A COMPARATIVE STUDY OF ISLAMIC LAW AND CIVIL LAW IN MALAYSIA on Contract, Arbitration, Banking Principles and Documentation.

by

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ACKNOWLEDGEMENT

This theses is written to fulfill the requirements - of - the Master of Comparative Law. The topics chosen is aimed mainly to elucidate the students and probably the busy practitioner the difference between Islamic law and the civil law in Malaysia. The chapters on Banking and documentation should be of immense value to the practitioner as many are not trained in the Islamic tradition and the documents used by these Islamic Institutions reflect the background of the draftsmen who draft them. A survey of old documents drafted before the arrival of the British will reveal that there was an extensive of the basma at the muqaddimah of the documents used .This is especially so when the documents are used by the Muslims.

As Bahasa Malaysia is being increasing being used to record transactions it is hope that there will be more research into Islamic documentation .

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I will like to apologise for any typography error as the use of computer by my secretary is still new.

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CONTENTS

CHAPTER ONE

Part 1

Title : Contract A Comparative Study of General Principles

The Islamic Viewpoint

God says at the beginning of Surah al-Maida : "O you who believe, fulfill contracts" and in another chapter (Al-Nisa,Ayat 29) He says: "O you who believe, do not squander your property among yourselves in vain things except it be in commerce by mutual consent."

Under the Islamic Law, it is the will of the two contracting parties which establishes the contract but the Sharia interpose to regulate the legal nature and effects every contract has.

Thus the fuqaha believe that contract are "legal formative" causes (asbab ja liya shariya) of their legal nature, effects and exigencies. The fuqaha are almost all of one opinion on this question, namely, that God the Law-giver has made the effects and nature of contracts dependent on these latter, it being considered that contracts are 'Formative causes' created by him. Therefore the will of man is limited to establishing the contract only.

Its effect are from God so that some people may not treat others unjustly through the commitments they establish and conditions they stipulate and so that every disposition may have its legal

nature created by God the wise law giver. (1)

Thus Jabir reported that he heard the messenger of Allah(s.a.w) say while he was at Makkah in the year of the conquest(of Makkah) :"Allah and his messenger have forbidden trade in wine and the dead (animals) and singing and idols"(2)

1(b) The meaning of contract

A contract in Islamic law is simply a legally recognised undertaking (3) Coulson is of the view that an aqd does not necessarily involve agreement because the term in used to describe a unilateral juridical act which is binding and effective without the consent of any other party. Nor does an aqd involve consider ation. However, the Mejelle states"Aqd" (concluded bargain) is the two parties taking upon themselves and undertaking to do something. It is composed of the combination of an offer(ijab)and an acceptance (qabul). "Iniqad" (the making of Aqd) is the connecting in a legal manner the offer (ijab) and acceptance (Qabul) the one with the other in a way which will be clear evidence of their being mutually connected"(4)

The rukun of a contract basically comprises the following elements: the seller, the buyer, the article of contract(sale_) and the consideration or price.

The condition for the seller or the buyer is that each one of them must be responsible, namely each must be of age of capacity to enter into a contract,intelligent,not mad and has the understanding of the nature of the transaction.Neither the buyer or sell must be under any legal interdiction nor under any duress.

1(c) Offer and Acceptance

Article 101 states: "Ijab" (proposal) is the word first spoker for making a disposition of property (Tassaruf) and the disposition(Tassaruf) is proved by it.

Article 102 states "Qabul"(acceptance) is the word spoken in the second place for the making of a disposition of property, and the agreement(Agd) becomes complete by it(5).

Iba Qudama said as follows :

"Allah permitted Sale but did not specify the manner in which it

was to be concluded. It is necessary, therefore, to refer to custom (`urf) for this, as it is in deciding what constitutes "delivery", `safe-keeping' and so on . Muslims follow this practice (of mu'at-at) in their maskets and trading practices. They have always recognised certain forms of sale. The Sharia subjected the practice of Sale to certain rules: otherwise it remained as it was. (6).

The Mejelle states : By an offer and acceptance the sale (bey) is complete(7).

The acceptance must agree with the proposal(8) Further, the offer and acceptance made by writing is the same as they are made by word of month(9).

1(d) The Majlis

The central feature of Islamic contract law is the concept of majlis bey (meeting for bargaining) (10)

At the meeting for bargaining, after the offer, until the end of

the meeting both parties have an option(11)It is at the Majlis-that the buyer and seller pronounces the ijab and qabul.The law sets no time limit to the Majlis. If the parties, during their bargaining take a nap or erect a screen between themselves for purposes of privacy the Majlis continues, no matter how long the period of time involved, provided the requirement of physical proximity is fulfilled (12)

Constructive Majlis begins when the letter of offer is received by the offerer or when the offer is communicated through the mes senger to the offerer. Termination of this constructive majlis will occur if the offerer does not respond to the letter or the message after uninterrupted consideration of its terms.

