

**AN EXAMINATION OF EFFECTS OF OPTIONS (*KHIYĀRĀT*)
IN DETERMINING MUTUAL CONSENT (*TARADĪ*) IN
COMMERCIAL TRANSACTIONS UNDER ISLAMIC LAW**

BY

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ABSTRACT

The foundation of contract in Islamic law is the consent (*riḍā*) of the contracting parties. This is decreed by the verse in the Glorious Qur'an, surah al-Nisa which says that "O you, who believe, devour not your property among yourselves by unlawful means except that it is trading by your mutual consent." The normal way of consenting to commercial contracts is through offer and acceptance by the contracting parties. Similarly, Islamic law provides *khiyārāt* (options), some of which are created by parties to the contract themselves, while others are inherent in the contract. Options (*khiyārāt*) are regarded as the right ordained for the contracting parties to either accomplish or dissolve a contract. Therefore, using the doctrinal research methodology, the research examined options (*khiyārāt*) with a view to assessing its impact on the determination of the Mutual consent (*Taraḍī*) of the contracting parties under Islamic law. The research found that apart from offer and acceptance in a contract, the parties can use *khiyarat* (options) as a mechanism for the determination of the consent of the parties in the contract. The research recommended that: parties to a contract can utilize or insert

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the mechanisms of khiyarat options in a particular contract as another way of ascertaining the consent or otherwise

Key words: consent, options, Islamic law of contract.

1.0 INTRODUCTION

To begin with, it is apt to indicate that the evolution of the Islamic law of contract, in particular, is distinctive from any other legal system¹. Its rules were originally based on certain provisions, addressing diverse issues of contract which were derived from the primary sources. Muslim jurists from different Islamic schools of jurisprudence, analyses these sources, and came up with concise explanations, that deal with commercial activities. However, it must be considered that, the effects of contractual agreements in Islam are covenants from Almighty Allah, so that people may not treat each other unjustly in the agreement they entered.² A text in the Glorious Qur'an expressly indicates that the believers must keep to their promises: "O believers keep faith with your contracts. The commentary on this verse represent an order from Almighty *Allah* to fulfill all promises that have been entered into; whether it is a contract proper (*'Aqd*) or an agreement or obligation created by any means other than verbal. The examples of *Aqd* are contracts of sale, hire, mortgage³ and the like.⁴

Generally, the foundation of the contract in Islamic law is obtainable from the mutual consent (*Taradī*) of the contracting parties, which emanates from the expression of contracting parties by making

¹Al-Zaagy, A. "The Islamic Concept of Meeting Place and its application in E-commerce" Masaryk University Journal of Law and Technology accessed from <https://journals.muni.cz/article/view/2026> Last visited on 9/1/2017

²Sanusi, M.M, (2008) "Money Laundering with Particular reference to the Banking Deposit Transactions", Journal of Money Laundering Control, Vol. 11 Iss 3 pp. 253, access from <http://dx.doi.org/10.1108/13685200810889399> available as at 22/2/2017

³ Dubyani, M.D, "Muamalatul- Maliyyah Usalatun wa Muatharatun" King Fahad Publishers, Riyadh, 2015, vol.1, 2nd Ed, at pp. 24. Access from www.ebooks4islam.com/2015/05/20.html available as at 11/1/2017.

⁴Suratul Maida, 5:1 Abu Abdullah, M. A(2005) "Al-Jami'u Li Ahkamul Qur'an" popularly known as Tafsirul Qurdubi, Maktabussafa Publishers, Cairo, Vol. 6 p. 205

an offer and conceding to acceptance⁵. This can be seen from the text in the surah Al-nisa which says that “O you who believe, devour not your property among yourselves by unlawful means except that it be trading by your mutual consent.”⁶ This verse has so many explanations one of which reflects that any contract entered into through unlawful ways and which covers all unjust acts at all levels.⁷ Furthermore, still in this verse; the necessity of manifestation of consent was stressed; the subject-matter of assent would not be inferred from a verbal acceptance unless the words used indicate a definite intention to enter into a contract. However, there was no agreement in Islamic jurisprudence as to what should be regarded as a sufficient manifestation of consent, even though the *Hadith* of the holy Prophet *Salallahu-alaihi-wasallam* reported to have said, reported by *Imam Abu Daud*, where the prophet Muhammad *sallallahu alaihi wasallam*, reported to have said; “The contracting parties should not be separated until the contract is concluded based on their consent”.⁸ While among the classical scholars *Ibnul Qayyim*, a Hanbali jurist, states that: “Islamic law and its rules specify that the intention behind contracts is an essential element that affects its validity. The formality of a legal act can be the same but the end result depends on the intention”.⁹ This is why Imam al-Mawardi said: trust and fulfilling a promise are inseparable twins that will never diminish at any circumstances.¹⁰ Likewise Imam Az-zarqany, a Maliki jurist, emphasized on the requirement of mutual consent (*Taraḍī*) as the foundation of a valid contract which must emanate from the parties, at the initial stage of offer and acceptance.¹¹ In the same vein, *Imam Ibnul Qudamah* explicated that the mainstay of a valid contract is to obtain

⁵ Shimizu, H. “Philosophy of the Islamic Law of Contract a Comparative Study of Contractual Justice” IMES working papers series no.15, The Institute of Middle Eastern Studies International University of Japan. Accessed from <http://nirr.lib.niigata-u.ac.jp/bitstream> available as at 2/2/2017

⁶ Suratun Nisai, 4:29 ibid at note 3 above

⁷ *Ibnul -Arabi*, M.A (2009) “*Ahkamul Qur’an*” Assariyya Publishers, Beirut, vol 1, p.428

⁸ Abady, M.A (2001) “*Awnul ma’abud sharhi sunani Abu Dawud*” Darul Hadith Publishers, Al-Qahira, Egypt. 2001 , Vol. 6, at p.311. quoted from hadith no 3455 this is one of the reasons for the rulings on *khiyar al majilis*

⁹ *Ibnul-Qayyim*, M. A. (2016). “*Tilamul Muwaqqi’in An-Rabbil-Alamin*” (Vol. 3). (A. F. Az-zawawy, Ed.) Cairo, Egypt: Dar-Al-Ghad Al-Jadeeda. at p.105

¹⁰ Al-Mawardi, M.A “*Adabud-dunya wad-din*” Al-Quds Publication company, Cairo, 2012, 1st Edition. P. 276

