



UNIVERSITI PUTRA MALAYSIA

**FORMATION OF CONTRACT IN THE INTERNET UNDER ISLAMIC
LAW**

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ISLAMIC LAW**

By

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**Thesis submitted to the Graduate School of Management ,
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September 2007

Chair : Prof. Shaik Mohd Noor Alam S.M. Hussain, PhD

Faculty : Graduate School of Management

The use of internet as a medium of communication or the trend of cyberspace contracting has widened the scope of contract formation. As the world of electronic commerce expands there is an increasing demand for clarity in the rules which apply to the participants and their transactions. Uncertainties that exist on many legal issues arise out of the online contract such as when or where the offer and acceptance is made, when the contract is concluded, whether agreements entered into electronically are enforceable and whether the display of goods in the web is considered as offer or not etc. Under Common law itself even though there are established rules regarding the online contract there are still a few unsettled issues regarding the online contract mainly because a standard international law governing the online contract is yet to be found. This is due to the fact that online contracts revolve around cross border transactions or the contract is beyond the jurisdictions of

the respective countries. Therefore there is a great need for a standard international law.

Under Islamic Law there are several areas of uncertainty which will have significant impacts on electronic contracting according to Shariah. The main areas are the issues of *Majlis Aqad* (Unity of Session). This is considered as a very fundamental issue especially in the online contract which implies the non physical presence of the parties. Similarly, *Khiyar* (Options) which is available to parties contracting inter presente will be an issue in the online contract. In fact if certain fundamental issues in the online contract are not resolved, then the dominance entry of the principles of *gharar* (uncertainty) will apply which will make online contracts in Islamic Shariah not feasible . All other relevant areas to the online contract are discussed such as the issue of capacity and the doctrine of mistake (*ghalat*).

Therefore the study aims to review some of these fundamental notions and the formation of online contracts not only in Shariah law but also in Common Law, to achieve an acceptable degree of certainty that will enable the practice of online contract especially in Shariah. Furthermore, it is hoped that more practical principles of law governing the online contract can be established and be made applicable to all parties to the online contract.

Abstrak tesis yang dikemukakan kepada Senat Universiti Putra Malaysia
sebagai memenuhi keperluan untuk ijazah Doktor Falsafah

**PEMBENTUKAN KONTRAK DI DALAM INTERNET MENGIKUT
UNDANG-UNDANG ISLAM**

Oleh

SITI SALWANI RAZALI

September 2007

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Penggunaan internet sebagai medium komunikasi ataupun kontrak secara elektronik sebenarnya telah mengembangkan lagi proses pembentukan kontrak. Dengan perkembangan e-dagang ini ia telah mengakibatkan keperluan terhadap undang-undang yang jelas yang perlu diguna pakai oleh mereka yang terlibat dalam perniagaan sebegini. Banyak isu undang-undang yang timbul akibat e-kontrak ini antaranya ialah bila dan di mana penawaran dan penerimaan dibuat, bila kontrak ini terlaksana, adakah kontrak yang dibuat secara elektronik ini boleh diterima pakai dan adakah pameran gambar di laman web itu dikira satu tawaran atau tidak. Di bawah undang-undang Umum (Common Law) sendiri walaupun telah ada undang-undang dan peraturan mengenai e-kontrak namun masih lagi banyak isu-isu yang belum selesai mengenainya, ini disebabkan oleh ketiadaan undang-undang

antarabangsa yang seragam untuk digunapakai dalam e-kontrak. Ini kerana e-kontrak berkisar tentang perniagaan melampaui batas negara dan sempadan dan tentulah ia memerlukan undang-undang antarabangsa yang seragam.

Manakala dalam undang-undang Islam pula banyak isu yang tidak jelas yang akan memberi kesan terhadap penggunaan e-kontrak dalam Syariah. Antaranya isu *Majlis Aqad*, yang dikira satu isu yang penting lebih-lebih lagi apabila e-kontrak melibatkan ketidakhadiran parti semasa pembentukan kontrak. Begitu juga dengan konsep *Khiyar* yang sepatutnya menjadi hak parti di dalam kontrak secara bersemuka. Bahkan sekiranya isu ini tidak dapat diatasi ia akan mengakibatkan kemasukan prinsip-prinsip *gharar* yang akan menjadikan e-kontrak ini tidak boleh dilaksanakan di dalam Islam. Banyak lagi isu lain yang turut dibincangkan di dalam kajian ini seperti isu keupayaan dan juga doktrin *ghalat* (kesilapan).

