

THE DOCTRINE OF KHIYAR AL-AYB IN PROTECTING THE CUSTOMER'S RIGHTS

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ABSTRACT

Khiyar is a theory of option in Islamic Law of *Mu`amalat* which made upon protecting the right of related parties in transaction. While, *Khiyar Al-'Ayb* is one of the components which highlights the caption on option due to defects which give the party at the deficient place or buyers an option to not obliged to the contract as might cause an offend or oppress to them. It is deemed as an important provision to enclose together in the contract term to exercise the *Khiyar Al-'Ayb* as the natural right of the buying party. This paper attempts to address challenges endure and its prospects through this doctrine of option in realizing it in today immense transaction. Furthermore, there are some example cases in the real practice which before and after the practicing of *Khiyar Al-'Ayb* in the stipulated contract terms and condition.

Keywords: khiyar al-ayb, doctrine, defect, option, protection

Khiyar adalah teori opsi di Hukum Muamalat Islam yang dibuat untuk melindungi hak dari pihak terkait dalam suatu transaksi. *Khiyar Al-'Ayb* adalah salah satu komponen yang menitikberatkan suatu pilihan/opsi karena adanya kerusakan/cacat dan pembeli tidak berkewajiban sebagaimana tertera pada kontrak dimana kerusakan tersebut dapat merugikan atau menindas mereka. Hal ini dianggap sebagai suatu ketentuan yang penting untuk menyertakan bersama dalam masa kontrak untuk melaksanakan *khiyar Al - 'Ayb* sebagai hak alamiah kedua belah pihak. Penelitian ini berupaya untuk mempelajari tantangan yang ada dan berusaha mewujudkan doktrin tersebut dalam transaksi dewasa ini. Selain itu, ada beberapa kasus contoh dalam praktek nyata yang sebelum dan sesudah menerapkan *khiyar Al-'Ayb* dalam kontrak dengan syarat dan ketentuan yang ada.

Kata kunci: khiyar al-ayb, doktrin, cacat, opsi, proteksi

RESEARCH METHODOLOGY

The primary source of this study is the Qur'an. Other primary source which has been used in this study is the *hadith* of the Prophet, which is based on *Sahih* Bukhari and Muslim. Additionally, other popular books were used to support the study and other several sources in relation to the theory of option, which are: Theses on *Consumer protection under Islamic Law with special reference to the book of Ahkam Al-Suq*, by Aziz Abdel Samad Osman and *The theory of option/Khiyar in Islamic and Malaysian*

Law: a comparative study, by Mohd Afandi Awang Hamat.

INTRODUCTION

Allah S.W.T allows human beings to enjoy the good things in this world. It is recorded in the Qur'an, *Al-Mulk*, (67:15) "He it is Who has made the earth subservient to you (i.e easy for you to walk on, to live in and to cultivate, etc.), so walk in the path thereof and eat of His provision, and to Him will be the Resurrection."¹

Muslim therefore should realize that by implementing good deed will bring them closer to Allah SWT. Not only by practising *Habblum Minallah* acts (prayer, remembrance, 'umrah, hajj, charity and other typical acts), but also *Habblum Minannas* acts should be implemented as well based on the Law of Islam. These acts can be reflected by putting effort on *halal* professions and business according to *Shari'ah* law.

Accurately, as refer to *Shari'ah* decree, principles can be referred to values, major beliefs and doctrine rather rulings *per se*. In this way, it gives a broader perspective of the *Shari'ah* and helps accommodate a wider scope of thinking in Islamic commercial transaction. However, existing conventions may have positioned *Shari'ah* principles as synonymous with legal rulings. These principles such as the prohibition of *riba*, *gharar*, and *maysir* in commercial transactions are also distinct in Islamic legal rulings (*hukm shari'*).²

However, when *Shari'ah* principles are made equal to "legal rulings or values" (*ahkam*), it tends to narrow down the general meaning of *Shari'ah* principles into the purviews of the permissible (*halal*) and prohibitions (*haram*) and hence, their *Shari'ah* technicalities. Therefore, in *Shari'ah* view, there should be fair and justice treatment to every parties to transact in order to waive up the consideration right to any defective or damages due to failure or non-performing of contract conditions as for example, any defects on subject matter which affect the buyers side and as a counter defects, buyers are given option of defect where they can expire or change the defects object to contract³.

For further discussion, this paper represents an attempt to see that the welfare of customers is being protected according to Islamic Law. Through this appealing topic on *Khiyar Al-'Ayb*, we will know the importance of Islamic Law in daily basis profession and business, and the role of *Khiyar Al-'Ayb* in particular. It is acknowledged that *Khiyar Al-'Ayb* can be portrayed as a provision to protect the customer's welfare however, it is also notable that in certain area, sellers or manufacturers are reluctant in applying this option of defects because they think that it will trigger their risk factor of losing the profit at later time.