¹¹ Azzarqany, M.A. “*Hashiyatus-shaikhul-adawy Ala Sharhul Iziyya*” Darul Ummah publishers, Kano 2013 ,1st Ed. At pp. 616.

the consent of both parties in a particular contract.¹² From the above mentioned positions, it is obvious that the proceedings in contract are what indicate the initial consent of both contracting parties,¹³ that is the effect of tying the offer and acceptance, which will result in transfer of ownership of the subject matter.¹⁴

Islamic law is a comprehensive law that cares for Muslims' interest and makes things easy for them. It has an amazing capacity to meet every emergency in life without changing the law in its divine character.¹⁵ This is evident in the legal rulings concerning trade transaction; Islamic law gives each of the parties to the contract the choice or options (*khiyārāt*) to consider his own interest, so that he can confirm what benefits him and cancels out what appears to be against his interest regarding the sale even though their apparent consent was initially given in respect of that contract.¹⁶ The fundamental wisdom, behind the permission of options in strict binding contracts is to give chance to the contracting parties,¹⁷ for either to proceed or to cancel same. In another vein, there are also certain contracts which cannot be executed there and then, like contract with executory consideration, upon which certain activities are expected to be done in future, in such circumstances; consent may likely suffer, along the way. It is not so easy for a formal consent to lead to a real one because it involves the work of drawing the real intention or the definite explanation of subject-matter from each party¹⁸. This work will therefore analyses the

¹² Salim, A.K "Sahihu fiqhussunnah wa adillatuhu wa taudhihu madzahibul Aimmah" popularly known as fiqhussunnah li abi malik, Taufiqiyya publishers Cairo, (2003) Vol. 4, at pp. 257, Quoted from Al-irtijahu ibnu -qudamah

¹³ Za'attary, A.D, "Fiqhul Muamalatul Maliyyah-al Muqaran Siyagatun Jadidatun wa amsilatun Muasaratun" Darul Asmau Publishers, 2010, Damascus, at pp., 9. Access from www.feqhweb.com/vb/ available as at 10/1/2017

¹⁴ Omar, M.N. et al (2011) "The implications of Ghubn in Islamic Contracts: An Analysis of Current Practices" American Eurasian Network For Scientific Information (AENSI) access online from www.aensiweb.com/old/jasr/jasr/ last visited on 9/1/2017

¹⁵ Ladan, M. T. "Introduction to Jurisprudence: Classical and Jurisprudence" Malthouse Press Limited (2010) at page 83.

¹⁶ al-Fawzan, S. "A Summary of Islamic Jurisprudence" Al-Maiman Publishing House, Riyadh, (2009) 2nd Edition , Vol. 2, at p. 23

¹⁷ Zubair, A. Q. "Principles of Islamic Law of Contract" I.I.C Publications, Lagos, 1991, at p. 116

¹⁸ As-san'any, M.I "Subulussalami sharhu bulugul marami min jam'u adillatil Ahkami" Nazarul Mustapha Bazz Publishers, Al-qadhy, A.A, (eds), 1999. 1st Edition, Vol.3, at p.747

principles of *Khiyārāt* (options) to show how they serve as mechanism in the determination of the *Taraḍī* (mutual consent) of contracting parties.

2.0 CONCEPTUAL CLARIFICATIONS

2.1 Contract in Islam

Contract in Islamic law briefly refers to an Arabic word *Aqd*,¹⁹ which literally means to bind, to tie, to fasten or to link together.²⁰ Technically, *Aqd* refers to the consensual relationship, which emanated from the expression of the contracting parties²¹ in accordance with the Sharia in a way that the ownership of property or anything valuable can be transferred, and the positions of the parties will change at the conclusion of the contract.²²

2.2 *Khiyārāt* (Options)

Islamic jurists have defined *khiyār* as the right ordained for the contracting parties to either accomplish or dissolve a contract²³ and they have regarded options (*khiyārāt*) as mechanisms to safeguard the contracting parties against hasty undertakings.²⁴ These mechanisms

¹⁹ Doi, A.I. "sharia: the Islamic law" revised and expanded by C. Abdussamad, Ta-Ha publishers, London, second Edition, 2008 United Kingdom, at p.500

²⁰ Sa'ad, M.I "Law of Contract" in Tabiu, M. et-al (eds), Principles of Islamic Law, An Introductory Textbook, Ahmadu Bello University Press limited, Zaria, 2016. p. 212

²¹ Abul-walid, M.A(2004) "Bidayatul Mujtahidi Wa Nihayatul Muqtasidi", Darul Hadith Publishers, vol. 3, at p. 146

²² Al-Dasuqi, M.A "Hashiyatuddasuqi ala sharhil kabir" Darul hayaul kutubil Arabiya publishers, Vol 3, p3

²³ ibid

²⁴ Bagheri, P. Hassan, K.H.(2015) "The Application of the Khiyar al-Tadlis (Option of Deceit) Principle in Online Contracts and E-Consumer Rights" Mediterranean Journal of Social Sciences, Vol 6 No. 4, MCSER Publishing, Rome-Italy. Access from <https://ukm.pure.elsevier.com/en/publications/the-> available as at 9/1/2017

have been designed to serve as solution to contractual problems, such as, *Ghabn* that is fraud etc.²⁵

2.3 Definitions of Consent (*Ridā*)

The Arabic word for consent is *Ridā* or *Taraḍī* etc. which literally means pleasure of heart and soul, opposite of discontent, will or choice (*Ikhtiyār*), mutual consent (*muwāfaqah*) and so forth.²⁶ However, when consent happens between two or more persons, it is called “*Taraḍī*” that is mutual agreement, which is based on the scale of “*tafā’ul*” which requires the participation of two or more parties, since trade and commerce are usually concluded between parties. Therefore, the mutual consent of both parties is required for conclusion of a valid contract.²⁷ Consent is an intangible mental fact which has to be manifested before its existence can be known. Before it is so manifested, it is a mere intention (*niyya*) which, by itself, is not sufficient to conclude the contract. That an apparent or formal consent lead to a real one before parties separate.²⁸ Some jurist referred consent to involve the full satisfaction of mind which can be reflected and apparent, as in the case of a smile on the face which reflects what is in the mind and the like.²⁹ While other jurist upholds the view that consent is a preference to particular class of object than other object or objects. That is to say, it means the actual satisfaction in relation to what is needed.³⁰

²⁵Uthaimin, M.S “*sharhu Riyadussalihin min kalami Sayyadil Anam*” an explanation of “*Riyadussalihin min kalamisayyidil Anam*” Darul Mustapha, Riyadh, 2008, 1st Edition, vol. 2, atp.231

²⁶ Ar-Razy, M.A (1981) “*Mukhtarus-Sihahi*” Darul fikr, Beirut , Labenoun.

