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OPTIONS (*KHIYARAT*) IN ISLAMIC LAW OF CONTRACT: AN APPRAISAL OF THE DETERMINATION OF MUTUAL CONSENT (*TARADHI*) OF THE CONTRACTING PARTIES

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ABSTRACT

Ordinarily, In Islamic law of contract, the normal way of consenting to commercial contracts is through offer and acceptance by the contracting parties, which formally signifies the consent of the parties. This is decreed by the verse in the Glorious Qur'an, surah al-Nisa which says that "O you, who believe, devour not your property among yourselves by unlawful means except that it is trading by your mutual consent." In the same vein, Islamic law provides khiyārāt (options), are regarded as the right ordained for the contracting parties to either accomplish or dissolve a contract. Therefore, using the doctrinal research methodology, the research explore the right of options (khiyārāt) as a mechanism of the determination of the Mutual consent (Taraḍī) of the contracting parties under Islamic law. The research found that apart from offer and acceptance in a contract, the parties can use khiyarat (options) as a means for the determination of the consent of the parties in the contract. The research recommended that: parties to a contract can utilize or insert the mechanisms of khiyarat options in a particular contract as another way of ascertaining the consent or otherwise

Key words: consent, options, Islamic law of contract.

1.0 INTRODUCTION

Generally, the history of Islamic law of contract in particular, is distinctive from any other legal system[1]. Its sources were originally derived from Glorious Quran and Hadith as primary sources of Islamic law. Muslim scholars came up with concise explanations, which deal with commercial activities. However, it must be considered that, the foundation of contractual agreements in Islam are covenants from Almighty Allah, so that people may not treat each other unjustly in the agreement they entered.[2] A text in the Glorious Qur'an expressly indicates that the believers must keep to their promises: "O believers keep faith with your contracts. The exegesis of this verse represent an order from Almighty *Allah* to fulfill all promises that have been entered into; whether it is a contract proper (*'Aqd*) or an agreement created by any means other than verbal, like in the contracts of sale, hire, mortgage[3] and the like.[4] Similarly, the mutual consent (*Taraḍī*) of

[1]Al-Zaagy, A. "*The Islamic Concept of Meeting Place and its application in E-commerce*" Masaryk University Journal of Law and Technology accessed from https://journals.muni.cz/article/view/2026 Last visited on 9/1/2017

[2]Sanusi, M.M, (2008) *"Money Laundering with Particular reference to the Banking Deposit Transactions"*, Journal of Money Laundering Control, Vol. 11 Iss 3 pp. 253, access from http://dx.doi.org/10.1108/13685200810889399 available as at 22/2/2017

[3] Dubyani, M.D, "*Muamalatul- Maliyyah Usalatun wa Muatharatun"* King Fahad Publishers, Riyadh, 2015, vol.1, 2nd Ed, at pp. 24. Access from www.ebooks4islam.com/2015/05/20.html available as at 11/1/2017.

[4]Suratul Maida, 5:1 Abu Abdullah, M. A(2005) *"Al-Jami'u Li Ahkamul Qur'an*" popularly known as *Tafsirul Qurdubi*, Maktabussafa Publishers, Cairo, Vol. 6 p. 205

the contracting parties, which emanates from the expression of contracting parties by making an offer and conceding to acceptance was the foundation of the contract in Islamic law.[5] However, there was no agreement in Islamic jurisprudence as to what should be regarded as a sufficient manifestation of consent, In the same vein, *Imam Ibnul Qudamah* exposited that the mainstay of a valid contract is to obtain the consent of both parties in a particular contract.[6] From the above mentioned positions, it is obvious that the proceedings in contract are what indicate the initial consent of both contracting parties,[7] that is the effect of tying the offer and acceptance, which will result in transfer of ownership of the subject matter.[8]

It is evident in the Islamic legal rulings concerning trade transaction; that gives each of the parties to the contract the choice or options (*khiyārāt*) to consider his own interest, so that he can confirm what benefits him and cancels out what appears to be against his interest regarding the sale even though their apparent consent was initially given in respect of that contract.[9] The fundamental wisdom, behind the permission of options in strict binding contracts is to give chance to the contracting parties, [10] for either to proceed or to cancel same. In another vein, there are also certain contracts which cannot be executed there and then, like contract with executory consideration, upon which certain activities are expected to be done in future, in such circumstances; consent may likely suffer, along the way. It is not so easy for a formal consent to lead to a real one because it involves the work of drawing the real intention or the definite explanation of subject-matter from each party[11].This work will therefore analyses the principles of *Khiyārāt* (options) to show how they serve as mechanism in the determination of the *Taraḍī* (mutual consent) of contracting parties.

