Electronic Contract: a Study of its Application in the light of Islamic Law with Particular Reference to Saudi Arabia Case

By

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Abstract

Since the emergence of electronic commerce, a massive development and a considerable increase of business has occurred in every aspect of business life. In particular, the adoption of the World Wide Web (the Internet) in conducting commercial activities has played a significant role in the development of commercial and economic sectors in many parts of the world. The notable expansion of electronic market activities has given rise to many legal issues; one of which is the explosion of online contracting or the 'electronic contract'. Electronic contract forms the basis of electronic commerce.

The ability to enter into contracts with remote parties via electronic forms of communication or through computerised electronic systems, within very short time frames, has transformed the way business is transacted today. Due to the nature of electronic contract, with its unique features and qualities, questions arise regarding the capability and appropriateness of existing commercial rules.

In Saudi Arabia, Islamic law is applicable to every aspect of life including business. Since the early phase of Islam, comprehensive efforts have been made to regulate the Islamic commercial sector. However, with regards to electronic commerce insufficient attention has been given to examine the application of Islamic law in electronic contract.

There is a dire need for legal clarification and the development of an appropriate legal environment in order for electronic commerce to fully develop and encourage business confidence in the use of electronic contract. This work studies the validity of forming electronic contracts in light of existing Islamic laws of contract. This study argues that although the general principles of Islamic contract are flexible enough to

accommodate electronic contract, there are some existing approaches in the law that effectively close the door to its application. In turn, this presents legal uncertainty to the law applicable to electronic contract. This thesis focuses on the main conditions of valid contracts, the Islamic concept of ‘meeting place’, the time and the place of the contract, and the validity of electronic contract data as evidence in court.

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Introduction

1. Technology and Trade: Preamble

Modern information technology has transformed the way people communicate and exchange information and knowledge. One of the most revolutionary aspects in electronic communication is the Internet. Initially, the Internet was used for academic, military and governmental purposes. However, when a decision was taken to allow the use of the Internet in commercial activity,[1] it underwent a phenomenal expansion and brought a significant change to how people conduct business transactions. The process of buying and selling goods and services electronically using, mainly, Internet-based communication and other electronic forms of communication is known as electronic commerce or e-commerce. However, the explosive growth of e-commerce and its huge commercial opportunity present considerable problems for legislators who struggle to reconcile existing laws, based on traditional ways of trading, with business conducted via the Internet. Legislators face many issues and the pace at which developments occur make it an almost impossible task. One of the more immediate issues concerns the validity of transactions formed electronically and the capability of traditional laws to deal with legal issues emerging from involvement in e-contract.

1.1.Electronic Commerce in Saudi Arabia

[1] LIoyd, I. (2000) *Information Technology Law*, third edition, Reed Elsevier, UK, p. 29

In recent years Saudi Arabia has made a major investment in developing a modern IT and telecommunications infrastructure capable of supporting e-commerce and the demands of a growing information conscious society.[2]

According to a recent study, conducted by the Arab Advisors Group, e-commerce has achieved noteworthy popularity in the Kingdom of Saudi Arabia. The Arab Advisors Group estimates e-commerce users in Saudi Arabia to exceed 3.5 million consumers representing 14.26 per cent of the population in 2007. Accordingly, the estimated value of transactions concluded by Saudi Internet users is set to have totalled $3.28 billion during the year of 2007.[3]

However, Saudi's e-commerce market is relatively small considering the Kingdom is the richest nation in the world in terms of oil.[4] There are many factors restricting the growth of e-commerce; one of which is the absence of an appropriate regulatory environment suitable and conformable to the Saudi and Muslim culture. This lack of legal certainty adds to the Kingdom's reluctance to embrace new technology and being a closed traditionalist society, Saudi citizens tend to shun anything related to western culture and norms unless it conforms to their religion.[5] For the promotion of

[2] IT & Electronic Market in Saudi Arabia, *UK Trade & Investment*, available at: http://www.trade.uktradeinvest.gov.uk/electronics/saudi_arabia/profile/overview.html.
[3] Shaikh, H., Saudi Internet users spend $3.2b in 2007, *Khaleej Times Online*, 14 February 2008, available at: http://www.khaleejtimes.com/DisplayArticle.asp?xfile=/data/business/2008/February/business_February422.xml&section=business
[4] See, Top World Oil Producers, Exporters, Consumers, and Importers, 2006, available at: http://www.infoplease.com/ipa/A0922041.html.
5 In fact there are other barriers to the development of e-commerce in Saudi Arabia - to note some, the lack of awareness, language difficulty as Arabic is the national language in Saudi Arabia, it is estimated that only 5% of information provided via the Internet is based on Arabic language, the relatively high cost of telecommunications and internet service, weakness of network security, and

e-commerce and to facilitate the use of electronic contracts, there should be an appropriate legal environment. This requires a removal of legal barriers to the use of electronic contract and the adoption of a technological-neutral approach to contracts formed via electronic means.

2. The Thesis: Objectives and Approaches

The emerging electronic commerce has given rise to diverse legal issues and central to this is the development of online contracting or electronic contract.[6] The ability to enter into valid and binding contracts on-line is crucial if the digital revolution is to continue and for businesses and consumers alike to benefit from e-commerce.[7] In electronic contract, parties will form their business agreements via electronic means that have different features and qualities from contracts formed via traditional methods. Hence, questions arise regarding the applicability and appropriateness of existing contractual rules to electronic contract.

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management difficulties, such as the absence of a trusted authority that issues and verifies electronic certificates and transactions, lack of proper postal service system, and the absence of effective electronic payment system like that of SPAN (SPAN stands for the Saudi Payment Network, which is the only automated payments network in the kingdom of Saudi Arabia. It connects all ATM (Automated Teller Machine) and Point of sale (POS) terminals throughout the country to a central payment switch which in turn re-routes the financial transactions to the card issuer whether it is a local bank, VISA, AMEX or MasterCard. All Banks of Saudi Arabia are required by the Saudi Arabian Monetary Agency (SAMA) to issue ATM cards fully compatible with the network. All services are provided to the end customer free of charge, regardless of the ATM used, its operator, or the customer's card issuer.) For further information, see, the National Plan for Information Technology, prepared by a group of scholars from King Fahd University of Petroleum and Minerals (2001) King Fahd University of Petroleum and Minerals Press, Dhahran, Saudi Arabia, p. 54, and Al-Shaddi, S. (2007) *Toroq Hemaya al-Tejara al-Electroniyya*, al-Homaidhi Press, Riyadh, pp. 59-66.

[6]Arno, R. and Henrik, W. K. (2002) *eDirectives: Guide to European Union Law on E-Commerce*, Kluwer Law International, the Netherlands, p. 1.

[7] Stephen, Y. and Daniel, T. (2000) *E-Commerce A guide to the law of electronic business*, second edition, Reed Elsevier Ltd, UK, p. 74.

Islamic law *(Sharia)* touch on virtually every aspect of Muslims' life including commercial relations and it is commonly agreed that Islamic law is all-encompassing and valid for every time and place.[8] As a result, for the purpose of this thesis, is there room in light of Islamic contractual rules to adequately accommodate electronic contract? This thesis is carried out to examine existing Islamic contractual rules and to discuss whether they can be applied in electronic contract and whether their application inhibits the use of e-commerce.

Technology and the Internet have had a significant impact on Muslims' life and undoubtedly changed the ways of conducting business. It is important therefore to examine the validity of electronic contract in light of Islamic contractual norms. This work tends to subscribe that the untapped e-commerce potential in the Kingdom will be enlivened and developed if the regulatory regime, under the aegis of the Saudi Arabian legal framework, is based on the cultural values of the citizen and most importantly, within the precept of the *Sharia* (Islamic Law). It is argued in the thesis that although general Islamic contractual principles are sufficiently flexible and applicable to accommodate electronic contract, there is a need for regulatory clarification to provide greater certainty and a consistent legal environment for increased use of electronic contract.

[8] It is stated in the Holy *Qura'an* that "This day have I perfected your religion for you, completed My favour upon you, and have chosen for you Islam as your religion". See, chapter. 5 verse. 3 translated by Ali, A. Y. (1997) *the Meaning of the Holy Qua'an*, ninth edition, Amana Publications, Maryland, p. 245. See, Al-Twaijri, A. Ijtihad and Modernity in Islam, *Islamic Educational, Scientific, and Cultural Organisation*, available at: http://www.isesco.org.ma/english/publications/Islamtoday/24/p1.php

On 11 April 2007, Saudi Arabia established the Electronic Transactions Rule (or E-transactions Rule). As stated in Article 2, it aims to; 1. Put forward unified regulatory principles for the use of electronic transaction and signatures, and facilitating their application in private and public sectors… 2. Provide the confidence for the legitimacy of electronic transactions, signatures, and documents and their integrity. 3. Facilitate the use of electronic transactions and signatures at national and international levels… 4. Remove the obstacles facing the use of electronic transactions and signatures.

Chapter 4 of the Rule is devoted to electronic contract, specifically validating the use of electronic means to form contracts. Yet, despite the enactment of the Saudi E-Transactions Rule, more regulatory guidance is needed since it fails to sufficiently cover some controversial contractual issues resulting from the involvement of electronic contracts.

3. Scope and Limitation

This thesis seeks to study the essential elements that must be present for a contract to be validly formed in light of traditional Islamic law rules and then examine their availability in electronic contracts in order to discuss whether electronic contracts can be validly formed. The elements for a valid contract under Islamic law are: the legal capacity of the contracting parties, the legality of the subject matter, and the parties' intention to enter into a binding contract (in the form of offer and acceptance). This

thesis will address a number of legal issues that have emerged as a result of the use of electronic means of communication to form contracts; specifically whether electronic contracts can be considered as similar to face-to-face transactions or contracting inter absentees and then the possible application of the Islamic theory of 'meeting place', the issues of when and where the electronic contract is concluded, and the validity of electronic contract records and signature, in the case of dispute, as valid evidence in court.

When analysing these issues, the thesis will concentrate, mainly, on Islamic legal system with references to the approach of select Islamic legal jurists' in similar off-line commercial issues. Throughout the research references will be made to Saudi Arabian legal approaches, in particular, and contractual provisions made by other Arabic countries in traditional and electronic forms due to the influence of Islamic contractual principles and traditions on their legal systems.

In addition, due to the universality of contracting legal issues in e-commerce, this work will also consider leading international frameworks, specifically the UNCITRAL Model Law on Electronic Commerce and Electronic Signature since its global influence cannot and should not be ignored. Furthermore, the research examines potential legal difficulties and issues may result from the application of electronic contract and compares scholarly views from different legal backgrounds. In this regard, it is worth considering historical legal responses to a range of electronic forms of communications, such as the telephone and telex, as this may help signify how the formation of contracts via the Internet can be dealt with from a legal

perspective. It is worthwhile to mention that the research will be primarily based on library-based information, such as textbooks and journal articles. Many of these materials are written in Arabic form, thus, double efforts need to be made to reformulate these accounts in English form when writing up the thesis.

The main focus of this thesis is the contract of sale and therefore, contracts of marriage, contracts of money exchange, auctions and other forms of contract are beyond the scope of this research. Furthermore, the thesis will not touch upon other legal issues relating to electronic commerce, such as, intellectual property, trademark (domain names issues), data protection and Internet governance. Likewise, it is beyond the scope of this research to discuss online money fraud activities and money laundering.

4. Outlines of the Chapters

4.1. Chapter two

Since the discussion provided in this thesis focuses on the Islamic legal system, specifically on its practical application in Saudi Arabia, it is worthwhile to commence this study by clarifying Islamic law with reference to the core Islamic sources. Attention will be paid to defining the Saudi legal system and its correlation with Islamic law. Later, the concept of contract of sale will be defined in light of Islamic law from traditional and electronic perspective.

4.2. Chapter three

This chapter focuses on the legal capacity of the involved parties and the legality of the subject matter in contracts. First, consideration is given to the legal capacity of parties. Within this section the stages of legal capacity will be examined in light of Islamic law: discretion, puberty and prudence. In this regard, the Saudi legal system will be considered. This will be followed by a special focus on the validity of a minor's commercial conduct. A fundamental difficulty of electronic contracts surrounds personal identification; hence, this section examines a range of measures that can be deployed to establish legal capacity, namely personal details and the requirement of payment, in light of the aforementioned discussions.

The discussion develops to focus on the legality of contract subject. This includes an examination of specific conditions that need to be met under Islamic law, mainly the subject matter's existence and its legitimacy. Later, as part of the subject matter of contract, monetary payment in contract will be examined in light of electronic contracts. Within the payment section, the validity of payment in electronic commerce via cards will also be studied in light of Islamic law. Issues relating to the payment of interest will also be discussed. This will be followed by a special examination of debit and credit accounts from an Islamic legal perspective.

4.3. Chapter four

Chapter four focuses on the internal consent of the parties to enter into a binding transaction in the form of offer and acceptance to create a valid contract. This chapter starts by defining offer and acceptance in contracts and raises important principles related to their validity. The validity of expressing parties' agreement by writing and pre-programmed computer will be form an integral part of the discussion. As a related legal issue the difference between actual and expressed consent will also be discussed. The legal uncertainty of offer or invitation to treat in Internet transactions will also be considered. This is followed by a discussion on the issue of offer revocation. The chapter develops with a focus on the legal validity of using click-through agreement to express party intention. In this regard, the enforceability of a click-through agreement on a website's terms and conditions will be examined. Subsequently, the validity of expressing consent by silence in electronic contract will be dealt with.

Since parties involved in electronic contracts are distant from one another and communication is conducted through electronic means, products are not presented at the time of forming the contract and thus the consent may change upon receipt of the purchased item. Part three of this chapter discusses the rules of buying unseen products. Within this the option of inspection, as practiced under Islamic doctrine, will also be discussed and include an analysis of an appropriate time-period for this option to be held open. The chapter concludes with a summary of the provided discussion.

4.4. Chapter five

According to Islamic jurisprudence for a valid forming of a contract the exchange of offer and acceptance must be carried out during the parties' meeting place. This chapter devotes itself to discussing the rules of 'meeting place' and their application to electronic contracting. Initially, a clarification to the theory of 'meeting place' will be provided in light of Islamic legal principles. The theory of 'meeting place' is discussed in relation to face-to-face transactions and later in contracting inter absentees. The legal uncertainty of offer or invitation to treat in Internet transactions will also be considered. This is followed by a discussion on the issue of offer revocation. The parties' option to annul the contract based on the option of 'meeting place' will also be examined according to Islamic law. The chapter then focuses on the application of 'meeting place' rules to electronic contracts.

The application of 'meeting place' in verbal or video-verbal means of communication will also be discussed. Finally, a conclusion to the above-mentioned discussions will be provided.

4.5. Chapter six

Since the exchange of offer and acceptance under the 'meeting place' theory will naturally lead to the conclusion of the contract, this chapter focuses on the issue of when and where a contract is concluded in light of electronic contracts. Initial consideration is devoted to the point at which a contract is deemed to be concluded.

This requires an examination of current legal theories provided in contact inter absentees. Thereafter, the discussion focuses on the conclusion of the contract via e-mail and website communication including an examination of international approaches.

The second part of the chapter is dedicated to the issue of place. This involves a discussion of jurisdiction issues since online commercial activities are, from the nature of the Internet, borderless. The study provided in this part will focus on two main issues namely jurisdiction in Business-to-Business (B2B) contracts and jurisdiction in Business-to-Consumer (B2C) contracts.

4.6. Chapter Seven

As in traditional contracts, it is possible for disputes to arise in online contracts this chapter therefore turns its attention to a discussion on the validity of electronic contract records and signature from an evidentiary perspective. The admissibility of electronic records will be considered first. In this regard, it will be useful to define essential legal thoughts on the concept of evidence in court. In this regard, the validity of means of evidence without restriction will be addressed. Subsequently, focus turns to the validity of electronic records in evidence. The admissibility of electronic records in evidence and particularly the legal requirement of 'original' will be addressed in light of Saudi Law of Procedure before *Sharia* Court (LPSC). An

international approach to the admissibility of electronic records as evidence will be also be examined.

The second part of chapter seven focuses on the admissibility of electronic signature as evidence in the case of a dispute. This commences with an analysis of the traditional definition of signature and the implications to electronic signatures. Subsequently, focus turns to the concept of electronic signature in light of the Saudi legal system. This is followed by a discussion on the evidential value of electronic signature in court. At the end, important points will be highlighted as a conclusion.

4.7. Chapter eight

This chapter provides a conclusion to the work with a re-examination of the ability of existing Islamic contractual rules to accommodate electronic contract. It also provides a model law which aims to provide the legal certainty essential to the promotion of electronic contract within the Kingdom.

Chapter Two: Building Block

1. Introduction

Since the focus of this thesis is the validity of contracts formed over the Internet in light of conventional commercial doctrine under the Islamic legal system, it is important to outline fundamental elements of the Islamic legal system and its development.

This chapter aims, primarily, to provide an introduction to Islamic law with reference to its essential sources. It is intended that this account will outline aspects most relevant to the focus of this research – it does not aim to provide an extensive examination of the Islamic legal system.

This introduction will be followed by a discussion of legal aspects of commercial practice in Saudi Arabia. It is necessary to note that a substantial part of the system is based on regulations derived from the principles of Islam. Generally speaking, the law of Islam regulates all aspects of the legal system in the Kingdom including commercial activities. Nominated judges in Saudi courts refer to it to reach judicial decisions on all cases brought before them. However, the second, more minor part of the legal system is the royal law-making which predominantly covers administrative matters and issues relating to public goods which have not been extensively dealt with by Islamic doctrines. [9]

Finally, this chapter examines the concept of contract under Islamic rules with specific focus given to the application and legal position of Islamic law in reference to electronic commerce (e-commerce) as a modern and additional method to conducting business.

[9] For further information about Islamic law and its application in Saudi Arabia, please see, Vogel Frank E (2000) *Islamic Law and Legal System Studies of Saudi Arabia*, Brill, the Netherlands, and Amin Sayed Hassan (1985) *Middle East Legal Systems*, Royston Limited, London, pp. 305-327.

2. Islamic Law – A General Introduction

2.1. What is *Sharia*[10]

Sharia is usually used to represent the law of Islam. As a system of law it differs, to some extent, from any other standard text-based legal system. What is generally understood by the term 'law' in English is only a part of the much wider concept of *sharia*. It is maintained that "*sharia* is not law in the modern sense of the word any more than it is an account of its subject matter."[11] The concept *sharia*, though, embodies all branches of law and designates the rules and regulations governing all aspects of a Muslim's life including life after death.[12]

Because of its breadth of scope, the term *sharia* cannot be rendered in English by any single word. The closest approximation may be 'religion', though *sharia* implies a stress on the prescriptive side of religion. *Sharia* encompasses many aspects of a Muslim's life both in this world and the next, and thus comprises the ethos of religion, the tenets of the law, and the bases of other disciplines. It governs, in short, man's

[10] In this research certain Arabic terms will be defined and then used in italic form, thereafter, and sometimes I will use the closest English translation of the Arabic term to represent those words. There are two rationales behind this: one is that they are usually understood and used in their Arabic terms, and from a linguistic point of view, sometimes there is no absolute translation for them in English, or the literal translation does not imply the proper meaning.
[11] The Encyclopaedia of Islam, Edited by Houtsma M. TH., Wensinck A. J., Gibb H. A. R., Heffening W. and Lėvi-provençal, E. J. Brill, Leyden, Holland (1934), vol. 4, p.321.
[12] Rayner S. E. (1991) *the Theory of Contracts in Islamic Law*, Graham and Trotman, London, p. 1.

conscience, intellect and act, and his relationship with God, his environment, and other men.[13]

2.2. The *Figh* 'Islamic rules'

The part of *sharia* that is more concerned with the actual behaviour of man in this world is termed *figh*. Literally, it means 'understanding', denoting human understanding of the Divine Law. *Figh* consists of detailed rules framed by opinions of scholars who have become qualified, because of their piety and learning, to interpret the scriptural sources[14] and thence derive legal rules.[15] These opinions not only comprise those formulated in the past but also those of the present created by these religious-legal scholars, known as *ulama* in Arabic, a term meaning 'possessors of knowledge' and designating the possessors of the knowledge of Islamic *sharia*.

However, the majority of the legal rules of Islamic law were framed in the early centuries of Islamic history and written and recorded in books by medieval scholars.[16] Most of the legal rules established since then have still relied heavily on those original texts. Legally, contemporary Islamic legal scholars are not obliged to follow them. However, when confronted with a question Muslims jurists, as a rule, choose one of

[13] Owsia Parviz (1994) *Formation of Contract, a Comparative Study under English, French, Islamic and Iranian Law,* Graham and Trotman, Landon, p. 17
[14]They are the Holy Book and The Prophetic Traditions, which will be discussed afterward.
[15]Vogel Frank E, *Islamic Law and Legal System Studies of Saudi Arabia*, op cit., p. 5
[16] It commenced about the beginning of the second century of the Islamic history and ended roughly in the middle of the fourth century.

the available inherited rulings and justify their preference for a specific source with valid proof.

And yet, this thesis does not support the view that sees this as a closed door on human striving and understanding[17] of the law. Accordingly, any new religious thought must not go beyond the ambit of those recorded by medieval scholars.[18] Yet, it would be beneficial for the development of Islamic doctrine to make trained scholars, at any period of time, free to introduce a new *fatwa*[19] based on valid and strong evidence, even if this fresh religious judgment contradicts a previous rule provided by earlier jurists. This approach is justified on the ground that some of the recorded judgements may be based on contexts and circumstances surrounding particular cases, or may be related to ideas of public interest which invariably change from time to time. There is no doubt that the jurists of Islamic law are free to establish new legal rules upon unregulated and newly emerged cases at any time.

2.3. Sources of Islamic Law

[17]This denotes to the meaning of *Ijtihad* in Arabic term, literally 'striving'. *Ijtihad* is the process by which qualified scholars find law by interpretation of the revealed scripts. See, Vogel Frank E, *Islamic Law and Legal System Studies of Saudi Arabia*, op cit., p. 4.
[18]Kamali Mohammad Hashim (1991) *Principles of Islamic Jurisprudence*, revised edition, the Islamic Texts Society, Cambridge, pp. 389-391. And Ramadan Tariq (1999) *To be a European Muslim*, the Islamic Foundation, Leicester, pp. 88-89. The reason that has lead some prominent scholars to talk of the closure of human striving is that there were increasing practices of *ijtihad* by unqualified people who started issuing false judgements and thus this opinion was made to prevent such fabricated jurists from misleading society.
[19]An Arabic term which means a scholar's opinion or judgment in a legal issue.

The term ‘source’ when used in the context of law has more than one meaning. Often it denotes the original basis of a system, such as the Holy Book or *Qura’an* for Islamic law. Sometimes the main body of the law is meant, such as judicial precedent in English law. ‘Source’ may also refer to an originally alien influence, such as, mercantile customs for some commercial aspects of English law. [20] Furthermore, the term may indicate whence a rule or legal argument is derived. When used in the plural, it is generally taken today as referring to the totality of rules and authorities set in a structural hierarchy.[21]

Islamic law is based on four sources: the *Qura’an (*or Holy Book), the *Sunnah* (or Prophetic Traditions), *Ijma* (or consensus), and *Qias* (or analogy). No other source is formally recognised, yet certain supplementary sources have had, and continue to play a vital role, albeit to varying degrees, in the development of the law. In this study reference will be given to the two most relevant supplementary sources, namely *maslaha* (or public interest) and *urf* (or custom). These sources are of significant use in Islamic doctrine to deduce legal decisions for new legal matters, especially in issues relating to economy, politics and business.

This chapter divides the sources into two categories – primary and secondary. Each class features more than one kind of source as indicated below.

[20] Owsia Parviz, *Formation of Contract, a Comparative Study under English, French, Islamic and Iranian Law* op cites, p. 55.
[21] Ibid.

2.3.1 Primary sources

The *Qura'an* or Holy Book

The *Qura'an* is the Holy Script of the Muslim and the foremost source of the law of Islam. The Arabic term *Qura'an* literally means 'reading' or 'recitation'. It may be defined as "the book containing the speech of God revealed to the Prophet Muhammad in Arabic and transmitted to us by continuous testimony."[22] The Revelation was conveyed to the Prophet by the Noble Angel Gabriel, who took the Divine Words directly from Allah and transmitted them to the Messenger of God (the Angel acting as an intermediary between *Allah* and His Messenger). The authenticity of the Holy Text is proven by universally accepted testimony. It has been protected from any alteration and retained intact in memory and in written record throughout the generations.[23]

The *Qura'an* is composed of more than 6,200 verses divided into 114 chapters. Its individual verses were pronounced over roughly 23 years of Muhammad's Prophet-hood. Out of these verses, only, around 350 verses establish legal rules.[24] The majority are concerned with matters of historical narrations, morality, the five pillars of Islam[25] and a variety of other issues. This signifies that the *Qura'an* is not a code of law or a constitutional document. A great number of the legal verses were revealed

[22]Kamali Mohammad Hashim, *Principles of Islamic Jurisprudence*, op cit., p. 14.
[23]Ibid, p. 17.
[24] Munir Lila Zakiyah, *General Introduction to Islamic law*, p. 8, online source, available at; http://www.lfip.org/laws718/docs/lily-pdf/Introduction_to_Islamic_Law.pdf
[25]They are, profession that there is no God but God (*Allah*, in Arabic), and his Prophet (the last of the prophets, the "seal of the prophets") is Muhammad; the five daily prayers, paying the poor-rate, fasting during Ramadan, and performing pilgrimage.

in response to problems that emerged over the lifetime of the Prophet.[26] Some aimed at voiding and repealing certain aspects of Arabic society, such as infanticide[27], gambling[28], and interest on loans[29] and other verses set out penalties with which to enforce the reforms that the *Qura'an* introduced.[30]

The larger part of the sacred legislations, however, tends to cover general principles relating to particular subjects. These general guidelines feature almost all aspects of Islamic jurisprudence. Al-Shatibi stressed this view and commented that "experience shows that every qualified jurist who has resorted to the *Qura'an* in search of the solution to a problem has found in the *Qura'an* a principle that has provided him with some guidance on the subject."[31]

This does not mean that the Holy Book provides a direct and specific rule to every issue. Rather, the *Qura'an* has laid down broad guidelines which cover, in a general sense, every conceivable matter. This is the meaning of the often-quoted declaration that "nothing have we (God) omitted from the Book."[32] This denotes that the general principles of the law are exhaustively covered in this Heavenly Book.

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[26] Munir Lila Zakiyah, *General Introduction to Islamic law*, op. cit., p. 8.
[27]Chapter. 6, verse. 140.
[28]Chapter. 5, verse. 90.
[29]Chapter. 3, verse. 130.
[30]Kamali Mohammad Hashim, *Principles of Islamic Jurisprudence*, op cit., p. 20.
[31]Al-Shatibi Abu Ishaq Ibrahim (1341 A.H) *al-Muwafaqat fi Usul al-Ahkam*, edited by Muhammad Hasanayn Makhluf, Al-Matba,ah al-Salafiyyah. Cairo, as translated by Kamali Mohammad Hashim, *Principles of Islamic Jurisprudence*, op cit., p. 29. The initial A.H. related to the Islamic Calendar which ascribed to the time when the Prophet emigrated from his old city Mecca to the new one when he established the first ever Muslim land in the earth. This calendar was introduced by Umar ibn al-Khattab during his leadership.
[32]Chapter. 6, verse. 38. Translated by Ali Abdullah Yusuf (1964) *the Holy Qur'an Text. Translation and Commentary*, Dar al-Arabia, Beirut, p. 298.

Therefore, this leads to the conclusion that the contents of the Holy Book need a considerable amount of elaboration, which was often provided, although not exhaustively, by the Traditions of the Prophet.[33] To clarify, in civil transactions the *Qura'an* emphasised the legality of sale and the prohibition of interest.[34] Yet, details of lawful and illegal transactions have not been indicated in the Divine Book. They have been, however, specified in the Prophetic Traditions. Islamic law scholars made further elaborations after the death of the Prophet based on general legal principles and in the interest and prevailing customs of the people.

Prophetic Traditions - *the Sunnah*

Whilst the Prophet was living he would answer the queries of his followers, adjudicate their disputes, and set rulings, either by words or through his actions, which were considered alongside the commandments of the *Qura'an*.[35] After His demise, the words and actions of his ministry were passed to succeeding generations. These Prophetic Traditions were maintained and recorded in hearts and in writing.

In jurisprudential terms, the *Sunnah* refers to the Prophet's Sayings, his acts, and whatever he has tacitly approved.[36] One example of His Sayings addressing certain commercial practice is "He who buys food should not sell it until he has taken

[33] Ibid, p. 29.
[34]Chapter. 2, verse. 275.
[35]Owsia Parviz, *Formation of Contract, a Comparative Study under English, French, Islamic and Iranian Law,* op cit., p. 69.
[36] Munir Lila Zakiyah, General Introduction to Islamic law, op. cit., p. 9.

possession of it." Ibn Abbas[37] said, "I regard everything (such as land or tree) like food as far as this principle is concerned."[38] In his acts he exemplified, for example, ways to deal with people in businesses. Moreover, the Messenger was sent to mankind while people traded among themselves, and He accepted this practice whilst disapproving of certain business aspects such as loan-interest, which illustrates His tacit approval to the people's customary ways of business dealings.[39]

Prophetic Tradition is considered one of the primary sources of law.[40]The *Qura'an* testifies to its authority and commands followers to comply with its rules.[41] Generally speaking, the *Sunnah* is regarded as a Divine Text similar to some extent to the *Qura'an*, albeit one formulated by a human person. This is due to the fact that Prophet Muhammad was, originally, inspired, His words and actions seen as coming from Heaven (*Allah*) and not self-created.[42] While God pronounced the Qura'anic verses word-for-word, the *Sunnah* includes the words of the Prophet himself but with the rules and ideas generated from God. The *Sunnah* therefore is not necessarily the exact

[37]Ibn Abbas was a cousin of the Prophet. He was born in Mecca 618-619 and died in Ta'if 68 A.H. (687-688) and he is considered to be one of the most knowledgeable scholars in Islamic law. *Al-A'lam*, vol. 4, p. 94.
[38]This Prophetic Tradition is narrated by Imam Muslim, *Sahih Muslim*, rendered into English by Siddiqi Abdul Hamid (2000) Kitab Bhavan, New Delhi, vol. 3, p. 968. Further discussion will be given to this issue in the next chapter under the subject matter of contract.
[39]Al-Zuhayli Wahbah (2003) *Financial Transactions in Islamic Jurisprudence*, translated by el-Gamal Mahmoud, Dar al-Fikr, Damascus, vol. 1, p. 6.
[40]Apart from a few jurists who indicate that the Holy Book is the only source of the law and voided the validity of the *Sunnah* as a source. For further discussion, please see, Al-Nabhan Muhammad Pharoogh (1974) *Netham al-Hukom Fi al-Islam*, al-Kuwait Publishers, Kuwait, p. 309-311.
[41]Allah says: "take what the Apostle (Muhammad) assigns to you, and deny yourselves that which he withholds from you." Chapter. 59, verse. 7. See, Ali Abdullah Yusuf, *the Holy Qur'an Text. Translation and Commentary*, op cit., p. 1523.
[42]Chapter. 53, verses. 3-4, it is said that: "Nor does he (the Prophet) say (aught) of his own desire, it is no less than inspiration sent down to him, from God." Ibid, p. 1443.

words of God but rather their meanings as explained by the Prophet. This is one of the differences between these heavenly sources.[43]

Whilst the Prophetic Traditions constitute a Divine Source of the law, similar to some extent to the Book of Allah, the *Qura'an* takes precedence over the *Sunnah* in terms of its authority and significance. Therefore, an Islamist jurist must first consult the *Qura'an* and only then refer to the *Sunnah* if he fails to find guidance in the former. Assuming that he finds the answer clearly provided in the *Qura'an*, it must be followed and be given priority over any ruling of the Prophetic Traditions.[44]

2.3.2. Secondary Sources - *Ijma* (Consensus) and *Qias* (Analogy)

The secondary sources relate to sources other than the *Qura'an* and *Sunnah*. These were introduced and developed in order to fully comprehend instructions from the Holy Book and the Prophetic Traditions[45], and were consulted when the two principal sources were not enough to resolve new problems.[46]

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[43]Some jurists lay down certain differences between them, for example, it has been indicated in the Divine revelation that the Book of Allah will be preserved (chapter. 15, verse. 9), whereas, this Divine promise has not been given to the Prophetic Traditions. Another difference is that the entire text of the *Qura'an* has reached us through continuous testimony. In contrast, the most part of the Prophetic Traditions has been narrated and transmitted in the form of an individual account. For further information please see, Kamali Mohammad Hashim, *Principles of Islamic Jurisprudence*, op cit., pp. 57-58.

[44] There are several reasons for the priority of the *Qura'an* over the Prophetic Traditions. One of these reasons is that the authenticity of the Book of Allah is not open to doubt as it is transmitted to us through continuous testimony, hence, must take priority over the *Sunnah* with its speculative authenticity. It is sufficient here to draw attention to one of these reasons and further reasons could be found in, Kamali Mohammad Hashim, *Principles of Islamic Jurisprudence*, op cit., p. 59.

[45]Dien Mawil izzi, *Islamic Law from Historical foundation to Contemporary Practice*, op cit., p. 40.

[46] Musa Muhammad Yousef (1996) *al-Amwal wa Nadharryyat al-Aqd fi al-Figh al-Esslami*, Dar al-Fikr al-Arabi Cairo, p. 117.

Consensus and analogy constitute secondary sources in Islamic law. No other sources are conventionally recognised, yet certain supplementary sources have had, and continue to have, notable influence in legal concerns. Initially, consideration will be given to the secondary sources, beginning with consensus and then the discussion will move on to analogy. Subsequently, this thesis will outline some of the widely recognised and frequently used supplementary sources in the law, which are of significant importance to this research, namely *maslaha* or 'consideration of public interest' and *urf* or 'custom'.[47]

Consensus of Opinion – *Ijma*

Ijma or consensus is one of the most radical principles in Islamic doctrine. The word originally meant 'coming together' or 'concurrence', and it came to denote the unanimous authority of the Prophet's Companions on any point of law. Later and more broadly it was taken to mean the concurrence of the body of informed Muslims on points of behaviour, or, in modern terms, the force of public opinion.[48] As a legal term, consensus is defined as agreement of the jurists[49] among the Muslim

[47] There are more controversial and disputable subsidiary sources which can be found in the specialised Islamic Jurisprudence textbooks, e.g. the legal opinion of the Prophet's Companions, and the previous Divine canons before Islam. For further discussions, see, Dien Mawil izzi, *Islamic Law from Historical foundation to Contemporary Practice*, op cit., pp. 51-86, Kamali Mohammad Hashim, *Principles of Islamic Jurisprudence*, op cit., pp. 229-264.

[48]Rahman Ghazi Shamsur (1981) *Islamic Law "As administered in Bangladesh"*, Islamic Foundation, Bangladesh, pp. 21-22.

[49]According to this definition only Muslim jurists have a voice in *Ijma*. Great diversity of opinion exists regarding who may participate in *Ijma* and who are qualified as eligible jurists, which can be found in the specialised textbooks. It is out of the scope of this paper to examine all of these opinions and it is sufficient to indicate two of the widely known arguments and more opinions can be seen in the available Islamic jurisprudence textbooks. Some legal doctors hold the view that the entire Muslim community must take part in consensus for it to be legally accepted. This view might be, in theory, conceivable, but in practice it is impossible to achieve. The most widely accepted view in this respect indicates that the qualified jurists are those who are in any given period the acknowledged Muslims of

community in a particular age, after the death of the Prophet Muhammad, on a legal question.[50]

Ijma developed as a valid source in the law on the authority of the *Qura'an* and the *Sunnah*. Whilst numerous Divine Texts derived from the *Qura'an* and the Traditions support the validity of consensus,[51] it should be noted that none of the available textual evidences in supporting the *ijma* amounts to conclusive proof.

One of the most frequently quoted proofs for the authority of *ijma* is the Prophetic Saying, "My followers (or community) shall never agree upon an error."[52] This statement is not clear in legitimising consensus as a source in the law, and yet, it shows that when there is agreement among the Muslim community then falsehood cannot occur. Thus, if their decision is absolutely correct it has to be implemented.

However, there is disagreement on the authority of this saying and the subsequent adoption of *ijma* as a source of Islamic law and dogma. Some argue that the consensus of the community was intended for political issues rather than legal ones.

Islamic law and that these who are eligible to participate in the council agreement. Goldziher describes them as those "who are the men with the power to bind and to loosen; it is their office to interpret and deduce law and theological doctrine, and to decide whether law and doctrine are correctly applied". See (Goldziher Ignaz (1981) *Introduction to Islamic Theology and Law*, Princeton University Press, Princeton, New Jersey, 'translated by Andras and Ruth Hamori', p. 52) Therefore, the non-Muslims are excluded from such juristic agreements because the power is held to be vested, by the texts, in the Muslims alone. Minors and lunatics are also excluded on account of their immature or defective understanding and those who are not learned in the law are also barred from participation in the unanimous agreement. See, Abdul Rahim (1911) *the Principles of Muhammadan Jurisprudence*, Indus Publishers, Lahore, p. 118.

[50]Ibid, p. 115, and Rahman Ghazi Shamsur, *Islamic Law "As administered in Bangladesh"*, op cit., p. 23.

[51] For further information about these evidences, please see, ibid, pp. 175-182, and Abdul Rahim, *the Principles of Muhammadan Jurisprudence*, op cit., pp. 115-116.

[52]Ibn Majah, *Sunan*, *Hadith* no. 3950, cited after Kamali Mohammad Hashim, *Principles of Islamic Jurisprudence*, op cit., p. 179.

In other words, the Prophetic Statement applies solely to political agreements; hence there is no proof to be taken from the above Statement in supporting the legitimacy of *ijma.*[53]

In contrast, it is followed that in fact there is no separation of theology from practice and law from politics. Accordingly, if the unanimous agreement was to be implemented on an important political matter then the same treatment should be given to all other agreed issues.[54] It is also stated that there is no evidence to indicate that the Prophetic Provision relates merely to political agreement and excludes all other agreements[55]. Therefore, consensus in the foregoing Saying includes unanimous political agreement as well as agreements based on legal matters.

Paradoxically, the problem with *ijma* begins with the definition of the term. There is no *ijma* or consensus on the definition of *ijma* and its acceptance demands universal agreement between qualified Muslim jurists in a given time. Such agreement is unlikely to be obtained today when jurists are scattered across the world in distant places, continents, and cities - access to every individual, and the collation of their views, is beyond the bounds of practicality.[56] Provided that the validity of *ijma*, as established in Islamic jurisprudence, is nothing less than universal consensus of

[53]This argument was put forward by Imam Al-Harmayn Abu al-Ma'ali al-Juwayni, (AH 419-478). His Book is entitled *Al-Ghiyath al umam fi iltiyath al-zulam*, Qatar, 1401. Cited after Dien Mawil izzi, *Islamic Law from Historical foundation to Contemporary Practice*, op cit., p. 45.
[54] Dien Mawil izzi, *Islamic Law from Historical foundation to Contemporary Practice*, op cit., p. 45
[55] Ibid.
[56]Kamali Mohammad Hashim, *Principles of Islamic Jurisprudence*, op cit., p. 182.

Islamic law scholars then there can be no form of consensus if a single scholar is missing or in disagreement.[57]

Furthermore, if an agreement is made between all scholars, as a rule, they have to maintain their view until their death. Hence, if some or even one jurist changes his opinion before his demise, it would invalidate the entire consensus. And then there is the problem of monitoring the consensus - how can scholars' agreement be continually assessed? Moreover, some jurists, in circumstances of political sensitivity, may not be able to disagree on a point due to possible intimidation.

Thus, it can be concluded that the logistics of establishing consensus is impossible. Ahmad Ibn Hanbal[58] aptly commented that "the man who claims (the occurrence) of consensus is a liar; how does he know that they did not disagree after that."[59]

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[57] Ibid, p. 168.

