

**“Electronic Contracts in Islamic Law and Modern Law with
Special Reference to Pakistani Law:
A comparative Study”**



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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

Dedication

I dedicate my humble struggle to all those Muslims who dedicate their lives for preaching & implementation of Islam in all aspects of life.

I dedicate to My Parents & Teachers who constantly offer their pray for my success...

I am very thankful to my father Hafiz Muhammad Haneef

From darkness to light, made me an advocate Tayyab Haneef

I am also thankful to my elder brother Salahuddin

Who is the best ever to me, Head and Dean

How can I forget my elder brother Prof. Riazuddin

Who has been, my teacher, guider and lamp of Aaladin

I pay special regards to my brother Fiazuddin

Who supported me in every pain, like Shamsuddin and Rafiuddin

And Thanks to all my Sisters, especially Hafsa Haneef whose fastidious progress in study makes me courageous.

Tayyab Haneef

INTRODUCTION AND IMPORTANCE OF THE STUDY

All praises be to Allah Almighty and peace be upon Prophet Muhammad (S.A.W), his companions and whoever follows him.

I have preferred to write on the topic of "Electronic Contracts in Islamic law and modern law with special reference to Pakistani law", because, at present, online transaction is commonly practiced by business community all over the world. As a result of the notable expansion of electronic market activities globally, many legal disputes and distress have surfaced. This indicates the need for rules and regulations to govern the new activities. Various countries and organizations globally have introduced rules and guidelines, based on their national laws, as a response to such need. However, little has been done to regulate the phenomena according to the Islamic legal system. The insufficiency of specific Islamic rulings and laws for the online market has dissuaded many Muslim traders and customers from participating in electronic commerce. In the case of electronic commerce there remains a need for further examination by Muslim jurists and appropriate Islamic rules are required for the development of this new phenomenon.

Therefore, I consider the emerging electronic market has given rise to many legal issues which should be discussed in detail i.e. concept of sitting in specific place (Majlis ul 'Aqd), ethical issues and issue of documentation etc. As we know that contract law is very pertinent in enhancing business activities. The traditional business contracts are made on papers and signed by the parties to be a valid contract. While, in an online contract, paper, pen, witness, hand written signature is not needed. Thus, an electronic contract is faster and cheaper. The parties in the contract do not need to sit down in a specific place or country to write down the terms of the contract.

There is also extremely need to compare Islamic laws with modern laws. This is mainly due to the different level of the source of law. By this my humble attempt, the Western world will know what the Islamic law of Electronic Contract is all about and they will be able to learn the differences between the two systems of law. I am also keen to write on recent development of electronic transactions in Pakistani laws to analyze especially about cyber-crimes and implementation of Islamic principles.

STATEMENT OF THE PROBLEM:

- a) What is Electronic Contract?
- b) Why do we need Electronic Contract?
- c) How is the formation of Electronic Contract?
- d) Whether the Islamic law of contract (Majlis ul 'Aqd) does recognize the validity of Electronic Contract?
- e) What is the position of Electronic Contract in modern, Islamic and Pakistani legal systems?
- f) Weather the Pakistani Electronic laws contradict with Islamic Injunctions?

LITERATURE REVIEW:

Various countries and organizations globally have introduced rules and guidelines, based on their national laws, as a response to such need. Different countries have enacted electronic contract laws based on the UNCITRAL Model Law on Electronic Commerce 1996.

The European Union and Malaysia have also enacted electronic contract law which recognizes electronic message as a means of communication for making electronic contracts.

However, little has been done to regulate the phenomena according the Islamic legal system. The scarcity of specific Islamic rulings for the online market has put off many Muslim traders and customers from participating in electronic commerce. In my research, I could not find anybook particularly written on this topic. However, some

articles have been written but detailed study is still required. Dr. Md. Abdul Jalil on "Islamic Law of Contract is Getting Momentum", and Salvatore Mancuso from University of Macau wrote on the topic "Consumer Protection in E-commerce Transactions: a First Comparison between European Law and Islamic Law" and Abdulrahman Alzaagy has explained electronic contract in his Article on "The Islamic Concept of Meeting Place and its Application in E-Commerce" although in these articles, they all have tried to elaborate E-contracts but could not discuss many issues regarding documentation requirements , practical implementation as legally enforceability, cyber-crimes and modern approach with Islamic comparison still needed to be discussed.I have not found any specific writing on E-contract in Pakistan with reference to Islamic perspective.

Research Methodology:

- Application of descriptive, comparative and analytical methods based on library and internet materials.
- Principles of Quwaid ul Fiqh have to be utilized in this research especially during the derivation of opinions of Islamic Jurists.
- The Real Islamic Commercial Rules be applied here.

ACKNOWLEDGEMENT

Allah Almighty the Creator of the Universe and His Prophet Muhammad (P.B.U.H) the Teacher of world, first and foremost I would like to thank them, who guided me to the right way.

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I also want to thank to Shafqat khan Mastoi my dissertation supervisor, for his expert and valuable guidance and encouragement extended to me. I place on record, my honest gratitude to Dr Muhammad Ijaz, Associate Professor, Director S. Zayed Islamic Center, University of Punjab LHR and Dr. Ataullah Khan Mahmood, Assistant Professor, for their help and appreciation.

At last but not least, I pay special thanks to one and all those who, directly or indirectly, have their helping hand in my God-gifted life.

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا أَوْفُوا بِالْعُقُودِ.

O You who believe, fulfill the contracts.

﴿ إِنَّمَا الْبَيْعُ عَلَى تَرَاضٍ ﴾

Verily trade is only upon mutual consent.

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Chapter 1

CONCEPT OF ELECTRONIC CONTRACTS

1.1: Introduction to Contract: Basic concepts

Before, I elaborate the concept for making Electronic Contracts; first of all, it is essential to be familiar with a contract and what elements are required for a contract to be valid.

Black's Law Dictionary defines a contract as "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law."

In other words, it is defined a contract is

"A promissory agreement between two or more persons that creates, modifies, or destroys a legal relation."¹

"A contract is an agreement entered into voluntarily by two parties or more with the intention of creating a legal obligation, which may have elements in writing, though contracts can be made orally."²

Under The Contract Act, 1872 of Pakistan³ (h) an agreement enforceable by law is a contract. In other words

¹ Garner Baryan, Black's Law Dictionary, 7th Ed. (1999), St, Paul, MN, West Group.

² See, contract law, at <http://en.wikipedia.org/wiki/Contract>, last visited on 03.02.12.

“A contract is formed in any transaction in which one or both parties make a legally enforceable promise. A promise is a commitment or undertaking that a given event will or will not occur in the future and may be expressed or implied from conduct or language and conduct. A promise is legally enforceable where it:

- was made as part of a bargain for valid consideration;
- Reasonably induced the promise to rely on the promise to his detriment or
- is deemed enforceable by a statute despite the lack of consideration.”⁴

A contract can be defined as a voluntarily agreement by competent person or persons having legal capacity to enter into and which shall have power to be enforced by law , however only legal agreements are contracts whereas illegal agreements are null and void contracts.

1.2: THEORY OF CONTRACT IN ISLAMIC LAW

Contracts have a fundamental part of the economic system of every country. If the finance is the back bone of every state then contracts are the back bone of every finance and trade; hence, Islamic law gives special importance and protection to agreements and contracts. Without such protection, people would definitely find it very difficult to plan transactions. Contract is a source of obligation and its faithful execution is a duty as affirmed by the Allah Almighty Himself in the Holy Quran:

“O you who believe! Perform your contracts.”

1.2.1: The Meaning of Contract

The Arabic word for contract is used as ‘Aqd’ (عقد) which literally means to tie (between two ends), to link together, to fasten, knitting; joining, locking.

The word ‘aqd’ (contract) means “tying tightly, as in tying a rope. In Arabs it was used to speak about firm belief or determination. They say “‘aqd al ‘ahd” to mean ‘make a covenant’ and ‘aqd al yamin’ to mean ‘give an oath.” The word ‘aqd also carries the meaning of obligations, as stated in the Holly Quran:

³ The Contract Act, 1872, (Pakistan) interpretation clause (h), see soft copy at <http://pakilaw.com>, last visit 04-02-2012.

⁴ Lexis Nexis Capsule, Summary on Contracts, Copyright © 2004 LexisNexis, a division of Reed Elsevier Inc., at www.lexisnexis.com/lawschool/study/outlines/pdf/contracts.pdf, last visited on 05-02-12.

يَأْتِيهَا الَّذِينَ ءَامَنُوا أَوْفُوا بِالْعُقُودِ.

“O you who believe, fulfill the contracts.”⁵

In Islamic Fiqh the word contract is used to mean an engagement and agreement between two persons in a legally accepted, impactful and binding manner.

“Originally, the tying or joining means a conjunction whether sensory or spiritual; from one side or from both sides. According to Muslim jurists, ‘aqd’ has two meanings; general and specific. As for the general meaning which is nearer to the linguistic meaning and is prevalence among the Malikis, Shafi’is and Hanbalis school of thoughts, it may be applied unilateral as well as bilateral. Here, whatever a person has come to a decision to do it whether such decision is one-sided as in endowment (gift, donation) and ibra (remission of debt), or he made to bilateral as in sale, hire and agency. This meaning consists of obligation, whether from one person or from two persons. 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.”⁶

“But, as for the specific meaning of ‘aqd, it is the connecting, in a legal manner, of the offer and the acceptance, in a way which will be a clear evidence of their being mutually connected. Thus, contract, essentially, is a promise or set of promises which a court will enforce. This means that the promises are legal contracts, not illegal ones like contracts to commit arson or killing. It also means that legal contracts do not include social obligations like promising someone to come to his house.”⁷

Therefore, when the parties satisfy all the requirements of a contract, Islamic law recognizes and enforces this obligation. By a contract, parties agree to impose legally enforceable duties on themselves that did not exist before.

Contract has been defined in Article 103 and 104 of the Majallah as “the obligation and engagement of two contracting parties with reference to a particular matter. It expresses the combination of offer and the acceptance. In the conclusion of the contracts, both

⁵ Al Quran, (5:1).

⁶ Muhammad Tahir Mansoori, Islamic Law of contract and Business Transactions, 2nd Edition (International Islamic University, Islamabad, 2004), p. 20.

⁷ Al-Zuhaili, al-Fiqh al-Islami wa Adillatuhu, vol. IV, p. 81; Clark & Kinder, Lawrence S & Peter D, Law and Business, (USA: McGraw-Hill, Inc., 1986), p. 107A.

the offer and the acceptance are interrelated in a legal manner, the result of which is seen in their mutual relationship.”⁸

In fact, the declaration of a Muslim to make any promise is a contract; he is answerable under the Islamic law.

In Al-Inayah: “Legal relationship created by the conjunction of two declarations, from which flow legal consequences with regard to the subject matter”⁹

1.3: Contract in Islamic law and Modern law:

Noel J. Coulson emphasizes the fact that “contract in Islamic law is in no sense the precise equivalent of the technical term contract in Western jurisprudence, which involves, certainly at the common law, the two basic essentials of agreement and consideration.”¹⁰

In contrast with the Western contractual laws, the Islamic law of contract does not represent only the bilateral contract - it also encompasses the unilateral contract. The unilateral contract is binding and effective without the need of the consent of the other involved party in the contract, such as the repudiation of a marriage by the husband or, in times past, the formal manumission of a slave. The wide application of the term contract in the Islamic legal system comprises moreover all contracts that lack the inclusion of consideration between contracting parties. To give an example, gift dealing is considered in the Doctrine as part of the general system of contract. To sum up, Coulson stressed “that a contract in Islamic doctrine means no more and no less than a legal undertaking.”¹¹

Therefore, we can say in legal view, it has two interpretation either general interpretation or specific interpretation. In *general term*, it means anything that is intended by a person to do/perform; either based on his own will, e.g endowment (وقف), divorce (طلاق) a donation contract ; or depended on wills of at least two (arties,

⁸ Majid Khadduri & H.J.Liebesny, Ed.2010, pub.The Law Book Exchange Ltd. New Jersey, Vol 1.

⁹ Muhammad Ayub, Understanding Islamic Finance, published John Wiley & Sons. Copyright.2007, England.p.104.

¹⁰ Coulson Noel J, Commercial Law in the Gulf States: the Islamic Legal Tradition. London: Graham and Trotman, (1984), p. 18.

¹¹ See, Ibid, p.18.

eg, sale (البيع), marriage (نكاح). *Specifically* 'aqd means a connection of the words of one party (الاجاب) to the words of the other party (سؤل) which constitutes legal implication on the subject matter.

In short, to understand the contract we can conclude it is a legally binding agreement among the parties. That can be produced as an evidence to prove acceptance. My research will focus on contracts that connect Electronic Contracts that bind two or more than two parties. Therefore, we can say it is form of a specific contract.

1.4: Electronic contracts: Definitions

Actually, whenever we talk about an electronic contract it means that it comes under the heading of e-Commerce. E-commerce is main heading while e-contract is sub heading and both are discussed under the law of contract. To understand the e-contract, first of all, we have to know about e-commerce.

1.4.1: What is E-Commerce?

There are so many definitions explored in different ways as following:

“Exchanging commodities and services through electronic media”¹²

Electronic Commerce, or e-commerce, is the process of buying and selling goods and services electronically with computerized business transactions using the Internet, networks and other digital technologies.

Justice (R) Khalil-ur-Rehman Khan defined ‘E-commerce’ “as conducting business on-line, including buying and selling products with credit card or digital cash, by transfer of data between different companies using networks, such as the Internet. He further says precisely, it is the collection of tools and practices involving Internet technologies that allow a company to create maintain and optimize business relations with consumers and other businesses.”¹³

¹² See, Egypt: Draft Law on E-Commerce, Arab Law Quarterly, Vol. 26, No. 4, 2012, BRILL, p. 288.

¹³ Justice (R) Khalil-ur-Rehman Khan, Cyber Laws in Pakistan, Khan, Article available at www.supremecourt.gov.pk/jjc/Articles/10/1.pdf, last visited 16-03-12.

E-Commerce is the process used to distribute, buy, sell or market goods and services, and the transfer of funds online, through electronic communications or networks. If it is defined broadly, E-commerce consists of all types of commercial transactions that are concluded over an electronic medium or network, essentially, the Internet and E-commerce covers three main types of transactions, i.e. business-to-consumer (B2C), business-to business (B2B), and business-to-government (B2G) and hence "E-commerce can be used as a synonym with the e-contracts."¹⁴ It is evident that whenever we talk about e-commerce it definitely signifies the meaning of e-contract.

1.4.2: Electronic Contract:

What means Electronic?

According to UETA Sec 2 definitions and E-SIGN Act Sec 106 definitions "Electronic means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."¹⁵

1. "Technology based on using electrical, electromagnetic, optical or similar capabilities."¹⁶

However, Electronic Contract is defined as:

"A contract which expresses the will of one or two parties, or to be negotiated, or to exchange its documents partially or completely through electronic media."¹⁷

E-Contract is drafting and negotiating contracts for e-commerce and related services. It is considered to help out people in formulating and implementing commercial contracts within e-businesses. It includes the sale of products and supply of digital products and services for every consumer.

"E-contract has three phases; it is modeled, executed and enacted by a software system. Computer programs are used to automate business processes that govern e-contracts. We can say electronic contract is a digital agreement "drafted" and "signed" in an electronic form. It

¹⁴ Siya Rathore, Understanding Electronic Contracts/ E-Contracts, Article available at <http://expertscolumn.com/content/understanding-electronic-contracts-e-contracts> last visit 20-03-12.

¹⁵ See, UETA(1999), available at http://www.law.upenn.edu/bll/archives/ulc/ecom/ucta_final.pdf, 08-04-12.

¹⁶ Electronic Transactions Law (Royal Decree No.M/8) (8 Rabi' I- 1428H – 26 March 2007), Art 1(9), www.mcit.gov.sa/NR/...74FB.../ElectronicTramsactions.pdf, last visited 08-04-12.

¹⁷ Draft Law on E-Commerce, Arab Law Quarterly, Vol. 16, No. 3 (2001), pp. 288-294, published JISC e Collections Service, Egypt.

can be drafted in the similar manner in which a normal hard copy agreement is drafted.”¹⁸
The deference lies only in form of communication; that is electronic.

To conclude, it is evident that nowadays, e-commerce is being promoted on the internet and electronic contract is the foundation of e-commerce. E-contract is a contract modeled, specified, executed and deployed through electronic technologies or by software system. It is conceptually very similar to traditional (paper based) commercial contract. However, the difference is only between the ways of communication. Seller presents their products, services, prices and terms to prospective buyer. Buyer considers his options, negotiates prices and terms (where possible), place orders and make payments through electronic form or other recognized forms of payment. Then, the seller delivers the purchased products to the relevant person. By this way a complete electronic transaction is being done.

1.4.3: Importance:

New technologies of communications like internet and other networks have changed business environment and provided the trading processes in e-business easier and effective. Its importance would be more explored in next coming years when almost all trade would be concluded through e-contracts.

E-contract infiltrates into every corner of the modern business world. It is obvious that it has reduced costs, time, higher margins, and having more efficient operations and higher profits. In this modern time when every person has become materialist and wants to gain high profit with small investment in short time. This is quite possible only in an e-environment where parties of contract, products, services and all necessary requirements to complete transactions are available. “It is helpful for both trader and consumer to end the traditional barriers of distance and lack of information about market opportunities. There is no need to maintain physical presence to establish business. On the Internet, virtual shops and contract points have made relationship strong and close directly to the consumer. Advertising possibilities worldwide at e-environment is helping small and medium industries and businessmen

¹⁸ Kapil Raina, Evidentiary Value of E-Contracts, See at <http://www.legalserviceindia.com/article/1127-E-Contracts.html>) last visited 25-04-12.

who traditionally find it difficult to reach the customer abroad. Now it has become possible to reach abroad without buying air ticket and visa for trade. E-contract is no doubt an easy way to make contract locally and internationally by saving time, money, frustration and uncertainty (if there is confidence).”

In short, e-contracting not only protects contractual partners but also reduce time and costs. It creates new opportunities regarding contract settlement, management, content re-use and speedy monitoring systems.

In the electronic contract, there is advantage that the whole process of transaction and trade can be completed in just few seconds, with simply clicking ‘Yes’ to an electronic contract. There is no worry for delayed couriers and additional travelling costs in such a set-up. Hence, e-contract has captured the traditional contract with new technologies and modes which definitely will have a great affect to boost up the economy of any state. In future, at internationally market the economy of that country will prevail which have e-contracting business strong and trustworthy.

1.5: Historical development of electronic contract

History of e-commerce is a new world which is evolving according to the need and advantage of the customers. It is a constant process which we are all building together every day, providing a secure foundation for the future generations. It has been about twenty years since the Internet is attracting businessmen and consumers in e-environment with new markets and new opportunities.

A few years ago the only way of buying books was that one had to go to bookstores. Purchasing stuff was done physically at specific shop. This procedure is done only through brokers. Not anymore! Today, we see that the trading has reached to our doorstep. A large number of business and trading companies have successfully managed to put an electronic outlet to approach the consumers. They are doing their business through e-contracts.

In the early stages when electronic data interchange and electronic commerce was in its initial level, there were questions about the legitimacy of electronic contracting. There were questions raised whether electronic contracts were real and

could transactions formed by electronic messages in an electronic environment and could be enforceable or not? Legally, people asked whether these paperless contracts could be produced as evidence if any dispute occurred.

Those questions have been satisfactorily resolved, to a great extent, both on a national and international basis. A key factor in that resolution was the work of the United Nations Commission on International Trade Law (UNCITRAL) and the adoption of the United Nations Model Law on Electronic Commerce in 1996.¹⁹

As early as 1985, UNCITRAL had called upon all national governments to review the legal barriers to electronic commerce found in writing and signature requirements of legal systems.²⁰ Concluding that paper-based requirements combined with the lack of harmonization in the rules applicable to electronic commerce constituted a barrier to international trade, UNCITRAL undertook the preparation of legal rules on the subject in 1992. Its Model Law on Electronic Commerce could be viewed as the first stage in accommodating the law to the demands of electronic commerce.

Drafted to facilitate electronic commerce by removing existing legal barriers, and to do so in a technology neutral, non-regulatory manner, the provisions of the model law, and its companion, the United Nations Model Law on Electronic Signatures, provide the basic framework for the validity and enforcement of electronic contracts.

Almost 40 years earlier, in 1970 the concept of electronic commerce arose when the facilitation technology such as Electronic Data Interchange (EDI) and Electronic Funds Transfer (EFT) were introduced. They allowed the traders to participate in businesses activities by sending commercial documents like purchase

¹⁹ See, United Nations Commission on International Trade Law, Report on the Work of its Twenty-Ninth Session, United Nations General Assembly, 51st Session, Supplement No. 17, at United Nations Document A/51/17 Annex I (1996), reprinted in 36 I.L.M. 200 (1997). The Model Law and the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce is on the web site www.uncitral.org.

²⁰ See, United Nations Resolution 40/71, para. 5(b), official records of the General Assembly, 40th Session, Supplement No. 17 (A/40/17), para. 360. This recommendation was endorsed by the General Assembly.

orders or invoices electronically. This was the first stage, where although ATM and credit card was not launched yet.

In second stage, 1980s when credit cards, automated teller machines (ATM) and telephone banking have growth up. E commerce started to enhance their activities rapidly. First time, airline reservation system was epitomized by Sabre.com in the USA and Travi.com in the UK.

From the 1990s onwards, Internet usage opened for public which make the electronic commerce indispensable part of computer users all over the world. Although the Internet became popular worldwide around 1994 when the first internet online shopping started, it took about five years to introduce security protocols and DSL allowing continual connection to the Internet. Around about in 2000, many international business companies offered their services through the World Wide Web. Since then a word "e-commerce" have been started to associate publically which definitely presumed as ability of purchasing various goods through the Internet using secure protocols and electronic payment services.²¹

In beginning, there was complexity and anxiety amongst the legislatures to recognize e-commerce as a modern technology, but now a number of states have enacted their laws to recognize e-contracts.