2.0 Theoretical background

2.1 Contract in Islamic law

Contract in Islamic law refers to an Arabic word *Aqd,*[12] which literally means to bind, to tie, to fasten or to link together.[13] Technically, *Aqd* refers to the consensual relationship, which emanated from the expression of the contracting parties [14] in accordance with the Sharia in a way that the ownership of property or anything valuable can be transferred, and the positions of the parties will change at the conclusion of the contract.[15]

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[5] Shimizu, H. *"Philosophy of the Islamic Law of Contract a Comparative Study of Contractual Justice*" IMES working papers series no.15, The Institute of Middle Eastern Studies International University of Japan. Accessed from http://nirr.lib.niigata-u.ac.jp/bitstream available as at 2/2/2017

[6] Salim, A.K "*Sahihu fiqhussunnah wa adillatuhu wa taudhihu madzahibul Aimmati*" popularly known as *fiqhusunnah li abi malik, Taufiqiyya* publishers Cairo,(2003) Vol. 4,at pp. 257,Quoted from Al-irtijahu ibnu - qudamah

[7] Za'attary, A.D, "*Fiqhul Muamalatul Maliyyah-al Muqaran Siyagatun Jadidatun wa amsilatun Muasaratun*" Darul Asmau Publishers, 2010, Damascus, at pp., 9. Access from www.feqhweb.com/vb/ available as at 10/1/2017

[8] Omar, M.N. et al (2011) "*The implications of Ghubn in Islamic Contracts: An Analysis of Current Practices*" American Eurasian Network For Scientific Information (AENSI) access online from www.aensiweb.com/old/jasr/jasr/ last visited on 9/1/2017

[9] al-Fawzan, S. "*A Summary of Islamic Jurisprudence*" Al-Maiman Publishing House, Riyadh, (2009) 2nd Edition , Vol. 2, at p. 23

[10] Zubair, A. Q. " *Principles of Islamic Law of Contract*" I.I.C Publications, Lagos, 1991,at p. 116

[11] As-san'any, M.I "Subulussalami sharhu bulugul marami min jam'u adillatil Ahkami"Nazarul Mustapha Bazz Publishers, Al-qadhy, A.A, (eds), 1999. 1st Edition, Vol.3,at p.747

[12] Doi, A.I. "*sharia: the Islamic law*" revised and expanded by C. Abdussamad ,Ta-Ha publishers, London, second Edition, 2008 United Kingdom, at p.500

[13] Sa'ad, M,I "*Law of Contract*" in Tabiu, M. et-al (eds), Principles of Islamic Law, An Introductory Textbook, Ahmadu Bello University Press limited, Zaria, 2016. p. 212

[14] Abul-walid, M.A(2004) "Bidayatul Mujtahidi Wa Nihayatul Muqtasidi", Darul Hadith Publishers , vol. 3, at p. 146

[15] Al-Dasuqi, M.A "*Hashiyatuddasuqi ala sharhil kabir*"Darul hayaul kutubil Arabiya publishers ,Vol 3, p3

2.2 *Khiyārā*t (Options)

Islamic jurists have defined *khiyār* as the right ordained for the contracting parties to either accomplish or dissolve a contract[16] and they have regarded options *(khiyārāt) as* mechanisms to safeguard the contracting parties against hasty undertakings.[17]These mechanisms have been designed to serve as solution to contractual problems, such as, *Ghabn* that is fraud etc[18]

2.3 Consent (*Ridā)*

The Arabic word for consent is *Ridā* or *Taraḍī* etc. which literally means pleasure of heart and soul, opposite of discontent, will or choice (*Ikhtiyār),* mutual consent (*muwāfaqah)* and so forth.[19] However, when consent happens between two or more persons, it is called "*Taraḍī*" that is mutual agreement, which is based on the scale of "*tafā'ul"* which requires the participation of two or more parties, since trade and commerce are usually concluded between parties. Therefore, the mutual consent of both parties is required for conclusion of a valid contract.[20]

3.1 Examination of Legal Basis of Mutual Consent (*Ridāl-Mutabāyī'an*) In Islamic Law of Contract

All contracting parties according to Sharia, whether in traditional trading or in contemporary modes of businesses, must perform a contract based on a free and mutual consent,[21] It is also known as *Ridāl-mutabāyī'an* consensus of both parties. Islamic law gives a t framework in which the transactions should take place, so justice and fairness are ensured for all concerned.[22] *"O you who believe, do not devour each other's property by false means, unless it is a trade conducted with your mutual consent"*[23].

The above verse of Noble Qur'an has set down an important principle concerning trade this is why Ibnul Arabi in his *Tafsir* said;[24] "while some scholars referred to consent as options after concluding the contract before separation of contracting parties from the *Majlis* this is the view of Ibn Umar, Abu Huraira Shuraihu, Imam As-Shaaby and *Ibn Sirin*," and he also make references to the reports of *Abdullahi Ibn Umar* and his like; by the saying of the holy Prophet peace be upon him. according to him, *"* the contracting parties are under their choices in as much as they did not separate from the place of transaction except buying with choices or options*."*[25]

Imam Abu Hanifa and his students are of the view that, if the contract is concluded by mere expression, it means consent[26]. While *Imam Addabary*, interpreted the verse as; when the contract is concluded and the parties have not separated or left the Majlis with their consent of executing a particular

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[16] ibid

[17]Bagheri, P. Hassan, K.H.(2015) "The Application of the Khiyar al-Tadlis (Option of Deceit) Principle in Online Contracts and E-Consumer Rights" Mediterranean Journal of Social Sciences ,Vol 6 No. 4, MCSER Publishing, Rome-Italy. Access from https://ukm.pure.elsevier.com/en/publications/the- available as at 9/1/2017

[18]Uthaimin, M.S "sharhu Riyadussalihin min kalami Sayyadil Anam" an explanation of " Riyadussalihin min kalamisayyidil Anam" Darul Mustapha, Riyadh,2008, 1st Edition, vol. 2, atp.231

[19] Ar-Razy, M.A (1981) "Mukhtarus-Sihahi" Darul fikr, Beirut , Labenoun.

