AN ANALYSIS OF ELECTRONIC DOCUMENTATION OF CONTRACTS IN ISLAMIC LAW

By:

Bala Babaji* and Umar Sani Bebeji **

1.1 Introduction

We are in an age where the life of the average human is trapped in a virtual cocoon, such that it is pretentious to ignore its overwhelming influence in all aspects of human endeavour. Our social, economic, religious, cultural and even political lives are dictated by the electronic and digital atmosphere. We buy cellular phones, tablets or personal computers, obtain SIM cards to enable us to access a telecommunication network, subscribe to data and hop on the internet, browse and explore different sites; open a Yahoo mail or Gmail account, Facebook, Instagram or even Twitter accounts, download software, books, watch videos, share information, buy goods or pay for services. By this, we are consciously or unconsciously getting ourselves committed to different forms of contracts with parties of virtual identities. Regulation of electronic platforms has been a burning issue even under common law. Its growing sophistication makes it even more imperative. However, little has been done to regulate the phenomenon according to, or to bring it to conform to the Islamic legal system.

In the documentation of traditional contracts, papers are required and signed by the parties to validate the contract, or concluded on a face-to-face *parol* basis. While in its e-contract counterpart, paper, pen, witness, handwritten signature are not necessary. Thus, an electronic contract is easier, faster and cheaper. The parties in the contract do not need to sit down in a specific place or be in the same country to write down the terms of the contract,[1] as this can be done electronically, Islamic law of contract evolved with a distinct body of rules based on divine principles based on Qur'an and *Sunnah* of the Holy Prophet (SAW). Although they are in condensed form, not providing minute details in

* Professor of Law, Faculty of Law, Ahmadu Bello University, Zaria

** LLM,BLL,ecturer, Commercial Law Department, Ahmadu Bello University, Zaria

[1]Haneef, T. (200), "Electronic Contracts in Islamic Law and Modern Law with Special Reference to Pakistani Law: A comparative Study" (Unpublished) LLM Dissertation, Submitted in Partial Fulfillment of the Requirements for the Master of Laws /LLM with Specialization in Islamic Commercial Law at the Faculty of Shari'ah and Law International Islamic University, Islamabad.

addressing all aspects of the contract, Muslim jurists from different Schools of Thoughts further developed them with time. There is extant *corpus* of Islamic commercial jurisprudence based on *Mua'amalat*, which attracted and refined prevalent commercial customs of trade and usages from different societies to suit the exigencies of the *Sharia*.[2] However, e-contract, being an emerging field, is still being examined by Muslim jurists, prescribing appropriate rulings on different aspects. The concept of "electronic" itself is indefinable in a world growingly relying on electronic mediums of communication, and new electronic mediums keep emerging. It is mainly described rather than defined, to mean, "(especially of equipment), using, based on, or used in a system of operation that involves the control of electric current by various devices.[3] Similarly, it is seen as a "device or technology associated with or employing low voltage current and solid-state integrated circuits or components, usually for transmission and/or processing of analogue or digital data."[4] A contract formed with the aid of such electronic equipment will logically raise some issues.

This throws up the question of whether electronic contract, as already developed internationally, is compatible with Islamic law. What aspects of its precepts are not and what can be done to bring it to conform to the *Sharia*? To what extent, can concepts peculiar to Islamic contracts, such as *Majlis al Aqd* be applied in e-contracts? This paper, therefore, attempts an analysis of electronic documentation of contracts in Islamic law. To achieve this broad aim, ventures to examine e-signature, formation and validity of e-contracts in the context of United Nations Commission on International Trade Law (UNCITRAL) and Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). The analysis will also extend to the application of the concept of *majlis al aqd, gharar, riba* and their effects on e-contract under the *Sharia*.

1.2 Nature of Electronic Contract and its Documentation under Islamic Law

The Islamic law has not developed in a similar fashion as common or civil law, because of its insistent on spiritual alignment. The contact of Islamic civilization with western colonialism distorted the organic development of Islamic commercial jurisprudence to the extent that it was jettisoned in some Muslim

[2]Alzaagy, A (2007), "The Islamic Concept of Meeting Place and its Application in e-Commerce", *Masaryk University Journal of Law and Technology, vol. (1)*, p.30

[3]Cambridge Dictionary,"Electronic". Retrieved from: https://dictionary.cambridge.org/dictionary/english/electronic on 6/11/2019

[4]Business Dictionary, "Definition: Electronic". Retrieved from: http://www.businessdictionary.com/definition/electronic.html on 6/11/2019

countries. The idea of modern virtual technology is a western conceptualization that largely ignores the reservations of Muslims and the *Shari*. This is the reason why Islamic law of contract is only just developing to meet the standards of business transactions of this information and communication age.[5]

Documentation is important in contracts because it gives significance and attaches full authority to transactions and may be enforced even where the original parties are not available to carry out their obligations to each other. Allah (SWT) states: "O you who believe! When you contract a debt for a fixed period, write it down." Also, "And get two witnesses out of your own men and if there are not two men (available), then a man and two women, such as you agree for witnesses, so if one of them errs, the other can remember." In another place, He (SWT) said: "You should not become weary to write it (your contract), whether it be small or big for its fixed term, that is more just with Allah; more solid for evidence, and more convenient to prevent doubts among yourselves."[6] Majority of Islamic jurists pronounce that a document can be ascribed to its owner as evidence for or against him. Ibn Al-Qayyum said, "the purpose of this is to ascribe the handwriting to its writer; if it is surely known, the same applies to speech because handwriting implies speech, and speech refers to volition."[7] In his regard, there is no restriction as to the form this documentation must take all the time. The concept has been expanded to take into consideration emerging modes of communication.