According to The Muhamuden Law of Sale(13) 'It is necessary in all case that the acceptance be declared before any change has taken place in the subject of the sale 'The proposer is at liber-ty to retract before acceptance by the other party but it is necessary that the other party should hear the retraction.

In a case of a letter or message the place of receipt of the letter and delivery of the message constitute the meeting. However, an offer sent by letter or message may be retracted before its receipt and aceptance, and the retraction is valid, whether known to the party addressed or not ; so that if accept ance be declared after an offfer has been actually retracted, the sale is not completed.

1(e) Competence to Transact

Two basic qualifications are required before a person can engage in legal transactions :

(1) age of majority (2) prudence

In the matter of age of majority Abu Hanafi has fixed the age of majority at seventeen. Al-Mughni however has cited a hadith where ibn Umar has said : I offered my services to the prophet when I was fourteen years old but he refused me permission to engage in the battle. I next presented myself to him when I was fifteen and he allowed me to join in the ranks (14)

There is a legal presumption of law that a male or female who reached the age of fifteen is physically mature.

The person who possess this quality is called rashid. "Rashid" is a person who busies himself in looking after his own property and does not desire prodigality and extravagance(15)

1(f) General interdiction(hajr)

"Hajr is to restrain a particular person from disposing a proper ty of his own (16)

The following classes are under interdiction `infants, madmen and people of unsound mind(matuh) are of themselves prohibited from dealing with their property (17) A person who is prodigal (sefih) can be prohibited from dealing with his property by the Judge (19). Under Maliki law, a female is not to be given control of her property until bedded, by her husband, because as long as the father has the right to marry her without her consent, inter diction is not lifted from her as it is not from the minor 20.

An exception to the interdiction of sagir ghayr mummeyyiz is the intfant mummeyyiz.

1(g) Nullity of Agreement

(i) Gharar

The Shariah doctrime of illegality of purpose embraces activities which are declared prohibited or haram, by the religions Law such as trading in wine or pigs. The doctrine of gharar forms on integral part of the Islamic contract. A contract which will result in profit for one party and a corresponding loss for the other is forbidden.

According to Ibn Rushid :

"Gharar in transactions of sale causes the buyer to suffer a loss and is the result of back of knowledge concerning either the price or the subject matter. Gharar is averted if both the price and the subject matter are proved to be in existence at the time the transaction is concluded, if the qualities are known and their quantities determined, if the parties have control over them so as to ensure that the excharge takes place and finally if any term of time involved is precisely determined" (21)

According to Nabil A Saleh (22) to avoid gharar in any given transaction three rules should be observed :

(a) There should be no want of knowledge (jahl) regarding the existence of the exchanged countervalue.

(b) There should be no want of knowledge (jahl) regarding the characteristics of the exchanged countervalues or the identification of their species or knowledge of their quantities or of the date of future performance if any.

(c) Control of the parties over the exchanged countervalues

should be effective.

(ii) Duress(ikrah)

Ikrah is without right to compel a person to do a thing without his consent by fear (23).

Sarakhsi defined it as "compelling or forcing a person to do something without his consent "(24)

Maliki and Hanbali Schools hold that while duress vitiates consent there is an aqd. Such a contract is voidable. The general rule is that no person will be bound by an agreement which he made under duress.Five conditions have to be satisfied if a threat is to amount to legal duress.The five conditions are as follows:

(i)The threat must be one of serious injury to the person, including deprivation of liberty through physical confinement, or serious damage to property.

(ii)The threatened injury or damage must be unlawful.

(iii)The threat must be directed against the contracting party personally or his close relative.

(iv)The threat must be realistic, in the sense that it is reasonable to expect that it will be carried out.

(v)The threat must be one of injury or damage which is so imminent that a person threatend has no real opportunity to protect himself from it.

1(h)Special Conditions (Shurut)

Ibu Qudama states there are four categories of Shurut(25) :

(a) Stipulations "of the essence of the contract" These stipulations relate to delivery of sale object.

(b) Stipulations connected with the legitimate interests of the

parties" These stipulations relate to guarantees, determination of the contract and are valid and binding.

(c) Stipulations "contrary to the essence of the contract"

Stipulations which imposes a restraint upon the buyers power of disposal is null and void.

However, if the whole transaction is regarded as null and void the party who has performed may invoke equitable remedies.

(d) Stipulations which neither reinforce nor contradict the essence of the contract but are designed to secure an additional benefit for one of the parties.

Such stipulations is valid if it is of a minor benefit.

