# Obligations of parties in e-commerce under Saudi Arabian and Islamic law:

## Compatibility of modern Saudi law with traditional Islamic law

By

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# ABSTRACT

This thesis examines parties' obligations in e-commerce transactions under contemporary Saudi Arabian regulations and under Islamic law as an integral component of the Saudi Arabian constitutional system. It analyses the compatibility of traditional Islamic law principles, which are enforceable in Saudi Arabia, with modern e-commerce provisions. The thesis comprises six chapters. Chapter One serves as an introduction, while Chapter Two delves into the principles of e-commerce, examining the integration of Saudi law into these principles. Chapter Three investigates obligation theory, its origins, sources, the stand of Saudi law, and the accommodation of Islamic law within this framework. Chapter Four addresses the obligations of e-service providers (merchants) in e-commerce under Saudi and Islamic law, including disclosure, delivery, warranty, consumer privacy, and the right of recourse. Chapter Five examines consumer obligations: payment; taking delivery; and consumer obligations when exercising their rights in e-commerce. Chapter Six concludes.

The conclusion is that Islamic law is highly compatible with these issues. However, particular areas may exhibit variations, necessitating the application of Islamic principles in specific ways. For instance, alternative means of applying Islamic principles, such as *Almaslahat Almursala*, which prioritises public interest, can be employed. Additionally, Saudi law is essentially harmonious with Islamic law, although some instances may not align with all four schools of Islamic law.

The thesis recommends that the current Saudi Arabian legislation governing parties' obligations in e-commerce is deficient and insufficient. Consequently, it should be replaced by a comprehensive consumer protection law that safeguards consumer interests and incorporates general principles of traditional Islamic law to facilitate its implementation.

# DECLARATION

I certify that this thesis:

1. does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university

2. and the research within will not be submitted for any other future degree or diploma without the permission of Flinders University; and

3. to the best of my knowledge and belief, does not contain any material previously published or written by another person except where due reference is made in the text

4. has been completed without the use of generative artificial intelligence tools.

Signed: Ahmed Alhammad

Date: .....28 November 2025.....

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# CHAPTER 1: RESEARCH CONTEXT AND APPROACH

## 1.1 Introduction

Saudi Arabia is one of the few countries around the world which applies Islamic law.[1] Saudi Arabia has a unique legal system in which the Holy Qur'an and Sunnah[2] are its constitution.[3] According to Article One from the *Basic Law of Governance* (Royal Decree No A/90 dated 27/08/1412H (1 March 1992)) ('*Basic Law of Governance*'),[4] '...Its religion shall be Islam and its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger, may God's blessings and peace be upon him (PBUH)…'.[5] The *Basic Law of Governance* is the highest law in Saudi Arabia.[6] However, its principles and provisions must be consistent with the principles of Islamic law.[7] This means the legal system in Saudi Arabia is based on traditional Islamic principles.[8] As a result, it can be said that the hierarchy of law in Saudi Arabia is the Holy Qur'an and the Sunnah, and then the *Basic Law of Governance*. Other laws and regulations are at the bottom of the hierarchy.

Due to the difference in governance in Saudi Arabia, some people may think it is a lawless country, or there is just what is written in Islamic law (*Sharia*).[9] However, this

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[1] Frank E Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill, 2000) 3; محمد مفتي ومحمد سليم [Mohammed Mufti and Mohammed Salim], الاسلام في دساتير الدول المسلمة [*Islam in the Constitutions of Muslim Countries*] (King Saud University, 1989) 18–19; Awad Ali Alanzi, 'Exploring the Legal System in Saudi Arabia', (2020) 11(2) *International Journal of Innovation, Creativity and Change* 114.

[2] What is transmitted from the Prophet, peace be upon him, in terms of saying, deed, or approval. See سلطان بن إبراهيم الهاشمي [Sultan bin Ibrahim Al Hashimi], التجارة الإلكترونية وأحكامها في الفقه الإسلامي ['*E-Commerce and its Provisions in Islamic Jurisprudence*'] دار كنوز اشبيليا [Dar kunuz ashbilya, or 'Seville Treasure House'] (1st ed, 2011).

[3] *Basic Law of Governance* (Royal Decree No A/90 dated 27/08/1412H (1 March 1992)) arts 1, 7, 46 ('*Basic Law of Governance*'); Hossein Esmaeili, 'On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System' (2009) 26(1) *Arizona Journal of International & Comparative Law* 45.

[4] *Basic Law of Governance* (n 3).

[5] Ibid art 1.

[6] Mufti and Salim (n 1) 18–19; Awad Ali Alanzi, 'Development of the Civil Legal System in Saudi Arabia' (2020) 23 (4) *Journal of Legal, Ethical and Regulatory Issues* 3.

[7] Mohammad Alharbi, 'Key Challenges Facing Online Dispute Resolution in Saudi Arabia' (2019) 88 *Journal of Law, Policy and Globalization* 76.

[8] Frank Edward Vogel, 'Islamic Law and Legal System Studies of Saudi Arabia' (PhD Thesis, Harvard University, 1993).

[9] Sharia is defined by that which God (Allah) has legislated for people in terms of beliefs, acts of worship, morals, transactions, and complete systems of life, to organise people's relationship with Allah and their relations with each other, and to achieve their happiness in this world and afterlife.

cannot be further from the truth because whatever Islamic law does not cover, lawmakers address through additional rules and regulations, as long as they do not contradict Islamic law.[10] This is as indicated in Article 7 of the *Basic Law of Governance*.[11] Alanzi (2020) gives an example of law not derived from Islamic law but compliant with it, namely the Saudi Companies Law.[12]

Similarly, the Saudi *Electronic Commerce Law* (Royal Decree No M/126 dated 1440H (2019)) ('*Electronic Commerce Law*')[13] is in line with traditional Islamic legal principles (*Sharia*) and is also suitable for modern e-commerce rules.[14] Nevertheless, some subjects remain to be explored, such as the obligations of parties in e-commerce; significantly, the *Electronic Commerce Law* does not provide a chapter or section for parties' obligations. Thus, the subject needs to be broken down and examined in depth, as proposed in this study. Also, the ways to apply legal obligations in e-commerce under both Saudi and Islamic law need to be investigated.

In the first instance, the term Islamic law, in general, refers to the broader framework encompassing both the divine Sharia and its juristic interpretation (fiqh). While the Sharia itself is immutable as it represents divine revelation derived from the Qur'ān and the Sunnah, fiqh reflects human understanding and reasoning (ijtihād) in interpreting those sources. Consequently, the juristic dimension of Islamic law operates similarly to positive law in that it is subject to contextualisation, interpretation, and reform through scholarly reasoning. The use of the term Islamic law in this thesis primarily refers to fiqh.

Fiqh, which represents the human application of divine guidance. The Sharia is broader in scope, encompassing not only legal rules but also beliefs, morals, and

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See مناع القطان [Manna Alqtan], تاريخ التشريع *الإسلامي [The History of Islamic Law]* (مكتبة الوهبة [Mawhebah Liberty], 5th ed, 2001) 14.

10 Esther van Eijk, 'Sharia and National Law in Saudi Arabia' in Jan Michiel Otto (ed), Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present (Leiden University Press, 2010) 139, 173.

11 *Basic Law of Governance* (n 3) art 7.

12 Alanzi, 'Development of the Civil Legal System in Saudi Arabia' (n 6).

13 *Electronic Commerce Law* (Royal Decree No M/126 dated 1440H (2019)) ('*Electronic Commerce Law*').

14 Adnan Almalki, 'Legal Protection for the Consumer in E-Commerce According to Saudi Law (A Descriptive, Analytical, and Comparative Study with the Laws of the United States of America)' (2021) 12(4) *Beijing Law Review* 1131, 1142.

ethical conduct. It is regarded as unchangeable, as there is consensus (ijmāʿ) among scholars that divine revelation does not vary over time.[15] However, within fiqh, it is often difficult to express a definitive Sharia position on a matter where scholars differ (ikhtilāf), since multiple interpretations may coexist. In such cases, no individual opinion can be claimed as Sharia itself, because another view may also be correct. Only when there is consensus, or when a ruling is directly established by the Qur'ān or authentic Hadith, can it be described as a Sharia ruling in the absolute sense.

For example, under Sharia, a Muslim is obligated to affirm tawḥīd (belief in one God) and to perform the five daily ṣalāh prayers. Prayer duties are fixed by divine revelation and are recognised within juristic methodologies; therefore, where qualified scholarly disagreement (ikhtilāf) exists, no single view should be asserted as the Sharia, unless supported by consensus (ijmāʿ) or a clear Qur'ān or authentic ḥadīth text.

In the second instance, it is essential to explain public interest, given that it plays a significant role in Islamic law in regard to law-making. The concept of public interest (Almaslahah Alaammah) in Islamic law refers to the benefit that Islamic law aims to achieve for the general public by promoting well-being and preventing harm. Public interest often takes precedence over individual interests. It encompasses various issues, such as enacting regulations that adapt to new developments in order to preserve the five essential objectives of Sharia: religion, life, intellect, lineage, and property.

When considering public interest according to Islamic law, there are three categories to take into account. The first is recognised interests, which are interests that Sharia has recognised and adopted in its legislation. Second is invalid interests, which are interests that Sharia has indicated should not be considered because they involve a greater harm or forfeit a greater benefit, such as alcohol, which has some benefit, but

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[15] For additional and also alternative information regarding *Figh* and *Sharia* see Asifa Quraishi-Landes, 'The Sharia Problem with Sharia Legislation' (2015) 41(3) Ohio Northern University Law Review 547-250; Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge University Press, 2009) 14-28, 31-37, 163-170,175 and 177; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (The Islamic Texts Society, 2003, Reprinted 2006) preface, 117-118, 313-332, 468-497, 513-521; Raficq S. Abdulla and Mohamed M. Keshavjee, *Understanding Sharia Islamic Law in a Globalised World* (London and New York in association with The Institute of Ismaili Studies, 2018) 2-5.

its harm outweighs its benefit. Third is unrestricted interests (Almaslahah Almursalh), which are interests for which there is no specific Sharia text, but which bring about benefit or avert harm, and are based on a general Sharia principle.[16] This category includes establishing public interest, such as enacting laws to regulate new issues, as long as certain conditions for their validity as legal arguments are met.

## 1.2 Background

The expansion of economies from Middle Eastern countries, such as Saudi Arabia, has contributed to the increasing prevalence of e-commerce in the region.[17] In a general sense, e-commerce remains an umbrella term for buying and selling transactions conducted online or using the 'Internet of Things'.[18] The growth in e-commerce can be attributed to its ability to streamline efficiency and performance of supply chains and increase a country's GDP, productivity, and accessibility to international buying.[19] However, the growth of e-commerce in states undergirded by Islamic law requires further analysis to determine its compatibility.[20] This is because countries such as Saudi Arabia have moved to shape economic development congruent with Islamic law.[21]

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[16] For more information see Wael B. Hallaq, *An Introduction to Islamic Law*, (Cambridge University Press, 2009). 19-27 and 174; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (The Islamic Texts Society, 2003, Reprinted 2006) 351-368; Muhammad Ibn Ashur [محمد بن عاشور], *The Objectives of Shraiah [مقاصد الشريعة الإسلامية]*, (Ministry of Endowments and Islamic Affairs, Qatar, 2004) vol 3, 297-302.

[17] On e-commerce generally see: David D VanHoose, *eCommerce Economics* (Routledge, 2nd ed, 2011); Andreas Meier and Henrik Stormer, *eBusiness & eCommerce: Managing the Digital Value Chain*, tr Elizabeth Gosselin (Springer, 2009); Kenneth C Laudon and Carol Guercio Traver, *E-Commerce 2021-2022* (Pearson Education, 17th ed, 2021); Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford University Press, 2008). On the impact of e-commerce internationally, see Gopalakrishnan Soundararajan, 'Impact of E-commerce on Global Business Environment: A Conceptual Study Focus on Middle East' (2018) 13 *Eurasian Journal of Analytical Chemistry* 96, 98; Pratim Datta, 'A Preliminary Study of eCommerce Adoption in Developing Countries' (2011) 21(1) *Information Systems Journal* 3.

[18] Meier and Stormer (n 17) 2; Jing Tan, Katherine Tyler and Andrea Manica, 'Business-to-business adoption of eCommerce in China' (2007) 44(3) *Information and Management* 332, 333.

[19] Alemayehu Molla and Paul S Licker, 'eCommerce Adoption in Developing Countries: A Model and Instrument' (2005) 42(6) *Information and Management* 877, 879.

[20] Abdullah Saleh Alqahtani, Robert Goodwin and Denise de Vries, 'Cultural Factors Influencing E-Commerce Usability in Saudi Arabia' (2018) 5(6) *International Journal of Advanced and Applied Sciences* 1.

[21] See M Ruslianor Maika and Irwan Alnarus Kautsar, 'Hiijrah: Islamic E-Commerce Disrupted Strategy' (2019) 10(1) *Economica: Jurnal Ekonomi Islam* 57, 58; Regina Garcia Almonte, 'Determinants of E-Commerce Websites' User Interface: A Cross-Cultural Investigation Between

### *1.2.1 Statistics of e-commerce in Saudi Arabia*

Electronic trade is booming worldwide because it allows for ease of accessibility; moreover, customers can find what they want and, usually, goods and services are cheaper than the actual market.[22] As evidence of that, e-commerce in Saudi Arabia is increasing more than the traditional market.[23] The Kingdom of Saudi Arabia is one of the largest countries in the Middle East that generates revenue from electronic trade and its rate is rising.[24] Sales in Saudi Arabia's electronic markets are considered one of the highest among the Arab countries.[25] According to the Saudi Communications and Information Technology Commission, the size of the e-commerce market in the Kingdom is 29.7 billion Saudi riyals (USD7.92 billion).[26] Saudi Arabia, with its growth rate, will soon be at the top of countries benefitting from electronic trade in the Middle East.

### *1.2.2 The legal history of e-commerce in Saudi Arabia*

In the Kingdom of Saudi Arabia, three pieces of legislation are the most relevant to e-commerce: the Saudi *Electronic Transactions Law* (Royal Decree No M/18 dated

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Saudi Arabia and Philippines' in Pei-Luen Patrick Rau (ed), *Cross-Cultural Design: Methods, Tools, and Users* (Springer International, 2018) 301; Khulood S Almani, 'The Impact of E-Commerce on the Development of Entrepreneurship in Saudi Arabia' (2019) 28(4) *Journal of International Technology and Information Management* 50; Rayed Al Ghamdi, Steve Drew and Waleed Al-Ghaith, 'Factors Influencing E-Commerce Adoption by Retailers in Saudi Arabia: A Qualitative Analysis' (2011) 47(1) *Electronic Journal of Information Systems in Developing Countries* 18.

[22] Anjali Gupta, 'E-Commerce: Role of E-Commerce in Today's Business' (2014) 4(1) *International Journal of Computing and Corporate Research*, International Manuscript ID: 2249054XV4I1012014-10:1-8; Dulce Jimenez, Sade Valdes and Mariana Salinas, 'Popularity Comparison Between E-Commerce and Traditional Retail Business' (2019) 1(1) *International Journal of Technology for Business* 10, 16.

[23] Communications and Information Technology Commission, *E-Commerce in the Kingdom of Saudi Arabia* (2016) 25; 'Saudi Arabia - Country Commercial Guide: eCommerce', *International Trade Administration* (Web Page, 3 January 2024) <https://www.trade.gov/country-commercial-guides/saudi-arabia-ecommerce>.

[24] Small & Medium Enterprises General Authority, *Unlocking E-Commerce for SMEs* (Report, 2024) <https://www.monshaat.gov.sa/sites/default/files/2024-08/monsha'at_e_commerce_thematic_report_en.pdf>; Saudi General Authority of Foreign Trade, *Electronic Commerce In Saudi Arabia: COMCEC 2023* (Report, 20th Meeting of the COMCEC Trade Working Group, 2 May 2023) <https://www.comcec.org/wp-content/uploads/2023/05/3-Presentation-by-Kingdom-of-Saudi-Arabia.pdf>; Communications and Information Technology Commission (n 23).

[25] إيناس خلف الخالدي ومحمد سعد الرحاحلة [Enas Khalaf Al-Khalidi and Muhammad Saad Al-Rahahleh], 'قواعد التجارة الإلكترونية في ضوء نظام التعاملات الالكترونية السعودي [E-Commerce Rules in Light of the Saudi Electronic Transactions System]' (2012) 21(35) مجلة البحوث القانونية والاقتصادية [*The Journal of Legal and Economic Research*] 11.

[26] Communications and Information Technology Commission, *Annual Report 2017* (Report, 2017) 126.

1428H (2007)) (‘*Electronic Transactions Law*’),[27] *Anti-Cybercrime Law* (Royal Decree No M/17 dated 1428H (2007)) (‘*Anti-Cybercrime Law*’)[28] and *Electronic Commerce Law*.[29]

#### *1.2.2.1 The Electronic Transactions Law[30]*

The Saudi legislator defines ‘electronic transactions’ as ‘any exchange, communication, contracting, or other procedure, performed or executed, wholly or partially, by electronic means’.[31] Electronic transactions are a wider area than e-commerce, which means each act of electronic commerce is an e-transaction.[32] However, the opposite is not true, because there are e-transactions that are not considered to be e-commerce, such as e-government, which counts as electronic transactions rather than e-commerce.[33] On the other hand, every commercial deal on the internet, whether it is for a product or a service, is an e-transaction (e-business).[34] The *Electronic Transactions Law* is about creating trust in e-transactions, which means focusing on electronic signatures and approving and certifying electronic transactions.[35] According to Article 2:

> This law aims to control electronic transactions and signatures, regulate them, and provide a legal framework for them in order to achieve the following:
>
> (i) Establishing unified statutory rules for the use of electronic transactions and signatures and facilitating their application in the public and private sectors by mediating reliable electronic records.
>
> (ii) To give confidence in the validity and integrity of transactions, signatures and electronic records.

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[27] *Electronic Transactions Law* (Royal Decree No M/18 dated 1428H (2007)) (‘*Electronic Transactions Law*’).
[28] *Anti-Cybercrime Law* (Royal Decree No M/17 dated 1428H (2007)) (‘*Anti-Cybercrime Law*’).
[29] *Electronic Commerce Law* (n 13).
[30] *Electronic Transactions Law* (n 27).
[31] Ibid art 1/10.
[32] عبد العزيز غرم الله الغامدي [Abdulaziz Ghorm Allah Al-Ghamdi], أحكام وضوابط العقود الإلكترونية في الفقه الإسلامي والقانون بالتطبيق على نظام التعاملات السعودي [‘Provisions and Controls of Electronic Contracts in Islamic Jurisprudence and Law in Application to the Saudi Transaction System’] (PhD Thesis, Islamic Omdurman, 2015) 70. See Ajeet Khurana, ‘The Difference Between E-Business and E-Commerce‘, *The Balance* (Web Page, 13 September 2022) <https://www.thebalancesmb.com/ebusiness-vs-ecommerce-1141573>.
[33] Al-Khalidi and Al-Rahahleh (n 25) 36.
[34] Al-Ghamdi (n 32) 69.
[35] Al-Khalidi and Al-Rahahleh (n 25) 40.

(iii) Facilitating the use of electronic transactions and signatures at the local and international levels to benefit from them in all fields, such as government procedures, trade, medicine, education and electronic financial payment.

(iv) Removing obstacles to the use of electronic transactions and signatures.

(v) Prevent misuse and fraud in electronic transactions and signatures.[36]

As seen above, the law does not focus on e-commerce as much as a trust in e-transactions and misses many provisions about electronic commerce. According to Al-Ghamdi (2015), the *Electronic Transactions Law* is relevant to electronic transactions more than electronic commerce.[37] Consequently, the law does not cover many e-commerce subjects such as the subject of this thesis. However, the *Electronic Transactions Law* is a fundamental law considered an umbrella for all electronic transaction subjects, for instance, commerce, government, health, education, and banking.[38] This law, in some chapters, refers to the legitimacy of e-transactions and undoubtedly e-commerce is one of these transactions based on Article Two.[39]

Chapter Two[40] is concerned with the recognition of electronic transactions and considers they are obligatory and require pieces of evidence for proof.[41] Furthermore, the conclusion of electronic transactions and the validity of electronically signed contracts are set out in Chapter Three.[42] In addition, Al-Khalidi (2012) states that Chapter Four contains one article[43] which confirms the legality of electronic signatures[44] and that it equates to the written signature, both having the same legal

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[36] *Electronic Transactions Law* (n 27).
[37] Al-Ghamdi (n 32) 68.
[38] Ibid 72. Al-Khalidi and Al-Rahahleh (n 25) 40.
[39] *Electronic Transactions Law* (n 27).
[40] Ibid arts 5–9.
[41] Al-Khalidi and Al-Rahahleh (n 25) 40.
[42] *Electronic Transactions Law* (n 27) arts 10–13.
[43] Ibid art 14.
[44] Electronic Signature: Electronic data included in, attached to, or logically associated with an electronic transaction and used to verify the identity and approval of the person signing it and to detect any change to a said transaction after signature: ibid art 1/14.

implications.[45] Finally, the law also includes a regulation that specifies further details related to electronic transactions, which confirms the legitimacy of e-commerce.[46]

#### *1.2.2.2 The Anti-Cybercrime Law[47]*

This legislation regulates cybercrimes, but it has certain provisions in relation to e-commerce. Article Two of the Act provides that one of the aims of this law is protecting the national economy[48] and companies are one part of the national economy. It is clear that many trade actions could be criminal because of this law; for instance: a company attacking the website of another; espionage; unjustified access to bank or credit data to obtain data, other information, or money, etc.[49]

#### *1.2.2.3 The Electronic Commerce Law[50]*

After almost 12 years under the *Electronic Transactions Law* and *Anti-Cybercrime Law*, the Kingdom adopted a special law to regulate e-commerce in Saudi Arabia. This law was implemented to help spread electronic commerce increasingly in the Kingdom of Saudi Arabia because it was designed to protect parties to contracts and boost trust in e-commerce.[51] Due to the widespread expansion of e-commerce in the Saudi Kingdom, the Saudi legislator became concerned and identified that this popular trade must be regulated to cover legal loopholes which otherwise were not covered in previous legislation.

Consequently, some legislative changes were initiated in Saudi Arabia in order to regulate e-commerce and to provide further security for those entering into contracts through electronic means. In this regard, the *Electronic Commerce Law* applies to all

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[45] Al-Khalidi and Al-Rahahleh (n 25) 40.

[46] اللائحة التنفيذية لنظام المعاملات الالكترونية [Implementing Regulations of the Electronic Transactions Law], 1429H-2008 <https://www.mcit.gov.sa/sites/default/files/llyh_ltnfydhy_lnzm_ltmlt_llktrwny.pdf> (‘*Implementing Regulations of the Electronic Transactions Law*’).

[47] *Anti-Cybercrime Law* (n 28).

[48] Ibid.

[49] أحمد بن حماد الحماد [Ahmed Hammad Al Hammad], جريمة المنافسة الإلكترونية غير المشروعة-دراسة مقارنة- [‘Unfair Electronic Competition Crime - A Comparative Study’] (Master Thesis, Imam Muhammad bin Saud University, 2015) 99, 104–5.

[50] *Electronic Commerce Law* (n 13).

[51] غرفة جدة [Jeddah Chamber], دراسة توجه قطاعات الأعمال نحو التجارة الإلكترونية في المملكة العربية السعودية [‘A Study of the Business Sector’s Orientation Towards E-Commerce in the Kingdom of Saudi Arabia’] (2019) <https://www.jcci.org.sa/documents/44210/0/دراسة+توجه+قطاعات+الأعمال+للتجارة+الإلكرونية.pdf/94961c45-94e0-1fff-c6f3-dcc075d5cad7?t=1660854186205>.

economic activities of consumers and service providers by electronic means for selling products, providing services, advertising, or interchanging data.[52]

*1.2.2.3.1 Protection for consumers*[53]

Since the beginning of the international discussion forums on electronic commerce, various countries have tried to increase consumer confidence in it because that has been a significant issue.[54] An Organisation for Economic Co-operation and Development (OECD) recommendation indicates the protection of an e-consumer must be effective, like any other commercial transaction.[55] E-commerce is different from traditional shopping and involves more risk[56] since consumers do not know the sellers and their locations and cannot see the reality of the product.[57] Consequently, Saudi legislators have put laws in place to protect consumers during the contract and post-contract periods.[58] For example, the service provider or seller must give details of a physical location where they are based in order for them to follow the law.[59] Therefore, if there is an error in an e-contract, a consumer has the right to rectify this error by informing the service provider or seller, in case technological constraints cannot fix it.[60] This does not mean that a consumer can change a contract at any time; instead, 24 hours are allowed from when the error is identified to rectifying it.[61] Another risk for an e-consumer is the potential privacy breach when conducting e-transactions. The risk of e-consumer privacy could be higher than for a traditional consumer.[62] That is due to the historical advance of electronics, which helps companies save and gather

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[52] *Electronic Commerce Law* (n 13) art 1.

[53] Consumer: A person who engages in e-commerce to obtain products or services provided by a service provider. *Electronic Commerce Law* (n 13) art 1.

[54] *Consumer Protection in Electronic Commerce: Note by the UNCTAD Secretariat,* UN Doc TD/B/C.I/CPLP/7 (3–4 July 2017) 13.

[55] OECD, *Recommendation of the Council on Consumer Protection in E-Commerce* (Report, 2016) <http://dx.doi.org/10.1787/9789264255258-en> 10.

[56] Huong Ha, 'Security and Privacy in E-Consumer Protection in Victoria, Australia' in Ian Wakeman et al (eds), *Trust Management V* (Springer, 2011) 240.

[57] Almalki (n 14).

[58] عزة علي الحسن [Azza Ali Al-Hassan], التنظيم القانوني للتجارة الإلكترونية في النظام السعودي، قانون التجارة الالكترونية ['The Legal Rules of E-Commerce in Saudi System: E-Commerce Law 2019'] مجلة العلوم القانونية [(2019) 5(10) *Journal of Legal Sciences*] 67.

[59] *Electronic Commerce Law* (n 13) art 3.

[60] Ibid art 4; Asif Iqbal, 'Saudi Arabian E-Commerce Law-A Step Towards Consumer Protection' (Kadasa Intellectual Property, 4 September 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450302>.

[61] *Implementing Regulations of the Electronic Transactions Law* (n 46) art 4.

[62] *Consumer Protection in Electronic Commerce*, UN Doc TD/B/C.I/CPLP/7 (n 54) 8.

consumers' private data for their interests.[63] According to Ha (2011), two of the five most critical issues facing e-buyers are privacy and security.[64] In other words, fear of theft of private information plays a primary role in consumers not engaging in e-commerce.[65] Consequently, many European Union (EU) countries establish laws protecting consumers' privacy.[66] In this regard, Saudi Arabia follows developed countries and has enacted an e-commerce law that satisfies e-consumers' protection.[67] As a result and as per legislative powers, the service provider or seller is obligated to treat the consumer's information as strictly confidential (privacy of data).[68] According to Articles 6 and 7, the service provider and dealer must disclose some mandatory information about an online store and its e-contract.[69] This is considered a form of protection because it ensures the consumer knows how the store operates and its privacy measures before signing a contract or engaging in an agreement.[70] In addition, Saudi legislators have banned any advertising that might deceive or mislead a consumer or introduce a trademark imitation.[71] In other words, Saudi legislators require the advertiser to ensure that any advertising should be honest and free from deception.[72] A consumer can terminate a contract except in some cases during the seven days from receiving a product, or contract date on service, under one condition: they did not use it or take benefit from it.[73] Also, in case a service provider or seller has a delay in shipment to the customer and the customer has not received it in 15 days or more, the consumer has the right to terminate the contract.[74] The exception to

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[63] Priya Singh, 'Consumer Privacy in E-Commerce' (2021) 25 *Supremo Amicus* 371.
[64] Ha (n 56).
[65] Mark E Budnitz, 'Privacy Protection for Consumer Transactions in Electronic Commerce: Why Self-Regulation Is Inadequate', (1998) 49(4) *South Carolina Law Review* 847 <https://scholarcommons.sc.edu/sclr/vol49/iss4/7>.
[66] *Project on Strengthening Technical Competency for Consumer Protection in ASEAN: Phones Internet Services & E-Commerce* (Report Version, 21 January 2016) 56 <https://asean.org/wp-content/uploads/2021/01/E-Commerce.pdf>.
[67] Almalki (n 14).
[68] *Implementing Regulations of the Electronic Transactions Law* (n 46) art 5. There are many rules about privacy of information, which it would take some pages to explain.
[69] *Electronic Commerce Law* (n 13) arts 6, 7.
[70] وحي فاروق لقمان [Wahyee Farouk Luqman], التزامات موفر الخدمة في نظام التجارة الإلكترونية السعودي ['Obligations of the Service Provider in Saudi E-Commerce System'] (2020) 8(31) *Journal of the Kuwait International Law College* 349.
[71] *Electronic Commerce Law* (n 13) art 11.
[72] Luqman (n 70).
[73] *Electronic Commerce Law* (n 13) art 13.
[74] Ibid art 14.

this last rule is *force majeure*, in which a service provider or seller is not responsible for postponement due to circumstances outside their control.[75]

*1.2.2.3.2 Protection for sellers or service providers*[76]

An electronic contract obligates a user (consumer) to accept some obligations, as with a traditional contract.[77] The *Electronic Commerce Law* applies to both parties to the e-contract; [78] thus, it offers high protection to both parties of the contract, the consumer and the seller. One safeguard for the protection of the interests of sellers is the right to rectify any error in an e-contract at the stage of negotiating the contract or during its implementation, and consumers must not use or take benefit from the product or service.[79] Moreover, the Saudi legislation allows for a 24 hour timeframe for a consumer to notify the seller or service provider from the time of error.[80] Furthermore, the dealer and service provider have the prerogative in the contract to take action rectifying any errors that happen at the stage of negotiating the contract, during it, or after it, but before implementing it. There are some conditions to this rule: the consumer must be informed about this issue as soon as it is known, and before shipping the product or starting the service. After that, the customer has the choice to take part in the contract or terminate it.[81] According to Articles 11[82] and 13/2[83], there are many cases in which a consumer does not have the right to terminate a contract. An example of this is a situation in which the subject of the contract are products manufactured upon the request of the consumer or according to the specifications he or she has chosen, unless the products are defective or do not conform to the agreed specifications. The exception to this rule is if a product appears to be defective due to

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[75] *Electronic Commerce Law* (n 13) art 14/1.

[76] Merchant: A person registered in the Commercial Register who practices e-commerce. Practitioner: A person who practices e-commerce but not registered in the Commercial Register. Service Provider: A merchant or practitioner. *Electronic Commerce Law* (n 13) art 1. Note: Saudi e-commerce law calls both the merchant and practitioner service providers for the protection of consumers. See Luqman (n 70).

[77] خليفة [Muhammad Ahmed Khalifa], الإثبات والالتزامات في العقود الإلكترونية [*Proof and Obligations in Electronic Contracts*] (دار الفكر الجامعي، [Dar Al-Fikr University, 1st ed, 2020]).

[78] Al-Hassan (n 58).

[79] *Electronic Commerce Law* (n 13) art 11.

[80] 'Implementing Regulation of the E-Commerce Law', *Ministry of Commerce* (Web Page) <https://mc.gov.sa/en/Regulations/Pages/details.aspx?lawId=691e2bec-f987-4856-b2bf-ab4b00c8c9b6> ('*Implementing Regulations of the E-Commerce Law*').

[81] Ibid.

[82] *Implementing Regulations of the E-Commerce Law* (n 80) art 11.

[83] *Electronic Commerce Law* (n 13) art 13/2.

mishandling by the consumer, if the contract involves providing accommodation, transportation, or catering services, or if the price of a product is subject to increase or decrease in a manner that is not controlled by the merchant or service provider during the termination period (7 days), such as gold and silver, the consumer cannot terminate the contract.[84] The seller is also protected because return costs are on the consumer, and the cost was not defined precisely in Saudi law, which opens the door to legal interpretation.[85]

### *1.2.3 Legal issues*

Despite the *Electronic Commerce Law*[86] having covered most of the problems regarding e-contracts, which in turn has helped to build trust between parties engaging in transactions via e-commerce and as a result has contributed to the spread of e-commerce in Saudi Arabia,[87] there are still some issues that have not yet been covered. Firstly, Asif Iqbal (2019) states that the law has not discussed any intellectual property rights with the exception of trademarks, and it would be a better option for the law to address all of them rather than only trademarks.[88] Secondly, the law implements the provision of choosing a meeting place for buyers, but there is no option for sellers.[89] Thirdly, according to Al Muqahem (2020), the *Electronic Commerce Law* does not state the right of the e-consumer to withdraw from the contract, compared to the French Consumer Protection Law, which clearly states this.[90] Finally, Article 18 states that any person who violates the law is punishable with several penalties;[91] relevant to this discussion is the fact that the financial penalty for lawbreaking is not more than 1 million Saudi Riyals (USD266,667),[92] which for large corporations is a minute sum. It is possible that a person or a company may intentionally mislead

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[84] *Electronic Commerce Law* (n 13) art 13; *Implementing Regulations of the E-Commerce Law* (n 80) art 11.
[85] Iqbal (n 60).
[86] *Electronic Commerce Law* (n 13).
[87] Jeddah Chamber (n 51).
[88] Iqbal (n 60).
[89] *Electronic Commerce Law* (n 13) art 4.
[90] سعود المقحم[Saud Al-Muqahem], حق المستهلك في الرجوع في العقود المبرمة عن بعد في نظام التجارة الالكتروني السعودي دراسة مقارنة في ضوء القانون الفرنسي والنظام السعودي" [The Consumer's Right to Recourse in Remote Contracts in the Saudi Electronic Commerce System, A Comparative Study in the Light of French Law and the Saudi System'], (2020) 21 مجلة العلوم الانسانية والادراية [*Journal of Humanities and Management*] 1. The present author does not agree with this argument because the *Electronic Commerce Law* states this right in Article 13.
[91] *Electronic Commerce Law* (n 13) art 18.
[92] Iqbal (n 60).

consumers, generating higher profits to offset any potential penalties required to be paid.

## 1.3 Research problem and questions

Given that the legal system of Saudi Arabia is primarily based on Islamic law,[93] there is firstly a need to consider how to apply the principles and general provisions of Islamic law to specific situations related to the e-commercial contract. Secondly, the *Electronic Commerce Law* contains no dedicated section that defines parties' obligations to contracts, and a few of these obligations are not mentioned at all.[94] The overarching research question is therefore: *To what extent are traditional Islamic law principles compatible with modern e-commerce rules, and how can Saudi Arabian law balance modern e-commerce practices and traditional Islamic law principles in regard to obligations of parties in e-commerce contracts?*

The associated sub-questions are:

(i) What is the position of the Saudi legislator regarding the service provider's obligations in e-commerce (disclosure, delivery, guaranteeing, the privacy of information, and giving the consumer the right of recourse in the contract). How can gaps in Saudi law, where specific situations are not detailed, be addressed?

(ii) How are the consumer's obligations in e-commerce (payment, receipt or taking delivery, and when using their rights in e-commerce) applied under Saudi law?

(iii) What is the position of Islamic law based on its principles and general provisions in relation to the obligations of parties to e-commerce contracts?

## 1.4 Objectives of the study

The objectives of this study are as follows:

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[93] Alanzi, 'Development of the Civil Legal System in Saudi Arabia' (n 6) 3.
[94] Al-Muqahem (n 90).

(i) Investigate whether Saudi law is in harmony with traditional Islamic law principles that are relevant to the obligations of parties in e-commerce.

(ii) Investigate the application to e-commerce of the obligations of parties in e-commerce contracts in existing Islamic law and Saudi law.

(iii) Clarify the obligations of the merchant in the e-commerce contract along with clearly defining the concept and provisions of these obligations in Saudi law, highlighting the position of legal scholars on laws related to these obligations, and outlining solutions for cases in which the Saudi legislator has not addressed one of the obligations.

(iv) Explain the obligations of the consumer in the e-commerce contract along with clearly delineating the concept and provisions of each of these obligations in Saudi law, highlighting the position of legal scholars on laws related to these obligations, and outlining solutions for cases in which the Saudi legislator has not addressed one of the obligations.

(v) Clarify the position of Islamic law on each obligation relevant to the parties to the e-commerce contract.

## 1.5 Methodology

This thesis employs doctrinal research and comparative legal research (comparative study).

### *1.5.1 Doctrinal research*

The word doctrine is of Latin origin ('*doctrina*') and means education, knowledge, or learning; therefore, it includes all legal matters derived from the principles of laws, regulations, rules, and cases.[95] The doctrinal research method is the basis for research in law because it systematically explains relevant rules in specific areas of law, shows links between laws, and helps to provide clarity and perspective on complex legal questions.[96] The focus of this research will be on the *Electronic Commerce Law*[97], as it is undoubtedly the reference for electronic commerce in the

[95] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83.

[96] Ibid.

[97] *Electronic Commerce Law* (n 13).

Kingdom of Saudi Arabia with its implementing regulations.[98] If the relevant situation is not specifically mentioned anywhere in these two areas of law of Saudi Arabia, the researcher will turn to other laws such as *Electronic Transactions Law*[99], *Anti-Cybercrime Law*[100], and the Ministry of Commerce's consumer rights guide.[101]

Given the generally interactive and complementary relationship between the civil law and the consumer protection law, the law of obligations complements the shortcomings in the consumer protection law.[102] It provides the consumer protection law with fundamental concepts, including in the absence of a specific provision in the consumer protection law.[103] Therefore, in all instances, this matter can be addressed from the Saudi *Civil Transactions Law* (Royal Decree No M/191, dated 2023) ('*Civil Transactions Law*').[104] If the *Civil Transactions Law* lacks a provision, the most appropriate provisions are derived from Islamic Law.[105] It is unnecessary to mention the focus on the Consumer Protection Draft (2022) ('*Draft Consumer Protection Law*')[106] to ascertain whether Saudi lawmakers have addressed the issue or need to draw their attention to it. Regarding privacy and confidentiality, dominant are the *Personal Data Protection Law* (Royal Decree No M/19 dated 1443H (2021)) as amended by Royal Decree No M/148 dated 1444H (2023) ('*Personal Data Protection Law*'),[107] the Implementing Regulation of the Personal Data Protection Law ('*Implementing Regulation of the Personal Data Protection Law*')[108] and the Regulation

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[98] *Implementing Regulations of the E-Commerce Law* (n 80).
[99] *Electronic Transactions Law* (n 27).
[100] *Anti-Cybercrime Law* (n 28).
[101] Ministry of Commerce, *Guide to Consumer Rights and Responsibilities 2023* (Report) <https://mc.gov.sa/en/guides/Documents/CustomerGuide.pdf>.
[102] محمد بودالي [Mohamed Boudali], 'أزمة القانون المدني في ظل اتساع نطاق قانون حماية المستهلك' ['The Crisis of Civil Law in Light of the Expansion of the Scope of Consumer Protection Law'] (Article, University of Sidi Bel Abbes) 224.
[103] Ibid.
[104] *Civil Transactions Law* (Royal Decree No M/191, dated 2023) art 1 ('*Civil Transactions Law*'); *Electronic Commerce Law* (n 13) art 24.
[105] *Civil Transactions Law* (n 104) 1.
[106] Ministry of Commerce, 'Consumer Protection Law' (Draft Law, 2022) <https://istitlaa.ncc.gov.sa/en/Trade/mci/Consumer/Pages/default.aspx>.
[107] *Personal Data Protection Law* (Royal Decree No M/19 dated 1443H (2021)) as amended by Royal Decree No M/148 dated 1444H (2023) ('*Personal Data Protection Law*').
[108] Saudi Data & AI Authority, *The Implementing Regulation of the Personal Data Protection Law* (English Translation) <https://sdaia.gov.sa/en/SDAIA/about/Documents/ImplementingRegulation.pdf>.

on Transferring Personal Data Outside the Kingdom (2024) (‘*Regulation on Transferring Personal Data Outside the Kingdom*’).[109]

This thesis will solely focus on the Saudi laws and Islamic law. It aims to establish originality and conduct research through primary sources. The key focus will be on the publications of lawmakers in Saudi Arabia, encompassing laws, regulations, and guidelines issued by relevant ministries on each case being addressed.

### *1.5.2 Comparative legal research (comparative study)*

Some European legal scholars are of the belief that in order for domestic laws to be most effective, they need to be compared to international laws.[110] For instance, France took advantage of this comparative approach to law, and it can be concluded that its domestic legal system has improved because of this.[111] In contrast, the Kingdom of Saudi Arabia has a unique system in which laws need to be compared to Islamic law in each specific point in law. In other words, Saudi laws must be in agreement with the perspective of Islamic laws, and if they are not, they are considered void laws based on the *Basic Law of Governance*.[112] Therefore, it is necessary to compare Saudi Arabian law with Islamic law. In this thesis the primary Islamic legal sources are The

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[109] Saudi Data & AI Authority, *Regulation on Transferring Personal Data Outside the Kingdom* (Regulation, August 2024) <https://sdaia.gov.sa/Documents/RegulationonPersonalDataEN.pdf>.
[110] Mark Van Hoecke, ‘Methodology of Comparative Legal Research’ (2015) 12 *Law and Method* 2, DOI:10.5553/REM/.000010.
[111] Ibid 29.
[112] *Basic Law of Governance* (n 3) art 7.

Holy Qur'an and The Sunnah, and the secondary sources are the famous four schools of Islamic thought[113]: *Hanafi,*[114] *Maliki,*[115] *Shafi'i*[116] and *Hanbali*.[117]

In terms of limitations and biases, I acknowledge that relying on these classical texts can introduce certain constraints; however, it is a necessary part of ensuring the analysis is grounded in authentic jurisprudence. Consequently, for this thesis, each book, article, seminar, and other relevant source from four centuries ago to the present is considered novel, while anything prior to that is regarded as historical. This approach will reflect the fact that the books of the schools of jurisprudence that are considered reliable sources are the older ones, while the more recent books are merely transmissions with occasional additions. Also, there are sometimes errors in attributing statements to one of the schools or in understanding certain points, so it is preferable to directly examine the historical sources to resolve the issue more

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[113] Each of these four schools tries to derive rulings from the Qur'an and the Sunnah in its own way. And most of the time at least two of them, if not all, have the same opinion in an exact study. Sometimes one school has two opinions on the same topic.

[114] The five most prominent books of this school: محمد بن أحمد السرخسي [Mohammed bin Ahmed Al-Sarkhi], المبسوط [*Mabsout*] (دار المعرفة - بيروت [Dar al-Maarifa - Beirut], 1993) vol 20; علاء الدين بن مسعود الكاساني الحنفي [Alaa al-Din bin Masoud al-Kasani al-Hanafi], بدائع الصنائع في ترتيب الشرائع [*Badaa'i al-Sana'i in the Arrangement of Canons*] (دار الكتب العلمية [Dar al-Kutub al-Ilmiyya], 2nd ed, 1986) vol 7; ابن عابدين محمد الدمشقي الحنفي [Ibn Abdin Muhammad al-Dimashqi al-Hanafi], رد المحتار على الدر المختار -حاشية ابن عابدين [*Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen*] (دار الفكر - بيروت [Dar Al-Fikr - Beirut], 2nd ed, 1966) vol 6; كمال الدين السيواسي (ابن الهمام الحنفي) [Kamal al-Din al-Siwasi (Ibn Hammam al-Hanafi)], فتح القدير على الهداية [*Fath al-Qadeer for Guidance*] (دار الفكر، لبنان [Dar Al-Fikr, Lebanon], 1st ed, 1970) vol 7; جماعة من العلماء [Group of Jurists], الفتاوى الهندية [*Indian Fatwas*] (دار الفكر بيروت [Dar Al Fikr -Beirut], 2nd ed, 1892) vol 6.

[115] The four most prominent books of this school: مالك بن أنس بن مالك [Malik bin Anas bin Malik] , المدونة [*Almudawana*] (دار الكتب العلمية [Dar al-Kutub al-Ilmiyya], 1st ed, 1994) vol 4; محمد بن أحمد ابن رشد [Muhammad ibn Ahmad ibn Rushd], بداية المجتهد ونهاية المقتصد [*The Beginning of the Diligent and the End of the Frugal*] (دار الحديث - القاهرة [Dar al-Hadith - Cairo], 2004) vol 4; محمد الطرابلسي الحطاب [Mohamed Trabelsi Al-Hattab], مواهب الجليل في شرح مختصر خليل [*Talents of Galilee in a Brief Explanation of Khalil*] ( دار الفكر [Dar Al-Fikr], 3rd ed, 1992) vol 6; أحمد بن غانم المالكي [Ahmed bin Ghanem al-Maliki], فواكه الدواني [*Al-Dawani Fruits*] ( دار الفكر [Dar al-Fikr], 1995) vol 2.

[116] The four most prominent books of this school: محمد بن إدريس الشافعي [Mohammed bin Idris Al-Shafei], الأم [*The Mother*] (دار المعرفة - بيروت [Dar Al Marefa - Beirut], 1990) vol 8; عبد الملك الجويني [Abd al-Malik al-Juwayni], نهاية المطلب في دراية المذهب [*The End of the Requirement in the Knowledge of the Doctrine*] (دار المنهاج [Dar Al-Minhaj], 1st ed, 2007); النووي [Al-Nawawi], المجموع شرح المهذب [*Al-Majmoo' Sharh Al-Muhadhab*] (دار الفكر [Dar Al-Fikr]); النووي [Al-Nawawi], روضة الطالبين وعمدة المفتين [*Rawdat al-Talibin and Omdat al-Muftis*] (المكتب الإسلامي، بيروت [The Islamic Office, Beirut], 3rd ed, 1991) vol 12.

[117] The four most prominent books of this school: ابن قدامة الحنبلي [Ibn Qudamah al-Hanbali], المغني [*Almughaniy*] (دار عالم الكتب المملكة العربية السعودية [Dar Alam Al-Kutub, Kingdom of Saudi Arabia], 3rd ed, 1997) vol 15; المرداوي الحنبلي [Al-Mardawi Al-Hanbali], الإنصاف [*Fairness*] (دار إحياء التراث العربي [House of Revival of Arab Heritage], 2nd ed) vol 12; منصور البهوتي الحنبلي [Mansour Al-Bahouti Al-Hanbali], كشاف القناع [*Kashaaf Alqinae*] (وزارة العدل في المملكة العربية السعودية [The Ministry of Justice in the Kingdom of Saudi Arabia], 1st ed, 2000-2008) vol 15; شمس الدين الزركشي [Shams Al-Din Al-Zarkashi], شرح الزركشي [*Al-Zarkashi's Explanation*] (دار العبيكان [Dar Al-Obaikan], 1st ed, 1993) vol 7.

precisely. Nevertheless, if an issue comes up in e-commerce law that has no root in historical Islamic sources, this study will look to new Islamic sources.[118]

In addressing the thesis, I will commence with Saudi law, as it is the most recent and addresses obligations in a contemporary legal manner, unlike the *Fiqh* books, which serve as legal encyclopedias explaining the laws. Furthermore, Islamic law books are replete with extensive information, making them unsuitable as the sole starting point for intricate topics, as they encompass detailed jurisprudential information. Essentially, the comparison should be between Saudi law and Islamic jurisprudence, rather than the reverse, as any inconsistency with the agreed-upon Islamic law renders it invalid according to Islamic law and, therefore, legally not binding in Saudi law, as previously mentioned.

Consequently, Saudi law will serve as the criterion and starting point for my analysis. I will thoroughly examine and address the issues in depth, adhering to the provisions of Saudi law. Subsequently, I will identify the closest Islamic law provisions related to these issues. I will then simplify and clarify these Islamic law provisions to facilitate comparison with Saudi law. This thesis will assert that Saudi law will be deemed in accordance with Islamic law whenever it aligns with any interpretation of Islamic law, even if it adheres to one school of thought in preference to others. It is important to note that Saudi law is not exclusively bound to a single school of thought but rather draws from various schools and occasionally contradicts them all.

## 1.6 Original contribution to knowledge

The emerging industries and sudden developments of the modern world are unpredictable; hence the digital age requires its own trade and commerce rules, both nationally and internationally. One of the most important innovations is the internet, which positively impacts many aspects of life such as healthcare, education and trade.[119] E-commerce helps Saudi Arabia and other countries increase profits and

[119] Haya Alshehri and Farid Meziane, 'Current State of Internet Growth and Usage in Saudi Arabia and Its Ability to Support E-Commerce Development' (2017) 5(2) *Journal of Advanced Management Science* 127.

improve the economy.[120] Despite the high e-market income in Saudi Arabia, still the development of e-commerce is unsatisfactory compared to its economy.[121] According to Zhang (2014), advanced e-commerce and inside markets need high legislation.[122] Although Saudi Arabia has the *Electronic Commerce Law*, *Electronic Transactions Law* and other rules, it needs to make plain laws for businesses to engage in e-commerce.[123] Al-Mushayt et al (2022) recommend that Saudi legislators enact regulations and rules to make e-transactions safe and credible,[124] which would help to spread e-commerce widely.

Moreover, Alqahtani (2016) states that there is a lack of studies on e-commerce in Saudi Arabia and developing countries from various disciplines and that research published does not cover all parts of the subject.[125] Accordingly, this thesis argues that the parties' obligations in e-commerce contracts are among the most prominent issues of electronic commerce that need to be addressed because no one has yet researched it in Saudi Arabia. It is a critical matter, knowledge of which is necessary to assist each party in knowing what rights each has and what each must do. Therefore, by addressing this matter, trust in e-commerce will increase because all parties in the e-commerce contract will understand their obligations and those of others, leading to more engagement in e-commerce.

However, peace of mind of the parties to an e-commerce contract cannot be achieved unless this thesis simultaneously investigates both Islamic and Saudi law perspectives. This is due to the fact that, as mentioned in Section 1, the Saudi government can make laws and rules only as long as they do not conflict with Islamic

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[120] Omar Saeed Al-Mushayt, Wajeb Gharibi and Nasrullah Armi, 'An E-Commerce Control Unit for Addressing Online Transactions in Developing Countries: Saudi Arabia—Case Study' (2022) 10 *IEEE Access* 64283-64291, 64283, DOI: 10.1109/ACCESS.2022.3180329.

[121] Eyad Makki and Lin-Ching Chang, 'E-Commerce Acceptance and Implementation in Saudi Arabia: Previous, Current and Future Factors' (2015) 4(3) *International Journal of Management Research and Business Strategy* 29, 29.

[122] Hengyi Zhang, 'Buyer's Remedies and Cure by Seller - A Study of the Harmonization of European Sales Law from the Perspective of Comparative Private Law' (2014) 11(11) *US-China Law Review* 1428.

[123] Raed Saud Al-Tayyar et al, 'Challenges and Obstacles Facing SMEs in the Adoption of E-Commerce in Developing Countries: A Case of Saudi Arabia' (2021) 39(4) *Studies of Applied Economics* 1, 8. DOI: http://dx.doi.org/10.25115/eea.v39i4.4644.

[124] Al-Mushayt, Gahribi and Armi (n 120).

[125] Abdullah Saleh Alqahtani, 'Factors Influencing the Adoption of E-Commerce in Saudi Arabia: Study of Online Shopping' (PhD Thesis, Flinders University of South Australia, 2016) xiv.

law.[126] Thus, if any laws or regulations regarding parties' obligations to e-commerce contracts in Saudi Arabia clash with Islamic law they are considered void based on article seven of the *Basic Law of Governance*.[127] Consequently, this thesis contributes to knowledge by investigating whether traditional Islamic law principles are compatible with Saudi law concerning parties' obligations in e-commerce contracts. According to Hamza (2017), the importance of studying the topic of contract binding force lies in the fact that it is one of the topics that need continuous study, especially in light of the changes in contracts as time passes.[128] Based on that, and as a top priority, the e-commerce contract obligations of parties should be addressed because the contract is through the internet, which has been changing the nature of trade generally, as mentioned earlier, and will change the obligations. Given that one of the e-commerce contract parties is the service provider, this thesis aims to explore both the position of Islamic law and the Saudi legislator regarding the service provider's obligations in e-commerce (disclosure, delivery, the obligation to provide an e-sale warranty, the privacy of information, and giving the consumer the right of recourse in the contract).

One significant gap not only in Saudi Arabia but also around the world concerns laws relating to the interests of sellers/service providers; nearly always, laws worldwide align with consumer interest and ignore the seller compared to the consumer. For example, there are several EU directives[129] which aim to protect the consumer.[130] This is because the consumer is the weaker party in the contractual relationship.[131] It is considered here that the prioritisation of consumer protection in law is likely to damage commercial transactions, so a balance of interests between contract parties is

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[126] van Eijk (n 10) 139, 173.

[127] *Basic Law of Governance* (n 3) art 7.

[128] Reem Abdel Baqi Hamza [ريم عبدالباقي حمزة], 'Binding Force of Contract' [القوة الملزمة للعقد] (PhD Thesis [رسالة دكتوراه], Nile University [جامعة النيلين], 2017) [D].

[129] See, eg, *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA Relevance* [2011] OJ L 304/64 ('*Directive 2011/83/EU*').

[130] Arno R Lodder, 'Information Requirements Overload? Assessing Disclosure Duties under the E-Commerce Directive, Service Directive and Consumer Directive' in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (Edward Elgar, 2014) 358.

[131] Fatima Zahra Sharifa Al-Mahi [فاطمة زهرة شريفة الماحي], 'Effectiveness of the E-Commerce Law No 18/05 in Protecting Electronic Consumer Against E-Suppliers Abuses [ 05-18 مدى فعالية القانون رقم المتعلق بالتجارة الإلكترونية في حماية المستهلك من تجاوزات الموردين الإلكترونية]' (2021) 10 Journal for Legal and Economic Studies [مجلة الاجتهاد للدراسات القانونية والاقتصادية] 178, 179.

necessary to achieve the optimal result.[132] Therefore, this thesis will constitute a building block in Islamic and Saudi law libraries by taking the first step of eliciting the consumer's obligations in e-commerce (payment, receipt or taking delivery, when using their rights in e-commerce) under Islamic and Saudi law. In conclusion, this thesis is important not only for the Saudi domestic market but also for international contractors who supply products or services to Saudi Arabia.[133]

## 1.7 Literature review

The obligations of parties in e-commerce are a very branched topic, which makes it more complicated that Saudi legislators did not classify a section or part relating to obligations in e-commerce law.[134] The previously mentioned law does not state some of the parties' contract obligations in e-commerce. For instance, Al Muqahem (2020) states that Saudi e-commerce law does not mention consumers' right of rescission in e-commerce contracts compared to French consumer protection law; therefore, one must return to Islamic principles and rules to see whether one can apply that right or not.[135] Consequently, parties' obligations in an e-commerce contract should be viewed from an Islamic law perspective for two reasons, firstly, some parties' obligations are not mentioned in e-commerce law, and secondly, e-commerce law is governed by Islamic law.[136] However, Saudi e-commerce law may create something that is not mentioned in Islamic law and it would be acceptable if it not against Sharia principles.[137] Therefore, Islamic and Saudi laws should be combined to obtain the correct judgment on parties' obligations in an e-commerce contract and to know all of them.

At this stage, the obligations are briefly mentioned to provide an overview, whereas in the following sections, when reference to each obligation comes up, the differences of view and other features will be explained. On the one hand, the service provider's (seller's) obligations are informing the consumer about the service or the product (disclosure), a sale delivery, a sale warranty, consumer information privacy protection

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[132] Zhang (n 122) 1428.
[133] *Electronic Commerce Law* (n 13) art 2.
[134] *Electronic Commerce Law* (n 13).
[135] Al-Muqahem (n 90) 1.
[136] *Basic Law of Governance* (n 3) art 7.
[137] van Eijk (n 10) 173.

and giving a consumer the right of recourse in the contract.[138] On the other hand, the consumer's obligations are payment, receipt or taking delivery, and obligations when using their rights in e-commerce .[139]

It is crucial to refer to literature reviews that deal with some of the parties' obligations in the e-commerce contract. However, before doing that, the reference laws essential to this thesis need to be mentioned. The *Electronic Commerce Law*[140] is the law most relevant to this thesis because it governs e-commerce in Saudi Arabia and states some obligations related to parties in e-commerce.[141] The *Electronic Transactions Law*[142] is also considered a reference law regarding e-commerce in Saudi Arabia based on e-commerce law.[143]

The literature review is categorised into Saudi Arabian and Islamic, to clarify, and concludes by identifying an important gap in the literature in regard to the present research problem.

### *1.7.1 Saudi Arabian law*

#### *1.7.1.1 A doctoral thesis by Dr Suleiman Muhammad Al-Shiddi entitled 'Methods of Electronic Commerce Protection – A Comparative Study'[144]*

A doctoral thesis by Dr Suleiman Muhammad Al-Shiddi entitled 'Methods of Electronic Commerce Protection - A Comparative Study' is one of the most valuable theses that deal with electronic commerce in comparative Arabic laws study. At that time, Saudi E-commerce and E-transactions laws had not been issued, so there was no foundation

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[138] This thesis aims to collect all obligations in one place. And it sometimes changes some topics from different conceptions to an obligation concept, for example, from implications of contract under Islamic law to obligations because some implications adapt to be obligations such as a sale warranty. For both Islamic and Saudi law references, see: Luqman (n 70); ميكائيل رشيد علي الزيباري [Mekaiel Rasheed Ali Al-Zebari], العقود الإلكترونية على شبكة الانترنت بين الشريعة والقانون ['The Electronic Contracts on the Internet between Islamic Jurisprudence and Law'] (PhD Thesis, الجامعة العراقية [Al Iraqiq University], 2012) 196–222.

[139] Same as previous footnote but here are the consumer obligations. For both Islamic and comparative law, عبدالرحمن عبدالله السند [Abdul Rahman Abdullah Al-Sanad], الأحكام الفقهية للتعاملات الإلكترونية [*Fiqh Provisions for Electronic Transactions*] دار الوراق [Dar Al Warrak, 1st ed, 2004) 183–202; Khalifa (n 77).

[140] *Electronic Commerce Law* (n 13).

[141] Luqman (n 70).

[142] *Electronic Transactions Law* (n 27).

[143] *Electronic Commerce Law* (n 13) art 24.

[144] سليمان محمد الشدي [Suleiman Muhammad Al-Shiddi], طرق حماية التجارة الإلكترونية ['E-Commerce Protection Methods'], رسالة دكتوراه, جامعة الامام محمد بن سعود ([PhD Thesis, Imam Muhammad bin Saud University, 2006]).

to address e-commerce. Still, Al-Shiddi did very well in contributing to the Saudi law library by drawing attention to the importance of making e-commerce laws in Saudi Arabia, following other countries such as Tunisia. Also, he provides methods to protect electronic commerce through statutory rules, penal protection, lawsuit, and modern methods of proof. Following on, he mentions ways to protect electronic commerce before concluding the contract. Then he refers to consumer protection in electronic commerce, mentioning many things which are of interest to us, including the consumer's right to information,[145] which can be considered somewhat as a disclosure obligation on service providers. However, the thesis discusses only a small number of the many obligations placed on the parties to an electronic commerce contract. In addition, it sees these obligations from a protection perspective and does not consider them to be obligations of the parties to the electronic contract. Moreover, the *Electronic Commerce Law*[146] had not yet been adopted when Dr Al-Shiddi was writing his thesis in 1427AH (2006), so the thesis contains no mention of the position of the Saudi legislation on these obligations.

#### *1.7.1.2 A Master's thesis from the Department of Regulations of the Faculty of Sharia at the Islamic University of Madinah entitled 'The Formation of the Electronic Commerce Contract in the Saudi System and Islamic Law', presented by the researcher Muhammad Abdullah Al-Falhi[147]*

Al-Falhi's thesis includes a discussion of the e-commerce contract and how parties must complete it, but the subject of the obligations of the seller and the consumer only lasts about forty-five pages,[148] appearing at the conclusion of the thesis. Furthermore, Al-Falhi mentions some obligations, but not all of them; for example, the obligation of confidentiality is not mentioned. In addition, the thesis was published in 1433AH (2012), which means that it does not address the *Electronic Commerce Law*.[149]

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[145] Ibid 346–56.
[146] *Electronic Commerce Law* (n 13).
[147] محمد عبدالله الفلحي [Muhammad Abdullah Al-Falhi], تكوين عقد التجارة الإلكتروني في النظام السعودي والشريعة الإسلامية ['The Formation of the Electronic Commerce Contract in the Saudi and Islamic Law'] رسالة ماجستير، الجامعة الإسلامية ([Master Thesis, Islamic University of Madinah, 2012]).
[148] Ibid 92–135.
[149] *Electronic Commerce Law* (n 13).

#### *1.7.1.3 A Master's thesis from the College of the Arab East in the Kingdom of Saudi Arabia by researcher Haya bint Muhammad Al-Shuaibi entitled 'Civil Protection for the Consumer in Electronic Contracting in the Saudi System'*[150]

The perspective of this thesis focuses on protecting the consumer in e-commerce only. The researcher does not address the consumer's obligations; she only discusses the consumer's rights. Moreover, obligations on the seller or service provider are not considered. For example, the author does not address the merchant's commitment to delivering the goods. Having said this, Al-Shuaibi's dissertation is distinguished from what came before it in that it adopts the e-commerce law bill. Since this thesis was written before the issuance of the *Electronic Commerce Law*,[151] it does not consider the Saudi legislator's position regarding the obligations in e-commerce contracts.

#### *1.7.1.4 The Saudi legal system and its effect on electronic contract formation*

Abduhamid Aleid submitted his thesis to fulfil the requirements for a Doctor of Philosophy at the Queensland University of Technology in 2017.[152] Aleid's thesis argues that modern commerce requires updated Saudi laws regarding electronic contracts. Aleid covers the need for clear legislation in this area that can be consistently applied, but he does not discuss parties' obligations in electronic contracts. Also, as this thesis was published in 2017, Aleid does not mention the *Electronic Commerce Law* [153], which came into effect in 2019.

#### *1.7.1.5 Electronic contract: a study of its application in the light of Islamic law with particular reference to the Saudi Arabia case*[154]

Abdulrahman A Alzaagy's thesis was submitted in partial fulfilment of the Doctor of Philosophy degree requirements at the University of Wales in Aberystwyth in 2009. In this thesis, Alzaagy provides a broad overview of how Islamic contract laws apply in the age of electronic contracts. The thesis covers the topic generally without providing a section on the parties' obligations in electronic contracts.

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[150] هيا بنت محمد الشعيبي [Haya bint Muhammad Al-Shuaibi], الحماية المدنية للمستهلك في التعاقد الإلكتروني في النظام السعودي ['Civil Protection for the Consumer in Electronic Contracting in the Saudi System'], رسالة ماجستير، كلية الشرق العربي ([Master Thesis, Arab East College, 2016]).

[151] *Electronic Commerce Law* (n 13).

[152] Abduhamid Aleid, 'The Saudi Legal System and its Effect on Electronic Contract Formation' (PhD Thesis, Queensland University of Technology, 2017).

[153] *Electronic Commerce Law* (n 13).

[154] Abdulrahman A 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).

#### *1.7.1.6 Obligations of the service provider in the Saudi e-commerce system*[155]

This article focuses on service providers' obligations, and Dr Luqman divides obligations into two categories. The first category is the obligations before the contract and is partitioned into two commitments: moral (fair) advertising and disclosure obligations.[156] The other category is obligations during and after the contract. He considers protecting consumers' privacy as a commitment during a contract and invoice delivery to a customer as a commitment after a contract.[157] Dr Luqman does not mention Islamic and modern laws and does not cover consumer's obligations. Although he mentions the service provider's obligations, a few obligations are not discussed, such as the guarantee of product or service commitment. However, even the discussed obligations still need more debate; for example, the privacy obligation is covered in only four pages.[158] Moreover, Dr Luqman discusses the draft executive regulations, which were not approved, even though he debates the *Electronic Commerce Law*.[159]

#### *1.7.1.7 The legal regulation of electronic commerce in Saudi law*[160]

This article is descriptive and analytical in general of the law but does not study the law critically and deeply; therefore, many essential points will be forgotten. Alhassan takes a quick view of the Saudi *Electronic Commerce Law*[161] without details. She mentions only some service providers' obligations without consumers' obligations and does not cover Islamic law. She states three service providers' obligations: not misleading advertisement, disclosure, and giving customers the right of withdrawal from the contract. They are not given what they deserve, only written seven pages.[162] In addition, Dr Alhassan addresses the service provider's commitments as consumers' protections, not as obligations, nevertheless forgets some of them, such as delivery and guarantee.

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[155] Luqman (n 70).
[156] Ibid 354–67.
[157] Ibid 368–81.
[158] Ibid 369–72.
[159] *Electronic Commerce Law* (n 13).
[160] Al-Hassan (n 58) 67.
[161] *Electronic Commerce Law* (n 13).
[162] Al-Hassan (n 58).

#### *1.7.1.8 The consumer's right of rescission in the field of remote contracting in Saudi E-Commerce Law (A comparative study under French and Saudi law)[163]*

Dr Al Muqahem's article covers only one service provider's obligation that gives the customer rescission the right of contract in the Saudi *Electronic Commerce Law*.[164] Nevertheless, he addresses the issue from the consumer's right, not the service providers' obligation perspective. Moreover, Dr Al Muqahem does not mention Islamic law except in two parts and not in detail as all are less than a half-page.[165]

### *1.7.2 Islamic law*

This section covers literature written under Islamic law and intended for e-commerce, specifically the obligations of the parties to the e-commerce contract.

#### *1.7.2.1 The option of annulment in the electronic commerce system: a comparative jurisprudential study[166]*

This article by Almazid deals with the service provider's obligation to give the consumer the right to rescind the contract from Islamic and Saudi perspectives. He addresses the subject very well in both aspects, even though he is an Islamic law specialist. This article is one of the materials most relevant to this thesis which has both Islamic and Saudi law, although with more focus on the first one. His conclusion of the comparison between Islamic and Saudi law regarding sellers' obligation to give the consumer the right to rescind is that this obligation is addressed under Islamic law by the *Khiar Alshart*[167] condition option. He argued that although contract parties choose the condition option, making a law to give them or one of them this option is acceptable.[168] This thesis agrees with that in principle and asserts that the obligation

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[163] Al-Muqahem (n 90) 1.
[164] *Electronic Commerce Law* (n 13).
[165] Al-Muqahem (n 90) 1.
[166] مزيد بن إبراهيم المزيد [Mazyad bin Ibrahim Almazid], خيار الفسخ في نظام التجارة الإلكترونية: دراسة مقارنة ['The Option of Annulment in the Electronic Commerce System: A Comparative Jurisprudential Study'], مجلة العوم الشرعية [(2020) 13 (5) *Journal of Shariah Sciences*] 3397, 3461. The present study disagrees with Almazid's title because he is creating something new in Islamic law by referring to the termination option. The correct option is Khiar Alshart or the condition option due to the fact that termination is one of the impacts of Khiar Alshart, not a choice.
[167] It is for one or both contracting parties to have the right to rescind the contract or to conclude it within a known period. For example, if the buyer says to the seller: I will buy this thing from you on the condition that I have the option for one or three days to revoke. It has proceeded to the need to lift the unfairness of the contract parties.
[168] Almazid (n 166).

to give the consumer the right to rescind is closer to the vision option *Khiar Alruwya*[169] than the condition option.[170]

#### *1.7.2.2 E-commerce and its provisions in Islamic jurisprudence[171]*

Dr Sultan Al Hashimi submitted this doctoral thesis for a doctorate at the College of Sharia, Imam Mohammad ibn Saud University. Sultan's efforts are nearly all-encompassing in their scope, with his work covering most e-commerce topics and mentioning the four schools of Islamic law in each subject.[172] The only issue with this thesis is that Dr Sultan does not focus on modern law as much as Islamic law. This does not mean the author avoids writing anything about modern law, but he does not address specific laws or regulations or offer any deep discussion. His focus is on explaining how Islamic law applies to e-commerce and proving e-commerce is acceptable under Islamic law. He does indeed mention parties' obligations in e-commerce under Islamic and modern law, but his section on the subject is brief, running to only ten pages,[173] whereas the enormous topic of parties' obligations requires a further lengthy discussion. Furthermore, there is no reference to the *Electronic Commerce Law*[174], as the thesis was published in 2007, and the law was not put into effect until 2019.

#### *1.7.2.3 Provisions of electronic commerce in Islamic jurisprudence[175]*

This is a doctoral dissertation by Dr Adnan Al-Zahrani, submitted to obtain a doctorate at the College of Sharia at Umm Al-Qura University. In his thesis, Al-Zahrani focuses on Sharia rulings in e-commerce and the correct approach to e-commerce issues from the point of view of Islamic law. Furthermore, from an Islamic law perspective, he

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[169] The buyer has the right to continue with or rescind the contract upon seeing the product if he did not see it at the time of establishing the agreement.

[170] علي أحمد المهداوي [Ali Ahmed Al-Mahdawi], أثر خيار الرؤية في حماية المستهلك الإلكتروني-دراسة تحليلة في قانون المعاملات المدنية الاتحادي، والقانون الاتحادي رقم ١ لسنة ٢٠٠٦م بشأن المعاملات والتجارة الالكترونية، والقانون الاتحادي رقم ٢٣ بشأن حماية المستهلك ['The Impact of the Vision Option on Electronic Consumer Protection - An Analytical Study in the Federal Civil Transactions Law, Federal Law No 1 of 2006 Regarding Electronic Transactions and Commerce, and Federal Law No 23 on Consumer Protection'] (مجلة الشريعة والقانون [(2010) 42 *Sharia and Law Journal*] 175.

[171] Al Hashimi (n 2).

[172] The four schools of Islamic law: Hanafi, Maliki, Shafi'i and Hanbali.

[173] Al Hashimi (n 2) 269–78.

[174] *Electronic Commerce Law* (n 13).

[175] عدنان بن جمعان الزهراني [Adnan bin Jamaan Al-Zahrani], أحكام التجارة الإلكترونية في الفقه الإسلامي ['The Provisions of Electronic Commerce in Islamic Jurisprudence'] (رسالة دكتوراه، جامعة أم القرى [PhD Thesis, Umm Al Qura University, 2008]).

mentions some implications of e-contracts, such as payment, receipt of the product and warranty.[176] These implications can be considered obligations because they are commitments of consumers or service providers, even if they are addressed from different angles. This is because the consumer is obligated to pay and receives the product in an e-commerce contract, and the service provider is obligated to provide a warranty. Regardless, this doctoral dissertation does not contain anything related to the *Electronic Commerce Law*[177] but mentions the United Nations Commission on International Trade Law (UNCITRAL). However, Al-Zahrani copies and pastes from UNCITRAL without critical discussion.[178]

#### *1.7.2.4 General principles of consumer protection in e-commerce: a comparative study between Sharia law and EU laws[179]*

Saif Nasser Abdullah Al-Mamari submitted this thesis to the University of Exeter for a Doctor of Philosophy in Law in February 2018. The researcher Al-Mamari does not mention Saudi law as theory except in six lines,[180] where he simply debates whether Saudi Arabia has a dedicated e-commerce law or not. At that time, no specific Saudi law for e-commerce existed, given that the law was enacted in 2019.[181]

Conversely, this present thesis will look deeply into the issues identified compared to how Al-Mamari addresses Saudi law. Al-Mamari's thesis does not focus on the buyer's (consumer's) obligations and asserts the consumer's rights without covering the seller's obligations. Therefore, he addresses the subject differently, but his thesis can be helpful if these rights are viewed from a standpoint of obligation. In addition, while Al-Mamari makes an excellent effort regarding Islamic law, his thesis is not based on old Islamic books; moreover, he does not compare modern law and Islamic law in every subject. For example, he discusses the topic of consumer privacy without any reference to Islamic law, and his treatment of the issue amounts to only half a page;[182] of course, this is much less than what the subject requires.

