CLASSIFICATION AND FORMATION OF CONTRACT

A COMPARATIVE STUDY

By

MOHD KHAIR BIN NGADIRON

LLB (Hons.) (IIU)

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PREFACE

This dissertation attempts to compare the classification and formation of contracts in the Islamic and Malaysian Legal System. The emphasis will be on the similarites and differences between Islamic and Malaysian law and where relevant, the English position is also stated.

This dissertation shall start with the discussion on the origin and the meaning of contract under both system i.e. Malaysian and Islamic laws. It is followed by the discussion on the overall classification of the types of the contracts. Following this, the conditions for a formation of a valid contract will be examined.

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MOHD KHAIR NGADIRON
Kuliyyah of Laws,
International Islamic university.

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CHAPTER 1

INTRODUCTION

Contract is the foundation of commerce in the Islamic and Malaysian legal system. This paper attempt to compare the formation of contract in the both system. The emphasis will be on the similarities and differences between Islamic and Malaysian law and where relevant the English position is also stated. The Malaysian and English law of contract are similar as they have a common origin, being based on the English common law.

MALAYSIAN LAW

1.HISTOROCAL INTRODUCTION

The modern law of contracts contains much which can properly be understood only in the lights of its history. Without some acquitance with this history, the law Reports, especially those earlier in date then the procedural simplifications of the nineteeNth century, will hardly be intelligible to the student. Hence, even in a book which aims only at stating the principle of modern law, it is desirable to give some account of how that law came to take the form.

i. The Law Relating To Contracts Before the Application of the Contracts Act in 1974.

Before the coming of British to Malaysia, Malay legal code had been in existence. These codes generally covered areas of public law, namely some areas of constitutional law and criminal law. However, there was no established legal like in the modern context and as such, disputes were settled mostly by the Sultan or their cheif. But no records of any legal procedings were kept, thus, it seem that the doctrine of precedent had no place in the legal system.

With the coming of the British, some semblance of an orderly modern legal system was set up. Attempts then made by the British to introduce laws relating to the various area. As result of the introduction of those laws by the British, a well established legal system came into existence. Since British intervention in the various parts of Malaysia took place over different periods, it necessarily followed that different laws were made applicable to the various States of Malaysia at different times. It is proposed to trace the law relating to contracts in these state prior to the extension of the Contracts Acts 1950 to the all States

of Malaysia in 1974.[1]

In Penang, the English law has been introduced through the introduction of the First Charter of Justice in 1819. And by the introduction of the Second Charter of Justice in 1826, the English law then be adopted in Malacca and Singapore.

Regarding the Federated Malay States, though the British had established control over some of the States that became the Federated Malay States as early as 1874, the States were not strictly under the control of the British. There was then no legislation which provides for the reception of English law. It was only through a gradual process that legislation was either introduced or certain pieces of legislation from India were extended to these states. Then, in 1899, the Indian Contract Act was extended to the four states of the Federated Malay States i.e. Selangor, Perak, Negeri Sembilan and Pahang.

Unlike the Federated Malay States, no attempt was made to introduce the Contract Enactment to the Unfederated Malay States.[2] However, with the appearance of the British in these States and with the introduction

of the various pieces of of legislation, the English administrator, employed indirect means in applying the English law relating to contracts. In certain States, special provision were inserted into the courts Enactment of the States to apply English law, whilst in other States, provision were made for the extension of the Contract Enactment of the F.M.S. to the States concerned.

ii. PRESENT LAW : a) The Contract Act 1950 (Revised 1974)

The Malaysian Contracts Act is not merely a model of the Indian Contract Act 1872 (in fact, the Indian Contract Act was in substance, with minor modification, extended to the F.M.S. as the Contract Enactment, 1899). It was not until 1950 that the Contract Ordinance, 1950 was revised in 1974, it became an Act through the Revision of Laws Act 1968 without going through Parliament.

As regard to the Indian Contract Act, it was the product of the work of a member of Indian Law Comission.

