

**UNIVERSITY of
STIRLING**



**Specific Challenges of Consumer Protection in
Distance Selling Contracts: A Comparison of the
Laws of England and Iraq on the Duty to Provide
Pre-Contractual Information and the Right of
Cancellation**

**A Thesis Submitted in Partial Fulfilment of the
Requirements for the Award of Doctor of Philosophy**

Division of Law and Philosophy

University of Stirling

By

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July 2018

ABSTRACT

This study has covered the duty to provide pre-contractual information and the right of cancellation, the two important key areas of consumer protection in distance selling contracts. These two protection models are invented to rebalance the distance contract in favour of the consumer albeit differently. The duty to provide information rebalances the contract in terms of information, and the right of cancellation provides the distance consumer with an opportunity to rethink the decision about the contract. The study has looked at pertinent laws of distance selling contracts in England and Iraq. In doing so, the study has followed comparative and analytical methodology, whereby strengths and weaknesses, similarities and dissimilarities between the selected laws under a chosen theme are addressed. The aim is to explore problems and loopholes, which may need future amendments, including legal gaps, ambiguity, and incomplete treatment.

During the study, specific challenges related to the theme of study are critically analysed. Apparently, the quantity and type of information required, the time and manner of sending information, and the remedy available at the breach are challenges of the information requirements. Challenges of the right of cancellation are the conditions and effects of using the right. The study has concluded that many aspects of protection under both laws need further improvements. The need for changes is more obvious with Iraqi Law than English Law, where distance selling protection has not been recognised yet.

DECLARATION

I, Nazar Mohammed, do hereby declare that the Thesis entitled “*Specific Challenges of Consumer Protection in Distance Selling Contracts: A Comparison of the Laws of England and Iraq on the Duty to Provide Pre-Contractual Information and the Right of Cancellation*”, has been undertaken by me for the award of Doctor of Philosophy at the University of Stirling/ Division of Law and Philosophy.

I further declare that this Thesis, or any portion thereof, has not been submitted for the award of any other degree or qualification of this or any other university or institution.

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Date: 18/10/2018

ACKNOWLEDGEMENT

Firstly, my deepest thanks and gratitude goes to God for giving me the good health and wellbeing that were necessary to complete this study. I am very indebted to my parents and siblings, who have always encouraged me and financially supported me during this journey.

I also would like to express my sincere gratitude to my principal supervisor, Mrs Tikus Little, for her encouragement, guidance, and support during the study. Without her support, it would not have been possible to accomplish this research. I am also grateful to my previous supervisor, Professor Fraser Davidson, who well guided and supported me during the first year of study, and to Dr David McArdle for his support and encouragement. A special thank goes to Dr Hong-Lin Yu, the Associate Dean of Graduate Studies, for all the help, support, and facilities she has provided for me and my fellow PhD students during my study.

I do not forget to express my deepest thanks to the University of Stirling especially Dr Emma Macleod, the previous Associate Dean of Graduate Studies, Erin Russell and all the staff of the 'Student Money Advice' who have financially helped me during my study. A special thank goes to the Kurdistan Regional Government for giving me the opportunity to study abroad.

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- The Electronic Commerce (Ec Directive) Regulations 2002.
- The Enterprise Act 2002.
- The Equal Pay Act 1970.
- The European Communities Act 1972.
- The Financial Services Act 1986.
- The Financial Services (Distance Marketing) Regulations 2004.
- The Human Medicines Regulations 2012. I.S. 2012 No. 1916.
- The National Health Service (Pharmaceutical and Local Pharmaceutical Services) (Amendment and Transitional Provision) Regulations 2015. I.S. 2015 No. 58.
- The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013. I.S. 2013 No. 349.
- The Sale of Goods Act 1979.
- The Unsolicited Goods and Services Act 1971.
- Unfair Contract Terms Act 1977.
- Unfair Terms in Consumer Contracts (Amendment) Regulations 2001.
- Unfair Terms in Consumer Contracts Regulations 1999.
- The European Union (Withdrawal) Bill 2018.

Iraqi legislation

- The Iraqi Civil Code (as amended) No. 40 1951.
- The Iraqi Commerce Law No. (149) 1970.
- The Iraqi Constitution 2005.
- The Iraqi Consumer Protection Law No. (1) 2010.
- The Iraqi Law of Proof (107) 1979.
- The Kurdish Proposal of Consumer Protection Law.
- The Law of Electronic Signature and E-Transactions No (78) 2012.
- The Law of Reforming the Legal System No (35) 1977.

EU Laws

- Agreement on the European Economic Area, 3. 1. 94, Official Journal of the European Communities No L 1/3. Available At; [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:21994A0103\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:21994A0103(01)).
- Council Directive 90/314/EEC of 13 June 1990 on Package Travel, Package Holidays and Package Tours, OJ 1990 L 158/59.
- Council Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated Away From Business Premises; OJ L372/31.
- Council Directive 89/104/EEC.
- Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.
- Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights.
- Directive 97/7/EC of the European Parliament and the Council of 20 May 1997 on the Protection of Consumers In Relation To Distance Contracts.
- Directive 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-To-Consumer Commercial Practices.
- 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.
- Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the Protection of Purchasers in Respect of Certain Aspects of Contracts Relating to the Purchase of the Right to Use Immovable Properties on a Timeshare Base, OJ 1994 L280/83.
- Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests, OJ 1998 L 166/51.
- Directive 98/6/EC of the European Parliament and of the Council Of 16 February 1998 on Consumer Protection in the Indication of the Prices of Products Offered to Consumers, OJ 1998 L 80/27.
- 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.
- Directive 2002/65/EC of the European Parliament and of the Council Of 23 September 2002 Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC And Directives 97/7/EC And 98/27/EC(A).
- Directive 99/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees.
- Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the Protection of Consumers in Respect of Certain Aspects of Timeshare, Long-Term Holiday Product, Resale and Exchange Contracts; OJ L33/10.

- Directive 2002/83/Ec of the European Parliament and of the Council of 5 November 2002 Concerning Life Assurance; Oj L 345/1.
- Directive 2008/48/Ec of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC; OJ L133/66.
- Draft Common Frame Of Reference (DCFR).
- EU Regulations (1008/2008) on ‘Common Rules for the Operation of Air Services in the Community’ Of Directive 2002/92/Ec of the European Parliament and of the Council of 9 December 2002 on Insurance Mediation.
- Regulation (EEC, EURATOM) No 1182/71 of the Council of 3 June 1971 on Determining the Rules Applicable to Periods, Dates and Time Limits, Which is Applicable for the Right to Cancellation to be Given by Member States Under The CRD 2011.
- The Lisbon Treaty 2007.
- The Markets in Financial Instruments Directive 2004/39/EC.
- Timeshare Directive 2008/122/EC.
- Treaty Establishing the European Economic Community and Certain Related Acts 97/C/ C 340/4.
- UN Convention on Contracts for the International Sale of Goods (CISG).
- UNIDROIT Principles of International Commercial Contracts 2010.

ABBREVIATION

The CCIACRs 2013 ----- The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

The CPRs 2014 ----- The Consumer Protection (Amendment) Regulations 2014.

The DSRs 2000 ----- The Consumer Protection (Distance Selling) Regulations. 2000.

The CUTRS 2008 ----- The Consumer Protection from Unfair Trading Regulations 2008.

The CRA 2015 ----- The Consumer Rights Act 2015.

The ECRs 2002 ----- The Electronic Commerce (Ec Directive) Regulations 2002.

The UCTA 1977 ----- Unfair Contract Terms Act 1977.

The CRD 2011 ----- Directive 2011/83/Eu of the European Parliament and of the Council of 25 October 2011.

The DSD 1997 ----- Directive 97/7/EC of the European Parliament and of the council on the protection of consumers in respect of distance contracts.

The ICPL 2010 ----- The Iraqi Consumer Protection Law No. (1) 2010.

The KRP 2015 -----The Kurdish Proposal of Consumer Protection Law.

CJEU ----- The Court of Justice of the European Union.

EFTA ----- The Court of European Free Trade Association.

INTRODUCTION TO THE RESEARCH WORK

A. Research Topic

The purpose of this thesis is to establish the effectiveness of consumer legislation in England and Iraq regarding two key areas of distance consumer protection; the duty to provide pre- contractual information and the right of cancellation. This introduction explores why these measures and jurisdictions have been selected for study and sets out the framework for the thesis.

It will be argued that these are the most important issues of modern distance selling laws and that the objectives and underlying principles of legal measures designed to implement them, the relationship between such measures and their effectiveness must be examined to determine whether they are fit for purpose.

The study examines English law, which derives from well-developed European principles of consumer protection and then compares it with current Iraqi law and where appropriate, a proposed Kurdish model. The scope of the study is examined in more detail below.

Generally, a contracting party who is a consumer is considered the weaker party of the bargain when the other party is a trader,¹ and the trader is perceived to have unequal bargaining powers.² One of the central causes of this inequality is the matter of “information asymmetry”; when a party to a contract does not have the same amount of information as the other party has.³

This disparity has gradually widened due to a number of factors. Technologically, developments mean that the products sold, goods and services, are increasingly complex themselves such as technology devices.⁴

Furthermore, the formation of contracts has developed in two ways. Firstly, it has shifted from individual negotiations, in which both contracting parties have relatively similar

¹ Ewoud Hondius, 'The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis' (2004) 27(3) *Journal of Consumer Policy* 245, 245.

² Immaculada Barral, 'Consumers and New Technologies: Information Requirements in E- Commerce and New Contracting Practices in the Internet' (2009) 27(3, 4) *Penn State International Law Review* 609, 610.

³ Eric Franklin, 'Mandating Precontractual Disclosure' (2013) 67 *University of Miami Law Review* 553, 561.

⁴ Chris Willett, 'Re- Theorising Consumer Law' (2018) 77(1) *Cambridge Law Journal* 179, 188.

bargaining powers, towards standard contracts where terms and conditions are unilaterally standardised by the trader.⁵ Those terms and conditions are often non-negotiable for consumers.⁶ Thus, there is nothing left in the hand of consumers to rectify the situation.⁷

Secondly, contracting has shifted from “face- to- face” contracting to distance contracting.⁸ The spread of distance selling has made the situation even more complicated, magnifying the disparity in information between the parties: the contract is made in “the dark”, the consumer places the order, makes the payment, and receives the products, goods or services, without a chance to see the trader and products prior to the conclusion of the contract.⁹ In this way, the consumer has to rely completely on the trader to be able to acquire information about the whole transaction.¹⁰ In face-to-face contracts, the parties meet physically, and so the consumer has the ability to gather information even without the trader’s intervention.

Therefore, in order to protect consumers buying at distance, there has been a need for intervention through consumer protection and contract law to rebalance the contract in terms of information and arguably support the principle of freedom of contract through reinforcing party autonomy. As a result, a form of intervention based on “the duty to provide pre- contractual information” is an important method of protecting the distance consumer.

Another key issue of distance selling contracts is the inability of the consumer to examine the goods before the contract is made. That opportunity only arises post contract and post-delivery and so the distance consumer is further disadvantaged compared to the face-to-face consumer, who may have chosen not to enter into it at all based on an examination of the product. This matter can be addressed through a second form of intervention called “the right of withdrawal or cancellation”. Accordingly, a time is given to the consumer after he receives products, or after the contract is made, to rethink his decision. And

⁵ Barral (n 2) 610.

⁶ Sales, H, B, 'Standard Form Contracts' (1953) 16(3) *The Modern Law Review* 318, 318.

⁷ Ludwig Kramer, *EEC Consumer Law* (E. Story-Scintia, Bruxelles 1987) 95.

⁸ Başak Bak, 'The Right of Withdrawal in Distance Contracts under Law on Consumer Protection Numbered 6502' (2015) 6(11) *Law & Justice Review* 129, 141.

⁹ John Dickie, 'Consumer Confidence and the EC Directive on Distance Contracts' (1998) 21(2) *Journal of Consumer Policy* 217, 218.

¹⁰ Pierre Legrand Jr, 'Pre- contractual Disclosure and Information: English and French Law Compared' (1986) 6(3) *Oxford Journal of Legal Studies* 322, 331.

because the rationale is to enable the consumer to see the product or to rethink, similar to the case of direct face to face sales, the measure may be framed so that exercise of cancellation does not depend on any particular reasons.

However, in analysing the objectives and effectiveness of these measures of consumer protection, the relationship between them must be analysed. Apparently, both are set up to tackle one certain issue with distance selling contracts, which is the incapacity of the consumer to see the products prior to the conclusion of the contract. When a party cannot see the product, he needs either information which he would have gathered in direct selling, or a period of cancellation after he sees the product to enable him to gather all the information needed. Then, it might be argued that the duty to provide information and the right of cancellation are two sides of the same coin, in which the imposition of both models are directly related to the issue of information asymmetry. If that is the case then, one might argue that the duty to provide pre- contractual information must have remedied the problem of information asymmetry at the point of contract formation. If the right of cancellation has the same root, then granting a right of cancellation might be critiqued as overly protective of consumers, to the detriment of traders.¹¹ This argument is important because English distance legislation overly aims to achieve “consumer’s confidence”.¹² It is therefore important to understand the objective of the law and whether the laws achieve their objectives in a coherent way.

This argument may have some truth in it but it does not represent the whole truth. To explain this, one has to examine the driver for introducing the right of cancellation. By doing so, it will be shown that this separate and additional right is not introduced to achieve the same purpose stated for the duty to provide pre –contractual information, nor to remedy cases of a failure to provide information. Instead, it should be considered as an independent model from the information model, albeit one that is connected with it. When information is provided, there is still a ground for a right of cancellation.¹³ In any case, giving consumers mere information cannot create the same atmosphere as if they buy from

¹¹ Jan M Smits, 'Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law: the Right to Change your Mind?' (2011) 29(3) Penn State International Law Review 671, 679.

¹² Explanatory Memorandum to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 2013 No. 3134. Paragraph (7.3).

¹³ Joasia Luzak, 'Online Consumer Contracts' (2014) 15(3) ERA Forum 381, 387; Hans Schulte-Nölke LT, *Perspective for European Consumer Law, Towards a Directive on Consumer Rights and Beyond* (Sellier 2010) 17.

shops. For example, in the distance environment a consumer cannot test the sound quality of a headphone, or the size of a pair of shoes.¹⁴ To remedy this issue, the right of cancellation provides consumers with the opportunity to examine the products personally after they receive them, or a period of cooling-off after the contract is made in services and digital content contracts.¹⁵ The aim is to ensure that the consumer in distance contracts is in a position similar to the position that he would have been in if the contract had been made in a traditional environment.¹⁶

However, these two models are interconnected in some other aspects. One may consider the right of cancellation as an extension of the duty to provide pre-contractual information.¹⁷ In this way, the period of cancellation gives the consumer sufficient time to assess the accuracy of the information provided, and collect undelivered information.¹⁸ Arguably, consumers can only ever be fully informed in “an extremely theoretical case”.¹⁹ In addition, even if he has all the information needed at the time when the contract is made, the complexity of the agreement means that he may not immediately grasp the overall meaning of the information provided. To this end, the period of cancellation gives the consumer a time to absorb the information.²⁰

In summary, the duty to provide pre-contractual information and the right of cancellation are two main key issues of distance selling contracts. It will be argued that they are

¹⁴ Aashish Srivastava, 'The New EU Consumer Rights Directive: An Empirical Study on Compliance Issues by E-Tailers' (2017) 2017(4) *Journal of Business Law* 282, 291.

¹⁵ Anderia Roxana, 'The New Consumer Rights Directive, a Comparative Law and Economic Analysis of the Maximum Effects of Consumers and Businesses' (Master Thesis, Aarhus School of Business, Aarhus University 2012) 35. Available at:

<<http://pure.au.dk/portal/files/44659752/Thesis.pdf>> accessed 7 June 2017.

¹⁶ According to Recital 37 of the Consumer Rights Directive 2011; “Since in the case of distance sales, the consumer is not able to see the goods before concluding the contract, he should have a right of withdrawal. For the same reason, the consumer should be allowed to test and inspect the goods he has bought to the extent necessary to establish the nature, characteristics and the functioning of the goods”.

¹⁷ Elizabeth Hall, 'Cancellation Rights in Distance-Selling Contracts for Services: Exemptions and Consumer Protection' (2007) 2007(5) *Journal of Business Law* 683, 684; Abdul-Fatah Hijazi, *Consumer Protection over Internet* (Dar AL-Kutob AL-Qanonia 2008) 41.

¹⁸ Josep Maria Bech Serrat, *Selling Tourism Services at a Distance: An Analysis of the EU Consumer Acquis* (Springer Berlin Heidelberg 2014) 102; Roxana (n 15) 36.

¹⁹ Pamaria Rekaiti and Roger Van Den Bergh, 'Cooling-off period in the consumer Laws of the EC Member States. A comparative law and economics approach' (2000) 23(4) *Journal of Consumer Policy* 371, 379.

²⁰ Reinhard Steennot, 'Consumer Protection with regard to Distance Contracts after the Transposition of the Consumer Rights Directive in Belgium and France' (2013) 3(4) *European Consumer Law Journal* 415, 436; Khazi Khalid Abo-Arabi, 'Protection of the Consumer's Consent: A Comparative Study Between the Law of Consumer Protection of U.A.E, and French Consumer Code and Proposal of the Jordanian Consumer Law' (2009) 36(1) *Dirasat Alum AL-Sharia Wal Qanun* 187, 191.

provided to achieve two different objectives. Information rebalances the contract in terms of information, and cancellation enables the consumer to inspect the products physically in sale contracts, and to think calmly in service and digital content contracts. Although, the cancellation model may help the consumer to achieve the function of the information model, it does not replace it. Both are required to address two particular difficulties, which face distance consumers.

B. Research Scope

These two key areas are examined under two different jurisdictions, English Law and Iraqi Law. English law has been chosen because it reflects the European protection measures, which have developed over sometime for European distance consumers, and has been further reformed relatively recently. However, it might still be asked why English law is chosen and not the law of another EU member state? The answer is directly related to the fact that the current EU Distance Directive aims to achieve full harmonisation in national laws of the EU member states. This policy requires member states not to introduce or maintain different measures in their national laws than those covered by the Directive, including less or more stringent measures.²¹ Choosing the law of another member state will lead to the same provisions.

English Law then is compared with current Iraqi Law and where relevant, a Kurdish Proposal for reform which may be implemented in part of Iraq. Iraq does not have specific legislation in the area of distance selling contracts; this field is covered by general protection measures which are set up for consumers. Therefore, there have been criticisms about whether those general measures maintain pace with the developments which have occurred in the field of communication, and whether they are fit for purpose in modern consumer contracts.²² The Kurdish Proposal is not law yet and would only apply to part of Iraq if implemented but represents some potential modernisation in this field so merits comparison where Iraqi law is silent or falls short of the Proposal. This comparison with English law will yield insights, which may benefit Iraqi lawmakers.

²¹ The CRD 2011, Article 4.

²² Waod Katib Al-Anbary, 'Contractual Negotiations over the Internet' (2009) 1(2) *Majalat Resalat Al-Hquq* 199, 200.

In English law the following laws are discussed;

- **The Consumer Contracts (Information, Cancellation, and Additional Payments) Regulations 2013 (as amended)²³ (the CCIACRs 2013)**

These Regulations came to force on 13th of June 2014 and apply to distance selling, off-premise, and on- premise contracts.²⁴ The regulations implemented the EU Consumer Rights Directive 2011.²⁵ Because of the full harmonization policy of the CRD 2011, the UK kept closely to the wording of the Directive, instead of elaboration or adding substantive provisions. Such a technique, as the Department for Business Innovation & Skills reported,²⁶ ensures that the intention of the Directive is accurately reflected in the UK law and avoids Gold-Plating.²⁷

It is worth noting that in the short term *Brexit* will not affect these regulations. In the UK, the ‘European Union (Withdrawal) Bill’²⁸ is going through Parliament to repeal the European Communities Act 1972,²⁹ but is intended to preserve all the laws which the UK made under Section 2(2) of the repealed Act, including the CCIACRs 2013. In the long

²³ The Consumer Contracts (Information, Cancellation, and Additional Charges) Regulations 2013/3134.

²⁴ On 1st of March 2014 they were minimally amended by the Consumer Protection (Amendment) Regulations 2014, 2014 No. 870; the Consumer Contracts (Amendment) Regulations 2015/2015 No.1629.

²⁵ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011, L 304/64.

²⁶ Department for Business Innovation & Skills, *Enhancing Consumer Confidence by Modernising Consumer Law, Consultation on the Implementation of the Consumer Rights Directive 2011/83/EU* (2012) 26. Available at:

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/34760/12-999-onsultation-implementation-of-consumer-rights-directive.pdf> accessed 23 March 2017.

²⁷ Gold-Plating is when; “Implementation goes beyond the minimum necessary to comply with a Directive”. Wim Voermans, ‘Gold-Plating and Double Banking: An Overrated Problem?’ in Henk Snijders, Stefan Vogenauer (ed), *Content and Meaning of National Law in the Context of Transnational Law* (Sellier European Law Publishers 2009) 82- 88. See also, HM Government, *Transposition Guidance; How to Implement European Directives Effectively* (Department for Business, Innovation and Skills, 2013) 7; Davidson QC, *Davidson Review, Final Report, Implementation of EU Legislation* (2006) 17-37. Available at;

<http://webarchive.nationalarchives.gov.uk/+/http://www.hm-reasury.gov.uk/d/davidson_review281106.pdf> accessed 27 February 2017.

²⁸ According to Section 2(1) of the European Union (withdrawal) Bill; “EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day”. The Bill is now at report stage in the House of Lords. Available at:

<<https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>> accessed 24 April 2018.

²⁹ The European Union (withdrawal) Bill, Section 1. See also, Department for Exiting the European Union, *Legislating for the United Kingdom’s Withdrawal from the European Union* (Cm 9446) Available at:

<<https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union>> accessed 10 April 2017.

term, the UK government may revisit all the EU derived laws. Then, any change required will depend on the political climate post- *Brexit*.³⁰ Eventually, any trade deal with the EU will likely require the UK to meet their standards.³¹ Then, any future change must take into consideration the EU standards of consumer protection.

- **The Electronic Commerce (EC Directive) Regulations 2002**³²

These regulations deal with the information requirements in electronic contracts, albeit they cover both business to business and business to consumer contracts.

- **The Consumer Rights Act 2015 (the CRA 2015)**³³

This Act came to force on 1st of October 2015 as “the biggest shake up in consumer rights law in a generation”.³⁴ The aim was to bring together all key consumer rights, in buying goods, services, and digital content, under various existing legislation in one single piece of overarching legislation.³⁵ With this step, the UK has remedied unnecessary complexity and fragmentation that existed in consumer laws over the last 30 years.³⁶

The CRA 2015 implemented some of the pre- contractual information provisions under the CRD 2011. However, this implementation does not add anything new to the provisions of information under the CCIACRs 2013 because of the full harmonisation policy of the CRD 2011. The Act also does not implement provisions of the right of withdrawal under the same Directive. This approach may be surprising because the objective of the CRA 2015 was to consolidate the rights granted to consumers under various laws.³⁷ On this matter, the explanatory notes do not provide any line of reasoning why this right is not included.

³⁰ Catharine MacMillan, 'The Impact of Brexit upon English Contract Law' (2016) 27(3) King's Law Journal 419, 424; Eric Fidel. 'Commercial Contracts Post-Brexit' (2016) available at; <http://www.americanbar.org/publications/blt/2016/10/05_fidel.html> accessed 10 April 2017.

³¹ Willett (n 4) 209.

³² The Electronic Commerce (EC Directive) Regulations 2002, 2002 No. 2013.

³³ The Consumer Rights Act 2015, 3/2015.

³⁴ Consumer Organisation Which? *The Consumer Rights Act 2015* (2015). Available at; <<https://www.which.co.uk/consumer-rights/regulation/consumer-rights-act>> accessed 12 December 2017.

³⁵ Paragraph 23, Explanatory Notes, Summary and Background of Consumer Rights Act 2015. See also, Mohammad El-Gendi, 'The Consumer Rights Act 2015: A One Stop Shop of Consumer Rights' (2017) 83(8) Queen Mary Law Journal 83, 95.

³⁶ Explanatory Notes, Summary and Background of Consumer Rights Act 2015, Paragraph 5. See also, Paula Giliker, 'The Consumer Rights Act 2015 – a Bastion of European Consumer Rights?' (2017) 37(1) Journal of Legal Studies 78, 79.

³⁷ Willett (n 4) 182.

However, this untaken step does not affect distance consumers because this entitlement is still available under the CCIACRs 2013.

Thus, the CCIACRs 2013 remain as the main regulations dealing with specific consumer protection challenges in distance selling contracts. Regarding duplicated regulations, the consumer can refer, at the same time, to the CRA 2015, the CCIACRs 2013, and the ECRs 2002 when a distance contract is made by electronic means of communication.

- **Other English and European jurisdictions**

Cross references are made to other consumer laws where necessary such as the Consumer Protection (Distance Selling) Regulations 2000, and the Consumer Protection from Unfair Trading Regulations 2008 (as amended). The study also considers principles of contract law through statute and case law, and their connection with the consumer protection is highlighted where relevant. In addition, relevant EU directives and legal cases are discussed. This extension of the scope beyond the UK laws is a valid exercise and unaffected by *Brexit*. It is valid because the UK distance laws are driven from EU directives. Then, any ambiguity or gap in the UK laws may be rectified by the EU directives, or the interpretation given by EU judiciary bodies about those directives. It is unaffected by *Brexit* because the UK will preserve all EU- sourced laws in the UK post *Brexit*. There is also an intension to enable UK courts to refer to relevant EU cases where necessary, though the supremacy of EU courts over UK courts will not exist post *Brexit*.³⁸

In Iraqi Law the following laws are discussed;

- **The Iraqi Consumer Protection Law No. (1) 2010 (the ICPL 2010)**

This law provides general protection for consumers in their contractual relations with traders. It covers all types of contracts that are made between a consumer and a trader, without taking into account the manner in which the contract is made.

³⁸ Section 6(1) of the European Union (Withdrawal) Bill ends the supremacy of the EU courts over the UK courts which states; “(1) A court or tribunal (a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and (b) cannot refer any matter to the European Court on or after exit day”. However, Subsection (2) allows the court to have regard to EU cases where necessary when it states; “A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so”.

- **The Kurdish Proposal of Consumer Protection Law 2015 (the KRP 2015)**

This proposal was prepared by the Kurdistan Regional Government within the devolved matters which are set up for regional powers within the federal system.³⁹ This proposal, if adopted, will cover consumer protection within the territorial jurisdiction of Kurdistan Region.⁴⁰ It is selected because it is a more developed piece of legislation than the ICPL 2010 in the area of study. For example, the KRP 2015 defines information provisions in the electronic contracts. Also, the proposal, if adopted, will be the first legislation in Iraq which introduces a right of withdrawal similar to the right of withdrawal defined by modern legislation for distance selling contracts. Thus, this legislative attempt, if successful, may benefit any future amendment to the ICPL 2010.

- **The Iraqi Civil Code No.(40) 1951**

The Iraqi Civil Code includes principles of contract in a broad sense. Accordingly, all contractual relations are governed,⁴¹ regardless of the manner in which the contract is made (i.e. direct contracting or contracting at distance). Thus, the Civil Code may offer solutions to the gaps which may be found in any other legislation. This particular test is important in the area of study because the ICPL 2010 does not recognise distance selling contracts. For such a reason, the study discusses the Civil Code to find alternatives to any missing provisions in that regard.

- **Other Iraqi jurisdictions**

Cross references are made to other laws when necessary such as the Iraqi Commerce Law No. (149) 1970, the Law of Electronic Signature and E-Transactions No. (78) 2012, and the Iraqi Law of Proof (107) 1979. However, no law cases have been found in the context

³⁹ According to Article 1 of the Iraqi Constitution 2005; “The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq”. According to Article 117(1); “This Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region”.

⁴⁰ According to Article 121 of the Iraqi Constitution, the Kurdistan Regional Power has “the right to exercise executive, legislative, and judicial powers in accordance with this Constitution”. However, if there is a contradiction between a Kurdish law and a federal law regarding a matter inside the jurisdiction of the regional power, the Kurdistan power has “the right to amend the application of the federal law within the region”. For such a reason, the KRP 2015, if successful, will replace the ICPL 2010 in the region.

⁴¹ The Iraqi Civil Code, Articles 73- 185.

of study since the Civil Code does not specifically recognise distance contracts, and the ICPL 2010 is relatively new. While, the KRP 2015 is still a draft- proposal.

C. Importance of Research (Originality)

Researching in the area of distance selling contracts is of particular importance to both jurisdictions because of the rise of distance selling in each economy. This research examines the most recent European measures implemented in the UK. By comparing this with Iraqi Law, this research determines whether or not there is a need for specific distance legislation, instead of relying on general protection measures, and whether this can be met by adopting the KRP 2015.

Furthermore, this is the first time these two jurisdictions are compared to each other in this particular area. Therefore, there is no literature on the elements of comparison. There is also no literature on the topic in Iraqi laws as protection in this area is not yet defined.

In English Law, the literature is minimal as there are few research papers which mainly consider the CRD 2011. Part A of this chapter introduces the Research Topic and highlights the key themes arising from a literature review but it should be noted that many papers focus on a single issue or simply introduce the new provisions rather than evaluating their effectiveness.⁴²

This study can therefore add to the body of knowledge for both jurisdictions by offering a full and through analysis of each and through comparison.

⁴² Such as Simon Whittaker, 'Distinctive Features of the New Consumer Contract Law' (2017) 133(Jan) Law Quarterly Review 47; Horst Eidenmüller, 'Why Withdrawal Rights?' (2011) 7(1) European Review of Contract Law 1; Joasia Luzak, 'To Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account its behavioural Effects on Consumers' (2014) 37(1) Journal of Consumer Policy 91; Peter O'Sullivan, 'Does the New Consumer Rights Directive Enhance Consumer Confidence in the Online Market?' (2016) 6 Kings Jn's Law Review 64; Peter Rott, and Evelyne Terryn, 'The Proposal for a Directive on Consumer Rights: No Single Set of Rules' (2009) 17(3) Zeitschrift Für Europäisches Privatrecht 456; Reinhard Steennot, 'The Right of Withdrawal under the Consumer Rights Directive as a Tool to Protect Consumers Concluding a Distance Contract' (2013) 29(2) Computer Law & Security Review 105; Steennot 'Consumer Protection with regard to Distance Contracts after the Transposition of the Consumer Rights Directive in Belgium and France' (n 20); Christian Twigg-Flesner, and Daniel Metcalfe, 'The Proposed Consumer Rights Directive - Less Haste, More Thought?' (2009) 5(3) European Review of Contract Law 368.

D. Research Objectives

This research therefore aims to achieve certain objectives under both jurisdictions. These objectives are different for each jurisdiction, but they eventually reflect the overall protection measures for distance consumers. The English CCIACRs 2013 represent the new European measures which have taken place in the UK from June 2014. These new measures replaced an old package of European measures which were in place in the UK under the DSRs 2000, and should have remedied pitfalls of the previous measures, in particular with the information requirements and the right of cancellation. At this point, the research evaluates the new measures as to find whether they properly respond to the matters addressed under the previous measures. In Iraqi law, there are no specific measures for distance consumers; therefore, there is scepticism about the ability of general measures to cope with distance selling challenges. Here, the research attempts to address this assumption.

In a broad sense, the research aims to look at both jurisdictions in order;

- To assess the impact of the information requirements on the freedom of contract;
- To evaluate the information required for distance consumers and its impact on the consumer's confidence at distance;
- To review the manner in which and the time when information should be provided; and their impact on the ability of consumers to grasp information;
- To identify the nature of the duty to provide pre –contractual information;
- To evaluate the remedies provided for a failure to perform the duty to provide pre –contractual information, and their sufficiency for distance consumers to rely on;
- To identify the concept and function of the right of cancellation;
- To examine conditions of an effective use of the right of cancellation;
- To assess the effects of using the right of cancellation.

E. Research Questions

To achieve these objectives the study attempts to find answers to the following research questions;

- Does the duty to provide information affect the freedom of contract?
- Does the law require enough information for distance consumers? If yes, does the law enable the consumer to grasp it properly? If no, what information should be included?
- Does the law require a proper manner and time for the information required?
- What criteria should be followed to identify the breach? What level of care is required to avoid breaches?
- What remedies are provided for breaches of the information required? What effect do they have on consumers at distance?
- What is the function of the right of cancellation? Does the law aim to ascertain that function in practice?
- What are the conditions and effects of using the right of cancellation? How easy are these conditions and effects for the consumer to take place in practice?

F. Research Methodology

The research methodology is mainly comparative and analytical. First, comparative methodology is used to reach a better understanding of distance laws of England and Iraq regarding the duty to provide pre- contractual information and the right of cancellation. This is, as Pieters called,⁴³ ‘the nearby goal’ or, as Zweigert and Kötz called, ‘the primary aim’ of comparative law.⁴⁴ It is also used as a useful guide to improve laws of distance

⁴³ Danny Pieters, 'Functions of Comparative Law and Practical Methodology of Comparing or How the Goal Determines the Road!' 1, 3-5. Available at:

<<https://www.law.kuleuven.be/personal/mstorme/Functions%20of%20comparative%20law%20and%20practical%20methodology%20of%20comparing.pdf>> accessed 21 March 2018.

⁴⁴ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Clarendon Press 1998) 15; Nils Jansen, 'Comparative Law and Comparative knowledge' in Mathias Reimann and Reinhard Zimmermann (ed), *The Oxford Handbook of Comparative Law* (Oxford University Press 2008) 305. See also, Esin Orucu, 'Developing Comparative Law' in Esin and Nelken (ed), *Comparative Law, a Hand Book* (Oxford and Portland, Oregon 2007) 53-54; Edward Eberle, 'The Method and Role of Comparative Law' (2009) 8(3) Washington University Global Studies Law Review 451, 453.

selling by addressing the areas where one law can learn from the other.⁴⁵ This is ‘the distant goal’ of comparative law which sets up a law reform by pointing issues within one law, then looking at how the other law has tackled them.⁴⁶

Second, the study has also used analytical methodology, as Hoecke demonstrates, to distinguish between ‘differences and commonalities’ at deep level between the legal systems of England and Iraq as to apparently different or similar provisions of distance selling legislation.⁴⁷ In this way, the study offers a variety of solutions to problems which may appear similar under both laws, but their solutions may be addressed differently. It also offers the lawyers and lawmakers a chance to find better solutions.⁴⁸

To put this methodology in practice, the study has chosen English Law to begin with as a more developed law in the field of distance selling. This will be carried out under a theme which represents a possible challenge. Next, English Law is thoroughly compared and analysed with Iraqi Law. In doing so, the study has followed two methods: first, Doctrinal method (black letter) is used to define the law within itself, focusing on statutes, case-law, and other legal sources.⁴⁹ It has also been useful to apply Functional method, “the basic methodological principle of all comparative law”,⁵⁰ (law in action)⁵¹ to define the way the law functions in practice.⁵² The legal system of distance selling laws faces similar challenges or problems in every society, and those problems are often solved by similar or quite different means albeit with the same results.⁵³ This means that different rules might be used in different legal systems to solve similar problems, but they can have the same

⁴⁵ See also, Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) Boom Juridische Uitgevers 1, 2-3. Available at:

https://www.researchgate.net/publication/291373684_Methodology_of_Comparative_Legal_Research
accessed 23 March 2018.

⁴⁶ Zweigert and Kötz (n 44) 16; Pieters (n 43) 8-10; Orucu (n 44) 55.

⁴⁷ Hoecke (n 45) 14.

⁴⁸ Zweigert and Kötz (n 44) 15.

⁴⁹ Hoecke (n 45) 16.

⁵⁰ Zweigert and Kötz (n 44) 34; Francesca Bignami, 'Formal versus Functional Method in Comparative Constitutional Law' (2016) 53(2) Osgoode Hall Law Journal 442, 444.

⁵¹ Rebecca Sandefur, 'When Is Law in Action?' (2016) 77 Ohio State Law Journal Furthermore 59, 59-60.

⁵² Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (ed), *The Oxford Handbook of Comparative Law* (Oxford University Press 2008) 343-344.

⁵³ Michele Graziadei, 'The Functionalist Heritage' in Pierre Legrand and Roderick Munday (ed), *Comparative Legal Studies, Traditions and Transitions* (Cambridge University Press 2003)102; Antonios Emmanuel Platsas, 'The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks' (2008) 12(3) Electronic Journal of Comparative Law 1, 2-3.

function or result.⁵⁴ By using Functional method, the study identifies challenges which cause problems to distance consumer protection in the distance selling law of England and Iraq, then it evaluates the rules within each law to find whether they fulfil the function of solving those similar problems.⁵⁵

G. Research Structure

This thesis is divided into seven chapters and conclusion as follows;

Chapter One defines the distance selling contract under both jurisdictions as a first necessary step before any analysis can be offered of the pertinent provisions.

Chapter Two examines the effect of the duty to provide pre- contractual information on the freedom of contract. This issue needs to be discussed as this duty is to be performed at the stage where freedom of contract is in effect. It goes on to analyse the information required under each law and whether it fulfils its consumer protection function.

Chapter Three deals with the manner and the time in which information should be provided. These two aspects have a connection with the overall objective of the information requirements. It is evident that information helps the consumer to make a transactional decision. This objective may be affected by the manner in which and the time when information is to be sent. Hence, the study critically addresses the role of these two mechanistic requirements in achieving the overall objective of the information.

Chapter Four discusses the remedies offered by distance legislation, and consumer legislation generally, to the breach of the information requirements, as well as the criteria which should be followed to determine such breach. This is important as an inadequate remedy may undermine the effectiveness of legal protection.

Chapter Five explores the remedies available under some general principles of contract law which may be related to the breach of the information requirements. This exercise determines potential connection between the information requirements and those principles. This is to clarify whether any entitlement under those principles will be relevant

⁵⁴ Jaakko Husa, *A New Introduction to Comparative Law* (Oxford, and Portland, Oregon 2015) 119; Oliver Brand, 'Conceptual Comparison: Towards a Coherent Methodology of Comparative Legal Studies' (2007) 32(2) *Brooklyn Journal of International Law* 405, 415-418.

⁵⁵ Orucu (n 44) 51; Zweigert and Kötz (n 44) 34-35.

to the cases of breach of the information requirements. This issue should be addressed because distance laws, from both sides of comparison, do not provide effective remedies in this context.

Chapter Six defines the right of cancellation and specifies its function. This is to ensure a better understanding of the nature and extent of the right, and to provide a basis for the study in analysing provisions of the right within the context of consumer protection in distance selling.

Chapter Seven critically discusses conditions of the use of the right to cancellation as well as the effects of exercising it. The study addresses issues which may have effect on the function of the right of cancellation, and focuses particularly on the cancellation period and whether it is effective to protect the distance consumer's needs? It also covers those challenges which are connected to the way in which and the time within which the return process is to be performed.

Conclusion addresses the findings and recommendations of the study, together with the future of studies in this particular area.

CHAPTER ONE: THE CONCEPT OF DISTANCE SELLING CONTRACTS

1.1. Introduction

Before analysing provisions on the duty to provide pre- contractual information and the right of cancellation, it is important to define distance contracts under both jurisdictions. By doing so, the study specifies the parties to a distance contract, the trader and the consumer. The study further addresses cases where a distance contract is excluded from the information requirements and the right of cancellation to determine the reason behind such an exclusion and whether this should be subject to any future consideration.

1.2. The Definition of Distance Selling Contracts in the English CCIACRs 2013

Regulation 5 defines a distance contract as;

Any contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.

Notably, the same elements required for a distance contract under the pre June 2014 regulations (the DSRs 2000) remain almost unchanged under the new regulations. Foremost, the contract must be between a consumer and a trader. Regulation 4 defines the consumer as “An individual acting for purposes which are wholly or mainly outside that individual’s trade, business, craft or profession”. In this way, the consumer has remained as a natural person but his definition has slightly changed to include not only those who act for purposes which are outside their trade or business, but also those who act for purposes which are outside their craft or profession.⁵⁶

This particular change may be thought contrary to the interest of the consumer because it does not make any difference between the term “trade” and the term “profession”. Thus, the definition is narrowly drawn to exclude those persons who act for purposes inside their profession and craft, those who were consumers under the DSRs 2000, such as lawyers, engineers, and doctors. However, the new definition helps the court to put an end to any dispute about whether a practice is a trade or a profession. This may be an issue in today’s dealing because many professions are practiced within a form of company. Thus, the court does not have to distinguish between a person who is acting for his trade and a person who is acting for his profession. Such a distinction might not be difficult in face- to- face contracting, but the use of means of distance communication makes it difficult for consumers to distinguish.

⁵⁶ The DSRs 2000, Regulation 3(1). See also, Ward Schoenmaekers, 'The Notion “Consumer” in European Private Law' (Master dissertation, University of Gent 2014) 16- 34. Available at; http://lib.ugent.be/fulltxt/RUG01/002/163/256/RUG01-002163256_2014_0001_AC.pdf accessed 12 March 2016.

Another development, the definition requires the purpose to be wholly or mainly outside the area of trade or profession. By adding the word “mainly” it has become clear that those consumers who act for “mixed-purposes”, a purpose outside and a purpose inside the trade or profession, are included by the definition of consumer if the purpose which is outside the profession is considered as the main purpose.⁵⁷ This change extends the concept of consumer to include a wider number of consumers. This aspect was a grey area under the DSRs 2000.⁵⁸ Although, it was arguably said that the buyer in such a case is a consumer because the definition did not require the consumer to exclusively contract for a private purpose,⁵⁹ in certain EU law cases the decision was otherwise made by Court of Justice of the European Union such as in the *Francesco Benincasa* case.⁶⁰

The trader is defined as “A person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf”. The wording “a person” includes any natural or legal person, but not only those who act for purposes relating to their business, but also those who act for purposes relating to their profession or craft. This change resulted from excluding the persons of profession or craft from the scope of consumer. This particular change is advantageous to ordinary consumers, who are the majority, because it includes a wide number of persons under the term “trader”. As a result, many consumer to consumer contracts under the previous regulations have become business to consumer contracts, such as when a contract is made between a lawyer and a client. This change also does not require the consumer to distinguish between a person of profession and a trader, which would be a further challenge in contracting at distance. However, this change turned many business to consumer contracts under the previous regulations to business-to-business

⁵⁷ Schoenmaekers (n 56) 25- 26; Caroline Cauffman, 'The Consumer Rights Directive- Adopted' (2014) 19(1) Maastricht Journal of European and Comparative Law 212, 213.

⁵⁸ Christian Twigg-Flesner, Hans Schulte-Nölke, Martin Ebers (ed), *EC Consumer Law Compendium, the Consumer Acquis and its Transposition in the Member States* (Sellier European Law Publishers 2008)413; Chantal Mark, 'Fundamental Rights and the European Regulation of iConsumer Contracts' (2008) 31(4) Journal of Consumer Policy 425, 430.

⁵⁹ Fidelma White, 'Selling on-line: Business Compliance and Consumer Protection English Legal Cases' (2004- 2005) 5 Hibernian Law Journal 223, 226.

⁶⁰ In *Francesco Benincasa v Dentalkit Srl* [1997] E.T.M.R. 447, at 453 it was held that; “Only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically”. Similarly, in *Shearson Lehman Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993] I.L.Pr. 199, at Paragraph 22, it was held that: “It is clear from the wording and the function of these provisions that they refer only to final consumers acting in a private capacity and not in the course of their trade or profession”.

contracts, such as when a contract is made between a firm of solicitors and an individual solicitor. This particular concern may not be a big issue when a person of profession deals with a consumer because he is dealing with a person below his position. This suggests that he needs less consumer protection than the consumer does. However, the issue is when a person of profession deals with a trader.

However, it is still unclear whether not-for-profit organisations are to be dealt with as consumers or traders. Nevertheless, it is arguably not difficult to consider those organisations as traders because the word “individual” in the definition of consumer does not include legal persons. Furthermore, consumer protection, through the duty to provide pre-contractual information and the right of cancellation, is not given to rebalance the contract in terms of economy or the purpose of dealing, but because of informational asymmetry and inability to see the goods in sale contracts, and the trader in services contracts.

At this point, it might be counter argued that this interpretation does not represent the will of the member states. As evidence, a report from the European Commission, which summarised comments made on the Green Paper 2007, stressed that the majority of EU member states refused to extend the definition of trader to cases of not-for-profit organisations, and that only some academics supported such an extension.⁶¹ However, this changed because the same report showed that the majority of the EU member states were of the view not to extend the definition of the consumer to cases of mixed-purposes contracts contrary to their current attitude which is finally adopted in the CRD 2011.

Under the definition, the contract must be concluded under “An organised distance sales or service-provision scheme”. The CCIACRs 2013 do not give any explanation to what constitutes “organised distance sales or services provisions scheme”. However, it is settled that one-off transactions and cases of specific requests given by consumers about goods and services, “ad hoc provisions”, are to be excluded.⁶² This requirement does not help the

⁶¹ The European Commission, *Commission Staff Working Paper Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis* (, 2007) 5. Available at; http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/acquis_working_doc.pdf accessed 28 February 2017.

⁶² Mary Donnelly, and Fidelma White, 'The Distance Selling Directives Time for Review' (2005) 56(2) Northern Ireland Legal Quarterly 200, 206; Julia Hornle, Gavin Sutter and Ian Walden, 'Directive 97/7/EC on the Protection of Consumer in Respect of Distance Selling' in A Lodder and H Kaspersen (ed), *eDirectives: Guide to European Union Law on E-Commerce* (Kluwer Law International 2012) 12;

consumer if a trader claims that he does not own any “organised distance sales or services provisions scheme”. In this case, the consumer has to distinguish between a trader of an organised distance sales or services provisions scheme and an individual seller who deals by means of distance communication once. This mission is not easy in a distance environment. What makes it even harder is that the law does not make it a condition that the trader should own those organised schemes, but it is relevant if those organised schemes are offered by a third party but run by the trader, as stated in Recital 20 of the CRD 2011.⁶³ Thus, many distance contracts made by telephone or email may be considered by the traders, in question, as non- distance contracts.⁶⁴ The same thing may happen with contracts made on websites, although some jurists consider websites as forms of “organised distance sales”.⁶⁵ This is because Recital 20 of the CRD 2011 excludes “Cases where websites merely offer information on the trader, his goods and/or services and his contact details” from the scope of “organised distance sales”.

This suggests that a definition of distance contract without this requirement would have protected the consumers from any endeavour made by the trader to escape from the liability. Given that this requirement was not included in the definition given to the distance contract in the original draft-proposal of the Directive, this suggests that the version adopted in the CRD 2011 was carefully considered and extended in this way.⁶⁶

Geraint Howells, and Reiner Schulze, *Modernising and Harmonising Consumer Contract Law* (European Law publishers 2009) 10.

⁶³ According to Recital 20 of the CRD 2011; “The notion of an organised distance sales or service-provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform”.

⁶⁴ Dg Justice European Commission, *Dg Justice Guidance Document Concerning 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* (2014) 30. Available at:

<http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf> accessed 21 March 2017.

⁶⁵ Alan Poulter, Kay Henderson and D McMenemy, "The distance Selling Directive: Consumer Champion or Complete Irrelevance?" (E-Society 2003 Conference on E-Commerce, E-Learning and E-Government unpublished, Lisbon, Portugal 2003-06-03-2003-06-06 2003) 7. Available at;

<http://www.cis.strath.ac.uk/cis/research/publications/papers/strath_cis_publication_126.pdf> accessed 27 March 2016.

⁶⁶ According to Article 2(6) of the original draft- proposal; a distance contract is “Any sales or service contract where the trader, for the conclusion of the contract, makes exclusive use of one or more means of distance communication”. See, the original proposal, Commission of the European Communities, *Proposal for Directive of the European Parliament and of the Council on Consumer Rights* (COM (2008) 614 final, 2008). Available at:

It is also a condition that the trader must make exclusive use of one or more of means of distance communication. The CCIACRs 2013 and the CRD 2011 do not give any explanation to what constitutes a means of distance. However, the same meaning given to means of distance communication in Regulation 3(1) of the DSRs 2000 has remained unchanged. Accordingly, means of distance communication includes “Any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties”. However, the new thing is that there is no longer indicative list of distance means.⁶⁷ This is clear from Recital 20 of the CRD 2011 when mentions some means of distance as examples. The wording of the Recital stipulates that “.....With the exclusive use of one or more means of distance communication (such as mail order, Internet, telephone or fax) up to and including the time at which the contract is concluded”.

This new development puts an end to any argument which may be raised about whether internet- based means can be included or not. This was the case under the former position because the DSD 1997, and implementation thereof in most of member states, came to force relatively before the era of Internet.⁶⁸ Therefore, it was questionable whether the Directive would cover contracts made via World Wide Web, albeit it did not have any mention in the indicative list provided. Despite this uncertainty under the previous regulations, there was a belief that the definition given to means of distance in Regulation 3(1) of the DSRs 2000 is clear enough to include electronic means,⁶⁹ which suggested that all Internet- based means in a broad sense fell under the scope of distance selling regulations.⁷⁰

<[http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2008\)0614_/com_com\(2008\)0614_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2008)0614_/com_com(2008)0614_en.pdf)> accessed 20 March 2015.

⁶⁷ Schedule 1 of the DSRs 2000 gave an “indicative list” of distance communication means which comprised; “Unaddressed printed matter, Addressed printed matter, Letter, Press advertising with order form, Catalogue, Telephone with human intervention, Telephone without human intervention (automatic calling machine, audio text), Radio, Videophone (telephone with screen), Videotext (microcomputer and television screen) with keyboard or touch screen, Electronic mail, Facsimile machine (fax), Television (teleshopping)”.

⁶⁸ Arno R. Lodder, and Marten B Voulon, 'Intelligent Agents and the Information Requirements of the Directives on Distance Selling and E-Commerce' (2002) 16(3) *International Review of Law Computers* 277, 281; Hornle, Sutter and Walden (n 62) 11- 12.

⁶⁹ Christine Riefa, 'The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?' (2009) 14(2) *Lex Electronica* 1, 11.

⁷⁰ Roger Brownsword and Geraint Howells, 'When Surfers Start to Shop: Internet Commerce and Contract Law' (1999) 19(3) *Legal Studies* 287, 300; Lodder, and Voulon (n 68) 281.

Finally, the CCIACRs 2013 extend protection to include not only contracts made for goods or services, as it was the case under the previous regulations,⁷¹ but also contracts made for digital content. Regulation 5 defines sale contracts as where “A trader transfers or agrees to transfer the ownership of goods to a consumer and the consumer pays or agrees to pay the price”. The same Regulation defines services contracts as where “a trader supplies or agrees to supply a service to a consumer and the consumer pays or agrees to pay the price”. However, the CCIACRs 2013 do not define digital content contracts. Instead, they define digital content in Regulation 5 as “Data which are produced and supplied in digital form”. Recital 19 of the CRD 2011 mentions some examples of digital content which are “computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means”. As a result, contracts for the supply of digital content fall within the scope of the CCIACRs 2013. However, if digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods in the meaning of Recital 19 of the CRD 2011.

Under the previous regulations, inclusion of digital content was subject to a debate.⁷² For example, a research report prepared for the Department of Business, Innovation and Skills addressed the need for applying implied terms under the Sale of Goods Act 1979 on digital content.⁷³ This approach would have been accepted if software is transferred into a physical media as decided in the *St Albans City* case.⁷⁴ However, it would have been difficult to accept the idea if software is not transferred into a physical media which was a

⁷¹ Regulation 3(1) of the DSRs 2000 defines the distance contract as “Any contract concerning goods or services.....”.

⁷² Aonghus McClafferty, 'Effective Protection for the E-Consumer in Light of the Consumer Directive' (2012) 11(85) *Hibernian Law Journal* 85, 102.

⁷³ See, Robert Bradgate, *Consumer Rights in Digital Products, a Research Report Prepared for the UK Department for Business, Innovation and Skills* (Department for Business, Innovation and Skills September 2010, 2010) 1.3; Althaf Marsoof, 'Digital Content and the Definition Dilemma under the Sale of Goods Act 1979: Will the Consumer Rights Bill 2013 Remedy the Malady?' (2014) 9(4) *Journal of International Commercial Law and Technology* 285, 286-287.

⁷⁴ It was held that “Suppose I buy an instruction manual on the maintenance and repair of a particular make of car. The instructions are wrong in an important respect. Anybody who follows them is likely to cause serious damage to the engine of his car. In my view, the instructions are an integral part of the manual. The manual including the instructions, whether in a book or a video cassette, would in my opinion be "goods" within the meaning of the SGA, and the defective instructions would result in a breach of the implied terms in section 14”. *St Albans City and District Council v International Computers Ltd* [1997] FSR 251.

concern raised by Lord Penrose in the *Beta Computers (Europe) Ltd* case.⁷⁵ The same difficulty would arise where software is bought and subsequently downloaded on a disk according to a licence agreement.⁷⁶

1.3. Exemptions under the English CCIACRs 2013

Several cases are exempted from the scope of regulations, some of which are completely exempted and others are partially exempted, as follow;

1.3.1. Contracts Exempted Completely

Regulation 6(1) gives a long list of unarguable exemptions, most of which were exempted under the previous regulations. Paragraph (2) addresses four types of contracts where the regulations do not apply which are contracts;

(A) concluded by means of automatic vending machines or automated commercial premises; (b) concluded with a telecommunications operator through a public telephone for the use of the telephone; (c) concluded for the use of one single connection, by telephone, internet or fax, established by a consumer;⁷⁷ (d) under which goods are sold by way of execution or otherwise by authority of law.

These contracts are exempted for various reasons. Some of these exempted contracts are already covered by other regulations. For example, financial services contracts are covered by the Financial Services (Distance Marketing) Regulations 2004. Some other contracts do not have elements of a distance contract. For example, contracts concluded via vending machines cannot be considered distance contracts because those machines are located in the business premises and goods, which are provided through those machines, are reachable physically by consumers.⁷⁸ This includes automatic car park, automatic photo booths, and airline or train ticket machines.⁷⁹ The same judgement is true regarding

⁷⁵ *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd* [1996] FSR 367.

⁷⁶ White (n 59) 228.

⁷⁷ For example, a contract with an Internet café for a single Internet session, see more examples at: Dg Justice European Commission (n 64) 30.

⁷⁸ European Commission, 'Commission of the European Communities Proposal for a Council Directive on the Protection of Consumers in Respect of Contracts Negotiated at a Distance (distance selling)' (1992) 15(3) Journal of Consumer Policy 297, 314.

⁷⁹ *ibid.*, 314; Donnelly, and White (n 62) 209.

contracts made with telecommunication operators via the use of public payphones.⁸⁰ For some other exemptions, the need for distance selling protection does not exist. For example, construction contracts are completely exempted as the existence of a right of cancellation would cause problems.⁸¹

One change from the previous regulations is that contracts made by “online –auction” are no longer excluded. The previous regulations exempted any contract made at an auction,⁸² without any distinction between traditional auctions and online- auctions. The reason why auction was excluded was because it is characterized by luck.⁸³ This has changed under the CCIACRs 2013 as auction is no longer within the list of exempted contracts.⁸⁴ It is also noted at the margin of Schedule 2 that “In the case of a public auction, the information listed in paragraphs (b) to (e) may be replaced with the equivalent details for the auctioneer”, which suggests that ‘auction’ is affected by distance regulations.

The main question is; should auction be excluded? Clearly, if the auction is carried out in a traditional form then it should be excluded because, as Regulation 5 states, in public auctions “The consumers attend, or are given the possibility to attend”. This suggests that the consumer will meet the seller physically. This fact mismatches the definition of a distance selling contract as noted earlier. However, the debate is about whether online forms of auctions should be included, and whether they should be called auction in the first place.

In this regard, a number of research studies argue that online auctions cannot fall within the scope of the traditional auction because they are no more than a venue where sellers and buyers can meet to make a deal.⁸⁵ For example, e-Bay Auction is an electronic medium where items are listed, for sale at a reserve price. The person who makes the highest bid will be the owner of the item listed, usually after paying the seller directly. This differs

⁸⁰ Donnelly, and White (n 62) 209.

⁸¹ *ibid.*

⁸² The DSRs 2000, Regulation 5(1) (f).

⁸³ Gerald Spindler, 'Internet -Auctions Versus Consumer Protection: The Case of the Distance Selling Directive' (2005) 6(3) German Law Journal 725, 725.

⁸⁴ Regulation 5 defines public auction as “A method of sale where (a) goods or services are offered by a trader to consumers through a transparent, competitive bidding procedure run by an auctioneer, (b) the consumers attend or are given the possibility to attend in person, and (c) the successful bidder is bound to purchase the goods or services”.

⁸⁵ Christine Riefa, 'To Be or Not to Be an Auctioneer? Some thoughts on the Legal Nature of Online e-Bay Auctions and the Protection of Consumers' (2008) 31(2) Journal of Consumer Policy 167, 170.

from traditional auctions where the auctioneer is physically involved with the auction as an agent who works on behalf of sellers in possessing auctioned goods, looking for the best price, collecting the payment, and passing it onto the seller. Furthermore, the seller, the buyer and the auctioneer meet physically in one place. In online auctions, however, the auctioneer does not have actual possession of auctioned goods, and does not collect the payment. Also, the three parties meet online without any physical appearance.⁸⁶ Moreover, many online auctions declare in their express terms and conditions that they do not work as auctioneers.⁸⁷

Based on these facts, there was a need to extend distance regulations to include what is called (mistakenly) “online auction”⁸⁸ because the consumer’s position in those online forms of auction is no better than his position in any other distance contract, and he is unable to examine the goods due to its existence in the other party’s possession.⁸⁹

This extension might be well justified if one analyses the issue from the consumer’s perspective. However, analysing the issue from the seller’s perspective may uncover a different argument. This is because the existence of a distance contract is connected to the existence of a trader running an “organised distance sales or service-provision scheme”. This requirement does not exist in online auction. Thus, the “auctioneer” cannot be a trader

⁸⁶ Kanchana Kariyawasam and Scott Guy, 'The Contractual Legalities of Buying and Selling on e-Bay; Online Auction and the Protection of Consumers' (2008) 19 *Journal of Law, Information and Science* 42, 47; Riefa 'To Be or Not to Be an Auctioneer? Some thoughts on the Legal Nature of Online e-Bay Auctions and the Protection of Consumers' (n 85) 174.

⁸⁷ Clause 3.1 of e-Bay user agreement states that; “Although we are commonly referred to as an online auction web site, it is important to realise that we are not a traditional "auctioneer". Instead, our Site acts as a venue to allow members to offer, sell, and buy just about anything, at any time, from anywhere, in a variety of formats, including a fixed price format and an auction-style format commonly referred to as an "online auction". See, e-Bay user agreement at:

<<http://pages.ebay.co.uk/help/account/about-agreements.html>> accessed 12 March 2016. Also, Clause 6 of Amazon’s Participation Agreement says “Amazon provides a venue for sellers and buyers to negotiate and complete transactions in accordance with the provisions of this Participation Agreement. See, Amazon’s Participation Agreement at:

<<https://www.amazon.co.uk/gp/help/customer/display.html?nodeId=3216781>> accessed 10 March 2017.

⁸⁸ Kay Henderson, and Alan Poulter, 'The Distance Selling Directive: Points for Future Revision' (2002) 16(3) *International Review of Law, Computers & Technology* 289, 292.

⁸⁹ Riefa 'To Be or Not to Be an Auctioneer? Some thoughts on the Legal Nature of Online e-Bay Auctions and the Protection of Consumers' (n 85) 168- 169; Kariyawasam and Guy (n 86) 48- 49.

in the meaning of distance regulations, nor is he an agent of the seller.⁹⁰ This is because he is not involved in the actual transaction between the seller and the buyer.⁹¹

In practice, some of selling transactions on online auction may be one –off transactions. It may happen a trader is involved in online auctions. In this scenario, it is difficult to apply distance selling provisions either because there is no direct link between the trader and the buyer. However, if that link is found the contract will be a distance contract if the conditions set up for the definition of a distance contract are satisfied, but without taking into account the role played by the auctioneer.

1.3.2. Contracts Exempted from the Information Requirements

The CCIACRs 2013 exempt some specific transactions from the scope of the information requirements due to their unique nature. By default, they are still affected by other provisions. Those exemptions are set out in Regulation 7 which includes;

(2)... contracts to the extent that they are (a) for the supply of a medicinal product⁹² by administration by a prescriber, or under a prescription or directions given by a prescriber; (b) for the supply of a product by a health care professional or a person included in a relevant list, under arrangements for the supply of services as part of the health service, where the product is one that, at least in some circumstances is available under such arrangements free or on prescription.⁹³ (3) ...contracts to the extent that they are for passenger transport services.

⁹⁰ According to Clause 6 of Amazon’s Participation Agreement “Amazon is not the agent of the seller”.

⁹¹ Clause 1.3 of e-Bay agreement states: “We are not involved in the actual transaction between buyers and sellers. As a result, we have no control over the quality, safety or legality of the items or content posted by users on the Site, the truth or accuracy of the listings, the ability of sellers to sell items or the ability of buyers to buy items. We cannot ensure and do not guarantee that a buyer or seller will actually complete a transaction or act lawfully in using our Site”.

⁹² Medical products are the subject of the Human Medicines Regulations 2012. I.S. 2012 No. 1916 and defined by Regulation (2) as (a) “Any substance or combination of substances presented as having properties of preventing or treating disease in human beings; or (b) any substance or combination of substances that may be used by or administered to human beings with a view to (i) restoring, correcting or modifying a physiological function by exerting a pharmacological, immunological or metabolic action, or (ii) making a medical diagnosis”.

⁹³ Health services altogether with provisions of health care professional and prescribers are governed by the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013. I.S. 2013 No. 349 as amended by the National Health Service (Pharmaceutical and Local Pharmaceutical Services) (Amendment and Transitional Provision) Regulations 2015. I.S. 2015 No. 58.

It is worth mentioning here that the excluded transactions were included by the DSRs 2000. However, with the new regulations traders are no longer required to provide information in that context. The reason why these transactions are precluded is that the products, subject to those transactions, are already addressed in specific legislation better suited to avoid the risks with those products.

However, excluding health care goods and services sold at distance may be prejudicial to consumers and lead to a significant degree of confusion. It is likely that selling health care services and medical products online will increase in the near future. As a fact, people who work in this field are not only professional persons but, in many cases, they are simply traders. Therefore, with this exemption consumers have to distinguish between health services and medical products sold by professional persons and those sold by traders. This is not an easy task in the distance environment. Based on this, extending information requirements to contracts concluded for health services and medical products is still relevant. In this regard, the Department for Business and Innovation and Skills recommended the UK government to adopt such extension before implementing the CRD 2011 in the UK for the same reasons given supra. There are, however, no reasons why this recommendation was left without a response.⁹⁴

1.3.3. Contracts Exempted from the Right of Cancellation

To strike a balance in interests between the trader and the consumer, Regulation 28(1) listed a number of contracts where the right of cancellation is excluded.⁹⁵ Generally, the

⁹⁴ Department for Business, Innovation & Skills (n 26); Department for Business Invocation & Skills, *Implementation of the EU Consumer Rights Directive (2011/83/EU) Impact assessment: Final* (BIS/13/1109, 2013) point 20. Available at:

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226630/bis-13-1109-implementation-of-the-eu-consumer-rights-directive-2011-83-eu-impact-assessment-final.pdf> accessed 10 October 2015

⁹⁵ According to Regulation 28(1) exceptions are; “(a) the supply of (i) goods, or (ii) services, other than supply of water, gas, electricity or district heating, for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the cancellation period; (b) the supply of goods that are made to the consumer’s specifications or are clearly personalised; (c) the supply of goods which are liable to deteriorate or expire rapidly; (d) the supply of alcoholic beverages, where (i) their price has been agreed at the time of the conclusion of the sales contract, (ii) delivery of them can only take place after 30 days, and (iii) their value is dependent on fluctuations in the market which cannot be controlled by the trader; (e) contracts where the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance; (f) the supply of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications; (g) contracts concluded at a public auction; (h) the supply of accommodation, transport of goods, vehicle rental services, catering or services related to leisure activities, if the contract

nature of the goods and service is the basis to justify exclusion of these cases. Notably, in all exemptions protection of the trader's interest is taken into account.⁹⁶ In addition, all of them seem not to be debatable or surprising.⁹⁷

However, a concern may raise about Subparagraph (b) regarding "the supply of goods that are made to the consumer's specifications or are clearly personalised". This exemption reflects the fact that when a buyer returns goods, the trader will try to find another buyer. However, this may not be possible if goods are made to the consumer's specification or are clearly personalised as if a wheelchair is made for a certain disability or a wedding dress is tailored according to a consumer's specification.⁹⁸ However, the term still needs to be interpreted by the court. For example, a consumer may specify a particular colour of a product with other alterations from the standard model. Hence, does choosing a product from various optional extras means the product is made to the consumer's specification? Especially the trader usually has the control over the optional extras which are relatively standardised.⁹⁹

1.4. The Definition of Distance Selling Contracts in Iraqi Law

In Iraq, consumers are protected by principles set out in general legislation, most of which are connected to direct selling. Unfortunately, a concept of distance selling contract has not yet evolved in the Iraqi legislation as shown below. Thus, although the law generally covers all developed types of today's contracts, including distance selling contracts, this study will determine whether there is a need for further protection for distance consumers.

provides for a specific date or period of performance". In addition, Regulation 28(3) ceases the right of cancellation in another three cases due to the fact that returning the goods inflicts damage on the trader, cases are; "(a) in the case of a contract for the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons, if they become unsealed after delivery; (b) in the case of a contract for the supply of sealed audio or sealed video recordings or sealed computer software, if the goods become unsealed after delivery; (c) in the case of any sales contract, if the goods become mixed inseparably (according to their nature) with other items after delivery".

⁹⁶ Commission of the European Communities, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the Implementation of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts* (Commission of the European Communities 21.9.2006, COM (2006) 514 final, 2006) 5.

⁹⁷ Stephen Weatherill, 'The Consumer Rights Directive: How and Why a Quest for "Coherence" Has (Largely) Failed' (2012) 49(4) *Common Market Law Review* 1279, 1301.

⁹⁸ White (n 59) 390.

⁹⁹ *ibid.*, 240- 241.

1.4.1. Distance Selling Contracts in the Iraqi Civil Code 1951

The concept of a distance selling contract has not been specifically evaluated under the Iraqi contract law. However, all contractual relationships are covered by the Iraqi Civil Code. Under the Civil Code, it is hard to find a concept of distance contract similar to the concept recognised by English law. However, this does not suggest that provisions of distance contracts are entirely unknown or uncovered by legal protection.

The Civil Code comes close to distance contracting when it introduced provisions relating to contracting between absentees. In two Articles, the Civil Code deals with provisions of “contracting between absent persons”. The first is Article 87(1) which stipulates; “Save express or implied agreement or a legal provision otherwise contracting between absent contracting persons will be deemed to have taken place in the place where and at the time when the offeror becomes aware of the acceptance”. The second is Article 88 which states; “Contracting by telephone or by any other similar way will be deemed as having taken place between two persons present insofar as relates to time and between two absent persons inasmuch as relates to place”.

However, these two Articles do not offer a clear definition of a distance contract similar to the concept received by English law. In such a way, most of the elements required for a distance contract under English law are missing here. For example, the identity of the contracting parties does not have special treatment. These provisions are applicable to all types of contracts, business to business, business to consumer, and consumer to consumer contracts. Nor is it a condition for a party to run an organised distance sales or service-provision scheme. One could, therefore, argue that these provisions do not recognise a distance contract in its contemporary concept. Rather, they specify the time and place where the contract between absent parties is deemed to have taken place.

Indeed, one civil law commentator argues that Articles 87(1) and 88 do not recognise distance contracts at all, but rather distinguish between two categories of contracts.¹⁰⁰ Firstly, contracts which are made between present contracting parties in cases where there is no time interval between the time when the offer is directed by the offeror and the time when it is received by the offeree. Here the contracting parties may meet physically or

¹⁰⁰ Abdulmajeed AL-Hakim, Abdulbaki AL- Bakry, and Mohammed AL-Basheer, *AL-Wageez fi Nathareat AL-Iltizam fi AL-Qanon AL-Madany AL-Iraqi, Masadr AL-Iltizam* (part 1 edn, Minster of Higher Education & Scientific Research 1980) 47- 48.

remotely where a telephone call or video call is used. Secondly, contracts which are made between absent contracting parties in cases where the offer takes time to reach the offeree such as when email or fax is used. The rationale is to specify the time when and the place where contracts have been made rather than treat distance contracts as a class of their own with specific protection.

Nevertheless, an oblique recognition of distance contracts is deducible as all contracts made in the absence of physical presence of the parties are deemed to be distance contracts. In addition, all contracts which are made between present parties, but with no face- to- face meeting, are considered distance contracts.

1.4.2. Distance Selling Contracts in the ICPL 2010

The ICPL 2010 aims to provide general protection to consumers in their contractual relations with suppliers. It covers all types of contracts made between a consumer and a supplier, without taking into account the manner in which the contract is made whether by face- to- face technique or means of distance communication. Thus, the law does not define distance contracts, albeit it covers them.

