

RIGHT OF *KHIYAR* (OPTION) AND TERMINATION OF CONTRACT

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Outline

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- ▶ Definitions of option
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- ▶ Termination of contract
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INTRODUCTION

- ▶ Option is a recognised principle of Islamic Law.
 - ▶ “And for you three days of option.” (Meaning of the *hadith*)
 - ▶ “The buyer and the seller have the option before they separate from each other except when the sale is optional.” (Meaning of the *hadith*)
- ▶ Once the option to rescind the contract is exercised, the contract comes to an end.
- ▶ Not only that, there are various ways to terminate the contract according to Islamic Law.



MEANINGS AND DEFINITIONS OF *KHIYAR*

- ▶ *Khiyar* is an *arabic* word which means wish or seek to choose between two things.
- ▶ *Al-Qur'an* uses the word *al-khiyarah* to connote a choice or an option.
 - ▶ “Your Lord does create and choose as He pleases, no choice have they (in the matter). (*surah al-Qasas*, 28:68)
 - ▶ “It is not fitting for the believer, man and woman when a matter has been decided by Allah and His Messenger to have any option about their decision.” (*surah al-Ahzab*, 33:36)

- ▶ *Khiyar* literally means option, choice selection or preference.
- ▶ Legal Definitions
- ▶ “A right of the contracting parties whether to ratify or rescind the contract.”
- ▶ *Khiyar* – “Having a power/right to choose (either to ratify or rescind the contract) (*Majallah*, article 116)



TYPES OF *KHIY* □ *AR*

- ▶ There are at least seventeen types of *khiy• ar* known to Islamic Law.
- ▶ They include
 - i) *Khiy• ar al-Majlis* (option of contractual session),
 - ii) *Khiy• ar al-‘Ayb* (option of defect),
 - iii) *Khiy• ar al-Shart* (option of stipulation),
 - iv) *Khiy• ar al-Ru’yah* (option of inspection) and
 - v) *Khiy• ar al-Ta’yin* (option of determination).



(i) *Khiyar al-Majlis*

- ▶ It refers to “a right of the contracting parties to rescind or ratify the contract so far as they are in the contractual session.”
- ▶ Shafi‘is and Hanbalis – every contract is subject to *Khiyar al-Majlis*.
 - ▶ “The seller and the buyer have the option of rescinding or ratifying the contract unless they separate, or one of them says to other, “choose”. (Meaning of the *hadith*)

- ▶ Malikis and Hanafis - *Khiyar al-Majlis* is not recognised.
- ▶ i) Contrary to clear injunctions of *al-Qur'an*.
 - ▶ “You shall provide two male witnesses (whenever you enter into a contract).” (*surah al-Baqarah*, 2:282)
- ▶ The authority of the verse would be baseless if *Khiyar al-Majlis* is recognised as this would be contrary to the commandment of providing witnesses.



- ▶ “O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. ”.(*surah al-Nisa'*, 4:29)
- ▶ The verse indicates that the concluded contract must be based on mutual consent that becomes effective through offer and acceptance. Its validity should not be subjected to the ending of contract / *Khiyar al-Majlis*. Thus, such contract should become enforceable to follow the commandment of Allah, “O you who believe! Fulfill your contracts.” (*surah al-Ma'idah*, 5:1)



- ▶ Malikis - *hadith* used by Shafi'is and Hanbalis is *hadith ahad* (solidatory) and it is contrary to the practice of people of Madinah. Thus, if the latter is in conflict with the former, the rule prescribed by practice of Madinah is followed since it is *mutawatir* and is considered as conclusive proof.
- ▶ Hanafis – if the *hadith* is accepted, the dissolution of the contract after being confirmed by the acceptance is an injury on the right of one of the contracting parties.



