



E-COMMERCE LAW IN PALESTINE WITH SPECIAL
REFERENCE TO APPORTIONMENT OF LIABILITIES

BY

YAHYA Y. F. HASAN

A thesis submitted in fulfilment of the requirement for the
degree of Doctor of Philosophy in Law

Ahmad Ibrahim Kulliyyah of Laws
International Islamic University Malaysia

JANUARY 2017

ABSTRACT

E-commerce allows any buyer to purchase goods from anywhere in the world; it creates a global market of goods in which business and consumers contract with each other electronically. Varieties and brands of goods are bought and sold via the Internet and consumed far away from the point of purchase and the place of manufacture. However, the apportionment of liability becomes uncertain because there are many intermediaries involved. Although the role of each of these intermediaries is clear and known, the apportionment of liabilities of each of them is not necessarily settled. Without clear acknowledgment and understanding of each party's role and responsibility, it is likely that any one party will bear all responsibility. This is because there is no certainty as to the apportionment of liability in the provision of sale of goods via the Internet. This research investigated and examined the nature of liabilities arising out of electronic transactions and the challenges of apportionment of those liabilities. In addition, this research studied Palestinian laws relating to electronic contracts, specifically on the issue of apportionment of liability. It also assessed the laws on apportionment of liabilities under the Shari'ah. Finally, this research came up with recommendations to improve the law on e-transactions in Palestine to effectively define and regulate liabilities of all parties involved in e-transactions. This research is a doctrinal research using both analytical and comparative approaches. In addition, the laws of Palestine, other Arab countries, and the European Directives were referred in order to clarify the issues of apportionment of liability in e-transactions in Palestine. It found from this research that the current laws in Palestine are inadequate to regulate the issue of apportionment of liability in electronic transaction. The benefit of this research is to propose recommendations to develop Palestinian laws in order to address the issues of apportionment of liability, in order to contribute to the development of e-commerce in Palestine. In addition, the researcher recommends that Palestinian lawmakers draft or improve the laws that explain the responsibility of all parties in electronic transactions, thus creating necessary the legal means to address problems arising in the e-commerce in Palestine.

ملخص البحث

هناك العديد من الإشكاليات الناتجة عن البيع عبر الإنترنت كالممارسات غير العادلة وعدم عدالة حل النزاعات وأمن المنتجات ونوعيتها وإشكالية تسليم البضائع والمنتجات التي تؤثر على الصحة أو تحتوي على مخاطر الأمان أو عدم تسليم البضائع بعد الوفاء. بالإضافة إلى تهديد الإحتيال والتصرفات غير الأخلاقية كإنكار الهوية والإعلانات الخاطئة والحصول على الثمن دون نية التسليم ومشاكل الخصوصية. وعدة مشاكل متعلقة بوسائل الوفاء الإلكتروني كالفقدان والأخطاء والصفقات غير المخولة. أدى وجود الإنترنت إلى استهلاك البضائع بعيداً عن مكانها حيث ازدادت المسافة من مكان التصنيع وأدى كذلك الى اختلاف أنواع البضائع وأصنافها أكثر من ذي قبل. ولكن توزيع المسؤولية أصبح مقلقا بسبب اشتراك عدة وسطاء في عملية بيع البضائع عبر الإنترنت. ورغم أن دور كل وسيط واضح ومعروف ولكن توزيع المسؤوليات لم يتحدد. ودون معرفة وفهم مسؤولية كل طرف بوضوح سيتحمل أحد الأطراف جميع التكاليف والأخطاء والإخفاق الناتج عن الآخرين بسبب عدم وضوح توزيع المسؤولية في أحكام البيع عبر الإنترنت. يوضح هذا البحث طبيعة المسؤولية الناتجة عن المعاملات الإلكترونية وتحديات توزيع هذه المسؤوليات. كما يدرس هذا البحث القوانين الفلسطينية المتعلقة بال عقود الإلكترونية وتحديدات توزيع المسؤولية. علاوة على ذلك يُقيم هذا البحث قوانين توزيع المسؤولية تحت مظلة الشريعة الإسلامية. استخدم الباحث المنهج التحليلي والمقارن بالإضافة إلى استخدام القوانين الفلسطينية والعربية والتوجيهات الأوروبية لتوضيح قضايا توزيع المسؤولية في المعاملات الإلكترونية في فلسطين. نتيجة هذا البحث أن القوانين الحالية في فلسطين غير كافية لتنظيم قضية توزيع المسؤولية في المعاملات الإلكترونية. ميزة هذا البحث احتوائه على توصيات لتطوير القوانين الفلسطينية لتنظيم قضايا توزيع المسؤولية في المعاملات الإلكترونية والتي تساهم في تطوير التجارة الإلكترونية في فلسطين. بالإضافة الى ذلك يوصي الباحث المشرع الفلسطيني لصياغة القوانين التي تبين مسؤولية جميع الأطراف في المعاملات الإلكترونية مع إيجاد الوسائل القانونية اللازمة لإثبات هذه المسؤولية والتحقق من قيامها وتحميلها على الطرف المسؤول عن أي مشكلة.

