LAW AND COMMERCE: THE MALAYSIAN PERSPECTIVE

MOHAMMAD NAQIB ISHAN JAN
LLB (HONS) (IIUM), MCL (IIUM),
Ph.D (IIUM)
ASSOCIATE PROFESSOR,
COORDINATOR OF ALTERNATIVE DISPUTE RESOLUTION UNIT,
AHMAD IBRAHIM KULLIYYAH OF LAWS (AIKOL)
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

IIUM Press
CONTENTS

Authors' Profile ................................................................................................................ i
Preface ................................................................................................................................. v
Contents ............................................................................................................................. ix
Table of Cases ................................................................................................................... xxvii
Table of Legislation ........................................................................................................... xlix

PART I
The Malaysian Legal System: An Overview

Chapter 1
Law and Legal System in Malaysia: An Overview

THE NATURE OF LAW................................................................................................. 2
Definition of Law .............................................................................................................. 2
Sources of Law .................................................................................................................. 5
  Written Law .................................................................................................................... 5
  Federal Constitution ...................................................................................................... 5
  State Constitution ......................................................................................................... 6
  Act, Enactment or Ordinance ....................................................................................... 6
  Subsidiary Legislation ................................................................................................... 7
Unwritten law .................................................................................................................... 9
  Common Law ................................................................................................................. 9
  Reception of English Common Law in
  Malaysia ....................................................................................................................... 9
  Customary Law ............................................................................................................. 11
Islamic Law ..................................................................................................................... 13
Islam in Malaysia .......................................................................................................... 15
Syariah courts in Malaysia ........................................................................................... 17

LAW MAKING AND LAW ENFORCEMENT MACHINERY....................................... 20
Legislature to make Law ............................................................................................... 22
Judiciary to enforce the Law............................ 25
Hierarchy of Courts in Malaysia.................... 27
   Special Court........................................ 28
   Federal Court....................................... 28
   Court of Appeal.................................... 29
   High Court.......................................... 30
Original Jurisdiction - Criminal Jurisdiction..... 32
Original Jurisdiction - Civil jurisdiction......... 33
Specific Jurisdiction................................ 33
Family Division..................................... 33
Appellate Jurisdiction............................... 34
Revisionary Jurisdiction............................. 34
Muamalat Division.................................. 34
New Commercial Court............................... 35
Sessions Court........................................ 36
Magistrates’ Court.................................. 37
Arbitration............................................ 37

PART II
Law of Contract: Fundamental to All Aspects of
Commercial Law

Chapter 2
The Nature of the Law of Contract

THE DEFINITION AND TYPES OF CONTRACT .......... 49
   Definition of Contract................................ 49
   Types of Contract.................................... 50
THE GOVERNING LAW................................... 51
   The Contracts Act 1950.............................. 51
   English Common law.................................. 53
THE REQUISITS OF A VALI CONTRACT............... 54

Chapter 3
The Primary Elements of an Enforceable Contract

PROPOSAL (OFFER)..................................... 57
ACCEPTANCE........................................... 60
CONSIDERATION...................................... 63
INTENTION............................................ 70
Chapter 4
Intention to Create Legal Relations

ISSUES PERTAINING TO INTENTION TO CREATE LEGAL RELATIONS ............................................ 76
Domestic Agreements.................................................. 76
Agreements between Husband and Wife............... 76
Car Pool Agreements may Involve the Necessary Intention.................................................... 78
Arrangements between Parents and Children....... 79
Other Social Arrangements................................. 80
Commercial Agreements................................. 81
Letters of Comfort.................................................. 82
CONCLUSION....................................................... 84

Chapter 5
Parties to Contract

CAPACITY TO CONTRACT ............................................. 88
Legal Competency.................................................. 88
Effect of Contract Entered by Minor....................... 88
Effect of Misrepresentation of Age by a Minor....... 89
Recovery of property Transferred under a Contract Entered by Minor..................................... 90
Exceptions to the General Rule in Capacity to Contract.......................................................... 92
Persons of Sound Mind............................................. 94
PRIVACY OF CONTRACT ............................................. 95
The Origin and Development of Privity of Contract at Common Law........................................... 95
The General Rule of Privity of Contract in Malaysia... 96
The Exceptions to the General Rule in Privity of Contract......................................................... 97
CONCLUSION....................................................... 100