- ▶ • The opinion of Shafi'is and Hanbalis are preferable because this is also the opinion of majority of the Companions such as Abu Bar'ah al-Aslami, Ibn 'Umar, Ibn 'Abbas, Abu Hurayrah, etc and the Tabi'in such as Shurayh, al-Subki, and Ibn Abi Mulaykah.
- ▶ Al-Zuhayli – i) there is no contradiction between the verse to fulfill the contracts and the *hadith* as the meaning of contract is the binding, concluded and enforceable contract that is not subject to any option.
- ▶ ii) there is no conflict of the verse pertaining to mutual consent as *Khiyar al-Majlis* is prescribed by the *Shari'ah* in order to have full and true consent amongst the contracting parties.

- ▶ It is applicable only to contract that is subject to annulment such as sale and hire/leasing. Thus, *Khiyar al-Majlis* is not applicable to *ibra'* (release of debt/liability), *nikah* (marriage), *hibah* (gift), *waqf* and the likes.

Termination of *Khiyar al-Majlis*

- ▶ i) Approval/confirmation of the contract by the contracting parties.
- ▶ ii) Separation of the contracting parties without any reservation.
- ▶ iii) Death of one of the contracting parties according to Hanbalis.



(ii) *Khiyar al-Shart*

- ▶ It connotes “a right of one or both of the contracting parties either to rescind or ratify the contract on the basis of conditions agreed upon by them.”
- ▶ All Muslim jurists allow and recognise *Khiyar al-Shart*.
 - ▶ “If you buy something, you may say, “There is no cheating.” and you have an option for three days for everything that you bought. If you wish, you can keep it and if you dislike, you can return it.” (Meaning of the *hadith*)
- ▶ It is permitted to both of the contracting parties or one of them to make stipulation.
- ▶ It is also permitted that one of them has an option for one day and another has two or three days.

Duration of Stipulation

- ▶ Shafi'is, Imam Abu Hanifah and Zufar – three days.
- ▶ “Whosoever bought the sheeps that their udders have been tied up, he has an option up to three days.”
- ▶ Malikis – three days or more that depends on the nature of the subject matter such as two days for clothes, one month or more for houses.

- ▶ Hanbalis – subject to agreement amongst the contracting parties provided that the duration is fixed.
 - ▶ “Muslims are bound by their stipulation except the stipulation that permits the prohibited thing or prohibits the permitted thing.”
- ▶ The stipulated duration must start concurrently with the contract.
- ▶ Reduction of duration period is allowed and becomes effective.

Termination of *Khiyar al-Shart*

- ▶ i) Exercising of right of option by its owner.
- ▶ ii) Exercising ownership right by disposing of the subject matter of contract.
- ▶ iii) Lapse of the stipulated time.
- ▶ iv) Destruction of subject matter of sale.
- ▶ v) Death of one of the contracting parties



(iii) *Khiyar al-‘Ayb*

- ▶ It means “a right of the buyer either to rescind or ratify the contract due to the existence of defect of subject matter of the contract.”
 - ▶ “Do not tie up the udders of camels and sheep so that they appear to have a lot of milk, for a person who buy them after that has two recourses open to him after he milks them. If he is pleased with them, he keeps them and if he displeased with them, he can return them along with one measurement of dates.”



- ▶ ‘Abdullah ibn ‘Umar sold his slave to a buyer with defects due to illness for 800 *dirham* with the stipulation that he is not responsible for defects. After the transaction, the buyer was not happy with the defects and complained to ibn ‘Umar and the latter insisted not to take the slave back. They brought the case before ‘Uthman ibn ‘Affn, the Caliph. ‘Uthman asked ibn ‘Umar to take an oath that he had sold the slave without knowing that he had any illness and ibn ‘Umar refused. The Caliph held that ‘Abdullah took the slave back.

Elements of Defect

- ▶ i) It reduces the value of the subject matter of contract or renders the subject matter unfit for purpose of contract such as a horse or mule is stubborn or bites.
- ▶ ii) It is determined by an expert according to the customary practices.

