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Sharīʿa and Legal Issues of Online Islamic Banking and Finance

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ABSTRACT

Although its recent development is welcome, online Islamic banking poses many unprecedented *sharīʿa* and legal dilemmas, warranting creative solutions. This paper highlights some of the relevant issues associated with e-banking and online banking practices, including principles of contract law and rights and liabilities. Issues include, *inter alia*, session of contract, various contract options, misrepresentation, fraud, and undue influence. Equal attention is given to modern methods of online payment, which can be problematic when purchasing equities, bonds, and certificates. Questions related to which law governs cross-border online Islamic banking transactions is also raised. Furthermore, actual and potential problems facing Islamic financial institutions are addressed. Though the focus is primarily on Islamic banking and Islamic capital market products and instruments, the paper does touch on the related topics of online *zakāt*, *waqf*, and *Æadaqa*.

I. INTRODUCTION

Online banking is an integral element of electronic commerce (e-commerce). E-commerce is the umbrella term describing automated business-related transactions through largely paperless mechanisms and represents a broad range of technologies, processes, and practices. It typically involves information communicated via electronic mail. Conceptually, electronic transactions are similar to traditional paper-based commercial transactions. Under both approaches, vendors present their products, prices, and terms to prospective buyers. Buyers consider their options, negotiate prices and terms (where feasible), place orders, and make payment. Vendors deliver the purchased products. These processes apply to traditional as well as electronic commerce alike. E-commerce however poses new and interesting differences not only from modern legal perspectives but also from *sharīʿa* perspectives.

Islamic banking activities are rooted primarily on trade, leases, and investments. Unlike conventional banking, they share a lot in common with e-commerce as they involve actual and bona-fide transactions. Conventional banking on the other hand is simply a lending-based activity and thus, issues of sale, leases, and other related actions are not pertinent. This key difference renders the present discussion more relevant simply because online Islamic banking, to a large extent, provides sale and lease transactions via electronic mail. Online Islamic banking is not about advancing a loan to a customer via electronic mail. Instead, it involves a number of processes, the ultimate result being either a transfer of ownership or an usufruct, as the case may be. All of these actions are done via electronic mail.

In order to assist online Islamic banking providers and operators[i] in managing their transactions to comply with *sharīʿa* principles, this paper aims to address a number of relevant topics, such as the formulation of Web contracts, incorporation of certain terms, conditions and warranties, exclusion clauses, misrepresentation, and methods of payment. Discussion of these terms might even influence *sharīʿa* perspectives on how contracts are concluded via the Web or the Internet.

II. *SHARĪʿA* FRAMEWORK FOR WEB CONTRACTS

The *sharīʿa* would most probably perceive contracts concluded via the Web just as another method of parties' expressions of consent, i.e., offer and acceptance.[ii] This is simply because the *sharīʿa* does not require or insist on any specific technique to reflect an offer and an acceptance. A contract is *prima facie* concluded once the elements of offer and acceptance have been satisfied, irrespective of whether this is affected through oral pronouncement, or in writing, or in such other forms as telephone, fax, or telex,[iii] or even conduct and body language of the contracting parties; these are better known as circumstantial evidence (*dilālat al-dhurūf*).[iv]

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As a basic rule, the *sharīʿa* provides that a transaction is not invalid merely because it took place wholly or partly by means of electronic communication. Unless otherwise agreed, a contract can be formed electronically between the parties. In other words, one can conclude that the *sharīʿa* is technologically neutral; it does not discriminate between different types of technologies. In this sense, paper-based commerce and electronic commerce are to be treated equally by law. Hence, a Web contract is *prima facie* valid. Transactions involving the sale of goods and services via this method will result in the physical delivery of goods and services to the customer.[v]

III. Formalities of a Contract in Islamic Law and the Position of the Web Contract

A valid contract in Islamic law essentially requires that six elements must be satisfied. These elements are as follows: 1. an offer; 2. an acceptance; 3. that is to be accepted in unequivocal terms; 4. subject matter; 5. the consideration, which is very often the price of the product or services purchased; and 6. the offeror and offeree who enter into the contract must have legal capacity. The question remains: do these elements vary in electronic commerce?

