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**E-COMMERCE FROM ISLAMIC PERSPECTIVE**

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## AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

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## ABSTRAK

Kajian ini adalah mengenai perdagangan elektronik dari segi pandangan Islam. Kajian ini menjelaskan bagaimana pembentukan kontrak, iaitu bagaimana penawaran, penerimaan dan balasan yang dilakukan di dalam perdagangan elektronik. Walaubagaimanapun, kajian ini menfokuskan pembentukan kontrak dan juga beberapa aspek yang relevan untuk memastikan ia adalah sah dilakukan dalam hukum Syara'. Untuk memperolehi data, kajian ini menggunakan kaedah pencarian perpustakaan. Kajian ini menghimpunkan beberapa buah buku yang menumpukan kepada pembentukan kontrak. Kebanyakan buku-buku tersebut adalah buku undang-undang dan buku undang-undang komputer termasuk juga kitab-kitab bahasa Arab yang menjelaskan prinsip, syarat-syarat kesahihan kontrak dan hukum-hukum Islam. Hasil kajian menunjukkan secara asasnya undang-undang kontrak Islam adalah harus. Oleh itu beberapa kelenturan yang ada adalah bergantung kepada konsep harus selagi ianya tidak bercanggah dengan peraturan asas dan yang sedia ada. Adapun undang-undang Islam tidak mempertikaikan beberapa peraturan-peraturan ciptaan manusia yang tidak bercanggah dengan Syariah, peraturan-peraturan itu diterima dan digunakan. Walaupun tiada nas yang jelas, dari segi undang-undang Islam untuk menentukan hukumnya, Syaria'h membenarkan kelenturan dalam berjihad. Oleh itu kias dalam kajian ini dibentuk di atas sumber-sumber yang disepakati dan cadangan-cadangan yang dibuat adalah berlandaskan bahawa urusan perdagangan itu adalah harus, sehinggalah ia dibuktikan bercanggah dari segi Syara'.

## ABSTRACT

This research is about e-commerce in Islamic perspective. The study reveals the formation of contract in e-commerce, the offer from e-commerce, the acceptance in e-commerce, and the consideration in e-commerce. The study is however limited to formation of contract in electronic commerce and all relevant aspects to determine its validity before *Syariah*. To acquire data, this study uses the survey method and library research. The study gathers many books focusing on the formation of contract. Actually, the books are mostly law books including computer law books and Arabic books, which reveal the principal, the ruling, and the condition of valid contract transaction etc of contract in Islamic law. The basic rule in Islamic contract law is *Ibahah*. Hence, there is some flexibility available in laying new principles so long this doesn't contradict any clear injunction and basic Islamic principle. Where the Islamic contract law is silence about some principles the law as regulated by men made law that does no go against *Syariah* injunction shall be applicable and permissive. In as much as Islamic contract law concerns, essentially area of contracts, stipulations in contracts and amendments of contractual agreements may be attended in all manners that are realized in legitimate ways. Where there is no established doctrine had existed, *Syaria'h* allows flexibility. Hence, in this study analogies are constructed on the nearest corresponding principle and suggestions are made on the basis that in commercial affairs things are deemed to be lawful until the contrary is proven.

## ملخص البحث

يدور هذا البحث حول التجارة الإلكترونية من منظور إسلامي. حيث تركز الدراسة على إجراء العقد الإلكتروني، وصيغة الإيجاب والقبول وسبب وطرق صحته. وتقتصر هذه الدراسة على تناول إجراء العقد الإلكتروني وكل ما يتعلق به من أجل تحديد صحته من الناحية الشرعية نبح الباحث منهج المكتبية لوصول على المعلومات المتعلقة. استفد البحث عدة الكتب التي ذكرت فيها شروط المتوفرة لقيام العقد في الإسلام. بناء على نتيجة البحث كان العقد مباحا ما داما يقوم موافق الشارع. لا يرفض الإسلام أحكام وضعية ما دامت تتوافق بروح الشريعة بل يراعها لمصلحة البشر. وتحاول الدراسة مراعاة قانون العقود الإسلامي، خاصة فيما يتعلق بإجراء العقود وتسجيلها، وتغييرها بما يحفظ صفتها الشرعية بالطرق المشروعة. وفيما لا نص فيه، فإن الشرعية تكون مرنة في فتح مجال الاجتهاد، ولذلك فإن القياسات في هذه الدراسة مبنية على أقرب المبادئ موافقة، كما أن المقترفات المقدمة مبنية على أساس أن في الأمور التجارة الأشياء مباحة إلا إذا ثبت العكس.

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## GLOSSARY

Bay'ee munabadha	Sale performed by the seller throwing a cloth at the buyer.
Bay'ee al-hasah	A type of sale which outcome is determined by the throwing of a stone.
Bay'ee mulamasa	The bargaining is struck by touching the object of the sale.
Fa'liyyah	Person making the contract
Ijab	An action that reflects consent or willingness
Iwad	Consideration
Maddiyyah	The proposal and acceptance
Majlis bai'ee	The place for a business bargain held between the offeror and offeree.
Qabul	An acceptance
Sawwariyyah	The clear manifestation

## TRANSLITERATION

## ARABIC WORDS TRANSLITERATION SYSTEM

## TRANSLITERATION TABLE

## 1. ALPHABET

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
ا	a	آية	<i>ayāt</i>
ب	b	بليغ	<i>baligh</i>
ت	t	تعذير	<i>ta'zir</i>
خ	kh	خلوة	<i>khalwat</i>
د	d	دية	<i>diyat</i>
ر	r	رجم	<i>rajm</i>
ز	z	زنا	<i>zina</i>
ش	sh	شرع	<i>syara'</i>
ع	a'	عامل	<i>'amil</i>
ف	f	فقهاء	<i>fuqaha'</i>
ق	q	قذف	<i>qazaf</i>
ل	l	لعان	<i>li'an</i>
م	m	مكلف	<i>mukallaḡ</i>
ن	n	نسب	<i>nasab</i>

## 2. Short Vowel

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
----- <sup>َ</sup>	a	نَسَب	<i>nasaba</i>
----- <sup>ِ</sup>	i	زِنَا	<i>zina</i>
----- <sup>ُ</sup>	u	فُقَهَاء	<i>fuqaha'</i>

## 3. Long Vowel

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
ا	ā	آيَات	<i>āyat</i>
ي	ī	حَدِيث	<i>hadīth</i>

## 4. Diphthong

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
ي	iy	شَرَعِي	<i>syar'iy</i>

## ABBREVIATION

All E.R	All England Report
Art	Article
Dar	Darul
E	Electronic Commerce
EDI	Electronic Data Interchange
E-Mail	Electronic Mail
LRCP	Law Report, Common Pleas
MLJ	Malayan Law
NZLR	New Zealand Law Report
n.a.	No author/ no artist
n.d.	No date/ No year
n.pl.	No place
n.pb.	No publisher
p.	Page
PBUH	Peace be upon him
Q.B	Queen Bench Division
UNCITRAL	United Nation Commission on International Trade Law
V	Verses
VCR	The seller stock replenishment
Vol.	Volume
WWW	World Wide Web

### Significance of Study

In as much as Islamic contract law concerns, essentially area of analysis, situations in contracts and commitments of contractual agreements may be attended in all manners that are realized in legitimate ways. Where there is an established doctrine law existed, Syaria's allows flexibility. Hence, in this study analogies are considered as the nearest corresponding principle and suggestions are made to the laws that in commercial affairs things are deemed to be lawful until the contrary is proven.