²⁷ Al-Qurduby, M. A. (2005). “*Aljamiu li Ahkamul Qur'an*” (Vol.5). (A. S. Muhammad Ayyad Abdulhalim, Ed.) Cairo, Egypt: Darus-safa Publishers at p. 153

²⁸Cattelan, V. (2011) A New Model for Options in Islamic Law: looking for Islamic derivatives: a legal oxymoron? at p. 12 Access from <http://onlinelibrary.wiley.com/doi/> available as at 23/2/2017

²⁹Rahman, H. et al. (2016). “Mutual Consent in Formation of Financial Contracts: A Juristic Analysis”. *Asian Journal of Research in Business Economics and Management*, vol.6, 9-26. access from <https://www.ajsh.com/doi:10.5958/2249-7307.2006.00030.x>

³⁰ Rahman, H. et al. (2016). “Mutual consent in Formation of Financial Contracts: A Juristic Analysis”. *Asian Journal of Research in Business Economics and Management*, vol.6, 9-26. access from <https://www.ajsh.com/doi:10.5958/2249-7307.2006.00030.x>

3.1 Examination Of Legal Basis Of Mutual Consent (*Ridāl-Mutabāyī'an*) In Islamic Law Of Contract

All contracting parties according to Sharia, whether in traditional trading or in contemporary modes of businesses, must perform a contract based on a free and mutual consent,³¹ It is also known as consensus of both parties (*ridā al-mutabāyī'an*) without any form of coercion, either directly or indirectly, or else, it would be a voidable contract³². Having said that, Islamic law proceeds to define a framework in which the transactions should take place, so justice and fairness are ensured for all concerned.³³ This is why Allah subhanahu wa ta'ala says:

“O you who believe, do not devour each other's property by false means, unless it is a trade conducted with your mutual consent”³⁴.

The above verse of Noble Qur'an has set down an important principle concerning trade this is why Ibnul Arabi in his *Tafsir* said;³⁵ “while some scholars referred to consent as options after concluding the contract before separation of contracting parties from the *Majlis* this is the view of Ibn Umar, Abu Huraira Shuraihu, Imam As-Shaaby and *Ibn Sirin*,” and he also make references to the reports of *Abdullahi Ibn Umar* and his like; by the saying of the holy Prophet peace be upon him. according to him, “ the contracting parties are under their choices in as much as they did not separate from the place of transaction except buying with choices or options. ”³⁶

Imam Abu Hanifa and his students are of the view that, if the contract is concluded by mere expression, it means consent³⁷. While

³¹ Vorah, b. Aun, W. (2010) “*The commercial law of Malaysia*” long man publishers, Kuala lumpur. at p. 8

³² Abduljalil, M.D.(2010) “*Islamic Law of Contract is Getting Momentum*” International Journal of Business and Social Science, Vol. 1 No. 2; November 2010, access from www.ijbssnet.com last visited on 1/8/2017

³³ Muhammad, et al (2011) “The Implications of Ghabn in Islamic Contracts: An Analysis Of Current Practices” 2177Journal of Applied Sciences Research, 7(13): 2177-2181, 2011 ISSN 1819-544X

³⁴ Holy qur'an, Chapter 4 Annisaa verse 29

³⁵ Abdullahi, M.A “Ahkamul Qur'an” Assariyya publishers, Bierut, 2009, vol 1. pp. 428-430

³⁶ Abady M. S. op.cit note 8 p.2 from p. 311 under hadith no. 2996.

³⁷ *ibid*

Imam Addabary, interpreted the verse as; when the contract is concluded and the parties have not separated or left the *Majlis* with their consent of executing a particular contract, which means ordinary cause of transaction has been fulfilled, by tying the parties to their obligations in the offer and acceptance, bearing in mind, the existence of options in the *Majlis* without considering expression or caution.³⁸ He referred to all those verses related to commercial or debt transaction have a plain, literal and ordinary meaning and it is neither contemplate or mention the *Majlis* or separation from *Majlis*. For instances Allah has said, in the *surah al-ma'idah* "oh you who believe fulfill all your obligations"³⁹ this verse does not indicate when the parties enter in to the contract without consent, but it does mean when there is an obligation the parties are bound to fulfill. But when the agreement is concluded, and the parties decide to cancel the transaction and there is no gap between the two expressions, and the other party keep silent, in these circumstances the other party's consent is not known, then the contract is not binding upon the parties.⁴⁰ It is very clear in this case that, the silence is excusable, because the contract has already being concluded and cancelled at the same time, this signifies lack of seriousness from the other party. "*wa mal in 'san laulal lisan*" meaning who is human being without expression"⁴¹

Furthermore, in support of the above mentioned verses of the glorious Qur'an; which gave foundational basis of mutual consent of contracting parties, the jurists were in the process of deriving from *Hadith* texts the criterion that determines the consent through intention of the parties for the purpose of validity of contracts, they identified two categories of texts. The first category implies the need to adopt intention of contracting parties as one of the base for validating their contracts, this is based on the well-known *Hadith* of the holy prophet peace be upon him where he said: "matters are determined by intention."⁴² This *Hadith* implies a general principle that; one is rewarded for his deed according to his real intentions and not according to his actual deed which might be good in themselves but were

³⁸ *ibid*

³⁹ *Surah al-maida* verses 1

⁴⁰ Abady M. S. op.cit note 8, at p.2 . quoted from *hadith* no 3456

⁴¹ *ibid*

⁴² This *hadith* was narrated by Umar bin Al-khattab (ra). See *Sahih al-Bukhari*, 1/3, *hadith* No (1); *Sahih Muslim*, 3/1515, *hadith* No (1907).

motivated by an ill-intention.⁴³ This *Hadith* can also imply that intention of the parties in relation to contract is vital which is supposed to be reflected in their expression when entering into the contract⁴⁴, therefore, a contract's form or structure alone is not sufficient for ruling it as valid; there must be a good intention to that effect.⁴⁵

