

Islamic Law of Contract is Getting Momentum

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Abstract

This article is basically a book review on the book written by Razali, Siti Salwani. The title of the book is the 'Islamic Law of Contract' which has been published by Cengage Learning from the United States in 2010. The ISBN of the book is 13: 978-981-4253-97-0 and there are a total of 124 pages. The authors of this review article (Dr. Jalil and Mr. Khalil) have reviewed the book to find its merits and demerits and finally have given some suggestions for its further improvement. The authors have also written some points on the Islamic law of contract which they think necessary for the readers (who are not exposed to the Islamic law of contract) to understand better on the Islamic law of contract as well as for a better insight on the relevant legal points involved therein.

Keywords: Shariah (Islamic law), Islamic law of contract, ijab (offer), qabul (acceptance), ahliyah (capacity to contract), majlis (meeting).

1.Introduction

The philosophy of law on Islam differs from the western philosophy of law quite significantly. The Islamic philosophy says this world was created by only one God known as 'Allah' and all materials on earth and in the universe were created by Him and He alone managed this creation. There were angels to help him but without the help of angels He was just as capable of accomplishing this monumental task without any problem in whatever way He wished and planned.

Allah has created this earth and all things therein. Among the creatures on earth, the best creation of Allah is the human being (known as *ashraful makhluqat* in the Arabic terms) which is mentioned in the religious book of Muslim known as the 'Qur'an'. The Islamic Scholars accept this philosophical concept of creation of the human being without a doubt and the Islamic philosophers (known as *Ulama*) say that Allah has provided all the basic principles of law in the performance of a social conduct in the Qur'an which must be applied in the society to act in a civilized manner at all times. The legal principles which have not been provided in the Quran or hadis (the sayings and deeds of the Prophet Muhammad), are left to the human being to interpret and act upon them accordingly based on the precept of a civilized society. The government through the Parliament can make the necessary laws for the society but these man-made laws will not be contradictory with the basic legal principles provided in the Quran and the hadis. This is the basic concept of the Islamic legal philosophy.

Razali has written the book entitled 'The Islamic Law of Contract' which has been published by a famous international publisher CENGAGE Learning. This book has been written based on the Islamic legal philosophy in which the author Razali had focused and concentrated on the contract law principles in Islam. This book is supposedly considered as the Islamic philosophy of contract law.¹

Contract law, being a very special branch of law, stands in the hub of business activities in such a pertinent way which enhances business transactions not only in the national level but also in the international level as well. Corporations are performing million dollar business transactions and numerous business contract documents are signed on behalf of the company with the pure intention of making a legitimate profit for the company shareholders. For this particular reason the Executive Directors need to be well-versed in the company law and other business law so as to keep abreast with the basic principles of the contract and company laws so that they can execute excellent business contracts in order to avoid many disputes which may arise from poorly drafted business contract documents in the near future. Due to ignorance, either intentional or unintentional, these same Executive Directors may conclude some contract documents but may overlook some important terms from the contract document that can later entail the loss of a huge amount of money due to the mistake committed in drafting the contract document properly. Thus, a contract law is very essential to run proper business activities especially to the directors or to the Executive Directors of a company.

The Islamic religion emphasizes on the importance of the law of contract. The Islamic law of contract has detailed provisions to ensure viable business transactions between the companies. Islam only prohibits earnings through usury or interest in business as clearly mentioned in the Al-Quran. Allah (God) says in the holy Quran: 'Taking interest on loan is prohibited for you but doing business is permitted for you'.² This verse of the holy Quran is exhorting the business community not to lend money with a fixed rate of interest. As a matter of fact, it encourages the rich people to give interest-free loans (qard al-hasan) to the poor and the needy people to help them solve their daily needs for survival. On the other hand, this verse encourages the rich people to also invest their money in business because the profit they gain from business is halal (permitted) as business creates employment opportunity for the people as well as contributes to the GDP growth of the country. On the same line of reasoning, the Islamic banks are operating some interest-free financial transactions based on the profit-loss sharing mechanism.³ The Islamic banking transactions are also conducted by using the Islamic contract law principles.

The holy Quran also provides provisions for making contracts when a loan is given or when any business agreement is made. Allah (God) exhorts the people to write down the terms of business or loan given free of interest so that they do not forget the terms of the business or loan agreement later.⁴ The objective of this paper is to introduce the basic principles of law of contract in Islam to people who know little about the Islamic law of contract. Another objective of this paper is to state that Islam validates contracts if riba (interest) and gharar (uncertainty) are not involved in the transaction. Descriptive and analytical research methodology has been adopted in this review research paper in which relevant materials have been collected and analyzed critically.

Review Comments on the Book

As mentioned earlier, this book has been published by a famous international publisher known as CENGAGE Learning which deserves an evaluation to determine the standard of the book and whether it covers all the relevant and essential topics of the Islamic philosophy of law of contract. In the "Preface" the author has claimed that "All the elements of contract are discussed in detail in the book". But after reviewing the book, we find that the author's claim is short of the truth. Many legal elements and topics essential for a contract law have not been discussed in this book.

¹ Razali, S.S. 2010. *Islamic Law of Contract*, USA, UK: Cengage Learning.

² The Quran, Surah (Chapter) 2, Verse 275.

³ Ahmad, Abu U.F. 2010. *Theory and Practice of Modern Islamic Finance: The Case Analysis from Australia*. USA: Brown Walder Press; Illiyas, M. 1995. Islamic interest-free banking in Malaysia: some legal considerations. *Malayan Law Journal*. 3: cxlix-clxiv; Ahmad, Abu U.F. 2007. Riba and Islamic Banking. *Journal of Islamic Banking, Economics and Finance*. 3(1): 9-42.

⁴ Surah (Chapter) Baqarah, verse 282.

For example, the author has not discussed the important basic elements of a contract, such as, consideration, intention to create legal relation, whereas the objective of the contract should be legal and enforceable by law, formality of a contract, privity principle of contract, exclusion clauses, voidable contracts, discharge of contract, remedies for breach of contract, etc.

The coverage of the book is very limited as it includes only five chapters which are:

- 1) Chapter one discusses on offer (*ijab*) and acceptance (*qabul*).
- 2) Chapter two deals with the legal capacity to make a valid contract which is known in Arabic as (*ahliyyah*). Here the capacity refers to the age and soundness of mind of a party to make a valid contract;
- 3) Chapter three discusses on the Islamic doctrine of *khiyar* which means option. The buyer in certain circumstances has an option either to fulfill the contract or to make it void for the existence of defect in the goods.⁵
- 4) Chapter four deals with a subject matter of a contract known in Arabic as *mal* which means goods or property. The Islamic contract law says that the subject matter of a contract must be *halal* (permitted) and it should never be *haram* (prohibited).⁶
- 5) Chapter five deals with mistakes. A mistake is known in the Islamic contract law as *ghalat*. Under both the common law of England and the Islamic law of contract, mutual mistake can vitiate a contract. However, in the case of a unilateral mistake, the common law says, the contract is valid.⁷ But in the Islamic contract law even a unilateral mistake may nullify a contract based on the fact and circumstances of the case.

