An analysis of Islamic Law's Aspects of the E-Sale Contracts: the Formation of a Valid E-Sale Contract

Aidh. Sultan. AlBaqme

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ABSTRACT

This research investigates and evaluates the formulation of the e-sale contract under the law of Islam. The project aim is to study the legal changes in this contract under the studies and guidance of four Islamic Sunni Schools which have been selected for this research.

The current research report is a comprehensive study which involves a thorough study of the objectives and rules pertaining to the formation of the e-sale contract. These are examined in light of the general principles of contract laid out by the Islamic law (Shari'ah) which form the basis of contractual dealings between individuals and businesses. For a sale contract to exist there must be two parties and one party makes an offer and the other must accept it. The sale contract becomes binding once acceptance of terms formulating the deal is achieved. The current research examines the sale contract in the electronic environment where parties enter into a contract to exchange products or services via the web. Legally binding sales or e-sale contract over the internet are usually in the form of email, EDI etc. Thus, through this research a comprehensive understanding is developed by studying and presenting a whole range of vital literature which would help in presenting the main elements of the e-sale contract under the general rules of Islamic law. Such dealings through the internet and eventual e-sales may involve different legal consequences which may be difficult to comprehend by those lacking sufficient understanding. This research will help in increasing awareness by providing a study of issues related to the basic phases of formulation process involving contracts and respective obligatory requirements under the Islamic law.

The current report is divided into chapters. Each chapter provides important information regarding the topic and important conclusions are presented in the final chapter supported by a literature review and findings from the current research.
NOTES ON TRANSLITERATION, QUOTATION AND CITATION

All transliterated Arabic words (except the names of people) and book titles have been italicised. In the transliteration of Arabic words I have, as a rule, followed generally:

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The definite article اль has always been transliterated al whether the pronunciation of (a) was affected by the syntactical position of the preceding word or the (١) has to be assimilated into the first letter of the following word if it were a 'sun letter'. Similarly, ١ has been shown by h, despite the fact that it is frequently pronounced t, and even written as ت, and in such terms ٢ has been rendered by w.

Vowels

Short: Long or Doubled iyya

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<th>Arabic</th>
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Diphthongs ١ ٢ ٣

Translation - In dealing with Arabic materials, whether statutory or not, I have attempted, with the exception of a few cases which are acknowledged, my own translation, or
relying on the “Oxford Student’s Dictionary”. However, the translation of the Qur'an has been done relying on the edition of King Fahd Complex for the Printing of the Holy Qur'an.

However, in dealing with the quotation from Arabic references, I have quoted and then translated from Arabic to English languages.

I have followed the Australian Guide to Legal Citation, second edition, which is the standard system of legal citation in Australia, and the University of Western Australia in particular.
(In the Name of Allah the Beneficent the Merciful)
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My grateful thanks go for my dear supervisors Professor. Peter Handford and Professor. Samina Yasmeen which without their helps and supports, definitely in a high percentage I gave up my job and focus on other subjects, although I have chosen this topic with my own personal interest.

I also wish to acknowledge supports of my parents and my wife.

Aidh. Sultan. Albaqme
GLOSSARY OF ARABIC TERMS

Terms are in alphabetical order, ignoring the definite article al-.

Ahl al-Hall wal-aqd: Muslim jurists who are qualified to resolve legal problems and infer binding rules either out of the said primary sources or differently.

Aqli: the letter rend supplemented these sources of Islamic law with certain rational or rational principles.

Asle al-Ebaha: the base or the foundation is licit of doing any thing under the Islamic law principles.

Ayb: defect; defect in goods giving purchaser a right to cancel the sale.

Ayat: the plural of Ayah which means a verse from the Qur'an but it can also mean proofs, evidences, verses, lessons, signs, revelations, miracles, etc.

Aqd: lit., knot, tie; obligation, compact; the conclusion or ratification of a compact or oath; in fiqh, juridical act; more narrowly, relationship created by offer and acceptance.

Ahkam: "laws or order. There are six types in Islam: 1. Compulsory (wajib); 2. Order without obligation (Mustahab); 3. Forbidden (Muharram); 4. Disliked but not forbidden (Makruh); 5. Legal and allowed (Halal); 6. No law defined/ required (Mubah)".¹

Bada'i: beginning or starting of any work.

Bay'atan fi Bay'ah: lit., two sales in one sale for example if a buyer bought goods from seller for either ten dollars in cash or fifteen dollars on credit, prohibited by a hadith; scholars differ as to its meanings.

Bay': sale.

Batil: incorrect, unaccepted; falsehood; evil.

Bay' al-Thunya: any sale with an exception of other goods of the same kind, until the buyer knew the quantity and quality of the goods.

Darura: necessity; this word derived from the lexical root darar that signifies 'haram' or 'damage'. Darar donates the dire state of hardship. In a loose legal context, darura designates both the state of necessity and its cause (sabab), which justifies altering a legal injunction on the ground, of avoiding imminent haram.

Daif hadith: "the classification of hadith according to the reliability and memory of reporters" are (sahih) sound, (hasan) good, (daif) weak. Daif hadith "usually, the weakness is one of discontinuity in the isnad, in which case the hadith could be Mursal, Muallaq, Mudallas, Munqati or Mudal, according to the precise nature of the discontinuity, or one of a reporter having a disparaged character, such as due to his telling lies, excessive mistakes, opposition to the narration of more reliable sources, involvement in innovation, or ambiguity surrounding his person." Mau du defines (fabricated, forged) as "the term applied to a hadith, the text of which goes against the established norms of the Prophet's sayings."

Daman: "(1) contract of guarantee (also called kafala); (2) one of two basic relationships toward property, entailing bearing the risk of its loss"; compare amana.

Dimni: where the rule (hakam) is derived from the signs and indication inherent in the text of Qur'an or Sunnah.

Fiqh: "Muslim jurisprudence; it covers all aspects of life, religion, political, social or economic. In addition to religious observance (prayer, fasting, zakat and pilgrimage) it covers family law, inheritance, social obligations, commerce, criminal law, constitutional law and international relations, including war. The whole corpus of fiqh is based primarily on the Qur'an and the Sunnah and secondarily on Ijma and Ijtihad".

Fuqaha: Islamic scholars "who are an expert in matters of Islamic legal matters."

Faskh: cancellation; termination, rescission.

Fi'li: active, effective.

Fasid: invalid, void, voidable, corrupt, unsound.

Fahm: comprehension, understanding, of the imposed legal injunction.

Fawriyyah al-Qaboul: promptitude of acceptance as the requirement of the presence of both parties at the same place.

Ghabn: gross inequality, damage, lesion, tort.

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2 http://www.islamic-awareness.org/Hadith/Ulum/asb7.html
4 http://www.kalamullah.com/intro-to-hadith.html
5 http://www.aals.org/am2004/islamiclaw/contract.htm
7 http://www.messageofislam.org/index.php?ptl=resources&sub=glossary
Ghalat: error; it is "the least prominent of contract defects in Islamic law, as it is the most subjective type of defect."  

Gharar: lit., peril, risk, hazard, uncertainty in the contract such as sale unknown goods to seller.

Ghabnfahish: "excessive overcharging or over-pricing. Tech used exorbitant or exploitative rate of profit".

Hadith: lit., report; historical account of a saying, act, or omission of the Prophet Mohammed (P.b.u.h), secondarily, of a esteemed figure among his companions and early Muslim generations.

Halal: Any permitted and lawful by the Shari’ah.

Ijma: "consensus of Muslim jurists on any issue of fiqh after the death of the Prophet (P.b.u.h)". See also fiqh.

Ibadat: literally means to enslave oneself (to God), when it is used as a religious term, refers to the ordinances of divine worship.

Ijtihad: lit., personal effort; the effort by a qualified fiqh scholar "to determine the true ruling of the divine law in a matter on which the revelation is not explicit or certain".

Ithna Ashari (twelve): a group belonging to Sha’ah school, acknowledged a line of twelve Imams or religion-political leaders of the group. The twelfth imam, who disappeared in 874, was believed to have gone into the seclusion; his future return as a Mahdi, or messianic guide, was waited. Sha’ah believe that the return of the Hidden Imam would bring an end to tyranny and corruption and the restoration of just rule and a society in which oppression and in justice were replaced by equity and social justice.

Ilm al-Usul al-Fiqh: "or the roots of Islamic law, expound the indications and methods by which the rules of fiqh are deduced from their sources. These indications are found mainly in the Qur’an and Sunnah, which are the principal sources of the Shari’ah. The

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9 http://search-keyword.com/islamic_economic_terms.asp?alpha=G
rules of *fiqh* are thus derived from the *Qur'an* and *Sunnah* in conformity with a body of principles and methods which are collectively known as *usul al-fiqh*.12

**Ikrah:** means to force someone to do something which he does not want to do.

**Ijarah:** "type of contract whereby the lessor (owner) leases out an asset or equipment to its client at an agreed rental fee and pre-determined lease period upon the contract (*aqd*). The ownership of the leased equipment remains in the hands of a lessor".13

**Istisna:** "A purchase order contract of assets whereby a buyer will place an order to purchase an asset that will be delivered in the future".14

**Ijab:** an offer is the necessary condition of a valid contract. It has been defined as a declaration or a firm proposal made first with a view to creating an obligation; see *qabul*.

**Iradah:** will or intention to produce an obligation in the contract.

**Ikhtiyar:** period of free choice.

**Iradah al-Batina:** internal will.

**Isharah:** "(i.e. a sign or hint) which may be given in the order in which the words are placed".15

**Ijab al-Mu'akhkhar:** the possibility of a factual reversal of preset chronological order of offer and acceptance becomes, as a result, logic-juridical polemic giving rise to extensive arguments on the permissibility or otherwise of an offer subsequent and an acceptance precedent.

**Iradah al-Munfaradah:** unilateral will to produce an obligation in the contract.

**Ittihad al-Majlis:** unity of the meeting-place in the contract, whereby offer and acceptance should be made in the same *majlis* (literally the 'seat' or the 'meeting-place').

**Ittisal:** the necessity of communication through the exchange of the formulas of a contract.

**Jahl:** "ignorance, lack of knowledge; indefiniteness in a contract, often leading to finding of *gharar*".16

12 http://suraj.lums.edu.pk/~ss182/060704/law.html
14 Ibid.
15 http://www.muslims.ws/win/quran/tafsir/Ilm-ul-usul.htm
Ja'iz: (facultative); contracts, which can be unilaterally, set aside by either party at any time.

Ju'alah: it is defined as arrangement whereby a person obligates himself to pay a known remuneration for the performance of an act whether the other party is determined or undetermined.

Kafala: "the pledge given by any one (kaful) to a creditor to secure that the debtor will be present at a definite place e.g. to pay his debt or fine or, in case retaliation, to undergo punishment".17

Khayar al-Majlis: the option of the meeting-place during the meeting session in the contract between the parties.

Khayar al-Ru'ya: an option ensures achievement of certainty by giving the buyer an unqualified option by Shari'ah to revoke the contract upon sight and inspection of the transacted goods.

Khayar al-Shart: an option by stipulation, the contracting parties may reserve the right of conventional option by special stipulation, the faculty of cancelling the sale contract within certain time.

Lafziyyah: predominance of word of mouth.

Lazim: (binding); contracts, which cannot be rescinded except by mutual agreement of the parties or due to a legally recognized cause.

La haraj: (hardship); meaning this phrase refers to what are admittedly adornments, and perhaps objects of enticement.


Mawquf ala al-Ijazat: contracts the effects of which were merely suspended, depending on the choice of the party whose intention was not validity expressed, and for whose protection the nullity was prescribed.

Mu'amalat: transactions; these are usually studied under seven headings: (1) transactions involving the exchange of value, which include contracts; (2) matrimonial law; (3) equity, (4) trusts; (5) civil litigation; (6) rules pertaining to dispute settlement in courts; and (7) administration of estates.

Madani: referred to the city of the Prophet Mohammed in Saudi Arabia.

17http://www.2discoverislam.com/books/Glossary%20.htm
Mahall al-Aqd: the object of legal obligation in Islamic law.

Majlis al-Aqd: a contractual 'meeting-place' refers to the setting in which offer and acceptance are exchanged.

Mubah: acts about which the Islamic law is indifferent (e.g., there is no specific reference) and may therefore be permissible.

Mudarabah: a form of partnership to which some of the partners contribute only capital and the other partners only labor.

Murabaha: sale at a percentage markup; one of the sale(bay) in which the price is stated in terms of the sale object's cost to the seller, the others being sale at cost (tawliya) and sale at discount (wadi'a).

Bay' Mu'ajjal: A sale in which the parties agree that the payment of price shall be deferred.

Mumayyiz: a person has a legal capacity to enter into a contractual relationship.

Mu'atat: contracts may be concluded by any act which signifies intention and consent, such as delivery and taking possession.

Mujib: whereby the offeror is predetermined in any given type of contract.

Munajjaz: an offer to be categorical and immediately effective.

Mu'allaq: a conditional statement which is, by its very making, to take effect at the happening of a contingency.

Msawamah: the negotiation of a selling price between the seller and the buyer.

Majlis: literally the 'seat' or the 'meeting-place', refers to the setting in which offer and acceptance are exchanged.

Muwalat or tawali: a formalistic point of view, the formulas being interdependent, they will not considered to 'tie' together if they are not exchanged in an uninterrupted 'sequence' (muwalat or tawali) due to the lapse of time, or a party falling asleep or the interdiction of an alien subject.

Mutabaqah: correspondence of acceptance with the offer bears on the totality of the terms of the proposed contract as contained in or set forth by the offer.

Muqaranah: concurrence or comparative.

Nusus: is meant those Qur'anic texts which are absolutely clear, which have a single meaning and about which there is no ambiguity whatsoever.
Niyya: The ‘intention’ which must be pronounced before carrying out a religious observance, in order to make it valid in Islamic law.

Qur'an: "the Holy book of the Muslims consisting of the revelations made by God to the Prophet Mohammed (P.b.u.h)", during his Prophethood. The Qur'an lays down the fundamental of the Islamic faith, including beliefs and all aspects of the Muslim way of life.19

Qiyas: analogy; one of the four roots (usul) of fiqh.

Qabul: literally, making a positive statement, or making a statement to beget a 'necessary' or 'binding' relation; see ijab.

Qasd: an intention to create legal relations.

Qasd al-Lafz: an intention to pronounce words.

Qasd al-Ma'ana: intention as to the meaning of the words used.

Qabil: the offeree party in the contract.

Qabul al-Muqaddam: the possibility of a factual reversal of preset chronological order of offer and acceptance becomes, as a result, logic-juridical polemic giving rise to extensive arguments on the permissibility or otherwise of an offer subsequent and an acceptance precedent.

Ra'y: an opinion based directly on transmission of knowledge, "it does not mean 'interpretation by mere opinion', but deriving an opinion through ijtihâd based on sound sources".20

Rahan: "an act whereby a valuable asset is used made as collateral for a debt. The collateral will be utilised to settle the debt when a debtor is in default."21

Riba: "literally means increase or condition and refers to the 'Premium' that must be paid by the borrower to the lender along with the principle amount as a condition for the loan or an extension in its maturity."22

Rida: a freedom from external pressure, deceit or other adverse influence, in order to conclude a valid and binding contract.

19 http://muhammad.net/quran/ulumulQuran/007.htm

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**Rida al-Mu'amali**: transactional consent; for example: a person under distress may have to sell a thing at a price much lower than its real value, and may not be content with his bargain, yet he is held to have a 'transactional consent'.

**Ruby**: rose-red.

**Sunnah**: "after the Qur'an, the Sunnah is the most important source of the Islamic faith and refers essentially to the Prophet's example as indicated by his practice of the faith. The only way to know the Sunnah is through the collection of ahadith."\(^{23}\)

**Sunni**: refers to one of the four Islamic Sunni schools.

**Shari'ah**: the divine law known from the Qur'an and Sunnah.

**Shurut al-Fasida**: invalid conditions in the contract such "as when the vendor stipulates that the buyer must not sell or hire the sold object".\(^{24}\)

**Shartan fi Bay**: two conditions in an one sale contract such as when the seller sells goods to the buyer for ten dollars in cash and for fifteen dollars on credit, where it may be presumed that the seller made two conditions.

**Shurut**: (1) stipulations; (2) genre of legal formularies.

**Seaghat al-Aqd**: the form of the contract.

**Shakliyyah**: formalism in the legal relations.

**Sahih**: valid.

**Salam**: lit., advance, loan; purchase of item known by specification or description for delivery at a later specified time, with payment of price in full at time of contract.

**Sabab**: cause

**Shirakah**: "partnership between two or more person whereby unlike mudarabah, all of them have a share in finance as well as entrepreneurship and management, though not necessarily equally."\(^{25}\)

**Sulh**: reconciliation or settlement of a dispute.

**Taqarun al-Qasdayn**: concurrence of intention in legal relations.

**Tadlees or Gharar**: lit., peril, risk, hazard, uncertainty.

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\(^{23}\) [Link](http://www3.pids.gov.ph/ris/dps/pidsdps0507.pdf)


\(^{25}\) [Link](http://www.iiibf.org/elibrary/muchapra/A1%20Towards%20Monetary%20System.pdf)
Uqud: aqd; lit., knot, tie; obligation, compact; the conclusion or ratification of a compact or oath; in fiqh, juridical act; more narrowly, legal relationship created by offer and acceptance.

Urf: "The term urf, meaning "to know", refers to the customs and practices of a given society."26

Usul al-Aqliyyah: 'rational principles', it covers detailed rules of interpretation, partly based on linguistic and literal considerations and partly influenced by Aristotelian system of logic. These rules have been developed mainly to resolve problems of approach to the first two primary sources of the Islamic law, the Qur'an and the Sunnah, and the relation within and between their respective precepts.

Uyub al-Rida: the defect in consent, comprising mistake, duress, fraud between the parties in the formation of contracts.

Wasf: the act of describing, portraying, characterizing.

Yagut: corundum.

INTRODUCTION

Islamic law today is the product of almost fourteen centuries of continuous development commencing early in the seventh century AD. The understanding of the general term 'law' used in English is only a small part of a much wider concept in the Islamic teachings – Shari'ah. The term Shari'ah is relatively comprehensive and has a much wider scope which cannot be conveyed by the use of a single word in English. The nearest equivalent to 'Shari'ah' may be 'religion': Shari'ah could be considered as the prescriptive side of religion. Shari'ah not only covers various aspects of human life in this world but also provides guidance for the life hereafter. It therefore provides reasoning for particular human behaviour and expectations of human beings from following a particular way of life. It consists of teachings from the Islamic Holy Book and Hadith regarding preferred culture, principles of religion and ethics, a code of law and other disciplines of life which are considered an integral part of human life helping humans to develop their beliefs, intelligence and perform different acts of life which help them in building a relationship with God and other human beings.

In the last two decades, the internet and e-technology have contributed tremendously to changing the ways in which communications are taking place and have really turned the face of world around. Distances have become meaningless and unlimited information is easily and freely available on the net. The use of information technology has not been limited to certain countries but it has been spread without boundaries. In the Islamic world the technology had been till recently used mainly for the purpose of spreading Islamic education, defending criticism of the religion and other religious purposes. In addition to these there has been limited application of technology for commercial and entertainment purposes.

2 Ibid.
3 Ibid.
4 Ibid 2.
5 Ibid 2.
7 Ibid.
8 Ibid.
The Qur'an is considered to be the most revered of books in Islam and is frequently regarded as the Holy Book. It serves to guide Muslims in all walks of life and in all ages. The use of analogy allows the book to be more than productive and far more than adequately adaptable for all modern innovations. Since modern day knowledge has become increasingly integrated with innovations in Information Technology, it comes as no surprise that the Qur'an advises its followers to pursue knowledge regardless of the hurdles that come forth.

The very first verses of the Qur'an called the follower to read in the name of his Lord and Cherisher and to acknowledge his Lord’s uniqueness by acknowledging the fact that He is the supreme creator and He created all mankind from nothing more than a congealed clot of blood.

As information technology represents a shift to new areas of knowledge, by implication, it is an area that is important for Muslims to learn about, and explore its potential for good purposes.

The Qur'an encourages its followers to engage actively in work that is productive to them. In this regard, the Qur'an makes frequent reference to elements such as business and other commercial activities as well as direct references to trade at numerous occasions. According to the Qur'an, engaging in productive activities should be perceived as a duty and no doubt remains when the Prophet Mohammad’s (P.B.U.H) saying is considered in which he has clearly stated that a person seeking knowledge is a person who God will lead to heaven and in order to do so, he shall make sure that there are angels by the individual’s side to guide him.

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10 Ibid.
11 Ibid.
12 The Qur’an: Surat al-‘Alaq, verse 1-2
14 Ibid.
15 Sulayman Abi Dawud, Sunan Abu Dawud (d. 275/889) No 3157.
In another instance, the Prophet also stated that "He who seeks knowledge would be rewarded twice if he accomplished its objectives, and would be rewarded once if he did not succeed."\(^{16}\)

We can infer from these and numerous other verses in the Qur'an and the Sunnah of the Prophet Mohammad (P.b.u.h) that there is an extremely high degree of importance given to the pursuit of knowledge in Islam and that no part of Shari'ah denounces the pursuit of knowledge in any way.\(^{17}\) It is essential to note that this understanding does not exclude the use of technological innovation as a means to facilitate the process of the pursuit of knowledge since the Shari'ah has not distinguished between any specific means or technologies that can be used.\(^{18}\) Hence, by doing so, the Shari'ah accepts the use of all forms of technology, including those that are generally brought into use in the case of e-commerce transactions. Hence, if this particular perspective was considered to be empirical, the Shari'ah approves the use of technology that is generally brought into use during e-commerce transactions.\(^{19}\)

However, the development of information technology has caused one of the most significant revolutions in our lives in the form of a close-knit society based on the internet.\(^{20}\) This has had a direct effect on the methods by which business is conducted in everyday life and the way in which elements such as competition commerce and businesses in general are perceived.\(^{21}\) The global presence of the Internet serves to stimulate buying and selling through the E-Commerce platform. E-Commerce here is the process through which electronic buying and selling is carried out through multilateral use of networking, digital technology and the internet.\(^{22}\)

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\(^{18}\) Ibid.

\(^{19}\) Ibid.


\(^{21}\) Ibid.

However, even though e-commerce has taken on the form of a global phenomenon, it is still one that many Muslims do not make use of in light of a lack of information on the Islamic perspective on transactions made through e-commerce. 23

Since little has been done to regulate this phenomenon according to the Islamic legal system, the main aim of the thesis is to establish that the general principles for ordinary sale contracts in Islamic law are appropriate to govern the formation of electronic sale contracts. The second aim is to provide a resource for all readers, researchers, interested individuals and organizations doing business by e-commerce contracts under Islamic law, whether they approach it from a business, information technology or legal background.

Issues of the legality of the formation of e-sale contracts in Islamic law shall be considered in an attempt to reflect on the benefits that e-commerce holds for Muslims across the globe and to elaborate on the legality of the use of e-commerce under Islamic principles. Regarding transactions via e-sale contract, the issues of offer and acceptance through the internet will be studied to clear Muslim doubts as to the Islamic law's approach to the valid formation of the e-sale contract. Many seminars and conferences have been held and many books have been written about e-commerce, but only a few have been devoted to the formation of e-sale contracts from the Islamic perspective. The challenge of this thesis is to fill this gap. It will elaborate on the e-sale contract in light of Islamic perspectives and the potential hurdles that can come forth in the development of the same.

It is beyond the scope of this thesis to examine all kinds of contract recognised in the Islamic law. The centre of attention in the case of this thesis shall be the sale contract. The part of the thesis constituting the legal framework shall relate to the laws of the sale contract as the contract par excellence in Islamic law. The fundamental principles of the sale contract can be used as a model for all other contracts in Islamic law. In Islamic law, this contract is one upon which other contracts rely. Moreover, the sale contract is dealt much more extensively in fiqh (science of the Shari‘ah) writing than

23 Ibid.
other contracts, which are presumed to be regulated by analogy to it where appropriate.

The thesis will examine and analyze the relevant literature and legislation. It will argue that the following legal issues may arise when forming sale contracts in an electronic environment under the general principles of ordinary sale contracts in Islamic law:

- Has a valid offer and acceptance been formed in the e-sale contract?
- With whom has the e-sale contract been formed (legal capacity)?
- When and where was the e-sale contract formed?
- Are there legal uncertainties when determining the precise point in time that an e-sale contract has been formed?
- If an offer to enter into an e-sale contract specifically requires acceptance to be communicated in a certain form, whether an electronic communication of acceptance will be effective to form an enforceable contract?
- How can we identify the object and consideration in the e-sale contract?

Each of these issues will be discussed in the thesis relying on the general principles governing the formation and validity of the ordinary sale contract in Islamic law.

As such, the thesis presents an aspect of the ongoing research by Muslim scholars from around the world aiming to analyze the status of e-commerce in Islamic perspective. However, our thesis will be limited to and rely on *Fiqh* cases from the jurists in the four major *Sunni* Islamic schools (the Hanafi, the Maliki, the Shafi‘i, and the Hanbali). These schools have greater common features between themselves, which frequently makes it easier and more correct to write our thesis, by way of generalization, on these schools.

The thesis will start in chapter 1 by familiarising readers with the background of Islamic law principles. The thesis shall begin with a discussion of Islamic law and shall proceed from this foundation onwards. This foundation is meant to serve as an outline, highlighting the specific relevance of this research, and therefore it should not be considered to be anything along the lines of an extensive delving into Islamic Law. We will describe the main contract principles under Islamic law, to clarify the scope
of this thesis. We will note the important basic features of the Islamic law regarding contracts, highlighting the way they facilitate the sale contract.

In chapter 2, the thesis discusses the validity of the e-sale contract from the Islamic point of view. At this stage, the initiation of the e-sale contract between the parties begins through a check of the binding pillars of the contract. Offer and acceptance are the most commonly found constituting pillars in this regard along with the two contracting parties and the exact mode of expression. The most important point that we will discuss at that initial stage is that these pillars in the e-sale contract must meet the Islamic requirements. Moreover, in this chapter, we will analyse the different kinds of contracts that can be classified as Islamic commercial contracts. These include those that relate to ordered sale (bay’ al-Salam), manufacturing sale (bay’ al-Istisna) as well as Deferred Sale (bay’ Muajjal).

Chapter 3 will cover basic notions relating to the formation of e-sale contract under Islamic law, and is divided into four sections. The first section deals with basic features of psychological elements. The second section will treat the exteriorization of psychological elements, making reference to subjective and objective, or consensualistic and formalistic, approaches in the Islamic law. The third section will review various means of expression, being word of mouth, writing, sign and conduct, and silence. The fourth section will examine the efficacy of these means of expression in the internet environment under Islamic law.

Chapters 4 and 5 will be the common analysis of an agreement in terms of offer and acceptance or, conversely, the treatment of offer and acceptance as the commonest mechanism for reaching an agreement. This entails a separate examination of various aspects of the mechanics of offer and acceptance in the formation of the e-sale contract, including their correspondence, and the nexus between the mechanism and the related agreement under the principle of Islamic law. Our discussion in these chapters first deals with offer, and second with acceptance (including its correspondence with the offer) and the import, or contents, of an e-sale contract comprising its terms and conditions and interpretation.

Finally, chapter 6 will be the conclusion of the thesis and its implications.
CHAPTER 1 – AN INTRODUCTION TO THE STUDY OF THE E-SALE CONTRACT UNDER ISLAMIC LAW

Islamic law (Shari'ah) is considered by Muslims to be the expression of the will of God, representing his final law governing men’s behaviour in this life and the hereafter. It is also regarded by some as an eternally valid and immutable standard of law. This is revealed in classical Islamic legal theory, which declares that no man has the right to interfere with Shari'ah or to change its rules. "It is comprehensive, universal, eternal, and not susceptible to change; its contents are set out in the authoritative codices of the orthodox schools."24 Changes, therefore, can only be effected by the word of God through his revelation, to which men have had no access since the death of the Prophet Mohammed. Moreover, since God alone is the lawgiver, and the right of law-creation is possessed by him alone, it follows that man does not have the right to create law. Man’s involvement is thus confined solely to the application of Shari’ah.

However, some modern Muslim scholars have defined Shari’ah in an alternate way. They believe that this approach is no longer sufficient, and have thus resorted to a number of different methods to overcome this predicament. For example, Maududi distinguishes between the part of the Shari'ah which has a "permanent and unalterable character and is, as such, extremely beneficial for mankind, and that part which is flexible and has thus the potentialities of meeting the ever-increasing requirements of every time and age."25 Another well known example is the opinion of Fazlur Rahman, who, although he defines the Shari’ah to include "all behaviour – spiritual, mental and physical"26, also recognizes that the legislative provisions of the Qur’an have to take into account the attitudes and beliefs of the then existing society27. This view, therefore, entails the acceptance by scholars that people do have the right to enact change to legislation, as long as it falls into the broad parameters of Islamic understanding.

24 Patrick Bannerman, Islam in Perspective (1988) 53
Scholars of this new understanding of Shari'ah believe that law-creation, which is the right of God alone, should not be confused with the comprehension and discovery of God's law. Therefore, they do not doubt that Shari'ah should develop and evolve continuously with the advancement of human beings' thought and civilization. They believe that it is a gross mistake to assume that Shari'ah of the seventh century is still suitable, in all its details, for application in the twenty-first century. The perfection of Shari'ah lies in the fact that it is a living body, growing and developing along with the continuous progression of human beings, guiding their steps and directing their way towards God, stage by stage. Human life will continue on its way back to God inevitably.

Thus, in order to help the Shari'ah adapt to changes in human society, Muslim jurists devised Usul al-Fiqh. By doing so, the difference between the changeable and the constant and the reason for the classification of the same is exposed along with any new debate that has to be subject to the Qur'an test which will be explained later in the chapter. In the event that a clear and undoubted approval from the Qur'an is acquired, the change is integrated into Muslim society. Otherwise, it is tested according to the Sunnah of the Prophet Mohammed (P.b.u.h). If there is not a clear sign of approval in the Sunnah, then the approval will then lie on the shoulders of other Islamic sources.

This chapter will therefore be divided into five parts, the first dealing with the classical structure of Islamic law, the second with the progressive concept of Shari'ah and Fiqh, including a study of Islamic jurisprudence, its methods of interpretation, the authority of the jurisprudential rules and the development of such jurisprudence. The third part of this chapter will examine the modernisation and possible future of Shari'ah. The future of Islamic law is discussed here, in light of its present authority and the 'heated' debates that occur in the contemporary Muslim world. The fourth part addresses the Islamic perspective of e-commerce, taking into account its legality,

29 Ibid.
30 Ibid.
31 Ibid.
Islamic business ethics and e-commerce sale contracts. The fifth part deals with the general principles that apply to sale contracts.

1.1 The Classical Structure of Islamic law

The structure of Islamic law is rooted in the Qur’an and the teachings of Prophet Mohammed and the interpretations of these sources of revelation by his followers. Islamic law serves as a provider of the right Shari’ah and governs the relations between mankind and Allah. It would therefore be reasonable to consider it to be nothing less than divine law established by Allah and communicated through the Qur’an. Therefore, the sources are put at four: the Qur’an and the Sunnah, which are primary, and the Consensus (Ijma) (sources in common between Sunni and Shi’ah schools) and reasoning by analogy (Qiyas) for Sunni or ‘Reason’ for the Shi’ah, which are secondary. There are other sources of lesser importance which will govern the sale contract in the absence of any rule in the primary and secondary sources such as custom (urf), necessity (darura), and judicial contribution.

Since Islamic law is our main subject, a look at some of its general characteristics would show how it compares in this regard with other legal systems such as Common law and Roman law. The first point which deserves to be emphasized in my thesis is that Islamic law comprises two main divisions based on the relations between men and between humans and Allah. The first, the acts of worship (Ibadat), deals with purely religious matters (these include recitation of the ‘shahadah’, Prayers ‘salah’, Fasts ‘sawm’, Charities ‘zakat’, Pilgrimage to Mecca ‘hajj’), and the second, the transactions (al-mu’amalat), deals with all those subjects which comprise the only content of other legal systems, which include judicial matters, warfare, peace, food and drink, punishments, penal, inheritance, marriage, divorce and financial transactions.

33 Ibid.
1.1.1 Primary Sources

The Qur'an and the Sunnah are considered to be primary sources in Islamic law. In light of the fact that their rules are written down, they are also generically referred to as verses (Nusus) which may be translated as Script or Text, forming the written authority.  

a) The Qur'an

The Qur'an is the Holy Script of the Muslims and is therefore regarded as the most significant source of Islamic law. It is composed of 114 chapters; each chapter is divided into different verses and sheds light on numerous subjects. It is however

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imperative to note that the Qur'an does not address all the various legal prescriptions. Approximately 80 of the 6000 verses that constitute the Quran pertain to law.38 The arrangement of the Qur'an in its present chapters and verses was made under the Third Caliph, Uthman.

The Qur'an contains, among such matters as historical narrations, fables, ritual observances, and what pertained to the Prophet’s life, specific principles that can be generalized along with numerous elaborative discussions on legal matters.39 These are scattered through various chapters and are far from being comprehensive. Some earlier verses were abrogated by later ones, while some others are in apparent contradiction with each other. All verses, however, have been retained and form part of the whole body. Broadly speaking, earlier verses handed down in Mecca, thus known as the Mecci verses, are more general in import, tolerant in spirit, and of an ethical nature.40 Those revealed later in Madinah, thus known as the Madani verses, are more detailed, and make up the majority of the legalistic rules, imposing specific commandments and abrogating certain (Mecci) precepts.41

In the early period of Islam, the Qur'an as the Word of God was not open to comment.42 As time went by, as an outcome of the opposing views of different dogmatic segments across Islamic history, many commentaries, both Sunni and Shi'ah, have been produced which greatly help its understanding; but no matter how scholarly some may be, none is considered a binding authority.43

b) The Sunnah (Tradition)
While the Prophet (P.b.u.h) was living, he would answer the queries of his followers, adjudicate their disputes, and pronounce rulings which were considered, next to the

38 Ibid.
40 Agus Moh. Najib, ‘Reinterpreting the Concept of Shari’ah and its Implication on Gender Issues’ (2008) 42 (1) Journal al-Shari’ah 7-9
41 Ibid 8.
43 Ibid.
The commandments of the Qur'an, rules of law.\textsuperscript{44} The Sunnah is the practice, conduct and tradition of the Prophet Mohammed.\textsuperscript{45} In the beginning, following his death, litigation would be dealt through reference to Qur'anic verses; in the event that none was found to provide a solution, the Sunnah was brought into use. The Sunnah constituted the tradition, speeches, and actions of the Prophet Mohammed (P.b.u.h).\textsuperscript{46} The Sunnah, therefore, adds to, illuminates, and elaborates the provisions of the Qur'an.\textsuperscript{47} However, it is significant to realize that even though the modus operandi of verification of authenticity and recording of Sunnah was undertaken by a large number of Muslim scholars of the second century of Islam, only the compilations of six scholars have come to be accepted by the majority of Muslims as containing sound of genuine Sunnah.\textsuperscript{48}

Thus, since then, the Sunnah has become a definite source of Islamic law. However, the Sunnah is still considered a supplementing source to and cannot be considered to supersede the Qur'an.\textsuperscript{49} In the event of such a contradiction, it is implied that the alleged Sunnah is weak or false.

However, based on the definition of Sunnah, it is important to highlight the reasons why the Sunnah is dynamic and therefore adaptable in a form such that it can handle present day problems and issues coming forth as a result of the increasing intricacy of life.\textsuperscript{50} In a modern day community, a moral tension exists in the form of a range of legal as well as administrative problems.\textsuperscript{51} The theological and moral dimensions of expanding Islamic society have given way to numerous controversies.\textsuperscript{52} Even though new material was considered and incorporated, the concept of the ideal Sunnah was

\textsuperscript{46}Ibid.
\textsuperscript{47}Ibid.
\textsuperscript{50}Ibid 18.
\textsuperscript{51}Ibid.
\textsuperscript{52}Ibid.
kept intact. This particular process of interpretation began with the comrades of the Prophet explicitly as well as tactically resulting in the deducing of numerous norms with practical applications in modern day society while keeping the rules of the Qur'an.53

1.1.2 Secondary Sources

The reason behind Shari'ah as a system that is both religious and legal makes it clear that it is to be inferred firstly from the Qur'an; second from the Sunnah.54 In case the primary sources (the Qur'an and Sunnah) are silent on the issue, then the consensus (Ijma) and reasoning by analogy (Qiyas) will follow as a source of Shari'ah according to the four Sunni schools.55

a) Consensus (Ijma)

In the event that the Sunnah does not provide the required level of clarity in guidance with regard to the issue in question, the third source for Islamic Law is present in the form of Ijma.56 It is agreement among Islamic scholars of a particular era regarding the rule of law that is most appropriate to the issue.57 It is imperative to note that the Ijma is an inference derived from independent legal reasoning on areas where the Ijma has to be resorted to.58 It is only permitted in areas where the Qur'an and the Sunnah provide no definitive instructions.59 The jurists represent the Muslim community in this regard and seek to reach agreements on issues.60 Once an agreement is reached, the resolution of the issue becomes integrated into Islamic jurisprudence.61 The Ijma comes into action only in cases where there is no directly or indirectly applicable testament in the Qur'an and the Sunnah but it is important to note that it should not under any condition contradict them.62

53 Ibid.
57 Ibid 6.
58 Ibid.
59 Ibid.
60 Ibid.
61 Ibid
62 Ibid.
*Ijma* was found in its most profound form in the beginnings of Islamic law during times when the community used to be of a form such that it would be fairly small and very few eminent jurists existed. This allowed the views of all the jurists to be ascertained.

**b) Reasoning by Analogy (Qiyas)**

In the event that the *Ijma* also does not serve as an adequate Muslim judge, the *Qiyas* is referred to. It is only resorted to in the case when no legal authority on an issue exists and in this case, the ruling of the *Qiyas* is generally based on an accepted principle and is considered to be “from the explicitly known to the explicitly unknown” would fit such a particular rule in relation to an issue at hand.

Principles of reason, effectively used for practical purposes as logical devices for the inference of detailed rules out of primary sources and the *Qiyas*, which are placed last in the formal hierarchy of conventional sources, have in fact made a contribution, at least in all Islamic schools, no less impressive than the other sources. Muslim jurists’ views and opinions expressed and employed in numerous expositions and commentaries under each school or trend have also contributed to contracts in Islamic law.

**1.1.3 Other Informal Sources**

The other sources of Islamic law consist of (a) custom, which has through the ages influenced the development of the detailed rules of Islamic law; (b) compendia, commentaries and religious rulings which, according to all Islamic schools, have shaped, supplemented or influenced the respective law; and (c) reconsidered thoughts and writings from Muslim scholars in the late nineteenth century onwards, which put a fresh interpretation on the age-old rules of Islamic law to bring them into line with

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64 Ibid.
modern needs, and subsequent legislative formulation in certain areas of Islamic law in the respective Muslim countries.67

1.2 Progressive Concept of *Shari‘ah* and *Fiqh*

A part of *Shari‘ah* more concerned with the actual behaviour of man in this world is termed *Fiqh* which consists of detailed rules and is closer than *Shari‘ah* to the concept of law, though often the two terms are used as synonyms.68 *Fiqh*, in spite of having a narrower ambit than *Shari‘ah*, covers a much broader area than law by including such rules as those on purely religious observance.69 A substantial part of *Fiqh*, however, correlates to the present-day notion of law.70

For convenience, *Shari‘ah* or *Fiqh* is often rendered in English by the term ‘law’ and sometimes by the term ‘jurisprudence’, though the latter is apt to generate confusion because of its particular use in English for a branch of jural study on the theoretical basis and philosophical aspects of the law.

*Faqih* (sing: *Fuqaha*) is a scholar who is versed in *Fiqh* and, being religious, is required to be pious and observant. He is a religious jurist, sometimes referred to in the Western literature as a ‘jurisconsult’. In the following research, we shall generally employ ‘law’ for *Fiqh*, which itself is a part of *Shari‘ah* and not infrequently equated with it, and shall utilize ‘religious jurist’, or simply ‘jurist’, for a *Fuqaha*.

