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Offer and Acceptance in Islamic Law of Contract

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Abstrak

Muamalat Kontrak merupakan suatu kemestian dalam kehidupan manusia sehari-hari. Justeru itu, artikel ini cuba menghuraikan secara agak terperinci perkara-perkara yang berkaitan dengan Ījāb dan Qabūl : penawaran dan penerimaan. Penekanan juga diberikan kepada persoalan Majlis al-'Aqd sebagai rujukan kepada pandangan-pandangan Mazhab Fiqh dengan mengambil kira perkembangan-perkembangan semasa dalam dunia hari ini.

Introduction

It is elementary that the basic premise upon which contractual obligations are considered to have arisen is the agreement between the contracting parties. It is equally well settled law that an agreement is reached when a firm offer by one party is unequivocally accepted by the other. The formation of contract in Islam generally does not require fix formality. What is required, as in any other legal system is the fundamental proof of consent by each party. Consent is discovered by the use of the offer and acceptance methodology. The offer or *ījāb* and acceptance or *qabūl* must meet, at the same time and meeting, or *majlis*.[1]

The machinery of offer and acceptance brings about this meeting of minds between the parties. The approach of the courts, therefore in attempting to discover whether an agreement has been reached by the parties usually takes the form of in-

terpreting the transactions between the parties into the ready mould of offer and acceptance and if what comes out from that mould appears like an agreement, such mould normally be so held. But the danger of over-using and over-dependence on this machinery has been warned by some writers.

The *Mejelle* defines an offer as: "*Ījāb* (proposal) is the first word spoken for making a disposition of property and the disposition is proved by it".[2] Another explanation of offfer is: ... it is the first proposal made by one of the parties in negotiating or concluding a bargain.[3] *Qabūl* (acceptance) is the word spoken in the second place for the making of a disposition of property and the agreement (*'aqd*) becomes complete by it".[4] As far as mode of acceptance is concerned, the Islamic *Sharī'ah* shares with the common law the notion that acceptance must be absolute and unconditional. The acceptance must conform with the offer.

An offer is the first stage of making a contract. The offer can be made in a number of ways;[5]

1. It can be made verbally (*bi al-Kalām*). This kind of offer is to be made in the same meeting.
2. It can be made in writing *(bi al-Kitābah).* This form of offer becomes effective as soon as the letter leaves the person offering and will remain valid until recipient. The offer must be replied to immediately.
3. It can be made through a message (*rasūl*), whose honesty is not doubted and the offer once is accepted, it will be a good acceptance. The Mālikī, Shāfi'ī and Ḥanbalī Jurist are of the opinion that the offer must be made by owner of the property in return of due consideration. But the Ḥanafī Jurists say that it can come from either party.
4. It can be made through signs and gestures particularly in those cases where the person offering is deaf or dumb or when the recipient does not understand the language of the person offering. The Mālikī school regards as valid the known signs made by even a perfect person since the main idea is that the person offering should communicate the offer. Most jurists believe that the known signs of dumb persons made to constitute an offer are valid, but there are some Jurist who consider signs and gestures invalid as modes of making an offer.
5. It can be made by conduct (*fi'l*). An offer made through the delivery of goods is valid according to the Mālikī school. But silence does not constitute an offer. If the contracting person keeps silent while he is expected to express himself, it will be deemed as a valid contract.

1. Offer and Acceptance in Contracting Inter Presences

1.1 Offer and Acceptance and Role of the Contracting Formula

The assumption held by all jurists that a verbal offer and acceptance is normal way of manifesting assent, couple with a desire to find an objective criterion for determining the presence of mutual assent, led the jurist to develop certain contracting formulae on the use of which by the contracting parties conclude the contract. These formulae were also made on the assumption that the parties are contracting in the presence of each other.

These formulae bear a superficial resemblance to the question and answer form of the Roman law contract of stipulation. But there is in fact a fundamental difference between the two. In the Roman contract of stipulation, the observance of the legal form is the cause of the obligation, while in Islamic contract, the cause of the obligation is the mutual assent of the parties. There is no distinction in Islamic law as corresponding to the Roman law distinction between formal and consensual contracts. All contracts in Islamic law are consensual. The use of the contracting formula by the parties concludes the contract because it raises a presumption of mutual assent. This is clear from the fact that, according to the majority of the school, a contract could be inferred from any circumstances that are indicative of mutual assent. This is so even if the parties are contracting in the presence of each other. The use of the contracting formula is not, therefore, a formal requirement.[6]

The substance of these formulae is in effect a synthesis of two elements. Firstly, the words indicating an intention to make a particular contract e.g. sale, gift or marriage etc.[7] Secondly, the form of tense which is regarded, either etymologically or customarily, as indicative of the present and definite intention. The formula for any particular contract is nothing more than the words showing an intention to make that contract couched in the appropriate form of tense.[8]