### Aim of Research

The aim of this research are three. The first one is to give a comprehensive explanation on the formation of contract on the Internet from the Islamic perspective. Secondly, to discuss the law on the validity of contract concerned through the

## **CHAPTER 1: INTRODUCTION**

### **Background of Research**

Basically Electronic Commerce (EC) refers to transaction carried out by means of electronic data interchange and other means of communication, which involves the use of alternatives to paper-based methods of communication and storage of information. It is understood as the buying and selling of goods and services by businesses and consumers over the Internet, also called as e-commerce.

This study is on how contract is formed over the Internet. How to identify the validity contract and its requirements via the Internet. It determine whether there is an offer, how offer is done, to ascertain whether an offer has been accepted and how effective acceptance happens. When the offeree accepts an offer, there is an agreement reached. The agreement is not enforceable unless the consideration is exchanged. So, this study also will have a close look on how consideration takes place in the formation of contract contracts.

### **Significance of Study**

In as much as Islamic contract law concerns, essentially area of contracts, stipulations in contracts and amendments of contractual agreements may be attended in all manners that are realized in legitimate ways. Where there is no established doctrine had existed, Syaria'h allows flexibility. Hence, in this study analogies are constructed on the nearest corresponding principle and suggestions are made on the basis that in commercial affairs things are deemed to be lawful until the contrary is proven.

### **Aim of Research**

The aims of this research are three. The first one is to give a comprehensive explanation on the formation of contract on the Internet from the Islamic perspective. Secondly, to measure on how far the validity of contract concerned through the

Internet. Lastly, the use of Internet as a medium of communication has widened the scope for contract formation. Sale and purchase activities are held on-line either for performance of contract through the Internet itself or to be performed outside the cyber world. Thus, it is necessary to examine how e-commerce as the basic form of commercial activities utilizing the use of at least two computers works.

### **Objective of Research**

The first objective is to apply Islamic Principle of contract in the formation of contract through the Internet. The second one is to compare the formation of contract done in the cyber world and face-to-face situation. Lastly, to examine the validity of contract over the Internet in accordance with the law in Malaysia.

### **Scope of Research**

The study is however limited to formation of contract and all relevant aspects to determine its validity before Syaria'h perspective as well as the law in Malaysia. It will take the applicable international system as a basis of comparison and possible suggestions are made.

### **Research Method**

The researcher uses the survey method and library research. The researcher gathers many books focusing on the formation of contract. Actually, the books are mostly law books including computer law books. The researcher also comes across Arabic books, which reveal the principal, the ruling, and the condition of valid contract transaction etc of contract in Islamic law. The researcher also looks up for the information about the study in articles, magazines, newspapers, and the Internet as well to discover the validity of e-contract in Islamic perspective.

## 1.1.The introduction to the e-commerce contract

Electronic data interchange (EDI) refers to the electronic transfer from computer to computer of information using an agreed standard to structure the information.<sup>1</sup> It is a proof by Julian Ding in his book entitled “E-commerce Law & Practice”, that reveals (EDI) in section 2(b). Many businesses choose EDI as a fast, inexpensive, and safe method of sending business documents including purchase orders, invoices and so on.<sup>2</sup> EDI can contribute to stronger interlocked relations especially between producers and wholesalers. The advantages EDI offers are more efficient because the overview of transactions become clearer, risks are reduced through quality control, logistic, design and continuity is guaranteed.<sup>3</sup>

EDI is different from sending electronic mail messages, or sharing files via a network, or a modem. EDI is to be used between a trading partner after they have agreed on the standard to be used, the network carrier (called a value-added network or VAN), and when information to be sent.<sup>4</sup> It allows for the straight transfer of computer files.<sup>5</sup> Thus, when a document will be automatically reformatted by the EDI translator, the trading partner’s modem will call the network and retrieve everything in its mailbox before the EDI translator will finally translate the data into the standard format.<sup>6</sup>

This saves time and money and decreases errors.<sup>7</sup> RJR Nabisco also added in an example that processing a paper purchase order costs the company a big sum of money. Thus, by using EDI, the cost can be reduced gradually. This also helps to improve customer service because the quick transfer of business documents and a decrease in errors allow the making of order faster. The seller stock replenishment

<sup>1</sup> n. a.. 12 July 2003. “*UNCITRAL Model Law on Electronic Commerce*”. <http://www.uncitral.org/en-index.html>

<sup>2</sup> Julian, D. 2000. *E-Commerce, Law And Practice*. Malaysia: Sweet & Maxwell Asia. p.

Nouwens J & Bouwman. 18 Jun 2003. “*Living Apart Together In Electronic Commerce*”. <http://www.ascusc.org/jcmc/vol1/issue3/nouwens.html>.

<sup>3</sup> *Ibid*

<sup>4</sup> n.a.. 12 July 2003. “*Electronic Data Interchange*”. <http://www.harbinger.com/resource/edifact.htm>.

<sup>5</sup> Alan M.G. et. 1998. *Internet Law. A Practical Guide For Legal And Business Professionals*. Canada: Thomson professional Publishing. p. 227.

<sup>7</sup> RJR Nabisco. 12 July 2003. “*EDI reduces the cost*”. <http://cc.weber.edu/technology.html>.

(VSR) program, for example works by requiring the seller to maintain appropriate inventory levels in all stores. When there is demand for a product, EDI system automatically bills the client, records the transaction and when the inventory levels is below its appropriate level, request for stock.<sup>9</sup> EDI frequently has no direct human involvement as the communicating computers may exchange information automatically.

## 1.2. Contract on the Net

According to Pollock in his book entitled “Principle of Contract”, a contract is a promise or set of promises, which the law will enforce.<sup>7</sup> Section 2(h) of the Contract Act, 1950<sup>10</sup> provides that an agreement enforceable by law is a contract. Section 2(e) of the Contract Act provides that every promise and every set of promises, forming the consideration for each other, is an agreement. A promise is formed when a proposal is accepted. Thus, principally a contract must include a proposal, assent to the proposal and consideration.<sup>11</sup>

The initial source of Islamic contract law is apparent through the *Quranic* revelation in these words:” O ye who believe! Fulfill all obligations (*‘Uqud*)<sup>12</sup>. The word *‘aqd*<sup>13</sup> has been used as an Arabic equivalent of contract. In a book of Islamic law, by Prof. Dr. Ala’ Eddin Kharofa “Transaction In Islamic Law” *aqd* literally means conjunction or tie.<sup>14</sup> It is to tie between ends of something either physically or morally.

Generally it covers everything a person commits himself to do which includes unilateral and bilateral action. More specific *‘aqd* refers to the meeting of offer and

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<sup>7</sup> Chris. R. 1996. *Computer Law*. p. 298.

<sup>9</sup> Pollock. 2000. *Principle of Contract*. America: The American Law Institute. p. 1.

<sup>10</sup> Contract Act, 1950 (ACT 136). p.2.

<sup>11</sup> Muhammad Rizal & Shahirah A.S. 2001. *Malaysian Commercial Law*. Malaysia: Mc Graw-Hill Sdn Bhd. p. 2.

<sup>12</sup> Al-Qur’an. Al-Maidah 5:1

<sup>13</sup> Abd al-Wahid al-Karam. 1987. *Mu’iam al-Mustalah al-Oanunivvah*. Beirut: Maktabah al-Nuhdah al-Arabiyyah. p. 615.