But if the benefit involved is substantial and amounts to a completely new contract the whole transaction is a nullity.

Transactions forbidden by Islamic Law

According to ABM Hossain(26) the following transactions are forbidden by Islamic (a) Forward transaction or wagering contract are forbidden.

It is related on the authority of a hadith related by Abu Huraira (R) that the Prophet prohibited dealings in fruits as long as they were not ripe. It was asked, how to know their ripeness ? He said,"Do you think that any one of you would be able to take the property of his brother if Allah were to stop fruits from ripening?(Bukhari and Muslim).

Hoarding Business is forbidden

It is related on the anthority of Mamar who said that the Prophet said : "He who accumulates stocks of grain during shortage of it (with a view to profiteering later) is a great sinner" (Muslim)

Muhagala, Muzabana Contracts are also forbidden. It was narrated by Ibu Umar :

"The Prophet forbade Muzabana; and muzabana is the selling of fresh dates for dried old dates by measure, and the selling of fresh grapes for dried grapes by measure."

Contract involving the element riba or ribawi contracts are also haram.It is stated in the Holy Quran in Surah Baqarah Ayat 275 as follows:

"Those who take usury shall rise up before Allah like men whom Satan has demented by his touch. For they claim that usury is like trading but Allah has permitted trading and forbidden usury. He that receives an admonition from his Lord and mends his ways may keep what he has already earned;his fate is in the hands of Allah. But he that pays no heed shall be among the people of the Fire and shall remain in it forever."

Voidable contracts

An option to rescind an aqd may exist either as a matter of law (khiyar al-majlis) or by agreement between the parties (khiyar al shart)

Khiyer Al-Majlis

In a hadith cited by Mughni(27) Abu'l Rada reported : During a raiding party we struck camp and one of our soldiers agreed the sale of his horse to another. Both of them remained in the camp for the rest of the day and throught the night. On the following morning when were preparing to depart the seller saddled and watered the horse. Then the buyer came along and claimed the horse as his. But the seller refused to hand it over and sug-

gested that Abu Baraza, a companion of the Prophet should settle the dispute they found Abu Baraza at the far end of the camp. When they told him what had happened, he said : "You will agree, will you not, that I should decide between you on the basis of a decision of the prophet him self?

The prophet said : "the parties to a sale have the option as long as they have not sperated ? I cannot see that you two have separated"

Abu Baraza judged have that the seller had exercised his right to rescind the sale during the majlis.

Loss or extinction of the option

There are according to Coulson four principal circumstances where the option is lost :

(i) By natural termination of the majlis either by death of either party or deliberate walking away to indicate the end of the majlis

(ii) By unilateral renunciation of the option by either party.

(iii) By loss of the object

(iv) By an agreed period of option (khiyar al shart)

Options to Rescind

There are three options to rescind an aqd.

Article 328 states : If a purchaser makes a purchase buying by lump, when he has seen some of the things and not seen others, when he sees the things which he has not seen, if the disapprove of then he has an option. If he wishes, he takes all, and if the wishes, he returns all.

This option is known as khiyar al-aib(Defect)

Article 320 states if some one purchase a property without seeing it he has an option until he has seen it. When he has seen it, if he wishes he accepts. This option is known as khiyar al ruyet.Article 310 states :When the seller has sold a property as possessed of some good quality, if that property terms out to be without that quality, the buyer has an option.

If he wishes the sale is annulled and if he wishes, he accepts the thing sold fo the whole price named This is called option on account of description (khiyar vasf)

Mistake (Ghalat)

According to Coulson there are three principles (28)

(1) The object of the contract must be precisely determined and property identified. A sale of a thing which is not existing is void (29)

(2) There must be a genuine intent to conclude the apparent contract. The identity of the contracting party must be known.

(3) Any valid contract may be rescinded on the general ground of "fault" A fasid sales is bad. (30)

Fraud(Khiyar al tadlis)

According to al Mughni(31) "Every kind of tadlis which is the cause of a variation such as dyeing the hair of a slave girl black or curling it ----. gives rise to the option of rescission ------ in the same way as tasriyya"

Two conditions has to be satisfied :(i) The complaint must have suffered matrial damage or darar

(ii) The fraudulent act must be cunning to a degree that it would

deceived an ordinarily prudent person.