E-contract is any kind of contract formed in the course of e-commerce by the interaction of two or more individuals using electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract.[8] Article 12 of the UNCITRAL Model Law defines e-contract as an agreement "between the originator and the addressee of a data message, a declaration of will or another statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message".[9]

Commonly, there are three types of approaches to concluding e-contract online. These are the click-wrap or web-wrap, the shrink-wrap, and browse wrap

[5]Abdul Jalil, M. D. and KhalilurRahman, M. (2010) "Islamic Law of Contract is Getting Momentum" *International Journal of Business and Social Science Vol. 1 No. 2;* November, p. 175
[6] Quran 2: 282.
[7]AL-Turuq al-Hakimah.Ghazālī, AbūH.āmid al. *Al-Mustas.fá min 'Ilm al- Us.ūl*.Vol. 1. Cairo: al-Maktabah al-Tijārīyah al-Kubrá, 1937 , p 175
[8] E-Contract Law and Legal Definition. Retrieved from: https://definitions.uslegal.com/e/e-contract/ on 6/11/2019
[9]Paragraph 1 of Article 12 of the UNCITRAL Model Law.

agreement. In the click-wrap or web-wrap approach, a party after going through the terms and conditions provided in the website or program has to typically indicate his assent to the same by way of clicking on an "I Agree", "ok" or "Agree" icon or decline the same by clicking 'I Disagree'. On the other hand, shrink-wrap contracts are license agreements or other terms and conditions which are packaged with the products. The usage of the product deems the acceptance of the contract by the consumer. The browse-wrap agreements cover the access to or use of materials available on a website or downloadable product. Only if the person agrees to the terms and conditions on the web page, then he can access the contents of the web page. In most cases, the website or the browse-wrap includes a statement that the user's continued use of the website or the downloaded software manifests assents to those terms.[10]

1.2.1 Impact of UNCITRAL on Electronic Contract

Electronic commerce is a global phenomenon that has transcended national borders for over three decades. Citizens of various countries meet online to make and conclude different kinds of commitments. In the early 1990s, the need for some international principle to serve as a global guide became an apparent concern. By 1996 the United Nations Commission on International Trade Law (UNCITRAL) intervened with the release of Model Law on Electronic Commerce. Its major goal was to remove legal obstacles to the use of electronic signatures. To this end, it provided that where the law requires the signature of a person,

> that requirement is met in relation to a data message if: (a), a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b), that method was reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.[11]

[10] Furtado, R. (2016), "E-contracts – What are Shrink Wrap, Click Wrap, and Browse-Wrap Agreements?" Retrieved from: https://blog.ipleaders.in/e-contracts-shrink-wrap-click-wrap-browse-wrap-agreements/ on23/9/2019

[11] Article 7, UNCITRAL Model Law (1996).

With the growing sophistication in electronic commercial activities and new ways of accessing the internet, UNCITRAL adopted another Model Law, this time around, specifically on recognition of e-signatures.[12] It was purposely issued, to among other things, provide a basis for equal treatment to the use of emerging electronic signature techniques with the use of hand-written signatures and other kinds of authentication mechanisms used in paper-based transactions, such as stamps and seals.[13] In 2005, the UNCITRAL Convention came into force, building on the provisions of the preceding Model Laws without substantively superseding any of their provisions.[14] Article 9.2 adds the safeguard that electronic communication is subject to the requirement that "the information contained therein is accessible so as to be usable for subsequent reference."[15]This addition was useful in order to store data and access it in its original form whenever the need arises, especially in the event that dispute arises.

Different countries have enacted electronic contract laws based on the UNCITRAL Model Law on Electronic Commerce. The European Union has also enacted electronic contract law which recognizes the electronic message as a means of communication for making electronic contracts. The electronic contract law also recognises the validity of the writing requirement and signature requirement, if the digital message is sent by using digital signature technology.[16]

1.2.2 Electronic Signature

The basis of determining consent of parties in every contract is the authority given through unique identifiers in the form of signature. Electronic contracts are concluded with unique identifiers called "e-signatures". This form of endorsement or consent is a recent development. E-signature is defined to mean a "set of lines that take a specific shape which have no relation to normal writing but which have a special geometrical pattern".[17]Al-Shareef defines e-signature as a form of the signature "based on certain procedures, and can be used through symbols, numbers and the access to electronic data message which all have a special encoded feature to electronically distinguish the sender of the message

[12] UNCITRAL (2001), UNCITRAL Model Law on electronic signature Resolution 56/80 adopted by the 85th plenary meeting of the General Assembly, December 12, 2001.
[13] UNCITRAL, Guide to Enactment of the UNCITRAL Model Law on Electronic Signature, para.31
[14]United Nations Convention on the Use of Electronic Communications in International Contracts, New York, 2005.
[15] ibid
[16] Electronic Identification, Authentication and Trust Services was established in EU Regulation 910/2014 of 23 July 2014 on electronic identification and repeals directive 1999/93/EC from 13 December 1999.
[17] Wang, M. (2006), *The impact of Information Technology Development on the Legal Concept a Particular examination on the legal concept of 'signature*, Oxford University Press, 2006, p. 216

transferred by way of using public and private key cryptography."[18] This definition has its limitations because it focuses mainly on symbols and letters, ignoring other forms of biometric authentications. A comprehensive definition will have to satisfy all the objectives of e-signature. Hence, it is further defined as "a set of technical procedures allowing determination of the identity of the person who follows these procedures and gives his consent to the reason for which the signature is given".[19] This definition opens up the forms of e-signature to different modes and settles the question of signatory's identity.

Thus, Article 2 defines e-signature as "data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and indicate the signatory's approval of the information contained in the data message."[20]Furthermore, electronic signatures cover digital signature in both the use of a private and public key pair and other forms of electronic signatures.[21] This extends to the use of a special pen to sign manually on either a computer screen or a digital pad, the use of a personal identification number, and then click on an "I accept" or similar icon on the computer screen.[22]

From this, we know that an electronic signature is not necessarily found in a single form, just as its traditional counterpart. The form it takes is determined by the electronic medium employed. The traditional signature itself can be scanned and placed on the document, particularly electronic deeds. Other examples include PIN, retina scan, finger/thumbprint, as well as facial and voice recognition. There is also a signature by the use of an electronic pen. Devices have been designed with sensitive electronic pads with touch screen and pen that guide the appendage of signature on electronic documents.[23]Under Islamic law, patterns and symbols as unique identifiers are recognized e-signatures as long as they conform to established principles.[24]

[18]Hasan al-Shareef, A., *et al* (2000), "*al-Tawqi al-Electrony, Qawaid al-EthbatwaMuqtqdayat al- Aman Fi al-Tijara al-Electronyah,*" a Survey Presented at the Conference of International Trade, Arab League, Cairo, Nov. 2000, p. 3.

[19]Jumai, H. A. (1997), "*Ethbat al-Tasarufat al-Qanunyah,*" AldarAljama'aih, Beirut, p. 35

[20] Article 2, UNCITRAL Model Law on E-Signature, 2001

[21] UNCITRAL, Guide to Enactment of the UNCITRAL Model Law on Electronic Signature, para.33.

[22] Ibid.

[23]Elsonbaty, E. M. (2005), "The Electronic Signature Law: Between Creating the Future and the Future of Creation", *E-Signature Law Journal*, , E.S.L.J. 2(1), p.61.

[24]Almajid, W. M. (2010), "The Legal Enforceability of Contracts made by Electronic Agents under Islamic Law:
A Critical Analysis of the Effectiveness of Legal Reform in Saudi Arabia" (Unpublished) Thesis Submitted in Partial Fulfillment for the Requirements of the Degree of Doctor of Philosophy in the School of Law at the University of Central Lancashire.

