

# The Time of Concluding the Contract in E-Commerce from Islamic Legal Perspective

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## Abstract

*The issue of when a contract between face-to-face parties is deemed to be concluded presents no legal difficulty to deal with in conventional dealings. However, the borderless nature of the Internet presents questions as to when a contract is deemed to be irrevocably formed and therefore raises questions regarding contract validity. As a general rule, a contract is formed when there is an exchange of offer and acceptance between the parties. However, in online contracts the contracting parties are not in face-to-face meeting and thus the exchange of offer and acceptance involves the possibility that such correspondence may not reach its intended recipient because of technical errors or other technological complexities. As a result, this article tends to engage in a critical study to determine the time when a contract formed in the cyberspace is concluded in the light of Islamic contracting principles with reference to a number of International legal frameworks.*

## Keywords

*Islamic law, Internet, legal science, electronic contract, e-commerce, economic studies, e-mail, Internet studies*

## Introduction

The aim of this article is to discuss the valid conclusion of electronic contract in light of the time the contract is deemed to be concluded. As a general rule, the contract becomes legally binding when there is unconditional correspondence between the offer and acceptance (Al-Oboodi 1997:154). However, in online contracts the exchange of offer and acceptance involves the possibility that such correspondence may not reach its intended recipient. It is also possible that a message sent via the Internet may be altered en route and reaches its final destination either incomprehensible or with a different meaning to the one intended. That is to say, when an acceptance is communicated over the Internet it may be illegible when it reaches the

*offeror* or it may never arrive at all. Consequently, it is questionable as to whether there is a valid conclusion of contract. Determining the time at which a contract is deemed to be formed is essential in order to establish whether the contracting parties can withdraw their communication before the contract becomes legally binding. There are other legal effects resulting from determining the time of a contract being formed, to name; setting the time of transferring the ownership of the purchased item to the buyer and thus in the case the item suddenly loses its value, who shall be legally responsible for such loss, either the buyer or the purchaser (Al-Dobaiyyan 2005:106-107).

The difficulty arises in determining when a contract is deemed to be formed when the contracting process is communicated between parties as absentees. In such contracts, a time delay occurs between the sending and receipt of offer and acceptance between the parties involved. Thus, it is disputable in such cases to determine the moment during which a contract is deemed to be binding. Legally, there are four main theories which jurists refer to when establishing the time at which a contract is formed between parties in absentees - the declaration, the mailbox, reception or information. Note that there are other legal theories, such as the formulation theory which considers a contract legally effective at the moment the offeree begins to formulate its communication for the acceptance. Accordingly, it is usually used in conjunction with the mailbox theory to prevent the offeror from withdrawing his offer once the other party has started to respond to that communication (Eiselen 1999). The position of Islamic law in this regard will be analytically explored next in the light of Internet communication.

### The Time of Concluding Online Contracts: An Analysis

A typical example may be considered in Internet communication when a party communicates his offer via email to another one offering to sell a particular good and enclosing its terms and conditions. The latter party accepts the offer and communicates his acceptance back via email. In this example, it is difficult to determine the exact point at which the contract is deemed

to be formed. Is it at the time when the offeree accepts the offer? The time when the acceptance is communicated back to the offeror? Or is it when the acceptance reaches the offeror, regardless of whether he is aware of the acceptance or not? Or maybe it is at the point that the acceptance comes to the notice of the offeror? (Alzaagy 2011:158)

Establishing the time at which a contract is deemed to be formed is essential in order to determine whether the contracting parties can withdraw their communication before the contract becomes legally binding. That is to say, if a contract is deemed to be formed as soon as the offer is accepted, the offer cannot be withdrawn when the acceptance has already been made, whereas, if the contract is deemed to be formed when the acceptance comes to the knowledge of the offeror, it is legally possible for the offer to be withdrawn so long as the offeror has not received the acceptance. Likewise, the offeree can revoke his acceptance before it comes to the notice of the offeror.

In the scenario given above an offer of withdrawal or acceptance withdrawal is likely to come to the notice of the recipient before the offer or acceptance is communicated despite it being sent and received earlier. To clarify this case, consider that a party, who lives in a country different from the offeree, sends his offer by email to the other recipient party and it was received say at 10:00 a.m. Several hours later, the offeror changes his mind and sends another email withdrawing his offer which arrives at the offeree's inbox at 1:00 p.m. Provided that the recipient party checks his inbox once a day at 4:00 p.m. the withdrawal of the offer should come to his attention before the offer itself despite the offer being sent and received earlier. The same is likely to occur when revoking an acceptance by email; sending a notice of an acceptance's revocation after an earlier acceptance is emailed earlier may come to the attention of the offeror before the acceptance itself. In this regard, article 22 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) (see Eiselen 1999) states that an acceptance may be withdrawn if the withdrawal reaches the offeror before, or at the same time as, the acceptance would have become effective.