APPROVAL PAGE

The thesis of YAHYA Y. F. HASAN has been approved by the following:

Asst. Prof. Dr. Sonny Zulhuda
Supervisor

Prof. Dr. Naemah Amin
Internal Examiner

Prof. Dr. Zinatul Ashiqin bt. Zainol
External Examiner

Assoc. Prof. Dr. Khaled Ibrahim Talahma
External Examiner

Prof. Dr. Amir Akramin Shafie
Chairman

DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

YAHYA Y. F. HASAN

SignatureDate

COPYRIGHT PAGE

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

**DECLARATION OF COPYRIGHT AND AFFIRMATION
OF FAIR USE OF UNPUBLISHED RESEARCH**

Copyright © 2017 (YAHYA Y. F. HASAN) by International Islamic University Malaysia. All rights reserved.

**E-COMMERCE LAW IN PALESTINE WITH SPECIAL
REFERENCE TO APPORTIONMENT OF LIABILITIES**

I hereby affirm that the International Islamic University Malaysia (IIUM) holds all rights in the copyright of this Work and henceforth any reproduction or use in any form or by means whatsoever is prohibited without the written consent of IIUM. No part of this unpublished research may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without prior written permission of the copyright holder.

Affirmed by YAHYA Y. F. HASAN

.....
Signature

.....
Date

This study is dedicated to:

My parents, and
all who have contributed directly and indirectly
to the success of this work

ACKNOWLEDGEMENTS

First and foremost, all praise belongs to Allah, the Lord of the Universe, whose mercy, guidance and blessings have enabled me to complete this study.

I would like to express my everlasting and heartfelt gratitude to my supervisor, Asst. Prof. Dr. Sonny Zuhuda for all his insightful guidance, invaluable comments and continuous motivation which helped me in completing this work in the best way.

My sincere thanks are also extended to the late Prof. Dr. Naemah Amin for her constructive comments and advice given to me, mainly in the first steps of my study.

Special thanks so to the International Islamic University Malaysia, particularly to Ahmd Ibrahim Kulliyyah of Laws, for giving me the opportunity to pursue my PhD and to all the lecturers and staff for their support and sincerity.

I would like to express my deepest gratitude to my dearest parents and family, who granted me the gift of their unwavering belief in my ability to accomplish this goal; thank you for your support and patience.

Finally, many thanks are extended to my friends and many other people who have contributed in the completion of this work.

May Allah SWT bless you all.

