

# Challenges Arising from the Retailer's Use of Standard Terms in B2C E-Contracts

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## Abstract

E-contracting is constantly growing. In the majority of retail transactions, i.e. B2C (Business-to-Consumer) the consumer does not have enough opportunity to negotiate the terms of the contract. Instead, the retailer expects the consumer to contract according to its standard terms, normally displayed on website.

Kuwaiti law no. 20/2014 on electronic transactions and law no. 39/2014 on the protection of the consumer do not include an express provision on the incorporation of standard terms used by either party into the e-contract. Furthermore, the general rules of Kuwaiti Civil Code on making the contract, although including a provision (Article 51) on model contracts, do not directly govern the issue of incorporation of standard terms into the contract.

In comparative (general) contract law, standard terms used by the retailer shall only be incorporated into the contract if the consumer knew or at least was given the opportunity to know about standard terms before the contract comes to exist. Thus, how can an online retailer ensure that it gives the consumer sufficient opportunity to know about its standard terms? This paper adopts the analytical methodology to answer this question under Kuwaiti law. It discusses the methods of making e-contracts, the methods of using standard terms by retailers in e-contracting, the requirements of including standard terms into the B2C e-contracts under Kuwaiti law. It concludes with a recommendation to make a new specific provision in this regard.

**Key words:** Standard terms; model contracts; adhesion contracts; B2C e-contract; Kuwaiti Law

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## **I. Introduction**

E-commerce, i.e. commercial transactions conducted electronically on the Internet is divided into three categories: online retailing, electric markets, and online auctions. Online retailing, that is to say e-contracting is constantly growing in breadth and scope.<sup>(1)</sup> Today, contracts are very often concluded and / or executed through electronic means, such as web-page and e-mail.

Parties to traditional contracts, as well as parties to e-contracts frequently use standard terms. Standard terms are defined as contract terms which are prepared in advance for general and repeatedly used by one party. They are actually used without negotiation with the other party.<sup>(2)</sup> If one of the parties only uses his standard terms, the question would be whether and how they are incorporated into the contract. If both parties use their standard terms, another question would arise: What shall happen if both sets of standard terms conflict (the battle – of - the forms)?

The parties to the contract, whether traditional or electronic, can be businesses (B2B, such as between a manufacturer and a wholesaler or between a wholesaler and a retailer), consumers (C2C), or a business and consumer (B2C). B2C entails the retailers that want to market their goods or services to consumers.<sup>(3)</sup> In the majority of retail transactions (B2C), the consumer does not have enough opportunity to negotiate the terms of the contract. Instead, the retailer expects the consumer to contract according to its standard terms,<sup>(4)</sup> displayed on its website or sent to him via e-mail.

This paper will focus only on the question of incorporation of the retailer's

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(1) Becher, S. I. & Zarsky, T. Z., E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation, Michigan Telecommunication and Technology Law Review, 2008, p. 305, available at :[http://law.haifa.ac.il/images/documents/E-Contract\\_Doctrine\\_2.0\\_Standard\\_Form\\_Contracting\\_in\\_the\\_Age\\_of.pdf](http://law.haifa.ac.il/images/documents/E-Contract_Doctrine_2.0_Standard_Form_Contracting_in_the_Age_of.pdf)retrieved on 16/02/19.

(2) Maxeiner, James R., Standard-Terms Contracting in the Global Electronic Age: European Alternatives, Yale Journal of International Law, Vol. 28, Issue 1, 2003, pp. 109-182, at 110, available at :<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1205&context=yjil>retrieved on 12/02/19.

Article 2.1.19(2) of the Unidroit Principles of the International Commercial Contracts says: "Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party." See <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=109294>retrieved on 05/03/2019.

(3) Kumar, Vinod & Raheja, Gagandeep, Business to Business (B2B) and Business to Consumer (B2C) Management, International Journal of Computers & Technology, Vol. 3 No. 3, Nov-Dec, 2012, p. 447.

(4) Becher & Zarsky, supra fn1, p. 305.

standard terms into the B2C e-contract in which a retailer sells a product or service directly to a consumer via an electronic means.<sup>(5)</sup> This paper will not address the use of standard terms in other types of contracts, namely B2B and C2C. It also excludes from its scope the question of the battle – of – the forms, i.e. the use of colliding standard terms by both parties.

Typically, the control of standard terms is divided into two types: procedural control and content control.<sup>(6)</sup> The former controls the incorporation of the standard terms into the contract. The latter controls the substance of the standard terms themselves. This paper addresses the procedural control only.

Both Kuwaiti law no. 20/2014 on electronic transactions (hereafter electronic transactions law) and Kuwaiti law no. 39/2014 on the protection of the consumer (hereafter consumer's protection law) do not including an express provision on the incorporation of either party's standard terms into the (electronic) contract. Furthermore, the general rules of the 1980 Kuwaiti Civil Code (hereafter KCC) on making the contract, although include a provision (Article 51) on model contracts do not directly govern the issue of incorporation of standard terms into the contract.