1.6: Formation of Electronic Contracts

It has been seen that for most computer users or consumers in Pakistan or all over the world that they have to come across a position where they deal with their computers or ATM machines; they have to give their assent to some terms and conditions. During utilizing the Internet, it is usually done by clicking on some prominent icons like "I Agree." However, in case of software when we install it; our assent is generally given by the conduct; we tear the CD package and use it. Many users carry out this job as just another "necessary evil" to finish. It is clear cut that

²¹ T.Suganthy, INTERNATIONAL BUSINESS TRANSACTION E-COMMERCE AND E-CONTRACTS, p10, article available at www.scribd.com › Business/Law › Technology , last visited 28-04-12.

these types of actions have massive importance because these make us responsible for our actions to a valid and enforceable contract and those terms that we often not try to read, can be strictly enforced against us. It is very important to mention all these types here which provide help for the parties of transaction to make an electronic contract. By understanding these types both the parties can get awareness about their rights and duties before conclusion of the contract.

1.6.1: Types of electronic transactions

As there may be many types of electronic transactions in the world; however I shall prefer to write down seven prominent kinds of them.

1. Via E-mail or through chat agreements
2. The Click-wrap or Web-wrap Agreements
3. The Shrink-wrap Agreements
4. The browse wrap Agreements
5. The Electronic Data Interchange or (EDI)
6. Voice Communication and Press communication Agreements
7. Movement(Al Harkat) Agreements

These types would be discussed while elaborating electronic contracts modes and methods in detail as following.

1.6.2: Modes and Methods to conduct electronic contracts:

Generally, all types of contracts are valid and enforceable if they are made by the competent parties with free will, a lawful consideration and with a lawful object which are not stated to be null and void in the eye of law. Whereas, in an electronic contract, agreement is created and "signed" in electronic form, no paper or other hard copies are used to create a complete contract. For example, a contract is emailed to a consumer, and the consumer emails it back with an electronic signature indicating his acceptance. In another way, it can also be created in the form of a "Click to Agree" contract, the user clicks an "I Agree" button on a page with terms before the transaction can be completed, and it is commonly used to download software.

A contract can be created in the electronic world in following ways?

1. Verbally
2. Conduct
3. In writing

To add more modes in electronic world:

4. Via the Internet
5. By Electronic Communication Devices(through voice or press and move)

1. **Via the Internet**

This way of “via the internet” formation of contract covers all first four types of electronic contracts mentioned above. Here are described all one by one and step by step as follows:

It is important to remember that when dealing with the creation of a contract all that is really needed is offer, acceptance and intention. Consideration can and often will move after the contract has been made.

Mostly sale contracts are done via the internet. Hence first and foremost to understand the concept of sale transaction over the Internet, we have to examine a popular Internet retailers like eBay.com, Amazon.com or alibaba.com. These online companies sell thousands of products, these may be in electronic as well as in hard form such as books, electronics accessories and goods which are examples of B2C (Business to Consumer) sales. Customers choose products from the online shopping website such as ebay.com and place them in a virtual shopping basket and give relevant information about credit card through PayPal or else to finish the purchase.

“When a purchaser clicks the “Place Your Order” icon, it means he has contractually agreed to buy. The required items and goods are sent through e-mail to the client’s chosen address. Therefore, physical signature and paper changes hands are out of question, although

these are used for identification and authentication but here is e-mail will be an evidence to produce.”²²

By internet, we can contract in different form in writing (email,messaging,Chat), speaking (audio,microphone,telephone), Watching (video,camera) and automatic programmed(installed software,).

a. Via E-mail or through chat agreements

Electronic Mail (E-Mail)

E-mail is a well known method of sending an electronic message by the Internet, through electronic devices like computer and mobile. It is an expedient process for direct communication.

E-mail although it is a message but has ability to form a contract. As a result, e-mail is considered a formal and informal medium of communications. It is clear that informal e-mail has no effect and they are considered non-contractual in the eye of business community. However, courts think telegrams “with typed signatures”, necessary for a binding contract. Hence, an e-mail formal which symbolizes assent to form a contract has legal consequences.

There are numerous methods of creating a contract via email. For example

Example of contract creation via email

Abdullah sends Omar this email:

“I have a computer for sale – you know the one that you used last week. I want to raise some money to go on holiday so I will sell it to you for Rs7000. Come and get it this evening if you want it”

THIS IS AN OFFER

Omar emails Abdullah

“That sounds great; I will come over tonight and get it”

THIS IS AN ACCEPTANCE

²² Jennifer E. Hill, The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies under the United Nations Convention on Contracts for the International Sale of Goods, article available at <http://scholarlycommons.law.northwestern.edu>, last visited 03-05-12.

- A contract will now have been formed

This example is possibly the simplest example of an emailed offer and acceptance.

We could have email used to create the contract in other ways. A person could send an email to an account advertised in the classifieds of a newspaper and T.V channel. Alternatively, an email would probably amount to valid acceptance for any offer that required acceptance to be made in writing. Therefore, when looking at electronic contracts and email, it is important to appreciate that the acceptance email is very important.

- Communication of acceptance

It is therefore important to ensure that communication of acceptance has occurred.

In Entores Ltd v Miles Far East Corporation Lord Denning said:

Entores v Miles²³

“Suppose, for instance, that I shout an offer to a man across a river ... but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait until the aircraft is gone and then shout back his acceptance so that I can hear what he says”

Acceptance must therefore be communicated. The law is the same regardless of the fact that we are dealing with e-commerce

- Silence and acceptance

The rule that silence cannot constitute acceptance will still apply.

Felthouse v Bindley²⁴

B. Chat (Using Skype /Yahoo messenger/Facebook, Twitter etc)

The same method of conducting contracts through chat can be done as mentioned above. The only difference between email and chat is of software not the ways. In simple words we can express that agent of both parties has been changed

²³ Entores Ltd v Miles Far East Corporation [1955] 2 All ER 493, at page 495.

²⁴ L Edwards & Charlotte Waelde, Law & the Internet, 2nd Edition, 2000, Hart Publishing, Oxford, Pp. 22-26.

here. However, here issue may rise related to validity and enforceability of such types of contracts.

2. The Click-wrap or Web-wrap Agreements:

(Where a party clicks an "I Agree" button on a website)

"Click-wrap agreement is also known as a "click through" agreement or click wrap license, generally, it is associated with software licenses. Mostly, these agreements are done on Internet during the process of installation of many software packages, or through using electronic technology."²⁵

The content and form of click-wrap agreements differ usually contract to contract. The majority click-wrap agreements required from the user to give his assent by clicking an "ok" or "I Agree" button on a dialog box or come up window. A user can also reject the agreement by clicking on "cancel" or closing the window. In case of rejection, the user is unable to benefit from product or service available to him or her.

Sometime, the terms and conditions of service or license do not become visible on window, but are always available before acceptance and prior to installation, such as through a hyperlink. In case if the terms of service are not accessible to user, the notice requirement is not fulfilled, the customer may not be bound to the terms of the agreement.

It is prominent to mention that although courts have ruled some click-wrap licenses are enforceable contracts, it does not mean that every term of every click-wrap license is enforceable and implemented. "The click-wrap agreement requires the user to manifest his assent to the terms of the license agreement by clicking on an icon. It is clear that the product or service cannot be acquired unless the icon is clicked. It is better to understand with this example, when a user tries to download something like books; a web page appears as a license agreement. It is visible on the screen in such these words, "Do you accept all the terms of the agreement? If you are agree, click on the "Yes" button. If you do

²⁵ See, Click wrap, at <http://en.wikipedia.org/wiki/Clickwrap>, last visited 21-06-12.

not want to use, click "No", Setup will close at once, and that is an end of click-wrap agreement."²⁶

A buyer cannot start using the software until he has to click on the button accepting the terms and conditions of the agreement. Buyers can assent to the contract without even reading it in order to use the product. Buyers cannot negotiate and must, therefore, accept the terms as-is. Most courts find these agreements enforceable. Understandably, click wrap agreements may be accepted without users actually reading or understanding contract terms when manifesting assent.

3. The Shrink-wrap Agreements:

Shrink-wrap agreement functions slightly differently. In this case, Shrink-wrap agreements are used when one purchases off-the-shelf software. The agreement is imprinted on the software box, CD- ROM case, or other materials included inside the package the license begins when the purchaser reads its terms and tears open the cellophane wrapping or shrink-wrap that surrounds the package. Buyers are supposed to return the software package to the retailer if they elect not to abide by the agreement. Courts are similarly concerned about buyers actually receiving notice of the sale, consciously agreeing to the sale, and conditioning the sale on acceptance of the license.²⁷

Shrink-wrap agreements generally contain the CD Rom of Software. The terms and conditions of software are printed on the cover of the CD and the buyer after observing them, tears the cover to access the CD Rom. It is quite possible that additional terms and conditions can be appeared on your PC when the CD is loaded to it .Option of returning the software is available if the new terms are not agreed with your mind.²⁸

²⁶RupakGhosh ,The Contractual Validity Of "E-Contracts": An Overview, at www.LegalServiceIndia.com, last visited 22-06-12.

²⁷ See,Ibid.

²⁸ See,RupakGhosh ,The Contractual Validity Of "E-Contracts": An Overview, at www.LegalServiceIndia.com, last visited 25-06-12.

Actually, in shrink wrap agreements terms and conditions of a contract can only be read and accepted by the consumer after opening the product purchased. The terms illustrates that the shrink-wrap agreements are not limited to the software industry. It relates to Web-wrap, click-wrap and browse-wrap terms which is downloaded or used over the internet in various ways referring to license agreements in software.

"A shrink wrap agreement is also called an end user license agreement. It is a type of adhesion contract where the terms of the contract are laid down by one party, and second party has to "take it or leave it" having no negotiation facility."²⁹

To conclude we can say that the shrink wrap contract is purchasing off-the-shelf software when money is paid for and the product is received by the consumer, after tearing the pack it comes with conditions attached with.

4. Browse wrap Agreement

In the third type, in Browse-wrap agreements the terms of use of the product are listed on a web site page. Here, company binds the user to the license terms merely by entering the website or downloading software. This agreement does not require express manifestation of assent. Therefore, Courts are generally reluctant to hold such contracts enforceable because of the lack of assent, or explicit agreement, on the part of the user.

The browse-wrap agreement can be shaped in any one of three forms; 1) use of a web page or 2) a hyperlink or 3) small disclaimer on the page. It cannot be enforced if assent is not given by the user. Assent in browse-wrap agreement must be clear; so that it can be called an agreement has been occurred. Regarding the browse-wrap agreements enforceability the court will decide case-by-case basis, because there are no "bright-line" principles to show the case obvious. However, based on *Specht v. Netscape*, some practitioners consider that the icon for the terms must be at upper left-hand on homepage and can be visible easily. The court concluded that "a consumer's clicking on a download button does not communicate assent to contractual terms if

²⁹ See, shrink wrap, at http://en.wikipedia.org/wiki/Shrink_wrap_contract, last visited 26-06-12.

the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms.³⁰

In short, in Browse wrap agreement is enforceable with two common factors. First, it must have sufficient notice of the terms. Second, the user clearly manifest acceptance of the terms by his actions. The shrink wrap agreements actually based in a paper environment while click wrap and browse wrap are distinctive to environments.

Electronic Data Interchange:

Electronic Data Interchange (EDI) is a process of electronic interchange of business information using a standardized format rather than with paper. Many business documents can be exchanged using EDI, but the two most common are purchase orders and invoices. The National Institute of Standards and Technology (NIST) defined EDI as the computer-to-computer interchange of strictly formatted messages that represent documents other than monetary instruments. EDI implies a sequence of messages between two parties, either of whom may serve as originator or recipient. The formatted data representing the documents may be transmitted from originator to recipient via telecommunications or physically transported on electronic storage media.³¹

It is the computer-to-computer transmission of information used by frequently contracting commercial parties to send and receive standard form so generally purchase orders and invoices in a store and forward message system. It is, perhaps, the clearest example of electronic contracting through the use of an electronic agent. It is electronic communication between trading partners from computer to computer. To add more, we can say that they are contracts used in trade transactions which enables the transfer of data from one computer to another in such a way that each transaction in the trading cycle (for example, commencing from the receipt of an order from an overseas buyer, through the preparation and lodgment of export and other official documents, leading eventually to the shipment of the goods) can be processed with

³⁰ See, *Browse_wrap*, at http://en.wikipedia.org/wiki/Browse_wrap, last visited 26.06.12.

³¹ See, PHYLLIS K. S OKOL, *FROM EDI TO ELECTRONIC COMMERCE* 14-22 (Marjorie Spencer ed., 1995).Id. at p.14.

virtually no paperwork. Here unlike the other two there is exchange of information and completion of contracts between two computers and not an individual and a computer.³²

5. By Electronic Communication Devices(voice and press or move)

There are many modern electronic communication devices by which we can conclude e-contracts quick and speedy way. It is quite possible to divide them into two main kinds. (1) Voice Communication such as telephone and mobile (2) Press communication as pressing or touching the words/digits to send messages e.g. ATM, Fax, Telex and Phone package activation.

1. Voice Communication

2. Press communication

3. Move Communication

1. Voice Communication Agreement

It is an agreement through transmission of sound by telephone or creation of an oral contract where conversation is recorded. It can be written and signed contracts over the telephone which is legally enforceable as their pen and paper counterpart.

For Example: Signed, Written Contracts over the Telephone.

We see Jazab Fiaz, the sales agent for Hafiz Sons Corporation, sitting next to his work telephone.

On the other side, we see Badar Riaz, the supplies manager for Islamic Scholars Computer College (ISCC), sitting near his phone. Jazab picks up his hone and dials. (Ringing)

Badar: Assalam o Alaikum, Badar Riaz, supplies manager for Islamic Scholars Computer College, speaking.

³² Sww, RupakGhosh ,The Contractual Validity Of "E-Contracts": An Overview, at www.LegalServiceIndia.com, last visited 26-06-12.

Jazab: Wa Alaikum us Salam, Badar, this is Jazab Fiaz, sales agent for Hafiz Sons Corporation.

Badar: Oh, Jazab, I am happy to speak with you. I heard that you went for Hajj, when did you come back?

Jazab: Last week I returned and obviously it was a great occasion of pleasure for me. Ma sha Allah, I just got your message that Islamic Scholars Computer College is interested in buying 20 set of Tafseer-e-Quran. Is that correct?

Badar: Yes, we want to purchase 20 set of Tafseer-e-Quran.

Jazab: Alright. [Jazab presses another button on his phone]. Ok Badar, now our talk is going to be recorded, Is it ok ? Badar: Of course. Jazab: Very nice. That's a conversation between Jazab Fiaz sales representative of Hafiz Sons Corporation, and Badar Riaz, supplies manager for Islamic Scholars Computer College on Oct 10, 2012.

Hafiz Sons Corporation is willing to sell Islamic Scholars Computer College 20 set of Tafseer-e-Quran for Rs 5000/ with delivery in five business days. Does Islamic Scholars Computer College ISCC want to purchase this one?

Badar: Yes, we want.

Jazab: In this position, please press #7 on your phone to confirm your order. (Badar pushes #7 on his phone and atouchtone sound can be heard easily) Jazab: Jazakallah and Thanks. I will mail to ISCC a copy of this contract soon. Badar: Thank you Jazab, Allah Hafiz!

Jazab: Jazakallah, Khuda Hafiz!

In this conversation, we observed an oral contract a complete procedure of its creation between Islamic Scholars Computer College and Hafiz Sons Corporation. Jazab Fiaz, Hafiz Sons Corporation's agent, offered to sell 20 set of Tafaseer-e-Quran. Badar

Riaz, ISCC's agent, accepted. Finally, the parties exchanged consideration when ISCC promised to pay Hafiz Sons Corporation Rs5000 for its product.

In short, Islamic Scholars Computer College and Hafiz Sons Corporation created a binding oral contract. We have actually observed that it is not only an oral contract between Jazab and Badar recorded through telephone, where Badar has given his assent confirmation by touchtone but also they have created an enforceable signed, written contract.

Thus, "under E-SIGN and UETA, the legally consensual recording of a telephone call, either on a computer system or digitally, is an electronic record. A contract comprised of both an electronic record and an electronic signature has the same legal effect and validity as a signed, written contract."³³

2. Press communication Agreement

Press communication or Instruction Agreements are those whereby a party without viewing the terms of the contract provided in the booklet or brochure or website of the company, not available at the time of transaction, where a user is to usually give his assent, by pressing or touching the digits/words on electronic device. These kinds of contracts are broadly used on the

ATM,

Fax, Telex

Phone package activation (sending messages)

T.V online offers,

Easy paisa or

easy load transactions etc

These agreements are being done by way of a messaging. For example to take money from ATM, we have to insert debit/credit card it shows our interest or intention for transaction then we press digits for desired amount and then press OK for sending command, in response we receive our amount.

³³ Brett S. Krantz, Mark D. Rasch & Melissa A. Yasinow , How Businesses Can Use UETA and E-SIGN to Create Signed, Written Contracts Over the Telephone.

3. Move Communication Agreement

In the electronic world, this is new emerging form of communication through which we can enter into a contract by moving our physic in front of electronic device by which we manifest our assent. The screen of electronic devise takes signal through electro optical waves of our physical movement. For example, if we move our hand down or nod our head in front of a computer screen to give indicator of assent, it is as we accept the offer or indicate "OK". This form of contract is not wide spread yet. It is in initial using in games.

1.7: Legal Phases of a Contracting Process

Generally, business phases are different from legal phases. Legal phases in the law of contract bind the parties instead of business phases. Therefore, it is necessary to discuss all the phases precisely. There are four phases with legal influences: we can see in this scenario

- Information Phase = Contract Conception
- Intention Phase =Contract Preparation
- Agreement Phase =Contract Negotiation
- Settlement Phase =Contract Fulfillment

It is crystal clear that we cannot give guarantee the will of the contract partners during the business phases, because it may change anytime. We see that it is not a appropriate situation for making a contract legally binding on parties. Here we need a mechanism that freezes the will of a contract party at a certain point of time. This will causes the legal consequences un regarded of the aspects that it may changes later on. This is necessary to create a certain trust in the process. We call this mechanism a declaration of will. Such a declaration is very often expressed verbally. But to ensure Secure Electronic Contracts we use the written complement to such a verbally expression. This complement is called a document. Such a document is suitable to generate proofs to be used in front of a court. This allows us to define the legal process as a combination of dynamic aspects, the phases where the will of the contract

parties changes permanently and of static aspects the documents that freeze the will of the contract parties at a certain point of time.³⁴

1. **Contract Conception**

It is an information phase where the procedure initiates generally with the basic information regarding market. Here the contracting parties prefer to utilize information given by dealer. Information in this phase is provided which is not an invitation to treat or an offer. In this phase the parties only show the willingness to their contracts. Therefore, its legal consequences are not enforceable on parties.

2. **Contract Preparation**

This phase is very important because it is legally enforceable for the contracting parties. In first stage a document is called "invitation to treat" which does not have legal consequences. It means that party can cancel his statement at any time. In an invitation to treat parties are in negotiating stage and in an offer parties are seriously wanted to create an agreement more than just information about markets, enterprises or products here is goal to create a transaction.

3. **Contract Negotiation**

This stage begins with an offer and not by invitation to treat. "This is the first legally binding document in the process. The offeror has to settle the contract as described in his offer if the offeree accepts it. This would be the shortest way of a contract negotiation and happens mostly with consumer goods as for example food, books and so on. But contracting about investment goods the buyer very often generates a counter offer. This happens already when the offeree asks for a discount.

4. **Contract Fulfillment**

When one party accepts the offer or in case of the counter offer of the other party and this last affirmation of will make a contract. Both parties have obligations on each other. Most common phase is the obligation of the seller to deliver a product or service and the obligation of the buyer to pay for it what was agreed between them. This exchange of goods happens during the phase of contract fulfillment. The buyer

³⁴ See, Michael Gisler, *Legal Aspects of Electronic Contracts, Infrastructures for Dynamic Business-to-Business Service Outsourcing (IDSO'00)*, Swiss Federal Institute of Intellectual Property, 5 June, 2000.

mostly gets a receipt for the amount he paid for the product. Such a receipt is the last document produced during the process. Not very common are receipts for the seller that confirms that he fulfilled his obligations of the contract. We suggest that for Secure Electronic Contracts also a receipt for the vendor is created.

The only fixed relation is the one between the number of obligations and the number of receipts. For each obligation that arises out of the contract there must be a receipt after the fulfillment of this obligation.³⁵

To conclude a contract formation we can say it is a complete process that leads four ingredients which starts with Information, Intention, and Agreement and winds up with Settlement stage. For each phase there are certain conditions and requirements which have to be fulfilled.

2.1: Electronic Contracts in Islamic perspective:

New electronic means of communication cannot change the Islamic concept of justice. The beginning of new terminology and technology has to be also established under principles of law.

2.1.1: Relationship between Business in new form and Islam:

All financial transactions are based on contracts. Contracts have become so familiar in our daily life that often we do not even realize that we are entering into agreements and contracts. Innumerable things in our daily lives for example, hiring a taxi, buying airline tickets online, using credit card and mobile card, taking and giving loan, purchasing and selling food stuff etc all these are governed by contracts. Most of us are doing business without thinking rather it is permissible or not in the light of Shariah (Islamic Law).

As well as in case of Electronic contracts we see that these are spreading world-wide day by day and a large Muslims community is unsure whether this new

³⁵ Michael Gisler, *Legal Aspects of Electronic Contracts, Infrastructures for Dynamic Business-to-Business Service Outsourcing*, Swiss Federal Institute of Intellectual Property, 5 June, 2000.

form of e-contract is all right in the light of Shariah or not? Hence, in this chapter, I will try to elaborate electronic contract in the light of Islamic principles to expose to Muslims community especially related to Internet users all over the world so that they could differentiate between Halal and Haram transaction in Islamic perspective.

Islam is a complete code of life that covers all aspects and fields of our daily life. A practical Muslim always concerns about his actions and deeds. He does not conduct any business as a deceiver, cheater and money-maker. Islamic business concept is different from modern concept; actually Islam demands that Muslims must be very sincere, God-fearing and faithful in any sort of business activity.