TABLE OF CONTENTS

Abstract	ii
Abstract in Arabic	iii
Approval Page.....	iv
Declaration	v
Copyright Page.....	vi
Acknowledgements.....	viii
List of Tables	xiv
List of Figures	xv
List of Cases.....	xvi
List of Statutes and Codes.....	xviii
CHAPTER ONE: INTRODUCTION	1
1.1 Background of the Study.....	1
1.2 Statement of the Problem.....	5
1.3 Objectives of the Study	7
1.4 Hypothesis.....	7
1.5 Literature Review	7
1.5.1 On the Nature of E-transaction	8
1.5.2 E-transaction in Palestine and under Islamic Law	10
1.5.3 On the Liabilities of Parties Involved in E-transaction.....	12
1.5.4 On Consumer Protection and Electronic Payment	13
1.6 Research Methodology.....	16
1.7 Scope and Limitations of Study	17
1.8 Chapterisation	18
CHAPTER TWO: E-TRANSACTION AND THE APPORTIONMENT OF LIABILITIES.....	20
2.1 Introduction	20
2.2 Nature of Electronic Transactions.....	21
2.2.1 Concept of Electronic Transactions	21
2.2.2 Types of E-Transaction.....	23
2.2.2.1 Business to Business (B2B)	24
2.2.2.2 Business to Consumers (B2C)	24
2.2.2.3 E-Commerce with Government	26
2.2.3 Advantages of E-Commerce	27
2.2.4 Disadvantage of E-Commerce	29
2.2.5 Legal Problems of E-Transaction	30
2.2.5.1 Consumer Protection.....	30
2.2.5.2 Privacy of Individuals	31
2.2.5.3 Electronic Payment	33
2.2.5.4 Admissibility of Electronic Documents	36
2.2.5.5 Problem of Fraud	37
2.2.5.6 Confusion Over the Applicable Law	38
2.2.5.7 Identity and Legal Capacity of the Parties	38

2.3	Parties Involved in E-Transactions	39
2.3.1	Seller	40
	Obligations of the Seller	40
2.3.1.1	Commitment to Transfer the Ownership	40
2.3.1.2	Obligation of Delivery	41
2.3.1.3	Warranty Against Hidden Defects	42
2.3.1.4	Warranty of the Merchantable Quality	43
2.3.1.5	Warranty of Safety	44
2.3.1.6	Obligation in Maintenance.....	45
2.3.2	Buyer.....	46
	Obligations of Buyers in e-transaction	46
2.3.2.1	Payment of Prices of Goods.....	46
2.3.2.2	Obligation in Receiving the Subject Matter of Sale	47
2.3.3	Intermediary Service Providers	48
2.3.4	Certification Authority (CA)	50
2.3.4.1	Certificates of Electronic Authentication.....	52
2.3.4.2	Types of Certificates of Electronic Authentication.....	53
2.3.4.3	Role of Certification Authority.....	54
2.3.5	Banks and E-Payment Operators	56
2.3.5.1	The Types of Electronic Banking Services.....	56
2.3.5.2	Advantages of Electronic Banks	58
2.3.5.3	Risks of Electronic Banks	61
2.4	Conclusion	65

CHAPTER THREE: E-TRANSACTION LAW IN PALESTINE 68

3.1	Introduction	68
3.1.1	The Legal System of Palestine.....	69
3.1.2	Palestinian Laws on E-Transaction.....	72
3.2	The Provisions of the Palestinian Electronic Transaction (E-Commerce) Draft Law, 2004	76
3.2.1	Scope of Application	77
3.2.2	Exceptions of the Law	77
3.3	Admissibility of Writing and Electronic Message	79
3.3.1	Availability of Writing.....	79
3.3.2	Non-repudiability.....	81
3.3.3	Admissibility of Electronic Writing as Proof	82
3.4	Electronic Signature	83
	Admissibility of Electronic Signature	84
3.5	Consumer Protection	85
3.5.1	Description of Product or Goods	85
3.5.2	Specification of Identity of the Offeror	86
3.5.3	The price of goods and Expenses	87
3.5.4	Methods of Refund or Replacement	88
3.5.5	Delivery and performance of Contract	89
3.6	Dispute Resolution	90
3.6.1	Alternative Dispute Resolution (ADR).....	90
3.6.1.1	Arbitration	92
3.6.1.2	Mediation	96
3.6.2	Online Dispute Resolution (ODR).....	98

