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ONLINE CONTRACT AND THE CONCEPT OF *CAVEAT EMPTOR*: A  
COMPARATIVE STUDY BETWEEN ISLAMIC PERSPECTIVE AND  
MALAYSIAN CONTRACT LAW.

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1000012886

PREPARED BY:

*SYAHIRAH BINTI ABDUL SHUKOR  
ABIDAH BINTI ABDUL GHAFAR  
DINA BINTI IMAM SUPAAT  
FARAH SALWANI BINTI MUDA  
SHEIKH SALIM BIN SHEIKH SALLEH*

FACULTY OF SYARIAH AND JUDICIARY

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Perpustakaan  
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## **PART I: ACKNOWLEDGEMENT**

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## PART II: SYNOPSIS

The evolution of the Internet has led to many discoveries and lessens the hassle in our daily life. Computer networks are playing an increasingly vital role day by day. Internet is not only used as a tool to gather information, but also as a way of communication and interaction. Internet has been regarded as the easiest, simplest and paperless method in making businesses instantly. These businesses, which appear through the net, are known as e-commerce or e-business. These online transactions are actually able to attract millions of people worldwide. However, online contracts that are done totally through the net without any physical contact between the seller and buyer may expose consumers to fraud and insecurities. Therefore, it is submitted that there should be certain mechanisms to control this practice, and to ensure that the consumer's rights are well protected by the laws and the authorities. Until now, the Malaysian government has passed several statutes, relating to Cyber Laws to ensure the success of the Multimedia Super Corridor projects. The study aims to discover the level of legal awareness among the Internet users pertaining to online contracts particularly on online shopping. The scope of this study is limited to Internet users in Klang Valley and Selangor only. Based on the survey result, the researchers will try to investigate the trend, practice and the benefits of online shopping among these consumers. Besides that, the study will explore the principle of *caveat emptor* i.e. "let the buyers beware" in online contracts and also to analyze this principle under the Islamic perspective. It is hoped that the findings, suggestions and analysis of this research would further enhance the development of online contracts in Malaysia.

## PART II: SINOPSIS (BAHASA MALAYSIA)

Evolusi Internet telah membawa kepada banyak penemuan dan mengurangkan kerumitan dalam kehidupan seharian. Jaringan komputer memainkan peranan yang semakin penting dari sehari ke sehari. Internet berfungsi bukan sahaja sebagai alat untuk mengumpul maklumat tetapi juga sebagai alat komunikasi dan interaksi dan menjadi cara menjalankan perniagaan tanpa kertas dan cara segera yang ringkas dan paling mudah. Perniagaan yang dijalankan di Internet dikenali sebagai “e-commerce” atau ‘e-business’. Transaksi atau talian ini telah menarik berjuta pengguna seluruh dunia. Bagaimanapun transaksi atau talian yang tidak melibatkan hubungan fizikal sebenar antara pembeli dan penjual boleh mendedahkan pengguna kepada pelbagai kelemahan dan ancaman. Oleh itu mekanisme kawalan ke atas aktiviti-aktiviti tersebut amatlah perlu untuk memastikan hak-hak pengguna dilindungi oleh undang-undang dan pihak berkuasa. Sehingga kini, Kerajaan Malaysia telah meluluskan Undang-undang Siber untuk memastikan kejayaan projek Multimedia Super Koridor. Kajian ini adalah untuk mengetahui tahap kesedaran pengguna Internet berkenaan kontrak atas talian terutama sekali “online shopping”. Skop kajian ini adalah terhad kepada pengguna internet di Lembah Klang dan Selangor sahaja. Daripada kaji selidik, penyelidik mengenalpasti trend, amalan dan faedah “online shopping” di kalangan pengguna. Di samping itu, kajian ini juga melihat kepada prinsip “*caveat emptor*” iaitu “biar pembeli yang berhati-hati” di dalam amalan transaksi atas talian dan untuk menganalisa prinsip ini berdasarkan perspektif Islam. Adalah diharapkan supaya penemuan, cadangan dan analisa yang dikaitkan didalam kajian ini akan dapat dimanfaatkan untuk perkembangan dan pembangunan transaksi atas talian di Malaysia.