[58]Abu abd-ullah Ahmad Ash-Shaibani al-Marwari, generally known by the name of 'Ibn Hanbal', who founded the fourth and the latest school of thought under the Sunni sect, was born in Baghdad, Iraq, 164 A.H. (780 A.D.) and died at 241-855. The followers of his doctrines, though at one time very numerous, are at present seldom out of the confines of Arabia. The Hanbali School is the dominated sect in Saudi Arabia, Kuwait, and a large part of Syria, Iraq, and the Gulf States. The other Sunni Schools are, Hanafi, Maliki, and Shafii, respectively. The founder of the Hanafi sect is Abu Hanifah Numan Bin Thabit, who was the principal of the Imams. He was born at Kufah, the ancient capital of Iraq in (80/699) and died in prison at 150/767. The Hanafi School is spread over various countries, particularly, Turkey, Bangladesh, Pakistan, India and some parts of Arabia. Malik Bin Anas is the eponym of the Maliki sect. The exact date of his birth is uncertain but the hypotheses vary between the dates of A.H. 90 and 97. He died at the age of about 85 after a short illness in the year 179/796. It is the predominant school in northern states and Africa. The founder of the third sect was Abd-ullah Muhammad Bin Idris ash-Shafei, was born at Askalon in Palestine (150 A.H.), studied at Gaza, then went to Mecca, Baghdad, Egypt and died at Cairo in (204 A.H.). Egypt is the principal stronghold of the Shafii's sect; however, it is followed in other parts of Africa, in Arabia, Malaysia, and some parts of India. For further information, please see, Abdul Rahim, *the Principles of Muhammadan Jurisprudence*, op cit., pp. 26-30, Dien Mawil izzi, *Islamic Law from Historical foundation to Contemporary Practice*, op cit., pp. 13-25, Klein F. A. (1979) *the Religion of Islam*, Curzon Press, London, pp. 34-35, and Rahman Ghazi Shamsur, *Islamic Law "As administered in Bangladesh"*, op cit., pp. 33-35. These four sects are the main schools under the Sunni sect, and there are others, but they are of no significance at present. The other sect among Muslims is the Shia school, and it is out of the scope of this research. A special reference to the Hanbali School will be given in this paper as it is the dominant sect in Saudi Arabian law.

Consequently, it can be concluded that the *Qura'an* and the *Sunnah* are the indisputable and agreed sources in the law. They cannot be revoked or overlooked and they have to be respected and implemented at all times. Therefore, given that the consensus is reached a legal matter based on the public interest or prevailing customs, it can be rejected when it becomes unsuitable to the next generations. Muhammad Hamidallah stresses that "if a consensus is reached on some issues and it is found to be unsuitable, the possibility remains that we may change and cancel it."[60]

Lastly, it can be said that with the exception of agreements made by the Prophet's Companions, any other consensus, as construed in Islamic doctrine, thereafter would be difficult to obtain. Since the Prophet's Companions were relatively few in number and were widely known their agreements could have been easily reviewed but in more recent times consensus would be hard to achieve due to the difficulty of obtaining an agreement from all the available jurists in any given period.

Analogy or *Qias*

As aforementioned, Islamic law is part of a textually based faith system (the Holy Book and the Traditions of the Prophet). However, a text cannot be sufficient to resolve new questions raised by emerging developments in human life. The *Qura'an* and the Prophet's Traditions did not cover all contingencies. As a result, the principle was established that where there was an absence of clear and direct precedent in the

[59]Dien Mawil izzi, *Islamic Law from Historical foundation to Contemporary Practice*, op cit., p. 42.
[60]Muhammad Hamidullah (1993) *the Emergence of Islam*, edited and translated by Afzal Iqbal, Islamic Research Institute, Islamabad, p. 97.

authoritative sources, those Divine Sources may be searched for a case sufficiently similar in underlying principles to provide an analogy, and thus deduce a correct judgment.[61] Analogy is defined as a method used by jurists to compare cases in order to reach a legal decision.[62] In other words, analogy can be used as a tool to regulate new issues not directly addressed in the Divine Sources by comparing it with explicit rules provided in primary sources.

Despite the fact that there is no clear authority provided for *Qiyas* neither in the *Qura'an* nor in the *Sunnah*, the majority of Islamic legal doctors have validated the use of analogy in the law.[63] It must be noted, however, that the Traditions of the Prophet validated implicitly the use of individual judgment (analogy) when there is no direct provision for a given issue. Often jurists quote the following Prophetic Report to support their views, citing the account of when the Prophet sent Muadh bin Jabal[64] to Yemen as their Judge and Governor. The Prophet asked Muadh questions, upon the latter's departure to Yemen, in answer to which Muadh replied that he would resort to his own individual judgment in the event that he failed to find guidance in the

[61]Bannerman Patrick (1988) *Islam in Perspective a Guide to Islamic Society, Politics and Law*, Routledge, London and New York, p. 38.
[62]Ibid.
[63] A few jurists deny the authority of analogy as a valid source of the law. They relied, in supporting their views, upon certain general texts. However, their views have no significant impact on the validity of analogy as a source and did not obtain wide audience. For further information, please see, Abdul Rahim, *the Principles of Muhammadan Jurisprudence*, op cit., pp. 139-140, and Kamali Mohammad Hashim, *Principles of Islamic Jurisprudence*, op cit., pp. 198- 199.
[64]Muadh ibn Jabal ibn Aws, was living in Medina before Islam and he embraced Islamic at early age when he was at around 18 years old. He was known for his intelligence, and for his massive knowledge of Islamic law. He passed away on the year of 18 A.H. nearby Syria as a result of plague illness spread in the area where he used to live. Avialable at:
http://www.sahaba.net/modules.php?name=Content&pa=showpage&pid=44

Qura'an and the Prophetic Traditions, and the Prophet was very happy when he heard this.[65]

It is clearly understood from this story that the divine sources have not provided a direct answer to every newly arising matter, thus, Islamic legal jurists are required to use their intellects to deduce rules by analogy when they confront such matters.

Another proof of analogy as a valid source is the practices of the Prophet himself. It is reported in one incident that a woman asked him whether she could perform the pilgrimage on behalf of her dead father and whether he would benefit if she performed pilgrimage on her fathers behalf. He replied in affirmative, using analogy, "supposing your father had a debt to pay and you paid it on his behalf, would this benefit him? To this her reply was in the affirmative……[66]

Islamic jurists have established certain conditions for the use of analogy to be legally accepted. If one or more of these requirements is missing the rule is rejected. The widespread application of the analogical deduction concerned doctors of Islamic Doctrine who feared that unqualified jurists could use it to establish rules contradicting Divine Will. Therefore, they identified several requirements that have to be in place in order for analogy to be legitimate in the law.[67]

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[65]This Tradition is narrated by Abu Dawud, cited after Kamali Mohammad Hashim, *Principles of Islamic Jurisprudence*, op cit., p. 218.
[66]Doi Abdur Rahman I (1984) *Shariah: the Islamic Law*, Ta Ha Publishers, London, p. 73.
[67] This paper will only highlight some of the major requirements and further conditions can be found in the specialised Islamic Jurisprudence textbooks. See for example, Dien Mawil izzi, *Islamic Law from Historical foundation to Contemporary Practice*, op cit., pp. 53-56, and Kamali Mohammad Hashim, *Principles of Islamic Jurisprudence*, op cit., pp. 200-211.

Suffice to indicate here that analogy must be based on the *Qura'an* and the *Sunnah*, and it is claimed that consensus, could also be a basis for analogy.[68] However, consensus as a source which analogy can rely on in the deduction of law may not represent a clear foundation upon which analogy can be introduced.[69] In addition, there is considerable doubt on the possible existence of *ijma*, particularly, after the demise of the Prophet's Companions. Overall, then, it would be implausible to include consensus as a basis for analogical deduction.

As indicated above, the Holy Book and the Traditions of Prophet Muhammad are the foremost sources of legislation in Islam; hence, the deduction of rules by analogy must not conflict with the context of the Holy Book and the Traditions of Muhammad. The basic function of analogy is to apply a rule on a case from another ruled one, both of them sharing the same effective cause. For example, the clear reason for the prohibition of alcohol[70] is that it leads to intoxication. Hence, by analogy, we can extend this rule to cover any kind of drink that may lead to intoxication.[71]

2.3.3. Supplementary Sources

Considerations of Public Interest or *Maslaha*

[68] Dien Mawil izzi, *Islamic Law from Historical foundation to Contemporary Practice*, op cit., p. 53.
[69] Ibid.
[70] Chapter. 5, verse. 90.
[71] Dien Mawil izzi, *Islamic Law from Historical foundation to Contemporary Practice*, op cit., p. 55.

The concept of public welfare and interest occupies a considerable position in the formation of Islamic law and the interpretation of texts. The Arabic term for public welfare is *maslaha*, which designates the construction and restoration of good, and the removal of harm or corruption.[72] Al-Ghazali[73] defined *maslaha* as "considerations which secure a benefit or prevent harm but which are, simultaneously, harmonious with the objectives of the *Sharia*." These objectives, al-Ghazali stated, "consist of protecting the Five Essential Values, namely religion, life, intellect, lineage and property. Any measure which secures these values falls within the scope of public interest, and anything which violates them is evil, and preventing this is also for the public welfare, *maslaha*."[74]

Maslaha relates to a situation where there is no other reference made to a given issue. It allows jurists to refer to their own analysis and reasoning in order to introduce juridical decisions, taking into account their historical and geographical contexts.[75] For *maslaha* to be upheld as a valid source in the law, it must not contradict or conflict with the primary sources of Islamic law, namely the *Qura'an* or the Prophet's Traditions.[76]

[72] Ibid, p. 69.
[73] Al-Ghazali, Abu Hamid Muhammad (1058-1111), is on of the greatest Islamic jurists, was born and died in Tus, in the Khorasan province of Iran. For further information about his life and notable works please see, http://www.ghazali.org/articles/gz1.htm
[74]Al-Ghazali, Abu Hamid Muhammad (1937) *al-Mustasfa min Ilm al-Usul*, Al-Maktabah al-Tijariyyah, Cairo, vol. 1, pp. 139-140. Translation after, Kamali Mohammad Hashim, *Principles of Islamic Jurisprudence*, op cit., p. 267.
[75]Ramadan Tariq, *To be a European Muslim*, op cit., p. 78.
[76] Ibid.

Maslaha is frequently used in the modern world to meet new situations and challenges. One example is the prohibition of selling grapes, which is otherwise legal, to wine merchants due to the fact that they may use them to ferment wine, which is unlawful under Islamic law for the protection of public faith and interest. Similarly, it is prohibited to sell firearms during a civil disturbance as this may intensify the struggle.[77]

There are diverse opinions on the validity of *maslaha* as a proper ground for legislation. One opinion considers public interest is a proper basis for doctrine, whilst, another other view rejects its authority as a valid source and thus voids any rules which rely solely on the idea of the welfare of the society.[78] This rejection is based on the grounds that the use of this source would open the door to unrestricted use of fallible human thoughts in regulating cases and the neglect of the divine textually sources in the name of public interest. In addition to such concerns, the notion public interest is not properly defined, being variable from place to place and time to time. Recently, this source has been wrongly used to justify any kind of new legal decision, even if it plainly contradicts clear texts in the *Qura'an* or the *Sunnah*, on, for example, rules concerning interest or inheritance.[79]

However, the scholars who validate the use of public interest as a source in the law have responded to such fears and have put forward certain conditions to restrict the use of this notion and to block the door to any potential abuse. There are various

[77]Doi Abdur Rahman I, *Shariah: the Islamic Law* op cit., p. 83.
[78]Doi Abdur Rahman I, *Shariah: the Islamic Law* op cit., p. 81
[79] Ibid.

established conditions and it suffices to cite here those main conditions which are generally recognised. Tariq Ramadan sums up three main conditions for the public interest to be legally accepted when there is no text available, as follows: "1- The analysis and the identification have to be very close in order for us to be certain that we are facing a genuine *maslaha* and not merely an apparent or specious one. The jurist must reach a high level of certainty that, by formulating a ruling, this will, while respecting the Islamic framework, remove hardships and not, on the contrary, accrue them. 2- The *maslaha* must be general and provide benefit to the people and society as a whole and not only to a group, class or an individual.[80] 3- The *maslaha* must not be in contradiction or conflict with a text from the *Qura'an* or the authentic *Sunnah.*"[81]

Custom and the Law

Custom or *Urf* is an important subsidiary source in applying the rules of Islam. It is defined as a practice which has been incorporated into the social life of a community and is known to be good and beneficial.[82]

As evident from its definition, custom must be good and beneficial for the people in order for it to constitute a valid basis for legal decisions. Hence, any practice which is harmful or brings no benefit to the community cannot amount to a valid basis even

[80]This condition means the society as whole in a given area and is not meant to cover all the Muslim people anywhere they are located in the world as this is impossible to achieve due to the differences of the interests of the people in every land.
[81]Ramadan Tariq, *To be a European Muslim*, op cit., pp. 79-80.
[82]Dien Mawil izzi, *Islamic Law from Historical foundation to Contemporary Practice*, op cit., p. 60.

though it may be commonly practised among the people. Furthermore, for custom to be legally considered it must not contradict with the principles provided in the Holy Book and Prophet's Traditions.

Examples of valid custom include the use of commercial advertisements to sell products and the use of card facilities for payment. These commercial practises are deemed valid because of the benefit they give to people given their adherence to the basic rules of Islamic doctrine. In contrast, the obtaining of a bank loan based on interest is not considered a valid commercial practice. This commonplace transaction, by the community, does not validate the type of custom as it contradicts the fundamental principles of Islamic rules.

There is evidence for the acceptance of usage as grounds for legislation. Suffice to say that it is universally recognised among Muslim jurists that custom takes its authority as a valid source from the widely accepted legal rule that states, "custom is referred to."[83]

For the custom to be legally valid, it has to be a common and recurrent occurrence. Thus, the practice of a few individuals, or of a limited number of people within a large society, will have no legal value in the law. To give an example, when a person buy a car, the question as to what is to be included in the purchase of the car is

[83]For further information, please see, Dien Mawil izzi, *Islamic Law from Historical foundation to Contemporary Practice*, op cit., p. 60, and Kamali Mohammad Hashim, *Principles of Islamic Jurisprudence*, op cit., p. 291-295.

determined by the prevailing customs between car dealers, unless it is specified in the terms of the agreement.[84]

In addition, for custom to be authoritative, it must also be in existence at the time of a case arising. In contract and commercial transactions consideration is given only to usages which are dominant at the time when the transaction was concluded. If, however, the usages originated after the conclusion of the contract, they would have no juridical effect.[85]

Further, custom must not contravene the clear stipulation of an agreement. Recourse to custom is only valid when there is no an established agreement. The general rule is that contractual agreements prevail over custom.[86] Lastly, custom is invalid as a basis for juridical pronouncement when it is clearly contradicts the divine texts.

2.4. The Royal Decrees under the Saudi Legal System

With the establishment and unification of the Kingdom of Saudi Arabia by the hand of King Abdul-Aziz (deceased 1953) there was widespread adoption of Islamic law. Since then the law of Islam remains the prevailing law in the Kingdom. The country's constitution is the law of God given through His noble and last Book the *Qura'an* and the rules given by His Messenger Muhammad; it is stated that "the religion of Saudi

[84]Kamali Mohammad Hashim, *Principles of Islamic Jurisprudence*, op cit., p. 286.
[85] Ibid.
[86] Ibid, p. 287.

Arabia is Islam, its constitution is the Book of God Most High and the Prophetic Traditions of His Prophet…"[87]

The legal structure of the Saudi Kingdom is founded on *Sunni* Islamic doctrine, with particular focus on the traditional Hanbali School of Thought. However, the ruler of the country, the King, or His representative, has the absolute right to initiate regulations and by-laws for the public good. This can only happen when there are no direct provisions in the Divine textual sources. Furthermore, these regulations or by-laws,[88] in order to be legitimately applied in courts, must not contravene with the general rules of Islamic law provided in the *Qura'an* and the Prophetic Traditions.[89]

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[87] Article 1 of the Basic Regulation of the Kingdom of Saudi Arabia (1992).

[88] The Arabic term for regulations used in Saudi to name these practices is *Nizam* (plural *anzima*), which designates acts, rules and regulations. *Nizam,* from a formal point of view, is a document issued by the King and the Saudi council of ministers to regulate the behaviour of people and the interest of society. The word *nizam* is used to avoid the use of the word law which implies that these regulations are made by human minds and not Divine sources. By-law or tablet (*la'iha*) is a term which specifies and explains in detail the general principles of the regulations (*anzima*). We can see that the *la'iha* is lower in legal ordinances to the *nizam* and thus cannot repeal it. The system follows an order of hierarchy whereby the lower cannot disagree with the higher in either context or formality. There are three types of *la'iha* or by-laws - implementation rules, regulation rules, and security rules. An example of the implementation rules is the traffic regulations such as driving licences and road rules. (The Regulations were made by A ministerial decision of internal affairs, dated the 20th of the 7th of AH 1395.) Regulation rules deal with regulating public sectors, public services and administration of the government. It differs from formal rules in the sense that it does not concern the implementation of its rules, but solely specifies the responsibility and organises the public sector. An example of this type is the regulation which defines the meaning of school, its duties, conditions, and objectives. (This regulation was established by the council of ministers, decree No. 1,006 dated the 13th of the 8th of AH 1395 and published in the official gazette Umm al-Qura, vol. 2, 596, dated the 28th of the 9th of the AH 1395). The security rules include all regulations for public security and health, such as rules relevant to the supervision of food, wandering vendors and the control of businesses that could cause public disturbances. See, Al-Hafnawi, Abd al-Majid Muhammad (1977) *Usul al-tashri fi al-mamlaka al-'arabiyya al-sa 'udiyya*, Riyadh, pp. 93, 109 and 117, and Dien Mawil izzi, *Islamic Law from Historical foundation to Contemporary Practice*, op cit., pp. 127-129.

[89] See Article 67 of the Basic Regulation of the Kingdom of Saudi Arabia (1992) which states that

"The regulatory authority shall have jurisdiction to enact regulations and by-laws in order to attain welfare and avoid hard in the affairs of the state, in accordance with the general rules of the Islamic *Sharia*……."

And also Article 48 which indicates that

"The courts shall apply in cases brought before them the rules of the Islamic *Sharia* in agreement with the indications in the Book and the *Sunna* (the Prophet's traditions) and the regulations issued by the ruler, the King, which do not contradict the Book or the *Sunna*."

2.4.1. The Legitimacy of Regulations set out by the Ruler

Islamic law states that the ruler may make new regulations to supplement the *Sharia*, or establish them in public interest, provided that the *sharia* is not infringed, or, in other words, as long as the *sharia* provides no direct text on the matter in hand.[90] It follows that the regulations formulated by the ruler do not derive from the State but rest directly on the *Qura'an*; and as such are God's own legislation. [91] Hence, these rules must be respected and upheld within their own spheres of authority, and if anyone infringes them, he or she will be in position of disobedience to God. In addition, the legitimacy of these practices by the nominated ruler or his authority is based on the widely accepted source of Islamic law that is the formation of regulations by virtue of the above source considering public interest.

Hundreds of regulations have been established as a result of the ruler's right to set out rules. These operate alongside Islamic law, acting as a kind of subordinate system and supplementing the *Sharia* to deal with modern issues. These regulations meet the most pressing needs of the people, such as dealing with modern commercial activities[92] (e.g. related to the case study of this research, the enactment of the Saudi

[90]Vogel Frank E, *Islamic Law and Legal System Studies of Saudi Arabia*, op cit., pp. 173-174.
[91] This is because Allah himself requires believers to obey those in authority, see Chapter. 4, verse. 59.
[92]Brand Joseph (1986) Aspects of Saudi Arabian Law and Practice, *Boston Collage International & Comparative Law Review*, vol. 9, pp. 1-4.

Arabian Electronic Transaction Rule[93]) defining unlawful narcotics, setting up traffic laws, and organising government entities.[94].

It is worth noting that some of the ruler's enactment rules were influenced by western-legal systems.[95] However, the fact remains that the Saudi legal system has distinguishing characteristics which differ from any other, even though it incorporates many features of other legal systems. In practice, Saudi authority stresses that Islamic law must not be infringed by regulations established by Royal-decree and, as stated, if they are in contrast with the general principles of Islam, they will have no legal authority in the local *Sharia* courts and would have to be abolished.[96]

In addition, the ruler's legal initiatives are only permitted when there is no direct provision to the particular matters in the available Divine Texts and when they are wholly for the good of the general public. Furthermore, when confronted with cases arising under the King's rules Saudi judges have complete freedom to apply legal precedent based on the general principles of the law of Islam, rather than the Royal-

[93] Hereinafter the Saudi E-Transactions Rule. It came into force on 11 April 2007. Its main aims is stated in Article 2 as follows; 1. Put forward unified regulatory principles for the use of electronic transaction and signatures, and facilitating their application in private and public sectors… 2. Provide the confidence for the legitimacy of electronic transactions, signatures, and documents and their integrity. 3. Facilitate the use of electronic transactions and signatures at national and international levels… 4. Remove the obstacles facing the use of electronic transactions and signatures. 5. Prevent the abusive use and fraud in electronic transactions and signatures.

[94]Vogel Frank E, *Islamic Law and Legal System Studies of Saudi Arabia*, op cit., p. 175.

[95]Dien Mawil izzi, *Islamic Law from Historical foundation to Contemporary Practice*, op cit., p. 129, and Saleh, N (1989) the Law Governing Contracts in Arabia, *International and Comparative Law Quarterly*, vol. 38, p.765.

[96] See above, Article 67 and Article 48

regulations alone. In fact, the courts routinely dismiss cases based on the King's rules and hand it to an executive committee to enforce.[97]

3. Islamic Law of Contract: General Principles

The focus of this research is on Islamic rules of contract and their application to electronic contracts. It is therefore essential to examine fundamental principles of commercial activity in Islamic law. This subsection will establish key principles on which much of the thesis' discussion will be founded.

An appropriate starting point can be made with defining the concept of contract under Islamic law. The Arabic word for contract is *aqd* (plural: *Uqud*) which literally means *of tie* which is the opposite of isolation, which is an act of putting a tie to a bargain.[98] The word *Uqud* used in the *Qura'an*[99] encompasses a broad and comprehensive meaning. Accordingly, all Muslims are instructed to fulfil the rights of Allah, by observing the Five Times Prayers, fasting, and so on, and fulfil the rights of the

[97]The rationale behind this was given by Shaykh al-Lahaydan, president of the Supreme Judicial Council. He (al-Lahaydan) characterised all regulations as concerned with one or both of two things: the determination of certain criminal penalties, or purely administrative matters. In either event, in his view, they concern matters of the executive branch and have nothing to do with the courts. If they venture beyond this, the courts should ignore them and apply the *Figh*. He gave the example of traffic regulations; if a case concerns the misdemeanour of driving on the wrong side of the road, a legal authority may use a Royal rule to fix a penalty once guilt is established, but if the issue is determining retribution, compensation, or criminal guilt, then the *Sharia* courts must take charge." This comment is being quoted from Vogel Frank E, *Islamic Law and Legal System Studies of Saudi Arabia*, op cit., p. 176.

[98]Doi Abdur Rahman I (1984) *Shariah: the Islamic Law*, Ta Ha Publishers, London, p. 355.

[99] Chapter no.5, verse no.1.

servants of Allah such as good neighbourliness, kindness and mercy to all human beings and animals.[100]

However, contract in terms of legislation defines as "the connection of an offer issued by one of the parties with the other party's acceptance in a way that originates a legal consequence on its subject matter."[101] Thus, a contract arises between two parties according to their agreement to initiate a binding commitment.

It is important to note that the overwhelming majority of Muslim jurists view the contract of sale as the model for all other types of contract[102]. As a result of an earlier comprehensive study on the contract of sale, fundamental and broad grounded rules have been established to provide a premise for analogy to deal with all other contracts in general. The authority for this is found in the *Qura'anic* verse (Chapter 2, verse no. 275) which states that "God has made sale lawful and interest unlawful". Thus sale became the archetype for valid contracts and interest whereby the payment and collection of interest is made the model for invalid contracts.[103] Schacht comments that the contract of sale forms the core of Islamic obligations, the categories of which have been highly developed; all other kinds of contracts, although regarded as legal

[100]Doi Abdur Rahman I, *Shariah: the Islamic Law*, op cit., p. 356.
[101]Basha Muhammad Qodri (1983) *Morshed al-Hairan ela Ma'arefet Ahwal al-Ensan*, second edition, Dar al-Farajani, Cairo, p. 49. This is the specific meaning of the word contract, however, contract in its general meaning denotes to every obligation that a person is committed to perform, whether or not it is unilateral or bilateral, or religious commitment such as vow or worldly such as sale. Zaidan Abdulkareem (1982) *al-Madkhal le Derasa al-Shariah al-Islamiya*, al-Resalah Institution, Beirut, p. 285.
[102]Such as a marriage contract, a rent contråct and other types of contract which are out of the scope of this research.
[103] Hussein Hassan (2002) Contracts in Islamic Law: the Principles of Commutative Justice and Liberality, *Journal of Islamic Studies*, vol. 13:3, p. 258.

institutions in their own right, are construed on the model of a sales contract and sometimes even defined as a type of sales contract.[104]

According to the definition of contract as "the connection of an offer issued by one of the parties with the other party's acceptance in away that originates a legal consequence on its subject matter," it denotes that for a contract to be legally valid, there must be contracting parties (an offeror and offeree), a subject matter of the contract, and an agreement between the contracting parties by the connection of offer and acceptance. These are the considered conditions for a valid contract under Islamic law.[105]

As mentioned previously Islamic rules of contract were derived directly from the original sources and were based on provisions addressing a wide range of issues.[106] These provisions, whilst containing the rudiments of several types of contract, did not detail specifics in relation to contracting issues. Consequently, Muslim jurists from different Islamic school of thoughts have carried out further developments and discussions on the law of contract.

One of the most fundamental principles is the Qura'anic injunction, "O ye who believe! Fulfil all obligations" [107] This maxim according to its generality governs the sanctity of all types of contracts, whether private, public, civil or commercial. It is important to note that there is no discrimination between foreigners or non-Muslims

[104] Schacht Joseph, *an Introduction to Islamic Law*, Clarendon Press, Oxford, pp. 151-152.
[105] Al-Joroshy Sulaiman, *Nadatiah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, op cit.,
[106] The Holy Book, and the Prophetic Traditions.
[107] Chapter no. 5, verse no. 1. See, Ali Abdullah Yusuf, *the Holy Qur'an Text. Translation and Commentary*, op cit., p. 238

in matters of contract according to the Islamic law of contract.[108] Accordingly, it is a duty upon the Muslim community to fulfil the contractual obligations towards all people even with alien and non-Muslims.[109]

Another important principle in the Islamic law of obligations is the role of mutual assent. Authority for this rule is found in the *Qura'an* and *Sunnah*[110]. The main purpose of a contract is to satisfy the manifest consent of both parties to enter into a binding dealing. One of the main objectives of having a contract is that it is a means to reflect parties' intention that mutual assent for the engagement in business has occurred. And then, based on such intention, a distinction can be reached between validated transactions from a void one.[111]

3.1. Freedom of Contracts and Conditions

It is worth noting that, as a general principle, there is no recognition of complete freedom of contracts and conditions in Islamic doctrine, Parties cannot initiate contracts or introduce further conditions in a transaction which may derogate from or

[108] Hamidulla, Muslim Conduct of State, (Revised Ed. 1945) p. 145. Cited after, Rayner S. E. *the Theory of Contracts in Islamic Law*, op cit., p. 87.
[109]Ibid
[110] In the Qura'an, chapter no. 4 verse no. 29 indicated that "Oh ye who believe! Eat not up your property among yourselves in vanities, but let there be amongst you trade by mutual good-will." (See, Ali Abdullah Yusuf, *the Holy Qur'an Text. Translation and Commentary*, op cit., p. 188.) The Prophet also emphasised the importance of mutual assent as a core condition to validate trading between parties. The Prophet is reported to have said "It is not lawful to take the property of a Muslim except by his consent." In another place, He stressed again that "Sale is by consent." See, M. A. Hamid (1977) Mutual Assent in the Formation of Contracts in Islamic Law, *Journal of Islamic and Comparative Law*, vol.7, p. 41.
[111] Due to the vital importance of this principle in the Islamic law of contract and its application in online contract, further elaboration will be given to this canon in forthcoming chapter.

against any established principle in Islamic law. For example, a contract which involves interest n a loan, or contains elements of harm to any party or whose object is illegal, such as alcohol, is invalid as it contradicts primary Islamic rules.

However, the essential argument that has emerged in Muslim jurisprudence concerns whether or not the parties are free to make transactions outside the scope of the nominate contracts established by early jurists and also whether they can enforce stipulations which are not mentioned in the Qura'an and the Prophetic Traditions. The debate has divided Islamic jurists.

One opinion opposes any freedom of contracts or conditions and annuls any new form of contract and condition besides those nominate contracts and established stipulations in the Islamic law of contract.[112] Jurists argue that by virtue of the Prophet's Saying that indicated "how can men stipulate conditions which are not in the Book of God? All conditions that are not in the Book of God are invalid, be it a hundred conditions. God's judgment is truer and His conditions are more binding."[113]

Hence, it is concluded that all contracts or conditions that are not proven by the Lawgiver are void and have no legal effect in the law.[114] It is important to note that this view also extends to obligations not expressly permitted by Islamic legal

[112]Rayner S.E. *the Theory of Contracts in Islamic Law*, op cit., p. 92.
[113]Narrated by Imam al-Bokhari, see Mosa Muhammad (1996) *al-Amwal wa Nadhariyya al-Aqd fi al-Figh al-Eslamy*, Dar al-Fekr al-Arabi, Cairo, p. 382.
[114]Ibn Taimyya's *Fatawi* (Legal Decisions) compiled by Ibn Qassem Abdulrahman, op cit., pp. 130-131.

principles. Thus, the verse that commands Muslims to fulfil their obligations[115] is merely relevant to those permissible obligations stated in the law.[116]

In contrast, the counterargument recognises the concept of freedom of contract and condition in the law. Accordingly, Muslims are granted relative freedom to make whatever type of transaction and stipulation they choose so long as they are not in contradiction with the general Islamic principles.[117] This approach is adopted by the majority of the Hanbali School, one of the main Islamic schools of jurisprudence.[118]

Like their counterparts, the Hanbali quote the authentic Tradition that Prophet Mohammed said, "every agreement is lawful among Muslims except one which declares forbidden that which is allowed by the Lawgiver, or declares allowed that which is legally forbidden."[119] Accordingly, this implies that parties are endorsed to set out whatever terms in their deals, without limitation to just conditions cited in the primary sources, so long as those terms are not inconsistent with general Islamic rules. Hence, the advocates of the latter opinion, based on authentic and unambiguous evidence, deducted that every contract and condition is legally valid even though it is not mentioned in the primary sources, unless of course it is in contrast to general religious rules.

[115] Chapter 5 verse no. 1.
[116]M.E. Hamid (1969) Islamic Law of Contracts or Contracts, *Journal of Islamic and Comparative Law*, vol. 3, p. 9.
[117]El-Hassan Abd El-Wahab (1985) Freedom of Contract, the Doctrine of Frustration, and Sanctity of Contracts in Sudan Law and Islamic Law, *Arab Law Quarterly*, vol. 1, p. 55.
[118]Al-Joroshy Sulaiman (2003) *Nadatiah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, Dar al-Kotob al-Watanyya, Libya, p. 129
[119]Ibid, p. 130.

These jurists also understood the Prophet's Saying that "every condition which is not in the *Qura'an* is void" to denote every contract or condition which is contrary to the *Qura'an* and Traditions of Prophet rather than a blanket rejection of every contract or condition not cited by the Divine Texts.[120]

In addition, the aforementioned Prophet's Saying provided by the counter argument relates to any contract and condition which is prohibited by religious rules. Thus, this saying, in essence, does not limit the liberty of the individual to formulate new contracts and conditions which are outside the scope of the Islamic sources.

It is worthwhile to note that the Hanabali's approach in this matter is compatible with the provision of the well-known Islamic legal principle that indicates, "the origin of worship is the ban unless it is permitted by the Lawgiver and the origin of dealing is the permission unless it is forbidden by the Lawgiver."[121] This principle infers that in terms of worshipping Allah Almighty, Muslims are obliged to follow only what is provided in the Holy Book and the Traditions of Prophet Muhammad. Any attempt to invent new kinds of worship outside the scope of both Divine Materials is rejected and void.

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[120] Musa (1955) The Liberty of the Individual in Contracts and Conditions According to Islamic Law, *Islamic Quarterly*, p. 84. Cited after Rayner S. E. *the Theory of Contracts in Islamic Law*, op cit., p. 93.

[121] Ibn Qayyim al-Jawziyya (Abdullah ibn Muhammad ibn Abu Baker known as Ibn Qayyim al-Jawziyya (1292- 1350) a famous Muslim scholar in Islamic law and close disciple of Imam Ibn Taymiyya died in the city of Damascus. For further of Ibn Qayyim's biography please see, http://sunnah.org/history/Innovators/ibn_al_qayyim_al-jawziyya.htm) in this regard he stresses that "nothing is unlawful unless it is declared to be so by God and His Apostle….in human transactions and contracts, the general rule is that they are valid, unless there is legal evidence that they are unlawful or forbidden….where the law is silent about them, the transaction or the contract is valid." Ibn Qayyim al-Jawziyya (1987) *E'alam al-Mowaqqe'aeen a'an Rab al-A'alameen*, al-Maktaba al-A'assriyya, Beirut, vol. 1 pp.344-345.

In contrast, there is no such restriction or limitation given in the law in respect of dealings and transactions. Therefore, Muslims are allowed to make whatever dealings they wish so long as they are not clearly prohibited in Islamic law. The Hanbali jurist Ibn Tamiyya fervently accepted the latter opinion of the Hanbali School and indicated, "men shall be permitted to make all the transactions they need, unless these transactions are forbidden by the *Qura'an* or by the Prophet's Traditions."[122]

3.1.1 Restriction of Conditions

Yet, the Hanbali's do restrict parties from making any more than one condition in a single contract. Thus, they do not accept any contract accompanied with more than one condition.[123] The invalidation of a contract containing more than one stipulation in the Hanbali School was attributed to the authoritative Prophetic Tradition that forbade the combination of a sale with two conditions.[124] For example, a buyer of wood cannot make a condition that the seller must carry the wood to his house and then chop it into small pieces. This transaction features two conditions and is therefore invalid, and the contract made void. The reason for this is that a plurality of stipulations in a transaction (not counting those which naturally emerge from an

[122]Rayner S. E. *the Theory of Contracts in Islamic Law*, op cit., p. 100.
[123]Ibn Qodama (Abi al-Faraj, Abdulrahman ibn Abi Omar Muhammad ibn Ahmad known as Ibn Qodama al-Maqdasi, a Hanbali jurist, was born in Nablis, Palestine in 541 AH and died in Damascus in 620 A.H. For further information please see, http://www.load-islam.com/artical_det.php?artical_id=313&section=indepth&subsection=Biographies *al-Moghni wa al-Sharh al-Kabeer*, Dar al-Kotob al-A'lmeeya, Beirut, vol. 4 pp. 52-53.
[124]Ibn Othaimeen Mohammad (2004) *al-Sharh al-Momtea Ala Zad al-Mostagnea*, Dar Ibn al-Jozi, Dammam, Saudi Arabia, vol. 8, p. 197.

effective contract) leads to risks and uncertainties and hence, may be a source of conflict.[125]

However, this reference to risk is not entirely convincing since it is unclear as to how the setting of two or more conditions in a contract, which are after all agreed upon by the contracting parties, may lead to increased risks of conflict. Therefore this restricted approach in the Hanbali sect currently remains unapproved by all Hanbali jurists. In more recent times, another view has emerged in the School which called for more absolute freedom toward conditions in contracts. This new liberal movement fervently validated all transactions that contained more than one condition provided that those stipulations are not in contradiction to the primary sources of the law.[126]

As in the Hanbali School of Thought that recognises the concept of freedom of contract and condition, it was upheld that the liberty to stipulate more than one condition should also be made the general principle of the law. In justifying this view, focus can be drawn to certain *Qura'anic* verses,[127] and based on this authority jurists concluded that God has solely commanded us to respect and fulfil all obligations and agreements, thus, Muslims, without any restriction are entitled to make whatever conditions in any undertaking, unless these conditions contravene with the law or

[125]Rayner S. E. *the Theory of Contracts in Islamic Law*, op cit., p. 359.
[126]Ibn Othaimeen Mohammad, *al-Sharh al-Momtea Ala Zad al-Mostagnea*, op cit., p. 235.
[127]It is said in Chapter 2, verse no. 275: "….but God has permitted trade and forbidden usury (interest in loan). In another place it is stated that "Oh ye who believe! Eat not up your property among yourselves in vanities, but let there be amongst you trade by mutual good-will.", and "Fulfil your obligations." See Chapter 3, verse no. 29 and Chapter 4, verse no. 1, respectively.

prescribe effects which are in contrast to the nature of contract.[128] The *Qura'an* contains no verse that calls for the restriction of conditions to only one stipulation. Ibn Othaimeen[129] interprets the aforementioned Prophet's Saying which forbids two conditions in a transaction as simply meaning the two conditions that lead to a prohibited action, such as unfairness or harm to any of the contracting parties, in the transaction.[130]

It is worth noting that this movement by certain Hanabali jurists towards liberalising conditions in contracts plays a significant role in the development of trading activities conducted in the Muslim world. In modern times and with the advent of e-commerce and the subsequent increase in commercial activities between Muslims and non-Muslims, there has been a vital need to make various essential conditions to secure business relations. The development of business-related practice would be significantly hampered if all transactions encompassing more than one condition were invalidated.

4. Islamic Legal Attitude to Electronic Commerce (E-commerce)

[128]For instance, making a condition in a contract, the buyer must not sell or use the object of the contract.
[129]Muhammad ibn Saleh ibn Othaimeen born in 1925 in Saudi Arabia was one of the most prominent scholars in Islamic law in contemporary times. He died in 2001 and was buried in Mecca. A short biography of Ibn Othaimeen is avialable at: http://www.ibnothaimeen.com/all/Shaikh.shtml
[130]Ibn Othaimeen Mohammad, *al-Sharh al-Momtea Ala Zad al-Mostagnea*, op cit., p. 198.

The recent emergence of e-commerce has brought a new and competitive way of conducting business online. As a general rule, every new development which emerges in a Muslims' life needs to be scrutinized for its legality in light of Islamic rules. Islamic doctrine has established general basis and evidences for every aspect in a Muslims ' life, whether it be social, economic, political, jurisprudent or commercial. Each concern can be addressed under the light of those bases and evidences. On this basis it is possible to reach an informed conclusion as to whether new matters conform with Islamic rules and therefore gain legitimacy in the law, and naturally this extends to e-commerce.

The first basis is that, as a general rule, every transaction be permitted in Islamic law. Thus, it will not be denied legitimacy unless Allah or His Prophet bans that commercial practice. In terms of habits and customs that people become accustomed to they are also not banned unless the Lawgiver disallows them. This principle is useful as it demonstrates that every transaction, dealing and habit undertaken by individuals in the course of their lives is lawful in Islamic jurisprudence as long as it is not explicitly invalidated by a direct rule. Hence, all new matters will be considered legitimate by the law except when there is any evidence denying its validity. [131]

E-commerce is the conduct of commercial activities using electronic processes or tools; based on the foundations of Islamic law outlined above this modern type of

[131]Ibn Taimyya's *Fatawi* (Legal Decisions) compiled by Ibn Qassem Abdulrahman, al-Resalah, Beirut (1997) vol. 29, pp. 226. Ibn Taymiyya, is a Sunni Islamic scholar, his full name is Taqī ad-Dīn Ahmad ibn 'Abd al-Halim ibn 'Abd as-Salam Ibn Taymiyya, known as (Ibn Taymiyya). He was born in Harran in 1263, in Turkey close to the border of Syria. Although he is considered a member of the Sunni school founded by Ibn Hanbal (see above footnote no. 50) he called for the return of the sources of Islam to seek religious decisions and not adhere to the thoughts of those Sunni four schools of thoughts. He passed away in confinement in Damascus in 1328 at the age of 65. Further information about Ibn Taymiyya life and works can be seen at: http://www.sunnahonline.com/ilm/seerah/0047.htm

commerce should be considered legitimate unless something shifts its emphasis from allowance to prohibition, such as in the selling or buying of drugs or alcohol online.

