



**Electronic Transactions Order,
2000 Of Brunei Darussalam**

**Electronic Transactions Order, 2000 Of Brunei
Darrussalam: An Islamic Legal Framework
Input in the Validity of Electronic Contracts**

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Abstract

Brunei Darussalam's government has committed \$1 billion in the e-Government and other ICT projects for the 8th Development Plan. Such an allocation reflects the serious effort of the government to move the nation into the new world of information technology. Brunei like other Asia-Pacific countries is committed in enhancing its capacity and competitiveness in meeting the challenges of the increasingly globalised world and in the ICT driven economy.

Brunei Darussalam has three Information Technology (IT) future strategic directions implemented under the Brunei IT strategic plan "IT 2000 and beyond". The three key IT strategies include a national drive towards paperless or information society, the public sector drive towards electronic government and the private sector drive towards electronic business.

The Regulatory Regime Governing the Internet in Brunei Darussalam is under many existing laws especially the two orders namely Computer Misuse Order 2000 and Electronic Transaction Order 2000. These two orders are introduced to address security threats of the anonymity in cyberspace in which Internet crimes are the hardest for law enforcers to detect.

The first order provides tough punishments for hackers, and the second order provides certainty and predictability in electronic transactions that includes offences relating to unauthorised accesses and unauthorised modification, a new term called 'protected computers' that is related to banking and communication infrastructure, military infrastructure as well as immigration.



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The Electronic Transaction Order is meant to encourage local businesses and consumer confidence in E-Commerce as it provides legal recognition of electronic transaction. It is substantially based on the Model Law on electronic commerce of the UN Commission on International Trade Law.

Brunei Darussalam considers Islam as its religion in its Constitution, hence, it is appropriate to analyze its law whether they are in accordance with Islamic teachings. This paper is an attempt to do so by focusing the discussion on the validity of electronic contracts according to Islamic law.

Keywords: Islamic law of contract, ICT in Brunei Darussalam, Electronic Transactions Order, 2000,

1. INTRODUCTION

The objectives of the Shari'ah pertain not only to the Afterlife but also to this world and may be summed up as the welfare of people in this world as well as in the Hereafter, this welfare comprising complete justice, mercy, well-being and wisdom. The Shari'ah objectives are to safeguard for human beings, their faith, their life, their intellect, their posterity and their property.

As one of the prime duties of man is to conduct his life in accordance with the will of Allah, the means of attaining the objectives of Shari'ah, whether mundane or spiritual, must be Islamically legitimate and consequently dominated by ethics. If one definition of economics is that it is a science whose chief purpose is to investigate the effects of various economic transactions and to define the ways which will assist in providing welfare, then, the economic order is necessarily among these means and ought to be Islamic : that is, it should be derived from the teachings of Islam.

The central notion of justice in the Shari'ah is based on mutual respect of one human being to another. The just society in Islam means the society that secures and maintains respect for persons through various social arrangements that are in the common interests of all members. Muslim scholars throughout the centuries have been aware of this fact since the demise of the Prophet (PBUH). Consequently, they learned and applied the Islamic injunctions to every aspect of life cautiously in order to avoid any contradiction. In this way, they formulated regulations and maxims for the conduct and dealings of Muslims and between Muslims and non-Muslim.



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Contracts are the basis of Islamic law of transactions. To make a contract, one party must propose a relationship to another party. That proposal is called an *al-ijab* (الإيجاب) or offer. Upon receipt of the offer, the second party must respond in some way. If he agrees to the proposal, there is a *al-qabul* (القبول) or acceptance and *al-natijah* (النتيجة) or agreement result. Both parties must agree to the same terms and there must be mutuality.

Earlier Muslim jurists have formulated a system for every known contract in their days, so, contemporary scholars could derive a general theory of contract from such systems. Consequently, we might find definitions of contract, its essential requirements and conditions as well as the rules which were deduced by them from the sources for each contract. In this way we can move from the analytical-investigative state of specific cases which our previous jurists have followed to the structural method or the general theories which our contemporary jurists follow.

This paper is attempt to apply such teaching on a modern legislation relating to electronic contract in Brunei Darussalam through its Electronic Transaction Order 2000.

2. THEORY OF CONTRACT IN ISLAMIC LAW

Contracts are an essential part of the economic system of free enterprise, hence Islamic law gives special protection to contracts. Without such protection, people would find it very difficult to plan transactions. The right to make and carry out contracts is fundamental to liberty and is protected by Islamic law. Its faithful execution is a duty as stated by the Quran to the effect: "*O you who believe! Perform your contracts.*"¹

2.1 The Nature of Contract in Islamic Law

All contractual relationships start with the fulfillment of a simple equation:

$$\text{offer} + \text{acceptance} = \text{mutual assent}$$

Without mutual assent - consisting of both an offer and an acceptance - the relationship between the parties is not contractual.

Before one can understand the rules for making enforceable contracts, one must know what a contract is and what elements are necessary for a contract to be valid.

¹ Surah al-Maidah: 1



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2.2 The Meaning of Contract

The Arabic word for contract is "'*aqd* عقد" which literally means "tying, knitting; joining, locking."² This tying or joining implies to a conjunction whether sensory or spiritual; from one side or from both sides. This linguistic meaning applies to the technical meaning of 'aqd in the view of Muslim jurists. According to them 'aqd has two meanings; general and specific. As for the general meaning which is nearer to the linguistic meaning and is prevalence among the Malikis, Shafi'is and Hanbalis, it is whatever a person has decided to do it whether such decision is one-sided as in endowment, and *ibra* إبراء (remission of debt), or needs to bilateral as in sale, hire and agency. This meaning includes the obligation, whether from one person or from two persons. In other words, 'aqd is an exchange of promises between two or more parties or an exchange of a promise for an act between two or more parties. This exchange results in an obligation to do or to refrain from doing some lawful act.

But, as for the specific meaning of 'aqd, it is the connecting, in a legal manner, of the offer and the acceptance, in a way which will be a clear evidence of their being mutually connected. Thus, a contract, essentially, is a promise or set of promises which a court will enforce. This means that the promises are legal contracts, not illegal ones like contracts to commit arson or killing. It also means that legal contracts do not include social obligations like promising someone to come to his house.³

Therefore, when the parties satisfy all the requirements of a contract, Islamic law recognizes and enforces this obligation. By a contract, parties agree to impose legally enforceable duties on themselves that did not exist before.

It is to be noted that the term "*iltizam* التزام" or "obligation" is similar to the term "contract" in its general meaning as mentioned above because obligation is any conduct that comprises of establishing, transferring or amending and ending a right whether it is effected by one party like an endowment, remission of debt, and divorce without compensation, or by two parties like sale, hire and divorce with compensation. On the other hand obligation differs from contract in its specific meaning because the

² Z. Madina, *Arabic-English Dictionary...*, v. 'a-qa-da.

³ Cf. al-Zuhaili, *al-Fiqh al-Islami wa Adillatuhu*, vol. IV, p. 81; Clark & Kinder, Lawrence S & Peter D, *Law and Business*, (USA: McGraw-Hill, Inc., 1986), p. 107.



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latter is only confined to a specific type of the former, that is, whatever issued by two persons like sale, hire, mortgage, etc.

