The Legal Effects of Unfair Contracts of Sale in Islamic Law

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Introduction:

Islamic law has highly stressed on fulfillment of contractual obligations.[1] The general principles of Islamic law of contract provide adequate protection to the consumers. Islamic law has rendered a number of transactions unlawful because they directly or indirectly violate rights of the consumers such as contracts based usury, uncertainty, adulteration, exploitation, concealment of the truth, cheating, fraud etc. Islamic law on the other hand opens the ways that lead to the promotion and preservation of consumer rights. The basic theme of this research is to assess the civil liability of harmful products therefore the chapter highlights the significance of the law of contract in cases product liability from the perspective of Islamic law of contract. The notions on which the modern product liability law is based have been traced in Islamic law in assessing the civil liability for the defective products. Islamic law of contract is formed in such a way that protects rights of both i.e. the seller and the buyer.[2]

The Concept of Sale in Islamic Law:

The term *Bay* is usually translated as sale; however, it has a much wider meaning in Islamic law. The term Bay' has a more comprehensive meaning, being, defined to be an exchange of property for property with mutual consent. The eminent Hanafi jurist Imam Kasani has defined Bay as it is an exchange of a useful and desirable thing for similar thing by mutual consent in a specific manner.[3] The *Majallah* defines a sale as:

> "The exchange of property for property", and in the language of the law, it signifies an exchange of property for property with mutual consent of the parties, which is completed by declaration and acceptance.[4]

The term *Bay'* covers all commutative contracts, that is, contracts in which there is an exchange of two counter-values. Legitimacy of the contract of *Bay* is established from the primary sources of Islamic Law.[5] Hiring (*Ijara*) is often referred by jurists as the sale of benefits arising from property rented or service rendered.[6]

Legitimacy of Sale:

The contract of sale is legalized by the basic sources of *Shari'ah* i.e. the

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Holy Qur'an and traditions of the Holy Prophet (pbuh). The Holy Qur'an has permitted this in the words:

"Allah hath allowed trading and prohibited Riba.[7]

The Holy Qur'an says:

"O you who believe! Do not devour your property among yourselves falsely except that it be trading by your mutual consent".[8]

This aspect is further strengthened by the fact that the Prophet (pbuh) himself, the Companions and the eminent jurists conducted business and entered into the contract of sale. The holy Prophet (pbuh) also gave it much importance by saying:

"That one of you takes his rope and then comes with a load of wood upon his back and sells, it is better than to beg of men whether they give or reject him".[9]

While encouraging truthfulness in sale transactions, the Holy Prophet (pbuh) stated that the truthful merchant (will be rewarded by being ranked) on the day of resurrection together with the Prophets, the truthful ones, the martyrs and the pious people. The Prophet is also reported to have said: "Allah will let the man enter the paradise who is an easy purchaser (in bargaining), and easy vendor (in selling), and easy debtor (in repaying the debts) and an easy creditor (in lending and demanding back the loans)."[10] The holy Prophet also said:

"The best earnings are those of the businessman who does not tell a lie when he speaks; does not misappropriate the trust; does not break the word if he promises; does not cavil while making purchases; does not boast while selling his goods; does not prolong the period of repayment of loan; and does not cause difficulty to his debtors!" Further: "The best type of earning is Bay based on truth and earnings of one by his own hands".[11]

Abu Sa`id khudri reported: "The Messenger of Allah (pbuh) said: *'The contract of sale becomes (lawful) with the consent (of both the parties)'."*[12]

Elements of Contract in Islamic Law:

There are various views regarding the elements of the contract in Islamic law. Majority is of the view that the essential elements of a contract are four: (a) *Sighah* the form i.e. (offer and acceptance); (b) the seller; (c) the buyer and (d) the subject matter (*ma`qud `alayh*).[13] Hanafi jurists hold that there is only one element of a contract; namely, the *Sighah* (form) i.e. *Ijab* and *Qabol.*[14] This, however, implies the existence of other elements. From the practical point of view, there is not much difference between the opinion of the *Hanafi* jurists and that of the majority. *Sighah*, consisting of *Ijab* and *Qabul*, is the basic element of contract. It is the

instrument or the means by which a contract is made. *Ijab* is the statement in an agreement that issues forth from one of the parties to the contract, and *Qabul* is the statement that is made by the second party in response to the *Ijab*.[15] Offer and acceptance are based on consent or *rida*. According to the Maliki School, the first element of the contract is *sighah (form)* on the basis of which a contract is formed. The demonstration of consent of the seller is known as *Ijab (offer)* and that demonstrates the consent of buyer is known as *Qabul (acceptance).*[16] In Shafi school the first element of sale contract is *sighah* (form) i.e. offer from the side of the seller such as saying: I will sell you this thing for this much amount. This is known as *Ijab.* Second the acceptance by the buyer that is known as *Qabul.*[17] Similarly, according to the Hanbali School the *Ijab* (offer) is made by the seller while the *Qabul* (acceptance) is always made by buyer.[18]

Hence to sum up this discussion in the view of Hanafi school the *Ijab* is that which is made first in point of time such as if one of the parties says: "I have sold this car to you for $ 10, 000," and the other party says, "I accept," then, what has been said by the seller is *Ijab* (offer) and the acceptance of the buyer is *qabul* (acceptance). If the buyer had said, "Sell me this car for 10, 000," and the seller had said, "accepted," the statement of the buyer would have been *Ijab* and that of the seller *qabul*. While in the view of majority of the schools, on the other hand, maintain that *Ijab* is the statement of the owner of property, while *qabul* is always the statement of the buyer.[19]

