

MAQĀSID AL-SHARĪ'AH AND STIPULATION OF CONDITIONS (SHURŪṬ) IN CONTRACTS

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I. INTRODUCTION

One of the *maqāsid al-Sharī'ah* (objectives of the Sharī'ah) with regard to wealth is ensuring that it circulates smoothly in society. Among the means that the Sharī'ah uses to achieve that objective is its strong encouragement of undertaking necessary types of commercial activities and its legislation of various types of contracts in order to ensure orderly transfers of wealth on the basis of mutual consent.

The contracts validated in the Qur'ān and Sunnah are not exhaustive, and new transactions can be introduced as long as they do not contradict the principles of the Sharī'ah. The underlying principle is that of permissibility (*ibāḥah*).

Likewise, the right to stipulate conditions (*hurriyyat al-ishtirāf*) in a contract is also acknowledged in line with the freedom of entering into contracts (*hurriyyat al-ta'āqud*). Those facilities are acknowledged as a means of realizing *maṣlaḥah* (benefit) and preventing *mafsadah* (harm) to the contracting parties.

II. RESEARCH OBJECTIVES

This research aims to look into the issue of contracts further by exploring the nature of conditions (*shurūṭ*) in Islamic contract law, their types and classifications, and by examining their relationship

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with the objectives of the Sharī'ah. All the conditions stipulated are required to be legally valid (i.e., in line with Islamic law/*aḥkam al-Sharī'ah*) and supportive to the objectives of Sharī'ah (*maqāṣid al-Sharī'ah*).

III. *SHURŪṬ* (CONDITIONS) IN ISLAMIC COMMERCIAL CONTRACTS

The Arabic word for 'condition' is *sharṭ*; the plural is *shurūṭ*. It is related to the word *sharaṭ*, which means a sign or indicator. Literally, it means 'a provision, condition, clause or stipulation' (Wehr, 1980: 465). *Sharṭ* can carry the connotation of binding another to something or committing oneself to it (*ilzām al-shay' wa iltizāmuhu*) ('Imārah, 2009: 175).

In the technical language of jurists, a *sharṭ* is "[a factor] whose absence requires the absence of a certain rule whereas its presence does not, in and of itself, require the presence or absence of that rule" (Badrān, 1996: 74).

Sharṭ (condition) in this regard implies a necessary element for a rule (*ḥukm*) and hence legality of a contract (*'aqd*). The presence or absence of the relevant *sharṭ* is taken into account in recognizing its legal effects (al-Ba' lī, 1989: 284; Kamali, 2007: 338). Nevertheless, unlike a *rukṅ* (literally, 'pillar') which is part of the thing with which it is associated and partakes of its essence, *sharṭ* is external to that thing. The existence of *sharṭ* (condition) is necessary for a valid contract, but its existence does not necessarily mean that a contract comes into existence. This is because *sharṭ* is an external attribute to the contract and does not participate in the contract's essence.

IV. TYPES OF CONDITIONS IN *MU'ĀMALAH* CONTRACTS

There are various types of conditions (*shurūṭ*) approved by the Sharī'ah. They can be classified into several categories based on their application, source, effect and validity.

A. Types of Condition with Regard to Application

With regard to application, conditions are classified into two categories:

- The condition which affects the cause and gives it its full effect. For example, ownership of the *niṣāb* (the minimal amount of wealth upon which *zakāh* is due) is the effective cause (*sabab*) of the duty to pay *zakāh*. One of the conditions for the *sabab* to take effect is the passage of a year after the owner gains possession of the *niṣāb*.
- The condition which directly affects the rule. For example, the lawfulness of the subject matter in a sale contract is a condition for the contract's validity. When such lawfulness is not fulfilled, the sale contract is invalid (Haqqi, 2009: 71).

B. Types of Condition with Regard to Its Source

With regard to their source, conditions are divided into legal conditions (*al-shurūṭ al-shar'īyyah*) and improvised conditions (*al-shurūṭ al-ja'liyyah*).

- *Al-shurūṭ al-shar'īyyah*: These are conditions laid down by the Lawgiver so that the contract can be valid and concluded. For example, the condition that the parties involved in a sale contract be sane (*'āqil*) and of sound judgment (*rushd*).
- *Al-shurūṭ al-ja'liyyah*: The conditions that are laid down by the *mukallaf* (a person having full legal capacity) in a contract in order to achieve certain objectives. The improvised condition should be in line with the nature and objective of the contract (*muqtadā al-'aqd*), should bring benefit to the contracting parties and should not contradict the legal conditions (*al-shurūṭ al-shar'īyyah*).

