INVALID AND DEFECTIVE CONTRACTS IN ISLAMIC LEGAL THEORY:
The Rise of a Transnational Islamic Law

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Abstract

There are three types of contracts under Islamic law: *ṣaḥīḥ*, *fāsid* and *bāṭil*. Contracts whose essence and attributes are lawful and which have no defects in their elements (*aṣl*) or characteristics (*waṣf*) are termed *ṣaḥīḥ* (valid). It should be stated that in respect of *fāsid* contracts only the *waṣf* may be defective, whereas in respect of *bāṭil* contracts the *aṣl* of the contract may also be defective. *Fāsid* is a type of contract permitted by its intrinsic characteristics but not its features. Its irregularity negates its validity, which if cured would make this type of contract valid. The concept of *bāṭil* relates to a contract whose elements and characteristics are devoid of legality. This difference between *fāsid* and *bāṭil* results in a difference of effects. Each of these contracts are divided into different types. Sometimes, the conditions incorporated in a contract also determine the nature of the contract as either valid, irregular, or void. This article discusses these contracts, as well as the requirements pertaining thereto, as well as the types of terms which are included in a contract and their effect on the validity of the contract.

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I. Introduction

It is true that Islamic law, and particularly its contractual dimension, has assumed some significance in the West in past decades, despite the fact that it is in decline in the Arab and Muslim world.[1] There are two inextricably linked reasons for this, namely: the growth of Islamic finance[2] and the associated desire of parties to such agreements that they be governed fully or partially by Islamic law.[3] This, in turn, has led scholars and legal professionals to rediscover the fundamental tenets of Islamic contract law.[4] It is perhaps instructive to set out a basic outline, as well as an equally brief overview of the sources and key principles of Islamic law, in order to guide the reader. The *Sharīʿa* consists of the Quran and those portions of the *sunna* (which itself consists of the deeds and sayings of Prophet Mohamed) that are not only deemed authoritative but also interpretative of the Quran. The *Sharīʿa* is the primary source (*aṣl*), but there are several secondary sources,[5] which, however, cannot under any circumstances

1. *See* Jonathan G. Ercanbrack, The Transformation of Islamic Law in Global Financial Markets (Cambridge Univ. Press, 2015).

2. *See* Zulkifli Hasan, Shari'ah Governance in Islamic Banks, (U.K.: Edinburgh Univ. Press, 2012); *see also* Ken Eglinton et al., Islamic Finance: Law and Practice (Oxford Univ. Press, 2012).

3. *See* Ilias Bantekas, *Transnational Islamic Finance Disputes: Towards a Convergence with English Contract Law and International Arbitration*, 12 J. of Int'l Dispute Settlement 505 (2021).

4. *See* P. Nicholas Kourides, *The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts*,9 Colum. J. Transnat'l L. 384 (1970); *see also* Hussein Hassan, *Contracts in Islamic Law: The Principles of Commutative Justice and Liberality*, 13 J. Islamic Stud. 257 (2002).

5. For example, *qiyās* (human reasoning by analogy, but only if adopted by a large

fall foul of the *Sharīʿa*. Islamic law is distinct, albeit complementary to the *Sharīʿa*. Out of the 6,239 verses of the Quran, only 190 specifically address what we might call legal issues.[6] It is these legal verses that comprise Islamic law, although these cannot artificially be divorced from the other religious verses in the Quran. Islamic scholarship has developed methodologies of Quranic interpretation known as ʿilm ʾuṣūl al-fiqh (usually translated as jurisprudence) and *fiqh* (usually translated as positive law or legal determinations), on the basis of which Islamic jurists aim to achieve *maqāsid al-sharīʿa* (goals of the *Sharīʿa*), as well as *siyāsat al-sharīʿa* (policy of the *Sharīʿa*). The development of *fiqh* has allowed a non-static and contextual interpretation of the *Sharīʿa*, even in respect of otherwise controversial issues.[7] In the course of this article the reader will come to appreciate that the fundamental tenets of Islamic contract law have been derived almost exclusively from the secondary sources and in particular the *fiqh* of Muslim jurists. Such reliance is not arbitrary, and the works cited here span several centuries. To some degree they resemble the process of transnational law, whereby best practices and consistent self-regulation gradually become accepted as 'law.' This is how the reader should perceive references to scholarly works in this article. Overall, it should be emphasized from the outset that the *Sharīʿa* or Islamic law represent a complexity and diversity of views and interpretations. Hence, it is anything but a primordial, monolithic and uncontested system of regulation and theology.