Article 1(4) defines consumer as “Any legal or natural person who obtains goods or services for the purpose of benefit”. Notably, this definition extends protection to legal persons along with natural persons, contrary to the definition of the consumer in English law.¹⁰¹ However, it covers only contracts concluded for goods and services, therefore, digital content are precluded, which contrasts with English law. It also does not mention anything which may refer to the case of mixed- purposes contracts.

Close to English law, a supplier is defined in Article 1(6) “As any natural or legal person who works as producer, importer, exporter, distributor, goods seller, or services supplier, regardless of whether he is involved as principal [by himself] or mediator or agent [on behalf of others]”. Although, the definition does not explicitly require “professionalism” as a condition of being a supplier, most terms set out in the definition have meaning of professionalism such as “producer, importer, exporter, distributor, and services supplier”. Also, most of these professions in reality are carried out through legal persons in the area of business. On top of that, most of these professions are defined as “Commercial

¹⁰¹ Mutaz Al-Mahdy, *The Professional Contracting Party: His concept, Obligations, and Liability* (Dar Al-Nahtha Al-Arabia 2009) 31.

Practices”.¹⁰² Meanwhile, practitioners of these professions acquire the identity of the trader. Nothing will change even if the person is not himself the producer of goods and services, but merely sells products bought from other manufacturers.

Nevertheless, the definition of supplier is wide enough to include even non-traders. Foremost, there is nothing to state that the supplier must be a trader. The wording “goods seller” in the definition includes any person who sells goods without the need for being a trader. This current provision comprises people of free profession who do not acquire the identity of the trader, and non- professional persons. For example, Paragraph (6) starts with the wording “any natural person” and continues with “goods seller”; a merely natural seller shall presumably be subject to the law since the need for being a legal person is not required, and there is no apparent exclusion of non- professional natural vendors. Consequently, non-professional sellers of one-off transactions are still affected by the law.

1.4.3. Distance Selling Contracts in the KRP 2015

The KRP 2015 is relatively similar to the ICPL 2010. If adopted, it will cover contracts made between a consumer and a supplier in all forms of contracts. However, unlike the ICPL 2010, the proposal recognises online contracts under title “electronic transactions”. In such way, more attention is paid to those consumers who are involved with electronic means than in the ICPL 2010. However, the KRP 2015 still does not define distance contracts nor electronic contracts.

Close to English law, consumer is defined in Article 1(8) as “Any natural person who obtains goods or services for filling his personal needs or house needs, and the contract is made with him on that basis, it includes small traders and craftsman of capital not more (3, 000, 000) Iraqi dinars”. This definition does not keep pace with the developments in distance selling contracts. It is set out to cover consumer’s protection in common without paying any attention to the particular position of distance consumers. Yet, the definition is unable to include consumers dealing with digital content. In dissimilarity with the ICPL 2010, however, a legal person cannot acquire identity of the consumer. Also, the definition does not mention contracts of mixed- purposes unlike English law.

¹⁰² According to Article 5 of the Iraqi Commerce Law No. (149) 1970; “Supply of goods and services, importing and exporting goods, and industry, shall be treated as commercial practices if they are accomplished by professional persons”.

Furthermore, the definition is too wide as it includes traders and craftsmen with a certain extent of capital. It may be justified to protect small business and craftsmen of low economic power as consumers but if small traders and craftsmen have an equal level of financial ability to consumers, this should not change their identities as professional persons. The law, in giving protection to small traders and craftsmen, does not require the other contracting party to be a trader.

This definition, if adopted, will have a negative impact on consumers at distance. The reason is that they will be required to distinguish traders of small business from traders of big business. To make such distinction, a person is to be a small business if his capital is not more than (3,000,000) ID. This fact is very hard to be known in distance selling transactions. Also, this definition will encourage traders and craftsmen of even big financial capability to hide their identities by claiming that their financial abilities do not exceed that certain extent. In such a way, they will be entitled to protection which is originally provided for consumers. This distinction does not exist in English law.

On the other hand, “supplier” is given two definitions and, the first one is set out in Article 1(11) which states that supplier is “A person who imports or distributes or produces or circulates or hires goods or provides services irrespective of whether he acts as principal or mediator or agent”. Here similar to the ICPL 2010, professionalism shall indirectly be understood: working in fields like importation, distribution, production, and circulation requires a level of professionalism. However, it is surprising that the Article does not give any particular importance to the wording “seller”, although the sale contract is the most common type of today’s contracts which can gather importer, producer, and other professional persons with consumers, and often the producer, importer, distributor works as a seller at the same time.¹⁰³

The second definition is laid down in Article 21 which defines supplier as; “A person who displays goods or services by using one of electronic means, either for the purpose of the sale or lease or any other purpose.....”. This concept gives a better understanding of suppliers in distance selling contracts. Foremost, this Article does not give any description of the identity of the person as a trader or mere professional and nor does it give any

¹⁰³ Hijazi Mohammed, 'The Duty to Provide Pre-Contractual Information and its Applications on the Electronic Contracts, its Framework and Warranties of the E-Consumers' (2013) 1(8) Journal of Al-Anbar for Legal and Political Sciences1, 17-18.

example which could enable the identity to be understood indirectly. Only the wording “for the purpose of the sale or lease” tells that the person may be a seller or a leaser.

However, this definition can unfairly include non- professional persons in the way discussed before.¹⁰⁴ Also, it cannot include all means of distance communication because although, electronic means are the most common means of today’s dealing; they are for sure not the only method. Means such as post, and telephone can be used in making distance contracts but they are not covered since they do not fall within “electronic means”.

1.5. Exemptions under Iraqi Law

Iraqi laws do not generally put any limitation to the scope of their jurisdictions. Thus, there has not been any case where the law does not entirely apply. However, in similarity with English law, the KRP 2015 excludes some cases from the scope of the right of withdrawal. Some of those cases are similar to those excluded under English law and for the same reasons. In this regards, Article 4(4) (b and c) respectively precludes the right of withdrawal in cases “where goods are made to the consumer’s specification, where subject –matter of the contract are books, magazines, video cassette, CD, or IT programmes if the cover has been removed”. These two cases are also excluded under Subparagraphs (b and f) of Regulation 28(1) of the English CCIACRs 2013.

Some other cases are recognised by the KRP 2015 but do not exist in English law. Hence, Subparagraphs (a, and d) of Article 4(4) of the KRP 2015 respectively exclude cases “where goods are used before the withdrawal period finishes and cases where goods become defective due to misuse or improper possession thereof by the consumer”. Some other cases do not exist in the KRP 2015 contrary to the case in English law.¹⁰⁵

¹⁰⁴ See this Thesis, 30-31.

¹⁰⁵ See, the English CCIACRs 2013, Regulations 28(1) (a, b, c, and h) (n 95).

1.6. Conclusion

In this chapter, the study highlighted the definition of distance selling contracts and exceptions under both jurisdictions to determine which contracts are given special status in relation to the information and cancellation rights in each jurisdiction. This is the starting point to assess the scope of protection in the context of distance selling legislation.

It has been observed that the English CCIACRs 2013 retain the concept given to distance contracts under the DSRs 2000. The concept requires a contract between a consumer and a trader, which has to be through an organised distance sales or service- provision scheme being run by the trader, with the exclusive use of one or more means of distance. The definition of the consumer has changed in two ways. Firstly, the definition is narrowed to exclude those persons who act within their profession or craft. Although, this change makes irrelevant a dispute about whether a practice is to be a trade or profession, it negatively affects persons in a profession who become consumers within that role.

Secondly, the definition is expanded to include those consumers who act for mixed- purposes contracts. This amendment helps a wider number of consumers to benefit from protection. On the other hand, the definition of the trader has slightly changed to include those persons who work for their professions or craft.

The main concern is with the requirement of “an organised distance sales or service- scheme”. This requirement is a real proof challenge for consumers in a distance environment. It also leaves room for the trader to escape from liability by bringing evidence to the contrary.

By contrast, the study found that Iraqi laws do not define distance selling contracts. This has led to identify some aspects of English Law which may act as a model for Iraqi Law. Firstly, there is a need for a clear definition of distance selling contract similar to the definition set out in Regulation 5 of the English CCIACRs 2013. The proposed definition should stress that a distance contract is a contract made by using a means or more means of distance communication. This will be a cornerstone and a starting point in the area of distance selling, towards introducing the duty to provide information and the right of withdrawal. The current Iraqi laws are unable to touch on these two important aspects of protection because they do not define distance selling contracts in the first place: the Iraqi ICPL 2010 is a general consumer law where distance consumers and ordinary consumers

are dealt with equally, and though the Iraqi KRP 2015 recognises electronic contracts, in Articles 21-22, it cannot cover non- electronic means of distance communication.

Another proposed change is that the definition of the consumer and supplier under Iraqi laws should be revised and amended in the way that is dealt with in Regulation 4 of the English CCIACRs 2013. The reason being that Article 1(4) of the Iraqi ICPL 2010 extends the definition of the consumer to legal persons, which may leave room for traders to seek consumer protection by claiming that they are consumers. This is more likely to happen with using means of distance in contracting. Also, the Article does not cover consumers in mixed- purposes contracts. On the other hand, the definition of the supplier, as set out in Article 1(6), is wide in a way which may include non- traders. In the KRP 2015, the definition of the consumer in Article 1(8) does not mention mixed purposes contracts, but it includes small traders of no more than (3, 000, 000 ID) capital, which will unnecessarily entitle traders to consumer protection. Moreover, it will place a heavy burden of proof on consumers in distinguishing small traders from big traders in a distance environment. Another concern is with the definition of the supplier in Article 21 which will unfairly include non- traders.

Finally, the English CCIACRs 2013 exclude some contracts from the scope of regulations in Regulation 6(1), some distance contracts from the information requirements in Regulation 7, and some distance contracts from the right of cancellation in Regulation 28(1). These exceptions are made for specific reasons. In Iraqi laws, similar provisions are needed as there has been no limitation to the scope of protection, save to the cases, which are excluded from the scope of the right of withdrawal in Article 4(4) of the KRP 2015. This omission may cause problems for the courts, as many contracts by their nature should either entirely be excluded from the scope of protection or partially from the information requirements and the right of withdrawal.

The next chapter begins to analyse the provisions relating to the information requirements by exploring the impact of the duty to provide pre- contractual information on the freedom of contract and the relationship between them before evaluating the information required under both jurisdictions.

CHAPTER TWO: THE EFFECT OF THE DUTY TO PROVIDE PRE-CONTRACTUAL INFORMATION ON THE FREEDOM OF CONTRACT, AND THE INFORMATION REQUIRED TO BE DELIVERED PRIOR TO THE CONCLUSION OF THE CONTRACT

2.1. Introduction

This chapter primarily aims to find answers to two key questions initially raised by the study. The first question is about the effect of the duty to provide pre-contractual information on the freedom of contract. As noted earlier, before standard contracts became the most common types of today's dealing, both contracting parties enjoyed relatively equal bargaining powers to negotiate. This was a reflection of the principle of party autonomy or free will. With this operating, the main role for the court is to enforce the agreement between the parties, regardless of whether or not they had enjoyed a level of fair dealing.¹⁰⁶

However, this has changed over time particularly with the emergence of the duty to provide pre-contractual information as a way of protecting consumers. In English law, the advent of this duty was relatively delayed due to the strength of the principle of freedom of contract.¹⁰⁷ The idea started to evolve within consumer legislation in the mid-nineteenth century.¹⁰⁸ The same reason was behind such a delay in Iraqi law.¹⁰⁹ With the advent of the duty to provide pre-contractual information, the law has intervened by requiring a party to deliver some pieces of information to the other party. Thus, the debtor of the duty no longer has the ability to negotiate freely.

At this point, it is questionable whether or not the freedom of the obligated party has been affected by such a duty. In response to this question, the study argues that this duty should be considered as one of the key limitations upon the freedom of contract. It also argues that such a duty supports the freedom of the weak contracting party not to contract as both

¹⁰⁶ Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (2nd edn Aldershot: Ashgate, 2005) 51.

¹⁰⁷ Patrick Atiyah, *An Introduction to the Law of Contract* (2nd edn Oxford University Press, London 1971) 187; 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) 61- 63.

¹⁰⁸ Legrand (n 10) 323.

¹⁰⁹ Amang Ahmed. 'Consumer Protection within Contract' (PhD thesis University of Sulaimaniah 2008) 85.

concepts, freedom to contract and freedom not to contract, are two sides of the same coin, the freedom of contract.¹¹⁰

The second key question pertains to the information required by distance legislation. In distance selling legislation, the first challenge is with the quantity of information that is required to be sent to the consumer. At this point, the function of distance laws is to provide distance consumers with *enough information* which can help the consumer to make an informed decision about the contract. However, providing *enough information* represents a challenge to distance laws. As a solution, the required information should not simply equate to the sheer amount an ordinary consumer can acquire. At the same time, it should not be more than what a distance consumer actually needs, or can read. A second challenge is whether the information required works properly in practice.

In response to this question, the study examines the bulk of information required by English Law and Iraqi law to know whether it provides *sufficient information*, then analyses the function of the information itself. In Iraqi law, where distance contracts are not especially defined, the study focuses on the information requirements that are set out in the ICPL 2010 and the KRP 2015 and their effect on distance consumers.

This chapter is divided into three sections; the first section discusses the relations between the duty to provide pre-contractual information and the freedom of contract. Sections two and three consider the information required by legislation.

¹¹⁰ Mark Pettit, Jr, 'Freedom, Freedom of Contract, and the "Rise and Fall"' (1999) 79(2) Boston University Law Review 263, 268.

2.2. The Effect of the Duty to Provide Pre- Contractual Information on the Freedom of Contract in English Law

Party autonomy is defined as “an ideal of self- creation, of people exerting control over their destiny, an autonomous life consists in the pursuit of freely chosen activities, goal and relationships”.¹¹¹ The idea is related to the existence of enough options before the party to choose.¹¹² In the legal concept, autonomy is the entitlement of the parties “in making the law governing their relationships and dealings”.¹¹³ In the area of contract, the idea is transformed to the freedom of contract theory. Some jurists consider the latter concept as an ethical justification of the former.¹¹⁴ This principle is still in place in the English law of contract.¹¹⁵

In effect, the freedom of contract gives the contracting parties different freedoms: one to contract which may be termed “positive liberty”, which means they freely create rights and undertake obligations, and a second freedom *not* to contract “passive liberty”, which means their wills are protected from intervention from whatever source, the law, the other party, or a third party.¹¹⁶

When the freedom of contract is shaped by the availability of choices and information before the parties,¹¹⁷ the effect will be different depending on the positions of the parties and whether the contract is a standard contract, as follows;

¹¹¹ Dori Kimel, 'Neutrality Autonomy, and Freedom of Contract' (2001) 21(3) Oxford Journal of Legal Studies 273, 482.

¹¹² Atiyah (n 107) 187.

¹¹³ Harold C. Havighurst, 'Limitations upon Freedom of Contract' (1979) 1979(1) Arizona State Law Journal 167, 167.

¹¹⁴ Banks McDowell, 'Party Autonomy in Contract Remedies' (1977) 57(3) Boston University Law Review 429, 429.

¹¹⁵ Patrick S. Atiyah sated, in *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford 1979) 256- 323, that from 1770 to 1870, the spread of individualism and political economy approach had contributed to securing the freedom of contract doctrine in place firmly. Such prevalent approach was reflected in some English cases such as *Printing and Numerical Registering Co v Sampson* (1874-75) L.R. 19 Eq. 62, at 465; *Esso Petroleum Co v Harper's Garage (stourport) Ltd* ([1967] 2 W.L.R. 871, at 306.

¹¹⁶ Nili Cohen, 'Pre-contractual Duties: Two Freedoms and the Contract to Negotiate' in Jack Beatson and Daniel Friedman (ed), *Good Faith and Fault in Contract Law* (Oxford University Press, 2012) 2.

¹¹⁷ Franklin (n 3) 561; Scott R. Peppet, 'Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts' (2012) 59(3) UCLA law Review 676, 678.

2.2.1. When Positions of the Contracting Parties are taken into Account

Firstly, where both contracting parties are businesses or consumers, they have relatively equal choices and equal access to information and so both contracting parties have equal abilities to find information if they make the same effort.¹¹⁸ In this way, there is no need for a duty to provide information.

When contracting parties have the same identity, as consumers or traders, the effect of the prior information appears to be material on the freedom of the party who is required by information. In any case, requiring a party to provide information affects the positive freedom (liberty) of that party. This is because he has involuntarily undertaken the obligation to provide information while the contract has not yet been made. Also, imposition of the information requirements upon one contracting party will contradict the rationale behind not having these requirements in the business environment. In such an environment, leaving the contracting parties to negotiate *freely* at length helps them to explore more information before entering into the contract, and it ultimately helps them to reach a better bargain. Thus, every contracting party is required to work for his own interest on the light of his wants and desires, those are assumingly known to him or could easily be known. In such way, each party will be aware enough of what he precisely needs from his counterpart. Furthermore, such requirement causes practical problems since it is hard to envisage what types of information need to be disclosed in every particular case.¹¹⁹

In certain cases relevant to the freedom of contract, the English court supported the freedom of contract by stressing that contracting parties are, indeed, disputing about a business contract. In the *Esso Petroleum* case, for instance, it was held that; “The law recognises that if business contracts are fairly made by parties who are on equal terms such parties should know their business best”.¹²⁰

Secondly, where the contracting parties have different identities, they are more likely to have unequal access to information resulting in information asymmetry. This is usually the case in business to consumer contracts. Inequality is not about whatever degree of inequality may exist. It is rather about existence of a considerable imbalance between the contracting parties in terms of information. A considerable imbalance of information is

¹¹⁸ Franklin (n 3) 566.

¹¹⁹ *ibid*, 561.

¹²⁰ *Esso Petroleum Co v Harper's Garage (stourport) Ltd* [1967] 2 W.L.R. 871, at 306.

likely to be in every contract where a party is a consumer and the other one is a trader. This does not automatically suggest that contracting parties of different identities “business to consumer” always have unequal access to information. For example, in the *Multiservice*¹²¹ case the contract was a business to consumer contract but both parties were of equal access to information at the time when the contract was made. Therefore, the court enforced the contract.

If the matter is analysed from the consumer’s perspective, it will be argued that requiring the other party to provide information enhances the freedom of the consumer.¹²² This is because the consumer cannot *freely* enter into the contract without sufficient information. If he decided, for instance, to enter into a contract without having enough information, he would then be forced to perform obligations that are contrary to his passive liberty. This suggests that the party cannot accurately anticipate consequences of his contractual behaviour if he has insufficient information to consider prior to the conclusion of the contract. In support of this argument Oren Bar Gill writes;

The force of the freedom of contract argument, however, is significantly reduced when one (or both) of the parties to the contract holds inaccurate perceptions of the future. The freedom of contract paradigm is based on the presumption that contracting parties correctly anticipate their future actions and thus the future consequences of the contract they have signed. Without an accurate perception of the future, freedom of contract cannot defend future-oriented contracts.¹²³

If the matter is analysed from the trader’s perspective, the idea is still against his freedom. However, this restriction upon the freedom of contract may appear justifiable if some facts are taken into consideration. Foremost, does maximizing the freedom of contract necessarily suggest more freedom, and minimizing it suggest less freedom? The answer to this question does not always have to be “yes” precisely where freedom of others is in

¹²¹ It was held that; “The court might assume that an unfair advantage had been taken of the borrower if there were an unusual or unreasonable stipulation, but that depended on the facts, that the Swiss franc uplift was not a premium and the parties were of equal bargaining power so that, while the terms may have been unreasonable, they were not unfair, oppressive or morally reprehensible and the court would not intervene to relieve the plaintiffs from performance of the terms of the mortgage”. *Multiservice Bookbinding Ltd. and Others v Marden* [1976 M. No. 1502] [1979] Ch. 84, at 85.

¹²² Whittaker (n 42) 52; Franklin (n 3) 565.

¹²³ Oren Bar-Gil, 'Seduction by Plastic' (2004) 98(4) Northwestern University Law Review 1373, 1415.

question.¹²⁴ To justify this argument, it is said that personal autonomy “freedom of contract” does not have value unless it is exercised “in pursuit of good”. Accordingly, the freedom would only have value when it is exercised “in the pursuit of valuable relations and activities”.¹²⁵ Tomas reaches the same conclusion when he states;

We shall see that freedom of contract, freedom in all the forms of doing what one will with one’s own, is valuable only as a means to an end. That end is what I call freedom in the positive sense....No one has a right to do what he will with his own in such a way as to contravene this end [the positive sense]. It is only through the guarantee which society gives him that he has property at all, or strictly speaking any right to his possession.¹²⁶

This suggests that freedom is not of any value if it is used in “the pursuit of exploitive relations”, such as in the case of most business to consumer contracts. In this model, it is justified to see, on the one hand, powerful members in the society having less freedom of contract, and weaker members, on the other hand, having greater freedom of contract.¹²⁷ Protecting the weaker party “the consumer” has equal importance, if not more, to the freedom of the powerful party in the policies of today’s legislation.¹²⁸ Close to this conclusion, Willett claims that the dichotomy is between “ethical positions” which allow intervention in the relationship to achieve fairness, and ethical positions that support “freedom of contract”. He concluded that when a contract is a business to consumer contract, more focus is on achieving fairness rather than freedom of contract.¹²⁹

Further analysis questions whether the idea of an absolute freedom of contract still exists in the modern English contract law.¹³⁰ In the nineteenth century, English law started to put

¹²⁴ Pettit (n 110) 267.

¹²⁵ Kimel (n 111) 487.

¹²⁶ Thomas Hill Green and R. L. Nettleship, *Lecture on Liberal Legislation and Freedom of Contract* (Cambridge University Press, 2011) 372.

¹²⁷ Pettit (n 110) 297.

¹²⁸ Ton Hartlief, 'Freedom and Protection in Contemporary Contract Law' (2004) 27(3) *Journal of Consumer Policy* 253, 262; Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) *Journal of Law and Society* 349, 355.

¹²⁹ Willett (n 4) 184, 185, and 190.

¹³⁰ In 1976, Waddams wrote; “Freedom of contract emphasises the need for stability, certainty, and predictability. However, important as these values are, they are not absolute, and there comes a point where they “face a serious challenge”. Against them must be set the value of protecting the weak, the foolish, and the thoughtless from imposition and oppression”. See, S. M. Waddams, 'Unconscionability in Contracts' (1976) 39(4) *The Modern Law Review* 369, 369.

restrictions on the freedom of contract for multiple purposes.¹³¹ In some cases, the law recognized intervention to protect public interest, and in some other cases to protect contracting parties in general or from each other.¹³²

In Common Law, the doctrine of inequality of bargaining power and unconscionable bargains has developed. Accordingly, the English courts have intervened and refused the enforceability of contracts against inequality of bargaining power in favour of the weaker party.¹³³ In the *Lloyds Bank* case, the English court decided to relieve a party from the enforcement of the contract due to the existence of inequality of bargaining power between the parties. This fact is explicitly mentioned in the quotation of Lord Denning which says;

They rest on "inequality of bargaining power". By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.¹³⁴

In Statutory Law, prohibition of unfair terms in consumers' contracts is an example of the intervention made by legislation for the benefit of the consumer. This principle was first implemented into the UCTA 1977.¹³⁵ In 2015, provisions of unfair terms in consumers'

¹³¹ Atiyah described the period from 1870 to 1980 as "period of a gradual decline in belief in freedom of contract". He addressed three main reasons behind giving such description; firstly, the emergence of standard contracts; secondly, the declining role of free choice; thirdly, the growth of consumer protection. Atiyah, *An Introduction to the Law of Contract* (n 107) 178- 188; Linda Mulcahy and John Tilloston, *Contract Law in Perspective* (Butterworths, London 1981) 108.

¹³² Maria Rosaria Marella, 'The Old and the New Limits to Freedom of Contract in Europe' (2006) 2(2) *European Review of Contract Law* 257, 258; David P. Weber, '*Restricting the Freedom of Contract: A Fundamental Prohibition*' (2013) 6(1) *Yale Human Rights and Development Law Journal* 51, 64.

¹³³ Waddams (n 130) 390.

¹³⁴ *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326, at 339; Philip Slayton, 'The Unequal Bargain Doctrine: Lord Denning in *Lloyds Bank v. Bundy*' (1976) 22 *McGill Law Journal* 94, 94- 109; S. Greenfield and G. Osborn, 'Unconscionability and Contract: The Creeping Shoots of *Bundy*' (1992) 7 *The Denning Law Journal* 65, 65- 74; Mel Kenny and James Devenney, *Unconscionability in European Private Financial Transactions; Protecting the Vulnerable* (Cambridge University Press, 2010) 340-400; Ewan Meckendrick, *Contract Law* (Sixth edn Palgrave Macmillan Law Masters, 2014) 369- 370; W. T. Major, *Casebook on Contract Law* (FT Prentice Hall, 1990) 179- 182.

¹³⁵ The UCTA 1977, Section 3.

contracts were transferred to the CRA 2015.¹³⁶ Accordingly, a party to a contract is prevented from including certain clauses to the agreement with the consumer, if such clauses possibly exclude or restrict the liability.¹³⁷ Otherwise, such clauses would lead to a level of unreasonableness in the contract.¹³⁸

Another example of the statutory intervention is the duty to provide pre-contractual information within consumer legislation albeit in a different way. Whilst, the CRA 2015 affects the positive freedom of the party because it requires him not to include exclusion clauses into the contract, the duty to provide pre –contractual information affects the passive freedom of the party because it requires him to provide information. In both cases, fairness, equality, and rebalancing the contract in favour of the weak party (the consumer) are intended.¹³⁹

2.2.2. When the Contract is a Standard Contract

It is believed that most electronic contracts are considered as standard contracts.¹⁴⁰ In these contracts suppliers have the superior position to impose one-sided terms.¹⁴¹ Judge Seymour defines standard terms in the *Hadley Design* case as;

That the relevant terms should exist in written form prior to the possibility of the making of the relevant agreement arising, thus being “written “, and they should be intended to be adopted more or less automatically in all transactions of a particular type without any significant opportunity for negotiation, thus being “standard”.¹⁴²

¹³⁶ The CRA 2015, Part 2, Sections 61-76.

¹³⁷ The CRA 2015, Schedule 2, Part 1, Section 63(1);

¹³⁸ *Mitchell (Chesterhall) Ltd. Respondents v Finney Lock Seeds Ltd*, [1983] 3 W.L.R. at 163.

¹³⁹ Reshma Korde, 'Good Faith and Freedom of Contract' (2000) 24 UCL Jurisprudence Review 142,142-146.

¹⁴⁰ Barral (n 2) 617; McClafferty (n 72) 89; Hossenin Kaviar, 'Consumer Protection in Electronic Contracts' (2011) 2(2) international Arab journal of e- Technology 96, 98.

¹⁴¹ Stephanie Drotar, 'Breaking "Too Darn Bad": Restoring the Balance between Freedom of Contract and Consumer Protection' (2014) 59(15) New York Law School Law Review 603, 604.

¹⁴² *Hadley Design Associates Ltd v Westminster City Council* [2003] EWHC 1617 (TCC); [2004] T.C.L.R. 1; [2004] Masons C.L.R. 3, at 78. See also, *African Export-Import Bank and others v Shebah Exploration and Production Co Ltd and others* [2017] EWCA Civ 845, at 21 – 27.

This explanation is almost relevant to all distance contracts where the ability of consumers to respond *freely* to such contracts is affected.¹⁴³ In the *Océano Grupo* case the CJEU came to this conclusion when it held,

Based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.¹⁴⁴

Despite the fact that the consumer is still able to *freely* react to the standardised forms, his choice is limited to either accept the form as it is or reject it as it is without having the capability to negotiate with the author.¹⁴⁵ In the *Yuanda* case, this was clearly stated when the court held that; “The conditions have to be standard in that they are terms which the company in question uses for all, or nearly all, of its contracts of a particular type without alteration”.¹⁴⁶

This superiority over consumers creates the monopoly power which the author of standard forms has. Nothing changes even where a number of competitors are in the market as they roughly use the same clauses in their forms.¹⁴⁷ This suggests that when all traders offer the same terms, the result will be the same.¹⁴⁸ This disadvantage to the consumer was also reflected in the decision made by the CJEU in the *Suisse Atlantique* case when Lord Reid stated;

Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the

¹⁴³ Drotar (n 141) 613; Howells and Weatherill (n 106)19.

¹⁴⁴ *Océano Grupo Editorial SA v Murciano Quintero* [2002] 1 C.M.L.R. 43, at 1255.

¹⁴⁵ Atiyah, *An Introduction to the Law of Contract* (n 107) 187; Mulcahy and Tillotson (n 131) 108.

¹⁴⁶ *Yuanda (UK) Co Ltd v WW Gear Construction Ltd* [2011] BusLR360, at 21.

¹⁴⁷ Friedrich Kessler, 'Contracts of Adhesion- Some Thoughts about Freedom of Contract' (1943) 43(5) *Columbia Law Review* 629, 632.

¹⁴⁸ Peter Diamond, 'A Model of Price Adjustment' (1971) 3(2) *Journal of Economic Theory* 156, 159- 160.

same. Freedom to contract must surely imply some choice or room for bargaining.¹⁴⁹

Thus, to raise the freedom of consumers, and avoid the traders from imposing one-sided terms, it is necessary to provide consumers with sufficient information. As Peppet pointed out; “If consumers have sufficient information to compare terms across different suppliers' contracts, suppliers will have reason to provide efficient contracts without unreasonable terms”.¹⁵⁰

To summarise, when distance contracts are considered standard contracts, there is a need for a duty to provide pre- contractual information to ensure that a *free* decision is made by the consumer.

2.3. The Effect of the Duty to Provide Pre- Contractual Information on the Freedom of Contract “Sultan Al-Irada” in Iraqi Law

Iraqi law also recognises freedom of contract as a cornerstone of contract law. Civil laws, including the Iraqi Civil Code, have received the principle of party autonomy “Sultan Al-Irada” from the philosophy of individualism which was predominant in the seventeenth century onwards.¹⁵¹ In Iraqi laws, party autonomy is understood in similar terms to the understanding received by English law. It generally suggests that all individuals are born *free* and equal in rights and duties. In consequence, they are allowed to *freely* create whatever transactions they wish with keeping rights of others unaffected. However, means of social compulsion through legal intervention has developed, albeit narrowed down to cases of public order and public policy.¹⁵²

¹⁴⁹ *Suisse Atlantique Société d'Armement Maritime S.A. Appellants v N.V. Rotterdamsche Kolen Centrale Respondents* [1967] 1 A.C. 361, at 406.

¹⁵⁰ Peppet (n 117) 710.

¹⁵¹ Al-Sanhory comments; “In the seventeenth century the principle of party autonomy (Autonomie de la Volonte) became steady, the influence of religion had weakened and replaced by the spread of political, economic, and philosophical theories, which are in overall saturated with the spirit of individualism, to reach the peak in eightieth century, and in such theories it was believed that there is a natural law based on the freedom of individual and independence of his\ her will in various economic and social regimes”. See, Abdul- Razaq Ahmed AL-Sanhory, *AL-Wasset Fi Sharh AL-Qanon AL-Madani AL-Jadid, AL-Mujalad AL-Thani, Nathariat AL-Iltizam Be Wajh Am, Masadr AL-Iltizam* (3rd edn Manshorat AL-Halabi AL-Hquqia, Beirut 2011) 187.

¹⁵² AL-Hakim, AL- Bakry, and AL-Basheer (n 100) 20; Mohammed Bo Kamash. 'The Authority of the Judge to Amend the Contract in the Algeria Law and Islamic Jurisprudence' (PhD Thesis University of AL-Haj L-Kther 2012) 3.

In the area of contract, party autonomy is transformed to the idea that the contract is a voluntary disposal. Therefore, both negotiators are supposed to be the best protectors of their own interests.¹⁵³ In that way, all obligations ought to be built upon the free will of the contracting parties. In contrast, restrictions on such freedom have only to be accepted in cases of public policy or public order.¹⁵⁴ This concept is understood from the definition of the contract under Article 73 of Iraqi Civil Code which states; “A contract is the union of an offer made by a contracting party with the acceptance of another party in a manner which establishes the effect thereof in the object of contract”.

Accordingly, all obligations have to be referred back to the free will, in which a party to a contract cannot be obliged to perform an obligation unless the will has *freely* been directed to create it, regardless of whether the direction of the free will has been expressed in the form of offer or acceptance.¹⁵⁵ Thus, we reach the same conclusion of the freedom of contract under English law. Briefly, before entering into a contract contracting parties are *free* to make a decision on whether to make the final contract or withdraw from the negotiation. To reach this end, there should not be any duties imposed on the parties which may affect their free will.

This sanctity given to the free will continues even after the contract is made. To this end, what is agreed between the parties, as a result of the free will, has to be literally enforced by the court without any change.¹⁵⁶ This provision is set out in Article 146 of the Iraqi Civil Code which stipulates; “Where a contract has been concluded it is legally binding and neither party may revoke or amend it except pursuant to a provision in the law or by mutual consent”. However, when the will of the parties is incomplete or unobvious in

¹⁵³ Mustafa Mussa. 'Role of Knowledge at Formation of Contractual Relationship' (PhD Thesis University of Cairo 2000) 16.

¹⁵⁴ Khlewy Anan. 'Consumer Protection Over Internet' (PhD Thesis University of Mawlod Muamary 2013) 7. Available at;

< <http://www.ummto.dz/IMG/pdf/ - --2.pdf>> accessed 24 May 2016.

¹⁵⁵ AL-Sanhory (n 151) 189; Alhusban (n 107) 65.

¹⁵⁶ AL-Hakim, AL- Bakry, and AL-Basheer (n 100) 21.

question, the Civil Code then will complete or interpret the willingness of the parties.¹⁵⁷ This may suggest that no regard is to be had to the free will.¹⁵⁸

If the law remained unchanged as it is now, it would always be open to argument that imposing any obligation, including the obligation to provide pre-contractual information, upon one of the parties before making the contract would be against the freedom of contract in the way explained supra. However, the same argument accepted under English law is relevant in here, as follows;

2.3.1. When Positions of the Contracting Parties are taken into Account

From the middle of the nineteenth century, the trend in the civil laws has been towards making more intervention in the contractual relationships.¹⁵⁹ Apparently, most of the factors that led to such interventional tendency in civil laws are, indeed, the same factors which led English law to recognise intervention.¹⁶⁰ Intervention in the form of obligation to provide information has been introduced in legislation of the civil law countries after a sharp informational imbalance was found between contracting parties in business to consumer contracts.¹⁶¹ Many reasons have contributed to create such imbalance such as emergence of industrial society, the increase of the level of complexity in the goods and services in markets, the spread of standard contracts, and emergence of distance means of communication.¹⁶² In addition to these global reasons, the spread of communism in the Middle East was another reason which led the civil laws to adopt more interventionist policy in contractual relationships.¹⁶³ As a result, a duty to provide pre-contractual information started to appear in consumer legislation in Iraq as a protection measure used to rebalance the contract in terms of information in favour of consumers.

It can be observed that, this civil law intervention is allowed only in contracts where one of the parties is a consumer: the lawmakers aim to provide the weak party with the

¹⁵⁷ Khalib Ali AL-Dawoody, *Introduction to the Science of Law* (7th edn Dar Wael, Amman 2004) 77; Abdulbaki AL- Bakry, and Mohammed AL-Basheer, *Introduction of the Study of the Law* (the Ministry of Higher Education 1982) 52.

¹⁵⁸ Mnhel Abdul ALGhani Glinder, 'The Adhesion between the Contract and the Legal System: A comparative study' (2013) 16(59) Rafidain of Law Journal 33, 35.

¹⁵⁹ Mussa (n 153) 170.

¹⁶⁰ See this Thesis, 42-45.

¹⁶¹ Awaz Dizay. 'The Duty to Provide Information at the time of contracting' (PhD Thesis University of Baghdad 2000) 42.

¹⁶² Mussa (n 153) 170- 177; Kamash (n 152) 17- 18.

¹⁶³ AL-Hakim, AL- Bakry, and AL-Basheer (n 100) 22; Kamash (n 152) 17.

information needed to make a *free* decision. This suggests that there is no need for such an intervention when both contracting parties are relatively at the same position as if they are businesses or consumers. Thus, the same argument found in the English jurisprudence about the need for the duty to provide pre-contractual information to *support* the freedom of the consumer in business to consumer contracts, can also be accepted in the Iraqi jurisprudence.¹⁶⁴

As with English law, therefore, the idea of an absolute ‘pure’ freedom of contract does not exist under the Iraqi Civil Code. Further evidence of this context can be found through other forms of restriction too, which are compatible with consumer protection. For example, Article 146(2) allows the court to reduce the contractual obligation of one of the parties to a reasonable limit if such obligation has become onerous as a result of unpredictable events of a general nature.¹⁶⁵ This restriction affects freedom of contract post-contract. Thus, both jurisdictions balance freedom of contract with consumer protection imperatives, which might be seen as either curtailing it or actively enhancing it through specific measures for consumers.

2.3.2. When the Contract is a Standard Contract

Furthermore, as stated earlier, distance transactions are often made in a form of standard contracts, where the buyer does not have power to freely negotiate terms and conditions with the author. These conditions may include unfair terms against the weak party. Without intervention, the party has two options either to accept the offer with included terms, or reject it. For such a reason, Article 167(2) of the Civil Code allows the court to exonerate the submissive party from unfair terms which the other party may include in standard contracts.¹⁶⁶ This is similar to the provisions of unfair terms set out in the English CRA 2015.¹⁶⁷

¹⁶⁴ See this Thesis, 39- 40.

¹⁶⁵ According to Article 146(2) of the Iraqi Civil Code; “Where however as a result of exceptional and unpredictable events of a general nature the performance of the contractual obligation has not become impossible but onerous on the debtor such as will threaten him with exorbitant loss the court after balancing the interests of the parties may if it would be equitable reduce the onerous obligation to a reasonable limit; every agreement otherwise shall be null and void”.

¹⁶⁶ According to Article 167(2) the Iraqi Civil Code; “With a contract of adhesion which has been concluded which contained arbitrary [unfair] conditions the court may amend or relieve the adhering party of the obligation to perform these conditions in accordance with the principles of equity, every agreement otherwise will be null and void”.

¹⁶⁷ See this Thesis, 42-43.

In summary, the duty to provide pre-contractual information is a separate, and well-justified, restriction on freedom of contract imposed by the law. It is separate because it cannot be grounded upon either Article 146(2) or Article 167(2). As noted, Article 146(2) deals with cases where unpredictable events make certain obligations onerous, but the information requirements are, of course, permanently needed. On the other hand, Article 167(2) may have the same ground of the information requirements since intervention in both cases is allowed at pre-contract phase. However, the Article cannot be extended to the information requirements as the power given to the court is to cease the effects of unfair terms, without going any further to add new commitments.¹⁶⁸

2.4. The Information Required by English Law (the CCIACRs 2013 and the ECRs 2002)

According to Regulation 13(1) of the CCIACRs 2013; “Before the consumer is bound by a distance contract, the trader (a) must give or make available to the consumer the information listed in Schedule 2”. Schedule 2, as shown in Section 2.4.2, includes a longer and more elaborate list of information compared to the list given by the DSRs 2000, which stems from the fact that the CRD 2011 directs full harmonisation to member states.¹⁶⁹ As a result, member states have transposed the information listed in the CRD 2011 literally into their national legislation without any change (known as ‘copy out technique’).

In this Section, the study evaluates the extent of the information laid down in Schedule 2. Then, the study moves to discuss the information and its function and effectiveness in distance contracts;

2.4.1. The Extent of the Information given in Schedule 2 and Possible Criticism

The length of information required may be subject to some criticism and should be critiqued from two perspectives: function and effectiveness.

¹⁶⁸ Thannon Younis Salih and Ibrahim Intar, 'The Legislative Regulation of Contracts of Adhesion in the Iraqi Civil Law' (2010) 2(5) Journal of Tikrit University for Legal and Political Science 38, 51- 57.

¹⁶⁹ According to Article 4 of the CRD 2011; “Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive”.

Firstly, it is arguable that consumer legislation requiring elaborate information to be provided, together with cancellation rights, provides a greater level of protection to distance consumers than those who enter into face-to-face contracts, putting distance consumers in a better position.¹⁷⁰

However, this criticism can be refuted by White because the information requirements are no more than “confidence building measures”, aiming to address “the different environment that surrounds distance sales”.¹⁷¹ To justify this, it is said that face-to-face consumers, at the very least, have a certain amount of information about traders and their businesses. With their physical presence they are either able to examine goods and question traders about the quality of goods and their fitness for the purpose behind the contract. Distance consumers, however, may have very little information about the identities of traders and locations of their businesses. Furthermore, they do not have physical ability to assess goods.¹⁷²

This suggests that giving an exhaustive description of the whole transaction is the only mechanism which could compensate such informational imbalance between contracting parties, which would not have happened at that level if the parties were able to meet physically.¹⁷³

However, the main criticism that can be more accurately directed against the extent of information is rather that it may render the distance consumer unable to understand the information. The matter is not always about availability of information itself but about the ability of consumers to grasp it. The existence of a large amount of information does not always ensure an informed purchasing discussion. Although, it may be counter argued that additional information can never harm consumers since irrelevant and ineffective information will be ignored at the end.¹⁷⁴

¹⁷⁰ Kevin M Rogers, 'The Changes to the Distance Selling Regulations – Are they likely to Rock the Boat?' (2005) 3(2) *Hertfordshire Law Journal* 45, 46.

¹⁷¹ White (n 59) 233.

¹⁷² Luzak 'Online Consumer Contracts' (n 13) 384; Poulter, Henderson and McMenemy (n 65) 3.

¹⁷³ White (n 59) 233.

¹⁷⁴ See this argument in, Great Britain. Department for Business, Enterprise and Regulatory Reform, Great Britain. Better Regulation Executive, National Consumer Council, 'Warning: Too Much Information Can Harm: an Interim Report by the Better Regulation Executive and National Consumer Council on Maximising the Positive Impact of Regulated Information for Consumers and Markets' Better Regulation Executive, Department for Business, Enterprise & Regulatory Reform URN 07/1553. Available at:

However, Daniel Kahneman refutes such an argument when he states; “[consumers] are influenced by all sorts of superficial things, and they procrastinate and do not read the small print. You have got to create situations that allow them to make better decisions for themselves”.¹⁷⁵ For sure, there is no guarantee that consumers are able to process the information properly. It may lead them sometimes to making wrong decisions.¹⁷⁶ Therefore, what the consumer needs is not perfect information, it is rather adequate information to enable effective decision making, Ramsay argues.¹⁷⁷ Similarly, Helberger points out;

More information on consumers will do nothing to further their interest, nor will it create incentives for traders to provide consumers with the best, safest, and most innovative and user-friendly products and services. On the contrary, too much information can actually confuse or distract consumers, as well as be costly and cause a competitive disadvantage for traders.¹⁷⁸

This concern was raised even before the full harmonisation policy of the CRD 2011 took place. For instance, Winn and Haubold commented on this issue by saying; “More concern could have been given to information duties themselves of which the electronic commerce directive and the distance selling directive make an almost inflationary use, the lists of information in both directives are long and not very well harmonised”.¹⁷⁹

Furthermore, many studies have shown the negative impact of overly lengthy information on making transactional decision. For example, a research study concluded that only “affluent –well-educated middle classes consumers” are likely to make rational use of such large amount of prior information, while disadvantaged consumers are likely to confront

<<http://www.eurofinas.org/uploads/documents/policies/NCB-BRE-Report.pdf>> accessed 21 November 2016.

¹⁷⁵ Richard Thaler and Will Tucker, 'Smarter Information, Smarter Consumers' (2013) (January and February) Harvard Business Review. Available at:

<<https://hbr.org/2013/01/smarter-information-smarter-consumers>> accessed 21 November 2016.

¹⁷⁶ Martin Ebers, 'Information and Advising Requirements in the Financial Services Sector: Principles and Peculiarities in EC Law' (2004) 8(2) Electronic Journal of Comparative Law 8, 8.

¹⁷⁷ Iain Ramsay, *Consumer Protection Law and Policy, Text and Materials on Regulating Consumer Markets* (Third edn Hart Publishing Ltd, Oxford 2012) 50.

¹⁷⁸ Natali Helberger, 'Form matters: Informing Consumers Effectively' (Institute for Information Law (IViR), University of Amsterdam, 2013) 12-13. Available at:

<http://www.beuc.eu/publications/x2013_089_upa_form_matters_september_2013.pdf> accessed 11 October 2016.

¹⁷⁹ Jane Kaufman Winn, and Jens Haubold, 'Electronic Promises: Contract Law Reform and E-Commerce in a Comparative Perspective' (2002) 27(5) Entertainment Law Review 574, 577.

significant challenges in that purpose.¹⁸⁰ Millar came close to this conclusion when he found that “the average person is able to receive, process, and remember about six or seven different pieces of information at a time”.¹⁸¹ Further research suggests that consumers prefer not to read lengthy information, even if doing so would be in their interests.¹⁸² In support of this suggestion, Luzak demonstrated that most consumers prefer to read information that is written in “approachable language” and shortened.¹⁸³ Briefly, the consumer may need protection not because he has lack of knowledge, but because he is in a position where he cannot adequately process the information.¹⁸⁴

Most importantly, the court does not consider factors which may demotivate the consumer, rather than making him unable, from reading the information such as the length of information or, the manner in which the trader makes the information available. Further to this, the Law Commission of England and Wales reported that the information sent by an electronic message does not need to be read, it needs only to be available.¹⁸⁵ The English courts have also traditionally found the consumer’s failure to process information which is available is immaterial. In the *L'Estrange* case “the buyer [claimed] that at the time when she signed the order form she had not read it and knew nothing of its contents, and that the clause excluding warranties could not easily be read owing to the smallness of the print”. Nevertheless, the court held that;

As the buyer had signed the written contract, and had not been induced to do so by any misrepresentation, she was bound by the terms of the contract, and it was wholly immaterial that she had not read it and did not know its contents; and that the action failed and the sellers were entitled to judgment.¹⁸⁶

¹⁸⁰ Howells (n 128) 357.

¹⁸¹ George A Miller, 'The Magical Number Seven, Plus or Minus Two Some Limits on our Capacity for Processing Information' (1956) 101(2) *Psychological Review* 81, 81- 97.

¹⁸² Natali Helberger, 'Diversity Label: Exploring the Potential and Limits of a Transparency Approach to Media Diversity' (2011) 1 *Journal of Information Policy* 337, 356.

¹⁸³ Luzak 'Online Consumer Contracts' (n 13) 384- 385.

¹⁸⁴ Gillian K. Hadfield, Robert Howse and Michael J. Trebilcock, 'Information-Based Principles for Rethinking Consumer Protection Policy' (1998) 21(2) *Journal of Consumer Policy* 131, 145.

¹⁸⁵ Law Commission, 'Electronic Commerce: Formal Requirements in Commercial Transactions Advice from the Law Commission' Law Commission, 11. Available at: http://www.lawcom.gov.uk/wp-content/uploads/2015/09/electronic_commerce_advice.pdf accessed 23 November 2016.

¹⁸⁶ *L'Estrange v F. Graucob, Limited* [1934] 2 K.B. 394.

For this problem, Luzak has suggested that European Institutions should find a new method of information requirements on the basis of Article 6 [Information requirements] of the CRD 2011.¹⁸⁷ Overall, any step forward should aim to reduce the amount of information required at the negotiation stage.¹⁸⁸ Such reduction may happen by dividing information into pre-contractual information and post-contractual information. In such way, consumers will receive a less elaborate list of information at the negotiation stage. This would also be less time-consuming for them to digest. Furthermore, this suggestion, if adopted, could also benefit traders because it reduces costs on the process of collating information and sending them in various ways.¹⁸⁹ In this regard, Christian Twigg-Flesner and Reiner Schulze have obliquely supported the foregoing suggestion when they state;

It may be tempting to think that it is best that a consumer has much information as possible before concluding a contract [and this seems to underpin The CCIACRs 2013 approach], but that might not necessarily be the most appropriate moment. In this regard, the timing of providing information is also significant. Often, regulation aimed at providing information requires that this is done at a time when the consumer does not yet need the information. Thus an extensive catalogue of information of pre-contractual information might not be of great help to consumers if the kind of information given relates to matters which are more likely to arise during the performance of contract, or, indeed, on completing the contract.¹⁹⁰

Another suggestion would be to examine the way in which the information is to be sent. It could be better to provide or make all information available to the consumer not all at once but via two segments. One of them can include particularly significant information and the other one can include information of less significance. The first tranche of information can be provided or displayed prominently to consumers, while the second tranche can be available upon request. This solution is easy to apply in contracts concluded via websites. For example, information about price, quality of goods and services, right of cancellation,

¹⁸⁷ Luzak 'Online Consumer Contracts' (n 13) 385.

¹⁸⁸ Marco Loos, *Review of the European Consumer Acquis* (Sellier European Law Publisher, Munich 2008) 47, 48.

¹⁸⁹ Thomas Wilhelmsson and Christian Twigg-Flesner, 'Pre- Contractual Information Duties in the Acquis Communautaire' (2006) 2 *European Review of Contract Law* 441, 452-454.

¹⁹⁰ Christian Twigg-Flesner, Reiner Schulze, 'Protection Rational Choice: Information and the Right of Withdrawal' in Geraint G. Howells, I. Ramsay, Thomas Wilhelmsson (ed), *Handbook of Research on International Consumer Law* (Edward Elgar Publishing Limited, Cheltenham-UK, UK 2010) 144.

should prominently be available to consumers at first visit, while the remaining information could be organized under a “separate button” in which the consumer can reach via clicking that button.¹⁹¹ In the area of financial services, Ebers has made the same suggestion under the concept “multi-level system”, in which a party to a transaction should only be bound to provide standard information “liabilities, financial position, profits and losses..etc” at the negotiation stage, whereas other information should be required after the contract is made.¹⁹²

These suggestions, however, are not the technique adopted by the CCIACRs 2013 which oblige the trader to provide all the information listed in schedule 2 and to do so before the contract is made. According to Regulation 13(1); “Before the consumer is bound by a distance contract, the trader (a) must give or make available to the consumer the information listed in Schedule 2...”. He is further required to provide all the information once again after the conclusion of the contract for the purpose of confirmation. According to Regulation 16 (1, and 2) the trader must give the consumer confirmation of the contract on a durable medium. The confirmation must include all the information referred to in schedule 2 unless the trader has already provided that information to the consumer on a durable medium prior to the conclusion of the distance contract.

Thus, if the trader does not preliminarily provide the specified information on a durable medium, as he is likely not to, he will have to do so after the contract is made. Consequently, a huge amount of information is to be sent at once. This may negatively affect the ability of consumer to process it, undermining its effectiveness.

2.4.2. The Information given in Schedule 2 and Possible Changes

Many pieces of the information listed in Schedule 2 were required by the DSRs 2000¹⁹³ and are currently required by other provisions.¹⁹⁴ Most of them, therefore, are already familiar to traders except those pieces regarding digital content.¹⁹⁵ Thus, it does not cause any significant problem to traders as a reasonable trader will probably be happy to provide

¹⁹¹ Helberger 'Form matters: informing consumers effectively' (n 178) 24.

¹⁹² Ebers (n 176) 9-10; Serrat (n 18) 60; Wilhelmsson and Twigg- Flesner (n 189) 453.

¹⁹³ The DSRs 2000, Regulation 7.

¹⁹⁴ The ECRs 2002, Regulation 6, 7, 8, 9(1); the CUTRS 2008, Regulation 5(4).

¹⁹⁵ The CCIACRs 2013, Schedule 2, Paragraphs (v and w).

it. Generally, Schedule 2 is designed to primarily support consumer's confidence in a distance environment. The information listed in Schedule 2 is stated in the footnote.¹⁹⁶

Further to Schedule 2, Regulation 15 of the CCIACRs 2013 requires the trader to provide another two pieces of information when a distance contract is made over the phone which are; (1) "where applicable, the identity of the person on whose behalf the trader makes the call, and (2) the commercial purpose of the call".

¹⁹⁶ Schedule 2 includes; (a) the main characteristics of the goods or services, to the extent appropriate to the medium of communication and to the goods or services; (b) the identity of the trader (such as the trader's trading name); (c) the geographical address at which the trader is established and, where available, the trader's telephone number, fax number and e-mail address, to enable the consumer to contact the trader quickly and communicate efficiently; (d) where the trader is acting on behalf of another trader, the geographical address and identity of that other trader; (e) if different from the address provided in accordance with paragraph (c), the geographical address of the place of business of the trader, and, where the trader acts on behalf of another trader, the geographical address of the place of business of that other trader, where the consumer can address any complaints; (f) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, (g) where applicable, all additional delivery charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable; (h) in the case of a contract of indeterminate duration or a contract containing a subscription, the total costs per billing period or (where such contracts are charged at a fixed rate) the total monthly costs; (i) the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate; (j) the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver the goods or to perform the services; (k) where applicable, the trader's complaint handling policy; (l) where a right to cancel exists, the conditions, time limit and procedures for exercising that right in accordance with regulations 27 to 38; (m) where applicable, that the consumer will have to bear the cost of returning the goods in case of cancellation and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods; (n) that, if the consumer exercises the right to cancel after having made a request in accordance with regulation 36(1), the consumer is to be liable to pay the trader reasonable costs in accordance with regulation 36(4); (o) where under regulation 28, 36 or 37 there is no right to cancel or the right to cancel may be lost, the information that the consumer will not benefit from a right to cancel, or the circumstances under which the consumer loses the right to cancel; (p) in the case of a sales contract, a reminder that the trader is under a legal duty to supply goods that are in conformity with the contract; (q) where applicable, the existence and the conditions of after-sale customer assistance, aftersales services and commercial guarantees; (r) the existence of relevant codes of conduct, as defined in regulation 5(3)(b) of the Consumer Protection from Unfair Trading Regulations 2008, and how copies of them can be obtained, where applicable; (s) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract; (t) where applicable, the minimum duration of the consumer's obligations under the contract; (u) where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader; (v) where applicable, the functionality, including applicable technical protection measures, of digital content; (w) where applicable, any relevant compatibility of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of; (x) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

Notably, some of this information is already provided by the ECRs 2002 in cases where a distance contract is made by electronic means of distance communication.¹⁹⁷ However, Regulation 9(1) of the ECRs 2002 adds to Schedule 2 some other important pieces of information in the area of electronic contracts, which are;

- (a) The different technical steps to follow to conclude the contract;
- (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
- (c) the technical means for identifying and correcting input errors prior to the placing of the order;
- and (d) the languages offered for the conclusion of the contract.

Furthermore, Regulation 9(2) of the ECRs 2002 requires a service provider to give information on how codes of conduct, which he is required to indicate under the regulation, can be consulted electronically. In addition, some specific information is added by Regulation 6 of the ECRs 2002 in certain cases of electronic contracts. For example, Under Paragraph (d) a person providing an information society service is required to give “details of the register in which the service provider is entered and his registration number, or equivalent means of identification in that register” in the case where “the service provider is registered in a trade or similar register available to the public”.¹⁹⁸ Under Paragraph (e) “where the provision of the service is subject to an authorisation scheme”, the service provider has to provide “the particulars of the relevant supervisory authority”. Under Paragraph (f) “where the service provider exercises a regulated profession”, the service provider has to provide (i) the details of any professional body or similar institution with which the service provider is registered; (ii) his professional title and the member State where that title has been granted; (iii) a reference to the professional rules applicable to the service provider in the member State of establishment and the means to access them”. Finally, under Paragraph (g), “where the service provider undertakes an activity”, the service provider has to provide the identification number referred to in Article 22(1) of the sixth Council Directive^{77/ 388/EEC of 17 May 1977}”.

¹⁹⁷ The ECRs 2002, Regulation 6(1) states; “a. the name of the service provider, b. the geographic address of the service provider, c. the details of the service provider, including his electronic mail address”.

¹⁹⁸ Regulation 2(1) of the ECRs 2002 defines “information society services” as “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service”.

However, the question is, does Schedule 2 add anything new to the information which was required under the pre-June Regulations (the DSRs 2000)? Whether there has been any issue under Schedule 2 which may need further consideration? To answer these questions, in the following subsections the study analyses those pieces of information which adds something new and those which might be subject to a further improvement, as below;

2.4.2.1. Information Regarding Inclusion of Taxes in Sales Prices, and Additional Charges and Costs

The important matter of whether information about total prices of goods and services should include all taxes is to some extent rectified by the CCIACRs 2013. Such matter was the major practical problem which could confront traders with prior information under the DSRs 2000.¹⁹⁹ This is because traders were required to calculate the “local” taxes of wherever consumers come from. This is not an easy task to accomplish in practice.²⁰⁰ Under the CCIACRs 2013, however, a level of improvement has shown at this point. Although, the CCIACRs 2013 still require the inclusion of taxes within the price information, if “the nature of the goods or services is such that the price cannot reasonably be calculated in advance”, the trader is free from this requirement. In this case, he is alternatively required to inform consumers of ‘the manner in which the price is to be calculated’.²⁰¹ The new provision is not unfamiliar to English law because the CUTRS 2008 introduces the same provision where they defined materiality of information which satisfies conditions of misleading omission.²⁰²

Nevertheless, it is unknown whether an objective or subjective criteria is to be followed to identify the nature of goods and services in which traders do not have the ability to calculate their total prices in advance. This uncertainty leaves room for the trader to escape from giving price with inclusion of local taxes under the pretext that the price cannot be calculated in advance. In this regard, the ECRs 2002 have adopted a more workable provision for traders in Regulation 6(2) which does not, in principle, require traders to

¹⁹⁹ The DSRs 2000, Regulation 7(a) (iii).

²⁰⁰ Donnelly, and White (n 62) 215-216; Poulter, Henderson and McMenemy (n 65) 4, 5.

²⁰¹ The CCIACRs 2013, Schedule 2, Paragraph (f); the CUTRS 2008, Regulation 5(1), (2) (a), and 5 (4) (d) “5 (1) A commercial practice is a misleading action.... if it contains false information and is therefore untruthful in relation.... to the price or the manner in which the price is calculated”.

²⁰² According to Regulation 6(4) of the CUTRS 2008; “Where a commercial practice is an invitation to purchase, the following information will be material if not already apparent from the context..... (d) Either (i) the price, including any taxes; or (ii) where the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated”.

include taxes within price information; but rather requires them to inform consumers of as to whether prices are inclusive of taxes or not.²⁰³

Regarding additional charges and costs, the CCIACRs 2013 aim to protect distance consumers against hidden charges and costs in contracts made online.²⁰⁴ Regulation 7(1) (a) (iv) of the DSRs 2000 required the supplier to inform the consumer of “delivery costs where appropriate”, but no reference was made to additional charges which the consumer might have incurred in that regard. Paragraph (g) of Schedule 2 of the CCIACRs 2013 has put an end to that possible argument by requiring the trader, where applicable, to inform the consumer of “all additional delivery charges and any other costs”. If those charges cannot reasonably be calculated in advance, then the Paragraph obliges the trader to inform the consumer of the “fact that such additional charges may be payable”.

However, there is still room for criticism. The new regulations require the trader to provide price information in addition to any additional charges. Nevertheless, they do not require him to include additional charges within the price information, so that the consumer would know the total price payable without doing any calculations. An obvious example is the price of airline tickets which is usually split into a series of different charges, in which the consumer knows the total price only at the end of booking process.²⁰⁵ On this matter, the European Commission conducted a survey in 2008 on a number of airlines websites and revealed that dividing the total price into different components is one of the main problems for e-consumers.²⁰⁶ Based on this survey, the European Commission took action in Article 23(1) of the EU Regulations (1008/2008).²⁰⁷ Accordingly, the final price to be paid shall be

²⁰³ The ECRs 2002, Regulation 6(2).

²⁰⁴ European Commission, 'New EU Rules on Consumer Rights to Enter into Force' Press Release (Brussels 10 October) MEMO/11/675 1. Available at: http://ec.europa.eu/justice/consumer-marketing/rights-contracts/directive/index_en.htm accessed 12 September 2016.

²⁰⁵ Riefa 'The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?' (n 69) 37.

²⁰⁶ The European Commission, 'One in Three Airline Sites Breaks Consumer Laws' Out-law.com, Legal News and Guidance from Pinsent Masons available at: <http://www.out-law.com/page-9113> accessed 13 October 2016.

²⁰⁷ According to Article 23 (1) of the EU Regulations (1008/2008) on Common Rules for the Operation of Air Services in the Community; “Air fares and air rates available to the general public shall include the applicable conditions when offered or published in any form, including on the Internet, for air services from an airport located in the territory of a Member State to which the Treaty applies. The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication”.

indicated at all times. Later, the CJEU, in two occasions based on Article 23(1), held that; “The final price to be paid must be indicated whenever the prices of air services are shown, including when they are shown for the first time”.²⁰⁸

This provision, ultimately, is only relevant to the UK’s airline companies.²⁰⁹ Thus, the existence of similar provision in the CCIACRs 2013 would make the commitment relevant to all distance transactions.

2.4.2.2. Information Regarding the Right of Cancellation

There is also a level of improvement from the DSRs 2000 under this heading. Under Regulation 7(1) of the DSRs 2000, traders were required to inform consumers of “the existence of a right of cancellation except in the cases referred to in Regulation 13”. Regulation 13 addressed the cases where the consumer would not be entitled to the right of cancellation. This provision gave traders an entire freedom not to inform consumers of the absence “non- existence” of a right of cancellation in those cases firstly, and the expiration dates of the cancellation period secondly. The exception was where a contract was “for the supply of services which are performed through the use of a means of distance communication, where those services are supplied on only one occasion and are invoiced by the operator of the means of distance communication” under Regulation of 9(1). In that case, the supplier was required to inform the consumer that he was not able to cancel the contract if the performance of the services has begun.²¹⁰

In the CCIACRs 2013, however, traders are required both to fully inform consumers of the existence of a right of cancellation in all cases where such right is to be provided and to inform consumers of the non- existence of such right in all cases where such right is not available. The duty to inform consumers of “where a right to cancel exists, time limit and procedures of exercising that right”, is set out in Paragraph (1) of Schedule 2. In this case, the trader is further required under Paragraph (1)(b) of Regulation 13 to “give or make

²⁰⁸ *Air Berlin plc & Co. Luftverkehrs KG v Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband e. V.* [C-573/13, CJEU, 15 January 2015]; *Air Berlin Plc & Co Luftverkehrs KG v Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V.* (Case C-290/16) [2018] 1 C.M.L.R. 21.

²⁰⁹ Guidance on the Protection of Regional Air Access to London at: -
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266383/pso-policy-guidance.pdf> accessed 13 October 2016.

²¹⁰ The DSRs 2000, Regulation 8(3).

available to the consumer a cancellation form as set out in part B of Schedule 3”. While, under Paragraph (o) there is an obligation to inform the consumer of cases where there is no right to cancel (non- existence) or where the right to cancel may be lost. The non-existence of the right to cancel is to be in cases addressed in Regulations 28, 36, and 37 of the CCIACRs 2013.

In doing so, the CCIACRs 2013 respond to the recommendations given in 2004 by Department of Trade and Industry when it examined this particular issue within the DSRs 2000.²¹¹

2.4.2.3. Information Regarding Digital Content

For the first time the new Regulations require the traders to provide some information regarding digital content. Two pieces of information in Schedule 2 have direct reference to digital content. Paragraph (v) includes “where applicable, the functionality, including applicable technical protection measures, of digital content”. While, Paragraph (w) refers to “where applicable, any relevant compatibility of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of”. Other information about price, the quality, the right of cancellation, licensing conditions...etc are already covered by the information requirements in general as set out in Schedule 2.²¹²

The Regulations define “functionality” in Regulation 5 as it “includes region coding, restrictions incorporated for the purposes of digital rights management, and other technical restrictions”. Recital 19 of the CRD 2011 clearly defines “functionality”, and “interoperability” which is equivalent to the word “compatibility” in Paragraph (w) of Schedule 2. Accordingly;

²¹¹ Department of Trade and Industry, 'DTI Consult on Changes to Distance Selling Regulations' DTI Press Release (22nd January) P/2004/034. Available at: <http://webarchive.nationalarchives.gov.uk/20040510033427/http://dti.gov.uk/ccp/consultpdf/distselcon04.pdf> accessed 27 March 2015.

²¹² Natali Helberger, Marco Loos, Lucie Guibault, Chantal Mak, and Lodewijk Pessers, 'Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Contracts- Final Report: Comparative Analysis, Law & Economics Analysis, Assessment and Development of Recommendations for Possible Future Rules on Digital Content Contracts' Institute of for Information Law (IViR) University of Amsterdam (Amsterdam) 52.

The notion of functionality should refer to the ways in which digital content can be used, for instance for the tracking of consumer behaviour; it should also refer to the absence or presence of any technical restrictions such as protection via Digital Rights Management or region coding. The notion of relevant interoperability is meant to describe the information regarding the standard hardware and software environment with which the digital content is compatible, for instance the operating system, the necessary version and certain hardware features.

Thus, the consumer should be informed about what makes the digital content functional such as how to access digital content, the ability to use it in certain places and certain time, and the ability to make one or more copies of it for private purpose. Alongside this, he is entitled to know the interoperability of digital content as some digital content can only be used on some specific devices. For example, a DVD cannot be played without a DVD player or computer, iTunes services can only be used on iPhone devices and so on.²¹³

Some information about digital content may not be easy to provide to consumers such as the value of a film, a piece of music, game before making use of them. Some other information may relatively be easy to provide such as the length or the title of a movie.²¹⁴ However, Paragraph (W) requires the trader to deliver the information “that the trader is aware of or can reasonably be expected to have been aware of”. This is to certain extent not an easy task to accomplish. As Helberger argues;

What can reasonably be expected²¹⁵ from eBooks, MP3, apps or video streaming services is essentially the result of an intrinsic and complex interplay of technical architecture and design, licensing conditions, copyright and the usage entitlements consumers have paid for, as well as other obvious and less

²¹³ Peter Rott, 'Download of Copyright-Protected Internet Content and the Role of (Consumer) Contract Law' (2008) 31(4) *Journal of Consumer Policy* 441, 447; Marco Loos, Natali Helberger, Lucie Guibault, and Chantal Mak, 'The Regulation Digital Content Contracts in the Optional Instrument of Contract Law' (2011) 6 *European Review of Private Law* 729, 743-744.

²¹⁴ Natali Helberger, Marco Loos, Lucie Guibault, Chantal Mak, and Lodewijk Pessers, 'Digital Content Contracts for Consumers' (2012) 36(1) *Journal of Consumer Policy* 37, 47.

²¹⁵ The principle of reasonable expectation is apparent in some judicial cases, some of which are not consumer cases, but cases between small businesses such as in *Gardiner v Gray* [171 E.R. 46]. It has also been implemented into the CUTRS 2008 Regulation 2 when defines “professional diligence” as “the standard of especial skill and care which a trader may reasonably be expected to exercise towards consumers”.

obvious interests that business and advertisers might pursue when selling digital content.²¹⁶

To remedy this problem, Helberger's research addresses a way to improve the situation by standardising the minimum expectations "to accessibility, functionality and safety" which consumers would be entitled to know about. This manner, if adopted, would offer the court a benchmark of how to measure the quality of digital content. Further, it will contribute to reduce the information burden upon both the consumer and the trader.²¹⁷ To achieve this, there are several possible approaches; standardising may happen through industry. In reality, there are already some successful industry standards in action such as DVB video standard,²¹⁸ and the GSM standard for mobile telephony.²¹⁹ It may happen also through copyright laws as it is suggested that the Copyright Law should put some possibilities before the consumer to use digital content.²²⁰ Finally, standards may be defined by "an independent regulatory authority".²²¹ An example of independent regulatory authority in the UK could be NRAS "National Rheumatoid Arthritis Society", which offers consumers a useful guide for using digital content in the area of communication.²²²

However, this much depends on whether the industry and consumers are ready to accept certain standards. This may also lead to freezing solutions which do not seem to be technically, legally ideal. Furthermore, it may lead to "undesirable standards" being in place rather than "a process of balanced standards".²²³

2.5. The Information Required by Iraqi Law

In contrast, The Iraqi consumer legislation is unable to set out a coherent picture of the information required for distance contracts.

²¹⁶ Natali Helberger, 'Standardizing Consumers' Expectations in Digital Content' (2011) 13(6) *Institute for Information Law (IViR)* 69, 71.

²¹⁷ *ibid*, 73; Rott 'Download of Copyright-Protected Internet Content and the Role of (Consumer) Contract Law' (n 213) 454.

²¹⁸ See these standards at:

<<http://www.deskshare.com/Resources/articles/video-dvd-formats.aspx>> accessed 19 October 2016.

²¹⁹ See these standards at:

<<http://searchmobilecomputing.techtargget.com/definition/GSM>> accessed 19 October 2016.

²²⁰ Helberger, 'Standardizing Consumers' Expectations in Digital Content' (n 216) 74- 75.

²²¹ *ibid*, 75- 76.

²²² See NRAS (National Rheumatoid Arthritis Society) website at:

< <http://www.nras.org.uk/>> accessed 19 October 2016.

²²³ Helberger, 'Standardizing Consumers' Expectations in Digital Content' (n 216) 73- 74.