The party who firstly manifests his willingness, by the use of the appropriate formula, to make a contract, is said to be making an *Ījāb* (offer), the manifestation of willingness coming from the other party is termed a *qabūl* (acceptance). The contract is said to be concluded when the connection *(irtibāt)* between the offer and the acceptance takes place. In the words of the *Mejelle,* the "Conclusion of a contract consists of connecting offer and acceptance together ..." [9]

Consent has thus been reduced to simple objective formula of the connection of the offer and acceptance. This formula is an objective in so far as it does not take into account the actual state of the minds of the parties. It is possible for such connection to take place, thereby concluding the contract, without there being any real assent in the minds of the parties. When discussing this point, Kamāl Ibn Al-Humām[10] - a distinguished Ḥanafī jurist wrote:[11]

> "Consent may or may not be present. The use of the phrase 'I sold' does not, of necessity, establish the existence of consent; it only indicates the existence of consent. Although the parties may use the formula - 'I bought' and 'I sold' - there may actually be no consent such as in the case of sale under duress. The truth of the matter is that the fact of consent is not a constituent part of the legal conception of sale, but a condition of its validity."

The italicized sentence represents the view of the Ḥanafī school only. But all schools agree that the connection of offer and acceptance raises a presumption of assent. This presumption, apart from proof of duress, seems to be conclusive and irrebuttable. This shows that Islamic Law was primarily concerned with the objective, manifestation of assent.[12]

The question now is how and when does the connection between the offer and the acceptance take place? Although the text of the other three schools do not say much about this, it is clear from the Ḥanafī texts that they thought in terms of a material connection between the offer and the acceptance. Because of this, it was argued, that strictly speaking such connection is a logical impossibility. This argument proceeds from the premise that both the offer and the acceptance – being words of mouth – cease to exist as soon as they have been spoken. Since the acceptance must necessarily come in point of time after the offer, it follows that the offer and the acceptance cannot be contemporaneous. Therefore they can never be a connection between the offer and the acceptance.[13]

How logical this argument may be, it is certainly not feasible. The jurists were the first to realize this. To insist on this argument will 'close the door' of contracting. If contracts are to be concluded at all, the life of the offer must be prolonged to enable the necessary connection to take place. With characteristic ingenuity, the jurists found the answer in the concept of the meeting place (*majlis al-'aqd*). The meeting place is the place where the parties meet to make the contract.[14]

1.2 The Meeting Place as a Juristic Concept

The logical impossibility of the connection between the offer and the acceptance could only be overcome by giving the offer an extended lease of life. This was done by holding that the offer exists constructively as long as the meeting continues, unless it is withdrawn. If the acceptance comes into existence at any time before the meeting breaks up, the necessary connection between the offer and the acceptance takes place and the contract is concluded.[15] It thus becomes possible for the offer and the acceptance to be contemporaneous. For this purpose, the meeting was regarded as one unit of time. "The option of acceptance continues until the meeting

breaks up" wrote al-Marghinānī[16] in *Al-Hidāya* "because the meeting brings together what is apart. Its hours are deemed one hour to avoid hardship and make things easy".[17]

1.3 The Unity of the Meeting Place and the Option of Acceptance

The offer confers upon the offeree an option of acceptance (*khiyār al-qabūl*). We have just seen that the offeree has to accept in the meeting place. But should this option be exercised immediately, or can the offeree exercise his option at any time before the meeting breaks up.

The Shāfi'īs argued that since it was only on account of necessity that the offer has been given a constructive existence, the option of acceptance has to be exercised immediately after the offer was made. The offer will not survive any delay in exercising the option of acceptance.[18]

The Ḥanafīs, though acknowledging the validity of the premise on which the Shāfi'īs based their argument, argued that the offeree must be allowed time to contemplate and consider the offer. The option of acceptance, according to this school, may be exercised at any time before the meeting breaks up. As regards the argument that the life of the offer is prolonged only on account of necessity, Kāsānī[19] argued that dictates of necessity are satisfied by the unity of the meeting place (*ittiḥād majlis al-'aqd*).[20]

The unity of the meeting place means that the offer and the acceptance must be made in the same place i.e. the meeting place. We have seen that strictly speaking, the offer and the acceptance can never be contemporaneous since the offer ceases to exist before the acceptance is born. To enable the necessary connection to take place, the meeting place was regarded as one unit of time. And the offer is deemed to be in existence as long as the meeting continues. Now the Ḥanafī jurists are thinking of the meeting place as one unit of place also. The offer and the acceptance will be contemporaneous only if both of them were in exactly the same place. It follows that if the offer was made in one place and the acceptance in another, the meeting breaks up, and the initial logical impossibility of connecting the offer and the acceptance will obtain.[21]