Chapter 6
Distinction between Void and Voidable Contracts

VOIDABLE CONTRACT.................................................. 105
CONTENTS

Meaning of Voidable Contract ........................................ 105
Circumstances Where Contract becomes Voidable .......... 106
Coercion ..................................................................... 106
Undue Influence ........................................................... 107
Fraud and Fraudulent Misrepresentation ..................... 109
Burden of Proof for Fraud ............................................. 110
Fraudulent Misrepresentation ..................................... 113
Elements of fraud and misrepresentation ................... 114
There must be a Representation of Fact ..................... 114
A representation of law ............................................... 115
An expression of opinion ............................................. 115
Fraud or misrepresentation under section 340 (2) (a)
of the National Land Code ............................................. 119
Exception to section 19 of the Malaysian Contracts
Act .............................................................................. 122
VOID CONTRACT ............................................................. 122
Meaning of Void Contract .............................................. 122
Circumstances where Contract becomes Void .............. 122
Doctrine of Severance .................................................. 129
Agreements Void If Object or Consideration is Void .. 131
Agreement in Restraint of Marriage Void .................. 132
Agreement in Restraint of Trade .................................... 133
Agreements in Restraint of Legal Proceedings Void ... 133
Agreements’ Void for Uncertainty ............................... 134
Agreements By Way of Wager Void ............................... 135

CONCLUSION................................................................... 136

Chapter 7
Discharge of Contract

DISCHARGE BY CONSENT OR AGREEMENT BETWEEN THE
PARTIES ......................................................................... 141
DISCHARGE BY PERFORMANCE ..................................... 144
Time and Place of Performance .................................. 145
Effect of Failure to Perform ....................................... 145
DISCHARGE BY BREACH OF CONTRACT .................... 147
BREACH DUE TO REPUDIATION OF THE CONTRACT .... 150
DISCHARGE BY FRUSTRATION OR IMPOSSIBILITY OF
PERFORMANCE ................................................................ 150
CONCLUSION .................................................................. 153
Chapter 8
Remedies for Breach of Contract

TYPES OF REMEDIES ......................................................................................................................... 155
Damages .................................................................................................................................................. 155
   Section 74 of the Contract Act 1950 and
   Remoteness of Damages ..................................................................................................................... 156
First Limb of Section 74(1) ................................................................................................................... 159
Second Limb of Section 74(1) .................................................................................................................. 160
   Quantum of Damages ............................................................................................................................ 161
   Expectation loss ................................................................................................................................. 161
   Reliance loss ..................................................................................................................................... 162
   Proof of Damage ............................................................................................................................... 163
   Duty to Mitigate ................................................................................................................................. 163
   Section 75 of the Contracts Act 1950 .................................................................................................... 164
Rescission .................................................................................................................................................... 167
Specific Performance ............................................................................................................................... 168
Injunction .................................................................................................................................................... 169
   Mareva Injunction ............................................................................................................................. 170
   Anton Piller Order ............................................................................................................................ 170
   Quantum Meruit ............................................................................................................................... 171

Chapter 9
Law of Contract in Shariah

THE PILLARS OF A CONTRACT .............................................................................................................. 176
   Offer (Ijab) and Acceptance (qabul) sighah ...................................................................................... 177
   The Existing of two Properly and Qualified Contracting Parties (Al-'Aqid) ..................................... 178
   Subject Matter of Contract (Mahal al Aqid) ...................................................................................... 179
THERE SHALL BE NO IMPEDIMENTS AFFECTING THE
VALIDITY OF THE CONSENT .................................................................................................................. 181
   The Elements of Gharar .................................................................................................................... 183
CONCLUSION ............................................................................................................................................. 183
PART III
E-Commerce