Prior to go ahead to express the relationship between E-commerce and Islam, let me express vividly that the Holy Quran is a book of Allah Almighty for guidance of humanity, which contain general principles applicable to all times and places. Many secular including some so-called Muslims say that today society has changed so we have to change ourselves accordingly to boost the economy of the country. They argued that if we enforce those old and rigid laws we cannot make progress and we do not want to go in the age of stones. Their baseless arguments are totally illogical; let me remind that it is not the book of Christians and Jews who have many contradictions with science. I do not want to go in past when they killed many scientists due to the true conflicts with science and technology. You will not find any example in Islamic history to kill any scientist, because Quran has no any conflict with science. It is fact that Islam never stops you to make progress but stops you from making exploitation and injustice.

No doubt, The Holy Quran describes the principles and provides the guidance pertaining to all spheres of lives, it also includes the area of E-commerce (by analogy). Absolutely, it has a direct relationship between E-environment and gaining of knowledge. The first revelation shows the importance of seeking both the divine and modern education very expressly without any condition. As Allah says:

"Read with the name of your Lord who created (everything), (1) He created man from a clot of blood. (2) Read, and your Lord is the most gracious, (3) Who imparted knowledge by means of the pen. (4) He taught man what he did not know."³⁶

Accordingly, seeking and exploring the knowledge of E-commerce should be utilized for prosperity of the humanity. However, it should be bear in minds that it must be worked under the shadow of Shariah and for good purposes.

The growth of IT has brought a great revolution in every field of life. We are victims of it every time and cannot get rid of it all the time. Almost all economy is developed through IT. However, e-contract has more affect in our business transaction with a competitive environment. At internationally accessibility of the Internet made the transactions between buyers and sellers very easy and fast and this is an Electronic Commerce.

E-commerce is buying and selling process of goods and services electronically, it is called computerized business because of Internet, networks and other digital technologies.³⁷ It is obvious that electronic contract is the base to indulge in ecommerce activities, without it e-commerce cannot exist.

2.1.2: Validity of Electronic Contracts in the light of Holy Quran and Hadith:

Islamic law is called Shariah, the whole teachings of Islam revolves around four sources; the Quran (قرآن) and the Sunnah (سنت) the basic sources and consensus of religious scientists (اجماع) and intellect (قياس) the secondary sources. The Quran does not only permit but also encourage his believer to participate in all types of productive work (such as business).Islamic concept of business, Muslims should be very faithful and God fearing in any kind of business or trade. As stated in the Quran:

³⁶ Al Quran, (96:1-5)

³⁷ Kenneth C. Laudon, Jane P. Laudon, Management Information Systems, sixth ed., Prentice Hall International,2001.

” وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا فَمَنْ جَاءَهُ مَوْعِظَةٌ مِنْ رَبِّهِ فَانْتَهَى فَلَهُ مَا سَلَفَ وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ

فَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ ”

“Whereas Allah has made trade lawful and interest unlawful. Henceforth, if one abstains from taking interest after receiving this admonition from his Lord, no legal action will be taken against him regarding the interest he had devoured before; his case shall ultimately go to Allah. But if one repeats the same crime after this, he shall go to Hell, where he shall abide forever”³⁸

Hence, the Quran considers business as lawful, good and beneficial for both the individual and the society. It is admired, recommended and strongly urged by the Quran to participate in fair and honest trade.

In this respect, many allusions have been given by the book of Allah for commercial activities. As the Quranic Ayats describes the principles in trade activities:

“Woe to Al-Mutaffifin (those who give less in measure and weight) decrease the rights of others”³⁹

It is religious obligation upon Muslims to act upon every Islamic rule and principle in every aspects of their life including social, commercial and political individually and collectively. We must follow them due to two main reasons; firstly, because it is recommended by Allah Almighty Himself and secondly, acting upon Islamic teachings make us sincere and faithful in public which definitely cause for our business reputation and prosperity. Hence, Islam has presented its followers with general guidelines according to which life should be lead. It is good for humanity to not ignore or infringe them, if they really desire to success in both worlds.

There are some prominent Islamic legal principles by which we can judge the legal status of electronic contracts as following:

³⁸ Al Quran, (2:275).

³⁹ Al Quran (83:1).

1. Rule of permissibility in general to make contracts and other commercial transactions (الاصول فى الاشياء الاباحية), except there is rule on the illegitimacy of a specific contract. from This rule is supported by the following evidence from Holly Book:

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

وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا ﴿٥٠﴾

“O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you”⁴⁰

This verse apparently requires the legalization of all business transactions concluded with the consent of contracting parties; therefore it also includes e-contracts.

In fact the basic requirement of a contract to be concluded is consent of the contracting parties and as a result both parties are obliged to act accordingly. Hence a contract is said to be valid when there is consent of the contracting parties in any type of business contract including the electronic contract; except those which are prohibited under the injunctions of the Holy Quran and the Sunnah of the Prophet (S.A.W).

b. يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ

“O you who believe, fulfill the contracts...”⁴¹

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 .The every statement or act of the people which according to them is considered as contract shall be fulfilled, except

⁴⁰ Al Quran (4:29).

⁴¹ Al Quran, (5:1).

those which prohibits permissible things or which permits illegal things proven in Islamic law.⁴²

It means that e contracts are also included under this circle of contracts and takes up the same ruling.

c. وَقَدْ فَصَّلَ لَكُمْ مَا حَرَّمَ عَلَيْكُمْ

“He hath explained to you in detail what is forbidden to you.”⁴³

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

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

الْحَلَالُ مَا أَحَلَّ اللَّهُ فِي كِتَابِهِ، وَالْحَرَامُ مَا حَرَّمَ اللَّهُ فِي كِتَابِهِ، وَمَا سَكَتَ اللَّهُ لَهُمْ مِنْهَا غَنَى غَنَاهُ

“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”⁴⁴

It may be explained as that all forms of contracts are lawful it includes Electronic contract also. Because there is no any single indication in the Holly Quran and Hadith which prohibits new forms of conducting contract.If we see the purpose of Shariah regarding contract we will find that main object is consent of the parties, no matter whatever form may be.

2.2: Formation of Contract:

According to majority of Muslim jurists, there are four ingredients of contract that must be fulfilled, which are offer (إيجاب) and acceptance (قبول), two contracting parties(العاقدان), subject matter (المعقود عليه)and the mode of expression (صيغته).

⁴² Muhammad Rashid Riza, TafsirulManar,,Vol 2,(Bairut : Al Maktab al Islami, 1404 AH), 254.

⁴³ Al Quran, (6:119).

⁴⁴ Abū ‘Isā Muḥammad ibn ‘Isā as-Sulamī aḥ-ḥarīr al-Būghī at-Tirmidhī, al-Jamī‘ as-Sahīh , Sunan al Tirmidhi,Kitab al libas (The Book on Clothing),Bab ma jaa fi lubs al fira(Chapter: What Has Been Related About Wearing Furs).

First, the offer is made by the first party to the contract. Then, it gave and confirmed the freedom of acceptance from the second party. The offer and acceptance must be clear to both parties, confirmed by both parties and there must be continuity from the offer to the acceptance (there is a connection between offer and acceptance).

Second, the capacity of the two contracting parties to enter into a valid contract is majority, the age of puberty and has a sound mind.

Third, the subject matter is the object of the sale and it must be beneficial, lawful in Is-lam (halal), valuable, under possession, in existence and deliverable.

Fourth, the mode of expression is the utterance of both contracting parties expressing their wills and it could be through words (act) or in writing, but it should be clear to both parties.⁴⁵

Therefore, based on the Shariah, E-contract is legitimate because all the basic pillars of Islamic law of contract are executed.

2.2.1: Types of E-contract in Islam

There are different types of Islamic contracts. I will focus some of them which are related to E-Commerce. These are Ordered Sale (بيع السلم), Manufacturing Sale (بيع الاستصناع) and Deferred Sale (بيع المعجل). These types especially refer to E-contract. However contract of sale is particularly very important in this respect.

2.2.2 The Contract of Sale

In Islamic legal system, the types of contract are apparent and recognized. Here, it is not needed to describe all of those because they are out of the scope of my research. However, contract of sale is relevant and more important regarding the interest of my topic.

In contract of sale, numerous definitions have been provided to define its appropriate concept. As, "sale is the exchange of one commodity for another, one of which is

⁴⁵ Ahmad, Dr. Ziauddin, The Theory of Riba and E-Commerce from an Islamic perspective, Electronic Commerce Research and Applications, Volume 3, issue 3 (Autumn, 2004), Pp. 280-293.

called the object, and the other the price", or "the transfer of ownership of property for another." ⁴⁶In a shorter form we can say, sale is as "an exchange of property."

An Interview session on Electronic Contract with Ustaz Mustafa Omar is comprehensive study in reference to concept of E-commerce/ E-contracts. (Appendix A)

2.3: Concept of Islamic Contract Session (مجلس العقد)

2.3.1: Introduction to "Majlis al 'Aqd":

Generally, a contract is formed when the parties are physically together in one place that is applicable to validate a contract. In case, the parties being in different locations, they use an appropriate means of communication to exchange the offer and acceptance, such as via a letter or messenger. When both parties are physically present the Contract Session (majlis al-'aqd) can be easily determined but if the parties are physically distant at the time of forming the contract, questions arise as to whether the theory of Contract Session (Majlis al 'Aqd) can be legitimately applied or not? The valid formation of a contract based on the Contract Session ("Majlis al 'Aqd") which demands that contracting parties be together in one place and engaged in their business discussion without any disturbance unrelated to the deal.

"Under the Islamic law, it is emphasized that an offer and an acceptance should take place in one meeting (majlis)."⁴⁷

From the tradition attributed to the Prophet Muhammad (S.A.W) gives emphasis to the concept of Majlis al 'Aqd that can be comprehended from the following Hadith:

حكيم بن حزام رضي الله عنه، قال: قال رسول الله صلى الله عليه وسلم: "البَيْعَانِ بِالْخِيَارِ مَا لَمْ يَتَفَرَّقَا، - أَوْ قَالَ: حَتَّى يَتَفَرَّقَا -
فَإِنْ صَنَعَا وَتَبَيَّنَا بُرُوكَ لهُمَا لِي يَبِيحِيَهُمَا، وَإِنْ كَلَّمَا وَكَتَبَا مَطَعَتْ بَرَكَةٌ بَيْنَهُمَا"

"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

⁴⁶ Abd al-Rahman al-Jaziri , Kitab al-Fiqha la al-Madhahib al-Arba, (7th Ed), Cairo: Dar hya al-Turath al-Arabi, vol.II, p.147.

⁴⁷ Niazi, L.A.K., Islamic Law of contract, Lahore: 1990, Research Cell.

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.”⁴⁸

This Hadith includes both the concept of meeting place and time to conclude the offer. It shows that extension of time for validity of the offer over a certain period in which the acceptance has to be made is required under Islamic legal system. Giving the option to both the parties to cancel the sale at any time before separation the *Majlis al ‘Aqd* (Contract Session) lessens the ambiguity. An ambiguity will sustain if the concept of *Majlis al aqd* is not determined.

Under Islamic law it is essential that there must be mutual consent by both parties to enter into a binding and valid deal. However, it is essential to note that the parties’ consent in contract bears no legal force until it is unequivocally expressed. Therefore, a contract is only deemed to be valid when there is a communication between the parties’ consent in the form of offer and acceptance. Yet, the question arises as to how long an offer can be held open. Should an acceptance be expressed as soon as an offer is made or, can it be delayed and accepted whenever the offeree wishes? Islamic law is distinct from other legal systems that it insists on the application of the concept of “*Majlis al ‘Aqd*”, which will hereafter be referred to as the “Contract Session” (“*Majlis al ‘Aqd*”). Accordingly, unless it is otherwise agreed, for a contract to be validly formed the consent of the parties in the form of offer and acceptance must be communicated during the parties’ “Contract Session.” The concept of “Contract Session” is paramount in Islamic commercial doctrine.

2.3.2: Wisdom behind “Contract Session”:

The essentiality of “*Majlis al ‘Aqd*” in Islamic law of contract is to determine the length of time for an offer and acceptance to be valid legally. Being practical, the offer and the acceptance cannot be contemporaneously communicated. Thus, to enable the necessary correspondence between the offer and acceptance, the “*Majlis al ‘Aqd*” was established according to which the offer is deemed to be valid for acceptance so long as the contracting parties continue their meeting.”⁴⁹

⁴⁸ See, Muḥammad b. Iamā’l al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Kitāb al Bayu’o’, bāb al ba’yaan bil khiyar.

⁴⁹ Al-Nawawi, Y. 2001, *al-Majmoo’a*, Dar Ehyaa’ al-Torath al-Arabi, Beirut, vol. 9, p. 121.

The concept of "Contract Session" was originally established to benefit both parties involved in the contract. Accordingly, the offeree enjoys a period of time (during the "Contract Session") to contemplate the worth of the offer without being required to make a hasty decision. The concept of "Contract Session" also provides the offeror with certainty as to whether or not there is an acceptance to be made and thus a contract is formed, before the parties separate from the 'meeting place'. When the offer is deemed to be legally valid for acceptance outside of a given timeframe, this may cause the offeror considerable difficulty in establishing whether or not an acceptance is going to be made. As it gave the offeree a rational period of time in order to express his acceptance, without slackness that lead to harm the offerer, the importance of the meeting place exists in the determination of place and time of conclusion. The Egyptian and the Jordanian legislator of the civil law adopted the same approach.

2.3.4: The Meaning of "Majlis al 'Aqd":

Literally "Majlis" means 'place of sitting', 'seat' or 'gathering'.

"Majlis al 'Aqd" is used as "Meeting place", contract session, contract council and meeting of minds in different similar names.

In the language of common law, it is called "consensus ad idem" or meeting of the minds. An article 181 of the Othman Justice Rules Magazine (the Mujallah) categorizes the parties' meeting place "Contract Session" as the meeting that is convened for contract making. The concept of the contract's 'meeting place' is defined as the time during which the contracting parties engage to form a deal.

"The time span during which the involving 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 them."⁵⁰ (This meaning is taken up by a large number of Shafi, Maliki and Hanbali scholars.)

⁵⁰ See, al-Shafiy Jaber (2001), *Majless al-Aqd fi al-Figh al-Eslamywa al-Qanoon al-Wadhei*. Alexandria: Dar al-Jameah al-Jedeedah, pp. 90-92, Al-Ebraheem Muhammad (1986), *HokomEjra'a al-Oquudbewasa'el al-Etesalat al-Hadeetha*. Jordan: Dar al-Dhiya, p.50.

Based on this definition, the valid formation of a contract is based on the ‘Contract Session’ that demands contracting parties be together in one place and engaged in their business discussion without any distractions unrelated to the deal.”⁵¹

2.3.5: Application of the concept of “Contract Session”:

To note, there is no application of the concept of “Contract Session” in Muslim commercial doctrine “when parties agree to extend the validity of the offer to a certain period in which acceptance must be confirmed if the offeree wishes to form the contract. When there is no agreement, the Islamic idea of Contract Session is applied.”⁵²

Hence, when A makes an offer to B and when B leaves the ‘Majlis’ or ignores the offer or turns his attention to something else, this means the offer lapses.

The spatiotemporal significance of Majlis is further reiterated by Imam Wahbah Az-Zuhayli who states that ‘Majlis’ does not imply the imperative physical presence of both parties in the same place. He adds that both parties may be in different places as long as there is a medium of communication which can connect them.⁵³

There are two types of “Majles al-Aqd” contract council, a true one (حقيقيا), and a propositional one or constructive unity (حكيميا), in the case of the true one (حقيقيا), “the contractors are meeting in the same place contacting and hearing each other directly, and they should not be diverted by something else other than the contractual matter, the council begins with an offer and end with acceptance or rejection, or dissolved without response,” There is no problem in this case, while the council is considered a propositional council (حكيميا), if one of contactors is absent, and it is usually the case of electronic council. Islamic law elaborates that when the contracting parties are not present to inter into contract (contracting inter absentee), it can be communicated either by letter (Kitaba) or through messenger (rasul). In this regard, *majlis* will become constructive or propositional.

⁵¹ Al-Shafiy, J. 2001, *Majless al-Aqd fi al-Fiqh al-Eslamywa al Qanoon al-Wadhei*, Dar al-Jamea’a al-Jadeedah, Alexandria, p. 154.

⁵² Alzaagy, Abdul Rahman, *The Islamic Concept of Meeting Place and its Application in Electronic commerce*, 2007 Masaryk University, *Journal of Law and Technology*, vol. 1, no. 1, pp. 27-42.

⁵³ Wahbah Az-Zuhayli (1984), *Al-Fiqh ul Islami Wa adillatuhu*, Al-Juz’u Rabi’ pg. 2947, Darul Fikr, Damascus.

Parviz Owsia in his book entitled *Formation of Contract, a Comparative Study under English, French and Iranian Law*⁵⁴ declared that “eminent post classical jurists believe that the sequence of offer and acceptance is to be left to the custom or uruf. This is somewhat similar to the opinion of Wahbah Az-Zuhayli who further emphasized that majority of jurists unanimously argue that to explain further regarding the session of contract depends on the uruf and custom of that specific community. He further added that meeting or Majlis here does not mean that both parties have to be in one place. They can be in any place as long as there is a medium of communication which can connect them. Here we can see that the meaning of MajlisAqd is not taken literally but constructively.⁵⁴ There are different opinions of jurists due to time parameter.

The time parameter is considered the appropriate and the most flexible, in order to distinguish between these two types of contracting, according to this parameter. If there is attendance or presence regarding both place and time, it would be true one (حقيقيًا) the theory of meeting place is established, however if anything is absent time or place it would be propositional council (حكميًّا).

When both parties are physically present the concept of “Contract Session” is easily determined but if the parties are physically distant at the time of forming the contract, questions arise as to whether the theory of “Contract Session” can be legitimately applied. Therefore, it is essential to initially discuss the application of “Contract Session” in face-to-face transactions and in contracts between absentee parties.

2.4: The Theory of “Majlis al ‘Aqd” in Face-to-Face Transactions

This is a case where it is required that both the parties must sit together face to face, it is not legally accepted that the offer and the acceptance is initiated in a different places. To make a contract legally enforceable, contract elements offer and acceptance should be communicated at the same time and place to form their contracts.

⁵⁴ Parviz Owsia, *Formation of Contract, a Comparative Study under English, French and Iranian Law* Publisher: Springer; 1stEdition (February 7, 1994).

However, it should be remembered that the application of the “Majlis al ‘Aqd” in Face-to-Face Transactions, Muslim commercial doctrine is conditional on the absence of parties’ agreement to extend the validity of the offer to a certain period of time in which the acceptance must be made within this specified and designated period. It must be noted that in this case where the offer was agreed to be open for acceptance for a particular time, such an offer cannot be cancelled until that specified period ends without acceptance being made. However, when there is no agreement to extend the offer for a certain period, the offering party has the right to withdraw his offer at any time before acceptance. Not only that, under the option of meeting place, both parties can even cancel the contract after it was concluded. In the following discussion, consideration will be given to the idea of the Islamic option of meeting place in face-to-face transaction.⁵⁵

2.5: The Application of “Contract Session” in Contracting between Absentees

Contracting inter absentees is a contract which is created between two or more contracting parties who are not gathered in one ‘meeting place’. It is prominent to note that this approach is in line with the Ruling of Islamic Jurisprudence Assembly 1990 section (1), in which it was indicated, accordingly, that when there is a conclusion of contract between two absent parties, not gathered in one place, and one cannot see each other nor can hear his voice directly, and the tool of communication between the parties is either writing a letter, messenger, or similar to that telegraph, telex, fax, or computer screens, in all cases, the contract is deemed to be as contracting inter absentees.⁵⁶

The purpose of legitimacy is to provide facilitation to the public and easiness in their transactions, if there is condition of presence for both parties in every contract, people definitely indulge in difficulties. To legalize, is near to spirit of Shariah that is to remove difficulties and provide easiness.

⁵⁵ Abdul Rahman Alzaagy, ‘the Islamic Concept of Meeting Place and its Application in Electronic commerce’ Masaryk University Journal of Law and Technology,(2007) vol. 1, no. 1, pp. 27-42.

⁵⁶ Al-Joroshi, S., *Nadatiah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al Moqaran*, GarYounes University Press,(2003), Benghazi, Libya, p. 64.

Islamic law only validates face-to-face transactions when the offer and acceptance is made in one “Contract Session”. However, in terms of applying the “Contract Session” in contracting inter absentees, a constructive “Contract Session” was established by analogy. The idea of a constructive “Contract Session” denotes the place where the offer is communicated to the offeree.

“It is a common practice, particularly nowadays with the advent of modern technological devices, that contracts are being conducted where parties are at a distance from each other. This can be classified in a legal sense as contracting between absentees. Hence, in such a contract, the offering party initiates his proposal in one place and 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 gathered in one place of bargaining.”⁵⁷

“The difference between face to face contract and inter absentees contract is that face to face contract is formed without any obstacle directly having no gap of time in the presence of two parties as both the offer and the acceptance are heard instantly. While, in the case of contracting inter absentees the theory has been extended in the Islamic doctrine by construction. It has to be assumed that the “Contract Session” is the place where the offer comes to the knowledge of the receiving party. It may be by any means of communication; via a messenger or a letter or other”⁵⁸

“The concept of the unity of “Contract Session” is compulsory in contracting with the present parties. However, in contracting between absentees an actual application of the unity of the “Contract Session” is not conceivable. Thus, a constructive unity is established for such contracting. It means that the acceptance has to be made in the very place where the offer came to the knowledge of the receiver. In other words, offer must be accepted before the parties physically depart from the sitting place”⁵⁹

However, this rule appears to be theoretical rather than practical as, for example, in the case of contracting between absentees using the letter method,

⁵⁷ Al-Shafiy Jaber, *Majless al-Aqd fi al-Fiqh al-Eslamy al-Qanoon al-Wadi*, op cite no. 18, p. 252.

⁵⁸ Mosa Muhammad, *Al-Amwal wa Nathariyya al-Aqd fi al-Fiqh al-Eslamy*. Cairo: Dar al-Fekr al-Arabi, (1996), p. 237.