[20] Al-Qurduby, M. A. (2005). "Aljamiu li Ahkamul Qur'an" (Vol.5). (A. S. Muhammad Ayyad Abdulhalim, Ed.) Cairo, Egypt: Darus-safa Publishers at p. 153

[21] Vorah, b. Aun, W. (2010) "*The commercial law of Malaysia*" long man publishers, Kuala lumpur. at p. 8

[22]Muhammad, et al (2011) "*The Implications of Ghabn in Islamic Contracts: An Analysis Of Current Practices*" 2177Journal of Applied Sciences Research, 7(13): 2177-2181, 2011 ISSN 1819-544X

[23]Holy qur'an, Chapter 4 Annisaa verse 29

[24] Abdullahi, M.A "Ahkamul Qur'an" Assariyya publishers, Bierut, 2009, vol 1. pp. 428-430

[25] Abady, M.A "Aunul Ma'abud Sharhi Sunani Abi Daud" Darul Hadith Publishers, Al-qahira, Egypt. 2001 , Vol. 6, at p.311. quoted from hadith no 3455 this is one of the reason s for the rulings on khiyar al majilis, op-cit at hadith no 3594 vol. 4 p. 16
p. 311 under hadith no. 2996.

[26] ibid

contract, which means ordinary cause of transaction has been fulfilled, by tying the parties to their obligations in the offer and acceptance, bearing in mind, the existence of options in the *Majlis* without considering expression or caution.[27] It is very clear in this case that, the silence is excusable, because the contract has already being concluded and cancelled at the same time, this signifies lack of seriousness from the other party. *"wa mal in'san laulal lisan"* meaning who is human being without expression"[28]

In another vein, some jurists adopt intention of contracting parties as one of the base for validating their contracts, this is based on the well- known *Hadith* of the holy prophet peace be upon him where he said: "matters are determined by intention."[29] This *Hadith* implies a general principle that; one is rewarded for his deed according to his real intentions and not according to his actual deed which might be good in themselves but were motivated by an ill-intention.[30]This *Hadith* can also imply that intention of the parties in relation to contract is vital which is supposed to be reflected in their expression when entering into the contract[31], therefore, a contract's form or structure alone is not sufficient for ruling it as valid; there must a good intention to that effect.[32]The other categories of authentic *Hadith* which shed more light on the essentiality of mutual consent of the contracting parties read as follows: "The parties to the contract cannot be separated until with their consent**"**[33]The above mentioned *Hadith* goes to show that the parties to the contract must have a consensual agreement in any particular contract, this is the opinion of *Imam Al-tayyiby,* while *Imam Al -Qary* pointed out that, the aim of the *Hadith is* to have the realization of what each party to the contract aim for, like exchange of the commodity and the price, if not it could be cheating which is prohibited in the Sharia..[34]

3.2 forms of Consent in Islamic law of contract

Mutual consent is an intangible mental fact which needs to be manifested in order to identify its existence. And it can take so many forms one of which to include internal intention (*Iradā badināh*) and is hidden and cannot be known and proven before the court[35].For this reason *Ibnul Qayyim*[36]has this to say:

> "Verily, almighty Allah subhanahu wa ta'ala has put expression or statement to mankind in order to communicate and understand each other, and to know what is in their mind. Whatever someone intends to do can be known only by means of his expression. it is the expression that reflects his intention, upon which the verdict can be attained. Which means the expression must convey the intention of the parties, or what they also intends to do or to say. but it also extends to what is intended but it does not work, or speak on it, or what was spoken but not intended, or spoken by mistake, or spoken by forgetfulness, or disliked or ignorantly spoken but it is not intended to be expressed"

The expression of intention is formulated in two ways: nomination (*tasmiya*) or by indication (*Ishara*). The former represents a genuine intention of the contracting party while the latter represents

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[27] ibid

[28] ibid

[29]This hadith was narrated by Umar bin Al-khattab (ra). See Sahih al-Bukhari, 1/3, hadith No (1); Sahih Muslim, 3/1515, hadith No (1907).

[30] Al-Zubaidi, A. A. (1996). Tajridussarih Li Ahadisi Jamiussahih. (M. M. Khan, Ed., & M. M. khan, Trans.) Riyadh, Saudi Arabia: Darus-salam.

