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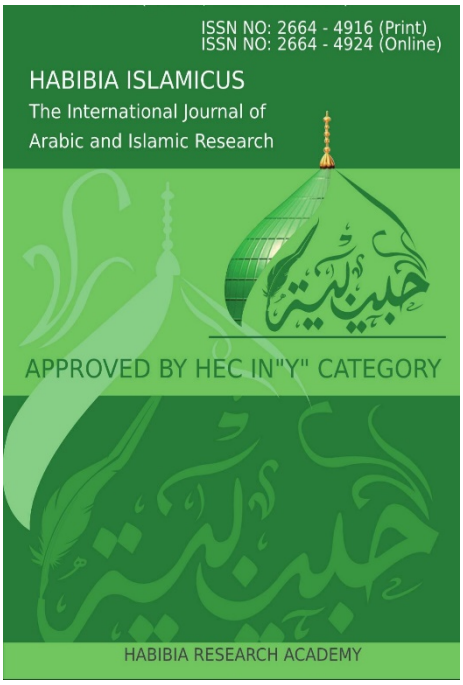

TOPIC:

THE CONCEPT OF FREEDOM OF CONTRACT AND THE ROLE OF KHĪYYĀR AL-SHART (OPTION OF STIPULATION) IN ISLAMIC COMMERCIAL LAW

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THE CONCEPT OF FREEDOM OF CONTRACT AND THE ROLE OF KHĪYYĀR AL-SHART (OPTION OF STIPULATION) IN ISLAMIC COMMERCIAL LAW

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ABSTRACT:

In Islamic law it is necessary for a binding agreement to take place; certain conditions are to be satisfied and a valid transaction can be formed if elements laid down in Islamic law are to be met in order to consider it lawful. The majority of Islamic jurists hold that those essential elements upon which a valid contract bases itself are threefold. The formation; Ijab and Qabūl (Sighah) subject matter of contract and lastly the parties to the contract that the essence of the validity of offer and acceptance is mutual consent. Besides, they are also agreed that there must be three conditions for valid constitution of offer and acceptance. First, both must be clear and definite, in terms of clarity, secondly conformity with the Muqtadā al-àqd, which means coherence or agreement between offer and acceptance and last and third is continuity that offer and acceptance must be connected. In other words, as a basic rule of Islamic law the contracting parties can make whatever stipulations they deem fit for regulating their contractual relationship. The law will intervene only in a few and exceptional cases to invalidate such stipulation. This means, it is validity rather than invalidity of stipulation which is the general rule in Islamic law.

KEYWORDS: *Khīyyār al-Shart, Freedom of Contract, Ghubn, Al darar, Muqtadā al-àqd, Qiyas, Bay'*

INTRODUCTION: Contract in Islamic legal system is a complex discipline in both sense as its practical function and in its jurisprudential foundation. Above all, it also serves a variety of needs, issues and dealings to meet the requirements of society. This is because, problems and issues pertaining to commercial matter unlike devotional matters 'Ibadāt' are ever-lasting and tied up with change due to changing circumstances and situations pertaining to object and subject of transactions.[1] Along the same lines, in regards to the idea that man is social by nature and the social life is necessary to him, the first article of the civil code of Ottoman Empire known as Mujallah al-Ahkām al-Adliyyah states: "In view of the fact that man is social by nature, he cannot live in solitude like other animals, but is need of co-operation with his fellow men in order to promote an urban society. Every person, however, seeks the things which suits him and vexed by any competition. As a result, it has been necessary to establish laws to maintain order and justice."[2]

As mentioned earlier, the contract is a complex legal discipline and it is perhaps the most affording branch of law in practice. The mechanism of its formation relies upon the fundamental conception of contract under Islamic legal system, its interrelation with allied modes and forms of undertaking by which an obligation may be generated. Along the side, the limits and parameters pertaining to the freedom of the parties to which matters could be extended and the procedures of contracts have its own significance. So, it is perhaps necessary for understanding this mechanism and to untie the complexity, one could proceed with the depiction and conceptualization of the contract in Shari'ah.

1.1. **Evolution of Islamic Law of Contract:** Historical hermeneutics, for its part, before the advent of Islam in Hijāz people used to regulate the commercial and agricultural contractual affairs through customary law, enforced by businessmen amongst themselves including legal procedure dealing loan transactions with interest-based agreements. Whereas, some legal rules were issued in Mecca by Grand Council (Dār al Nadwa) although its authoritative character, practically was purely moral.[3]To be certain, according to academic literature it has been argued that Islamic law of contract is characterized, conceptually by general principles of law, as opposed to being characterized by general theories of contract unlike other legal systems.