<sup>14</sup> Ala’ Eddin Kharofa. 1997. *Transaction in Islamic Law*. Malaysia: A.S.Nordeen. p. 1.

acceptance in conformity with the formality prescribed by the *Syariah*. It is for this more specific interpretation that this word is referred to for the purpose of this study.<sup>15</sup>

The use of Internet as a medium of communication has widened the scope for contract formation. Sale and purchase activities are held online either for performance of contract through the Internet itself or to be performed outside the cyber world. Thus, it is necessary to examine how e-commerce as the basic form of commercial activities utilizing the use of at least two computers works.<sup>16</sup>

### 1.3. Creating On-Line Contracts

At the most basic level, a contract is simply a promise that is legally enforceable.<sup>17</sup> It is formed when two or more persons reach an agreement that the law recognizes as binding.<sup>18</sup> Further, according to section 2(h) of the Contract Act, contract is an agreement enforceable by the law and legally binding between the parties. Contracts are traditionally analyzed in terms of an "offer"<sup>19</sup> and "acceptance".<sup>20</sup> In addition, based on section 9, it stated that if a proposal is made by words, therefore it is said to be express. However, if the proposal is made other than words, then it is to be implied.<sup>21</sup> For example, we usually will have entered into a legally binding contract when I "offer" to buy a particular book from you at a price that you "accept".

If either of us attempts to avoid our obligations, the law will compel compliance or award compensation. Hence, there must be at least two parties acting as offeror and offeree.<sup>22</sup> There must also be a valid offer accepted by a valid acceptance.

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<sup>15</sup> Ala' Eddin Kharofa. 1997. *Transaction in Islamic Law*. p. 1

<sup>16</sup> Chris, R. & John, A. 2000. *Computer Law*. London: Blackstone Press Limited. p. 301.

<sup>17</sup> Roger Le Roy Miller & Gaylord A. Jentz. 2002. *Management And E-commerce; The Online Legal Environment*. n.pl: West Legal Studies in Business. p. 147

<sup>18</sup> Contract Act 1950.

<sup>19</sup> Muhammad Rizal & Shahirah A.S. 2001. *Malaysian Commercial Law*. Malaysia: Mc Graw-Hill Sdn Bhd. p. 2.

<sup>20</sup> *Ibid.* p. 11.

<sup>21</sup> Contract Act 1950.

<sup>22</sup> n.a. 1985. *West's Law & Commercial Dictionary In five Languages*. Minnesota: West Publishing Co. p. 216.

And likewise it is necessary that there must be consideration without which contract is unlikely to be enforceable as against the other party.<sup>23</sup>

This is so whether we have arrived at this agreement in a face-to-face meeting,<sup>24</sup> on the telephone or in correspondence. It is also the case if we reach agreement on-line, for example by exchanging e-mail messages. Similarly, contracts can be formed via web sites, through automated touch-tone telephone systems and in any number of other ways, such as via interactive television or the wide range of so-called "digital appliances" which are becoming widely available.<sup>25</sup>

Generally, the applicable legal principles are not affected by the medium through which we conduct our communications leading up to an agreement. For example, when a company advertises products for sale to the public, this is not considered to be an "offer" but merely an invitation to submit "offers". A person who orders the product in response to the advertisement is considered to be the party making the "offer" and until the company "accepts" that offer there is no contract. If it is otherwise, the company would be legally obliged to fulfill all orders received even if these exceeded supply. Obviously, the same principles will apply where goods are offered on a website, so that when a person transmits an electronic order, by filling out a form at the website, it must first be "accepted" before there will be a binding contract.<sup>26</sup>

However, challenging issues can arise. For example, some systems may automatically produce a computer-generated response to an order received via the Internet. Will this be considered to be an "acceptance" resulting in the formation of a binding contract? The answer will probably depend on the form and content of the response generated. And the test will probably be an objective one, i.e. whether a

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<sup>23</sup> Syed Ahmad, A. 2001. *Principle of the Law of Contract in Malaysia*. Malaysia: Malayan Law Journal Sdn Bhd. p. 56.

<sup>24</sup> Ian, J.L. 2000. *Information Technology Law*. London: Butterworth. p.563.

<sup>25</sup> Lilian & Charlotte Waelda. 2000. *Law And The Internet; A Framework For Electronic Commerce*. America: Hart Publishing Oxford & Portland. p. 18.

<sup>26</sup> Alan M. Gahtan et al. 1998. *Internet law: A Practice Guide for Legal And Business Professionals*. Canada: Thomson Professional Publishing. p. 234

notional "reasonable person" receiving that particular response would have considered it to be an "acceptance" so as to immediately produce a binding contract.<sup>27</sup>

There are, of course, many other legal issues that can arise in relation to the formation of on-line contracts. These include whether an automatic computer-generated communication can constitute an "offer" which, if accepted, immediately results in a binding contract. This could be an issue, for example, where an insurance company's computer automatically generates a renewal notice. Will an "acceptance" by the policyholder immediately create a binding contract? And what if the renewal notice was generated in error or contains a mistake? Also, while using the mouse to click on a button<sup>28</sup> on a website would normally constitute an "acceptance" resulting in a binding contract, this may not always be the case. Certainly, there must be more doubts about whether the act of simply downloading a file from a website would itself constitute an "acceptance" binding the person doing so to terms sought to be imposed on a notice at that website.<sup>29</sup>

These are the basic requirement of valid contract. Each is indispensable for formation of contracts generally, including ones formed over the Internet. The same is equally required under common law and Islamic law.

<sup>27</sup> *Ibid.* p. 249.

<sup>28</sup> *Ibid.* p. 249.

<sup>29</sup> Chris, R. & John, A. 2000. *Computer Law*. London: Blackstone Press Limited. p. 301.

## CHAPTER 2: THE FORMATION OF OFFER IN THE INTERNET

### 2.1. The offer from e-commerce

The word offer means proposal; a proposal to do a thing or pay an amount, usually accompanied by an expected acceptance.<sup>30</sup> It refers to a proposal made by one party to a contract, the person making the proposal is called the promisor<sup>31</sup> or the offeror, signifying his willingness to do or abstain from doing anything that upon its acceptance by another, that is, the offeree agreement will be reached and it becomes binding.<sup>32</sup>

The Arabic equivalent of offer is *ijab*.<sup>33</sup> It means a specific action that reflects consent or willingness<sup>34</sup> of its maker that is presumed from the word firstly uttered by one of contracting parties. This is the interpretation according to the Hanafi School. According to Ala' Eddin Kharofa, *ijab* means confirmation because it gives and confirms the freedom of acceptance to the second party.<sup>35</sup>

Others maintain that *ijab* simply refers to the word uttered by the person whose legal authority to transfer the title on the subject matter of the contract, e.g. owner of the thing or his agent, regardless as to whether this come first or later. This is according to Art. 101 of Mejjelle which adopted the Hanafi's view.<sup>36</sup>

Basically an offer is uttered with the intention to get the assent of the offeree so that agreement may be reached. This is similarly applicable to contracts formed over the Internet. Further, it is necessary to determine whether there

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<sup>30</sup> n.a 1985. *West's Law & Commercial Dictionary In Five Languages*. Minnesota: West Publishing Co.

<sup>31</sup> *Carlil v Carbolic Smoke Ball Co.* [1892] 2 Q.B

<sup>32</sup> Eyyed Ahmad, A. 2001. *Principle of the Law of Contract in Malaysia*. Malaysia: Malayan Law Journal Sdn Bhd. p. 13.

<sup>33</sup> Abd al-Wahid al-Karam. 1987. *Mu'jam al-Mustalihat al-Qanunuyyah*. Beirut: Maktabah Al-Nuhdah Al-Arabiyyah. p. 576.