The other categories of authentic *Hadith* which shed more light on the essentiality of mutual consent of the contracting parties read as follows: "The parties to the contract cannot be separated until with their consent"⁴⁶ The above mentioned *Hadith* goes to show that the parties to the contract must have a consensual agreement in any particular contract, this is the opinion of *Imam Al-tayyib*, while *Imam Al-Qary* pointed out that, the aim of the *Hadith* is to have the realization of what each party to the contract aim for, like exchange of the commodity and the price, if not it could be cheating which is prohibited in the Sharia. Furthermore the objective of the above mentioned *Hadith* is to ensure that the party who intends to leave the *Majlis*, should seek the permission of the other party or either proceed with the contract or cancel same, if the other party wishes to proceed or cancel the transaction they can either affirm or cancel same, there and then.⁴⁷

3.2 Types of Consent in Islamic law of contract

As mentioned earlier, the bedrock of contract emanates from the consent of the contracting parties. The technical nature of the consent is something which is hidden, and it cannot be easily inferred or seen. Generally, it is compulsory to obtain the consent from both parties, likewise to find out the best ways to ascertain its presence in the *sigħa* of the contract. In other words, there must be clear expressions which represent the consent of the contracting parties.⁴⁸ This is the

⁴³ Al-Zubaidi, A. A. (1996). *Tajridussarih Li Ahadisi Jamiussahih*. (M. M. Khan, Ed., & M. M. Khan, Trans.) Riyadh, Saudi Arabia: Darus-salam.

⁴⁵ Abozaid, A (2010) "Contemporary Islamic financing modes between contract technicalities and Shariah objectives" *Islamic Economic Studies* Vol. 17 No. 2, January, 2010

⁴⁶ Abady, M. S. op. cit note 8 p. 2. quoted from hadith no 3457

⁴⁷ Ibid

⁴⁸ Although there are some opinions of the scholars like Imam an-Nawawy a shafi'i scholar, who says that the transaction which is below a one quarter of dinar that is

unanimous opinion of the majority of scholars, like Malik, Abu Hanifa and shafi'i they reasoned that, the *Bay'* is the contract of exchange in the commodity originated from the consent of the contracting parties, as the earlier verses in the surah *An-nisa'a* described above.⁴⁹ Some scholars have another point of view; they opined that as before the contract can be concluded there must be two separate intentions (*Iradā*).⁵⁰

In other words, Mutual consent is an intangible mental fact which needs to be manifested in order to identify its existence. It is the internal intention (*Iradā badināh*) and is hidden and cannot be known and proven before the court⁵¹. It is therefore necessary to have the external expression (*Iradā- zahira*) in order to indicate the presence of consent.

3.2.1 External Manifestation of Intention (*Irādā zahira*)

Ordinarily, spoken words are obviously needed in order to manifest the definite consent of the contracting parties to the contract, which is through verbal offer and acceptance. Other means such as signs, writing and gestures are also acceptable as long as they could manifest the presence of consent. Furthermore *Ibnul Qayyim*⁵² has put it thus:

“Verily, almighty Allah subhanahu wa ta’ala has put expression or statement to mankind in order to communicate and understand each other, and to know what is in their mind. Whatever someone intends to do can be known only by means of his expression. it is the expression that reflects his

mahaqir the sigha is not a compulsory requirement. But imam as-shafi'i himself, opined that there must be a two expression in any transaction

⁴⁹ Assan'any, M.I (1999) “ Subulussalam sharh bulughul Maram Min Jam'I Adillatil Ahkam” Najar Mustapha Al-baz Publishers, vol. 3, p. 787

⁵⁰ Dabyany, D. M, op-cit note 8, p.2

⁵¹ Omar, M.N .et al(2011)“The implications of Ghabn in Islamic contracts: an analysis of current practices” American Eurasian Network For Scientific Information (AENSI) access online from www.aensiweb.com/old/jasr/jasr/ last visited on 9/1/2017

⁵² Ibnul-Qayyim, M. A. (2016). “T'ilamul Muwaqqi'in An-Rabbil-Alamin” (Vol. 3). (A. F. Az-zawawy, Ed.) Cairo, Egypt: Dar-Al-Ghad Al-Jadeeda. at p.105

intention, upon which the verdict can be attained. Which means the expression must convey the intention of the parties, or what they also intends to do or to say. but it also extends to what is intended but it does not work, or speak on it, or what was spoken but not intended, or spoken by mistake, or spoken by forgetfulness, or disliked or ignorantly spoken but it is not intended to be expressed”

The expression of intention is formulated in two ways: nomination (*tasmiya*) or by indication (*Ishara*). The former represents a genuine intention of the contracting party while the latter represents apparent intention which may leads to a variance in the validity of the contract. Whenever the expression and action jointly come together, it is apt to state categorically that the intention has been manifested, thus justice has been achieved in determining the consent of the parties in relation to any contract.”⁵³

3.2.2 Internal or Hidden Intention (*Irādā batinah*)

Naturally, the intentions of humans are usually hidden, and it cannot suffice or serve to satisfy the requirement of valid contract until when it is manifested. This is why *Imam al-shafi'i* was of the opinion that the internal intention only cannot satisfy the requirement of a valid contract until when there are expressions to that effect, while Ibn Abideen on his part observed that, until the expression is present the mere intention could not serve as a conclusive evidence of contract. The *Niyya* or mere intent cannot be inferred from any transaction or contract, because we do not know what someone intended to do until there is expression or action for what he really intended to do⁵⁴.

It is basic that expression or statement or any action, must reveal the intention of the contracting parties, in other words, the contract must commiserate with internal intention.⁵⁵ If the internal intent conflicts with the external intent like in a manner someone bought a certain thing, but pointed at something different, or a business man wrote the price of a commodity mistakenly less than the real price,

⁵³Ibid

⁵⁴ Ibn-Abidyn, M. A. (n.d.). Hashiyat Ar-radd Al-Mukhtar Alal Durr Al-Mukhtar (popularly known as Hashiyatu ibn Abidyn) (2nd ed., Vol. 4). Cairo. At p.40

⁵⁵ Ibid

does seller consider the internal intent of the buyer or external intent?, Some scholars are of the view that, what would be considered in this case is internal intent (*Iradā badinā*) not external intent (*Iradha zahira*) because expression follows intent this is the position of Malikis, Shafi'is, Hanafis and Hanbalis.⁵⁶ Furthermore, this is the clear meaning of maxim which says: *al-ibratu fil uqudi lil maqasidi wal ma'ani la lil al-fazi wal mabany* which means "in contract, effect is given to intent and not words or form." Moreover, this maxim gives the effect that in the event of difference between the intention and the outward expression in the interpretation of contract, the judgment would be in accordance with intention (by understanding the content of offer and acceptance) and the meaning and not to the literal wording.

