

**VALIDITY OF ELECTRONIC CONTRACTS IN THE
PERSPECTIVE OF ISLAMIC LAW**



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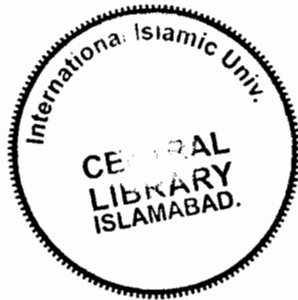
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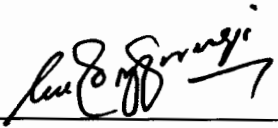
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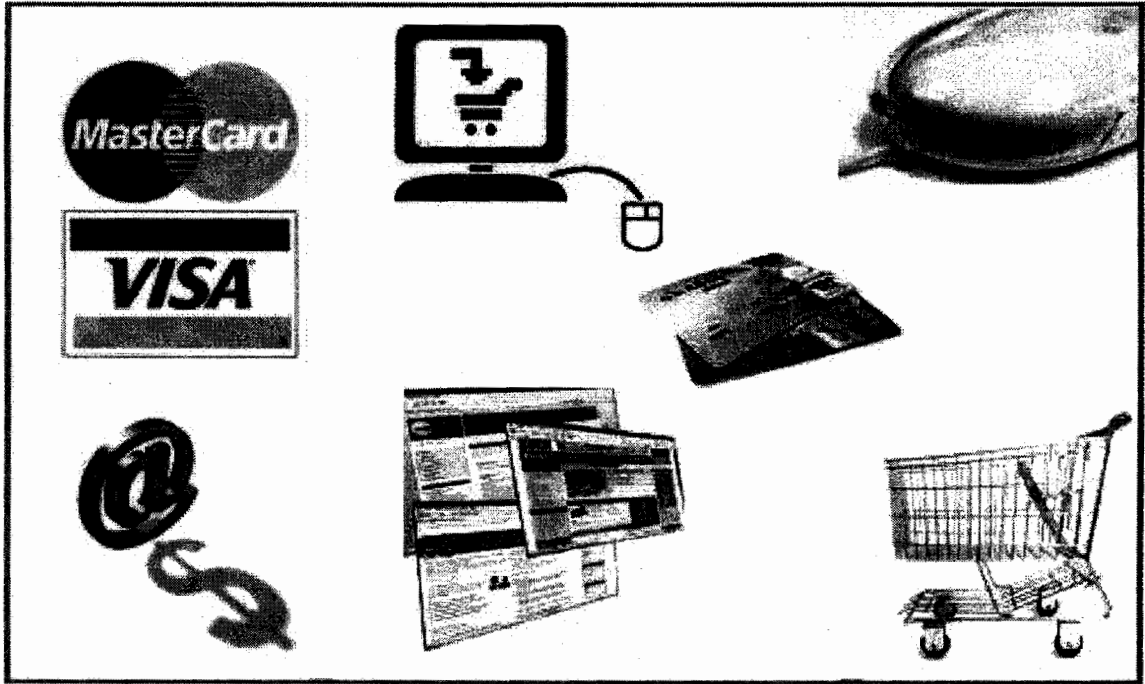


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STATEMENT OF UNDERSTANDING

I, **HAZRAT BILAL**, bearing the University Registration No. 378-FSL/LLM-F05, do solemnly declares, in the name of Allah, that my thesis entitled,

VALIDITY OF ELECTRONIC CONTRACTS IN THE PERSPECTIVE OF ISLĀMIC LAW,

Submitted to the Department of Shari'ah, Faculty of Shari'ah and Law, is a genuine work of mine, originally conceived and written down by me under the supervision of Prop. Dr. Muhammad Zia'ul-Haq, by Allah's will and approbation.

I do, hereby, understand the consequences that may follow, if the above declaration be found contradicted and/or violated, both in this world and in the hereafter.

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Hazrat Bilal.

ABSTRACT

VALIDITY OF ELECTRONIC CONTRACTS IN THE PERSPECTIVE OF ISLĀMIC LAW

By:

Hazrat Bilal

Chairperson: Prof. Dr. Muhammad Zia'ul-Haq

The rise of e-commerce, a colossal growth and a significant increase has occurred in all aspects of business life throughout the world. The conducting of business activities via the Internet, specifically, has played a vital role in the development of business and economical sectors in different parts of the world.

Primarily, business activities conducted electronically were not specifically regulated because it was generally perceived that regulations may disturb and hinder the expansion of electronic commerce. However, as a result of the remarkable growth of electronic market activities globally, many legal disputes and concerns have raised. This demonstrates the need for regulation to govern the new activities. Different countries and organizations globally have introduced rules and guidelines, based on their national laws as a response to such need. However, very little has been done to regulate the phenomena according to the *Islāmic* legal system. The lack of specific *Islāmic* rulings for the online market has disheartened many Muslim traders and customers from participating in electronic commerce.

It is essential for Muslims to implement *Islāmic* rules in every aspect of their life including commercial ones. From a purely business point of view, *Islām* has provided its followers with general guidelines which must not be ignored or infringed. Intentionally, the door is left open for market activities to be governed according to what the most appropriate and beneficial approach would be, based on prevalent trade practices and customs. Since the early period of *Islām*, comprehensive efforts have been made to regulate the *Islāmic* commercial sector. However, in case of electronic commerce there remains a need for further research by Muslim Scholars and proper *Islāmic* rules are required for the development of this new phenomenon.

The emerging electronic market has surfaced many legal issues; one of the major themes is online contracting or the electronic contracts. There are many smaller legal issues which stem from the larger theme of the law of contract in *Islāmic* law. This research paper is meant to study the *Islāmic* perspective in e-commerce, particularly in its transactions. Issues on the legality of e-commerce in *Islām* are examined to expose to the Muslims around the world so that they could benefit from this new technology if it is proved legitimate and acceptable in *Islām*. Regarding transactions, the issues of payment through credit card will be studied to clear the Muslims doubts on the *Islāmic* prospect of E-Commerce. Likewise, the paper discussed about E-Commerce and Transaction, E-Commerce in *Islāmic* Perspective which will cover the legality of Electronic

Contracts in *Islāmic* law, elements of contract and its application in electronic contracts. Similarly special focus is made with regard to the *Islāmic* concept of parties 'sitting place' of transactions. You will also find safeguards provided to business transactions in *Islām*, like wise exception from electronic contracts following a chapter devoted to Applicable law and court competency with regard to electronic contracts. This research paper concludes the above mentioned areas with the support mainly from the Holy Book (The *Qur'ān*) and the practices of the Prophet *Muḥammad* (S.A.W).

INTRODUCTION

We have gone through the centuries preceding different types of contracts made in different forms, like sale contract through radio, Television, Telephone, Fax, Telex etc. Here in the recent years we are witnessing dramatically evolved in different means of communication, in particular electronic contracts which entered all spheres of life including the commercial sphere, called electronic Transactions or E-Commerce, or contracts across distance Via the Internet, that has abolished all the geographical boundaries and linked together all parts of the world where a retail dealer could buy directly from the producer, and the consumer is shopping being at home.

Electronic Commerce is spread rapidly in the recent years, many national and Multinational companies have their own sites on the internet and the electronic transactions are now occupying a major portion of the International market.

For the importance of this issue and urgent need for it, we find very little about its legal status in the *Islāmic Fiqh* (Doctrine of *Islāmic* law), to propose an *Islāmic* solution in the light of provisions of *Islāmic* law.

Importance of the Research Paper:

In fact these days people are in front of reality and a very high-tech era. The use of growing technical means put the direction of *Islāmic* states to enter into the membership of W.T.O, so in the light of requirements of W.T.O in goods and services, and the vast use of internet in the world consequently the foreign companies entering into the markets of Muslim world has stressed that E-

Commerce is the best way to reach International markets inexpensively and in a very low possible cost which means that electronic commerce is key for the fast progress of nations in coming period.

No doubt in today's world we are witnessing transactions related to *Islāmic* economics, were not present in the past eras. However *Islāmic* law always provided its legal stand on issues of the time and has adopted the best methodology for further incidents and transactions, following Review (إعادة النظر) Research (البحث), Induction (استقراء), *Ijتهād* (اجتهاد) or Juristic opinion based on the Holy *Qurān* and *Sunnah* of the Prophet (S.A.W), Consensus of the Muslim Jurists (إجماع), Analogy (قياس) , The preferred interest (المصلحة المعتبرة), True custom (العرف) (الصحيح), and their implications thereof (الآثار المترتبة على ذلك) , that opens up wide prospects for the people interested in these transactions, likewise to takeaway their hardships and adversities.

Thus the broad use of modern communication tools to contract oblige for some sort of research in the light of above mentioned methodology to identify the elements of such contracts and to determine the impact of these contracts for its validity, in addition to the required terms and conditions to learn provisions of the new transactions.

We know that all legal systems of different civilizations hold their own stand on the legality of contracts and financial claims, the way to enter into a contract and its terms and conditions or their implication. For example some laws other than *Shari'ah* (*Islāmic* law) entail formalities in the contract which is not valid unless it

is certain in specific form. However *Islāmic* law provided the element of "Consent" (الرضا) as the basic condition for all contracts in any form whatsoever.

Allah says, " ¹ يا أيها الذين آمنوا لا تأكلوا أموالكم بينكم بالباطل إلا أن تكون تجارة عن تراض منكم "

O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will". Similarly saying of the prophet (S.A.W), ² " إنما البيع عن تراض " "A Sale transaction is valid only with consent of the parties".

The *Islāmic* law methodology in laying rule of "Consent" as a fundamental element for validity of contract is a clear legislative message, which asserts that it is an eternal law, valid for all times and place, for all people and societies, and for all kinds of business transactions no matter what new methods and forms of transactions get introduced, including contracts which are made through the means and machinery working through electronic mail and the latest and most significant is contract by internet or electronic contracts.

Also study on the topic has pointed out that there are several ways of contract by internet and the most important and widespread is contract through the network of sites (Web), contracts via e-mail and contracts through conversation. In all cases you will find its legal solution in *Islāmic* law.

¹ Al-Qur'ān 4: 29

² Ṣaḥīḥ Ibn-e-Ḥabbān, tradition No. 4967

In fact trade and business transactions have great importance in *Islām* on the grounds they are lovely and desire of every one. If non-Muslims from east and west are taking interest in financial and commercial gains regardless their source, then our sacred *Shari'ah* has also urged for earning but in a legitimate ethical framework.

Literature Review:

The day to day changing life compels a Muslim researcher to aware people about the legal status, terms and conditions of these new kinds of contracts. Though work done in this regard is very useful, but not sufficient. I find it not covering the basic aspects of these contracts, like the applicable law and court competency. Also how to cope legally with the practicing customs. Secondly most of them are in Arabic and very little is carried on in English language, and the fact is that a good number of people involved in such like transactions are ignorant of Arabic language. In order to serve better in this way I selected this topic for my thesis research.

Methodology:

Islāmic law has provided its followers with general guidelines in every aspect of life including the commercial one which cannot be ignored or infringed. In my thesis I have relied on the most suitable and beneficial approach what it would have been. Focus is made on the Primary sources along with the prevalent trade practices and customs. So the adaptation of existing rules from the off-line world,

for online contracting would not only retain consistency but will also regulate electronic sector based on the real world *Islāmic* Commercial rules.

In order to achieve the desired goals and access to the hypothesis of this study a descriptive analytical approach is adopted that will shed light on the aspects of the subject as a new technical revolution. Then after exploring the results and analysis, efforts have been made for an appropriate framework conforms to the requirements of *Islāmic* law.

Translation used for the verses of the Holy *Qur'an* is by *Abdullāh Yousaf 'Ali*,

Electronic version available on: <http://www.uah.edu/msa/quran/quranYusufali.html> .

CHAPTER I

OVERVIEW OF ELECTRONIC COMMERCE

1.1: INTRODUCTION

The term electronic commerce is heard frequently in corporate boardrooms, in management meetings, on the news, in newspaper (both in soft and hard form), and on *Capito Hill*.¹ Electronic Commerce is one of the most Common business terms in use as we embark on the 21st century. In the late 1980s the arrival of the internet² in the commercial arena had a profound effect upon organizational environments. The possibility of making centrally held information available on computer screens caused a radical shift in the way business perceived the role of electronic communication in gaining a competitive advantage. This was enhanced by the development of the worldwide Web (WWW) in 1993 which provided a graphical user interface to the internet and brought it to the Mass Market.³ This opened the door to the online business activities - a virtual market place (commonly known as Cyberspace) in which anyone could perform without restrictions of time or space.⁴

¹ *Capito Hill* is used for the legislative branch of U.S. Government, See *Webster's New World Dictionary*, s.v. "Capito Hill."

² See, Birth of the Internet, available on: <http://library.thinkquest.org/27887/gather/history/internet.shtml> last visited time: 04.04.2009 at 3:00 pm.

³ School of International Business, Faculty of Business-QUT, *Introduction to E-Business*, 3rd Edition (Australia: A MC GRAW-HILL and QUT Custom Publication, 2004), 3.

⁴ *Ibid.*

Due to its wide variety of applications E-Commerce has gained a lot of popularity over the decade which has drawn the attention of researchers regarding legal aspects of this new technology.

1.2: Definition of E-Commerce

A variety of definitions is found in describing E-Commerce. E-Commerce or Electronic Commerce is an emerging concept that describes the process of buying and selling or exchanging of products, services and information via computer network including the internet.⁵ Or E-Commerce is the conducting of business communication and transactions over networks and through computers.⁶

Electronic Commerce is also defined as, the use of electronic transmission mediums (telecommunications) to engage in the exchange, including buying and selling, of products and services requiring transportation, either physically or digitally, from location to location.⁷

So E-Commerce is directly or indirectly applicable in all areas of our life, be it banking, entertainment or other business transactions which means that electronic commerce could become a significant global economic element in the future.

1.3: Stages of Electronic Commerce

An electronic transaction can be divided into three main stages:

⁵ U.S Pandey and Rahul Srivastava, *E-Commerce and its Application* (New Delhi: S. Chand and Company Ltd., 2007), 3 (hereinafter referred to as Pandey and Rahul, *E-Commerce and its application*).

⁶ Ibid.

⁷ Marylyn Greenstein and Todd M Feinman, *Electronic Commerce: Security, Risk Management and Control*, MC GRAW-HILL International Edition (Singapore: MC GRAW-HILL publications, 2001), 2 (hereinafter referred to as Marylyn and Todd, *Electronic Commerce*).

- The advertising and searching stage;
- The ordering and payment stage; and
- The delivery stage.⁸

Any or all of these stages can be carried out by the internet (or by other electronic means such as the fax or the telephone) and may therefore be covered by the concept of electronic commerce.

Electronic means are being increasingly used by commercial firms to advertise and market both goods and services all over the world. Virtually all products can be sold on the basis of the information available on the internet. Information on prices, quality, delivery and payment conditions enables manufacturing companies, retailers or consumers in far-off countries to order their requirements from the most competitive suppliers. Physical goods are then delivered by other means of transport. It is becoming increasingly possible to deliver certain types of products electronically; in fact any product that can be reduced to a digital format can be delivered in this way. For example the audio visual products (films, games and music), travel services (airline tickets, hotel reservations) news and information services (online wire services and data bank retrievals), telecommunication services, information technology services and software. This list is not exhaustive additional products are likely to be found suitable for

⁸ International Trade Center UNCTAD/WTO (ITC), Common Wealth Secretariat (CS), *Business Guide to the World Trading System*, 2nd Edition (Geneva: ITC/CS, 2003), 313 (hereinafter referred to as ITC/CS, *Business Guide*)

electronic trade in the future. Today computer software is the leading product sold via the internet.⁹

1.4: Effectiveness of E-Commerce

Begin with the basics. To participate in electronic Commerce, an organization requires an internet connection to its computer network. The internet is an extensive and ever-growing collection of Computers around the world that communicates through a group of standard protocols called ¹⁰TCP/IP.¹¹ The beauty of internet communication is that anyone who connects a simple computer to the internet can interact with any other internet - connected device or user. The consumer moves through the internet to the merchant's website. From there he decides that he wants to purchase something, so he is moved to the online transaction server, where all of the information he gives is encrypted¹². Once he has placed his order, the information moves through a private gateway to a processing network, where the issuing and acquiring authority complete or deny the transaction. This generally takes place in no more than 5-7 seconds.¹³ There are many different payment systems available to accommodate the varied

⁹ Ibid.

¹⁰ TCP/IP (Transmission Control Protocol/Internet Protocol), This Internet Protocol is the fundamental software employed to control the Internet. This protocol specifies how data is routed from one computer to another. (See, <http://library.thinkquest.org/27887/gather/history/internet.shtml> last visited time: 04.04.2009 at 3:00 pm.

¹¹ David Ferris and Larry Whipple, *Building an Intelligent E-Business* (New Delhi: Prentice Hall of India Private Ltd., 2001), 9 (hereinafter referred to as David and Ferry, *Building E-Business*).

¹² Encrypted means data which has been transformed or scrambled from its plain version or text to an unreadable or incomprehensible format and is recoverable by an associated decryption or decoding technique. (See, Sec. 2 (m) of the prevention of electronic crimes ord. 2007, Pakistan).

¹³ Pandey and Rahul, 6.

processing needs of merchants, from those who have a few orders a day to those who process thousands of transactions daily.

1.5: Online Commercial Environment and Payment Mechanisms

Online Commerce environment, unlike payment systems, tends not to make assumptions about customers, nor do they necessarily require the consumer to take any specific prior action to be able to use them. The simplest example would be a secure Web server that encrypted the customer's Credit Card¹⁴ information prior to transmitting it to the merchant across the internet. Though a Credit Card is required, no special preparation is necessary prior to making an order, and the merchant handles the rest.¹⁵

Payment mechanisms are varied, ranging from token based electronic Cash or checks, to Smart Cards, or Debit Cards, to encrypted Credit Cards. On a larger scale, some payment mechanisms rely on business to business or bank to bank electronic funds transfer (EFT). Whatever the chosen mechanism, the premise of electronic payment is that trading parties can quickly and cost effectively transfer funds and the associated documents electronically.¹⁶

1.6: Nature and Scope of E-Commerce

E-Commerce is a modern business methodology, which help the companies and the consumers to have better business facilities through less cost while

¹⁴ For details see, Payment through Credit Cards on page 94.

¹⁵ Pete Loshin And Paul Murphy, *Electronic Commerce, Online Ordering and Digital Money*, 2nd Edition (Mumbai: Jaico Publishing house, 1998), xviii (hereinafter referred to as Pete and Paul, *Electronic Commerce*).

¹⁶ David and Larry, 12.

improving the quality of goods and services and increasing the speed of transactions.¹⁷

The scope of E-Commerce is very wide. It connects the management of the enterprises to the various aspects of trading through suppliers, distributors, retailers, consumers as well other traders on the global E-Commerce infrastructure. The enterprise provides product development, conferencing, accounting, financial planning and logistics etc.¹⁸

1.7: Main Instruments of Electronic Commerce

According to the WTO, *Electronic Commerce and the Role of WTO (1998)*:

There are six main instruments of electronic commerce: the telephone, fax, television, electronic payment and money transfer systems, electronic data interchange and the internet. While the term electronic commerce is used in many discussions to refer exclusively to the internet and other network-based commerce, the telephone, fax and television are in common use as media for commercial transactions, particularly in industrial countries. Orders, for example, are regularly placed over the telephone and paid for by Credit Card. The emergence of instruments like the internet did not therefore mean the invention of electronic commerce.

But the internet does open up many new possibilities: with the internet most elements of a commercial transaction can be conducted on an interactive basis with one or several persons, unconstrained by time and space, in a multimedia environment with sound, image and text transmission, and at a relatively low (and still declining) costs. This makes the internet much more versatile than other instruments of electronic commerce. The latter typically need to be used in combination with each other or with more traditional instruments such as mail or physical shopping, for a transaction to be conducted. The internet will therefore reduce the barriers to communications and trade to a greater degree than established electronic and traditional means of commerce.¹⁹

¹⁷ Pandey and Rahul, 6.

¹⁸ Ibid., 6-7

¹⁹ WTO, *Electronic Commerce and the Role of WTO (1998)*, quoted in International Trade Center UNCTAD/WTO (ITC), Common Wealth Secretariat (CS), *Business Guide to the World Trading System*, 2nd Edition (Geneva: ITC/CS, 2003), 314.

1.8: Benefits of Electronic Commerce

Electronic commerce provides consumers and business enterprises with information on the availability worldwide of products or services, prices and conditions of sale, enabling them to obtain their supplies on the best terms possible. It provides suppliers with an online marketing service, and enables them to do business without having to open an establishment or to hire an agent abroad. Virtual shops and contact points on the internet, by facilitating communications, eliminate some of the delays in the flow of supplies. The quick and assured availability of supplies may also enable industries, wholesalers, and retailers to reduce the level of inventories and stocks they hold. This will help companies, particularly the small and medium sized, to reduce their costs.²⁰

In order for business to invest resources to engage in electronic commerce, the benefits must exceed the costs. Green stain and Feinman in their famous book Electronic Commerce have mentioned some of the benefits which are potentially gained from engaging in electronic commerce are;

- Internet and Web-based electronic commerce is more affordable.
- Internet and Web-based electronic commerce allows more business partners to be reached.
- Internet and Web-based electronic commerce can reach a more geographically dispersed customer base.
- Procurement processing costs can be lowered.
- Cost of purchase can be lowered.
- Lower cycle times.
- Better customer service; and
- Lower sales and marketing costs.²¹

²⁰ITC/CS, 313-314.

²¹Marylyn and Todd, 3.

To conclude with, Electronic Commerce has the promise to be a very powerful business channel. The potential for Global on-line Communication created revolutionary changes in attitude of both business and consumers. The world saw a new mode of business in 'Cyberspace' where buyers and sellers far apart from each other took part in transactions using virtual organizations. So the value of electronic commerce an increasingly significant feature of international trade is expected to increase dramatically in the new century.²² Countries will have to build their capacities to engage in this trade as a priority. They need to invest in both physical and human infrastructures, specialized education and training, and to provide an appropriate legal framework in order to conduct commerce electronically.

In the coming chapters we will discuss issues on the legality of E-commerce in Islamic law to portray to the Muslims all over the world so that they could benefit from this new technology if it is proved legal and acceptable in *Islam*.

²² ITC/CS, 317

CHAPTER II
INTRODUCTION TO ELECTRONIC CONTRACTS AND ITS VALIDITY IN
ISLĀMIC LAW

2.1: Introduction

Islāmic commercial law, known as *fiqh al-mu'āmalāt* in *Islāmic* legal term, constitutes an important branch of law dealing with issues of contracts and the legal effect arising from a contract; be it a valid, void or avoidable contract respectively. Contract in *Islāmic* law, is a complex legal discipline in both its jurisprudential foundation and its practical function. Also contract covers a variety of dealings and transactions to meet the needs of the society. No doubt, issues of commercial transactions, unlike devotional issues (*'ibādāt*), are ever lasting and bound to change due to the changing circumstances and situations of both the object and subject of the transactions.¹ Intellectually, it is perhaps the most rewarding field of the law in action. The mechanism of contract formation depends on the fundamental conception of contract(s) under *Islāmic* law and its interrelation with other modes whereby an obligation may be generated.²

¹ See *Islāmic World-net, Iqtiṣād Al-Īslāmī* (*Islāmic Economics*), available on http://islamic-world.net/economics/contract_01.htm Accessed last time: 30.03.2009 at 6:00 PM

² *Ibid.*

2.2: The Islāmic Law of Contract: Definitions

To start with, it is appropriate to point out that the evolution of the *Islāmic* law of contract, in particular, is distinctive from any other legal system. Its rules are originally based on certain provisions addressing diverse issues of contract which are derived from the primary sources.³ These provisions, in fact, are general and did not go into detail to address all aspects of contract. Subsequently further developments have been carried out by Muslim jurists from different *Islāmic* school of thoughts. Developments of the law of contract have mainly been elaborative approaches to the provided, concise, maxims that deal with commercial activities, which are put forward in the *Qur'ān* and the Traditions of the Prophet (PBUH). Public interest, trading practices and usages are the key bases for those established rules to deal with the commercial section of law. However, it must be considered that those developments of law were formed by human thoughts based, as said, on prevalent commercial customs which vary from time to time and from society to society. Hence, such human rules are not sacred rules which must be followed all the time by all Muslims everywhere - they can be altered or even ignored when they seem inappropriate for particular

³ The *Qur'ān* and the *Sunnah* (*Sunnah* is the legal term to represent what the Prophet S.A.W has said, did and agreed to) are the primary sources of *Islāmic* law. *Ijmā'* (that is consensus of opinion of scholars) and *Qiyās* (that is laws derived through analogical deduction) are the secondary or dependent sources of *Islāmic* law. See, Shāh Abdulḥanān, *Sources of Islāmic Law*, available on: http://witness-pioneer.org/vil/Books/SH_SL/sources_of_islamic_law.htm last visited time: 01.06.2009 at 11:00 pm.

periods or for certain groups.⁴

The term “*Aqd*” is used for “contract” in *Islāmic* legal system. ‘*Aqd* literally means tying tightly, as tying a rope.⁵ ‘*Aqd* carries the meanings of covenant and fulfillment.⁶ The *Qur’ān* has used the word in this sense in different places.