1.3 Formation of Electronic Contract in Islamic Law

For the formation of any valid contract, there are four legal stages of a contracting process these are contract conception, preparation, negotiation and fulfillment.[25] All these processes are invariably concluded electronically. E-contract may be concluded either verbally, through the telephonc; by conduct, particularly with the use of payment system mediums such as the automated teller machine (ATM); in writing through exchange of messages through e-mail, direct messages via WhatsApp, Facebook Instagram; via the website click wrapping, shrink wrapping and brows wrap; or through software applications made for the purpose, such as Jumia, Uber, Opay. There are retail platforms online such as Amazon, Alibaba, Jumia, and Konga. There are also websites that are analogical to market places - such as Jiji.com and Nairaland –providing avenues for people to advertise products freely in order to get contacted by an interested buyer who will then, when and if satisfied, negotiate and make private arrangements to have the goods inspected, paid for, and even delivered.

As pointed out, Islamic law is not rigid and static; it recognises the importance of contracts in the economic relations of individuals, communities and nations, cultural variations in these relationships and the constant influence of technology on the same. Qardawi opined that Islam does not prohibit any trade except those which involves injustice, cheating, making exorbitant profits or the promotion of anything harmful.[26] Allah (SWT) stated categorically in the Holy Qur'an that, "O you who believe! Eat not up your property among yourselves unjustly except it is a trade amongst you, and do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you."[27]As such, the *Sharia* does not validate an electronic contract with an element of injustice. There are laid down conditions to be satisfied in order for a particular contract to be valid.[28] In an online contract of sale, there must be a buyer, the seller and the product. Also, offer, acceptance and consideration must be explicit.[29]Accordingly, the following conditions (elements) are proffered in testing the validity of such form of contract.

[25]Haneef, T., Op. Cit. p.20

[26]Qardawi, Y.,*The Lawful and Prohibited In Islam*. Retrieved from:http://www.usislam.org/pdf/Lawful&Prohibited.pdf on3/11/2019

[27]Qur'an 4: 29

[28]Muhammad, M., Muhammad, M. R., and Khalil, K.M., Op. Cit.

[29]El Islamy, Huriyah.(2002). "*E- Business: An Islamic Perspective.*" A.S Noordeen. Huseynov, F., and Yildirim, S.O.(2014). Internet Users' Attitudes Towards Business to Consumer online shopping: A survey. *Information Development*, p.1-14.

1.3.1 Offer and Acceptance (*Ijab wal Qabul*)

A legally binding agreement is deemed to be formed when an unequivocal offer is made and accepted without reservations. Even though this does not constitute formality under the *Sharia*, in its strict sense, it is still considered the only means of determining the *consensus ad idem* of contracting parties. Thus, the mode of offer and acceptance determines whether consent has been granted or not. The offer and acceptance must be manifest in indicating the absolute will of the contracting parties to be bound by that specific transaction. The acceptance must be completely compatible in every part with the offer, both the offer and the acceptance must be communicated to each party involved in the contract, and ultimately, the connection of the offer and the acceptance must be carried out at the parties' meeting place of transaction.[30]

An offer and acceptance may be made orally or in writing or from the conduct of the parties. They may, thus, manifest through any electronic medium. However, the expression by conduct may present some difficulties electronically especially where parties are not deploying audio-visual means of communication. It will be impossible to ascertain conducts where parties adopt e-mail or chatting approach. Thus, in this vein, both offer and acceptance must manifest in a similar form.

There is a view that any offer made electronically on the web will be considered, *prima facie*, a mere invitation to treat.[31] This may be true in some instances but an invitation to treat itself is not a different reality electronically. Whatever entreaties may be exchanged between the parties may qualify as an invitation to treat until a clear and equivocal expression is made through any acceptable mode, an offer may manifest. If, for instance, a user visits a website and a window pops up with an advertisement of a laptop from Jumia, and by clicking the window is led to Jumia.com where he accesses its model and features, upon satisfaction decides to click an option to pay on delivery and supply his contact information, it will be clear that an offer has been made. Thus, acceptance takes place when the buyer confirms the transaction and continues with the payment either through the bank or other methods of payment permissible under the *Sharia*.[32] Ultimately, as some jurists stipulate, offer and acceptance are valid on the conditions of connectedness, clarity and conformity.[33]

---

[30] Alzaagy, A., Op. Cit.
[31] M.D. Bakar, Z, Jaffar, (2001) "*Sharia and Legal Issues of Online Islamic Banking and Finance*". Retrieved from: http://ifp.law.harvard.edu./login/viewpdf/? file=Legal%201 on 20/10/2019
[32] Kambool, R., Op. Cit. p.43
[33] Al-Zuhayli, W. (2001)."*Financial transactions in Islamic jurisprudence*." Damascus, Syria: Dar al-Fikr, p.163

Consequently, electronic offer and acceptance can take place in two scenarios: where parties are virtually present and the space of offer and acceptance occur in one meeting or session to negotiate the term and condition of the contract via instant messaging such as chatting, or via electronic communication, like teleconferencing. In this situation, the offer and acceptance may take place when the parties present in the space although they are at different places/ locations.[34] This shall be deemed as a contract between parties because the ruling of the constructive meeting place in concluding the contract applies. The second scenario is where parties are not contemporaneously in contact with each other. They are not chatting, seeing or hearing each other instantaneously either individually or virtually. The contract is completed when the offeror communicates the offer to the offeree and the offeree gives notice of acceptance to the offeror.[35] A contract should be concluded willingly and with mutual consent.[36] This is an area where there is a challenge in online contracts because of the growing threat of fraud. There are too many dubious accounts and business outlets making it difficult to establish with certainty, the mutuality of the contract in some instances.