Thus, it becomes essential to determine the time when a contract becomes legally binding in order to avoid potential disputes. In face-to-face transac-

tions this does not present a problem. Accordingly, the contract is formed at the moment the acceptance comes to the knowledge of the offeror, which usually occurs as soon as the acceptance is expressed. (Al-Ebraheem 1986:421). Similarly, this general rule should be applied in contracts formed via direct forms of communication, such as on the telephone, when there is no time delay in the communication of offer and acceptance between the contracting parties (Alzaagy 2011:160).

It is worth mentioning the comment made by Denning LJ in the case of *Entores Ltd v. Miles Far East Corporation* [1955] 2 All ER 493) which indicated that;

“...where two people make a contract by telephone; Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes dead so that I do not hear his words of acceptance. There is no contract at that moment ... If he wishes to make a contract; he must therefore get through again so as to make sure that I hear. Suppose next that the line does not go dead, but it is nevertheless so indistinct that I do not catch what he says and I ask him to repeat it. He then repeats it and I hear his acceptance. The contact is made, not the first time when I do not hear, but only the second time when I do hear.”

That is to say, when parties use a telephone, or other direct forms of communication, to form a contract, this contract is deemed comparable to a face-to-face contract and therefore comes into legal force when the offeror becomes fully aware of the acceptance.

However, the difficulty arises in determining when the contracting parties enter into a binding transaction using non-instantaneous forms of communication. In such contracts, a time delay occurs between the sending and receipt of offer and acceptance between the contracting parties. Thus, it is disputable in such cases to determine the moment during which a contract is deemed to be binding. Legally, there are four main theories which jurists

refer to when establishing the time at which a contract is formed between parties in absentees - the declaration, the mailbox, reception or information.

### The Legal Theories Addressing When a Contract Inter Absentees is Concluded

In Islamic jurisprudence the issue of when a contract is considered to come into legal effect in contracting inter absentees is a matter of discussion. According to the declaration theory, a contract between absent parties is formed when the acceptance of an offer is expressed, regardless of whether the acceptance is brought to the mind of the offeror or not (Al-Sanhoo-ri 1953:56). This theory is based on the understanding that a contract is formed when there is a correspondence between the parties' intention to enter into a binding deal. Therefore, when the offeree declares his acceptance of the received offer, the contract becomes legally effective. It is argued that the declaration theory is suitable to the nature of commercial activities since they require the prompt formation of transactions. Therefore, the offeree can ensure the valid conclusion of the contract and enjoy instantly the use of the purchased item as soon as the acceptance is expressed without unreasonable delay (Al-Oboodi 1997:157). A number of legal texts are referred to, which imply, accordingly, that Islamic law follows the declaration theory in determining the time of forming a contract inter absentees (Al-Kasani 1997:540). Amongst others, (Al-Bahooti 1997:169) stated that "when a seller sends a letter or correspondence through a messenger to a prospective buyer, who is absent from the 'meeting place,'<sup>1</sup> offering to sell a certain article with certain value, then when the offer reaches the buyer, he unequivocally accepts that, at this time, the contract is considered to be validly formed." Therefore, this indicates that the contract is deemed to be formed at the time the offeree declares his acceptance to the offer.

However, this theory has been criticised as being biased towards the offeree since the contract is deemed to be formed without the offeror being aware of this conclusion. Thus, no one except for the offeree can ascertain that an acceptance has been made; yet the contract becomes legally binding and

furthermore he can deny declaring the acceptance, if he wishes to do so and perhaps with no way to establish the fact (Marqass 1956:133). This may lead to uncertainty and confusion for the offeror as the contract is formed entirely at the wish of the offeree, either to ratify his acceptance or to deny it if he wants to change his mind. Established by some classical jurists, the declaration rule may have been appropriate and relevant in days gone by, since it would have hastened the formation of contracts, but its relevance today is questionable. Previously, communications between parties may have taken days or even months but today's modern methods of communication facilitate keeping distant contracting parties in contact within considerably shorter time periods (Alzaagy 2011:162-163). Further, the aforementioned text given by early Islamic scholars was not meant to determine the time when a contract is considered to be formed, rather, it was based on clarifying the validity of forming a contract between absentees' parties who are not together in one 'meeting place' (Al-Sanhoori 1953:54-56).