<sup>34</sup> Ahmad Hidayat Buang. 2000. *Studies In Islamic Law of Contract; The Prohibition of Gharar*. Malaysia: International Law Book Services. p. 4.

<sup>35</sup> Ala' Eddin Kharofa. 1997. *Transaction in Islamic Law*. p.11.

<sup>36</sup> The Mejjelle. Art.101.

is an offer and the period of when an offer is made and for how long it remains valid in order to ascertain the enforceability of an alleged formation of contract.<sup>37</sup>

Actually, three elements are necessary for an offer to be effective. Firstly, the offeror (the party making the offer) must have a serious intention to become bound by the offer.<sup>38</sup> Secondly, the terms of offer must be reasonably certain, or definite, so that the parties and the court can ascertain the terms of the contract. Thirdly, the offer must be communicated by the offeror to the offeree (the party to whom the offer is made), resulting in the offeree's knowledge of the offer.<sup>39</sup> The offer must be communicated to the promisee. According to section 3 of the Contract Act, the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.<sup>40</sup>

The communication of an effective offer to an offeree gives the offeree the power to transform the offer into a legally binding contract by an acceptance provided, of course, that the other requirements for a valid contract are met. The offeree, naturally, also has the option of rejecting the offer and simultaneously making another offer, called a counteroffer.<sup>41</sup> In a counteroffer, the offeree becomes the offeror-offering to form a contract with different terms. For example, suppose that Ahmad offer to work for Abu for RM 25,000. Abu responds, "Your price is too high. I'll offer to hire you for RM 15,000." Abu's response is a counteroffer, because it terminates Ahmad's offer and creates a new offer by Abu.<sup>42</sup>

Both a rejection of the offer by the offeree or the making of a counter offer by the offeree terminates the original offer. The original offer can also be terminated by offeror by revoking the offer – unless the offer is irrevocable but only if the revocation is accomplished before the offeree accepts the offer. If the offeree is already accepted the offer, then both parties are bound in contract- the offeror cannot revoke the offer at this point. Additionally, an offer will terminate automatically by law in some

<sup>37</sup> Muhammad Rizal & Shahirah A.S. 2001. *Malaysian Commercial Law*. . p. 10.

<sup>38</sup> Roger Le Roy Miller & Caylord A. Jentz. 2002. *Management And E-commerce: The Online Legal Environment*. n.pl: West Legal Studies in Business. p. 148.

<sup>39</sup> Ian, J.L. 2000. *Information Technology Law*. p. 563.

<sup>40</sup> Contract Act 1950 (Act136)

<sup>41</sup> Muhammad Rizal & Shahirah A.S. 2001. *Malaysian Commercial Law*. . p. 8.

<sup>42</sup> Ian, J.L. 2000. *Information Technology Law*. p. 563.

circumstances, such as when the specific subject matter of the offer is destroyed, the offeror or offeree dies or becomes incompetent, or a new law is passed that makes the contract illegal. An offer will also terminate automatically by law when the period of time specified in the offer has passed or if no time has passed. What constitute a reasonable period of time depends on the subject matter of the contract, business and market condition and other relevant circumstances.<sup>43</sup>

## 2.2. Types of offer

There is no hard and fast rule to require that specific expressions need to be used in making the offer. An apparent expression of intention will suffice if the conduct of alleged offeror is as such as to induce the reasonable person to believe that he is making the alleged offer and if the alleged offeree actually holds the belief. Similarly, *ijab* may be verbal,<sup>44</sup> in conduct,<sup>45</sup> gestures<sup>46</sup> or in writing.<sup>47</sup> However when the offer is made verbally, the classical jurist unanimously agreed that both present and past tense might be used to express a valid offer while words used to show intention to offer in future or to ask for confirmations are not enough.<sup>48</sup> The reason given is because the contract of sale shall have immediate effect and this may not be reached unless the word used can accommodate purpose.<sup>49</sup>

It need not be strictly interpreted especially as contract proposals need not take place through the use of Arabic language. Word such as “ I have sold” is not the only word to be considered as valid offer.<sup>50</sup> This is especially in the light of principle that in contracts, attention is given to the purpose and meaning and not to the word and form. The same principle will be applicable when an offer is communicated by writing as it simply a mere substitution of verbal communication. Thus, when e-mail sent

<sup>43</sup> Syed Ahmad. A. 2001. Principle of the Law of Contract in Malaysia. p. –

<sup>44</sup> Ala' Eddin Kharofa. 1997. *Transaction in Islamic Law*. p. 11.

<sup>45</sup> *Ibid*. p. 11.

<sup>46</sup> Shalabi, M.M.1949. *Al-Madkhal fi al-Ta'rif bi al-Fiqh al-Islami*. Egypt: Matba'at al-Azhar. p. 366.

<sup>47</sup> Ala' Eddin Kharofa. 1997. *Transaction in Islamic Law*. p. 16

<sup>48</sup> Burhanuddin Abi Al-Hassan et al. 1980. *Al-Hidayah Sharh Bidayah Al-Mubtada*. Egypt: Shirkah Maktabah Wa Matba'ah. p.21.

<sup>49</sup> Wahbah Zuhayly. 1989. *Al-Fiqh Al-Islamy Wa Adillatuhu*. Damascus: Dar Al-Fikr. Vol 4. p. 97.

<sup>50</sup> Ala' Eddin Kharofa. 1997. *Transaction in Islamic Law*. p. 15.

offering a specific object for sale for a specific price, this amount to a valid offer, which will be binding, on the offeror upon its acceptance by the offeree.<sup>51</sup>

Gestures represent an exception that may be used by dumb people.<sup>52</sup> Article 70 of the *Mejelle* stipulates that for dumb people, a sign or gesture is equal to speech.<sup>53</sup> This however will be irrelevant, at least at present time, in the context of electronic commerce activities. Furthermore, regardless as to whether someone has the capacity to speak or not, the Internet allows him to access to electronic commerce affinity so long he has the capability to utilize the keyboard, cyber pen or mouse. According to Syed Ahmad Alsagoff, generally, a proposal can be made in any form, that is to say it can be made in writing, or orally, or by conduct or by a combination of these methods.<sup>54</sup>

By conduct, a person may intimate his intention to contract. According to Dr. Ala' Eddin, the jurist are of the opinion that contract can be concluded by action.<sup>55</sup> In *Fiqh* it is better known as *mu'atah*, *ta'ti* or *murawadah*. This simply refers to the conduct of a seller, displaying commodities for sale attached to them its price and a simple statement such as "first come served". Likewise is the conduct of a buyer who takes the commodity and pays its price (offer to buy) and in return to this, the seller delivers the commodity to the buyer without any expression of words.<sup>56</sup>

This may be analogous to the action of web sites owner virtually displaying commodities attached with their price on the web, when there is an apparent intention that he is making an offer. This necessitates further discussion to determine whether such action may be considered as an offer or merely an invitation to treat.<sup>57</sup>

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<sup>51</sup> *Ibid.* p.103

<sup>52</sup> Ḥalabi M.M.1949. *Al-Madkhal fi al-Ta'rif bi al-Fiqh al-Islami*. p. 397.

<sup>53</sup> The *Mejelle* art.70.

<sup>54</sup> Syed Ahmad. A. 2001. *Principle of the Law of Contract in Malaysia*. Malaysia: Malayan Law Journal Sdn Bhd. p. 14.

<sup>55</sup> Ala' Eddin Kharofa. 1997. *Transaction in Islamic Law*. p. 18.