3.3 The Impact of Consent in the Formation of Contract:

Going by the above mentioned explanation, it is very clear that, the requirement of mutual consent of the parties is essential in establishing a valid contract, since dispositions of the contracting parties which constitute the foundation of contract is a product of their intention, thus reflecting their initial consent.⁵⁷ While the legal effects of those consents follow in the conclusion of a particular contract which satisfy the legal requirements of a valid contract. And these legal effects are derived from the injunctions of Allah *subhanahu wa ta'ala* as mentioned earlier in chapter 4 verses 25 of the Holy Qur'an; and this is the reason why jurists formulated the maxim that: "*Al-Aqd Huwa mā yūjid al-haq*" "contracts are legal creative cause"⁵⁸ which means sharia is the one that makes the contracts as cause that lead to their effect.

Furthermore, scholars are divided as to the extent of the impact of consent or intention of the parties to the contract, prominent jurists like Imam Malik and Imam Ahmad are of the view that the parties to the contract are free to decide on their intention on their consents to the contract, that is by inserting further conditions on formation of the contract⁵⁹. The basis for this freedom in their opinion is in the legal maxim which says "*al-asl fil uqud al-ibaha*" "initial rule in the contract

⁵⁶ Ibid

⁵⁷ Ibn-Abidyn, M. A op-cit above

⁵⁸ Zubair, A. Q. op.cit note 27 p. 5

⁵⁹ Ibid

and condition under the sharia is permissibility”.⁶⁰ Thus no contract or condition can be prohibited or invalidated until textual evidence from the Glorious Qur’an or the Sunnah of the holy Prophet, or an evidence of *Ijmaa* or correct *qiyas* is obtained to prove it.

They further opined that, if there is no prohibitive evidence for a particular contract or condition, the contracting party to such a contract or condition is free to constitute it. That is to say, the particular contract is free from any legal impediments to render it prohibited. Among the legal texts to support their opinion are: “O you who believe fulfill all your obligations”⁶¹ and another verse which says “and fulfill every engagement, for every engagement will be inquired into in the day of reckoning.”⁶² While some jurist like *Imam Dawud al-Zahiri* opined that every contract or condition is prohibited except those contracts or conditions allowed by the sharia. This position was supported by the Hadith of the holy prophet peace be upon him, and it was reported to have said

*“Why is it people are stipulating conditions which are not available in the Book of Allah, the most Exalted. He who stipulates any condition, which is not found in the Book Allah, will not have it. And if he makes one hundred conditions the condition of Allah, the most Exalted is more rightful and more secure”*⁶³

From the foregoing we have learnt that the requirement of mutual consent is one of the pillars of the formation of contract failure of which may render the contract invalid. Although as it has been mentioned earlier, the consent is a latent or secret thing, which jurists accept to be obtained through formula of contract *sighat-al- aqd* represented by offer and acceptance, which should be clearly spelt out externally. This external manifestation of intention is central in the determination of mutual consent of the parties and must be consistent with external intention.

⁶⁰ Zubair, A. Q. op.cit note 27 p. 5

⁶¹ Qur’an chapter 5 verses 1

⁶² Qur’an chapter 17 verses 34

⁶³ Abady, M. S. op. cit note 8 p. 2 quoted from hadith no 3480

3.4 The Requirement of Consent in e-Transaction

The recent emergence of e-commerce has brought a new and competitive way of conducting business online.⁶⁴ As a general rule, every new development which emerges in a Muslims' life whether it be social, economic, political, jurisprudent or commercial needs to be scrutinized for its legal basis in the light of Islamic rules.⁶⁵ The first basis is that, as a general rule, every transaction be permitted in Islamic law. Thus, it will not be denied legitimacy unless Allah or His Prophet bans that commercial practice. Hence, all new matters will be considered legitimate by the law except when there is any legal evidence denying its validity.

E-commerce is the conduct of commercial activities using electronic processes or tools; based on the foundations of Islamic law outlined above this modern type of commerce should be considered legitimate unless something shifts its emphasis from allowance to prohibition, such as in the selling or buying of drugs or alcohol online. Secondly, based on the "Consideration of Public Interest", it can be clearly observed that e-commerce is of immense interest to the public and should therefore be regarded as a valid means to conduct business.⁶⁶ Accordingly, e-commerce adheres to the principles and rules of Islamic rules and guidelines which include legislature and is therefore permitted religiously. Therefore, nothing in the judgments of Islamic jurisprudence bans the benefit of using the Internet in the field of commerce as long as it is done in accordance with the general Islamic legal rules⁶⁷.

⁶⁴ Muhammad, M. et-al (2013) "Towards Shari'ah Compliant E-Commerce Transactions: A Review of Amazon.com" Middle-East Journal of Scientific Research 15 (9): 1229-1236, 2013 ISSN 1990-9233 © IDOSI Publications, 2013 DOI:10.5829/idosi.mejsr.2013.15.9.11176 access on 1/12 /2021

⁶⁵ Alzaagy, A.(2009) "Electronic Contract: a Study of its Application in the light of Islamic Law with Particular Reference to Saudi Arabia" A thesis submitted in Partial Fulfilment of the Requirements for the Degree Doctor of Philosophy at University of Wales, Aberystwyth access online from <https://journals.muni.cz/mujlt/article/download/2579/2143> available as at 1/12 2021

⁶⁶ Al-Sanad, M. (2004) al-Ahkam al-Faqhiya lel Ta'amolat al-Electroniyya, Dar al-Warraq Publisher, Riyadh, p. 167.