[32]Abozaid, A (2010) "Contemporary Islamic financing modes between contract technicalities and Shariah objectives" Islamic Economic StudiesVol. 17 No. 2, January, 2010

[33] Abady, M. S. op. cit note 25 p. 5. quoted from hadith no 3457

[34] Ibid

[35]Omar, M.N .et al(2011)"The implications of Ghabn in Islamic contracts: an analysis of current practices" American Eurasian Network For Scientific Information (AENSI) access online from www.aensiweb.com/old/jasr/jasr/ last visited on 9/1/2017

[36]Ibnul-Qayyim, M. A. (2016). "I'ilamul Muwaqqi'in An-Rabbil-Alamin" (Vol. 3). (A. F. Az-zawawy, Ed.) Cairo, Egypt: Dar-Al-Ghad Al-Jadeeda. at p.105

apparent intention which may leads to a variance in the validity of the contract. Whenever the expression and action jointly come together, it is apt to state categorically that the intention has been manifested, thus justice has been achieved in determining the consent of the parties in relation to any contract."[37]

Secondly, It is therefore necessary to have the external expression (*Iradā- zahira*) in order to indicate the presence of consent. Ibn Abideen on his part observed that,

"Until the expression is present the mere intention could not serve as a conclusive evidence of contract. The Niyya or mere intent cannot be inferred from any transaction or contract, because we do not know what someone intended to do until there is expression or action for what he really intended to do"[38].

It is basic that expression or statement or any action, must reveal the intention of the contracting parties, in other words, the contract must commiserate with internal intention.[39] If the internal intent conflicts with the external intent, Some scholars are of the view that, what would be considered in this case is internal intent (*Iradā badinā)* not external intent (*Iradha zahira)* because expression follows intent.[40]Furthermore, this is the clear meaning of maxim which says: *al-ibratu fil uqudi lil maqasidi wal ma'ani la lil al-fazi wal mabany*. Which means "in contract, effect is given to intent and not words or form'' More over this maxim gives the effect that in the event of difference between the intention and the outward expression in the interpretation of contract, the judgment would be in accordance with intention (by understanding the content of offer and acceptance) and the meaning and not to the literal wording.

3.3 The essentiality of Consent in the Formation of Contract:

Jurisprudentially speaking, the requirement of mutual consent of the parties is essential in establishing a valid contract, since dispositions of the contracting parties which constitute the foundation of contract is a product of their intention, thus reflecting their initial consent.[41] While the legal effects of those consents are derived from the injunctions of Allah *subhanahu wa ta'ala* as mentioned earlier in chapter 4 verses 25 of the Holy Qur'an; and this is the reason why jurists formulated the maxim that: "*Al-Aqd Huwa ma yujadul haq"* "contracts are legal creative cause"[42]which means sharia is the one that makes the contracts as cause that lead to their effect.[43]. The basis for this freedom in their opinion is in the legal maxim which says "*al-asl fil uqud al-ibaha*" "initial rule in the contract and condition under the sharia is permissibility".[44] Thus no contract or condition can be prohibited or invalidated until textual evidence from the Glorious Qur'an or the Sunnah of the holy Prophet, or an evidence of *Ijmaa* or correct *qiyas* is obtained to prove it.

They further opined that, if there is no prohibitive evidence for a particular contract or condition, the contracting party to such a contract or condition is free to constitute it. That is to say, the particular contract is free from any legal impediments to render it prohibited. Among the legal texts to support their opinion are: "O you who believe fulfill all your obligations"[45] and another verse which says "and fulfill every engagement, for every engagement will be inquired into in the day of reckoning"[46]While some jurist like *Imam daud al-Zahiri* opined that every contract or condition is prohibited except those contracts or conditions allowed by the sharia. This position was supported by the Hadith of the holy prophet peace be upon him, and it was reported to have said

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[37]Ibid

[38] Ibn-Abidyn, M. A. (n.d.). Hashiyat Ar-radd Al-Mukhtar Alal Durr Al-Mukhtar (popularly known as Hashiyatu ibn Abidyn) (2nd ed., Vol. 4). Cairo. At p.40

[39] Ibid

[40] Ibid, *this is the position malikiyya, shafi'iyya, Hanafiyya, and hanabila*

[41] Ibn-Abidyn, M. A op-cit above

[42]Zubair, A. Q. op.cit note 27 p. 5

[43] Ibid , For this reasons prominent jurists like Imam Malik and Imam Ahmad are of the view that, the parties to the contract are free to decide on their intention on their consents to the contract, that is by inserting further conditions on formation of the contract

[44] Zubair, A. Q. op.cit note 10 p.2

[45] Qur,an chapter 5 verses 1

[46] Qur'an chapter 17 verses 34

> *"Why is it people are stipulating conditions which are not available in the Book of Allah, the most Exalted. He who stipulates any condition, which is not found in the Book Allah, will not have it. And if he makes one hundred conditions the condition of Allah, the most Exalted is more rightful and more secure*"[47]

From the foregoing we have learnt that the requirement of mutual consent is one of the pillars of the formation of contract failure of which may render the contract invalid. Although as it has been mentioned earlier, the consent is a latent or secret thing, which jurists accept to be obtained through formula of contract *sighat-al- aqd* represented by offer and acceptance, which should be clearly spelt out externally. This external manifestation of intention is central in the determination of mutual consent of the parties and must be consistent with external intention.