Shariah requires from the contracting parties that they should be (*mukallaf*) i.e. capable to understand the legal obligation.[20] Besides understanding, it is also essential that the subject (*mukallaf*) performs the act by his free will and choice. If an act is performed under coercion, it will not produce legal effects that are assigned to a valid act. Understanding of communication which is a basis of legal capacity is linked in Islamic law with adulthood. Thus, when a person attains puberty and adulthood, he is presumed to have developed ability to understand and perform the act required by the *Shariah*. A minor or insane, are therefore, not under legal obligation (*taklif*) because they are devoid of intellect and reason required for understanding the legal obligation. An intoxicated person during the state of intoxication is also unable to understand the legal obligation, so his contracts and transactions are considered void in all four schools of thoughts of Islamic law.[21] There is an ongoing debate that whether or not the Islamic law recognise the artificial legal persons. The question is important in the context of ascertaining liability of producers or manufacturers for manufacturing defective and sub-standard products under Islamic law. These manufacturers and producers are often

artificial/legal persons in contemporary age. For the purpose of this research the view that 'an artificial person' is recognised by Islamic law has been taken into consideration. This view is based on solid arguments from imminent jurists. In this context it is pertinent to quote Sir Abdur Rahim who writes:

> "Corporations are treated as 'legal person'. It may be doubted whether the earlier jurists would recognize an artificial or juristic person. The state or community is regarded by them as holding and exercising the rights of God on His behalf through the Imam. But later jurists seem inclined to recognize an artificial person; for instance, they would allow a gift to be made directly to a mosque, while the ancient doctors would require the intervention of a trustee".[22]

Hence, the research in hand is based on the view of Muslim jurists that recognize a distinct artificial personality for a corporation that produces products.

Subject-matter (*Mabi'*) is one of the most important elements of Islamic Law of contract especially in the context of product liability. It includes object of the contract, commodity, performance, and consideration and of the contract. In Islamic law the contractual obligation of one party is consideration for the contractual obligation of another party. In a contract of sale for instance, the commodity is the consideration for the purchaser and the price is the consideration for the seller. The subject matter *mabi* must be valuable, evaluated or able to be evaluated, exist at the time of concluding the agreement or be going to exist in the future and be legal in order to be recognized by Islamic law.[23] All these conditions should exist in the subject matter. For example, the sale and trading of commodities such as wine or alcoholic products, pork and pork products is prohibited, and contracts involving such commodities are void on the grounds of their illegality. [24] The flesh and bones of animals that have died by other means than ritual slaughter (*Halal*) cannot be sold. Idols are also forbidden commodities. [25]

Types of sale contracts:

Bay i.e. sale with respect to the counter-values is divided into four types, the sale of an ascertained commodity (*`ayn*) for an ascertained commodity (*`ayn*), which is the sale of goods for goods and is called barter; the sale of an ascertained commodity (*`ayn*) with a (*dayn),* and this is the sale of absolute goods for absolute prices (currencies), which are *dirhams* and dinars, or their sale for copper coins or with a described measured commodity as a liability (debt) or a described weighed commodity or described identical counted items; the sale of a *dayn* with an ascertained commodity (*`ayn*), which is *salam*; and the sale of a *dayn* with

a *dayn*, which is the sale of an absolute price for an absolute price, and is called *sarf*.[26] Hence, there can be four types of sale according to the above description. These are *`ayn* (goods) for *`ayn* (goods)- barter ; *`ayn* (goods) for *`dayn* (currency)- regular sale; *`dayn* (delayed payment in goods) for *`ayn* (goods)- advanced payment in goods and *`dayn* (currency) for *dayn* (currency)- currency exchange and money loans.[27] The research in hand has focused on regular sale as most of the consumers sale fall in this category.

The Legal Effects of a Sale :

The contract of sale once finalized is irreversible that results in the transfer of complete and instant ownership of the subject matter. It means that the seller excludes the commodity from his ownership and gives it to the buyer on a permanent basis, while in loans, ownership is transferred for a specified period and exactly its similar has to be paid back.[28]

Express Terms and Islamic Law of Contract:

Muslim jurists have various views regarding the extent of freedom enjoyed by the contracting parties to insert terms in the contract especially those which may change and modify the effects *Shariah* accords to a contract. In the view of Zahiri School the conditions are not allowed except those which are approved by *Shariah*. According to this school the basic presumption of law is that all terms in a contract are prohibited except that which is established by the text or *ijma* (consensus of opinion).[29] They base their view on the tradition of the Holy Prophet (pbuh*): "He who performs an act we have not ordered him, his act is null and void"*.[30] The Hanbali view is a very much liberal on the topic as it acknowledges complete autonomy of will in contracts and transactions. This view is based on the presumption that the general rule is permissibility unless a text from the Qur'an, Sunnah or Ijma makes them invalid. There are many arguments for this presumption from the Holy Qur'an, Sunnah and Ijam. The Holy Qur'an says: "O ye who believe! fulfil (all) obligations. Lawful unto you (for food) are all four-footed animals, with the exceptions named: But animals of the chase are forbidden while ye are in the sacred precincts or in pilgrim garb: for God doth command according to His will and plan."[31]

The Holy Prophet (pbuh) said: "Muslims are bound by their stipulations unless it be a condition which turns *haram* (forbidden) into *halal* (permissible) or *halal* (permissible) into *haram* (forbidden)." [32] Hence, it is allowed to insert conditions in contract and the parties are bound to abide by it. However, the limitation is imposed on the parties that they should not insert such a term that is contrary to scheme of Islamic law.