A. Offer for an Online Contract

As for the offer, *Mejelle* for example, has defined it as "the statement made in the first place with a view to making a disposition of property and such disposition is proved thereby."[vi] What constitutes an offer is a question of fact. It is relevant to note that an e-merchant, that is, Islamic financial institution, must be certain of what constitutes an offer. Failure to appreciate this principle could render the e-merchant making an offer without actually knowing it, or making an offer to the world when they were only prepared to sell a particular product to a limited class of persons. One suggested solution would be to announce clearly on the Web site that all advertisements and similar activities by the institution pertaining to its products are an "invitation to treat" just as in the common law principle.[vii]

As far as Islamic law is concerned, the legal perspectives vary. While some scholars have required that an offer must refer to a definite party, some Mālikī scholars do not require such a condition. The view of the these Mālikī scholars is evident in their statement, for example, that if someone has presented his good for sale and offered to sell it at ten *dinars*, the sale is concluded for the one who has paid such amount because he has heard the offer or has been informed about it. The sale is binding on the offeror and he has no right to decline from selling this good, except where the buyer who came forward to purchase has not heard of the offer or has not been informed about it.[viii]

It is respectfully suggested that within the context of electronic contracts, any "offer" made on the web be *prima facie* considered as just an invitation to treat. Thus, when a customer submits an online form or faxes a copy of the form to an Islamic financial institution, it is treated only as an offer to buy and not as an acceptance of that offer. The result will be that the institution will have the option to either accept or reject the customer's offer. Arguably, this is the intended result by many online operators, including Islamic banks.

The rule, however, does not necessarily mean that all communications from an Islamic financial institution to its customers online will be treated as an invitation to treat. The institution may choose to regard any specific statement on the Web as the offer. Once the customer has accepted the offer through the prescribed methods of acceptance, then a contract is immediately concluded. This procedure requires the institution to be precise in offering any of its products, as any immediate acceptance by the customer will conclude the contract and thus will render it binding. It appears that this technique is more apt to Islamic stock purchases and sales, as customers normally prefer a spot transaction either to acquire a share or to dispose of it. Any time delay particularly in this sort of market might be detrimental to customers.

Another point worthy of consideration, is the time and place of the offeror's and offeree's meeting. Since an electronic contract is concluded via a certain instrument, it does not come under contracts of *inter praesentes*, that is, when two contracting parties or their representatives physically meet each other while concluding the contract. On the contrary, it comes under the purview of contracts *inter absentes*. Islamic law of contracts is well known for its requirement of unity of time and place (*itti®ād al-majlis*) whereby both the offer and acceptance are conducted in the same *majlis* (session of contract).[ix] This doctrine is relatively easy within contracts *inter praesentes,* but its compliance with contracts *inter absentes* is problematic. Here, Muslim jurists have to extend the theory of *majlis* by way of construction.[x] The doctrine of *majlis* is held to communicate an offer to the offeree and is to take place wherever the offeree receives that offer.[xi] According to classical Islamic law, the *majlis inter absentes* terminates after a reasonable lapse of time if the offeree has failed to respond to the offer, or when the offeree makes a declaration of acceptance.[xii]

With all this in mind, it is respectfully suggested as a good practice, the offeror in electronic contracts should specify a time limit within which he expects to receive a response from the offeree. The offer will therefore stand so long as that specified period has not lapsed.[xiii] If the offeror does not specify such a time, then the offer remains valid until acceptance is given, so long as it is deemed proper according to the circumstances of the case. Yet, this later scenario will, as a matter of fact, give rise to doubt and uncertainty. Therefore, to avoid any such uncertainty, it is recommended that the duration of the offer made on the Web be strictly disclosed. So once there is a lapse in time, any "response" from the customer cannot be considered as an acceptance as there is no link between the offer and the acceptance. Any such response from the customer is treated as a new offer to be accepted by the Islamic banking institution. Another suggestion is to repeat the offer daily on the Web site. This action would ultimately create a new *majlis* for a new acceptance.