Another clarification to be made concerns the concepts of ‘school’. Islamic law is not a uniform or unitary system. It consists of subsystems according to various schools. A ‘school’ refers to a particular Islamic faith and the related subsystem of law, each a system in itself, and not to a trend of jurisprudential doctrine or thought.71

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69 Ibid.
70 Ibid 6.
71 The Sunni- Shi‘ah schism originates in the question of succession to the Prophet Mohammed, upon his death in the Islamic Hijrah year 11/AD 632. *Sunni* believers maintain that the first four Rightly-Guided Caliphs (Abu Bakr, Umar, Uthman and Ali) each successively elected by an elite council, were the rightful successors to the Prophet, while *Shi‘ah* believers hold that only Ali among them was the rightful successor, not as the Fourth Caliph but as the first Imam. Further, *Shi‘ahs* believe that the leadership of the community of believers devolved, upon Ali’s death in 40/661, successively on Ali’s two sons born out of his marriage to Fatimah, the daughter of the Prophet. Thereafter it continued on
There are five major Islamic schools today of which four are Sunni and the fifth is the Shi'ah, itself divided into several branches of which the most important is the Twelve (Ithna Ashari).\footnote{Means the Twelver Imami Shi'ah school of thought which comprises the overwhelming majority of Shi'ah today.} Depending on the level of comparison, these schools present differences which distinguish them from each other and similarities which bring them together. There are notable differences in methodology and detailed rules between these schools. Our reference to the particularity of Sunni law in this research is exclusively to the four Sunni schools, Hanafi, Maliki, Shafi’i and Hanbali.

It may, therefore, be said, as a first categorization, that there are Sunni schools and Shi'ah schools, albeit that each are divided into individual branches. In a broader context, all the schools, whether Sunni or Shi'ah, have a common core in history, sources, classification, methodology, and so on, which makes it possible (notwithstanding variations and disunity in details) to treat Islamic law as a comprehensive system on its own, distilled from the general features of its various schools and branches.

All the four Sunni schools developed from the beginning of the second/eighth century. They were founded by, and respectively named after, pious and learned men, each referred to as ‘Imam’. These schools are the Hanafi, founded by Imam Nu’man Abu Hanifh (d.150/767); the Maliki, founded by Imam Malik ibn Anas (d. 180/796); the Shafi’i, founded by Imam Mohammed ibn Adris al-Shafi’i (d. 204/820); and, the Hanbali, founded by Imam Ahmad bin Mohammed bin Hanbal (d. 240/855).\footnote{Mirghasem Jafarzadeh, \textit{Buyer's Right to Specific Performance} (1997) 18-22.} Each, particularly the Hanafi school, was subsequently further developed by the respective disciples of the founding Imams who were themselves eminent jurists in their own right.\footnote{Mohammed Ibn Abd al-Hadi, \textit{Managib al-I‘imah al-Arbi’ah} (unknown year) 7.}

The Traditionalist and the Rationalist schools of thought are two schools that have emerged as a result of the evolution of Islamic law through these two approaches.\footnote{Mirghasem Jafarzadeh, \textit{Buyer's Right to Specific Performance} (1997) 5.}

These are associated with their respective differing views on the law sources.\textsuperscript{76} However, considering Qur'an as the empirical source, the former group tends to restrict itself to Traditions (Sunnah), the words and deeds narrated from the Prophet Mohammed (P.b.u.h) as a source of the law, while the latter group supplement these sources with certain Rational Principles (Aqli).\textsuperscript{77} The paragraphs to follow shall shed more light on the subject of the sources of these elements.

Of the four Sunni schools, the first two (Hanafi and Maliki) developed almost concurrently, and the third came about just after the first two and partly overlapped in time with the fourth. The Hanafi School, adopting a Rationalist approach, allowed the greatest latitude for 'free reasoning' (ra'y), while the Maliki School was Traditionalist.\textsuperscript{78} The Shafi'i school was eclectic, trying to reconcile the first two, for which reason its founder was accused of being a Traditionalist by the Rationalists and of being a Rationalist by the Traditionalists.\textsuperscript{79} He was in fact both, but predominantly a Rationalist. He placed greater stress on Traditions than did the Hanafi but organized, for the first time, a set of Rational Principles (Usul al-Aqli'ah) for the inference of detailed rules out of primary sources which brought order to, and restrictions on, the application of reason.\textsuperscript{80} These principles were in due course further refined and developed into a separate Islamic methodological discipline called the Science of Principles, or Roots, of the law (Ilm Usul al-Fiqh). The Hanbali School instituted a vigorous reversion to Traditionalism which was much later revived with a puritan austerity by the Wahhabi movement in the twelfth/eighteenth century, originated in Arabia by Mohammed ibn Abd al-Wahhab.\textsuperscript{81} Since the establishment of Saudi Arabia in 1926, the Hanbali faith has been revived and has been made the official school of Saudi Arabia.

The respective context of the development of these schools, together with their pairing off according to the said two tendencies, is significant. The Maliki and Hanbali, both Traditionalists in approach though different in degree, developed in Madinah, the city

\begin{footnotes}
\item[76] Ibid.
\item[77] Ibid 22.
\item[79] http://philtar.ucsm.ac.uk/encyclopedia/islam/sunni/shaf.html
\item[80] Mohammed Ibn Abd al-Hadi, \textit{Managib al-I'imah al-Arbi'ah} (unknown year) 11.
\end{footnotes}
of the Prophet Mohammed (P.b.u.h) which is located in Saudi Arabia, which after his death gradually lost its economic and political importance. Both schools, and their conservative approach, are therefore referred to as Madani, ‘of Madinah’. The Hanafi and Shafi‘i developed in Iraq (the latter also partly in Egypt) which became at the time the economic and political centre of the Muslim world.82

When the formation of these four schools was completed in the second half of the third/ninth century, a conviction gradually grew and was formulated in a maxim which held that the ‘gate of Ijtihad (independent juristic reasoning for inference of detailed rules out of primary sources) is closed’ and the subsequent generations had to follow the respective teachings of the early masters of the four schools.83 This caused a millennium of virtual stagnation of Sunni law till the latter part of the nineteenth century. Generations of jurists, of course, kept working within each school, but mainly elaborating on the works of the respective masters and with little original contribution.84

Western writers such Gibb and Schacht have attributed this supposed abandonment of Ijtihad to the mood of uncertainty in the Muslim community brought about by the Tartar invasions and the sacking of Baghdad by the Mongols in 1258.85 This, they say, made the Muslim scholars more inclined towards conservatism and less willing to accept innovation in religious thought.86 This view locked the Shari‘ah into a fixed and inflexible mould and prevented it adapting to modern times, contributing to its decline.

The idea persists today, in some quarters, that there must be no variation from the interpretations of Shari‘ah laid down before the 11th century, and that this is the only “correct” version of Shari‘ah. There is still considerable resistance to new ideas. The leaders of some conservative Islamic movements appear to want to return their societies to an imagined past “golden Age” of Islam where life was lived according to the example of the Prophet’s time. Interestingly, proponents of this view are usually

82 Mohammed Ibn Abd al-Hadi, Managib al-I‘imah al-Arbi‘ah (unknown year) 11.
83 Ibid 13.
84 Ibid.
85 Joseph Schacht, an Introduction to Islamic Law (1964) 70.
very happy to reimpose medieval restrictions on women, and ban cinemas and satellite dishes, but they see no contradiction in riding around in jeeps rather than riding camels, or using rocket launchers and grenades to fight their wars, rather than the swords and bows and arrows the prophet’s companions used.

During the period of Western expansion between the 16th and 20th centuries, most Muslim countries came at some time under the commercial and political domination of one of the major European colonising powers. The British ruled India and Malaya and at various times exercised political mandates in the Middle East; the Dutch controlled Indonesia, and the French ruled North Africa, and also exercised a sphere of influence over countries in the Middle East after the fall of the Ottoman Empire.

In these countries the Shari’ah was replaced with European-style legal systems, except for areas of law such as family law and inheritance which were of little significance to the colonial powers. Even in countries which were not directly colonised by European powers, such as the Ottoman Empire, there was a tendency to “modernise” by adopting Western legal systems. By the middle of the 20th century most Muslim countries had a “mixed” legal system, with Turkey - where Kemal Ataturk had completely abandoned the Shari’ah - at one extreme, and at the other extreme, only Saudi Arabia which retained an almost complete and traditional Shari’ah legal system.

The idea of “closure of the gate of Ijtihad” was never accepted by the Shi’ah schools, nor was it accepted by many influential Sunni Muslim thinkers, such as Ibn Taymiyah in the 14th century, Fazlur Rahman (d.1988), Mohammed Iqbal in Pakistan (d.1938), Hasan al-Bana (d.1949) and Mohammed Abduh in Egypt (d.1905), who maintained that despite the decline in the fortunes of Islamic civilisation, which continued under Western colonialism, Ijtihad was still possible and still continued to be exercised. They argue that the four Sunni schools never claimed infallibility or

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87 Joseph Schacht, *an Introduction to Islamic Law* (1964) 72.
88 Ibid.
89 Joseph Schacht, *an Introduction to Islamic Law* (1964) 72.
finality for their interpretations of the Shari‘ah and that it is a necessity and a duty for qualified Muslims to exercise Ijtihad in the present time. They hoped to develop a “new fiqh” that would modernize the laws within established parameters for the purposes of the emerging nation-state. Contemporary Muslim writers such as Abdullahi an-Na‘im also accept this view.92

Patrick Bannerman says that there are four main trends in modern Islamic thought.93 These are the:

1. Orthodox conservatives who adhere strictly to the doctrine of taqlid;
2. Quasi-orthodox conservatives, who hold views similar to the above but are forced to deal pragmatically with Western influences in their countries;
3. Modernising reformers, who seek to interpret the fundamentals of Islam in the light of existing and constantly changing circumstances; and
4. Conservative reformers, who hold that taqlid is wrong but set limits to the exercise of ijtihad.

1.3 Modernisation and the Future of Shari‘ah

As various Muslim countries attempted to modernise and “Westernise” their legal systems, it was clear that some of the traditional interpretations caused hardship and injustice – for example, the Hanafi rule prevalent in the Ottoman Empire and India that a woman could not obtain a divorce without her husband’s consent - and a solution in Shari‘ah had to be found to alleviate this kind of problem. Islamic modernists proposed three complementary methods of alleviating hardship through Takhayyur and Talfiq, re-interpreting the Shari‘ah text and the doctrine of Siyasa Shari‘ah.94

Takhayyur means making a choice from the variety of legal opinions offered by the eminent jurists of the past. It means that if a satisfactory solution to a problem can not be found within the opinions of the Islamic school predominant in a certain area, a

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solution may be adopted from the opinion of another Islamic school. Similar to this is the doctrine of Talfiq, which means combining part of the juristic opinion of one school with part of the opinion of another school or jurist in such a way as to establish a new legal rule.

Muslim scholars further demand the right to be free from the doctrine of taqlid, and to be allowed to exercise ijtihad to formulate new legal rules from a new interpretation of the Qur’an and Sunnah. This means going back to the sources and considering whether interpretations other than the traditional are possible. For example, the Quranic verses on polygamy have traditionally been interpreted to give a Muslim man the right to have up to four wives at the same time. Some modernists contend that the Qur’an in fact effectively prohibits polygamy through the requirement to be just and fair to each wife, and if this is not possible, then to marry only one. The verse on polygamy is followed by a later verse which says:

“You will never be able to be fair and just between women even if it is your ardent desire”

Since fairness and justice are impossible, a man must therefore restrict himself to one wife.

Not surprisingly, the differences in opinions have led to differing interpretations of the law. Let us take, as an example, the lawfulness or otherwise of music and art in Islam. In some Islamic countries, there is a firmly held view among many Muslims that music is forbidden (haram). The proponents of this view rely on certain texts and ahadith which forbid “vain talk” and which mention only certain pursuits such as archery and horse breaking as being suitable for a believer. Likewise, drawing, painting and sculpture are held to violate the Quranic ban on making images and so open the path to idolatry. The Taliban in Afghanistan and some extremist Muftis in Saudi Arabia, on coming to power in these countries, put their extreme version of this opinion into practice, banning not only music but television, destroying audio and

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96 Ibid.
97 The Qur’an: Surat al-Nisa, verse 3.
98 The Qur’an: Surat al-Nisa, verse 129.
99 For example, the Qur’an: Surat al-Qasas, verse 55.
video tapes and new technology, and forbidding photography which was deemed to be forbidden as the making of images contrary to God’s law.

Opponents of this view distinguish the text and reject the ahadith relied on by these people as doubtful, and hold that according to the Qur’an, what is not expressly forbidden is permissible. They rely on certain other ahadith in which the Prophet approved of the musical entertainment of the Ansar. Thus they allow singing accompanied by musical instruments so long as the lyrics are not un-Islamic and neither the performer nor the audience are tempted into sin by the music. Certain modern music with sexually suggestive or obscene lyrics would be outlawed under both views. Some hold that in art, only sculpture is forbidden. Some impose conditions on what is allowable in art as in music. Consequently, the emphasis of traditional Islamic art has been on calligraphy and geometric design, although human and animal figures have sometimes been used in secular setting.

In recent times, substantial political, economic and technological change has made urgent the need to find solutions in Islamic law to new problems and to re-assess some old rulings in the light of new knowledge.

Moreover, there are specialised areas where a religious scholar alone would not have sufficient technical knowledge to be in a position to give a proper opinion. In these cases there is a necessity for collective ijtihad, which may be obtained through the formation of councils of religious and secular scholars who are specialists in their chosen fields. Such councils have already been formed in many Muslim countries, and even in Europe, where a “European Council for Fatwa and Research” was formed with its headquarters in London in March 1997.

As an example of this new ijtihad, until recently the only choice of infertile couples was to reconcile themselves to childlessness or to adopt or foster someone else’s child. Nowadays, artificial insemination, donation of eggs and sperm are all new

100 The People of Madina (in Saudi Arabia)
102 Ibid.
medical possibilities to overcome infertility. Which of these, if any, are acceptable in Islamic law? There is no possibility of relying on the opinions of the classical scholars as they had certainly never heard of any such things, nor is there any mention in Qur'an or Sunnah. So the religious scholars needed to find new solutions through their own *ijtihad*.

Many of them agreed that the correct Islamic opinion was this: marriage is an essential foundation of an Islamic family. It is beneficial for a Muslim husband and wife to have children of their own, therefore there is no objection to using modern medical technology to that end. However, the means used must not violate Islamic tenets by using donated eggs or sperm: the husband's sperm is used, but not that of a donor. Surrogate motherhood is not allowed because it also requires the intervention of a person outside the marriage.

Another example of contemporary *ijtihad* can be found in the field of finance. Islam prohibits the giving and taking of interest, therefore Muslims should avoid taking loans from ordinary commercial banks or investing their money in them. Islamic banking has evolved as a means of overcoming the practical difficulty of obtaining finance in the modern world without becoming involved in interest-based transactions.

Among the many modernist-reformist voices that have proposed to bridge the gap between the Qur’an’s extrahistorical, transcendental value system of equal rights and its actual application in Muslim legal tradition riddled with discriminatory practices is the Sudanese jurist Abdullahi An-Na’im, disciple of Shaykh Mahmoud Mohammed Taha (d.1985), founder of the Sudanese Republican Brothers movement. Taha’s approach to the problem, as outlined in his book, had been to differentiate between the Qur’an early (Meccan) message (tolerant and egalitarian) and its later (Medinan) message (seen at least in part as an adaptation to the socioeconomic and political
situation of the Prophet’s Medinan community).\textsuperscript{108} An-Na’im has since developed his mentor’s general principles into a framework for the radical reform of Islamic law and legal institutions that invalidates the established historical institution of \textit{ijtihad} in favour of a new “evolutionary principle” of \textit{Quranic} interpretation; which reverses the historical process of \textit{Shari’ah} positive law formation (which was based on the \textit{Qur’an}’s Medinan verses) by elaborating a new \textit{Shari’ah} law (based on the Meccan revelations).\textsuperscript{109} This modernist approach, which reflects a sort of revival of the beliefs of the early Muslim jurists in the close relationship between law and culture in Islam, denies all normative powers to the \textit{Shari’ah} as presently formulated but maintains the essential validity of the concept.

The problem regarding the position and ongoing normative powers of the \textit{Shari’ah} in contemporary Islamic societies has continued to exacerbate polarization between secularist and traditionalist points of view. Secularists have argued that the \textit{Shari’ah} has lost its normative power and is no longer applicable. They have argued that the \textit{Shari’ah} laws relating to business and economy are outdated; other laws, such as those regarding slavery, are no longer valid, and the remainder “is largely contrary to international human rights and individual liberty laws.”\textsuperscript{110} In diametrically opposed fashion, Islamists are likewise focused on the normative power of the \textit{Shari’ah} (as presently constituted) by upholding it in essentialist terms. This means that when the law and social practices diverge, it is the law that is valid and social practice that must change in order to achieve conformity with it. The less society conforms to God’s law, the more urgent is the Islamists’ demand for change and purification. As exemplified by Sayyid Qutb (d. 1966), chief ideologue of the Muslim Brother in Nasser’s Egypt, Islamism has defined sovereignty largely within a framework of law and authority where the sovereignty of God is synonymous with the sovereignty of the \textit{Shari’ah} within an Islamic state.\textsuperscript{111} When Islamists, therefore, call for a “return of the \textit{Shari’ah}” they do not mean to bring back the traditionalist \textit{fiqh} (tainted by centuries of ulama-state accommodation), such as the Taliban regime has done in Afghanistan; rather, they envisage an alternative \textit{Shari’ah} based on the \textit{Qur’an} and, especially, the

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\textsuperscript{110} Mohammed Khalid Masud, \textit{Muslim Jurists’ Quest for the normative Basis of Shari’ah} (2001) 5.

\textsuperscript{111} Ibid.
\end{flushleft}
restoration of the Prophet’s Sunnah that prominently involves the building of a new state structure and new political institutions under Islamist leadership.\textsuperscript{112}

By contrast, when the traditionalists, especially now given a voice by conservative clergy and legal experts, call to restore the Shari’ah, their demand is generally for the restoration of Islamic fiqh to replace the legal norms and institutions that were created during the colonial period or by the post-colonialist nation-states. So far, only a few of the establishment’s religious scholars have used their professional credentials and legalistic expertise to develop innovative opinions within the legal methods of traditional fiqh. A prominent example is Yusuf al-Qaradawi,\textsuperscript{113} who arrived at new formulations of Muslim women’s social and political rights during the 1990s by way of the established fiqh: indigenous methods of law finding. In addition, the general public has to some degree begun to participate in the civilizational debate on the role and meaning of Islamic law in their modernizing societies. By way of the new media, especially the new electronic means of communication, non-specialist Muslim individuals, including women and the young, are beginning to create what may perhaps one day turn out to be a groundswell of scripture-based individual opinions on legal issues that they derive largely from a personal study of the Qur’an.\textsuperscript{114}

Is the Shari’ah as a legal system now defunct? While there is a clamor by Islamists in the Islamic world for the restitution of the Shari’ah and an affirmation of its efficacy and eternal validity, Wael Hallaq\textsuperscript{115}, in his opinion\textsuperscript{116}, argues that the Shari’ah is “no longer a tenable reality, that is has met its demise nearly a century ago, and that this sort of discourse is lodging itself in an irredeemable state of denial.” Although sympathetic to the desire of the Middle East to distinguish itself from the West, Hallaq is firm in his assertion that the concept of nationalism and the creation of modern nation-states have negated the possibility of living by any comprehensive system of Shari’ah. He supports his opinion by analysing the nature of reforms

\begin{footnotes}
\item[112] Ibid 6.
\item[114] Ibid.
\item[115] Wael Hallaq has been a professor of Islamic law at Institute of Islamic Studies, McGill University, since 1994. He has also held professorships at the University of Toronto and the State Institute of Islamic Studies in Jakarta, Indonesia.
\end{footnotes}
currently under way that he refers to as the “cobbling together” of interpretations of Shari’ah borrowed from various historical legal schools and other legal-theological traditions. Spurred on by international pressure to create a body of laws that will adhere to the conditions of a modern constitution, lawmakers in the various nation-states are now creating hastily constructed legal templates that will satisfy both international organizations and popular ideologies. The only way to achieve such a precarious balance is to adopt the most lenient laws offered by the various inherited legal traditions, laws that will receive the support of the population. The only sector of law maintaining any uniformity under these conditions, Hallaq argues, is personal status law. It may, however, be precisely the latter’s more Islamic uniformity, as opposed to the heterogeneity of the rest of state law, that will eventually serve to accentuate the larger legal system’s incoherence and thus contribute to strain “the intricate connection between the social fabric and the law as a system of conflict resolution and social control.” The root of the problem, according to Hallaq, is the modern state control of wa_f (the wealth amassed by centuries of private unalienable property contributions formerly administered by representatives of the clerical establishment), the loss of which has undermined the ability of Islamic schools of law, institutions, and officials to function independently of the political establishment and thus has destroyed their tradition of legal innovation and adjustment that informed the formulation and practice of Islamic law in the past.

We agree with the argument of Islamic modernists such as Fazlur Rahman, Abdullahi An-Na’im, Mohammed Iqbal and Abdullah Saeed117 that the interpretation of the ethico-legal content of the Qur’an and Sunnah needs to take social change into account in order to sustain the close relationship between the primary sources (Qur’an and Sunnah) and the Muslim today. The Qur’anic interpretation up to now, which has been to a large extent philological, needs to give way to a more sociological and anthropological exegesis in order to relate it to the contemporary needs of Muslim today. However, a search for acceptable methods in the modern period should not neglect the classical Islamic exegetical tradition entirely. On the contrary, we should benefit from the tradition and be guided by it where possible without necessarily being bound by all its detail. Contemporary scholars must be informed about the ways

in which the texts have been interpreted throughout history. That understanding can be helpful in our formulation of new interpretations in the light of new circumstances and challenges.

1.4 Challenges and Opportunities of Business and E-Commerce under Islamic law

Internet closes the distance in the physical world. With the existence of the internet the world is actually borderless. People can buy clothes, books, and electrical appliances through the internet and also can gather information and learn about other cultures and climates from the internet. With the development of the internet, it has not only become a way of communicating or information gathering but also of getting products sent to our home. Despite this era being referred to as the e-commerce era, seminars held to discuss the way forward have failed to put the Islamic view of e-commerce into consideration.118 With the challenge to fill this gap, the thesis will highlight the framework of Islamic E-commerce (E-sale contract) and the challenges that Muslims would be facing.

The world commerce industry, the way we communicate and do business has changed as a result of the impact of the internet. As we can see the changes are taking place rapidly in our daily life. We do not have to personally go to the hardware and supplies shops to buy materials required for building a house. What you have to do is to switch on your computer with an internet connection. While connected to the internet you are able to browse the online supermarkets and click on every single item that you want for the house construction in your virtual shopping cart. In a few days all the items ordered through the internet will be delivered to your doorstep. What you must have is a debit/credit card number and a postal address.

Islamic business can be described as an amalgamation of business organizations that function under the guidelines of the Shari’ah and do not engage in any of the following activities.119

1. Operations involving Riba or Interest as it is commonly referred to.

118 http://managementconference.com/Proposal/System/Presentations/P000687.
2. **Maisir** or operations involving Gambling.

3. Operations involving the manufacturing of non-**halal** products such as Pork or liquor.

4. Operations involving **Gharar** or elements of uncertainty such as those found in modern day insurance and banking.

Yusuf al-Qaradawi (a modern Muslim scholar from Egypt) said in his book, \(^{120}\) "Islam does not prohibit any trade except those which involve injustice cheating, exorbitant profits or the promotion of something which is **haram**".\(^{121}\)

The goal of Islamic business will be two fold: maximizing the profit margin while ensuring social welfare maximization.\(^{122}\)

Not only are trade activities the major economic activities at present, they are also the main economic activities of our ancestors. The traditional way of doing trade however is changing rapidly with the introduction of the internet. Physically, the internet is simply an unregulated network of computers mostly linked either by telephone lines or broadband connections.\(^ {123}\) It is different from our traditional way of doing business or trade. The internet development is so rapid, that no business, conventional or Islamic, could afford to be left out in order to be able to compete in the free market.

Therefore Islamic business must take part in the internet development to be at par with all other business. However, studies need to be conducted in the E-commerce area to adjust Islamic business needs in order to ensure that they are in line with **Shari'ah** guidelines.

There are three basic things that should be considered in Islamic e-commerce contract formation over the internet as well as the buyer, seller and the product. They are offer, acceptance and consideration. If all these things have been observed and implemented, e-commerce is permissible because the **Shari'ah** use **Ibahah**, which is a presumption


\(^{121}\) Ibid.


\(^{123}\) [http://www.in.gov/dfi/consumer/doing_business_online.htm](http://www.in.gov/dfi/consumer/doing_business_online.htm)
in Shari'ah that everything is permissible in the absence of specific Qur'anic injunctions.

The basic principle is that something which is not forbidden is deemed to be lawful based on the maxim "lawfulness is a recognized principle in all things." In other words, everything is presumed to be lawful, unless it is definitely prohibited by law.

Doing business according to the Islamic perspective is not difficult since it promote justice for sellers and buyers as long as it adheres to Islamic principles. However, avoiding riba or gharar seems almost impossible for Islamic businesses since almost every transaction will directly or indirectly involve the riba elements. These are the major challenges that Islamic businesses have to encounter. The other two prohibitions such as maisir and selling prohibited products are normally adhered to by Islamic businesses. Even though maisir and selling prohibited products are deviant for Islamic businesses, these two prohibitions should not be ignored completely. They should be managed by Islamic businesses in order to achieve the goals of profit maximization and welfare or success maximization.

Gharar and riba are the two prohibitions which are ignored by Muslim businesses due to our own ignorance. Riba is interest or any addition resulting from the lending process. It is predictable that riba are widespread in the business system in any company including Islamic businesses as the conventional financial system survives from it. This situation would encompass the problems that an Islamic business would be facing in avoiding the prohibition of riba in order to uphold equitable economic justice principles under Islamic law.

Riba is clearly prohibited from the Qur'anic perspective:

"Those who devour usury will not stand except as stand one whom the evil one by 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 (for ever)"\(^{124}\)

\(^{124}\) The Qur'an: Surat al-baqarah, verse 275.
The challenge for Islamic e-commerce in fighting *riba* would be choosing a payment and banking system which is *Shari'ah* compliant. This is important because the operational backbone of e-commerce is in its payment and banking system. In our present system, most of the domestic and international trades use conventional financial systems that are connected and related to *riba*.

So if Muslim entrepreneurs want to sell their products by e-commerce, they have to ensure that they do not become involved in *riba* transactions in their deposits, financing and payment system. To avoid *riba* at any cost, Muslim businesses must ensure that they utilize the Islamic banking or Islamic financial system. The products which are currently offered by the Islamic banks are competitive with a product range covering deposits, financing and other services.

Products such as *Mudarabah*\(^{125}\), *Musyarakah*\(^{126}\) and *Murabah*\(^{127}\) as we will explain further in the next chapter, are examples of the most common products of the Islamic banks. The support from the Islamic banker to Islamic commerce is inevitable and it is expected that Islamic bankers provide facilities which are on a par with the conventional system in term of its services, range of products and reliability.

Since the introduction of the Islamic banks, Muslims have the opportunity to avoid unscrupulous conventional financial system and use the *Shari'ah* compliant financial system. With this opportunity, the development of e-commerce must abide by the *Shari'ah* prohibition of interest and therefore the payment systems selected must also be *Shari'ah* compliant.

The next challenge is to avoid the *gharar* elements in buying and selling contracts. Numerous hadiths can be found on the subject of gharar and many of them refer to specific scenarios. A commonly cited hadith is that quoted by Imam Ahmad, Imam Muslim, al-Tirmidhi, Abu Dawud, Ibn Majah and al-Nasa'i, all of whom do so upon the authority of Abu Hurayra that:

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125 *Mudarabah* is a profit and loss sharing scheme.
126 *Musyarakah* is a partnership scheme.
127 *Murabah* is a mark up cost scheme.
"The Prophet (P.B.U.H) prohibited the gharar sale".

The Shari'ah established that in order to ensure fair dealings between parties to contracts, any case in which an uncertainty leads to an unjustified enrichment in contract is prohibited\textsuperscript{128} According to Kazi Mortuza Ali in his paper "Introduction to Islamic Insurance", gharar can be found in all the business dealings in which a party involved in the contract has no perception or idea about what the party shall receive upon the conclusion of the bargain.\textsuperscript{129} Yusuf al-Qaradawi defines gharar as an action in which something is sold with a clear element of uncertainty and can be expected to lead to the generation of conflict or an unjustified enrichment.\textsuperscript{130}

If gharar is to be avoided, the parties must ensure that (1) the price along with the subject of the sale are in existence and can be delivered, (2) the specific characteristics of the items and the counter value can be established, (3) fundamental attributes such as quality, quantity and delivery date are predetermined.\textsuperscript{131} If any of these prohibitions, riba and gharar, can be avoided along with other prohibitions, the Islamic business can achieve the two goals of profit and falah (success) maximization.

E-commerce does have a place in Islamic perspective; however, whenever it takes place, certain requirements of the Shari'ah should be complied with and adhered to. This is to ensure that the goals of the Islamic business, which are falah and profit maximization, could be achieved. By achieving these goals the Muslim can be successful in business and also in the days of hereafter. Falah maximization could be achieved by abiding by the Shari'ah and the four major prohibitions outlined are the prohibition of riba, maisir, gharar, and of selling prohibited products such as pork. On the other hand, profit maximization of the Islamic e-commerce could be achieved by differentiating products, fair price, quality and services offered to the customers through e-marking mix and networking. In adhering to Islamic principles, the Islamic business must have the products, full information or description about the products and the ability to deliver the products. As far as e-commerce is concerned, it is


\textsuperscript{131} http://islamic-finance.net/journals/journal2/art2.pdf
permissible in Islamic perspective as long as it abides by the Shari'ah guidelines. The Prophet (P.b.u.h), through his sayings and action, encouraged merchants to engage in honest trade so that they may be considered with Martyrs on the Day of Resurrection.\textsuperscript{132}

1.5 The Islamic Sale Contract

In the absence of a general theory of contract in Islamic law, the study of the e-sale contract should lead us first to begin with several observations and a deeper understanding about the traditional sale contract in general, and then consider the e-sale contract in particular. It is imperative to note that Qur'an and the Sunnah, in setting out Islamic law, present general rules pertaining to the law of contract which are unique when compared to the laws of individual contracts.\textsuperscript{133} In the Qur'an, there exist well over forty verses pertaining to a dozen forms of commercial contracts.\textsuperscript{134} Aside from the specific verse on performing contract, Qur'an 5:1, which enjoins believers to "keep faith contracts" (awfu bi al-uqud), and the three verses on the necessity of keeping a promise, a few other verses also shed light on advanced commercial contracts dealing with selling and hiring.\textsuperscript{135}

The Prophet Mohammed (P.b.u.h) himself was a merchant and engaged in commercial practice, however, he forbade some and permitted other activities in commercial practice.\textsuperscript{136} Most of these guidelines can be found in the Qur'an and can therefore be considered to be nothing less than Divine Commands that are to be applied at all times.\textsuperscript{137} Other guidelines can be found in the Sunnah as well as in authenticated references dating back to the actions and words of the Prophet.\textsuperscript{138}

However, the Muslim jurists from the four Islamic Sunni schools\textsuperscript{139} have devoted by far the greatest part of their scholarly writing to specific contracts such as the sale

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\textsuperscript{132} Reported by Ibn Majah and al-Hakim, who classified it as "sound".
\textsuperscript{134} Ibid.
\textsuperscript{135} Ibid.
\textsuperscript{137} Ibid.
\textsuperscript{138} Ibid.
\textsuperscript{139} The four Sunni Classical Islamic schools are Hanafi, Shafi'i, Maliki, and Hanbali.
contract. Businesses in the Islamic law are faced with the same set of financial challenges.

By confidence in the Qur'an and the traditions of Prophet Mohammed and all supplementary imperative alternates,\textsuperscript{140} the Islamic law will be wide enough to accommodate the needs of e-sale contract requirements, without however going against the general principles of Islam.

Prior to discussing the formation of the e-sale contract under Islamic law, it is essential to deal, in this chapter, with the general fundamental rules and principles governing the traditional sale contract. It is hoped that an exposition of these general principles and rules will assist in the clarification of the more detailed discussion on the formation of the e-sale contract under Islamic law which will follow later.

In Islamic law, there are various definitions of contract in general, and the sale contract in particular. The contract word in Arabic (Uqud) covers the entire field of obligations, including those that are social (like marriage), political, and commercial, and also deals with the individual’s obligation to God (Allah).\textsuperscript{141} However, the most well-known definition of the sale contract in particular came in the initial contemporary establishment of an Islamic law of obligations and contracts, \textit{Mejella al-Ahkam al-Adliyyeh}\textsuperscript{142} article 103: “contract is an obligation between two persons or contractors about a lawful act in good manner” or “exchange of offer and acceptance with real intention”\textsuperscript{143}.

However, if the contributions made by the jurists of different Islamic schools of thought are considered, differing definitions of a sale contract can be identified. This


\textsuperscript{142} The Ottoman \textit{Mejelle al-Ahkam al-Adliyyeh} was promulgated in 1877 as the civil law of the Ottoman State. It constituted the first modern codification of an Islamic law of contracts and obligations derived from the Hanafi school of jurisprudence. It was enforced across the territories of the Ottoman Empire. It was replaced by new civil codes in many Islamic countries such as Egypt, Lebanon, Syria, and Iraq.

\textsuperscript{143} Mohammed Qadri Pasha. \textit{Murshid al-Hayran} (1983) article 262. This is a code on property, contracts and agencies in accordance with the Hanafi school, and it is a nationalistic reminder of the existence of Islamic law.
topic is dealt with much more widely in *fiqh* writings than other contracts. A sale contract for Abu Bakr al-Kasani, the Hanafi author of *Badaa'i al-Sanaya* (d. 587/1191), purports the exchange of a coveted article against another coveted article; such an exchange takes place either by words or by deed.\(^{144}\) For al-Kassani the binding effect of the sale contract and the conferring of immediate possession of the countervalues intended to be exchanged are its two main effects.\(^ {145}\) Muwaffaq al-Din Ibn Qudama, the Hanbali author (d. 620/1223), sees a sale contract as an exchange of property against another property conferring and procuring possession.\(^ {146}\)

As we look at these early definitions, any definition suffers from an inherent inadequacy. Linguistically, words have different shades of meaning. Technically, terms and expressions evolve and frequently change over the course of time, albeit imperceptibly. Therefore, we find any definition involves a high degree of abstraction which, when applied to the instances meant to be covered by it, may fail to achieve its intended ambit. At best, a definition may be considered as a proposition for the explanation of the scope, or an initiation to the exposition, of the subject concerned. This approach to definition of the sale contract is perhaps more suitable to a jurisprudential treatment of the subject than to a normative formulation of it.

As a result, we may prefer to define the sale contract the way some authors define it, as the relocation of possession of legal goods for a set price (money or other assets), with both standards established and conveyed without delay.\(^ {147}\) However, impediment in imbursement of a counter-value is considered as a unique case in Islamic law.\(^ {148}\) The title of both countervalues transfers immediately at the time of sale, even if actual payment or delivery of property is delayed by stipulation or otherwise.\(^ {149}\)

In the Islamic legal system, like other legal systems of the world, certain formalities and substantive elements are essential for juristic acts to become legally binding on the parties. Classical Muslim jurists developed a clear concept of juristic acts which produced a legal effect on all commercial contracts. The sale contractual transactions,

\(^ {145}\) Ibid, 243.
\(^ {148}\) Ibid.
\(^ {149}\) Ibid.
whether written, unwritten or by correspondence, constitute the vast majority of juristic acts. That being so, Muslim jurists of the four Islamic schools stipulated a clearly defined idea of the conditions and requirements of validity for a binding sale contract. These essential conditions and requirements of substantive and procedural law now provide the criteria for void, valid, binding and enforceable elements of all contracts in general and the sale contract in particular. Muslim jurists from these schools laid down a set of criteria for distinguishing between essential conditions on which the valid conclusion of the sale contract depended, and those which are regarded as less fundamental and which might affect its binding force on only one of the parties in the sale contract. Furthermore, Muslim jurists went further and spoke of non-existence of goods in the sale contract as a radical form of nullity under which the contract was considered as if it had never taken place. They also recognised, in contrast to the above category, contracts the effects of which were merely suspended (mawqif ala al-ijazat), depending on the choice of the party whose intention was not validly expressed, and for whose protection the nullity was prescribed.

1.5.1 Principle of Freedom in the Sale contract

Islamic scholars from different schools seem to differ in their opinions regarding the degree of freedom contractors have to conclude a contract. However, a closer examination of their opinions reveals that they agree on the major rules and principles relating to the freedom of contracts and they only differ on some details. The first view, which is the view of the Hanbalies and Malikies, explains that contractors are totally free to conclude whatever they wish, provided that it complies with Islamic rules and principles. Proponents of this view believe that the root principle of contracts in Islamic law is the freedom of contracts except where they are explicitly prohibited by a provision or an injunction. Proponents of this view base their argument on some provisions from the Qur’an, and Sunnah and reasoning. Of particular importance here is:

150 A requirement for writing: even although the general principles of Islamic law do not actually require the traditional sale contract to be in writing, writing may resolve many issues arising from an absence of writing. There is therefore nothing in the Islamic law that opposes the use of writing in a sale contract, and it seems that such writing is supported by the provisions and principles of Islamic law and the Saudi Arabia Electronic Transaction Act 2007 (for example, articles 5, 6, 7).
"O ye who believe, fulfil pledges..."\textsuperscript{154}

"... but Allah hath permitted trade and forbidden usury."\textsuperscript{155}

"O ye who believe! Eat not up your property among yourselves; but let it be amongst you traffic and trade..."\textsuperscript{156}

"How can men stipulate conditions that are not in the book of Allah? All conditions that are not in the book of Allah are invalid, be it a hundred conditions. Allah’s book is more trustworthy and his conditions is more worthy to obey."\textsuperscript{157}

The second view is that of the Hanafies and the Shafi’ies, which have established a middle course concerning the issue of freedom of contracts. Their handling of the subject of freedom to include conditions in contracts shows, as will be seen later, that they are, in principle, not as liberal as the Malikies or the Hanbalies.\textsuperscript{158}

Regarding the conditions which can be included in sale contracts, jurists categorise the conditions that can be valid and legally sound as follows:

1.5.1.1 The Stipulation Inherent in the Nature of the Sale Contract

Questions have been raised as to the validity of an E-contract especially bearing in mind the Islamic school rules. There have been changes to the law on terms of a contract and these changes have helped modernize business and the worldwide acceptance of internet transactions. Developments in computers and telecommunications have certainly brought change to the world of commerce. Electronic trading takes place worldwide. Electronic trading entails selling and buying of products, services and information by means of a computer network (the internet). E-commerce assumes that there are at least two entities transacting via the internet. E-agreements must be carefully drafted to ensure that they fulfil their purpose.

Sometimes it is not necessary to stipulate conditions in the sale contract. To append a phrase to a sale agreement saying that the acquired item becomes the assets of the

\textsuperscript{154} The Qur'an: Surat al-Ma' idah, verse 1.

\textsuperscript{155} The Qur'an: Surat al-Bagorah, verse 275.

\textsuperscript{156} The Qur'an: Surat al-Nisa, verse 29.


purchaser is tautological. This requirement is in accordance with the essential nature of sale. In addition to this and other fundamental characteristics of the sale contract, for instance payment of the price and subsequent taking possession of the purchased item, the Shafi’i and Hanafi Schools place in this category conditions which follow from the particular character of the sale in question. But sale conditions that are in accordance with the sale contract do not nullify it. If a person or an entity purchases an item on the provision that they become the owner, or if the seller imposes a condition that he be paid the price of the object, or if he buys a garment on condition that he wears it, then the sale is permissible. This is because such clauses are necessarily implied in the sale agreement, and therefore specifying these clauses is basically recognizing the nature of the agreement. In this case there will be no quashing of the sale.