The legal term tagrir is to cheat(32) If there is an excessive deception without fraud in a sale the person who is deceived cannot annul the sale. But the sale of property of orphans made invalid by excessive deception although it be without fraud (33)When one of the parties to a sale has defrauded the other, and it has been ascertained that there has been excessive deception the person who is deceived can annul the sale (34)A sale which has a defect in its essential parts like a sale by a mad man in void (35)

Fraudulent Statement

According to Dr. Mohd Ali Baharum (36) "In Islam a representor is always liable to the represented for his misrepresentation. It does not matter whether much a statement was part of the contract when it become formed ,or whether or not it was taken into account in the contract itself. What is important is that the other party was misled by the falsity of the representor's statement"

However, the learned another states that option of defect (Khiyar alaib) option of sight (khiyar al ruyah)and option of attribute (khiyar ash-shart) allowed the victimised party to rescind.During the prophet's time the traders used to intercept caravans beofre it reached the centre of settled population and make vast profits from dealing with the varavan members because of the latter's ignorance of the local prices.Such activity is condemnd as "cheating" and "deceit".The second feature relates to contracts known as "uberrimae fiei "contracts of the Islamic system.These are contracts of resale of goods for the exact

price originally paid or with an agreed profit(bai al-murabaha).

Unilateral termination of contracts

These are contracts of licence in English Law known as "uqud ja'iza" in Islamic Law. The following are contracts known as "uqud ja'iza".

(i) Agency,(wakala) is a contract of licence as regards both parties. The principal may discharge the agent whenever he so wishes and the agent has the right to discharge himself, because contract is an authorisation to transact and therefore either party may cancel it.

(ii)Mudaraba, (parnership). This contract is terminated by the unilateral rescission of either party.

Part II

Principles of Contract - According to Contracts Act 1950

Civil Law Viewpoint

2(a) Offer and Acceptance

The contracts Act defines a proposal as (37) "When one person sigmifies to another his willingness to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence he is said to make a proposal" An offer or proposal is only effective when it is communicated (38) for a proposal to be converted into a promise the acceptance must be absolute and unqualified (39) where the acceptance been is qualified by the words such as "subject to contract" or subject to a formal contract being drawn up by our solicitors the courts will incline to hold it to be a mere conditional contract(40) peformance of the conditions of a proposal or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal is an acceptance of the proposal (41).

2(b) Communication of Acceptance

The communication in of a proposal is complete it comes to the knowledge of the person to whom it is made.

(2) The communication of an acceptance is complete.

(a) as against the proposer when it is put in a course of transmission to him, so as to be out of the power of the acceptor; and

(b) as against the acceptor, when it comes to the knowledge of the proposer.

In the local case of Fraser V Everett (42) the Supreme Court held

that under a contract for scrips for mining shares 'expected to be mailed about the end of March ' and which if mailed would have arrived on 23 April and it is not a delivery within a reasonable time, to have the scrips mailed early in April and to offer them on 15 May.

The rationale of the rule in section 6(b) of the Contracts Act was stated by Hashim Yeop a Sani J in Macon works & Trading Sdn Bhd V Pang Hon Chin & Anor (43) in the following words :

An offer lapses after a reasonable time not because thin must be inplied in the offer but because failure to accept within a reasonable time implies rejection by the offesee. As a consequence, the court can take into account the unduct of the parties after the offer was made in deciding whether the offeree was allowed too long a time lapse before accepting.

In the local case of Borhannddin Bin Haji Jantara V American International Assurance Company limited (44) the supreme Court had to consider whather there was a valid acceptance of an insurance policy by the insurance company. In this case, the deceased on 28 November 1977, that is two weeks before her death in a plane crash, had submitted a proposal form to insure her life. Paragraph (c) of the proposal form provided as follows :

The assurance herein applied for shall not take effect unless and until a policy is issued and delivered to me on this application and the first premium thereon actually paid in full during my lifetime and good health, provided however that if any payment of premium is made in cash at the time of signing who application and a conditional receipt shall apply hereto and are agreed to.

The deceased paid a cash sum of $118.00 for on 2 December 1977

and a reveipt was issued by the company. Two days after the cash payment she died and her estate instituted the proceedings to claim the sum insured. The company claimed that she was not covered by any valid policy. The supreme court rejected their arguments and held that there was a valid acceptance of the proposal.

Our Contracts Act provides that in order to convert a proposal into a promise the acceptance must.

(a) be absolute and unqualified.

(b) be expressed in some usual and reasonable manner unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be acceptaned, and the acceptance is not made in that manner, the proposer may within a reasonable after the acceptance is communicated to him insist that his proposal shall be accepted in the prescribed manner and not otherwise; but if he fails to do so, heaccepts the acceptance(45).

An option must be accepted in the exact manner prescribed in the option agreement . If the grantee in purporting to exercise the option adds' any new terms or vasies an existing term the exercise will not amount to a valid acceptance so as to bring about a binding contract (46).

The case of Ignatius V Bell 47 is authority for the proposition that registered letter posted which did not reach the proposer was a good acceptance, the parties having contemplated the use of the post as a means of communication.

Where it was reasonably clear from the circumstances that the parties contemplated the use of the post as a means of communica