⁵⁹ Al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud*, Beirut: Dar al-Bashaier al-Eslamiyyah, (2002) p.1093.

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 a very common that letters are opened while the receiver is alone without any one present and hence, 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. Therefore, it would be appropriate 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 and trading customs. If the acceptance is not issued within a reasonable time, then the offer will be terminated and thus, there is no possible valid conclusion of contract. Contracting inter absentees is deemed to be valid in light of Islamic rule.⁶⁰

It is indicated that in contracts inter absentees, the offer remains valid until acceptance is given, for so long as is deemed proper according to the circumstances of the case. The period will take into account the due time taken for the communication to reach the offeree, for him to give it adequate consideration, and for his decision to reach the offeror. If the acceptance is not made within a reasonable time then the offer is considered as having lapsed.

Consequently, when a reasonable period of time passes without an acceptance being made, the offer is revoked and any subsequent acceptance treated as a new offer regardless of whether the offeree stays or departs from the place where the offer was originally brought to his attention. It is worth noting that in order to rule out any uncertainty regarding the availability of the offer in contract inter absentees, the offeror should clearly indicate a time limit for the validity of the offer to ensure that any acceptance made after that time does not have legal force and is deemed a new offer.

⁶⁰ Al-Shafiy, J., *Majless al-Aqd fi al-Figh al-Eslamywa al-Qanoon al-Wadi*, op cit., p. 252.

2.6: The Option of Contract Session:

The term option (خيار) is the right of the buyer and seller to cancel the contract of sale. This may be very beneficial in reference to e-contracts; it definitely decreases uncertainty and disputes among e-parties. There are described five Options in a sale contract as following:

- a. Optional conditional (خيار شرط)
- b. Option of inspecting goods (خيار روية)
- c. Option of defect (خيار عيب)
- d. Option of quality (خيار وصف)
- e. Option of price (خيار ثمن)

The option of "Contract Session" or 'meeting place' was established in Islamic commercial doctrine in the interests of the contracting parties. "Accordingly, every party has legal rights to withdraw the sale, at any time although it has been concluded by the acceptance of the offer so long as the Contract Session continues. If contract session is over the right of option is over.

This right gives extra time for both parties to think all the advantages of the contract and the worth of the transaction after its completion. This option has been authorized and has legal value from the tradition attributed to the Prophet Muhammad (S) in which He said:

عن ابن عمر رضي الله عنهما عن رسول الله صلى الله عليه وسلم قال: «إذا تبايع الرجلان فكل واحد منهما بالخيار ما لم يتفرقا وقتنا جميعا، أو يُخَيَّرُ أحدهما الآخر، فإن خيَّر أحدهما الآخر فتابعا على ذلك فقد وجب البيع، وإن تفرقا بعد أن تبايعا وتم بتركه واحد منهما البيع فقد وجب البيع».

"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.⁶¹

It is held, accordingly, that the option of revoking the contract based on the parties' 'meeting place' is available to both of the contracting parties after a contract is created and until the end of their "Contract Session" or 'meeting place'.

This supra Hadith shows the validity of the option of "Contract Session". It provides for both parties the option of cancel the sale at any time before they separate. The word separation means physically leaving the place of transaction by any one of the parties. The question regarding the determination of physical separation is left to the Ummah to ease the transaction, according to trading practices and customs. Thus, when it is agreed customarily that ending of that much time will be considered the contracting parties have separated from the "Contract Session", then the contract is legally deemed to be irreversible. Different examples are there when parties separation is taken; it may be by walking away, in a house by leaving the house and in chat room leaving the chat room.⁶² Hence, the "Contract Session" option is finished as soon as either or both contracting parties leave from the place in which both parties get together to shape the deal.

2.6.1 The Option of "Contract Session" in Contracting between Absentees

The parties' rights to annul a contract formed inter absentees as according to the option of "Contract Session" remains a matter of discussion in Islamic law. It is provided that, unlike in the case of face-to-face transaction, the option of "Contract Session" cannot be applied in contracting inter absentees.

In contrast, "it was argued that the option of "Contract Session" is not so limited to merely face-to-face transactions, and suggested that as soon as an acceptance is made in a contract

⁶¹ See, Muḥammad b. Ismā'īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Kitāb al-Bay'ah, bāb al-ba'yān bil-khiyār.; Muslim b. al-Ḥajjāj al-Naysābūrī, *Ṣaḥīḥ Muslim*, Kitāb al-Bay'ah, bāb al-ba'yān bil-khiyār.

⁶² See, al-Joroshi Sulāimān Nadatīah al-Aqd wa al-Khiyārāt fī al-Fiḥ al-Eslāmī al-Moqarran, Libya: Dar al-Kotob al-Watanyya, (2003), pp. 161-162.

inter absentees, the offeree has right of option to cancel the contract at any time before he physically leaves the place where he received the offer.’⁶³

Similarly, the offeror can cancel the contract at any time as long as the offeree still stays in the same place where the offer came to his knowledge. However, from a practical point of view, the application of the option of “Contract Session” according to the latter legal approach appears to be difficult to establish in contracting inter absentees. “It is unclear as to how the option of the ‘meeting place’ or “Contract Session” can possibly be determined where the parties are in absentia. Consequently, applying the option of ‘meeting place’ may lead to uncertainty and dispute in transactions formed inter absentees as it is impossible to establish when the offeree physically leaves the place where the offer was originally brought to his attention.’⁶⁴

A contract with absent parties is normally formed after thorough consideration by the involved parties. Thus, the need of the option of “Contract Session” in contracting inter absentees is absent.

To conclude the topic of Option it is important to note that Iqala (إقالة) is appreciated by Islamic teachings very much. “A mutual agreement between buyer and seller to rescind the contract after its execution is called Iqala.’⁶⁵

As Prophet Muhammad (S) has stated “He who does the Iqala (rescinding the contract) with a Muslim who is not happy with his transaction, Allah will forgive his sins on the Day of Judgment.”

I consider that to avoid any uncertainty and dispute in transaction it is better to determine the time period. It may be conditioned for 3 days or one month to use the right of option.

⁶³ Al-Qarehdagy, A., *Mabda' al-Ridha fi al-Uquud*, 2d edn, Dar al-Bashair al-Eslamyya, Beirut, vol. 2, p. 1092.

⁶⁴ Rayner S.E., *The Theory of Contracts in Islamic Law*, London: Graham and Trotman, (1991), p. 112. See also, Dubai Contract Code (1971), Article 7 (2).

⁶⁵ Muhammad Imran Ashraf Usmani Dr, *Meezan Bank's guide to Islamic Banking*, 1sted (2002), Published Dar-ul-Ishaat, Urdu bazaar, Karachi. p 82.

2.7: The Implementation of the Islamic Principle in “Contract Session” in E-Commerce/E-Contract:

As it is an indispensable part of Muslim's faith, a complete code of life is only Islam and there is no any other constitution for Muslims all over the world except Quran the Holly Book of Allah Almighty that is proper and suitable for all times and places. It is a complete code of life for every human being. The concept of Islamic law (Shariah) is not narrow, it is wide enough to accommodate all types of emerging matters to promote, with providing powerful base in development of human civilization throughout every time.

Thus, after a great debate and thoughtful observation, it is considered that e-commerce a new form of trade is absolutely conformable with general principles of Islamic law.(This decision was taken in a juristic gathering regarding electronic commerce under the Shariah on 23 March 2000 at al-Azhar University in Cairo.) In view of that:

“It is permissible to carry out all types of trading and commercial activities through cyberspace so long as it is not in contradiction with some principles of Islamic law.”⁶⁶

2.7.1: “Contract Session” in Web sites Contracts:

It is matter of discussion whether transactions formed by electronic means are analogous to face-to-face transactions and therefore validates the rule of “Contract Session” or whether they should be considered as contracting inter absentees. One view indicates that although the contracting parties are geographically distant and not together in one place, the formation of contracts via the World Wide Web is comparable to face-to-face transactions.

On the other hand, transactions conducted over the telephone and transactions undertaken over the web does present some problems.

⁶⁶ Al-Sanad Abdulrahman, Al-Ahkam al-Fiqhiyah letaamolat al-Electroniyah. Riyadh: Dar al-Warrak, (2004), p. 167.

In telephone communication, both parties communicate as they would in a face-to-face meeting, albeit over a handheld unit, without an intermediary. The conversation develops in real-time allowing them to immediately negotiate the deal, amend its terms, and, if they wish, reach an agreement. In contrast, the website is unable to negotiate contracts with customers, change its terms and conditions or do anything other than it was initially programmed to do by the website's trader. Hence, even though there might be instantaneous connection via the Internet, websites are usually pre-programmed to deal with customers without direct human involvement. As a result, there cannot be direct communication between the contracting parties in web transactions as analogous to that of face to face transaction.

Therefore "the application of the 'Contract Session' concept is questionable in web transactions and thus it should be considered as contracting inter absentees."⁶⁷

2.7.2: The Application of "Contract Session" in E-Contract Using Instantaneous Electronic devices of Communication:

It is obvious that in face-to-face transactions, timing is not an issue, the offer and the acceptance is communicated at once. While, there is a timing gap between the parties inter absentee. However, on other hand we can observe that there is no timing break in the case of via electronic instantaneous forms of communication. It is a method where both the offer and the acceptance can be directly communicated via cyberspace. It may be in the form of instant writing, voice or a video, such as chatting by telephone, video conversation via the Internet (Skype, Facebook, Messenger), or in any other way of communication.

Unlike the contract with the presence of both parties in one place,. Here, a legal issue arises that where parties are sited in different places during contracting through instantaneous ways of communication; whether such contract is considered as face-to-face transaction or contracting in the absence of parties.

⁶⁷ See, Ruling of Islamic Jurisprudence Assembly 1990 section (1).

Concerning this issue, it is considered that this new form of communication must be regarded as similar to face to face transaction. Because, the communication of offer and acceptance can be completed at once without any interruption. Hence, the rules and conditions are same for both forms of contract.

As it is evident that the principle of "Contract Session" has immense importance in validity of contract, it will also be applicable in instant electronic forms. As pointed out before, the Contract Session 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 discussion." Therefore as long as both the parties continue their business talking the "Contract Session" is deemed to be valid and the right of option is opened; yet, the Contract Session is terminated as soon as their conversation would be finished.

"The right of option of "Contract Session" is valid and enforceable in instantaneous contracts so long as both parties are still deal via the electronic environment. It comes to an end when the instant communication is interrupted between the parties. We can take an example of the telephone to conclude the contract; the right of option is finished at the time that the call is ended."⁶⁸ Another example is of chatting-room; here the option is ended when any party signs out or leaves the room where their talking was going on.

2.7.3: The "Contract Session" in E-Contract Using Non-Instant Forms of Communication:

It is a method where no direct communication between the offer and the acceptance, it is called as inter-absentees contract. In these types of contracts, "parties are located 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 gap between the connection of the offer and the acceptance exists in the forming of electronic contracts using non-instantaneous tools of

⁶⁸ Al-Tayyar Abdullah, *Khiyara al-Majleswa al-Aeeb fi al-Figh al-Eslami*. Saudi Arabia: Dar al-Maseer, (1997), p. 136.

communication. As a result, this type of contract should be treated in every aspect under the Islamic law of contract as the same as contracting between absentees. 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, e-mails, to name but a few. In such devices, there is no direct link between the contracting parties, and the offer and the acceptance are not instantly connected. Hence, such contract is deemed in the law as contracting between absentees and it is regulated accordingly.

CONCLUSION

The analysis on the Islamic rules of Majlis Aqd "Contract Session" in electronic contracts focuses to provide a balanced benefit to both of the contracting parties, during which the offer and acceptance must be expressed for a contract to be valid under Islamic law. Hence, the meeting of physical is not important but the meeting of minds is significant and this principle is prevailing in Contract Session.

The perception of Majlis Aqd has flexibility in its meaning it covers all modes of communication and shows that on-line contracts are permissible under the Shariah. That is to say, the contracting parties can choose to not apply the concept of Majlis Aqd if they wish to do so, by extending the validity of offer for a certain time, irrespective of whether the parties remain in their 'meeting place' or not.

In case of an absent party an offer is communicated and should be valid for acceptance within a reasonable timeframe if the acceptance is communicated after that time period is exceeded. It makes unclear to implement the rules of Majlis Aqd in e- contracts.

The most basic issue relates to intention of the parties to create a legal contract irrespective of whether contract is in form of inter absentee or inter present. If any saying or act signifies diversion from the intention of any one of the contracting parties, the concept of "Contract Session" comes to an end at once.

CHAPTER 2

ANALYSIS OF MODERN LAWS IN ELECTRONIC CONTRACTS

3.1: Introduction:

All over the world, the main three legal systems are applicable, Common law, Civil law and Islamic law. Variations among these legal systems have a great effect on the different states' custom, history, law and cultural. Due to these differences among the systems, have a significant impact on the validity and enforceability of a contract in the state applying such system. Therefore, a short introduction of these systems is compulsory to comprehend the concept of a contract (electronic contract):

- (i) **The Common-Law system**, it based upon English law and practiced in the UK, the US, Australia, New Zealand and other countries once under the influence of the UK or other common law jurisdictions, such as Pakistan, Hong Kong, Singapore, Malaysia, India and parts of Africa and the Pacific Islands, in which the applicable law consists not only of written legislation but also of the body of case decisions rendered by learned judges over the centuries to interpret such written legislation.

The *stare decisis* doctrine became well established in common law, where judges were bound primarily by precedents established by previous judgments.

Common law systems do not, on average, recognize a general duty to negotiate nor to perform contracts in good faith.⁶⁹

(ii) **The Civil Law system** is applicable in most European countries and also those jurisdictions which were once under their control and a few other countries as well. Roman law was established by Roman jurists and spread throughout Europe via the Empire's influence. It fell out of fashion after the fall of the Roman Empire, but *ius civile* (It was the body of common laws that applied to Roman citizens) was rejuvenated and revised by legal scholars in European universities in the eleventh to thirteenth centuries. Roman law evolved into a series of civil codes, including the Civil Code of Napoleon, the German Civil Code, and the Italian Civil Code, which influenced not only legal systems within Europe, but the legal structures of colonies as well. Civil Law does not view its body of case law as an integral part of its binding law. The *stare decisis* doctrine does not exist in civil law systems based on Roman Law. While some cases may take on importance as guidance, or jurisprudence, civil law is based primarily on written laws and regulations only, combined with an underlying duty of good faith. Civil Law and Common Law based jurisdictions tend to apply different criteria to determine whether, or when, a binding contract exists.⁷⁰

Common Law VS Civil Law Contracts:

It is a general rule under the Common Law, "a contract is said to be formed where the parties have made clear their intention to be bound, or to create legal obligations between or among them. Common law sees a contract as a mutual declaration of an intention to be bound to stated, agreed, terms, as evidenced by an offer by one party which is, eventually or immediately, accepted by the other(s), must be embodied in a writing signed by both parties and, for certain contracts, there may be additional evidentiary requirements.

⁶⁹ See, Emilia Justyna Powell, The International Court of Justice and the World's Three Legal Systems, Georgia Southern University and Sara McLaughlin Mitchell from University of Iowa. 125 West Washington St. USA, The Journal of Politics, Vol. 69, No. 2, May 2007, pp. 398-399.

⁷⁰ See, Karen Mills and KarimSyah, Effective Formation of Contracts by Electronic Means, "Do We Need a Uniform Regulatory Regime?", Law Firm Jakarta, Indonesia (Paper presented at World Summit on Information Technology in Tunis, 15 - 18 November, 2005, and published in compendium book prepared by Centre for International Legal Studies).

Civil Law jurisdictions generally consider that a contract becomes binding as soon as the formal requirements for establishment of a contract have been complied with. The bona fides principle is an essential feature of civil law systems. The common law puts requirement of consideration for a contract and this is not usually present in the civil law regime, and the civil law duty of good faith, not specifically required under common law.

(iii) Islamic Legal System:

Islamic law is the last and major legal system, arose with the birth of last Prophet Muhammad (PBUH) in 570 AD in the Arab. As the Islamic territory extended, Islamic ruling and laws, customs and traditions became prime in many Central Asian, Middle Eastern and some western states such as Saudi Arabia, Egypt, Sudan, Malaysia, Labia, Iran, India, Pakistan, Spain, Turkey and other countries also influenced. The Islamic legal system has distinction with religious ethics of human conduct a complete code of life, and Shariah (Islamic law) is an essential part of the Islamic religion.

“The Islamic philosophy of law differs from the modern and western philosophy of law. The Islamic philosophy declares that the whole universe and all types of creatures were created and managed by only one God known as ‘Allah’. He alone has right to be worshiped. Allah has granted all the basic principles of law for human conduct in His Holy Book Qur’an which is applicable for all places, in all situations in a civilized manner at all times. According to change of world, the new issues are emerged day by day, it is quite possible that in the Holy Qur’an or Hadith, we cannot find vividly recommendation however general principles are described and these are left to the human being to interpret and act upon them accordingly. Any government through the consultation with scholars can promulgate for the society but these man-made laws will not be contradictory with the basic legal principles provided in the Quran and the Hadis. This is the basic concept of the Islamic legal philosophy. In case of contracts, Good faith represents one of the most important principles in the Islamic legal system. However, in Islamic law the *stare decisis* doctrine is absent, whereas the law is derived from two basic sources: the Quran and the Sunnah.”

But as a general principle, all jurisdictions Islamic, common and Civil look towards the intention of the parties. The intention is determined differently according to the provisions of their respective laws.

Table 1, Distinctiveness of Legal Systems in a Contract:⁷¹

Types	The Use of Precedents (Stare Decisis)	Good Faith in Contracting (Bona Fides)	Keeping Promises (Pacta Sunt Servanda)	Thoroughness of Contracts
Islamic Law	No	Yes	High	Medium
Common Law	Yes	No	Medium	High
Civil Law	No	Yes	Medium	Low

It can also be applicable in Electronic contracts as in general contracts.

3.2: Electronic Contracts at International Scenario: Basic Concepts:

Thinking of changes in the information technology used in online commercial transactions as falling into three generations can be a useful heuristic. The first generation is electronic data interchanging (EDI) technologies which came into widespread use in the 1980s. The second generation is Internet commerce, and in particular, commerce involving the World Wide Web which came into widespread use in the 1990s. The third generation is still under development and not yet in widespread use. It will permit the automation of a wider range of functions than EDI.

⁷¹ See, Emilia Justyna Powell, *The International Court of Justice and the World's Three Legal Systems*, p 400, Available at <http://saramitchell.org/pmjop07.pdf>.

One of the technologies that may help to make this possible is XML, which stands for “Extensible Markup Language”, a successor to one of the current standards for Web content HTML (“Hypertext Markup Language”) that is more adaptable to the requirements of business communications.

Electronic commerce/E-contracts present a huge number of “challenges to traditional paper-based contract law, including: jurisdiction, authentication, message integrity, validity, formation, modifications, and non-repudiation of e-contracts.

The fundamentals of contract creation offer, acceptance, and consideration come under attack in electronic contract formation in the initial agreement and in modification. Ultimately, the “take-it-or-leave-it” nature of electronic contracts, where the agreement is accepted as unread or by acquiescence, poses the greatest challenge to predictability and certainty in sales.⁷²

Whenever we talk about e-contract it means that it is a semi-structured document, which can be saved and stored in any format it may be in MS Word, PDF, or XML etc. Most e-contracts include semi-structured information, such as XML-based words, sentences, clauses or meta-information. However it is noted that some e-contracts have the legal status of digital documents. Depending on whether networks are used during the e-contract establishment stage or not, it is created online through electronic networks or with satellite systems at both national and international level.

3.3: Who lays down the rules for E-Commerce/E-Contracts?

Who addresses modern laws on e-commerce law at the international level?

There are several organizations which are contributing to the development of global e-contract law at the international level. Different organizations have inclined to take the lead on diverse issues. I here introduce only the important of them, their contribution in legislation of e-contracts are guiding line for any company, organization and state.

⁷² See, Jennifer E. Hill, *The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies under the United Nations Convention on Contracts for the International Sale of Goods*, 2 *Nw. J. Tech.&Intell. Prop.* 1,(2003), at <http://scholarlycommons.law.northwestern.edu/njtip/vol2/iss1/1>, last visit 01-12-12.

- UNCITRAL is the first and foremost, has a most central role in developing model laws for e-commerce/e-contracts all over the world.
- OECD has been at the front position of Internet taxation, e-commerce consumer protection and privacy related issues.
- WIPO played role as the international leader on digital copyright and trademark matters involving domain names also.
- ICANN has implemented the Uniform Domain Name and Dispute Resolution Policy, which has dealt many domain name disputes worldly.
- APEC has effort on digital divide concerns and small and medium sized enterprise (SME) it helps to e-commerce adoption.
- The Hague Conference on Private International Law has been the worldwide essential king on Internet jurisdiction issue.
- WTO has believed e-commerce/e-contracts trade barriers, to agreements between governments on a variety of aspects of trade, tariffs, telecommunications and financial services all over the world.

3.4: UNCITRAL Model Law:

Background:

As UNCITRAL Model law has played the most leading role in the field of electronic contracts, therefore my mostly focus of research would be in this reference.

Civil, common and Islamic systems make together a concept of modern laws. However, today whatever is recognized by international level is called modern law. Now the most international recognized forum is United Nations Organization. UNCITRAL is the United Nations Commission on International Trade Law. In 1966 it was founded to harmonize the law of transaction all over the world, which is a main legal body of the UN to create practical applicable and unified commerce legislation.

With special reference to my research on "Electronic Contracts" The United Nations Commission on International Trade Law ("UNCITRAL") has provided many applicable suggestions to solve many problems in its Model Law on Electronic

Commerce of 1996 (the "Model Law" supplemented in 1998, having legal influence in many countries, including USA, UK, China, Malaysia and Pakistan).

"In the business and legal world, people asked whether electronic contracts were real and could transactions formed by electronic messages in an electronic or Internet environment be enforceable. In matters of law, people asked whether these paperless contracts could be introduced into evidence in the event of dispute.

All these type of questions have been satisfactorily resolved, to a great extent, both on a national and international basis. A key factor in that resolution was the adoption of the United Nations Model Law on Electronic Commerce in 1996.