Moreover, the information that is used in this paper consists of secondary data. The refereed data used is qualitative that will explain based on previous studies, book review and other literature findings. The paper organized as follows. Section 2 then, presents on the literature review by previous scholars on their views regarding the doctrine of *Khiyar Al-'Ayb*. It is then supported with the rationale and the legality of *Khiyar Al-'Ayb* based on Islamic scholar's view in section 3. Next on section 4, the paper discusses on a theoretical framework of Contract of Sale.

In Section 5 it then specifically describes the theoretical framework of *Khiyar Al-'Ayb*. Later in Section 6, the study continues on discussing the issue on *Caveat Emptor* vs. *Khiyar Al-'Ayb*. In section 7, it

1 Abd Rahman, Z. (). *Money, You and Islam*. Malaysia : True Wealth Sdn Bhd

2 Rosly, S. A. (2010). Shariah parameters reconsidered, *International Journal of Islamic and Middle Eastern Finance and Management*, Vol. 3 No. 2, 2010, pp. 132-146.

3 Refer Rosly (2010), p.133

then highlighted some issues and challenges pertaining to *Khiyar Al-'Ayb* in the current practice and supported with. Furthermore, in section 8, the research expresses an overall conclusion and imposes some recommendations on *Khiyar Al-'Ayb* application. Finally, the paper ended with the bibliography part in Section 9.

LITERATURE REVIEW

The main purpose for the option in Islamic law is risk management in various forms. Therefore, there are areas in *Shari'ah* based options that are comparable to financial options and the differences are many. For this reason, *Shari'ah* options may not stand strong as basis for financial options. It is necessary to find solutions in other areas of Islamic law. *Shari'ah* options and financial options have been discussed by Arbouna (2007) in his paper. He suggest *Shari'ah* possible solutions for options which include *Hāmish Jiddiyah* and Call Option, *Ijarah* and Financial Options, *Ju'alah* Contract and Financial Options, Options and Combination of Sale and Contract of Gift and lastly Financial Options and Payment of Price in *Shari'ah* Options.

Moreover, as mentioned by Arbouna (2007), the concept of financial options was examined under the principle of sale. The paper examines the concept of *arbun* sale that plays a significant role in mitigating risks for both the buyer and the seller. The buyer is given the chance to think about the deal and the seller is protected against the loss of waiting, if a better deal comes up. However, this concept too is not similar to the concept of financial options from many respects.

Moyer (1985) found that complainers with relatively good information concerning their consumer rights are more active in seeking information and more aware of possible opportunity on rendering their option of revoking the contracts if any defects detected after receiving the goods. This group of buyers are more likely to express their dissatisfaction to sellers.

Moreover, Day (1977) mentioned that, if the actual performance of the product or service dilutes the consumer's status, they will be more likely to make a complaint in order to uphold their right as being violated to get a good condition of subject matter which is free from defects.

An effective complaint management must be a priority for every business, as the complaining behaviour provides companies with a chance to remedy the dissatisfaction and, ultimately, to retain loyal customers as giving proper option due to customer fairness treatment. (Franklin, 1992, Davidson & Dacin, 1997).

LEGALITY AND RATIONALE ON *KHIYAR AL-'AYB*

The legality aspect of *Khiyar Al-'Ayb* is basically based on the *Quranic* verses and *Hadith* by Prophet SAW with the support by Islamic scholars' justification and wise opinion on the issue discuss. As known, *Khiyar Al-'Ayb* is a doctrine of option due to defects which give the buyers the power to revoke or not comply with the contract condition as the subject matter is defects without their fault. *Khiyar Al-'Ayb* is made to give protection and safeguard towards buyers to exercise their right which has been violated upon receiving the goods.

It is highlighted that the legitimacy of *Khiyar Al-'Ayb* is to ensure that any sale and purchase agreement must be concluded with mutual consent in this sense, both seller and buyer agrees to the condition of the contract and willingly to enter into the contract without the issue of undue influence, fraud or threat and one party can revoke the contract if the other party is not fulfilling the condition of the contract. According to *The Mejelle*, Article 336:

"Any buyer in Islamic law has an automatic implied warranty against latent defects in the goods purchased".