In drafting the Act, the Law Comission, to a large extent, based most of their proposals on the English Common Law and therefore, for this reason, the Indian Contract Act was a codification of the English Common Law. However, certain provisions of the Indian Contract Act were also borrowed from the Draft Civil Code for the State of New York (the Field Code).

b. Application of English Law

By virtue of Section 3 and 5 of the Civil Law Act 1956 (revised 1972), the English Law relating to contract is applicable in Malaysia if there is a particular subject not covered by the Contract Act. However, if the English Law is applicable, the distinction between Section 5(1) and 5(2) should be noted. Under Section 5(1), when English Law applies in any dispute arising in West Malaysia, other than Malacca and Penang, 'the law to be administered shall be the same as would be administered in England in the like case at the corresponding; if such question or issue had arisen, or had to be decided in England.' The effect of this distinction is that, any development in the English Law after 7th. April 1956 would not be

applicable to the States of West Malaysia, whereas these changes would be applied in Penang, Malacca, Sabah and Sarawak.

2. THE MEANING OF CONTRACT.

Under the classical theory, contract has been defined as :

> ' A bilateral executory agreement. It consist of an exchange of promises: the exchange is deliberately carried through by the process of offer and acceptance, with the intention of creating a binding deal. When the offer is accepted, the agreement is consumated, and contracts comes into existence before anything is actually done by the parties. No performance is required....The contract is binding because the parties intended to be bound....When the contract is made, it$ bind$ each party to performance, or, in default, to a liability to pay damages in lieu. Prima facie these damages represent the value of the innocent party's dissapointed expectation.'

The above model has been said to represent the market economic theory theory and to involve market principles.These principles are that each person relies on his own skill and judgement in the market and the parties bargain or negotiate with each other. In contract law, this is reflected in the rules of offer, counter-offer and acceptance.(3)

The American Restatement of the Law of Contracts has defined contract in the more simple and understandable manner;

> ' A contract is a promise or set of promises for the breach which the law gives a remedy, or the performance of which the law in some way recognises as a duty.'

The above definition is broadly acceptable, provided that it is realised that, in law, a promise may be constituted by an assurance that a thing has been or is (for example, that an engine of a car has been recently overhauled or is now in good mechanical condition) as well as that a thing will be, and provided that it is also appreciated that mosts contracts take the form of an agreement, that is to say, each parties

agrees to accept the promise or promises of the other in return for the promise or promises made by himself.[4]

Under Malaysian Law, a contract is defined as an agreement enforfeable by law.[5]

This requires the definition of an agreement, and an agreement is defined as;

> 'every promise and every set of promises, forming consideration for each other.'[6]

Thus, it further requires the definition of promise and consideration. A promise is defined as;

> 'when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted; a proposal when accepted, becomes promise.'[7]

A consideration is defined as;

> 'when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing something, such act or abstainance or promise is called consideration for the promise.'[8]

So, to conclude, all contracts must upon an agreement although not all agreements are automatically contracts. To constitute a contract, there must be other ingridients apart from a bare agreement. These essential ingridients include certainty, consideration and an intention to create legal relations between the contracting parties. Beside that, the agreement must be made by the free consent (9) of the parties who are competent to contract, for a lawful consideration and with a lawful object. If one or more of these elements is missing, for instance, where there is no intention to create legal relations, the agreement is not enforceable in a court.

B. ISLAMIC LAW

1. SHARIAH : THE AIMS AND ITS SOURCES.

Shariah is an Arabic word meaning the path to be followed. It is the path not only leading to Allah,the Most High, but the path beleived by all Muslims to be shown by Allah, the Creator Himself through His

Messenger, Prophet Muhammad (peace be upon him). In Islam, Allah alone is the Sovereign and it is He who has the right to ordain a path for the guidance of mankind. Thus, it is only Shariah that liberates man from servitude to other than Allah. This is the only reason why Muslims are obliged to strive for the implementation of that path, and that of no other path.(10)

Eventhough the Shariah is originated from Allah, but there is the provision or power given to man in order to interpret and expand Divine Commandment, by means of annalogical deductions and through other process.

The very first source of Shariah is the Holy Quran. The second sources is the Sunnah or the practice of Prophet Muhammad.(11) The third and fourth sources which may be classified as both 'ijma (i.e. consensus opinion of ulama) and qiyas (i.e.analogical deductions), provide detailed understanding derived from Quran and Sunnah, covering the myriads of problems that arise in the course of man's life.