As early as 1985, UNCITRAL had called upon all national governments to review the legal barriers to electronic commerce found in writing and signature requirements of legal systems.

UNCITRAL undertook the preparation of legal rules on the subject in 1992. Its Model Law on Electronic Commerce could be viewed as the first stage in accommodating the law to the demands of electronic commerce. The United Nations Model Law on Electronic Signatures, provide the basic framework for the validity and enforcement of electronic contracts.⁷³

In the early 1990's, EDI (Electronic Data Interchange) emerged progressive tool for electronic commerce. In 1987, the first legislation was done in form of set of EDI rules (Uniform Rules of Conduct for Interchange of Trade Data by Tele transmission). This was the beginning of the Electronic contracts and as we know that business does not wait for law. When electronic contracts spread at International level many disputes arose regarding electronic contracts. There was definitely need for promulgation which fulfill all requirements of a valid and enforceable contracts. Then United Nations Commission on International Trade Law (UNCITRAL) promulgated laws regarding E commerce step by step, here I shall introduce and analyze some important aspects of those laws.

⁷³ See, Dennis M. Kennedy, Key Legal Concerns in E-Commerce: The Law Comes to the New Frontier, 18 T.M. COOLEYL, REV. 17, 25 (2001).

An Overview of Model Law on Electronic Commerce in 1996:

UNCITRAL created a Model Law on Electronic Commerce in 1996 to boost the paperless communication in electronic environment. "In 2001, it created a Model Law on Electronic Signatures. Future electronic commerce work will focus on: electronic contracting, with a view to creating a draft convention; online dispute settlement; dematerialization of documents of title; and a convention to remove legal barriers to the development of electronic commerce in international trade instruments.

The purpose of UNCITRAL Model Law is to help and harmonize legal standards with reasonable approach throughout the world. It does not want to create equally binding uniform rules and regulations. Generally, Model Law provides solution that any type of information in shape of documents, instruments or other, will not be rejected legally. The Model Law has been well draft in a compatible manner with the unique borderless, paperless nature of electronic commerce. It makes crystal clear in its Objective.

Paragraph 2 of section A, Objectives, states:

"The purpose of the Model Law is to offer national legislators a set of internationally acceptable rules as to how a number of such legal obstacles may be removed, and how a more secure legal environment may be created for what has become known as electronic commerce. The principles expressed in the Model Law are also intended to be of use to individual users of electronic commerce in the drafting of some of the contractual solutions that might be needed to overcome the legal obstacles to the increased use of electronic commerce."⁷⁴

"According to Article 1, the law 'applies to any kind of information in the form of data message used in the context of commercial activities', but allows for exceptions to be made by individual countries (Article. 1)."⁷⁵

⁷⁴ See, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment', of 16 December 1996' (an additional article 5 bis was adopted in 1998), at UNCITRAL's website <http://www.uncitral.org/english/texts/electcom>, last visit 10-10-12.

⁷⁵ Ibid, p.12.

It defines data message as: information generated, sent, received or stored by electronic, optical or similar means, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy' (Article. 2 a). thus every type of electronic information will be considered as data. According to its Article 6, a data message is sufficient where there is requirement of information to be in writing. Article 7, lays down the criteria of signature requirements, which allows approval of the information contained in the data message, because it is necessary to be thought reliable as an evidence in future.

It harmonized standards of signature reliability. Articles 6 and 7 describe the mode of communication and place and put (electronic) data messages in the same category as paper-based messages.

Article 11 affirms that the background of the contract formation must be in mind, the offer and the acceptance expressed by any means of communication this data message shall not be denied validity or enforceability. And to add with Article 12 which elaborates that a declaration of will or other statement shall be accepted validity or enforceability as a data message, created between the originator and the addressee of that contract.

According to UNCITRAL Model Law, Article 11 is not intended to interfere with the law on formation of contracts but rather to promote international trade by providing augmented legal certainty as to the conclusion of contracts by electronic means. In certain countries a provision along with the lines of provision of Articles 11 might be regarded as merely stating the obvious, namely that an offer and an acceptance, as any other expression of will, can be communicated by any means, including data message.

As to the time and place of formation of contracts, in cases where an offer or the acceptance of an offer is expressed by means of a data message, no specific rule has been included in the Model Law in order not to interfere with national law applicable to contract formation. It was felt that such a provision might exceed the aim of the Model Law which should be limited to providing that electronic

communication would achieve the same degree legal certainty as paper-based communication. The continuance of existing rules on the formation of contracts with the provisions contained in Article 15 is designed to drive out uncertainty as to the time and place of formation of contract in case where the offer or the acceptance are exchanged electronically.⁷⁶

To summaries, now time has come for UNCITRAL to help electronic commerce to become operational, rather than theoretical. It has to remove barriers and obstacles towards creating a legal frame work where ownership rights can be transferred and enforced.

UNCITRAL Working Group IV (Electronic Commerce) 2001 to up to date:

The Purpose of UNICITAL Working Group IV⁷⁷ is specially to concentrate on electronic commerce to harmonize and facilitate at international.

In 2001, the UNCITRAL issued by Resolution of the General Assembly a Model Law on Electronic Signatures (the "MLESig") provides that: "Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose of which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement."However, it is silent to guide how the electronic signature may be created to meet its requirements.

The General Assembly adopted the Use of Electronic Communications in International Contracts. It was the first international convention on e-commerce which was created for international B-to-B. The Convention applies not only to data exchanged over the Internet using web pages or e-mail, but also extends to older

⁷⁶ See, Communication of data messages, Chapter III, at <http://www.jus.uio.no/lm/un.electronic.commerce.model.law.1996/art.11.html> , last visited 12-12-12.

⁷⁷ See, UNICITAL Working Group IV, at http://www.uncitral.org/uncitral/en/com.mission/working_groups/4Electronic_Commerce.html.last visit 15-01-2014.

technologies such as Electronic Data Interchange (EDI) or even telefax, telex and telegram (art. 4 (c)).

At its forty-third session, in 2010, the Commission had before it additional information on the use of electronic communications for the transfer of rights in goods, with particular regard to the use of registries for the creation and transfer of rights (A/CN.9/692, paras 12-47). At that session, the Commission requested the Secretariat to convene a colloquium on relevant topics, namely, electronic transferable records, identity management, electronic commerce conducted with mobile devices and electronic single window facilities, and to report on the discussions held at that colloquium.

The Working Group, at its forty-fifth session, agreed that a broad approach should be taken, taking into consideration all possible types of electronic transferable records, that may include promissory notes, bills of exchange, cheques, certificates of deposit and bills of lading and warehouse receipts. Currently, there is no internationally accepted, generalized and harmonized legal framework addressing the various issues involved in the use of transferable instruments or documents of title.

At Forty-sixth session Vienna, 29 October-2 November 2012, 47th session, 13-17 May 2013, New York and 48th session, 9-13 December 2013, Vienna were held on the Legal issues relating to the use of electronic transferable records:

The Working Group wishes to discuss the scope of work at a later stage when it has been able to identify the relevant issues and has had the opportunity to address them. This note provides an overview of key legal issues relating to the creation, use and transfer of electronic transferable records. It does not aim at addressing substantive legal issues that would apply regardless of the medium used. Hence, Pakistan (2016) is also a member of this Working Group.

b) OECD

The Organisation for Economic Co-operation and Development (OECD)⁷⁸ grew out of the Organisation for European Economic Cooperation, which administered American and Canadian aid to Europe after World War II. Established in 1961, OECD today has 30 member countries and maintains active relationships with 70 more. Its goals are to build strong economies in its member countries, improve market systems, expand free trade and contribute to development in both industrialized and developing countries. The governing body of OECD, the Council, is led by a secretary-general and is made up of representatives of member countries, who provide guidance on the work of OECD committees and decide on the annual budget.

Contribution of OECD in E-commerce:

E-commerce has become an area of focus for Economic Co-operation and Development (OECD) because of its transporter nature and it is possible for all countries in the areas of economic growth, trade and improved social conditions. It has developed policy in areas ranging from telecommunication infrastructure and services to taxation, consumer protection, network security, privacy and data protection, as well as emerging markets and developing economies.

The mission of the Organization for Economic Co-operation and Development (OECD) is to promote policies that will improve the economic and social well-being of people around the world.

In 1998, OECD prepared an Action Plan for Electronic Commerce to build trust for users and consumers in the field of e-commerce and to take advantage of e-commerce. These activities are currently under way in field of Consumer Protection, privacy issues and to make information technology accessible and affordable costs in rural and urban areas equally.

⁷⁸ See, OECD, at www.oecd.org, last visited 12-11-12.

c) WIPO:

The World Intellectual Property Organization (WIPO)⁷⁹ its object is to promote and protect original works in the area of art, science and technology as an international organization.

In 1970, it was established however it had its root back in Paris Convention for the Protection of Industrial Property in 1883. WIPO's headquarter is in Switzerland and recognised by the United Nations in 1974.

WIPO contribution for E-Commerce:

WIPO works to build up international standards for the protection of intellectual property. The World Intellectual Property Organization (WIPO) covers the area of use of intellectual property that includes patents, copyright, trademarks, designs, etc.”

“The Digital Agenda also aims to:

- integrate developing countries into the Internet environment through such tools as the use of WIPO net and the electronic delivery of information and services;
- rethink how intellectual property law works in Internet transactions and examine emerging new norms in this respect;
- facilitate the creation of effective online systems to resolve disputes; and
- coordinate and ensure the development of efficient and consistent responses to common concerns across national and multi-sectoral boundaries.”

d) ICANN

In 1998, a broad coalition of the Internet's business, technical, academic and user communities established 'The Internet Corporation for Assigned Names and Numbers' (ICANN)⁸⁰ a technical coordination body for the Internet. It is a non-profit, private-sector corporation to preserve and promote the operational stability of the

⁷⁹ See, WIPO, at <http://www.wipo.int/about-wipo/en/>, last visited 12-11-12.

⁸⁰ See, ICANN, at <http://www.icann.org/en/about/welcome> last visited 14-11-12.

Internet with competition. One distinction of ICANN is that it encourages the participation of any Internet user all over the world.

What is ICANN's involvement with e-commerce?

ICANN's work deal with different Internet functions that includes:

Internet domain names

IP address numbers

Protocol parameter and port numbers

Operation of the Internet's root server system

In future ICANN is working in several key issues including internet user's participation in the policy-making process, the establishment of domain name dispute resolution process and in others relevant fields.

e) The Hague Conference on Private International Law

What is the HCPIL?

The Hague Conference is an intergovernmental organization that works to unify private international law rules. The first session of the Hague Conference was held in 1893; after seven more sessions, a statute came into force in 1955 making the Conference a permanent organization.

The Conference holds plenary sessions to discuss and adopt draft conventions and recommendations and make decisions on the working agenda of the Conference.

What is the Hague Conference's involvement with e-commerce?

The principal role of the Conference is to negotiate and draft multilateral treaties (conventions) in the different fields of private international law (e.g. international judicial and administrative cooperation; conflict of laws for contracts, torts, maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts; jurisdiction and enforcement of foreign judgments.

“In 1999, the Conference held a round-table discussion (in conjunction with the University of Geneva) with experts in various fields on issues arising from e-commerce and Internet transactions. A series of recommendations were adopted in

such areas as online contracts, business-to-business and business-to-consumer transactions and online dispute resolution. In June 2001 the Conference held its Nineteenth Session to work towards a new Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters and to decide on its future work programme. Delegates based their discussions on both a Preliminary Draft Convention drawn up in October 1999 and on the results of formal and informal meetings of experts on e-commerce and intellectual property.”⁸¹

f) WTO

The World Trade Organization (WTO) has played a vital role in drafting the rules of trade between nations. In 1995, WTO was established in Switzerland as the successor of the General Agreement on Tariffs and Trade (GATT).

Various aspects of trade, tariffs, telecommunications and financial services agreements have been settled between the governments. These agreements provided basic rules for international trade and commerce.

What WTO's contribution is with e-commerce?

In a ministerial meeting in 1998, WTO members decided to study trade issues regarding e-commerce, concentrating on three questions:

- How does an existing WTO agreement impact e-commerce?
- are there any weaknesses or omissions in the law which need to be remedied?
- are there any new issues not now covered by WTO system on which members want to negotiate new disciplines?

From that time, these issues of e-commerce are being discussed by WTO especially in the field of goods, services, intellectual property and transaction. In 2000, a seminar has also been held on the topic "Government Facilitation of E-commerce for Development", where different countries and international organizations discussed issues related to e-commerce and development. WTO working bodies has presented progress reports on e-commerce.

⁸¹ Professor Michael Geist, A Guide to Global E-Commerce Law, Attachment 4, University of Ottawa, Faculty of Law: Director of E-commerce Law, Goodmans LLP, p.6.

3.5: E-CONTRACTS LEGAL ISSUES: (Case Law)

Issues related to types of transactions:

There are three main types of transactions in electronic contracting. First is a shrink wrap, Second is a click-wrap and in the third type, the browse wrap transaction (I have discussed in the 1st Chapter).

All three types have raise fundamental questions, especially about assent and what substantive rules are applicable in assent. In particular, the question relates to what rules apply to the typical modes of contract formation in an electronic environment.

The question is about what types of conduct constitute assent to terms and conditions. There are issues about how to treat terms that are not proposed or disclosed until after the user has already agreed to go forward with the transaction and has tendered the required consideration. There are also questions related to disclosure about whether there was assent, when was it manifested, is it only for terms about which the user had knowledge or awareness, or does it extend to terms and conditions which the user had not read or understood.

“There are no international cases addressing these important issues. Rather, there is a series of conflicting cases often at variance in different jurisdictions with inconsistent regulatory overlay. Some countries address these types of issues under the category of consumer protection. Directives in the European Union, for example, govern what terms will be recognized in standard form contracts.”⁸²

Other countries, such as the United States have originally addressed these types of issues under the notion of manifestation of assent, so that the result is great uncertainty.

⁸² See, Unfair Terms in Consumer Contracts and an Appropriate Method of Control, Resolution (76) 47 of the Comm. of Ministers, Council of Europe, 262nd, Meeting (1977); Unfair Terms Directive, Council Directive 93/13/EEC, 1993 O.J. (L. 95) 29.

a) Shrink Wrap Issue:

The difficulty with the typical shrink wrap contracts is that the terms are not made available to the purchaser until after payment is made.

In the United States, the court that heard appeals of a leading case on shrink wrap, ProCD Inc. v. Zeidenberg, upheld the use of shrink wrap as a means of binding a purchaser to contractual terms. Where, Zeidenberg purchased a CD-ROM, created by ProCD, which contained a compilation of a telephone directory database. Upon purchase of this CD-ROM, Zeidenberg installed the software onto his computer then created a website which offered to visitors the information contained on the CD-ROM at a price less than what ProCD charged for the software. Prior to his purchase of the software, Zeidenberg may not have been aware of any prohibited use or dissemination of the product without consent by ProCD. However, upon preparing to install the software onto his computer, the software license appeared on his computer screen and would not allow him to continue with the installation without indicating acceptance by clicking his assent in a dialog box. The court held that Zeidenberg did accept the offer and the terms contained within the license by clicking through the dialog box. Zeidenberg had the opportunity to read the terms of the license prior to clicking the acceptance box. The court further stated that Zeidenberg could have rejected the terms of the contract and returned the software.⁸³

The inability of the buyer to see the terms of the license before paying, although not before accepting, did not trouble the court because consumers often cannot examine the contents of purchases in advance.

“The ruling of ProCD has found favour in some United States’ courts and in some draft legislation that has not received widespread enactment. However, other courts have refused to follow the reasoning in this case.”⁸⁴

⁸³ See, Shrink wrap, at <http://en.wikipedia.org/wiki/Shrinkwrap>, last visit on dated 04-10-12.

⁸⁴ See, Case Law “Klocek v. Gateway, Inc.,” 104 F. Supp. 2d 1332 (D. Kan. 2000).

b) Click Wrap Issue:

Another method of obtaining assent is called click wrap agreement. In *Register.com, Inc. v. Verio, Inc.*, Register.com allegation was that Verio had breached the terms of our company. Verio responded that user could not access the database with or without expressing consent to the terms so they were not binding on them. The court's was verdict in favor of Register.com, holding that contractual relationships could be formed whether or not users are required to express assent prior to using a product or service. The terms of use are clearly posted on its website which can be seen. The conclusion of the terms paragraph states "by submitting this query, you agree to abide by these terms." (Ex. 27 to Pl.'s Sept. 8, 2000 Motion). Verio does not argue that it was unaware of these terms only that it was not asked to click on an icon indicating that it accepted the terms. However, in light of this sentence at the end of Register.com's terms of use, there can be no question that by proceeding to submit a WHOIS query, Verio manifested its assent to be bound by Register.com's terms of use, and a contract was formed and subsequently breached.

Several courts have upheld the use of click wrap agreements. For example, the case of *In re Real Networks, Inc. Privacy Litigation*, the court held that Internet users had agreed to a license agreement requiring arbitration.⁸⁵

Similarly, in *Hotmail Corp. v. Van \$ Money Pie, Inc.*, a court upheld the validity of restrictions on the use of free e-mail accounts for sending advertisements. It should be noted however that even though courts have ruled some clickwrap licenses to be enforceable contracts, it does not follow that every term of every clickwrap license is enforceable. Clickwrap licenses must still meet the criteria for enforceability of a unilateral form contract.⁸⁶

A task force of the American Bar Association has released a set of fifteen strategies in five areas: opportunity to review terms; display of terms; acceptance or rejection of terms; opportunity to correct errors; and keeping records to prove assent.

⁸⁵ See, case law, *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004), See Shrink wrap at <http://en.wikipedia.org/wiki/Shrinkwrap>, last visited on dated 04-10-12.

⁸⁶ See, case law, 1998 WL 388389, 6 (N.D. Cal.). See also, *Groff v. America Online*, 1998 WL 307001, 5 (R.I. Super).

c) **Browse wrap:**

A browse-wrap agreement is created by use of a web page or a hyperlink or small disclaimer on the page. If the browsing user assents to it, then it will be enforced. To becoming an assent valid the browse-wrap agreement must be clear that there is an agreement. Not all browse-wrap agreements are enforceable but it's on courts to decide its enforceability case-by-case basis, as there are not existed specified exact rules which can be sufficient to make a contract enforceable.

“Regarding the enforceability, Courts in the USA have once again split on browse wrap agreements whether sufficient assent is given or not? In the case of *Specht v. Netscape Communications Corp*, a consumer downloaded software from a web site that contained a message saying, “Please review and agree to the terms of the Netscape Smart Download software license agreement before downloading and using the software, but it did not otherwise require the user to review or click agreement to the terms of the agreement. Here, the court decided that this scheme did not sufficient to create an enforceable agreement. There was no manifestation of assent as the only act (downloading the software) was not an explicit indication of assent from the user. However, in this case of *Specht v. Netscape*, some practitioners have considered that the icon for the terms should be placed in the upper left-hand of the homepage.”⁸⁷

Another example of its enforceability of browse-wrap agreements occurred in the case of in *Hubbert v. Dell Corp* in 2005, where the Illinois Appellate Court ruled in favor of a browse-wrap agreement. In this case consumers of Dell products were repeatedly shown the words "All sales are subject to Dell's Term[s] and Conditions of Sale", including a noticeable hyperlink, over a series of pages. The court held that this repeated exposure and visual effect would put a reasonable person on notice of the "terms and conditions". Thus, it is enforceable.⁸⁸

A task force of the American Bar Association has released a set of fifteen strategies in five areas: opportunity to review terms; display of terms; acceptance or rejection of terms; opportunity to correct errors; and keeping records to prove assent.

⁸⁷ See, at http://en.wikipedia.org/wiki/Browse_wrap, last visit on 12-10-12.

⁸⁸ See, *ibid*.

To conclude issues relating to types of Electronic transactions, in all types if there is no any ambiguity and illegality, and a reasonable notice of terms and conditions of agreement are shown, contracts are legally enforceable. However there are some rules and terms to avoid any uncertainty which have to be followed.

d) Postal Rule Vs Receipt Rule:

On the issue of when an offer and acceptance is deemed to have taken place, either one follows the common law rule of Postal Rule (considering the offer and acceptance to be valid when they are sent by the offeror or offeree) or one follows the international law and treaty, namely, the Vienna Convention or the EU E-Commerce Directive which states that an offer and an acceptance will be valid only when they reach the other party.

Thus, the moment of the online contract takes on a new, greater level of importance. The courts of many countries essentially developed two rules: the postal rule (the dispatch rule, mailbox rule, and postal rule are considered to have the same meaning.)and the receipt rule, to determine the moment of acceptance of contracts formed by post or telex.

Although the basic principle of communication in all countries adopts the receipt rule, some countries, such as the UK, USA, and Korea, adopt the postal rule in particular situations, such as non simultaneous business communications. However, international instruments like the United Nations Convention on Contracts for the International Sale of Goods (hereinafter CISG) and UNIDROIT Principles of International Commercial Contracts (hereinafter PICC) adopt the receipt rule even in an non simultaneous business communication.

Table 1, Characteristics of Legal Systems in a Contract:

Communication Method		Jurisdiction	Islamic Law	English Law	American Law	UNCITRAL Model Law, CISG, PI CC
General Principle of intention			Receipt Rule	Receipt Rule	Receipt Rule	Receipt Rule
The intention of acceptance	Real-time	Chat	Receipt Rule	Receipt Rule	Receipt Rule	Receipt Rule
		EDI	Receipt Rule	Receipt Rule	Receipt Rule	Receipt Rule
		Web-based	Receipt Rule	Receipt Rule	Receipt Rule	Receipt Rule
	Non real-time	Email	Receipt Rule	Postal Rule	Postal Rule (Receipt Rule)	Receipt Rule
		Web-board	Receipt Rule	Postal Rule	Postal Rule (Receipt Rule)	Receipt Rule

To conclude we can say that although the postal rule is still applied in some countries, such as the UK and USA where a contract is concluded by using a remote business communication, the rule should be replaced by the receipt rule without exception according to the Islamic Law and UNCITRAL Model Law. The reason is that the receipt rule could be a solution because most international laws and rules apply the receipt rule and, even from the electronic technical perspective, the receipt rule is more reasonable than the postal rule. Islamic law stresses on reliability and clarity without uncertainty and that is possible only in receipt rule not in postal rule.