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ أُحِلَّتْ لَكُمْ بَهِيمَةُ الْأَنْعَامِ إِلَّا مَا يُنْتَلَىٰ عَلَيْكُمْ غَيْرَ مُحْلِيِّ الصَّيْدِ وَأَنْتُمْ حُرْمٌ
إِنَّ اللَّهَ يَحْكُمُ مَا يُرِيدُ⁷

“O ye who believe! Fulfill (all) obligations. Lawful unto you (for food) are all four-footed animals, with the exceptions named: But animals of the chase are forbidden while ye are in the sacred precincts or in pilgrim garb: for Allah doth command according to His will and plan.”

The plural of word ‘*Aqd* is ‘*uqud* which is mentioned above in commanding the faithful to keep their covenants.

وَلَا تَعْزِمُوا عُقْدَةَ النِّكَاحِ حَتَّىٰ يَبْلُغَ الْكِتَابَ أَجَلَهُ وَاعْلَمُوا أَنَّ اللَّهَ يَعْلَمُ مَا فِي أَنْفُسِكُمْ فَاحْذَرُوهُ وَاعْلَمُوا أَنَّ
اللَّهَ عَفُورٌ حَلِيمٌ⁸

⁴ Abdulrahmān A’lżāgy, “*The Islāmic Concept of Meeting Place and its Application in E-Commerce*,” Masaryk University Journal of Law and Technology, Vol. 1, No. 1 (2007): available on: <http://www.digitalIslām.eu/article.do?articleId=1524> Accessed last time: 31.03.2009 at 11.00 AM (hereinafter referred to as A’lżāgy, “*The Islāmic Concept of Meeting place and its Application in E-Commerce*”).

⁵ Muhibbuddīn Abī Fayz Al-Ḥanafī, *Tāj al-‘urūs*, vol. 5 (Beirut: Dār al-Fikar, 1414 AH /1994), 115 (hereinafter referred to as *Tāj al-‘urūs* 1414/1994).

⁶ Ibid.

⁷ Al-Qur’ān 5:1

⁸ Al-Qur’ān 2:235

“Nor resolve on the tie of marriage till the term prescribed is fulfilled. And know that Allah Knoweth what is in your hearts, and take heed of Him; and know that Allah is Oft-forgiving, Most Forbearing.”

“لَا يُؤَاخِذُكُمُ اللَّهُ بِاللَّغْوِ فِي أَيْمَانِكُمْ وَلَكِنْ يُؤَاخِذُكُمْ بِمَا عَقَّدْتُمُ الْأَيْمَانَ”⁹

“Allah will not call you to account for what is futile in your oaths, but He will call you to account for your deliberate oaths”.

In *Hadith Ibn ‘Abbās*, commenting on a *Qur’ānic* verse, we mentioned that ‘*aqd*’ means **covenant, agreement and faith**. In Arabic usage, we read that a man cannot tie (‘*aqd*’) a rope to mean he is too poor and feeble to do anything.¹⁰

Contract, from an *Islāmic* legal perspective is used in two senses i.e. general and specific, and is conceptually divided into two main categories, namely unilateral and bilateral contract. While the former is gratuitous in character and does not require the consent of the recipient, the latter is more bound to strict rulings and guideline since it requires the consent of both the parties to a contract. Also what is normally ‘tolerated’ in unilateral contract, would not necessarily be the case in bilateral contract. Therefore, the (strict) conditions required for both the offeree and the subject matter of the bilateral contract would cease to apply in a

⁹ Al-Qur’an, 5: 106

unilateral contract.¹¹ So the Unilateral Contract is binding and effective without the need of the consent of the other party in the contract, such as the repudiation of a marriage by the husband or, in times past, the formal manumission of a slave.¹² Similarly unilateral contract comprises of transactions in favor of the recipient such as gift (*hadiyyah, hibah*), off-set of the debt (*ibra*), will (*waṣīyyat*) endowment (*waqf*) and loan (*qard*).¹³ So in a general sense it is applied to an obligation irrespective of the fact that the source of this obligation is a unilateral declaration or agreement of two declarations.¹⁴

In the specific sense it has been defined in different ways. However, the common feature of all definitions is that it is a combination of an offer and acceptance which gives rise to certain legal consequences.¹⁵

Ḥusayn al-Nurī defined in *Al-'Iltizām* page 29, as the expression of exchange between two confirming wills in an aim to have a legal impact of a financial nature, be it origination, modifying, transferring or ending a commitment. Contract in man-made laws is an agreement between two wills producing a legal impact. The act of selling is a contract between the seller and the purchaser in

¹¹ See, Islāmic World-net, *Iqtisād Al-Īslāmī* (Islāmic Economics), available on http://islamic-world.net/economics/contract_01.htm Accessed last time: 30.03.2009 at 6:00 PM

¹² A'izāgy, "The Islāmic Concept of Meeting place and its Application in E-Commerce

¹³ See, Islāmic World-net, *Iqtisād Al-Īslāmī* (Islāmic Economics), available on http://islamic-world.net/economics/contract_01.htm Accessed last time: 30.03.2009 at 6:00 PM

¹⁴ Muḥammad Ṭāhir Maṣṣūrī, *Islāmic law of Contracts and Business Transactions*, 2nd Edition (Islamabad: International Islāmic University Islamabad, 2004), 20 (hereinafter referred to as Maṣṣūrī, *Islāmic Law of Contracts*.)

¹⁵ Ibid

which the seller takes it upon himself to transfer to the buyer the ownership of something or some other financial right in return for a monetary price (agreement of two or more wills to initiate, transfer, modify or end a commitment). The important thing is that there should be a legal impact ensuing from the contract transaction. Inviting a friend to a meal, giving him help or promising him a reward are convention and not contract, as they do not have a legal effect.¹⁶

The *Islāmic* Civil Law Codification which took place in the 19th century, namely both the *Majallat al-Aḥkām al-‘Adliyyah* and *Murshid al-Hayran* (the 1891 Egyptian version of the *Ottoman's Majallah*), started to give a precise definition to a contract. The *Majallah*, for instance, describes contract as, the contracting parties obligating themselves with regard to a given matter and binding themselves together with the same as result of connecting an offer with an acceptance. Also according to the *Majallah*, contracting is the connection of an offer with an acceptance in a lawful manner which marks its effect on the subject of the connection.¹⁷ Here the definition also includes a marriage contract because the definition is not confined only to financial matters.

¹⁶ See, Islāmic World-net, *Iqtisād Al-Īslāmī* (Islāmic Economics), available on <http://www.islamic-world.net/economics/contract.htm> Accessed last time: 30.03.2009 at 7:00 PM

¹⁷ See, Islāmic World-net, *Iqtisād Al-Īslāmī* (Islāmic Economics), available on http://islamic-world.net/economics/contract_01.htm Accessed last time: 30.03.2009 at 6:00 PM

In *Al-Ināyah* the definition of a contract is, Legal relationship created by the conjunction of two declarations or that which substitutes them (i.e Conduct creating a legal effect).¹⁸

2.2.1: Preferred Definition

Contemporary Muslim scholars prefer the definition of *Al-Ināya* referred to above, because it is much more comprehensive, and covers all the ingredients of contract: (1) agreement based on offer and acceptance; (2) contracting parties: (3) completion of offer and acceptance in al legal manner: and (4) subject matter.¹⁹

2.3: Definition of Electronic

The Technology of using electric, electromagnetic, visual or other similar technological means.²⁰

2.4: Definition of Electronic Contracts

Electron is the elementary particle which forms a part of all atoms and circulating around the nucleus having a negative charge.²¹ Electrons are used in manufacturing and have entered in many emerging areas like the coming up of radio which is running by the electronic waves, then the emergence of television,

¹⁸ Bābartī, *Ināyah 'ala Faḥ al-Qadīr*, Vol. 5, p. 47 quoted in Maṣūri, *Islāmic Law of Contracts*, 21.

¹⁹ Maṣūri, *Islāmic Law of Contracts*, 22.

²⁰ Art. 9, *Electronic Transactions Act*, Kingdom of Saudi Arabia, 1424 AH.

²¹ See *Websters's New World Dictionary*, s.v, "electron".

telephone, telex, fax, computer and other devices working through the electronics means.²²

Hence in the light of above definitions for electron and electronics we can define electronic contracts as, The agreement to connect an offer with acceptance through the use of technical means of electrical or electromagnetic, optical or any other similar technical means.²³

Accordingly, electronic contracts are contracts which are made through these means and the like machines that operate through electrons. This is in terms of the actual form of electronic contracts, however, after the emergence of computer and internet, and its broad use for the purpose of mail and other correspondence, consequently entering into a contract has allocated this term to contracts which are made through computer and internet. As for the contracts made by means of radio, telephone or other means of communication are not covered by the norm of this term in the last two decades, that's why the term electronic contracts go directly to the contracts which are made through the Internet, and therefore, we find that Electronic-commerce is also described as: the set of operations carried out by electronic means, especially via the websites and e-mail.²⁴

²² See, Muḥammad al-Mutabannī, *Encyclopedia of Electrons*, s.v, "Electron". Also see, Lejeen Needak, *Alelectron wa Atharuhu fi Hayatina*, p. 6 quoted in Abdullah Bin Ibrāhīm Bin Abdullah al-Nāṣir, *A-'uqūd al-'ilikrunīyyah*, available on http://slconf.uaeu.ac.ae/prev_conf/2003/5.pdf last visited time: 01.06.2009 (hereinafter referred to as Nāṣir, *A-'uqūd al-'ilikrunīyyah*)

²³ Sec. 1, *Mashru' al-Nizām al-ta'āmulāt al-'ilikrunīyyah al-Sa'udī*, 1424 AH.

²⁴ See, 'Abdal Ḥamīd Bāsūnī, *Albay' wal-ttijārat 'alal intarnit*, 54 quoted in Nāṣir, *A-'uqūd al-'ilikrunīyyah*.

2.5: Electronic Transactions

Any exchange, messaging, contracting or other action concluded or executed, wholly or partially, by an electronic means.²⁵

Since this definition includes all transactions including trade deal known as electronic commerce as well as contracts and exchanges in goods, material and non-material goods, services, publicity, advertising and others. But in order to achieve the electronic treatment indefinitely, it must be implemented fully or partly by electronic means, whether in the form of telephonic means, telex or the World Wide Web (Internet) which is the best way at present to conduct electronic trading - or any other electronic means.²⁶

2.5.1: Definition of E-commerce in the Narrow Sense (E-commerce via the Internet)

We have gone through the definition of electronic commerce in the broader sense. On the other hand many of the well known researchers have given definitions to electronic commerce in the narrow sense, thus limited electronic commerce to the Internet (web site). Some of these definitions are as following:

²⁵ Art. 10, *Electronic Transactions Act*, Kingdom of Saudi Arabia, 1424 H

²⁶ 'Abdal Fattāḥ Ḥijāzī, *Al-Nizām al-Qānūnī liḥimāyāti- ttijārat al 'iliktrunīyyah*, (Egypt: Dāral fikar al-Jāmi'i, 2002) P. 95-97 (hereinafter referred to as Ḥijāzī, *Al-Nizām al-Qānūnī liḥimāyāti- ttijārat al 'iliktrunīyyah*).

- Business and commercial activities, which are being practiced by the international computer network (Internet)²⁷
- Transactions which take place electronically via the World Wide Web (Internet)²⁸
- The process which take place between two or more parties through the use of computers via the Internet²⁹

2.6: Methods to Conduct Electronic Contracts via the Internet

There are many ways to enter into a contract via the Internet, the most important and widely used is contract through a network of Web sites (web) then the contracts via e-mail (Email) and contracts by chatting and conversation.

2.6.1: Contracts through a network of sites (World Wide Web)

The mechanism of contracts which take place through the World Wide Web is that a purchaser looking for the products or services or the information he intends to contract by the network of sites, either through search engines, which leads to the site of the company or institution, or through access to the site directly, or through an ad leads to the site, or through a virtual shopping on the web which brings together a number of exhibitors, companies, institutions or

²⁷ Muḥammad Ibrāhīm Abu- al-Hijā, ‘*uqūd al-ttijārat al ’ilikrunīyyah* (Oman: Dār al-thaqāfat linnashar wa al-ttawziy’, 2005), 25.

²⁸ Ibrāhīm al-Dasūqī Abū-l-layl, *Aljawānib al qānūnīyyah littā’amulāt al ’ilikrunīyyah*, (Kuwait: Majlis al-Nashar al- ‘ilmi, 2003), 35. (hereinafter referred to as, al-Dasūqī, *Aljawānib al qānūnīyyah*).

²⁹ Hudā Ḥāmid Qashqūsh, *Alḥimāyat al-jinā’īyyah al ’ilikrunīyyah ’abral intarnit* (Cairo: Dār-al Nahḍat al-‘arabīyyah, 2000), 5.

individuals offering their products and services in catalogs which are showing these goods with particular specification and prices. When the purchaser comes to the good or services or information he wants, the Site often provides a picture or pictures of the goods and clear information on the advantages and descriptions. Sometimes the site provides an audio or video show or a hypothetical experience about the goods or services. When convinced by the company and knows the price and specifications, the purchaser clicks on the key appears to approve the contract for purchase, which contains a pay mechanism, conditions of contract and location of delivery along with the law governing the contract and other terms of contract for items which are non-negotiable in addition to the buyer's personal data, name, address, and credit card number, or how to pay the price, and the signing of contract electronically.³⁰

In this type of contract, the site which presents goods and services on the web is often considered as an offer followed by the acceptance of a buyer or contractor who clicks on the icon meant for this purpose, or sends a message to the seller via e-mail, or in writing or other word to indicate approval of the contract, and the request to be accepted electronically. After it ensures to the seller about the authenticity and validity of the buyer to pay, the product or service or the required information starts to download on a computer or sent to the contractor

³⁰ Aḥmad Al-'ajlūnī, *Atta'āqud 'an Ṭarīq il-intarnit*, (Oman: Al dār al-'ilmīyyah wa maktabat dār al-thaqāfat, 2002), 16 (hereinafter referred to as Al-'ajlūnī, *Atta'āqud 'an Ṭarīq il-intarnit*).

via an e-mail, or is sent to him, where the buyer receives it in concrete material form.³¹

The Amazon site (Amazon.com), is a very good example of sites selling worldly and is considered the largest department store to sell books online. Similarly the eBay site (eBay.com), which is considered one of the largest auction sites on the Internet.³²

2.6.2: Contract via e-mail

E-mail is a mode of sending and receiving electronic messages between computers using the Internet, which is similar to the traditional mail in principle, but differs in the fact that it is online and the letter reaches to the addressee in a very short time provided there is no objection or hindered. The electronic mail is stored in the mail box and can be read as soon as the message arrives or be postponed to another time deems appropriate, and could be read repeatedly unless deleted from the mail box.³³

The contracting process starts when the seller sends messages to specified mail boxes or random people, offering products and services, and invites them to enter into contract with him, indicating the price, specifications and terms of contract, and encourages to click on the icon for approval to issue an acceptance

³¹ Ḥasan al-Mumīnī, *Al-tawqy' al-'iliktrunī wa qānūn al ttijārat al 'iliktrunīyyah*, (Oman: Dār Wā'il linnashari wa'l-ttawzy', 2003), P. 30-31 (hereinafter referred to as al-Mumīnī, *Al-tawqy' al-'iliktrunī*).

³² Ibid.

³³ Ibid.

and then the same procedure as described in the aforementioned method. The electronic mail sent to a mail box could be attached with files, such as photographs, video and sounds. Often the correspondence occurs between two parties regarding the products or services, along with their specifications and is concluded by the issuance of acceptance if the buyer is convinced with the terms of contract.³⁴

2.6.3: By means of Chat, Pictures, and Viewing via the Internet

It includes several types of online contacts, like talking through a regular telephone using the Internet, as well as exchange of letters and conversations between several people immediately following the exchange of voices and images, which are;

1 - Direct exchange of words between two people using a program called chat room, enabling them to negotiate in writing in a way more physical and faster to bring the response. This could be between people more than two and in different places.

2 - Exchange of words by means of audio-visual, or through another program which can send voice and image; video images are used to show movement with sound, and are called the video room. In some programs the participants are also taking part in the printing of documents and file sharing.

³⁴ Naḍāl Ismā'il Barham, *Aḥkām 'uqūdu'ttijārat al 'ilikrunīyyah*, (Oman: Dār al-thaqāfat,2005), 26-27 (hereinafter referred to as Naḍāl, *Aḥkām 'uqūdu'l-ttijārat al 'ilikrunīyyah*)

3 - Exchange of words in audio form like talking through a regular telephone using the internet with the rates of Internet connection, thus reducing the cost of communication among the dealers.³⁵

³⁵ Al-'ajlūnī, *Atta'āqud 'an Ṭarīq il-intarnit*, p 17-18.

2.7: VALIDITY OF ELECTRONIC TRANSACTIONS VIA THE INTERNET

We know from the above discussion that electronic transactions are the business transactions which come into practice as result of electronic commerce or electronic contracts via the internet or any other electronic means whether entered into and carried out through electronic means, or is used at any stage of the contract in order to conclude a contract.

These contracts differ from ordinary contracts since they are made through distance between two parties not together in one place³⁶ and are made through electronic means as mentioned above. Offer and acceptance in electronic contracts take place between the parties through electronic writing or voice conversation or by both, or voice and image, or meets all the three forms.³⁷

These contracts could be of any type of the contracts, whether they are designated (عقود مسماة) or non- designated contracts. Among the e-commerce contracts, the contracts of sale and lease or service and information contracts where some of its kinds are similar to lease contracts though some researchers have included services and information contracts under the non-designated contracts, or have expanded this term to include all the contracts of e-commerce.

³⁶ Hijāzī, *Al-Nizām al-Qānūnī liḥimāyāti-ttijārat al 'ilikruniyyah*, p. 34-35.

³⁷ Muḥammad Ḥasan Qāsim, *Alta'āqud 'an Bu'd*, (Alexendria, Dāral Jāmi'a al-jadidah linnashar, 2005), p.19 (hereinafter referred to as Qāsim, *Alta'āqud 'an Bu'd*).

But in fact these contracts are subject to be governed same as the doctrine of contracts in *Islāmic* law.³⁸

These are the facts by which we can judge the legal status of electronic transactions in general and in particular via the Internet, through the following:

1. Rule of permissibility in general to make contracts and other commercial transactions ³⁹(الأصل في الأشياء الإباحة), except there is rule on the illegitimacy of a specific contract. This rule is supported by the following evidences:

I. From the Holy *Qur'an*:

a. ⁴⁰"يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ"

"O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will:"

This verse apparently requires the legalization of all business transactions concluded with the consent of contracting parties; therefore it also includes e-commerce. In fact the basic requirement for a contract to be concluded is consent of the contracting parties and as a result both parties are obliged to act

³⁸ Fārūq al-'ibāsīrī, '*Aqḍul ishtirāki fi qawā'id al-ma'lūmāati 'abra shabakatil intarnit* (Alexendria, Dāral Jāmi'a al-jadīdah linnashar, 2002), p. 20-22- (hereinafter referred to as al-'ibāsīrī, '*Aqḍul ishtirāki fi qawā'id al-ma'lūmāat*).

³⁹ Jalāluddīn 'Abdurrahmān a'lssuyuwṭī, '*Al-ashbāh wa'l-nnāzā'ir*, (Beirut: Dāral Kutub al-'ilmīyyah, 1983), 60.

⁴⁰ Al-Qur'ān 4:29

accordingly. Hence a contract is said to be valid when there is **consent** of the contracting parties in any type of business contracts including the electronic contracts, except those which are prohibited under the injunctions of Holy *Qur'ān* and *Sunnah* of the Prophet (S.A.W.S).⁴¹

b.

42 " يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ "

“O ye who believe! fulfil (all) obligations”

According to this verse every believer is bound to fulfill his contract and what he has been associated with. No one can restrict this verse only to limited types of contracts unless provided with solid evidence. Thus every statement or act of the people which according to them is considered as contract shall be fulfilled, except those which prohibits permissible things or which permits illegal things proven in *Islāmic* law.⁴³

The fulfillment of contracts in general indicates that originally all the contracts are permitted to enter into, as well as the associated conditions, which could be restricted only by giving evidences.⁴⁴ It means that electronic contracts are also included under this circle of contracts and takes up the same ruling.

⁴¹ Shykh-ul-Islām ibne Timīyyah, *Majmū'ul Fatāwā*, vol.29 (Saudi Arabia: Tawzy' a'l'rri'āsatul-'āmmat lishu'ūnil Ḥaramyn al-sharīfayn, 1404 AH), 155 (hereinafter referred to as Shykh-ul-Islām, *Majmū'ul Fatāwā*).

⁴² Al-Qur'ān 5:1.

⁴³ Muḥammad Rashīd Riḏā, *Tafsīr al-Manār*, vol. 2 (Beirut: Al Maktab al Islāmī, 1404 AH), 254 (hereinafter referred to as Rashīd Riḏā, *Tafsīr al-Manār*).

⁴⁴ Muḥammad Alḥāj Nāṣir, “Bahath al-Islām wa Ijra'ul 'uqūd biālāt al-ittiṣāl al-ḥadīthah,” *Journal Majallath-ul Majma'ul fiqh al-Islāmī* 6, vol. 2 (1410 AH): 1078.

c. "اللَّهُ الَّذِي سَخَّرَ لَكُمُ الْبَحْرَ لِتَجْرِيَ الْفُلُكُ فِيهِ بِأَمْرِهِ وَلِتَبْتَغُوا مِنْ فَضْلِهِ وَلِعَلَّكُمْ تَشْكُرُونَ" ⁴⁵

"It is Allah Who has subjected the sea to you, that ships may sail through it by His command, that ye may seek of his Bounty, and that ye may be grateful."

In this verse the almighty Allah exposes to creature his favor and generosity by the conduct of sea who made it obedient for vessels and ships in order to facilitate for the people different types of trades and gains⁴⁶. Electronic commerce and contracts are from these types of trades and gains.

d. "وَقَدْ فَصَّلَ لَكُمْ مَا حَرَّمَ عَلَيْكُمْ" ⁴⁷

"He hath explained to you in detail what is forbidden to you"

This verse describes generally the permissibility of different matters and actions.

In the same way if not permissible, it would have been described; consequently if not proved to be illegal then these are valid and acceptable. Since making contracts are from the normal matters therefore they are not prohibited and are legitimate.⁴⁸ This ruling is also applicable for electronic commerce and contracts.

All the above mentioned verses of Holy *Qur'an* are very clear with regard to the validity, permissibility and legitimacy of electronic contracts and transactions.

⁴⁵ Al-Qur'an 45:12

⁴⁶ 'Abdal Raḥmān bin Nāṣir al-Sa'dī, *Taysīr al-karīm al-Raḥmān fī Tafsīr Kalām al Mannān* (Beirut: Mu'assasatu a'lrrisālah, 1421 AH).

⁴⁷ Al-Qur'an 6:119

⁴⁸ Shykh-ul-Islām, *Majmū'ul Fatāwā*, vol. 29, P.150.