Moreover, as refer to *Hadith* narrated by Hakim bin Hizam: The Prophet said, “*The buyer and the seller have the option of cancelling or confirming the bargain unless they separate, and if they spoke the truth and made clear the defects of the goods, them they would be blessed in their bargain, and if they told lies and hid some facts, their bargain would be deprived of Allah’s blessings.*” (Sahih Bukhari, Vol 3 (323), Book 34).

Besides, this is supported by the *Hadith* narrated by `Uqbah ibn `Amir (may Allah be pleased with him) who said, “I heard the Messenger of Allah (peace be upon him) say: *A Muslim is the brother of a fellow-Muslim. It is not lawful for a Muslim to sell his fellow-Muslim a deficient item, unless he shows him this defect.* (Related by Ahmad ibn Hanbal in his Musnad), and Ibn Majah in his Sunan (*Hadith* compilation classified by jurisprudential themes) (Vol.2, p.755). This is the wording as narrated by Ibn Majah. This *Hadith* is also narrated by Al-Bukhari in his *Sahih* (authentic book of *Hadith*, Vol.3, p.10) in the form of *Hadith Mawquf* (a *Hadith* narrated from a Companion of the Prophet) on the authority of `Uqbah ibn `Amir. The *Hadith* says: “*It is not lawful for a person to sell a commodity in which he knows that there is a defect, unless he makes it known.*”

Consequently, based on the opinion of the well-known 4 schools of jurists on the **period of valid execution of *Khiyar Al-`Ayb***; Shafie’, Hanafi, Hanbali and Maliki, all of them agree on the doctrine of *Khiyar Al-`Ayb* to be executed in order to protect the buyers’ right from being unjustly treated. According to Shafie’s school, the period for a valid *Khiyar Al-`Ayb* is on immediate (*Ala Al-Fawr*) notification to the seller. For example, when the buyer identifies the defects after receiving the goods and immediately clarifies the defects to seller.

However, as referred to Maliki’s school, *Khiyar Al-`Ayb* can be executed within 1 or 2 days after knowing the defects in which not an immediate action of informing the seller on the defects. While in Hanafi and Hanbalis’ school of thought, both jurists are in the opinion that *Khiyar Al-`Ayb* is valid anytime after notice on the defects of the goods in which the period of executing *Khiyar Al-`Ayb* is not stressed here.

In this situation, Shafie’s opinion is prevails where his opinion is more adequate and fair because if the buyer can easily report or claim any defects after several days of receiving the goods, this is a bias circumstances and will affect the seller’s right as seller can be in a danger place because buyer can simply claim on the defects goods even after long time ago and the worst case is, if the buyer take an advantage by using the *Khiyar Al-`Ayb* doctrine to defeat seller. However, there are certain conditions in which *Khiyar Al-`Ayb* can be exercised as long provided with a relevant reason and not purposely for self greediness.

Furthermore, according to article 336 of the *Mejelle*, “any buyer in Islamic Law has an automatic implied warranty against latent defects in the goods purchased which highlighted **the diminution of value due to *Khiyar Al-`Ayb***.”

Hanafi School implied that a latent defect as “everything which results in a diminution of value, according to commercial custom, whether this diminution is gross or minimal. The Maliki School allow for a reduction in price to be made if the defect occurs, but not allowed to cancel the contract. The Syafi’e School do not agreed with this doctrine, they do not recognise defects in the goods as giving rise to the option to annul the contract, except where such defects have prevented the purchaser from achieving his legal aims.

According to Hanafi and Hanbali the defect which renders the right for *khiyar* is any natural defect which has resulted in the decrease in value of the subject matter. The defect here is more to the material fact of the subject matter, whereas according to Syafi’e, the defect here refers to the personal value of the subject matter for example the defect which decreases the value of the reason or purpose

of the subject matter like the size of the shoes bough does not fit.

The rationale behind the legality of *Khiyar Al-'Ayb* is referring to the reason, for the existence of the doctrine of option due to defects. According to Othman & Zhou (2010), awareness of consumer's rights and consumer protection agencies is important for consumers making the decision to redress their dissatisfaction to firms or sellers by the means of applying the option of defects.

Hence, the consumer protection through exercising *khiyar al-'ayb* doctrine is one of the reactions to change consumer's helplessness. Guiding the consumers to enjoy their rights and the awareness of the existence of regulations and provisions becomes important when they encounter frustration or depression about the dissatisfied products or services (Agbonfoh & Edoreh, 1986).

Efforts are being made by governments to obtain greater enforcement from laws, however, these laws are not considered as particularly helpful to consumers for matters pertaining to trade descriptions for example, door-to-door sales, distance selling, and safety of particular product as consumers should be provided more protection by statutes (Rachagan, 1998). Thus, several Asian countries, including Malaysia, Singapore, Brunei, Pakistan, Bangladesh, Indonesia and Papua-New Guinea, have enacted statutes titled "Consumer Protection Acts/Codes" for consumers to solve specific problems.