## PART II: SINOPSIS (ARABIC)

### ملخص

أدى تطور الإنترنت إلى حدوث اكتشافات كثيرة ، حيث قلل كثيراً من معضلات الحياة اليومية ، وتساهم شبكة الحاسوب بدور حيوي و متزايد في الحياة اليومية ، فلم يعد استخدام الحاسوب كأداة لجمع المعلومات فقط وإنما أصبح أيضاً وسيلة للاتصال و التفاعل لذا يعد الإنترنت أبسط و أسهل الطرق في التعامل التجاري الحالي ، هذه التجارة أو الأعمال التجارية التي تتم باستخدام أو عبر الشبكة تعرف بالتجارة الإلكترونية أو تجارة إلكترونية ، وقد أخذت الصفقات و العقود التجارية التي تعقد عبر الشبكة أو على الشبكة تجذب انتباه الملايين من الناس في كل أنحاء العالم ، ومهما يكن من أمر فإن هذه العقود التي تعقد عبر الشبكة وبدون اللقاء المباشر أو الشخصي بين البائع و المشتري قد تخلق نوعاً من القلق بالنسبة للمستهلكين ، و بالتالي يجب أن توجد آلية و تكون هناك سيطرة على هذه الممارسة التجارية لضمان و حماية حقوق المستهلك ، وحتى الآن فقد نفذت الحكومة الماليزية العديد من القوانين التي تتعلق بقوانين الإنترنت وذلك لضمان نجاح مشاريع ( كوردور المتعددة الأوساط الممتازة ) ، وهذه الدراسة تميل إلى امتلاك نظرة عامة على مبدأ مسؤولية المشتري ، أو بمعنى آخر جعل المشتري يحترس في حالات التعاقد على الإنترنت ويحلل هذا وفقاً للمنظور الإسلامي . الدراسة تحاول تحري الوعي القانوني بين مستعملي الإنترنت ، و بمعنى آخر المستهلكون في وادي كلاننج و ولاية سيلانجور ، و استناداً على الردود فإن الباحثة ستحاول تحري اتجاهات الممارسة العملية للتسوق عبر الإنترنت لهؤلاء المستهلكين وفق مبادئ الشريعة الإسلامية و القانون الماليزي للعقود ، و تتمنى أن تساهم النتائج و المقترحات و التحليلات في تحسين و تطوير العقود عبر الإنترنت أو على الإنترنت في ماليزيا .

## PART III: INTRODUCTION

### 3.1 Problem Identification

The launching of Multimedia Super Corridor in Cyber Jaya has played an important role as it has brought Malaysia to the era of information. The progress of information technology derived from the strong support by Malaysian government and the recent development is the introduction of the borderless concept worldwide. The government has introduced attractive schemes as well as incentives to boost the Multimedia Super Corridor Project. The Malaysian Government also through its Bill of Guarantees, declared that the government would provide a regional leadership in intellectual property protection and cyber laws.

Until 2002, the government has passed several statutes relating to cyber laws, namely;

- (a) Copyright (Amendment) Act 1997,
- (b) Computer Crimes Act 1997,
- (c) Telemedicine Act 1997,
- (d) Digital Signature Act 1997
- (e) Communications and Multimedia Act 1998.

The Prime Minister of Malaysia, Dato' Seri Dr. Mahathir Mohamed said; "Whether we like it or not, statistics show that e-commerce will become a part of our lives". The usage of the Internet has not been restricted as a tool of collecting information but also as a medium to do transactions without any physical contacts. The government foresees this situation. Therefore, in order to equip the existing cyber laws, in November 1998 the

Deputy Minister of Energy, Communication and Multimedia announced that the government would table an e-commerce business Act to protect individuals concluding transactions via the Internet. This study attempts to tackle four main issues:

- (a) Are the existing cyber laws adequate to protect consumers to conclude transactions through the Internet?
- (b) What is the position of online transactions under existing laws such as the Contract Act 1950 and Consumer Protection Act 1999?
- (c) Can these laws be applied to solve problems pertaining online shopping?
- (d) Can these traditional laws be applied to the development of Information Technology?

Legal problems raised from the advancement of technology should be treated as challenges that should be solved by amending and interpreting the existing statutes, besides enacting new statutes. The traditional statutes, which are already in existence, should not be put aside since some principles still can be applied together with the new statutes.