Nevertheless, the authors will attempt to answer the question of incorporation of the retailer's standard terms into the B2C e-contract through analyzing the rules of relevant Kuwaiti laws. Part 2 will describe the methods of making e-contracts. Part 3 will address the methods of using standard terms by retailers in e-contracting. Part 4 will discuss whether and how such standard terms incorporate into the B2C e-contracts under Kuwaiti law.

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(5) Kumar & Raheja have classified five types of B2C e-commerce companies: direct sellers (which includes retailers and manufacturers selling products or services to consumers); online intermediaries (brokers); advertising based models (websites offer a free service to consumers and use advertising revenue to cover costs); community-based models (that combine the advertising method that relies on traffic at sites that focus on specialized groups to create communities); and fee-based models (like online subscription to journals or movie sites such as NetFlix). Kumar & Raheja, *supra* fn3, p. 450.

(6) Maxeiner, *supra* fn2, pp. 114-115. Malbon, Justin, *Online Cross-Border Consumer Transactions: A Proposal for Developing Fair Standard Form Contract Terms*, 37 U. W. Austl. L. Rev. 2013, pp. 20-44, at 29, available at HeinOnline.

Al-Anzy speaks about three types of control of the standard terms: "(i) remedial mechanism (i.e. after the conclusion of the contract), (ii) preventive mechanism (i.e. between the drafting and conclusion of the contract), and (iii) ultra-preventive mechanism (i.e. during the drafting of the contract and prior to its conclusion)." Al-Anzy, Sami M. Al-Hathal, *Unfair Contract Terms Under the Kuwaiti Civil Code: A Critical Analysis and Suggestions for Reform*, PhD thesis, University of Glasgow, 2014, p. 190, available at: <http://theses.gla.ac.uk/5452/1/2014Al-AnzyPhd.pdf> retrieved on 10/02/19

## II. Methods of Making E-Contracts

Generally, parties manifest their consent to the contract in any form unless they agree or the law states otherwise.<sup>(7)</sup> In e-contracts, there are certain methods to express intention that fit with the electronic means used,<sup>(8)</sup> like e-mail, social media, and web-page<sup>(9)</sup> (web-wrap, browse-wrap and shrink-wrap).

In e-mail, messages are electronically sent and received from one device (e.g. computer, smart phone, or tablet) to another connected to the internet;<sup>(10)</sup> users can correspond easily and quickly.<sup>(11)</sup> Offer and acceptance can be communicated via e-mail. The email containing the offer or acceptance can be sent through sender's (offeror's or offeree's) outbox to the other party's (offeree's or offeror's) inbox. The parties express their consent through writing (electronic messages).<sup>(12)</sup>

Social media are interactive computer-mediated technologies that facilitate the creation and sharing of information, ideas, career interests and other forms of expression via virtual communities and networks. Social media websites include Facebook (and its associated Facebook Messenger), YouTube, Twitter, Snapchat, Viber... etc.<sup>(13)</sup> Many businesses are now using social media to contract with their consumers.<sup>(14)</sup> The consumer may express his intent to contract through writing (text message), voice (talking on

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(7) Jabr, Naeem Kazem & Husein, Walid Kazem, Acceptance in Electronic contract, *Al-Mustansiriya Journal of Arts* 2007, Issue 46, pp. 1-19, at 4 (in Arabic).

In this regard, Article 34 KCC makes it clear that an expression of intent (like offer or acceptance) may be made orally or in writing, by such means as are customary, by an interchange of acts demonstrating the mutual consent, or by adopting any course in respect of which the circumstances leave no doubt that it demonstrates the intended by such course.

(8) Jabr & Husein, *supra* fn7, p. 4.

(9) Mahmoud, Feras Bahr, Electronic Expression of Will, *Journal of the College of Law / Al-Nahrain University*, Vol. 16, Issue 3, 2014, pp. 29-56, at 38 (in Arabic). Sulaiman, Eman M. A., Formation and Proof of Electronic Contract – Legal Aspects of the Commercial e-Contract, *Dar Al-Jamia'a Al-Jadidah, Alexandria*, 2008, p. 96 (in Arabic).

(10) Mahmoud, *supra* fn9, p. 38.

(11) Jabr & Husein, *supra* fn7, p. 4. Al-Mzeni, Ghazi bin Fahd bin Ghazi, Consumer Legal Protection in Commercial E-Contracts – An Inductive, Practical and Comparative Study, *Dar –El-Kitab Al-Jamia'i*, 2018, p. 329 (in Arabic).

(12) Mahmoud, *supra* fn9, p. 39. Sulaiman, *supra* fn9, p. 90.

(13) Wikipedia: [https://en.wikipedia.org/wiki/Social\\_media](https://en.wikipedia.org/wiki/Social_media)  
Mahmoud, *supra* fn9, p. 41.