1.3.2 Nature and Value of the Subject Matter

Under the *Sharia*, the subject matter of the contract and its prices are important elements that must be sufficiently described and the value determined in order for the contract to be concluded. In this regard, the subject matter must be in existence at the time of the negotiations. The subject matter must constitute the object and price, valuable, and in existence in this world, being delivered for the contract to be valid.[37]To avoid spéculation (*gharar*),[38] it must exist at the time the contract is made and should be possible to be delivered at the agreed time of delivery. The price must also be agreed upon by the parties. The non-existence of the subject matter or failure to deliver it renders the contract null and void,[39] as one cannot sell something that is not in his or her possession.[40]

[34]Kambool, R., OP. Cit.
[35] The Council of Islamic Fiqh Academy, 2000 Resolutions and Recommendations of the Council of the Islamic Fiqh, 1985-2000, Majma• al-Fiqhal-Islâmî(Organisation of Islamic Conference); Islamic Research and Training Institute, Jeddah, Saudi Arabia : Islamic Development Bank.
[36]Qur'an 4: 26.
[37] Dali, M. *et al* (20014), "E-commerce in Islamic Perspectives: The theoretical Framework, Key Success Factor and Challenges for Islamic e-Commerce Business" In: Knowledge Management International Conference and Exhibition 2004 (KMICE 2004), 14-15 February 2004, Evergreen Laurel Hotel, Penang.
[38] This will be discussed in more detail subsequently in this paper.
[39]Muhammad, M., Muhammad, M. R., and Khalil, K.M. (2013). "Towards *Sharia* Compliant Ecommerce Transactions : A review of Amazon. com." *Middle East Journal of Scientific Research*, 15(9)1229-1236
[40]Kharofa, A. E., Op. Cit.

In e-contracts, particularly pertaining to online transactions, except the vendor permits a "pay on delivery" option; chattels are normally delivered in a future time. This does not, however, excuse the seller from hiding defects or misrepresenting the subject matter in any way. It must, thus, be able to be ascertained and determined clearly, lest the contract becomes void.[41] The website must present the subject matter and all its features, in texts, pictures and even video to the satisfaction of the buyer. Latent defects must be disclosed to guide the buyer's decision.

Similarly, the subject matter must be lawful. The *Sharia* will not support any contract done electronically or otherwise on the basis of anything considered *haram*. For example, transactions on wine, pork, pornography, gambling and betting are not permissible in the eyes of the *Sharia*. Any agreement revolving around these will be in contravention of the tenets of *Sharia*. Furthermore, the subject matter must be what is considered as *mal*. *Mal* in Arabic signifies whatever, in effect, a man may acquire and possess. This generally translates into a property, chattel, material goods, commodities, and so forth.[42] This is applicable only to objects which have perceptible existence in the outside world; that is to say, things sold which are fixed and individually perceptible and can be acquired and secured to be used at the time of need. Finally, it must belong to the offeror/seller or with unequivocal right to sell from the owner. As Allah (SWT) clearly enjoins, "O you who believe, do not devour each other's property by false means, unless it is a trade concluded with mutual consent".[43]The Prophet (SAW) also specifically warned that "do not sell what you do not have".[44] Thus, in an agency situation, if the owner gives belated permission after the sale has taken place, the contract is considered valid but without it the contract is void.[45]This condition is important in e-contracts because many online vendors do not, *ipso facto*, possess the goods they display online, rather, they enter into an arrangement with owners of malls to provide their platforms in order to market their products. What will be required of them is that they must be able to constantly update the website so that goods displayed are always in stock before enticing their customers.

[41]Abdullah, N.I. and Razali, S.S. (2008).*Commercial law in Malaysia*. Prentice Hall, Kuala Lumpur, p.30
[42]Wahidul Islam, M.(1999). "*Al Mal : The Concept of property In Islamic Legal Thought*".Vol. 14. P.361-368
[43]Quran, 4:29
[44]As quoted in Kambool, R., Op Cit.
[45]Kharofa, A. E., Op. Cit.

1.3.2.1 Gharar in Electronic Contracts

Because of the differences in time and space, electronic contracts are vulnerable to uncertainties. Anyone can open a website and stuff it with information on items, not in their possession. This opens room for fraudulent sales of items that do not exist, overvalued and embellished, or with hidden defects, making it a subject of *gharar*.

Gharar is an Arabic word with a fairly broad meaning, translating to "risk", "uncertainty", "deceit", "fraud", and "hazard" that might lead to destruction or loss. *Gharar* is defined as "any bargain in which the result of it is hidden".[46] As a term, *gharar* means speculation on events that might and might not occur. In other words, it is a transaction where the gain of each party is not clearly determined.[47] It, thus, refers to any transaction of probable objects whose existence or description are not certain, due to lack of information and knowledge of the ultimate outcome of the contract or the nature and quality of the subject matter of it. This uncertainty reflects in the basic elements of the agreement in the wording, subject matter, consideration and the liabilities or even delivery.[48] In effect, *gharar* covers all uncertainties that can lead to disputes that may render the contract invalid.

Jurists agree that where there is uncertainty about the actual existence of the subject matter at the time of contracting, the contract will be vitiated. However, they differ on the degree of uncertainty that should be applied to a subject matter for it to be considered *gharar*.[49] The party must have complete knowledge of the subject matter in order to avoid *gharar*. This requires a precise description of the subject matter and price, quantity and quality, in order to prevent a dispute from arising. In circumstances, where a party lacks knowledge over small details of the subject matter, this type of *gharar* will be considered *yasir* (insignificant), of little effect, and therefore, permissible. However, where a party lacks knowledge over excessive details (*al-gharar al-kathir*) of the subject matter, the jurists agree that this is a prohibited *gharar* and it would render the contract invalid.[50] It must be noted that the purchaser must not be completely

---

[46] "The Arabic Word Gharar غرر Means Risk." Retrieved from: https://www.coursehero.com/file/p3hgq0i/The-Arabic-word-Gharar-%EF%BA%AD%EF%BA%AE%EF%BB%8F-means-risk-uncertainty-and-hazard-Gharar-is-also/ on3/11/2019

[47] Saleh, N. (1986) *Unlawful Gain and Legitimate Profit in Islamic Law*. Cambridge University Press, London p. 56

[48] Paldi, C. (2014). "Understanding Riba and Gharar in Islamic Finance." *Journal of Islamic Banking and Finance*, 2(1), 249-259

[49] Al-Snhwry, A. (1997) *McuadrAlhgfyAlfghAla'slamy*.4th ed. Beirut: Dar a'eya' AltrathAlarby, p. 11.