II. From the Traditions of the Holy Prophet (S.A.W):

a. Saying of the Prophet (S.W.A):

"الحلال ما أحلَّ الله في كتابه، والحرام ما حرَّم الله في كتابه، وما سكت عنه فهو مما عفا عنه"⁴⁹

"All what Allah has made lawful in his book are permissible and all what Allah has made unlawful in his book are prohibited and from which he is silent are pardoned by him"

We have pointed out that God Almighty has made lawful different types of trades and gains. Moreover where he is silent from the permissibility or prohibition of a particular matter or act, is pardoned by him thus no one can set aside its permissibility.⁵⁰ Therefore e-commerce contracts come under the general trades, contracts and gains due to the absence of any ruling which nullifies such type of transactions or by analogy ruling out these transactions.

b. Saying of the Prophet (S.A.W):

عن المقدام رضي الله عنه عن رسول الله صلى الله عليه وسلم قال " ما أكل أحد طعاماً خيراً من أن يأكل من عمل يده"⁵¹

⁴⁹ Sunan al-Tirmidhī, tr. 1648. Electronic version available at: <http://hadith.al-islam.com/Display/Hier.asp?Doc=2&n=0>

⁵⁰ Ibn al-Qayyim al Juzīyyah, *I'lām al Muwaqī'in 'an Rabbil'ālamīn*, ed. Muḥammad Muḥayyuddīn 'Abdal Ḥamid, vol. 1, 2nd edition (Beirut: Dāral fikar, 1397 AH), 344-345 (hereinafter referred to as Ibn al-Qayyim, *I'lām al Muwaqī'in*).

⁵¹ Ṣaḥīḥ al-Bukhārī, tr. 1930. Electronic version available at: <http://hadith.al-islam.com/Display/Hier.asp?Doc=0&n=0>

*Miqdām*⁵²- (May Allah be pleased with him), narrating from the Messenger of Allah (S.A.W) said, "No one is eating food better than one who earned from his own sweat"

c. وعن عائشة رضي الله عنها قالت: قال رسول الله إنَّ أطيب ما أكل الرجل من كسبه⁵³

‘*Ā’isha*⁵⁴ - (May Allah be pleased with her) narrated from the messenger of God (S.A.W) said, "The best of what a man eats is the gains of his own earning".

It is made very clear for us that electronic commerce and contracts are tools of business, hence they are explicitly included as mode of earnings by the text of above mentioned traditions, and there is no clear text, neither any ruling nor order which declares such type of transactions illegitimate or forbidden.

2. E-commerce contracts are designated contracts (عقود مسماة), either contracts for the sale of goods and products, or lease contracts on the benefits, or contracts for services or online services and information. It means that electronic contracts

⁵² He is the son of Ma’dikarab al-kindī, a young companion of the Prophet (S.A.W). He was more than eighty years when died in Himṣ. (Quoted from Ibn Ḥajar al ‘asqalānī, *Fathul bārū, Sharḥ Ṣaḥīḥ al-Bukhārī*, Electronic version available at: <http://hadith.al-islam.com/Display/Hier.asp?Doc=0&n=0>).

⁵³ Sunan ibn Māja, tr. 2128. Electronic version available at: <http://hadith.al-islam.com/Display/Hier.asp?Doc=5&n=0>

⁵⁴ ‘*Ā’isha* daughter of the second caliph of Islām Abū Bakar Ṣiddīq (May Allah be pleased from them. The Prophet (S.A.W) married her after the demise of Khadija in Makkah. Her innocence and virtuousness was revealed in verses from heaven that will continue to be recited until the Day of Judgment. She was the top most prominent among the women in scholarship and has narrated a very good number of traditions of the Prophet (S.A.W). She died in Madīna in the year 58 AH. (See, *Almawsū‘at al Tārīkhīyah*, s.v. "عائشة" electronic version available at : <http://www.dorar.net/enc/history> last visited: 15.06.2009 at: 11:00 pm.

could be in the form of sale contracts, sometimes in the form of lease contracts and in some cases in the form of *Muqāwalah* contracts⁵⁵ (عقود معاولة).⁵⁶

The legitimacy of the sale and lease contracts needs not to be mentioned in this research work, anyhow validity of *Muqāwalah* Contracts could be understand from the following lines:

I. ⁵⁷ " يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ أُحِلَّتْ لَكُمْ بَهِيمَةُ الْأَنْعَامِ إِلَّا مَا يُنْتَلَى عَلَيْكُمْ "

"O you who believe! Fulfill (your) obligations. Lawful to you (for food) are all the beasts of cattle except that which will be announced to you (herein)".

This verse orders to fulfill all the obligations which are not held contrary to *Islāmic* law at all, so *Muqāwalah* contract falls under this general rule.

II. ⁵⁸ " يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ "

"O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will:"

⁵⁵ According to the Article 661 of the Civil Code of Kuwait *Muqāwala* Contracts are defined as: (المقاولة عقد *Muqāwala* contract يلتزم بمقتضاه أحد الطرفين أن يؤدي عملاً للطرف الآخر مقابل عوض ، دون أن يكون تابعاً له أو نائباً عنه) whereby one party is committed to do for the other party in return for payment, without being proxy or following him". *Majma' al Fiqh al Islāmi* in its declaration No. 129 (3/14) give the definition of '*Aqd al Muqāwala* or *Muqāwala* contract as: (عقد يتعهد أحد طرفية بمقتضاه بأن يصنع شيئاً أو يؤدي عملاً مقابل بدلاً يتعهد به الطرف الآخر) It is a contract whereby one of the party undertakes to make or doing something in return of what the other party is committed to.

⁵⁶ Muḥammad Ḥusay Mansūr, *Almas'ulīyyat al 'ilikrunīyyah*, (Alexendria, Dāral Jāmi'a al-jadidah linnashar,, 2003), 20 (hereinafter referred to as Mansūr, *Almas'ulīyyat al 'ilikrunīyyah*)

⁵⁷ Al-Qur'ān 5:1.

⁵⁸ Al-Qur'ān 4:29

This verse of the Holy *Qur'an* demonstrates the path of legitimate trade which is necessary to be held with the consent of both parties. *Muqāwalah* Contract comes under this meaning, as this type of trade is a valid transaction and fulfills the qualification of Consent from both contracting parties.

III. From the Prophetic Tradition:

"عن جابر بن عبد الله رضي الله عنهما أن امرأة من الأنصار قالت لرسول الله صلى الله عليه وسلم: يا رسول الله: ألا أجعل لك شيئاً تقعد عليه، فإن لي غلاماً نجاراً، قال: إن شئت قال: فعملت له المنبر، فلما كان يوم الجمعة، قعد النبي صلى الله عليه وسلم على المنبر الذي صنع...⁵⁹"

"*Jābir*⁶⁰ the son of *Abdullāh* - (May Allah be pleased from them) narrates that a woman from *Anṣār*⁶¹ said to the Messenger of Allah (S.A.W): O Messenger of God: Wouldn't it be good to make something for you to seat because I have a carpenter boy. The Prophet (S.A.W) said: as u wish; he (*Jābir*) said: then he made

⁵⁹ Ṣaḥīḥ al-Bukhārī, tr. 1953. Electronic version available on: <http://hadith.al-islam.com/Display/Hier.asp?Doc=0&n=0>

⁶⁰ *Jābir* the son of 'Abdullāh is one amongst the companions who narrated the greater number of traditions of the Holy Prophet (S.A.W). He was one of the twelve men who attended the first 'Uqbah (the first group of people from Madīnah who embraced Islām in the 2nd year BH) together with his father when he was very young. He had been the Governor of Madīnah and was the last one from these twelve, died in Madīnah in the year 74 AH and his age was 94 at that time. His eyes became blind in the last years of his life. He was unable to join the Battle of *Badar* and 'Uḥud, but when his father embraced martyrdom in the battle of 'Uḥud nothing stopped him to come to the battlefield afterward. (See, *Almawsū'at al Tārikhīyyah*, s.v. جابر "e-version available on: <http://www.dorar.net/enc/history> last visited: 15.6.2009 at: 11:00 pm.

⁶¹ *Anṣār* (literally meaning supporters) are the people from *Madīnah*. The Prophet (S.A.W) had made a relation of brotherhood between the immigrants who migrated from *Makkah* and left everything there for Allah, and *Anṣār* who supported these people in the days of trouble. They gave them share in their goods and belongings till the strength of Muslims to one unit. May Allah be pleased from all of them. (See, *Almawsū'at al Tārikhīyyah*, s.v. "أنصار" electronic version available on: <http://www.dorar.net/enc/history> last visited: 15.06.2009 at: 11:00 pm.

and fixed for him a pulpit, and when it was Friday the Prophet (S.A.W) had seat on that pulpit which he made ...”

This tradition of the Prophet (S.A.W) makes obvious the permissibility of ‘*Aqd Al-Istiṣnā‘a*’⁶² (Manufacturing Contract) because the Prophet (S.A.W) permitted the carpenter to make the pulpit. So this process of making pulpit came into practice through a contract for a particular work which is called in modern juristic terminology ‘*Aqd al-Muqāwalah* or *Muqāwalah* contract. In other words such type of contract concludes between two parties where one party (the principal party) is obliged to provide allowance and the other party (manufacturer) is obliged to work.

IV. Another tradition of the Prophet (S.A.W):

عن عائشة رضي الله عنها قالت: استأجر رسول الله صلى الله عليه وسلم وأبو بكر رجلاً من بني الدليل هادياً خريئاً، وهو على دين كفار قريش، فدفعنا إليه راحلتيهما، وواعداه غار ثور بعد ثلاث ليال براحلتيهما أصبح ثلاثاً⁶³

“*Ā’isha* - (May Allah be pleased with her) reports that the Messenger of Allah (S.A.W) and *Abu Bakar*⁶⁴ rented a man from *Banī a’liddīl* tribe to work as a guide

⁶² It is a contract of sale where the buyer gave an order to a workman (seller) to make a definite thing with an agreement to pay definite wage or price for that thing when it is made. (See, Zia’uddin Aḥmad, *Theory of Ribā*, 2001, quoted in Norazlina Zainul and Fauziah Osman, *E-commerce from an Islāmic perspective*, Department of information system, Faculty of Information and Communication Technology, International Islāmic University, Malaysia, available on: <http://www.sciencedirect.com/science> last accessed time: 10.04.2009 at 3:00 pm.

⁶³ Ṣaḥīḥ al-Bukhārī, tr. 2104. Electronic version available on: <http://hadith.al-islam.com/Display/Hier.asp?Doc=0&n=0>

⁶⁴ He is one of the early ratifiers of the Prophet Muḥammad (S.A.W) and the first believer of *Islām*. He remained with the Prophet in *Makkah* and migrated with him to *Madīnah*. He is one of the ten guaranteed companions to enter *Jannah* (The heaven). He spent all his property in the cause of Allah. He was the first secretary and advisor of the Prophet (S.A.W). He was chosen for Caliphate by the Muslims allegiance after the death of the Prophet (peace be upon him). He remained caliphate for a period of two years three months

for them who was believer of the same religion like the infidels of *Quraysh* tribe. They paid him his service charges and promised to be back there on third morning”.

This *Ḥadīth* (Saying or practice of the Prophet S.A.W) points out the permissibility of ‘*Aqd al-Muqāwalah* or *Muqāwalah* contract. Because this contract is concluded between the Prophet (S.A.W) and *Abu Bakar* on one side and the infidel guide who had the experience of ways and tracks on the other side which is in fact *Muqāwalah* contract, where the Prophet position is like an employer who pays the infidel remuneration in return of services carried by him i.e. guidance to the road to *Madīnah*.⁶⁵

V. *Muqāwalah* contracts are connected with the interests of the people in order to accomplish their needs and make easier their burden specially in the current era where *Muqāwalah* contracts play a vital role in bridging the needs of the people.⁶⁶

All what mentioned above are some of the evidences which legalize *Muqāwalah* contracts.

and ten days. He died from his illness in the year 13 AH. During this short period he fight with apostates to bring them back to *Islām*, who settled themselves in whole parts of the island then launched wars against the Persians and Romans which showed the potential strength of Muslims. He was buried beside the Prophet (S.A.W), so he laid with him after death like he accompanied him in this world. May Allah be pleased from him. (See, *Almawsū‘at al Tārīkhīyyah*, s.v. "أبي بكر الصديق" electronic version available on: <http://www.dorar.net/enc/history> last visited: 15.06.2009 at: 11:00 pm.

⁶⁵ ‘Ali Abū al-Başal, ‘*Aqd al Muqāwalah wa’littawrid fil fiqh al-Islāmī* (Dubai: Dāral Qalam linnashri wa’littawzy’, 1423 H), 22 (hereinafter referred to as ‘Abū al-Başal, ‘*Aqd al Muqāwalah*).

⁶⁶ ‘Abdāl Raḥmān al-‘ā’id, ‘*Aqd al Muqāwalah* (Riyadh: Imām Muḥammad bin Sa‘ūd Islāmīc University, 1425 AH), 147.

3. Electronic transactions and electronic contracts are attached with the interests of the people in large; also it is very clear that *Islām* encourages people to get benefited and prevents them from unlawful things and evils. Here one can raise objection that sometimes electronic transactions are linked with certain evils? In response simply we can say that all types of trades and businesses could have link with unlawful things and evils and it is not only the electronic contracts or transactions.⁶⁷

To clarify this point, we know and as mentioned before that electronic tools of transactions make easier for the people the troubles of searching in the markets, moving and traveling because in electronic transactions and specially via the internet goods could be browsed with specifications and purchased according to the given prices. Moreover one could access to the goods very far from him in another country while he is sitting in his house. Similarly the other party is free from the burden of searching buyers and opening shops or other commercial markets with high prices in addition to the appointment of workers and employees there, consequently having impact in saving money, cheap goods and guarantee.⁶⁸

Same is the case with lease and other contracts, because *Islām* has never declared such type of contracts void and invalid but had legalized taking into account interests of the people connected to these transactions.

⁶⁷ 'Ali Abdullāh al-Shihri, *A'tijarat al 'iliktruniyyah 'abral intarnit*, available on: <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?Nawazel ItemID=89> last accessed time: 01/05/2009 at 3:00 pm.

⁶⁸ Ibid.

4. All financial transactions combined with the terms of these transactions are studied in *Islāmic* law under the chapters of *Mu‘amalāt* (governing of transactions) and not under the chapters of *Ibādāt* (worship and devotion). The text governing transactions and other associated conditions are originally based upon reasoning (التعليل), because basically the validity of these transactions is due to its connection with the great interests of the people taking into consideration the purpose, reasons, interests, usages and customs which are mostly based on the interests of the people.⁶⁹ All these are obvious in electronic transactions, and for this reason electronic contracts or any of the associated condition could not be invalidated except in the following two cases;

- I. Repugnant to the sacred injunctions and *Islāmic* law in general, or in other words which legitimate the things prohibited by God and his Messenger.
- II. Any thing which is repugnant and inconsistent to the basic requisites of a contract.⁷⁰

In the light of above mentioned evidences we can summarize that basically electronic transactions and contracts are legitimate and permissible unless proved contradictory to the basic requirements of these contracts no matter whether they are designated (عقود مسماة) or non-designated contracts.

⁶⁹ Ibid.

⁷⁰ ‘Abū al-Baṣal, ‘*Aqd al Muqāwalah*, 77.

Secondly such types of contracts are connected with the interest of both contracting parties and people are benefited more. Therefore to authorize the legitimacy and validity of these contracts are with in accordance to the teachings of *Islāmic* law which is a unique law that covers each and every thing of all times and places and provides solutions to the issues created by the evolution of modern science. The situations where electronic contracts are inconsistent to the *Islāmic* principals, takes place the same ruling as if they are concluded outside the scope of e-commerce e.g. gambling contracts,⁷¹ *Munābaha*⁷² or *Mulāmasah*⁷³ contracts, some kinds of Insurance contracts,⁷⁴ and contracts containing *Ribā* (Usury)⁷⁵. Similarly unlawfulness of the subject matter is also a major cause of

⁷¹ Gambling or *al-maysir* from Islāmic perspective is defined to mean a game of haphazard in all matters particularly a game of chance by means of divinatory arrows. *Maysir* is of various categories. Some of these types of *maysir* are seeking omen or fortune by divinatory arrows, back gammons, chess, lottery and many others. (See, ‘Abdullāh Ḥasan, *Maqāsid Shari‘ah: The Prohibition of Gambling, Punishment and Justification* available on: <http://maqasid.wordpress.com/2008/07/11/maqasid-shariah-the-prohibition-of-gambling-punishment-and-justification/> last visited time: 25.06.2009 at 7:00 pm)

⁷² A contract of sale performed by the vendor throwing a cloth at the buyer and achieving the sale transaction without giving the buyer the opportunity for properly examining the object of sale. (see. Maṣṣūrī, *Islāmic Law of Contracts*, p. 95)

⁷³ Where the bargain is struck by touching the object of sale without examining it. (see. Maṣṣūrī, *Islāmic Law of Contracts*, p. 95)

⁷⁴ A contract of Insurance is one whereby one party, i.e., Insurer promised in return for a money consideration, i.e., the premium to pay to the other party, i.e., the insured, a sum of money or provide him with some corresponding benefit, upon the occurrence of an event specified in the contract. (see. Parkington and Anthony on Insurance law, 17th edition (London: O’Dowd Sweet and Maxwell, 1981), p. 3, quoted by Maṣṣūrī, *Islāmic Law of Contracts*, p. 101)

⁷⁵ *Ribā* means an increase in the principal, stipulated in loan transaction. So, anything chargeable in addition to the principal amount as a contractual obligation falls under the purview of *Ribā* and is, therefore, prohibited. *Abū Bakar Jaṣṣāṣ* has defined *Ribā* as: “It is a loan given for stipulated period with stipulated increase on the principal payable by the loanee”. (see, Jaṣṣāṣ, *Aḥkām al Qur’an*, (Lahore: Suhail Academy) quoted by Maṣṣūrī, *Islāmic Law of Contracts*, p. 117)

the invalidity of a contract.⁷⁶ Subject matter is the object of the sale which must be beneficial and lawful in *Islām* (*ḥalāl*).⁷⁷

⁷⁶ ‘Alī Abdullāh al-Shihri, *A’ltijarat al ’iliktruniyyah ’abral intarnit*, available on: <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?NawazelItemID=89> last accessed time: 01/05/2009 at 3:00 pm

⁷⁷ Norazlina Zainul and Fauziah Osman, *E-commerce from an Islāmic perspective*, Department of information system, Faculty of Information and Communication Technology, International Islāmic University, Malaysia, available on: <http://www.sciencedirect.com/science> last accessed time: 10.04.2009 at 3:00 pm. (hereinafter referred to as, Norazlina & Fauziah, *E-commerce from an Islāmic perspective*)

2.8: VALIDITY OF ELECTRONIC MODES OF CONTRACTS VIA THE INTERNET

In the previous lines we have gone through the legalization of electronic commerce and contracts. Moreover both types of contracts were considered whether designated or non-designated contracts. Here we will discuss and try to know the legal status of different modes of electronic contracts via the internet. We have already mentioned before that contracts are concluded online via the internet through the process of setting certain software and programs made for this purpose. Similarly there are different ways for conducting electronic contracts, mostly by electronic letter method or voice or both in writing and voice or sometimes through audio and video visuals which we will discuss in detail in the following sections:

2.8.1: Validity of Electronic Contracts in Writing (Letter Method) via the Internet:

This could be envisaged in the following two cases:⁷⁸

2.8.1.1: First case is with regard to the ruling on electronic contracts when concluded in writing via the internet and the contracting parties are considered to be present at that time. This could be pictured in different forms, for example the contracting parties are online in a chat room and sending messages in

⁷⁸ 'Ali Abdullāh al-Shihri, *A'tijārat al 'ilikruniyyah 'abral intarnit*, available on: <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?Nawazel ItemID=89> last accessed time: 01/05/2009 at 3:00 pm

writing to each other directly, both parties receive and read the message at the same time and reply on the spot.

2.8.1.2: Second case is with regard to the ruling on electronic contracts when concluded in writing via the internet and the contracting parties are considered to be absent at that time. This could also be pictured in different forms like correspondence via e-mail, or through a company or seller Web-site in such a way that the offering party is inviting for the sale of goods or services, or by auction sites (public sale sites) or through the market of electronic business transactions or any other web page where there is a written contract for an offer in advance so that if the party on the other side wants to accept this offer either for the sale of goods or getting services, he simply sends or submits his consent and so the contract is concluded and signed. Sometimes the implementation of contract and the exchange of goods and prices also take place electronically via the internet and by the personal computer of the contractor.⁷⁹

In both cases mentioned above the contract is concluded electronically either written by the contractor using his key board at that time or is already available in written form on the web-site or is sent through electronic mail, and where the other party also responds in the same manner i.e. replies in writing electronically. In this way the contract is concluded in writing transmitted between the parties without any change in the body and associated terms and

⁷⁹ Ibid.

conditions of the contract, hence taking the rule of a general contract concluded by letter method.⁸⁰

There is difference of opinions among the school of laws⁸¹ in *Islāmic* legal system with regard to the validity of commercial contracts concluded through letter method.⁸² This could be explained in the following three approaches;

1. **In the narrow sense:** According to the *Shāfi'i* school of thought,⁸³ commercial contracts concluded in writing are invalid except for the people who are not able to speak.⁸⁴
2. **In the normal sense:** According to the *Hanafi* School of thought,⁸⁵ commercial contracts concluded in writing are legitimate, provided that the contracting parties are not present.⁸⁶

⁸⁰ Ibid.

⁸¹ A School of law or a school of thought in the *Islāmic* legal system is usually associated with the name of its founder. This is true, at least, of the *Sunni* schools. A school of law, besides being an internally consistent system of interpretation lends uniformity to the law. It is generally known that there are multiplicity of opinions within the *Islāmic* legal system. By following a school of law the follower accepts a uniform version within this rich variety. (See, Imrān Aḥsan Khān Nyazee, *Theories of Islāmic Law*, 2nd reprint (Islāmabad: Islāmic Research Institute, 2005), 8), (hereinafter referred to as Nyazee, *Theories of Islāmic Law*).

⁸² Nūruddīn al Khādīmī, *Baḥth 'Uqūd al-bay' wa'lshirā' wa'l nnikāḥ bil intarnit wa Ajhizat al'ittiṣālāt alḥadīthah* (Beirut: Dāral Kutub al-'ilmīyah, 1424 H), 348 (herein after referred to as al Khādīmī, *Baḥth 'Uqūd al-bay'*)

⁸³ One of the four major Schools Of Thought in *Islāmic* legal system associated with the name of its founder, *Muḥammad Bin Idrīs al-Shāfi'i*.

⁸⁴ Muḥaiyyuddīn bin Sharaf Nawawī, *Almajmu' Sharḥ al Muḥaddhab*, vol.9 (Beirut: Dāral fikar), 162,167 (hereinafter referred as Nawawī, *Almajmu'*).

⁸⁵ The most prominent among the four major schools of thought in *Islāmic* legal system associated with the name of its founder, *Abū Ḥanīfah Nu'mān Bin thābit*.

3. In the broader sense: According to the *Mālikī* School of thought,⁸⁷ all commercial contracts concluded through letter method are legitimate and there is no difference whether the contracting parties are present or absent.⁸⁸ This opinion is also preferred in the *Shāfiʿī* school of thought.⁸⁹

2.8.1.3: Juristic Debate and Supporting Arguments:

I. Supporting Arguments in favor of those who approach in the Narrow Sense:

1. During the time of the Prophet (S.A.W) the expressions used for contracts are all in wording and it had never been a custom during that time that contracts concluded were in writing, except those who are incapable of speech and can only express either in writing or through indications.
2. Letter method is not a means of relied expressions; most likely this could allow forging or falsification through the beauty of lines. So this probability does not substantiate the contracts which are subject to so

⁸⁶ ‘Alā’uddīn Al-Kāsānī, *Badā’i’ al-Ṣanā’i’*, vol. 5, 2nd edition (Beirut: Dāral Kutub al-‘Ilmiyyah, 1406 AH), 138 (hereinafter referred to as, Al-Kāsānī, *Badā’i’ al-Ṣanā’i’*) and Maḥmūd al-‘aynī, *Albināyah fi Sharḥil Hidāyah*, vol. 9 (Beirut: Dār al-Fikar, 1401 AH), 201 (hereinafter referred to as, ‘aynī, *Albināyah*).

⁸⁷ One of the four major Schools Of Thought in Islāmic legal system associated with the name of its founder, *Mālik Bin ‘Anīs*.

⁸⁸ ‘Ali bin Aḥmad Al‘adwī, *Ḥāshiyatal ‘Adwī ‘alal Kharshī*, vol. 5, (Beirut: Dāral Kutub al-‘Ilmiyyah, 1417 AH), 261.