<sup>56</sup> *Clark v Earl of Dunraven* [1895] AC 59, HL.

<sup>57</sup> Ian, J.L. 2000. *Information Technology Law*. London: Butterworth. p. 563

### 2.3. Offer or invitation to treat

Invitation to treat<sup>58</sup> can be defined as a declaration, which does not contain all the essential element of an offer.<sup>59</sup> In the case, it was held that for a communication to be an offer it must be made with the intention that it is binding<sup>60</sup> as soon as it is accepted. It is in other word, an incomplete offer. Offer is complete when it fulfills its stipulated requirement concerning the essence and attributes of the subject matter, price, etc. when there are some deficiencies in these; it is not a valid offer but may amount to invitation to treat.<sup>61</sup>

The position under common law as also adopted in Malaysia draws a distinction between an offer and a mere invitation to treat. An offer, once accepted, binds the offeror to act according to his offer. On the other hand, the acceptance to an invitation to treat is an offer made by such person to the person inviting to treat.<sup>62</sup> Thus, the acceptance to mere invitation to treat does not bind its maker. It gives the person inviting to treat discretion either to accept or to reject the offer, i.e., the invitee's acceptance to invitation to treat. However it is difficult to determine whether a statement is an offer or merely invitation to treat by simply looking at its wording. A statement may be an invitation to treat although the word offer used,<sup>63</sup> while it may be an offer although it requests the person to whom it is addressed to make an offer.<sup>64</sup>

The normal practice as adopted presently views the display of goods at a fixed price in a shop window<sup>65</sup> or on a shelf in a self-service store as a mere invitation to treat rather than an offer. It is very much possible that this is also the intention of any parties displaying their goods on websites.<sup>66</sup>

This principle of invitation to treat is adopted to protect the interest of the seller to evade the possibility of being bound by too many contract exceeding the

<sup>58</sup> Alan, M. G. 1998. *Internet law: A Practice Guide for Legal And Business Professionals*. p.234.

<sup>59</sup> *Boulder Consolidated Ltd. v Tangdere* [1980] 1 NZLR 560 at 187

<sup>60</sup> Atiyah, P.S. 1989. *An Introduction To The Law Of Contract*. Vol 4. Oxford: Clarendon Press. p. 61.

<sup>61</sup> Ian, J.L. 2000. *Information Technology Law*. p. 563.

<sup>62</sup> *Harris v Nickerson* [1873] LR 8 QB 286.

<sup>63</sup> *Spencer v Harding* [1870] L.R. 5 C.P. 561.

<sup>64</sup> *Clifton v Palumbo* [1944] 2 All E.R at 497

<sup>65</sup> *Fisher v Bell* [1961] 1 Q.B. 394.

<sup>66</sup> *Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Ltd.* [1953] 1 All ER 482.

number of stock available, thus amounting the contract to provide something he is unable to deliver. The seller may also want the right to reject orders from known bad payers or from certain jurisdiction. Furthermore it is also unreasonable to assume that the seller is making an offer to sell every article in the shop to any person who may come in and that the person can insist on buying any article by saying "I accept your offer".<sup>67</sup>

It is submitted that the same principle should be applied to contracts formed over the Internet where the subject matter of contract are physical goods as opposed to computer program or other cyber products. In regard to the latter, there is no limit to stock and the application of this principle will not serve a good purpose. Hence, a communication of intention to buy cyber product will very likely be considered as an acceptance as the display will be viewed as an offer, rather than a mere invitation to treat.<sup>68</sup>

To determine the Islamic point of view on this, it is worth comparing the principle of invitation to treat and the principle of *mu'atah*.<sup>69</sup> The concept of *mu'atah* actually involves give and take, as the word itself implies. That is, in other word a physical aspect to *mu'atah*, which might make it different to cyber displays. It seems that *mu'atah* is concerned mainly with spot sale in which the counter values are present, exchange or about to be exchanged without any verbal communications in terms of offer and acceptance.<sup>70</sup>

It was argued that when the goods attached with its price are displayed, such display constitute a valid offer. This kind of action may fall under the category of *mu'atah*. This is because on the surface of practice of *mu'atah* the buyer simply needs to hand over the price of the goods to the seller, leading to misconception that this is the acceptance to the offer, i.e. the display of goods attached with its price. It is true that there is a valid contract concluded by *mu'atah*, i.e. acceptance of the payment for the price of goods displayed without any expressed statement uttered as offer and acceptance. However, this does not necessarily imply that such display constitute an

<sup>67</sup> Petter, H. et al. 2002. *Principle Of Contract Law*. Sydney: Law Book Co. p. 54.

<sup>68</sup> Egan & Charlotte. W. 2000. *Law And The Internet: A Framework For Electronic Commerce*. p. 21.

<sup>69</sup> Ala' Eddin Kharofa. 1997. *Transaction in Islamic Law*. p.80.

<sup>70</sup> Ibn Qudamah, S. n.d. *Al-Sharh Al-Kabir Ala Matn Al-Mughni*. Cairo: Dar Al-Manar. p. 272

offer. The display is not the offer the conduct of buyer handing over the price is. Thus, there is a contract when the seller accepts the price paid, as only then there is an acceptance and not at the moment the buyer hands over the price.<sup>71</sup>

Furthermore, it shall be noted that the application of principle of *mu'atah* is subject to certain condition, which upon Muslim jurists are divided into three opinions.

- 1- The *Hanafi* and *Hambali* schools allow formation of contract through *mu'atah* with two conditions. Firstly, it is within normal practice known to trade usage. Secondly, the price of the goods must be satisfactorily described.<sup>72</sup> Therefore, there is a valid contract when the buyer takes any commodities displayed on shelf then pays the price as stated if common trade usage views that this may effect legal transfer of such commodities. This is because according to this view, the acknowledgement of public is a clear indication of consent to such practice. Hence, even when the display of good is made on the web, it may constitute a valid offer if the trade usage does not recognize the display of such commodities in such manner as an offer.<sup>73</sup>

However, this may not be extended to a situation where the custom does not consider the display of certain commodities as an offer as oppose to mere invitation to treat. Hence merely displaying any commodities on a web without any further indication of the site owner's intention to contract will not constitute an offer. Consequently, when the buyer communicates his intention to buy the commodities he is making an offer and not acceptance that gives the seller the right either to accept or to reject such offer.<sup>74</sup>

- 2- Imam *Malik* and Imam *Hanbal* view that *mu'atah* may give effect to valid contract if there is definite indication of consent, regardless of whether such practice is known to common usage or otherwise. By virtue of this a virtual

<sup>71</sup> Mohd Ma'sum Billah. n.d. *The Principle Of Contract In Islam; A Comparative Analysis With The Common Law*. (Dissertation). IIUM

<sup>72</sup> Wahbah Zuhayly. 1989. *Al-Fiqh Al-Islamy Wa Adillatuhu*. p. 324.

<sup>73</sup> Al-Sharbiniy, S.M.M. 1994. *Mughniy al-Muhtaj Ila Ma'rifati Ma'ani al-Minhaj*. Vol.1. Beirut: Dar al-Kitab al-Alamiyyah. p. 324.