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[176] Ibid 396–449.
[177] *Electronic Commerce Law* (n 13).
[178] Al-Zahrani (n 175).
[179] Saif Nasser Abdullah AL Mamari, 'General Principles of Consumer Protection in E- Commerce Trade: A Comparative Study between Sharia Law and EU Laws' (PhD Thesis, University of Exeter, 2018).
[180] Ibid 136.
[181] *Electronic Commerce Law* (n 13).
[182] AL Mamari (n 179) 87.

#### *1.7.2.5 Means of consumer protection in electronic commerce in Islamic jurisprudence and law: commitment to the media as a model*[183]

This article addresses the obligation of disclosure as protection for the consumer under Iraqi law and Islamic law. It is just 25 pages long, and it focuses on a single obligation; it does not cover other commitments, such as privacy. In addition, it avoids any mention of Saudi law.

#### *1.7.2.6 The impact of the vision option on electronic consumer protection. (An analytical study in the UAE Federal Civil Transactions Law, Law No. 1 of 2006 for Electronic Transactions and Commerce, and Law No. 24 for Consumer Protection)*[184]

This article covers in detail the obligation of disclosure in electronic commerce under Emirate (UAE) law and Islamic law; there is nothing about either Saudi law or other obligations, such as delivery commitment.

### *1.7.3 Modern law*

A few articles address comparative laws, as in the last two articles mentioned, but they do not cover Islamic or Saudi law. In addition, they only pertain to one obligation, which is disclosure. For example, they cover the commitment to disclose in e-commerce contracts in Algerian and French law.[185] The last footnoted article is about traditional contracts, not electronic agreements. In addition, Enas Alqodsi writes an article that only covers United Arab Emirates law.[186] However, these materials are still relevant to

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[183] سلام الفتلاوي، رزاق الغراوي و محمد الأسدي [Salam Al-Fatlawi, Razak Al-Gharawi and Muhammad Al-Asadi,] وسائل حماية المستهلك في التجارة الإلكترونية في الفقه الإسلامي والقانون: الالتزام بالإعلام أنموذج'Means of Consumer Protection in Electronic Commerce in Islamic Jurisprudence and Law: Commitment to the Media as a Model'] (2017) 44 *Kufa Studies Center Journal* 19.

[184] Al-Mahdawi (n 170).

[185] قادة شهيد [Qadah Shahid,] الالتزام بالإعلام في عقود التجارة الإلكترونية'Disclosure Obligation in E-Commerce Contracts'] (2010) 14 مجلة المناظرة [*Journal of Debate*] 141; حجازي محمد [Mohamed Hegazy,] الالتزام بالإعلام قبل التعاقد وتطبيقاته على العقود الالكترونية -ونطاقه وضمانات المستهلك الإلكتروني-'Commitment to Informing before Contracting and its Applications on Electronic Contracts - Its Scope and Electronic Consumer Guarantees'] مجلة جامعة الأنبار للعلوم القانونية والسياسية (2013) 8 *Anbar University Journal of Legal and Political Sciences*] 239; ليلى هوارى ومحمد بوجانة [Laila Hawari and Mohamed Boujana,] الالتزام بإعلام المستهلك في عقد الاستهلاك'The Obligation to Inform the Consumer in the Consumer Contract'], مجلة الاجتهاد الاقضائي [ (2020) 12 (2) *Journal of Judicial Jurisprudence*] 471, 488; عائشة قصار اللليل [Aisha Kassar Al-Layl] الإلتزام بالإعلام 'الإلكتروني السابق للتعاقد,[Commitment to Pre-Contracting Electronic Media'] مجلة الحقوق والعلوم الإنسانية, [(2016) 28 *Journal of Law and Human Sciences*] 77;. أحمد بومدين [Ahmed Boumediene,] دور الالتزام بالإعلام قبل التعاقد في حماية رضا المستهلك'The Role of the Obligation to Inform before Contracting in Protecting Consumer Satisfaction'] مجلة العلوم القانونية [(2010) 1 *Journal of Legal Sciences*] 163.

[186] Enas Mohammed Alqodsi, 'The Right to Pre-Contractual Information in E-Commerce Consumer Contracts: UAE Law and Comparative Perspectives' (2021) 24(2) *Journal of Legal, Ethical and Regulatory Issues* 1.

this thesis from a comparative legal study view because they address one of the e-seller's obligations: disclosure.

#### *1.7.3.1 The pre-contractual obligation to inform in the sales contract in the light of modern technological means: a comparative study*[187]

This article is extremely extensive regarding disclosure in e-contracts in the chosen context, as it covers every aspect of the subject. Al-Mursi made an incredible effort with his writing, which is close to 200 pages. He discusses three laws: Egyptian, French and Kuwaiti laws. He gives an introduction to Islamic law about obligations. Al-Mursi thinks that the disclosure obligation is present in Islamic law under the item where the seller is asked to tell the truth about the product.[188] However, this thesis will argue that that inference is incorrect because what he refers to relates to cheating and covering defects. Moreover, the article does not mention Saudi law or go deeply into Islamic law.

Two additional articles may develop the argument in this thesis from a comparative law view. They are helpful articles concerning sellers' obligations under some Arab countries, especially in Gulf.[189] However, they do not cover Islamic and Saudi law and do not mention consumers' obligations and some sellers' obligations, such as delivery and payment. Furthermore, these articles do not address the subject completely; for example, there is no mention of the liability of non-fulfillment of the obligation.

#### *1.7.3.2 A Master's thesis entitled 'Commitment to inform in electronic contracts'*

This thesis was submitted by Nawaf Al Thiabat to fulfil the requirements for obtaining a master's degree in Private Law, College of Law, Middle East University, in Jordan.

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[187] حمود عبدالعزيز المرسي [Hammoud Abdulaziz Al-Mursi], الالتزام قبل التعاقدي بالإعلام في عقد البيع في ضوء الوسائل التكنولوجية الحديثة: دراسة مقارنة ['The Pre-Contractual Obligation to Inform in the Sales Contract in the Light of Modern Technological Means: A Comparative Study'] مجلة البحوث القانونية والاقتصادية [(2000) 9(18) *Journal of Legal and Economic Research*)] 245.

[188] Ibid 267.

[189] يوسف سي و زاهية حورية [Youssef Sy and Zahia Houria], تفعيل التزامات المورد الإلكتروني آلية لحماية السمتهلك, ['Activating the Electronic Resource's Obligations as a Mechanism to Protect Electronic Consumerism: A Comparative Study'] مجلة الاجتهاد للدراسات القانونية والاقتصادية [(2022) 11 (1) *Journal of Ijtihad for Legal and Economic Studies*)] 111; عادل علي المقدادي [Adel Ali Miqdadi] التزامات البائع في عقود التجارة الالكترونية ['Seller's Obligations in Electronic Commerce Contracts'] جامعة جرش [(2009) 14(1) *Jerash University*] 473.

This is a comparative study between Jordanian, French and Tunisian law and a discussion of European directives on the obligation of disclosure.[190]

#### *1.7.3.3 A doctoral thesis entitled 'The importance of consumer protection for the development of electronic commerce: the need for reform in Jordan'*

This thesis was submitted by Ahmad Alhusban for the Degree of Doctor of Philosophy in Law at the University of Portsmouth.[191] Regardless of the absence of any focus in this thesis on Saudi law and consumer obligations, the researcher does not refer much to primary and secondary Islamic law resources. In addition, Alhusban's thesis avoids mentioning some consumer rights, such as the delivery commitment.

#### *1.7.3.4 Evidence and obligations in electronic contracts[192]*

Khalifa writes his book in ten chapters, and the most relevant chapters to this thesis are chapters five and six.[193] Chapter five is concerned with three user (consumer) obligations: disclosure, receiving, and payment.[194] Consideration of these obligations is at the core of the present study related to consumers' obligations, although Khalifa misses other obligations, which are privacy and disclosure. In Chapter six, Khalifa addresses three of the programmer's (service provider's) obligations: disclosure, matching between the program and the customer order, and guarantee.[195] Disclosure and guarantee of the product are two of the service provider's obligations; therefore, Khalifa's book is very relevant to the present study. However, he not only does not mention some obligations, such as delivery, he also does not mention Saudi or Islamic law. In addition, this book discusses only IT contracts and programs; therefore, most e-contracts are not mentioned because they are not IT; for example, most products on the Amazon website are not IT.

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[190] Nawaf Al Thiabat, 'Commitment of Informing in Electronic Contracts' (Master Thesis, Middle East University, 2013).
[191] Ahmad Alhusban, 'The Importance of Consumer Protection for the Development of Electronic Commerce: The Need for Reform in Jordan' (PhD Thesis, University of Portsmouth, 2014).
[192] Khalifa (n 77).
[193] Ibid 147–221.
[194] Ibid 147–78.
[195] Ibid 179–221.

#### *1.7.3.5 Assessing disclosure duties under the E-commerce Directive, Services Directive and Consumer Directive[196]*

This chapter by Lodder addresses disclosure in e-contracts under the EU E-Commerce Directive,[197] Services Directive[198] and Consumer Directive.[199] In other words, the author explains the three aforementioned laws from a purely legal analysis perspective, not an academic perspective. The chapter is more analytical than philosophical, which means it focuses on describing these directives without deep discussion. Despite all of that, the chapter is still beneficial to this thesis because it relates to one of the service provider's obligations. Moreover, the chapter incorporates not only the EU E-Commerce Directive but also the Services Directive and Consumer Directive, thus combining three essential laws in one place. The chapter also simplifies all these directives, making it easier for the present thesis to develop its argument by comparison with those directives.

#### *1.7.3.6 E-commerce law: National and transnational topics and perspectives[200]*

This book by Professor Henk Snijders and Professor Stephen Weatherill, published in 2003, does not address Saudi law or Islamic law and only briefly addresses the seller's obligations. This book broadly covers competent courts and applicable laws in some detail but does not address Saudi law.

#### *1.7.3.7 The Law of Electronic Commerce[201]*

Alan Davidson's book, published in 2009, does not address either Saudi law or Islamic law. It also does not cover the topic of the obligations of parties in electronic contracts except privacy, which the author focuses on as protection rather than as obligation.[202]

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[196] Lodder (n 130).
[197] *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market* [2000] OJ L 178/1.
[198] *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market* [2006] OJ L 376/36.
[199] *Directive 2011/83/EU* (n 129).
[200] Henk Snijders and Stephen Weatherill (eds), *E-Commerce Law: National and Transnational Topics and Perspectives* (Kluwer Law International, 2003).
[201] Alan Davidson, *The Law of Electronic Commerce* (Cambridge University Press, 2009).
[202] Ibid 216–42.

### *1.7.4 Gap in the literature*

Many studies and books dealing with e-commerce and Islamic and Saudi law are precious and can develop and improve this thesis and the researcher's thinking. However, they are less relevant to this thesis due to its focus on the obligations of parties in an e-commerce contract, whereas those studies focus on different subjects. The examples are many, and there is insufficient room to list them all here.

After extensive research, it became clear that previous studies have not fully addressed obligations of parties in e-commerce contracts under both Saudi Arabian and Islamic law. As mentioned, some references on obligations detail one specific commitment in-depth without mentioning other commitments. In addition, many studies deal with some obligations (though not all) in a brief or dedicated manner, without expanding and giving the subject its full right. Moreover, most of these did not write that on the one hand they are obligations of parties in e-contract, but on the other hand they are protection for one of the parties or something of that nature. There are differences between looking at the subject as protection or obligation because not all protections are obligations.[203] An example of where protection is not an obligation is announcing the commercial register on the Internet: it is set to protect the consumer, and while the service provider must do it, the announcement does not consider the merchant's obligation to the consumer. Conversely, not all obligations are protections; for instance, payment and product receipt are obligations, whereas they are not protections. Furthermore, addressing any issue is entirely different between protection and obligation because most protection is made by a third party (law). In contrast, an obligation is broader and is created by contract, unilateral will, tort, illicit enrichment, and the law. [204] Over and above, protection studies only focus on consumer protection, and service providers have no share in it. From this, the urgent need for the subject of this thesis to be addressed is clear, as it will provide both theoretical and practical information for everyone who will enter the Saudi e-market or be interested in Saudi, Islamic or comparative law.

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[203] سلطان ناعم سلطان العمري [Sultan Naim Sultan Al-Omari], عقود التجارة الإلكترونية وحقوق المستهلك وجزاءات الإخلال بها وفق النظام السعودي ['E-Commerce Contracts and Consumer Rights, Penalties for Breaching Them According to the Saudi System'], المجلة العلمية [(2022) 1 (34, first part) *Scientific Journal*] 57.

[204] مصطفى الزرق [Mustafa Al-Zarqa], المدخل إلى نظرية الإلتزام العامة في الفقه الإسلامي [*Introduction to the General Obligation Theory in Islamic Jurisprudence*] (Dar Al-Qalam -Damascus, 1st ed, 1999) 107.

## 1.8 Overview of thesis chapters

This thesis consists of the present introductory chapter and five further chapters. This first chapter introduces the foundation of duty requiring that Saudi e-commerce rules be consistent with Islamic law; otherwise, they are not acceptable. The next section provides background, first regarding the concepts of e-commerce and e-commerce contracts, mentioning Saudi Arabia's e-commerce statistics and its legal history of e-commerce, including the *Electronic Transactions Law*, the *Anti-Cybercrime Law* and the *Electronic Commerce Law*. Further background is offered regarding issues related to starting transactions in e-commerce that lead to establishing obligations. Subsequent sections detail the research problem and questions, objectives of the study, original contribution to knowledge, and a literature review.

Chapter Two clarifies the core principles of e-commerce law in the modern world, starting with the concept of e-commerce and the definitions associated with it. This chapter explores the various categories of e-commerce and the distinction between e-commerce and traditional trade. Three basic principles of e-commerce are discussed in Section 2.3, namely functional equivalence, technological neutrality and non-discrimination. This is followed in Section 2.4 by an examination of the key legal issue relating to e-commerce, namely e-signature, including definitions and analyses of approaches to dealing with it. Section 2.5 then addresses the formation of an e-contract, essential features being the timing of dispatch and receipt of the e-contract, as well as places of dispatch internationally. This is also addressed regarding Islamic law.

Chapter Three introduces the concept of obligations in general and examines the importance of the comparative study of laws of obligations and the lack of a consistent classification of obligations. It separately defines the notion of obligations law in Saudi and Islamic law before discussing the different views on sources of obligations in each of these two legal systems.

The key focus of this thesis is Chapter Four, which deals with service providers' obligations, addressing this subject entirely from the two perspectives of Saudi and Islamic law. The chapter first investigates the seller’s disclosure obligation to the consumer—a product or service delivery to the customer and a sale warranty. Consumer privacy is then presented as the service provider's obligation. This chapter

also analyses how service providers give a consumer the right of recourse in the contract.

Chapter Five extends the analysis by focusing on consumers' obligations in e-commerce contracts with merchants. The chapter presents three points of view on addressing issues in Saudi and Islamic law concerning consumer obligations. The first refers to payment; the second refers to receiving a product or taking a service benefit, and the third concerns consumers' obligations when using their rights in e-commerce.

The concluding Chapter Six discusses the results of the comparative analysis, identifying variations between Islamic law and Saudi law in regard to both seller and consumer obligations. The chapter predicts some future issues and proposes solutions for them.

# CHAPTER 2: PRINCIPLES OF E-COMMERCE IN THE MODERN WORLD

This chapter reviews the core principles of e-commerce law in the modern world, starting with the concept of e-commerce itself and the definitions associated with it. Section 2.2 explores the various categories of e-commerce and the distinction between e-commerce and traditional trade. Three basic principles of e-commerce are discussed in Section 2.3, namely functional equivalence, technological neutrality and non-discrimination. This is followed in Section 2.4 by an examination of the key legal issue relating to e-commerce, namely e-signature, including definitions and analyses of approaches to dealing with it. Section 2.5 then addresses the formation of an e-contract, essential features being the timing of dispatch and receipt of the e-contract, as well as places of dispatch internationally. This is also addressed in regard to Islamic law.

## 2.1 Concept of e-commerce

There are many definitions for e-commerce, and views about e-commerce differ[1] due to several factors. Firstly, numerous countries and important organisations around the world have their own special laws and regulations regarding e-commerce;[2] secondly, year after year electronic commerce continues to develop,[3] which leads to extensions of what it entails; and finally, because e-commerce is carried out in many areas and among many users[4], everyone sees it from their own perspective, and therefore everyone defines it their own way.[5] Thus, e-commerce is defined separately by laws, organisations, and legal scholars with different views, and although there are

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[1] J Ohene-Djan, *Electronic Commerce* (Study Guide CO3323, University of London, 2008) 8; Tereza Semerádová and Petr Weinlich, 'The Broad and Narrow Definition of E-Commerce', in Tereza Semerádová and Petr Weinlich (eds), *Achieving Business Competitiveness in a Digital Environment* (Springer, 2022) 6.

[2] Zheng Qin, *Introduction to E-Commerce* (Tsinghua University Press, 2009) 7. See Roger Reinsch, 'E-Commerce: Managing the Legal Risks' (2005) 47(1/2) Managerial Law 168.

[3] Reinsch (n 2).

[4] Catherine L Mann, 'Electronic Commerce in Developing Countries: Issues for Domestic Policy and WTO Negotiations' (Working Paper Series WP00-3, Peterson Institute for International Economics, 2000) <https://www.academia.edu/26440364/ELECTRONIC_COMMERCE_IN_DEVELOPING_COUNTRIES_Issues_for_Domestic_Policy_and_WTO_Negotiations>.

[5] Semerádová and Weinlich (n 1) 19.

similarities between the various viewpoints, the differences are distinctive. Broadly speaking, these variations can be clustered into two groups, based in the first instance on a narrow definition and in the second instance on an expanded definition.[6]

### *2.1.1 Narrow definition of e-commerce*

Some legal scholars have proposed that e-commerce refers only to buying and selling through the internet; for example, Savin (2013) states that electronic commerce is any transaction of selling or buying merchandise or service through electronic means.[7] However, limiting e-commerce only to buying, selling and servicing reduces the scope of the concept of electronic trade, given that businesses undertake a range of actions that do not fall under this definition. One example, among others, is the leasing of goods offered online.[8] In another limitation of the scope of electronic commerce some scholars relate it just to companies[9] or to computers.[10] According to Kütz (2016), electronic commerce is 'the trading in products or services using the computer network, such as the internet'.[11] In the same context, Knight and Mann (2017) define e-commerce as the selling or buying of goods or the provision of a service through a computer network.[12] Even though these latter definitions include a wider variety of e-trade transactions – for instance, commercial services – there are still some variables missing, such as licensing of software by electronic means.[13]

### *2.1.2 Extended definition of e-commerce*

Supporters and followers of the extended way of defining e-commerce are greater in number than those of the narrow definition described in the previous section. One of the well-known supporters of the extended definition is the EU. The EU defines e-

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[6] Many legal scholars write about e-commerce definition in the same categories (broad and narrow), but the one I follow is 'Measuring Electronic Commerce' (Digital Economy Papers No 27, OECD, 1997) 6 <http://dx.doi.org/10.1787/237203566348>.

[7] Andrej Savin, *EU Internet Law* (Edward Elgar, 2013) 28.

[8] Henry Cheeseman, *The Legal Environment of Business and Online Commerce: Business Ethics, E-Commerce, Regulatory, and International Issues* (Prentice Hall, 6th ed, 2010) 157.

[9] Darrel Ince, *Dictionary of the Internet* (Oxford University Press, 3rd ed, 2013) 180.

[10] Douglas A Downing et al, *Dictionary of Computer and Internet Terms* (Barron's, 10th ed, 2009) 163.

[11] Martin Kütz, *Introduction to E-Commerce: Combining Business and Information Technology* (Bookboon, 1st ed, 2016) 16.

[12] Sarah Cleeland Knight and Catherine L Mann, 'Electronic Commerce' (2017) *Oxford Research Encyclopedia of International Studies* <https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-85>.

[13] Cheeseman (n 8) 157.

commerce as follows: 'Any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession'.[14] This definition is practical because it includes most meanings of e-trade; it does not limit e-commerce only to internet-based means, thus also allowing for e-trade via other electronic means, such as Fax. The World Trade Organization (WTO)[15] defines e-commerce in this way: 'production, distribution, marketing, sale or delivery of goods and services by electronic means'.[16] It is a succinct definition without any unnecessary mention of the commercial transaction parties, unlike the EU's definition. However, the WTO's definition misses some types of e-commerce, for example, electronic data interchange. Saudi Arabian legislation defines e-commerce as 'An activity of economic nature undertaken, in whole or in part, by a service provider[17] and a consumer[18] through electronic means[19] to sell products, provide services, advertise the same, or exchange data related thereto'.[20] If this definition did not determine the activities at the end, it would be perfect because, without that detail, it is comprehensive in using the wording 'an activity of economic nature', which includes any commercial transaction. Although the Saudi definition defines economic activity in four categories; selling, providing service, advertising, and interchanging data, it still misses merchant deals such as product rental transactions which are an essential part of e-commerce. Finally,

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[14] *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market* [2000] OJ L 178/1, art 2 ('*Electronic Commerce Directive*').

[15] The World Trade Organization was established through the Marrakesh Agreement, which was signed by 188 countries with its procedures being completed in 1995. There was also a study issued in the year 1998 on electronic trade and the role of the Organisation in that: <https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm>. The Kingdom of Saudi Arabia was accepted as a member of the Organisation in 2005. See also إبراهيم أحمد زمزمي [Ibrahim Ahmed Zamzami], القانون الواجب التطبيق في منازعات عقود التجارة الإلكترونية [*The Applicable Law in E-Commerce Contract Disputes*] (دار النهضة- القاهرة [Dar Al-Nahda - Cairo], 2009) 19–21.

[16] 'Electronic Commerce', *World Trade Organization* (Web Page) <https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfecom_e.htm>.

[17] Service Provider: A merchant or practitioner. Merchant: A person registered in the Commercial Register who practices e-commerce. Practitioner: A person who practices e-commerce but is not registered in the Commercial Register. Person: A natural or legal person. *Electronic Commerce Law* (Royal Decree No M/126 dated 1440H (2019)) art 1 ('*Electronic Commerce Law*').

[18] Consumer: A person who engages in e-commerce to obtain products or services provided by a service provider: ibid.

[19] Electronic Means: Any information and communications technology (ICT) medium, whether electrical, electromagnetic, visual, optical, digital, or any other form of similar technology: ibid.

[20] Ibid.

the OECD provides both a narrow and a broad definition for e-commerce.[21] According to Klaus (2003), the OECD definition is perhaps the most commonly used due to the fact that all member countries of the Organisation agree on it.[22] However, despite this widespread agreement among the members of OECD, there is still some disparity between countries as many have their own perspectives on e-commerce concepts.[23]

### *2.1.3 E-contracts*

E-contracts are integral to the concept of e-commerce, however different laws may apply to them in different parts of the world. In common law, an agreement can be concluded in entirely written form, entirely oral, or a combination of oral and written; an agreement can even be made through nods.[24] Blount (2009) argues that common law can apply to e-contracts by applying its familiar principles to familiar and unfamiliar issues or by extending those familiar principles to include all issues.[25] According to Savin (2013), national civil laws in European countries apply to e-contracts because the *Electronic Commerce Directive* does not state the provisions of the offer and acceptance, place or effects of the contract termination. Moreover, Article 9 of the *Electronic Commerce Directive* states the legality of electronic means, indicating a willingness to consider them as like traditional contracts.[26] The Saudi *Electronic Commerce Law*[27] does not mention many provisions relating to e-contracts, so there is a need to look at Islamic law principles.[28]

While normal contract rules apply to e-contracts in many cases, many USA States have dedicated laws for e-commerce, and the Federal Government has also made

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[21] 'Measuring the Information Economy', *Organisation for Economic Co-operation and Development* (Report, 2002) annex 4 <https://web-archive.oecd.org/2012-06-15/160358-2771174.pdf>.
[22] Klaus Fichter, 'E-Commerce: Sorting Out the Environmental Consequences' (2003) 6(2) *Journal of Industrial Ecology* 25, 27.
[23] Semerádová and Weinlich (n 1) 19, 32.
[24] Peter Gillies and Niloufer Selvadurai, *Law of Contract* (Federation Press, 2009) 1.
[25] Simon Blount, *Electronic Contracts Principles from the Common Law* (LexisNexis Butterworths, 1st ed, 2009) 1.
[26] *Electronic Commerce Directive* (n 14) art 9. Savin (n 7) 40–1.
[27] *Electronic Commerce Law* (n 17).
[28] Because of that, this thesis dedicates chapter two to the contract and its provisions.

several laws on e-commerce.[29] That means there is a difference between traditional contracts and e-contracts, namely the platform by which the contract concludes. The fact that e-contracts are concluded online leads to different laws being applied in the contracts.[30] Whatever the differences, both electronic contracts and traditional contracts are legally defined as contracts, and they often involve similar provisions, though many variations are possible.[31]

A contract can be defined as an agreement between two or more parties that are committed to certain terms based on reciprocal obligations.[32] However, an e-contract is created either partly or entirely through new technological means and therefore needs to be defined separately. According to Karkouri and Hemici (2020), an electronic contract is an agreement between two parties that involves the making of an offer and acceptance of that offer through electronic or any other similar means that is valid for the exchange of information between the contracting parties, that is, whether concluded through this electronic means only or in conjunction with other traditional means.[33] This indicates that if the parties agree on something via the internet but receive the goods or services and make payment in person, it is considered an e-contract because it arose through electronic means. The *UNCITRAL Model Law* on Electronic Commerce applies to every commercial relationship, whether contractual or not.[34] That means in the *UNCITRAL Model Law* sense, every e-commercial contract is considered e-commerce because e-commerce includes all e-trade, whether concluded by a contract or not. Moreover, Saudi legislature considers contracts entered into through electronic means to be under e-commerce, as stated in the definition of contract in Saudi e-commerce law.[35] The agreement is concluded electronically between the parties who are dealing in electronic commerce.[36] Based on this definition, e-commerce controls e-commercial contracts, but not the reverse.

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[29] Cheeseman (n 8) 157.
[30] Kedar Ghimire, 'Electronic Contract and Legal Issues' (2020) 14 *NJA Law Journal* 287.
[31] Brian Fitzgerald et al, *Internet and E-Commerce Law: Technology, Law and Policy* (Thomson Reuters Lawbooks, 2007) <https://eprints.qut.edu.au/15361/>.
[32] Hans Weigand and Lai Xu, 'Contracts in E-Commerce' in Robert Meersman, Karl Aberer and Tharam Dillon (eds), *Semantic Issues in E-Commerce Systems* (International Federation for Information Processing, 2003) vol 111, 3.
[33] Mebarka Karkouri and Ridha Hemici, 'The Mechanisms for the Implementation of the Electronic Commerce (Comparative Study)' (Proceedings of Al Yamamah University Law Forum, 2020).
[34] *UNCITRAL Model Law* (n **Error! Bookmark not defined.**) 3.
[35] *Electronic Commerce Law* (n 17).
[36] Ibid art 1.

Ghimire (2020) states that one branch of electronic commerce is the e-contract.[37] Therefore, this thesis is based on the premise that there is a steady relationship between e-contracts and e-commerce, and thus e-contract in this thesis means an e-commercial contract.

## 2.2 Categories of e-commerce and the distinction between e-commerce and traditional trade

Every commercial transaction involving electronic means is considered e-commerce, whether it be a personal or a company transaction.[38] That means e-commerce can be sorted into categories to help understand it, thus benefiting lawmakers and those who engage in it. This is especially important given that e-trade is rapidly developing and involving many new transactions, and that laws will not be constant in the future.[39] This section therefore reviews the different types of e-commerce and the distinction between e-commerce and regular commerce.

### *2.2.1 Categories of e-commerce*

The types of e-commerce can be grouped in different ways, which means some authors divide them into only two broad categories, while others identify more than that. According to Wang (2010), business-to-business (B2B) and business-to-consumer (B2C) are the two major categories of e-commerce.[40] However, B2B and B2C do not cover all types of e-trade, so more can be added to them, such as consumer-to-consumer (C2C).[41] Individual projects may also be allowed to take part in e-trade, with a clear example being eBay platforms.[42] The United Nations Conference on Trade and Development (UNCTAD) (2015) continues the expansion by subjoining more types of e-commerce through business to government (B2G), for instance, public e-procurement.[43] This is similar to B2B but differs in that the purchaser here is a government, not a consumer. Qin (2009) suggests that government-to-

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[37] Ghimire (n 30).
[38] Chris Reed and John Angel (eds), *Computer Law* (Oxford University Press, 5th ed, 2003) 332.
[39] Ibid 392.
[40] Faye Fangfei Wang, *Law of Electronic Commercial Transactions: Contemporary issues in the EU, US and China* (Routledge, 1st ed, 2010) 5.
[41] 'Information Economy Report 2015', *United Nations Conference on Trade and Development* (Report, 2015) 3.
[42] Ibid.
[43] Ibid.

government (G2G) is another kind of e-commerce, and he gives as an example those statistics taken by a government for servicing society.[44] However, this is an unnecessary expansion of the e-commerce categories because e-government activity counts as an electronic transaction rather than e-commerce.[45] Electronic transactions constitute a wider area than e-commerce, encompassing e-government activity as well as electronic commerce.[46] Therefore, while every commercial deal on the internet, whether it is a product or a service, is an e-transaction (e-business), there are various e-transactions that are not e-commerce.[47]

Overall, B2B and B2C are clearly the prime categories of e-commerce as business to government (B2G) and government-to-government (G2G) have limited scope and in fact little has been written about them. Therefore, this section focuses on only B2B and B2C.

#### *2.2.1.1 Business to business*

The business-to-business (B2B) category of e-commerce refers to transactions between dealers and commercial purchasers that are only done for trade objectives.[48] B2B is named for commerce that is conducted between different companies or enterprises,[49] such as deals between industrialists and wholesalers or between a company that sells products in large quantities and a retailer.[50] Diverse B2B platforms are usually dedicated to specific manufacturers or value chains.[51] According to Wang (2010), B2B increases the economy and may become more than a country's gross

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[44] Zheng (n 2) 33.

[45] إيناس خلف الخالدي ومحمد سعد الرحاحلة [Enas Khalaf Al-Khalidi and Muhammad Saad Al-Rahahleh], ' قواعد التجارة الإلكترونية في ضوء نظام التعاملات الالكترونية السعودي [E-Commerce Rules in Light of the Saudi Electronic Transactions System]' (2012) 21(35) مجلة البحوث القانونية والاقتصادية) [The Journal of Legal and Economic Research] 36.

[46] عبد العزيز غرم الله الغامدي [Abdulaziz Ghorm Allah Al-Ghamdi], أحكام وضوابط العقود الإلكترونية في الفقه الإسلامي والقانون بالتطبيق على نظام التعاملات السعودي ['Provisions and Controls of Electronic Contracts in Islamic Jurisprudence and Law in Application to the Saudi Transaction System'] (PhD Thesis, Islamic Omdurman, 2015) 70. See Ajeet Khurana, 'The Difference Between E-Business and E-Commerce', *The Balance* (Web Page, 13 September 2022) <https://www.thebalancesmb.com/ebusiness-vs-ecommerce-1141573>.

[47] Al-Ghamdi (n 46) 69.

[48] Saif Nasser AL Mamari, 'General Principles of Consumer Protection in E- Commerce Trade: A Comparative Study between Sharia law and EU Laws' (PhD Thesis, University of Exeter, 2018) 94.

[49] Wang (n 40) 5.

[50] UNCTAD, 'Information Economy Report 2015' (n 41) 3.

[51] Ibid.

domestic product (GDP).[52] B2B plays a significant part in e-commerce, and statistics refer to B2B having more income than B2C by around $15.2 trillion in 2013 globally.[53] The reasons why B2B is essential are that businesses in B2B e-commerce have an intention to decrease process costs and can also manage logistics better than others.[54] Moreover, over the course of an operation, these companies can guarantee capital security and credit, as well as being well qualified in both theory and practice.[55]

#### *2.2.1.2 Business to consumer*

The business-to-consumer (B2C) concept in e-commerce has become familiar to specialists in this area to the extent that they can easily differentiate B2C from B2B.[56] In B2C, the buyer or the taker benefits from service as an individual customer and the other party is a business, so this term is a synonym for electronic retailing.[57] In other words, the difference between B2C and B2B is that B2C supplies to consumers, whereas B2B supplies to companies.[58] B2C includes enterprise, regular retail businesses, and manufacturing firms that service or sell electronically to a consumer. In addition, such e-commerce can be entered into either domestically or internationally.[59]

Regarding parties' contractual relationship in e-commerce, B2C is the most discussed category.[60] That is because of the influential role that B2C is playing in e-commerce. While B2B represents the majority of e-commerce revenues, B2C is growing more rapidly.[61] According to UNCTAD (2020), in 2019, about 27 per cent of the global population aged 15 and over (in other words, 1.5 billion people) made online purchases, which was 7% higher than in 2018.[62] However, the percentage of people who shop online is much lower in low-income countries, whereas more than half of the

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[52] Wang (n 40) 5.
[53] UNCTAD, 'Information Economy Report 2015' (n 41) 30.
[54] Zheng (n 2) 25–6.
[55] Ibid 26–7.
[56] Ahmad Alhusban, 'The Importance of Consumer Protection for the Development of Electronic Commerce: The Need for Reform in Jordan' (PhD Thesis, University of Portsmouth, 2014) 40, 49.
[57] Wang (n 40) 5.
[58] Ibid.
[59] UNCTAD, 'Information Economy Report 2015' (n 41) 3.
[60] Alhusban (n 56) 49.
[61] UNCTAD, 'Information Economy Report 2015' (n 41) 30.
[62] 'The UNCTAD B2C E-Commerce Index 2020: Spotlight on Latin America and the Caribbean', *United Nations Conference on Trade and Development* (Report, 2020) 3.

population in high-income countries is used to shopping online.[63] Ideally, significant differences between the highest and lowest countries' levels of preparedness should be corrected to build e-commerce that includes the greatest number of people.[64] Usually, the B2C methods for reaching consumers involve social media, crowd-sourcing platforms, devoted e-trade sites and mobile apps.[65] Moreover, the COVID-19 pandemic has brought a new dimension due to mandatory quarantine, which has caused a rise in e-commerce within high-income countries.[66]

Although e-trade has brought many advantages for consumers for more than a decade, such as vast options at lower prices and ease of use, the risks to consumers have become more complex than before.[67] In this context, consumers face challenges regarding their rights and obligations when purchasing online, for instance, rights and obligations relating to mobile bills or prepaid cards.[68] One result of B2C is that merchants and consumers do not meet in person, and marketed products and services are not physically touchable and not physically recognised.[69] For example, commercialised goods or services may not have the promised quality, may be faulty, may not be delivered promptly or may not be delivered at all.[70] As a result, B2C in e-commerce has special rules compared to B2B.[71]

Modern laws recognise the unequal contractual relationships between dealers and buyers in e-commerce, and lawmakers have needed to empower purchasers in order to rebalance power in these relationships.[72] To this end, the OECD's guidelines aim to secure consumers' rights in an e-commerce environment and provide them with high protection.[73] The OECD (2016) states that consumer protection authorities should strengthen their capacity to protect e-consumers and grant them efficient protection

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[63] Ibid 3.
[64] 'UNCTAD B2C E-Commerce Index 2019', *United Nations Conference on Trade and Development* (UNCTAD Technical Notes on ICT for Development No 14, 2019) 1.
[65] UNCTAD, 'Information Economy Report 2015' (n 41) 3.
[66] UNCTAD,'B2C E-Commerce Index 2020: Spotlight on Latin America and the Caribbean' (n 62) 1.
[67] 'Recommendation of the Council on Consumer Protection in E-Commerce', (Recommendation, OECD, 2016) 3 <http://dx.doi.org/10.1787/9789264255258-en>.
[68] Ibid.
[69] Sukran Ince and Izel Kibar, 'Distance Contracts in E-Commerce' (2019) 20 [Winter] *GSI Articletter* 41.
[70] Ibid.
[71] Al-Mamari (n 48) 76.
[72] Alhusban (n 56) 50.
[73] Al-Mamari (n 48) 76.

no lower than any other trade protection level.[74] In this regard, the EU tends to distinguish between B2C and B2B, giving e-consumers more protection than businesses.[75] However, although this distinction comes from the EU, it still is not mandatory in EU countries; therefore, they are able to expand the field to businesses through their local laws.[76]

UNCITRAL principles mention many consumer protection provisions in e-commerce.[77] Ince and Kibar (2019) state that it is indispensable to the law to include the rights and obligations concerning the merchant and buyer relationship, and it is the right decision to regulate e-contracts in consumer legislation.[78] The same contractual elements must be taken into account in both B2C and B2B as there are no differences between them, except for the protection stated in the law.[79] Currently, the laws and recommendations in B2C e-commerce stand with the buyer or recipient, who is the consumer, whereas this is not so with businesses in B2B. However, the equality principle requires the legislature to expand consumer protection to involve companies, particularly sole traders, due to the fact that there is no substantive justification for such an exclusive distinction.[80] In addition, small businesses usually confront a corresponding case to those often cited as reasons for consumer protection.[81] The present author entirely agrees with the last argument and considers that the protection standard in e-commerce should be based on the parties' prior experience of that type of service or goods. Whether the buyer or service recipient is an individual customer or company, both deserve the same protection if both have the same lack of experience of the type of service or goods. For example, if a law firm intends to buy furniture for its office, and that firm does not itself specialise in dealing with furniture, it is fair and necessary to protect it by law like any other consumer. That is because this company has no knowledge of furniture, and it will take the same risk that individual customers may take when buying online. Therefore, justice requires equal protection for company and

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[74] OECD, 'Recommendation of the Council on Consumer Protection in E-Commerce' (n 67).
[75] Martijn W Hesselink, 'Towards a Sharp Distinction between B2B and B2C? On the Consumer, Commercial and General Contract Law after the Consumer Rights Directive' (Centre for the Study of European Contract Law Working Paper Series No 2009/06, 2009) 3.
[76] Ibid.
[77] This will be addressed in the UNCITRAL principles section.
[78] Ince and Kibar (n 69).
[79] Alhusban (n 56) 50.
[80] Hesselink (n 75) 3.
[81] Ibid.

consumer; otherwise, it will increase the risk of fraud in online transactions. A question arises here; someone may say the experience standard needs to be more disciplined, leading to a foggy situation in e-commerce law because it is challenging to define experience regarding companies. The best answer to the question of knowing a particular thing or not is determined by the specialty of the shopper. So, the first step is to look at the field of the company that is buying or receiving the benefit of a service. If it is the same field as the appointed contract, such as when a furniture company buys furniture, in this case, it does not deserve identical consumer protection. In any event, the burden of proof of inexperience rests with the company that claims it, and through this, all parties are protected; moreover, justice is more likely to be achieved.

### *2.2.2 Distinction between e-commerce and traditional trade*

Nowadays, traditional and online contracts form the basis of many transactions and supply the tools for consumers and companies to deal with each other in activities such as selling, transferring goods or servicing.[82] However, electronic commerce differs from traditional commerce because the parties are not located in the same place, and the contract offer and its acceptance occur at different times.[83] In other words, the means to contact are various, and in e-commerce contact is done from a distance.[84] While in many cases normal contract rules apply to e-contracts[85], organisations and countries worldwide have enacted laws regarding e-contracting and e-signatures, with the result that different laws may apply to e-commerce.[86] In this context, UNCTAD (2022) states that statistics indicate very considerable improvement in adoption in four legal fields worldwide that provide confidence to the user, which have led to growing e-commerce.[87] In these legal fields – e-transaction, consumer protection, privacy and data protection, and cybercrime – data only between 2015 and 2021 show significant progress.[88] In addition, transactions in e-commerce are

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[82] Cheeseman (n 8) 156.
[83] Hussein Riyadh Khudura, Ali Abdulrazzaq Muslim and Eyad Mutshr Sayhod, 'Electronic Commerce: Legal Perspective (Comparative Study)' (2019) 8(5) *International Journal of Innovation, Creativity and Change* 1.
[84] Blount (n 25) 5.
[85] See Wang (n 40) 14; ibid.
[86] See Diane Rowland, Uta Kohl and Andrew Charlesworth, *Information Technology Law* (Routledge, 4th ed, 2012) 234. See Cheeseman (n 8) 15.
[87] UNCTAD, *E-Commerce and the Digital Economy in LDCs: At Breaking Point in COVID-19 Times*, UN Doc UNCTAD/DTL/STICT/2022/1 (2022) 38.
[88] Ibid 39.

paperless compared to traditional trade, which has led to many advantages; for instance, contact is much faster and cheaper because there is no need to transfer work papers from one place to another around the world.[89] Obviously, e-commerce helps countries not to waste time and money that they may squander in regular transactions.[90] Moreover, because of the different logistics between normal transactions and e-commerce, this last is better for the environment in that online activity delivery outputs less $CO_2$ emissions and utilises less primary energy.[91]

## 2.3 Basic principles of e-commerce

On the eve of the 21st century, a new economic move brought the world to the information era, dramatically increasing computers and Internet usage.[92] A large part of the new online economy relies on e-contracts, and that has created problems in the formation of electronic contracts and the enforcement of electronic agreements.[93] Savin (2013) states that, indeed, regulating the Internet continues to be an elusive notion.[94] Despite the obstacles and legal ambiguity facing e-commerce, the *UNCITRAL Model Law* has solved many problems.[95] This model law aims to develop e-commerce globally,[96] including Saudi Arabia.[97] The objective of the *UNCITRAL Model Law* is to supply necessary procedures and principles for e-commerce; in the meantime, it allows countries to make individual laws with more provisions to follow their own system.[98] In fact, many countries have been influenced by the *UNCITRAL Model Law*, including the United States, Canada, Europe and Australia, which means

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[89] Shivani Singh, 'UNCITRAL Model Law on E-Commerce: Bringing Uniformity and Harmony to E-Commerce in the Contemporary World' (2022) 5(1) *International Journal of Law Management and Humanities* 1035.
[90] Ibid.
[91] Christopher L Weber et al, 'Life Cycle Comparison of Traditional Retail and E-Commerce Logistics for Electronic Products: A Case Study of buy.com' (Conference Paper, IEEE International Symposium on Sustainable Systems and Technology, 18–20 May 2009) <https://doi.org/10.1109/ISSST.2009.5156681>.
[92] Cheeseman (n 8) 157.
[93] Ibid.
[94] Savin (n 7) 27.
[95] Singh (n 89).
[96] Yee Fen Lim, *Cyberspace Law: Commentaries and Materials* (Oxford University Press, 2nd ed, 2007) 81; *UNCITRAL Model Law* (n **Error! Bookmark not defined.**) arts 1–2.
[97] Saudi Arabia is a member of UNCITRAL 2022-2028. See 'Origin, Mandate and Composition of UNCITRAL ', *United Nations Commission on International Trade Law* (Web Page) <https://uncitral.un.org/en/about/faq/mandate_composition>.
[98] Lim (n 96) 81.

the model law has played a significant role in e-commerce law worldwide.[99] In this context, the *UNCITRAL Model Law* is a helpful guide to many countries because it provides a profound new concept of e-transactions and practical solutions to e-commerce issues.[100] As a result of following the *UNCITRAL Model Law*, e-commerce has increased around the world, and it will continue to grow at a high rate.[101] In any event, UNCITRAL presents to national lawmakers how to remove barriers to e-commerce development and provides principles related to e-commerce.[102] The *UNCITRAL Model Law* is the first piece of legislation to embrace the basic principles of functional equivalence, technological neutrality and non-discrimination that are considered the foundational building blocks of modern e-commerce law.[103] So this section is divided into three parts: functional equivalence, technological neutrality and non-discrimination.[104]

### *2.3.1 Functional equivalence*

Functional equivalence is regarded as one of the most significant principles of e-commerce legislation.[105] The *UNCITRAL Model Law* recognises that legal requirements for the use of paper transactions are the major impediment to accepting Electronic Data Interchange (EDI) because it is not considered to be like physical paper in both legal and natural aspects; hence, UNCITRAL provides 'functional equivalence' as a new approach that analyses the paper document and its functions and then follows it by analysing EDI.[106] Functional equivalence can be defined as an approach in which services that are functionally similar or serve the same objective

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[99] See Abdulhadi M Alghamdi, *The Law of E-Commerce: E-Contracts, E-Business* (AuthorHouse, 2011) [Kindle iOS version]; Lim (n 96) 81.
[100] See Alghamdi (n 99); Lim (n 96) 81.
[101] Singh (n 89).
[102] See Alghamdi (n 99); Lim (n 96) 81.
[103] *UNCITRAL Model Law* (n **Error! Bookmark not defined.**) art 5. See Luca Castellani, 'Implementing the Legal Provisions of the Framework Agreement on Paperless Trade Facilitation' (Report, UNCITRAL) <https://www.unescap.org/sites/default/files/3_Implementing%20the%20legal%20provisions%20of%20the%20Framework%20Agreement%20on%20Paperless%20Trade%20Facilitation%20by%20Mr.pdf>.
[104] See Abdulrahman Abdullah Alajaji, 'An Evaluation of E-Commerce Legislation in GCC States: Lessons and Principles from the International Best Practices (EU, UK, UNCITRAL)' (PhD Thesis, Lancaster University, 2016) 165–6.
[105] Ibid 67.
[106] Farhan Al-Farhan, 'Electronic Contracts: The Impact of the UNCITRAL Model Law on International Legal Systems - Saudi Arabia Information Technology Development from a Legal Perspective' (2002) 4 <https://www.academia.edu/?h=33007895>.

should be regulated in the same manner, which leads to applying old regulations to new industries.[107] That means building on the following principle: paperless transactions are treated the same as paper transactions and are also given identical legal recognition.[108]

According to Savin (2019), the best description of functional equivalence is that by the *United Nations Convention on the Use of Electronic Communications in International Contracts* (2005),[109] which provides an analysis of the objective and functions of non-digital paper and document demands in order to define how these can be fulfilled by digital paper in e-commerce.[110] The concept of this principle establishes the legality according to which electronic communications can be regarded as equivalent to traditional communications; specifically, it defines the particular demands that paper-based communications should have; after that, paperless communications fulfil the same objectives and functions such as 'writing, original, signed, and record'.[111] The *UNCITRAL Model Law* provides the functional equivalence principle to deal with emerging electronic barriers in e-commerce and treat them equally with traditional trade; therefore, it enables the empowering of e-commerce, which leads to increasing international business.[112] On the other hand, without acknowledgment of functional equivalence, as was the case in the past when legal systems worldwide did not recognise this principle, e-commerce would be without legal value and useless formally.[113] For example, the *UNCITRAL Model Law* provides e-signature provisions

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[107] Andrej Savin, 'Rule Making in the Digital Economy: Overcoming Functional Equivalence as a Regulatory Principle in the EU' (Copenhagen Business School Law Research Paper No 19-10, 2019).

[108] Castellani, 'Implementing the Legal Provisions of the Framework Agreement on Paperless Trade Facilitation' (n 103).

[109] *United Nations Convention on the Use of Electronic Communications in International Contracts*, opened for signature 23 November 2005, 2898 UNTS 3 (entered into force 1 March 2013) ('*Electronic Communications Convention*').

[110] Savin (n 107); article published in (2019) 22(8) *Journal of Internet Law* 3.

[111] 'UNCITRAL Model Law on Electronic Commerce (1996) with Additional Article 5 *bis* as Adopted in 1998', *United Nations Commission on International Trade Law* (Web Page) <https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce> ('*UNCITRAL Model Law Website*'); See Castellani, 'Implementing the Legal Provisions of the Framework Agreement on Paperless Trade Facilitation' (n 103).

[112] *UNCITRAL Model Law Website* (n 111). See Castellani, 'Implementing the Legal Provisions of the Framework Agreement on Paperless Trade Facilitation' (n 103).

[113] Andrew D Murray, 'Articles 9-11 ECD' in Lilian Edwards (ed), *The New Legal Framework for E-Commerce in Europe* (Hart Publishing, 2005) 78–9; Rob van Esch, 'Electronic Signatures: A Survey of the Directive and the Legislation in the Unigted Kingdom and the Netherlands' in Henk Snijders and Stephen Weatherill (eds), *E-Commerce Law: National and Transnational Topics and Perspectives* (Kluwer Law International, 2003) 27; Savin (n 107).

in article 7 that give e-signatures identical legal status to hand-written signatures, and under some conditions, for instance, identifying the signatory's identity and the signatory's approval of the e-document moreover, allow for return to it later.[114]

In addition to the legal recognition of the e-signature and e-message, Article 9 of the *UNCITRAL Model Law* states the eligibility of the e-message in legal proceedings.[115] Therefore, the step taken by model law to adopt functional equivalence is helpful and provides certainty in e-commerce, as it does not make a distinction between paper and paperless signatures and records.[116] As a result of the UNCITRAL adoption, this principle is widely accepted in many countries and legislatures worldwide.[117] The *UNCITRAL Model Law* and its principles are enacted chiefly around the world, including most of West and East Asia.[118] In this context, the Saudi *Electronic Transactions Law*[119] has many similar provisions to the *UNCITRAL Model Law* regarding e-transactions.[120] According to Savin (2019), although the functional equivalence principle is not mentioned by name in EU laws, it is one of the main approaches to regulating e-transactions.[121] The *Electronic Communications Convention* is based on UNCITRAL, which means it is the first convention that gives legitimacy to electronic contracting in international commerce.[122]

However, in spite of the fact that the functional equivalence principle is accepted almost everywhere in official documents and laws, as mentioned above, some scholars direct some criticism at it. According to Reed (2010), although legislators frequently claim that equivalence of legal treatment applies to both online and offline transactions, this principle has no obvious meaning regarding the context of

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[114] van Esch (n 113) 27; Alghamdi (n 99); *UNCITRAL Model Law* (n **Error! Bookmark not defined.**) art 7; Savin (n 107); Castellani, 'Implementing the Legal Provisions of the Framework Agreement on Paperless Trade Facilitation' (n 103).

[115] *UNCITRAL Model Law* (n **Error! Bookmark not defined.**) art 9. See Ghimire (n 30).

[116] See Castellani, 'Implementing the Legal Provisions of the Framework Agreement on Paperless Trade Facilitation' (n 103); Alghamdi (n 99); Murray (n 113) 69; Alajaji (n 104) 67.

[117] See Chris Reed, 'Online and Offline Equivalence: Aspirations and Achievement' (2010) 18(3) *International Journal of Law and Information Technology* 248; van Esch (n 113) 28.

[118] Castellani, 'Implementing the Legal Provisions of the Framework Agreement on Paperless Trade Facilitation' (n 103).

[119] *Electronic Transactions Law* (Royal Decree No M/18 dated 1428H (2007)) ('*Electronic Transactions Law*').

[120] Abduhamid Aleid, 'The Saudi Legal System and its Effect on Electronic Contract Formation' (PhD Thesis, Queensland University of Technology, 2017) 134–9.

[121] Savin (n 107).

[122] See Wang (n 40); Castellani, 'Implementing the Legal Provisions of the Framework Agreement on Paperless Trade Facilitation' (n 103); *Electronic Communications Convention* (n 109) art 9.

lawmaking.[123] In other words, it is not always straightforward to determine a class to include many different types of services or transactions, and on the other hand, sometimes the same situations are governed by different rules.[124] For instance, the law that applies to usual privacy differs from electronic privacy, as the latter has stricter rules.[125] It can be answered that there is a need to develop the economy, and one important way to do that is through e-commerce; of course, e-commerce cannot succeed without online contract implementation, and contracts need clear laws; otherwise, consumers will not be engaged.[126] That would harm both consumers and economies; thus United Nations determined to establish the *UNCITRAL Model Law* in order to enhance confidence between e-transactions parties.[127] Moreover, as discussed below, the *Electronic Communications Convention* officially governs international commerce, and it enables paperless commerce by defining the legal framework for e-transactions through validating functional equivalence demands of 'signature', 'writing' and 'original'; furthermore, the *Electronic Communications Convention* allows for the transboundary recognition of e-signatures.[128]

A second criticism is that there is no sense in applying the same rules between traditional and e-transactions because the situations or activities involving such transactions vary from each other. If the same law is implemented in both of them it will cause an unstable legal environment; therefore, it was necessary to enact new dedicated e-commerce laws that apply to every aspect of it, and which are necessarily somewhat different from previous laws.[129] However, if normal commerce and e-commerce laws are drastically different, it will cause difficulties for users to shift their trade transactions by going online. In fact, people already face difficulties in complying with laws that apply to traditional trade and it might be much more difficult with new separate laws to regulate e-transactions.[130] Finally, Savin (2019) recommends to

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[123] Reed, 'Online and Offline Equivalence: Aspirations and Achievement' (n 117).
[124] Savin (n 107).
[125] Ibid.
[126] Murray (n 113) 67.
[127] Ibid.
[128] Castellani, 'Implementing the Legal Provisions of the Framework Agreement on Paperless Trade Facilitation' (n 103).
[129] See Reed, 'Online and Offline Equivalence: Aspirations and Achievement' (n 117); Savin (n 107).
[130] Reed, 'Online and Offline Equivalence: Aspirations and Achievement' (n 117).

lawmakers that any new framework ask the following three questions to achieve good results regarding functional equivalence:

- is disruptive service innovative and satisfying a new need in the society?
- does the service become impossible or is significantly hampered by being subjected to traditional legal framework?
- are there any other reasons justifying its inclusion under the other framework (e.g., strong public policy reasons, unlawful competition, etc.)?

If the answer to all three questions is positive, the lawmaker should refrain from using functional equivalence to regulate disruptive services and should make efforts to outline a new framework. Under this approach, functional equivalence would still be appropriate in cases where the service does not pass the test. A non-innovative service thus deserves to be treated as functionally equivalent. A service that becomes impossible as a result of the application of legacy models should not be subject to them. A service in violation of transport, health, or other laws cannot hide under the mantle of innovation.[131]

### *2.3.2 Technological neutrality*

A second important principle that prevails in the *UNCITRAL Model Law* is 'technological neutrality'.[132] The principle of technological neutrality requires that neutral provisions be adopted for the technology utilised.[133] This means covering all factual positions where information is created, stored or transmitted in the form of e-transactions, whatever the medium or technology used, it is thus not dependent on nor presupposes the use of certain kinds of technology and could apply to e-activities and all e- storage information.[134] It is worth pointing out at this stage that mentioning the genesis of this principle explains its concept and objectives more fully. According

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[131] Savin (n 107).
[132] Aleid (n 120) 132.
[133] *UNCITRAL Model Law Website* (n 111).
[134] *United Nations Convention on the Use of Electronic Communications in International Contracts: Explanatory Note* (United Nations, 2007) [47] <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf> ('*Electronic Communications Convention Explanatory Note*'). See Alajaji (n 104) 164; Hervé Jacquemin, 'Legal Issues of M-Commerce with Regard to the Principles of Technological Neutrality and Functional Equivalence' (University of Namur Research Centre on IT and Law, 2011) 1.

to Lim (2007), early in the process of drawing up the *UNCITRAL Model Law*, emphasis was placed on EDI, namely a structured system through which one party agrees to submit data in a particular format and another party agrees to receive data in that format.[135] When the draft was several years old, the editors realised that the concept of EDI was outdated, even though it was famous at that time. However technology was and will continue to be developing fast, so they consciously formulated a 'technology neutral' principle, which does not need to be reformulated as new technologies emerge.[136] In this way, technology impartiality is enabled to allow future technologies to be used and also to stop lawmakers from mandating or encouraging the use of any particular technology.[137] In other words, with fast technological advancements, this principle aims to adapt to any future developments without additional legislation.[138] Thus, a formulation that directly or indirectly takes any form or medium out, by way of a limitation in the scope of technological means, is against the purpose of this principle.[139] Consequently, central to the technological neutrality notion is that the legal case of the content or information should be permitted, regardless of the technology or medium used.[140]

Lim claims that for any legislation to be effective for a long time, it must be enacted and interpreted in a stationary way.[141] However, the technological neutrality principle is the best long term solution because it allows legislatures to contain new technology by establishing general technical standards and avoiding specifying or preferring certain technologies that may be outdated over time.[142] Unfortunately, there is a real risk of confusion among the functional equivalence and technological neutrality

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[135] Lim (n 96) 82.
[136] Ibid.
[137] See Castellani, 'Implementing the Legal Provisions of the Framework Agreement on Paperless Trade Facilitation' (n 103). See Luca Castellani, 'UNCITRAL E-Commerce Texts and Paperless Trade Facilitation' (Report, UNCITRAL Working Group IV) <https://www.unescap.org/sites/default/files/3%20UNCITRAL_Session%208.pdf>; Luca Castellani, 'UNCITRAL Legal Instruments for E-Commerce and Paperless Trade' (Report, UNCITRAL Working Group IV) <https://www.unescap.org/sites/default/files/2_UNCITRAL%20texts%20for%20e-commerce%20and%20paperless%20trade_Luca_1.pdf>.
[138] *UNCITRAL Model Law Website* (n 111).
[139] *Electronic Communications Convention Explanatory Note* (n 134) [48].
[140] Aleid (n 120) 132.
[141] Lim (n 96) 82.
[142] Aleid (n 120) 133; Alajaji (n 104) 164.

principles because each principle is intended to serve different but related purposes.[143] However, functional equivalence determines the meaning of laws that apply to e-transactions and shapes the substantive rule to some degree, whereas technology neutrality focuses on activities and stands neutral with all technologies used, which means it makes no distinction between them.[144] A substantive rule could be designed only for e-commerce and thus would not necessarily aim at online and offline equivalence.[145] Indeed, some writers have made this mistake as they do not differentiate between the two principles and confuse them when writing about them.[146] Importantly, the rationale behind better regulation of e-commerce is technology neutrality, so consumers or businesses should treat technologies similarly.[147] They should not fear increased risk and improper remedies in one over others, whether the 'technology' is the voice, paper, fax, or the phone.[148] There may be some concerns raised about online neutrality compared to traditional transactions; however, both of them have the same risks, such as security regarding fraud and transmission errors.[149] Such a rule could be designed only for e-commerce and thus does not necessarily aim at online and offline equivalence. However, it must be assumed that a paperless legal environment will need to follow a similar set of graduated steps to those that were taken over a number of years to secure paper documents legally, and therefore over time various alternatives to a handwritten signature in plain contracts and notarial deeds may gradually be developed.[150] In the meantime, the technology neutrality principle is broadly agreed upon internationally, including by UNCITRAL[151], European Union[152], most Asian countries[153], Australia[154] and Saudi Arabia.[155]

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[143] Reed, 'Online and Offline Equivalence: Aspirations and Achievement' (n 117).
[144] Ibid.
[145] Ibid.
[146] Janja Hojnik, 'Technology Neutral EU Law: Digital Goods within the Traditional Goods/Services Distinction' (2017) 25(1) *International Journal of Law and Information Technology* 63.
[147] Rowland, Kohl and Charlesworth (n 86) 233.
[148] Ibid.
[149] *Electronic Communications Convention Explanatory Note* (n 134) [49].
[150] Ibid.
[151] See Alajaji (n 104) 165. See Aleid (n 120) 163.
[152] See Rowland, Kohl and Charlesworth (n 86) 233. See Alajaji (n 104).
[153] See Castellani, 'UNCITRAL E-Commerce Texts and Paperless Trade Facilitation' (n 142).
[154] Lim (n 96) 82.
[155] See Aleid (n 120) 163.

### *2.3.3 Non-discrimination*

The third principle of the *UNCITRAL Model Law* is 'non-discrimination',[156] which is established by Article 5 of this law and Article 8, paragraph 1 of the *Electronic Communications Convention*.[157] There is no explicit international agreement on the non-discrimination principle in e-commerce; the meaning is foggy.[158] However, if such interlinkages exist, they are addressed as separate and distinct notions, where Article 5 defines the basic concept of non-discrimination or the principles of technological neutrality.[159] The principle of non-discrimination ensures that an e-transaction is not deprived of legal effect, or validity, or be unenforceable only because it is in electronic format.[160] In other words, if paperless transactions provide significantly equivalent levels of reliability, they have the same legal effect as actual paper.[161] This means that the provisions should be applied equally to paper documents and e-communications, but the principle of non-discrimination does not seek to go beyond the applied electronic commerce law requirements.[162] However, it must be clarified that looking only at what is the medium that concludes the communications does not give it legal legitimacy or validity, which should refer to the whole transaction.[163]

Non-discrimination, as one of the essential principles of e-commerce, is intended to ensure the legal equivalence of foreign and national signatures and certificates; therefore, no value is attributed to the geographic location of the issuer of the certificate, the signatory or their business.[164] In this context, if the non-discrimination

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[156] Ibid 133.

[157] *Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts* (2005) [129] <https://wipolex-res.wipo.int/edocs/lexdocs/treaties/en/uncitral-uecic/trt_uncitral_uecic.pdf>; *UNCITRAL Model Law* (n **Error! Bookmark not defined.**) art 5. See Renuad Sorieul, Jennifer R Clift and José Angelo Estrella-Faria, 'Establishing a Legal Framework for Electronic Commerce: The Work of the United Nations Commission on International Trade Law (UNCITRAL)' (2001) 35(1) *International Lawyer* 107; Aleid (n 120) 133; Castellani, 'Implementing the Legal Provisions of the Framework Agreement on Paperless Trade Facilitation' (n 103); John D Gregory, 'The Proposed UNCITRAL Convention on Electronic Contracts' (2003) 59(1) *Business Lawyer* 313.

[158] Jeongmeen Suh, Joohyoung Lee and Jaeyoun Roh, 'On the Non-discrimination Principles in Digital Trade', (Yeungnam University Research Grant, 2022) 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4077393>.

[159] Sorieul, Clift and Estrella-Faria (n 157) 107.

[160] *UNCITRAL Model Law Website* (n 111). See Aleid (n 120) 133.

[161] Sorieul, Clift and Estrella-Faria (n 157) 107. See Castellani, 'Implementing the Legal Provisions of the Framework Agreement on Paperless Trade Facilitation' (n 103); Luca Castellani, 'UNCITRAL E-Commerce Texts and Paperless Trade Facilitation' (n 137).

[162] *Electronic Communications Convention Explanatory Note* (n 134) [129]. See Gregory (n 157).

[163] *Electronic Communications Convention Explanatory Note* (n 134) [129]. See Gregory (n 157).

[164] Sorieul, Clift and Estrella-Faria (n 157) 107.

principle is clearly determined, it leads to increasing e-commerce and removes online trade barriers, including the data localisation demand.[165] However, this principle alone may not totally address all preferential activities loopholes created by e-commerce.[166] Either way, both private and public entities should be subject to the principles.[167] According to Suh, Lee and Roh (2022), after quickly opening to e-commerce, many countries are still concerned about applying the principle of non-discrimination.[168] Nevertheless, many countries do apply this principle to e-commerce. For example, every government agreed on the *Electronic Communications Convention*,[169] including Saudi Arabia,[170] and more than 25 Asian and Pacific countries.[171]

## 2.4 A key legal issue: E-signature

At present, the world is confronted with a growing dependence on technology, especially the internet. Because of the nature of the internet, any attempt to accurately estimate how many individuals use it is unattainable, nevertheless there is no doubt its significance and ubiquity will continue to grow.[172] Not surprisingly, the law has difficulty keeping up with these developments.[173] However, considering how exponentially the internet is growing, the legal environment is faced with serious questions about regulating e-commerce, as with all past technological revolutions.[174] Therefore, many countries are increasingly concerned about the need to develop and modernise the law in order to make full use of technological improvements.[175] Among the core questions of concern is developing evidence and appropriate trade legislation for e-commerce.[176] This is because e-commerce creates new legal issues in this area,

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[165] Suh, Lee and Roh (n 158) 1.
[166] Ibid.
[167] Castellani, 'UNCITRAL Legal Instruments for E-Commerce and Paperless Trade' (n 137).
[168] Suh, Lee and Roh (n 158) 1.
[169] *UNCITRAL Model Law Website* (n 111).
[170] *Electronic Commerce Law* (n 17) art 5. See Aleid (n 120) 145.
[171] Castellani, 'UNCITRAL Legal Instruments for E-Commerce and Paperless Trade' (n 137).
[172] Lim (n 96) 1.
[173] Comment, 'Developments in the Law: More Data, More Problems' (2018) 131(6) *Harvard Law Review* 1714, 1716.
[174] Lim (n 96) 1.
[175] Commonwealth Secretariat, *Law in Cyber Space* (2001) 1.
[176] Ibid.

such as consumer protection,[177] privacy,[178] conflict of laws,[179] payment,[180] human rights and related topics,[181] and intellectual property.[182] Although they are exciting and, to some extent, relevant to this thesis, this section will not address them. Some are discussed in subsequent chapters[183] and there is insufficient space for the rest.[184] Therefore, this section will focus on the most pertinent issue, which is the use of e-signatures.

Lack of confidence, mainly due to a perceived lack of legal certainty, means that consumers, businesses and governments are reluctant to conduct e-transactions and adopt new services, so strengthening confidence in e-commerce is essential for economic and social development.[185] In view of the fact that the use of e-signatures for authentication is generally considered critical for future e-commerce development, matters of international admission of e-signatures play a significant role in the expansion of its use globally.[186] Domestic legislation on e-signatures, with a focus on national signature requirements and certification services, may restrict the recognition of foreign signatures and certificates, limit the development of e-commerce and create a possible obstacle to business.[187] Whilst a paperless signature potentially performs the same functions as a paper signature, the signed document does not exist in the same physical manner as the content of a touchable document on a paper carrier.[188] However, UNCITRAL[189] has developed a series of laws to allow and facilitate e-means

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[177] *Consumer Protection in Electronic Commerce: Note by the UNCTAD Secretariat,* UN Doc TD/B/C.I/CPLP/7 (3–4 July 2017) 2. See Patrick Quirk and Jay Forder, *Electronic Commerce and the Law*, (John Wiley & Sons, 2nd ed, 2003) 299.

[178] See Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (Hart, 3rd ed, 2009) 441; Quirk and Forder (n 177) 331; Lim (n 96) 126.

[179] See Zheng Sophia Tang, *Electronic Consumer Contracts in the Conflict of Laws* (Hart, 1st ed, 2009) 265; Chris Reed, *Making Laws for Cyberspace,* (Oxford University Press, 1st ed, 2012) 17.

[180] See Quirk and Forder (n 177) 114.

[181] See Commonwealth Secretariat (n 175) 27.

[182] See Quirk and Forder (n 177) 179; Lim (n 96) 417, 535, 642; Hector L MacQueen, 'Appropriate for the Digital Age? Copyright and the Internet' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (Hart, 3rd ed, 2009) 181.

[183] Consumer protection, privacy, conflict of laws, payment.

[184] Human rights and related topics, and intellectual property.

[185] *Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market and Repealing Directive 1999/93/EC* [2014] OJ L 257/73 ('*Reg 910/2014*').

[186] Sorieul, Clift and Estrella-Faria (n 157).

[187] Ibid.

[188] Stephen Mason, *Electronic Signatures in Law* (University of London Press, 4th ed, 2016) 181.

[189] As mentioned in the previous section, UNCITRAL states its law for every country worldwide, so each country can take advantage of it.

used to be involved in e-commerce.[190] In particular, the UNCITRAL Model Law on Electronic Signatures (2001) contains further provisions on the use of e-signatures.[191] In addition, the EU Electronic Identification and Trust Services for Electronic Transactions in the Internal Market Regulation 2014 (eIDAS) aim to increase confidence in electronic transactions in the internal market, offering an everyday basis for safe electronic interaction, thereby growing e-commerce in the whole Union.[192] In other words, one of the significant changes brought about by the eIDAS regulation is that it is not a directive, but a regulation, which makes it immediately applicable throughout the EU without it being necessary to transpose it into domestic legislation.

The Saudi *Electronic Transactions Law*[193] is about creating trust in e-transactions, which means focusing on e-signatures and approving and certifying e-transactions.[194] According to Article 2:

> This law aims to control electronic transactions and signatures, regulate them, and provide a legal framework for them in order to achieve the following*:*
>
> 1 - Establishing unified statutory rules for the use of electronic transactions and signatures and facilitating their application in the public and private sectors by mediating reliable electronic records*.*
>
> 2 - To give confidence in the validity and integrity of transactions, signatures and electronic records*.*
>
> 3 - Facilitating the use of electronic transactions and signatures at the local and international levels to benefit from them in all fields, such as government procedures, trade, medicine, education and electronic financial payment*.*
>
> 4 - Removing obstacles to the use of electronic transactions and signatures*.*
>
> 5 - Prevent misuse and fraud in electronic transactions and signatures.[195]

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[190] 'Electronic Commerce', *United Nations Commission on International Trade Law* (Web Page) <https://uncitral.un.org/en/texts/ecommerce>.
[191] 'UNCITRAL Model Law on Electronic Signatures (2001)', *UNCITRAL* (Web Page) <https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_signatures>.
[192] *Reg 910/2014* (n 190) Preamble [2].
[193] *Electronic Transactions Law* (n 119).
[194] Al-Khalidi and Al-Rahahleh (n 45) 40.
[195] *Electronic Transactions Law* (n 119) art 2.

As seen above, the law aims at facilitating e-transactions and enhances trust in them, including the use of e-signatures. According to Al-Ghamdi (2015), the *Electronic Transactions Law* is more relevant to electronic transactions than electronic commerce.[196] However, the *Electronic Transactions Law* is a fundamental law considered an umbrella for all electronic transaction subjects, for instance, commerce, government, health, education, and banking.[197] Al-Khalidi (2012) states that Chapter Four contains one article[198] which confirms the legality of electronic signatures and that it equates to the written signature, both having the same legal implications.[199]

To clarify the discussion of e-signatures, the following two sub-sections review first the definition of e-signature and second the legal approaches taken in regard to it.

### *2.4.1 Definition of e-signature*

This chapter considers the definition of electronic signature according to the UNCITRAL Model Law on Electronic Signatures, and the EU and Saudi Arabia laws.[200] The first of these, the UNCITRAL Model Law on Electronic Signatures, defines e-signature as meaning 'data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message'.[201] This definition of e-signature by UNCITRAL would encompass the full spectrum of e-signature techniques, from a high level of security, including cryptography-based signature assurance.[202] Second, the EU defines e-signature as 'data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign'.[203] This definition sets the stage for new paperless signature solutions and an enhanced user experience. Third, e-signature is defined by Article 1 of the *Electronic Transactions Law* as: 'Electronic data included in, attached to, or logically associated with an electronic transaction and

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[196] Al-Ghamdi (n 46) 68.
[197] Ibid 72; Al-Khalidi and Al-Rahahleh (n 45).
[198] *Electronic Transactions Law* (n 119) art 14.
[199] Al-Khalidi and Al-Rahahleh (n 45).
[200] See above 1.5 Methodology.
[201] *UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001*, art 2(a); See United Nations, *Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods*, (United Nations, 2009) para 20 ('*Promoting Confidence in Electronic Commerce*').
[202] *Promoting Confidence in Electronic Commerce* (n 201) para 21.
[203] *Reg 910/2014* (n 185) para 10.

used to verify the identity and approval of the person signing it and to detect any change to a said transaction after signature'.[204] According to UNCITRAL (2009) it is clear that UNCITRAL texts on e-commerce, as well as many other pieces of legislation, are intended to take into account all forms of electronic signatures.[205] Evidence for that is provided in the stated aim of UNCITRAL, EU, and Saudi laws to increase trust in e-transactions and give e-signature legality, as mentioned in the previous section. However, because e-signature definitions differ in various aspects, the following section is dedicated to discussing those differences and legal approaches to them.