Later, a comprehensive explanation on the definition of contracts and *Khiyar Al-'Ayb* will be discussed as to give clear meaning and condition on both elements for a better understanding.

CONTRACT OF SALE

4.1.0. DEFINITION OF CONTRACT/'AQD

The word contract in the legal sense refers to an agreement between two or more parties that is legally binding between them. The word '*aqad*' under Islamic Law literally means to tie between two ends of something either physically or morally.⁴ As stated in the *Qur'an, Al-Maidah* (5:1), *Al-Aqd* carries the meaning of covenant and fulfilment, as follows:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ أُحِلَّتْ لَكُمْ بَهِيمَةُ الْأَنْعَامِ إِلَّا مَا يُتْلَى عَلَيْكُمْ غَيْرَ مُحِلِّي الصَّيْدِ وَأَنْتُمْ حُرْمٌ إِنَّ اللَّهَ يَحْكُمُ مَا يُرِيدُ

Meaning: *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 or in Pilgrim grab: for Allah doth command according to His Will and Plan.*⁵

Under Islamic Law, the term contract ('*aqad*') in general refers to a legal transaction which involves a bilateral declaration namely the offer and acceptance. The '*aqad*' is a legal transaction which creates a new legal situation. Reference is made to certain contracts such as sales of goods where the actual delivery of the object of sale is regarded as a condition for the conclusion of the '*aqad*'.⁶

4.1.1 DEFINITION OF CONTRACT OF SALE

Sale is the ultimate permissible contract, as known in the *Qur'an, Al-Baqarah* (2:275)

وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا

⁴ Razali, S.S. *Islamic Law of Contract*. Cengage Learning Asia Pte Ltd.

⁵ Refer *Al-Maidah* (5:1)

⁶ Razali, S.S. *Islamic Law of Contract*. Cengage Learning Asia Pte Ltd.

Meaning: *"Allah has allowed trading and forbidden usury."*⁷

The contract of sale is allowed, but it becomes void if it contains any element of *riba'* as mentioned previously on the condition of clarifying whether the transaction or contract can be deemed as permissible or otherwise.

During the time of Revelation and in the presence of the prophet (PBUH), people were conducting trade contracts and he (the prophet) allowed it; and it is known that approval or sanction is an aspect of the (*sunnah*) of the Prophet. Moreover, he stated that, *"Two people conducting a sale agreement are in choice until they part."* This *hadith* is narrated by both al Bukhari and Muslim. He stated that, *"An honest merchant will be in the company of the prophets, virtuous people and martyrs."* This is a (*hasan*) approved (*hadith*). He was once asked, *"Which kind of earning is best?"* and he answered, *"[From] man's working with his hand and [from] a blessed and legal sale."* He said, *"Sale is but by mutual consent."* And this basic information will led us to the doctrine of *Khiyar*.

KHIYAR AL-AYB

DEFINITION OF *KHIYAR*

Option or *khiyar* in the *fiqh* literature means the right of one or both parties to a contract to make a choice between two opposing events: execution of a contract or suspension of a contract. The buyer or the seller is entitled to maintain the concluded contract or cancel it within a particular period due to a particular event. The termination of the contract based on options have various factors including, among others, the contract being not serving the interest of the terminating party, defect in the subject matter of the contract or violation of a stipulated valid condition.

Thus, an option in Islamic law gives a party in a contract the right, within certain circumstances, to reverse the contract. The options change the status of a contract from being binding to being "floating", as like, non-conclusive. They make a contract flexible. However, entitlement to options to cancel a contract or to perform depends on the nature of the underlying contracts. In some contracts, options give only one party the right to cancel the contract after the commencement of a contract and prior to completion, such as an option to cancel the contract by the worker in a reward-based contract (*jualah* contract)⁸.

Literally, the word *khiyar* denotes a choice on the part of the holder of the right of option who may either confirm the act or render it void. Legally *al-khiyar* means the option or right of withdrawal, as an example, the right for the parties involved to terminate the legal act unilaterally.⁹

According to Arbouna (2007) in complying with the requirements of protecting wealth, it is noted that the jurists had discussed mechanisms of mitigating risks of losses, misrepresentations or option due to product defect¹⁰. There are a lot of kinds of option applicable in *Shari'ah* law, this is exemplified in the number of traditional *Shari'ah* options which are:

⁷ Refer *Al-Baqarah* (2:275)

⁸ Arbouna, M.B. (2004). *Option Contracts and The Principles of Sale of Rights in Shari'ah*. p.52 (as edited in Ali and Ahmad, 2007, *Islamic banking and finance: fundamentals and contemporary issue*. Jeddah, Saudi Arabia: Islamic research and training institute.)