The view of Hanafi, Maliki and Maliki schools on the topic is divided into three kinds i.e. valid, irregular and void terms.[33] These are further classified into four kinds. Terms or conditions which confirm the effects, attributed to juridical act by the *Shariah.* Such conditions strengthen the purpose of contract e.g. to sell on the condition that the seller will not hand over good to buyer unless he pays the price is a valid condition because it ensures the effects of the contract. Terms or conditions which are admitted explicitly by the *Shariah,* such as the *Khiyar al-Shart* (option of stipulations) and *Khiyar al-ru'yah* (option of inspection) as these are explicitly admitted by *Shariah.* Terms or conditions, which are intimately, connected with the contract such as pledge of security in a contract of surety.

The Hanafi jurists also allow a term which has been established by custom such as for example in case of sale of a car by a specific manufacturer the condition that it will be responsible for its repair for a certain period.

The condition will be regarded as irregular if it is repugnant to requisites of the contract; it is irreconcilable with the purpose and effects of contract; it is not allowed by the *Shariah*; it is not allowed by custom and usage; and it gives an undue advantage to one of the contracting parties such as if a person sells his house with a condition that he will reside in it for a month after the sale is concluded; if a person sells a piece of land with a condition that he will cultivate for a year on it; if a person sells an animal with a condition that he will keep and riding it for a certain period; and if a person sells a garment to a consumer with a condition that he will wear it for a certain period etc. such conditions are irregular as it amounts to usury.[34] Hence, the effect of such condition is that it renders the entire contract invalid especially in case of commutative contracts. It is a term or condition that directly infringes any rule of the *Shariah* or inflicts harm on one of the two contracting parties or derogates from completion of contract, such as in the context of product liability the condition imposed by a seller that the consumer will not use the product he bought. The effect (*hukm)* of a contract with a void condition is that the condition is severable from the contract; it does not nullify the whole contract. The condition alone will be regarded null and void.[35]

Hence, in Islamic law unfair contract terms are considered void ab initio. It is one of the requirements of a valid sale that it should be free from any unlawful term and condition.[36] In Islamic law, terms of contract, properties of goods and consideration must be clear. A forbidden practice is for a man to purchase goods for a definite sum payable at a specified deferred term, then to bargain for a sum which will show him a profit if

paid in cash immediately. This is not permissible because the (deferred) term is allowed for by a portion of the price. Another is for a man to purchase goods for a specified sum and then, if he should find a flaw in them, to return to the seller with a demand for a discount, bargaining about the original price when the question of a discount had not arisen. The terms of a contract that may lead to Riba (Usury) is strictly forbidden under Islamic law. In this context, Imam Sarakhsi writes:

> "Trade is of two kinds: permitted (Halal), which is called Bay in the law; and prohibited (Haram), which is called Riba. Both are types of trade. Allah Almighty informs us, through the denial of the disbelievers, about the rational difference between exchange (Bay) and Riba, and says: 'That is because they said Bay is like Riba'. Almighty, then, distinguishes between prohibition and permission by saying: 'And Allah has permitted sale and prohibited Riba'.[37]

Similarly, any term in a transaction that is ambiguous is known as *Gharar* (uncertainty) and such contract are considered void in *Shariah.* There are many instances such as:

1. Bay` al- hasat

Bay` al- hasat is also known as *ilqa al hajar.*[38] It is effected when the vendor says, "Of these pieces of cloth or these sheep I sell you the one upon which falls this pebble thrown in the air," and the consumer says, "Yes". The transaction is valid on the basis of the existence of an offer and acceptance; similarly the sale of a piece of land is valid to the distance of a stone's through; or by saying, "I want to buy as many goods as there are stones which I am grasping in my palms." Or a sale may become irrevocable by throwing a stone; or by stipulating, "I sell you such and such an object, and you will have a right of option until I have thrown this stone. Holly Prophet (pbuh) had forbidden a transaction determined by throwing stones, which involves uncertainty. [39] Hence, this kind of sale is forbidden in Islamic law.[40]

2. Bay` al-Mulamasah

A "touch" sale is an expression which implies:

a) The sale , i.e. of a piece of cloth already folded , that is bought by merely touching it, and renouncing in advance the right of option accorded by law after seeing it.
b) A sale by merely touching an article without any formal offer and acceptance and without mutual consent.
c) A sale concluded by saying, "Where you have touched this cloth I have sold it you."

According to Hanafi school this kind of sale is voidable (fasid). [41] According to Imam Malik[42] and Imam Shafi.[43] it is reported that the

prophet (pbuh) had forbidden bay al-mulamasah, because the consumer is not given a chance to examine the good.

3. Bay` al-Munabadha

According to Imam Malik, Bay`al-Munabadha is the practice whereby one man throws a garment to another , and the other also throws a garment without either of them making any inspection. Each of them says, "This is for this." It is reported that two types of transactions are forbidden by the Prophet (pbuh), i.e. Bay`al-mulamasah and Bay` al-munabadha. [44] This type of sale is prohibited in Islamic law.[45] The reason is that consumers are not allowed to proper or adequate inspection in order to know the goods thoroughly.

4. Bay`al-Muwasafa: (Sale by Description)

It is the sale of goods which has not been possessed or a sale of goods by describing them without any inspection, the delivery being made later, after the vendor had bought them. According to Sa`id ibn al-Musayyab, the sale by description is a secret agreement made when a man describes to the consumer goods, which not with him, by deferment of an obligation.[46] It is prohibited because the transactions would have to be made before the goods were possessed by the vendor.[47]

5. Bay`al-Muzabanah

It is a contract of exchange of harvested dry dates by their calculated and definite measure for fresh dates or other fruit of the same species on the tree. It was reported that the Prophet had forbidden Bay`al-Muzabanah.[48] In cases where goods (i.e. fruits), whose weight, size and number are not known, are sold in bulk for a definite weight , measure or number of some other goods, i.e. green dates for a definite measure of ripe dates. The same applies to the selling of raisins by measure for grapes.[49] This type of sale is prohibited because it is buying of something that's number, weight and measure is not known.