Oleh itu kajian ini di buat khusus untuk melihat kembali isu-isu sebegini yang timbul bukan sahaja dari sudut undang-undang Syariah tetapi juga undang-undang konvensional agar wujudnya kejelasan dalam aspek-aspek e-kontrak ini agar membolehkannya dipraktikkan di dalam Syariah. Adalah diharapkan juga agar prinsip undang-undang yang praktikal dapat dihasilkan untuk digunapakai di dalam e-kontrak bagi semua pihak yang terlibat.

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I certify that an Examination Committee on 26th July 2007 to conduct the final examination of Siti Salwani Razali on her Doctor of Philosophy thesis entitled " Formation of Contract in the Internet under Islamic law " in accordance with Universiti Pertanian Malaysia (Higher Degree) Act 1980 and Universiti Pertanian Malaysia (Higher Degree) Regulations 1981. The Committee recommends that the candidate be awarded the relevant degree. Members of the Examination Committee are as follows;

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8. Married Women Property Act 1882
9. Law Reform Act (Married Women and Others in Tort) 1935
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TRANSLITERATION TABLE

<i>Consonants. Arabic</i>										
Initial: unexpressed medial and final:										
ء	'		د	Ḍ		ض	ḍ		ك	k
ب	b		ذ	dh		ط	ṭ		ل	l
ت	t		ر	R		ظ	ẓ		م	m
ث	th		ز	Z		ع	‘		ن	n
ج	j		س	s		غ	gh		ه	h
ح	ḥ		ش	sh		ف	f		و	w
خ	kh		ص	ṣ		ق	q		ي	y
<i>Vowels, diphthongs, etc.</i>										
Short:		ا	a			ي	i		و	u
Long:		آ	ā			ي	ī		و	ū
Diphthongs:		او	aw							
		اي	ay							

CHAPTER ONE

INTRODUCTION

The development and use of technical devices that help in virtually all forms of human activity, e.g. entertainment, education, trade, government and communications are nothing out of the ordinary. People have always acquired new devices or equipment as their need for them arose and as long as these devices were available¹. With the introduction of the internet it has become the source of information and communication tool for mass advertising, marketing, business and commercial activities. In fact it is the world's fastest growing commercial market place. Estimates of its growth show unprecedented development. It is now projected that by 2005 one billion people will be on the internet and at least one third will make online purchases².

Even though under Common Law the e-contract law is quite settled, however, there are still several legal issues which arise out of the online contract. Where the online contract is concerned, the transactions transcend beyond nations and countries, therefore, there is a need to revisit the law so that more practical principles of law governing the online contract can be established and be made applicable to all parties to the online contract not only in Malaysia but also other countries.

¹ Assafa Endeshaw, *Internet and E-Commerce Law*, p3, (2001)

² http://www.legalserviceindia.com/articles/Settling_E-Commerce_Disputes.htm

It is also important to look at the online contract from the Islamic Law perspective due to the fact that there is a great degree of uncertainty in the laws pertaining to the online contract. In fact, one is yet to find any Islamic writings on the online contract. Looking at the Islamic law of contract as a total system, therefore, thorough research has to be carried out so that the Islamic principles of the online contract which is in line with Shariah can be established.

1.1 PROBLEM STATEMENT

Many people nowadays prefer to enter into a contract of sale and purchase through the internet as they claim that online contract is speedier, costs less and saves time.. This scenario has focused attention on various contractual issues raised by the internet itself.

Even though under Civil Law there are established rules and regulations pertaining to online contracts namely Uniform Electronic Transaction Act 1999 (US) ,Unsolicited Goods and Services Act 1971 (UK),Uniform Commercial Code (US), UNCITRAL and etc., however in Malaysia, rules or regulations relating to the online contract have yet to be established.

Under Common law itself even though there were established rules regarding the online contract there are still a few unsettled issues regarding the online contract mainly because there is yet to find any standard international law governing the online contract. This is due to the fact that online contracts

revolve around cross border transactions or the contracts are beyond the jurisdictions of a country. Therefore, the need for a standard international law is demanding.

Under Islamic Law there are several areas of uncertainty which would have significant impact on electronic contracting according to Shariah. One of the the main areas would be on the issue of *Majlis 'Aqad* (Unity of Session). This is considered a very fundamental issue especially in the online contract because it implies the non physical presence of the parties. Another similar issue is with *Khiyar* (Options) which is available to parties contracting *inter presente* but would be an issue in the online contract. In fact if certain fundamental issues in the online contract cannot be resolved then the dominance entry of the principles of *gharar* (uncertainty) will apply which will make online contract in Islamic Law unfeasible .