Conditions of *Khiyar al-'Ayb*

- ▶ i) The defect must exist in the subject matter of contract before the delivery/while in the possession of the offeror.
- ▶ ii) The offeree is not aware of the defect before taking possession of the subject matter of contract.
- ▶ iii) The contract is not subject to any express exclusion of liability by the offeror.

Termination of *Khiyar al-'Ayb*

- ▶ i) Acceptance of defect by the offeree/buyer.
- ▶ ii) Disposition of the subject matter of the contract by the offeree.
- ▶ iii) Destruction of the subject matter of the contract while it is the hand of the offeree.
- ▶ iv) Transfer the ownership of the subject matter of contract by the offeror to the offeree by way of gift.



(iv) *Khiyar al-Ru'yah*

- ▶ It is “a right of one of the contracting parties either to rescind or ratify the contract when seeing the subject matter because he does not see it during or before concluding the contract.”
- ▶ Hanafis and Malikis – it is recognised.
 - ▶ “Whosoever purchases an article that he does not see, he has an option when he sees it.”
(Meaning of the *hadith*)



- ▶ It arises due to inability of one of the contracting parties to inspect the subject matter of contract during or before the contract is entered into.
- ▶ It is allowed also in order to have full knowledge and full consent from the offeree.
- ▶ It is only given to the offeree [unilateral right of the buyer] not to the offeror.
- ▶ *Jumhur* – it is rejected because it involves unknown subject matter of contract that causes *gharar* (uncertainty).
- ▶ “The Prophet s.a.w. forbids *gharar* transaction.”

Conditions of *Khiyar al-Ru'yah*

- ▶ i) The subject matter of contract must be something that can be particularised by specification.
- ▶ ii) The contract must be capable of annulment such as sale and hire. Thus, *khiyar al-ru'yah* is not applicable to contract of marriage, release of liability, gift, endowment and the likes.
- ▶ iii) The offeree never sees or inspects the subject matter of contract before or during the conclusion of contract.

Termination of *Khiyar al-Ru'yah*

- ▶ i) Exercising right of option by the offeree when seeing the subject matter of the contract.
- ▶ ii) Exercising ownership right by disposing of the subject matter of contract.
- ▶ iii) Death of the offeree according to Hanafis.



(v) *Khiyar al-Ta'yin*

- ▶ It indicates “a right of the buyer to determine one of two or three subject matters of contract as stated in the agreement provided that the price of each one of them is specified.”
- ▶ *Jumhur* – it is not recognised because it involves unknown subject matter of contract that causes *gharar* (uncertainty).
 - ▶ “The Prophet s.a.w. forbids *gharar* transaction.”



- ▶ H• anafis – it is recognised on the basis of *istihsan* (equity). It is beneficial to a man to enable him to choose between good and bad. Not only that, he needs *Khiyar al-Ta'yin* for him to consult other people about his choice particularly agent needs to consult his principal about his choice.
- ▶ Malikis – it is allowed but it is known as *bay' al-ikhtiyar*.
- ▶ Zaydan – The view of • Hanafis and Malikis are preferred on two grounds i.e. i) *Khiyar al-Ta'yin* is necessary in order to avoid hardship to the contracting parties. ii) element of *gharar* is eliminated upon determination of one of the subject matters of contract.

Conditions of *Khiyar al-Ta'yin*

- ▶ i) The subject matter of contract is not of similar classes. Thus, this option is not applicable to the contract of sale through sample.
- ▶ ii) The subject matter of contract is limited to a number less than four. Hence, the choice is either on one out of two or three things. This is a) to comprehend the three quality of them i.e. good, medium and bad; and b) to avoid uncertainty to the subject matter of contract.



iii) The time of option must be determined and fixed. Imam Abu Hanifah restricts it to three days whereas Abu Yusuf and Muhammad permit it to more than three days provided that it is fixed.