The main focus of this study is on the trends and practice of online shopping among the Malaysian consumers in Klang Valley and Selangor. With regard to online banking, it is believed that such transaction creates a secured platform for the bank's customers, as the transactions done are not totally through the Internet. Problems start to occur when the individuals who purchased goods online do not get what they have ordered after the

consumer has made payment. In some circumstances, the consumers have been misled by the transaction they have entered while shopping online.

E- Commerce can actually be divided into three types; Business-to-consumer, business-to-business and consumer-to-consumer. (R.K. Suri 2001). Our study will highlight on the business-to-consumer type, which includes shopping online. However, the study will not touch on online banking issues.

Computer abuse is a serious threat to the development of this field. Fraud, virus infections, hacking, theft of data, unauthorized medications and unauthorized use, are threats to the integrity of data. These threats will frighten the consumers and decrease their confidence in online transactions. Realizing these threats, the government has introduced certain mechanisms to protect it. (Jackie Wilson 1996). The government plays a crucial role to ensure that the right of the consumers are protected. Malaysia claims to be the best regulator of cyber laws as it has covered all aspects and activities of transactions online. (Utusan Malaysia, Thursday, 15 November 2001) However, it is submitted that there are still loopholes (lacuna) on the clear-cut regulatory framework on the issue of online contracts not only in Malaysia but also globally. Dato'Rais Yatim, The Minister in the Prime Minister's Department mentioned that the application and effectiveness of our existing laws need to be reviewed so as to face all the risks in the cyber world. Although Malaysia is amongst the few countries in the world to enact cyber laws, the efforts to improve the existing cyber laws should be welcomed and supported

by the government. Hence, it is undeniable that the government plays an important role to boost the usage of Internet as a business medium to the public.

At the international level, there are three bodies, namely, The Organisation for Economic Cooperation and Development (OECD); the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL), that have made some initiatives to create and respond to the evolution of Internet and e-commerce.

These bodies tend to overlap in their responses and have not taken any steps for coordination. These bodies have tried to respond to pertinent issues in e-business such as formation of online contracts, payments and consumer protection. For instance, the United Nations has provided guidelines for consumer protection, which addresses six main issues. The issues are as follows:

- (a) The protection of consumers from hazards to their health and safety;
- (b) The promotion and protection of the economic interests of consumers;
- (c) Consumer access to adequate information to enable them to make informed choices according to individual wishes and needs;
- (d) Consumer education;
- (e) Availability of effective consumer redress;
- (f) Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them.

The central issue of this research is to explore the initiatives and efforts taken by the Malaysian government in tackling these legal issues on matters pertaining to online contract and consumer protection. The study also aims to measure the level of legal awareness among these consumers. Besides that, a comparative study on the Islamic view of online contracts in general and the rights of consumers will also be discussed. It should be noted that the comparison will only be between the Malaysian Law and the Islamic Law as a whole and will not specify on any schools of thought in Islam. It is hoped that the issues aforementioned above could be resolved in this research. Hence, it is our hope that this research would generate and contribute to the study of comparative laws between the Malaysian and Islamic Law, particularly on shopping online via the Internet.

### **3.2 Mission of the Research**

The study highlights the practicality of online contracts and the principle of *caveat emptor* i.e let the buyers beware (the Internet users in Klang Valley and Selangor). The study measures the level of legal awareness and discovers the consumers' perspective as Internet users from the Malaysian point of view. This comprehensive study investigates the trends, practice, practicality and perspective of online contracts based on the Malaysian Law of Contract and Islamic Law of Contract. It is hoped that the research will be able to identify the current problems faced by the consumers in Klang Valley and Selangor in online contracts cases. However, it should be noted that the scope of online

contracts is limited to business-to-consumer i.e. online shopping and does not include online banking services.