(14) Kumar & Raheja, *supra* fn3, p. 447.

microphone or voice message)<sup>(15)</sup> or customary signal<sup>(16)</sup> (the smiling face means acceptance; the angry face means rejection).<sup>(17)</sup>

The web-page, World Wide Web (www)<sup>(18)</sup> can be used to make the web-wrap contracts (also called click-wrap contracts<sup>(19)</sup>). The retailer may provide a display of products and prices on his website. The consumer can scroll through the website to preview the products; he may click on the product for more information. If interested, he may order the product by clicking “Submit”, “Place the Order”, “I Accept” or a like.<sup>(20)</sup> The consumer may express his acceptance through writing,<sup>(21)</sup> signals or codes agreed upon or customarily used by internet users.<sup>(22)</sup>

The consumer’s consent can also be expressed through a conduct that manifests its consent.<sup>(23)</sup> Thus, downloading a file or a program after paying its price with his credit card, for example, will manifest the consumer’s acceptance.<sup>(24)</sup>

Browse-wrap contract refers to contracts or license agreements covering access to or use of materials on a website or downloadable product. There will be a hyperlink at the bottom of the homepage refers to the standard terms. These terms normally state that by entering the website or downloading the product, users agree to be bound by those terms. Obviously, this type of e-contract does not require an express manifestation of consent. Rather, a web-site user purportedly gives its implicit consent by simply using the product, such as by

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(15) Sulaiman, *supra* fn9, pp. 90-91. Al-Mzeni, *supra* fn11, p. 333.

(16) Al-Shieban, Abdul-Razaq Ahmad, *Expression of Will in Consumer E-Contract*, Journal of Anbar University for Law and Political Sciences, 2015, Vol. 1, Issue 10, pp. 276-241, at 226 (in Arabic). Mahmoud, *supra* fn9, p. 41.

(17) Mahmoud, *supra* fn9, p. 41.

(18) The World Wide Web (WWW), commonly known as the Web, is an information space where documents and other web resources are identified by Uniform Resource Locators (URLs, such as <https://www.example.com/>), which may be interlinked by hypertext, and are accessible over the Internet. The resources of the WWW may be accessed by users by a software application called a web browser. [https://en.wikipedia.org/wiki/World\\_Wide\\_Web](https://en.wikipedia.org/wiki/World_Wide_Web)

(19) Wang, Faye Fangfei, *The incorporation of terms into commercial contracts: a reassessment in the digital age*, Journal of Business Law (2015), p. 94, available at: <http://bura.brunel.ac.uk/handle/2438/11004> retrieved on 12/02/19.

(20) Mahmoud, *supra* fn9, p. 40. Sulaiman, *supra* fn9, p. 92.

(21) Jabr & Husein, *supra* fn7, pp. 4, 9. Al-Mzeni, *supra* fn11, p. 327.

(22) Al-Shieban, *supra* fn16, p. 225. Al-Mzeni, *supra* fn11, p. 327.

(23) Mahmoud, *supra* fn9, p. 42.

(24) Al-Shieban, *supra* fn16, p. 229. Al-Mariya, Amr Mohammad, *Electronic Sale Contract: Rules and Effects – A Comparative Study between Islamic Fiqh and Civil Law*, Dar El-Hamia’a Al-Jadidah, Alexandria, 2017, p. 259 (in Arabic).

entering the website or downloading software.<sup>(25)</sup>

Shrink-wrap contract usually applies to a contract for a software product. The term 'shrink-wrap' describes the shrink wrap plastic wrapping which coats software boxes or the standard terms which come with products on delivery. By the time the consumer opens the box, and thus reads the contract terms, he has already paid for the software.<sup>(26)</sup> Theoretically, the consumer can return the software or accept the terms. In practice, however, software retailers generally refuse to accept software returned under such conditions. Besides, the opening of the box by the consumer would be deemed as a conduct that indicates his acceptance. Thus, the consumer will normally not return the software; he will rather be deemed to accept the contract after he opens the product.<sup>(27)</sup>

### III. Electronic Methods of Using Standard Terms

The retailer may alert the consumer to his standard terms by a statement that the contract is subject to his own standard terms. The retailer normally states how and where the standard terms can be found, too.

Availability of the retailer's standard terms to the consumer is generally realized by placing such standard terms on the retailer's website. The retailer may include a hyperlink to the standard terms in the statement on the reference to such terms. The retailer may as well incorporate a scrollable dialogue box in the website that contains the standard terms in full. He may also display the standard terms on the website in a downloadable PDF or Word file. He may also provide a scanned copy or picture in the consumer's online account for later access. Some retailers offer the consumers a requesting form for hard copies, too.

The retailer may send the statement that refers to the standard terms through an e-mail with an attachment including such standard terms in full. As long as such terms are conspicuously notified to the consumer,<sup>(28)</sup> the latter will have the chance to download, save and read them on his device or even to print them out.

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(25) Wang, *supra* fn19, p.94.

(26) *Ibid*, p. 95.

(27) Daiza, Heather, *Wrap Contracts : How They Can Work Better For Businesses And Consumers*, California Western Law Review, Vol. 54, 2017, p. 216, available at: <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1662&context=cwlr> retrieved on 16/02/19.