Broadly speaking, principles commonly start with Qur'anic verses, there were Qur'anic injunctions, guiding Muslims to make their conduct in trustworthy ways. Coupled with number of Prophet ﷺ traditions those supplement the Qur'anic ground work, which already contain the fundamentals of different nominate contracts as well as certain contractual maxims with generality or sometimes detailed statements, enclosing the specific goals and objectives of Shari'ah law. To this point, certain of these maxims are derived directly from text and some of them are originated from the writings of leading Jurists that have subsequently been refined by different Jurists in later times.[4]In due course, these eminent jurists among different Islamic schools of law later developed the principles of contract law. Interestingly, they did not discuss the rules of contract as separate body of law and the majority of Jurists have focused on the contract of sale, while discussing the principles of contract and its formation, in this research we will covers the two aspect inter alia:

- The discussion about freedom of contract. (obligations by nature of contract and obligation obligatory by terms of contract)
- The discussion about the application of Khīyyār al-Shart (Option of stipulation) and contractual obligations
- The discussion about the illegality of the contract. (prohibitions)

With that, this discussion proceeds to define a framework in which the transaction should take place with absolute fitness, so that fairness and justice are guaranteed for all concerned. Significantly it must be based on mutual consent of the participants. In order to ensure the existence of fairness and justice and to devoid the misrepresentation, the Muslim scholars looked into the main aim of contract in Islamic law which is a performance of contractual obligations. They also observed that observed that there are number of vitiating factors that may have effect on contractual relationship and its validity, such as Tadlis Ikrah Ghubn, misrepresentation etc the parties should complete the performance of all their obligations according to agreed contractual terms. Islamic law is very firm about the performance of contract and decisively the performance must be precise and exact: that is contiguous; that there should not be any loop. Needless to say, the specific theory of contractual relationship derived directly from the tradition of Prophet ﷺ which is "La darar wla dirrār" and Al darar u Yūzāl" it is in fact is the essence of Islamic law of contract. Accordingly, the contractual parties must perform the terms and condition depending upon the express and implied intentions of participants, judged from the nature of the contract

observing the circumstances and custom. In this regard we may perhaps discuss the following concept which covers, inter alia:

1.2. **Perception of the Contract in Shari'ah :** Generally speaking, the word contract is decoded as àqd which literally means "the tying together of two or more things by rope"[5]. However, study reveals that contract in Islamic legal literature is used in two senses. The first in a general sense, where the contract is involved with actual phenomenon of every act undertaken in earnestness with stiff determination regardless of whether or not it arose or came forth from a unilateral intention such as trust etc. Decisively, the term is used not only to refer to covenants but also to refer to oaths and other kinds of promise like Nikah, Pledge or personal commitment.[6] Moreover, the word is also quoted in Qur̓ ān to refer the direction of personal obligations.[7]

The second in a particular sense, it is used for consequence and outcome of mutual agreement such as sale, hire, and agency. It is relevant to note that contemporary scholars are inclined to apply the contract to bilateral contracts as is the case in common law.[8] Number of Qur'anic verses supporting the opinion, that fulfillment of contract in all aspects of life contains faith and obligation. It is a moral as well as a religious obligation. These verses regulate the principles of contract through different terms namely contract, covenant and promise. For example:

"O ye who believe fulfill the contractual obligation" [9]

"And fulfill you covenant with me and as I fulfill my covenant with you"[10]

"And they who keep their promises whenever they promise"[11]

Interestingly, overwhelming majority of specialists within the context of Islamic law is in attempt to define contract have turned their attention to explain the contract of sale, which they observed as model for all sort of contracts. The incipient definitions from major schools of Islamic Jurisprudence, each revolves around the idea of acquisitive exchange between parties. A sale contract within Hanafi school for instance, the author of Badāī al-sanāī concluded that "The exchange of certain coveted items for another coveted item".[12] Such as exchange by words or by deed" and Ibn Qudāmah famous Hanbali jurist therefore, attempts to conclude by saying that "sale contract is the exchange of property against another property conferring and procuring possession".[13] Accordingly, as it is mentioned above that for these early scholars and their followers a contract is perceived as a mechanism for exchanging possession physically as property. Therefore, by this conception one party relinquishes the possession of an article to another in transfer for the other party who relinquish the possession from him. Thus, conferring of immediate possession with an instantaneous change in respect to counter values intended to be exchanged are its main effects.

Along the same lines, in regards to the modern Islamic literature on contract law, number of other definitions taken from classical Islamic Jurisprudence and modern law, for this Mujallah defines that "contract or àqd take place when two parties undertake obligation in respect of any matter"[14]. In the same way a contemporary scholar Dr. Tahir Mansuri quoted a definition through Al sanhūry, where the phrase contract is noted as being a "Connection of an offer emanating from one party with the acceptance of the other party in a manner

which marks its effect and the subject matter of the contract."[15] Remarkably, further analysis of the above definition reveals that contract involves certain facts; the parties, internal willingness, the issuance of an outward act in shape of offer and Al darar Acceptance Al darar and most importantly there must be a legal bond between the two declarations in respect of subject matter which is in fact regarded as contractual obligation. With that realization, it is affirmed that contract therefore implies a legal relationship in consequence of the conjunction of two declarations which follow legal effects regarding subject matter. The above meaning and analysis make the sense that contract includes two parties and it is usually used for two party transaction with the mechanism of offer and acceptance to serve the interests and benefits of both parties, which arise from the exchange of subject matter, and it seems quite equitable that each party must show fairness in revealing the information about subject matter.