6. Bay`al-Mukhadarah

Bay`al-Mukhadarah is selling fruit before it had started to ripen. The Holly Prophet is reported to have forbidden Bay`al-Mukhadarah. He forbade this transaction for both buyer and seller.[50] The Holly Prophet is reported to have stated further; *"Have you not seen if God prevents any fruit (from coming out) for what exchange shall one of you take the property of his brother."*[51] This type of contract gives rise to a lot of disputes, quarrels and feuds because of fluctuations in the quantity and quality; losses resulted on these commodities so that claims were made and disputes starts.

7. Bay`al-Muhaqalah:[52]

It is the exchange of seed-produce, still in the ear, for the grain of wheat .the prophet is reported to have forbidden Bay`al-Muhaqalah which was considered to involve certain hazardous elements.[53]

8. Bay`al-Sinin or Bay`al-Mu`awamah

It is effected by saying, "I sell this commodity (fruit or harvest before the crop has grown on palm trees or others) for a year or more and when the year has ended the term of contract will be terminated between us and I shall give the price and you will give me back my commodity."[54] Holly Prophet has prohibited *Bay`al-Sinin* because of the existence of a hazardous element in it.[55] This type of sale is also called *bay`al-mu`awamah* because it selling of something years ahead.[56]

9. *Bay`al-Haml*

It is the sale of an embryo or the sale of youngling to be brought forth later from the foetus of an animal, that is, what a female animal bears in the womb. This type of transaction is not allowed because the commodity is not known. It is prohibited due to uncertainty.[57]

10. *Bay'al Hayawan bi'L-lahm*

It is narrated that the Prophet (pbuh) had prohibited bartering live animals for meat.[58] It is also considered as a kind of gambling or a game of hazard (*al-qimar*). The reason is uncertainty in their weight.

The above types of transaction are declared unlawful in Shariah because they carry uncertainty because that may result in exploitation of the consumer. Moreover, Islamic law does not differentiate between false advertisements, trader's puff and sales talk etc. Any statement by the producer that could influence a consumer in making a purchase will make him liable under the same rules. It is also pertinent to explain here the meaning of false or misleading representation under Islamic law which is one that omits facts as well one that states false one. Even if a statement is literally truce but it misleads the public would be considered as false representation. A statement must be read in the context and light of the overall impression it might give to the people it is addressed to. The Holy Prophet (pbuh) stated: "*he who cheats us is not one of us*".[59] Therefore under Islamic law the literal truth of statements is not a defense if they convey a misleading impression upon the reader. Hence, in order to determine the legality of an advertisement the general impression it gives will be considered and an advertisement will be considered false if it can deceive or misleads any person.[60] The manufacturer may base his argument for defense on that the consumer (plaintiff) was not likely to be deceived by the advertisement; however, the relevant interpretation would be the one made by the consumer as misleading advertisement is a relative

thing which defends on the group of people addressed.[61] Now what would be the standard for a misleading advertisement so it is very easy under Islamic law being a religious law that even if a person of below average intelligence is misled by an advertisement such an advertisement in this specific case will be considered mis-leading.[62]

Hence, the contracting parties may change or limit these statutory provisions if they choose to do so under the contract. Thus, Islamic law of contract has safeguarded the interests of the consumers in cases of defective products by imposing liability upon the manufacturer and made him liable for any hidden defects, the seller is also bound by the express terms which they offer to the consumers.

Implied Terms in Islamic Law of contract

The Islamic law of contract has recognised various implied terms in contract through different kinds of (*khiyarat*) options. These options highly protect rights of the consumers in contracts and commercial transactions. The purpose of option is to give chance to a consumer who suffered some loss in transaction to revoke contract within stipulated time. They have been designed to maintain balance in transactions and to protect a weaker party from being harmed. Some of these options are discussed below which have great impact on the protection of consumers in commercial transactions. In this context *Khiyar al ayb* must be highly appreciated. It is a right given to a purchaser in a sale to cancel the contract if he discovers that the object acquired has in it some defect diminishing its value. The defect is anything that is recognised by the commercial custom (*urf tijari*).[63] Hence, this meaning covers the various types of defects recognised in contemporary times such as manufacturing defect, design defect and instruction defects etc. Khiyar al ayb is a well-recognized legal method under Islamic commercial dealings which protects society from the problems arising from purchasing defective products. It is an implied warranty imposed by the law itself and the parties do not have to stipulate it. It is thus a necessary condition of the contract. The goods are liable to be rejected if undeclared defects are discovered. In this context, it is pertinent to quote Hidaya:

> "If the goods purchased prove unfit for use, the buyer is entitled to a full refund of the purchase price even in case of perishables, if a person purchases eggs, musk melons, cucumbers, walnuts, or the like, and after opening them discover them to be of bad quality; in that case, if they be altogether unfit for use, the purchaser is entitled to complete restitution of the price from the seller, as the sale is invalid, because of the subject of it not being in reality property."[64]

Hence, Islamic law protects consumers both before and after conclusion of the sale and purchase agreement by giving them the right of inspection and the right of option. The Islamic doctrine of *khiyar al ayb* allows the buyer the right of inspection of the goods (to ensure its quality, etc.) and also the right of option (whether to continue with the contract or otherwise) both before and after the contract of sale and purchase is concluded.