### *2.4.2 Legal approaches to e-signature*

Having in the previous section reviewed e-signature definitions and mentioned the aims of a few e-commerce laws worldwide, it might be thought that countries worldwide have adopted the same approach to dealing with e-signatures. However, legislation and regulations on e-authentication have taken several different forms at both national and international levels, based on one or other of three primary approaches to processing signing and authentication: (a) the minimalist approach, (b) the technology specific-approach and (c) the two-tiered or two-pronged approach.[206]

#### *2.4.2.1 Minimalist approach*

This approach is referred to as minimalist because it provides a minimum legal status for every form of e-signature.[207] It means that, when the technology used is intended for certain specific functions and furthermore meets certain technologically neutral reliability requirements, e-signatures are granted the same functions as handwritten signatures.[208] This requires a service provider to determine all important steps in order that the buyer can be fully informed of every obligation in the contract.[209] Examples of

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[204] *Electronic Transactions Law* (n 119) art 1/14.
[205] *Promoting Confidence in Electronic Commerce* (n 201) para 21.
[206] For more information, see *Promoting Confidence in Electronic Commerce* (n 201) para 82; Oways Kinsara, 'Revising the Saudi Electronic Transactions Law on E-Signatures' (2022) 19 *Digital Evidence and Electronic Signature Law Review* 1; Stephen Errol Blythe, *The E-Commerce Law Trilogy: Volume 1: E-Commerce Law Around the World* (Xlibris, 2011) Loc 359; Mason (n 188) 115.
[207] *Promoting Confidence in Electronic Commerce* (n 201) para 83.
[208] Ibid para 85.
[209] Sylvia Mercado Kierkegaard, 'E-Contract Formation: U.S. and EU Perspectives' (2006) 3(3) *Shidler Journal of Law, Commerce & Technology* 1.

this approach being adopted are Australia,[210] and both the UNCITRAL Model Law on Electronic Signatures and the *Electronic Communications Convention*.[211] The disadvantage of this approach is that it ignores the fact that, in fact, certain kinds of e-signatures are more readily usable than others.[212] Nevertheless, Mason (2016) states that the requirements in this approach are strict, to a degree not found even in the age of the telegram.[213]

#### *2.4.2.2 Technology-specific approach*

In this approach a specific type of e-signature is considered acceptable in order for a digital signature to be accepted as equal to a handwritten signature.[214] Followers of this approach think that protecting digital signatures by providing them with the most significant degree of security is the best way to manage e-transactions.[215] Thus, this approach grants the e-signature high protection, which cannot be manipulated.[216] However, a disadvantage is that only allowing one form of technology to be used is onerous and too restrictive.[217] Moreover, the approach is ambiguous since there is no legal certainty and no certain development of electronic commerce.[218] Therefore, from the point of view of trade, it is more suitable to scale security requirements in stages similar to the levels of legal certainty encountered in regard to physical paper.[219] This also reflects the fact that those who deal in traditional commerce are primarily free to choose from a wide range of methods to achieve the integrity and genuineness of contracts.[220] Finally, according to Alajaji (2016), the Saudi *Electronic Transactions Law* takes a strict approach to the legal recognition of e-signatures, as demonstrated in Article 10, which states six conditions to be fulfilled.[221]

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[210] Mason (n 188) 120.
[211] *Promoting Confidence in Electronic Commerce* (n 201) para 87.
[212] Blythe (n 206) Loc 381.
[213] Mason (n 188) 120.
[214] Ibid 116. An example of an acceptable signature is Encryption using digital signatures. See the same previous reference.
[215] Blythe (n 206) Loc 363.
[216] *Promoting Confidence in Electronic Commerce* (n 201) para 90.
[217] Blythe (n 206) Loc 369.
[218] Mason (n 188) 116.
[219] *Promoting Confidence in Electronic Commerce* (n201) para 90.
[220] Ibid.
[221] Alajaji (n 104) 226. See Mason (n 188) 117.

#### *2.4.2.3 Two-tiered or two-pronged approach*

Legislation in a two-tiered or two-pronged approach confers an increased legal effect on some methods of electronic authentication, while also establishing a low threshold of requirements for electronic authentication methods to obtain minimum legal status to achieve easier e-signature.[222] In this approach, when certain conditions are met, paperless signatures are considered equal to handwritten signatures in terms of legitimacy.[223] This approach sets out precise conditions for recognising an e-signature and sometimes also depends on the technology used.[224] Singapore was at the forefront of this approach, followed by many countries such as those in the European Union.[225] It can be said that this approach is more developed and appropriate for e-commerce than the other two[226] because it provides flexibility and allows for technological development.[227]

In conclusion, the United Nations (2007) recommends enacting uniform international legislation to govern e-commerce because it will lead to many advantages worldwide; in contrast, the current variation in rules causes much confusion and risk.[228]

## 2.5 E-contract formation

One of the most significant parts of regulating e-trade is authentic contract formation; however, the question is to what extent e-commerce law is required to fulfil this role.[229] Contract formation includes offer and acceptance, categories of e-agreement, mistakes and errors in the contract, and unfair contractual terms. Moreover, the time and place of the contract conclusion are also relevant, both in international law and Islamic law. This section is devoted to the last mentioned features of contract formation – time and place. The other features are addressed in the next chapter.

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[222] *Promoting Confidence in Electronic Commerce* (n 201) para 93.
[223] Kinsara (n 206); *Promoting Confidence in Electronic Commerce* (n 201) para 93; Blythe (n 206) Loc 391.
[224] *Promoting Confidence in Electronic Commerce* (n 201) para 93; Blythe (n 206) Loc 391 and 16271.
[225] Blythe (n 206) Loc 391. See *Promoting Confidence in Electronic Commerce* (n 201) para 95.
[226] *Promoting Confidence in Electronic Commerce* (n 201) para 96; Blythe (n 206) Loc 16271.
[227] *Promoting Confidence in Electronic Commerce* (n 201) para 94.
[228] Ibid para 147.
[229] Henry Gabriel, 'Uniform Law of Electronic Commerce in Private International Law: Where Have We Been and Where are We Going' (2011) 14 *International Trade and Business Law Review* 386.

### *2.5.1 Time and place of the e-contract*

The e-contract can be described as complex to a great extent, because it creates many issues, which lead to several questions, importantly when and where e-contracts can be formed.[230] Timing is addressed in section 5.1.1 and place in section 5.1.2.

#### *2.5.1.1 Timing*

Legal systems worldwide differ in their use of criteria to determine when a contract is concluded.[231] However, the *Electronic Communications Convention* provides advice to enable the interpretation of terms used in the context of e-contracts, either in international conventions or domestic law, notably 'dispatch' and 'receipt' of an e-transaction.[232] To clarify the subject, this thesis will follow the same divisions as in the *UNCITRAL Model Law*[233] and the *Electronic Communications Convention*,[234] which are the time of 'dispatch' and 'receipt'.

##### *2.5.1.1.1 Time of dispatch*

According to article 15(1) of the *UNCITRAL Model Law*, the parties can agree on defining the time of dispatch.[235] Otherwise, it happens when the data message leaves the control of the originator or of the person who sent it vicariously.[236] On the other hand, although the *Electronic Communications Convention* follows in principle the same provisions stated in Article 15 of the *UNCITRAL Model Law*, 'it provides that the time of dispatch is when the electronic communication leaves an information system under the control of the originator rather than the time when the electronic communication enters an information system outside the control of the originator'.[237] In practice, the result of the *UNCITRAL Model Law* and the *Electronic*

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[230] Reed and Angel (n 38) 332.
[231] Faye Fangfei Wang, *Law of Electronic Commercial Transactions: Contemporary Issues in the EU, US and China* (Routledge, 2nd ed, 2014) 44.
[232] See ibid; *Electronic Communications Convention* (n 109) art 10; *Electronic Communications Convention Explanatory Note* (n 134) [15]–[17] <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf>.
[233] *UNCITRAL Model Law* (n **Error! Bookmark not defined.**) art 15.
[234] *Electronic Communications Convention* (n 109) art 10.
[235] *UNCITRAL Model Law* (n **Error! Bookmark not defined.**) art 15. See Tana Pistorius, 'Contract Formation: A Comparative Perspective on the Model Law on Electronic Commerce' (2002) 35(2) *Comparative and International Law Journal of Southern Africa* 129.
[236] *UNCITRAL Model Law* (n **Error! Bookmark not defined.**) art 15. See Pistorius (n 235).
[237] *Electronic Communications Convention Explanatory Note* (n 134) [177].

*Communications Convention* is the same.[238] It may be said that the model law does not address any of the aspects of contract formation and performance that may be affected by how e-transactions are currently structured, as its rules relate only to emails or SMS text messages.[239] However, in this situation, the *Electronic Communications Convention* has an alternative practice whereby the message is considered 'sent' when it is under the control of the addressee.[240] In this context, Wang (2014) points out that the EU did not define the dispatch time in their laws, such as in the *Electronic Commerce Directive*.[241] Related to this, Gabriel (2011) recommends that an important principle here is that what is necessary technologically for the data message to be out of the dispatcher's information system should not be determined in the law; instead, it is a technology question based on evidence.[242]

*2.5.1.1.2 Time of receipt*

The time of receipt of an electronic communication is when it becomes available for retrieval by the recipient at an e-address designated by the recipient, and it is assumed that this happens when the electronic communication reaches the recipient's e-address.[243] The receipt time in the *Electronic Communications Convention* is derived from the *UNCITRAL Model Law* article 15(2) with different wording.[244] Article 10(2) is conceived as the basis of assumptions instead of as a strict rule on receiving electronic communications.[245] In other words, it does not mean abolishing all references to receiving communications in the local legislation regarding e-commerce.[246] There are

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[238] Ibid.
[239] Gabriel, 'Uniform Law of Electronic Commerce in Private International Law: Where Have We Been and Where are We Going' (n 229).
[240] Ibid.
[241] Wang (n 231) 44.
[242] Gabriel, 'Uniform Law of Electronic Commerce in Private International Law: Where Have We Been and Where are We Going' (n 229).
[243] *Electronic Communications Convention Explanatory Note* (n 134) [179].
[244] Ibid.
[245] Ibid [180]. See Henry Gabriel, 'The United Nations Convention on the Use of Electronic Communications in International Contracts: An Overview and Analysis' (2006) 11(2) *Uniform Law Review* 285.
[246] *Electronic Communications Convention Explanatory Note* (n 134) [182]. See Gabriel, 'The United Nations Convention on the Use of Electronic Communications in International Contracts: An Overview and Analysis' (n 245).

some suggestions to address the receipt time; however, they are not enforceable; every country can apply their own rule.[247]

#### *2.5.1.2 Place of dispatch*

Locating the parties is essential not only to determine the place where electronic communications are sent from, but also to determine the place where the contract is formed.[248] This is necessary to determine which tribunal and which country has jurisdiction over the agreement and can hear disputes that may result under an electronic contract.[249] Although the *UNCITRAL Model Law* provides rules based on where the parties are doing business, it is not aimed at establishing a conflict of laws rule.[250]

The *UNCITRAL Model Law* provides in Article 15(4) some provisions related to determining the place of dispatch:

> Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph:
>
> (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;
>
> (b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.[251]

However, these rules may need to be updated because e-commerce is consistently developing. UNCITRAL (2022) notes that the provisions concerning the determination of the time and place of dispatch of electronic communications imply that the sender

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[247] For more information regarding the time of receipt, see *UNCITRAL Model Law* (n **Error! Bookmark not defined.**) art 15; *Electronic Communications Convention Explanatory Note* (n 134) [180]; Wang (n 231) 46–8; Gabriel, 'The United Nations Convention on the Use of Electronic Communications in International Contracts: An Overview and Analysis' (n 245).

[248] See Christopher T Poggi, 'Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation' (2001) 41(1) *Virginia Journal of International Law* 224; Aleid (n 120) 109.

[249] Aleid (n 120) 109.

[250] Sorieul, Clift and Estrella-Faria (n 157) 107. See *UNCITRAL Model Law* (n **Error! Bookmark not defined.**) art 15.

[251] *UNCITRAL Model Law* (n **Error! Bookmark not defined.**) art 15.

and the recipient use separate 'information systems', which is perhaps not the case with the technology used in automated contracts, for instance, distributed ledger systems.[252]

## 2.6 Chapter conclusion

This chapter has reviewed the core principles of e-commerce, with a view to laying the groundwork for subsequent investigation of the legal obligations between parties in e-commerce under both Saudi and Islamic law. The definitions and categories of e-commerce were reviewed, and a distinction was discussed between e-commerce and traditional trade. The nature and role of the e-commerce principles in the modern world of functional equivalence, technological neutrality and non-discrimination were then discussed, followed by an examination of the e-signature as a legal issue, including definitions and analyses of approaches to dealing with it. E-contract formation was then addressed, notably the timing and place of dispatch and receipt of the e-contract.[253]

More importantly, Saudi law is compatible with modern legal principles governing e-commerce, as it has incorporated international best practices while ensuring compliance with Islamic law. The Electronic Transactions Law (2007) and the E-Commerce Law (2019) regulate digital contracts and electronic signatures, aligning with global e-commerce standards. Additionally, Islamic law, with its inherent flexibility, can adapt to these modern principles.[254]

Further aspects of obligation formation, including contract, are discussed in the next chapter.

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[252] United Nations Commission on International Trade Law, *Report of Working Group IV (Electronic Commerce) on the Work of its Sixty-Fourth Session (Vienna, 31 October–4 November 2022)*, UN Doc A/CN.9/1125 (21 November 2022).

[253] To prevent redundancy, reference can be made to the discussion on e-contract formation, which examined key aspects such as the timing and place of the e-contract in Islamic law, or the application of the Islamic legal concept of Majlis al-'Aqd (the meeting place), see below Section 5.4.2.3 Position of Islamic law on using the right to amend the request.

[254] See below 5.4.2.3 Position of Islamic law on using the right to amend the request.

# CHAPTER 3: OBLIGATIONS THEORY IN COMPARATIVE LAW: SAUDI AND ISLAMIC LAW

This chapter first discusses the concept of obligations in general and examines the importance of the comparative study of the law of obligations and the need for consistent classification of obligations. Section 3.4 then investigates the notion of obligations law in Saudi and Islamic laws, while section 3.5 discusses the sources of obligations in Saudi law before outlining the Islamic law position.

## 3.1 Concept of obligation: Overview

Obligation is not only a legal concept but has, for instance, moral, sociological and political connotations.[1] Nevertheless, the relevant aspect in this thesis is obligation as a legal concept, although this does not mean that other aspects are not important in their context. The law of obligations is essential to the smooth functioning of society, providing, for example, a framework for people to deal with each other in a fair and orderly way, and support to protect wealth by enforcing agreements between parties and the provision of compensation for personal injuries.[2] In other words, the theory of obligations is a cornerstone of civil law systems[3] and even common law.[4]

Clearly, without an understanding of what 'obligation' means, there would be no 'law of obligations',[5] and a correct understanding of the term is necessary to know how to use it appropriately.[6] Consequently there is a need to define ‘obligation’ as a notion: the law is managed by definitions, and the rule of law relies on them.[7] However, definitions can also be hazardous and can misinform, unless they correctly determine what to include and what to exclude.[8] Therefore it is important to consider the variable

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[1] Daniel Matthews and Scott Veitch (eds)*, Law, Obligation, Community* (Routledge, 2018) I.
[2] AM Tettenborn, *An Introduction to the Law of Obligations* (Butterworths, 1984) 1.
[3] Dário Moura Vicente, *Comparative Law of Obligations* (Edward Elgar, 2021) 7.
[4] عبدالرزاق السنهوري [Abdul Razzaq Al-Sanhouri], نظرية العقد: النظرية العامة للالتزامات [*Contract Theory: The General Theory of Obligations*] (The Arab Islamic Scientific Academy - Beirut) vol 1, 8.
[5] Martin Hogg, *Obligations: Law and Language* (Cambridge University Press, 1st ed, 2018) 12.
[6] Ibid 13.
[7] Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, 1997) 6.
[8] Ibid 7.

usage to which terms have been applied when examining the fundamental structural language used in the law of obligations.[9]

However, among those who argue for a single fundamental concept of an 'obligation', there is some troubling disagreement. For instance, there may be discussion among civil lawyers regarding what belongs to the law of obligations and what does not.[10] This is a result of the fact that the notion of obligation has gone through a long evolutionary development over many centuries.[11] Consequently, the term 'obligation' is not limited to one meaning; rather, it has a multitude of meanings.[12] Furthermore, western systems of law have varying descriptions of the circumstances in which that legal tie arises, which is the basis of the law of obligations.[13] Indeed, use of the term ‘obligations' in various meanings may mislead users because it is unclear which meaning is paramount in a particular setting.[14] Therefore, the legal concept of obligations has to cover every aspect and be understood in its entirety; otherwise, subtleties will be lost.[15]

Nevertheless, in law, the meaning of a term is not always clear-cut. While there is a core of certainty, where everyone agrees on what the word means, there is also a periphery, where reasonable people may disagree about whether or not a given proposition falls within the word's meaning.[16] To clarify the term obligation, it is useful to go back to the Latin origin of the word – *ligare* – which means 'to bind'[17] and to its legal notion, which goes back to Roman law.[18] Thus an obligation is the legal relationship between the respondent and the plaintiff in private or civil law which establishes the liability and rights of the parties.[19]

The concept of obligations as a category of law originated in Roman law, whereby Romans considered that obligations were civil relationships between persons, while

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[9] Hogg (n 5) 12.
[10] Ibid.
[11] George Mousourakis, *Fundamentals of Roman Private Law* (Springer, 2012) 184 .
[12] Hogg (n 5) 71.
[13] Andrew Robertson (ed), *The Law of Obligations: Connections and Boundaries* (Routledge-Cavendish, 2004) 12.
[14] Hogg (n 5) 72.
[15] Geoffrey Samuel, *Law of Obligations and Legal Remedies* (Cavendish, 2nd ed, 2001) 1.
[16] Birks (n 7) 6.
[17] Robertson (n 13) 12; Hogg (n 5) 13.
[18] See Vicente (n 3) 1; Samuel (n 15) 2; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta, 1st ed, 1992 reprint) 1.
[19] See Robertson (n 13) 12; Hogg (n 5) 13.

rights in rem were relationships between persons and things. The law of property controlled the latter relationship, not the law of obligations.[20] In other words, in Roman law, the term 'obligation' referred to a legal relationship between two persons, in which one person (the debtor) was obliged to perform a particular duty or duties in relation to the other person (the creditor) and the debtor's obligation was personal, meaning that it could not be engaged by a third party.[21] The idea of obligations suggests not only a duty that someone needs to do but also something that they should not do.[22] Samuel (2001) considers that the most crucial aspect of the obligation notion is the legal bond that it creates between two persons, which gives the creditor a right against the debtor and entitles the creditor to a personal action (action in personam) to enforce that right; thus, it is a category of law concerned with legal claims between individual legal subjects.[23]

This concept of a legal relationship remains essential within the framework of civil legal thought, and all civil codes are organised based on the distinction between personal rights and real rights.[24] That means the concept of legal obligations does not align with common law because common law does not envisage the legal bond between two persons that civil law does. Nevertheless, the essence of the theories of real and personal rights is present in all laws due to the unity of human thought, and some symmetry in civilisation and human systems, even though the technical formulation differs from one law to another, with each law having its distinctive formulation, which is what contributes to establishing legal principles.[25] When the obligation has not been correctly fulfilled, the obligor has the option to initiate a personal legal action (known as 'action in personam') against the specific debtor to secure a verdict that could be enforced against the debtor in question. Through this personal action, the creditor asserts that the debtor was obligated to carry out a specific action for the creditor's benefit; this could involve giving something to the creditor, performing a task on their behalf, or refraining from engaging in a particular activity.[26] For instance, the seller can

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[20] See John Cooke and David Oughton, *The Common Law of Obligations* (Butterworths, 2nd ed, 1993) 5; Birks (n 7) 7; Samuel (n 15) 1–2.
[21] Mousourakis (n 11) 183.
[22] Tettenborn (n 2) 1.
[23] Samuel (n 15) 2.
[24] Ibid 3.
[25] Al-Sanhouri (n 4) 6.
[26] Mousourakis (n 11) 1.

be compelled to transfer the house he or she had committed to selling, and he or she may also be required to provide compensation if they fail to do so; likewise, one can be legally restrained from making defamatory statements about others, and if one does make such statements, one can be held accountable for damages.[27]

In conclusion, within continental legal systems, the overarching notion generally is that obligations need a clear legal foundation.[28] Moreover, Bertea (2019) argues that the concept of obligation related to relationships is merely indirect and lacks practical significance. This supports the argument that a comprehensive and tolerant understanding of obligation should avoid including any mention of the relational framework that forms the basis of obligation.[29] Nevertheless, if the concept of obligation is to be employed within a legal context, its intended meaning could potentially be defined in a manner that mitigates any issues of ambiguity.[30] This implies that scholars with a wide range of philosophical perspectives and inclinations can agree to support the broad notion of obligation whilst simultaneously still being able, and even expected, to differ when presenting a more detailed explanation or understanding of obligation.[31] In this context, there is an indication from a judicial standpoint that specific 'fundamental' interpretations exist for each term, even though, regrettably, the exact nature of these fundamental interpretations has frequently been a subject of contention. Nevertheless, a prevailing perspective suggests that the word ‘obligation’ encompasses at least two principal definitions: (i) a legal connection or commitment that compels someone to carry out a task in support of another; and (ii) more broadly, any legal responsibility established by law.[32] However, this does not imply that the concept of obligation is easily accessible or simply waiting for us to grasp it; even though the idea primarily forms the foundation, often implicitly, of various perspectives on obligation, it still requires a process of construction.[33] Essentially, stating that the term should possess only a single interpretation would be an ineffective

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[27] Tettenborn (n 2) 2.
[28] Samuel (n 15) 4.
[29] Stefano Bertea, *A Theory of Legal Obligation* (Cambridge University Press, 2019) 40.
[30] Hogg (n 5) 72.
[31] Bertea (n 29) 40.
[32] Hogg (n 5) 71.
[33] Bertea (n 29) 13.

endeavour; furthermore, such an effort could result in rigidity and potentially unfair outcomes in particular instances.[34]

This thesis will not excessively focus on the diverse interpretations the term obligation can hold in the various legal contexts in which obligations are employed, given that this examination has been extensively covered worldwide in the taxonomy literature. On the contrary, I intend to emphasise the fundamental aspects of our comprehension of this term in the comparable laws that hold significance for this thesis that aims to compare Saudi and Islamic law.[35] However, before moving on that, it is crucial to discuss the importance of the comparative study of the law of obligations.

## 3.2 Importance of the comparative study of the law of obligations[36]

Within the realm of legal scholarship comparing one's own legal system with another is frequently necessary.[37] Towards the conclusion of the twentieth century, a considerable number of legal scholars in Europe regarded comparative law as an indispensable tool for achieving the (favourable) goal of legal harmonisation within the European Union.[38] Not just in Europe but also globally, numerous initiatives with a shared fundamental aim have been initiated since the 1920s by various intergovernmental organisations; this effort reached its pinnacle with the establishment of the 1980 United Nations Convention on the International Sale of Goods[39] (‘*CISG*’) and the UNIDROIT Principles of International Commercial Contracts,[40] of which the most recent edition was released in 2017.[41] However, in contemporary Europe, all legal systems have over time become hybrids; for example, the Netherlands initially adopted the Code Napoléon in 1804; subsequently, German

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[34] Hogg (n 5) 71.
[35] Robertson (n 13) 12.
[36] See Vicente (n 3) 3–6; Reiner Schulze, ‘Changes in the Law of Obligations in Europe’ in Reiner Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Sellier European Law Publishers, 2013) 3–24.
[37] Mark Van Hoecke, ‘Methodology of Comparative Legal Research’ (2015) 12 *Law and Method* 2, DOI:10.5553/REM/.000010.
[38] Ibid.
[39] *United Nations Convention on the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) (‘*CISG*’).
[40] International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* (2016) <https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf>.
[41] Vicente (n 3) 5.

legal principles held more sway in the Netherlands compared to other nations following the Code Civil tradition which led to the introduction of a new Burgerlijk Wetboek in 1992, which had been in development for several years; since then there has been a noticeable influx of Anglo-Saxon legal doctrine, encompassing both English and American influences, within the Dutch legal landscape.[42]

The causes and motivations of law reform projects exhibit significant disparities such that in one country the impetus for change might be the advanced age of their legal code, whereas another nation may embark on a reform initiative because it lacks its own legal code following its independence, or the impetus may be due to the absence of a code that facilitates the transition to a market-oriented economy.[43] Thus, comparing legal systems can have different reasons and purposes.[44] Specifically, the comparative study of the law of obligations serves several vital functions. In the first place it serves to interpret domestic law, which, regardless of its originality, frequently relies heavily on foreign legal precedents and experiences.[45] An example is that during the 1990s Eastern European countries were eager to become part of the European Union, and as a result they actively sought to embrace Western European legal systems in order to modernise their own existing laws.[46] Another example is that EU law and European Human Rights law have facilitated the incorporation of concepts from French and German legal doctrine into other legal systems: for instance, the (continental) principle of good faith has been adopted in the UK and Ireland, and the (German) principle of proportionality has been integrated into the legal frameworks of other member states.[47] However, this does not imply that it should consistently hold supremacy over the Constitution or regular legislative measures.[48] In the second place, the judicial evolution of this legal field relies on legal comparison, and any legislative reform must consider the solutions that are established in other legal

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[42] Van Hoecke (n 37) 26.
[43] Schulze (n 36) 4.
[44] Van Hoecke (n 37) 2.
[45] Vicente (n 3) 3.
[46] Van Hoecke (n 37) 26.
[47] Ibid.
[48] European Commission for Democracy through Law, *Rule of Law Checklist*, CDL-AD(2016)007 (18 March 2016) 20 <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf> .

systems for similar legal issues.[49] A notable illustration of the development of law by comparison to other foreign rules is the German law of obligations which adopted this process for its modernisation, drawing on guidance from the *CISG*. The EU Consumer Sales Directive[50] also played a significant role as an inspiration, of which the influence extended beyond merely reforming sales law and impacted the broader framework of the law of obligations within the German Civil Code.[51] This reform of the Law of Obligations Act, enacted in 2002, was partly prompted by the EU Consumer Sales Directive of 1999; categorised as a 'minimum harmonisation directive,' it established minimum standards of consumer protection that were applicable across the member states of the European Union.[52] The third objective of legal comparison of obligations laws is to play a crucial role in the accurate application of foreign laws, which often occurs when parties select them to govern international contracts or when such laws are designated by choice of law rules.[53] Additionally, it facilitates a proper comprehension of the extent and implications of specific boilerplate clauses commonly inserted into international contracts, as their effects can vary significantly based on the applicable legal framework.[54] In this context, Mark (2015) suggests an excellent method to compare international laws. If, for example, one aims to investigate the potential harmonisation of laws regarding house or flat rental contracts within the European Union, an examination of the legal systems of all 28 member states is

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[49] Vicente (n 3) 3.

[50] *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees* [1999] OJ L 171/12. For information, it was replaced on 1 January 2022 by *Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contracts for the Sale of Goods, Amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and Repealing Directive 1999/44/EC* [2019] OJ L 136/28. See 'Consumer Sales and Guarantees: About the Directives', *European Commission* (Web Page) <https://commission.europa.eu/law/law-topic/consumer-protection-law/consumer-contract-law/consumer-sales-and-guarantees_en#:~:text=About%20the%20directives,-On%201%20January&text=Under%20the%20Directive%2C%20the%20seller,two%20years%20of%20that%20time>.

[51] See Carsten Herresthal, '10 Years after the Reform of the Law of Obligations in Germany – The Position of the Law of Obligations in German Law' in Reiner Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Sellier European Law Publishers, 2013); Reiner Schulze and Hans Schulte-Nölke, 'Schuldrechts- reform und Gemeinschaftsrecht' in Reiner Schulze and Hans Schülte-Nölke (eds), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Mohr Siebeck ,2001) 3, cited in Schulze (n 36) 6 <https://doi.org/10.1515/9783866539839.3>.

[52] Tjakie Naude, 'The New German Law of Obligations: Historical and Comparative Perspectives' (2009) 20(1) *Stellenbosch Law Review* 161.

[53] Vicente (n 3) 4.

[54] Ibid.

necessary.[55] However, if the initial assumption is that such harmonisation is not feasible, it might be adequate to study just two legal systems, such as the French and English systems, provided one can demonstrate that harmonisation between these two systems would be impractical, thereby making any harmonisation across the entire EU challenging.[56] Fourthly, the theory of obligations is the backbone of civil and even common law, with which laws can be unified; because it is based on common sense.[57] As a result of that, several noteworthy European Union Directives have been established since the mid-1980s with the aim of aligning national laws. These directives encompass areas such as conflicts of law, with the unification of the European system of contractual and non-contractual obligations being finalised with the publication of the *Rome I* and *Rome II* Regulations in 2007 and 2008, respectively.[58]

In conclusion, nations, upon recognising the perceived benefits stemming from the comparative analysis of laws concerning obligations, persist in this practice. According to Vicente (2021), relevant initiatives of this phenomenon can be observed in the numerous endeavours pursued in Europe and globally during the last two decades aimed at the modernisation of the law of obligations, such as in Germany, Spain, France and China.[59] Such initiatives in the law of obligations can lead to a new perspective on the role of legislators in the realm of private law that may involve introducing mandatory rules to protect specific groups such as consumers or utilising contract law provisions to facilitate transactions such as distance sales or online trade. Such a perspective may also involve contract law, and related aspects of the law of obligations may demonstrate the increasing impact of international rules and European legal acts, reflecting a broader shift that moreover influences the entire field of civil law.[60]

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[55] Van Hoecke (n 37) 5.
[56] Ibid.
[57] Al-Sanhouri (n 4) 8.
[58] Vicente (n 3) 5. See *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)* [2008] OJ L 177/6, applicable to contracts concluded since 17 December 2009; and *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)* [2007] OJ L 199/40, applicable to harmful events occurring after 11 January 2009.
[59] Vicente (n 3) 3.
[60] Schulze (n 36) 4.

The significant surge of interest in the comparative study of the law of obligations in recent years, as evidenced by the extensive array of relevant publications cited below, is intricately connected to the ongoing initiatives for harmonisation and unification of the law of obligations. These efforts, which explicitly address the legal structure of contractual obligations, further underscore this relationship.[61] This dynamic extends beyond a simple coexistence, encompassing numerous mutual influences and benefits.[62] However, what appears successful in another legal system may not necessarily work in one's own legal system due to divergent contextual factors; thus, merely copying foreign law can hardly be deemed a valid 'method.' Instead, it serves as a prime illustration of the absence of a structured approach in comparative law.[63] This applies especially to the development of obligations law being affected, for example, by social and economic matters.[64]

## 3.3 Need for classification of obligations

Categorisation is a prevalent human tendency aimed at facilitating comprehension and comprehensive coverage of various subjects.[65] However, the issue pertaining to the division of the law of obligations and whether such division is warranted remains a subject of ongoing discourse and dispute.[66] Currently the absence of a structured framework renders the law a collection of subjects lacking coherent organisation, leading to a random assortment of topics or, in the case of legal education, a selection of mandatory and elective courses without a systematic arrangement.[67] While categorising obligations does not encompass the entirety of legal classification, a well-constructed framework delineating the law of obligations would significantly enhance the overall coherence of legal principles.[68] This would demonstrate the law of obligations as constituting a cohesive legal domain, encompassing a unified regulatory

[61] Vicente (n 3) 4–5.
[62] Schulze (n 36) 5.
[63] Van Hoecke (n 37) 30.
[64] Al-Sanhouri (n 4) 8–10.
[65] Andrew Burrows, *Understanding the Law of Obligations* (Hart, 1998) 16.
[66] Birks (n 7) 1.
[67] Ibid 2.
[68] Ibid.

framework governing a spectrum of legal relationships which, despite their structural semblance, emanate from a spectrum of divergent sources.[69]

Nevertheless, the ongoing discourse regarding the division of the law of obligations and whether such division is even warranted remains a subject of significant discussion and dispute. Contemporary discussions have been invigorated by commentators proposing alternative methods of categorisation within the law of obligations.[70] This contemporary taxonomy movement has revitalised doctrinal research, which faced neglect due to various ideologies in the 1970s and 1980s. Yet, the cautionary example of remedies by legal scholars underscores that, while taxonomy is valuable, it must not become an isolated pursuit; we must remain vigilant about its inherent limitations.[71] At the same time it is valuable to note the areas of inconsistency in classification within the notion of obligations law.

## 3.4 The notion of obligations law

The notion of obligations law differs in Saudi and Islamic law, so this section addresses each one separately. However, it is imperative to construe obligation theory in both common and civil law to gain a comprehensive understanding of obligations theory.[72] This is because civil law and common law frequently serve as the foundation for studies in comparative law, and they are the two most renowned legal systems in Western civilisations. Jurists' interest in legal systems outside of their own and their engagement with comparative law has been a longstanding tradition; over the past three decades in particular, there has been a remarkable surge in this interest, given the advent of the Common Market and the rapid expansion of international trade and

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[69] Vicente (n 3) 400.
[70] Burrows (n 65) 1.
[71] Robertson (n 13) 141.
[72] For more information see Mousourakis (n 11); Zimmermann (n 18); Samuel (n 15); Cooke and Oughton (n 20); Vicente (n 3); Tettenborn (n 2) 1; Al-Sanhouri (n 4); Hogg (n 5); Robertson (n 13); Ewan McKendrick, 'Contract in General' in Andrew Burrows (ed), Principles of the English Law of Obligations (Oxford University Press, 2015) 239, 240. This last book refers to some court cases regarding this subject. The oldest in 1991, and the latest in 2012. Unjust enrichment occurring at the expense of a claimant triggers legal responses that entail varying rights based on the specific circumstances. Among these responses, a right to restitution emerges as an option. In instances where a defendant benefits unjustly at the cost of the claimant, the latter may gain a restitutionary entitlement for the reversal of the enrichment. That means unjust enrichment before restitution. For more information see McKendrick 240. However, the obligations notion in civil and common law has generally been addressed previously, see above 3.1 Concept of obligation: Overview.

commercial programs.[73] Although comparisons can sometimes yield a negative, rather than positive, impact, leading to a destructive outcome,[74] all legal systems share the common objective of regulating and aligning human activities within their respective societies. In each society, the legal system is an integral component of its culture, civilisation, history, and the daily lives of its people.[75]

### *3.4.1 The Saudi notion of obligations law*

In line with the Saudi Vision 2030, Saudi Arabia enacted the *Civil Transactions Law*[76], to modernise its legal framework and promote contract stability and transparency.[77] Preceding this, announcements had been made regarding the *Family Law* (Royal Decree No M/73, dated 9 March 2022) ('*Personal Status Law*')[78] and the *Law of Evidence* (Royal Decree No M/43 dated 26/5/1443AH) ('*Law of Evidence*'),[79] and there is a proposed new Penal Code for Discretionary Sentences as well.[80] However, the codification of the *Civil Transactions Law* under the Saudi Vision 2030 marks a substantial shift that will impact both national and international contractual relationships,[81] coinciding with efforts to attract investments and with the rollout of the Regional Headquarters Programme.[82] The new law has been in effect since mid-

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[73] Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1967) 15(3) American Journal of Comparative Law 419.

[74]William Eves and John Hudson, 'Introduction: Situating, Researching, and Writing Comparative Legal History' in William Eves and John Hudson (eds), *Common Law, Civil Law, and Colonial Law* (Cambridge University Press, 2021) 12.

[75] Dainow (n 73).

[76] *Civil Transactions Law* (Royal Decree No M/191 dated 2023) ('*Civil Transactions Law*').

[77] Farid (Fred) Haroun and Nanda Al Qazaz, 'The New Saudi Civil Transactions Law: What You Need to Know', *Mayer Brown* (Web Page, 25 July 2023) <https://www.mayerbrown.com/en/insights/publications/2023/07/the-new-saudi-civil-transactions-law-what-you-need-to-know>; 'Kingdom of Saudi Arabia Civil Code: General Principles of Contract Law - The Formation of Contracts', *Clyde & Co* (Web Page, 13 July 2023) <https://www.clydeco.com/en/insights/2023/07/the-saudi-civil-transactions-law-general-principle>.

[78] *Family Law* (Royal Decree No M/73, dated 9 March 2022) ('*Personal Status Law*').

[79] *Law of Evidence* (Royal Decree No M/43 dated 26/5/1443AH) ('*Law of Evidence*').

[80] 'Saudi Civil Transactions Law Expected to Enhance Contractual Certainty',*Pinsent Masons* (Web Page, 27 June 2023) <https://www.pinsentmasons.com/out-law/news/saudi-civil-transactions-law-expected-to-enhance-contractual-certainty>.

[81] محمد عواد الأحمدي [Muhammad Awad Al-Ahmadi], مصادر الالتزام الارادية وفقا لنظام المعاملات المدنية "العقد والتصرف بالإرادة المنفردة" [Sources of Voluntary Obligation According to the Civil Transactions Law 'Contract and Disposition by Unilateral Will'] (Saudi Judicial Association, 1st ed, 2024) 6, 30–1; محمد عواد الأحمدي [Muhammad Awad Al-Ahmadi], مصادر الالتزام وفقا لنظام المعاملات المدنية [Obligation Sources According to the Civil Transactions Law] (University Book House, 1st ed, 2025) 10–11.

[82] 'The New KSA Civil Transactions Law in Saudi Arabia', *Dentons* (Web Page, 4 July 2023) <https://www.dentons.com/en/insights/articles/2023/july/4/the-new-ksa-civil-transactions-law-in-saudi-arabia>.

2024.[83] The recently approved law in Saudi Arabia is anticipated to streamline the process for businesses to engage in contracts and enhance the comprehension of their legal rights and responsibilities within the local legal framework.[84] The recently enacted law has been appropriately characterised as 'innovative', since it represents the first codification of civil law in Saudi Arabia, replacing the historical reliance on classical Islamic Sharia principles, specifically those of the Hanbali school, encompassing property rights and obligations.[85] Given the novelty of the law and the scarcity of studies and research on its component topics, the responsibility of specialists is to direct their attention to identified issues with this law, conducting research, studying, and discussing them to facilitate its provisions and bring clarity for those who deal with them, whether they are professors, judges, advisors, or lawyers.[86] Since the law's implementation has resulted in a significant legislative shift, the repercussions of which have affected a wide range of areas, specialists must engage in such activities to ensure the law's effective implementation and practical application.[87]

It is notable that the provisions of obligations play a considerable part in the *Civil Transactions Law*, which encompasses more than three hundred articles on this law.[88] The Saudi legislator does not define the concept of obligations in *Civil Transactions Law* but has left this to the jurists. However, the basic concept of obligations can be derived from a few articles stating that the object of the obligation may be the transfer of a real right or doing an act or refraining from an act.[89] The subject matter of the obligation must fulfil the following conditions: it must be possible in and of itself; it must not be contrary to public order; and it must be specified by its nature, type and amount,

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[83] 'Landmark Saudi Civil Transactions Law Sets a New Milestone for Legislative Reform in the Kingdom', *Norton Rose Fulbright* (Web Page, July 2023) <https://www.nortonrosefulbright.com/en/knowledge/publications/0309bed4/landmark-saudi-civil-transactions-law-sets-a-new-milestone-for-legislative-reform-in-the-kingdom>.

[84] 'Saudi Civil Transactions Law Expected to Enhance Contractual Certainty' (n 80).

[85] Béligh Elbalti, 'The New Saudi Civil Transaction Act and its Potential Impact on Private International Law in Saudi Arabia', *Conflict of Laws* (Web Page, 24 June 2023) <https://conflictoflaws.net/2023/the-new-saudi-civil-transaction-act-and-its-potential-impact-on-private-international-law-in-saudi-arabia/>.

[86] Al-Ahmadi, 'Sources of Voluntary Obligation According to the Civil Transactions Law' (n 81) 6.

[87] Ibid.

[88] Ibid 30. The obligations provisions come in many sections of this law, both at the beginning and end of the law. However, there is a section focusing on obligations, which is section four, and it can be said that articles 30 to 306 are all about obligations and what derives from them.

[89] *Civil Transactions Law* (n 76) art 70.

or subject to designation.[90] Therefore, the Saudi legislator is in harmony with the general idea of obligations: being committed to transfer property, do something, or refrain from doing something. However, the Saudi legislator has refined this general idea to align it more closely with Islamic law, which involved incorporating provisions derived from Islamic law while eliminating or modifying those that conflicted with it.[91] As a result, the legislation is consistent with Islamic law and aligned with Saudi Arabia's legal framework, reflecting the practical realities of its judiciary.[92]

### *3.4.2 The Islamic notion of obligations law*

Some scholars say that prior Islamic jurisprudents did not use the term 'obligation' literally, but, in reality, wrote about the topic in a manner unlike how modern legislation is written.[93] Moreover, the classification of personal and real rights in Islamic law is closer to that of English law than Roman law and other laws derived from it.[94] However, Al-Zarqa (1999) claims that Islamic jurists have in fact referred to obligation in the same way as it is used as legal concept.[95] Although Islamic jurisprudence distinguishes between personal (obligations) and real rights, this distinction is not considered significant and does not establish a comprehensive theory.[96] Furthermore, in Islamic jurisprudence, the word 'obligation' is rarely used, but instead the word 'right' is used.[97] In fact, Islamic jurists used the term a lot, but not precisely as the obligations legal concept; in other words, they used it under different subjects.[98]

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[90] Ibid art 72.
[91] Al-Ahmadi, 'Sources of Voluntary Obligation According to the Civil Transactions Law' (n 81) 32–3.
[92] Ibid.
[93] Sanih Buthnin, 'mafhum al iltizam wanwah bayn alfiqh al'iislamii waqanun alailtizamat w al uqud almaghribii' 'The Concept of Commitment and its Types between Islamic Jurisprudence and the Moroccan Law of Obligations and Contracts' (2014) 18 *Majallat al-Fiqh wa-al-Qānūn* 12. See سلطان بن إبراهيم الهاشمي [Sultan bin Ibrahim Al Hashimi], التجارة الإلكترونية وأحكامها في الفقه الإسلامي ['*E-Commerce and its Provisions in Islamic Jurisprudence*'] دار كنوز اشبيليا [Dar kunuz ashbilya, or 'Seville Treasure House'] (1st ed, 2011) 269.
[94] Al-Sanhouri (n 4) 6.
[95] مصطفى الزرقا [Mustafa Al-Zarqa], المدخل إلى نظرية الإلتزام العامة في الفقه الإسلامي [*Introduction to the General Obligation Theory in Islamic Jurisprudence*] (Dar Al-Qalam -Damascus, 1st ed, 1999) 95.
[96] Al-Sanhouri (n 4) 6.
[97] عباس حسني محمد [Abbas Hosni Muhammad], العقد في الفقه الإسلامي [*The Contract in Islamic Jurisprudence*] (The Higher Institute, 1st ed, 1993) 27–8, 156.
[98] عبالعزيز الناصر [Abdulaziz Al-Nasser], مراجعات فقهية في نظرية الالتزام [Jurisprudential Reviews in Obligation Theory], (2021) 24 مجلة قضاء [*Judiciary Journal*] 9, 14–15.

The difference between the Islamic and other legal systems in regard to the concept of obligations lies in two aspects:[99] the comparative law is more comprehensive, as it includes that a person obliges himself or herself to do something, as in a contract, and also that he or she is obligated not to do something without permission, as in the law.[100] However, in Islamic law, it only applies to him or her obligating himself or herself to something, not to being obligated to something.[101] This means that in Islamic legal systems, even those where Sharia law is intertwined with rules adopted from Western legal systems, the law of obligations is subservient to a religious ethic that imparts its fundamental values upon it.[102] On the other hand, the obligation notion in Islamic law is more expansive in that not only does it concern correct behaviour between people but also what is correct behavior in the eyes of Allah (God).[103] Therefore, Islamic legal systems give rise to a distinctive notion of the law of obligations, which can be described as fundamentally idealistic and sharply contrasts with the pragmatism and pursuit of economic efficiency that characterises Anglo-American legal thinking in this realm and others.[104]

Instead of prioritising contractual freedom, Islamic legal systems emphasise the importance of ensuring the substantial equivalence of contractual performances and the certainty of voluntarily undertaken obligations; consequently, Islamic law prohibits all forms of excessive behaviour such as '*riba*' (interest/usury) advantages gained in transactions between private parties.[105] In Islamic law, *riba* is considered illegal enrichment, whereas, in foreign regulations, it is legitimate enrichment; however, this difference in application does not mean the non-existence of obligation theory.[106] The safeguarding of the less powerful party in a contract holds paramount significance in Islamic law, where there is no space, unlike in other legal systems, for the concept of caveat emptor.[107] One of the criticisms that may be put forward against the obligation

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[99] Ibid.
[100] Muhammad (n 97) 154.
[101] Al-Nasser (n 98) 9, 15–16.
[102] Vicente (n 3) 403.
[103] Al-Nasser (n 98) 9, 16.
[104] Vicente (n 3) 402–3.
[105] Ibid 403.
[106] Al-Zarqa (n 95) 95.
[107] Vicente (n 3) 403.

concept in Sharia law is that the enforceability of contracts is subjected to substantial limitations, notably due to the presence of options and the potential for excusing contracting parties based on unforeseen changes in circumstances that occur around the time of contract formation.[108] Nevertheless, such options do not affect the principle of the force of the contract at all. The options are of two types. The first relates to what is established as a condition of one of the contracting parties, meaning that it arose by the will of the contracting parties, so it does not challenge the binding force of the contract; rather, it supports it, because it is part of the contract.[109] The second relates to what is established by the rule of the Sharia without a condition from parties to ward off harm to either of the two contracting parties; that is helpful due to it being an interpretation of the contracting parties' tacit will and legal protection that requires respect of the principle of mutual support and then balance in the rights and duties of the contracting parties.[110]

The concept of obligation did not receive significant focus from classical Islamic jurists, and its incorporation into modern civil codes of Islamic nations has been represented as resulting from a legal transplant influenced mainly by French legal principles.[111] However, this representation is inaccurate because the Napoleonic Code, which, according to Cherfils (1999), is considered the foundation of French civil law, is more than ninety per cent derived directly from Islamic jurisprudence rooted in *Fiqh* or the rulings of Imam Malik.[112] Moreover, Islamic law is incredibly extensive and encompasses a wide range of legal matters, including obligations and various other aspects, even though it might not categorise and subdivide them in the same way as modern legal systems do, and numerous Islamic jurisprudence texts have addressed a multitude of questions in this regard.[113]

In the event, there are some modern Islamic jurisprudents, such as Al-Zarqa and others, who do define obligations. Al-Zarqa's definition for an obligation is that a person

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[108] Ibid.
[109] Al-Zarqa (n 95) 71.
[110] Ibid 71–2.
[111] Vicente (n 3) 403.
[112] Christian Cherfils, *Napoleon and Islam* (Utusan, 1999) xvii, xx.
[113] Al-Zarqa (n 95) 116–17.

is legally obligated to do or abstain from doing an action for the benefit of others.[114] This refers to what a person must fulfill towards another person. This definition and other definitions in Islamic law do not focus on contractual obligations; rather, they focus on general obligations without specifically giving attention to contracts.[115] However, in Islamic law, contractual and quasi-contractual obligations are enforceable based on the Holy Qur'an, 'O you who believe! Fulfil your obligations',[116] and the Sunnah 'Muslims are bound by their conditions, except for a condition that forbids what is *Halal* or allows what is forbidden'.[117] An example of a forbidden transaction in Islamic law is *riba* interest.[118]

To conclude, the distinction between Islamic jurisprudence and other legal systems in their treatment of the notion of obligations resides primarily in formal and terminological variations.[119] While Islamic law inherently incorporates the concept of obligation and does not inherently conflict with its existence, the structural arrangement of Islamic jurisprudence diverges due to its engagement with human conduct, which inherently gives rise to both obligations and rights.[120] Consequently, the foundational principles of traditional Islamic law harmoniously coexist with the tenets of modern civil law and Saudi law concerning the concept of obligations. The ensuing section will delve into the sources of obligations, facilitating a more comprehensive comparison elucidated through illustrative examples.

## 3.5 Sources of obligation

Unlike rights in rem, obligations are innumerable; however, the sources of obligations can be counted.[121] To be precise, the source of the obligation is the matter that created the obligation, which is always the answer to the question of from where the

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[114] Ibid 93.
[115] Buthnin (n 93).
[116] Muhammad Taqī-ud Dīn Al-Hilālī and Muḥammad Muḥsin Khān, *Translation of the Meanings of the Noble Quran into the English Language* (King Fahd Glorious Qur'ān Printing Complex, 2006) 181.
[117] سليمان بن أحمد الطبراني [Suleiman bin Ahmed Al-Tabarani], المعجم الكبير [*The Great Lexicon*] ( مكتبة ابن تيمية القاهرة - [Ibn Taymiyyah Library - Cairo], 2nd ed) vol 2, 307.
[118] Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press, 1st ed, 1964) 145.
[119] Al-Zarqa (n 95) 119.
[120] Ibid 120.
[121] Al-Sanhouri (n 4) 2.

commitment is established.[122] An illustrative example can be found in the buyer's obligation to pay the seller, a commitment arising directly from the source of the contract.[123] Yet categories differ across legal systems and can be influenced by cultural factors.[124] Consequently, this section will separately address the sources of obligations in Saudi legal systems and in Islamic law.

### *3.5.1 Sources of obligation in Saudi law*

The *Civil Transactions Law*[125] determines the sources of obligation as contracts, unilateral will, tort (delict), unjust enrichment and law.[126] Although the Saudi legislator accurately follows the modern legal systems regarding the sources of obligation,[127] custom is missing. Yet custom is considered to apply and be obligatory in Islamic and Saudi law. The Saudi Law of Evidence[128] states that customs or norms between the litigants may make evidence in cases without special provisions or agreements between the parties or in matters that do not contradict public order.[129] In other words, customs can count as a source of obligation between parties, so it would be better if the *Civil Transactions Law* included customs alongside the other five sources. Customs, which have been mandated in numerous matters lacking agreement or legal framework, hold considerable prominence in Saudi law. Notably, the *Civil Transactions Law* provides numerous instances where customs govern parties' conduct. For instance, in the event of an obligation being deferred and without a specified deadline for its performance, the court, at the request of either the creditor or the debtor, shall set a deadline based on customary practices and the nature of the transaction.[130] Additionally, the delivery of the sold item will include its accessories, permanently attached items, and other items considered customary to accompany it, even if they are not explicitly mentioned in the contract.[131] The *Civil Transactions Law* stipulates that, notwithstanding the provisions outlined in Article 1 of this law, the regulations

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[122] Al-Zarqa (n 95) 97.
[123] Al-Sanhouri (n 4) 27.
[124] Robertson (n 13) 141.
[125] *Civil Transactions Law* (n 76).
[126] See *Civil Transactions Law* (n 76) section one, chapter one (Obligations' Sources).
[127] Al-Ahmadi, 'Sources of Voluntary Obligation According to the Civil Transactions Law' (n 81) 54.
[128] *Law of Evidence* (n 79).
[129] Article 88. The custom has many provisions in Islamic and Saudi law; however, there is no need for it to be discussed here.
[130] *Civil Transactions Law* (n 76) art 276.
[131] Ibid art 322.

articulated in this Article shall be applied consistently with existing legal frameworks, taking into account their inherent nature, conditions, and exceptions.[132] The rules including: customary practices shall have legal validity, and any matter recognised by custom shall hold equivalent status to a matter codified in textual form.[133] This implies that custom plays a significant role in Saudi law. Customary practices compel parties to adhere to them, provided they do not conflict with the law or the terms of the contract;[134] therefore, custom or norm must be considered a source of obligation.

### *3.5.2 Sources of obligation in Islamic law*

In Islamic jurisprudence books, the exploration of obligations and their origins does not exist as a distinct stand-alone chapter; rather, it necessitates the review and examination of various sections within jurisprudential texts in order to extract principles relevant to the theory of obligations.[135] Consequently, commencing with the sources of obligation as recognised within contemporary legal systems, this section will proceed to draw a comparative analysis with Islamic law.

Islamic jurisprudence acknowledges the validity of all five sources of obligation.[136] Firstly, the concept of a contract occupies a substantial portion of Islamic jurisprudential texts, often constituting a significant proportion, even up to half, of the total content; thus agreement is a source of obligations in Islamic law.[137] Secondly, within Islamic jurisprudence (*Fiqh*), the individual's will carries numerous legal implications, with the pivotal outcome being the establishment of legal obligations.[138] The Holy Qur'an mentions an act that considers unitarian will: 'They said: "We have lost the (golden) bowl of the king and for him who produces it is (the reward of) a camel load; and I will be bound by it."'[139] Thirdly, within *Fiqh* the concept of wrong acts is integrated into the framework of the theory concerning safeguards against

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[132] Ibid art 720.
[133] Ibid.
[134] For more provisions about Custom in Saudi law, see *Law of Evidence* (n 79) arts 88–91.
[135] Al-Sanhouri (n 4) 62.
[136] Al-Zarqa (n 95) 113.
[137] Al-Sanhouri (n 4) 63.
[138] خالد السيد موسى [Khaled Al-Sayed Musa], مصادر الالتزام في الفقه الاسلامي والانظمة السعودية: النظريات العامة للالتزامات [*Sources of Obligations in Islamic Jurisprudence and Saudi Regulations: General Theories of Obligations*] (University Book House, Riyadh, 1st ed, 2017) 187.
[139] Muhammad Taqī-ud Dīn Al-Hilālī and Muḥammad Muḥsin Khān (n 116) 181.

infringement or harm.[140] While there is no overarching principle in either Islamic or English law stipulating that each unlawful harmful act inherently necessitates its perpetrator to provide compensation for ensuing damages, numerous applications of this principle are prevalent, bordering on becoming rules.[141] In this context, for instance, from provisions concerning destruction or coercion, one can infer a general principle in Islamic law that any unlawful action against a person's property results in an obligation to provide restitution or compensation.[142] Islamic jurists employed the term ‘wrong’ to inversely reflect the concept of intention, while in comparative law, it encompassed any form of harm, intentionally or not; nevertheless, the actor responsible for the damage is equivalent mainly, as warranties pertain to both deliberate and erroneous actions in Islamic jurisprudence.[143] The fourth source, illegal enrichment, holds significant prominence within *Fiqh*, especially concerning warranties and the restoration of rights from those who gain enrichment at the expense of others.[144] However, Islamic law does not regard unlawful enrichment as a primary source of obligations, except in a limited number of instances.[145] That may be because *Fiqh* is primarily centred on individual cases rather than doctrinal principles; its main focus is on resolving specific legal situations, often relying on analogy ('*qiyas*') for this purpose.[146] Lastly, Islamic law unequivocally recognises the law as a source of obligations, exemplified by numerous instances, such as the obligation of providing alimony for a wife.[147]

Nonetheless, Al Nasser (2021) asserts that achieving complete harmony between the sources of obligation in modern law and Islamic law might be challenging due to conflicting aspects. Firstly, in *Fiqh*, the primary sources are the Qur’an, Sunnah, *Ijma* (consensus), and *qiyas*. These sources can directly or indirectly establish obligations or provide a basis for their creation, such as in contracts, where both direct and indirect sources of obligation are rooted in Islamic law.[148] However, if a government makes a

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[140] Al-Zarqa (n 95) 113.
[141] Al-Sanhouri (n 4) 64.
[142] Ibid 68.
[143] Al-Nasser (n 98) 9.
[144] Al-Zarqa (n 95) 113.
[145] Al-Sanhouri (n 4) 71.
[146] Vicente (n 3) 403.
[147] Al-Zarqa (n 95) 115–16; Al-Sanhouri (n 4) 71.
[148] Al-Nasser (n 98) 9.

law, it generally becomes a part of the legislative of Islamic law, and one should follow it if it is not against Sharia. This is a result of the order to obey those who are in authority, also in accordance with public interest (Almasalih Alaammh).[149] Furthermore, Al-Nasser (2021) highlights a disparity in the obligation concept between Islamic law and comparative law.[150] Nevertheless, it is noteworthy that this discrepancy, while existing, does not negate the overarching notion of the existence of obligations and their origins in both legal systems.[151] In addition, it is noteworthy that Islamic jurisprudence (*Fiqh*) incorporates certain sources of obligation that may not find direct equivalence in comparative legal systems, such as the consideration of duties in certain cases; conversely, comparative legal systems might permit certain contracts that are deemed impermissible in Islamic law, like the sale of alcohol.[152] Indeed, while variations may exist in applying the commitment theory and the derived examples, these differences do not negate the overall existence and root of the theory.[153] Finally, although sometimes the sources are the same, the provisions of one are distinguished between two legal systems; for instance, the contract provisions in Islamic law differ from those in comparative laws.[154] However, distinguishing between contract provisions exists even across four Islamic law schools. Despite distinguishing between contract provisions, no one can argue against the general concept or suggest that the name of the contract is different.

To conclude, although Islamic law does not mention sources of obligation or dedicate a section to them in *Fiqh* books, and although it has some differences in applying these sources compared to modern legal systems, it does definitely involve the five sources: Contract, Tort, Individual will, Unlawful Enrichment and Law, innumerable examples of which can be found in different parts of *Fiqh* books. There is no doubt that custom is incorporated into each of these sources, as custom is regarded as binding in Islamic law, subject to its conditions.[155]

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[149] Al-Sayed Musa (n 138) 346.
[150] Al-Nasser (n 98) 9.
[151] See above: 3.4.2 The Islamic notion of obligations law.
[152] Al-Nasser (n 98) 9.
[153] Al-Zarqa (n 95) 116.
[154] Al-Nasser (n 98) 9.
[155] To avoid repetition, I will refrain from discussing Islamic law regarding customs or norms, as Saudi law is essentially derived from Islamic jurisprudence in a literal manner. See *Civil Transactions*

## 3.6 Chapter conclusion

Within continental legal systems, obligations are grounded in a clear legal basis, allowing scholars from various backgrounds to interpret the concept of obligation collaboratively. Generally, ‘obligation’ encompasses two main definitions: (i) a legal relationship that compels someone to perform a duty for another; and (ii) any legal duty established by law.

Countries increasingly conduct comparative analyses of obligations law, offering new perspectives on lawmakers' roles in private law and potentially leading to mandatory regulations to protect specific groups, such as consumers. This growing interest is linked to efforts aimed at harmonizing the law of obligations, particularly in contractual obligations.

Despite slight differences in obligations law among civil codes, the core idea remains a legal relationship. The Saudi legislator parallels this concept by establishing obligations tied to property transfer, and either doing or refraining from doing something in close alignment with Islamic law principles. The main distinction lies in the formal differences between Islamic jurisprudence and other legal systems, although Islamic law fundamentally embraces the notion of obligation, harmonizing traditional Islamic principles with modern legal frameworks.

The origins of obligations in contemporary legal systems identify contracts, wrongdoing, unjust enrichment, unilateral will, and laws as distinct sources of obligations. In comparison, Saudi law recognises contracts, unilateral declarations, tort (delict), unjust enrichment, and statutory law as sources of obligations.

While the Saudi legal framework aligns closely with modern civil law systems regarding sources of obligations, it notably lacks the specific inclusion of custom. Nonetheless, customary practices are considered applicable and enforceable within Islamic and Saudi law, and in many instances customs have indeed been recognised

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*Law* (n 76) art 720: “Without prejudice to the provisions of Article 1 of this Law, the rules set forth in this Article shall be applied in a manner not inconsistent with legal provisions, subject to their respective nature, conditions, and exceptions. Said rules shall comprise the following: … Rule 3: Custom shall have legal effect. Rule 4: A matter established by custom shall be equivalent to a matter established by text. Rule 5: A matter established by custom shall be equivalent to a matter stipulated as a condition. Rule 6: A matter deemed highly unlikely by custom shall be equivalent to a matter deemed impossible.”

as sources of obligation in Saudi law. Although Islamic law does not explicitly identify sources of obligations or allocate a specific section for them in *Fiqh* literature, five sources are readily identifiable: Contract, Tort, Individual will, Unlawful Enrichment, and Law, with countless instances documented throughout various parts of *Fiqh* texts. In fact, customs are also integrated into these sources, as recognition of them is deemed obligatory in Islamic law, depending on relevant conditions.

Given that the concept of obligations is addressed, and the sources of obligations are examined in both Saudi and Islamic law, it is now appropriate to discuss the e-seller's obligations towards the e-consumer and the e-consumer's obligations towards e-seller in separate chapters.

# CHAPTER 4: OBLIGATIONS OF E-SERVICE PROVIDERS (MERCHANT)[1] IN E-COMMERCE UNDER SAUDI AND ISLAMIC LAW

This chapter analyses the obligations of those service providers, whether merchants or practitioners, who are practising e-commerce and are to apply Saudi e-commerce law and take account of the position of Islamic law. The first obligation is disclosure, or the obligation to inform other parties (section 4.1), the second obligation is delivery (section 4.2), the third refers to sale warranty (section 4.3), the fourth to consumer privacy (section 4.4), and the fifth obligation is the right of recourse (section 4.5). Each of these obligations is discussed first in regard to Saudi law and then in regard to Islamic law, with some conclusions being drawn for each regarding the relationship between Saudi and Islamic law.

## 4.1 Obligation to inform other parties (disclosure)

Consumers play a significant role in the online sphere, with a substantial portion of internet activity centering around their involvement.[2] Emerging communication technologies introduce fresh risks to consumers and have the potential to give rise to novel types of information imbalances.[3] As consumer engagement grows, so does the associated risk, underscoring the heightened need for protection.[4] The consumer in traditional contracts has the right to be informed by the seller or service provider about many things, so it is *a fortiori* that this right should be present in electronic contracts.[5]

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[1] Saudi E-commerce law defines a Service Provider as a merchant or practitioner. The Merchant is a person registered in the Commercial Register who practices e-commerce. The Practitioner is a person who practices e-commerce but is not registered in the Commercial Register. The Person is a natural or legal person. Internationally, the term 'service provider' has no agreed meaning. See Graeme B Dinwoodie (ed), *Secondary Liability of Internet Service Providers* (Springer, 2018). However, it is broader than Saudi law usage, which globally includes the intermediaries that are between dealers and consumers, such as Amazon and eBay. This thesis will follow the Saudi approach.

A Note: Saudi e-commerce laws mention only service providers without the words 'Electronic' or 'Internet', so this thesis will follow the Saudi approach, which only says service providers and means e-service providers.

[2] Andrej Savin, *EU Internet Law* (Edward Elgar, 2013) 160.

[3] Gert Straetmans (ed), *Information Obligations and Disinformation of Consumers* (Springer, 2019) v.

[4] Savin (n 2) 160.

[5] سليمان محمد الشدي [Suleiman Muhammad Al-Shiddi], طرق حماية التجارة الإلكترونية ['E-Commerce Protection Methods'], رسالة دكتوراه, جامعة الامام محمد بن سعود ([PhD Thesis, Imam Muhammad bin Saud University, 2006]) 357.

While the Internet has undoubtedly transformed how consumers shop, consumer vulnerability has grown; this is evident in the heightened demand for additional information, insurance, and protection, which has paralleled the rise in fraudulent attacks.[6] As widely recognised, changing market conditions, marked by mass-produced goods and standardised contracts, has highlighted the prevalence of market failures, eroding the notion of consumers being on an equal footing with traders.[7] E-consumer threats originate from two sources; firstly, they involve explicit attempts to deceive the consumer; secondly, they emerge from problematic business practices, which encompass inadequate practices related to consumer information, contract formation, and contract execution.[8] Therefore, consumer protection regulations in e-commerce initially addressed market failures, such as the growing information imbalances, to implement corrective measures that would reinstate genuine parity between merchants and consumers as market dynamics demanded greater information transparency, and as there was an evolving realisation that consumers, under certain conditions, should be regarded as the less powerful party and thus entitled to expanded safeguards.[9] According to Khalifi (2011), the legal obligation to disclose certain pieces of information is one of the most essential guarantees in electronic commerce to achieve equality in knowledge for the contracting parties, especially since many electronic contracts have hidden conditions.[10] To address the market inefficiencies stemming from the information disparity between businesses and consumers, there has been a growing emphasis on requiring businesses to provide more information; this empowers consumers to safeguard their interests by making independent, well-informed decisions.[11] Moreover, providing information can foster consumer trust in e-commerce even before disputes emerge, and it can also reduce the occurrence of e-commerce disputes; this is particularly valuable in overcoming the

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[6] Savin (n 2) 160.
[7] Straetmans (n 3) vi.
[8] Savin (n 2) 161.
[9] Straetmans (n 3) vi.
[10] مريم خليفي [Maryam Khalifi], الالتزام بالإعلام الالكتروني وشفافية التعامل في مجال التجارة الالكترونية ['Obligation to Electronic Media and Transparency of Dealings in the Field of E-Commerce'] (2011) (4) دفاتر السياسة والقانون [*Policy and Law Notebooks*] 201.
[11] Straetmans (n 3) vi.

challenges faced by Saudi e-consumers who may not have the opportunity for physical inspections.[12]

The obligation to disclose in contracts has existed since antiquity in the laws of a diverse range of societies, so it is present in traditional contracts.[13] However its presence in electronic contracts is particularly important.[14] Consumers are often ignorant of fundamental matters related to goods or services. Therefore, some information about these goods and services is required; compared to traditional consumers electronic consumers especially need more information about goods and their specifications or about the identity of sellers or service providers.[15] To this end, a general obligation that exists on the part of service providers or sellers prior to the contract involves the obligation to disclose to the other party (the consumer) all details about their identities, locations, and addresses, as well as the commodities or services that are the subject of the contract and all the conditions and regulations related to the contract.[16]

This obligation is discussed here in two parts, the first of which is the e-disclosure obligation in Saudi law, and the second of which is the position of Islamic law on disclosure and what options can be applied to e-disclosure, which are discussed in detail.

### *4.1.1 The disclosure obligation in Saudi law*

The key features of the disclosure obligation in Saudi law concern the ID of the service provider (section 4.1.1.1), the core features of the product or service (section 4.1.1.2), electronic contract information and conditions (section 4.1.1.3) and solutions for non-compliance with the disclosure obligation (section 4.1.1.4).

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[12] Saud Abdullah Alshathri, 'Online Dispute Resolution as a Mechanism to Enhance Consumer Trust in E-Commerce - How Can Saudi Arabian Law be Improved?' (PhD Thesis, Newcastle University, 2021) 101.

[13] See William C Whitford, 'The Functions of Disclosure Regulation in Consumer Transactions' (1973) 1973(2) *Wisconsin Law Review* 400.

[14] See Savin (n 2) 160; رمزي الحجازي [Ramzi Al-Hijazi], الحماية المدنية للمستهلك بعد التعاقد الإلكتروني [*Civil Protection of the Consumer after Electronic Contracting*] (منشورات الحلبي الحقوقية [Al-Halabi Legal Publications], 1st ed, 2016) 48.

[15] See Savin (n 2) 160; علاء الجاف [Alaa Al-Jaf], الآليات القانونية لحماية المستهلك في عقود التجارة الالكترونية [*Legal Mechanisms for Consumer Protection in E-Commerce Contracts*] (منشورات الحلبي الحقوقية [Al-Halabi Legal Publications], 1st ed, 2017) 188.

[16] Al-Shiddi (n 5) 357.

#### *4.1.1.1 ID of the service provider in Saudi law*

Many countries, such as France and other EU countries,[17] agree that sellers or service providers should identify their own ID, as do some Arab countries for instance, the United Arab Emirates and Tunisia.[18] Saudi Arabian legislation states that dealers or service providers must disclose the following information in their electronic store: the name or any distinctive feature of it, the address (unless it is registered with an e-shop authentication entity), the means of communication, the name and number registered in the commercial register or any other register that is available for the public, and the tax number (if any).[19] One of the reasons for these disclosure requirements is to determine the applicable law as well as the appropriate court.[20] The OECD adds that a business has to clarify information to consumers if this business has membership in any relevant program or other body such that consumers can easily contact such a body.[21] Indeed, the Saudi legislator agrees with the OECD, in Article 9, in that a merchant or service provider who practises a profession that is subject to a specific regulation and requires a license or permit to practise it should provide disclosure of the entity with which it is registered, information about the license or permit, the working professional title, the country that granted it and the date of its expiry.[22] Article 9 of the *Implementing Regulations of the E-Commerce Law* clarifies that none of these provisions affect the other provisions in force in Saudi Arabia regarding the professional activity of the service provider.[23] Not only the service provider but also

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[17] See Savin (n 2) 161. See André Janssen, 'The Information Requirements in the Principles of European Private Law 'Long-Term Commercial Contracts: Commercial Agency, Distribution, Franchise' - A Model for a European Civil Code?' in Geraint Howells, André Janssen and Reiner Schulze (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Routledge, 2005) 196.

[18] قادة شهيد [Qadah Shahid], الالتزام بالإعلام في عقود التجارة الإلكترونية ['Disclosure Obligation in E-Commerce Contract'] (2010) 14 مجلة المناظرة [*Journal of Debate*] 141, 143–5.

[19] *Electronic Commerce Law* (Royal Decree No M/126 dated 1440H (2019)) art 1 ('*Electronic Commerce Law*') art 6.

[20] Al-Shiddi (n 5) 358.

[21] 'Recommendation of the Council on Consumer Protection in E-Commerce', (Recommendation, OECD, 2016) 3 <http://dx.doi.org/10.1787/9789264255258-en>.

[22] *Electronic Commerce Law* (n 19) arts 9/A–B; 'Implementing Regulation of the E-Commerce Law', *Ministry of Commerce* (Web Page) art 9/1 <https://mc.gov.sa/en/Regulations/Pages/details.aspx?lawId=691e2bec-f987-4856-b2bf-ab4b00c8c9b6> ('*Implementing Regulations of the E-Commerce Law*').