3.6: OVERVIEW OF U.S, U.K, China and Malaysia APPROACHES

a) U.S Approach:

“In the United States, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) has presented two uniform acts regarding electronic transactions to make it applicable and to remove uncertainty. These uniform acts are the Uniform Computer Information Transaction Act (UCITA) and the Uniform Electronic Transaction Act (“UETA”).⁸⁹ UCITA deals with contracts or transactions in “computer information” contract involving computer information (for example a software license) may be concluded electronically or may be completed in person or by other means. It also deals with IT and not only specific to electronic contracting. On the other hand, UETA is a statute with a vast sense that covers all types of electronic transactions.

To comprehend the US approach in electronic contracts in detail, it is necessary to mention important aspects these Acts. Firstl, UETA that includes a consent provision that the Act does not require a message date (a record or signature, generated, communicated, stored or otherwise processed) should be in electronic means or in electronic form. It also provides facilitation in use of electronic signatures for notarization of documents. In Section 10 of UETA, it clarifies that any change or error in an electronic record if occurred during transmission what will be the procedure between the parties.

Another step which was taken by US Congress is to enact the Electronic Signatures in Global and National Commerce Act (E-SIGN) in 2000. One of the distinctions is to include strong consumer consent provisions that require consumers affirmatively consent before electronic records can be concluded in writing. Consumers are also granted the right to withdraw their consent. I consider that this provision of Option in Contract Session (Majlis al Aqd) is opted from Islamic principles of justice to facilitate the consumers.

⁸⁹ Uniform Computer Information Transaction Act (2002), Uniform Electronic Transaction Act (1999), available at <http://www.law.upenn.edu/bll/ulc/ucita/2002final.pdf>, last visited August 30, 2012.

There are some distinguished provisions in E-SIGN that related to electronic agents. In creation a contract if one or more electronic agents involved that contract may not be denied legally. Thus, contracting parties are bound by electronic agents.”

By the recent study , US government had made change in Article 2B of the Uniform Commercial Code to elucidate that human are not compulsory to create a legal e-contract it can be done with intelligent agents without human involvement.

b) OVERVIEW OF U.K APPROACH

E-Commerce Regulations was enforced in the UK on 21st August 2002. These regulations cover more than just e-commerce. In the European Union, the Electronic Commerce Directive and the Electronic Signatures Directive were also influenced greatly by the Model Law and Draft Rules. The EU's Electronic Commerce Directive contains several articles that bear direct similarity to principles found in the Model Law. The Regulations, properly called the Electronic Commerce (EC Directive) Regulations 2002,⁹⁰ implement the EU's E-commerce Directive into UK law. The Directive was introduced to clarify and harmonize the rules of online business throughout Europe with the aim of boosting consumer confidence.

We can say that almost every commercial website is covered by these Regulations. The Directive applies to the 27 Member States of the European Economic Area (EEA) of the EU. The EU has decided to re-examine the Directive after every two years constantly.

The EU has framed rational regulations for electronic commerce. That cover the following area of Directives: Electronic Commerce Directive (“E-Commerce Directive”), The “Distance Contracts Directives,” Unfair Terms in Consumer Contracts Directive (“Unfair Contract Terms Directive”),and the Community Framework for Electronic Signatures (“E-Signature Directive”). In addition to these, Privacy and Intellectual Property Rights in Cyberspace ,The Electronic Commerce Directive (Terrorism Act 2006) Regulations 2007 and The Electronic Commerce

⁹⁰ See, Electronic Commerce (EC Directive) Regulations 2002, at web www.legislation.gov.uk/uksi/2002/2013/contents/made , last visited 12-12-12.

Directive (Racial and Religious Hatred Act 2006) Regulations 2007 and there are many parallel directives which are created time to time. One prominent aspect of these directives is that they cover all types of sectors not related to any particular sector. The Electronic Signature Directive gives same legality to an "advanced electronic signature" as the equivalent of a traditional signature.⁹¹

European Union Electronic Commerce Directive may have provided a greater work to identifying potential problems related to consumer protection in e-contracting processes. For example, Art. 10 (1) makes requirement on service providers to inform consumers of the technical steps to create a contract prior to concluding it, and gives procedure for correcting errors and mistakes. I considered that this requirement is opted from teachings of Islamic law of contract especially in the concept of *Majlis al Aqd* and *Khiyar al Aqd*.

The Unfair Contract Terms Act has played an important role in policing exemption clauses since its commencement. It continues to do so and in recent years the Act has played a prominent role in a number of disputes relating to computer software which were important issues for electronic contracts.

It is clear mentioned in The Directive that contracts concluded online does not deprive of validity just because they are electronic. However, there are described some exceptions to it, such as property sales and guarantees. The reason to make not any specific regulation in this regard was that UK Government considered that it already applied.

"In December 2001, the conclusions of a report was issued on e-commerce by the Law Commission for England and Wales (44-page / 131KB PDF) clarified that statutory requirements for "writing" and a "signature" are generally acceptable by email and by website trading."⁹²

⁹¹ Sylvia Mercado Kierkegaard, *E-Contract Formation: U.S. and EU Perspectives*, 3 *Shidler J. L. Com. & Tech.* 12 (Feb. 14, 2007), at <http://www.lctjournal.washington.edu>., last visited 12-121-2

⁹² See, Council Directive 2000/31, *Directive on Electronic Commerce*, 2000 O.J. (L 178) (EC) available at <http://europa.eu.int> , last visited 17-11-12.

c) OVERVIEW OF CHINA APPROACH:

In China, The work had been done in the area of E-contract was the promulgation of “The new unified Contract Law of the People’s Republic of China” (New Contract Law),⁹³ enacted on 15 March 1999 and came into force on 1 October 1999. Structurally, the new Contract Law has been divided into three parts: General Provisions, Specific Provisions and Supplementary Provisions with 23 Chapters and 428 Articles.

In drafting the new Contract Law, the Chinese legislators focused on the UNIDROIT (The Principles of International Commercial Contracts, 1994).

One of the characteristics of this New Contract Law is to cover the variety of contracts not only specific to economic and technology contracts. It extends to all agreements establishing, modifying and terminating civil rights and obligations among independent parties. In spite of all, there is an exception mentioned regarding agreements involving personal status relationships (marriage, adoption, guardianship, etc.). Articles 3-7 of the new Contract Law set forth its basic principles, i.e. equality (Article 3), party autonomy (Article 4), fairness (Article 5), good faith (Article 6), public interest (Article 7). These basic principles are also expressed in the UNIDROIT Principles with a slight change of words. For example, Article 4 of the new Contract Law says: The parties shall have the right voluntary to enter into a contract in accordance with the law. No entity or individual may illegally interfere with such right.

Under the previous Contract Laws, it was required that contract must be in writing, although there was no definition of what “written form” will be. This requirement was no longer in tune with the rapid development of commercial transactions, in particular that of electronic commerce.

The new Chinese Contract Law adopts quite a descriptive approach in its Article 11 regarding “written form”, as it does the various possible forms, i.e. a written contractual agreement, letters and electronic data (including electronic data interchange (EDI), telegram, telex, fax, and electronic mail). It further clarified that

⁹³ See, The new unified Contract Law of the People’s Republic of China at web www.unidroit.org/english/publications/review/.../2000-3-zhang-e.pdf.

contracts is considered to be concluded at the time of arrival of an offer and acceptance and to the place of formation of the contract by electronic means in Articles 16.2, 26.2 and 34.2.⁹⁴

d) Malaysia Approach:

Malaysian legislation covers the various laws in formation of e-contract that includes the Contracts Act 1950, Sale of Goods Act 1957 (SOGA), the Digital Signature Act 1997 and Electronic Commerce Act 2006.

The Electronic Commerce Act 2006, although does not provide definition of an electronic contract, but recognized its legality in section 6(1) and (2) and 7(2) of the ECA 2006.as it is stated that a contract shall not be denied legal effect, validity or enforceability on the ground that an electronic message is used in its formation. In addition, section 7(1) of the same Act also states that in the formation of contract, the communication, acceptance and revocation of proposals and acceptances or any related communication may be expressed by an electronic message. Although, e-mail or web based contract is considered legally enforceable but both Acts do not provide any procedure to when and where the e-contract can be concluded.⁹⁵

In 1997, Malaysia enacted the Digital Signature Act (DSA), and is part of a larger legislative framework, known as 'Cyber laws' which clearly demonstrate the government's commitment in preparing the country for the information age. The purpose of the Malaysia DSA is to facilitate the growth of multimedia industry and e-commerce in Malaysia and is based substantially on the Utah Digital Signature Act of 1996. (Chong; 1998) The other Cyber laws are the Computer Crimes Act 1997, the Telemedicine Act 1997 and the 1997 Amendment to the Copyright Act. In 1999, the new Multimedia and Communication Act was passed.

⁹⁴ Zhang Yuqing, The New Contract Law in the People's Republic of China and the UNIDROIT Principles of International Commercial Contracts : A Brief Comparison , Huang Danhan, at www.unidroit.org/english/publications/review/.../2000-3-zhang-e.pdf.

⁹⁵ See, Naemah Amin, Legal Protection for Consumers in Distance Selling Transactions. In the proceeding of the 12th National M ACFEA Conference 2008, Residence Hotel, UNITEN.

The Malaysia Digital Signature Act (DSA) is a modest statute on digital signature and is focused primarily on the legal recognition of electronic documents signed by digital signatures as well as the establishment and liability of certification authorities.

In Malaysia, licensing of Certification Authority is mandatory. Although in Malaysia, licensing of Certification Authority is mandatory, this does not mean that a certificate issued by an unlicensed Certification Authority is invalid. In fact, the Act specifically provides that the licensing requirements under the Act shall not affect the effectiveness, enforceability and validity of any digital signatures.

However, Malaysia DSA silent on the electronic contracts issue. As such, guidance on issues relating to electronic contracts will have to be sought from the shoulders of the Contracts Act 1950 and Electronic Commerce Act 2006.⁹⁶

Conclusion:

E-contracting is spreading day by day all over the world. Most of the business activities are being formed electronically. Many countries, organizations and NGO's enacted their laws to harmonize and facilitate the business community. Differences in their laws are present but object is same to avoid fraud and illegality.

Whereas, UNCITRAL is the main center for legislation on electronic commerce at international level but United Nations has not given any value to internet community's opinions and suggestions. To call to participate in e-commerce legislation (Drafting process on UNCITRAL) only states and interested international organizations is against the spirit and the fundamental value of the Internet community. Despite its deficiency, the UN Convention on Electronic Contracts has done a great job at international level to ease the e-commerce activities.

⁹⁶ See, Naemah Amin and Roshazlizawati Mohd Nor, Issues on Essential Elements of Formation of E-Contract in Malaysia: E-Consumers' Perspective, Kulliyyah of Laws, International Islamic University Malaysia, Gombak Selangor.

A timeline for the development of e-commerce:

- 1971 or 1972: The ARPANET is used to arrange a cannabis sale between students at the Stanford Artificial Intelligence Laboratory and the Massachusetts Institute of Technology, later described as "the seminal act of e-commerce" in John Markoff's book *What the Dormouse Said*.
- 1979: Michael Aldrich demonstrates the first online shopping system.
- 1981: Thomson Holidays UK is first business-to-business online shopping system to be installed.
- 1982: Minitel was introduced nationwide in France by France Télécom and used for online ordering.
- 1983: California State Assembly holds first hearing on "electronic commerce" in Volcano, California. Testifying are CPUC, MCI Mail, Prodigy, CompuServe, Volcano Telephone, and Pacific Telesis. (Not permitted to testify is Quantum Technology, later to become AOL.)
- 1984: Gateshead SIS/Tesco is first B2C online shopping and Mrs Snowball, 72, is the first online home shopper
- 1984: In April 1984, CompuServe launches the Electronic Mall in the USA and Canada. It is the first comprehensive electronic commerce service.
- 1984: California becomes first US state to enact an Electronic Commerce Act defining basic consumer rights online.
- 1990: Tim Berners-Lee writes the first web browser, WorldWideWeb, using a NeXT computer.
- 1992: Book Stacks Unlimited in Cleveland opens a commercial sales website (www.books.com) selling books online with credit card processing.
- 1992: St. Martin's Press publishes J.H. Snider and Terra Ziporyn's *Future Shop: How New Technologies Will Change the Way We Shop and What We Buy*.
- 1992: Terry Brownell launches a fully graphical, iconic navigated Bulletin board system online shopping using RoboBOARD/FX.

- 1993: Paget Press releases edition No. 3 of the first App Store, The Electronic AppWrapper
- 1994: Netscape releases the Navigator browser in October under the code name Mozilla. Netscape 1.0 is introduced in late 1994 with SSL encryption that made transactions secure.
- 1995: The US National Science Foundation lifts its former strict prohibition of commercial enterprise on the Internet.
- 1995: Thursday 27 April 1995, the purchase of a book by Paul Stanfield, Product Manager for CompuServe UK, from W H Smith's shop within CompuServe's UK Shopping Centre is the UK's first national online shopping service secure transaction. The shopping service at launch featured W H Smith, Tesco, Virgin Megastores/Our Price, Great Universal Stores (GUS), Interflora, Dixons Retail, Past Times, PC World (retailer) and Innovations.
- 1995: Jeff Bezos launches Amazon.com and the first commercial-free 24-hour, internet-only radio stations, Radio HK and NetRadio start broadcasting. Dell and Cisco begin to aggressively use Internet for commercial transactions. eBay is founded by computer programmer Pierre Omidyar as AuctionWeb.
- 1996: IndiaMART B2B market place established in India.
- 1996: ECPlaza B2B marketplace established in Korea.
- 1996: Sellerdeck, formerly Actinic, the UK's first PC/LAN e-commerce platform established.
- 1998: Electronic postal stamps can be purchased and downloaded for printing from the Web.
- 1999: Alibaba Group is established in China. Business.com sold for US \$7.5 million to eCompanies, which was purchased in 1997 for US \$149,000. The peer-to-peer filesharing software Napster launches. ATG Stores launches to sell decorative items for the home online.
- 2000: The dot-com bust.
- 2001: Alibaba.com achieved profitability in December 2001.
- 2002: eBay acquires PayPal for \$1.5 billion. Niche retail companies Wayfair and NetShops are founded with the concept of selling products through several targeted domains, rather than a central portal.
- 2003: Amazon.com posts first yearly profit.
- 2004: DHgate.com, China's first online b2b transaction platform, is established, forcing other b2b sites to move away from the "yellow pages" model.
- 2007: Business.com acquired by R.H. Donnelley for \$345 million.
- 2009: Zappos.com acquired by Amazon.com for \$928 million. Retail Convergence, operator of private sale website RueLaLa.com, acquired by GSI

Commerce for \$180 million, plus up to \$170 million in earn-out payments based on performance through 2012.

- 2010: Groupon reportedly rejects a \$6 billion offer from Google. Instead, the group buying websites went ahead with an IPO on 4 November 2011. It was the largest IPO since Google.
- 2011: Quidsi.com, parent company of Diapers.com, acquired by Amazon.com for \$500 million in cash plus \$45 million in debt and other obligations. GSI Commerce, a company specializing in creating, developing and running online shopping sites for brick and mortar businesses, acquired by eBay for \$2.4 billion.
- 2012: US eCommerce and Online Retail sales projected to reach \$226 billion, an increase of 12 percent over 2011.
- 2012: Pakistan crosses global B2B e-commerce transactions of \$ 12.4 trillion which was \$ 3.4 trillion in 2005. (<http://www.thenewstribes.com/2012/04/03/>)
- 2013 Blucora, Inc. (NASDAQ:BCOR) buys Monoprice, an online provider of self-branded consumer electronics and accessories in an all-cash transaction of \$180 million.
- 2014: India's e-commerce industry is estimated to have grown more than 30% from a year earlier to \$12.6 billion in 2013.

Chapter 3:

Introduction to Electronic and Cyber Laws in Pakistan: Analysis and Criticism

4.1: Introduction:

The purpose of writing this chapter is to introduce and analyze all prominent development and progress in the field of electronic world in the region of Pakistan.

“An Action Plan on e-commerce headed by the Ministry of Science and Technology is in progress since year 2000 in Pakistan. About 137 different sets of laws, ordinances, acts, rules and procedures requiring consideration have been studied with reference to electronic commerce. Among some of the statutes has been examined, in a long process are the State Bank of Pakistan Act, Qanun-e-Shahadat Order, the Contract Law, Companies, Pakistan Penal Code, Criminal Procedure Code, and Export and Import laws. IT legislation was prepared in the light of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on e-commerce 1996, the IT laws of neighboring countries, as well as recommendations of the Computer Society of Pakistan, National Telecommunication Organizations, and National Database Organization (NADRA).”⁹⁷

Now Electronic Transaction Ordinance 2002, Electronic Funds Transfer Act 2007 and Prevention of Electronic Crimes Act 2007 give legal recognition to information in electronic form, equating it with information in hard form and a legal framework to electronic banking and cyber crimes in Pakistan.

Before I write something on Electronic Commerce/Contracts, in Pakistani perspective, it is necessary to understand the background and development of electronic laws. So that, we can comprehend the communication means and also can recognize electronic laws expansion in this area. That would be beneficial in the field

⁹⁷ See, Monteiro, Noel, DAWN Sub-Editor, E-Commerce implementation in Pakistan, Information Technology (IT), the future of Pakistan, available at www.itu.int , Last visited 17-11-12.

of electronic contracts. There is a short introduction and analysis of these laws as prescribed following:

a) Telegraph Act, 1885

The first basic law relating to telecommunication in this region was the Telegraph Act, 1885. This law primarily dealt with sending of messages through waves, particularly telegraph. Its emphasis was mainly on sending of messages without payment, sending obscene messages, and alteration of messages. This law also gave immense powers to the government to enter upon any land and lay telegraph lines. One important aspect of this law was that permission was required from the government for operating any telegraphs. "This Act deals with telegraphs in Pakistan. The Federal Government may grant a license to any person that he may establish, maintain or work a telegraph within any part of Pakistan. The Government and the telegraph officer both shall not be responsible for any loss or damage which may occur in consequence of failure to the receipt, transmission or delivery of any message unless the telegraph officer is negligent in performing his duties.

b) The Wireless Telegraphy Act, 1933

Then the Wireless Telegraphy Act 1933, which deals with the possession of wireless telegraphy apparatus. It prohibits the possession of wireless telegraph apparatus without a license. The Federal Government has power to exempt any person or class of persons from the operation of this Act by making rules on it either generally or on conditions. It also prescribes offences and penalties in case of violation of this Act.

c) The Pakistan Telecommunication (Re-Organization) Act, 1996:

The first law regulating all internet activity in Pakistan is the Pakistan Telecommunication (Re-Organization) Act; 1996. This law regulates all internet activity, starting from license to provide telecommunication services upto misuse of internet.

"The aim of the Act is the re-organization of telecommunication system. It provides for re-organization of telecommunication system in Pakistan by establishing

the Pakistan Telecommunication Authority, the Frequency Allocation Board, National Telecommunication Corporation and the Pakistan Telecommunication Employees Trust, Regulation of Telecommunication Industry, Transfer of Telecommunication Services to private sector and matters connected and incidental thereto. It elaborates the powers, functions and responsibilities of the Pakistan Telecommunication Authority.”

This law has penal provisions also whereby the violators could be sentenced to imprisonment. Cognizance of the offences punishable under the PTA, 1996, could only be taken by the competent Court on a complaint in writing by an officer authorized by the Authority or the Board.

d) The Electronic Transactions Ordinance, 2002

Regarding electronic contracts, we can say this Ordinance is the main and first big step in Pakistan. Therefore, it is essential to write down all important aspects in detail. Electronic Transaction Ordinance 2002 (ETO) was promulgated on September 11, 2002. This was the first law that gave legal reorganization to information in electronic form, equating it with information in hard form.

The purpose of this Ordinance is to recognize and facilitate Documents, Records, Information, Communications and Transactions in electronic form, and to provide for the accreditation of Certification Service Providers.

There are 43 sections in this ordinance. It deals with following 8 main areas relating to e-Commerce. Recognition of Electronic Documents, Electronic Communications, Digital Signature regime and its evidential consequences, Web Site & Digital Signatures, Certification Providers Stamp Duty Attestation, notarization, certified copies Jurisdiction Offences.

In this reference Qanoon e Shahadat Ordinance ratifies under Article 164 that Production of evidence that has become available because of modern devices, etc.: In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques.

To understand the main concept and ingredients of this Ordinance it is necessary to elaborate some important sections. The ETO makes it clear that where a rule of law has a requirement for information to be in writing, an electronic record containing that information will similarly satisfy that requirement of being in writing, so long as the information can be accessed for subsequent use. ETO, S.4

In the same vein, where a rule of law requires a signature, an electronic signature will also satisfy the said rule of law. The ETO has provided that an electronic signature can be proven in any manner.S.8

Where there are legal rules governing the retention of documents and records, the ETO sets out the circumstances and requirements where such rules can be satisfied by storing the information in an electronic form. S. 6. The ETO also deals with other important elements in the formation of contracts such as the time and place of dispatch and receipt of the electronic records relating to the contract. S. 15

In the electronic environment, dispatch and receipt can take place almost anywhere geographically with a suitable telecommunication link. Hence, to avoid ambiguity, the ETO has provided that the place of dispatch and receipt is deemed to be the place of business of the originator and the addressee, irrespective of where the record was actually dispatched or received. Where there is no such place of business, it will be deemed as the usual place of residence” S.15 (4) and 15(5).⁹⁸

In 2000, Pakistan enacted IT Policy after analyzing various legislations of both Civil and Common law countries especially reviewing UNCITRAL model laws regarding electronic authentication and best practice guidelines applicable globally. It was proffered the “International Consensus Principals on Electronic Authentication” designed by Internet Law and Policy Forum and “two-tier” approach.