Al-shurūṭ al-ja'liyyah are further classified into three sub-categories (Faddād, 2005: 171):

- *Al-sharṭ al-ta'liqī*: Improvised condition of contingency which is designed with the proviso that the effect is made contingent upon the existence of an event in the future. For example, a person appoints somebody to be his agent on the condition that he should

come and move to his country. In this case, the contract of agency (*wakālah*) would not come into effect unless and until the agent moves to the principal's country.

- *Al-sharṭ al-taqyīdī*: Restrictive improvised condition which is put in a contract by one of the parties to impose certain restrictions upon the other party that are not imposed by the Sharī'ah. For example, the buyer requires the seller to deliver the goods to a certain place.
- *Al-sharṭ al-idāfī*: Improvised condition that defers the completion of a contract's effects until a stipulated future time.

C. Types of Condition with Regard to Its Effects on the Contract

The conditions with regard to their effects on contracts can be classified into four types (Ba'li, 1989: 287-288):

- *Shurūṭ al-in'iqād*: Preconditions for concluding the contract such as the full capacity (*ahliyyat al-adā'*) of the contracting parties—i.e., possessing sanity and sound judgment—or the condition that the subject matter of the contract is legal (*ḥalāl*).
- *Shurūṭ al-siḥḥah*: Conditions for contract validity such as the condition that no *ribawi* element be present in an exchange contract or the condition of consent (*riḍā*) among the contracting parties.
- *Shurūṭ al-nafādh*: Conditions for the execution of the contract; for example, full ownership of the goods being sold. In this regard, if others have a right in the goods, such as in joint ownership (*shirkat al-milk*), the contract cannot be executed.
- *Shurūṭ al-luzūm*: Condition that makes the contract binding such as the absence of options (*khiyār*) in a sale contract. The contract is not binding until the option to either buy or not buy is exercised.

D. Types of Condition with Regard to Validity

With regard to their soundness and validity, conditions are categorized into two types according to the majority of jurists (*jamhūr*): *ṣaḥīḥ* (sound) and *bāṭil* (void). The Ḥanafīs, on the other hand, classify conditions into three types: *ṣaḥīḥ* (sound), *fāsīd* (voidable) and *bāṭil* (void).

- *Al-shart al-ṣahīh* (sound condition): Any condition which is in line with the objective and nature of the contract (*muwāfiq li muqtadā al-‘aqd*); or supports the contract by strengthening what is necessitated by the contract (*ta’kīd*) or secures the contract (*tawthīq*); or a condition that is explicitly allowed by the Shari‘ah even though it is not part of the nature and objective of the contract such as stipulating an option (*khiyār*) for a certain period of time to choose whether to ratify the contract or annul it; or a condition which is in line with custom or normal practice (*‘urf*) (al-Zuḥaylī, 1995: 4/204; Arabi, 2008).
- *Al-shart al-fāsīd* (voidable condition): Stipulation that confers an additional advantage (which would not have otherwise been obtained under the prescribed effects of the contract) to one of the contracting parties or the subject matter of the contract or a third party (al-Kasānī, 2000).

Examples the Ḥanafīs give include buying an item on the condition that the vendor delivers it to one’s home; or buying wheat on the condition that the vendor grinds it; or buying cloth on the condition that the vendor tailors it; or selling a house on the condition that the buyer also lends the seller money. These conditions, according to them, function as a new attachment to the primary terms which are distinct from them and would create irregularity in the contract and thus render it voidable (Arabi, 1998: 37).

The effect of voidable conditions upon the ruling for financial exchange contracts (*‘uqūd al-mu‘āwadah al-māliyah*), such as sale, lease, *mudārabah*, *mushārah*, *muzārah* and others, is that they would lead to a voidable contract (*‘aqd fāsīd*) (al-Ba‘lī, 1989: 294; al-Zuḥaylī, 1995: 4/205). This means the contract would be void (*bāṭil*) if the voidable stipulation remains; while the contract would become valid (*ṣahīh*) if the voidable stipulation is cancelled (Haqqi, 2009: 74).