[23] *Implementing Regulations of the E-Commerce Law* (n 22) art 9/2.

any electronic platform that functions as an intermediary between the service provider and the consumer should obey all these rules.[24]

The Saudi lawmaker is keen to achieve clarity regarding the address of the service provider, stating, for example, that if a service provider operates from multiple locations and none of them has been designated as the business address, the business address for the contract will be the one that is most closely related to the specific contract.[25] Moreover, in the event that a practitioner (an individual) in Saudi Arabia does not operate from a business location, their place of business will be their residential address as per the registered national address.[26]

According to the Ministry of Commerce (2023), information disclosure about the online store increases the reliability of its products and services and makes the consumer feel safe while purchasing goods and obtaining services.[27] It also facilitates communication between the parties in regard to the purchasing process and enables all parties to quickly reach those in charge of the store and inform them of developments or consumer complaints, and to work to address them and gain their trust.[28]

#### *4.1.1.2 The core features of the product or service in Saudi law*

In e-commerce contracts, the absence of physical product inspection underscores the importance of vendors providing detailed product or service descriptions, enabling consumers to make informed choices, whereas in traditional offline transactions there is not as much need for information disclosure because face-to-face interactions allow for product examination and additional inquiries.[29] Saudi law concurs with this view and considers it necessary to disclose basic information in e-commerce contracts, asking dealers or service providers to reveal the basic characteristics of the products or services that are subject to the contract.[30] However, not only does e-commerce

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[24] Ibid art 18/C.
[25] *Electronic Commerce Law* (n 19) art 3/3.
[26] *Implementing Regulations of the E-Commerce Law* (n 22) art 3/2.
[27] Ministry of Commerce, *Guide for Electronic Stores under the E-Commerce Law and its Implementing Regulations* (2023) 11 <https://mc.gov.sa/en/guides/Documents/MerchantGuide.pdf, from page 8>.
[28] Ibid.
[29] Hussam Ibrahim Fallatah, 'Addressing the Need for Consumer Protection in E-Commerce in Saudi Arabia' (PhD Thesis, University of Leeds, 2017) 133.
[30] *Electronic Commerce Law* (n 19) art 7/C.

law[31] not mention the required essential features of product information, the *Implementing Regulations of the E-Commerce Law*[32] also does not. Nevertheless, the merchant or service provider must provide the consumer with particular information, depending on the nature of the product or service.[33] This includes a product manufacturing certificate or a license to provide a service that requires provision of such a certificate or license; the country of origin of the product;[34] the name or trademark of the product or service; the product's weight or measure; the number of products or services; and the production or expiration date.[35] Moreover, the following should also be provided: the type of product, its group, its serial number, its code, or any other data that leads to its identification, as well as product components or basic elements that make up the service.[36] At all events, this information must be disclosed in Arabic, while it is acceptable to provide it in other languages in addition to Arabic,[37] but if there is a meaning conflict between them, Arabic comes first.[38] Finally, the information provided to the consumer must be clear, accurate, adequate and not misleading.[39] On the other hand, if any disclosure obligations regarding this core information are found to be misleading or fraudulent to a consumer, it is considered commercial fraud.[40]

#### *4.1.1.3 Electronic contract information and conditions in Saudi law*

The Saudi Regulator paid great attention to clarifying the service provider's obligation to disclose information and terms of the contract, as Article 7 of the *Electronic*

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[31] *Electronic Commerce Law* (n 19).
[32] *Implementing Regulations of the E-Commerce Law* (n 22).
[33] See *Commercial Data Law* (Royal Decree No M/15 dated 1423 (2002)) ('*Commercial Data Law*'); *Implementing Regulations of the Commercial Data Law* (Ministerial Resolution No 1901 dated 1423 (2002)) ('*Implementing Regulations of the Commercial Data Law*'); Ministry of Commerce, 'Consumer Protection Law' (Draft Law, 2022) <https://istitlaa.ncc.gov.sa/en/Trade/mci/Consumer/Pages/default.aspx> ('*Draft Consumer Protection Law*').
[34] *Draft Consumer Protection Law* (n 33) art 6/H.
[35] See *Draft Consumer Protection Law* (n 33) art 6; *Commercial Data Law* (n 33) art 1; *Implementing Regulations of the Commercial Data Law* (n 33) art 3.
[36] See *Draft Consumer Protection Law* (n 33) art 6; *Commercial Data Law* (n 33) art 1; *Implementing Regulations of the Commercial Data Law* (n 33) art 3.
[37] *Draft Consumer Protection Law* (n 33) art 8; *Commercial Data Law* (n 33) art 2; *Implementing Regulations of the Commercial Data Law* (n 33) art 5.
[38] *Implementing Regulations of the Commercial Data Law* (n 33) art 5.
[39] *Draft Consumer Protection Law* (n 33) art 7/1.
[40] *Anti-Commercial Fraud Law* (Royal Decree M/19 dated 1429H (2008)) art 2/1; *Implementing Regulations of the Anti-Commercial Fraud Law* (Ministerial Decision 155 dated 1431H (2010)) arts 2, 3 ('*Implementing Regulations of the Anti-Commercial Fraud Law*').

*Commerce Law* and *Implementing Regulations of the E-Commerce Law* was devoted to that.[41] Article 7 stipulates that the merchant or service provider is obligated to provide a statement to the consumer that clarifies the terms and conditions of the contract, including the procedures to be taken to conclude the contract.[42] To prevent any discrepancy of understanding between the parties, the Saudi Regulator obliges the service provider to clarify the total price with all fees, taxes or additional amounts related to delivery (if any) and any cost that may apply to the consumer in the future with clarification of how it applies and the conditions of determining it.[43] In this context, the service provider is obligated to inform the consumer about arrangements for payment and delivery; also, if shipping and delivery are required, then arrangements must be specified.[44] Moreover, the *Electronic Commerce Law* and *Implementing Regulations* impose on the service provider a requirement to disclose some of his or her obligations to the consumer, such as details of warranty (if any)[45] and giving the customer the right to terminate the contract.[46] If termination is allowed, the merchant must clarify what actions the consumer should take to terminate the contract and what expenses will be incurred; alternatively, if the consumer lacks the right to terminate the contract this must be clearly stated.[47] The disclosure of e-contract information and conditions should include after-sales services (if any) and their conditions, along with the duration and expiration date of the contract, if applicable.[48]

The *Electronic Commerce Law* authorises its *Implementing Regulations* to define the rules for the service provider's provision of information regarding the nature of each transaction.[49] Consequently, the *Implementing Regulations of the E-Commerce Law* obligate the service provider to inform the consumer of the procedure for concluding the contract by stating in the designated payment field that when this field is clicked,

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[41] *Electronic Commerce Law* (n 19) art 7; *Implementing Regulations of the E-Commerce Law* (n 22) art 7.
[42] *Electronic Commerce Law* (n 19) art 7/A.
[43] Ibid art 7/D. *Implementing Regulations of the E-Commerce Law* (n 22) art 7/1-B.
[44] *Electronic Commerce Law* (n 19) art 7/E; *Implementing Regulations of the E-Commerce Law* (n 22) art 7/1-E.
[45] *Electronic Commerce Law* (n 19) art7/F. This obligation will be addressed in detail below in: 4.3 Obligation to provide an e-sale warranty.
[46] *Implementing Regulations of the E-Commerce Law* (n 22) art 7/1-A. This obligation will be addressed in detail below in: 4.5 Obligation to ensure right of recourse.
[47] Ibid. This obligation will be addressed in detail below in: 4.5 Obligation to ensure right of recourse.
[48] Ibid arts 7/1-C, D.
[49] *Electronic Commerce Law* (n 19) art 7.

the contract will be completed; the contract must clearly and simply include the obligation to pay.[50] However, there needs to be more regulation here on two points. Firstly, a mistranslation in the English version determines strictly that the disclosure should be in the payment field, which limits the e-contract to less than what is in the actual e-commerce. However, in none of the several Arabic versions does the designated field mention payment, so the meaning is that when the service provider simply clicks on the designated field the contract will be concluded, and the obligation to pay will result from that.[51] Obviously, this is the correct meaning and makes the legal text broader, including more transactions than the English version. Secondly, which is more critical, as mentioned previously, the *Electronic Commerce Law* gives its *Implementing Regulations* the authority to govern rules on how service providers offer information based on the nature of each transaction.[52] Unfortunately, the *Implementing Regulations* address only one type of e-contract, which is Clickwrap[53] agreements.[54] However, this has been considered insufficient regulation because e-contracts are not restricted to Clickwrap agreements, as there is more than one formation for e-contracts, such as Browse wrap agreements,[55] e-signature, and e-mail.[56] Consequently, the Saudi *Draft Consumer Protection Law* addresses the issues by making the legal text wider and more general; as a result, it includes all the formations of e-agreements.[57] To this end, article 44 states that the contract is not

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[50] *Implementing Regulations of the E-Commerce Law* (n 22) art 7/2.
[51] *Implementing Regulations of the E-Commerce Law* (n 22) art 7/12 (Arabic version).
[52] *Electronic Commerce Law* (n 19) art 7.
[53] There is no agreement on the definition, however, it can be said the common factor is that the consumer can click the icon that says 'I accept' or 'I agree' on this transaction. See Stephen Mason and Daniel Seng, *Electronic Signatures in Law* (University of London Press, 5th ed, 2021) 308; Faye Fangfei Wang, *Law of Electronic Commercial Transactions: Contemporary issues in the EU, US and China* (Routledge, 1st ed, 2010) 33; Simon Blount, *Electronic Contracts Principles from the Common Law* (LexisNexis Butterworths, 1st ed, 2009) 72.
[54] *Implementing Regulations of the E-Commerce Law* (n 22) art 7/2.
[55] A contract between a website and a user, the consent for the transaction comes before or after it, in other words, the customer does not click I agree on this specific transaction, s/he accepts when enters the website or after downloading the product or service. See Paul J Morrow, 'Cyberlaw: The Unconscionability/Unenforceability of Contracts (Shrink-Wrap, Clickwrap, and Browse-Wrap) on the Internet: A Multijurisdictional Analysis Showing the Need for Oversight' (2011) 11(1) *Pittsburgh Journal of Technology Law & Policy* [i]; Blount (n 53) 72; Michelle Garcia, 'Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum' (2013) 36 *Campbell Law Review* 31.
[56] See Simone WB Hill, 'Email Contracts - When is the Contract Formed' (2001) 12(1) *Journal of Law and Information Science* 46; Wang (n 53) 33–5; Mason and Seng (n 53) 308–12; Blount (n 53) 72–95.
[57] *Draft Consumer Protection Law* (n 33) art 44/2.

binding on the consumer if the economic operator[58] does not indicate to him that its conclusion creates an obligation to pay.[59] Undoubtedly, this article with its general meaning text covers every contract in the online environment, even if a new e-agreement is established, because it does not limit the e-contract to one type and makes it comprehensive enough to include every transaction whether it exists currently or may exist in the future. Following this principle, the service provider has the burden of proving an obligation to provide the consumer with the information and data stipulated in the article.[60]

#### *4.1.1.4 Solutions in Saudi law for non-compliance with the disclosure obligation*

This section is about civil responsibility and does not cover the subject of criminal liability. Most laws that relate to obligation of disclosure do not specify any civil responsibility not to breach such commitments, so it is necessary to go back to general rules to find principles to apply.[61] However, the aim of the pre-contracting disclosure is to inform the consumer of electronic goods and services of the nature of the contract, so the subject of protection in this obligation is those consumers.[62]

In this sense, the Saudi *Electronic Commerce Law* mentions general compensation in article 22, which states that the appropriate court is in charge of settling disputes, including claims for compensation arising from the application of the provisions of the Law.[63] In the researcher's opinion, based on this article, a customer can demand reparations from a seller or service provider in the appropriate court because the article applies generally to any violation of this law and the law states that there is a commitment to inform consumers. In other words, if the service provider does not keep his or her obligation that is against the law; therefore, the other party (consumer) has the right to terminate the contract. What supports this understanding is what is stated in the *Draft Consumer Protection Law* that if a consumer has suffered damage due to

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[58] A person with a natural or legal status, private or public, who practices a commercial, industrial, professional, or craft activity, and provides a service to the consumer, or produces, manufactures, imports, exports, sells, rents, displays, distributes, or markets a product with the aim of providing it to the consumer or dealing or contracting with it by any means, including electronic means. See *Draft Consumer Protection Law* (n 33) art 1.

[59] Ibid art 44/2.

[60] Ibid arts 16, 44/3.

[61] See Janssen (n 17); Khalifi (n 10) 201.

[62] Al-Shiddi (n 5) 357; Al-Jaf (n 15) 188.

[63] *Electronic Commerce Law* (n 19) art 22.

a violation of his rights or the commission of any act by the service provider constituting a violation stipulated in the law or regulation, appropriate measures can be taken, including terminating the contract and compensation for the damages sustained.[64] Also, the *Ministry of Commerce Guide to Consumer Rights and Responsibilities* states that the consumer can choose to keep the order or cancel it and get a refund for the payment if an error occurs in services, pricing, or specifications from the service provider.[65]

However, there are many cases where the consumer cannot terminate the contract in accordance with laws and regulations.[66] Exceptionally, the consumer can use his or her right to cancel the contract when products are not up to the agreed specifications or are defective.[67] Although the *Electronic Commerce Law* addresses the case if the product does not conform to the agreed-upon specifications, it does not address the case if the consumer wants to cancel the contract and there has been a misuse of the product while at the same time the product did not conform to the agreed upon specifications. The law sets out a special paragraph for non-compliance with specifications[68] and a separate paragraph for consumer misuse.[69] Here, there is definitely a legal vacuum that must be resolved. Consequently, the *Draft Consumer Protection Law* is more intelligible and addresses this issue by mentioning it generally, and also at the end of the article devoted to this issue; in no case can the contract be cancelled by the consumer if there is a defect in the product caused by misuse.[70] In other words, the consumer mishandling the product cannot return it no matter the circumstances because the legal text states literally all cases; moreover, it comes at the end of the article without a separate paragraph, which means including non-compliance with specifications.

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[64] *Draft Consumer Protection Law* (n 33) art 65.
[65] Ministry of Commerce, *Guide to Consumer Rights and Responsibilities 2023* (Report) 26 <https://mc.gov.sa/en/guides/Documents/CustomerGuide.pdf> ('*Ministry of Commerce Guide to Consumer Rights and Responsibilities*').
[66] *Electronic Commerce Law* (n 19) art 13; *Implementing Regulations of the E-Commerce Law* (n 22) art 11; *Draft Consumer Protection Law* (n 33) art 42. Details are provided below in: 4.5 Obligation to ensure right of recourse.
[67] *Electronic Commerce Law* (n 19) art 13/A; *Draft Consumer Protection Law* (n 33) art 42/B.
[68] *Electronic Commerce Law* (n 19) art 13/A.
[69] Ibid art 13/D.
[70] *Draft Consumer Protection Law* (n 33) art 42.

The French, Egyptian and Algerian judiciary consider that breaches of the obligation to disclose are fraud, so consumers have the right to continue the contract or to demand the termination of the contract and compensation based on the extent of the effect on their initial decision-making due to mistakes or fraud. It can be seen that the rules in the Kingdom of Saudi Arabia are the same due to the *Guide to Consumer Rights and Responsibilities* issued by the Saudi Ministry of Commerce.[71] The *Guide* stipulates that the consumer has the right to return a product or have it replaced in the case of the provision of information that does not match the real situation, as there is a difference between the information provided before purchase and the reality such that the product is not valid in terms of what it was purchased for or what was promised.[72] In the event that the consumer disputes with the service provider regarding the obligation of disclosure, the law stipulates that the service provider has the burden of proving its commitment to providing the consumer with the information and data required by the law to inform the consumer.[73]

The Court of Justice of the European Union held

> …that Article 5(1)(c) of [Directive 2000/31/EC] must be interpreted as meaning that a service provider is required to supply to recipients of the service, before the conclusion of a contract with them, in addition to its electronic mail address, other information which allows the service provider to be contacted rapidly and communicated with in a direct and effective manner. That information does not necessarily have to be a telephone number. That information may be in the form of an electronic enquiry template through which the recipients of the service can contact the service provider via the internet, to whom the service provider replies by electronic mail except in situations where a recipient of the service, who, after contacting the service provider electronically, finds himself without access to the electronic network, requests the latter to provide access to another, non-electronic means of communication.[74]

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[71] *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65).
[72] Ministry of Commerce, *Consumer Rights Guide* 35 <https://mc.gov.sa/ar/guides/CustomerGuide/Documents/MCIDoc.pdf> (Arabic Version) ('*Ministry of Commerce Consumer Rights Guide - Arabic*').
[73] *Draft Consumer Protection Law* (n 33) art 44/3.
[74] *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV v deutsche internet versicherung AG* (C-298/07) [2008] ECR I-07855 [40] <https://www.ipcuria.eu/case?reference=C-298/07>.

Moreover,

> The Court replied that the third sentence of Article 23(1) of Regulation (EC) No 1008/2008 must be interpreted as meaning that, when publishing their air fares, air carriers must specify separately the amounts payable by customers in respect of taxes, airport charges and other charges, surcharges or fees referred to in that regulation. Furthermore, they may not, as a consequence, include those items, even partially, in the airfare. Article 23(1) of Regulation (EC) No 1008/2008 seeks to ensure, in particular, that there is information and transparency with regard to prices for air services from an airport located in a Member State and accordingly to contribute to safeguarding protection of customers who use those services.[75]

### *4.1.2 The disclosure obligation in Islamic law*

The key features of the disclosure obligation concern the ID of the service provider (section 4.1.2.1), the core features of the product or service, including electronic contract information and conditions (section 4.1.2.2) and solutions for non-compliance with the disclosure obligation (section 4.1.2.3). The concept of 'option' in Islamic law is directly relevant to this last feature of the disclosure obligation as well as to various features of the other obligations discussed in this chapter.

The term 'option' in *Fiqh* has many uses, but in most cases is used in conjunction with other words to indicate types of options, thus not requiring a literal definition for the term itself. Nevertheless, it is possible to express a general definition of option by saying that it is the right of the contracting party to annul the contract or to continue it due to the operation of legal justification or a contractual agreement.[76] In other words, an option occurs when a contracting party can choose between fulfilling the contract or cancelling it. Thus, an option is a right that applies to one or both contracting parties. If only the seller has an option, the seller alone is capable of implementing or cancelling the sale, even if the buyer does not consent, whereas if the buyer alone has the option

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[75] Court of Justice of the European Union, 'Electronic Commerce and Contractual Obligations' (Fact Sheet, July 2020) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-06/fiche_thematique_-commerce_electronique_et_obligations_contractuelles_-_en.pdf> 12.

[76] وزارة الأوقاف والشؤون الإسلامية [The Ministry of Awqaf and Islamic Affairs], الموسوعة الفقهية الكويتية [*Kuwaiti Jurisprudence Encyclopedia*], (دار السلاسل-الكويت [Dar Al Salasil-Kuwait], 2nd ed, 2006) vol 20, 41 ('*Kuwaiti Jurisprudence Encyclopedia*'); عبدالستار أبو غدة [Abdul Sattar Abu Ghada], *الخيار وأثره في العقود [The Option and its Effect on Contracts]*, (مطبعة مقهوي-الكويت [Maqhawi Press -Kuwait, 2nd ed, 1985) vol 1, 42 ('*The Option and its Effect on Contracts*').

he or she can implement the sale or terminate it without the consent of the seller.[77] The option to annul or confirm a contract under Islamic law can be established within the contract by either or both parties, although in many cases this option is inherent and governed by Islamic law itself so there is no need for a statement from the two parties.[78]

The purpose of legally established options is to achieve the element of consent to prevent harm to the contracting parties; hence, jurists have divided the options into two types: consideration options and prevention of shortcomings options. Prevention of shortcomings options are options that aim to prevent harm from the contracting parties while the consideration options aim to bring them benefit.[79] As for voluntary options (party's option), the motive is almost always one thing, which is what Islamic jurists call deliberation, that is, contemplating the suitability of the item, as the contracting party wants to obtain a benefit they are keen on.[80] Some scholars under Islamic law recognise a total of around thirty-three options, whereas some scholars count them differently, recognising far fewer because they combine them within comprehensive terms. Nevertheless, all scholars mostly concur on the fundamental options although with some differences in application.[81]

Having introduced the concept of option in Islamic law, it will now be possible to show how it can be applied concerning this disclosure obligation as well as other obligations discussed elsewhere in the chapter.

#### *4.1.2.1 ID of the service provider in Islamic law*

Islamic law, precisely the concept of eligibility (*al'ahlia*), is a requirement for contracting parties, and there is a consensus among jurists regarding this principle.[82] Therefore,

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[77] علي حيدر [Ali Haider], *درر الحكام في شرح مجلة الأحكام [Durar Al-Hikam in Explaining Al-Ahkam Magazine*], (دار الجيل [Dar Al-Jeel], 1st ed, 1991) vol 1, 110–11.

[78] Wael Hallaq, *Sharia - Theory, Practice, Transformations* (Cambridge University Press, 1st ed, 2009) 248; *The Option and its Effect on Contracts* (n 76) 43.

[79] *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 20, 46; *The Option and its Effect on Contracts* (n 76) 59.

[80] *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 20,

[81] See the best-written book about the options in Islamic law with a comparative study between Islamic schools: *The Option and its Effect on Contracts* (n 76) vol 1–2.

[82] علاء الدين بن مسعود الكاساني الحنفي [Alaa al-Din bin Masoud al-Kasani al-Hanafi], بدائع الصنائع في ترتيب الشرائع [*Badaa'i al-Sana'i in the Arrangement of Canons*] (دار الكتب العلمية [Dar al-Kutub al-Ilmiyya], 2nd ed, 1986) vol 4, 321 ('*Badaa'i al-Sana'i in the Arrangement of Canons*'); محمد الطرابلسي الحطاب [Mohamed Trabelsi Al-Hattab], مواهب الجليل في شرح مختصر خليل [*Talents of Galilee in a Brief Explanation of Khalil*]

in the context of e-commerce, particularly for e-sellers, it is crucial to establish their eligibility. This is done by mandating sellers to disclose information about their identity, location, commercial registration numbers, and contact details, enabling consumers to verify their eligibility.[83]

### *4.1.2.2 Core features of the product or service*

In Islamic law, one of the conditions for the validity of a sale is that the item and the price must be known in order to prevent disputes; consequently if one of them is unknown the transaction is invalid.[84] This prohibition is because it is *Gharar*[85] (that which cannot be delivered), and because "Allah's Messenger' (ﷺ) forbade a transaction determined by throwing stones, and the type which involves some uncertainty".[86] Also, In Islamic law, satisfaction is a required condition in transactions between two parties, and satisfaction is only possible with a known price and sale.[87] A case illustrating 'Gharar' is the sale of a sheep from a herd without specifying which sheep is being sold; in this situation, the sale is considered void because the specific sheep from the herd is not identified. This lack of clarity can lead to disputes, especially

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(دار الفكر [Dar Al-Fikr], 3rd ed, 1992) vol 6, 31 ('*Talents of Galilee in a Brief Explanation of Khalil*'); النووي[Al-Nawawi], روضة الطالبين وعمدة المفتين [Rawdat al-Talibin and Omdat al-Muftis] ( المكتب الإسلامي، بيروت [The Islamic Office, Beirut], 3rd ed, 1991) vol 12, 343; منصور البهوتي الحنبلي [Mansour Al-Bahouti Al-Hanbali], كشاف القناع [*Kashaaf Alqinae*] (وزارة العدل في المملكة العربية السعودية [The Ministry of Justice in the Kingdom of Saudi Arabia], 1st ed, 2000-2008) vol 3, 120 ('*Kashaaf Alqinae*').

[83] Al-Shiddi (n 5) 364. For more details about eligibility in e-commerce under Islamic law see عدنان بن جمعان الزهراني [Adnan bin Jamaan Al-Zahrani], أحكام التجارة الإلكترونية في الفقه الإسلامي ['The Provisions of Electronic Commerce in Islamic Jurisprudence'] (رسالة دكتوراه، جامعة أم القرى [PhD Thesis, Umm Al Qura University, 2008]) 64–95; سلطان بن إبراهيم الهاشمي [Sultan bin Ibrahim Al Hashimi], التجارة الإلكترونية وأحكامها في الفقه الإسلامي ['*E-Commerce and its Provisions in Islamic Jurisprudence*'] دار كنوز اشبيليا [Dar kunuz ashbilya, or 'Seville Treasure House'] (1st ed, 2011) 221–66.

[84] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 156; ابن عابدين محمد الدمشقي الحنفي [Ibn Abdin Muhammad al-Dimashqi al-Hanafi], رد المحتار على الدر المختار -حاشية ابن عابدين -[*Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen*] (دار الفكر - بيروت [Dar Al-Fikr - Beirut], 2nd ed, 1966) vol 4, 529 ('*Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen*'); Al-Nawawi (n 82) vol 3, 360; *Kashaaf Alqinae* (n 82) vol 3, 163; علاء الدين السمرقندي [Aladdin Al-Samarqandi], تحفة الفقهاء [Tuhfat al-Fuqaha] (دار الكتب العلمية، بيروت – لبنان [Dar Al-Kutub Al-Ilmiyyah, Beirut – Lebanon], 2nd ed, 1994) vol 2, 45 ('*Tuhfat al-Fuqaha*').

[85] *Kashaaf Alqinae* (n 82) vol 3, 163. Gharar: It is that which cannot be delivered, whether not present or non-existent; likewise, the uncertainty of things, if they sell what on this tree, then the existence, value, or character of the thing sold is unknown. See ابن قيم الجوزية [Ibn Qayyim al-Jawziyyah], *إعلام الموقعين عن رب العالمين* [*Informing the Signatories about the Lord of the Worlds*] ( دار ابن الجوزي، المملكة العربية السعودية [Dar Ibn Al-Jawzi, Kingdom of Saudi Arabia], 1st ed, 2002) vol 3, 207 ('*Informing the Signatories about the Lord of the Worlds*').

[86] Sahih Muslim, Book 21, Hadith 8 <https://sunnah.com/muslim:1513>; Sunan Ibn Majah, Book 12, Hadith 58 <https://sunnah.com/ibnmajah:2194>.

[87] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 156.

when there are significant differences between individual sheep; consequently, the sale is deemed invalid.[88]

The question at hand is how to establish a valid sale in Islamic jurisprudence or, in simpler terms, how to obligate the seller to disclose in e-commerce. This hinges on whether the goods being traded are physically present or not. In the case of present goods, confirming the sale involves identifying or indicating and seeing the goods or identifying the item by taste or smell; in other words, knowledge of the sale is what achieves the intent of the sale, which is feasible in traditional face-to-face transactions.[89] In the context of electronic transactions, this confirmation occurs when there is an immediate means of communication between the seller and the consumer.[90]

In Islamic law, when goods are not physically present (absent), there are two cases to consider, both involving the seller's disclosure of the essential characteristics of the goods, such as their name, type, description, and value.[91] They are established as follows: when the seller owns the goods (absentee sale) and when the seller does not own the goods.

*4.1.2.2.1 Seller owns the goods (absentee sale)*

This is called an absentee sale under Islamic law and is permissible according to the various schools of Islamic thought, apart from the Shafi'is. In this transaction, the seller discloses the sale as previously mentioned, or the buyer has seen the sale previously so the seller does not need to disclose it; with regard to making payment in this case, the buyer may pay it in advance or later.[92] However, the Hanafi school considers that the seller is not obligated to disclose the commodity as long as they give the buyer the

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[88] Ibid; Al-Nawawi (n 82) vol 3, 360; *Kuwaiti Jurisprudence Encyclopedia* (n 76)155.

[89] There are slight differences between the four schools about identifying the sale, however, I think the conclusion of their opinion is same. See *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 164; Al-Nawawi (n 82) vol 3, 360; *Kashaaf Alqinae* (n 82) vol 3, 163. المرداوي الحنبلي [Al-Mardawi Al-Hanbali], الإنصاف [*Fairness*] (هجر- القاهرة [Hijr-Cairo], 1st ed, 1995) vol 11, 101 ('*Fairness*').

[90] See below: 5.4.2.3.2 Implementation of the meeting place option in e-commerce.

[91] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 164.ابن قدامة الحنبلي [Ibn Qudamah al-Hanbali], المغني [*Almughaniy*] (مكتبة القاهرة [Cairo Library], 1st ed, 1968) vol 3, 494 ('*Almughaniy*'); *Fairness* (n 89) vol 11, 103; *Kashaaf Alqinae* (n 82) vol 3, 163.

[92] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 163; *Fairness* (n 89) vol 11, 103; *Kashaaf Alqinae* (n 82) vol 3 164; القاضي عبد الوهاب [Judge Abdul Wahab], *المعونة على مذهب عالم المدينة* [*Aid to the Doctrine of the Scholar of Medina*], (المكتبة التجارية-مكة المكرمة, The Commercial Library-Mecca) vol 2, 978, 981 ('*Aid to the Doctrine of the Scholar of Medina*').

option of seeing it; so when the buyer sees the goods, he or she has the right to buy or cancel the contract.[93] In other words, in their view, non-disclosure does not prevent the validity of the contract and does not oblige the buyer to do anything unless the buyer does see the goods and approves of them.[94] Their evidence for that view is that 'Allāh has permitted trading and forbidden Ribā (usury)'.[95] Nevertheless, the Qur'anic verse is not against the hadith of Garar, so a combination should be acceptable.[96]

Additionally, the Hanafi school refers to the story of two of the Prophet's companions who engaged in a sale without physically inspecting the goods, and views this as evidence of the permissibility of selling absent goods without describing them.[97] However, other schools of jurisprudence dispute this story's significance and argue that there might have been some form of disclosure, rendering the story inconclusive for two reasons: first, there is no consensus among the schools of thought that the actions of the Prophet's companions serve as conclusive evidence, and second, the story contradicts a particular hadith, which compromises its use as evidence.[98] Selling goods not seen and without description is considered invalid because it is a form of sale rendered void if the seller is unaware of the nature of the goods being sold, as indicated by the hadith "Allah's Messenger (ﷺ) forbade a transaction determined by throwing stones, and the type which involves some uncertainty".[99] However, the issue of uncertainty can be addressed by providing the buyer with the option to inspect the goods, ensuring that if the buyer does not accept the sale, he or she can reject it; in this scenario, uncertainty does not lead to disputes.[100] This thesis upholds the validity of selling absent goods owned by the seller, even without their disclosure, with the provision that the buyer is given the option to inspect the goods; once the buyer

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[93] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 163; *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 84) vol 4, 529.
[94] Ibid.
[95] Muhammad Taqī-ud Dīn Al-Hilālī and Muḥammad Muḥsin Khān, *Translation of the Meanings of the Noble Quran into the English Language* (King Fahd Glorious Qur'ān Printing Complex, Al-Madīnah Al-Munawwarah, 2006) 80 ('*Translation of the Meanings of the Noble Quran into the English Language*').
[96] *Almughaniy* (n 91) vol 3, 495.
[97] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 163; ibid.
[98] *Almughaniy* (n 91) vol 3, 495.
[99] Sahih Muslim, Book 21, Hadith 8 <https://sunnah.com/muslim:1513>; Sunan Ibn Majah, Book 12, Hadith 58 <https://sunnah.com/ibnmajah:2194>; ibid.
[100] *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 84) vol 4, 529.

examines the goods, they can decide whether to complete the transaction or cancel it.[101]

*4.1.2.2.2 Seller does not own the goods*

In Islamic jurisprudence, when the seller does not own the goods, there are two variations: (a) sale of specific goods, and (b) sale of indefinite goods or described sale (*Mawswf fi aldhima*).

**Sale of Specific Goods**: This pertains to unique and distinct goods, meaning there is only one unit or quantity of goods, and there is nothing like them for which they could be mistaken.[102] For example, this could involve selling a specific piece of real estate in a particular city or selling a unique red car.

- The sale of specific goods, such as a unique red car, is unanimously forbidden according to the consensus of the four primary schools of thought in Islamic jurisprudence, irrespective of whether there is disclosure or not.[103] This prohibition is based on the hadith that states, 'The condition of a loan combined with a sale is not lawful,....nor is selling what is not in your possession'.[104] This prohibition exists because the seller is highly likely to be unable to provide the specified product, which could lead to disputes between the seller and the buyer.[105] Additionally, it involves an unacceptable level of uncertainty, which is forbidden according to the hadith regarding Garar.[106]

In summary, the sale of specific goods that the seller does not own is unanimously forbidden in Islamic jurisprudence due to the significant potential for disputes and the

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[101] More details regarding the seeing option will be presented below in: 4.5 Obligation to ensure right of recourse.

[102] See *Fairness* (n 89) vol 11, 103–4; *Kashaaf Alqinae* (n 82) vol 3, 164.

[103] See *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 207; *Talents of Galilee in a Brief Explanation of Khalil* (n 82) vol 4, 514; Al-Nawawi (n 82) vol 12, 343; *Kashaaf Alqinae* (n 82) vol 3, 288; *Almughaniy* (n 91) vol 3, 496; محمد بن أحمد السرخسي [Mohammed bin Ahmed Al-Sarkhi], المبسوط [*Mabsout*] (دار المعرفة - بيروت [Dar al-Maarifa - Beirut], 1993) vol 12, 124 ('*Mabsout*'); محمد المواق المالكي [Muhammad al-Mawaq al-Maliki], التاج والإكليل لمختصر خليل [The Crown and the Crown by Mokhtasar Khalil] (دار الكتب العلمية [Scientific Books House], 1st ed, 1994) vol 6, 476 ('*The Crown and the Crown*'); *Aid to the Doctrine of the Scholar of Medina* (n 92) vol 2, 983.

[104] Bulugh al-Maram, Book 7, Hadith 803 <https://sunnah.com/bulugh/7/24>.

[105] See *Informing the Signatories about the Lord of the Worlds* (n 85) vol 3, 193; *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 163.

[106] See *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 163; *Informing the Signatories about the Lord of the Worlds* (n 85) vol 3, 193.

presence of unacceptable uncertainty. This prohibition applies regardless of whether the goods are disclosed or not.

**Sale of Indefinite Goods**: The second variation involves the sale of goods that are not owned by the seller, but these goods are themselves indefinite. In other words, they are not specific in and of themselves, but information about them is disclosed.[107] For example, this could include selling a property in a particular city or a red car of a certain type and make, with the details provided.

- Selling goods that are not owned by the seller but are indefinite in nature and their information is disclosed is similar to the concept of '*Salam*'[108] in Islamic jurisprudence.[109] *Salam* transactions are permissible according to the consensus of Islamic jurisprudence's four primary schools of thought.[110] Scholars cite the following verse from the Qur'an as evidence: 'Allāh has permitted trading'[111].
- Additionally, scholars refer to the well-known Hadith of *Salam*, which is that when the Prophet (ﷺ) came to al-Madinah, they were paying one and two years in advance for fruits. So, he (ﷺ) said: 'Those who paid in advance for fruits must do so for a specified measurement and weight, and for a specified time'.[112] This Hadith expressly permits such transactions .

*4.1.2.2.3 Prohibition on selling specific items one does not own*

The prohibition on selling specific items one does not own refers to two situations:[113]

Selling a specific item that the seller does not yet own, which belongs to someone else. In this case, the seller first buys the item to acquire it and then delivers it to the buyer.

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[107] See *Fairness* (n 89) vol 11, 103–4; *Kashaaf Alqinae* (n 82) vol 3, 164; *Aid to the Doctrine of the Scholar of Medina* (n 92) vol 2, 978.
[108] A guaranteed-to-occur sale that is described and capable of being delivered. See *Informing the Signatories about the Lord of the Worlds* (n 85) vol 3, 193.
[109] See *Fairness* (n 89) vol 11, 103; *Kashaaf Alqinae* (n 82) vol 3, 164.
[110] See *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 207; *Talents of Galilee in a Brief Explanation of Khalil* (n 82) vol 4, 514; Al-Nawawi (n 82) vol 12, 343; *Kashaaf Alqinae* (n 82) vol 3, 288; *Almughaniy* (n 91) vol 3, 496; *Mabsout* (n 103) vol 12, 124; *The Crown and the Crown* (n 103) vol 6, 476; *Aid to the Doctrine of the Scholar of Medina* (n 92) vol 2, 983.
[111] *Translation of the Meanings of the Noble Quran into the English Language* (n 95) 80.
[112] Bulugh al-Maram, Book 7, Hadith 857 <https://sunnah.com/bulugh/7/91>.
[113] *Informing the Signatories about the Lord of the Worlds* (n 85) vol 3, 193.

Attempting to sell something that the seller cannot deliver, even if it involves a debt.

Revisiting the Hadith on *Salam*, Islamic scholars have laid out certain conditions and requirements related to this type of transaction. These conditions are meant to ensure transparency and fairness in the contract. Some critical conditions for *Salam* include:[114]

(i) The Goods Must Be Specifiable: The goods to be delivered in a *Salam* contract should be capable of being specifically described. This means that the type of goods and their measure, weight, and other essential characteristics should be clearly defined.

(ii) Deferral for a Specific Period: The contract should specify a specific period or deadline for the goods to be delivered to the buyer.

(iii) Determining the Consideration: The contract should establish the consideration for the goods, whether monetary or something else. This consideration is typically paid in full during the contract session (Majles Aleaqd).[115]

(iv) Disclosure of Essential Characteristics: The essential characteristics of the goods to be delivered must be disclosed. This includes details that are relevant to the transaction.

(v) Place of Fulfilment (optional): While some scholars argue that the place of fulfilment should be disclosed to prevent potential disputes, the majority do not require this disclosure. The reason is that it is not mentioned in the Qur'an or the Sunnah, and disputes related to it do not affect the validity of the contract.[116]

(vi) Avoiding Usury: The price and the valuer must not be combined in a way that would constitute usury. In other words, the transaction should not involve interest or usurious practices. For example, the transaction

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[114] *The Crown and the Crown* (n 103) vol 6, 476 and after; *Mabsout* (n 103) vol 12, 124 and after; *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 212 and after. *Kashaaf Alqinae* (n 82) vol 3, 289 and after.

[115] This will be discussed in detail below in: 5.2 Consumers' payment obligation.

[116] This will be discussed in detail below in: 4.2 Obligation to transfer sale ownership and deliver a product or service.

> should involve exchanging money for goods, not an interest-based loan.[117]

In summary, the sale of goods that are not owned by the seller but are indefinite themselves and disclosed is permissible, akin to the concept of *Salam* in Islamic jurisprudence. This is based on the consensus of the schools of thought, and specific verses from the Qur'an and Hadith support this permissibility. It differs from the prohibited sale of specific items that the seller does not own. However, a *Salam* contract in Islamic law should meet these conditions to ensure that it is in compliance with Islamic principles. These conditions are designed to protect the interests of both parties and maintain fairness in the transaction.

#### *4.1.2.3 Solutions for non-compliance with the disclosure obligation*

Solutions for non-compliance with the disclosure obligation all involve application of the Islamic law concept of 'option'. As mentioned in the introduction to this chapter, the term 'option' in *Fiqh* is most often used in conjunction with other words to denote specific types of option. However, in general, the option is the right of a contracting party to either annul or continue the contract based on legal justifications or contractual agreements.[118] Thus, in regard to solutions for non-compliance with the disclosure obligation, application of the option concept relates primarily to termination of the contract of sale or service.

In Islamic law, electronic contracts may involve four key options related to disclosure: the option of the defect (*khiar aleib*), the option of deception or fraud (*altadlisi*), the option of seeing (*alruwyah*), and the option of the absence of the attribute (*Khalaf alsifah*).[119] These four options are each described here in regard to how they can be applied to the disclosure obligation.

The option of defect allows the buyer to exercise the right to cancel the contract if any flaw leads to a decrease in the value of the sold item.[120] Defects that warrant the

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[117] This will be discussed in detail below in: 5.2 Consumers' payment obligation.

[118] *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 20; *The Option and its Effect on Contracts* (n 76) 42.

[119] In this section, the focus will be on the Khalaf alsifah option; because it is most closely related to the topic of disclosure, while the other options have a stronger connection to other issues that will be addressed later.

[120] *Fairness* (n 89) vol 11, 366.

application of this option are broadly defined as anything causing a decrease in value and price according to the customary practices of merchants.[121] Consequently, if the seller fails to disclose information about the product that would reduce its value, even if the essential details have been provided, the buyer retains the right to cancel the contract under this option.[122] This ensures that buyers are protected when essential information affecting the value of the item is not adequately disclosed by the seller.

The option of deception involves a seller engaging in actions to raise the selling price artificially.[123] Scholars have derived the basis for this option from the hadith: 'Do not go out to meet the riders, and do not bind the udders of camels and sheep. Whoever has bought anything in that manner has two choices: If he wishes, he may keep it, or return it; if he wants to, he may return it, along with a *Sa* of dates'.[124] According to jurists, if the sold item does not meet the required quality and description, it is considered a deficiency in the sale. In such cases, the buyer retains the right to either cancel the contract or proceed with it, and the seller is not entitled to object to this decision.[125] This option is applicable when the seller intentionally provides incorrect information to inflate the price of the goods. Consequently, if a buyer purchases goods based on a description provided by the seller that turns out to be false, the buyer has the right to cancel the contract.[126]

The translation of '*alruwyah*' into English is quite difficult, and the term 'seeing' is used here to indicate a mismatch between a given description and the actuality when the product is seen by the buyer. In other words, it involves selling a product with a specified description which does not match the actual product. This right to annulment arises from the failure to meet the required description outlined by the contracting party in the contractual arrangement.[127] The required description is not precisely what the buyer stipulated. If, by custom, goods are known by a specific description, the buyer

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[121] *Tuhfat al-Fuqaha* (n 84) vol 2, 93.
[122] The defect option is addressed below in: 4.3 Obligation to provide an e-sale warranty.
[123] *Fairness* (n 89) vol 4, 398.
[124] Sunan an-Nasa'I, Book 44, Hadith 39 <https://sunnah.com/nasai:4487>.
[125] *Fairness* (n 89) vol 4, 101; Haider (n 77) 305; *Kashaaf Alqinae* (n 82) vol 7, 337; *Almughaniy* (n 91) vol 3, 496; *Mabsout* (n 103) vol 15, 93; النووي [Al-Nawawi], المجموع شرح المهذب [*Al-Majmoo' Sharh Al-Muhadhab*] (دار الفكر [Dar Al-Fikr]) 210 ('*Al-Majmoo' Sharh Al-Muhadhab*'); *The Crown and the Crown* (n 103) vol 6, 476; *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 212.
[126] Haider (n 77) 305.
[127] *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 20, 157; *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 39, 268.

can cancel the contract if this known description is not matched in a particular feature, regardless of whether the buyer expressly stipulated it in the contract.[128] This principle is grounded in the legal maxim: 'What is known as the custom among the people is like what is written as a condition in the contract' ('*almaeruf earfan kalmashrut shartan*').[129]

If the description is absent or falls short, the question arises: what if the description is present and exceeds what the buyer described or stipulated? According to some scholars, the option is not valid for the buyer in such cases because the option is recognised only for a decrease, not an increase.[130] However, others provide a more nuanced explanation: if the difference in characteristics fails to fulfil the buyer's intention, they argue that the buyer has the right to cancel the contract.[131] In situations where the seller and the buyer disagree about the description of the goods and lack evidence, some scholars believe that the seller's claim is correct.[132] Yet, others argue that the correct stance is what the buyer asserts because the fundamental principle is that the buyer is absolved from the sale unless the seller's claims are proven by evidence or a suitable substitute.[133] This perspective aligns more closely with the obligation of the seller to disclose, and if they fail to do so or cannot provide evidence, they should assume responsibility based on the principle of '*almufrit damin*'—negligent guarantees.[134]

Ultimately, the absence of the description only grants the buyer the option to return or accept the item; however, it does not entitle the buyer to accept the sold item at a

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[128] Haider (n 77) 305.

[129] لجنة مكونة من عدة علماء وفقهاء في الخلافة العثمانية [A Committee Composed of Several Scholars and Jurists in the Ottoman Caliphate], مجلة الأحكام العدلية [*Journal of Judicial Laws*] (نور محمد [Noor Muhammad, Karachi]) Article 42, 44. This rule is stated in the Saudi *Civil Transactions Law* (Royal Decree No M/191 dated 2023) art 720 ('*Civil Transactions Law*').

[130] *Aid to the Doctrine of the Scholar of Medina* (n 92) vol 2, 979–80; *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 20, 104.

[131] Haider (n 77) 307.

[132] Ibid 305.

[133] *Almughaniy* (n 91) vol 3, 496; *Kashaaf Alqinae* (n 82) vol 7, 165, 299.

[134] Whoever fails to protect or take care of what or those under his control until they are lost or destroyed is in debt and liable for what was lost or destroyed due to his negligence. See محمد آل بورنو [Muhammad Al-Borno], *مُوْسُوعَة القَواعِد الفِقْهِيَّة [Encyclopedia of Jurisprudential Rules],* ( مؤسسة الرسالة، بيروت [Al-Resala Foundation- Beirut, 1st ed, 2003) vol 10, 788 ('*Encyclopedia of Jurisprudential Rules*').

reduced price unless returning it is impossible due to a valid excuse; the right to accept the item at a reduced price would be established in such cases.[135]

*4.1.2.3.1 Some conditions regarding absence of a required adjective in a sale according to Islamic law*

The validity of these descriptions is contingent upon specific conditions outlined in the previously discussed legal framework. The product descriptions considered[140] acceptable in Islamic law must meet the following criteria:

(i) Permissibility: The product description is permissible and does not involve anything forbidden or prohibited by Islamic law.

(ii) Absence of Uncertainty (Gharar): The product should not lead to uncertainty or ambiguity (Gharar), which is forbidden in Islamic law.

(iii) Presence of the Promised Characteristic: The promised characteristic must be present in the contract or its various stages.

(iv) Conformity to Established Norms: The desired feature should align with society's established norms and reasonable expectations.

### *4.1.3 Section conclusion*

Having addressed the provisions of Saudi and Islamic law regarding e-disclosure, one can conclude that the fundamental idea and foundation of the concept of disclosure are there for both Saudi and Islamic law, so the basic principle is identical. However, Saudi law applies specific rules regarding ID disclosure; for example, it obligates the service provider to disclose some information about electronic stores or requires a license or permit for professions subject to a specific regulation. In contrast, Islamic law does not state these rules; nevertheless, one of the conditions of a requirement for contracting parties in Islamic law is eligibility (*al'ahlia*), and e-service providers can only be recognised as eligible if they disclose their ID. Therefore, although there are some slight differences between Saudi and Islamic law in that Saudi law states more requirements regarding the ID in e-commerce, Islamic law still can include them because they are not against its principles; indeed, it can count them under considered interests (*almaslahat almursala*) which are acceptable to it.

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[135] Haider (n 77) 305.

Regarding the features of the products and services that are obligated to be disclosed, both laws require some information in detail, whilst also stating a comprehensive condition that involves the disclosure of the product's core feature that makes it flexible for any change in the future. However, Islamic law is more profound regarding the product's core feature and interprets it as that every piece of information can change the price or purpose of paying and, depending on whether it exists or not, decrease or increase the desire for paying. The most remarkable dissimilarity between Islamic and Saudi law is that all four schools forbid selling a specific not-owned thing, whether disclosed or not, whereas Saudi law does not address this issue in any way. Nevertheless, it may be because Saudi lawmakers see all e-sellers as owning what they will sell or selling a disclosed product that can provide disclosure because there are many like it. In all cases, this issue can be addressed from a logical and legal perspective, which is that if Saudi e-commerce law has no provision regarding an issue, it refers to Saudi civil law and this law, if it also has no provision, then it is stated that the most appropriate provisions derived from Islamic law are to be applied to this issue.[136] In conclusion, Saudi legislators regulate e-disclosure by specific provisions that make it modern and keep pace with electronic developments. Fortunately, they are compatible with traditional Islamic law principles.

## 4.2 Obligation to transfer sale ownership and deliver a product or service

This section considers both Saudi and Islamic law in reference to the obligation to transfer sale ownership and deliver a product or service to the customer when engaging in e-commerce. Section 4.2.1 addresses Saudi law and section 4.2.2 addresses Islamic law.

### *4.2.1 Obligation to transfer sale ownership and deliver a product or service: Saudi law*

This section focuses on the Saudi law applicable to the transfer of sale ownership (section 4.2.1.1) and delivery of products or services to the customer (4.2.1.2).

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[136] *Electronic Commerce Law* (n 19) art 24; *Civil Transactions Law* (n 129) art 1.

#### *4.2.1.1 Obligation to transfer sale ownership*

The Saudi e-commerce law does not initially address the obligation to transfer ownership from the seller to the buyer.[137] Therefore, it must be governed by the Saudi *Civil Transactions Law*, as that is the reference if no particular statement addresses a specific issue in electronic commerce.[138] Due to the importance of the obligation to transfer ownership from the seller to the buyer, the Saudi regulator makes it the seller's first obligation,[139] and states that the ownership of the sold item shall be transferred to the buyer upon the conclusion of the sale.[140] However, the Saudi regulator distinguishes between two forms of sale. In the first case, where the sale is precisely specified, the contract transfers ownership.[141] In the second case, where the sale is defined by the category of goods, rather than being precisely specified, the ownership only transfers by its separation from others in that category.[142] Consequently, the sale being made randomly is acceptable, and the transfer of ownership is not prevented, even if in the future the price will be determined based on an estimate of the specific sold item.[143] Nevertheless, here, Saudi law conflicts with Islamic law in that both random sale and undetermined price during the transaction are considered as uncertainty (Garar) transactions which are forbidden in *Fiqh*.[144]

It is notable that Saudi law sets the condition that the seller should own the sale when concluding the contract to transfer ownership.[145] Inevitably, that limits e-transactions and puts various difficulties in the path of e-contract parties, as some e-transactions nowadays are items not owned by the seller during the contract. Interestingly, Islamic law allows this selling but under a few conditions.[146] It may address this issue by saying that Saudi law does not disallow this transaction but only regulates the ownership transfer. Consequently, if the seller sells an unowned item, it is a legally acceptable

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[137] *Electronic Commerce Law* (n 19)*; Civil Transactions Law* (n 129) art 1.
[138] *Electronic Commerce Law* (n 19) art 24; *Civil Transactions Law* (n 129) art 1.
[139] *Civil Transactions Law* (n 129) arts 318–44, governing the seller's obligations.
[140] Ibid art 318/1.
[141] Ibid art 656/1.
[142] Ibid art 656/2.
[143] Ibid art 318/2.
[144] This issue will be addressed deeply below in: 5.2 Consumers' payment obligation. One reasonable question appears: What law is applied in this case? This question needs to be logically and philosophically answered; it will also be addressed profoundly in the payment obligation section.
[145] *Civil Transactions Law* (n 129) art 655.
[146] See above in: 4.1 Obligation to inform other parties (disclosure).

transaction, but the ownership only transfers to the consumer once the seller owns that item.

In any case, the seller is obligated to do what is necessary on his or her part to transfer ownership of the item sold to the buyer and to refrain from any action that would make the transfer of ownership impossible or difficult.[147] Nevertheless, the seller can stipulate to suspend the transfer of ownership to the buyer until the buyer has paid the full price, even if the sold item is delivered.[148] So when the seller receives the full payment, the buyer's ownership will be determined from that point in time.[149]

In conclusion, if a regulatory text stipulates a procedure for transferring ownership and other real rights, they will only be transferred once that procedure is completed.[150] As e-commerce law does not mention transferring ownership, civil transactions law governs this matter. Based on that, it is the e-seller's responsibility to transfer ownership of the item sold to the buyer and to avoid any action preventing the transfer of ownership. On the one hand, the e-contract transfers ownership when the sale is precisely specified. On the other hand, when it is a category of goods that defines an e-sale, rather than an explicitly specified item, ownership is only transferred when it is separated from other items. However, even if the item has already been delivered, the e-seller can set the condition that the transfer of ownership to the buyer will be delayed until the total price is paid.

#### *4.2.1.2 Obligation to deliver a product or service*

This section considers the Saudi law relating to five key aspects of obligation in regard to product or service delivery. Products can include any material item sold electronically, while a service 'is any physical or intellectual activity performed by a service provider for a consumer'.[151] The variety of such services has increased in reality, from rental of diverse items to tele-health sessions, and some, especially rental services, have been widely adopted. The five aspects of obligation regarding product or service delivery are: the process, timing, place and cost of delivery, and the consequences of failure to deliver a product or service.

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[147] *Civil Transactions Law* (n 129) art 319.
[148] Ibid art 320/1.
[149] Ibid art 320/2.
[150] Ibid art 657.
[151] See *Draft Consumer Protection Law* (n 33) art 1.

*4.2.1.2.1 Process of delivery*

The obligation to transfer a real right includes the obligation to deliver the item and preserve it until it is delivered.[152] The delivery of the sold item shall be by placing it in possession of the buyer or by the seller leaving the sold item to the buyer so that he or she can possess it and benefit from it without any objection, as long as the seller has informed the buyer of this, and that this delivery is in a manner consistent with the nature of the sold item.[153] The text seems to lack specificity regarding the delivery method, and it is proposed here that the determination of the nature of delivery should be either linked to customary practices or addressed through the establishment of general rules for various types of sales. This suggests a need for the Saudi regulator to clarify this matter, either by referencing standard business practices or by formulating overarching guidelines that can be applied to different types of sales transactions. However, the e-seller is obligated by e-commerce law to inform the consumer regarding the delivery arrangement and the implementation of the e-contract.[154] Also, it is the seller's responsibility to deliver the sold item to the buyer in the same condition as at the time of sale.[155] The Saudi regulator appears to emphasise the obligation of the seller to deliver the item in the condition it was in before or at the time of sale. However, a potential regulatory gap is identified: the sold item might suffer damage or breakage before completion of the contract, especially if the buyer has specified that repairs or improvements should be made before delivery. This raises concerns about addressing such situations within the existing regulatory framework. Nevertheless, the perceived gap in the legal text could be addressed by relying on the principles outlined in the option of condition *khiar alshart*[156] or defect *khiar aleayb*.[157] This implies that if the buyer specifies a particular condition for the delivered item or if the item has a defect unknown to the buyer at the time of the contract, the buyer retains the right to void the contract.

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[152] *Civil Transactions Law* (n 129) art 166.
[153] Ibid art 324.
[154] *Electronic Commerce Law* (n 19) art 7/E.
[155] *Civil Transactions Law* (n 129) art 321/1.
[156] See ibid arts 197–203. This option will be addressed in detail below in: 4.5 Obligation to ensure right of recourse.
[157] See ibid arts 330–44. This option will be addressed in detail below in: 4.3 Obligation to provide an e-sale warranty.

The seller is obligated to deliver the sold item including delivering the sold item without any rights to a third party that the buyer is unaware of being the seller's obligation.[158] Moreover, the delivery of the sale includes everything that comes with it and what are commonly understood to be accessories to the sold item, even if it is not explicitly mentioned in the contract.[159] Unless otherwise specified, it is considered delivery when the buyer possesses the sold item before the sale, regardless of the capacity or reason of the buyer's possession.[160]

The Saudi regulator expanded the concept of acceptability of delivery. For example, if both transaction parties agree in a particular case, the buyer will be considered to have received the item.[161] The same applies if a legal provision deems the buyer to have received the item sold in a particular situation.[162] It applies furthermore in the case where the seller retains the sold item after the sale for a reason other than ownership with the buyer's consent.[163] However, in all these cases, unfair situations can be caused by the e-seller exploiting the consumer's weaknesses; for instance, he or she may state in the contract that delivery is complete once signed, but at the same time, they intend not to deliver the sale. Nevertheless, a contract that was concluded by adhesion and had arbitrary conditions like this can be amended or exempted by the court based on what is called for by justice, as any agreement that is contrary to that will be null and void.[164]

On the other hand, in rental contracts, the regulations governing the delivery of the sale and its accessories are typically applicable to the lease delivery unless explicitly specified otherwise.[165] The act of surrender, in this context, grants the tenant the right to enjoy and utilise the leased property without any impediments throughout the entire duration of the lease.[166] Consequently, the lessor is obligated to provide the leased property and its associated features in a condition that facilitates the full realisation of the intended benefits.[167] Nevertheless, the lessor retains the right to withhold delivery

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[158] Ibid art 321/2.
[159] Ibid art 322.
[160] Ibid art 325.
[161] Ibid art 326/A.
[162] Ibid art 326/B.
[163] Ibid art 326/C.
[164] Ibid art 96.
[165] Ibid art 418.
[166] Ibid art 416/2.
[167] Ibid art 416/1.

until the agreed-upon advance rental payment is collected.[168] It is important to note that rent is not deemed payable for any period that transpires before the leased property is delivered, except in cases where the delay in delivery is attributable to the lessee.[169] Although this protects the consumer, fairness will still take time to be achieved.

In summary, the delivery obligation of an electronic service provider is enforceable and is contingent on the characteristics of the item being sold or leased. The e-service provider is obliged to communicate the delivery details to the consumer or lessee. Furthermore, the provider must ensure the delivery of the purchased item, free from any right to a third-party claim unknown to the buyer. Lastly, the electronic service provider is mandated to furnish the sold item or leased property along with its associated components, encompassing the delivery of the item, its accessories, connected elements, and anything conventionally regarded as part of the sold item or lessor, even if not explicitly mentioned in the contract.

*4.2.1.2.2 Timing of delivery*

The Saudi Arabian *Electronic Commerce Law* has stipulated regulations concerning delivery timing, obliging the e-service provider to communicate the delivery schedule to the consumer during the contract.[170] Furthermore, the law mandates the provider to furnish the consumer with an invoice post-contract, incorporating the delivery date.[171] However, while addressing the obligation to inform consumers about the delivery date, these regulations are notably broad and do not encompass various other pertinent issues. As a result, the e-commerce law delegates authority to its implementation regulations to address these additional concerns.[172] In this context, the implementation regulations require the service provider to notify the consumer of the carrier's name responsible for delivering the product and the tracking data for the delivery route, if any.[173] It is worth noting that the language used, particularly the phrase ‘if any,’ may

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[168] Ibid art 417.
[169] Ibid art 429/2.
[170] *Electronic Commerce Law* (n 19) art 7/E; *Implementing Regulations of the E-Commerce Law* (n 22) art 7/E; *Draft Consumer Protection Law* (n 33) art 28/1/H.
[171] *Electronic Commerce Law* (n 19) art 8; *Implementing Regulations of the E-Commerce Law* (n 22) art 8/F.
[172] *Electronic Commerce Law* (n 19) art 8.
[173] *Implementing Regulations of the E-Commerce Law* (n 22) art 8/G.

not unequivocally compel the service provider to disclose information about the carrier and delivery route tracking data, potentially allowing the provider to evade this obligation.

The *Electronic Commerce Law* lacks explicit provisions regarding the specification of a delivery time between parties in e-commerce transactions when left unspecified. This creates an overlap between the *Electronic Commerce Law* and the *Civil Transactions Law*. The former grants the consumer the right to cancel a contract if the service provider fails to deliver within fifteen days of its conclusion.[174] Conversely, the *Civil Transactions Law* vests the court with the authority to determine the delivery time, based on the request of either contract parties, considering the tradition and the nature of the transaction.[175]

This legal landscape introduces uncertainty in e-commercial transactions where a contract may lack a specified delivery period. In such cases, one of the parties might file a lawsuit, prompting the court to determine the delivery time and obligating the parties to adhere to its decision.

In contrast, the *Draft Consumer Protection Law*[176] addresses this issue more clearly by mandating the service provider to deliver within fifteen days of contract conclusion.[177] The consumer can cancel the contract if the service provider fails to meet this timeframe.[178] This formulation establishes a normative delivery period of fifteen days unless the parties specify a different timeframe.[179] Notably, this formulation precludes either party from initiating legal proceedings to determine the delivery time. This approach is considered advantageous as it proactively specifies a delivery period, reducing the likelihood of disputes. It is better to oblige the service provider to deliver by a determined time than merely to grant the consumer the right to cancel the contract after a determined time. This current process is reliant on the existence of another law that authorises the court, upon the request of one of the

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[174] *Electronic Commerce Law* (n 19) art 14/1. See *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 26.
[175] *Civil Transactions Law* (n 129) art 276.
[176] *Draft Consumer Protection Law* (n 33).
[177] Ibid art 32/1.
[178] Ibid art 32/3.
[179] Ibid art 32/1.

parties to the contract, to determine the delivery time, which will lead to unstable transactions.

The *Draft Consumer Protection Law* permits the contracting parties to mutually agree to cancel a consumer's right to terminate the contract in case of a delay, a provision not explicitly stated in the *Electronic Commerce Law*.[180] This flexibility may introduce the risk of exploitation by a service provider acting in bad faith, as they could intentionally cause indefinite delays. To address this concern, it is recommended that Saudi lawmakers eliminate the option for parties to waive the consumer's right to cancel the contract in the case of a delay. If there are concerns about fairness to the service provider, an alternative approach could involve adjusting the period for cancellation. For instance, the period could be extended to twenty-one days. Crucially, the regulator should disallow the possibility of an agreement that forfeits the consumer's right to cancel, especially when such an arrangement could be exploited by a service provider acting in bad faith. If the regulator aims to protect service providers from force majeure circumstances, it can explicitly state such a condition that absolves them of responsibility for delivery delays. This approach ensures a fair balance between consumer protection and the legitimate concerns of service providers.

In the event of contract termination, the service provider must refund the consumer for the product or service, including any associated costs resulting from the delay, unless the delay is attributed to force majeure.[181] However, the current law lacks clarity on the timeframe for the refund process, potentially giving rise to disputes. A proposed solution to this issue is found in the *Draft Consumer Protection Law*, which specifies a period for the reimbursement—within a maximum of fourteen days from the date of notification of the cancellation.[182] This provision ensures a clear and reasonable timeframe for consumers to receive their refunds, reducing ambiguity and potential conflicts.

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[180] Ibid art 32/3.
[181] *Electronic Commerce Law* (n 19) art 14/1.
[182] *Draft Consumer Protection Law* (n 33) art 32/4.

Finally, the service provider is obligated to inform the consumer of any expected delays or difficulties that would have a material impact on the completion of the delivery or performance of the contract and the expected delivery date or performance.[183]

*4.2.1.2.3 Place of delivery*

The obligation to provide the consumer with an invoice for the place of delivery upon the contract's conclusion is an essential aspect of e-commerce.[184] While the current e-commerce law grants its regulations power to detail various provisions, including those related to delivery, it does not explicitly address the place of delivery.[185] It is advisable for Saudi lawmakers to consider incorporating relevant provisions on this matter in the proposed consumer protection draft.

One crucial scenario left unaddressed is when the delivery place is not specified. In such cases, the *Civil Transactions Law* provides guidance by distinguishing between contractual and non-contractual obligations. If the obligation is contractual and the subject is not precisely specified, delivery should occur where the obligation arose.[186] For non-contractual obligations, delivery can be at the seller's domicile at the time of fulfilment or where they conduct business if the obligation is related to that business.[187]

When applying these rules to e-commerce, distinctions can be made between instant and non-immediate communication means. In the case of instant communication, the delivery place may be considered the service provider's location or where they conduct business if the obligation is business-related. The delivery place may default to the consumer's domicile for non-immediate communication unless the product is precisely specific. In this case, it should be delivered where it is located when the obligation arises. Addressing these scenarios in the consumer protection draft would clarify and enhance the legal framework for e-commerce transactions.

*4.2.1.2.4 Cost of delivery*

The *Electronic Commerce Law*, its implementing regulations, and the *Draft Consumer Protection Law* do not address who bears the cost of delivery: the service provider or

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[183] *Electronic Commerce Law* (n 19) art 14/2; *Draft Consumer Protection Law* (n 33) art 32/2.
[184] *Electronic Commerce Law* (n 19) art 8.
[185] *Implementing Regulations of the E-Commerce Law* (n 22) art 8.
[186] *Civil Transactions Law* (n 129) art 277/A.
[187] *Civil Transactions Law* (n 129) art 277/B.

the consumer. All they require is that the service provider informs the consumer of any delivery cost before the contract[188] and provides a receipt that includes the delivery price, if any.[189] Nevertheless, more than these texts are needed to address the delivery cost issue. For example, the service provider may not, whether intentionally or unintentionally, inform the consumer of the delivery price before the contract, and it is also possible that he or she may provide a receipt to the consumer that does not include the delivery price. The *Draft Consumer Protection Law* prohibits the service provider from engaging in misleading practices, including concealing the price of the product or service, including any additional amounts.[190] Undoubtedly, concealing the delivery cost falls under these prohibited practices, but more is needed to resolve the issue regarding who is obligated to bear the cost of delivery. A solution is needed here, primarily since the *Electronic Commerce Law* requires addressing the obligation to provide information regarding the cost of the delivery and preventing concealment of this cost yet does not oblige the seller or buyer to bear the cost of delivery.

The *Civil Transactions Law* can address this deficiency in the *Electronic Commerce Law*. In this context, Article 123 stipulates that the seller shall bear the expenses of delivering the sold item unless otherwise agreed upon.[191] Therefore, the delivery cost generally falls on the service provider unless the consumer agrees with the service provider to pay during the e-transaction.

*4.2.1.2.5 Responsibility for failure of delivery*

Because of the complexity of this topic, failure in product delivery and failure in service delivery are treated separately.

*4.2.1.2.5.1 Responsibility for failure in product delivery*

Unfortunately, neither the *Electronic Commerce Law* nor its implementing regulations address the consequences of non-delivery. However, the *Draft Consumer Protection Law*, which will replace the *Electronic Commerce Law,*[192] does address the

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[188] *Electronic Commerce Law* (n 19) art 7/D; *Implementing Regulations of the E-Commerce Law* (n 22) art 7/1/B; *Draft Consumer Protection Law* (n 33) art 28/H.
[189] *Electronic Commerce Law* (n 19) art 8; *Implementing Regulations of the E-Commerce Law* (n 22) art 8/D.
[190] *Draft Consumer Protection Law* (n 33) art 18/D.
[191] *Civil Transactions Law* (n 129) art 321/1.
[192] *Draft Consumer Protection Law* (n 33) art 82.

consequences of non-delivery of the product.[193] Firstly, the draft makes the economic operator[194] (service provider) take responsibility for the loss of a product before it is delivered to the consumer or whoever he or she appoints or delegates to the service provider.[195] Secondly, the consumer bears the consequences of the failure of the product, if it is received by a carrier appointed by him or her without a recommendation from the service provider.[196] Nevertheless, restricting delivery with a recommendation by the service provider to bear responsibility may be a legal solution to absolve themselves of responsibility for the loss or destruction of any product before delivery, as the service provider may refrain from recommending any carrier. In such a case, consumers are forced to choose a carrier themselves, and if the product is lost or damaged, the responsibility will be on them because the service provider did not recommend this carrier. Undoubtedly, this does not protect the consumer, so the Saudi regulator should have required the service provider to recommend at least two carriers.

Nevertheless, these provisions are brief and only cover some delivery cases, so it may be unfair to place responsibility on one of the e-commerce parties without detailing the cases more than what is contained in the draft. Therefore, the regulatory vacuum in e-commerce must be filled by returning to the *Civil Transactions Law*, especially since it does not conflict with the e-commerce texts.[197] Based on that, the buyer is considered to have received the sold item and is obligated to pay the price if the sold item is destroyed or damaged before delivery by their action and if the seller has the right to renounce the contract; they have recourse to the buyer for compensation.[198] On the other hand, if the product or part of it is destroyed before delivery by the action of the seller or a third party, the buyer has the right to request annulment of the sale or to continue it and request compensation to the person who caused the loss, or to request

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[193] Ibid art 33.
[194] Economic Operator: A person with a natural or legal status, private or public, who carries out a commercial, industrial, professional, or craft activity, and provides a service to the consumer, or produces, manufactures, imports, exports, sells, rents, displays, distributes, or markets a product with the aim of providing it to the consumer, dealing, or Contracting with him, by any means, including electronic means. See *Draft Consumer Protection Law* (n 33) art 1.
[195] Ibid art 33/1. See *Civil Transactions Law* (n 129) art 166/1.
[196] *Draft Consumer Protection Law* (n 33) art 33/2.
[197] *Civil Transactions Law* (n 129) art 1.
[198] Ibid art 327.

annulment for the part that is destroyed only.[199] Likewise, if the merchandise is destroyed before delivery due to a reason beyond the control of any of the contract parties or a third party, the sale is annulled, and the buyer returns the price.[200]

However, what if part but not all of the sold item is lost? Then, the sale is annulled for that part, the buyer recovers the corresponding price for it, and the buyer has the right to request cancellation of the sale for the remainder and retrieve the total price.[201]

Nonetheless, if the consumer does not pay the price of the sold item to the service provider, then according to the seller's satisfaction, if they agree to postpone payment, the loss is on them.[202] On the other hand, if they do not accept, they have the right not to deliver the sold item, so if it is lost or damaged, then it is the consumer's responsibility.[203]

Nevertheless, supposing the buyer receives the sold item before paying the spot price with the seller's knowledge and does not prevent him, in that case, this is an authorisation to take delivery, so the buyer bears the liability.[204] However, if the buyer receives the sold item before paying the due price without the seller's permission, the seller has the right to return it. If it perishes or is damaged in the hands of the buyer, the buyer is considered to have received it, and if the seller chooses to return it, the seller has the right to demand compensation from the buyer.[205]

*4.2.1.2.5.2 Responsibility for failure in service delivery*

The absence of specific provisions regarding the consequences of the loss or damage of rented items in the *Electronic Commerce Law*, its implementing regulations, and the *Draft Consumer Protection Law* necessitates a reliance on the *Civil Transactions Law*. While the *Civil Transactions Law* generally applies the provisions on the delivery of sold property and its accessories to the delivery of leased property and its

[199] Ibid art 328.
[200] Ibid art 329/1.
[201] Ibid art 329/2.
[202] Ibid art 346/1.
[203] Ibid art 346/2.
[204] Ibid art 347/1.
[205] Ibid art 347/2.

accessories,[206] service (lease) contracts have unique characteristics, especially when compared to sales contracts.

In the event that the leased item is completely destroyed during the lease period, the contract is automatically terminated.[207] However, suppose the leased item is partially destroyed or rendered less beneficial during the lease period, and the lessee is not at fault. In that case, they may request either the cancellation of the contract or a rent reduction.[208] If the loss results from the owner's mistake, they are obliged to restore the item to its original condition, and the right to use returns to the beneficiary.[209]

Possessors in good faith are not obligated to compensate for losses or damages beyond the benefit they gained from the item.[210] On the other hand, possessors in bad faith are responsible for damages even if they were not within their control, unless they can prove that the destruction or damage would have occurred even if the item were under the owner's control.[211]

The usufruct right ends with the destruction of the item, and if compensation is paid, the usufruct right is transferred to the compensation.[212] The beneficiary must return the item or its replacement after the usufruct right expires.[213] However, if the beneficiary, through transgression or negligence, destroys or damages the item, they are obligated to compensate for the loss.[214]

Additionally, the beneficiary is obligated to compensate if the item is destroyed or damaged after the benefit period expires, and they do not return it to the owner, even if the item is not used after the period; this obligation remains unless it is proven that the item would have perished or been damaged even if returned to the owner.[215] These principles provide a framework for dealing with the consequences of loss or damage in service (lease) contracts, and their application ensures fairness and accountability in e-commerce transactions.

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[206] Ibid art 418.
[207] Ibid art 420.
[208] Ibid art 421.
[209] Ibid art 691/2.
[210] Ibid art 678/1.
[211] Ibid art 678/2.
[212] Ibid art 691/1.
[213] Ibid.
[214] Ibid art 685.
[215] Ibid art 686.

### *4.2.2 Obligation to transfer sale ownership and deliver a product or service: Islamic law*

This section focuses on the Islamic law applicable to the transfer of sale ownership (section 4.2.2.1) and delivery of products or services to the customer (section 4.2.2.2).