Thus the offer will have to be accepted in precisely the same place where it was made. The concept of the meeting place has thus become a fragile one as will be seen from the following passage;

> "The meeting breaks up by one of the parties rising before acceptance, or without rising, one of them should betake himself to any other business than the matter in hand... Again if one or both of the parties should go to sleep laid down or reclining, the meeting breaks up but if they fall asleep

> sitting the meeting continues... And if the purchaser, being in the house, should go out and then say "I have bought, there is no contract..... If the parties engaged in a bargain of sale are walking together, or riding either both on the same animal or separately, and the person addressed should give his answer in immediate connection with the offer of his fellow, the contract is complete; but a short interval between them will prevent the conclusion of the contract".[22]

The unity of the meeting place is not required in the contracts of agency and bequest. Thus in a contract of agency, the agent may accept the offer wherever he learns of it; and in the contract of bequest, the legatee cannot accept until the testator dies. The Māliki and Ḥanbali schools do not require that the option of acceptance should be exercised immediately.[23]

1.4 Communication of the Offer and the Acceptance

The necessity for the communication of the offer and the acceptance appears to have played a very little part in the Islamic Law scheme of contracting. Most of the texts are silent as to whether such a communication is essential for the formation of the contract.

The Ḥanafi texts, on the assumption that the parties are contracting verbally and in the presence of each other, make it a condition for the conclusion of the contract that the offeree must hear the offer and offeror must hear the acceptance. The juristic basis for the necessity of this mutual hearing is not clear. According to one text, there can be no consent without such mutual hearing.[24] And according to another text, the necessary connection between the offer and the acceptance will not take place unless each party hears what was said by the other. It has even been suggested that if the parties did not hear each other there will be no unity of the meeting place.[25]

Whatever the true juristic basis of this requirement is, it seems clear that, as far as the Ḥanafi school is concerned, there will be no contract without such mutual hearing where the parties are contracting in the presence of each other.

According to the Shāfi'is, it is not necessary that the offeree shall hear the offer or the offeror shall hear the acceptance; provided that both the offer and the acceptance are made in a voice loud enough that it will normally be heard by those present in the meeting place.

Since it is not necessary that the offeree shall hear the offer or that the offeree, without hearing the acceptance, it appears that the requirement that the offer and the acceptance should be made in a voice loud enough that it will normally be heard by those present in the meeting place, is merely of evidentiary value. It could thus be

concluded that in Shāfi'ī law, it is not necessary for the offer and the acceptance to be held in the same meeting place.

It is not clear from the texts of the Ḥanbalī and Mālikī schools whether it is necessary that the offer and acceptance should be communicated.[26]

1.5 The Option of Withdrawal (*Khiyār al-Rujū'*) and the Communication of Revocation

According to the Ḥanafī and Ḥanbalī schools, the offeror has the right to withdraw his offer at any time before acceptance.[27] Although this right also theoretically exists in the Shāfi'ī school, it is doubtful whether the offeror will ever find time to exercise it. This is because, as we have already seen, the Shāfi'īs, require the acceptance to be made immediately after the offer was made otherwise the offer will cease to exist.

According to the Mālikī school, the offeror is bound by his offer until the meeting breaks up. Thus if he revokes his offer and the offeree afterwards accepts before the meeting breaks up, the contract will be concluded.

The question whether the revocation of an offer can have any effect before it is communicated, does not, therefore, arise in Maliki Law. Nor is it of much significance in Shāfi'ī and Ḥanbalī law. This is because these two schools allow either party to repudiate the contract, after it has been concluded at any time before the meeting breaks up. This is called the option of withdrawal *(khiyār al-Rujū')*. This is perhaps why there is no mention in the text of the Ḥanbalī and Shāfi'ī school of whether a revocation of an offer has to be communicated.[28]

According to the Ḥanafī school, there are two views in the matter. According to one view, the revocation is not effective until it is communicated. Thus if the seller should say "I have sold you this for so much" and then added "I have revoked my offer" and the buyer without hearing the revocation should say "I have bought", sales is concluded.[29]

According to the other view, the offeror can revoke his offer whether or not the other party knew of the revocation.

Since the Ḥanafī school insists that both the offer and the acceptance should be communicated, the better view would seem to be that the revocation of an offer has to be communicated.