(28) Eiselen, Sieg, *The Requirements for the Inclusion of Standard Terms in International Sales Contracts* (April 19, 2011), Potchefstroom Electronic Law Journal, Vol. 14, No. 1, 2011, p. 7/234, available at: SSRN: <https://ssrn.com/abstract=1838362> retrieved on 24/02/19.

#### IV. Discussion of Methods of Using Standard Terms in Light of Kuwait Law

In this part the researchers will consider all Kuwaiti laws relating to the question of inclusion of the retailer's standard terms into the B2C e-contract; namely, the electronic transactions law, the consumer's protection law, and KCC.

##### IV.1 Standard Terms under Kuwaiti Laws Nos. 20/2014 and 39/2014

Kuwait electronic transactions law employs the 'functional equivalent approach'; the function of the paper-based document could be fulfilled through electronic documents or records.<sup>(29)</sup> Article 5 thereof says: '*Offer, acceptance and all other issues relating to contracting, including any amendment or revocation of offer and acceptance, may be expressed totally or partially through electronic transactions. The Expression shall not lose its authenticity, effect or enforceability for the mere fact it was undertaken through one electronic correspondence or more.*'<sup>(30)</sup>

However, electronic transactions law does not include any provisions on the incorporation of standard terms used by the retailer *vis-à-vis* the consumer in the B2C e-contract. Nor does consumer's protection law<sup>(31)</sup> contain such a provision. Indeed, the latter includes other types of protection of the consumer against the retailer's standard terms. Article 6 thereof gives 'the National Committee for the Protection of the Consumer' the power to establish the committees necessary to achieve its task, including a committee to study standard contracts in the different spheres of consumption of commodities and services to avoid unfair terms for the consumer.

Such a committee is already set up, but its task is to review the standard terms in the consumers' contracts in advance.<sup>(32)</sup> Such a preventive mechanism aims at eliminating prejudicial terms of all existing standard contracts in the market to

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(29) Article 1 thereof defines the electronic documents or records as: 'The group of data or date which are created, stored, extracted, copied, sent or notified, or received whether partially or totally through an electronic means, on a tangible medium or any other electronic mediums, which can be retrieved in an understandable way.'

(30) Article 18 thereof also equates the electronic signature with the traditional signature. The legal effect of an electronic signature shall not be disregarded for its mere receipt in an electronic shape.

(31) Article 1 thereof defines the consumer as «every natural or juristic person who purchases a commodity or a service against an offset, benefits from either of them for the purpose of consumption, or it is dealt or contracted with him in its respect.»

(32) Article 6(5)(c) consumer's protection law.

In practice, however...

protect all prospective consumers.<sup>(33)</sup> It does not deal with the incorporation of the retailer's standard terms into the contract with regard to a specific consumer.<sup>(34)</sup>

According to Article 11 of consumer's protection law, each condition in the contract concluded with a consumer shall be null and void if it exempts the procurer of the commodity or the provider of the service from any of his obligations or diminishes any of the rights of the consumer under this law. Likewise, Article 33 thereof makes any condition or agreement null and void if it violates or diminishes the rights of the consumer or exempts the provider from his obligations.

While Articles 11 & 33 deal with the content control of standard terms, Article 6 tackles a phase prior to the making of the contract. Thus, the question of the incorporation of the retailer's standard terms into the contract shall be discussed according to KCC rules on making the contract.

### **IV.2 Standard Terms under KCC**

#### **IV.2.a Standard Terms and Model Contracts:**

Article 51 KCC governs the so-called 'model contracts'. Model contracts are written in advance by a private or public entity, such as trade unions, chambers of commerce, banking associations, the State or any other public entity. The model contract is just a sample of a contract; it gives the parties the opportunity to choose the model contract that suits them. According to Article 51(1) KCC, *'the provisions of a model contract or bylaws shall apply if the parties have agreed that they will be applied to their affairs, save where either party establishes that at the time of concluding the agreement, he had no knowledge of the said provisions and did not have the opportunity to know them.'*

Model contracts are different from standard terms. Whereas the former is written by a third party, the latter is prepared in advance by the retailer to be incorporated in the contract with any prospected consumer.

#### **IV.2.b Standard Terms and Adhesion Contracts:**

Articles 80-82 KCC deal with the adhesion contracts. An adhesion contract is drafted by the party in a position of power, leaving the weaker party to take it or leave it.<sup>(35)</sup> Generally, the weaker party shall be obliged to accept the

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(33) This is similar to the powers of the UK Office for Fair Trade (OFT), for more details see Malbon, *supra* fn29, p. 40.

(34) Al-Anzy, *supra* fn6, p. 191.