1.5.1.2 The Stipulation Appropriate to the Sale Contract

There are two types of clauses appended to the sale contract even though they are not a fundamental part of the sale agreement; these clauses make it easy to comply with the basic requirements of the sale contract. They are the suretyship clause (Kafala) and the pledge clause (rahan). The special characteristic of these clauses is their consistency with the legal structure and purpose of the sale transaction. For that reason, suretyship and pledge are acceptable terms according to all four Sunni Islamic schools. Any clause that is appropriate to the agreement, even though not intrinsic to the nature of the transaction, does not nullify the sale agreement. We see that in such situations it is in accordance with its fundamental nature. This applies to the scenario where an individual sells an item on condition that the buyer pledges security (rahan) as an equal value to the price of the object, or alternatively, on condition that the purchaser provides a guarantor (Kafil) who provides security for the object’s

159 Oussama Arabi, 'The Contract Stipulations (Shurut) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya' (1998)30 (1) International Journal of Middle East Studies 33. The author acknowledges the assistance provided by this work in the drafting of section 1.5 of this chapter.
160 Ibid 33.
161 Ibid 33-4.
162 Ibid 34.
166 Ibid 34.
price: in such circumstances the transaction is legally acceptable according to the majority of juristic opinion. Analogical conclusions (Qiyas) do not allow the transaction for the reason that on principle, any condition which is at variance with the main contract cancels it. Suretyship and pledge clauses, being unrelated to the principal terms of the transaction, have accordingly a nullifying effect on the agreement. On the other hand we have clauses allowing sale of objects based on the pledge of security as a counter-value to the price, and the same argument applies to suretyship. Such specifications emphasize the right of the seller and thus do not nullify the sale agreement. Since the main reason of pledge is to get reimbursement, its lawfulness depends on its proof of the right to reimbursement. Corroboration of this right is a condition suitable to the sale agreement. Provided that the above is obeyed the sale contract is legal and therefore cannot be quashed.

1.5.1.3 The Stipulation that is Customary Practice
All four Islamic schools decided that the type of clause called “the conventional stipulation” was allowable because they are elements of local tradition or custom (Urf). These conventional conditions are held to be legally binding regardless of the fact that they are outside the fundamental stipulations of the sale agreement. We note that article 321 of Murshid al-Hayran has permitted this kind of requirement, so a condition which is not stated in the main contract nor proper to it, however which is general practice, is allowed. For example, an individual purchases a sole on provision that the seller attaches the sole to the shoe. On the contrary, reasoning by analogy (Qiyas) Hanafi jurists do not allow such a clause as it is not mandated by the principal agreement and is of benefit to only one of the parties. Therefore, the clause cancels the transaction as a result of one entity benefiting at the expense of the other.

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167 Ibid 34.
168 Ibid 35.
169 Ibid 35.
171 Ibid 35.
172 Ibid 35-6.
1.5.1.4 The Stipulation of Benefit to One of the Parties

Sometimes we have contract stipulations that may benefit only one entity and therefore invalidate the transaction. The Hanbali and Maliki rulings upholding such terms in sale agreements were drafted in knowing disagreement with the Hanafi view. This is evident from Ibn Qudama's dismissal of the Hanafi ruling against extra clauses that profit one of the contracting parties. Thus Hanbali and Maliki jurisprudence legalizes the very same sale agreements whose appended clauses or sections were regarded by Hanafi jurisprudence as quashing the entire agreement. The Hanafi School's Hadith has been impugned in two phases, namely it is not in the recognised hadith collections and secondly by adopting an alternative version of the hadith in question which only invalidates sales with two appended clauses.

Sale contracts with only one supplementary provision are deemed lawfully binding-departing from the Hanafi view. The conservative Hanafi view about stipulation in sale agreements was met by theHanbali view which is directed at the two main arguments in favour of the more restrictive approach: namely the Prophet's injunction against "sale with attached conditions" and the classification of profitable conditions under illegitimate gain (riba).

According to Hanbali and Maliki law, the consent of parties becomes a sufficient condition for the validity of a sale contract, thus emphasising the importance of party autonomy in such contracts. While the Hanafis regulation that mutual approval by the buyer and seller to the terms of the agreement is merely a basic stipulation of

173 Muwaffaq al-Din Ibn Qudama is the leader of the Hanbali juristic community (d. 620/1223).
177 There is consensus among all Islamic schools of Islamic law that usury and interest-charging are forbidden acts. The interdiction stems from the Qur’an, sura II, verse 275: “God permitted the sale (al-bay’) and prohibited usury (al-riba).” A number of Prophetic dicta came to reinforce the Qu’anic prohibition, resulting in substantial restrictions on financial transactions in Muslim societies and the development of specialized legal stratagems to controvert these restrictions. See Hussein Hassan, ‘Contracts in Islamic Law: The Principles of Commutative Justice and Liberality’ (2002) 13:3 Journal of Islamic Studies 257, 288-90.
179 Ibid 41.
legitimacy and not enough to legalize the sale, Ibn Taymiyya\(^{180}\) takes another view. Ibn Taymiyya’s justification of the sale agreement based wholly on the concurrence of the buyer and seller marks a considerable progress for independence of business in Islamic law. The parties have freedom lawfully to lay down whatever conditions they think are in their line of interest, free of customs, norm, and similar limitations put forward by the Hanafi School.\(^{181}\) It is from these truisms that Ibn Taymiyya arrives at important conclusions according Islamic legality to agreements and transactions of non-Islamic epochs and culture.\(^{182}\)

There is another matter that hampers the freedom of stipulation in Islamic sale agreements, namely, the effect of the exclusion of usury. The Hanbali and Maliki Schools insisted that subjective and motivational states such as the parties’ agreement and their true intent (niyya) could only have one effect. This allows the recognition of clauses conferring benefit on a contracting party in excess of that included in the main stipulations of the sale agreement.\(^{183}\) The Hanbalis’ and Malikie's policies are determined by their elementary doctrine concerning the true intent or latent motive in accordance with authorized acts.\(^{184}\) Therefore we see that the legitimacy of a sale is closely linked with the motivations or intentions of either the buyer or the seller under Hanbali jurisprudence. Thus, Ibn Taymiyya’s well-known follower emphasizes the illicit/licit nature of the real intentions behind lawful dealings, which nature is vital for the legality of the business deal.\(^{185}\) A transaction is cancelled if the intention of a specific condition in an agreement is profit or interest-charging with no equal value. In simple terms, a transaction is deemed invalid if only one party profits from the business deal.\(^{186}\) In contrast to the Hanafi School rule, the Hanbali School does not hold that non-customary clauses which benefit one of the parties are generally

\(^{180}\) Taqi al-Din Ahmad Ibn Taymiyya lived in Cairo and Damascus. In his legal thought, Hanbali law attains the culmination of its development. Ibn Taymiyya’s corpus includes his multi-volume treaties of jurisprudence, *Fatawa Ibn Taymiyya* and a fundamental work on the principles of Islamic government.


\(^{183}\) Ibid 41.

\(^{184}\) Ibid 41-2.

\(^{185}\) Mohammed bin Ahmad Ibn Juzy, *I’ lam* (1973) 3:96-98

\(^{186}\) Ibid 3:338-39.
unacceptable. On condition that the objective of the entities is not baseless gain such clauses are acceptable, and therefore the whole agreement is permitted.

1.5.1.5 The Invalid Stipulation

Islamic schools take the view that a lawful act which depends on the object of compulsion (Mahall al-Aqd) remains valid, whether in isolation or appended to the main legal act. Applied to contract terms, the rule validated such terms unless a stipulation is the object of a particular ban established in the Qur'an or Sunnah. Ibn Taymiyya elevates this approach to a general principle. He limits invalid conditions (al-shurut al-fasida) to two categories, namely any term that counteracts the lawful object of the agreement for instance when the seller demands that the purchaser ought not to sell or rent the sold item, and secondly, any clause that breaches a specific Qur'an or prophetic injunction, for example prohibiting the accepting of interest. Transactions in which we have two sales in one were not allowed since this is a form of usury. An example of multiple conditions in one agreement, such as two sales in one sale (Bay'atan fi Bay'ah), would be where the vendor sells items to the purchaser for 10 (ten) dollars in hard cash and for 15 (fifteen) dollars under credit payment mode. This kind of business dealing was prohibited by the Prophet. On the other hand these limits on the number of permissible clauses in a sale contract do not matter in Ibn Taymiyya's way of thinking and therefore he allows such transactions to go ahead.

There has to be some qualification on the trend towards allowing greater scope for individual will in lawful acts, whether limited to one school or among all the schools. We might have schools that allow greater independence in appending terms to agreements in general and sale agreements in particular, but which at the same time is

188 Ibid 42.
189 Ibid 36.
190 Ibid 36.
194 Ibid 63.
found to be more conventional in terms of restriction on interest or profit on non-fungible property.\textsuperscript{196} Any traditional lawful mechanism that focuses on trying to avoid usury prohibition is criticized by Hanbali jurists.\textsuperscript{197} On the other hand, the Shafi'i School do not consider the inherent objective of such business deals and merely takes into account their literal meaning regarding them as completely acceptable.\textsuperscript{198} A rigid approach to charging interest is a feature of the Hanbali rule.\textsuperscript{199} On the other hand, Maliki and Shafi'i do not agree with this approach.

The Hanafis take the view that the Prophet's injunction that there should be no sale with a condition stemmed from usury, where there is profit without counter-value. Indeed, unfair profit (\textit{shabih al-riba}) is enough evidence to cancel any agreement containing an appended clause that is not based on custom and is of gain to only one of the parties.\textsuperscript{200} It appears that this restriction on liberty of contract (\textit{al-shart al-fasid}) may be the main reason why the Hanafi School's rule was removed from the original Mejella \textit{al-Ahkam al-Adliyyeh}.\textsuperscript{201} However, the Mejella \textit{al-Ahkam al-Adliyyeh} provision goes against the view of the leading juristic school of the Ottoman state, according to which a sale contract with an appended clause which only benefits one party is valid.\textsuperscript{202} According to Hanbali amendments, this kind of sale is unacceptable since it consists of an appended stipulation in favour of a party to the contract and is definitely contrary to the prerequisites of modern commerce.\textsuperscript{203} With its significant restriction of contractual freedom, the Hanafi School's prohibition of this kind of condition creates a challenge for current Ottoman jurists. A solution is however offered by Hanbali jurisprudence. Under Hanbali jurisprudence we have less strict laws especially where one party benefits. As long as there is no breach of their agreement and none of the parties complain, such transaction cannot be invalidated.\textsuperscript{204}

\begin{footnotesize}
\begin{enumerate}
\item Given the importance Hanbali jurists accord to subjective motivation in determining the validity of legal acts.
\item This attitude is exemplified in the Shafi'i school recognition of the declared intent in legal transactions and his belittling of implicit and hidden motives as having no legal effect.
\item Ibid 37-8.
\item \textit{Mejella al-Ahkam al-Adliyyeh} (1922), art 3.
\item Oussama Arabi, 'The Contract Stipulations (\textit{Shurut}) in Islamic Law: The Ottoman \textit{Majalla} and Ibn Taymiyya' (1998)30 (1) \textit{International Journal of Middle East Studies} 44.
\item Ibid 44.
\item Ibid 44.
\end{enumerate}
\end{footnotesize}
The Islamic rules on contract stipulations have evolved over time, as seen for three schools, namely the Hanafi, Hanbali and Maliki, where there have been true doctrinal transformations. Those advances explain why the Hanbali School (Ibn Taymiyya and Ibn Qudama) has thrived as compared to the Hanafi School.\textsuperscript{205} Ibn Taymiyya and Ibn Qudama initiated freedom of stipulation in the transaction agreements which eventually gained popularity in Islamic law.\textsuperscript{206} Any appended term is permitted provided that the clauses are not openly prohibited in the Qur'an and Sunnah.\textsuperscript{207} Accordingly, it is courtesy of the later jurists of the Hanbali School that freedom of contract has become recognised in the Islamic law of sale.

The persisting question which we must ask here is: how do we reconcile the foregoing facts and realities with the restrictive views of some Islamic schools regarding the freedom of the sale contract? The answer is simple. Any reader of those large encyclopaedic volumes written by Muslim jurists from different schools would come to only one conclusion. That is, none of the four Islamic schools have, in practice, restricted the commercial activities of the businessmen and traders of their day simply because they were the first to foresee the legal problems and find a proper solution to them. The jurists were Islamic scholars and philosophers, some were businessmen, and on top of that they were judges. They were ready to give legal advice wherever they were.

This is the reason why their books have been full of detailed answers to innumerable questions where they have not bothered too much to conceptualise a rule or principle. To them the rules and principles were already laid down by God and his Messenger, and their function was to search for, interpret, philosophise, and deduce the relevant rules and principles of Shari'ah using their reasoning, and apply them to concrete cases and questions. The variety of opinions and solutions the jurists have provided evidences that their restrictions were cautious rather than restricted, insisting on the primacy and supremacy of Shari'ah rules and principles. Those who advocate the freedom of the Islamic sale contract believe that the restrictions and prohibitions of Shari'ah are exclusive categories beyond which freedom is the rule, whereas the

\textsuperscript{205} Ibid 44.
\textsuperscript{206} Ibid 44.
\textsuperscript{207} Ibid 44.
advocates of the restrictive viewpoint believe that Shari‘ah has already established the exclusive categories of legal conditions beyond which freedom is restricted. In reality, it is apparent that there exists no opposing difference when the two views are considered, especially if one takes into account the fact that the application of their restrictive views has, to a large extent, resulted in almost the same outcome.

The majority of legal systems in Islamic countries have adopted a quite flexible regime regarding freedom of conclusion of sale contracts as well as the inclusion of conditions therein. The major restrictions on the making of sale contracts in such countries relate either to public order or to special regulations relating to a particular sector or activities or Shari‘ah rules and principles with various degrees of emphasis. A reader of the civil laws of such countries will very often come across certain provisions regarding the validity of the conditions to be included in the sale contract. Typical examples here are that such conditions must be possible, certain and not contradictory.\footnote{Egypt Civil Code (1948)art 266, 267.}

Ibn Juzy - a scholar of the Hanbali School - provides a list of ten cases which in his opinion constitute a forbidden gharar. These cases are described as follows:\footnote{Mohammed bin Ahmad Ibn Juzy, al-Qawanin al-Fiqhiyyah (1979)169-170.}

1. Difficulty in performing delivery of the subject matter, such as the sale of a stray animal or an unborn foetus;
2. Lack of sufficient knowledge (Jahl) regarding the type of the price or the subject matter, such as the seller saying to the potential buyer: “I sell you what is in my bag”;
3. Lack of sufficient knowledge regarding the characteristics of the price or of the subject matter, such as the seller saying to the potential buyer: “I sell you a piece of cloth which is in my house”, or the sale of an article without the buyer inspecting it or the seller describing it;
4. Lack of sufficient knowledge with regard to the quantum of the price or the quantity of the subject matter;
5. Lack of sufficient knowledge with regard to the date of future performance;
6. Two sales in one transaction;

\footnote{http://www.vahrenwald.com/doc/part4.pdf}
(7) The sale of what is not expected to revive;

(8) *Bay' al-hasah*, which is a type of sale whose outcome is determined by the throwing of a stone;\(^{211}\)

(9) *Bay' al-mulamasah*, where the bargain is concluded by touching the subject of the sale without examining it;

(10) *Bay' al-munabadhah*, is a sale that is performed by the vendor literally throwing a cloth at the buyer and bringing the sale transaction to a close without having given the buyer the opportunity to adequately consider the item in question.\(^{212}\)

As a result of our discussion in this chapter, the parties to sale contracts are entitled to establish any kinds of agreements according to the freedom of contract in whatever manner they see fit and do not oppose these principles and legality under Islamic law. These principles maintain a policy of freedom of contract where any agreement between the parties themselves will take precedence whether the agreement is formed electronically, orally or through paper based communication under Islamic law. However, as it is impossible to agree upon something totally unknown under the general principle of Islamic law, it is usually successfully argued that conditions do not bind the buyer if he has not been familiar with the contents of them prior to the agreement.

\(^{211}\) [http://www.insurance.com.my/zone_takaful/takaful/introislam06.htm](http://www.insurance.com.my/zone_takaful/takaful/introislam06.htm)

\(^{212}\) *Ibid.*
CHAPTER 2 - VALIDITY OF THE E-SALE CONTRACT UNDER ISLAMIC LAW

2.1 Introduction

This part of the study is an attempt to present briefly the controlling rules for a valid e-sale contract to take place under Islamic law. The background of Shari‘ah as the root principles of Islamic law must be kept in mind for an analysis and understanding of e-sale contract formation in Islamic law.

Modern Muslim scholars have tried to define the e-sale contract according to the principles of Shari‘ah. For example, Professor Osamah Mojahad\textsuperscript{213} defines an e-sale contract as an exchange of offer and acceptance on the internet, and the process of the exchange of the offer and acceptance gives the effect to the agreement.\textsuperscript{214} Another Muslim writer has defined the e-contract as a connection between the offer and acceptance of a certain object by means of an electronic device.\textsuperscript{215}

In the concepts of Islamic Business, Faith and Fear of God should be exercised by Muslims in all forms of business and trade.\textsuperscript{216} As stated in the Qur’an:

"O believers! Keep faith with contracts . . ."\textsuperscript{217}

"O believers, take not doubled and redouble interest, and fear Allah so that you may prosper. Fear the fire which has been prepared for those who reject faith, and obey Allah and the Prophet so that you may receive mercy."\textsuperscript{218}

"O believers, fear Allah and give up the interest that remains outstanding if you are believers."\textsuperscript{219}

Hence, as a general condition, the Qur’an refers to a lawful business as one that provides benefits to the society as well as to the individual.\textsuperscript{220} Fair trade is not only

\textsuperscript{213} Professor Osama Mujahad is an Egyptian scholar, and specialised in electronic commercial law.
\textsuperscript{214} Osamah Mujahad, al-T‘aqud Abr Al- Internet (2002) 39.
\textsuperscript{217} The Qur’an : Surat al-Maidah, verse 1.
\textsuperscript{218} The Qur’an: Surat al-Imran, verse 130-2.
\textsuperscript{219} The Qur’an: Surat al-Baqarah, verse 278.
recommended but also encouraged and exhorted by the Qur'an in this regard.\textsuperscript{221} In the Traditions (Sunnah) the act of the Prophet (P.b.u.h) preached quality-values such as flexibility, accuracy, contract standardization, veracity, convenience, effectiveness, cost and speed.\textsuperscript{222} The Prophet Mohammad (P.b.u.h) said:

"Allah showers his mercy and compassion upon the one who is tolerantly flexible, both when buying and selling."\textsuperscript{223}

These principles have been accepted as forming the basis of conventional transactions. However, from the foregoing views, the electronic age raises the question if electronic sale contracts are required to perform the same function and meet the same requirements as conventional traditional sale contracts? Out of the basics of the sale contract and contracting process described in the Islamic law, the legal requirements that follow can be considered as a summary of the standards that an electronic sale contract should incorporate.

- Clear identification of the contracting parties;\textsuperscript{224}
- Clear Identification of the electronic sale contract language (Seaghat al-Aqd);\textsuperscript{225}
- Transparent recognition of the subject upon which the electronic sale contract is being carried out;\textsuperscript{226}
- The electronic sale contract has to have consideration;
- An intention and genuine consent to create legal relations; and
- The contract has to have valid offer and acceptance of the involved parties.\textsuperscript{227}

These issues might lead to a void, voidable or enforceable contract. Therefore, I will discuss the first four issues in this chapter under the four Islamic schools each of which has a set of conditions without which the validity of all commercial contracts in...
general and the sale contract in particular becomes questionable under Islamic law. The last two issues will be discussed in detail in the rest of the thesis.

2.2 Conditions Relating to the Contractors (Offeror & Offeree)

In order to enter into a contractual relationship under Islamic law the contractor must (1) be a person; and (2) have the required legal capacity. Legal capacity can be either natural personality or juristic personality. Natural personality corresponds to the living status of a human being and, generally speaking, it starts at birth and ends at death. However, natural personality can be a presumed legal personality which might, exceptionally, be present before birth or after real death. Every human being, therefore, is a person regardless of sex or age or any other form of discrimination. Juristic personality in all Islamic schools is a presumed personality in entities that have a separate existence from the individuals who establish them but do not have human qualities. In fact, Islamic law recognises the concept of juristic personality based on the Islamic practice and treatment of certain Islamic institutions rather than on their explicit mention of the term. Accordingly, entities such as commercial companies, schools, hospitals, and orphanages can have such a presumed personality and can enter into a contractual relationship provided that such a relationship is carried out by their representatives. The vast majority of Islamic countries have recognised this concept in their legislation.

However, in order to conclude a valid sale contract, the contractor, either offeror or offeree, must satisfy the requirement of legal capacity of natural personality: he or she must have attained a certain age and have a certain level of mental ability. Although the exact age of maturity is not identified in Islamic law, Islamic scholars tend to treat every case on its own merits identifying the criteria according to which such age can be identified. These criteria depend on the attainment of the age or signs of puberty.

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229 Ibid 73.
230 Ibid.
231 Ibid 79.
and also on the attainment of the defect-free\textsuperscript{235} physical and mental maturity with which the person can attain a reliable standard in transactional matters. Islamic jurists differ in identifying such criteria; some restrict them to reliability in transactional matters, whereas others add that the person should also enjoy a good religious character.\textsuperscript{236} In Islamic countries, the age of majority varies from one country to another; some such as Saudi Arabia refer it to \textit{Shari'ah} rules and principles, according to the Hanbali school;\textsuperscript{237} others identify it at 18 years such as Syria and Jordan or 21 years such as Egypt, Kuwait and United Arab Emirates.\textsuperscript{238}

It is important to note here that according to Islamic law discerning children can be allowed to enter into a contractual relationship as part of the process of training them, provided that such a contractual relationship is not detrimental to the child.\textsuperscript{239} Accordingly the sale contract may be allowed, in certain circumstances, to be executed by a discerning child. However, such actions in the sale contract are not valid or able to produce their legal effect unless they are approved in advance or subsequently by the guardian or the discerning child upon attaining maturity. It is also important to note that guardians are allowed to conclude contracts on behalf of their discerning wards provided that:\textsuperscript{240}

1. The guardians for children have full legal capacity;
2. They are not subject to interdiction; and
3. The contract is not detrimental to the child.

\textsuperscript{235}Legal capacity defects could be natural defects such as minority, insanity, mental derangement, unconsciousness and terminal illness, or incidental defect such as intoxication, spendthriftness and bankruptcy; see Mohammed Ahmad Sraj, \textit{Nazryh al-Aqd fi al-Fiqh al-Islami} (1998).
\textsuperscript{237}Exceptionally the provision implementing the Civil Service Regulation, issue by Royal Decree no 49 of 10/7/1397H. Stipulate that one of the qualifications for being a civil servant is the attainment of the age of 17.
\textsuperscript{238}Nabil Saleh, 'Definition and Formation of Contract Under Islamic and Arab Laws' (1990) 5 (2) \textit{Arab Law Quarterly} 101, 113-4.
\textsuperscript{239}Islamic law provides that the conduct of a child might fall into one of three categories: (1) detrimental actions that entail definite financial loss (such as giving away donation). This category of conduct is not allowed to be carried out either by the child or his guardian or even by a judge. If such an action is carried out by any one of them it is null and void and has no legal effect whatsoever; (2) actions which have definite benefits/profits (such as accepting gifts and donations), these actions are allowed, valid and capable of producing their full legal effect whether such actions are taken by a discerning child or the child's guardian; (3) actions which might entail both possible benefit and possible loss (such as sale and rent). This action may be allowed, in certain circumstances, to be executed by the discerning child. However, such actions are not valid or able to produce their legal effect unless they are approved in advance or subsequently by the guardian or the discerning child upon attaining maturity. See for more information Mohammed Ahmad Sraj, \textit{Nazryh al-Aqd fi al-Fiqh al-Islami} (1998) 76-9.
Regarding juristic persons, their representatives must conclude all their legal activities on their behalf, provided that the representative:\(^\text{241}\)

1. Has full legal capacity;
2. Satisfies the legal requirement to be a representative to the entity; and
3. Satisfies the requirement of the regulation of the entity itself (he/she must have the required credentials and conduct the transaction within their legal authority).

In an electronic environment, it will be important to ensure that a party who purports to enter into a contractual relationship via electronic communication has full legal capacity to enter into the e-sale contract. A person who is a child, drunk, insane, or bankrupt does not have legal capacity. What happens, for example, when the sellers discover that the buyer at the other end of an e-sale transaction is a minor? This is a classic legal problem, of which a brief overview will suffice here. As regards the traditional sale contract discussed earlier, all the four Islamic schools and Islamic countries jurisdictions have rules that set the age of majority at 18 years to make a binding transaction, or exclude transactions which are binding on a child only if they can be shown to be for the child’s benefit under the Hanafi and Shafi’i schools. If no such benefit exists (such as with a contract to buy an expensive car, which a child could not possibly complete), then the contract is not binding on the child, in the view of all four Islamic schools.

But in such a situation in the e-sale contract, it is important to have a clear understanding of the differences between a paper environment and an electronic environment in each transaction in which the parties cannot meet face to face. While the site’s owner can control the disclosure of identity, those engaging in commerce with that person over that site may not correctly or truthfully identify themselves. It is always a risk for the seller and therefore up to the seller or service provider to check the status of the buyer. Hence, it is easy to understand the popularity of requiring a credit card or digital signature, as the possession of a credit card or digital signature automatically means not only that your buyer is of age, but as well is some kind of

\(^{241}\) Ibid.
guarantee of economic independence.\textsuperscript{242} Another means to certify the identity of the customer is the requirement of registration. Only a registered member can use all services of a certain site.\textsuperscript{243} The registration process is nevertheless useless if the service provider or seller does not check the credibility of the given information. After registration the potential buyer is given personal codes and passwords.\textsuperscript{244} When such codes and passwords are used, the presumption is that the person to whom they were granted is indeed the person who has behaved according to the log-information of the site, for example ordered certain goods or behaved according to the rules.\textsuperscript{245} There are numerous possibilities for supervising the use of a site for misuse of services and all those are compatible with the rules of Islamic law, but these issues are outside the scope of our thesis.\textsuperscript{246}

However, for example, let us assume that we have checked the opposite party's credit card information and we know therefore that this contracting party is of age and in possession of his property and faculties. We have been sufficiently cautious. But there is no way to check whether the other party is sober or possibly under the influence of some drugs or a third party. Neither do we know if the party is a minor using his or her parent's credit card and sending in supplementary information known to the minor in order to create an image of an adult.

If the parent or guardian has not taken sufficient care to keep that kind of material out of the reach of a minor, in effect, we would adopt the legal fiction that the parent or the owner of the computer is bound by the contract under the \textit{fiqh} principle of the guaranteed (al-Daman).\textsuperscript{247} Thus, the Islamic law will treat the computer as a machine. Therefore, the owner or the guard of the computer will be responsible for any damage to others.\textsuperscript{248}

\textsuperscript{242} Omar Khalid al-Zryqat, \textit{Aqd al-Bay' Abr al-Internet} (2005) 92.
\textsuperscript{244} Ibid.
\textsuperscript{245} Ibid.
\textsuperscript{246} For more information see Sulman Mohammed al-Shadi, \textit{Turuq Himayh al-Tijarh al-Ictron'ah} (2007) 225.
\textsuperscript{247} Or the responsibility doctrine such as in article 173 of the Egyptian Civil Code 1948:“Each of the guard, take custody of things requires special care or custody of mechanical machines will be responsible for what has happened these things from harm.” See Adnan Ibrahim al-Srhan, \textit{al-Il Mizam bi al-Daman fi al-Fiqh al-Islami} (1997) 111.
\textsuperscript{248} Likewise, we find article 12 of The United Nations Convention on the Use of Electronic Communications in International Contracts (2005) has state that the data message is supposed to be
In the electronic environment, one of the main issues relating to inter-systemic contracts concerns the obvious fact whether the electronic agent\textsuperscript{249} has legal personality or capacity. Briefly, regarding the previous conditions under Islamic law, our opinion is that computers totally lack legal personality, as is the case under most of the western legal systems.\textsuperscript{250} Therefore, referring to our discussion, the computer’s owner will be bound under the principle of the guaranteed (\textit{al-Daman}) in Islamic law for any mistake or fault of the computer.

In Islamic law, a sale contract is permissible between Muslim and non-Muslim parties as there had been many cases of the Prophet Mohammed (P.b.u.h) selling and buying from non-Muslims.\textsuperscript{251} However, our opinion is that the non-Muslim party should be aware of all Islamic principles regarding contracts.

2.3 The Fundamental Elements of the E-Sale Contract

The corner-stone elements of the sale contract are the offer and acceptance and the consent of the parties. Briefly, the offer and acceptance, which are termed by Islamic scholars as the form of the sale contract (\textit{Seaghat al-Aqd}), are supposed to satisfy the following requirements which will discuss in detail in the following chapters:

(1) They must be clear to reflect their intention;
(2) They must be serious;
(3) They must match and concord with each other; and
(4) They must be conclusive.

Islamic scholars from the four schools differentiate between two kinds of contracts, namely, contracts that are concluded between contractors present in a meeting (\textit{Majlis al-Aqd}), and contracts concluded by writing or correspondence.\textsuperscript{252} Article 69 in \textit{Mejella al-Ahkam al-Adliyyeh} stated: “the stipulation by writing is the same as the

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\textsuperscript{249} In case when the computer can be programmed automatically to issue a standard offer and to both acknowledge and record acceptance from trading partners. See Tom Allen and Robin Widdison, ‘Can Computers Make Contract?’ (1996) 9 \textit{Harvard Journal of Law & Technology} 26, 26-52.

\textsuperscript{250} For example: U.S. Uniform Computer Information Transactions Act (1999), Germany, Scotland, Egypt and Jorden.

\textsuperscript{251} Mohammed bin Ahmad Ibn Juzy, \textit{Ahkam Ahl al-dhmah} (1970) 149.

oral stipulation”. However, the general view of Islamic scholars is that the sale contract is said to have been concluded when the acceptance made by one of the parties matches and concords with the offer of the other provided that either:253

(1) The meeting sessions254 have ended (khayar al-majlis) (negotiability during the meeting session/s); or

(2) One of the parties gave the other a final and conclusive option as to whether to accept or reject the conclusion of the contract, and the other explicitly accepted the final offer.

Contracts by correspondence can also, generally speaking, be said to have been concluded when the offer has reached the other party who accepted immediately or within the time-limit set by the offeror, provided that the offeror has not revoked his offer before it has reached the second party.255

Another fundamental element of the sale contract is the defect-free consent of the parties. In order to define such consent Islamic jurists identify certain defects the presence of which in a contract may cause it to be invalid. These defects as we shall further amplify in the following chapter under defect in consent (Uyub al-Rida) are:256

(1) Coercion (ikrah); is defined as “threat of something disagreeable for getting an act done by the person without his consent” 257

(2) Fraud (Tadlees or Gharar) is “a statement by which one party is induced to enter into the contract with the expectations that he could get profit or gain out of the contract; but unfortunately it was otherwise”258 such as the sale of fruit not yet ripe, or sale by touching the subject without possibility of examination, or sale by throwing the subject from seller to buyer without specifying that one was in exchange for the other, trusting to luck;

(3) Error (Ghalat)

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254 The expression of “a meeting” does not mean that it is a one-session meeting; rather, it could be multi-session meetings. See Mohammed Ahmad Sraj, Naeryh al-Aqd fi al-Fiqh al-Islami (1998) 45.
258 Ibid.
(4) Gross inequality between the benefits of the parties \((ghabn)\); therefore, the seller can have an action for a supplementary price to oblige the buyer to complete it at the normal price of its value at the time of the sale;\(^{259}\) and

(5) Any element of gambling which is a game of chance such as the sale with an exception \((Bay' al-Thunya)\); the Prophet has forbidden any transaction with an exception of other goods of the same kind, until the buyer knew the quantity and quality of the goods.\(^{260}\)

The conditions above are clearly intended to show the real intentions of the contractors which are supposed to be beyond doubt. In order to facilitate this, the sale contract under Islamic law must be formed in clear terminology reflecting the exact intention of the parties and clarifying all the key terms and provisions of the sale contract. In an attempt to show how serious this stage of forming the sale contract is, with regard to the structure of the sale contract, attention must be given to the order of its paragraphs, ideas and provisions, with them formed into groups which have similar contents or are relevant to each other. The particular structure of the sale contract must be in a clear, simple, confusion-free and easy to follow format. In addition, the contents of the sale contract must be clear, unambiguous, unconfused, convey the exact intention of the parties and be free from unresolved matters. The parties must ensure that they understand all the contents of the contract.

As previously mentioned, while under the traditional sale contract these elements have to be met, in the e-sale contract under Islamic law, when the buyer has found a promising site or a market place, it is up to this buyer to find out all the information concerning the tempting goods or services as well as the conditions for the possible sale contract. If after all this work the buyer makes a decision to buy, the buyer must fill up all the required information and send this information to the net seller.

### 2.4 The Subject of the E-Sale Contract

The Islamic law has laid down a series of rules concerning the subject of the traditional sale contract. The main purpose of these imperative rules is to forbid the sale of subjects that religion considers impure, and therefore excluded from commerce, and to maintain a strict and perfect balance between the reciprocal

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benefits, as well as to avoid any element of hazard that might be the occasion of illicit
gain. As Allah stated in the Qur'an:

"O ye who believe! Eat not up your property among yourselves in vanities:
but let there be amongst you traffic and trade by mutual goodwill."261

It is for this reason that most Muslim jurists affirm that the subject of obligation is
licit, that is to say valid in the eyes of the law, if the following requirements of the
subject in the traditional sale contract are fulfilled:262

(1) It must be present or able to be present in the future, because impossible
subject matters are invalid;263

(2) It must be licit (mubah). The Islamic jurists have drawn up a list of things
prohibited, which fall into two groups. Some are prohibited for essentially
religious reasons such as alcoholic liquor and pork, and others for strictly
moral reasons such as air;264

(3) It must be identified or able to be identified, as known features of the subject
might constitute a serious defect which, in certain circumstances, is a cause for
invalidating the contract;

(4) It must be owned by the contractor or his/her principal in the case of an agent;
and

(5) It must have a determined value.

All these requirements will apply under Islamic law to all sale contracts regardless of
whether they are formed electronically, orally or through paper based communication.

However, in a sale contract in the electronic environment, the subject matter of the e-
sale contract is in a non-present position, thus the important question is whether the
non-presentation of the subject in an e-sale contract at the time of the sale is concluded
necessarily invalidates the e-sale. A substantial majority of scholars (Hanafi, Shafi'ī,
and some Hanbali) stipulate that the subject matter must be in existence and present at
the time the sale is concluded, as an essential ingredient of the validity of the sale.

They base their view on two primary proofs. The first proof is Abu Hurairah’s report

261 The Qur'an: Surat al-Nisa, verse 29.
263 Ibid.
264 Ibid.
that the Prophet (P.b.u.h) has forbidden the sale in which uncertainty (gharar) exists or is present.\textsuperscript{265} The second proof is that the Prophet (P.b.u.h) “has forbidden the Muslim to sell goods, he does not have it”.\textsuperscript{266} Other Muslim scholars (Maliki, and new Hanbali)\textsuperscript{267} challenge this view and they have been able to defeat the majority opinion, simply because the majority fail to base their opinion on a wider perspective which takes into account a deeper analysis of legal texts and the evolving nature of technological innovations.\textsuperscript{268} Their view is that there is no indication in the book of Allah or in the Sunnah of the Prophet (P.b.u.h) that the sale of what is non-present or not existent is prohibited. What was narrated was the prohibition of the sale of some particular not-yet-existing articles such as the sale of a stray animal or an unborn foetus, in as much as there was also a prohibition of selling some other article under Shari’ah which actually was already in existence or present.\textsuperscript{269}

As there was no injunction in the Qur’an regarding this matter, the proponents of the first view, which requires that the subject matter must be already in existence and present at that time the sale is concluded, base their view on two primary proofs. The first is Abu Hurairah’s report that the Prophet (P.b.u.h) has forbidden the sale in which uncertainty (gharar) exists.\textsuperscript{270} The second is the claim that there is a general consensus (ijma) that has materialised on the invalidity of the sale contract of non-existent subjects (bay’ al-ma’dum).\textsuperscript{271} As these two proofs are the focal point of debate between the various scholars, it is necessary to analyse and assess their weight and implication regarding the requirement of the existence of the goods at the time the sale is concluded. Let us evaluate their authenticity.

Various versions of Abu Hurairah’s report have been narrated by a number of companions, amongst whom are Ibn Abbas\textsuperscript{272} and Abu Hurairah who declare that the Prophet (P.b.u.h) has forbidden the gharar sale (bay’ al-gharar). Imam Malik in his book (al-Muwatta) has reported another version of the hadith where its final link

\begin{footnotesize}
\begin{itemize}
  \item This hadith was narrated by Muslim in “Sahih Muslim”, (d. 261/875) hadith no.1013.
  \item This hadith was narrated by al-Tirmidhi in “Sunan al-Tirmidhi”, (1975-1978) Hadith no.1232.
  \item Ibn Taymiyya and Ibn Qayyim.
  \item Taqi al-Din Ahmad Ibn Taymiyya, al-Qiyas fi al-Shar’ al-Islami (1951)26-27.
  \item Ibid.
  \item Ibn Abbas’s hadith is reported by Ibn Majah in his Sunan. It reads to the effect that “the messenger of Allah forbade the gharar sale (bay’ al-gharar).
\end{itemize}
\end{footnotesize}
reaches Sa‘id bin al-Musayyib.\(^{273}\) The *Hadith* as narrated by Ibn Abbas is considered weak (*da‘if*) as mentioned by al-Busayri.\(^{274}\) However, Abu Hurairah’s *hadith* as reported by Muslims, Abu Dawud and Ibn Majah carries a high standard of authenticity because it bears a reliable chain of transmitters (*sanad*) in its narration.\(^{275}\) The *hadith* that was originally narrated by Ibn Umar and reported in al-Bayhaqi and Ibn Hibban also, according to al-Hafizi’s comments,\(^{276}\) possesses a good quality with respect to its chain of transmitters (*sanad*). In fact, a thorough examination of the books of *hadith* reveals that none of the scholars of *hadith* questioned the authenticity of the *hadith* that meets Abu Hurairah in its chain of transmitters (*isnad*). al-Tirmidhi further points out that as far as the learned scholars are concerned, they all have confirmed the authenticity and applicability of the *hadith* under discussion.\(^{277}\)

As for the availability of *ijma* on the invalidity of the sale contract of a non-existent subject as claimed by Yahya bin Sharaf al-Nawawi, al-Nawawi referred to Ibn al-Mundhir,\(^{278}\) who was supposed to be the scholar who transmitted the *ijma* on the prohibition of the sale of fruits prior to their cultivation for several years ahead (*bay‘ al-sinin*).\(^{279}\) In fact, this type of *ijma*, i.e., *bay al-sinin*, is not directly relevant to the case in point because there is no doubt that the prohibition of dealing in such transactions has been specifically regulated by a different provision,\(^{280}\) though one should admit that the subject in this kind of sale does not exist at the time the contract is concluded. The fact in question, however, relates to the availability of *ijma*, which is said to have materialised on the invalidity of sale of a not-yet-existing subject. Referring back to Ibn al-Mundhir’s original work that consists of up 766 reports on *ijma*, none of its reports offers evidence to support the claim of *ijma* under

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\(^{274}\) In the chain of transmitters of the *hadith* there is Ayyub bin Atabah, who causes the *hadith* to be weak (*daif*). *Sunan Ibn Majah* (with commentary by Mohammed Fuad), Vol. 2, 739.