Furthermore, it is to be noted that there is a difference between 'contract' and 'obligation' on the one hand and '*tasarruf* تصرف' (conduct or disposition) on the other. '*Tasarruf*' may be defined as any saying or action that is issued by a person, willingly, in which the Islamic law assigns a legal effect whether it is in favour of such person or not. *Tasarruf* or conduct is therefore more general than 'contract' and 'obligation' for it includes sayings and actions, whether they give rise to obligations or not. It might be that oral conduct as allegations and admission is not included to the meaning of contract even in its widest or general meaning.⁴

A contract in Islamic law is simply a legally recognized undertaking. This is not the precise equivalent of the technical term "contract" in Western Jurisprudence, which involves, certainly at Common Law, the two basic essentials of agreement and consideration. In Islamic law a contract does not necessarily involve an agreement because the term is used to describe a unilateral juridical act which is binding and effective without the consent of any other party - for example, the repudiation of a marriage by the husband or, in times past, the formal manumission of a slave. Nor does a contract necessarily involve consideration. A gratuitous loan, a gift, or a bequest, for examples, are all parts of the system of contracts recognized by Muslim jurisprudence. Accordingly, while '*uqud* (عقود)' may be translated as "contracts" because the term normally refers to legal transactions which are concluded by an offer from one party and an acceptance from the other, it must be emphasized that a contract in Islamic law means no more and no less than a legal undertaking, the essentials of which are very different from the binding promise which constitutes a contract in Western law.

2.3 Types of Contract

Earlier Muslim jurists did not categorize contracts to various types explicitly, but if we need to categorize such contracts we can do so by considering various aspects relating to the contracts. In regard to the existence of special regulation given by Islamic law, a contract might be divided into '*aqdun musamma* عقد مسمى (named contract) and '*aqdun ghayr*

⁴ See al-Zuhaili, *al-Fiqh al-Islami wa Adillatuhu.*, vol. IV, p. 82-3.



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musamma عقد غير مسمى (unnamed contract). As for the conditions of the conclusion of a contract, a contract might be divided into 'aqdun ridai' عقد رضائي (consensual contract) and 'aqdun shakli' عقد شكلي (configurative contract). In terms of obligation, contracts might be divided into 'aqdun mulzimun li janibin wahid' عقد ملزم لجانِب واحد (unilateral contract) and 'aqdun mulzimun li janibain' عقد ملزم لجانِبين (bilateral contract). With respect to compensation, contracts may be divided into 'aqd mu'awadah' عقد المعاوضة (compensational contract) and 'aqd tabarru' عقد التبرع (gratuitous contract). And finally, with respect to the execution of contract, it might be divided into 'aqd fawri al-tanfidih' عقد فوري التنفيذ (constant executed contract) and 'aqd mustamir al-tanfidih' عقد مستمر التنفيذ (continuous executive contract).⁵

It is important to note that these categories are not mutually exclusive; a contract may fall into several different categories. In the Islamic law of contract, classification is important since rules for contracts may differ depending upon the category to which a contract belongs.

2.4 A Legal Maxim on Contract

When a person buys an item from a seller and says : "Keep this item in your trust until I come and pay its price." What do we consider this agreement or contract? If we look to the word "your trust" we will say that such contract is a trust but when we look to the meaning it is a mortgage. Which of the two states will prevail? The word or the meaning of such contract? If we prefer the former we will consider such a contract as a trust and all rules relating to trust shall apply to it, but if we prefer the latter then all rules relating mortgage will apply to it.

The Muslim jurists have examined this question and formulated a maxim, although the wording differs the meaning remains the same. Shafi'i jurists have formulated it by the question: "Is consideration given to the contractual form or to their meaning ?"⁶ Hanbali jurists formulated it as "In most cases is consideration given to the word or meaning ?"⁷ But Hanafis

⁵ Cf. Hasanain Yusuf Ghanaim, *al-Madkhal Li Dirasah al-Qanun* (Kuwait: Matba'ah Ma'had al-Tijari li al-Banin, 1986), pp. 147-8; al-Zuhaili, *al-Fiqh al-Islami wa Adillatuhu*, vol. IV, p. 234.

⁶ Al-Suyuti, Abdul Rahman Ibn Abi Bakar, *al-Ashbah wa al-Nazair Fi Qawa'id Wa Furu' Fiqh al-Shafi'iyah* (Cairo: Dar Ihya al-Kutub al-'Arabiyyah, n.d.), pp. 183-4.

⁷ Al-Hanbali, Abdul Rahman Ibn Rajab, *al-Qawa'id Fi al-Fiqh al-Islami*, (Beirut: Dar al-Ma'rifah, n.d.), Qa'idah 38th, p. 49.



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and Malikis follow the maxim : "In contract effect is given to intentions and meanings not to words and phrases العبرة في العقود المقاصد والمعاني لا المباني والألفاظ"⁸ Thus, there is a confusion according to Shafi'is and Hanbalis regarding the maxim pertaining to contracts whether the word or the meaning should be considered. However for the Hanafis and Malikis such confusion does not occur for in case of conflict they have preferred the meaning unless there is a difficulty in reconciling the word and the meaning. Even in that case it would appear from the Malikis' statements that they prefer the meaning.

The meaning of such maxim according to the Hanafis is "When a contract is concluded, effect will not be given to the words which are used by the two parties to the contract but effect will be given to the real intentions of the words which they have uttered because the real aim is the meaning not the words or the context in which they are used because the words are only the moulds of the meaning. But when a reconciliation is not feasible between the words and the intended meanings, it is not allowed to defeat the words."⁹

Returning to the case proved above, such case is considered as a mortgage not a trust because the meaning of such contract is mortgage although the word "trust" was used. Mortgage may be defined as the detention of a thing on account of a claim which may be satisfied out of that thing.¹⁰ It could not be considered a trust for in a trust the trustor deserves to get back such trust and the trustee should return it when asked¹¹ and this meaning is excluded from such contract because the ownership of such item has not been transferred yet to the buyer.

3. THE VALIDITY OF A CONTRACT IN ISLAMIC LAW

3.1 Essential Requirements and Conditions of Contract

For its validity, the Islamic law of contract requires and specifies the presence of certain components or essential requirements or *rukun* ركن and

⁸ Ibn Nujaim, Zainuddin Ibn Ibrahim, *al-Ashbah wa al-Nazair* (Beirut: Dar al-Kutub al-Ilmiyyah, 1400 H), p. 207; *the Majallah*, Art. 3.

⁹ Al-Burnu, Muhammad Sidqi, *al-Wajiz fi Idah Qawa'id al-Fiqh al-Kulliyah*, (Beirut: Muassasah al-Risalah, 1403), pp. 66-7.

¹⁰ See al-Shirbini, Mughni al-Muhtaj..., vol. II, p. 121.

¹¹ Al-Burnu, *al-Wajiz fi Idah Qawa'id...*, p. 67.



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condition or *shart* شرط. If a transaction does not fulfill them, then such transaction may not be enforced.

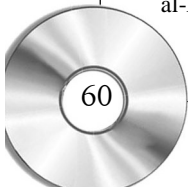
Based on the foregoing fact, Muslim jurists have formulated and specified the essential requirements and condition for a contract. Their discussion of such formulation and specification has different approaches. Although these different approaches exist but the factual matters of any transactions are the same. In other words, these differences are only concerning the terminology that will not affect the result of transactions.

According to the Hanafi jurists, the essential requirements of a contract or transaction are *ijab* and *qabul* offer and acceptance) or whatever replaces them.¹² Thus, the element of transaction is anything that expresses an agreement of the offer and acceptance or that replaces the two such as an action or a signal or writing. As for the other elements such as the subject-matter and the two contracting parties, they constitute the necessities for concluding a contract but not its essential requirements for the existence of an offer and an acceptance necessitates the existence of the two contracting parties and their relationship will not exist without the existence of the subject-matter as the result of such connection. This means that offer and acceptance are the pivot of contractual agreement because a contract is a legally binding agreement. The agreement results from the acceptance of a legal proposal. For an agreement to be valid, there must be a proper offer and a proper acceptance. An offer states what the offeror will do and what he expects in exchange. It also gives the offeree the power to accept the offer thereby to create an agreement between the parties.