[50] Ibid

ignorant of the time of delivery, for this will amount to excessive *gharar*, which renders the contract invalid.[51]

Sometimes these contracts are automated. This means the systems are programmed to negotiate the process without any human intervention while the session is in process, and up to its conclusion. The automated system, thus, is acting as an agent of the vendor. This will only be a problem where the requirement for precise determination of the subject matter, price and quantity is not satisfied.[52] But the general state of affairs in electronic contracts is that the simplest electronic agents are programmed to carry out specific tasks, and while the minute details may be overlooked by the operators, the important ones are always explicit. As *gharar* itself, cannot be totally avoided even in a real trade, this cannot be fatal to the contract. As al-Shatiby points out, "it is difficult to remove from contracts all *gharar*; besides, it narrows the scope of transactions."[53]

Consequently, where it is *gharar al yasir* (insignificant), it does not necessarily render transactions invalid. As another scholar opines,"*gharar* is prohibited and avoided under Islamic law unless it is very little in which case it is tolerated".[54]However, where excessive *gharar* dominates the contract or entirely characterize it, such as where the subject matter is not attainable, price is undisclosed, a deferred sale without a definite period of delivery, the generality of scholars agree that it is invalid.[55] Both Maliki and Hanbali schools hold the view that the validity of the contract is dependent upon the knowledge of the price to avoid *gharar*, meaning, it is enough that the price is clearly determined. The Hanafi School suggests that when an object or its price is within sight, it needs no description, as there is no *Gharar* involved. There is no disagreement among Hanafi jurists that the price in such instances has been clearly described.[56]The likelihood of this class of *gharar* arising is farfetched because most online sales clearly state prices of items and the cost of delivery.

There is the need for further analysis on a very common e-contract whereby, new items are advertised, booked by prospective buyers and advances paid before they are produced. This can be seen where, for instance; new phones are released or football jerseys of particular clubs or nations. Here, the genus is known and sufficiently described and price fixed but is yet produced, in the process of production, or yet to get to the retailer. The ruling is that there is

[51]Ibid
[52]Kharofa, A. E., Op. Cit.
[53]Al-Shatbya, Op. Cit. p.345.
[54]Ibid
[55]Al-saati, A. (2003) "The Permissible Gharar (Risk) in Classical Islamic Jurisprudence". Retrieved from: http://islamiccenter.kau.edu.sa/english/Journal/Issues/Pdf/16_2/162-Al-Saati55.pdf on23/92019
[56]Al-Snhwry, A., Op. Cit., p.40.

nothing wrong in entering into such contracts provided that the right to rescind is not denied where the item does not meet the expectations of the purchaser. The Maliki School permits the sale of something belonging to an unknown genus on condition that the purchaser has the right to option of inspection and rescission afterwards.[57] The Hanafis also grant this right with an option of inspection, even if this is not stipulated in the contract.[58] This option, however, is exercisable within three days, based on a report the Prophet (SAW) said to a man that, "when you sell, say: no cheating and I have a choice for three days". [59] This principle appears to have been applicable in many online stores. For instance, Jumia allows for the return of items found being defective.

1.3.2.2 The Risk of *Riba* in Credit Payment

In electronic transactions, the credit card is a major instrument of transferring money and settling obligations. Almost all types of credit cards involve some form of interest. The credit card allows its holder to buy goods and services based on the holder's promise to pay back. Some of these cards include PayPal, Visa, and Master Card. A credit line is granted to the user from which the user can borrow money for payment to a merchant. The size and duration of the credit facility is the subject of an agreement between the cardholder and the card issuer. It provides a form of overdraft (loan) sanctioned by a bank to its customers.[60] Interest charges are levied on the unpaid balance after the payment is due. This interest is a type of usury called *riba*[61] expressly prohibited by all sources of *Sharia*: the *Quran*, *Sunnah* of the Holy Prophet (SAW), *Ijma'a* (consensus of *Ulama*) and *Qiyas* (analogical reasoning). Allah in the Holy Quran says,

> Those who devour usury will not stand
> except as stands one whom the Evil One by

[57] Almgrby (2003) *MwAhbAljlyl.* Vol. 4 Beirut: Dar a'almAlktb, p. 245.
[58] Ibn Al-Humam, (1999) *Fath Al-Qadir.*Vol. 5 Riyadh: Dar Alshwaf, p. 137.
[59] This Hadith was narrated by Alhakm. See Hameed, H. "22 Hadith on the Virtues of Acquiring Knowledge". Retrieved from:https://medium.com/@hasan.hameed/virtues-of-acquiring-knowledge-in-the-light-of-hadeeth-f319b106f1e3 on14/10/2019
[60] Gaurie, M. (2008), "Indians Get Elastic with Plastic Money." *The Economics Times*, Retrieved from: http:// economictimes.indiatimes.com/ articleshowl2382580.cms on 23/5/2019
[61] The word *Riba*, in Arabic language, literally means an "increment" or "addition". In Islamic *Fiqh* the term riba has a special meaning. *Riba* is an unjustified increment in borrowing or lending money, paid in kind or in money above the amount of loan, as a condition imposed by the lender or voluntarily by the borrower. *Riba* defined in this way is called in *Fiqhriba al-duyun* (debt usury). See Ahmad, A-R. Y., Riba, Its Economic Rationale and Implications, *Institute of Islamic Banking and Insurance, Islamic University Pakistan*, retrieved from:
http://www.islamic-banking.com/iarticles_8.aspx on5/3/2017

> his touch hath driven to madness. That is because they say: "Trade is like usury," but Allah hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for Allah (to judge), but those who repeat (the offence) are companions of the Fire: they will abide therein (forever).[62]

Again, Allah (SWT) emphatically declared elsewhere,

> O ye, who believe, fear Allah and give up what remains of your demand for usury if ye are indeed believers. If ye do not, take notice of war from Allah and His messenger: but if ye turn back, ye shall have your capital sums; deal not unjustly, and ye shall not be dealt with unjustly.[63]

Jurists are also unanimous on the prohibition of *riba*.[64] Payment through credit card will create an issue of legality and is prohibited if it involves interest. The interest paid over and above the original payment will be considered as*riba* and it is unlawful *haram* (unlawful). The challenges for Islamic e-commerce in fighting *riba* would be choosing the mode of payment and banking system which adheres to the *Sharia* principles.[65]

1.3.3 The Capacity of the Parties

It is trite under the universal law of contract that parties must possess the legal capacity to enter into binding agreements. Both parties must possess the

[62] Surah al-Baqarah, 2: 275, the prohibition is supported by various chapters of the holy Qur'an, like chapters 30: 39; 4: 161, 3:130 and 2: 281. For example in chapter 3 verse 130, Chapters 2 verses 278-279, 3 verse 130, 4 verse 161, and 30 verse 39.
[63] Qur'an 2 : 278-279.
[64] See Siddiqi, M.J. (1983) Issues in Islamic Banking, Economic Series 4, Leicester, Islamic Foundation, pp. 9-10.
[65] Kambool, R., Op Cit., pp. 40-41

capacity to enter into the contract.[66] Parties must not be minors or suffer from any mental blemish that may take from them the requisite capacity to intelligibly conclude beneficial agreements in any way.[67] In Islam, the free will of the individual in contractual engagements is imperative; as such, all transactions must be based on freedom of the parties involved.[68]A contract of sale occurs when two or more parties mutually agree to bind themselves with the terms and conditions stipulated in the contract. Therefore, selling and buying activities of a child is considered as invalid because he or she does not possess legal capacity except permission from a parent or guardian is granted. Electronic platforms, particularly the internet, are still largely an anonymous; yet to develop a child-proof mechanism to filter out minors and persons of unsound mind with no capacity to engage contractually. Transactions occur through space, the requirement for legal capacity for the parties seems difficult to be ascertained. A minor may also acquire e-signature and deceptively assume the identity of an adult to conclude contracts. Therefore, the rule of trust is very important.[69] Analogically, an electronic contract with a lunatic, the under aged a drunken person is considered invalid. However, the Hanafi School permits such a contract by a child as long as the child's guardians consent to it and the child is mature enough to make a decision.[70] If all these conditions are satisfied, then such contract will be considered valid under the *Sharia*, as al-Ibahah opined, "everything is permissible in the absence of specific Qur'anic injunctions".[71]