⁸⁹ Muḥaiyyuddīn bin Sharaf Nawawī, *Rawḍat-al-Ṭālibīn wa ‘Umdatul Muḥīn*, vol. 3, 2nd edition (Beirut: Almaktab al Islāmī, 1405 AH), 338-339 (hereinafter referred to as, Nawawī, *Rawḍat-al-Ṭālibīn*).

many outcomes and aftereffects in addition to the transfer of possession etc.⁹⁰

Arguments in favor of this approach could be debated in such a way that the lack of writing and its use for the establishment of contracts during the period of Prophet (S.A.W), does not indicate illegality of contracts because the contracts are always fashioned with consent and self-satisfaction, and are not limited to certain terms and wordings, but could be referred to the tradition and custom of the time. Hence whatever is accepted among the people to make a contract is legal unless it is repugnant to the *Islāmic* Injunctions. Similarly the Prophet (S.A.W) has used letter method for something more valuable than the creation of contracts i.e. Call to God and the message sent to the kings and others. So if it is permissible for calling people to God then its permissibility is worthier and *fortiori* in case of creation of contracts. Here it is also evidenced that letter method is used as a means of expression without any discrimination.⁹¹

As for the possibility of fraud and falsification or misuse through the beauty of lines is concerned, so this will pass away by looking to other circumstantial evidences. Secondly this could be argued in case of validation of a contract, but the fact is that our topic of discussion is on the subject of writing used as

⁹⁰ 'Ali Muḥaiyyuddīn Alqurradāghī, "Baḥāth Ḥukam ijrā'ul 'Uqūd biālāt alittiṣāl al-ḥadīthah," *Journal of Majma' al fiqh al-Islāmī* 6, vol.2 (1410 AH), 945. (Hereinafter referred to as, ⁹⁰ Alqurradāghī, Ḥukam ijrā'ul 'Uqūd biālāt alittiṣāl al-ḥadīthah).

⁹¹ Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol.3, p.109 And Shykh-ul-Islām, *Majmū'ul Fatawā*, vol. 29, p.26-27 and 'Ali Muḥaiyyuddīn Alqurradāghī, *Mabda' al-rizā fil 'uqūd*, 2nd edition vol.2 (Beirut: Dārul Bashā'ir al-Islāmiyyah, 2002), 948 (Hereinafter referred to as Alqurradāghī, *Mabda' al-rizā fil 'uqūd*).

indicator to express the intention for entering into a contractual relation, and not with regard to the justification of a contract.⁹²

II. Supporting Arguments in favor of those who approach in the Normal Sense:

They are also supporting their point of view by the same arguments mentioned above in support of those following approach in the narrow sense. However they observe an immense need for the absent contractors and not the present parties, that's why they permit the use of letter method as an exceptional rule in case of contracting between the absentees while its use is not permissible between the parties when they are in the presence of each other and there is nothing to bar them from talking and conversation.⁹³

Arguments made here could be debated in such a way that the conflict is arising as a result of letter method, so the issue is that whether writing could be accepted as a good indicator of intention or not? If the answer is yes, then it should not be limited only to the contract between the absentees and shall cover the present partners as well, therefore this is not a logical answer which is also inconsistent to the basic requisites of a contract since we know that the basic requirement of a contract is consent (الرضا) of the parties. If the response is negative then it must not exclude the absent partners because the expression of consent is necessary for

⁹² Alqurradāghī, Ḥukam ijra'ul 'Uqūd biālāt alittiṣāl al-ḥadīthah, vol.2, 948 and Alqurradāghī, *Mabda' al-rizā fil 'uqūd*, vol. 2, 946.

⁹³ 'Alī Abdullāh al-Shihri, *A'tijarat al 'ilikruniyyah 'abral intarnit*, available on: <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?Nawazel ItemID=89> last accessed time: 01/05/2009 at 3:00 pm

the establishment of a contract as contracts are not valid unless justified by the consent of the parties.⁹⁴

III. Supporting Arguments in favor of those who approach in the Broader Sense:

According to them all commercial contracts concluded through letter method are legitimate and there is no difference whether the contracting parties are present or absent. They are supporting their point of view by the following arguments:

1. That the messenger of God (S.A.W) was obliged to preach the message of *Islām* by the order of Allah;

يَا أَيُّهَا الرَّسُولُ بَلِّغْ مَا أُنزِلَ إِلَيْكَ مِنْ رَبِّكَ وَإِنْ لَمْ تَفْعَلْ فَمَا بَلَّغْتَ رِسَالَتَهُ وَاللَّهُ يَعْصِمُكَ مِنَ النَّاسِ إِنَّ اللَّهَ لَا يَهْدِي الْقَوْمَ الْكَافِرِينَ⁹⁵

“O Messenger! Proclaim the (message) which hath been sent to thee from thy Lord. If thou didst not, thou wouldst not have fulfilled and proclaimed His mission. And Allah will defend thee from men (who mean mischief). For Allah guideth not those who reject Faith.”

The Prophet (S.A.W) obeyed this order and preached the message sometimes in the form of speech or address, sometimes through his messengers and emissaries and sometimes through letter method. Hence He sent letters to the well known emperors of the time like the emperor of Rome Caesar (قيصر الروم) and the

⁹⁴ ‘Abdal Razzāq Al-Haytī, *Hukum’l tta’āqud ‘abr Ajhizat al-ittiṣāl al ḥadīthah* (Jordan: Dāral Bayāraq, 1421 AH), 58 (Hereinafter referred to as Haytī, *Hukum’l tta’āqud ‘abr Ajhizat al-ittiṣāl al ḥadīthah*).

⁹⁵ Al-Qur’ān 5:63

emperor of Persia (كسرى فارس) inviting them to embrace *Islām*. So preaching the message through letter method was in place of message by speech or address. Thus it is made very clear that writing or letter method is equivalent to speech or address.⁹⁶

2. *Islām*ic law or the *Shari'ah*⁹⁷ cares too much with regard to the contracts and other agreements to be documented in written form. Allah Almighty orders the believers in his Book:

"يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدِينٍ إِلَىٰ أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ وَلْيَكْتُب بَيْنَكُمْ كَاتِبٌ بِالْعَدْلِ وَلَا
يَأْب كَاتِبٌ أَنْ يَكْتُبَ كَمَا عَلَّمَهُ اللَّهُ فَلْيَكْتُبْ وَلْيَمْلِكِ الَّذِي عَلَيْهِ الْحَقُّ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا يَبْخَسْ
مِنْهُ شَيْئًا"⁹⁸

"O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing Let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as Allah Has taught him, so let him write. Let him who incurs the liability dictate, but let him fear His Lord Allah, and not diminish aught of what he owes."

Similarly Saying of the Almighty Allah:

"وَإِنْ كُنْتُمْ عَلَىٰ سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهَانٌ مَّقْبُوضَةٌ"⁹⁹

⁹⁶ Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol.3, p.109 And Muwaffaquddīn ibn Qudāmāh, *Almughnī*, 3rd edition, vol. 10 (Cairo: Hajr litibā'ati wa'l-nnashri wa'l-ttawzay', 1413AH), 503 (hereinafter referred to as: ibn Qudāmāh, *Almughnī*)

⁹⁷ *Shari'ah* is the religious teachings that Allah has prescribed on His slaves. (Definition available on, <http://www.islamweb.net/ver2/Fatwa/ShowFatwa.php?lang=E&Id=84355&Option=FatwaId> last accessed time: 09.07.2009 at 3:00 pm.

⁹⁸ Al-Qur'ān 2:282

"If ye are on a journey, and cannot find a scribe, a pledge with possession (may serve the purpose)."

3. That the *Shari'ah* has connected the legitimacy of trade with the mutual consent of the parties irrespective of a particular format unless declared voidable by the Holy injunctions mentioned in other places. Allah Almighty says:

"يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ"¹⁰⁰

"O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will."

Since in this verse of the Holy *Qur'an* the element of consent is not restricted to a particular format that's why custom and tradition of the time shall be looked up. We know that since past and coming to the present, it has always been custom of the people to express their will and consent in writing. Hence there should be no objection on the subject of letter method used for the establishment of business contracts.¹⁰¹

4. Writing is a means of expression of will like talking or discussion.¹⁰²

⁹⁹ Al-Qur'an 2:283

¹⁰⁰ Al-Qur'an 4:29

¹⁰¹ Shykh-ul-Islām, *Majmū'ul Fatāwā*, vol. 29, p.7-18 and Alqurradāghī, *Ḥukam ijrā'ul 'Uqūd biālāt alittiṣāl al-ḥadīthah*, vol.2, 947.

¹⁰² Haytī, *Ḥukum'l tta'āqud 'abr Ajhizat al-ittiṣāl al ḥadīthah*, 54.

5. Anyone who comes to know about the intendment of the speaker by any way, he is obliged to comply with his aim. There is no difference whether the intention is expressed in writing or by other indication.¹⁰³

The Preferred Approach:

As a researcher on the subject the preferred opinion seems to be the one which goes in favor of those who approach in the broader sense. According to them all commercial contracts concluded through letter method are legitimate and there is no difference whether the contracting parties are present or absent. We preferred this approach, for its endorsement by strong and solid arguments. On the other hand, arguments passed in favor of the other two approaches seemed not to be as that much clear and strong. Similarly the broader approach is preferred for its connection with the interest of the people in large particularly in this age considering the farness of lands as well as the abundance of contracts and the wide range of trade along with the advancement of communication tools and its role in saving time and traveling. Likewise by looking to low price with less struggle and surety of rights for both parties without any loss or oblivion. And this is the reason that our pious religion is not concerned but with the interest of the people both in past and present.¹⁰⁴

¹⁰³ Ibn al-Qayyim, *I'lam al Muwaqqi'in*, vol. 1, 218.

¹⁰⁴ This approach is also preferred in Art. 11 of the Electronic Transactions Act of Saudi Arabia, issued by the Royal Decree No. M/18 dated 08.03.1428 AH (2007).

Here it shall be noted that contracts concluded in writing or through letter method are valid only in case the following two conditions are insured;

1. That the writing shall be clear and free from all vagueness. It could be possible if written on something capable of being sighted and where the image remains after writing, like writing on papers or slabs which could be read and understood.
2. That the writing shall be defined in such a way that common people can read and understand in their usual life.¹⁰⁵

Applying these conditions to the process of writing on Internet it shall be noted that the writing must be obvious and clear. Likewise the language used shall be understandable, as sometimes there are certain codes or language used in computer which the parties can not understand, or virus attack on the computer which either deletes the data or change the language. That's why the writing shall be clear, readable and understandable to both parties. Moreover if deem necessary the writing shall be duly signed.

2.8.2: Validity of Electronic Contracts Concluded with the Use of Voice and Image via the Internet:

Here the transmission of voice could be directly between the parties such as they are in a chat room and are listening to each other, or even looking to each other through a webcam or through voice telephony via the Internet, or

¹⁰⁵ Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol.3, p.109

through linkage programs or programs meant for the purpose of meetings where the image could also be glanced like video conferences.¹⁰⁶

Similarly the process of communication in the form of voice or both voice and video could be made through a web page or website of Company or service provider or other body offering information, or through a chat room of a particular company operating electronically.¹⁰⁷

Likewise the transmission of voice or both audio and video could be in recorded form placed in a particular program or other advertising CD or certain attachments along with electronic message or on the website of a company bringing up the offer to enter into a contract highlighting the required terms and conditions clearly that remains no ambiguity. This could be a contract of sale or lease contract or providing other services and information in a way that one party is listening or listens and looks to the other party and then accepts the offer made either by sending electronic message or by following the same way in which the offer is made or through any other electronic method.¹⁰⁸

¹⁰⁶ 'Alī Abdullāh al-Shihri, *A'tijārat al 'iliktrunīyyah 'abral intarnit*, available on: <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?Nawazel ItemID=89> last accessed time: 01/05/2009 at 3:00 pm

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

2.8.2.1: Legitimacy of Electronic Contracts concluded with the use of voice directly via the Internet:

The process of conversation or voice chat conducted online between the parties of electronic contracts; in any manner and whatever the way adopted, the transmission of voice takes place very rapidly. Both parties can listen to each other clearly, though they can't see each other and are in different places, still nothing can diverge their conversation. Hence any electronic contract conducted in such a way and concluded with the offer and acceptance of the parties is a valid contract, provided that the other basic requisites of contracts are there. Because lack of viewing the other party has no link with the validity of a contract, what required for the legitimacy of a contract is the connection of offer with acceptance and its realization in any way.¹⁰⁹

This ruling is also supported by the Muslim Jurists when discussing the issues related to this subject. *Nawawī* a great Muslim Jurist of the *Shāfi'ī* school of thought has mentioned in his famous book *Almajmo'* that if a sale contract is concluded in such a way that the parties to the contract are far and can only listen to each other when they speak with a loud squawk, the contract is valid.¹¹⁰ Likewise *Khaṭīb al-Sharbīnī* has reported from some of the Jurists belonging to *Shāfi'ī* School of thought in his book *Mughnī al-Muḥtāj* that if a

¹⁰⁹ Alqurradāghī, *Ḥukam ijrā'ul 'Uqūd biālāt alittiṣāl al-ḥadīthah*, vol.2, 929

¹¹⁰ *Nawawī, Almajmo'*, vol. 9, 181.

sale contract is made from a distance by speaking loudly, the parties have option of revocation till any of the party leaves his sitting place.¹¹¹

Similarly *Rāfi'i*, another great Jurist, has also mentioned in his book *al-'Aziz* that if someone said, "I bought it from him (who is absent at this time)", and when the news had reached to this absent person, he said, "I accept", the contract is concluded because phonation is better than writing.¹¹²

All the above mentioned quotes clearly illustrate that lack of viewing either party to the contract has no negative impact regarding the validity of a contract. Hence relying on the above facts we can say that if an electronic contract is concluded with the use of voice or in audio form directly via the internet, is legitimate.

Secondly we know that the basic requirement for the validity of a contract is to achieve consent of the parties in any form, but clearly and without any ambiguity. This condition has been placed by the Holy *Qur'an*, saying the Almighty:

"يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ"¹¹³

"O ye who believe! Eat not up your property among yourselves in vanities:

But let there be amongst you Traffic and trade by mutual good-will".

¹¹¹ Muḥammad al-Sharbīnī al-Khaṭīb, *Mughnī al-Muḥtāj ilā ma'rifat al-fāz al-minhāj*, vol. 2, (Egypt: Maṭba' Muṣṭafā albābī, 1377 AH), 45 (Hereinafter referred to as, al-Khaṭīb, *Mughnī al-Muḥtāj*)

¹¹² 'Abdal Karīm al-Rāfi'i, *Al-'Aziz Sharḥal wajiz*, vol. 4 (Beirut: Dārul Kutub al-'ilmīyyah, 1417 AH), 13. (hereinafter referred to as, al-Rāfi'i, *Al-'Aziz Sharḥal wajiz*).

¹¹³ Al-Qur'ān 4:29

This condition is inevitable in case of electronic contracts concluded with the use of voice or in audio form directly via the internet, because here the expression of consent has taken place online in verbal form which is unanimously accepted among the Muslim Jurists and internet is used for this purpose as a means of transmitting the voice and not as a newly invented instrument to express the intention of the party. So the basic principal for the establishment of a contract is to ensure consent of the parties, no matter in any form or in any means it has been expressed.¹¹⁴

Since customs and habits of the people have a great role in the chapter of contracts that's why it could be referred to find out the legal status of a contract where there is no explicit text. *Ibn Nujaym* a well known jurist of the *Ḥanafī* School of thought, says, Customs and habits of the people have been considered in many issues pertaining to the doctrine of *Islāmic* Law even sometimes it had been treated as the original ruling.¹¹⁵ *Dusūqī* says, In short the basic requisite of a contract is consent of the parties expressed in any form according to their customs.¹¹⁶ Similarly *Ibn Qudāmāh* a well known Jurist of the *Ḥanbalī* School of thought says, "The Almighty Allah has made contracts

¹¹⁴ Alqurradāghī, *Ḥukam ijrā'ul 'Uqūd biālāt alittiṣāl al-ḥadīthah*, vol.2, 929-930.

¹¹⁵ Zaynul'ābidīn ibn Nujaym, *Alashbāh wa'l-nnazā'ir* (Beirut: Dārul Kutub al-'ilmīyyah, 1400 AH), 93 hereinafter referred to as, ibn Nujaym, *Alashbāh wa'l-nnazā'ir*

¹¹⁶ Muḥammad 'Arfat al-Dusūqī, *Ḥāshiyatu'l Dūsūqī 'alal sharḥil kabīr*, vol. 3 (Egypt: Dār 'ihya' al-kutub al-'Arabīyyah), 4. (hereinafter referred to as, al-Dusūqī, *Ḥāshiyatu'l Dūsūqī*).

permissible for us and has not described the manner to conduct, it means that referring them to the customs of the people is an obligatory duty".¹¹⁷

The wide range of internet and its use in all phases of life including the commercial sector is very common and increasing day by day. Contracts are concluded through online telephony where one party can listen clearly the other party representing themselves or a company, a corporation or an organization. This custom has been recognized in every society and is therefore having legal effects related to the rights and obligations of the parties. Since this custom is not inconsistent to the injunctions of Holy *Qur'ān* and *Sunnah*, likewise to the basic norms of *Islāmic* Law, and is connected with the interest of the people in large, therefore online contracts with the direct use of voice are legitimate because internet is customarily a recognized tool of connection.¹¹⁸

2.8.2.2: Legitimacy of Electronic Contracts concluded with the direct use of voice and video via the Internet:

Such type of contracts where one party can listen and watches the other party clearly and without any vagueness, are declared legitimate by the Muslim Jurists. *Imām Nawawī* has argued on this subject, saying, that if a sale contract is concluded in such a way that the parties to the contract are far and can only

¹¹⁷ ibn Qudāmah, *Almughnī*, vol. 6, 8.

¹¹⁸ Haytī, *Hukum'l tta'āqud 'abr Ajhizat al-ittiṣāl al ḥadīthah*, 19.

listen to each other when they speak with a loud squawk, the contract is valid without any dispute.¹¹⁹

In fact we discussed in full detail that contracts concluded online with the direct use of voice or in audio form are legally binding. Similarly we proved its legality by providing different arguments which need not to be repeated. That's why in this case where video is added with voice in the formation of a contract is fortiori and more worthier in legitimacy than the earlier one where there is no video, for both the contracting parties can talk and watch each other directly as if they are sitting in the same place. Moreover the process of offer and acceptance along with other associated terms if any, conclude with the consent of the parties.¹²⁰

2.8.2.3: Legitimacy of Electronic Contracts concluded with the use of voice or both voice and video indirectly via the Internet:

In these two situations the offer is addressed to the public in large where the transmission of voice or voice with video takes place. The sound is not directly from the contractor but is recorded in such a way that invites the people to accept the offer of a particular contract explaining other associated terms and conditions of the contract. In such type of contracts the contracting

¹¹⁹ Nawawī, *Almajmu'*, vol. 9, 181

¹²⁰ 'Alī Abdullāh al-Shihri, *A'tijarat al 'ilikruniyyah 'abral intarnit*, available on: <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?Nawazel ItemID=89> last accessed time: 01/05/2009 at 3:00 pm

parties are far from each other and the process of offer and acceptance does not take place at the same time.

Contracts concluded in this way occupy the same ruling as applied for electronic contracts concluded with letter method between the absentees via the internet, which are regarded as valid contracts in the previous lines. Arguments provided in support of its validity need not to be repeated. Since the factor of viewing or listening or both listening and viewing are added here, it means that consent of the parties has been made more certain, surely the contracts are valid and nothing can harm its legitimacy.¹²¹

¹²¹ al Khādīmī, *Bahth 'Uqūd al-bay'*, 361 And Haytī, *Ḥukum'l tta'āqud 'abr Ajhizat al-ittiṣāl al ḥadīthah*, 38.

Sanhūrī, an eminent contemporary Muslim Jurist, has cited seven component elements in a contract; They are (1) the concurrence of offer and acceptance; (2) the unity of the *Majlis* of contract: (3) plurality of contracting parties: (4) reason (*'aql*), or the power of distinction (*tamyīz*) of the contracting parties; (5) that the subject (*maḥall*) is susceptible to delivery; (6) the object (*maḥall*) defined; and (7) the beneficial nature of the object in that it is permitted for trade in.³ We have however to follow the scheme of majority jurists.

3.1: *Ṣīghah* or Form of Electronic Contracts via the Internet

With reference to the first element of electronic contracts which is the form or expression of both offer and acceptance, *Islāmic* law of contract recognizes both express contracts as well as what has been described as contract by conduct. It presupposes the making of an offer and acceptance either orally by writing or by conduct but indicating the consent and intention of the parties.⁴

3.1.1: Definition of Offer (*Ījāb*) and Acceptance (*Qabūl*)

The Muslim Jurists differ in opinions on the definition of offer and acceptance; According to the *Ḥanafī* jurists *Ījāb* or an offer is defined as, A declaration that is

³ 'Abdal Razzāq al-Sanhūrī, *Maṣādir al-Ḥaq*, vol.4, pp. 134-135 quoted in Manṣūrī, *Islāmic Law of Contracts*, 25.

⁴ 'Abdal Ḥamid al-Bālī, *ḍawābit al-'uqud* (Cairo: Maktaba Wahaba), 87.

made first with a view to creating an obligation, while the subsequent declaration is termed *Qabūl* or acceptance.⁵

However the majority jurists hold that *Ījāb* or an offer is, the declaration made by the party who owns the possession, no matter whether the declaration is made first or in response. And the *Qabūl* or acceptance is defined as, the declaration made willingly by the party to whom the ownership is going to be transferred though it is made first.⁶

The preferred definition in my opinion and as a researcher on the subject is the definition adopted by the *Ḥanafī* Jurists, for its easiness in clarifying the difference between offer and acceptance as one can judge very easily that which one is made first, is therefore an offer while acceptance is the second declaration indicating willingness and response to the first party.⁷ This point of view is also adopted by many modern Muslim Scholars likewise most of the common law systems have also termed the first declaration as an offer and the second declaration as an acceptance.⁸

⁵ Majallah, Art. 101 quoted in Maṣṣūrī, *Islāmic Law of Contracts*, 26.

⁶ Nawawī, *Rawḍat-al-Ṭālibīn* vol. 3, 338.

⁷ 'Adnān al-Turkamānī, *ḍawābit ul-'Aqd al Islāmī*, 2nd edition (Jeddah: Maktabah Dārul Maṭbu'āt al-Ḥadīthah, 1413 AH), 42.

⁸ Muḥammad Amīn al-Rūmī, *Atta'āqud al-'iluktrunī 'abral intarnit* (Alexandria: Dārul Maṭbu'āt al-Jāmi'iyyah, 2004), 49.

In fact an offer and acceptance indicate willingness of the contracting parties in order to establish a contract. Moreover this indication could be either orally by writing or by conduct, clearly showing consent of the parties and should be free from all types of ambiguities. This approach is followed by *Shaykh ul-Islām ibn Tīmīyyah*⁹ and the jurists of *Mālikī* School of thought.¹⁰

In the foregoing chapter we have gone through the legitimacy of different ways for conducting electronic contracts, i.e. by electronic letter method or with the use of voice or both in writing and voice or sometimes through audio and video visuals, indicating consent of the contracting parties.

The Electronic Transaction Act of the Kingdom of Saudi Arabia, 1424 AH, declares the legitimacy of electronic contracts where offer and acceptance are indicated by any electronic means including the internet. This indication could be expressed by entering data of electronic characteristic in the form of texts, codes, images, graphics, sounds or any other format, combined or separate.¹¹

⁹ A well known and prominent Jurist of the *Ḥanbalī* School of thought.

¹⁰ Abal walīd al-Bājī, *Almuntaqā sharḥ al-Mu'attā*, vol. 4 (Egypt: Maṭba'at al-Sa'ādah, 1423 AH), 157.

¹¹ See, Articles 1, 5 and 9 of the *Electronic Transactions Act*, Kingdom of Saudi Arabia, 1424 AH.