The *Mejjalla* terms such option as *khiyar al-ayb*, or "option for defects."[65] The option of defect (*khiyar al-ayb*) is based on the following verse:

> "O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will: Nor kill (or destroy) yourselves: for verily God hath been to you Most Merciful!"[66]

The other options are such as the Option of the Session (*Khiyar al-Majlis*), Option of Defect *(Khiyar al-ayb)*, Option to Ascertain the Subject-Matter (*Khiyar al-Ta`yin*), Option of Inspection (*Khiyar al-Ru`yah*), The Option to Revoke the Contract (*Khiyar al-Sharth*), *Khiyar al-Ghalat*, *Khiyar al-Tadlis.* These options are provided in those contracts, which accept revocation like sale, hire, *muzara'ah* (crop sharing). These options are not available in those contracts, which do not accept revocation such as divorce, manumission etc.

Majallah has codified six options (*khiyarat*) in favour of the consumers. They can be divided into two broad categories. First, the options that are implied warranties whether the parties stipulates them or not they exist. These are the option of defect (*khiyar al-'ayb*); the option of fraud (*khiyar al-tadlis*); and the option of inspection (*khiyar al-ru'yah*). Secondly, conventional options that are created by the mutual consent of the parties and affecting the formation of the contract such as the option of acceptance or rejection within the contractual session (*khiyar al-majlis*); the option of distinction (*khiyar al-ta'yin*); the option to defer payment within a specific time limit (*khiyar al-naqd*).[67] Of all these options, Muslim jurists have regarded *Khiyar al-Ayb* as a rubric for the study of options.

Option of Defect *(khiyar al-ayb)* **:**

Khiyar al ayb is a well-recognized legal method under Islamic commercial law that protects consumers against the defective products. It is a right given to a consumer in a sale to cancel the contract if he discovers that the object acquired has in it some defect diminishing its value or that makes it fall short of its requirements or specifications. [68]

Likewise, in regard to quality, the vendor guarantees to the purchaser that the sold goods are in proper condition. *Ayb* is defined as any defect existing in the goods at the time of the contract that will call for a

reduction in value as recognised by the customary standards of merchants.[69]

It would be considered fraudulent of a seller's part to intentionally conceal a defect.[70] It is an implied warranty imposed by the law itself and the parties do not have to stipulated it. The ruling of Islamic provisions, the *Sunnah* in particular, has evidently envisaged the eventuality where a buyer does not possess sufficient knowledge of the product he/she has agreed to buy. A sale of this type cannot be said to reflect of the true intentions of the buyer, especially if the product turns out to be defective in a way that is not obvious to the naked eye.[71] The *Majallah* regulated the liability for hidden defects in the contract of sale in Arts. 336-355. Article 238 defines a defect as "what reduces the price of the thing sold among merchants and men of discernment". As per these provisions, upon the discovery of a defect the buyer is granted the option either to rescind the contract of sale, i.e. to practice *khiyar al-ayb*, or to keep the thing sold as is.

An Islamic legal mechanism used to protect consumer rights is the inclusion of option of defect in contract formation. The *Ayb* (defect) is of two kinds: patent and hidden. Some authors have defined defect as ''any increase or decrease of the merchantable quality of the original creation of anything'' or refer the determination of defect to the precedent. However, precedent cannot be used to judge goods that are produced for the first time.[72]

In this context the *Majallah* states: *"Any buyer in Islamic law has an automatic implied warranty against latent defects in the goods purchased".*[73] A defect consists of any faults which, in the opinion of persons competent to judge, cause depreciation in the price of the property.[74]

The option is valid in case of products, which need to be specified like a house, land or any room, which has its own individuality. The goods are liable to be rejected if undeclared defects are discovered. This type of option arises only if the contract has been concluded. If the contract is still in the state of negotiation or still under discussion, the affected party cannot exercise this option. This method is based on the Holy Qur'an[75] and following *Sunnah* of the Holy Prophet (pbuh): ''*He who defrauds another is not from us''*[76] and ''*If the contracting parties speak the truth and reveal the defects of the goods then the contract will be beneficial for both. If they do not speak the truth and hide the defects of the goods they will [Allah will] diminish the benefit of the transaction.*''[77]

a) Conditions for Option of Defect (*Khiyar al-Ayb)*

There are various conditions for exercising *Khiyar al-Ayb* such as: the defect should be such which causes decrease in the value of the property; the defect may be obvious or hidden; the defect should have existed prior to the contract, a defect appearing later after delivery is not valid for purpose of the option; the defect should continue after delivering till the time of the exercise of the option, if the defect disappears before this, there is no option; the buyer should have no knowledge of the defect at the time of the contract or at the time of delivering; and there should not be any agreement of non-guarantee.[78]

b) Effects of Defect on Contract

In case, the consumer has bought a defective product, he/she has the choice to confirm the sale or to cancel it in the view of majority of jurists. The Maliki jurists distinguish between the minor (*yasir*) defect and major (*fahish*) defect and purpose that if the defect is minor, the buyer may confirm the sale while being returned part of the price paid in proportion to the extent of the defect. In case the defect is major. He has the choice either to cancel it or to confirm it without compensatory restitution.[79] The Hanbali jurists hold that the buyer of an object with defect whether minor or major, may confirm the sale while being paid the difference between the price of the article in perfect condition and its price with defect.[80]

In case the seller declares at the time of sale that there is a defect in the product sold, and the consumer accepts the product with the defect, he has no option on the account of defect as he himself waived the same.[81] Hence he cannot return the product in such a situation e.g. if a consumer buys an animal with all defects of any description whatsoever whether blind, lame, or worthless, he cannot return such animal ascertaining that it had a defect of long standing.[82]