This “two-tier” provides standards for operation of PKIs, and a legally valid electronic signature. This law also provides for electronic signatures. At present, barring certain exceptions, all filings/transactions (e.g., tax returns, payments, cheques, banking instructions, custom documents, employment applications, court documents, fee payments, academic transcripts, complaints etc. etc.) are

⁹⁸ See, ETO 2002, available at www.fia.gov.pk/ETO.pdf , last visited 10-12-12.

authenticated by signatures on paper, which can then be used as evidence as needed. This approach is increasingly accepted all over the world, especially in the European states.

However, In ETO 2002, Electronic Documentation & Records recognized Electronic & Digital forms of authentication & identification given legal sanctity Messages through email, fax, mobile phones, Plastic Cards, Online recognized.

“As with other legislation tackling electronic signatures, the Electronic Transaction Ordinance suffers from two fundamental problems. First, the changing nature of the digital signature technology has the potential of rendering the Ordinance obsolete within a short span of time. Second, the Electronic Transactions Ordinance, being a local law in nature, is rather inadequate to cope with the regulation of e-commerce, which is basically a global phenomenon. The Electronic Transactions Ordinance appears to be conservative in its approach.”⁹⁹

The ETO 2002, however, does not deal with the issue of foreign CAs. It remains unclear whether certificates issued by foreign CAs are recognized in Pakistan or not. This is unsatisfactory as if such certificates are not recognized e-commerce conducted on a cross-border basis will be unnecessarily limited in scope.

Under the Electronic Transaction Ordinance on regulation of certification service provider and issue of digital certificates issued by them appears to be that most of the electronic transactions undertaken on the internet are of the ‘high-value’ type. In other words, the value of the electronic transactions is high compared to the cost and money of obtaining a certificate from the CAs. This may be true in the case of ‘business-to-business’ e-commerce, but is not necessarily so in retail transactions. For example, electronic transactions of some goods, such as books, may not justify the cost of a certificate.

This law is a primarily a civil law with just 2 penal provisions contained in sections 36 & 37. The main focus of this law was to treat information in electronic form i.e if in compliance with any legal provision anything was to maintained in hard form or register, the same could also be maintained in soft form. This law does not

⁹⁹ Taymour Aly Khan, Legal Environment of E-commerce in Pakistan, page 13, www.supremecourt.gov.pk/ijc/Articles/10/3.pdf, last visited 04-12-12.

create any rights but provides a mechanism for enforcement of rights which would otherwise be available under general law. The criminal offences under the ETO 2002 were made cognizable, compoundable and non-bailable³⁶. (ETO 2002, S.38)

e) The Payment Systems and Electronic Fund Transfers Act, 2007

In 2007, Pakistan got the Electronic Fund Transfers Act; 2007. This law gives legal cover to electronic banking, providing standards for consumer protection and determination of rights and liabilities of the financial institutions, consumers and other Service Providers.

The main concentration of the Act is to provide regulatory framework for payment systems and electronic fund transfers. "Electronic fund" is defined as the money transferred through an electronic terminal, ATM, telephone instrument, computer, magnetic medium or any other electronic device to order, instruct or authorize Banking Company, a Financial Institution or any other Company or Person to debit and credit an account. This Act grants special powers to State Bank of Pakistan to designate a "Payment System: that if it is necessary for the public interest. State Bank has also authority to revoke the designation of payment system, if it is needed.

To conclude, we can say that it covers all relevant aspects of electronic funds, including Payment Systems, Real Time Gross Settlement System (RTGS), Documentation of Transfers, Operator Arrangement, Clearing and other obligations, Notification of Error, Liability of parties and penalties as well.

f) The Prevention of Electronic Crimes Ordinance, 2007

The first law regulating electronic crime in Pakistan was the Prevention of Electronic Crimes Ordinance, 2007. Aim of the Ordinance is to make provision for prevention of Electronic Crimes. Prevention of any action directed against the confidentiality, integrity and availability of electronic system, networks and data as well as the misuse of such system, networks and data by providing punishment of such actions and to provide mechanism for investigation, prosecution and trial of offences and the other matters connected thereto.

It deals with Criminal access, Criminal data Access, Data damage, System damage, Electronic fraud, Electronic forgery, Misuse of Electronic System or Electronic Device, Unauthorized access to Code, Misuse of encryption, Malicious code, Cyber stalking, Spamming, Spoofing, Unauthorized Interception, Cyber Terrorism it also deals with their punishments, abetting, aiding and attempts to commit offences, prosecution and trial of offences, establishment of investigation and prosecution agencies etc.

It presents penalties for offenders ranging from six months imprisonment to capital punishment for 17 types of cyber crimes. It will apply to every person who commits an offence, irrespective of his nationality or citizenship. It gives exclusive powers to the Federal Investigation Agency (FIA) to investigate and charge cases against such crimes. However, there are seemingly 21 'cyber' issues covered in this Bill It may seem to cover all aspects of the new digital era. But detailed look shows quite the contrary. Practically in all issues the government has gone the extra mile to reinvent a new definition, significantly deviating from the internationally accepted norms. There seems to be an elaborate play of words within the document allow room for the regulating body (FIA) to confuse and entrap the innocent people The FIA, has been given complete and unrestricted control to arrest and confiscate material as they feel necessary A very dangerous supposition Safeguards and Protection.

“One example of the hideous nature of the bill: The Government has literally attempted to insert a new word in the English language. The word TERRORISTIC is without doubt a figment of their imagination vocabulary Hence they attempt to define the word, quite literally compounding the problem at hand They have actually defined what real-life terrorism might be But fail to explain what they mean by the word Cyber in cyber terrorism. The concern is that there happens to be no clear-cut explanation on how a Cyber Terrorism crime is committed.”¹⁰⁰

According to Section 7 of the Prevention of Electronic Crimes Ordinance that defines the offence of fraud but not the offence of misrepresentation as offence.

¹⁰⁰ Taha Mehmood, Presentation Transcript: Cyber Laws in Pakistan Presenting, at www.slideshare.net/mehmood_taha/cyber-laws-in-pakistan.last visit 02-05-2013.

Likewise, express provisions about misuse of electronic cards, regulation of online pharmacies, internet trademark violations, operations of a pirated website, tax-evasion, and illegal on line sale transactions, on-line gambling, immoral and un-Islamic Transactions and activities should be part of a comprehensive criminal statute that aims to reduce risk to e-contracts activities.

To conclude, there is no doubt this Ordinance will lead to speed and efficiency in accessing of records and documents through electronic means if it is implemented with full spirit and on merit. Then it will definitely have an exponential impact on Commerce, Administration and Governance in Pakistan.

Electronic Documents and Prevention of Cybercrimes Act, 2014

The government has decided to set up a “cyber authority”, a special court to deal with cyber crime and disputes as well as an emergency unit to counter attacks that are against Pakistan’s interests.

This is part of larger plan to amend a dozen major laws through a consolidated compendium to be called the Electronic Documents and Prevention of Cybercrimes Act, 2014. This consolidates and updates the different laws that are applicable to information technology or cyber activity in an all-encompassing piece of law to combat crime and to promote electronic and computerised businesses through legal documents, e-signatures, etc

Besides many changes in the existing criminal laws, the new law seeks to amend major laws such as the Pakistan Telecommunication Reorganisation Act of 1996, the Qanun-e-Shahadat law of 1984, the Negotiable Instruments Act of 1881, the Power of Attorney Act of 1881, the Trust Act of 1882 and the Criminal Procedures Code, 1898.

The law provides a framework for the authentication of electronic documents by affixing electronic signatures through a unique system of private and public keys so that any changes in documents, forms and signatures are detectable by the Cyber Authority. As a result, such transactions and businesses would be legally

recognised, with authenticity to be confirmed by the Cyber Authority and kept in the safe record for any future re-verification.

This would also involve receipt or payment by means of such electronic forms as the government may prescribe and allow electronic filing and the issuance of forms, applications, licences, permits or any other documents with any office, authority, body or agency owned or controlled by the government.

The authority will also take care of contract formation, the communication and acceptance of proposals or their revocation through the use of electronic documents and devices. It will be responsible for prescribing the procedure for electronic contract formation or authentication.¹⁰¹ It is a still Draft law, expected to be taken up by the cabinet soon.

4.2: Case Law:

The brief facts of the case are that the plaintiff and the defendant entered into a sales contract for supply of 1,600 MT of steel rods. The defendant supplied 500 MT of steel rods to the plaintiff. A dispute arose and plaintiff filed suit claiming damages against defendant in respect of balance 1,100 M.T. of steel rods. Consequently, the defendant filed an application under section 34 of the Arbitration Act, for stay of plaintiff's suit to refer the dispute to arbitration as the parties by the very said contract under which the plaintiff is seeking relief had agreed to settle all disputes by arbitration in terms of the said contract. Claim of plaintiff was that sale transaction was based on pro forma invoice, purchase order and correspondence by faxes and E-mails and that plaintiff had never entered into any sales contract containing an agreement to arbitration.

In a paragraph of the Order, it has been observed that "The learned counsel for the Plaintiff has also argued that the Sales Contract has not been signed and therefore is

¹⁰¹ See, Report on Electronic Documents and Prevention of Cybercrimes Act, 2014, <http://www.dawn.com/news/1079918/govt-to-set-up-cyber-authority-court>, last visited 14-01-2014, 12 Rabi ul awal, 1434.

not enforceable. As discussed above, the Defendant has established that sales contract was electronically sent to the plaintiff who acted on the same and opened a Letter of Credit in accordance with its terms and conditions, which also contained an arbitration clause. The submissions of the learned Advocate for the Plaintiff have no force in view of the provisions of the Electronics Transactions Ordinance, 2002 (Ordinance LI of 2002) – It is further to be pointed out that after promulgation of Electronic Transactions Ordinance, 2002, the Qanun-e- Shahadat, 1984 (P.O. 10 of 1984) stands amended in terms of section 29 of the Ordinance, 2002 – By the said amendments various definitions of the Qanun-e-Shahadat Order have been changed and specifically by addition of section 2(e) in the said Order all the documents produced or generated through modern devices have been given evidentiary value...

It is further observed in Paragraph 11 of the Order thereof that in view of the aforesaid provisions of the Electronic Transactions Ordinance 2002, as well as amendment in the Qanun-e-Shahadat Order, it appears that it is no longer necessary for electronically transmitted documents, which include Commercial / Banking Contracts, to be manually signed or for the same to be attested by any witness. Therefore, all the documents involved in the matter (faxes, pro forma invoice, L.C. and Sales Contract) are part of one deal and that the matter should be decided as per the terms of the Sales Contract agreed between the parties which includes the arbitration agreement.¹⁰²

There are some important verdicts of apex court with regard to evidentiary value of electronic and print media and devices. Mostly, it has been seen between consumer and retailer that they clash with each other on price of products. Because, the consumers believe on press reports showing something else other than mentioned price. In this regard, the courts do not decide the cases on press reports.¹⁰³ However, Audio-cassette is admissible in evidence.¹⁰⁴ With regard to video evidence, the courts are also in view to accept them as evidence. Screening of video cassette is admissible evidence and also conclusive in some cases but not in all.¹⁰⁵

¹⁰² See, case law at http://law.zafcointl.com/area_e-commerce.html, last visited on 10-12-12.

¹⁰³ See, Case Law, PLD 2004 SC, 583.

¹⁰⁴ See, Case Law, PLD 1988 SC, 109.

¹⁰⁵ See, Case Law, PLD 1989 SC, 249.

4.3: Pakistani Laws on Electronic Contract in Islamic Perspective

4.3.1: Background:

Pakistan is an Islamic state and “Islam” declared in its Constitution sole religion hence, it is suitable to analyze its all laws and regulations whether they are in accordance with Islamic teachings or not. This chapter is an attempt to do so by focusing the discussion on the validity of E-contracts and cyber laws in Pakistan according to Shariah.

As the objectives of the Shariah pertain not only to the Afterlife but also to this world and may be summed up as the welfare of people in this world as well as in the Hereafter, this welfare comprising complete justice, mercy, well-being and wisdom. The Shariah objectives are to safeguard for human beings, their faith, their life, their intellect, their posterity and their property.

As one of the prime duties of man is to conduct his life in accordance with the will of Allah, the means of attaining the objectives of Shariah, whether mundane or spiritual, must be Islamically, legitimate and consequently dominated by ethics.

Pakistan has a dual legal system. The first system is inherited from the British, similar to the ones found in India, Malaysia and Singapore. It is based on the English Common Law.” The second is the system inherited from the Islamic laws. Islam has become an important aspect in the life of people in Pakistan where ultimately it has become the official religion of Pakistan. The Constitution of Islamic Republic of Pakistan 1973¹⁰⁶ is based on Islamic Teachings. The Islamic provisions directly express that:

- Islam was declared to be the State religion;
- All the three constitutions (1956, 1962, 1973) state, with very slight change of wording, that “steps shall be taken to enable the Muslims to order their lives in the individual and collective spheres, in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah” and that “the

¹⁰⁶ See, Constitution, <http://www.pakistani.org/pakistan/constitution/>, last visited 01-12-12.

principles of democracy, freedom, and equality, tolerance and social justice, as enunciated by Islam, shall be fully observed.

- It was further affirmed that:
 - a) “The state shall eliminate riba as early as possible; (Art 38(f))and that
 - b) All existing laws shall be brought in conformity with the injunctions of Islam and no law shall be enacted which is repugnant to these injunctions. (Article 227).”

Herewith in this scenario, object is to avoid committing riba (usury), gharar (uncertainty) and to make actions and transactions secure and durable to be involved only in permissible or halal transactions according to Islamic teachings.

4.4: THE APPLICATION OF ISLAMIC CONTRACT LAWS ON ETO 2002 and PECO 2007:

In the preamble of Electronic Transaction Ordinance 2002, it is described that “WHEREAS it is expedient to provide for the recognition and facilitation of documents, records...” This preamble confirms with teachings of Islam as to provide facilitation is main essence of Islam as Allah said in Quran:

يُرِيدُ اللَّهُ بِكُمْ الْيُسْرَ وَلَا يُرِيدُ بِكُمْ الْعُسْرَ

“Allah intends every facility for you; He does not want to put you to difficulties”¹⁰⁷

”عَنْ أَنَسِ بْنِ مَالِكٍ، عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، قَالَ: «يُسِّرُوا وَلَا تُعْصِرُوا، وَيُسِّرُوا وَلَا تُعْصِرُوا، وَلَا تُلْقُوا»

Narrated Anas bin Malik(R.A):

The Prophet(s) said: “Facilitate things to people (concerning religious matters), and do not make it hard for them and give them good tidings and do not make them run away (from Islam).”¹⁰⁸

¹⁰⁷ Al Quran (2:185).

¹⁰⁸ See, Muhammad b. Ismā‘īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, kitab al Uḥm; Muslim b. al-Ḥajjāj al-Naysābūrī, *Ṣaḥīḥ Muslim*, Kitab al Jihād wa al siyer(The Book of Jihad and Expeditions).

عن سعيد بن أبي بردة، عن أبيه، عن جده، أن النبي صلى الله عليه وسلم بعثه ومعه إلى اليمن، فقال: «يسرا ولا تعسرا، ويُسرا ولا تُنلرا، وتطوعا ولا تُكفرا» .

Narrated Saeed bin Abu Burda:

“When the Prophet sent his Companions Mu'adh and Abu Musa to teach Islam to the people of Yemen, he gave them the following advice: Facilitate (religious matters to people) and do not make (things) difficult. Obey each other and do not differ (amongst yourselves).”¹⁰⁹

In this Ordinance, although basic elements of Islamic contract are fulfilled as we have seen in this discussion on the validity of e-contract in Islamic law i.e Aijab (Offer) U/S 13, and Qabul (Acceptance) U/S 14, however Islamic conditions and principles are almost neglected. Even there is no any single word that elaborates that the Islamic teachings should be followed. There are some important conditions and principles which have to be fulfilled in formation of transactions and actions, not only in electronic world but also in real world.

a) Riba:

First and foremost requirement under Islamic Law is to avoid usury. Interest (ربا) is prevailing in electronic contracts as it is prohibited in Islamic contracts. ETO 2002 must have to mention clearly that any transaction which involves interests is illegal and unenforceable. Unfortunately, e-contracts and transactions carried on are permissible and allowed in Pakistani laws. As On 23 December 1999, the Supreme Court of Pakistan (SCP), Shariat Appellate Bench, in its revolutionary judgment in the Khaki Case (Riba Judgment) declared Riba as unIslamic, the court has definitely defined the term “interest”, held that:

“Any amount big or small, over the principal in a contract of loan or debt is ‘Riba’ prohibited by the Holy Quran, regardless of whether the loan is taken for the purpose of consumption or for some production activity”¹¹⁰

Literally Riba means an increase. “According to Islamic Jurist it can be defined as usury or a practice of lending money with interest rates. In this concern, Islamic Fiqh Assembly issued its decision No. 108 (12/2) stating (Al-Faqih, 2002):

¹⁰⁹ , Muhammad b. Ismā'il al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, kitab al Jihād wa al siyer (The Book of Jihad and Expeditions)

¹¹⁰ See, Dr. M. Aslam Khaki and Others vs. Syed Muhammad Hashim and Others, PLD 2000 SC 225.

i. It is not permitted to issue uncovered credit cards or to deal in them if there is a condition that fixes usurious increase even if a user intends to pay up within a given free period.

ii. It is permitted to issue uncovered credit cards as long as there is no condition that fixes usurious increases to be added to debt. Here are two (2) sub points:

i) It is lawful (for the bank or issuer) to receive a fixed charge for the issue or renewal of such cards as a wage for service rendered.

ii) It is also lawful to receive commission from the trader for purchase, by the customer provided that selling by card is equal in price to selling in cash."¹¹¹

b) Legal capacity (الاهلية):

To enter into electronic contract there is no any criteria mentioned in the ETO 2002, regarding legal capacity. According to this Ordinance, even child, insane, blind and intoxicated person may contract which eventually can create legal issues.

In the Usul al-fiqh Jurists discussed legal capacity or ahliyyah as follows:

Legal capacity or ahliyyah is a quality by which a person becomes fit for what he is entitled to, or for the discharge of legal obligations to which he is liable in the eye of the Shari'ah law. Since the possession of the mental faculty of 'aql (intellect) is the basic criterion of taklif (juridical responsibility) Islamic law concerns itself with the circumstances that affect the sanity and capacity of the individual such as minority, insanity, duress, intoxication, interdiction and mistake. In the absence of intelligence, it would be without use or effect to expect any result in the law. Hence, the Shari'ah system correlates adulthood and sanity with intellect. Accordingly, the general competence to engage in legal transactions requires two basic qualifications: prudence and attainment of majority must be followed.¹¹²

It is difficult to recognize who is entering into contract. There must be certain requirement and procedure which have to be followed during formation of a valid electronic contract.

¹¹¹ See, Islamic Fiqh Assembly, decision No. 108 (12/2) (Al-Faqih, 2002) at www.arraydev.com/commerce/fjbc/2011-04/Mohd%20Zulkifli.pdf, last visited 02-12-12.

¹¹² See, Abdurrahman Raden Aji Haqqi Dr, Electronic Transactions Order, 2000 Of Brunei Darussalam: An Islamic Legal Framework Input in the Validity of Electronic Contracts, Faculty Of Shariah And Law, Sultan Sharif Ali Islamic University, Brunei Darussalam, at slconf.uaeu.ac.ae/papers/PDF%201%20English/e4.pdf.

c) Null Stipulation:

Another important issue is Stipulation .In Islamic law there are certain conditions and stipulations which are valid, voidable and void to be concerned during transactions. Here, I only mention the null stipulation which make a contract unenforceable.

A stipulation is null when it is not necessary to the contract itself such as where the vendor requiring from the buyer that he shall not sell or otherwise dispose of what he has acquired; or when it is not appropriate to the contract, such as requiring the party to do something which is not an obligation; or when the Shari'ah does not recognize it such as stipulating riba in the contract; or when it is not customary to the people of certain place such as purchasing a car with the condition that the seller will be allowed to use the car for a time. The above stipulations are ineffective and any of its will nullify the contract for it is contrary to the purpose of the Islamic law of transactions.¹¹³

d) Conditions of the Subject-matter (المعقود عليه):

In ETO 2002, we will find that everything can be subject matter whether permissible (حلال) or prohibited (حرام) in Shariah. There must be certain provisions which do not generalize everything in this Ordinance. If Islam prohibits anything there is wisdom (حكمة) behind its prohibition and if anything is permissible there is also logic behind it. Islamic teachings show that there must be evasion of uncertainty (غرر) and cruelty (usury) in any form of contract (e-contract).

As Subject Matter is called the thing which the parties to an agreement promise to do or the thing one party gives in return for the act or promise of another. It is similar to consideration in the English law. But not everything is suitable to be the subject-matter of a contract according to Islamic law. Wine, for example, is not suitable to become the subject-matter among the Muslims in their transactions. To sale and purchase intoxicating beverages, non-hunting dogs, pigs, unslaughtered carcass and gambling tools are not allowed.

¹¹³ See, ibid, p 65.

Some forms of consideration that may be regarded lawful under the latter are not necessarily so under Islamic contract law principles. Thus things such as pigs and wine cannot be a valid consideration under Islamic contract principles while they are lawful considerations according to the applicable law. Similarly, anything which is useless and/or immoral such as pornographic material is also prohibited by Shariah.”

Hence, “the jurists have stipulated four conditions for the subject-matter:

- It must exist or can exist;
- It can be delivered;
- it can be ascertained or known to the parties;
- And suitable for transactions or is recognized by the *Shariah*.

It is, however, to be noted that the schools of Islamic law have differed regarding such conditions. “According to the Hanafis, the conditions for the subject-matter of a contract are property, valuable, legal, deliverable whether immediately or in future. While according to the Malikis they are pure, useful, deliverable, legal, and known. The Shafi’is conditions are like the Malikis with the difference that they are owned instead of being legal. And according to the Hanbalis they are of a financial nature, owned, deliverable, and known.”¹¹⁴

Supra discussion shows the conclusion that Islamic law requires two conditions in any contract for subject-matter. These conditions are the ownership of the subject-matter as deliverable and such subject-matter should be useful thus, a useless thing cannot be the object of Islamic contract.

e) Pornography:

Now a days, pornography trade is spreading day by day not only in society but also in online market. It is not only un-Islamic but also immoral, should be banned immediately. Pakistan as an Islamic state has not done any particular legislation in this regard. “ETO 2002 and Cyber Law do not address the crimes related to pornography and lewdness. The area of child pornography is particularly sensitive as all the developed countries have started a war against such criminals so if child pornography is not a crime in

¹¹⁴ See, Abdurrahman Raden Aji Haqqi Dr, Electronic Transactions Order, 2000 Of Brunei Darrussalam,p 68.