### 3.3 Objectives of the Research

- ✓ To provide a general view from the principles of Islamic Law of Contract with regard to online contract.
- ✓ To identify the current problems faced by online consumers and the possible solutions based on the current situation and existing laws in Malaysia.
- ✓ To measure the level of legal awareness among the Internet users in Klang Valley and Selangor in matters arising from online shopping
- ✓ To compare as far as possible the underlying principles and theories which underline Islamic Law and Malaysian law.
- ✓ To study the concept of *caveat emptor* in cases of online contract, particularly online shopping under the Malaysian Law of Contract

### 3.4 Literature Review

Many issues in Internet law remain unsolved. Up-to-date, there is no single statute which focuses on online contracts done through the net in Malaysia i.e. shopping online. There are many written works available on the issues, problems and highlights of Internet law. Unfortunately, these written works generally discuss the development of Internet laws in the United States, the United Kingdom and the European countries. The research may thus, be lacking in references and materials in Internet law, especially from the

Malaysian and Islamic perspective. Internet Law is actively studied in the Western countries and there are quite a large number of books written on it but they focus more on the United States, the United Kingdom, and other European countries. A book edited by Chris Reed entitled *Computer Law* provides the recent development, particularly on the Internet Law by examining the European and other international changes and recent law cases. This book provides a compilation of articles written by expertises in Internet Law. One of its articles entitled *Electronic Commerce* written by Chris Reed and Lars Davies provide a general view on the matters pertaining to regulatory issues of electronic commerce. This article is a must read article for it provides the basic information on electronic commerce.

In understanding the general theories of a valid contract, local books written by Visu Sinnadurai (1987), *The Law of Contract in Malaysian and Singapore* provides a clear picture on the development of law of contract in Malaysia as well as Singapore. The author discusses on the local cases, which are relevant to the application of the law of contract. *Principles of Law of Contract in Malaysia*, the book written by Syed Ahmad Al-Sagoff (1999) is undeniably a must have reference in understanding the essential principles required to form a valid agreement in the eyes of law. The author highlights the precedents derived from the English law as well as the Malaysian law. In fact, in the appendices of the book, the author provides samples of written agreement such as contract for the dissolution of a partnership, contract of sponsorship and others, which can serve as a guideline in drafting an agreement.

The book written by a local academician, Abu Bakar Munir (1999) *Cyber Law and Issues*, provides a general idea on pertinent issues that should be addressed by Malaysians in realizing the vision to become one of the leading countries in Internet services. However, this book covers the development of Cyber Law at the international level and not from the Malaysian perspective. Assafa Endeshew's (2001) *Internet and E-Commerce Law* addresses on the issue of *caveat emptor* when a consumer purchases online. The author examines Singapore's code for e-commerce and the experiment to generate trust among consumers. Besides that, the author reviews the ongoing attempt on the production and implementation of e-commerce laws in Asia Pacific.

The article written by Abu Bakar Munir and Siti Hajar Hj Mohd Yasin (1997) highlights the legal issues in cyberspace contracting. Whereas Sarah Aziz Abdul Ghani Aziz (1998) in her article entitled *Communications and Multimedia Act 1998 of Challenges and Possible Remedies* highlights the issue of protection provided by Communications and Multimedia Act 1998 to the consumers.

Lee Swee Seng in his article *Legal Issues in B2B E-Commerce in Malaysia* addresses five issues that should be considered by Malaysian government and other countries. Among the issues are the jurisdictions to file claims and relevant laws, the evidential aspects of claims, security on the Internet and payments, consumer and data protection. The writer relates the existing issue with the existing statutes in Malaysia, for example Direct Sales Act 1993 and Description Act 1972. Another notable article is written by Haji Sallehuddin bin Haji Mohd Lip entitled *E-commerce, e-Trading and Internet*

*Money Transaction*, raised the question on the adequacy of business law or commercial in Malaysia to meet the need of e-commerce. His article concentrates on the development of e-commerce and its effect from evidential problem, existing business law and the methods that can be used to protect e-trading and Internet money transaction.

Other notable reference books such as the *Information, Technology Laws (Laws relating to cyber & E-commerce)* by R.K Suri, Parag Diwan and Shammi Kapoor (2001), *Cyber Law, Text and Cases* by Gerald R.Ferrera (2001) and *Introduction to Computer Law* by David Bainbridge (2000) are of good assistance in understanding the concepts of online contract and the recent development in European countries, United Kingdom and the United States of America. R.K Suri (2001), for instance provides the latest development of cyber and e-commerce laws in India.