It is also of relevance to discuss revocation of an offer that has already been made online. In other words, can an Islamic institution withdraw the offer it made earlier? As for revocation prior to acceptance by the offeree, the majority of scholars have allowed the offeror to withdraw his offer during the period of *majlis*.[xiv] The Mālikīs however are of the view that the offeror must stand by his offer until it has received a response from the offeree, before the lapse of the session of the contract.[xv] The view of the majority is probably best suited for web contracts as it gives greater flexibility to the offeror to retract his offer, particularly when the offeree is yet to accept the offer. The foregoing issue is not as difficult as the case of revocation of the offer after the offeree has already accepted and communicated his acceptance. Consider further what would happen if a financial institution's e-mail to revoke its offer is sent to the offeree but is received after the latter had already accepted the offer. In this situation, it is proposed that online procedures should expressly deal with such scenarios.

B. Acceptance of an Online Contract

If an offer is to be accepted, the unequivocal acceptance of that offer must be communicated to the person who has made the offer. Generally speaking, acceptance must be made in the manner specified in the offer. If the offer is silent on this issue, then the acceptance can be made in any manner that is reasonable under the circumstances. When the offer is made through an electronic medium, such as e-mail, a response could constitute an acceptance of the offer. It could also be communicated through other means, such as by fax or post. The e-merchant or online Islamic banking institution ought also to explain to their potential customers how their acceptance of the offer will be communicated to them and when such acceptance will take effect.

While it is clear that communication of an acceptance can take many forms, it is less clear when acceptance takes place. When an acceptance is made over the telephone, the acceptance is deemed to occur at the time and place it is heard by the offeror. This rule has been held to apply to other instantaneous forms of communication, e.g. telex or facsimile. An acceptance sent by post is also deemed effective upon the receipt of the letter.[xvi]

Due to the nature of online communications, it is not clear whether this rule is applicable. Communications made via the Web, unlike the telephone and the facsimile, are not instantaneous in the strict sense of the word. Once dispatched through the Internet, they are routed through several service providers and/or text messaging agents before finally arriving at their destination. If we were to adhere to the receipt rule, it is not clear when the actual receipt occurs. Does it occur when the e-mail arrives at the customer's mail server or is it when the customer actually opens and reads the e-mail response?

As communications of offer and acceptance via the Web is unprecedented in Islamic law, in the sense that it cannot be simply made analogous to other forms of communications in contracts *inter absentes*, one would need to exercise his or her legal reasoning or *ijti®ād* to arrive at the legal rule that is compatible to *sharīʿa* principles. It is the author's personal view, after contemplating the features of *ʿilla* in Islamic law, that the communication of an acceptance via the Web is effective once it reaches the offeror's mail server and the offeror has actually opened the mail.

The so-called "mailbox rule" therefore would not be applicable to online Islamic banking. This is because the mailbox rule, as a legal principle, hinges legal effectiveness at the time of dispatch, as opposed to the time of receipt, resulting in various anomalies. Following this principle, an offeror may be bound by an acceptance he or she never received, or by an acceptance mailed prior to a revocation of the offer. Islamic law's perspective would probably render the administration of law and justice more workable. Here, law is based on an attribute that is evident and constant, that is, receipt of the acceptance by the offeror.

The ßanafīs, who argue the above points, contend that the contract is concluded and effective when the two parties have heard each other.[xvii] This principle requires that the offeror actually know of the acceptance made by the offeree because hearing of an acceptance is required in *inter praesentes* contracts. Knowledge of acceptance is equally required in contracts of *inter absentes*.[xviii] Nonetheless, given legal uncertainties, online Islamic e-merchants should specify the method of acceptance as well as when and how the acceptance should take place. Such

provisioning will enable the customers of online Islamic banking to retain their prerogative to accept or reject the offer.

It is a normal practice in online transactions that an offeree give a counter-offer just by providing any qualification or variation to the offer. If accepted, under the principles of Islamic law, it would supersede the terms of the original offer. Online Islamic e-merchants may design their Web site in such a way as to allow customers to add or remove any term(s) from the standard terms posted online. This is a matter of policy and has no bearing on *sharī*ᶜ*a* principles except where such qualification or variation made to the offer constitutes a new offer to be accepted by the offeror.