⁹ Razali, S.S. *Islamic Law of Contract*. Cengage Learning Asia Pte Ltd.

¹⁰ Arbouna, M.B. (2007). *Option Contracts and The Principles of Sale of Rights in Shari'ah*. p.51 (as edited in Ali and Ahmad, 2007, *Islamic banking and finance: fundamentals and contemporary issue*. Jeddah, Saudi Arabia: Islamic research and training institute.)

1. a. *Khiyar Al-Majlis* (Option during the meeting)
2. b. *Khiyar Al-Shart* (Option of condition)
3. c. *Khiyar Al-Rukyah* (Option of viewing)
4. d. *Khiyar Al-Ayb* (Option of defect)
5. e. *Khiyar Al-Tadlis, Al-Ghalat* (Option of impediments of consent)

For the next section, further discussion is being focused into *Khiyar Al-Ayb* in particular.

DEFINITION OF KHIYAR AL-AYB

Khiyar al-`Ayb is an option given to a party to rescind the contract when he discovers in the subject, defect that reduces its value or that makes it fall short of its requirements or specifications. This type of option arises only if the contract has been concluded.¹¹ The Malikis termed this option as “*khiyar al-Naqisah*” or the option of reduction.

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. If anything appears in the subject of the contract which does not match its original use or decreases its conventional market value, or makes it unfit to meet requirements expected of it, then the buyer have the right to exercise option of defect, as freedom from defects is the right of the buyer given in any commercial transactions.

It can be implied that the purpose of this *Khiyar* is to preserve the principle of fairness and justice in the trading which has become the basis for the contract. As being explained in the Qur’an, *An-Nisa* (4:29)

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِّنكُمْ وَلَا تَقْتُلُوا رِجْسًا ۗ إِنَّ اللَّهَ كَانَ بِكُمْ أُنْفُسًا

Meaning: *O ye who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you.*¹²

5.1.2 CONDITION OF VALID OPTION IN RESPECT TO KHIYAR AL-AYB

In order for *Khiyar Al-`Ayb* to become relevant, the following conditions must be fulfilled:¹³

An original defect, where the defect has existed in the subject matter prior to the time of sale or it occurs before the delivery and while it is still in the hands of the seller.

The defect which existed in the subject matter decreases its value or renders it unfit for the purpose to which it is intended for example, any defect that affects the substance or the value of the thing sold in such a way as to render it unfit for the use which it is lawfully destined.

The buyer must be unaware or ignorance of the defect (*al-jahl bi al-`ayb*) at the time of contracting and taking the subject matter into his possession. If the seller indicates that the defect is so manifestly obvious so as not to escape defection and the buyer accepted it without protest, he is considered to have renounced his right.

11 Rosly, S. A. Sanusi, M. and Mohd Yasin, Norhashimah . The Role of *Khiyar Al-`Ayb* in Al-Bay’ Bithaman Ajil *Financing International Journal of Islamic Financial Services*. Vol.2 (3).

12 Refer *An-Nisa*’ (4:29)

13 Razali, S.S. *Islamic Law of Contract*. Cengage Learning Asia Pte Ltd.

The absence of stipulation for waiving or releasing the seller from liability for the defect in the subject matter.

5.1.3 CONDITIONS UNDER WHICH RIGHT OF OPTION OF DEFECT CANNOT BE EXERCISED

The right to option cannot be executed at will as some conditions must be fulfilled before the buying party can exercise his right to continue or terminate the contract arising from a defective goods sold. These requirements are given below:¹⁴

- If the parties declare their approval of the contract. If only one does so, he loses the right of option but that of the other party remains until he makes a similar declaration.
- If the parties separate without any express reservation. A right of *khiyar* remains however as long as the separation has not taken place even though the parties remain together for a long time or get up and walk about together. Custom indicates what is to be understood by the word separation.
- When the seller sells a thing with a condition that he shall not be made liable for any defect in the subject matter and the buyer agreed upon that condition. The buyer loses his right of option of defect.
- When the buyer knew the defect in the subject matter but transfer or gives it to other persons as a gift or as a selling thing. He loses his right of option of defect.
- If the defect is slight and if it does not reduce the value of the object, and if it is conventional to overlook it, then the party cannot use it as a pretext to return the sold object.