\(^{278}\) At the very beginning of his treatise *al-Majmu*, al-Nawawi noted that most of the *ijma* he mentioned in his *al-Majmu* was based on Ibn al-Mundhir, see al-Nawawi, *al-Majmu*, Vol.1, 5.


discussion. In sharp contrast, there is clear evidence that *ijma* have materialised on the validity of some sales that violate the requirement that the subject must be in existence, as we shall further amplify in the following section under the valid modern sale contracts in the case of the advance purchase (*bay‘ al-salam*). This suggests that the claim of *ijma* on the invalidity of the sale of non-existent subjects is unrealistic and cannot be reliable evidence.

Thus, they propose that the sale of a subject that does not exist or is not present at the time of the contract is not always invalid. The discussion in their arguments proves that the non-existence or non-presence of the subject matter does not necessarily invalidate the sale.

The argument, however, found that absence of uncertainty and doubt regarding the qualitative and quantitative description of the subject matter as well as the safe availability rather than the existence of the subject matter is the prime concern for the validity of the contract of sale. Therefore, in our opinion, if the parties provided in their contract sufficient parameters and criteria that can eliminate the effect of uncertainty about the price and the quality and quantity of the subject matter as well as their future availability, then the contract should, in principle, be valid. If the lack of such parameters and criteria is curable by reliance on the available technology or on usage or custom then the contract of sale may also be valid. If such uncertainty is incurable then the contract of sale is invalid.

Another key question in considering the subject of the e-sale contract is whether the buyer would have the right to return the defective goods or service under Islamic law. In order to answer the question briefly, our opinion is that if a seller can afford to create an exclusive web-site and he can make an announcement on his web-site about different goods or services with adequate price information, and the seller has defended his right to accept the buyer’s order as an offer which they can turn down or accept, since there is a need for consumer protection in online transactions, a possible solution would give the buyer sufficient time to inspect the goods or services and

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282 Therefore, any legal status (*hukm*) relating to a sale of a not-yet-existing subject should be referred back to the source of law from which it was derived in the first place.
284 Ibid 196.
decide whether he/she would like to retain the goods or the services, the first based on the hadith, Abu Hurairah’s report on the prohibition of gharar sale, and the second based on the principle of guaranteed (al-Daman) and option by Sight (Khiyar al-Ru’ya) in Islamic law which we shall further amplify in chapter 5.

2.5 The Cause or Consideration of the E-Sale Contract

A “sale” consists in the transfer of the general property of interest in goods from the “seller” to the “buyer” for a consideration called the “price”. The consideration can take the form of money, a service rendered, property or individual rights. The consideration shall be lawful (halal) in Islamic law. On the other hand, cause (sabab) is defined as the immediate contractual purpose as indicated in the contract itself. This section is meant to provide an answer to the question whether a sale contract, which otherwise meets all the conditions of validity, will be cancelled in case its cause or consideration is proven unlawful.

The assessment of whether something can be the subject of a sale contract can be carried out in the light of Islamic rules (Shari’ah) and principles. The majority of Islamic jurists advocate the maxim that: “Everything is allowed unless it is explicitly prohibited by a provision or an injunction”. This maxim seems to clarify the fact that a contractor should be aware of prohibited subject matter in order to avoid involving his/her contract with it. As clear as such a maxim may be, the list of prohibited actions cannot be said to have the same clarity. This is because, although the list of prohibited subjects is exhaustive and clear per se in Islamic law, the list of prohibited actions and transactions regarding the subject of the contract is neither exhaustive nor uncontroversial. In fact, the biggest problem here is in the identification of the legal nature of a given action or transaction and testing it against those provisions and injunctions that identify the list of subjects prohibited per se.

285 This hadith was narrated by Muslim in “Sahih Muslim”, (d. 261/875) hadith no.1013.
This problem has been complicated even more by the introduction of other elements, such as the cause and consideration of the contract and the motives of contractors.\textsuperscript{288} The best example I can give here is selling unprohibited commodities such as grapes. There is no doubt that selling grapes is as valid as selling any other fruits or unprohibited commodities and, therefore, is a valid subject matter for a sale contract or gift, etc. However, the presence of the possibility of transforming grapes into alcoholic products has caused Islamic jurists to be cautious should the buyer have such an intention.\textsuperscript{289} On this particular issue, Islamic jurists have several viewpoints: the first view is that grapes are a valid subject matter and therefore every contract which involves such fruit is also valid regardless of the motive of either of the parties.\textsuperscript{290} Another view argues that although grapes are valid \textit{per se}, the contract that aims at producing prohibited material from unprohibited material is invalidated because of its illegitimate consideration, whether this consideration is mentioned in the contract or not.\textsuperscript{291} And the only prerequisite to take such a consideration into account is that the seller must have known, or it was possible for him to know from the available circumstances, that the buyer is definitely going to produce prohibited material from the subject matter.\textsuperscript{292} The argument here is based on the maxim that "Everything which leads to a forbidden thing is forbidden". A third view is that such a contract is invalid if, and only if, the invalid purpose is explicitly or implicitly mentioned in the contract.\textsuperscript{293} It is important to note that jurists who consider the motives of the parties as an effective factor in the contract consider such a motive from an objective rather than a subjective viewpoint.\textsuperscript{294} That is why the motive is only taken into account when it is known or can be known from the available circumstances by other contractor.

\textsuperscript{289} Ibid.
\textsuperscript{290} The Shafi'i school believe that the sale is valid in this case but it is detestable (\textit{makrooh}) as it is leading to a sin. However, if the seller knew for sure that the buyer was definitely going to produce wine the Shafi'i jurists have two opinions: the first considers such a sale as being strongly detestable and the other prohibits it. Although the Maliki jurists agree with the Shafi'i school that the invalid purpose of the sale contract does not invalidate such a contract, it, however, prevents the sale contract from producing its effects. See for more information Mohammed Ahmad Sraj, \textit{Nazryh al-Aqd fi al-Fiqh al-Islami} (1998) 153-7.
\textsuperscript{291} Ibid 153.
\textsuperscript{292} The Hanbali takes the motives of the contractors as a cause for invalidating the contract; see, Ibn Qudamah, \textit{al-Mugni} (1983) 40-1.
\textsuperscript{293} Ibid.
The foregoing example illustrates that it is not always easy to judge whether certain contracts are valid or not unless the person is familiar with Islamic rules and principles and at the same time familiar with the legal system of the particular Islamic country he or she is dealing with, taking into account the following:

1. The adoption of Shari'ah rules and principles varies from one Islamic country to another;296
2. The adoption of a particular Islamic school by certain countries might, and most probably will, influence the legality or illegality of certain legal actions or transactions;297
3. The legal system of the Islamic country itself might introduce more prohibited actions and/or transactions such as the Israel Boycott Law298 or restrictions relating to oil production, public properties, or public orders.

The particular conditions relating to the cause or consideration of a contract in many Islamic countries are that every sale contract must have a valid cause and consideration299 (usually it is considered valid unless proven otherwise) and it must conform to law, public order and decency or morality.300

2.6 The Valid Modern Sale Contracts and Stipulation Options
As a result of the foregoing discussion, both the traditional sale contract and the e-sale contract define the valid contract (sahih) as the connection of an offer emanating from one of the contracting parties with the acceptance of the other party in a lawful manner which marks its effect on the subject-matter of the contract and includes all these conditions (shurut), otherwise it would be a null contract (batil). However, the concern of modern Muslim jurists is to reconcile the ever evolving practical needs with the prescriptions of Shari'ah in face of economic development, and it is necessary to find solutions case by case without going against the Islamic principles.

296 Saudi Arabia, Iran, and Pakistan, for instance, rely heavily on the Shari'ah rules and principles more than other Islamic countries.
297 Although it is rare to find a Muslim country that relies totally on one particular school of Shari'ah, it is very likely that the existence of lobbies of traditional scholars in some countries may influence its practice to follow a single school. The example here is Saudi Arabia; despite numerous attempts to induce the application of the prevalent views of all schools, the presence of a large number of Hanbali followers managed to make the Hanbali view the most dominant.
298 Which exists in many Islamic countries such as Saudi Arabia, Egypt, Syria, and Kuwait.
299 Kuwait Civil Code (1980), art 167; Dubai, Contract Law (1971), art 21(1); Egypt Civil Code (1948), art 137; Syria Civil Code (1949), arts 136 &137.
300 Egypt Civil Code (1948), art 136.
As a result several doctrinal approaches have been formulated to make various new valid contracts. Among these new contracts are contracts such as Advance Purchase (Salam), Commissioned Manufacture (Istisna), and Credit Sale or Deferred Sale (Bay‘ Mu‘ajjal). We will briefly explain these three types of Islamic contracts which can be used in e-sale.

2.6.1 The Advance Purchase (Bay‘ Al-Salam)

The advance purchase or future delivery has been defined by the Muslim jurists as the forward purchase of generically described goods for full advance payment, and the described goods will exist at a pre-determined time in the future and will be delivered to the buyer. The price must be paid at the moment of the conclusion of the contract under pain of nullity. The advance purchase sale was implying authorised by the Prophet (P.b.u.h). A Tradition (Sunnah) was reported that Abdull al-Rahman ibn Abza al-Khuza‘I and Abdullah ibn Awfa al-Aslami said:

“We used to share the booty (or the spoils of war) in the lifetime of the Prophet, when the peasants of al-Sham (Syria) came to us, we used to pay them in advance for wheat, barley and raisins to be delivered within a fixed period.”

Besides, there is another Hadith narrated by Abdullah Ibn Abbas that stated:

When the Prophet came to Madinah the people used to pay in advance the price of ordered sale (Salam) of the future harvest of their fruits (within one, two and three years). The Prophet then Said: Whoever wants to make money in advance or salam sale (for fruit) to be delivered later, do so upon specified weight and for a specified duration of time.

‘Abdullah Ibn Abbas said: “I witness that the sale by advance which is guaranteed to a certain period was permitted by God (Allah) in his Book, and he allowed it in the verse: “O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, put them in writing”

303 For more information about the advance purchase sale see Frank E Vogel and Samuel L Hayes, Islamic Law and Finance (1998) 145-6.
305 A companion of Prophet Mohammed.
306 A city of the Prophet Mohammed which was located in Saudi Arabia.
307 The Qur’an: Surat al-Imran, verse 282.
Muslim jurists have laid down a number of conditions for the validity of the advance purchase, in order to limit as far as possible the application of this exception and the risk of fraud (gharar) which might upset the balance of the benefits.\(^{308}\) However, if the goods delivered are specifically different from what the seller was promised, the buyer has two choices: either take back his price or take any other goods becoming available later in place of the goods previously advanced, with no compensation permitted for the delay.\(^{309}\)

2.6.2 The Commissioned Manufacture (Bay' al- Istisna)

The commissioned manufacture contract or sale on order is an exception to the application of the need for the present existence of the object at the time of contract, as mentioned in our earlier discussion of the fundamental elements of a valid sale contract under Islamic law, because the principle of necessity (darurat) has led the Muslim jurists to validate this sale contract by appealing to Istisna, meaning that the derogation has been accepted out of equity, for clearly practical reasons. It differs from the advance purchase contract only in the fact that the goods which are the object of the commissioned manufacture contract remain to be manufactured and will not exist materially until the actual time of sale.\(^{310}\) It exists only in the Hanafi school while in other schools, the manufacture of goods was secured either by the advance purchase contract (Salam) or a contract of sale (of the raw material) combined with a contract of hire (Ijara) by which the seller agrees to process the raw material into a finished product.\(^{311}\)

The majority of Hanafi jurists have required one condition on the commissioned manufacture contract, that is, it binds neither party until the object of the contract is made or exists and is accepted by the buyer.\(^{312}\)

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\(^{309}\) Ibid ,73.


\(^{311}\) Ibid.

\(^{312}\) For more information about this kind see Siddiq Mohammed al-Amin, *al-Gharar in Contracts and Its Effects on Contemporary Transactions* (1997) 31-2.
2.6.3 The Credit Sale (Bay' al-Mu'ajjal)

The credit sale is the closest Islamic analogue to interest finance.\(^{313}\) It is made on a credit basis rather than cash.\(^{314}\) The main feature of this technique consists in procurement of goods at the request of the client and selling them to him on credit. In other words, it is a contract under which if the buyer chooses for the goods to be delivered but is not able to pay in cash, the seller will then offer a price which is higher then the cash price.\(^{315}\) It is then for the buyer to choose whether or not he wishes to buy at this price, which is to be paid over a stipulated period.\(^{316}\) Again, the incapacity to compensate clause applies where appropriate, therefore this and the former contract differ from the interest-based contracts, where defaults in reimbursement allow for additional interest to be charged based on the buyer defaulting in his obligations.\(^{317}\) Therefore, the following rules govern credit sale under Islamic law:\(^{318}\)

1. The subject of the contract must exist;
2. The subject of the contract must be held and owned by the seller;
3. The sale must be immediate and complete, not on a future date;
4. The price is certain;
5. No stipulations are annexed.

Therefore, e-sale contracts may be any one of the three types of new Islamic contracts mentioned above, depending on the manner of communication and the type of trade being carried out.\(^{319}\) When a vendor or business conducting sales online first takes the money and then afterwards delivers the merchandise, it is advance purchase.\(^{320}\) If the vendor or the corporation established an agreement with the buyer to produce or manufacture the product ordered and take payment from the buyer once the product is

\(^{313}\) Ibid 139.
\(^{314}\) Ibid.
\(^{315}\) http://www.sanabelnetwork.org/conference/pdf/Mohammed_N_Alam2.pdf
\(^{317}\) Ibid.
\(^{320}\) Ibid.
made, it is a commissioned manufacture sale.\(^{321}\) And if the vendor or the corporation agrees to sell the product to the buyer and the payment of the price is to be deferred or the price is to be payable in instalments, then it is a credit sale.\(^{322}\)

### 2.6.4 Stipulation Options

The subject-matter of the sale contract may be known for its genus, species, attributes and quantity, and it may also be in existence, and deliverable, and yet, for some Muslim jurists,\(^{323}\) it may still be subject to uncertainty (*Gharar*) because one of the contracting parties cannot see it: either it is not present at the site of the sale contract, or is present there but unseen placed in a container. This is what is known as the sale of the absent object. What is meant here is that the subject, owned by the seller, is present outside, but not seen by the buyer.

Muslim jurists from the four Islamic schools have different views regarding the sale of the absent object. Hanafi, Maliki, and Hanbali jurists have held it permissible to sell the absent object on the basis of description because this is the customary manner in the sale of absent objects. However, they have laid down certain conditions for the validity of such a sale that are designed to remove uncertainty (*Gharar*).\(^{324}\) Also, they have found that the sale is binding on the buyer if he found the object corresponding to the way it was earlier described to him. But if he found it different, he has the option either to ratify the sale or to revoke it.\(^{325}\)

Therefore, the sale contract in Islamic law may also include a stipulation option (*Khiyar*). Literally this denotes a choice on the part of the holder of the right of option, who may either confirm the act or render it void. This option, which can be stipulated by one or both parties in the sale contract, is legitimated in several Traditions (*hadith*):

\(^{321}\) Ibid.
\(^{322}\) Ibid.
\(^{325}\) Ibid.
Al-San'ani recorded a Tradition which was related by Ta'us. In this Tradition, the Prophet P.b.u.h is said to have bought a camel from a Bedouin, before his prophethood. After the transaction, the Prophet said to the Bedouin: "Take your right of option (Khiyar)." He looked at the Prophet and said: "May God perpetuate your life. Who are you?" After his prophethood, the Prophet instituted the law of Khiyar after sale. 326

The main option in Islamic business contracts is the option of the meeting place (Khiyar al-Majlis), which is the period during which the contracting parties devote themselves to the business in hand and is terminated by any event, such as physical departure from the place of business, which indicates that negotiations are concluded or suspended. In addition, the right of option of the meeting place (Khiyar al-Majlis) is the inalienable right to repudiate unilaterally a contract concluded by both parties, so long as they have not yet separated, when the contract is a bilateral transaction. 327

The four Islamic schools had figured kinds of other options (Khiyar), as is discerned from the Tradition of the Prophet (P.b.u.h) as follows and the four Islamic schools:

2.6.4.1 Option by Stipulation (Khiyar al-Shart)

In an option by stipulation, the contracting parties may reserve the right of conventional option by special stipulation, the faculty of cancelling the sale contract within a certain time. 328 The four Islamic schools agreed generally that the buyer has a period of three days with respect to the sale contract. However, Hanbali and Maliki jurists agreed that the period can be more than a period of three days if the contracting parties agreed. 329 The four Islamic schools' cooling off period of three days is based on the Tradition of the Prophet Mohammad (P.b.u.h):

"The Prophet (P.b.u.h) said to one has bought goods, take your right of option (Khiyar) within three days." 330

Stipulation may be made either by one of the contracting parties or by both. A stipulated and agreed period of time during which either one or both parties may

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327 Ibid 37.
330 This hadith was narrated by Muslim in his Sahih in “Kitab al-Buyu” (d. 261/875) No 176.
revoke the contract stands as a valid stipulation according to general principles because it strengthens the basic purpose of certainty of contractual commitment. 331

However, if for example the buyer in the sale contract does not later cancel it by the exercise of the right of option, the buyer of the goods is considered to have been the owner from the time the bargain was concluded; if, on the contrary, the contract is cancelled, the seller’s ownership is considered to have been uninterrupted. 332 The Prophet (P.b.u.h) is reported to have said:

"Both the buyer and the seller have the option of cancelling or confirming the bargain as long as they are together. They separate or one of them gives the other the option of keeping or returning the goods and a decision is reached in that case the bargain is considered as final. If they separate after the bargain and none of them has rejected it, then the bargain is rendered final." 333

2.6.4.2 Option by Sight (Khiyar al-Ru’ya)

This option ensures achievement of certainty by giving the buyer an unqualified option by Shari’ah to revoke the contract upon sight and inspection of the transacted goods. 334 This is considered as a unilateral right for the buyer to rescind. For this option the Prophet is reported to have said:

"Whoever purchases goods, and he has not seen it, he has the right of option whenever he sees it." 335

2.6.4.3 Option by Defect (Khiyar al-Ayb)

The option by defect implies a latent fault, flaw or defect which exists in the goods or services at the time of the contract, and which is material to the purpose of the contract, and substantially impairs the value of the goods or services to the recipient. 336 For this option, the Prophet (P.b.u.h) said:

332 Ibid.
"If a Muslim sells goods to another Muslim and it included defective, the seller must declare it to the buyer."\(^{337}\)

Therefore, the buyer has the right of option on account of defects of which he has become aware only after taking possession of the commodity which he bought, but which existed previously in the commodity, which allows the buyer to return the defective goods and have the price back. If, on the other hand, the buyer is aware of the defects when buying the object, then he has no right of option. There is no direct rule attributed to the Prophet on this option.\(^{338}\)


\(^{338}\) Ibid 206.
CHAPTER 3 – BASIC NOTIONS RELATING TO THE
FORMATION OF THE E-SALE CONTRACT UNDER ISLAMIC
LAW

3.1 Introduction

The Hanafi, Shafi'i, Maliki, and Hanbali schools in Islamic law assign a role to some
psychological elements in the formation of any contract in general, and the sale
contract in particular. Such elements relate, obviously, only to natural persons.

In Islamic law there are differences between intention (qasd), consent (rida), will
(iradah) and choice (ikhtiyar) and further distinctions between an ‘intention to create’
a contract (qasd al-insha), an ‘intention to pronounce words’ (qasd al-lafz) and an
‘intention as to the meaning’ of the words used (qasd al-ma’na).^{339}

The legal imports of these notions are to be treated beyond their respective lexical
meanings, and their respective roles in the formation of a sale contract are to be
compared in theoretical and functional terms.

This chapter will deal with basic features of the psychological elements in the
formation of contract under the four classical Islamic schools. We will discuss the
exteriorization of psychological elements, making reference to the subjective and
objective, or consensualistic and formalistic. We will review various means of
expression, namely word of mouth, writing, sign, conduct, and silence. And last, we
will examine the efficacy of these means of contractual expression over the internet
due to the classical contract principles in the Islamic law.

3.2 Range of Psychological Elements

3.2.1 Intention to Create Legal Relations

All the four Islamic schools require a primary process of decision-making, whether its
motivating factor is termed ‘intention’ (or qasd); an accompanying willingness,
whether it is termed ‘consent’ (or rida); and a freedom from external pressure, deceit
or other adverse influences - all in order to conclude a valid and binding sale contract.

These elements, depending on their respective roles, contribute to demarcating, first, a legal valid sale contract from an ethical agreement and second, a legally binding contract from a legally avoidable sale contract.

Islamic law shows at times an appearance of consensualism but it has, in fact, a formalistic approach to the formation of contracts. The formalities are not in the performance of certain ceremonial acts, or related to the enforcement of a sale contract, but in the utterance of appropriate words in the right way for the formation of contracts.\footnote{Mohammed Najeeb al-Magrabi, \textit{Usess al-T'aqud \ fu al-Fiqh al-Islami} (2006) 13.} Thus, a trend of thought in Islamic studies holds that there is no ‘formalism’ (\textit{shakliyyah}) in Islamic law but a ‘verbalism’ (\textit{lafziyyah}) which is based, first, on the preference of word of mouth over all other means of expression and, second, on strictly logical and grammatical analysis of various modes of declaration of intention and consent.\footnote{Ibid 15.} The underlying psychological notions consist of intention and consent which provide, \textit{prima facie}, a consensual basis for the conclusion of contracts while, this notwithstanding, verbalism retains its dominance. Intention is necessary for the valid conclusion of a contract and consent for giving it a binding force.

\textbf{3.2.2 Relation to ‘Freedom of Choice’ and ‘Will’}

In all the Islamic schools, intention (\textit{gasd}) and consent (\textit{rida}) are frequently used together as joint elements required for the validity and the binding force of a sale contract, but the difference in their function emerges where certain vitiating elements adversely affect the contract. As we shall shortly see, the term ‘will’ (\textit{iradah}) often means ‘intention’. In other words, ‘will’ and ‘intention’ are generally interchangeable as synonyms in Islamic law.\footnote{Ali Mohammed Abu Al’z, \textit{al-Tijarah al- Ictroni’ah Fi al-Fiqh al-Islami} (2007) 133.}

However, in freedom of choice, there is then \textit{ikhtiyar} which, for practical purposes at the moment, may be translated as ‘choice’. In Islamic law it is at times loosely used as a synonym for consent and, as such, a condition for making a contract binding.\footnote{Mohammed Najeeb al-Magrabi, \textit{Usess al-T'aqud \ fu al-Fiqh al-Islami} (2006) 99.}
more precise meaning of the term is 'the choice in giving or withholding consent', that is, from our earlier discussion in chapter two – the validity of e-sale contracts under Islamic law - the freedom from any external pressure, which does not obtain if the consent is extorted by duress. In other words, the consent of the party will be considered lacking if he contracts under duress because he has no freedom to withhold it. Consequently, the contract, though concluded, will be avoidable. Only when the pressure is removed, that is to say, after the victim of duress has regained his choice (ikhtiyar) and given his consent, will the contract become binding.  

Therefore, when the term 'intention' is used alone, without being accompanied by the term 'consent', as a condition for the conclusion of a valid and binding contract, it must be presumed that 'consent' is implied and 'intention' in this context is to mean 'an intention which is the result of an internal willingness' or consent.

In the presentation of the four Islamic schools 'will' (iradah) is frequently used as comprising all three elements of 'intention', 'consent' and 'choice'. 'Will' in Islamic law, says al-Sanhuri:  

"Is composed of two elements: choice (ikhtiyar) and consent (rida). If the will perishes, both elements perish together .... In duress ..., according to Islamic law, the element of rida is lacking but the element of ikhtiyar exists ..."

Choice (ikhtiyar), in this context, may either be equated with, or be taken to comprise, the classical Islamic schools' notion of intention (qasd).

However, under all the four Islamic schools, the elements of consent (rida) and choice (ikhtiyar) may be considered to be the same. Therefore, if the person is independent in his intention, his 'choice' is valid; but if not, it is corrupt. In other words, if a person is independent, free from duress, in forming his intention, he has his 'choice' and consequently his contract is valid and binding; but if he is not independent and

344 Ibid.
346 Ibid.
free from material external pressure, then the element of ‘choice’ is lacking and his contract is voidable under Islamic law.\textsuperscript{347}

On the significance of these three elements al-Zaraqa states,\textsuperscript{348} in the context of all Sunni schools, that:

"Iradah is the mere volition for an act and the directing (of mind) towards it, while ikhtiyar means the power to prefer doing or not doing an act, and rida is the desire to do an act and the contentment with it."

"Intention, being a part of ikhtiyar in all Sunni schools, exists, as in Shi‘ah law, even in the case of duress; but may be or may be not accompanied by the element of ‘choice’ (which in all Sunni schools is directly connected with intention, whereas in Shi‘ah law it is more closely linked with consent). Or, as it is put for Sunni schools, Iradah is more general than all the rest. Ikhtiyar is a particular instance of iradah, because a person who has iradah may or may not have the power to choose otherwise, that is, he may be free or forced. Rida is a particular instance of ikhtiyar because a person may be free in doing an act, namely, he may have the power to do otherwise, but may not have consent in doing it, that is, may not desire it or be content with it, such as a person who does not wish to kill, but kills in self defence.\textsuperscript{349}

It will be noted that rida in the latter part of this exposition is used more in its literal, rather than in a technical, sense and signifies contentment or desire.

Technically, what is meant by rida in the Islamic schools is a ‘contractual or transactional willingness’, which may or may not be coupled with a real and internal contentment.\textsuperscript{350} A person under personal distress may have to sell a thing at a price much lower than its real value, and may be not content with his bargain, yet he is held to have a ‘transactional consent’ (rida al-mu’amali) and to have concluded a valid and binding sale contract.

\textsuperscript{347} Ibid.
\textsuperscript{349} Ibid.
3.2.3 Differentiation of ‘Intention of Word’ (Qasd al-Lafz) and ‘Intention of Meaning’ (Qasd al-Ma’na) in Islamic law

For a sale contract to be validly concluded, either a traditional sale contract or an electronic sale contract, the parties to the sale contract should have the ‘intention to create’ (qasd al-Insha) the contract, which expression may, loosely, be equated with animus contrahendi. But certain distinctions made by the Islamic Schools between different kinds of intention reveal its strongly objective approach through verbalism. Such distinctions produce certain anomalies which fall back on the function of intention such as the following:

(a) Exposition of Differentiation: The primary distinction made by these jurists is between two types of intention: the intention of words and the intention of their meaning. A lunatic, for example, has no intention even of pronouncing the words he happens to utter; they pour uncontrolled from his mouth without his knowledge. By contrast, a person under duress has the intention of pronouncing the words but, according to these jurists, not the intention as to the meaning of his words. They hold that in the formation of a contract no more than an intention to pronounce the words is required. For a sale contract to be validly concluded, “It is enough to have only the intention as words, which is inferred from the words used”. Therefore, a sale contract for which the party has only the intention to pronounce the words, but not the intention to create what those words mean, will not be void ab initio. It will only be voidable by the person who has thus made it.

(b) Ensuing Anomalies: a distinction between the instance where a person pronounces words consciously and where he pronounces them unconsciously, and the fact that his words are taken to have legal effects in the first instance but not in the second, entails certain anomalies:

352 There are, however, certain provisos, in the case of a minor, or a person who uses words only in jest, which shall be presently treated.
353 This is the opinion of the Hanafi and Shafi’i schools; Mohammed Waheed al-deen Sawaar, al-Ta’byr ain al-Iradah fi al-Fiqh al-Islami (1960) 372.
1. Discerning infants - from our earlier discussions in chapter 2 about infants, even in the case of those old enough and 'discerning' (mumayyiz) to understand what they say, jurists state that their purported contracts are void not only as a result of their lack of capacity, but also because of the absence of intention unless they are approved in advance or subsequently by the guardian or the discerning child upon attaining maturity. This seems to be a fictitious proposition since the presumption that infants in the age of discernment lack intention does not usually conform to reality. Thus, we find a boy of eight years old, for example, who goes to buy a toy, cannot be said to have no intention as to the words he pronounces in the same way as a sleepwalker who just mutters sounds and words without knowing or realizing what he is uttering.

2. Utterance in jest - when a person is making or accepting an offer of a contract in jest, though he does not mean, in a legal context, what he is saying, he is fully conscious of what he says and has, employing the terminology of the aforementioned jurists, the intention as to the words he uses. His words, following this distinction, should therefore produce the same result as those of a person under duress, in other words, a contract should ensue but its binding force should depend on his subsequent ratification in earnest. Jurists, however, reject such a conclusion and argue against it in two alternative ways: either his words constitute only a 'form' (surah) devoid of any content based on an intent to enter into a contract and, thus, the case resembles that of a liar in giving information; or he is not using the words for their proper 'referents', that is, not in the sense for which such words have been devised. Of these answers to the criticism concerning the case of a jester, the first is, as can be seen, of a consensual nature whereas the second has a verbalistic basis.

356 Hanafi jurists, Ibid.
357 Maliki, Shafi‘i and Hanabi jurists.
359 "What a jester intends by his words is jest and joke, so he means by his words something different from their referents.”
These jurists,\(^{360}\) while principally giving weight to words, cannot fail to regard them at some point as being the expression of intention.

3. Slip of the Tongue – in the case of a person making a slip of the tongue, he is rightly held to have no intention as to the words nor, \(a\ fortiori\), as to their meaning.\(^{361}\) Similarly, no contract will be concluded if words are used in a way which is contrary to the intention of creating a contract (\(qasd\ al-insha\)), such as the case where a person utters the words by way of posing a question or for the purpose of providing some information.

From our foregoing discussion, the parties to a sale contract must intend to enter into a legal relationship. It will be generally easy to conclude this from the surrounding facts of the matter particularly where one is in a site offering goods or services for sale. Nonetheless, it would be as well to make this clear, particularly in the internet environment where many special offers are made to encourage internet users to visit a site. Essentially, your customers should be under no misapprehension as to the point in time at which they become liable to purchase goods or services from you through your website. However, there are methods which can identify the intention of contracting parties and the approval of the e-sale contract, which we will discuss in the following sections of this chapter.

3.2.4 Defects in Consent (\(Uyub\ al-Rida\)) and 'Options' (\(Khiyarat\))

In Islamic law, coercion or duress (\(Ikrah\)) is the chief cause of defect of consent that the Muslim jurists agree to treat as affecting the will,\(^{362}\) when adopting the subjective theory.\(^{363}\) This is not the case with error (\(Ghalat\)) or fraud (\(Tadlees\) or \(Gharar\)), which

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\(^{360}\) Maliki, Shafi'i and Hanabi jurists.


\(^{362}\) Ibid 441.

\(^{363}\) The rules relating to the examination of the will come into the framework of Western legislation thanks to the theory of defects of consent. Article 1109 of the French Civil Code says: "there is no valid consent if the consent has been given only as a result of error, wrung out by violence, or surprised by fraud." It is therefore important for validity of the contract that the will should be sane and the psychological quest for interference with the will is primordial. This is why the theory of defects of consent leading to nullity of the act is an essentially subjective theory in Western law. Abd al-Razzaq al-Sanhuri, \(Masadir al-Haq fi al-Fiqh al-Islami\) (1960) 183.
the Muslim jurists analyse very objectively. These two causes of defect of consent are given only subsidiary consideration by the Muslim jurists.

The reasons leading to this differentiation between the three kinds of defect of consent are to be found in the way contract is understood in Islamic law and in its close interdependence with morality, for these affect both the drawing up of the contract and its efficacy. Indeed, the adoption by the Muslim jurists of optional clauses constitutes a proof of the intervention of morality in any contract, in order to protect the parties against any danger of disturbance of the equivalence of the benefits. Another form of protection, which is secondary, is provided by the rules relating to defects of consent.

The Muslim jurists in *Fiqh* have considered these protective rules not merely for safeguarding the will but for considerations of morality and equity, in order to ensure for both parties the best conditions for making their contract while fully aware of what they are doing.

As we have discussed in previous chapters, apart from the optional clauses made available to the contracting parties, option by defect (*khiyar al-Ayb*), effective by annulment by defect of consent, constitutes a second protection for the contracting party assured by Islamic morality in Islamic law.

We shall first consider coercion or duress (*Ikrah*) since it constitutes in Islamic law a real interference with the contracting will, then we shall consider the two other defects of consent, error (*Ghalat*) or fraud (*Tadlees* or *Gharar*):

(a) Coercion or duress (*Ikrah*): coercion or duress can be defined as follows: "By coercion one designates the action of one person against another suppressing the consent of this latter person or vitiating his free will", or is "that action directed against a person which supposes his consent". All the definitions of coercion or

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366 Ibid.
duress given by jurists of the other schools will be found to be almost identical to those just given.\textsuperscript{367}

However, defect through coercion or duress is the only defect of consent which has a strictly subjective basis in Islamic law.\textsuperscript{368} To judge the coercion or duress it is necessary in each case to take into consideration the physical strength of the person threatening and the impression he makes on the consciousness of the person threatened in order to determine whether this coercion or duress causes a defect destroying consent and so annulling the juridical act.\textsuperscript{369}

Moreover, it is also desirable to determine the conditions demanded by the Muslim jurists for coercion or duress to be a cause of annulment of the contract. All the Islamic schools are unanimous in declaring that there are three causes constituting coercion or duress by reason of their influence on the free will of the parties.\textsuperscript{370} The coercion or duress should be legally unjustified. The Muslim jurists consider that coercion or duress is justified when the means of coercion, used by a person having a legitimate right, helps to impose respect for this right or for the law by using it,\textsuperscript{371} for example on a debtor to sell his chattels to pay his creditors, or his land to allow the widening of a road; secondly, it should come from a person who has the power to carry out his threats,\textsuperscript{372} for example those persons empowered are understood to have the means of carrying out their threats; thirdly, it should be of such a nature as to make an impression on its victim - one may take the example of a person being forced to sell some of his possessions to pay money to somebody who is threatening him.\textsuperscript{373}

The four Islamic schools had accepted more or less the same doctrine concerning the conditions and the basis of coercion or duress, but they differ as to the effect of the coercion or duress and its repercussions on the validity of the juridical act.\textsuperscript{374}

\textsuperscript{367} Ibid.
\textsuperscript{368} Ibid 107.
\textsuperscript{370} Mohammed bin Ahmad al-Sarkhasi, \textit{al-Mabsut} (1986) 101.
\textsuperscript{371} Ibid.
\textsuperscript{372} Ibid 39.
Hanbali jurists, holding the theory of *al-Iradah al-Batina*, internal will with its implication of a psychological search for the intention (*Irada*) of the parties necessary in juridical acts, quite logically consider that an act extracted by force is an absolute nullity (*batil*), that is to say that it does not exist since the essential condition of the juridical act, the will, is vitiated in its very being. It follows that this act, being fundamentally null and void, can never be confirmed; even if the constraint is removed, the contract must be made anew. The Shafi’i jurists have taken the same position as the Hanbali jurists.

The Maliki school jurists consider that the juridical act which has been extorted by coercion or duress has been underwritten by its author, meaning that the will to subscribe to this act basically exists, but is not free. For this reason the Maliki jurists consider that this act, although basically valid (*sahih*), is not binding, which means that the person forced has a choice between cancellation of the act (*faskh*), or its confirmation.

However, Hanafi jurists, whose point of view is similar to the Maliki jurists, have decided that coercion or duress suppresses freedom of the will while at the same time leaving the will itself.

But the consequences of this point of view are peculiar to the Hanafi jurists. The opinion prevailing among exegetes of this school is that the act extorted by force is not binding (*ghayr lazim*), but is *fasid*, null and void. Nullity by coercion or duress is to be distinguished from the *fasid* nullity of common or customary law.

In principle, nullity which is *fasid* cannot be corrected, whereas an act which is null and void due to coercion or duress may be confirmed by its author if the latter chooses to give his confirmation once the coercion or duress has been removed.

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376 Ibid.
378 Ibid.
379 Ibid.
After a sale contract which is null (fasid), if the buyer has disposed of the article by an act which may be cancelled, such as sale or donation, the first seller cannot reclaim the article which has now been sold into the possession of a third party.381

On the other hand, where it is a question of nullity for coercion or duress, the seller in either the traditional sale contract or the e-sale contract will be able to reclaim his property in whoever’s hand it may later be. Even if the property was destroyed while in the possession of the third party, the person who was compelled to sell it has the right to demand its value.382 As for nullity which is fasid in common or customary law, if the buyer has disposed of the article by an act which cannot be cancelled, for example by the constitution of a waqf, no claim is possible.383 But it is a matter of nullity which is fasid because of coercion or duress, then the victim may lay claim to the value of the article from the buyer who used coercion or duress.384

A judge may in his official capacity invoke at any time the fasid nullity of common or customary law. But only the victim of the coercion or duress may either demand the annulment of the act extorted from him by force or, if he wishes its validation, confirm it.385

(b) Error (Ghalat): the concept of error invalidating consent exists in the spirit of the fiqh only in a very subsidiary way and its importance as an instrument for protecting the free will of a contracting party is entirely secondary in either traditional sale contracts or e-sale contracts.

The reason is that the Muslim jurists, eager to preserve a balance of equity and justice between any two parties, have built up a whole edifice relative to the object of obligation, with certain options for which one finds exclusive requirements particular to Islamic law and which reduce to a minimum all risk of error for the contracting parties.

382 Ibid.
383 Ibn Abdeen, Hashyaih Radal-Muhtar (d.1252/1836) 125.
The concept of error appears only very occasionally in the books of fiqh of all the Islamic schools. Allusion is made to it in a few scattered dispositions relating to defects of the object, to the option of inspection and to objects of contract in general. It should incidentally be noted that these occasional rules covering cases of error are to be found in books of fiqh in the framework of details of the conditions particular to the object of sale.

In Islamic law, parties to a contract have the right admitted by all four schools to impose an option by stipulation (khiyar al-shart) which we amplified in the previous chapter. This is in fact a delay for reflection allowed them by the Islamic law lest they fall into any trap as a result of a too hasty decision. In this way the option of inspection allows the party acquiring an article not before him when he makes the contract to annul the purchase when he sees his acquisition for the first time, if he feels himself to be cheated. The same applies to the option for latent defect, which is a roundabout means of correcting the consequences of the error. Finally, the Islamic law concerning the object of obligation constitutes a measure to prevent any error.

However, Muslim jurists have considered as nonexistent (batil), any act concluded under the influence of error either in the traditional sale contract or likewise the e-sale contract as result of the similarity between these two contracts; consent may be rendered null and void in certain extreme cases, with the intention of protecting the will of the contracting parties who have been led into putting themselves under an obligation, for their consent may well have been given because of a false presentation of facts. In Islamic law error is conceived as a false representation by the contracting parties of the facts relative to the object of obligation or to one of the substantial qualities of the object.

We shall confine ourselves to an examination of the basis for error which is nullified when it bears on the substance of the matter, since the interest of our study lies in sale contract.

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Error considered as such by Muslim jurists is any error bearing on a substantial quality of the thing.\textsuperscript{389} The act is then considered to be nonexistent (batil); such is the case when the quantity of something stipulated and what is presented are different.