2. The Discussion About Freedom of Contract. (Obligations by Nature of Contract and Obligation Obligatory by Terms of Contract)

2.1 **Freedom of Contract in Shari'ah:** According to Islamic law of contract in consequence of formation of any valid contract two types of obligations arise. First of these two types include certain basic obligations understood from the very nature of that specific contract. To be sure, that could be equated to the term implied by Muqtadā al-àqd, or the nature and essence of the contract.[16] These terms may not require to be expressed in the contract by any of the parties to that very contract. With that understanding, perusal of Islamic literature on law of contract in case of sale contract finds certain examples, such as delivery of goods be free from defects, and consideration as price on delivery- Some jurists or researchers on Islamic law viewed from another angle, such terms are also called "Āthār al-àqd" or the effect arises from the contract.[17] The principle here applied is "al-àqd asbab Jaliyyāh Shari'ah Le Ahkām e ha, wā ātharīha wa muqtadayātīha" which declares that "Contracts are the casual legal justifications for the operation of the set of rules, legal effects and implications preset by Shari'ah." Parties are free to enter into any contract, but it is Shari'ah to determine its "Muqtadā" as its legal effects, therefore the parties need not to mention for the same as stipulation of express terms.[18]Muqtadā al-àqd is creation of law linked with the nature of particular contract opt by parties and practically making of that contract has no concern in its determination. Whereas, the second type of obligations is; which must be stated expressly in the contract by the party relying upon it. In other words, these express terms are the stipulations for certain descriptions or particular objective which fall under the ambit of Khīyyār al Wasaf.

To this point, having discussed the above distinction, the next step in this discussion is to deal with the question of freedom of contract in the sense of the party's freedom to ascertain contractual terms, regulating the implications of the contract in terms of conditions implied by Shari'ah. However, in Islamic law there is controversy over this issue, which may be discussed into two main streams. The first group of jurists maintain the concept of freedom of contract as general rule while another school of Islamic law takes the opposite view, they maintain that it is the exception.[19] The following lines present a brief account of each view both the general rule and exception.

2.2. **Freedom of Contract; As a General Rule:** In a bid to understand this controversial phenomenon, of both the said steams, the first view is represented by the Hanbali School; general argument has been presented by the famous scholars the late Imam ibn Tamiy'ah and Ibn al Qayyim. Along the same line, we find that the Malaki School also proceeds on similar arguments.[20] They argued that contracting parties are free to conclude contract by making any stipulation with their mutual consent, and the contractual terms thus made are considered legally binding, except in such cases where these stipulations stand contrary to the express principles of Shari'ah or its objectives. For this, they wrinkle this general theory about the freedom of contract relying on the text of Qur̓ ān and from the traditions of Prophet ﷺ along with applying analogical reasoning.[21] As it is stated in Qur̓ ān:

"O ye who believe fulfill your undertakings"

"And keep the covenants of the covenant it will be asked"[22]

And some of the traditions also support this view as it is stated:

"An importer has four characteristics, one of which is that does not honor his undertaking".

And it is also stated:

"Muslims are bound by their undertakings"[23]

Ironically, the basis for aforementioned contention is built on the text of these injunctions that command to fulfill undertaking is unconditional and absolutely unqualified in its application, which infers the meaning that there is no prohibition by Shari'ah. The only necessary and obligatory condition for the validity of contracts and stipulations is the presence of mutual consent of the parties to a contract[24]. Thus accordingly, the general principle for contracts in context of stipulation is validity and permissibility, unless it contravenes the explicitly given text from Qur̓ ān and Sunnah. They, however, further argue that to enter into a contract and to put in the proper form of any stipulation is an integral part of human ordinary activities and the validity of these activities is the core presumption, as in this regard it is clear in Qur'anic verse;

"He Hath Explained to you that which is forbidden unto you."[25]

With that understanding, it is also argued by the saying of Prophet ﷺ that:

"Muslims are bound by their stipulations except for a stipulation which makes the lawful unlawful"[26]

Therefore, jurist of this stream does not limit the liberty of general principles and maintain their opinion that Muqtada al àqd not to be a rigid bond or ligament for limiting the party's freedom to put forward any stipulation in pursuance of their mutual consent. Hence, Shari'ah has delegated the power to regulate the legal consequences of the contracts to the parties with their mutual consent, but unless it will not infringe the basic tenants of Shari'ah. For this, these jurists do not consider contractual stipulation invalid, merely on the ground that they are against Muqtadā al Àqd.

However, it is observed that these stipulations must not put any encroachment on the established rights of any of the party to contract. To this, they invalidate any sort of stipulation which deprive any party to contract irrespective of being offeror or offeree of their rights established by "Muqtadā al àqd." To illustrate with a focus on this sort of undue

deprivation, if one party put forward a stipulation in the contract which limits the buyer capacity from dealings with the goods after sale by any means, in their viewpoint, this stipulation is not allowed. Hanbali school therefore, attempts dissociate this stipulation from contract arguing with the tradition reported from Prophet ﷺ such as:

"How can man stipulate conditions which are not in the Book of Allah."[27]

Nevertheless, this viewpoint, in turn can be estimated to have manifested to itself in further slighter difference. Analogically speaking such a stipulation is considered irregular Fāsid, that it nullifies the entire transactions according to one of the opinions of that group. Though, according to another opinion reported from Hanbali school, only the condition is null and void without affecting the contract. In a similar vein, Malaki jurist also nullifies it by way of exception, alike as unjust condition, if attached to the contract will be invalidated according to them without spoiling the remainder of the contract.[28]