1.6 The Option of the Meeting *(Khiyār al-Majlis)*

According to the Ḥanbalī and Shāfi'ī schools, each party to the contract has the option of repudiating it after it has been concluded but before the meeting breaks

up. This is called the "option of the meeting". The Ḥanafī and Mālikī schools do not recognize this option.[30]

This option is based on a tradition attributed to the Prophet according to which he said: "Each of the parties to a contract of sale has the option against the other party as long as they have not separated."[31]

The Mālikīs and Ḥanafīs argue that this option cannot be interpreted to mean that either party can repudiate the contract after it has been concluded by offer and acceptance. Such an interpretation will be contrary to verse of the Qur'ān[32] which enjoins Muslims to fulfill their undertaking. Mālik refused to follow this tradition on the ground that it is contrary to the established practice in Madīna.[33]

The option of the meeting continues until the meeting breaks up either by the separation of the parties or otherwise.[34]

Professor Sanhūrī rightly observes that the option of the meeting fits well in the Shāfi'īs design of agreement. As we have seen, this school requires the offeree to exercise his option of acceptance immediately after the offer has been made. The offeree therefore has very little time to consider the offer before he accepts. The option of the meeting thus give him the chance to reconsider his position after he has accepted. If he now discovers that the offer is not as attractive as it appeared to be, he can repudiate the transaction. This reasoning, however, does not apply to the offer or who also has the option to repudiate. Nor does it apply to the offeree in Ḥanbalī law since he is not required to accept immediately.[35]

1.7 Acceptance of Unilateral Offer

The Sharī'ah takes a pragmatic approach to the problem of determining the completeness or otherwise of an acceptance of an unilateral offer.[36] The general view of the Sharī'ah is that the offer is that the offer is revocable as long as acceptance is incomplete.[37] But, unlike the common law, the offeree may in certain circumstances be able to claim payment proportionate to the portion of the acceptance already completed. This measure avoids the rigidity of the common law rule of "all or nothing" in accepting unilateral offers. This is especially so when the demand to be compensated to the extent of acceptance already complete is specifically allowed in situations where the offeree is able to complete the work but is prevented from doing so by the arbitrary action of the offeror.[38]

2. Offer and Acceptance in Contracting *Inter Absentes*

2.1 The Meeting Place

When the parties are not contracting in the presence of each other, the contract is

communicated either by letter *(Kitāb)* or through a messenger *(rasūl).* We have seen that when the parties are contracting in the presence of each other, the meeting place is the place where the offer is made. When the parties are contracting *inter absentes*, the meeting place is the place where the offer is communicated.[39] However, if communications take in the form of correspondence, that is, *inter absentes*,[40] the *majlis* becomes constructive *Majlis*. The *Majlis* begins when the letter of offer is open and will continue for so long as it is not terminated by the conduct of the offeree, such as, from the messenger who delivered the offer letter.[41] Essentially therefore the *Majlis* is equivalent to the period of time for which an offer remains capable of acceptance. This conclusion is justified by saying that messenger is only a conduit pipe for conveying the words of the offeror. Thus the position is the same as if the offeror himself is present in the meeting place. Likewise it is said that the letter of an absent offeror is the same as the spoken words of an offeror who is present in the meeting place.

2.2 The Unity of the Meeting Place and the Option of Acceptance

When the parties are not contracting in the presence of each other, an actual unity of the meeting place is not conceivable. A constructive unity is therefore substituted. Consequently the offeree has to declare his acceptance in the very place where the offer was communicated to him. If he did not accept until the meeting breaks up, a new meeting cannot be set up by the repetition of the oral message or the re-reading of the letter.[42] According to the Ḥanafīs, the contract of marriage is an exception to this rule. Thus if X writes to Y offering to marry her, she need not accept in the meeting place. The letter may read in another meeting and acceptance made then will conclude the contract. The reason for this is that the necessary witness may not be available in the first meeting. This exception does not apply to oral messages conveyed through a messenger, probably on the ground that a messenger may not be available for another meeting while a letter is always available.[43]

2.3 Communication of the Offer and the Acceptance

When the parties are contracting *inter absentes*, the offer could be brought to the knowledge of the offeree either orally through a messenger or by letter. When the communication is made orally through a messenger, the messenger need not himself have the authority of the offeror to make the communication. All that is necessary is that the offeror must have consented to the communication being made. Once such consent is present, it matters not who made the actual communication. Thus if the offeror asks X to make the communication, but Y, having overheard him, made the communication, the communication will nevertheless be effective. If, on the other hand, the offeror did not authorize any person to make such a communication, a communication on his behalf will be ineffective.[44]

As regards the communication of acceptance, it appears that when the parties are contracting *inter absentes*, the acceptance need not be communicated. The contract is complete as soon as the offeree declares his acceptance. This appears to be the rule in all schools. In the case of the Ḥanafī school, this must be taken as an exception to the rule that the offer and the acceptance must be communicated when the parties are contracting in the presence of each other.[45]

2.4 The Option of Withdrawal and the Communication of Revocation

The fact that the parties are contracting *inter absentes* does not affect the offeror's option of withdrawal. He still has the option of revoking his offer at any time before acceptance except in Mālikī law where he has no option to withdraw his offer.