Chapter 10
E-Commerce and the Practice in Malaysia: An Overview

DEFINITION OF E-COMMERCE .................................................. 186
E-COMMERCE AND E-CONTRACTS ........................................... 186
THE REGULATORY FRAMEWORKS ............................................. 187
  By the United Nations ......................................................... 187
  E-commerce Regulations ..................................................... 188
  The Malaysian laws ............................................................ 189
OTHER RELEVANT STATUTES .................................................... 191
TYPES OF E-COMMERCE ......................................................... 191
  Business to Business (B2B) .................................................. 191
  Business to Consumer (B2C) ................................................. 191
  Consumer to Business (C2B) ............................................... 192
  Business to Employee (B2E) ............................................... 192
  Consumer to Consumer (C2C) .............................................. 192
ADVANTAGES AND DISADVANTAGES ......................................... 193
LEGAL ISSUES IN E-COMMERCE .............................................. 194
  Breach of Online Contract .................................................. 195
  E-Commerce and Privacy Issues .......................................... 196
  E-Commerce and Consumer Protection .................................. 199
  E-Commerce and Web Advertisement .................................... 200
E-COMMERCE AND ADMISSIBILITY OF ELECTRONIC RECORDS IN ELECTRONIC CONTRACTS ............................................. 202
COMMERCE AND OTHER RELATED MATTERS ............................. 203
  Electronic Data Interchange ............................................... 203
  Taxation on internet services .............................................. 204
THE CHALLENGES IN E-COMMERCE ........................................ 205
THE FUTURE OF E-COMMERCE ................................................. 206
  Virtual Dressing Rooms ..................................................... 207
  Improved Supply Chain Process ......................................... 207
  Sharing of Product Lists and More Choices ............................ 208
  Easier Transactions and Better Delivery Options ..................... 208
  Secured Transactions ....................................................... 208
## Chapter 11
The Law of Electronic Contract in Malaysia: Issues and Challenges

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>THE MEANING AND SCOPE OF ELECTRONIC CONTRACT</td>
<td>217</td>
</tr>
<tr>
<td>THE FUNDAMENTAL PRINCIPLES IN E-CONTRACT LAW.</td>
<td>218</td>
</tr>
<tr>
<td>LEGAL LANDSCAPE OF E-COMMERCE IN MALAYSIA</td>
<td>222</td>
</tr>
<tr>
<td>- Digital Signature Act 1997</td>
<td>223</td>
</tr>
<tr>
<td>- Computer Crimes Act 1997</td>
<td>223</td>
</tr>
<tr>
<td>- Communications and Multimedia Act 1998</td>
<td>224</td>
</tr>
<tr>
<td>- Payment systems Act 2003</td>
<td>225</td>
</tr>
<tr>
<td>- Electronic Commerce Act 2006</td>
<td>225</td>
</tr>
<tr>
<td>- Minimum Guidelines on the Provision of the Internet Banking Services by Licensed Institution</td>
<td>226</td>
</tr>
<tr>
<td>- Other Laws Applicable for Online Environment</td>
<td>226</td>
</tr>
<tr>
<td>E-CONTRACT UNDER THE ELECTRONIC COMMERCE ACT</td>
<td>228</td>
</tr>
<tr>
<td>2006: THE BASIC FEATURES</td>
<td>228</td>
</tr>
<tr>
<td>- Functional Equivalence and the Legal Recognition</td>
<td>230</td>
</tr>
<tr>
<td>- Legal Recognition of Electronic Message</td>
<td>231</td>
</tr>
<tr>
<td>- The Requirement of Writing</td>
<td>231</td>
</tr>
<tr>
<td>- The Requirement of Signature</td>
<td>232</td>
</tr>
<tr>
<td>- The Requirement of Seal, Witness and Originality</td>
<td>233</td>
</tr>
<tr>
<td>- The Formation of Electronic Contract</td>
<td>234</td>
</tr>
<tr>
<td>ELECTRONIC CONTRACT AND THE CHALLENGE OF DATA PRIVACY</td>
<td>235</td>
</tr>
<tr>
<td>- Personal Data Protection Act 2010</td>
<td>236</td>
</tr>
<tr>
<td>- The Seven Data Protection Principles</td>
<td>237</td>
</tr>
<tr>
<td>ELECTRONIC CONTRACT AND THE CHALLENGE OF SYSTEM SECURITY</td>
<td>241</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>244</td>
</tr>
</tbody>
</table>