#### *4.2.2.1 Obligation to transfer sale ownership*

In Islamic jurisprudence, ownership is transferred when the contract (sale) is finalised.[216] Since the transaction leads to the transfer of ownership, it is transferred through the contract.[217] The transfer of ownership is carried out through the contract itself, and it is not dependent on the delivery of the sold item.[218] This means that when a buyer and seller conclude an electronic contract, ownership of the sold item is transferred to the buyer, while the seller owns the money received. Similarly, the tenant has the benefit of the leased object by the concluding of the contract.[219] However, if the contract includes an option for either the buyer or the seller to cancel the sale, this issue is subject to disagreement among the four Islamic schools about the time of ownership transfer.[220]

Therefore, the transfer of ownership will result in the following:[221]

A. The buyer will receive any excess amount resulting from the sale, even if they have not yet taken possession of the item. This means that after the contract is concluded, any profit made from the sale will belong to the buyer.

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[216] *Kashaaf Alqinae* (n 82) vol 7, 426; *Talents of Galilee in a Brief Explanation of Khalil* (n 82) vol 4, 229; *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 9, 36; عبد القادر الشيباني [Abdul Qadir Al-Shaybani], *نيل المآرب بشرح دليل الطالب* [*Achieving Purposes by Explaining the Student's Guide*] (مكتبة الفلاح، الكويت [Al-Falah Bookstore, Kuwait], 1st ed, 1983) vol 1, 345; أبو بكر الصقلي [Abu Bakr Muhammad Al-Siqilli], *الجامع لمسائل المدونة* [*The Container of the Blog Issues*] (دار الفكر [Dar Al-Fikr], 1st ed, 2013) vol 20, 75.

[217] أبو يعلى الحنبلي [Abu Ya'la Al-Hanbali], *التعليقة الكبيرة في مسائل الخلاف علي مذهب أحمد* [*The Great Commentary on Issues of Controversy over the Doctrine of Ahmad*] (دار النوادر [Dar Al-Nawader], 1st ed, 2010) vol 3, 64.

[218] *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 9, 36.

[219] ابن قدامة المقدسي [bin Qudama al-Maqdisi], *الشرح الكبير* [*The Big Explanation*] (هجر، القاهرة [Hajar, Cairo], 1st ed, 1995) vol 14, 437 ('*The Big Explanation*'). The upcoming chapter (Chapter 5: Consumer obligations in e-commerce under Saudi and Islamic law) will delve deeper into the payment obligation, including rent time.

[220] Most e-transactions have the option to terminate the contract except a few mentioned by law, so these issues will be addressed profoundly below in: 4.5 Obligation to ensure right of recourse.

[221] See *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 9, 36–7; Haider (n 77) 297; عبد الكريم اللاحم [Abdul Karim Al-Lahim], *المطلع على دقائق زاد المستقنع [Al-Mati'a fi Dhaqa'at Zad Al-Mustaqna'in "Financial Transactions"]* (دار كنوز إشبيليا- الرياض [Dar Kunooz Ishbilia - Riyadh], 1st ed, 2008) vol 1, 71.

B. In case the sale is delivered, the buyer's actions regarding the item sold and the seller's actions regarding the price are considerable (measurable).[222]

C. If the item is not delivered to the buyer, and the seller becomes bankrupt or dies, the buyer has the right to claim the item over all other creditors. In this case, the item sold is considered a trust in the hands of the seller and is not part of the estate.

D. In the case where the sold item is destroyed, the consequence is on the buyer unless the item requires delivery.[223]

E. The buyer will be responsible for any damage caused by the sold item. For example, if the sold item is an animal and it causes harm, the buyer is responsible for the damage.

F. If there are any expenses related to the sold item, such as care for a tree, the buyer will be responsible for these expenses.[224]

Interestingly, Islamic law and Saudi law differ in three major cases regarding ownership transfer, resulting in contrasting outcomes.[225] Firstly, in Islamic law, ownership is transferred to the buyer even if the seller does not own the item sold but it must merely be described and not specified.[226]

Secondly, in Islamic law, the transfer of ownership is like that of debts, which does not require receipt or separation from similar items.[227] In other words, by analogy, if it is acceptable for the money to be considered a debt, then it is also acceptable for the

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[222] The buyer's action before possession will be addressed deeply below in: 5.2 Consumers' payment obligation.

[223] This issue is examined below in: 4.2.2.2.5 Responsibility for failure of delivery.

[224] See below in: 4.2.2.2.4 Cost of delivery.

[225] At the conclusion of this obligation, this will be explained, and some examples of different outcomes will be shown.

[226] To understand the provisions of Islamic law regarding the scenario where the seller does not own the goods and the conditions under which it is deemed acceptable, please see above in: 4.1.2.2.2 Seller does not own the goods.

[227] Al-Hanbali (n 217) vol 3, 63; علاء الدين البخاري [Aladdin Al-Bukhari], *كشف الأسرار عن أصول فخر الإسلام البزدوي* [*Revealing the Secrets about the Origins of Fakhr al-Islam al-Bazdawi*], (شركة الصحافة العثمانية- إسطنبول [Ottoman Press Company, Istanbul], 1st ed, 1890) vol 4, 297; See *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 9, 37; دبيان الدبيان [ Debian Al-Debian], *المعاملات المالية أصالة ومعاصرة [Authentic and Contemporary Financial Transactions]* (2nd ed, 1432AD (2011AD)) vol 13, 522 ('*Authentic and Contemporary Financial Transactions*'); أحمد الأنصاري [Ahmed Al-Ansar], *كفاية النبيه في شرح التنبيه [The Sufficiency of the Observant in Explaining the Warning]* (دار الكتب العلمية [Scientific Books House], 1st ed, 2009) vol 5, 195 ('*The Sufficiency of the Observant in Explaining the Warning*').

sold item to be viewed as a debt since it is one of the two exchanges, so whatever is permissible for money should also be permissible for the sold item.[228] For instance, if a buyer purchases a known amount of a specific quantity of rice, their ownership of the rice exists, but their share of that quantity is not determined until the delivery; by analogy, the money is not specified by itself when it is an existing debt until repayment.[229] In this case, the buyer owns the rice and the quantity even if they do not receive it, just as when the debtor owes money for the creditor in debt.

This is supported by the fact that most jurists widely acknowledge that *zakat*[230] is payable by the buyer,[231] indicating that the sold item ownership has left the seller and been directed to the buyer. However, some Islamic scholars consider this as incomplete ownership unless the buyer ultimately acquires and holds the sold item.[232] Similarly, the validity of the transfer of sold items which have been described but not separated out is supported by the fact that the monetary worth of the item sold in the liability may be exchangeable because its meaning is its value, not itself.[233] Also, assuming that the sold item has yet to be transferred to the buyer, it would mean that both the money and the sold item are under the seller's ownership, which is not a correct assumption.[234]

The third main difference between Saudi and Islamic law on transferring ownership relates to allowing postponed ownership transfer after the signing of the contract. As mentioned previously,[235] in Saudi law, the seller has the right to delay the transfer of ownership to the buyer until they have paid the total price, even if the item has already been delivered. Only at the time of payment receipt by the seller will the buyer's ownership be fulfilled. In contrast, under Islamic law, the seller is not allowed to keep

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[228] *Authentic and Contemporary Financial Transactions* (n 227) vol 8, 27; محمد العثيمين [Muhammad Al-Othaimeen], *الشرح الممتع على زاد المستقنع* [*Interesting Explanation of the Person who has Acquired Contentment*], (دار ابن الجوزي [Dar Ibn Al-Jawzi], 1st ed, 1422AH [2001AD]) vol 8, 289.

[229] *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 9, 37.

[230] A form of Islamic charity.

[231] *Kashaaf Alqinae* (n 82) vol 4, 318–23; النووي [Al-Nawawi], روضة الطالبين وعمدة المفتين [Kindergarten of Students and Mayor of Muftis], (المكتب الإسلامي [The Islamic Office], 3rd ed, 1991) vol 2, 193. There are different opinions and provisions about the zakat, for more information see same references.

[232] Al-Nawawi (n 231) vol 2, 193.

[233] *Encyclopedia of Jurisprudential Rules* (n 134) vol 8, 409.

[234] Al-Hanbali (n 217) vol 3, 69.

[235] *Civil Transactions Law* (n 129) arts 320/1–2.

ownership of the item sold until the deferred price is paid or another specified date.[236] As per the requirements of the contract, the seller must transfer ownership of the sold item upon sale.[237] However, the condition of retaining ownership until all instalments are paid or at any other time goes against the core of the sale contract as it prevents the transfer of ownership in the event of a sale.[238] In addition, the seller has agreed to waive their right to immediate payment, thereby not stopping the purchaser from having the right to own the sold commodity.[239]

Moreover, selling a commodity in instalments while retaining ownership is considered Gharar (uncertainty) in two ways; firstly, if the buyer fails to pay one of the instalments, they may lose all the price they paid for the commodity under the pretext that what was presented was rent, not price and that the condition of ownership was not fulfilled, which is a clear example of Gharar.[240] Secondly, the nature of the contract in this form will not be determined until after the last obligatory instalment is paid, which creates hesitancy between selling and leasing, so the sale may or may not occur, which can be seen as an act of uncertainty.[241] Despite being a controversial topic, some prior Hanbalis and several Islamic jurisprudence councils have recently accepted a possible solution to this issue, which involves mortgaging the item sold to the seller.[242] The seller has the option to stipulate a condition that the buyer must mortgage the item to him against the deferred price after acquiring it in person or in a constructive manner.[243]

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[236] *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 9, 37; 1(6) *Journal of the Islamic Fiqh Council* 193; 2(7) *Journal of the Islamic Fiqh Council* 9; Resolution No 51 (6/2).
[237] *Kashaaf Alqinae* (n 82) vol 7, 402.
[238] Accounting and Auditing Organisation for Islamic Financial Institutions, *Legitimate Standards* (المعايير الشرعية) (King Fhad, 2015) Standard 39 ('*Legitimate Standards*'); *Authentic and Contemporary Financial Transactions* (n 227) vol 9, 531.
[239] *Tuhfat al-Fuqaha* (n 84) vol 2, 41; *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 250; *Kashaaf Alqinae* (n 82) vol 7, 489.
[240] *Authentic and Contemporary Financial Transactions* (n 227) vol 9, 531–2.
[241] Ibid 532.
[242] *Almughaniy* (n 91) vol 6, 504; 1(6) *Journal of the Islamic Fiqh Council* 193; 2(7) *Journal of the Islamic Fiqh Council* 9; Resolution No 51 (6/2); *Legitimate Standards* (n 238) Standard 39.
[243] *Legitimate Standards* (n 238) Standard 39-3/2/7. For more information see *Almughaniy* (n 91) vol 6, 504–5.

### *4.2.2.2 Obligation to deliver a product or service*

The five aspects of obligation regarding product or service delivery are: the process, timing, place and cost of delivery, and the consequences of failure to deliver a product or service.

#### *4.2.2.2.1 Process of delivery*

Islamic law jurists provide detailed provisions regarding the possession of goods during a sale (*Qabd*), which includes various purchase types. However, possession can also refer to the empowerment of transfer, abandonment of sale, and the removal of any hurdles in delivering the sold item as per customary practice.[244] In other words, the four schools of thought relate possession to the customary practice of the sale delivery and this means that possession is considered correct when it aligns with the norm followed by members of the society, or at least the majority of them in that particular place.[245] That is because every concept normally has a definition in Islamic law or language, but where it does not, its interpretation is based on people's customs, such as the possession mentioned in hadiths.[246] In general, the jurists of Islamic jurisprudence in the modern era have followed the same principle, stipulating that things differ in how they are received depending on their condition and the differences in customs regarding what constitutes receiving them.[247] However, Islamic law distinguishes between possession in the sale of movable and immovable property.

In short, it can be generally said that Islamic law takes the following position. Actual possession of the immovable property is achieved through the transfer of ownership and the allowable transactions within it.[248] Actual possession of movable property is established through physical delivery. Constructive possession[249] of movable

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[244] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 148.

[245] Al-Nawawi (n 82) vol 3, 516; *Almughaniy* (n 91) vol 6, 188; *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 9, 132; الرافعي القزويني [Al-Rafi'i Al-Qazwini], *الشرح الكبير* [*Al-Sharh Al-Kabir*] (Dar Al-Kutub Al-Ilmiyyah, Beirut – Lebanon, 1st ed, 1997) vol 4, 305 ('*Al-Sharh Al-Kabir*'); منصور البهوتي [Mansour Al-Bahuti], *الروض المربع بشرح زاد المستقنع* [*Al-Rawd Al-Murabba', Explained by Zad Al-Mustaqni*'], ( دار ركائز للنشر [Rakaez Publishing House - Kuwait], 1st ed, 2017) vol 2, 264.

[246] ابن تيمية [Ibn Taymiyyah], *مجموع الفتاوى* [*Total Fatwas*], (مجمع الملك فهد لطباعة المصحف الشريف [King Fahd Complex for the Printing of the Holy Qur'an - Saudi Arabia], 2004) vol 29, 16 ('*Total Fatwas*'); Al-Bahuti (n 245) vol 2, 264.

[247] 1(6) *Journal of the Islamic Fiqh Council* 453; Resolution No 53 (6/4); *Legitimate Standards* (n 238) Standard 18: 3.

[248] *Legitimate Standards* (n 238) Standard 18: 3/1.

[249] According to Islamic jurists, constructive possession takes the place of actual possession even if it is not real possession in reality. See *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 32, 262.

property, whether a known or described liability, is established after its ascertainment through one of the known methods.[250] The possessor relinquishes the object to the entitled person, enabling them to take possession without hindrance, even if no transportation or transmission has occurred.[251] This applies to things acquired by hand in practice or delivered through customary units of measurement such as cubic measure, weight or linear measure, or commodities to which these measures do not apply; in the latter case, the sale is made by estimate.[252]

Therefore, according to the strict Sharia sense, possession (*Qabd*) is achieved through accepted methods of actual and constructive possession in e-contracts.[253] Moreover, if the sold commodity is computer software or similar goods, possession in the Sharia sense is attained when the purchaser downloads the software or data from the website to their personal computer after signing the contract.[254]

*4.2.2.2.2 Timing of delivery*

According to the basic principle of Islamic law, a sale is expedited basically,[255] meaning that the seller delivers the item immediately. However, in most electronic commerce transactions, delivery takes time. Therefore, permissible sales in Islamic law are divided into two categories: the sale of goods, where the seller owns the goods, and the sale of indefinite goods, where the seller does not.[256] One of the conditions for the latter is determining the delivery date.[257] In the case where the seller owns the goods, there is a disagreement between the four schools of thought regarding whether or not to accept an agreed-upon postponed delivery.[258] However, the more correct opinion is that it is permissible, as several pieces of evidence support it.[259] First of

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[250] *Legitimate Standards* (n 238) Standard 18: 3/2–3; 1(6) *Journal of the Islamic Fiqh Council* 453; Resolution No 53 (6/4).
[251] *Legitimate Standards* (n 238) Standard 18: 3/2–3; 1(6) *Journal of the Islamic Fiqh Council* 453; Resolution No 53 (6/4).
[252] *Legitimate Standards* (n 238) Standard 18: 3/2–3; 1(6) *Journal of the Islamic Fiqh Council* 453; Resolution No 53 (6/4).
[253] *Legitimate Standards* (n 238) Standard 38: 7/2.
[254] Ibid Standard 38: 7/3.
[255] Haider (n 77) 232.
[256] See above in: 4.1.2.2 Core features of the product or service; Seller owns the goods (absentee sale) and Seller does not own the goods: (a) sale of specific goods, and (b) sale of indefinite goods.
[257] For more details see above in: 4.1.2.2.2 Seller does not own the goods.
[258] *Almughaniy* (n 91) vol 6, 166; *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 2, 20.
[259] *Almughaniy* (n 91) vol 6, 166; *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 2, 20.

these is, ‘O you who believe! Fulfil (your) obligations’;[260] also, ‘fulfil (every) covenant. Verily, the covenant will be questioned about’. [261] Moreover, the explicit hadith that shows this is an acceptable transaction is that narrated by Jabir bin 'Abdullah (RA): I was travelling on a camel of mine which had become exhausted, so I intended to let it go free. The Prophet (ﷺ) followed me and made supplication for me and struck it. Then, it went as it had never done before. He then said, ‘Sell it to me for one Uqiya.’ I replied, ‘No.’ He again said, ‘Sell it to me.’ So, I sold it to him for one Uqiya. However, I stipulated that I should be allowed to ride it home. Then, when I reached (home), I took the camel to him, and he paid me its price in cash. I then went back, and he sent someone after me. (When I came), he said, ‘Do you think that I asked you to reduce the value of your camel's price to take it? Take your camel and your money, for it is yours.’[262] Consequently, from an Islamic law perspective, it is correct for the e-seller to agree with the consumer to specify a future delivery time for the sale.[263]

Finally, if the seller and buyer do not specify a time for delivery and the delivery is not immediate, then the situation is returned to the norm, which is that the immediate sale is deferred or instalments for a known term, and the immediate sale ends at that time.[264] However, the Saudi *Electronic Commerce Law* gives the consumer the right to terminate the contract if the delivery is delayed 15 days.[265] Hence, the norm is inappropriate here because the law is over the norm unless the law is against Islamic law.

*4.2.2.2.3 Place of delivery*

In immediate traditional sales, the item is handed over to the buyer immediately after the sale, hence the place of delivery is the same as the place of sale.[266] However, sales usually occur remotely in electronic commerce, making delivery more complicated. There are several situations that need to be considered. Suppose both

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[260] *Translation of the Meanings of the Noble Quran into the English Language* (n 95) 181 (Chapter 5 verse 1).
[261] Ibid 479 (Chapter 17 verse 34).
[262] [Agreed upon; and this is Muslim wording], Bulugh al-Maram, Book 7, Hadith 788 <https://sunnah.com/bulugh/7/5>.
[263] Delaying the delivery of certain products is not acceptable on some occasions. Section 5.2 Consumers’ payment obligation below will specifically address this.
[264] Haider (n 77) 232.
[265] *Electronic Commerce Law* (n 19) art 14/1. See *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 26.
[266] *The Sufficiency of the Observant in Explaining the Warning* (n 227) vol 8, 446.

parties to an electronic contract agree on the place of delivery; in that case, the agreed-upon place will be considered the place of delivery.[267] Some scholars believe that if delivery is not possible at the place of the contract or if delivery involves a cost, it is obligatory to specify the place to avoid any disputes that may arise.[268] However, the more accurate opinion is that specifying the place is not obligatory,[269] as the Prophet Muhammad does not mention the necessity of specifying the place in the hadith of *Salam*.[270] Even though it is essential, specifying the place is not considered a core element of the contract.[271] The first opinion holds that the contract is invalid if the place is not specified,[272] while the second opinion holds that the contract is valid. However, suppose the place of delivery is not specified between the parties to the contract. In that case, some believe that delivery occurs at the place of the contract because it was concluded there,[273] while others believe that the custom determines the place.[274] For instance, in a country where it is customary for the seller to deliver the sold product to the buyer, the buyer should expect the seller to do so.[275]

*4.2.2.2.4 Cost of delivery*

Islamic jurists have agreed that the seller is responsible for the cost of completing a sale, which includes the weight or measurement of the sold item and bringing it to the place of sale.[276] This is because the sale can only be considered complete with it, and Islamic law states that any obligation cannot be done without an item; this is obligatory (*ma la yatimu alwajib ala bih fahu wajib*).[277] For instance, if a person in Adelaide buys

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[267] علي اللخمي [Ali Al-Lakhmi], *التبصرة* [*Insight*], (وزارة الأوقاف والشؤون الإسلامية، قطر [Ministry of Endowments and Islamic Affairs, Qatar], 1st ed, 2011) vol 7, 2972; Haider (n 77) 270; *The Sufficiency of the Observant in Explaining the Warning* (n 227) vol 8, 447.

[268] *Fairness* (n 89) vol 12, 290; *The Big Explanation* (n 219) vol 12, 292.

[269] Haider (n 77) 269; *Fairness* (n 89) vol 12, 240; *The Sufficiency of the Observant in Explaining the Warning* (n 227) vol 8, 447.

[270] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 213.

[271] Ibid; Haider (n 77) 414.

[272] Haider (n 77) 414.

[273] Al-Lakhmi (n 267) 2971; إبراهيم الشيرازي [Ibrahim Al-Shirazi], *المهذب* [*Al-Muhadhdhab*], (دار الكتب العلمية [Scientific Books House]) vol 2, 77.

[274] Haider (n 77) 272; Al-Lakhmi (n 267) 2972.

[275] Haider (n 77) 272.

[276] *Almughaniy* (n 91) vol 6, 188; *The Sufficiency of the Observant in Explaining the Warning* (n 227) vol 8, 447; *Legitimate Standards* (n 238) 510, Standard 18; Haider (n 77) 271; كمال الدين السيواسي (ابن الهمام الحنفي [Kamal al-Din al-Siwasi (Ibn Hammam al-Hanafi)], فتح القدير على الهداية [*Fath al-Qadeer for Guidance*] (دار الفكر، لبنان [Dar Al-Fikr, Lebanon], 1st ed, 1970) vol 6, 296 ('*Fath al-Qadeer for Guidance*').

[277] *Almughaniy* (n 91) vol 4, 13; *Legitimate Standards* (n 238) 510, Standard 18.

a car from an Australian dealer who purchased the car from Japan, the Australian dealer must bring the car to Adelaide.

However, the situation is different in electronic commerce, where the goods are delivered to the buyer's location instead of the place of sale. There are two cases here: the parties agree or do not agree on the delivery cost during the contract. If they agree, it will be considered as agreed upon in their contract.[278] If they disagree or do not mention it, the decision will be based on custom.[279] If the country's custom is that the delivery cost is on the seller, it will be the seller's responsibility.[280] Without agreement or custom, it will be the buyer's responsibility.[281] This contradicts Saudi law, which states that the seller is responsible for the delivery cost in case of disagreement.[282]

*4.2.2.2.5 Responsibility for failure of delivery*[283]

Because the provisions of failure in product and service delivery are slightly different, they will be addressed individually.

A. Responsibility for failure in product delivery: As previously mentioned, most e-commerce transactions do not involve the immediate sale of a product or service. This section will focus on transactions where the product or service is absent or only described. The four schools of Islamic jurisprudence agree that once the buyer takes possession of the sold item, they are responsible for any damage or loss incurred.[284] Also, if the buyer causes the damage or loss, they must pay for it, and the sale is not annulled, even if they have yet to pay for the item.[285] If a buyer destroys an item, it is considered taking possession of it; in other words, the buyer cannot rightfully destroy it unless s/he has

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[278] See the evidence on the timing of delivery. *Legitimate Standards* (n 238) 511, Standard 18.
[279] Haider (n 77) 272.
[280] Ibid.
[281] *Almughaniy* (n 91) vol 6, 188; *Kashaaf Alqinae* (n 82) vol 7, 503; Haider (n 77) 272; *The Sufficiency of the Observant in Explaining the Warning* (n 227) vol 8, 447.
[282] *Civil Transactions Law* (n 129) art 321. The solution to this problem will be presented at the conclusion of this chapter.
[283] This subsection requires an introduction to warranty (yad aldaman w yad al'amanh) in Islamic law to better understand it. Note: If it is stated that the consequences of loss or damage of a sold item are either on the seller or buyer, and a third party causes the loss or damage of the item that has been sold, it does not necessarily mean that the third party has no obligation to compensate.
[284] *Almughaniy* (n 91) vol 6, 186; Haider (n 77) 278; أبو بكر محمد السرخسي [Muhammad Al-Sarkhasi], أصول السرخسي [*Origins of Al-Sarkhasi*] (لجنة إحياء المعارف النعمانية بالهند [Committee for the Revival of Numani Knowledge, India], 1975) vol 2, 282.
[285] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 539; *Tuhfat al-Fuqaha* (n 84) vol 2, 41; Al-Sarkhasi (n 284) 282.

possession.[286] However, if the loss occurs before the buyer receives the item and is caused by the seller or a third party, then the provisions of the sale differ depending on whether the item was absent or described. If the sale is absent and the item is lost before the buyer receives it, the seller bears the responsibility for the loss, the sale is annulled, and the seller must return any payment received from the buyer.[287] This is because if the contract is continued despite the seller's inability to deliver the item sold, the buyer cannot demand payment for an undeliverable item. In such a scenario, the contract becomes void, and the sale is cancelled.[288] In contrast, if the item is described and is destroyed before the buyer takes possession of it, the seller is also responsible for the loss,[289] but the sale is not annulled; instead, the seller must provide a replacement for the item sold.[290] That is because the seller's liability is committed to a debt (a described sale) until it is delivered to the buyer.[291] To illustrate this difference, the following are considered examples: if the seller sells a specific car that is known to both parties, meaning there is only one of it, or it is known by itself to them, and it is destroyed before the buyer takes possession of it, then the contract is annulled, and the seller must refund the money. However, suppose the seller sells a car that matches certain specifications but is not a specific car, and then it is destroyed before the buyer takes possession of it. In that case, the seller must provide a replacement car that matches the agreed-upon specifications. It is worth noting that Saudi law does not distinguish between the two types of sales. According to Saudi law, the contract is annulled as soon as the item sold is destroyed, regardless of whether it was absent or described.[292] However, in my view the distinction

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[286] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 539.

[287] Haider (n 77) 275; ابن تيمية [Ibn Taymiyyah], درء تعارض العقل والنقل [*Preventing the Conflict of Reason and Scripture*], (جامعة الإمام محمد بن سعود [ Imam Muhammad bin Saud], 2nd ed, 1991) vol 9, 12 ('*Preventing the Conflict of Reason and Scripture*');

ابن قيم [Ibn Qayyim], تهذيب سنن أبي داود [*Tahdheeb Sunan Abu Dawud*], (دار عطاءات العلم [Dar Attaat Al-Ilm (Riyadh)], 2nd ed, 2019) vol 2, 492.

[288] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 538; *Preventing the Conflict of Reason and Scripture* (n 287) vol 9, 12.

[289] *Almughaniy* (n 91) vol 6, 186; Al-Nawawi (n 82) vol 3, 519; *Al-Sharh Al-Kabir* (n 245) vol 4, 307.

[290] *Kashaaf Alqinae* (n 82) vol 3, 120; *Preventing the Conflict of Reason and Scripture* (n 287) vol 9, 12.

[291] *Kashaaf Alqinae* (n 82) vol 7, 499.

[292] *Civil Transactions Law* (n 129) art 321.

made in Islamic jurisprudence should be followed, as it better serves the parties' desires. In the case of a specific sale, the buyer's desire is tied to that particular item, so if it is destroyed, no replacement can be made. On the other hand, in the case of a described sale, the buyer's desire is tied to the item's qualities, so as long as those qualities are met, the buyer's desire is fulfilled. In addition, the item for sale is similar to a debt.[293] The debtor is not required to return the money itself but rather the same quantity of cash.

B. Responsibility for failure in service delivery: In Sharia law, if the beneficiary misuses or neglects the rented items, they are responsible for the loss or damage that occurs.[294] However, if the beneficiary does not cause the loss, the type of a rented item determines what happens next between designated and described rented items.[295] Firstly, regarding the designated rented item if it is damaged before the beneficiary takes possession of it. In that case, the contract is cancelled, and the lessor bears the loss according to the agreement of the four schools; because the benefit is not received, it is like a sale that is not received.[296] There are variations when the rented item is destroyed after the beneficiary takes possession, depending on whether it is a complete or partial loss. If the destruction is complete, the correct opinion among Islamic jurists is that the contract is annulled, and the lessee pays the total amount of the rent up until the rented item was destroyed.[297] Because the benefit is taken gradually, when it is lost, it becomes non-existent and so cannot be delivered.[298] If the destruction is a partial loss, the beneficiary can choose between two

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[293] *Preventing the Conflict of Reason and Scripture* (n 287) vol 9, 12.

[294] See *Fath al-Qadeer for Guidance* (n 276) vol 9, 122; Haider (n 77) 275; *Almughaniy* (n 91) vol 5, 396; عبد الملك الجويني [Abd al-Malik al-Juwayni], نهاية المطلب في دراية المذهب [*The End of the Requirement in the Knowledge of the Doctrine*] (دار المنهاج [Dar Al-Minhaj], 1st ed, 2007) vol 8, 163 ('*The End of the Requirement in the Knowledge of the Doctrine*'); ابن النجار الفتوحي [Ibn Al-Najjar Al-Fotohi], شرح الكوكب المنير [*Explanation of the Bright Planet*] (مكتبة العبيكان [Obeikan Library], 2nd ed, 1997) vol 6, 172.

[295] محمد بن أحمد ابن رشد [Muhammad ibn Ahmad ibn Rushd], بداية المجتهد ونهاية المقتصد [*The Beginning of the Diligent and the End of the Frugal*] (دار الحديث - القاهرة [Dar al-Hadith - Cairo], 2004) vol 4, 13 ('*The Beginning of the Diligent and the End of the Frugal*'). Recommendation: Saudi lawmakers should follow Islamic law regarding distinguishing between particular and described rented items to be more flexible and fairer. See Responsibility for failure in product delivery.

[296] See ibid; *Total Fatwas* (n 246) vol 30, 288.

[297] *The Beginning of the Diligent and the End of the Frugal* (n 295) vol 4, 13; *Total Fatwas* (n 246) vol 30, 288; *Almughaniy* (n 91) vol 5, 337.

[298] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 4, 179.

pathways: cancellation or continuation of the contract.[299] As a result the rental item's benefit is not eradicated; thus, the beneficiary can still take advantage of the rental item.[300] In comparison, Saudi law, in this case, allows the beneficiary to request termination of the contract or a reduction in rent,[301] whereas in Islamic law, reducing the rental price for partial loss is not a standard practice.[302] A question may arise whether this agreement violates Islamic law where it does not exist. However, if both parties agree, such an arrangement can be acceptable. Sharia law is not violated when there is such mutual agreement, as it does not make lawful (*halal*) forbidden or unlawful (*haram*) allowed, and it is not contrary to the core of the contract. Thus, it can be acceptable according to the evidence of the necessity of adhering to the agreement between the two parties, which is one of the interests considered in Sharia.[303] Secondly, regarding the described rented item, according to most Islamic jurists, if a described rented item is lost, the owner must provide a replacement.[304] This is because the missing rental item is not subject to the contract; as it is not specified, the contract is based on benefits that are in the debt; thus, the lessor must provide an alternative.[305]

### *4.2.3 Section conclusion*

The seller must transfer ownership of the sold item to the buyer and refrain from any actions hindering this transfer. On the one hand, the electronic contract conveys ownership once the sale is clearly defined. Conversely, when an online sale is characterised by a type of product rather than a specifically identified item, ownership is transferred only when distinguished from other products. In comparison, in Islamic

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[299] *Almughaniy* (n 91) vol 5, 337; *Total Fatwas* (n 246) vol 30, 288–93; يحيى الشافعي [Yahya Al-Shafi'i], البيان في مذهب الإمام الشافعي [*Clarity of the Doctrine of Imam Al-Shafi'i*], (دار المنهاج - جدة [Dar Al-Minhaj - Jeddah], 1st ed, 2000) vol 7, 364 ('*Clarity of the Doctrine of Imam Al-Shafi'i*').

[300] *Total Fatwas* (n 246) vol 30, 289–93; *Clarity of the Doctrine of Imam Al-Shafi'i* (n 299) vol 7, 363; *Almughaniy* (n 91) vol 5, 337.

[301] *Civil Transactions Law* (n 129) art 421.

[302] Based on my personal knowledge and searches. However, Ibn Taymiyyah indicates that after the destruction of the rented items there are three provisions: cancellation, continuation and reduction in rent. See *Total Fatwas* (n 246) vol 30, 293.

[303] See above in: 4.2.2.2.2 Timing of delivery.

[304] *The Beginning of the Diligent and the End of the Frugal* (n 295) vol 4, 13; *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 4, 223; *Clarity of the Doctrine of Imam Al-Shafi'i* (n 299) vol 7, 364.

[305] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 4, 223; *Clarity of the Doctrine of Imam Al-Shafi'i* (n 299) vol 7, 364.

law, ownership is deemed to be conveyed at the moment the sale contract is completed. Therefore, when an e-contract is finalised between a buyer and seller, ownership of the item is transferred to the buyer, while the seller retains ownership of the payment received.

Nevertheless, if the contract provides an option for either party to annul the sale, this matter is a point of contention among the four Islamic schools regarding the timing of the ownership transfer. Generally, in Saudi and Islamic law, the delivery procedure is obligatory and depends on the specific traits of the item being sold or leased. However, regarding delivery timing, Saudi law mandates a 15-day delivery period. On the other hand, *Fiqh* sees that if the seller and buyer do not indicate a delivery timeframe and the delivery is not prompt, the situation defaults to whatever custom dictates. However, under the Saudi *Electronic Commerce Law*, a consumer can cancel the contract if the delivery is delayed for 15 days. Therefore, custom is not applicable in this context, as the law takes precedence over the norm unless the law contradicts Islamic law.

Islamic law considers the delivery location in traditional sales as the point of sale, relying on agreements or customary practices for more intricate situations such as e-commerce. In similar vein, Saudi law recognises the significance of mutual consent. While e-commerce transactions may not specify the delivery address directly, differences can be made between immediate and delayed communication methods. For immediate communication, the delivery address might be viewed as the location of the service provider or their business premises if the obligation pertains to a business. Conversely, for non-immediate communication, the delivery address defaults to the consumer's place of residence unless the product is explicitly defined. In these instances, the product should be delivered to its existing location when the obligation is triggered. Incorporating these situations in the consumer protection draft could elucidate and enhance the legal framework for e-commerce dealings. Lastly, concerning delivery addresses, while Islamic law offers a timeless solution through customary practices, both systems align on this issue but lack thorough provisions for resolving disputes arising from unclear delivery terms.

The seller is obligated for delivery costs under Islamic law until the point of sale. However, when the goods are sent to the buyer's location rather than the place of purchase, if delivery costs are agreed upon in the contract, those terms are accepted. If not mentioned or disputed, responsibility falls to local customs: if customs dictate

that the seller pays, they do; otherwise, the buyer is responsible. This differs from Saudi law, where the seller always bears delivery expenses in cases of disagreement.

Regarding liability for delivery failure, Saudi law largely mirrors Islamic law, but with two key distinctions. First, Islamic jurisprudence differentiates between a specific sale and a described sale. If a specifically designated item is absent and lost before delivery, the seller bears the responsibility, leading to the annulment of the sale. This is because, in a specific sale, the buyer's interest is tied to that exact item, and if it is destroyed, no substitute is available. Conversely, in a described sale, the seller is required to provide a replacement. Saudi law, however, does not make this distinction; under its legal framework, the contract is automatically voided if the sold item is destroyed.

The second difference concerns services. Saudi law follows a similar principle by allowing contract termination or rent reduction in cases of partial failure. In contrast, traditional Islamic law does not generally permit rent reductions for partial losses. However, it does allow such adjustments through mutual agreement, ensuring flexibility while preserving fundamental principles.

## 4.3 Obligation to provide an e-sale warranty

Warranty obligations are particularly important in e-commerce. The obligation to provide an e-sale warranty is addressed here in two sections, the first of which is the types and conditions of warranty in Saudi law, and the second of which is the provisions of Islamic law on a sale warranty and what options can be applied to it, which are discussed profoundly.

### *4.3.1 The warranty in e-commerce under Saudi law*

This section will cover three topics: types of warranties, warranty exemptions, and breach of warranty obligation.

#### *4.3.1.1 Types of warranties*

The following section pertains to warranties related to the goods or services themselves, or benefits derived from them. It does not cover issues related to

exposure or entitlement to a third party.[306] To make it easier to understand, this section will be divided into legal and additional (contractual) warranty.[307]

*4.3.1.1.1 Legal (statutory) warranty*

The Saudi *Electronic Commerce Law* stipulates a legal guarantee, but the text is brief and ambiguous,[308] making it impossible to perfectly define, enumerate, or address it. This creates a considerable regulatory vacuum in the legal environment. Fortunately, the *Draft Consumer Protection Law* has addressed these matters.[309] A general definition of legal guarantee can be concluded by saying that the economic operator guarantees that the product or service conforms to standards: standard specifications, and quality standards. Additionally, the product or service should conform to the terms of the agreement with the consumer prior to or within the contract or any statement or form issued by the economic operator.[310]

Moreover, the product and service should be free from defects. A defect is a deficiency in the quality, quantity, or efficiency of the service or product or a difference in its shape, size, or components resulting from an error in its design, manufacture, production, or method of presentation to the consumer.[311] A defect leads to harming or depriving the consumer, in whole or in part, from benefiting from the product or service. Nevertheless the defect must not arise from the consumer's behavior, whether directly or indirectly.[312]

However, the legal guarantee is much broader than what is mentioned here. It also includes conformity of quality, quantities, and other benefits known to be available in products or services of the same type, as well as the purposes for which products or services of the same type are used.[313] This is additional evidence that the Saudi

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[306] These warranties guarantee that the seller will not expose the buyer to any issues related to the sold item, and that no third party has any right to it. This is because such warranties are not typically used in electronic commercial transactions, which mostly involve delivered goods or services that the seller does not want to access or that no third party can claim rights to. See *Civil Transactions Law* (n 129) arts 330–1.

[307] Warranty in Advertising could be added. However, although advertising is part of a contract in Saudi law, I think it is not strongly relevant to the obligation between parties.

[308] *Electronic Commerce Law* (n 19) art 13/1.

[309] *Draft Consumer Protection Law* (n 33) art 49.

[310] Ibid art 6/H.

[311] Ibid art 1; *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 12.

[312] *Draft Consumer Protection Law* (n 33) art 1; *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 12.

[313] *Draft Consumer Protection Law* (n 33) art 49.

legislator considers custom to be one of the sources of obligations and applies it. Making it binding is one of the criteria in determining the warranty on the product and services. In addition, the economic operator's obligation includes a warranty in two cases of an installation error.[314] First, the sales contract stipulates that the economic operator is responsible for installing the product, or having the installation under his supervision, and is thus responsible for any error;[315] and second, if the consumer installs the product and makes a mistake due to incorrect installation instructions provided by the economic operator.[316]

Regarding the new legislation, the law obligates the economic operator to inform the consumer and provide him or her with updates to digital products, including the necessary protection updates to maintain compliance with legal guarantee requirements.[317]

The economic operator cannot evade his or her obligation in the legal guarantee as it remains in place for the benefit of the last consumer to whom ownership of the product is transferred, and any agreement to the contrary is void.[318] S/He remains responsible towards the consumer for any product warranty breach within at least two years from its delivery date.[319] Agreeing on a shorter warranty period for used goods is permissible, provided that it is not less than one year.[320] On the other hand, the economic operator is responsible in regard to the consumer for any breach of the service guarantee within at least one year from the date of its provision.[321]

It is possible to ask how to calculate the duration of a continuous service. Suppose the contract for the sale of digital products stipulates that the digital content or digital service will be continually provided to the consumer during a specific period. In that case, the economic operator will be liable for any breach of the warranty of this content or service within two years from the delivery date of the content or implementation of the service.[322] Suppose the contract stipulates that the content or service will be

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[314] Ibid art 50.
[315] Ibid art 50/1.
[316] Ibid art 50/2.
[317] Ibid art 49/2.
[318] Ibid art 49/4.
[319] Ibid art 50/1.
[320] Ibid.
[321] Ibid art 50/2.
[322] Ibid art 50/3.

provided continuously for over two years. In that case, the economic operator will be responsible for any breach of warranty that occurs during the period during which the content or service is supplied under the sales contract.[323]

*4.3.1.1.2 Additional (contractual) warranty*

The contractual guarantee is provided by the *Electronic Commerce Law*, but its text is limited and unclear, making it difficult to precisely define, specify or fully address it.[324] There is a conflict between the *Ministry of Commerce Guide to Consumer Rights and Responsibilities*[325] and the *Draft Consumer Protection Law* regarding the concept of an additional warranty. The *Guide* states that if a product covered by warranty experiences a defect and the commercial agent fails to meet maintenance work deadlines and requirements, they must provide an additional one-year warranty for the defect or malfunction after the original warranty period has expired.[326] On the other hand, the *Draft Consumer Protection Law* allows the economic operator to provide an additional guarantee during the contract, according to an independent guarantee document or through an electronic medium.[327] This creates an apparent contradiction in meaning, duration, and method. However, it is possible to combine the two, as both constitute an additional guarantee to the legal guarantee, albeit with a difference in meaning. To ensure stability in transactions and the legal environment and avoid disagreement, the Saudi project should have included the guarantee mentioned in the *Guide to Consumer Rights* in the *Draft Consumer Protection Law* along with what was mentioned.

When an economic operator offers an additional warranty, they must clearly indicate that it is separate from the legal guarantee,[328] even though it may be included in the additional warranty or make some exceptions to it. There is no cost to take advantage of the legal guarantee, while the additional guarantee does carry a cost. The terms of the additional guarantee are flexible and can be agreed upon by both parties. The economic operator must provide a document that includes their name and address, as

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[323] Ibid.
[324] *Electronic Commerce Law* (n 19) art 13/1.
[325] *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65).
[326] Ibid 14.
[327] *Draft Consumer Protection Law* (n 33) art 54/1.
[328] Ibid art 54/3.

well as the scope, duration, cost, and any exceptions.[329] Also, the consumer must follow the proper procedures to exercise their rights for the additional warranty.[330]

#### *4.3.1.2 Warranty exemptions[331]*

The *Electronic Commerce Law* includes only one scenario where the service provider (seller) can be excluded from a consumer's contract termination, which means the service provider is exempt from warranty if the defect is caused by the consumer's mishandling of the product.[332] However, the law does not refer to either of the two guarantee provisions mentioned previously,[333] which creates ambiguity and requires reference to general rules regarding defects. The general rules are deficient due to the difference between traditional and electronic transactions.

A seller is not responsible for any defect in the sold item if the buyer knew about it at the time of sale or if a reasonable person would have discovered it upon inspection.[334] However, the seller may be held responsible if they warrant to the buyer that the product is free from a particular defect or deliberately conceals such defect.[335] If customers accept the defect[336] or it occurs after delivery, the seller is not responsible unless the cause existed before delivery.[337] Moreover, the seller is not responsible if the sale was made at auction by judicial or administrative authorities.[338] A warranty claim against defects may be raised only within 180 days from the date of delivery of the sold item unless the seller's warranty extends beyond that period.[339] However, the seller may not claim that the warranty has lapsed if they fraudulently concealed the

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[329] Ibid art 54/2/C.
[330] Ibid art 54/2/D.
[331] This section will only cover topics related to warranty and not every exemption from recourse. It will intersect with the fifth commitment, which involves ensuring the right of recourse. A few differences will be mentioned below in: 4.5 Obligation to ensure right of recourse.
[332] *Electronic Commerce Law* (n 19) art 13/2/D. Many cases protect the service provider from returning the product or service; they will be addressed under the fifth obligation. See *Electronic Commerce Law* (n 19) art 13/2; *Implementing Regulations of the E-Commerce Law* (n 22) art 11.
[333] Meaning the legal and additional warranty: See *Electronic Commerce Law* (n 19) art 13/1.
[334] *Civil Transactions Law* (n 129) art 339/A. Or if the buyer accepts the defect. See *Civil Transactions Law* (n 129) art 341/1.
[335] *Civil Transactions Law* (n 129) art 339/A.
[336] Ibid 339/B.
[337] Ibid art 33/C.
[338] Ibid art 339/D. This comes in the *Implementing Regulations of the E-Commerce Law* (n 22) art 11/F. Compared to the *Civil Transactions Law* (n 129), there are slight differences in that the Implementing Regulations mention ‘at a public auction', not 'judicial or administrative authorities', meaning the Implementing Regulations are more general than civil law.
[339] *Civil Transactions Law* (n 129) art 343/1.

defect.[340] An agreement may be reached to exempt the seller from the warranty against defects or to limit or extend such warranty, but only if the seller has not intentionally hidden the flaws.[341]

Though these exemptions are not extended and may protect the buyer, they do not protect the consumer. Exempting the economic operator from the warranty in case of an agreement or a defect occurring after delivery would cause significant harm to the consumer. Also, this violates the *Draft Consumer Protection Law*, which states that the guarantee has a specific period of one or two years.[342] Whenever a defect occurs in a sale or service within a specific period, by law the economic operator is not exempted from responsibility, and it is not permissible to make an agreement about it because it is one of the imperative rules in the law. In a conflict between a general text, such as the *Civil Transactions Law*, and a particular text, such as a consumer protection draft, the specific text takes precedence over the general text.[343]

In case of a dispute about warranty exemption, it is better to adhere to the exemptions in the *Draft Consumer Protection Law*. Suppose the economic operator informs the consumer explicitly of a breach of warranty upon concluding the contract, and the consumer accepts this in writing. In that case, the economic operator is not held responsible.[344] Suppose the economic operator proves that the product or service is compatible with the warranty requirements and fit for use when delivered to the consumer. In that case, they are not held responsible either.[345] However, the last exemption contradicts the one- or two-years warranty period, which obligates the economic operator to warranty the product or the service for the consumer.[346] Saudi lawmakers must consider this contradiction when choosing between the warranty period or the exemption, whether the economic operator delivers the product or service in a way compatible with the warranty requirements and fit for purpose. Adding a warranty period is preferable because the defect may only appear after a delivery period, and it may be a significant defect. Therefore, the consumer must be protected,

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[340] Ibid art 343/2.
[341] Ibid art 343.
[342] *Draft Consumer Protection Law* (n 33) art 51.
[343] Considering that the *Draft Consumer Protection Law* (n 33) will be enforced.
[344] *Draft Consumer Protection Law* (n 33) art 52/A.
[345] Ibid art 52/B.
[346] Ibid art 51.

especially in electronic commerce, since contracts are conducted remotely, and the consumer is the weaker party.

#### *4.3.1.3 Breach of warranty obligation*

The *Electronic Commerce Law* states that consumers do not have the right to cancel a contract in many cases unless the service provider breaches the warranty obligation.[347] The consumer can terminate the contract if the product is not defective or meets the agreed specifications.[348] Similarly, cancelling the contract is an option for consumers if the software is not functioning correctly, cannot be downloaded, or does not comply with the agreed specifications.[349]

However, the issue with these texts is that their relevance to e-commerce law is insufficient, so they should not address the warranty obligation and address it in other laws; otherwise, they need to address the breach of the warranty obligation adequately and in several ways. Firstly, these texts link the guarantee only to agreed-upon specifications and do not take into consideration the legal specifications and conformity with approved or recognised standards.[350] This is a violation of the *Anti-Commercial Fraud Law* (Royal Decree M/19 dated 1429H (2008)) ('*Anti-Commercial Fraud Law*')[351] and the *Draft Consumer Protection Law*, which added protection for the consumer according to the agreed-upon or standard specifications.[352] Secondly, the breach of warranty is restricted to some defective products and programs only,[353] which therefore does not guarantee all products, or at least most of them, nor services in general. Thirdly, the period for cancelling the contract in the event of a defect is set to seven days after receiving the product,[354] which is a limitation as the defect may only be discovered after seven days. This period is also shorter than the period given

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[347] *Electronic Commerce Law* (n 19) art 13. The picture will be completed regarding the cancellation of the contract and its exemption after the fifth obligation (right of recourse).
[348] Ibid art 13/2/A.
[349] Ibid art 13/2/F.
[350] Ibid art 13/2/A-F.
[351] *Anti-Commercial Fraud Law* (Royal Decree M/19 dated 1429H (2008)) ('*Anti-Commercial Fraud Law*').
[352] See *Draft Consumer Protection Law* (n 33) art 49; *Implementing Regulations of the Anti-Commercial Fraud Law* (n 40) art 2; *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 5; *Ministry of Commerce Consumer Rights Guide – Arabic* (n 72) 15.
[353] *Electronic Commerce Law* (n 19) art 13/2/A-F.
[354] Ibid art 13/1.

to the traditional consumer, as the law gives them 30 days.[355] It would have been more appropriate to protect the electronic consumer more than the ordinary consumer or to provide them with the same protection, not less. Lastly, the text only provides a single solution – to terminate the contract – and does not diversify the solutions, such as replacing or repairing the product.[356]

Fortunately, the *Draft Consumer Protection Law* has avoided these problems. It obligates the economic operator to maintain their statutory warranty obligation.[357] In the event of a breach, solutions are arranged according to whether the breach was in a product or service. When a violation of the regulatory warranty occurs, the economic operator is obligated to repair, replace, or return the product and refund its value at no cost to the consumer, according to what the regulation specifies.[358]

On the other hand, the economic operator is obligated, in the event of a breach of the statutory guarantee, to refund the value of the service, compensate for the deficiency or perform it again properly according to what the regulation specifies.[359] The consumer has the right to claim compensation for damage resulting from a breach of warranty.[360] According to the regulations, the compensation claim is subject to three conditions: the responsibility for product fraud should not fall on the consumer, regardless of whether it occurs during shipping, storage, or misuse;[361] the consumer is required to provide the original invoices or receipts;[362] and within 15 days of the request, the consumer must be reimbursed for the cost of the fake product.[363]

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[355] Or more in three cases. See *Implementing Regulations of the Anti-Commercial Fraud Law* (n 40) art 12/B; *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 6; *Ministry of Commerce Consumer Rights Guide – Arabic* (n 72) 16.

[356] As *Draft Consumer Protection Law* (n 33) art 53 that is coming soon.

[357] Ibid.

[358] Ibid art 53/1.

[359] Ibid art 53/2.

[360] Ibid art 53/3. See *Implementing Regulations of the Anti-Commercial Fraud Law* (n 40) art 12/A; *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 6; *Ministry of Commerce Consumer Rights Guide – Arabic* (n 72) 16.

[361] See *Implementing Regulations of the Anti-Commercial Fraud Law* (n 40) art 12/C/1; *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 6; *Ministry of Commerce Consumer Rights Guide – Arabic* (n 72) 16.

[362] See *Implementing Regulations of the Anti-Commercial Fraud Law* (n 40) art 12/C/2; *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 6; *Ministry of Commerce Consumer Rights Guide – Arabic* (n 72) 16.

[363] See *Implementing Regulations of the Anti-Commercial Fraud Law* (n 40) art 12/C/3; *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 6; *Ministry of Commerce Consumer Rights Guide – Arabic* (n 72) 16.

To ensure that the warranty remains valid, it is important that the product does not malfunction due to misuse, negligence, failure to follow instructions, or damage.[364] The consumer must commit to regular maintenance as recommended by the manufacturer and must not be negligent in doing so.[365] Any malfunction should not be attributed to natural disasters, external factors, or force majeure.[366]

Finally, the consumer has the burden of proving that the reason for the contract has been terminated.[367] However, the agreement may be subject to the seller's (service provider's) exchange and return policy before terminating it.[368]

### *4.3.2 Islamic law provisions on a sale warranty and what options can be applied to it*

This section discusses warranty sales under Islamic law and is divided into three parts: the option for defects, warranty exemptions, and breaches of warranty obligations.

#### *4.3.2.1 The option for defects*

The warranty of a sale in Islamic law may encompass the option to address defects, which will be the focus of this section. The concept of defects is more comparable to warranty provisions in Saudi law than fraud *Tadlis*, as fraud is more closely associated with the disclosure obligation.[369]

Islamic jurisprudence does not address warranties in the same way that Saudi law does; instead, it addresses them by defining defect as anything that causes a reduction in value or price based on merchants' usual practices.[370] This unique approach to defects in Islamic law sets it apart from other legal systems, as it is designed to prevent an issue before it happens by warning the seller. Concealing a

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[364] *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 14; *Ministry of Commerce Consumer Rights Guide – Arabic* (n 72) 27.

[365] *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 14; *Ministry of Commerce Consumer Rights Guide – Arabic* (n 72) 27.

[366] *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 14; *Ministry of Commerce Consumer Rights Guide – Arabic* (n 72) 27.

[367] *Draft Consumer Protection Law* (n 33) art 41/3; *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 7; *Ministry of Commerce Consumer Rights Guide – Arabic* (n 72) 17.

[368] For more information see *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 17–23; *Ministry of Commerce Consumer Rights Guide – Arabic* (n 72) 33–41.

[369] See above: 4.1.2.3 Solutions for non-compliance with the disclosure obligation.

[370] *Tuhfat al-Fuqaha* (n 84) vol 2, 93; *Fairness* (n 89) vol 11, 366; *Kashaaf Alqinae* (n 82) vol 3, 215; الخطيب الشربيني [Al-Khatib al-Sharbini], مغني المحتاج [*Mughaniy Almuhtaj*] (دار الكتب العلمية [Dar al-Kutub al-Ilmiyyah], 1st ed, 1994) vol 2, 425 ('*Mughaniy Almuhtaj*'); Haider (n 77) 342; *The Crown and the Crown* (n 103) vol 6, 334.

defect in a sale is prohibited in *Sharia*, supported by various verses from the Qur'an and numerous hadiths that condemn fraud. For instance, the Qur'an states: 'O you who believe! Do not consume each other's wealth unjustly, except through mutual consent in trade.'[371] Additionally, the Prophet Muhammad said: 'Do not go out to meet the riders and do not tie the udders of camels and sheep. If anyone buys something under such circumstances, he has two choices: either keep it or return it, along with a *Sa* of dates.'[372]

Therefore, Islam strictly prohibits dishonest business practices and requires that the product be defect-free.[373] Sellers are expected to be honest and inform buyers if the product has any defects because concealing defects in sold goods or selling items that could harm people is forbidden in Islam.[374] In other words, in Islamic transactions, sellers are obliged to disclose any defects they are aware of to promote transparency in purchasing.[375]

Islamic law also upholds the rights of the buyer.[376] If any defects diminish the value of the item being sold, the buyer has the right to cancel the contract.[377] Alternatively, the buyer has the right to retain the purchased item by receiving compensation, known as *Arsh*, which represents the difference in value between the defective item and a fully functional item.[378] For instance, if a buyer purchases a mobile phone for two thousand dollars and discovers that its camera is broken, valued at five hundred dollars, the seller would compensate the buyer with five hundred dollars. This provision ensures the protection of consumer rights in Islamic transactions.

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[371] *Translation of the Meanings of the Noble Quran into the English Language* (n 95) 144 (Chapter 4 verse 29).
[372] Sunan an-Nasa'I, Book 44, Hadith 39 <https://sunnah.com/nasai:4487>.
[373] *Tuhfat al-Fuqaha* (n 84) vol 2, 93; Muhammad Hafiz Mohd Shukri, Rahmah Ismail and Ruzian Markom, 'Exploring the Relationship between Consumer Protection and Product Liability: Civil and Islamic Perspectives' (2024) 32 *Malaysian Journal of Consumer and Family Economics* 177.
[374] *Tuhfat al-Fuqaha* (n 84) vol 2, 93; Shukri, Ismail and Markom (n 373) 177; Haider (n 77) 337.
[375] Abdul Malek, Anju Man Ara Begum and Kazi Arshadul Hoque, 'Doctrine of "Caveat Emptor" (Buyer be aware) in Common Law and the Doctrine of "Khiyar al aib" (Option of defect) in Islamic Law: A Comparative Study' (2014) 10 & 11 *IIUC Studies* 201.
[376] For more details see below in: 4.3.2.3 Breaches of warranty obligations.
[377] *Tuhfat al-Fuqaha* (n 84) vol 2, 93; *Fairness* (n 89) vol 11, 375; *Kashaaf Alqinae* (n 82) vol 3, 218; Malek, Begum and Hoque (n 375); Niniek Mumpuni Sri Rejekia, 'Overview of the Concept of Khiyar Al Aib in E-Commerce Practice' (2022) 6(2) *Journal of Humanities and Social Studies* 218; Janos Jany, *Legal Traditions in Asia: History, Concepts and Laws* (Springer, 2020) 189.
[378] *Fairness* (n 89) vol 11, 375; *Kashaaf Alqinae* (n 82) vol 3, 218; Jany (n 377) 189.

To establish the right to a defect option *khiyar al-aib*, two conditions must be met: First, the buyer must not be aware of the defect in the sold item before the sale.[379] Second, the defect must have originated before the sale,[380] meaning the defect was present with the seller. Therefore, if the defect arises in the item before it is delivered to the buyer, the buyer is entitled to seek a remedy for the defect.[381]

When it comes to online buying and selling transactions, warranty issues can be addressed by applying the principles of *khiyar al-aib*.[382] This review of *khiyar al-aib* aims to clarify that the concept of seller obligations regarding warranty in Islamic law is applicable and can be effectively implemented in online trading transactions.[383]

#### *4.3.2.2 Warranty exemptions*

One reason for waiving the sale warranty under Islamic law is if the defect arises due to the buyer's actions, even before they have taken possession of the item.[384] Importantly, if the buyer accepts the defect—whether explicitly or implicitly—or if they acknowledge the defect and then choose to dispose of the item as an owner, they are demonstrating their understanding and knowledge, which may lead to the warranty being waived.[385]

However, scholars of Islamic jurisprudence have differing opinions on the issue of waiving the warranty in such circumstances.[386] Some argue that the seller is still responsible for guaranteeing the sale, even if the buyer opts to waive the right to claim defects.[387] This is because a release from unknown defects is not valid, just as a

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[379] *Fairness* (n 89) vol 11, 375; *Kashaaf Alqinae* (n 82) vol 3, 218; *Tuhfat al-Fuqaha* (n 84) vol 2, 99; *Mughaniy Almuhtaj* (n 370) vol 2, 425; *The End of the Requirement in the Knowledge of the Doctrine* (n 294) vol 12, 471; Sri Rejekia (n 377); Oussama Arabi, 'Al-Sanhūrī's Reconstruction of the Islamic Law of Contract Defects' (1995) 6(2) *Journal of Islamic Studies* 153.

[380] *Kashaaf Alqinae* (n 82) vol 3, 219; *Tuhfat al-Fuqaha* (n 84) vol 2, 100; *Mughaniy Almuhtaj* (n 370) vol 2, 425; *The End of the Requirement in the Knowledge of the Doctrine* (n 294) vol 12, 471.

[381] *Mughaniy Almuhtaj* (n 370) vol 2, 425.

[382] Sri Rejekia (n 377); Parviz Bagheri and Kamal Halili Hassan, 'The Application of the Khiyar al-'Aib (Option of Defect) Principle in On-Line Contracts and Consumer Rights' (2012) 33(3) *European Journal of Law and Economics* 565; Al Hashimi (n 83) 179.

[383] Sri Rejekia (n 377); Bagheri and Hassan (n 382); Al Hashimi (n 83) 179.

[384] *Mughaniy Almuhtaj* (n 370) vol 2, 425.

[385] *Tuhfat al-Fuqaha* (n 84) vol 2, 101; Jany (n 377) 189.

[386] Here will be mentioned the major two opinions, however, there a few different opinions in this issue. For more details see *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 20, 125–30; *Tuhfat al-Fuqaha* (n 84) vol 2, 102; *Talents of Galilee in a Brief Explanation of Khalil* (n 82) vol 4, 440.

[387] *Fairness* (n 89); vol 11, 377; *Tuhfat al-Fuqaha* (n 84) vol 2, 102.

release from unknown rights is invalid.[388] Similarly, acquittal implies ownership, but ownership of something unknown is also considered invalid.[389] The second opinion asserts that if the buyer chooses to waive their right to claim a defect, then this right is relinquished.[390] According to this view, the buyer's acceptance of the defect constitutes a waiver, and since this is their right, they can choose to waive it independently.[391]

#### *4.3.2.3 Breaches of warranty obligations*[392]

If a seller sells a defective product and the buyer has the option of the defect, what are the implications? Islamic jurists agree that the buyer has the right to cancel the sale, return the product, and receive a full refund of the amount paid to the seller.[393] Alternatively, the buyer may choose to accept the defect and not seek cancellation of the contract.[394] In this case, the buyer waives the right to cancel the contract and releases the seller from any responsibility for returning the payment or providing compensation (*Arsh*).

Rent is comparable to sale; therefore, what applies to sale also applies to rent; for example, if a tenant rents a house and discovers a defect in it, he has the right to cancel the contract.[395]

It is widely accepted in Islamic jurisprudence that both the buyer and seller can reach an agreement where the seller compensates the buyer with *Arsh*, which represents

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[388] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 283; *Fath al-Qadeer for Guidance* (n 276) vol 6, 397.
[389] *Fath al-Qadeer for Guidance* (n 276) vol 6, 397.
[390] *Fairness* (n 89) vol 11, 377; *Tuhfat al-Fuqaha* (n 84) vol 2, 102; *Mughaniy Almuhtaj* (n 370) vol 2, 405.
[391] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 82) vol 5, 283.
[392] For more details see *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 20, 129 and after; *Authentic and Contemporary Financial Transactions* (n 227) vol 6, 429 and after.
[393] *Tuhfat al-Fuqaha* (n 84) vol 2, 96; Shukri, Ismail and Markom (n 373) 177; *Kashaaf Alqinae* (n 82) vol 3, 218; Arabi (n 379); *Fath al-Qadeer for Guidance* (n 276) vol 6, 355; المازري المالكي [Al-Mazari Al-Maliki], شرح التلقين [*Explanation of Al-Talqin*] ( دار الغرب الإسلامي [Dar Al-Gharb Al-Islami], 1st ed, 2008) vol 2, 613 ('*Explanation of Al-Talqin*'); Sri Rejekia (n 377); *The End of the Requirement in the Knowledge of the Doctrine* (n 294) vol 12, 471.
[394] *Fath al-Qadeer for Guidance* (n 276) vol 6, 355; *Explanation of Al-Talqin* (n 393) vol 2, 613; *Kashaaf Alqinae* (n 82) vol 3, 218; Arabi (n 379); Sri Rejekia (n 377).
[395] علي الدين [Ali Al-Din], الهداية في شرح بداية المبتدي [*Al-Hidayah fi Sharh Bidayat al-Mubtadi*] (Dar Ihya al-Turath al-Arabi) vol 3, 246.

the difference in value between the sound and defective product.[396] However, there is significant disagreement regarding the seller's obligation to pay this compensation if s/he refuses. Most Islamic jurists do not consider the seller obligated to pay *Arsh* in such cases, leading to the cancellation of the contract.[397] Based on the fact that in *Sharia*, transactions are not permissible without the consent of the other party.[398] Additionally, the standards and specifications for the sale do not break down the price into individual components.[399] In other words, the entire sale is offered as a single unit at one price, rather than being sold in separate parts. Therefore, the price applies to the complete sale, and the descriptions do not list specific prices for individual items.

On the other hand, the Hanbali school of thought supports the idea that the seller can be obligated to pay *Arsh* to the buyer if the buyer requests it.[400] The two parties involved in the transaction have agreed that the sale is in exchange for money, so each portion of the money corresponds to a part of the sale.[401] However, if there is a defect, a portion of the sold item is considered lost; therefore, in this case, the seller is responsible for compensating the buyer for the equivalent value of that loss.[402]

Regarding the timing of the defect option, is there a specified period, or not? Does the seller’s warranty obligation expire after a certain time if the buyer learns of the defect and does not assert their rights? Scholars have differing opinions on this matter.[403]

The Hanafis and Hanbalis hold a more lenient view, suggesting that there is no set period.[404] In this case, the consumer has the right to wait to claim their rights, as long

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[396] *Fairness* (n 89) vol 11, 375; *Kashaaf Alqinae* (n 82) vol 3, 218; Malek, Begum and Hoque (n 375); Haider (n 77) 335; *Explanation of Al-Talqin* (n 393) vol 2, 617–20.
[397] See Haider (n 77) 336; *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 20, 129; *Authentic and Contemporary Financial Transactions* (n 227) vol 6, 429 and after; *Explanation of Al-Talqin* (n 393) vol 2, 613, 617–20.
[398] "O you who believe! Do not consume each other's wealth unjustly, except through mutual consent in trade." See *Translation of the Meanings of the Noble Quran into the English Language* (n 95) 144 (Chapter 4 verse 29).
[399] Haider (n 77) 335.
[400] *Fairness* (n 89) vol 11, 375; *Kashaaf Alqinae* (n 82) vol 3, 218; Malek, Begum and Hoque (n 375).
[401] *Fairness* (n 89) vol 11, 375; *Kashaaf Alqinae* (n 82) vol 3, 218.
[402] *Fairness* (n 89) vol 11, 375; *Kashaaf Alqinae* (n 82) vol 3, 218.
[403] For more information see *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 20, 127–9; *Authentic and Contemporary Financial Transactions* (n 227) vol 6, 393–6; Al Hashimi (n 83) 177–8.
[404] Haider (n 77) 335; *Almughaniy* (n 91) vol 7, 557.

as they do not indicate consent by disposing of the sold item after learning about the defect.

Conversely, the Shafi'is believe that the seller's obligation lapses if the buyer does not assert their right immediately after discovering the defect.[405] They argue that the buyer's right is contingent upon learning about the defect; once the buyer is aware, they must act promptly, or else they forfeit their right.[406]

The Malikis take a middle ground, stating that the buyer has the right to retain the defective item for up to two days after knowing the issue.[407] If more than two days pass without action, it is considered evidence of consent, unless the seller is absent and the buyer demonstrates a clear indication of their objection to the defective item.[408]

### *4.3.3 Section conclusion*

The Saudi *Electronic Commerce Law* provides a legal guarantee but is brief and ambiguous, creating a regulatory vacuum.[409] The *Draft Consumer Protection Law* has addressed these issues.[410] A legal guarantee ensures that a product or service meets standard specifications and quality standards, conforms to the agreement with the consumer, and is free from defects not caused by the consumer.[411] The guarantee is broader, including customary obligations and warranties for installation errors.[412] Identically, Islamic law prohibits sellers from concealing defects in goods, as it is considered fraud and violates the principle of transparency in transactions.[413] Defects are defined as any factor that reduces the value or price of a product based on

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[405] *The End of the Requirement in the Knowledge of the Doctrine* (n 294) vol 12, 471; Al-Nawawi (n 82) vol 3, 468.
[406] *The End of the Requirement in the Knowledge of the Doctrine* (n 294) vol 5, 11.
[407] *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 20, 129; *Authentic and Contemporary Financial Transactions* (n 227) vol 6, 394; Al Hashimi (n 83) 178. There is a book that mentions three days instead of two; see Al-Nawawi (n 82) vol 3, 468.
[408] *The Crown and the Crown* (n 103) vol 6, 355–6.
[409] *Electronic Commerce Law* (n 19) art 13/1.
[410] *Draft Consumer Protection Law* (n 33) art 49.
[411] Ibid art 6/H.
[412] Ibid art 50/1.
[413] *Tuhfat al-Fuqaha* (n 84) vol 2, 93; Shukri, Ismail and Markom (n 373) 177; Haider (n 77) 337.

merchants' customary practices.[414] Linking the defect and warranty with custom is significant, making it timeless and adaptable across all platforms. Additionally, it aligns with Saudi law.

The guarantee lasts at least two years from the product delivery date and one year for services, with shorter periods permissible for used goods.[415] For continuous digital services, the economic operator is liable for warranty breaches within two years of delivery or implementation, extending to the entire contract period if over two years.[416] However, the four schools of thought disagree on the timing of the defect option, with varying opinions on whether there is a specified period for buyers to assert their rights.[417] However, they agree that the defect must have existed before the sale. [418] This means that the warranty differs between Saudi law and *Fiqh* because Saudi regulators do not set this condition. Nevertheless, it may be said that the defect occurs after the contract, primarily because of a manufacturing defect, which means the defect happened before the sale. Alternatively, if this is not the case, condition option *Khiyar Alshart* can be applied.

The *Electronic Commerce Law* provides a contractual guarantee, but its text is unclear, complicating its definition and application.[419] Unfortunately, there is also a conflict between the *Ministry of Commerce Guide to Consumer Rights and Responsibilities* and the *Draft Consumer Protection Law* regarding additional warranties.[420] Importantly, consumers and sellers, based on Saudi law, can agree on more guarantees;[421] subject to some conditions, one of them being that consumers must adhere to proper procedures to claim their rights under the additional

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[414] *Tuhfat al-Fuqaha* (n 84) vol 2, 93; *Fairness* (n 89) vol 11, 366; *Kashaaf Alqinae* (n 82) vol 3, 215; *Mughaniy Almuhtaj* (n 370) vol 2, 425; Haider (n 77) 342; *The Crown and the Crown* (n 103) vol 6, 334.
[415] Ibid art 50/1.
[416] Ibid art 50/3.
[417] See *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 20, 127–9; *Authentic and Contemporary Financial Transactions* (n 227) vol 6, 393–6; Al Hashimi (n 83) 177–8.
[418] *Kashaaf Alqinae* (n 82) vol 3, 219; *Tuhfat al-Fuqaha* (n 84) vol 2, 100; *Mughaniy Almuhtaj* (n 370) vol 2, 425; *The End of the Requirement in the Knowledge of the Doctrine* (n 294) vol 12, 471.
[419] *Electronic Commerce Law* (n 19) art 13/1.
[420] *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 65) 14; *Draft Consumer Protection Law* (n 33) art 54/1.
[421] *Draft Consumer Protection Law* (n 33) art 54.

warranty.[422] Generally, Islamic law does not ban this agreement in contracts unless it has a forbidden condition, thus, contractual guarantee is acceptable.

Under both Saudi and Islamic law, sellers are generally not responsible for defects known to the buyer or discoverable upon inspection, but they may be liable if they conceal defects. Also, they allow a service provider to be exempt from a consumer's contract termination if the defect is due to the consumer's mishandling. However, Islamic scholars debate whether the buyer can waive their right to claim defects, with some arguing it is invalid and others supporting the buyer's right to relinquish it; Saudi law considers the last opinion unless the seller hides the defect.

*Electronic Commerce Law* is insufficient for providing warranty breach solutions. It only provides one solution: contract cancellation.[423] However, the *Draft Consumer Protection Law* fills this vacuum by applying solutions that vary based on whether the breach involves a product or service. For product warranty breaches, sellers must repair, replace, or return products and refund their value at no cost to consumers.[424] For service guarantee breaches, the service provider must refund service value, compensate for deficiencies, or perform services again properly.[425] On the other hand, Islamic jurisprudence allows buyers to cancel sales, accept defects or accept with a compensation (*Arsh*) from the seller only.[426] Schools of thought differ on whether the seller is obligated if the buyer accepts the defect with *Arsh* while the seller wants not to pay *Arsh*; only the Hanbali school forces the seller to pay,[427] whereas others nullify the contract.[428] As a result, Bagheri and Hassan (2012) claim that while the option of defect is a viable mechanism to safeguard consumer rights, it is insufficient and requires reform to adapt to the evolving technological landscape, particularly in regard

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[422] Ibid art 54/2/D.
[423] *Electronic Commerce Law* (n 19) art 13.
[424] *Draft Consumer Protection Law* (n 33) art 53/1.
[425] Ibid art 53/2.
[426] *Fairness* (n 89) vol 11; 375; *Kashaaf Alqinae* (n 82) vol 3, 218; Malek, Begum and Hoque (n 375); علي حيدر [Ali Haider], *درر الحكام في شرح مجلة الأحكام [Durar Al-Hikam in Explaining Al-Ahkam Magazine*], ( دار الجيل [Dar Al-Jeel], 1st ed, 1991) vol 1, 335; *Explanation of Al-Talqin* (n 393) vol 2, 617–20.
[427] *Fairness* (n 89) vol 11, 375; *Kashaaf Alqinae* (n 82) vol 3, 218.
[428] Haider (n 77) 336; *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 20, 129 and after; *Authentic and Contemporary Financial Transactions* (n 227) vol 6, 429 and after; *Explanation of Al-Talqin* (n 393) vol 2, 613, 617–20.

to the influence of the internet in the era of e-commerce.[429] However, Islamic law can accommodate the mechanisms of repair or change the defective production by *Khiyar Alshart* or the public interest *Almaslahat Almursalatu*. In other words, there is no obstacle in Islamic law to accept repair or change the defective production in cases where the parties agree.