The question whether such revocation has any effect before it is communicated to the offeree was discussed only by the Ḥanafī jurists. According to them, such a revocation is effective whether the offeree knew of it or not. An acceptance after such revocation has in fact been made will be ineffective. This again must be taken as an exception to the rule that a revocation has to be communicated when the parties are acting in the presence of each other.[46]

2.5 Option of the Meeting

The tradition from which the argument for the option of the meeting derives authority presupposes that the parties are contracting in the presence of each other. It should follow, therefore, that the option will not be available when the parties are contracting *inter absentes*.[47] Some Shāfi'ī's texts, however, suggest that the option is not so limited. According to them, the offeree has the option to repudiate the contract at any time before he leaves the meeting place. Likewise, the offeror has the option of repudiating the contract at any time before the offeree leaves the meeting place. This rule is impractical; since neither of them will know when the other has left the meeting place.[48]

3. Termination of Offer

An offer may be terminated by;[49]

i) Revocation,
ii) Lapse of time,
iii) Failure of condition subject to which the offer was made,
iv) Death.

3.1 Revocation of an Offer

Revocation means abrogation, particularly of a contract. An offer may be revoked

at any time, before communication. In *fiqh, 'Iqālah* means to annul a contract and to put an end to it.[50]

Revocation is also called the option of cancellation (*khiyār al-fiskh*). It is supported by a Ḥadīth of the Holy Prophet (PBUH); narrated by Ibn 'Umar; Allah's Apostle (PBUH) said, "Both the buyer and seller have the option of canceling or confirming the bargain, as long as they are still together, and unless they separate or one of them gives the other option of keeping or returning the things and a decision is concluded then, in which case the bargain is considered as final. If they separate after the bargain and none of them has rejected it, then the bargain is rendered.[51]

Thus the contract requires that;

i) There should be two parties to it

ii) There should be offer and acceptance which should be communicated

iii) The agreement should be voluntary

iv) The agreement should be in accordance with the injunctions of the Sharī'ah

v) The agreement gives legal consequences in respect of the subject matter of the contract.

The revocation of an offer can be made before communication of the acceptance to the offeror, but not afterwards. This can be done by the communication of a notice of revocation by the proposer to the other party in the case of a proposal and by a notice of revocation of the acceptance to the proposer in the case of acceptance. But just as the notice of revocation of the proposal should reach the promisee before acceptance, so a notice of revocation of acceptance should reach the proposer before he receives the communication of acceptance.

The revocation of the proposal by the proposer can be affected by;

i) The communication of the notice of revocation. But the proposal stands revoked *ipso facto* by the lapse of time prescribed in such proposal for its acceptance or if no time is prescribed, by the lapse of reasonable time, without communication of the acceptance.

ii) By the failure of the acceptor to fulfil a condition precedent to acceptance.

iii) By the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

3.2 Lapse of Time

Stipulations to the time of performance are divided by law into kinds. Some such stipulations are treated as being of the essence of the contract. Failure to perform a

stipulation of this kind gives rise automatically to a right to rescind. Others are regarded as less important. Failure to perform these does not automatically give rise to a right to rescind, though it may do so under one of the headings already discussed; e.g. if the delay amounts to a serious failure in performance.

In other words, a buyer can rescind if delivery is not made within the agreed time, but a seller cannot rescind merely because the buyer delays in taking delivery or in paying for the goods.[52]

As a general rule, the effect of supervening events on a contract must be assessed by reference to the time when they occur, so that the rights of the parties are not left indefinitely in suspense. Thus becomes highly probable that the only possible route will be blocked; and it makes no difference that the route is then, quite unexpectedly, reopened within the time fixed for performance.[53]

It has already been mentioned that the promisor can revoke his offer prior to its acceptance by the promisee. According to juristic opinion it is not necessary that the promisee should accept the offer as soon as it is made him nor the offer is revoked merely by the separation of the parties, if the offer is not accepted. It would therefore follow that where the promisor fixed a time for acceptance, the offer should remain open indefinitely without any response from the person to whom the offer is made. If there is any custom or rule of business to govern this matter it will be the customary rule which will govern it. Otherwise the offer can be said to be open only for a reasonable time. The reason is that the offer must be taken seriously by the person to whom it is made and this is exactly what is meant by the jurists about *Majlis al-'Aqd* (the contract session).

If a proposer fixes some period for acceptance of the offer, his offer will remain open during that period only and the acceptance cannot be validly made after it expired. This is based on public weal, so that it may be easy for them to enter into contract. The Muslims have been ordered to fulfil the condition laid down in the offer before acceptance except when the condition is against the object of the contract, or is contrary to the Qur'an and the Sunnah. But it shall be in conformity with the offer.

Dr. Husain Hamid Hassan is of the same view. He says that a correct contract becomes enforceable either after its completion or by the removal of any hurdle on which the completion of the contract is made dependent.[54]

It is clear that the proposer can fix time for acceptance on expiration of which the offer shall stand revoked, since the policy of the Islamic *Fiqh* is that the contract may be completed within the shortest possible time.