⁶⁷ This is the fatwa (Islamic verdict) made collectively by Islamic legal scholars in a seminar titled: 'The extension of electronic commerce and the attitude of Islamic

It is obvious that the consent of the parties in the form of an offer and acceptance can be validly expressed by automatic electronic system without direct human intervention. This rule is consistent with the general principle of Islamic law of contract that indicates the consent of the parties to form a contract can be validly expressed by any means customarily used in commercial practices without limitation.⁶⁸

As mentioned earlier,⁶⁹ Islam emphasizes on the requirement of mutual consent between contracting parties and prohibits taking property of others without legal right. The requirement for mutual consent is indispensable in a transaction, without which the contract is null and void and thus carries no legal effect. This clearly indicates that all transactions must be based on free willingness of parties involved. Thus, any factor that breaches this requirement might render the invalidity of the contract. Coercion, for instance, renders the contract to be invalid due to lack of free will in the transaction. Consent, however, is something hidden and internal. The majority of scholars agreed that beside words offer and acceptance can occur in a form of writing or in other forms such as telephone, fax, telex, or even body languages that is gestures signs of the contracting parties.⁷⁰ Hence online transaction, which involved e-offer and e-acceptance-between the contracting parties - act as external manifestation of consent thus rendered the contract valid.

legislature') on 23 of March 2000 at Saleh Kamel's Centre for Islamic Economy in Al Azhar University, Cairo, Egypt.

⁶⁸Abdul Ghofur, R. (2009) "Islamic Economics Analysis on E-Commerce Transaction Mechanism in Indonesia" *Advances in Social Science, Education and Humanities Research*, volume 492 *Proceedings of the 1st Raden Intan International Conference on Muslim Societies and Social Sciences*. Published by Atlantis Press SARL. This is an open access article distributed under the CC BY-NC 4.0 license access from <http://creativecommons.org/licenses/by-nc/4.0/> as at 2/12/2021

⁶⁹ No property should be taken from its owner without the consent of the owner. Such concept is based on Quranic verse which states: "O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent" (4:29). The Prophet (peace be upon him) has also been reported to say: "Sale is but based on mutual consent".

⁷⁰ Mohd D. and Abdul Hamid, H. (2007). "A Study on Islamic Credit Cards Holders" Being a Paper presented at the 1 National Conference on Islamic Finance, Kuala Trengganu, Malaysia.

4.0 Brief Examination of Legal Basis of Options (*Khiyārāt*) in Islamic Law of Contract

The origin of Options (*Khiyārāt*) are clearly traceable in the Sunnah of the holy Prophet (peace be upon him), but the elaborate details and subdivisions of Option (*Khiyārāt*) in to various types have been all developed, as a matter of initiative and *Ijtihad* in the juristic writings of the scholars.⁷¹ The basic concept of Options (*Khiyārāt*) which occurs in the Sunnah and in the manuals of fiqh, was intended not so much as a new trading formula,⁷² or risk management tool, but as a way to ensure propriety and fairness, as well as to protect the integrity of *Riḍā* (consent) of the parties in the completion of contract.⁷³ The typical variety of Options (*Khiyārāt*) validated by Sunnah of the options of stipulations (*khiyar al-shart*) which granted the buyer the options within a time frame (three days or so) following the conclusion of the contract to either ratify the contract or revoke it.⁷⁴ For example; in the Hadith of the Holy Prophet peace be upon him where he said, “Muslim must keep to the conditions they make”⁷⁵ and in another Hadith the Prophet was reported to have said to Habban ibn Munqadh al-Ansari; “.....When you are to conclude a trade you may say that there must not be fraud and you reserve for yourself an option of three days.....”⁷⁶ In another Hadith reported by Amr ibn Shuaib that the Prophet was reported to have said “The two contracting parties have a right of options as long as they are not separated or the sale was sale with options.”⁷⁷

⁷¹Kamali, M. H., op- cit note 2 at p.1.

⁷²New trading formula in the future trading in option is a new concept which is in practice in some developing Muslim countries and referring the principles of maslaha(consideration of public interest) as enshrine in the sharia, as the basis of developing the concept. This concept will be discuss later in this research

⁷³Kamali, M. H, op-cit at note 2, p.1

⁷⁴Ibid

⁷⁵Abady, M.A “Aunul Ma’abud Sharhi Sunani Abi Daud” Darul Hadith Publishers, Al-qahira, Egypt. 2001 , Vol. 6, at p.311. quoted from hadith no 3455 this is one of the reason s for the rulings on khiyar al majilis, op-cit at hadith no 3594 vol. 4 p. 16

⁷⁶Al-Asqalany, op-cit at vol.4 p.434 hadith no.2117 and Al-maqdisi, M. A. (2006). Al-umdah Fil-Ahkam Fi Ma'alimi Halal wal-Haram an Khairil Anam Muhammad Alaihissalatu wassalam Min Man tafaqqal alaihi Shaikhani Bukhari Wa Muslim (Vol. 1). (A. M. Shakir, Ed.) Cairo: Maktabatus-sunnah.

⁷⁷ Abady, M. S. op. cit note 8 p. 2. quoted from hadith no 3481 opcit above

These narrations clearly indicated the rights of the contracting parties, and demonstrate the validity of *khiyar-as-shart*.⁷⁸ Likewise, on the authority of Abu Khalid, hakim Ibn Hazim (may Allah be pleased with him): the Prophet peace be upon him was reported to have said; “Buyer and seller are bound by their options in as much as they are at the Majlis (place of entering the contract) if each of the contracting parties fully submitted to conclusion of the contract by reciprocating what is required from him, may Allah bless the agreement, but if they hide any information or lied to each other It destroys the blessings of each other in the transaction.”⁷⁹

The ruling of the above-mentioned Sunnah has evidently envisaged the eventuality of a situation of uncertainty, or where the buyer does not possess sufficient knowledge of the subject matter, in this regard the party lacking in the knowledge could either validate or terminate same when it comes to their knowledge what they dealt in.⁸⁰ A sale of this type cannot be said to be reflective of true intentions of the buyer especially if the subject matter turns out to be defective in a way that is not obvious to the naked eye to detect.⁸¹ Following this, the options that the Islamic law has granted are of two types, namely, those which are granted by the law itself regardless of any contractual stipulations, and options which materialize only as a clear provision in the contract.⁸² The former variety is basically confined to the options of defect *khiyar al- Ayb* and the options of viewing *khiyar ar- ru 'ya*, thus the law grants the buyer an option on account of material defects, in which case he is automatically entitle to seek revocation of contract on that basis,⁸³ or when he sees the object he has bought or ordered for the first time, but it is the second type option that is a contractual options such as the option of stipulations (*khiyar as-shart*).