As for *khīyār al-majlis*, particularly for Scholars who subscribe to this notion, it continues up to the time of receipt of the acceptance by the offeror. If he has opened and read his electronic mail containing the acceptance, then the right to *khīyār al-majlis* is deemed to expire. That is, to some extent, based upon the principle of *khīyār al-majlis* as already established in contracts effected through telex, fax, and the like. The option or *khīyār* to revoke a contract ceases to apply once the offeror has received the acceptance by the offeree.[xix] In the case of electronic contracts, the *majlis* or session of the contract ends upon the receipt of this acceptance.

C. Subject Matter of Web Contracts, with Special Reference to Islamic Banking Instruments

As for deposits in Islamic banking, the underlying contract of both saving and current accounts is the *wa∞ī*ᶜ*a*.[xx] No serious problem exists whether one makes a deposit offline or online. The same applies to *mu∞āraba* contracts, which form the basis of Islamic investment accounts. Here, the investor submits an acceptance to all terms of an investment account, such as periods of investment, type of project, ratio of profit sharing, etc., via electronic mail. The investment could also be made through credit card or other similar facilities as will be discussed later. Writers find no critical issue as far as online deposits and investments are concerned. The only exception would be in the case of special and specific investment accounts. Here, the investor has the right to negotiate on the ratio as well as the project of investment. Therefore, the web should be designed in such a way the prospective investor has the opportunity to negotiate both the ratio and the project into which the investment will be channeled.

Within the financing sector, Islamic banking institutions normally offer instruments and products in the form of a partnership within trading or leasing or a combination of both. In other words, Islamic banks are supposed to assume the role of actual trader, vendor, lessor, or partner as the case may be. Therefore, in performing these business tasks, critical problems may exist that are relevant for both offline and online banking activities. These include defects of the goods, transfer of ownership and its attached risk (risk incidental to ownership), delivery risk, possession before the second sale (*al-qab∞*), etc.

IV. Consideration in a Web Contract

As in traditional contracts, a valid contract requires that parties agree on the consideration that is being exchanged for the subject matter of the contract. This would normally involve payment. For a Web contract, payment could be effected either through credit card or financial electronic commerce payments or electronic funds transfer as the case may be. Many writers on online banking and Islamic financial institutions have stressed the security aspect of using these instruments for payment purposes. Islamic law furthermore is concerned with the method of payment. As in some cases, the payment must be effected through a spot transaction, otherwise, this could trigger the *sharī*ᶜ*a* prohibitions like buying currencies for currencies or buying *ribāwī* or usurious items on credit.[xxi]

V. Contractual Capacity in Web Contracts

Due to the present faceless nature of the Internet, an e-merchant is not easily able to verify the identity of online customers. In many circumstances, the verification of identity or some other quality of the contracting parties can be of significance. Of major concern is contracts entered into with minors. Under Islamic law, a contract made with a minor can be generally void or voidable, as the case may be.[xxii] For some Islamic financial institutions, depending on their *sharī*ᶜ*a* advisory council's perspectives, restrictions such as taking deposits from certain individuals and/or companies are unacceptable.

Having said this, online Islamic bankers should be encouraged to incorporate into their web pages an express declaration on the criteria required to satisfy age requirements as well as other relevant information. If the customer has acted upon this declaration and has later found out that the conditional requirements pertaining to the contractual capacity were not satisfied, then the Islamic banks are entitled to recall the facility. This is simply based

on the principle of utmost good faith and on the *Ḥadīth* that parties to a contract are bound by their own conditions or stipulations, so as long as the stipulations do not render what is impermissible permissible and vice versa.[xxiii]

VI. The Purchase of Real Property via an Electronic Contract

Islamic banking is actively involved in financing real property, be it residential homes, small businesses, and land sales. Questions arise as to how real property transactions are affected when conducted through the Internet. Most states require all transactions pertaining to land and real property to be executed according to strict statutory regulations. Online Islamic bankers should also comply with all these statutory procedures, otherwise, the transaction can be deemed illegal. Nevertheless, property acquisition laws will need to be further relaxed in order to allow for transactions via the Internet.

VII. Product Defects and the Right to Revoke the Contract

In offline Islamic banking transactions, many practitioners still perceive Islamic banking products as purely financial instruments. Many instruments are therefore detached from the actual transaction, be it the trade or the lease. Moreover, focus is on compliance with banking statutes and guidelines rather than on the substantive laws of trading or leasing. These challenges are intensified in the case of online banking. Here, customers will now purchase an asset or take a lease on an asset without an actual physical examination and inspection of it, even before signing the contract. Issues of fitness, merchantable quality, and goods corresponding to their description are a new challenge to verify with online Islamic transactions.