The classical example proposed by the Muslim jurists is that of corundum (yagut).\textsuperscript{390} If a stone is sold as being corundum but turns out to be only glass, the sale is null and void, the reason being that between glass and corundum there is a difference of genus, in the very substance of the stone. Other examples of difference of substance are that between a garment dyed with saffron and another dyed with cardamom, or between a sack of sugar and a sack of flour, or between a garment of silk and a garment of another material.\textsuperscript{391}

The substitution by the seller of any one of the above for the other substance, stipulated in the contract, nullifies the act, which is considered void for lack of the object.\textsuperscript{392} However, the criterion taken for the substantial quality used by the jurists is not a formal one. They base themselves sometimes on the utility, that is to say the use normally made of the article, and sometimes on the properties which the purchaser had principally in his mind and which decided him to make the contract.\textsuperscript{393}

However, all the jurists of the four schools agree that in the case of an error concerning a description (wasf), a non-substantial quality, the sale is valid, but leaves the buyer a choice between the cancellation of the sale and its confirmation.\textsuperscript{394} To take for example the case of the corundum sold in the dark as rose-red (ruby) and revealed in the light of day as yellow (topaz), both forms being precious, the buyer may cancel the purchase.\textsuperscript{395} The difference lies solely in a non-substantial quality, or (wasf). Likewise, if somebody buys a book online stipulating it should be by a particular author, and the book turns out to be by another author, then the same Islamic legal principles will apply irrespective of whether the sale contract has been formed electronically, or through paper based communications: the sale contract is valid, but the purchaser may cancel the purchase since the identity of the author is

\textsuperscript{389} Ibid.
\textsuperscript{391} Abu Bakr al-Kassani, \textit{Badaa'i al-Sanaya} (1982) 140.
\textsuperscript{393} Ibid.
\textsuperscript{395} Ibid.
important to him. However, the quality, substantial or non-substantial, the absence of which will render the act nonexistent (batil), or allow its termination because of an option, according to whether this quality is substantial or not, should be stipulated in the contract itself.396

c) Fraud (Tadlees or Gharar): the Muslim jurists have always been concerned that the right balance should exist between the parties in the contract. In other words, it is the harm which is caused and which gives rise to a great disproportion between the parties to the contract which has held the attention of the Muslim jurists and led them to annul contracts; unless there is lesion, fraud has had no practical consequences in Islamic law even when it has been the determining factor for the will of the contracting party.397 Only the prejudicial fraud caused is taken into consideration.398

Some authors have adopted the Hanafi School conception in which fraud is taken into consideration only if it is found at the conclusion of one and the same juridical act. This requirement is found in a less apparent way in the teaching of the other schools, but even there fraud is operative only if it results in the concealment of a defect in the article which, if excessive, would mean cancellation of the contract.399

However, in the teaching of the four Islamic schools one can find no text clearly defining fraud or affirming that any fraud, having weighed heavily on the will of the contracting party and having decided him to conclude the contract, is alone sufficient to annul the contract.400 All the Muslim jurists fix their attention on the more or less injurious consequences of the fraudulent manoeuvres or of the lying allegations. What is important for them is to safeguard justice between the two contracting parties and to take measures against any illicit profit.401

Carrying on from this point, we come to the defect that one is supposed to extirpate when one wishes to suppress fraud. The jurists wish to preserve the right balance

398 Ibid.
400 Ibid.
401 Ibid (Hanafi and Maliki view).
between the contracting parties to the contract and opt for annulment of the contract for fraud when the lack of equivalence between the benefits is only too obvious and constitutes a breach of social justice. This is the excessive fraud (ghabn fahish) which is penalised.\textsuperscript{402} This position of the Hanafi school is to be found in the teaching of the other schools.\textsuperscript{403}

In their approach to the subject of fraud, the Muslim jurists of the different schools study objectively, case by case, the tricks and fraudulent manoeuvres that have decided a contracting party to make an agreement and that give him the right to annul the contract because of the fraud done to him. Fully resolved to keep watch over contractual justice, the exegetes have built a juridical structure around fraudulent lesion based sometimes on reasoning by analogy and sometimes on equity, and in consequence there is no investigation of any supposed psychological influence on the consent of the parties. What is essential for the Muslim jurists is the material result caused by any prejudice which would be to the profit of one of the parties, enriching him illegally at the expense of the other.\textsuperscript{404} This is the original feature of Islamic contract law, essentially religious and moral, which can not be linked to any other legal system.

Taking the example of fraud, we find that the classical Muslim jurists have retained the use of the fraudulent manoeuvres that decide the contracting party to cause cancellation of the contract on account of fraud, and this is why the Hanafi jurists, followed by the exegetes of the other schools, consider that two conditions are necessary if the fraud is to affect the binding force of the contract:\textsuperscript{405}

1. The fraud should have been committed by one of the contracting parties or by the broker who acted as intermediary. If it was the work of any other person, it will have no effect.
2. Unless there have also been fraudulent manoeuvres, the lesion caused to the victim by the fraud must be excessive.

\textsuperscript{402} Ibid 101.
These conditions have led the jurists from the four schools to choose two kinds of fraud resulting from fraudulent manoeuvres, fraud by action (Fi'li), and verbal fraud (Lafzi).406

1. Fraud by Action (Fi'li): the jurists have based themselves on a tradition (Sunnah) of the Prophet (P. b. u. h) in order to give substance to this kind of fraud which is the result of fraudulent manoeuvres. According to Abu Hurairh, the Prophet said:

"Do not tie the teats of the she-camel. By doing this milk of the camel is made to accumulate and the future buyer will be deceived about her yield of milk. Whoever buys the beast will have the choice between two solutions, keeping the beast or returning it with a measure of dates."407

The jurists from all the four schools agree as a matter of general principle that fraud by action is the result of going as far as actual lesion. The classical example is the kind of sale known as tasriyat (the animal which is musarra) that has just been alluded to.408 However, in the example of sale alone (tasriyat) jurists hold different opinions as to the effects involved in the penalties for such a sale. The Hanafi jurists consider that in the case of such a sale the buyer has no right to cancel the sale because there is not properly speaking any latent defect, meaning any defect inherent in the object sold that the fraud was meant to hide, nor even any serious lesion that the fraud helped to cover up.409 In this case the buyer will have a right only to compensation.410

In contrast, the other three schools, while basing themselves on the same tradition (hadith), admit that in the necessary sale (musarra), there can by way of exception be fraud without lesion capable of annulling the contract.411 However, in all the other cases of fraud by action, the jurists are unanimous in considering that fraud by action, however serious the fraudulent manoeuvres, does not open the way to any option in favour of the buyer unless there is also lesion which incidentally need not be

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409 Ibid.
410 Ibid.
411 Ibid.
excessive.\textsuperscript{412} Any raising of the price, however slight, will when it is the results of such manoeuvres give the buyer the right to cancel the sale. But this cancellation will be made through option of defect (\textit{khiyar al-ayb}) as we have explained before, which fact is yet another proof of the absence of any idea of autonomy in the notion of fraud.

2. Verbal Fraud (\textit{Lafzi}): there is verbal fraud when without any manoeuvre the seller attributes to his merchandise qualities which it does not possess or speaks highly of some imaginary perfection.\textsuperscript{413} However, it is inevitable in business that a seller should vaunt his wares to obtain from them all the profit he can, even when he lies to exaggerate their value. As Islam has great respect for commercial activity, the jurists were shy of penalising such verbal fraud as might be the consequence of a little lie and so of paralysing all business. Only verbal fraud entailing excessive damage prejudicing the buyer can lead to annulment of the sale contract, the jurists being unanimous on this subject.\textsuperscript{414}

The Muslim jurists are not generally concerned with the psychological impact of fraud. What counts for them are the effects of the fraud in the form of the injury caused, so that the equivalence of the benefits may be maintained. This means that unless there is lesion, even if it has been the deciding factor for the will of the contracting party, it has no effect on the validity of the juridical act. However, it remains to determine the extent of lesion beyond which the injured party may cancel the sale contract. Profit is permitted by the Islamic law and it is even necessary in these contracts to have profit, for it is only with the intention of some gain or other that the seller and buyer make the agreement.\textsuperscript{415}

In conclusion, the jurists have adopted a very particular point of view, peculiar to Islamic law, to ensure double protection for the contracting party who might have committed an error concerning the quality of something. In Islamic law everything turns on the notion of correct proportion between what is exchanged, of just profit, of equity, and of justice, even in what concerns the supposed defects of consent -

\textsuperscript{412} Muwaffaq al-Din Ibn Qudama “option for fraud is conceded when the fraud has raised the price.” For more instances see Mohammed Ahmad Sraj, \textit{Nazryh al-Aqd fi al-Fiqh al-Islami} (1998) 103-4.


\textsuperscript{414} Ibid.

coercion or duress, error, fraud. The role of will and consent is eclipsed by these moral concepts which underlie all contractual law.

To sum up, the intervention of the rule of morality in Islamic law in the domain of the practical problems of life, to which contracts belong, is the basis of the opinion which considers this law to be a meta-juridical system. However, the coexistence of law and religion, not considered in systems of secular law, is assured in a system of religious law (Islamic law) by the submission of the law to a system of general precepts drawn from the Shari'ah, which governs the business world as well as the economic and financial sectors. For example, purchase and sale are licit, whereas interest is illicit.

Justice and equality between believers form the basic precept recommended by Islam, on which is based the whole juridical structure of the Muslim jurists. As for morality, it provides the bond between all the juridical elements particular to Islamic law.

The impact of morality on contractual law in classical jurisprudence is felt at every stage of the contractual process, limiting freedom in the making of contracts in favour of perfect equivalence in what is exchanged. The influence of moral directives in both the strict limitation of the object of obligation and the strict ban on ancillary conditions has meant great rigour in the structure of the contract in Islamic law.

However, in all the works of Muslim jurists on the fiqh they have elaborated a whole series of options (khiyarat), as we explained in our earlier discussion on stipulation options in chapter two. The four Islamic schools agreed to give the buyer the right to cancel the contract within a period of three days under option by stipulation (Khiyar al-Shart) based on the Tradition of the Prophet, and thus we can use these stipulation options in Islamic law to govern the e-sale contract, in order to ensure great protection for the contracting party in this new sale contract.416 Their confirmation of the juridical act comes with complete understanding of these clauses.

Moreover, Islamic schools share a fairly sophisticated approach to psychological elements in the formation of contracts which can be used practically in the e-sale

416 This option is found as well in another jurisdiction such as French law which give the buyer by the internet the right to return the subject to the seller within a period of seven days.
contract. However, the overall function and role of psychological elements have to be considered together with certain other juridical institutions peculiar to the Islamic law of contracts either in the traditional sale contract or e-sale contract, such as the doctrine of ‘options’ (khiyarat). Psychological elements determine, within set patterns, the formation of a contract, but the binding force of a contract or its validity is determined by the operation of both psychological elements and ‘options’. The rules pertaining to the capacity of contracting parties also have their function, as in any other system of law, though not as an element of the contract itself but as a prerequisite to the formation of a valid and binding contract.

On the other hand, consent and will are more problematic in the electronic environment than in a paper based world. The most obvious reason is that the internet is an open network, and therefore, it is not as secure as other channels of business communication. Thus, computer error is more often than not caused by human errors, or by practices and processes designed with little understanding of the internet, but they leave the impression that the internet is unreliable.

Furthermore, the following factors also can affect trust in which may called e-consent in the e-sale contract:

- Business entities can change their public facades quickly and easily on the web. A site that was there yesterday may be not there tomorrow or it may be hosted on another server.
- Electronic transactions take place between wider varieties of people, with a larger proportion being one-off purchases.
- Electronic transactions take place more quickly, and the opportunities to investigate fraud or errors do not arise to the same extent as in the paper-based world.
- Business is becoming more international, and problems associated with cross border transactions will multiply.

From our discussion regarding e-consent and will under the rules of the four Islamic schools, even the e-sale contract that satisfies the requirements and principles of contract may be unenforceable in some circumstances where one of the following
factors arise in which the e-sale contract may be vitiated and there is defect in e-consent:

1. Where the e-sale contract was induced by duress or undue influence. This involves a party (such as a doctor or lawyer) using their position or relationship to dominate the independent will of a weaker party to obtain some undue benefit.

2. Where there is an error about the basis of the agreement.

3. Where the e-sale contract was induced by a material misrepresentation of fact.

4. Where the e-sale contract is illegal or against the principles of Islamic law or public policy as well. An extreme example would be if the subject of an e-sale contract is alcohol.

3.3 Exteriorization of Psychological Elements

3.3.1 Introduction

Inner psychological elements, residing within the mind of a human being, can never be known to anyone else unless they are exteriorized, expressed in some communicative way. Even when they are so expressed, it can never be verified that the expression of such elements corresponds to what was in the mind of the person concerned.

Some legal systems pay greater attention to what is considered to be the inner element, however it may be expressed, and others pay greater attention to the expression of the inner element, whatever the actual state of such element may inwardly be. "The difference in approach is only a matter of emphasis, since all legal systems have to work with exteriorized indications of inner psychological elements in order to appraise and evaluate their legal effects."[417]

A purely internal process of mind, related to a psychological element required for the formation of a contract under any legal system, is, first, beyond the reach of the law and, second, not a concern of the law. The law does not, and can not, look into the state of mind of a person in the same way as a philosopher or a psychologist may attempt to do in order to comprehend, analyse and categorize it. Consideration of psychological elements in the formation of a contract is a different matter. It is

directed towards a socio-economic end in regulating the legal relations of the people in a community.

Thus, abstract inner psychological elements are never at issue in any legal system; it is always an outward appearance of them and the significance to be given thereto, but in a narrower or in a wider spectrum of the behaviour of the parties to the contract. The outward appearance consists not only of what is explicitly conveyed by a person as being the expression of his internal state of mind, but also of all other factors surrounding such an expression. It is at this level that legal systems differ from each other. Some systems allow a person to claim and, if he can, prove subsequently that what appeared to have been an expression of his state of mind was not actually so, while other systems hold him bound to what was expressed and outwardly understood and deny him the possibility of going back on it after it has been made. In neither case is the question considered in isolation, but is weighed in the light of other external tangible factors. Under the former approach the person concerned may produce his version of his inner state of mind while under the latter the general and common understanding, geared to some social parameters such as the test of reasonableness or the criterion of custom and usage, is taken into account.

It is only in such a context that a legal system may be referred to as being 'subjective' or 'objective', as being 'consensualistic' or 'formalistic', and so on. Such labels have no precise or uniform or universal significance, however. They denote only the generality of a trend. While some legal systems which share some common traits may be termed 'subjective' or, conversely, 'objective', it does not mean that their approaches are necessarily alike. The subjectivity or the objectivity of two systems which resemble one another may well be different from one another in essence.

For example French law may be said, in broad terms, to have a subjective tendency towards allowing a subsequent expression of the inner psychological elements to be considered against its primary expression in the formation of a contract,\textsuperscript{418} whereas Islamic law and common law may, at different planes, be said to have an objective approach either by denying a subsequent reversion to inner psychological elements.

\textsuperscript{418} The French Civil Code (1804), art 1109.
running counter to their outward expression or by adhering to the outward significance of contractual statements made. However, all legal systems are not the same, for example the objectivity of common law is not in any way similar to that of Islamic law. Each system has its own particular features.

In the next section we will deal with such general tendencies in contrasting the weight of inner psychological elements and their expression in the formation of a ordinary sale contract in general, and the electronic sale contract in particular, pointing out the particular traits of Islamic law.

3.3.2 Exteriorization of Psychological Elements under Islamic law

With regard to the juridical value of intention, will or consent and their expression, the four Sunni schools have, as was mentioned in our previous discussion, two different approaches which are, though not clear-cut or comprehensively formulated, discernible through the mass of legal writing on detailed questions. One trend gives predominance to real and inner intention over the manner in which it is expressed. This we may call a subjective or voluntarist approach, which has a consensus colouring. Another trend attaches much significance to particular forms of expression of intention and maintains the words of the parties to be of paramount importance. This we may style an objective or formalistic approach with a verbalistic hue, which is the prevalent one in Islamic law. It is difficult to classify individual Muslim jurists into the exponents and opponents of one or the other approach, since almost all of them make use of both in different contexts, in varying degrees, according to the nature of the issue at hand. In arguing different topics, Muslim jurists from different schools, and frequently one and the same jurist, may invoke Qur'an verses and certain Traditions (Sunnah). Some of these verses and Traditions are often cited as maxims, and a general saying giving effect to intention has also taken shape. The most important of such texts and maxims are as follows:

1. Qur'an Verses (Ayat)

The consensualistic argument is mainly based on the (Surat Women), verse 29th of the Qur'an which says:
"O believers! Devour not your assets among yourselves in vanity, except in trading by your consent"

In subjectivistic terms, it is argued that what is meant in this verse by "consent" is the inner readiness to enter into a contract, without any necessity for the consent and intention to be expressed in a particular manner. It is likewise reasoned that the 27th verse (Surat the Cow) of the Qur'an, which says:

"... God made a sale (Trading) licit . . ."

Is of general application and embraces all cases in which the parties to the contract have the intention of trading, regardless of the way in which they choose to express their intention. There is also the 1st verse (Surat the Nourishment) of the Qur'an:

"O believers! Keep faith with contracts . . ."

This is the most significant among such verses in enjoining that contracts should be performed and promises kept, whether they are contracts properly so-called (Aqd) or an engagement or obligation created by any means other than word of mouth. This is supported by the 34th verse (Surat the night Journey), which ordains:

"... keep faith with covenant (or pact) since (pact) begets responsibility"

And there are two other verses where keeping faith with a covenant (or pact) towards God is commanded.

2. Tradition (Sunnah)

There are some Traditions to the same effect, of which the following are often cited:

"Acts are determined by intent (or motives)"
"A man is taken by his intent (or motive)"
"The property of a Muslim is not licit for others to enjoy unless by his consent"
"Contract is law for Muslims"

420 Ibid 12.
422 The 152nd verse (Surat al-Cattle), and 91st verse (Surat al-Bee).
3. Maxim

From the said verses and Traditions a general maxim has evolved which is frequently proffered to support a consensus interpretation. The validity of contracts is to be tested by this maxim to see whether what has been concluded was in fact intended. If not, the attempted contract will be void, according to a formula derived from the above-mentioned maxim.

How is this inner intention to be gathered? No doubt, through outward expression; but such expressions have no juridical value in themselves, according to this trend of thought, unless in so far as they correspond to the real intention of the parties. In the interpretation of the said texts, intention is sometimes equated with motive.

However, according to the view of the Hanafi and Shafi'i schools, it is the words which are the essence of a contract. The same verse of the Qur'an which says, "keep faith with contracts" is invoked but interpreted in formalistic terms so as to establish that a contract (Aqd) will not come into existence unless proper words are used to create the 'knot' or 'tie' denoted by the term contract 'Aqd'.

The adherents of this thought are in fact numerous, for nearly all the eminent jurists of the schools subscribe to this trend of thought. The further we get away from the early period of Islam into the classical period, the more we see a sort of sanctity attributed to words. In the science of 'Usul' a considerable space is dedicated to words (Ifaz), their meaning and their value in different contexts. Jurists from these schools have held that there will be no valid contract unless the offer and acceptance are pronounced in a particular language, and in a particular way.

The development of specific contracts such as the sale contract and the absence of a law of contract, together with the predominance of word of mouth as the expression of contractual intention, have driven Muslim jurists to devise precast patterns for the formation of various contracts. This is particularly noticeable, as we shall see in the next chapter, in the conceptions of offer and acceptance and their respective

424 This school of thought resembles the approach of Maliki and Hanbali law where the stress is said to be more on the intention of the parties. See Abd al-Razzaq al-Sanhuri, Masadir al-Haq fi al-Fiqh al-Islami (1960) 75.
predetermination. When it comes, therefore, to detailed rules of formation, it is not only the outward expression but what amounts to formulated ways of expression which count.

Islamic law lends itself to both a consensualistic and a formalistic approach. Historically, however, the latter has prevailed in spite of textual materials stressing intention, consent and motive. The main reason appears to be the absence of a general theory of contract and the development instead of nominate contracts, which facilitate the formulation of specific approaches to the formula (seaghah) of each contract.

Both the consensualistic and the formalistic attitudes under Islamic law correspond, roughly speaking, respectively to the 'theory of will' and the 'theory of the declaration of will' which are usually discussed in modern legal systems, mainly those with a civil law background such as French Civil Code.\textsuperscript{426} It is to be noted that the predominant formalistic approach of Islamic law, having regard to its verbalistic nature and its particular conception of offer and acceptance, is essentially different from the objective approach of modern legal systems, such as English law, which in different ways lays emphasis on the expression of psychological elements but without requiring any particular form for it.

3. 4 Means of Expression of Psychological Elements

3.4.1 Introduction
The inward existence of will and consent, not being sufficient in the eyes of the law to produce an agreement, must somehow be outwardly manifested by such means for the declaration of intention and consent, namely, the evolution of various expressions which may constitute a valid offer or acceptance.

In this part we will deal with the classification of the means of expression, and the divergent approaches to such means, adopted by the four Sunni Islamic schools. Next we will examine in detail various means of expression under Islamic law because of basic problems involved in the recognition of some of such means.

\textsuperscript{426} The French Civil Code (1804), art 1134.
However, the classification of legal concepts is generally reflective of the basic approach of the legal system concerned. These may be words of mouth, writing, gesticulation or signs, conduct or silence. Islamic law does not have a formal classification of such means of expression.\textsuperscript{427} However, Islamic law lacks a categorization of the means of expression parallel to that in other systems such as French law but deals, instead, with individual means of expression in the context of various nominate contracts.

### 3.4.2 Primary Classification under Islamic Law

In the Islamic law the primary classification of the means of expression is into spoken words, writing, gesticulate signs, conduct or silence. This will soon be discussed in more detail; suffice it here to mention that a general pattern based on intention or on the type of expression in a contractual context is lacking. The reason may be twofold: first, the absence of a general theory of contract necessitates separate treatment of individual nominate contracts; and second, verbalist considerations of the formula of each contract provide a rule-orientated pattern which essentially escapes factual analysis.\textsuperscript{428} As a result, expressions will always, at least according to the classical prevalent view of classical Islamic schools, have to be express.

Yet it may be useful to consider a parallel treatment of two similar instances for the present purpose: first, nullification or ratification of an unauthorized (\textit{fuduli}) contract or of a contract which is subject to an option (\textit{khiyar}) may be effected by words or acts, that is to say, by explicit (\textit{sarih}) or implicit (\textit{dimni}) manifestation. Second, abrogation of an earlier Qur'an verse or a Tradition by a later one is, likewise, held to be either explicit or implicit: explicit abrogation of an earlier rule takes place by direct reference to that effect in the later rule, while implicit abrogation arises out of the incompatibility of the two rules over the same subject.

In the contractual sphere, such a distinction between explicit and implicit expressions could be of use only when the requirement for concluding a contract exclusively through the pronouncement of a predetermined formula may be set aside, that is,


when conduct may be admitted to constitute a valid expression. Thus, as we shall see, it is along such a course, as against the classical background, that a classification of the means of expression in line with that adopted for unauthorized transactions and options or for the manner of abrogation as aforesaid will become meaningful. Otherwise, the basic differences will remain between word of mouth and all other expressions, to which we will revert under the next heading.

A. Predominance of Words of Mouth (Lafz)
Many modern systems require in some cases, under the sanction of unenforceability or nullity, that the agreement of the parties be put into writing or evidenced thereby. It is obvious that any written document is less likely to be misinterpreted than an agreement orally made or reached by conduct; and, in the event of a dispute, a written document facilitates the task of the court in deciding the terms of the agreement. It puts the judge one step ahead in the process of settling the litigation, as he will have only to determine the interpretation of the document at hand without having to go first into the question of establishing the facts contained therein, which would be the case if the agreement were made orally or by conduct, and then interpret them. Besides, even if not legally bound to do so, parties normally prefer, particularly in more important transactions, to frame their agreement in writing in order to derive greater protection for their respective interests should a dispute arise in future.

This development has taken place alongside the growth of commerce with its increasing complexities and the diffusion of education which has provided a greater opportunity to many more members of societies to learn how to read and write. But when and where literacy has not been widespread, writing has not been significant in legal transactions but, owing to other particular reasons under some legal systems, has been relegated to an inferior position.

Islamic law, under the classical Islamic schools, for a combination of historical and technical reasons, has attached great importance to word of mouth for the conclusion of contracts almost to the exclusion, up to recent times, of other means of expression.

429 Ibid, 265.
430 Ibid 268.
1. Historical Reasons

Historical reasons for the predominance of words are partly of a general nature and partly special to the faith. A thorough review of such reasons would require an extensive study cutting across several disciplines, including theology, sociology and economic history, which fall beyond the scope of the present work. The following factors, however, may be mentioned.

(a) Clerical Literacy Privilege: Islamic doctrines have flourished under the hands of the clergy. Proportionately, they formed only a small part of the vast number of believers living in lands where, and through periods when, commoners had little facility, or felt little need, for learning even to the least degree about reading and writing. The clergy, together with courtiers, had the privilege of learning. The layman had no urge for such a luxury. His religious leaders could answer his problems both in temporal and spiritual matters and solve his doubts. Under these conditions, and because the relative simplicity of economic relations, the commonest and most natural way of establishing legal relations was the spoken language.

(b) Religious Significance of Words: this socio-cultural aspect has been coupled with a religious significance of words, which gives rise to two reasons. The main reason is that in Islamic jurisprudence, as in some other religious systems of law, all the affairs of believers are governed by precepts of the faith, and the essentially secular character of some business transactions does not exclude them from its fundamental tenets. The second is that words, as we have already mentioned, are ascribed a divine origin: they are created by the Deity either directly and taught to early humankind or indirectly through bestowing upon humanity the faculty of inventing and using them. These two factors, the first more and the second less general, may account in part for the formalistic approach of Islamic jurists.

(c) Miracle of Qur'an: another particular reason has also contributed to the importance of verbal expressions. We know that the Qur'an has been held to be the singular miracle of the Prophet in proving his divine mission. Its verses were orally

431 Ibid 269-70.
433 Ibid.
435 Ibid.
recited by the Prophet as they were 'revealed' to him, and memorized by his companions. Its sublime literary beauty in the original version has been a cause of marvel and admiration for all Muslims, who believe that every word has been so placed in the text that even the slightest fault in pronunciation will change the whole meaning of the Holy Scripture. It must be read with the utmost care, lest one should commit the sin of changing God's Word. This may be regarded as the starting-point for the discussion of the sanctity of words. But the stress placed upon the Word and its significance varies in degree in different schools of Islam.

2. Technical Reasons
Technical reasons are due in part to linguistic considerations and in part to particular religious precepts.

Linguistic considerations are a common phenomenon under various legal systems but the approach to linguistic requirements differs from one system to another. It appears that Muslim jurists from the four schools have less rigidity in dealing with the formulae (seaghah) of contracts and seek fewer formalities. Their attitude is said to be altogether a formalistic one only to the extent of taking into account the outward expression. Al-Sanhuri, the contemporary Egyptian jurist, writes "The principle is that the expression of the intention should be clear and unequivocal .... But if the expression is not clear, then the intention, the inner will of the parties, will be taken into account." The classical Islamic schools' belief found its support in lands where the language of the Qur'an and Traditions, Arabic, was, or became after Arab domination, the native tongue of ordinary people in the street. The linguistic problems in the formation of contracts did not call for too much attention by jurists beyond the bounds of an objective treatment.

3. Views of the Four school Jurists
The view of all classical four schools jurists, persisting up to a century ago and with vestiges surviving in the period of revived Ijtihad up to the present time, has

436 Ibid
437 Ibid 341.
438 Ibid.
predominantly affirmed the necessity of word of mouth for the conclusion of various 'binding' contracts.440

B. Other Means of Expression

Means of expression other than word of mouth may be subdivided into the following categories:

(1) Sign (Isharah)

By sign probably is meant any thing except word of mouth which signifies the purpose.441 From the generality of this statement must be excluded conduct (in other words, the tacit non-gestured behaviour, as distinguished from gesticulative expressive physical signs) which is, as we have mentioned and shall shortly elaborate, subject to a separate lengthy treatment by jurists.442 The reason for such a distinction is to be found in causes (sabab) of concluding a contract which fall back on the notion of offer and acceptance. Verbal offer and acceptance undoubtedly constitute the prime ‘causes’; and conduct in such a contract as sale, where there is ‘the giving and the taking’, may replace (according to the views of later jurists) verbal offer and acceptance.443 Sign lacks the characteristics of either. The category of signs, therefore, comprises only physical gestures.

Gesticulate Signs: these are any movement of hands, head, eyes or lips (without utterance of intangible words) meant to constitute offer or acceptance. In a majority of Islamic schools (Hanafi, Shafi‘i and Hanbali) such signs are generally held insufficient in the case of those capable of speaking444 but are regarded as being effective from those unable to talk, whether such an inability is permanent, as in the case of mute persons, or temporary, as in the case of some people who are ill.445 In fact, this is the only allowance made by the majority of classical Islamic schools for the substitution of words by non-verbal signs. It may be taken as an instance of the application of another widely acknowledged principle, the rule of “negation of distress” (La haraj), which is based on a Qur’an text446 and embodied in the maxim

442 Ibid.
443 Ibid.
445 Ibid 220.
446 The Qur’an, chapter 2, V. 185; 280; and chapter 22, V. 78.
“hardship begets facility”. The sign in such cases must be sufficiently expressive, understandable in the circumstances and intended for the conclusion of the proposed contract.447

A suggestion is raised in certain treatments of the subject to the effect that if the incapable person can find a proxy to speak and utter the formula on his behalf, then signs are not acceptable and he must appoint a proxy to act for him.448 Some jurists also pose a question whether it is necessary for a valid sign to be made by the fingers, or accompanied by the moving of the tongue, on an analogy with the case of prayer where a mute, to have his prayer religiously accepted, has to move the tongue. Here again a negative answer is given on the grounds (it is interesting to observe) that the rule in the conclusion of a contract is to establish consent, while in prayer the rule is not the same; and thus here anything will suffice which may signify consent.449 This argument supports the view which we have already put forward that the formalistic or consensus approach is not the definite and universal line of this or that jurist, but may also constitute the attitude of the same jurist in dealing with different problems, albeit that the tendency may vary in dealing with different hypotheses.

In all the classical Islamic schools, the rule on this point is similar, except in the Maliki School where a sign, if indicative of consent, is permitted for the conclusion of a contract; the basis of the Maliki jurists' argument is said to be the sufficiency of consent regardless of the way in which it is expressed.450

(2) Writing
This symbol occupies, in theory, a better position than that of the physical gesture. In Fiqh, the view of the majority of jurists in the Hanafi, Maliki, and Hanbali schools put writing on the same footing as word of mouth or gesticulate signs by holding that they equally appear to constitute sufficient 'causes' for the conclusion of a contract of sale.451 They quote their opinion from the Qur’an:

448 Ibid.
449 Ibid 216.
451 Ibid.
“O you, who believe when you contract a debt for a fixed period, write it down. Let a scribe write it down in justice between you. Let not the scribe refuses to write as God has taught him, so let him write. Let him (the debtor) who incurs the liability dictate, and he must fear God, his Lord, and diminish not anything of what he owes. But if the debtor is of poor understanding, or weak, or is unable himself to dictate, then let his guardian dictate in justice. 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 that if one of them (two women) errors, the other can remind her. And the witnesses should not refuse when they are called on (for evidence). 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 God; more solid as evidence, and more convenient to prevent doubts among yourselves, save when it is a present trade which you carry out on the spot among yourselves, then there is no sin on you if you do not write it down. But take witnesses whenever you make a commercial contract. Let neither scribe nor witness suffer any harm, but if you do (such harm); it would be wickedness in you. So be afraid of God; God teaches you. And God is the all-Knower of each and everything.”452

As the principal source for the approval of written documentation, this Qur’anic passage was supplemented by other less pointed passages and series of Traditions (Sunnah) indicating that writing was used for a number of purposes by the Prophet (P.b.u.h). Among the latter is a Tradition in which the Prophet is reported to have used a written document in connection with a sale contract in which he was the buyer.453 Together with the Qur’anic passage, al-Tahawi an early jurist was deeply concerned with the problematic status of documents.454 After mention of the chain of transmitters, the gist of the Tradition “text” (matn) is that a Companion of the Prophet shows a document (kitab) that the Prophet either wrote himself or had written to embody his purchase of a slave from the Companion.455

However, the jurists of the Shafi’i school revealed that writing only takes the place of word of mouth in the same kinds of situation where gesticulate signs are allowed in substitution for spoken words, as a visible behavioural expression, and even here “if making a sign is possible”.456

452 The Qur’an: Surat al-Baqarah, verse 282.
453 This Tradition is among those cited by al-Tahawi (d. 933) see Jeanette Wakin, The Function of Documents in Islamic law (1972) 12.
455 Ibid.
The Shafi’i jurists have reservations about reducing contracts to writing because of the possibility of misunderstanding and mistake in a community where most of the people were illiterate.\(^{457}\) This possibility is expressly admitted by some jurists and given as an ancillary reason in support of their arguments. Such a position becomes more readily understandable when note is taken of the fact that some classical Islamic jurists require the terms of offer and acceptance to be in Arabic, though this was not the mother tongue for the majority of believers, as a result of which they were more easily liable to misunderstand or misconstrue written documents.\(^{458}\)

(3) Conduct (\textit{Mu'atat})

A great controversy rages between Islamic schools on the validity and effect of conduct in the formation of a contract, with particular stress on a contract of sale. Jurists through their positions, glosses and commentaries indulge in lengthy discussions on this subject, which are not always systemic or pruned of circumlocution.

The cleavage of opinion is mainly due to two factors, both already expounded throughout this work: first, the lack of a general theory of contract in Islamic law whereby the mere agreement of the parties, if not clothed in the form of specific contracts, could still be validly recognized; and, second, the formalistic notion of contract whereby, according to the historically prevalent view, only word of mouth, to the exclusion of other means, can constitute offer and acceptance.

In all irrevocable contracts such as sale contracts, most Shafi’i jurists do not recognize conduct as a valid means for the conclusion thereof, though some later jurists have taken exception to the predominant view.\(^{459}\)

In contrast, in contracts such as the sale contract, the great majority of classical jurists do recognize conduct as a valid means for the conclusion thereof. Therefore, most jurists from the Hanafi, Maliki, and Hanbali schools of earlier eras agree that a

\(^{457}\) Ibid.
\(^{458}\) Ibid.
\(^{459}\) It may be fair to say that most contemporary jurists and preceding generations tend to follow this line, which constitutes a departure from the classical trend. See Ali Mohammed Abu Al’z, \textit{Al-Tijarah al- Ictron’ah Fi al-Fiqh al-Islami} (2007) 144.
contract can be concluded by conduct, but disagree as to the effect of conduct when parties in practice employ it.  

(4) Silence
Silence as an expression of contractual intention presents great difficulties, as well as interesting features in conceptual and practical terms. In all the classical Islamic schools, there is a maxim which says: "No statement is to be attributed to a silent person" because the silence may or may not signify "consent" or, in other words, is ambiguous enough to be interpreted either way.

Thus, all the four Islamic schools (generally speaking) equally hold silence to be in principle ineffective and commonly attribute its inefficacy to the inherent ambivalence of its significance.

However, some of the exceptions made under Islamic law to the general principle of the inefficacy of silence relate to the silence of the acceptor rather than to the silence of the offeror. In Islamic law the maxim on inefficacy of silence is supplemented by a qualifying sub-maxim which says: "Silence amounts to a statement where there is a need to speak." It is said by an eminent jurist that silence, in exceptional cases where it is considered effective, concerns acceptance. It is our submission that such a proposition, influenced as it appears to be by modern thought, constitutes a superimposition on cultural rules of Islamic law rather than reflecting its actual position. The application of the sub-maxim to contract formation is in fact limited due to a twofold reason. First, cases of efficacy of silence generally concern contracts inter absentes the validity of which under Islamic law is, to say the least, in doubt in the most important categories of 'binding' (lazim) contracts even when intention may be expressly manifested. Secondly, in contracts inter praesentes, formalistic verbalism

461 Ibid 147.
462 In the United Nations Convention on Contracts for the International Sale of Goods (1980) comprehensive formulation is to be found on the efficacy of silence. Under the latter part of article 18(1), "silence or inactivity does not in itself amount to acceptance." There is no certain doctrinal view explaining it in terms of the requirement for a contractual expression of intention to be unequivocal and it does not contain any express and general provisions on this point.
465 Ibid.
classically obtaining under Islamic law requires the pronouncement of formulae to the degree of questioning the validity of conduct, let alone silence. Even in 'facultative' (ja'iz) contracts, where there is generally some latitude on the rules of formation, silence in place of acceptance, as distinguished from conduct, is not directly considered. Despite the fact that there are several instances under Islamic law, including some contractual ones, where silence, or in fact inaction, produces legal effects, none relates to the formation of contract, except one to be noted below.

3.5 Means of Expression in the E-Sale Contract

Faced with present-day developments, the internet is merely another tool of communication, but one which, in relation to the formation of e-sale contracts under Islamic law, presents unique technological issues. It is these technological issues which all too often cloud our analysis of the e-sale contract. In our earlier discussion about the traditional contract, it was said that a contract is formed when all parties agree on its essential terms. If there is no agreement between the parties as to the terms of contract, no contract is concluded. The agreement is reached only when both parties assent to intention to create a legally binding relation as to the terms of the contract. If we look at our earlier discussion of the Muslim jurists and the different schools of thought of Islam, we will find many different opinions as to the means of expression in contracts, but none of them requires only one way, such as written document or word of mouth, as necessary for the validity of the contract. Thus, all schools of Islam consider valid any form of the agreement that fully reflects the consent of the parties involved in the transaction as an instrument to express the will of the contracting parties.

Under the law of the four Islamic schools, the consent can be expressed orally, by written agreement, sign, silence, or with conventional practice (conduct), that can without a doubt express its existence. Expression of the intention must be without coercion or duress (ikrah), error (ghalat), or fraud (tadlees or gharar).

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466 Ibid 267.
467 There is another case in which silence is held effective under Islamic law which concerns the silence of a virgin bride for the conclusion of a contract of marriage, which is geared to the general pattern of offer and acceptance and their predetermination by the law in each specific contract.
469 Ibid.
Now the question regarding the main subject of this chapter is whether a sale contract entered into electronically by the contracting parties is valid and therefore binding upon the parties and can be governed by the same classical contract sale principles of intention to create legal relation under Islamic law. With regard to e-sale contracts, under the opinion (fiqh) of the majority of Muslim jurists in our earlier discussion, since the e-sale contract can be mostly formed electronically by oral agreement (such as in chatting rooms) and written agreement, this means the answer is that the e-sale contract can be valid, compatible and enforceable as a result of our discussion comparing it with the traditional sale contract.

In the electronic environment, there are three main modes of electronic contracting, each with their own distinctiveness, and needing to be treated independently.471 As a result of the above discussion, each can be compatible with the principles of Islamic law which classified them as written or oral: 472

1. Electronic Email (e-mail): Exchanging e-mail communications is the digital equivalent of a letter.473 A person types it out, occasionally encloses some additional material, addresses it and sends it to the recipient.474 E-mail is capable of doing all the things that traditional mail can do. It can be employed to make an offer or to communicate acceptance.475 It can be used for advertisements and circulars and can even be a source of junk mail.476 E-mail is sent and received like traditional mail. The sender puts it in his outbox, the digital equivalent of a mail-box, and this is then collected by the mail server, which forwards it to the recipient’s mail server which then delivers it to the recipient’s inbox, which may be seen as the equivalent of his mail-box.477 This process, although usually very quick, is not instantaneous, just as traditional letters can be delayed or even lost in the post.478

472 Ibid.
474 Ibid.
475 Ibid.
476 Ibid.
477 Ibid.
2. Web Site Forms: The click-wrap means of contracting used on the World Wide Web.\textsuperscript{479} A web site operator will offer goods or services for sale, which the customer orders by completing and transmitting an order form displayed on the screen.\textsuperscript{480} When the seller receipts the order, an e-sale contract is formed.\textsuperscript{481} The goods and services may be physically delivered in the traditional manner.\textsuperscript{482} "For example, the website may carry an advertisement for a book, where the operator offers to supply it in exchange for a certain sum of money. On this webpage will be a hypertext order form which the customer or the buyer will fill out. At the end of this form will be a button saying "Submit", "I Accept", or something similar. When the customer clicks this button, they submit their order to the website operator. This is like taking the goods to the cash register in a shop, except the cashier will usually be a computer instead of a person. Like communication between a customer and a cashier in a shop, communications across the Web are instantaneous".\textsuperscript{483}

3. The third mean is through chatting rooms: - this is made when the contracting parties engage in negotiations online (this is not a compulsory phase in the sale contract formation process). The parties negotiate every detail of a sale contract orally or using written word and simply end negotiations by making an offer to sell or buy goods or services.\textsuperscript{484} Thus, the offer by this method can be through oral or written means.