The ICPL 2010, and the KRP 2015 if adopted, remains pertinent legal primary source in that respect. Nevertheless, it can be argued that the generality used in both of them render them incapable of keeping pace with the developments which have occurred in the field of communication.

Furthermore, the Law of Electronic Signature and E-Transactions no (78) 2012 surprisingly does not include information provisions, notwithstanding that a substantial part of this law has been allocated for electronic transactions.

In consequence, what is supposed to be given to distance consumers is substandard compared to contemporary consumer laws elsewhere such as England. This is examined below;

2.5.1. The Information Required by the ICPL 2010

In the ICPL 2010 a few pieces of information are consistent with distance selling contracts. According to Article 6; the supplier is required to provide;

b- complete information regarding the quality of goods and the sound ways of using them or the way of receiving the service with its form and the official language adopted, c- labelling which proves any good purchased or any service provided including the value and the date, along with its quality and quantity or number and type in addition to its price.

Under Article 7(1), he is further required to “ensure that data and quality and entire content of goods are fixed on the labels before sending them to the markets or selling them or purchasing them or advertising about them, precisely the date of production, expiration, and place of origin”. Under Article 7(6), the supplier has a duty to “write his business name and address or any other brand adopted by the law on all of his correspondences and prints and advertisements”.

The above-mentioned information is primarily set up for face-to-face contracts, with nothing making particular reference to distance contracts. The issue of labelling the products with the nominate price shown on their coverages is obviously needed in cases where consumers physically negotiate with traders. Only in Article 7(6) can a piece of information needed for distance contracts be clearly observed (i.e. the obligation to write the business name etc). Here the word “write”, in Article 7(6), suits most of the distance

means of communication such as E-mail, internet, and mobile texts messages. However, it does not include all means; for example, this provision cannot extend to instances where telephone call or video call is used, which may suggest that the supplier is not required to provide his business name verbally.

This argument does not exist under English law for two reasons; firstly, Regulation 13(1) (a) of the CCIACRs 2013 requires the trader to “give or make it available” the information set out in Schedule 2 which includes the trader’s details.²²⁴ The word “give” includes all forms of verbal conversations such as phone calls, video call, and the wording “make it available” includes written forms. Secondly, Regulation 15(a) requires the trader to disclose his identity “at the beginning of the conversation with the consumer” when he uses a phone call.

With this current Iraqi provision, the level of information required to be delivered is less than one might expect in the field of distance contracts. Apart from quality of goods, nothing has been mentioned regarding the right of withdrawal, additional charges or costs. This is not surprising because the law does not define distance contracts, which in turn results in all information in that context being missing.

2.5.2. The Information Required by the KRP 2015

The KRP 2015 is, however, more detailed on prior information in electronic contracts. Article 21 of the proposal addresses information required in cases where E- means of communication are used to display goods and services, as below:-

2.5.2.1. Information Regarding the Trader’s Identity

Under Article 21(1); the online consumer has the right to receive “information pertaining to the trader’s name and his address, phone number, place of registration, email address, if it is a company; its name, type, and nationality beside its activity office, or any other piece of information which can contribute to introducing the person in a better manner”.

This piece of information could arguably be found to be adequate in distance contracts. The Article requires almost all the information required from the trader under Paragraphs (b and c) of Schedule 2 of the English CCIACRs 2013. By contrast, if the trader is acting on behalf of another person, the Article does not include any clear indication that the trader

²²⁴ The CCIACRs 2013, Schedule 2, Paragraphs (b, c, d, and e).

is required to introduce that other person to the consumer. In English law, this information is clearly required under Paragraph (e) of Schedule 2. Although, it may arguably be said that the wording “or any other piece of information which can contribute to introducing the person in a better manner” covers such requirement, it is unknown whether the decision of considering that information as having contribution in that regard is to be left to the trader, the consumer, or the court.

2.5.2.2. Information Regarding the Quality of Goods and Services

Under Article 21(2); the online consumer has to be informed of;

The nature of displayed goods or services along with elements of their formation and way of use, probable risks of use, and time for keeping the subject displayed, period of warranty, date and method of delivery, or any other data pertaining to goods or services which will help consumer to make his decision about contracting.

This Paragraph is equivalent to Paragraph (a) of Schedule 2 of the English CCIACRs 2013. Although, the KRP 2015 uses the term “nature” instead of the term “characteristics”²²⁵ which is used by the CCIACRs 2013, this does not pose any challenges before the court as both terms lead to the same meaning, referring to the quality, state and conditions of the thing.²²⁶

However, what the KRP 2015 does not include is information about digital content. Therefore, it is uncertain whether to consider digital content as goods or services. The matter is arguably better left to each individual case as some forms of digital content are close to goods and others to services. For example, where software is supplied on a website the issue is of supplying a service, but where software is supplied on a CD or Desk or, where both software and hardware are provided together such as “where a PC is bought with pre- installed software”, the issue then is of supplying goods.²²⁷ This missing

²²⁵ According to Cambridge Dictionary “characteristic is defined as a typical or noticeable quality of someone or something”. See at:

<<https://dictionary.cambridge.org/dictionary/english/characteristic> > accessed 20 December 2017.

²²⁶ According to Oxford Dictionaries “quality” means “The standard of something as measured against other things of a similar kind”, while nature means the basic or inherent features, character, or qualities of something. See at:

<<http://www.oxforddictionaries.com/definition/english/quality>> accessed 14 of September 2016.

²²⁷ See these examples in; White (n 62) 227.

judgement does not exist under English law. Although, Paragraph (a) of Schedule 2 does not mention characteristics of digital content, Paragraphs (v, and w) require the trader, where applicable, to provide information on the functionality and compatibility of digital content.

Finally, the wording “any other data.....which will help consumer...”, in which the Article 21(2) ends with, creates uncertainty around the criteria which ought to be followed in determining the data as being helpful to the consumer. What is helpful in the view of the trader may not be so in the view of the consumer.

2.5.2.3. Information Regarding the Price of Goods and Services

According to Article 21(3); the trader has to inform the consumer of “the price of goods or allowance of services, the currency adopted for payment, or any other amount which can be added to the price such as taxes; fees; costs of uploading or calling; date and place and method of delivery”. Here, the draft-makers aim to protect online consumers against hidden costs and additional charges. The wording “any other amount which can be added to the price” covers all charges which may finally be added to the price.

It is also observed, the Article does not require information on the amount due from the consumer, price and any additional charge, in one figure. This particular issue is common in some forms of online contracts where the consumer knows the total amount due only at the end of transaction such as airline tickets. By comparison, it can be argued that English law has a better approach to this matter in Paragraph (f) of Schedule 2 which requires the trader to provide the “total price” of the goods and services in one amount. However, the total price must only include taxes and not in all cases. In particular, the total price cannot include taxes “where the nature of the goods or services is such that the price cannot reasonably be calculated in advance”. By contrast, Paragraph (g) of the Schedule requires the trader, where applicable, to inform the consumer of “all additional delivery charges and any other costs”. This suggests that it is fine to deliver information on the total price under Paragraph (f) and additional charges under Paragraph (g) separately. As there is nothing can require the trader to give information on the whole final amount due in one figure. Indeed, the existence of this missing requirement would protect the consumer from hidden charges, as explained before.²²⁸

²²⁸ See this Thesis, 57- 58.

2.5.2.4. Information Regarding the Method of Terminating the Contract and Resolving Conflicts

Under Article 21(4), the consumer is entitled to know “the necessary procedures to follow in terminating the contract, and the method of resolving any conflict which may arise from the contract”. This is equivalent to Paragraph (x) of Schedule 2 of the CCIACRs 2013 which requires the trader, where applicable, to inform the consumer of “the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it”. Although, Paragraph (x) does not mention procedures for terminating the contract contrary to Article 21(4) of the Proposal, this does not affect distance consumers’ rights because terminating a distance contract does not have any different rules than terminating any other contract. Here, general rules of terminating contracts under the English law of contract are relevant to distance contracts.

2.5.2.5. Information Regarding the Right of Withdrawal

Finally, Article 21(5) obliges the trader to equip the consumer with information regarding “the period of withdrawal within which the consumer has right to repudiation from the decision he has made about purchase or lease or benefiting from services.....”.

This provision does not require the trader to mention the existence and non- existence of the right of withdrawal as English law does.²²⁹ Alternatively, it requires the trader to mention the period within which the consumer has the right to cancel the contract. Hence, it may arguably be said that giving information on the period of cancellation obliquely suggests the existence of the right of withdrawal. However, not giving that piece of information does not necessarily suggest non-existence of such a right. In modern distance legislation, the right of cancellation does not exist in certain cases of distance selling contracts. In some of the cases, this right is excluded by the law due to their nature.²³⁰ In some other cases, this right exists but it will be lost upon certain behaviour of the consumer.²³¹ Therefore, informing the consumer of the excluded cases, where applicable, should be of considerable benefit to him.

In summary, the Iraqi laws do not provide a clear picture of the information required in distance selling contracts. The ICPL 2010 sets up a general protection framework for

²²⁹ The English CCIACRs 2013, Schedule 2, Paragraphs (1 and o).

²³⁰ *ibid*, Regulation 28; the KRP 2015, Article 22(second).

²³¹ The CCIACRs 2013, Regulations 36(1), and 37(1).

consumers without making any distinction between direct contracts and distance contracts. Thus, unsurprisingly it is devoid of any information which is specifically relevant to distance selling contracts. On the other hand, the KRP 2015 has paid more attention to distance selling contracts than the ICPL 2010. However, it does not reach the level of detail and comprehensiveness of the English CCIACRs 2013. This is because the KRP 2015, like the ICPL 2010, does not specifically recognise distance selling contracts. Instead, it recognises electronic contracts. In this way, provisions of electronic contracts under the KRP 2015, if adopted, will be irrelevant to non-electronic distance contracts. Moreover, the KRP 2015 currently does not have any practical value because it is still a draft-proposal which may or may not be allowed by the Kurdistan Regional Parliament.

Thus, Iraqi distance consumers have to claim their rights based on Article 6(1) of the ICPL 2010 which gives the consumer the right to receive “all information pertaining to protection of his rights and legitimate interests”. However, the information which can protect the consumer’s rights and interests in a distance environment is a grey area. To remove this uncertainty, Article 1(3) of the Iraqi Civil Code allows the court to apply the adjudication of the judiciary and jurisprudence in Iraq and then of the other countries the laws of which proximate to the laws of Iraq. This reliance is allowed in all cases where the stance of the law is incomplete or vague.²³²

In the following subsection, the study examines the Civil Law Jurisprudence in this regard. Although the law and theory determine the information requirements in a broad sense, the study attempts to examine the ideas from distance selling perspective, as follows;

2.5.3. The Information Required by the Civil Law Jurisprudence

In the view of Civil Law jurists, some conditions have to be satisfied before requiring the trader to provide any piece of information. Those conditions were highlighted by Ghestine, the French jurist, when he quoted;

A party who was, or having regard especially to any professional qualification, ought to have been aware of a fact which he knew to be of determining importance for the other contracting party is bound to inform the latter of that

²³² According to Article 1(3) of the Iraqi Civil Code; “The court shall in all the foregoing be guided by the adjudication determined by the judiciary and jurisprudence in Iraq and then of the other countries the laws of which proximate to the laws of Iraq”.

fact, provided that he was unable to discover it for himself or that, because of the nature of the contract, the character of the parties, or incorrectness of the information provided by the other party, he could justifiably rely on that other to provide the information.²³³

In the following subsections these conditions are generally discussed, and a paragraph within each section discusses the issue in distance selling contracts;

2.5.3.1. The Trader Should Know the Information and Its Influence on the other Party's Consent

The first condition is that the party to a contract cannot be obliged to provide any piece of information unless he knows that information, and its influence on the other party's consent. Ghestine reached this finding by comparison to the provisions of mistake,²³⁴ and fraud (dol)²³⁵ under the French Civil Code, where the silence of a party justifies the other party to set aside the contract.²³⁶ These provisions are relatively similar to the provisions of the Iraqi Civil Code.²³⁷ Such similarity has, therefore, provided a basis for the Iraqi jurists to apply Ghestine's approach in providing a legal criterion for the duty to provide pre – contractual information. This condition is further divided into two elements;

A. The party should know the information

In fact, requiring a party to provide what he knows is compatible with provisions of the obligation in general. As a general rule, performance of any obligation must be under the

²³³ Jacques Ghestin, 'The Pre-Contractual Obligation to Disclose Information' in Donald Harris, Denis Tallon (ed), *Contract Law Today: Anglo- French Comparisons* (Clarendon Press, 1989) 166.

²³⁴ According to Article 1110 of the French Civil Code (consolidated version of May 19, 2013); "Error is a cause of nullity of an agreement only when it bears on the very substance of the thing that is the object of the agreement. It is not a cause of nullity when it only bears on the person with whom one intends to contract, unless the consideration of that person was the principal cause of the agreement."

²³⁵ According to Article 1116 of the French Civil Code; "Dol (dolus) is a cause of nullity of an agreement when the schemes and devices used by one of the parties are such that it is clear that without them the other party would not have contracted. Dol (dolus) is not presumed and must be proven".

²³⁶ Paula Giliker, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (2005) 13(5) *European Review of Private Law* 621, 621; Ghestin (n 233) 157- 159.

²³⁷ According to Article 117(1) of the Iraqi Civil Code; "Where there is a mistake in a contract concerning the object which has been named and indicated, the contract will where the kind differed to be related to the object named and will be voided because of the non-existence thereof". And according to Article 121(1) "Where a contracting party has made false representations to the other party and it was established that the contract contained grievous damage the contract will be subject to the approval of the aggrieved party".

party's control otherwise it will be void.²³⁸ Regarding the information requirements, the obligation can be performed when the party either knows the information or has the ability to know it.²³⁹

In the first scenario, it is unexpected to see a professional person unaware of the goods he makes, services he provides, and terms and conditions he unilaterally includes into the contracts.²⁴⁰ In the second scenario, when a professional party does not actually know a side of his work, this does not discharge him from the liability. Arguably, the case is not only about what is actually known to the party, but also what is supposed to be known to him. To make the unknown known, the party is required to perform another obligation named "the obligation to direct enquiries".²⁴¹ This obligation exists at an early stage to ensure proper collecting of information about the whole transaction. At a later stage, the collected information is to be provided under the duty to provide pre- contractual information. The enquiry may be directed to the buyer particularly in cases when the seller does not exactly know what the buyer is looking for. It may also be directed to other professional persons who work in the same industry.

B. The party should know the influence of the information on the other party's consent

It is explained supra; the trader is required to provide what he actually knows in addition to what he is supposed to know. However, leaving this requirement open may create some difficulties for the trader. This is because actual information known and information that is supposedly known by a person cannot be limited. Also, requiring the trader to acquire such huge amount of information may cost him a lot of money. From the consumers'

²³⁸ According to Article 127(1) of the Iraqi Civil Code; "If the object of the obligation is an absolute impossibility the contract is void".

²³⁹ Khalid Ahmed, *Duty to Pre-Contractual Information* (Dar AL-Nahtha AL-Arabia, 1999) 277-278; Mustafa Aboamro, *Duty to Provide Information in Consumer Contracts: A study in French law and Arabic legislation* (Dar AL-Jamiha AL-Jadida, 2010) 55.

²⁴⁰ Al-Mahdy (n 101) 52; Budali Mohammed, *Obligation to Advice in the Frame of Services Contract: A Comparative study* (Dar AL-Fagr Lnashr Wal-Tawzih, 2005) 16, 17; Baxtiyar Baiz, 'Preventive Protection for Consumers from Deceptive Commercial Advertisements' (2012) 1(2) Journal of College of Law for Legal and Political Sciences 1, 37.

²⁴¹ Omar Abdalbaki, *Contractual Protection of Consumer: A comparative Study between Sharia And Law* (Munshaat Al-thaqafa Lilnashr, 2004) 257; Mohammed Lotfy, *Civil Liability at the Negotiation Stage: A Study in Egyptian Law and French law* (private publishing, 1995) 23-25; Sabri Khatr, 'Duty to Provide Pre- contractual Information' (1996) 1 Majlat AL-Ulum AL-Qanunia, 178; Ala Yousif, 'Consumers Legal Protection in Contracts of e.Commerce' (2005) 14(8) Journal of the College of Law- Al-Nahrain University, 94, 95; Saddam Faisal AL-Mohammadi, 'Negotiation on the Contracts between Freedom and Limitation' (2009) 1(1) Journal of the College of Law- Al-Nahrain University 262, 74- 75.

perspective, the idea is not ideal either because they may receive a flood of information much greater than what they actually need to make a rational decision about the contract.²⁴² Thus, Ghestine suggests that only information which has essential influence on the consent of the other party should be provided.²⁴³

2.5.3.2. Knowing the Information and Its Influence in Distance Selling Contracts

This requirement is much more likely to be satisfied in distance contracts than contracts concluded otherwise. As established earlier, in distance contracts a person is bound by information provisions when he acts as a professional person.²⁴⁴ Then, it is much easier to presume that the trader knows the information and its significance on the consumer's consent. This finding, however, is more relevant to English law than Iraqi law, since the latter does not include any indication which may exclude non- professional persons from being asked by information provisions.²⁴⁵

It is believed that the professional party should acquire enough information to specify the influence of the information on the consent of consumers.²⁴⁶ Thus, knowing and assessing the influence of information is a requirement. This approach is arguably more justifiable in distance selling contracts than in other contracts, where consumers have considerable ability and opportunity to obtain information themselves. By their physical presence, they examine the goods when goods are capable of being examined. If goods are incapable of being examined, the existence of the goods in reach helps them to gather the information needed. In both cases, consumers are more likely to unilaterally know the influence of any piece of information even without the need for the trader's intervention.

By contrast, distance consumers do not share that ability. In practice, it is not common to find a distance consumer able to negotiate the contract with the trader. Although, it is difficult to consider the distance contract as an adhesion contract (standard contract) due to the existence of competitive traders in the markets, distance consumers are still in an adhesive contractual relationship with the trader in most cases. This is because traders

²⁴² Ahmed (n 239) 290.

²⁴³ Ghestin (n 233) 160.

²⁴⁴ See this Thesis, 30-31.

²⁴⁵ See this Thesis, 31.

²⁴⁶ Ahmed (n 109) 50, Aqil Hamad- AL-Dahan, and Ghani Jadr- AL-Saeedy, 'Duty to Provide Information in E-Contract' (2007) 5 Ahl AL-Bait University 204, 210.

usually give consumers only two options either to accept the offer as it is or to refuse it.²⁴⁷ Thus, it is rare to see an online consumer able to introduce new terms or exclude some included terms.

In summary, the inability to negotiate with traders in addition to the inability to examine the goods in person, have jointly shown the weak position of distance consumers in relation to information. This fact has shaped the civil law jurisprudence which suggests strict liability in this respect. The way to have such liability is to suppose that the trader does not only know the information, but also the significance of information to consumers.²⁴⁸ In most cases, the trader is actually aware of the importance of information. For instance, he should be aware of; firstly the value of the information regarding his identity which is important in response to the spread of online fake trading. Secondly, the trader should be aware of the value of information regarding characteristics of goods and services since at the relevant time, he is the only source for such information to consumers. The same is true regarding the value of the information on the right of withdrawal.

2.5.3.3. The Justifiable Ignorance of the Creditor (Consumer) of the Information

Knowing the information and its influence by the trader does not, however, suffice to bring a *duty* to provide information into practice. It further needs the other party “the consumer” to be justifiably ignorant about information. Here, Ghestine suggests that two types of information should be precluded from the enforcement. Firstly; the information which the other party knows.²⁴⁹ In such a case, both contracting parties are at relatively the same level of information, so there is no need for the duty to provide information.²⁵⁰ Secondly, the information that is on something which the consumer is unjustifiably ignorant about. As a rule, both contracting parties are generally required to put reasonable effort into gaining information from each other.²⁵¹ Based on this fact, a party does not have the entitlement to information if information is reachable by making a reasonable effort.²⁵²

²⁴⁷ Talib Abas, and Akram Saeed, 'Consumer Protection in the Electronic Service Contracts' (2009) 1(1) Journal of the College of Law- Al-Nahrain University 182, 100; Akram Hussain AL-Bdo and Mohammed Abdula, 'Objective Effect of the Contracting Willingness on the Negotiation Stage' (2011) 13(49) Rafidain of Law Journal 404, 414.

²⁴⁸ Abdulbaki (n 241) 265.

²⁴⁹ Ghestin (n 233) 160.

²⁵⁰ Al-Mahdy (n 101) 58.

²⁵¹ Ahmed (n 109) 50.

²⁵² Ahmed (n 239) 102.

Apart from these two derogations, a party is qualified to acquire information in another two cases; firstly, if he is found excusably unable to be aware of the information due to either objective reasons or subjective reasons. Secondly, if a party is ignorant of the information as he has legitimately relied on the other party. Both are now considered;

2.5.3.4. The Justifiable Ignorance of the Creditor (Consumer) of the Information in Distance Selling Contracts

A. Justifiable Ignorance Due to Objective or Subjective Reasons

In the first scenario, a party may justifiably be unable to gain information because of either objective reasons or subjective reasons.

Regarding objective reasons, there are some possible instances which may make a person justifiably unable to acquire information, most of which are applicable to distance contracts because the objective barrier may be the way in which the contract is concluded.²⁵³ Using means of distance communication can itself be the circumstance in which the buyer is unable justifiably to know the seller or, the quality of goods and services.

Using such means may lead to further objective barriers. As a rule, making a distance selling contract correctly may require a party to be acquainted with certain technical steps. Those steps are of a different nature depending on the nature of means used in making the contract. For instance, what is required for the use of telephone calls is different from the case where a Website, TV programme, or an Email is used. Consequently, many consumers may find themselves excusably unable to go through such technical steps unless the trader intervenes.

Regarding subjective reasons, here the problem is not with the means used in making the contract, but in the character of the consumer himself. It may be argued that there is no particularity specific to distance consumers. However, the character of distance consumers is probably weaker than consumers shopping in high street. A consumer may (subjectively) be able to shop from the store, but he may be unable to do so over the Internet. Therefore, using means of distance communication again can have an impact on making a consumer

²⁵³ Ghestin (n 233) 161; Ahmed (n 109) 51; Ahmed (n 239) 301; Hady Hussain Al-Kaaby and Mohammed Hady, 'The Duty to Provide Information before Contracting' (2013) 5(2) Journal of Al- Hli for Legal and Political Sciences 8, 55.

personally unable to gain information. This is simply because he may not have much experience in using means of distance.

The question is what criterion should be followed here? The answer is debated. To some, inexperience of the party should subjectively be assessed by looking at the ability of that person under his private circumstances. Other jurists argue that the standard of the reasonable person (an objective test) should be used. A third view is that neither purely subjective nor purely objective criterion should be independently applied, lest some detrimental effect against the interest of one of the parties occurs as a result.²⁵⁴

If the criterion is to be subjective, although it would ensure better protection for consumers, it may discourage them from trying to gain information.²⁵⁵ Here, the mission of the trader to provide information would be more difficult as he would possibly see less informed consumers than the status where an objective standard is followed. If the criterion is to be objective, this would ensure a better position for a trader because he would not be liable for the private circumstances in which a consumer would pass through. Rather, he would be reliable if it is proven that the consumer had spent reasonable care to obtain information. This, however, would be prejudicial to consumers as their own circumstances would not be taken into account.

The compromise solution is to mix between both standards in which consumers' own circumstances should be taken first into account. Then, the case of that consumer should be analogized to the case of a consumer having the same technical ability. Then asking whether the comparative consumer would have had the same response if he was found in the same circumstances as the first consumer had gone through.²⁵⁶

B. Justifiable Ignorance Due to Reliance

The case of reliance has been narrowly drawn in relation to contracts where there is a special confidence between the contracting parties. Here, the parties will confidentially expect from each other information without even making any effort,²⁵⁷ although they may individually have the ability to be positive in that regards.²⁵⁸ Based on this, if it is proven

²⁵⁴ Abdalbaki (n 241) 240- 245; Ghestin (n 233) 161- 163.

²⁵⁵ Mohammed (n 103) 250; Baiz (n 240) 38.

²⁵⁶ Ahmed (n 109) 52; Abdalbaki (n 241) 243- 244.

²⁵⁷ Al-Kaaby and Hady (n 253) 56.

²⁵⁸ Ghestin (n 233) 163.

that one of the parties has legitimately relied on the other party, the latter party then will be required to provide the former party with the information.

The nature of distance contracts does not have any significance to impose any particular confidence between traders and consumers. However, it may be the position of the party is what renders the other party to confidentially go for reliance. This notion is widely applicable to standard contracts where a party “the trader” has a strong bargaining power, while, his counterpart “the consumer” in return is in a weak position.²⁵⁹ Such disparity would lead the consumer to believing that the other party would provide him with necessary information as everything is under his control. In reality, most forms of distance selling contracts are of nature to be relatively considered as standard contracts, as explained before.²⁶⁰

In summary, this jurisprudential approach may fill the gaps found in the ICPL 2010 to some extent. However, it does not provide a basis for a solid measure which could be applied consistently in the area of distance selling. Using this approach always requires a decision from a court, and those decisions are not binding: this means one court may follow and another may not. Also, if the Iraqi courts are prepared to accept this approach there is no guarantee that the same decision would be made by different courts. Moreover, this approach gives the court a criterion to follow in specifying whether a trader has breached a possible duty to provide information. One could, therefore, assume that this approach does not help consumers with information at the negotiation stage, it rather helps them to seek appropriate remedy where available.

²⁵⁹ Ahmed (n 239) 326- 328; AL-Bdo and Abdula (n 247) 414.

²⁶⁰ See this Thesis, 43-45.

2.6. Conclusion

In this chapter, it has been observed that the requirement to provide prior information does not undermine freedom of contract under both jurisdictions. The study concluded that prior information supports the freedom of the distance consumer. It is also observed that prior information constitutes justifiable restriction to the freedom of the party who is required to provide that information. In this way, imposing an information requirement on one party helps the other party to exercise his *passive* freedom without being exploited.

It has also been observed that the new English regulations have put an end to many problematic issues under the DSRs 2000. For example, the CCIACRs 2013 do not require the trader to include local taxes within price information in cases where there is a difficulty to calculate it.²⁶¹ Also, price information should include all delivery charges and other possible charges. If those charges cannot reasonably be calculated beforehand, the consumer is still entitled to know that such charges may be payable.²⁶² Furthermore, the trader is obliged not only to inform the consumer of the existence of right of cancellation, but also of the non- existence in cases where such right is to be unavailable.²⁶³ Finally, for the first time some new information regarding digital content has been included within prior information.²⁶⁴

However, the study addressed issues where further improvement is needed. Firstly, the length of the information listed in Schedule 2 may impede the consumer from digesting it properly. Secondly, the CCIACRs 2013 do not specify the person who will identify whether the nature of certain goods or services is that in which the price cannot reasonably be calculated in advance as Paragraph (f) requires. Finally, the new regulations do not include information regarding the technical steps of making online contracts, although this is covered by Regulation 9 of the ECRs 2002.

By comparison, in the Iraqi ICPL 2010 distance consumers are not distinguished from ordinary consumers. With this generality, Articles 6 and 7 of the ICPL 2010 entitle consumers to information which they need in face-to face contracts. Thus, most of the information, which has a direct link to distance selling, is missing. To fill this gap, some

²⁶¹ The CCIACRs 2013, Schedule 2, Paragraph (f).

²⁶² *ibid*, Paragraph (g).

²⁶³ *ibid*, Paragraphs (I, and O).

²⁶⁴ *ibid*, Paragraphs (V, and W).

information, similar to that is introduced in the CCIACRs 2013, is necessarily needed for a future Iraqi distance law. For example, information regarding identity of the trader,²⁶⁵ additional charges and costs of using means of distance communication,²⁶⁶ the right of cancellation,²⁶⁷ and digital content.²⁶⁸

The KRP 2015 is more consistent with distance information requirements. Although, the proposal does not specifically regulate distance contracts, it has given online consumers some particularity. Article 21 addresses some information for online consumers, most of which is relevant to distance consumers. Nevertheless, some improvement is still needed when issues are compared to English law. Firstly, when the trader acts on behalf of another person, the proposal does not require him to introduce that person to the consumer, so a similar provision to Paragraph (g) of Schedule 2 in English Law is needed. Secondly, the proposal needs to introduce information regarding digital content similar to Paragraphs (v, and w) of Schedule 2. Finally, the proposal does not require the trader to inform the consumer of the non-existence of the right of withdrawal. To tackle this issue, a similar provision to Paragraph (o) of Schedule 2 is needed.

Finally, the study considered whether the Civil Law Jurisprudence could provide solutions for distance consumers in Iraqi Law. Initially, the jurisprudence approach may lead to a clear picture of what should be delivered in distance contracts. However, this approach may not be accepted. It is proven that to enforce it, there must always be a decision from the court. Such decision is unlikely to be made unless gaps are found in the competent legislation. Furthermore, it is not mandatory for the court to apply jurisprudence or judicial judgements. The wording set out in Article 1(3) of the Civil Code shows that these two assistant sources can only play the role of guide.²⁶⁹ Thus, a court may decide to apply it and another may decide otherwise. Moreover, the duty to provide information aims to help consumers before making the contract, while, this jurisprudence approach provides solutions after the contract has been made and the claim has been raised before the court.

²⁶⁵ The CCIACRs 2013, Schedule 2, Paragraphs (b, c, d, and e).

²⁶⁶ *ibid*, Paragraphs (g, and i).

²⁶⁷ *ibid*, Paragraphs (l, m, n, and o).

²⁶⁸ *ibid*, Paragraphs (v, and w).

²⁶⁹ According to article 1(3) of the Iraqi Civil Code; “The court shall in all the foregoing be guided by the adjudication determined by The Judiciary and Jurisprudence in Iraq and then of the other countries the laws of which are proximate to the laws of Iraq”.

The next chapter discusses another two important aspects of information to distances consumers which are; the manner and the time in which the information should be provided.

CHAPTER THREE: THE MANNER AND TIME IN WHICH THE INFORMATION SHOULD BE PROVIDED

3.1. Introduction

This chapter discusses the manner and time of delivering information. These are another two important aspects of the information requirements in distance contracts because, as noted previously, distance consumers are disadvantaged compared to ordinary consumers, and entitled to information under distance legislation. However, this policy may not fulfil the desired function of re-balancing informational asymmetry and supporting freedom of contract for consumers if information is not to be delivered in an appropriate manner and at an appropriate time.

The manner of delivering must fulfil three main functions. Firstly, the way in which the information is put into the consumers' possession should not create difficulties for consumers. This is because different means are used in delivering information, some of which need the consumer to intervene and others which do not. Therefore, the argument is whether the law requires the trader to 'provide' information or 'make it available' or both. Secondly, the information should be delivered in a clear and comprehensive manner, which allows the consumer to grasp it without difficulty. This is also an important issue because incomplete and vague information may have the same impact on consumers as inexistence of information has. Thirdly, the information should be delivered on a medium which can preserve the consumer's rights in question. This is another important issue particularly when a dispute arises between the parties regarding performance of the duty to provide pre- contract information.

In addition, the overall function of the information requirements cannot be fulfilled unless an appropriate time is chosen to deliver information. This is particularly important in distance selling contracts because delivering a big bulk of information requires the consumer much more time to process it.

It will be demonstrated that most of these issues are addressed under English law. However, in some other issues English law does not have a clear approach. To fill this unwanted gap the study borrows two EU cases, one case from the Court of European Free

Trade Association,²⁷⁰ and another one from the CJEU. In Iraqi laws, most of the issues regarding the manner and time of delivering information are missing due to the lack of specific distance selling laws. However, the study aims to ascertain the effect of the current information provisions under Iraqi laws in responding to the function of effective information regarding the manner and time in distance selling contracts.

This chapter is divided into four sections; the first two sections will discuss the manner in which the information should be provided. The second two sections will discuss the time in which the information should be provided;

²⁷⁰ The European Free Trade Association Court has jurisdiction over the *European Economic Area Agreement* which was signed in Porto on 2 May 1992 and came into force on 1 January 1994. This agreement brings together the EU member states and the EFTA states (Iceland, Liechtenstein and Norway). The aim of the agreement, as stated in Article 1 and 2, is to guarantee free movement of goods and services and capital, in addition, to provide equal conditions of competition among the members. The EFTA Court was established under Article 108(2) of the EEA Agreement, to look at “(a) actions concerning the surveillance procedure regarding the EFTA States; (b) appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority; (c) the settlement of disputes between two or more EFTA States”. Under Article 110 of the agreement, judgements under the agreement by the EFTA court shall be enforceable. However, decisions by the EFTA court, as by the CJEU, remain advisory to the UK courts post- *Brexit*. This does not suggest that decisions by the EFTA Court are irrelevant to the UK courts because Section 6(1) of the European Union (Withdrawal) Bill, leaves room for the English court to have regard to EU cases, from whatever EU judicial body, when “it considers it appropriate to do so”. On the matter subject to the discussion, the EFTA judgement may be found relevant as it gives an interpretation to a provision of an EU directive, very similar in wording to a provision stated in English Law. See, Agreement on the European Economic Area, 3. 1. 94, Official Journal of the European Communities No L 1/3. Available At;

<[<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:21994A0103\(01\)>](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:21994A0103(01))> accessed 5 September 2018.

3.2. The Manner in Which the Information should be provided in the English CCIACRs 2013

The CCIACRs 2013 draw a line between pre-contractual information and post- contractual information. For each assumption, there is a particular binding mechanism on traders to satisfy the information provisions. As shown below:-

3.2.1. The Manner in Which Pre- Contractual Information should be provided

According to Regulation 13(1); “Before the consumer is bound by a distance contract, the trader must give or make available to the consumer the information listed in schedule 2 in a clear and comprehensible manner, and in a way appropriate to the means of distance communication used”. Accordingly, the trader has to do three things; firstly delivering information to the consumer either via giving or making it available. Secondly, delivering information has to be in a clear and comprehensible manner. Thirdly, it has to be in a way appropriate to the means of distance communication used. As discussed below;-

3.2.1.1. Giving Information or Making it Available to Consumers

Under this heading, there is some improvement in the new regulations compared to the former regulations. Under the DSRs 2000, the supplier was required to provide information.²⁷¹ The wording “provide information” put the onus on the supplier in performing the entire obligation. In return, the consumer had nothing to do to receive information.²⁷² With this interpretation, it was not enough for online traders, as they usually do, to put terms and conditions on their commercial web sites then asking consumers to take positive action to access them.²⁷³

However, the CCIACRs 2013 brought a new policy for online trade in this context. The wording drafted in Regulation 13(1) (a) offers traders two options; either to “give information or make it available”. The term “give” is equivalent to the term “provide” which both require the trader to be positive in performing the duty without anything

²⁷¹ According to Regulation 7(1) of the DSRs 2000; “Subject to paragraph (4), in good time prior to the conclusion of the contract the supplier shall a- provide to the consumer the following information....”.

²⁷² Luzak 'Online Consumer Contracts' (n 13) 385.

²⁷³ *ibid.*

required on the consumer's part. In contrast, the term "to make it available" still requires the trader to be positive, but some positivity is required from the consumer.²⁷⁴

One could, therefore, assume that the trader is entirely free either to provide information or make it available to the consumer. It may also be assumed that the wording allows the trader to provide *some* information and make the remaining information available. In theory, this interpretation may be accepted but in practice it is hard to be so. When the regulations say "to give or to make it available" they do not give the trader options. Rather, they mitigate load on the trader regarding contracts made by a particular means of distance communication in which the information could be made available to the consumer. In that specific context, the trader has the choice either to give information or make it available.²⁷⁵ The means intended by the wording "make it available" are arguably websites. If the trader chooses a website for delivering information, he can store the information in html. Then, the consumer needs to visit the website and click the link or logo, which passes him to a page where information is provided.²⁷⁶ However, not in all cases the use of websites will satisfy Regulation 13(1) (a). Regulation 8 of the CCIACRs 2013 makes clear that making information available satisfies Regulation 13(1) "when the consumer can reasonably be expected to know how to *access* [information]". With this new requirement, the passive consumer is no longer protected in contracts made via websites.²⁷⁷ Nevertheless, in contracts made by other means of distance communication, like email, fax, mobile phone messages, he is still entitled to obtain the information needed without any action required on his part.²⁷⁸

In reality, Lodder argues that it is hard to place all the information listed in Schedule 2 on an ordinary website.²⁷⁹ This is true not only to the case of websites but also to the case of some other devices of limited capability for display such as Audio, SMS, Voicemails, and

²⁷⁴ This new provision is not entirely unknown to English law. For example, Regulations 6(1) of the ECRs 2002 clearly mentions this requirement in the case when a person is a provider of society services.

²⁷⁵ Serrat (n 18) 59.

²⁷⁶ Arno R. Lodder, 'Information Requirements Overload? Assessing Disclosure Duties under the E-Commerce Directive, Services Directive and Consumer Directive' in Andrej Savin, Jan Trzaskowski (ed), *Research Handbook on EU Internet Law* (Edward Elgar Publishing, Cheltenham, UK 2014) 362.

²⁷⁷ Luzak, 'Online Consumer Contracts' (n 13) 385.

²⁷⁸ C Erasmus. 'Consumer Protection in International Electronic Contracts' (Magister in Import and Export Law North- West University 2011) 19- 21. Available at:

<http://dspace.nwu.ac.za/bitstream/handle/10394/6917/Erasmus_C.pdf?sequence=2> accessed 28 October 2016

²⁷⁹ Lodder (n 276) 374.

Smart Phones, some of which have limited space and others consume limited time.²⁸⁰ Indeed, consumers use a variety of devices in receiving information. This suggests that different consumers may not have the opportunity to obtain the same information even if they deal with the same trader and for the same goods and services.²⁸¹ Devices with a lack of necessary space constitute a challenge in how to communicate all of the information required. For example, most smart phones are unable to display a long list of information due to their small screens.²⁸² Also, text messages “SMS” on such smart devices are limited to 160 characters in length.²⁸³ Addressing this particular problem is of great importance because e-commerce is shifting from desktop or laptop to smart phone devices.²⁸⁴

However, Regulation 13(4) of the CCIACRs 2013 deals with this concern as follows;

Where a distance contract is concluded through a means of distance communication which allows limited space or time to display the information (a) the information listed in paragraphs (a), (b), (f), (g), (h), (l) and (s) of Schedule 2²⁸⁵ must be provided on that means of communication in accordance with [the regulations], but (b) the other information required ... may be provided in another appropriate way.

Thus, if the trader uses a means of limited capability he is required to display on the chosen means the information listed in Paragraphs (a, b, f, g, h, l, and s) of Schedule 2. Subsequently, the remaining information of the Schedule should be provided on another

²⁸⁰ Henderson, and Poulter (n 88) 293.

²⁸¹ *ibid.*

²⁸² Lodder (n 276) 373; Helberger, Loos, Guibault, Mak, and Pessers (n 212) 191.

²⁸³ Riefa, 'The reform of electronic consumer contracts in Europe: towards an effective legal framework?' (n 69) 14.

²⁸⁴ Lodder (n 276) 362, 372.

²⁸⁵ Required information is, “(a) the main characteristics of the goods or services, to the extent appropriate to the medium of communication and to the goods or services; (b) the identity of the trader (such as the trader’s trading name) (f) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, (g) where applicable, all additional delivery charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable; (h) in the case of a contract of indeterminate duration or a contract containing a subscription, the total costs per billing period or (where such contracts are charged at a fixed rate) the total monthly costs; (i) the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate; (s) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract”.

appropriate way. For example, the minimum information required may be sent by SMS with a hypertext link to another page where the remaining information is provided.²⁸⁶

Hence, two things require further examination. Firstly, why do the regulations not give the trader the option to select information from Schedule 2 for the first delivery himself since eventually all the information listed in the Schedule is to be delivered. The possible answer, arguably, is that the regulations select pieces of information which are important in distance selling contracts. This particular requirement can have a positive effect on the consumer's ability to process information because the consumer will receive less information but the most important part. This may give him enough knowledge to decide about the contract even before the remaining information is delivered.

However, nothing can explain why the selected information is more important than the other. The argument is relatively true because some of the selected information may not be required in the first place because the need to provide it is qualified by the phrase "where applicable" as in the provisions on additional charges and duration of contract.²⁸⁷ When it is not required what information will replace it? The matter is entirely left to the trader to decide who may select less important information to replace the unrequired information. Also, nothing can prevent the trader to deliver the remaining information first. In other words, Regulation 13(4) does not require the trader to deliver the information listed in Paragraphs (a, b, f, g, h, l, and s) first then the remaining information. With this uncertainty, the trader may send the remaining information first then the information required by Regulation 13(4). In this case, the consumer will receive less important information first which may negatively affect the consumer in making the decision.

Secondly, the remaining information must be provided in 'another appropriate way'. However, it is uncertain whether the way is meant to be appropriate to the trader, the consumer, or the distance means used in communication? This particular issue does not exist under Regulation 13(1) which requires the trader to choose a means appropriate to the distance means used in the communication. This requirement would provide better protection because the way may turn out to be inappropriate if the communication carried out verbally via phone call, and the remaining information is provided by a hypertext link or sent out by an –Email, at the time when the consumer does not have access to the

²⁸⁶ Lodder (n 276) 373.

²⁸⁷ The CCIACRs 2013, Schedule 2, Paragraphs (g and s).

Internet.²⁸⁸ This may not exceptionally be an issue in transactions which are entered into throughout Web-Portals where the consumer is able to go through without the need for the Internet access.²⁸⁹

3.2.1.2. In a Clear and Comprehensible Manner

Further to the foregoing requirement, giving information or making it available is to be performed in “a clear and comprehensible manner”. Different language is used in different paragraphs of the Regulation: for example, three phrases are used in Regulation 14; “a clear and prominent manner”, “easily legible manner”, and “clearly and legibly”.²⁹⁰ In the original wording of this requirement in the CRD 2011 is “plain and intelligible language”.²⁹¹ In the ECRs 2002 two wordings are used; firstly Regulation 9 requires the information in “a clear, comprehensible and unambiguous”. Secondly, Regulation 6 gives effect to misleading omission practice if information is presented in “unclear, unintelligible, ambiguous or untimely” manner. All this different wordings eventually fall under the concept of “clarity and comprehensibility”.

This requirement is connected to the language and the form used in delivering information. In terms of the language, the information does not have to be written in the way which the law makers or the companies understand, but in the way which the consumer understands.²⁹² That in itself can be difficult to identify. Research has shown that consumers are not likely to pay attention to information unless it is written to be meant for them.²⁹³ In terms of the form, the form in which the information is presented may become one of the top reasons which make the consumer neither read the information nor understand it if it is formed badly.²⁹⁴ To make the form effective the trader may insert

²⁸⁸ Serrat (n 18) 63.

²⁸⁹ Yazan Mansour, 'The Incapability of the Distance Selling Regulations to M- Content Transactions?' (2013) 19(7) Computer and Telecommunication Law Review 189, 190.

²⁹⁰ The CCIACRs 2013, Regulation 14(2, 4, and 6).

²⁹¹ The CRD 2011, Article 8.

²⁹² Helberger, 'Form Matters: Informing Consumers Effectively' (n 178) 28. See also, Helberger, Loos, Guibault, Mak, and (n 212) 49.

²⁹³ Victoria Law Foundation, *Better Information Handbook, A Practical Guide to Producing Better Information about the Law* (1st edn Victoria Law Foundation, 2011) 43.

²⁹⁴ Helberger, Loos, Guibault, Mak, and Pessers (n 212) 49; Twigg-Flesner, Schulze (n 190) 140; Madeleine de Cock Buning, Ewoud Hondius, Corien Prine, and Marc de Vries, 'Consumer Protection. EU. An Analysis of European Consumer Legislations in the Information Society' (2011) 24(3-4) Journal of Consumer Policy 287, 300.

pictures, videos, animations, bold for headings, different font size, short sentences, personalizing the information by using the word “you”.²⁹⁵

This requirement needs careful consideration when information is provided by a website link. In such a case, clarity and comprehensibility require that the link should be made in a way which enables the consumer to go through without much effort and without exploring a number of web pages.²⁹⁶ To achieve that, the link has to be displayed in a very visible part of the website page, or the message in case the link is provided by an email.²⁹⁷ Feasibly, the link is usually listed along with the bottom of the web page.²⁹⁸ Most importantly, the link should be displayed in a place which enables the consumer to see before he clicks on the icon “I agree” or “submit” in click wrap contracts since after the click, reading information is meaningless because the transaction is processed, and the contract is made.²⁹⁹

In assessing whether the criteria is met, Donnelly and White note that it is unclear whether the requirement of clarity and comprehensibility is a subjective or objective measure.³⁰⁰ The CCIACRs 2013 require the information in a clear and comprehensive manner, but they do not specify to whom should this requirement be fulfilled, the consumer, the reasonable consumer, or the trader? Further, the DSRs 2000 did not stop at the requirement of clarity and comprehensibility but further required suppliers to provide information “with due regard in particular to the principles of good faith in commercial transactions”.³⁰¹ Thus, it is further questionable whether this additional requirement should have been included or not under the CCIACRs 2013. The matter is controversial. Donnelly and White do not

²⁹⁵ Natali Helberger, 'Form Matters: Informing Consumers Effectively' (n 178) 25.

²⁹⁶ Lodder (n 276) 362.

²⁹⁷ Serrat (n 18) 59; Hornle, Sutter and Walden (n 62) 15.

²⁹⁸ Rachel Conklin, 'Be Careful What You Click for: An Analysis of Online Contracting' (2008) 20 *Loyola Consumer Review* 325, 326.

²⁹⁹ There are two main forms of online agreements; Click Wrap Agreements and Browse Wrap Agreements. The first form requires the user to make some manifestation before he is bound by the contract. The requirement is usually clicking a button labelled “I agree” or “Submit”, or “I have read and agree to the terms and conditions”. While, in click browse wrap agreements, the contract is accepted by performance such as when the user keeps navigating the website or uses a product or service found on it. See, Conklin, (n 298) 327; Michael Rustad, *Global Internet Law* (2nd edn West Academic, U.S.A 2016) 405- 470; Andrew D. Murray, 'Entering into Contracts Electronically: the Real W.W.W' in Lilian Edwards, Charlotte Waelde (ed), *Law and the Internet* (Bloomsbury Publishing, U.S.A 2009) 450- 459; McClafferty (n 72) 92-94.

³⁰⁰ Donnelly, and White (n 62) 217.

³⁰¹ The DSRs 2000, Regulation 7(2); Richard Jones and Dalal Tahri, 'EU Law Requirements to Provide Information to Website Visitors' (2010) 26(2) *Computer Law & Security Review* 613, 618.

recommend the requirement of good faith in this context because it will cause problems to Common Law where such concept is not generally defined.³⁰² In contrast, Dickie found the requirement of good faith supportive to consumer's confidence, and helpful for the court to adopt equitable decisions where circumstance has changed. Furthermore, it would help the court to take into account the relationships between particular consumers and suppliers in the decision-making process.³⁰³

3.2.1.3. In a Way Appropriate to the Means of Distance Communication Used

Along with clarity and comprehensibility, traders are further required to use a manner appropriate to the distance means used in the communication. To give it effect, the information should be given in the manner which is consistent with the nature of the means used in contracting. For example, if a phone call is used, information should then be given orally or via text messages. In the case of the Internet, information should be given electronically by using online devices such as web sites either via written texts or visual images or even an e-mail.³⁰⁴

3.2.2. The Manner in Which Post- Contractual Information should be provided (on a Durable Medium)

For post-contractual information, Regulation 16(1 and 2) requires all the information drafted in Schedule 2 to be given to consumers on a durable medium.³⁰⁵ Further to schedule 2, Regulation 16(3) requires that; "If the contract is for the supply of digital content not on a tangible medium and the consumer has given the consent and acknowledgment, [the confirmation then] must include confirmation of the consent and acknowledgement [as well]".

Contrary to the DSRs 2000, the CCIACRs 2013 define "durable medium" in Regulation 5 as;

³⁰² Donnelly, and White (n 62) 217.

³⁰³ Dickie (n 9) 221.

³⁰⁴ Hornle, Sutter and Walden (n 62) 15. Donnelly, and White (n 62) 293.

³⁰⁵ According to Regulation 16 of the CCIACRs 2013; "1- In the case of a distance contract the trader must give the consumer confirmation of the contract on a durable medium". "2- The confirmation must include all the information referred to in Schedule 2 unless the trader as already provided that information to the consumer on a durable medium prior to the conclusion of the distance contract".

paper or email, or any other medium that (a) allows information to be addressed personally to the recipient, (b) enables the recipient to store the information in a way accessible for future reference for a period that is long enough for the purposes of the information, and (c) allows the unchanged reproduction of the information stored.³⁰⁶

Under the ECRs 2002 a similar provision is provided in Regulation 9(3) which stipulates; “Where the service provider provides terms and conditions applicable to the contract to the recipient, the service provider shall make them available to him in a way that allows him to *store* and *reproduce* them”. However, the ECRs 2002 do not require the information to be personally addressed.

The implementing Guide of the CCIACRs 2013 drafted by the Department of Business Innovation and Skills gives some examples of means which will be considered as durable mediums;³⁰⁷

(1) - A letter if trader sends it with a reasonable care to the address given by consumer. (2)- A CD/DVD if trader sends it to consumer even if the latter does not have a CD/DVD player. (3)- An Email if trader sends it to the address given by consumer even if the latter does not check his email account or deletes it. (4)- A text message if trader sends it to the consumer’s mobile number. (5)- A personal account: This must enable consumer to store personal information in a form which will be left fixed and stay accessible for a reasonable period of time.

In practice, however, some of the aforementioned mediums may cause problems for consumers. For instance, technically there is no guarantee that every sent email will be received by the addressee. In some cases, the email is susceptible to various risks as it may be hacked, faked, or edited or even never reached.³⁰⁸ The question here is, does the law

³⁰⁶ This definition is a copy- out of the definition set out in Regulation 2 of the Financial Services (Distance Marketing) Regulations 2004.I. S. 2013 No. 3134.

³⁰⁷ See, Paragraph (g) of Department for Business Innovation & Skills, 'Consumer Contracts (Information, cancellation, and additional charges) Regulations 2013 'Department for Business Innovation & Skills (Implementing Guide) /13/ 1368. available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429300/bis-13-1368-consumer-contracts-information-cancellation-and-additional-payments-regulations-guidance.pdf accessed 27 March 2015.

³⁰⁸ Henderson, and Poulter (n 88) 294.

require the confirmation to be sent by the trader or to be received by the consumer? Initially, Regulation 16(1) uses the wording “must give” which might indicate both an action from the trader in delivering information, as well as an action from the consumer in receiving it. However, this Regulation does not specify whether the requirement is done at the time when the confirmation is sent or at the time when it is received. This uncertainty is erased in Regulation 16(5) where “the confirmation is treated as provided as soon as the trader has sent it or done what is necessary to make it available to the consumer”. Thus, there is no need for the confirmation to be received on the part of the consumer. This might be interpreted as something against the interest of consumers. However, why does the law not require the confirmation to be received by consumers? On this matter, the Law Commission does not recommend this requirement from the consumer, considering that this would unnecessarily constrain the use of most of electronic means.³⁰⁹ An alternative view recommends acknowledgement from the consumer via email if the consumer has used email for placing his initial order.³¹⁰ However, confirmation will not be regarded as having been made on a durable medium if sent it by an email through websites.³¹¹

A. The Case of Websites

The main concern here is about websites, where information is made available and nowhere else, and whether they can be deemed to be durable mediums. At present, there is no English case-law on this matter. However, there have been some indicators under the CCIACRs 2013, which may define a website as a durable medium. For example, under Regulation 13(1) making information available to consumers meets the information requirements.

There may still be some confusion as to whether this manner is only allowed with prior information or can extend to post-information as well. It is true that the Regulation offers this manner only for prior information. While for post-information, the trader is required to

³⁰⁹ Law Commission (n 185).

³¹⁰ Great Britain, Department of Trade and Industry, *A Further Consultation Paper, Distance Selling, Implementation of the EU Directive 97/7 on the Protection of Consumers in respect of Distance Contracts* (DIT, London 1999); Department of Trade and Industry, *A consultation Paper, Distance Selling: Implementation of the EU Directive 97/7 on the Protection of Consumers in respect of Distance Contracts* (DTI, London 1998).

³¹¹ DTI considers an email as a durable medium but “information contained via link to a website which may change, and which is embedded in an email” will not be considered as having been provided via durable medium. See, Paragraph (g) of Department for Business Innovation & Skills (n 307).

“give the consumer confirmation of the contract on a durable medium”.³¹² Thus, it may be argued that using the term “give” removes the confusion about the manner of confirmation. This is, however, not particularly clear because Regulation 16(5) mixes up again between giving information and making it available, rendering them equal in giving confirmation. Accordingly, the confirmation is to be regarded as having been provided “as soon as the trader has sent it or done what is necessary to make it available to the consumer”. Further evidence of this confusion, the regulations do not require confirmation on a durable medium to be received on the part of the consumer, as was the case under the previous regulations.³¹³ Alternatively, they require confirmation to be given on the part of the trader.³¹⁴ Using the term “give” may require the consumer to do some actions in receiving information, while the term “receive” would have put him in a passive position to the information with no action required on his part.

Despite that, the issue entirely depends on the nature of websites and how likely they are to meet conditions of a durable medium as legislatively defined. As explained elsewhere,³¹⁵ Regulation 5 does not exclude Internet sites when defining durable mediums, but it requires three features to be met; “allow information to be addressed personally, enable the recipient to store the information for a period of time, and allow the unchanged reproduction of the information stored”. However, the question is, do websites have these features?

B. Inconsult Anstalt v Finanzmarktaufsicht

This was debated in the *Inconsult Anstalt* case before the EFTA court.³¹⁶ The main question which arose before the court was; what are the criteria by which an Internet site may be regarded as constituting a durable medium, as it is to be understood under Article 2(12) of the Directive 2002\92\EC?³¹⁷ This question is relevant to English law because the definition given to the durable medium in Article 2(12) of the Directive is similar to the one given in Regulation 5 of the CCIACRs 2013. This case is important because it gives

³¹² The CCIACRs 2013, Regulation 16(1).

³¹³ The DSRs 2000, Regulation 8(1).

³¹⁴ See this Thesis, 95-96.

³¹⁵ See this Thesis, 87-88.

³¹⁶ *Inconsult Anstalt v Finanzmarktaufsicht* E-4/09 available at :

<http://www.eftacourt.int/uploads/tx_nvcases/4_09_Judgment_EN.pdf> accessed 8 November 2016.

³¹⁷ For more information about the case See Report for the hearing available at:-

<http://www.eftacourt.int/uploads/tx_nvcases/4_09_RH_EN.pdf> accessed 7 November 2016.

interpretation to three main elements of the durable medium definition in Regulation 5 in relation to websites.

The first element is the requirement of the information being addressed personally. In this regard there was a debate about whether or not the wording “addressed personally” suggests that information should have personal relevance to the consumer, rather than a general character which relates to all consumers? This needs to be addressed because information on websites does not often include personal information of a certain consumer. On this matter, the parties involved in the case presented different views. One party argued that information can still be considered as “personally addressed”, even when information is freely accessible to the public.³¹⁸ In contrast, the other party argued that this requirement can only be met if the consumer has his own personal account on a webpage, accessible by a personal password.³¹⁹

However, the court did not pay much attention to whether information is addressed personally or not. Rather, the attention of the court was focussed more on the matter of whether there is an obligation to “provide the customer with” the information required, and whether the consumer has the ability to store the information himself.³²⁰ As a result, the court held that when information is provided on the basis of an obligation, this action has to be regarded as having been addressed personally, regardless of whether the means used is freely accessible to the public or to specific consumers.³²¹

The second element was about the period within which the consumer should have access to the information. For such purpose, Article 2(12) of the Directive 2002/92/EC and Regulation 5 do not specify a certain period of time. This led to a debate about the time when such period should begin to run, and the time when the period should end. This is particularly important in the case of websites where information is not made available for ever, but is subject to updates and therefore changes from time to time. At this point, it is necessary for the consumer to know the period and the day when this period should run after he has accessed the information on a website. In this regards, one party was of the view that the period should include the duration of the legal relationship between the trader and the consumer. To the other party, the period should start from the beginning of the

³¹⁸ *Inconsult Anstalt v Finanzmarktaufsicht* E-4/09, Paragraph 35.

³¹⁹ *ibid*, Paragraph 35.

³²⁰ *ibid*, Paragraph 37 and 38.

³²¹ *ibid*, Paragraph 36.

negotiation until the moment when the contract is to be concluded. It was further argued that the period should cover the duration of the contractual negotiation.³²² Further to the negotiation period, all parties involved in the case agreed that the accessibility to information should be possible even after the termination of a contract.³²³

The court held;

The information must be accessible for as long as it is relevant to the customer in order to protect his interests stemming from his relations with the insurance intermediary.³²⁴ The length of this period will depend upon the content of the information, the contractual relationship and the circumstances of the case. Furthermore, in order to allow a customer, where necessary, to seek redress, the adequate period of accessibility may also cover the period after such a contract has lapsed.³²⁵

The third element was about the capability of the information stored being changed by the trader. If a website is to be a durable medium then the trader should be unable to unilaterally change the information stored on the Website. If a change occurred, he is required to indicate easily when the change took place. In principle, making that happen on a website may not be difficult, but the difficulty is how to prove that the person who has the control over the website has modified the information. To remedy this matter, it was argued that the consumer should be required to print out or store information on his personal hard drive. In this interpretation, what constitutes a durable medium is not the website itself but the means where the information is stored.³²⁶

In response, the court adopted and agreed with an investigation carried out in 2007 by the European Securities Markets Expert Group “ESME”.³²⁷ This investigation distinguished between two types of web sites; the first type is called “Ordinary Websites” where the user cannot store information or print out pages. Furthermore, information is often changed by

³²² *Inconsult Anstalt v Finanzmarktaufsicht E-4/09*, Paragraph 42.

³²³ *ibid*, Paragraph 43.

³²⁴ This part of judgement is literally implemented into Recital 23 of the CRD 2011 which states, “Durable medium should enable the consumer to store the information for as long as it is necessary for him to protect his interest stemming from his relationship with the trader”.

³²⁵ *Inconsult Anstalt v Finanzmarktaufsicht E-4/09*, Paragraph 44.

³²⁶ *ibid*, paragraph 49.

³²⁷ *ibid*, paragraphs 61-67.

administrators. Therefore, in the view of ESME this type of website cannot be regarded as “durable mediums”.³²⁸

The second type is called “Sophisticated Websites”. This category of websites is further divided into two types; “(1) those which act as portals for the provision of information in another “durable medium”, and (2) may actually constitute “durable mediums” themselves”. In the first type of Sophisticated Websites, the user is able personally to send emails and attaching files or PDF files to himself. He is further able to print out information in question. Hence, what constitutes a durable medium is not a website itself, but rather the proper means in which the information is stored. In the view of ESME this category meets the requirements of DMD (the Distance Marketing Directive) and MiFID (the Markets in Financial Instruments Directive) in providing information on a durable medium. The second type of Sophisticated Websites is in a form of personal secure storage which grants the user to access by using a user code and password.³²⁹ In the opinion of ESME, a website with these features is to be regarded as a durable medium.³³⁰

C. Content Services Ltd v Bundesarbeitskammer

Nevertheless, a different interpretation was given by CJEU to this matter in the *Content Services* case.³³¹ In this case, it was proven that information regarding the right of withdrawal was made available via a link sent to the consumer by an email. In response to

³²⁸ See pages 12-13 of European Securities Markets Expert Group “ESME”, 'Esme's Report on Durable Medium- Distance Marketing Directive and Markets in Financial Instruments Directive' European Securities Markets Expert Group “ESME”. Available at: http://ec.europa.eu/finance/securities/esme/index_en.htm accessed 9 November 2016.

³²⁹ A debate about these types of websites occurred recently in 2015 in the *BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation* (Case C-375/15), which was viewed before Supreme Court in Austria in September 2016, and a similar approach was adopted. See paragraphs (2, 3, 63, and 88) of the case available at :

<http://curia.europa.eu/juris/fiche.jsf?id=C%3B375%3B15%3BRP%3B1%3BP%3B1%3BC2015%2F0375%2FP&language=en> accessed 10 November 2016. See also, David Bowden, 'Advocate General's opinion is that a bank's secure messaging system is 'durable medium' Bawag psk Bank für Arbeit & Wirtschaft AG v. Verein für Konsumenteninformation Case C-375/15' (2016) David Bowden Law 1.

³³⁰ See page 13 of European Securities Markets Expert Group “ESME (n 328).

³³¹ In this case, “an email was sent to the internet user after the placing of an order allowed access to the content of the website. That email did not contain any information on the right of withdrawal; that information could be obtained only via a link sent in the email. The internet user then received an invoice from C which reiterated that the right of withdrawal had been waived and that there was no longer an option to cancel the subscription contract. A German consumer organisation brought an action challenging C's business practice on the grounds that it infringed various provisions of EU and domestic law with regard to consumer protection”. *Content Services Ltd v Bundesarbeitskammer* [2012] 3 C.M.L.R. 34, at 807.

the claim, the court was reluctant to consider it as having been made on a durable medium. To make this decision, the court took two facts into consideration.

Firstly, the basis for judgement was Article 5 of the DSD 1997, which required the confirmation on a durable medium to be received by the consumer.³³² Based on that, the court stressed the passive communication of information, in which the information should have reached “the consumer’s sphere of influence” without requiring him to take any action.³³³ The Court’s decision was; “the customer must “receive” the information. This means, more specifically, that the information must be conveyed without the customer having to make any active effort to obtain it”.³³⁴ This was so regardless of whether the action required by the consumer was not difficult;

Although, in fact, the action involved in clicking on a hyperlink is not, in principle, particularly difficult, the fact remains that it requires a deliberate act on the part of the consumer, and therefore requires him to take an “active” role. On the contrary, as we have seen, the meaning of art.5 is precisely that certain information must be provided to the user, without any specific action on his part (except, obviously, the action resulting in the conclusion of the contract).³³⁵

Secondly, the consumer must be able to store the information in a way that enables him to reproduce it for future references. In the view of the court, “this is the whole purpose of the obligation to provide the information on a durable medium”.³³⁶ In the case, the consumer was indeed unable to take control over the information. The company did not make the information available in a way in which the consumer could download it, but rather the consumer was directed to the official sites of manufacturers.³³⁷

Hence, the interpretation given by CJEU entirely contradicts the attitude taken by EFTA court. As noted earlier, the EFTA court did not distinguish between passive consumers and positive consumers.³³⁸ Furthermore, such interpretation is against the policy of newer EU legislation which does not pay any attention to the idea of passive and active

³³² The DSD 1997, Article 5.

³³³ Carl Baudenbacher, and Theresa Haas, 'Websites as Durable Media' (2015) 10(10) *Journal of Intellectual Property Law & Practice* 785, 786.

³³⁴ *Content Services Ltd v Bundesarbeitskammer* [2012] 3 C.M.L.R. 34, at 814.

³³⁵ *ibid*, at 815.

³³⁶ *ibid*.

³³⁷ *ibid*, at 812.

³³⁸ See this Thesis, 90-91.

communication of information. For example, Article 8(7) of the CRD 2011 uses the term “provide” instead of the term “receive” as set out in Regulation 5 of the superseded directive (the DSD 1997).³³⁹ Moreover, the idea of a fully passive consumer does not exist from a technological perspective. All examples mentioned in the definition of durable medium, which are reckoned to be pure durable mediums, actually require the consumer to perform further action in order to possess information. For example, using a CD ROM, DVD, or floppy disk, in delivering confirmation require the consumer to acquire technical devices (CD, DVD Player, and a computer) which make the information readable.³⁴⁰

In summary, it is submitted that the judgement made by EFTA court is more relevant to the English CCIACRs 2013. Provisions for confirmation under Regulation 16 do not distinguish between passive consumers and positive consumers. In either case, confirmation has to be given. Thus, when a website acquires the elements stated in Regulation 5, and in the way explained by the EFTA court, it constitutes a durable medium for the purpose of sending confirmation.

3.3. The Manner in Which the Information should be provided In Iraqi Law

3.3.1. The Manner in Which the Information should be provided in the ICPL 2010

Hence, the study discusses three related issues; giving information or making it available, clarity and comprehensibility, and the requirement of sending information on a durable medium:

3.3.1.1. Giving Information or Making it Available to Consumers

According to Article 6; “The consumer has the right to receive (obtain) information...”. This is the main wording used in introducing the supplier’s duty to provide information. In terms of terminology, Article 6 uses the term “receive” in referring to the process of delivering information. This means that consumers have the entitlement to possess information without any action required on their part. Thus, the Iraqi legislator has

³³⁹ According to Article 8(7) of the CRD 2011; “the trader shall provide the consumer with the confirmation of the contract concluded, on a durable medium within a reasonable time after the conclusion of the distance contract”.

³⁴⁰ Baudenbacher, and Haas (n 333) 789- 790.

protected passive consumers similarly to the approach taken by CJEU but not the English CCIACRs 2013.³⁴¹ Hence, any means used to deliver information should enable the consumer to possess information without making any effort. Means such as e-mails; fax, mobile phone messages SMS, and Postal letters, are likely to meet the requirement. However, making information available via a website link sent to the consumer will not probably meet the requirement inasmuch as there is an action required on the consumer's part.

If so, does this mean that the Iraqi consumers have more protection than the English consumers? Ostensibly, yes because nothing is required from the consumer in that regards. However, this approach may cause problems as, indeed, the idea of a passive consumer does not exist from technical perspective. In all cases of distance means of communication, a certain action is required from the consumer. If the means is an email, the consumer needs to connect his computer with Internet and open the email, if it is a SMS message, he needs to be in a place where the coverage is available. Furthermore, Article 6 does not introduce the information requirement from the trader's perspective as a duty. If it did, it would have been much clearer whether the law requires the information to be given by the trader or to be received by the consumer. Instead, the Article introduces the requirement from the consumer's perspective as a right. In such a scenario, it is inevitable that the law will define a right by using terms which enables a person to enjoy such right. In this case, enjoyment of the right of information comes after a person receives the information and not before. Therefore, it is uncertain whether this wording can be interpreted in the same way as the wording "receive" was interpreted by CJEU. This is because the word "receive", which was subject to the CJEU judgement, was used in the DSD 1997 as to introduce the information requirements form the supplier's perspective as a duty.³⁴²

3.3.1.2. Clarity and Comprehensibility

Unlike English law, there is ambiguity about whether clarity and comprehensibility are required in Iraqi law. Generally, the ICPL 2010 does not offer a clear answer to this question. However, there have been other provisions which may arguably suggest that the information is to be provided in a clear and comprehensible manner.

³⁴¹ See this Thesis, 93-95.

³⁴² See this Thesis, 93- 94.

One example is Article 9(1) which requires the trader to refrain himself from “deception, misleading, falsehood and concealing information regarding content of goods and services”. It may be argued that this does not have anything to do with the manner of sending information. However, when commercial practices are protected from fraud, misleading, deception and concealment, this certainly raises the level of transparency between traders and consumers. As AL-Jbury argues, information, on whatever device delivered, is to be clear and comprehensible if it is delivered to the recipient free from deception, misleading, falsehood, and concealment.³⁴³ Regardless of whether the prohibited practice is exercised by an affirmative conduct, as where information is written in a vague “intangible” language, or omissions conduct such as where the trader deliberately conceals information from consumers.³⁴⁴

However, it is hard to accept this argument without supporting evidence from the court and legislation. The issue is not as simple as it might appear at first glance. Foremost, provisions of prohibited practices protect consumers from traders who deal in bad faith. In any case, intention is to be taken into consideration. This suggests that a practice shall not be deemed as prohibited practice unless the trader wilfully intends to exercise it. Indeed, unclear information does not necessary mean that a trader is of bad faith, but unclear information could also be delivered by a trader of good faith. The use of technical terms may create some difficulties on the part of consumers, notwithstanding that the trader may not have a deceptive purpose.³⁴⁵ Furthermore, the provision set out in Article 9(1) entails the trader to keep himself away from any behaviour could eventually make a prohibited practice but there is no corresponding positive obligation to seek the clarity by action. In short, simply being free from deception, misleading, concealment and falsehood does not always lead to a clear statement.

Another example is Article 9(3) which prohibits a practice where it relates to producing, selling, displaying, and advertising “b- any goods in which their entire content or warnings and start date and expiration date have not been written clearly on their coverages or cans”. Although, this Paragraph clearly requires clarity, it cannot add anything to distance selling

³⁴³ Helan Mohammed AL-Jbury, 'Misleading and Deception or Lying in the Commercial Media' (2014) 3(11) Journal of College of Law for Legal and Political Sciences 293, 297; Fatn Hawa, *AL-Wagiz in Consumer Protection Law: A Study in Provisions of Lebanese Law with Indicating to Consumer Protection at Distance Contracts* (1st edn Manshorat AL-Halabi AL-Hqoqia, 2012) 66, 67.

³⁴⁴ Baiz (n 240) 5-7; Ahmed (n 239) 198.

³⁴⁵ Ahmed (n 109) 371.

contracts because the wording “coverages or cans” has a clear reference to goods which are displayed for sale in stores. Therefore, this requirement does not include cases where goods are displayed over means of distance communication. This requirement is, of course, still in effect even where the trader displays goods for online selling, but the trader is not required to consider clarity online, rather he is required to do so with labelling information on the products.