Therefore, there is a need to revisit some of these fundamental issues to achieve an acceptable degree of certainty to enable the practice of online contract in Shariah.

1.2 SIGNIFICANCE OF STUDY

The advance of new technology has opened a new dimension of communication. Nowadays, business and trading are carried out through the internet and it has contributed a lot in the development of one country. Therefore, it is very important to establish Islamic rules on online contract based on Islamic contract law which originated from the sources of Islamic Law (*Al-Quran, Sunnah, Ijma', Qiyas*) so that online contracts can also be made applicable under Shariah law.

It is also hoped that the study will be able to establish Islam as a unified regime transcending mazhab or in other words, the established Islamic online contract law will transcend and be applicable not only to Muslims but also to other regimes of law which can benefit from the established laws and principles.

As regards to the formation of contract online, there exist several differences between Common Law and Islamic Law. It will be very useful if these two regimes can be compared, not to highlight the differences but to find the commonalities so that Common law can incorporate Islamic law. The formulation of Islamic e-contract will be able to provide an alternative system of universal transaction which can appeal to those who want to enter into the contract with clear conscience, for example those who want to avoid committing *riba*, *gharar* or be involved only in permissible or *halal* transactions.

1.3 RESEARCH QUESTIONS

1. There are difficulties in determining the existence of the essential elements of contract namely offer, acceptance, invitation to treat, capacity etc., if the contract is made online either in Common Law or Islamic Law

2. The law in Malaysia is incomplete in governing online contracts especially relating to the basic elements of contracts namely offer, invitation to treat, acceptance, subject matter, consideration and the enforceability of contract.

3. The distinct features of Islamic law of contract such as options (*Khiyar*), *Majlis Al-'Aqad*, *Ghārār* (Uncertainty) and *Ghālāt* (Mistake) are some of the issues which affect the legality of the online contract under Islamic Law, therefore the questions of validity and injustice will arise

4. By comparing the elements of formation of contracts between common law and Islamic law, it will help in finding solutions to any loopholes which may arise from the online contract because both laws are meant to complement each other.

5. There is a need to have a standard international law governing online contracts to settle any legal issues which may arise from these types of contracts.

1.4 LIMITATIONS

Among the limitation of this study is the difficulty in finding any Islamic articles regarding online contracts. Therefore this study will be an exploratory study and a lot of hard work has to be done to find relevant articles particularly in this area. Another point is that even though that there are some literature in the Arabic language, but they are published in foreign countries and it is very difficult to have access to them.

A lot of writings or literature is Mazhab confined and the research may be confined to sectorian literature. Most literature available in Islamic contract is confined to the traditional mode of contract and none actually discussed the Islamic e-contract. Therefore, to establish the principles of Islamic e-contract the rules of interpretation under Usul Fiqh have to be applied for instance the method of deriving rules under ijihad and qiyas.

1.5 RESEARCH OBJECTIVES

The objectives of this study are:

To identify the legal issues that arise out of the online contract especially under Islamic law perspectives.

To determine the existence of the distinct features of Islamic law of contract such as Majlis Aqad, Ghalat , Gharar and Khiyar in the online contract.

To compare the position of the online contract under Common law and Islamic law, not to find which is the best law, but to find the commonalities between the two to provide solutions to the issues in online contracts.

To propose a unified system of Islamic online contract law which will be applicable not only to Muslims but also to other regimes of law to enable them to benefit from the established laws and principles.

1.6 SCOPE OF STUDY

The scope of this study will not be confined to the jurisprudential scope especially in the context of Shariah. However, the researcher will look at Islamic jurisprudence as a unified system and the study will not be confined to any particular Mazhab.

Regarding the territorial scope, since the online contract is a borderless transaction which operates parallel to other legal systems therefore it becomes inevitable that a comparison be made with other nation's legal system especially their existing law on e-contract.

As such this study will be based on the Common Law and the most prominent applicable international legal system as a basis of comparison. For example, on the issue of when an offer and acceptance is deemed to have taken place, either one follows the common law rule of Postal Rule (considering the offer and acceptance to be valid when they are sent by the

offeror or offeree) or one follows the international law and treaty, namely, the Vienna Convention or the EU E-Commerce Directive which states that an offer and an acceptance will be valid only when they reach the other party. In fact the UK E-commerce regulations also adhere to this theory.

However, this study will concentrate more on the Shariah perspective of the online contract. In the Shariah context there is still a great degree of uncertainty on the issue compared with the conventional law where most of the issue concerning the online contract is quite settled.