## PART IV
Sale of Goods: The General Principles

### Chapter 12
Sale of Goods Law: A Prologue

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>BACKGROUND OF THE SOGA 1957 (MALAYSIA)</td>
<td>251</td>
</tr>
</tbody>
</table>
THE APPLICABLE LAW IN SALE OF GOODS LAW IN MALAYSIA................................................................. 255
   Section 14 of SOGA 1979 UK: Satisfactory Quality... 258
SCOPE OF THE SALE OF GOODS ACT 1957 .................... 259
DEFINITION OF GOODS UNDER THE SOGA .................. 261
CLASSIFICATION OF GOODS........................................... 262
FORMATION OF THE SALE CONTRACT............................ 264
DISTINCTION BETWEEN SALE AND AGREEMENT TO SEL................................................................. 265
NATURE OF THE SALE OF GOODS CONTRACT............... 269
CAPACITY TO MAKE A SALE OF GOODS CONTRACT....... 270
FORMALITY AS AN ELEMENT OF A SALE OF GOODS CONTRACT.......................................................... 272
PRINCIPLE FOR DETERMINATION OF PRICE OF GOODS................................................................. 273
SALE OF GOODS LAW: AN ISLAMIC PERSPECTIVE........... 275
CONCLUSION.................................................................... 279

Chapter 13
Implied Terms under the Sale of Goods Act 1957

DEFINITION OF THE SALE OF GOODS CONTRACT ...... 284
   A Contract of Sale....................................................... 284
   An Agreement to Sell................................................. 284
   Price........................................................................ 285
   Goods........................................................................ 285
   Implied Terms.......................................................... 286
   Right to sell............................................................... 286
IMPLIED WARRANTY AS TO QUIET POSSESSION........ 289
IMPLIED WARRANTY THAT THE GOODS ARE FREE FROM ENCUMBRANCE........................................ 290
IMPLIED CONDITION THAT GOODS CORRESPOND WITH DESCRIPTION........................................... 290
THE FORM OF THE DESCRIPTION................................. 290
EXTENT OF THE DESCRIPTION........................................ 291
SALE BY SAMPLE AND DESCRIPTION........................ 293
THE RELATIONSHIP OF DESCRIPTION AND QUALITY... 294
CAVEAT EMPTOR....................................................... 295
   Implied condition as to quality under Section 16(i)(a).. 296
   Buyer’s reliance on the sellers’ skill and judgment.... 298
## CONTENTS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>DISCLOSURE OF PURPOSE</td>
<td>301</td>
</tr>
<tr>
<td>IMPLIED CONDITION AS TO MERCHANTABLE QUALITY</td>
<td>302</td>
</tr>
<tr>
<td>Meaning of merchantable quality</td>
<td>303</td>
</tr>
<tr>
<td>SALE BY SAMPLE</td>
<td>307</td>
</tr>
<tr>
<td>EXCLUSION OF IMPLIED TERMS</td>
<td>310</td>
</tr>
</tbody>
</table>

### Chapter 14
Transfer of Title

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>THE GENERAL RULE</td>
<td>314</td>
</tr>
<tr>
<td>EXCEPTIONS TO THE NEMO DAT RULE</td>
<td>317</td>
</tr>
<tr>
<td>Estoppel</td>
<td>317</td>
</tr>
<tr>
<td>Sale by Mercantile Agent</td>
<td>318</td>
</tr>
<tr>
<td>Sale by One of Joint Owners</td>
<td>320</td>
</tr>
<tr>
<td>Sale under Voidable Title</td>
<td>321</td>
</tr>
<tr>
<td>Disposition by Seller in Possession after Sale</td>
<td>322</td>
</tr>
<tr>
<td>Dispossesssion by Buyer in Possession after Sale</td>
<td>323</td>
</tr>
</tbody>
</table>

### Chapter 15
Rights and Remedies of the Buyer and the Seller

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>RIGHTS AND DUTIES OF THE SELLER</td>
<td>330</td>
</tr>
<tr>
<td>RIGHTS AND DUTIES OF THE BUYER</td>
<td>332</td>
</tr>
<tr>
<td>REMEDIES</td>
<td>334</td>
</tr>
<tr>
<td>DAMAGES FOR NON-DELIVERY</td>
<td>335</td>
</tr>
<tr>
<td>Damage</td>
<td>335</td>
</tr>
<tr>
<td>Compensation for Breach of Contract where Penalty is Stipulated For</td>
<td>336</td>
</tr>
<tr>
<td>Specific Performance</td>
<td>337</td>
</tr>
<tr>
<td>Restitution</td>
<td>337</td>
</tr>
<tr>
<td>Expectation Loss</td>
<td>338</td>
</tr>
<tr>
<td>Reliance Loss</td>
<td>339</td>
</tr>
<tr>
<td>Remedies for Seller</td>
<td>339</td>
</tr>
<tr>
<td>Right to Forfeit Deposit</td>
<td>340</td>
</tr>
<tr>
<td>A Lien</td>
<td>341</td>
</tr>
<tr>
<td>Stoppage in Transit</td>
<td>342</td>
</tr>
<tr>
<td>Resale by Seller</td>
<td>342</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>342</td>
</tr>
</tbody>
</table>
Chapter 16
Disputes and Issues Relating to Sale and Purchase of Land in Malaysia