The book only discusses the above five chapters which incidentally are not an adequate coverage of essential topics in a contract law book. Usually a contract law book includes at least ten chapters. Some contract law books have even twenty chapters, hence, this book, even though well-written and based on the Islamic philosophy of law of contract, is not a complete book on the Islamic philosophy of law of contract as it is an incomplete book which deals with only a few issues and many issues related to a contract are left out.

The author could, in all probability, start the book with a chapter on 'the origin and the nature of the Islamic contract law'; the second chapter could have been 'the merging and harmonizing of the English contract law principles with the Islamic contract law principles' as such topics should have invoked the significant highlight by virtue of the very fact that the British had ruled almost all the Muslim countries in the world for more than 200 years from the seventeenth century to the nineteenth century. Before the British ruler took over the political power in the Muslim countries, the Muslim rulers had applied the Islamic law of contract principles which were derived from the Quran⁸ and Hadis⁹.

When the English people occupied the political powers in the Muslim countries, they were not familiar with the Arabic language, the Quran and the hadis, hence, they brought the English common law principles on contract into the Muslim countries.

⁵ Rosly, Saiful Azhar. 1999. The Role of Khiyar al-Ayb in al-Bay Bisaman Ajil Financing. *International Journal of Islamic Financial Services*, 2(3).

⁶ Salleh, N.A. 1986. *Unlawful Gain and Legitimate Profit in Islamic Law : Riba, Gharar and Islamic Banking*. Chambridge: Chambride University Press.

⁷ Lee, M.P. 2007. *General Principles of Malaysian Law*. Kuala Lumpur: Penerbit Fajar Bakti Sdn. Bhd.;

See also, Vohra, B. & Wu, M.A. 2010. *The Commercial Law of Malaysia*. Kuala Lumpur: Longman, 2010.

⁸ The Quran is the religious book for Muslims which was revealed to Prophet Muhammad (peace and blessings be upon him) through angel Jibril. It has been said by Allah (God) in the Holy Quran.

⁹ Hadis is the sayings, doings and tacit approvals of Prophet Muhammad (peace and blessings be upon him). Whatever he said, whatever he did and whatever he tacitly approved for people are known as hadis. Hadis was collected and preserved during the life time of Prophet Muhammad and even after this death by his close companions.

When they applied the English common law principles in contractual disputes in the Muslim countries, many Muslims were not happy with the English law and the decisions arrived thereupon. On some occasions, the English contract law principles were contradictory with the Islamic philosophical principles of the law of contract.

Cases of legal tangle could have arisen due to some judicial situational circumstances of the case at hand on which the English judge could have tried to effect a compromise between the Islamic contract law principles and the English contract law principles just to make the Muslims happy. For that very reason the present contract law in the Muslim countries is the integration of the English common law principles and the Islamic contract law principles.

The author has discussed the five chapters on the Islamic contract law precisely and they are well-written referring to the opinions of the Islamic jurists. But there are minor mistakes in the book, such as, on p. 73 she mentioned that pig and dog meats are intoxicating elements and they are *haram* (prohibited) goods for Muslims. That statement is wrong because pig and dog meat are prohibited for the Muslims to eat and sell but they do not cause intoxication among people after they are eaten. Allah (God) says in the Quran, there are harmful germs in the meat of pigs and dogs which are the reasons why Allah has prohibited selling and eating pig and dog meat for the Muslims. Intoxicating things like wines and dangerous drugs, such as heroin and cannabis are prohibited for the Muslims to produce, drink/eat and sell mainly because they are intoxicating and cause health hazards, such as, serious harm to the heart and lungs in the forms of coronary and pulmonary diseases.

On p. 65, the author has given a definition of the legal term 'caveat emptor' stating that the seller has an obligation to allow the buyer to inspect the goods before buying. This is known as 'caveat emptor' principle. To me this definition is wrong. The main concept of 'caveat emptor' principle (which originated from *Chancellor V. Lupos* (1603) Cro. Jae, 4.79 ER 3) was that the buyer should always be careful to inspect the goods before buying. The meaning of 'caveat emptor' is 'let the buyer beware'. If the buyer finds any defect in the goods, he has an option either to buy it or to refuse to buy it. But, after inspection, if he has bought it, he cannot complain later and return the goods saying that there is a defect in the goods. This is the main concept of the caveat emptor principle.¹⁰

If the seller does not allow the buyer to inspect the goods before buying, the buyer has an option to refuse to buy the goods. Thus, the duty of a seller is to allow inspection of goods before buying is irrevocably implied in the 'caveat emptor' principle. On page 67 the author states, "The general principles which govern the doctrine of caveat emptor are that the seller is under an obligation to allow the buyer to inspect the goods so as to ensure that they are free from any defect before the conclusion of the contract".

With respect to the author, my contention is that, that was not the general principle of the 'caveat emptor' doctrine at that time. 'Caveat emptor' are Latin words which mean 'let the buyer beware' as has been stated above. In fact the 'caveat emptor' principle protects the sellers at the cost of buyers. Buyers are not safe under the 'caveat emptor' principles as they are not protected.¹¹ The principle puts potential buyers of goods under risk, because it states that the buyer must be careful before buying goods. They must inspect and find out whether there is any defect in the goods. If they fail to inspect the goods properly and after buying the goods they find some defects in it, they cannot complain. Hence, the 'caveat emptor' principle does not provide any rights to the buyer but from the writing of the author it seems that the 'caveat emptor' principle gives good rights to the buyer which is a misunderstanding of the author on the concept of 'caveat emptor'.

Under the 'caveat emptor' principle if a buyer is negligent in the inspection of goods prior to buying them and later finds some defects in them, he cannot repudiate the sale contract nor can he return the goods and get the refund paid as a compensation. Hence, under the 'caveat emptor' principle the buyer is in a risky position which the respected author could not perceive from the 'caveat emptor' principle. She thought the 'caveat emptor' principle provided protection to the buyer by imposing a responsibility on the seller to allow the buyer to inspect the goods before buying. The right to inspect goods before buying is inherent in the principle of 'caveat emptor'. As said earlier, if the seller refuses to allow the buyer to inspect the goods, the buyer may refuse to buy the goods as he is not bound to buy the goods in such a situation.

¹⁰ Vohrah, B. and Aun, W.M. 2010. *The Commercial Law of Malaysia*. USA, Malaysia: Longman.

¹¹ Jalil, Md. Abdul. 2010. *Commercial Law in Malaysia*, unpublished monograph.

However, it is to be noted that this is not the main issue of the 'caveat emptor' principle because the main issue in the 'caveat emptor' principle is whether it protects the fundamental rights of the buyers or not in the case of defects found after buying the goods. A principle of law which does not protect the fundamental rights of buyers is not a good law.

In the seventeenth century, the buyers were unhappy with this 'caveat emptor' principle as it put buyers in risky position and it did not provide any legal right to buyers against unscrupulous sellers. As a result, later courts in England invented some exceptions to the 'caveat emptor' principle to do justice on buyers. These exceptions in fact modified the 'caveat emptor' principle to reduce the injustice it caused to buyers especially when they bought sophisticated and complicated electrical goods on which the visual inspection may not reveal the defects of the goods.¹²

To reduce negative effects of the 'caveat emptor' principle, the Parliament of UK and other common law countries enacted the Sale of Goods Act which had provided eight implied conditions and warranties to protect the fundamental rights of buyers. The author did not focus on this development due to lack of professional vigilance in the legal circumstantial interpretation.