Secondly, based on the aforementioned source of Islamic law, the "Consideration of Public Interest",[132] it can be clearly observed that e-commerce is of immense interest to the public and should therefore be regarded as a valid means to conduct business. Online business transactions have created a new economy not bound by local, state or international borders and the popularity of e-commerce is surging.[133]

Thirdly, the legitimacy of conducting business via e-commerce has been confirmed by a legal decision made collectively by Islamic legal scholars in a seminar (titled 'The extension of electronic commerce and the attitude of Islamic legislature') on 23 of March 2000 at Saleh Kamel's Centre for Islamic Economy in Al Azhar University. Accordingly, e-commerce adheres to the principles and rules of Islamic legislature and is therefore permitted religiously. Therefore, nothing in the judgements of Islamic legislature bans the benefit of using the Internet in the field of commerce as long as it is done in accordance with the general legislature rules.[134]

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[132] See above pp. 25-28.

[133]Total e-commerce sales were estimated to reach $108.7 billion in 2006. See a report (7-2007) written by Kluver Ashley, *Electronic Commerce, Sales Tax, and the Implications for Missouri*, Institute of Public Policy University of Missouri, published on July 2007, p. 1 available at: http://truman.missouri.edu/uploads/Publications/7-2007eCommerce.pdf

[134]Quoted from Al-Sanad Muhammad (2004) *al-Ahkam al-Faqhiya lel Ta'amolat al-Electroniyya*, Dar al-Warraq Publisher, Riyadh, p. 167.

As identified every Muslim is required to comply with the law of Islam in all aspects of their daily life, including the modern type of forming contracts by connecting the offer with acceptance via electronic means. It has also been established that Islamic doctrine specifies certain conditions for a contract to be valid and therefore, it is necessary to study these contractual conditions and examine their application to electronic contracts. Chapter three discusses both the elements of the legal capacity of contracting parties and the legality of the subject matter of contract and then examines their application to electronic contracts.

Chapter Three: The Contracting Elements of Legal Capacity of Parties and the Legality of Subject Matter and their Application to Electronic Contract.

1. Introduction

For a transaction to be legally valid, certain conditions must be met. Different legal systems have different requirements for the validity of contracts. The significance of these requirements is that if one or more is missing the contract is considered legally void.

The contract of sale in Islamic law is no different. As stated in the previous chapter, Muslim jurists have established certain conditions that have to be met for a contract to be validly formed. This chapter focuses on the validity of the contract in terms of the legal capacity of contracting parties and the legality of the contract's subject matter in light of the Islamic legal system, with reference to the law in Saudi Arabia. The aim of this study is to discuss the range of Islamic rules provided for these two elements and to analyse their application to online trading practises, in order to ascertain whether or not electronic contracts are legitimate within the scope of Islamic law.

Muslim jurists have long debated issues concerning legal capacity and subject matter. Indeed, there are wide differences of legal opinion and some appear to hinder the development of commercial activities. Therefore, this chapter is essential in order to discuss the significance of those opinions and hence, advocate the eligibility of electronic contracts within Islamic law.

This chapter is divided into two sections. The first is devoted to a discussion on the element of the legal capacity of the contracting parties and their studied correspondence to electronic contracts. The second section focuses on the subject matter of contract, including its application to electronic contracts. Within this, focus will also be drawn to financial aspects and the validity of using bank-issued cards as a form of payment in electronic transactions in light of Islamic law.

2. Legal Capacity in Electronic Contracts

Under Islamic law the capacity of the parties to contract is vital to the validity of the contract. A party or a contractor is a person who makes a stipulation by uttering either an offer, in which case he/she is legally referred to as an offeror, or an acceptance, in which he/she is referred to as an offeree or acceptor. For instance, in a contract of sale the parties are the seller and the buyer.

In all cases, in order for a contract to be legally valid the parties involved must be legally capable of initiating obligations. Thus, a contract cannot take effect under the

law if the contracting parties do not have legal capacity. The capacity of contractors literally refers to the legal ability of the parties to enter into a valid commitment to deal.[135]

It is essential to note that the requirement of parties' legal capacity in face-to-face traditional business is not, in any material way, different from transactions formed via electronic methods. What has changed, and will continue to evolve, is the means by which the parties will conduct transactions.[136] However, since electronic transactions are conducted by parties in different locations and do not deal face-to-face it is difficult to determine the legal capacity of contracting parties. Thus, it presents the possibility for minors to enter into commercial contracts, since it is difficult to establish the identity of the parties contracting, online, behind computer screens.[137]

That is to say, the difficulties presented in checking identities may lead to contracts being formed with minors having no legal capacity and to their consequent nullification. This may cause serious loss to businesses when those transactions are deemed to be void. Furthermore, online traders may unknowingly infringe rules by selling certain products such as alcohol and tobacco, whose sale to those under a

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[135] Al-Qarehdagy Ali (2002) *Mabda' al-Ridha fi al-Uquud*, Dar al-Bashair al-Eslamyya, Beirut, Second Edition, vol. 1, p. 264 (Arabic source).
[136] Mills Karen, *Effective Formation of Contracts by Electronic Means Do we Need a Uniform Regulatory Regime?* p. 2, 'Online Article' available at;
http://www.karimsyah.com/imagescontent/article/20050922170958.pdf
[137] Jawahitha Sarabdeen and Chikhaoui Emna (2007) the Adequacy of Malaysian Law on E-Contracting, *Computer and Telecommunications Law Review*, 13(4), 121-125, p. 124. Nevertheless, this issue may be of less concern when transactions are formed electronically through the use of certain instantaneous methods of communication where the contracting parties face each other via live-webcam technologies, such as a webcam connection between users in msn.

certain age is strictly prohibited in certain legal systems[138], to underage buyers without being able to check their identity.

In traditional business, parties conduct transactions face-to-face, thus, the capacity of the contracting parties to form a valid commercial agreement can be determined by asking for proof of age, such as an ID card, thereby signifying whether or not the legal capacity of the parties to enter into a binding agreement is reached. It is, therefore, necessary to discuss ways in which this can be addressed when traders establish electronic contracts. Initially, the legal capacity of contracting parties should be discussed in light of Islamic law.

2.1. The Stages of Capacity under Islamic Law

2.1.1. Discretion

In Islamic law there is no valid transaction if one or both of the contracting parties has not yet attained physical puberty and sound business mind, also known as prudence. Therefore, as a general rule, all commercial transactions entered into by a child before

[138] See, for instance, article 146 (1) of the UK Licensing Act 2003, which stipulates that a person commits an offence if he sells alcohol to an individual aged under 18. And, Article 13 of the UK Health Act 2006 which gives the Secretary of State the legal power to amend the age of sale of tobacco from 16 to 18. On 1st October 2007 it became illegal in the UK to sell tobacco products to anyone under the age of 18, the penalty being a fine of up to £2,500. See NHS, Smoke Free, at http://www.tobaccoagechange.co.uk/thelaw.html.

reaching the age of 'discretion' are deemed absolutely void.[139] The word discretion in this regard means the mental capability to form proper intention in a contract, in other words, the ability of someone to fully understand the nature of a transaction and its terms and conditions.[140]

As in the case of attaining prudence early Muslim jurists did not specify the age at which discretion is attained, rather they left it to be determined according to prevailing customs and practices, which have differed from time to time and from society to society. As a way of establishing a rule according to which the attainment of discretion can be determined, when a minor[141] begins to perceive the meanings of expressions, he should then be deemed to reach the age of discretion. Accordingly, he would understand the meaning of the word 'sell' as denoting the transference of a good owned by one person to another person with a certain value, and the meaning of 'buy' as taking ownership of a certain item in return for payment of its value.[142]

Yet, it has been recently determined that the starting age of attaining discretion is when someone reaches seven years of age.[143] This is based on the Prophet Muhammad's

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[139] See, article 86 (1) of the Kuwait Civil Law, and Zaidan Abdul-Kareem, *Almadkhal Lederashat al-Shariah al-Eslamiyyah*, op. cit. p. 315. To note further that there are other cases which exclude temporarily or permanently a person from attaining capacity, such as insanity, mental disorder, sleeping or unconsciousness or intoxication, to name but a few. Hence, legal conducts of a person during these cases are considered void. For further discussions of the legal conducts of a person during these cases and more and their legal considerations in the law, please see, Al-Joroshy Sulaiman, *Nadhariah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, op. cit. pp. 58-77.

[140] Al-Khafeef Ali (1954) Mokhtassar *Ahkam al-Moa'amalat al-Shara'eya*, Al-Sonnah al-Mohammadyya Publisher, Cairo, p. 87. (Arabic Source)

[141] A minor is used in this chapter to denote those who have reached the age of discretion but have not yet reached the stage of complete legal capacity.

[142] Abo Zahara Muhammad, *Al-Molkaiya wa Nathariyya al-Aqd fi al-Shara'aa al-Eslamiyyah*, op. cit. pp.309-311; al-Khafeef Ali, *Mokhtassar Ahkam al-Moa'amalat al-Shara'eya*, op. cit. p.102.

[143] Zaidan Abdul-Kareem, *Almadkhal Lederashat al-Shariah al-Eslamiyyah*, op. cit. p. 315.

order for Muslims to ask their children to perform prayer at the age of seven,[144] which implies that since they are able at this age to appreciate religious duties, thus, this should also be the age at which legal discretion begins.[145] This stage lasts until the individual reaches legal capacity.

2.1.2. Requirement of Puberty and Prudence for Attaining Legal Capacity under Islamic Law

Unlike other legal systems where there is a clear-cut indication at which age a person is deemed to reach legal capacity,[146] under Islamic law an individual reaches legal capacity when two characteristics are present. These are reaching the age of puberty and attaining prudence. If either of these characteristics is not present the individual cannot enjoy full legal capacity and is therefore unable to form binding transactions.

A person, male or female, is legally considered to reach the age of puberty when he/she attains the ultimate growth of mental capability. Since this is an internal determination it is impossible to conclude whether a minor fulfils it by any external examination. Therefore, physical signs of puberty have been established as a determining factor. However, it is worth noting that not all Islamic Schools of Thought

[144] Narrated by Abu Dawud, *Book of Prayer*
[145] See Abo Zahara Muhammad (1996) *Al-Molkaiya wa Nathariyya al-Aqd fi al-Shara'aa al-Eslamiyyah*, Dar al-Fekr al-Arabi, Third Edition, pp. 309-311 (Arabic source); al-Khafeef Ali, *Mokhtassar Ahkam al-Moa'amalat al-Shara'eya*, op. cit. p. 102
[146] See, for instance, part 1 (1) of the UK Family Law Reform Act 1969 in which it states that "……. A person shall attain full age on attaining the age of eighteen instead of on attaining the age of twenty-one…"

place significance on signs of puberty.[147] The majority of Islamic jurisprudents regard 15 years of age as the age of reaching puberty.[148]

It is worthwhile noting that whilst reaching the age of puberty qualifies the minor to legally perform religious duties it does not grant him the legal capacity to form valid and enforceable business activities according to Islamic law. Rather, this must be accompanied with the quality of a sound mind or prudence, which is the second element for the qualification of attaining legal capacity.

This rule takes its authority from the provision of the Holy *Qur'an* that states "if then a sound judgment (prudence) is found in the minors, release their property to them…"[149] This verse clearly denotes that when a minor attains prudence or sound business judgment, besides attaining puberty, only then, is he legally capable of conducting transactions. That is to say, prudence is required in Islamic doctrine to rule out the risk of granting a minor legal capacity when he reaches puberty at an early age while he is mentally unqualified to enter into binding agreements.[150]

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[147] For further discussion, please see, Ibn Qodama, *al-Moghni*, vol. 4 p. 509, al-Bahooti, Hashiyat al-Roodh al-Morbe'a ala sharh zad al-Mostange'a, vol. 5, p. 184.

[148] Although there are other different age limits for puberty given by some Muslim jurists, namely 18, 22 and 25 years, the age of 15 years as a sign takes its legal authority from the Prophet Tradition that was reported by Abdullah Bin Umar: "My parents brought me to the Messenger of Allah on the eve of the Battle of Uhud and I was fourteen years old, so the Prophet did not enlist me in fighting." But a year later in the Battle of Al-Khandaqq (Trench), I was fifteen, so this time the Prophet enlisted me in the combat." (Muslim). This Tradition indicates that the age of 15 is the legal age for a Muslim boy or girl to be accountable for his or her religious duties and responsibilities. For further details, see, al-Kasani, *Bada'ea al-Sana'e*, vol. 9 p. 4469, Al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud*, op. cite. pp. 287-289.

[149] Chapter 4 Nisa'a (the Women), verse no. 6. Translated by Ali Abdullah Yusuf (1968) *the Holy Qura'an "Text, Translation and Commentary"*, Dar al-Arabia Publishing, Printing and Distribution, Beirut, p. 180.

[150] Al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud*, op. cite. p. 289.

As for defining the concept of sound mind or prudence, this remains an issue of debate among Muslim jurists. It is sufficient to define prudence here as the ability to preserve and maintain wealth and to spend it wisely, as well as investing and managing it properly.[151]

Determining whether a person has attained the age of prudence occurs through an examination of his ability to handle his commercial dealings sensibly.[152] However, this is difficult to assess in practical terms since the attainment of prudence is largely an internal skill which cannot be tangibly observed. Hence, determining whether or not a person attains prudence based on the above definition appears impractical.

Whilst 15 years of age is accepted as a definite sign for attaining puberty, Islamic doctrine provides no determining age at which someone is considered of sound business mind and thus legally capable to enter into binding transactions.[153] The reason given for not determining a specific age for prudence, unlike puberty, is that the acquisition of a sound business mind will differ from society to society and from time

[151] Bada'ea al-Sana'e, vol. 9 p. 4467, Ibn Qodama, *al-Moghni,* vol. 4 p. 509.
[152] This is according to a verse in the Qura'an in which Allah requires the ability of youngsters to conduct commercial activities to be tested before they are granted full capacity to use their money as they wish. Chapter 4. verse no. 6.
[153] However, certain Islamic jurists oppose this approach and determine the age of 25 years as the ultimate age of achieving prudence. Nevertheless, such determination of the age of 25 years as the ultimate stage of achieving prudence in a person, is not supported by firm argument. Hence, the majority of Muslim jurists submitted to the opinion that states no determination of specific age for attaining prudence. For further details see, Al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud,* op. cit. p. 293, and Al-Qortabi Muhammad (2007) *al-Jame'a le Ahkam al-Qura'an,* al-Resala Institution, Beirut, vol. 6 pp. 55-56 and 66-67.

to time depending on the influences on each person from social and environmental circumstances.[154]

As a way of harmonising and providing stability and certainty to Islamic rules, Saudi Arabian Law has determined that the age of attaining legal capacity is 18.[155] That is to say, when a person turns 18, he/she is, supposedly, deemed to attain legal capacity under the Saudi legal system, unless it is proven to be otherwise which requires a judicial order.[156]

Foreigners' Age of Legal Capacity

Whilst 18 is the age at which Saudi citizens attain legal capacity, it is unclear as to whether this rule extends to foreigners living in the Kingdom, as it follows that when determining the age of legal capacity for foreigners, the law of their nationality should be referred to.[157]

However, the implementation of this rule may disrupt the consistency of dealings formed in Saudi between citizens and foreigners or between foreigners themselves, who may come from different countries with different jurisdiction regarding the age of

[154] , Al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud*, op. cit. p. 293.
[155] This is according to the Statement of Saudi Consultancy Council no. 114 dated at 05/11/1374 A.H. Cited after al-Jabr Muhmmad Hassan (1996) al-Qanoon al-Tejari al-Saudi, fourth edition, King Fahd National Library Publisher, Riyadh, p. 107.
[156] See, article 96 (1) of the Kuwait Civil Law No. 67 (1980).
[157] See, Article 12 (1) of the Jordan Civil Law No. 43 (1976), article 33 of the Kuwait Law No. 5 (1961) for Regulating Legal Dealings that Contain Foreign Element, and al-Jabr Muhmmad Hassan, al-Qanoon al-Tejari al-Saudi, op. cit. p. 110.

legal capacity.[158] It may not be practical or commercially viable for international traders to refer to the national law of every foreigner in order to check his/her legal capacity before entering into a transaction. Hence, it appears that for the promotion and consistency of trading activities in Saudi Arabia, it is apt to determine the legal capacity of foreigners as according to the adopted rule for Saudi citizens, which is 18 years of age.

Special Rules for Small Value Transactions Conducted by Minors

Before considering the legal capacity of parties in electronic transactions, it is essential to first discuss the validity of the minor's commercial conduct. There are three conditions that need to be considered under Islamic law.

First, in transactions that are absolutely advantageous to the minor, such as accepting a bestowal, charity or a gift, the minor's conduct takes legal force without the need for the permission of the minor's judicial guardians.[159]

Secondly, transactions which are absolutely disadvantageous to the minor, such as a commitment to repay a loan or the lending of money to another, these acts are not considered beneficial to the minor, thus, such transactions carried out by the minor are deemed void in Islamic law.[160]

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[158] Ibid, p. 111.
[159] Al-Joroshy Sulaiman (2003) *Nadhariah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, Gar Younes University Press, Benghazi (Libya), p. 55.
[160] Ibid.

Thirdly, in transactions which cannot be clearly identified as either absolutely advantageous or disadvantageous to the minor, such as selling and buying, there are differing legal opinions provided in Islamic law in terms of the minor's commercial conduct.[161]

Suffice to say that generally speaking there are two main points of view. One opinion indicates that all minor's commercial conduct is deemed void regardless of whether his legal guardian gives permission for the minor to enter into commercial practises.[162] The other states that the minor's commercial conduct is deemed valid when his legal guardian allows him to do so.[163] Yet, according to the latter legal thought, if there is no permission given to the minor, the minor's commercial conduct is subject to the legal guardian's approval in order to bear legal force. Accordingly, the legal guardian can repudiate such contracts made by the minor when he disapproves of his commercial conduct.[164]

However, it seems that neither approach is free from legal difficulties. Although the first approach protects the minor from potential exploitation by nullifying his commercial actions, it does not benefit him to preclude him completely, from engaging in commercial practise and gaining essential commercial experiences and skills.[165]

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[161] It is out of the scope of this chapter to discuss them, for further discussion, please see, Al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud*, op. cit. pp. 274-285.
[162] Al-shafea, *Al-Omm*, vol. 3 p. 193, and al-Nawawi, *al-Majmoo'a*, vol. 5 pp. 155-158.
[163] Al-Kasani, Bada'e al-Sana'e, vol. 9 p. 4467.
[164] See, article 87 (1) of the Kuwait Civil Law.
[165] ,Al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud*, op. cit. p. 284.

The second, more flexible, legal approach does allow the minor to engage in commercial activity but its validity is, accordingly, restricted by the guardian's expressed permission or approval for its enforceability. The rationale behind this restriction accepts that the minor, not having attained legal capacity, may be commercially immature and inexperienced, and thus the guardian is afforded the opportunity to disapprove of his commercial conduct in order to protect the minor from potential exploitation or deception.[166]

Whilst the latter approach provides, in theory, a more robust argument, it is impractical to enforce since it may be impossible for the other party in the contract to ascertain whether or not the minor has obtained the guardian's permission to engage in commercial activity. Since the enforceability of the minor's contract depends on the guardian's approval and there is no specified time limit during which such approval must be made, the minor's commercial conduct may be repudiated by the legal guardian at any time even after a considerable period. Also, in the case that neither approval nor disapproval is given to the minor's commercial conduct, it is provided that when the minor attains legal capacity he can then approve or disapprove his deal himself.[167]

Therefore, implementing this approach may cause significant problems for the other party involved as he would not be certain whether or not the minor's commercial conduct is approved or disapproved of by the legal guardian. Furthermore, in the case

[166] Al-Joroshy Sulaiman, *Nadatiah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, op. cit., p. 55.
[167] Al-Kasani, Bada'e al-Sana'e, vol. 9, p. 4467.

that no approval or disapproval is indicated, the other party, according to the latter approach, may have to wait until the minor attains legal capacity (reaching the age of 18 years according to the Saudi legal system) and then decide whether to approve or disapprove the contract. A lengthy wait could have dramatic implications on the financial stability of the other party.

Hence, in consideration of the discussion above, minors should only be allowed to conduct small value transactions and these transactions are legally enforceable without a guardian's permission.[168] This approach is relevant because the intention behind the requirement of guardian's permission to validate the minor's commercial conduct is to protect his/her wealth from being wasted; and conducting transactions of small value cannot lead to significant commercial loss.[169] Furthermore, invalidating transactions of any value would inconvenience commonplace activities such as when minors shop at the market and buy items of small value; for example, food, clothes, and so on. It is therefore sensible and justifiable to allow small value transactions to take place.

Nonetheless, Islamic law makes no further provision in determining what constitutes a small value transaction. Bearing in mind that an item's value is relative to the wealth of the individual person, in cases of dispute the definition of 'small value item' is determined by the judge. In each case brought before him, the judge must take into

[168] Ibn Qodama, *al-Moghni*, vol. 4 p.506. In similar provision, under English Common legal system, in the case of necessaries, a minor may validly form contract. The term "necessaries" is defined as goods suitable to the condition in life of the minor and to his or her actual requirements at the time of the sale and delivery. See, Section 3 (3) of the Sale of Goods Act 1979, after, Deadman Stephen (2005) Minor, Mobile and the Law, *Computers and Law* 16(1), 12-14

[169] AL-Bahooti, *Kashaf al-Qena'a*, vol. 2 p.206.

account the prevailing commercial customs as well the financial background of the disputed parties.

2.4. Measures to Identify Legal Capacity in Electronic Contracts

2.4.1. Personal Details

We have seen above that the essential requirement for the legal capacity of the parties is no different in offline or online contracts. However, due to the difficulty of confirming the identity of contracting parties via electronic means, minors can potentially form electronic contracts, including the purchase of items not permitted by their age. This deception may result in significant business loss to vendors when such deals are deemed void, thus, necessitating the return of payments and goods.

In order to minimise risk, online traders could insist that customers complete a standard online form providing a range of personal details. Before the conclusion of any transaction buyers must disclose details, including their date of birth. The transaction can then be refused if the contracting person is under the legitimate age for making such a contract.[170]

[170] Al-Shaddi Sulaiman (2007) *Toroq Hemaya al-Tejara al-Electroniyya*, al-Homaighi Press, Riyadh, p. 43. Asking for such information as a preliminary measure may suffice, provided the responding party provides accurate information. Electronic signature, discussed on a separate chapter of this

Nevertheless, it is questionable whether or not it is legally sufficient to request such personal details before the conclusion of the contract and act accordingly. One may argue that it is not adequate for online traders to rely solely on this method to validate transactions. Minors might be induced by the websites' offers and provide false personal information, especially in regards to their age, in order to conclude the transaction. In traditional commerce, if a shopkeeper in the UK suspects a customer of being too young to buy alcohol or cigarettes it is insufficient for them to enquire as to their age and to trust the veracity of the response; he must demand to see a valid ID card or other evidence of age.[171] Any shopkeeper failing to do so risks prosecution and the imposition of a large fine or even suspension of business.

In addition, if the minor provides false information in order to complete the contract, what would the legal position be in this case? Would the contract be deemed valid? And in the case that the misinformation causes the online trader to incur damages is he then eligible for compensation?

In the Saudi E-Transactions Law there is no direct provision for such situations. Yet, in responding to this legal question, the rules provided for minors conducting conventional trading activities should be considered. It is worth noting that the rules provided in Islamic law for the minor's commercial conduct do not, directly, address cases where a minor lies about his age of capacity, hence the other party forms the

research, may provide some ease to such difficulty. See, Mills Karen, *Effective Formation of Contracts by Electronic Means Do we Need a Uniform Regulatory Regime?* op. cit. p. 11.

[171] The UK Licensing Act 2003, article 146 (4,5).

contract with the minor assuming he attains the legal capacity. In this regard, article 134 (2) of Jordan Civil Law states that in the case that the minor uses fraudulent methods to conceal his real age, by for instance giving ID with a fake date of birth to indicate his legal capacity, he is legally liable for compensation.[172]

However, it can be argued that providing false information in an online transaction may not be considered a 'fraudulent method' since this requires an intentional attempt for fraud by providing a forged proof of age. Hence, this provision seems to be irrelevant to the above case, thus it may create some burden to online vendors, who may act according to the given information.[173] Therefore, further legal clarification is required when considering if the act of the minor in giving wrong information about his/her age in electronic transactions is deemed as a fraudulent attempt, thus, necessitating compensation.

However, provided that the customer gives accurate information about his age, questions may arise when electronic transactions cross international borders. For instance, consider a customer in Kuwait, at the age of 18, completes an online form indicating that he is 18 to purchase a product from a website based in Saudi Arabia, and then the contract is concluded based on the given information. In this scenario, according to the Kuwait Civil Law a minor only attains legal capacity at the age of 21[174], whereas, in Saudi Arabia the adopted age for legal capacity is 18. Thus, the

[172] See, article 134 (2) of Jordan Civil Law.
[173] Al-Khashroom Abdullah, Oqood al-Tejarah al-Electronyya abr Shabaka al-Enternet wafqaa le Ahkam al-Sharyya al-Ordonyya, *Arab Law Info*, p 29, online journal available at; www.arablawinfo.com
[174] See, article 96 (1) of the Kuwait Civil Law.

contract can be negated according to article 87 (1) of the Kuwait Civil Law because the customer has not reached the age of legal capacity.

From this scenario it is evidently beneficial for online traders to clearly state which law is being applied before the contract is concluded. They therefore avoid being subject to the law of the buyer, which may contradict elements, in terms of legal capacity, of their own.

2.4.2 The Requirement of Payment[175] and the Minor's Ability to Form Electronic Contracts

In Internet deals, online traders often stipulate certain payment methods before allowing the conclusion of the contact. Frequently, these options include credit and debit cards. Individuals under the age of legal capacity are not able to open any of these accounts. [176] Since a minor is not allowed to use banking services without the consent of his legal guardian, he is not able to conclude the online contract because he does not own a card.

Yet, the minor may secretly use his parent's debit or credit card to pay for Internet purchases without their expressed consent. By this action, the online trader concluded the contract based on the validity of the account used for payment, which also signifies

[175] This issue will be further discussed at a later stage of this chapter.
[176] See, for instance, Riyadh Bank's terms and conditions to issue silver/gold visa card in which it is dictated in one of those conditions that the applicant must be at least 18 years of age, available at; http://www.riyadbank.com/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd4w3tAgCSUGYAfqRKGIG8Y4IEV-P_NxU_SB9b_0A_YLc0IhyR0dFAGCdmfw!/delta/base64xml/L3dJdyEvd0ZNQUFzQUMvNElVRS82X0JfUkw!

the legal capacity of the person since it is not given to anyone under the legitimate age. Since it is impossible for the online trader to ascertain whether the payment is made by the account holder or his/her child, such a contract should be legally binding based on the validity of the payment used, regardless of who actually uses it.

Therefore, the issue of whether such a contract has been validly concluded and whether it needs the guardian's approval becomes academic.[177] This is because the parent, and not the online trader, is legally responsible for keeping their card details safe and out of reach of their children. Therefore, it may hold here that parents are responsible for the minor's commercial transactions when using their credit cards as a result of their negligence and carelessness.[178]

However, in the case that the parent has consented to the use of a credit card, or any similar instrument, by a child who has not yet attained legal capacity, this can be used as evidence of the parent granting permission for the minor to perform valid transactions. To put it another way, under Islamic doctrine[179] the commercial conduct of a minor must be approved by his guardian to be legally enforceable. In the present case, the guardian's consent for his child to use the credit card to purchase online goods signifies his approval of the minor's commercial activity. Hence, the minor's online purchases should be legally binding. In addition, worth noting, as

[177] Deadman Stephen, Minor, Mobile and the Law, op cites.
[178] Al-Ramlawi Muhammad (2006) *al-Ta'aqod be al-Wasa'el al-Mostahdatha fi al-Fiqeh al-Esslami*, Dar al-Fekr al-Jama'ei, Alexandria, Egypt, p. 110. It should be added here identity theft whereby a minor may claim a different person identity with legitimate age is out of the scope of this research to deal with.
[179] See above pp. 12-13.

aforementioned, the minor's online purchases of 'small value' shall be legally binding without the need for the guardian's approval.

3. The Subject Matter of Contract in Electronic Commerce

After studying the issue of the legal capacity of the contracting parties, focus now turns to the legality of the subject matter of contract. As one of the requisite elements of a valid contract, the subject matter of contract is especially significant. Just as there is no contract without parties having legal capacity a contract cannot be formed without a legal subject matter. Therefore, it is worth studying this issue in view of Islamic rules and examining the legality of the subject matter in electronic contracts.

Subject matter refers to the aim of creating a contract.[180] In the sale contract, the subject matter is the item and the price. Naturally the subject matter of contract varies, it could be valuable property, such as in a contract for the sale of land or it may be the performance of work, such as in a contract with a doctor to examine or operate on a patient.

Under Islamic doctrine not all kinds of subject matter are suitable for forming a valid contract. There are certain items that are considered illegal and thus cannot be validly traded. Any contract based on such unlawful subjects bears no legal effect in the law.

[180] Musa Muhammad Yousef (1996) *al-Amwal wa Nadharryyat al-Aqd fi al-Figh al-Esslami*, Dar al-Fikr al-Arabi Cairo, p. 281. 'Arabic Source'

Alcohol, for example, is banned for Muslims in Islamic doctrine[181] and hence, any contract concerning its supply is rendered legally invalid.

Islamic jurisprudents have identified specific conditions regarding the subject matter for a contract is to be made valid. These conditions aim to avoid uncertainty or risk that may lead to a dispute as a result of the contract.[182]

3.1. The Requirement of Existence for the Subject Matter of contract

As for the existence of the subject matter when contracts are formed, jurists of Islamic law are not in agreement as to whether this is a requirement. According to one legal opinion, the subject matter must be in existence at the time of forming the contract, referring to the example of selling fruit that has not yet appeared on the tree.[183] In support of this argument, jurists refer to the Prophetic Tradition which narrates that a man by the name of Hakeem Ibn Hezam[184] came to the Prophet and asked him, "A man asked me to sell him something that I did not own; should I go and buy it from the market?" the Prophet replied "Do not sell what you do not have."[185]

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[181] Chapter 5 "al-Mai'da" verse 93: "ye who believe! Intoxicants and gambling …….are an abomination of Satan's handiwork, eschew such abomination that ye may prosper." Ali Abdullah Yusuf, *the Holy Qur'an: Text, Translation and Commentary*, pp. 270-271.
[182] Zaidan Abdul-Kareem, *Almadkhal Lederashat al-Shariah al-Eslamiyyah*, op cit, p. 307.
[183] Zaidan Abdul-Kareem, *Almadkhal Lederashat al-Shariah al-Eslamiyyah*, op. cit, pp. 308-309.
[184] Hakeem Bin Hozam Bin Khawild bin Asst Bin Abdul Faze, one of the Prophet's companions, Khadja Bint Khawild's brother son, born in Mecca, died aged 120 years, in 54 at Medina. He joined Islam on the Fatah day and has about 40 narrations from the Prophet (See Tahzeep – *Al Tahazeep* 2/447, and Alasab 2/349)
[185] Narrated by Abu Dawud. See Ibn Othaimeen Mohammad, *al-Sharh al-Momtea Ala Zad al-Mostagnea*, op cit, p. 128, and Rayner S.E., *the Theory of Contracts in Islamic Law*, op cit, p. 133. Yet,

However, implementing this legal approach may have negative implications on the development of e-commerce in the long-term. A large amount of electronic transactions relate to services that have not yet been provided and as such, under this jurisdiction, they face the possibility of being invalidated, as they are not in existence at the time of forming the contract.

In contrast, an opposing School of Thought recognises that the subject matter, either tangible or intangible, does not have to be in existence at the time of forming the contract, so long as it does not involve uncertainty, meaning that it is possible to be delivered in the future.[186] Accordingly, the Lawgiver forbids the sale which involves an element of risk and uncertainty[187] regardless of whether the subject matter is in existence or not. Therefore, in the case where the subject matter of the contract can be delivered in the future, it ought to be valid for trading.[188]

In fact, the aforementioned Prophet Saying that forbids Muslims from selling something they do not possess does not denote the requisite requirement for the physical existence of the subject matter of contract. Rather, the reason behind this

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as a matter of necessity and being familiarly practised by people in the market, the ordered sale (which is a contract of sale in which the price is fully paid in advance while the product will be delivered in future), and manufacturing sale (which is a contract of sale where a buyer gave an order to workmen (seller) to make a definite thing with an agreement to pay a definite wage or price for the item when it is made) have been allowed as an exception to the principle of the existence of the subject matter in contract, which provide, respectfully, for the future provision and manufacturing of goods. See, sale Musa Muhammad Yousef, *al-Amwal wa Nadharryyat al-Aqd fi al-Figh al-Esslami*, op. cit., p. 282.

[186] Al-Joroshy Sulaiman, *Nadatiah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, op. cit., p. 110.
[187] Narrated by Imam Muslim; see Ibn Othaimeen Mohammad, *al-Sharh al-Momtea Ala Zad al-Mostagnea*, op cit., p. 143.
[188] Musa Muhammad Yousef, *al-Amwal wa Nadharryyat al-Aqd fi al-Figh al-Esslami*, op. cit., p. 284.

instruction by the Prophet is simply to prevent uncertainty by selling something that is not possible to deliver, [189] not because it is not in existence, which may lead to conflict between the contracting parties when the seller is not able to deliver the purchased item.

Thus, in respect of electronic transactions, the latter School of Thought presents a more valid approach and provides greater security to Muslims conducting business electronically. That is to say, contracts of services can be validly formed online despite not being in existence at the time the contact is formed as long as they can be performed after the conclusion of the contract.

3.2. The Requirement for the Legitimacy of Subject Matters

In terms of the legitimacy of the subject matter of contract, the position is similar to those binding traditional transactions, in that the subject must be legal and not contrary to the principles of Islamic law. Notwithstanding this condition, many trading practices carried out over the Internet do contravene it. A large number of websites offer items deemed as unlawful in Islamic law, such as pornographic films, gambling opportunities, drugs and alcohol. It must be stressed that all transactions concluded via

[189] Ibn Qodama, *al-Moghni*, vol. 4, p. 208, and Ibn al-Qayyim, *E'alam al-Mowaqaeen*, vol. 3, p. 8.

electronic means which have such illegitimate subjects will have no legal force in Islamic doctrine. [190]

Since the Internet is a worldwide communications network and is not restricted in the content that it publishes, Muslim countries including Saudi Arabia have established ways to tackle unlawful content. The Institute of King Abdul-Aziz City of Science and Technology currently filters access to the Internet and blocks access to these unlawful websites. This governmental institution has the power to control the operation of the Internet and block all websites that are contrary to Islamic or Saudi cultural or political values. Therefore, Internet users in Saudi Arabia cannot view or deal with these businesses.[191]

Yet, the effectiveness of this blocking is questionable as numerous reports indicate that some Internet users use satellite connection to bypass the filtering system, there is also a practise of proxy breaking to get through to blocked websites from Saudi.[192] Hence, there might be violation of the law by supplying those types of trades to residents in Saudi Arabia. Therefore, online traders engaged in 'unlawful' commercial activity should be aware of such potential violation and make provisions to avoid contracting

[190]This trend was reinforced by the Saudi Council of Ministers Decree no. 163 dated 24/7/1417H, regarding the acknowledgment of the Internet Regulation, which states in Article 3 (2) that the Internet must not be used for prohibited purposes, amongst others, gambling, viewing pornography, or doing anything which opposes the customary and cultural values of the society or adopted policies in the Kingdom of Saudi Arabia.

[191] For further information please see, Internet Filtering in Saudi Arabia in 2004, available at; http://opennet.net/studies/saudi, and Alfred Hermida, 'Saudi Block 2000 Websites, BBC News published on 31 July 2002 available at; http://news.bbc.co.uk/1/hi/technology/2153312.stm. It is important to note that it is beyond the scope of this research to discuss whether or not this practise by the Saudi government to block certain websites is justified and also if yes to what extent in terms of human rights.

[192] Khazindar Abid, High Costs of Blocking Websites, Arab News, published on 6 November 2006 available at; http://www.arabnews.com/?page=13&section=0&article=77760&d=16&m=11&y=2006

with customers from Saudi Arabia; otherwise they might infringe State rules and be open to severe judicial punishment.

3.3. Monetary Price in Contract

There are two main elements to the subject matter of contract: the goods or object of the contract and what is paid in exchange for the value of the purchased goods, [193] which is referred to as payment. As a general rule, payment does not have to be in monetary value, rather, the contract can be validly formed by an exchange of products, one that is considered as an object of sale and the other which represents the payment and vice versa.[194] In the interest of this section, the price will denote, although it is not so restrictive, the monetary value as an exchange for purchasing an article. Islamic doctrine features a number of specific rules relating to monetary price in contract of sale and thus, at a later stage these will be examined and applied to payment practices in e-commerce.

This section aims to examine the compatibility of payment methods frequently used in e-commerce with Islamic rules in order for the payment to conclude a legally binding contract. This examination will be based on the Islamic rules provided for payment in conventional contracts of sale. This section is, however, not aiming to provide an extensive examination of electronic payment in terms of potential legal issues, such as the risk of fraud or money laundering, nor does it aim to provide excessive study to

[193] Al-Sanad Muhammad, *al-Ahkam al-Fighiyya lel-Ta'amolat al-Electroniyya* op cit, p. 200.
[194] Al-Zuhayli Wahbah, *Financial Transactions in Islamic Jurisprudence*, op. cit., p. 54.

Islamic banking payment services or issues relating to stock-exchange or currency-exchange contracts.

Islamic law states that the price must be in existence and determined by both contracting parties before the conclusion of a contract.[195] As with the subject matter of contract, the purpose of the condition of accurate and precise determination of payment is to prevent any uncertainty which may lead to a conflict between the parties.[196]

Thus, payment cannot be fixed at a later date with reference to the market price, nor can it be made subject to determination by a third party. It is important to note that the currency must be in circulation and that its value and specifics must be sufficiently defined.[197]

[195] Al-Khateeb, *Moghni al-Mohtaj*, vol. 2, p. 17.

[196] Recall that the Islamic legal system vitiates all transactions based on uncertainty. See above footnote 54.

[197] Rayner S.E., *The Theory of Contracts in Islamic Law*, op. cit, p. 141. However, in the case that currency has lost its value after it has been determined and before it has been delivered to the seller, there are two different opinions provided in Islamic law. According to one of them, the contract is deemed to be void, and thus, the buyer has to return the purchased article if it is still in its original condition, otherwise a replacement, if it is possible, or the value of the purchased article has to be made. However, the other opinion maintains that the contract in this case is not voided, but the seller is given the option to either void it or to take the value of the money that agreed upon before losing its value. However, in the case of money fluctuation, where the value of currency has gone up or down but has not lost its value, it is unanimously followed that the sale is not voided. Yet, it is a matter of disagreement whether or not the value of the currency is considered. According to one juristic view, the value of the money at the time of concluding the contract is considered, since the payment is due at the time of the contract and that should be when its value is due. However, the majority of Muslim jurists state that the same amount of the agreed currency for payment between parties at the time of contract is considered regardless of whether its value has gone up or down, since this is the agreed amount of money between the parties and the increasing or the decreasing of its value is related to the market which is out of the parties' control. For further discussion of this issue, please see, Al-Zuhayli Wahbah, *Financial Transactions in Islamic Jurisprudence*, op. cit., pp. 59-60, and Al-Zuhayli Wahbah (2002) al-Moa'amalat al-Maliyya al-Mo'asera, Dar al-Fikr, Damascus, pp.155-1158.