3.6.2.1 Online Arbitration.....	98
3.6.2.2 Online Mediation	101
3.7 Conclusion	102

CHAPTER FOUR: LIABILITY OF THE SELLER IN E-TRANSACTIONS . 105

4.1 Introduction.....	105
4.2 Liability for Misleading Information	107
4.2.1 Obligation of Seller in Providing Information in Electronic Contract	107
4.2.1.1 Time of Providing the Information.....	110
4.2.1.2 Methods of Providing the Information	111
4.2.2 False and Misleading Advertising through the Internet; What is 'Electronic Misleading' Advertisement?	113
4.2.2.1 Fraud through the Internet.....	117
4.2.2.2 Elements and Conditions of Fraud.....	120
4.2.2.3 Fraud in Electronic Contracts	121
4.2.3 Nature of Liability for Misleading Information.....	124
4.3 Liability for Lack of Quality of Goods	130
4.3.1 Liability for Hidden Defect.....	131
4.3.2 Liability for Breach Warranty of merchantable Quality.....	141
4.3.3 Liability for Unsafe Product	145
4.4 Liability for Delivery Failure	149
4.4.1 General Provisions of Delivery.....	150
4.4.2 Liability for Loss before Delivery	157
4.4.2.1 Destruction of the Subject Matter by Wrongdoing of the Buyer.....	157
4.4.2.2 Damage of the Subject Matter by Wrongdoing of the Seller.....	158
4.4.2.3 Damage of the Subject Matter by the Force Majeure	158
4.4.2.4 Damage of the Subject Matter by Others (a Third Party) ...	160
4.5 Conformity of the Goods with the Specifications.....	161
4.6 Conclusion	163

CHAPTER FIVE: RESPONSIBILITIES OF THE INTERMEDIARY SERVICE PROVIDERS IN E-TRANSACTION..... 166

5.1 Introduction.....	166
5.2 Internet Hosting Provider.....	167
5.3 Internet Content Provider.....	171
5.4 Network Operator.....	176
5.5 Internet Service and Access Provider	180
5.5.1 The Role of the Internet Service Provider (ISP).....	180
5.5.2 Liability of Internet Service Provider (ISP).....	183
5.5.2.1 Liability on Content of Information.....	183
5.5.2.2 Liability for Service Failure.....	193
5.5.2.3 Issues of Exemption Clause	196
5.6 Cloud Computing Service Providers.....	200
5.6.1 The Use of Cloud Computing (CC) Within E-Commerce	202
5.6.2 Cloud Service Delivery Models:.....	205
5.6.2.1 Software as a Service (SaaS)	205

5.6.2.2 Platform as a Service (PaaS).....	206
5.6.2.3 Infrastructure as a Service (IaaS).....	207
5.6.3 Standards Provided by Cloud Computing Services.....	208
5.6.4 Regulatory Issues of Cloud Services.....	212
5.6.5 Unfair Contract Terms.....	213
5.6.6 Issues Related to Data Security and Privacy of Cloud Computing	214
.....	214
5.6.7 Liability in the Cloud.....	220
5.7 Conclusion.....	222

CHAPTER SIX: THE ROLE AND RESPONSIBILITIES OF PAYMENT

SERVICE PROVIDERS	224
6.1 Introduction.....	224
6.2 Types of Paymentservice Providers in E-Transactions.....	225
6.2.1 Banks.....	226
6.2.2 Payment Service Provider.....	230
6.2.3 Payment Card Issuer.....	232
6.2.3.1 Types of Payment Cards.....	232
6.2.3.2 Characteristics of Credit Cards.....	234
6.2.4 Online Payment Service Provider.....	235
6.2.4.1 PayPal.....	236
6.2.4.2 Electronic Money and Bitcoin.....	240
6.3 Liability in Relation to System Failure.....	244
6.4 liability in Relations to Credit Cards.....	253
6.4.1 Legal Relationships Arising from Credit Cards.....	253
6.4.1.1 Relationship between the Issuer and the Holder.....	253
6.4.1.2 Relationship between the Issuer and the Merchant.....	254
6.4.1.3 Relationship between the Holder and the Merchant.....	254
6.4.2 Obligations of the Credit Issuer.....	255
6.4.2.1 Obligations of the Credit Issuer towards the Holder.....	255
6.4.2.2 Obligations of the Credit Issuer towards the Merchant.....	257
6.4.3 Liability Lost, Forged or Stolen Cards.....	258
6.5 Unfair Terms in E-Transaction Payment Services.....	265
6.5.1 Unfair Terms Generally.....	265
6.5.2 Agreements of Exclusion of Liability (Exception Clauses).....	270
6.5.2.1 Agreements of Exclusion of Liability of the Bank Contracts...	270
.....	270
6.5.2.2 Exclusion of the Liability of the Credit Card Issuer.....	272
6.6 Transaction Security and Confidentiality.....	274
6.6.1 Issues of Payment Security.....	274
6.6.2 Encryption and Electronic Signature.....	281
6.6.3 Privacy and Confidentiality.....	286
6.7 Conclusion.....	291

CHAPTER SEVEN: THE SHARI'AH PERSPECTIVE ON THE ISSUE OF APPORTIONMENT OF LIABILITY IN E-TRANSACTIONS.....