2.3. **The Freedom of Contract; An Exception :** As oppose to First stream's jurists 'notion of Freedom of Contract' Zāhiri and Hanafi school offers particularly a different conceptualization. The second group, therefore, attempt to maintain the freedom of contract as an exception. They however, further differed into two different opinions. The first of this group is the Zāhiri school, the founder of that school was Ibn Hazam al-Zāhiri, whose views have strictly been reinforced by his renowned disciple Daud al-Zāhir[i].[29] They however, articulate their opinion with reliance upon Hadīth "Every stipulation which is not in the book of Allah is void".[30] To this, they further contended that any undertaking or stipulation put forward by the parties to contract notwithstanding the consent of the parties is ensured is considered not valid unless and until validated by the express provisions namely, Qur'ān, Sunnah or otherwise approved by valid consensus done over by companion of Prophet ﷺ . They also strengthen their views with the evidence of another Prophetic Sunnah which says: **"**How can man stipulate conditions which are not in the book of Allah, all conditions that are not in the Book of Allah are invalid, be they a hundred conditions. The judgment of Allah is truer and his conditions are more binding. [31].

With that realization on the understanding of this tradition, they split up the meaning of the Hadīth into two parts and derived twofold set-up from this Hadīth. They gave explanation in unique terms that person either undertakes to do what Allah has ordered or commanded to be done or otherwise undertakes to commit something which has not been so ordained by law giver to be fulfilled. In the latter case, either he may be promising to do lawful what he has been declared contrary, or undertaking to adopt unlawful, what has been maintained lawful or valid.

To this point, in both mentioned situations they viewed such undertaking is not valid because it will tantamount to a transgression of Allah's limits.[32] Hence, Zāhiri approach stands for just to validate few expressly sanctions as type of stipulations. On the other hand the other group of the jurists, Hanafi and Shāfi'ī maintain bit wider approach towards the tradition of Prophet ﷺ relied upon by the Zāhiri school. [33] To refer back to the core contention, they interpret the phrase in the 'Book of Allah' differently, as meaning comprise in addition to stipulations expressly provided by the Qur'an, Sunnah and Ijmāh,

they widen the domain of the phrase and added in its application the stipulations validated by Qiyas or analogical reasoning.

With that prospect in mind, it could be argued that they based their position on the basis of Prophetic statement, where Prophet ﷺ was reported to have ruled the stipulation made to master in contract of emancipation. "Allegiance of the slavevest in the emancipator"[34] In other words the point of distinction here between Zāhiri and others is based upon the space and scope of freedom of contract by inclusion of Qiyas, hence, Zāhiri holds most stringent and restrictive position in this regard. To this, one may conclude that in above case the jurist other than Zāhiri interpreted the invalidation of the stipulation in said contract, based on the reason that it contradicted the prescribed outcome or objective of contract and in other contracts be like that on the basis of analogical reasoning. They further argued that Muqtadā al Àqd is prescribed in Shari'ah to maintain balance between rights and obligations for the sake of ultimate objective of Shari'ah, which is called justice and fairness among the contracting parties.[35] Along the same lines, in the absence of special provisions the Shāfi'ī maintain their viewpoint that any stipulation which is neither consistent with Muqtadā' al àqd nor consolidating prescribed outcome is not valid, and further invalidate the entire transaction if it is beneficial to make only and not to other party, but if it contain no benefit upon none of the parties than will be invalidated without the remainder of the contract,

Similarly, according to Hanafi Jurists in the absence of any explicit provision of law that any stipulation which is neither in accordance with Muqtadā al àqd, nor consolidating it is either irregular if it confers additional benefit on the party creating it, or void if it does not confer benefit on any of the contracting parties. While an irregular stipulation will have effect on the entire deal but a void stipulation is merely unenforceable not vitiating the entire deal. However, there is distinction found in both opinions between Hanafi and Shāfi'ī jurists. Hence, Hanafi prescribe custom very widely and in consequence they hold validation about stipulations, notwithstanding their contradiction to the Muqtadā al àqd if such are established by custom.[36] To put it differently, it could be established that despite their varied opinions over the broad concept of freedom of contract; irrespective of the fact that in principle it is the general rule or the exception, yet all schools of Shari'ah agree up to varying degrees for the stipulating in contradiction of Muqtadā al àqd is not valid.

2.4. Contract of Sales and Freedom of Contract: Altogether, jurists of Islamic law agreed on established fact, that it is an implied term in a contract of sales of goods that the party who is selling must make sure that the goods delivered are free from defects. Otherwise, it is fair right of the buyer that he can revoke the contract or reject the goods, irrespective of the fact whether it was stipulated in the contract or not on behalf of excuse of freedom from defects. This basic implied term is said in Islamic law as "Shart al Salamah minn al-ūyub." In other words, it is sort of condition in contract for freedom of contract. Such condition is also prescribed as term implied by Muqtadā al àqd.[37] With that realization, breach of this condition gives the other party to operate right of Khīyyār al Aib or option to reject or return the defective subject. This right of rejection is also known as

Khīyyār al radd bil Aib. This right has reliance on the tradition as reported from Prophet ﷺ that:

"It is unlawful for a Muslim to sell his brother defective goods unless he makes this known to him."[38]