3.2: *Ijāb* or Offer in Electronic Contracts via the Internet

We concluded the above discussion by validating the use of letter method, voice or voice with video images etc. to indicate the intention of contracting parties in electronic contracts. The user of internet can express his offer in e-commerce contracts by sending message from his e-mail to the inbox of the mail recipient. This message inclusive of an offer could be in favor of a particular person or e-mail subscribers of a particular company. Similarly the offer could be made through a website (World Wide Web) or through other services offering the internet, like a chat room or newsgroups. The required conditions for this *Ijāb* or offer are same as the requirements of an offer in ordinary contracts. Some of them are mentioned as following;

1. The offer should be clear and specific to demonstrate the will and aim of the contracting party because it expresses the will of the inner self. If the intention is ambiguous, it means its link with offer is not confirmed.¹² This condition requires that the offer shall comprise certain basic elements in order to conduct the intended contract and to bring all these into the knowledge of the other party in such away that the contract concludes simply by the acceptance of the other party. For example if the offer is with regard to the sale of a particular product, there should be a precise description of the sale, including the exact description of this product that

¹² Badrān Abul'ynayn Badrān, *Al-Shari'at al-Islāmiyyah, Tārikhuhi wa nazriyyat ul-milkiyyah wal 'Uqud* (Alexandria: Mu'assasat Shabāb al-Jāmi'ah), 371.

remains no ambiguity, likewise a description of the price and mode of payment as well as method of delivery and so on. Similarly the offer could be via an electronic mail (e-mail) or a website or through a virtual market or a chat room etc. and could be in writing or voice or in the form of audio-visuals. It is necessary to note the possibility to attach the real dynamic images of the offered products for sale; likewise the offered product could be pictured in such a way that reflects the true expression through a technical three dimensional (3D) images without any difficulty.¹³

2. The offer shall be absolute and decisive so that it demonstrates an implemental intention for the settlement of a contract without any hesitation and procrastination, otherwise the linking intention will go opposite with the desired contract, because indecisiveness or hesitation portrays the meaning of rejection, consequently there is neither a contract nor an obligation.¹⁴ Similarly an offer could not be initiated merely by invitation to negotiate or by an advertisement unless it is evidenced by certain proofs which indicate conclusively that an offer is intended.¹⁵

The wording of the offer can determine an absolute offer by containing certain expressions which make it absolute; for instance, if provides that,

¹³ al-Dasūqī, *Aljawānib al qānūniyyah*, 88.

¹⁴ Muṣṭafā al-Zarqā, *Almadkhal al fiqhī al-‘ām*, vol.1 (Damascus: Dārul Qalam, 1418 AH), 408-409.

¹⁵ Bayān al-Dibyān, *Alījāb wal Qabūl bayn al-Fiqhi wal Qānūn* (Riyadh: Maktabat al-rushd, 1426 AH), 27.

this offer is irrevocable, or it is mentioned on the website that the product will be sent to you if you submit to accept this offer, or duration is specified during which acceptance could be made. Such types of expressions demonstrate that the offering party is committed to offer decisively. It is also necessary to consider that the offer is free of any influential reservations, like the offeror reserves the right to modify the offer or he extends this right to the offeree as well; if so or like then it is just an invitation to treat and not a formal offer, even if any party agrees to enter into this contract just by invitation to negotiate or advertisement, his consent shall be dealt as an offer and requires acceptance from the original offeror.¹⁶

It is pertinent to note that there is no difference whether an offer is made in favor of a particular person or is addressed to the general public through the Website of Production Company or service provider on the web or any other site. The Muslim Jurists have discussed the subject of offer (*Ījāb*) when addressed to the general public, so as some of the *Mālikī* Jurists have said that where a man had described his commodity in such a way that if any person comes for ten (money in consideration of the commodity), he will get this commodity; soon after a man comes who

¹⁶ Maḥmūd al-Sharīfāt, *Al-ttarāḍī fi tta'āqud 'abral-intarnit* (2005), 120-121 quoted in 'Alī Abdullāh al-Shihri, *A'tijarat al 'ilikrunīyah 'abral intarnit*, available on: <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?Nawazel ItemID=89> last accessed time: 01/05/2009 at 3:00 pm (hereinafter referred to as (al-Sharīfāt, *Al-ttarāḍī fi tta'āqud 'abral-intarnit*).

either have heard him directly or is conveyed to him, the seller is bound to deliver and he can not revoke his offer at this stage. On the other hand if the buyer has neither heard him directly nor the offer is conveyed to him then the seller is not bound to deliver.¹⁷

However in cases where the offer is addressed to the general public, the offeror is advised to provide in his offer that in fact it is an invitation to treat or invitation for contracting so that he may enjoy the right of revocation taking into account some special circumstances like the implementation of stock-in-trade. Similarly if competition is observed among those who are interested in buying the product or want to obtain the service then priority will be given to those customers who are prior in access to the offeror,¹⁸ which is very easy to find out while contracting via the internet.

3.3: *Qabūl* or Acceptance in Electronic Contracts via the Internet

3.3.1: Meaning of *Qabūl* or Acceptance in Electronic Contracts via the Internet:

We know from the above discussion that *Qabūl* or acceptance is the second declaration of either parties for initiating a contract, thus it could be defined here as, expression to indicate the intention of a person who seeks to contract online from a distance through the network of sites (World Wide Web), having full

¹⁷ See, *Ḥāshiyatul-banā 'alal-Zarqānī 'ala Mukhtaṣar khalīl*, vol. 5, p. 6, quoted in 'Alī Abdullāh al-Shihri, *A'tijārat al 'ilikrunīyyah 'abral intarnit*, available on: <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?NawazelItemID=89> last accessed time: 01/05/2009 at 3:00 pm

¹⁸ Haytī, *Ḥukum'l tta'āqud 'abr Ajhizat al-ittiṣāl al ḥadīthah*, 34.

concurrence and coincidence with the elements of offer made via the internet so that the contract concludes by the corresponding acceptance.¹⁹

Acceptance submitted online could be in different forms, for example by using the technology of e-mail in such a way that the second party (to whom an offer is addressed) sends or submits his acceptance in the form of electronic message to the first party who offered to initiate a contract, inclusive of all required elements to conclude the contract, and which shows that the concurrence of acceptance with the offer is ascertained. Likewise this message could be confirmation for contracting on the website in case where the offeror has provided the condition that acceptance has to be sent through a message via an e-mail.²⁰

Similarly acceptance could be declared through a web page or a website where acceptance is expressed in the form of electronic message and is sent to the personal e-mail of an offeror if the offeror has stipulated this condition as confirmation for contracting. This process concludes just by a single click of the acceptance icon or the icon which indicates yes at the end of the page. Hence acceptance is conveyed to the offeror electronically in this way the contract concludes.²¹

¹⁹ Bishār Maḥmūd Dūdīn, *Al'itār al-Qānūnī li'aqd al-mubram 'abr Shabakat al intarnit* (Jordan: Dār al-thaqāfah, 2006), p. 71 (hereinafter referred to as Dūdīn, *Al'itār al-Qānūnī li'aqd al-mubram 'abr Shabakat al intarnit*).

²⁰ 'Alī Abdullāh al-Shihri, *A'tijarat al 'ilikruniyyah 'abral intarnit*, available on: <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?Nawazel ItemID=89> last accessed time: 01/05/2009 at 3:00 pm

²¹ Ibid.

Acceptance may be by clicking more than once the icon (confirm to accept) as required by the offeror in the contract in order to prevent transmission of acceptance by a single click, or by using some additional phrases, like Do you confirm to accept or by creating an additional icon for this purpose. This is useful for someone to take him out of the problems if he clicks the acceptance icon mistakenly, or is clicked by a child or any other frivolous person sitting beside him.²²

Acceptance could be expressed in writing directly through a website or a chat room and so on. Similarly it could be expressed in the form of voice either through a chat room or online telephony, and may be in the form of audio visuals (live) by using a particular program via the internet or sometimes through the same site.²³

3.3.2: Conditions Required for *Qabūl* or Acceptance in Electronic Contracts via the Internet

The required conditions for *Qabūl* or Acceptance in Electronic Contracts concluded via the Internet are same as the requirements of *Qabūl* in ordinary contracts. Some of them are mentioned as following;

1. That the offer exists at the time of declaration of acceptance. It means that the contracting parties are neither dispersed before the declaration of acceptance, nor any of them has been engaged in something which

²² Dūdīn, *Al'itār al-Qānūnī li'aqd al-mubram 'abr Shabakat al intarnit*, p. 137-140.

²³ Al-'ajlūnī, *Atta'āqud 'an Ṭarīq il-intarnit*, p 75.

customarily cuts off the contract. If they are dispersed or engaged, the contract does not conclude, because they avoided the contract. There is no harm in case of delay in accepting the offer as long as they have not left the meeting place and are not engaged in something which normally cuts off the contract. If one of them is absent then the concurrence of acceptance with the offer will take place at time when the offer comes into his knowledge and hence the contract concludes. However if the offeror has withdrawn his offer before the acceptance of the other party, the contract does not conclude though the offeree is unaware of this revocation.²⁴

Similarly meeting of the contracting parties could be in the legal sense like contracting through a direct contact via the internet with the use of voice or visuals. Likewise contracting in writing directly through a chat room or newsgroups, and if accompanied by voice or visuals, will be suited more. In such cases the meeting place becomes closer more than the factual meeting place since acceptance is issued directly soon after the offer, otherwise acceptance could be delayed till the parties leave the meeting place. Moreover in online meetings the parties could not be engaged in something which normally cuts off the offer, so when the chat breaks

²⁴ Al-Kāsānī, *Badā'i' al-Şanā'i'*, vol.5, p.137

down or the contact is disconnected without the declaration of acceptance, the offer is no more effective.²⁵

In some cases while contracting electronically via the internet, the offer may remain effective for a limited time provided by the offeror in his message or on the website. Thus acceptance shall follow the offer within this limited time, because if the time is over and then the offer is accepted, it would have no legal effect.²⁶

2. That the acceptance shall coincide with the offer, because concurrence and coincidence between the offer and acceptance indicate consent of the parties, that's why it is necessary that acceptance shall be inclusive of all the ingredients containing an offer; if the offer does not coincide with acceptance, it means that consent of the parties is not achieved.²⁷

Here we want refer to the fact that most of the contracts conducted through internet, conclude in such a manner that the website provides to the public internet users a model contract where its clauses contain most of the fundamental issues which the website provider deems appropriate. In this way the other party who is willing to contracting has non other than the option to click on the accept icon provided in this model contract which declares

²⁵ Al-'ajlūnī, *Atta'āqud 'an Ṭarīq il-intarnit*, p 75.

²⁶ Naḍāl, *Aḥkām 'uqūdu'l-ttijārat al 'iliktruniyyah*, p. 26-27.

²⁷ Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol.5, p.136.

acceptance of the contract, consequently acceptance submitted is with conformity to the offer.²⁸

Similarly the contracts concluded through exchange of electronic messages or other direct communication services whether in the form of audio or visuals or in writing in such a way that acceptance is conform to the offer, the contract is valid. However if the message or the language used requires from the contractor certain amendments to be brought into the offer or is inconsistent to the fundamental issues of the offer, then the contract does not conclude unless both parties express their consent regarding the required amendments.²⁹

In some cases the internet users or some e-mail holders receive electronic message containing offer for a contract or service which provides that if the offer is not denied during the given limited time, it shall be considered acceptance from his side. So if the offer is not denied during the given time then the applicable rule is this *Fiqhī Maxim* ³⁰ (لا ينسب إلى ساكت قول لكن السكوت في معرض الحاجة بيان)

“Silence is not to be construed as speech, except silence when there is occasion for speech” it means that no statement can be attributed to a person who remains silent, but to keep silent where speech is called for amounts to a spoken admission. Hence in the above case silence shall be considered acceptance

²⁸ al-Sharīfāt, *Al-ttarādī fi tta'āqud 'abral-intarnit*, p. 144-145.

²⁹ Ibid.

³⁰ ibn Nujaym, *Alashbāh wa'l-nnazā'ir*, 154.

provided that it is accompanied by strong circumstantial evidences which indicate silence in the sense of acceptance.³¹

3.4: Meeting Place and its Application in Electronic Commerce

In dealing with this concept, this subject is divided into three key sub-headings; to start with, pointing out in short, the meaning of parties' sitting place. This is followed by exploring the idea of meeting place in face-to-face transactions. The next part of this discussion is devoted to the theory of sitting place based on contracting between the absentees.

3.4.1: The Meaning of Meeting Place

To properly understand the discussion of this part, it is important to primarily describe the unique principle of the meeting place in the *Islāmic* legal system. Amongst other definitions, article 181 of the *Islāmic* Civil Law Codification which took place in the 19th century, namely the *Majallat al-Aḥkām al-'Adliyyah* (the 1891 Othman Justice Rules Magazine) classifies the parties' meeting place as, the meeting that is assembled for contract making. This definition, as can be observed, looks to be inadequate, and the term still needs further clarification. Hence, another definition, which provides more explanation and precise details, is put forward for this legal principle as, the time span during which the contracting parties are together to engage with the forming of contract without being busy by something else not related to the negotiated bargaining by any of

³¹ 'Abdal Raḥmān al-sind, *Alaḥkām al-fiqhiyyah littā'āmulāt al 'iliktrunīyyah* (Riyadh: Dārul waraq, 1424 AH), 115.

them.³²

Hence, the theory of meeting place is considered as one unit of time according to the later definition. The unity of meeting place means that the offer and the acceptance must be ended at the same time during which the parties are facing each other to conclude the contract, without anything that could avert their attention away from it. It is obvious that, the contract must be carried out in the same place where the contracting parties originally initiated their negotiation as they, sometimes, may be engaged in business dealings while walking or riding or even travelling in a train or plane and hence, such a place is not applicable in the law.³³

Speaking flawlessly, the offer and acceptance can never be, in a practical sense, contemporaneous since the offer ceases to exist before the acceptance comes to life. Therefore, to make possible the necessary connection to take place, the meeting place is considered as one unit of time. As such, the offer is deemed to be in existence so long as the contracting parties continue their business engagement. The main reason behind the formation of the theory of sitting place in the *Islāmic* legal system is to determine the allowed time-span for the offer to be legally stand for acceptance without bringing potential damage to the offering party, by delaying the declaration of acceptance for a long time after the breaking

³² It is indicated that this definition is adopted by a large number of *Shāfi'i*, *Hanbalī*, and *Mālikī* scholars. See, Jābir al-Shāfi'i *Majlis al-'Aqd fil-Figh al-Islāmī wal-Qānūn al-Waḍ'ī* (Alexandria: Dār al-Jāmi'ah al-Jadīdah, 2001), 90-92. (hereinafter referred to as, al-Shāfi'i *Majlis al-'Aqd fil-Figh al-Islāmī wal-Qānūn al-Waḍ'ī*)

³³ See, A'lzāgy, "The *Islāmī* Concept of Meeting place and its Application in E-Commerce, p.5.

up of the parties from their meeting place,³⁴ nor damaging the accepting party as the theory provides him with more time to think the worth and the benefit of the offer before making any quick decision.³⁵

3.4.2: The Concept of Sitting Place in Face-to-Face Transactions

According to the rules of *Islāmic* law, in the case where both contracting parties are in the presence of each other, it is not legally accepted that the offer is made in one place and the acceptance is formed in a different place. That's why, for a contract to bear a legal effect, the offer and acceptance must be communicated at the same place where both parties assembled to form their contract. So, for instance, if one party meets another one in a place, say, the place of work, and offers his car with a certain value in consideration, but the other party has not accepted the offer until both parties have separated from each other - in such a case, unless it is agreed for that offer to be extended for a longer time, there would be no valid conclusion of the transaction. This is due to the fact that the acceptance was not issued at the same time during which both parties got together to negotiate their commercial bargaining.³⁶

However, it is pertinent to note that the application of sitting place idea in the Muslim commercial doctrine is conditional on the absence of parties' agreement so as to extend the validity of offer to a certain period of time in which the

³⁴ 'Abdal-Karīm Zaydān, *Almadkhal Lidirasāt al-Sharī'at al-Islamīyyah* (Beirut: al-Risālāt Ltd, 1982) 290-291.

³⁵ *Ibid.*

³⁶ Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol.5, p.137.

acceptance must be initiated within this limited period. It must be added that in this case where the offer is agreed to be open for acceptance for a particular time, such an offer cannot be withdrawn until that specified period comes to an end without acceptance being made.³⁷ However, when there is no commitment to extend the offer for a certain period, the offering party can withdraw his offer at any stage before acceptance. Similarly under the option of meeting place, both parties can even cancel the contract after it was concluded.³⁸ In the following discussion, consideration will be given to the concept of the *Islāmic* option of meeting place in face-to-face transaction.

3.4.2.1: The Option of Meeting Place

The option of meeting place is one of the recognized *Islāmic* rights of options. Accordingly, each of the contracting parties bears the legal right to revoke the sale after it has been concluded by the acceptance of the offer so long as the meeting place continues.³⁹

This option provides extra time for both parties to thoughtfully re-contemplate and reconsider the benefit and the worth of their commercial dealing after it had been concluded. This option took its authority in the law from a tradition attributed to the Prophet (S.A.W) according to which he said:

³⁷ See, the Religious Decree of the Islāmic Law Institute, *Majma' al-Figh al-Islāmi*. This was set out in its sixth meeting held in Jeddah from 14-20 March 1990.

³⁸ Haytī, *Ḥukum' l tta'āqud 'abr Ajhizat al-ittiṣāl al ḥadīthah*, 74-75.

³⁹ *Ibid.*

"إذا تباع الرجلان فكل واحد منهما بالخيار ما لم يتفرقا وكانا جميعاً، أو يخير أحدهما الآخر، فإن خير أحدهما الآخر فتبأيعا على ذلك فقد وجب البيع، وإن تفرقا بعد أن تبأيعا ولم يترك واحد منهما البيع فقد وجب البيع"⁴⁰

"When two persons enter into a transaction, each of them has the right to annul it so long as they are not separated and are together (at the place of transaction); or if one gives the other the right to annul the transaction. But if one gives the other the option, the transaction is made on this condition (i.e. one has the right to annul the transaction), it becomes binding. And if they are separated after they have made the bargain and none of them annulled it, even then the transaction is binding".⁴¹

This Prophetic Saying is clear in recognizing the validity of the option of meeting place. The Prophet (S.A.W) plainly conferred both contracting parties the option of annulling the sale at any time before separation. The word separation is defined as either or both contracting parties physically leaving the place of transaction. The determination of what constitutes physical separation is left to the prevailing trading practices and customs. So, when it is customary that the contracting parties have separated from the meeting place of transaction, then the contract is legally deemed to be irreversible. Hence, the meeting place option is terminated as soon as either or both contracting parties depart from the place

⁴⁰ *Ṣaḥīḥ Muslim*, tradition no. 1531, electronic available on: <http://www.dorar.net/enc/hadith> last visited time: 01.07.2009 at 12:00 am.

⁴¹ English translation by Ṣiddīqī ‘Abdal Ḥamīd (India: Kitāb Bhavan, 2000).

in which both parties gathered to form the bargain.⁴²

3.4.3: The Application of Meeting Place in Contracting between the Absentees

It is a common practice, especially nowadays with the advent of modern technological devices, that contracts are being conducted where parties are at a distance from each other. This could be classified in a legal sense as contracting between absentees. Hence, in such a contract, the offering party initiates his proposal in one place while the receiving party receives it in a different location. Contracting between absentees is a contract which is concluded between two contracting parties who are not assembled in one place of bargaining.⁴³

The main difference between a contract which is formed in the presence of the contracting parties from a contract whose parties are absent is the existence of some period of time which is needed for the offer to reach the receiver of it and for the acceptance to reach the offering party. There is no such time gap when the contract is formed in the presence of two parties as both the offer and the acceptance are heard instantly as soon as they are pronounced by the contracting parties.⁴⁴

As mentioned above, it is an important condition that the offer and the

⁴²Different examples of when parties' parting or separation is taken place were set out. Amongst others, in a big market, parting is established by walking away until one does not hear the other's common talk; and on a ship by going to different levels, and in a house by one leaving the house or going to a different room. See, Sulaymān al-Jurushī, *Nazriyyat al-'Aqd wal-Khīyārāt fil-Fiqh al-Islāmī al-Muqārīn* (Libya: Dār al-Kutub al-Waṭaniyyah, 2003) 161-162.

⁴³ al-Shāfi'ī *Majlis al-'Aqd fil-Fiqh al-Islāmī wal-Qānūn al-Waḍ'ī*, 252.

⁴⁴ A'lzāgy, "The Islāmīc Concept of Meeting place and its Application in E-Commerce, p.6.

acceptance must be connected in a unified meeting place. When both parties are contracting in the presence of each other, it is evident that the meeting place is the place where the offer is made. In the case of contracting inter absentees the theory has been extended in the doctrine of *Islāmic* law by construction. Due to the natural difference of the contracting with an absent party from the contract whose parties are present, it was put forward that the meeting place in contracting between absentees is the place where the receiving party becomes fully aware of the contents of the sent offer via a messenger through chat or a letter, e-mail or other means of communication.⁴⁵

The concept of the unity of meeting place is an essential condition in contracting with the present parties. However, an actual application of the unity of the meeting place, as mentioned above, is not conceivable in contracting between absentees, and so, a constructive unity was established for such contracting. The concept of a constructive unity of meeting place means that the acceptance has to be made in that very place where the offer came to the knowledge of the receiver. In other words, it was provided that the unity of meeting place demonstrates that the acceptance must be issued before the receiver physically departs from the place where the offer came to his knowledge.⁴⁶

However, this rule appears to be theoretical rather than practical as, for instance,

⁴⁵ Muḥammad Mūsā, *Al-Amwāl wa Nazrīyyat al-'Aqd fil-Fiqh al-Islāmī* (Cairo: Dāral-Fikar al-'Arabi, 1996), 237.

⁴⁶ Alqurradāghī, *Mabda' al-rizā fil 'uqūd*, vol. 2, 1093.

in the case of contracting between absentees using the letter method, sometimes, the content of the letter will be read while the receiver is walking or driving and thus more time is needed for him to consider the value of the offer. So, the unity of meeting place as indicated is difficult to apply. Furthermore, it is very common that letters are opened while the receiver is alone without any one being present and therefore, neither the offering party nor any other person except the receiver can know for sure when and where the offering letter is read and also when the physical departure has taken place. In view of that, it would be apt to say that the acceptance in contracting in the absence of one party must be made within a reasonable time taking into account the nature of the contract and surrounding circumstances as well as the trading customs. If the acceptance is not issued within a reasonable time, then the offer will be terminated and hence, there is no possible valid conclusion of contract.⁴⁷

3.4.3.1: The Option of Meeting Place in Contracting between the Absentees

Unlike the case of contracting while parties are present, the option of meeting place will not be available for the parties in contracting between the absentees. The tradition from which the idea of the option of meeting place derives authority presupposes that the parties are contracting in the presence of each other in one meeting place, thus, this option cannot be applied in the case of

⁴⁷ A'izāgy, *"The Islāmic Concept of Meeting place and its Application in E-Commerce*, p.6.

contracting with an absent party.⁴⁸

In contrast to this view, it has been argued that the meeting place option is not so restricted. Accordingly, the receiving party in contracting between absentees has the option to repudiate the contract at any time before he physically leaves his place where he receives the offer. Similarly, the offering party can cancel the contract at any time before the meeting place of the receiver 'breaks up'.⁴⁹ However, this rule appears to be theoretical and hence hard to apply in practice in the trading environment since it is impractical to know when the receiver leaves the meeting place. Yet, it is logically sensible that the acceptance could be withdrawn at any time before it is communicated to the offering party.⁵⁰

3.4.4: The Implementation of the Islāmic Principle of Meeting Place in E-Commerce

In concluding the topic of meeting place, discussion below will be divided into two main parts - forming a contract using instantaneous electronic tools and non-instantaneous methods of communication.

3.4.4.1: The Application of Meeting Place in Electronic Commerce Using Instantaneous Electronic devices of Communication

In face-to-face transactions, there is no time interval in communicating both the offer and the acceptance. As can be observed, there is no timing break in the case

⁴⁸ al-Rāfi'i, *Al-'Aziz Sharḥ al wajīz*, vol.4, 178.

⁴⁹ Alqurradāghī, *Mabda' al-rizā fil 'uqūd*, vol. 2, 1093.

⁵⁰ S.E. Rayner, *The Theory of Contracts in Islāmic Law* (London: Graham and Trotman, 1991), 112.

that a contract is formed via electronic instantaneous forms of communication. Such as both the offer and the acceptance are instantly communicated via cyberspace, the method that is used there to convey the parties' will is classified as instantaneous. Sometimes this type of instant electronic communication may be in the form of a voice, such as by telephone, or voice and picture such as with video conversation via the Internet (e.g. msn or yahoo messenger), or instant writing such as with chat-rooms on the Internet.⁵¹

Unlike the contract with the presence of both parties in the same place, parties are located in different places when contracting using such forms of communication. As a result, a legal problem has emerged on whether such contracts are regarded as face-to-face transactions or contracting in the absence of parties.