THE NATURE OF LAND OWNERSHIP AND GOVERNING LAWS................................................................. 346
TYPE OF LAND OR PARCEL.................................................. 348
THE SALE AND PURCHASE AGREEMENT................................. 348
ISSUES RELATING TO SALE AND PURCHASE OF LAND... 350
SPA Conditional upon Compliance with Restriction in Interest.................................................. 350
Other Conditions Attached to the SPA.................................. 351
Purchase Subject to an Existing Tenancy............................ 352
Purchase of Property Subject to a Charge Action............ 353
Effect of Pending Land Acquisition................................. 354

DISPUTES RELATING TO SALE AND PURCHASE OF LAND.................................................. 356
Late Delivery of Vacant Possession................................. 356
Abandoned Housing Projects by Developers................... 357
Poor Workmanship or Quality........................................ 358
CONCLUSION..................................................................... 359

PART V
Hire Purchase

Chapter 17
A Review on the Application of Malaysian Hire Purchase Act 1967 and the Recent Amendment 2010

MEANING OF “HIRE PURCHASE” UNDER HPA............... 368
MEANING OF “GOODS” UNDER THE HPA...................... 370
Formation of the Hire Purchase Agreement ........... 371
Pre-Contractual Obligations........................................... 371
Construction of a Hire-Purchase Agreement........... 372
Post Contractual Obligations........................................ 372

RIGHTS AND PROTECTIONS OF HIRERS....................... 373
STATUTORY RIGHTS OF THE HIRER.......................... 376
REPOSESSION OF GOODS BY THE OWNER AND... 377
PROCEDURES PRIOR TO REPOSESSION...................... 379
Chapter 18
Islamic Hire-Purchase (Al-IjarahThumma al-Bay‘) (AITAB)

DEFINITION OF IJARAH........................................ 387
IJARAH VS KIRA............................................... 388
LEGALITY....................................................... 388
The Qur'an .................................................. 388
The Sunnah.................................................. 389
Consensus of Scholars.................................... 390
DEFINITION OF ISLAMIC HIRE-PURCHASE (AITAB).... 390
AITAB VS INSTALLMENT SALE.......................... 391
AITAB VS OPERATING LEASE............................. 391
PRACTICAL STEPS OF AITAB............................... 392
JURISTIC CONSTRUCTION OF AITAB (AL-TAKYEEF AL-
FIQHI)............................................................. 392
LEGAL RULING FOR AITAB.................................. 393
AREA OF APPLICATION..................................... 397

PART VI
Law of Agency

Chapter 19
Agency Law

MEANING OF AGENT........................................ 400
CREATION OF AGENCY: AUTHORITY..................... 400
Express and Implied Appointment...................... 401
Doctrine of Estoppels.................................... 402
Ratification.................................................. 403
Necessity.................................................... 404
APPOINTMENT BY COHABITATION...................... 405
OBLIGATIONS OF AGENT TO PRINCIPAL.............. 405
RIGHTS OF AGENT.......................................... 409
Chapter 20
Agency in Islamic Law