On the other hand, the majority of the jurists have another approach in considering the essential requirements for a contract. They are in agreement that, generally, a contract has three essential requirements, that is, the contracting parties, the subject-matter and the formation.¹³ But,

¹² Kasani, *al-Bada'i wa al-Sana'i...*, vol. V, p. 133; al-Zuhaili, *al-Fiqh al-Islami...*, vol. IV, p. 92; Muhammad Amin, Ibn 'Abidin, *Radd al-Muhtar 'Ala Durr al-Mukhtar* (Pakistan: Maktabah Rashidiyyah, 1st ed. 1399/1979) vol. IV, p. 5.

¹³ Al-Dasuqi, Muhammad Arafah, *Hashiyah al-Dasuqi 'Ala al-Sharh al-Kabir* (Cairo: Dar Ihya al-Kutub al-Arabiyyah, n.d.), vol. III, p. 3;
- Abu al-Barakat Sayyidi Ahmad al-Dardir, *al-Sharh al-Kabir* in Muhammad Ibn Muhammad al-Maghribi, al-Hattab, *Mawahib al-Jalil Li Sharh Mukhtasar Khalil* (Beirut: Dar al-Fikr, 2nd ed., 1398/1979), vol. IV, p. 228;
- Muhammad Ibn Yusuf al-Abdari, *al-Muwaq, al-Taj Wa al-Iklil Li Mukhtasar Khalil* (Beirut: Dar al-Fikr, 2nd ed., 1398/1979), vol. IV, p. 221;





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actually, these three essential requirements are five in the view of the Malikis¹⁴ and six in the view of the Shafi'is.¹⁵

However, such essential requirements might extend to more than six elements. In *hawalah* الحوالة (transfer of debt), for instance, there are seven essential requirements that is, the contracting parties - *muhil* محيل the first debtor who wants to release his debt and he is also the creditor of the second debtor, *muhtal* محتال (the creditor), *muhil 'alaih* محال عليه (the second debtor), the subject-matter - the debt of *muhil* to the *muhtal* and the debt of *muhil 'alaih* to the *muhil*, and the formation - the offer and the acceptance.¹⁶ However, this difference as to the numbers of the essential requirements is only in the terms of the terminology used which does not affect the essence of the transaction.

By making a contract, parties incur legal obligations and own liabilities. They agree to carry out the terms of an agreement, and Islamic law protects and enforces their exchange of promises. A transaction may be quite simple: it may be expressed verbally and formalized by a handshake or a nod of the head. A contract also may be formal: it may be drafted by legal experts, signed by both parties, witnessed, notarized, and registered with a government agency. Verbal contracts are usually concluded for small purchases, but written contracts are advisable for serious transactions.

Although there may be said to be a similarity between *rukun* (essential requirement) and *shart* (condition) but the two are different in respect of whether they partake in the essence of a thing or not. While *rukun* partakes in the essence of a thing, *shart* does not.¹⁷ The contracting parties are an

- Muhammad Ibn Muhammad al-Ghazali, *Ihya 'Ulum al-din* (Cairo: al-Maktabah al-Tijariyyah al-Kubra, n.d.), vol. II, p. 64; al-Shirbini, *Mughni al-Muhtaj...*, vol. II, p. 3;

- Mansur Ibn Yunus al-Bahuti, *Kashshaf al-Qina' 'An Matn al-Iqna'* (Beirut: Dar al-Fikr, 1402/1982), vol. III, p. 146.

¹⁴ Ibn Juzay, *al-Qawanin al-Fiqhiyyah...*, p. 258; al-Hattab, *Mawahib al-Jalil...*, vol. IV, p. 228. (In sale, for example, the essential requirements are; the contracting parties, formation - the offer and the acceptance - and the subject-matter - the item and the price. The contracting parties are considered one essential requirement because they have similarity in their conditions)

¹⁵ al-Shirbini, *Mughni al-Muhtaj...*, vol. II, p. 3. (In sale contract, for example, the elements are; the contracting parties - the seller and the buyer, the subject-matter - the item and the price, and the formation - an offer and an acceptance)

¹⁶ See Amin Abdul Ma'bud Zaghul, *Nazariyyah al-Tawthiq Fi al-Shari'ah al-Islamiyyah* (Kuwait: Maktabah al-Saffar, 1st ed., 1404/1980), p. 229.

¹⁷ See Sha'ban, *Usul al-Fiqh...*, p. 210; Kamali, *Principles of Islamic Jurisprudence...*, p. 428; Hitu, *al-Wajiz fi Usul al-Tashri'...*, pp. 50.



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essential requirement of a transaction and sanity is a condition for the contracting parties. The former partakes in the essence of such contract but the latter does not because it is a condition of the former and is a complementary part of such contract.

The conditions of a contract are intended to accompany the inception of secular transactions and to regulate them once in operation, to make sure that neither of the contracting parties suffers wrongs at the time the agreement is reached and furthermore that neither of them will suffer such wrongs during the implementation of the agreement. It is the main concern of the Islamic law of contract, if not of the whole Islamic legal system, that no party should be allowed to suffer any undue burden from a given transaction when it is possible. Thus, the condition normally complements the cause and gives it its full effect. In other words, the legal consequences of a contract are not fully realized without the fulfillment of its necessary essential requirements and conditions.

3.2 Types of Conditions

The Ulama of Usul al-fiqh have examined types of condition in their discussion and they have divided the conditions into two types, namely, conditions with regard to its application and conditions with regard to its source.

With regard to its application, conditions are classified into two :

First, the condition which affects the cause, meaning that the condition complements the cause and gives it its full effect. Sanity, for example, is the cause of the validity of a contract on condition that it occurs besides the existence of the other conditions.

Second, the condition which affects the rule, it means that the rule of something exists when the condition is present. The lawfulness of subject-matter in a contract, for instance, is a condition for the existence of the rule of the validity of a sale contract. When such lawfulness is not fulfilled, the sale contract is invalid.¹⁸

And, conditions with regard to the source are subdivided into legal condition (*shart shar'i* شرط شرعي and improvised condition (*shart ja'li* شرط جعلي).

¹⁸ Cf. Sha'ban, *Usul al-Fiqh...*, p. 210; Kamali, *Principles of Islamic Jurisprudence...*, p. 427-8; Faidullah, *al-Ilmam bi Usul al-Ahkam*, p. 128.



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First, a legal condition is a condition laid down by the Lawgiver. This kind of condition comprises all cases which are stipulated by the Lawgiver concerning worship, contracts and legal actions. Ablution, for example, is a condition for the validity of prayer, witnesses are a condition for the validity of a marriage contract and consent is a condition for transferring property in sale contract.

Second, improvised condition is a condition laid down by the *mukallaf* $\text{\u0627}\text{\u0628}\text{\u0627}\text{\u0649}$ (person in his legal capacity). This condition is further subdivided into two kinds;

1. Suspended improvised condition (*Shart ja'li mu'alliq* شرط معلي معلق). This means that the mukallaf himself has enacted something as a condition for the effect of his legal action or obligation with the proviso that he has suspended such effect on the existence of that thing. When such thing does not exist, it effects his legal action or obligation. For example, a person who has made endowment of his land to a society providing that such society should devote itself to the educational field. In this case, the person who made such endowment has suspended the existence of the endowment on the devotion of such society to educational field. Hence, if such activity has been carried out the rule of endowment is effective while this effect is enacted by the mukallaf.