3.6 Approval of Will and Consent in the E-Sale Contract

In the previous sections of this chapter we discussed the means of expression of will and consent with entering traditional and electronic contracts. We have seen that in Islamic law a contract will only come into being if the parties intend to create a legal relationship. This intention must comprise three elements: the will to act at all, the consciousness of making a legally binding declaration, and finally, the will to engage

\textsuperscript{479} Ibid.
\textsuperscript{480} http://www.mbc.com/db30/cgi-bin/pubs/LMZ-Electronic_Contracts.pdf
\textsuperscript{481} Ibid.
\textsuperscript{482} Ibid.
in this particular transaction. Offeror and offeree must express their willingness to be bound explicitly or it must be implicit in their actions.

In this section we will focus on the approval of the will and consent of the parties in the e-sale contract. We will examine the traditional Islamic law of writing as a method for contractual approval. We will then consider whether the data message and the digital signature will be legally acceptable to prove the will and consent under Islamic law.

Imagine you are browsing on the web and you come across an interesting offer to sell a book. You exchange several e-mails with the seller, finding out more about it. You eventually decide to buy it. Without prior clarification, you would be the first to test whether a sale contract entered into electronically using a symmetric or asymmetric system satisfies the requirements AND is acceptable in the Islamic law. One of the most revealing of Muslim doctrines about writing concerns the rather mundane and narrow genre of legal documents. From our early discussion, there is no particular requirement for a contract to be formed in writing under the Islamic general contractual principles. As articulated by early jurists from the Hanafi and Shafi'i schools, the doctrine held that such writing as contracts and other private legal documents had no evidential value.\(^\text{485}\) According to the classical rules of evidence in Islamic law, written documents could not be brought forward in legal proceedings as proof of a claim. Evidence, as defined by the jurists, was exclusively oral, anchored in the spoken testimony of present, upright witnesses.\(^\text{486}\) This non-recognition of the evidentiary value of written documents is remarkable both because it went against the prevailing (and continuing) practice of routine use and reliance upon documents and also because it ran counter to explicit confirmations of this practice found in each of the two authoritative sources of Islamic law, the Qur'an and the Tradition (\textit{Sunnah}).\(^\text{487}\)


\(^{486}\) Ibid.

\(^{487}\) If the quintessential Muslim “book” denies its writings while foregrounding its recitational quality, the status of the \textit{Sunnah} of the Prophet, the second source of Islamic law, is more revealing of the distinctive ambivalence toward writing. The Traditions (\textit{hadith}) of the Prophet’s doings and sayings also eventually took authoritative textual form, but this occurred in spite of several specific orders (also Traditions) from the Prophet to the contrary. The process of “recording” (\textit{tadwin}) Traditions in writing had to contend with contradictory Prophet dictums (e.g., “Abu Sa’id al-Khudri said: ‘I asked the Prophet permission to write the Tradition down, but he refused to give it’ ”; “Do not write down
Maliki jurists, and Abu Yusuf and Mohammed bin Hassan from the Hanafi school, by contrast, relying on the same sources we mentioned in section 3.4.2.B Other Means of Expression (writing), authorised that writing can be evidence of a contractual relationship, and the legal document can be formally acceptable evidence.488 Also, Mejella al-Ahkam al-Adliyyeh article 1736 accepts the written document to be approved evidence in contract.

It is now well known that, in electronic commerce, the traditional documentation of transactions on paper is being replaced by the novel method of electronic documentation. Correspondingly, traditional hand-written signatures are being replaced by a variety of methods which can be included under the broad category of the electronic signature.489

These electronic documents and electronic signatures are expressly recognised in e-contracts for purposes of concluding contracts. These two main ways can face the problem of consent and will bring an end to any uncertainties that may have existed with regard to consent in electronic communications.

Having done an analysis of Islamic laws concerning sale contracts and the formation of an acceptable E-sale contract we recommend that the electronic signature or electronic documents be accepted as confirmation of approval in an e-sale agreement. Since E-sale is an interactive process in which both parties communicate and agree based on the stipulations, such contracts are legally binding and therefore the buyer and the seller will be bound by the terms and conditions of the contract. However, from our earlier discussion on the general nature of these personal or subjective

anything from me except the Qur'an. He was noted down any thing from me apart from the Qur'an must erase it”; but, on the contrary: “Abdullah bin Omar asked the Prophet permission to write the Tradition down. It was granted”; and, generally, “Commit knowledge to writing”. The recording went forward, but only after a century during which the Traditions had been transmitted only by oral means. As had happened in the case of the Qur’an, the human interventions to preserve Traditions in writing were fraught with intra-community conflict. See Abd al-Razzaq al-Sanhuri, Masadir al-Haq fi al-Fiqh al-Islami (1960) 115.

489 There are a variety of methods of electronic signature which are not part of our subject and any method can present the problem of consent in e-sale contract such as: Digital signature, pen-computer signature, ok-box, biometric signature, and personal identification card (PIN). For more instances see: Khalid M Ibrahim, Ibram al-Aqd al-Ictroni (2007) 253-8.
criteria in Islamic law, it is essential to highlight further objective criteria. The Islamic law initially never allowed this kind of transaction but later accepted it. Objective criteria have been proposed by Islamic doctrine and jurisprudence for example: confirmation of contractual stipulations prior to contracting, checking the intelligibility of the clauses used in the contract, common contract procedure, visual space management and acceptance by the buyer.\textsuperscript{490} The advantage of these objective criteria is that an opportunity is created in which the buyer subjectively understands the attempt put forward by the seller to make the details of the agreement known.\textsuperscript{491} All these criteria put together allow us to propose a tentative structure in accordance with Islamic law for applications in a field that really requires greater harmonization.\textsuperscript{492}

To have a valid E-sale contract, it is vital that the buyer be in a position to access the contract terms and understands them. The seller should make it impossible to access the services or goods before the buyer sees the agreement clauses. Moreover, the agreement clauses should be in simple terms and easy to read; it is proposed that the parties should be cautious about the use of hyperlinks and that the e-sale contract should be printable. It should be possible to access the e-sale agreement after it has been “signed”\textsuperscript{493} to ensure that all parties are aware of the contract. Contractual clauses must be arranged properly and be of high quality, be tailored to the applicable medium and obey official prerequisites for example those governing signatures and writing.\textsuperscript{494} Furthermore for security purposes, steps must be taken to ensure that there are no loopholes which may lead to fabrication of signatures and other vital clauses of the sale contract.

Contract consent ought to be clear. This can be attained by the use of icons saying “I accept” and “I refuse” next to each other with a click option so that the buyer can choose accordingly. Access to services and goods will be denied should the buyer click the “I refuse” icon; clicking the “I accept” icon will give access. Once more, it is crucial that the procedure employed to show one’s will must be unambiguous and not

\textsuperscript{491} Ibid.
\textsuperscript{492} Ibid.
\textsuperscript{494} Ibid.
look like behaviour usually employed to “surf” a given website. To eliminate all dangers involved, it is recommended that the buyer indicate approval by filling out a textbox with the buyer’s name or other identifiers.\textsuperscript{495} There must be provisions where the buyer can cancel the contract, for example in situations where there is an error or if the buyer decides to cancel buying the goods or services for any other reason.\textsuperscript{496} In addition, this cancellation should be in favour of both the buyer and the seller because it might be an expensive process for the seller in terms of time and other immaterial losses. A mechanism must be developed to determine whether the buyer or seller is serious about the business deal as some may turn out to be jokers. For permanent proof of the E-sale agreement, the buyer should print the terms of the transaction or the vendor can print and send them to the buyer and keep the same for future reference.\textsuperscript{497} If all these terms and conditions are followed to the letter, then an E-sale contract is deemed valid so long as there is no breach of these stipulations by either the seller or the buyer.

Finally, we find the purpose of an EDI link, for instance, will be inter alia the formation of contracts. Thus, the parties clearly intend to be bound by the ‘declarations’ exchanged between their computer systems. Interactive Web pages which are designed for commercial reasons are put on the World Wide Web in order to create binding agreements. Similarly, messages produced by a supplier’s computer and communicated via videotex have to be seen as his declarations of intention. Therefore, as in the cases of automatic machines, it is of no legal consequence that the contract is completed by a computer program.

\footnotesize
\textsuperscript{493}Ibid 210-11.
\textsuperscript{494}Ibid 211.
\textsuperscript{496}Ibid 211.
\textsuperscript{497}Ibid.
4.1 Doctrine of Offer and Acceptance

The idea of offer and acceptance suits different systems at different levels, depending on their respective approach to the law of contract(s) and the basis thereof: it suits best a formal system of contracts, like Islamic law, where the order of pronouncing contractual formulae is set by the law. Next, a consensual system based on the 'will theory' such as English law lends itself, in most cases though not all, to an analysis of 'agreement' in terms of offer and acceptance as the respective expressions of the wills of the parties.

In this chapter and the following chapter we are concerned with detailed rules relating to the mechanism of making a sale contract. We will examine the manner of and problems involved in the determination of 'offer and acceptance' as a primary notion in analysing the formation of a sale contract under the principles of Islamic law of the four Islamic schools, and then we will examine these principles as they apply to a sale contract in the electronic environment.

In Islamic law not only do 'offer and acceptance' constitute the only way of making a contract, but also there is a particular conception of offer (ijab) and acceptance (qabul), whereby the offeror (mujib) and offeree (qabil) are predetermined in any given type of contract. Based on an analysis of detailed rules, this chapter aims to show that there is an underlying principle geared to the concept of ownership which determines the position of the offeror and the offeree in each nominate contract. The proprietary position of the parties with respect to the subject-matter of the sale contract or the immediate or eventual effect of the contract on their respective patrimonial positions determines, a priori, who should make the offer and who should make the acceptance. We will also discuss in this chapter the distinction between an offer and an invitation to make an offer under the Islamic law.

The concept of offer (ijab) and acceptance (qabul) in Islamic law has developed alongside the development of its nominate contracts. It is, therefore, almost as old as
the law of contracts itself. 'One of the most distinctive features of Islamic law,'\textsuperscript{498} undoubtedly, is 'the juridical construction of contracts' which is suggested\textsuperscript{499} to be possibly derived from ancient Near Eastern law and might have come to the Muslims through the medium of commercial practice in Syria and Iraq.\textsuperscript{500} This construction is essentially formal since both the offer (\textit{ijab}) (literally, making a positive statement, or making a statement to beget a 'necessary' or 'binding' relation) and acceptance (\textit{qabul}) are to be pronounced in a given order. The four Islamic schools may differ in detail, but the general outline of their basic approaches to offer and acceptance is similar.

Essentially, all discussions of the four schools’ jurists centre on and around the role of words in the formation of contracts, with almost all earlier eminent jurists adhering to the necessity of words and some later jurists of the 20\textsuperscript{th} century dispensing with such necessity. Complete volumes are at times devoted to the validity or invalidity of a contract by conduct (\textit{mu’atat}), particularly in respect of a contract of sale which is the intellectual field for Islamic jurists to exercise their power of reasoning. As we have already dealt with the linguistic requirements for the formulae of a sale contract and the arguments for and against a contract by conduct in the last chapter, here and in the forthcoming chapter we will concentrate on the basic notion and mode of determination of offer and acceptance and will expand on its particular trait according to the dominant view of the classical jurists from the four Islamic schools which hold the offeror and the offeree in the sale contract to be predetermined.

The majority classical schools’ view\textsuperscript{501} on offer and acceptance, like many other Islamic doctrines, as has already been mentioned, is that the offeror and offeree may be predetermined by the law in various contracts, that is to say, the law decides in advance for every kind of nominate contract which party is to make the offer and which party is to make the acceptance, rather than letting the offer and the acceptance be determined in each case as a question of fact.\textsuperscript{502} This is due partly to the absence of

\textsuperscript{498} J Schacht, \textit{An Introduction to Islamic Law} (1964) 22. This suggestion, at least to the degree of negating a Roman influence on the subject (loc. cit., n. 1), seems plausible. Verification of the suggestion as it stands needs, however, detailed historical research

\textsuperscript{499} Ibid.

\textsuperscript{500} Ibid.

\textsuperscript{501} The majority of classical Islamic schools (Maliki, Shafi’i and Hanbali schools).

\textsuperscript{502} According to the Hanafi school’s view.
a general theory of contract, partly to the prevalence of verbalistic formality in Islamic law and, we believe, mainly to the significance of private ownership. Even when, in certain nominate contracts, either party is left free to make the offer and the other the acceptance, it is the law which, in line with certain principles, specifically permits it.

In a series of important contracts, whether in terms of commercial or private relations, such as the sale contract, one party is invariably required to make the offer and the other party to make the acceptance. The chronological order of offer and acceptance, therefore, becomes a consequence of the rule of the law according to the facts of individual cases. The possibility of a factual reversal of the preset chronological order of offer and acceptance becomes, as a result, a logical-juridical polemic giving rise to extensive arguments on the permissibility or otherwise of an offer subsequent (ijab al-mu‘akhkhar) and an acceptance precedent (qabul al-muqaddam) which is possible by the majority classical schools’ view as we will further amplify in the section on conformity of acceptance to the offer in chapter 5.503

In a limited number of nominate contracts, such as partnership (shirakah), either party may make the offer and the other the acceptance. But, even in such contracts, the offer and the acceptance should, according to the classical Islamic schools view, be made in their linguistically logical sequence. In other word, it is not purely the construction of the parties’ respective pronouncements in a factual chronological order which establishes which one constitutes the offer and which one the acceptance, but the verbalistic significance of the respective utterances.

Thus, in such contracts, too, despite the freedom of either party to pronounce the offer, the basic notion of adherence to a precast formulation of offer and acceptance does not, in its essence, cease to be applied.504 Therefore, the rules may appear to vary according to the type of contracts at issue. Yet an analytical review of such rules reveals a universal principle working at the root, which is geared to the concept of ownership and linked to the verbal formalism of Islamic law.

The Maliki, Shafi'i and Hanbali view on the question of offer and acceptance suggests that in a sale contract, where a thing or the possession thereof is to be transferred, the statement made by the owner of that which constitutes the subject matter of the contract is the offer and the one made by the other party (buyer) is the acceptance.\textsuperscript{505}

These jurists believe that the determining factor is the concept of ownership and the formula of the contracts in Islamic law is required to establish its transfer from one person to another. Therefore, the idea of transfer of the ownership through verbalistic formality appears to constitute their principle.

One significant result of this approach, as we shall see at different junctures of this work, is that contracts are identified with offer and acceptance and, owing to verbalistic requirements, terms and conditions are normally considered outside the strict scope of offer and acceptance. Therefore, we find that the difference between the Hanafis and the other classical Islamic schools in determining the offer and acceptance is that mere formality is otherwise not essential, and the consequence is not different. Thus, the four Islamic schools agreed to provide for the validity of acceptance even if it comes before the offer, and that does not make the contract defective, nor does it lead to nullity, since the aim is the intended meaning, and that happens in both cases.\textsuperscript{506}

In the next section, we shall first present our detailed study of the subject by taking note of the position of the offer according to the traditional rules of the Islamic schools; however we shall defer the comparative treatment of the traditional offer under Islamic principles and the sale contract in the electronic environment to the last part of this section.

4.2 Making an Offer Using Electronic Means

4.2.1 Established Position in Islamic Law

The common analysis of an agreement in terms of offer and acceptance or, conversely, the treatment of offer and acceptance as the commonest mechanism for reaching an agreement, entails a separate examination of various aspects of the mechanics of offer and acceptance in the formation of a sale contract. As we have


already seen, Islamic law traditionally confines the mechanism of contract formation
to verbal offer and acceptance and, particularly in the case of binding (lazim)
contracts,\textsuperscript{507} identifies the offer and acceptance with the related contract.

Under all the four Islamic schools, the form of an offer is usually not defined.
However, from our previous discussion regarding the principle of offer and
acceptance in Islamic law, we can describe the offer from the Hanafi school’s view as
an expression by one person (seller or buyer) to another (seller or buyer) of his or her
willingness to enter into a contract. By contrast, the other classical Islamic schools
(the Maliki, Shafi’i and Hanbali view), defined the offer as an express or tacit
indication of contractual intention from the seller to be legally bound if the other party
(buyer) adheres to it as it stands.

As a general principle, for a statement to constitute an offer as an expression of
contractual intention, it should be defined enough and cover the basic terms sufficient
for it to ripen into a contract upon simple acceptance. In a case where an offer is
inferred from conduct or is considered as having been tacitly made, its definiteness is
more an assumption than a concrete fact.

Attributes of offer provide the criteria for the important distinction between an offer
and an invitation to make an offer in non-formalistic systems. Islamic law contains
explicit rules which require an offer to be categorical and immediately effective and
definite (munajjaz). A conditional statement which is, by its very making, to take
effect on the happening of a (suspensive) conditional expression (mu’allaq), is not a
valid offer,\textsuperscript{508} whether the contingency is certain to happen, or only probable, such as,
respectively, an offer to sell a thing ‘if tomorrow the sun rises’ or ‘if tomorrow it
rains’, for what is taken into account is the genus of the condition and not the species

\textsuperscript{507} (Lazim) contracts, namely binding or irrevocable, are those which cannot, except in cases
specifically envisaged by the law, be unilaterally rescinded by either party. This category includes the
most important types of contracts and comprises marriage; sale; hire or lease; guarantee (daman);
personal suretyship (kafalah); transfer of a debt (hawalah); sharecropping (muzarah) whereby one
party undertakes to work on the land of another and share the yield. See Frank E. Vogel and Samuel L.

\textsuperscript{508} Ibrahem Jamal, \textit{In’iqad al-Uqud bi Wasa’al al-Itsal al-Hadythh} (2005) 34.
A statement which is definite in its form as an offer, though it may be conditional in substance, will therefore be valid as a formula. However, it must be noted that the condition mentioned above means, primarily, a suspensive condition; and what is under discussion is the conditionality of offer or acceptance, and not the obligation which arises under the contract. A contract, when made by unconditional offer plus acceptance, may contain conditions, in the usual meaning of the term, namely, what the party is bound to do under the contract.

As previously mentioned the contract is defined by the Islamic jurists in terms of offer and acceptance rather than in terms of an agreement or the ensuing obligations. It is the very formulas which beget the vinculum juris, the ‘tie’ or the ‘knot’, namely the contract (Aqd) in its etymological sense. It may be said, therefore, that in every contract the statements of the parties reduced to offer and acceptance are, by the very nature of the contract so defined, conditional in a sense. An offer, in however absolute a form it may be framed, does not produce a contractual relation unless and until accepted. The offer under Islamic law therefore always contains in itself a condition, notwithstanding the fact that it is required to be categorical. When a person, observing the rules of the Islamic law, makes an offer to another by saying, for example: ‘I sold you these goods for 50 dollars’; this statement is categorical only in form, but conditional in substance. It means, in effect: ‘I shall have sold it to you at the moment you buy it, if you buy it’. This ‘conditionality’ is obviously inferred from the fact that the offeree is not bound, and cannot be made bound, to accept the offer.

Similarly, when the other party says: ‘I bought it’ this means ‘I shall have bought it, if you shall have sold it.’ The conditionality of the acceptance on the offer is not at first sight so easily discernible as the conditionality of an offer on the acceptance because, once the acceptance is made in its categorical form, pursuant to the offer, the contract will be concluded and there will remain no choice for either party to reject the proposal of the other party, even if the concluded contract may be set aside by either party due to certain other legally recognized factors. This, however, does not negate the conditionality of acceptance. While, for the purpose of creating a contract, the

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509 Ibid.
510 Ibid, 36.
511 Ibid.
offer is conditional on acceptance, which is to take place at a later time, the acceptance is conditional on the offer which has already come into existence.\textsuperscript{513}

The mutuality of the conditionality of offer and acceptance does not involve a circle, for each condition has a different content. The content of the one is, say in a sale contract, the ‘selling’, and the content of the other is the ‘buying’. These notions of selling and buying, though only the complementary facets of the same unitary concept of sale/purchase, differ from each other through the difference in standpoint.\textsuperscript{514}

The conclusion which obviously follows with respect to this example is that, by pronouncing the formulas, and contrary to the significance which the verbs employed may literally convey, the offeror ‘sold’ not solely by the offer, without acceptance, and the offeree ‘bought’ not solely by his acceptance, without the offer. The reciprocal conditionality of these proposals lies in their interrelation and interaction and, thus, ‘conditionality’ in this context becomes synonymous with the ‘interdependence’ of offer and acceptance in begetting the sale contract.

Because jurists from the four Islamic schools attach great importance to the form of expression, the requirement of definiteness becomes mainly syntactical and concerns the formulas of the offer and acceptance. The contract must be entered into by means of categorical formulas, though when made in an absolute form, the reciprocal conditionality of offer and acceptance is, as some jurists have noted,\textsuperscript{515} inherent in their substance.

The crux of the matter is that, as we have already explained, the determination of offer, or acceptance, is under Islamic law a question of law, thus, it is immaterial in Islamic law to argue that a condition is expressed in a categorical statement. It is equally immaterial that what the parties actually say in their conditional offer and acceptance is no more than what is inherent in the statement when made categorically.\textsuperscript{516} The Islamic law considers a categorical pronouncement to be the best

\textsuperscript{513} Ibid.
\textsuperscript{514} Ibid 172.
\textsuperscript{515} Ibid.
\textsuperscript{516} A clear example of this issue can be found to the contract of mandate (wakalah). It is said if the principal says: “you are my agent on Friday to sell my goods” it will not be a valid offer; but if he says:
vehicle for conveying the presence of an absolute contractual intention and maintains a (suspensive) conditional expression to be insufficient to produce legal effects.

4.2.2 The Electronic Offer

In our earlier discussion in section 1.3 Definition of sale contract in chapter 1, we said that an offer can be described as an indication by one person to another of his or her willingness to enter into a contract, and that a contract of sale results from an offer and an acceptance of the very same offer. An offer in this sense can be presented over the internet. Even more imperative is the fact that the terms of the offer must be sufficiently clear as we have already discussed in section 2.3 The fundamental elements of the e-sale contract in chapter 2. In order for a contract to be established by offer and acceptance without further negotiation, the offeror's intention to be bound by the terms of the offer must be clear. There is no reason why an electronic offer would have less validity than the offers mentioned above.

Therefore, the offer is the first part of the contract, and it has been preceded by negotiations or contract or an invitation to the declaration. These are not included in the contract unless there was the positive expression of the will of the certain elements as we will discuss in section 4.3 the requirements of making a valid electronic offer.

It is clear from the foregoing that the electronic offer can be subject to the same general principles that govern traditional offers under Islamic law, but it has some privacy concerning its nature. Because it is made through the electronic environment:

1. The electronic offer is remote: - Based on this subject, a remote offer should be subject to the rules of consumer protection, so imposing on the offeror a duty to provide consumers with information about his name, address, Head Office, and

"you are my agent and you do not sell my goods but on Friday", this will be a valid offer though, for selling a given subject in a given day; "the purpose is the same in both cases".

517 Sharon Christensen, ‘Formation of Contracts by Email-Is it Just the same as the Post?’ (2001) 1 (1) QUT Law & Justice Journal 22.

518 Ibid.

519 The UNCITRAL Model Law on Electronic Commerce does not contain a certain definition for the offer made by electronic means; however, article 11 defined the formation of contract in general in the following terms: "In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose."
information on the goods and their descriptions, price, means of payment and the method of delivery, the warranty, conditions, and other information.\textsuperscript{520}

2. The electronic offer requires an internet service provider.

3. The electronic offer is often international: the electronic offer uses electronic media and is made through an international network, so it does not abide by the limits of particular countries. There is no reason to restrict the offer to a specific geographic region, such as the decision in the United States of America to ban direct offer because of the economic sanctions such as Cuba and North Korea.\textsuperscript{521}

As we have already discussed in section 3.5 Means of Expression in the E-Sale Contract, there are three methods of making an offer in an electronic sale contract, each with their own characteristics (Electronic Email, Web Site Forms and chatting rooms). Whatever the method, whether the offer is expressed orally or in electronic writing, the Internet is only a means to deliver an offer in writing to the another party, thus, it is acceptable under Islamic law, as we have seen in discussing the Islamic jurists in section 3.4.2 Primary classification under Islamic law in chapter 3.

4.3 The Requirements of Making a Valid Electronic Offer

From our foregoing discussion, in order to constitute a valid offer to sell or buy goods under Islamic law in the internet environment, as we have already discussed in section 2.3 The fundamental elements of the e-sale contract in chapter 2, a proposal to make an offer must meet certain minimum requirements under Islamic law. The offer is a party's proposal for concluding a contract addressed to a specific person.\textsuperscript{522} Such a proposal must contain all essential terms of a sale contract.\textsuperscript{523} If not, it is considered merely as an invitation to make an offer as we will further amplify in the next section. The jurists of the four Islamic schools agreed, as we have discussed in the previous chapter and under section 1.4 Freedom of the sale contract in chapter 1, and section 2.3 The fundamental elements of the e-sale contract in chapter 2, that the parties must declare their intention and consent of making an offer or acceptance. Therefore, a

\textsuperscript{520}These commitments were mentioned in the European directive No. 7/97 in the matter of consumer protection in the electronic contracts.
\textsuperscript{521}Osama Mojahd, \textit{khuses ah al-Taqud Abr al-Internet} (2001) 77.
\textsuperscript{523}http://joe.law.pace.edu/cisg/principles/uni14.html
proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.524 Regarding the conditions that can be included in the offer in the e-sale contract, as already discussed in chapters 1 & 2, Muslim jurists categorise the conditions that can be valid and legally sound as follows:

1. conditions and principles that are already considered valid by Islamic law: these are unanimously agreed on by all the jurists;
2. conditions that emphasise and strengthen the essential elements and the expected legal effect of the contract: these are unanimously agreed on by all the jurists;
3. conditions that comply with the essential elements and the expected legal effect of the contract: these are also unanimously agreed on;
4. conditions that are not repugnant to Islamic rules and principles;
5. conditions that are not repugnant to the essential elements and the expected legal effect of the contract: these are advocated by the Maliki and Hanbali schools; and
6. Conditions that are recognised by valid custom: this has been advocated by the Hanafi School.

Furthermore, in Islamic law’s view, a proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.525 Therefore, the key components of an offer are specificity, definiteness and an indication to be bound.526 As far as the element of specificity is concerned, it appears to make no difference what form of communication one uses.527 In respect of this feature of the offer, electronic forms of communication do not give rise to problems which do not occur in relation to other forms of communication.528

525 Ibid.
528 Ibid.
This is basically also true in respect of the required intention to be bound as we mentioned in chapter 3, which distinguishes an offer from an invitation to make an offer. Some kinds of transactions involve a preliminary stage in which one party invites the other to make an offer; this stage is called invitation to treat. The law of many Muslim countries distinguishes between an offer, which binds the offeror, and an invitation to make an offer which has no such binding effect.

In most cases, an offer will be made to a specified person. However, offers can be addressed to a group of people or even to the general public as we will further amplify in the following sections. Such a proposal is considered an offer unless the circumstances of the case or legally recognized custom dictate something else. A proposal not addressed to one or more specific persons is interpreted merely as an invitation to treat. However, one who clearly indicates an intention to be bound by such a proposal will be treated as having made an offer. For example, the offer is always sent to a specific person if sent by e-mail, and so such a proposal is considered as an offer, not an invitation to treat. By contrast, catalogues, advertisements, and price lists can also be sent per e-mail; generally, advertisements, catalogues, and price lists are considered as invitations to treat. However, the sender of such an invitation is liable for prejudice caused to offerors, if he does not accept the offer without substantiated reason. The same interpretation might be extended to web sites through which a prospective buyer can buy goods: an advertisement on a web site should be considered as an invitation to treat.

The doctrine has also included an opposite opinion. Catalogues, advertisements, price lists, etc., could be considered as an offer if they contain all essential terms of a future sale contract. They should contain a precise description of goods, price, time, place and method of performance, etc. However, in our opinion to avoid problems whether a message is an offer or invitation to treat, it is recommended that in a case of doubt there should be a clarification stipulating that a message sent is not considered as an offer.

529 The Jordan Civil Code Article 94 sec (2), the United Arab Emirates Transaction Law article 134, and the Kuwait Civil Code article 40 sec (3), however, there is no mention in the Egyptian Civil Code.
4.4 Offer and Invitation to treat

It is important at this stage, to distinguish between what we would regard as an offer which is capable of acceptance and a proposal which may on the face of it seem to be an offer but which is really an invitation to treat as we see in the following figure:

An offer can be defined as a set of conditions which if successful forms the foundation of an agreement or contract. The main characteristic of this suggested set of stipulations is that there is a high chance of it being accepted since the terms contemplate acceptance. However, statements that appear to be offers may in fact not be offers if the terms stipulated do not reflect acceptance. Such statements are known as invitations to treat as they open the door to the alleged offeree to make an offer, in so doing giving an opportunity for the parties to continue to negotiate until agreement is reached. The difference between true offers and invitations to treat is that we have a finished contract under a true offer while on the other hand the invitation is simply an offer which needs further negotiations. Different authorities have come up with assumptions to determine whether given stipulations or statements or deeds add up to an offer or simply an invitation to treat. As a result, we can conclude that exhibits in shops are simply invitations to treat as is revealing objects for transaction at advertisements and auctions.

536 Ibid.
When these underlying principles are applied to the electronic medium, it is found that website advertisements are no different from other cases involving the display of objects.\textsuperscript{537} In fact a web-advertisement is almost same as a shop exhibit compared to television or magazine advertisements which are not interactive.\textsuperscript{538} To demonstrate how a website transaction is interactive, on the internet some items such as software can be sampled and once the buyer decides to buy, it can be done without departing from the store.\textsuperscript{539} In most cases internet-advertisements constitute invitations to treat except if the web-advertiser points towards intending to accept and be bound by it.\textsuperscript{540} Hence, the bond between the contracting entities for concluding an agreement settled through the negotiation process comprises an offer or tender provided it is adequately specific and specifies the purpose of the offeror to be held accountable should acceptance occur.\textsuperscript{541} An offer is sufficiently definite provided that it shows the items to be purchased and specifically provides means by which the price, the quantity, delivery mode and the parties can be ascertained. Similarly, the procedure of agreement negotiation via the internet or E-commerce is identical with reality: where we have invitation to treat, then an offer and counter-tender or counter-offer, and lastly acceptance.\textsuperscript{542} As seen earlier, we have three main forms of communication employed in the agreement formation stage namely: web page, chat rooms and electronic mail. Bearing in mind that all agreements start with objective negotiations and any of three above forms of communication can be employed, we see that all agreements can be handled easily. The only challenge here is the technological complexities that the internet poses, but it is merely a way of communication and this technical problem can be solved by hiring computer literate staff for easy facilitation of the transaction.\textsuperscript{543}

Islamic law has known the invitation to treat which is called negotiation (msawamah) which takes place between the parties to the contract in one meeting or more in the beginning of the contract formula, and it is not a condition to end the invitation to

\textsuperscript{537} Ibid 6.  
\textsuperscript{538} Ibid 6.  
\textsuperscript{539} Ibid 6.  
\textsuperscript{543} Ibid.
treat by conclusion of the contract. While an offer in the technical sense of the term is, as stated above, a definite expression of willingness to be bound upon simple acceptance, an ‘invitation to treat’ in the present legal parlance means, borrowing some historically earlier epithets where the term ‘offer’ is used in the non-technical sense of a proposition, an offer to negotiate, an offer to receive offer(s) or an ‘offer to chaffer’. Muslim jurists did not make the process of negotiating the provisions part of the contract, and did not consider the negotiating a stage of the contract unless there was true intention to be bound by the offer as already discussed in section 3.2.3

Differentiation of ‘Intention of Word’ and ‘Intention of Meaning’ in Islamic law in chapter 3.

In comments on the negotiation al- Sanhuri says:

"a binding offer usually comes after a period of negotiations for either a long or a short time such as the negotiations come before the offeror’s offer to the offeree to do something, but negotiation must not contain conditions or supply details or conditions."

So we can summarize the Islamic law by saying that the contract negotiation or an invitation to treat should not accepted and should not be addressed as an offer, but must be answered with an offer if a contract is to be established. This offer must be accepted by the originator of the invitation to treat in order to create a legally binding e-sale contract. It is probably better in e-commerce practice to ensure that, when you make available goods or services over the internet, you do so on the basis that it is an invitation to treat or an offer. This will give you the opportunity of rejecting an offer made by a customer if, for example as a result of a mistake on the website, the price is not correct or if, for example, you have run out of stock and are unable to procure more supplies.

4.5 Variety and Communication of Offers

In most cases, either in the classical contract or in the electronic environment, an offer may be made to a specified person, to a class of persons or to the public at large. It

545 Ibid.
may also be indivisible or divisible which, in certain ways, gives rise to the question of a 'standing offer' and cuts across the question of a definite offer and its differentiation from an invitation to treat as already discussed. Furthermore, for a statement or expression to qualify as an offer, it should, in principle, be brought to the notice of the offeree, i.e. be communicated.

The rules pertaining to an offer generally relate to a single offer made to a given person calling for a promise in order to enter into a contract. Variations in this general pattern are presented by an offer made for the performance of an act by a given person, an offer made to unspecified persons, being the public at large or a group of persons, and a proposal involving either more than one contract ('standing offer'), or for multiple performances as against a single performance.\footnote{547}

Islamic law has known and recognized a variety of offers as valid which announce a reward or remuneration to indefinite persons to perform some act, such as finding and returning a lost object.\footnote{548} This doctrine is known as (fu’alah). However, Islamic law also has known divisible offer and/or acceptance with regard to combining a lease and a sale contract such as when an owner of a property offers to lease out premises for a year and sell the fruit already on the trees in the property for a specific sum covering both the rent of the promises and the price of the fruit.\footnote{549} In this case there are, in effect, two offers while the acceptance, pronounced in one word, is taken to be single. In the opinion of Islamic jurists in the four Islamic schools, in dealing with this example, a different criterion based on what is called the “social aspect” of the twin subjects of the offer or single contract comprises in reality two contracts of lease and sale: if they are not category-wise compatible, such as the material line and the proprietary relation in, respectively, marriage and sale, then two contracts are concluded rather than one; but if they are compatible, such as transferring the usufruct in a property and the ownership of the fruits thereon through the exchange of a single offer and acceptance for a contract of composition (sulh) covering, in effect, both the lease and the sale, then there is only one contract.\footnote{550}

\footnote{547} Ali Mohammed Abu Al’z, al-Tijarah al-Ictroni’ah Fi al-Fiqh al-Islami (2007) 162.
\footnote{548} Ibid.
\footnote{549} Ibid 104.
\footnote{550} Kazim Tabataba’i, Sw’al wa Jawab (unknown year) 154.
Moreover, the premises of the example given - with the introduction of the medium of the contract of composition which is in itself an independent nominate contract – transform the question it is supposed to answer: there are no longer two distinct contracts of lease and sale at issue through a divisible offer, but a single contract of composition though the effects of it are those close to a lease and a sale combined.

Whatever the juridical Islamic schools’ niceties or the objections involved in these examples, the point relevant to our subject is the possibility in electronic transaction of an apparently single offer being considered, depending on its construction, as constituting a multiple offer which may produce, when accepted as it is made, one contract taking the place of more than one or multiple contracts.

On the other hand, it is not enough under Islamic law for an offer to be definite and precise as we have mentioned. It must also be communicated, brought to, or receive the notice of the offeree - hence its close connection with the question of acceptance.\textsuperscript{551} Under Islamic law, the requirement of communication of offer is to be deduced from certain other rules relating to the formation of a contract.

According to the classical trend of thought, which maintains that for each nominate contract words signifying in the offer the type of the proposed contract are to be used, and the acceptance is to be made in response thereto, there is no need to stress the necessity of communication since without it the whole mechanism of offer and acceptance would fail.\textsuperscript{552} It is, therefore, in borderline cases, such as when a party does not know the language in which the offer is made, or through discussions by Muslim jurists as already discussed on the use of metaphor or euphemism in the formula of the sale contract or on the validity of signs by a mute person made for the conclusion of a contract, that indications are to be gleaned as to the necessity of communication.\textsuperscript{553}

The key concept from an Islamic law perspective in contracts in such cases is comprehension (\textit{fahm}) to make the offer understood and to understand the offer.

\textsuperscript{552} Ibid 64.
\textsuperscript{553} Ibid.
Obviously, an offer cannot be understood if it is not communicated in the first place.\textsuperscript{554}

As examples of this underlying rule we may refer to the following instances. Metaphors and euphemisms constitute a valid means provided they are understood to signify as we mentioned an ‘intention to create’ (\textit{gasd al-insha}) the contract since, otherwise, “the addressee will not comprehend what he has been addressed to”. Signs are allowed for a mute person to make an offer or acceptance provided they are “understandable signs”; or a response to be given by way of acceptance in a proposed sale of contract should come from the addressee of the offer, the person to whom the offer was made and communicated.\textsuperscript{555} Likewise, if a person does not know Arabic, according to those jurists who stipulate the use of this language for the validity of the formulas of contracts, he must either learn the formula and understand what he is going to communicate, or employ an agent to pronounce the formula on his behalf as we shall further explain in the following chapter under the subject of conformity of acceptance to the offer.\textsuperscript{556} Thus, an offer, or an acceptance, which is not heard and understood is not valid.\textsuperscript{557}

On the other hand, some legislation such as the French Civil Code\textsuperscript{558}1994 article 2 requires the use of the national language in the expression of the offer, but a global internet and international supply environment makes it difficult to respond to this requirement, as there is a chance to make a bad faith manipulation via the internet.\textsuperscript{559}

4.6 Duration and Revocation of Offer

May an offer, once made in definite terms, be at any time revoked before acceptance is made under Islamic law? The answer recognizes a binding force in an offer. Islamic law (with the exception of the Maliki school) denies such a force to an offer. In

\textsuperscript{554}Ibid.
\textsuperscript{555}Ibid 65-6.
\textsuperscript{556}This again is peripheral to the requirement of correspondence (\textit{mutabaqah}) between offer and acceptance.
\textsuperscript{558}Omar Khalid al-Zryqat, \textit{Aqd al-Bay' Abr al-Internet} (2005) 110.
\textsuperscript{559}The UNCITRAL Model Law on Electronic Commerce makes no mention of using certain language in the conclusion of the e-commerce contract; it may imply the expression of will in any language pursuant to the general principle which allows the expression of will in any way understandable to the contracting parties.
Islamic law, according to the majority of the classical Islamic schools (Hanafi, Shafi’i and Hanbali), the governing principle is the revocability of the offer.\textsuperscript{560}

Only under the Maliki School does a contrary view seem to be embraced in an exceptional situation. The option of the meeting place (\textit{khiyar al-majlis}) is not recognized in this or in the Hanbali school. They hold that the meeting-place breaks up as soon as acceptance has been made.\textsuperscript{561} But as to whether an offer may be revoked before acceptance, the schools differ. The Hanafi school agree with the Hanbali and Shafi’I schools in considering the offeror free to withdraw his offer at any time before it is accepted, while the Maliki school maintain that “when a party makes an offer of sale to another, it is necessary that the other party should accept it in the same ‘meeting-place’, and the offeror cannot withdraw it before this (before the ‘meeting-place’ breaks up). If the party making the offer, however, withdraws it before the other party answers, the revocation will not avail him if that other party subsequently accepts the offer in the same ‘meeting-place’ ”.\textsuperscript{562} This rule is held by a modern jurist to be based on the efficacy in the Maliki school of ‘unilateral will’ (\textit{iradah al-munfaradah}) to produce an obligation.\textsuperscript{563}

In the electronic environment, we find there is no difference between an offer made in the traditional sale contract or over the internet. Therefore, the offeror can at any time revoke his offer before acceptance is made under the view of the majority of the classical Islamic schools. However, our opinion is that to revoke the offer made online would require the offeror to withdraw the offer advertised on the internet, which provides evidence that offeror has declared his intention to revoke his offer, but there is an exception to this where the offer is accompanied by a binding deadline for acceptance.