TRANSACTIONS.....	295
7.1 Introduction.....	295
7.2 Legality of E-TransactionS Under Islamic Law.....	298

7.2.1	Juristic Description of Contracting Via the Internet.....	298
7.2.2	Formation of Contract.....	299
7.2.3	Ruling on Ratification of Electronic Contracts in Writing	308
7.2.4	Ruling on Oral Ratification of Electronic Contracts	312
7.3	Responsibility in the Shari’ah in relation to GuaranteeS in E-Transaction ..	313
7.3.1	Conditions of Guarantee	315
7.3.2	Reasons of Guarantee in Islamic Jurisprudence	316
7.3.2.1	Guarantee of Contract	316
7.3.2.2	Guarantees of Damage (Harmful Act).....	317
7.3.3	Exemption of Responsibility in Islamic Jurisprudence	319
7.3.3.1	Mistake Made by the Harmed Person	319
7.3.3.2	Force Majeure	319
7.3.3.3	Others' Mistake	320
7.3.4	Compensation for Damage in Islamic Jurisprudence	320
7.4	Consumer Protection in E-Transaction Under Shari’ah Perspective	323
7.4.1	Consumer Protection in Commercial Advertisement and Offer Periods	324
7.4.2	The Options.....	327
7.5	Conclusion	331
CHAPTER EIGHT: CONCLUSION		333
8.1	Summary of Findings	333
8.1.1	The Palestinian laws on Electronic Contracts.....	333
8.1.2	The Nature of Liabilities Arising Out of Electronic Transactions	335
8.1.3	The Recommendations as to Improve the Law on E-Transactions in Palestine	337
8.1.4	The Laws on the Apportionment of Liabilities under the Shari’ah. ...	337
8.2	Recommendations and Suggestions	354
REFERENCES		357

LIST OF TABLES

<u>Table No.</u>		<u>Page No.</u>
8.1	Summary of roles and liabilities in e-transaction under Palestinian law	342

LIST OF FIGURES

<u>Figure No.</u>	<u>Page No</u>
1. Parties involved in e-transactions	40
2. Intermediaries involved in e-transactions	168
3. Types of payment providers in e-transactions.	226

LIST OF CASES

Egyptian Cases

Egyptian High Court Case No. 384/33. Date: 20/10/1966.
Egyptian High Court Case No. 1529/49. Date: 25/5/1983.
Egyptian High Court Case No. 1196. Date: 18/11/1993.
Egyptian High Court Case No. 25/27. Date: 13/5/1965.
Egyptian High Court Case No. 222/25. Date: 15/10/59.
Egyptian High Court Case No. 199/36. Date: 24/11/1970.
Egyptian High Court Case No. 1529/49. Date: 25/5/1983.
Egyptian High Court Case No. 190/34. Date: 19/12/1968.
Egyptian High Court Case No. 6/27. Date: 14/5/1962.
Egyptian High Court Civil Rebuttal. 3 April/ 2000. Appeal No. 176/64q.

Jordanian Cases

Jordanian High Court. Decision No. 445/1978. Date: 1/1/1978. Majallat Naqabat al-Mohameen (Journal of Bar Association): page: 731, No. 5. Year: 1979.
Jordanian High Court. Decision No. 188/1968. Date: 1/1/1968. Majallat Naqabat al-Mohameen (Journal of Bar Association): page: 617, No. 2. Year: 1968.
Jordanian High Court. Decision No. 445/1978. Date: 1/1/1978. Majallat Naqabat al-Mohameen (Journal of Bar Association): page: 731, No. 5. Year: 1979.
Jordanian High Court. Case No: 2/1972. Legislation and opinion Bureau,
http://www.lob.gov.jo/ui/principles/search_no.jsp?no=2&year=1972&PrincType=7&PrincPage=000363.