3.3.1.3. The Requirement of Sending Information on a Durable Medium

The English CCIACRs 2013 require the trader to send confirmation of information on a durable medium. This requirement is subject to debate under the ICPL 2010. It may arguably be said that Article 7(6) of the ICPL 2010 requires delivery of information on a durable medium when it obliges the trader to “write his business name and address or any other brand adopted by the law on all of his correspondences and prints and advertisements”. However, this provision refers to means which are naturally durable mediums. This particular concern may not rise in using some means of distance communication such as Catalogues, Leaflets, Postal Letters, and sale by a sample. These means already meet the conditions of a durable medium. Catalogues, Leaflets and Postal Letters are paper and traditionally documented by ordinary writing.³⁴⁶ Sale by a sample, on the other hand, is the product itself and all information needed must be labelled on it.³⁴⁷ Whereas, electronic means such as World Wide Web, TV Programs, and mobile phone, may pose serious concerns about their sufficiency in keeping information unchanged over a reasonable period of time for the sake of proof.³⁴⁸ Furthermore, this provision deals only with information related to traders’ identities, but the remaining information may be passed in any manner chosen by traders. To this end, suppliers are not required to use durable medium in sending information. This means, they are free to choose manners which are in their best interests.

³⁴⁶ Ahmed (n 239) 304.

³⁴⁷ Khalid Ibrahim, *Making The Electronic Contract: A Comparative Study* (Dar AL-Fkr AL-Jamihi, 2006) 70.

³⁴⁸ Mohammed Mansur, *Provisions of Sale, Classical and Electronic and International Sales and Consumer Protection* (Dar AL-Fkr AL-Jamiyi, 2006) 155- 156; Osama Mujahid, 'Speciality of Contracting over Internet' (The Law and Computer and Internet the College of Sharia and Law, University of U.A.E, U.A.E 1st to 3rd of May 2004) 99. 131- 133. Available at:

<http://slconf.uaeu.ac.ae/prev_conf/2000/1.pdf> accessed 15 November 2016.

Then the question is, what should have been done to safeguard the interest of distance consumers? This may have been achieved for distance consumers contracting through electronic means through the laws of evidence in disputes under the definition of *probativity* in such contracts. An electronic means has probative force in a dispute when the conditions set out in the Iraqi law of of Electronic Signature and E-Transaction No (78) 2010 are met. Article 13(1) states;

Electronic means, electronic writing, and electronic contracts have probative force of paper medium where three conditions are satisfied: a- The recipient must be able to store information in a way which enables him to reproduce it for future references. b- The medium must be capable of keeping information unchanged C- The information must refer to the person who created the means or who received it, in addition to the date of delivery and reception.³⁴⁹

The first two conditions are similar to those required for durable mediums under the English CCIACRs 2013. However, English law only requires information to be personally addressed to the consumer.³⁵⁰ While under Iraqi law, information must refer to the sender or receiver. Hence, the wording “personally addressed” may have different interpretation under Iraqi law than the approach taken by EFTA Court. As noted, in the view of the EFTA Court information is still regarded as having being addressed personally even where such information is accessible to the public or group of consumers.³⁵¹ This interpretation, however, may not be accepted under Iraqi law because making information open to the public or group of consumers does not certainly refer to any particular consumer.³⁵²

³⁴⁹ See, Hadi AL-Bashkani, *Legal Regulation of E-Commerce: A Comparative Study* (Dar AL-Kutob AL-Jadida, 2009) 434- 435; Samir Abdul Aziz AL-Jamal, *The Contracting over Contemporary Technology of Communication: A Comparative Study* (2nd edn Dar AL-Nahtha AL-Arabia 2007, 2007) 199- 204; Osama Badr, *Warranties of the Buyer within the Contract of Electronic Sale* (Dar AL-Jamiha AL-Jadida, 2011) 29- 32; Nael Musada, 'The Writing in Electronic Contracts' (2012) 26(50) *Journal of College of Sharia And Law* 193, 203; Mohammed Zaheeruddin, 'Evidentiary Value of Electronic Transactions' (The Electronic Transactions Conference, Electronic Trade- Electronic Government, College of Sharia and Law College of Sharia and Law, University of U.A.E, U.A.E 19-20 of May 2009) 19, 18.

³⁵⁰ See this Thesis, 87-88.

³⁵¹ See this Thesis, 90- 91.

³⁵² Using World Wide Web in providing information is subject to another legal argument about whether it constitutes offer or invitation to treat. For some jurists it has to be regarded as *invitation to treat* because information is addressed to the public. While for others, it may constitute *offer* if it includes all terms and conditions required for having a contract soundly made. See, Kadim Karim Ali, 'The Electronic Contract' (2009) 1(1) *Journal of Muhaqiq AL-Hili for Legal and Political Sciences* 132, 139; Ilyas Bn Sasi, 'The Electronic Contracting And the Issues Related to It' (2005) 2 *Journal of Researcher*, 62; Mohammed

In further room for improvement, the ICPL 2010 does not require any period in which information should remain unchanged which is similar to English law. Not requiring a period appropriate to the purpose behind information may negatively affect consumers. However, requiring durability of means for an unlimited period of time is prejudicial to traders since some means of distance may not be durable for a long period of time.

In summary, the ICPL 2010 does not oblige the trader to deliver information in a way which is compatible with the Electronic Signature and E-Transaction law. Consequentially, a wide freedom is accorded to the trader in choosing means appropriate to his interest. Unfortunately, many of distance means are not of the nature to keep them consistent with the conditions set out in the Iraqi Signature and E-Transaction Law. For example, if World Wide Web is used in sending information it is hard to render it admissible because there is no guarantee that the displayed information will remain unchanged over a reasonable period of time. Electronic mails and mobile phone calls may raise the same evidentiary concerns as the trader may not leave his name or the recipient's name fixed on email messages.³⁵³ Using phone calls, on the other hand, is not capable of being recorded on the part of consumers. Therefore, sending confirmation of what have been conversed verbally throughout the phone calls is highly recommended.³⁵⁴

3.3.2. The Manner in Which the Information should be provided in the KRP 2015

Under this heading the KRP 2015 is arguably in a better position compared to the ICPL 2010. Article 21 attempts to specify the manner of sending information required for making an electronic contract. Hence, three issues are discussed in relation to distance contracts; giving information or making it available, clarity and comprehensibility, requirement of sending information on a durable medium;

Tahir, 'Contracting between Present Parties and its Speciality in E-Commerce Contracts: Legal Analytical and Comparative Study' (2012) 12(54) Rafidain of Law Journal 42, 75; Tima Fawzi AL-Saraf, 'Legal Overture to the Internet' (2005) 3(26) Rafidain of Law Journal 425, 432- 433; Mustafa Musa AL-Ajarma, *Legal Regulation of Making The Contract over Internet* (Dar AL-Kutob AL-Qanunia, 2010) 76- 78.

³⁵³ Musada (n 349) 217; Mussa (n 153) 74- 75; Amal Hassoni, 'Contracting over Electronic Mail and its Proof Needs documenting' (2013) 5(20) Journal of Law 256, 266- 270; Nazih AL-Sadiq AL-Mahdi, 'Conclusion of the Electronic Contract' (The Electronic Transactions Conference, Electronic Trade-Electronic Government College of Sharia And Law, University of U.A.E, U.A.E 19- 20 of May 2009) 207.

³⁵⁴ Ibrahim (n 347) 67.

3.3.2.1. Giving Information or Making it Available to Consumers

The proposal uses the term “provide” in referring to the process of delivering information. According to Article 21 “every person, who displays goods or services.....is required to provide the consumer with clear and adequate information...”. This wording is closer to the term “give” which is employed by English law. Both terms refer to an action required on the part of the trader which contrasts with the term “receive” as used in the ICPL 2010 which refers to an action required on the part of the consumer in addition to an action required on the part of the trader. This suggests that the proposal does not distinguish between passive and positive information communication in providing protection similarly to English law. However, it is hard to determine whether or not making information available to online consumers meets the requirements of providing information. This ambiguity is not found in English law because the law clearly makes giving information equal to making it available in accordance with the information requirements.

3.3.2.2. Clarity and Comprehensibility

According to Article 21 “every person, who displays goods or services is required to equip the consumer with clear and adequate information which will ensure the latter to make his decision about the contract, precisely the following information.....”. Hence, the trader has to do two things;

Firstly, information has to be clear. The wording “clear information” apparently has linkage to the language used in writing or uttering information. This requires the trader to provide information free from ambiguity which could make it unintelligible to consumers. To achieve this, the trader should not use the language circulated among businesses.³⁵⁵ Size and type of font, on the other hand, play a crucial role in making information easy to be understood to consumers.

Secondly, information has to be adequate. As discussed previously, lengthy information may render it unclear. Sending a flood of information could cause difficulties for consumers. The risk of this is high with the policy adopted in the KRP 2015. As noted earlier, the list of information laid down in Article 21 is not an exclusive list of

³⁵⁵ Mohammed Abdl- Raba, *Liability for Actions of Hazardous Products, A Comparative Study* (Dar AL-Jamiha AL-Jadida, 2012) 229- 230; Mohammed (n 103) 277.

information.³⁵⁶ Rather, it is the minimum level of information which cannot be ignored by traders. Article 21 requires information to be adequate then asks the trader to precisely send some information. This suggests that the information listed in the foregoing Article may not be of a quantity to adequately help consumers. Thus, the wording “adequate” covers cases where the information listed in the preceding Article turns out to be inadequate. Otherwise, any attempt to give an exclusive character to the list of information set out in Article 21 makes the wording “adequate information” dispensable. In consequence, traders are free either to stick with the extent stated in the preceding Article, or add further information. If he decides to add further information, this may confuse consumers and cause more problems than solve them.

Furthermore, there is still some ambiguity about the criteria which should be followed to determine whether information has been sent clearly and adequately. Article 21 does not explain whether clarity and adequacy is to be assessed in the view of the consumer or the trader “subjective criterion”, or the court “objective criterion”. Further to this ambiguity, and contrary to the approach taken by English law, clarity and adequacy are linked to the word “information” rather than the manner in which information should be sent. This approach may lead to further controversy because it may be interpreted that information is to be regarded as having been sent clearly if it is deemed to be clear and adequate, regardless of whether the medium used in sending information was adequate to clearly accommodate information.

3.3.2.3. The Requirement of Sending Information on a Durable Medium

Although, the KRP 2015 recognises electronic contracts, it does not address confirmation of information. This suggests that the trader is not required to send confirmation of information on a durable medium. Hence, all of the criticisms directed at the ICPL 2010 can also be directed at the KRP 2015.

3.4. The Time in Which Pre-Contractual Information should be provided in the English CCIACRs 2013

It is not only the availability of information that makes it effective, but also the appropriate timing of sending it. Helberger argues that consumers tend to forget information if it is not

³⁵⁶ See this Thesis, 64- 65.

sent at the moment when it is relevant.³⁵⁷ Serrat suggests that to be effective, the right time for pre-contractual information must be connected to the aim of providing such information.³⁵⁸ Since pre-contractual information aims to help the consumer make an informed decision about concluding a contract, information should be provided prior to the conclusion of the contract.

The CCIACRs 2013 generally address two basic timings; as follows;

3.4.1. The Time in Which Pre-Contractual Information Should be provided

The first timing is set out in Regulation 13(1) which obliges traders to “give or make available the information listed in the Schedule 2.....before the consumer is bound by a distance contract”.³⁵⁹ This timing is consistent with the aim established for prior information inasmuch as consumers are entitled to receive information before the conclusion of contract. Accordingly, traders are not bound to any specific time over the negotiation period. Instead, they are required to provide the information before the consumer makes his decision about the contract. It could be either at the beginning of negotiation or even at the last moments before the consumer makes his decision and concludes the contract. This depends on the nature of means used in providing information. If a trader decides to make information available on a website, information then should be there at any time the consumer visits the website.³⁶⁰ It does not matter if the aim of the visit is to make a contract or just to pass by. Meaning that, information has to be shown as part of the webpage, either directly or via a link to another page.³⁶¹ Thus, the consumer is able to see information at any time he visits the medium where information is made available.³⁶²

Further to this general requirement, the nature of some distance means of communication may need special treatment. The CCIACRs 2013 regulate two such cases where traders are

³⁵⁷ Helberger, 'Form Matters: Informing Consumers Effectively' (n 178) 23.

³⁵⁸ Serrat (n 18) 77.

³⁵⁹ In the area of e-commerce, Regulation 9(1) of The ECR 2002 uses the wording “prior to an order being placed by the recipient of a service”, which has the same meaning of the wording used by the CCIACRs 2013 albeit in different words.

³⁶⁰ Lodder (n 276) 364.

³⁶¹ Nicholas Ryder, Margaret Griffiths, Lachmi Singh, *Commercial Law: Principles and Policy* (Cambridge University Press, New York 2012) 168; Lodder (n 276) 364.

³⁶² Regulation 6(1) of the ECRs 2002 introduces similar provision, which requires information to be made available to recipients in a manner which is permanently accessible.

required to deliver some information at a particular time within the negotiation period. One example is Regulation 14(2) regarding electronic contracts which states; “If the contract places the consumer under an obligation to pay, the trader should make the consumer aware in a clear and prominent manner *directly* before the consumer places the order”. Although, there has been no clear interpretation from the court and literature about what the term “directly” can add here, it obliges the trader to ensure directly that the consumer has absorbed information.³⁶³ To make this happen, the trader should ensure that there is enough time before the consumer decides or he will not expect to have the consumer’s acknowledgement, as Regulation 14(3) requires. Another example is Regulation 15, regarding contracts made by phone calls, which requires the trader to disclose some information “at the beginning of the conversation with the consumer”.³⁶⁴ Apart from these cases, the information listed in Schedule 2 is required to be given at any time before the contract is made.

Does this requirement provide adequate protection especially when compared with the older regulations? The DSRs 2000 required suppliers to provide information “in a good time prior to the conclusion of the contract”.³⁶⁵ With this requirement, it was interpreted that consumers must have had adequate time to process information before concluding contracts.³⁶⁶ Although, it was unknown whether “good time” was a subjective or objective criterion, it would create at least a measure for the courts to judge as to whether the period was adequate for consumers to process information before the contract was made.³⁶⁷ It is submitted that there is still a need for a provision which describes the time in which the information should be provided; a time which ensures that the consumer is given enough time to process information. This earlier provision might be of some benefit to the CCIACRs 2013. As set out earlier, the major problem with prior information under the

³⁶³ Christian Twigg-Flesner, *The Europeanisation of Contract Law: Current Controversies in Law* (2nd edn Routledge, U.S.A. and Canada 2013) 77.

³⁶⁴ According Regulation 15 of the CCIACRs 2013; “If the trader makes a telephone call to the consumer with a view to concluding a distance contract, the trader must, at the beginning of the conversation with the consumer, disclose (a) the trader’s identity, (b) where applicable, the identity of the person on whose behalf the trader makes the call, and (c) the commercial purpose of the call”.

³⁶⁵ The DSRs 2000, Regulation 7(1).

³⁶⁶ Dickie (n 9) 221.

³⁶⁷ Hans Schulte-Nölke, Christian Twigg-Flesner, and Martin Ebers (ed), *'E. Distance Selling Directive (97/7) (EC Consumer Law Compendium, The Consumer Acquis and its Transposition in the Member States, Sellier European Law Publishers, Munich 2008) 328.*

new regulations is not about insufficiency of information but it is rather about inability of consumers to grasp it.³⁶⁸

3.4.2. The Time in Which Confirmation of Information Should be provided

The second basic timing is set out in Regulation 16 regarding confirmation of distance contracts “post-contractual information”. Accordingly, traders “must give the consumer confirmation of the contract”,³⁶⁹ and “within a reasonable time after the conclusion of the contract, but in any event not later than the time of delivery of any goods supplied under the contract, and before performance begins of any service supplied under the contract”.³⁷⁰ It is for the court to decide on meaning of reasonable time.³⁷¹ This must include all the information laid down in Schedule 2 unless the trader has already provided that information to the consumer on a durable medium prior to the conclusion of the distance contract.³⁷²

At this point, no room is found for any further improvements; this may change if a dispute arises in that area.

3.5. The Time in Which Pre-Contractual Should be provided in Iraqi Law

Iraqi laws, and more clearly the KRP 2015, set up a time for pre-contractual information, but not for post- contractual information because they do not recognise distance selling contracts specifically, as discussed below;

3.5.1. The Time in Which Pre- Contractual Information Should be provided in the ICPL 2010

The ICPL 2010 does not introduce any provision which could refer to the time when information must be sent. Article 6, where information provisions are mainly set out, only

³⁶⁸ See this Thesis, 50-54.

³⁶⁹ The CCIACRs 2013, Regulation 16(1). This provision is slightly different from the approach taken by the pervious Regulations. Regulation 8 of the DSRs 2000 required confirmation to be sent in good time before the conclusion of the contract. The term “good time” can have the same effect as the term “within a reasonable time” has under the new regulations. However, the pervious regulations made confirmation possible even after the performance of services begins since Paragraph (b) of Regulation 8 required conformation “in any event (i) during the performance of the contract, in the case of services”.

³⁷⁰ The CCIACRs 2013, Regulation 16(4).

³⁷¹ Schulte-Nölke, Twigg-Flesner, and Ebers (n 367) 530.

³⁷² The CCIACRs 2013, Regulation 16(2).

grants consumers the right to obtain information,³⁷³ leaving the time when such information should be obtained silent.

Unlike Article 6, Article 7(1) includes an explicit reference to the time when some pieces of information are to be sent but this is arguably aimed at face to face contracts. The trader and advertiser are obliged; to ensure that data and quality and entire content of goods are fixed on the labels before sending them to the markets or selling or purchasing them..³⁷⁴

Article 7 does not appear to be relevant to distance consumers. Therefore, it does not have a practical effect in the area of distance selling contracts and standard contracts, where such requirement could play a pivotal role. Thus, distance consumers in Iraq are susceptible to being unable to digest information unless it is to be legally provided in “good time” before the contract is made.

3.5.2. The Time in Which Pre- Contractual Information Should be provided in the KRP 2015

Article 21 of the KRP 2015 implicitly requires the trader to provide pre-contractual information before the contract is made. Accordingly, “every person is required to equip the consumer with clear and adequate information which will ensure the latter to make his decision about the contract”. By default, the information required would not ensure the consumer to make his decision about the contract unless such information is given before the contract is made. Nevertheless, there is no any description to the precise moment when information should be provided. In consequence, all the criticisms directed to the ICPL 2010 and English law can also be directed at the KRP 2015.³⁷⁵

³⁷³ According to Paragraph (b) of Article 6; the consumer has the right to receive “complete information with regards to quality of goods and the sound ways of using them or the modality of receiving the service with its form and the official language adopted”.

³⁷⁴ Similar to Paragraph (1) of Article 7, Subparagraph (b) of Paragraph (2) within Article 9 includes a reference to the time when some information should be put in reach of consumers but this once obliquely. The previously mentioned provision prohibits the trader from producing or selling or displaying or advertising “any goods in which their entire content or warnings and start date and expiration date have not been written clearly on their coverages or cans”. By default, the prohibition is effective since the time when goods are to be produced or sold or displayed or advertised. The subject -matter of prohibition is the non-existence of some pieces of information fixed on goods. In consequence, the trader is required indirectly to put such information within reach of consumers before selling.

³⁷⁵ See this Thesis, 98-100.

3.6. Conclusion

It has been observed that by employing terms “give” and “making information available” in Regulation 13(1), English law no longer distinguishes between passive and positive consumers in obtaining pre- contractual information. For confirmation, it is established in Regulation 16(2) that confirmation must be given to consumers on a durable medium. The biggest issue here is whether websites can technically meet the conditions of durable mediums, and it was established that the EFTA Court confirmed that Sophisticated Websites do meet the requirement.³⁷⁶

In Iraqi law, it is found that there have been no clear benchmarks about the manner of sending information. The ICPL 2010 and the KRP 2015 do not require the trader to send information on a durable medium. This deprives distance consumers from gaining proof at the time when disputes arise. Here, a similar provision to Regulation 16(2) of the CCIACRs 2013 is required. For pre- contractual information, the issue is not clear. The ICPL 2010 employs the term “receive” in referring to the process of transmitting information.³⁷⁷ Thus, no action is required on the part of consumers similarly to the approach taken by the CJEU in a case.³⁷⁸ This provision needs to be changed similarly to Regulation 13(1) of the CCIACRs 2013 as the idea of passive consumers does not exist technically. The KRP 2015 uses the term “provide” which may require an action on the part of consumers similar to the approach taken in English law.³⁷⁹ Also, making information available on websites does not meet the requirement under Iraqi laws. This current attitude prevents traders from using websites, the common means of distance communication in today’s dealing, in sending information. Thus, a need for a similar provision to Regulation 13(1) of the CCIACRs 2013 exists.

It is also found that, the ICPL 2010 is not clear about the clarity and comprehensibility requirement. This should be amended similarly to Regulation 13(1) of the CCIACRs 2013. The attitude of The KRP 2015 is arguably clearer in this sense. In the proposal, there has been an explicit requirement to provide clear and adequate information.³⁸⁰

³⁷⁶ See this Thesis, 92-93.

³⁷⁷ The ICPL 2010, Article (6).

³⁷⁸ See this Thesis, 93-95.

³⁷⁹ The KRP 2015, Article (21), the CCIACRs 2013, Regulation 13(1) (a).

³⁸⁰ The KRP 2015, Article 21.

Furthermore, it has been observed that English law requires pre- contractual information to be sent “before the consumer is bound by a distance contract”.³⁸¹ Hence, the study concluded that the absence of a specified moment within the negotiation period may leave the consumer unable to process the information required under the current legislation. It is concluded that Iraqi laws do not appropriately deal with timing information compared to English law. The ICPL 2010 does not require any time for information requirement.³⁸² This may lead to the conclusion that that information does not necessarily need to be provided at the negotiation stage. This has to be tackled by clearly requiring the supplier to provide information before the contract is made, similarly to Regulation 13(1) of the CCIACRs 2013. On the other hand, the KRP 2015 implicitly requires information to be sent before the contract is made.³⁸³ Again, non- existence of a specific time may lead to overloading the consumer with information if it is not sent at an appropriate time.

In the next chapter, the study will discuss the remedy available for the consumer when such a duty is breached.

³⁸¹ The CCIACRs 2013, Regulation 13(1) (a).

³⁸² The ICPL 2010, Article 6.

³⁸³ The KRP 2015, Article 21.

CHAPTER FOUR: THE REMEDY AVAILABLE WHEN THE DUTY TO PROVIDE PRE-CONTRACTUAL INFORMATION IS BREACHED

4.1. Introduction

This chapter analyses the remedies available to the consumer when the duty to provide pre-contractual information is breached since the duty cannot function effectively unless the law provides effective remedies for the breach.

The study examines each system for two separate remedies. The first is the remedy which covers non-performance and defective performance of the duty to provide pre-contractual information. It also seeks to establish the remedy which covers breach of the information provided after the duty has been fully performed. In the latter scenario, the performance of the duty may eventually be regarded as defective performance because delivering a product contrary to the information provided makes the performance of the duty defective.³⁸⁴

Here, three related matters to the remedy have to be addressed before any attempt is made to discuss remedies. Firstly, it is important to know whether a breach of such a duty would give rise to any liability in cases where the parties fail to conclude the contract. This scenario is possible because the duty is to be performed at the negotiation stage (i.e. pre-contract). Secondly, it is important to know whether a breach of the duty would constitute contractual liability or tortious liability in cases where the parties do have a contract. Thirdly, it is also important to understand the measure by which the court will determine whether a party has breached the duty or not, and whether there is any defence for the defendant. This is related to the idea of a duty to achieve a particular result or duty to exercise reasonable skill.

This chapter is divided into four sections. The first section will discuss the case when the duty is breached without the contract being made. The second section will discuss the liability if the duty is breached and the contract is made. The third section will examine the

³⁸⁴ For example, a trader may provide information about a product of certain quality. If he delivered a product of less quality than the one he gave information about, the claim then may be based on the breach of information because the trader did not keep his promise about delivering a product of the quality he promised. The claim may also be grounded on defective performance of the duty to provide pre-contractual information because the trader fails to give correct information about the product he delivered.

breach as to be of fault- based liability or strict liability. The last section will discuss remedies provided by consumer legislation.

4.2. When the Duty to Provide Pre- Contractual Information is breached without the Contract being made and after it is made in English Law

4.2.1. When the Duty to Provide Pre- Contractual Information is breached without the Contract being made

Pre- contractual information must be communicated between contracting parties during negotiations. At this stage, negotiating parties are free to walk away from negotiations or conclude a contract.³⁸⁵ In the first scenario, terminating negotiations does not raise any contractual liability upon negotiating parties in Common Law.³⁸⁶ Claims for pre-contractual liability are normally unsuccessful due to two reasons. Firstly, the English courts tend to protect freedom of contracting parties against any commitment, other than exceptional cases, which may be claimed before the contract is made, as explained before.³⁸⁷ Secondly, English law does not yet define the role of “good faith” at the negotiation stage as an overarching principle.³⁸⁸ Indeed, good faith has a long history of debate in English law and whether the law should imply such a duty or not. Historically, it started in 1766 when Lord Mansfield C.J attempted to establish a subjective concept of good faith and import it into English law in the *Carter* case as a “governing principle applicable to all contracts”.³⁸⁹ However, this attempt did not succeed and solely survived for contracts of utmost good faith, such as insurance contracts.³⁹⁰

³⁸⁵ Lucian Arye Bebchuk, and Omri Ben-Shahar, 'Precontractual Reliance' (2001) 30(2) the Journal of Legal Studies 423, 424.

³⁸⁶ Whittaker (n 42) 51; Stathis Banakas, 'Liability for Contractual Negotiations in English Law: Looking for the Litmus Test' (2009) University of East Anglia 1. 4. Available at: <<http://www.raco.cat/index.php/InDret/article/viewFile/124354/172327>> accessed 11 December 2016.

³⁸⁷ See this Thesis, 38- 39.

³⁸⁸ Bao Anh Thai, 'Culpa in Contrahendo in English Law'. 8. Available at:

<<http://www.baolawfirm.com.vn> > accessed 11 December 2016; Alyona N. Kucher, 'Pre-Contractual Liability: Protecting the Rights of the Parties Engaged in Negotiations' (2004) 17. Available at: <http://www.law.nyu.edu/sites/default/files/upload_documents/Kucher-paper.pdf> accessed 11 December 2016.

³⁸⁹ *Carter v Boehm* (1766) 3 Burrow 1905, at 1910.

³⁹⁰ The duty to act in good faith is implemented into Section 17 of Marine Insurance Act 1906. Later this duty was replaced by “the duty to take a reasonable care” under Section 2 of the Consumer Insurance

In other contracts, the duty to negotiate in good faith is not yet imposed routinely.³⁹¹ However, it is unclear whether English law defines a contractual implied duty to act in good faith based on the intention of the parties which can arise if the parties do conclude the contract, but this argument is not relevant here because this section discusses the liability which may arise when the negotiation ends without making the contract.³⁹²

In summary, a breach of the duty to provide pre-contractual information at the negotiation stage does not give rise to any contractual liability unless the contract is finally made. This is because each negotiating party has a right to withdraw from the negotiation.³⁹³

(Disclosure and Representations) Act 2012, and “the duty to fair presentation” under Section 3 of the Insurance Act 2015.

³⁹¹ In this regard, Lord Ackner stated in *Walford v Miles* [1992] 2 A.C. 128, at 138, that: “The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiation. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentation”. In *James Spencer. Co. Ltd. v. Tame Valley Padding Co. Ltd.*, 8 April 1998, the court of appeal ruled out good faith on the basis of freedom of contract when held; “There is no general doctrine of good faith in English law of contract. The plaintiffs are free to act as they wish provided that they don’t act in breach of contract”. See this case reported in: Pettinelli, C., 'Good Faith in Contract Law: Two Paths, Two Systems the Need for Harmonisation' (2005) *Diritto & Diritti* ISSN, 1127-8579. Available at:

< <http://www.diritto.it/archivio/1/20772.pdf> > accessed 11 December 2016.

³⁹² English law now, more than any time before, is ready to accept the idea. This has developed over sometimes. In some cases, the English courts tended to refuse the idea (*Philips Electronique Grand Public SA and Another v British Sky Broadcasting Limited* [1995] E.M.L.R. 472, at 484). In other cases, good faith appeared on the fair dealing basis (*Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd* [1989] Q.B. 433, at 439]; *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway* [1996] C.L.C. 1435, at 1442]; *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, at 494). In more recent cases the English court did not refuse the idea of implied contractual duty of good faith if the intention of the parties, explicitly or implicitly, went to that direction (*Yam Seng Pte Ltd v International Trade Corp Ltd.* [2013] EWHC 111 (QB) [at 131]; *Astor Management AG (formerly known as MRI Holding AG) and another v Atalaya Mining plc (formerly known as Emed Mining Public Ltd) and others* [2017] EWHC425(Comm); *Globe Motors Inc & Ors v TRW Lucas Varity Electric Steering Ltd & Anor.* [2016] EWCA Civ 396 at 68; *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch); *Acer Investment Management Ltd v Mansion Group Ltd* [2014] EWHC 3011 (QB); *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch); *BP Gas Marketing Ltd v La Societe Sonatrach* [2016] EWHC 2461 (Comm); and finally *Monde Petroleum SA v Westernzagros Ltd* [2018] EWCA Civ 25. See also, Angelo D M Forte, *Good Faith in Contract and Property Law* (Hart publishing Ltd, England 2000); Bilal Ahmad. 'The Pre-Contractual Duty of Good Faith- A Comparative Analysis of the Duty of Utmost Good Faith in the Marine Insurance Contract Law with the Duty of Good Faith in the General Contract Law' (Master Thesis Faculty of Law Lund University N.D); Vanessa Sims, 'Good Faith in Contract Law: of Triggers and Concentric Circles' (2005)16 *The Ki N G' S College Law Journal* 293.

³⁹³ It was held in *Walford v Miles* [1992] 2 AC, at 128, that “While negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason”.

However, this does not mean that the English Common law does not provide any remedy at all. If breaking the negotiation causes any damage, possible remedies may be found in Tort Law.³⁹⁴ The *Hedley Byrne principle* may apply which requires the claimant to ground his claim on pure economic loss based on a breach of a duty of care, in cases where a special relationship between the parties has been established which made one to rely on the other.³⁹⁵ However, the claimant is unable to raise a claim based on the Misrepresentation Act 1967 because it wholly depends on the existence of a valid contract.³⁹⁶

4.2.2. When the Duty to Provide Pre- Contractual Information is breached after the Contract is made

In the second more likely scenario, if the negotiating parties have concluded the contract, any breach of the duty to provide information during negotiations is to be judged by a series of techniques which have been developed in English law to deal with the parties' behaviour during negotiations.³⁹⁷ Concepts such as misrepresentation, mistake, duress, and undue influence which may impact on the validity of the contract.³⁹⁸ Hence, there is a need to find an answer to another important question related to liability of pre- contractual information. The question is, is pre- contractual information a matter relating to contract or tort? What makes this attempt important is, pre- contractual information needs to be judged differently than misrepresentation, mistake, duress, and undue influence. These are omission obligations which require the parties not to do something, such as misrepresenting a fact. However, the duty to provide information requires the party to do something positive.³⁹⁹ What makes the idea worth exploring is that English law generally tends not to impose positive obligation upon negotiating parties due to the freedom of contract.⁴⁰⁰

³⁹⁴ *Thai* (n 388) 11.

³⁹⁵ *Hedley Byrne & Co. Ltd. Appellants; v Heller & Partners Ltd. Respondents* [1963] 3 W.L.R. 101. This principle was further introduced in *Caparo plc v Dickman* [1990] 2 W.L.R. 358 where an investor had a claim raised for financial loss incurred due to reliance on annual account report published by Fidelity Plc company.

³⁹⁶ Paula Giliker, *Pre-contractual Liability in English and French Law* (Kluwer Law International 2002) 109.

³⁹⁷ *Banakas* (n 386) 3.

³⁹⁸ Richard Stone, *The Modern Law of Contract* (9th edn, Routledge 2011) 264; Dominik Michoński, 'Contractual or Delictual? On The Character of Pre-Contractual Liability in Selected European Legal Systems' (2015) 20 *Comparative Law Review* 151,160. Available at:

< http://www.comparativelawreview.umk.pl/D_Michonski.pdf > accessed 11 December 2016.

³⁹⁹ Atiyah, *An Introduction to the Law of Contract* (n 107) 245.

⁴⁰⁰ *Mulcahy, and Tillotson* (n 131) 106; *Stone* (n 398) 265.

First, it is important to know that during the negotiation negotiating parties may communicate many statements, some of which are sufficiently important to turn to terms after the contract is reached, and others may remain as mere representations which have no legal effect on contracting parties.⁴⁰¹ Broadly speaking, the intention of the parties determines whether a statement is to be dealt with as a term or representation.⁴⁰² In some cases, it may not be easy to identify terms from representations.⁴⁰³ In English law, as a rule, such difficulty does not exist in written agreements, in which all recorded statements between the parties turn to terms after the contract is made.⁴⁰⁴ However, there is a great difficulty where agreements are made orally.⁴⁰⁵ At this point, it is not difficult to argue that pre- contractual information, if provided, is regarded as a term of the contract. This is because Regulation 16 of the CCIACRs 2013 requires traders to give the consumer confirmation of the contract on a durable medium. This suggests that pre- contractual information is eventually to be recorded and handed to the consumer. Thus, it is arguable that all distance contracts should be regarded as written contracts, and pre- contractual information as a term of the contract. More importantly, Regulation 18 explicitly treats pre- contractual information as a term of the contract, when it states; “Every contract to which this Part applies is to be treated as including a term that the trader has complied with the provisions of (a) Regulations 9 to 14, and (b) Regulation 16”.⁴⁰⁶

Returning to the question, then, does the breach of the duty to provide pre- contractual information constitute contractual or non- contractual liability?⁴⁰⁷

⁴⁰¹ Mulcahy, and Tillotson (n 131) 105.

⁴⁰² Atiyah, *An Introduction to the Law of Contract* (n 107) 179-180; Roger Halson, *Contract Law* (1st edn, Pearson Education 2001) 286.

⁴⁰³ Atiyah, *An Introduction to the Law of Contract* (n 107) 179.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ In oral agreements, the English courts have followed certain criteria in distinguishing terms from representations. For example, important issues to the parties are to be terms (*Bannerman v White* 142 E.R. 685, at 844.); when the representor asks the representee that he should check the accuracy of the statement made, this suggests that the statement was intended to be representation (*Ecay v Godfrey* (1947) 80 Lloyd’s LR 280.); The knowledge of the negotiating parties may also have a role in this regard (*Oscar chess ltd v Williams* [1957] 1 W.L.R. 370) (*Dick Bentley Productions Ltd. and Another v Harold Smith (Motors) Ltd* [1965] 1 W.L.R. 623).

⁴⁰⁶ See also, the CRA 2015, Section 12(2), Section 37(2), and Section 50(3).

⁴⁰⁷ The English Common law has mainly recognised two types of obligations, contractual and tortious obligations. They are different from each other in some aspects. Contractual obligations arise where a person agrees with another one to do something or to abstain from doing something, supported by a consideration or made by a deed. Tortious obligations, on the other hand, are generally obligations not to harm others by conduct. In addition, contractual obligations are voluntarily chosen by contracting parties,

Hence, determining the type of liability is applicable to the duty to provide pre- contractual information is important. The use of each type of liability would require the plaintiff to establish different elements before the court. If he decided to claim for tort, he would have to prove that the defendant has committed a fault (negligence) which caused him to suffer loss.⁴⁰⁸ However, if the contract is chosen to be the basis for liability the plaintiff would only need to prove non- performance of the contractual obligation.⁴⁰⁹ This suggests that it is much more favourable for the distance consumer to raise a claim based on the contract.⁴¹⁰ Further to this, contractual obligations are better in terms of recoverable remedies available.⁴¹¹

At first glance, it may arguably be said that pre-contractual information should be a matter relating to Tort Law rather than Contract Law. Provided, contractual liability arises where there is a breach of an obligation imported freely and voluntarily into the contract by the parties i.e. “self- helped”. On the contrary, pre- contractual information is imposed by the law i.e. “external- helped”. This approach was adopted by the CJEU in the *Fonderie Officine* case.⁴¹² In this case, the Italian court directed a preliminary question to CJEU about whether; “An action against a defendant for pre-contractual liability falls within the scope of matters relating to tort “Article 5(3) of the Convention”?”⁴¹³ If not, does it fall

while non- contractual obligations are imposed upon persons by law. Thus, contractual obligations are directed to contracting parties, while non- contractual obligations are directed to everyone. It may happen that one act may constitute breach of contract and tort at the same time. In such case, English law allows the plaintiff to choose whether to raise a claim for tort or breach of contract. See, Andrew Burrows, *Remedies for Torts and Breach of Contract* (2nd edn, Butterworths 1994) 3; Atiyah, *An Introduction to the Law of Contract* (n 107) 245; Walter Van Gerven, and Jeremy Lever Pierre, *Cases, Materials, and Text on National, Supranational, International Tort Law* (Hart Publishing 2000) 32; G Rob and Johnp Brookes, *An Outline of the Law of Contract and Tort* (4th edn, The Estates Gazette Limited 1970) 141.

⁴⁰⁸ Burrows (n 407) 76.

⁴⁰⁹ Van Gerven, and Pierre (n 407) 33.

⁴¹⁰ Cheshire F, and Furmstons, *Law of Contract* (6th edn, Oxford University Press 2012) 31; Donald Harris, David Campbell, and Roger Halson, *Remedies in Contract and Tort* (2nd edn, Cambridge university press 2002) 49.

⁴¹¹ Burrows (n 407) 78.

⁴¹² See preliminary ruling as proceeded before Corte suprema di cassazione – Italy in opinion of advocate general geelhoed delivered on 31 January 2002. Available at:

<<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-334/00>> accessed 13 December 2016. See also, Julija Kiršienė, and Natalja Leonova, 'Qualification of Pre-Contractual Liability and the Value of Lost Opportunity as a Form of Losses' (2009) *Mykolo Romerio Universitetas*, 232-234. Available at:

<<https://www3.mruni.eu/ojs/jurisprudence/article/view/1585/1524>> accessed 10 December 2016.

⁴¹³ Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.

within the scope of matters relating to a contract “Article 5(1) of the Convention?”” In responding to this question, the Court held that the liability is a matter relating to tort.⁴¹⁴

Nevertheless, further analysis of the duty to provide pre- contractual information may lead to a different finding. It is true that the existence of such a duty imposed by the law may make it closer to Tort Law, but there are other reasons which may make this obligation closer to the contract. Foremost, tortious obligations are directed to everyone. On the contrary, pre-contractual information duty is directed to every trader who freely and voluntarily decides to conclude a distance contract with a consumer. In consequence, there is not an automatic obligation to provide pre- contractual information imposed upon the trader unless he freely makes a distance contract with a consumer. Furthermore, having the law determining duties does not always lead to tortious obligations. In modern laws, the distinction between Tort Law and Contract Law has completely been broken down.⁴¹⁵ It is very much possible to see both types of obligations arising from the same set of facts.⁴¹⁶ For example, the duty not to misrepresent is fixed by the Misrepresentation Act 1967, but it still offers a basis for contractual remedies.⁴¹⁷ The same judgement is true regarding, mistake, undue influence, and fraud. Finally, and more importantly, Regulation 18 of the CCIACRs 2013 explicitly treats pre- contractual information as part of the contract.⁴¹⁸

To sum up, under the CCIACRs 2013 pre- contractual information is dealt as a term of the contract so classed as a contractual obligation.

⁴¹⁴ It was held that “The answer to the first question must be that, in circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention”. See, *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* In Case C-334/00 at 27. [2002] ECR I-7357.

⁴¹⁵ Rob, and Brookes (n 407) 141; Atiyah, *An Introduction to the Law of Contract* (n 107) 245; Van Gerven, Pierre (n 407) 33.

⁴¹⁶ Rob, and Brookes (n 407) 141.

⁴¹⁷ Halson (n 402) 171.

⁴¹⁸ See also the CRA 2015, Section 12(2), Section 37(2), and Section 50(3).

4.3. When the Duty to Provide Pre- Contractual Information Is breached without the Contract being made and after it is made in Iraqi Law

4.3.1. When the Duty to Provide Pre- Contractual Information is breached without the Contract being made

If the negotiating parties fail to reach the final contract, causing one of the parties to suffer loss, the blameworthy party is to be obliged to pay damages based on tortious liability. This is similar to the case of English Law where pre-contractual damages are recovered under the Tort Law. However, the basis for the liability differs. In English Law, the principle developed from *Hedley Byrne*.⁴¹⁹ In contrast, the basis for this liability under Iraqi Law goes back to the principle of *good faith*.⁴²⁰ Although, Article 150 of the Iraqi Civil Code introduces good faith as a principle which governs the contract at performance stage,⁴²¹ most of the Civil Law commentators argue that under influence of good faith⁴²² the law has recognised a number of duties covering the negotiation stage.⁴²³ It is provided that provisions of mistake, latent defects, fraud, and exploitation are actually originated from good faith.⁴²⁴

⁴¹⁹ See this Thesis, 112.

⁴²⁰ The Iraqi Civil Code received good faith from Article 1134 of the French Civil Code which states; “Agreements lawfully entered into take the place of the law for those who have made them. They may be revoked only by mutual consent, or for causes authorized by law. They must be performed in good faith”.

⁴²¹ According to Article 150 of the Iraqi Civil Code; “The contract must be performed according to its contents and in a manner which confirms to the norms of good faith”.

⁴²² For example, Article 118 of the Iraqi Civil Code has explicitly shown a link between mistake and good faith when it stipulates; “If there is a mistake as to the quality of thing which in the view of the contracting parties is or must be considered essential due to circumstances in which the contract had been concluded and to the good faith that must be expressed in dealing”. See also, Lotfy (n 241) 14.

⁴²³ Saad Abdul- Milhm, 'Negotiations of Contracts over Internet' (2015) 12(8) Rafidain of Law Journal 73,100-103; Muna Abu-Bakr AL-Sadiq, *Duty to Inform Consumer about the Products* (Dar Al-Jamiah Al-Jadidah 2013) 72; Mohammed Jamal Atia Isa, *The Role of Good Faith in Contracts* (Dar Al- Nahtha AL-Arabia 2008) 53-63; Ebrahim Shoarian Sattari, 'Observation of Good Faith Principle in Contract Negotiations: A Comparative Study with Emphasis on International Instruments' (2013) 3(9) Australian Journal of Business and Management Research 56, 57.

⁴²⁴ An attempt is made by some Civil Law jurists to give contractual liability to the damages which are caused at the negotiation stage based on theory of “Culpa in Contrahendo” which was found by Rudolf von Jhering, the German jurist. Accordingly, if a negotiating party knew or should have known that the performance of the contract was impossible, he is obliged to pay damages to the injured party for any loss he has suffered on the basis of the validity of the contract. This means that the injured party is allowed to claim for ‘negative interest’ damages (what the party has lost), but not “positive interest” damages (what the party has missed or what he would have been enjoyed if the contract had been concluded). In Von Jhering’s opinion, the claim for negative interest damages has a contractual legal nature, although the contract is valid for that specific purpose and invalid for other purposes. However, the Iraqi Civil Code

4.3.2. When the Duty to Provide Pre- Contractual Information is breached after the Contract is made

In the Iraqi literature, it is debatable as to whether a contractual or tortious liability is to be applied in the case where negotiating parties have concluded a contract, and it is established in fact that there was a breach of the information requirements at the negotiation stage. This debate does not exist under English law because Regulation 18 of the CCIACRs 2013 and the CRA 2015 explicitly treat pre- contractual information as part of the contract.⁴²⁵ To settle the debate three arguments are discussed;

Firstly, on one side of the argument the liability which arises in this case is to be contractual liability which includes mistakes of the contractual period, but also includes mistakes of the earlier stage of the contract, the negotiation. It is further provided that effects and outcomes of the pre-contractual mistakes cannot appear before the contract has been made. For example, the effects of the obligation to warrant latent defects do not appear until after the contract is made albeit the breach occurs at the negotiation stage.⁴²⁶ The same judgement is true with regards to the obligation to warrant impediment and revendication “replevin”.⁴²⁷ These are obligations of contractual liability set out in the Iraqi

does not recognise any type of contractual liability based on the idea of “negative interest”. The non-existence of a concluded contract is found to be sufficient to ascribe the liability to Tort Law. On this theory see, Michael Tegethoff, 'Culpa in Contrahendo in German and Dutch Law-a Comparison of Precontractual Liability' (1998)5 Maastricht J Eur & Comp L 341, 351; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 695; Munroe Smith, 'Four German Jurists III.' (1897) 12(1) Political Science Quarterly 21, 44; Yoav Ben-Dror, 'The Perennial Ambiguity of Culpa in Contrahendo' (1983) 27(2) the American journal of legal history 142, 147; Friedrich Kessler, and Edith Fine, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A comparative Study' (1964) 77(3) Harvard Law Review 401, 402- 403; Filipovic MB and Vehovec MT, 'Precontractual Liability in EU and Croatian Law' (2012) 13(1) Harmonius: Journal of Legal and Social Studies in South East Europe 13, 16; Rodrigo Novoa, 'Culpa in Contrahendo: A Comparative Law Study: Chilean Law and the United Nations Convention on Contracts for the International Sales of Goods (Cisg)' (2005) 22(3) Arizona Journal of International & Comparative Law 583, 585; Batqa Hafitha. 'The Duty to Provide Information in the Consumer Contracts' (Master dissertation, University of Akly Manhat 2013) 12; Nadia E. Nedzel, 'A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability' (1997) 12 Tulane European & Civil Law Forum 97, 112; Edwin Corwin McKeag, *Mistake in Contract: A Study in Comparative Jurisprudence* (The lawbook Exchange, Ltd 2013)75-76.

⁴²⁵ See also the CRA 2015, Section 12(2), Section 37(2), Section 50(3), and Section 50(3).

⁴²⁶ According to Article 558(1) of the Iraqi Civil Code, “If an old defect is revealed in the thing sold the purchaser has an option either to restitute it or to accept it as is for the price quoted”.

⁴²⁷ According to Article 549 of the Iraqi Civil Code; “(1) The vendor warrants against the impediment (obstruction) to enjoyment of all or some of the thing sold caused by him or by any person who claims a right on the thing sold....”, “(2) The warranty against obstruction is established even if there is no stipulation to that effect in the contract”.

Civil Code.⁴²⁸ By analogy, it is said that the duty to provide pre- contractual information should have the same contractual liability.⁴²⁹

However, although this analogy may ostensibly be true, it cannot be the whole truth. The existence of the law as a source for some contractual obligations does not necessarily suggest that any obligation set out in the law should be a contractual obligation. The Iraqi Civil Code is still the main basis for tortious liability in which any breach causes damage out of the contract finds appropriate remedies in Tort Law. This liability requires three elements which are; a breach of a duty of care,⁴³⁰ the breach causes damage,⁴³¹ and a causal relationship between the damage and the breach.⁴³² This is also the case in the English Common Law under negligence which is a tortious liability arises when three conditions are satisfied; claimant was owed a duty of care,⁴³³ the duty of care was breached,⁴³⁴ and the breach caused damage to the claimant.⁴³⁵

Furthermore, the analogy used in this argument has suffered some weakness. It is true that the duty to provide pre-contractual information shares similarities with some contractual obligations in some aspects, but differences in other aspects are quite obvious. Obligations such as warranty of latent defects are operative at post- contract stage. For example, the value of this warranty can be reaped after a defect has been revealed after the contract was made.⁴³⁶ Therefore, the defect is not warranted if found at the negotiation since the defect

⁴²⁸ Kawthar Khalid, *E-Consumer Protection* (Dar- AL-Jamiha AL-Jadida 2012) 284.

⁴²⁹ AL-Bashkani (n 349) 326-327.

⁴³⁰ According to Article 186(1) of the Iraqi Civil Code; “A person who wilfully or by trespassing has directly or indirectly causes damage to or decreased the value of the property of another person shall be liable”.

⁴³¹ According to Article 207(1) of the Iraqi Civil Code; “In all cases the court will estimate the damages commensurately with the injury and the loss of the gain sustained by the victim provided that the same was a natural result of the unlawful act”.

⁴³² Article 211 of the Iraqi Civil Code addresses the cases where the causal relationship is missing when states; “A person who has established that the injury had arisen from a cause beyond his control such as by an act of God, an accident, a force majeure, by an act of a third party, or the fault of the injured himself shall not be liable on damage unless there is a provision in the law or in the agreement otherwise”.

⁴³³ In *Donoghue v Stevenson* [1932] UKHL 100, and *Henderson v Merrett Syndicate Ltd* [1995] 2 AC 145, a duty of care was confirmed [1994] 3 All ER 506. In *Caparo Industries plc v Dickman* [1990] 2 AC 605 where a duty of care was rejected.

⁴³⁴ *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205; *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

⁴³⁵ Causation or “but for” test was established in *Cork v Kirby MacLean* [1952] 2 All ER 402 (CA), and *Barnett v Chelsea & Kensington Hospital* [1969] 1 QB 428.

⁴³⁶ Abu-Bakr AL-Sadiq (n 423) 75.

is to be patent then.⁴³⁷ By contrast, with the duty to provide pre-contractual information the liability arises at the negotiation stage, notwithstanding the claim is often made at post-contract stage.

Secondly, for some jurists the contractual argument has to be built on the idea of having one undividable duty to provide information covering the negotiation and post-contract stage. They argue that such a duty should not be divided into prior and contractual duties because such division is not legally upheld. Thus, contractual information and pre-contractual information shall have the same legal nature.⁴³⁸ Otherwise, the claim is to be divided in which the consumer would have to incur costs of making two separate claims; each claim would need a different ground.⁴³⁹

This argument cannot be accepted for different reasons. Foremost, such interpretation is groundless if the contract has not been made. In this default, if there is a breach of prior information, the consumer will be unable to claim for contractual remedies on the idea that prior information was going to be a part of a contractual duty to provide information. More importantly, if information is required at the negotiation and post-contract stages it does not suggest that at both stages information is required for the same purpose. As has been much cited, prior information aims to protect the real consent of the parties, while the contractual information aims to help the consumer using the subject-matter of the contract in a good manner.⁴⁴⁰

Finally, with difficulties to prove otherwise, it is believed that the breach of prior information constitutes tortious liability. Provided, it is hard to imagine existence of a contractual obligation before the contract is made, no matter even if the contract is made

⁴³⁷ According to Article 559 of the Iraqi Civil Code; “The vendor shall not warrant and old defect of which the purchaser was aware or could have discovered himself if had he examined the thing sold with the necessary care unless the purchaser has proved that the vendor had affirmed to him the absence of the defect or fraudulently concealed from him”.

⁴³⁸ Akram Hussain AL-Timimi, *Legal Regulation of Professional: A comparative Study within Commercial Business* (1st edn, Manshorat Al- Halabi Al- Hkukia 2010) 110; Ibrahim Abdullah, *Civil Liability of the Expert Consultant: A Comparative Study* (Dar AL-Nahtha AL-Arabia 2003)12.

⁴³⁹ Aboamro (n 239) 68.

⁴⁴⁰ Abdalbaki (n 241) 198; Hawa (n 343) 61- 63; Al-Mahdy (n 101) 49-51.

later⁴⁴¹ Otherwise approach should exceptionally be accepted if the negotiating parties agreed to have a duty to provide pre-contractual information as part of the contract.⁴⁴²

4.4. Legal Measures to determine when a Trader has breached the Duty to Provide Pre- Contractual Information in English Law

Pre-contractual information relates to the contract in English law. This section goes on to address the level of care required on the part of the trader in performing the duty. Hence, it is questionable whether the duty is of the best endeavours or of achieving a specific result.⁴⁴³ In English law, the issue is generally about strict liability and fault- based liability. The former is liability without fault, and the latter is liability based on some sort of fault.⁴⁴⁴ When the commitment is of the best endeavours, the liability is of fault- based liability in which the obligated party is required to exercise all reasonable skill in keeping his promise, regardless of whether the care exercised has led to achieving the result promised or not. This principle was settled in the *George Hawkins* case⁴⁴⁵ when Lord Dillon held; “A professional man who is called in to advise is bound, and impliedly undertakes, to use reasonable skill and care in advising, but is not responsible for providing a perfect result or a perfect building ”.⁴⁴⁶

⁴⁴¹ Al-Mahdy (n 101) 46; Khalid (n 428) 286-287; AL-Timimi (n 438) 110.

⁴⁴² Lotfy (n 241) 68-69; Hijazi (n 17) 40.

⁴⁴³ In *Rhodia International Holdings Ltd & Anor v Huntsman International LLC* [2007] EWHC 292 (Comm), a best endeavour was construed as requiring the party to exercise all reasonable endeavours. However, in *EDI Central Ltd v National Car Parks Ltd* [2012] CSIH 6, at 28, it was suggested that a party should not be required to act against his commercial interest “commercially reasonable efforts” even where the obligation is of the best endeavour. The same voice was heard in *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417. See, Neil Andrews, *Contract Law* (2nd edn, Cambridge University Press 2015) 32; Charles Boundy, *Business Contracts Handbook* (1st edn, Routledge 2010) 54- 55; Aleka Mandaraka-Sheppard, *Modern Maritime Law (Volume 2): Managing Risks and Liabilities* (3rd edn, Routledge 2013) 153-154; Brian Eggleston, *Liquidated Damages and Extensions of Time: In Construction Contracts* (3rd edn, John Wiley & Sons 2009) 311.

⁴⁴⁴ John C.P. Goldberg & Benjamin C. Zipursky, 'The Strict Liability in Fault and the Fault in Strict Liability' (2016) 85 Fordham Law Review 743. 745.

⁴⁴⁵ *George Hawkins v Chrysler (UK) Ltd and Burne Associates* 1988 38 B.L.R. 36.

⁴⁴⁶ In *Lanphier v Phipos* 173 E.R. 581; (1838) 8 Car. & P, at 475, it was also held that; “Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of care ”.

The breach will then occur when it is proven that a reasonable person would have behaved otherwise than in the way in which the defendant behaved.⁴⁴⁷ By contrast, when the commitment is of achieving a particular result, the liability is of strict liability in which the obligated party is required to achieve the result promised.⁴⁴⁸ Not having that result achieved makes the party liable regardless of the level of actual care and skill exercised by the defendant.⁴⁴⁹ To avoid this liability, the party needs to prove that not having the result was due to the force majeure.⁴⁵⁰ One could, therefore, assume that a duty of the best endeavours is distinguished from a duty to achieve a particular result in terms of burden of proof. When a duty is of best endeavours the burden is on the plaintiff to prove that the defendant has committed a fault in performing the obligation at lower degree of care than what it would be expected from a reasonable person. This was settled in a recent case by Leggatt J when he stated: “But it is important to remember that the burden of proof is on the party alleging failure to comply with the obligation”.⁴⁵¹

By contrast, when a duty is to achieve a particular result the burden of proof is on the defendant to prove that the force majeure was the reason behind not achieving the result.⁴⁵² Eventually, having the duty to provide pre- contractual information as a duty to achieve particular result is of better protection to distance consumers than a duty to exercise best or reasonable efforts.

⁴⁴⁷ In *Bou-Simon v BGC Brokers LP* [2018] EWCA Civ 1525 it was held; “That any notional *reasonable person* would have regarded the agreement as being for full repayment of the loan unless four years had been completed, and that without an implied term to that effect the contract would lack commercial or practical coherence”. Also, Article 5.4.1.(2) of UNIDROIT 2010 states that: “To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances”.

⁴⁴⁸ Julian Bailey, *Construction Law* (Routledge 2011) 180.

⁴⁴⁹ According to Article 5.4.1. of UNIDROIT; “To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result”.

⁴⁵⁰ According to Article 7.1.7. of UNIDROIT; “Non- performance by a party is excused if that party proves that the non- performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences”.

⁴⁵¹ *Astor Management AG (formerly known as MRI Holding AG) and another v Atalaya Mining plc (formerly known as Emed Mining Public Ltd) and others* [2017] EWHC425 (Comm), at 70- D.

⁴⁵² Christoph Brunner, *Force Majeure and Hardship Under General Contract Principles: Exemption for Non-performance in International Arbitration* (Kluwer Law International 2009) 71.

To know whether the contract imposes a duty to achieve a specific result or exercise best efforts depends on factual evidence and the language of contract.⁴⁵³ In distance contracts, however, the issue is not entirely left to the will of contracting parties. The duty to provide pre- contractual information is shaped in a certain form of liability by statutory consumer laws, taking into account the position of the consumer as the weaker contracting party. That form of liability then is subject to test of fairness under the CRA 2015, where restrictions have been put on the will of the trader towards including the contract with clauses which exclude or limit his liability against consumers.⁴⁵⁴

From the language used by the regulations, it is likely to read the duty to provide pre- contractual information as a duty to achieve a particular result in the form of sending information. Wording such as “must give, shall provide, shall make available”, is concrete evidence to prove such argument.⁴⁵⁵ This form of liability is compatible with the policy of consumer legislation in maximizing the level of protection. However, the liability is likely to be different where a duty is upon the consumer. A clear instance is Section 2(2) of Consumer Insurance (Disclosure and Representations) Act 2012, which obliges the consumer “to take reasonable care not to make a misrepresentation to the insurer”. This wording is likely to be read as there is no duty on the consumer to provide information. When a reasonable care is required no specific result is required. Furthermore, the consumer is required not to make misrepresentation, and provisions of misrepresentation do not impose a duty to provide information, as it will be shown in the next chapter.

Further evidence to the argument, Regulation 17(1) of the CCIACRs 2013 places the burden of proof upon the trader by stating: “In case of dispute about the trader’s compliance with any provision of Regulations 10 to 16, it is for the trader to show that the provision was complied with”. As noted elsewhere, when the burden of proof is on the debtor of the duty, the duty is the duty to achieve a particular result.⁴⁵⁶

Finally, as the study concluded that the duty to provide pre- contractual information is a matter related to contract, this suggests that the court is unlikely to ask the trader why he

⁴⁵³ Atiyah, *An Introduction to the Law of Contract* (n 107) 376; Allan Farnsworth, 'On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law' (1984) 46(1) *University of Pittsburgh Law Review* 1, 4-5.

⁴⁵⁴ The CRA 2015, Section 31(1), Section 47(1), and Section 57(2).

⁴⁵⁵ The CCIACRs 2013, Regulations 13(1) and 16(1); the ECRs 2002, Regulations 6(1) and 9(1).

⁴⁵⁶ See this Thesis, 121.

failed to fulfil his contractual obligation.⁴⁵⁷ Rather, non-performance of the obligation amounts to fault and sufficient to give rise to the liability.⁴⁵⁸ This general principle was clearly established by Lord Edmund Davies in the *Raineri* case when he held: “It is axiomatic that, in relation to claims for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfil his obligation, and certainly no defence to plead that he had done his best”.⁴⁵⁹

4.5. Legal Measures to determine when a Trader has breached The Duty to Provide Pre- Contractual Information in Iraqi Law

In civil laws, the distinction between the obligation to achieve a particular result “obligations de résultat” and the obligation to exercise a reasonable care “obligations de moyens” was first introduced by René Demogue 1925, a French jurist.⁴⁶⁰ Under the “obligations de résultat” the promisor is bound to achieve the result promised. Not achieving the result renders him liable unless he proves the force majeure. Alternatively, under the “obligations de moyens” the promisor is obliged to use the diligence of a reasonable person in performing the obligation, without taking into account the result to come out of that diligence. If the actual diligence was below the diligence of a reasonable person, the promisee has the burden of proof.⁴⁶¹ Subsequently, the French Civil Code has recognised this dichotomy of obligation.⁴⁶² Under the influence of the French Civil Code,

⁴⁵⁷ Atiyah, *An Introduction to the Law of Contract* (n 106) 376.

⁴⁵⁸ *ibid*, 379-380.

⁴⁵⁹ *Raineri Plaintiff v Miles and Another Respondents (Defendants) v Wiejski and Another Appellants (Third Parties)* [1981] A.C. 1050, at 1086.

⁴⁶⁰ Dario Alessi, 'The Distinction between Obligations de Résultat and Obligations de Moyens and the Enforceability of Promises' (2005) 13(5) *European Review of Private Law* 657, 657; Nils Jansen, *The Development and Making of Legal Doctrine* (Cambridge University Press 2014) 92.

⁴⁶¹ Alessi (n 460) 660; Hubert Bocken, Walter de Bondt, *Introduction to Belgian Law* (Kluwer Law International 2001) 236; John Cartwright, Stefan Vogenauer, Simon Whittaker, *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de Réforme Du Droit Des Obligations et De La Prescription ('the Avant-projet Catala')* (Bloomsbury Publishing 2009) 553.

⁴⁶² Article 1137 of the French Civil Code (consolidated version of May 19, 2013) refers to the “obligations de moyens” when it states that; “The obligation to look after a thing, whether the agreement is for the benefit of one party only or for their common benefit, compels the one in charge to bring to it all the care of a prudent administrator. This obligation is more or less extensive in certain contracts whose effects in this regard are explained under the Titles which relate to them”. Article 1147 recognises “the obligations de résultat” by stating: “Debtor shall be ordered to pay damages, in the proper circumstance, either on account of the non-performance of the obligation, or on account of the delay in performing, whenever he cannot establish that the non-performance was due to an external cause that cannot be imputed to him provided, moreover, there is no bad faith on his part”.

the idea has been implemented into civil laws around the globe, including the Iraqi Civil Code.⁴⁶³

Generally, civil laws do not have a different understanding to this form of liability than the form received by English law. Under both jurisdictions, the duty to achieve a particular result is based on strict liability and the duty to exercise a reasonable care on a fault- based liability. Also, under both jurisdictions the burden of proof is on the debtor of the duty when the duty is of a particular result and on the creditor when it is of a reasonable care.

Under the Iraqi consumer laws, it is hard to establish a position of the duty to provide pre – contractual information between the foregoing duties because the Iraqi consumer laws do not define the duty to provide pre –contractual information as either a matter related to Tort or to Contract Law. Furthermore, they do not specify the party who has the burden of proof when the duty is breached. This difficulty does not exist in English Law where these two matters are well established. As noted earlier, the CCIACRs 2013 define the duty to provide pre –contractual information as a contractual duty.⁴⁶⁴ It also puts the burden of proof on the trader in question.⁴⁶⁵

To fill this gap, wider Civil Law Jurisprudence has established a position for the duty to provide pre –contractual information based on other evidence. Firstly, an attempt is made to define the duty as a duty to achieve a particular result. Provided, this duty affords better protection for consumers because it requires the trader to reach a result, and if he fails to do so he has the burden of proof.⁴⁶⁶ To support this argument it is said that the subject- matter of the duty to provide information is under the trader’s control. It is about delivering information on the goods and services which are provided by the trader. Thus, achieving the result depends on whether the information is fully delivered.⁴⁶⁷ It is also provided that

⁴⁶³ Article 251(2) of the Iraqi Civil Code refers to the idea by stating: “In case of an obligation to perform work, if the obligation stipulated that the debtor will safekeep or manage the thing or it was required from him to exercise caution in performing the obligation the debtor would have performed the obligation if he had exercised the care of an ordinary person even where the intended object has not been realised”.

⁴⁶⁴ The CCIACRs 2013, Regulation 18; the CRA 2015, Section 12(2), Section 37(2), and Section 50(3).

⁴⁶⁵ The CCIACRs 2013, Regulation 17(1).

⁴⁶⁶ Nabil Saad, *Nominate Contracts Part 1, sale* (Dar AL-Nahtha AL-Arabia 1997) 309; Adnan Sarhan, 'The Consumer’s Right to Obtain Facts, the Correct Data and Information of the Goods and Services' (2013) 8 *Mufakr Journal of the College of Law and Politics* 11, 18; Haj Ali Mohammed, 'The Distinction between the Duty to Provide Information and the Duty to Advise: A Comparative Study' (2011) 6 *Academic Journal For Social and Humanitarian Studies* 74, 81.

⁴⁶⁷ Mahmood AL-Sherifat, *Consentement in Contracting over the Internet: A Comparative Study* (1st edn, Dar Hamid LInashr Waltawzih 2005) 104.

the duty to provide information helps the consumer to obtain information with proper remedies for the breach.⁴⁶⁸ This objective is difficult to fulfil if the duty is defined as a duty to exercise reasonable care because the burden of proof would be on the consumer. At this point, the use of electronic means of distance communication makes the proof even harder. It is further said that the law establishes the duty to exercise reasonable care in contracts where contracting parties have equal information.⁴⁶⁹ However, distance consumer contracts cannot be classed as such since the contracting parties have unequal information.

The counter argument is, maximizing the protection afforded to consumers should not be founded on something out of the trader's control. According to this argument, the duty to provide pre –contractual information is a duty to use proper means, because the trader does not have full control over the duty.⁴⁷⁰ He certainly does not have the power to force consumers to receive information and work accordingly.⁴⁷¹ Then, achieving the result does not only depend on whether the trader has fully delivered the information, but also whether the consumer has cooperated in receiving it.⁴⁷² It is further provided that the duty may turn to a duty to achieve a particular result if the contracting parties explicitly agree on it.⁴⁷³ However, feasibly it is rare to have such an agreement about pre-contractual information. It is not also imaginable to have it about post- contract information, at any rate in distance contracts. In distance contracts, the offer is unnegotiable because terms and conditions are often standardised.⁴⁷⁴ Consequently, the consumer does not have the power to negotiate terms, imply new terms, or change the nature of a duty in his favour. Also, it is not expected from the trader to unilaterally imply a term or determine a form of liability which is not of his interest.

Between these two arguments, some of the jurists suggest a compromise solution. The new argument divides the duty to provide pre –contractual information into two parts. The first part is the duty to deliver the information required by legislation. With this part, the duty is

⁴⁶⁸ Abu-Bakr AL-Sadiq (n 423) 96.

⁴⁶⁹ Mussa (n 153) 227; Al-Mahdy (n 101) 52.

⁴⁷⁰ Al-Mahdy (n 101) 90; Abu-Bakr AL-Sadiq (n 423) 98- 99; Mohammed (n 240) 27; Aboamro (n 239) 77; Abdul- Munam Ibrahim, *Good Faith in Contracts: A Comparative Study* (Manshorat Halabi AL-Hqugia 2006) 15; Dizay (n 161) 63.

⁴⁷¹ Nawaf Muflih Al- Thiabat, 'Commitment of Informing in Electronic Contracts' (Master dissertation, Middle East University 2013) 63.

⁴⁷² Abu-Bakr AL-Sadiq (n 423) 92.

⁴⁷³ Nori Khatr, *IT Contracts: A Study In General Principles of Civil Law: A Comparative Study* (Dar AL- Thaqafa Lnashr Waltawzih 2002) 147.

⁴⁷⁴ See this Thesis, 43-45.

a duty to achieve a particular result because information is always under control. The second part is the duty to choose appropriate ways in delivering information. With this part, the duty is a duty to use proper means because the trader is not always in control of the matter in particular with electronic means of communication.⁴⁷⁵ Accordingly, the trader is in breach if he fails to provide all the information required. In such a case, he cannot avoid the liability unless he proves the force majeure.⁴⁷⁶ If the trader fails to choose proper means in delivering information, he is in breach if the consumer proves that the actual care exercised by the trader was below the care of a reasonable person.⁴⁷⁷ However, without the law to support this argument, it remains to be seen if this reasoning will be adopted by the courts.

4.6. Remedies for Failing to Perform the Duty to Provide Pre-Contractual Information in the English Consumer Legislation

Under the DSRs 2000 “pre June 2014 regulations” there was a lack of specific remedies available for consumers where the duty to provide information was breached. Only a failure to send confirmation had remedy, which would extend the period of the right of withdrawal.⁴⁷⁸ This situation resulted from the copy- out technique whereby the UK government transferred the DSD 1997 into the UK laws. The situation could have been better because the DSD 1997 provided minimum measures, which allowed the member states to go beyond the Directive.⁴⁷⁹

Fortunately, this historical problem is rectified to some extent after three pieces of legislation came in force in the UK; the CCIACRs 2013, the Consumer Protection (Amendment) Regulations 2014 which amended the CUTRs 2008, and the CRA 2015. These new amendments provide an extension to the range of remedies available for failing to perform the information requirements. Although, it is hard to know the effect of these

⁴⁷⁵ Ahmed (n 240) 31; Nazar Mohammed, 'The Legal Regulation for the Mobile Phone Service, Analytical Comparative Study' (Master Dissertation, University of Duhok 2010) 79- 80; Ibrahim Fathi AL-Hyani, 'The Duty to Warning of the Risks in the Selling Contract' (2015) 7(25) Journal of the University of Tikrit for Legal Sciences 45, 63.

⁴⁷⁶ Hassan Ali-ALthanon, and Mohammed Raho, *The Public Theory of the Obligation, Part 1, the Resource of the Obligation: A Legal Comparative Study with the Comparative Islamic Jurisprudence* (1st edn, Dar Wael LI-Nashr 2000) 20.