Answering to such concern, it has been responded that such new kind of trading using instantaneous methods of communication should be regarded as similar to the contract while both parties, in reality, face each other, even though they are not physically together.⁵² The reason for such a conclusion is that the communication of the offer and the acceptance in both types of contract is done immediately without any delay. Hence, the forming of an electronic contract using instantaneous tools should be through the same rules as in face-to-face

⁵¹ 'Alī Abdullāh al-Shihri, *A'tijarat al 'iliktrunīyyah 'abral intarnit*, available on: <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?NawazelItemID=89> last accessed time: 01/05/2009 at 3:00 pm

⁵² Muḥammad Al-ibrāhīm, *Ḥukam ijrā'ul 'Oqūd biwasā'il al-itīṣālāt al-Ḥadītha* (Jordan: Dāral ḍiyā' 1986), 105.

transaction.⁵³

Thus, by analogy with the face-to-face transaction, the principle of meeting place is an essential element for the validation of contracting using instant electronic means. As indicated earlier, the meeting place is the period during which both parties are involved in negotiating business dealing without any of them being busy with something outside the scope of their commercial bargain.

Therefore, in applying the meeting place in contracts formed via instant tools of communication, the time during which both parties communicate would be considered as the meeting place. So long as both parties continue their business talking through such means, the meeting place is deemed to be valid; yet, the meeting place is terminated as soon as their conversation is ended or switched to another unrelated topic.⁵⁴

3.4.4.2: The Option of Meeting Place in Electronic Commerce Contracts

The option of meeting place is also applied in the forming of contracts using instantaneous methods of communication. The option can be practiced so long as both parties are still bargaining via the electronic sphere. The option of meeting place comes to an end when the instant communication between the offering party and the receiver is interrupted. For example, in the case of the online telephony being used to conclude the contract, the option of meeting place is

⁵³ Ibid.

⁵⁴ Al-'ajlūnī, *Atta'āqud 'an Ṭarīq il-intarnit*, p 75.

terminated at the time that the phone is disconnected.⁵⁵ In the msn or yahoo messenger for example, the option of meeting place is deemed to be finished when both of the contracting parties, or one of them, sign out or leave the room where their instant conversation was held.

3.4.4.3: The Meeting Place in Electronic Commerce Using Non-Instant Forms of Communication

When there is no instant connection between the offer and the acceptance, this kind of contract is known as contracting between absentees. In such contracts, parties are sitting in different places at the time of forming the bargaining and also there is a considerable timing interval between the issuance of the offer and the acceptance and the knowledge of both of them by the contracting parties.

It is believed that such a time-span between the connection of the offer and the acceptance exists in the forming of electronic contracts using non-instantaneous tools of communication. As a result, this type of contract should be treated in every aspect under the *Islāmic* law of contract as the same as contracting between absentees.⁵⁶ In times past, the messenger and the letter were the most famous non-instant means to carry parties' commercial wills; however, many other diverse means have been emerging with the advent of technology in our modern life, such as fax, telegram, interactive websites, and e-mails etc. In such devices,

⁵⁵ 'Abdullah Al-Ṭṭayyār, *Khīyār al-Majlis wal-'ayb fil-Figh al-Islāmī*(Saudi Arabia: Dāral-Maṣīr, 1997), 136.

⁵⁶ A'lzāgy, "The Islāmic Concept of Meeting place and its Application in E-Commerce, p.9.

there is no direct link between the contracting parties, and the offer and the acceptance are not instantly connected. Consequently such contract is deemed in the law as contracting between absentees and it is regulated accordingly.⁵⁷

⁵⁷ See above the sub-headings of The Application of Meeting Place in Contracting between Absentees, and The Option of Meeting Place in Contracting between Absentees.

3.5: Contractual Capacity of contracting parties (*'aqidān*) in Electronic Contracts

By this we mean legal capacity of the contracting parties in all types of contracts including the electronic contracts. The contracting parties are required to be qualified for the conclusion of a valid contract, in other words they must be legally competent to enter into a contract. The competence to transact in *Islāmic* law according to the majority jurists is measured largely by two aspects, namely prudence and puberty as revealed in the *Qur'ān*;

"وَابْعَلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ"⁵⁸

“Make trial of orphans until they reach the age of marriage; if then ye find sound judgment in them, release their property to them;”

Therefore a minor without discretion (*Ṣabī Ghayr Mumayyiz*), an insane (*Majnūn*), drunken (*Sukrān*), sleeping (*Nā'em*), foolish (*Safih*) and coerced (*Mukrah*) are not legally competent to enter a contract. The *Shāfi'i* Jurists are against the competence of a minor who possess discretion (*Ṣabī Mumayyiz*) to form a valid contract. However the majority jurists are of the view that a minor who possess discretion could be assigned such a capacity.⁵⁹

It is very easy to find out the legal capacity of involved parties in case of contracts concluded in the presence of contracting parties i.e. verification of the personal data of contractor or the job which he is carrying on this behalf and

⁵⁸ Al-Qur'ān 4:6

⁵⁹ Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol.5, p.135.

confirmation of his legal competency. However the situation becomes more difficult in finding out the legal competency of other party in case of electronic contracts concluded via the internet. Because the contracting parties are not physically present, since it is easy to use the personal data of another person or by arrogating his electronic data and conclude contracts on his behalf. Similarly the contractor could be of deficient capacity while the other party has no knowledge of the fact. This happened due to the ease of internet on one hand and the use of credit card belonging to any of his parents or relatives without their knowledge.⁶⁰

In order to solve the problem of contractual capacity in electronic contracts, there is need for a regulatory authority such as Digital Certification provided in the Electronic Transactions Act of Saudi Arabia and is defined as, An Electronic document issued by the certification service provider used to confirm the identity of the person holding the electronic signature system and contains signature verification data,⁶¹ or any similar authority in another country to be a neutral party to regulate online relationship between the parties with the issuance of digital certificates to the clients electronically, after taking such personal information from the certificate holder, then to give him an electronic signature characterized by, that shall be reliable from the authentication side.⁶²

⁶⁰ Dūdīn, *Al'itār al-Qānūnī li'aqd al-mubram 'abr Shabakat al intarnit*, p. 153.

⁶¹ Article 1 (17) of the Electronic Transactions Act of Saudi Arabia, 2007.

⁶² Electronic Transactions Act of Saudi Arabia, 2007, provides special chapters to regulate Electronic Signature system and the establishment of National Digital Authentication Centre. (See, Chapter II, IV, & V).

Hence each of the contractors is confident that the other party is legally competent to enter a valid contract.⁶³

Similarly, websites on the internet could also be designed in such way that makes the contracting party on the other side bound to produce his identity and show his exact age. In case he ignores to provide these requirements shall not be allowed to proceed with the contract. Likewise he could also be required to attain the age of adulthood and so on. Furthermore some websites on the internet resort to a number of model contracts inclusive of clauses which confirm the identity of contracting party. Some of these sites require from the offering party to enter his personal data like name of the trader and description of his business, national identity card number, address of location, business record or register, e-mail address, telephone and fax numbers. In the same way the accepting party is also required to enter his personal information which could be used to find out his identity as well.⁶⁴

The Electronic Transactions Act of Saudi Arabia validates the conclusion of a contract through automated or direct data systems between two or more electronic data systems which are prepared and programmed in advance to perform such functions as representatives of the parties to contract. Hence the contracts shall be considered valid, effective and legally binding in spite of the lack of direct interference by a person of a natural capacity in the contract

⁶³ Naḍāl, *Aḥkām 'uqūdu'l-ttijārat al 'iliktrunīyyah*, pp. 48-49

⁶⁴ al-Sharīfāt, *Al-ttarāḍī fi tta'āqud 'abral-intarnit*, pp. 49-50.

conclusion process.⁶⁵ Moreover it provides that contracts may be concluded between an automated electronic data system and a person of a natural capacity if it is known or presumed that he knows that he is transacting with an automated system which will undertake the task of concluding or executing the contract.⁶⁶

3.6: Subject Matter (*Maḥall al-‘aḳd*) or (*Ma‘qūd ‘alayh*)

The third essential element of a contract is the subject matter which flows legal consequences in the conclusion of a contract. This includes a number of things; namely commodity, performance, consideration and object of the contract.⁶⁷ The Muslim Jurists have stipulated subject matter with some conditions, in case any of these conditions is missing, the contract is void and thus have no legal effect with regard to the subject matter. Required conditions for the subject matter are as following:

1. Legality of subject matter

Lawfulness requires that the object must be lawful, that is something which is permissible to trade. It must be of legal value that is, its subject matter (*maḥall*) and the underlying cause (*sabab*) must be lawful; and it must not be proscribed by *Islāmic* law, nor a nuisance to public order or morality.⁶⁸

⁶⁵ Article 11 (1), of the Electronic Transactios Act of Saudi Arabia, 2007.

⁶⁶ Article 11 (2), of the Electronic Transactios Act of Saudi Arabia, 2007.

⁶⁷ Maṣūri, *Islāmic Law of Contracts*, 35.

⁶⁸ Al-Kāsāni, *Badā'i' al-Ṣanā'i'*, vol.5, pp.142-143 & See, Islāmic World-net, *Iqtiṣād Al-Īslāmī* (Islāmic Economics), available on http://islamic-world.net/economics/contract_01.htm Accessed last time: 30.03.2009 at 6:00 PM

Most laws provide that the subject matter must be lawful and shall not be contrary to public order and morals, otherwise the contract is null and void.⁶⁹ It is obvious that some sites on the Internet are violating these requirements, such as sites that offer movies and pictures, likewise songs and music which are prohibited (*ḥarām*). Moreover some sites provide direct gambling or meant for selling alcohol or pork, or display ads which call for the act of adultery and facilitate the exercise of, or sell books containing the forbidden literature and so on. These materials are available on the Internet in a very good quantity and can be received electronically by direct download into the buyer computer. The method used to avoid such transactions is the use of Fire Wall i.e. a computer placed between the Internet from one side and the LAN on the other hand which works as a tool to block the intruders, hackers as well as works in denial of access to materials banned by *Shari'ah*.⁷⁰

2. Precise determination of subject matter

The general principal in *Islāmic* law is that the subject matter must be precisely determined so that it does away with all uncertainty and vagueness likely to lead to dispute among the contracting parties.⁷¹

⁶⁹ Uthama Mujāhid, *Khuṣuṣiyyat al-tta'aqud 'abral-intarnit*, 3rd edition (Emirates: Emirates University, Faculty of *Shari'ah* and Law, 2004), 180 (hereinafter referred to as, Mujāhid, *Khuṣuṣiyyat al-tta'aqud 'abral-intarnit*).

⁷⁰ Muḥammad 'Abdal Ḥalim 'Umar, *A'ltijarat al 'ilikruniyyah min Manzū al Islāmī*, paper of debate held in the center of Islāmic Economics, Al-azhar University, p. 73. Quoted in, 'Alī Abdullāh al-Shihri, *A'ltijarat al 'ilikruniyyah 'abral intarnit*, available on: <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?Nawazel ItemID=89> last accessed time: 01/05/2009 at 3:00 pm.

⁷¹ Maṣūri, *Islāmic Law of Contracts*, pp. 41 & 42.

The subject matter could be determined either parties to a contract see and examine it, or by gesture indication if the subject matter is present at the session (meeting place), or by description if it is not present at the session.⁷²

In e-commerce contracts via the internet, online description of the subject matter takes place i.e. highlighting its specification and characteristics through the same network. Furthermore this description is accompanied by an image same as is the case in traditional paper catalog, or a three-dimensional image or a moving video created through a camera like television visuals.⁷³ In this way the subject matter becomes known to the contractor by description which does away with any vagueness and uncertainty.

However, many of the contracts traded are keen to stress the possibility that difference may arise between the description of the product and what it is in real form, but this does not apply in case the seller commits fraud or gross error.⁷⁴

With regard to the value of the subject matter, *Islāmic* Law prohibition against uncertainty requires that the price must be in existence and determined at the time of the contract and cannot be fixed at a later date with reference to the market price, nor can it be left subject to determination by a third party so that it may not lead to dispute among contracting parties.⁷⁵ This principal is applicable both in ordinary as well as in electronic contracts.

⁷² Nawawī, *Rawdat-al-Ṭālibīn* vol. 3, 358.

⁷³ Dūdīn, *Al'itār al-Qānūnī li'aqd al-mubram 'abr Shabakat al intarnit*, p. 165.

⁷⁴ Mujāhid, *Khuṣuṣīyyat al-tta'aqud 'abral-intarnit*, p.177.

⁷⁵ See, Islāmic World-net, *Iqtisād Al-Īslāmī* (Islāmic Economics), available on http://islamic-world.net/economics/contract_01.htm Accessed last time: 30.03.2009 at 6:00 PM

3. Certainty of Delivery

The ability or capacity to deliver the subject matter of the contract at the time of conclusion of a contract is an essential condition to make a valid contract. If such a capacity is lacking, the contract is void and this position is not altered by the fact that the seller was able to deliver the goods after the time of contract. Thus, in a contract of sale the purpose is that the buyer should be able to exercise the authority and benefits of an owner. If such a capacity is lacking the purpose fails. The Muslim Jurists, therefore, prohibits the sale of a stray animal, whose whereabouts are not known, or fish in the sea or birds in the air.⁷⁶

4. Existence of the subject matter

The issues of existence presuppose that the object of a contract must be in existence at the time of contract. This approach is adopted by many eminent Jurists basing on the tradition of the Prophet (S.A.W), ⁷⁷(لا تبع ما ليس عندك) “sell not what you do not have”. It means that the sale of non-existent objects is invalid, because in such types of contracts the factors of uncertainty and risk are involved which is forbidden in *Islāmic Law*. *Salam*⁷⁸ (Ordered Sale) and

⁷⁶ Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol.5, p.147, quoted in, Mansūri, *Islāmic Law of Contracts*, p. 41.

⁷⁷ Sunan Abū Dāwūd, tr. no. 3040, electronic version available on: <http://hadith.al-islam.com/Display/Hier.asp?Doc=4&n=0>.

⁷⁸ *Salam* or ordered sale means a contract in which advance payment is made for goods to be delivered later on. The seller undertakes to supply some specific goods to the buyer at a future date in exchange of an advance price fully paid at the time of contract. (See, Glossary of Islāmic Banking terminologies, available on: https://www.ubl.com.pk/ameen/pdf/Glossary_Islamic_Banking.pdf last accessed time: 01.06.09 at 1:00 am).

*Istiṣnā'*⁷⁹ (Manufacturing Sale) transactions are permissible as exceptions to the rule of existence of subject matter.

E-commerce contracts may fall under any of these two contracts; when a company which is conducting sales online took the money first from the customer and delivered the product in the future, it is *salam* or Ordered Sale. If the company made an agreement with the customer to produce the product ordered and take money from the customer only after the product is made, it is *Istiṣnā'* or Manufacturing Sale.⁸⁰

*Ijārah*⁸¹ or lease contract is valid despite its being sale of the usufructs, which is non-existent at the time of contract. Imam *Sarakhsī* stating the lawfulness of this contract writes: The contract and dealings practiced before *Islām* are valid practices for us also in the absence of any text disapproving them. The Holy Prophet (S.A.W) was sent as Prophet and he saw the people practicing *Ijārah* and he approved that practice.⁸²

Imām Ibn timīyyah and *Imām ibn al-Qayyim* the two eminent *Ḥanbalī* Jurists are of the view that non-existence of an object does not constitute a reason for prohibition so long as the object is clearly described. Similarly non-existence of

⁷⁹ *Istiṣnā'* or Manufacturing sale is a contractual agreement for manufacturing goods and commodities, allowing future payment and future delivery. (See, Glossary of Islāmic Banking terminologies, available on: https://www.ubl.com.pk/ameen/pdf/Glossary_Islamic_Banking.pdf last accessed time: 01.06.09 at 1:00 am).

⁸⁰ Norazlina & Fauziah, *E-commerce from an Islāmic perspective*, 285.

⁸¹ A contract on usufructs for known consideration. (See, Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol.4, p.147).

⁸² Shams-ul-'Ayimmah Abū Bakar Muḥammad al-Sarakhsī, *al-Mabsūṭ*, vol. 15, p. 74 quoted in, Maṅṣūrī, *Islāmic Law of Contracts*, p. 230.

the subject matter is not a legal effective cause resulting in the nullity of a contract; in fact *Gharar* (uncertainty) is the legal effective cause which leads to create dispute among the contracting parties. The uncertainty is due to the inability to deliver the subject matter of the contract no matter whether in existing form like (*al-ba'ir al-shārid*) a runaway camel⁸³ or fish in the sea, or in non-existing form like fetus yet in the mother's womb, which involves risk and gambling practice that is forbidden in *Islāmic Law*.⁸⁴

In the light of above discussion we can say that if an e-commerce contract concluded by the contracting parties via the internet regarding a non-existent object; but is clearly described at the time of conclusion of the contract and which is certain in delivery is a valid contract. For example contract for the deed of a computer program, or purchasing a program or device etc. however if the fear of uncertainty is detected then the contract is void.

⁸³ Whenever the '*illah* or cause is removed, the *Hukam* or ruling too stands removed.

⁸⁴ See, Shykh-ul-Islām, *Majmū'ul Fatāwā*, vol. 29, pp.22-25. & Ibn al-Qayyim, *I'lām al Murwāqī'in*, vol. 2, pp. 6-12.

CHAPTER IV
PAYMENT MECHANISM IN ELECTRONIC CONTRACTS AND ITS
AUTHENTICATION

4.1: Payment Mechanism

This topic will cover in detail the Payment Mechanism in electronic contracts concluded via the internet. Before going into these details it is pertinent to have an idea with regard to the following issues:

4.1.1: Definition of Price (*thaman*)

It is the wealth (*māl*) to be paid by the buyer in consideration to a sale.¹ *thaman* or price differs from value (*Qīmat*), since price is not specific whatever the contracting parties agreed to fix, while value or *Qīmat* is the standard worth of something without any increase or decrease which means that it is the actual price of something. That's why price in sale transactions could be less or more than the actual price or sometime equal to the real price.²

In a sale transaction the price must be wealth and specified, moreover it should be in the legal possession of the buyer and able to be delivered, likewise must be precisely determined in value and description.³

¹ Muṣṭafa al-Zarqā, '*Aqd al-Bay*' (Damascus: Dārul Qalam, 1420 AH), 75.

² Ibid, 76-77.

³ Ibid, 82.

4.1.2: Payment of Price

If the sale relates to the exchange of capitals, both shall be delivered among the contracting parties at the same time. If they agreed on deferred price or in installments, the product shall be delivered to the buyer and he is not bound to make payment unless the date becomes due or as required in installments. In case the contracting parties differ on the issue to whom delivery will be made first where the price is specified then the preferred solution is that an arbitrator appointed by the judge will tackle from both of them the product and price, and after he will deliver them for the cause to does away the dispute among the contracting parties. This approach is followed by some *Shāfi'i* Jurists and the *Hanbalī* School of thought.⁴

There is difference of opinions among the Muslim Jurists in case the amount price is being away of the meeting place; some jurist are of the view that the buyer must make the payment first, because the seller has to keep the product or commodity under his custody till he receives the payment. This approach is followed by *Hanafī* and *Mālikī* schools of thought, also a view of the *Shāfi'i* school of thought.⁵

On the other hand some *Shāfi'i* Jurists view that the seller has to deliver the product firstly then the buyer will be forced to make payment; because right of

⁴ Nawawī, *Rawḍat-al-Ṭālibīn* vol. 3, 522.

⁵ Kamāluddīn ibn Ḥumām, *Fatḥul Qadīr 'alal-hidāyah*, vol.6 (Egypt: Maktabah Maṭba'a Muṣṭafā albābī, 1389 AH), 296 (hereinafter referred to as, ibn Ḥumām, *Fatḥul Qadīr*).

the buyer is attached with the product while right of the seller is associated with the debt obligation; hence delivery of product to the buyer is prevailed.⁶

Regarding this issue the *Shāfi'ī* Jurists have provided that the seller has to keep the product under his custody if he fears with regard to the payment. Similarly the buyer enjoys this right if he fears with regard to the delivery of product.⁷

The prevailing practice in electronic contracts is that the delivery of product takes place after the payment is done.⁸

The general principal with regard to the price is that it shall be defined and specific in value and description to do away the uncertainty which leads to dispute among the parties. Hence if the price or remuneration is described in a contract, whether ordinary or online contract, by mentioning name of the currency, for instance if said, by one thousand rupees and the contract concludes in Pakistan, the currency shall immediately convey the meaning of Pak rupees, because it is the active marketable currency in Pakistan. Similarly in International transactions if the currency is specified in dollars, it shall also convey the meaning of active marketable currency in international markets i.e. American Dollar and so on.⁹

⁶ al-Khaṭīb, *Mughnī al-Muḥtāj*, vol.2, pp. 74-75.

⁷ Ibid.

⁸ Jāsīm al-Shāmīsī, *Baḥath ul-Mas'ūliyyat al-madanīyyah a'līnnātijah 'annittijārat al 'iliktrunīyyah*, vol.3, 3rd edition (Emirates: Emirate Universtiy, Faculty of *Shari'ah* and Law, 2004), 1142.

⁹ Ibn 'ābidīn, *Raddul Mukhtār 'ala-ddurriil Mukhtār*, 2nd edition, vol.4 (Egypt: Maṭba'a Muṣṭafā albābī, 1386 AH), 512 quoted in 'Alī Abdullāh al-Shihri, *A'ltijārat al 'iliktrunīyyah 'abral intarnit*, available on: <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?Nawazel ItemID=89> last accessed time: 01/05/2009 at 3:00 pm.

4.1.3: Payment Mechanism in Electronic Contracts via the Internet

The buyer is bound to pay the full price in exchange for the seller's obligation to the delivery of Sale, as well as to consider carefully the conditions agreed upon with regard to the price in contracts concluded electronically via the internet, hence many of the contracts traded are keen to stress in specifying the kind of currency to be paid by the buyer. Mostly the currency used in such transactions is currency of the same country where the contract concludes, however in case of exported materials the price is normally in foreign currencies, mostly in US Dollar. Similarly in most cases payment required for such contracts has to be made online i.e. on the internet by using bank cards or electronic portfolio etc. likewise payment could be delayed in some cases till the delivery of goods.¹⁰ Sometimes payment done is in traditional way just like in a contract between absentees, for example by sending bank check, or sending bank card number by mail or fax, or by sending particulars of bank account through which the other party can deduct money from his account. However these methods are not consistent with the privacy of e-commerce and its rapid service. Moreover it involves risk with regard to the secrecy and misuse of bank card number.¹¹

4.1.3.1: Electronic Payment

Electronic payment means, payment against online sale product, service or information through international network i.e. the internet. This payment is in

¹⁰ Mujāhid, *Khuṣūṣiyyat al-tta'aqud 'abral-intarnit*, 163-165.

¹¹ Mansūr, *Almas'ulīyyat al 'iliktrunīyyah*, 120.

accordance with the privacy and requirements of electronic commerce.¹² There are different methods for electronic payment and are increasing rapidly, however we will discuss here only the most significant and largely used.

4.1.3.2: Payment through Credit Cards

Will that be Visa, MasterCard or American Express? A common question these days. A credit card is a thin plastic card, usually 3-1/8 inches by 2-1/8 inches in size that contains identification information such as a signature or picture, and authorizes the person named on it to charge purchases or services to his account charges for which he will be billed periodically.¹³ The credit card is your identification. You'll often find that when you're in a situation where you need ID, you'll be asked if you have a credit card. A credit card gives you credibility in the consumer world. It tells merchants and other business establishments that you're financially responsible - a rewarding state to be in these days.¹⁴

Electronically, a credit card is a pretty complex device. Everything on a credit card is a code that stands for a specific bit of information. Some that you can see, some that's hidden. On the face of it, you'll find a series of numbers. While these

¹² Dūdīn, *Al'itār al-Qānūnī li'aqd al-mubram 'abr Shabakat al intarnit*, p. 198.

¹³ See, How Credit Cards Works, available on: <http://money.howstuffworks.com/personal-finance/debt-management/credit-card.htm> last accessed time: 02.08.09 at 12:00 am.