Pakistan, this place will be a haven for predators. Interestingly in the first draft child pornography was a crime but in the latest draft it is missing. Our children are already victims of all sorts of abuse both at home and outside and at least, if child pornography is not made a crime, we should be ready to see porn pictures and videos of our children floating in the cyberspace.”¹¹⁵

Western internet monitoring organizations have informed Pakistani government especially authorities FIA’s NR3C about internet users in Pakistan who access ‘child pornography’ websites. They are in several numbers more than one million but alas! Still there is no law to deal with the danger to punish them. Lewdness (فحش) must be crime. *Shariah* prohibits any activity which involves in lewdness and pornography. We can say lewdness is any obscene saying, act or environment which deprave passion of a human towards negative side. It includes every type of obscene pictures, images, audios, videos, sayings and actions. These types of activities must be banned and punished. As Quran prohibits indecency in following words:

إِنَّ الَّذِينَ يُحِبُّونَ أَنْ تَشِيعَ الْفَاحِشَةُ فِي الَّذِينَ آمَنُوا لَهُمْ عَذَابٌ أَلِيمٌ فِي الدُّنْيَا وَالْآخِرَةِ وَاللَّهُ يَعْلَمُ

وَأَنْتُمْ لَا تَعْلَمُونَ ﴿٥٠﴾

“Surely, those who like that lewdness (the immorality, indecency, slander, scandal) spread among the believers, for them there is painful punishment in this world and the Hereafter. Allah knows, and you do not know.”¹¹⁶

Indecent Exposure is the exposure of any part of the female/male body is considered indecent. In Islam the standards are very strict standards of modesty which require most of the body to be covered for dignity of human beings.

No permission to expose any part of woman body. However, one group of Islamic thoughts gives relaxation to reveal face and hands to some extent but not any other thing. Hijab and Niqab are two terms which are used in Islamic society regarding veil. Protection and self-respect of woman is the main purpose of veil in Islam.

¹¹⁵ Justice (R) Khalil-ur-Rehman Khan, CYBER LAWS IN PAKISTAN, available at www.supremecourt.gov.pk/ijc/Articles/10/1.pdf

¹¹⁶ Al Quran, (Surah Noor 24-19).

Although Pakistan Electronic Media Regulatory Authority (Content) Regulations 2012¹¹⁷ defines:

(h) "indecent" includes whatsoever may amount to any incentive, sensuality and excitement of impure thoughts in the mind of an ordinary man of normal temperament and has the tendency to deprave and corrupt those whose minds are open to such immoral influence, and which is deemed to be detrimental to public morals and calculated to produce pernicious effect, in depraving and debauching the minds of persons;

Additionally, PEMRA adds:

Ethical & social values: Licensee shall show deference to the ethical and social values of the country and ensure that: content is not obscene or indecent.

But if we see this definition PEMRA is unable to explain: What is an 'impure thought'? Who is this 'ordinary man' by whom you will be quantitatively or qualitatively? Measuring indecency, depravity and corruption? What about the views of an 'ordinary woman'? What includes in obscene? Where is the list of 'public moral' standards? Obviously no limitation is determined!

In practical, lewdness, immorality, indecency, slander and scandal is spreading in our electronic and print media day by day. No check and balance is made to control them. Authorities are silent on this prevailing crime. It is clear crystal that, their transaction (with consideration/voluntarily) in all forms of obscene CDs, DVDs, Software, Books, Magazines, Audios, Videos, Pictures and Images are void and unenforceable in Islamic Law. والله اعلم.

¹¹⁷ See, Pakistan Electronic Media Regulatory Authority (Content) Regulations 2012 www.pemra.gov.pk/, last visit 10-12-12.

Credit Cards:

With reference to electronic transaction credit card is the main element in transferring of money. Nowadays, almost all types of credit cards involve in interest. Imposing a percentage on the amount of money used by credit cards is Riba (interest) in itself, whether such a percentage is taken as a charge service and administrative expense or due to delay in settlement. Both forms are a usurious loan and the most well-known form of Riba of non-Islamic systems.

“However, how does Islam accept the concept of credit card as a medium of on-line payment? What are the underlying principles required by Shariah in the functionality of credit card? Islamic credit card is the substitute for conventional interest-based credit cards. Islam allows the use of credit card as long as it does not involve the element of interest. In Malaysia, the doctrine of Bay al-Inah is recognized and used to validate the credit card transaction.”¹¹⁸

The Bay al-Inah contract works on the basis of two (2) separate agreements, namely Bay al-Mutlak (cash sale) and Bay Bi-thaman Ajil (deferred sale). The former is the bank’s agreement to sell an item to the customer at an agreed price, while the latter agreement covers the customer selling back to the bank at a lower price. The difference is the bank’s profit on the transaction and is a predetermined amount. There is no penalty charged to the customer and for the unutilized financing amount the customer is legible for rebate.

But the doctrine of Bay al-Inah is not recognized by the most scholars from Middle-East.(Pakistan, India)Their reasoning is that the contract is ethically flimsy when applied in this manner, the sale transacted is a fake sale and thus just a means of masking Riba. They decided that the solution to Riba avoidance was to exercise the acceptable right of charging for the provision of a financial guarantee called the guarantee system.¹¹⁹

¹¹⁸ Mohd Zulkifli Muhammad, Kazi, M, Malaysian banks launch first Islamic credit card in Asia. Retrieved from Comprehensive Approach for Sharia' Compliance E-Commerce Transaction, Lecturer of Islamic Finance, SPKAL, University Malaysia: Journal of Internet Banking and Commerce, April 2011, vol. 16, no.1 <http://www.arraydev.com/commerce/jibc/>, last visit 10-12-12.

¹¹⁹ Darwish, A. F, Can a credit card ever be halal?, (2003), at <http://www.arraydev.com/commerce/jibc/> , last visit 10-12-12

Regarding the above issue, Murabahah System is proposed by Mustafa Omar of Islamic International University Malaysia.¹²⁰ "Murabahah is generally defined as a sale with Mark-up or a cost plus profit sale. It is sale of product for the price at which the bank in this case has purchased it, with the addition of stated profit. Islamic banks use it as a credit vehicle to finance the buyer against a predetermined profit without bearing any risk." Islamic credit cards must be introduced by Islamic traders to enhance Islamic e-commerce at all over the world.

- **Epilogue:**

In conclusion, we can say that there is no any apparent contradiction in the validity of contract between Islamic law and Electronic Transaction Ordinance 2002. The main object is that Islamic features and principles have to be applied by Muslim Bankers, traders and states as being Muslims. It must be noted that they are answerable for all their actions and omissions to the Allah Almighty in the hereafter and these terms/conditions are applicable regardless of whether the commercial affairs are conducted commonly or offered over the e-environment. Islamic principles must be followed during entering into any contract anywhere, anytime.

¹²⁰ Zainul,N., Osman, F., &Mazlan, S. H. (2004), E-commerce from an Islamic perspective. *Electronic Commerce Research and Application*, 3, 280-293.

CONCLUSIONS AND RECOMMENDATIONS

The purpose of analyzing the whole process of electronic contracts in Islamic and modern perspective was to compare and understand electronic laws at international. We have found that Islamic laws give special concentration on application of justice; it is to avoid cruelty, uncertainty (Gharar) and obscene things by finishing any usury (Riba), fraud and immorality. In contrary modern laws do not care about usury and immorality in their contracts.

On the other side, Modern laws have done much in the field of electronic contracts while Muslim states and scholars are in their initial stage. Although some Islamic states enacted their laws on electronic contracts but they did not give special priority to Islamic principles. To summarize the whole thesis we can wind up that:

- Electronic contracts are just a little different from 'normal' contracts. The differences arise from the medium and not the message.
- Electronic contract are those which are made through the modern communicating technology it may include internet and satellite connections in computerized machinery.
- In Modern law and Islamic law the meaning of electronic contract is almost same, distinction is only in their principles and provisions.
- Contracts can be created in the electronic world in the form of
 1. Verbally (Telephone, Mobile, Wireless)
 2. Conduct (ATM Card)
 3. In writing (E-mail, chat)
 4. Via the Internet(Click wrap, Shrink wrap, Brows wrap, E-mail)
 5. By Electronic Communication Devices(all types of software based machinery)

- For formation of a valid contract, there are four Legal stages of a Contracting Process these are Contract Conception, Preparation, Negotiation and Fulfillment.
- Electronic contracts are permissible under Islamic principles. However, it is essential that there must be mutual consent by both parties to enter into a binding and valid deal.
- In Islamic law, electronic contract based on the 'Contract Session' ("Majlis al 'Aqd") which demands that contracting parties be together in one place and engaged in their business discussion without any distraction unrelated to the deal.
- With reference to "Majlis al 'Aqd", Islamic jurists denote two senses (i) Meeting of place (ii) Meeting of minds. Many modern Muslim Jurists does not make it compulsory physical presence of both parties in the same place. They consider that contracting parties may be in different places. The main thing which is considered as majlis al aqd is a medium of communication which can connect them.
- The concept of "Contract Session" was originally established to benefit both parties involved in the contract. Accordingly, as it gives the offeree a rational period of time in order to express his acceptance, and the offeror with certainty as to whether or not there is an acceptance to be made and thus a contract is formed, before the parties separate from the 'meeting place.
- Islamic legal system is different from the modern legal system. Islamic law is derived from four principle sources: the Qur'an (Divine Holly Book), the Sunnah, judicial consensus and analogical reasoning, whereas the modern legal system based on human intention which vary time to time.
- There are several organizations which have contributed to the development of global e-contract law at international level. The most international recognized forum is UNCITRAL the United Nations Commission on International Trade Law with prominent legislation on "Model Law on Electronic Commerce of 1996".

- All three types (shrink wrap click-wrap and browse wrap transactions) have raised fundamental questions, especially about assent, although it is clear that one can validly assent electronically. However, if substantive rules of assent are governed, no issue would be faced.
- In electronic contract to determine when an offer and acceptance is deemed to have taken place, two rules are applicable (i) Receipt Rule and (ii) Postal Rule: However the receipt rule could be a solution because in electronic contracts the receipt rule is more reasonable than the postal rule. Islamic law also stresses on reliability and clarity without uncertainty and that is possible only in receipt rule not in postal rule.
- U.S, U.K, China, Malaysia and Pakistan all such countries have influenced from UNCITRAL Model law in reference to e-commerce legislation.
- Pakistan also has enacted some electronic laws from which Electronic Transaction Ordinance 2002 and Prevention of Electronic Crimes Act 2007 are important one. They give legal recognition to information in electronic form, equating it with information in hard form and a legal framework to electronic banking and cyber crimes in Pakistan.
- Pakistan has a dual legal system; Islamic and British. Islam is considered as a state religion however, its implementation of principles is often neglected in practically.
- In Electronic Transaction Ordinance 2002, although basic elements of Islamic contract are fulfilled, i.e Aijab (Offer) and Qabul (Acceptance), however Islamic conditions and principles are almost totally neglected. Even there is no any single word that elaborates that the Islamic teachings should be followed.
- In electronic transaction credit card is the main element in transferring of money. Nowadays, almost all types of credit cards involve in interest. Imposing a percentage on the amount of money used by credit cards is Riba. There is an immense need of Islamic credit card system that does not involve the element of interest.

- According to Islamic law, everything is not suitable to be the subject-matter of a contract for example, Wine, pornographic materials, gambling tools and pigs are not permissible to become the subject-matter in Islamic society. However, it is possible in modern contracts.

Recommendations

There are some important issues which need to be explained more in this context:

In electronic contract

- When there will be a meeting of the minds?
- Is the transaction affirmed by the user/consumer?
- Is the transaction fair?
- Questions of form and questions of proof are still difficult to determine.
- Giving the assent, although it is apparent that one party can give his assent electronically. However, it is still further needed to study and comprehend that what substantive rules and regulations of assent administer during formation of e-contracts.
- Are there any specific criteria in electronic environment which can guarantee consumer protection? Consumer does not enter into many contracts due to unsecure environment of e contracts. There need to be provide criteria of consumer protection where every consumer can feels secure and reliable.
- There is need to be focused on the occurrence of error and mistake in the contracting process. Is there required to be given any option and choice to the parties to correct error or not?
- The other issues are related with negotiable transfer documents that are paperless how the law accommodates them.

In the light of above recommendations there is intense need to take standards that are the best and International from the Global experience, it is required that the

draft of the E-Consumer Protection and E-Commerce Legislation take into account the central recommendations of Islamic system as well as OECD and the EU.

The intention of examining the whole development of Islamisation was to evaluate what we have achieved so far and what remains to be achieved. Pakistan has definitely made some progress to the road to Islamisation of different laws. However, nothing has been done in the area of electronic transactions and cyber laws yet.

Electronic contract has entered into our daily routine that we cannot avoid it in the modern society. Formation of e-contract is easy however, implementation of it is difficult. Here it was aimed to present a complete structure of all possibilities of e contract in this research paper. In spite of all, there are numerous issues relating to this topic left uncovered or detail writing is required. There are some suggestions how to Islamize the laws especially e-contracts.

- As United Nations UNICITRAL provides laws and regulations in every important aspect at international level as well as Muslims states should sit together at one platform to enact laws according to Islamic point of view. Where this guiding legislation will be applied to all Muslim states. The other important aspect is regarding to international Islamic court where the standard of justice should be admirable that Islamic and unIslamic both states can appeal in case of any dispute.

International platform for legislation can be established under Organization of Islamic Countries (OIC) or with separate new named United States of Islam (USI) where only legislation would be done. This Board of Islamic scholar, Jurists and experts can be named as World Islamic Order or International Muslims Legislation while international court can be called International Islamic Superior Court.

This supra suggestions can be applicable at international level. Whereas, at national level a collective Bench can be established where all renowned scholars can sit in one place to enact the Islamic laws. Their codification must be done and present applicable laws be modified according to Islamic Law.

In supra suggestions if compliance is made through government it have much effects.

- Today, in e-contracts online payment system is on its apex. Credit Card system which is applicable at international level involves in usury. Every Muslim trader

has to bargain through interest based credit card system because they do not have alternative interest free system at international market. Therefore, it is on Muslim Bankers to introduce Islamic Credit card which must be reliable and interest free. In initial stage, they can send payment through Islamic banks instead of credit cards online to avoid usury.

- It is time for Muslim Traders to launch such big online websites (i.e ebay.com) where transaction of all important kinds can be concluded. In start, it can be made possible at national level and then at international level. Where all selling and purchasing can be finalized according to Islamic principles.
- Nowadays, many slogans in the name of Islam are being raised for marketing of products which involve usury or cruelty. For example, “Halal Munafah”, “Service Charges”, “Advance loan on mobile”, “Insurance” mostly types of them involve interest. Muslim jurists should come forward to distinguish among all such modern practical applicable types of Riba. There is also need to create awareness among Muslim community through electronic and print media to avoid repugnancy of Shariah.
- It is indeed need to established separate courts at every district to deal with e contracts and cyber crimes. The procedure of complaint entertaining and its compliance must be made easy and cheaper. It will be better to start online FIR system for registering complaint rather than Thana Culture. In Pakistan FIA and NRC3 have to work speedily to overcome recent crimes. Many crimes are done on social media related to unethical pictures, videos especially against privacy of women to blackmail and scandalize them. But due to unawareness, hesitation and long complicated procedure, only few complaints are registered against criminals.
- As all over the world almost 80% trade is being concluded through e-commerce directly and indirectly. Therefore it is need to make e-contracts and cyber laws part of syllabus for the universities and colleges. It must be made essential part of Commerce and law syllabus in graduate and post graduate level.

Appendix A. ¹²¹ Interview session on Electronic Contract with Ustaz Mustafa Omar, lecturer from kulliyyah of economics and MGT Sciences, IIU Malaysia:

Basically, what Islam says about E-Commerce?

What are the Islamic Perspectives of E-Commerce?

Islam is not against E-Commerce. Islam basically encourages E-Commerce as a new way of conducting business. Traditionally, business was conducted verbally face to face but today the two contracting parties are connected together via computer. However, there are conditions that need to be observed for the validity of E-Commerce in Islam. According to most scholars, there are four pillars of Islamic contract, namely *ijab* and *qabul*, two contracting parties, the subject matter and *sigha* (the mode of expressions). Traditionally, when two contracting parties involved in a contract, the place is called '*majlis*' (meeting) where both parties communicate face to face. Today, with the emergence of E-Commerce, we have to redefine '*majlis*' as the communication which takes place via computers.

Since E-Commerce is conducted using computers and networks and this is a new mode of conducting business, how about its legality in Islam? Can you explain it from the Shariah point of view?

There are certain conditions that must be observed to ensure the legality of E-Commerce in Islam. First, there should be clarity in the communication and the products offered must be clearly defined, for example, the pictures of the products must be clearly displayed on the screen, give detailed specifications, the prices, the mode of delivery and the mode of payment must be clearly stated. Second, both

¹²¹ Norazlina Zainul , Fauziah Osman, "E-Commerce from an Islamic perspective" Department of Information System, Faculty of Information and Communication Technology, International Islamic University Malaysia, Jalan Gombak, Gombak, 53100 Kuala Lumpur, Malaysia, accepted 19 January 2004, Available online 6 February 2004 at www.elsevier.com/locate/ecra.

contracting parties must receive the message in order to achieve conformity in the agreement (concluding the contract). Third, there must be continuity in the communication, whether in the transmission of message or in consulting between one another via e-mail.

What are the drawbacks of E-Commerce according to Islam? (the problems that arise from E-Commerce)

There must be much concern on the mode of payment and the delivery. First, the mode of payment must be Islamic. Second, the mode of delivery-the product must reach the buyer. This two, I could say, are problems that the buyer always faced when purchasing online (through E-Commerce).

The most common method of payment in E-Commerce is via credit card. When customer use credit card, he/she only pays the 1.5% minimum requirement where the issuing bank will charge him/her 2% monthly interest rate on the remaining balance. Here, the issue of Islamicity of E-Commerce is in question. So, can you give some explanation regarding this issue? Is there any halal credit card system for such transaction or is there any other alternative method of payment for E-Commerce transaction?

Credit card involves the element of Riba' and as I know, there is still not exist any Islamic credit card system. So, I would suggest using the Murabahah system where the buyer can ask any Islamic bank to purchase the product on behalf of him and he buys back the product and does payment in installment. The form is called Letter of Credit.

How can a Muslim who conducts business online ensure he is doing halal business and making profit in halal or correct way?

There are five stages that a Muslim business-man should follow to ensure he is doing business online in a correct way:

1. Initiating a contract (Al-Ta'aqut)

In this stage, all the four pillars of Islamic contract, namely offer and acceptance, two contracting parties, subject matter and the mode of expression must be met. Regarding the subject matter, other than the conditions mentioned before, the

subject matter must be available some-where in the market (global market). Regarding the mode of expression, since the contract is performed online, the communication must be clear and smooth without any interruption such as server down and virus attack.

2. Confirming the validity (Sihhah)

During the process of negotiation, the contract must be free from the following elements: interest (Riba'), uncertainty (Gharar), deceit, duress and any elements of gambling (Maisir).

3. Implementation (Nafath)

In this stage, two things must be ensured:

- a. The person offering the product is the real owner of the product.
- b. The product is free from any liabilities.

4. Binding (Ilzam)

In this stage, both contracting parties have to sign a contract which is binding (lawful contract). Before signing the contract, the buyer must verify the company (seller) and the product sold through agents or any other people to confirm its existence. After signing the contract, the buyer must keep the hardcopy of the agreement for later reference to avoid any manipulation or exploitation.

5. Delivery (state of exchange)

This is the final stage where both contracting parties have to exchange the counter values that are the price and the product. Once the buyer received the product, the buyer has to check and confirm whether the product met the buyer's conditions and specifications. Here, the buyer can practice the option of condition if there are certain conditions not met, but it must be stipulated before in the contract.

On the consumer side, how can they ensure that the products sold online are halal? For example, selling chocolate online, the chocolate must be made from halal milk; or selling leather products like shoes, the shoes must be made from halal animal skin; the animal is slaughtered correctly and so on. Can you explain on this issue?

The consumer can verify about the ingredients of the product from any Muslim organizations that is in that country. For example, the consumer buys product from US, he can go to any Islamic websites that is also at US to verify the product. Alhamdulillah, now we have a lot of Muslim websites which deals with different area of business. So there is no problem.

E-Commerce falls under what type of Islamic contract?

E-Commerce is a mode of production that can interact with so many types of Islamic contract. It depends on the mode of communication and the type of business being conduct. For example, E-Commerce may be categorized as Bai' Al-Salam (Ordered Sale), Bai' Al-Istisna' (Manufacturing Sale) or Bai' Muajjal (Deferred Sale). So, there is no specific type.

From Islamic perspectives, what are the rights that both parties must know when they involved in e commerce?

Islam has provided rights for both parties. Among the rights of consumer s are the rights to know about the goods, prices, time of delivery, and also the rights to exercise to option (to accept or to reject the product if it meets the certain requirement).

Beside that consumers also have the rights to get privacy when they get involved with the e commerce. Beside, the seller has the rights to receive the price and also the rights of option to force the buyer to buy the products if it fulfills the requirements that are needed.

Regarding the issues of privacy and data protections, what is your comment?

If we look to the situation, e commerce is a global market and when people engaged in this new system, they will automatically be open to the global market. Internet is not secured, although we have the rules that everybody should follow but at the same time the system is not guaranteed the security of the technology. Therefore, the failure of the system to provide the security and privacy is the subject matter not the laws. As long as the system does not provide a strong and reliable mechanism in the ecommerce the privacy and data protection issues cannot be settle.

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