Islamic contract law is based on principles that are common to Western notions of contracts. The word *ʿaqd* denotes an agreement encompassing offer and acceptance,[8] although there are other terms in the Quran that are viewed as expressing a binding agreement. The majority of Muslim jurists are in agreement about the quintessential elements of a valid contract, namely: a) the existence of an appropriate form (*ṣigha*); b) a seller; c) a buyer and; d) an appropriate subject matter of the contract (*maḥal al—ʿaqd*).[9] The element of intention, which is the 'glue' between offer and acceptance in Western contract law in the form of a common, mirror-image, intent to be bound,[10] is conflated between consent (*riḍā*

enough majority of Muslim scholars) and; *ijmāʿ*, which represents the actual consensus of the Muslim scholarly community. There are also other methods of interpretation, such as ijtihad. *See* Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 Am. J. Comp L. 199, 199–201 (1978).

6. *See* M. Cherif Bassiouni, The Sharia and Islamic Criminal Justice in Time of War and Peace 23 (Cambridge Univ. Press 2014).

7. *See* Eleni Polymenopoulou, *LGBTI Rights in Indonesia: A Human Rights Perspective*, 19 Asia-Pacific J. on Hum. Rts. & L. 27, 28–33 (2018).

8. *See* Al-Sayyid Salim & Abu Malik Kamal, Sahih Fiqh al-Sunnah wa Adillatihi Wa Tawdihi Madhahib al-Aimah, 4:259–261 (Cairo: Al-Maktabah al-Tawfiqiyyah, 2003).

9. Wahbah Al-Zuhayli, al-Fiqh al-Islami wa-Adillahtuhu, 5:3309(Dar al-Fikr, 1989).

10. *See* Paul R. Powers, Intent in Islamic Law: Motive and Meaning in Medieval Sunni Fiqh (Brill 2006); *see also* J. M. Smits, Contract Law: A Comparative Introduction

) and intention proper (*nīyya*). The latter is viewed as a standalone condition that is assumed as existing where offer and acceptance are free from coercion, but there is no general principle of intention in Islamic contract law.[11] In any event, consent may be express or inferred from the conduct of the parties.[12] The *ṣigha*[13] requires conformity between offer and acceptance issued in the same session, the existence of the *ījāb* (offer) until the issuance of *qubūl* (acceptance) and the means and methods of their communication.[14] Consent should be freely provided free from fraud, misrepresentation or coercion.[15] If the contract is found to have been made in jest, then it is deemed as not having been formed.[16]

Islamic contract law has a very limited application, if any, in the private laws of Gulf Cooperation Council (GCC) states, as well as states in the Middle East and North Africa (MENA) region, save for Saudi Arabia. The great Egyptian private law codification of 1948 was meant to bridge Islamic and secular (chiefly civil law) private law.[17] While it achieved its purpose, the Islamic foundations of the new civil codes were forgotten or best conflated with the Western-inspired provisions of the codes. In any event, Abd Al-Razzaq Al-Sanhuri, the architect of the Egyptian codification, greatly influenced the development of private law throughout the MENA, as well as the GCC.[18] Several of his students drafted the

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65–70 (Edward Elgar, 2nd ed. 2017).

11. *See* Ilias Bantekas et al.,Islamic Contract Law (Oxford Univ. Press 2024) (stating there that contractual will (*irāda*) is composed of two elements, namely: choice (*khiyār*) and consent (*riḍa*)); *see also* Oussama Arabi, *Intention and Method in Sanḥurī's Fiqh: Cause as Ulterior Motive*, 4 Islamic L. & Soc'y 200 (1997).

12. *See* Hashiyat Ibn ʿābidīn, Radd al-mu Ḥ tAr ʿ ala al-Durr al-mukhtAr 4:526 (Dar Al Fikar, 1992); *see also* Khalīl b. Isḥāq Al Jundī, Mukhtasir Mukhtaṣar (?) al Khalīl 3:148 (Dal Al Hadith, 2005). It is stipulated that the formation of contracts through conduct is allowed only for trivial matters and not for major transactions. *See* Ibn Qudāma, Al Kāfī 2:3–6 (Dar al Kutab al Ilmiya, 1994); Al Karkhī, ʾuṣūl Al karkhĪ 173 (Javed Press Karachi, 2011). According to another opinion, a sale by conduct is allowed in respect of both trivial and important issues. The description of cheap/trivial refers to objects such as bread and expensive/important corresponds to a slave or whatever is more than the amount of *ḥadd al-sariqa* (fixed punishment for theft). *See* Ibn ʿābidīn, *supra* note 12.