⁴⁷⁷ Hanan Azmi, *The Obligation to Means between the Theory and Application* (1st edn, Makabat AL-Wafa AL-Qanonia 2009) 56.

⁴⁷⁸ The DSRs 2000, Regulation 11(4).

⁴⁷⁹ The CRD 2011, Articles 11(1), and 24.

remedies for distance consumers due to the absence of any reported case, the new laws have offered distance consumers a wider range of remedies than those were available under previous measures. These are explained below;

4.6.1. Remedies Available in the English CCIACRs 2013

Under the CCIACRs 2013, distance consumers are entitled to claim for a wide range of remedies when the duty to provide pre –contractual information is breached. Most of these remedies grant the consumer the right to avoid a certain effect or have a certain effect without claiming for rescission. In addition, the new regulations, for the first time, treat the information requirements as a term of the contract thereby entitling the consumer to the remedy available for the breach of contract.

One example of remedies is Regulation 13(5) which grants the consumer “the right not to bear charges or costs” if he was not informed by the trader. This remedy includes all additional delivery charges, and costs of returning the goods in the event of cancellation.⁴⁸⁰ Another remedial provision is Regulation 13(6) (b), as amended by the Consumer Contracts (Amendment) Regulations 2015, which affords the consumer of the supply of digital content other than for a price paid by the consumer, the right not to be bound by any changes in the information after it is delivered to him, regardless of whether the information has changed before the contract is made or afterwards. Only an explicit agreement between the parties can give effect to such changes.⁴⁸¹ Also, Regulation 31 gives the consumer the right to have the period of cancellation extended up to 12 months if he was not informed of the right of cancellation. Finally, in contracts concluded by electronic means of communication the consumer is given a right to claim for not having a binding contract in certain circumstances.⁴⁸²

⁴⁸⁰ The CCIACRs 2013, Schedule 2, Paragraphs (g, h, and m).

⁴⁸¹ This remedy might work better if the law asked traders to rectify those changes that occur before the contract is made inasmuch as there is a time to do so, and inform the consumer of those changes that occur after the contract is made. See also, the CRA 2015, Sections 11(5), 12(3), 36(4), 37(3), and 50(4).

⁴⁸² This provision is set out in Regulation 14(5) which grants the consumer a right to rescind the contract or order if the trader fails to ensure that the consumer explicitly acknowledges that the order implies an obligation to pay when placing the order. The same remedy is actionable if the trader fails to ensure that the button or similar function is labelled in an easily legible manner only with the words “order with obligation to pay” or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. This is in the case when placing an order entails activating a button or a similar function.

The question here is, are they effective enough to cover all cases of breach of the information requirements? The answer might not be much encouraging. Those remedies are provided to cover certain cases under certain conditions. They do not, however, cover any possible breach of other information provisions. For example, it is not clear what remedy applies in the case where the trader fails to disclose his identity on phone at the beginning of conversation, as required by Regulation 15. Also, the CCIACRs 2013 do not specify any remedy for any possible breach which could occur of provisions for sending confirmation of “post-contract information”. What if the trader fails to send confirmation or sent it but without including all the information referred in Schedule 2, or sent it within an unreasonable time after the conclusion of the contract, contrary to Regulation 16.

In these cases, the consumer is not, however, left without remedies since Regulation 18 means that the information requirements are treated as a term of the contract.⁴⁸³ Accordingly, a failure to fully comply with information provisions allows the consumer to claim for general remedies for the breach of contract. It does not matter whether the breach is in the form of not giving information or giving incorrect information. For example, he can claim for damages when he suffers certain loss behind the breach. He is further entitled, where applicable, to withhold the performance until the trader performs his duty.⁴⁸⁴ Moreover, he can terminate the performance of the contract prospectively, or keep the contract safe with an option to claim for restitution instead.⁴⁸⁵ However, Regulation 15 is not included as a contractual term since Regulation 18 only refers to Regulations 13, 14, and 16.

In summary, Regulation 18 opens another door for the consumer to seek for appropriate remedy, but it cannot be regarded as effective as it would have been if the matter was addressed under consumers legislation because general principles do not distinguish between consumers and non- consumers.

⁴⁸³ See also, the CRA 2015, Sections 11(4), 12(2), 36(3), 37(2), and 50(3).

⁴⁸⁴ Whittaker (n 42) 54; Luca Donna, 'Remedies for the Breach of the Duty to Inform Consumers' (2012) 23(2) *European Business Law Review* 253, 254 -255.

⁴⁸⁵ Ewan McKendrick, *Contract Law, Texts, Cases and Materials* (2nd edn, Oxford University Press 2005) 389-433; Hugh Beale, *Remedies for Breach of Contract* (Sweet & Maxwell 1980).

4.6.2. Remedies Available in the CUTRs 2008 (as amended)

In the field of consumer protection, the CPRs 2014 is a further crucial enactment which made substantial amendments to the CUTRs 2008. The new amendment gives effect to the provisions of prohibited commercial practices.

The new amendment provides remedies for consumers in the case when the trader engages in a prohibited commercial practice.⁴⁸⁶ Regulation 27B defines “prohibited practice” as “a commercial practice that (a) is a misleading action under Regulation 5, or (b) is aggressive under Regulation 7” of the CUTRs 2008. Surprisingly, the new amendment does not include “misleading omission” within the concept of prohibited practice, although Regulation 16 of the CUTRs 2008 defines “misleading omission” as a prohibited practice.⁴⁸⁷ Thus, the remedies provided by the new amendment are irrelevant to the case of misleading omission.

Nevertheless, it is provided that this limitation is narrowly drawn to cases where the trader omits material information but the overall presentation is not misleading. In most cases, if omitting material information has made the presentation misleading in overall, the practice is more likely to constitute misleading action.⁴⁸⁸

The amendment addresses three types of remedies for consumers under the title “the right to redress”⁴⁸⁹ including; (a) the right to unwind the contract,⁴⁹⁰ (c) the right to a

⁴⁸⁶ The CUTRs 2008 as amended, Regulation 27A.

⁴⁸⁷ According to Regulation 6 of the CUTRs 2008; “(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2) (a) the commercial practice omits material information, (b) the commercial practice hides material information, (c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or (d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context, and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise”.

⁴⁸⁸ Department for Business Invention & Skills, *Misleading and Aggressive Commercial Practices, New Private Rights for Consumers, Guidance on the Consumer Protection (Amendment) Regulations 2014* (Department for Business Invention & Skills, August 2014) 5.

⁴⁸⁹ According to Regulation 27A of the CUTRs 2008; the consumer has a right to redress the contract if (4) (a) the trader engages in a prohibited practice[as defined in Regulation (5)] in relation to the product, or (b) in a case where a consumer enters into a business to consumer contract for goods or digital content (i) a producer engages in a prohibited practice in relation to the goods or digital content, and (ii) when the contract is entered into, the trader is aware of the commercial practice that constitutes the prohibited practice or could reasonably be expected to be aware of it”.

⁴⁹⁰ Regulation 27E grants the consumer a right to undo the contract under two conditions. Firstly, the consumer must complain within relevant period of time. Secondly, the complaint must be raised at a time when the product is capable of being rejected.

discount,⁴⁹¹ and (c) the right to damages.⁴⁹² These remedies are standard remedies provided for consumers who are victims of misleading or aggressive commercial practice. Importantly, these remedies are based on strict liability which does not require the consumer to prove loss or negligence on the part of the trader.⁴⁹³ Exceptionally, the claim for damages is allowed where the consumer has incurred financial loss. These remedies are compatible with the nature of the duty to achieve a particular result as the study drawn for the duty to provide pre- contract information.⁴⁹⁴

Hence, two things have to be addressed; firstly, it is necessary to know whether a failure to provide information satisfies prohibited commercial practice. The relevance of these remedies to the duty to provide pre –contractual information entirely depends on that potential relation. Secondly, it is also important to know the effect of these remedies, if they are found relevant, to distance consumers since the CUTRs 2008 (as amended) is not a distance law. In the following subsections, the study discusses these two matters;

4.6.2.1. The Relation between the Duty to Provide Pre- Contractual Information and Remedies in the CUTRs 2008 (as amended)

The answer depends on the existence of a possible link between a failure to provide information and the concept of misleading action. According to Regulation 5 of the CUTRs 2008 (as amended);

A commercial practice is a misleading action...if it contains false information and is therefore untruthful in relation to any of the matters in Paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; (b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

⁴⁹¹ Regulation 27I gives the consumer the right to a discount in cases where he makes one or more payments for the goods or one or more payments under a contract has not been concluded. However, the consumer does not have the right to a discount if he exercised the right to unwind the contract. The CUTRs 2008 (as amended), Regulation 27I (2) (b), and Regulation 27E (10).

⁴⁹² Regulation 27J grants the consumer the right to damages if he; (a) Has incurred financial loss which the consumer would not have incurred if the prohibited practice in question had not taken place, or (b) has suffered alarm, distress or physical inconvenience or discomfort which the consumer would not have suffered if the prohibited practice in question had not taken place. The CUTRs 2008 (as amended), Regulation 27J (5).

⁴⁹³ Department for Business Invocation & Skills (n 488) 11.

⁴⁹⁴ See this Thesis, 121-122.

If one has to test Paragraph (4), it would be revealed that most of the information laid down in the CCIACRs 2013 is for sure material by the meaning of Regulation 5.⁴⁹⁵ As a result, distance consumers are entitled to claim for remedies addressed by the CUTRs 2008 (as amended) in every case where conditions of Regulation 5 are met.⁴⁹⁶

At this point, one may arguably say that provisions of prohibited practice deal with the quality of the information provided rather than a failure to provide information. They mainly consider the practice prohibited if information is false or presented in a deceitful way. Thus, the matter does not include the case when a trader fails to provide information. What supports this argument is the new amendment excludes “misleading omission” from the definition of prohibited practice. One could, therefore, assume that the remedies provided for misleading action does not cover the case of not providing information.

However, the idea is not as simple as it might appear at first sight. Foremost, distance consumers need effective remedies when the duty to provide pre- contractual information is generally breached. It does not matter whether the breach is in the form of not providing information or providing false or incomplete information. In any case, the remedy for failing to provide information, and the remedy for failing to provide correct information, in a broad sense fall under the remedies for breaching the duty to provide pre –contractual information. It is also possible to consider “giving false information” as a breach of the requirement of providing information. This is because giving false information suggests that there was genuine information which has not been provided. Furthermore, misleading action, particularly if information presented in a deceitful way, constitutes a breach of the requirement of clarity in Regulation 13(1) (a). Eventually, giving false information and not giving information at all are two sides of the same coin, a breach of the duty to provide pre –contractual information.

4.6.2.2. The Applicability of Remedies in the CUTRs 2008 for Consumers at Distance

Undoubtedly, the new amendment of the CUTRs 2008 adds a new range of remedies for consumers. Although, the amendment does not specifically apply to distance selling

⁴⁹⁵ See Regulation 5(4) of the CUTRs 2008 (as amended), and compare it with the information listed in Schedule 2 of the CCIACRs 2013.

⁴⁹⁶ A Nordhausen, 'Information Requirements in the E- Commerce Directive and the Proposed Directive on Unfair Commercial Practices' in G Howells, A Janssen, and R Schulze (ed), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Ashgate 2005) 106-107.

contracts, the distance consumer can claim for the provided remedies when false information is sent, or when information is presented in a deceitful way. In both cases, the commercial practice is a misleading action which allows the consumer to claim for the provided remedies. What makes these remedies relevant is, the amendment requires misleading or aggressive action based on falsification against the information listed in Paragraph (4) of Regulation 5 of the CUTRs 2008 (as amended). Most of the information referred to in Paragraph (4) is mentioned in Schedule 2 of the CCIACRs 2013. As a result, when the information listed in Schedule 2 is falsely or deceitfully given, all the remedies provided for misleading action will be relevant. One more positive aspect of the amendment, Regulation 2(6) extends protection to all types of contracts, sale contracts, services contracts, and digital content contracts. This was not possible before the CUTRs 2008 was amended.⁴⁹⁷

However, the new amendment does not make a big change to the remedy in the field of distance contracts. This is because relevance between the remedies provided under CUTRs 2008 (as amended) and distance selling contracts is limited to untruthful giving of the information listed in Schedule 2 of the CCIACRs 2013 which overlaps with the information listed in Regulation 5(4) of the CUTRs 2008. In any case, falsely giving the remaining information of Schedule 2 makes the remedies irrelevant. Most of the information listed in Schedule 2 which is not covered by Regulation 5(4) of the CUTRs 2008 has a direct link to distance selling contracts. For example, false giving of the information related to the trader's identity,⁴⁹⁸ additional charges,⁴⁹⁹ the right of cancellation,⁵⁰⁰ and digital content,⁵⁰¹ does not allow the distance consumer to claim for the remedies under the CUTRs 2008. This suggests that when a distance consumer claims for remedies under the CUTRs 2008, he indeed claims as an ordinary consumer without having any particularity as a distance consumer. This is against the policy of distance legislation which aims to specifically provide protection for distance consumers.

Furthermore, remedies under the amendment are well connected to the case when information is untruthful or deceitfully given. However, it does not include the case when information is not given at all or partially given, whether that information is covered by

⁴⁹⁷ See, the CUTRs 2008, Regulation 2(1) before the amendment.

⁴⁹⁸ The CCIACRs 2013, Schedule 2, Paragraphs (b, c, d, and e).

⁴⁹⁹ *ibid*, Paragraph (g).

⁵⁰⁰ *ibid*, Paragraphs (l, m, n, and o).

⁵⁰¹ *ibid*, Paragraphs (v, and w).

Regulation 5(4) of the CUTRs 2008 or not. This makes the amendment irrelevant to all breaches which may have a connection with a failure to *provide* information.

4.6.3. Remedies Available in the CRA 2015

The CRA 2015 provides the consumer with a new remedy when the trader breaches the information requirements. If the breach is of the information regarding the main characteristics of goods, the consumer is entitled to (the short-term right to reject, the right to repair, and the right to price reduction), and other remedies allowed by general principles.⁵⁰² However, regarding other information (required by the CCIACRs 2013, Schedule 2) the remedy differs according to the nature of the contract. If the contract is a sale contract, “the consumer has the right to recover from the trader the amount of any costs incurred by the consumer as a result of the breach, up to the amount of the price paid or the value of other consideration given for the goods”. If the contract is a digital content contract, “the consumer has the right to recover from the trader the amount of any costs incurred by the consumer as a result of the breach, up to the amount of the price paid for the digital content or for any facility, by way of payment, used by the consumer”.⁵⁰³ If the contract is a service contract, “the consumer has the right to a price reduction”.⁵⁰⁴

The new remedy differs from other remedies because it covers all the breaches which may occur of the duty to provide pre-contractual information. Accordingly, in sale and digital content contracts the consumer is allowed to recover any costs incurred by him as a result of the breach. In sale contracts, the recoverable amount may reach the amount of the price paid or the value of other consideration given for goods. In digital content contracts, the recoverable amount may reach the amount of the price paid or for any facility, by way of payment, used by the consumer.

However, if the contract is a service contract, the consumer has the right to a price reduction. This might be because services are incapable of being returned. Nevertheless, it is unknown why the CRA 2015 does not treat digital content similarly to services since many forms of digital content are incapable of being returned, and if they are capable of that, there is no guarantee that the consumer has not duplicated it. (i.e. a video game supplied online, or on MP3, and a movie supplied online or on a CD).

⁵⁰² The CRA 2015, Sections 11(4), 19(1) (a), 19(3) and 19(9) (11).

⁵⁰³ *ibid*, Section 19(5), and Section 37(4).

⁵⁰⁴ *ibid*, Section 54(4).

4.7. Remedies Available in the Iraqi Consumer Legislation

4.7.1. The Stance of the ICPL 2010

Under this heading, the study discusses two things: remedies provided and the effectiveness of those remedies for distance consumers because the ICPL 2010 is not a distance law, as follows;

4.7.1.1. Remedies Available in the ICPL 2010

The ICPL 2010 has generally addressed remedies for any breach of the information provisions. Thus, all types of breaches are covered by one unified range of remedies, without distinguishing distance contracts from direct contracts. According to Article 6(2) of the ICLP 2010;

The consumer or anyone who has an interest, in case of not being given the information set out in this Article, has the right to partially or fully return the goods to the supplier, and claim for compensation before the civil courts against any injury inflicted on him or his estate behind that.

The Article addresses three remedial options. Firstly, the right to rescind the contract. Although, Paragraph (2) of Article 6 does not mention the word “rescission”, the wording “the right to... fully return back the goods” implicitly refers to the legal effects of rescission. Although, rescission can have this legal effect, so can avoidance, but the Iraqi legislator likely intended to impose rescission rather than avoidance.⁵⁰⁵ The contract is void if one or more elements of having the contract soundly made do not exist.⁵⁰⁶ By contrast, rescission is applied when a breach occurs against one of the valid obligations.⁵⁰⁷ Paragraph (2) of Article 6 is likely to have the effect of rescission because before the time of breach both parties had a valid contract.⁵⁰⁸ Nonetheless, this provision is subject to criticism because it introduces rescission by its effect rather than as the remedy itself i.e. using the concept directly. This may mix up rescission with other concepts which may

⁵⁰⁵ Al-Kaaby and Hady (n 253) 104.

⁵⁰⁶ According Article 137(1) of the Iraqi Civil Code; “A void contract is that which due to its cause (origin) is not valid as to its essence or as to its attributes regarding some of its external features”.

⁵⁰⁷ According to Article 177(1) of the Iraqi Civil Code; “In bilateral contracts binding both parties if either party has failed to perform his obligation under the contract, the other party may after service of notice (formal summons) demand rescission of the contract and where necessary claim damage”.

⁵⁰⁸ Hijazi (n 17) 40.

share the same legal effects.⁵⁰⁹ When a demand is made for rescission, the contract will be terminated, and then both contracting parties will be reinstated into their original positions before entering the contract.⁵¹⁰ Thus, the right to rescind the contract is very much similar to the right to unwind the contract under the CUTRs 2008.⁵¹¹

Secondly, Paragraph (2) of Article 6 grants the consumer an option to partially return the goods instead. In doing so, the law allows the consumer to partition the contract for the purpose of redress. Meanwhile, the consumer is entitled to keep a part of the contract safe, while for the other part, in which the goods do not match the information given, he may claim for partial refund.⁵¹² When a demand is made for redress, the part of the contract in which the information has not been given or untruthfully given, will be voided.⁵¹³ Whereas, the remaining part of the contract will be dealt with as a valid contract unless it is revealed that the parties would not have made the contract without the avoided part. Notably, this remedy does not exist under English law. However, the CUTRs 2008 introduce “the right to unwind the contract, the right to a discount, and the right to damage” under the name “the right to redress”.⁵¹⁴

Finally, the consumer is entitled to claim for damages in cases where a failure to provide information inflicts injury upon him or his estate: this right is separately provided for consumers.⁵¹⁵ This suggests that the entitlement to damages is applied regardless of whether the consumer has decided to fully or partially return the goods or even keep the whole contract safe.⁵¹⁶ Only two conditions are required; firstly the occurrence of actual

⁵⁰⁹ Al-Kaaby, and Hady (n 253) 104.

⁵¹⁰ The Iraqi Civil Code, Article 180, and Article 64.

⁵¹¹ The CUTRs 2008 (as amended), Regulation 27E (1).

⁵¹² According to Article 139 of the Iraqi Civil Code; “where a part of the contract is void that part only will be void, the remaining part of contract will remain valid and be considered as an independent contract unless it is revealed that the contract would not have been concluded without the part which has been voided”.

⁵¹³ According to Article 138(2) of the Iraqi Civil Code; “If the contract is voided the parties will be reinstated in their positions which existed prior to the contract; if such reinstatement is impossible damages equivalent to the loss may be awarded”.

⁵¹⁴ The CUTRs 2008 (as amended), PART4A, Regulation 27A.

⁵¹⁵ According to Article 6(2) of the ICPL 2010; “The consumer or anyone who has an interest therein, in case of not being given the information set out in this article, has the right to partially or fully return the goods to the supplier, and claim for compensation before the civil courts against any injury inflicted on him or his estate beyond that”.

⁵¹⁶ Mikahil Ali AL-Zebari, *E-Contracts Over Internet between Sharia and Law* (Dar Al-Jamiha AL-Jadidah 2015) 436.

damage and secondly, such damage must be ascribed to a breach of the information provisions.⁵¹⁷ This is similar to provisions of damage under the English CUTRs 2008.⁵¹⁸

4.7.1.2. The Applicability of Remedies in the ICPL 2010 for Consumers at Distance

The ICPL 2010, therefore, provides a range of remedies for the consumer at distance. The law offers the consumer all possible remedies known by civil laws so far. Accordingly, the consumer is entitled to rescind the contract if the breach is deemed to be fully injurious. He may also opt to correct the contract if the breach has partial effect on the contract. If a contract is corrected, the consumer is not to be deprived from advantages of the contract because the contract is still operative. At the same time, he is not to be affected by the defected part of the contract because it is to be considered void from the inception.

Although, the law does not say so, the consumer should have the right to, fully or partially, substitute the goods subject to returning.⁵¹⁹ If not then the interpretation is contrary to the policy of consumer protection because the goods may be necessary for the consumer. In such a case, not allowing the consumer to substitute the goods prevents him from necessary goods.⁵²⁰ Furthermore, the consumer can impose substitution upon the trader in accordance with the Iraqi Civil Code.⁵²¹ Moreover, it is not in the trader's interest to refuse substitution because it has less effect than rescission. Thus, providing the right to rescission without substitution is prejudicial to the trader's rights,⁵²² and also it is against the rules of performance in rem which is set out in the Iraqi Civil Code.⁵²³

One more positive finding is that both rescission and redress are linked to the case of a failure to provide information. This suggests that the consumer has the freedom to choose between rescission and redress, whether the information made the goods fully or partially defective. As a result, the consumer can fully return the goods even if the injury is deemed

⁵¹⁷ Hussain AL-Timimi (n 438) 212.

⁵¹⁸ The CUTRs 2008 (as amended), Regulation 27J.

⁵¹⁹ Al-Kaaby, and Hady (n 253) 105.

⁵²⁰ Abdulbaki (n 237) 295.

⁵²¹ According to Article 248(2) of the Iraqi Civil Code; "If the debtor has failed to perform his obligation the creditor may after having obtained leave from the court or in case of urgency without such leave obtains at the debtor's expense a thing of the same kind; he may also claim the value of the thing without prejudice in the preceding two cases to his right to compensation".

⁵²² Al-Kaaby, and Hady (n 249) 108.

⁵²³ According to Article 246(2) of the Iraqi Civil Code; "The debtor where will possible be compelled to perform his obligation in rem".

to be partial, and partially return the goods even if the injury appeared to be full.⁵²⁴ Alongside that, the entitlement to damages is provided to cover any injury which the consumer may suffer.

Nevertheless, the prevailing remedies do not provide any particular treatment to cases of distance contracts. Perhaps, they have a link to information provisions in general whereby distance consumers and non -distance consumers are equally treated. Thus, the position of the distance consumer is not better than the position of other consumers. Also, the provided remedies are ascribed to the breach which may occur of provisions of Article 6, and it does not recognise distance contracts. For example, the Article does not cover information regarding the identity of the trader,⁵²⁵ necessary technical steps to conclude a distance contract, warranties available, and price nominate. While any breach of the information provisions which are set out in Articles, 7, and 9 does not allow the consumer to claim for the remedies set out in Article 6.⁵²⁶

Even with the entitlement set out in Article 6 there is still room for criticism. The current version only lists remedies without detailing the mechanism which should be followed, in contrast with English Law where remedies are introduced in detail. Thus, the remedy may be more difficult to apply than first thought. If the consumer decided to fully return the goods, the reinstatement of the parties to their original positions before the contract was made is not difficult but, if the decision is to return the goods partially, the reinstatement of the parties to their original positions regarding the returning goods may encounter some difficulties. It is unknown, for instance, the price basis which should be followed in assessing the part of the goods which is returned. This matter arises in the case where goods are sold by total price or where the goods subject to partial returning is merely a part of a product i.e. the wire of a laptop, the battery of a mobile phone.

⁵²⁴ This provision is contrary to the provision set out in Article 561 of the Iraqi Civil Code, which allows the goods to be fully or partially returned if they can be divided without damage.

⁵²⁵ The ICPL 2010, Article 7(6).

⁵²⁶ Some provisions set out in Articles 7, and 9 have direct relationship with the information requirements. Under Paragraph (6) of Article 7, business name and address or any other brand adopted by the law need to be in writing. By the meaning of Article 9(1) the trader is banned from practicing “deception, misleading, falsehood and concealing the information regarding content of goods and services”. Under Article 9(3) the trader is banned from producing, selling, displaying, and advertising “b- any goods in which their entire content or warnings and start date and expiration date have not been written clearly on their coverages or cans”.

A further criticism is that the current remedies do not treat many key issues of distance selling contracts. For example, the remedies do not include contracts concluded for services and digital content. Thus, a wide range of distance selling contracts are excluded. This loophole does not exist under the CUTRs 2008, where the term “product” is defined to include goods, services, and digital content.⁵²⁷ However, the ICPL 2010 made a successful attempt when excluded services in cases of fully and partial return. As self-evident, services which are provided are naturally incapable of being returned.⁵²⁸ It is suggested before, if the law recognised rescission by the concept other than the legal effects, services would have been included. Thus, if a demand is made to rescind or redress a contract regarding goods, contracting parties would then be retrospectively reinstated into their original position before the contract is made. While if the contract is made for services, introspective reinstatement would only be possible.

Furthermore, the ICPL 2010 does not determine the period in which the consumer is allowed to claim for either full or partial returning. Leaving the period open prejudices the trader’s right. It may eventually make the consumer undergo the period which the trader may provide. The same thing is true under English Law which does not provide any period for the consumer to claim for the remedies, save to the right to unwind the contract under the CUTRs 2008 which determines 90 days.⁵²⁹

Finally, it is unknown whether returning the goods would cost the consumer any additional charges. This may not be an issue at face-to –face contracts as the consumer would return the goods to the store where he received them first. In distance contracts, however, goods are usually delivered to consumers’ addresses at certain expense. In the same way, goods being returned are collected from their addresses by traders (or their agents) or returned by the consumer via a carrier. Thus, it is necessary to know if the collection would cost the consumer any additional charges. However, there is no need for this requirement if the prior information includes this explanation. This is not the case under English Law because the CCIACRs 2013 make it clear that the consumer is not bound by certain charges if he is not informed about them.⁵³⁰ One of the included charges is the costs of returning the goods

⁵²⁷ The CUTRs 2008 (as amended), Regulation 2(6).

⁵²⁸ Badr (n 349) 88.

⁵²⁹ The CUTRs 2008 (as amended), Regulation 27E (3).

⁵³⁰ The CCIACRs 2013, Regulation 13(5).

in the case of cancellation.⁵³¹ In other cases, other than cancellation case, the consumer is not bound by the charges according to Paragraph (g) of Schedule 2 which pardons the consumer from “all additional delivery charges and any other costs”. The wording “any other costs” includes any charge which may be imposed by a trader but he fails to inform the consumer about it.

4.7.2. The Stance of the KRP 2015

Surprisingly, the KRP 2015 does not provide any remedy for the breach of the duty to provide pre –contractual information in electronic contracts. For such a breach, the proposal provides only criminal penalties.⁵³² Also, the proposal does not provide any remedy for the breach of the information requirements in general. Thus, the study makes an attempt to explore other remedial provisions under the proposal which may be relevant in this regard.

In the following subsections, these remedies are discussed along with a discussion of the applicability of remedies for consumers at distance.

4.7.2.1. Remedies Available in the KRP 2015

Three bases of remedy are found under the KRP 2015, similar to those stated in the ICPL 2010. Firstly, the right to rescind the contract is set out in Articles 4 and 5. Unlike the ICPL 2010, the proposal defines rescission in cases of goods and services.⁵³³ In Article 16(2) the KRP 2015 repeatedly states the right to rescission but this time in the field of advertisements.⁵³⁴

In above- mentioned articles, the proposal drafter has included a link between remedies and information provisions. In both Articles 4 and 5, rescission is provided in the case when the goods or services are defective, imperfect, or not matched the quality or the

⁵³¹ The CCIACRs 2013, Schedule 2, Paragraph (m).

⁵³² The KRP 2015, Article 35.

⁵³³ According to Article 4(1) of the KRP 2015; “The consumer, during 10 days from the day in which he receives the goods, has the right to substitute or return the goods to the supplier, and claim for refund without any additional charges...”. According to Article 5; “The consumer has the right to demand the services provider to re-provide the service or return its pecuniary allowance or the allowance which replenishes the shortage...”.

⁵³⁴ According to Article 16(2) of the KRP 2015; “Where the goods or services, subject to the advertisements, have not been provided in accordance with the conditions announced by the advertiser beforehand, the consumer has the right to either accept other goods or services which must be similar to those which are subject to the advertisements in terms of nature or use, or retrieve the money paid”.

purpose of the contract. This suggests that the consumer should have a description about the state of goods or services given by the supplier and the goods turn out to be against such description. Or he should have a description about the purpose of goods but they turn out to be dysfunctional for that specific purpose. The same thing is true regarding advertisements because the goods or services are seen otherwise the description given in the advertisements. In any case, the trader has either knowingly or unknowingly misrepresented information to the consumer, or concealed the information from him. As a result, the goods or services in the hands of the consumer would be otherwise the description given by the trader.

Consequently, if a demand is made to rescind the contract based on Articles 4, 5, and 16, both contracting parties shall be reinstated into their original positions prior to the contract in the same way discussed under the ICPL 2010. This is similar to the right to unwind under the English CUTRs 2008.⁵³⁵ However, the proposal is similar to the ICPL 2010, and dissimilar to the CUTRs 2008, in not giving information about the way in which the parties are to be reinstated into their previous positions. In another aspect, the KRP 2015 is similar to English Law, and dissimilar to the ICPL 2010, in providing a period for the consumer to claim for rescission. Finally, the KRP 2015 is similar to English Law and dissimilar to the ICPL 2010, in covering sale and services contracts.

Secondly, the right to redress the contract which is limited to cases of services contracts.⁵³⁶ This suggests that if a contract is made for services, and then it is revealed that the services are otherwise the information given. This is either because there is a defect or shortage found in the services. In such a case, the consumer has three options; firstly, he may rescind the contract. Secondly, he may go for substitution which requires the supplier to re-provide the services. Thirdly, he may claim for partial allowance which covers the defect or shortage found in the services.⁵³⁷ In English law, the right to redress the contract does not exist apart from the fact that the CUTRs 2008 define a range of remedies under the name “the right to redress the contract” as stated earlier.

⁵³⁵ See this Thesis, (n 490) 129.

⁵³⁶ See this Thesis, 139.

⁵³⁷ If a demand is made for partial allowance, it would be understood that the consumer has accepted the services which are provided. Therefore, there is no claim for rescission or substitution. Instead, the trader has to restore the defect or shortage by paying back the consumer a part of allowance. The recoverable amount must be calculated in parallel with the degree of defect or shortage found. However, the consumer does not have the right to claim for partial re-providing, because the service is naturally not of capability to be divided. In this sense, the stance of the proposal drafter is well stated.

Finally, the right to “ compensation where necessary due to the damages inflicted upon him, and its proportion should not be less than the difference between the price of goods or services at the time of being displayed and their prices afterwards”. The entitlement to compensation is separately provided for consumers. It is well connected to cases of damages when the goods or services are delivered which are not compliant with the information given in the advertisements. In this case, rules of compensation under the Iraqi Civil Code are to be followed.⁵³⁸ However, the amount of compensation should not, under any rate, be less than the difference between the price of goods or services at the time of display and their prices afterwards.

4.7.2.2. The Applicability of Remedies in the KRP 2015 for Consumers at Distance

The KRP 2015 has responded to many key issues which are left untreated by the ICPL 2010. Foremost, the right to rescission, as set out in Article 4, is not provided for unlimited period of time but there is a period of 14 days before consumers to exercise it. Another positive provision is that, where a demand is made for rescission regarding goods or services, the supplier must respond to the demand without imposing any additional charges on the consumer, similar to English Law.⁵³⁹ The supplier is further required not to include any clause into the agreement which may discharge himself from his obligation.⁵⁴⁰

However, the proposal is still subject to a degree of criticism. For example, remedies are not explicitly linked to the breach of the duty to provide pre –contractual information. This duty is defined in Article 21 regarding e-contracts, and Article 7 regarding contracts in general. However, none of the provided remedies has a direct connection to these articles. Alternatively, the remedies are linked to cases when the absence of information has an impact upon the contract. In effect, it is unknown whether remedies include the breach of the information listed in Articles 21 and 7. The matter is completely left to the discretionary authority of the courts. In most cases, it is hard to find relevancy because remedies are given in a very narrow context. For instance, the right to rescission and right

⁵³⁸ The Iraqi Civil Code, Articles 168-176.

⁵³⁹ The KRP 2015, Article 4(2).

⁵⁴⁰ According to Article 6 of the KRP 2015; “It is void any agreement or stipulation within the contract, or document, or deed or what is in its default, regarding the agreement with the consumer, if it leads either to discharging the supplier of goods or services from any of the obligations set out in this law, or discharging, or mitigating or limiting his liability in the way leading to breaking down the balance between rights and obligations of both parties against the consumer’s interest”.

to compensation, as set out in Article 16, cover the breach of the information which is displayed in advertisements. Thus, information displayed on other means of distance communication, such as Internet, leaflet, telephone, and fax, would be irrelevant.

Another room for criticism, the combination between rescission and the right of withdrawal in Article 4 is unnecessary and unjustified. Article 4(2) deprives the consumer from exercising the right to rescission and the right of withdrawal, in several cases.⁵⁴¹ Most of the prohibited cases, if not all, are applied to the case of withdrawal and not rescission because the right to withdraw is an absolute right which does not require any reason from the consumer to exercise. Quite to the contrary, the right to rescission is exercised when something goes wrong with the contract. For example, the goods may be found defective or not matched to the quality and the purpose of the contract. Such defects or non-conformity is not to be revealed unless the consumer has tested the good or removed the labels. The same judgement is applicable even if the goods were made at especial request of the consumer. Otherwise interpretation would discharge the supplier from the liability if the goods turned out to be against the specific quality agreed beforehand.

⁵⁴¹ Cases are; “If the goods are used before the period set out in Paragraph (1) elapses [10 days for cancelation and 14 days for rescission], 2- if the subject –matter of the agreement was a good manufactured on the demand of the consumer or according to qualities specified beforehand, 3- if the subject –matter of the agreement were books, journals, video castes, CD, or I.T. programmes in case where the labels were removed, 4- if the goods defected behind misusing it or wrongly possessing it by the consumer”.

4.8. Conclusion

This chapter discussed the liability arising from the duty to provide pre-contractual information. The study concluded that in English law pre-contractual liability does not normally arise if the contract has not been made because of the freedom of contract principle and absence of an overarching principle of good faith. In Iraqi law, the same thing has been observed albeit slightly different because of the role given to good faith.⁵⁴² Under both jurisdictions, if negotiations cause any damage Tort Law may apply if certain conditions are met. However, if the contract is made, any breach of the duty to provide pre-contractual information constitutes contractual liability under the CCIACRs 2013.⁵⁴³ In Iraqi laws, the case is still one of the grey areas because the laws do not address this matter. So for future laws, an attempt should be made to make the information provided part of the contract, similar to Regulation 18 of the CCIACRs 2013. This change will entitle the consumer to the remedies provided for the breach of contract. It will also lift a heavy burden of proof upon consumers which is in place in Tort Law.

The study also found that the CCIACRs 2013 are likely to read the duty as a duty to achieve a particular result. The main reason is that Regulation 17(1) places the burden of proof upon the trader. This requirement should be incorporated into Iraqi Law as the issue is not dealt with. Furthermore, the study has observed that the English CCIACRs 2013 provide a wide range of remedies for consumers when the duty is breached. Many of these remedies protect the consumer from a certain effect or add more protection.⁵⁴⁴ However, these remedies cover breaches of certain information under certain conditions. They do not include breaches which may happen of other information.

It is further noted that the CUTRs 2008 provide the consumer with another set of remedies in the case of misleading action.⁵⁴⁵ In most cases, the breach of the duty to provide information suffices conditions of misleading action. However, these remedies do not add much to distance selling contracts. They cover the case when information is falsely given or given in a deceitful way. However, they do not cover a failure to provide information and breaches of information relating to distance selling. This makes the remedies provided

⁵⁴² See this Thesis, 115-116.

⁵⁴³ The CCIACRs 2013, Regulation 18.

⁵⁴⁴ *ibid*, Regulations 13(5), 13(6), 13(7), and 31(3). See also, the CRA 2015, Sections 11(5), 12(3), 36(4), 37(3), and 50(4).

⁵⁴⁵ The CUTRs 2008 (as amended), Regulation 5.

irrelevant. Finally, the CRA 2015 adds new remedies to the case when the information requirements are breached. Accordingly, the consumer is allowed to claim for all the amount, or value, he paid in sale and digital content contracts and for a price reduction in services contracts.⁵⁴⁶

In Iraqi laws, the study found that distance consumers do not have many remedies. Most importantly, the laws do not give any particularity to distance consumers. The ICPL 2010 offers the consumer certain remedies if there is a breach of provisions of Article 6, but these remedies are irrelevant if the breach is of the information provisions set out in Articles 7, and 9. Furthermore, those remedies cover breaches in sale contracts, services and digital content contracts are excluded. On the other hand, the KRP 2015 is found similar to the ICPL 2010 in providing the same set of remedies. Again, those remedies do not have direct link to Article 21, and 7 where the information provisions are introduced. Furthermore, it is noted that some of those remedial options are limited to case of certain means of distance communication. For example, the right to rescission and right to damages are provided in Article 16 for the breach of information displayed over advertisements. In general, there is a clear gap with remedies which needs to be filled by providing more effective remedies for the breach of information requirements. This is can be learned from Regulations 13(5), 13(6), 13(7), and 31(3) of the English CCIACRs 2013, and Sections 19(5), 37(4), and 50(3) of the English CRA 2015.

The next chapter addresses other possible remedies which may be claimed when the duty to provide pre- contractual information is breached. This is an important attempt because under both jurisdictions there is still a need for more effective remedies.

⁵⁴⁶ The CRA 2015, Sections 19(5), 37(4), and 54(4).

CHAPTER FIVE: REMEDIES AVAILABLE FOR FAILING TO PERFORM THE DUTY TO PROVIDE PRE- CONTRACTUAL INFORMATION UNDER THE LAW OF CONTRACT

5.1. Introduction

Many years before the issue of information rose to prominence in modern day consumer legislation, English and Iraqi lawyers sought to identify the role played by general principles of contract law in delivering information to the contracting parties. Most of these principles significantly protect the will of contracting parties at the negotiation. Therefore, it is argued that some of those general principles include elements of the information requirements such as fraud, mistake, and guarantee of latent defects. If this argument is true, distance consumers are entitled to a wider range of remedies, not only those found in specific statutory provisions which are designed to impose the duty to provide pre – contractual information, but also in the wider law of contract. This is an important examination for distance consumers because consumer laws under both jurisdictions arguably have serious weakness in providing effective remedies. Therefore, it is useful to bring those general principles into the scope of discussion to establish whether these offer greater protection for the consumer.

This chapter aims to consider the answer to some key questions. Firstly, how important are the principles of contract law to help distance consumers with information? To what extent are the remedies thereof relevant to distance consumers? If they are relevant, what possibly makes them better for the consumer to apply rather than the remedies provided in consumer legislation? For such purpose, the study argues that general principles are relatively adequate to enhance consumers' information at the negotiation. It is also argued that a claim for remedies under general principles requires the claimant to establish some elements, some of which could be hard to establish for consumers. However, the existence of a statutory duty to provide pre- contractual information greatly helps consumers to establish those elements and seek the remedies provided accordingly.

In English Law, principles of contract law are scattered between Statutory Law and Common Law. For example, provisions of misrepresentation are introduced under the Misrepresentation Act 1967 and Common Law. Provisions of satisfactory quality are introduced in the Sale of Goods Act 1979 and now, for consumers by the CRA 2015. Thus,

the study considers provisions of defects of the goods under the CRA 2015. In Iraqi Law, principles of contract law are introduced under one statutory law, the Iraqi Civil Code.

Therefore, this chapter is divided into three sections. The first section will discuss misrepresentation under English Law, and the Iraqi Civil Code. The second section will discuss mistake under the English Common Law and the Iraqi Civil Code. The last section will consider provisions of satisfactory quality under the English CRA 2015 and provisions of defects of the goods under the Iraqi Civil Code.

This chapter is divided into three sections. The first section will discuss misrepresentation under English Law, and the Iraqi Civil Code. The second section will discuss mistake under English Law and the Iraqi Civil Code. The last section will consider satisfactory quality under the English CRA 2015 and warranty of defects of the goods under the Iraqi Civil Code.

5.2. Remedies Available under Provisions of Misrepresentation

5.2.1. Misrepresentation in English Law

Generally, misrepresentation is a duty not to make a false statement.⁵⁴⁷ In the English literature, it is defined as “a false statement of fact not opinion or law which is made by a party, and which induces the other party to enter into the contract”.⁵⁴⁸

English Law provides two basic remedies for misrepresentation. Firstly, Common Law provides *rescission* as a remedy available, in principle, for all types of misrepresentation.⁵⁴⁹ When a contract is set aside for misrepresentation the parties are put back, retrospectively and prospectively, to the position which they were in before the contract was made.⁵⁵⁰ For example, in the *Redgrave* case,⁵⁵¹ the defendant purchased the plaintiff’s house for £1600, and paid a deposit. However, he refused the contract on the basis that the plaintiff refused “to have any reference to the business inserted in the agreement”. The plaintiff brought an action for specific performance. The defendant counter-claimed for rescission on the ground of misrepresentation.⁵⁵² The Court of Appeal held that;

Where one person induces another to enter into an agreement with him by a material representation which is untrue, it is no defence to an action to rescind the contract that the person to whom the representation was made had the means of discovering, and might, with reasonable diligence, have discovered, that it was untrue.....therefore, the Defendant was entitled to have the contract rescinded and the deposit returned, but that as he had not pleaded knowledge on

⁵⁴⁷ Atiyah, *An Introduction to the Law of Contract* (n 107) 257.

⁵⁴⁸ These elements are established in some English cases. For example, in *Bisset v Wilkinson* [1927] AC 177, the emphasis of the court was on the fact that a misstatement should be of a fact. In *Edgington v Fitzmaurice* [1882 E. 920.] it was established that to be actionable, the misrepresentation must have induced a party to enter into a contract. See also, W Major & C Taylor, *Law of Contract* (Pearson Professional limited 1993) 144; Ewan McKendrick, *Contract Law, Text, Cases, and Materials* (2nd Oxford University Press 2005) 659; Stone (n 398) 268.

⁵⁴⁹ McKendrick, *Contract Law* (n 134) 285.

⁵⁵⁰ McKendrick, *Contract Law, Text, Cases, and Materials*, (n 548) 678.

⁵⁵¹ *Redgrave v Hurd* [1880 R. 0703.], (1881) 20 Ch. D. 1.

⁵⁵² In *Car and Universal Finance Co. Ltd. v Caldwell* [1964] 2 W.L.R. 600, [1965] 1 Q.B. 525, at 549. The Court of Appeal validated the rescission made by the defendant, without being communicated to the plaintiff as it was held that; “In the circumstances of this case that there can be rescission without communication where the seller of a motor car, who admittedly had the right to rescind the contract of sale on the ground of *fraudulent misrepresentation*, terminated the contract by an unequivocal act of election which demonstrated clearly that he had elected to rescind it and to be no longer bound by it”.

the part of the Plaintiff that the statements as to the business were untrue, and had not specifically alleged the statements in his counter-claim, he could not recover damages.

Rescission is also available under Section 1 of the English Misrepresentation Act 1967 which stipulates that; “If a person has entered into a contract after a misrepresentation has been made to him... he would be entitled to rescind the contract without alleging fraud”.

Secondly, a right to claim for contractual damages is available for the aggravated party under sections 2(1) of the Misrepresentation Act.⁵⁵³ Under 2(2) the aggravated party, in cases of innocent misrepresentation, may be given a right to claim for damages, as the power to award it is discretionary.⁵⁵⁴ In addition, the damages are in *lieu rescission*, which means when a claim is made for rescission, the party is not entitled to claim for damages.⁵⁵⁵

It is worth mentioning that, in Common Law the right to claim for contractual damages is not available unless the misrepresenting has been incorporated into the contract as a term, then the claim is for a breach of the term of contract.⁵⁵⁶ However, misrepresentation may be recovered in Tort Law if it was made fraudulently, as applied in the *Doyle* case,⁵⁵⁷ or

⁵⁵³ According to Section 2(1) of the Misrepresentation Act; “Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true”.

⁵⁵⁴ McKendrick, *Contract Law* (n 134) 290.

⁵⁵⁵ According to Section 2(2) of the Misrepresentation Act; “Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party”.

⁵⁵⁶ McKendrick, *Contract Law* (n 134) 288.

⁵⁵⁷ It was held that; “That the proper measure of damages for deceit, as distinct from damages for breach of contract, was all the damage directly flowing from the tortious act of fraudulent inducement which was not rendered too remote by the plaintiff’s own conduct, whether or not the defendants could have foreseen such consequential loss”. See, *Doyle v Olby (Ironmongers) Ltd. and Others* [1969] 2 Q.B. 158, at 159. Similarly, it was held in *Smith New Court Securities Ltd. Appellant Cross-Respondent v Citibank N.A. Respondent Cross-Appellant* [1996] 3 W.L.R. 1051, at 255, that; “The judge had found ample evidence for the conclusion that in the absence of those representations the plaintiff would have withdrawn from the transaction; and that, accordingly, the essentials of the *tort of deceit* were established”.

negligently, which was established in the *Hedley* case⁵⁵⁸ and applied in the *South Australia Asset* case.⁵⁵⁹ However, for innocent misrepresentation, damages are not available under rules of Common Law, unlike Section 2(2) of the Misrepresentation Act.⁵⁶⁰

However, the chances of the distance consumer to claim for these remedies depend on the potential of *misrepresentation* to impose the duty to provide pre-contractual information. Apparently, the idea is not encouraging as it might appear at first blush. From lawyers' perspective, English law has recognised misrepresentation to mitigate the effect of nonexistence of a duty to disclose.⁵⁶¹ Accordingly, the law cautiously observes behaviour of the negotiating parties to ensure that there have been no false statements. However, it is argued that misrepresentation does not have a significant impact on directing the parties towards a positive duty to provide information. What makes it relatively relevant is if a party voluntarily decided to provide information, he would be required to pay attention to his statements to avoid making false statements.⁵⁶²

Furthermore, the requirements of an actionable misrepresentation do not appear easily established, especially for distance consumers. For instance, what is exactly equivalent to a misrepresentation is not as simple to be specified as it might initially appear.⁵⁶³ Some conditions need to be satisfied. Firstly, the representation must appear in a form of a "statement". This requires some positive behaviour on the part of the trader, either in a written or oral form. This is consistent with general principles of English Law which impose a negative obligation not to tell falsehood, rather than a positive obligation to tell the truth.⁵⁶⁴ By default, mere silence does not amount to a misrepresentation.⁵⁶⁵ This suggests that silence does not provide a basis for misrepresentation.⁵⁶⁶ In the English

⁵⁵⁸ *Hedley Byrne & Co. Ltd. Appellants; v Heller & Partners Ltd. Respondents* [1963] 3 W.L.R. 101. See also, Catherine Elliott and Frances Quinn, *Contract Law* (Pearson Longman 2007) 172.

⁵⁵⁹ It was held that; "Where a person was under a duty to take reasonable care to provide information on which someone else would decide on a course of action he was, if *negligent*, responsible not for all the consequences of the course of action decided on but only for the foreseeable consequences of the information being wrong". See, *South Australia Asset Management Corporation Respondents v York Montague Ltd.* [1997] A.C. 191, at 192.

⁵⁶⁰ Ewan McKendrick, *Contract Law* (n 134) 290; Elliott and Quinn (n 558) 174; Stone (n 134) 276.

⁵⁶¹ Atiyah, *An Introduction to the Law of Contract* (n 107)187.

⁵⁶² Cartwright, Vogenauer, and Whittaker (n 461) 4.

⁵⁶³ Atiyah, *An Introduction to the Law of Contract* (n 107) 187.

⁵⁶⁴ Stone (n 134) 271.

⁵⁶⁵ Patrick S. Atiyah & G. H. Treitel, 'Misrepresentation Act 1967' (1967) 30(4) *The Modern Law Review* 369. 369- 370.

⁵⁶⁶ McKendrick, *Contract Law, Texts, Cases and Materials* (n 541) 659.

Court, this rule was well justified on the ground of the principle of *Caveat Emptor*.⁵⁶⁷ For example, in the *Smith* case the buyer claimed for rescission because the seller did not give him information, but the court rejected this, holding that; “There is no legal obligation on a vendor to inform a purchaser that the latter is under a mistake not induced by the act of the vendor”.⁵⁶⁸

Despite that, in the *London General Omnibus* case Lord Vaughan Williams L.J made an attempt to include non-disclosure in misrepresentation.⁵⁶⁹ He observed that there is a duty to provide information in cases where non-disclosure is comparable to misrepresentation. However, this approach solely survived in fiduciary contracts where a party is in a position to disclose all facts such as insurance contract. Otherwise, a failure to disclose material facts does not amount to a false statement in the current attitudes of the English courts. Exceptionally, the English Court has given silence the effect of misrepresentation. One of those cases is when there is a true statement but it is misleading because it does not reveal the whole fact. This is known as the statement of *half-truth* and applied in the *Dimmock*

⁵⁶⁷ *Caveat emptor*– “let the buyer be aware” was derived from Latin and applied for a long time. Accordingly, the buyer was obliged to know everything about the contract. In return, the seller was entirely exempt from providing information regarding the subject- matter of the contract. He only had to allow the buyer to inspect it. Also, he had to provide information when it was requested by the buyer. If he failed to provide it, he would be liable for misrepresentation. In several cases the English Court applied *Caveat Emptor* such as, *Ward v Hobbs* [1878] 4 App. CAS, at 13, and *Hurley v. Dyke* [1979] R.T.R., at 265. Later *Caveat Emptor* has been reserved effectively towards the seller by firstly; Sections 3, 2(1), and 4(B) of the Misrepresentation Act 1967. Secondly; Section 13 with regards to the sale of goods by description, and Section 14 with regards to satisfactory quality under the Sale of Goods Act 1979 (as amended). Instead, *Caveat Venditor* has taken place. It is further provided that the death of *Caveat Emptor* started with the Unfair Contract Terms Act 1977. Prior to that Act, the seller under the effect of exclusion clauses was still able to acquit himself from provisions of implied terms under the Sale of Goods Act. See, Howells and Weatherill (n 106) 145-146; Richard Williams, 'What is the Rule of *Caveat Emptor* and to What Extent Does Part V of the Housing Act 2004 Undermine the Rule?' (2008) 6(1) Hertfordshire Law Journal 14; Mohd. Ma'sum Billah, 'Caveat Emptor versus Khiyar al-'Aib: A Dichotomy' (1998) 13(3) Arab Law Quarterly 278.

⁵⁶⁸ *Smith v Hughes* (1870-71) L.R. 6 Q.B. 597, at 597.

⁵⁶⁹ *London General Omnibus Company, Limited v Holloway* [1912] 2 K.B. 72, at 77.

case.⁵⁷⁰ Another case is when circumstances have changed prior to the conclusion of contract as applied in the *With* case.⁵⁷¹

This present attitude to silence does not help distance consumers. It is reasonable to foresee that consumers in general and more specifically in contracts concluded at distance are vulnerable to concealment rather than misstatements. In return, traders are more likely to withhold information rather than present misstatements. This matter arguably justifies why non-disclosure is treated differently under consumer legislation. As noted elsewhere, modern consumer laws require traders to provide the consumer with a long list of information prior to the conclusion of contract. In this way, any endeavour from the trader to hide, omit, or exclude any piece of the required information makes him liable. It further constitutes “misleading omission” in the concept of the CUTRs 2008.⁵⁷² In other words, the trader is obliged to send a list of information. This suggests that consumer legislation requires the trader to be positive about specific information. Then, any false statement in the information specified constitutes misrepresentation.

However, the onus of proof may be a problem for the consumer if he wants to claim for misrepresentation. This is not the case under consumer legislation because the CCIACRs 2013 place burden of proof upon traders.⁵⁷³ However, if the consumer decided to claim for misrepresentation, he would have to prove that there was a false statement. He would further need, as Lord Scott J. held in the *Museprime Properties* case, to prove that the misrepresentation “induced him to act as he did” where it “would not have induced a

⁵⁷⁰ In the *Dimmock* case the vendor of the land informed the purchaser that the land is occupied by a tenant for a particular rent and the fact was true, however, the former failed to inform the latter that the tenant had given a notice to quit in that way the new tenant was required to pay lower rent. On the basis of this SIR G. J. TURNER, L.J held that; “I do not mean to impute actual fraud, there is what, in the view of a Court of equity, amounts to fraud—a misrepresentation calculated materially to mislead a purchaser”. See *Dimmock v Hallett* (1866-67) L.R. 2 Ch. App. 21, at 29; see also *Nottingham Patent Brick and Tile Co. v Butler* (1885-86) L.R. 16 Q.B.D. 778.

⁵⁷¹ In the *With* case the seller of a medical practice put in his statement a particular price for his products. Later he fell in a health problem ultimately caused the products to decline; therefore the price became much lower than the price addressed before. However, he did not inform the purchaser, *With*, of the change in circumstance; therefore the latter sought to rescind the contract on the ground of misrepresentation. The decision, therefore, was held; “That the representation was made with a view to induce the purchasers to enter into the contract and must be treated as continuing until the contract was signed, and that it was the duty of the vendor to communicate the change of circumstances to the purchasers”. See, *With v. O’Flanagan* [1934. W. 1358.], at 575-576.

⁵⁷² The CUTRs 2008, Regulation 6(1).

⁵⁷³ The CCIACRs 2013, Regulation 17.

reasonable person”.⁵⁷⁴ If he claimed for damages on the basis of negligent misrepresentation under Section 2(1), his mission would be more difficult because he would need then to prove, as Lord Herschell stated in the *Derry* case, that the representor made negligent misrepresentation “knowingly or without belief in its truth or recklessly, careless of whether it is true or false”.⁵⁷⁵ Then, if the defendant could prove, on a balance of possibilities, that “he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true”, the liability would then shift from negligent misrepresentation to innocent misrepresentation.⁵⁷⁶

However, this matter might have been rectified by the information requirements because distance consumers are entitled to receive confirmation of the information which was communicated at the negotiation stage. This confirmation provides the distance consumer with a good proof which may be used to prove misrepresentation. Therefore, it would not be hard for the court to infer whether there has been any false statement in the confirmation given. However, the difficulty to prove may appear again if the trader failed to send confirmation of the information.

5.2.2. Fraud “misrepresentation” in the Iraqi Civil Code

The Iraqi Civil Code does not specifically recognise misrepresentation. However, all provisions of misrepresentation are introduced under the concept of fraud. In practice, fraud and misrepresentation are two sides of the same coin. This is not the case under the English Misrepresentation Act because misrepresentation may be fraudulent, negligent, or innocent.⁵⁷⁷

In the Iraqi jurisprudence, fraud is defined as a misrepresentation occurring where a party to the contract intentionally gives false information to the other party or withholds information from him. As a result, the other party may mistakenly enter into the

⁵⁷⁴ *Museprime Properties Ltd. v Adhill Properties Ltd* (1991) 61 P. & C.R. 111, at 124. See also, Atiyah & G. H. Treitel, 'Misrepresentation Act 1967' (n 565) 374- 375.

⁵⁷⁵ *Derry v Peek* (1889) 14 App. Cas. 337, at 360. See also Nicola Monaghan C, *Beginning Contract Law* (Routledge 2013) 7; P. B. Fairst, 'Misrepresentation and the Act of 1967' (1967) 12(2) Cambridge Law Journal 239, 243; R. D. Taylor, 'Expectation, Reliance and Misrepresentation' (1982) 45(2) the Modern Law Review 139, 146.

⁵⁷⁶ *Howard Marine and Dredging Co. Ltd. v A. Ogden & Sons (Excavations) Ltd* [1978] QB 574.

⁵⁷⁷ The Misrepresentation Act 1967, Section 2(1).

contract.⁵⁷⁸ It is more likely that the decision would have been taken otherwise if the defrauded party had known the fact.⁵⁷⁹ In distance contracts, this may happen in various forms such as intentional concealment of information, intentionally giving false information,⁵⁸⁰ using trade-mark or domain-name of another trader, and using a fictitious (fake) website.⁵⁸¹

According to Article 121(1) of the Iraqi Civil Code, if it is revealed that a party has made false representations, the contract will be suspended on the defrauded party's approval.⁵⁸² Accordingly, the aggrieved party is entitled to either validate the contract or avoid it within a period of three months, starting from the day on which the fraud has been detected.⁵⁸³

As a matter of fact, there is a connection between the information requirements and the concept of fraud. In any case, when a party in whatever form manipulates pre-contractual information, in most cases the other party will be defrauded. One could, therefore, argue that the breach of the information requirements adequately constitutes fraud. Accordingly, remedies available for fraud are relevant to the case when the duty to provide pre-contractual information is breached.

However, an actionable fraud requires the claimant to establish some elements, which may be difficult for distance consumers to establish. It is well established that the provision set out in Article 121(1) does not require the party to provide information. Rather, it requires him to avoid making false statements if he decides to provide information voluntarily.⁵⁸⁴ This is exactly the same conclusion which the study reached under English Law. Under

⁵⁷⁸ Nori Khatr & Adnan Al- Sarhan, *Civil Law, Sources of the Rights in Personam, Obligations: A Comparative Study* (Dar Al-thaqafa LI-Nashr Wal-Tawzi 2005) 147; Ghany Hsson Taha, *Al-Wagiz in the General Theory of Obligation, the First Book, Sources of the Obligation* (Matbat ALMarf 1971) 200-201; Omar Khalid Zorighat, *Electronic Commercial Contract, Sale Contract Over the Internet, Analytical Study* (1st edn, Alhamid 2007) 195.

⁵⁷⁹ Ahmed AL-Sanhory (n 151) 342; Abdul AL-Mueem Farag AL-Sada, *The Theory of the Contract in the Legal Systems of Arab Countries* (Dar AL-Nahtha AL-Arabia 1974) 254.

⁵⁸⁰ Hamad- AL-Dahan, and Jadr- AL-Saeedy (n 246) 215.

⁵⁸¹ Ibrahim (n 347) 141-142.

⁵⁸² According to Article 121(1) of the Iraqi Civil Code; "Where the contracting party has made false representations to the other party and it was established that the contract contained grievous damage (lesion) the contract will be subject to the approval of (be allowed by) the aggrieved party....".

⁵⁸³ According to Article 136 of the Iraqi Civil Code; "2- The option of validation or revocation must be exercised within three months and if during this time limit no sign has been made to indicate the wish to revoke the contract it will be deemed effectual. 3- If the cause for suspension was because of fraud the time limit begins from the time when the fraud has been detected...".

⁵⁸⁴ Farag AL-Sada (n 579) 257.

both jurisdictions, non- disclosure (mere silence) is not tantamount to fraudulent representation.⁵⁸⁵

Nevertheless, fiduciary contracts are exceptionally precluded from this general rule similar to English Law.⁵⁸⁶ Article 121(2) of the Iraqi Civil Code addresses the cases where silence in fiduciary contracts constitutes fraud by stipulating: “Fraudulent misrepresentation is deemed to be the failure to elucidate (state clearly) in the contracts of trust where caution must be exercised against ambiguity by elucidation such as cheating in contracts of resale with profit, at cost-sharing and at discount or loss”.⁵⁸⁷

Further to this, a mere misrepresentation cannot be operative unless the defrauded party shows that such misrepresentation has led to grievous lesion (injury), and the other party was aware of fraud or could have easily known.⁵⁸⁸ A failure to prove that will shift the contract from a suspending contract to a valid contract. In this case, the right to damages is available to cover any insignificant injury.⁵⁸⁹ This rule is set out in Article 123 which states;

A contracting party who has been the subject of fraudulent misrepresentation may claim damages if he has only suffered little (insignificant) injury (lesion) or if he suffered a grievous injury where misrepresentation was unknown to the other party and it was not easy for the latter to know....

In summary, the entitlement to remedies of fraud is limited to cases where fraud is an outcome of a positive conduct. In contrast, passive conduct cannot constitute fraud save in fiduciary contracts. Also, there is a greater burden of proof on the Iraqi consumer than the English consumer because he would need to prove that the fraud led to grievous damage,

⁵⁸⁵ Abdul Al-Mueem Ahmed Khalifa, *Consumer Protection in Computer Supply Contracts* (Dar Al-Fkr Al-Jamihi 2015) 312; AL-Sherifat (n 467) 109.

⁵⁸⁶ See this Thesis, 150.

⁵⁸⁷ According to Article 530(2) of the Iraqi Civil Code; “Resale at a profit is a sale which is made at a comparable price to that paid by the vendor plus a definite profit ; (Tawliya) (Sale at Cost) is the resale by the vendor at the price of purchase without any increase or decrease to the price; (Ishrak) is resale of some of the thing sold for some of the price; ; and (Wadia) is the resale of the thing at the price paid by the vendor with a reduction of a certain sum therefrom”.

⁵⁸⁸ AL-Hakim, AL- Bakry, and AL-Basheer (n 100) 87. See also; Riadh Abo-Saeda, 'The Obligatory Power of the Contract and the Widen Concept of Lesion' (2011) 11(1) *Journal of Kufa for Legal and Political Sciences* 6, 49- 54; Taha (n 578) 204.

⁵⁸⁹ Sangar Ali Rasol, *Consumer Protection and Its Provisions* (Dar Al-Fkr Al-Jamhia 2016) 80- 84.

and the other party was aware of it.⁵⁹⁰ However, it has been argued that the existence of a duty to provide information may ease the proof.⁵⁹¹ For example, Article 121(1) does not include passive conduct, but passive conduct constitutes fraud if it happens of the information which is subject to a contractual or statutory duty.⁵⁹² The existence of such a duty is sufficient to assume that the trader is aware of the outcome of his misrepresentation.

However, this argument does not work under the current Iraqi consumer legislation. This is because the Iraqi consumer laws do not determine the information which needs to be delivered for distance consumers, nor require the trader to send confirmation of the contract. As a result, the trader is allowed to keep silent and this does not constitute fraud. In addition, the burden of proof would be much harder without confirmation of the information. This is not the case under English Law because a long list of information as well as a written confirmation of the information is to be delivered to consumers. These two rules make the mission of the English consumer much easier to claim for misrepresentation.⁵⁹³

5.3. Remedies Available Under Provisions of Mistake

5.3.1. Unilateral Mistake in English Law

Either party may make a mistake about facts surrounding the contract, indeed, the parties may share a misapprehension. In such cases, it is not easy to identify the party who is in a better position to avert the mistake.⁵⁹⁴ However, when one party is unilaterally mistaken about a certain fact, the other party may either have been aware of that misunderstanding or should have reasonably known about the mistaken fact, but decided not to speak up about it.

⁵⁹⁰ Hafitha (n 424) 101-102.

⁵⁹¹ Hamad- AL-Dahan, and Jadr- AL-Saeedy (n 246) 215.

⁵⁹² Ghani Chadr YG, 'The Duty to Provide Information in the Insurance Contract' (2013) 5(2) Journal of Resalat AL-Hquq 96, 108; Alian Ida, 'The Duty to Warning from the Risks of the Thing Sold' (Master thesis, University of Algeria 2009) 107-108. Available at:

<http://biblio.univ-alger.dz/jspui/bitstream/1635/9897/1/ALIANE_ADDA.pdf> accessed 24 December 2016.

⁵⁹³ See this Thesis, 150- 151.

⁵⁹⁴ Anthony T. Kronman, 'Mistake, Disclosure, Information, and the Law of Contracts' (1978) 7(1) the Journal of Legal Studies 1, 5.

The question whether or not the non-mistaken party is under a duty to provide information is not as simple as it may appear. In the English Common Law, the mistaken party is entitled to relief himself from the contract. At this point, some commentators argue that in such a case there is a practical duty to provide information upon the non- mistaken party. If the non- mistaken party wishes to enforce the contract, he will have to eliminate the other party's mistake.⁵⁹⁵ Furthermore, it is reasonable to assume that in such a scenario the mistaken party owed a duty to provide information based on fraudulent misrepresentation. This allows the other party to claim for damages under Section 2(1) of the Misrepresentation Act if he has suffered loss. This is in addition to the right to rescind the contract.⁵⁹⁶ In many cases, the English court gave the silence of the non-mistaken party the effect of fraudulent misrepresentation. In the *Bradford* case, for instance, it was held that; "[Claimant] was induced by fraudulent misrepresentations, of which the plaintiffs had knowledge, to enter into the contract, and that she was entitled to certain damages".⁵⁹⁷

What can possibly be used to support this argument in English law is the *Hartog* case,⁵⁹⁸ where Colin and Shields, the defendants, entered into an oral agreement with Hartog, the plaintiff, to sell him 30,000 Argentinian hare skins at a price of 10d *per skin*. However, on their written agreement the defendants made a mistake when they stated that they would sell the plaintiff 30,000 hare skins at 10d *per pound*. This would mean that the price stated in the offer was 'one third cheaper' for the plaintiff than the price which had previously been agreed orally between the parties. Hartog accepted this offer 'snatched at a bargain', but the defendants refused to enforce the contract.

The plaintiff argued that the defendant's refusal to enforce the agreement caused him to suffer a loss of profit, therefore, he claimed for damages. On the other hand, the defendant argued that there was a mistake to the price and the plaintiff was aware or would have been aware of the mistake based on the oral agreement that they had previously.⁵⁹⁹

⁵⁹⁵ Stephen Waddams, 'Pre-contractual Duties of Disclosure' in P Cane and J Stapleton (ed), *Essay for Patrick Atiyah* (Clarendon Press 1991) 246.

⁵⁹⁶ The Misrepresentation Act, Section 2(1).

⁵⁹⁷ *Bradford Third Equitable Benefit Building Society v Borders* [1940] Ch. 202, at 205.

⁵⁹⁸ *Hartog v Colin and Shields* [1939] 3 All E.R. 566.

⁵⁹⁹ *ibid.*

The Court held that; “The plaintiff must have realised that a mistake had been made in the offer and therefore there was no binding contract”.⁶⁰⁰ In reasoning the decision, Singleton held that; “The plaintiff knew that there was a mistake and sought to take advantage of that mistake. In other words, realising that there was a mistake, the plaintiff did....."snapping up the offer." He further stated;

The offer was wrongly expressed, and the defendants by their evidence, and by the correspondence, have satisfied me that the plaintiff could not reasonably have supposed that that offer contained the offerers' real intention. Indeed, I am satisfied to the contrary. That means that there must be judgment for the defendants.⁶⁰¹

Thus, the decision in the *Hartog* case was made upon the fact that the plaintiff was aware of the mistake. Therefore, there was a duty upon him to inform the defendants of the mistake that they had made if he wanted to enforce the contract. For sure, the decision could have been made otherwise if the plaintiff did not know about the mistake. For example, in the *Centrovincial Estates Plc* case, a landlord mistakenly offered to renew his tenant’s lease at a rent of £65,000 a year and the offer was accepted. However, the real intention of the landlord was to offer it at £165,000. And because the tenant did not know about the mistake, the court enforced the contract and did not give the mistake any effect on the contract.⁶⁰²

The question is, does the *Hartog* case provide a basis for a duty to provide information? Does not help at all consumers in distance selling contracts? The matter needs further analysis. First of all, the *Hartog* case was settled in favour of a seller who had made a

⁶⁰⁰ A similar judgement was reached in *Ulster Bank Ltd v Lambe* [2012] NIQB 31 when the plaintiff had made an offer to settle a case for €155,000, and it was accepted by the defendant. However, since the parties meant to settle the case for £155,000, the court held that the offer for £155,000 was “mistakenly expressed in euros” and enforced the settlement accordingly.

⁶⁰¹ To Richard Stone, James Devenney, and Ralph Cunnington, the decision made in *Hartog v Colin and Shields* fulfil two requirements set out in *Smith v Hughes* (1871) LR 6 QB 597; there was a mistake as to a term of the contract, and the plaintiff was aware that the defendant had made a mistake about that term. See, Richard Stone, James Devenney, and Ralph Cunnington, *Text Cases, and Materials on Contract Law* (2nd Routledge 2011) 365.