The Islamic contract law provides a better protection to buyers than the English law. The Prophet Muhammad (peace and blessing be upon him) said 1431 years ago to sellers that "It is your duty to disclose any defects in the goods to the buyer if you are aware of the defect" (Muslim Hadis book). Under the English law, the seller has no duty to disclose defects in goods even if he knows about it, but under the Islamic law it is the duty of the seller to disclose any defects in the goods before selling them to the buyer. The legal effect is that if the seller fails to disclose any defect in the goods to the buyer whilst the seller is aware of it, then under the Islamic law of contract the buyer has a legal right to repudiate the sale contract and get the refund of payment. However, in spite of the glaring legal anomaly on the matter, this right is not available in the English law of contract.

In another hadis the Prophet Muhammad (peace and blessing be upon him) said 1431 years ago that "whoever cheats buyers while selling goods, they are not real Muslims" (Bukhari hadis book). In another hadis the Prophet Muhammad (peace be upon him) said: "If any one sells a defective article without drawing attention to the buyer on the defect, he will then remain under God's anger or the angels will continue cursing him unless he (the seller) informs the buyer of that defect."¹³

1. Origin and Development of the Islamic Law of Contract

It is to be noted that the Islamic legal system did not develop and progress for a long time, that is, for the last 600 years in most of the Muslim countries which were occupied and ruled by the British Empire. Before, the English rulers ruled the Muslims countries for almost 200 years, the Islamic law¹⁴ was applied in Muslim countries in the informal courts to give decisions on disputes submitted to the courts. England started ruling the Muslim countries from the 16th century. The English rulers applied the English law, which they brought from England, in the Muslim countries instead of the Islamic law.¹⁵

¹² Abdullah, N. I. & Razali, S.S. 2008. *Commercial Law in Malaysia*. Kuala Lumpur: Pearson.

¹³ *Miskat al-Masabih*. 2(55), p. 284.

¹⁴ Islamic law in Arabic known as shariah. The basic principles or the guiding principles of Islamic law are derived from the religious book of Muslims known as the Quran and Hadis. The Quran was revealed to prophet Muhammad (the last prophet in this world) through the angel Jibril and Hadis is defined as 'the sayings, deeds, and tacit approval of acts of his companions.' In other words, hadis is the interpretation and practice of the Quran by prophet Muhammad. He practiced his whole life based on Quranic guidance and injunctions and asked his companions to follow him as he follows the Quran, to write down his deeds and sayings if necessary. The companions wrote down the important lectures and instructions given by prophet Muhammad and his deeds during his life time.

¹⁵ See, Hashim, M.S. 1989. *An Introduction to the Legal System of Malaysia*. Malaysia: Fajar Bakti. In this book the author has discussed in detail how the English rulers applied English laws including English contract law principles in Malaysia. English laws including the principles of contract law was applied in Malaysia through First Chapter, Second Chapter and Third Chapter between 1786 to 1938. See, Alsagoff, S.A. 2003. *Principles of Law of Contract in Malaysia*. 179

Therefore, the Islamic legal system could not develop in a systematic way as the common law and the civil law system have been developed by refinement and amendment process from time to time. Even today, all the Muslim countries which were colonized by England are applying the English contract law principles in their pursuit of their daily business transactions. This has been the main reason until today that the Islamic law of contract is not applied in the Muslim countries and for this particular single reason the Islamic contract law cannot be developed to meet the standard of business transactions in the present era.

However, Muslims are now conducting researches on the Islamic legal system which had been basically applied around 600 years ago in different Muslim countries when commerce did not progress tremendously as in the present time. Nonetheless, research works on the Islamic legal system are producing a lot of prosperous interest-free transactions which are currently being applied in the Islamic banks.¹⁶

There are similarities between the English legal system and the Islamic legal system in terms of different types of courts, functions of courts, law making procedure and court procedures which are being adopted in the Muslim countries at present. The fundamental difference between the English legal system and the Islamic legal system in framing the law is that in Muslim countries the Parliament can make laws for the benefit of the society but it must not be contradictory or inconsistent with the Islamic law principles, such as, Allah is the Creator of the universe and sustainer of all things contained therein. He is alone and there is no partner with Him and every man will be answerable to Him in the Hereafter for his deeds in this world. The fundamental sources of the Islamic legal system are the Quran, *Sunnah*, *Ijma* and *Qias* which are not available in the English legal system.

In fact the Islamic contract law is not totally different from the English contract law principles. In the English law, 'contract is an agreement enforceable by law'. In the Islamic law, contract is known as '*aqd*' which means tie or bond. It means a contract that binds the parties together. To make a contract in the Islamic law, there must be an agreement between two parties.¹⁷ The agreement must be based on a free consent of the parties.¹⁸ To make an agreement legally effective, there must be an offer and an acceptance between the parties. In other words, the offeree must accept the offer from the offerer absolutely and without any qualification.¹⁹ To effect a valid contract the parties must have the intention to create a legally binding relationship.²⁰ Islam emphasizes on fulfilling contractual obligations. Allah says in the Quran: 'O ye who believe, fulfill all of your obligations'.²¹

2. Some Salient Features of Islamic Law of Contract

A contract is an agreement which is enforceable by law and only legal agreements are contracts whereas illegal agreements are not contracts.²² To draft a valid contract there must be some basic legally enforceable elements which are basically similar and applicable either in the Islamic law of contract or the English law.²³ As mentioned above, these elements are: i) an offer (*Ijab*); ii) an acceptance (*qabul*); iii) a free consent; iv) a consideration; v) an intention to create a legally binding relationship; vi) the objective and consideration of the contract should be legal; vii) a certainty of legitimate performance, viii) a capacity (*ahliyah*); and ix) a formality.

USA: LexisNexis. at pp. 9-15. English laws including contract law principles were applied in Malaysia through Section 3 and 5 of the Civil Law Act 1956 (Malaysia). See, Alsagoff, S.A. 2003. Ibid.

¹⁶ CERT. 2006. *A Mini Guide to Islamic Banking and Finance*. Kuala Lumpur: CERT Publications; Siddiqi, M.N. 1983. *Issues in Islamic Banking*. UK: Islamic Foundation; Nik Norzrul et al. 2003. *Law and Practices of Islamic Banking and Finance*. Malaysia: Sweet and Maxwell Asia.

¹⁷ For a detailed discussion on the formation of a contract law in Islamic law see, Razali, S.S. 2010. *Islamic Law of Contract*. United Kingdom: Cengage Learning. pp. 1-25.

¹⁸ Hasbullah, Abdul Rahman. 2000. Offer and Acceptance in Islamic Law of Contract. *Journal Shariah*, 8(2): 23.

¹⁹ Ashshafi, J.A.H.S. 2001. *Majlis Aqdi fil fiqhi Islami wal Qanun al-wadi*. Iskandariah. p. 91.

²⁰ O'Sullivan, J. and Hilliard, J. 2006. *The Law of Contract*. Oxford, New York: Oxford University Press. pp. 46-50.

²¹ Surah (Chapter) Al-Maidah: Verse 5.

²² Vohrah, B. and Aun, W.M. 2010. *The Commercial Law of Malaysia*. Malaysia: Longman. pp. 6-7.