## 4.4 Obligation to ensure consumer privacy

This section reviews the provisions of consumer privacy data under Saudi law (section 4.4.1) and the compatibility between Islamic and Saudi law regarding privacy (section 4.4.2).

### *4.4.1 Provisions of consumer privacy data under Saudi law*

Due to their significance, the Saudi regulator safeguarded private rights in various ways. Protecting private rights is mandated in several articles of the *Basic Law of Governance*, which states that all forms of communication, such as telegraph, mail, telephone conversations, and others, shall be safeguarded, and they shall not be seized, delayed, viewed, or listened to except in cases specified by the *Basic Law*.[430] Moreover, this *Basic Law* declares that the State shall safeguard human rights in accordance with Islamic law.[431] There are countless texts in Sharia prohibiting spying or violating the rights of others.[432] For example, believers should refrain from entertaining too much suspicion, as some suspicions can be sinful. They should also avoid spying on one another and speaking ill of each other behind their backs. 'Would any of you like to eat the flesh of a dead brother? Indeed, you would detest such an act; therefore, hate backbiting and fear Allah, for He is the One who forgives and accepts repentance, and He is the Most Merciful.'[433]

The Saudi Arabian regulator has implemented laws and articles to protect private life regarding modern electronic means. Anyone who commits information crimes such as

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[429] Bagheri and Hassan (n 382).
[430] *Basic Law of Governance* (Royal Decree No A/90 dated 27/08/1412H (1 March 1992)) art 40 ('*Basic Law of Governance*').
[431] Ibid art 16.
[432] Some of them come below in: 4.4.2.1 Privacy under Islamic law.
[433] *Translation of the Meanings of the Noble Quran into the English Language* (n 95) 898 (Chapter 49 verse 12).

infringing on private life using mobile phones equipped with a camera shall be punished with imprisonment for a maximum of one year and a fine not exceeding five hundred thousand riyals or one of these two penalties.[434] Producing, preparing, sending, or storing anything that would harm public order, religious values, public morals, or the sanctity of private life via an information network or a computer shall result in imprisonment for a period not exceeding five years and a fine not exceeding three million riyals or one of these two penalties.[435]

Nevertheless, this chapter explicitly addresses civil laws and does not cover criminal ones. As such, the obligation in question will be governed by the *Electronic Commerce Law*[436] and its associated implementing regulation,[437] as well as the *Personal Data Protection Law*[438] and its regulations, including the *Implementing Regulation of the Personal Data Protection Law*[439] and the *Regulation on Transferring Personal Data Outside the Kingdom* for data transfers outside of Saudi Arabia.[440]

Maximum protection is ensured for personal data, with provisions in place to protect the deceased and their families.[441] The law applies to any processing of personal data related to individuals in Saudi Arabia by any means, including the processing of personal data related to individuals residing in Saudi Arabia by any party outside Saudi Arabia.[442] This includes the data of the deceased if it would specifically lead to knowledge about them or their family members.[443] However, the law does not apply when an individual processes personal data for personal or family use that does not involve publishing or disclosing it to others.[444] It is crucial to note that this exception

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[434] *Anti-Cybercrime Law* (Royal Decree No M/17 dated 1428H (2007)) art 3/4.
[435] Ibid art 6/1.
[436] *Electronic Commerce Law* (n 19).
[437] *Implementing Regulations of the E-Commerce Law* (n 22).
[438] *Personal Data Protection Law* (Royal Decree No M/19 dated 1443H (2021)) as amended by Royal Decree No M/148 dated 1444H (2023) ('*Personal Data Protection Law*').
[439] Saudi Data & AI Authority, *The Implementing Regulation of the Personal Data Protection Law* (English Translation) <https://sdaia.gov.sa/en/SDAIA/about/Documents/ImplementingRegulation.pdf> ('*Implementing Regulation of the Personal Data Protection Law*').
[440] Saudi Data & AI Authority, *Regulation on Transferring Personal Data Outside the Kingdom* (Regulation, August 2024) <https://sdaia.gov.sa/Documents/RegulationonPersonalDataEN.pdf> ('*Regulation on Transferring Personal Data Outside the Kingdom*').
[441] *Personal Data Protection Law* (n 438) art 2.
[442] Ibid art 2/1.
[443] Ibid.
[444] Ibid art 2/2.

does not cover the public disclosure of personal data or sharing it with anyone outside the scope of personal or family use.[445] Additionally, using personal data for professional, commercial, or non-profit purposes is not included in this exception.[446]

Important in the provisions of consumer privacy data under Saudi law are the following four matters: confidentiality of personal data, duration of data storage, service provider's obligation regarding data, and liability for a data breach. These are discussed in the following sub-sections.

#### *4.4.1.1 Confidentiality of personal data*

The service provider's obligation is to protect the consumer's electronic communications or personal data that is in the service provider's possession or in the possession of any entities or agents they transact with.[447] In this context, 'data' refers to any information obtained from any source or in any form used in an e-commerce transaction, whether directly or indirectly.[448] Personal data, in particular, is any statement, regardless of its source or form, which could lead to identifying an individual specifically or making it possible to identify them directly or indirectly.[449] This includes information such as name, personal identification number, addresses, contact numbers, license numbers, official records, personal property, bank account and credit card numbers, as well as fixed or animated photos of the individual and other data of a personal nature.[450]

The *Electronic Commerce Law* authorises its implementation by regulating which data should be kept confidential.[451] Any data, regardless of its form or source, that can be used to identify a consumer, such as names, identity information, addresses, contact numbers, license numbers, official records, personal property, account and bank card numbers, and still or moving pictures, is classified as protected Personal Consumer Data.[452]

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[445] *Implementing Regulation of the Personal Data Protection Law* (n 439) art 2/3/A.
[446] Ibid art 2/3/B.
[447] *Electronic Commerce Law* (n 19) art 5.
[448] Ibid art 1.
[449] *Personal Data Protection Law* (n 438) art 1/4.
[450] Ibid.
[451] *Electronic Commerce Law* (n 19) art 5/1.
[452] *Implementing Regulations of the E-Commerce Law* (n 22) art 5/1.

#### *4.4.1.2 Service provider's obligation regarding data*

The service provider is obligated to take all the necessary measures to safeguard and uphold the confidentiality of data during the retention period.[453] This includes protecting Personal Consumer Data from access, alteration, disclosure, or processing for non-legitimate purposes by implementing administrative and technical measures that are appropriate to the nature of said data.[454] The service provider should also be responsible for securing the personal data or electronic communications of the consumer that are under their possession or under the possession of entities or agents that they transact with.[455] Personal Consumer Data should only be retained for the purpose of fulfilling the obligations of the Service Provider and should not be utilised for other purposes, such as advertising or marketing, without the express prior consent of the consumer.[456] Additionally, the service provider is obligated not to use the personal data or electronic communications of the consumer for disallowed or impermissible purposes, nor should they disclose the same to other entities, whether at cost or no, unless the consumer consents to the disclosure or is required by law.[457]

Nevertheless, there is more that must be addressed regarding the consumer's privacy, because what is mentioned does not stipulate all the service provider's obligations. However, the implementing regulation states that data protection provisions stipulated in other laws must be considered.[458] Without a doubt, the most important law governing personal data is the *Personal Data Protection Law*.[459] It clarifies several rights of the personal data subject (the consumer), and, in other words, several obligations on the service provider for the consumer's benefit.[460]

First, the personal data owner must be informed of the legal justification for collecting personal data and its purpose.[461] Second, s/he must be allowed access to all of his or her personal data which is available to the controlling authority.[462] Third, there is an

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[453] *Electronic Commerce Law* (n 19) art 5/1.
[454] *Implementing Regulations of the E-Commerce Law* (n 22) art 5/2/A.
[455] *Electronic Commerce Law* (n 19) art 5/1.
[456] *Implementing Regulations of the E-Commerce Law* (n 22) art 5/2/B.
[457] *Electronic Commerce Law* (n 19) art 5/2.
[458] *Implementing Regulations of the E-Commerce Law* (n 22) art 5/2/D.
[459] *Personal Data Protection Law* (n 438).
[460] Ibid art 4.
[461] Ibid art 4/1.
[462] Ibid art 4/2. In accordance with the controls and procedures that are stated in Article 9.

obligation to allow the personal data owner to request access to his or her personal data available to the controlling authority[463] in a legible and clear form.[464] Fourth, it is necessary to allow requests to correct, complete, or update personal data available to the controller.[465] Finally, the data subject has the right to request the destruction of personal data that is no longer needed and available to the controller.[466]

#### *4.4.1.3 Duration of data storage*

The time a consumer's saved personal data is kept depends on whether the relationship between the consumer and service provider is continuous. If it is not continuous, the duration of the data storage is considered as if there is a storage agreement between the parties and the consumer has consented.[467] If there is no agreement, the service provider must not keep the data once the transaction has ended. In other words, depending on the nature of the transaction in e-commerce.[468] This obligation on the service provider is more stringent than what is found in the *Personal Data Protection Law*, where the control authorisation is allowed to retain personal data without a time limit, subject to the removal of everything that leads to identifying its owner,[469] meaning that the data holder is not obliged to destroy the data after a specific period. Nonetheless, the *Personal Data Protection Law* states that the provisions and procedures stipulated in the law do not prejudice any provision granting a right to the personal data owner or determining better protection, provided for by another law or international agreement to which Saudi Arabia is a party.[470] The *Electronic Commerce Law* text offers more robust security.[471] Therefore, if the relationship is not continuous, the service provider must not retain the consumer's data once the transaction ends, except with the consumer's consent.[472]

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[463] Controlling authority (body): any public body and any person or legal capacity that specifies the purpose and how personal data will be processed; and determines whether it is initiated by it or by the processing party. See *Personal Data Protection Law* (n 438) art 1/18.
Processing entity: any public entity and any person or legal capacity. Personal data is processed for the benefit of and on behalf of the controller. See *Personal Data Protection Law* (n 438) art 1/19.
[464] *Personal Data Protection Law* (n 438) art 4/3.
[465] Ibid art 4/4.
[466] Ibid art 4/5. However, without prejudice to what is required in Article 18.
[467] *Electronic Commerce Law* (n 19) art 5/1.
[468] Ibid; *Personal Data Protection Law* (n 438) art 18/1.
[469] *Personal Data Protection Law* (n 438) art 18/1.
[470] *Personal Data Protection Law* (n 438) art 3.
[471] *Electronic Commerce Law* (n 19) art 5/1.
[472] Ibid art 5/2; *Implementing Regulations of the E-Commerce Law* (n 22) art 5/2/B.

If the service provider's relationship with the consumer is ongoing and requires creating an account for future contracts, the service provider may retain the data after obtaining the consumer's approval to keep it.[473] However, the service provider must comply with the consumer's requests to close the account at any time.[474] In all cases, the service provider must make it easy and transparent for the consumer to close their account.[475] However, if the service provider wishes to retain the data for a period longer than the allowed period, they must have a legal justification for doing so.[476] In that case, the data will be deleted after the expiry of this period or the purpose of collecting it, whichever is longer.[477] Secondly, if the personal data is closely related to a case pending before a judicial body, and its retention is required for this purpose, the data may be retained on condition that it will be destroyed after completion of the judicial procedures related to the case.[478]

#### *4.4.1.4 Liability for a data breach*

This section does not pertain to criminal law or penalties for offenders. It addresses civil matters, which refer to the relationship between the service provider and the consumer and the consequences of consumer data leaking. Starting with personal data, the definition is that leakage encompasses any occurrence that results in the intentional or unintentional disclosure, destruction, or unauthorised access of personal data, whether manually or automated.[479] This is a significant issue for the consumer; therefore, the service provider should be accountable for it.

The *Implementing Regulations of the E-Commerce Law* addresses the breaching[480] of data by stating that if a breach of personal consumer data occurs, the service provider must inform the Ministry and the consumer within three days of becoming aware following the mechanism determined by the Ministry.[481] Compared to the *Personal Data Protection Law* which does not define a specific period for

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[473] *Implementing Regulations of the E-Commerce Law* (n 22) art 5/3.
[474] Ibid.
[475] Ibid.
[476] *Electronic Commerce Law* (n 19) art 5/2; *Personal Data Protection Law* (n 438) art 18/1.
[477] *Personal Data Protection Law* (n 438) art 18/1.
[478] Ibid art 18/2.
[479] *Implementing Regulation of the Personal Data Protection Law* (n 439) art 1/3.
[480] *Implementing Regulations of the E-Commerce Law* (n 22) uses the word 'breached' and I believe it is a limited word compared to 'leaking' which is more general and can include manual or electronic action. In the Arabic version the term used is 100% limiting.
[481] Ibid art 5/2/C.

notification,[482] the *Electronic Commerce Law* provides more protection for the consumer by specifying a minimum of three days; thus, the applicable law for this case will be the one that provides greatest protection.[483] The notification should explain the extent of the breach, its effects, and the measures taken to resolve it.[484] Nevertheless, the Saudi Ministry of Commerce does not publish the procedures for data breaches.[485] Fortunately, the *Electronic Commerce Law* and its *Implementing Regulations* refer to the relevance of any provisions from other laws that can apply to confidential data.[486] Therefore, it is better to see what is in the *Personal Data Protection Law* regarding the procedures for addressing data leaking. According to the *Personal Data Protection Law* the data holder must provide notification in a simple and clear language and include a description of an incident where the data has been leaked, and the potential risks arising from that leak, and also the measures taken to prevent or reduce those risks and mitigate their effects.[487] Also must be provided the name and contact information of the controller and its data protection officer – if any – or any other appropriate means of communication with the controller.[488] Lastly, recommendations or advice that may help the personal data subject take appropriate measures to avoid the identified risks or mitigate their effects.[489]

Nevertheless, the service provider is not exempted from liability towards the consumer by the notice,[490] meaning the consumer has the right to compensation for the data leaking. Therefore, the consumer can sue the service provider not only based on the agreement between him or her and the service provider but also based on the laws, as the laws grant them this right of action towards the service provider.[491]

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[482] *Implementing Regulation of the Personal Data Protection Law* (n 439) art 24/5.
[483] *Personal Data Protection Law* (n 438) art 3.
[484] *Implementing Regulations of the E-Commerce Law* (n 22) art 5/2/C.
[485] To my knowledge and search.
[486] *Electronic Commerce Law* (n 19) art 5/1; *Implementing Regulations of the E-Commerce Law* (n 22) art 5/2/C.
[487] *Implementing Regulation of the Personal Data Protection Law* (n 439) art 24/5/A–B.
[488] Ibid art 24/5/C.
[489] Ibid art 24/5/D.
[490] *Implementing Regulations of the E-Commerce Law* (n 22) art 5/2/C.
[491] *Electronic Commerce Law* (n 19) art 26; *Personal Data Protection Law* (n 438) art 40; *Implementing Regulations of the E-Commerce Law* (n 22) art 5/2/C.

### *4.4.2 Compatibility between Islamic and Saudi law regarding privacy*

#### *4.4.2.1 Privacy under Islamic law*

In Islamic law, there is no literal text on privacy (*kososiah*), neither in the Qur'an, Sunnah nor the prior books of *Fiqh*. Basically, defining privacy is challenging due to its ties to various traditions, cultures, religious beliefs, and political values that differ across societies.[492]

However, it is incorrect to claim that Sharia law does not recognise privacy; in fact, it places significant importance on what is commonly understood as 'privacy,' considering it essential for the personal well-being and development of every individual within society.[493] Many provisions in both the Qur'an and the Sunnah address various aspects of privacy. Islamic law has given great attention to privacy, one of its principles being to preserve privacy and give it a special status.[494] Islamic law attends to several privacy issues, such as the sanctity of the home and the preservation of secrets; it also prohibits revealing secrets, revealing private marital matters, or spying.[495]

The importance of home privacy is highlighted in hadiths and verses, reflecting the Sharia interest in it. 'O you who believe! Enter not houses other than your own, until you have asked permission and greeted those in them; that is better for you, in order that you may remember.[496] And if you find no one therein, still, enter not until permission has been given to you. And if you are asked to go back, go back, for it is purer for you. And Allāh is All-Knower of what you do.'[497] Moreover, the Prophet (may Allah's peace and blessings be upon him) said: 'If a man – or someone – peeped at

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[492]. عبدالله آل طه [Abdullah Al Taha], خصوصية الفرد في الفقه الإسلامي وموقف التشريعات القانونية في دولة الإمارات العربية المتحدة منها ['Individual Privacy in Islamic Jurisprudence and the Position of Legal Legislation in the United Arab Emirates on It'] (2015) 23(1) *Security and Law Journal* 231; بولقرينات إكرام [Boulqrinat Ikram], 'حرمة الحياة الخاصة بين الحماية القانونية و الشريعة' ['The Sanctity of Private Life between Legal Protection and Sharia'] (2017) 1 *Journal of Jurisprudential and Legal Issues* 283.

[493] See جليلة نعمان [Jalila Noman], 'حق الخصوصية دراسة مقارنة بين الفقه الإسلامي والقانون' [The Right to Privacy: A Comparative Study Between Islamic Jurisprudence and Law] (2016) 5(10) *Sharia and Economics Journal* 205, 206; Sattam Eid Almutairi, 'The Islamic and Western Cultures and Values of Privacy' (2019) 16(1) *Muslim World Journal of Human Rights* 51; Al Taha (n 492).

[494] See Abdulaziz Almebrad, 'The Sufficiency of Information Privacy Protection in Saudi Arabia' (PhD Thesis, Indiana University, 2018) 5–53.

[495] See Noman (n 493); Al Taha (n 492); Almutairi (n 493); Muharman Lubis and Mira Kartiwi, 'Privacy and Trust in the Islamic Perspective: Implication of the Digital Age' (2013) 5 *International Conference on Information and Communication Technology for the Muslim World*, DOI: 10.1109/ICT4M.2013.6518898.

[496] *Translation of the Meanings of the Noble Quran into the English Language* (n 95) 604 (Chapter 24 verse 27).

[497] Ibid.

you without your permission and you threw a pebble at him that gouged out his eye, you would not be at fault.'[498] This demonstrates the importance of privacy in housing according to Islamic law. In this context, the concept of housing pertains to any location where a person resides and is specific to that individual.[499]

In Islam, protecting secrets between spouses or the general public is a necessary requirement, and there is much evidence to support this.[500] It is agreed that disclosing secrets is a sinful act because it constitutes a breach of the duty of keeping secrets, a duty required by the sanctity of private life, as it constitutes its fundamental pillar.[501] Also, keeping secrets in Sharia means keeping a trust, and betraying it is a betrayal of the trust.[502] 'O you who believe! Betray not Allāh and His Messenger, nor betray knowingly your Amānāt (things entrusted to you, and all the duties which Allāh has ordained for you)'.[503] The connection in the verse between maintaining trust among people and upholding the trust of Allah and the Messenger highlights the significance of keeping secrets and preserving trust among individuals. One of the hadiths that maximises the value of conversations between people is that 'The Prophet (ﷺ) said: When a man tells something and then departs, it is a trust'.[504]

Islam places great importance on preserving privacy, not only in relationships between people in general, but specifically between spouses.[505] This is evident in that Mohammed (ﷺ) said, 'The most evil of the people to Allah on the Day of Resurrection will be the man who consorts with his wife and then publicises her secret.'[506]

Islam explicitly forbids spying, which is considered a major sin as it violates the sanctity of others.[507] Believers should refrain from entertaining too much suspicion, as some suspicions can be sinful; and they should also avoid spying on one another and

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[498] 'Hadith 2989', *Encyclopedia of Translated Prophetic Hadiths* (Web Page) <https://hadeethenc.com/en/browse/hadith/2989>.
[499] Noman (n 493).
[500] Al Taha (n 492); Ikram (n 492); Almebrad (n 494) 38–53; Almutairi (n 493).
[501] Ikram (n 492).
[502] Ibid.
[503] *Translation of the Meanings of the Noble Quran into the English Language* (n 95) 301 (Chapter 8 verse 27).
[504] Sunan Abi Dawud, Book 43, Hadith 96 <https://sunnah.com/abudawud:4868>.
[505] See Almebrad (n 494) 46–7; Noman (n 493); Al Taha (n 492).
[506] Riyad as-Salihin, Book 1, Hadith 5 <https://sunnah.com/riyadussalihin:684>.
[507] See Al Taha (n 492); Ikram (n 492).

speaking ill of each other behind their backs.[508] 'Would any of you like to eat the flesh of a dead brother? Indeed, you would detest such an act; therefore, hate backbiting and fear Allah, for He is the One who forgives and accepts repentance, and He is the Most Merciful.'[509] The hadith confirms the prohibition of spying 'Beware of suspicion, for it is the worst of false tales and do not look for the other's faults and do not spy and do not hate each other, and do not desert (cut your relations with) one another, O Allah's slaves, be brothers!'[510]

Islamic law has an advantage over contemporary legal thought in its understanding of privacy, not only because it was among the first legal systems to recognise this right but also because it does not view privacy as a limitation on another right.[511] Instead, it considers privacy a fundamental aspect of individual and societal behaviour, integral to the educational framework that shapes moral character. This perspective is supported by various texts on privacy found in Islamic literature and ethics.[512]

Nowadays, technology has introduced new challenges to privacy that must be addressed through Islamic principles.[513] Historically, these principles have offered significant protections for individual privacy from the time that Islam first emerged. The broad language and reliance on general customs in these principles have enabled their application in numerous contexts.[514]

However, Almebrad (2018) claims that it is essential to further develop Sharia principles and rules that protect information privacy to ensure that individuals in the online era enjoy the same level of protection that was provided in the offline era.[515] In my view this claim is questionable since Sharia has until now been stable and suitable for every place and time. Instead, it is more appropriate to create laws that are derived

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[508] *Translation of the Meanings of the Noble Quran into the English Language* (n 95) 898 (Chapter 49 verse 12).
[509] Ibid.
[510] Sahih al-Bukhari, Book 85, Hadith 2 <https://sunnah.com/bukhari:6724>.
[511] See Noman (n 493); Al Taha (n 492); Ikram (n 492); تنوير أحمد نذير [Tanweer Ahmed Nazir], ' حق الخصوصية، دراسة مقارنة بين الفقه الإسلامي والقانون الإنجليزي' [The Right to Privacy, A Comparative Study between Islamic Jurisprudence and English Law] (PhD Thesis, Islamic University- Islamabad, 2007) 283, 287.
[512] Noman (n 493); Ikram (n 492); Nazir (n 511) 283, 287.
[513] Almebrad (n 494) 13.
[514] Ibid 110.
[515] Ibid.

from or compatible with the principles of *Fiqh* (Islamic jurisprudence) and in no way contradict them.

Such laws have in fact already been established regarding privacy online, specifically the *Electronic Commerce Law*[516] and its associated implementing regulation,[517] as well as the *Personal Data Protection Law*[518] and its regulations, including the *Implementing Regulation of the Personal Data Protection Law*[519] and the *Regulation on Transferring Personal Data Outside the Kingdom* for data transfers outside of Saudi Arabia.[520] These all comply with Islamic law's privacy principles. They aim to protect consumer data in ways that may not be directly addressed in traditional Islamic law while ensuring they do not permit what is forbidden or prohibit what is permissible. They respect privacy deeply, aligning with the foundational principles of privacy in Islamic law.

#### *4.4.2.2 Circumstances in which it is permissible to disclose secrets or breach privacy obligation*

As mentioned above, the original principle is the prohibition on disclosing secrets. However, there may be cases in which it is permissible to disclose secrets based on certain Qur'anic verses, hadiths, or jurisprudential rules.[521] Examples of such cases where the secret may be disclosed include the following.

- First: After the death of the person who kept the secret, if disclosing it would not cause harm, such as if this secret were a virtue, an immortalisation of favour, or a commendation of the person who kept the secret.[522]
- Second: The secret has a specific term, and the term has ended.[523]
- Third: If keeping the secret would cause harm that exceeds the harm of disclosing it, or if revealing it would be of benefit that outweighs the harm of keeping it.[524] This is based on the rule of committing the lesser of two harms to

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[516] *Electronic Commerce Law* (n 19).
[517] *Implementing Regulations of the E-Commerce Law* (n 22).
[518] *Personal Data Protection Law* (n 438).
[519] *Implementing Regulation of the Personal Data Protection Law* (n 439).
[520] *Regulation on Transferring Personal Data Outside the Kingdom* (n 440).
[521] See Al Taha (n 492); Nazir (n 511) 206–15.
[522] Al Taha (n 492); Nazir (n 511) 208–9.
[523] Nazir (n 511) 215.
[524] Al Taha (n 492); ibid 213–15.

avoid the more significant, and also on the rule of achieving the public interest.[525]

- Fourth: According to the verse that 'Allāh does not like that the evil should be uttered in public except by him who has been wronged', the grievance is permissible even if it includes a secret reviling.[526]
- Fifth: One can defend an accusation, even though it involves disclosing a secret, based on the verse 'He [Yūsuf (Joseph)] said: "It was she that sought to seduce me'.[527]
- Sixth: The state of keeping the secret has ended, meaning it has previously been disclosed by someone other than the person who kept it.[528] In other words, there was initially a period of secrecy, and then the information began to spread among people. For example, if a person tells his friend about his wedding party, and after a while, the secret owner reveals the secret, then his friend has the right to talk about it, which is not considered revealing the secret.

### *4.4.3 Section conclusion*

The Saudi regulator safeguards private rights through laws and regulations, including the *Basic Law of Governance* and the *Personal Data Protection Law*.[529] The *Personal Data Protection Law* ensures maximum protection for personal data, including that of the deceased, and outlines obligations for data storage, confidentiality, and liability in case of breaches.[530] Specifically, service providers are obligated to protect consumer data, including personal information that can identify individuals.[531] This protected data encompasses various forms of information, such as names, addresses, contact details, and financial information.[532] Furthermore, service providers must safeguard

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[525] Al Taha (n 492).
[526] *Translation of the Meanings of the Noble Quran into the English Language* (n 95) 172 (Chapter 4 verse 148). See Nazir (n 511) 209–10.
[527] *Translation of the Meanings of the Noble Quran into the English Language* (n 95) 395 (Chapter 12 verse 26). See Nazir (n 511) 212–13.
[528] Nazir (n 511) 206–8.
[529] For more details See above: 4.4.1 Provisions of consumer privacy data under Saudi law.
[530] See above: 4.4.1 Provisions of consumer privacy data under Saudi law.
[531] For more information see above: 4.4.1.1 Confidentiality of personal data.
[532] See above: 4.4.1.1 Confidentiality of personal data.

consumer data confidentiality and limit its use to fulfilling obligations, whilst requiring consent for any other purpose.[533] Consumers have rights to know the justifications for data collection, to access their data, request corrections, and request data destruction.[534]

Service providers must delete consumer data after a transaction ends unless the consumer consents to longer retention.[535] Continuous relationships requiring account creation allow data retention with consumer approval and easy account closure.[536] One of the most important issues that is addressed by Saudi law is consumer data leaking, specifically personal data.[537] The service provider bears responsibility for data breaches, including notification requirements and potential consumer compensation.[538]

On the other hand, Islamic law, while not explicitly defining privacy, recognises its importance for individual well-being and societal harmony. It emphasises the sanctity of the home and the preservation of secrets and prohibits spying, viewing privacy as a fundamental aspect of human behavior.[539] Although technology presents new challenges, Islamic principles, rooted in the Qur'an and Sunnah, offer a robust framework for protecting privacy in the digital age.[540] However, they need to be more comprehensive, particularly in the e-commerce environment, as they currently lack a profound focus on privacy. Therefore, the Saudi regulator has made significant efforts to secure the online environment.

Secret disclosure is permissible under specific circumstances,[541] including after the secret-keeper's death, when the secrecy term expires, or if keeping the secret causes greater harm than revealing it. Other exceptions include defending against

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[533] For more details see above: 4.4.1.2 Service provider's obligation regarding data.
[534] See above: 4.4.1.2 Service provider's obligation regarding data.
[535] For more information see above: 4.4.1.3 Duration of data storage.
[536] See above: 4.4.1.3 Duration of data storage.
[537] For more details see above: 4.4.1.4 Liability for a data breach.
[538] See above: 4.4.1.4 Liability for a data breach.
[539] For more information see above: 4.4.2.1 Privacy under Islamic law.
[540] See above: 4.4.2.1 Privacy under Islamic law.
[541] For more details see above: 4.4.2.2 Circumstances in which it is permissible to disclose secrets or breach privacy obligation.

accusations, when the secret is already public knowledge, or if the secret involves a grievance.

## 4.5 Obligation to ensure right of recourse

This section first addresses the consumer's right of recourse in Saudi law and then the position of Islamic law on this obligation and what options can be applied to it.

### *4.5.1 Obligation to ensure right of recourse in Saudi law*

The following section is constructed in four distinct parts: an introduction, types of recourse in electronic contracts, the timing of the right, and the consequences of implementing the consumer's right of recourse in accordance with Saudi law.

#### *4.5.1.1 Introduction*[542]

The Saudi regulator regulates the right to withdraw from a contract, and has allowed withdrawal in several laws, giving permission to whoever has the right to cancel the contract.[543] In other words, if there is a right to cancel the contract, it is binding and valid, and the other party is obligated to accept it from the person who has this right.[544] If a person has the option to withdraw from a contract, they can cancel the contract within the specified period, provided that the other contracting party is notified.[545] Once the owner of this right decides to use it, the contract is terminated.[546] In e-commerce, the consumer has the right to cancel the contract unilaterally, and this decision binds the seller subject to several provisions.[547] This is a unique distinction for e-commerce transactions over traditional commerce since this obligation or right does not exist unless stipulated in the contract.[548] As an alternative, the *Draft Consumer Protection Law* stipulates that the contract for selling a product or providing a service is signed outside the economic operator's place of business, giving the consumer the right to

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[542] The next chapter, Chapter 5: Consumer obligations in e-commerce under Saudi and Islamic law, will cover the obligations that consumers need to fulfil regarding this obligation. This chapter is dedicated to addressing service providers' obligations only.
[543] *Civil Transactions Law* (n 129) art 106; *Electronic Commerce Law* (n 19) art 13; *Draft Consumer Protection Law* (n 33) art 41/1.
[544] *Civil Transactions Law* (n 129) art 106.
[545] Ibid.
[546] Ibid.
[547] *Electronic Commerce Law* (n 19) art 13; *Draft Consumer Protection Law* (n 33) art 41/1.
[548] *Civil Transactions Law* (n 129) art 106.

cancel the contract.[549] In other words, this can occur when the commercial operator concludes the contract with a consumer during a visit s/he makes outside his place or during the operator's own visit to the consumer's residence or place of work, unless the visit is at the consumer's request.[550] Otherwise, Saudi law does not stipulate an obligation on the seller or service provider unless the contract is outside their scope.[551] The differences in some provisions between traditional and e-commerce indicate the importance of electronic commerce and the e-consumer.

#### *4.5.1.2 Types of recourse in electronic contracts*

There are two categories of rights to terminate the agreement: legal rights and contractual rights, both held by the right holder. According to the laws, the service provider is obligated to inform the consumer about their right to terminate the agreement.[552] The service provider must provide details about the circumstances under which termination is allowed, the expenses incurred by the consumer if they choose to exercise this right, the steps to follow if a consumer wishes to terminate the agreement or reference to cases where the consumer is not entitled to terminate the agreement based on legal provisions.[553]

The *Electronic Commerce Law* grants the right to cancel a contract for a consumer if the product has not been used, the service has not been received, and the consumer has not benefitted from either.[554] However, it needs to be clarified whether a reason is needed for cancellation or if the consumer can cancel without any reason. This could cause a disagreement between the service provider and the consumer, as the consumer may believe the provider is obligated to accept the contract termination. In contrast, the provider may believe the opposite. Nevertheless, the *Draft Consumer Protection Law* addresses this issue by explicitly stating that the contract can be terminated without giving any reasons.[555] The service provider cannot waive the

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[549] *Draft Consumer Protection Law* (n 33) art 36.
[550] Ibid art 35.
[551] There are more differences that will be addressed in the following sections.
[552] *Electronic Commerce Law* (n 19) art 13/1; *Implementing Regulations of the E-Commerce Law* (n 22) art 7/1/A; *Draft Consumer Protection Law* (n 33) art 44/1.
[553] *Implementing Regulations of the E-Commerce Law* (n 22) art 7/1/A.
[554] *Electronic Commerce Law* (n 19) art 13/1. This case will be addressed profoundly below in: Chapter 5: Consumer obligations in e-commerce under Saudi and Islamic law.
[555] *Draft Consumer Protection Law* (n 33) art 44/1/C.

obligation since it is a legal requirement that the law mandates this obligation, and the service provider cannot exclude it.[556]

Regarding the right to terminate the contract by agreement rather than by law, there is no provision in the *Electronic Commerce Law*; it does not address that point. Therefore, the question must be returned to the law of civil transactions as it is covered there, demonstrating that it is valid to condition the option of withdrawal for both parties;[557] thus, it is valid for the agreement that the right to cancel the contract belongs to the service provider as it is to the consumer. However, any party who wants to terminate the contract must notify the other party.[558]

#### *4.5.1.3 Consequences of implementing the consumer's right of recourse in accordance with Saudi law*

The cancellation of a contract has various implications for both the customer and the service provider.[559] It results in the dissolution of their respective obligations, as well as any sub-contracts that may have arisen from it.[560] After a contract is terminated, one of the most critical responsibilities of the service provider is to return the amount paid by the customer.[561] The issue of refunds has not been specifically addressed in the texts of the *Electronic Commerce Law* and its *Implementing Regulations*. However, the *Draft Amendment* to the executive regulation for the e-commerce law and the *Draft Consumer Protection Law* have both provided detailed guidelines on this matter.[562] In general, the service provider must return the money to the customer within fourteen days unless there are circumstances beyond their control that cause a delay.[563] The fourteen-day period begins when the customer informs the service provider of the contract termination, provided that the customer has yet to receive the product or service.[564] If the customer has already received the product or service, the fourteen-day period commences after the product has been returned to the service provider

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[556] Ibid arts 30/1, 30/A; *Guide for Electronic Stores under the E-Commerce Law and its Implementing Regulations* (n 27) 21.
[557] *Civil Transactions Law* (n 129) art 106.
[558] Ibid.
[559] *Electronic Commerce Law* (n 19) art 13/1; *Draft Consumer Protection Law* (n 33) art 41/1.
[560] *Draft Consumer Protection Law* (n 33) art 41/2.
[561] Ibid arts 41, 43.
[562] Ibid art 43/2; مشروع تعديل اللائحة التنفيذية لنظام التجارة الإلكترونية [The Draft Amendment to the Implementing Regulation for the Electronic Commerce Law] (‘*Draft Amendment*’).
[563] Ibid.
[564] Ibid.

and received by them.[565] The *Draft Consumer Protection Law* includes a better regulation that links the return of money to the customer to either the notification of contract termination or the authorisation of the economic operator to withhold the refund until the product is received or the customer provides proof of its return or sends it to them, whichever happens first.[566] This protects the customer from unscrupulous service providers, as well as in the event that the product is damaged or destroyed during transit. The service provider must refund the payment using the same method that is used for the original payment unless the customer agrees to another method,[567] or the same method is not feasible for reasons beyond the control of the economic operator.[568] The customer must not be charged any additional fees if a different payment method is used.[569]

### *4.5.2 Position of Islamic law on this obligation and what options can be applied to it*

This section is organised into three comprehensive components: an overview of *khiar al-shart*, an analysis of the foundations of recourse in Islamic law, and an examination of the implications of exercising the consumer's right of recourse as prescribed by Islamic legal principles.

#### *4.5.2.1 Overview of khiar al-shart*

The seller's obligation to grant the buyer the right to terminate the contract in electronic sales is comparable to several concepts in Islamic jurisprudence, such as the options of sight and absence of description.[570] However, *khiar alshart* as the option of condition is more applicable in this context than any other option.[571] This is because the right of sight is not established for the buyer if the sale is accurately described, according to most scholars, except for the Hanafi school.[572]

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[565] Ibid.
[566] *Draft Consumer Protection Law* (n 33) art 43/2.
[567] Ibid art 43/3; *Draft Amendment* (n 562).
[568] *Draft Consumer Protection Law* (n 33) art 43/3.
[569] Ibid; *Draft Amendment* (n 562).
[570] For more details see above: 4.1.2.3 Solutions for non-compliance with the disclosure obligation.
[571] مزيد بن إبراهيم المزيد[Mazyad bin Ibrahim Almazid], خيار الفسخ في نظام التجارة الإلكترونية: دراسة مقارنة ['The Option of Annulment in the Electronic Commerce System: A Comparative Jurisprudential Study'], مجلة العوم الشرعية [(2020) 13 (5) *Journal of Shariah Sciences*] 3397.
[572] For more information see above: 4.1.2.3 Solutions for non-compliance with the disclosure obligation; *Almughaniy* (n 91) vol 3, 496.

For example, if an electronic seller sells a mobile phone and accurately describes it, and the buyer receives the phone and finds it matches the description, then the buyer does not possess the right of sight, according to the opinion of most scholars.[573] However, if the buyer specifies to the seller that s/he wishes to see the item and has the right to terminate the contract after viewing it, then this right is established for the buyer based on the option of condition, not the right of sight.[574]

The fundamental principle of the contract is that it is binding on both parties, and neither party has the right to terminate the contract unless it has been mutually agreed that termination is permissible.[575] The option of condition allows for the right to terminate the contract without the need to provide reasons for doing so. The origin of the option of condition is derived from a hadith in which a man often encountered deceit in purchasing. The Prophet (ﷺ) advised him, 'When you buy something, say (to the seller), "No cheating".'[576] In another narration, it is stated, 'so say: "No deception," and you have the option for three nights for every commodity you buy.'[577] Based on these hadiths, the option of condition is accepted and practiced in all four schools of thought.[578] The purpose of determining the legitimacy of this option is to rethink, consider the matter, and decide whether to approve or reject the sale.[579]

On the other hand, for the sale of *Salam* the condition option is not allowed.[580] This is because one of its requirements is that the seller and buyer must complete the transaction and pay the payment during the meeting, meaning the option for condition does not apply here, similar to an exchange.[581]

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[573] For more information see above: 4.1.2.3 Solutions for non-compliance with the disclosure obligation; ibid.
[574] *Aid to the Doctrine of the Scholar of Medina* (n 92) vol 2, 979.
[575] *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 84) vol 4, 565.
[576] Sahih al-Bukhari, Book 44, Hadith 5 <https://sunnah.com/bukhari:2414>.
[577] *The Sufficiency of the Observant in Explaining the Warning* (n 227) vol 8, 398.
[578] *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 84) vol 4, 565; *Al-Sharh Al-Kabir* (n 245) vol 4, 183; Al-Nawawi (n 82) vol 3, 447; ibid 397; *Kashaaf Alqinae* (n 82) vol 7, 418; *Talents of Galilee in a Brief Explanation of Khalil* (n 82) vol 4, 412.
[579] *Authentic and Contemporary Financial Transactions* (n 227) vol 6, 184.
[580] *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 84) vol 4, 571; *Al-Sharh Al-Kabir* (n 245) vol 4, 183; Al-Nawawi (n 82) vol 3, 448; *Al-Majmoo' Sharh Al-Muhadhab* (n 125) vol 9, 192; *The End of the Requirement in the Knowledge of the Doctrine* (n 294) vol 9, 35, 190.
[581] *Al-Majmoo' Sharh Al-Muhadhab* (n 125) vol 9, 192; *The End of the Requirement in the Knowledge of the Doctrine* (n 294) vol 9, 35, 190.

Regarding the option of condition in leases, most Shafi'i scholars prohibit it, arguing that it disrupts the transaction.[582] They question how the lease can be returned once the benefit has been delivered.[583] Conversely, other Islamic schools of thought permit the inclusion of an option of condition in leases.[584] They view such leases as transactions similar to sales, offering a different perspective with no legal barriers to accepting this option in such agreements.[585]

#### *4.5.2.2 Analysis of the foundations of consumer's right of recourse in Islamic law*

The foundations of a consumer's right of recourse in e-commerce are based on the e-commerce law, while in civil transactions, the law allows the parties to agree on this right.[586] In Islamic law, the option of condition arises from the parties' agreement.[587] The key difference between Islamic law and the *Electronic Commerce Law* lies in the origin of this option; Islamic law treats the contract as the source of the obligation. Therefore, if the buyer does not include it when contracting, the right is not established.[588] In contrast, the e-commerce law considers the law itself as the source of the obligation, meaning the buyer does not need to explicitly stipulate this right.

Al-Mazid (2020) claims that the option to cancel is a legal right in Islamic jurisprudence rather than a contractual right, arguing that the hadith requires merchants to accept returns from buyers, and this view parallels the provisions in e-commerce law.[589] However, this interpretation is flawed; the hadith obliges the seller to accept a return only if the buyer has stipulated the right to do so. If accepting returns were mandatory

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[582] *The End of the Requirement in the Knowledge of the Doctrine* (n 294) vol 9, 35; *Al-Majmoo' Sharh Al-Muhadhab* (n 125) vol 9, 192.

[583] زين الدين ابن نجيم [Zain Al-Din Ibn Nujaym], البحر الرائق شرح كنز الدقائق [*Al-Bahr Al-Ra'iq Sharh Kanz Al-Daqa'iq*] (دار الكتاب الإسلامي [Dar Al-Kitab Al-Islami], 2nd ed) vol 8, 41; *The End of the Requirement in the Knowledge of the Doctrine* (n 294) vol 9, 35.

[584] See Zain Al-Din Ibn Nujaym (n 583) vol 8, 41; *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 84) vol 4, 571; *Kuwaiti Jurisprudence Encyclopedia* (n 76) vol 1, 257; *Kashaaf Alqinae* (n 82) vol 7, 418.

[585] Zain Al-Din Ibn Nujaym (n 583) vol 8, 41; *Authentic and Contemporary Financial Transactions* (n 227) vol 12, 110; *Authentic and Contemporary Financial Transactions* (n 227) vol 9, 35.

[586] For more details see above: 4.5.1.2 Types of recourse in electronic contracts.

[587] *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 84) vol 4, 565; *Kashaaf Alqinae* (n 82) vol 7, 421; Al-Nawawi (n 82) vol 3, 447.

[588] *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 84) vol 4, 565; *Kashaaf Alqinae* (n 82) vol 7, 421; Al-Nawawi (n 82) vol 3, 447.

[589] Almazid (n 571).

without the buyer's stipulation, the Prophet Muhammad, may Allah bless him and grant him peace, would not have asked the buyer to clarify and request the return from the seller during contracting.

Moreover, the principle of '*Khair*' is not solely reliant on the contract—it may also be validated by current customs in the country where the sale occurs, or by laws established by ruling authorities.[590] Without such conditions, customs, or laws, the obligation to accept returns does not hold. Therefore, Islamic law aligns with the e-commerce law in recognising universally a consumer's right to returns, without requiring prior agreement in the contract.

In Islamic law, the option of condition may belong to either party or solely to one of them.[591] If the right is based on the contract, the consumer may waive it; however, if it is based on the law, waiving it is not permissible. For instance, the option of sight cannot be waived by mutual agreement between the seller and buyer because doing so could result in binding the contract to an unknown element, which could lead to harm.[592]

Although Al-Mazid (2020) suggests that the option of condition applies exclusively to the buyer, citing the hadith that supports such a viewpoint, this assertion is inaccurate.[593] All four schools of thought in Islamic jurisprudence recognise that the option can be applicable to both parties, not just the buyer.[594] Restricting it solely to the buyer is a misinterpretation of the hadith without adequate justification.

In conclusion, it is permissible to compare the provisions of the e-commerce law with the option of condition in Islamic law, and while some differences may exist, they are acceptable within the framework of jurisprudence.[595] Ultimately, the option of the

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[590] أحمد الأزهري المالكي [Ahmad Al-Maliki], الفواكه الدواني [*Al-Fawaki Al-Dawani*] (دار الفكر [Dar Al-Fikr], 1995) vol 2, 97; علي العدوي [Ali Al-Adwi], حاشية العدوي على شرح كفاية الطالب الرباني [*Al-Adwi's Commentary on the Explanation of Kifayat Al-Talib Al-Rabbani*] (دار الفكر [Dar Al-Fikr], 1994) vol 3, 192.

[591] *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 84) vol 6, 77; *Kashaaf Alqinae* (n 82) vol 7, 418; Al-Nawawi (n 82) vol 3, 447.

[592] *Almughaniy* (n 91) 495.

[593] Almazid (n 571).

[594] *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 84) vol 4, 565; *Al-Sharh Al-Kabir* (n 245) vol 4, 183; Al-Nawawi (n 82) vol 3, 447; *The Sufficiency of the Observant in Explaining the Warning* (n 227) vol 8, 397; *Kashaaf Alqinae* (n 82) vol 7, 418; *Talents of Galilee in a Brief Explanation of Khalil* (n 82) vol 4, 412.

[595] Almazid (n 571).

condition is valid for both parties, the seller and the buyer, or may be designated solely for one party in the transaction. If the parties agree that the right belongs to one of them, there is no objection to the validity of that transaction.

#### *4.5.2.3 Examination of the implications of exercising the consumer's right of recourse as prescribed by Islamic legal principles.*

The party that has been proven to be in the right, whether it is one party or both, has the right to cancel the contract without needing to involve a judge.[596] In such a case, the seller must return the purchase price to the buyer, and the buyer must return the sold goods to the seller .

The right to cancel the contract can be forfeited, either implicitly or explicitly.[597] For instance, if the buyer uses or disposes of the sold goods in a manner that indicates satisfaction, they forfeit their right to cancel the contract. Similarly, if the buyer explicitly states, 'I am waiving my right to cancel the contract,' they also forfeit this right. Additionally, the right to cancel the contract is forfeited if the cancellation period expires without the right being exercised.[598]

### *4.5.3 Section conclusion*

In the realm of e-commerce, consumers possess the right to cancel contracts unilaterally, and it is obligatory for the seller to accept this choice, subject to certain regulations. In Saudi law, the consumer's right to annul e-commerce contracts arises from statutory provisions rather than contractual agreements. Accepting this right is obligatory for service providers and cannot be declined, thus ensuring the protection of consumers. Conversely, in Islamic Law, the right to recourse is derived from concepts such as *Khiar al-Shart* (option of condition), which relies on mutual consent between the involved parties. Unlike Saudi law, Islamic law stresses that this right must be distinctly stated in the contract unless indicated by customary practices or established legislation. In Islamic law both parties may retain the right to cancel if there is mutual agreement, while in Saudi law this right is exclusive to the consumer.

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[596] *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 84) vol 6, 77; Al-Nawawi (n 82) vol 3, 447.

[597] *Fairness* (n 89) vol 11, 414. For more details see *Authentic and Contemporary Financial Transactions* (n 227) vol 9, 305–14.

[598] For more details see *Authentic and Contemporary Financial Transactions* (n 227) vol 9, 315–24.

Under Saudi law, consumers have the right to unilaterally cancel contracts within defined timeframes. Service providers are obliged to comply by refunding amounts and terminating obligations, even if the consumer does not provide justification. This extensive approach is designed with the e-commerce context in mind and focuses on consumer protection. Likewise, Islamic law encompasses *Khiar al-Shart*, which permits contract cancellation without needing justification, similar to Saudi law, but requires a clear agreement unless dictated by customs or local regulations. The right may be forfeited if the purchaser uses or disposes of the products, explicitly renounces the right, or if the cancellation period lapses.

Concerning duties following cancellation, Saudi law asserts that upon cancellation, service providers must refund payments, terminate related contracts, and follow a defined refund schedule (generally within 14 days). Refunds are usually processed using the original payment method unless agreed otherwise. Similarly, in Islamic law, the seller is obligated to return the purchase amount, and the buyer must return the goods.

## 4.6 Chapter conclusion

Concerning the obligation to transfer ownership upon sale and delivery of a product or service, Saudi law allows a contract to have a condition that prevents ownership transfer until the full payment is received and accepted. However, no school of Islamic law permits this condition, considering it contrary to the essence of the contract. To address this issue, they may either deem the contract invalid or amend it by invalidating the condition. Therefore, it is recommended that Saudi lawmakers either abolish or revise the article to forbid this condition, as it does contravene Islamic law principles. This recommendation emphasises that Saudi law should align with Islamic law, as outlined in Article 7 of the *Basic Law of Governance*. In cases of total loss of goods or services not caused by a third party, Islamic law precedes Saudi law. According to Saudi law, the contract ends, and the buyer (consumer) receives a refund. Conversely, Islamic law mandates that the service provider must offer a substitute. This approach is more suitable for transactions, as it maintains the contract's validity, allowing the consumer to obtain the necessary goods or services while enabling the service provider to receive the required payment. By preserving the

contract's validity and supplying an alternative, the interests of both parties are effectively met.

There are similarities and differences between Saudi law and Islamic law regarding e-disclosure. Both systems share a foundational disclosure principle, but Saudi law includes specific requirements such as ID disclosure and licensing for service providers in e-commerce, which Islamic law does not explicitly state. However, Islamic law recognises the importance of ID disclosure for the eligibility of contracting parties.

Both laws require detailed disclosure of product features, with Islamic law offering a more profound interpretation regarding how such features can influence pricing and consumer desire. A key difference is that Islamic law prohibits selling specific non-owned items, while Saudi law does not address this issue directly, potentially viewing e-sellers as owning what they sell. If Saudi law lacks specific provisions, it defers to civil law or derives relevant principles from Islamic law. Overall, Saudi regulations for e-disclosure are modern and aligned with Islamic law principles in general.

A legal guarantee ensures a product or service meets quality standards, aligns with the consumer agreement, and is free from defects not caused by the consumer. This guarantee includes customary obligations and installation warranties. Similarly, Islamic law prohibits sellers from concealing defects, defining defects as anything reducing a product’s value per customary trade practices. The link between defects, warranties, and customs ensures adaptability across contexts, aligning with Saudi law.

The warranty period is at least two years for products and one year for services, with shorter terms for used goods. For continuous digital services, liability extends two years from delivery or for the entire contract period if longer. Islamic jurisprudence differs on the time frame for claiming defects but agrees defects must exist before the sale. Unlike Islamic law, Saudi regulations do not require the defect to preexist. Despite this, it is possible to argue that the defect arises after the contract, primarily due to a manufacturing defect, which implies that the defect occurred before the sale. Alternatively, condition option *Khiyar Alshart* can be considered if this is not the case.

The E-Commerce Law provides a contractual guarantee, but its vague wording complicates enforcement. Additionally, conflicts exist between the *Ministry of Commerce Guide to Consumer Rights and Responsibilities* and the *Draft Consumer Protection Law* on additional warranties. Saudi law allows parties to agree on more

guarantees, provided consumers follow proper claim procedures. Islamic law generally permits such agreements unless they include prohibited conditions.

Under Saudi and Islamic law, sellers are not liable for known or easily discoverable defects but may be if they conceal defects. Both legal systems allow service providers exemption from contract termination if defects result from consumer misuse. Islamic scholars debate whether buyers can waive defect claims; Saudi law permits it unless the seller hides the defect.

The *Electronic Commerce Law* offers limited remedies for warranty breaches, primarily contract cancellation. The *Draft Consumer Protection Law* provides additional solutions: for products, sellers must repair, replace, or refund at no cost; for services, providers must refund, compensate, or redo the service. On the other hand, Islamic law allows buyers to cancel sales, accept defects, or accept compensation (*Arsh*). Scholars differ on whether sellers must pay *Arsh* if unwilling, with only the Hanbali school requiring payment. In any case, Islamic law can accommodate repair and replacement through *Khiyar Alshart* (stipulated option) or *Almaslahat Almursalatu* (public interest), making it flexible for modern needs.

The Saudi regulatory authority protects private rights through various laws and regulations, such as the *Basic Law of Governance* and the *Personal Data Protection Law*. The *Personal Data Protection Law* guarantees the highest level of safeguarding for personal data. In particular, service providers are mandated to protect consumer data, including personal information that can identify individuals. Additionally, service providers must maintain the confidentiality of consumer data and restrict its use solely to fulfilling their obligations, obtaining consent for any other reasons. Service providers are required to erase consumer data upon the conclusion of a transaction unless they receive the consumer's consent for extended retention. The service provider is held accountable for any data breaches, which includes the responsibility to notify affected parties and potential compensation to consumers.

Conversely, while privacy is not explicitly defined in Islamic law, it acknowledges its significance for individual well-being and societal stability. It stresses the inviolability of the home and the importance of keeping secrets, prohibiting espionage, and viewing privacy as a core element of human conduct. Even though technological advancements present new obstacles, Islamic teachings, based on the Qur’an and

Sunnah, provide a solid foundation for privacy protection in the digital era. Nonetheless, they are somewhat lacking in comprehensiveness, especially concerning the e-commerce sector, as they do not place adequate emphasis on e-privacy. As a result, the Saudi regulatory authority has undertaken substantial initiatives to secure the online environment in alignment with Islamic law.

In the realm of e-commerce, consumers possess the right to cancel contracts unilaterally, and this choice is obligatory for the seller, subject to certain regulations. In Saudi Law, the consumer's right to annul e-commerce contracts arises from statutory provisions rather than contractual agreements. This is obligatory for service providers and cannot be relinquished, thus ensuring the protection of consumers. Conversely, in Islamic Law, the right to recourse is derived from concepts like *Khiar al-Shart* (option of condition), which relies on mutual consent between the involved parties. Unlike Saudi law, Islamic law stresses that this right must be distinctly stated in the contract unless indicated by customary practices or established legislation. Both parties may retain the right to cancel if there is mutual agreement, while in Saudi law, this right is exclusive to the consumer.

Under Saudi law, consumers have the right to unilaterally cancel contracts within defined timeframes. Service providers are obliged to comply by refunding amounts and terminating obligations, even if the consumer does not provide justification. This extensive approach is designed with the e-commerce context in mind and focuses on consumer protection. Likewise, Islamic Law encompasses *Khiar al-Shart*, which permits contract cancellation without needing justification, similar to Saudi law, but requires a clear agreement unless dictated by customs or local regulations. The right may be forfeited if the purchaser uses or disposes of the products, explicitly renounces the right, or if the cancellation period lapses.

Concerning duties following cancellation, Saudi law asserts that upon cancellation, service providers must refund payments, terminate related contracts, and follow a defined refund schedule (generally within 14 days). Refunds are usually processed using the original payment method unless agreed otherwise. Similarly, in Islamic law, the seller is obligated to return the purchase amount, and the buyer must return the goods.

# CHAPTER 5: CONSUMER OBLIGATIONS IN E-COMMERCE UNDER SAUDI AND ISLAMIC LAW

This chapter addresses the consumer's obligations as an individual who participates in electronic commerce to acquire goods or services offered by a provider of such services.[1] Saudi law applies to such consumers and considers the position of Islamic law. This chapter starts with an introduction to consumer obligations (section 5.1). Then the first obligation is *Payment* (section 5.2), the second obligation is *Taking delivery* (section 5.3), and the third refers to *Consumers' obligations when using their rights on E-Commerce* (section 5.4).

The text below explores the intersection of traditional Islamic law principles and modern e-commerce rules concerning the consumer's obligations. It also delves into how Saudi Arabian law harmonises modern e-commerce practices with traditional Islamic law principles in relation to consumers' obligations in e-commerce contracts. It clarifies Saudi legal regulations and suggests potential remedies in case there is a legal gap or improved perspective. It discusses the stance of Islamic law with respect to its principles and general provisions regarding these obligations. Finally, it examines the application of consumer obligations in e-commerce under Saudi Law and compares them with Islamic law.

## 5.1 Introduction to consumer obligations

Relations between merchants and consumers typically occur in real life and are established as civil law; consequently, these relationships are managed through all legally sanctioned civil regulation methods.[2]

It is widely accepted that all internet-related transactions involving the exchange of goods are considered legal obligations and are governed by the same regulatory

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[1] *Electronic Commerce Law* (Royal Decree No M/126 dated 1440H (2019)) ('*Electronic Commerce Law*') art 1.

[2] Victor I Tsyganov, Aleksey A Demin and Elvira O Osadchenko, 'Obligations in the Field of E-Commerce' in Agnessa O Inshakova and Elena I Inshakova (eds), *Competitive Russia: Foresight Model of Economic and Legal Development in the Digital Age* (Springer, 2020) 585, 586.

structures as traditional legal obligations.[3] However, consumer paradigms have been shifted to new roles due to technological developments and their financial constraints.[4]

Fortunately, Saudi lawmakers created civil law as an umbrella that covers e-commerce transactions; in other words, civil law governs e-commerce law but allows e-commerce law to state its own provisions. According to Article 30, the regulations stated in contract provisions are relevant to both nominal and innominate contracts and do not affect the legal provisions that apply to particular contracts.[5] That means the legal effect of a contract is established when an offer and acceptance concur in compliance with the legal provisions that regulate the conclusion of contracts.[6] Therefore, when an agreement is concluded between the consumer and service provider, it is obligatory for both of them. In other words, the rights that arise from a contract will come into effect as soon as the contract is concluded, and they will not depend on payment or any other factor, except if the law states otherwise; both parties involved in the contract are obligated to fulfil their respective obligations.[7] Moreover, not only the provisions of a contract but also other requirements as prescribed by legal provisions, custom, and the nature of the contract shall bind a contracting party.[8] The buyer's obligations are highly significant, which is why Saudi law enforcement authorities regulate these obligations extensively in civil law transactions.[9] Moreover, the beneficiary's (lessee's) obligations are addressed in civil law transactions.[10]

Based on that, the consumer has three obligations, which will be addressed in separate sections: first, the *Payment obligation*; second, *Taking delivery*; and third, *Consumers' obligations when using their rights on E-Commerce.*

## 5.2 Consumers' payment obligation

This section describes and analyses the consumer's payment obligation, first in Saudi law and then in Islamic law, with a conclusion on the relationship between the two.

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[3] Ibid 587.
[4] Jim Hawkins, 'Protecting Consumers as Sellers' (2019) 94(4) *Indiana Law Journal* 1407.
[5] *Civil Transactions Law* (Royal Decree No M/191, dated 2023) art 30 ('*Civil Transactions Law*').
[6] Ibid art 31.
[7] Ibid art 94.
[8] Ibid art 95.
[9] See ibid arts 345–52.
[10] See ibid arts 429–39.

### *5.2.1 Payment obligation in Saudi law*

The Saudi regulator obligates the buyer and the beneficiary to pay the price of the goods or the rent to the seller or lessor[11] (service provider). However, does the Saudi regulator stipulate whether the amount should be determined before entering into a contract? What is the payment time? Moreover, who pays the cost of the payment? Where should the payment be made? Does the Saudi regulator protect the service provider's rights concerning the consumer's obligation to pay? What are the implications of non-payment? Each of these questions will be answered in a separate section.

#### *5.2.1.1 Determining price and sale*

As mentioned in the service provider's obligation to disclose, the price must be disclosed before any agreement between the two parties.[12] What is required is a clear breakdown of the total price, including all fees, taxes, or additional costs related to delivery (if applicable), as well as any potential future costs that may apply to the consumer, including a clear explanation of how they are determined and the conditions under which they apply.[13] In addition, the *Draft Consumer Protection Law* forbids using deceptive practices, which include hiding the cost of the product or service, along with any additional fees.[14] Therefore, if there is no information that entering into the contract entails a payment obligation, Article 44 specifies that the contract does not hold the consumer accountable.[15] In confirmation of this, the *Ministry of Commerce Guide to Consumer Rights and Responsibilities* mentions that if there is an issue with the service provider's services, pricing, or specifications, the consumer has two options: either keep the order or cancel it and receive a refund for the payment.[16]

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[11] See ibid art 345, 429.
[12] For more information see above: 4.1.1 The disclosure obligation in Saudi law.
[13] *Electronic Commerce Law* (n 1) art 7/D. 'Implementing Regulation of the E-Commerce Law', *Ministry of Commerce* (Web Page) art 7/1-B <https://mc.gov.sa/en/Regulations/Pages/details.aspx?lawId=691e2bec-f987-4856-b2bf-ab4b00c8c9b6> ('*Implementing Regulations of the E-Commerce Law*').
[14] Ministry of Commerce, 'Consumer Protection Law' (Draft Law, 2022) art 18/D <https://istitlaa.ncc.gov.sa/en/Trade/mci/Consumer/Pages/default.aspx> ('*Draft Consumer Protection Law*').
[15] Ibid art 44/2.
[16] Ministry of Commerce, *Guide to Consumer Rights and Responsibilities 2023* (Report) 26 <https://mc.gov.sa/en/guides/Documents/CustomerGuide.pdf> ('*Ministry of Commerce Guide to Consumer Rights and Responsibilities*').

The law in Saudi Arabia related to e-commerce has mandated that the service provider must disclose details about the product or service being offered.[17] Depending on the nature of the product or service, the service provider must provide specific information to the consumer.[18] The information provided to the consumer must be transparent, precise, sufficient, and free from any misrepresentation.[19]

Thus, according to Saudi law, it appears that determining the price of the sale or service is a requirement under the disclosure obligation. However, the obligation to disclose does not necessarily mean that the price of the sale or service should be determined and that otherwise the contract is invalid. Assuming a consumer buys a product or service without specifying the price or the essential characteristics of the item or service, what is the ruling if the consumer agrees to it or declines it after the contract is concluded? Is the consumer obligated to pay or not?

While the legal rules relating to the electronic environment do not directly address this case, the general civil legal rules can be a helpful starting point. However, it is crucial to bear in mind that understanding Saudi Arabian law, with its distinct provisions for determining the core information of a sale or its price, is of the utmost importance and requires careful consideration.

Firstly, the buyer must be aware of the item being sold either by physically viewing it or by receiving a description of its identifying features.[20] If the contract of sale specifies the buyer's knowledge of the sold item, the buyer can only nullify the contract due to lack of knowledge if they can prove that the seller deceived them.[21] So if a consumer agrees to a contract while being aware of the essential characteristics of the sale, they cannot claim lack of knowledge of the sold item unless the seller deceived them. Therefore, the consumer cannot terminate the contract and must pay the service

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[17] For more details see above: 4.1.1 The disclosure obligation in Saudi law; 4.1.1.2 The core features of the product or service in Saudi law.

[18] See *Commercial Data Law* (Royal Decree No M/15 dated 1423 (2002)) ('*Commercial Data Law*'); *Implementing Regulations of the Commercial Data Law* (Ministerial Resolution No 1901 dated 1423 (2002)) ('*Implementing Regulations of the Commercial Data Law*'); *Draft Consumer Protection Law* (n 14).

[19] *Draft Consumer Protection Law* (n 14) art 7/1.

[20] *Civil Transactions Law* (n 5) art 308/1.

[21] Ibid art 308/2.

provider. The reverse meaning of this concept is that the consumer is entitled to avoid their payment obligation if the core information of the sale is not established.

Secondly, in regard to determining the sales price, the Saudi regulator in some situations permits it not to be specified in the contract.[22] First, sale price estimation can only be done using appropriate pricing criteria.[23] This means the price can be determined after the contract conclusion. Moreover, if both parties in a contract mutually agree to determine the sale price based on the market price, then the market price shall be determined according to the time and place of sale.[24] If there is no market in the place of sale, then the prices of the market that are deemed applicable according to custom shall be referred to.[25] The challenge lies in the fact that the e-commerce industry is extensive and determining market prices can be difficult due to its universal nature; additionally, the prices vary significantly from one another, compounding the issue.

Third, if the parties involved in the contract do not establish a price for the item that has been sold, the sale will not be considered void if the circumstances suggest that the parties intended to apply either the market price or the price that has been used in previous dealings between them.[26]

In summary, Saudi law mandates that e-commerce service providers disclose details about products or services, including a clear breakdown of the total price. If there is no disclosure about the core information of the sale, the consumer can rescind the contract and not pay the service provider. Nevertheless, if consumers express their agreement about knowing the core information of the sale, they cannot nullify a contract due to a lack of knowledge unless they can prove that the seller deceived them. Sale prices can be determined after the contract conclusion, based on the market price, and if there is no established price, the sale will not be considered void if the circumstances suggest parties intended to apply either the market price or the price used in previous dealings. In conclusion, whereas the sale should be determined

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[22] Regardless of the provisions of the to transferring sale ownership. For more information about that see above: 4.2.1.1 Obligation to transfer sale ownership.
[23] *Civil Transactions Law* (n 5) art 313.
[24] Ibid art 314.
[25] Ibid.
[26] Ibid art 315.

under Saudi law; in contrast, the price should not be determined in those cases previously mentioned.

#### *5.2.1.2 Time of Payment*

The *Electronic Commerce Law* does not stipulate a specific payment time. However, the regulations that implement the law dictate that a consumer should receive an invoice once the contract has been entered into.[27] The invoice must confirm that full payment has been made, if indeed it has.[28] The Article states that if the payment is made, it should be documented. This means that the payment may have yet to be made, and there is no specific time for making the payment. However, what options are available if the consumer is not bound to a specific time for making the payment? When is it the consumer's responsibility to fulfil their obligation?

Unless the parties agree to a deferred payment or payment in instalments for a definite term, the price should be paid at the time of sale.[29] In case the payment is postponed or scheduled to be paid in parts, the period shall begin from the contract date unless otherwise agreed.[30] In every case, prior to taking delivery, the purchaser is required to pay for the sold item unless there is a prior agreement to the contrary.[31]

Nevertheless, a rental agreement has different provisions regarding the payment time as it does not come with the benefit on one single occasion. Therefore, the rent payment by the lessee shall be made on agreed-upon dates.[32] In the case where there are no agreed dates, the rent shall be paid upon the delivery of the leased item. If the lease contract is divided into time periods, the lessee shall pay the rent at the start of each period.[33] In the case of delay in delivery, if the lessee is not responsible for the delay, they will not be required to pay rent for any period that ends before the leased item is delivered.[34] However, if the lessee is responsible for the delay, they will be

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[27] *Implementing Regulations of the E-Commerce Law* (n 13) art 8.
[28] Ibid art 8/I.
[29] *Civil Transactions Law* (n 5) art 317/1.
[30] Ibid art 317/2.
[31] Ibid art 345.
[32] Ibid art 429/1.
[33] Ibid.
[34] Ibid art 429/2.

required to pay rent for the entire lease period, including any period that may have elapsed prior to the delivery of the leased item.[35]

#### *5.2.1.3 Cost of Payment*

The *Electronic Commerce Law* and its *Implementing Regulations* require disclosing payment arrangements and their provisions.[36] However, these arrangements and provisions need to be clarified, specifying what is included, such as whether or not payment costs are included. The consumer protection draft is more precise in addressing payment costs as it prohibits charging consumers fees over and above those borne by the economic operator when using a specific payment method.[37] This may mean that the payment cost is on the consumer, but they should not bear more than the actual cost. However, it is essential to note that the consumer protection draft has certain limitations in addressing payment costs. Notably, the service provider is implicitly authorised to pass on the payment costs to the consumer as the consumer protection draft only prohibits service providers from increasing the consumer's obligation more than the actual payment value. This is insufficient as it does not establish a legal basis in the event of a dispute over who is obligated to bear the cost or a disagreement between the parties to the contract.

Fortunately, the *Civil Transactions Law* steps in to provide a clear solution to this problem. Unless otherwise agreed, the buyer is obligated to pay the cost of the payment.[38] In other words, the cost of payment is essentially a consumer's obligation to the service provider unless the contract specifies that the service provider bears this cost. This legal provision offers a straightforward path for resolving disputes over payment costs, thereby instilling confidence in the legal framework.

#### *5.2.1.4 Place of Payment*

It was previously mentioned that the payment time is in advance if no payment time is specified.[39] Therefore, it is reasonable to some extent that the *Electronic Commerce Law* did not select a place for payment, especially since most electronic commercial

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[35] Ibid.
[36] *Electronic Commerce Law* (n 1) art 7/D; *Implementing Regulations of the E-Commerce Law* (n 13) art 7/E.
[37] *Draft Consumer Protection Law* (n 14) art 17/M.
[38] *Civil Transactions Law* (n 5) art 352.
[39] See below: 5.2.2.2 Time of Payment.

transactions require payment electronically and in advance. This means that payment often does not require specifying a place in the e-commerce environment. However, this does not mean that it covers all e-commerce transactions, as parties to a contract may agree to make payment in cash without specifying a payment location. Also, there may be no agreement on the place of payment, but it is agreed that payment is not advanced. Therefore, there may be situations where the place of payment needs clarification in e-commerce law.

The *Civil Transactions Law* has addressed most cases related to the place of payment. The payment location is based on what is agreed upon between the parties.[40] However, if there is no agreement on the location, then when the sold item is delivered, the buyer is obligated to pay the due price at the place of delivery.[41] If the price is not due at the time of delivery, it should be paid at the place where the contract was made.[42]

An apparent legal conflict arises when a consumer and a service provider engage in an e-commerce contract without specifying a payment time or location. One provision stipulates that the consumer must pay in advance due to the absence of a specified payment time,[43] while another provision requires payment to be made at the place of delivery in the absence of a specified payment location.[44] This conflict is not only evident but also significant, as both provisions are part of the same law, and neither provision is more favourable than the other. It is imperative for Saudi lawmakers to resolve this contradiction.

#### *5.2.1.5 Implications of non-compliance with the payment*

This subsection is divided into two distinct parts: one part deals with the guarantees provided to the service provider regarding payment by the consumer, while the other pertains to the consumer's responsibility in case of damage or loss of non-paid items.

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[40] *Civil Transactions Law* (n 5) art 348.
[41] Ibid.
[42] Ibid.
[43] Ibid art 317/1.
[44] Ibid art 348.

*5.2.1.5.1 Guarantees provided to the service provider regarding payment by the consumer*

Saudi law provides the seller (service provider) with various guarantees to protect him or her in the event the buyer fails to fulfil his/her obligation to pay. It gives the seller the right to withhold the transfer of ownership until full payment is received; otherwise, the consumer cannot transfer the ownership. In other words, the transfer of ownership is subject to full payment being received.

In any event, the seller is obligated to do what is necessary on his or her part to transfer ownership of the item sold to the buyer and to refrain from any action that would make the transfer of ownership impossible or difficult.[45] Nevertheless, the seller can stipulate to suspend the transfer of ownership to the buyer until the buyer has paid the full price, even if the sold item has been delivered.[46] So when the seller receives the full payment, the buyer's ownership will be determined from that point in time.[47]

The seller has the option to keep the sold item until full payment is received from the buyer, regardless of whether the buyer offers a pledge or surety.[48] However, if the seller agrees to defer payment, they will have to let go of their right to hold the sold item and hand it over to the buyer.[49] The lessor can decline to hand over the leased item unless they receive the rent due in advance.[50]

If the sale contract specifies a payment deadline and the seller states that the sale will be void if payment is not received by that deadline, and the buyer fails to meet the deadline, the seller may terminate the sale without notification, unless otherwise agreed.[51]

In conclusion, Saudi law provides three guarantees to protect the e-seller in case of non-payment from the consumer. The seller has the right to suspend the transfer of ownership until payment is made, withhold the sold item until the price is received, and cancel the sale for non-compliance with payment. However, the seller must do what is necessary to transfer ownership of the item sold to the buyer. The seller can stipulate suspending ownership transfer until the buyer pays the total price. The seller can then

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[45] Ibid art 319.
[46] Ibid art 320/1.
[47] Ibid art 320/2.
[48] Ibid art 346/1.
[49] Ibid art 346/2.
[50] Ibid art 417.
[51] Ibid art 350.

keep the sold item until they receive full payment from the buyer. However, if the seller agrees to defer payment, they must hand over the sold item to the buyer. The lessor can decline to hand over a leased item unless they receive the rent due in advance. If the sale contract specifies a payment deadline and the buyer fails to meet it, the seller may terminate the sale without notification.