Notwithstanding the conditions set out above, commercial customs and practices play a vital role in this regard. For instance, if it is customary to obtain the price of a commodity in the market by weekly instalments, such transactions will be legally valid provided that there is clear determination of the time and manner of payment before the conclusion of the sale. The payment in such a contract will be interpreted according to the trading usages in the market.[198] In cases where the type of currency unit is not provided the trading usage will define the currency unit of payment according to the unit most frequently used in the country where the contract is transacted.[199]

Furthermore, in the case that parties agree for the payment to be done at a later stage, there must be clear time guidelines. Payment cannot be uncertain or fixed to the occurrence of an uncertain event, as this may lead to conflict between parties.

3.3.1. Payment in E-commerce

As indicated above, Islamic law does not restrict payment in contract to any particular form. Hence, any form of payment that is agreed upon by the contracting parties and aims to eliminate any potential involvement of uncertainty appears to fulfil the essential condition of payment in contract.

Payment for goods purchased over the Internet does not differ from goods purchased in any other way except in terms of its form and the way the payment is executed. Money

[198] Rayner S.E., *The Theory of Contracts in Islamic Law*, op. cit, p. 142.
[199] Ibid.

in e-commerce transforms, in effect, notes and coins into intangible electronic forms.[200] The requirement of payment is essentially unchanged by the advent of electronic forms of technology. This is due to the fact that communication technology represents a revolution in how contracts are formed, rather than the substance of contract.[201]

The legal term 'payment' may be defined in reference to electronic contracts as any mechanism facilitating the transmission of value, electronically, which bypasses its physical delivery from the payer to the payee.[202] This definition encompasses the majority of electronic payment methods.

There are various methods of payment in e-commerce, for example 'e-cash'[203], stored valued cards[204] and electronic fund transfer (EFT)[205] which all appear to comply with

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[200] 'Emerging Electronic Methods for Marking Retail Payments', Congressional Budget Office Study, Chapter 1, available online at: http://www.cbo.gov/doc.cfm?index=14&type=0&sequence=2

[201] 'Report 50: Electronic Commerce Part One: A Guide for the Legal and Business Community', A report was published on October 1998 as Parliamentary Paper E31AK (cited as; NZLC R50) Wellington, New Zealand, Para 76, Available online at; http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_49_95_R50.pdf

[202] Geva (1991) 'International Funds Transfer Mechanism and Law' in Norton, Reed & Walden (eds) *Cross Border Electronic Banking: Challenges and Opportunities*, cited by Edwards, L. & Walde, C. (2000) *Law and Internet: a Framework for Electronic Commerce*, 2nd Ed. Oxford: Hart, p. 58.

[203] E-cash or digital cash involves the creation of a digital unit or token value stored in an electronic device such as a computer. The stored value may be in a particular currency or multiple currencies. Usually an e-account needs to be opened with a bank or financial institution, which will then issue an encrypted code to identify the user in Internet purchases. Upon conclusion of the sale, the bank or financial institution as an intermediary will, upon instruction from the customer, credit the amount to the e-tailer and debit the customer's e-account. See al-Roomy, Muhammad, *al-Ta'aqud al-Electroni aber al-Internet*, Dar al-Matbo'at al-Jame'eiyya, Egypt (2004) pp. 143-144.

[204] It is also known as 'smart cards' or 'e-purse'. It is a multipurpose prepaid plastic card embedded with a microchip and supplied in advance with generally accepted purchasing power. It can be reloaded either at the bank's counter, through the automated teller machine (ATM) or through a specially equipped telephone, against a debit entry in a credit institution account or against bank notes and coins, making it a premium choice. The user opens an e-account with the bank or non-bank institution and then receives an encrypted code which identifies him in Internet transactions. The user transfers funds from his bank account to the e-account. When he needs to make a payment for an Internet purchase he informs the seller of his code, which is then verified by the seller with the issuer. The issuer, as an

the contractual requirement for payment under Islamic law. These alternatives provide a modern and electronic way of transferring value between users contracting online without the need for physically handling monies. They should therefore be deemed valid in Islamic law as long as they do not involve an element of uncertainty and interest.

3.3.2. Attitude of Islamic Jurisdiction towards Electronic Card Payment

Central to e-commerce is the attitude of Islamic jurisprudence towards payments made by card, which is one of most important means of electronic payment.[206] A number of modern jurists and legal institutions have studied and attempted to define the essential aspects of electronic payment by card in order to establish Islamic doctrine. The Islamic Jurisprudence Council defines it as a 'reference' given by its issuer (normally a bank) to the other party according to a contract between them. This reference enables the cardholder to buy goods or services from whoever accredits this reference without

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intermediary, will then effect payment and accordingly debit the e-account. In this way, confidentiality remains intact. See Working Group on EU Payment System: Pre-Paid Card (May 1994) *Report to the Council of the European Monetary Institute* at http://www.systemic.com/docs/papers/eu_prepaid_cards.html

[205] It has since improved and is commonplace for remittance of funds using a system such as Chaps and Bacs (for UK domestic transfers), Chips and Fedwire (for US domestic transfers) and Swift (for international transfers). The existing EFT system falls into two classes: a) high value intermediate payments and b) low value delayed payments. Payment by EFT is effected by swiping the buyer's card at the relevant EFT terminal, when the payment instruction is communicated instantaneously. In principle, it could also be adapted for Internet purchases through improved Internet protocol infrastructure. See Reed, C. (1996) *Legal Regulation of Internet Banking: A European Perspective*, Queen Mary & Westfield College, University of London and Smith, GJH (2002) *Internet Law and Regulation*, 3rd. London: Sweet & Maxwell, p. 492.

[206] Zainul Norazlina, Osman Fauziah, Mazlan Siti Hartini, E-Commerce from an Islamic Perspective, *Electronic Commerce Research and Applications* 3 (2004) 280-293, p. 286.

immediate cash payment, because the reference includes the issuer's obligation to pay. It also enables its holders to obtain cash withdrawals from banks' ATMs.[207]

There are three parties involved in a credit-card payment scheme; the cardholder, the issuer and the trader who accepts the card. In the following discussions, two of the most frequently used card types, namely debit cards and credit cards, will be referred to and studied from the perspective of Islamic doctrine. Central to this discussion is the issue of 'interest' in loans and its implications for Muslim clients.

3.3.3. Interest[208] and Islamic Law

For the purpose of this study, interest is defined as "a predetermined excess or surplus over and above the loan received by the creditor conditionally in relation to a specified period."[209] Under Islamic law it is prohibited to lend money on the condition that the money will be repaid with an increase. For example, it is unlawful to loan £1000 on the condition that it has to be returned at a specified time with an increase that takes the value up to £1200. Any transaction based on such practise is strictly prohibited in Islamic law.

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[207] Decisions and Recommendations of the Islamic Jurisprudence Assembly at its Seventh Meeting, Decision No. 65/1/7, quoted by Al-Shaddi Sulaiman, *Toroq Hemaya al-Tejara al-Electroniyya*, op cit, p.340.

[208] In another terms, 'usury' is used to refer to the same practise. 'Usury' is the practise of lending money to people making them pay unfairly high rates of interest. See, Longman Advanced American Dictionary, Pearson Education Limited, Essex (2000), p. 1596. In Arabic term, this refers to as *Riba*.

[209] Rahman Afzul ur (1986) *Economics Doctrine of Islam*, 3rd edition, Islamic Publication Ltd, Lahore, vol. 3, p. 69.

A number of verses in the Holy *Qura'an* and Prophet Traditions mention, plainly, the strict prohibition of interest.[210] Among others, it is stated clearly in the *Qura'an* that "…..Allah has permitted trade and forbidden interest…."[211] This is established a clear distinction between trade and interest. The above *Qura'anic* verse prohibits, plainly, and without any doubts all rates and causes of interest, irrespective whether the extraneous addition to the borrowed amount is small. Thus, any accrued amount added to the principal 'the taken loan" is unlawful whatever the causes were for the incurrence of the debt.[212]

Also, it is reported that the Prophet cursed the receiver and the payer of interest, the one who records it and the two witnesses to the transaction and said: "they are all alike in guilt"[213] Thus, this Prophet Tradition made it, strictly, not permissible for Muslims to involve in this transaction in any sort of way either as lender or borrower or even just a recorder or witnesses.[214]

3.3.4. The Debit Account and its Legality in Islamic Law

Debit accounts are used as an alternative to cash to pay for purchases. The holder of a debit account is provided with a card that is connected to an account into which he/she

[210]For further discussion of interest and its practises in Islamic law, please see, Al-Zuhayli Wahbah (2002) al-Moa'amalat al-Maliyya al-Mo'asera, Dar al-Fikr, Damascus, pp. 46-53.
[211] Chapter 2 verse no. 275.
[212] Ali Engku Rabiah, *Riba and Its Prohibition in Islam*, online article, p. 10, available at: http://www.cert.com.my/cert/pdf/riba_drengkue.pdf
[213] Narrated by Imam Muslim, cited after ibid, pp. 11-12.
[214] Ibn Othaimeen Mohammad, *al-Sharh al-Momtea Ala Zad al-Mostagnea*, op cit, p. 392.

deposits money. Whenever the debit card is used the withdrawn amount of money is deducted directly from the account balance.[215] The cardholder can use it to pay for any purchases, offline or online, within the available overdraft.

Different companies and countries have different rules for debit cards. This section aims to examine the legality of using this card from an Islamic legal viewpoint. Therefore, it is worth noting that the use of this card is considered to be lawful so long as it does not involve any interest.[216] However, as far as the online trader, who accepts the card, is concerned, the banks typically do not credit the trader's account with the entire amount of the transaction. Rather, a percentage referred to as the discount is charged by the bank and other intermediaries.[217]

In this case, the charge is applied based on the services that are offered by the card issuer. Effectively, the online trader is being charged for the transfer of cash between the buyers account and his own. Since these charges are not based on increasing loans they are not considered as illegal interest. Instead these charges are considered as a commission resulting from the provision of services which benefit the online trader. In that regard, a juristic decision was issued to validate the practise of charging commission for providing this service, provided that the trader sells the product at the

[215] Debit Cards and Credit Cards – the Difference, available at; http://www.direct.gov.uk/en/MoneyTaxAndBenefits/ManagingMoney/BankAccountsAndBankingProducts/DG_10035158
[216] Islam Today, Religious Rulings Archives, available at; http://www.islamtoday.com/show_detail_section.cfm?q_id=1388&main_cat_id=5
[217] 'Emerging Electronic Methods for Marking Retail Payments', Congressional Budget Office Study, Chapter 1, available at: http://www.cbo.gov/doc.cfm?index=14&type=0&sequence=2

same price, regardless of whether payment is made by card or cash. [218] Thus, since such practise is considered as a commission, it should be legally valid as the commission contract is legally valid in Islamic law.[219]

Similarly, PayPal, owned by eBay, facilitates the transfer of value from buyer to purchaser across the Internet by charging a certain amount as a fee for this service.[220] This fee is considered commission since the charge applied is for the service of facilitating the transfer of value between users and not because PayPal lends money to its users. That is to say, there is no unlawful practise of interest here, hence, this service should be a valid payment method under Islamic law.

3.3.5. Credit Account from Islamic Law Perspective

Today, a credit account is an essential mode of payment, especially in transactions conducted online [221]. Issued by a bank or business, a credit card authorises the holder to borrow money or buy goods or services on credit. The cardholder is required to pay

[218] This is according to the juristic ruling of the Islamic Jurisprudence Council numbered as 108 (12/2) quoted from Islam Questions and Answer, Religious Ruling no. 97530. available at; http://www.islam-qa.com/en/ref/97530.
[219] Al-Zuhayli Wahbah, al-Moa'amalat al-Maliyya al-Mo'asera, op cit, p. 540.
[220]González Andrés, PayPal and eBay; the Legal Implications of the C2C Electronic Commerce Model, a paper submitted to BILETA (British and Irish Law, Education and Technology Association) Conference held on 13 April 2003 in London.
[221] Böhle Knud and Krueger Malte (2001) Payment Culture Matters – A Comparative EU-US Perspective on Internet Payments, Background Paper No. 4, Electronic Payment Systems Observatory (ePSO) p. 21 available at;
http://citeseer.ist.psu.edu/cache/papers/cs/28078/http:zSzzSzepso.jrc.eszSzDocszSzBackgrnd-4.pdf/payment-culture-matters-a.pdf

back the credit with additional interest.[222] As with a debit account, a credit account holder is provided with a magnetic card to pay for these purchases or be advanced cash.

The charging of interest on debts incurred by the use of a credit card appears to be obligatory and constant. Thus, in Islamic law it is considered a loan connected with obligatory interest. Hence, the use of such cards is illegitimate as it involves an explicit charging of interest which is not permitted under Islamic doctrine.[223]

Yet, in the case that the policies of the issuing company include a condition that the interest charges connected with the credit is waived if full payment is made within a given time period, while partial payment or a delay in payment beyond the designated time results in the application of interest charges, Islamic legal opinion differs. One School of Thought considers this practise lawful due to the essentiality of this card in today's businesses so long as the cardholder makes sure to settle his credit within the given period.[224]

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[222] In Saudi Arabia, the procedures of credit cards as applied in certain Saudi Banks as follows; the card allows the bearer to withdraw certain amount of money as a loan, and he has to repay the same amount of money within a period not exceeding fifty-four days. If he does not pay it back within the period stated, the bank charges interest of 1.95 riyals for each hundred riyals of money withdrawn. The bank also charges 3.50 riyals for every hundred riyals of cash withdrawn by the carrier of the card, or a minimum of 45 riyals for every cash withdrawal. The card holder is also entitled to buy products in stores that the bank deals with, without paying any cash, and it becomes a loan from the bank. If there is a delay in paying off the cost of purchases for more than fifty-four days, a charge of 1.95 riyals for every hundred of the price of the products purchased will be added to the total borrowed cost. See, for instance, credit card rules of the Samba Bank in Saudi Arabia, for more information visit its website at, http://www.samba.com/ENGLISH/INDEX_01_01_en.html

[223] Al-Shaddi Sulaiman, *Toroq Hemaya al-Tejara al-Electroniyya,* op cit, p.344.

[224] This is according to a legal opinion, See Islam Today, Religious Rulings Archives, available at; http://www.islamtoday.com/show_detail_section.cfm?q_id=1388&main_cat_id=5

However, in contrast to this approach, it follows that this card is not allowed under the rule of Islamic law, even if the cardholder is determined to pay back the borrowed amount of money within the free period.[225] This is due to the fact that the card is clearly involved in a condition of interest in the case of late payment and this is banned in Islamic law. Also, there is a potential risk of incurring interest, as the cardholder may be unable, for a number of reasons, to pay off future credit within the specified grace period.

However, due to the strict prohibition of this type of credit card, interest free credit cards have been introduced to conform to Islamic rules. This service does not charge interest for late bill settlement. Instead, it is standard procedure for the card issuer to warn clients that in the case of late payment there is a possibility of withdrawing and cancelling the card.[226] Card issuers routinely charge their clients set fees when issuing or renewing a card. In addition, the issuing bank takes commission from the online trader who accepts the card, which is considered a valid practise as mentioned previously.

In terms of the legality of applying charges to the client, it is thought that charges applied to the client involve uncertainty and are therefore deemed illegal as the clients

[225] This is according to the statement of the Islamic Jurisprudence Council numbered as 108 (12/2), quoted from Islam Questions and Answer, Religious Ruling no. 97530. available at; http://www.islam-qa.com/en/ref/97530

[226] See for instance, Bank al-Jazira's Credit Card, available online at; http://www.baj.com.sa/perbank/default.asp?page=visa

do not know what they are supposed to obtain in return for paying such charges.[227] It is also feasible that a cardholder does not use the card during its issuance period and yet the card issuer charges him for issuing and renewing the card.

However, the fact remains that these charges are only fees set by the card issuer as a result of enabling the client to enjoy the services provided with the card. Irrespective of whether the client uses the card or not the charges are applied since the services are integral to the provision of the card. Also, there is no element of uncertainty as the client accepts the card fully cognisant of these set fees. In this regard, it is juristically decided that it is permissible for the card issuer to apply set charges on a client for issuing or renewing the card because these fees cover the actual services. [228] However, it is worth noting that any charges in addition to the set one, such as charges exceeding the amount required to cover the services offered are deemed illegal because that is interest which is expressly forbidden under Islamic law.[229]

4. Conclusion

The elements of legal capacity of the contracting parties and subject of contract must be met for the valid formation of a contract under Islamic law. The analysis of those two elements in the context of e-commerce should be based on the application of

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[228] This is based on the aforementioned statement of the Islamic Jurisprudence Council numbered as 108 (12/2), quoted from Islam Questions and Answer, Religious Ruling no. 97530. available at; http://www.islam-qa.com/en/ref/97530

[229] Ibid.

traditional contract law principles. From the discussion above, the following points are to be emphasised.

- In general terms the discussion of the elements of the legal capacity of contracting parties and the subject of contract required by the Islamic law of contract, as it applies to traditional business, is not in conflict with activities conducted via electronic methods. Although certain Islamic legal thought provided for these two elements of contract appear to be inconsistent with the practise of electronic contract, it has been discussed above that these legal thoughts are not the most appropriate approaches. Hence, the Islamic rules governing these elements of contract offer no hindrance to the development of e-commerce.

- The Islamic law of contract, like other legal systems, requires the legal capacity of the parties for a contract to be legitimately made. Accordingly, a minor, who is yet to attain legal capacity, cannot validly form a binding contract. Due to the nature of contracts formed via electronic means, where the contracting parties are remote, it is difficult for each to identify the legal capacity of the other. Hence, there is a possibility of electronically forming a contract with a minor.

- Thus, in theory, there is a risk that contracts formed electronically are legally void. However, in practice, this can be tackled by demanding that customers complete an online form detailing personal details, including their date of

birth, prior to the completion of the contract. Thus, allowing the conclusion of the contract when the customer attains the age of legal capacity. However, there is still a lack of clarity as to the legal position when an individual provides wrong information about their age and whether it qualifies as a fraudulent attempt, thus requiring compensation when the contract is deemed void and the online trader incurs damages.

- As a rule, in online transactions a method of payment is required before allowing the conclusion of the contract. Most available methods of payment for online transactions, including credit and debit cards, can only be owned by adults with legal capacity. This requirement eliminates the risk of traders forming contracts with minors. Where a minor forms an online contract using his parent's credit card the legal responsibility for payment is borne by the parent.

- Due to the nature of commercial activities conducted in cyberspace, where the majority of users are not Muslims, there are many transactions based on illegitimate subjects under the law of Islam. However, as a practical way of dealing with such concerns in Saudi Arabia, the governmental institution of King Abdul-Aziz City for Science and Technology blocks all commercial practices which are in conflict with the country's cultural and political rules. Whilst there is the possibility that Internet users may break this blockade, this is regarded as an offence so website owners of these illegitimate products are

advised not to deal with customers from Saudi Arabia in order to avoid the possibility of prosecution for infringing domestic rules.

- This chapter has discussed the status of payment as an essential element of contract in Islamic law. Payment must be determined by parties prior to the conclusion of a contact. Electronic payment methods have been identified as suitable alternatives to payment options in offline trading practise. It has been noted that credit and debit cards are the most frequently used payment methods in electronic transactions and that whilst Muslims are permitted to use debit cards, the use of any other card which involves a mandatory element of interest is unanimously banned in Islamic doctrine and prohibited by law. However, in the case where no interest is charged by the bank their use is allowed, according to a juristic opinion, as long the credit bills are settled before a pre-determined date.

THE ELEMENT OF CONSENT IN CONTRACT AND ITS LEGAL STUDIED APPROACHES TO ELECTRONIC COMMERCE

1. Introduction

This chapter turns from external elements to focus on internal elements required by all contracts, namely the consent of parties to enter into a binding transaction. Parties' consent is an imperative requisite for the legitimacy of any transaction in Islamic law. That is to say, without mutual consent given by both of the contracting parties to enter into a binding transaction there is no contract to be validly considered. The authority of this condition is referred to in the Qura'anic verse that clearly states "Oh you who believe! Squander not your wealth among yourselves in vanity, except it be a trade by mutual consent.[230]" The Prophet also emphasised the importance of mutual consent as a core condition to validate trading between parties, saying that "It is not lawful to take the property of a Muslim without his wish" and that "sale is by consent.[231]"

[230]Chapter no. 4 verse no. 29
[231]Narrated by Ibn Hebban, see, Ibn Lebban A'la al-Dayyn, *Saheeh Ibn Hebban*, third edition, al-Resalah Institution, Beirut (1997), volume no. 11, p340, Prophetic Saying no. 4967.

Accordingly, there can be no legitimate trade without mutual consent. However, there is no further clarification as to how this mutual consent can be expressed. Legally, mere consent to enter into a transaction without verbalising that consent is insufficient to conclude a contract. Parties' consent is hidden in the breast and what is in the breast is not possible to be known and thus, a mere consent to form a transaction without an expression of that consent cannot form a contract.[232] As a result, traditionally, the mutual consent of parties in a contract is legally considered when there is a connection of offer and acceptance through which the consent of the parties can be ascertained.

The parties' agreement is deemed to be legally formed when a firm offer by one party is unequivocally accepted by the other. The offer and acceptance methodology does not constitute formality in the Islamic contractual legal system. It is only a means to find out the inner will and consent of the parties to enter into a legal binding transaction.[233] Based on the mode of offer and acceptance, a decision can be made whether a free agreement has been reached in transactions or not.

Traditionally the consent in a contract is formed between parties dealing with each other in one another's presence. This idealised model of face-to-face transaction makes no provision for Internet transactions used in the field of e-commerce. Hence, when considering the nature of electronic communication where the contracting

[232] Shams al-Din al-Sarakhsi, *al-Mabsut*, vol. 13, p.46.
[233]Aron Zysow, the Problem of Offer and Acceptance: A Study of Implied-in-Fact Contracts in Islamic Law and the Common Law, *Cleveland State Law Review*, vol.34 no.1, p. 69-77.

parties are at distance, uncertainty may arise in terms of the validity of expressing the consent of the parties and thus forming legal electronic transactions.

Consequently, it is essential to discuss the validity of Internet communication as a medium to express consent in light of traditional Islamic rules of contract. This aims to clarify whether a contract can be validly formed when the consent of the parties is exchanged via the Internet. Furthermore, the nature of Internet transactions allows contracting parties to program their computers to express consent in the form of an offer or even an acceptance without direct human intervention. Accordingly, it is uncertain whether offer and acceptance can be exchanged electronically where there is an absence of human involvement. It is also possible that programmed computers can make errors in expressing consent when there is actually none intended. Hence, this chapter also discusses whether such contracts can be deemed legally binding and whether the originator bears the responsibility of the computer's error.

A thorough examination of the validity of Internet transactions also requires consideration of the following; whether the content of a website constitutes an offer or an invitation to treat, revocation of an offer, a click on a button and its sufficiency to express the consent of the parties, users' consent to incorporating terms and conditions, whether it is possible to express acceptance by silence, and whether the purchaser can validly return purchased goods and thus cancel the transaction without liabilities.

2. Offer and Acceptance – Definition and General Principles

An offer has been defined as an expression of willingness to contract made with the intention that it shall become legally binding on the person making it (the offeror) when it is accepted by the person or persons to whom it is made (the offeree).[234]

The offer alone is insufficient to conclude a valid contract; rather there must be an expression of acceptance to the offer in order to establish a binding contract. The acceptance is an expression issued by the offeree showing his/her willingness to enter into a binding deal according to the terms of the offer.[235] Similarly, in the case of an offer the acceptance has to be decisive with the intention of being legally bound with the contract.

There are two leading definitions to the terms of offer and acceptance under Islamic legal doctrine. The first indicates that offer is the initial proposal which is made by one of the parties to show his willingness to form a contract. Acceptance, in turn, is the subsequent response from the other party to demonstrate his consent to the offer[236]. So, the essence of this approach is that proposal is the first movement from either seller or buyer to demonstrate interest in entering a business relationship. The acceptance is the resulting willingness to the proposal.

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[234] Chitty on Contract (2004) *General Principle*, Reference no. 2-002, Sweet and Maxwell, London.
[235]Al-Oboodi Abbas (1997) *al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori*, Moktabat Dar al-Thaqafah, Amman, Jordan, p. 122.
[236] This definition is made by the majority of Hanafi's jurists. The Mejelle which is mainly based on the Hanafi Sect provides similar definitions, see arts. 101 and 102. Al-Ebraheem Muhammad (1986) *Hokom Ejra'a al-Oquud bewasa'el al-Etesalat al-Hadeetha*, Dar al-Dhiya, Jordan, p. 34.

However, according to the second approach; the offer, whether it is made in the first or second place, refers to what the seller says or acts to show his/her consent in contract. On the other hand, acceptance can only be made by the buyer, regardless of whether the buyer's initiative is issued initially or after the proposal is made[237]. Nevertheless, the above divergence regarding the definition of offer and acceptance is, in effect, a terminological difference and has no significant impact on the validity of contract. This is due to the fact that according to the later approach; an acceptance can be validly made before an offer. Thus, if acceptance is given before offer, this does not lead to the nullification of the contract. In essence, consideration is given in Islamic doctrine to mutual consent which occurs in either approach.[238]

As outlined above, the parties' consent in the form of offer and acceptance is a requisite element for the valid conclusion of any contract. It is beside the point whether offer and acceptance is made by the seller or the buyer. Therefore, this chapter will follow the first definition provided in Islamic doctrine. As a general principle, parties' consent in contact can be expressed by any means, be that verbally, by sign or gesticulation[239], or by conduct such as giving-and-taking contract.[240]

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[237] This approach is adopted by the majority of Muslim jurists from all schools of thoughts accept the Hanafi school. Ibid, p. 35-37. For further information see also, Al-Dobaiyyan Dobaiyyan (2005) *al-Ejab wa al-Gobol bin al-Figh wa al-Qanoon*, al-Rashd Library Press, Riyadh, pp.13-15, and pp. 223-226.

[238] Al-Ebraheem Muhammad, *Hokom Ejra'a al-Oquud bewasa'el al-Etesalat al-Hadeetha*, op cites., p. 37.

[239]Gesticulation as a tool of expressing out the consent of the parties defines as moving a part of the human body in a way that designating either the parties' consent or refusal to form a contract, such as, moving the head in a vertical way to express the consent or, in contrast, moving it horizontally to mean the objection, or doing other types of movements based on the trading usages and practices for a society. It is important to bear in mind that the meaning of the used gesture in contract has to be clearly perceived by the parties as the used of gesture for trading matter might have one or more meanings in a

Therefore, when a contract is formed electronically through a verbal exchange of offer and acceptance between parties it should be legally valid as this is analogous to the verbal expression of parties' agreement in face-to-face contracts. It is irrelevant in Islamic law whether or not the parties are contracting together in one place at the time of forming the contract, as mutual consent is the essential requirement for the valid conclusion of a contract.

Since Islamic doctrine does not assert how mutual consent should be expressed, commercial practice can provide significant guidance. Ibn Tammiyya asserted that a contract can be validly formed by any means, verbally, or by action and this should be left to the people to determine based on prevailing trading practises which vary from

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society and in the case the parties are from different cultures, gesture may have contrasting meanings or no sense in other societies. It is an agreed point between Muslim jurists that gesture is a valid tool to form a contract for a deaf-mute person. However, the overwhelming majority of those scholars did not validate the use of this tool to form a contract by normal people who can hear and talk. Yet, there is another view in the law allowed the use of gesture to indicate the parties' will in contract for both normal and mute people so long as it shows clearly the consent of the parties. See, Al-Dobaiyyan Dobaiyyan, *al-Ejab wa al-Gobol bin al-Figh wa al-Qanoon*, pp. 83-95, and Al-Qarehdagy Ali (2000) *Hokom Ejra'a al-Aqood be Alat al-Ettessal al-Hadeetha*, an article published in Majallat Mojamma'e al-Fogh al-Eslami, sixth edition, vol. 2, pp 956-963.

[240]The giving-and-taking transaction denotes that the buyer gives the money to the seller and takes the purchased article without both of them saying anything. This type of contract is largely practised in the market. One of the explicit examples for such contract is the display of products with their prices attached in shops, so that customers select what they want and pay for it without verbal expression. There is a division between Islamic jurists regarding the validity of such transaction. It is sufficed here to mention that the majority of Islamic legal scholars validated this type of transaction which is the accurate approach as it is compatible with our daily business life. For further details see, Al-Dobaiyyan Dobaiyyan, *al-Ejab wa al-Gobol bin al-Figh wa al-Qanoon*, op cite pp.71-79, and Mahmassani (1955) *Transactions in the Sharia Law in the Middle East: Origin and Development of Islamic Law*, Masjid Khadduri and Herbert J.Liebesny. (ed) Washington D. C. the Middle East Institute, p. 192.

society to society and from time to time.[241] This demonstrates the flexibility of Islamic law to accommodate developing methods of communication.

A noteworthy comparison can be made between today's electronic exchanges of offer and acceptance with the traditional practise of two parties conducting business behind walls. Parties' exchange would be shouted to each other over distances or contracted behind a wall, without seeing each other or being in the same location. This practise is considered a valid transaction in the law.[242] This implies the validity of forming a contract between two parties at distance and thus these mentioned cases could be used as a basis to validate the forming of transactions through the exchange of verbal agreement via the Internet or other forms of technology.

2.1 Expressing Parties' Agreement by Writing

The written word plays an essential part in electronic transactions and it is the format by which the exchange of offer and acceptance is made. Email is the most broadly used form of digital communication and it is expected to remain so for some time. However, it is worth noting that email correspondence has developed its own unique style and in many ways its own language.[243].

[241]Al-Dobaiyyan Dobaiyyan, *al-Ejab wa al-Gobol bin al-Figh wa al-Qanoon*, op cite, pp 83-95, and al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud*, op,cit., pp 956-963.
[242]Al-Nawawy Mohyyi al-Dain, *al-Majmoo'a*, vol. 9, Dar al-Fekr, p171.
[243]Fadhel Monther and Shaykho Sa'eed (1994) *al-Ta'aqod a'an Tareeq al-Computer*, Jordan Law Magazine, issue no. 3, p. 57.

However, in principal the language of email as a combination of letters and words is not any different to conventional writing other than the medium which carries such writing.[244] In email the written work is prepared via the computer and transferred between users via the Internet. Traditionally, writing is made on paper using a pen, yet with the advent of computers writing is formed in a modern way by typing on a keyboard.[245]

The validity of forming a contract by writing is a matter of discussion between Islamic lawyers. According to one legal thought, writing is a valid tool to express the consent of the contracting parties to legally enter into a binding transaction.[246] It is, accordingly, legal to conclude a contract by writing either in contract inter absentees or face-to-face contract so long as it is understood by both of the contracting parties.[247] However, opposing lawyers consider that writing is an invalid tool to exchange the offer and acceptance between parties and thus a contract cannot be legally formed by writing except for those, who because of their disability, cannot talk.[248]

According to the later school of thought and in keeping with common commercial practises, parties' agreement is normally exchanged in the form of verbal expressions, and it was not commercially common during the Prophet's Lifetime that writing was

[244] Al-Ajlooni Ahmed (2002) al-Ta'aqod a'an Tareeq al-Internet, al-Dar al-A'lmeyyah al-Dowalayyah & Dar al-Thaqafah, Jordan, p.46.
[245] Ibid, pp.45-46.
[246] Al-Dosoqi Muhammad A'rafa (1983) *Hashiyat al-Dosooqi ala al-Sharh al-Kabeer*, Dar Ehya'a al-Kotob al-Arabiyya 'E'assa al-Babi al-Halabi wa Shoraka'ah, vol. 3, p. 3, al-Bohooti Mansoor (1983) *Kashaf al-Qena'e*, A'alam al-Kotob, Beirut, vol. 3, p. 148.
[247] Ibid.
[248] Al-Nawawi Mohyi al-Deen, *al-Majmooe'a Sharh al-Mohathab*, Dar al-Fikr, vol. 9, pp. 162. 167.

used to form transactions.[249] Also, there is no substantial justification to shift from verbal expression to writing to exchange parties' agreement in contract inter absentees, as the parties in such contract can arrange for an agent who can form the deal with the other party by verbal expression on behalf of the principal.[250] Moreover, writing is at risk of forgery; hence, it should not be deemed as a valid means to express the parties' agreement to form a binding transaction.[251]

Yet, it could be argued that whilst written contracts were not the primary form for conducting transactions during the Prophet's Lifetime they should not be rendered invalid. Mutual consent is the requisite requirement for valid transactions in Islamic doctrine and its attainment is not limited in the law to specific verbal expressions or form. Rather, it can be achieved by any means used in commercial practise. Furthermore, in terms of the potential of forgery this can be tackled using a range of methods and rules to secure its evidence. For the purpose of this analysis the discussion here is, basically, about the validity of the use of writing to denote parties' agreement in contract rather than its credibility.[252]

Islamic lawyers also validate the use of writing to form all types of transactions, since the Prophet Muhammad used writing as a means to spread and call people for Islam.[253] Thus, by analogy, if writing was used as a means to express the call for

[249] Ibid.
[250] Ibid.
[251] Al-Qarehdagy Ali (2000) *Hokom Ejra'a al-Aqood be Alat al-Ettessal al-Hadeetha*, an article published in Majallat Mojamma'e al-Fogh al-Eslami, sixth edition, vol. 2, p. 945.
[252] Al-Heeti Abdulrazzaq (2000) *Hokom al-Ta'aqod abr Ajhezat al-Ettessal al-Hadeetha*, Dar al-Bayareq, Jordan, p. 58.
[253] Narrated by al-Bokhari, vol. 3, Hadeeth no. 234-235.

Islam, it should also be considered as a valid means to form transactions. [254] Therefore, this implies that the written form should be deemed a valid means to form transactions. If writing was not used to form transactions during the Prophet's Lifetime it is perhaps because writing, at that time, was merely not customarily used in forming transactions rather than denoting it as invalid. In addition, it has explained elsewhere that Islamic doctrine requires mutual consent to be exchanged between the contracting parties without requiring certain formalities or special forms. Hence, this is to be determined according to trading practises. As a general norm, when writing is the customary means to form transactions according to a given commercial market, it shall always bear validity. Therefore, this demonstrates that writing should be considered as a valid means to exchange the parties' agreement to enter into a binding deal, similar to verbal expression, as it clearly denotes the consent of the parties.

Thus, based on the above arguments, Islamic doctrine accepts writing as a valid means to express the parties' consent to form contracts. Furthermore, the declaration of writing as invalid would have led to significant hurdles and threatened future development, particularly in the field of e-commerce. Also, this attitude may cause serious disruption to the development of electronic transaction as large numbers of transactions conducted daily by writing may face the danger of being invalidated. Therefore, this would lead to preclude followers of Islamic law from gaining substantial benefit from e-commerce. Hence, this approach of not considering writing as a valid means to form transactions seems to be inconsistent with the spirits and

[254]Abo al-Ezz Ali Muhammad (2008) *al-Tejarah al-Electronyya wa Ahkamoha fi al-Shariyya al-Eslamyya*, Dar al-Nafa'es, Jordan, p. 139, and Al-Qarehdagy Ali, *Hokom Ejra'a al-Aqood be Alat al-Ettessal al-Hadeetha*, op cites, p. 941.

principles of Islamic doctrine which requires consideration for public interest and the removal of potential harm to its people.[255]

Hence, this leads to the conclusion that writing is considered a valid means to form a contract under Islamic law. Since writing in traditional or electronic form is fundamentally the same, electronic writing should also be deemed valid to form electronic transactions. In light of the escalating use of electronic communication around the globe anything other than acceptance of electronic writing would have serious implications on a country's ability to engage in online commercial activity.

However, it is worth noting that there is a juristic view stating that for a writing to be a valid means by which to express the parties' agreement in contract, it has to be done in a tangible form, such as papers.[256] Hence, writing in water or in air has no legal recognition. As a result, based on this condition, a contract formed through electronic writing may not wholly satisfy this juristic requirement. In electronic transactions, the exchange of letters, via email or other electronic devices such as telex, is carried out in an electronic form which may not be considered as a tangible form. Consequently, this condition appears to provide restriction to the use of email, and other electronic devices, to validly form electronic transactions by writing.

[255] In the Qura'an, Allah Said; "Allah intends for you ease and does not intend for you hardship", chapter 2, verse no. 185, Prophet Muhammad reported to have said that: "You have been sent forth to make things easy, not to impose difficulties." Narrated by al-Bohkari, see, al-Jar`î Abdulrahman Ahmed, *General Principles of Islamic Law and their Practical Application for Islamic Work*, online article available at; http://www.islamtoday.net/english/printmenice.cfm?cat_id=36&sub_cat_id=683

[256] Al -Oboodi Abbas, *al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori*, op cite, pp 59-60.

However, it could be argued against the authority of this condition as since if writing in air demonstrates a meaning which is, clearly, understood by both parties, it should be deemed valid to express the parties' consent in contract.[257] As an essential Islamic principle, the consent of the parties can be expressed by any means so long as it is understood by the contracting parties. Therefore, when it is customary in a market to use modern technological devices to communicate by writing the agreement of the parties to form a business deal, this should bear legal recognition in the law. It is irrelevant whether or not the writing is done in tangible or intangible forms as long as the used writing can be read and understood by the contracting parties.

Furthermore, this approach is compatible with the essential principle of 'technology-neutral', as it is wide enough to accommodate the future development of new writing methods. The essential requirement is the exchange of mutual consent between the contracting parties, and thus, as a rule in Islamic doctrine, any form of writing can meet this requirement so long as the consent of the parties can be exchanged in a format that is comprehensible to both contracting parties. In this regard, article 13 of the Jordan E-Transactions Law states that "data message is considered as one of the valid means to express the consent of the parties in the form of offer and acceptance to initiate a binding deal."[258]

[257]Al-Nahi Salah al-Dain (1984) *Masader al-Hoqooq al-Shakhseyya*, Jordan, p. 45.
[258]Article 13 of the Jordan E-Transactions Law. In similar provision, article 11 (1) of the Model Law on Electronic Commerce provides that: "In the context of contract formation, unless otherwise agreed by the parties, an offer and acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose."

2.2. The Validity of Expressing Consent by Pre-Programmed Computer

The discussion above is based on cases where there is direct human involvement in the process of expressing offer or acceptance by written forms of communication. However, in Internet transactions computers are programmed to send, initiate actions, and respond to messages without direct human intervention and the implications of this needs to be considered.[259]

In electronic transactions, an email may be sent or answered by pre-programmed computers. Also, interactive websites may program its server to conclude transactions with prospective purchasers by automatic response to their orders without human intervention.[260] According to the Islamic rule of contract, for a transaction to be validly established, there must be an expression of mutual consent, thus, the question may arise as to whether consent can be validly expressed by computers without direct human involvement? To put in another way, it is questionable whether such interactions can create binding transactions.

It is worth noting that as a possible solution to the above question, it has been suggested to consider the programmed computer as a legal person and thus develop a

[259] This process is referred to as automated electronic agent. Article 2 of the Dubai E-Transaction Law defined the concept of automated electronic agent as "an electronic program, or system to a computer capable of acting or responding to an act, independently, wholly or partly, without any supervision by any natural person at the time when the act or the response has taken place."
[260] Glatt, C. (1998) Comparative Issues in the Formation of Electronic Contracts, *International Journal of Law and Information Technology*, 6 (1): at 45.

theory of liability on that basis.[261] However, the appropriateness of such a solution is questionable since a computer cannot be deemed to have self-consciousness and it is therefore improper to consider it as a legal person. Whilst a programmed computer may have the capacity to act autonomously, it is unable to make a conscious, moral decision of their own without human involvement.[262]

In addition, the idea of attributing programmed computers with legal personalities raises the question as to whether the software or hardware can be considered an 'electronic agent'. As programmed computers are a combination of hardware and software it is difficult to envisage how the notion of legal personality can be applied if the hardware and software are dispersed over several sites and maintained by different individuals.[263]

Furthermore if the programmed computer is considered a legal person this would give them rights and responsibilities. As a result they would be legally liable for their actions and able to sue for negligent acts, which in any case would not be viable. In a legal sense, a legal personality cannot be conferred to any person unless he/she bears financial duty. Generally speaking, programmed computers cannot be deemed to bear financial duty and as such they cannot be granted with legal personality.