Under the information rule, acceptance becomes effective and thus a contract comes into existence at the moment the acceptance comes to the notice of the offeror. As with face-to-face transaction, this theory takes into account that the acceptance is an expression of the offeree's consent and this expression cannot take legal effect unless it is brought to the attention of the offeror. Thus, only at this time can it be said there is a correspondence between the parties' consent (in the form of offer and acceptance) and therefore the contract is deemed validly formed (Al-Sanhoori 1966:242). Accordingly, the offeror can withdraw the offer at any time before the expressed acceptance by the other party (offeree) comes to his knowledge. Paradoxically, it is important to note that, and in contrast to the declaration theory, the offeree may suffer under the information theory as it is difficult for him to determine when the acceptance comes to the notice of the offeror. Implementing the information theory may also lead to unreasonable delay in the formation of transactions. As we can observe here, the legal position in Islamic law toward this issue is not so settled and hence the legal stance in Saudi Arabia, as a country which constitutionally implements Islamic Law, is unclear. From online transactions perspective, the enacted Saudi Electronic

Transaction Rule (2007) failed to address this controversial matter which is central in contracts formed between parties in absentees. It seems that it is unclear when an electronic contract is deemed to be formed under the judicial system in the country. Thus, determining the courts' interpretation of the issue in the light of electronic contract is problematic.

### The Time of Concluding the Contract via Email Communication

It is worth discussing that in the case that the parties use a non-instantaneous means of communication, like that of email, it is questionable as to which of those aforementioned theories provide an appropriate approach to the issue of when a contract should come into legal existence.

Neither the information nor the declaration theory appear to provide a suitable framework for contracting via email since the information theory makes it difficult to determine when a message comes to the notice of the offeror and the declaration rule presents uncertainties in determining when an acceptance is declared, as discussed above.

Under the mailbox theory, also known as the postal rule, it is not legally sufficient for the acceptance to be only declared in order for a contract to be formed, rather, the acceptance is legally effective and thus a contract becomes legally binding at the time when it is sent or posted to the offeror (Jones 2000). The postal rule has its origins in common-law jurisdiction and is applied in delayed forms of communication, such as ordinary mail, as an exception to the general rule. The courts have yet to consider whether to apply the postal rule in email communication. The fundamental difference between the two systems relates to recipient timing. Posted items typically take days or even weeks to arrive whereas email communication, when it works properly, takes considerably less time to reach its intended destination (Stott 1999). In light of modern communication systems, the general rule which accepts that a contract is effective at the time of the receipt of acceptance is applied in instantaneous forms of communication, like that of telex (See, *Entros v. Miles Far East Corporation Ltd* [1955] 2 Q.B. 327).

However, email communication may be delayed for hours or even days due to

server breakdown or other technical faults. Therefore, it has been suggested that the postal rule be applied in email communication since it presents similarities to traditional mail (Al-Ibrahim et al. 2007). Accordingly, as with traditional mail, the risk of substantial delay or possible non-delivery of the email should lie with the offeror. Nevertheless, a possible delay in the transmission of telex messages is contemplated, similar to email communication, and yet the courts did not find it justifiable to apply the postal rule and negate the general rule (Poyton 2004:183). However, the rapid development of technology may soon be able to eliminate existing problems with email communication and instead, deliver a service that guarantees instantaneous connection between users. Already technology allows email users set up an immediate confirmation of receipt. This ability to confirm the receipt of an offer and an acceptance almost instantaneously deprives the postal rule of much of its utility (Bernachi 1997). Moreover, like the declaration rule, it seems that solely the convenience of the offeree is protected under the mailbox rule. Accordingly, a contract is formed at the time that the acceptance letter is handed to a post-office representative or put in the post box irrespective of whether the letter is delayed, destroyed or lost en-route and not even reaches the offeror (Belgum 1999). Therefore, the application of the postal rule in email transactions appears to be questionable.