<sup>74</sup> *Fisher v Bell* [1961] 1 Q.B. 394. p. 399.

display of goods together with simple advertisement such as “for sale, while stocks last” “offer for sale” may constitute an effective offer. This is because such words indicate the seller’s intention to make an offer, thus signifying his consent. In the absence of anything that may infer such person intention to contract, his conduct of displaying goods will not constitute an offer.<sup>75</sup>

To apply this view to the cyber world context when the virtual displays of commodities are free from any statement indicating the owner’s intention to make an offer, it will only constitute a mere invitation to treat. Hence, when the web site prefers to make such display as an offer and any response to it will constitute an effective acceptance, thus it will conclude the agreement between the two, such intention shall be indicated on the web.<sup>76</sup>

- 3- *Syafi’*e, *Syi’ah* and *Zahiri* schools of law reject the validity of contract formed through *mu’atah* on the ground that mere conduct does not apply any intention to contract. Consent is intangible mental fact that cannot be ascertained but through words expressing it, hence mere conduct<sup>77</sup> will not suffice.<sup>78</sup>

According to this view, unless there is an express word spoken or written or even though understandable gestures asserting an intention to conduct, mere display of commodities will not imply offer. An offer must be made by apparent intention indicating it. *Al-Syarbiniy* in his book *Mughni Al-Muhtaj* cited that *Al-Mutawali* had clarified this disagreement by stating that simply weighing or measuring and taking away the subject matter without any *ijab* and *qabul* will not constitute a valid contract. That is to say, these ambiguous conducts will not constitute a valid offer or acceptance unless there is a clear indication to that effect.<sup>79</sup>

The argument that since the wordings of the offer used by the offeror are usually in the past tense, such conduct of attaching price is a past conduct that

<sup>75</sup> Wahbah Zuhayly. 1989. *Al-Fiqh Al-Islamy Wa Adillatuhu*. p. 100.

<sup>76</sup> Alan M. Gahtan et al. 1998. *Internet law: A Practice Guide for Legal And Business Professionals*. p. 234.

<sup>77</sup> Ramli, S.M. 1967. *Nihayah Al-Muhtaj Illa Sharh Al-Mihtaj F Al-Fiqh ‘Ala Mazhab Al-Imam Al-Shafi’ee*. Vol.3. Egypt: Shirkah Maktabah Wa Matba’ah Mustapa Al-Bab Al-Jali Wa Awladah. p. 375.

<sup>78</sup> Wahbah Zuhayly. 1989. *Al-Fiqh Al-Islamy Wa Adillatuhu* . p. 101.

<sup>79</sup> Al-Syarbiniy. 1994. *Mughni Al-Muhtaj*. Beirut: Dar Al-Kitab Al-Alamiyyah. p. 324.

signifies the intention of the offeror to make a valid offer.<sup>80</sup> While it is true that past tense form will undoubtedly infer the consent of the offeror in making the offer, yet the same is the necessarily applicable where the alleged offer is form of conduct. Mere conduct is very ambiguous.<sup>81</sup>

It is very hard to construe a simple action of mere displaying of goods as consent to sell the goods to anyone who has the access to see the goods. It is argued that the fact that the seller describes the goods and specifies the prices of these items shows a strong *qarinah* that the sellers do intend to make offers. Such intention of making offers, although are difficult to be proven, could be inferred from the above-mentioned *qarinah*. Thus, the sellers have no justification to deny this presumption of them making valid offers which are enforceable by law.<sup>82</sup>

With due respect it is submitted that even Mohd. Ma'sum Billah, the author of the article suggesting such proposition, requires strong *qarinah* to show the seller intention to make an offer. He further acknowledges that such intention is difficult to prove. It is too much to say that simple conduct of virtually displaying the goods on the web will imply strong *qarinah* of the seller's intention to make offer. The display normally is meant to invite the potential customer to make an offer. It is also done as part of commercial strategies to attract potential customers.

The balance of convenience favors the web owner's position especially in the context of cyber space where any one around the globe for around the clock may view the web. Further, when the displays or advertisements do not identify the offeree. It is unlikely that a reasonable person would rely on it to his detriment. It is also injustice to the offeror, who does not intend to mislead the offeree and has taken all the reasonable steps to make an invitation to treat<sup>83</sup> as opposed an offer, being bound by it. As Islam does not approve injustice to be done to neither of the contracting party,

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<sup>80</sup> Mohd. Ma'sum Billah. n.d. *The Principal of Contract In Islam*. International Islamic University Malaysia. p. 1x-1xii

<sup>81</sup> Owsia, P. 1994. *Formation of Contract; A Comparative Study Under English, French, Islamic And Iranian Law*. London: Graham & Trotman. p. 398.

<sup>82</sup> *Ibid.* p. 1x-1xii.

<sup>83</sup> David Johnston et al. 1998. *Cyber law; An In-Depth Guide To The Often Turbulent, Increasingly Profitable Confluence Of Business, The Internet And Law*. Malaysia: Pelanduk Publication. p. 180.

and yet the *Syariah* emphasizes that the contract should be clear of ambiguity, it is necessary that the parties should clearly communicate their intention to one another.<sup>84</sup>

And this may be safely done by holding the mere display of commodities. It is not an offer, so that unjust and undesired imposition of binding contract on the buyer may be avoided. Given the facility of instant access to the other party in the Internet setting, the requirement of clarity and open communication in unambiguous word is not excessive. Furthermore, it is required that an offer must be addressed to one or more specific person otherwise a proposal will merely constitute an invitation to treat.<sup>85</sup> In the context of display of goods over the Internet, the addressee is normally not specified.<sup>86</sup> It is unreasonable to presume that the web site owner intends to contract with anyone having the access to the site. Thus, it is submitted that the general rule will presume the display as a mere invitation to treat and not an offer, unless the contrary is clearly indicated by the person making the proposal.<sup>87</sup>

Even under Islamic contract law, to be valid, an offer must be clearly addressed. The interpretation of this will not validate the transaction when the buyer simply says to the seller, “are you selling this for RM50?” or when he asks “did you sell this for this much?” and the seller says “yes” or “I sold”. In these examples, it is not clear to whom the offer is addressed. The latter example very much explains that simply displaying properties, although attached with their price without any further clarification indicating the intention of the buyer to contract will not, by itself constitute an offer. When it is not clear to whom the offer is addressed it is unreasonable to infer that the seller indeed intends to make an offer.<sup>88</sup>

It only executes the buyer’s intention to invite a person to make an offer for the price as stated. In other word, it is simply a declaration that he may consider selling the commodities for the price as stated and not, in the absence of anything to

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<sup>84</sup> Ala’ Eddin, K. 1997. *Transaction in Islamic Law*. p. 29-30.

<sup>85</sup> Owsia, P. 1994. *Formation of Contract; A Comparative Study Under English, French, Islamic And Iranian Law*. p. 527.

<sup>86</sup> n.a. 15 December 2003. A Newsletter on Selling Product Directly on the Web. <http://www.wilsonweb.com/wct1/issue10.txt>.

<sup>87</sup> *Carlil v Carbolic Smoke Ball Co.* [1892] 2 Q.B at 487

<sup>88</sup> Al-Syarbiny. 1994. *Mughni Al-Muhtaj*. Beirut: Dar Al-Kitab Al-Alamiyyah. p. 327

contrary, imply his consent to be bound by a contract to anyone who sees the display and interested to buy the commodities.<sup>89</sup>

Similarly, mere display of commodity together with its description does not necessarily constitute an offer. When the buyer takes the commodity and pays the price, this constitutes an offer and not acceptance. The contract may be validly created when the seller accepts his offer. That is by allowing him to have the commodity and taking its price from the buyer. In this way, all the elements of contracts are satisfied, and there shall be valid contract although some jurists still require the use of *sighah*<sup>90</sup> to avoid *gharar* especially when the subject matter is expensive and of much value.