2. Qualified improvised condition (*Shart ja'li muqayyid* شرط جعلي مقيد). This condition means that the mukallaf has qualified himself by an additional obligation¹ such as where the investor in mudarabah partnership has stipulated that the agent should only deal with Muslim consumers.

3.3 Freedom of Making Stipulation

Muslim jurists agree that when a contract has fulfilled its essential requirements and conditions it becomes an obligation to the contracting parties for the Holy Quran states to the effect: "*O you who believe! fulfil your contracts.*"¹⁹ And it also states to the effect: "*And fulfil (every) engagement, for (every) engagement will be inquired into (on the day of Reckoning).*"²⁰

¹⁹ Surah al-Maidah: 1

²⁰ Surah al-Isra: 34.



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Most schools of Islamic law hold that in secular matters permissibility is the rule unless there is prohibition but when this principle is put into practice, these schools are reluctant to allow the contracting parties to a given contract to change the pattern of that contract as defined by the Shari'ah by way of adopting supplemental stipulations which alter its effects. Permissibility is in any case tempered by a set of requisites which narrow to some extent the avenue open to the contracting parties for determining their terms and conditions absolutely.

3.4 Classification of Stipulation

In Islamic law the stipulations may be classified into three categories - valid, null and voidable stipulation.

3.4.1 Valid Stipulation

A stipulation is valid when it is necessary to the contract itself²¹ such as taking possession of the price and the item sold;²² or when it is appropriate to the contract such as the vendor asking for a pledge to secure payment of a sale price;²³ or when it determines a specific benefit such as a stipulation for allowing the seller to stay for one month in the house sold;²⁴ or when it provides a specific description such as that the sold animal should be pregnant;²⁵ or when the Shari'ah encourages such stipulation as the stipulation of option;²⁶ or when the stipulation is customary to the inhabitants of the place where the contract is concluded such as giving guarantee by the seller.²⁷

²¹ In Arabic term it is *li muqtada al-'aqd* لمقتضى العقد which means the principle rules that ordained by Shari'ah for each contract whether they are stated directly by the Text or deduced by Mujtahids aiming at fulfillment the balance in rights among the contracting parties. (See al-Zuhaili, *al-Fiqh al-Islami...*, vol. IV, p. 203)

²² See al-Shirbini, *Mughni al-Muhtaj...*, vol. II, p. 34; al-Bahuti, *Kashshaf al-Qina'...*, vol. III, p. 189;

- Shamsuddin Abdul Rahman Ibn Qudama, *al-Sharh al-Kabir* in the bottom of Muwaffiquddin Abdullah Ibn Qudama, *al-Mughni* (Beirut: Dar al-Kitab al-'Arabi, 1983), vol. IV, p. 48.

²³ See al-Shirbini, *Mughni al-Muhtaj...*, vol. II, p. 32; al-Bahuti, *Kashshaf al-Qina'...*, vol. III, p. 189; Ibn Qudama, *al-Sharh al-Kabir*, vol., IV, p. 48.

²⁴ Al-Bahuti, *Kashshaf al-Qina'...*, vol. III, p. 190; Ibn Qudama, *al-Sharh al-Kabir*, vol. IV, p. 49.

²⁵ Al-Shirbini, *Mughni al-Muhtaj...*, vol. II, p. 34.

²⁶ Al-Shirbini, *Mughni al-Muhtaj...*, vol. II, p. 32; al-Zuhaili, *al-Fiqh al-Islami...*, vol. IV, p. 204.

²⁷ Al-Zuhaili, *al-Fiqh al-Islami...*, vol. IV, p. 204.



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All mentioned stipulations are valid, in that the contract when concluded with such stipulations is valid and affective.

3.4.2 Null Stipulation

A stipulation is null when it is not necessary to the contract itself such as where the vendor requiring from the buyer that he shall not sell or otherwise dispose of what he has acquired;²⁸ or when it is not appropriate to the contract²⁹ such as requiring the party to do something which is not an obligation;³⁰ or when the Shari'ah does not recognize it³¹ such as stipulating riba in the contract; or when it is not customary to the people of certain place such as purchasing a car with the condition that the seller will be allowed to use the car for a time.³²

The above stipulations are ineffective and any of its will nullify the contract for it is contrary to the purpose of the Islamic law of transactions.

3.4.3 Voidable Stipulation

Another kind of stipulation is voidable one. It means that while a transaction is valid it may at the same time also could be considered null. It depends on whether the stipulation is cancelled though the contract remains³³ such as a stipulation that wine as a mortgaged item.³⁴ A voidable stipulation is of no advantage to any of the contracting parties. For example in the case of the sale of an animal with the condition that its new owner shall not resell it, then the condition is cancelled but not the contract.³⁵

4.5 Conditions of Formation (*Sighah* صيغة)

Lawful contracts create legal consequences. Islamic law emphasizes that the consent of the contracting parties should be the main pillar. It means

²⁸ See Ibn Qudama, *al-Sharh al-Kabir*, vol. IV, p. 54; al-Bahuti, *Kashshaf al-Qina'...*, vol. III, p. 193; al-Zuhaili, *al-Fiqh al-Islami...*, vol. IV, p. 204.

²⁹ Al-Zuhaili, *al-Fiqh al-Islami...*, vol. IV, p. 204.

³⁰ Al-Shirbini, *Mughni al-Muhtaj...*, vol. II, p. 34.

³¹ Al-Zuhaili, *al-Fiqh al-Islami...*, vol. IV, p. 204; al Bahuti, *Kashshaf al-Qina'...*, vol. III, p. 193.

³² Al-Zuhaili, *al-Fiqh al-Islami...*, vol. IV, p. 204.

³³ Cf. Ibn Rushd, *Bidayah al-Mujtahid...*, vol. II, p. 120; al Zuhaili, *al-Fiqh al-Islami...*, vol. IV, p. 205.

³⁴ See Ibn Qudama, *al Sharh al-Kabir*, vol. IV, p. 56

³⁵ See al-Bahuti, *Kashshaf al-Qina'...*, vol. III, p. 193; al-Zuhaili, *al-Fiqh al-Islami...*, vol. IV, p. 205.



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that a contract cannot exist unless someone has made an offer to enter into a legal relationship and another person has responded to it. An offer states what the offeror will do and what he expects in exchange. On the other hand, an acceptance shows an offeree's willingness to be bound by the terms of the offer. Hence, without the offeree's assent to the terms of such offer the parties have not agreed, and there can be no contract.

Islamic law gives effect to the intentions and meanings of the contract and rather than to the words and phrases used. Most of Muslim jurists of all Islamic law schools³⁶ have started their discussion on contract by examining its first pillar, i.e., sighth formation).³⁷ The reasons for such starting point of discussion as given by such Muslim jurists are "because of its smallness or because it is the first pillar in the existence of contract when an inter-exchange occurs. It is not true to say that the contracting parties come before the formation because the formation is a word or an action from him [each of the contracting parties] while after that comes his description.³⁸ or because it is most important for its controversy but it is more appropriate if it is said that the reason is because the contracting party and the subject-matter will not exist without it.³⁹

Muslim jurists have stipulated three conditions for the validity of formation in a contract. Such conditions are the clarity, the conformity and the communication of an offer and an acceptance.⁴⁰

4.6 Conditions of the Contracting Parties (عاقدان 'Aqidan)

The contracting parties are the pivot of the existence of a contract. Islamic law presumes that most people can evaluate, negotiate, and agree to the terms of a contract and that they can protect themselves from deceit, trickery, force, and mistake. But there are groups whose members cannot evaluate proposals or protect themselves from the dishonesty of others.