At present, contracts for the sale of goods in Malaysia are generally governed by the Sale of Goods Act of 1957 (referred to hereafter as "the Act"). In addition to the express terms and conditions of a sale of goods contract, the Act provides that certain conditions and warranties with respect to goods sold are implied into the contract. These implied terms arise automatically by operation of law. These terms, which are contained within traditional sale transactions, will equally be implied into electronic contracts. These implied terms are as follows:

1. That the seller has a right to sell the goods, that the goods should be free from encumbrances and that the buyer should enjoy quiet possession of them;
2. That where the goods are sold by description, they should correspond with that description;
3. That the goods should be of satisfactory quality (i.e., the standard that a reasonable person would regard as satisfactory, taking into account any description of the goods, the price and all other relevant factors);
4. That the goods should be fit for the buyer's purpose where he makes that known to the seller; and
5. That where the goods are sold by sample, the goods should correspond with the sample.

All of these implied terms (except for those related to freedom from encumbrances and quiet enjoyment) are regarded as conditions. This means that if the goods are defective in any manner that is inconsistent with these implied terms, the buyer is entitled to reject the goods and terminate the contract. The buyer may also choose to accept the goods and simply claim damages with respect to the breach instead.[xxiv]

Islamic law's perspective on breach of explicit and implicit conditions and warranties, particularly within the case of online transactions, requires a closer look. The corresponding legal term in the *sharī῾a* for mistake is *al-khaṭa'* or *al-ghalaṭ*. While defects in any of the essential elements render a contract void *ab initio*, a non-substantial mistake does not lead to the same result. Instead, the law prescribes the right of options for the suffering party. Mistake or *al-khaṭa'* is actually a wrong presumption made by the parties as to certain facts of the contract. It occurs when parties to a contract wrongly presume a fact that is contrary to factors indicated in the offer and in the acceptance.[xxv] This presumption may be of a hidden will or expressly indicated by a manifest will. Another definition of mistake is *ghalaṭ*. It means the contracting parties presume that the subject matter of the contract consists of specific attributes or of a specific nature. Whereas, here, the actual subject matter is different either in type or in its attributes.[xxvi]

Islamic law recognizes five types of mistake. This paper will focus only on three, as they are more pertinent to the question of online sale transactions. The first is mistake as to the subject matter. It takes place when a contract is concluded on a subject matter that is not agreed to or intended upon by the parties. They, however, only know this error after concluding the contract.[xxvii] A mistake with regards to the kind of the subject matter would render the contract void.[xxviii] On the other hand, a mistake as to the attribute of the subject matter renders the contract voidable but not necessarily void.[xxix] Thus, the buyer is given the right to revoke as prescribed in Article

310 of the *Mejelle*. "When the seller has sold a property of some good quality, if that property turns out to be without that quality the buyer has an option. If he wishes the sale to be annulled, and if he wishes, he accepts the thing sold for the whole price named. This is called option on account of description (*khīyār al-waÆf*)."

The third category would be mistake as to value, which is always associated with flagrant misrepresentation (*ghabn fā®ish*).[xxx] Mistake as to value takes place when the contracting parties are unaware of the real price and value of the subject matter. The contract is defective on the ground that if they had known of the true price, they would never have concluded the contract. Ibn Nujaym opined that when a seller fraudulently misrepresents the price of a thing (subject matter) and the buyer purchases the thing, and where it varies considerably from its real price, the buyer has the right to return the item.[xxxi]