DEFINITION OF AGENCY (WAKALAH) ........................................... 419
DISTINGUISHING AGENCY FROM OTHER RELATIONSHIPS .......... 420
Agency and Deputation (niyyabah) ....................................... 420
Agency and Guardianship (wilayah) .................................... 420
Agency and "Will" (wasiyyah) ............................................. 420
Legality of Agency ............................................................ 421
Qura’n ............................................................................. 421
Hadith ............................................................................. 422
Consensus ................................................................. 422
NATURE OF AGENCY CONTRACT ........................................... 423
PILLARS OF AGENCY CONTRACT ......................................... 424
CONDITIONS FOR AGENCY VALIDITY .................................... 424
Conditions for Contract Language ...................................... 425
Conditions for Principal .................................................... 426
Conditions of Agent ........................................................ 426
Conditions for Object of the contract .................................. 426
Agency in Transactions and Financial Rights ................. 427
DELEANINGS WHICH DO NOT ACCEPT LEGAL REPRESENTATION ........... 429
Agency in Testimony (al-shahadah) ................................. 429
Agency in Acts of Worship .............................................. 429
Agency in hudud and other Punishments ......................... 430
Agency in establishing hudud crimes ............................... 430
Agency in Executing Hudud Punishments ....................... 430
Agency in Executing Retaliatory Punishment ................. 431
TYPES OF AGENCY .............................................................. 431
Restricted Agency (wakalah muqayyadah) ..................... 431
Unrestricted Agency (wakalah mutqaqah) ....................... 431
Obligations of agent to principal ................................. 432
Obligations of principal to agent .................................. 432
Legal effects of contracts performed by agents ............ 433
TERMINATION OF AGENCY CONTRACT ................................... 433
PART VII
Consumer Protection

Chapter 21
The Nature of the Law on Consumer Protection

AN OVERVIEW OF THE CONSUMER PROTECTION ACT 1999 ................................................................. 438
NEW REGULATIONS ON UNFAIR CONTRACT TERMS.... 440
LIABILITY FOR DEFECTIVE PRODUCTS .......................... 444
MANUFACTURER'S LIABILITY FOR BREACH OF IMPLIED
GUARANTEES ................................................................. 445
MANUFACTURER'S LIABILITY FOR BREACH OF EXPRESS
GUARANTEES ................................................................. 447
MANUFACTURER'S LIABILITY UNDER PART X .............. 449
THE TRIBUNAL FOR CONSUMER CLAIMS (TCC) .......... 454
CONCLUSION ................................................................. 456

PART VIII
Negotiable Instruments and Franchise Law

Chapter 22
Negotiable Instruments

DEFINITION OF NEGOTIABLE INSTRUMENTS ............. 464
TYPES OF NEGOTIABLE INSTRUMENT .......................... 464
Statute: Bills of Exchange 1949 .................................. 465
Promissory Notes ......................................................... 465
Cheque ................................................................. 465
Mercantile Custom ...................................................... 465
Bankers' Draft ......................................................... 465
Bank Notes ............................................................ 466
Travellers' Cheques .................................................... 466
Treasury Bills .......................................................... 466
Share Warrants ......................................................... 466
Dividend Warrants .................................................... 466
Debentures ............................................................ 467
DEFINITION AND CHARACTERISTICS OF BILLS OF
EXCHANGE .............................................................. 467
FUNCTIONS OF BILLS OF EXCHANGE ...................... 470
THE ELEMENTS OF BILLS OF EXCHANGE .......................... 471
  Consideration .................................................. 471
  Capacity to Contract ........................................... 471
  Negotiation of Bills ........................................... 471
  Acceptance ..................................................... 472
  Endorsement .................................................... 473
  Delivery ......................................................... 474
  Liability of the Parties ....................................... 475
  Holder .......................................................... 476
  Holder in Due Course ......................................... 476
  Holder for Value ............................................... 477

ISSUES OF BILLS OF EXCHANGE ................................. 477
  Forged Signatures ............................................. 477
  Inchoate Bills .................................................. 477
  Presentment for Payment ..................................... 478
  Procedure of Dishonour ...................................... 479
  Noting and Protest ............................................ 479

CHEQUES ............................................................ 480
  Definition ....................................................... 480
  Characteristics ............................................... 480
  Legal Effect on Cheques ...................................... 480
  Crossing of Cheques .......................................... 482
  Alteration on a cheque ........................................ 482

PROTECTION OF THE PAYING BANKER ......................... 483

PROTECTION OF THE COLLECTING BANKER .................... 484

TERMINATION OF A BANKER’S AUTHORITY TO PAY .......... 484

ANTI-MONEY LAUNDERING ACT 2001 ............................ 485

CASE LAWS ON NEGOTIABLE INSTRUMENTS ..................... 486

SHARIAH PERSPECTIVES ON NEGOTIABLE INSTRUMENTS ....... 497
  Definition of Sukuk ............................................ 497
  Basic Structure of Sukuk ..................................... 499
  Purpose and Benefits of Sukuk ................................ 499
  Comparison with Bonds ........................................ 501
  Comparison between Sukuk and Bond ........................ 502