Literature writing on e-commerce does not focus much on the Islamic principles. For the written materials in Islamic Law, there are several books, which have been referred and beneficial to the study, eventhough they do not discuss on the issue of e-commerce or online contracts specifically. Mohammad Ali Baharom (1999) in his book “ *Undang undang Kontrak Perbandingan Islam dan Inggeris*” provides a comparative study on the issues of offer and acceptance between English Law and Islamic Law. Razali Nawawi, (1999) in his book *Islamic Law on Commercial Transactions* discusses the Islamic principles on the issues raised from the current commercial transactions such as insurance and Islamic banking. “*Multimedia dalam Islam*” (2000) a compilation of

articles provided by Institute of Islamic Understanding Malaysia provides nineteen (19) chapters, which discuss multimedia in Islam. One of the compiled articles is written by P.S Sangal (2000) entitled *Issues on Cyber Laws*, discusses briefly on the existing Cyber Laws in Malaysia which are the Computer Crimes Act 1997, Telemedicine Act 1997, Digital Signature Act 1997 and the Communication and Multimedia Act 1998. Another notable article written by Ali Badron bin Mokhtar (2000) entitled “ *E commerce: Keharusan Urusniaga Daripada Perspektif Islam*” explores the elements of a valid contract from Imam al-Ghazali’s perspective. The author stated that the general guidelines outlined by Imam al-Ghazali as regard to what are valid contracts should be referred when we are involved with e- commerce or business through the Internet. As for the Islamic perspective, a brief discussion on e-commerce in Islam is afforded by Hurriyah El Islamy (2002) in her book: *E-commerce from Islamic Perspectives*. The writer explores three elements of a valid contract, which are; (1) offer (2) acceptance and (3) consideration by comparing the position of Malaysia, under the common law and the Islamic perspective. As mentioned by the author, although Islamic Law of contract may or may not be imposed in commercial transactions by the ruling government, it is essential that Muslims observe its principles.

Besides referring to the available literature from books and article, the report produced by Taylor Nelson Sofres (2002) entitled *Interactive Global e-Commerce 2002*<sup>1</sup> provides data and response from 37 countries including Malaysia on the issue of online shopping, product purchasing and e-spend by the Internet users of selected countries. Taylor

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<sup>1</sup> Taylor Nelson Sofres, *Interactive Global e-Commerce*, [www.tnssofres.com/interactive](http://www.tnssofres.com/interactive), 11 July 2002.

Nelson Sofres is the fourth largest market information company in the world. They provide expertise provide in custom research to measure and optimize the client's e-business performance and also online research techniques and capabilities. The research done by the company is more on business aspects rather than legal issues. Hence, the aim of our study is to look on the issue of consumer awareness, particularly Malaysian consumers when they enter into online contracts and how far do they understand the legal implications of online shopping?

In exploring online contracts and consumer awareness (the principle of *caveat emptor*) in Malaysia, we stressed on the following issues:

- a) Are the existing cyber laws adequate to protect the Malaysian consumers who make transactions through the Internet?
- b) What is the position of the existing laws such as Contract Act 1950 and Consumer Protection Act 1999 with regard to the online transactions?
- c) Can these laws be applied to solve the problems arised from the online shopping?
- d) Can these traditional laws be applied to the development of Information Technology?

#### **PART IV: METHODOLOGY**

Generally, the methods undertaken by the researchers in completing this research can be divided into two, collection of the primary data and the secondary data. In order to see the applications of the above concepts in theory and practice, the data for this study is

based on doctrinal approach that employs library based and fieldwork. To study the trends, perception and consumer's behavior towards online Internet, the researchers have taken the initiative to develop a set of questionnaire, which have been distributed to two hundred and fifty (250) respondents who have different backgrounds from lawyers to homemakers. The questionnaires are distributed to people living in Klang Valley and Selangor by an enumerator as these areas are assumed to be the main subscribers of Internet line. Respondents for the questionnaire are carefully selected to ensure reliable results. Having various groups of respondents with different backgrounds will provide a better understanding of the consumer's behavior. The analysis of the information collected from the questionnaire is done using of Microsoft Excel and Statistical Procedure for Science Social (SPSS) v 10. Besides questionnaire, the researcher (one of the researchers) has attended a one-day workshop entitled "Computer Law with Emphasis on Computer Contracts" which was regarded as a platform for the researcher to explore the current information and issues pertaining to online contract especially online shopping. During that one-day workshop, the information gathered by the researcher is an eye opener to the problems and issues faced by the local laws such as the Contracts Act 1950 and Evidence Act 1950. The workshop was considered as a golden opportunity to discuss and exchange views with other legal practitioners who directly deal with the identified problems. Interviews have been taken place with the practitioners who are involve with online contracts, lawyers as well as academicians who are specializing in Internet law, particularly online contract. The secondary data has been collected from the law libraries in Universiti Kebangsaan Malaysia, Universiti Islam Antarabangsa Malaysia and the online articles provided by the websites in the

Internet such as Malayan Law Journal, Current Law Journal, Consumer Forum Malaysia and others.