²³ Razali, S.S. 2010. *Islamic Law of Contract*. United Kingdom: Cengage Learning. pp. 1, 27; See also Zuhayli, Wahbah. 1977. *Al-fiqh al-Islami wa adillatuhu*. Damascus: Darul Fikr. p. 2947; See also Coulson, Noel J. 2000. *Commercial Law in Gulf States*. p. 40.

Offer (Ijab)

When someone wants to make a contract, he has to make a proposal to the other person to obtain his consent to the act or abstinence. This is known as an offer.²⁴

For example, if A wants to sell something to B, it is required that A has first to make an offer to B that A wants to sell a particular thing for a certain price, whether B is willing to buy or not. Thus, making an offer to another party is an element of a contract in the Islamic law.²⁵

Kinds of offer

There are three kinds of offer in the Islamic law of contract. They are:

- i. Verbal offer (*kalam*)
- ii. Offer by conduct (*'amal*)
- iii. Offer in writing (*kitabah*)

Verbal offer (kalam)

An offer can be verbal in which it is expressed in words to sell something to someone else and is not written down. A verbal offer is acceptable in Islam from which an acceptance is good for an immediate sale. However, when the sale will take place in a future time, it is recommended that the terms of the offer and the acceptance should be written down concisely so that no disagreement can arise later due to ambiguity.²⁶

A classical Islamic jurist said that the verbal words for an offer should be in the past or the present tense but not in the future tense, because the offer should have an immediate effect to the offeree.²⁷ If someone says: "I will offer to sell my car in future for RM 10 000" then the offeree says "I will accept it to buy it in future". Do the expressions here make good offer and acceptance? In fact no offer has been made yet so there cannot be an acceptance at the present time.

Offer by conduct (amal)

An offer can be made by conduct, that is, without any verbal words or gestures being exchanged or expressed. For example, seller X is selling rice from a pile of rice. The price per kilogram is written on top of the pile at \$3 per kilogram. Buyer Y gives \$6 to the seller and the seller gives the buyer 2 kilograms of rice. Here no verbal communication is made between the offerer and the offeree. The offer and acceptance has been concluded by conduct. Offer and acceptance by conduct is recognized in the Islamic law of contract.²⁸

Offer in writing (kitabah)

An offer can be made in writing to potential customers. It is the best way of making a contract as the terms of offer and acceptance are in writing and signed by the parties in which case if any dispute arises later, it can be resolved by referring to the written terms of the agreement.

Invitation to treat (Al-Muasah)

In the Islamic law of contract, an invitation to treat is known as *al-muasah*. An invitation to treat is not an offer. It is merely an invitation to make an offer to buy something.

²⁴ Mulcahy, L. and Tillotson, J. 2004. *Contract Law in Perspective*. London: Cavendish Publishing Limited ; See also Billah, M.M. 2003. *Islamic Law of Trade and Finance: A Selection of Issues*. Kuala Lumpur: Ilmiah Publishers.

²⁵ Niazi, Liaquat Ali Khan. 1991. *Islamic Law of Contract*. Lahore: Research Cell, Dyal Sing Trust Library.

²⁶ Kharofa, A. 1997. *Transaction in Islamic Law*. Kuala Lumpur: A.S. Nordeen.

²⁷ See Article 199 and 170 of *al-Mejelle*. See also Zuhayli, W. 1997. *Al-Fiqhul Islamiy wa Adillatihu*. pp. 97-99.

²⁸ Abdullah, N. I. & Razali, S.S. 2008. *Commercial Law in Malaysia*. Kuala Lumpur: Pearson, Prentice Hall.

There are different types of invitation to treat in the English common law which are recognized in the Islamic contract law as *al-mu'asah*.²⁹ Different types of invitation to treat are as follows:

- a) Displaying of goods in shop,
- b) Advertisement,
- c) Reply to inquiry,
- d) Auction sale
- e) Tender³⁰

Acceptance (*qabul*)

In the Islamic law of contract, acceptance is known as *qabul*. When an offer is accepted by the offeree, it is said that an acceptance has been made. When there is an effective acceptance, an agreement is made between the parties which become legally binding for them. An acceptance can be verbal, by conduct or in writing as stated earlier.³¹

Under the Islamic law, in order to effect a contract the offer must be accepted by the offeree and the acceptance must be in the same meeting (*majlis*) not later.³² The Islamic law of contract emphasizes on an immediate acceptance of an offer to make a valid contract. However, it seems that such requirement of an immediate acceptance of an offer in the same meeting between the offerer and offeree may not be plausible in the modern business world as businessmen need time to think about the possibility and viability of making a contract and to finally decide positively.

Under the Islamic law of contract there must be a consideration in a contract. If there is no consideration, the agreement will not be valid as it is not enforceable by law. A consideration needs not be adequate as an inadequate consideration is enough to validate a contract as long as the parties give consent freely to the agreement upon which they are satisfied.³³ If a contract is not caused by a misrepresentation, fraud, coercion, undue influence and other attendant legal ambiguities then the contract is valid even though its consideration is not adequate. For example, A sells his car to B for RM 5,000 while the market value of the car is RM 10,000. If A sells the car with a free consent and he is not forced by someone to sell the car or he is not unduly influenced to sell the car and if he is satisfied with the price, we can say that the contract will not be invalid due to a merely inadequate consideration.

However, there are exceptions to this general rule as under certain circumstances a contract might be valid without consideration. For example, a husband leaves a wife to stay in another country and promises to pay her every month an amount of \$2000 for the maintenance of wife and children's educational cost. Such a promise which the wife accepts is enforceable against the husband if he fails to pay the money due every month. Here, without consideration an acceptance is valid as in the Islamic religion where a husband has a legal duty to provide maintenance cost for his wife as well as his children and educational cost for his children unless he has formally divorced his wife.

A gift offered to a friend makes a valid contract between them as long as no fraud, coercion or mistake is involved. A gift is usually given as a social practice or as a token of love, or to help someone. A gift makes a valid contract when offered to and accepted by the other party and may not be taken back saying that there was no consideration.

²⁹ El-Islamy, H. 1999. *Business on the Internet: The Islamic Perspective and its comparison with common law*, MCL partial thesis, IIUM, Malaysia.

³⁰ For a detailed discussion on 'invitation to treat in Islam' see, Billah, M.M. 2003. *Islamic Law of Trade and Finance: A Selection of Issues*. Kuala Lumpur: Ilmiyah publishers; See also, O'Sullivan, J. and Hilliard, J. 2006. *The Law of Contract*. New York: Oxford University Press.

³¹ Abbas, Amanat. 2007. *Islamic law in the contemporary context*. Stanford: Stanford University Press.

³² Zuhaily, W. 1997. *Al-fiqh al-Islami wa adillatuhu*. Damascus: dar al-Fikr.

³³ Vohra, B. & Aun, W. M. 2010. *The commercial Law of Malaysia*. Kuala Lumpur: Longman.

However, an issue may arise whether a promise to offer a gift which has been accepted by the other person is enforceable under the Islamic contract law. The answer is no because there is a lack of consideration.