Chapter 23
Franchise Law in Malaysia

FRANCHISE IN MALAYSIA ........................................ 504
  Definition ....................................................... 505
The Law................................................................. 506
FRANCHISE AGREEMENT........................................ 507
  Duration.............................................................. 510
  Fees and Promotion Fund....................................... 512
FRANCHISE BUSINESS........................................... 512
  Conduct of the Parties.......................................... 513
  Offences........................................................... 513
CONCLUSION......................................................... 515

PART IX
Other Related Topics

Chapter 24
Civil Court Jurisdiction over Islamic Banking Cases –
Muamalat Division of the High Court

LEGISLATING POWERS OVER ISLAMIC BANKING
LAWS............................................................................ 520

ARTICLE 3(1) OF THE FEDERAL CONSTITUTION AND ITS
IMPLICATIONS ON ISLAMIC BANKING INDUSTRY.......... 521

CIVIL COURT JURISDICTION OVER ISLAMIC BANKING
CASES.......................................................................... 523

MUAMALAT DIVISION OF THE HIGH COURT................ 524

MUAMALAT DIVISION OF THE HIGH COURT VIS-A-VIS
SHAR’IAH ADVISORY COUNCIL OF BANK NEGARA
MALAYSIA................................................................. 532

CONCLUSION.............................................................. 534

Chapter 25
The Nature, Concept and Epistemological Development
of the Law of Bailment: A Prolegomenon

THE NATURE OF THE LAW OF BAILMENT................. 538

SOURCES OF THE LAW OF BAILMENT IN MALAYSIA.... 540

ELEMENTS OF BAILMENT........................................ 541
  Subject Matter ..................................................... 542
  Delivery ............................................................... 542
  Purpose ............................................................... 543
  Contract ............................................................... 543
Chapter 26
The Tort of Negligence

THE DUTY OF CARE........................................... 566
The Scope of Duty of Care.................................. 567
Reasonable Foreseeability................................. 567
Proximity ....................................................... 568
Public interest................................................. 568
NEGLECTENT STATEMENTS............................... 568
The Need for a Special Relationship – Knowledge of Victim...................................................... 571
From Knowledge to Foresight.............................. 572
From Foresight Back To Knowledge..................... 575
Avoiding and Excluding Liability........................ 579
Professional negligence insurance....................... 579
Chapter 27
Islamic Commercial Law

DEFINITION OF COMMERCIAL LAW................................. 586
THE EVOLUTION OF ISLAMIC COMMERCIAL LAW........ 587
THE ISLAMIC REFORM.............................................. 588
THE BASIC CONCEPT AND PRINCIPLES OF COMMERCIAL LAW................................................................. 590
    Justice and Goodness.......................................... 590
    Transparency in Commercial Dealings..................... 592
    Prohibition of Gharar.......................................... 592
    Circulation of Wealth and Prohibit Hoarding and Monopoly............................................................... 594
CONCLUSION............................................................ 594

INDEX............................................................................. 597
CHAPTER 9

LAW OF CONTRACT IN SHARIAH

by
FAUZIAH MOHD NOOR

Contracts are essential part of the economic system of free enterprise. They are the basis of Islamic law of transactions. 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 stated by the Quran to the effect: "O you who believe! Perform your contracts" (Al-Maidah, 5:1). A contract in Islamic law is simply a legally recognized undertaking. To make a contract, one party must propose a relationship to another party.

The Arabic word for contract is "aqd," which literally means "tying, knitting, joining, locking." In the dictionary of Lisan al Arab, they say, aqad al Ahad which means to make a covenant and aqad al Yamin to mean give an oath. So the word aqd carries the meanings of covenant and fulfillment. The plural of the word 'uqud’ is mentioned in the Holy Quran, in commanding the faithful to keep their covenants. 'Aqd’ is basically an exchange of promises between two or more parties resulting in an obligation to do or refrain from doing some lawful act intended to result in legal relations or legal consequences which are enforceable in law.