In short, the research was conducted in two (2) phases. The first phase involves data collection from the secondary sources such as from the Internet, books, journals, newspapers and magazines. On the other hand, the second phase involves data collection from primary sources, which are based on questionnaires and interviews.

## **PART V & PART VI: FINDINGS, ANALYSIS AND SUGGESTIONS.**

In coming out with the findings, the researchers have decided to divide the discussions into four chapters. **First Chapter** provides the general views on the conditions of a valid contract from the Islamic perspective as well as Malaysian Law. The chapter explores the concept of *caveat emptor* and its position in the Islamic Law. In studying the Malaysian laws, Malaysian Contracts Act 1950 has been extensively referred to so as to look on the redress or mechanism provided by law in cases of online shopping. As regard to Islamic Law, there is only one codified code, namely, the *Majallah al-Ahkam al-Adliyyah*, which is now recognized as the most comprehensive code ever existed in Islam. This chapter attempts to explore the basic requirements of Islamic Law of contract in cases of online contract. **Second Chapter** provides a general view on consumer protection from the perspective of Islamic Law as well as the existing laws in Malaysia. Besides that, it explores the efforts and initiatives taken by the government in handling consumers' needs. For example the establishment of Consumer Forum Malaysia, which was set up by the Multimedia and Communications Act 1998 and the

new statute i.e. Consumer Protection Act 1999. It also explores the recent development of consumer law pertaining to online contracts at the International level. **Third Chapter** provides the results and findings based on the questionnaires, which has been developed by the researchers. **Fourth Chapter** deals with the suggestions and findings of the research.

## CHAPTER ONE

### ONLINE CONTRACT: COMPARATIVE LAWS OF CONTRACT

#### 1. Introduction

In this chapter, it will discuss the general principles laid down under our Contracts Act 1950 as regard to the requirements of a valid contract. Next, it will explore whether the existing law and traditional principles can be harmonized with the online contracts. In most circumstances the present laws are unsatisfactory, and many problems may arise as result of uncertainties.<sup>2</sup> Besides underlying the principles of contract law in civil law, the discussion will also touch on the general requirements of a valid contract from the Islamic principles. The final part in this chapter is the conclusion.

#### 1.1 What is meant by contract?

This chapter will first discuss briefly the definition of the term contract based on the common law, Contracts Act 1950 and Islamic principles. Then, it will try to explore the provided definitions of online contract. This is followed by a discussion of the essential elements of a valid contract under the common law as well as Islamic perspective.

In Osborn's Concise Law Dictionary (1983), the word "contract" has been defined as an agreement enforceable at law. An essential feature of a contract is a promise by one party to another to do so or forbear from doing certain specified acts. The offer of a

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<sup>2</sup> Adeline Wong and Brian Chia. 2000. *E-Com Legal Guide Malaysia*.

[Http://www.bakerinfo.com/apec/malayapec.htm](http://www.bakerinfo.com/apec/malayapec.htm). 8<sup>th</sup> December 2000.

promise becomes a promise by acceptance. Contract is that species of agreement whereby a legal obligation is constituted and defined between the parties to it. Based on the above-mentioned definition, the term contract itself represents some essential elements of an agreement which bind both parties. In order for a contract to be valid and enforceable, the agreement must fulfil all the requirements such as offer, acceptance, capacity, legality of the subject, consideration and free consent.