*5.2.1.5.2 Consumer's responsibility in case of damage or loss of non-paid items*

If the consumer does not pay the price of the sold item to the service provider, then according to the seller's satisfaction, if the seller agrees to postpone payment, the loss is on them.[52] On the other hand, if the seller does not accept, they have the right not to deliver the sold item, so if it is lost or damaged, then it is the consumer's responsibility.[53]

Nevertheless, supposing the buyer receives the sold item before paying the spot price with the seller's knowledge and non-prevention, in that case, this is an authorisation to take delivery, so the buyer bears the liability.[54] However, if the buyer receives the sold item before paying the due price, and without the seller's permission, the seller has the right to take it back. If it perishes or is damaged in the hands of the buyer, the buyer is considered to have received it, and if the seller chooses to take it back, the seller has the right to demand compensation from the buyer.[55]

Article 44 of the *Draft Consumer Protection Law* states that the contract is not binding on the consumer if the economic operator[56] does not indicate to him that its conclusion creates an obligation to pay.[57] What supports this understanding is what is stated in the *Draft Consumer Protection Law* that if a consumer has suffered damage due to a violation of his rights or the commission of any act by the service provider constituting a violation stipulated in the law or regulation, appropriate measures can be taken,

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[52] Ibid art 346/1.
[53] Ibid art 346/2.
[54] Ibid art 347/1.
[55] Ibid art 347/2.
[56] A person with a natural or legal status, private or public, who practices a commercial, industrial, professional, or craft activity, and provides a service to the consumer, or produces, manufactures, imports, exports, sells, rents, displays, distributes, or markets a product with the aim of providing it to the consumer or dealing or contracting with it by any means, including electronic means. See *Draft Consumer Protection Law* (n 14) art 1.
[57] Ibid art 44/2.

including terminating the contract and compensation for the damages sustained.[58] Also, the *Ministry of Commerce Guide to Consumer Rights and Responsibilities* states that the consumer can choose to keep the order or cancel it and obtain a refund for the payment if an error occurs in services, pricing, or specifications from the service provider.[59]

### *5.2.2 Payment obligation in Islamic law*

This section is crucial as it delves into Islamic law and its comparison with Saudi law, particularly in terms of the buyer's and the beneficiary's obligation to pay the price of the goods or the rent to the seller or lessor (service provider). It also touches upon some pertinent provisions that, despite Saudi law being silent on them, are worth considering.

This section is divided into five parts: determining price and sale, time of payment, cost of payment, place of payment, and implications of non-compliance with payment. Each of these topics will be discussed as an independent section.

#### *5.2.2.1 Determining price and sale[60]*

In Islamic law, one of the conditions for the validity of a sale is that the item and the price must be known in order to prevent disputes; consequently if one of them is unknown the transaction is invalid.[61] This prohibition is because it is *Gharar*[62] (that

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[58] Ibid art 65.

[59] *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 16) 26.

[60] To avoid repetition, this section will only briefly re-mention the general idea of determining price and sale. For more details, please refer above to: 4.1.2.2 Core features of the product or service.

[61] علاء الدين بن مسعود الكاساني الحنفي [Alaa al-Din bin Masoud al-Kasani al-Hanafi], بدائع الصنائع في ترتيب الشرائع [*Badaa'i al-Sana'i in the Arrangement of Canons*] (دار الكتب العلمية [Dar al-Kutub al-Ilmiyya], 2nd ed, 1986) vol 5, 156 ('*Badaa'i al-Sana'i in the Arrangement of Canons*'); ابن عابدين محمد الدمشقي الحنفي [Ibn Abdin Muhammad al-Dimashqi al-Hanafi], رد المحتار على الدر المختار -حاشية ابن عابدين [*Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen*] (دار الفكر - بيروت [Dar Al-Fikr - Beirut], 2nd ed, 1966) vol 4, 529 ('*Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen*'); النووي[Al-Nawawi], روضة الطالبين وعمدة المفتين [*Rawdat al-Talibin and Omdat al-Muftis*] (المكتب الإسلامي، بيروت [The Islamic Office, Beirut], 3rd ed, 1991) vol 3, 360 ('*Rawdat al-Talibin and Omdat al-Muftis*'); منصور البهوتي الحنبلي [Mansour Al-Bahouti Al-Hanbali], كشاف القناع [*Kashaaf Alqinae*] (وزارة العدل في المملكة العربية السعودية [The Ministry of Justice in the Kingdom of Saudi Arabia], 1st ed, 2000-2008) vol 3, 163 ('*Kashaaf Alqinae*'); علاء الدين السمرقندي [Aladdin Al-Samarqandi], تحفة الفقهاء [*Tuhfat al-Fuqaha*] (دار الكتب العلمية، بيروت – لبنان [Dar Al-Kutub Al-Ilmiyyah, Beirut – Lebanon], 2nd ed, 1994) vol 2, 45 ('*Tuhfat al-Fuqaha*').

[62] *Kashaaf Alqinae* (n 61) vol 3, 163. Gharar: It is that which cannot be delivered, whether not present or non-existent; likewise, the uncertainty of things, if they sell what is on this tree, then the existence, value, or character of the thing sold is unknown. See ابن قيم الجوزية [Ibn Qayyim al-Jawziyyah], *إعلام الموقعين عن رب العالمين* [*Informing the Signatories about the Lord of the Worlds*] (دار ابن

which cannot be delivered, uncertainty of things), and because “Allah's Messenger (ﷺ) forbade a transaction determined by throwing stones, and any type which involves some uncertainty”.[63] Also, In Islamic law, satisfaction is a required condition in transactions between two parties, and satisfaction is only possible with a known price and sale.[64]

A case illustrating *Gharar* is the sale of a sheep from a herd without specifying which sheep is being sold; in this situation, the sale is considered void because the specific sheep from the herd is not identified. This lack of clarity can lead to disputes, especially when there are significant differences between individual sheep; consequently, the sale is deemed invalid.[65]

However, there are differences regarding the timing of knowing the price, whether it is at the time of the contract or after it. Most of the four schools have made it obligatory to know the price at the time of the contract, prohibiting selling at market price.[66] A few jurists have permitted selling at market price because the price would be determined and known in the future. However, it is argued that determining the price in this case varies depending on the view of market experts.[67] While the buyer wants to buy at a lower value, the seller wants to buy at a higher value.[68] Accordingly, some stipulate that, for a transaction to be permissible, the market price must be known at the time of the contract, which is before the parties separate from each other, or that the merchandise is not variable.[69] This means that its price is the same in all circumstances; for example, a new mobile iPhone is the latest version, so it does not

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الجوزي، المملكة العربية السعودية [Dar Ibn Al-Jawzi, Kingdom of Saudi Arabia], 1st ed, 2002) vol 3, 207 (‘*Informing the Signatories about the Lord of the Worlds*’).

[63] Sahih Muslim, Book 21, Hadith 8 <https://sunnah.com/muslim:1513>; Sunan Ibn Majah, Book 12, Hadith 58 <https://sunnah.com/ibnmajah:2194>.

[64] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 5, 156.

[65] Ibid; *Rawdat al-Talibin and Omdat al-Muftis* (n 61) vol 3, 360; وزارة الأوقاف والشؤون الإسلامية [The Ministry of Awqaf and Islamic Affairs], الموسوعة الفقهية الكويتية [*Kuwaiti Jurisprudence Encyclopedia*], (دار السلاسل-الكويت [Dar Al Salasil-Kuwait], 2nd ed, 2006) vol 31, 155 (‘*Kuwaiti Jurisprudence Encyclopedia*’).

[66] *Kashaaf Alqinae* (n 61) vol 7, 359; المرداوي الحنبلي [Al-Mardawi Al-Hanbali], الإنصاف [*Fairness*] ( هجر- القاهرة [Hijr-Cairo], 1st ed, 1995) vol 12, 126 (‘*Fairness*’); النووي [Al-Nawawi], المجموع شرح المهذب [*Al-Majmoo’ Sharh Al-Muhadhab*] (دار الفكر [Dar Al-Fikr], 1st ed) vol 9, 328 (‘*Al-Majmoo’ Sharh Al-Muhadhab*’).

[67] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 5, 158.

[68] *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 61) vol 4, 529.

[69] كمال الدين السيواسي (ابن الهمام الحنفي) [Kamal al-Din al-Siwasi (Ibn Hammam al-Hanafi)], فتح القدير على الهداية [*Fath al-Qadeer for Guidance*] (دار الفكر، لبنان [Dar Al-Fikr, Lebanon], 1st ed, 1970) vol 6, 260 (‘*Fath al-Qadeer for Guidance*’); *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 61) vol 4, 529.

vary, and if there is a discrepancy, it will be a slight discrepancy that does not lead to uncertainty in price.

#### *5.2.2.2 Time of Payment*[70]

In Islamic law, the general rule is that payment is due at the time of the contract, requiring the buyer to pay the price upfront.[71] However, in certain localities, it is customary for a sale to be deferred or paid in instalments over a specified period.[72] In such cases, the sale will be subject to the prevailing custom.[73] For instance, if a person purchases an item from the market without a specified payment time, the default expectation is for payment to be made upfront, unless local custom dictates otherwise.[74] In such situations, the custom effectively acts as a condition of the sale.[75]

As for the *Salam* sale, according to Islamic jurists,[76] the buyer must pay the total amount during the contracting session, which means that it is not permissible to postpone the price even if the parties to the contract agreed to do so. However, some Malikis permit delaying the payment on condition that the delay is at most three days.[77] They believe less than three days is forgivable because there is no difference between payment at the time of the contract or within three days.[78] However, this inference is contrary to most scholars of Islamic jurisprudence, and basically there is no evidence for it; in fact, it is contrary to the evidence. In the *Salam* sale the buyer should pay the price immediately because if payment is delayed, it will come under the rule of selling debt for debt, which is forbidden in Hadith, and the risk would also increase. Moreover,

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[70] To have the comprehensive concept, please see above: 4.1.2.2 Core features of the product or service.

[71] يوسف بن عبد البر [Yusuf bin Abdul-Barr], *الكافي في فقه أهل المدينة* [*Al-Kafi fi Jurisprudence of the People of Medina*], (مكتبة الرياض الحديثة [Riyadh Modern Library, Riyadh], 2nd ed, 1980) vol 2, 726; *Kuwaiti Jurisprudence Encyclopedia* (n 65) vol 9, 37; علي حيدر [Ali Haider], درر الحكام في شرح مجلة الأحكام *[Durar Al-Hikam in Explaining Al-Ahkam Magazine*], (دار الجيل [Dar Al-Jeel], 1st ed, 1991) vol 1, 232 (‘*Durar Al-Hikam in Explaining Al-Ahkam Magazine*’).

[72] *Durar Al-Hikam in Explaining Al-Ahkam Magazine* (n 71) vol 1, 232.

[73] Ibid.

[74] Ibid.

[75] Ibid.

[76] محمد المواق المالكي [Muhammad al-Mawaq al-Maliki], التاج والإكليل لمختصر خليل [*The Crown and the Crown by Mokhtasar Khalil*] (دار الكتب العلمية [Scientific Books House], 1st ed, 1994) vol 6, 476 (‘*The Crown and the Crown by Mokhtasar Khalil*’); القرافي [Al-Qarafi], الذخيرة [*Aldakhira*], (دار الغرب الإسلامي- بيروت [Dar Al-Gharb Al-Islami - Beirut], 1st ed, 1994) vol 5, 226 (‘*Aldakhira*’); ibid vol 1, 417; *Kashaaf Alqinae* (n 61) vol 3, 304.

[77] *The Crown and the Crown by Mokhtasar Khalil* (n 76) vol 6, 476; *Aldakhira* (n 76) vol 5, 226.

[78] *The Crown and the Crown by Mokhtasar Khalil* (n 76) vol 6, 476; *Aldakhira* (n 76) vol 5, 226.

the transaction would fall within the scope of deception because the buyer might be delayed, and the price could not be paid.[79]

It should be noted that in electronic commercial transactions, usury (*Riba*) may occur during payment. According to Islamic jurisprudence, if the commodity is gold or silver, the receipt of the commodity and the price must be simultaneous.[80] Most contemporary scholars believe that modern money is subject to usury because it shares the same characteristics as gold and silver.[81] Therefore, the consumer must not pay the price in the contract session unless they or their agent receive the commodity in the same contract session.

In a rental contract, the time of payment is determined by the agreement of the parties involved. If there is no agreement, there are differing opinions among the schools of jurisprudence.[82] The Hanafis and Malikis believe that payment should be made incrementally based on the benefits received.[83] On the other hand, the Shafi'is and Hanbalis believe that the entire price must be paid during the contract session.[84] They argue that the Prophet, may God bless him and grant him peace, requested that rent be paid to the landlord before his sweat dries, indicating that it should be paid in advance.[85]

#### *5.2.2.3 Cost of Payment*

In Islamic law, the payment cost falls on the buyer generally because one of the completions of the sale is payment, and payment is on the buyer, so matters that

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[79] See *The Crown and the Crown by Mokhtasar Khalil* (n 76) vol 6, 476; *Kashaaf Alqinae* (n 61) vol 3, 304; *Informing the Signatories about the Lord of the Worlds* (n 62) vol 3, 194.

[80] ابن قدامة الحنبلي[Ibn Qudamah al-Hanbali], *المغني [Almughaniy]* (مكتبة القاهرة [Cairo Library], 1st ed, 1968) vol 4, 9 ('*Almughaniy*'); *Kuwaiti Jurisprudence Encyclopedia* (n 65) vol 40, 228.

[81] 3(3) *Journal of the Islamic Fiqh Council* 1650; 3(5) *Journal of the Islamic Fiqh Council* 1609; Resolution No 21 (9/3).

[82] محمد بن أحمد ابن رشد [Muhammad ibn Ahmad ibn Rushd], بداية المجتهد ونهاية المقتصد [*The Beginning of the Diligent and the End of the Frugal*] (دار الحديث - القاهرة [Dar al-Hadith - Cairo], 2004) vol 4, 13 ('*The Beginning of the Diligent and the End of the Frugal*'); *Kuwaiti Jurisprudence Encyclopedia* (n 65) vol 1, 266–7.

[83] *The Beginning of the Diligent and the End of the Frugal* (n 82) vol 4, 13; *Kuwaiti Jurisprudence Encyclopedia* (n 65) vol 1, 266–7.

[84] *The Beginning of the Diligent and the End of the Frugal* (n 82) vol 4, 13; *Kuwaiti Jurisprudence Encyclopedia* (n 65) vol 1, 266–7.

[85] *The Beginning of the Diligent and the End of the Frugal* (n 82) vol 4, 13; *Kuwaiti Jurisprudence Encyclopedia* (n 65) vol 1, 266–7.

complete the payment are also on the buyer for the sale to take place.[86] However, some scholars make a distinction between the payment cost, which previously related to weighing the gold and silver, and the cost of paying the price, placing the former on the seller and the latter on the buyer.[87]

#### *5.2.2.4 Place of Payment*

As previously mentioned, in the *Salam* transaction the payment provisions must occur in the place where the contract occurs. Likewise, if the sold item is gold, silver, or paper currency (exchange), the transaction must take place at the contract site.[88] Therefore, the place of payment is the place of the contract, so the consumer must pay the price at the place of the contract; otherwise, the sale will be invalid.

However, what if the item sold is a commodity, not one of the above? Should the place of payment be the place of the contract or not? In the first instance, it is according to what the parties to the contract stipulate. In the second instance, if they do not agree, then, given that the merchandise is absent in electronic commerce, the place of payment is the place of receipt of the sold item because this is equality between the two parties, and it covers situations where the sold item is lost.[89] Therefore, the buyer can refuse to make the payment until they see the item sold.

#### *5.2.2.5 Implications of non-compliance with payment*

The following section is split into two separate segments: One segment focuses on the assurances given to the service provider concerning the consumer's payment, while the other relates to the consumer's obligations in the event of damage or loss of unpaid items.

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[86] *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 61) vol 4, 560; الرافعي [Al-Rafi'i], الشرح الكبير [Al-Sharh al-Kabir], (دار الفكر [Dar Al-Fikr]) vol 8, 454 ('*Al-Sharh al-Kabir*'); *Rawdat al-Talibin and Omdat al-Muftis* (n 61) vol 3, 521; عبد الله النسفي [Abdullah Al-Nasafi], كنز الدقائق [*Treasure of Tiny*], ( دار السراج [Dar Al-Siraj], 1st ed, 2011) 409.

[87] *Al-Sharh al-Kabir* (n 86) vol 8, 454; *Rawdat al-Talibin and Omdat al-Muftis* (n 61) vol 3, 521; *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 61) vol 4, 560.

[88] See above: 5.2.2.2 Time of Payment.

[89] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 6, 153–4; *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 5, 237.

*5.2.2.5.1 Guarantees for the service provider against the consumer regarding payment*

This section addresses the seller's right to set payment of the full price as a condition on the transfer of ownership, retain the sold item until the price is received, and terminate the sale due to payment non-compliance.

The main difference between Saudi and Islamic law on transferring ownership relates to allowing postponed ownership transfer after the signing of the contract. As mentioned previously, in Saudi law[90] the seller has the right to delay the transfer of ownership to the buyer until they have paid the total price, even if the item has already been delivered. Only on receipt of payment by the seller will the buyer's ownership be fulfilled. In contrast, under Islamic law, the seller is not allowed to keep ownership of the item sold until the deferred price is paid or another specified date.[91] As per the requirements of the contract, the seller must transfer ownership of the sold item upon sale.[92] However, the condition of retaining ownership until all instalments are paid or at any other time goes against the core of the sale contract as it prevents the transfer of ownership in the event of a sale.[93] In addition, the seller has agreed to waive their right to immediate payment, thereby not stopping the purchaser from having the right to own the sold commodity.[94]

Moreover, selling a commodity in instalments while retaining ownership is considered *Gharar* (uncertainty of things) in two ways. Firstly, if the buyer fails to pay one of the instalments, they may lose all the price they paid for the commodity under the pretext that what was presented was rent, not price and that the condition of ownership was not fulfilled, which is a clear example of *Gharar*.[95] Secondly, the nature of the contract in this form will not be determined until after the last obligatory instalment is paid, which creates hesitancy between selling and leasing, so the sale may or may not occur,

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[90] *Civil Transactions Law* (n 5) art 320/1–2.

[91] *Kuwaiti Jurisprudence Encyclopedia* (n 65) vol 9, 37; 1(6) *Journal of the Islamic Fiqh Council* 193; 2(7) *Journal of the Islamic Fiqh Council* 9; Resolution No 51 (6/2).

[92] *Kashaaf Alqinae* (n 61) vol 7, 402.

[93] Accounting and Auditing Organisation for Islamic Financial Institutions, *Legitimate Standards* ( المعايير الشرعية) (King Fhad, 2015) Standard 39 (‘*Legitimate Standards*’); دبيان الدبيان [ Debian Al-Debian], *المعاملات المالية أصالة ومعاصرة [Authentic and Contemporary Financial Transactions]* (2nd ed, 1432AD (2011AD)) vol 9, 531 (‘*Authentic and Contemporary Financial Transactions*’).

[94] *Tuhfat al-Fuqaha* (n 61) vol 2, 41; *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 5, 250; *Kashaaf Alqinae* (n 61) vol 7, 489.

[95] *Authentic and Contemporary Financial Transactions* (n 93) vol 9, 531–2.

which can be seen as an act of uncertainty.[96] Despite being a controversial topic, some prior Hanbalis and several Islamic jurisprudence councils have recently accepted a possible solution to this issue, which involves mortgaging the item sold to the seller.[97] The seller has the option to stipulate a condition that the buyer must mortgage the item to him against the deferred price after acquiring it in person or in a constructive manner.[98]

Most Islamic jurists give the seller the right to withhold the item until the buyer pays the price if there has been no agreement to defer the payment.[99] This is based on the fact that the seller has agreed to sell the item at a certain price, so there is no obligation to deliver it before receiving full payment of that price.[100]

If the buyer has paid almost the entire price but a small amount is left unpaid, the seller would have the right to withhold the whole item to collect the remaining amount.[101] This is because the thing sold is subject to confiscation at the price and is indivisible, so the entire thing sold is subject to confiscation for any part of the price.[102]

However, there are circumstances where the seller's right to withhold the item becomes void.[103] For instance, if the seller agrees to delay the price after the contract, the right to withhold the item is no longer valid. This is because the seller has agreed to delay his right, so that the buyer's right to receive the item is not delayed.[104] Also, the seller may not withhold the item if the buyer has paid the entire price or the seller clears him, as there is no price to collect in these cases.[105]

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[96] Ibid 532.

[97] *Almughaniy* (n 80) vol 6, 504; 1(6) *Journal of the Islamic Fiqh Council* 193; 2(7) *Journal of the Islamic Fiqh Council* 9; Resolution No 51 (6/2); *Legitimate Standards* (n 93) Standard 39.

[98] *Legitimate Standards* (n 93) Standard 39-3/2/7. For more information see *Almughaniy* (n 80) vol 6, 504–5.

[99] *Almughaniy* (n 80) vol 6, 188, 287; *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 5, 237; محمد بن أحمد السرخسي [Mohammed bin Ahmed Al-Sarkhi], المبسوط [*Mabsout*] (دار المعرفة - بيروت [Dar al-Maarifa - Beirut], 1993) vol 14, 110 ('*Mabsout*'); شمس الدين الشربيني [Shams al-Din al-Shirbini], مغني المحتاج [*Enricher for Who Needs to Know*], (دار الكتب العلمية [Scientific Books House], 1st ed, 1994) vol 2, 473 ('*Enricher for Who Needs to Know*'). For more information see عبدالرحمن العايد [Abdulrahman Al-Ayed], 'حبس المبيع على ثمنه [Detaining the Sale for its Price]' (2017) 38 (مجلة الجمعية الفقهية السعودية [*Journal of the Saudi Jurisprudence Association - Saudi Arabia*]) 173.

[100] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 5, 237.

[101] Ibid; *Almughaniy* (n 80) vol 6, 287; *Fairness* (n 66) vol 11, 490.

[102] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 5, 237; *Fairness* (n 66) vol 11, 490.

[103] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 5, 250.

[104] *Fairness* (n 66) vol 11, 491; *Kashaaf Alqinae* (n 61) vol 7, 489; *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 5, 250; *Enricher for Who Needs to Know* (n 99) vol 2, 474.

[105] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 5, 250.

In Islamic jurisprudence, there is a difference between a solvent and an insolvent buyer when it comes to the cancellation of a contract by the seller due to the consumer's failure to pay.[106] Most jurists agree that the seller has the right to cancel the contract if the buyer is insolvent and does not commit to paying the price,[107] as delaying payment would harm the seller.[108] More importantly, based on Hadith, 'If a creditor finds his very property with a debtor who becomes bankrupt, s/he is more entitled to it than anyone else.'[109] However, if the buyer is well-off, some scholars believe that the seller has the right to cancel the contract to prevent harm,[110] while others believe that the seller has the right to claim it in court.[111] It can be concluded that the outcome is nearly the same, but the entity taking action differs, either a judge or the sellers themselves.[112] If a judge makes the decision whether to uphold the contract with payment or terminate it, that judge also has the right to impose a penalty on the solvent buyer.[113]

*5.2.2.5.2 The consumer's responsibility in case of damage or loss of non-paid items*[114]

The four schools of Islamic jurisprudence agree that once a buyer takes possession of a sold item, they are responsible for any damage or loss incurred.[115] Also, if the buyer causes the damage or loss, they must pay for it, and the sale is not annulled,

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[106] It should be noted that the contract cancellation provisions differ under the perspective of Islamic law compared to other laws. This needs a specific search to be addressed. For more information: see وهبة الزحيلي [Wahba Al-Zuhaili], الفقه الإسلامي وأدلته [*Islamic Jurisprudence and its Evidence*], ( دار الفكر- سوريا [Dar Al-Fikr - Syria], 4th ed) vol 4, 176 and after ('*Islamic Jurisprudence and its Evidence*'); *Kuwaiti Jurisprudence Encyclopedia* (n 65) vol 32, 136 and after.

[107] *Kashaaf Alqinae* (n 61) vol 7, 490; *Fairness* (n 66) vol 11, 488–9; *Enricher for Who Needs to Know* (n 99) vol 2, 473; النووي [Al-Nawawi], منهاج الطالبين [*Minhaj al-Talibin*], (دار الفكر [Dar Al-Fikr], 1st ed, 2005) 104; بدر الدين الأسدي الشافعي [Badr al-Din al-Asadi al-Shafi'i ], بداية المحتاج في شرح المنهاج [*Bidayat al-Muhtaj fi Sharh al-Minhaj*] (دار المنهاج- المملكة العربية السعودية [Dar Al-Minhaj- Kingdom of Saudi Arabia], 1st ed, 2011) vol 2, 75–6 ('*Bidayat al-Muhtaj fi Sharh al-Minhaj*').

[108] *Kashaaf Alqinae* (n 61) vol 7, 490; *Fairness* (n 66) vol 11, 488–9; *Bidayat al-Muhtaj fi Sharh al-Minhaj* (n 107) vol 2, 75–6.

[109] Bulugh al-Maram, Book 7, Hadith 867 <https://sunnah.com/bulugh/7/102>.

[110] See *Kashaaf Alqinae* (n 61) vol 7, 490; *Bidayat al-Muhtaj fi Sharh al-Minhaj* (n 107) vol 2, 75–6.

[111] *Kashaaf Alqinae* (n 61) vol 7, 490; *Fairness* (n 66) vol 11, 488–9.

[112] *Kashaaf Alqinae* (n 61) vol 7, 490.

[113] This conclusion is from the researcher, and some scholars share the same logic. See *Kashaaf Alqinae* (n 61) vol 7, 490; *Enricher for Who Needs to Know* (n 99) vol 2, 473.

[114] This subtitle interacts with: 4.2.2.2.5 Responsibility for failure of delivery. Please take a look at it to avoid repetition. However, in Islamic law, the main idea is possession, whether paid or not. It can be addressed in different ways, but I keep it like this for the sake of comparison.

[115] *Almughaniy* (n 80) vol 6, 186; *Durar Al-Hikam in Explaining Al-Ahkam Magazine* (n 71) vol 1, 278; أبو بكر محمد السرخسي [Muhammad Al-Sarkhasi], أصول السرخسي [*Origins of Al-Sarkhasi*], ( لجنة إحياء المعارف النعمانية بالهند [Committee for the Revival of Numani Knowledge, India], 1975) vol 2, 282.

even if they have yet to pay for the item.[116] If a buyer destroys an item, it is considered taking possession of it; in other words, the buyer cannot rightfully destroy it unless s/he has possession.[117]

### *5.2.3 Section conclusion*

Saudi law requires e-commerce service providers to disclose details about products or services, including a clear breakdown of the total price. If there is no determination about the core information of the sale, including price, the consumer can rescind the contract and not pay the service provider. However, there is a legal vacuum here because the consumer may agree to a contract that has not determined the price and sale, raising the question of whether they are obligated to make the payment and what or who determines the price. This is addressed by civil law; firstly, buyers must know the sold item either by physically viewing it or by receiving a description of its identifying features. If the contract states that the buyers have knowledge of the sold item, they cannot nullify a contract due to a lack of knowledge unless they can prove that the seller deceived them. Secondly, sale prices can be determined after conclusion of the contract, based on the market price, and if there is no established price, the sale will not be considered void if the circumstances suggest parties intended to apply either the market price or the price used in previous dealings. On the other hand, Islamic law requires that the item and the price be known at the time of sale to prevent disputes. However, there is a difference of opinion regarding whether the price must be known at the time of the contract or can be determined after the contract. Most jurists prohibit selling at a price undetermined at the time of contract, while a few permit it based on the fact that the price will shortly be set by market experts. For the sake of avoiding uncertainty, these jurists make two conditions for a transaction to be permissible: the market price must be known at the time of the contract, or the merchandise must not vary in price in all circumstances. This means there is no difference between one and the other.

The *Electronic Commerce Law* does not specify a specific payment time, but regulations dictate that a consumer should receive an invoice once the contract is

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[116] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 5, 539; *Tuhfat al-Fuqaha* (n 61) vol 2, 41; Al-Sarkhasi (n 115) vol 2, 282.
[117] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 5, 539.

entered into, confirming full payment if the payment has already been made. Nevertheless, if there is no mention of a specific time for making the payment, it may or may not have been made. This issue is solved by civil law, which rules that unless there is an agreement for deferred or instalment payments, the price should be paid at the time of sale. In rental agreements, rent payment is made on agreed-upon dates, and if there are no agreed dates, the rent is paid upon delivery of the leased item. If the lease contract is divided into time periods, the lessee pays the rent at the start of each period. In comparison, in Islamic law, payment is generally due at the time of the contract, but in certain localities, sales can be deferred or paid in instalments based on prevailing customs. More notably, the *Salam* sale in Islamic jurisprudence requires the buyer to pay the total amount at the time of the contract. Moreover, delaying the payment may lead to issues such as selling debt for debt and increased risk, which are agreed as forbidden. In electronic commercial transactions, usury (*Riba*) may occur during payment, especially with gold, silver, and modern money; for these three kinds, according to Islamic jurisprudence, the payment time must be the same as the time of receipt of the sold item. In rental contracts, the time of payment is determined by the agreement of the parties involved. Different schools of jurisprudence hold differing opinions on whether payment should be made incrementally based on benefits received or in full at the time of the contract.

According to the *Draft Consumer Protection Law*, the consumer may be responsible for payment costs but should not bear more than the actual cost. However, the consumer protection draft has limitations in addressing payment costs. It only prohibits charging consumers fees over and above genuine cost, which means it does not cover all cases. Meanwhile, the *Civil Transactions Law* specifies that the buyer is obligated to pay the cost of the payment unless otherwise agreed. This provision aims to resolve disputes over payment costs and instill confidence in the legal framework. The buyer generally bears the payment cost in Islamic law because payment is one of the necessary parts of the sale, and it is the buyer's responsibility. Therefore, the buyer is responsible for the completion of the payment. However, some scholars differentiate between the cost of weighing the payment and paying the price. This is because gold and silver, which were often used as payment, need to be weighed, and this cost is placed on the buyer, while the act of paying the price is the seller's responsibility.

The *Electronic Commerce Law* does not specify a place for payment, which is reasonable given that most electronic transactions require advance electronic payment. However, this may not cover all e-commerce transactions, and there may be situations where the place of payment needs clarification in e-commerce law. Additionally, it raises a potential legal conflict when a consumer and a service provider engage in an e-commerce contract without specifying a payment time or location. Such a conflict might arise from provisions stipulating different payment requirements, which indicates a need for lawmakers to resolve this contradiction. In contrast, in *Fiqh*, if the transaction is *Salam* or the sold item is gold, silver, or paper currency, the transaction must take place at the time of the contract for the sale to be valid. However, if the item sold is a commodity not mentioned above, the place of payment is determined by the parties or, in the absence of an agreement, by the place of receipt of the sold item. This ensures equality between the parties and allows the buyer to refuse payment until they receive the item sold.

In the event of non-payment from the consumer, Saudi law offers three protections to safeguard the e-seller. The seller is entitled to hold off on transferring ownership until payment is received, to retain the sold item until the price is paid, or to cancel the sale if payment terms are not met. Nevertheless, the seller is obligated to take the necessary steps to transfer ownership of the sold item to the buyer. However, if the seller agrees to postpone payment, they must deliver the sold item to the buyer. In the case of rentals, the lessor has the right to refuse to hand over a leased item unless the rent due is paid in advance. If the sale contract specifies a payment deadline and the buyer fails to meet it, the seller can terminate the sale without providing prior notice. On the other hand, under Islamic law, the seller is not allowed to keep ownership of the item sold until the deferred price is paid or another specified date. Selling a commodity in instalments while retaining ownership is considered *Gharar* (uncertainty) in two ways. Some prior Hanbalis and several Islamic jurisprudence councils have accepted a possible solution to this issue, which involves mortgaging the item sold to the seller. Most Islamic jurists give the seller the right to withhold the item until the buyer pays the price if payment has not been deferred. However, there are circumstances where the seller's right to withhold the item becomes void. In Islamic jurisprudence, there is a difference between a solvent and an insolvent buyer when it comes to the cancellation of a contract by the seller due to the consumer's failure to

pay. If the buyer is insolvent and does not commit to paying the price, the seller has the right to cancel the contract. If the buyer is well-off, some scholars believe that the seller has the right to cancel the contract to prevent harm, while others believe that the seller has the right to claim it in court. If the judge makes the decision whether to uphold the contract with payment or terminate it, the judge also has the right to impose a penalty on the solvent buyer.

If the buyer fails to pay the service provider for the purchased item, then if the seller agrees to delay payment, they will bear the loss. However, if the seller does not agree, they have the right to refuse to deliver the item, and if it is lost or damaged, it is the buyer's responsibility. However, if the buyer receives the item before paying the full price with the seller's knowledge and without objection, this constitutes acceptance of the delivery, and the buyer assumes the liability. Yet, if the buyer receives the item before paying the total price and without the seller's consent, the seller has the right to reclaim it. If it is lost or damaged while in the buyer's possession, the buyer is considered to have taken possession of it, and if the seller chooses to reclaim it, they have the right to seek compensation from the buyer.

In contrast, the consensus among the four schools of Islamic jurisprudence is that once the buyer takes possession of the purchased item, they assume responsibility for any ensuing damage or loss. Moreover, if the buyer is the cause of the damage or loss, they are obligated to compensate for it, and the sale remains valid, even if the payment has yet to be made. When a buyer destroys an item, it is viewed as taking possession of it; thus, the buyer cannot rightfully destroy it unless they have possession.

## 5.3 Taking delivery

This part discusses and assesses consumers' obligation upon taking delivery, initially under Saudi law and subsequently under Islamic law, followed by a conclusion on the correlation between the two.

### *5.3.1 Taking delivery under Saudi law*

This section covers the following topics: the taking delivery obligation and its cost, disposing of the sale item before receiving it, sales matching, and implications of non-compliance with taking delivery.

#### *5.3.1.1 Taking delivery: Obligation and cost*

The Saudi regulator obligates the purchaser to receive the item sold and transport it promptly, considering the necessary time for transportation, unless otherwise agreed.[118] Regarding the location for receiving the purchased item, Saudi law gives priority to any agreement of the parties involved in the contract;[119] if they did not reach an agreement, then the item's location at the time of sale will be considered.[120] Moreover, the buyer is responsible for any expenses associated with delivering the purchased item and for the contract of sale and its registration, unless otherwise specified.[121]

However, a crucial contradiction arises in the text regarding the seller's obligation to deliver the purchased item.[122] One part asserts that the seller is responsible for the delivery costs,[123] while the other part states that the buyer is responsible.[124] This issue is not a mere translation error, but a fundamental misunderstanding of the Arabic text. The Arabic text clearly differentiates between the cost of delivering the item and receiving it. The first part specifies the seller's obligation, while the latter specifies the buyer's obligation. This distinction between delivering and receiving the item is not just a semantic nuance, but a legal obligation. To illustrate, consider the following example: if a consumer purchases a product from a service provider and specifies who will bear the delivery and pickup costs, then that is based on their mutually agreed arrangement.[125] However, a legal issue arises if they fail to determine who will bear the delivery or receipt costs. The English texts are contradictory, and it is not possible to reconcile the two.[126] In the Arabic text, the seller is obligated to cover the delivery costs, while the buyer is obligated to cover the receipt costs.[127] Consequently, the service provider covers the transportation company's costs for the product, and the

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[118] *Civil Transactions Law* (n 5) art 351.
[119] For more information, please see above: 4.2.1.2.3 Place of delivery.
[120] *Civil Transactions Law* (n 5) art 351.
[121] Ibid art 352.
[122] For more information see above: 4.2.1.2.4 Cost of delivery.
[123] *Civil Transactions Law* (n 5) art 321: ”1. **The seller** shall deliver the sold item to the buyer in its condition at the time of sale and shall bear **the costs of delivery**, unless agreed otherwise…”.
[124] Ibid art 352: “**The buyer** shall bear **the costs of payment, delivery of the sold item**, and the sale contract and registration thereof, unless agreed otherwise.”
[125] Ibid art 321.
[126] Ibid arts 321, 352.
[127] Ibid.

buyer covers any costs associated with receiving the product. This could include packaging costs or higher charges for specific delivery times.

#### *5.3.1.2 Disposing of the sale item before receiving it*

The majority of e-commerce transactions do not involve the direct receipt of the purchased item. The question arises: What if the consumer sells or acts upon the item they purchased before actually taking delivery? Is this acceptable under Saudi law? However, the *Electronic Commerce Law* does not specifically cover the buyer's actions upon the purchased item before taking possession, and neither does the Civil Code explicitly address this scenario. Nonetheless, conclusions regarding this matter can be inferred from the Civil Code. According to the Civil Code, the rights established under a contract become effective immediately upon its conclusion and are not dependent on payment, receipt or otherwise [128] unless explicitly specified by law otherwise.[129] Since there is no legal provision that stipulates otherwise, the buyer retains the right to ownership once the contract is signed.[130] The right of ownership grants the owner the exclusive right to use, exploit, and dispose of the item.[131] Therefore, the buyer has the right to sell or act upon the product before taking delivery.

#### *5.3.1.3 Sales matching*

The responsibility of the service provider to ensure the product or service for the consumer, including the types of guarantees, its terms, exemptions, duration, etc., was previously discussed in the fourth obligation of the service provider's duties.[132] The obligation of the service provider to allow the consumer to cancel the contract within seven days without providing reasons for the cancellation was also previously addressed.[133] Considering all the conditions specified in these obligations, the buyer is not just a passive recipient but an active participant in ensuring that the item purchased matches the description. According to Saudi law, the obligation to ensure

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[128] Unfortunately, there is a mistake in the translation of this article; the official English version states that “the rights created under a contract shall become effective immediately upon the conclusion thereof and shall not be contingent on **payment** or otherwise...”. The Arabic version states that **possession** is instead of **payment**.
[129] *Civil Transactions Law* (n 5) art 94.
[130] Ibid art 655.
[131] Ibid art 806/1.
[132] See above: 4.3 Obligation to provide an e-sale warranty.
[133] See above: 4.5 Obligation to ensure right of recourse.

that the purchased item matches the description falls on the buyer.[134] Therefore, after receiving the purchased item, the buyer must inspect its condition as soon as possible in a customary manner. The buyer must inform the seller of any defects within a reasonable period; otherwise, the buyer will be considered to have accepted the purchased item as is.[135] Furthermore, if the buyer discovers a defect that could not have been discovered through reasonable inspection, the buyer must notify the seller as soon as the defect is found; otherwise, the buyer will be considered to have accepted the purchased item as is.[136]

Lastly, the fourth obligation of the service provider mentions that there are some contradictions in warranty obligations between civil law and consumer regulations.[137] However, in such cases, it is significant to note that a specific text, like the *Electronic Commerce Law* or *Draft Consumer Protection Law*, takes clear precedence over a general text, such as the *Civil Transactions Law*. This hierarchy of texts provides a clear and reliable framework for understanding and applying the law.

#### *5.3.1.4 Implications of non-compliance with taking delivery*

In the event that the buyer fails to receive the sold item, it is within the seller's rights to notify the buyer and request them to fulfil their delivery obligation.[138] However, if the item is perishable or to fulfil their obligation the cost of storing it is too high, the seller may, with or without court permission in urgent circumstances, sell it at market price or by auction if sale at market price is impossible.[139]

Upon notifying the buyer, the seller can also ask the judge to implement or cancel the sale.[140] However, the seller may, by agreement, terminate a contract without a judicial ruling; nevertheless, they must notify the buyer of their intention to terminate the contract, except if the parties involved specifically agree differently.[141] Importantly, in

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[134] See *Civil Transactions Law* (n 5) art 340.
[135] See ibid art 340/1.
[136] See ibid art 340/2.
[137] Such as duration and exemptions of the warranty.
[138] See *Civil Transactions Law* (n 5) art 164/1.
[139] See ibid art 269.
[140] See ibid art 107.
[141] See ibid art 108. However, there are more expectations, The debtor (who is obligated, in this case, is the buyer) does not need to be notified in the following situations:
A. If the parties explicitly or implicitly agree that the maturity date of the debt serves as notification to the debtor. B. If the debtor's act makes the performance of the obligation impossible or futile. C. If

all cases, the seller has the right to claim compensation for any damage due to the buyer's failure to receive the sold item,[142] thereby ensuring protection and security against a breach by the buyer.

If the buyer has been notified to be ready to receive the sold item, they must bear the consequences of destruction or damage.[143] That means if the service provider delivers the sold item to an agreed place, such as a local post office, and notifies the buyer, and then the item becomes damaged in that place, the consequences are on the buyer. In this case, regardless of how it becomes damaged and who damages it, or who is responsible for looking after it, the service provider disclaims responsibility.

Rent is due for any period before delivery if it is the lessee who causes that delay. This highlights the lessee's responsibility for any delivery delays.[144]

### *5.3.2 Taking delivery under Islamic law*

This section is divided into four parts: Taking delivery (obligation and cost), disposing of the sale before receiving it, sales matching, and implications of non-compliance in taking delivery.

#### *5.3.2.1 Taking delivery: Obligation and cost*

In Islamic law, taking delivery is obligatory for the buyer, and many provisions are based on that.[145] For instance, when the contract has been concluded between the parties and after that the sold item is damaged without human involvement, such as an animal injuring itself, the consequence rests with the buyer.[146] Moreover, in a situation where there are expenses related to a sold item, such as care for a tree, the buyer will be responsible for these expenses.[147]

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the obligation involves payment of compensation for a harmful act. D. If the obligation is to return an unlawfully received item and the debtor was aware of its unlawfulness. E. If the debtor provides written confirmation that he will not fulfil his obligation. See ibid art 176.

[142] See ibid arts 108, 267.

[143] See ibid art 267.

[144] Ibid art 429/2.

[145] For more information regarding delivery provisions see the rest of this section especially 5.3.2.4 Implications of non-compliance with taking the delivery.

[146] This issue is examined in: 4.2.2.2.5 Responsibility for failure of delivery.

[147] See: 4.2.2.2.4 Cost of delivery.

One of the provisions is the place of taking delivery, which is not made explicit in the current *Electronic Commerce Law*.[148] In short, there are two different opinions regarding whether it is obligatory to specify the place of taking delivery and the implications of not doing so. One opinion holds that specifying the place is necessary for the validity of the contract, while the other opinion considers the contract valid even if the place is not specified. Similarly, if the place is not specified, the viewpoints on where delivery occurs are also twofold: it should be either the place where the contract was agreed or it should be in accordance with customary practice. As a result, if a buyer purchases an item but does not receive it or pay for it, then the seller meets the buyer at another location.[149] In the case where the seller requests payment, the buyer can refuse until the item is delivered without being forced to pay, regardless of whether delivery charges are associated with the item or not. This is due to Islamic law and customs requiring equality in transactions, which cannot be achieved without delivering the sold item.[150] The delivery cost for delivering the goods to the buyer's location depends on whether or not the parties agreed on the delivery cost in the contract; if they did not, then the delivery cost is based on custom; in the absence of custom or prior agreement, the delivery cost falls on the buyer.[151]

#### *5.3.2.2 Disposing of the sale before receiving it*

The issue of a buyer selling an item before taking possession of it has been a subject of debate in Islamic jurisprudence, with scholars holding differing views. This divergence can be traced back to the historical context and the ambiguous nature of the issues. The relevant Hadith offers no clear basis for analogy in this case, with some jurists adhering to the literal meaning of the texts and some not.[152] This issue can be further dissected into two scenarios: selling a specific item before receipt and selling an item as described but not yet owned or specified, with only its characteristics mentioned (*Salam*).

The prohibition on selling a specific item before taking possession of it is firmly rooted in the hadith, a saying of the Prophet Muhammad, that states: 'The Messenger of Allah

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[148] See above: 4.2.2.2.3 Place of delivery.
[149] *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 6, 154.
[150] Ibid.
[151] For complete picture see above: 4.2.2.2.4 Cost of delivery.
[152] ابن تيمية [Ibn Taymiyyah], *مجموع الفتاوى* [*Total Fatwas*], (مجمع الملك فهد لطباعة المصحف الشريف [King Fahd Complex for the Printing of the Holy Qur'an-Saudi Arabia], 2004) vol 29, 403–4.

said: “Whoever buys food, let him not sell it until he has taken possession of it.”’[153] This hadith, a pivotal text in Islamic tradition, has played a significant role in shaping the consensus among the four schools of jurisprudence on the matter of selling food before taking possession, highlighting the profound influence of religious texts in Islamic jurisprudence.

While there is consensus on the prohibition of selling specific food that has yet to be received, scholars differ in their opinions when the item sold is not food.[154] Some view the prohibition as including selling any merchandise before taking possession of it because one of the companions of the Messenger, may God bless him and grant him peace, said, ‘I consider everything like food.’[155] However, the Maliki School allows pre-possession sales for non-food items because the hadith mentions only food,[156] considering that if non-food was intended, it would have been stated in the hadith, but it was not.[157] The pre-possession sale is prohibited by some Hanbalis when it comes to measured or weighed products because food can only be measured, weighed, or counted, so anything measured, weighed, or counted is given the same ruling as food.[158] Certain followers of the Hanafi school of thought allow the sale of real estate before taking possession because property loss is uncommon, and consideration is given to that which is common rather than what is uncommon or exceptional (*Alnaadir*

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[153] Sunan an-Nasa'I, Book 44, Hadith 147 <https://sunnah.com/nasai:4595>.

[154] For more information see *Al-Majmoo’ Sharh Al-Muhadhab* (n 66) 270–3; *Fath al-Qadeer for Guidance* (n 69) vol 6, 510–5; أبو بكر الصقلي [Abu Bakr Muhammad Al-Siqilli], *الجامع لمسائل المدونة* [*The Container of the Blog Issues*] (دار الفكر [Dar Al-Fikr], 1st ed, 2013) vol 11, 385–8 (‘*The Container of the Blog Issues*’); الماوردي [Al-Mawardi], الحاوي الكبير [Al-Hawi Al-Kabir] (دار الكتب العلمية، بيروت [Dar Al-Kutub Al-Ilmiyyah, Beirut], 1st ed, 1999) vol 5, 220–2 (‘*Al-Hawi Al-Kabir*’).

[155] This is the main evidence for Shafi, and they argue for more reasons, such as the ownership is incomplete, yet also, in case the sold item is damaged, there will be two warranties for one sale. See الرافعي القزويني [Al-Rafi’i Al-Qazwini], *الشرح الكبير* [*Al-Sharh Al-Kabir*] (Dar Al-Kutub Al-Ilmiyyah, Beirut – Lebanon, 1st ed, 1997) vol 8, 414–5; *Al-Majmoo’ Sharh Al-Muhadhab* (n 66); النووي [Al-Nawawi], المجموع شرح المهذب [*Al-Majmoo’ Sharh Al-Muhadhab*] (دار الفكر [Dar Al-Fikr]) 270–3; كمال الدين [Kamal al-Din], النجم الوهاج في شرح المنهاج [*The Glowing Star in Explaining the Curriculum*] ( دار المنهاج [Dar Al-Minhaj, Jeddah], 1st ed, 2004) vol 4, 157–8 (‘*The Glowing Star in Explaining the Curriculum*’); *Al-Hawi Al-Kabir* (n 154) vol 5, 220–2.

[156] *The Container of the Blog Issues* (n 154) vol 11, 385–8; أبو الوليد بن رشد [Abu Al-Walid bin Rushd], البيان والتحصيل [*Explanation, Collection*] (دار الغرب الإسلامي، بيروت [Dar Al-Gharb Al-Islami, Beirut], 2nd ed, 1988) vol 18, 40.

[157] *Al-Majmoo’ Sharh Al-Muhadhab* (n 66) 271.

[158] The other Hanbalis say the prohibition is only about food like Maliki school, see *Almughaniy* (n 80) vol 4, 82–90; منصور البهوتي [Mansur Al-Bahuti], شرح منتهى الإرادات [*Explanation of Muntaha Al-Iradat*] (عالم الكتب، بيروت [Alam al-Kutub, Beirut], 1st ed, 1993) vol 2, 58.

*la hikm lah*).[159] This diversity of views underscores the depth of complexity of this issue.

The rationale for prohibiting the sale before receipt lies in the severance of the seller's connection with the item, creating a possibility of the seller attempting to cancel the sale if they believe it has been profitable.[160] This may lead to unjust cancellations, disputes, and hostility between the parties involved.[161] In other words, Islamic law prevents the buyer from disposing of the item until it is received, ensuring that the seller does not seek to cancel the sale and refrain from delivering the item. This reflects the interests upheld by Islamic law, promoting the prevention of corruption and benefiting those unfamiliar with the law.[162]

Selling an item with only its mentioned characteristics before it is owned or specified is referred to as '*Salam*' according to two differing opinions. However, neither opinion differentiates between food and non-food in the *Salam* transaction compared to selling a specific item. It is not permissible for the buyer to dispose of the sold item in a *Salam* transaction, whether by sale or otherwise.[163] This is because the buyer's complete ownership of the sold item has yet to be established, similar to the buyer's behaviour in regard to disposing of someone else's item.[164] In contrast, the other opinion views that the buyer has the right to dispose of the sold item.[165] This is because if the unspecified item sold is lost, the seller compensates the buyer with another similar item.[166] In other words, if the buyer sells what he bought before taking possession and it is destroyed, the new buyer will be compensated with an item possessing the same qualities as the destroyed item. For instance, if a buyer purchases a car that was

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[159] *Fath al-Qadeer for Guidance* (n 69) vol 6, 513.

[160] ابن قيم [Ibn Qayyim], تهذيب سنن أبي داود [*Refinement of Sunan Abu Dawud*] (دار عطاءات العلم, الرياض [Dar Attaat Al-Ilm, Riyadh], 2nd ed, 2019) vol 2, 511.

[161] Ibid.

[162] Ibid 512.

[163] *Kashaaf Alqinae* (n 61) vol 7, 499–500; ابن قدامة المقدسي [bin Qudama al-Maqdisi], *الشرح الكبير* [*The Big Explanation*] (هجر، القاهرة [Hajar, Cairo], 1st ed, 1995) vol 12, 292; أحمد الأنصاري [Ahmed Al-Ansar], كفاية النبيه في شرح التنبيه [*The Sufficiency of the Observant in Explaining the Warning*] (دار الكتب العلمية [Scientific Books House], 1st ed, 2009) vol 5, 195 ('*The Sufficiency of the Observant in Explaining the Warning*').

[164] *Kashaaf Alqinae* (n 61) vol 7, 499–500.

[165] محمد بن إدريس الشافعي [Mohammed bin Idris Al-Shafei], الأم [*The Mother*] (دار المعرفة - بيروت [Dar Al Marefa - Beirut], 1990) vol 3, 72; القاضي عبد الوهاب [Judge Abdul Wahab], *المعونة على مذهب عالم المدينة* [*Aid to the Doctrine of the Scholar of Medina*], (المكتبة التجارية-مكة المكرمة, The Commercial Library-Mecca) vol 2, 1002 ('*Aid to the Doctrine of the Scholar of Medina*').

[166] Al-Shafei (n 165) 72.

described but not specified, sells it before taking possession, and it is lost before the new buyer receives it, the first buyer must provide a similar car to the lost one.

In summary, within Islamic law, there is a distinction between specified and non-specified items when it comes to the buyer disposing of the sold item before taking possession of it. In the case of a specified item, all four schools are in agreement that the buyer is prohibited from disposing of the item before taking possession if it is food. This strong consensus among the schools, grounded in the hadith of the Prophet Muhammad, is a significant factor in shaping agreement on this issue. However, there are four different opinions regarding the specified non-food sold item and its disposal before taking possession. Nevertheless, it can be concluded that the most prevalent opinions vary between two that allow it and others that do not.

As for the non-specified item (*Salam*), the four schools do not distinguish between food and non-food sold items, although they vary in their stances on acceptance and non-acceptance.

#### *5.3.2.3 Sales matching*

In Islamic law purchasers are required to inspect the item they are buying so if the item lacks a certain characteristic, purchasers must take action to protect their rights, whether that means returning the item or accepting it.[167] Islamic law places the responsibility of ensuring the conformity of the item on the purchaser, as it distinguishes between hidden and apparent defects in the item. In the case of a hidden defect, all jurists agree that the purchaser has the right to return the item if the defect is discovered.[168] However, if the defect is apparent and the purchaser claims not to have been aware of it at the time of the purchase, there are differing views on whether the purchaser has the right to return the item.[169] Some argue that the purchaser has the right to return the item with the defect, based on the principle of lack of knowledge of the defect, while others believe that the purchaser does not have this right because the apparent defect is presumably known to the purchaser at the time of purchase,

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[167] *The Container of the Blog Issues* (n 154) vol 14, 153. For more information, please see above: 4.1.2.3 Solutions for non-compliance with the disclosure obligation.

[168] *The Container of the Blog Issues* (n 154) vol 14, 156; *Mabsout* (n 99) vol 13, 110; *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 5, 282; إبراهيم الشيرازي [Ibrahim Al-Shirazi], المهذب/ [*Al-Muhadhdhab*], (دار الكتب العلمية [Scientific Books House]) vol 2, 49.

[169] *Mabsout* (n 99) vol 13, 110.

and thus, their knowledge of the defect waives their right to return the item.[170] This indicates that the jurists require the purchaser to ensure the conformity of the item sold, as they prevent the purchaser from using their right to return the item if it has an apparent defect. If the purchaser were not obligated to ensure the conformity of the item, their right to return the item with an apparent defect would not have been waived.

In Islamic jurisprudence, one of the conditions for returning defective goods is that the buyer does not know about the defect before making the purchase.[171] If the buyer knows about the defect and is satisfied with it, their right to return the goods is waived.[172] Satisfaction with a defect can be indicated through an explicit statement from the buyer or an action showing acceptance of the purchased item.[173] For example, if a buyer knowingly purchases a mobile phone with a broken camera and says, 'I am satisfied with this malfunction,' or sells the phone despite knowing about the defect, this is considered acceptance of the defect. Such actions indicate the buyer's consent to the defect and invalidate their right to return the item.

Regarding the timing of returning defective goods, Hanafi and Hanbali scholars believe that the buyer can either return the item at their convenience if they are dissatisfied or dispose of the item after discovering the defect.[174] On the other hand, the Shafi'i school of thought holds that the item must be returned immediately upon discovering the defect.[175] In Saudi law, if the buyer finds a defect that could not have been discovered through reasonable inspection, they must notify the seller as soon as the defect is

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[170] أحمد الونشريسي [Ahmed Al-Wansharisi], إيضاح المسالك إلى قواعد الإمام أبي عبد الله مالك [*Clarifying the Paths to the Rules of Imam Abu Abdullah Malik*] (دار ابن حزم، بيروت [Dar Ibn Hazm, Beirut], 1st ed, 2006) 72; محمد مصطفى الزحيلي [Muhammad Mustafa Al-Zahili], القواعد الفقهية وتطبيقاتها في المذاهب الأربعة [*Jurisprudential Rules and their Applications in the Four Schools of Thought*] (دار الفكر - دمشق [Dar Al-Fikr - Damascus], 1st ed, 2006) vol 1, 120 ('*Jurisprudential Rules and their Applications in the Four Schools of Thought*'); *Mabsout* (n 99) vol 13, 110; محمد آل بورنو [Muhammad Al-Borno], مُوْسُوعَة القَواعِد الفِقْهِيَّة [*Encyclopedia of Jurisprudential Rules*], (مؤسسة الرسالة، بيروت [Al-Resala Foundation- Beirut, 1st ed, 2003) vol 1, 278.

[171] *Fairness* (n 66) vol 20, 512; *Fath al-Qadeer for Guidance* (n 69) vol 6, 396; *Kuwaiti Jurisprudence Encyclopedia* (n 65) vol 20, 123; *Authentic and Contemporary Financial Transactions* (n 93) vol 6, 401.

[172] *Fath al-Qadeer for Guidance* (n 69) vol 6, 396; *Authentic and Contemporary Financial Transactions* (n 93) vol 6, 401.

[173] *Mabsout* (n 99) vol 13, 99; *Badaa'i al-Sana'i in the Arrangement of Canons* (n 61) vol 5, 282; *Aid to the Doctrine of the Scholar of Medina* (n 165) vol 2, 1052.

[174] *Fairness* (n 66) vol 20, 512; *Islamic Jurisprudence and its Evidence* (n 106) vol 4, 3118, 3567; *Almughaniy* (n 80) vol 4, 109.

[175] Ibid.

discovered.[176] This aligns with the Shafi'i doctrine, which requires the buyer to match the item sold and notify the seller immediately if a defect is discovered.

It is crucial to remember that the buyer's responsibility to match the purchased item's characteristics does not condone the seller's engagement in dishonesty or deceit. The Qur'an, Hadith, and Muslim consensus are unequivocal in prohibiting cheating and deception in transactions,[177] emphasising the severity of such actions and the need for ethical conduct. One of the pieces of evidence from the Qur'an for prohibiting cheating is: 'O you who believe! Eat not up your property among yourselves unjustly'.[178] Moreover, in the Hadith comes: 'The Messenger of Allah (ﷺ) happened to pass by a heap of corn. He thrust his hand in that (heap) and his fingers felt wetness. He said to the owner of that heap of corn, "What is this?" He replied: "O Messenger of Allah! These have been drenched by rainfall." He remarked, "Why did you not place this (the drenched part of the heap) over the corn so that people might see it? He who deceives is not of us."'[179] Also, the Messenger of Allah (ﷺ) said: "Both parties in a business transaction have a right to annul it so long as they have not separated; and if they tell the truth and make everything clear to each other (i.e., the seller and the buyer speak the truth, the seller with regard to what is purchased, and the buyer with regard to the money) they will be blessed in their transaction, but if they conceal anything and lie, the blessing on their transaction will be eliminated."'[180]

In conclusion, in Islamic law, the purchaser is required to examine the sale item, while the seller is prohibited from deceiving or defrauding the buyer. This aspect of Islamic law is advantageous as it anticipates issues before they arise, advises the involved parties to be mindful of their actions before finalising the deal, and emphasises the importance of compliance for Muslims. Therefore, Islamic law not only offers recourse after a problem arises but also precludes unfairness from both parties at the outset.

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[176] See *Civil Transactions Law* (n 5) art 340.

[177] محمد التَّمِيمي المازري المالكي [Muhammad Al-Tamimi Al-Mazari Al-Maliki], شرح التلقين [*Explanation of Indoctrination*] (دار الغرب الإسلامي [Dar Al-Gharb Al-Islami], 1st ed, 2008) vol 2, 613–5 ('*Explanation of Indoctrination*').

[178] Muhammad Taqī-ud Dīn Al-Hilālī and Muḥammad Muḥsin Khān, *Translation of the Meanings of the Noble Quran into the English Language* (King Fahd Glorious Qur'ān Printing Complex, Al-Madīnah AlMunawwarah, 2006) 144 (Chapter 4, Verse 29).

[179] Riyad as-Salihin, Book 17, Hadith 69 <https://sunnah.com/riyadussalihin:1579>.

[180] Riyad as-Salihin, Introduction, Hadith 59 <https://sunnah.com/riyadussalihin:59>.

### *5.3.2.4 Implications of non-compliance with taking the delivery*

As mentioned previously, it is the buyer's responsibility to receive the item. However, what happens if the buyer refuses or fails to receive the item? In such a case, the judge will compel the buyer to take the sold item; if the buyer still refuses, the judge will appoint someone to take the sold item on the buyer's behalf as if the buyer is absent.[181] If the seller enables the buyer to take possession of the sold item, but the buyer fails to do so, and the item is damaged or destroyed, there are differing opinions on who bears the consequences in this scenario. Some argue that the loss should be on the seller because the buyer did not receive the item,[182] while others suggest that the buyer should bear the consequences of the harm.[183] According to one of the companions of the Messenger, may God bless him and grant him peace: The Sunnah, if the transaction reaches the buyer as a living and aggregate item, in other words, in front of the buyer, it becomes part of the purchaser's property.[184] Moreover, it is as if the buyer received the item sold and then returned it like a deposit to the seller, making it a deposit to the seller.[185] In this case, the loss of the deposit is borne by the depositor, who is the buyer, unless the seller is doing illegal action that exceeds (*Tadl*) the deposit or is negligent (*Tfrret*). If the buyer negligently fails to collect the item after a reasonable amount of time has passed, the seller's warranty will be waived, and it becomes the buyer's responsibility as in a traditional sale,[186] because if the seller enables the buyer

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[181] *Rawdat al-Talibin and Omdat al-Muftis* (n 61) vol 3, 518.

[182] محمد الطرابلسي الحطاب [Mohamed Trabelsi Al-Hattab], مواهب الجليل في شرح مختصر خليل [*Talents of Galilee in a Brief Explanation of Khalil*] ( دار الفكر [Dar Al-Fikr], 3rd ed, 1992) vol 4, 385 (‘*Talents of Galilee in a Brief Explanation of Khalil*’); *The Glowing Star in Explaining the Curriculum* (n 155) vol 4, 157–8; *Al-Hawi Al-Kabir* (n 154) vol 5, 220–2. The Shafi’is hold the belief that the transfer of a movable property, which means it is not real estate, can only occur through physical handover. Therefore, merely enabling the buyer to take possession of the item sold is not enough for the seller. Instead, the item should be physically transported from the place of sale, as supported by the hadith we possess in relation to the sale of an item before taking possession of it. See *The Glowing Star in Explaining the Curriculum* (n 155) vol 4, 158; *Al-Hawi Al-Kabir* (n 154) vol 5, 221, 227.

Some Hanbalis distinguish between items purchased based on measures, weight, quantity, length, description, or previous visual examination and items not bought using these criteria. Responsibility for such matters lies with the seller; otherwise, it lies with the buyer. This is because the mentioned criteria are contingent on the obligation to pay being linked to specific delivery terms. See *Kashaaf Alqinae* (n 61) vol 7, 498; مصطفى بن سعد الرحيباني [Mustafa bin Saad Al-Ruhaybani], مطالب أولي النهى في شرح غاية المنتهى [*The Demands of Oli al-Nuha in Explaining the Purpose of the End*] (المكتب الإسلامي [Islamic Office], 2nd ed, 1994) vol 3, 148 (‘*The Demands of Oli al-Nuha in Explaining the Purpose of the End*’).

[183] *Explanation of Indoctrination* (n 177) vol 2, 784, 900; *Kashaaf Alqinae* (n 61) vol 7, 498; *Talents of Galilee in a Brief Explanation of Khalil* (n 182) vol 4, 385.

[184] *Kashaaf Alqinae* (n 61) vol 7, 498.

[185] *Explanation of Indoctrination* (n 177) vol 2, 784.

[186] Ibid 900.

to take possession of the item but the buyer voluntarily abandons it, then the guarantee is on the buyer.[187] However, if the seller prevents the buyer from taking possession of the item, the warranty is on the seller because he is like a usurper[188] or stopping the buyer from taking his right.[189] Nevertheless, if the seller prevents the delivery of the sold item due to the buyer becoming insolvent, then the buyer bears the consequences as a result of the seller rightfully preventing the buyer from receiving the item sold.[190]

### *5.3.3 Section conclusion*

In both Saudi regulations and Islamic law, the purchaser is obligated to receive the item sold. The location for receiving the purchased item is determined based on the agreement of the parties involved in the contract. If there is no agreement about the location, there is an opinion in Islamic law that invalidates the contract that does not explicitly appoint the location. Nevertheless, because this opinion is not derived from the Qur'an, a hadith, or the principle of Islamic law, Saudi law is still in line with Islamic law because it follows another opinion in Islamic law that considers the item's location at the time of sale. Even though this second Islamic law opinion appoints the norm to determine the place of taking the delivery, Saudi law is still in harmony with it as long as the norm itself does not contradict the law. Moreover, the law will become the norm over time, so there will be no conflict between the Saudi law and the second *Fiqh* opinion.

The cost of taking delivery can be considered in the same way as the location of taking delivery, as Saudi law is compatible with Islamic law. Nevertheless, there is an issue with the translation between the English and Arabic versions. The English text contains conflicting information about delivery and receipt costs. In the Arabic text, the seller covers the delivery costs, while the buyer covers the receipt costs. The Saudi regulator should ensure that the English version is modified to perfectly align with the Arabic version.

In Saudi law, the buyer has the right to sell or take action on the item before receiving it. However, the issue is complex in Islamic law, and the judgments vary depending on

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[187] Ibid 784, 900.
[188] *Kashaaf Alqinae* (n 61) vol 7, 498.
[189] *The Demands of Oli al-Nuha in Explaining the Purpose of the End* (n 182) vol 3, 148.
[190] Ibid.

the circumstances, particularly whether the sold item is categorised as food or non-food. Among the four schools of thought, there is unanimity that disposing of the sold item before receiving it, if it is food, is prohibited based on the hadith. Therefore, under Islamic jurisprudence, it is forbidden to dispose of food, while Saudi law allows it – this contradicts Islamic law. The legislator in Saudi Arabia should take note of this and urgently revise the law that permits the disposal of food sold before delivery and instead prohibit it to align with Islamic law. Otherwise, the transaction would be fundamentally invalid under Saudi law due to the violation of Islamic law, which in turn would be considered a breach of the *Basic Law of Governance*. Regarding the disposal of non-food items before receiving them, there are differing opinions, with some permitting everything except food, for example the Maliki school of thought, and others prohibiting the disposal of any sold item or permitting certain sales and quantities, such as the Hanbali and Hanafi schools.

Therefore, it can be concluded that Saudi law contradicts the majority of schools of thought with regard to the disposal of a sold product if it is not food, as it allows such disposal. However, Saudi law is aligned with the Maliki school of thought on this issue, hence it does not conflict with Islamic jurisprudence in this particular aspect.

Buyers have an active role in ensuring that the purchased item matches the description. According to Saudi and Islamic laws, the obligation to ensure that the item matches the description falls on the buyer. The buyer must inspect the purchased item and inform the seller of any defects within a reasonable period. However, the aspect of Islamic law regarding sale matching is more beneficial because it addresses potential issues in advance, encourages the parties involved to be cautious before completing the transaction, and highlights the significance of adherence for Muslims. Therefore, Islamic law not only provides a solution after an issue arises but also prevents unfairness from occurring at the start for both parties.

Saudi law aligns with Islamic law, allowing the seller to take legal action against the buyer if the buyer fails to fulfill their obligation to take the delivery. Additionally, if the buyer refuses to take possession of the purchased item, they bear the risk of any potential loss.

## 5.4 Consumers' obligations when using their rights in e-commerce

This section provides a comprehensive discussion and evaluation of the obligations that consumers must adhere to when exercising their rights in the context of E-Commerce. It initially examines the relevant laws and regulations in Saudi Arabia and subsequently delves into the perspective of Islamic law. The section concludes by exploring the correlation between the legal frameworks of the two systems.

### *5.4.1 Consumers' obligations when using their rights in e-commerce under Saudi law*

The Saudi Arabian government's unwavering commitment to enhancing the business environment, promoting investment, and increasing the number of participants in commerce has instilled confidence in the market's stability.[191] It has also led to Saudi laws establishing rights for e-consumers engaged in e-commerce.[192] However, these rights are limited to prevent any negative impact on e-sellers.[193]

This section will address consumer obligations when exercising their rights in e-commerce within the framework of Saudi Arabian legislation. These responsibilities concern: Non-termination of contract, timing of the right to terminate, return of goods, confidentiality and property rights, and Obligation when using the right to amend the request

#### *5.4.1.1 Non-termination of contract obligation*[194]

Given their significance, all contracts in electronic commerce between merchants and consumers are subject to the consumer's right to withdraw.[195] This right, being absolute and personal, is at the consumer's discretion without any liability.[196] It is a

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[191] Adnan Almalki, 'Legal Protection for the Consumer in E-Commerce According to Saudi Law (A Descriptive, Analytical, and Comparative Study with the Laws of the United States of America)' (2021) 12(4) *Beijing Law Review* 1131.

[192] Ibid.

[193] وداد معلش [Widad Maalish], حق المستهلك في العدول عن العقد الإلكتروني في التشريع الجزائري['The Consumer's Right to Withdraw from the Electronic Contract in Algerian Legislation'], رسالة ماجستير، جامعة المسيلة [Master Thesis, University of M'sila, 2021] 32; Almalki (n 191).

[194] For complete picture see above: 4.5 Obligation to ensure right of recourse.

[195] عائض البقمي [Ayed Al-Baqmi], التجارة الإلكترونية في النظام السعودي [*E-Commerce in Saudi Law*] (دار الاجادة [Dar Al-Ajada], 2nd edition, 2021) 214 ('*E-Commerce in Saudi Law*'); Maalish (n 193) 32.

[196] وحي فاروق لقمان [Wahyee Farouk Luqman], التزامات موفر الخدمة في نظام التجارة الإلكترونية السعودي ['Obligations of the Service Provider in Saudi E-Commerce System'] (2020) 8(31) *Journal of the Kuwait International Law College* 349.

matter of public law (mandatory rules in the law) and cannot be waived, nor can the service provider compel the consumer to relinquish this right.[197] However, specific laws related to e-commerce contracts exempt certain situations where withdrawal from the contract after its conclusion is not allowed.[198] This is to maintain the equilibrium of the contract and uphold the principle of not harming the interests of sellers and merchants, which is a positive step to prevent damage to the seller.[199] In simpler terms, the laws require consumers to either keep the product or accept the service, and they cannot ask the service provider to return the money paid regardless of any defective items.[200]

While the Saudi regulator aimed to protect the consumer in this type of contract, due to the nature of the contract, the consumer needs the opportunity to view and closely examine the goods or service.[201] At the same time, the regulator balanced the consumer's right to cancel the electronic contract as a general rule in all electronic contracts.[202] However, Saudi law excludes the consumer's right to withdraw and terminate the contract with the service provider in some cases so as not to cause harm to the service provider and electronic stores.[203] The consumer is obligated to obey what is set out in the law as the law is one of the sources of the obligations. The law regarding e-commerce entitles consumers to cancel a contract, provided that they have not used the products, received the services, or derived any benefit from them.[204] However, the Saudi *Electronic Commerce Law* specifies certain products that cannot be returned by the buyer.[205]

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[197] Ibid; سعود المقحم [Saud Al-Muqahem], حق المستهلك في الرجوع في العقود المبرمة عن بعد في نظام التجارة الالكتروني السعودي "دراسة مقارنة في ضوء القانون الفرنسي والنظام السعودي [The Consumer's Right to Recourse in Remote Contracts in the Saudi Electronic Commerce System, A Comparative Study in the Light of French Law and the Saudi System'] (2020) 21 مجلة العلوم الانسانية والادراية [*Journal of Humanities and Management*] 1.

[198] *E-Commerce in Saudi Law* (n 195) 214; Maalish (n 193) 32; Almalki (n 191); *Draft Consumer Protection Law* (n 14) art 42.

[199] *E-Commerce in Saudi Law* (n 195) 214; Maalish (n 193) 32; Almalki (n 191).

[200] For more details please see above: 4.3 Obligation to provide an e-sale warranty.