Thus, in order to decide when the acceptance is complete, it is necessary to decide whether an electronic message should be compared to a means of instantaneous communication rather than to a letter or telegram.\textsuperscript{564} Our opinion is that we should

\textsuperscript{561} Ibid 17.
\textsuperscript{563} Ibid 38.
\textsuperscript{564} http://www.uncitral.org/english/workinggroups/wg_ec/wp-91e.pdf
deal with e-mail messages as being more like regular mail than a phone call, because an e-mail is more like a one way communication. The offeror sends his offer to an offeree who is usually not going to read it at once and consequently delays in responding. In contrast other electronic methods of communication are without doubt a two way communication allowing the information systems involved to instantly respond to each other’s messages.

4.7 Termination of Offer

The formation of a contract, either in the traditional sale contract or the electronic environment, may be adversely affected not only by the offeror’s revocation or the offeree’s rejection of the offer, but also by also either passage of time or the death or incapacity of a party before the contract is finally concluded.

4.7.1 Passage of Time

Certain aspects of the passage of time have been already treated in the previous section, mainly under the discussion on the binding force of an offer. Here we confine ourselves to what pertains, essentially, to the effect of the passage of time on an offer before it is accepted or an acceptance thereof is attempted.

The time concept involved in this question is to be distinguished from the time-frame pertaining to the revocability of an offer, though they are, in certain respects, interrelated. An offer may be revocable in different legal systems as of a particular moment, or after the passage of a certain time from the date it is made, but may actually be left standing by the offeror for some time. How long after an offer is made will the offeree be entitled to accept it? The point is best illustrated where the offer is in principle revocable, but if not revoked, may be accepted with a certain delay.

Thus, while the question of the revocability of the offer relates to the obligation of the offeror to leave the offer open for a period of time and to the binding force of the offer in general, the present discussion relates to the time-frame beyond which the offer will altogether lapse and the offeree will no longer be in a position to effectively exercise his power of accepting the offer. However, we will analyse the place of acceptance in e-sale contracts in the following chapter.
The four classical Islamic schools have a requirement known as the ‘unity of the meeting-place’ (*ittihad al-majlis*), whereby offer and acceptance should be made in the same *majlis*, literally the ‘seat’ or the ‘meeting-place’. A contractual ‘meeting-place’ refers to the setting in which offer and acceptance are exchanged. There is no formal requirement for the meeting or its setting, but the requirement of its ‘unity’ is a result of the verbalistic formalism of offer and acceptance to be ‘promptly’ exchanged, as strengthened by the understandable fact that, throughout the centuries of their development, contracts were made inter praesentes, where it is imperative for the formation of a ‘binding’ contract that acceptance should be made at the same time ‘meeting-place’ where the offer is made or, as idiomatically phrased, there should be the ‘unity of meeting-place’.

However, the length of the time of the ‘meeting-place’ depends on the span of time allowed for acceptance after the offer has been made, which span determines in turn the length of the time in which the offer will be standing and its termination upon its expiration.

The time which is allowed under Islamic law to elapse in the ‘meeting-place’ between an offer and its acceptance is in fact extremely short. As a rule, an offer should be ‘promptly’ accepted if the requirement of the ‘unity of the meeting-place’ is to be satisfied.

The requirement produces under the majority of classical Islamic schools two interrelated ancillary rules: ‘promptitude of acceptance’ (*fawriyyah al-qabout*) and the uninterrupted ‘sequence’ (*muwalat* or *tawali*) of offer and acceptance. This requirement, however, should not be mistaken for the ‘option of meeting-place’ (*khiyar al-majlis*) in a sale contract whereby either party has a right, an ‘option’ to rescind the contract after it is concluded but before the ‘meeting-place’ breaks up, to provide a reasonable time for both parties to consider the terms before committing themselves to the contract in its final binding form.

566 Ibid.
567 Ibid.
568 Ibid 180-1.
However, the rule is stringent in ‘binding’ (lazim) contracts, but relaxed in the case of ‘facultative’ (ja’iz) contracts, as we shall explain under the discussion on acceptance. Suffice it here to deal with the lapse of the offer.

Two elements appear to be at work and they are very useful in our research. First, from a formalistic point of view, the formulas being interdependent, they will not be considered to ‘tie’ together if they are not exchanged in an uninterrupted ‘sequence’ (muwalat) due to the lapse of time, or a party falling asleep or the introduction of a different subject. Second, on consensualistic grounds, it is maintained that there should be a ‘concurrence of intention’ (taqarun al-qasdayn) between the parties to produce the contract, which concurrence will not exist if the offer is not ‘promptly’ accepted. The same reasoning is encountered also in the discussion on the effects of an intervening incapacity, as we shall shortly discuss.

In the electronic environment, our opinion is that, if the offer is addressed to the general public by widespread dissemination across a web site, and the offeror appointed a positive validity period for this offer by saying that the offer is valid until a certain date, then the offer remains valid until that certain date. By contrast, if the offeror did not assign a positive deadline for his offer on the Web page, we believe that the offeror is entitled to withdraw the offer only as long as the goods or services disappear from the web page. Therefore, if the offer disappeared from the web page, the presumption is that this is the end of the offer, and therefore, if the customer requests the commodity later, we consider this request as a new offer and it needs acceptance from the supplier.

However, if an offer has been addressed to a certain person by e-mail, and the offer is limited to a certain period, the offeror is bound by his offer until the expiration date,

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570 (Ja’iz), namely facultative or potestative contracts, are those which may unilaterally be rescinded by either party at any time. This category consists of loan of money or other fungible things (qard); deposit (wadi’ah); loan of specific things for use (ariyah); capital-labour partnership (mudarabah) whereby one party provides the capital for another to trade with and share the profits; mandate (wakalah); and, civil partnership (shirkah). See Frank E. Vogel and Samuel L. Hayes, Islamic Law and Finance (1998) 111.


572 Ibid.
but if the offer is not limited to a certain period, then our opinion is that the offer must be accepted immediately unless the circumstances indicate otherwise. Moreover, we find the offeror can revoke his offer, if it has not yet been transferred to the offeree.

4.7.2 Death or Incapacity

The Islamic law provides that the offer will certainly lapse on the death or incapacity of either party. Taking the present context, the concept of incapacity is much wider under Islamic law.573 Under the main principle of formation of contract in Islamic law, as we have previously discussed in section 2.2 Conditions relating to the contractors in chapter 2, both offer and acceptance shall be made when both parties are in a position to make a valid proposal. This state ceases to exist either if a party is no longer capable of negotiating, as in the case of his death, insanity, unconsciousness or, perhaps, even when asleep, or if the consent of a party is no longer legally valid, as in the case of supervening interdiction due to insolvency, prodigality, slavery if assumed, or illness ending in death.574

The primary reason in all such cases is that the concept of the contract will not materialize.575 This reasoning fits in both with a consensualistic argument, as at times put forward by all Islamic schools in term of intention and consent, and a formalistic approach, which is predominant among them. In consensualistic terms, it can be said that in such events there will be no valid link between the respective intention and consent of the parties, while with a formalistic approach it may be said that the respective formulas of the parties fail to be made within the pattern prescribed for that purpose by the law in order to produce a sale contract. Both arguments are equally used to explain the brevity of the time in which the offer stands and the problem of validity of contracts inter absentes as we will further discuss in the following chapter.

574 Ibid.
575 Ibid.
CHAPTER 5 – ACCEPTANCE OF AN ELECTRONIC OFFER ON E-SALE CONTRACT UNDER ISLAMIC LAW

5.1 Position in Islamic law

Acceptance, as we have already discussed at the beginning of chapter 4, according to the Hanafi School is a definite response to the offer intended to conclude the proposed contract from either of the parties.\(^{576}\) However, the Maliki, Shafi’i and Hanbali view on the question of offer and acceptance suggests that in a sale contract, where a thing or the possession thereof is to be transferred, the statement made by the owner of the thing which constitutes the subject matter of the contract is the offer and the one made by the other party (buyer) is the acceptance.\(^{577}\)

In a definition from a recent Muslim jurist, acceptance of an offer means unconditional agreement to all terms of that offer.\(^{578}\)

Thus, offer and acceptance, being complementary elements from opposite sides in producing a contract, share in part a common ground while differing in what is peculiar to the nature of the one or the other. As a result, a number of questions pertaining to the formation of a sale contract cut across both elements and may be treated either under offer or under acceptance, such as rejection of the offer, and the duration for which the offer may be accepted.

Moreover, in certain sophisticated areas of sale contract formation, such as where the mechanism of formation differs from the common pattern of offer and acceptance, or where more than two parties are involved, or where acceptance is inferred from conduct or is assumed to incorporate terms implied in the offer, other considerations equally come into play which strain the arrangement of topics.

When treating the subject in a comparative context, further complications arise in respect of such matters as contracts inter absentes, to which the four Islamic schools here under review have radically different approaches. In Islamic law, where the offer


\(^{578}\) Ibid.
and acceptance are predetermined in a set pattern and where the more important
cATEGORIES OF NOMINATE CONTRACTS ARE CLASSICALLY REQUIRED TO BE CONCLUDED INTER
praesentem, certain issues become simple through elimination, but otherwise the whole
discourse develops in a universe of its own.

As we have already discussed, Islamic law does not, due to its determined pattern of
offer and acceptance, go beyond certain elementary questions but, in more recent
works, scattered references to some newer problems may be found.\textsuperscript{579}

As already discussed under chapter 4 dealing with the mechanism of formation of
offer and acceptance, certainty of acceptance may, in a broad sense, be considered
either intrinsic or extrinsic. By intrinsic certainty we mean here the unequivocal,
categorical and present existence of acceptance without its efficacy being made
dependent on any future event; in short, a definite acceptance. But an acceptance
which is intrinsically definite may become ineffective due to extrinsic elements, such
as failure of a condition or the destruction of the subject-matter of the contract, which
fall beyond the scope of the present study.\textsuperscript{580} A grey area in between concerns cases
of acceptance by conduct, ranging from silence to performance, where the principle of
certainty assumes in practice the nature of a presumption. It is, in reality, an imputed
certainty in borderline cases which determines the efficacy of acceptance, and the
process of this imputation differs according to the attitude of the legal system
concerned.

Definiteness of acceptance, which constitutes its intrinsic certainty, is in part related
to the contractual intention to be bound and in part to the mode of its expression. As a
basic principle, the Islamic law here under review maintains that an acceptance must,
like an offer, constitute a definite and unequivocal expression of contractual intention,
though the stress on the inner or outward intention varies as we have already
discussed in chapter 3.

\textsuperscript{579} Such as the linguistic requirements for the formulae of contracts and the arguments for and against a
contract by conduct.

Under Islamic law, the requirement of definiteness (tanjiz) is not, in a like manner, confined to the offer but is equally applicable to acceptance, though the definition of acceptance varies, due to the verbalistic approach if the Islamic schools, according to the category of contracts at issue.\textsuperscript{581}

Therefore, the requirement that acceptance should be definite is subject to certain modalities which vary in degree depending on the construction of the facts taken to constitute acceptance, as we will discuss in the following sections.

5.2 Conformity of Acceptance to the Offer
All the classical four Islamic schools here under consideration agree on the basic principle of conformity of the acceptance to the offer.\textsuperscript{582}

The primary principle under the four Islamic schools is that an unequivocal and certain acceptance either in the traditional sale contract or the electronic sale contract should also be unqualified, and fully conform, or correspond, to the offer without any material variance.

Under the four Islamic schools, the significance of correspondence (mutabaqah) as we have already discussed relates to the verbal formula (sighah) of the type of the contract concerned, and for the post-classical perspective it may still fall short of embracing such terms beyond the latitude allowed in making the formula through any means of expression.

The basic principle requiring full correspondence appears to be taken for granted under many legal systems such as English law:

"Acceptance must be absolute and unconditional, and must indicate willingness to contract on the exact terms put by the offeror." \textsuperscript{583}

Article 89 of the Egyptian Civil Code stated:

\textsuperscript{581} The requirements of contract formation under Islamic law vary according to whether the contract is binding (lazim) such as the sale contract, or facultative (ja 'iz) such as the agency contract.
\textsuperscript{582} Abu Bakr al-Kassani, Badaa'i al-Sanaya (1982)136.
\textsuperscript{583} Atiyah P. S, An Introduction to the law of Contract (1989) 71.
"The contract shall be formed by full correspondence of the parties' expression of their intention ..."

The statement of the principle looks, at first sight, to be the same under Islamic law:

"Offer and Acceptance should necessarily correspond; otherwise the contract will not be concluded."

The reason, however, differs: alteration of the offer by the offeree in his purported acceptance, according to the classical Islamic schools, will run counter to the verbalistic requirements pertaining to the formula (sighah) of the contract; according to some Islamic schools jurists, this will not constitute a response to what the offeror had consented to.

By correspondence is generally meant a 'correspondence of meaning' between the formula of the acceptance and that of the offer. Nevertheless, this is a different thing from correspondence in the substance of the terms of offer and acceptance, also required under English law, since the formulas of offer and acceptance are under Islamic law distinct from the terms of the contract except perhaps for the most essential terms such as the price and the thing to be sold in a sale contract, as we have discussed. The gist of the formula in a sale, for example, is the pronouncement of the words 'I sold' and 'I bought' by the seller and the buyer respectively.

However, in application of the principle of conformity of acceptance to the offer, Islamic law allows a certain latitude concerning variances between the acceptance and the offer, depending on the respective approach adapted to the significance of correspondence. We may, therefore, classify such variances into two categories: immaterial and material, noting in the meantime that the range of statements which are neutral in conveying a contractual intention does not constitute a variance to be considered, material or not.

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586 Ibid.
5.2.1 Immaterial Variance

Immaterial variance may be defined as a variance which does not change the substance of the offer, either because the variance is only in appearance or because there exists a variance but on such matters as to leave the import of the offer intact.588

1. Seeming Variance

From our discussion in chapter 3 seeming variance may be said to consist of a difference in the semantics of the expression of acceptance when compared with that of the offer but without changing its substance. This may occur in various ways such as:

(a) Verbal Variance - a purely linguistic variance between the acceptance and the offer will not denude the acceptance of its efficacy. As to Islamic law, the requirement of the correspondence of the formula of the acceptance with the offer is generally held to be satisfied when the respective expressions mean the same thing even if different words are employed, as we have already mentioned above, with the result that the use of synonyms in offer and acceptance is not taken to produce a variance.589 For example, if in an e-sale contract, the seller says: “I sell the book” and the buyer answers: “I accept” the contract will be validly concluded according to the general principle. But some jurists go to extremes and say that the requirement of correspondence will not be satisfied unless a derivative of the same word is used in the offer and acceptance: in the above case the man should say “I accept to buy the book”.590 They believe that if correspondence is not carried out to the letter of the offer, the offer and acceptance will not meet. The great majority of Muslim jurists, however, do not agree with this rigorous view.591 This mitigates to a limited extent the rigour of the classical rule on correspondence. For the post-classical jurists who dispense, in large measure, with the strict verbalistic requirements and/or adopt a consensualistic approach to the formation of contracts, correspondence of the meaning of offer and acceptance will suffice.592

590 Minority jurists of the Hanafi School.
592 Ibid.
(b) Wishful Expression – expressing the desire in an acceptance which is otherwise unqualified, without making the acceptance conditional on the fulfilment of that desire, does not render the acceptance ineffective, nor does a statement of a lawful motive. Its application to the formalistic trend of Islamic law may be not free from doubt since such expressions, if pronounced as part of the formula, may be taken to render it ineffective due to the introduction of a subject alien to the formula, but the consensualistic trend, not being strict with verbal requirements as we have already mentioned, may have room to accommodate it.

(c) Meaningless Statement - perhaps the case of a meaningless statement in the acceptance may be appended to the category of seeming variances. Under principles of Islamic law, acceptance would be held ineffective, either for its conditionality, however vague, rendering it indefinite or due to the absence of correspondence arising out of a real difference in the import and significance of the acceptance when compared with that of the offer.

2. Expressing Terms Implied by the Law

According to some legal systems, such as the English analysis, a variation from expressing a term in the acceptance not specified in the offer but implied by the law is treated as an example of verbal variance. We believe, nonetheless, that expressing implied terms constitutes a separate category and is open to a different analysis, though the result may be the same. While a purely verbal variance is only a linguistic form, without changing the meaning of the offer as it stands, the express statement in the acceptance of an obligation imposed by the law, but not specified in the offer, constitutes a genuine variance. These two kinds of variances differ in their semantics. Yet, despite such a semantic difference, their effects are similar; namely, legally and in so far as the substance of the obligation is concerned, both kinds of variances are equally inconsequential in affecting the validity of the acceptance.

594 Ibid.
For example in French law the efficacy of acceptance, when it spells out an obligation not stated in the offer but applying due to the operation of the law based on the provisions of article 1135 of the French Civil Code, also binds the parties to what ensues from "equity, usage and the law".

However, the Islamic law of contracts consists in fact of such type patterns as we have already discussed. Once for any given nominate contract such as the sale contract, the formula is pronounced, incidences thereof (ahkam) as laid down by the law will follow. Whether or not stating some such incidences by the offeree would be taken as varying the formula of the acceptance and affect its correspondence with that of the offer will depend on the strictness of the trend concerned. The rigid formalistic approach may consider such a statement as introducing a variance of or a condition in the formula, and thus hold the purported acceptance ineffective.\(^{597}\)

5.2.2 Enquiry and Acknowledgment, No Variance

The requirement that the response to an offer has to be unequivocal, definite and an expression of contractual intention to constitute an effective acceptance leads to the logical corollary that a mere enquiry or a pure acknowledgment, not yet embodying an intention either to accept or to reject the offer, should not enter into the question of variance at all. What pertains to this question is in effect a problem of construction of fact rather than the formulation of a rule. Whatever rule, therefore, may emerge under a given legal system on the effects of an enquiry or acknowledgment is only a particular rule of interpretation which is to be applied, as a guideline, to cases in which a question of this nature may arise. It is in such a context that a seeming enquiry or acknowledgment may be considered an attempted acceptance or, conversely, a seeming acceptance may be considered an enquiry or acknowledgment. Obviously, note should be taken of the circumstances surrounding the statements made, the overall relations of the parties and the related parameters of interpretation if developed under the legal system concerned.

\(^{597}\) If the purely verbalistic correspondence between the offer and the acceptance is to be disregarded in line with a consensualistic approach, it may be said, using a framework of thought encountered at times in Muslim jurists' writings, that the offer and acceptance, despite the variance in their 'significance by correspondence', accord with each other in their 'significance by implication'.

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1. Enquiry
The position of Islamic law is that acceptance should, according to the majority of the classical view of the Hanafi, Maliki, and Hanbali schools, take place 'promptly' (fawri) during the 'meeting-place' (majlis). An enquiry posed after the offer is made will interrupt the 'sequence' (tawali) of offer and acceptance and therefore prevent the formation of the contract. Even if a post-classical trend with a consensualistic leaning is taken into account, the problem is not certain to be resolved. The informality allowed by adherents of this trend, such as admitting writing as a valid means of expression, does not altogether eliminate the requirement of promptitude (fawriyyah) of acceptance as we will further analyse in section 5.4 of this chapter dealing with communication of acceptance, nor does it change the basic formalistic structure and conception of offer and acceptance. Yet it is only under this trend, and in line with a certain view which is tolerant on the question of 'sequence' of offer and acceptance and the 'promptitude' of acceptance, that an intervening pure enquiry may be considered to leave the offer intact and susceptible of subsequent acceptance.

2. Acknowledgment
If, in logical terms, an enquiry is of an interrogatory nature, acknowledgment is, by definition, of a purely informative, as distinct from creative, nature. It lacks, therefore, a reference to the element of intention (whether objectively or subjectively ascertained) to enter into a contract as we have further analysed in the section on communication of acceptance.

On acknowledgment it is American law which provides, out of a number of litigated cases, certain general guidelines. The courts have taken into account such factors as "the nature of the business relation to be consummated" and, more often, "previous dealings between the parties and subsequent behaviour" to help interpret an ambiguous statement as constituting acceptance rather than acknowledgment. In the

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598 However, the position of acceptance in Shafi'i school was required to be immediately following the offer, see Ibrahem Jamal, In'iqad al-Uqud bi Wasta Wasa'al-Itsal al-Hadykh (2005) 32.
599 This problem, however, arises on the assumption that the contract is being made inter praesentes. Otherwise, invalidity of writing which hampers the formation of contract inter absentes will make the present issue altogether irrelevant.
absence of such factors, it is stated that the “offeree’s simple acknowledgment of receipt of an offer does not constitute acceptance rather than acknowledgment”. 601

The position of Islamic law in this respect is the same as that stated under (1) above on enquiry, i.e. open to doubt, with the added element here that, since acknowledgement usually arises in contracts inter absentes, it becomes much less relevant to Islamic law owing to the invalidity of such a way of contracting in the most important categories of contracts. 602

5.2.3 Material Variance

Any variance that goes beyond the semantics of the acceptance and contains a proposition which is not purely interrogatory or informative but conveys an intention to enter into the contract, while meaningfully introducing such changes in the content of the offer which would not have otherwise been read into it by direct operation of the law or as provided under the law, will be a real variance and, as such, material in adversely affecting the process of contract formation. 603

Of the accounts so far given of immaterial variances and the manner of distinguishing them from a material variance, it transpires that any legal system such as Islamic law here under consideration views a case of variance with a strict approach, holding it *prima facie* to be a real variance unless the contrary is obvious or otherwise established. A real variance, being material, produces a number of effects which are noted, due to their importance and the complexities involved, under an independent heading.

5.2.4 Effects of a Material Variance

A real variance produces, at close scrutiny, three distinct effects: it prevents the formation of the contract proposed by the offer; it may cause the destruction of the offer so that the offer as made may no longer be capable of being accepted; and it may constitute in itself a fresh offer (counter-offer) capable of being accepted by the

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601 Ibid, 1052.
603 The conformity of offer with acceptance, even in detail, is obviously a different question from the range of the terms that corresponding offer and acceptance have to cover in order to produce a contract.
original offeror who at this stage becomes the offeree. In fact, Islamic law, with some notable reservations, agrees about the said three effects of an acceptance at real variance with the offer.

However, the first two effects are closely interrelated since both involve the rejection of the original offer. But the rejection of the offer resulting from a variance, while preventing the formation of the envisaged contract, may or may not, so to speak, 'kill' the offer by rendering it incapable of being revived. Customarily, it is this effect which is discussed under the rubric of 'rejection of the offer'. We shall, therefore, defer reference to the rejection of the offer to the topic on the destruction of the offer.

1. Prevent Conclusion of proposed Contract
Any real variance will prevent the formation of the envisaged contract. This is a corollary (if not a restatement in a different guise) of the principle that acceptance should be 'unqualified'. The approach to the rationale of the rule, however, differs from one legal system to another.

The Maliki, Shafi'I and Hanbali schools hold that the criterion stated for the correspondence of offer and acceptance is that what is created by the offer should be exactly what is created by the acceptance, even with regard to a condition forming part of the contract. In other words, acceptance should exactly match the offer even with respect to any condition proposed by the offer. The Hanafi school jurists agreed with the other schools in general but they maintained that if the offeree agreed to pay a higher price than the original price, then the contract shall be concluded. For example, if the seller offered to sell a car for $1000, and the buyer agreed to buy it for $1500, then according to the Hanafi school jurists the sale contract shall be concluded.

Yet there is a view under some Islamic schools suggesting that the offer may be accepted without the proposed condition if, after the offer is made and before the

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605 Similarly, article 96 of the Egyptian Civil Code agreed with Islamic law and stated: “If the acceptance is accompanied by more than acceptance or restricts or modifies the offer, therefore, it is a rejection of the offer, and it may include a new offer.”
607 Ibid 70.
acceptance is attempted, it becomes impossible of fulfilment; but this view is rejected and such a situation is held to prevent the correspondence of the (purported) acceptance with the offer.608

2. Amount to Rejection of and may destroy the Original Offer

As we have already discussed in chapter 4, an offer may be directly rejected by an active but negative response of the offeree to the offer, be it made through express means or tacit conduct, or due to the passivity of the offeree and the lapse of time in which the offer could have been validly accepted.609 The effect of a straight rejection is generally, but not necessarily, extended to rejection resulting from a variance. When concerns us here is the effect of an attempted acceptance varying from the offer.

It should be noted that, where the envisaged contract fails due to a non-corresponding acceptance, it does not, simply as a matter of any logical necessity, follow that the original offer will altogether lapse so that it may not be met anew by a subsequent, conforming, acceptance. It all depends on the approach of the legal system concerned.

The issue is open to argument between Muslim jurists under Islamic law due to the scarcity of materials directly bearing on the point. To clarify the matter, first its position as to the straight rejection of the offer has to be considered.

The main principle from the four Islamic schools, as we have already discussed, maintains that the rejection of the offer by the offeree, like its revocation by the offeror, destroys the offer and prevents mutual assent, thereby concluding that an attempted ‘acceptance after rejection is of no effect’. We base our view on a rule pertaining to an unauthorized (fuduli) sale contract, which according to the majority of Islamic schools shall be effective if not preceded by rejection; otherwise it shall have no effect.610

608 Shi‘ah school (Ja‘fari group).
609 See in relation to chapter 4 under duration and revocation of an offer (123-30).
An attempted acceptance varying the terms of the offer, however, is not, by definition, identical with an outright rejection. It may produce the same effect. However, the stress placed by Muslim jurists on the formula (independent of the terms) of contracts leaves room for treating a variance between the formula of offer and acceptance differently from a discrepancy in the terms. A problem posed by way of a question and its answer in our study may illustrate this point. The question is to the effect that two conditions were made between the parties for the sale of goods by one to the other and the conditions were of a kind that if the buyer would not have accepted, the seller would not have sold the goods; but, in the course of making the offer and acceptance, reference to the conditions was forgotten and, after the sale contract, the buyer failed to fulfil the conditions; in this case, can the seller rescind the contract? The answer first refers to the “meeting-place of the sale contract” and then distinguishes two hypotheses: first, if in the said “meeting-place and before uttering the formula” before making the formal offer and acceptance, the parties had agreed and concluded the sale on the basis of those conditions but forgot to stipulate the conditions while making the formula, then it is sufficient, the conditions are as if stipulated, and the buyer’s failure to stand by the conditions will entitle the seller to rescind the contract; but, second, if those conditions were not made as a part of the agreement on sale, then the conditions are not binding. The answer is then concluded by a summary statement: the result is that if in course of making the formula, the parties had a prior understanding of the agreement on those conditions, the conditions are binding as if stipulated in the contract; otherwise not. The distinction, therefore, is clear between the parties’ agreement on terms and their utterances of the formal offer and acceptance.

As a result of Islamic law, as referred to above, if the acceptance varies in its terms from the offer, the contract may not be concluded. This may yet leave the original offer standing, the argument being that such a variation does not affect the original formula of the offer itself but proposes a modification in the terms accompanying it. Thus, if the proposed modification of the terms is not taken up by the original offeror, the offer, as a formula, may stand intact. Furthermore, even if an analogy is to be drawn, in the guise of ‘unity of reasoning’, with the case of an outright rejection, it

612 Ibid.
may be said, on the basis of the view which holds the offer still standing, that in the
case where the acceptance is at variance with the offer, the offer will a fortiori stand.
But if the prevalent view of the classical jurists on the lapse of offer upon rejection be
extended to the case of the variance of acceptance with the offer, the argument being
that a proposed modification in the terms is tantamount to the rejection of the offer as
made, the proposal by the offeree to alter the terms of the offer will equally, in this
case, be regarded as destroyed. The matter, therefore, is at least open to conflicting
arguments under the four Islamic schools.

3. May Constitute a New Offer

A variance response purporting to be the acceptance of the original offer may,
depending on the legal system, constitute a counter-offer, which is not to be confused
with cross-offers consisting of two distinct offers but without one being made in
response to the other.

Under Islamic law, on the question whether a variant attempted acceptance will
constitute a new offer, some texts suggests that an acceptance varying the terms of the
offer is not wholly ineffective; it operates as a proposal, but "the contract will not be
concluded without a new corresponding offer" on the part of the original offeror,
which in fact means that the contract will be concluded in the normal way by the new
offer of the predetermined offeror and the acceptance of the predetermined acceptor.
This is to preserve the respective roles of the offeror and the acceptor as laid down by
the law.

5.3 Correlation of Acceptance with the Offer

In Islamic principle, acceptance has to be made in response to the offer in order to be
effective. But this principle, simple or logical as it may seem at first, is not universally
applied or maintained. There are in particular two areas under the Islamic law under
review which are to be noted: one relates to the question of acceptance emanating
only from the addressee of the offer and not from anyone else, and the other concerns
the problem of identical cross-offers.

5.3.1 Acceptance by the Addressee of the Offer

As a general rule, under the Islamic laws which are being considered, only the offeree (or a person duly authorized on his behalf) is entitled to accept the offer, as we have already discussed in section 2.2 Conditions relating to the contractors in chapter 2, but in certain situations the question may arise as to how the offer was made or to whom it was addressed. The following examples or views expressed under the Islamic law serve as illustrations of various concerns in two distinct situations: one, where the common pattern of offer and acceptance is at work, and the other, where this pattern is not operative.

1. In Common Pattern of Offer and Acceptance

We may have to consider the question: who may accept an offer? The basic principle, however, seems to be clear: “the acceptance ought, in principle, to emanate from the offeree” if the offer was made to a determinate person. The question in doubtful cases, such as where A believes he is dealing with B, while it is C who accepts, is treated “as one involving a problem of mistake as to the person”.

According to the classical view of the four Islamic schools as to exchange of the formula of offer and acceptance, for validity it is required that acceptance should be made by the addressee of the offer. This is to be inferred from the rule that the offeree is required to understand the offer before responding to it as we have already discussed in section 4.5 Variety and communication of offers in chapter 4.

Furthermore, the foregoing general rules concerning offers made to specific persons should not be extended under the principles of Islamic law to offers made to indeterminate persons where the identity of the offerees may not be an element or an implied term of the offer. Such offers may be made to the public at large or to a class of persons. When, for example, an offer to sell a book is addressed in the traditional way or over the internet to the members of a group or a club for a certain price, the identity of the would-be acceptor or his or her attributes become, in our submission, immaterial: an acceptance by any member of the public or of the class concerned will constitute a valid acceptance.\textsuperscript{614} In all such cases, it may be alternatively said, all

qualified addressees are offerees; and therefore each may accept the offer in accordance with the said principle, with the proviso that when it is accepted by the first, or the first set, of offeree(s) as indicated by the offer, the rest will no longer be entitled to tender an acceptance for the offer thus exhausted.

2. When No Offer and Acceptance Discernible

In certain cases when the technique of reaching an agreement defies the mechanism of offer and acceptance, the question may, depending on the approach of the legal system concerned, lose its significance or be posed differently. If, for example, C puts forward a proposal to A and B for them to reach an agreement, and A and B do in fact reach the agreement in, let us assume, a simultaneous response to C, neither of them may be considered to have made an offer, for the other to be considered to have made an acceptance in response to that offer. Both parties respond to the proposal of a third person who is, technically, alien to the agreement. A and B may be held to be dealing, through the intermediary of C, with each other, but it is not clear where the offer and acceptance lie for the latter to be considered a response to the former.

For a legal system which considers the mechanism of offer and acceptance to be the exclusive vehicle of making contracts such as Islamic law, the problem arises in principle and due to other more fundamental reasons. Therefore, Islamic law does not admit that a contract may be concluded in such a way owing to its inflexible requirement of sequential offer and acceptance.615 It is suggested by all Islamic schools, as we have already discussed, that offer and acceptance should be made as expressions of the respective intentions from two different directions and in alternative turns. But, it sometimes happens that the parties do not express their respective intentions to create the contract in alternative turns. For example, a third person proposes a certain transaction to two persons and invites them to conclude it. In such a case, the (would-be) parties may together simultaneously say we accept. There is no offer and acceptance in this proposed transaction and pursuant to this analysis, no contract.616

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616 Ibid, 77.
5.3.2 Problem of Acceptance in Identical Cross-Offers

Another issue that we should discuss regarding our study under Islamic law is that which arises when the parties make independent offers to each other on the same subject matter, neither of them knowing of the offer of the other party. Most often the terms of their offers differ and, thus, each proposition constitutes an offer of its own requiring acceptance by the other party. Assuming now that the two offers happen to be identical, though neither is made in relation to the other, will they supplement each other to generate a contract? This is a different case both from that of a counter-offer, which is made with the knowledge of the original offer, and from that of an agreement reached through a third personating as an intermediary, where each party again acts with the knowledge of the contractual standing of the other.

To review the Islamic law with respect to the question of cross-offers, it is not at all amenable to holding a cross-offer effective. The main reason is the strict categorization of offer and acceptance in various contracts and the stress placed upon their predetermined sequence according to our discussion in section 4.1 The doctrine of offer and acceptance under Islamic law at the beginning of chapter 4. An added impediment is that cross-offers involve the use of writing in contracts inter absentes, which is not recognized by classical Muslim jurists for the most important category of contracts as we have already discussed. Even taking into account the latitude allowed by some post-classical jurists for the means of making the offer and acceptance, still the exclusivity of this mechanism in producing a contract, to which all of them adhere, would require differentiation of offer and acceptance and their sequence. Any argument, therefore, for the efficacy of cross-offers under Islamic law will be unavailing.

5.4 Communication of Acceptance

Is it necessary for acceptance to be communicated in order to be effective? This is one of the most important questions of the formation of contract since on it depends the determination of the time, and may depend the determination of the place, of the contract. To answer the question according to Islamic law, the case of contracts inter praesentes should be distinguished from that of contracts inter absentes. The line of

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617 In section 3.4.1.2 Other means of expression in chapter 3 and the following section 5.4 Communication of acceptance.
demarcation between the two sets of contracts is not always drawn according to the physical presence of the parties at one and the same place; instantaneous communication from two different localities, such as through an internet website, is legally often treated as being temporally inter praesentes but spatially inter absentes. As a result, general rules, which are often initiated in the context of contracts inter praesentes, are extended (or, it may be said, creep over) to certain aspects of contracts inter absentes. These considerations primarily apply to systems which have for a long time enjoyed the facilities of technological advances and been exposed to sophisticated legal problems arising out of the expansion of modern means of communication. The widespread use in everyday life of postal services has made them, due to the combination of low cost and facility of proof, a common vehicle for the conclusion of contracts inter absentes in countries where such services have become part of social and business relations. This may explain why many features of offer and acceptance, though by no means theoretically confined to contracts inter absentes, have in practice gained significance mainly in relation to this group of contracts.

Before embarking on a detailed examination of the requirement of communication of acceptance, some preliminary clarifications need to be made, as follows:

First, the expression ‘communication’ has an ambivalent meaning and may at times appear confusing: it is used in some contexts in a broad sense denoting an action taken by the offeree, for the transmission of the acceptance, to establish contact with the offeror, whether or not the offeror is to take notice thereof, such as when it is said that a letter of acceptance is ‘communicated’ when mailed or when received. It is, in a narrower sense, used to denote bringing something to the actual knowledge of the offeror, such as when it is said that a letter of acceptance is ‘communicated’ when received and read. The expression has yet a different general significance denoting the device of contact, such as when reference is made to the ‘means of communication’ meaning such vehicles of communication as post, telephone, internet chatting room,

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etc. In contracts inter praesentes, the expression is generally used to denote actual knowledge, but otherwise its significance has to be derived from the context.\textsuperscript{619}

Second, where communication of acceptance, in whatever sense, is required as a primary principle, it yet admits exception, including a waiver of the requirement either expressly made by the offeror or by implication attributed to him in certain cases. The waiver of the requirement of communication of acceptance, however, is a different thing from an attempted waiver of acceptance, since the former relates to the offeror's right which he may unilaterally forgo but the latter may involve a unilateral imposition by the offeror of an obligation on the offeree either to answer or else be considered as having accepted the offer - something which he is not entitled to do.

We shall first treat here the individual position of Islamic law on the question of communication of acceptance. We shall then concentrate on the respective correlation of the time and the place of acceptance with those of the contract and with the practical consequences thereof.

However, the problem under Islamic law goes beyond the mere requirement of communication of acceptance. This is due to the difference not only in detail but also in essence between contracts inter praesentes and inter absentes and, under the latter, between the so-called binding (\textit{lazim}) and facultative (\textit{ja 'iz}) contracts.

\textbf{5.4.1 Sale Contract Inter Praesentes: Actual Communication Required}

In contracts inter praesentes actual communication of acceptance appears to be taken for granted as a pillar of contract formation through the exchange of the formulas of a contract.

The necessity of communication is to be gathered in earlier classical works from some references to the pronouncement of a formula in Arabic or the validity of signs by mute persons as we have already discussed. It is said, for example, on a contract of marriage, that the formula should be pronounced in Arabic by a person who is capable of uttering it 'provided that either party should understand, even if through two "just"

interpreters, the words of the other. In the case of a mute person, her or his sign by way of offer or acceptance is held valid provided that 'the purpose is understood' thereby. In a sale contract the parties should understand the meaning of sale and other components of the formula and have the intention to create it as we have already discussed.

5.4.2 Sale Contract Inter Absentes: Question of Validity
From our discussion it is clear that contracts are divided under Islamic law into two basic categories of irrevocable or binding (lazim) contracts such as the sale contract which is the subject of our study, and which cannot be rescinded except by mutual agreement of the parties or due to a legally recognized cause, and revocable or facultative (ja'iz) contracts such as the contract of agency (wakalah), which can be unilaterally set aside by either party at any time.

In a binding contract such as the sale contract, there are two basic adverse requirements which according to the classical view prevent the formation of a binding contract inter absentes, namely the invalidity of writing and the need for the presence of both parties at the same 'meeting-place' (majlis al-Aqd). The latter requirement has certain corollaries which create further hurdles. As we shall presently see, however, some of the four Islamic schools strive to find ways and means for the conclusion of such contracts.

1. Adverse Effect of Inefficacy of Writing
As already explained in section 3.4 Means of expression of psychological elements in chapter 3, the majority of the schools (Hanafi, Maliki, and Hanbali schools), according to the prevalent view of the jurists, recognize the validity of any means of expression for the conclusion of 'binding' contracts. Correspondence, therefore, can be a legal frame for offer and acceptance.

As to the opinion of the four Muslim schools, there is a difference between them. While correspondence is accepted in the Hanafi, Maliki, and Hanbali schools, it is

620 Ibid 174.
621 Ibid.
rejected in the Shafi‘i school. Thus, the Hanafi, Maliki, and Hanbali schools state that as regards writing it is as effective as oral utterance to form the binding sale contract as we have already discussed in subsection 3.4.1.2 Other means of expression in chapter 3.

By contrast, Abu Ishaq al-Shirazi from the Shafi‘i school states:

“There are two opposite views on the permissibility of writing between absent persons. Those in favour of such a permissibility stress the ‘necessity’ of correspondence between absent parties when they want to conclude a contract, to which al-Shirazi, who holds that the adverse view is the ‘correct’ one, answers that the necessity of contract formation can be met by appointing an agent to speak on behalf of the absent party.”

Based on the Islamic law appears to follow a more flexible approach, our opinion agrees with the majority of Islamic schools who, by contrast, do not regard oral utterance to be the exclusive means for making an offer and acceptance. It follows that sale contracts may be concluded between absent parties if the twin problem of the ‘meeting-place’ can be resolved, as we have referred to in the analysis in the section on the time and the place of acceptance of the contract.

2. Adverse Effect of the ‘Unity of Meeting-Place’

The other obstacle lies in the requirement of the presence of both parties at the ‘meeting-place’ (majlis). It is imperative for the formation of a ‘binding’ sale contract that acceptance should be made at the same ‘meeting-place’ where the offer is made or, as idiomatically phrased, there should be the ‘unity of meeting-place’ (ittihad al-majlis). This requirement, however, should not be mistaken for the ‘option’ of meeting-place (khiyar al-majlis) in a sale contract whereby either party has a right, an ‘option’, to rescind the contract after it is concluded but before the ‘meeting-place’ breaks up, and that is to provide a reasonable time for both parties to consider the terms before committing themselves to the contract in its final binding form.