Thus, it is submitted there is no clear-cut authority for saying that a display of goods will, by itself, absolute constitute an effective offer. Even the principle of *mu'atah* is not an authority for saying that the conduct of the seller i.e. displaying goods attached with the price, is an offer that may be accepted by simply taking or communicating an intention to take such goods. Before we may conclude that there is an agreement reached from such conduct, it is necessary to determine the intention of the person displaying the goods by reference to circumstances, nature of the goods involved or whether such practice is already known to trade usage. This is especially in the context of concept that is not the wording but the intention of the party that shall be taken into consideration in commercial matters. Further, according to The Mejlle, Art. 2 stated that [a] judgment is in accordance with what the object of an act may be.<sup>91</sup>

In the context of cyberspace activities over the Internet, since the prospect of a spot transaction in this sense of physical give and take, as in *mu'atah*, is limited, implied intentions should also have a limited role. A greater degree of clarity in explicit communication is therefore required.

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<sup>89</sup> *Timothy v Simpson* [1834] 6C & P 499.

<sup>90</sup> Ahmad Hidayat, B. 2000. *Studies In The Islamic Law of Contracts; The Prohibition of Gharar*. Malaysia: International Law Book Services. p. 2.

<sup>91</sup> The Mejlle, Art. 3

## 2.4. Time of offer in cyber-space

It is important to determine when an offer is made as this will influence the issue of valid acceptance to such offer. Unlike face-to-face communication the offer is conveyed once the offeror has completed his statement that is heard by the offeree, the position of contract formed over the Internet is somehow unique.<sup>92</sup>

It is not accurate to say that communication through the Internet is simultaneous and equal to telephone communication. The normal principle applicable to face to face communication or communication through telephone, i.e. the time of offer will be the time when it comes to the offeree's knowledge may not be applicable to Internet contracts. Internet contract may take two forms. Firstly, contract formation made through e-mails.<sup>93</sup> Secondly, contract that concluded almost instantaneously when the acceptance is made on the web simply by clicking the "I accept" button.<sup>94</sup>

E-mail enables the user to send textual messages to a specific recipient through the Internet. Message can be transmitted in most cases almost instantly, regardless of physical distance between sender and receiver. It may be argued that the mailbox principle is applicable since e-mail is just another mailing system using more advanced facilities compared to ordinary mail that utilizes human power.<sup>95</sup>

This may not however be absolutely correct. It is true that e-mail carries so many similarities with a posted letter. However it shall be noted that normally e-mail is almost an instantaneous as telephone communication, and unlike royal mail that are delivered as soon as possible to its addressee, the service provider will not deliver e-mails unless the recipient has dialed and got connected with the server.<sup>96</sup>

Some e-mail is not even delivered. The recipient has to collect them. Even if the recipient is connected to the Internet, it may not have to notice of e-mails arrival

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<sup>92</sup> Ahmad Hidayat Buang. 2000. *Studies In The Islamic Law of Contracts; The Prohibition of Ghara*. p. 5.

<sup>93</sup> Lilian & Charlotte Waelda. 2000. *Law And The Internet; A Framework For Electronic Commerce*. p. 22.

<sup>94</sup> Alan M. Gahtan et al. 1998. *Internet law: A Practice Guide for Legal And Business Professionals*. p. 235.

<sup>95</sup> *Ibid*.p. 234.

<sup>96</sup> Gringas C. & Nabarro Nathason. 1997. *The Law of The Internet*. London: Butterworth. p. 17.

although some servers, such as yahoo through its messenger, do try to alert the arrival of a new e-mail. Even this requires the recipient to log in to the program to enable notification. E-mail can be misaddressed, delayed by any server or router on the way and they may not be collected for some time after delivery.<sup>97</sup> This is a situation comparable to sending an offer to a pigeonhole abroad. Many parties are involved in the transmission of the message. Even on arrival, the recipient must act to retrieve it.<sup>98</sup>

The UNCITRAL model law on e-commerce does give guidelines regarding the effectiveness of any information sent through the Internet as against the offeror, the offer is validly created once he has keyed in the data and clicked the “send” button, thus expelling his power to alter the data. And this will take complete effect upon the addressee once it has reached its information system or when it is retrieved.<sup>99</sup> This is however not applicable to offer made on the web. The web is a distributed hypermedia environment within the Internet that allows multimedia information to be located on the network around the word, which are interconnected, allowing one to travel through information by clicking on hyperlinks. Any hyperlink (text, icon or image in a document) can point to any document anywhere on the Internet.<sup>100</sup>

Unless the contrary is expressed, it is submitted that any offer made on the web will be a valid offer that subsists as long as it is accessible. Once the intended addressee get access to the web, the offer has immediate full effect as a valid offer. Under Islamic contract law, there is no specific textual injunction of the *Syariah* that deal with this aspect. However the jurist mark the starting point for *majlis* or meeting of contract at the place where the offer is conveyed to the offeree. From this it may be inferred that what is necessary under Islamic contract law is the time when the offer comes to the offeree’s knowledge regardless of the means used to convey the offer.<sup>101</sup>

The problem with the e-mail is that, it may be almost instantaneous and it may also be delayed. It is not safe to predict the arrival of an e-mailed offer. Thus, it is

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<sup>97</sup> Lilian & Charlotte, W. 2000. *Law And The Internet; A Framework For Electronic Commerce*. p. 25.

<sup>98</sup> David, J. 1998. *An In Depth Guide To The Often Turbulent, Increasingly Profitable Confluence of Business, The Internet And The Law*. p. 184.

<sup>99</sup> n. a.. 12 July 2003. “UNCITRAL Model Law on Electronic Commerce”. <http://www.uncitral.org/en-index.htm>.

<sup>100</sup> Hoffman, D.L et al. 13 July 2003. “Commercial Scenarios For The Web; Opportunities And Challenges”. <http://www.ascusc.org/jcmc/vol1/issue3/hoffman.html>.

<sup>101</sup> Wahbah Zuhayly. 1989. *Al-Fiqh Al-Islamy Wa Adillatuhu*. p.103

suggested that for the offeree to avoid from being bound by unwanted contract to specify the length of period his offer will be valid. It is advisable to specify the date on which the offer will lapse. Putting this in relative terms, for instance, seven days after receipt, poses problem unless the offeror provides a definition of what receipt is. This also necessary to avoid unwarranted legal suits, that will in any case burden both parties. This is especially true when there is a delay in transmission.<sup>102</sup>

## 2.5. Rejecting the offer

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An offer can be revoked at any time before it is accepted. It is according to section 5 of the Contract Act of Malaysia.<sup>103</sup> It also can lapse after a specified time or on a specified event. The Majority Islamic schools of law allow either contracting parties to withdraw their declaration be it an offer or acceptance so long they are still within the meeting for bargaining. Thus, an offer may be revoked so long it has not been accepted. *Maliki* however does not share the same view. To this school of law, offeror must stand by his offer until he received a response from the offeree. To mitigate this to rather strict requirement, the offeree simply may terminate the *majlis* in case he regrets making the offer.<sup>104</sup>

Hence, when the offer communicated through e-mail, the offeror may effectively e-mail his revocation provided the offer has not yet been accepted. It is submitted that other means of communication may be used so long it is expedient and much faster than e-mail. In the context of web page where the offeree is required to respond directly, merely amending the page to end the offer and remove any electronic order form is likely to suffice. Again it would be prudent, where there is a risk of offeror being bound by an unwanted contract, to specify in the initial offer how it can be revoked. This may also be the case where there could be a risk of a delay between an alteration to a web page and its availability to all users, such as where certain access providers maintain some pages.<sup>105</sup>

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<sup>102</sup> Lilian & . Charlotte ,W. 2000. *Law And The Internet; A Framework For Electronic Commerce*. p.25.