It is worth mentioning that the said statement reported from Prophet ﷺ does cover patent or obvious defects or any defect otherwise visible or in the knowledge of the vendee at sale spot, alike it does in English law but conversely this statement also applies to the concept of latent defect. Similarly, the categories of defects which give the vendee the option to reject the goods are generally propose broader concept. The concept essentially, proposes that where the happening of such thing effect the value or price of the goods in the sense that it decrease the value or price of subject in the custom of traders.[39] In other words, it is as like the condition of merchantability found in English law but not exactly the same as it was decided by Lord Ellen Borough J. where he stated;

"Seller cannot insist without warranty that the goods should be of any special kind or specific quality. However, the presumed intention of the parties must be that the goods should be merchantable under the name mentioned in the contract between them. The buyer cannot be supposed to buy goods to throw them away."[40]

Along the same lines, the other features or conditions prescribed for fitness and contract's discipline like samples etc. in English law are classified within Islamic law under the terminology known as "Khīyyār al wasf" in Islamic law of contract. Although Islamic jurist treat such terms as express terms.[41] However, in America the warranty of fitness in relation to the description is treated as type of implied term where breach of such terms results the same remedies for vendee in case of defective goods as it would be there as Khīyyār al Aib in Islamic law. In fact, it is a more realistic approach since it is redundant to mention in law that goods should be corresponding with their descriptions in all respect. This is because the express terms may be understood by their letters without the law intervenes to fill the slits. To this, parties must detail the express terms to invoke competent court jurisdiction in this regard, otherwise they cannot seek their due legal effects in order to have right to reject the goods for breach of description or to make function the notion of Khīyyār al-wasf in contract of sale.[42]

Moreover, the notion of concept and approach, consequently lead that the defects must be known in the subject of sale at the time when sale is going to be conducted or at least any time before it is delivered to the vendee.[43] In case where such breach of implied term or 'Shart al Salamah mina al-ūyub' occurs, then vendee can operate his right or remedy in two ways. Following this, Hanafi, Malaki and Shāfi'ī jurists say that he either asks for ratification or may opt the option of recession of contract. Whereas, the Hanbali jurist add third option as well, which is compensation along with ratification and recession. For this, the further detail of all these options and the operation of their feasibility and non-feasibility would be discussed thoroughly in upcoming discussion in next chapter. Even so, this remedy of compensation is known in Islamic literature as "daman al àqd", and in Shari'ah that compensation applies in respect to subject property of contract only. Whereas, the commercial loss of profit and personal injury damage caused by these injury or other

property losses of the vendee do not fall under the scope of contractual liability in Shari'ah.[44]

2.4.1. **Rule for Seller's Liability in Case of Defects:** With that foregoing, it may be apparent at this stage, the freedom of goods from defect being an implied term based upon Muqtadā al-àqd of that very contract, but along the same lines another issue arises that whether Islamic law recognize any exemption or disclaimer clause which put limitations for such terms implied by law, or invalidating such limitations. However, Islamic jurists have different point of view on that issue as we discussed earlier. To this point the disagreement regarding their adherence to Muqtadā al-àqd becomes quite ostensible. Hence, they are not found with the equal degree of tenacity. Their respective views on the issue concern are as under:

I. **Māliki' Opinion:** In this setting, jurist of Mālaki school upheld that an exemption clause which affects the liability for defective quality as exclusion is invalid. They consider such an exception is not according to the core principle. In terms of evaluation, however, their view is better than the position taken by Zāhiri's regarding putting forward invalid stipulations on the remedies which will be explained later. Jurists of this school consider remainder of the contract intact. [45]

II. **Shāfi'ī' Opinion:** To this point, Shāfi'ī offers a particularly rich conceptualization, it is reported that jurists of Shāfi'ī school have three views on this matter. First that Shart al-Barāah is valid save as it does not apply to defects occurred after contracting. And the second view, it is valid regarding latent defect in cases of sale of animals only and third view is totally in negativity of Shart al-Barāah, because an exemption clause would always refer to such defects that are not known at the time of transaction.[46] The last view is reported to be in harmony with Imam Shafi'ī's own opinion regarding Muqtadā al-àqd as it is supported by known Shāfi'ī jurists Shirazi that it is indeed in line with the principles led down by their jurists regarding waiving and transferring of right.[47]

III. **Hanmblī' Opinion:** Along the same lines, Hanmblī jurists also have their different views on the matter. In one of their opinions they validate Shart al-Barāah only in one situation where it refers to particular defect known to both parties to contract, vender and vendee. In second opinion they upheld that it is invalid where the defect exempted is not known to seller. Then, in third version they validate it only in respect of such defect that is shown to buyer. Though, in the light of previous discussion about the exceptions it is held that Hanblī jurists do not apply strictly the theory of Muqtadā al-Àqd but they delegated the powers to both the parties to a contract and linked it with the concept of encroachment on buyer right established by contract,[48] thus, the first view of jurists is seem more consonant with their conceded exception.

IV. **Zāhiri Opinion :** As a part of critical negotiation in the quest for greater understanding, before entering into details of the Hanafi position on the matter it is better to give brief view of Zāhiri jurists. As we have noted before that this school does not consider Qiyas, so by dint of this, it is inferred that they do not consider semantics of Muqtadā al-àqd too, in relation to the question of validity of stipulations in general.[49]

Obviously in their viewpoint, as there is no text from Qur ̓ ān and Hadīth of Prophet ﷺ or any Ijmā authority expressly considering the matter of excluding or limiting the implied term "Shart al-Barāah" and it does not come under their prescribed valid conditions, they simply consider it invalid to stipulate because it is not found in the Book of Allah.[50] So, they invalidate the entire contract if it contains such an invalid exemption clause.