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[261] Allen, Tom and Robin Widdison (1996) Can Computers Make Contracts? *Harvard Journal of Law and Technology*, 9 (1): at 34-35, and Kerr, I.R. '*Providing for Autonomous Electronic Devices in the Uniform Electronic Commerce Act'*, an online journal, available at: http://www.ulcc.ca/en/cls/index.cfm?sec=4&sub=4f&print=1. For further discussion to the issue of conferring legal personality onto electronic agents, please see, Andrade, F., Novais, P., Machado, J. and Neves, J. (2007) Contracting Agents: Legal Personality and Representation, *Artificial Intelligence and the Law* 15:4 at 361-367.

[262] Kerr, I.R., ibid.

[263] Allen and Widdison, Can Computers Make Contracts? op cite, at 42.

Another approach to the question of responsibility is to consider the computer as a legal agent and thus apply the rules of the agency to electronic transaction. That is to say "when a principal uses a computer in the same manner that it uses a human agent, then the law should treat the computer in the same manner that it treats the human agent."[264]

However, as in the case of attributing legal personality the application of this solution is invalid and unenforceable. As an applied principle in the agency rule, there must be a mutual consent between the agent and the principal in order to establish an agent-principal legal relationship.[265] In the case of a computer transaction it is absurd to assume that a computer can have consent of its own.

Accordingly, software agents cannot be sued, owe no fiduciary duties, and do not have interests of its own.[266] As a computer is a programmed machine instructed to act within pre-set limits and has no consent of its own it cannot be seen as a juridical person and thus it cannot be an agent. Hence, the concept of software agent does not mean to be used in its legal sense, but rather connotes, by analogy, the more general idea that the software does what one tells it to do.[267]

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[264] Fischer, J. (1997) Computers as Agents: a Proposed Approach to Revised U.C.C. Article 2. *Indiana Law Journal*, 72(2) at 557

[265] Lerouge, J-F. (2000) the Use of Electronic Agents Questioned under Contractual Law: Suggested Solutions on a European and American Level, *the John Marshall Journal of Computer and Information Law*, 18(2): at 473-474.

[266] Sommer, J. (2000) Against Cyber Law, *Berkeley Technology Law Journal*, 15(3): at 1178.

[267] Middlebrook, S. and Muller, J. (2000) Thoughts on Bots: the Emerging Law of Electronic Agent, *the Business Lawyer*, 56(1): at 342.

Hence, a computer which is programmed to express a party's consent and form a transaction without a direct human review should be seen as merely a tool for communication, similar to a telephone or fax.[268] Yet, a programmed computer may have an independent character in the way that it has the capacity to act without direct human intervention. However, the fact remains that the computer, no matter how advanced and sophisticated, cannot make an autonomous decision. It simply operates according to the way it is programmed and should only be considered as a tool to communicate the consent of the human.

Programmed computers are not the only machines performing tasks without direct human intervention. Vending machines are also pre-set to act automatically - to sell, deliver products and collect money without human control. In this regard, the vending machine was considered to be legally capable of concluding a contract without human involvement.[269]

The significance of this is that the person who controls, programs, or uses the programmed computer to work for his benefit would bear the risk of the transaction and thus he should be liable for the computer's action.[270] This is due to the fact that he/she uses the computer with the intention to be bound by its declaration. In this regard, article 13 (2) of the UNCITRAL Model Law on Electronic Commerce attributes the operation of electronic devices to the person who originates the data

[268]Allen and Widdison, Can Computers Make Contracts? op cite, at 46, and Andrade, F. and others, Contracting Agents: Legal Personality and Representation, op cite, at 360.
[269] See the case of Thornton v. Shoe Lane Parking [1971] 2 Q.B. 163, cited in Glatt, C. Comparative Issues in the Formation of Electronic Contracts, op cite, at 45.
[270] Weitzenboeck, E. (2001) Electronic Agents and the Formation of Contracts, *International Journal of Law and Information Technology*, 9(3).

message "if it was sent by an authorised agent of the party, or by an information system programmed by, or on behalf of, that party to operate automatically."[271]

It is worth noting that legal difficulties arise because a programmed computer is being deployed rather than because of the process itself. This is because the legal doctrine of contract-law was built on the account that transactions are formed between natural persons.[272] Therefore, in order to provide certainty toward this legal matter, it becomes necessary to establish a law expressly stating that the formation a transaction through a programmed computer is valid and thus the parties are bound by such act. That is to say, a party should not be able to deny liability on the grounds that there is no direct human review to the computer's action.

In that regard, article 11 (1) of the Saudi E-Transactions Rule states expressly that:

It is permissible for a contract to take place between automated electronic mediums that include two electronic information systems or more, set and programmed earlier for carrying out such tasks. A contract shall be valid, effective and legally enforceable despite the fact that there has been no personal or direct involvement by any natural person, in such systems, in the conclusion of the contract.[273]

In light of this provision it is obvious that the consent of the parties in the form of an offer and acceptance can be validly expressed by automatic electronic system without

[271] See also, article 12 of the Saudi E-Transactions Rule and article 15 (2-B) of the Dubai E-Transactions Law.
[272] Allen and Widdison, Can Computers Make Contracts? op cite, at 50.
[273] See also article 14 (1) of the Dubai E-Transactions Law.

direct human intervention. This rule is consistent with the general principle of Islamic law of contract that indicates the consent of the parties to form a contract can be validly expressed by any means customarily used in commercial practises without limitation.[274]

2.2.1 Contrasting Claim between the Actual Consent and the Expressed One

As a rule, the expression of intention in contract must be conformable with the actual intention concealed in the heart. The manifested expression in the contract is, basically, a description to the hidden intention of the parties. It is a means to transfer the intention of the parties from the heart, which is impossible to be ascertained, to the outside world. There is no legal difficulty regarding the valid conclusion of the contract when the concealed intention mirrors the manifested expression of consent. Yet, the issue is of immense concern when there is a claim of difference between the apparent expression and the real consent of the contracting parties.

It is worth noting that a key concern of the Internet is the potential of the programmed computer to make an error in forming a transaction. Regardless of whether or not the error occurred due to a technical fault, the expressed consent is, in effect, different from the actual consent of the originator.[275] Hence, it is questionable whether there is

[274] See above pp. 4-5.

[275] Another case in point concerns Argos which mistakenly advertised a television priced only £2.99 on its website. A large numbers of orders were placed over the Internet, but Argos refused to fulfil them. It was claimed that due to a computer error the price had been incorrectly priced at £2.99 instead of the actual intended price which was £299. See, Gallagher, S. (2000) E-Commerce Contracts: Contracting in Cyberspace – A Minefield for the Unwary, *Computer Law and Security Report* 16(2).

a binding contract and whether or not the computer's owner is legally responsible for such error.

As discussed previously, a computer is merely a tool of communication to express the consent of the parties. Therefore, when a mistake does occur in a transaction this is similar to any other mistake that may occur when parties transact and consent via other forms of communication. For instance, a party may prepare an email offering to sell a certain item with a certain value, but by accident the price is typed with a lower value than intended; for example instead of writing £100 the article is offered by at just £10. Given that the offer is accepted, is there any contract to be legally concluded while the manifested expression is at odds with the actual intended price?

In Islamic law a number of approaches have been suggested to deal with this legal question. The first one indicates that consideration is given only to the expressed intention regardless of whether or not it is consistent with the actual intention as there is no practical way to know what is in someone heart or brain[276]. Therefore, based on the example given above, the contract will be concluded with the £10 offered price despite it being in contradiction with the intended offer price of £100.

Accordingly, court judgments in this world are to be made based on a person's behaviour rather than on their intentions as no one, except Allah (God), is able to

[276]Ibn al-Qayyem Muhamad (1993) *E'alam al-Muaqe'en an Rab al-A'alameen*, second edition, Dar al-Kutob al-Elmeyah, Beirut, third volume, pp. 82-85.

identify the intention of the person[277]. The expression, communicated either verbally or through other mediums, is a method to designate what is in the person's mind and without it communication between individuals would be impossible.

Therefore, when someone wants something he/she must reveal their intention by expressing that and subsequently, rules will be applied by virtue of this expressed intention. Without expression, a person's intention is otherwise unknown and cannot be judged. Hence, the contract should be governed according to the manifested expression of the parties' consent regardless of whether or not it is conformable with the real intention. Otherwise, it may lead to the breakdown of trust and confidence between parties, which will undermine the promotion and stability of commercial activities. The other party acts according to the expressed intention and this is ultimately all he can do since there is no way for him/her to know what the actual intention is in his/her heart.[278]

However, an essential principal of Islamic law of contract is that there is no valid conclusion of the contract without mutual consent of the contracting parties. In this regard Article 3 of the Othman *Mejelle* states that "in contracts, effect is given to intention and meaning and not words and phrases."[279] As a result of that, consent has

[277]Ibid.
[278] Shoogi Ahmed (1989) *al-Nadhariyya al-A'ammah lel Eltezamat*, second edition, Cairo, p. 32.
[279] Nasir Jamal, *the Islamic Law of Personal Status*, second edition, Graham and Trotman, p. 25, online book available at:
http://books.google.co.uk/books?id=N4WmwikqudIC&printsec=frontcover&dq=article+3+of+Mejelle&source=gbs_summary_r&cad=0#PPA127,M1

no legal consideration in the Muslim law when it is impeded by the involvement of error, misrepresentation, fraud, and coercion. [280]

It is demonstrated in Islamic doctrine that party consent is a vital condition for the validity of the contract. Hence, expression is merely a means to articulate the intention of the parties and thus, holds no legal force when it is in contrary to the actual intention of the contracting parties. Therefore, the intention of the parties must be sought over the manifested expression to decide whether or not there is a legal conclusion of the contract[281]. Hence, the expression of consent to form a contract made by, for example, a mad or sleeping person or forcing someone to form a contract, holds no legal force because of the lack of proper intention from those people.

Thus, to answer the aforementioned query, according to the later approach, the contract does not validly take effect as the seller has not consented to sell the product with the attached price. The buyer in such cases has two options - either to accept the correct value of the proposed article and then the contract will be legally concluded or to reject the actual intended price of the product and thus, there is no legal conclusion of the deal.

[280] For further details about the impediments of consent in the law, see Rayner S.E., *the Theory of Contracts in Islamic Law*, chapters 6.2 to 6.5, pp. 174-258, and al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud*, op cite, pp. 600-822.
[281]Al-Asqalani Ibn Hajar (1989) *Fateh al-Bari, Dar al-Kutob al-Elmiyya*, Beirut, volume no. 1, pp.179-181.

Yet, the theory that contracts are to be ruled by intention rather than expression is impractical to instil. Intention is located in the brain and as is the nature of human beings there is no practical way to extract brain activity unless it is being expressed. So, how can the contract be governed by the intention of the parties when it cannot be examined? Furthermore, implementing this theory may cause serious instability for transactions conducted in the market because individuals wishing to avoid being committed to a contract can claim that his/her actual intention was different from the expressed one, which will automatically result in the annulment of the contract.

In an attempt to provide a satisfactory solution to the ambiguity surrounding intention, and as a kind of reconciliation between these two approaches, an amalgamation of both theories could offer an appropriate solution. Mutual consent lies at the heart of contracts in Islamic doctrine for a contract to be validly concluded, yet as discussed the consent of the parties has no legal force unless it is being expressed. The expression conveys the intention of the parties which is hidden in the heart and it is impossible to ascertain. Therefore, the contract should always be legally formed according to the expressed consent of the parties.

Hence, for a claim of contrasting between the actual intention and the manifested expression to succeed, there must be an obvious indication to such claim.[282] In the example given above, the presentation of an item costing £10 when it is actually £100 is a non-deliberate error. When, by reference to the market, the value of an offered article is found to be higher than the wrongly expressed price, this would be an

[282] Ibn Qayyim al-Jawziyya (1993) *I'lam al-Muwaqqin An Rabb al-Alamin*, op cite, pp. 98-99.

indication to a mistake. Therefore, the party should not be bound with the wrongly expressed price for the item. In incidences where there is no unambiguous implication of such contrasting between the verbal statement and the genuine intention and, the party who claims for such contrasting yet fails to produce a valid support for that claim, consideration should be given solely to the manifested expression in the contract, irrespective of whether or not it is consistent with the actual intention.[283]

According to this theory, in the case that a mistake occurs when expressing the value of the offer and it in turn causes damages the other party, compensation for such damage is to be the responsibility of the offeror.[284]

In electronic transactions the party, on whose behalf the programmed computer is operating, cannot deny responsibility because of that the error is, entirely, due to a computer fault and not due to his/her negligence. The party selects to use the computer to act on his/her behalf with the knowledge that errors may occur. That is to say, as a party benefits from using the computer he/she also accepts the risk and liability of employing such a device. Hence, this liability should be extended even in the case where the computer accidentally performs operations which are not intended by the party. This is similar to the liability assigned with the use of cars or machines

[283] Ibid.

[284]This rule is also applied in the theory that follows the inner will of the contracting parties when considering the valid conclusion of a contract. Al-Oboodi Abbas, *al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori*, op cite, p.77.

by the owner, as he/she cannot deny liability on the ground that this is due to cars or machines technical fault.[285]

However, it is prudent to indicate that the offeree should not be given any compensation when there is a presumption that he/she knows or should know the existence of a mistake connected with the offer, but he/she carried on to accept the offer to obtain some advantage out of that error.[286]

However, it is uncertain whether this theory would apply in certain cases when, for instance, the wrongly expressed price of an item is not remarkably different to the intended one, say, the offered price is £10 and the intended one is £20, as this could be seen as kind of special sale discount or promotion. It is worth noting that this determination will depend on the particular facts involved in every case.[287]

Hence, the later theory seems to be an ideal approach to address the above legal issue and provide stability and fairness in commercial practise. Accordingly, not every contract can be annulled by a mere claim of difference between the intention and the expression without producing proof for such a claim, as this may lead to instability in terms of the legal force of conducted commercial transactions. Moreover, as errors

[285] Andrade, F. and others, op cites, p. 361.
286 Under common-law systems, in dealing with the above legal question, a court will consider the external manifestation of assent, regardless of actual assent. Therefore, as a general rule the party will be bound by the contract even if an error occurs when expressing his assent. Yet, accordingly, for a mistake claim to succeed, the mistake must be fundamental to the terms of the contract and the other party must have acted upon the mistake knowing of its existence. See, Hartog v. Colin and Shields [1939] 3 All E.R. 566. After, Versey Guy and Chissick Michael (2000) the Perils of On-Line Contracting, Computer and Telecommunication Law Review, 6 (5): at 121.
[287] Ibid.

are more likely to occur in commercial practises it is prudent to offer the party the option to withdraw from a deal. However, in order to ensure the enforceability of transactions formed between the parties, this opportunity should be limited to cases where there is proof of a mistake. In addition, it aims to reduce the opportunity of one of the parties concluding the contract in order to take advantage of an obvious mistake made by a party in expressing his/her intention.

It is worth noting that the legal stance in Saudi Arabia regarding the question of computer's error in expressing the actual intention of the parties is uncertain, as this issue was not addressed in the recently enacted Saudi E-Transactions Rule. Also, we have seen above that there are different approaches followed in Islamic law to deal with the legal matter when there is a claim of mistake in expressing the consent of the parties.

Therefore, in light of the aforementioned discussion, it would be prudent to suggest that in the case of a computer's error when expressing the intention of the parties, even though transaction may be legally concluded by the exchange of offer and acceptance, it can be revoked if that error can be manifested. The computer's owner should be liable to compensate the other party for any lose resulting from the mistake unless that party acted knowing the existence of that error.

2.3. Offer and Invitation to treat in Internet Transactions

As determined earlier an offer is an expression of willingness to contract on a specific set of terms, made by the offeror with the intention that, if the offer is accepted, he or she will be bound by a contract. In Internet transactions it is questionable whether the content of a website satisfies the rules of legal offer or whether it is intentioned to be a mere invitation to treat.

The importance for this distinction is crucial since where website content is treated as an offer the contract is deemed to be concluded when the acceptance is made by the website's visitor; whereas, if website content is regarded as a mere invitation to treat, a customer's response to that content as an offer needs to be accepted by the website owner to establish a contract. [288]

Before an analysis of online trading activity can begin, it is useful to review commercial practice in traditional, offline trading. Evidently, offers on retailers websites can be accessed by a large number of users. Hence, this is quite similar to the making of commercial advertisement in shop displays.[289] Therefore, it is essential to examine whether such commercial advertisement by traders is regarded as offer or mere invitation to treat.

Different legal frameworks approach the question of invitation to treat in specific ways. According to one of these approaches, the offer directed at the general public is

[288] Al-Nasser Abdullah, al-Oqood al-Electroniyya Derasah Feqhiyya Moqaranah, *Majallat al-Bohooth al-Feqhiyya al-Moa'asera*, issue no. 73 (December 2006 – February 2007), p. 281.
[289] Noeding, T. (1998) Distance Selling in a Digital Age, *Communications Law*, 3: 85.

not deemed to be an offer but an invitation to treat, since it is not directed to a particular person or persons[290]. Hence, if an item is being advertised for sale to the general public via shops, TV, newspapers or other mediums it is merely deemed as an invitation to treat. In this way, the trader's intention is to advertise available products and persuade the public to buy them, rather than aiming to be an offer. Article 40 of the Kuwait Civil Code states that "a publication, advertisement or a current price list or any other statement connected with offers or orders directed towards the public or individuals shall not be considered as implicit offers, notwithstanding any indication to the contrary given by the circumstances of the case."

This approach of considering the display of goods in shops as invitation to treat is justified as it absolves the seller from fulfilling orders when displayed goods may be out of stock. This justification can also be applied to advertisement.[291] In light of this justification, if the website content is deemed to be an offer there is a possibility that the online retailer is unable to fulfil obligations where demand outweighs supply. Considering the vast geographical reach of the Internet this situation could easily occur.

From an Islamic legal perspective, this justification of shop displays as an invitation to treat rather than an offer is not of significant relevance. This is due to a number of

[290] Shafeeq Mehssen (1984) *Naqel al-Toknologiya men al-Naheyah al-Qanonyyah*, Cairo, p.92, al-Hakeem Abdulmajeed (1977) *al-Mojez fi Shareh al-Qanoon al-Madany Baghdad*, p. 104, cited after Al-Oboodi Abbas, *al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori*, op cites, pp.97-98.
[291] As provided by the court in England in the case of *Partridge v Crittenden*. It is pointed out, accordingly, that "if the advertisement was treated as an offer, this could lead to many actions for breach of contract against the advertiser, as his stock of birds was limited. He could not have intended the advertisement to be an offer." See, [1968] 1 W.L.R. 1204; *Partridge v Crittenden*, Queen's Bench Division.

reasons. Firstly, based on the concept of 'meeting place'[292], both of the contracting parties can annul the contract after the exchange of offer and acceptance so long as they remain together at the same place of transaction. Hence, given that the shop display is deemed as an offer, the seller, regardless of whether the displayed goods are in stock, can reject the customer's acceptance at the till without being in breach of contract according to the legal norm of meeting place.

Secondly, the traders' intention was based on selling stocked items and thus, there cannot be any intention once the available commodities have been depleted. Since a requisite element in Islamic law of contract is the notion that there must be mutual consent for transactions to take legal force, the trader without any stock cannot be legally bound to fulfil obligations.

Finally, as discussed in the previous chapter, Islamic Law requires the subject matter to be capable of delivery in order to form valid trade. Hence, in the case that the advertised commodities are sold out, traders would have no further possession and thus the merchandised articles could not be possible for delivery. As a result, the transaction could not be validly concluded.[293]

In the case that orders outweigh supply, the trader is only committed to fulfil the orders received first, in a consecutive order, until the exhaustion of displayed items.

[292] This issue is going to be examined further in the following chapter of this research.
[293] Al-Nasser Abdullah, *al-Oqood al-Electroniyya Derasah Feqhiyya Moqaranah,* op. cite, p. 282.

Subsequently, he/she is not obliged to fulfil orders after the items have been depleted.[294]

In contrast to the above approach, the display of goods in shops is deemed offers so long as all necessary elements of the deal are clearly indicated. Hence, the contract is deemed to be constituted when the acceptance is made.[295] Article 94 (1) of the Jordan Civil Law states inter alia that "the display of goods along with their price is deemed to be an offer."[296] Therefore, in light of this provision, the advertisement of goods or services with clearly attached prices should be considered as offers.

However, should ambiguity exist as to whether a statement amounts to an offer or merely an invitation to treat, consideration is given to such a statement as an invitation to treat.[297] This exceptional rule is provided in order to rule out any uncertainty and avoid potential dispute between contracting parties. Yet, it is implied, on the other hand, that when the publication, advertisement, and other displays directed to public or individual contains the essential elements of contract, it should be considered as an offer not an invitation to treat.[298]

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[294] Al-Haiti Abdulrazzaq (2000) *Hokom al-Ta'aqod abr Ajhezat al-Ettesal al-Hadeetha*, Dar al-Bayareq, Jordan, p. 58.
[295] Abdulrahman Ahmed Shoqie (1989) *al-Nathaeyyah al-A'ammah lel Eltezamat*, second edition, Cairo, p. 38.
[296] See, article 94 (1) of the Jordan Civil Law.
[297] It is provided in article 94 (2) of the Jordan Civil Law that the publication, the advertisement, stating the current prices of goods and every other display relative to proposal directed to public or individual at the case of ambiguity is not treated as offer, but an invitation to treat.
[298] Ibid.

Accordingly, it is irrelevant whether a statement is directed at an individual person or the general public when considering whether a statement is an offer or invitation to treat. Rather, it is the intention of the seller that is of primary consideration. Hence, depending on its wording, the seller's statement may be seen as an offer and not an invitation to treat.[299] Based on this, when commodities are offered with their prices attached and connected with a statement indicating that the offer is valid until the commodities are sold out, such offers may be legally considered as offer and not invitation to treat..[300] Likewise in website transactions, the contents of a website should be considered as offer when a website offers products connected with their prices. Sometimes, these products are linked to databases indicating how many items are still available for sale.[301]

In order to offer clarity on the debate surrounding offer and invitation to treat, Article 14(2) of the (1980) United Nations Convention for the International Sale of Goods (CISG)[302] states "A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal." As such in a general sense every proposal that is directed to the public is considered as invitation to treat. However, such a proposal will be regarded as offer in exceptional cases where the

[299] Al-Dobaiyyan Dobaiyyan, *al-Ejab wa al-Gobol been al-Figh wa al-Qanoon*, op cite, p. 27.
[300] It is important to note that in cases where there is no provision of time limit for the advertised commodities, advertisers (merchants) will not be bound with the offering price lists if there has been a significant gap period between the issuance of the offer and the arrival of the acceptance which has led to the changing of market values. The same treatment is given also when there has been a rapid and sudden pricing turn. See, Ali al-Saloos (2003) *Figh al-Bae'e wa al-Estiethag wa al-Tatbeeq al-Moa'aser*, two volumes, Dar al-Thaqafah, Qatar, vol. no. 1, pp 29-30 and 36-37. Al-Dobaiyyan Dobaiyyan, *al-Ejab wa al-Gobol been al-Figh wa al-Qanoon*, op cite, pp 26-27.
[301] Archer, Q. (2000), The E-Commerce Series: Electronic Contracts, *Practical Law for Company*, 11 (7): 17, at 17.
[302] Available at: http://www.cisg.law.pace.edu/cisg/text/treaty.html

advertiser or the merchant has made it clear that his/her commercial advertisement is intended to be an absolute offer.[303]

Therefore, there is a presumption that the trader's web advertisement is considered as an invitation to treat. This provision is, in the main, appropriately applied to commercial activities. In practice however, it is not absolutely certain whether commercial advertisement is intended to be an absolute offer or just a means to present certain items to the public and induce them to make a purchase. Hence, in order to eliminate doubt and confusion regarding this matter, the aforementioned article appears to consider commercial advertisement as an invitation to treat unless the advertiser makes it clear that he/she intended otherwise.

Under Islamic law it is essential to determine whether or not the online traders intention in displaying their goods was intended as an offer or invitation to treat. It is essential to note that when the advertisement meets the requirement of offer by including all essential elements of a contract, the advertiser's intention is likely to be considered an offer. Yet, it should be observed that the selling of goods or services on a website can be viewed and thus accepted by anyone regardless of their geographical location. This may present problems for an online trader who may not wish to trade with everyone who visits the website. Furthermore, the identity of website visitors may not be possible to confirm.

[303]Shafeeq Mehssen, *Naqel al-Toknologiya men al-Naheyah al-Qanonyyah,* op cites, p.92, and Al-Oboodi Abbas, *al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori,* op cites, p. 100.

Therefore, it may in the best interests of a website trader to design his/her website as an invitation to treat rather than an offer. As such, the website would clearly indicate that its content is intended to be nothing other than an invitation to treat, in order to avoid ambiguity. Ambiguity is relatively easy to avoid online, perhaps easier that being off-line, given the formalities that ordinarily accompany an invitation to enter into an online contract (exchange of identity information, credit card information, etc.).[304]

Hence, when the website is designed as an invitation to treat, the buyer should identify him/herself when making an offer so that the seller has the opportunity to accept or reject the offer. Furthermore, the website trader should reserve the right not to supply goods to certain jurisdiction, to applicants under a certain age or to exercise other discretions, such as requiring payments to be received prior to dispatch.[305]

2.3.1 The Revocation of Offer[306]

The absolute offer is different from the concept of invitation to treat in terms of the legal force of offer to form a contract if it is being unequivocally accepted. However, based on the legal force of offer, it is questionable whether or not it is legally permissible for the offeror to revoke the offer at any time before acceptance is made. In online transactions, this scenario may occur when, for instance, an email is

[304] Belgum, K (1999) 'Legal Issues in Contracting in the Internet', an online article available at; http://library.findlaw.com/1999/Aug/1/128190.html
[305] Smith, G. *Internet Law and Regulation*, op cites p. 451.
[306]In another legal term, it is known in Islamic law as the option of withdraw

distributed to sell certain goods or service and the offeror wishes to change their mind and not engage in a contract.

Islamic law makes provision for the revocation of offers in two ways. According to one legal thought, as soon as an offer is made the offeror is legally bound by this offer and thus, it cannot be revoked until it is either accepted or rejected by the offeree.[307] Accordingly, when the offer is made the offeree is entitled with the right to possess the offered good or service, if he wishes to accept. As a result, it is not legally permissible for the offeror to revoke the offeree's right to form the deal without the latter's consent.[308] Therefore, the contract is deemed to be validly formed when the acceptance is made even if a revocation of an offer has already taken place.

In contrast, another provision of law is that an offer may be revoked at any time before the acceptance is being made.[309] There might be various motives for such revocation of the offer such as a misunderstanding between parties, or political motives, such as in an international transaction where a conflict occurs between the country of the offeror and the offeree's country, or economical causes which may affect market prices, to name but a few. Needless to say, the offeror must produce a valid reason to annul the offer.

[307] Al-Hattab, *Mawaheb al-Jaleel le Sharh Mokhtassar Khaleel*, vol. 6, p. 29.
[308] Ibid.
[309] Ibn Qodama, *al-Moghni*, vol. 4, p.7, and al-Nawawwi, *al-Majmoo'a fi sharh al-Mohadhab*, vol. 9, p. 199.

In supporting the latter legal attitude, it is argued that although the offeree bears the right to possess the offered good or service, the fact remains that this offered good or service is already under the ownership of the offeror. Hence, the offeror's right as the owner of the offered item is stronger than the offeree's right to possess if he wishes to accept the offer.[310] Therefore, as the offeror's right bears stronger authority over the offered goods or service in the law, it should be given legal priority over the offeree's right. Hence, the offeror should be legally able to revoke the offer at any time before acceptance.

Furthermore, there is no binding relationship until there is a contract and the contract cannot be formed except when there is a correspondence of offer and acceptance. Thus, before acceptance there is no contract to be legally established which means that there is no legal force upon the offeror to be bound to the offer.[311] Hence, the offeror should be legally able to revoke the offer as there is no legal force preventing him from doing so. Based on this, the offer can be revoked at any time before acceptance.

However, for such revocation to be legally valid, it has to be made before the acceptance has taken place.[312] To give a practical example, when a trader dispatches a letter, via post, detailing an offer to sell an item at a certain value and then changes his mind and wishes to revoke the offer, in order for the cancellation to be effective, the

[310]Al-A'aqlah Muhammad (1986) *Hokom Ejra' al-A'aqood be Wasa'el al-Ettessal al-Hadeetha*, Dar al-Dheya', Amman, p. 61.
[311] Abo Zahra Muhammad (1976) *al-Molkiyyah wa Nadhariyyat al-Aqd fi al-Sharee'ah al-Esslamiyya*, Dar al-Fikr al-Arabi, p. 204.
[312]In this regard Article 16(1) of the CISG Convention states that "until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance."

offeror has to act quickly by revoking the offer before the acceptance is made by, for instance, sending an email. [313] Therefore, where an offer is distributed by email and is then followed by another email revoking that offer before an acceptance is being made revocation of the offer should take legal effect. Hence, if the acceptance is initiated after revocation of the offer taken place, it bears no legal force and there is no contract to be established. This is due to the fact that if the offeror was legally bound by the offer until the acceptance is made, he would be obliged to form a contract against his wish. This is inconsistent to the general rule of Islamic law of contract which requires a mutual consent for a contract to be legally formed.

However, if an offer is connected with a determined time span during which the acceptance can be made the question arises as to whether the offer can be validly revoked before the end of the stated time or, to phrase it differently, is the offer legally considered irrevocable until the end of allocated period for acceptance? According to the Islamic schools of thoughts, this issue was not, specifically, addressed.[314] However, this issue was, recently, discussed by a group of Islamic legal scholars. Accordingly, a decision has been reached that when an offer connected with a determined period for acceptance is made, the offeror is legally bound by this offer and thus he cannot revoke it until the end of the determined time.[315]

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[313]Al-Far Abdulqader (1996) *Masader al-Haq al-Shakhsi fi al-Qanoon al-Madany al-Ordony*, Dar al-Thaqafah Library, Amman, p.51.

[314] Mossa Muhammad (1958) *al-Figh al-Esslamy: Madkhal le Derasateh, Nedham al-Mo'amalat feeh*, third edition, Dar al-Ketab al-Arabi, Egypt, p. 326.

[315] 3) of the Juristic Verdict by the Council of Islamic Jurisprudence Assembly (Mojamma' al-Figh al-Eslami) regarding the making of contract by the use of modern forms of communication which was set out in its Sixth Conference held in Jeddah, Saudi Arabia, on 14-20 March 1990 (hereinafter the Verdict of Islamic Jurisprudence Assembly 1990), cited in Al-Dobaiyyan Dobaiyyan, *al-Ejab wa al-Gobol been al-Figh wa al-Qanoon*, op cite, p. 123.

The above decision is compatible with a number of modern laws. Article (93) of the Egyptian Civil Law states that "when a period has been determined for acceptance, the offeror has, by law, to adhere by his offer until the end of that period, and this period could be inferred from the circumstances and the nature of the deal."[316] Hence, an offer cannot be revoked when it includes a fixed time for acceptance until the end of the stated time.

It should be observed from the above article that determining the given time for acceptance included in the offer can be either implicitly or explicitly made. The explicit example is where an offer of selling certain articles is dispatched to a person by email for instance which includes a statement that the receiver has one week to accept or reject the offer. In this example, the offer cannot be revoked before the end of the week and if the offeror does so, such revocation does not take legal effect.

In addition, the offer could be connected with a determined period for acceptance implied from the nature of commercial circumstances and customary practises. In such circumstances, the offeror has to uphold his offer for acceptance until a reasonable period of time had passed[317]. An example for the implicit determined period for acceptance could be in the case of an offer for sale based on a trial condition. In these circumstances the offeror is intended to be bound to the offer until

[316] See also, article 98 of the Jordanian Civil Law which states that "if a determined time for acceptance has been set, the offeror is committed to continue the offer until that time has expired." Abo al-Ezz Ali Muhammad, *al-Tejarah al-Electronyya wa Ahkamoha fi al-Shariyya al-Eslamyya*, op cites, p. 170.
[317] Al-Oboodi Abbas, *al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori*, op cites, p. 108.

the end of the period necessary for the trial, which should be determined according to the nature of the offered item and the commercial practise.

It is worth noting that the aforementioned legal approach, which considers an offer connected with a determined period for acceptance as legally irrevocable until the end of the determined period, appears to provide more certainty and stability for commercial dealings. If it were legally permissible for an offer, connected with a time span, to be revoked prior to the end of the determined period it may cause undue harm to the offeree. This is due to the fact that the offeree may have made considerable effort to evaluate the offer relying on its validity for the duration of the determined time. Thus, traders would have no confidence and incentive to rely on the credibility of the offer connected with a determined period to form a contract.

Furthermore, the offeror in this case makes a condition upon himself and out of his wish to make the offer valid for acceptance within a determined period. As a considered rule in Islamic law, every condition set in contract which is not inconsistent with the principles of Islamic law and the nature of contract must be followed.[318] Hence, the offeror has to abide by the offer until the end of the provided period according to the conditions connected with the offer.

Therefore, based on the given rule, when an offer is sent via email, or displayed on a website connected with a determined period for acceptance, the offer cannot be

[318] Al-Sanhoori Abdulrazzaq (1953) *Masader al-Haq fi al-Figh al-Esslam*i, Dar al-Hana', Egypt, vol. 2, p. 16.

legally revoked until the end of the determined period. Any communication for a revocation of the offer before the termination of the determined period shall not legally valid. Thus, if acceptance is made before the end of the given period, it shall bear legal force and the contract is deemed to be validly formed.[319]

2.4. The Legal Validity of Using a Click-through Agreements to express the Intention of the Parties

In written contracts parties typically sign paper documents to signal their assent to be bound by a contract. In the online arena this has been adapted to develop electronic versions known as 'click-through agreements'. In a click-though agreement the online purchaser is required to indicate his assent to be bound by the terms of he offer by the act of clicking on a button typically stating 'I agree' or 'I accept'. It may be questionable whether a click on the 'I accept' icon is legally valid to express the party's consent to enter into a binding deal.

In view of Islamic law, it has been discussed that party consent can be expressed in any way as long as it can manifest, clearly, the consent of the parties. It is asserted in this regard that Allah has permitted sale[320] but He did not set forth how to carry out businesses. Thus, in this regard consideration has to be referred to commercial practises in order to determine the validity of sale. Accordingly, a click on an 'I

[319] It is important to note that an offer connected with a time limit for acceptance is deemed to be revocable when the determined time is passed without an acceptance is being made.
[320] Chapter 2, verse no. 275.

agree' button, or any other form, in Internet transactions, should always be considered a valid means to express party consent.

Given that there is every chance users will inadvertently click on the 'I agree' button by error online traders are advised to include a message to confirm acceptance. This can take the form of "Will you assure acceptance?" The answer to this would be (yes) or (no), or in another way, to express acceptance by double clicking twice to confirm the parties consent to the offer.[321]

Yet, a question may arise here on the value of confirming the acceptance on the Internet as mentioned above. If the acceptance is deemed to be made before such confirmation there is no value in this confirmation as the offeree is legally bound by the very first click. In contrast, if the acceptance does not bear any legal effect until such confirmation is done, the confirmation will be considered as acceptance, and hence, there is no need to consider it as anything other than acceptance. To reach any satisfactory conclusion to this query, careful attention must be paid to the website content. In this regard, two cases are to be considered. First, the website does not permit the conclusion of the contract unless the confirmation of acceptance is performed, in which the first click on the acceptance button without confirmation bears no consideration. In this case, the acceptance will not be legally considered unless confirmation is made at which point the contract can then be legally formed.

[321] Mojahed Osamah (2002) *al-Ta'aqod abr al-Enternet*, Dar al-Kotob al-Qanooniyya, Egypt, p. 84, Al-Momni Bashar (2004) *Moshkelat al-Ta'aqod abr al-Enternet*, first edition, A'alam al-Kotob al-Hadeeth, Jordan, p.66.

In contrast, in the second possible case, the website may include a necessary requirement of confirmation, but the website is designed to ratify the first click on the acceptance button without the need of confirmation. In this case, the first click on the acceptance key can be considered as an inference of consent to form the contract. However, in the case that the confirmation has not been made, this inference can be used to prove the unwillingness to form the contract.[322] This means that the customer could reject the contract on the grounds that clicking on acceptance is done by mistake without his/her willingness, and the non-issuance of confirmation shall be evidence for this claim.

2.4.1. Incorporation of Terms and Conditions and their Enforceability in Contracts

In relation to the above discussion, it is worth noting that an essential condition for the valid formation of a contract is that its acceptance has to conform with the offer in every aspect, including the incorporation of terms and conditions.[323] Therefore, any alteration or change to the terms and conditions of the sale will be deemed as a new offer. [324] Therefore, when an offer is sent via email and includes all relevant terms and conditions and there has been an acceptance to that offer, without any alteration to its terms and conditions, as with other forms of contracting, the validity and the legal applicability of those terms in the contract is undisputable.

[322] Mojahed Osamah (2002) *al-Ta'aqod abr al-Enternet*, op cites, p. 86.
[323] Al-Kasani *Bada'e al-Sana'e*, vol. 6, p. 537, al-Bahooti, *Kashaf al-Qena'a a'an matn al-Egna'e*, vol. 2, p. 1377, and see, article 99 (1) of the Jordan Civil Law.
[324] See, Article 99(2) of the Jordanian Civil Law.

However, in the context of Internet transactions, concerns may arise in terms of the enforceability of standard terms incorporated into transactions formed via websites.[325] In accordance with the general rule of mutual consent for those terms and conditions to take legal force in the contract they must be presented to the other party and he/she has to consent to them before the contract is formed. That is to say, when those terms and conditions of offer are not clearly brought to the attention of the other party at the time of forming the contract, he may not be legally bound by them.

It is important to note that, in a legal sense, it is irrelevant whether the parties actually read the terms and conditions. However, it is a legal requirement for those terms and conditions to be agreed upon by the other party in order to eliminate any potential claim of ambiguity or misleading.[326] A variety of methods may be used to refer to the terms and conditions of a contract in the context of website transactions. One option is to hypertext a link to the terms and conditions so that they can be accessed directly from the website. A simpler option is to provide access to the terms and conditions in an offline environment. Another method may be to set out the terms and conditions as part of the web page and ensure that the client scrolls through them and acknowledges them by clicking a hypertext link to indicate his consent before he can proceed to form the contract.[327] Yet, in terms of the appropriateness and adequacy of these methods from a legal perspective in Saudi Arabia this remains unclear as this particular issue was not addressed in the new Saudi E-Transactions Rule nor is there a direct rule to be found in Islamic jurisprudent literature.

[325] Smith, G. (2002) *Internet Law and Regulation*, third edition, Sweet and Maxwell, London, p. 456.
[326] Matus, W. (2001) *Forming Binding Agreements on the Internet*, an online article available at;
[327] Smith, G. *Internet Law and Regulation*, op cites. p. 456.

It is useful therefore to refer to the court's decision in *Ticketmaster Corp. v. Tickets,Com,*[328] where Ticketmaster set out its terms and conditions, via hyperlinks, in small print at the bottom of its website. As observed by the court, there was no requirement set for the user to click on the 'I agree' button in the Ticketmaster website. In addition, due to the fact that the terms and conditions were "set forth so that customers needed to scroll down the home page to find and read them and since customers will likely to skip reading the 'small print', it cannot be said that merely putting the terms and conditions in this fashion necessarily creates a contract with anyone using the website."[329] This denotes that when a website is poorly designed so that a customer is unlikely to be aware of its terms and conditions he should not be bound by the terms and conditions.