<sup>103</sup> Contract Act. 1950 (ACT 136)

<sup>104</sup> Wahbah Zuhayly. 1989. *Al-Fiqh Al-Islamy Wa Adillatuhu*. p.103.

<sup>105</sup> Petter ,H. et al. 2002. *Principle Of Contract Law*. p. 63.

Difficulty may arise when, for example when the offeror has sent the revocation and it has effectively reached the offeree's system yet the acceptance is sent immediately before the offeree has the opportunity to read the revocation.<sup>106</sup>

Section 6(a) of Contract Act provides that a proposal is revoked by the communication of notice of revocation of offeror to the other party. When it may be revoked is further provided in section 5(1) stating that a proposal may be revoked at any time before the communication of acceptance is complete as against the offeror. Section 4(3) gives further clarification stating that the communication of revocation is effective against the person who makes it at the moment he puts it into a course of transmission to the person to whom it is made. In subsection 3(b) to subsection 4 it is stated that such revocation is complete against the person to whom it is made when it comes to his knowledge.<sup>107</sup>

It is not clear whether the information of revocation must come from its maker or otherwise. The plain reading of this subsection simply require knowledge of revocation on the part of offeree hence it is likely that so long the knowledge of revocation can be proven, it will not matter how and by who an information of revocation of offer is communicated. The book written on Islamic contract law does not deal with this point extensively. In *Kitab Bad'I Al-kasani* has stated that when an offeror sends his agent to communicate his offer, he can effectively revoke his offer by having such intention regardless or whether this intention is known to his agent or otherwise.<sup>108</sup>

This however does not exclude the necessity that the offeree must have knowledge of revocation. Hence, it is stated that when a written offer made, it may be revoked verbally and when an agent is sent to communicate the offer, its principle may revoke the offer personally.<sup>109</sup>

Applying this principle to the above hypothetical problem, it may be argued that the acceptance will be effective as the revocation although communicated before

<sup>106</sup> Chris, R. & John, A. 2000. *Computer Law*. p. 304.

<sup>107</sup> Contract Act. 1950 (ACT 136);

<sup>108</sup> Al-Kassani 1982. *Bad'ai Al-San'ai fi Tartib Al-Syara'*. Beirut: Dar Al-Kitab Al-Araby. p 137.

<sup>109</sup> Syed Ahmad, A. 2001. *Principle of the Law of Contract in Malaysia*. p. 25.

the acceptance is transmitted has not come to the offeree's actual knowledge when he communicates the acceptance. The offeree's knowledge of information is a must for its effectiveness.<sup>110</sup>

The point to be highlighted is whether actual or constructive knowledge is required. Referring to the basic principal regarding the effectiveness of e-mail communication, the communication is basically effective as against the sender once it is sent, yet it is not effective as against the addressee until it reaches his information system.<sup>111</sup> It is revealed in Article 15(2) of UNCITRAL Model of Law on E-Commerce. Therefore it is submitted that constructive knowledge of offeree will suffice. By choosing an information system or having agreed to use one server to communicate his commercial affair, he is presumed to have consented that such information system to act as his agent for such purpose.<sup>112</sup>

Hence, communication of revocation of offer is completed against him the moment it is received by its information system. When he notices that there is further communication from the offeror yet he continues sending the acceptance and overlooks this, he cannot later allege that he does not have knowledge of revocation. Similarly when the revocation has reached the communication yet the offeree has not retrieved it from his inbox.<sup>113</sup>

However if the offeree has designated an information system for the purpose of receiving data and the revocation is sent to an information system of the offeree that is not the designated system, revocation shall not be effective until it is retrieved. This is due to the fact that there is no inference that he has consented to the use of such information system to communicate his commercial affairs. Thus, an offeror who sent the offer at the offeree's hotmail e-mail address and yet communicated the revocation to the offeree's yahoo e-mail address without his actual or implied consent

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<sup>110</sup> Chris, R. & John, A. 2000. *Computer Law*. p. 304.

<sup>111</sup> n. a.. 12 July 2003. "UNCITRAL Model Law on Electronic Commerce". <http://www.uncitral.org/en-index.htm>.

<sup>112</sup> Julian, D. 2000. *E-Commerce, Law And Practice*. p. 339.

<sup>113</sup> Lilian & W. Charlotte. 2000. *Law And The Internet; A Framework For Electronic Commerce*. p. 18.

will not be allowed to assert that he has communicated his revocation unless it has been retrieved by the offeree prior to acceptance.<sup>114</sup>

It is stated in Art. 15(2)(a)(ii). Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follow: (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs at the time when the data message is retrieved by the addressee.<sup>115</sup>

<sup>114</sup> n. a., 12 July 2003. "UNCITRAL Model Law on Electronic Commerce". <http://www.uncitral.org/en-index.htm>;

<sup>115</sup> Julian Ding. 2000. *E-Commerce, Law And Practice*. Malaysia: Sweet & Maxwell Asia. p. 339.

## CHAPTER 3: THE FORMATION OF ACCEPTANCE IN THE INTERNET

### 3.1. The acceptance in e-commerce

Acceptance may be defined as an unconditional assent, communicated by the offeree to the offeror, to all terms of the offer,<sup>116</sup> made with the intention of accepting.<sup>117</sup> According to section 2(b) of Contract Act, acceptance is made when the person to whom the proposal is addressed signifies his assent thereto.<sup>118</sup> In Arabic, acceptance is best described by word *qabul*<sup>119</sup> that together with *ijab* they form the *sighah* and *'aqad*, one of the pillars for contract formation. *Qabul* according to the *Hanafi* School of law is the word is uttered later, corresponding to the terms of a subsisting offer, without distinguishing whether this comes from the buyer or the seller.<sup>120</sup> Other requirements include that valuable consideration must be given and there must be an adequate description of the subject matter.<sup>121</sup>

An offeree's acceptance of an offer results in a legally binding contract if all of the other elements of a valid contract are present. One requirement of an acceptance is that it be unequivocal. In other word, the terms of the offer must be accepted exactly as stated by the offeror.<sup>122</sup> This principle of contract law is known as the mirror image rule- the terms of the acceptance must be the same as mirror, the terms of the offer. Is the acceptance is the subject to new condition or if the terms of the acceptance materially change the original offer, the acceptance may be deemed a counteroffer that implicitly rejects the original offer.<sup>123</sup>

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<sup>116</sup> Syed Ahmad, A. 2001. *Principle of the Law of Contract in Malaysia*.p. 25

<sup>117</sup> Robert Duxbury. 2000. *Nutshell Contract In A Nutshell*. London: Sweet & Maxwell Limited. p. 6.

<sup>118</sup> Contract Act. 1950 (ACT 136)

<sup>119</sup> Abd al-Wahid al-Karam. 1987. *Mu'jam al-Mustalihat al-Qanunyyah*. Beirut: Maktabah Al-Nuhdah Al-Arabiyyah. p. 640.

<sup>120</sup> Wahbah Zuhayly. 1989. *Al-Fiqh Al-Islamy Wa Adillatuhu*. p.93

<sup>121</sup> Alan, M. G. 1998. *Internet law: A Practice Guide for Legal And Business Professionals*. p. 234.

<sup>122</sup> *Hyde v Wrench* [1840] 3 Beav 334.

<sup>123</sup> Syed Ahmad, A. 2001. *Principle of the Law of Contract in Malaysia*.p. 26.