4.1 Significance of Options (*Khiyārāt*)

a. Options (*Khiyārāt*) are one of the mechanisms under Islamic law designed to protect the parties to a particular contract in respect of a

⁷⁸Abary, op-cit at note above.

⁷⁹Al-maqdisi, op-cit at note 180 above.

⁸⁰Kamali, M. H., op- cit note 2 at p1

⁸¹Ibid

⁸²ibid

⁸³ Ibid

particular commodity in a contract.⁸⁴ Sometimes in contracts, the injured party are left with no remedy in the event of any disappointment that could arise from the part of the vendor or the buyer, vice-versa.⁸⁵

b. Options (*Khiyārāt*) help to undo deliberately or unintended act, thus causing the possibility of conflict between the parties,⁸⁶ that is to say, if the party that has the right to stipulations like purchaser it will appear that the commodity has entered into his ownership since the formation of the contract. But if the purchaser exercises the right of options of stipulation by revoking the contract the commodity returns back to the ownership of the seller⁸⁷

c. Through options the parties to the contract are granted reassessment or consultation period over which they can rationalized their decision or reverse same, due to an abrupt or irrational wrong decision that had been taken.⁸⁸ It was reported from Ibn Umar which says “either party can choose or opt to have for the other or the options belong to you only”.⁸⁹ The above mentioned positions, suggest the liberal approach of Islamic law of contract in relation to the right of the parties, which signifies that options are rights which belong to all of the parties and no one has a monopoly of it.⁹⁰ The reason behind this position is the Hadith of the Holy Prophet (peace be upon him) who was reported to have said; “ The believers are bound by their stipulations except stipulations that allow what has been disallowed”⁹¹ and in another Hadith which says “ in as much as they are not separated”⁹² that is from the meeting place of the contract. Additionally, these Hadith

⁸⁴ Arabi, O. op-cit note 69 p 13

⁸⁵ Elahi Y., Abdul-Aziz, M. (2011) “Islamic options (al-Khiyarat); Challenges and opportunities” International Conference on Information and Finance IPEDR vol.21, IACSIT Press, Singapore at page 3 available at <http://www.ipedr.com/vol21/20-ICIF2011-F10019.pdf>

⁸⁶ Elahi Y., Abdul-Aziz, M., op-cit at note 151 above

⁸⁷ Zubair, op-cit at note 3 p 1.

⁸⁸ Kamali, M. H., op- cit note 2 at p1

⁸⁹ Uthaimin M.S “Sharhu Riyadussalihin Min Kalami Sayyadil Anam” an explanation of “ Riyadussalihin min kalamisayyidil Anam” Darul Mustapha, Riyadh, vol. 2, 2008, pp.231

⁹⁰ Al-baghdady, Q. A. (n.d.). Alma'unah Ala Mazhaby Alimil Madinah Imam Malik Ibn Anas (1st ed., Vol. 3). (H. Abdul-haq, Ed.) makkatul-mukarram, Saudi Arabia: Mustapha Albaz

⁹¹ Kamali, M. H., op- cit note 2 at p1

⁹² Ibid

signifies that, the moment the parties separated from each other with their bodies separation, the right of option has elapsed, and the contract become binding and enforceable.

d. The Holy Prophet (peace be upon him) says “if they tell the truth and revealed all what is needed to be known in the contract may Allah bless the transaction.”⁹³ This brings to the point that the true nature of the subject matter must be told or explained to extent that the seller must clearly explain the nature of his commodity, any deformity, damage, or anything that may likely diminish the value of the commodity must be stated. Lastly, Ibnul Qayyim added more flavor to the significance of Options (*Khiyārāt*) by stating that⁹⁴;

“The Lawgiver has ordained to us, that the options are allowed during the contract session in the interest of the two parties, so also to ascertain the mutuality in consent, and satisfaction of both parties. Allah subhanahu wa ta’ala clearly stipulates in transactions when he said in the glorious Qur’an “... by mutual consent ...” Sometimes a contract is concluded without being reconsidered or reviewed, therefore the sharia necessitates the existence of the session during which the two parties can reconsider their deal. Thus according to the above quoted hadith, both the seller and buyer have the choice to confirm or cancel the deal as long as they have not separated from the place of deal. However if the two parties or one of them ignores this aspect of choice, the deal is still deemed a valid one, once the transaction is concluded. This right of option is open to both seller and the buyer, and each of them is allowed to ignore it “... As long as they have not parted their ways and are still together, or one of them gives to other the option of keeping or cancelling the bargain as the Prophet peace be upon him said”

⁹³ Al-Asqalany, op-cit at vol. 4 p.419 hadith no

⁹⁴Ibnul-Qayyim, M. A. (2016). “Tilamul Muwaqqi’in An-Rabbil-Alamin” (Vol. 3). (A. F. Az-zawawy, Ed.) Cairo, Egypt: Dar-Al-Ghad Al-Jadeeda. at p.105

4.2 Contemporary Application of Options (Khiyārāt) in e-Transaction

Previously, we have pointed out the requirement of consent in e-transaction. It is imperative to point out that, the party to the e-transaction needs options (*khiyārāt*) in the event of misrepresentation. *Tadlis* that is misrepresentation refers to concealment of defects of the subject matter or to provide a complete description for something that does not really exist, after which the other party is deceived.⁹⁵

In e-transactions, it is impossible for e-consumers to touch the good, the consumer can only evaluate the goods based on the seller's description, through the Web site or on a computer screen, and there is no opportunity to handle the goods physically⁹⁶. Certainly, the consent of the buyer in the contract was obtained based on description or information of goods gathered or sent on-line. Therefore, e-consumers are more susceptible to misrepresentation. This principle focuses on a defect which is patent or hidden in e-transaction, thus, the supplier or provider presumably has complete knowledge of all the aspects of the subject matter.⁹⁷

Generally, the mechanism of *khiyar tadlis* or *khiyar al-ayb* provide an opportunity to e-consumer who have suffered losses in online transactions to revoke contracts since the principle of *la ḍarār wa la ḍirār* (no damage or loss) is applicable in business transaction⁹⁸. In other words, the e-seller is liable to the e-consumer for any lack of conformity that exists when the goods are delivered to the e-consumer. Therefore, the application of the Islamic legal mechanism of option of deceit or misrepresentation (*khiyar tadlis*) guarantees to some extent

⁹⁵ Bagheri, P., Hassan, K.H. & Mansour. (2012). M.S. "Parties' legal capacity in electronic commerce transactions" European Journal of Law and Economics, Available at:

<http://www.springer.com/economics/law+%26+economics/journal/10657>

⁹⁶ Khan, M.A. (2011). Consumer protection and the Islamic law of contract, International Islamic University of Islamabad Law Review, Vol.2, No.2, 20-37.