(35) Cf. Wilkinson-Ryan, Tess, *The Perverse Consequences of Disclosing Standard Terms*, 103 *Cornell L. Rev.* 2017, pp. 117-175, at 118, available at HeinOnline.

adhesion contract even if it contains unfair clauses.<sup>(36)</sup>

According to Kuwait Court of Cassation, an adhesion contract shall have the following three characteristics: a. the object of the contract must relate to goods or services of an essential need for consumers, b. the provider of such goods or services is a monopoly, and c. the monopoly makes the contractual offer for public use.<sup>(37)</sup>

By contrast, use of standard terms by the retailer is not limited to contracts whose object is necessary for consumers.<sup>(38)</sup> Nor does such use require a monopoly for the goods or services provided to the consumer by the retailer.<sup>(39)</sup>

Obviously, standard terms are different from model contracts and adhesion contracts. Contrary to the general contract law in other countries (e.g. BGB, in Germany), KCC contains no specific rules on the inclusion of standard terms into the contract. KCC (Articles 81-82) only controls the substance of adhesion contracts. Article 51 KCC regulates the manifestation of the parties consent to the contractual provisions already prepared by a third party (model contract or bylaws). As for the procedural control of standard terms, it should therefore be discussed under the general rules of the manifestation of consent by the contracting parties (offer and acceptance).

In addition, KCC does not provide any special control over model contracts. Eventually, Article 51 KCC states for the application of the KCC general rules on manifestation of assent. Indeed, these are the rules that also apply to the control of standard terms (*infra*, IV.2.c).

#### **IV.2.c Standard Terms and KCC Rules on Offer and Acceptance:**

KCC does not directly govern the issue of incorporation of standard terms into the contract. Regardless of the fact that one of the parties (i.e. the consumer) is the weaker party, this issue should therefore be solved according to the general rules of making the contract: offer and acceptance.

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(36) That's why Articles 81-82 KCC provide him with some protection: a. by granting the court broad discretion to vary or even cancel the unfair term, and b. by ordering the court to interpret the unfair term in favor of the weaker party. This protection belongs to the content control of the adhesion contract. In contrast, KCC does not include any provision to protect the consent of the adhering party at the time of making the contract; there is no procedural control on the adhesion contracts. Al-Anzy, *supra* fn6, p. 70.

(37) Court of Cassation, Commercial Matters, Kuwait, Appeal no.639 of the 1998 judicial year, decision dated 13 June 1999, available at: <http://www.saljas.com/> retrieved on 25/02/19.

(38) Pro Al-Mariya, *supra* fn24, p. 153.

(39) Pro Al-Mariya, *supra* fn24, p. 153.

As for the offer, Article 39 states that: ‘A proposal comprising the determination of the offeror to make the contract on mere acceptance by the offeree is deemed to be an offer; it must contain at least the nature and basic stipulations of the contract to be made.’

With regard to the acceptance, Article 43 states that the acceptance must coincide with the offer; it says that: ‘2.For the conclusion of a contract, the acceptance must be conformant with the offer.3.Acceptance which is coupled with that which increases, decreases or modifies in any other way the offer, is deemed to be a rejection comprising a new offer.’

Under Article 34 KCC, an expression of intent (like offer or acceptance) may be made orally or in writing, by such means as are customary, by an interchange of acts demonstrating the mutual consent, or by adopting any course in respect of which the circumstances leave no doubt that it demonstrates the intended by such course. Under Article 5 electronic transactions law, the offer (or acceptance) can be made by different electronic means.<sup>(40)</sup> The content of a website<sup>(41)</sup> or an e-mail message<sup>(42)</sup> can be considered an offer.<sup>(43)</sup>

The terms will become part of the contract when both parties consent to them. Given the stronger bargaining power the retailer has,<sup>(44)</sup> the standard terms are generally drafted by him to favor his own interests.<sup>(45)</sup>The consumer must know all the terms of the offer and be able to both read and understand

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(40) Under Article 8 electronic transactions law, the contract may also be concluded without any personal or direct inference of a natural person. Indeed, contracting may be undertaken between automated electronic systems that include two electronic systems or more which are prepared and programmed in advance to execute such assignments. Contracting may also be undertaken between an electronic system attributed to a natural or juristic person and a natural person if the latter knew or should have known that such system will undertake the task of making the contract.

(41) According to Article 40(2) KCC, an offer of goods accompanied by an indication of the consideration shall be regarded as an offer.

(42) Under Article 5 electronic transactions law, an offer expressed through electronic means shall not lose its authenticity, effect or enforceability for the mere fact it was undertaken through an electronic correspondence or more.

(43) Cf. Argy, Philip & Martin, Nicholas, The effective formation of contracts by electronic means, *Computers & Law*, p. 20, available at: <http://classic.austlii.edu.au/au/journals/ANZCompuLawJl/2001/33.pdf> retrieved on 18/02/19.

(44) Malbon, *supra* fn29, p. 32. Meinel, Matt, Requiring Mutual Assent in the 21st Century: How to Modify Wrap Contracts to Reflect Consumer's Reality, *N.C. J.L. & Tech.*, Vol. 18, Issue 5, 2016, pp. 180-213, at 190, available at: <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1336&context=ncjolt> retrieved on 14/02/19.