4.0 Brief analysis of Options (*Khiyārāt*) In Islamic Law of Contract

The origin of Options *(Khiyārāt)* are clearly traceable in the Sunnah of the holy Prophet (peace be upon him), but the elaborate details and subdivisions of Option *(Khiyārāt)* in to various types have been all developed, as a matter of initiative and Ijtihad in the juristic writings of the scholars.[48] The basic concept of Options *(Khiyārāt)* which occurs in the Sunnah and in the manuals of fiqh, was intended not so much as a new trading formula,[49] or risk management tool, but as a way to ensure propriety and fairness, as well as to protect the integrity of Ridha (consent) of the parties in the completion of contract.[50] The typical variety of Options *(Khiyārāt)* validated by Sunnah of the options of stipulations (khiyar as-shart) which granted the buyer the options within a time frame (three days or so) following the conclusion of the contract to either ratify the contract or revoke it.[51] For example; in the Hadith of the Holy Prophet peace be upon him where he said, "Muslim must keep to the conditions they make"[52] and in another Hadith the Prophet was reported to have said to Habban ibn Munqadh al-Ansari*;* "…..When you are to conclude a trade you may say that there must not be fraud and you reserve for yourself an option of three days….."[53] In another Hadith reported by Amr ibn Shuaib that the Prophet was reported to have said "The two contracting parties have a right of options as long as they are not separated or the sale was sale with options"[54]

These narrations clearly indicated the rights of the contracting parties, and demonstrate the validity of khiyar-as-shart[55]. Likewise, on the authority of Abu Khalid, hakim Ibn hazim (may Allah be pleased with him): the Prophet peace be upon him was reported to have said; "Buyer and seller are bound by their options in as much as they are at the Majlis (place of entering the contract) if each of the contracting parties fully submitted to conclusion of the contract by reciprocating what is required from him, may Allah bless the agreement, but if they hide any information or lied to each other ….. It destroys the blessings of each other in the transaction"[56]

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[47] Abady, M. S. op. cit note 25 p. 5.quoted from hadith no 3480

[48]Kamali, Kamali, M. H. (2000). Islamic Commercial Law: An Analysis of Futures and Options.cambridge, United kingdom: The Islamic Text Society.

[49]New trading formula in the future trading in option is a new concept which is in practice in some developing Muslim countries and referring the principles of maslaha(consideration of public interest) as enshrine in the sharia, as the basis of developing the concept. This concept will be discuss later in this research

[50]Kamali, M. H, op-cit above

[51]Ibid

[52]Abady, M.A "Aunul Ma'abud Sharhi Sunani Abi Daud" Darul Hadith Publishers, Al-qahira, Egypt. 2001 , Vol. 6, at p.311. quoted from hadith no 3455 this is one of the reason s for the rulings on khiyar al majilis, op-cit at hadith no 3594 vol. 4 p. 16

[53]Al-Asqalany, op-cit at vol.4 p.434 hadith no.2117 and Al-maqdisi, M. A. (2006). Al-umdah Fil-Ahkam Fi Ma"alimi Halal wal-Haram an Khairil Anam Muhammad Alaihissalatu wassalam Min Man tafaqqal alaihi Shaikhani Bukhari Wa Muslim (Vol. 1). (A. M. Shakir, Ed.) Cairo: Maktabatus-sunnah.

[54] Abady, M. S. op. cit note 8 p. 2. quoted from hadith no 3481 opcit above

[55]ibid.

[56]Al-maqdisi, op-cit at note 18 above.

The ruling of the above-mentioned Sunnah has evidently envisaged the eventuality of a situation of uncertainty, or where the buyer does not possess sufficient knowledge of the subject matter, in this regard the party lacking in the knowledge could either validate or terminate same when it comes to their knowledge what they dealt in[57]. A sale of this type cannot be said to be reflective of true intentions of the buyer especially if the subject matter turns out to be defective in a way that is not obvious to the naked eye to detect[58]. Following this, the options that the Islamic law has granted are of two types, namely, those which are granted by the law itself regardless of any contractual stipulations, and options which materialize only as a clear provision in the contract.[59] The former variety is basically confined to the options of defect khiyar al- Ayb and the options of viewing khiyar ar- ruuya, thus the law grants the buyer an option on account of material defects, in which case he is automatically entitle to seek revocation of contract on that basis,[60] or when he sees the object he has bought or ordered for the first time, but it is the second type option that is a contractual options such as the option of stipulations (khiyar as-shart).

4.1 Importance of Options (Khiyārāt)

a. Options *(*Khiyārāt*)* are one of the mechanisms under Islamic law designed to protect the parties to a particular contract in respect of a particular commodity in a contract.[61] Sometimes in contracts, the injured party are left with no remedy in the event of any disappointment that could arise from the part of the vendor or the buyer, vice-versa.[62]

b. Options **(**Khiyārāt*)* help to undo deliberately or unintended act, thus causing the possibility of conflict between the parties,[63] that is to say, if the party that has the right to stipulations like purchaser it will appear that the commodity has entered into his ownership since the formation of the contract. But if the purchaser exercises the right of options of stipulation by revoking the contract the commodity returns back to the ownership of the seller[64]

c. Through options the parties to the contract are granted reassessment or consultation period over which they can rationalized their decision or reverse same, due to an abrupt or irrational wrong decision that had been taken.[65] It was reported from Ibn Umar which says "either party can choose or opt to have for the other or the options belong to you only".[66]The above mentioned positions, suggest the liberal approach of Islamic law of contract in relation to the right of the parties, which signifies that options are rights which belong to all of the parties and no one has a monopoly of it.[67] The reason behind this position is the Hadith of the Holy Prophet (peace be upon him) who was reported to have said;" The believers are bound by their stipulations except stipulations that allow what has been disallowed"[68] and in another Hadith which says " in as much as they are not separated"[69] that is from the meeting place of the contract. Additionally, these Hadith signifies