⁶⁰² *Centrovincial Estates Plc and v Merchant Investors Assurance Company Limited* 1983 WL 215645. A similar decision was made in *Ram Lubhaya v John Stanley* 2014 WL 6633395 where the court did not consider any effect of the mistake which the solicitor of the claimant had made regarding inclusion of the credit hire charges within the settlement which the claimant was bound to, since the other party to the settlement was not aware of the mistake. See also, *James McIlhatton v John McMullan* [2014] NICH 21.

mistake on his written agreement contrary to an oral agreement that he had with a buyer. Thus, the buyer (the consumer) had, what is supposed to be, a duty to inform the seller of the mistake that he had made. This is rare to happen in distance selling contracts as the party who is supposed to give information is the trader, and if he has made a mistake in the offer which allows the consumer to snap up the offer, applying the *Hartog* case will be detrimental to the consumer's interest. However, if the information is given mistakenly or non-mistakenly to the disadvantage of the consumer, and contrary to the information given previously, the *Hartog* case cannot add anything either as under the CCIACRs 2013 and the CRA 2015 the consumer has a right not to be bound by any changes in the information after it is delivered to him, regardless of whether the information has changed before the contract is made or afterwards.⁶⁰³

In addition, the *Hartog* case does not provide a basis for a duty to provide information, but rather a duty to correct the mistake.⁶⁰⁴ This explains that there should be a previous understanding between the parties, then a mistake occurs at the stage of finalising the agreement, which obliges the non-mistaken party to correct the mistake or the contract will be rejected. This matter was well explained by Lord Denning in the *Storer* case when he stated that; "In contracts you do not look into the actual intent in a man's mind. You look at what he said and did".⁶⁰⁵ This is consistent with the rules of rectification, as the parties must have reached an agreement about the terms and conditions, and the written contract must fail to express those terms and conditions.⁶⁰⁶ As a result, it is irrelevant if the trader

⁶⁰³ The CCIACRs 2013, Regulation 13(6), the CRA 2015 Sections 11(5), 12(3), 36(4), 37(3), and 50(4).

⁶⁰⁴ *Chitty on Contracts: General Principles* (Sweet & Maxwell 1994) 310.

⁶⁰⁵ *Storer v Manchester City Council* [1974] 1 W.L.R. 1403, at 1408. Similarly, in *Frederick E. Rose (London) LD. v William H. Pim Jnr. & Co. LD.* [1953] 2 Q.B. 450, at 461, Lord Denning held that; "In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties - into their intentions - any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed".

⁶⁰⁶ Catherine Elliott and Frances Quinn, *Contract Law* (Pearson Education Limited, 2007) 202. In a recent case of rectification, it was held that; "The effect of a successful rectification claim based on unilateral mistake is always that it imposes a contract upon the defendant which he did not intend to make. It is the unconscionable conduct involved in staying silent when aware of the claimant's mistake that makes it just to impose a different contract upon him from that by which he intended to be bound. For that reason as well, convincing proof is needed that the defendant's conduct, taken as a whole, fell short of the requirements of good conscience". See *Charbrook Ltd v Persimmon Homes Ltd* [2007] EWHC 409, at Paragraph 137. It was also held in *Frederick E. Rose (London) LD. v William H. Pim Jnr. & Co. LD.* [1952 F. No. 485.] At 450, that; "As the concluded oral agreement between the parties was for

does not provide information, similarly to the case of misrepresentation, as explained earlier.⁶⁰⁷ However, if he provides information contrary to what he had previously provided, no matter whether mistakenly or non- mistakenly, to the interest of the consumer or not, the trader is not required to correct his intention because the consumer is not bound by the new information under CCIACRs 2013 and the CRA 2015 as mentioned above.

Moreover, to apply the *Hartog* case the mistaken party should have known the mistake.⁶⁰⁸ To this end, it is hard to assume that a party would have known the mistake unless a previous agreement had taken place, as happened in the *Hartog* case. The question is whether it is possible to assume that the other party ought to have known about the mistake, if he does not actually know. In English law, two cases suggest that a party cannot impose the offer if he is ought to have known the mistake which are; the *Centrovincial* case, and *OT Africa Line* case.⁶⁰⁹ However, as one author said,⁶¹⁰ there must be a reason to believe that there is a mistake, other cases of unilateral mistake only actual knowledge of the mistake can impose the *Hartog* principle. Furthermore, there will be a great burden of proof upon the party who claims that the other party is ought to have known the mistake.⁶¹¹

Even with an actual knowledge of mistake, it may not be well justified to impose a duty to provide information upon the party who has superior information. A party may have incurred economic loss searching and collecting information. Thus, banning him from taking advantage of information is an incentive to him not to disclose facts. Furthermore, imposing such a duty discourages traders from gathering information in the first place.⁶¹² In responding to this problem, Professor Kronman distinguishes between two types of information; “deliberately acquired information and casually acquired information”. The term “deliberately acquired information” in the concept of Kronman is “information whose acquisition entails costs which would not have been incurred but for the likelihood,

horsebeans, and the written contracts were in the same terms, the remedy of rectification, available only where there was clear proof that a written agreement did not correspond with the contract into which the parties entered, as expressed by their outward acts, was not available to make new contracts for feveroles between the parties”.

⁶⁰⁷ See this Thesis, 149.

⁶⁰⁸ Stone (n 134) 307-308.

⁶⁰⁹ *Centrovincial Estates v Merchant Investors Assurance Co* [1983] Com. L.R. 158, *OT Africa Line Ltd v Vickers Plc* [1996] C.L.C. 722.

⁶¹⁰ Laurence Coffman, and Elizabeth Macdonald, *The Law of Contract* (Tolley 1998) 234.

⁶¹¹ *Chitty on Contracts* (n 604).

⁶¹² Douglas G. Baird, 'Precontractual Disclosure Duties under the Common European Sales Law' (2013) 50(special issue) *Common Market Law Review* 297, 299.

however great, that the information in question would actually be produced”. By contrast, information is casually acquired where a party incidentally hears a piece of valuable information.⁶¹³

Based on this distinction, he argues, that casually acquired information provides a reasonable ground for a duty to provide information. On the other hand, economic perspectives well justify not imposing such a duty when information is an outcome of a deliberate examination.⁶¹⁴ To support Kronman’s approach, Harrison argues that Common Law in general authorises the parties to internalise the advantages of their efforts. In consequence, they, as he argues, should be given intellectual property rights to enable them to reap benefits from their efforts.⁶¹⁵ In contrast to Kronman’s approach, Cooter and Ulen claim that there should be an identification of whether information is “productive”, or merely “redistributive” to decide if non-disclosure is appropriate. They argue that when information “increases wealth by allocating resources more efficiently”, information is productive, but when it only creates bargaining advantages, then it is redistributive. Thus, the contract should be enforced, as they argue, where non-disclosed information is productive. In return, it should be rescinded where non-disclosed information is merely redistributive.⁶¹⁶

However, Halson argues that none of these arguments “seeks to offer something more than description of the law we have; each purports to offer a theory about the law we should have”.⁶¹⁷ As a result, it is not possible to adopt any of these theories unless the role of the law of contract is determined as to support economic perspectives or merely promote moral principles. Furthermore, this debate has strongly emerged among American lawyers as an attempt to explain why the U.S courts tend to impose a duty to provide information in some cases of mistake.

Even if the English Court is prepared to accept these theories in practice, such theories are not free from drawbacks. Firstly, it may be hard for the court to prove that the non-

⁶¹³ Kronman (n 594) 13.

⁶¹⁴ *ibid*, 16.

⁶¹⁵ Jeffrey L. Harrison, 'Rethinking Mistake and Nondisclosure in Contract Law' (2010) 17(2) *George Mason Law Review* 335, 337.

⁶¹⁶ R Cooter and T Ulen, *Law And Economics* (1988), cited in Janet Kiholm Smith & Richard Smith, 'Mutual Mistake, and Incentives to Produce and Disclose Information' (1990) 19(2) *Journal of Legal Studies* 467, 470.

⁶¹⁷ Halson (n 402) 108.

mistaken party is a better mistake preventer. Also, the liability may shift towards the mistaken party if he has taken risks of mistake. He does so if he knew or had reason to know, at very slight costs, the non-mistaken party's expectations.⁶¹⁸ It is either not an easy task to identify whether information has been acquired causally, or was an outcome of a deliberate search. The same difficulty the court may encounter in distinguishing between productive and redistributive information.⁶¹⁹

Up to date, it is well established that English Law does not impose a duty to provide information on contracting parties based on unilateral mistake. Alternatively, contracting parties are required to take all precautions that ensure their own interests are protected such as implying contractual warranty. This approach was taken by Lord Atkin in the *Bell* case when he stated that: "If parties honestly comply with the essentials of the formation of contracts - i.e., agree in the same terms on the same subject-matter - they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them".⁶²⁰

Otherwise, it will be interpreted that the mistaken party has taken the risks of his mistake as Lord Atkin further said in the same case: "He takes the risk; if he wishes to protect himself he can question his servant, and will then be protected by the truth or otherwise of the answers".⁶²¹ The same judgement is true even if the English Court has considered mistake as a form of misrepresentation, because the latter is not of a better position to enforce a duty to provide information.⁶²² In the English Common Law, there is further evidence which shows the passive attitude of the English Court towards imposing such a duty in cases of mistake. In the *Keates* case, for example, it was held that: "There is no implied duty in the owner of a house which is in a ruinous and unsafe condition, to inform a proposed tenant that it is unfit for habitation; and no action will lie against him for an omission to do so, in the absence of express warranty, or active deceit".⁶²³ In the *Turner* case also, Lord Chitty J proposed the same thought when he stated that: "Mere silence as

⁶¹⁸ Kronman (n 594) 8.

⁶¹⁹ Ariel Porat, 'The Law and Economics of Mistake in European Sales' (2013) 50(especial issue) Common Market Law Review 127,134.

⁶²⁰ *Bell v Lever Brothers Ltd* [1932] A.C. 161, at 224.

⁶²¹ *ibid*, at 228.

⁶²² See this Thesis, 148-151.

⁶²³ *Keates v The Earl of Cadogan* [1851] 10 C.B. 591, at 234.

regards a material fact which the one party is not under an obligation to disclose to the other cannot be a ground for rescission or a defence to specific performance”.⁶²⁴

5.3.2. Mistake in the Iraqi Civil Code

Similar to the English jurists, the Iraqi jurists define mistake as a form of misunderstanding or error in assessing the facts, leading a party to enter the contract under influence of mistake.⁶²⁵ Often, the decision would probably have been taken otherwise if the mistaken party knew the facts.⁶²⁶

The Iraqi Civil Code provides two types of remedies for mistake. If the mistake has a connection with the subject- matter of the contract which is named by the parties, the contract is voided.⁶²⁷ However, if the mistake has a relation with the description agreed between the parties, the contract is suspended on the approval of the mistaken party within a period of three months, starting from the day on which the mistake has been revealed.⁶²⁸ During that time, the mistaken party is allowed to either revoke the contract or validate it.⁶²⁹ This is similar to the case of mistake under the English Common Law which gives the non- mistaken party the right to rescind the contract.⁶³⁰

In Article 118 of the Iraqi Civil Code, arguably there has been an indirect link between information and mistake which says;

⁶²⁴ *Turner v Green* [1895] 2 Ch. 205, at 208.

⁶²⁵ Mohammed Yousif Al-Zughbi, *Nominate Contracts, Sale Contract in Civil Law* (Dar Al-Thaqafa Ll-Nashr Wal-Tawzih 2006) 104.

⁶²⁶ AL-Hakim, AL- Bakry, and AL-Basheer (n 100) 80.

⁶²⁷ According to Article 117(1) of the Iraqi Civil Code; “Where there is a mistake in a contract concerning the object which has been named and indicated, the contract will where the kind differed to be related to the object named and will be voided because of the non-existence thereof; where the kind corresponded is the same but the description is differed the contract if the latter is the desired object relates to that which has been indicated and will be concluded because the object is existing but will be subject to the approval of the contracting party”.

⁶²⁸ According to Article 136 of the Iraqi Civil Code; “2- The option of validation or revocation must be exercised within three months and if during this time limit no sign has been made to indicate the wish to revoke the contract it will be deemed effectual. 3- If the cause for suspension was because of mistake the time limit begins from the time when the mistake has been revealed...”.

⁶²⁹ According to of Article 134(1) of the Iraqi Civil Code; “Where a conditional contract [suspended] is concluded due to an interdiction, duress, mistake, or fraud the contracting party may revoke the contract after cessation of the interdiction of the duress of revelation of the mistake or of unveiling the deception; he may also validate the contract...”.

⁶³⁰ See this Thesis, 155.

An assumption the falsity of which is apparent is of no legal consequence, a contract will not be performed if; 1- there is a mistake as to the quality of thing which in the view of the contracting parties is or must be considered essential due to circumstances in which the contract had been concluded and to the good faith that must be expressed in dealing. 2- There is a mistake as to the identity or any of the capacities of a party which thing was the sole or main cause (object) for the contracting.⁶³¹

Thus, if a party wishes to enforce the contract he would have to provide necessary information which avoids the other party erring about quality of the thing or identity of the party.⁶³² A failure to do so makes the other party mistakenly enter into the contract. Subsequently, validity of the contract will be suspended on the approval of the mistaken party.⁶³³

Paragraph (2) of the foregoing Article has a direct relation with distance contracts. The identity of traders is usually a major concern in the area of distance selling. Without an opportunity to see the other person, the consumer is likely to be mistaken about his identity. Therefore, Paragraph (2) has tackled one of the contemporary problems that consumers encounter in distance contracts. Accordingly, the trader has to reveal his identity for consumers in particular when the identity is the main reason for contracting.⁶³⁴ This is well-justified because firms have different reputations for the quality they provide in their goods and services.

The entitlement of the mistaken party requires two conditions. Firstly, there must be some essential information which has been mistakenly processed by a party. According to Article 118(1) of the Iraqi Civil Code, essentiality in the first place has to be subjectively examined by the contracting parties. Accordingly, it is enough to consider mistake as essential where it attains a level of significance in the view of the mistaken party in which he would not have made the contract if he was aware of it.⁶³⁵ In the second place, it has to be objectively assessed in the light of either the circumstances which accompanied the

⁶³¹ Khatr & Al- Sarhan (n 578) 137- 139; Ismail Abdul-Nabi Shahin, *General Theory of Obligation, Part 1, Sources of Obligation* (1st edn, Maktabat Al-Wafa Al-Qanunia 2013) 144-145.

⁶³² Hussain Al-Kaaby, and Hady (n 253) 92; Ali-ALthanon, and Raho (n 476) 111.

⁶³³ Hamad- AL-Dahan, and Jadr- AL-Saeedy (n 246) 214.

⁶³⁴ Hsson Taha (n 578) 186-187.

⁶³⁵ Khalid Zorighat (n 578) 187.

contract or the requirement of good faith. With this criterion,⁶³⁶ information is considered essential if it is expected that a reasonable person would consider so under similar circumstances.⁶³⁷ Secondly, the other party should have made the same mistake or have knowledge or could have easily known that.⁶³⁸ This requirement is set forth in Article 119 which states: “A party to a contract who has committed a mistake may not invoke it except where the other party had committed the same mistake or had knowledge thereof or could have easily detected the mistake”. With these requirements, it is intended to narrow down cases of avoidance, aiming to keep contractual transactions stable among the parties.⁶³⁹

Therefore, it can be argued that mistake does not provide a good ground for the distance consumer to claim for. In similarity with English Law, an actionable mistake is not so easy to establish.⁶⁴⁰ If a decision is made to avoid the contract on mistake, the consumer must prove essentialness of that information.⁶⁴¹ Hence, much information set forth in consumer legislation may not be essential in the meaning of Article 118. Furthermore, one party has to prove that the other party has committed the same mistake or has known or could have easily known the mistake. This is itself a hard task particularly where means of distance are used in contracting. Whereas, if a decision is made to claim for rescission on the ground of the information requirements, the consumer will reach rescission with less burden as he is only required to prove the failure of the other party to comply with information provisions.⁶⁴²

Nevertheless, the vast majority of jurists disagree with the preceding argument.⁶⁴³ It is provided that the existence of a duty to provide information has eased the way for consumers to base a claim on mistake. In respect of essentiality, it is argued that the information fixed by consumer legislation or suggested by lawyers should have attained a level of essentiality to enable the consumer to make a transactional decision.⁶⁴⁴ With

⁶³⁶ Ahmed (n 109) 90- 91.

⁶³⁷ Hussamadin Kaml AL-Ahwani, *The General Theory of Obligation Part 1, Volume 1* (3rd edn, especial edition 2000) 179; Ali Rasol (n 589) 74-75.

⁶³⁸ Nabil Ibrahim Saad & Mohammed Hassan Qasim, *Sources of Obligation, A Comparative Study* (1st edn, Manshorat Al-Halabi Al-Hquqia 2010) 58-60.

⁶³⁹ Abdalbaki (n 241) 271.

⁶⁴⁰ Ida (n 592) 109.

⁶⁴¹ Khalifa (n 585) 299.

⁶⁴² See the analysis made on Article 6 of the ICPL 2010, and Articles 4 and 5 of the KRP 2015, 133-142.

⁶⁴³ Abdalbaki (n 241) 272; Ahmed (n 109) 55; Fathi AL-Hyani (n 475) 52; Marzoq Nor AL-Huda, 'The Consent in the Electronic Contracts' (Master thesis, University of Mawlod Muamary 2012) 83.

⁶⁴⁴ See this Thesis, 71- 72.

regards to awareness of the mistake, it is shown that the debtor of the duty as a professional party should have known the knowledge and its influence on the other party's consent.⁶⁴⁵ This fact is irrefutable presumption in which the party cannot disprove by bringing evidence to the contrary.⁶⁴⁶

Again, does the remedy provided for mistake cover all aspects of the information requirements? The answer may not be as simple as it is addressed supra. Article 118 cannot be extended to give obligatory effect to all pieces of information laid down in consumer legislation. In Paragraph (1) effect is given to the mistake where a party mistakenly processes information about the quality of the thing sold, but quality is not the only matter that arises in distance contracts. Equally significant is information about the right of withdrawal and technical steps to make an electronic contract. Furthermore, the wording "quality of the thing sold" is likely to be interpreted that the provision is set out to cover contracts made for goods. While, it is unknown whether the provision covers contracts made for services and digital content.

In Paragraph (2) also, the effect is given to the mistake when identity of the party is the main reason for the other party to make the contract. In distance contracts, identity of the trader may be of a considerable importance but may not be the *main* reason for contracting, and quality of certain goods and services is more important to making the contract. However, because the transaction goes through some risky steps such as online- payments, the trader needs to reveal his identity for the consumer as precaution for the latter to safeguard himself from deception. This information may make the consumer refrain from concluding the contract, but in common is not the main reason for contracting.

Finally, it is not always in the interests of the consumer to avoid the contract where mistake is found, and he may be better to validate the contract and raise a claim for damages where necessary. However, if a decision is made to do so, the consumer cannot ground his claim for damages upon mistake: he is only entitled to either validate the contract without suing for damages or revoke the contract suing for damages where necessary. While, under Article 6(2) of the ICPL 2010,⁶⁴⁷ and Article 16(2) of the KRP

⁶⁴⁵ See this Thesis, 72.

⁶⁴⁶ See this Thesis, 72.

⁶⁴⁷ See, the ICPL 2010, Article 6(2), 133.

2015,⁶⁴⁸ the entitlement to compensation is separately provided, regardless of whether the consumer has rejected the contract partially or as a whole, or accepted it as a whole.⁶⁴⁹

5.4. Remedies Available under Provisions of Satisfactory Quality and Defects of the Goods

5.4.1. Standard of Satisfactory Quality in the English CRA 2015

Generally, where a party intends to enter into a sale contract he has supposedly certain expectations of the quality of goods he is going to buy. Hence, the role of satisfactory quality standard is to enforce those expectations by addressing that there should be guarantee that goods must meet at any rate a specific quality.⁶⁵⁰ This was held in the *Sumner Permain* case when Lord Atkin stated that;

The obligation to ensure that the goods shall be of [satisfactory] quality is one which applies to all sales of goods by description quite irrespective of the place where they are intended to be resold. It is a warranty that the goods delivered shall be the goods described in the contract, and that they shall not differ from the normal quality of the described goods, including under the term "quality" their state or condition as required by the contract, to such an extent as to make them unsaleable.⁶⁵¹

This standard is known in English Law as “satisfactory quality”.⁶⁵² In the meaning of Section 9(2) of the CRA 2015 goods are of satisfactory quality “if they meet the standard that a reasonable person would regard as satisfactory, taking account of a) any description of the goods, b) the price (if relevant) and c) all the other relevant circumstances”.⁶⁵³ According to the Act, providing goods of a quality below that standard gives the buyer a

⁶⁴⁸ See, the KRP 2015, Article 16(2), (n 534) 139.

⁶⁴⁹ See this Thesis, 140.

⁶⁵⁰ Christian Twigg-Flesner, 'Information Disclosure about the Quality of Goods – Duty or Encouragement?' in Geraint Howells, Andre Janssen, and Reiner Schulze (ed), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot 2005) 4.

⁶⁵¹ *Sumner Permain and Company v Webb and Company* [1922] 1 K.B. 55, at 64. See Also, Hardy Ivamy, *Casebook on Sale of Goods* (4th edn, Liloyd's of London Press Ltd 1980) 16-18.

⁶⁵² Colin Scott & Julia Black, *Cranston's Consumers and the Law* (3rd edn, Butterworths 2000)157.

⁶⁵³ According to Section 9(3) of the CRA 2015; “The quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods- fitness for all the purposes for which goods of the kind in question are commonly supplied, appearance and finish, freedom from minor defects, safety, and durability”.

range of remedies such as the right to rescind the contract, the right to repair or replace the goods, and the right to price reduction.⁶⁵⁴

Are these remedies linked to the duty to provide pre –contractual information? At first blush, provisions of satisfactory quality do not include any explicit provision which require the seller to provide information. To this end, the seller is not required to provide relevant information about the quality of goods. Instead, he will be liable if he delivers goods below to the quality that the purchaser reasonably expects. This provision is set out in Section 9(1) of CRA 2015 which stipulates; “Every contract to supply goods is to be treated as including a term that the quality of the goods is satisfactory”.⁶⁵⁵

However, Section 9(4) of the CRA 2015 arguably creates a link to an indirect duty to provide information which stipulates;⁶⁵⁶

The term mentioned in subsection (1) does not cover anything which makes the quality of the goods unsatisfactory (a) which is specifically drawn to the consumer’s attention before the contract is made, (b) where the consumer examines the goods before the contract is made, which that examination ought to reveal, or (c) in the case of a contract to supply goods by sample, which would have been apparent on a reasonable examination of the sample.

Subsection (a) may be construed as if there are some defects known to the vendor; he has to draw them to the buyer’s attention before the contract is made unless “the consumer examines the goods before the contract is made, as regards defects which that examination

⁶⁵⁴ According to Section 19(3) of the CRA 2015; “If the goods do not conform to the contract because of a breach of any of the terms described in Sections 9, 10, 11, 13 and 14, or if they do not conform to the contract under Section 16, the consumer’s rights (and the provisions about them and when they are available) are; (a) the short-term right to reject (Sections 20 and 22); (b) the right to repair or replacement (Section 23); and (c) the right to a price reduction or the final right to reject”.

⁶⁵⁵ *Customs Brokers Co. Ltd. v United Dominions Trust Ltd. v Saunders Abbott (1980) Ltd* [1988] 1 W.L.R. 321; *Ashington Piggeries Ltd. and Another Appellants v Christopher Hill Ltd. Respondents* [1971] 2 W.L.R. 1051; *Stevenson and Another v Rogers* [1999] 2 W.L.R. 1064. Dora Ss Neo, 'Sale in the Course of a Business" under the Sale of Goods Act, *Stevenson v Rogers*' (2000) 2000(1) Singapore Journal of Legal Studies 60; Patrick S. Atiyah, John N Adams, and Hector MacQueen, *Atiyah's Sale of Goods* (12th edn, Pearson 2010) 160; Michael G. Bridge, *Benjamin's Sale of Goods* (2nd edn, Sweet & Maxwell 1981) 382.

⁶⁵⁶ Michael Mark, and Jonathan Mance, *Chalmers' Sale of Goods Act 1979, including the Factors Acts 1889 & 1890* (Butterworths 1981) 122; Michael Furmston, *Sale And Supply of Goods* (3rd edn, Cavendish Publishing Limited 2000) 114; Dionysios P. Flambouras, 'Amendments in the Sale of Goods Act 1979 Following the Implementation of Directive 1999/44/Ec in the United Kingdom' (2011) 64(1) *Revue Hellenique de Droit International* 463, 470.

ought to reveal”. Otherwise, the goods will not satisfy the requirements of satisfactory quality.

Up to date, Section 9(4) is a controversial subject among lawyers. There is much scepticism about its capability to establish a ground for a duty to provide information.⁶⁵⁷ It is unknown, whether this provision represents an indirect duty to provide information or mere incentives to do so. In this respect, some commentators have inclined to give Section 9(4) the effect of a duty to provide information. For example, Hedley argues that;

If a court complains that goods are defective, but tendering identical goods along with information about them would have cured the “defect”, then surely an independent duty is at work. And if the buyer would have been quite happy with the goods, if only they had known what they were, then surely the true complaint is about information.⁶⁵⁸

He further observed that in most cases goods in themselves are free from defects. However, they are not of appropriate quality due to lack of sufficient information. It may also lead to misunderstanding: what is supposed to be drawn to the buyer’s attention is not the fact that goods are “inherently unsafe” as this might be understood by satisfactory quality. It is rather the certain amount of information which the purchaser cannot be safe without. In Hedley’s opinion, the House of Lords in the *Kendall* case misunderstood when it defined merchantability as “whether a reasonable buyer with full knowledge of the facts would find them acceptable”.⁶⁵⁹ For this assertion, he relied on the comment made by Atiyah when he stated;⁶⁶⁰

Where the very nature of the defect in question depends on the fact that it is hidden and unknown, it seems absurd to test the question of merchantability by asking whether a buyer with full knowledge of the facts would have accepted them. The whole problem arose from the very fact that the buyer did not know,

⁶⁵⁷ Thomas Wilhelmsson and Christian Twigg- Flesner, 'Pre- Contractual Information Duties in the Acquis Communautaire' (2006) 2 European Review of Contract Law 441, 446.

⁶⁵⁸ Steve Hedley, 'Quality of Goods, Information, and the Death of Contract' (2001) 2001 Journal of Business Law 114,116.

⁶⁵⁹ *Kendall v. Lillico* [1969] 2 A.C. 31.

⁶⁶⁰ Patrick Atiyah, *The Sale of Goods* (9th ed J.N. Adams, London 1995).

and had no reason to know, all the facts. In circumstances like these it is precisely the fact that the condition is hidden which constitutes the danger.⁶⁶¹

Wilhelmsson adopted the same approach when considering the Consumer Sales Directive 99/44/EC. In his opinion, giving information about problems with quality is the only way to eliminate the lack of conformity. Therefore, the seller is indirectly required to speak out about any problem that may affect the quality of goods. He reached a suggestion to reform the relevant Article in the way that ensures a duty to provide information. In his opinion, Section 9(4) has to be read in this way;

Before the conclusion of a contract, a party has a duty to give the other party such information concerning the goods and services to be provided as the other party can reasonably expect, taking into account the standards of quality and performance which will be normal under the circumstances.⁶⁶²

By contrast, some commentators do not see any connection between Section 9(4) and a duty to provide information.⁶⁶³ According to this argument, a duty to provide information based on the foregoing Section encounters a number of problems, most of which are of a different nature than those addressed by Hedley. Foremost, it is not often fair to imagine that the trader has the information required. This depends on how likely he is to know defects of the quality of goods. In most cases, he plays a mediation role between the consumer and producer. Thus, liability is to be passed back to the producer not the trader. The latter may have a preliminary thought about the quality of goods. However, he may not have adequate information about any supposed defects which may render the quality of goods unsatisfactory by the meaning of Section 9(4). This finding is a matter of fact because the trader generally is not involved in the process of designing and manufacturing the products.⁶⁶⁴

To avoid such liability, the trader is unable to rely on exclusion clauses in their dealings with purchasers in particular where purchasers act as consumers. Such clauses would not have any effect against consumers according to provisions of unfair contract terms under

⁶⁶¹ Hedley (n 658) 114,116.

⁶⁶² Thomas Wilhelmsson, 'European Rules on Pre-contractual Information Duties?' (2006) 7(1) ERA Forum 16, 20-21.

⁶⁶³ Roger Halson (n 402) 105.

⁶⁶⁴ Bradgate, Robert, and Christian Twigg-Flesner, 'Expanding the Boundaries of Liability for Quality Defects' (2002) 25(3) Journal of Consumer Policy 345, 352-353.

the CRA 2015.⁶⁶⁵ On the contrary, the manufacturer may use exclusion clauses against the trader if the latter seeks to pass the liability to the former. As the trader is not a consumer, producer may rely on standards of reasonableness under the UCTA 1977⁶⁶⁶ to imply limitation clauses which deprive the trader from passing the liability to the former.⁶⁶⁷ It is not either possible to escape the liability by stating that “the supplier cannot say whether the goods are of normal quality or not”.⁶⁶⁸ As such argument stands against the decision taken by the House of Lord in the *Harlingdon* case when Lord Stuart-Smith L.J. observed that;

It would in my judgment be a serious defect in the law if the effect of a condition implied by statute could be excluded by the vendor's saying that he was not an expert in what was being sold or that the purchaser was more expert than the vendor. That is not the law; it has long been held that conditions implied by statute can only be excluded by clear words.⁶⁶⁹

Further to above- mentioned observation, Section 9(4) of the CRA 2015 covers the quality of goods. Thus, there is no reason why it should cover the quality of services.⁶⁷⁰ As a result, a significant number of contracts are taken out from application, notwithstanding some lawyers found implied terms appropriate to all contracts of similar circumstances, irrespective of whether the subject- matter is goods or services, and the parties are businesses or consumers.⁶⁷¹

⁶⁶⁵ The CRA 2015, Sections 31, 47, 57, and 61.

⁶⁶⁶ According to Section 2(2) of The UCTA 1977; “In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness”. By the meaning of Section 11 (1) “the requirement of reasonableness means that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made”.

⁶⁶⁷ Robert, and Twigg-Flesner (n 664) 353.

⁶⁶⁸ Karl Riesenhuber, 'Party Autonomy And Information in the Sales Directive' in Stefan Grundmann, Wolfgang Kerber, Stephen Weatherill (ed), *Party Autonomy and the Role of Information in the Internal Market* (de Gruyter, Berlin 2001) 353.

⁶⁶⁹ *Harlingdon and Leinster Enterprises Ltd. v Christopher Hull Fine Art Ltd.* [1991] 1 Q.B. 564, 580.

⁶⁷⁰ Section 34 (4) of the CRA 2015, which deals with digital content, introduces similar provision to Section 9(2), but Section 49 which deals with services does not include any similar provision.

⁶⁷¹ Wilhelmsson, and Twigg- Flesner (n 657) 459-460; Wilhelmsson (n 662) 21.

To sum up, English law does not create a duty to disclose information by the meaning of implied terms.⁶⁷² Instead, as Twigg-Flesner inferred, such statutory device provides a very strong incentive to the vendor to provide information with regards to problems which may make the quality of goods unsatisfactory.⁶⁷³ Then, the positive side of Section 9(4) is embodied into setting out the matters which suppliers are encouraged to disclose information. Eventually, it does not include matters which a reasonable person would regard as satisfactory because these are covered by a general description of the goods.

5.4.2. Guarantee against Defective Goods in the Iraqi Civil Code

Provisions of defects of the goods under civil laws mainly deal with the object of the contract not conforming to the description agreed between the parties, including defective goods. Some civil laws have recognized the obligation to conformity under provisions of latent defects and given the same effect. Together, these mean that if a contract is made under a condition that goods should match certain descriptions, and, if at the time of delivery they do not, then the contract would be defective.⁶⁷⁴

Nevertheless, such combination is open to criticism. Non-conformity has a wider concept as it covers the difference between what has been agreed explicitly or implicitly between the parties and what has been delivered.⁶⁷⁵ In most cases, such difference does not constitute defect by the meaning of the law. It may occur to the quantity, quality, description required, or the manner in which the goods are to be contained or packaged.⁶⁷⁶

⁶⁷² Madeleine van Rossum, 'The Duty of Disclosure: Tendencies in French Law, Dutch Law and English Law; Criteria, Differences and Similarities between the Legal Systems' (2000) 7(3) *Maastricht Journal of European and Comparative Law* 300, 309.

⁶⁷³ Twigg-Flesner, 'Information Disclosure about the Quality of Goods – Duty or Encouragement?' (n 650) 18.

⁶⁷⁴ Abas AL-Saraf, *The Explanation of the Sale and Lease Contracts in the Iraqi Civil Law* (Matbaat AL-Ahali 1956) 209.

⁶⁷⁵ Nasreen Salamat Muhasinat, *The Seller's Obligation to Delivery and Conformity* (1st edn, Dar Al-Thaqafa Li-Nashr Wal-Tawzih 2011) 341; Iman Tariq AL-Shukri, Haider Abdul-Hadi, 'The Remedy of the Breach Against Conformity in the Sale Contract' (2014) 6(4) *Journal of Muhaqiq AL-Hili for Legal And Political Sciences* 180, 183; Murad Qurfy, 'The Claim of Legal Warranty Against Latent Defects' (PhD thesis, University of Boumerdes 2006) 22.

⁶⁷⁶ Article 35 of the 1980 UN Convention on Contracts for the International Sale of Goods (CISG) gives explanation to the obligation to conformity by stipulating; "1- The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract". See also, Mohammed Abdul-Rezaq Xisha, 'The Essential Breach as an Objective Frame of the Obligation to Conformity' ((n.d) unpublished research, university of Mansoura n.d) 2-3. Available at :

< <http://www1.mans.edu.eg/faclaw/arabic/megala/documents/50/8.pdf> > accessed 16 March 2016.

While, the defect occurs when there is an accidental damage in which the origin of goods is supposed to be free from.⁶⁷⁷ For example, if a party agreed to buy a machine of a certain speed, and if at the time of delivery it is revealed that the machine works at lower speed, the breach which should take place would be non-conformity rather than defect because the machine works at the level of speed which it is originally manufactured for.⁶⁷⁸ In addition, non-conformity does not have to be essential nor has certain negative impact on the value of goods, unlike latent defects. Furthermore, the obligation to conformity does not take place unless the parties agreed explicitly or implicitly to that effect. By contrast, guarantee of latent defects is operative by the law.⁶⁷⁹ Finally, guarantee of non-conformity does not require latency unlike guarantee of latent defects.⁶⁸⁰

Despite these differences, there is still an area where the information requirements can arguably connect to guarantee of latent defects and non- conformity.⁶⁸¹ Provided, when the law makes the seller liable for latent defects, or where the agreement requires him to provide goods of a certain quality, it tacitly suggests that he is obliged to provide information regarding defects or the quality required.⁶⁸²

Notably, the Iraqi Civil Code does not recognise guarantee of non-conformity. However, it cannot be construed that the law is not familiar with the effects of this guarantee. Article 177(1) of the Civil Code gives a right to rescind the contract and claim for damages where necessary in cases where a breach occurs of what has been agreed between the parties in

⁶⁷⁷ Ashgan Khales Hammo El-Zuhiry, 'Concealed defects' (2015) 11(4) *Journal of American Science* 183, 184.

⁶⁷⁸ Salam Abdullah AL-Fatlawi, 'The Warranty against Inconformity in the Thing Sold' (2009) 1(13) *Journal of the Centre of Kufa Studies* 155, 159.

⁶⁷⁹ Jafar AL-Fathly, *The Little in Civil Contracts (Sale, Lease, Contractor Contracts)* (2nd edn, Dar AL-Thaqafa LI-Nashr Wal-Tawzih 2016) 130-131; Mansur (n 348) 316-317; Blabd Sami, 'Duty of Professional Person to Warrant Defective Products' (Master Thesis, University of Mintory 2005) 6.

⁶⁸⁰ Tariq Ajeel, 'The Frame of Warranty against the Latent Defect in I.T. Contracts' (2009) 2009(39) *Journal of College of Sharia and Law* 253, 261.

⁶⁸¹ Hassani Ali. 'The frame of duty to warrant products' (PhD Thesis, University of Abo-Bakr Bil-Qaid Tilimsan 2012) 9- 10.

⁶⁸² Ahmed (n 239) 467; Barry Nicholas, *The French Law of Contract* (2nd edn, Clarenon Press Oxford 1992) 104; Abdullah AL-Fatlawi (n 678) 158-159.

bilateral contracts.⁶⁸³ Also, in one case the Iraqi Court mixed up the concepts of non-conformity and latent defect, rendering the former constituting the latter.⁶⁸⁴

To what extent do guarantee of latent defects help consumers in seeking an appropriate remedy? The answer depends on how the law has recognised the subject. According to Article 558(1) of the Iraqi Civil Code; “if an old defect is revealed in the thing sold the purchaser has an option either to retribute it (to the vendor) or to accept it (as is) for the price quoted”. In similarity with Section 9(4) of the English CRA 2015, this Article is open to argument. It may arguably be interpreted that if there are some defects in the thing subject to the contract; the seller would have to draw them to the purchaser’s attention prior to the conclusion of the contract. Otherwise, the latter is entitled to either rescind the contract or validate it for the price nominated.

With this interpretation in mind, how crucial are remedies of guarantee of latent defects for consumers? The answer to this key question may not be encouraging for distance consumers. Elements of an actionable guarantee are not easy to satisfy. As a general rule, the defect has to be latent in which the vendor would not be liable if it is revealed that the consumer was aware of the defect or could have revealed it himself by examining the goods with necessary care.⁶⁸⁵ Save to the case where the former had affirmed to the buyer the absence of defects or made fraud to conceal defects, as Article 559 stipulates.⁶⁸⁶ Even

⁶⁸³ According to Article 177(1) of The Iraqi Civil Code; “In bilateral contracts binding both parties if either party has failed to perform his obligation under the contract, the other party may after service of notice (formal summons) demand rescission of the contract and where necessary claim damage”.

⁶⁸⁴ In the case No. 158- 2012 the Court of Appeal held that; “After receiving the equipment subject to the contract between the parties, it is revealed that the equipment delivered by the defendant does not match the conditions and quality agreed in the contract in addition to manufacturing fraud, this is considered latent defects and governed by guarantee against latent defects as laid down in Article 558 of the Iraqi Civil Code”. Cited in AL-Shukri, and Abdul-Hadi (n 675) 185.

⁶⁸⁵ The necessary care is to be objectively assessed, thus the Iraqi courts take into consideration the ability of a reasonable person in discovering the defects other than the personal ability of a certain buyer. For example, in the case No, 2200/h/ in 18th December 1956 the Court of Appeal held that; “Who buys an estate needs expertise shall recourse to experts to discover the estate”. Cited in Jafar Jawad AL-Fathly, 'The Warranty Against Latent Defects in Sale of Cars' (2004) 9 (21) Rafidain of Law Journal 1, 5. See also, Munthr Al-Fadl & Sahib Obid Al-Fatlawi, *Explanation of Jordanian Civil Law, Sale and Lease Contract, in the Light of Islamic Jurisprudence and Civil Laws* (2nd edn, Maktabat Dar Al-Thaqafa Li-Nashr Wal-Tawzih 1995) 121.

⁶⁸⁶ According to Article 559 of the Iraqi Civil Code; “The vendor shall not warrant an old defect of which the purchaser was aware or could have discovered himself had he examined the sold thing with the necessary care unless the purchaser has proved that the vendor had affirmed to him the absence of the defect or fraudulently concealed it from him”. See also on this, Mohammed Mansur, *Explanation of Nominate Contracts, Sale and Barter, Insurance, and Lease* (1st edn, Manshurat Halabi Al-Hoqia 2010) 149-151;

if the defect is latent, the vendor is always able to discharge himself from the liability of all possible defects if he does not deliberately intend to conceal them.⁶⁸⁷ Moreover, the defect has to be essential “which depreciates the thing sold or which causes the loss of a valid object if its non-existence is the prevalent practice in regard to comparable things”.⁶⁸⁸ Finally, the defect has to be old which should exist in the thing sold before the time of the contract or thereafter; while it had been still in the hands of the vendor prior to the delivery.⁶⁸⁹

Meanwhile, guarantee of non-conformity would offer a better ground for consumers rather than guarantee of latent defects. On one hand, a mere failure to comply with the information requirements would constitute non-conformity, making the remedies available thereof relevant.⁶⁹⁰ On the other hand, such noncompliance would not always constitute a defect in the meaning of the law. As noted, the concept of defect is narrowly drawn to cases where the thing sold is defected by an accidental damage otherwise the status of comparable things.⁶⁹¹ In most cases, breach of the information requirements does not meet conditions of a latent defect. For example, any breach to information of the trader’s identity, steps to concluding electronic contracts, legal rights or liabilities does not constitute defect.

Furthermore, although it is widely agreed that provisions of guarantee are applicable to all types of consumer contracts, there is still some difficulties to its application to contracts for

Ali Hadi AL-Obaidi, *Nominate Contracts, Sale and Lease* (Dar AL-Thaqafa LI-Nashr Wal-Tawzih 2005) 139.

⁶⁸⁷ According to Article 567(2) of the Iraqi Civil Code; “If the vendor has stipulated that he is relieved of every defect, or of every defect existing in the thing sold as well as the stipulation are valid even if he has not disclosed (named) the defects; in the first case the vendor is relieved of the defect which existed at the time of the contract and of the subsequent defect which occurred before receipt; in the second case he shall be relieved of the existing and not of the occurring defect”. However, “every stipulation however which extinguishes or reduces the warranty shall be null and void if the vendor had intentionally concealed the defect”, this is what Article 568(2) stipulates.

⁶⁸⁸ According to Article 558(2) of the Iraqi Civil Code; the essential defect is “that which depreciates the thing sold or which causes the loss of a valid object if its non-existence is the prevalent practice in regard to comparable things; the defect will be old if it has existed in the thing sold before the time of the contract or has occurred thereafter while it was still in possession of the vendor prior to delivery”. See also, Bn Zadi Nasreen, 'Consumer Protection over the Obligation to Warranty' (Master Thesis, University of Algeria 2015) 45- 46.

⁶⁸⁹ The Iraqi Civil Code, Article 558(2).

⁶⁹⁰ Muhasinat (n 675) 341.

⁶⁹¹ See this Thesis, 170-171.

services.⁶⁹² In such contracts, the object of the contract is not available at the time of negotiations. In this way, some conditions of latent defects will be irrelevant such as the oldness of defect.⁶⁹³

⁶⁹² Mohammed Fawaz AL-Mataliqa, *The Legal Regulation of Contracts Concluded for Computer Programs* (1st edn, Ed Dar AL-Thaqafa LL-Nashr Wal-Tawzih 2004) 115; Ajeel (n 680) 266; Thafir Habib Jabara, 'The New Concept of Defect in the Regimes Governing the Producer's Liability' (2013) 8(1) *Journal of Law for Studies and Legal Researches* 6, 34; Walid Mohammed AL-Wazan, 'The Seller's Responsibility Absolution From Guaranteeing the Latent Defects in the Sale's Contract' (Master thesis, University of Middle East 2011) 25.

⁶⁹³ Eyal Zamir, 'Toward a General Concept of Conformity in the Performance of Contracts' (1991) 52(1) *Louisiana Law Review* 1, 12.

5.5. Conclusion

This chapter examined general principles of contract law under both jurisdictions. The aim was to establish whether distance consumers are entitled to better remedial choices than those set out in consumer laws. In doing so, the study made an attempt to identify the relationship between those general principles and an obligatory duty to provide information.

The study found that from both sides of comparison there has been a linkage between information provisions and such principles albeit at different level. First of all, the study found that the existence of a statutory duty to provide information is greatly helpful to claim for misrepresentation. On one hand, if non-disclosure does not generally amount to misrepresentation under English Law and Article 121 of Iraqi Civil Code, the statutory duty to provide information obliges a party to speak out about a long list of information. Then, any false statement in delivering such information shall be misrepresentation. On the other hand, proving elements of misrepresentation is no longer difficult because of the confirmation requirement. With these two facts, distance consumers are able to rescind the contract and claim for damages according to provisions of misrepresentation. However, it has been observed that this advantage serves consumers under English law better than Iraqi laws. As noted, Iraqi laws do not specify in details information required in distance contracts, as English law does. Furthermore, a duty to send confirmation of information has not evolved yet under Iraqi laws. This explains the need for introducing information requirements, similar to the information listed in Schedule 2 of the English the CCIACRs 2013, as well as a duty to send confirmation of information, similar to Regulation 16 of the CCIACRs 2013.

The study also noted that the English Common Law does not impose a duty to provide information by provisions of mistake. By contrast, the Iraqi Civil Code is more inclined towards imposing the information duty through mistake. Article 118 makes a clear connection between information of quality and identity and mistake. However, this does not cover all aspects of information. It is rather limited to quality information and identity in cases where identity is the main reason for contracting. In addition, it might not be so

easy for consumers to prove that the mistake was essential, and the other party has made the same mistake.⁶⁹⁴

It is further found that remedies set out for satisfactory quality under Sections 9(4), and 34(4) of the English CRA 2015 do not seem so relevant here. The foregoing Sections are set forth to deal with the quality of goods and digital content. In consequence, other aspects of information and contracts concluded for services will be precluded. In common with the English CRA 2015, it is found that guarantee of latent defects in Article 558(1) of Iraqi Civil Code does not seem as relevant to the information requirements. It deals with defects of goods; therefore, services and digital content are excluded. Furthermore, it is not an easy task for consumers to prove essentialness, oldness, and latency of the defect.

In the next chapter, the study will move on to discuss the right of cancellation.

⁶⁹⁴ See this Thesis, 163- 164.

CHAPTER SIX: THE RIGHT OF CANCELLATION, THE CONCEPT AND FUNCTION

6.1. Introduction

As soon as a distance contract is made, both contracting parties are bound by its terms and conditions. From that moment onwards, the contract is governed by the principle of “*Pacta Sunt Servanda*”, which literally suggests that “agreements must be kept”. Accordingly, none of the parties can unilaterally amend or terminate the contract. This principle is regarded as one of the main governing principles under both English⁶⁹⁵ and Iraqi contract law.⁶⁹⁶

As ever, there are exceptions to the general principles under both jurisdictions, where a binding contract can be legally terminated by a unilateral decision of a party. As stated elsewhere,⁶⁹⁷ under English law, a party to a contract is allowed to rescind a contract if he made it under inducement of a misrepresentation, mistake, or if the other party fails to perform his obligations.⁶⁹⁸ The same restriction is imposed on “*Pacta Sunt Servanda*” under Iraqi law in cases where a contract contains mistake or fraud.⁶⁹⁹ Thus, a right to cancel the contract is a further derogation to “*Pacta Sunt Servanda*” albeit with a deference. In all other exceptions, there should be a ground (legal causes) for a party to set aside the contract.⁷⁰⁰

⁶⁹⁵ ‘*Pacta sunt servanda*’ is a Latin term driven from Roman Canon Law which has influenced the English Common Law. This principle was firstly stated in the case of *Paradine v Jane* (1647) 82 E.R. 897 where the court decided that “but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good”. See also, *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67; [2015] 3 W.L.R. 1373 at 33; Brian A. Blum, *Contracts: Examples & Explanations* (4th edn, Aspen Publishers Online 2007) 10; Jill Poole, *Textbook on Contract Law* (Oxford University Press 2004) 466.

⁶⁹⁶ “*Pacta sunt servanda*” was implemented into Article 146(1) of the Iraqi Civil Code which states; “Where a contract has been performed it is legally binding and neither party may revoke or amend it except pursuant to a provision in the law or by mutual consent”.

⁶⁹⁷ See this Thesis, 147.

⁶⁹⁸ Caroline Cohen, ‘The Contract Law Principle of *Pacta Sunt Servanda* and Behavioural Economics Literature in Relation to Justifications for the European Consumer’s Right of Withdrawal under Directive 2011/8 3/EC’ (2016) 2 Exeter Student Law Review 13,15.

⁶⁹⁹ See this Thesis, 152-154.

⁷⁰⁰ Başak Bak, ‘The Right of Withdrawal in Distance Contracts under Law on Consumer Protection Numbered 6502’ (2015) 6(11) Law & Justice Review 129, 131.

However, distance contracts are also subject to unique cancellation rights related to their special status within consumer protection laws. The right of cancellation allows consumers to cancel the contract without having or giving any particular reasons.⁷⁰¹

This chapter will critically assess the right to cancel the contract given to distance consumers under both jurisdictions in order to establish its concept and function.

6.2. The Right of Cancellation in English Law

The right of “withdrawal” was first introduced to English law by the EU Directive 85/577/EEC⁷⁰², which was implemented in the UK under the Cancellation of Contracts Concluded away from Business Premises Regulations 1987.⁷⁰³ In 2008, the Directive was re-implemented under the Consumer Protection (Cancellation of Contracts made in a Consumer’s Home or Place of Work etc). Regulations 2008. Thereafter, a right of withdrawal emerged gradually in subsequent EU Directives such as the Timeshare Directive;⁷⁰⁴ the Distance Selling Directive,⁷⁰⁵ the Distance Marketing of Financial Services Directive,⁷⁰⁶ the Life Assurance Directive,⁷⁰⁷ the Consumer Credit Directive,⁷⁰⁸ and finally the Consumer Rights Directive.⁷⁰⁹ All these directives have become part of the UK’s laws under various laws.⁷¹⁰

⁷⁰¹ Cohen (n 698) 15; Van Gerven (n 407) 240; Smits (n 11) 673.

⁷⁰² Council Directive 85/577/EEC of 20 December 1985 to protect the Consumer in Respect of Contracts Negotiated away from Business Premises; OJ L372/31.

⁷⁰³ The Cancellation of Contracts Concluded away from Business Premises Regulations 1987, SI 1987/2117 as amended by SI 1998/3050 AND 19888/958.

⁷⁰⁴ Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the Protection of Purchasers in Respect of Certain Aspects of Contracts Relating to the Purchase of the Right to Use Immovable Properties on a Timeshare Basis; OJ L280/83. Later, this Directive was repealed by Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the Protection of Consumers in Respect of Certain Aspects of Timeshare, Long-Term Holiday Product, Resale and Exchange Contracts; OJ L33/10.

⁷⁰⁵ Directive 97/7/Ec of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts; OJ L144/19.

⁷⁰⁶ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC; OJ L27/16.

⁷⁰⁷ Directive 2002/83/Ec Of The European Parliament and of the Council of 5 November 2002 Concerning Life Assurance; OJ L 345/1.

⁷⁰⁸ Directive 2008/48/Ec Of The European Parliament and of the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC; OJ L133/66.

⁷⁰⁹ The Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights; OJ L 304. This directive replaced both Directive 97/7/Ec of the European parliament

It is worth mentioning here that the nature of the right has not changed over this period, although different terminologies are used to refer to the right. For example, the right to cancel in this context was first introduced as a “right of withdrawal”.⁷¹¹ Alongside the term “withdrawal”, the term “cooling- off” is often used in the literature to refer to the period of time within which a right of withdrawal can be exercised on the part of consumers, particularly in doorstep contracts.⁷¹² It is also referred to as a right to revoke, disaffirm, renounce, or cancel the contract.⁷¹³ Broadly speaking, there is no harm to use any other terms if they correspond to the concept and function of the right of withdrawal.⁷¹⁴

Interestingly, the CRD 2011 uses the term “right of withdrawal”,⁷¹⁵ but its implementation regulations in the UK, the CCIACRs 2013, substituted the term with “the right of cancellation”. This deviation in the UK law approach might be because the CCIACRs 2013 re-affirm a principle of contract law that concerns “the right to withdraw the offer”. This is set out in Regulation 29(3), which confirms that the right to cancel “does not affect the consumer’s right to withdraw an offer made by the consumer to enter into a distance or off-premises contract, at any time before the contract is entered into, without giving any reason and without incurring any liability”.⁷¹⁶

In consequences, under the CCIACRs 2013 the term “the right of cancellation” refers to the right which enables the consumer to withdraw from a concluded contract. This suggests that the right of cancellation under the CCIACRs 2013 is equivalent to the right of

and of the council of 20 may 1997 on the Protection of Consumers in Respect of Distance Contracts; and Council Directive 85/577/EEC Of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises.

⁷¹⁰ It is worth mentioning that although the UK has received the right of cancellation from EU directives, this right is not EU’s invention. Provided, between 1960s and 1970s some of the EU countries introduced a form of the right to cancel within Door-Step selling laws at the time when there were no any of those EU directives which, sometime later, required the EU Member States to do so. For example, Germany, Spain, France, and Netherland laws introduced a right of withdrawal sometime before the right first emerged at level of EU laws with the Directive 85/577/EE. See, Van Gerven (n 403) 241; Serrat (n 18) 101.

⁷¹¹ Directive 97/7/Ec of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts.

⁷¹² Pamaria Rekaiti and Roger Van Den Bergh, 'Cooling- off- Period in the Consumer Laws of the EC Member States. A comparative Law and Economics Approach' (2000) 23(4) Journal of Consumer Policy 371, 371.

⁷¹³ *ibid*, 371; Robert Lowe, and Geoffrey F. Woodroffe, *Consumer Law and Practice* (Sweet and Maxwell Limited 1980) 268-270.

⁷¹⁴ Twigg-Flesner and Schulze (n 190) 146-147.

⁷¹⁵ The CRD 2011, Articles 9-16.

⁷¹⁶ See also, the CCIACRs 2013, Regulation 32 on how to exercise the right of withdrawal, Regulation 33 on effects of withdrawal and Regulations 34 on reimbursement by the trader in the event of withdrawal.

withdrawal under the CRD 2011. By contrast, the term “the right of withdrawal” refers to the right which enables the consumer to withdraw from the negotiation before the contract is made. Thus, the right of withdrawal under the CCIACRs 2013 is a re-affirmation of the right of withdrawal under principles of contract law by which a party is allowed to withdraw the offer, irrespective of whether he is a consumer or trader.⁷¹⁷ By contrast, the right of cancellation is introduced within consumer legislation and limited to consumers in certain contracts, off- premises and distance contracts. However, both rights are to be exercised without the consumer being required to give any reasons, or incur any liability.

Here, two issues have to be critically addressed: the concept of the right of cancellation and its function. Then the study identifies whether provisions of cancellation can discharge this function in practice.

6.2.1. Concept of the Right of Cancellation

Regulation 29(1) introduces the right: “The consumer may cancel a distance or off-premises contract at any time in the cancellation period without giving any reason, and without incurring any liability except under these provisions..”. One could, therefore, define the right as a right which allows the consumer, who made either an off-premises or distance contract, to cancel the contract within a certain period of time after the contract is made, without having or giving any reason and without incurring any liability unless otherwise stated by the law.⁷¹⁸ Thus, it is clear that the consumer need not state any reason, nor incur any liability. These two issues are explained below;

6.2.1.1. The Consumer Need not State any Reason

Under Regulation 29, the consumer should be able to cancel the contract “without giving any reason”. This raises some interesting points about the scope and nature of this remedy and whether it is used for the right reasons. Firstly, when a consumer cancels a contract there will be a reason that has made him change his mind. The reason may be linked to the trader’s duties if he provides products of lower quality than the quality agreed in the contract. In this scenario, the consumer may find the right of cancellation a useful legal device to remedy that breach of contract on the part of traders, without having to argue a case under more targeted statutory remedies under the CCIACRs 2013, and the CRA 2015.

⁷¹⁷ *Payne v Cave* [1775] All E.R. Rep; *Routledge v Grant* 130 E.R. 920; (1828) 4 Bing. 653.

⁷¹⁸ *Cohen* (n 698) 13-14; *Serrat* (n 18) 101.

In this context, the cancellation is used to remedy the breach of the duty to provide pre – contractual information but only in the view of the consumer. As already noted that the law does not generally recognise cancellation as a remedy.⁷¹⁹

The same perceived remedy of cancellation is available when the reason is unrelated to any such breaches on the part of the trader. The trader might have provided products with the quality agreed in the contract, and all the information required, but the consumer can still cancel it. For example, when a consumer buys a tent for camping then reveals that he does not need it because the event has been cancelled, the consumer can still cancel the contract, though no fault lies with the trader.⁷²⁰

Although, the consumer may always have a reason for cancellation, an effective cancellation does not *require* the consumer to provide the reason as a justification. Moreover, if the consumer states a reason, this should not be taken into consideration even if the reason was wrongfully assessed as to be the ground for avoidance, inasmuch as it can be presumed that the consumer wanted to rethink his decision about the conclusion of the contract.⁷²¹ Although, this should not affect the right of companies to question the consumers about their reason since it may aid improvements to their products in the future, nothing can justify using the reason as a ground for refusing the return.⁷²²

In practice, a trader may agree with a consumer on a condition that the contract will only be cancelled when the consumer provides a reason. It is also possible that a consumer agrees with a trader that he will waive his right in return for a reduction in the price. The question here is whether the CCIACRs 2013 allow the trader to imply a term into a distance contract which makes the consumer provide a reason at the time he cancels the contract, and whether the regulations allow the consumer to waive his right. On these two matters, Article 25 of the CRD 2011 clearly states that: “If the law applicable to the

⁷¹⁹ The CCIACRs 2013, Regulation 29(1).

⁷²⁰ Eidenmüller (n 42) 5.

⁷²¹ Marco Loos, 'The Case for a Uniform and Efficient Right of Withdrawal from Consumer Contracts' (2007) 1(5) *Zeitschrift für Europäisches Privatrecht* 5, 14.

⁷²² Wien Siegfried Fina, 'The Consumer's Right of Withdrawal and Distance Selling in Europe, A Consumer Stronghold in European Distance Selling and E-Commerce', the Stanford-Vienna Transatlantic Technology Law Forum (Stanford Law School/University of Vienna School of Law), the Forum on Contemporary Europe at the Freeman Spogli Institute for International Studies at Stanford University, the Stanford Centre for E-commerce, the Department of European Integration and Business Law at the Danube University Krems, and the Lower Austria Research Institute for European and International Technology Law, 46.

contract is the law of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive”, and “any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer”. However, the CCIACRs have not implemented this Article. With this approach, it might not be difficult for the court to apply the interpretation stated in Article 25 when a dispute arises in that regard. However, practically not implementing Article 25 may encourage traders, knowingly or unknowingly, to imply such terms. In addition, many consumers may not be encouraged to cancel the contract if they have agreed on such terms, particularly those who do not know the effect of those terms in the meaning of Article 25 of the CRD 2011. As a result, this may affect many consumers’ cases before they reach the court. As it is proven that one of the factors which may affect the consumer’s decision towards enforcing their rights, at the time when they face a problem, is lack of information about their rights.⁷²³ This is also the attitude of the CJEU in the *Commission* case.⁷²⁴

The question then is, does non- implementation of Article 25 cause any confusion as it would not have happened if the Article was implemented? The answer depends on the characteristic of the right of cancellation between a mandatory and optional rule, and whether there is any provision under the CCIACRs 2013 which may be interpreted as to give effect of Article 25 of the CRD 2011. In the following subsections these two matters are analysed;

6.2.1.1.1. The Ability of the Trader to imply a Term Which Restricts the Right of Cancellation

From the English law standpoint, the idea is not clear. On this matter, the Department for Business Innovation and Skills provided a line of reasoning why Article 25 was not implemented, arguing that provisions of the Regulations are mandatory anyway.⁷²⁵ This

⁷²³ Christian Twigg-Flesner, 'Does the Codification of Consumer Law Improve the Ability of Consumers to Enforce Their Rights? A UK-perspective' in B.Heiderhoff and R.Schulze (ed), *Forthcoming in Consumer Rights and Consumer Behaviour* (2015) 25, 29. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686688> accessed 21 April 2017.

⁷²⁴ In C-144/99 *Commission of the European Communities v Kingdom of the Netherlands* at Paragraph 17, the court held that “It should be borne in mind ... that ... it is essential for national law to guarantee... that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts”.

⁷²⁵ Department for Business, Innovation & Skills, *Directive 2011/83/EU on Consumer Rights, Draft Transposition Note*, (BIS/13/1123, AUGUST 2013) 25.

suggests that the CCIACRs 2013 provide consumers with a mandatory entitlement to the right of cancellation with respect to distance selling contracts.⁷²⁶ With this character, traders are obliged to provide, and inform, the consumer with a right to cancel the contract within the period stated by the law. Nothing will change although some provisions may ostensibly be read as to give an optional character to this right. One example is Regulation 13(1) (b) which requires the trader to give or make it available to the consumer a cancellation form in cases where a right to cancel exists. Indeed, this provision does not give the trader an option to provide the right. It rather gives him an option to provide cancellation form in cases where such a right exists. The existence and non-existence of a right of cancellation should not be understood as something to be decided by traders but by the law. This suggests that there is no room for traders to exclude this right.

However, what may cause confusion for the parties here is the meaning of “mandatory rules”. At this point, it might be argued that mandatory refers to the idea that the right should be provided. However, it may not include the case where a trader implies a term which does not exclude the right but restricts the exercise of it on a certain condition. In this scenario, the mandatory nature of the right is not affected because the right is still there but conditional. Nor does it erase the confusion around the fact that Regulation 29 refers to a cancellation without giving reasons. This is because the Regulation introduces the provision on a balance of probability when it states that: “The consumer may cancel the contract.... without any reasons”. In the first place, the consumer may not cancel the contract, or he may cancel it with a reason. The reason might be given by a consumer voluntarily, or it might be given upon a condition stated by a trader. All these eventualities are possible in the view of contracting parties with the language used in Regulation 29. The issue might otherwise be interpreted if the Regulation addressed that “the consumer has a right to cancel the contract without any reasons”. Under this proposed wording, mandatory would have been interpreted with certainty as “when the consumer exercises the right of cancellation it has to be without giving any reasons”. If this was the case, traders and consumers, to a considerable extent, would be aware that any restriction on the right of cancellation will be invalid.

Thus, it may still be a grey area under Regulation 29, for the parties at least, as to whether mandatory provision in this context relates to the existence of the right of cancellation, or

⁷²⁶ Eidenmüller (n 42) 9.

extends to include existence of such right without restrictions. Under this legal uncertainty, the trader may establish a restriction on such a right based on the principle of the English contract law. Particularly the principle of freedom of contract which ensures the parties to include any term to the contract. This is something permissible in every case where the regulations do not regulate.⁷²⁷

Hence, it is further questionable whether provisions of unfair contract terms under the CRA 2015 can be used to invalidate any term which may restrict the right of cancellation. The answer entirely depends on whether a restriction can be tested for fairness under the CRA 2015. Under Section 62(4) of the Act, two conditions are required to decide unfairness of a term. First, the term should “cause a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer”. Second, the term should be “contrary to the requirement of good faith”. In this regards, whether a term, which restricts the right of cancellation for a valid cause, will meet these two requirements is a further grey area.

Generally speaking, a term is to be unfair if it excludes or limits the trader’s liability against what the House of Lords called in the *Photo Production* case “fundamental breach”.⁷²⁸ This suggests that the term should exclude or limit the trader from liability when the contract is fundamentally breached. This general requirement does not apply in the case of a restricted right of cancellation. As the assumed limitation here is on a right which the law does not require the breach.

However, the requirement of significant imbalance and good faith under the CRA 2015 may not be relevant to a restricted right of cancellation. In *The Office of Fair Trading* case Lord Bingham quoted;

The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty..... The requirement of good faith in this context is one of fair and open dealing. Openness requires that

⁷²⁷ This fact is mentioned in Article 14 of the CRD 2011 which states; “This Directive should not affect national law in the area of contract law for contract law aspects that are not regulated by this Directive”.

⁷²⁸ *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 [1980] 2 W.L.R. 283, at 837.

the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps.⁷²⁹

A similar approach was adopted in *The Director General of Fair Trading* case when the court interpreted the test “of a significant imbalance of the obligations” as to direct attention to the substantive unfairness of the contract.⁷³⁰

Here, a restricted right of cancellation, if existed, would not affect the rights and obligations under the contract. Instead, it would prohibit the consumer to exercise a statutory right unconditionally, which would end retrospectively all the rights and obligations under the contract. Also, it would not be against good faith if the term is expressed fully, clearly and legibly.⁷³¹

However, in the *Parking Eye* case another side of argument was raised regarding “the question whether there is a “significant imbalance in the parties’ rights” depends mainly on whether the consumer is being deprived of an advantage which he would enjoy under national law in the absence of the contractual provision”.⁷³² If this was the case, a restricted right of cancellation might be subject to test of fairness because it deprives the consumer from the use of a right under the national law in the absence of the contractual term. However, this interpretation was not allowed by the court in the foregoing case as the court held that;

A provision derogating from the legal position of the consumer under national law will not necessarily be treated as unfair. The imbalance must arise “contrary to the requirements of good faith”. That will depend on “whether the seller or supplier, dealing fairly and equitably with the consumer, could

⁷²⁹ *The Office of Fair Trading v Ashbourne Management Services Ltd and Others* [2011] EWHC 1237 (Ch), at 124, and 125.

⁷³⁰ *The Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, at 417.

⁷³¹ In *Parking Eye Limited v Barry Beavis* [2015] EWCA Civ 402, at 34, the court held that “There was no breach of the duty of good faith, since the terms of the contract were prominently displayed and clear to any motorist who might wish to use the car park. He also held that the term did not cause a significant imbalance in the parties' rights and obligations because the charge was no greater than that which a motorist could expect to pay for overstaying in a municipal car park”. See also, *Casehub Ltd v Wolf Cola Ltd* [2017] 5 Costs LR 835.

⁷³² *Parking Eye Ltd v Beavis* [2015] UKSC 67 [2016] R.T.R. 8, at 137.

reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.⁷³³

In summary, this legal confusion, at least from the viewpoint of contracting parties, would not have existed if the CCIACRs 2013 had simply implemented Article 25 of the CRD 2011, or if the Regulations had introduced the right of cancellation in a way which it makes the right mandatorily exercisable without any restrictions.

6.2.1.1.2. The Ability of the Consumer to Waive the Right of Cancellation

In this scenario, the potential of legal confusion is even higher than the previous case. When provisions of the regulations are mandatory, they are so, of course, not from consumers' perspective, who are targeted by protection.

At this point, it is important to address whether the CCIACRs 2013 allow the consumer to waive his right in the absence of Article 25 of the CRD 2011, and whether such permitting would add any value to consumer protection. This is particularly important to address when the consumer waives his right in return for a reduced price.

Broadly speaking, it is uncertain whether the law gives the consumer the right to waive his right to cancel the contract. It might be argued that the consumer should be allowed to waive his right to cancel because the CCIACRs 2013 do not state whether the right to cancel is renounceable or not, contrary to Article 25 of the CRD 2011. Rather, the regulations introduce some provisions which may be read, in a way or another, so as to give the consumer this permission. One example is Regulation 36(2) which gives the consumer a right to waive his right of cancellation if he requests the trader to perform the services before the end of cancellation period, with acknowledgement that his right to cancel will be lost.⁷³⁴

Also, it may be of little practical concern from the consumer perspective that imposing a mandatory cancellation right upon traders for the benefit of consumers does not mean that the right must be exercised, as stated earlier. In most cases, the consumer prefers to stay with the contract rather than cancellation.⁷³⁵ This common consumer behaviour does not need explanation because distance contracts are not made to give the right of cancellation,

⁷³³ *Parking Eye Ltd v Beavis* [2015] UKSC 67 [2016] R.T.R. 8, at 137.

⁷³⁴ See, the CCIACRs 2013, Regulation 37(1).

⁷³⁵ Cohen (n 698) 19; O'Sullivan (n 42) 77.

and they are not made to be cancelled in the first place, but they are made to provide array of rights which are incomparable to the right of cancellation, most of which boost the position of consumers in fulfilling necessary needs. However, the right of cancellation does not improve the position of the consumer, but it protects him from being hurt by the contract by reinstating him back to his position prior to the conclusion of the contract.

Therefore, it has been argued by Wagner that the rules of cancellation are “unilaterally mandatory” for traders to follow and “optional” for consumers with certainty.⁷³⁶ It is further said that being able to waive the right may bring some positive aspects to the whole bargain. For example, a consumer may decide to renounce his right in return for a lower price, or he may prefer not to have the right if he can analyse contractual benefits and costs.⁷³⁷ The waiver may also help consumers to avoid costs of returning goods which may entirely be allocated to them by traders.⁷³⁸ In addition, the consumer’s interest would not be at risk if a right to cancel has been precluded not for a valid cause because the courts under rules of unfair terms have power to intervene in favour of consumers.⁷³⁹ However, these opinions cannot be substantiated by the CCIACRs 2013.

For further analysis of whether the right can be renounced, it is also possible to look behind the CCIACRs 2013 to the originating Directive. The CRD 2011 clearly states in Article 3(6): “This Directive shall not prevent traders from offering consumers contractual arrangements which go beyond the protection provided for in this Directive”. Going back to the case when a consumer waives his right in return for a lower price, it is questionable whether an implied contractual term which gives that effect would be compatible with Article 3(6).⁷⁴⁰

With certainty, any offer from the trader which excludes or limits the right of cancellation in return for nothing would be incompatible with Article 3(6), and of course Article 25 of the CRD 2011, because it cuts down protection to below the level covered in the

⁷³⁶ Gerhard Wagner, 'Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights' (2010) 3(1) Erasmus Law Review 47, 48.

⁷³⁷ Luzak, 'To Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into account its Behavioural Effects on Consumers' (n 42) 106.

⁷³⁸ Wagner (n 736) 59.

⁷³⁹ *ibid*, 60.

⁷⁴⁰ This provision should have been fully harmonised in national laws of EU Member States because no room was left to derogate from it.