In case when a defect appears in the thing sold while in the possession of consumer, and it proves to be a defect of long standing, the consumer has no right to return the thing sold to the seller rather he has the right to claim reduction in the price. For example if the consumer buys a piece of cloth which after being cut up is found to be frayed and rotten, he cannot return it to the seller because by cutting he caused a new defect and it may not be sold again. The consumer in such a case has the right to claim a reduction in the price.[83]

When a purchaser buys a roll of linen and cuts it up to make shirts. He then finds it to be defective and sells it. He cannot claim any reduction of the price from the vendor. The reason for this is that while the vendor may state that he would take back the stuff with the defect of recent origin, that is to say, cut up, the sale thereof by the purchaser is tantamount to an

adoption of the defect.[84] This indicates that the reduction may not be claimed when the thing bought is for commercial purposes and sold to a third party. When the consumer adds something to the product e.g. sewing or dying in case of a cloth such acts prevent the return of the subject matter to the seller.[85]

If the consumer buys a thing and subsequently it appears to be in such a state that no benefit can ever be derived from it the sale is void and the consumer can recover the whole of the price. For example if a consumer buys eggs which have been proved to be rotten and useless, the consumer can claim whole of his money.[86]

c) Termination of the Khiyar al-Ayb

The death of buyer does not terminate the option. The right in such case is inherited by the heirs. The factors that terminate the *Khiyar al-Ayb,* mentioned by jurists, are the acceptance of the product with defect by the consumer; and destruction of the object in the hands of buyer.[87] It is a matter of further investigation that whether or not the Muslim jurists had mentioned some rulings about the situation in which the destruction is caused by a defect in the product itself. Similarly, is it possible for a consumer to claim damages under the notion of *Khiyar al-ayb* for such loss? Traditionally, in Islamic consumer contracts, if one produces and sells defective goods to others the buyer has the right to nullify the contract or to obtain compensation (*arsh*), i.e. the balance price of the damage or loss between non-defective and defective goods.[88] In such cases, the modern legal regime may be applied if it promotes the purposes of Islamic *Shariah* and leads to the welfare of the Muslim *ummah.*

Option of fraud (Khiyar al-tadlis or khiyar taghrir**) :**

The option to rescind the contract, if the option of the defect and sight cannot be put into effect, is the option of fraud. This option exists in cases where the disappointed party can established that his agreement contract was gained by the deceit or wilful misrepresentation of the other party.[89] This also includes concealment of a defect in the subject matter and the seller hides it to sell the subject matter.[90] It can be revoked for fraud which causes loss of property. It is forbidden to deceive in business transaction.[91] For instance, it is prohibited to sell an animal that has not been milked for few days in order to increase the amount of milk at the moment of sale. Such fraud gives the purchaser the right of cancellation, provided he makes use of it without delay. According to *al-Shafi'* the right of the consumer in these circumstances, can still be exercised three days after the discovery.[92] If the purchaser has already consumed the milk from the animal, he should return it to the vendor together with a *Sa'* (*Sa'* plural *suwa* is a measure for grain) of the value four *mudds* (*modius*), according

to the custom of Medina" or it would be approximately five pints. The official capacity of the *mudd* of *Madinah* (and it was called *mudd al- nabi*) would be approximately five gills.[93]

It has also been stated in Majjalla that when in a transaction of sale one of the parties deceives another and misrepresentation is proved, the person so deceived can cancel the contract.[94] In case the victim of such misrepresentation dies his right is transmitted to his heirs.[95]

Option of Inspection (Khiyar al-Ru'yah):

It is the basic rule that the subject matter should be known to the parties at the time of contract. The option of inspection is given to the customer buys anything not present at the time of the contract. Knowledge of the subject-matter is an essential condition for the conclusion of the contract. The option of inspection gives opportunity to the customer to examine the subject-matter at the time of the contract or by description in a manner, which removes all kinds of *Jahala* (want of knowledge). This is known as the option of examination or *khiyar al ru yia.*

In order to conclude a valid binding contract the subject matter must exist at the time of the contract in order to avoid *gharar* or uncertainty.[96] But, this strict rule will caused hardship to the contracting parties. Thus the Muslim jurist had allowed exceptions to the strict rule of existence. As for example, *bay' al-salam* (sale by advance payment for the future delivery), *bay' al-istihshan'* (contract of manufacture),[97] *Ijarah* (contract of hire) and Masqat (contract of irrigation). But still all this kind of transaction still has its own stage of uncertainty (*gharar*) because the party still has not seen the subject matter yet. Thus, to avoid uncertainty the consumer is given power to opt whether to continue or withdraw the contract concluded between them after seeing and inspect the subject matter- This option known as option of viewing or option of sight (*Khiyar al-Ru'yah*). This option also known as option of inspection. The purpose of this option is to avoid injustice that may lead to ignorance and dispute among parties, to protect the interest (*Istihshan*) of Muslim and to prevent any disputes among them and to avoid unfairness when they have no experience or ability to market place to buy things they have not seen.[98]

Option of the session (khiyar al-majlis**) :**

Al-majlis (a session) is the period during which contracting parties devote themselves to the business in hand and is terminated by any event, such as physical departure from place of business, which indicates that negotiations are concluded or suspended.[99] The right of the option of session (sitting), called *Khiyar al-majlis,* is the inalienable right to repudiate unilaterally a contract concluded by both parties, so long as they have not yet separated. This is based on the tradition of the Holy Prophet

(pbuh) i.e. "The contracting parties have the right of option until they separate".[100]