[57]Kamali, M. H., op- cit note 1 at p9
[58]Ibid
[59]ibid
[60] Ibid
[61] Arabi, O. op-cit note 69 p 13
[62]Elahi Y., Abdul-Aziz, M. (2011) "Islamic options (al-Khiyarat); Challenges and opportunities" International Conference on Information and Finance IPEDR vol.21, IACSIT Press, Singapore at page 3 available at http://www.ipedr.com/vol21/20-ICIF2011-F10019.pdf
[63]Elahi Y., Abdul-Aziz, M., op-cit at note 151 above
[64] Zubair, op-cit at note 10 p 2.
[65]Kamali, M. H., op- cit note 9 at p1
[66] Uthaimin M.S "Sharhu Riyadussalihin Min Kalami Sayyadil Anam" an explanation of " Riyadussalihin min kalamisayyidil Anam" Darul Mustapha, Riyadh, vol. 2, 2008, pp.231
[67]Al-baghdady, Q. A. (n.d.). Alma'unah Ala Mazhaby Alimil Madinah Imam Malik Ibn Anas (1st ed., Vol. 3). (H. Abdul-haq, Ed.) makkatul-mukarram, Saudi Arabia: Mustapha Albaz
[68]Kamali, M. H., op- cit note 1 at p9.
[69]Ibid

that, the moment the parties separated from each other with their bodies separation, the right of option has elapsed, and the contract become binding and enforceable.

d. The Holy Prophet (peace be upon him) says "if they tell the truth and revealed all what is needed to be known in the contract may Allah bless the transaction"[70] this brings to the point that the true nature of the subject matter must be told or explained to extent that the seller must clearly explain the nature of his commodity, any deformity, damage, or anything that may likely diminish the value of the commodity must be stated. Lastly, Ibnul Qayyim added more flavor to the significance of Options ***(****Khiyārāt)* by stating that[71];

> *"The Lawgiver has ordained to us, that the options are allowed during the contract session in the interest of the two parties, so also to ascertain the mutuality in consent, and satisfaction of both parties. Allah* subhanahu wa ta'ala *clearly stipulates in transactions when he said in the glorious Qur'an "… by mutual consent …" Sometimes a contract is concluded without being reconsidered or reviewed, therefore the sharia necessitates the existence of the session during which the two parties can reconsider their deal. Thus according to the above quoted hadith, both the seller and buyer have the choice to confirm or cancel the deal as long as they have not separated from the place of deal. However if the two parties or one of them ignores this aspect of choice, the deal is still deemed a valid one, once the transaction is concluded. This right of option is open to both seller and the buyer, and each of them is allowed to ignore it "… As long as they have not parted their ways and are still together, or one of them gives to other the option of keeping or cancelling the bargain as the Prophet peace be upon him said"*

5.1 Consent in the Light of Options (*Khiyārāt*)

The legal framework of options in Islamic law of contract entails the complete mutual consent of the contracting parties, which signifies the bedrock or foundation of the agreement, and entails the essentials of contract.[72] The basic concept of options which occurs in the *Sunnah* and in the manuals of *fiqh*, which can be use as risk management tool and its a way to ensure propriety and fairness, as well as to protect the integrity of mutual consent of the parties in the completion of contracts[73]. The ruling of the *Sunnah* has evidently envisaged where the buyer does not possess sufficient knowledge of the subject matter, or he had agreed to buy. A sale of this type cannot be said to be reflective of true intention and consent of the buyer especially if the subject matter turns out to be defective in a way that is not obvious to the naked eye to detect, except with the fulfillment of the requirement of those stipulated days.

Following the above mention positions, the options that the Islamic law granted are of two types, namely, those which are granted by the law itself regardless of any contractual stipulations, and options which materialize only as a clear provision in the contract.[74] The former variety is basically confined to the options of defect *khiyar Al- Ayb* and the options of viewing *khiyar al- Ru'uya*, thus the law grants the buyer an options on account of material defects, in which case he is automatically entitled to seek revocation of contract on that basis, or when he sees the object he has bought or ordered for the first time, but it is the second type of options that is contractual options, such as the options of stipulations *khiyar al-shart.*,

Lastly, while recognizing the basic freedom of contract and also the binding nature of contract, Islamic law also entitles the contracting parties to stipulate that the contract so concluded will become more effective only after further ratification and approval, which means the consent of both parties must be reflective. This is basic rationale behind the provisions of the sharia concept of *al-Khiyārāt* that modern writers have utilized in their discourse on the validity or otherwise of trading options.[75]

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[70] Al-Asqalany, op-cit at vol. 4 p.419 hadith no