VIII. CHOICE OF LAW

Choice of law revolves around what legal principles a dispute resolution forum will apply to resolve the case at hand. Generally speaking, a country that claims jurisdiction does not necessarily have to apply its own laws to that case. The parties to a contract may decide to apply another state's laws instead of that of the state. However, in a typical online transaction, the customer is in one jurisdiction and the e-merchant in another. The payment for the product is made by way of electronic cash issued by a virtual bank situated in a third jurisdiction and most likely, the product actually sold is manufactured in a fourth jurisdiction. So which is the jurisdiction that has the closest connection with the online contract? This is one vexing question that no one single national legislator is able to resolve. The most practical approach however is for the online Islamic e-merchant to elect and to specify the choice of governing law in the online contract itself. Viability and feasibility of Islamic law principles governing online cross-border transactions are very much uncertain, at least in this point in time. As a suggestion, parties to the contract could agree to settle disputes by arbitration or by amicable settlement (*Æul®*). It avoids resorting to the court where conflicts over jurisdiction and governing law would never end. Though, rules and regulations relating to arbitration and amicable settlements would have to comply with Islam.

IX. METHODS OF PAYMENT

Conventional payment instruments such as cash, bank drafts and bills of exchange, are obviously not suitable for the speed required in e-commerce purchases. There is a wide range of payment systems currently deployed in retail transactions on the Web. Some systems are suitable for high value transactions, while other systems are more suited to low value transactions. Examples of payment systems presently in use on Web retail transactions include credit cards, charge cards, debit cards, electronic cash and electronic checks. They are basically designed as electronic analogs of various forms of payment backed by a bank or financial institution.

It appears that Islamic law has no objection to these forms of payment as they do not contradict any known *sharī^ca* principles. As previously said, the *sharī^ca* is technology neutral. The only reservation would be transactions where the *sharī^ca* has insisted on spot payment, such as in the case of foreign currency exchange and sale of *salam*.[xxxii] The other relevant issue is the aspect of security. Credit card details can be exposed to parties not related to the contract. Among the security measures that have been developed so far is the use of encryption technology to encode information prior to its release onto the Internet. Most PC browsers are fitted with the Secure Socket Layer ("SSL") protocol to authenticate the server system and encrypt the data stream automatically.[xxxiii] Another is the use of electronic cash.[xxxiv]

X. THE RIGHTS AND LIABILITIES OF ISLAMIC BANKING PORTALS

It is anticipated that the various Islamic banking portals will assist both customers and product providers in completing their transaction, be it in-house financing, vehicle financing, Islamic insurance, investments in certain funds, investment in the stock market, and the like. Their function is merely to introduce products relevant to the needs and desires of online customers. The actual seller, lessor, or partner as the case may be is the financial institution that signed the agreement with the customer.

Are portal and service provider companies liable for any defect and misrepresentation? The answer to this question depends largely on the nature of the contract between these portals and the financial institutions. Should there be an agency contract between the two, then these portals are equally liable for any fraud or misrepresentation as discussed earlier. However, should financial institutions engage Islamic portals just as an advertiser, then there is no liability to these portals should there be any fraud or misrepresentation. It is therefore advisable for Islamic

banking portals to incorporate an exclusion clause in the contract to the effect that the advertiser is and shall not be liable for damage caused by defective goods advertised on their web pages.

XI. CONFIDENTIALITY AND PROTECTION OF PERSONAL INFORMATION

Many countries provide laws to protect confidential information and trade secrets. The general law of confidence protects information that is transmitted under an obligation of confidence from unauthorized disclosure or use. Information that should not generally be in the public domain, particularly in an e-commerce context, are employee or customer medical records or credit card numbers, technical details of industrial processes, business ideas, customer lists, and price lists. Obligations of confidence can arise independently of, and parallel to, any contract, as long as the information was communicated under an express requirement of confidentiality or in circumstances that would reasonably give rise to such an obligation.

Islamic law would also protect the privacy of a transaction and its parties. An online Islamic e-merchant is likely to possess some confidential information. They should therefore have an information management policy in place. For example, security measures such as employee access controls, express confidentiality clauses in employee contracts, corporate firewalls, offline Internet data storage, regular security and system audits, and the use of encryption technology. Safeguarding from negligent disclosure also minimizes potential liability.

XII. METHODS OF INCORPORATION OF TERMS

It has been observed that most online contracts are pre-drafted standard form contracts, offered on a "take-it-or-leave-it" basis. Although this approach would be prima facie acceptable within the *sharīʿa*, it is however questionable in many countries. They stipulate that a party is not bound by standard terms of a contract unless sufficient steps have been taken to bring the terms to their attention.