On the other hand, Sir William Anson in his book entitled “Principles of the Law of Contracts” defines the word contract as “ a legally binding agreement made between two or more parties, by which rights are acquired by one or more to acts or forbearances on the part of the other or others”. Hence, it could be said that the agreement made by two parties or more have a legal side effect, which both parties should be aware of. The practice of business has relied heavily on paper-based communications and nowadays due to the recent changes in the technology; businesses have shifted to paperless communications, which are in electronic form. It is common for people today to resort to electronic banking, electronic delivery of documents and electronic purchase. In response to this development, the Malaysian government has passed new legislation pertaining to digital signatures, communications and multimedia, computer crimes and telemedicine. However, there is no single legislation, which has been passed to cover the electronic transactions or online contracts.

### 1.1.1 What is meant by online contract?

The existing Malaysian cyber laws do not provide the definition of online contract. According to Ron C. Ben-Yehuda (2000) the terms online contract can be referred to three types of contract, firstly, **click-through agreements** which means an electronic document setting forth the proposed terms of an agreement that may be accepted or rejected by verifiable means of assent, such as clicking a button marked “ I Agree” or “ I Accept”, secondly, **“Terms of Use”** which means an electronic document setting forth the proposed terms of an agreement that is available for viewing by a link to a page on a web site. The third type of contract is known as **Shrink Wrap Agreements**, typical printed agreements that are included in the packaging of software, electronic goods or other products. In this type of agreement, the purchaser will only read these agreements after the purchaser has consummated the transaction.<sup>3</sup>

The terms online contract based on our understanding can be defined as a commercial transaction which is done electronically using the Internet Service Provider (ISP) in an open system from anywhere in the world. Hence, it is essential for the Malaysian legislators to provide the accurate definition of online contract as the layman themselves do not know the types of online contracts that are available in the Internet. Although providing the definitions to the words of online contract in Malaysia does not necessarily mean they will be accepted in another country but at least, for the national level, there is a legislation, which provides guideline to our local consumers pertaining to online

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<sup>3</sup> Ron C. Ben Yehuda, 2000, *Enforceability of Online Contracts: State and Federal Developments*, <http://www.sidley.com/cyberlaw/features/enforce>, 11<sup>th</sup> May 2002.

contract. By having such legislation, it promotes sense of security not only to the consumers but also to the online merchants.

## 1.2 From “Contracts” to “Online Contracts”.

In Malaysia, the Contract Act 1950 governs the legislation of contracts. The Contracts Act 1950 is based on the Indian Contracts Act 1872. A contract is an agreement to exchange property or services that is enforceable in the court of law<sup>4</sup>. It could also mean agreements to transfer property or goods to the buyer for money consideration called price.<sup>5</sup> In the millennium era nowadays, contracts can be concluded anytime, and anywhere. The parties no longer need to meet and sit together to agree upon certain contractual terms before a contract can be concluded. Papers and pens are no more needed to make the parties bound by their promises. Only three (3) simple steps are needed; log on, select then click. By a click of the mouse, the agreement or transaction carries legal implications causing goods and services to change hands. This type of agreement can be categorized as “Click-Through Agreement” which is designed to prevent the proposed transaction from being finalized until the purchasers indicate their consent.

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<sup>4</sup> Ferrera, Lichtenstein, Reader, August and Schiano. 2000. *Cyber Law Text and Cases*. United States of America: West Thomson Learning, p 90.

<sup>5</sup> David I Bainbridge.2000. *Introduction to Computer Law*, 4<sup>th</sup> Ed.England: Longman, p. 167.

As time passes, new technologies are being developed everyday. Compared to the old days, contracts are now done electronically “online”. Online contracts could be defined as transactions conducted via an electronic medium including electronic trading, electronic messaging, electronic data interchange, electronic mail (e-mail), facsimile, computer-to-fax (c-fax) and many more.<sup>6</sup> In simple words, the term refers to transactions concluded in cyberspace using e-mail or websites.<sup>7</sup>

Sale and purchase activities are held online either for performance of contract through the Internet itself or to be performed outside the cyber world.<sup>8</sup> Due to *lacuna* of legislation on the online contract, the study would refer to the existing laws such as the Contracts Act 1950 to see the possibilities of adoption to the online contract.

### **1.3 Essential Elements of A Valid Contract.**

Generally, under the Malaysian Contract Act 1950, there are five (5) elements required for the formation of a contract namely:

- a) Proposal (offer);
- b) Acceptance;
- c) Consideration;
- d) Intention to create legal relations between the contracting parties; and
- e) Capacity.