Imam al-Nawawī[55] says: "The contracting parties may be special stipulation reserve a right of conventional option, i.e. the faculty of cancelling the contract

within a certain time. Such stipulation may be made either by one of the contracting parties or by both. It is admissible in all agreements of the nature of a contract of sale, except only those in which possession must be taken on the spot, as in the exchange of goods subject to the prohibition of illicit gain, and in the contract of *salam*. The faculty can only be reserved for a specified time, not exceeding three days, from the conclusion of the bargain, or according to others from the separation of the parties".

The ownership of the thing sold remains with the vendor, if a right of option has been stipulated by him; or with the purchaser if the stipulation was his; and remains in suspense if both made the stipulation. However, if the contract is not subsequently cancelled by an exercise of the right of option, then ownership of the goods is considered to have been the purchaser's from the time the bargain was concluded while if, on the contrary, the contract is cancelled, the vendor's ownership is considered to have been uninterrupted.

Cancellation or approval of a sale concluded under reservation of a right of option should be announced in explicit terms, such as, "I wish the bargain to be cancelled," or "suppressed", or that "the goods be returned"; or "I approve the contract", or "I wish it to be carried out".

Similar acts on the part of the purchaser are considered as showing that he approves the bargain concluded; but exposing the goods for sale does not constitute an act of ownership, either on the part of the vendor or the purchaser, and consequently does not suffice to establish approval or cancellation.[56]

Offer may be terminated if there is failure of a condition subject to which the offer was made.

3.3 Death

Contracts are not dissolved in general by the death of either of the contracting parties, unless the subject of the contract be of a personal nature, such for instance, as in the case of a lease, if either the landlord, or farmer dies, the contract ceases on the occurrence of that event. Similar is the case of partnerships where the surveying partners are not bound to continue in business with the heirs of the deceased partner, and *vice versa*.[57]

3.4 Effect of Exemption Clauses

An exemption clause is a term in a contract which seeks to exempt one of the parties from liability in certain events. The principles involved also apply to limitation clauses, that is, clauses which seek to limit (rather than wholly exclude) a party's liability and clauses which provide that complaints must be made within a certain period of time.[58]

It is now very common for contracts to be made on standard terms prepared by one party and presented by him to the other. Usually such terms are set out in a printed form, which is either the contractual document or one to which reference is made at the time of contracting. Such terms are meant to govern a whole class of contracts, only the individual details being completed in each case. The practice has obvious advantages. It saves time; and, by creating a standard pattern of dealing, it enables parties to know, in general terms, what sort of risks they will probably have to bear, and to cover by insurance. On the other hand, the practice was also open to abuse, particularly where it was used by commercial suppliers of goods or services when contracting with private consumers. The supplier might put into the printed form a clause limiting or altogether excluding a liability to which he would otherwise be subject, either by virtue of a term implied in law or even irrespective of contract. The customer would often be in a weak position to resist the imposition of such exemption clauses. For one thing, he would generally not read the printed form; indeed, if he did so, its main purpose (of saving time) would be defeated. For another, he would often not be able to obtain the goods or services except on the standard terms, so that his only choice might be to secure them on these terms or to do without them altogether. To some extent the courts were able to redress the balance in favour of the party prejudiced by such exemption clauses. To this end they developed stringent requirements for the incorporation of exemption clauses, and limited the scope and effectiveness of such clauses in various ways.

A party who wishes to rely on an exemption clause, must first of all show that it has become part of the contract. He can do this in one of two ways;

a) Signature: The first is to get the other party to sign the contractual document in which the clause is set out. The party signing is then *prima facie* bound, even if he could not read or understand the document, e.g., because it was in a language which he did not know.

b) Notice: More frequently, contracts are made without being signed by either party. In such cases, standard terms, including an exemption clause, may be contained in a notice posted up on the premises where the contract is made. Alternatively, they may be printed in a document which is simply handed or sent by one party to the other; or in one to which reference is made in the document, which is handed over; for example where a ticket refers to conditions set out in a timetable. In these situations the exemption clause will form part of the contract if, at or before the time of contracting, the party relying on the clause took reasonable steps to bring it to the other party's attention.[59]

Even though an exemption clause is undoubtedly a term of the contract, and even though, on its true construction, it covers the loss or damage which has occurred, it may yet fail, if there were fraud.

Summary and Conclusion

The formation of a contract, according to Islamic law, does not, generally speaking, require any formality. All that is required is declaration of consent by each party. The declaration that is first made is called proposal and the second declaration is called acceptance. The offer and acceptance must be made at the same meeting (*majlis*), either in fact or what the law considers as such.