Directive.⁷⁴¹ However, uncertainty is when the right is waived in return for a lower price which eventually means a better bargain. Here, it is important to address whether a better bargain amounts to better protection in the meaning of Article 3(6) of the CRD 2011.

Of course, gaining a better bargain in exchange for the waiver should not be interpreted as “better protection”. This suggests that a better bargain cannot be equivalent to better protection for the purpose of Article 3(6) of the CRD 2011. The term “better bargain” implies that the consumer reaps every possible benefit from the contract, while better protection is connected with maximisation of the level of protection provided. Thus, the right to cancel is a protective measure aiming to offer consumers an option or backup plan to set aside the contract where necessary, no matter whether the bargain is the best one. An example of a better protection would be an agreement on providing a right of cancellation in cases where such a right does not exist, which is of course possible.⁷⁴²

Another note, Regulations 36(2) and 37(1) of the CCIACRs 2013 are not introduced to establish a right to waiver. Rather, they are introduced as an exception to give the consumer an option to act in a certain way in exchange for losing his right to cancel. Indeed, a close look at these two cases does not show that the lawmakers intended to recognise the notion of “waiver”. Instead, it shows that the intention was to give the consumer an option to request performance of services or digital content to begin before the end of the cancellation period. If he does so, and the trader begins to perform the contract the right to cancel will become useless according to Regulations 36(1) and 37(1). Thus, acknowledgment and consent are required from the consumer as a matter of being necessary informed that such a decision will cost him to lose the right to cancel. Even if otherwise interpreted, the effect remains limited to these two exceptional cases and cannot provide an over-arching principle of the waiver.

Finally, the counter-argument should not be used to say that waving the right to cancel may protect the consumer from costs of using the right to cancel since the law has limited the costs to only direct costs, as it will be shown in the next paragraph.

⁷⁴¹ See also the same approach in the DSD 1997, Article 12.

⁷⁴² Cohen (n 698) 23-24; Eidenmüller (n 42) 9-10.

In summary, nothing under the CCIACRs 2013 can clearly refer to an existence or non-existence of a right to waive the right of cancellation. Thus, it emphasises again the importance of Article 25 of the CRD 2011 in relation to the CCIACRs 2013.

6.2.1.2. The Consumer Need not Incur any Liability

The consumer is allowed to exercise the right to cancel without giving any reason. At this point and for the sake of striking the balance between contracting parties, it may be argued that the trader should be able to charge the consumer for that. However, Regulation 29(1) of the CCIACRs 2013 precludes this by allowing the consumer to cancel the distance contract “without incurring any liability”. This provision ensures that the consumer is fully free in making his decision, either to stay with the contract or cancel it. As Fina states, if distance traders were able to impose penalties, consumers would probably be hesitant in making decisions about cancellation so long as this would cost them a financial loss.⁷⁴³

However, Regulation 29(1) provides specific exceptions where the consumer may incur a certain liability in the event of cancellation. Indeed, in most of these cases, liability is not linked to the use of cancellation, but to something else which makes unconditional cancellation harmful to the trader’s interests. Thus, the liability in those exceptions does not result from the exercise of the right of cancellation, but from a certain behaviour of the consumer. This suggests that it is under the consumer’s control to avoid liability in most of these cases.

One example is Regulation 34(3) “where enhanced delivery chosen by consumer”. Accordingly, if the consumer had chosen a delivery which is more expensive than standard delivery offered by the trader, then he would incur the difference between the price which the trader would incur and the price which he paid.

Another example is Regulation 34(9) which allows the trader to recover any diminished value in the goods caused by the consumer in handling the goods. This exception with certainty cannot be construed as a penalty on using the right of cancellation. Quite simply, a penalty is a punishment for cancelling the contract which would require the consumer to pay amount of money in return for cancelling the contract without even any mistake on his side.⁷⁴⁴ By contrast, the diminished value claim has the effect of compensation which takes

⁷⁴³ Fina (n 722) 44.

⁷⁴⁴ *ibid.*

place if the consumer breaches his duty to take care of the goods during the cancellation period.⁷⁴⁵

Another example is Regulation 36(4) where the service is supplied in response to a request made by the consumer. In this case, the consumer must pay to the trader an amount for the period for which the service is supplied, ending with the time when the trader is informed of the consumer's decision to cancel the contract.

In all above-mentioned cases, it is under the consumer's control to avoid liability in the event of cancellation. In the first case, he freely chooses an enhanced delivery, and he breaches the duty of care in the second case, while in the third case he makes a request for an early supply of the service. Save to these cases, one case has remained out of the consumer's control which is the direct costs of returning the goods as set out in Regulation 35(5). Thus, it is interpreted that the only charge which the trader may make to the consumer, if the contract is cancelled, is the direct costs of returning the goods to the trader. This may be enacted to minimise the effects on traders as most of cancellation cases have no clear reason.⁷⁴⁶ Article 14 of the CRD 2011, which states: "The consumer shall only bear the direct cost of returning the goods" is further evidence that no charge other than direct costs of returning goods can be made to the consumer if the contract is cancelled. Similarly, the former Directive used the wording "the only charge" in Article 7(2). In addition, the ECJU had the same approach in the *Heinrich* case when it interpreted the wording "the only charge" to mean: "make a strict interpretation of that provision necessary and render that exception exhaustive".⁷⁴⁷

This liability can be precluded in only two cases:- if the trader has agreed to bear those costs or has failed to provide the consumer with the information about the consumer bearing those costs, as stated in Regulation 35(5) (a, and b). However, if the trader has not agreed on that, or has not failed in performing his duty, the consumer would not be able to give that effect contrary to other cases.

⁷⁴⁵ See, the CCIACRs 2013, Regulation 34(12); the CRD 2011, Recital 47.

⁷⁴⁶ Loos, *Review of the European Consumer Acquis* (n 188) 17.

⁷⁴⁷ *Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen eV* (Case C-511/08) [2011] Bus. L.R. D33. Paragraph 46.

The effect of contractual terms about liability in the event of cancellation

It is important to discuss whether any contractual term, which may impose a liability on the consumer in the event of cancellation, would have any effect. This discussion is important in the absence of Article 25 of the Directive, and because Regulation 29(1) introduces the right of cancellation without any liability on the balance of probability. This may ostensibly give traders an impression that such contractual agreements might have been allowed to be implied into contracts.

At this point, the absence of Article 25 of the CRD 2011 does not create confusion about the fact that cancellation has to be used without liability. As there are other provisions under the CCIACRs 2013, other than Regulation 29(1), which may invalidate any contractual term contrary to the Regulation. In the first place, when a right of cancellation is restricted in return for amount of money, this may be subject to the test of fairness under the CRA 2015. In this case, the term is more likely to meet the requirement of a significant imbalance of the rights and obligations under the contract, as shown before.⁷⁴⁸

If the term is not subject to the test of fairness, there are other regulations which certainly invalidate those contractual terms. One example is Regulation 30 of the CCIACRs 2013 which ends all obligations of the parties if a contract is cancelled. This suggests that when the consumer cancels the contract, any contractual obligation which may compel the consumer to pay charge or damages will be extinguished accordingly.⁷⁴⁹ If this is the case, then why are contractual terms which make the consumer to bear direct costs of sending the goods not extinguished as well? In both cases, a term is stated in favour of the trader against the consumer's interests. This may give room for an argument that the term should remain valid because in both cases the term cannot have any effect unless the contract is cancelled. In other words, before the contract is cancelled both terms, a term requires the consumer to bear direct costs of sending the goods, and a term requires him to pay money in the event of cancellation, are ineffective.

Part of the answer to this possible question was given by the CJEU. Generally, the CJEU is of the view that cancellation within EU Directives extinguishes all obligations including a

⁷⁴⁸ See this Thesis, 184- 185.

⁷⁴⁹ Marco Loos, 'Right of Withdrawal- Interoperability of the Directive' (2013) Centre for the Study of European Contract Law 1, 10. Available at: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343565 > accessed 22 March 2017.

contractual obligation to pay damages. This judgement was clearly made in the *Travel Vac SL* case where the Travel-Vac company had included in the contract a clause which enforced Mr Manuel, the consumer, to pay 25 percent of the total price if he cancelled the contract. However, the court held that the Directive⁷⁵⁰ “precludes the inclusion in a contract of a clause imposing payment by the consumer of a lump sum for damage caused to the trader for the sole reason that the consumer has exercised his right of renunciation of such a contract”.⁷⁵¹

However, the court did not explain why should a contractual term which forces the consumer to bear costs of collecting the goods remain valid? Despite that, it is not difficult to assume that Regulation 30 of the CCIACRs 2013, and the above-mentioned CJEU judgement, does not apply to the implied terms about direct costs. The reason is, Regulation 35(6) explicitly mentions that “the contract is to be treated as including a term that the trader must bear the direct cost of the consumer returning goods”, otherwise interpretation will make the Regulation worthless. Furthermore, Regulation 29(1) explicitly mentions an exercise of cancellation without any liability, and if this is stated on the balance of probability, nothing under the CCIACRs 2013 can explicitly or implicitly allow the trader to imply such terms.

6.2.2. Function of the Right of Cancellation

The function of this right is linked to contracts made away from business premises. The justification is arguably that in such contracts there is clearly potential for imbalance arising to the disadvantage of the consumers in these situations. As others have argued, consumer vulnerabilities are always prone to traders’ exploitation.⁷⁵² The function differs from one contract to another depending on whether the contract is an off- premise contract or a distance contract. Firstly, when the contract is an off- premises contract in which both contracting parties make the contract in a place which is not within the business premises of the trader, notwithstanding the contract may be made in the simultaneous physical presence of both contracting parties.⁷⁵³ One example is door-step sales where the trader

⁷⁵⁰ Directive 85/577 to protect the Consumer in Respect of Contracts Negotiated away from Business Premises.

⁷⁵¹ *Travel-Vac S.L. v Manuel Jose Antelm Sanchis Case C-423/97* [1999] 2 C.M.L.R. 1111.

⁷⁵² Twigg-Flesner and Schulze (n 190) 147; Luzak, 'To Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into account its Behavioural Effects on Consumers' (n 42) 91.

⁷⁵³ See the definition of off-premises contract in, the CCIACRs 2013, Regulation 5.

visits the consumer's home or place of work to make a contract.⁷⁵⁴ In such contracts, the trader takes the initiative in making the contract and the consumer takes it by surprise.⁷⁵⁵ Then, the justification behind according a right of cancellation is the existence of a "psychological deficit" which makes the consumer unable to make a rational decision because sales practice deemed to be aggressive.⁷⁵⁶ Thus, the function of the right, in such contracts, is to offer the consumer a period of cooling-off in order to rethink his decision about the conclusion of contract.⁷⁵⁷

Secondly, when the contract is a distance contract in which one or more means of distance communication are used in making the transaction.⁷⁵⁸ In such situations, there is a "case of information asymmetry", in which the consumer does not have sufficient information to either examine the quality of the product or examine the reliability of the other party prior to the conclusion of the contract.⁷⁵⁹ This does not suggest that when all information is provided there is no need for the right of cancellation. As explained earlier, the consumer may have sufficient information but he may not be able to use the information properly because the product is not in his possession. Therefore, the function of the cancellation is to provide the consumer with an opportunity to actually inspect the products in sale contracts, and to rethink about his decision in services contracts.⁷⁶⁰

Notably, some means of distance communication have the same impact on consumers as the door-step contracting has. Means such as TV, Telephone, Skype, Video Chat can put the consumer under pressure akin to being home visited. In such cases, the right of cancellation performs double functions, giving the consumer time to rethink his decision away from the trader's influence, and offering him a chance to inspect the goods physically after the delivery.⁷⁶¹

⁷⁵⁴ See this concept clearly stated in Regulation 3 of the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 (superseded).

⁷⁵⁵ Twigg-Flesner and Schulze (n 190) 146; Christina Ramberg, 'Electronic Commerce in the Context of the European Contract Law Project' (2006) 7(1) ERA-Forum 48, 53.

⁷⁵⁶ Van Gerven (n 407) 240.

⁷⁵⁷ Twigg-Flesner and Schulze (n 190) 148.

⁷⁵⁸ Van Gerven (n 407) 241; Twigg-Flesner and Schulze (n 190) 148.

⁷⁵⁹ Cohen (n 698) 16.

⁷⁶⁰ Twigg-Flesner and Schulze (n 190) 148; Bak (n 700) 133.

⁷⁶¹ Steennot, 'Consumer Protection with Regard to Distance Contracts after the Transposition of the Consumer Rights Directive in Belgium and France' (n 42) 435.

6.3. The Right of Withdrawal in Iraqi Law

6.3.1. The Right of Withdrawal in the ICPL 2010

The ICPL 2010 provides the consumer with one form of cancellation.⁷⁶² This is set out in Article 6(2) which grants the consumer “a right to wholly or partially return the goods to the trader if he does not obtain the information stipulated in the Article”. In effect, if the goods are wholly returned then this action has the effect of cancellation.

However, this form of cancellation is not the form which the study discussed under the English CCIACRs 2013. This is because Article 6(2) links cancellation to a failure to provide information as a remedy. Therefore, it cannot replace the cancellation required for distance contracts because the latter should be available without giving any reasons.⁷⁶³ This current provision may not be so peculiar because the ICPL 2010 does not recognise distance contracts nor electronic contracts. However, this approach cannot respond to the requirements of contemporary protection provided for distance consumers around the globe.

6.3.2. The Right of Withdrawal in the Iraqi Civil Code

If this right is not provided under consumer law, what alternatives do distance consumers have under the Iraqi Civil Code? At this point, it is worth remembering that the right of cancellation is given to consumers to remedy the case of not being able to see the product at the time when the contract is made. Hence, the possible question would be; does the buyer, under the Iraqi Civil Code, has a right to cancel the contract at the time when he sees the product if such viewing was not possible at the time when the contract was concluded? In response to this question, the Iraqi commentators have discussed two main provisions, provisions of “Kayar AL-Ruya” (the right of viewing option), and provisions of “Kayar AL-Tajriba” (the right of testing option). As explained below;

6.3.2.1. The Right of Viewing Option “Kayar AL-Ruya”

According to Article 517(1) of the Iraqi Civil Code; “He who has purchased a thing which he did not see will have discretion either to accept or to revoke the sale when he sees it...”. In Paragraph (2) “viewing is meant to be learning “comprehending” the attributes and

⁷⁶² Ali Rasol (n 589) 251.

⁷⁶³ *ibid*, 250-251.

characteristics of the thing as relates to looking at, touching, smelling, hearing, or tasting”. At first observation, it might be thought that this form of cancellation is relevant to all cases of distance contracts in which not being able to see the thing at the time when the contract is made is a common denominator.⁷⁶⁴ To a number of authors, the existence of the viewing option might be one of the reasons why the Iraqi legislature has not introduced a right of withdrawal as a matter of avoiding overlap between provisions.⁷⁶⁵

However, a close look at the viewing option reveals that this option can never reflect effects of the consumers’ right of cancellation as understood under English law. Firstly, the viewing option is well-connected with the inability to visually see the thing. However, in some cases of distance means of communication the consumer actually can visually see the thing such as contracts made by TV or Skype, or website.⁷⁶⁶ Further evidence, in Article 523(1) of the Civil Code the viewing option lapses if the buyer had viewed the thing or if the thing is described in such manner which replaces the viewing. Thus, it may arguably be said that elaborate information, if sent to the consumer, will always replace the viewing.⁷⁶⁷ Indeed, requiring a long list of information is an objective of the modern consumer laws as demonstrated by Schedule 2 of the English CCIACRs 2013. Thus, providing the consumer with elaborate information ends the viewing option in the meaning of Article 523(1) of the Civil Code. Whereas, under the English CCIACRs 2013 the information requirements and the right of cancellation are two separate entitlements and one cannot replace the other.

A further observation, the viewing option, as connected to visual seeing, can only cover sale contracts. By default, services, and some forms of digital content, are excluded from its scope because they are not ‘things’. This suggests that the consumer cannot visually see

⁷⁶⁴ Mustafa Mohammed Jamal, *Seeking to the contracting* (Manshorat AL-Halabi AL-Hquqia 2001) 218-219; Abas, and Saeed (n 247) 208; Hijazi (n 17) 42; Nasser Khalil Jalal, 'The Legal base of the Consumer's Right to Cancel the Electronic Contract' (2012) 9(1) Journal of Law 335, 362- 363; Abdula Thib Abdula Mahmood, 'Consumer Protection in Electronic Contracting, a Comparative Study' (Master dissertation, National university of Najah 2009) 128-129. Available at: https://scholar.najah.edu/sites/default/files/all-thesis/consumer_protection_in_electronic_contracting_comparative_study.pdf accessed 24 July 2017.

⁷⁶⁵ Mansour Hatem Mohsen and Isra Khudair Madlum, 'Rescinding the Contract in a Consumption- Mail (Comparative Study)' (2012) 4(2) Majlat Al-Muhaqiq Al-Hli LL-ALum Al-Qanunia 48, 53.

⁷⁶⁶ Article 523(1) of the Iraqi Civil Code stipulates; “The viewing option lapses.....by the lapse of sufficient time which would enable the purchaser to view the thing but he has failed to view it”.

⁷⁶⁷ Ala Yousif, 'Consumers Legal Protection in Contracts of e.Commerce' (2005) 14(8) Journal of the College of Law- Al-Nahrain University 61, 101.

them even after performance.⁷⁶⁸ Whereas, the English CCIACRs 2013 provide the right of cancellation to all types of contracts, sale, services, and digital content contracts. Further, the English CCIACRs 2013 specify 14 days for the consumer to exercise cancellation. However, in Iraqi law there is no limitation to the period within which the buyer has the option to cancel the sale. Instead, Article 523 of the Civil Code introduces two ways of ending the viewing option. First; the viewing option lapses “by the lapse of sufficient time” which is entirely left to the discretionary authority of the court.⁷⁶⁹ This may lead to legal uncertainty. Second; if the seller determines a time for the buyer to exercise the viewing option and the buyer does not use the option within that period.⁷⁷⁰ This is also against the consumer’s interest because the time given by traders may not be enough for a proper viewing.

Finally, the viewing option is given to the buyer to confirm the conformity between the thing he receives and the description he has been given before he makes the contract. This suggests that there should be a reason for cancellation under the viewing option. By contrast, the right of cancellation under the English CCIACRs 2013 is given to the consumer to revisit the decision he made about the contract and no matter the conformity between the thing received and the information given.⁷⁷¹

In summary, the viewing option under the Civil Code does not amount to the right to cancellation under English law. In English law, cancellation is an unconditional right granted to distance consumers over a certain period of time. Whereas, the viewing option is a conditional right given to those buyers who buy a thing without a visual seeing. It is a conditional right since withdrawal which follows the option should be based on a reason. In addition, the whole dispute will undergo the observation of the court.

⁷⁶⁸ Ramzy Baid- Al-Ah Ali Al-hijazi, *The Consumer's Civil Protection after Electronic Contracting* (1st edn, Manshorat AL-Halabi Al-Hiquqia 2016) 155-156.

⁷⁶⁹ Jalal (n 764) 363.

⁷⁷⁰ According to Article 523(2) of the Iraqi Civil Code; “The vendor may set a suit time limit for the purchaser (to exercise his right of option) the expiration of which extinguishes the right of option if he does not reconstitute the thing during the said time limit”.

⁷⁷¹ The English CCIACRs 2013, Regulation 29(1).

6.3.2.2. The Right of Testing Option “Kayar AL-Tajriba”

According to Article 524(1) of the Iraqi Civil Code;

The purchaser may accept or reject the thing sold subject to testing, where the vendor shall enable the purchaser to try the thing, if the purchaser has rejected the thing sold he shall declare within the time limit agreed, and in the absence of an agreement as to the time limit within a reasonable time limit as fixed by the vendor if on the expiration of this time limit the purchaser has kept silent although he was able to try the thing sold, his silence shall be deemed to be an acceptance of the thing sold.

In Paragraph (2) of the Article “a sale subject to testing is deemed to be made subject to a suspensive condition which is the acceptance of the thing sold unless it would be revealed from the agreement or the circumstances that the sale was subject to resolutive condition”. Accordingly, some of the commentators have argued that the testing option can be a basis for a modern right of withdrawal. This is because the testing option, similarly to cancellation rights, enables the consumer to see and test the thing, then, express his final decision about the contract, either to accept it or reject it during a certain period of time.⁷⁷²

However, a close look at the testing option reveals a different argument. The right of cancellation under the English CCIACRs 2013 is always available because it is imposed by the law. However, the testing option is only available when the seller decides to give the buyer this option.⁷⁷³ Therefore, there is always room for the contracting parties to agree on the form of testing option. For instance, the seller is free not to offer this option, and if he does so he is free in determining a time within which the buyer should test the thing, and in deciding whether or not the contract is effective during that period.⁷⁷⁴ By contrast, the right of cancellation in modern laws, including the English CCIACRs 2013, is a mandatory rule

⁷⁷² See, Yousif Al-Shndy, 'The Effect of the Right to Cancellation on Determining the Time of Making the Contract' (2010) 24(43) Journal of College of Sharia And Law 255, 269.

⁷⁷³ Jalal (n 764) 351; AL-Bashkani (n 349) 343.

⁷⁷⁴ Abu-Alkair Abdul-Wanis AL-Kuwailidy, *The Right of The Buyer to Cancel the Contract Made by Modern Technology* (Dar AL-Jamiha Al-Jadida LI-Nashr 2006) 154; Mustafa Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (Dar Al-Jamiha Al-Jadida 2016) 58.

upon the seller in distance and off-premise contracts fixed by the law. Based on this fact, all provisions thereof are not supposedly subject to any restriction or waiver.⁷⁷⁵

Also, the testing option is granted to enable the buyer to ensure that the thing bought works properly for the purpose behind the contract.⁷⁷⁶ Therefore, the buyer is not entirely free to reject the thing after the test because the testing option is linked to objective norms which undergo the observation of the court.⁷⁷⁷ Thus, the seller can prove that the thing sold works properly for the intended purpose and the rejection decision of the buyer was abusive.⁷⁷⁸ On the contrary, the right of cancellation under the English CCIACRs 2013 does not have connection with the function of the thing sold. Rather, it is the opportunity for the consumer to revisit the decision he made about the contract and freely decide whether to stay with the contract or cancel it, without giving any reasons or incurring any liability.

In a further difference, a contract with the testing option, in principle, is not generally effective during the period of testing unless otherwise agreed.⁷⁷⁹ While, a contract with the right of cancellation under the English CCIACRs 2013 is effective during the period of cancellation and any agreement to the contrary would be void.

In summary, all the above-mentioned reasons demonstrate that the testing option cannot be an alternative to the right of cancellation.⁷⁸⁰ This demonstrates the need for introducing a right of withdrawal in Iraqi law, similar to the one under English law.

6.3.3. The Right of Withdrawal in the KRP 2015

Contrary to the ICPL 2010, the KRP 2015 introduces a right of withdrawal for consumers who make electronic contracts.⁷⁸¹ However, the proposal has not become law yet, and even after it becomes law, it will only offer withdrawal for electronic contracts which are concluded in Kurdistan Region as explained below;

⁷⁷⁵ See this Thesis, 186 -189.

⁷⁷⁶ Mustafa Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 57-58.

⁷⁷⁷ AL-Kuwailidy (n 774) 154; Ahmed (n 109) 181.

⁷⁷⁸ AL-Kuwailidy (n 774) 154.

⁷⁷⁹ AL-Bashkani (n 349) 343.

⁷⁸⁰ *ibid*; Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 60- 61; Al-Shndy (n 772) 272-273; Jalal (n 764) 352.

⁷⁸¹ The KRP 2015, Article 22.

6.3.3.1. Concept of the Right of Withdrawal

Similar to English law, the Iraqi literature defines the right of withdrawal as “a right which allows the consumer to return the product or refuse the service during a period of time fixed by the law, without giving any reason. Accordingly, the trader or supplier is obliged to reimburse the consumer. In return, the consumer only bears costs of returning the goods to the trader”.⁷⁸²

The KRP 2015 also defines “the right of withdrawal” in Article 22(1);

In electronic transactions the consumer has the following rights; A- A right to withdraw from purchasing the product or service during 15 days from the day of contracting in the case of services contracts, and from the day of receiving the goods in the case of sale contracts. B- The right to retrieve the money he paid for the goods or services without any additional costs, but the consumer shall bear costs of returning the goods and costs of contact.

Thus, the right of withdrawal is a right which allows the consumer, who makes an electronic contract, to withdraw from the contract during a period of 15 days, and retrieve the money he paid without any additional costs, except costs of returning the goods and costs of contact.

Here, two things need to be discussed; first, whether this right is to be used without giving any reasons and whether this right is to be used without any liability. These two matters are clearly required by English law, but the Kurdish proposal does not state them clearly;

6.3.3.1.1. The Consumer Need not State any Reason

Under the KRP 2015, the E-Consumer is enabled to exercise the right of withdrawal without giving any reason. Of course, the proposal does not explicitly mention the wording “without any reason” as the English CCIACRs 2013. However, this provision can be implicitly inferred because the KRP 2015 does not suspend the entitlement to the right of withdrawal upon breaches of the contract. Thus, it is irrelevant to check whether the goods or services match the description given beforehand, or whether there was a defect in the product. Rather, the decision may be made because of economic or social or psychological

⁷⁸² Khalid (n 428) 627. See also, Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 31- 32; Ahmed (n 109) 176.

reasons which made the consumer change his mind.⁷⁸³ It is also possible for the consumer to exercise such a right without even having a reason for that.⁷⁸⁴ Therefore, the trader is obliged to respond to the consumer's decision without asking him for the reason behind withdrawal.⁷⁸⁵ Furthermore, the court cannot have any observation power over the right of withdrawal under the theory of abuse rights.⁷⁸⁶

However, in the absence of clear wording prohibiting that, the trader may imply a term to the contract which requires the consumer to provide a reason in the event of withdrawal. Also, the consumer may agree with the trader to waive his right of withdrawal in return for a reduced price. These two issues are not well- stated under English law. The reason is, the English CCIACRs 2013 have not implemented Article 25 of the CRD 2011. These two issues are discussed below;

A. The Ability of the Trader to Imply a Term Which Restricts the Right of Withdrawal

In the KRP 2015, the same confusion found with Regulation 29(1) of the English CCIACRs 2013 is possible with the wording of Article 22(1). This probability is even higher as the proposal does not mention that withdrawal is to be without giving any reasons. Interestingly, Article 22(3) of the KRP 2015 well treats this problem when clearly states that; “It is null any conditions in the offer or the contract, or any agreement which contradicts provisions of Paragraph (1) of this Article”. This Article has the effect of Article 25 of the EU CRD 2011 in prohibiting any restrictions on exercising the right of withdrawal rather than those stated by the law. Accordingly, the trader is not allowed to include a term which discharges him from giving a right of withdrawal. He is neither allowed to restrict this right by either putting new conditions, further to those stated by the law, or making the right exercisable on a certain condition.

To justify this restriction, it is provided that the right of withdrawal is created by the law. Therefore, none of the contracting parties can restrict the right or take it out.⁷⁸⁷ It is also

⁷⁸³ Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 43; AL-Bashkani (n 349) 334.

⁷⁸⁴ Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 44; Ali Al-hijazi (n 768) 137.

⁷⁸⁵ Khalid (n 428) 626.

⁷⁸⁶ Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 44.

⁷⁸⁷ AL-Timimi (n 438) 85.

said that provisions of this right are of “public order” which does not allow the parties to restrict it to the disadvantage of the consumer.⁷⁸⁸ It is further said that this right in the way stated in the law represents a minimum level of protection which cannot be of any benefit for the consumer if the parties go lower.⁷⁸⁹ However, any agreement to improve the right for the benefit of the consumer is to be accepted. As if the parties agree on extending the period of withdrawal beyond the period fixed by the law, or extending the scope of the right to include those contracts which are exceptionally precluded by the law. In the English CCIACRs 2013, the study reached the same conclusion because Article 3(6) of the CRD 2011 requires the member states not to prevent traders from offering consumers contractual obligations which go beyond the protection stated in the Directive.

B. The Ability of the Consumer to Waive his Right of Withdrawal

Under this heading the KRP 2015 is clearer than the English CCIACRs 2013. As noted, the CCIACRs 2013 do not explicitly state whether the right of cancellation can be waived by the consumer.⁷⁹⁰ However, Article 22(3) of the KRP 2015 clearly states that; “It is null any conditions in the offer or the contract, or any agreement which contradicts provisions of Paragraph (1) of this Article”. Accordingly, the right of withdrawal under the proposal is not subject to any waiver by the consumer, even if the waiver is in exchange for an amount of money. By default, any agreement which includes a waiver of the right of withdrawal acknowledged by the consumer would be incompatible with Article 22(3), and ultimately will be void.

6.3.3.1.2. The Consumer Need not Incur any Liability

Similar to English law, Article 22(1) of the KRP 2015 allows the consumer to withdraw from the contract without incurring any liability. The only thing that the consumer needs to do, at the time when he withdraws from the contract, is to pay the costs of returning the goods to the trader and costs of contact.⁷⁹¹ Thus, the trader cannot impose any penalty on consumers in return for exercising the right of withdrawal. Such imposition does not have any effect, in the meaning of Article 22(3), even if it has proven that the consumer has agreed on that. Otherwise interpretation would have negative impact on consumers because

⁷⁸⁸ Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 40.

⁷⁸⁹ Khalid (n 428) 620.

⁷⁹⁰ See this Thesis, 183-186.

⁷⁹¹ See, the KRP 2015, Article 22(1) (b), 193.

it may discourage them not to use the right. This penalty would eventually make the protection given through the right of withdrawal meaningless.⁷⁹²

However, what makes the KRP 2015 different from the English CCIACRs 2013 is that the proposal adds the costs of contact to the costs of returning the goods. This provision cannot add any value because it is a matter of fact that the consumer bears costs of using means of distance communication in concluding the contract. No matter whether the contract is made or the parties broke the negotiation. In any case, the consumer bears costs of contact unless the trader offers to bear them, albeit this is seldom.

6.3.3.2. Function of the Right of Withdrawal

From jurists' point of view, the function of the right of withdrawal in electronic contracts is to give the consumer a time to rethink about the decision he made at the time when he was not able to make a clear judgement on the contract as he was away from the goods.⁷⁹³ It is also said, this right gives the consumer another chance to rethink about the decisions which he rushes to make under either influence of advertisements or influence of an urgent need to the goods or services.⁷⁹⁴ Although, the proposal is not yet law, it is submitted that it shares the same function intended by the English CCIACRs 2013 for the right of cancellation.⁷⁹⁵

To some authors, this right is of great help to complement the function of the duty to provide pre- contractual information. For example, giving the consumer numerous pieces of information may not be of any effect to the consumer if the thing is not under his possession. That is why it is said that the right of withdrawal is found to complete the function of the duty to provide pre-contractual information.⁷⁹⁶ Accordingly, the consumer can take advantage of the period of withdrawal in gathering more information, checking the veracity of the available information, and absorbing complexity of some

⁷⁹² Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 46.

⁷⁹³ Khalid (n 428) 628- 629; Ali Rasol (n 589) 246; Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 33; AL-Bashkani (n 349) 330; Ranya Asab, *IT Contracts in the Internet Law, a Comparative & Analytical Study in the Arabic, American, European Jurisprudence and Legislation* (Dar AL-Jamiha AL-Jadidia 2012) 507.

⁷⁹⁴ Ahmed (n 109) 175; Ali Rasol (n 589) 249.

⁷⁹⁵ See this Thesis, 192-194.

⁷⁹⁶ Hijazi (n 17) 41.

information.⁷⁹⁷ However, withdrawal can never be a remedy for failure to provide information even if it is used to be so by the consumer because the law does not provide it as remedy.

⁷⁹⁷ Khazi Khalid Abo-Arabi, 'Protection of the Consumer's Consent, a Comparative Study between the Law of Consumer Protection of U.A.E, and French Consumer Code and Proposal of the Jordanian Consumer Law' (2009) 36(1) *Dirasat Alum AL-Sharia Wal Qanun* 187, 191.

6.4. Conclusion

This chapter discussed the concept and the function of the right of cancellation under both jurisdictions. The study found that English Law has almost two decades of experience with this right. However, in Iraqi law a right of withdrawal has not yet been recognised. It has also found that using the viewing option “Kayar AL-Ruya” and testing option “Kayar AL-Tajriba” under the Civil Code may *partially* benefit distance consumers. In both cases, the buyer (the consumer) is allowed to cancel the contract after he sees or tests the product. However, these provisions cannot ensure the more rounded protection provided by the right of cancellation in modern consumer laws. For example, services contracts cannot be comprised because services are naturally incapable of being seen or tested at any stage of the contract: in the English CCIACRs 2013 all contracts are included.

Also, in both cases, determination of the withdrawal period is entirely left to the will of the seller, unlike the right of cancellation under the English CCIACRs 2013 which is fixed by law. Finally, the viewing and testing options are exercisable only for the sake of checking the conformity between the product and the description given beforehand. By contrast, the right of cancellation in the English CCIACRs 2013 is an absolute right and cannot be subject to any judicial intervention based on the theory of abuse rights. Thus, a right of withdrawal, similar to the right of cancellation under Regulation 29 of the English CCIACRs 2013, should be introduced.

However, the study found that the KRP 2015, if adopted, would be the first legislative attempt in which Iraqi law ever made in introducing a modern right of withdrawal similar to the model introduced by the English CCIACRs 2013.

The study also inferred that the English CCIACRs 2013 and the KRP 2015 define cancellation or withdrawal as a right given to the consumer to end the contract during a certain period of time, without any reasons and without incurring any liability except those stated by the law. The function is to provide the consumer with an opportunity to inspect the goods in sale contracts, and rethink about the decision in services contracts.

The study has further observed that English law does not make clear that the right of cancellation is not subject to any restriction or waiver, but this fact is understood clearly

from the EU CRD 2011.⁷⁹⁸ By contrast, the KRP 2015 makes it clear that any agreement which makes the entitlement to the right of withdrawal subject to any restriction or waiver will be null.⁷⁹⁹ Here, English law may learn from the EU CRD 2011.

The next chapter will discuss conditions and effects of the right of cancellation.

⁷⁹⁸ The CRD 2011, Article 3(6).

⁷⁹⁹ The KRP 2015, Article 22(3).

CHAPTER SEVEN: THE CONDITIONS AND EFFECT OF THE RIGHT OF CANCELLATION

7.1. Introduction

This chapter discusses another two aspects of the right of cancellation. In the first place, a one-sided cancellation post conclusion of the contract restricts the principle of “*Pacta Sunt Servanda*”.⁸⁰⁰ Thus, the existence of unconditional cancellation would have a negative impact on the interest of the trader as well as the principle of legal certainty. For such reason and as a condition, consumer laws have tended to introduce a time limit within which the right must be exercised. This means, an effective cancellation requires the consumer to cancel the contract timeously. Hence, many issues may have an effect on the function of the right of cancellation. On top of that, one might question the length of the period and how it responds to the consumer’s needs in a distance environment? Further, the moment at which the cancellation should start to run is another challenge due to variation in commodities sold at a distance as to whether they are goods, services, or digital content. These questionable issues are subject to a critical discussion in this chapter.

In the second place, the study focuses on the effects which may be produced by cancellation for both parties. Generally, the right of cancellation is set up to afford the consumer an opportunity to avoid effects of certain distance contracts. This literally means that exercising the right to cancel has the function of resetting the parties back to their original positions before the contract was made. In reality, the way to put this function in place may encounter some challenges, particularly when retrospective effects are to be put in place. Those challenges are connected to the way in which and the time within which the returning process is to be performed, in addition to the potential remedy which the party may rely on if the other party delays or abstain in performing the return. Discussion of these challenges is another objective of this chapter.

This chapter is divided into two sections, one discusses the conditions and one discusses the effects of the right of cancellation.

⁸⁰⁰ See this Thesis, 177.

7.2. Conditions of the Right of Cancellation in the English CCIACRs 2013

It has been observed that the right of cancellation is an unconditional right which allows the consumer to cancel the contract without any reasons, and without any liability, save for exceptions under the law. However, this fact does not mean that this right is completely free from conditions. If we look at Regulation 29(1) which states; “The consumer may cancel a distance or off-premises contract at any time in the cancellation period...”, we will find that there are two conditions; the contract should be an off- premise contract or a distance contract, and cancellation has to be exercised within the period stated by the law, as follows;

7.2.1. The Contract should be an Off- Premise Contract or a Distance Contract

The right to cancellation is a unilateral right restricted to consumers: traders are not allowed to exercise it.⁸⁰¹ However, it does not apply to all consumers but only those who are involved in contracts made away from business premises. This includes consumers in both off-premise contracts, and distance selling contracts. It should be noted that some off-premise and distance contracts are excluded from the scope of the right of cancellation.⁸⁰²

7.2.2. Cancellation has to be exercised within the Period Stated by the Law

As a condition, cancellation is exercisable only within a certain period of time stated by the law. Of course, this requires the consumer to inform the trader about cancellation within that period, either by using the model cancellation form which is provided by the law,⁸⁰³ or otherwise by making any other clear statement on cancelling the contract.⁸⁰⁴ The notification has to be sent within the period and no matter if it reached the trader afterwards.⁸⁰⁵ Many have argued that this simplified method makes cancellation cheap and effective.⁸⁰⁶ However, the consumer is recommended to send cancellation notification on a

⁸⁰¹ Roxana (n 15) 32.

⁸⁰² The CCIACRs 2013, Regulations 27, and 28.

⁸⁰³ *ibid*, Part B of Schedule 3.

⁸⁰⁴ *ibid*, Regulation 32(2).

⁸⁰⁵ *ibid*, Regulation 32(5).

⁸⁰⁶ Loos, *Review of the European Consumer Acquis* (n 188) 17; Serrat (n 18) 121; Twigg-Flesner, and Schulze (n 190) 154.

durable medium because Regulation 32(6) places the burden of proof upon him.⁸⁰⁷ It is also not ideal to require notification on durable medium because this requirement would give room for the trader to refuse many cancellation applications under the reason that they do not meet the formality required.⁸⁰⁸ In addition, the consumer may not be able to understand what such a medium is.⁸⁰⁹

It is submitted that the length of cancellation period should respond to the function of the right. To make that possible, the period should be framed in a way that gives the consumer adequate time to process information away from any pressure during the period of cancellation.⁸¹⁰ Under the current regulations there have been two periods of cancellation; a normal period which is generally stated for the exercise of the right of cancellation, and the other period is an abnormal period which is set up for the case where the trader fails to give the consumer information on his right of cancellation. In the following subsections, the study briefly discusses both normal and abnormal cancellation periods, then offers a critical evaluation to some aspects which might be subject to further improvements.

7.2.2.1. Normal Cancellation Period

Regulation 30 provides a period of 14 days for the consumer to cancel the contract.⁸¹¹ These 14 days runs after the day on which the contract is made, if the contract is a service contract, or a contract for the supply of digital content which is not supplied on a tangible medium.⁸¹² If the contract is a sale contract the period runs after the day on which the goods come into the physical possession of the consumer or his representative.⁸¹³

However, if multiple goods are ordered by the consumer in one order but some are delivered on different days, the cancellation period runs after the day on which the last of the goods comes into the physical possession of the consumer.⁸¹⁴ If goods consist of multiple lots or pieces of something are delivered on different days, the cancellation period runs after the day on which the last of the lots or pieces comes into the physical possession

⁸⁰⁷ Recital 44 of the CRD 2011. See also, Steennot, 'The Right of Withdrawal under the Consumer Rights Directive as a Tool to Protect Consumers Concluding a Distance Contract' (n 42) 110.

⁸⁰⁸ Serrat (n 18) 122

⁸⁰⁹ Rott, Bremen, and Terry (n 42) 471.

⁸¹⁰ *ibid*, 470.

⁸¹¹ The CCIACRs 2013, Regulation 30(1).

⁸¹² *ibid*, Regulation 30(2).

⁸¹³ *ibid*, Regulation 30(3).

⁸¹⁴ *ibid*, Regulation 30(4).

of the consumer.⁸¹⁵ Finally, if the contract is a sales contract for regular delivery of goods during a defined period of more than one day, the cancellation period runs after the day on which the first of the goods comes into the physical possession of the consumer.⁸¹⁶

Briefly, the starting point for the period to run depends on whether the contract is a sale contract or a service contract.⁸¹⁷ However, it may happen that a contract includes both goods and services (mixed contracts). In this case, the European Commission is of the view that if the main purpose of the contract is transforming the ownership then the contract would be a sale contract such as “the purchase of a new kitchen set, including its installation at the consumer's apartment”. However, if the main purpose is supplying a service then the contract would be a service contract such as “a contract for attending a lecture, including delivery of pens and folders to the participants”.⁸¹⁸

7.2.2.1.1. Distinction between the Current Regulations and the Previous Regulations

The new regulations made two major changes to the period of cancellation. Firstly, Regulation 30 extends the period of cancellation to 14 days after it was 7 days under the former regulations.⁸¹⁹ This extension gives the consumer more time to think calmly about the decision he made and advantages and disadvantages thereof.⁸²⁰ The second major change is that the new regulations changed the way of calculating the cancellation period from working days to calendar days.⁸²¹ This gives the consumer more certainty as he does not have to be aware of different national holidays.⁸²²

Thus, the CCIACRs 2013 appear to have almost doubled the period of cancellation from 7 working days to 14 calendar days.⁸²³ Here, it may be argued that the period is too long and

⁸¹⁵ The CCIACRs 2013, Regulation 30(5).

⁸¹⁶ *ibid*, Regulation 30(6).

⁸¹⁷ See definition of the sale and service contracts in Regulation 5 of the CCIACRs 2013.

⁸¹⁸ Dg Justice European Commission (n 64).

⁸¹⁹ See the DSRs 2000, Regulations 11(2), and 12(2).

⁸²⁰ Cohen (n 698) 17.

⁸²¹ According to Article 2(2) of Regulation (EEC, EURATOM) No 1182/71 of the Council of 3 June 1971 on Determining the Rules Applicable to Periods, Dates and Time Limits, Which is Applicable for the Right to Cancellation to be Given by Member States under the CRD 2011 “For the purposes of this Regulation, ‘working days’ means all days other than public holidays, Sundays and Saturdays”.

⁸²² Luzak, 'Online Consumer Contracts' (n 13) 389.

⁸²³ Although, the CCIACRs 2013 does not make it clear whether the 14 day period is to be calculated in working days or calendar days, Recital 41 of the CRD 2011 makes it clear that “All periods contained in this Directive should be understood to be expressed in calendar days”.

it may cause the seller to suffer because the longer period of cancellation increases the chances of diminishing the value of goods.⁸²⁴ However, a close look at the calculation method uncovers the fact that the new period gives the consumer only 3 extra working days in addition to the 7 working days that he had under the former law.⁸²⁵ In other words, 14 calendar days is a period of two weeks including public holidays, Saturdays and Sundays. However, if we count working days within a period of two weeks, the number will be 10 working days.

7.2.2.1.2. Calculation of the Cancellation Period in a Sale Contract

According to Regulation 29(1) of CCIACRs 2013, the consumer may cancel the contract “at any time *in* the cancellation period”. The cancellation period in sale contracts, as laid down in Regulation 30(3), runs “after the day on which the consumer receives the goods”. Apparently, it may be read from these Regulations that the time when the contract is made does not have any effect on running the cancellation period in sale contracts. With this said, the consumer should, if he wishes to cancel the contract, wait for the goods to come into his physical possession then make his decision about cancelling the contract. It may also be said that this requirement is justified if the function of the right of cancellation in sale contracts is taken into consideration. As noted elsewhere,⁸²⁶ this right is introduced in distance selling contracts to offer the consumer a chance to examine goods personally, which is possible at the time when the consumer receives the goods.⁸²⁷ On the contrary, it is impossible to see any function of the right of cancellation if the consumer is allowed to cancel the contract before he obtains actual possession of the goods.⁸²⁸ Also, a different approach may risk encouraging consumers to abuse their rights of cancellation against traders’ interests. Giving consumers an absolute cancellation free from conditions may give rise to opportunistic behaviours on the part of consumers. To support this claim, a research study conducted in Germany found that providing unconditional cancellation increases the percentage of returns.⁸²⁹

⁸²⁴ Roxana (n 15) 39.

⁸²⁵ Luzak, 'Online Consumer Contracts' (n 13) 389.

⁸²⁶ See this Thesis, 192- 194.

⁸²⁷ Steennot, 'Consumer Protection with Regard to Distance Contracts after the Transposition of the Consumer Rights Directive in Belgium and France' (n 42) 436.

⁸²⁸ C Erasmus (n 278) 23.

⁸²⁹ It is observed that a right to cancel in distance contract has been used to “borrow” goods rather than purchasing them. One example is ordering expensive TV-sets before a football championship or wedding

However, Regulation 29(2) provides a different provision when it states; “the cancellation period begins when the contract is entered into and ends in accordance with regulation 30 or 31”. This Regulation gives the distance consumer a right to cancel a sale contract from the day when the contract is entered into until the end of the period of cancellation (14 days) which runs from the day on which the consumer receives the goods. To say it differently, the period of cancellation begins to run from the time when the contract is made, and ends at the end of 14 calendar days starting from the day on which the goods come into the physical possession of the consumer. Accordingly, if a trader delays in sending the goods two weeks, then the period would be two weeks in addition to 14 days. In this way, traders would be encouraged to perform an immediate delivery to avoid prolongation of the period of cancellation.⁸³⁰ Thus, Regulation 30(3) specifies the date when the period of cancellation runs and finishes, but it does not restrict the use of the right on receiving the goods since Regulation 29(2) clearly allows the consumer to cancel a sale contract from the time when the contract is made.

It is worth mentioning that Regulation 29(2) does not affect the nature and function of the right of cancellation. Indeed, the law provides cancellation for a certain function, but it does not require the right to perform that function. As noted before, the law explicitly stipulates that no conditions are required on the part of consumers to exercise cancellation. In consequence, the entitlement is available, no matter whether the right has functioned or not.⁸³¹ However, if the right of cancellation does not have any function in specific cases, those cases should clearly be exempted from the scope of the right of cancellation.⁸³² This is the exact approach followed by the EU CRD 2011 and all its implementations across the EU member states, as it has shown before.⁸³³

A further consideration, Regulation 29(2) may be of some interest to both parties. For example, in the absence of the Regulation, the consumer would have to wait for the goods

dress before the wedding and returning them back afterward. See, Roxana (n 15) 37; Annalies Azzopardi, 'The contribution of EU directives to the objective of consumer protection' (2012) 2(2012) *Elsa Malta Law Review* 41, 60.

⁸³⁰ This is exactly the position of the Draft Common Frame of Reference (DCFR) in article (II.-5:103) which states that; “(1) A right to withdraw may be exercised at any time before the end of the withdrawal period, even if that period has not begun”.

⁸³¹ Marco Loos, 'The Case for a Uniform and Efficient Right of Withdrawal from Consumer Contracts' (2007) 1(5) *Zeitschrift für Europäisches Privatrecht* 5, 14.

⁸³² Steennot, 'Consumer Protection with Regard to Distance Contracts after the Transposition of the Consumer Rights Directive in Belgium and France' (n 42) 436.

⁸³³ See this Thesis, 23-28.

to come into his possession, and then he would be able to cancel the contract though the decision on cancellation might be made before the consumer receives the goods. In this scenario, the consumer would waste his time on waiting. He might also miss an opportunity to make a deal with another provider. The trader also would incur costs of delivery which would happen, of course, if the consumer is not allowed to cancel the contract before the trader delivers the goods. Furthermore, the trader might miss other bargains which he might have about the same item during the time between the conclusion of the contract and receiving the goods.

7.2.2.1.3. Calculation of the Cancellation Period in Sale Contracts of Multiple Goods

Under Regulation 30(4) where multiple goods are ordered in one order but some of them are delivered on different days, the 14 day period begins to run “after the day on which the last of the goods comes into the physical possession of the consumer”. The question here is why should the period not run after the day on which *each* good comes into the possession of the consumer? This interpretation might make the consumer more flexible in dealing with the order. It does not matter whether the goods are of the same or different nature. However, Regulation 30(4) does not change anything as the consumer is entitled to cancel the contract from the time when the contract is made under Regulation 29(2). Indeed, Regulation 30(4), provides a better protection for consumers because it prolongs the period of cancellation. For example, if each good had to individually be treated for the purpose of running the period, then the cancellation period would run from the day when the first good comes into the consumer’s possession. In this way, the cancellation period for the first of goods arrived would run out earlier than the period of the last of goods.

However, this should not suggest that the consumer cannot split the order in accepting some goods and rejecting some others. In reality, the trader usually allows the consumer to split the order in rejecting some items and accepting others within one order. It is worth noting the fact that the order of all items has been processed under one receipt.

Remarkably, Recital 10 the DSD 1997 allowed this interpretation when it stated;

Whereas the same transaction comprising successive operations or a series of separate operations over a period of time may give rise to different legal descriptions depending on the law of the Member States; whereas the

provisions of this Directive cannot be applied differently according to the law of the Member States, subject to their recourse to Article 14; whereas, to that end, there is therefore reason to consider that there must at least be compliance with the provisions of this Directive at the time of the first of a series of successive operations or the first of a series of separate operations over a period of time which may be considered as forming a whole, whether that operation or series of operations are the subject of a single contract or successive, separate contracts.

Also, the Commission of the European Union is of the view that when different products are covered by one order, the consumer should be able to cancel the contract after receiving each product, without the need to wait for the last product.⁸³⁴

A similar approach to Regulation 30(4) is adopted in Regulation 30(5) for goods of multiple pieces, such as a dismantled cupboard or bed.

7.2.2.1.4. When Goods are delivered in the Absence of the Consumer

Another issue remained unsolved which pertains to the case when goods are delivered at the time when the consumer is absent. Under the CCIACRs 2013, it is unknown whether the period should start from the moment when the postman leaves a letter, informing the consumer of the attempted delivery, or from the moment when the consumer picks up the goods from the post office.⁸³⁵ This is a matter which the Commission of the European Union has flagged it up for a broader review work.⁸³⁶

In the absence of a clear solution, it is likely to say that the period should run from the moment when the consumer picks up the goods from the post office because from that moment the consumer will have actual physical possession of goods as set out in Regulation 30(3). The only matter for the court would be the case when goods are actually delivered to the consumer at the time when he is absent (i.e. the good is a small item put in an envelope and through a letter box to the consumer's home). Hence, if the court is to follow a subjective norm, then the consumer should be allowed to prove that at the time when the object was delivered he was absent. However, if the court is to follow an

⁸³⁴ Commission of the European Communities (n 96) 10.

⁸³⁵ Fina (n 722) 42.

⁸³⁶ Commission of the European Communities (n 96) 10.

objective norm, then it is more likely to be held that the consumer has acquired the possession of the item at the time when it was delivered to his house.

7.2.2.2. Abnormal Cancellation Period

Under the CCIACRs 2013 a failure to provide the consumer with the information on the right of cancellation prolongs the period to 12 months beginning with the day after the day on which the initial period would have ended,⁸³⁷ which would be either the day of receiving goods or the day of concluding the contract, as explained elsewhere.⁸³⁸ However, if the trader provides that information within the period of 12 months, the cancellation period then lasts at the end of 14 days after the day on which the consumer receives the information.⁸³⁹ With this provision, the period of cancellation may extend to beyond the 12 month period if the information is given at the end of the month 12 as it would run for a further 14 days. However, under the former position the period of cancellation would have extended to only three months and seven working days, beginning either with the day after the day on which the consumer receives the goods if the contract is a sale contract,⁸⁴⁰ or with the day after the day on which the contract is concluded if the contract is a service contract.⁸⁴¹ However, if the supplier performed his duty within the period of three months, the cancellation period would have ended on the expiry of the period of seven working days, beginning with the day after the day on which the contract is concluded in services contracts, and the day on which the consumer receives the information in sale contracts.⁸⁴²

In the following subsections, the study observes issues which require further discussion;

7.2.2.2.1. Distinction between the Current Regulations and the Previous Regulations

A question may arise regarding the efficiency of the new extended period for consumers compared to the previous case. One arguable answer would be, the period of three months and seven working days under the former position would have offered the consumer a better position than what the period of 12 months does under the current regulations. This is because under the previous regulations the period of cancellation would not have started

⁸³⁷ The CCIACRs 2013, Regulation 31(3).

⁸³⁸ See this Thesis, 208- 209.

⁸³⁹ The CCIACRs 2013, Regulation 31(2).

⁸⁴⁰ *ibid*, Regulation 11(4).

⁸⁴¹ The DSRs 2000, Regulation 12 (4).

⁸⁴² *ibid*, Regulations 11(3), 12(3).

unless the consumer had received information. This suggests that the consumer would have been entitled to an indefinite period of cancellation. This was the interpretation of CJEU in the *Heininger* case regarding the right to cancel under Doorstep Selling Directive 85/577 where the court expressly decided that the Directive does not allow national laws to provide that the right of cancellation has to be exercised over a limited period of time in cases where the trader does not inform the consumer of his right.⁸⁴³ Based on that, the CJEU allowed a party to cancel the contract after almost four years of being concluded because the trader left the consumer unaware of his right to cancel over that time.

However, the interpretation taken in the *Heininger* case was restricted to cases of contracts made under certain EU Directives other than the Distance selling Directive.⁸⁴⁴ Provisions of DSD 97/7/EC had clearly given the consumer a maximum period of three months and seven working days in the case where the trader would have failed in notifying the consumer of his right to cancel.⁸⁴⁵ This fact had been clearly reflected in the provisions of extension under the DSRs 2000 in the UK.⁸⁴⁶ It is further said by some writers that not providing indefinite period for cancellation does not contradict the consumers' interest. It rather serves legal certainty and makes a fair balance between the interests of both contracting parties.⁸⁴⁷ This objective of a definite period of cancellation has clearly been addressed in Recital 43 of the CRD 2011.⁸⁴⁸ Even before the CRD 2011 was adopted, this approach was also underpinned by the CJEU in the *Hamilton* case where provisions of the right of withdrawal under the Doorstep Selling Directive 85/577 were interpreted as to allow the national legislature to determine that such a right shall be exercised no later than one month, beginning with the day on which the contracting parties had fully performed

⁸⁴³ *Heininger v Bayerische Hypo- und Vereinsbank AG (C-481/99)* EU: C: 2001:684; [2001] E.C.R. I-9945; [2003] 2 C.M.L.R. 42; [2004] All E.R. (EC) 1; [2004] C.E.C. 202.

⁸⁴⁴ For example under the Doorstep Selling Directive 85 /577/EEC Article 4 obliged the trader “to give consumers written notice of their right of cancellation”, and in Article 5 gave the consumer “The right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4”. See also Article 6 of Distance Marketing Directive 2002/65/ec.

⁸⁴⁵ The DSD 97/7/EC, Article 6.

⁸⁴⁶ The DSRs 2000, Regulations 11(4), and 12(4).

⁸⁴⁷ Rott, and Terryn (n 42) 472; Twigg-Flesner, and Schulze (n 190) 153; Weatherill (n 97) 1296.

⁸⁴⁸ According to Recital 43 of the CRD 2011; “If the trader has not adequately informed the consumer prior to the conclusion of a distance or off-premises contract, the withdrawal period should be extended. However, in order to ensure legal certainty as regards the length of the withdrawal period, a 12-month limitation period should be introduced”.

their contractual obligations, and no matter whether or not the consumer was ignorant about his right to cancel.⁸⁴⁹

In consequences, the period of 12 months under the current regulations offers the consumer better position. Here, it is not convincing to argue that the length of the cancellation period may have negative impact on the trader. That is because the extension is imposed in a form of penalty to remedy a fault of the trader concerning non-fulfilment of his duty to inform the consumer of his right to cancel. Because of the same penalty, Regulation 34(11) ceases the right given to the trader under Regulation 34(9) to recover the diminished value of goods “as a result of handling of the goods by the consumer beyond what is necessary to establish the nature, characteristics and functioning of the goods”.

However, the new regulations have left some leeway for the trader to avert the cancellation period being extended that long by providing information on the right to cancel within the period of 12 months. Then, the period of cancellation begins to run only 14 working days beginning with the day on which the consumer receives the information.⁸⁵⁰ The only concern remained unanswered is, the 12 month period may run out before the consumer finds out that he had a right to cancel the contract.⁸⁵¹ This particular concern cannot be erased by saying that the length of the period is enough for the consumer to complain about the contract and then to find out that he has a right to cancel. However, the right to cancel is not introduced to remedy cases of dissatisfaction about goods or services. Therefore, in many cases where the consumer does not have a reason for cancellation the extended period of cancellation is likely to run out without the consumer being able to know about it.

7.2.2.2.2. Extension is attached to a Specific Failure

The new regulations have also linked the extension of the cancellation period to non-fulfilment of the duty to provide information on “the existence of the right to cancel, the conditions, time limit and procedures for exercising”, as listed in paragraph (l) of Schedule 2.⁸⁵² However, a failure to provide other additional information on the right of cancellation does not have any effect on the period of cancellation: for example if the trader fails to

⁸⁴⁹ *Hamilton v Volksbank Filder eG* (Case C-412/06) [2008] 2 C.M.L.R. 46.

⁸⁵⁰ The CCIACRs 2013, Regulation 31(2).

⁸⁵¹ Luzak, 'Online Consumer Contracts' (n 13) 389.

⁸⁵² The CCIACRs 2013, Regulation 31(1).

inform the consumer “that he will have to bear the cost of returning the goods in case of cancellation and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods”,⁸⁵³ or if the trader fails to inform the consumer that he will have to pay the trader reasonable costs if he exercises the right to cancel after having made a request on performing the service contract before the end of the cancellation period,⁸⁵⁴ or if the trader fails to provide the consumer with information on the cases where the right of cancellation does not exist, or the cases where the right to cancel is to be lost.⁸⁵⁵ Such a failure may have other effects other than extending the period of cancellation of course.⁸⁵⁶ On the contrary, under the former regulations the extended period of three months and seven working days had been connected with the failure to send confirmation of the information.⁸⁵⁷

Hence, it is questionable whether the extended period should be linked to the non-fulfilment of the duty to provide information in general other than only information on the right to cancel? This particular suggestion would have remedied the matter of lack of remedy available for the information provisions. However, the correct answer would be; such a provision might have been fine under the former position where the period would have been extended relatively for a short period of time. Quite to the contrary, under the present position, where the period extends up to one year, the proposed provision would seem unfair to the trader because a failure to provide minor information would extend the period that long.⁸⁵⁸ At this point, it might be possible to provide a separate extension of a shorter period for cases where other information, non-related to the right to cancel, is breached. This is what the Timeshare Directive 2008/122/EC adopted which prolongs the cancellation period to one year and 14 days in the case where a separate standard withdrawal form has not been provided by the trader, and three months and 14 days in the case where other information has not been provided.⁸⁵⁹

⁸⁵³ The CCIACRs 2013, Paragraph (m) of schedule 2.

⁸⁵⁴ *ibid*, Paragraph (n) of schedule 2.

⁸⁵⁵ *ibid*, Paragraph (o) of schedule 2.

⁸⁵⁶ For example, Regulation 13(5) exempts the consumer from bearing costs of returning the goods in case of cancellation if the trader fails to notify him on that as required by Paragraph (m) of schedule 2.

⁸⁵⁷ The DSRs 2000, Regulations 11(4), and 12(4).

⁸⁵⁸ Geraint Howells, and Norbert Reich, 'The Current Limits of European Harmonisation in Consumer Contract Law' (2011) 12(1) ERA Forum 39, 53.

⁸⁵⁹ The CCIACRs 2013, Regulation 6(3) (a, b).

7.3. Conditions of the Right of Withdrawal in Iraqi Law

Nothing to say here about the ICPL 2010 where the right is not defined, but similar to English law, the KRP 2015 restricts the use of the right of withdrawal on two conditions; the contract has to be an electronic contract, and the right must be used within a certain period of time. These two conditions can be found under Article 22(1) of the KRP 2015 which states; “(a) In electronic transactions the consumer has a right to withdraw from the contract within 15 days....”, as follows;

7.3.1. The Contract Should be an Electronic Contract

If adopted, the Kurdish proposal will offer the consumer, who makes an electronic contract, a right to withdraw from the contract during the time fixed by the law. The concept of electronic contract is mainly attached to contracts made via Internet. Nowadays, as a matter of fact, the Internet provides rapid electronic means at reduced costs for the parties to use in making the contract such as Websites, E-mails, and all social media applications including Skype, Facebook, and WhatsApp.⁸⁶⁰

In this meaning, the right of withdrawal covers most common types of distance selling in today’s dealing, electronic contracts. This is, however, cannot be an ideal provision for distance consumers because other means of distance communication are excluded. For example, distance consumers who make the contract by using Telephone with or without human intervention, Fax, TV, Catalogue, Radio, Mail, are not entitled to the right of withdrawal. This is not the case under the English CCIACRs 2013.

7.3.2. The Right of Withdrawal has to be exercised within the Period stated by the Law

Similar to English law, the KRP 2015, if adopted, will allow the e-consumer to cancel the contract during a certain period of time. In doing that, the consumer is free to cancel the contract in any form chosen which may be in a verbal or written form.⁸⁶¹ In practice, it is appropriate to send the cancellation notification over any means of distance

⁸⁶⁰ Kidd DJ and Daughtrey Whj, 'Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions' (2000) 26(2) Rutgers Computer & Technology Law Journal 215, 217-218.

⁸⁶¹ Sulaiman Barak Daih, 'Legislative Withdrawal in Consumers Contracts' (2005) 14(8) Majlat Kuliat Al-Huquq Jamiat AL-Nahrain 164, 179.

communication such as E-mail, Fax, Telephone conversation, and post.⁸⁶² Apparently, English law does not provide a different provision. Indeed, Regulation 32(3) (a) of the CCIACRs 2013 provides the consumer with a model cancellation form. However, it is not compulsory for the consumer to use the form because Subparagraph (b) of the same Regulation allows the consumer to cancel the contract by making any clear statement on that.

From a practical perspective, however, the consumer is advised to use a durable medium in sending the withdrawal notification to avoid being having problems with proof when a dispute arises.⁸⁶³ This is because it is the consumer's duty to prove withdrawal in question. Although, the Kurdish proposal does not say so, unlike English law,⁸⁶⁴ Article 7(1) of the Iraqi Law of Proof (107) 1979 (as amended) states that the claimant is the person who has the burden of proof.⁸⁶⁵ Hence, in withdrawal disputes the consumer is to be the party who claims that the contract is cancelled in question.⁸⁶⁶

It further needs to be mentioned that most means of distance communication, mainly electronic means, do not pose any problem to a timeously withdrawal. For example, if a phone call is used in sending the withdrawal notification the parties would be in a direct contact. If an email, fax, or SMS is used, the withdrawal notification would reach the trader most likely in few minutes. However, this may not be the case when the notification is sent by post. For instance, the consumer may post the notification few days before the withdrawal period finishes. In this scenario, it may reach the trader after the withdrawal period has come to the end, and it may not reach the trader at all as if it went missing or sent to a wrong address. Here, it is questionable whether the time when the withdrawal arranges effects is the time when the notification is posted by the sender or the time when it is received by the addressee? Under English law, this issue is not questionable since Regulation 32(5) of the CCIACRs 2013 gives the effect to the cancellation notification from the time when it is posted. However, the Kurdish proposal does not provide any

⁸⁶² Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 137- 138.

⁸⁶³ Mohammed Ahmed AB-Dul Hamid Ahmed, *Civil Protection of the Traditional Consumer and Electronic Consumer* (Dar Al-Jamiah AL-Gadid 2015) 370, 372; Ahmed (n 108) 192.

⁸⁶⁴ The CCIACRs 2013, Regulation 32(6).

⁸⁶⁵ According to Article 7(1) of the Iraqi Law of Proof "Onus of proof lies with the plaintiff and denial shall be supported by oath".

⁸⁶⁶ Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 139- 140.

answer to this matter. Furthermore, the Iraqi Civil Code does not introduce postal rules. One could, therefore, assume that the time of sending any notification does not operate any effect unless it reaches the addressee. Having said this, it does not matter whether the notification is an offer, acceptance, or withdrawal notification. This can be driven from Article 87(1) of the Iraqi Civil Code which makes it clear that a contract between absent persons is to be made at the time when and the place where the offeror hears from the acceptor unless otherwise agreed between the parties or stated in the law.⁸⁶⁷

Generally, both jurisdictions have further differences in the length and the method used in calculating the period. According to Article 22(1) (a) of the KRP 2015, the consumer has “15 days to withdraw from the contract”. This may be seen as one day longer than the period provided under the English CCIACRs 2013. In terms of the method, however, it is unknown whether the 15 day period will be calculated in working days or calendar days. At this point, the major problem will be with legal uncertainty in which the consumer will not be aware of the actual period of withdrawal. One could, therefore, assume that if the 15 day period is to be calculated in working days, the consumer will not be affected by public holidays.⁸⁶⁸ However, if such period is to be calculated in calendar days, then the actual period of cancellation may be less than 15 days if Fridays and public holidays are precluded. Nevertheless, this legal uncertainty is remedied by Article 9 of the Iraqi Civil Code which determines Gregorian calendar to follow in all time limits, unless otherwise provided in the law.⁸⁶⁹ This is also the case under English law since although the CCIACRs 2013 do not make it clear whether the 14 day period is to be calculated in working days or calendar days, Recital 41 of the CRD 2011 states that “all periods contained in this Directive should be understood to be expressed in calendar days”.

In terms of calculation, Article 22(1) (a) specifies that in sales contracts the 15 day period runs from the day on which the consumer acquires the physical possession of the goods. This is similar to the attitude adopted by the CCIACRs 2013. However, the day on which the goods are received is actually to be included within the 15 days given for the withdrawal period. Quite to the contrary, under the CCIACRs 2013 the day after the day of

⁸⁶⁷ According to Article 87(1) of the Iraqi Civil Code; “Save express or implied agreement or a legal provision otherwise contracting between absent persons will be deemed to have taken place in the place where and the time when the offeror becomes aware of the acceptance”.

⁸⁶⁸ Ahmed (n 109) 193.

⁸⁶⁹ According to Article 9 of the Iraqi Civil Code; “In the absence of a provision in the law otherwise, the time limits will be calculated according to the Gregorian calendar”.

receiving the goods is fixed for the cancellation period to run. In service contracts, the 15 day period runs from the day on which the contract is made, similarly to the English CCIACRs 2013. However, unlike English law, the proposal does not make any reference to the case of digital content contracts which are supplied not on tangible medium.

In the following subsections, the study addresses the issues which may need further improvement;

7.3.2.1. Calculation of the Withdrawal Period in a Sale Contract

As noted, the English CCIACRs 2013, under Regulations 29(1) and 30(3), expressly allow the right to cancel to be exercised during the cancellation period. Such period shall run from the day on which goods are possessed by the consumer.⁸⁷⁰ However, Regulation 29(2) makes it clear that cancellation on sale contracts is allowed from the time when the contract is entered into. Under the KRP 2015, this issue is debatable. One possible argument, under Article 22 of proposal the entitlement to withdrawal is only allowed during the withdrawal period as there has been no mention to any provision similar to Regulation 29(2) of the English CCIACRs 2013 which might refer to the possibility of withdrawal before the actual possession is acquired by the consumer. This approach is upheld by most Iraqi and Arab lawyers on the basis that the right of withdrawal is granted to give the consumer the chance to examine the goods.⁸⁷¹ This suggests that withdrawal does not function before the consumer has possessed the goods.

However, Article 22 should be interpreted by a court because a counter argument exists. Hence, one may counterclaim that the consumer should not be compelled to wait for the goods to come into his possession for the purpose of withdrawal. To support this argument, one could say that the Iraqi law does not explicitly prohibit the withdrawal before the goods are possessed. In addition, the law probably determines the time of receiving the goods for the cancellation to run to ensure that the consumer will have enough time to make a decision after he has possessed the goods. Otherwise, the consumer would have lost that opportunity if the time was the time when the contract is made, and the supplier delayed in delivering the goods two weeks. However, this objective would not be affected if a similar provision to Regulation 29(2) of the English CCIACRs 2013 is provided.

⁸⁷⁰ The CCIACRs 2013, Regulation 30.

⁸⁷¹ Mohammad Al-Mursi Zahra, *Civil Protection of Electronic Business (E-Contract- E-Proof) (E-Consumer)* (Dar AL-Nahza AL-Arabia 2000) 90; Hamid Ahmed (n 863) 370.

Furthermore, the consumer has an absolute right to withdrawal, leading to the fact that withdrawal is possible without giving any reason. This suggests that the consumer does not have to mention any reason at the time when he cancels the contract.

Quite often, three possibilities are foreseeable with the consumer and allowed at the withdrawal time. Firstly, the consumer may cancel the contract because the goods do not meet his expectations. This possibility always exists after the consumer has physically acquired the goods. Secondly, the consumer may cancel the contract for a reason not related to the goods as if he is offered a better product. This possibility may exist before and after the consumer acquired the goods. Thirdly, the consumer may cancel the contract without having any particular reason. One could, therefore, assume that requiring the consumer not to exercise withdrawal before the goods are possessed contradicts with the absolute nature thereof, as Samh points out.⁸⁷²

However, all the above- mentioned analysis cannot confirm the existence of a right of withdrawal before the goods are possessed with certainty because such interpretations would be contrary to the clear wording of Article 22 of the KRP 2015 which allows withdrawal *within* the withdrawal period only.