³⁶ Al-Ghazali (d. 505H), for example, has started the discussion with the contracting parties in his book *Ihya 'Ulum al-Din*, vol. II, p. 64. al-Shirbini (d. 977H) has supported it in *al-Mughni*, vol. II, p.3.

³⁷ See, for examples, Ibn Abidin, *Radd al-Mukhtar*..., vol. IV, p. 7; al-Dasuqi, *Hashiyah al-Dasuqi*..., vol. III, p. 3; al-Hattab, *Mawahib al-Jalil*..., vol. IV, p. 228; al-Shirbini, *Mughni al-Muhtaj*..., vol. II, p. 3; al-Bahuti, *Kashshaf al-Qina'*..., vol. III, p. 146; Ibn Qudama, *al-Sharh al-Kabir*, vol. IV, p. 3.

³⁸ Al-Hattab, *Mawahib al-Jalil*..., vol. IV, p. 228.

³⁹ See al-Shirbini, *Mughni al-Muhtaj*..., vol. II, p. 3.

⁴⁰ For detail see for example, Haqqi, *The Philosophy of Islamic Law of Transactions*, 84-86



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In order to show or establish capacity, it is essential that reason or intellect should be present. For an understanding of what is ordered in the law, the person addressed, should essentially be intelligent enough to understand what is said or ordered. In the absence of intelligence, it would be without use or effect to expect any result in the law. Human beings, differ in matters of personal intelligence; the law, therefore, provides an hierarchy of persons in accordance with the degree of their intelligence of power of mind.⁴¹

In the *Usul al-fiqh* discourses legal capacity or *ahliyyah* أهلية is discussed through the discourse of *hukm shar'iy* حكم شرعي or shara'i rule which is divided into the discourses of *al-hukm* الحكم (rule), *al-hakim* الحاكم (the Lawgiver), *al-mahkum 'alaih* المحكوم عليه (the person to whom the hukm is addressed), and *al-mahkum fih* المحكوم فيه (the subject matter of hukm). Legal capacity is the subject of the *al-mahkum 'alaih* discourse which looks into the question whether a person is capable of understanding the demand that is addressed to him and whether he comprehends the grounds of his responsibility. Thus, legal capacity or *ahliyyah* is a quality by which a person becomes fit for what he is entitled to, or for the discharge of legal obligations to which he is liable in the eye of the Shari'ah law.

Since the possession of the mental faculty of *'aql* عقل (intellect) is the basic criterion of *taklif* تكليف (juridical responsibility), Islamic law concerns itself with the circumstances that affect the sanity and capacity of the individual such as minority, insanity, duress, intoxication, interdiction and mistake. In the absence of intelligence, it would be without use or effect to expect any result in the law. Hence, the Shari'ah system correlates adulthood and sanity with intellect. Accordingly, the general competence to engage in legal transactions requires two basic qualifications: prudence and attainment of majority.⁴²

4.7 Conditions of the Subject-matter (*al-Ma'qud 'alaih* المعقود عليه)

Being the last pillar of a contract, *al-ma'qud 'alaih* has a meaning that is whatever is the object of a contract according to its rules and effects.

⁴¹ See Qadri, *Islamic Jurisprudence...*, pp. 244-5 ; Cf. al-Ba'li, *Dawabit al'Uqud...*, vol. I, p. 76.

⁴² Ibn 'Abidin, *Radd al-Muhtar...*, vol. IV, p. 5; al-Hattab, *Mawahib al-Jalil...*, vol. IV, p. 241; al-Shirbini, *Mughni al-Muhtaj...*, vol. II, p. 7; al-Bahuti, *Kashshaf al-Qina'...*, vol. III, p. 151.



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Islamic law regards agreements as coming into existence when one party induces another to change his legal position in some way. Inducements may consist of money, property, time spent working, or the surrender of a right. Thus, *al-ma'qud 'alaih* is the thing which the parties to an agreement promise to do or the thing one party gives in return for the act or promise of another. It is similar to consideration in the English law.

Not everything is suitable to be the subject-matter of a contract according to Islamic law. Wine, for example, is not suitable to become the subject-matter among the Muslims in their transactions. Hence, the jurists have stipulated four conditions for the subject-matter: it must exist or can exist; it can be delivered; it can be ascertained or known to the parties; and suitable for transactions or is recognized by the Shari'ah.

It is, however, to be noted that the schools of Islamic law have differed regarding such conditions. According to the Hanafis, the conditions for the subject-matter of a contract are property, valuable, legal, deliverable whether immediately or in future.⁴³ While according to the Malikis they are pure, useful, deliverable, legal, and known.⁴⁴ The Shafi'is conditions are like the Malikis with the difference that they are owned instead of being legal.⁴⁵ And according to the Hanbalis they are of a financial nature, owned, deliverable, and known.⁴⁶

From the above enumeration of conditions to constitute suitable subject-matter for a contract under the Islamic law, we may conclude that the subject-matter of a contract should be a pure thing, thus, an impure thing such as wine cannot be an object of Islamic contract; a useful thing, thus, a useless thing such as a handful of soil cannot be the object of Islamic contract; deliverable, meaning that the subject-matter could be delivered immediately or in the future; legal, meaning that such subject-matter is allowed to be dealt with by Islamic law; known, which means that the two contracting parties should know and ascertain the object of such contract;

⁴³ Ibn 'Abidin, *Radd al-Muhtar...*, vol. IV, p. 23 ff.;

- Kamaluddin Muhammad Ibn Abdul Wahid - Ibn al-Humam, *Sharh Fath al-Qadir* (Beirut: Dar al-Fikr, 2nd ed., n.d.), vol. VI, p. 248.

⁴⁴ Al-Hattab, *Mawahib al-Jalil...*, vol. IV, p. 258; *al-Muwaq, al-Taj wa al-Iklil...*, vol. IV, p. 258.

⁴⁵ Al-Shirbini, *Mughni al-Muhtaj...*, vol. II, pp. 11-2, 15-6;

- Abdullah Ibn Umar al-Baidawi, *al-Ghayah al-Quswa Fi Dirayah al-Fatwa* -Ali Muhyiddin Ali edt. (Baghdad: Dar al-Nasr Li al-Tiba'ah al-Islamiyyah, n.d.), vol. I, p. 460.

⁴⁶ Al-Bahuti, *Kashshaf al-Qina'...*, vol. III, pp. 152, 157, 162-3.



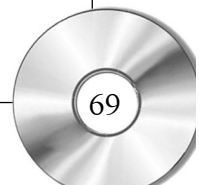
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financial thing meaning that the subject-matter has a value; and it is to be owned by one of the contracting parties. However, al-Subki (d. 771H) a Shafi'i jurist made an observation, quoted by al-Shirbini (d. 977H): "By investigation, the ownership and the usefulness are only the conditions [for the subject-matter of a contract] while the other conditions are not necessary. As for the stipulation of purity it could be included in the meaning of ownership for the impure thing is not acceptable to be owned [by a Muslim]. As for deliverability and certainty they are the conditions of the contracting parties."⁴⁷ This leads to the conclusion that in any contract, Islamic law requires two conditions for subject-matter. These conditions are the ownership of contracting parties of such subject-matter and such subject-matter should be useful. Such conditions are required by Islamic law to ensure that contractual rights and duties must be precisely specified and that any element of risk or uncertainty which would upset the contemplated balance of the rights and duties of the parties under the contract must be eliminated. Certainty and precise foreseeability of the rights and duties of the parties, are, therefore, a basic tenet of the Islamic law of transactions.