Communication of acceptance

An acceptance must be communicated to the offeree to form an effective acceptance. The communication of acceptance is complete the moment it comes to the knowledge of the offeree³⁴. If the acceptance does not come to the knowledge of the offeree, it would not be an effective acceptance and no contract will be formed. This is the majority view of the classical Muslim jurists³⁵ who are also of the opinion that when an offer is made to a person who is not present near the offeror, the *majlis* (meeting) will continue until the offeree receives the offer. For example, if the offer is sent by a letter through the post office, the *majlis* will continue until the offeree receives the letter and he will be given some time to accept the offer, but not for long.³⁶

Examples of communication of acceptance and revocation of acceptance are as follows:

Example 1:

B accepts the offer by sending a letter through the post office to the offeror A. Here, the acceptance is complete against B, when A receives the letter. Therefore, if B wants to revoke the acceptance, he must revoke it before it comes to the knowledge of A and not afterwards.³⁷ The acceptance comes to the knowledge of A when he receives the letter and the agreement is complete and enforceable. When the acceptance comes to the knowledge of the offeror, the offeree cannot revoke the acceptance.

However, in English law, A (offeror) needs not to receive the acceptance letter. A contract is concluded the moment when the offeree (B) posts the acceptance letter, no matter whether the offeror (A) receives the letter or not. This is known as 'postal rule' which is an exception to the general rule that the offeror (A) must receive the acceptance to conclude a binding contract. It is to be noted that the general rule of acceptance is applicable only in instantaneous mode of communication of acceptance such as face to face acceptance, acceptance by telephone, fax, e-mail etc.³⁸

Example 2:

If the acceptance is communicated by e-mail, the acceptance is complete the moment the acceptance in the e-mail enters the designated e-mail account of A. Therefore, if B wants to revoke the acceptance, he must have to revoke it before it enters the designated e-mail of A and not afterwards. As e-mail is an instantaneous way of communication, B will not have sufficient time to revoke the offer in which case he has to think twice before he accepts the offer.³⁹

When a contract is made *inter absente* the offer and acceptance can be communicated by using modern systems of communication, such as, telex, fax, e-mail etc., and the offer and acceptance would be considered valid⁴⁰. Islam does not prohibit people to adopt the latest technology if it is beneficial for the people and not contradictory with the basic *Shariah* principle *al-maslaha al-mursalah* (public interest consideration) which is also a source of law in *Shariah* **which** allows the adoption of a modern technology by the people to maximize human resources and convenience for human benefit.

³⁴ Niazi, Liaquat Ali Khan. 1990. *Islamic Law of Contract*. p. 67.

³⁵ Niazi, Liaquat Ali Khan. *Ibid.*; Rayner. *Theory of Contracts under Islamic Law*. p. 100.

³⁶ P. Owsia. *Formation of Contract*. p. 575.

³⁷ Pheng, L.M. and Detta, I. J. 2009. *Business Law*. New York, Oxford University Press. P. 146.

³⁸ Hill, S.W.B.H.M. 2001. Email Contract: When is Contract Formed. *Journal of Law and Information Science*, 12(1): 47-56; Munir, A.B. 1999. *Cyber Law Policies and Challenges*, Singapore: Butterworths; Suri, R.K. 2001. *Information Technology Laws*, Malaysia: ILBS.

³⁹ Electronic Commerce Act 2006 (Malaysia), section 5.

⁴⁰ Bakar, Mohd Daud. 2000. *Contracts in Islamic Commercial Transactions and Their Application in Modern Islamic Financial System*. p. 5.

Meeting (Majlis)

Under the Islamic law, it is emphasized that an offer and an acceptance should take place in one meeting (*majlis*)⁴¹. This is to ensure that the offer is accepted before it lapses. As long as the meeting continues, *majlis* does exist and the offer can be accepted before the meeting ends.

However, the problem with this condition of acceptance is that it does not allow the offeree enough time to think about the offer, whether the terms of the offer are reasonable, whether he will be able to make profit out of it or not. Another important point is that it hinders bargaining on the price between the seller and the buyer as it does not give extra time for a second or a third meeting or to accept later.

In a commercial contract sometimes extra time is needed to finalize the terms of the contract and to fix suitable price through bargaining. The requirement of simultaneous offer and acceptance at the same *majlis* (meeting), thus, creates some problems to a business transaction in terms of making a wise decision in a time frame constraint. It is therefore highly recommended that the Muslim scholars should view the ridiculously time constraint concept of acceptance of offer in the same *majlis* whereby if the offeree fails to accept the offer in the same *majlis* (meeting) in the time allocated, the offer will automatically become void and unenforceable once the time limit has lapsed. This legal anomaly should be reviewed for the interest of legitimate execution of business transactions in the Muslim community currently prevailing when business has exponentially expanded.

All Muslim countries are involved in billions of dollar business in the regional and international markets. In this sort of avoidable commercial situational circumstances, the Muslim legal community should, in all urgency, devise rules and regulations that can be adapted into the system of simultaneous offer and acceptance in such a system that exceptions to the rules can be conveniently applied without so much as upsetting the accepted Syariah principle so as to expeditiously accommodate, promote and facilitate the legitimate commercial transactions of billions of dollar businesses. Categorization of business types can, in all probability, be made based on the order of national importance as being the exception to the rules.

It is to be noted that, presently, the company law principle allows directors of a company to maximize profit for the benefit of the company shareholders⁴² and must, as far as is practically possible, avoid conflict of interest⁴³ as well as that the directors are duty bound to act with reasonable care and diligence⁴⁴ so that profitable business transactions can be efficiently and legitimately executed without the gloomy prospect of investment loss arising out of any business transaction which, incidentally, involves sufficient time for evaluation and assessment whether the transaction (either buying or selling) will be profitable or otherwise. After reviewing the transaction and surveying the viability of the market potential, they will then arrive at a reasonable conclusion to finally sign the contract document when they are sure that the transaction will be profitable either in the near or distant future.

⁴¹ Niazi, L.A.K. 1990. *Islamic Law of contract*. Lahore: Research Cell; Rayner, S.E. 1991. *Theory of contract in Islamic Law*; Zuhaily, W. 1997. *Al-Fiqhul Islami wa Adillatuhu*. 4: 107.

⁴² Desjardins, Joseph. 2010. *An Introduction to Business Ethics*. London: McGraw Hill; See also, Richard. 2010. *Business Ethics*. New York: Prentice Hall, Pearson; Velasquez, Manuel G. 2010. *Business Ethics: Concepts and Cases*. London: Prentice Hall.

⁴³ Chan, Koh and Ling. 2009. *Commercial Law of Malaysia: Principles and Practice*. Malaysia: Sweet and Maxwell. pp. 580-627; *Boston Deep Sea Fishing and Ice Co. v Ansell* (1888) 39 Ch D 339; *Regal Hastings Ltd v Bulliver and Others* [1967] 2 AC 134, (HL); Shanthi Rachangan, et. al. 2007. *Principles of Company Law in Malaysia*. Kuala Lumpur: Malayan Law Journal. In *Boston Deep See* case, Mr. Ansell was the Managing Director of the company and ordered for the construction of fishing boats for the company. However, unknown to his company, he was paid a commission by the ship builders. The court held that Ansell's personal interests conflicted with his fiduciary duty to Boston Company in respect of the commission received from the ship builders. In *Regal Hastings* case, the plaintiff company wanted to extend its business operations and acquired two other cinemas with a view to selling all of them as a single concern. Later, the directors set up another subsidiary company and sold the whole business to this subsidiary. The directors earned 7000 pounds profit from this sale and it was not accounted for to the company. The House of Lords in England held that the directors were in a fiduciary position to the company and they were trustees for the company. So, they could not make personal profit by using their position as trustees for the company. Such making of personal profit conflicted their personal interest with the company's interest and were liable to account for the profit to the company.