¹⁴ Arlene Martell, *How Credit Card Work? A Report on Swiping*, available on: <http://www.howitworks.net/how-credit-cards-work.html> last accessed time: 02.08.09 at 12:00 am.

numbers as a group identify you, individually they identify the financial institution you deal with, the one that issued you the card.¹⁵

Almost all credit card companies use a standardized system for tracking and billing their customers' transactions. Since there are so many financial institutions using this system, to avoid confusion between credit card companies, the numbers on your credit card identify which institution "owns" each transaction. For example, the first few digits identify the financial institution, the next few are your account number, and the last digit is what's called a "check digit".¹⁶

Under the bank credit-card system, the bank credits the account of the merchant as sales slips are received (this means merchants are paid quickly) and assembles charges to be billed to the cardholder at the end of the billing period. The cardholder, in turn, pays the bank either the entire balance or in monthly installments with interest (sometimes called **carrying charges**).¹⁷

4.1.3.3: Legitimacy of Credit Cards in *Islāmic* Law

Generally, Usage of Credit cards issued by conventional banks, involve two elements; Payment Device and Credit Line. As per *Shari'ah*, you can use it as a payment device through which you pay any amount you owe to any person

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ See, How Credit Cards Works, available on: <http://money.howstuffworks.com/personal-finance/debt-management/credit-card.htm> last accessed time: 02.08.09 at 12:00 am.

while you shop or go for eating on Credit card. The second use of credit card is a "Personal clean Credit Line" which means availing an interest-based facility from a bank. When you draw cash from bank on your Credit card or you do not pay your dues within the grace period allowed for payment (usually 45 days), the bank starts charging interest on the outstanding amount. This use of Credit card is not allowed since in this case you indulge yourself in a *Harām* (prohibited) activity.¹⁸

Though conventional banks' credit cards could be used in a way legally acceptable, still the possibility to indulge in *Ribā* or usury could not be ignored.

Since the *Sharī'ah* Complaint Credit Cards become more common,¹⁹ therefore

¹⁸ Mufti Irshād Aḥmad i'jaz, *Is the Usage of Credit Card in line with Sharī'ah*, available on: http://www.bankislami.com.pk/ask_the_shariah/#?44 last accessed time: 02.08.09 at 12:00 am.

¹⁹ The latest Islāmic credit cards to hit the market include Al Ruban MasterCard, launched in September by Bahrain-based Shamil Bank, a subsidiary of the Saudi-owned Dār Al Māl Al Islāmi (DMI) Group headed by Prince Muhammed Al Faisal; Al Burāq launched also in September by Bahrain-based ABC Islāmic Bank through its dedicated Islāmic Credit Card Company (ICC), incorporated by the Bahrain Monetary Agency in June 2001 as a restricted investment banking license; and BIC (Bank Islām Card) launched by Malaysia's premier Islāmic financial institution, Bank Islām Malaysia Berhad (BIMB) in July under the MasterCard label. Another Malaysian bank, Arab Malaysia Bank Berhad (AMBB) launched the Al Taslif credit card, also under the MasterCard label. They all charge an annual fee and some of them have a minimum charge per transaction.

Of course other banks such as Saudi Arabia's Al-Rajhi Banking & Investment Corporation (ARABIC) and Kuwait Finance House (KFH) would claim that they launched Islāmic cards a few years ago. ARABIC's MasterCard and Visa cards are increasingly widely used by Saudis, and KFH's Al-Tamweel cards are similarly well-established. (See, Mushtak Parker, *Battle of Islāmic Credit Cards to hot up*, available on: <http://www.arabnews.com/?page=6§ion=0&article=19231&d=7&m=10&y=2002> last accessed time: 02.08.09 at 2:00 am).

In Pakistan Sādiq Visa Credit Card and Sādiq Visa shopping cards issued by standard Chartered bank, are good examples of Sharī'ah-compliant *Ribā* Free Credit Cards, which combine the international acceptability of VISA with worldwide reliability and excellent service. (See, Sādiq Visa Credit Cards, available on: <http://www.standardchartered.com/pk/islamic/credit-debit-cards/en/saadiq-visa-credit-cards.html>

Last accessed time: 02.08.09 at 2:00 am).

Muslims are required to follow strict *Islāmic* standards in their daily transactions and to say goodbye to conventional banks' credit cards. It is for this reason that the principles of *Shari'ah* state that Muslims are forbidden to participate in any financial practices or do business with any money-lending entity that charges interest, known as *ribā*; invokes *gharar*, or uncertainty, most commonly in the form of variable interest rates; or uses funds for *maysir*, or gambling.²⁰

The *Shari'ah* Complaint Credit Cards require no assets of ownership. They are easy to use. And the limit is set on the basis of creditworthiness of the person. Generally, there are three groups of *Shari'ah*-compliant credit card arrangements:

1. A bank provides a line of credit to the cardholder and charges a monthly or yearly usage fee tied to the outstanding balance of the line of credit.
2. A customer is allowed to buy an item with a card, but in the instant that the card goes through, the bank purchases the item before selling it to the cardholder at a higher price.
3. A lease-purchase agreement where the bank holds title to the purchased item until the cardholder makes the final payment.²¹

²⁰ Liza Rogak, *Shari'ah Complaint Credit Cards become more common*, available on: <http://www.creditcards.com/credit-card-news/shariah-compliant-credit-cards-1273.php> last accessed time: 02.08.09 at 1:00 am.

²¹ Ibid.

Table: 1²²

Comparing <i>Shari'ah</i> -compliant credit cards with traditional Western cards		
	<i>Shari'ah</i>	Traditional
Interest	No interest is charged. Bank is compensated with a fixed monthly fee	Interest is variable, depending on the outstanding amount
Collateral	Collateral is required in many cases; most banks require an underlying deposit or undated check	No collateral needed
Contract type	Lease-based	Loan-based
Transaction restrictions	The purchase of alcohol, tobacco, gambling, pork, and sexually-related items are forbidden	There are no such restrictions on items that can be purchased
Profit margin on deposits	Fixed. Profit is shared between the bank and customer and is not compounded	No deposits
Late payment fees	Fixed amount + 3 percent of outstanding balance; the 3 percent is typically donated to charity	Variable, compounded

²² *ibid.*

4.2: Authentication of Electronic Contracts

Authentication is the process of proving the identity of a computer or computer user. For users, it generally involves a user name²³ and password.²⁴ Computers usually pass a code that identifies that they are part of a network.²⁵

Authenticity is concerned with the source or origin of a communication. Who is the message from? Is it genuine or a forgery? Every party to an electronic contract must have confidence in the authenticity of the messages it receives. A party who fails to verify the other party's identity in any transaction may have no recourse if a fraud is perpetrated.²⁶

The biggest concern in electronic communication is the identity and authority of the person on the other side of the transaction. It is a simple matter for a person to adopt a pseudonym (false name) on-line or to send an electronic message that appears to come from someone else. This person could be anyone from a curious competitor to a dishonest person with too much time on their hands.²⁷

²³ A name used to gain access to a computer system. Usernames, and often passwords, are required in multiuser system. In most such systems, users can choose their own usernames and passwords. (See, Webopedia, an online encyclopedia dedicated to computer users, available on: <http://www.webopedia.com/TERM/U/username.html> last visited time: 03:08:09 at 11:00 am).

²⁴ A secret series of characters that enables a user to access a file, computer or program. On multiuser systems, each user must enter his or her password before the computer will respond to commands. The password helps ensure that unauthorized users do not access the computer. In addition, data files and programs may require a password. (See, Webopedia, an online encyclopedia dedicated to computer users, available on: <http://www.webopedia.com/TERM/P/password.html> last visited time: 03:08:09 at 11:00 am).

²⁵ See, Definition of authentication on: <http://www.cheap56k.com/glossary/Authentication.html> last visited time: 03:08:09 at 11:00 am.

²⁶ John S. Foster, *ELECTRONIC CONTRACTS AND DIGITAL SIGNATURES*, available on:

<http://www.corbinball.com/articles/art-digitalcontracts.htm> last visited time: 03:08:09 at 11:00 am.

²⁷ Ibid.

For those who want to engage in on-line contracting, two major issues arise: (1) how can you be sure that the person with whom you are communicating is the person he or she claims to be? And (2) can an impersonator bind you to an electronic contract?

Since electronic communications does not involve business cards, letterhead or corporate seals it is impossible for one party to determine the other party's authority to book a meeting or sign a contract. Just because someone has a corporate e-mail address and says they are the executive director, vice-president of special events or director of meeting planning does not make it so. Parties to an on-line contract must still exercise due diligence to ascertain who they are dealing with on the other side. The development of Electronic signatures (discussed below) is helping to solve this problem.²⁸

4.2.1: Electronic and Digital Signatures

Generally, a signature is "any symbol executed or adopted by a party with present intention to authenticate a writing."²⁹

The advent of e-commerce and e-services is changing the way we do business. Traditionally, we created records on paper and we authenticated a record by signing it in ink. Today, technology is making both paper and ink irrelevant to many business processes.

²⁸ Ibid.

²⁹ Ibid.

This has all sorts of consequences, but, whether in ink or in an electronic format; a signature must fulfill the same functions: it has to authenticate the signer and the document. To use electronic signatures effectively, you need to select the appropriate technological application and make sure they meet these legal obligations. Because signatures are important for their legal and evidentiary value foremost, legal concerns must be the guiding factor in the selection of technologies.

As you implement an electronic signature application, you will need to document the key features of the system in order to demonstrate its trustworthy operation and establish its evidentiary value.³⁰

An **Electronic Signature** means an electronic sound, symbol, or process attached to or logically associated with an electronic record³¹ and executed or adopted by a person with the intent to sign the electronic record. This record or signature may not be denied legal effect or enforceability solely because it is in electronic form. Examples of potential electronic signatures include but are not limited to:

- Click OK on a screen
- Password
- PIN Number
- Digitized Signature

³⁰ Electronic Records Management Guidelines, Minnesota State, available on :

<http://www.mnhs.org/preserve/records/electronicrecords/ersigs.html> last visited time: 03.08.09 at: 2:00 pm.

³¹ Data which are created, sent, delivered, transmitted or saved by an electronic medium and which are retrievable or obtainable in an understandable form. (Article 1 (17) of the Electronic Transactions Act of Saudi Arabia, 2007).

- Digital Signature
- Biometrics^{32 33}

A **digitized signature** is, a written signature that has been read by a computer device, which has converted the signature into digital data, examples include:

- A scanner used to copy a signature from paper and store the signature as a digital image. The image can then be printed on a document. This is basically a digital replacement for the rubber signature stamp.
- A digitizing device used when making a credit card purchase at a retail store.³⁴

A **digital signature** is defined as an electronic substitute for a manual signature and is generated by a computer rather than a pen. It serves the same functions as a manual signature, and a lot more.³⁵

³² In computer security, biometrics refers to authentication techniques that rely on measurable physical characteristics that can be automatically checked. There are several types of biometric identification schemes:

- **face:** the analysis of facial characteristics
- **fingerprint:** the analysis of an individual's unique fingerprints
- **hand geometry:** the analysis of the shape of the hand and the length of the fingers
- **retina:** the analysis of the capillary vessels located at the back of the eye
- **iris:** the analysis of the colored ring that surrounds the eye's pupil
- **vein:** the analysis of pattern of veins in the back of the hand and the wrist
- **voice:** the analysis of the tone, pitch, cadence and frequency of a person's voice.

See, <http://www.webopedia.com/TERM/P/biometrics.html> last visited time: 03:08:09 at 11:00 am).

³³ Electronic and Digital Signatures, Indian State Board of Accounts, available on: <http://www.in.gov/sboa/3232.htm> last accessed time: 03:08:09 at 2:00 pm.

³⁴ Ibid.

³⁵ John S. Foster, *ELECTRONIC CONTRACTS AND DIGITAL SIGNATURES*, available on: <http://www.corbinball.com/articles/art-digitalcontracts.htm> last visited time: 03:08:09 at 11:00 am.

A digital signature is not a replication of a manual or typed signature such as "signed, Ahmad Zia". In technical terms, digital signatures are created and verified by a special application that generates cryptographic³⁶ messages.³⁷

Digital signatures are a particular type of electronic signature. The advantage a digital signature may offer is that, by providing a unique identifier and linking the signature to Electronic record, it can authenticate both the signer and the signed document. This promises to meet legal requirements for admissibility and trustworthiness.³⁸

Hence Digital signatures accomplish the following:

- They can provide a means to verify the integrity of messages sent.
- Verify the source of an electronic message because only a sender's public key will decrypt a digital signature encrypted with the sender's private key.
- Prevent repudiation by the sender once the authenticity and integrity of a communication have been established.
- Satisfy the requirement for a writing and signature required by the Statute of Frauds.³⁹

³⁶ Cryptography is a branch of applied mathematics and involves transforming clear messages into seemingly unintelligible forms and back again. (See, John S. Foster, *ELECTRONIC CONTRACTS AND DIGITAL SIGNATURES*, available on: <http://www.corbinball.com/articles/art-digitalcontracts.htm> last visited time: 03:08:09 at 11:00 am.).

³⁷ Ibid.

³⁸ Electronic Records Management Guidelines, Minnesota State, available on : <http://www.mnhs.org/preserve/records/electronicrecords/ersigs.html> last visited time: 03.08.09 at: 2:00 pm.

³⁹ John S. Foster, *Electronic Contracts And Digital Signatures*, available on: <http://www.corbinball.com/articles/art-digitalcontracts.htm> last visited time: 03:08:09 at 11:00 am.

4.2.2: Authentication of Electronic Contracts in the Perspective of *Islāmic Law*

Authentication is a process which is legally valid for the people's needs in their transactions for fear of denial or loss of rights. The legality of authentication is originally derived from this verse of the Holy *Qur'ān*:

"يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَىٰ أَجَلٍ مُّسَمًّىٰ فَاكْتُبُوهُ وَلْيَكْتُب بَيْنَكُمْ كَاتِبٌ بِالْعَدْلِ وَلَا يَأْبُ

كَاتِبٌ أَنْ يَكْتُبَ كَمَا عَلَّمَهُ اللَّهُ فَلْيَكْتُبْ وَلْيَمْلِكِ الَّذِي عَلَيْهِ الْحَقُّ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا يَبْخَسْ مِنْهُ شَيْئًا"⁴⁰

“O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing Let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as Allah Has taught him, so let him write. Let him who incurs the liability dictate, but let him fear His Lord Allah, and not diminish aught of what he owes.”

The benefit from authentication of an agreement is that it does away any dispute among the contracting parties because authentication becomes the authoritative source and point of reference in case of conflict or dispute among the parties. In the coming lines we will discuss an important issue with regard to authentication.

4.2.2.1: Methods of proof are restricted, or not?

The Muslim Scholars disagree on the issue whether methods of proof are confined to specific limit, or not?

⁴⁰ Al-Qur'ān 2:282.

According to the majority Jurists methods of proof are restricted relying upon the explicit texts or by extracting, like testimony, oath or Confession.⁴¹

However some of the Jurists hold that methods of proof are not limited, but all that prove and establish the right could be evidence for a judge to declare his judgment. The most eminent among these Jurists is the *Ḥanbalī* Jurist *Ibn Qayyim*, says: Evidence (*Bayyannah*) demonstrates all what prove and establish a right, furthermore the *Qur'ān* has never used evidence (*Bayyannah*) in the context of witness but has always demonstrated a proof, evidence and testimony either in singular or in plural form. Similarly saying of the Prophet (S.A.W):

"البينة على المدعي واليمين على من أنكر"⁴²

"Proof is on the claimant, oath on him who denies". It means that the claimant is required to produce all what prove his claim, hence witness is a kind of proof (*Bayyannah*), and no doubt that other types of evidence may be stronger.⁴³ Further he says: the aim is that *Shari'ah* does not decline right of someone neither rejects any evidence nor invalidates any proof; the purpose is that, according to *Shari'ah*, evidence or *Bayyannah* demonstrates all what prove and establish a right, in some cases it must be four witnesses, sometimes three as in case of insolvent, in some cases two witnesses, and sometimes one man or one woman witness; hence saying of the Prophet (S.A.W) "Burden of proof is on the claimant" means that

⁴¹ , ibn Nujaym, *Alashbāh wa'l-nnāzā'ir*, 217.

⁴² Sunan Tirmidhī, tradition no. 1261, electronic version available on: <http://hadith.al-islam.com/Display/Hier.asp?Doc=2&n=0> last visited time: 03.08.09 at 12:00 pm.

⁴³ Ibn Qayyim, *Al-ṭuruq al-ḥukmiyyah*, ed. Muḥammad Ḥāmid al-fiqī (Beirut: Dārul kutub al-'ilmiyyah), 12.

the claimant is required to produce all what prove his claim, and whenever he validates his right and satisfies the court in anyway, he shall own the title. ⁴⁴ This approach is also followed by *Ibn Tīmīyyah*.⁴⁵

As a researcher on the subject, the later view seems to be the preferred one, as *Sharī'ah* has never specified any particular method of proof while disregarded the others. Moreover in modern era several methods of proof emerged which result in finding out the truth, therefore it is more relevant to hold the view that methods of proof in *Islāmic* Law are not restricted.

Hence in the light of above discussion, and by following the preferred opinion, the authentication process in e-commerce contracts and the use of electronic signature is legally admissible, provided that the data and information entered in an electronic record is authentic and in accordance with the technical requirements and conditions, confirming the integrity of given information, conclusively since its inception. Since the above mentioned verse of the Holy *Qur'ān* validates a written document as a good proof to establish a right therefore electronic writing used in electronic contracts or electronic record shall also serve the same. It means that in case of dispute or conflict between the contracting parties electronic signature or electronic record could be referred for the dismissal of dispute.⁴⁶

⁴⁴ Ibid. 24.

⁴⁵ Shykh-ul-Islām, *Majmū'ul Fatāwā*, vol. 35, P.392.

⁴⁶ 'Alī Abdullāh al-Shihri, *A'lījār at al 'iliktrunīyyah 'abral intarnit*, available on: <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?NawazelItemID=89> last accessed time: 01/05/2009 at 3:00 pm.

CHAPTER V

**SAFEGAURDS PROVIDED TO BUSINESS TRANSACTIONS AND
EXCEPTION FROM ELECTRONIC CONTRACTS**

5.1: *Islāmic* law Provides Safeguards to the Business Transactions

In fact *Islāmic* law safeguarded business transactions from all types of fraud, deceit and cheating, as well as prohibited all types of money laundering business and obliged to ensure means of safety in business transactions, so that the money earned becomes lawful. Moreover permission request from the owner has been regarded compulsory and made everyone bound by his commitment.

Islamic law clearly orders to stay away from cheating, saying of the Holy Prophet (S.A.W),⁴⁷ "من غش فليس منا" It is not from us who put fraud into practice, and urged to follow the moral values emanating from *Islāmic* faith in our daily life.⁴⁸ Hence there is need to link honesty, faith, and integrity in business transactions, likewise commitment to the terms of contract. There is no doubt that the theory of supply and demand, prohibition of monopoly, fraud, extortion or stealing is for the common interest of the people and invigoration of the

⁴⁷ Sunan Tirmidhī, tradition no. 1236, electronic version available on: <http://hadith.al-islam.com/Display/Hier.asp?Doc=2&n=0> last visited time: 03.08.09 at 12:00 pm.

⁴⁸ Nadia Muḥammad Sa'īd Al-Dimyātī, *Al-ttejārat fil-Islām wa mawqifūl Sharī'at minittijārat al 'iliktrunīyyah*, available on: <http://jmuslim.naseej.com/Detail.asp?InSectionID=260&InNewsItemID=201893> last visited time: 08.06.09 at 10:00 pm.

market. Similarly one of the moral priorities regarded by *Islāmic* law is to prevent business transactions from all types of harms and damages which is very important in commercial process, as the utmost principal of *Islāmic* law (لا ضرر ولا

⁴⁹ ضرر) no wrong, no wrong doing is concerning this issue. Its use is forbidden either directly or indirectly e.g. monopoly or access to the websites for unauthorized copying or using commercial logos of others. It is necessary to keep a special commercial logo and ensure its safety and discretion in order to use it in all legal transactions, likewise to stay away from different tricks and deception techniques and to preserve rights of the others. Another important thing which *Islāmic* law considers in electronic transactions is to put down suspicions and uncertainties, depart from false advertising, keeping honesty, pay *Zakāt* and welcome morality.⁵⁰

The arguments in support of electronic contracts are made clearly by the Standing Committee for research studies and *Iftā* (Advisory opinion) Saudi Arabia in its Advisory opinion (*Fatwā*) No: 18453 dated 02/01/1417 H. stating the inadmissibility of copying software prevented by their owners except with

⁴⁹ Mustadrak Ḥākim, tradition no. 2345

⁵⁰ Nadia Muḥammad Sa'id Al-Dimyāti, *Al-ttejārat fil-Islām wa mawqifūl Shari'at minittijarat al 'iliktunniyyah*, available on:

<http://jmuslim.naseej.com/Detail.asp?InSectionID=260&InNewsItemID=201893> last visited time: 08.06.09 at 10:00 pm.

their permission; acting upon sayings of the Prophet (S.A.W), ⁵¹ (المسلمون على شروطهم)

Muslims are bound of their own terms, and ⁵² (من سبق إلى مباح فهو أحق به) it is his right who get earlier into a permissible thing. No matter whether the programmer of that software is Muslim or non-military non-Muslim (كافر غير حربي) because their rights are as respected as Muslims. Similarly electronic transactions in the modern times are inviolable intellectual property rights,⁵³ authorized in *Islāmic* law. Hence decided that:

1. Trade name and address, trademark,⁵⁴ patent,⁵⁵ copyright⁵⁶ or innovation; only the owners are entitled to claim these rights, because these are valuable according to the customary law of the day and is a source to finance the people. So lawfully these rights are significant and transgression is not allowed.

⁵¹ Sunan Abū Dāwūd, tradition no. 3120, electronic version available on: <http://hadith.al-islam.com/Display/Hier.asp?Doc=4&n=0> last visited time: 03.08.09 at 12:00 pm.

⁵² Abū Dāwūd. Tradition no. 2669, electronic version available on: <http://hadith.al-islam.com/Display/Hier.asp?Doc=4&n=0> last visited time: 03.08.09 at 12:00 pm.

⁵³ Intellectual property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. (See, <http://www.wipo.int/about-ip/en/> last visited time: 03.08.09 at 12:00 pm).

⁵⁴ A trademark is a distinctive sign which identifies certain goods or services as those produced or provided by a specific person or enterprise. (See, <http://www.wipo.int/trademarks/en/trademarks.html> last visited time: 03.08.09 at 12:00 pm).

⁵⁵ A patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem. (http://www.wipo.int/patentscope/en/patents_faq.html#patent last visited time: 03.08.09 at 12:00 pm).

⁵⁶ Copyright is a legal term describing rights given to creators for their literary and artistic works. (See, <http://www.wipo.int/about-ip/en/copyright.html> last visited time: 03.08.09 at 12:00 pm).

2. The disposal or transfer of trade name, address, trademark, or brand is permissible for some consideration, provided that there is no fraud, cheating, or uncertainty, because it is now a financial right.
3. Copyright, patent or innovation is legally preserved, and only their owners have the right to dispose of. Violation of these rights is not allowed.
4. Amongst the safeguards provided by *Islāmic* law to electronic contracts, is enforcement of *Hadd*⁵⁷ and *Ta'zīr*⁵⁸ punishment in case of fraud, cheating or theft by misusing electronic means, likewise by adopting title of someone else by using their credit cards, electronic signatures, password without their knowledge as well as removal of sites, intimidation and forgery. All such acts are prohibited in *Islāmic* law and in case of violation there shall be punishment as it is threat to the sanctity of legitimate funds.

Determination of punishments in case of violation of these rights come under *Ta'zīr* punishments, and the judge or other supervising authority in an *Islāmic* state has the discretion to specify appropriate punishment taking into account nature of the crime.⁵⁹

⁵⁷ A fixed penalty prescribed as a right of Allah. (See, Nyazee, *Theories of Islāmic Law*, 316).

⁵⁸ *Ta'zīr* are discretionary penalties. Some jurists consider *Ta'zīr* penalties to apply to genus of those crimes for which had penalties have been prescribed, but where *hadd* cannot be applied for want of required evidence or fulfillment of conditions. Jurists in the present times give a wider scope to *Ta'zīr* and consider it to apply to all punishments other than *ḥudūd* and *Qīṣāṣ* (Retaliation for loss of life or limb). (See, Nyazee, *Theories of Islāmic Law*, 330).