In contrast to the declaration and mailbox rules, the reception rule states that a contract is not completely formed until the acceptance is actually received by the offeror or at least made available for him, regardless of whether the content of the acceptance is read by the offeror. The actual receipt of acceptance by the offeror is treated as an inference of his knowledge as to its content. The reception theory appears to provide a more reasonable approach for both of the parties. The binding conclusion of the contract starts at the time of receiving the acceptance, regardless of whether it comes to the attention of the offeror or not since he is ultimately responsible for the prompt handling of letters received in his mailbox. At the same time, the theory ensures that the contract should not validly be formed in the case that the acceptance gets lost on the way since the offeror has not yet had any control of the acceptance. That is to say, the reception theory is based



on dividing the risk of communicating the acceptance equally between the parties so that the communication of acceptance can only be held effective at the time the acceptance arrives in the offeror's mailbox, unlike the postal rule where the offeror bears the risk when the communicated acceptance does not find its way to him. As a result, the parties should, in due time, address in details the issue of contract formation in order to prevent any potential uncertainty and conflict (Niemann 2000).

### Determining the Conclusion of Electronic Contracts: An International Attempt

Due to the importance of establishing when an electronic contract is deemed to be legally effective, an international attempt has been recently made by various legal systems to establish a uniform framework. It is worth noting that there is a tendency at the international level to adopt the time of receipt as the time when communication of messages becomes legally effective (Nimmer 1996). The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) provides in this regard that "an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror." It is relatively important to note that the word "reach" provided in the Convention is clarified in article 24 as when the message is communicated orally to the addressee, or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence. Likewise, in the United States, the 2004 Uniform Commercial Code article 2-213(a) provides that an electronic communication bears legal effect when it is received even if no individual is aware of its receipt. As an attempt to determine the point of time when the sending and the receiving of electronic message have taken place, article 15 of the UNCITRAL (United Nation Commission on International Trade Law) Model Law provides important guidelines. Accordingly, an electronic message is deemed to be sent at the time when it enters an information system outside the control of the originator, while, the receipt of the electronic message occurs at the time when it has arrived at the recipient email's inbox.

Therefore, it can be said, based on the above provisions, that there is neither subjective requirement for the recipient's awareness of the content of the message nor deeming the message to become legally effective as soon as it is posted. However, the electronic message is rationally deemed effective as soon as it is readably delivered to the recipient. And, this appears to be an objective and fair approach for both contracting parties. In light of this provision, it seems that an acceptance sent by email would be legally effective and thus the contract becomes legally binding, at the time it safely arrives in the intended recipient's mailbox.

Nonetheless, it is worth mentioning that in the context of email communication it is quite unclear as to when the acceptance message is deemed to be received. When the acceptance sent via an email is converted into a digital format and broken into a number of separate packets before arriving at its intended recipient thus determining the time when the acceptance has been received is problematic. An email may also travel via several different servers before reaching its intended recipient. In this case, it is uncertain at which server the emailed acceptance is deemed to be handled. Is the timing based on when the Internet server receives it, bearing in mind that an email may travel through a number of servers, or when the acceptance message is delivered into the recipient's mailbox? It should be taken into account that in email communication, a data message, even after it is delivered into the recipient's mailbox, may still become corrupted or destroyed before the recipient accesses it. In fact, no universal rule can cover all situations. It is worth referencing Lord Wilberforce's comment that "...no universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases a judgment where the risks should lie." (See, *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandel GmbH* [1983] 2 A.C. 34)

As a result, for the purpose of contract formation, is there any contract that can be validly formed by a mere receipt of the electronic message even if the message is destroyed before the recipient reads it or even knows of its existence? Consequently, it seems that further clarification is needed on the issue of receipt in the context of email communication in order to provi-

de greater certainty and prevent any ambiguity regarding the formation of electronic transaction (Murray 2000:26-27).

As suggested, when an email is used to form a contract an acceptance should be deemed effective when the communicated acceptance becomes available for the recipient to read in his mailbox. That is to say, neither the postal rule, which states that a contract is formed when the acceptance in the form of email is sent, nor the information rule where the acceptance becomes effective when it comes to the attention of the offeror, provides a suitable approach to email communication. In that regard, it is inequitable to deem a contract formed when the communicated acceptance via email is vividly read by the offeror. He may not regularly check his in-tray or may delete emails, intentionally or by mistake, without reading their contents. As a result, if it is upheld that the contract is formed at the time when the offeror reads the acceptance, the offeree, accordingly, will be deprived from forming the contract even though he may have made every effort to communicate the acceptance. In addition, it should also be noted that the offeree might miss the opportunity to form other transactions relying on the complete forming of the contract by ensuring the accurate communication of his acceptance to the offeror.