⁴⁴ Krishnan Arjunan & Low Chee Keong. 2009. *Understanding Company Law in Malaysia*. Kuala Lumpur: LBC Information Services; See also, Walter Woon. 2009. *Company Law*. Petaling Jaya: Sweet & Maxwell Asia.

It is also highly improbable that efficient business transaction can be executed just within one majlis (meeting) and in a very limited time frame. As is always the case with big business transactions involving billions dollars investment, it may need more than five meetings and more than one month to conclude the business transaction after a thorough review of the pros and cons that may have been highlighted. Some Islamic schools of law and their Muslim scholars have accepted this view that the requirement of accepting the offer in the same majlis (meeting) is clearly unreasonable, untenable and unacceptable by the business community in the light of the imposition of its time constraint as currently prevailing in the commercial sphere of activities.⁴⁵

It is of judicial interest to note that the requirement that the offer must be accepted in the same majlis, as is the opinion of some Islamic scholars, is quite contrary to the spirit of commercial development as the Quran and hadis⁴⁶ are silent on this salient point of time frame imposition. There is no clear verse in the Qur'an nor hadis which specifically mentions that the offer must be accepted in the same majlis. This anomaly has actually arisen out of the idea of accepting the offer (ijab) in the same majlis which originated from a marriage contract. Some Muslim scholars thought that the offer of marriage and the acceptance of offer of marriage from the groom must be in the same majlis for the interest of the marriage and the parties.⁴⁷ However, to be fair and judicially equitable to both parties in the marriage contract, the Muslim scholars should not impose such strict rule of acceptance of offer (ijab) to conclude the marriage because this decision involves a lifetime partnership whereby both the bride and the groom should be given sufficient time to decide whether the marriage will be sustainable or not; whether the marriage can bring happiness for the groom and bride for the whole of their lifetime.⁴⁸

Free consent

For a contract to be valid, the agreement must be made by a free consent of the parties in the contract. A free consent of parties is also known as consensus of parties without any form of coercion, either directly or indirectly. If the contract is caused by a coercion or a fraud or undue influence, it would be a voidable contract. Hence, the contract must be based on free consent from both parties.⁴⁹ A free consent of parties is very important in the discharge and execution of the Islamic contract law.⁵⁰

In a *hadith* the Prophet (pbuh) said: "Verily trade is based on a mutual consent".⁵¹ Regarding a free consent Allah swt says in the Quran: "O ye who believe, squander not your wealth among yourselves in worthless dealings, but let there be trade by mutual consent..."⁵². In this verse Allah (the Creator) emphasizes on the importance of executing a trade contract by a mutual consent. Thus, it is a fundamental principle in the Islamic law of contract that both parties must demonstrate a free consent while conducting a transaction. The proof of a free consent between the offeror and the offeree is very significant and highly required as the essence of the Islamic contract law *aqd*.⁵³

Intention to create legal relation

Under the Islamic law of contract, an intention to create a legal relationship is significant. If there is a lack of intention to create a legal relationship, the agreement may not, in all probabilities, be enforceable by law.⁵⁴

⁴⁵ Jalil, Md. Abdul. 2010. *Commercial Law in Malaysia*. unpublished monograph.

⁴⁶ Hadis is the sayings, deeds and tacit approvals of prophet Muhammad (peace be upon him).

⁴⁷ Razali, S.S. 2009. *Islamic Law of Contract*. United States: Cengage Learning. pp. 5 and 17-20.

⁴⁸ Jalil, Md. Abdul. 2010. *Commercial Law in Malaysia*. unpublished monograph.

⁴⁹ Vohrah, B., and Aun, W.M. 2010. *The Commercial Law of Malaysia*, Malaysia: Longman; Saleem, M.Y. 2009. *An Introduction to the Theoretical Foundations of Islamic Transactions*. Malaysia: Ilmiyah Publishers.

⁵⁰ Rahman, H.H.A. 2000. Offer and Acceptance in Islamic Law of Contract. *Journal of Shariah*. 8(2): 15-32; Rayner, S.E. 1999. *The Theory of Contract in Islamic Law*. London: Graham and Trotman Ltd.

⁵¹ As-Sharbini. 1994. *Mughni Al-Muhtaj*, 2: 325

⁵² The Quran, 4:19.

⁵³ Kharofa, A.S. 2000. *Transactions in Islamic Law*. Kuala Lumpur: A.S. Noor Deen; Zuhaily, W. 1997. *Al-fiqh al-Islami wa adillatuhu*, Damascus: Dar al-Fikr.

⁵⁴ Nawawi, R.H. 1999. *Islamic Law of Commercial Transaction*. Malaysia: CT Publications Sdn. Bhd.; Taylor, W.T.M.A.C. 1996. *Law of Contract*, Great Britain: Pitman Publishing; Mulcahy, L. and Tillotson, J. 2004. *Contract Law in Perspective*. London, Sydney: Cavendish Publishing.

However, the party that claims that there is a lack of intention to create the legal relationship has to prove beyond a shadow of doubt of its tangible existence. Usually, the agreement which has a consideration is regarded as having an intention to create a legal relationship between the parties. Business contracts are usually considered as having the intention to create a legal relationship in one way or another. Some social agreements may lack the intention to create a legal relationship and it depends on the case by case basis and circumstances of the agreement. For example, A is a friend of B and A promises to give qard al-hasan (interest-free loan) to B for an amount of \$2,000, but later refuses to conclude the deal.

Here, the contract may not be enforceable due to a lack of consideration. This is an example of a social contract where there is a lack of intention to create a legal relationship between the parties.⁵⁵

The objective and consideration should be legal

It is important under the Islamic law of contract that the objective of a contract should be lawful and legally binding⁵⁶ otherwise the contract will be invalid and not enforceable by law. If the objective of a contract is to perform some form of illegal act or immoral acts, then the contract will be invalid.⁵⁷

Similarly, the consideration or a subject matter of the contract should be legal, legitimate and lawful because if any of these elements is absent, the contract will be invalid. For example, if the subject matter of a contract is *haram* (prohibited) in Islam, then the contract will be illegal and not enforceable by law due to the nature of the spirit of the contract which may be against the grain of judicial prudence and justice. Hence, a contract to sell pig meat or dangerous drugs, such as, heroin or different types of wine etc., is legally considered as invalid because to form a valid contract under the Islamic law of contract, the objective and consideration must be lawful and must fall within the ambit of legal enforceability.⁵⁸

Certainty

Under the Islamic law of contract, the terms of an agreement must be definite, clearly defined and unambiguous. The terms must be expressed or clearly and precisely written down so that no element of uncertainty can be presumed in the contract. If the terms or subject matter is uncertain and ambiguous, the contract will become void.⁵⁹ A term in the contract is considered uncertain if it is not very clear to be understood. For example, company X has agreed to buy 100 tons of rice from company Y for an agreed price. This agreement may become void due to an uncertainty as it does not mention what type of rice to be delivered, the time frame within which the goods must be delivered as well as the quantity of rice if it is delivered on a partial basis and the terms of payment involved thereupon. This example can be considered as quite crucial as there are different types of rice with the same name in which case the sample of the rice should be clearly spelled out to be made available before delivery and other pertinent matters to be clearly itemized and specified in order to avoid elements of uncertainty in the contract.