Option to Stipulate (khiyar al-sharth) **:**

Khiyar al Shart is that option through which one party or both of them stipulate for themselves or for someone else the right to revoke the contract within a determined period.[101] For instance, the consumer says to the seller "I purchased this thing from you but I have the right to return it within three days''. As soon as the period is over the revoke derived through this option, lapses. The result of this option is that contract which is binding (*lazim*) initially becomes non-binding (*ghair-lazim*) with the stipulation of this option. It is a right given to the parties or another person to confirm or cancel the contract during an agreed period of time. It is accepted on two reasons that were one Prophet (pbuh) accepted it and sanctioned it and two some people may not be knowledgeable about trading and need expert opinion. It is valid to compulsory, necessary and binding contracts which are cancellable even it was effecting one party e.g. sale, rent, partnership, warranty etc. Both or either one of the parties has the option of condition. Imam Abu Hanifah, Imam Maalik, Imam Ahmad Ibn Hanbal and the Shafi'is are of the opinion that one of the parties may delegate it to the other parties. In response to a question that parties may not be knowledgeable and need expert opinion, Al-Shafi'is are of the opinion that this is not permissible to delegate to another person. Period of Option of Condition according to Imam Abu Hanifah, Imam Zufar and Al-Shafi'i it does not exceed 3 days. But according to Imam Abu Yusuf, Imam Muhammad and Imam Ahmad ibn Hanbal it can exceed 3 days and may be longer provided that the time is determined and clear. And according to Imam Malik it is originally 3 days but can be extended to sufficient time in case where the subject matter of contract was in a place which is very far and could not be reached within 3 days.[102]

khiyar al-ta'yin (option to ascertain the subject matter):

Another option given to the customer by Islamic law of contract is that the buyer can choose, designate or determine within a pre-stated time one object out of two or more which are offered to him. It is called *Khiyar al-Ta`yin*. This right can be exercised by the customer in a situation when he is offered to buy an unascertained thing out of a number of ascertained things with a right to ascertain the exact thing later.[103] For example one buying a car out of three vehicles offered for fixed price, gets opportunity through this option to have cars examined by a specialist and chooses any one of them. The reserving of the right to ascertain the bought item later is known as the *Khiyar al tayin* or the option of determination. This option

can be only exercised by the buyer and it makes a binding contract non-binding in favour of the customer.

The option of determination, where a person having purchased two or three things of the same kind, stipulates a period to make his selection.[104] The purpose of this *Khiyar* is to give wide choice to the buyer to choose and the seller to specify the subject matter of the contract e.g. the object was car and has three types, Toyota, Honda and Suzuki and has different qualities and different price. In this situation, the seller has the option to determine the object, price and the qualities of the subject matter of the contract itself.

This option is applicable to the parties of the contract only in a determined time. This option cannot be stipulated by the third parties. However, some scholars are of the opinion that this option is applicable to the buyer only. Duration of this option is according to the nature of the transaction. Imam Abu Hanifah maintains that the period of this *Khiyar Al-Ta'yin* is same as *Khiyar al-Shart* which is 3 days. However duration of option must be defined by contracting parties while Shafi'is and Hanbalis do not recognize this option. They are in the opinion that if the subject matter of the contract is not determined sufficiently then it is not confirming the basic principle of Islamic Transaction. They also argued that there is no authority on *Hadith* about *Khiyar At-Ta'yin*. Hanafi and *Maliki* approved *Khiyar at-Ta'yin* on the basis of *Istihshan* and affirmed that the option has been introduced to prevent any damages.

***Option of Mistake** (Khiyar al-ghalat):*

This type of option was only introduced by the successors. This natural doctrine of a contractual system is based on the *caveat emptor* principle.[105] This principle means that the buyer must ascertain the good quality of goods he buys. In this context, the *hadith* of the Holy Prophet (pbuh) is to be mentioned. Narrated 'Abdullah bin Umar: Allah's Messenger (pbuh) said: "*He who buys foodstuff should not sell it till he is satisfied with the measure with which he has bought it".*[106] However, the Islamic ethical system does not endorse the doctrine of *caveat emptor* that many Western courts have considered valid in several shadowy cases. It has put the responsibility on the part of seller to disclose all the defects of the product to the consumer.

Compensation for Damages in Islamic Laws of Contract:

Contractual liability for compensation in Islamic law is well known as *dhaman-al-uqud*. When the subject matter of the contract is destroyed, as in the case where the sold property has been destroyed prior to delivery or when the hired subject matter is destroyed whilst in the possession of the hirer, the concept of warranty (*daman al-aqd*) applies. This means that

the holder of the subject matter in question in warranty (*daman al-aqd*) will be responsible for the destruction of the subject matter.[107] The contract liability is applied only to damage or loss of the property that is the subject matter of the contract and does not extend to consequential personal injury or damage to the other property of the consumer. In this regard *Majallah* states:

> "A defect of long standing is a fault which existed while the thing sold was in the possession of the vendor; any defect which occurs in the thing sold after sale and before delivery, while in the possession of the vendor, is considered a defect of long standing and justifies rejection."[108]

Such contractual liability can be applied to the various kinds of damages that may be awarded to the party seeking remedy i.e. compensatory damages, consequential damages, punitive damages and nominal damages. Islamic law too has no problem about these kinds of remedies in general and compensatory damages in particular. Compensatory damages are called *Dhaman* which literally means compensation. The value depends on the amount of performance promised in the contract. This may be the value of the commodity sold or services rendered or other consideration. Consequential damages occur as a result of the breach and are usually lost profits. These are also termed as *Dhaman al- Uqud*. If it is known to the consumer that the product is defective and may cause damage to him or his other property, he can rescind the contract. Rescission is an equitable right to put an end to a contract and have the status quo restored.