13. The first requirement is consent, which is derived from verse 29 of the *al-Nisāʾ* chapter in the Quran; *see also* Nethercott & Eisenberg, *supra* note 2, at 52.

14. Al Rafi, Sharh al Kabir 8:394 (Dar al-Kotob al-Ilmiyah 1997); Al Mosuli, Al Ikhtiyar li talil al Mukhtar 3:71 (Al Hilbi Publications, Cairo, 1937).

15. Ahmad Al-Nafrāwī, Al-Fawākih al-Dawānī ʿalā Risālat Ibn Abi Zaid al-Qairawānī 140 (Dar al-Fikr, 1995); Ali Al-Māwardī, al-Hāwī al-Kabīr 5:17 (Dār al-Kutub al-'Ilmiyah 1994).

16. Muhammad ibn Ali Haskafi, Al Dur Al Mukhtar fi Sharh Tanwir al Absar 394 (Dar al Kutub al-'Iʿilmiyyah 2002).

17. *See* Guy Bechor, The Sanhuri Code, and the Emergence of Modern Arab Civil Law 177–78 *(1932 to 1949*) (Brill 2007).

18. Sanhuri's students later drafted other MENA and GCC civil codes on the basis of his philosophy and ideals. *See* Nabil Saleh, *Civil Laws of Arab Countries: The Sanhuri Codes*, 8 Arab. L. Q. 161, 165 (1993).

civil codes of other GCC and MENA states or served as judges and commentators to subsequent codifications.

This marginalization of Islamic contract law is evident in the law and practice of GCC and MENA states. By way of illustration, Qatari courts are bound to construe a contract in accordance with the *Sharīʿa* where the particular subject matter is not regulated by statute.[19] The parties may not exclude the *Sharīʿa* where their contract is governed by Qatari law and the latter lacks a statutory provision regulating a particular issue under the contract.[20] This is not an easy venture nor is it free from contention. Article 1(2) of the Qatari Civil Code (CC) provides a hierarchy, with statute at the apex, followed by the *Sharīʿa* ("if any"), customary practices and finally "rules of justice." This is in contrast to article 169(2) Qatari CC, which allows the courts to infer the parties' common intention by reference to commercial custom. While it seems that the two provisions serve distinct purposes, namely that: article 1(2) CC merely attempts to posit the *Sharīʿa* as a secondary source of law, whereas article 169(2) CC refers to commercial custom as an interpretative tool, article 1(2) CC is effectively transformed into an interpretative tool where a statutory provision is deemed to be lacking.[21] That is as far as the Qatari CC will go to concede a role for Islamic law in the regulation of contractual relations.[22] The only outlier is Saudi Arabia, which does not possess a civil code and private law is regulated by an uncodified body of the *Sharīʿa*, as construed and applied by the courts and other expert bodies.

The *Sharīʿa*, no doubt, becomes a primary source of law in interpreting a dispute where Islamic law is the governing law of the parties' contract,[23] or where the subject matter of the dispute concerns a contractual type predicated on

19. Qatari Civil Code art. 1(2).

20. In practice, it seems that several issues in the Qatari CC are regulated by the *Sharīʿa* and CC in tandem, especially where it is deemed that the *Sharīʿa* is more elaborate. The Qatari Court of Cassation in Judgment 21/2008 accepted the applicability of the *Sharīʿa* concerning the acquisition of property by prescription, despite the existence of a relevant provision in the CC. *Id.* at art. 404. While ultimately the Court did not agree with the lower court's interpretation of Islamic law, neither the Court nor the parties expressed any concern about the use of *Sharīʿa* despite the existence of express provisions in the CC. Hence, it is evident that the courts will apply the *Sharīʿa* not only where the CC is silent on a particular issue, but also where the *Sharīʿa* is more elaborate.

21. The best approach in the event where the *Sharīʿa* becomes applicable is to apply only its contractual dimension. *See* Bantekas et al., *supra* note 11.

22. *See* Ilias Bantekas & Ahmed Al-Ahmed, Contract Law of Qatar (Cambridge Univ. Press 2023).