[201] *E-Commerce in Saudi Law* (n 195) 214; Almalki (n 191).

[202] *E-Commerce in Saudi Law* (n 195) 214.

[203] Ibid 214; Almalki (n 191).

[204] *Electronic Commerce Law* (n 1) art 13/1.

[205] Ibid art 13/2; Luqman (n 196); Almalki (n 191).

When the contract pertains to a custom-made or specially ordered product,[206] exempting it from the consumer's right to withdraw may be reasonable, as such products are challenging to resell or find other interested buyers.[207] Also, if the subject of the contract is videotapes, records, compact discs, or computer software that has been used[208] or other items the consumer may have benefited from, such as newspapers, magazines, and computer programs, the contract cannot be terminated. Likewise, if the circumstances and times of selling the goods or services result in the loss of the possibility of selling them the consumer cannot terminate the contract.[209] The same applies if the flaw is due to the consumer mishandling the product.[210] Furthermore, if the contract involves providing accommodation, transportation, catering services, or event management services, there might be multiple brokers or platforms involved in finalising such agreements[211] so the consumer may not cancel; cancellation could also mean that the service provider misses out on the opportunity to resell the service, especially during peak seasons.[212]

The Saudi *Electronic Commerce Law* gives its *Implementing Regulations* the authority to specify additional cases based on the nature of the product or service.[213] To a large extent, the *Implementing Regulations* reiterates the cases mentioned in the e-commerce law concerning these services and products. Nevertheless, the *Implementing Regulations* do stipulate more, such as in the case of an item that may spoil within the allowable time for contract termination and return to the seller.[214] In such cases, the seller cannot resell it again, which is harmful to the seller; therefore, excluding this case from the scope of the consumer's right is very logical, as it protects the seller's interests, especially in the case of food resources that are subject to rapid spoilage.[215] The same applies if the item being sold is a product that cannot be resold

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[206] *Electronic Commerce Law* (n 1) art 13/2/A; *Implementing Regulations of the E-Commerce Law* (n 13) art 11/E.
[207] *E-Commerce in Saudi Law* (n 195) 215; Maalish (n 193) 32.
[208] *Electronic Commerce Law* (n 1) art 13/2/B–C.
[209] *E-Commerce in Saudi Law* (n 195) 216.
[210] *Electronic Commerce Law* (n 1) art 13/2/D.
[211] Ibid art 13/2/E; *Implementing Regulations of the E-Commerce Law* (n 13) art 11/D.
[212] *E-Commerce in Saudi Law* (n 195) 215.
[213] *Electronic Commerce Law* (n 1) art 13/2/G.
[214] *Implementing Regulations of the E-Commerce Law* (n 13) art 11/A.
[215] *E-Commerce in Saudi Law* (n 195) 215; Maalish (n 193) 32.

for health reasons,[216] which could lead to the spread of infection.[217] Additionally, if the agreement is made at a public auction,[218] which is permissible as the auction law regulates such a situation, the consumer does not have the right to cancel the agreement resulting from the auction.[219] Finally, termination is not permitted if the item being sold is a product or service for which the price may change during the period in which the agreement can be canceled, due to a market with continuous price fluctuations beyond the control of the service provider, such as gold and silver.[220]

In conclusion, consumers are required to uphold their contractual obligations and are not permitted to exercise their right to terminate the contract for the products and services mentioned, as the law exempts these particular products and services from consumer termination rights. These exceptions are justified based on the unique nature of e-commerce contracts and the specific considerations that apply to them.[221]

#### *5.4.1.2 Timing of the right to terminate*

The right to terminate a contract is divided into different aspects, including its duration and whether this can be increased or decreased. The commencement of the option period to terminate the contract depends on whether the contract is for a product or service.[222] Additionally, it is necessary to determine when the term of the option to terminate the contract begins.

According to the *Electronic Commerce Law* and the *Draft Consumer Protection Law*, the consumer has the right to exercise this option within seven days.[223] Once this period expires, the service provider is not obliged to accept the consumer's contract termination. However, agreeing to extend this period for the consumer's benefit is

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[216] *Implementing Regulations of the E-Commerce Law* (n 13) art 11/B.
[217] *E-Commerce in Saudi Law* (n 195) 215.
[218] *Implementing Regulations of the E-Commerce Law* (n 13) art 11/F.
[219] *E-Commerce in Saudi Law* (n 195) 215.
[220] *Implementing Regulations of the E-Commerce Law* (n 13) art 11/G.
[221] *E-Commerce in Saudi Law* (n 195) 216; Almalki (n 190).
[222] *Electronic Commerce Law* (n 1) art 13/1; *Draft Consumer Protection Law* (n 14) art 41/1.
[223] *Electronic Commerce Law* (n 1) art 13/1; *Draft Consumer Protection Law* (n 14) art 41/1.

permissible.[224] This is considered an additional advantage in pursuing consumer satisfaction[225] and does not violate the law.

On the other hand, the service provider cannot evade this obligation and reduce the period, as such a move would clearly violate the law.[226] The provider must adhere to what is stated in the law.[227] The provider may increase the period by more than seven days but cannot decrease it, even if the consumer agrees.

If the contract is for a product, the period starts when the consumer receives the product.[228] The consumer has the right to cancel the contract within seven days following receipt of the product.[229] This means the day the consumer received the product is not counted as part of the seven days.

If the contract is for a service, the period begins when the contract is signed to provide the service.[230] However, there is an issue if the service is to be provided within seven days of signing the contract or less. The law is currently silent on this matter, so it is necessary to address this issue in the implementing regulations. The *Draft Consumer Protection Law* has not adequately addressed this problem, and consequently the Saudi regulator must now address this legal vacuum before issuing the Consumer Protection Law and address it satisfactorily. If the service is to be provided within seven days of signing the contract, cancellation of the contract is prohibited. Alternatively, a specific period should be specified, such as that the consumer must cancel the service contract five days before it is provided.

In all cases, any uncertainty or ambiguity in a clause or condition in the contract should be interpreted in favour of the consumer.[231] Accordingly, any ambiguity or voidness in the law should also be interpreted in favour of the consumer.

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[224] Ministry of Commerce, *Guide for Electronic Stores under the E-Commerce Law and its Implementing Regulations* (2023) 21 <https://mc.gov.sa/en/guides/Documents/MerchantGuide.pdf, from page 8>.
[225] Ibid.
[226] *Draft Consumer Protection Law* (n 14) arts 30–31/A.
[227] Ibid.
[228] *Electronic Commerce Law* (n 1) art 13/1; ibid art 41/1.
[229] *Electronic Commerce Law* (n 1) art 13/1.
[230] Ibid; *Draft Consumer Protection Law* (n 14) art 41/1.
[231] *Draft Consumer Protection Law* (n 14) art 34.

#### *5.4.1.3 Obligation regarding return of goods*

As previously stated, the consumer has the right to cancel a contract, but if they choose to do so, they must cover the expenses and return the items.[232] Saudi law has softened the impact of the consumer's right to cancel by requiring the consumer to handle the return expenses unless the parties to the contract agree that the seller will cover the return cost.[233] However, this may be unjust to the consumer if the seller ships an incorrect product and then requests its return, as the expense falls on the consumer regardless of the mistake. Nonetheless, Al-Baqmi (2021) indicates that the consumer is responsible for the re-export costs unless the mistake is attributed to the seller.[234] Although this seems fair and just, the law does not address this issue. Therefore, the Saudi regulatory authority should address the situation by placing the responsibility on the service providers if they make a mistake, rather than on the consumer.

If a buyer decides to withdraw from a contract, they are obligated to return the item in the same condition as they received it.[235] In the context of the *Electronic Commerce Law*, there is no explicit provision addressing this issue, creating a legal vacuum.[236] However, the *Draft Consumer Protection Law* addresses this gap by stipulating that the consumer must return the product to the seller or their representative within seven days from the date of notifying the seller about the contract termination.[237]

### 5.4.1.3 Confidentiality obligations and property rights obligations

Considering the growth of online shopping, there is a growing concern about protecting data that it is vital to safeguard personal information from being accessed or misused by unauthorised individuals or entities.[238] The rise of the Internet and the expanding digital economies and e-commerce are critical drivers for the discussion on data

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[232] Maalish (n 193) 38–42; *E-Commerce in Saudi Law* (n 195) 213.
[233] *Electronic Commerce Law* (n 1) art 13/1; Luqman (n 196); Al-Muqahem (n 197); Almalki (n 191); Maalish (n 193) 41.
[234] *E-Commerce in Saudi Law* (n 195) 213.
[235] Ibid.
[236] *Electronic Commerce Law* (n 1) art 13.
[237] *Draft Consumer Protection Law* (n 14) art 43/1.
[238] Sarah Waleed Alfayez, 'E-Commerce Consumer Data Protection in Saudi Arabia: History, Challenges, and Suggested Improvements' (2023) 65(6) *Arab Journal for Scientific Publishing* 1.

protection.[239] When it comes to securing the privacy of data stored using cloud computing services, users or consumers need to be informed and fully aware of the potential risks.[240] This can be achieved by carefully reviewing and comprehending the terms and conditions provided by the service provider to avoid any breaches of confidentiality and misuse of private data.[241]

It is important to note that the data subject (consumer) is entitled to access their personal data held by the Controller.[242] However, the exercise of this right must not adversely affect the rights of others, including intellectual property rights or trade secrets.[243] Additionally, the consumer has the right to request a clear and readable copy of their personal data.[244] Again, it is vital to ensure that exercising this right does not harm the rights of others, such as intellectual property rights or trade secrets.[245]

#### *5.4.1.4 Obligation when using the right to amend the request*

If a consumer makes a mistake in an electronic communication through an ICT medium that cannot be corrected, the Saudi *Electronic Commerce Law* gives the consumer the right to rectify the electronic communication subject to the consumer informing the service provider of the error within 24 hours of sending it.[246] However, the *Draft Consumer Protection Law* introduces a new clause stating that the two parties may agree in the contract on a longer period than 24 hours,[247] which is advantageous as it upholds the rights of the parties involved in the contract. Therefore, it is important to retain this provision when the draft becomes law as it safeguards the rights of the parties involved in the contract without contravening any laws. Notifying the service provider of the error is considered rectification unless the consumer has

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[239] Ahmed Abdullah, 'Consumers' Personal Data Protection in Saudi Arabia: A Comparative Analytical Study' (PhD Thesis, University of Kansas, 2020) 15.
[240] Ni Ketut Supasti Dharmawan, Desak Putu Dewi Kasih and Deris Stiawan, 'Personal Data Protection and Liability of Internet Service Provider: A Comparative Approach' (2019) 9(4) *International Journal of Electrical and Computer Engineering* 3175.
[241] Ibid.
[242] For more information see above: 4.4.1 Provisions of consumer privacy data under Saudi law.
[243] Saudi Data & AI Authority, *The Implementing Regulation of the Personal Data Protection Law* (English Translation) art 5/1 <https://sdaia.gov.sa/en/SDAIA/about/Documents/ImplementingRegulation.pdf>.
[244] Ibid art 6.
[245] Ibid art 6/1.
[246] *Electronic Commerce Law* (n 1) art 4; *Implementing Regulations of the E-Commerce Law* (n 13) art 4; *Draft Consumer Protection Law* (n 14) art 45; Ministry of Commerce, *Consumer Rights Guide* 22 <https://mc.gov.sa/ar/guides/CustomerGuide/Documents/MCIDoc.pdf> (Arabic Version) ('*Ministry of Commerce Consumer Rights Guide - Arabic*').
[247] *Draft Consumer Protection Law* (n 14) art 45.

utilised or benefited from the service provider's product or service.[248] On the other hand, the service provider can rectify unintended errors in electronic communications sent to the consumer, provided that this is agreed upon in the contract and the consumer is notified of the error before the product is shipped or the service commences.[249] In this situation, the consumer can choose to proceed with the contract after the correction or terminate the contract and recover the costs incurred for the product or service and other costs resulting from the error.[250]

### *5.4.2 Consumers' obligations when using their rights in e-commerce under Islamic law*

This section will discuss consumer obligations when exercising their rights in e-commerce within the framework of Islamic law. These responsibilities involve the following aspects: the timing of the right to terminate the contract, the return of goods, confidentiality and property rights, and obligations when using the right to amend a request. To avoid redundancy, this section will focus only on the timing of the right to terminate, obligations regarding the return of goods and obligations associated with amending a request.

The concept of non-termination of a contract can be better understood through the application of *khiar al-shart*, as discussed in Chapter 4 (specifically in section 4.5.2, which addresses the position of Islamic law on this obligation and the possible options that can be applied). This concept is relevant to both consumers and sellers. Additionally, it pertains to confidentiality and property rights, which are also discussed in Chapter 4, specifically regarding the compatibility between Islamic and Saudi law concerning privacy (see section 4.4.2).

#### *5.4.2.1 Timing of the right to terminate the contract*

It was previously established in Chapter 4 that the option of condition gives the consumer the right to terminate the contract. However, the question remains: is this

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[248] *Electronic Commerce Law* (n 1) art 4; *Implementing Regulations of the E-Commerce Law* (n 13) art 4; *Ministry of Commerce Consumer Rights Guide - Arabic* (n 246) 22.

[249] *Implementing Regulations of the E-Commerce Law* (n 13) art 4/3; *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 16) 26, 50; *Ministry of Commerce Consumer Rights Guide - Arabic* (n 246) 22.

[250] *Implementing Regulations of the E-Commerce Law* (n 13) art 4/3; *Ministry of Commerce Guide to Consumer Rights and Responsibilities* (n 16) 26, 50; *Ministry of Commerce Consumer Rights Guide - Arabic* (n 246) 22.

right absolute, meaning it is not subject to a time limit; or should it be limited to a particular period? If it is to be limited, how long should that period be?

The four schools of jurisprudence have differing opinions on the appropriate time limit for terminating a contract. The Shafi'i and Hanafi schools agree that the period allowing for termination is three days and that this time frame cannot be exceeded.[251] This conclusion is based on one interpretation of a hadith: that it sets the termination period as three days.[252] Therefore, consumers cannot demand a more extended period, even if the seller is agreeable.

Conversely, the Maliki school of thought asserts that the termination period should not be fixed but should vary based on the item sold.[253] This means that the period can be extended if longer consideration is needed for specific items or shortened if less time is deemed sufficient.[254] For instance, the time allowed for reviewing a car purchased online may differ significantly from that for a table, as each item has its own considerations regarding scrutiny and consultation.

The Hanbali perspective holds that the allowable period for terminating a contract depends on the parties' mutual agreement.[255] The principle ‘Muslims are bound by their conditions’ supports this view,[256] indicating that consumers must adhere to the expiry period that they have negotiated with the seller, regardless of whether it is lengthy or brief.

In a smilar way, rulings regarding the option to terminate a lease contract differ among the various schools of thought.[257] According to two opinions of those schools that permit termination, Hanafi allows it only if it occurs within three days, even if rent payment follows immediately after the contract is signed.[258] The Maliki school shares

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[251] *The Sufficiency of the Observant in Explaining the Warning* (n 163) vol 8, 397; *Al-Majmoo’ Sharh Al-Muhadhab* (n 66) vol 9, 192; *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 61) vol 4, 565.

[252] *The Sufficiency of the Observant in Explaining the Warning* (n 163) vol 8, 397; *Al-Majmoo’ Sharh Al-Muhadhab* (n 66) vol 9, 192; *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 61) vol 4, 565.

[253] *Talents of Galilee in a Brief Explanation of Khalil* (n 182) vol 4, 412.

[254] Ibid.

[255] *Kashaaf Alqinae* (n 61) vol 7, 417; *Almughaniy* (n 80) vol 3, 505.

[256] *Kashaaf Alqinae* (n 61) vol 7, 417; *Almughaniy* (n 80) vol 3, 505.

[257] For complete picture see above: 4.5.2.1 Overview of khiar al-shart.

[258] *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 61) vol 6, 77; زين الدين ابن نجيم [Zain Al-Din Ibn Nujaym], البحر الرائق شرح كنز الدقائق [*Al-Bahr Al-Ra'iq Sharh Kanz Al-Daqa'iq*] ( دار الكتاب الإسلامي [Dar Al-Kitab Al-Islami], 2nd ed) vol 8, 41 (‘*Al-Bahr Al-Ra'iq Sharh Kanz Al-Daqa'iq*’).

a similar view but does not specify a three-day limit, suggesting that the termination period can be longer, and that rent can follow the commencement of the contract.[259]

In contrast, the Hanbali school states that the option to terminate a lease contract should be based on the parties' agreement, with the critical condition that the option to terminate must conclude before the lease period begins.[260] This condition arises because incorporating a termination option that extends into the lease period could result in missing out on some agreed-upon benefits, which is unacceptable.[261]

As a result of these differing interpretations, in the case of electronic services, both the Hanafi and Maliki schools allow the consumer to terminate the contract, even after it has begun. However, the Hanafi school stipulates that this termination must occur within three days of the signing of the contract. On the other hand, the Hanbali school agrees that consumers can negotiate a specific period for termination with the service provider, provided that the termination occurs before the implementation of the contract begins.

Finally, it is crucial to note that the seller and the buyer can agree on different termination periods.[262] For instance, they may decide that the consumer has three days to terminate the contract while the seller has only two days to do so.

#### *5.4.2.2 Obligation regarding the return of goods*

If a buyer decides to exercise his or her right to cancel the contract, s/he is required to return the item purchased. Additionally, the consumer must cover the expenses associated with returning that item.[263] This obligation stems from the hadith which states, 'The hand that takes is responsible for what it has taken until it returns it.'[264] This means that the buyer is accountable not only for the item's safe return but also for any costs incurred during the return process.[265] It is essential for buyers to be aware of these obligations when considering cancellation to ensure a smooth transaction.

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[259] *Talents of Galilee in a Brief Explanation of Khalil* (n 182) vol 4, 412.
[260] *Almughaniy* (n 80) vol 3, 505; *Kashaaf Alqinae* (n 61) vol 7, 419.
[261] *Almughaniy* (n 80) vol 3, 505.
[262] *Rawdat al-Talibin and Omdat al-Muftis* (n 61) vol 3, 448.
[263] *Explanation of Indoctrination* (n 177) vol 2, 203; *Al-Muhtar's Response to Al-Durr Al-Mukhtar - Hashiyah Ibn Abdeen* (n 61) vol 4, 16, 594; *The Sufficiency of the Observant in Explaining the Warning* (n 163) vol 9, 114; *Rawdat al-Talibin and Omdat al-Muftis* (n 61) vol 3, 374; *Al-Bahr Al-Ra'iq Sharh Kanz Al-Daqa'iq* (n 258) vol 6, 30.
[264] Sunan Ibn Majah, Book 15, Hadith 11 <https://sunnah.com/ibnmajah:2400>.
[265] *The Sufficiency of the Observant in Explaining the Warning* (n 163) vol 9, 114.

#### *5.4.2.3 Position of Islamic law on using the right to amend the request*

*Sharia* governs not just the relationship between people and God, *Allah*, but also all aspects of human life including commerce.[266] This means e-commerce is ruled by *Sharia*; there must be no disagreement between Islamic law and electronic trade, in Saudi Arabia, in order for it to be accepted.[267] In Islamic law, e-commerce is considered a new subject because it is so recent compared to Islamic law; therefore, *Sharia* does not have a specific principle for e-commerce. Nevertheless, its general principles concerning transactions may be applied to to e-commerce. In any case, e-commerce is now a widespread innovation; thus, it needs to be addressed from an Islamic law perspective.[268] This section will focus on the position of Islamic law on most matters related to electronic commercial contracts, meaning that it covers special cases in e-commerce which are not related to traditional trades or that differ from them.

##### *5.4.2.3.1 The meeting place*

Most jurists of Islamic law state that '*Majlis al-aqd*',[269] or 'the meeting place', has particular provisions in any contract.[270] The place where the buyer and seller meet in sales transactions can be defined in Islamic law as a situation in which contracting parties are engaging in contract, or in other words, *a union of speech* on the subject matter of the contract.[271] This means that parties should face each other to agree to a contract and they should not focus on any other matter as part of that process.[272] The question that arises is whether e-commerce is acceptable or not in Islamic law given that most e-commerce is not face-to-face. This will be discussed in a coming section.

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[266] Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press, 1st ed, 1964) 1; Abdulrahman Alzaagy, 'The Islamic Concept of Meeting Place and Its Application in E-Commerce' (2007) 1(1) *Masaryk University Journal of Law and Technology* 27.

[267] Rositah Kambol, 'E-Commerce in the Context of Islamic Law of Contract of Sale' 2018 1(1) *Journal of Law & Governance* 36, 42. See also *Basic Law of Governance* (Royal Decree No A/90 dated 27/08/1412H (1 March 1992)) art 7.

[268] سلطان بن إبراهيم الهاشمي [Sultan bin Ibrahim Al Hashimi], التجارة الإلكترونية وأحكامها في الفقه الإسلامي ['*E-Commerce and its Provisions in Islamic Jurisprudence*'] دار كنوز اشبيليا [Dar kunuz ashbilya, or 'Seville Treasure House'] (1st ed, 2011) 6–7.

[269] '*Majlis al-aqd*' is a meeting to contract. See لجنة مكونة من عدة علماء وفقهاء في الخلافة العثمانية [A Committee Composed of Several Scholars and Jurists in the Ottoman Caliphate], مجلة الأحكام العدلية [*Journal of Judicial Laws*] (نور محمد [Noor Muhammad, Karachi]) Article 181, 38. Other definition: The time that begins from the issuance of the offer and continues until the period during which the two contracting parties remain interested in the contract without the appearance of any reluctance on the part of one of them to contract. See *Kuwaiti Jurisprudence Encyclopedia* (n 65) vol 20, 169.

[270] Abduhamid Aleid, 'The Saudi Legal System and its Effect on Electronic Contract Formation' (PhD Thesis, Queensland University of Technology, 2017) 89.

[271] *Islamic Jurisprudence and its Evidence* (n 106) vol 4, 2945.

[272] Alzaagy (n 266) 33.

In terms of how the concept of *Majlis al-aqd* is applied, the most important provision relating to the idea of the meeting place in Islamic law is the freedom to choose '*khiar almajlis*'[273], at the meeting place, whether or not to continue with the contract; thus, each of the two contracting parties has the right to terminate the contract as long as they are in the meeting place, do not physically separate, and neither of them gives up this option during the process.[274] The purpose of having a choice of meeting place in Islamic law is so that the parties to the contract are able to think carefully, reconsider the deal and have a chance to notice any mistakes in the arrangement that were not obvious at first; this provision is the best way to ensure fairness for all parties.[275]

*5.4.2.3.2 Implementation of the meeting place option in e-commerce*

The choice of the meeting place can be implemented in e-commerce whether a contract is discussed via instant or non-immediate communication. However, parties can agree not to apply this option either for both of them or only one as mentioned above.[276]

*5.4.2.3.2.1 Option of meeting place in a contract by means of instant communication*

Conclusion of the contract through the use of voice or voice with video between the parties of the e-contract via the Internet counts as face to face in regard to the provisions of the contract,[277] which is acceptable (*Halal)*[278] in general, except where

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[273] *'khiar almajlis'* or 'Option of Meeting': The right of the contracting party to sign the contract or not from the time of contracting to separation or giving only the other party this option. It ends with separation, which is the departure of one of the contracting parties from the place where the contract took place or giving the option of signing or rejecting the contract for one of them to use it after separation. See *Authentic and Contemporary Financial Transactions* (n 93) vol 6, 20.

[274] *Islamic Jurisprudence and its Evidence* (n 106) 3104.

[275] Ibn al-Qayyim, *Inform the Signers* (*Ialam almogean)* (Dar alkotob alalmeah- Beirut, 1st ed, 1991) vol 3, 130.

[276] *Islamic Jurisprudence and its Evidence* (n 106) vol 4, 3104; See *Authentic and Contemporary Financial Transactions* (n 93) vol 9, 531.

[277] 'A Decision Regarding the Ruling on Contracting with Modern Communication Machines' (Decision, Conference of the International Islamic Fiqh Academy, 23 Sha'aban 1410 (20 March 1990)) vol 3, 785.

[278] Every authorised action or statement (saying) has no reward for doing it or punishment for leaving it. *Halal* is called Mubah and the last word in Islamic law is more used. See ابن النجار الفتوحي [Ibn Al-Najjar Al-Fotohi], شرح الكوكب المنير [*Explanation of the Bright Planet*] (مكتبة العبيكان [Obeikan Library], 2nd ed, 1997) vol 1, 624.

the product is forbidden (*Haram*)[279] in Sharia.[280] For examples, in the case of pork, or when the sale involves something that is banned, such as interest (*Riba*).[281] The meeting place, in this case, is the duration of the contact between the parties of the contract as long as the discussion is about the contract, and if the communication ends or is cut off, or the contracting parties begin to discuss another topic that has no connection with the original subject of the communication, the meeting place is terminated and the contract is considered to be agreed upon in a legal sense unless the interruption is for a short time according to custom.[282] In summary, an e-commerce contract through instant means is considered a traditional commercial transaction, so *khiar almajlis* applies to those who participate in this transaction, and they can renounce the transaction during the negotiation; consequently, there are no obligations to them because the contract is not concluded.

*5.4.2.3.2.2 Option of meeting place in a contract by means of non-instant communication*

When parties use non-instant communication to agree on a contract, for instance by e-mail or via a website, the contract operates under the provisions of a contract between absentees, such as contracting by letter.[283] The evidence in *Sharia* for accepting the validity of this provision is that the jurisprudential rule says that writing is like discourse (a principle known as *alkitab ka alketab*), which means writing between absentees is like speech between parties physically present to each other.[284] Legally defined, the meeting place in this case starts from the moment the offer is put forward to the party it is directed to, and then ends either with the issuance of acceptance of that offer or with the withdrawal by the offeror of the offer before the other party accepts the offer. If the seller sets a time period for the offer's validity then the offer is valid until the end of the specified period, and the seller does not have the

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[279] What is proven to be forbidden without an objection, and the one who abandons it deserves a reward from Allah, and its perpetrator deserves punishment. See علي بن محمد الجرجاني [Ali bin Muhammad Al-Jurjani], التعريفات [*Tariffs*] (دار الكتب العلمية -لبنان [Dar al-Kutub al-Ilmiyya - Lebanon], 1st ed, 1983) 205.

[280] Kambol (n 267) 42.

[281] An increase at no charge according to the standard of Islamic law is conditional to one of the contracting parties in the transaction. See محمد البركتي [Mohammed Al-Barkati], التعريفات الفقهية [*Legal Definitions*] (دار الكتب العلمية [Dar al-Kutub al-Ilmiyya], 1st ed, 2003) 102.

[282] *Legitimate Standards* (n 93) Standard 38.

[283] Alzaagy (n 266) 157.

[284] *Jurisprudential Rules and their Applications in the Four Schools of Thought* (n 170) vol 1, 339.

right to revoke the offer during that period.[285] Therefore, when another party accepts the transaction before another one withdraws the offer or before the offer's validity ends, the transaction takes place; thus, the e-commerce obligations apply to both of them.

### *5.4.3 Section conclusion*

Every agreement in online business transactions between sellers and buyers is subject to the consumer's right to cancel, which is absolute and cannot be waived. However, specific exceptions exist where withdrawal is not allowed, to protect the interests of sellers and merchants. These include non-returnable products such as custom-made goods and goods affected by mishandling, as well as perishable goods and items that spoil quickly, such as food. Moreover, health considerations such as products not being resold for health reasons require exemption from the withdrawal right. Furthermore, agreements from public auction sales cannot be cancelled, and products with fluctuating prices, such as gold and silver, cannot be returned. Finally, services, for example, contracts related to accommodation, transportation, catering, or event management, may not be cancelled to prevent harm to service providers during peak seasons. Overall, these regulations aim to balance consumer rights with the protection of sellers' interests in e-commerce transactions, obligating the consumer to bear them in mind when considering using the right. However, the notion of contract non-termination can be more clearly understood through the lens of *khiyar al-shart,* as examined in Chapter 4. In fact, Saudi law is consistent with Islamic law in that any conditions within an agreement between parties—whether they are explicitly stated in the contract, required by law, or rooted in customary practices—are permissible so long as they do not conflict with Islamic law. Thus, all previous provisions comply with Islamic law.

Consumers have the right to make use of this option within a specified number of days, after which timeframe the consumer is unable to terminate the contract, although it is acceptable to agree to extend this period for the benefit of the consumer. Conversely, neither the consumer nor the service provider is allowed to reduce this period, even if the consumer consents. If the agreement pertains to a product, the timeframe begins

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[285] *Legitimate Standards* (n 93) Standard 38.

when the consumer obtains the product. The consumer is entitled to cancel the contract within seven days following the receipt of the product, with no exceptions. The day the consumer receives the product is not included in the seven-day count. In contrast, Islamic law has varied opinions on the termination period for sales. The Shafi'i and Hanafi schools set a fixed three-day period for termination based on one interpretation of hadith, disallowing extensions even if the seller agrees. The Maliki school consider that the period should vary based on the item, allowing more time for complex purchases and less for simple ones. Lastly, the Hanbali school allows termination based on mutual agreement, emphasizing the principle that 'Muslims are bound by their conditions,' meaning consumers must follow the agreed period, whether short or long.

In the case of a service contract, the timeline starts once the contract is signed to deliver the service. However, complications arise if the service is set to commence within seven days of contract signing, or less. Current legislation does not address this situation, and the *Draft Consumer Protection Law* has not sufficiently tackled this issue, leaving a legal gap that the Saudi regulator now needs to resolve. If the service is to begin within seven days following the signing of the contract, the contract cannot be cancelled. Alternatively, a clear timeframe should be established, stipulating that the consumer must cancel the service contract at least five days prior to its commencement. In contrast, the rulings concerning the option to end a lease agreement vary among different schools of thought. Due to these varying interpretations, both the Hanafi and Maliki schools permit the consumer to cancel the contract, even after it has commenced. However, the Hanafi school requires that this cancellation take place within three days of the contract signing. Conversely, the Hanbali school allows consumers to agree upon a specific termination period with the service provider, as long as the termination happens prior to the commencement of the contract. Ultimately, it is essential to highlight that the buyer and seller can establish different termination timelines.

If a consumer opts to cancel a contract, they are responsible for covering the costs and returning the items. Saudi law has eased the consequences of the consumer's right to cancel by stipulating that the consumer must pay for the return expenses unless the contract parties agree that the seller will bear the return costs. If a buyer

chooses to withdraw from a contract, they must return the item in the same condition in which they received it. This aligns with Islamic law.

Under the Saudi *Electronic Commerce Law*, consumers can rectify mistakes in e-commerce within 24 hours, subject to obligations to notify the service provider, and that they have not already used or benefited from the product or service. Similarly, service providers can correct errors in electronic communications if agreed upon in the contract, and the consumer is informed before shipping or service commencement. In such cases, the consumer may either accept the correction and continue the contract or terminate it, receiving a refund for the product/service and related costs.

Likewise, Islamic law has similar rules that Saudi law is compatible with, so there is no conflict between them. The meeting place (*Majlis al-aqd*) plays a significant role in contractual agreements, representing the union of speech concerning the subject matter of the contract. One of the most important provisions related to this concept is *Khiar al-Majlis*, which grants both contracting parties the right to terminate the contract as long as they remain in the meeting place, have not physically separated, and have not voluntarily waived this option.

The principle of *Majlis al-Aqd* can be applied to e-commerce contracts, whether conducted through instant or non-immediate communication. In contracts concluded through instant communication, such as live chat or phone calls, the transaction is treated similarly to traditional commercial agreements, where the parties retain the right to withdraw during negotiations. This means no binding obligations arise until the contract is formally concluded. In contrast, in non-immediate communication, such as emails or online orders, the meeting place period begins when the offer is made to the receiving party and ends either with the acceptance of the offer or the withdrawal of the offer by the offeror before acceptance.

## 5.5 Chapter conclusion

Consumers must pay service providers, who are required to provide a clear price breakdown. Unspecified prices allow consumers to rescind contracts. Civil law allows for price determination based on market rates post-contract, while Islamic law mandates known prices at sale to avoid disputes, although exceptions exist for expert-determined prices.

Saudi law lacks specific regulations on payment timing in e-commerce, defaulting to civil law which states payment is due at sale unless agreed otherwise. In Islamic law, deferred payments are allowed for owned commodities but prohibited for gold, silver, or currency. The *Electronic Commerce Law* does not specify a payment location, following electronic payment norms. In case of ambiguity, civil law defaults to the delivery location, whereas Islamic law ties payment to contract formation for specific transactions.

Saudi law gives sellers some protections, including the right to withhold delivery or cancel contracts in cases of non-payment. In Islamic law, sellers cannot retain ownership as a payment condition but may mortgage items as security. Consumers typically bear payment costs unless agreed otherwise, with limits on charges. Islamic law states buyers bear costs like weighing for gold or silver payments. Buyers assume liability for items once possession is taken, even if payment is not complete. In both Saudi and Islamic law, buyers must compensate for damage or loss caused post-possession.

Under Saudi law, buyers must receive the sold item at a mutually agreed location, in line with Islamic principles. Some Islamic opinions challenge contracts without a clear delivery location, but this is not widely accepted. Typically, the seller covers delivery costs, while the buyer bears receipt costs. Confusion arises due to inconsistencies in translations of Saudi law, which should be clarified. In Islamic law, costs are based on agreement or custom.

Saudi law permits the buyer to sell or act on goods before receipt, including food, which contrasts with Islamic law prohibiting such actions for food items. Non-food items have varying opinions, with Maliki scholars being more lenient compared to Hanafi, Safhi and Hanbali scholars. Buyers must ensure that items match their description and report defects promptly, as failure to do so can impact their rights. Islamic law emphasises thorough inspection before transactions to prevent disputes. In both Saudi and Islamic law, if a buyer fails to take possession of an item, they assume the risk of loss or damage and may face legal consequences from the seller.

The consumer's right to cancel agreements in online business transactions is stated in Saudi law, emphasizing that this right is absolute but has specific exceptions. Exceptions include non-returnable products like custom-made items, perishable

goods, health-related products, public auction agreements, and services related to accommodation and transportation. These regulations aim to protect sellers' interests while balancing consumer rights. Similarly, the concept of *khiyar al-shart* illustrates that conditions within contracts are permissible under Saudi law and Islamic law, provided they do not conflict with Islamic law.

Consumers have a specific timeframe to use the option to terminate a contract, usually seven days after receiving a product. This period can be extended for the benefit of the consumer, but cannot be reduced by either party, even with consent. The seven-day cancellation period does not include the day the product is received. In contrast, Islamic law presents different views on termination periods with Shafi'i and Hanafi schools requiring a fixed three-day termination period with no extensions, the Maliki school allowing a variable period based on the complexity of the item, and the Hanbali school allowing termination based on mutual agreement, following the agreed period.

In service contracts, the timeline begins upon contract signing. Complications arise if services start within seven days, as current legislation leaves a gap in addressing cancellations in this timeframe. To resolve this, clear guidelines should stipulate that consumers cancel at least five days before service begins. Different schools of thought have varying interpretations regarding lease agreements: the Hanafi and Maliki schools allow cancellation even after commencement, with the Hanafi school requiring it within three days of signing, and the Hanbali school permitting the establishment of a specific termination period with the service provider. Both buyers and sellers can define different termination timelines.

Consumers who cancel a contract in Saudi Arabia are responsible for return costs unless the seller agrees to cover them. Items must be returned in the same condition as received, in accordance with Islamic law.

Under the Saudi *Electronic Commerce Law*, consumers can rectify mistakes within 24 hours if they have not used the product/service, and service providers can correct errors if agreed to in the contract and informed prior to shipping. Consumers can then either accept corrections or terminate the contract, receiving a refund. Islamic law is compatible with Saudi law, particularly regarding contractual agreements. Moreover, the concept of *Majlis al-aqd* (meeting place) allows both parties to terminate a contract as long as they have not physically separated or waived this option.

In Islamic law regarding e-commerce transactions, contracts through instant communication are treated like traditional agreements, while for non-immediate situations the meeting period commences upon the presentation of the offer to the recipient and concludes either with the acceptance of the offer or the withdrawal of the offer by the offeror prior to acceptance.

# CHAPTER 6: CONCLUSION

Saudi Arabia's legal system is based on Islamic law, with the Holy Qur'an and Sunnah heading the hierarchy. While Islamic law covers many areas, additional rules and regulations are regularly created to address unaddressed areas, ensuring compliance with Islamic principles. E-commerce growth in Middle Eastern countries such as Saudi Arabia is driven by economic expansion and technological advancements. However, the compatibility of e-commerce with Islamic law in these countries requires further analysis.

E-commerce, characterised by remote transactions and diverse communication methods, differs from traditional commerce. While e-contracts often follow traditional contract rules, various laws worldwide govern e-commerce, impacting user confidence and adoption. E-commerce offers advantages such as faster, cheaper transactions and environmental benefits due to reduced paper usage and $CO_2$ emissions. E-commerce is booming worldwide, with Saudi Arabia experiencing significant growth. In Saudi Arabia, the legislation most pertinent to e-commerce is the *Electronic Commerce Law*. However, the Saudi *Electronic Commerce Law*, while addressing many e-contract issues, lacks coverage of some issues. This is because the Saudi regulator has made an astute decision to adopt a broad approach to e-commerce definition.

The present thesis relates to the first part of the Saudi *Electronic Commerce Law* definition, focusing on economic activities between service providers and consumers through electronic means. This broad definition, encompassing various activities including leasing, aligns with UNCITRAL's recommendation for a comprehensive e-commerce concept. B2B and B2C are undoubtedly the most prominent categories in the e-commerce landscape.

The *UNCITRAL Model Law* has significantly contributed to the development of e-commerce globally, providing a framework for countries to establish their own laws. This model law, adopted by many countries, promotes e-commerce growth and offers practical solutions to e-commerce challenges. UNCITRAL provides functional

equivalence, technological neutrality and non-discrimination principles.[1] Functional equivalence applies old regulations to new industries, treating paperless transactions the same as paper transactions. The technological neutrality principle mandates neutral provisions for all technologies used in e-transactions. This ensures the law applies to all e-activities and information storage, regardless of the medium or technology used.[2] Non-discrimination in e-commerce ensures legal equivalence of signatures and certificates, regardless of geographic location. This principle promotes e-commerce and removes online trade barriers, including data localisation demands. Although many countries are concerned about applying the principle of non-discrimination in e-commerce, a number of countries including Saudi Arabia and over 25 Asian and Pacific countries have agreed to the *Electronic Communications Convention*.

Moreover, UNCITRAL has developed laws to facilitate e-commerce, including the Model Law on Electronic Signatures (2001).[3] Similarly, the Saudi *Electronic Transactions Law* aims to establish trust in e-transactions by focusing on e-signatures and approving and certifying e-transactions.[4] E-signature can be defined as electronic data used to verify identity, approval, and detect changes in electronic transactions. Nevertheless, e-signature definitions vary, necessitating discussion of differences and legal approaches. As a result, e-signature legislation and regulations vary based on three primary approaches: minimalist, technology-specific, and two-tiered. The Saudi *Electronic Transactions Law* strictly regulates e-signature recognition, requiring six conditions for legal validity.[5] However, the two-tiered approach is more developed and appropriate for e-commerce. In this context, the United Nations (2007) recommends uniform international legislation for e-commerce to reduce confusion and risk.[6]

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[1] For more information and criticism of these principles see above: 2.3 Basic principles of e-commerce.
[2] See above: 2.3.2 Technological neutrality.
[3] See above: 2.4 A key legal issue: E-signature.
[4] *Electronic Transactions Law* (Royal Decree No M/18 dated 1428H (2007)).
[5] See Abdulrahman Abdullah Alajaji, 'An Evaluation of E-Commerce Legislation in GCC States: Lessons and Principles from the International Best Practices (EU, UK, UNCITRAL)' (PhD Thesis, Lancaster University, 2016) 226; Stephen Mason, *Electronic Signatures in Law* (University of London Press, 4th ed, 2016) 117; ibid art 10.
[6] See *United Nations Convention on the Use of Electronic Communications in International Contracts: Explanatory Note* (United Nations, 2007) [147] <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf>.

The law of obligations is crucial for societal order and wealth protection. It provides a framework for fair interactions and enforces agreements and compensation, resulting in Obligations theory being fundamental to civil law systems and common law.[7] Nations continue to compare laws of obligations for perceived benefits, as seen in modernisation initiatives in Europe and globally.[8] While comparative study influences the law of obligations, simply copying foreign law is not a valid method due to differing contexts. The concept of obligations law can be traced back to Roman law, and the concept of legal relationships remains fundamental in civilian legal thought, with civil codes structured around real and personal rights. While codification of obligations is pursued, challenges arise from specialised statutes and European harmonisation.

Provisions of obligations constitute a significant aspect of the Saudi *Civil Transactions Law*, which comprises over three hundred articles pertaining to this legal framework.[9] However, the term 'obligation' is rarely used in Islamic jurisprudence, with 'right' being the preferred term. Nevertheless, the distinction between Islamic law and other legal systems in their treatment of the concept of obligations primarily lies in formal and terminological variations.[10] While Islamic law inherently incorporates the concept of obligation and does not inherently conflict with its existence, the structural arrangement of Islamic jurisprudence diverges due to its engagement with human conduct, which inherently gives rise to both obligations and rights.[11] Consequently, the foundational principles of traditional Islamic law harmoniously coexist with the tenets of modern civil law and Saudi law concerning the concept of obligations.

Modern legal systems classify obligations based on contract, wrong, unjust enrichment, unilateral will, and law. Saudi law, while accurately following modern systems, omits custom as a source of obligation despite its application in Islamic and Saudi law. Islamic law, while not explicitly mentioning sources, involves the five

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[7] For more information see above: Chapter 3: Obligations theory in comparative law: Saudi and Islamic law.
[8] Dário Moura Vicente, *Comparative Law of Obligations* (Edward Elgar, 2021) 3.
[9] *Civil Transactions Law* (Royal Decree No M/191, dated 2023) art 1 ('*Civil Transactions Law*').
[10] مصطفى الزرقا [Mustafa Al-Zarqa], المدخل إلى نظرية الإلتزام العامة في الفقه الإسلامي [*Introduction to the General Obligation Theory in Islamic Jurisprudence*] (Dar Al-Qalam -Damascus-, 1st ed, 1999) 119.
[11] Ibid 120.

sources of obligation: contract, tort, individual will, unlawful enrichment, and law; in addition, norm.[12]

## 6.1 Variations between Islamic law and Saudi law: Seller obligations

Regarding obligations of e-service providers in e-commerce under Saudi and Islamic law,[13] having addressed the provisions of Saudi and Islamic law pertaining to e-disclosure, it can be concluded that the fundamental principle and foundation of the concept of disclosure are consistent in both legal frameworks. However, Saudi law imposes specific regulations regarding the disclosure of identification information. For instance, it mandates service providers to disclose certain details about electronic stores or requires licenses or permits for professions subject to specific regulations. In contrast, Islamic law does not explicitly state such rules. Nevertheless, one of the conditions for contracting parties in Islamic law is eligibility (*al'ahlia*), and e-service providers can only be recognised as eligible if they disclose their identification. Therefore, while there may be slight differences between Saudi and Islamic law, with Saudi law imposing more requirements regarding the disclosure of identification information in e-commerce, Islamic law can still incorporate these requirements because they align with its principles. In fact, Islamic law can consider them under considered interests (*almaslahat almursala*) that are acceptable to it. In essence, any Islamic law that is not explicitly covered is addressed through additional rules and regulations, provided that these regulations do not contradict Islamic law.[14]

Variations in seller obligations relate to mandatory disclosure, transfer of sale ownership, delivery, guarantees and remedies for defects, privacy and right of recourse, each of which is discussed in what follows.

### *6.1.1 Mandatory disclosure*

Regarding the mandatory disclosure of product and service features, both laws require detailed information while also stipulating a comprehensive condition that mandates

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[12] See above: 3.5 Sources of obligation.

[13] For more details see above: Chapter 4: Obligations of e-service providers (Merchant) in e-commerce under Saudi and Islamic law.

[14] Esther van Eijk, 'Sharia and National Law in Saudi Arabia' in Jan Michiel Otto (ed), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press, 2010) 139, 173.

the disclosure of the product's fundamental features, which enables future flexibility. However, Islamic law places greater emphasis on the product's core feature, interpreting it as any piece of information that can alter the price or purpose of payment, and whose presence or absence can influence the desire to pay. The most striking distinction between Islamic and Saudi legal systems is that all four schools of Islamic law prohibit selling a specific unowned item, whether disclosed or not, whereas Saudi law does not address this issue in any manner. This may be attributed to the perception among Saudi lawmakers that all e-sellers own the items they will sell or that a disclosed product can provide disclosure because there are many similar products. Regardless, this issue can be addressed logically and legally, with Saudi e-commerce law referring to Saudi civil law when it lacks specific provisions. If Saudi civil law also lacks provisions, the most appropriate provisions derived from Islamic law are applied to the issue. In conclusion, Saudi legislators have implemented specific provisions that modernise and align with electronic developments, ensuring compliance with traditional Islamic law principles.

### *6.1.2 Obligation to transfer ownership*

Regarding the obligation to transfer sale ownership and deliver a product or service[15] in Saudi law, if a regulatory text outlines a procedure for transferring ownership and other real rights, ownership transfer occurs only upon completion of that procedure. Since e-commerce law does not explicitly mention ownership transfer, civil transactions law governs this matter. Therefore, the e-seller's responsibility is to transfer ownership of the item sold to the buyer and avoid any actions hindering the transfer.

On the one hand, an e-contract transfers ownership when the sale is precisely specified; on the other hand, when it is a category of goods defining an e-sale rather than an explicitly specified item, ownership transfer occurs only when separated from other items. However, even if the item has been delivered, the e-seller can stipulate a delayed ownership transfer to the buyer until the total price is paid.

Interestingly, Islamic law and Saudi law differ significantly in three major cases regarding ownership transfer, leading to contrasting outcomes. Firstly, in Islamic law,

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[15] See above: 4.2 Obligation to transfer sale ownership and deliver a product or service.

ownership is transferred to the buyer even if the seller does not own the item sold. However, the item must merely be described, not specified. Secondly, in Islamic law, the transfer of ownership is similar to debt transfer, which does not require receipt or separation of similar items. By analogy, if it is acceptable for money to be considered a debt, then the sold item should also be viewed as a debt since it is one of two exchanges. Therefore, whatever is permissible for money should also be permissible for the sold item. The third main difference between Saudi and Islamic law concerns postponing ownership transfer after signing of the contract. As mentioned earlier, in Saudi law, the seller has the right to delay the transfer of ownership to the buyer until the total price is paid, even if the item has already been delivered. Only upon receipt of the buyer's payment will the buyer's ownership be fulfilled. In contrast, under Islamic law, the seller is prohibited from retaining ownership of the sold item until the deferred price is paid or another specified date. To address this issue, jurists either corrupt the contract or rectify it by altering the condition.

### *6.1.3 Delivery*

The *Electronic Commerce Law* specifies a 15-day delivery period, but the *Draft Consumer Protection Law* goes further by offering stronger protections. For example, it ensures that consumers have the right to cancel orders in case of delays and this right cannot be waived. These measures are a step forward in promoting fairness and stability in e-commerce. However, there are still areas that need attention. The current law lacks clarity on the place and cost of delivery, leading to potential disputes and hidden consumer fees. Additionally, the absence of clear rules on what happens if a product or service is not delivered correctly leaves both consumers and providers uncertain. While the *Draft Consumer Protection Law* addresses some of these gaps, it does not cover all situations, such as partial loss or damage. For these, we often have to rely on the *Civil Transactions Law*, which is not tailored to the specific needs of e-commerce.

The analysis reveals both similarities and differences between Islamic law and Saudi law regarding delivery obligations in e-commerce transactions. While Islamic law provides a foundational framework rooted in traditional principles, Saudi law, influenced by contemporary needs, has introduced specific regulations to address the complexities of modern commerce.

In Islamic law, delivery (*Qabd*) is achieved through actual or constructive possession. Actual possession applies to movable items through physical delivery, while constructive possession applies when the seller enables the buyer to take control without physical transfer. This principle extends to e-commerce, where possession is considered complete when the buyer downloads digital goods such as software after the contract is signed. Saudi law aligns with this in principle but lacks explicit rules on digital possession, which Islamic jurisprudence addresses more comprehensively by relating the process of delivery to customs or norms.

Islamic law generally requires immediate delivery in sales, but e-commerce often involves delays. Permissible sales are divided into two types: (1) the sale of goods, where the seller owns the item, and (2) the sale of indefinite goods, where the seller does not, requiring a specified delivery date. If no delivery time is set for the first category and delivery is delayed, the situation defaults to the norm. However, the Saudi *Electronic Commerce Law* allows consumers to cancel the contract if delivery exceeds 15 days, overriding the norm unless it contradicts Islamic law. The law does not explicitly require parties to specify a delivery time, creating uncertainty. The overlap between the *Electronic Commerce Law* and *Civil Transactions Law* further complicates matters, as the former allows consumers to cancel after 15 days, while the latter allows courts to determine delivery time based on a party's request. This legal ambiguity can lead to disputes and lawsuits. Fortunately, the *Draft Consumer Protection Law* addresses this by requiring service providers to deliver within 15 days, ensuring clarity and stability. A predefined delivery period reduces disputes, making it preferable to obligate service providers to deliver on time rather than just granting consumers the right to cancel. Relying on courts to set delivery times creates instability in transactions.

Islamic law treats the place of delivery in traditional sales as the point of purchase, relying on agreement or custom for more complex scenarios such as e-commerce. Similarly, Saudi law acknowledges the need for mutual agreement. Although the delivery address is not explicitly provided in e-commerce transactions, distinctions between immediate and non-immediate communication methods can be drawn. In the case of immediate communication, the delivery address may be considered the service provider's location or business premises if the obligation is business-related. The delivery address defaults to the consumer's domicile for non-immediate

communication unless the product is precisely specified. In such cases, the product should be delivered to its current location when the obligation arises. Addressing these scenarios in the consumer protection draft can clarify and enhance the legal framework for e-commerce transactions. Finally, regarding delivery addresses, although Islamic law provides a timeless solution, namely custom, both systems converge in this respect but lack comprehensive provisions for disputes arising from ambiguous delivery terms.

In regard to delivery expenses, under Islamic law the seller is accountable for these up to the point of sale. However, when the goods are sent to the buyer's location rather than the place of purchase, there are two scenarios to consider: whether or not both parties have agreed on the delivery charge during the contract. If they are in agreement, their contract will be deemed accepted. In cases of disagreement or if it is not mentioned, the outcome will be determined based on customary practices. If local customs dictate that the delivery costs fall upon the seller, then the seller will assume that responsibility. Conversely, the obligation will shift to the buyer when there is no agreement or established custom. This stands in contrast to Saudi law, which asserts that the seller bears the delivery expenses in situations of disagreement.[16]

In terms of responsibility for delivery failure, Saudi law closely aligns with Islamic law. However, there are two notable differences. Firstly, *Fiqh* distinguishes between a specific sale and a described sale. For specific absent items, the seller assumes responsibility if the item is lost before delivery, effectively annulling the sale. In the context of a specific sale, the buyer’s desire is directly linked to that particular item. Consequently, if it is destroyed, there is no viable replacement option. Conversely, for described items, the seller is obligated to provide a replacement. In contrast, Saudi law does not differentiate between the two types of sales. According to Saudi law, the contract is automatically annulled once the item sold is destroyed. Secondly, Saudi law adopts a similar approach in regard to services, permitting contract termination or rent reduction in cases of partial failure. While Islamic law traditionally does not allow for rent reductions for partial losses, it permits such agreements if mutually consented, ensuring compatibility while upholding core principles.

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[16] This issue is addressed in the *Civil Transactions Law* (n 9), not the *Electronic Commerce Law* (Royal Decree No M/126 dated 1440H (2019)).

### *6.1.4 Guarantees and remedies for defects*

This thesis also highlights the complexities and similarities in e-seller guarantees and remedies for defects obligations under Islamic and Saudi law. While both systems aim to ensure fairness and protect consumers, differences emerge in their approaches to defining, addressing, and resolving warranty and defect issues.

Both Islamic and Saudi law emphasise the seller's obligation to provide goods and services free from defects. The Saudi *Electronic Commerce Law* offers a legal guarantee, but its provisions are vague, creating a regulatory gap that the *Draft Consumer Protection Law* seeks to address. This guarantee includes ensuring product quality, conformity to agreements, and protection against manufacturing defects, lasting up to two years for products and one year for services. In contrast, Islamic law prohibits concealment of defects, viewing it as fraud, and ties the definition of defects to customary practices, making the framework adaptable and timeless.

A key distinction lies in the timing of defect occurrence. Islamic law asserts that defects must predate the sale unless otherwise agreed upon through *Khiyar Alshart* (condition option), while Saudi law does not explicitly require defects to exist before the contract. This creates a nuanced difference in interpreting the seller's liability for post-sale issues. However, Islamic principles such as *Almaslahat Almursalatu* (public interest) allow flexibility for modern remedies such as repair or replacement, bridging the gap between traditional jurisprudence and contemporary needs.

Regarding remedies for breach of warranty Islamic law traditionally offers buyers three remedies: annulment of the contract, acceptance of the defect, or acceptance with compensation (*Arsh*). The schools of thought differ on whether sellers must pay *Arsh* if the buyer chooses to retain the defective item. The Hanbali school supports mandatory compensation, while others nullify the contract if the seller refuses *Arsh*.

Saudi law, in comparison, provides more structured solutions under the *Draft Consumer Protection Law*. These include repair, replacement, or refund for defective products and re-performance or compensation for deficient services. Unlike Islamic jurisprudence, Saudi law's remedies extend beyond annulment and compensation, reflecting a modernised approach tailored to the demands of e-commerce.

Both Islamic and Saudi law recognise the validity of contractual guarantees, provided they do not involve prohibited conditions. Saudi law allows consumers and sellers to

negotiate additional guarantees, requiring consumers to follow specific procedures to claim them. Islamic law concurs with this flexibility, reinforcing the principle of mutual agreement as long as it does not violate *Sharia* principles.

Under both systems, sellers are exempt from liability for defects known to or discoverable by buyers upon inspection unless they actively conceal them. Additionally, both frameworks acknowledge that defects caused by consumer mishandling absolve the seller from liability. However, while Saudi law allows buyers to waive their right to claim defects, Islamic scholars debate its validity, with some rejecting such waivers unless the defect is hidden by the seller.

### *6.1.5 Privacy*

The thesis reveals distinct yet complementary approaches to privacy in Saudi and Islamic law, particularly regarding e-commerce. While Saudi law provides detailed regulations and protections for consumer data, Islamic law offers foundational principles emphasising the sanctity of privacy.

Saudi law, primarily through the *Personal Data Protection Law*, offers comprehensive privacy safeguards. It obligates service providers to protect consumer data, ensure confidentiality, and limit data use to specific purposes unless additional consent is obtained. The *Personal Data Protection Law* addresses modern challenges, such as data breaches, by holding service providers accountable and requiring notification and compensation in case of violations. Consumers are empowered with rights to access, correct, and request the deletion of their data, ensuring transparency and control over personal information.

Islamic law, while not explicitly codified for the digital age, views privacy as a fundamental human right rooted in Qur'anic and Sunnah teachings. It prohibits spying, upholds the sanctity of the home, and emphasises the ethical handling of secrets. However, its application to e-commerce privacy is less detailed, leaving gaps in addressing contemporary issues like data storage and breaches. Saudi law can align effectively with Islamic law as they are fundamentally compatible. Islamic law explicitly mandates the protection of privacy, which corresponds with the specifics of Saudi law.

Saudi law provides clear guidelines for data retention, requiring service providers to delete consumer data after transactions unless continued retention is consented to by the consumer. For ongoing relationships, data retention must be accompanied by

consumer approval and the ability to easily close accounts. These provisions are absent in Islamic law, which lacks explicit guidance on data retention but aligns with principles of ethical stewardship and minimising harm.

Circumstances where privacy may be compromised are recognised in both Saudi and Islamic law. Saudi law permits limited data use under specified conditions, while Islamic law allows secret disclosure only in situations where greater harm would result from maintaining confidentiality. These include posthumous disclosure, grievances, public accusations, or when secrecy is no longer relevant. Such allowances reflect the ethical balance both systems aim to achieve between individual privacy and societal needs.

The complexities of privacy in the digital age are addressed in Saudi law through specific regulations, making it more effective in handling modern e-commerce scenarios. In contrast, Islamic law provides a moral and ethical framework but lacks detailed mechanisms to address technological challenges. By combining Islamic principles of ethical conduct with the detailed provisions of Saudi law, a more robust privacy protection system can be achieved.

### *6.1.6 Right of recourse*

This thesis elucidates the intricate similarities and disparities in the e-seller obligation to ensure right of recourse for the consumer under Islamic and Saudi legal frameworks.

In Saudi Law the right of recourse, particularly the unilateral right of the consumer to cancel e-commerce contracts, originates from legal provisions, not contractual stipulations. This right is mandatory for service providers and cannot be waived, ensuring consumer protection. The *Electronic Commerce Law* establishes the consumer's ability to terminate contracts without requiring a reason, although ambiguities exist in the implementation. In contrast, in Islamic law the right of recourse derives from principles such as *Khiar al-Shart* (option of condition), which depends on agreement between the contracting parties. Unlike Saudi law, Islamic law emphasises that this right must be explicitly included in the contract unless recognised by custom or established laws. Both parties can hold the right to cancel, provided they mutually agree to it.

In Saudi law, consumers are entitled to cancel contracts unilaterally within specified periods. Service providers must comply by refunding payments and terminating obligations, even without justification from the consumer. This broader approach is tailored to the e-commerce environment and ensures consumer-centric protections. Similarly, Islamic Law has *Khiar al-Shart* that allows contract termination without justification but requires explicit agreement unless customs or local laws dictate otherwise. The right can be forfeited if the buyer uses or disposes of the goods, explicitly waives the right, or if the cancellation period expires.

Regarding obligations following termination, Saudi law states that upon cancellation, service providers must refund payments, dissolve associated contracts and adhere to a clear refund timeline (usually within 14 days). Refunds are typically made using the original payment method unless otherwise agreed. Likewise, in Islamic law, the seller must return the purchase price, and the buyer must return the goods.

## 6.2 Variations between Islamic law and Saudi law: Consumer obligations

This section comparatively analyses consumer obligations under Saudi and Islamic law, which adopt a similar approach to those addressed in the service provider's (seller's) obligations.

### *6.2.1 Payment*

One consumer obligation is payment to service providers, who must provide a clear price breakdown. If the price is unspecified, the consumer can rescind the contract. Civil law supplements this gap by allowing price determination after the contract is signed, referencing market rates or prior dealings to resolve disputes. Similarly, in Islamic Law, the item and price must be known at the time of sale to avoid disputes. However, most Islamic jurists prohibit undetermined prices, although exceptions exist if market experts establish the price within a short space of time. Conditions for permissibility include market stability or uniform pricing across transactions.

Payment timing in Saudi law is not explicitly addressed in the *Electronic Commerce Law*. Regulations require invoices confirming payment once the contract is formed. Civil law resolves ambiguities, stipulating that payment is due at the time of sale unless

otherwise agreed. Rental payments follow agreed dates or delivery schedules. On the other hand, in Islamic law deferred payments are permissible for commodities owned by the seller but prohibited for transactions involving gold, silver, or currency to prevent usury (*Riba*). In *Salam* sales, full payment is required upfront.

The *Electronic Commerce Law* does not specify a payment location, aligning with the advance electronic payment norm. Civil law applies in cases of ambiguity, defaulting to the delivery location. In contrast, Islamic law requires payment to coincide with the contract formation for *Salam* transactions or items involving *Riba*. For other goods, the payment place is determined by agreement, or it defaults to the delivery location.

In case of non-payment, Saudi law provides sellers some protection such that the sellers may withhold delivery, retain ownership, or cancel the contract if payment is not made. If payment is deferred, sellers must transfer ownership despite delayed payment. In rentals, the lessor can withhold possession until payment. On the other hand, in Islamic law sellers cannot retain ownership as a payment condition, as it introduces *Gharar* (uncertainty). However, items may be mortgaged to the seller as security. If a buyer fails to pay, the seller can cancel the contract for insolvent buyers or seek judicial remedies for solvent ones.

Saudi law obligates consumers to bear payment costs unless otherwise agreed upon, but they cannot be charged beyond actual costs. The *Draft Consumer Protection Law* offers limited provisions on this matter, relying on civil law for clarity. In the same way, Islamic law states that buyers bear costs such as weighing gold or silver payments. Payment facilitation remains the seller's responsibility.

Regarding liability after possession, Saudi law states that the buyer assumes liability if the buyer takes possession without full payment and the seller consents. Without consent, the seller can reclaim the item and seek compensation if lost or damaged. Similar to Islamic law, consensus holds that the buyer assumes liability upon possession. Damage or loss caused by the buyer obligates compensation, even if payment is pending.

### *6.2.2 Taking delivery*

The second obligation of the consumer towards the seller is the obligation to take delivery, whereby Saudi law mandates the purchaser to receive the item sold. The delivery location is determined by mutual agreement or, in the absence of such

agreement, by the item's location at the time of sale. This aligns with the Islamic principle that the purchaser must receive the item sold, and the delivery location is determined by agreement or norm. However, some opinions in Islamic law invalidate contracts lacking an explicit delivery location. While this view exists, it is not widely accepted, and Saudi law's reliance on practical norms remains in harmony with Islamic jurisprudence.

As for the costs of delivery, Saudi law states that the seller typically bears delivery costs, while the buyer bears receipt costs. However, inconsistencies between the Arabic and English versions of Saudi law create confusion, and consequently the Saudi regulator should clarify each translation to ensure alignment with the intent of the law. On the other hand, in Islamic law, delivery and receipt costs are generally allocated based on agreement or customary practice, aligning with Saudi law.

Regarding the disposition of goods before receipt, Saudi law allows buyers to sell or take action on items before taking possession. This provision applies to all goods, including food, creating a potential conflict with Islamic law, which maintains that disposing of sold items before receipt depends on the nature of the item. Food is prohibited based on a clear hadith, with unanimous agreement among Islamic schools. Nevertheless, opinions vary about non-food items: Maliki scholars permit the selling of non-food items, whereas Hanbali and Hanafi scholars impose conditions, sometimes prohibiting disposal altogether. Saudi law’s allowance of food taking action (selling) before receipt contradicts Islamic law and risks violating the *Basic Law of Governance*, which mandates conformity with Islamic principles. For non-food items, Saudi law aligns with the Maliki school, maintaining consistency with Islamic jurisprudence in this context.

A further obligation on the buyer in Saudi law is to ensure that the item matches the agreed description and report any defects within a reasonable time. Failure to do so may affect the buyer’s rights. Similarly, *Fiqh* states that the buyer is responsible for inspecting the item to ensure conformity with the description. Islamic law emphasises proactive measures to prevent disputes, encouraging thoroughness before completion of the transaction. This approach fosters fairness and reduces potential conflicts.

In Saudi law, if the buyer fails to take possession, they bear the risk of loss or damage and can face legal action from the seller. Likewise, in Islamic law, the buyer’s refusal

to take possession also shifts liability for loss or damage to them. Sellers may seek recourse to enforce the contract.

### *6.2.3 Consumers' obligations when using their rights in e-commerce*

In online business transactions, consumers have an absolute right to cancel agreements, which cannot be waived. However, certain exceptions exist to protect sellers and merchants. These include non-returnable goods, such as custom-made items and products damaged due to mishandling, as well as perishable goods that spoil quickly. Similarly, service contracts—including accommodation, transportation, catering, and event management—cannot be canceled to prevent financial losses for providers during peak seasons. These regulations aim to balance consumer rights with seller protections in e-commerce.

The concept of contract non-termination is further explained in Islamic law through *khiyar al-shart*. Saudi law aligns with Islamic principles by allowing contract conditions explicitly stated, legally required, or based on customary practice, provided they do not contradict Islamic law.

Consumers can exercise their cancellation right within a specific timeframe. For product purchases, the period begins upon receipt of the item, and consumers have seven days to cancel, excluding the day of delivery. In Islamic law, different schools of thought vary on the termination period. The Shafi'i and Hanafi schools enforce a fixed three-day withdrawal period, while the Maliki school adjusts the duration based on the complexity of the item. The Hanbali school permits termination through mutual agreement, reinforcing the principle that 'Muslims are bound by their conditions.'

For service contracts, the cancellation period starts upon signing. However, challenges arise when services are set to begin within seven days of signing. Current regulations do not address this issue, leaving a legal gap that Saudi regulators must resolve. If the service is scheduled to start within seven days, the contract cannot be canceled. A clear rule should require consumers to cancel at least five days before service commencement. On the other hand, Islamic jurisprudence offers different interpretations: the Hanafi and Maliki schools allow contract termination even after services have started, with the Hanafi school limiting it to three days post-signing. The Hanbali school allows termination within an agreed period, as long as it happens before service begins.

If a consumer cancels a contract, they are responsible for return costs unless otherwise agreed. Saudi law facilitates this by requiring the consumer to cover return expenses unless the seller agrees to bear them. The item must also be returned in its original condition, aligning with Islamic law.

Saudi e-commerce law allows consumers to correct errors in transactions within 24 hours, provided they notify the service provider and have not used or benefited from the product or service. Service providers can also fix mistakes in electronic communications if the contract allows it and the consumer is informed before shipping or service commencement. In such cases, the consumer may either accept the correction or cancel the contract for a full refund.

Islamic law supports similar principles, ensuring compatibility with Saudi regulations. The concept of *Majlis al-aqd* (contractual meeting place) plays a key role in agreements, representing the continuity of discussions. *Khiyar al-Majlis* grants both parties the right to revoke the contract as long as they remain in the meeting place and have not physically separated or voluntarily waived the right. This principle extends to e-commerce transactions. In real-time agreements, such as phone calls or live chats, parties may withdraw during negotiations until the contract is finalised. In delayed communication, such as emails or online orders, the contract remains open until the offer is accepted or withdrawn by the offeror before acceptance.

Overall, Saudi law, to be deemed acceptable according to its constitution (*Basic Law of Governance*), must not conflict with Islamic law. Islamic law can be interpreted to adopt the principles and validity of electronic commerce in the modern Saudi legal system, in a contemporary and ideal manner, making it fundamentally compatible with modern e-commerce practices, including the obligations of parties in e-commerce. Nevertheless, modern Saudi law may not completely align with all principles of Islamic law according to four schools of Islamic thought. As an example, Saudi law, to a great extent, adopts the theory of obligation and its sources, ensuring its alignment with Islamic law. However, it lacks a specific provision stipulating customs as a source of obligation. It is imperative to rectify this oversight, particularly considering the significant role of customs in both Saudi and Islamic law. On the other hand, while details of modern Saudi law and Islamic law may differ, Islamic law principles can be accommodated by Saudi law through involving certain principles of Islamic law (*Fiqh)* such as the public interest (*Almaslahat Almursalatu)* and the option of conditions

(*Khair Alshirt*) and freedom of contract (*huriyat altaeaqud*) as long as the agreement is not against Islamic law.

## 6.3 Recommendations

This study clearly indicates that, despite significant improvements, there is still room for growth in the Saudi Arabian e-commerce regulations. More precise and comprehensive rules are essential to build trust and protection in the digital marketplace. This can be addressed through the following recommendations, derived from analysis of the key issues identified in this thesis.

The recommendations fall into two categories: (a) addressing compatibility between Saudi law and Islamic law; and (b) reforming Saudi e-commerce law. Implementation of these recommendations would enable a fairer and more reliable system that could protect both consumers and sellers.

A: Addressing compatibility between Saudi law and Islamic law

1. Saudi law does not distinguish between a sale that is merely described in the contract and an item that is specified. Consequently, in the event of the destruction of the sold item, the contract is automatically terminated. However, Islamic law provides a different perspective. While destruction of a specified item terminates the contract, destruction of a described item does not. This arrangement is more suitable for transactions as it maintains the validity of the contract, ensuring that the consumer can receive the goods or services they require while the service provider can receive the payment they need. By preserving the contract's validity and offering an alternative, both parties can mutually satisfy their needs. Therefore, it would be more beneficial for Saudi law to align with Islamic law to increase the potential of preserving the contract. This approach would be particularly advantageous in the context of e-commerce, as it would ensure the continuity of contracts and facilitate smoother business transactions. Additionally, this principle can be applied to services or rentals as well.
2. Saudi law allows the seller to add a contractual provision stipulating that the transfer of ownership is contingent upon the complete receipt and acceptance of the total price. However, none of the Islamic law schools endorse this condition, as they perceive it as deviating from fundamental

contractual principles. Consequently, they resort to altering the contract through corruption or correcting it by only corrupting the condition. Therefore, it is recommended that Saudi lawmakers either repeal or revise the article to disallow this condition, as it does conflict with Islamic law principles. This suggestion aligns with the principle that Saudi law should not conflict with Islamic law, as enshrined in the *Basic Law of Governance* Article 7. However, several Islamic jurisprudence councils and some prior Hanbali scholars have proposed a potential solution to this issue. This solution involves mortgaging the item sold to the seller. The seller retains the option to specify a condition that the buyer must mortgage the item to them against the deferred price upon acquiring it.

3. Islamic law provides protection to consumers regardless of whether the seller is a merchant or a practitioner (service provider). However, the Saudi *Electronic Commerce Law* only offers protection to consumers engaging with a merchant, meaning that when consumers buy from ordinary individuals they are not protected by the laws and regulations. This is because the *Electronic Commerce Law* only protects consumers dealing with a service provider. This situation is unfair to consumers. Therefore, the *Electronic Commerce Law* needs to ensure protection for e-consumers when not dealing with a merchant or practitioner.

B: Reforming Saudi e-commerce law

4. Although the *Civil Transactions Law* is a relatively new legal framework, it has adhered to comparative civil laws in defining the sources of obligation. These sources are as outlined in the law itself: the five sources explicitly mentioned. However, I contend that a sixth source should be included: custom. This is supported by the *Civil Transactions Law* itself, which explicitly references custom in numerous matters, including the law of evidence. This clear reference to custom leaves no doubt that custom is indeed a source of obligation under this legal framework.[17]

[17] For more details see above: 3.5 Sources of obligation.

5. *The Anti-Commercial Fraud Law* is limited to products and did not explicitly address services. This is a deficiency in the law. Given that services may encompass fraudulent activities, it is imperative that the statute include a provision regarding services.
6. Article 7 of the *Electronic Commerce Law* permits the implementation of regulations to govern all transactions. However, Article 7(2) specifically mentions only contracts formed through clicking. This is just one of several types of electronic agreement, and the wording should be amended to encompass all e-transactions, including e-mail browsing agreements and e-signatures. Otherwise, the e-commerce legal framework in Saudi Arabia falls short of addressing the diverse nature of electronic contracts, as it currently focuses solely on one type.
7. Finally, it is suggested that the *Electronic Commerce Law* should be amended and replaced with a comprehensive consumer protection framework, similar to the standard consumer protection legislation found in modern legal systems such as that of Australia. While a detailed discussion of various federal and state consumer laws in Australia was beyond the scope of this thesis, the *Competition and Consumer Act 2010* (Cth), previously known as the *Trade Practices Act 1974* (Cth), serves as a relevant example for developing consumer protection legislation in the fast-emerging economy of the Kingdom of Saudi Arabia.

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