V. **Hanafi Opinion :** On the other hand, Hanafi jurists upheld that an exemption clause which excludes liability for any defect including patent or latent either known or not known to the vender or vendee is a valid stipulation.[51] Interestingly, this is a contradictory position, if we take into account their general view about the concept of freedom of contract where they maintained it as exceptional situation and more specifically their point of view that "Shart al-Salamah mina al-ūyub" is an implied term by Muqtadā al-àqd.[52] However, this diversity in this case is only apparent since they justify stipulations established by custom as an exception to their stand about the matter of freedom of contract and the theory of Muqtadā al-àqd. For this, in their opinion, where any such type of conditions or stipulations are established by recognized custom, notwithstanding of the fact that it might be in contradiction with Muqtadā al-àqd, be valued as rightful stipulation, and in the same way they consider the issue of "Shart al-Salamah mina al-ūyub."[53] Through this recognition of custom in said matter, in fact, they have maintained a very mid view about exception which consequently would swallow up Hanafi general principle about freedom of contract. However, it is worth mentioning, that apart from this position taken by majority of Hanafi Jurists at least one prominent scholar of Hanafi school opposed this point of view, and maintained contradictory opinion, that exceptional clause is invalid where the excepted defect is not known at the time of conclusion of the contract.[54]

3. The discussion about the application of Khīyyār al-Shart (Option of stipulation) **and contractual obligations**

3.1. Concept of Khīyyār al-Shart : Khīyyār al-Shart may be translated as 'option by stipulation' or 'condition options.' which of course, constitute a condition stipulated in the contract. This option convenes the contractual parties both seller and buyer with the right to proceed with contract either by confirmation of contract or with its cancelation subject to pre-agreed period of time. So, they have right and opportunity of studying their respective positions in the transaction in order to reach their final decision regarding its confirmation or rejection. This option can attract any commutative transaction, for instance any transaction that involves the interchange in terms of counter values and which is cancellable at any future date of time. Whereby, the buyer during the duration fixed for effectiveness of this option can assume his right to effectuate the deal by paying the price agreed upon and take delivery of the subject property object of sale.[55]

However, majority of the jurists having the opinion that contracting parties can make option of stipulations and even can also validly put any stipulation in favor of third party.[56] Suppose, "I have bought this item from you provided Mr. 'X' has the option to confirm or resend."

Whereas, Khīyyār al -Shart derives its authority form the traditions of Holy Prophet, in the first place is a famous Hadīth on Habban ibn Muqiz who reportedly committed cheating or

attempted to defraud in his contractual relation, at that time people complained against his behavior to The Holy Prophet ﷺ The Prophet ﷺ said;

"Whenever any of you carries out a sale transaction, he should say. 'No cheating and I have the option for three days." [57]

Just in the same way, another tradition of Prophet ﷺ transmitted by Tirmidhi from Amr Ibn Auuf which also declares: "The Muslims are on their stipulations." [58]

3.2. Various Views of Jurists on its Applications : The brief analyses of the views of different schools of Islamic Jurisprudence about various applications of the option of stipulation are as follows:

I. **Malik'ī School :** It could therefore be conceivable that the definition and meanings given to the concept of option in terms of stipulation according to Malik'ī school are susceptible to different implications from a linguistic and conceptual viewpoint, due to the variability in interpretation. The jurist of this school opined that this Khiȳār or option can be exercised validly by the buyer or the seller, and even for the third party it is permitted where right to annul or confirm the contract is contingent to the opinion of third party.[59] To illustrate if one of the parties to contract says:

"I have bought it for you at 'Y' consideration provided Mr. 'Z' consent or agrees." Here the conclusion of transaction is made contingent to the sole agreement of Mr. 'Z' who is given the right to do so, Mr. Z is now seizing of the agreement.[60] While in another transaction the implication could be different where purchaser says: "I have purchased it, pending consultation with Mr. Z." Here the principle party has to last say on whether to confirm or to reject the transaction and not Mr. Z. whereas in any situation if Wakil is appointed for deal, then both will share the option for confirmation, the representative and the principle party.

As for the period or timeframe is concerned within which the options to be exercise. The views of Malik'ī jurists vary from transaction to transaction according to subject of sale, in such cases where transaction concerns with dealing of perishable fruits, the period shall not be extended more than one day.[61] Though, in transaction dealing on animals and clothes, the period is extended up to three days. However, in case of house and farm lands the period is considered one month and period of computation of time starts immediately after the conclusion of the contract.[62]

II. **Hanafī School :** The principle enunciated by Malik'ī jurist pertaining to Khīyyār al- Shart for the most part, applicable and permitted among Hanafi school; nevertheless, jurists of this school went ahead to confer the participatory role, confirming or annulling the transaction extend the scope of its legitimacy on any of the representative as well if there along with principal parties. On the contrary, the Malik'ī Jurists consider that either the representative or the party can exercise the option in case of stipulation.[63]