US cases

Chris D. Young v. Bank of America. Civ. No. 52096. First Appellate District, Division 5 141 Cal App. 3d 108; 190 Cal. Rptr. 122; 1983 Cal. App.
Craig Comb and Roberta Toher, v. PAYPAL, INC. Jeffrey Resnick, v. PAYPAL, INC., Case Number C-02-1227 JF (PVT), C-02-2777 JF (PVT), [Docket No. 23, 5]. 218 F. Supp. 2d 1165; 2002 U.S. Dist.
Ellen L. Batzel v. Robert Smith. No. 01-56380, No. 01-56556. 333 F.3d 1018. 2003 U.S. App.
Fair Housing Council of San Fernando Valley v. Roommates. com LLC. No. 04-56916, No. 04-57173. 521 F.3d 1157; 2008 U.S. App.
Hy Cite Corporation v Badbusinessbureau.com, LLC, Ed Magedson and Xcentric Ventures, LLC. 418 F. Supp. 2d 1142; 2005 U.S. Dist. No. CIV 04-2856-PHX-EHC.
John Green Appellant v. America Online (AOL); John Does 1&2. No. 01-1120. 2003.
Yazan Hussein, v. COINABUL, LLC, a Wyoming limited liability company, and Jason Shore. No. 14 C 5735. 2014 U.S. Dist.
Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

EU Cases

Skov AEG v Bilka Lavprisvarehus A/S: C-402/03. [2006] All ER (D) 03 (Jan). [2006] ECR I-199, [2006] All ER (D) 03 (Jan). Judgment Date: 10/01/2006.

UK Cases

St. Albans City v. International Computers, Ltd. [1996] 4 All ER 481.

Godfrey v. Demon Internet Service [1999] 4 All ER 342, [2001] QB 201 (QBD).

LIST OF STATUTES AND CODES

International Documents

- Arabic Agreement on Fighting Information Technology Crimes. (21/12/2010).
- Code of EU Online Rights. Section: 2, chapter: 5/1. This Code Compiles the Basic Rights and Principles enshrined in EU law that Protect Citizens when Accessing? and Using Online Networks and Services.
- Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts. Article 3/1. Official Journal L 095, 21/04/1993 P. 0029 – 0034.
- Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community Framework for Electronic Signatures.
- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market ('Directive on electronic commerce').
- Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007. On Payment Services in the Internal Market Amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC, and 2006/48/EC and repealing Directive 97/5/EC.
- Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters.
- Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.
- Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data.
- OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999.
- The OECD Guidelines for Protecting Consumer from Fraudulent and Deceptive Commercial Practices Cross Border, 2003.
- The UNCITRAL Model Law on Electronic Commerce. 1996.
- The UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001.

Bahrain

Bahraini Law on Electronic Transaction No. 28/2002.

Egypt

Civil Law No. 131/194.

Jordan

The Electronic Transaction Law No. 85/2001.
Civil Law No. 43/1976.

The Instructions of Jordanian Central Bank Regarding to the Working of E-Banks No. 8/2001. These Instructions are Issued According to Article 99/b of the Jordanian Banks Law No. 28/2000.

Commercial Law No. 12/1966.

Family Law (Personal Status) No. 61/1976.

Penal Law No. 16/1960.

The Law of Transaction in Immovable Property No. 49/1953.

Palestine

Al-Majallah (The Ottoman Courts Manual based on Hanafi jurisprudence). Mejallatul Ahkam Al-'adlyyah.

Amended Basic Law 2003.

Arbitration Law No. 3/2000.

Civil Draft Law No. 4/2012.

Consumer Protection Law No. 21/2005.

Electronic Signature Draft Law (2004).

Electronic Transaction (E-Commerce) Draft Law, 2004.

Evidence Law No. 4/2001.

Monetary Authority Law No. 2/1997.

Presidential Decree No. 9/2010 on Banking Law.

The Civil Amended Offenses Law No. 5/1947.

The Civil Offenses Law No. 36/1944.

The Executive Regulation No.39/2004 for the Palestinian Arbitration Law No. 3/2000.

The Instructions No. 3/2012 regarding of Account for Every Citizen (Primary Account). The Palestinian Monetary Authority.

The Instructions No. 5/2009 regarding of Security and Safety. The Palestinian Monetary Authority.

The Instructions No. 5/2010 regarding of Automated Connectivity and Outsourcing.