But in non-exchange contracts (*‘uqūd ghayr al-mubādalah*) such as charitable contracts (*‘uqūd al-tabarru‘āt*), a pledge (*rahn*), debt transfer (*hawālah*), guarantee (*kafālah*), gratuitous loan of a non-fungible asset (*i‘ārah*), bequest (*wāṣīyyah*) and others that do not involve considerations or payment, the contract itself is valid, and the voidable conditions are given no legal consideration (Ba‘lī, 1989: 294; Kāmil, 2005: 142-3; al-Zuḥaylī, 1995: 4/205).

- *Al-sharṭ al-bāṭil* (void condition): Ḥanafīs define a void stipulation as one which does not fall under any of the categories of a valid stipulation and at the same time does not confer any additional advantage to any person (Zaydān, 2003). For example, a stipulation by the seller that the buyer shall not re-sell the goods; a stipulation by the seller of a house that the buyer shall destroy it; and a stipulation by the seller that the buyer shall not use the property sold.
- A void condition would have no implication on the validity of the contract as the condition is considered null and void and hence it is simply ignored. In this case, the contract is valid (*ṣaḥīḥ*), but the condition is considered nonsense (*laghw*), which is inadmissible and does not affect the validity of the contract in which it occurs (Ba'li, 1989: 295; Kāmil, 2005: 144; Arabi, 1998: 32).

V. FREEDOM TO STIPULATE CONDITIONS (*HURRIYYAT AL-ISHTIRĀṬ*)

In principle, Islamic contract law aims to realize benefit (*maṣlaḥah*) to the contracting parties from the contract. It is also a basic principle in Islamic contract law that to achieve the *maṣlaḥah* of contracting parties, consent (*riḍā*) is the basis of contract (al-Zuḥaylī, 1995: 4/197).

Mutual consent (*tarāḍī*) can only occur if the contracting parties have free will (*irādah ḥurrah*) to enter into the contract and agree with the terms and conditions stipulated. In other words, it requires the freedom to contract (*hurriyyat al-ta'āqud*) and freedom to stipulate conditions (*hurriyyat al-ishtirāṭ*).

However, scholars have differences of opinion with regard to the relationship between freedom to contract (*hurriyyat al-ta'āqud*), freedom to stipulate conditions (*hurriyyat al-ishtirāṭ*) and consent (*riḍā*). This is because the stipulations attached to the contract to some extent restrict the freedom to contract while, on the other hand, the freedom to contract also means the freedom to create stipulations to the contract (Arabi, 1998). Furthermore, the establishment of the contract's ruling (*ḥukm al-'aqd*) and its effects (*āthār al-'aqd*) are actually under the authority of the Lawgiver rather than the

contracting parties' authority, which means the contracting parties should submit themselves to the Shari'ah rules in concluding the contract (al-Zuḥaylī, 1995: 4/198).

Nevertheless, there are differences of opinions among jurists regarding the extent to which the Lawgiver has given authority to the contracting parties to amend the provisions stipulated by legislation. There are three main positions on this issue. The Zāhirīs believe that the basic principle regarding contracts and stipulation of conditions is that they are prohibited unless there is evidence for their permissibility (*al-aṣl fī al-'uqūd wa al-shurūṭ al-man' ḥattā yaqūm dalīl 'alā al-ibāḥah*). Any stipulation of conditions which are not approved by the Shari'ah in the Qur'an, Sunnah or *ijmā'* (consensus) is therefore null and void (*bāṭil*) (al-Zuḥaylī, 1995: 4/198-200).

The Ḥanbalīs argue that the principal rule in contractual conditions is that stipulation is permitted without qualification (*iṭlāq*). Therefore, any condition that is stipulated, if there is no evidence of its prohibition by the Shari'ah, is considered permitted (al-Zuḥaylī, 1995: 4/202).

The Ḥanafīs and Shāfi'īs, on the other hand, argue that the principal rule in contractual conditions is that they are permitted with qualification (*taqyīd*). Any condition stipulated against a principle of the Shari'ah or the nature and objective of the associated contract is void (*bāṭil*) (al-Zuḥaylī, 1995: 4/202).

VI. SHURŪṬ AND MAQĀṢID AL-SHARĪ'AH

The conditions of a transaction are intended to accompany the inception of the transaction and to regulate it once it is in operation. The conditions are not intended to add undue burden on the contracting parties. This is in line with the objective of Islamic law of contract that all parties involved in a contract should benefit from the transaction and no party should be allowed to suffer any undue burden from a given transaction (Haqqi, 2009: 70).