In terms of comparison Hanafi jurists divide it into two categories, first which susceptible to option of stipulation and second not susceptible to this option such as Nikāh, Talāq, Bequest, Nadhar, etc.[64] Whereas its period of commencement and termination is concerned, Hanafi jurists consider three days for its termination after the contract gets concluded. In case, if the period exceeds for more than three days, the contract becomes

valid, except the Muhammad al Shaybānī, who holds a bit contradictory opinion. While in exceptional circumstances where the vendee takes possession of the sale subject and unfortunately it gets perished, in these situations he is liable to render it on assessed price. This assessment is to be considered from the date, when he got into the possession of the sale subject and not from the date the same got perished.[65]

III. Hanmblī and Shāfi'ī School's Views : Broadly speaking, the views given on this issue by the jurists of these two schools are not varying fundamentally from the views of aforesaid jurists of other two schools. The difference lies on certain matters in their details, like period, or length of stipulation. With that, in their general opinion a transaction done with a condition in reverence of requirement of the contract is valid and condition is of force.[66] Similarly, any dealing done in pursuance of usage and custom prevailing in locality is right and condition is also valid. To refer back to the discussion outlined earlier, this attitude of generality of Muslim jurists about this issue as pointed out in discussion supra, one may conclude that Shari'ah law is a dynamic legal system, thus allows freedom of contract and stipulation thereof.[67]

4. **The discussion about the illegality of the contract (**Prohibited Practices)

The following headings, for their part will probe the examples of such prohibited practices as;

4.1. Bay' al- Mulāmsa and al-Munābza: Mulāmsa literally means to touch an object by hand. Technically, in this kind of transaction seller offers the buyer that 'if you touch any cloth it would be yours' through the payment of 'y' as consideration or price. Consequently, in this transaction the party was required just to touch the cloth without any examination of the sale subject. Munābza conversely is that form of transaction where seller should throw the cloth to the buyer without giving him any chance to have careful examination of the subject. In fact, the very act of throwing the cloth concludes the transaction. For this, the illah or cause of prohibition here is lack of inspection of subject property. In due course, purchasers in either case should have given opportunity to examine the subject matter sold to him and here in this case it lacks. As well as, it was not certain whether the transaction was likely to prove undue disadvantageous to one side. In the context of Shari'ah law theses both the forms are declared illegal . To this, Abū Hūraira (May Allah be pleased with him) reported a tradition from Prophet ﷺ :

"Two types of transactions have been forbidden by "The Holy Prophet" ﷺ al- Mulāmsa and al- Munābza."[68]

4.2. Bay' al-Hasatī : This is referred to a kind of sale transaction conducted via throwing of pebbles. As a principle, in this transaction one party probably the buyer will throw a pebble towards the goods of the seller, upon whatever goods the pebble falls, the bargain is concluded. The illah cause for prohibition here is the lack of certainty and absence of proper inspection of subject matter. These both the factors may cause injustice or may result hardship and suffering of loss to any party. Therefore, it is not allowed in Shari'ah and considered invalid, as it is reported that prophet ﷺ has forbidden transaction determined by throwing stones and the type which involves some uncertainty.[69]

"Abu Huraira (Allah be pleased with him) reported that Allah's Messenger ﷺ forbade a transaction determined by throwing stones and the type which involves some uncertainty."

4.3. Bay' al-Muzabna and Bay' al-Muhaqlah : The basis for the prohibition of Bay' al-Muzabna and Bay' al-Muhaqlah is built on a hadith of Prophet ﷺ .Sa'īd bin Musayyib reported a tradition from Prophet ﷺ;

"The messenger of Allah ﷺ prohibited Muzabna and Muhaqlah which are sale of fresh dates on the trees against dry dates and sale of field of wheat against wheat and taking or of land on rent against wheat (to be produced in it) respectively."[70]

With that Muzabna is such sort of transaction where parties agreed to exchange fresh fruits for dry fruits. In this case point debated is that quantity of dry fruits to be rendered for exchange is fixed and measured exactly while the quantity of fresh fruits to be rendered for exchange in consideration determined via a rough estimate or through guising while still on the date palms. Illah cause involved here is again the uncertainty. Since, such equation of fresh fruit on trees can hardly be determined correctly. To this point, it is just like dark transaction or blind hunch for buyer. Thus, stand prohibited in Islamic law.

4.4. Bay' al-Mu'dhtarr : However, it is sort of transaction where one of the parties apply the unjust force, duress or coercion for bargain, and other party faces the compulsion. Such a sale is void, thus prohibited in Islamic law.[71] As it is reported by Ali Ibn Abu Talib (RZ) that:

"A time is certainly coming to mankind when people will bite each other and a rich man will hold fast, what he has in his possession (i.e. his property), though he was not commanded for that". Allah, Most High, said: "And do not forget liberality between yourselves." "Those who are under compulsion will be bought from, while the Prophet ﷺ forbade forced contract, one which involves some uncertainty and the sale of fruit before it is ripe."

Illah cause of prohibition is that duress has affected the true intention of victim, which ultimately vitiates the consent and might cause the suffering of loss.