The Instructions No. 6/2008 regarding of Risks Management. The Palestinian Monetary Authority.

The Presidential Decree No. 15/2009 relating to the Palestinian Authority on organizing communication.

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

E-commerce¹ is increasingly popular globally, including in Palestine and major Arab countries. It is a very effective business model which enables any buyer to purchase goods or services from practically anywhere in the world.² It creates a global market of goods and services in which business and consumers contract with each other electronically.³ However, this phenomenon has caused many concerns to consumers which are peculiar to E-commerce and is to the disadvantage of those who are not well-versed in it.⁴

There are several issues that arise from sale of goods through Internet such as unfair practices and unfair dispute resolution,⁵ product safety and quality, problems with the delivery of goods, goods that present health or safety risks, or failure to supply the goods after payment. Besides, there is the temptation of fraud and unethical conduct, such as identity deception, false advertising as well as receiving payment without intending to supply and problems with privacy issues. Several problems also

¹ The researcher will use e-commerce and e-transaction interchangeably in this research.

² Do'a', "Electronic Commerce," manshor.net, <http://www.manshor.net/forum/showthread.php?143305-Electronic-commerce> (accessed, 15 May, 2016).

³ Lorna E. Gillies, (2008). *Electronic Commerce and International Private Law*, (USA: Ashgate Publishing, 2008), 26.

⁴ Georges Decocq, "Cyber Consumer Protection and Unfair Competition", *Electronic Journal of Comparative Law*, vol. 11. 3 (December 2007): 1. EJCL, <<http://www.ejcl.org/113/article113-18.pdf>>.

⁵ Cristina Coteanu, *Cyber Consumer Law and Unfair Trading Practices*. (USA: Ashgate Publishing, 2005), ix.

exist relating to online payment methods such as loss, errors and unauthorised transactions.⁶

With the Internet, the products are consumed far away from their point of purchase, more distantly from their place of manufacture, and in more varieties and brands than ever before. However, the apportionment of liability has become uncertain because there are many intermediaries involved in the process of sale of goods via the Internet.⁷ The growth of the electronic marketplace leads disputes in between the parties on many issues such as quality and delivery disputes, excessive delivery costs, absence of information on associated costs, breach of privacy policy, breach of security of confidential information, non-reimbursement of goods returned, and disputes arising from online banking transactions. These disputes are usually solved by the courts or by online dispute resolution.⁸

There are many parties or intermediaries involved in the process of e-commerce. These include the Internet Service Providers (ISP), access service providers, banks of each of consumer and seller, online payment providers, third party credit card operator and the delivery company. While the role of each of these intermediaries is clear and commonly known, the apportionment of liabilities of each of them is not clearly settled. Without clear acknowledgment and understanding of each party's liability, it is likely that one party will bear all the costs for the errors or

⁶ Abu Bakar Munir and Sonny Zulhuda, "*Becoming E-cities: Legal Issues and Challenges*," http://webcache.googleusercontent.com/search?q=cache:imOjVsVFUs4J:www.unapcict.org/ecohub/resources/becoming-e-cities-legal-issues-and-challenges/at_download/attachment1+&cd=2&hl=en&ct=clnk (accessed 9 May, 2016).

⁷ Jan k. Winn, *Consumer Protection in the Age of the Information*, (USA: Ashgate Publishing, 2006), 15.

⁸ Coteanu, 87.

failure caused by any others. This is because there is no clarity as to the apportionment of liability in the provision of sale of goods via Internet.⁹

In many transactions, by the terms of contract, merchants and banks try to exclude their liability between them and the customers. The terms and conditions of the majority of banks offering Internet banking do not provide for fair rules. There is no fair apportionment of liability between banks and their customers, and many banks attempt to escape liability of any loss or damage that may arise. This is done by means of provision of exclusion of liability clauses in terms and conditions of contract. Some banks and merchants impose liability on customers. For example, the terms and conditions of using Visa credit card in Arab Bank in Palestine provide that:

“Visa assumes no liability or responsibility for any errors or omissions in the content of the Visa site. In fact, your use of the Visa site is at your own risk. To the maximum extent allowed by law, neither Visa nor any other party involved in creating, producing, or delivering the Visa site is liable for any direct, indirect, incidental, consequential, or punitive damages, however caused, arising out of your access to, use of, or reliance on the Visa site, even if Visa has been advised of the possibility of such damages.”¹⁰

By this term, Visa excludes its liability for any errors in its site, and it imposes the liability for risks on the customer who uses Visa. Furthermore, Visa excludes the liability of any party involved in creating, producing, or delivering the Visa from any damage to the customer, and it assumes that the customer knows of such damage before using Visa, such as viruses, which may affect his computer.