The *majlis* therefore is the period of time when both the offer and acceptance are capable of meeting. There is no time limit for the *majlis*. The doctrine is based on physical proximity - the meeting face-to-face of the parties negotiating '*interprasentes*'. The *majlis* is terminated if this physical proximity is broken.

However if negotiations take the form of correspondence, that is, '*inter absentes*' the *majlis* becomes constructive majlis. The *majlis* begins when the letter of offer is open and will continue for so long as it is not terminated by the conduct of the offeree, such as by turning away from the messenger who delivered the offer letter. Essentially therefore the majlis is notionally equivalent to the period of time for which an offer remains capable of acceptance.

The Islamic Law shares with the common law the notion that acceptance must be absolute and unconditional. The acceptance must conform with the offer. The shari‘ah takes a pragmatic approach to the problem of determining the completeness or otherwise of an acceptance of an unilateral offer.

The general view of the shari‘ah is that the offer is revocable as long as acceptance is incomplete. But, unlike the common law, the offeree may in certain circumstances be able to claim payment proportionate to the portion of the acceptance already completed. This measure avoids the rigidity of the common law rule of ''all or nothing'' in accepting unilateral offers. This is especially so when the demand to be compensated to the extent of acceptance already completed is specifically allowed in situations where the offeree is able to complete the work but is prevented from doing so by the arbitrary action of the offeror.

End Notes

1. Liaquat Ali Khan Niazi, *Islamic Law of Contract,* Lahore: Research Cell Dyal Sing Trust Library, 1990, p. 63; See also Shaik Mohd Noor Alam bin S.M. Hussain, *Contracts and Obligations,* Selangor (Malaysia): The Malaysian Current Law Journal Sdn. Bhd., 1994, p. 111.
2. *The Mejelle,* (transl. by C.R. Tyser), Lahore: Law Publishing Co., 1967, Article 101.
3. Thomas Patrick Hughes, *Dictionary of Islam,* p. 179.
4. *The Mejelle,* Article 102.
5. Abdur Rahman I. Doi, *Shari'ah: The Islamic Law,* Kuala Lumpur: A.S. Noordeen Publisher, 1992, p. 356-357.
6. M.A. Hamid, "Mutual Assent in Formation of Contracts in Islamic Law" in *Journal of Islamic and Comparative Law,* 1997, vol. 7, p. 43.
7. *The Mejelle,* Article 168.
8. *The Mejelle,* Article 109.
9. *The Mejelle,* Article 104.
10. Ibn Humām, Kāmal al-Dīn Muḥammad Ibn 'Abd al-Wahid al-Siwasī al-Ḥanafī (d. 861/1456). He was one of the leading Ḥanafī jurists and wrote several works such as *Fatḥ al-Qadīr* etc. See Hossein Modressi Tabataba'i, *Kharaj in Islamic Law,* England: Anchor Press Ltd. 1983, p. 239.
11. Ibn Humām, *Fatḥ al-Qadīr,* Beirut: Dār al-Fikr, 1979, vol 5, p. 455-456.
12. M.A. Hamid, "Mutual Assent in Formation of Contracts in Islamic Law", p. 43.
13. *Ibid.*
14. *Ibid.*
15. Baillie, Neil B.E, *Moohummudan Law of Sale,* Delhi (India): Delhi Law House, n.d, p. 12.
16. al-Marghinānī, Abū Ḥasan 'Alī Ibn Abū Bakr al-Farghānī (d. 593/1196). He was one of the Ḥanafī jurists and wrote several works such as *al-Hidāyah* etc. See, Hossein Modressi, *Kharaj in Islamic Law,* p. 245.
17. *The Hedaya* (transl. by Charles Hamilton), Lahore: Premier Book House, 1957, vol. 1, p. 241-242.
18. 'Alamgir, Awrangzeb, *Al-Fatawa al-'Almagirriya,* Calcutta, 1828, vol. 3, p. 9-10.