Furthermore, such conditions of subject-matter are required in order to fulfill some characteristics of Islamic teachings relating to the elimination of any disputation among its followers and precluding squandering of wealth among themselves in worthless dealings. There is no doubt that Islam as the religion of peace and order demanded its followers to adhere to its teachings. They are requested to deal with each other in peace and harmony, and to eliminate any disputation that might lead them to enmity and loss of their power. It is stated in the Holy Quran to the effect: "*And obey Allah and His Messenger; and fall into no disputes lest you lose heart and your power depart; and be patient for Allah is with those who patiently persevere.*"⁴⁸ Eliminating disputation could make for success and when it arises it could bring about humiliation and failure. On the other hand, Muslims are also requested not to squander their wealth among themselves in worthless dealings as a Quranic ayah states to the effect: "*O you who believe ! Eat not up your property among yourselves in vanities,*

⁴⁷ *Mughni al-Muhtaj*, vol. II, p. 11.

⁴⁸ Surah al-Anfal: 46





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but let there be among you trade by mutual good will."⁴⁹ These two principles of Islamic teachings have inspired Muslim jurists to regulate and formulate the guidelines for dealings among Muslims and others. To appreciate this teaching, the research examines the five conditions mentioned earlier.

4. BRUNEI ELEKTRONIC TRANSACTION ORDER 2000

4.1 Brunei at a glance

Brunei became a Muslim country in the 14th century, with the conversion of Awang Alak Betatar, the first Brunei ruler (raja) to adopt Islam. Under the subsequent Islamic sultans, Brunei expanded its role and became actively involved in trade and commerce, as well as conquering nearby islands and states. As with many countries in Southeast Asia, Brunei then fell victim to the European imperialists, achieving full independence only in 1984. Today, the country is ruled by the 29th Sultan in the direct line from the first Islamic Sultan who ruled in the 14th century. In the 1980s after achieving independence from Britain, the Sultan adopted, as the country's national philosophy, the *Melayu Islam Beraja* or Malay Islamic Monarchy. This national philosophy encompasses strong Malay cultural influences, stresses the importance of Islam in both daily life and in the functioning of the state, and calls for respect for the monarch as represented by His Majesty the Sultan. Since adoption of this philosophy, the country has pushed the development of Islam and is attempting to implement Islamic law and ideas in all realms.

Being a state where majority of the populations are Muslims, Islam has been made the official religion of Brunei Darussalam. In fact, Islamic laws have always been the governing laws in Brunei Darussalam even before the coming of the British.

There are evidences which show that Islam had come to Brunei since the 10th century.

However, its reception was slow probably because most of the populations during that

⁴⁹ Surah al-Nisa: 29)





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time were still holding on to their beliefs in Hinduism. Muslims were comprised of just a small section of the population including those traders who came to Brunei.⁵⁰ And it was believed that the acceptance of the Sultans and nobles had started the spread of Islam among the community. Awang Alak Betatar, the first ruler of Brunei, embraced Islam when he married the princess of Johore.⁵¹ He changed his name to Sultan Mohammad Shah and since then Islam slowly spread within Brunei.

4.2 Brunei and ITC

The Internet is clearly transforming the retail marketplace and e-business technologies have fostered an unprecedented range of innovations in business structure, distribution of wealth and indeed, redefined the way we do commerce. E-business allows more room for companies to compete. This is because information networks and technology conveniently make information more available or accessible to consumers, resulting in increased competition as well as better quality products and services at a reduced price.

Brunei like other Asia-Pacific countries is committed in enhancing its capacity and competitiveness in meeting the challenges of the increasingly globalised world and in the ICT driven economy.

The government has committed \$1 billion in the e-Government and other ICT projects for the 8th Development Plan.⁵² Such an allocation reflects the serious effort of the government to move the nation into the new world of information technology.

The \$1 billion budget will see the implementation of several projects over a period of time, which will create jobs along the way and also encourage the private sector to venture in the IT and IT related businesses.

⁵⁰ Prof. Dato Dr. Haji Mahmud Saedon A. Othman, "Ke Arah Pelaksanaan Undang-Undang Di Negara Brunei Darussalam", *Jurnal Undang-Undang Syariah Brunei Darussalam*, Januari-Jun 2002 Jilid 2 Bil. 2 p. 2

⁵¹ Pehin Jawatan Dalam Seri Maharaja Dato Seri Utama Dr. Haji Awang Mohd. Jamil Al-Sufri, *Tarsilah*

Brunei: Sejarah Awal dan Perkembangan Islam, Jilid 1, Pusat Sejarah Brunei 2001, p. 33.

⁵² *Borneo Bulletin*, 10/9/02, "Brunei Allocates \$1 Billion For ICT Projects"



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Subsequently, many people are optimistic of these ICT projects, stating that the \$1 billion budget will also create other non-IT jobs such as in the fields of administration, marketing, finance and public relations.

Because most of the projects are reserved for the full establishment of e-government, most of the future ICT related job vacancies will be in the public sector. And the job opportunities are largely to come from the implementation of the Sultanate's first Eco Cyber Park which, if completed, will likely to provide an excellent lure to beckon foreign firms to allocate branches in Brunei and thus bringing in jobs. A large chunk of the budget is for the construction of this state-of-the-art Eco Cyber Park.⁵³

The E-Government Executive Committee held its first meeting on the 24th March 2001, Saturday to discuss IT related strategies and programmes. This is the committee's first assembly, since its promotion from that of an interim committee. The session focused on the four-year plan to hold workshops and seminars for the further advancement of e-related services in ministries and government agencies.⁵⁴

The government has set year 2005 as the deadline for the full implementation of the E-Government system.⁵⁵

4.3 BIT

The Brunei Information Technology Council was formed by the command of His Majesty to ensure all necessary steps are taken to enhance IT national league competitiveness.

The BIT Council implements a strategic action plan encouraging use of information technology (IT) among ministries, departments and government agencies. The “e-Government Programme Executive Committee” is chaired by the Permanent Secretary at the Prime Minister’s Office.

The plan will support the public service foundation of Brunei’s goal in the 21st century.

In July 2001,⁵⁶ His Royal Highness Crown Prince Haji Al-Muhtadee Billah yesterday officially launched the BIT website.

⁵³ *Borneo Bulletin*, 22/10/02, “ICT projects to boost employment”.

⁵⁴ Government of Brunei Official Website, 27/3/01, “E-Government Executive Committee holds its first meeting”

⁵⁵ *Borneo Bulletin*, 28/8/02, “2005 deadline for e-Government”

⁵⁶ *bruDirect*, 10/7/01, “Crown Prince Launches BIT Website”.





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The website will highlight information about the council and its activities. It will also act as key means of disseminating IT related information, activities and services in the country.

The official website will channel the vision, goals and co-IT strategies in line with the nation's IT strategic plan.

The launching of the BIT's website marks another important milestone in the council's key activities.

His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam underlined the importance of ICT access for all as a way to develop and improve the quality of nation's lives and envisioned the Sultanate achieving the e-Brunei status. The monarch said establishing an information society is one of the important agendas in assisting the economic development as well as improving the standard of living.⁵⁷

2005 marked the end of the first wave of Brunei's e-Government program as the five-year 8th National Development Plan came to a close.⁵⁸

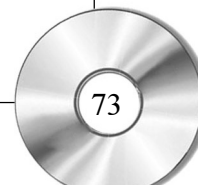
His Majesty Sultan Haji Hassanal Bolkiah Mu'izzaddin Waddaulah, the Sultan and Yang Di-Pertuan of Brunei Darussalam, agrees with the suggestion mooted by the Brunei Darussalam National Information Technology Council to review the existing e-government initiative.