The above court decision is compatible with the principles of Islamic law of contract, because of the basic rule pertaining to the mutual consent required in order to form a valid contract. It is observed however in the above case that without the user being required to express his consent, such as in the action of clicking on the 'I agree' button, there may not be consent as expressed in the website's terms and conditions. Nevertheless, it may be said that the user by continuing to order the goods or service, acknowledges implied consent to the website's terms and conditions. However, despite the fact that the consent of the contracting parties can be validly made by

[328] *Ticketmaster Corp. v. Tickets.com*, Inc., United States District Court for the Central District of California (2003 U.S. Dist. LEXIS 6483 Mar. 7, 2003) available online at: http://eric_goldman.tripod.com/caselaw/ticketmastermarch72003.htm
[329] Ibid.

explicit and implied ways, the implied consent should not be applied in the above case as the user may not have had access to those terms and conditions or even been aware of their existence.

Therefore, in order to rule out any uncertainty as to whether or not the user has knowledge of the website's terms and conditions and whether he/she agrees to them, the website owner should ensure that the user is provided with a means to evidently express his consent to the website's terms and conditions, such as in the click of an 'I agree' button, before he can proceed to order the offered goods or services. Hence, a website should be constructed in a way that ensures its terms and conditions are adequately brought to the attention of clients. Also, those terms and conditions have to be manifestly consented before the forming of contract in order to avoid a probable situation where its terms and conditions may be denied legal force based on the lack of consent given by the website's users.[330]

2.4.2. Silence in Electronic Contracts

According to the legal concept of acceptance it is an expression to reveal the consent of the offerree to the offer and to enter into binding contract. It is questionable in this regard whether it is possible for acceptance to be expressed by silence. Consider an offer made via email for instance - an email is sent to an individual offering to form a

[330] For further information about the issue of click-wrap agreement, please see Rambarran Ian and Hunt Robert (2007) Are Browse-Wrap Agreements All They Are Wrapped Up To Be? *Tulane Journal of Technology & Intellectual Property* 173-203.

deal but given that there was no reply either accepting or rejecting that offer can the contract legally conclude based on the offeree's silence, thus being treated as a silent or implied acceptance?

First, it is important to establish the issue of silence in contract in general Islamic law. Accordingly, mere silence is not considered to have any legal effect in a contract. There can be no contract without consent and what is in the heart is unknown until it is manifested, and hence, silence does not in itself provide any clarification as to what is concealed in the heart. Therefore, based on such a premise, Muslim jurists refer to a well-known religious principle which states that "It does not attribute to a silent person any saying.[331]" However, in certain cases silence may be a valid means to express consent in contracts where it is customarily used in the market to denote acceptance. The validity of silence as a means to indicate consent in Islamic doctrine is based on the complementary part of the aforementioned religious rule which states that "but silence in circumstances which urgently requires a statement is an indication to consent."[332]

[331] Al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud*, op. cite, p. 966. See also, Majella, article 67. It is important to note that silence in the formation of contract is confined merely to an acceptance of an offer. As a matter of fact, silence cannot be a source of offer in forming transactions.

[332] Al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud*, op. cite, p. 966. This approach has been followed by certain Arabic legal systems, to name, see, Egyptian Civilian Law article 98 (2), Syrian Civilian Law article 99 (2), Iraqi Civilian Law article 81, Jordanian Civilian Law article 95 and the Emirate Civilian Law article135 (2).

In the narrow line of our discussion, silence is defined as the absolute silence that is surrounded with presumptions denoting a party's consent to form the contract.[333] This definition highlights certain important elements which must be in existence for silence to hold legal force as a legitimate consent to form a contract as follows; silence in this regard refers to the meaning of not talking. Moreover, absolute silence means silence which is unaccompanied by acts, such as gesticulations or conduct, such as giving-and-take sale. Finally, not all silence can be valid to express consent in the contract. Rather, the only accepted silence in this regard is that which is joined by further assumptions which provide an indication to an implicit tendency to enter into the contract.[334]

Various examples have been given in Islamic law in which silence can bind an individual to a contract, for example in cases when there are pre-trading links between a seller and a buyer, and in the contract of a lease when a landlord increases the rent and informs the tenant but the tenant remains at the property without rejecting the new price[335].

Therefore as a general rule silence does not constitute acceptance. Thus in view of email transactions, if a person receives an electronic offer via email and it includes a term and condition that if there is no reply to this email within a certain time then this will be considered as acceptance, this has no legal binding over the receiver and thus even if no reply is made there is no valid contract to be concluded from that silence.

[333] Al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud,* op. cite, p. 965.
[334] Ibid.
[335] For more details, see al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud,* op cite, pp. 965-974.

And yet the consideration of silence as a valid means of acceptance in exceptional cases should be treated with caution when it comes to Internet trading. There is currently no statutory law which can applied to determine when it is legitimate to accept silence as an indication of acceptance – online traders are advised to proceed cautiously.

Therefore, in the case of pre-dealing example, an important fact should be born in mind that the advent of commercial practices via the Internet has facilitated the sending of offers by emails. Emails can be quickly sent to large numbers of users with a single click. As a result, if silence is deemed to be a valid means to indicate acceptance in this regard it may lead to impose making a contract on consumers who always deal with such an interactive store without their wish. And yet, based on the pre-dealings example, they may be legally bound with such offers based on their silence. Consider for example a merchant who sends an email to an existing client, and offers new goods or services as detailed in the email and then regards the clients non-response as a silent acceptance. It is entirely possible that the customer may not even be aware of the offer since they may not have access to their emails, thus a valid contract cannot be established based on their silence and there is no mutual consent.

In order to form a satisfactory resolution it would be prudent therefore to advise that acceptance is not obtained from silence on the grounds of pre-dealings through the Internet. Rather it should be demonstrated through an additional action, such as the making of a payment. Therefore, silence can never amount to acceptance in transactions held over the Internet or any other electronic means.

3. The Rules of Buying Unseen Products at the Time of Forming the Contract

In online transactions products are purchased over the Internet without physical observance at the time of forming the contract. In this regard it is legally required for the subject matter in online contracts to be sufficiently determined and defined in a way that renders it apparent to the online purchaser before the conclusion of the contract.[336]

However, as products are not physically presented at the time of forming the contract, the mutual consent of the parties may be changed upon receipt of the purchased item. This notion accepts that regardless of how accurate and sufficient item description may be there is no substitute for products being physically inspected at the time of forming the contract. Therefore, a juristic view in Islamic Law invalidates a contract in which its subject matter (tangible goods) is not, in reality, presented to the parties at the time of forming the contract even if it is sufficiently defined.[337] The basis for this juristic rule originates from the Prophet's saying which asserted "do not sell what you do not have"[338] which appears to address not merely the subject matter which is not in

[336] A large number of e-commerce regulations stress this issue and require e-traders to provide customers with a sufficient and accurate description of the nature, value and form of the offered products or services. In the Arab region, see for example Article 25 of the Electronic Exchanges and Electronic Commerce Bill of the Republic of Tunisia (2000). At the international level, sections 1 and 2 of Article 16 of the UNCITRAL Model Law on Electronic Commerce (1996) requires the description of the subject of contract in terms of its nature, price, quantity and other related and important components before the execution of the contract.
[337] Al-Nawawi, *al-Majmmo's*, vol. 9, p. 286.
[338] Narrated by Abu Dawud. See Ibn Othaimeen Mohammad, *al-Sharh al-Momtea Ala Zad al-Mostagnea*, op cit, p. 128

existence, but, accordingly, it also covers the subject matter which is not presented to the parties at the time of forming the transaction.[339] Furthermore, Prophet Muhammad forbade all sales containing uncertainty and here the selling of an absent article from the parties at the time of forming the contract involves uncertainty.[340]

However, this approach could constrain commercial activities on the Internet, as the subject matter of electronic contracts are displayed therein and not presented in front of parties at the time of forming the contract. Parties are often geographically distant and unable to be together at the point of forming the contract, and thus, it is impractical to require the subject matter of contract to be presented to the parties at the time of concluding the contract. Besides this, the uncertainty involved with the unseen products at the time of making the deal fall off when they are sufficiently described.[341]

Therefore, according to the majority of Islamic law jurists, the subject matter does not have to be presented to the parties, but, it is sufficient to be defined at the time of forming the contract.[342] This approach is convenient and practical to parties, especially for those who are contracting at distance as they can legally form valid deals without the article being required to be at their presence. Furthermore, this approach provides a way to encourage and promote the development of e-commerce. Therefore, the selling

[339] Al-Joroshy Sulaiman, *Nadatiah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, op. cit, p. 175.
[340] Al-Ramlawi Muhammad, al-Ta'aqod be al-Wasa'el al-Mostahdatha fi al-Fiqeh al-Esslami, op. cit., p. 390.
[341] Al-Joroshy Sulaiman, *Nadatiah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, op. cit, p. 176.
[342] Al-Ramlawi Muhammad, *al-Ta'aqod be al-Wasa'el al-Mostahdatha fi al-Fiqeh al-Esslami*, op. cite, p. 385.

of articles displayed and defined via electronic means should be legally considered valid assuming the subject matter of the contract is sufficiently defined.

In addition, the Prophet's aforementioned saying that prohibits Muslims to not sell something which they do not have, refers more likely to an article which is not possible to have delivered, such as a camel which has fled, rather than absolute prohibition of unpresented items at the time of sale. Hence, an article which is not presented to the parties at the time of forming the contract but is under the control of being delivered should not be forbidden within the context of the Prophet's saying.

3.1. The Option of Inspection under Islamic Doctrine

Moreover, Islamic Law protects the purchaser in cases where the subject matter is not presented to the parties at the time of forming the contract the purchaser, by providing the option to withdraw from the contract upon receiving the purchased article.[343] Hence, there would be no concern for false or inaccurate descriptions given to the purchased article, as the purchaser can withdraw from the contract upon seeing, the article without being legally bound. However, it is a point of disagreement in Islamic Law whether or not this option should be available to the purchaser when the article is

[343] This is known in Islamic law by the term of the option of inspection. There are other options for cancelling a contract provided in Islamic law, to name, the option of defect, whereby a contracting party has the right to revoke the contract if a defect has been found in the subject matter, the option to withdraw, when both or one of the parties stipulate in the contract that he/she can repeal the contract within a determined period. For further information, please see, Al-Joroshy Sulaiman, *Nadhariah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, op. cite, pp. 171-203, and Al-Ramlawi Muhammad, *al-Ta'aqod be al-Wasa'el al-Mostahdatha fi al-Fiqeh al-Esslami*, op. cite, pp. 374-407.

found to be matching with an accurate description provided at the time of forming the contract.

One legal thought maintains that the option to withdraw should always be available to the purchaser no matter whether the provided description is matched or not.[344] In contrast to this approach, it is provided that this given option in Islamic doctrine is not available to the purchaser when the item is received as according to the provided description.[345]

The latter approach is justified on the grounds that when the article is sufficiently described it provides a prospective purchaser with knowledge of the article akin to observing it in reality. Thus, as in the selling of articles physically observed at the time of forming the deal is legally binding, without the purchaser having the option to withdraw, unless it is otherwise agreed, hence, the contract should be binding when the unpresented item is received in accordance to its given description.[346]

However, this justification presents problems in day-to-day transactions since acquiring knowledge through descriptions, regardless of how accurate the description may be, can never equal the same level of knowledge resulting from actual observance to the same article. In addition, the application of this legal thought may lead to confusion and uncertainty that could potentially lead to conflicts in the commercial

[344] Al-Kasani, *Bada'ea al-Sana'e*, vol. 5, p. 163.
[345]Al-Bahooti, *Kashaf al-Qena'a*, vol. 2 p. 17.
[346] Al-Joroshy Sulaiman, *Nadhariah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, op. cit. p. 178.

market. There simply cannot be a straightforward and clear-cut measure to determine, upon receipt of the purchased article, whether the description attached to the article is accurately matched, thus the contract is deemed to be legally binding or not, which then provides the purchaser with the option to withdraw.

To provide greater certainty and stability to commercial practises and to minimise potential disputes, the purchaser should therefore be legally entitled to the option of withdrawal in the case that the purchased article is not presented to him at the time of forming the contract. This option should be applied regardless of whether the description provided for the article is met or not.[347] Based on this premise, it is essential to note that this withdrawal option should be available to buyers in electronic transactions, irrespective of whether the article is described in verbal or written form, or displayed in virtual Internet stores, in catalogues, or through the use of any other electronic display tools.

3.1.1. When does the Option of Inspection Start and End?

Given the withdrawal option is available to purchasers in such contracts, it is essential to discuss how long this option to withdraw should be made available. In other words, as the purchaser of the described article bears the right of the option to withdraw the contract, therefore, it is important to determine at what stage such contract is deemed to be legally irrevocable. This issue is a matter of disagreement between Islamic law jurists. One scholarly opinion regards that availability remains until there is an

[347] This is according to the earlier legal thought provided in this matter.

unambiguous consent given by the party after seeing the subject matter of the contract, such as announcing 'I accept this subject matter' or 'I confirm the deal', or when the party uses the subject matter in a way which signifies an implied consent.[348] Accordingly, given that the purchased article remains in its original condition the option of withdrawal could be available for the purchaser for unspecified time so long as there is neither explicit nor implied consent given by the purchaser.[349]

However, this legal approach has the capacity to cause difficulty and discomfort as the availability of this option for unspecific time periods may bring injustice or hardship to the other party who may have other obligations to perform. Given the case that the party, who bears the right of the option to withdraw, may remain silent without showing any consent upon seeing the subject matter this may also lead to confusion as to whether or not the contract is going to be confirmed or revoked.

Hence, as a tendency to provide a time limit for the availability of the option of inspection to the purchaser, it is, on the other hand, provided that the availability of the option to withdraw commences upon seeing the article and lasts so long as the party remains in the same place where he receives the article.[350] This approach signifies that this given option of withdrawal is deemed to come to an end, and thus the contract is irrevocable at the point when the purchaser physically leaves the place where he receives the purchased article, without rejecting the purchased article.

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[348] Al-Joroshy Sulaiman, *Nadhariah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, op. cite, p. 180.
[349] Al-Kasani, *Bada'ea al-Sana'e*, vol. 5, p. 295.
[350] Al-Nawawi, *al-Majmmo's*, vol. 9, p. 289.

However, whilst this approach provides the purchaser with the right to withdraw and limits the options availability, it is difficult to enforce from a logistical stance. This is due to the fact that in distance contracts where the parties are not in the same place and often in very different countries, it is impractical to determine at which place the purchaser receives the article and at what time he leaves. Therefore, any implementation of this legal approach cannot be without concerns.

Having pressed the need for establishing a time restriction for the availability of the option to withdraw in such cases, it might be worthwhile to suggest that the matter be left to the contracting parties to determine. That is to say, the contracting parties should state, in the terms and conditions of the contract, an agreed time during which the purchaser can withdraw from the contract should he wish to do so. This time should start upon receipt of the article by the purchaser and remain so long as it is agreed upon in the contract's terms and conditions. In determining this time, the nature of the contract must be taken into consideration. This means providing sufficient time for the purchaser to observe the suitability of the purchased article and to cancel it in the case of dissatisfaction. As mentioned above, this option should not last unduly long as to cause distress or inconvenience to the other party.

In relation to e-commerce regulations, article 30 of the Electronic Exchanges and Electronic Commerce Bill of Tunisia, issued in 2000 (Tunisia Electronic Commerce Bill) provides customers with a legal right to inspect the quality and the suitability of a product or service purchased online and to exercise the option to terminate the contract

within 10 working days, starting from the day of receiving the item in the case of goods, or from the day of conclusion of the contract in the case of services.[351] However, it could be argued that setting 10 working days during which the option of withdraw can be practised may not be suitable for all contracts. In many cases quality and suitability can be assessed in a day or less, making the additional nine days unnecessarily long. This length of time may be deemed unfair to the other party as keeping the product in the hand of the purchaser may cause him to lose out on the opportunity to sell the kept product to other customers.

Hence, based on the above discussion, it should be left to the contracting parties to determine the length of the option to withdraw based on the nature of their sale. It should be taken into account that this given time should be sufficient for the customer to inspect the quality and suitability of the purchased product or service yet last no longer than is necessary in order for the interests of the other party to be best represented.[352] In this regard, it should be indicated that the right of the option of inspection for unseen purchased products is given to the purchaser by legal force and thus the seller cannot deny it.

[351] At European level, according to article 6 (1) of the 1997 EC Directive in Distance Selling, customer is provided with 7 working days.

[352] It essential to note that with similar approach to Islamic law, article 32 of the Tunisia Electronic Commerce Bill provides certain restrictions for the right of the customer to withdraw in online contract as follows; "for the provision of services if performance had begun, with the consumer's agreement, before the end of the time of the right to withdraw, for the supply of goods made to the consumer's specifications or clearly personalised or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly, for the supply of audio or video recordings or computer software which were unsealed by the consumer, for the supply of newspapers, periodicals and magazines."

4. Conclusion

According to traditional Islamic Law three key principles must be satisfied for a contract to be legally complete - the capacity of parties, the legality of the subject matter and the consent to enter into a legal relation. The focus in this chapter was given to the principle of the consent of the parties to form a contract. In determining the validity of Internet transactions, the principle of the consent of the contracting parties should be analysed in the light of traditional contract law rules.

According to what has been discussed in this chapter, the following can be summarised;

- As a rule, a mere consent to initiate a binding deal without expressing that consent cannot bear a legal force and thus there is no binding deal to be established. Hence, the formula of offer and acceptance has been developed to reveal the inner consent of the contracting parties and through which a binding contract can be deemed to establish.
- As a general principle of Islamic Law, expressing the contracting parties' consent in the form of offer and acceptance can be made by any means of communication. Accordingly, where the consent can be exchanged in a clear and understandable manner to both of the involved parties the used means of communication should be legally valid. This principle is appropriate in e-commerce as consent can be validly expressed by electronic means of communication to form a binding transaction.

- It has been discussed in this chapter that writing is a valid means by which to express the parties' consent to form a binding deal. The validity of writing should not be restricted to writing which is done in tangible form as this may be seen as inapplicable to electronic commerce. If this rule is applied, this will lead to nullify a large number of transactions conducted online by electronic writing. This is inconsistent with the general principle of Islamic rule that states a contract can be formed by any means without restriction. Therefore, writing, in general, should be considered a valid means to communicate parties' consent regardless of whether it is done in tangible or intangible form or in a traditional or electronic format.
- Where computers are programmed to express the consent of the parties, consideration is given for such practise to regard the computer as a mere tool of communication. Hence, consent in this regard is deemed to originate from the parties themselves since the computer is unable to freely consent of its own accord.
- In the case that a mistake occurs when expressing consent, due to a technical computer error, it has been discussed that if valid proof for such errors can be produced a contract can be legally revoked, as this is incompatible with the actual consent of the parties. Furthermore, the originator should bear responsibility as he opted to deploy the computer to act on his/her behalf knowing that technical errors can occur. Yet, in the case that the other party forms the deal knowing the existence of the computer fault, he/she should not be legally competent for compensation.

- Since Islamic Law enforces that a contract can be legally formed by any means, a single click on a website button is deemed to be a valid means to express consent. However, there should be a requirement for confirmation for that click in order to rule out the possibility of a hand-mistake on the first click. That is to say, the first click will not bear any legal force unless it is confirmed by another click. Furthermore, a click, or other appropriate action, is required to express the consent of the parties to terms and conditions in website transactions in order to ensure their enforceability.
- In terms of considering whether the content of a trading website constitutes an offer or an invitation to treat it remains a disputable point between legal scholars. Therefore, in order to rule out doubt, it would be prudent and in the best interests of the website trader to make it obvious that the content of the website is intended to be a mere invitation to treat. That is to say, the offer will be made to the online visitor and the website owner is responsible for initiating the acceptance and thus create a binding deal.
- It has been demonstrated that the offer, unlike an invitation to treat, bears the legal force to form a deal if the acceptance is being made. However, accordingly, as there is no binding deal unless there is an exchange of offer and acceptance, the offer can be revoked at any time before acceptance. Yet, this legal ability to revoke the offer is limited when there is no fixed time provided in the offer for acceptance. Therefore, in the case that the offer is connected with a determined period for acceptance,

such an offer is legally deemed to be irrevocable until the determined period is passed without an acceptance being made.

- As a general rule, mere silence without an explicit or implied expression of acceptance cannot amount to a valid acceptance. Thus, silence is not a valid means to express the offeree's consent to enter into a binding deal. It is indicated, however, that, as an exception to the rule, silence can represent a valid acceptance in contract according to Islamic doctrine when it is possible, based on the commercial usages, to assume the offeree's acceptance from his silence. Yet, this exception from the general rule should not yet be applied to Internet transactions as it may lead to impose forming contracts with users based on their silence without their consent.
- This chapter has demonstrated that there is no requisite requirement for the subject matter of contract to be presented to the parties. It is sufficient for the subject matter to be precisely and sufficiently defined. It is discussed that the purchaser bears the option of inspection. Furthermore, the availability of this option should be left to the contracting parties to mutually determine, based on the nature of the contract.

It is worth noting in Islamic Law that one of the conditions for a valid offer and acceptance is that the parties' consent is exchanged during the meeting place. The concept of the meeting place and its application in the light of Internet transaction will be discussed in the following chapter.

The Islamic Concept of Meeting Place and its Application in Electronic Commerce

1. Introduction

As identified in the previous chapter, under Islamic law there must be mutual consent by both parties to enter into a binding deal in order for a contract to be valid.[353] 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? This issue has been tackled in Islamic law under the idea of 'meeting place'. 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' 'meeting place'. The concept of 'meeting place' is paramount in Islamic commercial doctrine.

The essentiality of 'meeting place' in the Islamic legal system is to determine the length of time for an offer to remain legally valid for acceptance. Practically speaking, the offer and the acceptance can never be contemporaneously communicated. Thus, to enable the necessary correspondence between the offer and acceptance, the 'meeting place' was established according to which the offer is deemed to be valid for

[353] This chapter is based originally on an article, wrote by the researcher, titled as the Islamic Concept of Meeting Place and its Application in E-Commerce, published in *Masaryk University Journal of Law and Technology.* Vol. 1, No. 1, 2007.

acceptance so long as the contracting parties continue their meeting and there is no explicit or implicit rejection to the contract.[354]

Traditionally, a contract can be validly formed when the parties are physically together in one place or, in the case of the parties being in different locations, they use a suitable means of communication to exchange the offer and acceptance, such as via a letter or messenger. When both parties are physically present the concept of 'meeting place' 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 'meeting place' can be legitimately applied. Therefore, it is essential to initially discuss the application of 'meeting place' in face-to-face transactions and in contracts between absentee parties.

Technological developments present additional legal concerns to the 21st Century contractor. Many modern day methods of communication enable a virtual instantaneous connection between parties through which the offer and the acceptance will come immediately to the knowledge of the other party. Yet, equally, some forms of communication may not be instantaneous and there can often be delays between the dissemination of the offer and its receipt. Consequently, debate ensues as to whether a contract formed via modern forms of communication can be comparable to a face-to-face transaction or rather as a contract made between parties in absentees. This chapter discusses the possible application of the concept of 'meeting place' in light of Internet-based transactions. It will establish whether an electronic contract can be validly formed according to the Islamic rules of 'meeting place'.

[354] Al-Kasani, *Bada'e al-Sana'e*, vol. 6, p. 539.

2. The Theory of 'Meeting Place' in Electronic Contract

2.1. 'Meeting Place': Definition and General Thoughts

According to the modern jurist Sanhuri 'the theory of 'meeting place' is a unique Islamic idea which has been the focus of many Islamic jurists. It turn it has evoked many differences among them regarding its definition"[355]. It is worth noting that the early jurists did not form a general definition to the concept of 'meeting place'. In more recent times however, a range of definitions have been given to this concept although none of them seem to be free of criticism.[356]

Article 181 of the Othman Justice Rules Magazine (the *Mejelle*) defines the parties' 'meeting place' as "the meeting that is held for forming a contract." This definition, as many jurists observed, is largely insufficient and requires further elaboration. Hence, another definition, which provides additional detail and clarification, presents the

[355] Sanhuri, 'Abd al-Razaq Ahmed (1960) *Masadir al-Haqq fi al-Fiqh al-Islami*, Dar al-Hana Publisher, Cairo, vol. 1, p. 90.
[356] For further information, please see, al-Shafiy Jaber (2001) *Majless al-Aqd fi al-Figh al-Eslamy wa al-Qanoon al-Wadhei*, Dar al-Jamea'a al-Jadeedah, Alexandria, pp. 86-98.

concept of ‘meeting place’ as the time span that commences after the issuance of offer during which the parties are together to negotiate forming a contract without being distracted by something not related to the contract.[357] It is also defined as the state according to which the contracting parties engage to form a deal.[358]

The concept of ‘meeting place’ was originally established to benefit both parties involved in the contract. Accordingly, the offeree enjoys a period of time (during the ‘meeting place’) to contemplate the worth of the offer without being required to make a hasty decision. The concept of ‘meeting place’ also provides the offeror with certainty as to whether or not there is an acceptance to be made thus the contract is formed before the parties separate from the ‘meeting place’. This is due to the fact that 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.[359]

Yet, the application of the concept of ‘meeting place’ in Muslim commercial doctrine is conditional on the absent parties’ agreement to extend the validity of the offer to a certain time period in which acceptance must be confirmed. When there is no agreement the Islamic idea of ‘meeting place’ cannot be applied. Hence, when a specified time period is given for acceptance and that deadline is passed before the contracting parties leave the ‘meeting place’ there can be no valid acceptance even if

[357] Al-Zarqa Mustafa (1969*) Sharh al-Qanoon al-Madani al-Soori*, the Institute of Arabic Research and Studies, p. 50.
[358] Al-Zuhayli Wahbah, *Hokom Ejra’a al-A’qood be Wasa’el al-Ettesal al-Hadeetha*, op cite, p. 17.
[359] Zaidan Abdul-Kareem, Almadkhal Lederashat al-Shariah al-Eslamiyyah, op cite no. , pp 290-291, and al-Ramlawi Muhammad Sa’eed, al-Ta’aqod be al-Wasa’el al-Mostahdatha fi al-Figh al-Esslamy, op cites, p. 131.

the contracting parties remain in the same place. Likewise, the contract can be validly formed even after the parties separate from the 'meeting place' so long as the contracting parties have agreed to extend the validity of the offer for a particular period.[360]

2.2. The 'Meeting Place' in Face-to-Face Transaction

Based on the provided definitions, the 'meeting place' in face-to-face contracts begins from the time of communicating the offer and lasts as long as the contracting parties continue their meeting, providing that the offer is not rejected. However, questions surrounding validity may arise when the parties' 'meeting place' keeps shifting or changing, such as when parties initiate their business talk whilst walking or travelling in a car or aeroplane. Current Islamic law presents two contrasting points of view when faced with this situation.

[360] In fact, another contrasting view opposes the idea that the contract can validly be formed outside of the theory of 'meeting place'. Accordingly, the parties' agreement to extend the validity of offer for a specified time contradicts with the concept of 'meeting place' according to which the validity of the offer is deemed to come to an end by either of the parties leaving the 'meeting place' before acceptance or explicit or implicit refusal to the offer. However, this view seems to be implausible for trading activities and thus, the parties should be allowed whenever they want to set a specific time for acceptance without any restriction. Traders, sometimes, may need more time to consider the worth of deals. Therefore limiting the validity of offer for merely the 'meeting place' may bring harm and difficulty to them and thus, as an Islamic principle, harm and difficulty must be removed. Moreover, the concept of 'meeting place' is essentially set out for the benefit of the contracting parties, not to provide formalism or complexity in the Islamic system, so the parties should have the right to extend the validity of the offer for longer time if they think it is for their benefit. See, Al-Ebraheem Muhammad, *Hokom Ejra'a al-Oquud bewasa'el al-Etesalat al-Hadeetha*, op cite no, pages 58-59.

According to one School of Thought, a contract can only be accepted at the exact place where the offer is initiated.[361] Therefore there can be no valid contract when the parties, either together or separately, are participating in an activity that they are able to stop, such as riding an animal or travelling in a car. This approach is justified on the ground that as the 'meeting place' keeps moving there can be no unified place since the offer is made in one place and the acceptance in another which directly conflicts with the rule of a single 'meeting place'. Therefore, there can be no valid correspondence between the offer and the acceptance to form a binding contract since this correspondence is done outside of the 'meeting place'. [362] In such cases, the contract can only be validly formed if both parties stop walking or travelling and exchange the offer and the acceptance in a single location. If it is impossible for the contracting parties to stop their means of transportation such as when travelling in an aeroplane or ship, provision is made for the contract to be validly formed regardless of whether such means are moving or standing.[363]

However, this legal approach is inconsistent with the actions of Prophet Muhammad according to which it is narrated that the Prophet himself formed a contract while he was riding an animal without stopping His means of transportation.[364] This denotes therefore that, by the Prophet's example, contracts can be validly formed whilst parties ride or walk without the need to cease the activity. Furthermore, the

[361] Al-Kasani, *Bada'e al-Sana'e*, vol. 6, p. 539, and al-Sanhoori Abdulrazzaq (1953) *Masader al-Haq fi al-Figh al-Eslamy*, Dar al-Hana Publisher, vol. 2, p. 9.
[362]See, Al-Joroshy Sulaiman, *Nadatiah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, op cite no. , pages 33-34. For further discussions see, al-Shafiy Jaber, *Majless al-Aqd fi al-Figh al-Eslamy wa al-Qanoon al-Wadhei*, op cite no. p. 86-127.
[363] Ibid.
[364] Narrated by Al-Bokhari, Sales Chapter, Prophet Saying no. 2115, p. 239.

complications arising from parties having to stop their means of transportation for the sake of forming a contract in one 'meeting place' is inconsistent to the core Islamic principle of removing hardship against Muslims. Therefore, according to another legal School of Thought, the theory of 'meeting place' is more likely to mean the state according to which the contracting parties engage in forming the contract and not the materialistic meaning of a single specified place. Thus, a contract can be validly formed, regardless of whether the parties are together in one actual place or travelling or walking.[365]

As aforementioned, for a contract to be valid the offer and acceptance must be communicated during the parties' 'meeting place'.[366] However, divergence surrounds the meaning of such communication between the offer and the acceptance. Imam al-Shafi provided that the acceptance must be performed as soon as the offer is issued. Hence, any delay in expressing the acceptance will be considered as a rejection, even if the parties are still together in their 'meeting place'.[367] Accordingly, an offer ceases to exist as soon as it is expressed. Therefore, while the acceptance can only be made after the offer there cannot be contemporaneous correspondence between the offer and the acceptance which may close the door for making valid contracts.[368] As a result, since it is only on account of necessity in order to enable the valid

[365] It is essential to note that the Islamic theory of parties' meeting for bargaining does not, in any case, apply to unilateral contracts such as gift, contracts of agency and bequest, partnerships which can be revocable by either parties at any time, or contracts of pledge and deposit which only become binding after delivery of the object and also can be cancelled at any time by the owner of the object. See, Rayner S.E., the Theory of Contracts in Islamic Law, op cite no. , p. 307

[366] Zaidan Abdul-Kareem, *Almadkhal Lederashat al-Shariah al-Eslamiyyah*, op cite no. , p. 290.

[367] Al-Nawawy Mohyyi al-Dain, *al-Majmoo'a*, vol. 9, Dar al-Fekr, p. 160.

[368] Hamid, *Mutual Assent in the Formation of Contracts in Islamic Law*, op cite no. , page 43.

correspondence between the offer and the acceptance, the offer is given a constructive existence so that the acceptance must be done instantly after the offer is made.[369]

Nonetheless, it is worth mentioning that this view is not widely accepted. Many jurists uphold that the acceptance does not have to be expressed immediately after the offer; rather, it can be validly expressed at any time so long as the 'meeting place' continues.[370] Traders may need time to consider the contracts worth before making a decision, thus, in fact, the requirement of an immediate expression of acceptance may pose hardship and difficulty towards the offeree which contravenes the fundamental Islamic principle of providing ease and removing hardship. Consequently, the offeree should have the opportunity to evaluate the offer during the 'meeting place' period.[371] Any delay in expressing acceptance can only be practised during the parties' 'meeting place' which is usually brief enough to avoid any inconvenience to the offeror.

2.3. The Theory of 'Meeting Place' in Contracting inter Absentees

Traditionally, where both parties face each other at the time of forming the contract in one 'meeting place', the rules of 'meeting place' are straightforward. However,

[369] However, it is permissible, accordingly, for the acceptance to be delay for short time so long as the parties do not speak of any alien word not related the transaction. Zaidan Abdul-Kareem, *Almadkhal Lederashat al-Shariah al-Eslamiyyah*, op cite, pp. 290-291, and Al-Nawawy Mohyyi al-Dain, *al-Majmoo'a*, vol. 9, op cite, p. 160.
[370] Al-Kasani Ala'a al-Dain, *Badae'a al-Sanae'a fi Tarteeb al-Sharae'a*, op cite, vol. 6, p. 39, Ibn Mefleh, *al-Faro'a*, vol. 4, p. 4.
[371] Al -Dobaiyyan Dobaiyyan (2005) *Al-Ejab wa al-Gobol been al-Figh wa al-Qanoon*, Al-Rashd Publisher, Riyadh, p. 182.

difficulties arise when the concept of 'meeting place' is applied in a contract formed between parties in different locations. Difficulties occur since there is a time delay between the sending and receipt of communications between parties. Naturally, this delay does not occur in face-to-face transactions since both the offer and the acceptance are heard as soon as the contracting parties express them.

This type of contract is legally termed as contracting inter absentees. Contracting inter absentees is a contract which is formed between two contracting parties who are not gathered in one 'meeting place'.[372] Contracting inter absentees is deemed to be valid in light of Islamic rule.[373] In order to facilitate and simplify trading activities, the contract takes legal force even if it is formed while the parties involved are not together in one 'meeting place'. If contracting with an absent party had not been permitted in the Muslim canon this would have created serious difficulties for Muslim's engaging in commercial practise.[374] However, one requirement of contracting inter absentees is the need for an intermediary. An intermediary is employed to exchange the consent to enter into a binding contract between the contracting parties. Traditionally, a messenger or written letter would have been engaged but in more recent times it is just as likely to be an electronic device, such as an email sent via the Internet.

[372] Al-Joroshy Sulaiman, *Nadatiah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, op cite no. , p. 64.
[373]Al-Shafiy Jaber, *Majless al-Aqd fi al-Figh al-Eslamy wa al-Qanoon al-Wadhei*, op cite no. p. 252.
[374] Ibid.

As mentioned above, Islamic law only validates face-to-face transactions when the offer and acceptance is made in one 'meeting place'. However, in terms of applying the option of 'meeting place' in contracting inter absentees, the rule is rendered inapplicable since the contracting parties are not together in one place and the concept of 'meeting place' is plainly difficult to determine. Therefore, a constructive 'meeting place' was established, by analogy, in Islamic law. The idea of a constructive 'meeting place' denotes the place where the offer came to the knowledge of the offeree. [375] That is to say, the constructive 'meeting place' is deemed to be effective when an offer comes to the knowledge of the offeree and lasts so long as the offeree physically remains in the same place as where the offer came to his knowledge. Accordingly, for the valid formation of contracting inter absentees, the offeree has to accept the offer in the exact place where either the message is delivered to him or the letter is read.[376] It does not mean that the offer has to be accepted immediately since the offeree may need sometime to ponder on the worth of the offer, but rather that the acceptance must be made before the offeree physically leaves the place where the offer was originally brought to his attention.[377]

Islamic jurists remain divided as to whether an offer in the form of a letter or relayed by messenger can be validly available for acceptance by re-reading or re-delivering of the message. According to one School of Thought, in contracting inter absentees, when the offeree physically leaves the 'meeting place' where the offer came to his

[375] Al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud*, op cite no. , p. 1093, al-Ba'ali Abdul-hameed, *Dhawabed al-Uquud*, Maktabat Wahbah, Cairo, p. 150,
[376] Mosa Muhammad, *al-Amwal wa Nathariyya al-Aqd fi al-Figh al-Eslamy*, op cite no. p. 237, Al-Joroshy Sulaiman, *Nadatiah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, op cite no. , p. 34 and Al-Ba'ali Abdul-hameed, *Dhawabed al-Uquud*, Maktabat Wahbah, Cairo, p. 149.
[377] Mosa Muhammad, *al-Amwal wa Nathariyya al-Aqd fi al-Figh al-Eslamy*, op cite no. p. 236.

knowledge without an acceptance being made, the offer is deemed to be rejected and thus the 'meeting place' cannot be set up again by the repetition of the oral message or the re-reading of the letter.[378] In the case of an offer being made via a trader's website this approach provides a constrained rule since website content is available 24/7 and a website visitor cannot revisit a web page to form a valid deal without an acceptance being made during the first visit.

However, this point of view is not widely accepted in Islamic doctrine and the majority of Islamic jurists argue that the offer in contracting inter absentees can be re-read or re-delivered so long as the letter or the messenger is available whereupon the contract can be validly formed if an acceptance is made.[379]

Nevertheless, from a practical point of view, an actual application of the rule of 'meeting place', as given above in Islamic law, in contracting inter absentees is questionable. To clarify this issue, consider for instance the case that a contract is formed using letters to exchange the offer and the acceptance. It is reasonable to expect that the content of a letter may take some time to read and that the offeree may choose to read the item whilst walking or travelling, in turn, the application of the 'meeting place' becomes uncertain. Furthermore, the letter might be read whilst the receiver is alone and it then becomes difficult to determine when and where the offer letter is read and also whether the offeree physically leaves the place where the offer came to his knowledge.

[378] M. A. Hamid, *Mutual Assent in the Formation of Contracts in Islamic Law*, op cite no. , p. 51.
[379] al-Shafiy Jaber, *Majless al-Aqd fi al-Figh al-Eslamy wa al-Qanoon al-Wadhei*, op cite no. p. 257.

Therefore, due to the difficulty in determining the idea of 'meeting place' in contract inter absentees, the practical application of 'meeting place' rule is questionable. Instead, the availability of an offer in contracting inter absentees is apt to be extended for acceptance within a reasonable time, determined by courts in the case of dispute, taking into account the nature of the contract and the surrounding circumstances and trading customs. [380] 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, 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.

2.4. The Islamic Option of 'Meeting Place': Analytical Study

The option of 'meeting place' is deemed as one of the recognised Islamic rights to legally cancel a contract.[381] Accordingly, as an essential rule of the concept of

[380] 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. See, article 48 (1) and (2) of the Kuwaiti Civil Code (1980) .

[381] Some Muslim jurists do not recognise the validity of the option in the law. See, Al-Tayyar Abdullah (1997) *Khiyara al-Majles wa al-Aeeb fi al-Figh al-Eslami*, Dar al-Maseer, pp. 66-67.

'meeting place' each of the contracting parties bears the right to cancel the contract after it is formed by the correspondence of the offer and the acceptance so long as the parties remain together at their 'meeting place'.[382] This option takes its authority from a tradition attributed to the Prophet:

"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.[383]"

However, legal jurists remain divided as to the terms of this option. According to one School of Thought, when there is a correspondence between offer and acceptance the contract is deemed to be irrevocably formed and thus the parties do not have the option to cancel their deal, regardless of whether or not the parties are still in their 'meeting place'.[384]

In support of this legal thought, it is referred to in a *Qura'anic* verse in which it enjoins Muslims to fulfil their contracts.[385] Legally, a contract is formed when there is a correspondence of the parties' consent in the form of offer and acceptance and

[382] See, al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud*, op cite no. , pp. 1091-1092, and Al-Joroshy Sulaiman, *Nadatiah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, op cite no. , p. 162.
[383] Sahih Muslim, the tradition no. 3658, translated into English by Siddiqi Abdul Hamid, Kitab Bhavan, India (2000), p. 971.
[384] Al-Kasani Ala'a al-Dain, *Badae'a al-Sanae'a fi Tarteeb al-Sharae'a*, op cite, vol. 6, pp. 238-239, Ibn Roshed, *Bedayat al-Mojtahd wa Nehayat al-Moqtasd*, vol. 2, pp. 170-171.
[385] Chapter 5, verse no. 1.

according to the above verse there is a clear instruction to Muslims to fulfil their contracts. Thus, applying the option of 'meeting place' appears to be inconsistent to this instruction to fulfil contracts since the parties can, accordingly, cancel their contract as long as the 'meeting place' continues even though the contract is already formed. In this regard, the above Prophet Saying is interpreted according to the view that the two parties negotiate the contract and that a contract is yet to be formed by the exchange of unequivocal offer and acceptance. [386] Accordingly, the word 'separation' mentioned in this Saying relates to separation by word as opposed to physical separation, which may take place when the acceptance of an offer is, unequivocally, communicated.[387]

In contrast, it is held that the option of cancelling the contract based on the parties' 'meeting place' is available to both of the contracting parties after a contract is formed and until the end of their 'meeting place'.[388] Arguably, this Prophetic Saying was clear in recognising the validity of the option of 'meeting place'. The word separation is defined as either one or both contracting parties physically leaving, not by word, the 'meeting place'. This interpretation makes the mention of the term 'separation' meaningful in the Prophet's Saying since it is beyond doubt that a legally binding contract cannot exist between parties before there is a correspondence between the offer and the acceptance. Therefore, when a contract comes into a legal existence by the correspondence of offer and acceptance, both of the contracting parties based on

[386]Al-Zuhayli Wahbah (2003) *Financial Transactions in Islamic Jurisprudence* translated by el-Gamal Mahmoud A. and Eissa Muhammad S. Dar al-Fikr, Damascus, vol. 1 page 10.
[387] Ibid.
[388] Ibn Qodama, *al-Mogni*, vol. 4, p. 7.

the option of 'meeting place', bear the right to validly cancel the contract without being liable for infringement, so long as they remain together at their 'meeting place'.