19. Kāsānī, Ala' al-Dīn Abū Bakr Ibn Mas'ud al-Hanafī (d. 587/1191). He is one of the Jurists of the Ḥanafī school of Law. His famous works are *Badā'i' al-Sanā'i'* etc. (See, Hossein Modressi, *Kharaj in Islamic Law,* p. 245).
20. Kāsānī, *al-Kitāb Badā'i' al-Sanā'i',* Beirut: Dār al-Kitāb al-'Arabī, 1982, p. 137.
21. Baillie, *Moohummudan Law of Sale,* p. 13.
22. M.A. Hamid, "Mutual Assent in the Formation of Contracts in Islamic Law", p. 47. See also *al-Fatawa al-'Almagirriya,* vol. 3, p. 9-10; *Badā'i' al-Sanā'i',* p. 19.
23. Al-Ḥaṭṭāb, Abū 'Abd Allāh Muhammad bin Maḥmūd, *Mawāhib al-Jalīl,* vol. 4, p. 240-241; al-Bahūtī, Manṣūr bin Yūnus bin Idrīs, *Kashshāf al-Qinā',* Beirut: Dār al-Fikr, 1982, vol. 3, p. 147-148.
24. It is essential that each of the parties should hear the other for otherwise there can be no consent - *Durar al-Hukkam,* vol. 1, p. 409.
25. Contracting means the connection between what is said by one party and what is said by the other in a manner that gives rise to the contract. This follows when what is said by one party is a definite and meaningful answer to what was said by the other, and by each of the parties hearing the other. *Fatḥ al-Qadīr,* vol. 3, p. 102.
26. M.A. Hamid, "Mutual Assent in the Formation ot Contracts in Islamic Law", p. 48
27. *The Mejelle,* Article: 184.
28. M.A. Hamid, "Mutual Assent in the Formation of Contracts in Islamic Law", p. 49.
29. Baillie, *The Moohummudan Law of Sale,* p. 14.
30. See Noel J. Coulson, *Commercial Law in the Gulf States,* London: Graham & Trotman Ltd., 1984, p. 58-62.
31. Fuwad Abdul Baqi, *Al-Lu'lu wa al-Marjan* (translated by Dr. Muhammad Muhsin Khan), vol. 2, p. 498 .
32. Qur'ān: (Al-Mā'idah) V: I.
33. M.A. Hamid, "Mutual Assent", *ibid,* p. 50.
34. *Ibid.* See also 'Abd al-Razzāq Aḥmad Sanhurī, *Maṣadir al-Haq fī al-Fiqh al-Islamī,* Kaherah: Dār al-Ma'arif, 1968, vol. 2, p. 23.
35. Sanhuri, *Maṣadir al-Haq,* vol. 2, p. 23.
36. Shaik Mohd Noor Alam bin S.M. Hussain, *Contracts & Obligation,* p. 113.
37. Mahmassanī, *Transactions in the Shari'a,* n.p.

38. Ibn Rushd, Abū Walid Muhammad bin Ahmad, *al-Muqaddimat*, Beirut, p. 630.
39. Baillie, *The Moohummudan Law of Sale*, p. 14-15; See also *Hedaya*, vol. 1, p. 242.
40. Wahbah al-Zuhaylī, *Al-Fiqh al-Islām wa Adilatuh*, vol. 2, p. 108-109.
41. N.J. Coulson, *Commercial Law in the Gulf States*, p. 41.
42. M.A. Hamid, "Mutual Assent", *ibid*, p. 51.
43. *Ibid.* See also Ibn 'Abidin, *Radd al-Muktār 'alā al-Dur al-Mukhtar*, Beirut: Dār al-Fikr, 1966, vol. 4, p. 13-14.
44. Wahbah al-Zuhaylī, *Al-Fiqh al-Islām wa Adilatuh*, vol. 2, p. 102-104.
45. *Ibid.* See also M.A. Hamid, "Mutual Assent", p. 51-52.
46. Ibn Humām, *Fatḥ al-Qadīr*, vol 5, p. 462; see also *Badā'i al-Sanā'i*, vol. 5, p. 138.
47. *Maṣadir al-Haq*, vol. 2, p. 59.
48. Al-Sharbīnī, Muhammad al-Khatib, *Mughnī al-Muḥtāj*, Beirut: Dār al-Fikr, n.d, vol. 2, p. 6.
49. Liaquat Ali Khan Niazi, *Islamic Law of Contract*, p. 71.
50. *The Mejelle*, Article 163.
51. *Ṣaḥīḥ Muslim*, (English transl.), n.d., p. 183.
52. Liaquat Ali Khan Niazi, *Islamic Law of Contract*, p. 72.
53. *Ibid.*
54. Dr. Husain Hamid Hassan, *al-Madkhal li Dirasat al-Fiqh al-Islāmi*, Maktabah al-Muthanna, 1979, p. 431.
55. Al-Nawawi, Abu Zakariyya Yahya bin Sharaf al-Hurani, al-Shafi'i (d. 676/ 1277). He was one of the famous jurist and traditionalist. His famous works are *al-Mujma'*, *Minhaj al-Talibin, Riyad al-Salihin, Sharh Sahih al-Muslim*, etc. (see, Hossein Modressi, p. 256).
56. An-Nawawī, *Minhaj al-Ṭalibin*, a Manual of the Mohammadan Law, transl. to English from French edition of L.W.C Van Den Berg by E.C. Howard, London.
57. Standish Grove Grandy, *Manual of the Mohammadan Law of Inheritance and Contract*, Allan & Co., London, 1869, p. 168.
58. Liaquat Ali Khan Niazi, *Islamic Law of Contract*, p. 74.
59. *Ibid.*