The right of rescission (*Khiyar*-Option) is the right unilaterally to cancel (*faskh*) or to ratify (*imda'*) a contract, and in particular a contract of sale; if it is not exercised within the proper time limit, the sale is complete (*tamm*), with a somewhat different meaning of the term. It can be conferred by law, or agreed upon by the contracting parties.[109] The buyer has the right of rescission at the time at which he sees the object which he has bought, the act of 'seeing' not to be taken too narrowly (*khiyar al-ruyah*); also in the case of a defect, i.e. everything that causes a reduction in price among traders (*khiyar al ayb*) or lack of a stipulated quality.[110] The defect gives only the right of rescission, not of abatement; this last arises only if the return of the object of the sale has become impossible either by its loss or by the occurrence of a new defect after delivery but before recognition of the first defect (in which case return is possible only with consent of the seller), or by increase in value (such as the dyeing of cloth). If the seller delivers less than the stipulated quantity, the buyer has the choice between rescission of the sale and abatement of the price in proportion".[111] The waiver of the *Khiyar al ayb* by the consumer in a

contract of sale is possible; the resulting absence of obligation is called *bara'a.* The buyer can stipulate the right of choosing from among several objects (*khiyar al-tayin),* and by agreement of the contracting parties there can be conferred on one or on both or on a third party the general right of rescission (*khiyar al-sharth*) during a period of not more than three days (according to the prevailing opinion).[112]

Dr Wahba Zuhaili is relevant to be quoted here:

> "If the sale is valid, binding, free from option and the parties agree to abolish or terminate it, then its cancellation will be by way of rescission. And rescission, if it is separate from sale of which it generally consists, will be allowed in all binding contracts, except marriag".[113]

Hence, damage is one of the basic elements of contractual liability in Islamic law. In order to satisfy this element the consumer is only required to prove the link between the product and the manufacturer i.e. that the product is produced by a particular manufacturer. If this link is established that is enough proof for the liability of the manufacturer.[114]

Is there any 'time limitation' for suits under the Islamic Law of Contract? :

Muslim scholars have difference of opinions regarding the limitation period for claim.[115] The *Hanafi* permit a claim to be barred if a certain period of time has passed.[116] The Ottoman Civil Code that is based on *Hanafi* school has provided for statutes of limitations in the following articles states: "a debt, or property deposited for safe-keeping, or real property held in absolute ownership, or inheritance, or actions not relating to the fundamental constitution of a property dedicated to pious purposes leased for a single or double rent, or to pious foundations with the revenue of a pious foundation, or actions not relating to the public, shall not be heard after the expiration of a period of fifteen years since action was last taken in connection therewith."[117] In the same sequence, Article 1661 states that "actions brought by a trustee of a pious foundation ... may be heard up to a period of thirty- six years. In any event these actions shall not be heard after the thirty-six years has elapsed."[118] Despite these statutory provisions, the contracting parties may change or limit these statutory provisions if they choose to do so under the contract.[119] This provides a kind of flexibility to the legislatures in an Islamic state to specify a time period for certain issues that are adequate with the requirements of a particular age.

Conclusion:

Contract law in any system ensures the parties to private agreements that any promises they make will be enforceable through the

machinery of the legal system. Islamic law of contract ensures the protection of rights of both seller and buyer. Islamic law of contract, based on the divine law and ethics, highly emphasis on the protection and preservation of buyers' interests before the making of a contract, while formation of the contract and even after its conclusion. It has prohibited all the unfair transactions in order to insure protection of buyers against mal-practices in trade such as hoarding, adulteration, usury, misrepresentation, exorbitant profiteering, dealing in prohibited goods and services, gambling and games of chance, arbitrarily fixing prices of the commodities, cheating and fraud, trickery, false representation, swearing to sell a product and exaggeration in description of the goods and services etc. all are strictly prohibited by *Sharī'ah* . In Islamic law of contract a large number of transactions are declared unfair only because they harm a particular party. Moreover, it has given buyers right to rescind the contract when they feel that their rights are at stake. Hence, they can utilize the Islamic law of options (*Khiyarāt*).

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2 Islamic law of contracts is based upon the following types of commercial transactions i.e. Contract of Sale, Contract of *Ijarah* (Leasing), Contract of *Musharakah*, and Contract of *Mudaraba*, Contract of *Kafalah* (surety ship), Contract of *Hawalah* (assignment of debt) and Contract of *Rahn* (Pledge) etc. All these contracts have great concern with consumers as to get some goods or services is the ultimate motive behind these contracts. The consumer cannot fulfil their needs and requirements without entering one of these contracts. However, the research in hand is focused on product liability therefore the main concern is to discuss provisions from those chapters of *Fiqh* where there is delivery of goods such as *Bay'* and *Ijara*.

3 Kasani, *Badai al-Sanai`*, vol.5, p.133.

4 Majallah, Art. 105.

5 Qur'an says: *"And Allah has permitted sale" (*Qur'an 2:278). It also says: "O you, who believe, devour not your property among yourselves by unlawful means except that it be trading by your mutual consent" (Qur`an 4:29).

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7 Holy Qur'an, 2: 275.

8 Holy Qur'an, 4: 29.

9 Al-bukhari, *Sahih*, tradition no. 2373, vol.3, p.113; Muslim, *Sahih*, tradition no. 1042, vol.2, p.271; Ibn Maja, *Sunan*, tradition no.1836, vol.1, p.588; Al-nasai, *Sunan*, tradition no.2584, vol.5, p.93; Ahmad, *Musnad*, tradition no. 1430, vol.3, p.43.

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