[71]Ibnul-Qayyim, M. A. (2016). "I'ilamul Muwaqqi'in An-Rabbil-Alamin" (Vol. 3). (A. F. Az-zawawy, Ed.) Cairo, Egypt: Dar-Al-Ghad Al-Jadeeda. at p.105

[72]Kamali, M. H. op. cit note 1, p.9

[73]Ibid

[74] Dubyani, D. M. op.cit note 8 p. 1

[75] *Kamali, M. H. op. cit. note1 p.9.*

6.0 Examination of consent in some types of contract in Islamic law

6.1 Al -Aqd al –Munjiz (Prompt or Executed Contract)

This is a contract which takes immediate effect upon its formation, without further delay. The parties take possession of commodities and price, by the buyer and seller respectively[76]. In other words, this type of contract requires promptness on its execution, and any delay destroys its bindingness, and it is not contingent upon any happenings in the future,[77] Furthermore, The consent of the contracting parties is clearly ascertained before its conclusion, thus the need to ascertain that consent may arise where there is a problem in respect of the subject matter or the price in the contract On this background, the mechanism of *khiyarat* (options) may come in to protect the interest of either of the parties not at default, and the option can be used either to proceed with or rescind the contract.

6.2 al- Aqd al- Mudhaf li Mustaqbal (Deferred Contract)

This is a contract that is ordinarily concluded by the parties but the taking of the possession of the subject matter, or its effect, is deferred to a future time.[78] The deferred contract is thus valid according to the Hanafis and Malikis as at the moment of conclusion but it becomes effective only at a specified time in future which is normally stipulated as a condition of the contract. Ibnul Qayyim has added another point to corroborate the above said position that *bay as-salam* and *istisnaa*[79] are normal contract but the requirement of existence of subject matter is not a pre-requisite of valid contract if the attributes of the object of contract are known and can be described accurately enough to eliminate the conflict, uncertainty and deception.[80]Furthermore, Shafi'i jurists do not recognized the division between *al- Aqd al-Mudhaf li Mustaqabal* (Deferred Contract) and *al- Aqd al- Mu'allaq* (Contingent Contract) they described that, both two contracts to be concluded in the present time but become effective in the future. while in the case of *al Aqd al-Mudhaf li Mustaqabal* (Deferred Contract), the stipulation as to the time affects only the consequence of the contract but not its cause, and the position is different in a *al -Aqd al- Mu'allaq* (Contingent Contract), where the stipulated condition affects the essence or cause of the contract, and the contract does not come into being unless the stipulated conditions materialize.

In another point of view, the general rule of the requirement of a valid contract upheld by the jurists is that the subject matter of the contract must exist at the time of contract[81]. The sale of a non-existing product (*bay al ma'adum*) is therefore not allowed, and it does not matter whether the non-existence is temporary or permanent.[82] The jurists justify this position by showing that the effect of contract which transfers ownership of property which is abstract or invisible may amount to dealing in *gharar*, it is therefore deemed necessary that the effect of contract with transfers of ownership must be attached to something on existence at the time of conclusion of contract.[83] This requirement is generally maintain in contracts related to tangible objects like in executed contract *Aqd Munjiz*, but when the subject of the contract is something that can only come about at future time like in this type of contract we are discussing, that is deferred contract *aqd mudhaf li mustaqbal* like in manufacturing contract *istisnaa* for example, this requirement of existence of the subject

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[76] ibid

[77] *Ibid*

[78] *Zubair, A. Q. op-cit at note 10 p. 2*

[79] *Briefly, this is manufacturing contract which consists of an agreement made in advance to pay a definite price for something that is to be made and delivered at a future date. This types of agreement has been validated by general consensus (ijma) and custom (urf) and the necessities of the business*

[80] *Ibnul-Qayyim, M. A. (2016). "I'ilamul Muwaqqi'in An-Rabbil-Alamin" (Vol. 1). (A. F. Az-zawawy, Ed.) Cairo, Egypt: Dar-Al-Ghad Al-Jadeeda. , at p.357*

[81] *Mohammed L. A. (2009). Contemporary Issues in Islamic Jurisprudence. (M. L. Ahmadu, Ed.) Benin, Edo, Nigeria: Rawel Fortune Resources.*

[82] *Ibid*

[83] *Kamali, M. H. op-cit at note 1 p.9*

matter at the time of executing the contract is missing[84], and according to the majority of the scholars, this is an exception to the general rule. As mentioned earlier, the Muslim jurists have disagreed about the validity of a s ale in which the subject-matter is absent and cannot be seen at the time of contract, the basic issue is once again one is of *gharar* arising from ignorance of subject matter, but the jurists are still in disagreement as to whether the *gharar is* trivial (*gharar yasir*) or major (*gharar kathir*), [85] Imam As-shafi'i has held that *gharar* is a major one,[86] whereas *Imam Malik* held opinion that the *gharar* here is trivial. The contracts that come under this category include:

i. contracts with a condition to take effect in a future time for example *al- wasiyyah* (bequeath), it takes effect at the death of *Musi* (legator)[87]
ii. That contract that requires immediate transfer of ownership of the subject matter of the contract between the contracting parties, which is immediate execution.[88] The jurists have suggested that the rationale behind making these contracts to be of immediate execution is that the Law giver, makes them cause of their legal effect , any suspension of their execution may lead to the loss of their causative link to their legal effect[89]. Thus the object of sharia has been defeated.[90]
iii. Contracts that are capable of being executed as well as accommodating of suspensory effect, the reason for their suspensory nature and at the same time executed in nature is that they only relate to the ownership of the usufruct which is recurrent time after time, their suspensory effect does not therefore affect the ownership of the substance of the property.[91]