5.2.0. BAY' AL-BARAAH

Chronically, as based on the thesis on "*The theory of option/Khiyar in Islamic and Malaysian Law: a comparative study*" by Mohd Afandi Awang Hamat. *Bay' Al-Baraah* is a different scope of discussion on *Khiyar Al-'Ayb* but both terms are interrelated in relation where one of the condition for a valid execution of *Khiyar Al-'Ayb* is where the absence of free-defect stipulation (*Bay' Al-Baraah*) in the contract's condition.

It is actually referred to the situation where seller not in all circumstances eligible to escape from being liable or responsible on the defects which relate to *Khiyar Al-'Ayb*. But, this situation is happen if seller not stipulated the free-defects liability and situation might be different if seller does mention the provision in the contract.

In this doctrine of *Bay' Al-Baraah*, it is exposes by seller as the counter of *Khiyar Al-Baraah* where sellers at the upon of contract or agreement with buyers, they stipulates that any defects will not deem as their liability later for instance in the case of sale of items which the seller him or herself in the stage of sincerity of not assured on the condition of the subject matter as physically means, its seems to be good and usable, but internally, it might not as good as its appearance like in a bunch of fruits, one or two might be less tasty than the others. This provision is made to give seller the option of free from liability in case of innocent in the first place.

CAVEAT EMPTOR VS KHIYAR AL-'AYB

¹⁴ Razali, S.S. *Islamic Law of Contract*. Cengage Learning Asia Pte Ltd.

CAVEAT EMPTOR

The doctrine of *Caveat Emptor* originated from the Latin phrase means “*Let the buyer aware*”. The buyer according to the doctrine of *Caveat Emptor* is called upon to make a thorough examination of the goods before he agrees to buy them. It is an obligation in any commercial transaction that the seller is to allow the buyer prior to entering into an agreement to inspect the subject matter (i.e. the goods) in order to ensure that the goods purchased are free from any unknown defect.¹⁵

A nostrum much quoted in traditional contract law courses is ‘caveat emptor’ (let the buyer beware). Buyers had to look after themselves and protect their own interests. The laissez-faire philosophy which lay behind this maxim took the view that the operation of unrestrained market forces was the best method for protecting consumers as a whole. Emphasis was placed on free competition providing alternative choices as the best way of satisfying consumer wants¹⁶.

In reality, even in the middle of 19th century when this philosophy was dominant, the consumer was not left without the protection of the law. Freedom of contract notionally existed and much judicial rhetoric was expended on justifying it but in reality the courts were quite astute in protecting consumers in situations where they were the victims of fraud, trading malpractice or unequal contracts.¹⁷

The doctrine of *Caveat Emptor* however does not imply any obligation on the seller to point out defects in the goods to be sold.¹⁸ The buyer has no obligation to inform if there is any defect in the goods, which means consumer welfare is less protected compare to Islamic Law (*Khiyar Al-Ayb*). The issue of this doctrine appeared when there is no opportunity to inspect the commodity. Thus, the maxim of *Caveat Emptor* cannot be applied.

KHIYAR AL-`AYB

In Islamic Law, the seller and the buyer should explain the condition of goods (good or bad side) of his or her business transaction. Basically, the theory of option in Islamic Law is to get rid of as much risk as possible, and to implement justice and fairness. This is to ensure that both the seller and the buyer are spared and freed from any form of exploitation and misrepresentation in their business transaction.¹⁹ The theory of option is considered as a helpful instrument for the seller to observe the basic condition in his or her transaction.

This doctrine does not only safeguard the purchaser from implication of buying defective products before the agreement is being concluded but also guarantees similar protection after the conclusion of the sale and purchase agreement.²⁰

FINDINGS

7.1.0. ISSUES AND CHALLENGES CONFRONT ON KHIYAR AL-`AYB IN PROTECTING THE CUSTOMER'S RIGHTS

15 Razali, S.S. *Islamic Law of Contract*. Cengage Learning Asia Pte Ltd.

16 Johnson, H. (2007). ‘Caveat Venditor’ (Let the Seller Beware). University College, Cardiff. *Emerald Backfiles*

17 Refer Johnson (2007). p1

18 Razali, S.S. *Islamic Law of Contract*. Cengage Learning Asia Pte Ltd.

19 Hideyuki, *Philosophy of the Islamic Law of Contract*.

20 Billah, *Islamic Law of Trade and Finance*, p.206

Is guarantee and warranty is considered as an implementation of *Khiyar al-Ayb*?