As mentioned previously, the option of 'meeting place' was established in Islamic commercial doctrine in the interests of the contracting parties. It is often human nature to rush into deals without appropriate consideration and this option enables parties to reassess the contract's worth, and thus annuls it, if they wish so, without facing legal liabilities. This option lasts only for a limited time period during the parties' 'meeting place'. It ends by the physical separation of the parties from the 'meeting place' and each of the parties can leave the 'meeting place' soon after the formation of the contract.[389] Islamic jurists refer to prevailing trading practices and local customs when determining what constitutes physical separation. So, whenever it is customarily deemed that the contracting parties separate from the 'meeting place', and providing that none of them annuls the contract, at this moment the contract is legally considered to be irrevocably binding.[390] In addition, as the 'meeting place' was set forth for the benefit of the contracting parties, thus, it should be considered that the contracting parties may choose to not apply the option of 'meeting place', if they wish so, by stating that on the contract's terms and conditions

[389] As according to the practise of Abdullah Ibn Omar (a Prophet's Companion) who used to walk away from the 'meeting place' when he formed a contract in order to make the contract irrevocable. This is narrated by al-Bokhari, *al-Saheeh al-Jame'a*, Prophet Saying no. 2107, p.238.
[390] Various examples of when parties' parting or separation is taken place were set out. Amongst others, in a large market, parting is established by walking away until one does not hear the other's normal talk; and on a ship by going to different levels, and in a house by one leaving the house or going to a different room. See, Al-Joroshy Sulaiman, *Nadatiah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Moqaran*, op cite no. , pp. 161-162.

However, in terms of applying the option of 'meeting place' in contracting inter absentees, the rules are less clear cut since the contracting parties are not together in one place so that the concept of 'meeting place' is plainly difficult to determine. The parties' right to annul a contract formed inter absentees as according to the option of 'meeting place' remains a matter of discussion in Islamic law. It is provided that, unlike in the case of face-to-face transaction, the option of 'meeting place' cannot be applied in contracting inter absentees.[391] The tradition[392] from which the idea of the option of 'meeting place' derives its authority presupposes that the parties are contracting in the presence of each other in one 'meeting place'. Thus, it is unrealistic to apply this rule in contracting inter absentees since the parties are in different locations.

In contrast, it was argued that the option of 'meeting place' is not so limited to merely face-to-face transactions.[393] It is, therefore, suggested that as soon as an acceptance is made in a contract inter absentees, the offeree, accordingly, bears the option to cancel the contract at any time before he physically leaves the place where he receives the offer. Likewise, 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.[394]

However, from a practical point of view, it is valid to note that applying the option of 'meeting place' as according to the latter legal approach appears to be difficult to

[391]Al-Shafiy Jaber, *Majless al-Aqd fi al-Figh al-Eslamy wa al-Qanoon al-Wadhei*, op cite no. p.544.
[392] See p. 9.
[393] Al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud*, op cite no. , p. 1093.
[394]Ibid.

establish in contracting inter absentees. It is unclear as to how the option of the 'meeting place' can possibly be determined where the parties are in absentees. 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.[395] In addition, unlike in face-to-face transactions where the contracting parties may be tempted into rushing into a contract, which highlights the necessity of the 'meeting place' to reconsider the value of the deal, a contract with absent parties is normally formed after thorough consideration by the involved parties, thus, the necessity of the option of 'meeting place' in contracting inter absentees appears to be insignificant.[396]

2.5. The Rules of 'Meeting Place' in Electronic Commerce

In terms of Internet transactions, it is questionable as to whether the rules of the 'meeting place' can be applied to electronic contracts. It is unclear whether transactions formed by electronic means are analogous to face-to-face transactions and therefore validate the rule of 'meeting place' or whether they should be considered as contracting inter absentees and therefore require different legal consideration.

[395] Rayner S.E., *the Theory of Contracts in Islamic Law*, op cite no. p. 112. See, Dubai Contract Code, 1971, Article 7 (2).
[396] Al-Shafiy Jaber, *Majless al-Aqd fi al-Figh al-Eslamy wa al-Qanoon al-Wadhei*, op cite no. p.545.

Although the contracting parties are geographically distant and not together in one place, it is provided that the formation of contracts via the World Wide Web is comparable to face-to-face transactions.[397] Like other forms of communication, including the telephone, the web can deliver instantaneous communication between parties. Since the offer and the acceptance comes to the knowledge of the intended recipient as soon as they are communicated, it can be presented that they should be deemed, in analogy, comparable to face-to-face transaction. In this regard, it holds that in terms of the instantaneous communication between the contracting parties, there is no difference between telephone and website software except that the software is programmed, on behalf of the website trader, to deal with online customers immediately.[398]

Nevertheless, drawing parallels between transactions conducted over the telephone and transactions undertaken over the web does present some problems. 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, website software 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 programmer. Hence, even though there might be instantaneous connection via the Internet, websites are usually pre-programmed to

[397]Al-Fadhel Monther (1992) *al-Natharyyah al-A'mmah lel el-Tezam*, Dar al-Thaqafah, Amman, Jordan, vol. 1 pp. 136-137.
[398] Ibid.

deal with customers without direct human involvement. As a result, it is valid to say that there cannot be direct communication between the contracting parties in web transaction as analogous to that of face-to-face transaction. Therefore the application of the 'meeting place' concept is questionable in web transactions.[399]

Similarly, in e-mail transactions, communications of offer and acceptance between the parties may be subject to inherent delay. As a result the offer and acceptance cannot come to the knowledge of the contracting parties as soon as they are communicated.[400] E-mail messages can often be delayed for hours before arriving at its intended destination. Therefore, when this means of communication is used to form electronic contracts it should be treated as contract inter absentees. This is due to the fact that a time delay occurs between the issuance of offer and acceptance and its arrival with the intended recipient. In effect, e-mail draws parallels with traditional letter formats in contracting inter absentees. Thus, likewise in contracting inter absentees, it appears to be that the application of the concept of 'meeting place' in e-mail transaction is questionable since it is impractical to determine the rule of 'meeting place'.

[399] It is worth noting that this approach is in line with the Ruling of Islamic Jurisprudence Assembly 1990, 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. Section (1) of the Ruling, cited in Al-Dobaiyyan Dobaiyyan, *al-Ejab wa al-Gobol been al-Figh wa al-Qanoon*, op cite, p. 123.

[400] This approach is applied also on fax and telegram communications. Al-Adawi Mahmood S, *Nadhariyyat al-Aqd fi al-Shariyya al-Esslamyya*, Modthakerat Ustanl Publisher, p. 18.

Yet, when there is an instant communication between the contracting parties by writing, like that of telex and Internet chat rooms, it is debatable as to whether such types of communication are considered as face-to-face transactions or rather as contracting inter absentees. In this regard, it is held that such electronic forms of communication should be legally treated as similar to the communication between parties conducting face-to-face transactions because there is an instantaneous connection between the contracting parties, even though they are not together in one 'meeting place'.[401] The reason for this legal variation is that, as given above, the essential difference between face-to-face transaction and contracting inter absentees is that there is a delay in communicating the offer and acceptance and its arrival with the intended recipient. It is observed, accordingly, that the typing of offer and acceptance in telex or Internet chat rooms is brought to the parties' knowledge instantaneously.[402]

Therefore, based on the latter legal approach, the 'meeting place' in a transaction formed via such written forms of communication deems to commence at the time that the offer reaches the offeree[403] and lasts as long as the contracting parties engage with the transaction via such instant communication provided that there is no explicit or implicit rejection or withdrawal of the offer by one of the parties.

[401] Al-Ebraheem Muhammad, *Hokom Ejra'a al-Oquud bewasa'el al-Etesalat al-Hadeetha*, op cite, p. 104. So also the Judgment of Denning LJ in the case of *Entores Ltd v. Miles Far East Corporation* (1955) 2 All ER 493.

[402] Al-Ebraheem Muhammad, *Hokom Ejra'a al-Oquud bewasa'el al-Etesalat al-Hadeetha*, op cite, p. 112.

[403] See similarly, article 2 (1.3) of the UNIDROIT (United Nations International Institute for the Unification of Private Law) Principles on International Commercial Contract (2004).

Nonetheless, the consideration of such written forms as instantaneous communication should be reviewed. It is, therefore, argued that such modern written forms of communication should be deemed as similar to contracting inter absentees.[404] Accordingly, modern writing tools appear not to be any different from the formation of a contract by the conventional writing of letters which was considered by early Muslim jurists as contracting inter absentees. In both cases the act of writing, in essence, has remained the same but the form and the carrier of such written material has changed from book or paper and pen to technological forms.[405]

It is worth noting further that based on defining 'instantaneous' as dependent on whether the sender knows immediately whether his communication comes completely and accurately to the knowledge of the purported receiver,[406] the sender in telex and similar forms of written communication will be unaware if a failure occurs during the sending of messages or whether his communication arrives incomplete. It is accepted that in face-to-face contracts the offer and acceptance come to the knowledge of the parties, instantly, but this is not guaranteed in the case of a telex contract. It is feasible that one of the parties may not be present behind the telex machine to instantly read the information relayed. In a similar vein, it is not uncommon for Internet connections to experience delays and even complete breakdown and this may cause the user of Internet chat rooms to experience delays or even complete loss of communication.

[404] See for instance, Al-Zakhaili Wahbah, *al-Fiqh al-Islam wa Adillatuhu*, op cites, Vol. 4, p. 2951, and al-Adawi Shawkat, *Natharyyat al-Aqed fi al-Shariyah al-Eslamyya*, Mothakkarat Esstnel, p. 18.
[405] Al-Shafiy Jaber, *Majless al-Aqd fi al-Figh al-Eslamy wa al-Qanoon al-Wadhei*, op cite no. pp. 293-294.
[406] Beale, H and others (1999) *Chitty on Contracts* (*General Principles*) vol. 1 at 2-045.

Hence, in the light of these factors, telex and similar forms of written communication should not be deemed as ‘instantaneous’. Therefore, as with contracting inter absentees it is unlikely that the rules of ‘meeting place’ can be applied. In fact, it is impracticable to establish in telex and Internet chat rooms whether the parties remain engaged with the transaction or perhaps turn their attention to deal with something entirely unrelated to the transaction. Yet, it could be argued that the option of ‘meeting place’ can be applied in telex contract, by analogy, so long as both parties have not switched off their machine or signed out of the chat room. However, since it is possible for the parties to temporarily leave a room without switching off the machine and remain logged onto a chat room whilst being elsewhere this is also impossible to monitor. Furthermore, it is commercially unsound to stipulate that both parties can cancel the deal as long as the telex machine remains on and their status in the chat room remains active as these may be automatically set to stay on for hours and even days.

Hence, the formation of a contract via telex or Internet chat rooms should be assimilated to the exchanging of offer and acceptance via conventional posting of letters; thus, the ‘meeting place’ should be determined according to the rules provided for contracting inter absentees. In such contracts, the offer comes to effect when it reaches the offeree and lasts so long as it is deemed reasonable. Unless otherwise agreed, a reasonable length of time in contracting inter absentees can be determined by calculating an adequate time period needed for the offer to reach the offeree and sufficient time for the offeree to evaluate the worthiness of the offer and give his acceptance, if he wishes so. It is important to mention that considering telex and

similar written forms of communication as analogous to contracting inter absentees is consistent with the ruling of Islamic Jurisprudence Assembly 1990 in which it was indicated that the forming of contract by the use of telegraph, telex, and fax is legally deemed as contacting inter absentees.[407]

2.5.1 The 'Meeting Place' in Verbal or Video-Verbal Means of Communication

In modern Islamic law, there are diverse juristic views in terms of applying the 'meeting place' rule in telephone-based communication (similarly Internet-telephone communication). Some jurists consider it akin to face-to-face transaction but others rule it according to contracting inter absentees.

According to one juristic view, it is thought that the use of Internet-telephone to form a commercial deal is legally regarded as the formation of a contract with one of the contracting parties absent from the 'meeting place'.[408] Accordingly, Internet-telephone communication is, by analogy, equated with the traditional communication between parties by a messenger. The messenger is a (human) tool deployed to transfer the intention of one of the contracting parties to form a deal with the other intended party. Likewise, the Internet-telephone is a (non-human) tool used to convey the intention of parties to enter into binding deal. As a result, the concept of 'meeting

[407]See part (1) of the Ruling, cited in Al-Dobaiyyan Dobaiyyan, *al-Ejab wa al-Gobol been al-Figh wa al-Qanoon*, op cite, p. 123.
[408]See, al-Shafiy Jaber, *Majless al-Aqd fi al-Figh al-Eslamy wa al-Qanoon al-Wadhei*, op cite, p. 286, and Ewadhain Muhammad Najeeb, Hal Yajoz al-Ta'aqod be al-Wasa'el al-Mostahdathah? *al-Wa'e al-Eslamy Magazine*, Dec 2000- Jan 2001, no. 422. p. 35.

place' in such types of communication should be considered according to the formation of contract inter absentees.[409] In support of this legal approach, it is provided that the application of the rules of 'meeting place' in face-to-face transaction presupposes that both of the contracting parties are physically together in one place, whereas, the parties in Internet-telephone communication are physically located in different places at the time of making the transaction. Therefore, since the parties are not in one 'meeting place', the formation of contract via Internet-telephone communication should be deemed and thus regulated according to contracting inter absentees.[410]

Nevertheless, it is worth noting that the notion that both of the contacting parties must be together in one place is not a well-defined element for the application of 'meeting place' in face-to-face transaction. As discussed above, the contracting parties may validly form the contract while they are walking or travelling even though there is no particular place since the place of transaction keeps moving.[411] As a result, any requirement that the parties must physically be together in one particular place in order to apply the rules of 'meeting place' in face-to-face transaction appears to be irrelevant. Furthermore, it should be mentioned that Internet-telephone based communication is different to the messenger tool in a number of ways. Critically, the contracting parties in Internet-telephone are instantaneously linked without an intermediary and thus hear each other's words as soon as they are expressed. Hence,

[409]Al-Shafiy Jaber, *Majless al-Aqd fi al-Figh al-Eslamy wa al-Qanoon al-Wadhei*, op cite, p. 286
[410]Al-Ramlawi Muhammad Sa'eed, *al-Ta'aqod be al-Wasa'el al-Mostahdatha fi al-Figh al-Esslamy*, op cites, pp. 146-147.
[411] See above pp. 5-7.

the contract can be immediately negotiated and its terms altered to suit the parties' interest, whereas, the messenger lacks the authority to do anything but deliver what he was told to say.

Consequently, according to another legal approach, when Internet-telephone communication is used to form a contract, it should be legally deemed as analogous to face-to-face transaction based on the instantaneous communication between the contracting parties. [412] This is due to the fact that, similar to face-to-face transaction, the offer and acceptance should arrive to the knowledge of the parties without delay as soon as they are expressed through telephone conversation.[413] In live-video communication where the contracting parties can communicate and visually see each other simultaneously this should also be considered as analogous to face-to-face transaction.[414]

Yet, in terms of applying the 'meeting place' in Internet-telephone contracts, it is important to note that an actual application of the rules of 'meeting place' as given in face-to-face transaction appears to be impractical. Therefore, another 'meeting place' is substituted by analogy. Accordingly, the 'meeting place' is deemed to commence at

[412]Al -Oboodi Abbas (1997) *Al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori*, Dar al-Thaqaffah, Jordan, p. 146, Al-Ebraheem Muhammad, *Hokom Ejra'a al-Oquud bewasa'el al-Etesalat al-Hadeetha*, op cite, p. 105. The same approach was adopted by most of the Arabic countries civil laws, to name some, article (95) of the Syrian Law, article (50) of the Kuwaiti Law, article (102) of the Jordan Civil Law, and article (94) of the Egyptian Law, and see also the (1990) Ruling of Islamic Jurisprudence Assembly, section (2), cited after Al-Dobaiyyan Dobaiyyan, *al-Ejab wa al-Gobol been al-Figh wa al-Qanoon*, op cite, p. 123.

[413]Al-Khaffaif Ali, Mokhtasar (1954) *Ahkam al-Mo'amalat al-Shariyyah*, al-Sonnah al-Mohammadiyyah Publisher, Cairo, p. 177, Isma'eel Mohyyi al-Dain, *Nadhariyyat al-Aqd*, Dar al-Nahdah al-Arabiya, Egypt, p. 165, and Madkoor Muhammad Salam, *al-Wajeez lel-Madkhal fi al-Figh al-Eslamy*, Dar al-Etihad al-Araby Publisher, p. 264. See article 102 of the Jordan Civil Law.

[414] Al -Oboodi Abbas, *Al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori*, op cite p. 148.

the time the offer is communicated via the telephone, and it should last so long as both of the parties continue their telephone conversation. As such, the offer can be withdrawn at any time before an acceptance is made by communicating such a withdrawal to the offeree.[415] Similarly, the offer is deemed to be revoked when the telephone connection is terminated without an acceptance or when there is an explicit or implicit rejection to the offer, such as the parties engaging in talk about issues unrelated to the offer. [416] In such contracts, unless the offer is extended for a specific period, the acceptance can be validly made any time before the Internet-telephone or live-video communication is terminated.

Nonetheless, when an acceptance is communicated during the telephone connection, it is questionable in this case whether the option of 'meeting place', where both of the contracting parties have the right to cancel the contract, can be applied. This is due to the fact that, as given above, the Islamic concept of 'meeting place' presupposed that both parties are, physically, together in the 'meeting place' at the time of forming the contract.[417] Also, the 'meeting place' is deemed to come to an end in conventional face-to-face transaction at the time when both or one of the parties leave, physically, not by words, the 'meeting place', as discussed above, which is difficult to apply in telephone contract. Additionally, it is possible that the Internet-telephone connection is accidentally cut off; hence, the application of the option of 'meeting place' in

[415] Al-Heeti Abdulrazzaq (2000) *Hokom al-Ta'aqod abr Ajhezat al-Ettesal al-Hadeetha*, Dar al-Bayareq, Jordan, pp.22-23.
[416]Al-Janko Ala al-Dain (2004) *al-Tegabodh fi al-Figh al-Eslamy*, Dar al-nafa'es, Jordan, p. 321.
[417] In which it was indicated, according the Prophet Saying, that 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)….. See above p. 9.

'Internet'-telephone communication as analogous to the 'meeting place' in traditional face-to-face transaction is questionable.[418]

However, it should be mentioned that so long as the Internet-telephone and live-video communication is deemed comparable to face-to-face transaction, the parties' right to annul the contract after it is formed should be applied. However, due to the difficulty in establishing the physical departure of the contracting parties from the 'meeting place' in Internet-telephone communication, a constructive termination can be suggested. Accordingly, the option of 'meeting place' in contract via instantaneous Internet-telephone communication should come to an end at the time of hanging up the telephone connection between the contracting parties.[419] Furthermore, in live-video communication, where the parties can clearly identify one another, the option of 'meeting place' may come to an end, in analogy to face-to-face transaction, when one of the parties watches the other party physically leave the conferencing room even if their connection is not terminated. Yet, it is important to note that the availability of the option of 'meeting place' should not be interrupted in live-video communication when that party leaves the room to collect something related to the forming of contract.[420]

In this regard, the rationale behind the option of 'meeting place' in contract should be taken into consideration. Accordingly, such option provides both parties with more

[418] Ewadhain Muhammad Najeeb, *Hal Yajoz al-Ta'aqod be al-Wasa'el al-Mostahdathah?*, op cite , pp. 35-36.
[419] Al-Tayyar Abdullah, *Khiyara al-Majles wa al-Aeeb fi al-Figh al-Eslami*, op cite, p.
[420] Al-Qarehdagy Ali, Hokom Ejra al-A'qood be A'alat al-Ettesal al-Hadeetha, *Majallat Majam'a al-Figh al-Esslamy*, 1410 (H), edition no. 6, p. 941.

time to re-consider and re-evaluate the worth and benefit of the transaction. Thus, the legal requirement of physical departure from the ‘meeting place’ is just a means, introduced in Islamic law, to determine the point where the validity of this option comes to an end. Consequently, the option of ‘meeting place’ should always be available for contracting parties as long as it is possible to determine the time span of its validity and when it is likely to come to an end. As a result, in analogy to the physical departure of the parties from the ‘meeting place’, the option of ‘meeting place’ in Internet-telephone contract should draw to an end when the telephone communication is terminated.

In terms of the possibility that the Internet-telephone gets accidentally disconnected due to a technical fault, a parallel can be drawn to the sudden interruption of ‘meeting place’ in traditional face-to-face transactions, by for instance, a flood, earthquake or a dangerous animal attacking the parties, which causes the unintentional physical separation of the contracting parties from the ‘meeting place’. In such circumstances, it is considered that both of the contracting parties can resume their ‘meeting place’ and practise the option of ‘meeting place’ so long as both of the contracting parties do not engage with something unrelated to the contract.[421] The same practice should be applied when a technical fault leads to a sudden termination to the Internet-telephone communication between the parties. The constructive ‘meeting place’ should remain unaffected as the parties can re-initiate another communication and resume their ‘meeting place’.

[421] Ibid.

3. Conclusion

The analysis provided in this chapter focuses on the Islamic rules of ‘meeting place’ and its application in e-contracts. Accordingly, there is no valid contract until there is an expression of the parties’ consent, and there is no valid expression of consent in contract under Islamic law except if it is done within the limits of the ‘meeting place’. In light of the above discussion, the following points are to be highlighted:

- The concept of ‘meeting place’ is introduced in Islamic law to determine the validity of offer for acceptance in a way that appears to provide a balanced benefit for both of the contracting parties. That is to say, the contracting parties can choose to not apply the concept of ‘meeting place’ 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.
- The ‘meeting place’ is the state according to which the parties get together and engage in forming a business deal. It is, thus, not referred to that the contracting parties must be together in one exact place in order to form a valid contract. Therefore, a contract can be validly formed according to the Islamic rule of ‘meeting place’ even if the parties are walking without necessitating that they stop walking to form the contract in one particular place.
- According to the rules of ‘meeting place’, both of the contracting parties bear the right to annul the contract after it is formed by the correspondence of offer and acceptance so long as the parties are still together in their ‘meeting

place’. This practise is known in the Islamic legal system as the option of ‘meeting place’. Accordingly, the contract is deemed to be irrevocably binding at the moment when one of both of the parties leaves the ‘meeting place’ after the contract is formed by the exchange of offer and acceptance. That is to say, the parties’ right to annul the contract according to the option of ‘meeting place’ is deemed to come to an end at the moment where the parties separate from the ‘meeting place’. The parties’ separation in this regard refers to the physical separation after the forming of contract. In addition, commonly accepted trading practises should play an essential role in determining the parties’ physical separation from the ‘meeting place’ of the contract.

- When there is a delay in communicating the offer and acceptance between the contracting parties, the contract is deemed to be formed between absentees’ parties. In Islamic law, a contract can be validly formed by the exchange of offer and acceptance, through a means of communication, between two parties who are not together in one ‘meeting place’. However, due to the difficulty in determining the concept of ‘meeting place’ in contracting inter absentees it is questionable if the rules of ‘meeting place’ can be applied. As a result, when an offer is communicated to an absent party it should be valid for acceptance within a reasonable timeframe so that the contract cannot be validly formed if the acceptance is communicated after that time period is exceeded. In order to rule out any uncertainty regarding the reasonability of time, the offer should be unequivocally connected with a certain time for its validity for acceptance. That is to say, for a contract to be

legally formed the acceptance must be communicated before the end of the given time for the validity of the offer and thus any acceptance made afterwards should be deemed as a new offer.

- It is unclear whether the rules of ‘meeting place’ can be applied in e-commerce. With regards to web transactions, although it may be said that there is instantaneous communication between the parties, it should not be ruled as comparable to face-to-face or telephone transaction. Thus, applying the rules of ‘meeting place’ in web transactions appears to be questionable.
- Similar to the traditional formation of contract between absentees’ parties, there is a delay between the communication of offer and the acceptance and its arrival at the intended recipient in e-mail transactions. Therefore, since it is difficult to determine the concept of ‘meeting place’ in contract inter absentees, the rules of ‘meeting place’ in e-mail transactions cannot be applied.
- However, it is essential to note that delays might not occur in other modern forms of communication, including Internet chat rooms and telex. Accordingly, the exchange of offer and acceptance by writing comes instantly to the knowledge of the parties as soon as they are communicated. And yet, forming a contact through such forms of communication by writing should not be equated to the communication between the parties in face-to-face transaction. In telex and Internet chat rooms it may not be possible to immediately establish whether the parties simultaneously read their correspondence or engage in activity unrelated to the contract. Hence, it may not be appropriate to apply the rules of ‘meeting place’.

- Unlike the case of telex and Internet chat rooms, despite the fact that the parties are not together in one place in telephone contracts, forming a contract via telephone is deemed to be as comparable to a contract formed between parties in face-to-face. Likewise with face-to-face transaction, the communication of the offer and acceptance in telephone contract should come to the knowledge of the parties as soon as they are expressed. However, in terms of applying the rules of ‘meeting place’, it is impractical to apply the rules of ‘meeting place’ in a telephone contract. Therefore, the ‘meeting place’ in a telephone contract is refers to the time during which the parties are connected together via the telephone communication. Accordingly, the parties’ right to annul the contract after it is formed by the communication of offer and acceptance deems to come to an end when the telephone connection is terminated. This is an analogous approach to the parties’ physical separation from the ‘meeting place’ in face-to-face contract.

Communication between offer and acceptance based on the concept of ‘meeting place’ may raise some difficulties in electronic transactions in terms of when and where a contract is deemed to be irrevocably formed. This legal issue is going to be the focus of study in the next chapter.

The Time and the Place of Forming Contract: a Study in the Light of Electronic Commerce

1. Introduction

Chapter four discussed the communication between offer and acceptance based on the Islamic fundamental of 'meeting place' and its application to electronic transactions. According to the concept of 'meeting place' a contract becomes legally effective at the time when the 'meeting place' of the parties comes to an end. However, the borderless nature of the Internet presents questions as to when and where a contract is deemed to be irrevocably formed and therefore raises questions regarding contract validity. As a general rule, a contract is formed when there is an exchange of offer and acceptance between the parties. However, in online contracts the exchange of offer and acceptance involves the possibility that such correspondence may not reach its intended recipient. It is also possible that a message sent via the Internet may be altered en route and reaches its final destination either incomprehensibly or with a different meaning to the one intended. That is to say, when an acceptance is communicated over the Internet it may be illegible when it reaches the offeror or it may never arrive at all. Consequently, it is questionable as to whether there is a valid conclusion of contract.

Furthermore, provided that the acceptance has been unequivocally communicated to the offeror, questions arise concerning the time and place of the contract's conclusion. As a general rule, the place of the contract is based on where the contract becomes legally binding.[422] The means of communication used to exchange the offer and acceptance also affects the time and place of concluding the contract. That is to say,

[422] Al-Oboodi Abbas, *Al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori*, op cite, p. 154.

when the parties are instantaneously connected together so that both the offer and the acceptance come to the attention of the parties as soon as they are expressed, like that of the Internet-phone, these forms of communication are considered as face-to-face transactions. In contrast, when there is a time delay in communicating the offer and the acceptance between the parties, which often occurs in e-mail, these forms of communication are closely comparable to traditional contracts formed between absent parties. Early consideration in this chapter will discuss the point at which an online contract is deemed to be legally binding. At a later stage, an attempt will be made to explore the place of contract, which will involve a discussion on national and international jurisdiction law in light of electronic contracts.

2. The Time of Concluding Online Contracts: An Analysis

A typical example may be considered in Internet communication as when a party based in Saudi Arabia communicates his offer via e-mail to another party residing in the United Kingdom; the latter party accepts the offer and communicates his acceptance back via e-mail. In this example, it is difficult to determine the exact point at which the contract is deemed to be formed. Is it at the time when the offeree accepts the offer? The time when the acceptance is communicated back to the offeror? Or is it when the acceptance reaches the offeror, regardless of whether he is aware of the acceptance or not? Or maybe it is at the point that the acceptance comes to the notice of the offeror?

Establishing the time at which a contract is deemed to be formed is essential in order to determine whether the contracting parties can withdraw their communication before the contract becomes legally binding. That is to say, if a contract is deemed to be formed as soon as the offer is accepted, the offer cannot be withdrawn when the acceptance has already been made, whereas, if the contract is deemed to be formed when the acceptance comes to the knowledge of the offeror, it is legally possible for the offer to be withdrawn so long as the offeror has not received the acceptance. Likewise, the offeree can revoke his acceptance before it comes to the notice of the offeror.[423]

It is important to mention that in the scenario given above a notice of offer withdrawal or acceptance is more likely to come to the notice of the recipient before the offer or acceptance is communicated despite it being sent and received earlier. To clarify this case, consider that the Saudi party sends his offer by e-mail to the British party and it was received at 10am. Several hours later, the Saudi party changes his mind and sends another e-mail withdrawing his offer which arrives at the British party's inbox at 1pm. Provided that the British recipient checks his inbox once a day at 4pm the withdrawal of the offer should come to his attention before the offer itself despite the offer being sent and received earlier. The same is likely to occur when revoking an acceptance by

[423] There are other legal effects resulting from determining the time of a contract being formed, to name; setting the time of transferring the ownership of the purchased item to the buyer and thus in the case the item suddenly loses its value, who shall be legally responsible for such lose, either the buyer or the purchaser. For further information please see, Al-Oboodi Abbas, *Al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori*, op cite, pp. 173-176 and Al -Dobaiyyan Dobaiyyan, *Al-Ejab wa al-Gobol been al-Figh wa al-Qanoon*, op cite, pp. 106-107

e-mail; sending a notice of an acceptance's revocation after an earlier acceptance is e-mailed earlier may come to the attention of the offeror before the acceptance itself.[424]

Thus, it becomes essential to determine the time when a contract becomes legally binding in order to avoid potential disputes. In face-to-face transactions this does not present a problem. Accordingly, the contract is formed at the moment the acceptance comes to the knowledge of the offeror, which usually occurs as soon as the acceptance is expressed.[425] Similarly, as discussed in the previous chapter, this legal approach is usually applied in contracts formed via direct forms of communication, such as on the telephone, when there is no time delay in the communication of offer and acceptance between the contracting parties. That is to say, when parties use a telephone, or other direct forms of communication, to form a contract, this contract is deemed comparable to a face-to-face contract and therefore comes into legal force when the offeror becomes fully aware of the acceptance.[426]

However, the difficulty arises in determining when a contract is deemed to be formed when contracting inter absentees. In such contracts, a time delay occurs between the sending and receipt of offer and acceptance between the contracting parties. Thus, it is

[424] In this regard, article 22 of the (1980) United Nations Convention on Contracts for the International Sale of Goods (CISG) states that an acceptance may be withdrawn if the withdrawal reaches the offeror before, or at the same time as, the acceptance would have become effective.
[425] Oqla Muhammad, Hokom Ejra al-Oqood be Wasa'el al-Ettessal al-Hadeetha, p. 38, Shalabi Muhammad (1983) Dar al-Nahdha al-Arabiyya, Beirut, p. 421
[426] In this regard, it is worth mentioning the comment made by Denning LJ in the case of *Entores Ltd v. Miles Far East Corporation* (see above footnote no. 48) which indicated that "where two people make a contract by telephone; Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes dead so that I do not hear his words of acceptance. There is no contract at that moment … If he wishes to make a contract; he must therefore get through again so as to make sure that I hear. Suppose next that the line does not go dead, but it is nevertheless so indistinct that I do not catch what he says and I ask him to repeat it. He then repeats it and I hear his acceptance. The contact is made, not the first time when I do not hear, but only the second time when I do hear."

disputable in such cases to determine the moment during which a contract is deemed to be binding. Legally, there are four main theories which jurists refer to when establishing the time at which a contract is formed between absent parties - the declaration, the mailbox, reception or information.[427]

2.1. The Legal Theories Addressing When a Contract inter Absentees is Formed

According to the declaration theory, a contract between absent parties is formed when the acceptance of an offer is expressed, regardless of whether the acceptance is brought to the mind of the offeror or not.[428] This theory is based on the understanding that a contract is a correspondence between the parties' consents to enter into a binding deal. Therefore, when the offeree declares his acceptance to the received offer the correspondence between the parties' consents is deemed to be reached thus, the contract becomes legally effective. It holds, accordingly, that the declaration theory is suitable to the nature of commercial activities since they require the prompt formation of transactions. Therefore, the offeree can ensure the valid conclusion of the contract

[427] Note that there are other legal theories; such as the formulation theory which considers a contract legally effective at the moment the offeree begins to formulate its communication for the acceptance. Accordingly, it is usually used in conjunction with the mailbox theory to prevent the offeror from withdrawing his offer once the other party has started to respond to that communication. See, Eiselen Siegfried (1999) Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980, *EDI Law Review*, at 24, available at: http://www.cisg.law.pace.edu/cisg/biblio/eiselen1.html For further information, see also, Al-Oboodi Abbas, *Al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori*, op cite, pp. 164-166.

[428] Al-Sanhoori Abdulrazzaq, *Masader al-Haq fi al-Figh al-Eslamy*, op cite, vol. 2 p. 56.

and enjoy instantly the use of the purchased item as soon as the acceptance is expressed without unreasonable delay.[429]

However, this theory has been criticised as being biased towards the offeree since the contract is deemed to be formed without the offeror being aware of this conclusion. Thus, no one except for the offeree can ascertain that an acceptance has been made yet the contract becomes legally binding and furthermore, he can deny declaring the acceptance, if he wishes to do so.[430] This may lead to uncertainty and confusion for the offeror as the contract is formed entirely at the wish of the offeree, either to ratify his acceptance or to deny it if he wants to change his mind. Established by early jurists, the declaration rule may have been appropriate and relevant in days gone by, since it would have hastened the formation of contracts, but its relevance today is questionable. Previously, communications between parties may have taken days or even months but today's modern communication methods facilitate communication between distant contracting parties in considerably shorter time periods.

Nevertheless, under the mailbox theory, also known as the postal rule, it is not legally sufficient for the acceptance to be only declared in order for a contract to be formed, rather, the acceptance is legally effective and thus a contract becomes legally binding at the time when it is sent or posted to the offeror. [431] The postal rule has its origins in

[429] Al-Oboodi Abbas, *Al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori*, op cite, p. 157.
[430] Marqass Sulaiman (1956) *Nathariyyat al-Aqd*, Dar al-Nashr lel-Jame'at al-Masriyyah, p.133 cited after Abo al-Azz Ali M (2008) *Al-Tejarah al-Electroniyya wa Ahkamaha fi al-Figh al-Esslamy*, Dar al-Nafa'ess, Jordan, p. 198.
[431] Jones Simon (2000) Forming Electronic Contracts in the United Kingdom, *International Company and Commercial Law Review*, 11 (9), 301-308 at 303.

common-law jurisdiction and is usually applied in delayed forms of communication, such as mail.[432]

In contrast to the declaration and mailbox rules, the reception rule states that a contract is not completely formed until the acceptance is actually received by the offeror or at least it is made available for him, regardless of whether the content of the acceptance is read by the offeror.[433] The actual receipt of acceptance by the offeror is considered as an inference of his knowledge to the content.[434] The reception theory appears to be fair for both of the parties in which it delays, within a reasonable time, the binding conclusion of the contract to the time of receiving the acceptance, regardless of whether it comes to the attention of the offeror or not since he is ultimately responsible for the prompt handling of letters received in his mailbox. At the same time, the theory ensures that the contract should not validly be formed in the case that the acceptance gets lost on the way since the offeror has not yet had any control of the acceptance.[435] That is to say, the reception theory is based on dividing the risk of communicating the acceptance equally between the parties so that the communication of acceptance can only be held effective at the time the acceptance arrives in his mailbox, unlike the postal rule where the offeror bears only the risk of the communication of acceptance.[436]

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[432] Eiselen Siegfried, Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980, op cite, at 24.
[433] Ibid.
[434] Al-Sanhoori Abdulrazzaq (1966) *Al-Wasset fi Sharh al-Qanoon al-Madani*, Dar al-Nahdha al-Arabiyya, Egypt, vol. 1 p. 242.
[435] Al-Oboodi Abbas, *Al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori*, op cite, p. 160.
[436] Ibid.

Under the theory of the final rule – the information rule - acceptance becomes effective and thus a contract comes into existence at the moment the acceptance comes to the notice of the offeror. As with face-to-face transaction, this theory takes into account that the acceptance is an expression of the offeree's consent and this expression cannot take legal effect until it is brought to the attention of the offeror. Thus, only at this time is there deemed to be a correspondence of the parties' consent and therefore the contract is validly formed.[437] Accordingly, the offeror, based on the information theory, can withdraw the offer at any time until he is aware of the other party's acceptance. However, it is important to note that, unlike the declaration theory the offeree may suffer under the information theory as it is difficult for him to determine when the acceptance comes to the notice of the offeror.[438] Implementing the information theory may also lead to unreasonable delay in the formation of transactions.

In Islamic jurisdiction the issue of when a contract is considered to be validly formed in contracting inter absentees is a matter of discussion. According to one legal thought, a contract comes into existence at the time the offeree declares the acceptance[439] In support of this approach, a number of legal texts are referred to, which imply, accordingly, that Islamic law follows the declaration theory in

[437] Al-Sanhoori Abdulrazzaq, *Al-Wasset fi Sharh al-Qanoon al-Madani*, op cite, vol. 1, p. 242.
[438] Marqass Sulaiman, *Nathariyyat al-Aqd*, op cite, p. 133.
[439] al-Qarehdagy Ali, *Mabda' al-Ridha fi al-Uquud*, vol. 2, p. 1101. It is worth mentioning the Ruling of Islamic Jurisprudence Assembly 1990 in which it is provided that when a contract is formed between absentees' parties who are not together in one 'meeting place' and they cannot see nor hear each other and their mean of communication is a letter or messenger, and this is compatible with telex, telegraph, fax, and computer screen, in this case the contract is considered to become validly effective at the time the offeree declares his acceptance.

determining the time of forming a contract inter absentees.[440] Amongst others, it is stated that "when a seller sends a letter or correspondence through a messenger to a prospective buyer, who is absent from the 'meeting place', offering to sell a certain article with certain value, then when the offer reaches the buyer, he unequivocally accepts that, at this time, the contract is considered to be validly formed."[441] Therefore, this indicates that the contract is deemed to be formed at the time the offeree declares his acceptance to the offer.