There are various techniques for designing Web sites to maximize the chances that a court will find that the online customer was aware of the online terms and conditions and that true acceptance of them did occur. Terms and conditions should be clearly sign-posted, be ready for print, and be available to customers for future reference.

Some common methods of displaying terms and conditions online are as follows:[xxxv]

1. Reference to terms without a hypertext link by merely including a statement, such as, "This contract is subject to the terms and conditions of this company." This method may be the simplest form from the perspective of an e-merchant but will probably fail the reasonable notice requirement. Customers are unlikely to be aware of terms that were not made accessible for their viewing.
2. Reference to terms with a hypertext link, where a reference statement may be linked to another web page containing the standard terms. This method achieves some legal credibility and may satisfy the reasonable notice requirement for usual terms, but possibly not the more onerous ones.
3. Display of terms in a dialogue box. At the final stage of an order (e.g. after a review of the order), the customer is made to scroll through the terms set out in a dialogue box before clicking on the "Submit and I accept the above terms" button.

As far as Islamic law is concerned, the last method appears to be the most satisfactory. The customer is forced to review the terms (or acknowledge having reviewed the terms) and then must agree to the terms through some positive action (like the "click"). The purpose of insisting on this method is to provide greater transparency to the customer. Customers will understand that these terms form the legal part of the online contract. In Islamic law, any agreement must be *gharār*-free as well as mistake-free. Hence, the onus is on the Islamic e-merchant to provide the most detailed information about the transaction.

XIII. CONCLUSION

Electronic and online banking, Islamic or conventional, has similar requirements to that of offline banking. There are great similarities to most principles of law. However, both do differ in the manner in which these principles are satisfied. This is not surprising, as the nature of communications between the bank and the customer as in e-banking, is faceless and relatively quick. This paper has highlighted a few issues deemed to be relevant to Islamic electronic banking activities. It has equally argued in favor of certain legal principles to which operators of online Islamic banking should adhere. The legal and *sharīʿa* issues discussed were not meant to be exhaustive. New

issues will continue to emerge both in proportion to technical knowledge of online banking and to technical developments in information technology.

[i] According to a source, there are five Islamic banking portals operating from their respective Web sites: i.e., iHilal.com (Dubai), online.com (Jersey), riba-free.com (London), IslamiQ (Kuala Lumpur and London), and Muslim eFinancials, Inc. (McLean, Virginia). See Islamic Banker 54 (July 2000).

[ii] It is worth noting that the *῾illa* or the *ratio decidendi* of the formation of a valid contract in Islamic law is the connection of both offer and acceptance, instead of the consent itself, as the consent (*ri∞ā'*) or mutual consent (*≤ara∞ī*) is an attribute that is not evident and not constant; thus it did not qualify to be the basis of the ruling.

For details, see al-Shawkani. *Irshad al-Fuhul ila Tahqiq al-ßaqq min 'Ilm al-Usūl*. pp. 2-7-208.; Bakar, Mohd. Daud. "A Note on *Qiyas* and *Ratio Decidendi*." IIUM Law Journal 4 (1994). pp. 79-80.

[iii] See the decision of the International Islamic Academy of *Fiqh* (no. 52). *Majallah Majma' al-Fiqh al-Islami* 6(2) (1990).

[iv] See Ibn Taymiyyah. *Majmu' al-Fatawa* 29. p. 16; al-Shirazi. *al-Muhadhdhab* 1. p. 258; Ibn Qudamah. *al-Mughni* 6. p. 354; al-Kasani. *Badai' al-Sanai'* 5. p. 635.

[v] Online transactions could involve the sale of goods and services, or a direct online transfer of information. The latter kind of transaction uses the Internet as the medium of communication as well as the medium of exchange.

[vi] Article 101, *Majallah al-Ahkam al-῾Adliyyah*. The translation is taken from Hooper, C.A. The Civil Law of Palestine and Trans-Jordan 1. Jerusalem: Azriel Printing Works, 1933. p. 31.

[vii] According to English common law, this principle is well established in Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd. [1953].

[viii] Al-Dasuqi. *Hashiyah al-Dasuqi* 3. p. 4.