“The customer further agrees that neither the bank nor any of its officers shall be liable for any loss or damage suffered by the customer as a result of disclosing divulging or revealing of any information concerning the customer Account(s) with the bank as provided for in item 15.1 above.”¹¹

⁹ Abu Bakar and Sonny, 65.

¹⁰ Visa. *Terms of use*, <http://www.visa.com/visabillpay/legal.jsp> (accessed 12 October, 2015).

¹¹ Bank Islam, <https://www.bankislam.biz/> (accessed 8 April, 2015).

In this term, the customer should agree that the bank and its officers are not held liable for any loss or damages as a result of disclosing any information concerning the customer account.

“Limitation of Liability: The access to this website and / or used on the user's responsibility, nor bear the Bank of Jordan responsibility for any: claims, losses, costs, expenses or damages of any kind without any limits of public or private with respect to any use of the site of Bank of Jordan network and information contained in it.”¹²

By this term, the Bank excludes its liability from any losses, costs, expenses, or damages that are incurred by consumers as a result of using the website of the bank.

There are many banks introducing the services through Internet, and they are excluding their liability for any loss or damage that happens to the customer, whether this damage is intentional or not. These banks put unfair terms in the contracts and in their websites which excludes all their liabilities and leads to imposing these liabilities to the customer. There are many unfair and illegal terms in these contracts, and it needs to change because the customer cannot negotiate before signing the contract; for example, in its website disclosing the terms of its use, Malaysian Maybank states that:

“The Maybank group and /or its partner shall in no event be liable for any loss or and damages howsoever arising whether in contract, tort, negligence, strict liability or other contract basis, including without limitation, direct or indirect, special, incidental, consequential or punitive damages, or loss of profits or savings arising in connection with your access or inability to access or use of this website (or any third party link to or from the Maybank Group's website).”¹³

By this term, the bank excludes its liability for many issues that confront customers who have accounts with the bank such as losses to customers in contract, tort, or any type of liability, direct or indirect damages, errors of software or hardware and viruses.

¹² Bank of Jordan, www.jcbank.com.jo (accessed 8 April, 2015).

¹³ Maybank2u.com, Malaysia, <http://www.maybank2u.com.my/> (accessed 8 April, 2015).

Clients face some security risks such as computer viruses or other destructive programs which they expose to the computers of merchants or banks. Therefore, the merchants and banks on their web sites exclude their responsibility from risk of attacks of computer viruses and other destructive programs. Its common formulation is that: “The user assumes full responsibility for the protection of their computer and the computer system including hardware and software, protection of databases in their system as well as the protection of hardware and software of third persons who have access to the user's system.” The user also assumes responsibility for damages incurred because of the recorded or received documents from the web site of banks or merchants which may contain viruses or other destructive programs.¹⁴

There are more concerns and need for legal reform; the issues of apportionment of liability in e-transaction between consumers, merchants and everyone involved in the process through the Internet such as banks and internet service providers.

1.2 STATEMENT OF THE PROBLEM

The wide use of the Internet in the daily life of many people has given rise to a variety of legal issues relating to the area of the apportionment of liability in electronic commerce. Such issues require governmental interference in order to provide apportionment of liability in the sale of goods and services through the Internet.¹⁵

The government in Palestine tries to provide many online services, aiming to save time and effort, but it needs to be carefully studied to reduce risks by publishing

¹⁴ Veljko Trivun, Vedad Silajdžić and Fatima Mahmutćehajić, “*Exclusion and Limitation of liability Clauses in Electronic Contracts*,” https://emnet.univie.ac.at/uploads/media/Trivun_Silajdzic_Mahmutcehajic_01.pdf (accessed 9 May, 2016).

¹⁵ Gillies, 2. See also, Coteanu, xiv.