⁵⁹ Nāṣir, *A- 'uqūd al- 'ilikrunīyyah*, 34.

5.2: Exception from the validity of Electronic Contracts

In the foregoing chapters we reached to the conclusion that electronic contracts concluded via the internet are valid and hence will have legal effect. Moreover we discussed some important issues which were obviously relevant to the subject. However there is an exception from the legitimacy of electronic contracts; and that is marriage contract. Hence a marriage contract conducted through internet has no legal effect, for its special requirements.

5.2.1: Legality of Marriage Contract concluded electronically

The social order of every society evolves around several instincts and out of those two are not only powerful rather make a lot of influence on the society: the natural appetite or hunger and the sexual desire. The former signals for the preservation of individual itself, whereas the later deals with the preservation of descent, especially the lineage of mankind. For this object, almost every society on the earth has made certain rules in order to secure itself. But the divine way of life ---the *Shari'ah*--- has developed a unique system for the preservation of its subjects, its values, the society and mankind at large. Hence by means of marriage (*nikāḥ*) on the one side the generation is protected and on the other human beings fulfill their natural need in the natural way.

Marriage is "*mīthāq*" - a solemn covenant (agreement). It is not a matter which can be taken lightly. It should be entered into with total commitment and full knowledge of what it involves. It is not like buying a new dress where you can exchange it if you don't like it. Your partner should be your choice for life. One

should be mature enough to understand the demands of marriage so that the union can be a lasting one.⁶⁰ For a marriage to be valid certain conditions must be met. According to the majority jurists these conditions are as following:

1) Consent of both parties accompanying the element of *Sighah* (offer and acceptance):

Marriage by definition is a voluntary union of two people.⁶¹ *Sighah* is the essential element of Marriage contract which means an offer (*Ījāb*) and acceptance (*Qabūl*). *Ījāb* is used for such word or phrase that is expressed by the guardian (*walī*) of the girl or a person acting on her behalf. For example, where A's daughter B is to be married C, the expression by A in the following words is called an offer (*Ījāb*): I married my daughter B for a dower consideration of a hundred *dinars* with C. It is a condition that the offer must be in the past tense. In the above quoted sentence the offer is in the past tense (*fi`l māḍī*). Hence, this is valid offer.⁶²

The second part of the "*Sighah*" is called acceptance (*qabūl*). It is the word or the sentence which is uttered in response to the offer by the man or a person acting on his behalf. For example, the man, namely C, says, I accepted B the daughter of

⁶⁰ See, Marriage in Islām, available on: <http://www.jannah.org/sisters/marr.html> last visited time: 22.07.2009 at 11:00 pm.

⁶¹ Ibid.

⁶² Shahzād Iqbāl Shām, *Some aspects of Marriage and Divorce in Muslim Family Law*, available on: [http://www.pu.edu.pk/szic/journal/currentissue_pdf/E-1%20Shehza%20sham%20\(Islamic%20Law%20of%20Marriage%20and%20Divorce\).pdf](http://www.pu.edu.pk/szic/journal/currentissue_pdf/E-1%20Shehza%20sham%20(Islamic%20Law%20of%20Marriage%20and%20Divorce).pdf) last visited time: 22.07.2009 at 12:00 pm.

A for a dower consideration of a hundred *dīnārs*. This whole sentence is called acceptance (*qabūl*).⁶³

All jurists (*fuqahā*) agree that the offer and acceptance must be in the same sitting or session of assembly. In case the sitting or session had dispersed and thereafter the acceptance occurred then such an acceptance would be void automatically. The acceptance must also be in the past tense.⁶⁴

2) " *Mahar*" a gift from the groom to his bride:

The wife is entitled to a marriage gift that is her own. This may be prompt or deferred depending on the agreement between the parties. A marriage is not valid without *mahar*.⁶⁵

3) Witnesses- 2 male or one male and 2 female:

The Majority Jurists have declared that the presence of two witnesses is essential element of *nikāḥ*.⁶⁶ Their argument has the support of a *ḥadīth* according to which the Messenger of *Allah* said: A marriage (*nikāḥ*) contract without two witnesses is not permissible.⁶⁷

With regard to the legitimacy of marriage contracts concluded electronically, we know from the previous chapters, that contracts in general have taken on a different dimension following the spread of the internet. Thus, it has become

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ See, Marriage in Islām, available on: <http://www.jannah.org/sisters/marr.html> last visited time: 22.07.2009 at 11:00 pm.

⁶⁶ al-Khaṭīb, *Mughnī al-Muḥtāj*, vol. 3, 144.

⁶⁷ Sunan al-Tirmidhī, tr. No. 1022, Electronic version available on: <http://hadith.al-islam.com/Display/Hier.asp?Doc=2&n=0> last visited time: 22.07.2009 at 12:00 pm.

easy to sign all forms of contracts via the internet, from marriage contracts, financial transactions, and contracts to subscribe to multiple services. However, *Islāmic Shari'ah* has its own perspective regarding the issue of authenticating contracts, deeming it permissible to conclude some contracts via the internet, while others are considered impermissible.

Since the marriage contract is more serious than a contract of sale, and it also has a ritual aspect. Moreover, the presence of two witnesses as mentioned above is an essential condition for its validity. Therefore, the offer and acceptance (of marriage) that are made via the internet and video conference are considered invalid. However, if these means are used to authorize someone to conclude the marriage and the authorized agent - on behalf of the one who authorized him - makes the offer and receives acceptance in the presence of two witnesses, then the marriage is valid. In this case, it is incumbent that the two witnesses know the authorizer or that the authorizer's first and second names are mentioned at the time of offering and acceptance of marriage.⁶⁸

Hence, there is special condition, which makes a marriage contract different from other forms of contracts. This is related to the fact that witnesses must be part and parcel of the contract.

⁶⁸ Resolution passed by the Islāmic Fiqh Academy India, available on: http://www.islamonline.net/servlet/Satellite?cid=1243825060474&pagename=IslamOnline-English-Ask_Scholar%2FFatwaE%2FFatwaEAskTheScholar last visited time: 21.07.2009 at 3:00 pm.

Dr. *Wahba Al-Zuhayli*, a prominent scholar, says: A marriage contract is not valid through modern communications means because the Offer and Acceptance procedures must be pronounced because of their sensitivity.⁶⁹

⁶⁹ khaleej times saturday 6th august 2005, available on:
<http://www.iacad.gov.ae/vEnglish/detailnewspage.jsp?articleID=6788&pageFlag=0&newsType=4> last visited time: 21. 07. 2009 at 3:30 pm.

CHAPTER VI

APPLICABLE LAW AND THE COMPETENT COURT

6.1: Applicable Law

All the business transactions and contracts concluded via the internet are regarded as international transactions, for often the parties belonging to different countries. The World Wide Web on the internet has linked together all the countries of the world in a constant contact in such a way that any information uploaded on the website is spread around the world in just a few moments.

Here the question arises with regard to the applicable law, which must be applied in such contracts and business, whether it is the buyer (consumer), or the seller, or the mediator in case of existence, or the Internet service provider?

This issue has been debated by the international conventions and legislations and reached to the conclusion that the applicable law must be, what the contractors have agreed upon at the time of making a contract (Law of Free Will), provided that this shall not lead to the deprivation of consumer in consumption contracts from the safeguards provided by the law of a particular state where he resides usually. This may be for the reason that consumer in a contract is mostly the weaker party as compared to the production companies and international

markets.¹ Similarly sometimes methods of marketing and advertising used by these companies create uncertainty or *gharar*².

6.1.1: Applicable Law under the Doctrine of *Islāmic* Law

Mostly, parties to the contract determine the applicable law, since both the contracting parties are agreed upon at the time of contract making; or provided by the company in its modal contract.

This agreement is valid and could be practiced, acting upon saying of the Prophet (S.A.W):³ (المسلمون على شروطهم إلا شرطاً حرم حلالاً أو أحل حراماً) “Muslims are bound of their settled terms, except what nullifies any legal thing or legalizes prohibited thing”.

There is no difference whether this is the law of a particular country or any arbitral institution. However it is essential that this agreement shall strictly follow the basic *Shari'ah* Principal i.e. the law where the contracting parties are agreed upon must not be with inconsistency to *Islāmic* law, and shall be derived from *Shari'ah*. This principal is determined by the Holy *Qurān* and *sunnah* of the Prphet (S.A.W) likewise consensually agreed between the Muslim jurists all over the world in all ages. Saying of the Lord Almighty:

“فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ”⁴

¹ Hijāzī, *Al-Nizām al-Qānūnī liḥimāyāti-ttijārat al-'ilikrunīyah*, vol. 1, 168

² Ibid. vol. 1, 176.

³ Sunan Abū Dāwūd, tradition no. 3120, electronic version available on: <http://hadith.al-islam.com/Display/Hier.asp?Doc=4&n=0> last visited time: 03.08.09 at 12:00 pm.

⁴ Al-Qurān 4:59

“If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day”.

Likewise Allah says:

"وَمَا اخْتَلَفْتُمْ فِيهِ مِنْ شَيْءٍ فَحُكْمُهُ إِلَى اللَّهِ"⁵

“Whatever it be wherein ye differ, the decision thereof is with Allah”.

Similarly there is no difference whether the disputed parties are Muslims or non-Muslims or some of them are Muslims and some are non-Muslims. Allah says:

"وَأَنِ احْكُم بَيْنَهُم بِمَا أَنْزَلَ اللَّهُ وَلَا تَتَّبِعْ أَهْوَاءَهُمْ وَاحْذَرْهُمْ أَنْ يَفْتِنُوكَ عَنْ بَعْضِ مَا أَنْزَلَ اللَّهُ إِلَيْكَ"⁶

“And this (He commands): Judge thou between them by what Allah hath revealed, and follow not their vain desires, but beware of them lest they beguile thee from any of that (teaching) which Allah hath sent down to thee”.

In this verse “between them” is referred to the Jews, who used to bring their disputes to the Prophet (S.A.W) for the purpose of settlement.⁷

Hence in the light of above mentioned verses it is very clear that the applicable law in case of governing electronic contracts must be derived from the Holy *Qurān* and *Sunnah* of the Prophet (S.A.W).

6.1.2: Practicing Facts and the Proposed Solutions

From the above discussion we reached to the conclusion that the applicable law in case of governing electronic contracts must be derived from our sacred *Sharī'ah*, and is therefore subject to no dispute among the Muslim scholars.

⁵Al-Qurān 42:9

⁶Al-Qurān 5:49

⁷ Muḥammad ibn Jarīr al-ṭabarī, *Jāmi'ul Bayān fi Ta'wil ilqurān*, vol. 4 (Beirut: Dāral Kutub al-‘ilmīyah, 1412 A.H), 614.

However the practical situation in case of electronic contracts is contrary to this principal. It is for this reason that most of the companies offering services or products are in non-Muslim countries, or in *Islāmic* countries but not governing the *Sharī'ah* law. Often the company offering a contract includes name of the applicable law for the purpose of governing the contracts; so how this problem could be solved so that there remains no contradiction between *Sharī'ah* principals and the practical situation; and what are the appropriate solutions to this?

In order to solve this problem, we find ourselves between two options;

First Option: To accept the status quo and recognize these laws and regulations on the grounds of rule of necessity.

However this option is not significant because *Islāmic* law does not consider any option left to the wishes of a contractor. Moreover rule of necessity is not plentiful in most cases of contracting via the internet, except certain special circumstances.⁸

Second Option: To search for an appropriate solution in accordance with the fundamental principles of *Islāmic* law.

The proposed solutions which I see to be applied for governing electronic contracts are as following:

⁸ Nāṣir, *A-'uqūd al-'ilikrunīyyah*, 24-25.

1). Inclusion of Provision explicitly declares *Shari'ah* Law for Arbitration

When a Muslim enters into a contract with foreign or Multinational companies, he is required not to accept the contract in case it provides law of a foreign state which is not derived from our sacred *Shari'ah* for the purpose of arbitration. He is required to declare explicitly that the applicable law must be *Islāmic* law or law of a particular state where *Shari'ah* rules are applied in their transactions.

One of the factors of success as a result of requiring the inclusion of this provision largely from Muslim contractors can turn away international marketing and production companies towards the insertion of this provision and so on contracting with Muslim traders.

2). Formation of International *Shari'ah* Arbitration Institutions

These institutions are required to have websites on internet which give way for arbitration according to the principals of *Islāmic* law and avert all those things which are inconsistent to *Shari'ah* principals. These institutions shall be distinguished by the following features;

I. Fair and Clear Governing System:

These institutions are required to have fair and clear governing system relying upon the preferred opinions in the doctrine of *Islāmic* law along with the declarations passed by relied *Fiqh* Councils or other similar bodies in some Muslim countries like Commission of the eminent Muslim Scholars in Saudi Arabia or *Islāmic* Research Institute of Al-Azhar University and so on.

II. Direct Supervision:

These Institutions are required to have a direct contact and correlation with eminent qualified figures, so that each arbitration institution shall be distinctive from other in respect of its connection with fair and honest eminent scholars and who have more capability of understanding modern issues and analyzing them according to the principals and objectives of *Shari'ah*.

6.2: Competent Court

Electronic contracts are often concluded among the parties reside in different places, either in a single State or multiple States. Hence after determining the law governing the contract, question arises with regard to the competent court to hear such cases?

Different approaches are adopted to solve the issue of court Jurisdiction with regard to electronic contracts; some of them are mentioned below:

1. That the Jurisdiction of that court shall be considered which the parties have agreed upon. Here the plaintiff is facilitated to be able to obtain the required judicial protection.⁹
2. That the Jurisdiction of that court shall be considered where the defendant resides or runs his company.¹⁰

6.2.1: Competent Court under the Doctrine of *Islāmic* Law

This topic has extensively discussed by the Muslim Jurists under the subject "Competent Judge" "القاضي المختص" and have difference of opinions with regard to the competent judge at the time of dispute between the plaintiff and defendant residing in different places. They are agreed on the point that if the disputed parties are residing in the same place i.e. same city, then judge of that city is competent to hear the case,¹¹ however if they reside in different places, then the

⁹ Ibid, 27.

¹⁰ Circular No. 2394/2, Kingdom of Saudi Arabia.

¹¹ Nāṣir bin Muḥammad al-Ghāmīdī, *Al-ikhtisāṣ al-qaḍā'ī fil fiqhīl Islāmī* (Riyadh: Maktabat al-rushd, 1420 AH), 418.

Muslim Jurists have adopted four different approaches with regard to the competent Judge for the purpose of litigation.

1. That the competent Judge to hear the case is that of the plaintiff. This approach is adopted by the majority scholars of *Hanafi*, *Māliki*, *Hanbalī* and *Shāfi'i* schools of thought.¹² According to them plaintiff is originator of the dispute and he is entitled to achieve his right, therefore he has the right to file case with judge of his jurisdiction.¹³
2. That the competent Judge is judge of the plaintiff except in cases where right is attached to immovable property. In such cases competent judge is judge of the place where matter of proceeding locates. This approach is adopted by some of the *Hanafi* and *Māliki* Jurists.¹⁴
3. There is no specific Judge to hear the case. Any judge to whom the suit is brought, is competent for litigation. There is no difference whether the disputed parties reside in the same place or different places. This approach is also followed by some of the *Hanafi* and *Māliki* Jurists. They adopted this approach for the reason that there is no evidence to determine a specific judge, therefore any judge whatsoever be, is competent to hear the case.¹⁵

¹² ibn Nujaym, *Al-Baḥru'l Rā'iq*, vol. 7, 192, and al-Dusūqī, *Ḥāshiyatu'l Dūsūqī*, vol. 4, 129, and al-Khaṭīb, *Mughnī al-Muḥtāj*, vol. 6, 269.

¹³ Ibid.

¹⁴ ibn Nujaym, *Al-Baḥru'l Rā'iq*, vol. 6, 280, and al-Dusūqī, *Ḥāshiyatu'l Dūsūqī*, vol. 4, 164.

¹⁵ Ibid.

4. That the competent Judge is that of the defendant. This is the relied approach among *Hanafi* Jurists. Their argument in support of this view is that the defendant enjoys freedom from any obligation; therefore it is worthier that he should not be disturbed by moving to the disputed place and so on disrupting his interests.¹⁶

6.2.2: The preferred Approach

All the above four approaches clearly demonstrates that there is no such explicit provision which specifies Jurisdiction of a particular judge for litigation. Therefore this issue has to be governed by the general rules of *Islāmic* law, keeping in view the assurance of fairness and justice to the oppressed.

It may be appropriate in the electronic contracts to adopt the 2nd approach i.e. judge of the plaintiff, because he is the holder of right in litigation. Similarly in contracts via the internet, mostly consumer is the weaker party; as he is aggrieved either, for lack of conformity of goods to the advertisement or description or because of non-implementation of the contract as agreed upon, so it is the plaintiff who is oppressed in most cases. Likewise by following this approach, it gives protection to the consumers from manipulation of the international companies and the methods they are using for marketing. Therefore it is appropriate to protect the consumer in this case, taking into account what has been agreed by the parties to the contract and the place in which the subject matter locates. However if the dispute is related to immovable

¹⁶ ibn Nujaym, *Al-Baḥru'l Rā'iq*, vol. 7, 192.

property then the competent judge is the judge of the place of the defendant, because he is closer to the subject matter and is better able to know the norms and regulations in that regard. This approach is also close to the majority jurists who believe that the competent judge is that of the plaintiff at all.

CHAPTER VII

CONCLUSION AND RECOMMENDATIONS

The emerging electronic market has given rise to many legal issues; one of the major themes is online contracting or the 'electronic contracts, followed by numerous smaller legal issues which stem from the larger theme of the law of contracts in *Islāmic* law. It is difficult that this research project would have covered all the rules and guidelines which govern these activities based on *Islāmic* law, however efforts have been made in order to regulate this sector by testing and analyzing the following points in this research paper;

- *Islāmic* law provided the element of "Consent" (الرضا) as the basic condition for all contracts in any form whatsoever, including the electronic contracts.
- Electronic contracts are those which are made through the means and machinery working through electronic mail and the latest and most significant is contract by internet.
- There are several ways of contract by internet and the most important and widespread is contract through the network of sites (Web), contracts via e-mail and contracts through conversation or chat.
- In *Islāmic* law, a contract is deemed to be formed, by verbal statement, writing, action or indication from both contracting parties or one of them.

- Internet is a machine and means of communication in writing that is legally permissible, for lack of forbidden terms and is similar like deal through a messenger or by mail in general.
- Contract by internet is actually face to face presence of contracting parties in terms of time, and absentees in terms of place; unless there is relatively long interval of time separating offer from acceptance, then it is contract between absentees both in terms of time and place.
- According to the *Hanafi* School of thought, offer is made first than acceptance; so advertising or announcement of goods or services is generally considered offer from the offering party. In the same manner offer is made via e-mail and chat.
- Two essential conditions are put as; the offer and acceptance must be so obvious in indicating the absolute will of contracting parties to enter into contractual relations. The acceptance must be completely compatible in every part with the offer; moreover these conditions need to be ensured in electronic contracts in order to be valid.
- Meeting of the contracting party starts by browsing the website of offering party and is terminated at the time window is closed. In contract via direct mail; meeting starts soon after the offer is made and will continue until the site is closed. This rule also applies for contracts by chat. In contracts made indirectly via e-mail the meeting starts at

the time it is received, and will continue until the end of period if any, otherwise commercial usages will be considered.

- Financial contracts through internet are valid. However the marriage contracts in view of its unique status for the reason to be in specific form, it is not conducted via the internet. There is special condition, which makes a marriage contract different from other forms of contracts. This is related to the fact that witnesses must be part and parcel of the contract.
- If the contracting parties agreed to identify specific law governing the contract, the contract is valid. Provided that such law is derived from *Islāmic* injunctions, no matter between the contracting parties to be all Muslims or some are Muslims and others non-Muslims. And if the law is not derived from *Shari'ah* then the agreement is invalid and shall not be acted upon.
- There is difference of opinion among the Muslim jurists, in the competent court (the competent judge) for trial of cases where dispute between the parties arise in the subject matter and place of occurrence. It will be more appropriate to follow the *Jamhūr* (majority jurists) view, that the competent judge is the judge of plaintiff, except in immovable properties, because most of the time he is the loser and weaker party in the contract. So it is appropriate to defend him; taking into account what had been agreed upon by the contracting parties.

- Validity of electronic signature (especially digital thereof); to establish electronic contracts in *Islāmic* Jurisprudence, since it is consistent with principal of legitimacy in *Islāmic* law. Secondly it is not confined to a certain number or specification, but every means creating the right and getting to justice.
- The conventional banks' credit cards could be used in a way legally acceptable. Generally, Usage of Credit cards issued by conventional banks, involve two elements; Payment Device and Credit Line. As per *Shari'ah*, you can use it as a payment device through which you pay any amount you owe to any person while you shop or go for eating on Credit card. The second use of credit card is a "Personal clean Credit Line" which means availing an interest-based facility from a bank. When you draw cash from bank on your Credit card or you do not pay your dues within the grace period allowed for payment (usually 45 days), the bank starts charging interest on the outstanding amount. This use of Credit card is not allowed since in this case you indulge yourself in a *Harām* (prohibited) activity
- Keeping in view the significance of electronic signature; and about the risk of Cyber crimes going on the victims of electronic transactions, a researcher get to the conclusion that protection of electronic signatures from criminal acts is consistent with the objectives of *Islāmic* law.

Recommendations:

We know that an effective *Shari'ah* governance framework requires involvement of the *Shari'ah* Committee as the key player, the government as the regulatory body, the *Islāmic* financial institutions as the implementer and also to other persons relevant to the business such as auditors, accountants and lawyers.

The Supreme Court can play a very important role in ensuring good *Shari'ah* governance. The role of the Supreme Court is to include advising board of directors on *Shari'ah* matters with special focus on modern commercial transactions to ensure that the operations comply with *Shari'ah* principles at all time, endorsing and validating relevant documentations pertaining to the products and services, as well as the internal policies and manuals and marketing advertisements, assisting related parties, advising on any *Shari'ah* matter arising before referring the same to the *Shari'ah* Committee, assisting the *Shari'ah* Committee on reference for advice and ensuring all its decisions are properly implemented.

The setting up of a special High Court in the *Islāmic* Commercial Division or the *Mu'āmalāt* bench could be a positive indication by the government in providing more comprehensive and effective *Shari'ah* governance in *Islāmic* finance sector. This will ultimately result in regularizing e-commerce and electronic contracts concluded via the modern means of communications including the internet. The *mu'āmalāt* bench in the High Court shall provide special focus by the respective

judges on the disputes on *Islāmic* finance. *Sharī'ah* governance is unique to *Islāmic* system of financial management.

The Council of *Islāmic* Ideology in Pakistan is advised to arrange such programs and seminars comprising the eminent Muslim Scholars from the country and abroad to clarify the issues with regard to the modern contracts concluded electronically.

Similarly some features must be noted and applied by Muslim traders, as being Muslims they are answerable for all their actions in the hereafter and these principles are applicable regardless of whether the commercial affairs are conducted or offered over the Internet. For example according to Justice (R) Khalil-ur-Rehman Khan, ex-Rector of International *Islāmic* University Islamabad, An important feature with regard to validity of consideration under *Sharī'ah* is that the contract formed has to be free from '*gharar*' (uncertainty) and *ribā* (usury). The *Islāmic* prohibition against uncertainty requires that the price must be in existence and determined at the time of the contract and cannot be fixed at a later date, nor can it be left subject to determination by a third party. When the consideration consists of a monetary payment (as opposed to payment in kind), the Muslim jurists require that the currency must be in circulation and that its value and species must be determined exactly.

It is to be observed that not only must the elements of contracts be lawful; other attributes incidental to these elements must also be lawful. When the payment is made by conventional credit card that is subject to charging of monthly interest,

the transaction is void. Here the price is lawful yet the payment is effected in a way that involves the practice of *ribā*. Thus, although the consideration by itself is lawful it is still *Islāmically* illegal when the operation of the method of payment is unlawful. Hence due care shall be observed while making payment, and only that mode shall be adopted which is free from repugnancy with *Islāmic* injunctions as well as principal governing *Islāmic* financial system.

Another important thing which is highly recommended is that all the law colleges and universities especially the international *Islāmic* University Islamabad shall ensure the inclusion of "E-contracts under *Islāmic* law" as a compulsory subject for its vital role in the current era, and to update its course materials regularly in order to create awareness among the students.

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