- ▶ iv) The price of each subject matter must be stated clearly to avoid *gharar* and dispute.
- ▶ v) The existence of *Khiyar al-Ta'yin* must be together with *Khiyar al-Shart* according to some Muslim jurists. Example is the seller says, "I sold to you one of these two clothes on the condition that you can choose either one of them in three days; and the price of A is so and so and the price of B is so and so."

Termination of *Khiyar al-Ta'yin*

- ▶ i) Exercising right of option by the buyer.
- ▶ ii) Destruction of subject matter of the contract while in the hand of the buyer.

TERMINATION OF CONTRACT

- ▶ There are various reasons and ways that termination happens in the contract.
- ▶ They include
 - ▶ i) Rescission (*faskh*),
 - ▶ ii) death and
 - ▶ iii) non-approval of suspended contract.

(i) Rescission

- ▶ Rescission is possible due the following reasons.
- ▶ a) Invalidity of contract – It arises due to non-fulfillment of the required conditions of the contract such as the subject matter of contract is unknown and not existed. The contracting parties or court may rescind the contract provided that the subject matter is not yet being disposed of. If this happens, the offeree may claim compensation for the value of subject matter.



- ▶ b) Right of option – It happens after a party to the contract exercised his right of option to rescind the contract.
- ▶ c) Mutual rescission (*Iqlah*) – It occurs when all the contracting parties agree to end their contract amicably. Islamic law encourages such act on the basis of the *hadith*, “Whosoever mutually agrees to rescind his contract, Allah regards his offence as undone in the Day of Judgment.”
- ▶ d) Frustration – It exists due to happening of natural catastrophe such as flood, draught, volcano and the likes that causes the inability of the contracting parties to carried out their obligations of the contract accordingly.

e) Lapse/expiration of time – It comes into existence for the contracts that may be constituted for certain period of time. Such contracts include contract of hire, borrowing, bequest, partnership and the likes.

f) Accomplishment of work/objective – It arises for certain types of contract such as i) contract of guarantee and mortgage [payment of debt made by the principal debtor to the creditor], and ii) agency and hire of person [agent or employee has done all the required jobs].

(ii) Death

- ▶ Death terminates certain types of contract.
- ▶ a) Contract of Hire – Death of either the lessor or lessee terminates the contract according to Hanafis.
- ▶ b) Contract of Mortgage and Guarantee – Death of the mortgagor, guarantor or guaranteed person causes termination of such contracts.
- ▶ c) Contract of Partnership and Agency – Partner, agent or principal died in such contracts make them cease to exit.
- ▶ d) Contract of Share-cropping and Irrigation – death of one of the contracting parties resulting such contracts terminate.

(iii) Non-Approval

- ▶ Suspended contract refers to “a contract that its validity is subject to approval/ratification of another person.”
- ▶ Sha• fi‘is – it is void contract as elements and conditions of a valid contract are missing.
- ▶ Hanafis – it is a voidable contract that is subject to removal of certain restriction for it to be valid.
- ▶ Malikis – it is generally regarded as a valid contract that depends upon the permission and authorisation of another person. If the permission is given then the contract becomes valid and effective.



- ▶ It consists of i) contract of discerned child [subject to ratification by the guardian], ii) contract of compeller [subject to ratification by the victim], iii) contract of interdicted spendthrift/prodigal [subject to the endorsement of court/judge], iv) contract of overspending debtor [subject to permission from the creditors], v) gratuitous contract of death sickness person [subject to consent of co-legal heirs], vi) contract of unauthorised agent [subject to permission from the actual owner of the subject matter of contract], vii) contract of an apostate [subject to re-acceptance of Islam].
- ▶ Such contracts become terminated if the parties concerned do not approve the contracts respectively.

CONCLUSION

- ▶ To ensure that the contract entered into by the contracting parties is based on mutual consent Islamic Law allows them or one of them to exercise right of option.
- ▶ There are various ways to terminate the contract such as through rescission, due to death or non approval of the contract.