In this regard, the condition stipulated should be in line with the objective of the contract itself (*mawḍū' al-'aqd*) as has been outlined by the Lawgiver in nominate contracts (*'uqūd musammāh*) and the general objectives of Shari'ah (*maqāṣid al-Sharī'ah*).

The objective of each nominate contract is established by the Lawgiver. Likewise, the rules and effects of a particular contract are in line with the objective of the contract (*mawdū' al-'aqd*) and are set by the Lawgiver. It is upon those objectives, rulings and effects that the contracting parties establish their relationship when they draw up a contract (*inshā' al-'aqd*) (al-Zuḥaylī, 1995: 4/182).

The objective of the contract differs from one contract to another. For example, the objective of a sale contract (*bay'*) is to transfer the ownership of the purchased item to the buyer for a consideration (*'iwad*); the objective of a leasing contract (*ijārah*) is to transfer the ownership of usufruct for a consideration; and the objective of a gift contract (*hibah*) is to transfer the ownership of an item without any consideration.

The particular objective of a given contract (*mawdu' al-'aqd*) can be regarded as a particular objective (*maqṣad juz'ī*) of the Sharī'ah. The conditions of each contract that are stipulated by the Lawgiver are intended to regulate the rule of the game of a contract, ensuring the realization of *maṣlahah* to the parties in the contract and protecting them from harm (*mafsadah*) that might come as a result of inequality between the contracting parties; for example, one party exploiting the other, or ignorance or uncertainty about the object of contract.

Those particular objectives are established under the rubric of more general objectives that are in the larger scheme of the Sharī'ah (*maqāṣid al-Sharī'ah*). The highest objective of the Sharī'ah as a system of life is to secure and protect human well-being. All the teachings, injunctions and prohibitions of the Sharī'ah are related to the grand wisdom (*hikmah*) of blessing mankind and securing human interests. All the Sharī'ah rules that contain obligations and duties bring benefit and prosperity and all its prohibitions are meant to prevent harm and hardship.

Stipulation of conditions in commercial contracts has to be recognized as part of the effort to achieve the overall Sharī'ah objective of realizing *maṣlahah* and preventing *mafsadah* to the contracting parties. Sometimes, stipulating conditions is very crucial due to need or to ensure that the benefit to the contracting parties is realized.

Therefore, the conditions established in a contract should not be intended to put an additional burden on one or both of the contracting

parties or to restrict their freedom of contract. Instead, they should aim at creating a positive atmosphere in the contract by facilitating its rulings and its effects and creating a level playing field between the contracting parties, ensuring full knowledge and mutual consent and ensuring that benefit can be gained by both parties to the contract. It is mentioned in *al-Mawsū'ah al-Fiqhiyyah al-Kuwaytiyyah* (20/156) that “the *maṣlaḥah* of the contracting parties is part of the nature and objective of [every] contract” (مَصْلَحَةُ الْعَاقِدِ هِيَ مِنْ مُفْتَضَى الْعَقْدِ).

Likewise, the conditions improvised by contracting parties themselves (*shurūṭ ja'liyyah*) should not contradict the very purpose of the contract (*muqtaḍā al-'aqd*) or the overall purpose of Shari'ah (*maqāsid al-Shari'ah*) of realizing benefit (*maṣlaḥah*) and preventing harm (*mafsadah*) in contracts.

Stipulating conditions in commercial contracts should be done in a two-way process that ensures correspondence between the needs of each contracting party, with due consideration of their circumstances of place and time, and the grand framework of the Shari'ah. In the literature, this effort is identified as *jalb al-maṣlaḥah* (realising benefit); *taghyīr aw daf' al-mafsadah* (changing or repelling harm); *sadd al-dhari'ah* (blocking apparently lawful means that lead to harmful results); and *raf' al-ḥaraj* (removing hardship).

VII. CONCLUSION

The freedom to stipulate conditions (*hurriyat al-ishtirāt*) in a contract is not only recognized by Islamic contract law but is also guaranteed and protected. The effort should be done within the spirit of realizing the objectives of the Shari'ah (*maqāsid al-Shari'ah*), namely to achieve the *maṣlaḥah* (interest) of the contract (*maṣlaḥat al-'aqd*) and of the contracting parties (*maṣlaḥat al-'āqidayn*).

However, the process of stipulating conditions in contracts should also refer to the nature and objective of contract (*muqtaḍā al-'aqd*), the rulings and principles of Shari'ah in contracts and the common customs accepted by people in the contract.

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