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<sup>6</sup> Nick James. *Online Contracts and Electronic Signatures*. p.

1. [http://www.geosp.uq.edu.au/conferences/Annual\\_prop-conf/online\\_contracts.pdf](http://www.geosp.uq.edu.au/conferences/Annual_prop-conf/online_contracts.pdf)

<sup>7</sup> Ibid.

<sup>8</sup> Refer to WTO website. <http://www.uncitral.org/en-index.htm>>. 5<sup>th</sup> May 2002.

**Section 2(a) and (b) of the Contract Act 1950** does not specify a certain method on how to make proposals and acceptances. Thus, they can be made in any form, either in writing, orally, by conduct or even by combining these methods.<sup>9</sup> Applying these methods to online contracts, it could be concluded that proposals and acceptances in online contracts can also be made in various forms. The parties can either conclude a valid contract by exchanging e-mails together with paper documents and also oral discussions.<sup>10</sup>

It is very interesting to note that websites displaying information are likely to be considered as an invitation to treat, rather than an offer.<sup>11</sup> Advertisements on Internet webs, newsletters, quotation sheets and merchandise displays do not constitute offers.<sup>12</sup> This can be seen as a positive step to provide some space for the seller to decide whether or not to accept offers from the “buyers to be” since only he would know his ability to cope with the demand made by those interested with the deal. Moreover in the world of cyber space, the seller cannot predict in advance who will respond to his advertisements and end up being bounded to him. Despite all that, in whatever contracts made, the most important factor related to offers and acceptances is to ensure that the parties communicated well between themselves.<sup>13</sup>

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<sup>9</sup> Syed Ahmad Alsagoff. 1999. *Principles of the Law of Contract in Malaysia*. Kuala Lumpur: Malayan Law Journal, p. 14.

<sup>10</sup> Nick James. Online Contracts and Electronic Signatures. p.2.

<sup>11</sup> Ibid.

<sup>12</sup> Ferrera, Lichtenstein, Reder, August and Schiano. 2000, *Cyber Law Text and Cases*. p. 95.

<sup>13</sup> Section 3, Contract Act 1950.

For a proposal, it becomes complete when it comes to the knowledge of the person to whom it is made<sup>14</sup>. For the acceptance, it is complete against the proposer when it is put in a course of transmission to him, so as to be out of the power of the acceptor<sup>15</sup> and as against the proposer, when it comes to the knowledge of the proposer<sup>16</sup>. The two provisions above clearly apply to situations where communication between the parties is not made instantaneously. Instantaneous communication is when the sender and recipient are virtually present in each other's presence<sup>17</sup>. Unfortunately our Contract Act 1950 lacks of a statutory provision concerning instantaneous communication up until today. As a result it leads us to the issue of whether the Internet is included within the scope of instantaneous form of communications or not? Since there is a *lacuna* in our Act, until today we are relying on the two old celebrated cases of *Entores Ltd. V Miles Far East Corp.*<sup>18</sup> and *Brinkibon V Stahag Stahl and Stahlwarenhandelsgesellschaftmbh*<sup>19</sup>. In the *Entores* case, Denning LJ discussed on communications made orally, via the telephone and through the telex. However, the question whether or not the use of the Internet is an instantaneous form of communication and therefore goes beyond the postal rule<sup>20</sup> has no decisive answer.<sup>21</sup> The courts have yet to lay down a precedent to all.

<sup>14</sup> Section 4 (1) Contract Act 1950.

<sup>15</sup> Section 4 (2) (a) Contract Act 1950.

<sup>16</sup> Section 4 (2)(b) Contract Act 1950.

<sup>17</sup> Julian Ding. 1999. *E-Commerce Law & Practice*. Sweet & Maxwell Asia, p 54.

<sup>18</sup> [ 1955 ] 2 QB 327 ; [ 1955 ] 2 All ER 493..

<sup>19</sup> [ 1983 ] 2 AC 34 ; [ 1982 ] 1 All ER 293.

<sup>20</sup> Postal rule – Is an exception to the rule that the acceptance is only complete when it is communicated to the proposer. Section 4 (2)(a) of the Contract Act 1950 indirectly lies down that for postal communications, acceptance is complete upon posting.

<sup>21</sup> Nick James, *Online Contract and Electronic Signatures*, p3.

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