⁹⁷ *ibid*

⁹⁸ Zuhayli, W.A. (2007). Financial Transactions in Islamic Jurisprudence, Vol 1, Beirut: Dar al-Fikr al-Mansour.

the e-consumer's rights and helps maintain the balance between the e-seller and e-consumer in online transactions.⁹⁹

5.1 Consent in the Light of Options (*Khiyārāt*)

The legal framework of options in Islamic law of contract entails the complete mutual consent of the contracting parties, which signifies the bedrock or foundation of the agreement, and entails the essentials of contract.¹⁰⁰ The basic concept of options which occurs in the *Sunnah* and in the manuals of *fiqh*, which can be use as risk management tool and its a way to ensure propriety and fairness, as well as to protect the integrity of mutual consent of the parties in the completion of contracts¹⁰¹. The ruling of the *Sunnah* has evidently envisaged where the buyer does not possess sufficient knowledge of the subject matter, or he had agreed to buy. A sale of this type cannot be said to be reflective of true intention and consent of the buyer especially if the subject matter turns out to be defective in a way that is not obvious to the naked eye to detect, except with the fulfillment of the requirement of those stipulated days.

Following the above mention positions, the options that the Islamic law granted are of two types, namely, those which are granted by the law itself regardless of any contractual stipulations, and options which materialize only as a clear provision in the contract.¹⁰² The former variety is basically confined to the options of defect *khiyar Al-Ayb* and the options of viewing *khiyar al- Ru'uya*, thus the law grants the buyer an options on account of material defects, in which case he is automatically entitled to seek revocation of contract on that basis, or when he sees the object he has bought or ordered for the first time, but it is the second type of options that is contractual options, such as the options of stipulations *khiyar al-shart*.,

⁹⁹ Bagheri, P. and Hassan, K.H. (2015) "The Application of the Khiyar al-Tadlis (Option of Deceit) Principle in Online Contracts and E-Consumer Rights" Article in Mediterranean Journal of Social Sciences · July 2015 DOI: 10.5901/mjss.2015.v64p155 access from <https://www.researchgate.net/publication/282602715> available as 1/12/202

¹⁰⁰Kamali, M. H. op. cit note 44, p. 16

¹⁰¹Ibid

¹⁰² Dubyani, D. M. op.cit note 8 p. 2

Lastly, while recognizing the basic freedom of contract and also the binding nature of contract, Islamic law also entitles the contracting parties to stipulate that the contract so concluded will become more effective only after further ratification and approval, which means the consent of both parties must be reflective. This is basic rationale behind the provisions of the sharia concept of *al-Khiyārāt* that modern writers have utilized in their discourse on the validity or otherwise of trading options.¹⁰³

6.1 Major Findings

The major findings of the Research are as follows:

Islamic contracts law is based on *Ridā* (consent) of the contracting parties. It is also the fundamental requirement behind all investment transactions in Islamic law. And it is the fundamental way of ascertaining the true consent of contracting parties in a given contract that is through making an offer and acceptance (*Ijab* and *Qabul*).

By this research, we came to realize that, by adopting numerous mechanisms of *khiyarat* options can be used as another form of ascertaining the consent of contracting parties which in other way round, serve as a mechanism designed to serve as a solution to contractual problems.

This research also found that *khiyar al-Shart* (options of stipulation) gives to a party to a contract a legal or contractual right to terminate the contract after its conclusion when it appears not to serve the purpose of such a contract as agreed. On the other hand, the consent can clearly be seen from the conduct of inserting the *khiyar al-Shart* which is agreed by both parties, since the legality of a transaction is intimately connected with the internal intentions of the parties involved.

This research further found that *Khiyar al-`Ayb* as an option given to a party to rescind the contract when he discovers that the subject matter to the contract is defective, or it fall short of its requirements or

¹⁰³ Kamali, M. H. op. cit. note44 p.16.

specifications, and the contract is subject to the fulfillment of such specifications, hence such consent to the contract was not available.

It was further found that, the basic idea behind the insertion of *khiyar al-Ru'ya* in a given contract is to establish whether the buyer has consented to the subject matter supplied to him or not. This is because at the time of entering the contract the consent of the supplier is actually given pursuant to the terms of agreement while the subject matter of the contract may likely not be present but it is actually subjected to the viewing of the party.

Lastly, it was observed in this research that *khiyarat* options are generally introduced to the contract for various purposes and reasons; provided the reasons for an option are within the principles of Islamic law. It was further observed that there are options that are inherent in the contract, or either created by the agreement of the contracting parties. These options exist only when the contracting parties choose to attach a particular right to the contract. However, they must have been consented by the other parties. Similarly, *khiyarat* can be considered as an instrument that will determine the actual consent of contracting parties in the contract.

8.0 Recommendations

Although it was found and observed above that the effort of the contracting parties in discharging their obligation in a particular contract has a lot of challenges, that do not close this research by simply recommending the effort and leave everything to speculation without recommending a better way for discharge of the obligations. This is because trading and commercial activities are seen as an institution in Islamic law with a designed principle to govern commercial transactions, and so also to protect the interest of each party in the contract. There is also a strong desire to help parties to balance each interest, to this end; the parties can use *khiyarat* (options) as a mechanism for the determination of the consent of the parties.

Finally, it's also recommended that, the parties can also insert the stipulation as the mechanism in determining how to ascertain their

consent in respect of any of the *khiyarat* to determine whether the contract should proceed or not

9.0 Conclusion

From the distillation of all the authorities in this work, with particular reference to the findings, observations and recommendations of the research, it is obvious that, the requirement of consent of the contracting parties in any particular contract is fundamental; this principle can be seen from the verses of chapter 4 verses 29. This is in addition to adopting numerous mechanisms of *khiyarat* options as another instrument aimed at protecting parties to the contract rights, and in any forms of contract, they can be used as another form of ascertaining the consent of contracting parties.