23. Islamic law as the governing law of contracts has generally been treated as falling outside the purview of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ L 177*. *See* Beximco Pharm. v. Shamil Bank of Bahrain EC, 1 W.L.R. 1784 (2004); Musawi v. R.E. Int'l (UK) Ltd., 1 Lloyd's Rep 326 [2008]. The reason is that Islamic law as such as not the law of a legal system.

Islamic law.[24] The consistent practice in the GCC is that in interpreting such contracts, the courts are not bound to accept the parties' stipulations that the contract is in conformity with the *Sharīʿa*; rather, the courts have authority to undertake an objective analysis of said conformity.[25] There is limited information concerning the choice of law underpinning Islamic finance products. General practice suggests the emergence of concurrent choice of law clauses, embracing both Islamic contract law as well as English law.[26] English courts (and less so the courts of other nations) have entertained such cases and it is because of these that we are aware of the proliferation, as a matter of practice, of concurrent clauses.[27] In *The Investment Dar Co. KSSC v. Blom Development Bank S.A.L*, the English High Court was able to override the designation of English law as the governing law of a *Wakāla* agreement, on the ground that it was not *Sharīʿa*-compliant with the underlying investment, which the parties had expressly agreed should be so compliant.[28] A similar result, through a similarly sensible conflict process, was reached in *Sanghi Polyesters Ltd. India v. The International Investor KCFC (Kuwait*). There, the parties had agreed to English law as the governing law of their agreement to the degree that this was compatible with Islamic law.[29] The Court had no trouble finding in the event of a conflict between English and Islamic law that the more pressing law to the issue at hand (in the present instance an Islamic finance transaction) would prevail. In equal measure, where English law is the governing law of a BBA (*Bai Bithamin Ajil*) transaction,[30] the Malay High Court held that in the event the respondent failed to pay a particular installment the remedy sought by the applicant, namely the mandatory sale of the respondent's land, was permissible. The Court rightly held that even though the BBA facility was integral to rendering the transaction compatible with Islamic

24. The Qatari Court of Cassation, although it rarely refers to the *Sharīʿa* in contractual disputes, sometimes does refer to it as the origin of a rule. *See* Qatari Court of Cassation Judgment 94/2013.

25. *See* Dubai Cassation Court Judgment 898–927/2019(concluding that for a *murābaḥa* contract to be *Sharīʿa* -compliant, it has to satisfy the criteria of the Maliki school and that a certificate of compliance from an Islamic bank or financial institution is insufficient).

26. *See* Bantekas, *supra* note 3, at 8–12.

27. *See* Julio C. Colón, *Choice of Law and Islamic Finance*, 46 Tex. Int'l L. J. 411, 414–17 (2011).

28. Inv. Dar Co. KSSC v. Blom Dev. Bank S.A.L., All ER (D) 145 (2009).

29. Sanghi Polyesters Ltd. India v. Int'l Inv. KCFC (Kuwait), 1 Lloyd's Rep 480 (2000).

30. *Bai' bithaman ajil*, (Is this a standardized spelling for the BBA in a specific context?) involves the sale of goods with deferred payment based on a profit margin agreed by the parties. Deferred interest is avoided on the assumption that the buyer will pay the sale price and hence in theory this distinguishes the transaction from the payment of interest on a loan. *See* Rafida Mohd Azli et al., *Implementation of* Maqasid Sharia *in Islamic House Finance: A Study of the Rights and Responsibilities of Contracting Parties in* Bai' Bithaman Ajil *and* Musharakh Mutanaqisah 27 J. Applied Bus. Rsch. 85 (2011).

law, the execution against non-performance was based on the Land Code, which applied irrespective of the Islamic or secular nature of the transaction.[31]