1.4 The Concept of *Majlis al 'Aqd*

One cardinal theme to the law of contract is the concept of *Majlis al 'Aqd* (Contract Session) which demands that contracting parties be together in one place to engage in the transaction without any distraction unrelated to the contract. The concept of "'Contract Session'" was originally established to benefit both parties involved in the contract. According to jurists, it is denoted in the sense of meeting place and meeting of the minds. Many modern jurists do not make it compulsory for parties to be physically present in the same place before the consummation of the contract. What is important is that the contract must be

[66]Kharofa, A. E. (2000). *Transactions in Islamic Law.* 2nd ed. Kuala Lumpur: Lukmanulhakim, H., *et. al* (2012). *AnalisaShariahterhadapproduk-produkpelaburanemas di Malaysia.*Research Paper 36, International Shariah Research Academy for Islamic Finance (ISRA). Kuala Lumpur. Malaysia.

[67]Stim, R.,"Who Lacks the Capacity to Contract?" Retrieved form: https://www.nolo.com/legal-encyclopedia/lack-capacity-to-contract-32647.htmlon 4/11/2019

[68]Muhammad, M., *et al.*, .Op. Cit.

[69] Wang, Y.D. and Emurian, H.H.(2005). "An Overview of Online Trust: Concepts, Elements and Implications." *Computers in Human Behaviour,* 21 (11), 105-125

[70]Kambool, R., Op Cit., p. 44

[71]Kharofa, A. E., Op. Cit.

done through an acceptable medium of communication without disruptions capable of cutting the chain.[72]

The place of the *majlis* is indeterminate; although the term *majlis* refers literally to a sitting down together, the parties in an Islamic council could be standing, walking or aboard a plane. Thus, it may be real or virtual. A real council means "a council of contract in which both parties are together at the same place in direct contact each of them can hear the speech of the other, directly. The council starts with the offer; proceeding step by step."[73]It merely describes a series of connected events beginning with the request to negotiate, the negotiations, discussions to the point of offer, bargain proper, ending with the acceptance or rejection of the proposal.

As for the time frame, if the offer comes with a time limit, then upon the exhaustion of such time, the offer will automatically lapse. However, in most circumstances, uninterrupted reasonable time or the customs of particular trade will determine the period. For instance, the contract can be open for 2 hours or even 2 days and even where parties break company it will be considered subsisting until the exhaustion of such a period. Sometimes, in a virtual *majlis*, however, only one of the contracting parties may be present, as in the case of the electronic contract initiated by the offeror only. It is not compulsory that the offeree replies instantly, but for fear of leaving the offeror hanging, the offeree should not be given excessive time to come to a decision. The time factor is one of the nubs of contract formation and is no less central to electronic than it is to traditional contracts.[74]

1.4.1 The Rationale behind Contract Session

The *Majlis* serves the purpose of affording the contracting parties the time for thought and consideration within a context favourable to serious negotiation. An essential objective, therefore, is to create the ambience or setting of a *majlis*, although this is likely to take place at the instance of the offeror, the prescribed behaviour of the *majlis* protects both parties in a contract.[75] Hence, as it affords the offeree reasonable time in order to reflect over and express acceptance to the terms offered. Conversely, the offeror is presented with the certainty as to whether or not there is an acceptance to be made and, thus, a contract is formed before the

[72]Haneef, T. Op. Cit., p.20

[73] Mohammed, N. (1988) "Principles of Islamic Contract Law", *Journal of Law and Religion* 6 ,1988, p.115–16

[74]Jaber, A. "Council Contract in Islamic Figh and the International Law", (Unpblisehed) PhD dissertation, Alexandria University ,2001, p.128

[75]Hussein , M. (2002) "al-Masulyyah al-Electronyyah", *Dar al-Nahda al-Arabyyah*, Cairo, p.67

parties disperse from the meeting place.[76]The importance of the *majlis* lies in the fact that it defines the time and place of contracting which a competent court can thereafter determine in any dispute, and in conformity with the applicable law.

As long as the session subsists, parties reserve the right to rescind the agreement. The Prophet (SAW) is reported to have said, "when two people enter into a transaction, each of them has the right to annul it so long as they are not separated and are together, 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, it becomes binding. Where they are separated after they have made the bargain and none of them annulled it, even then the transaction is binding."[77] Evidently, both parties can employ the option of annulling the sale at any time before separation. What constitutes separation will necessarily be determined by the custom of the trade.[78] As such, this separation could be physical in conventional contracts and virtual in electronic contracts. Thus, in an online sale, the session terminates where some form of commitment is made by the parties, by either making the payment or selecting the option of payment on delivery.

1.4.2 Application of the Concept of *Majlis al 'Aqd* in Instantaneous e-Contracts

The *majlis* starts from the moment of meeting and ends with the moment of dissolution. Neither offer nor acceptance is binding or obligatory if the meeting has not been concluded. The offeror can still withdraw his offer, and the offeree can still accept or refuse for as long as the council has not been dissolved and is still in session. This is referred to as the 'option of the council.' [79] The *majlis* rests on two legs, the tangible one, being a place, and the incorporeal being time.[80]Hence, the distinction between virtual and real councils is in place and time, with time being a major criterion. Where the parties are physically present, time loses its significance because walking away without a definite contract ends the session[81] except where the parties agree to a given time to ruminate over the offer on the table.