In contrast, it is held that those provided legal texts, given by early Islamic scholars, were not meant to determine the time when a contract is considered to be formed, rather, they were based on clarifying the validity of forming a contract between absentees' parties who are not together in one 'meeting place'.[442] Therefore, the general rule should be applied. That is to say, so long as a contract between face-to-face parties is formed under Islamic law when the acceptance comes to the notice of the offeror, likewise, a contract should be formed accordingly at the time when the acceptance is brought to the attention of the offeror in contracting inter absentees.[443]

The Arabic legal system follows different theories in addressing the issue of when a contract inter absentees is formed; Kuwait and Egypt have adopted the information theory, whereas, other countries including Syria, Jordan and Tunisia have chosen to

[440] See, al-Kasani Ala'a al-Deen, *Bada'e al-Sana'e*, vol. 5, p. 138, Ibn A'abdeen Muhammad A. (2003) *Hashiyat Rad al-Mohtar ala al-Dorr al-Mokhtar*, Dar A'alam al-Kotob, Riyadh, vol.7, p. 26, and Al-Nawawy Mohyyi al-Dain, *al-Majmoo'a*, vol. 9, p. 197.
[441] Al-Bahooti Mansoor, *Kashaf al-Qena'a a'an Matn al-Eqna'a*, vol. 3. p. 148.
[442] Al-Sanhoori Abdulrazzaq, *Masader al-Haq fi al-Figh al-Eslamy*, op cite, vol. 2, pp. 54-56.
[443] Al-Dobaiyyan Dobaiyyan, *al-Ejab wa al-Gobol been al-Figh wa al-Qanoon*, op cite, p. 108. Al-

follow the declaration theory to determine the time at which a contract is formed. [444] However, the legal stance in Saudi Arabia is unclear bearing in mind that the matter of when a contract is considered to be formed remains a debatable subject in light of Islamic rule.

2.2. The Time of Concluding the Contract via E-mail Communication

It is worth discussing that in the case that the parties use a non-instantaneous means of communication, like that of e-mail, it is questionable as to which of those aforementioned theories provide an appropriate approach to the issue of when a contract should come into legal existence. As identified above, each theory bears advantages and disadvantages in terms of their application in contract inter absentees.[445]

Neither the information nor the declaration theory appear to provide a suitable framework for contracting via e-mail since the information theory makes it difficult to determine when a message comes to the notice of the offeror and the declaration rule presents uncertainties in determining when an acceptance is declared.

[444] Ebraheem Muhammad, *Hokom Ejra'a al-Oquud bewasa'el al-Etesalat al-Hadeetha,* op cite no, p. 89.
[445] Al-Oboodi Abbas, *Al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori*, op cite, p. 166. For further details, please see, Donmaz Ebraheem K, *Majellat Mojamma'a al-Figh al-Esslamy*, edition no. 6, vol. 2. (1990) cited after Al-Dobaiyyan Dobaiyyan, *al-Ejab wa al-Gobol been al-Figh wa al-Qanoon*, op cite, pp. 109-124.

Applying the mailbox rule in e-mail communication also presents problems. Although e-mail, like traditional post, is deemed not instantaneous, e-mail is different in a number of key ways. When sent an e-mail is converted into a digital format and broken into a number of separate packets before arriving at its intended recipient.[446] An e-mail may also travel via several different servers before reaching its intended recipient. Unlike with a post office representative, e-mail users may not be aware that service providers participate in delivering their messages. Furthermore, it is possible with e-mail communication to set up an immediate confirmation of receipt. This ability to confirm the receipt of an offer and an acceptance almost instantaneously deprives the postal rule of much of its utility.[447] Moreover, like the declaration rule, it seems that the convenience of the offeree is solely sought under the mailbox rule. Accordingly, a contract is formed at the time that the acceptance letter is handed to a post-office representative or put in the post box irrespective of whether the letter is delayed, destroyed or lost en-route and not even reache the offeror.[448] Therefore, the application of the postal rule in e-mail transactions appears to be questionable.[449]

2.3. The Time of Concluding the Contract in Web Transactions

[446] Jones Simon, Forming Electronic Contracts in the United Kingdom, op cite, at: 302.
[447] Bernachi Reachard (1997) *Selected Issues in Electronic Contracting*, available at: http://www.cla.org/Publications/MemberArticles/Selectiss.html.
[448] Belgum Karl D (1999) *Legal Issues in Contracting on the Internet*, available at: http://library.findlaw.com/1999/Aug/1/128190.html#DeterminingtheTermsofaContract
[449] It is worth noting that there has been a call in Scottish law to abolish the application of postal rule in modern forms of communication. See, "Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods", Scottish Law Commission, No. 144, (1993), available at: http://www.scotlawcom.gov.uk/downloads/rep144.pdf

The question of timing in web transactions depends on the nature of individual websites and the procedures they follow in forming transactions with customers. Some websites operate purely in a passive format and function merely as a shop-window to their traditional business. Such a website would typically display the company name and provide information relating to its trading products or services, including the company's contact details for further communication via offline means.[450] These websites present no opportunity for forming online contracts; therefore determining when a contract is formed will be based on another means of communication. Assuming in this regard that a client accesses the website and subsequently contacts the company via telephone, using the provided contact details. He offers to buy some of the company's products and his offer is accepted during the telephone conversation, in this regard the contract is deemed to be formed at the time when the client hears the acceptance.

Conversely, there are websites with far greater interactivity and include the option to complete transactions entirely online. Suppose, in this regard, that the display of product information is deemed as an offer, and this offer is accepted by a website client and his acceptance is communicated online via the same website, the communication between the client and the website owner is likely to be carried out instantaneously, like that of telephone. The only difference, however, is that the parties in web transactions are simultaneously connected between computers rather

[450] Rothchild, J. (1999) Protecting the Digital Consumer: Limits of Cyberspace Utopianism, *Indiana Law Journal*, 74: 839, at 900.

than humans.[451] One important distinction however is that orders placed via a website may be processed by programmed software and not involve a human participating in any way. Thus, the application of the information theory that requires the offeror to be made aware of the acceptance appears to be impractical to apply in these circumstances.[452]

2.4. Determining the Conclusion of Electronic Contracts: An International Attempt

Due to the importance and criticality of establishing when an electronic contract is deemed to be legally effective, an international attempt has been recently made by various legal systems to establish frameworks. The UNCITRAL Model Law attempted to deal with the question of when a contract is deemed to be formed in electronic commerce by determining the time of sending and receiving an electronic message. According to Article 15 of the Model Law;

(1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

(2) ….the time of receipt of a data message is determined as follows;

[451] Gringras Clive (2003) *the Laws of the Internet*, second edition, Butterworths LexisNexis, UK, p. 36.
[452] Eiselen Siegfried, Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980, op cite, at 24.

(a) if the addressee has designated an information system for the purpose of receiving data messages; receipt occurs;

(1) at the time when the data message enters the designated information system; or

(2) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;

(b) *if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.*[453]

Whilst Article 15 provides clarification on issues relating to the communication of electronic messages between parties, it fails to address specifics relating to the formation of contract. In particular, it fails to address the critical question of when an electronic message is deemed to be legally effective.

Nevertheless, it is worth noting that there is a tendency at international level to adopt the time of receipt as the time when communication of messages becomes legally effective.[454] For example, the 1980 United Nations Convention on Contracts (CISG) provides in this regard that "an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror."[455] It is relatively important to note that the word "reach" provided in the Convention is clarified in Article 24 as

[453] Article 15 'Time and Place of Dispatch and Receipt of Data Message', the UNICTRAL Model Law on Electronic Commerce.
[454] Nimmer, R. (1996) Electronic Contracts: Part: 2, *Computers and Law*, 7: (2) at 38.
[455] Article 18 (2).

when the message is communicated orally to the addressee, or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.[456] Likewise, in the United States, the Uniform Commercial Code provides that an electronic communication bears legal effect when it is received even if no individual is aware of its receipt.[457]

Therefore, it can be said, based on the above provisions, that there is no subjective requirement for the recipient' awareness of the content of the message nor deeming the message to become legally effective as soon as it is posted. However, the electronic message is, accordingly, deemed effective as soon as it is made available for the recipient to read. And, this appears to be an objective and fair approach for both contracting parties. In light of this provision, it seems that an acceptance sent by e-mail would be legally effective, thus the contract becomes legally binding, at the time it arrives in the intended recipient's mailbox.[458]

Nonetheless, it is worth mentioning that in the context of e-mail communication it is quite unclear as to when the acceptance message is deemed to be received. Is the timing based on when the Internet server receives it, bearing in mind that an e-mail may travel through a number of servers, or when the acceptance message is delivered into the recipient's mailbox? It should be taken into account that in e-mail

[456] Article 24 of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG).
[457] Article 2-213 (a) of the Uniform Commercial Code (2004).
[458] Report 50: Electronic Commerce Part One: A Guide for the Legal and Business Community, released on Oct 1998, the Law Commission, Wellington, New Zealand (cited as NZLC R50) paragraph 73, p. 29.

communication, a data message, even after it is delivered into the recipient's mailbox, may still become corrupted or destroyed before the recipient accesses it. As a result, for the purpose of contract formation, is there any contract that can be validly formed by a mere receipt of the electronic message even though the message gets destroyed before the recipient reads it or even know of its existence? Consequently, it seems that further clarification is needed on the issue of receipt in the context of e-mail communication in order to provide greater certainty and prevent any ambiguity regarding the formation of electronic transaction.[459]

As suggested, when an e-mail is used to form a contract an acceptance should be deemed effective when the communicated acceptance becomes available for the recipient to read in his mailbox. That is to say, neither the postal rule, which states that a contract is formed when the acceptance in the form of e-mail is sent, or the information rule where the acceptance becomes effective when it is read, provide a suitable approach to e-mail communication. This is based on the understanding that it is the responsibility of the offeror to check his mailbox for correspondence. In this regard, it is worth referring to a comment made by Lord Fraser regarding a telex communication in which it is observed that "once a message has been received on the offeror's telex machine, it is not unreasonable to treat it as delivered to the principal offeror, because it is his responsibility to arrange for prompt handling of messages within his own office."[460]

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[459] Murray Andrew D, Entering Into Contracts Electronically: the Real W.W.W., published in *Law and the Internet* (2000) edited by Edwards L and Waelde C, Hart Publishing, Oxford, pp. 26-27.
[460] See the case of *Brinkibon Ltd v. Stahag Stahl und Stahlwarenhandelsgesellschaft M.B.H. Respondents*, House of Lords [1983] 2 A.C. 34, at 43.

In that regard, it is inequitable to deem a contract formed when the communicated acceptance via e-mail is not brought to the attention of the offeror. He may not regularly check his in-tray or may delete e-mails, intentionally or by mistake, without reading their contents. As a result, if it is upheld that the contract is formed at the time when the offeror reads the acceptance, the offeree, accordingly, will be deprived from forming the contract even though he may have made every effort to communicate the acceptance. In addition, it should also be noted that the offeree might miss the opportunity to form other transactions relying on the complete forming of the contract by ensuring the accurate communication of his acceptance to the offeror.

At the same time, it is unreasonable to uphold a contract formed in e-mail communication whence the acceptance is sent. Technical problems may render an e-mail illegible or simply non-existent. Therefore, it seems inappropriate to hold the offeror bound by the acceptance if he is unaware of its existence. The unsuccessful delivery or the illegibility of the sent acceptance is not due to the offerors own negligence, thus, it seems unjust to hold him liable. Similarly, the offeror may enter into other binding transactions assuming that his offer was not accepted.

In light of the above discussion, it seems appropriate that the contract should be deemed formed at the time when the acceptance, sent via e-mail, is received in a legible format at the offeror's mailbox rather than when it was sent or read. In this regard, it seems reasonable to suggest that in the case that the e-mailed acceptance enters into the offeror's mailbox but is illegible, the offeror, should, without undue

delay, request the acceptance to be resent. With e-mail communication, an automatic response of receipt of acceptance may imply the successful delivery of acceptance and thus the contract is formed.[461]

Unlike other Arabic countries that have adopted one legal theory, Saudi Arabia does not currently have clear jurisdiction in determining the time at which a contract is concluded. The newly released E-Transaction Rule did not address this issue, thus, it seems that it is unclear when an electronic contract is deemed to be formed under the judicial system in the country. As a result, the parties should, in due time, address, in details, the issue of contract formation in order to prevent any potential uncertainty and conflict.[462]

3. The Place of Online Contract: Jurisdiction Issues

Determining where a contract is deemed to become effective is essential in order to establish, in the case of dispute, the applicable law that has jurisdiction over the dispute and the court that is competent to adjudicate. In a face-to-face transaction, it is not a problem to determine the place where the contract becomes effective as both of the parties are physically together in one country. Thus, in the case of dispute, it is

[461] In this regard, it is worth mentioning the definition of 'receipt' within the context of electronic communication in the Uniform Commercial Code (UCC) Article 2B according to which it is stated that "a contract is formed when: (1) the response is received by the initiating party or its intermediary, if the response consists of furnishing digital information or access to it and the record initiated by that party invited such a response; or (2) the initiating party or its intermediary receives a message signifying or a acknowledging acceptance…" Cited in Nimmer Raymond T., Electronic Contracts: Part: 2, op cite, at 38.

[462] Niemann, J. (2000), Cyber Contracts – A Comparative View on the Actual Time of Formation, *Communications Law* 5 (2) at 53.

undisputable that the country's law and judicial system, where the contract is formed, has jurisdiction over the contract.[463]

However, when attention turns to electronic and Internet communication the determination of jurisdiction on e-commerce disputes has been of immense difficulty and questionability. This is due to the fact that Internet commerce has no geographical borders and thus enables its users to transact between each other from any part of the world regardless of their own national borders.[464]

The Internet is a unique medium of communication through which data messages are routed through a series of protocols and packet switches, then broken up into small pieces and systematically routed through a series of phones lines. Each piece of data travels through a different path and is then reassembled at its intended destination. This process presents fundamental problems when determining the geographic territory of a message on the Internet.[465]

Since the Internet does not have any physical boundaries it is not possible to find a meaning to the word 'place' within its context. Therefore, determining the appropriate court in online disputes remains unclear and results in many conflicts between countries attempting to assume jurisdiction and thus apply their tribunals in cases relating to their citizens and residents. When a dispute occurs there is a tendency for

[463] Endeshaw, A. (1998) the Proper Law of Electronic Commerce, *Information and Communications Technology Law* 7 (1) at 8.
[464] Mitrani, A. (2001) Regulating E-Commerce, E-Contracts and the Controversy of Multiple Jurisdiction, *International Trade Law and Regulation* 7 (2) at 50.
[465] Mirzaian, A. G. (1999-2000) Y2K … Who Cares? We Have Bigger Problems: Choice of Law in Electronic Contracts, *the Richmond Journal of Law and Technology* 6 (4) para. 11

individuals and companies to resort to the familiar jurisdiction of their own country, even if a prior agreement has been endorsed to apply another jurisdiction. As a result, these dilemmas may lead to uncertainty and confusion in online business, which may affect the development of e-commerce.[466]

Complications occur since contracts can be formed between parties located in different countries with different jurisdictions. Furthermore, the website or service provider could operate from a third country. As a result, it is questionable in the case of dispute which country's law should have jurisdiction over the dispute and under which court. That is to say, when, for instance, a contract is formed electronically between a party situated in Saudi Arabia and another party from the United Kingdom, it is unclear as to which country's law should have jurisdiction in the case of dispute.

This matter could be answered differently based on the diverse rules provided to determine the time when a contract is deemed to become effective as discussed above.[467] For example, in e-mail contracts, according to the declaration rule, the contract is formed at the time when the acceptance is declared, thus, unless it is otherwise agreed, the contract is deemed to be effective at the offeree's place. Under such rule, the contract becomes legally binding at the country where the offeree declares his acceptance, therefore, that country's law should have jurisdiction over the

[466] Mitrani A. Regulating E-Commerce, E-Contracts and the Controversy of Multiple Jurisdiction, op cite, at 50. There has been a call due to the borderless nature of Internet transactions to devise separate international rules for cyberspace jurisdiction without recourse to national laws and courts. For further discussion please see, Johnson D and Post D (1996) Law and Borders – the Rise of Law in Cyberspace, *Stanford Law Review* (48), available online at: http://www.temple.edu/lawschool/dpost/borders.html and Gillies L (2008) Addressing the Cyberspace Fallacy: Targeting the Jurisdiction of an Electronic Consumer Contract, *International Journal of Law and Information Technology* 16 (3) 242-269.
[467] See above pp. 4-8.

contract. Since the offeree can access his e-mail by connecting to the Internet in any part of the world, the acceptance may be declared and thus the contract becomes effective in a country outside of the offeree's habitual residence. Therefore, there is a possibility that a foreign law unknown to either of the contracting parties would govern the contract.

Similarly, under the reception rule, the contract is deemed to be effective at the time the acceptance is made available for the offeror to read in the latter's inbox. Accordingly, the offeror may receive the e-mailed acceptance when he is outside the country he normally resides in. Article 15 (4) of the UNCITRAL Model Law on E-Commerce addressed this potential concern in electronic transaction by clearly providing that "unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business."[468] In light of this provision, regardless of the actual location of the offeror at the time he receives the e-mailed acceptance, a contract can only be concluded at the place where the offeror has his place of business and thus the contract should be governed by the law of the country where his business is situated.

[468] See, article 15 (4) of the UNCITRAL Model Law on E-Commerce. However, if the offeror has more than one place of business or if he has no place of business, these situations have been addressed under the same article of the Model Law. Accordingly, in the case that there are more than one place of businesses for the offeror, the acceptance is deemed to be accepted and thus the contract is formed at the place of business which has the closest relationship to the underlying contract, and if there is no underlying contract, it is deemed formed at the principal place of business (the headquarter). Yet, if the offeror has no place of business, the contract is deemed to be formed at the offeror's habitual residence. See, article 15 (4): (a, b) of the UNCITRAL Model Law on E-Commerce.

Nevertheless, as previously examined, a website transaction is different from a contract made via e-mail communication. On the assumption made earlier that a contract can be formed online through the website without recourse to offline means of communication, which is deemed as an instantaneous mean of communication, the general rules of face-to-face transaction should apply. Accordingly, there is no binding contract until a notice of acceptance is brought to the attention of the offeror, or the programmed software in the case of a website. Therefore, the contract is considered to be effective at the place where the acceptance is received through the website. Likewise with e-mail transaction, it could be said that in light of the aforementioned Article 15 (4) of the UNCITRAL Model Law on E-Commerce that the place of the offeror in a website transaction is his place of business or, in the absence of a place of business, his home of residence, not the place where the website is operated. However, it is worth mentioning that it may not be clear to determine a party's place of business in an online contract since the domain name of a trading website may not necessarily correspond with the country where the website owner has his place of business. That is to say, it is a possible practise that an online trading company has a domain name registered in one country while the company has no place of business located in that country.[469] Also, in the case that a website involves the supply of digital goods, it may be ambiguous as to whether a business is considered to have a location at where the server hosting the files constituting its website is located.[470]

[469] Sander C. and Thole E. (2000) Digital Risks from a Legal Perspective, *Communications Law*, 5 (6) at 225.
[470] Rothchild J. (1999) Protecting the Digital Consumer: the Limits of Cyberspace Utopianism, *Indiana Law Journal*, 74: 893, at 918.

As the discussion above highlights, determining the applicable law and jurisdiction in dispute cases remains a matter of discussion in online contracts. As a protective measure online traders should therefore include a clause in their contract's terms and conditions clearly stating a specific jurisdiction and court to be applied to in the case of dispute. They should also request that clients agree to those terms and conditions before allowing the conclusion of the contract.[471] However, the enforceability of this clause in online contracts is questionable. For instance, if both of the contracting parties are domiciled in the same state, thus, that state's law and court have a jurisdiction over the dispute since this complies with the national rule of the state's sovereignty over its region. As a result, when there is an agreement to apply a foreign court and law in an online contract formed between an online trader and a buyer who are domiciled in one state, such agreement is considered void. This is due to the fact that a state's court has the jurisdiction to settle a dispute between residents even if there is an agreement between the parties to apply another foreign law. This is followed by the Saudi commercial judgment.[472] It is mentioned accordingly, that the

[471] Mitrani A. Regulating E-Commerce, E-Contracts and the Controversy of Multiple Jurisdiction, op cite, at 53.

[472] See, the Judicial Decision no. 1/C/3 made in the year of 1418 A.H. of the Aggrieved Board (the Authority of Verification no.3) in the case no. 422/2/K submitted in the year of 1417 A.H. In a summary of the case, the disputed parties had agreed in one of the contract's terms and conditions that in the case of dispute, the dispute will be settled through a foreign forum of arbitration in the city of Colon. However, one of the parties in contradiction to the agreement brought the dispute to the Local Aggrieved Board for settlement. In a primary decision, the dispute was initially rejected on the ground that it is inconsistent to the parties' contracting agreement to apply an arbitral tribunal in the city of Colon. However, the Authority of Verification negated the primary decision and decided that the disputed is pertaining to merely the jurisdiction of Saudi Arabia since both of the claimer and the defendant are Saudi citizens. As a result, the agreement to apply a foreign forum of arbitration is deemed to rob the jurisdiction of the Saudi Judicial System from hearing a dispute belonging to its national jurisdiction which is inconsistent to the general legal system in the Kingdom. Hence, this agreement is considered to be void and therefore based on that argument it is concluded that the dispute must be considered under the national judicial system.

agreement in determining a forum of arbitration to solve a dispute outside the Kingdom, in the case that the claimer and the defendant are local residents, is considered as an agreement to deprive the jurisdiction of the Saudi Judicial System and prevents it from considering the conflict belonging to its jurisdiction which is contrary to the general system in the Kingdom.[473] As a result, the agreement holds no legal force. If this is the judicial decision when there is an agreement to apply an alien forum of arbitration, it is necessary to apply the same judicial decision in the case that the parties agree to apply a foreign court and law.

Moreover, another important consideration in this matter is the location of the subject matter of the contract. Article 26 (1) of the Law of Procedure before Shari'ah Courts (LPSC) in Saudi Arabia emphasises that the Saudi court has jurisdiction over a dispute if it is concerned with real estate located in the Kingdom or the contract has a close connection to its territory. [474] Therefore, the parties' decision to include a clause applying a specific law or jurisdiction may not necessarily be valid or enforceable.

Inherent differences between business-to-business (B2B) transactions and business-to-consumer (B2C) transactions also challenge existing notions of jurisdiction law.

3.1. Rules of Jurisdiction in B2B Contracts

[473] Ibid.

[474] See, article 26 (1) of the Law of Procedure before Shari'ah Courts in Saudi Arabia (LPSC). See, also, article 7 of the (1994) Unfair Terms in Consumer Contract Regulations in which it is stated that "these regulations shall apply notwithstanding any contract term which applies or purports to apply the law of a non member state, if the contract has a close connection with the territory of the member states."

When no governing law is provided for in a B2B contract, a range of international and national rules have been presented to determine the governing law in case disputes. One key rule is that the law of the country that has the closest connection to the contract shall govern the contract.[475] Another important factor in determining the jurisdiction in online contracts is the principle of the parties' place of residence. However, assuming that the claimer has a different domicile to the defendant then questions arise as to which of the domicile's laws should have jurisdiction over the contract.

Islamic law currently provides two different approaches. One legal School of Thought upholds that the claimer's domicile law should have jurisdiction to ensure that the court of the claimer's country is specialised to settle the dispute.[476] Thus, the lawsuit is the right of the claimer and he should have the ability to take the dispute wherever he wishes. Also, since the claimer is the one who initiates the dispute it is more appropriate for him to seek settlement of the dispute under his domicile national law and court.

However, another School of Thought upholds that the defendant's domicile law is held to have a jurisdiction, thus, the court of the defendant's country is specialised in considering the dispute.[477] This is based on the fact that the defendant is considered

[475] See, for instance, article 4 (1) of the Convention on the Law Applicable to Contractual Obligation 1980 (Rome Convention).
[476] Ibn Farhoon, *Tabserat al-Ahkaam*, vol. 1, p. 74, al-Mawardi, *al-Ensaaf*, vol. 11, p. 168, and Ibn Mofleh Ebraheem, *al-Mobda'e Sharh al-Moqne'a*, vol. 10, p. 15.
[477] Ibid.

innocent until proven otherwise, therefore, justice refuses to make him suffer transportation costs and other expenses in order to defend himself under the claimer's court before the evidence of his guilt is affirmed.[478] Moreover, as the claimer demands a right in the contract, it is not sensible for the defendant to be summoned to the claimer's domicile court to be prosecuted. The latter opinion seems to hold firm argument and thus it is followed in the Saudi judicial legal system.[479]

However, in the case that a dispute is based on property or real estate jurisdiction is passed to the country where the property is located. That is to say, irrespective to the law of the claimer or the defendant's domicile, the court of the country where the disputed property is held is deemed to be specialised to adjudicate. Reference can be made to a case where a man from Medina has a house in Mecca which is claimed to be possessed by another man from Mecca; it is provided that the dispute is to be heard at the court where the house is located.[480]

Another relevant criteria in determining the governing law is that of the place of contracting or the place of performance.[481] However, as identified, it may not be easy to determine the place of contracting in online transactions since the parties may be from different countries and the website, through which the contract is formed, hosted in an altogether different country. The place of performance may also be difficult to determine since the item may be held and shipped from another country. It is

[478] Al-Dardeer Ahmed, *al-Sharh al-Kabeer*, Dar al-Fikr, Beirut, vol. 4, p. 134.
[479] See, article 25 of the LPSC.
[480] Ibn Farhoon, *Tabserat al-Ahkaam*, vol. 1, p. 74
[481] See, article 26 (1) of the Law of Procedure before Shari'ah Courts in Saudi Arabia (LPSC).

therefore difficult to identify which country the contract is enforceable in; taking into account that the rules of jurisdiction may be different from one country to another. For example, under the Kuwait legal system the contract between absentees' parties is formed at the time when the acceptance comes to the knowledge of the offeror[482], whereas, such contract is deemed to be formed at the time the acceptance is declared under the Jordanian Civil Law.[483] Therefore, on the assumption that a contract is formed on the Internet where the offeror is from Kuwait and the offeree is from Jordan, there may be a conflict of laws in terms of the governing law since both of the contracting parties may argue that the contract is formed under their national laws. As a result, in the case of dispute, each country may claim jurisdiction over the contract.

Furthermore, it may be ambiguous to determine the place of performance in some cases of online contracts. For example, when a contract is based on the supply of digital goods, it may not be clear where the performance of contract takes place; is it at the sellers location; or is it where the computer that holds the digital products is located, or even where the service provider through which the digital goods are transferred to the purchaser computer is located, or is it at the place where the purchaser is located at the time of downloading the purchased software, or is it where the computer receiving the digital goods is located?[484]

Therefore, the uncertainty of determining jurisdiction in online contracts demonstrates the importance of prior agreement on applied jurisdiction between the parties before

[482] See, article 49 the Kuwaiti Civil Law No. 67 (1980).
[483] See, article 101 of the Jordanian Civil Law No. 43 (1976)
[484] Rothchild J. Protecting the Digital Consumer: the Limits of Cyberspace Utopianism, op cite, at 918.

the formation of a contract. If the parties agree to apply a certain jurisdiction this agreed jurisdiction should be applied in the case of dispute.[485] This principle takes its authority from the verse provided in the Holy *Qura'an* that instructs the parties in a contract to fulfil their agreement.[486] However, in reference to Article 28 of the LPSC, this cannot be enforceable if the disputed contract involves real estate located outside of the Kingdom.[487]

Nevertheless, it is worth noting that as a requisite rule under Islamic law, for the validity of the parties' agreement in determining a governing law, the chosen law must be derived from and according to the principles of Islamic law. In confirming the authority of this rule, it is referred to in a number of *Qura'anic* verses. Amongst others, it is stated in the Holy *Qura'an* that "if ye (Muslims) differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best, and most suitable for final determination."[488] In another verse, it is provided that "whatever it be wherein ye (Muslims) differ, the decision thereof is with Allah."[489] In light of these provisions, it unambiguously states that Muslims must

[485] See article 28 of the Law of Procedure before Shari'ah Courts (LPSC) issued no. M/21 (20/05/1421 A.H.)
[486] Chapter 5 verse no. 1
[487] See article 28 of the Law of Procedure before Shari'ah Courts in Saudi Arabia (LPSC). It is relatively important to note that for the validity of the agreement in applying a certain jurisdiction, a legal commentator provides more that there should be a reasonable connection between the disputed contract and the chosen jurisdiction or there is a valid interest for both of the parties in that regard and the agreement must not enclose an element of fraud. See, Abdul-Kareem Ahmed, al-Qanoon al-Dowali al-Khass Feraq amm Telaq, a published article in *the Conference of Law and Computer and Internet*, Emirate University (2000) p. 31.
[488] Chapter 4, verse no. 59. translated by Ali Yusuf.
[489] Chapter 42, verse no. 10, translated by Ali Yusuf.

consult the rules of Islamic law in order to seek settlement for their disputes.[490] Therefore, when the parties agree to apply a governing law that is not based on Islamic rule this agreement is inconsistent to the prerequisite requirement of applying Islamic law, as provided above, and thus bears no legal force.[491]

However, the Internet is a universal medium of communication whereby people from different countries and difference faiths interact with each other and non-Islamic faiths may present problems to the Muslim. For instance, if a website includes a click-wrap agreement that requires traders to accept a choice of law-clause in the case of a dispute and it is not based on Islamic law it is questionable if a Muslim can validly click on the agreement button and enter into a binding transaction. As stated in the Holy *Qura'an* it is invalid to agree on a clause where there is no reference to an Islamic-based legal system. Therefore, it is not permissible for a Muslim to enter into such a contract. As a result, this may limit Muslims' online commercial dealings which may be seen as inconsistent to the spirit of e-commerce which fosters and stimulates global trade. However, the spirit of e-commerce does not justify neglecting the rules of Islamic law for the sake of promoting Internet trading. Rather, as it is indicated in chapter 2 under the sources of Islamic law, the established rules in the Holy *Qura'an* and the Prophet Teachings must always prevail. Therefore, the validity of commercial activities over the Internet must be studied in light of these established

[490] For further discussion, please see, al-Nashmi A'ajeel, Al-Tahkeem wa al-Tahakom al-Dowali fi al-Sahriyya al-Eslamyya, an article submitted to *European Council for Fatwa and Research* (9) held in France.

[491] This is based on the Prophetic Tradition according to which it is narrated that ""Muslims must abide by the conditions of their agreement, except if there was condition that made permissible what was prohibited by Allah or made forbidden what was permissible by Allah (then they have no obligation to abide by that condition)." Narrated by al-Tarmathi Hadeeth no. 1272.

rules. Subsequently, when a practise is regarded as inconsistent to the rules of Islamic doctrine, such as gambling, selling alcohol or, as related to our discussion, applying a foreign law not based on Islamic law, it is considered invalid and a Muslim must therefore not involve in such illegitimate practises.

One possible solution for the Muslim trader wishing to form an online contract, which contains a reference to a choice of law clause to a non-Islamic-based legal system, is to request an amendment. The trader should contact the website's owner via e-mail or any other means of communication and request the amendment of the law clause to the Islamic law or refer to a country's legal system based on Islamic law, such as Saudi Arabia.[492] Therefore, when the website trader agrees to amend the choice of law clause to apply the Islamic law, then the contract can validly be formed.

3.2. Rules of Jurisdiction in B2C Contracts

In B2C transactions, the validity of a choice of law clause in a website contract may be questionable. In a consumer contract, an individual enters into a contract for the purpose of buying goods or service for his private use and consumption, and not for commercial gain, from a seller acting for the course of business.[493] Since the consumer might be in weaker bargaining position, there has been a legal tendency to protect him from any potential unfair dealings, since businesses are generally

[492] Al-Nassar Abdullah, al-A'qood al-Electronyya: Derasah Feqhyya Moqarana, *Majellet al-Bahooth al-Feqhayyaih al-Mo'asera*, 73 (2006-2007), pp. 298-299
[493] Farah, Y. (2008) Allocation of Jurisdiction and the Internet in EU Law, *European Law Review* 33 (2) at 262.

economically stronger and bear more experience in legal matters. Therefore, in the case of dispute in a consumer contract, it is held that as the consumer is the weaker party, he may sue the other party under his local court or, if he wishes to do so, he may bring the claim to the court of where that party is domiciled, whereas, the proceeding can only be brought against the consumer in the court of where he is domiciled provided certain conditions are met which vary from one law to another.[494]

In Europe, for instance, where a company directs its commercial activities at the consumer's domicile state, then the general rule is that the courts of the consumer's domicile would have jurisdiction.[495] In light of Internet transactions, the word 'directs at' is interpreted to include when a foreign customer can access a website via the Internet; therefore the website trader is deemed to have directed its activities to the customer's country, regardless of whether the trader intended to do so or not.[496]Accordingly, the insertion of a jurisdiction clause by a website trader within the contract terms and condition will not override the protection provided to the consumer. That is to say, even if the consumer agrees on the jurisdiction clause provided in a website, this agreement will not waive or alter the legal protection given to him. As a result, the jurisdiction clause may not have legal force in a consumer contract. Since the website may be accessed from anywhere in the world, it could be said that the website owner may direct his commercial activities to any country. However, in light of the phrase 'directs such activities', it is questionable whether

[494] Al-Shaddi Sulaiman (2007) *Toroq Himayat al-Tejarah al-Electronyya*, al-Homaidhy Publisher, Riyadh, p. 195.
[495] See article 15 (1) (c) of the Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2000) No. 44/2001.
[496] King, G. (2000) Electronic Commerce Disputes, *Communications Law* 5 (1) at 14.

consumer legal protection may be applied in a passive website since there is merely a display of information without any possibility to directly form contracts with online visitors. [497]

Subsequently, online traders may face the risk of being subject to diverse laws and courts or they may be held, without intention, in violation of other legal systems, such as if they attempt to sell alcohol or provide online gambling to users in Saudi Arabia.[498] Therefore, it appears that online companies have two options, either to comply with the consumer law protection of every legal system throughout the world or to limit themselves to dealing with certain customers from a few countries where they feel reassured by the law.[499] The former seems to bring heavy and unbearable burden on the companies and the latter is undesirable since it would be inconsistent to the spirit of Internet commerce where there is no boundary for its commercial activities.[500]

In light of the aforementioned rule, it could be argued that since the jurisdiction clause may not have any effect, a Muslim consumer who is based in a state implemented Islamic legal system may validly enter into a website transaction which contains a

[497] Gillies, L. Addressing the Cyberspace Fallacy: Targeting the Jurisdiction of an Electronic Consumer Contract, op cite, at: 253-254.
[498] See chapter 3 "the Contracting Elements of Legal Capacity of Parties and the Legality of Subject Matter and their Application in Electronic Contract" pp. 21-23. In that regard, it could be argued so long as the websites' owners are benefiting from the commercial globalisation of Internet, they should at the same time bear the risk of doing businesses online with clients from different parts of the world which then may lead to the possibility of being subject to different jurisdictions. See, Abeyratne, R (1999) Auction on the Internet f Airline Tickets, *Communications Law* 4 (1) at 26.
[499] This can be done by, for instance, requiring the customer to fill a registration form which include a reference to the customer's address according to which the website trader can decide whether to allow the forming of transaction or not.
[500] Swindells C and Henderson K (1998) Legal Regulation of Electronic Commerce, *the Journal of Information Law and Technology* (3).

reference to a jurisdiction not based on Islamic law. This is due to the premise that according to the online consumer protection regulation a consumer can only be sued under his domicile court, which is in this regard, an Islamic based legal system. On the other hand, when Muslim traders form contracts with customers on the Internet they may face the risk of being prosecuted under the legal systems of their customers' domiciles where there is no recognition of Islamic law.

However, due to the lack of direct communication with Internet users, it may be difficult for online vendors to accurately determine whether the purported purchaser forms the contract in the form of a business or consumer.[501]

4. Conclusion

The Internet's structure has the ability to foster human interaction in considerably short time frames and without respect to physical boundaries. In turn, it presents complex challenges to existing notions of jurisdiction in contract law and not least of all on the subject of when and where a contract can be legally formed. This is due to the fact that Internet communication may travel through several countries with different legal systems, and so it becomes difficult to determine which law should be

[501] It is worth noting that in the case that the purchaser buys some goods for both commercial and private purposes or in the case that the online trader is misled to believe, in good faith, that the other party is acting for commercial purpose whereas, in reality, he forms the contract for the purpose of his private goods, it is provided that the legal protection provided for customers may not applied in these cases. For further information, please see, Farah, Y. Allocation of Jurisdiction and the Internet in EU Law, op cite, at 263.

applied in the formation of the contract. Also, in the case of dispute, it may not be clear which country has jurisdiction since the Internet has no territorial boundaries and thus its commercial activities may have consequences in many jurisdictions. Through what it has been discussed in this chapter, attention should be drawn to the subsequent points as follows:

- With regards to the time a contract becomes legally binding, it is worth noting that the nature and means of communication used to form the contract plays an essential part in determining when a communicated message is deemed to take legal effect. That is to say, when an instantaneous means of communication is used to exchange the offer and the acceptance between the contracting parties, like the telephone, the contract is deemed to become legally effective at the time when the acceptance is brought to the attention of the offeror. However, when there is no direct form of communication between the parties, and no simultaneous exchange of offer and acceptance, a number of different legal theories have been established to determine when a contract is deemed to be formed.

- In Internet transactions it appears that the communication between users via websites is considered instantaneous despite the fact that there may not be any direct human involvement during the process. As a result, the contract should be deemed to be formed at the time when the acceptance is communicated to the offeror or the point at which the software is programmed to operate to act on behalf of its user.

- However, with e-mail communication the exchange of offer and acceptance via e-mail correspondence may not be instantaneous; therefore, it may not be clear when a contract is deemed to be formed. In this regard, neither the declaration theory which deems that a contract is formed at the time when the acceptance is expressed nor, the information theory which considers the contract legally binding when the acceptance is brought to the mind of the offeror, seem to be appropriate for application. Similarly, it is discussed that e-mail communication is different from communications conducted via the posting of a letter; thus, the application of mailbox in e-mail communication may be questionable.

- Consequently, the contract should be legally formed upon receipt of an e-mailed acceptance in the offeror's mailbox unless it arrives illegible. Based on the international UNCITRAL Model Law, this legislation provides greater objectivity and equality to both parties. It is accepted that upon receipt of the illegible email, the offeror should without undue delay inform the offeree of the problem and request the e-mail to be resent.
- It should be mentioned however that due to the legal uncertainty involved with the time of when an electronic contract shall be legally effective, the parties should clearly address this issue in their contract’s terms and conditions in order to prevent any potential dispute. For example, they can stipulate that the contract can only be legally formed when the acceptance is read by the offeror, or when the acceptance is received. To recall, automatic confirmation of

receipt established in electronic communication may provide certainty in that regard.

- Due to the borderless nature of forming transactions via the Internet, different legal systems and jurisdictions, which may be vary from one county to another, may apply in online transactions. Also, as users can access the Internet from anywhere in the world, thus, there is a possibility that a contract may be taken legal force in a country different from the parties' domicile. Therefore, in terms of determining the place of the contract, it may not be clearly determined. It is worth noting that Article 15 (4) of the UNCITRAL regards the place of a data message as the parties' place of business or their place of residence, regardless of the service provider's location.

- Furthermore, in the case of dispute it is questionable as to which country's legal system may have jurisdiction in the online contract. In this regard, the location of the subject matter of the contract, the defendant's resident country and the country that has the closest connection to the contract may play an essential role in determining the applied jurisdiction. However, in order to avoid any uncertainty regarding the issue of jurisdiction and the possibility of being subject to diverse laws, website traders should include a clause in their transactions' terms and conditions determining the applied jurisdiction.

- In light of Islamic law, when the jurisdiction clause is not based on the Islamic legal system, Muslim's should not accept it. Therefore, for the valid formation

of such a contract the clause should be amended to specify an Islamic-based legal system. Questions surround the enforceability of such a jurisdiction clause in B2C contracts. Accordingly, the dispute can only be brought against the consumer under his domicile country's law even if an agreement has been reached between the website trader and the consumer to apply a different jurisdiction. Therefore, a Muslim consumer may validly enter into such website transactions which contain such jurisdiction clause since the legal proceedings can solely be preceded under his Islamic state of domicile.

Nonetheless, since the formation of an electronic contract excludes any paper-based form of communication questions may arise regarding the admissibility of electronic contracts as valid evidence before a court of law. This question will be the focus of the next chapter.