7.3.2.2. Calculation of the Withdrawal Period in Services Contracts

At this point, some of the Arab commentators suggest that the beginning of the withdrawal period should be counted from the time when services are supplied because at this time the consumer will be fully aware of the nature of the services supplied in analogy to the goods.⁸⁷³ However, the analogy used in this approach is not well-justified to be accepted overall. First of all, it may be true that if some services are provided, the consumer may obtain some extra information about their quality: for example knowing the speed of the internet service provided by a supplier. However, in most other cases having the services supplied will not make any difference such as water, gas, and electricity services. Further, some services may immediately be performed and in full. This suggests that performing such services makes the right of cancellation useless. For this reason, Regulation 36(1), and 37(1) of the English CCIACRs 2013 prohibit the trader from performing such services

⁸⁷² Samh Abdul-Wahid, *Contracting Over the Internet, a Comparative Study* (Dar AL-Kutb AL-Qanunia 2008) 338. See also, Hamid Ahmed (n 863) 372.

⁸⁷³ Al-Mursi Zahra (n 872) 107. See also, Qadree Mohammed Mahmud, *The Consumer Protection in Electronic Contract* (Dar AL-Nahtha AL-Arabia 2014) 145.

before the end of cancellation period unless if the consumer has given his express consent on that, if the consumer does so, the right to cancel is to be lost.

Finally, there has been no mention to any criteria which may be followed to distinguish services contracts from sale contracts in the case of mixed contracts. With bearing in mind, the issue has not been addressed under English law either, but a criterion has been stated for the issue by the European Commission.⁸⁷⁴

7.3.2.3. Abnormal Duration of the Right of Withdrawal

Under English law, the abnormal duration of cancellation, from 14 days up to 12 months, is connected with the trader's failure to provide information on the right to cancel. Under the Kurdish proposal, on the contrary, there has been no extension to the withdrawal period under this particular heading. This attitude, to some commentators, is subject to criticism because not informing the consumer of the right of withdrawal renders the exercise thereof impossible.⁸⁷⁵ In most cases, the period will run out shortly after the goods are delivered and the contract is made.⁸⁷⁶ Thus, if extension is linked to a failure to provide information, the consumer would be protected from losing the right of withdrawal. Also, the proposal would have remedied the problem of lack of remedies available for the breach of information requirements.

However, Article 21(5) of the KRP 2015 allows the parties to agree on extending the period of withdrawal. Literally, the Article requires the trader to inform the consumer about the period of withdrawal, but in any case such period should not be determined less than the period provided in the law. One could, therefore, assume that the 15 day period determined in the proposal is the minimum period within which the consumer can cancel the contract. By default, the contracting parties will be allowed to agree on a longer period of withdrawal. Similarly, English law allows the 14 day period of cancellation to be extended contractually. Although, the CCIACRs 2013 do not explicitly mention contractual extensions, Article 3(6) of the CRD 2011 provides room for such extension when it states; "This Directive shall not prevent traders from offering consumers contractual arrangements which go beyond the protection provided for in this Directive".

⁸⁷⁴ See this Thesis (n 823), 209.

⁸⁷⁵ Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 138. Ahmed (n 109) 193.

⁸⁷⁶ Khalid (n 428) 641- 642; Abdula Mahmood (n 764) 128.

By default, any offer from the trader which aims to extend the period of cancellation would be compatible with the foregoing Article.

7.4. The Effect of Cancellation in the English CCIACRs 2013

The effect of exercising the right to cancel is to terminate the contract, followed by releasing the contracting parties from the obligations created under the cancelled contract. This form of termination, however, would not be possible by following general principles of termination under contract law. This is because under general principles the entitlement to termination is linked to a breach committed by a party to the contract. As if a party, without a lawful excuse, refuses or fails to perform his obligation, or performs his obligation defectively.⁸⁷⁷ By contrast, the entitlement to termination under rules of cancellation does not need a breach. It is rather available even in cases where all obligations are performed according to the contract.

In the following subsections, the study examines first provisions of effect, then it critically addresses the issues which might be subject to further discussion; as follows;

7.4.1. The Effect of Cancellation

According to Regulation 33 of the CCIACRs 2013, if the right to cancel is exercised the effect thereof would mainly be ending the obligations created for the parties under the cancelled contract, and terminating any ancillary contract which gives a party the right to “acquire goods or services related to the main contract”.⁸⁷⁸ To put these effects in place, the regulations distinguish sale contracts from other contracts. In sale contracts, if the

⁸⁷⁷ See this Thesis, 147.

⁸⁷⁸ The CCIACRs 2013, Regulation 38(3). According to Paragraph (3) of the foregoing Regulation ancillary contract is any contract linked to the main contract by “which the consumer acquires goods or services related to the main contract, where those goods or services are provided (a) by the trader, or (b) by a third party on the basis of an arrangement between the third party and the trader”. However, it is the consumer’s duty to prove that contracts were linked. Probably the proof would be satisfied if both contracts are offered by the same trader, or when one contract refers to the other one, or when the second contract was offered by a third party but has connection with the trader. For this purpose, all financial services contracts (such as insurance or credit contracts) are subject to an automatic termination if they are linked to the main distance contract, though those contracts are excluded from the scope of the CCIACRs 2013. In doing so, the trader is under an obligation to inform any other trader with whom the consumer has a linked contract. See, the CCIACRs 2013, Regulation 34(4, and 2). See also, Luzak, 'Online Consumer Contracts' (n 13) 390.

contract is cancelled the parties should stop performing their unperformed obligations.⁸⁷⁹ If obligations have been performed, as it is often the case, each party must return what he has received from the other party under the cancelled contract.⁸⁸⁰ Accordingly, the trader must reimburse all the payments received from the consumer.⁸⁸¹ This must include the price as well as the cost paid for the initial delivery unless an enhanced delivery is chosen by the consumer, but except direct costs of sending the goods.⁸⁸² This obligation must be done “without undue delay, and in any event not later than the day on which the trader receives the goods back, or if earlier, the day on which the consumer supplies evidence of having sent the goods back”.⁸⁸³

On the other side, the consumer must send back the goods to the trader, of course, if the trader does not offer to collect them, “without undue delay and in any event not later than 14 days after the day on which the consumer informs the trader of his decision about cancelling the contract, as required by regulation”.⁸⁸⁴ He is further liable to pay the diminished value of the goods which may result from improper handling of the goods unless the trader fails to inform him about the right to cancel.⁸⁸⁵ This was a grey area under the previous regulations.⁸⁸⁶

⁸⁷⁹ Twigg-Flesner, and Schulze (n 190) 154.

⁸⁸⁰ Serrat (n 18) 125.

⁸⁸¹ The CCIACRs 2013, Regulation 34(1).

⁸⁸² *ibid*, Regulations 34(2 and 3), and 35(5).

⁸⁸³ *ibid*, Regulation 34(5).

⁸⁸⁴ *ibid*, Regulation 35(1-4), and in Regulation 35(8) as amended by the Consumer Protection (Amendment) Regulations 2014 “the consumer is not required to bear costs of collecting goods unless the trader has offered to collect the goods and the consumer has agreed to bear costs”.

⁸⁸⁵ *ibid*, Regulation 35(9-12).

⁸⁸⁶ Under the previous law, the consumer would not be liable for any diminished value of the goods beyond the use. However, at level of the CJEU a different matter was addressed regarding the use of goods during the cancellation period. This was discussed in *Messner v Firma Stefan Krüger* (Case C-489/07), [2010] Bus. L.R. D78, at 78- 79 where a second- hand computer was returned after the contract was cancelled, but the defender counterclaimed for compensation for the use of the product over eight months. The court was of the view that provisions of the DSD 1997 preclude national laws from any provision which give the trader room to claim for any form of compensation beyond the exercise of the right to cancel. However, at the same time the court did not protect the consumer from being asked to pay damages for the use of goods if national laws do allow so. The court justified this judgment by stating that; “It is not intended to grant [the consumer] rights going beyond what is necessary to allow him effectively to exercise his right of withdrawal”. One could, therefore, distinguish between the concept of “compensation for the use of goods”, and “compensation for the diminished value of goods”. If the basis for compensation is the consumer’s benefit behind the use of the goods during the cancellation period, the compensation is to be for the use of goods, but if the basis is the trader’s loss as the goods may turn into second-hand goods, the compensation is to be for the diminished value of the goods. With bearing in mind, the value of some products may decrease instantly after the first use and others may not for years.

In service and digital content contracts, if the contract is cancelled the trader must not supply the service, or digital content.⁸⁸⁷ He is further required to reimburse any payments he received from the consumer. On the consumer's side, if the service was supplied in response to a request from the consumer, the consumer must pay the trader its price.⁸⁸⁸ These effects have to take place before “the end of 14 days after the day on which the trader is informed of the consumer's decision to withdraw the offer or cancel the contract”.⁸⁸⁹

7.4.2. The Reimbursement of the Costs Paid for the Initial Delivery

Under Regulation 34(2, 3) the reimbursement should cover any cost paid for the initial delivery as far as it does not exceed the price fixed for the standard deliveries offered by the trader. In general, this norm is easy to follow in all cases where standard deliveries are offered by the trader, and where standard deliveries are offered but the trader fails to inform the consumer about the standard deliveries on offer.⁸⁹⁰ In the first scenario, the amount of money that needs to be returned will be measured by the price fixed for the standard deliveries. In the second scenario, the trader must bear costs of any additional delivery if he fails to inform the consumer about it.⁸⁹¹ In each case, it does not matter whether standard delivery is chosen by the consumer.

However, difficulties may arise where standard deliveries are not offered by a trader. In the distance selling environment, this is possible as the law does not oblige the trader to offer delivery. For the same reason, the law does not require the trader to inform the consumer of the costs of additional deliveries unless “where applicable”.⁸⁹² Another difficult case would be the case where the trader offers free delivery as part of the package. In this case, it is possible that part of the overall price is assessed for the delivery. Hence, the law does not offer any solution if the consumer chooses a way of delivery. If he did so, how would the recoverable costs be determined? From the trader's perspective, it might be argued that

See also, Peter Rott, 'The balance of the Interests in Distance Selling Law- Case Note on Messner v Firma Stefan Krüger) (2010) 18(1) European Review of Private Law 185, 189; Steennot, 'The Right of Withdrawal under the Consumer Rights Directive as a Tool to Protect Consumers Concluding a Distance Contract' (n 42) 111; Rott and Terryn (n 42) 474; Cohen (n 698) 21.

⁸⁸⁷ The CCIACRs 2013, Regulations 36(1) and 37(1).

⁸⁸⁸ *ibid*, Regulations 36(4); Regulation 36(5).

⁸⁸⁹ *ibid*, Regulations 34(6).

⁸⁹⁰ *ibid*, Paragraph (g) of Schedule 2.

⁸⁹¹ *ibid*, Regulation 13(5).

⁸⁹² *ibid*, Paragraph (g) of Schedule 2.

the consumer should bear the costs of delivery either because delivery is not offered, or because free delivery is offered and the trader has not fixed a price for the delivery to be returned even if the delivery service is taken into account within the overall price. From the consumer's perspective, on the contrary, it might be argued that the trader should bear those costs since the law explicitly requires him to do so. Between these two perspectives, an applicable normative solution is a further grey area which should be addressed.

7.4.3. The Remedy Available for the Breach

Under Regulations 34(4, 5) and 35(4) both parties are obliged to perform their obligations about return during a certain time. However, the regulations keep silent about the remedy which each party may rely on in case of breach. On the one hand, it is unknown the right which the consumer may have if the trader fails to make a timeously reimbursement. In this regard, the CCIACRs 2013 could have provided a better position under Article 24(1) of the CRD 2011 which allows member states to lay down the rules on remedies applicable.⁸⁹³ This was also the case in the UK under the former EU DSD 1997,⁸⁹⁴ but other member states provided different remedies.⁸⁹⁵

On the other hand, it is either uncertain the remedy which the trader may rely on if the consumer fails to make a timeously return, or if anything goes wrong with delivery as if the goods never reach or reach with some damages. Although, Regulation 29(1) entirely exempts the consumer from liability, it is not entirely clear whether this provision includes the case of damages which may happen to the goods on their way back to the trader. This issue is also not well treated under the CRD 2011. For example, Recital 55 thereof provides that the consumer should “be protected against any risk of loss of or damage to the goods occurring before he has acquired the physical possession of the goods”. However, nothing has been mentioned to protect the trader against the loss or damage which

⁸⁹³ According to Article 24(1) of the CRD 2011; “Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive”.

⁸⁹⁴ According to Recital 48 of the DSD 1997; “In situations where the trader or the consumer does not fulfil the obligations relating to the exercise of the right of withdrawal, penalties provided for by national legislation in accordance with this Directive should apply as well as contract law provisions”.

⁸⁹⁵ For example, Spanish law had granted the consumer the right to claim for double the sum, and Slovenian law had obliged the trader to pay 10% of the overall value for every 30 days delays in addition to the legal interest. See, Twigg-Flesner, Schulte-Nölke, Ebers (n 58) 366.

may happen to the goods before the trader has acquired the physical possession of the goods in the event of cancellation.

The question here is whether these breaches can be recovered by general principles. Indeed, this route is allowed for the consumer under Recital 48 of the CRD 2011 which states that lack of remedies does not prevent the consumer from seeking appropriate remedy under principles of contract law. It does not, of course, prevent the trader either to seek appropriate remedy under the contract law where necessary. For example, Recital 51 of the CRD 2011 makes it clear that disputes regarding “goods getting lost or damaged during transport and late or partial delivery” shall be covered by national laws, without making any distinction as to whether the loss, damage, late, or partial delivery should occur during the initial delivery made by the trader, or during the delivery which follows cancellation and made by the consumer.⁸⁹⁶ Furthermore, Recital 14 generally and Recital 42 particularly with regards to provisions of cancellation, allow the member states to maintain or introduce any remedial provision in the area of contract inasmuch as it does not contradict with the provisions covered by the Directive.⁸⁹⁷ In following these principles, the issue is likely to be settled in question by ensuring that the consumer has met the rules of reasonable care.⁸⁹⁸

One could, therefore, assume that each party may claim for damages where necessary, or may withhold the return until the other party performs his return. Indeed, Article 13(3) of the CRD 2011 re-affirms this general principle when it states; “With regard to sales contracts, the trader may withhold the reimbursement until he has received the goods back,

⁸⁹⁶ According to Recital 51 of the CRD 2011; “The main difficulties encountered by consumers and one of the main sources of disputes with traders concern delivery of goods, including goods getting lost or damaged during transport and late or partial delivery. Therefore, it is appropriate to clarify and harmonise the national rules as to when delivery should occur. The place and modalities of delivery and the rules concerning the determination of the conditions for the transfer of the ownership of the goods and the moment at which such transfer takes place, should remain subject to national law and therefore should not be affected by this Directive”.

⁸⁹⁷ According to Article 14 of the CRD 2011; “This Directive should not affect national law in the area of contract law for contract law aspects that are not regulated by this Directive. Therefore, this Directive should be without prejudice to national law regulating for instance the conclusion or the validity of a contract (for instance in the case of lack of consent). Similarly, this Directive should not affect national law in relation to the general contractual legal remedies, the rules on public economic order, for instance rules on excessive or extortionate prices, and the rules on unethical legal transactions”. And According to Recital 42 “The provisions relating to the right of withdrawal should be without prejudice to the Member States’ laws and regulations governing the termination or unenforceability of a contract or the possibility for the consumer to fulfil his contractual obligations before the time determined in the contract”.

⁸⁹⁸ See this Thesis, 120-121.

or until the consumer has supplied evidence of having sent back the goods, whichever is the earliest”. This provision is understood indirectly under the CCIACRs 2013. Regulation 34(4) of the CCIACRs 2013 requires the trader to reimburse the consumer after the cancellation without undue delay. This suggests that the trader may reimburse the consumer immediately after the contract is cancelled and before he receives the goods. In addition, Regulation 34(5) requires the trader, in any event, to reimburse the consumer not later than 14 days from the day on which he “receives the goods back, or if earlier, the day on which the consumer supplies evidence of having sent the goods back”. Accordingly, the trader is indirectly in the position of withholding the reimbursement until the consumer performs his obligation regarding sending the goods back to the trader.

One could, therefore, claim that this attitude does not benefit the consumer since it prohibits him from withholding the delivery in cases where the trader delays or abstains from making the reimbursement.⁸⁹⁹ To say it differently, the regulations require the consumer first to perform his obligation as his period runs from the day when he informs the trader about his decision, as Regulation 35(4) requires. Therefore, any delay in performing that, even in the meaning of withholding, would be incompatible. By contrast, the trader is, indeed, in the position of withholding the obligation, by the meaning of the law, because his period runs from the day when he receives the goods, as Regulation 34(5) requires.

Here, it is unknown why the law should not ask the trader first, as a powerful party, to perform his obligation? So that the consumer’s entitlement to withholding the obligation would remain untouched.

7.4.4. Distinction between the Use of Goods and Testing the Goods

In practice, the consumer handles the goods during the cancellation period for the purpose of testing them. This handling is not allowed under Regulation 34(9) if “it goes beyond the sort of handling that might reasonably be allowed in a shop”.⁹⁰⁰ For this purpose, a distinction should be made between testing the goods and actual use thereof. On the one hand, consumers are allowed to inspect and test the goods in all face- to- face transactions. In doing so, they may unpack the goods or remove their tags without incurring any

⁸⁹⁹ Rott, and Terry (n 42) 473.

⁹⁰⁰ The CCIACRs 2013, Regulation 34(12).

financial loss.⁹⁰¹ This entitlement must also be the case in distance transactions as the policy of distance legislation is set up to ensure that distance consumers have similar rights to those which they have in traditional transactions.⁹⁰² This suggests that goods do not have to be returned in their original packaging if they are taken out of their packaging for check-up purposes.⁹⁰³ On the other hand, distance consumers are not allowed to use the goods beyond what is allowed in direct transactions. If that happens, the consumer must pay proper compensation for the diminished value of the goods which may reach the contract price.⁹⁰⁴ He is further required to pay compensation equal to the benefit gained behind the use of goods if such use is incompatible with national laws. A prime example is when a new car is registered by the consumer which may lose certain percentage of its value because of registration.⁹⁰⁵

Nevertheless, it is further subject to questioning the moment when the consumer switches from testing the goods to using them. This question was raised by Peter when he asked whether testing a book would require the consumer to check that all pages are in or to read a part of it in order to ensure that the writing style is of his kind.⁹⁰⁶ At this point, the shop comparison shall be followed to distinguish between the action of use and the action of testing. For example, a few pages of books, not a big chunk, are allowed to be read in the shop, clothes are allowed to be tried on but not to be washed.⁹⁰⁷

A further question, if it is the consumer's duty to bear costs of depreciation during the cancellation period, why does the law not ask the trader to make the consumer aware of that? Also, why is the consumer not acquitted from paying the depreciation costs when he is not informed about it in analogy to the case of additional delivery and direct costs of returning the goods?⁹⁰⁸ Regarding the first question, it might be rather an advantage not to have the consumer being informed about such a financial obligation. Otherwise, the

⁹⁰¹ Steennot, 'The Right of Withdrawal under the Consumer Rights Directive as a Tool to Protect Consumers Concluding a Distance Contract' (n 42) 111.

⁹⁰² Twigg-Flesner, and Metcalfe (n 42) 383.

⁹⁰³ Loos, *Review of the European Consumer Acquis* (n 188) 18.

⁹⁰⁴ The CCIACRs 2013, Regulation 34(9).

⁹⁰⁵ Rott, and Terry (n 42) 473.

⁹⁰⁶ Rott, 'The Balance of the Interests in Distance Selling Law- Case Note on *Messner V Firma Stefan Krüger*' (n 886) 190.

⁹⁰⁷ *ibid*, 191.

⁹⁰⁸ The CCIACRs 2013, Regulation 13(5).

consumer may be dissuaded from exercising the right to cancel.⁹⁰⁹ However, this does not affect the existence of a duty to take reasonable care of the goods since the basis of such existence is found in the general principles of the contract law.⁹¹⁰ Regarding the second question, because the trader is not required to inform the consumer about the diminished value of the goods, therefore it would be unfair to make him bear that charge because of not doing something he is not required to do so in the first place, unlike the case of other charges. However, to strike the balance, the law makes it possible for the consumer not to pay diminished value of the goods if he is not generally informed about the right to cancel.⁹¹¹

7.5. Effects of Exercising the Right of Withdrawal in the Iraqi KRP 2015

The Kurdish proposal does not include the effects which may result from the use of the right of withdrawal. This is in contrast to the attitude held by English law. The only provision set out in the proposal regarding the effects of cancellation is Article 22(1) (b) which stipulates; “In electronic transactions the consumer has a right to recover the amount of money he paid for the goods or services, without incurring any additional charges, save to the costs of sending the goods back to the trader and costs of contact, in the event of withdrawal”.

This provision only shows the retrospective effects which the withdrawal has on sale and services contracts so the study must consider if the Iraqi Civil Code fills this gap. Generally, if the right of withdrawal is exercised the contract will be terminated and it will be deemed as never having been made.⁹¹² Similar to English law, withdrawal under the proposal may lead to the same effects if termination occurs by following other general principles such as avoidance and rescission. However, the difference is, the right of withdrawal is an absolute right of the consumer to terminate the contract without giving any reasons. Quite to the contrary, by using other ways of terminating the contract will not

⁹⁰⁹ Cohen (n 698) 21; O’Sullivan (n 42) 77.

⁹¹⁰ Loos, *Review of the European Consumer Acquis* (n 188) 18.

⁹¹¹ The CCIACRs 2013, Regulation 34(11).

⁹¹² Mohsen and Madlum (n 765) 67.

take place unless something goes wrong, regarding either the elements of the contract or obligations thereof.⁹¹³

In the following subsections, the study explains the effects of using the right of withdrawal under the KRP 2015, and then it critically addresses issues which may need further improvements.

7.5.1. The Effect of Withdrawal

If the contract is terminated, both contracting parties need to be reinstated into their positions prior to the conclusion of the contract. This would end all the obligations created under the cancelled contract, and also any other contract linked to the main contract.⁹¹⁴ Accordingly, the parties are required not to perform any obligation left unperformed at the withdrawal time. They are further required to return what they have received from each other under the cancelled contract. Similar to English law, under Article 22(1) (b) if the contract is a sale contract the trader must reimburse all the payments he received from the consumer under the contract, including the price in addition to the price paid for the initial delivery.⁹¹⁵ The reimbursement must be made without requiring the consumer to pay

⁹¹³ One example would be void as set out in Article 137 of the Iraqi Civil Code which states that, “1- Avoid contract is that which due to its cause is not valid as to its essence or as to its attributes regarding some of its external features. 2- a contract will be void if there is a defect in its constituent elements such as the offer and acceptance have been exchanged by parties who are not legally competent to conclude contracts or where the object is not performable or where the cause is unlawful. 3- The contract will also be void if some of its features are defective such as when the object of the contract is of an excessive ignorance or where the contract does not conform to the form imposed by the law”. Another example would be rescission as set out in Article 177(1) which stipulates; “In bilateral contracts binding both parties if either party has failed to perform his obligations under the contract the other party may after service of notice demand rescission of the contract and where necessary claim damages”. See also, Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 61- 62; Daih (n 861) 172- 173.

⁹¹⁴ If a contract is cancelled all other contracts which are linked to the cancelled contract must be terminated at the same time. The consumer may enter into a loan contract in order to ensure the price for the product. Hence, if the main contract is cancelled, the loan contract should automatically be cancelled. Unfortunately, the proposal does not refer to the effect which the withdrawal may have on linked contracts unlike English law. However, this issue can be covered under Article 1346 of the Civil Code which suggests that any hypothec loan given to a creditor as a security for the debt that is owed must be terminated at the time when the debt (or the source of the debt) has been terminated as it states; “The right of a possessory mortgage is extinguished by the extinction of the secured debt and it is revived if the cause which extinguished the debt has ceased without prejudice such right of a bona fide person which he had acquired legally within the period separating the extinction and the revival of the debt”. See also, Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 150; Mohsen and Madlum (n 765) 70- 71.

⁹¹⁵ Ali Al-hijazi (n 768) 180; Al-Mursi Zahra (n 871) 93.

additional charges. In English law, this is also the case under Regulation 34(8) of the CCIACRs 2013.

However, costs of sending the goods back to the trader and costs of contact must be borne by the consumer unless otherwise agreed in the contract. As such an agreement provides the consumer with better protection.⁹¹⁶ However, opposite to English law,⁹¹⁷ a failure to provide information on the right of withdrawal does not render the trader to bear direct costs of sending the goods. As a matter of fact, bearing costs of sending the goods is an obligation. As a general rule, each party must be informed about his obligations towards his counterpart. Otherwise, it would be unfair to require a party to do something under a contract which is out of his knowledge.

On the other side, whilst Article 22 of the KRP 2015 does not make any reference to any obligation which the consumer may have towards the trader in the event of withdrawal, it is not difficult to infer the consumer's obligations from the wording of Article 22(1) (b) of the proposal. For instance, the first sentence of the foregoing Paragraph gives the consumer, in the event of withdrawal, the right to recover all sums paid for the goods or services. Such entitlement, however, would not be possible without sending the goods back to the trader. Also, the second sentence makes the consumer bear the costs of sending the goods. This indirectly tells us that the consumer has the obligation to send the goods back to the trader. Any other interpretation would be very surprising as to compel the consumer to bear costs of sending back the goods at the time when the obligation is on the trader.

If the contract is a service contract, all obligations under the cancelled contracts should be terminated. Notably, the proposal does not require the trader to withhold services during the cancellation period as Regulation 36(1) of the CCIACRs 2013 does. However, the withdrawal should not exist if the service is fully performed during the withdrawal period since services are incapable of being returned.⁹¹⁸ However, if such services are to be performed after the withdrawal period finishes, then withdrawal releases the trader from performing this obligation. At the same time, it releases the consumer from making the payment unless if he has already made the payment during the withdrawal period. In this scenario, the trader must reimburse him the sum he paid for the service beforehand.

⁹¹⁶ Abdul-Wahid (n 872) 342.

⁹¹⁷ The CCIACRs 2013, Regulation 35(5).

⁹¹⁸ Abdul-Wahid (n 872) 340; Ali Al-hijazi (n 768) 164.

However, if services are to be continued before and after withdrawal such as water, gas, and electricity services, then withdrawal releases the parties from their obligations after the withdrawal.

7.5.2. Interpretation of the Wording “All the Sum Paid”

Under Article 22(1) (b) the KRP 2015 would give the consumer a right to “recover the amount of money he paid for the goods or services, without incurring any additional charges, save to the costs of sending the goods back to the trader and costs of contact, in the event of withdrawal”. This wording is not clear enough to be interpreted so as to oblige the trader to bear any cost paid for the initial delivery. As evidence, the wording states “money paid for the goods or services”: This may or may not include the money paid for delivering the goods. And, if it is to be interpreted as to give such effect, it does not make any distinction between the case where a standard delivery is used, and the case where a specific delivery is chosen by the consumer which may be more expensive than the standard delivery that is offered by the trader. Under English law, such distinction is clearly made in Regulation 34(2) of the CCIACRs 2013.⁹¹⁹

This current provision cannot respond to the case when delivery is not offered by a trader, and the consumer paid a third party for the delivery. In such a case, Article 22(1) (b) cannot be relied on to reimburse delivery payments.

7.5.3. The Period Required for the Parties to Perform Returns and the Remedy for a Failure

Article 22 clearly addresses that both parties, in the event of withdrawal, are required to perform certain obligations about returns. However, it does not mention a timescale within which those obligations should be performed. This is not the case under the English CCIACRs 2013 where a 14 day period is set up for that purpose. For the trader, the period runs after the day on which the goods or the notification on sending the goods are received by the trader, and whichever is the earliest, and for the consumer after the day on which the consumer informs the trader about cancellation.⁹²⁰ Thus, it may be argued that, with no

⁹¹⁹ See this Thesis, 226 -227.

⁹²⁰ The CCIACRs 2013, Regulation 35(4).

timescale, the parties may be encouraged to procrastinate in performing the return in due course.⁹²¹ This may adversely affect legal certainty.

Also, the proposal does not mention any remedy which a party may rely on if the other party fails to perform his return. This is also the case under English law where no remedies are provided for such breaches. In this case, however, both parties may rely on the general principles of contract law. Accordingly, the each party is allowed to withhold his return until the other party performs his return on the basis of Article Articles 177(1) and 280(2) of the Iraqi Civil Code.⁹²² On top of it, the consumer can claim for the legal interest which is 4% in accordance with Article 171 of the Civil Code.⁹²³

This provision may hold a benefit for the consumer since when a date is set up for the consumer to send the goods first, the consumer would not have a right to withhold his obligation in accordance with general principles. As noted, the withholding option is not available for the consumer under English law since reimbursement on the part of the trader is due at the time when he receives the goods or the notification on sending the goods back. Therefore, withholding the goods by the consumer would not be of any success because the law allows the trader not to reimburse the consumer until he has received the goods or the notification of sending the goods, and whichever is earliest.⁹²⁴ Furthermore, the law explicitly requires the consumer to send back the goods during 14 days after the day on which he informs the trader of the cancellation decision.⁹²⁵ Thus, withholding the goods by the consumer beyond that period will further be incompatible with the law.

⁹²¹ Khalid (n 428) 645; Aboamro, *The Legal Regulation of the Right of the Consumer to Cancel the Contract, a Comparative Study* (n 774) 164.

⁹²² In doing so the consumer may rely on Article 177(1) of the Iraqi Civil Code which stipulates; “In bilateral contracts binding both parties if either party has failed to perform his obligations under the contract the other party may after service of notice demand rescission of the contract and where necessary claim damage”. He may also rely on Article 280 (2) of the Iraqi Civil Code which states that; “Every party to a financial commutative contract may generally withhold the object of the contract while it is in his possession until he has received the consideration due”.

⁹²³ According to Article 171 of the Iraqi Civil Code; “Where the object of the obligation is a sum of money which was known at the time the obligation arose and the debtor delayed the payment thereof, he shall be obligated to pay the creditor by way of damages for the delay a legal interest at the rate four per cent in regards to civil matters and five per cent in respect of commercial matters...”. See also, Khalid (n 434) 644; Abdul-Wahid (n 870) 344.

⁹²⁴ The CCIACRs 2013, Regulation 34(5).

⁹²⁵ *ibid*, Regulation 35(4).

7.5.4. The Consumer's Liability for the Diminished Value of the Goods

In another issue, the proposal does not mention whether the consumer should be held liable for any diminished value of the goods beyond the use thereof. This is not the case under the English CCIACRs 2013 since Regulation 34(9) allows the trader to recover the diminished value.⁹²⁶ One possible solution, under Article 22(2) of the proposal “the right of withdrawal is excluded in the case where the goods are used before the withdrawal period finishes”. In theory, this Article covers all cases of diminished value of the goods which usually take place after using the goods. For such purpose, a distinction should be made between testing the goods and using them. However, this Article is not in the consumer's benefit because it prohibits him from exercising the right of withdrawal, instead of making him liable for the diminished value which may take place after the use, contrary to the English law attitude. Furthermore, the Article leaves room for the trader to claim for excluding the right of withdrawal because of the use even if such use does not affect the value of the goods.

At this point, some of the Arab jurists argue that the right of withdrawal should be exercised without the consumer being asked to pay any kind of compensation. Otherwise, the consumer may be reluctant in using the right if such use will cause him a financial loss.⁹²⁷ For the same reason, it is neither possible to imply a term into the contract requiring the consumer to pay any kind of compensation since such a term would be null in accordance with Article 22(3) of the proposal.⁹²⁸ Also, at the time of withdrawal all contractual obligations must be terminated, including all implied terms which may require a party to pay damages.⁹²⁹ Some other commentators do not believe that the existence of diminished value provisions would make any difference since any damage to the goods would be recovered by general principles under the Civil Code.⁹³⁰ As a rule, the delivery determines the party who must bear damages. In any case, the seller bears damages if the goods are under his possession at the time when the damage occurs and vice versa. According to Article 547(1) of the Iraqi Civil Code; “If the thing sold has perished in the hands of the vendor before being taken over by the purchaser the former shall suffer the

⁹²⁶ See this Thesis, 229 -231.

⁹²⁷ Ali Al-hijazi (n 768) 177.

⁹²⁸ According to Article 22 (3) of the KRP 2015; “It is deemed to be null any term in the offer or the contract, or any agreement which contradicts provisions of paragraph (1) of this Article”.

⁹²⁹ See this Thesis, 190 -192.

⁹³⁰ Abdul-Wahid (n 872) 342; Jalal (n 764) 365; Mohsen and Madlum (n 765) 67.

perishing and nothing will be suffered by the purchaser...”. By default, the purchaser shall be held liable if the goods are under his possession at the time when the perishing occurs.

Nevertheless, the foregoing Article does not properly cover the case of diminished value of the goods in question. Firstly, Article 547(1) covers the damage which may occur to the goods before the first delivery. Therefore, it is unknown whether this Article can cover the damage which may occur before the second delivery after the withdrawal. Also, the Article only covers material damages. This issue is also covered by general principles of English law in cases where there is an actual loss caused by the breach. Whereas, diminished value of the goods is not necessarily linked to material damages. For instance, the product may turn to second –hand even without any damages.

In summary, there is a need for a provision, similar to English law, which clearly sets out the liability for the consumer in the case when the value of goods is diminished during the withdrawal period.

7.5.5. The Way in Which the Reimbursement Should be Made

Another difference between the approaches of each jurisdiction is that the proposal does not explain the way that reimbursement should be made, in contrast with Regulation 34(7) of the CCIACRs 2013. This may also leave room for the trader to impose a certain way which may not be the way in which the first payment was made.⁹³¹

⁹³¹ Rayan Adil Nasser, *The Right to Withdraw from the Contract* (1st edn, Manshurat Al-Zain Al-Hquqia 2016) 181- 182.

7.6. Conclusion

It has been observed that both jurisdictions restrict the use of the right to cancellation on two conditions albeit differently. Under both jurisdictions, the contract must be of a certain nature and the right must be used during a certain period of time. The contract must be a distance or off-premise contract in English law, and an electronic contract in the Iraqi KRP 2015. At this point, the proposal should be amended, to reach the level of English Law, as to include distance selling contracts because the current attitude does not give a right of withdrawal to those consumers who make a distance contract by using non-electronic means of distance communication.

It is also found that both jurisdictions provide a similar period of cancellation, which is 14 days under English law and 15 days under the Iraqi KRP 2015.⁹³² It is further noted that both jurisdictions have similar timing for the period to run which is the day when goods are received in sale contracts, and the day when the contract is made in services contracts. However, in sale contracts, Regulation 29(2) of the English CCIACRs 2013 clearly allows the consumer to cancel the contract from the time when the contract is made. This Regulation puts the consumer in a better position as he does not have to wait for the goods to come into his possessions. Under the Iraqi KRP 2015, there is no clear attitude on the ability of the consumer to cancel the contract before he acquires the goods. The wording of Article 22 does not allow withdrawal before the goods are received. This matter should be addressed and tackled in the same way that Regulation 29(2) deals with.

One more thing, the period under the English law is to be extended exceptionally when the trader fails to provide information on the right of cancellation.⁹³³ This extension, however, is not possible under the Kurdish proposal unless the parties otherwise agreed.⁹³⁴ This attitude is surprising since the proposal requires the trader to inform the consumer of the right of withdrawal in the first place, but it does not provide any remedy when the trader does not fulfil this duty. Thus, Regulation 32 of the English CCIACRs 2013 can be taken into consideration when any amendments are made to the KRP 2015.

It is further found that both jurisdictions are similar in giving cancellation the effect of ending the contract retrospectively. However, they are different in the way in which

⁹³² The CCIACRs 2013, Regulation 30; the KRP 2015 Article 22(1) (b).

⁹³³ The CCIACRs 2013, Regulation 32.

⁹³⁴ The KRP 2015, Article 21(5).

retrospective effects should be put in place. English law determines 14 days for both parties to reinstate their positions. However, the law makes the consumer begin the process first,⁹³⁵ while the trader will be in the position to withhold reimbursement until the consumer has performed his obligation.⁹³⁶ Thus, the law prohibits the consumer from the right to withhold the delivery which he would use against any delay or abstention from the trader in making the repayment. By contrast, the Kurdish proposal does not specify any time limit for the parties to reinstate their positions. It also fails to provide any remedy when a party fails to perform his part of the duty. This attitude is negative in one way and positive in another. With no time limit, both contracting parties are encouraged to procrastinate in performing their duties. Apparently, this would affect the principle of legal certainty. Hence, there is a need for a similar provision to Regulation 35(4) of the English CCIACRs 2013.

On the other hand, not providing a compulsory time limit leaves room for each party to withhold his part of duty until the other party performs his part of the duty.⁹³⁷ At this point, the consumer is further entitled to claim for the legal interest.⁹³⁸

Finally, English law allows the trader to recover the diminished value of goods after the use.⁹³⁹ However, the way the Kurdish proposal deals with this matter is entirely different and even prejudicial to the consumers' interests. To protect the interests of the trader, the proposal excludes the right of withdrawal in the case when goods are used.⁹⁴⁰ This provision is against the consumers' interests because it prohibits the consumer from withdrawal instead of making him liable if the value of the goods is diminished after the exercise thereof. In addition, a mere use of the goods gives the trader room for excluding the right even if such use does not affect the value of the goods. Therefore, Regulation 34(9) may act as a model for the KRP 2015 in dealing with this particular issue.

⁹³⁵ The CCIACRs 2013, Regulation 35(4).

⁹³⁶ *ibid*, Regulation 34(5).

⁹³⁷ The Iraqi Civil Code, Articles 177(1), and 280 (2).

⁹³⁸ *ibid*, Article 171.

⁹³⁹ The CCIACRs 2013, Regulation 34(9).

⁹⁴⁰ The KRP 2015, Article 22(2).

CHAPTER EIGHT: CONCLUSION AND FINDINGS

This thesis has critically analysed consumer protection measures of English law and compared them to Iraqi law in the area of distance selling contracts to answer the key research questions. It has focused on the duty to provide pre- contractual and the right of cancellation because these two key areas of protection are essential in modern distance selling to put the consumer at distance, in terms of rights, into a similar position of direct selling.

The duty to provide pre- contractual information is intended to rectify the issue of *asymmetry of information*, where there is a considerable imbalance in the information to the detriment of consumers. The right of cancellation is introduced to enable the consumer to revise the decision he has made for a time after the contract is made. These two protection models are set up to perform two different functions: the information model ensures the consumer acquires the information that he would have acquired if the contract was made face- to- face, and the right of cancellation ensures the consumer can inspect the goods, use the information acquired in sale contracts, similar to any case of direct selling, and to calmly think of the contract in service and digital content contracts.

During this research, relevant laws of distance selling contracts as well as related laws in each jurisdiction are thoroughly reviewed. The study has also explored other laws within each law for various reasons, sometimes to provide a better understating of distance selling legislation, and sometimes to find a solution for a matter left untreated or improperly treated. In English law, a range of statutory laws as well as cases have been brought to the discussion, in addition to a number of related EU directives as well as cases from the CJEU, where some provisions of relevant EU directives are interpreted as to give solutions to disputes which may arise about similar provisions of the law of the EU member states. In Iraqi law, Civil Code, and a Kurdish proposal have been discussed. Discussing these laws, along with pertinent laws, are chosen for the following reasons. The Civil Code, as the law of general principles of contract, has been looked at to find solutions to any matter which may be found within consumer laws. The Civil Law Jurisprudence offers critique to current consumer laws as well as solutions to matters. This exercise offers the Iraqi courts a useful guide to settle disputes accordingly, as they are allowed to do so.⁹⁴¹ It also offers lawmakers thoughts for any future amendments. The Kurdish proposal is chosen as the

⁹⁴¹ The Iraqi Civil Code, Article 1(3).

first Iraqi law ever, if adopted, which recognises provisions of distance selling contracts similar to those provided by English law. The assessment of this local law may benefit any future amendments to the federal laws.

In comparing the laws, the study has used Doctrinal method to define the law, and Functional method to define the way the law works in practice. It has sought answers to the research questions stated in the introduction. Those questions have covered important aspects of the information model and the right of cancellation model. Regarding the information model, questions have been raised about the quantity of information, the manner and time of sending information, the criteria of identifying the breach of information, the care required to avoid the breach, and the remedies of the breach. Regarding the right of cancellation, questions have covered the function of the right, conditions of using the right, and effects of using the right of cancellation.

In the following sections findings, answers to the research questions, are addressed with highlighting provisions of English Law which may act as a model for Iraqi Law, as well as issues which may need improvement in the future amendments;-

A. A General Finding

In principle, English law has been familiar with consumer protection in distance selling contracts since the year 2000. All aspects of this protection, which are known up to now, are regulated, in some cases further development is needed but the framework is in place. The study finds that the case in Iraqi law is completely the opposite. Iraqi law does not know consumer protection in this particular area. Most aspects of this protection, if not all, are missing and can never be covered by general principles, and if they are covered they would not be effective to distance consumers as distance legislation. Most aspects of distance selling protection are supposedly linked to the fact that contracts are made at distance, where parties are physically away from each other. To this end, general principles of consumer protection are unable to touch on this matter. If some of the general principles are relevant to distance selling, this does not make any difference as protection is provided without any distinction between a distance consumer and an ordinary consumer. While, distance selling legislation provides particular protection for a distance consumer, which is supposedly higher than what general consumer legislation provides for an ordinary consumer.

Regardless of how well the provisions are dealt with, the English CCIACRs 2013 clearly define a distance contract as any contract made between a consumer and a trader by the use of a means of distance communication, and through an organised scheme run by the trader.⁹⁴² In that particular context, the consumer is given a range of rights, most of which are not available in direct selling. For example, Regulation 13(1) provides the consumer with an entitlement to a long list of information, most of which has a direct link to contracting at a distance such as information regarding the identity of the trader,⁹⁴³ the cost of using means of distance communication,⁹⁴⁴ the right of cancellation,⁹⁴⁵ and digital content.⁹⁴⁶ Also, Regulation 29(1) gives the consumer the right to cancel the contract which is not available, for sure, in ordinary contracts other than distance, and off- premises contracts.

On the other side of comparison, the Iraqi CPL 2010 does not recognise a distance contract. Thus, all the rights provided accordingly, indeed, are not set up to meet the requirements of consumer protection in the field of distance selling, but they are provided for any consumer who is involved in a contract with a supplier. The use of generality in providing protection cannot tackle issues of distance contracts precisely. For example, the entitlement to information is established in Articles 6 and 7 of the ICPL 2010, but none of the Article deals with the information required at distance contracting, as mentioned in Schedule 2 of the English CCIACRs 2013. Because the distance contract is not defined, the entitlement to a right of withdrawal is missing. At this point, the Iraqi Civil Code cannot add anything, although a concept of distance contract can be understood under Articles 87(1) and 88. As these Articles clarify the time when and the place where a contract between absentees should be made.

The Iraqi KRP 2015 deals with distance protection differently, but it is still below expectations for a modern economy. Article 21 introduces the information requirements in electronic contracts, most of which are relevant to distance selling. It also offers the e-consumer the right of withdrawal in Article 21(2) similar to the right of cancellation under English law. However, the proposal is nowhere near as detailed as English law in dealing with issues of distance selling. First, the KRP 2015 defines electronic contracts, but not

⁹⁴² The English CCIACRs 2013, Regulation 5.

⁹⁴³ *ibid*, Schedule 2, Paragraphs (b, c, d, and e).

⁹⁴⁴ *ibid*, Schedule 2, Paragraph (i).

⁹⁴⁵ *ibid*, Schedule 2, Paragraphs (l, m, n, and o).

⁹⁴⁶ *ibid*, Schedule 2, Paragraphs (v, and w).

contracts at distance. Distance protection covers a wide number of contracts; electronics contract are only one type of them albeit the most common ones. Furthermore, this narrowed protection, if adopted, will be given to e-consumers who make e-contracts in Kurdistan Region. In addition, this regional attempt is still a draft- proposal which may or may not be allowed by the Kurdish Parliament. Therefore, there is a need for specific Iraqi distance legislation to tackle issues of distance selling contracts.

B. The duty to provide pre- contractual information arguably supports the freedom of distance consumers in the English literature, but it justifiably restricts the freedom of the trader in both English and Iraqi Law

It has been observed that in the English literature, freedom of contract is shaped by the availability of choices and information before the parties.⁹⁴⁷ This is often the case when both contracting parties have the same identity as businesses or consumers. Then, requiring one party to provide information at the negotiation stage automatically affects the freedom of the other party.⁹⁴⁸ However, imposing such a requirement in the Business to Consumer contracts negatively affects the freedom of the consumer because he does not have enough information, compared to the trader, to practice his freedom not contract ‘the passive freedom’. Thus, when he enters into the contract with less information, he obliges himself to perform a contract which he would not if he had enough information. As a result, the duty to provide pre- contractual information is found to re-affirm the freedom of consumers in Business to Consumer contracts.⁹⁴⁹ This argument can also, in a way or another, be accepted in the Iraqi literature since intervention at the negotiation stage in Iraqi Law, which is against the freedom of contract, is only allowed in Business to Consumer contracts.⁹⁵⁰

From the trader’s perspective, the idea is still against his freedom. However, this restriction upon the freedom of contract appears justifiable under both laws. First, freedom does not have value if it is used in “the pursuit of exploitive relations”, such as in the case of most Business to Consumer contracts. In these contracts, much more focus is on achieving fairness rather than freedom of contract.⁹⁵¹ Finally, the idea of an absolute freedom of

⁹⁴⁷ Franklin (n 3) 561; Peppet (n 117) 678.

⁹⁴⁸ See this Thesis, 40.

⁹⁴⁹ See this Thesis, 40.

⁹⁵⁰ See this Thesis, 46-47.

⁹⁵¹ See this Thesis, 41.

contract does not exist in the modern English and Iraqi contract law, as there are other examples of intervention in the interest of consumers such as provisions on unfair terms.⁹⁵²

C. Enough Information but Unsystematic Manner and Time from the English Law Perspective, and Insufficient Information as well as Missing Manner and Time from the Iraqi Law Perspective

The entitlement to information under the new English regulations is, to some extent, well stated. A long list of information is specified,⁹⁵³ longer than any list which English law had ever provided for distance consumers.⁹⁵⁴ It is not only the additional information that makes the new measure different; it also rectifies some grey areas and answers some criticisms of the pre June 2014 regulations. For example, the trader is no longer required to include local taxes if the price cannot reasonably be calculated in advance.⁹⁵⁵ Also, the trader has become responsible for notifying the consumer of not only existence of the right of cancellation as it was the case before,⁹⁵⁶ but also the non- existence of such a right.⁹⁵⁷ Furthermore, the consumer is entitled, for the first time, to information regarding digital content.⁹⁵⁸

This does not mean that the current list is flawless and free from criticism. For example, it is unknown, under Paragraph (f) of Schedule 2, whether an objective or subjective criteria is to be followed to identify the nature of goods and services in cases where the trader cannot calculate their prices in advance. Also, Paragraph (g) of Schedule 2 does not require the trader to include additional charges within the price information in one figure, as this requirement would show the total price without the need for any calculations. Furthermore, under Paragraph (w) it is not entirely clear how to put the phrase “reasonably expected” in practice regarding digital content information. These loopholes or weaknesses may be corrected in any future amendments.

⁹⁵² See *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326, at 339; *Hadley Design Associates Ltd v Westminster City Council* [2003] EWHC 1617 (TCC); [2004] T.C.L.R. 1; [2004] M.C.L.R. 3, at 78; the English CRA 2015, Part 2, Sections 61-76; The Iraqi Civil Code, Article 167(2).

⁹⁵³ See, the CCIACRs 2013, Schedule 2.

⁹⁵⁴ Distance consumers are entitled to a longer list of information than the list provided under Regulation 7(1) of the previous regulations, the DSRs 2000.

⁹⁵⁵ The CCIACRs 2013, Schedule 2, Paragraph (f).

⁹⁵⁶ The DSRs 2000, Regulation 13(1) (a) (vi).

⁹⁵⁷ The CCIACRs 2013, Schedule 2, Paragraphs (l, and o).

⁹⁵⁸ *ibid*, Schedule 2, Paragraphs (v, and w).

However, it has been observed that the major problem with the new information policy is not about the length of information, but it is about the mechanism which is to be followed in providing information. In principle, the UK could not have avoided such a lengthy list of information because of the full- harmonisation policy of the CRD 2011. Even so, the study does not recommend reducing the list in future as every single piece of information performs a function in the distance environment. Nevertheless, it is not certain whether the consumer would be able to grasp such a long list of information unless an effective mechanistic manner and timing are set up to deliver it. This matter is equally important to protect consumers as the availability of information. In both cases, the risk is of uninformed decisions being made by consumers.

Unfortunately, the CCIACRs 2013 do not provide well developed mechanistic provisions which may ensure proper process of information. Regulation 13(1) requires all the information listed in Schedule 2 to be delivered at once before the contract is made, but in a clear and comprehensible manner. The requirement of timing does not tackle the issue as it is not certain whether the trader should give the consumer enough time to process the information. In addition, whilst the requirement of clarity and comprehensibility helps the information to be understandable, it may not encourage the consumer to read lengthy information. It is foreseeable that lengthy information demotivates the consumer from reading it. Thus, too much information can be equated with too little information in terms of the impact on consumers. In this way, the objective behind giving elaborate information in distance selling may become unattainable in many cases. What makes this issue serious is the courts do not consider the factors which may demotivate the consumer, rather than making him unable, of reading information.⁹⁵⁹ It is also immaterial whether the consumer has read the information before he made the contract or not.⁹⁶⁰

Therefore, there is a need for a new method of disseminating information to the consumer. The method should not touch on the list of information, but the manner and time in which the information should be provided. This may be achieved by reducing the amount of pre-contractual information, but still providing other information later.⁹⁶¹ This may be achieved by dividing information into pre-contractual information and post-contractual information. In such way, consumers will receive a less elaborate list of information at the

⁹⁵⁹ *L'Estrange v F. Graucob, Limited* [1934] 2 K.B. 394.

⁹⁶⁰ Law Commission (n 185) 11.

⁹⁶¹ Loos, *Review of the European Consumer Acquis* (n 188) 47, 48.

negotiation.⁹⁶² It is also possible to divide information into important information of both stages, negotiation and post- contract, and less important information of both stages, and make the first tranche of information available permanently, and the second one upon a request.

The study found that in Iraqi law the opposite is the case. The Iraqi CPL 2010 has failed to set up a picture of the information requirements for distance contracts because it simply does not recognise distance contracts. Most of the information set out in Articles 6 and 7 suits direct contracting. Only Article 7(6) provides a piece of information needed for distance contracts, which is the identity of traders. With this current provision, the information required is far below the information provided in the English CCIACRs 2013. The Iraqi KRP 2015 has a better approach to the information requirements. Article 21 addresses some information related to distance contracts such as the identity of the trader, the right of withdrawal, but it is still below the level of protection offered by English law.

To fill this gap, the study has explored the solutions set forth by civil law jurisprudence. Particularly the Ghestine's approach which requires a party who knows, or should have known, the information and its impact on the consumer, to provide such information. The study concluded that this approach provides the court with a useful guide to settle cases of distance selling under Article 1(3) of the Iraqi Civil Code, but it does not provide a satisfactory solution. It is proven that to enforce it, there must always be a decision from the court. Such decision is unlikely to take place unless gaps are found in the pertinent legislation. Even when a gap is found, it is not mandatory upon the court to apply jurisprudence. The wording set out in Article 1(3) shows that jurisprudence can only play the role of guide.⁹⁶³ Thus, a court may decide to apply it and another may not. More importantly, pre- contractual information should exist before the contract is made, while, the jurisprudence approach provides solutions after the contract has been made and the claim has been raised before the court.

In addition to the improper treatment with the quantity of information, Iraqi law needs substantial review work to the manner and time. It has been observed that the ICPL 2010 introduces information provisions in several articles but without any mention to the manner and time of sending information. Article 6 of the foregoing law gives the consumer a right

⁹⁶² Wilhelmsson and Twigg- Flesner (n 189) 452-454.

⁹⁶³ The Iraqi Civil Code, Article 1(3).

to receive information, but it is ambiguous the manner in which information should be received. This ambiguity does not only surround the manner of sending pre- contractual information, but also the manner of sending confirmation of information on a durable medium contrary to English law.⁹⁶⁴ It is not either clear whether the information should be in a clear and comprehensible manner, unlike Regulation 13(1) of the English CCIACRs 2013. The attitude of The KRP 2015 is arguably clearer in this regards. In the proposal, there is an explicit requirement to provide clear and adequate information.⁹⁶⁵ Regarding the time, the study found that the ICPL 2010 does not require any time for the information requirements.⁹⁶⁶ This may lead to the belief that information does not necessarily need to be provided at the negotiation stage. By contrast, the KRP 2015 implicitly requires information to be sent before the contact is made.⁹⁶⁷ However, non- existence of a specific time may overload the consumer with information if it is sent in unsuitable time. Therefore, provisions of the manner and time need a revision.

D. A Better Remedy Policy than ever before for the Information Breaches but yet to be Improved from the English Law Perspective, and no Particular Remedy for the Information Breaches in Distance Selling contracts from the Iraqi Law Perspective

Generally, the study found some similarities and dissimilarities between the laws in the liability system of the duty to provide pre-contractual information. They are found similar when a breach exists at the negotiation stage as the issue may be covered by tort law albeit on different bases, the *Hedley Byrne Principle* is the basis in English law and the *principle of good faith* is the basis in Iraqi law.⁹⁶⁸ However, they are different when a breach exists after the contract is made. In English law, such a breach constitutes contractual liability in the meaning of Regulation 18 of the CCIACRs 2013 which treats provided information as part of the contract. This approach prevents the consumer from a heavy burden of proof which he would bear if the claim was to be based upon tortious liability.⁹⁶⁹ In Iraqi law, the issue has not been treated, but it is jurisprudentially reckoned that the liability is tortious

⁹⁶⁴ The CCIACRs 2013, Regulation 16.

⁹⁶⁵ The KRP 2015, Article 21.

⁹⁶⁶ The ICPL 2010, Article 6.

⁹⁶⁷ The KRP 2015, Article 21.

⁹⁶⁸ See this Thesis, 111, and 115 -116.

⁹⁶⁹ See this Thesis, 115.

based. This approach, if adopted by the court, would place a big burden of proof on the consumer.⁹⁷⁰

Another important difference is that English law does not leave any room for the trader to avoid the liability at the breach. The liability is strict which does not require a fault from the trader's part. The study has observed this finding from two Regulations; firstly and most importantly, Regulation 17(1) places burden of proof upon the trader. When the burden of proof is upon the trader, the duty is a duty to achieve a particular result, then not having the result achieved makes the trader liable, without allowing him to disprove any fault. Secondly, Regulation 18 considers the duty as a contractual duty. As a result, it is unusual for the court to ask the trader to give a reason behind not fulfilling his contractual obligations.⁹⁷¹ In Iraqi law, the opposite is the case. Although, the commentators have posed various opinions under this heading, none of them is strong enough to certainly be allowed by the court. However, what is certain is the law does not define the duty as a contractual or non-contractual duty, which would help to identify the issue here. It also does not specify the person who bears the burden of proof. With this gap, the court will apply the general principle of proof which makes the claimant bear the burden of proof,⁹⁷² who is the consumer in the case under discussion. With this said, the duty is a duty to exercise a reasonable care, which allows the trader to avoid the liability if he could prove no fault on his part. This provision, for sure, is less protective to consumers than the provision adopted in English law. Thus, this matter also needs to be revised in Iraqi law in future.

Another big difference can be found in the remedy provided for the breaches. In the English CCIACRs 2013, three remedial provisions are introduced; the right not to bear charges in the case of not informing the consumer of the charges, the right not to be bound by information in the case when a change has occurred after sending information, and the right to have the period of cancellation extended in the case when the consumer is not informed of his right of cancellation.⁹⁷³ These remedies cover breaches of certain information and under certain conditions. They do not, however, cover any possible breach

⁹⁷⁰ See this Thesis, 122.

⁹⁷¹ *Raineri Plaintiff v Miles and Another Respondents (Defendants) v Wiejski and Another Appellants (Third Parties)* [1981] A.C. 1050, at 1086.

⁹⁷² The Iraqi Law of Proof (107) 1979, Article 7(1) "the onus of proof is upon the claimant, and the taking of an oath is upon him who denies".

⁹⁷³ The English CCIACRs 2013, Regulations 13(5, and7), 30.

could occur of other information provisions. For example, it is unknown the remedy applicable in the case where the trader fails to disclose his identity on the phone at the beginning of conversation, as required by Regulation 15. Also, the CCIACRs 2013 do not specify any remedy for any possible breach could occur of provisions of sending confirmation “post-contract information”. As if the trader fails to send confirmation or sent it but without including all the information referred in Schedule 2, or sent it within unreasonable time after the conclusion of the contract, contrary to Regulation 16.⁹⁷⁴ Fortunately, the CRA 2015 adds “the right to recover the money paid” as a general remedy to cover any possible breach which may happen of the information requirements in general. Thus, the consumer does not need to satisfy any specific conditions, unlike the CCIACRs 2013, other than identifying a breach of an information provision.

To rectify the situation a further review work may need to be made on the CCIACRs 2013 or distance information provisions under the CRA 2015. This step is necessary after the study found other English laws unable to fill the gap. For example, remedies under the CUTRs 2008 cover the case when information is untruly given, but they do not cover a failure to provide information. Also, misrepresentation remedies are irrelevant when the trader fails to provide information as well as other cases of breaches may not be easy to meet elements of misrepresentation, and if they meet, they do not distinguish consumers’ buyers from non- consumers’ buyers. In addition, provisions of mistake are irrelevant to the cases of information requirements. Finally, provisions of satisfactory quality under the CRA 2015,⁹⁷⁵ other than quality of goods, cannot cover other aspects of information as well as contracts made for services.

The range of remedies is found to be even more limited in Iraqi law. The ICPL 2010 offers the consumer certain remedies if there is a breach of provisions of Article 6. Whereas these remedies are irrelevant if the breach is of the information provisions which are set out in Articles 7, and 9. Furthermore, those remedies cover breaches in sale contracts, services and digital content contracts are excluded. The KRP 2015 is found similar to the ICPL 2010 in providing the same set of remedies. However, those remedies do not have direct link to Article 21, and 7 where information provisions are introduced. They are rather linked to cases where absence of information leads to certain effects. Here, a further review

⁹⁷⁴ See this Thesis, 127.

⁹⁷⁵ The CRA 2015, Section 9(4).

work needs to be made on this matter under consumer laws. To rectify the matter it is not ideal to rely on general principles for various reasons. For example, remedies of fraud, similar to the English misrepresentation, do not cover a failure to provide information. Remedies of mistake, on the other hand, require some conditions, some of which are difficult for the consumers at distance to satisfy.⁹⁷⁶ If the conditions are met, they do not cover all aspects of information other than quality of the thing sold. Finally, guarantee of latent defects cannot be better as it deals with defects found in the goods and it cannot cover information problems with services and digital content.

E. More Clarity is Required from English Law than the Iraqi KRP 2015 Regarding the Use of the Right of Cancellation without Restrictions and Wavier

The right of cancellation, or withdrawal as defined by the KRP 2015, is introduced to enable the consumer, who makes a contract at distance, to cancel the contract without giving any reasons and without incurring any liability. The function is to provide the consumer with an opportunity to actually inspect the products in sale contracts, and to think calmly of the decision about the contract in services and digital content contracts. This suggests that any restrictions on the use of this right out of the law should not have any effect. On this matter, the CRD 2011 clearly makes ineffective “any contractual terms which directly or indirectly waive or restrict the rights granted by the Directive”.⁹⁷⁷

However, the English CCIACRs 2013 has not implemented this Article under the reason that regulations are mandatory. This omission may create confusion particularly when the consumer waives his right of cancellation in return for a reduced price. It has been observed that there are many reasons which may create a belief that waiver is allowed on the part of the consumer. For example, the English CCIACRs 2013 do not state whether the right to cancel is renounceable or not, contrary to Article 25 of the CRD 2011. Also, rules of cancellation are unilaterally mandatory upon traders but optional upon the consumer. As evidence, in most cases the consumer prefers to stay with the contract rather than cancellation.⁹⁷⁸ This does not need explanation because distance contracts are not made to give the right of cancellation, and they are not made to be cancelled in the first place, but they are made to provide array of rights which are incomparable to the right to

⁹⁷⁶ The Iraqi Civil Code, Article 118.

⁹⁷⁷ The CRD 2011, Article 25.

⁹⁷⁸ Cohen (n 698) 19; O'Sullivan (n 42) 77.

cancellation. Furthermore, being able to waive the right to cancel on the part of consumers may bring some positive aspects to the whole bargain. For example, a consumer may decide to renounce his right to cancel in return for a lower price, or he may prefer not to have a right to cancel if he can analyse contractual benefits and costs.⁹⁷⁹

Under this heading, the Iraqi KRP 2015 is clearer when states in Article 22(3) that “it is null any conditions in the offer or the contract, or any agreement which contradicts provisions of Paragraph (1) of this Article”. Accordingly, the right of withdrawal under the proposal is not subject to any waiver by the consumer, even if the waiver is in exchange for an amount of money. By default, any agreement which includes a waiver of the right of withdrawal, acknowledged by the consumer would be incompatible with Article 22(3).

F. Rules of the Period of Cancellation for Sale Contracts Need to be further examined from the Iraqi Law perspective

Firstly, the study has observed that the English CCIACRs 2013, as set out in Regulation 29(2), allow the distance consumer to cancel a sale contract after the contract is made and before he receives the goods. This provision does not affect Regulation 30(3) which specifies the time when the period of cancellation begins to run in sale contracts. As the purpose of Regulation 30(3) is to identify the time when the period ends, but the time when it begins is clearly stated in Regulation 29(2).

However, it is found that the Iraqi KRP 2015 does not provide a similar provision to Regulation 29(2) of the English CCIACRs 2013. Thus, Article 22 of the Iraqi KRP 2015 remains the only provision which deals with the time when the period of withdrawal should begin, and the time when it should end. According to Article 22, the consumer may cancel the contract “during the period of withdrawal”, and not before or after. This approach is not in the consumer’s interest. If the consumer is in a position to cancel the contract after a few minutes of making it, he should not be compelled to wait for the goods to come into his physical possession so long as he is allowed to withdraw from the contract without giving any reasons. A contrary interpretation would mean that the consumer should wait for the goods to come into his possession, then he would make the same decision which he made before he obtains the possession. In this scenario, the consumer

⁹⁷⁹ Luzak, 'To Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into account its Behavioural Effects on Consumers' (n 42) 106.

wastes his time on waiting. He may also miss an opportunity to make a deal with another provider. The supplier also incurs costs of delivery which will not happen, of course, if the consumer is allowed to cancel the contract before the trader delivers the goods. Furthermore, the supplier may miss other bargains which he might have about the same item during the time between the conclusion of the contract and receiving the goods.

Therefore, the consumer should be allowed to withdraw from the contract before he actually possesses the goods, as it is the case under Regulation 29(2) of the English CCIACRs 2013. This recommendation does not create any legal challenges since cancellation is granted for a function, which is related to inspection of the goods, but it does not require that function to be achieved since the right is to be used without giving any reasons.

Secondly, it is found that Regulation 30(4) of the English CCIACRs 2013 makes the period run after the day on which the last of the goods comes into the physical possession of the consumer. However, this Regulation does not affect the consumer's right to cancel the contract after receiving each good or even before receiving any goods. As Regulation 29(2) entitles the consumer to cancel the contract from the time when the contract is made. This current provision prolongs the period of cancellation. For example, if each good had to individually be treated for the purpose of running the period, then the cancellation period would run from the day when the first of goods comes into the consumer's possession. In this way, the cancellation period for the first of goods arrived would run out earlier than the period of the last of goods. Under Iraqi law, these provisions are missing.

G. Some Rules of Cancellation Effects Need Further Review from both Laws

It has been observed that the use of the right of cancellation in both laws ends all the contractual relations and obligations created under the cancelled contracts. Accordingly, the parties must stop performing unperformed obligations, and they must return back to each other all the things which are exchanged under performed obligations. However, the rules which are to be followed in returning exchanged obligations are different under the laws. The English CCIACRs 2013 is positive in one way and negative in another in dealing with this matter. First, as a positive point, Regulation 35(1) specifies 14 days for the parties to return what they have received from each other, this is important for legal certainty.

However, as a negative point, the law makes the consumer begin first since this period runs from the day when he informs the trader about his decision.⁹⁸⁰ While the trader will be in the position to withhold the reimbursement until he receives the goods or the notification on sending them, and whichever is earliest.⁹⁸¹ Thus, the law prohibits the consumer from the right to withhold delivery which he would use against any delay or abstention from the trader in making the repayment. What makes the situation even worse is the law does not provide any other remedy for the consumer if he does not recover the payment which he made timeously. With bearing in mind that making the trader to begin first may bring some difficulties to him as it would be hard for him to follow and collect the goods from consumers' addresses.

By contrast, it is found that the Kurdish proposal does not specify any time limit for the parties to perform their obligations about returns. It does not also impose any remedy when a party fails to perform his part of the duty. This attitude is found negative in one way and positive in another. With no time limit, both contracting parties are encouraged to procrastinate in performing their returns, which will affect the principle of legal certainty. On the other hand, not providing a compulsory time limit leaves room for each party to withhold his duty until the other party performs his duty.⁹⁸² At this point, the consumer is further entitled to claim for the legal interest.⁹⁸³

H. Lessons to be learnt for Iraqi Law

Iraqi Law should be reformed, either under current laws or via new legislation, to ensure that consumers can acquire proper protection in distance selling contracts. To do so, there are lessons can be learnt from English Law. In the first place, distance selling contracts should be defined in the way that is similar to Regulation 5 of the English CCIACRs 2013. Subsequently, the entitlement to information should be improved under Article 6 of the Iraqi CPL 2010, and Article 21 of the Iraqi KRP 2015, to include information which has a direct connection with distance selling contracts. Most of that information is listed in Schedule 2 of the English CCIACRs 2013 such as information regarding: the identity of the supplier,⁹⁸⁴ all additional charges,⁹⁸⁵ the cost of using the means of distance

⁹⁸⁰ The CCIACRs 2013, Regulation 35(4).

⁹⁸¹ *ibid*, Regulation 34(5).

⁹⁸² The Iraqi Civil Code, Articles 177(1), and 280 (2).

⁹⁸³ *ibid*, Article 171.

⁹⁸⁴ The English CCIACRs 2013, Schedule 2, Paragraphs (b, c, d, and e).

communication and the arrangements for payment, delivery, performance,⁹⁸⁶ the right of withdrawal,⁹⁸⁷ and digital content.⁹⁸⁸ In addition to the information regarding technical steps of concluding an electronic contract, as set out in Regulation 9 of the English ECRs 2002. Also, the way should information be delivered should be stated in the way that is similar to Regulations 13 and 16 of the English CCIACRs 2013, stressing on the fact that the information can be made available or sent, it should be in a clear and comprehensible manner, and on a durable medium. This is to enable the consumer to receive information without difficulty, and to make reference to it at the time when a dispute arises. Furthermore, the reform should include clear remedies for the breach of the information requirements. At this point, Regulations 13(5, and 6), 31 of the English CCIACRs 2013, and Sections 11(4), 19(1, 3, 5, 9, and 11), 37(2) 50(3) of the English CRA 2015 may be taken into consideration.

Alongside the information requirements, a right of withdrawal should be introduced at level of the Iraqi federal laws, and this attempt may benefit from the English CCIACRs 2013. At the same time, the right of withdrawal under the Iraqi KRP 2015 should be improved to reach the level of the English CCIACRs 2013. So, the aspects of the right of withdrawal which need to be introduced: definition of the right of withdrawal,⁹⁸⁹ rules of the period of cancellation,⁹⁹⁰ extension of the period of cancellation,⁹⁹¹ exercise of the right to withdraw,⁹⁹² and effect of withdrawal.⁹⁹³

⁹⁸⁵ The English CCIACRs 2013, Schedule 2, Paragraph (g).

⁹⁸⁶ *ibid*, Schedule 2, Paragraphs (I, and j).

⁹⁸⁷ *ibid*, Schedule 2, Paragraphs (m, n, and o).

⁹⁸⁸ *ibid*, Schedule 2, Paragraphs (v, and w).

⁹⁸⁹ *ibid*, Regulation 29.

⁹⁹⁰ *ibid*, Regulation 30.

⁹⁹¹ *ibid*, Regulation 31.

⁹⁹² *ibid*, Regulation 32.

⁹⁹³ *ibid*, Regulations 34-38.

I. The Future of Study

Researching in the area of distance selling contracts is subject to further review in the future. The rapid development in the area of communication may come up with new technologies, different from those which are in use in today's dealing. This may create further challenges to the current provisions of the duty to provide pre- contractual information and the right of cancellation. Also, the study has only covered the information requirements and the right of cancellation. Thus, studies are needed to cover other important aspects of the distance selling contracts particularly performance of these contracts.

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