[76]Haneef, T. Op. Cit., p.20
[77]As quoted in Alzaagy, Op. Cit., p.36
[78]Alzaagy, A., Op. Cit., p.36
[79] Hassan, H. (2002) "Contracts in Islamic Law: The Principles of Commutative Justice and Liberality", *Journal of Islamic Studies*, Vol. 13: p.257
[80]Kronman, A. T.(1980) 'Contract Law and Distributive Justice', (1980), *Yale Law Journal*, 89, p. 472
[81] M. E. Hamid, "Islamic Law of Contract or Contracts", (1969), Journal of Islamic and Comparative Law 3, pp. 1–11

In an electronic contract, the virtual space is the place of contract. It is required that the connection between the parties subsists without any form of disruption.[82] Duration, therefore, varies according to electronic mode of contracting whether through the exchange of e-mails, in chat, on the website, through audio-visual means like teleconferencing, through electronic payment system, or USSD transfers. If it is a chat room or an exchange of series texts messages, for instance, quitting the chat or reading the message and abandoning it without reply, may cancel the session.[83] As such, the conditions for establishing the e-contract would be the virtual presence of the parties and their involvement in drawing up the form. Each party reserves the right to opt-out as long as the session is not mutually determined and the connection is not interrupted without justification. But where one of the parties leaves on his own volition or cut the connection the session will be deemed terminated.[84]

Instantaneous e-contract is the situation whereby both the offer and the acceptance are concurrently communicated in real-time through an electronic medium. This may be in audio (telephone) or audio-visual (video conferencing via Skype) form or instant wring through chat rooms on WhatsApp, direct message on Twitter of Facebook. The legal question that naturally emerged is whether equivalence can be drawn between such e-contract with a face-to-face contract or between absentees. It is, thus, opined that using such instantaneous modes of communication should be regarded as similar to the contract while both parties, in reality, face each other, even though they are not physically together. This is because offer and acceptance are made immediately without delay, and as such, similar rules should apply.[85] However, unlike in real contracts, it the time during which both parties communicate that would be regarded as the meeting place. So long as both parties continue their business talking through such mediums, the meeting place is deemed to be valid; yet, the session terminates when the conversation is ended or parties switch to an unrelated topic.[86]

1.4.3 Reconstruction of Session between Absentees in Non-Instant Forms of e-Contracts

In this age, contracts are growingly concluded between parties, miles apart from each other, in what is now understood to be contracted between absentees. The offer is made in one place and acceptance in a different location. This may

[82] Kronman, A. T., Op. Cit., p. 472
[83] Ibid
[84] Hassan, A. A. H. (2008) *Contracts in Islamic Law*, Tauris and Co Ltd., United Kingdom, p. 35
[85] Alzaagy, Op. Cit., p.39
[86] Ibid, p.40

seem to go against the general principle that offer and acceptance must be connected in a unified place. Muslim jurists were constrained to extend some principles by construction to cover contracts inter absentees. What this translates to is that a constructive meeting place is devised to cover this phenomenon. It was put forward that the meeting place between absentees is the place where the receiving party is fully aware of the content of the offer, whether a messenger or a letter.[87]Still, this does not take the right of the offeror to withdraw such an offer before a definite and unqualified acceptance is made.

The concept of a constructive unity of meeting place means that the acceptance has to be made in the very place where the offer came to the knowledge of the receiver. In other words, it was provided that the unity of meeting place denotes that the acceptance must be issued before the receiver physically departs from the place where the offer came to his knowledge. The concept is rather theoretical rather than practical because parties themselves may be walking or driving while concluding the contract. The UNCITRAL determines the place of e-contract be the location of the acceptance.[88]As for time for acceptance, it must be made within reasonable time taking into account the nature of the contract, surrounding circumstances and customs of the trade. If the acceptance is not made within a reasonable time, then the offer will lapse and thus, there is no possible valid conclusion of the contract.[89] The International Islamic Fiqh Academy states that,

> when a contract is to be signed, through a written message or messenger, between two absent parties who are not in the same place and neither of them can see or hear the other - a case which includes contracting through telex, fax and pc screens - the validity of such contract starts as soon as the concerned party receives and accepts the offer.[90]

The considerable timing interval between the issuance of the offer and the acceptance as a result of lack of contemporaneity in non-instant e-contracts suggests some similarity between them. As a result, this type of contract should be treated in every aspect under the Islamic law of contract as the same as

[87]Alzaagy, Op. Cit., p.36
[88] John D Gregory, J. D. (2003),"The Proposed UNCITRAL Convention on Electronic Contracts" *The Business Lawyer*, 59(1); p. 313
[89]Alzaagy, Op. Cit., p.37
[90] Fatwas No. 52/3/6 The Council of Islamic Fiqh Academy, Op. Cit.

contracting between absentees.[91] Hence, such a contract is deemed as contracting between absentees and it is regulated accordingly.

1.5 Accounting and Auditing Organization for Islamic Financial Institutions Standards

While the UNCITRAL Model Laws of 1996 and 2001, and the Convention of 20005, provide general guiding principles on documentation e-contracts generally, there were no corresponding attempts to fit them into the *Sharia* until the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) came up with its own guide on online contracts. This guide is useful in so many ways because it was guided by Islamic commercial jurisprudence. [92] It should be noted that it merely a guide setting standards aiming to clarify the issue of legality according to *Sharia.*[93]

This standard covers the *Sharia* rulings relating to the conclusion of financial contracts online, either by launching commercial websites or by the provision of online access services. The standard aims to indicate the various aspects pertaining to this subject such as the Shari'ah status of the contracts concluded in this manner, determination of the time of contract inception, permissible procedures of possession after signing the contract, and *Sharia* rulings relating to protection of online financial dealings.[94]

The standard states that, *Sharia* permits institutions to provide online access services to users on the basis of subscription contracts or any other similar arrangements, and against a specific fee. The provision of online access service by the institution is a shared hiring contract *Ijarah Musharakah* signed between the institution and the beneficiary.[95] The institution which provides such services should take all necessary precautions and measures to prevent impermissible use of the internet by the beneficiaries to whom the institution provides the access service.[96]

As for the *Majlis Al Aqd,* to conclude an online financial contract, it is stated that when the contract is concluded through audio or audiovisual

---

[91] Ibid, p.41

[92] Ibid, p. 46

[93] Accounting and Auditing Organization for Islamic Financial Institutions, AAOIFI, (2015), Shari'ah Standard No. (38), "Online Financial Dealings". In: "Shari'ah Standards" *King Fahd National Library Cataloging-in-Publication Data.* Retrieved from: http://www.iefpedia.com/english/wp-content/uploads/2017/12/Shariaa-Standards-ENG.pdf on 3/9/2019

[94] Scope, Ibid

[95] 3/2, Ibid

[96] 3/3, Ibid

communication between two parties, it should become the subject to the same *Sharia* rulings on contracts signed in the presence of two parties. The contract signing session, in this case, is the time of communication between the two parties if the conversation relates to the contract. If the conversation is over or disconnected, or the two (2) parties shifted to another subject, the contract signing session is considered to have stopped (unless disconnection of the conversation is for a reasonably short while).