The BIT council, as the highest committee for strategic ICT planning here, suggested to bring in external consultants to help review vision and strategies, conduct benchmarking exercises, analyse the current infrastructure and make proposals for the next phase of e-government initiative as part of the 9th National Development Plan for 2006 to 2010. The government's commitment to adopt ICT was first reflected in the 8th National Development Plan, 2001 to 2005. A budget of \$526 million, set aside under the National Development Plan, was increased to nearly \$1 billion in a bid to develop and implement the e-government system.

Under the second wave of e-government build-up that will last until 2010, the strategy will be moving from infrastructure-based projects to citizen-centric projects, such as establishing improved online services for the public's benefit.

⁵⁷ *BruDirect*, 8/9/05, "Sultanate's e-Brunei Vision".

⁵⁸ *Borneo Bulletin*, 15/8/06, "Time to plan new ICT strategy





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4.4 Brunei Legal System

Modern Brunei has a dual legal system. The first is the system inherited from the British, similar to the ones found in India, Malaysia and Singapore. It is based on the English Common Law, but with codification of a significant part of it. The Common Law legal system covers most of the laws in Brunei.

Islam was quickly spread among most of the people in Brunei when Sultan Sharif Ali, the

Third Sultan of Brunei, ascended to the throne. Believed to be a descendant of the Prophet Muhammad (Peace Be Upon Him),⁵⁹ he was a pious person and was the one who had started to build mosque and had been the one who determined the direction of the Qiblat.⁶⁰ From then on Islam has become an important aspect in the life of people in

Brunei where eventually it has become the official religion of Brunei Darussalam.

Other evidence that shows Brunei was indeed been governed by Islamic law can be seen

in written and codified form. There exist two manuscripts, the first manuscript was called

the "Hukum Kanun Brunei" which, contained 96 pages and is kept at the Language and

Literature Bureau, whilst copy for reference can be found at the Brunei Museum

reference no. A/BM/98/90.⁶¹ While the second manuscript was known as "Undang-

Undang dan Adat Brunei Lama" (Old Brunei Law and Custom). It consists of 68 pages

and is now reserved in the Sarawak Museum.⁶²

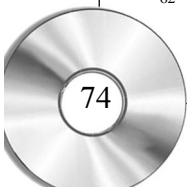
The Constitution was promulgated 29th September 1959 (with some provisions suspended under the State of Emergency since December 1962

⁵⁹ Ibid, p. 80.

⁶⁰ Ibid, p. 90.

⁶¹ Prof. Dato' Dr. Hj Mahmud Saedon bin Awang Othman, "Undang-Undang Islam Dalam Kesultanan Melayu Brunei hingga Tahun 1959", International Seminar on Brunei Malay Sultanate in Nusantara 1999, p. 22.

⁶² Ibid. p. 23.





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and others since independence on 1st January 1984). Article 3 declares Islam the state religion, "according to the Shafi'i sect". Article 3 also provides that "the Head of the religion of Brunei Darussalam shall be His Majesty the Sultan and *Yang Di-Pertuan* (Head of State)."

Brunei maintains separate *shari'a* and regular court systems, with the former having jurisdiction over Muslim personal status. *Shari'a* courts decide personal status cases or cases relating to religious offences following Shafi'i opinion, then legislation by the Religious Council (*Majlis*) under the terms of the 1955 Religious Council, State Customs and *Kathis* Courts Enactment. The Council may have recourse to non-*rajih* Shafi'i interpretations or positions from other schools of *fiqh* if required by *maslaha* and approved by the Sultan.

Brunei has many sets of law and among the latest law which was set up is the Electronic Transaction Order 2000 (ETO) that encourages the use of electronic media for dealing with government administration and business. The risks of conducting businesses on the Internet were many, as the transactions were faceless, making them hard to trace. Security threats, hackers, viruses, and Internet fraud are a common thing.

Due to the anonymity in cyberspace, Internet crimes were the hardest for law enforcers to detect.

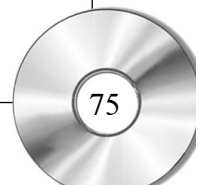
To address these security threats, the Attorney General's Chambers has introduced two new orders.⁶³

The first, is the New Computer Misuse Order 2000, which provides tough punishments for hackers, and the second is New Electronic Transaction Order, which provides certainty and predictability in electronic transactions.

The New Electronic Transaction Order 2000 includes offences relating to unauthorised accesses and unauthorised modification, a new term called 'protected computers' that is related to banking and communication infrastructure, military infrastructure as well as immigration.

Those caught hacking into protected computers are liable to end up with a \$100,000 fine or 20 years imprisonment, or both.

⁶³ *Sunday Bulletin*, 22/4/2001, "New Rules & Regulations For IT"





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The Electronic Transaction Order is meant to encourage local businesses and consumer confidence in E-Commerce as it provides legal recognition of electronic transaction.

It is based on Singapore's ETA 1998 which was substantially based on the Model Law on electronic commerce of the UN Commission on International Trade Law.

The other existing laws which were still applicable to regulate Internet content include the Penal Code (Cap22), Censorship of Film and Public Entertainment Act (Cap 69), Local Newspapers Act (Cap 105), Sedition Act (Cap 24), Undesirable Publication Act (Cap 125) and Public Entertainment Act (Cap 181).

4.5 Electronic Transaction Order 2000

Electronic Transaction Order 2000 is among the latest legislation adopted in Brunei Darussalam. It was made in 23rd. of Syaaban, 1421 Hijriah corresponding to the 20th. of November, 2000.

The Order is divided into 12 Parts and it has 65 sections.

Part I is about the Preliminary which includes 5 sections (1-5) on Citation, commencement and long title; Interpretation; Purposes and construction; Application; and Variation by agreement.

Part II, Electronic Records and Signatures Generally has 4 sections (6-9) which discusses Legal recognition of electronic records; Requirement for writing; Electronic signatures; and Retention of electronic records.

Part III Liability of Network Service Providers has only one provision (10) regarding the liability of network service providers.

Part IV Electronic Contracts comprises 5 sections (11-15) relating to Formation and validity; Effectiveness between parties; Attribution; Acknowledgement of receipt; and Time and place of despatch and receipt.

Part V Secure Electronic Records and Signatures which includes 3 sections (16-18) about Secure electronic record; Secure electronic signature; and Presumptions relating to secure electronic records and signatures.

Part VI Effect of Digital Signatures with 4 sections (19-22) regulates Secure electronic record with digital signature; Secure digital signature; Presumptions regarding certificates; and Unreliable digital signatures.



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Part VII General Duties Relating to Digital Signatures comprises 4 sections (23-26) relating to Reliance on certificates foreseeable; Prerequisites to publication of certificate; Publication for fraudulent purpose; False or unauthorised request.

Part VIII Duties of Certification Authorities includes 9 sections (27-35) about Trustworthy system; Disclosure; Issuing of certificate; Representations upon issuance of certificate; Suspension of certificate; Revocation of certificate; Revocation without subscriber's consent; Notice of suspension; Notice of revocation.

PART IX Duties of Subscribers comprises 5 sections (36-40) includes Generating key pair; Obtaining certificate; Acceptance of certificate; Control of private key; Initiating suspension or revocation.