[ix] Musa, Muhammad Yusuf. *al-Amwal wa Nazariyyat al-'Aqd*. Cairo: Dar al-Fikr al-Arabi, 1953. p. 258. According to the author, the doctrine of the unity of the session of contract is meant for the interest of the contracting parties, but this view has been rejected by some Western Islamicists. See Rayner, S.E. The Theory of Contracts in Islamic Law. London: Graham & Trotman, 1991. p. 107; Owsia, Parviz. Formation of Contract: A Comparative Study Under English, French, Islamic, and Iranian Law. London: Graham & Trotman, 1994. p. 475.

[x] Al-Kasani, *supra* 7. p. 138.

[xi] Ibid.

[xii] Ibn al-Humam. *al-Fath al-Qadir* 7. p. 138.

[xiii] This is in line with the decision of the International Islamic Academy of *Fiqh*, 1990.

[xiv] Ibn 'Abidin. *Radd al-Muhtar* 4. 1252 H, vol. 4, p. 29; al-Kasani, *supra* 5. p. 137.

[xv] Malik. *al-Muwatta'*. Cairo: 1310. With commentary by al-Zurqani, vol. 3, p. 136.

[xvi] See al-Zuhayli. *al-Fiqh al-Islami* 4. pp. 108-109; Shammam, Muhammad. "Research Paper" in *Majallah Majma' al-Fiqh al-Islami* 2(6) (1990). p. 916. Under common law principles, an acceptance sent by mail is deemed effective upon mailing.

[xvii] Ibn al-Humam, *supra* 5. p. 274; *al-Fatawa al-Hindiyyah* 3. p. 3.

[xviii] Al-Sanhuri. *Masadir al-ßaqq* 2. p. 56.

[xix] al-Qaradaghi, 'Ali Mahy al-Din. "Research Paper" in *Majallah Majma' al-Fiqh al-Islami* 2(6) (1990). p. 949.

[xx] The reference is made to Islamic banking practice in Malaysia.

[xxi] See *Sharī῾a* Standard on Dealing in Currencies, prepared by the Accounting and Auditing Organization for Islamic Financial Institutions, Bahrain, 2000. pp. 15-16.

[xxii] See al-Jaziri. *al-Fiqh 'ala al-Madhahib al-'Arba'ah* 2. p. 143.

[xxiii] Al-Tirmidhi. *Sunan al-Tirmidhi* (*Kitab al-Ahkam*) 4. p. 584.

[xxiv] Vohrah, Beatrix and Wu Min Aun. The Commercial Law of Malaysia. Kuala Lumpur: Longman, 2000. pp. 194-196.

[xxv] Al-Sabuni. *al-Madkhal li Dirasat al-Tashri' al-Islami* 2. Damascus: Matba'ah Riyad, 1974. p. 167.

[xxvi] Madkur. *al-Fiqh al-Islami: al-Amwal wa al-Huquq wa al-'Uqud* 2. Beirut: Dar al-'Ilm li al-Malayin, 1983. p. 570.

[xxvii] al-'Aisawi, Ahmad. *al-Madhkal fi al-Fiqh al-Islami*. Cairo: Dar al-Ta'lif, 1985. p. 525

[xxviii] Al-Suyuti. *al-Ashbah w al-Naza'ir*. p. 341.

[xxix] Al-Shalabi. *al-Madkhal*. pp. 584-586.

[xxx] Article 65 of the Mejelle defined *ghabn fā®ish* as excessive deception in value of goods sold, not according to market price.

[xxxi] Ibn Nujaym. *al-Ashbah wa al-Naza'ir*. p. 85.

[xxxii] See the decision of The International Islamic Academy of *Fiqh* in *Majallah Majma' al-Fiqh al-Islami* 2(6) (1990). p. 1268. Mention should be made that the issuance and operation of both debit and charge cards is permissible. The position of the credit card is questionable, however, as it is based on interest. See *Sharī῾a* Standard

on Debit Card, Charge Card, and Credit Card, prepared by the Accounting and Auditing Organization for Islamic Financial Institutions, Bahrain, 2000, p. 35.

[xxxiii] Your Guide to e-Commerce Law in Singapore. Singapore: Drew & Napier, 2000. p. 51.
[xxxiv] Ibid.
[xxxv] Ibid. pp. 9-10.