(45) Maxeiner, *supra* fn2, p. 147. Malbon, *supra* fn29, p. 30.

them<sup>(46)</sup> if their acceptance is going to be ‘conformant with the offer’ in the meaning of Article 43(2) KCC. The consumer’s consent to the contract shall be an ‘informed consent’ to incorporating the retailer’s standard terms into the contract.<sup>(47)</sup> Under the good faith principle, the retailer has to inform the consumer about such standard terms.<sup>(48)</sup>

In other words, in order to validly incorporate its standard terms into the contract, the retailer may not only rely on an incorporation clause in the offer, without making the text of the standard terms themselves available for the consumer.<sup>(49)</sup> Even if the consumer accepts the retailer’s offer, the retailer’s standard terms (not consented to by the consumer) will not be incorporated into the contract<sup>(50)</sup> (that may be concluded through conduct, e.g. consumer’s payment for the retailer’s product).

Similarly, the consumer cannot be expected to inquire the retailer’s standard terms,<sup>(51)</sup> e.g. requesting them from him.<sup>(52)</sup> This would be contrary to the principle of good faith stated in Article 197 KCC.<sup>(53)</sup> Rather, the retailer shall give the consumer a notice of the standard terms and shall make them understandable for him.<sup>(54)</sup>

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(46) Cf. Wilkinson-Ryan, *supra* fn35, p. 119. Eiselen, *supra* fn28, p. 7/234, ‘where the offeror has clearly communicated to the offeree that it wanted the agreement to be subject to its standard terms then the standard terms should be applicable where the offeree accepts the offer, unless the offeree clearly indicates that it does not agree to such incorporation.’

(47) Cf. Wang, *supra* fn19, p. 97.

(48) Cf. Al-Mzeni, *supra* fn11, p. 373.

(49) Pro Argy & Martin, *supra* fn43, p. 22.

Contra Al-Anzy, *supra* fn6, p. 70: As for the adhesion contracts, he argues that ‘if the stronger party refers in the original document of the contract to other documents that were not readily available before contracting and the adhering party signs the original document, then his signature binds him to the incorporated terms even if he did not read them.’

(50) Cf. Loos, M.B.M., Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law, *European Review of Private Law*, Vol. 23, issue 2, pp. 179-193, at 189, available at: [https://pure.uva.nl/ws/files/2537599/166461\\_469191.pdf](https://pure.uva.nl/ws/files/2537599/166461_469191.pdf) retrieved on 20/02/19.

(51) Cf. Kruisinga, S.A., Incorporation of Standard Terms Under the CISG and Electronic Communication, in Schwenzler, I., Spagnolo, L. (eds.), *Towards Uniformity*, 2011, pp. 69 - 82, at 76, available at: <https://dspace.library.uu.nl/handle/1874/241956> retrieved on 24/02/19.

(52) Cf. Eiselen, *supra* fn28, p. 13/234.

(53) It says that the contract must be performed ... in a manner consistent with the requirement of good faith and fair dealing.’ The good faith performance undoubtedly requires making of the contract in good faith, too.

(54) Cf. Loos, *supra* fn50, p. 180.

#### IV.2.c.i Notice of Standard Terms:

By the way of the interpretation of Article 43(2) KCC, the retailer's standard terms do not become part of the contract unless referred to by the retailer<sup>(55)</sup> and notified to the consumer. Otherwise, the consumer's purported acceptance will not coincide with the retailer's offer.<sup>(56)</sup> Thus, the notice shall be apparent to the average consumer; he shall have enough opportunity to review the standard terms.<sup>(57)</sup>

The standard terms incorporated in an e-contract shall be available in a durable medium for later reference.<sup>(58)</sup> They shall be recordable, downloadable or printable in a way that allows a safe storage and unchanged reproduction.<sup>(59)</sup> This aims at enhancing 'legal certainty, transparency and predictability'<sup>(60)</sup> in e-contracts.

Where the B2C e-contract is made through e-mail,<sup>(61)</sup> the e-mail message (the offer) sent from the offeror's (retailer's) outbox to the offeree's (consumer's) inbox can include the standard terms in full.<sup>(62)</sup> The retailer may provide the standard terms in an attachment to the e-mail with a clear and conspicuous reference to their incorporation. Acceptance by the consumer under such conditions will make the retailer reasonably believe that the consumer accepts without any modification. As the consumer is in a position to consult the text of the standard terms, they should be considered as incorporated into the contract.<sup>(63)</sup>

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(55) Cf. Meinel, supra fn44, p. 212.

(56) Cf. Wilkinson-Ryan, supra fn35, p. 119.

(57) Cf. Ibid, p. 124. Meinel, supra fn44, p. 203. Daiza, supra fn27, p. 212.

(58) Article 1 Consumer's protection law defines electronic writing as: All letters, figures, symbols or other marks that are fixed on an electronic, digital, photic medium, or any other similar means, and they have indication that can be perceived and retrieved afterwards., Article 9 thereof states that the electronic document or record, in order to produce its legal effect, shall inter alia meet the following requirements- the possibility of storing it in the form in which it was created, sent or received or in any other form that facilitates proving the accuracy of the data that was included in it on its creation sending or receiving – that the data contained in it can be kept and stored in a way that it can be referred to at any time.