It is the requirement in the Islamic contract law that the subject matter of a contract must exist at the time when the contract is made and it should be possible to be delivered at the agreed time of delivery.⁶⁰ If the subject matter does not exist when the contract is made the element of *gharar* (uncertainty) may occur and can invalidate the contract.⁶¹

⁵⁵ For detailed discussion on 'intention to create legal relation' see, Alsagoff, S.A. 2003. *Principles of the Law of Contract in Malaysia*. USA, UK: LexisNexis. pp. 77-895.

⁵⁶ The Contract Act 1950 (Malaysia) has clearly states that a contract to be enforceable by law, the agreement must be a legal agreement. See, section 2(h) of the Contracts Act 1950 (Malaysia). Here, 'enforceable by law' means recognized by law. An unlawful or illegal agreement would not be acceptable and enforceable in the court of law. See also, Sinnaduari. 2003. *Law of Contract*. UK, USA: LexisNexis, Butterworths.

⁵⁷ Pheng, L.M. and Detta, I.J. 2010. *Business Law*. Oxford, New York:Oxford University Press.

⁵⁸ Razali, S.S. 2010. *Islamic Law of Contract*. Cengage Learning: UK, USA.

⁵⁹ Abdullah, N. I. & Razali, S.S. 2008. *Commercial Law in Malaysia*. Kuala Lumpur: Pearson, Prentice Hall.

⁶⁰ Al-Kasani. *Badai Sanai*. 5: 171; Al-Dardir. *Al-Sharh Saghir*. 4:142.

⁶¹ Owsia, P. 1994. *Formation of Contract: A Comparative Study under English, French, Islamic and Iranian Law*. London: Graham & Trotman; Al-Kasani. *Badai Sanai*. 5:171.

The Islamic law of contract usually discourages the making of a sale contract on non-existent or future goods as they cannot be seen when the contract is made as the type and quality of the goods is not known and whether it would be available at all for delivery on the time fixed in the contract.⁶² However, non-existent goods or invisible commodities can be a subject matter of a contract if the nature of the subject matter and its quality are properly described, well defined and is predominantly available for delivery on the appointed time.⁶³

Capacity (*ahliyyah*)

Under the *Shariah* (Islamic) contract law, capacity is known as *ahliyyah*.⁶⁴ Capacity is the ability to make a contract under a fully sane physical condition with a healthy mental awareness. Not every person can make a legal contract, such as, a minor, an insane person and any person incapable of making a decision due to physical and mental defect, etc. Under the Malaysian Contract Act 1950 and Age of Majority Act (Malaysia), a person must be eighteen years of age before he can make a valid legal contract which is basically similar to the contract law of the UK.⁶⁵

Under the Islamic contract law, the age of majority is fifteen years. This is known as *bulug* (puberty)⁶⁶ of a man or woman. At this age he/she understands things better, however, taking into account of legal consequences of a contract, it is better to fix the majority age as eighteen years when making a valid contract without the need to have a written consent from the parents or guardians. For a marriage contract, the Islamic Family Law (Federal Territory) Act 1984 (IFLA 1984) (Malaysia) provides that a man must be of 18 years of age and the woman must be of 16 years of age before a marriage can be solemnized in Malaysia.⁶⁷ If a man and a woman want to solemnize a marriage but they are below the minimum age prescribed in the above mentioned Act, they must take a permission in writing from the Shariah Judge.⁶⁸ Thus, IFLA 1984 prohibits early marriage for boys and girls because an early marriage of boys and girls most of the times creates social problems, such as, they cannot maintain friendly conjugal life resulting in divorce later on.

For the non-Muslims in Malaysia, there is a different statute for marriage known as the Law Reform (Marriage and Divorce) Act 1976 (LRMDA 1976). This statute is not applicable on Muslims in Malaysia.⁶⁹ Under this statute the minimum age for solemnizing a marriage for both man and woman is 18 years.⁷⁰ However, a woman who has attained her 16 years, can solemnize marriage after obtaining an authorization license granted by the Chief Minister of a state.⁷¹

⁶² Kamali, M.H. 2005. Islamic Commercial Law: An Analysis of Futures. *The American Journal of Islamic Social Sciences*. 13(2): 197-224.

⁶³ Al-Hattab. *Mawahib al-Jalil*. 4:220.

⁶⁴ Abdullah, N. I. & Razali, S.S. 2008. *Commercial Law in Malaysia*, Kuala Lumpur: Pearson; Zuhayli, W. 2003. *Financial Transactions in Islamic Jurisprudence*. Lebanon: Dar al-Fikr al-Mouaser.

⁶⁵ McKendrick, E. 2003. *Contract Law Text, Cases and Materials*. Oxford: University Press.

⁶⁶ Under Islamic law *bulug* (puberty) starts when certain signs appear e.g. for a boy when he gets wet dream and for a girl when she gets menstruation or he/she attains the age of fifteen. So, under Islamic law the age of majority to make a contract is 15 years of age.

⁶⁷ So, the Islamic Family Law Act (Federal Territory) 1984 provides two types of ages for the boy and the girl for marriage purpose. To conduct a valid marriage, the boy must be of 18 years of age and the girl must be of 16 years of age. The age for girls is fixed in the Act is 16 years because, usually girls become *bulug* (age of majority) earlier than boys or there is a possibility of girls to be victimized by boys who may convince them to have illegal sex with them.

⁶⁸ Section 8 of the Islamic Family Law (Federal Territory) Act 1984.

⁶⁹ Section 3 of the Law Reform (Marriage and Divorce) Act 1976.

⁷⁰ So, the LRMDA 1976 unlike the IFLA 1984 which provides same age for both the boys and girls. Non-Muslim boys and girls in Malaysia can solemnize valid marriage when both of them are 18 years of age. This 18 years of age requirement is in line with the requirement of making valid contract provided in the Age of Majority Act and Contracts Act 1950 (Malaysia). So, the both Acts restrain early marriage in Malaysia which is a very good attempt by the government.

⁷¹ Section 10 of the Law Reform (Marriage and Divorce) Act 1976.

The age of majority is the capacity for a person to make a valid enforceable contract. At this age a man or woman can understand the legal consequences of a contract and they have a good judgment on different matters.⁷² If a person is below the age of majority, he/she cannot make a valid contract under the shariah law.⁷³

Formality

Formality means the writing and signature requirement of a contract and the contract might be required to be witnessed by others. The Islamic law of contract emphasizes on writing down the terms of a contract which is to avoid a dispute between the parties as one or more parties may, after long period of time, forget what they had actually decided or agreed upon.⁷⁴ However, under the Islamic law of contract, an oral contract is valid if it can be proven by reliable and capable witnesses. In a conventional law, an oral contract is also valid but the conventional law encourages people to write down the terms of the contract in all contracts if possible.⁷⁵ Nonetheless, some contracts should be in writing because of the nature of contract. Marriage contract, transfer of real property, etc., must be in writing and signed by the parties involved. There are parliamentary laws in many countries that stipulate to write down some contracts and the law provides that if the parties do not write down the contract and duly sign it, the contract would be considered as invalid. As mentioned above, the Quran requires people to write down a loan contract in Surah (Chapter) 2, Verse 282. This verse also requires witnesses to testify the contract when any dispute arises out of this contract.