Part X Regulation of Certification Authorities comprises 6 sections (41-46) discusses Appointment of Controller and other officers; Regulation of certification authorities; Recognition of foreign certification authorities; Recommended reliance limit; Liability limits for licensed certification authorities; Regulation of repositories.

Part XI Government Use of Electronic Records and Signature which has only one section (47) relating to Acceptance of electronic filing and issue of documents.

Part XII General which comprises 18 sections (48-65) includes Obligation of confidentiality; Offences by bodies corporate; Authorised officer or employees; Controller may give directions for compliance; Power to investigate; Access to computers and data; Obstruction of authorised officer or employee; Production of documents, data etc; General penalties; Sanction of Public Prosecutor; Jurisdiction of Courts; Composition of offences; Power to exempt; Regulations; Savings and transitional; Amendment of Law Revision Act, (Chapter 1); Amendment of Interpretation and General Clauses Act, (Chapter 4); and Amendment of Evidence Act, (Chapter 108).

5. THE APPLICATION OF CONTRACT IN ISLAMIC LAW ON BRUNEI ELECTRONIC ORDER 2000: THE VALIDITY

In point 3 of this paper, we have seen the discussion on the validity of a contract in Islamic law. We discussed there essential requirements and



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conditions of contract. We also highlighted freedom of making stipulation and its classifications namely valid, void and voidable stipulation.

We also discussed the conditions of formation, contracting parties, subject matters. When we look to the contents of Brunei Electronic Order 2000, we find that the appropriate part of the order that Islamic law might be applied is Part IV regarding Electronic Contract.

In this part, section 11 (1) provides *“for the avoidance of doubt, it is hereby declared that in the context of the formation of contracts, unless otherwise agreed by the parties, and offer and the acceptance of an offer may be expressed by means of electronic records.*

(2) Where an electronic record is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that an electronic record was used for that purpose.

This section resembles to the discussion on the formation of contract in which *ijab* and *qabul* was studied. The conditions of the both are fulfilled in this section. This is confirmed by section 12 which says: *“As between the originator and the addressee of an electronic record, a declaration of intent or other statement shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record.*

Concerning the contracting parties and their intentions and actions on making a contract, the Order in section 13 states: *(1) An electronic record is that of the originator if it was sent by the originator himself.*

(2) As between the originator and the addressee, an electronic record is deemed to be

that of the originator if it was sent —

(a) by a person who had the authority to act on behalf of the originator in respect of that electronic record; or

(b) by an information system programmed by or on behalf of the originator to operate automatically.

(3) As between the originator and the addressee, an addressee is entitled to regard an electronic record as being that of the originator and to act on that assumption if —

(a) in order to ascertain whether the electronic record was that of the originator the addressee properly applied a procedure previously agreed to by the originator for that purpose; or



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- (b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify electronic records as its own.*
- (4) Subsection (3) shall not apply —*
- (a) from the time when the addressee has both received notice from the originator that the electronic record is not that of the originator, and had reasonable time to act accordingly;*
 - (b) in a case within subsection (3)(b), at any time when the addressee knew or ought to have known, had it exercised reasonable care or used any agreed procedure, that the electronic record was not that of the originator; or*
 - (c) if in all the circumstances of the case, it is unconscionable for the addressee to regard the electronic record as that of the originator or to act on that assumption.*
- (5) Where an electronic record is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the electronic record received as being what the originator intended to send, and to act on that assumption.*
- (6) The addressee is not so entitled when the addressee knew or should have known, had the addressee exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the electronic record as received.*
- (7) The addressee is entitled to regard each electronic record received as a separate electronic record and to act on that assumption, except to the extent that the addressee duplicates another electronic record and the addressee knew or should have known, had the addressee exercised reasonable care or used any agreed procedure, that the electronic record was a duplicate.*
- (8) Nothing in this section shall affect the law of agency or the law on the formation of contracts.*

The *qabul* or the acceptance of a contract by the acceptor in Islamic law is implemented in section 14 of the Order which provides: “(1) Subsections (2), (3) and (4) shall apply where, on or before sending an electronic record, or by means of that electronic record, the originator has requested



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or has agreed with the addressee that receipt of the electronic record be acknowledged.

(2) Where the originator has not agreed with the addressee that the acknowledgement be given in a particular form or by a particular method, an acknowledgement may be given by —

(a) any communication by the addressee, automated or otherwise; or

(b) any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

(3) Where the originator has stated that the electronic record is conditional on receipt

of the acknowledgement, the electronic record shall be treated as though it had never been sent, until the acknowledgement is received.

(4) Where the originator has not stated that the electronic record is conditional on

receipt of the acknowledgement, and the acknowledgement has not been received by the

originator within the time, specified or agreed or, if no time has been specified or agreed

within a reasonable time, the originator —

(a) may give notice to the addressee stating that no acknowledgement has been

received and specifying a reasonable time by which the acknowledgement

must be received; and

(b) if the acknowledgement is not received within the time specified in paragraph (a), may, upon notice to the addressee, treat the electronic record as though it has never been sent, or exercise any other rights it may have.

(5) Where the originator receives the addressee's acknowledgement of receipt, it is presumed, unless evidence to the contrary is adduced, that the related electronic record was received by the addressee, but that presumption does not imply that the content of the electronic record corresponds to the content of the record received.

(6) Where the received acknowledgement states that the related electronic record met technical requirements, either agreed upon or set forth in



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applicable standards, it is presumed, unless evidence to the contrary is adduced, that those requirements have been met.

(7) Except in so far as it relates to the sending or receipt of the electronic record, this Part is not intended to deal with the legal consequences that may flow either from that electronic record or from the acknowledgement of its receipt.

And the mechanism of the conclusion of the contract is regulated in section 15 of the order which says: “(1) *Unless otherwise agreed to between the originator and the addressee, the dispatch of an electronic record occurs when it enters an information system outside the control of the originator or the person who sent the electronic record on behalf of the originator.*

(2) Unless otherwise agreed between the originator and the addressee, the time of receipt of an electronic record is determined as follows —

(a) if the addressee has designated an information system for the purpose of receiving electronic records, receipt occurs —

(i) at the time when the electronic record enters the designated information system; or

(ii) if the electronic record is sent to an information system of the addressee that is not the designated information system, at the time when the electronic record is retrieved by the addressee;

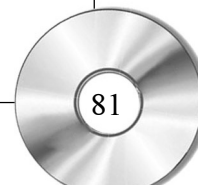
(b) if the addressee has not designated such an information system, receipt occurs when the electronic record enters an information system of the addressee.

(3) Subsection (2) shall apply notwithstanding that the place where the information system is located may be different from the place where the electronic record is deemed to be received under subsection (4).

(4) Unless otherwise agreed between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business.

(5) For the purposes of this section —

(a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;





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(b) if the originator or the addressee does not have a place of business, reference is to be made to the usual place of residence; and

(c) "usual place of residence" in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.

(6) This section shall not apply to such circumstances as the Minister may by regulations prescribe.

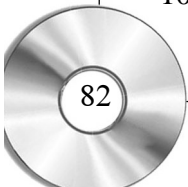
It is obvious that the validity of electronic contract in the eye of Brunei Electronic Order 2000 doesn't differ from the essence of the validity of contract in Islamic law. It fulfills all essential requirements and conditions that Islamic law requests. Such essential requirements and conditions are formulated in the manner of legal provision in accordance to the need of nowadays necessity.

6. CONCLUSION

In conclusion, we do not find any contradiction in the validity of contract between Islamic law and Brunei Electronic Transaction Order 2000. But we find that the later as an implementation of the former in modern world. *Wallahu a'lam*

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