The necessity of a guarantee emerged as a means of protection to safeguard the right of the consumer. With the strength of the guarantee, a seller is liable to make the complete replacement of the purchased item, in case it was found to be below the prescribed standard.²¹ This is given by the seller or the manufacturer of a product to the customer and remains valid for a fixed period. The guarantee is a legal instrument irrespective of whether the customer paid for the article or not.

Likewise, the warranty is also an instrument to safeguard the rights of a consumer. It requires payment on the part of the customer to make it legally viable as in the case of an insurance policy.²² With the strength of the warranty, the seller or the manufacturer is liable to face the judicial courts if the seller or the manufacturer fails to comply with the provisions of the warranty on their part. Warranty is only relevant to the repairing of articles.

A guarantee is generally given by manufacturers whereas the warranty is provided by most of the retail sellers or distributors. In a case of motorcycle purchase for instance, there is the guarantee from the manufacturer and the seller has to provide the warranty on the vehicle from his part.

The main difference between guarantee and warranty lies in the dissimilarity of expectations in both the cases. Generally, it is believed that one can get his money back with the strength of a guarantee, if the product is defective or does not provide the assured standard. Warranty on the other hand, implies the provision of getting the article repaired if the product is defective. The most common in the recent period is the use of a limited warranty, which places conditions on the parts of an article, the quality of damaged incurred and the time period of validity of the document.

Naturally, the expectation in a warranty is reduced by the expression they use in the warranty document and hence the expectations are minimal. Therefore, there is a vast difference in the essence and spirit of guarantee and warranty which the consumer must understand before expecting the benefit of such a document on the purchase he makes.

Under Common Law, *Khiyar al-Ayb* is somewhat similar to breach of warranties and breach of condition as regards to the terms of contracts. Therefore, it gives the right to the affected party to claim for damages for repudiation of contract. Generally, it can be said that guarantee and warranty is considered as part of implementation of *khiyar al-ayb* in the sense that both aim at protecting society from problems surrounding the sale of defective products. In short, guarantee and warranty are instruments to safeguard the right of the consumer just like *khiyar al-ayb*; to preserve the principal of fairness and justice in the trading which has become the basis for the contract.

Issue Due to the Buyer Keeps Silent of the Defect in the Subject Matter.

The right of *Khiyar Al-'Ayb* will not be available if the defect is the one which could be apparent with usual examination and the buyer knows of it. However, if the defect does not appear at the usual examination, the option is never dropped.

²¹ <http://www.differencebetween.net/business/difference-between-guarantee-and-warranty>

The Option of Defects (*Khiyar Al-'Ayb*) is Transferable to Heir.

The option of defect is one of the options that are transferable to the inheritors as it is attached to the subject of the contract. The option holder's death does not cause the option to be lost because the object itself is transmitted to inheritors, and thus so is the option. This is because inheritors should inherit a sound and not a defective object.

Lack of awareness or refusal to impose the condition of *Khiyar Al-'Ayb* in the BBA contract clause by seller.

The refusal act to impose the condition of *Khiyar Al-'Ayb* in the contract is observed from one of Legal device of Al'Bay Bithaman Ajil (BBA) Financing. Based on the given rules on *Khiyar Al-'Ayb*, it is apparent that an Islamic bank as a selling party must hold all liability arising from all defective goods sold. But, in practise, as shown in the respective legal documentation, it is evident that the bank holds no such liability.²³

Following is the Property Sale Agreement that explained that bank as the financier and not the seller or vendor. The provision of Property Sale Agreement (PSA) that is related with the issue is:

"The bank, not being the developer of the property, shall not liable for any claims in respect of any defects, shrinkage or other faults affecting the property which are due to defective workmanship or materials or any other cases whatsoever of the property are not having seen constructed in accordance with the specifications and plans approved by the appropriate authority."²⁴

The issue that appeared is that *Khiyar Al-'Ayb* or option of defect is an option given to the customer to cancel the BBA contract when the defect occurs on the goods sold. By observing above PSA provision, it is a violation against Islamic Law, when the bank forced a circumstance that may contradict with the option of defect. Bank is not being responsible if defect occurs as the customer has no opportunity to examine the goods when contract is being concluded. In this case, there is no mutual consent happen in the trade, there is no fairness. Customer is being imposed by all responsibility and liability, and, in contrast, bank free from any liability and risk. The fairness does not applied in this matter and once again it is a violation against Islamic Law.

7.2.0 EXAMPLE OF REAL CASES IN CURRENT SCENARIO BEFORE KHIYAR AL-'AYB ESPOUSAL IN THE CONTRACT PHRASE.

Real cases in current situation pertaining to deficient party that bear such significant losses due to non-perform contract are very controversial because the so called victims party are not given enough damages or compensation in return. Besides that, eventhough now the deficient party may be granted with some amount of damages, given that they can prove of being innocent, but, it is still not fair to them if have to bear losses that not causes by them for example in the most famous and controversial issue on BBA non-performance contract.