The Quran is the best commentary of the Quran and the main sources of the Shariah. The Scholars of the

Quran have enumerated varying number of verses of legal injunction and the number is approximately considered to be 500. They deal with the marriage, polygamy, dower, maintainenance, rights and obligations of the spouses, divorce and various modes of dissolution of marriage, the period of retreat after divorce, fosterage, contracts, loans, deposits, weights and measures, removal of injury, oaths and vow, etc.(12)

The Quranic injunctions, from which the Shariah is derived, are further explained and translated into practice by the Sunnah of the Prophet. Sunnah literally means a way, practice, rule of life; and refers to the exemplary conduct or the model of behaviour of the Prophet in what he said, did or approved. Thus, it became a very important sources of the Shariah only second in authority after the Holy Quran.

Besides the Quran and Sunnah, the consensus of the opinion of the learned man and jurists, known in the Shariah as the 'ijma, plays an important role in Islamic law since it provides a broad vehicles of progress and reconstruction. Qiyas or analogical deduction is also recognise as the source of Islamic legal system since it gives an instrument to cope with the growing needs and

requirements of society. But such analogical deduction is based on very strict, logical and systematic principles and is not to be misconstrued as mere fancies and imaginations of man.(13)

Alongside these four sources, the Shariah takes into considerations Istihsan or justice preference or equity of a jurist as against qiyas which helps in providing elasticity and adaptibility to the entire Islamic legal system. The concept of Al Masalih Al Mursalah (i.e. the matters which are in public interest and which are not specifically defined in the shariah) has also become a part of Shariah system.

2. THE MEANING OF CONTRACT.

The Arabic word for contract is al aqd which literally means an obligation or tie. It is an act of putting a tie to a bargain. When two parties enter into contract, it is called al-in'iqad, that is joining or tying up the offer and acceptance together. Thus, the obligations arising out of contract are called uqud.(14)

The Mejelle defined contract as;

'Aqd (concluded bargain) is the two parties taking up themselves and undertaking to do something. It is composed of the combination of an offer (ijab) and acceptance (qabul).[15]

In the above background, the basis of contract is provided by the Quran itself. The Quran says;

' O Ye who beleived! Fulfill your obligation.'[16]

Obligations or uqud implies so many things. Firstly, there Divine obligations that arise from our spiritual nature and our relation to God i.e. Huquq Allah. He created mankind and implanted in them the faculty of knowledge and foresight; besides intuition and reason which He gave man, He made nature responsive to man's need, and His signs in nature are so many lessons for us in our own inner life; He further sent messengers and teachers for the guidance of human conduct in individual, social and public life. All these gifts create corresponding obligations, express and implied. We make a promise; we enter into a commercial or social contract; we enter into a contract of marriage: we must faithfully fufill all obligations in

all these relationship. Our group or our States enters into treaty: every individual of that group is bound to see that, as far as lies in his power, such obligation are faithfully discharged. There are tacit obligation: living in civil society, we must respect its tacit convention unless they are morally wrong, and in that case we must get out of such society. There are tacit obligations in the character of the host and the guest, the wayfarer and the companion, the employer and the employee, etc., which everyman of faith must discharge conscientiously. The man who deserts whose need him and goes to pray in the desert is a coward who disregard his obligation. All these obligations are inter-connected. (17)

Thus, to conclude, in Islamic Law, there are four main condition for a valid contract; consent of the contracting parties (which comprises offer, acceptance and free consent), legal competence on the part of the parties, subject matter and consideration. (18)

C. COMPARISON

From the above discussion, we can conclude that

there are differences in the origin and the meaning of contracts between Islamic Law on one hand and Malaysian (including English) law on the other hand.

Whilst the law of contracts in Mlaysia is based on the Indian Contract Act which derived its principle from the Common Law (which is solely depend on the man-made law), the Islamic Law of Contracts on the other hand is based on the Divine Revelation which the being explained by Quran, Sunnah, Ijma, Qiyas and other sources of Islamic Law.

A contract in Islamic Law is simply a legally recognised undertaking. The Arabic word for this is 'aqd, with literal meaning of 'tie' or 'bond'. This is in no sense the precise equivalent of the technical term contract in English Law, which involves, the two basic essential agreement and consideration. In Islamic Law an 'aqd does not necessarily involves agreement because the term is used to describe a unilateral judicial act which is binding and effective without the consent of other party - for example, the repudiation of marriage by the husband or, in time past, the formal manumission of a slave. Nor does an 'aqd necessarily involves consideration. A gratuitous loan, a gift, or a bequest,