(59) Cf. Wang, supra fn19, p. 104.

In order the recipient be bound by an electronic document or record, Article 13 electronic transactions law requires that such document or record be retrievable, printable, storable and savable.

(60) Wang, supra fn19, p. 99.

(61) According to Article 1 electronic transactions law the electronic message (e-mail) includes data that are sent or received through electronic means whatever is the way of extracting them in the place of receipt. Article 3 thereof states that the e-mail shall produce the same legal effects entailed from traditional (written) letters as regards binding its creator, its strength in proof, or its authenticity.

(62) Cf. Kruisinga, supra fn51, p. 76.

(63) Cf. Kruisinga, supra fn51, p. 76.

Social media, like Twitter and WhatsApp ... etc., may be used for making contracts.<sup>(64)</sup> Like the e-mail, the text message itself may include the complete text of the standard terms. The standard terms may also be sent to the consumer as an attachment.<sup>(65)</sup> This would be considered sufficient notice of the standard terms.

Where the B2C e-contract is made via the web-page, the mere reference by the retailer to a website which contains his standard terms would not suffice.<sup>(66)</sup> The consumer cannot be reasonably expected to search for the standard terms on the retailer's website, on which there may be other sets of standard terms for other types of contracts.<sup>(67)</sup> Rather, the retailer has not only to state that the contract is subject to his standard terms but also to make such standard terms available for the consumer.<sup>(68)</sup> This would be the case:

- if the retailer includes a hyperlink<sup>(69)</sup> in the statement on the reference to the standard terms that will go directly to such terms;<sup>(70)</sup>
- if the retailer incorporates a scrollable dialogue box in the website that contains the standard terms in full;
- if the retailer displays the standard terms on the website in a downloadable PDF or Word file; or
- if the retailer provides a scanned copy or picture in the consumer's online account for later access.

In all these click-wrap contracts, the retailer reasonably draws the attention of the consumer to the standard terms; the consumer has the opportunity to read, or at least scroll through, the standard terms. The consumer is well notified of

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(64) Under Article 5 electronic transactions law, an offer may be expressed totally or partially through electronic transactions.

(65) Under Article 5 electronic transactions law, an offer expressed through electronic means shall not lose its authenticity, effect or enforceability for the mere fact it was undertaken through an electronic correspondence or more.

(66) Cf. Carlson, Robert R. & Lee, Stephen E. & Morra, Jennifer, *Contracts Go Green: Incorporating Standard. Terms and Conditions by Reference to a Company Website*, Paul Hastings Stay Current, August 2008, p. 1, available at: <https://www.paulhastings.com/docs/default-source/PDFs/973.pdf> retrieved on 13/02/19.

(67) Cf. Kruisinga, supra fn51, p. 77.

(68) Cf. Wang, supra fn19, p. 97. Jabr & Husein, supra fn7, p. 5.

(69) Cf. Wang, supra fn19, p. 99, A hyperlink acts as an indexed tool which is identical to indexes in a library or bookstore.

(70) Cf. Carlson & Lee & Jennifer, supra fn66, p. 1.

the retailer's standard terms;<sup>(71)</sup> his consent to the contract would be manifested by clicking the 'I Agree' or a like button.<sup>(72)</sup> In contrast, placing the hyperlink to the standard terms at a hidden location in the retailer's website<sup>(73)</sup> is not a sufficient notice.

In browse-wrap contracts, a notice is given to the consumer by the website that, by using it, the consumer agrees to the standard terms. The consumer can consent to the contract without looking at the standard terms and without indicating that he agrees to them.<sup>(74)</sup> This would not be considered a sufficient notice.<sup>(75)</sup> As the purported acceptance by the consumer is not conformant with the retailer's offer according to Article 43(2) KCC, the retailer's standard terms shall not be included into the contract.

As for the shrink-wrap contracts, the consumer assents to the agreement before having the opportunity to see the standard terms of the provider. The reference and availability of standard terms must take place before or at the same time of making the contract.<sup>(76)</sup> Otherwise, there shall be no confluence of offer and acceptance under Article 43(2) KCC. Thus, any attempt to incorporate the standard terms after the conclusion of the contract shall fail.<sup>(77)</sup> The provider's standard terms will not be part of the contract under such circumstances. The provider may not unilaterally modify the agreed on terms of the contract already made.<sup>(78)</sup>

### IV.2.c.ii Understandable Standard Terms:

The consumer shall have the chance to determine its legal position when

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(71) Pro Argy & Martin, *supra* fn43, p. 22. Maxeiner, *supra* fn2, p. 166.

Contra Kruisinga, *supra* fn51, p. 76: 'A website may be temporarily inaccessible, a risk which should not be borne by the offeree.'

(72) According to Article 5 electronic transactions law, an acceptance may be expressed through electronic means. Such expression shall not lose its authenticity, effect or enforceability for the mere fact it was undertaken through an electronic correspondence.

Cf. Meinel, *supra* fn44, pp. 185, 197.