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The requirement produces two interrelated ancillary rules: the promptitude of acceptance (fawriyyah al-qabul) and the uninterrupted sequence (tawali) of offer and acceptance.625

The criterion in the four Islamic schools for deciding the length of the time permissible for acceptance to be made for a binding contract is prima facie reasonable in so far as it provides for the promptitude of acceptance as we have already discussed, whereby 'acceptance should not be delayed so that it could not be considered an answer to the offer'. But a statement usually made to the effect that 'the interval of a moment, breathing or coughing will not prejudice' the 'unity of the meeting-place'626 clearly shows the rigour of the rule and its strict significance and application. However, some Muslim jurists believe that 'the sequence of offer and acceptance is to be left to custom'.627

The requirements of 'sequence' and 'promptitude', in turn, will not be satisfied if 'other subjects foreign to the contract are interposed' or, perhaps, if a party may fall asleep in the interval between pronouncing the formulas of the offer and the acceptance.628

An argument which partakes of a consensualistic analysis, but is in fact rooted again in formalism, maintains that unless the said requirements are satisfied the necessary concurrence (muqaranah) or connection (ittisal) of the parties’ intention will not obtain since the validity of either the offer or the acceptance depends on its meaning to stand in the soul (the mind) of the speaker from the beginning of the formation of the contract until the cause thereof.629 What begets the contract, being offer and acceptance, materializes whereby the meaning of mutually contracting of the contract will be completed.630

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625 Ibid.
626 Ibid.
629 Ibid.
630 Ibid.

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3. Certain Latitude and Leeway

As we have already discussed, under the Hanafi, Shafi‘i, Maliki, and Hanbali schools the requirement of the “unity of the meeting-place” must be satisfied, but the Islamic schools appear to have a more flexible approach based on the contemporary practices. Upon the admissibility of writing in certain schools as aforesaid, the requirement of the ‘meeting place’ is said to be satisfied where an offer emanates from the offeror and is accepted by the offeree. Thus, when a person writes a letter or sends an oral message to another, the letter or the messenger carries the offer materially to the offeree. If the offeree reads the letter or hears the message and understands what it says when he receives it, the ‘meeting-place’ is formed whereupon, if he accepts the offer there and then, the requirement will be satisfied and the contract will be created. Likewise, it is concluded that when persons are connected by telephone or other means of instantaneous communication such as the internet, the ‘meeting-place’ will remain so long as the line is open or the contact is uninterrupted; and when an email is sent, the same rule as regards letters will apply: the ‘meeting-place’ will be the place where the offeree receives it as we will discuss in the following section.

In our opinion, this argument, artificial and extended as it may be, appears to be a good doctrinal device to soften the otherwise rigid effects of the rule.

5.5 Acceptance in E-Sale Contract in an Electronic Environment

As a result of our above discussion, under Islamic law, acceptance of an offer means unconditional agreement to all the terms of that offer over the internet. The general principle in Islamic law under the four Islamic schools does not lay down any specific process for acceptance of an offer.

What will be a suitable technique of acceptance depends on the fact of each condition. Acceptances in traditional contract law include written and oral communications and acceptance by conduct. Their online equivalents are acceptance by e-mail or any supplementary means of electronic messaging, and

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632 Ibid.
633 Ibid.
634 Sharon Christensen, ‘Formation of Contracts by Email: Is it Just the same as the Post?’ (2001) 1 (1) *Law & Justice Journal* QUTLJJ.
635 http://www.mbc.com/db30/cgi-bin/pubs/LMZ-Electronic_Contracts.pdf
conduct such as clicking on a button or downloading contents.\textsuperscript{636} We can expect that in an e-sale contract acceptance by e-mail will be allowed as a reasonable practice if all parties have the means to communicate with each other. If acceptance was made by another communication method, like a letter or fax, our opinion is that it should be treated as an acceptance by classic means.

However, acceptance via electronic means does not essentially have to be sent in the same way as the offer.\textsuperscript{637} For the same reasons discussed above, in our opinion, acceptance should not be sent using a slower means of communication than the one used by the offeror. It is not opposed to the general rules of Islamic law where the parties communicate online or are permanently connected to their service provider. Often, however, e-mail users will check their mailbox stored on the service provider’s computer only from time to time. Thus, there may well be a period of days before a message is actually read. It is submitted that this will not affect the general rule of Islamic law. If someone sets up an electronic mailbox and uses it for contract negotiations or includes an e-mail address in his letterhead he has to expect that it will be used for the communication of answers.\textsuperscript{638} If he collects his electronic mail infrequently he will have to inform recipients of correspondence not to reply by e-mail.\textsuperscript{639}

The acceptance by use of electronic means should follow generally the same rule of the traditional sale contract in Islamic law, even though there are different means of communication, therefore the result of the discussion above applies here as well. This means, for instance, that according to the Islamic view an e-sale contract is normally concluded when and where the offeree declares his acceptance of the offer (declaration theory). The time and place of e-sale contract formation can be essential in settling the question of whether an agreement is binding, and in order to decide the moment of the transfer of ownership and the risk, and for the consequences of the formation of the e-sale contract.

\textsuperscript{636} Ibid.
\textsuperscript{638} Ibid 341-2.
\textsuperscript{639} Ibid.
It has, however, been emphasized that the general rule in Islamic law may have to be modified in the face of technical development and that there is no obvious universal rule to cover all such cases. Regarding the above criteria, how are electronic acceptances to be dealt with? Some recent Muslim jurists suggest that electronic acceptance should be treated in the same way as writing (messenger). Thus, this approach will be simplistic.

As pointed out above, an online communication where the parties are connecting over a direct link (chatting rooms) is an instantaneous means of communication. Here, in our opinion, the 'unity of meeting-place' (ittihad al-majlis) rule under Islamic law will apply: the contract is concluded when and where the offeree declares his acceptance of the offer in the same meeting-place. In an EDI transmission – the most likely case of a direct link - this will be upon when and where the offeree declares his acceptance of the offer from his computer. Such a virtually instantaneous communication should, therefore, be dealt with under the general rule of Islamic law as well.

If data is transmitted over one or more networks involving one or more service providers the situation is different. Compared to the face-to-face ‘unity of meeting-place’ (ittihad al-majlis), this is a non-instantaneous exchange of information. However, means of network transmission that are virtually instantaneous might have to be placed in the same category as telex and thus the general rule would be applicable.

Following this reasoning and analysis, it has been argued that in the case of electronic mail the general rule of Islamic law should prevail.

If we adopt the test that has been developed by the International Islamic Academy (Majam'a al-Fiqh al-Islami) in the telex cases, this would first require near simultaneous dispatch and receipt of e-mail. In many cases e-mail will, indeed, be delivered very quickly. The transmission speed cannot, however, be compared to telephone or even fax. Sending problems arise even without computer hacking leading

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to an ‘internet crash’. A simple ‘tailback’ on the information highway may entail delay, or even prevent transmission. Thus, there is no certainty when or if an e-mail will arrive.

Furthermore, it is imperative that the e-mail message is placed in the responsibility of a network based service provider that is solely responsible for nothing more than the sending and receiving of data. In normal circumstances, data constituting e-mails is stored away in computers of the service provider in the service provider's mailbox from where it is retrieved by the addressee. This resembles letters sent by international post to PO boxes where they have to be picked up. Be this as it may, there is in no case a direct connection between acceptor and offeror comparable to telephone, telex or fax. The parties actually have to rely on a recognizable third party.

Finally, it has to be asked whether the sender should bear the risk of transmission rather than the recipient. Some software enables the user to request confirmation of delivery or even for confirmation of reading to be automatically returned after sending an e-mail message. However, this works only if the software of the addressee is able to answer such a request. Even if such a receipt is returned, this confirms only that a message has been received by the addressee’s service provider (confirmation of delivery) or that it has been retrieved by the addressee (confirmation of reading). Furthermore, it may take a long time before the sender gets the confirmation and until then he cannot be sure whether his acceptance arrived complete or became garbled on the way.

These considerations clearly show that communication via e-mail cannot be regarded as virtually instantaneous. Therefore, the Islamic rule (declaration theory) will usually apply here and the e-sale contract is concluded when and where the offeree declares his acceptance of the offer.

643 Sharon Christensen, 'Formation of Contracts by Email-Is it Just the same as the Post?' (2001) 1 (1) Law & Justice Journal QUTLJJ.
644 Ibid.
646 Ibid.
But what amounts to ‘declaring’ in an electronic environment? Is it sufficient that the sender (acceptor) presses the enter button on his computer so that the contract is made in that moment and at the place where he is? Or does ‘declaring’ mean that the message has been received by the service provider’s computer system from where it is delivered to the addressee? We have discussed the general Islamic rule that the offeree has accepted the offer and the contract is concluded in the moment he declared his acceptance and says ‘I accept’. Applied to network communication, this means, in our opinion, that the sender (acceptor) will declare his acceptance by pressing the enter button on his computer so that the contract is made in that moment and the place where he is according to the general rule in Islamic law even though the computer or the link malfunctions after the sender sends his acceptance but the offeror does not receive the message of acceptance.

It is submitted that the same general rule of Islamic law will also apply to EDI communications carried out using one or more service providers. Here, the situation will not be significantly different from e-mail use as outlined above. No direct link will be established between the parties and their communication cannot be seen as virtually instantaneous.

Finally, acceptances over interactive web sites have to be examined. Unlike e-mail, the parties are here in an online communication. Depending on the way in which the messages are transmitted and the time of day, there is likely to be some time lapse between dispatch and receipt. The user waiting for confirmation or some reaction to his message will also realize when the connection fails. Thus, in our opinion, this form of communication is close to the ‘unity of meeting-place’ (ittihad al-majlis) and it seems reasonable to apply the general rule: the contract is complete when the offeree declares his acceptance.

5.6 The Time and the Place of Acceptance in the E-Sale Contract
Determination of the time and the place of acceptance, in addition to presenting the complexities so far noted, require further consideration in view of a number of significant consequences it produces under many legal systems. It may help, for example, to determine the time and the place of the sale contract subject, however, to two provisos: first, the parties may decide a time and/ or a place for the sale contract
different from those of the acceptance; and second, the place of the sale contract may not, in certain circumstances, be the same as that of the acceptance (or correlated to the implication arising out of the determination of the time of the acceptance). However, as we mentioned earlier, our study deals exclusively with the formation of e-sale contract from Islamic law's view, without going to the case of conflict of laws such as the time and place of the e-sale contract, when the contracting party has accepted the offer in a different country with a different legal system.

Two other points have also to be noted: first, determination of the time and the place of the sale contract depend, according to the Islamic Law, primarily on the intention of the parties; and second, contrary to the classical view, there is no necessary link between the time and the place of acceptance and thereby of the contract. Most of the problem areas, therefore, concern cases where the intention of the parties is not known and, in such cases, the greater difficulty is experienced in the domain of contract inter absentes.

We deal in this section with instances where the parties determine the time and the place of the sale contract over the internet, then with cases where their intention is not known, and finally with the consequences of determining the time and the place of acceptance in the sale contract.

5.6.1 Parties' Determination
As a matter of contract principle, the parties are entitled to fix the time and/or the place of the acceptance of the contract. Whether the contract is inter absentes or inter praesentes, variation of the time of acceptance from that of the contract calls for some explanation.

The question of the time of the contract under Islamic law may be approached in a different way, which will be relevant in part to the legal system of each Islamic country. Generally, in the most important category of contracts under Islamic law, those which are to be concluded inter praesentes and in a set pattern of offer and acceptance, the contract takes effect immediately upon offer and acceptance.\textsuperscript{648} Any

\textsuperscript{648} Ali Mohammed Abu Al'z, al-Tijarah al-Ictroni 'ah Fi al-Fiqh al-Islami (2007) 177.
deferment of the effect of the contract, making the contract take effect at a future date, may throw doubt on the definiteness of offer and acceptance and give rise to the question of a suspensive condition.649 There are, however, two particular instances which may be considered as constituting exceptions:

1. Unauthorized (Fuduli) Transactions

In the case of an unauthorized (fuduli) transaction, when a person sold something to foster the interest of another person without the latter’s prior consent,650 the time at which the owner’s subsequent authorization, if given, takes effect is the subject of elaborate and often inordinately lengthy discussions of Muslim jurists of the four schools. According to the minority view that holds authorization to be dispositive (naqil), effective as of the time when authorization is given, the date of the contract will become different from and subsequent to that of the acceptance.651 By contrast, the majority view holds the authorization to be of retrospective effect (kashif) and so ratification of the unauthorized contract becomes effective as of the date of the contract. This view accords with the normal pattern of Islamic law whereby the date of the contract is the same as that of the date of offer and acceptance.652

2. The Option of Meeting-Place (Khiyar al-Majlis)

As already discussed in section 4.6 Duration and revocation of offer in chapter 4, under Islamic law, the option of meeting-place (khiyar al-majlis) entitles either party, in a sale contract,653 unilaterally to rescind the contract before the meeting-place breaks up. The consequence of this option is that the time of the contract does not irrevocably become complete at the time of acceptance even though the contract is categorized as an irrevocable (lazim) contract.

In such cases in which the contract date is projected into the future, the question relates in essence to the effective date of the contract rather than to the date of its conclusion. When the parties fix a date for the contract later than that of the effective

649 Ibid.
652 Ibid 119.
653 The buyer has the option which entitles him to rescind the contract within three days as of the date of the contract. An option for delay of payment of the price gives the seller the power to rescind the contract if the buyer, in certain circumstances, delays in the payment of the price for longer than three days as of the date of the contract.
acceptance, the contract will take effect as of that date, subject to the construction of the terms and conditions. The Hanafi and Maliki schools agreed that the time of the contract is the time when the offer and acceptance are concluded unless there is a condition of one of the parties, a Option by Stipulation (Khiyar al-Shart) clause, that requires the same right of choice for a certain period as we have already discussed in subsection 2.6.4.1 Option by stipulation in chapter 2. The Shafi'i and Hanbali schools' view is that each of the contracting parties has the right to rescind the contract as long as they are in the meeting-place (majlis al-Aqd), despite the date set by the parties either before or after the date of acceptance.  

It is not certain whether, under Islamic law, this option will apply also to contracts made by an instantaneous means of communication between persons absent in space, such as through the internet.

5.6.2 Parties' Intention Not Known

In the absence of determination by the parties of the time and/or the place of acceptance in the contract, cases of contracts inter praesentes and inter absentes should be differentiated.

In the case where the parties are actually in each other's presence, as we had already discussed in the section on the communication of acceptance, the Islamic law holds the time of the contract to be the time of the acceptance and the place of the contract to be where the parties meet. The time and the place of the contract, therefore, coincide.

However, when the sale contract is to be treated inter absentes, either because the parties are separate in time and place, or for a particular purpose under the given legal system because the parties are separate only in place, such as the sale contract over the internet, then the problem under Islamic law is academic due to its negative approach to contract inter absentes. In limited instances where such contracts are allowed, the time and the place of the contract is where the offeree (acceptor)

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655 Ibid 186.
announces his/her acceptance. Thus, we find the Islamic law takes “the theory of declaration of acceptance” as the principle to determine the time and the place of the contract in inter absentes contracts.

As evidence that Islamic law has adopted the declaration theory, Ibn al-Humam said:

“If the offeree reads the letter or hears the message and understands what it says when he receives it, the ‘meeting place’ is formed whereupon, if he accepts the offer there and then, the requirement will be satisfied and the contract will be created.”

In addition, Ibn Abdeen said in his book:

“In a writing phrase of selling something, if the seller wrote a letter to buyer to sell something for a certain amount and the buyer after he read the letter accepts it, the sale is concluded.”

From the foregoing cases, we find that the inter absentes contract, such as an e-sale contract, under Islamic rules will be complete immediately from the moment that the buyer accepts the offer without regard to other conditions such as the knowledge of the seller of the acceptance unless the parties made a different agreement.

A recent Muslim jurist (Dr. Ali al-Grdagi) claimed that this view (declaration rule) is not compatible with electronic contracts. He maintained that in electronic contracts, the contract will be concluded when the acceptance reaches the offeror and is read (Information Theory). Before that, both parties have the option of stipulation (Khiyar al-Majlis).

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656 Ibid 204.
657 All the modern legal systems adopted one of the four theories of jurisprudence which determine the time of the contract between the absentees and then location of the contract which are the declaration, expedition, reception, and information theories. For more instances see Mahmood al-Shoryfat, *al-Tradi fi al-Aqd Abr al-Internet* (2005) 154-63.
658 A scholar from the Hanafi school.
661 A scholar from the Hanafi school.
662 Information theory- acceptance of the offer ripens into a contract only when it has come to the actual knowledge of the offeror, e.g. when he is ‘informed’ (that is, learns of the content) of the letter of acceptance, regardless of the time when he received it. Mahmood al-shoryfat, *al-Tradi fi al-Aqd Abr al-Internet* (2005) 154.
Given the above analysis, in the e-sale contract under Islamic law, we have an individual case regarding ‘meeting-place’ (majlis al-Aqd). In our opinion, the meeting-place can be either inter praesentes or inter absentes depending on the method of the electronic communication.

Thus, unless the contracting parties agreed, the e-sale contract is formed as soon as there is consensus between the parties to the contract, i.e. as soon as the offeree has legally accepted the offer, other than when it is received. Where the parties are not in each other’s presence, a contract between parties making use of information messages is inferred at the moment and the place when the offeree accepts the offer, according to our analysis of the Islamic view. As to the adoption of this theory of acceptance, although this provision creates problems such as the non-acknowledgement by the offeror of the offeree’s acceptance, the Islamic law has tried to eradicate hesitation from the creation method. Also, it provides the offeree with self-belief and safety that an acceptance once affirmed will be successful, even if the postal system delays delivery of the acceptance beyond the offer date and avoids many problems such as the loss of the acceptance before it comes to the actual knowledge of the offeror.664

Moreover, as to the general rule is that an electronic offer can be withdrawn at any time before acceptance, the implication is that the offer can not be withdrawn once it has been accepted. In the case of an e-sale contract, as soon as the acceptance enters the information system of the offeree, even if the offeror is not yet aware of the acceptance,665 the offer can, according to our discussion, no longer be revoked. This is a clear deviation from traditional rules relating to offer and acceptance under the Islamic view.

As far as the place of the contract is concerned, according to our earlier discussion that the place of the e-sale contract by e-mail is the place where the offeree received the e-mail, thus a data message must be referred to as having received at the offeree’s usual place of business or at the place of residence. This means that, in the case of an e-sale contract where one clicks an “I accept” button, the data message is sent to the

665 http://www.bileta.ac.uk/02papers/basu.html
seller (offeror), and the place of the contract will be where the buyer (offeree) declares the acceptance of the electronic offer, which is his usual residence or business.

However, in a case, where the parties' communication in an e-sale contract is actually instantaneous, such as where the parties are engaged in a chatting room, as we have already discussed in the section on the communication of acceptance, the Islamic law holds the time of the formation of the contract to be the time of the acceptance and the meeting-place (majlis al-Aqd) will be the period of conversation between the parties. This resembles a case which has been found in some old jurists' books (the validity of a contract between two parties, which are far from each other and they can not see each other, but they can hear each other under Islamic law). Thus, the time and the place of the contract coincide.

In electronic trading, the seller displays products, the prices and the terms of sale to potential buyers. If the buyer agrees, they order the product and arrange to pay. Such form of concluding an agreement is now very common. An example of these 'Click wrap' agreements is the amazon.com secure order form for buying books. Alternatively, there are websites which contain forms setting out the terms on which they can be used. On these forms we have terms of engagement which the buyer must read and understand before deciding to buy those services or products.

For HTML-based agreements, e-mails are not employed as a form of communication and all rules applied to e-mail form of communication based contracts do not apply here. Under click wrap agreements communication between the web clients and servers is instantaneous as compared to an e-mail based contract which is not. In addition if the seller or buyer is not logged on to the internet, the other party will

668 Ibid, A good example of such service agreement is on the Wiley Interscience page: http://www.interscience.wiley.com/terms.html.
670 Ibid.
immediately know this.671 We have an integral self-checking device known as a checksum that constantly checks the transfer of messages between the server and the clients.672 Should the checksum fail to arrive, then the server or the client will know immediately that there has been a communication breakdown.673 The checksum device for the computer is the same as somebody saying 'okay?' in response to a question posed via the telephone.674 The legal significance of this technological advancement is that click wrap agreements exhibit the features of a telephone talk as compared to a mail communication or message.675 The sender of the message knows immediately whether it has been received. The rules of Islamic law requiring writing for inter absentes contracts will consequently not be applicable since there is no need for this.676 To be effective to complete the agreement, click wrap acceptance must be received by the sender.677

On the other hand, with respect to our discussion in section 2.6 The valid modern sale contract & stipulation options in chapter 2, the subject-matter of the e-sale contract may be known for its genus, species, attributes and quantity, and it may also be in existence, and deliverable, and yet, for some Muslim jurists,678 it may still be subject to uncertainty (Gharar) because one of the contracting parties cannot see it, if it is not present at the site of the sale contract or is present there but unseen placed in a container. This is what is known as the sale of the absent object. What is meant here is

672 "The checksum is there for technical rather than legal reasons. All internet communications are packet switched. This means they are sent as several packets rather than one whole. The client machine reassembles the information and, with the World Wide Web, displays the page on a browser. If any packet were to go missing the information would be corrupted, therefore the client receives with the information packets a checksum, a calculation of exactly how much information there should be. If the checksum does not match the received information, the client knows there is missing/incorrect information and can request it is resent" for further information see "Andrew D Murray, ‘Entering into Contracts Electronically: the Real WWW’ (2002), 9 (published in L Edwards and C Waelde (eds), Law and the Internet: A Framework for Electronic Commerce (Oxford, Hart Publishing, 2002)."
673 Ibid 9.
674 Ibid.
675 Ibid.
678 Shafi‘i school opinion.

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that the object, owned by the seller, is present at the site of the sale contract, but not seen by the buyer.

Muslim jurists from the four Islamic schools - as we have discussed - hold different views regarding the sale of the absent object. Hanafi, Maliki, and Hanbali jurists have held it permissible to sell the absent object on the basis of description because this is the customary manner in the sale of absent objects. However, they have laid down certain conditions for the validity of such a sale that are designed to remove uncertainty (Gharar). Also, they have found that the sale is binding on the buyer if he found the object corresponding to the way it was earlier described to him. But if he found it different, he has the option either to ratify the sale or to revoke it. Therefore, in an e-sale contract by any method of electronic communications under Islamic law one or both parties may also include all the kinds of stipulation options: option by stipulation (Khiyar al-Shart), option by sight (khiyar al-Ru’ya), and option by defect (Khiyar al-Ayb).

However, comparing our discussion in section 4.6 Duration and revocation of the offer in chapter 4, in a case when the offeror in an e-sale contract revokes his offer before the acceptance, does the offeree have to have actual knowledge of the revocation of the offer? The Hanafi school agrees with the view of the Hanbali and Shafi’i schools in considering the offeror free to withdraw his offer at any time before it is accepted, and the offeror is not responsible for informing the offeree of his revocation of the offer unless the parties otherwise agreed. Thus, we find the majority of Islamic schools tried to create a compromise between taking by the “declaration theory” for the time of the contract is concluded and the right of the offeror to revoke his offer without informing the offeree of his revocation.

5.6.3 Consequences of Determining the Time and the Place of Acceptance

Determination of the time and the place of acceptance produce significant effects which are enumerated below. It is to be noted that most, but not all, of the effects of the time and the place of acceptance are the same as those of, respectively, the time

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580 Ibid.
and the place of the contract. Some, however, are the effects of acceptance rather than those of the contract. And, conversely, some are the effects of the contract rather than those of the acceptance, such as those relating to the determination of the jurisdiction of the competent court, if under a legal system it depends on the place of the contract, when the place of the contract may differ from that of the acceptance.

1. Consequences of the Time of Acceptance in e-sale contract

By the time of acceptance we mean the time when, under the Islamic law and according to the applicable judicial and/or doctrinal trend, acceptance is considered to have been effectively made such as, under the declaration theory, the time when the offeree declares his acceptance.

Certain consequences pertaining to the time of the acceptance will follow if the parties have not provided to the contrary, but some others are to follow due to the mandatory rules of the Islamic law. The following instances represent the types of issues to be considered under the Islamic law.

(a) In Relation to the Formation of E-Sale Contract

Issues pertaining to the formation of the e-sale contract may be listed as follows:

1. Subject to the reservations outlined in the preceding pages and notably in the absence of an agreement by the parties to the contrary, the time of acceptance determines the time of the contract.

2. The parties’ intervention in the process of contract formation terminates upon acceptance, at which point the offeror will no longer be able to revoke the offer which may have until then been revocable, nor can the acceptor in principle retract his acceptance subject, however, to certain special considerations which may apply under a given legal system.

3. The offeror’s or offeree’s death or supervening incapacity will become immaterial except where the contract may have a strong personal character or the law may otherwise provide, such as for facultative (ja’iz) contracts which are terminated upon such events under Islamic law. It is to be noted, however,

682 Such as the time and the place of contract when they are held to follow from, respectively, those of acceptance.
that such instances concern post-formation incidences and, therefore, may not be true exceptions.

4. The validity or enforceability of the contract at issue shall be determined, such as when the contract may be tinged with fraud in bankruptcy cases. Under English law it has been suggested that the bankruptcy of the offeror or the offeree may prevent the formation of a contract in certain circumstances.684

5. Incidences of the contract concerned shall follow, for example title and/or risk, or the benefit in a contract involving the transfer of property, will pass, depending on the legal system and the type of the contract concerned or in a contract of insurance the loss will thenceforth be covered by the policy.

(b) In Relation to What Follows the Formation

As of the time the contract is formed, certain other consequences may follow:

1. The period of limitation of action for a claim under the contract, if applicable, will start running. However, Islamic law does not recognize limitation of actions.685

2. the period allowed by the law in certain cases such as the time limits pertaining to certain ‘options’ under Islamic law, or stipulated by the parties, for a unilateral termination of the contract, will begin.

3. the substantive laws applicable to the contract for municipal purposes are, in principle, the laws which are in force at the time when the contract is made, and the supervening illegality or impossibility will not usually affect the formation of the contract though the performance may thereby be affected.

4. other, miscellaneous, effects may follow either due to the operation of a particular rule under the law or a particular contractual arrangement, for example, when the offer is to the effect that the contract price shall be the market price applicable at the date of acceptance (provided the mechanism of price-fixing is certain enough and the legal system concerned recognizes the validity of such an agreement).

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2. Consequences of the Place of Acceptance

The most significant consequence of the determination of the place of acceptance is its relevance to the determination of the place of the contract. We have already discussed in the previous sections a number of instances under the Islamic law where the place of the contract is where the acceptance is effectively made. The determination of the place of the contract, in its turn, may become of significance for jurisdictional purposes and/or determining the governing law at the municipal and/or international levels. However, it should be noted that our study is exclusive to the formation of the sale contract (offer and acceptance). Also, it should be noted that all classical Islamic schools are obviously not concerned with such cases and recent suggestions for the extension of its basic rules to such instances do little to overcome basic problems rooted in its formalistic approach.

\[686\] Ibid 72.
CHAPTER 6 – CONCLUSION

The research was carried out in an attempt to delve into the authenticity of numerous forms of contracts that are observed in e-sales under the perspective of Islamic Law. The focus of the evaluation was the four Sunni Schools that provide guidance to a large share of Muslim consumers. Not only did the research attempt to shed light on the formation of the e-sale contract but it also evaluated the principles of the e-sale contract as they have been dictated by Islamic law and the form in which they are present in modern day contracts. In order for a sale to take place through contract, the fundamental elements of offer and acceptance must exist and it is in the same light that this research attempted to evaluate the modern day e-commerce based contract.

The research made extensive use of literature on modern day contracts and Islamic laws for contracts in order to acquire a clear picture of the contract from the form in which it is present before and during the formation process, to the point where the terms of the contract are satisfied and the obligatory requirements of the contract are completed according to Islamic Law. The research began with an introduction to the subject of the research and attempted to focus the discussion through the literature review until ultimately coming to the findings and conclusion of the research.

The research attempted to focus on the principles of Islamic Law as they are found in the prerequisites of a valid offer and acceptance in an e-sale contract while delving into the legal capacity of the e-sale contract in the Islamic Law perspective at the same time. The research also attempted to shed light on the specifics of time and place of the formation of the contract and the necessity of this aspect according to Islamic Law. Legal uncertainties were highlighted and special attention was given to the necessity of analysing the electronic contract for its effectiveness and validity as perceived by the principles of Islamic Law. In so doing, the research also highlighted the method through which object and consideration can be identified and highlighted in an e-sale contract.

The research began with an introduction to the study of the e-sale contract under Islamic law and proceeded by shedding light on the discussion with respect to the teachings of the Shari'ah. The research proceeded in a highly organized fashion,
beginning with the classic structure and perception of the contract as found in Islamic law and moving on to the progressive concepts of the contract as found in the Shari'ah and the Fiqh. A study of Islamic jurisprudence was also included at this point in order to enable the research to delve into modern day interpretations and implementation forms of Shari'ah. This was performed in order to assess the Shari’ah for its potential future in the midst of the continuous conflicting debates and their interpretations in the contemporary Muslim world.

Having completed the exploratory study, the fourth part of the research attempted to take a direct approach to the subject under examination and evaluate e-commerce for its existence in the perspective of Islam. Not only is e-commerce evaluated but its legality along with the authenticity of its contracts is also evaluated. This discussion was finally brought to a close with an elaboration of the general principles that apply to sale contracts.

The research was also empirical in its analysis of the validity of the e-sale contract under Islamic law since the conditions relating to the contractors (offeror and offeree) were covered along with the fundamental elements of the e-sale contract. The subject of e-sale contracts was also examined as found in Islamic law as well as the cause or the consideration as it exists in an e-sale contract and is recognized by Islamic law. A highly significant part of the research was that in which the valid modern sale options were elaborated upon along with stipulation options in light of their perception by the various schools of Muslim Jurists.

The advanced purchase, being a highly debated issue, was also considered in the research and light was shed light on it using Hadith and in the traditional framework of Islam. Considering the numerous scenarios in which e-sales exist, the commissioned manufacturer scenario was also considered and was evaluated for its recognition by the Hanafi School. Perhaps one of the most controversial areas covered by the research was that of the credit sale. Numerous researches were encountered that held differing opinions, therefore the research attempted to make use of an inferred set of requirements that must exist in a credit sale in order for the credit sale to be considered as legal by Islamic Law.
In analyzing the stipulation options, the study realized the nature of the sensitivity and made extensive use of Hadith and Sunnah in an attempt to ensure the legitimacy of the research findings. Areas such as option by stipulation, option by sight and option by defect were covered.

The third chapter was based on the basic notions relating to the formation of the e-sale contract under Islamic law. Following an introduction, the study delved into the range of psychological elements that exist in this regard. Areas covered included the significance of the intention to create legal relations, the relationship that exists between 'freedom of choice' and 'will', as well as the differentiation of 'intention of word' (qasd al-lafz) and 'intention of meaning' (qasd al-ma'na) in Islamic law.

No research on the basic notions relating to the formation of the e-sale contract under Islamic law can be considered to be complete without a discussion of the defects that are found and can be potentially present in consent and options. It is of the utmost importance that the analysis of defects in both cases was carried out on the basis of Islamic Law and perception of the e-sale contract. In order to do so, all four Islamic schools were constantly referred to for their individual and collective perspectives in the discussion. Coercion and error were also discussed in detail along with fraud and its numerous kinds as existent in the framework of Islamic Law.

With increasing expansion in recent years, e-commerce has been marked by complex and diversified applications. With the whole of the contract process taking place online, business costs have been greatly cut. This can be attributed to the reduced costs of transactions which depend entirely on information technology.

For their validity within Islamic law, certain conditions have to be applied. This is because e-sale is completely dependent on computers. To begin with, the language used should not possess any complexities that might mislead anybody involved in the transaction. In addition, there should be a clear portrayal of the products to avoid

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688 Ibid.
689 Ibid 284.
690 Ibid.
Also, the necessary conditions regulating the sale should be comprehensibly and clearly stated. Equally, the prices, how payment is to be done and how the goods are to be delivered must be indicated clearly. Furthermore, everything that entails the contract must be clear to both the seller and the buyer. Aspects of permanence must be reflected within the contract terms. Finally, the contract must reflect positively all the four pillars which are offer, acceptance of the offer, subject matter and the two contracting parties.

It was observed that the Maliki, Shafi'i and Hanbali view on the question of offer and acceptance suggests that in a sale contract, where a thing or the possession thereof is to be transferred, the statement made by the owner of the thing which constitutes the subject matter of the contract is the offer and the one made by the other party (buyer) is the acceptance. All the classical four Islamic schools here under consideration agree on the basic principle of conformity of the acceptance to the offer. The primary principle under the four Islamic schools is that an unequivocal and certain acceptance either in the traditional sale contract or the electronic sale contract should also be unqualified, and fully conform, or correspond, to the offer without any material variance.

However, in application of the principle of conformity of acceptance to the offer, Islamic law allows a certain latitude concerning variances between the acceptance and the offer, depending on the respective approach adapted to the significance of correspondence.

The research served to prove that there are numerous aspects of modern day e-commerce practices in which the legitimacy of the practices with respect to the principles of Islamic Law is controversial. However it was also observed that the presence of multiple schools of thoughts and multiple interpretations of each serves as a measure against the resolution of this controversy. E-commerce based contracts were found to be of a nature such that slight modifications the constituents and the
terms and conditions of the contracts were causing the legitimacy of the contract to be severely affected.

Other areas covered in the research were covered on account of their influence in the establishment of an e-sale contract as one that abides by the principles of Islamic Law. The exteriorization of psychological elements was one such area that was initially covered for its relevance to a contract and was then considered for its role in a contract as perceived by Islamic Law. It was observed at this point that while all four Sunni Schools are not in mutual agreement, there are certain cases in which there is a tendency to converge. For instance, with regard to the exteriorization of psychological elements under Islamic law, it was observed that two differing schools of thought were present in the four Sunni schools.

The relevance of an objective or formalistic approach with a verbalistic hue was found to be a crucial element in this regard. The most imperative elements that the research encountered in this regard were those that allowed referencing of modern day e-sale contract elements to Shari'ah through verses in the Qur'an and through Hadith. Another highly relevant observation was the presence of a consensualistic approach found in Islamic Law alongside the rudimentary formalistic approach.

It was observed that the intricacy that exists in the development of a contract in terms of Islamic Law is one that takes place as a result of the high degree of flexibility and the tendency of the contract to be centered towards either the offeror or the offeree. It is in this regard that a strong need was felt for the establishment of a central body that could be relied upon to provide adequate consultation to bodies wishing to develop contracts that were compliant with Islamic principles.

The contract is made when the original party makes an offer to a second party who independently accepts the offer thus the autonomy in acceptance.\textsuperscript{697} For the offer and acceptance to be valid, both parties must understand it and be willing to enter into the agreement; in addition, there must be a steady transition from the stage of the offer to

acceptance.\textsuperscript{698} The offerer and offeree ought to have attained the age of legal capacity and be of a stable mind.\textsuperscript{699} The object of the sale is the subject matter and it must be lawful and beneficial in accordance with the Islamic law.\textsuperscript{700} It should also be inexistence, valuable, deliverable and under someone's possession.\textsuperscript{701} There must be a mode of expression from both parties expressing their wills.\textsuperscript{702} The expression may take place in a written form or through action. Furthermore, the expression must be comprehensible to both the contracting parties.\textsuperscript{703} Thus, all Islamic schools believe valid any form of the agreement that entirely reflects the permission of the parties involved in the business as a tool to express the will of the contracting parties.

The research can be concluded on the note that the form of modern day contract referred to as the e-sale contract is one that is highly reliable and can be taken to be in compliance with Islamic principles. It is also noted that in cases where the e-sale contract is not in compliance with Islamic principles, there is the capacity present to make modifications in order make it compliant. It is therefore justified to surmise that the performance of trade through e-sale contracts over the internet is an acceptable practice and is one that complies with \textit{Shari'ah} principles. However, it is essential to mention at this point that this research did not incorporate a hypothesis with the intention of carrying out a widespread assessment of e-commerce but was focused on the legitimacy of e-commerce in light of Islamic principles. It is therefore recommended that the research is taken in the same manner.

The research was carried out in a manner such that it was designed to be extensively thorough and based on secondary research. The reason secondary research was given a pivotal position in the study was because the research subject was one that required authentication from historical contexts and it is for the same reason that the date of the sources brought into use was not an issue in the research.

However, it is imperative to note that most of the material brought into use in the research was translated from the Arabic language to the English language and it is

\textsuperscript{698} Ibid.
\textsuperscript{699} Ibid.
\textsuperscript{700} Ibid.
\textsuperscript{701} Ibid.
\textsuperscript{702} Ibid 285.
\textsuperscript{703} Ibid.
therefore important to realize that the research is reliant on the accuracy of the translator and the contexts in which the translations were made. Language translation is a highly complicated action and when one considers the fact that most of the material used belongs to ancient times, the question of the authenticity of meaning becomes all the more imperative. This comes forth as a prime limitation that may hinder the authenticity of the research in the future if research on the authenticity of Arabic-English translation served to bring about a change in contexts or meanings of words.

The research was not carried out to be conclusive but there were numerous aspects of the research that gave the research a wide expanse in its exploratory examination. The research served to touch upon numerous areas that were found to be of a nature such that they merited further study and examination. It is imperative to note that this study was not meant to be one that would be exhaustive but was meant to provide an exploratory insight into the intricacies of the subject. However, many of the areas that the research touched during the course of its study and examination were found to be of a nature such that they merited further research and it is recommended that when research is carried out in these areas, the findings of this research are also considered since the recommended researches shall serve as extensions of this particular research.

There are numerous websites on the internet that incorporate the carrying out of a transaction and the general practice that is carried out in an attempt to increase consumer trust is for these website to acquire certifications and other similar elements from third parties in an attempt to assert their authenticity. This research recommends that a panel of experts be established that will serve to play the same role but in a manner such that their certification will evaluate websites to verify if they comply with Islamic Law. If the websites' transaction systems are found to be in compliance with Islamic Law, then the panel can have the authority to certify the website as Islamic Law-Compliant. This will not only serve to increase the degree of comfort that a large share of consumers have with internet based transactions but will also provide a reason to form a platform through which authoritative research and examination on the subject of study can be carried out.
Before ratifying an e-sale contract as effective, the panel should check to ensure that the four pillars that bind contracts are present. The following conditions must be present for the contract to take effect— the contracting parties, offer and acceptance as well as the expression mode. If the product owner is absent an agent must represent him or her to prove that the corporation exists. The agent ought to have a verification certificate to show that they have authority to act on behalf of a vendor or company. There must be a product that is deliverable, allowable and in possession of the parties. Moreover, there must be a market place for the subject matter. The system must function properly without glitches like virus attacks or server breakdown because the contract for an e-sale takes place online.

The research was carried out in a manner such that it was designed to be as thorough as possible. However, secondary research was brought into use as the most essential element of the research and it was felt at numerous instances during the research that it would be of great assistance if the research had a primary research component to it. However, due to constraints pertaining to limited budgets and time frames, primary research could not be integrated into the study.

It is therefore recommended that if an extension of this study is carried out in order to acquire a recent picture of the subject of this research, scholars be interviewed in order to integrate primary research into the study. The reason why primary research is being recommended is because the integration of primary research into the study will allow the study to cover the limitations caused by the nature of secondary research.

Also, the primary research can be designed to be two-fold. Firstly, scholars can be consulted and interviewed on the subject of the research, and secondly, internet transaction users and consumers can be consulted for their opinions and perceptions of e-commerce and e-commerce based transactions in the light of Islamic Law. An analysis of consumer perceptions may serve to provide an insight into modern trends.

705 Ibid.
706 Ibid 286-87.
707 Ibid 287.
708 Ibid.
709 Ibid.
and the evolution process that took place with regard to the trends in e-commerce based transaction usage.
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