4.5. Bay al-Najash : To understand this, it could be defined as a deceptive form of sale transaction; it is defined as an act of offering a higher price for a commodity with no intention to buy it. With that realization, the real motive is just to deceive the buyer who really wants to have it. Specifically, this is sometime a trick used by the seller which switches the market index to increase his offer to outbid the first offer. The practice is illegal since it is prohibited in hadith, quotation from the text of hadith is as;

"One who practices Najash is ribā earning traitor …"

Needless to say, that such practice is forbidden because it is a false trick being used in deceptive manner. Along the same lines, as it is also reported from Sa'īd bin al-Musayyib that Prophet ﷺ prohibited deceptive sale.[72]

4.6. Bay' Talaqqī al- Rukban : To this, it refers to a situation where people go to the outskirts of the town to meet traders, before they reach the market and buy their merchandise for unfair low price or sometimes take stock of certain merchandise for dumping to hijack market index in their favor,with intent to get sole profit. For this, they deprive both the seller and the buyer from enjoying the real blessing of the market. Shari'ah forbids this practice because of its unfairness and unjustness. Quotation from the portion of tradition witnesses its illegality, as narrated by Ibn Umar (RZ);

"Do not meet merchant in the way and enter into business transaction with him, and whoever meets him and buy from him, and if the owner of the merchandise comes into the market, he has the option".[73]

Wherefore, the Islamic law in its characteristic manner of equitable remedial conception gives such victim a right to rescind the contract with the person who bargained in lesser price upon learning the real value of his commodities in the market place.

4.7. Bay' al-Īnāh : Interestingly, this is different from all above-mentioned situations, it is sort of technique to coverup Ribā, this is referring to a situation where the seller sells the commodity on credit for for a fix period of time. To this, the seller then repurchases the same commodity from the same buyer but with reduction of the price for cash payment. This injurious nature of transaction is not allowed according to majority of jurists with the authority of tradition reported by Ibn Umar, as;

"Narrated Abdullah ibn Umar that Holly Prophet ﷺ said: When you enter into the Īnāh transaction, hold the tails of oxen, are pleased with agriculture, and give up conducting jihad (struggle in the way of Allah). Allah will make disgrace prevail over you, and will not withdraw it until you return to your original religion."[74]

It could, therefore be conceivable that in all above situations, it is evident that the contract is not valid until it is not free from these vitiated factors. These factors affect the consent of parties and stand contradictory to the basic Islamic phenomenon of fair trade as mentioned supra in pervious chapter, taking on the theoretical framework of "Al Darar Yūzāl" "Haram must be eliminated or" "La darar wa la dirrār" "There should be neither harming nor reciprocating harm", especially the segment for contractual liabilities must be focused.

5. **Conclusion:** With that, it is endeavored to demonstrate the discourse on the topic of description of the contract in Shari'ah, with a focus on detailed investigation of concept of the freedom of contract in Shari'ah. For this the views of different school of thoughts being examined, It is also endeavored to demonstrate that despite their varied opinions over the broad concept of freedom of contract; irrespective of the fact that, in principle it is the general rule or the exception, yet all schools of Shari'ah agree up to varying degrees for the stipulating in contradiction of Muqtadā al àqd is not valid. It has been contended throughout the discussion that contract therefore implies a legal relationship in consequence of the conjunction of two declarations which follow legal effects regarding subject matter. Further, it is argued that the mechanism of its formation relies upon the basic conception of contract under Islamic legal system, its relevance with allied modes and forms of undertaking by which an obligation may be generated. It is also concluded that the contract therefore implies a legal relationship in consequence of the conjunction of two declarations which follow legal effects and requirements regarding subject matter along with that the issue of these allied requirements as well as the conceptualization of freedom of contract (obligations by nature of contract and obligation obligatory by terms of contract) with the view point of eminent jurists among different Islamic schools of law was examined in detail. Moreover, rules for seller's liability in case of defects with their relationship to formation of contract under Islamic commercial law is debated and diverse

opinions of jurists were examined in detail that the basis for the aforementioned contention is built on their adherence to Muqtadā al-àqd, they are not found with the equal degree of tenacity. With that added understanding, Al-Shart stipulation denotes an act of stating firmly as requirement for ultimate happening or making any condition or any prerequisite for the fulfillment of any transaction. In the light of discussion about conditions outlined earlier, as it is pertinent to mention that the entire concept of option of stipulation revolves around the question, whether it is permitted in contract for parties to make stipulation pertaining to its execution? And the majority's view enables the parties to a contract that they can make option of stipulations and even can also validly put any stipulation in favor of third party.

Furthermore, it has been debated that there are certain factors which could vitiate consent, even though the parties to a contract verbally uttered the offer and acceptance in an ordinary way but still not tantamount to be a valid formation, it is perhaps, being argued that Shari'ah does not permits any transaction which would lead to uncertainty 'Gharar' and ambiguity 'Juhāla'. Gharar is an Arabic term that is associated with uncertainty, deception and risk in any arrangement, it denotes that subject of deal is not in effect to the level of misunderstanding, that exist between the parties, or to the level of uncertainty to the goods or payment which render them rather not obtainable. Juhāla means that commodity certainly exists but its Wasaf description or identification is not clearly shown.

Having discussed, the conceptualization of contract formation and theory of contract, it is therefore endeavored to investigate remedial measures against tribulations of vitiating factors which impair the legal validity. It is being analyzed that the general idea is that the victim may terminate the contract by using some legal framework, or he may be given any option or chance to repair his losses. The choices which possibly will provide a party to a contract a legal or contractual right to terminate the contract, or on the other way gives one of the parties, probably the vendee, the right to acquire discount, or right of settlement for defects, due to tribulations of these factors. Ultimately it is called the risk management.

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