The basis for the permissibility of concluding online financial contracts is due to the fact that such contracts do not involve any *Sharia*-prohibited aspect. They carry no difference from the traditional contracts except in the means used for their conversation is different. In principle, such contract is allowed as long as they observe the rules of Islamic transaction. Further, when the contract is concluded through written communication, e-mail, or through access to website, it shall become the subject to the rulings applicable to contract signed in the absence of the parties, because such dealing is similar to message contracting and the contract signing session starts from the moment of communicating the offer to the concerned party up to the issuance of the acceptance. The contract signing session may also be discontinued when the offering party retreats from his offer before an acceptance decision is made by the other party and when the offering party specifies a certain period for the validity of his offer, the time allowed for acceptance should cover the whole period. The offering party has no right to withdraw from his offer during that period. The basis for this is that, when a contract is concluded through written communication, by email or through access to the website, it shall be classified as a contract signed in the presence of the two parties. This ruling is based on the fact that the exchange of offer and acceptance, in this case, takes place without simultaneous presence of the two parties. The online contract is deemed signed, though the two parties are not at the same place, it is considered as a contract between two absent parties, the Sharia rulings on message contracting will be applied.[97]

The Standard emphasizes the importance of expressing the offer and acceptance. It is clearly stated that the expression of the offer and acceptance in online contracts can be in any form that indicates the consent of the two parties to conclude the contract. When the offering party send through websites or email a message containing all the rights and commitments pertaining to the contract without retaining the right to withdrawal, if the message is accepted, that message is considered as an offer. On the other hand, if the offering party send an electronic message through websites or email without indicating all rights and commitments to the contract in question, or when he stipulates a condition that he

[97] Ibid

should have the right to withdrawal, even if the message is accepted, the message is considered to be an announcement or an invitation for contracting to treat rather than an offer. In this case, the process of an offer and acceptance has to be done.[98]

It further states that in a situation when the contract is concluded through the website, clicking on the acceptance icon will be considered as acceptance in the strict *Sharia* sense if the system in the website does not require confirmation of acceptance. If it requires confirmation, acceptance will not take place until the confirmation is given. The Standard also emphasizes that the time for the commencement of the online contract is when the other party accepts the offer irrespective of the method of contracting. The possession of the products sold online will take place through all accepted methods of actual and legal possession. If the sold commodity is computer software or the like, possession takes place when the purchaser, after signing the contract, downloads the software or data from the websites to his personal computer. However, when the sold subject is the currency, gold, silver or any usurious goods, instant exchange of the objects of the contract should be ascertained during the contract's signing session to avoid *riba.*[99]

1.6 Conclusion

Islam is a complete way of life that is based on justice.[100] There is no aspect of our being it has not regulated. Islamic commercial jurisprudence regulates commercial activities, of which contract is central to. Although the *Sharia* relies on *Qur'an* and *Hadith* as its primary sources, there are other secondary sources all-embracing enough to accommodate and regulate emerging conducts as man continues to interact with the environment. Electronic contracts emerged as a result of man's constant quest to control time and space to save resources.

Having attempted to analyse the documentation of electronic contracts under Islamic law, we found that unless where a contract is documented in a manner making it patently incompatible with the *Sharia*, the presumption will be that such contract will be valid under Islamic law. Generally, online contracts do not make reference to Islamic commercial jurisprudence. These forms of agreements themselves developed around the western conceptualization of contracts. Although the fundamental distinction between documentation and

[98] Ibid

[99] Ibid

[100] This is one of the objectives of *Maqasid al Shariah.* See Auda, J. (2008) "Maqasid Al-Shariah: An Introductory Guide". Retrieved from: https://www.jasserauda.net/new/pdf/maqasid_guide-Feb_2008.pdfon 4/11/2019

formation of conventional Islamic contract and electronic contract is the medium of choice by parties, Muslims cannot surrender to this new phenomenon without guidance from the *Sharia*. In view of this, where aspects of e-contract are in contradiction with Islamic teachings, a way around them must be fashioned.

The internet is one of the most perilous places on earth. It has become a tool for perpetrating all kinds of mischief. It does not only expose Muslims to ideas fundamentally at variance with the *Sharia*, but it also makes them vulnerable as well. Documentation of electronic contracts is not done on the terms of Islam or to appease Muslim interests. The *Sharia* can only come in to regulate and dictate the limits of electronic documentary use in an ideal "Islamic state", because only the state can filter, sensor and enforce the precepts of the *Sharia* in general commercial activities.

One obvious challenge is the way and manner online contractual terms are generally drawn up in tiny ink and drafted in such language that makes it difficult for lawyers to appreciate, talk less of ordinary laymen. Still, all that is required of the customer is to simply click to accept such terms, capitalizing on his gullibility and desperation, as online contracts are almost all the time required to be concluded with expedience. The cost of data and remaining online makes it unreasonable to expect all contracting parties to read up and appreciate these terms. This opens room for taking advantage of the weaker party. The terms of these agreements are not definite, not clearly outlined, and ambiguous. They are not expressed with as much precision as possible so that no element of uncertainty can be presumed in the contract.

Similarly, in online contracts, parties are known to display pictures embellishing the quality of goods they have. In some instances, vendors may display pictures of products they do not own or possess at the time of concluding such contracts. For any form of contract to be permissible and acceptable, it must fulfill certain requirements as laid down by the *Sharia*, which main aim is eliminating harm and protecting parties in the transaction, and also promoting ethical codes of dealing.

It is also found that deferred payments and credit card usage in payments impose some form of interest amounting to *riba*. As such, there is the need to encourage options that do not involve usury, such as payment on delivery.

There is an imperative to design an internationally recognized model law to guide the documentation of e-contracts under Islamic law because the AAOIFI standards are not enough, though providing a general guide and rulings on online contracts only. The global information and communication electronic framework requires minute approach of regulation, extensive enough to cover all conceivable forms of electronic transactions.

It is further recommended that in order to bring terms of online contracts to conform to Islamic law, leading institutions must draft standard agreements covering different forms of e-contracts to ensure all fundamental terms comply with the *Sharia* and are drawn up in clearer wordings, comprehensible enough to ordinary users.

A final recommendation is the need to establish an *ad hoc* global body of Muslim Jurists to constantly review emerging trends in technology in order to issue an appropriate *fatwa* to guide the Muslim *Ummah*. In the case of electronic commerce there remains a need for further examination by Muslim jurists and appropriate Islamic rules are required for the development of this new trend.