(73) Cf. Becher & Zarsky, *supra* fn1, pp. 320-321. Meinel, *supra* fn44, pp. 203-204.

(74) Wilkinson-Ryan, *supra* fn35, p. 126.

(75) Pro Maxeiner, *supra* fn2, p. 166. Wilkinson-Ryan, *supra* fn35, p. 127.

Contra Meinel who argues that browse-wrap contracts are in principle unenforceable unless there is a constructive notice, i.e. whether the design and content of the retailer's website renders the existence of standard terms reasonably conspicuous. Meinel, *supra* fn44, pp. 185-186.

(76) Argy & Martin, *supra* fn43, p. 22. Loos, *supra* fn50, p. 189.

(77) Cf. Sulaiman, *supra* fn9, p. 126.

(78) Article 196 KCC.

reading the retailer's standard terms made available to him.<sup>(79)</sup> In order the consumer's acceptance coincides with the retailer's offer in the meaning of Article 43(2) KCC, the consumer shall know about the retailer's standard terms intended to be included in the contract. Thus, the retailer's standard terms must be understandable by the average (ordinary) consumer without any legal advice.<sup>(80)</sup> The retailer must draft the standard terms in plain and intelligible language.<sup>(81)</sup>

As suggested by Daiza,<sup>(82)</sup> the standard terms *inter alia* should be contained in one document, e.g. an e-mail attachment, one website location or one scroll box; the font-size of the words should be in 12-point font or in a comparable one; and the length of the standard terms should be proportional to the type of contract at issue.

In international B2C e-contracts, particularly, the language of the contract is normally neutral, like English, or the one of either party to the contract.<sup>(83)</sup> If the retailer's standard terms are in a different language, the consumer shall not be deemed to understand them. He may not be considered as consented to them under Article 43 KCC. Thus, they will not be part of the contract.<sup>(84)</sup>

Where the retailer takes reasonable steps to bring the attention of the consumer to the standard terms (that affect his rights and obligations) that are written in legible language, the consent of the consumer will make the standard terms part of his contract. The consumer's consent may be manifested by an e-mail, text message through a social media application or by clicking the 'I Agree', 'I Accept', 'OK' or a like buttons on the retailer's website.<sup>(85)</sup> Although 'inserting a name in an encrypted email message or clicking the "I agree" button on a website' may be

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(79) Loos, *supra* fn50, pp. 179-180.

(80) Al-Anzy, *supra* fn6, p. 84.

(81) *Ibid.* Cf. Daiza, *supra* fn27, p. 205. Jabr&Husein, *supra* fn7, p. 5.

(82) *Supra* fn27, pp. 234-236

(83) Eiselen, *supra* fn28, p. 15/234.

(84) Cf. Amtsgericht Kehl - Germany, decision no. 3 C 925/93, dated 06.10.1995, available at <http://www.unilex.info/case.cfm?id=163>, retrieved on 24/02/19: The Court held that the choice of law clause in favor of German law contained in the buyer's standard terms was invalid, as the buyer failed to give evidence that it had sent its general conditions of purchase in a language other than German, which was not the language of the contract.

(85) Under Article 5 electronic transactions law. an acceptance may be expressed totally or partially through electronic transactions. Such an expression shall not lose its authenticity, effect or enforceability for the mere fact it was undertaken through one electronic correspondence or more.

considered an electronic signature,<sup>(86)</sup> there is no need for an official electronic signature by the consumer to manifest his consent under Kuwaiti law.<sup>(87)</sup>

### V. Conclusion

As Kuwaiti laws Nos. 20/2014 (electronic transactions) and 39/2014 (consumer protection) haven't regulated the question of incorporation of the standard terms in the B2C e-contracts, this question has to be answered according to the KCC general rules of making the contract (i.e. mutual consent, offer and acceptance). Instead, Kuwaiti legislator should make a specific regulation to sufficiently protect the weaker party. This regulation should aim at protecting the consumer in traditional and electronic contracts. As for the e-contracts, such regulation should include provisions on the following issues:

- Availability of retailer's standard terms for the consumer;
- Legibility of the standard terms for the average consumer.

The researchers suggest the following provision:

*'Where a B2C e-contract is concluded and contract standard terms are provided to the consumer, such terms must be drafted in plain, intelligible language and made them available in a way that allows the consumer to store and retrieve them.'*

Needless to say, in addition to the "procedural control" of standard terms, such special regulation could also include provisions on the "content control" of standard terms, like *contra proferentem* rule, surprising terms, black list and gray list of standard terms.

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(86) Wang, *supra* fn19, p. 108.

(87) Article 5 electronic transactions law.

Cf. Daiza, *supra* fn27, p. 216.

It is worth mentioning that electronic transactions law distinguishes between two types of e-signature. Article 18 speaks about the (normal) e-signature; it says that e-signature may not lose its legal effect for the mere fact it is received in an electronic shape. Article 19 thereof regulates the so-called protected e-signature; it determines the requirements that shall be met to consider e-signature as a protected one.

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