Going by the above mentioned explanation on this type of contract, it is quite clear that, this is a contract with specific features that accommodate some activities in the future time, which reflect one unique nature, which is the subjective nature of the consent of either of contracting parties. That is to say, the consent of the either of the parties is subject to the fulfillment of all conditions attached to it in future, even though the contract was executed before the said future conditions, that is by making an offer and acceptance which signifies the consent of the parties at the first instance.[92] Thus, it is glaring that the consent of the parties cannot be clearly shown until after the execution, not after the conclusion of the contract.

6.3 al- Aqd al- Mu'allaq (Contingent Contract)

As the name of this type of contract implies is a contract which is dependent for its conclusion upon the occurrence of some other events in a future time. If the condition occurs, the contract may be executed at once or at the stated future time.[93] This type of contract goes with *khiyar al-shart* that is options of stipulation, guiding the performance of contract[94]. If the stipulated conditions have already materialized, the contingent contract automatically converts to a prompt contract[95] The Muslim jurists are of the view that before such contracts can be entered into, certain conditions must be present[96]; these conditions are:

i. That the conditional act upon which the execution of the contract is dependent must be non-existent at the time of the contract and that it is possible to be carried out;[97]

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[84] *ibid*
[85] Zubair, A. Q. op.cit note 10p. 2
[86]Ibid
[87] Ibid
[88] Zubair, A. Q. op-cit at note 10 p. 2
[89] Kamali, M. H. op-cit at note 1 p.9
[90] Ibid
[91] ibid
[92] Zubair, A. Q. op-cit at note 10 p. 2
[93] Kamali, M. H. op-cit at note 1 p.9
[94] Ibid
[95] Zubair, A. Q. op-cit at note 10 p. 2
[96]Ibid
[97] ibid

ii. That the conditional act is attainable in future time or otherwise it would be a prompt contract.[98]

However, for this type of contract with the execution of which is contingent on the occurrence of other things in a future time, it has resemblances with *al-Aqd Mudhaf li Mustaqabal*.. It is imperative to point out here that the consent in this contract rarely ascertainable at the point of concluding the contract. The best avenue to realize the true consent of the parties is after the said happenings in the future.

7.1 Major Findings

The major findings of the Research are as follows:

Islamic contracts law is based on *Ridā* (consent) of the contracting parties. It is also the fundamental requirement behind all investment transactions in Islamic law. And it is the fundamental way of ascertaining the true consent of contracting parties in a given contract that is through making an offer and acceptance (Ijab and Qabul).

By this research, we came to realize that, by adopting numerous mechanisms of khiyarat options can be used as another form of ascertaining the consent of contracting parties which in other way round, serve as a mechanisms designed to serve as a solution to contractual problems.

This research also found that khiyar al-Shart (options of stipulation) gives to a party to a contract a legal or contractual right to terminate the contract after its conclusion when it appears not to serve the purpose of such a contract as agreed. On the other hand, the consent can clearly be seen from the conduct of inserting the khiyar al-Shart which is agreed by both parties, since the legality of a transaction is intimately connected with the internal intentions of the parties involved.

This research further found that Khiyar al-`Ayb as an option given to a party to rescind the contract when he discovers that the subject matter to the contract is defective, or it fall short of its requirements or specifications, and the contract is subject to the fulfillment of such specifications, hence such consent to the contract was not available.

It was further found that, the basic idea behind the insertion of khiyar al- Ruuya in a given contract is to establish whether the buyer has consented to the subject matter supplied to him or not. This is because at the time of entering the contract the consent of the supplier is actually given pursuant to the terms of agreement while the subject matter of the contract may likely not be present but it is actually subjected to the viewing of the party.

Lastly, It was observed in this research that khiyarat options are generally introduced to the contract for various purposes and reasons; provided the reasons for an option are within the principles of Islamic law**.** It was further observed that there are options that are inherent in the contract, or either created by the agreement of the contracting parties. These options exist only when the contracting parties choose to attach a particular right to the contract. However, they must have been consented by the other parties. Similarly, khiyarat can be considered as an instrument that will determine the actual consent of contracting parties in the contract.

8.0 Conclusion

From the distillation of all the authorities in this work, with particular reference to the findings, observations and recommendation of the research, it is obvious that, the requirement of consent of the contracting parties in any particular contract is fundamental; this principle can be seen from the verses of chapter 4 verses 29. This is in addition to adopting numerous mechanisms of khiyarat options as another instrument aimed at protecting parties to the contract rights, and in any forms of contract, they can be used as another form of ascertaining the consent of contracting parties

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[98] *Ibid*

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