Real Cases example:

Affin Bank v. Zulkifli Abdullah: The court affirms the judgment in the case of *Affin Bank v Zulkifli Abdullah* where it rejected the interpretation of the selling price by the plaintiff and applied the equitable interpretation of the term. The sum as the calculated selling price is calculated for the date

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when the facility was to be paid off.

Malayan Banking Berhad v. Ya'kup bin Oje & Anor: However, in this case, the defendant is fortunate to be granted a considerable amount of damages. It verifies the decision in the case where the court applies the principle of equity to demand the plaintiff to grant substantial rebate to the defendant upon the disputed BBA facility.

Bank Islam Malaysia Berhad v. Adnan Omar: In the case of *Bank Islam Malaysia Berhad v. Adnan Omar*, the High Court held that the defendant was bound to pay the whole amount of the selling price based on the grounds that he knew the terms of the contract and knowingly entered into the agreement. In this respect, the court applied the classic common law approach where the parties are bound with the terms and conditions of the contract.

Due to the issue arises, it is suggested to apply *Khiyar Al-'Ayb* in this BBA contract.

CONCLUSION AND RECOMMENDATIONS

The notion of options in the framework of *al-khiyar* in Islamic law is essentially ethical. While options in mainstream finance encompass all kinds of rights without obligations that have financial implications, *al-khiyar* generally refers to a specific type of right of either or both parties to the contract to confirm or rescind the contract. Of the various types of options, some are created by mutual consent of the parties to the contract, while others are in the nature of rights existing for either or both parties because of the very operation of the law.

A valid contract may still be entered into under conditions of *gharar* relating to the article of exchange, price etc., but with a provision of options for the parties to be affected by the same. The provision of options in the *al-khiyar* framework helps reduce *gharar* and brings it within Islamically acceptable limits. It helps undo any possibility of wrong committed on a party deliberately or unintentionally.

Islamic options are also justified on grounds of several larger benefits to the society. Through options, the parties to the contract are granted a 'reassessment' or 'cooling off' period over which they can rationalize their decisions or reverse the same. Thus, the possibility of conflicts between the parties because of their abrupt, irrational and wrong decisions is minimized.

In complying with the requirements of protecting wealth, we noted that the jurists had discussed mechanisms of mitigating risks of losses, misrepresentations or product defect. This is exemplified in the number of traditional *Shari'ah* options, such as *khiyar al-majlis*, *khiyar al-shart*, *khiyar al-'ayb*, *khiyar al-naqd*, to mention but few. The rationale for allowing this risk management mechanism is to allow the contracting parties a time to think about the contract and to avoid harm that may overwhelm them when the contract continued.

The jurists also established principles of guarantees for the same purpose, notably *dhaman al-dark*, which may be translated as guarantee against market misrepresentation. It is noted that the jurists are not in favour of any action that jeopardizes investment objectives so much so that they hold an entrepreneur, such as *mudharib*, liable for embarking on risky investments. Thus, risk management is an evident requirement of Islamic law from various aspects.

In practice, there are a multitude of problems that will arise. For example, there may be conflicts of interest between seller and buyers in the commercial transaction that lead to controversial issue like the *Khiyar Al-'Ayb* or option of defects stipulated in the contract. Besides, these problems are significant and will need to be addressed over a period of time with growth and government regulation on customer's protection.

However, if these problems can be surmounted and there is a growth in the number of sellers and

buyers courtesy on *Khiyar Al-'Ayb*, it could be a relatively strong source of rejoice and satisfaction for the Islamic commercial dealings advancement. It would also impose some market discipline as along with greater governmental regulation on the short-term and long term behaviour of many sellers especially the Muslim sellers to opt for fair treatment to buyers.

RECOMMENDATION

Herewith are some of the recommendations to be implemented by related parties to contract in order to uphold justice and protect the right of consumers: First, Liability comes together with gain and risk. Mutual consent in a trade should be prevailing in both parties (the buyers and the seller as well) in order to evade any bias action towards one party only. Second, develop quality service and regular inspection for example, on the subject matter that meet the demand and requirements of customers and defects should be identified before conclusion of contract. Lastly, Educate sellers in how to enclose the doctrine of *Khiyar Al-'Ayb* in the contract and explain the benefits of *Khiyar Al-'Ayb* to consumer as consumers play the important role in business transaction, therefore, by rendering such option will benefit them and retain their loyalty to the seller's company.

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