Therefore, based on the understanding that it is the responsibility of the offeror to check his mailbox for correspondence, the contract should be legally effective at the time when the communicated acceptance arrives at his inbox in a clear and readable form (Alzaagy 2011:170). It is worth referring to a comment made by Lord Fraser regarding a telex communication in which it is observed that “once a message has been received on the offeror’s telex machine, it is not unreasonable to treat it as delivered to the principal offeror, because it is his responsibility to arrange for prompt handling of messages within his own office.” (Brinkibon Ltd v. Stahag Stahl und Stahlwarenhandels-gesellschaft M.B.H. Respondents, House of Lords [1983] 2 A.C. 34) In this regard, it seems reasonable to suggest that in the case that the emailed acceptance enters into the offeror’s mailbox but, due to some technical errors, is impossible to read, the offeror, should, without undue delay, request the acceptance to be resent. With email communication, an

automatic response of receipt of acceptance may imply the successful delivery of acceptance and thus the contract is formed. It is worth mentioning the definition of 'receipt' within the context of electronic communication in the UCC Article 2B according to which it is stated that

“...a contract is formed when: (1) the response is received by the initiating party or its intermediary, if the response consists of furnishing digital information or access to it and the record initiated by that party invited such a response; or (2) the initiating party or its intermediary receives a message signifying or a acknowledging acceptance...”

### The Time of Concluding the Contract in Web Transactions

The question of timing in web transactions depends on the nature of individual websites and the procedures they follow in forming transactions with customers. Some websites operate purely in a passive format and function merely as a shop-window to their traditional business. Such a website would typically display the company name and provide information relating to its trading products or services, including the company's contact details for further communication via offline means (Rothchild:1999). These websites present no opportunity for forming online contracts; therefore determining when a contract is formed will be based on another means of communication. Assuming in this regard that a client accesses the website and subsequently contacts the company via telephone, using the provided contact details, he offers to buy some of the company's products and his offer is accepted during the telephone conversation. In this regard the contract is deemed to be formed at the time when the client hears the acceptance, thus applying the information theory.

Conversely, there are websites with far greater interactivity that include the option to complete transactions entirely online. Suppose that the display of product information is deemed as an offer, and this offer is accepted by a website client and his acceptance is communicated online via the same website, the communication between the client and the website owner is

likely to be carried out instantaneously. In this situation, the parties in web transactions are simultaneously connected between computers rather than humans (Todd 2008:41). That is to say, orders placed via a website may be processed by programmed software and not involve a human participating in any way. Thus, the application of the information theory that requires the offeror to be made aware of the acceptance appears to be impractical to apply in these circumstances. However, the fact remains that the software only acts based on what it is programmed to do so and thus it represents the party as it works on its behalf. Therefore, when the acceptance is communicated via the website by the client, the contract is complete when the client proceeds with the order providing his bank details and confirming his or her purchase by clicking on the acceptance button.

## Conclusion

The Internet's structure has the ability to foster human interaction in considerably short time frames and without respect to physical boundaries. With regards to the time when a contract becomes legally binding, the nature and means of communication used to form the contract play an essential part in determining when a communicated message is deemed to take legal effect. That is to say, when an instantaneous means of communication is used to exchange the offer and the acceptance between the contracting parties, like the telephone, the contract is deemed to become legally effective at the time when the acceptance is brought to the attention of the offeror. However, when there is no direct form of communication between the parties, and no simultaneous exchange of offer and acceptance, a number of different legal theories have been established to determine when a contract is deemed to be formed.

In cyberspace, it is not clear when a contract is deemed to be formed. In this regard, neither the declaration theory which deems that a contract is formed at the time when the acceptance is expressed, nor the information theory which considers the contract legally binding when the acceptance is brought to the mind of the offeror seem to be appropriate for application. Consequently, the contract should be legally formed upon receipt of the

communicated acceptance. This approach provides greater objectivity and equality to both parties. It is accepted that upon receipt of the illegible email, the offeror, if he wishes to finalise the contract, should without undue delay inform the offeree of the problem and request the email to be resent.

It should be mentioned however that due to the legal uncertainty involved with the time of when an electronic contract shall be legally effective, the parties should clearly address this issue in their contract's terms and conditions in order to prevent any potential dispute. For example, they can stipulate that the contract can only be legally formed when the acceptance is read by the offeror, or when the acceptance is received. To recall, automatic confirmation of receipt established in electronic communication may provide certainty in that regard.

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## Notes

<sup>1</sup> It is the place within which the contracting parties physically meet and engage to form a deal.