It is easier to prove a contract when the terms are in writing. A loan agreement also should be in writing so that if the parties forget the amount of loan and other agreed terms, the written note will remind them of the terms of loan agreement, loan amount, payment date etc. For this particular reason Allah SWT has asked the parties in a loan agreement to write down the particulars as mentioned in *Surah al-Baqarah* which is also as mentioned above.⁷⁶ It is highly recommended that for the parties in a contract to write down the terms of the contract. If any dispute arises out of the contract, they can refer to the written contract to solve the dispute. It would be much better if the contract can also be signed by one or more witnesses so as to give weight to the validity of the document.

The Islamic law of contract has not specified any formalities for making a contract. According to Ibn Qudama, the Islamic law of contract does not fix any formality to make a contract. He observed, Allah has permitted sale but did not specify the manner in which it is to be concluded⁷⁷. This view is also supported by Liaquat Ali Khan Niazi who said: there is no fix formality in a contract under the Islamic law.⁷⁸ Allah has mentioned in the Qur'an to write down contracts and to have witnesses but does not provide specific format of writing down the contract.

⁷² O'Sullivan, J. and Hilliard, J. 2006. *The Law of Contract*, New York: Oxford University Press; Kool, Chin Nam. 1991. *A comparative study of Islamic law and civil law in Malaysia on contract, arbitration, banking principles and documentation*. Petaling Jaya, Kuala Lumpur: International Islamic University Malaysia.

⁷³ Zuhaily, Wahbah. 1997. *Al-Fiqhul Islamiy Wa Adillatuhu*, p. 122; Sanhuri, Abdul Razak Ahmad. 1990. *Syarh Qanun Al-Madaniy*.

⁷⁴ In Surah (Chapter) Baqara (2): Verse 282, Allah asks the lender and the borrower to write down the loan transaction. The objective and benefits of this writing requirement have been very clearly explained by Allah (the Creator) in Surah Baqarah 2:282. Allah narrates in verse 282 of the holy Quran as follows: 'O you who believe, when you transact a loan for any period, you shall write it down. An impartial scribe shall do the writing. No scribe shall refuse to perform this service, according to God's teachings. He shall write, while the debtor dictates the terms. He shall observe God as his Lord and never cheat. If the debtor is mentally incapable, or helpless, or cannot dictate, his guardian shall dictate equitably. Two men shall serve as witnesses; if not two men, then a man and two women whose testimony is acceptable to all. Thus, if one woman becomes biased, the other will remind her. It is the obligation of the witnesses to testify when called upon to do so. Do not tire of writing the details, no matter how long, including the time of repayment. This is equitable in the sight of God, this assures better witnessing, and eliminates any doubts you may have. Business transactions that you execute on the spot need not be recorded, but have them witnessed. No scribe or witness shall be harmed on account of his services. If you harm them, it would be wickedness on your part. You shall observe God, and God will teach you. God is Omniscient'.

⁷⁵ Vohra, B. and Aun, W.M. 2010. *The Commercial Law of Malaysia*, Malaysia: Longman; Hui, Lam Sinn. *Commercial Law* (Students' Companion Law Series). Kuala Lumpur: International Law Book Services.

⁷⁶ The Quran, 2: 282.

⁷⁷ Ibn Qudama. *Al-mughni*. 4: 218.

⁷⁸ Niazi, Liaquat Ali Khan, 1990. *Islamic Law of contract*. p. 60.

Even though the Qur'an has not made it compulsory to have written contract documents but its mention is sufficient evidence to indicate its necessity in a veiled manner as the essence of its spirit is self explanatory. As has been earlier stated, oral contract is also valid in the Islamic law of contract. Hence, we can say that Islam does not provide any specific formality to make a contract, so that, people are at a liberty to develop a specific formality of a contract based on practice in the society and nature of the contract, such as, writing and signature requirement and witnessing requirement. Specific format and formality for certain contracts under certain circumstantial situations can also be established to perform in accordance with the requirement of the prevalent law.

3. Conclusion

Electronic commerce is proliferating on the internet nowadays and electronic contract is the basis of e-commerce. Different countries have enacted electronic contract laws based on the UNCITRAL Model Law on Electronic Commerce 1996. The European Union and Malaysia have also enacted electronic contract law which recognizes electronic message as a means of communication for making electronic contracts.⁷⁹ The electronic contract law also recognizes the validity of writing requirement and signature requirement, if the digital message is sent by using digital signature technology. Many legal scholars have written on the formation of electronic contracts.⁸⁰

The author of the book on 'Islamic Law of Contract' could write a chapter on this electronic contract to discuss whether the Islamic law of contract does recognize the validity of electronic contract made on the internet and how it proposes to solve the writing requirement and signature issue in an electronic contract. This is the latest issue and is a very important issue which the author could not have succinctly ignored.⁸¹

Contract law is very pertinent in enhancing business activities. The traditional business contracts are made on papers and signed by the parties to be a valid contract. At present online transaction is widely practiced by business community. In an online contract, paper, pen, witness, hand written signature are not needed.⁸² Thus, an electronic contract is faster and cheaper. The parties in the contract do not need to sit down in a specific place or country to write down the terms of the contract. Businessmen nowadays can conclude business contracts involving millions of dollar just communicating through the electronic message, hence, it saves time and money and it helps to conclude a contract within a very short time even though the contract is a multinational contract.

In conclusion, we can say that the respected author of the book mentioned above has done a great work in writing a book on the "Islamic Law of Contract". The Western world will know what the Islamic law of contract is all about and they will be able to learn the differences between the two systems of law. It would have been better if the author could write a complete book on the Islamic law of contract covering all the essential sub-topics as mentioned earlier on so that varied readers of law, both Muslims and non-Muslims, can gain highly informative legal information about the Islamic law of contract in a broader sphere of the relevant legal perspective.

⁷⁹ See, Electronic Commerce Act 2006 (Malaysia).

⁸⁰ Waelde, L.E.C. 2005. *Law and the Internet: A Framework for Electronic Commerce*, Oregon: Hart Publishing; York, S.C.K. 2006. *E-commerce: A Guide to the Law of Electronic Business*. USA: Butterworths Publication; Yousuf, N.M. 2007. *Islam in ICT Era: A More Active Role is Expected and Promoted*. Malaysia: Current Law Journal. Shariah (Islamic law) does not prohibit e-commerce. The Islamic law principles do not contradict with e-contract or e-commerce principles. So, e-commerce is valid and recognized in Islamic law of contract.

⁸¹ El-Islamy, H. 2002. *E-Business: An Islamic Perspective*. Kuala Lumpur: A.S. Nordeen; Mokhtar, Khairil Azmin. 1993. *The theory of contract and formation of contract: a comparative study between Islamic law and common law as practiced in Malaysia*. Petaling Jaya, Malaysia: International Islamic University Malaysia.

⁸² The Electronic Commerce Act 2006 (Malaysia) and the Digital Signature Act 1997 (Malaysia) recognize electronic message used to conclude electronic contracts. It recognizes electronic contracts and provides provisions to meet the writing and signature requirement on the internet.

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