In the course of this article it will become clear that there are certain elements that make the subject matter of a contract permissible for sale when originally it was not. In converting an impermissible subject matter into a permissible one, custom, benefit and necessity play very important roles. Impermissible subject matters, such as the sale of human organs or blood are allowed on account of their necessity in surgery and medical treatment.[32] Subject matters originally thought to be non-existent are allowed for the facilitation of people's needs; for example, fruit and vegetables of which some have ripened and others that have not yet ripened.[33] Similarly, some subject matters that are not *mutaqawwim* (legal) and have no value, become permissible, if they are deemed beneficial according to custom.[34] Sometimes, the derived benefit from a *maḥal al-ʿaqd* permits the conclusion of a contract, which would otherwise be prohibited.[35] The article is structured as follows. Section 2 discusses the importance of the subject matter of contracts, the legality of which is central to the overall validity of contracts under Islamic law. This is followed in section 3 by an examination of the variety of valid contracts in Islamic legal theory, including the pertinent conditions and appropriate capacity. Section 3 further highlights three key types of valid contracts, namely: *lāzim*, *jāʾiz* and *mawqūf*. Section 4 examines the thorny issue of usury as exemplified by *gharar* and *ribā*. Section 5 discusses the suspension of the operation of *ṣaḥīḥ* contracts, while section 6 goes on to highlight *fāsid* contracts. Section 7 tackles the transformation of otherwise valid contracts into *bāṭil*, while section 8 concludes with the requirements for the suspension of *bāṭil* and *fāsid* contracts.

II. Legality of Subject Matter and Underlying Cause

The subject matter of a contract, also named *maḥal al ʿaqd*or *maʿqūd ʿalayh* is an object/thing—movable or immovable and tangible or intangible—for

31. Bank Kerjasama Rakyat Malaysia (BKRM) Bhd v. Emcee Corp. Sdn Bhd, 2 MLJ 408 (2003).

32. See Muwaffiquddin Ibn Qudāma, Al-Mughnī fī Fiqh al-Imam AḤmad ibn Ḥanbal al-Shaibanī 4:260 (Maktabat al-Qahirah 1968); Abubakr Al-Kāsānī, Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i' 5:138–140 (Dar al-Kutub al-'Ilmiyah 1986); Ibn ʿābidīn, *supra* note 12, at 7:241–242, 264. It should be noted that the necessity in itself is not sufficient to make permissible an impermissible thing, unless that situation is not included in some qaida kulya. *See* Ashraf Ali Thanwai, Imdad ul Fatawa 6:471–72 (Zikriya Book Depot n.d.).

33. Zainuddin Ibn Nujaim, Fatawa ibn e Nujaim in the margin of Fatawa al Ghayasiya 113 (Matba' Amiriya 1922). *al-Fatāwā al-Ghaythīyya ?*

34. Abu Zakariyyā Al-Nawawī, Al-Majmū' Sharḥ Al-Muhadhdhab 10: 286 (Dar al-Fikr n.d.); Shihābuddin al-Ramlī, Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj 3:393 (Dar al-Fikr 1984); Ibn Qudāma, *supra* note 32, at 4:302.

35. Abu Isḥāq Al-Shīrāzī, Al-Muhadhdhab fī Fiqh al-Imam al-Shāfi'ī 2:10–11 (Dar al-Kutub al-Ilmiyyah 1995).

which a contract is made. According to Islamic jurists (*fuqahāʾ*), the determinants of the 'thing' allowed to become a subject matter of a valid contract are the following: (i) it should be *māl mutaqawwim*, (legal) (ii) existent, (iii) owned by the seller, (iv) in the possession of the seller, (v) able to be delivered, and, (vi) precisely determined (*maʿlūm*).[36] These conditions are discussed in detail due to their importance; when met, they create contractual certainty, which is a foundational principle for an agreement to qualify as valid and for the ensuing rights and liabilities of the parties to be enforceable. The foregoing elements will be examined in the context of the contract of sale. Of course, the conditions pertaining to *mabīʿ* (subject matter in a sale contract) are also relevant in relation to other types of contract, such as *hiba* (gift), *ijāra* (lease; usufruct), *waṣīya* (bequest) and others.

The concept of *māl* or property is something which human nature desires and which may be accumulated or put aside for an hour of need.[37] The monetary or financial value (*malīa*) of *māl* makes people wealthy and rich and establishes its value (mu*taqawwim*). A commodity which, while permissible, is incapable of having a monetary value, or from which no benefit can be extracted does not constitute *māl*.[38] There are two possible reasons why a commodity may not be susceptible of producing benefit. First, it may be of such low quantity that it cannot produce a benefit, as is the case with one or two grains of wheat, or raisin. Goods of such quantity are not considered *māl*. This would still be the case if the good in question were mixed with another good, or if it were used as bait for hunting, because this was not its original purpose. Secondly, objects such as insects, or beasts of prey, which cannot be used for hunting, or birds that are inedible, nor used for hunting, such as vultures and glede, do not produce benefit or a financial value.[39] The commodity that has the quality of making people rich but from which it is not permissible to benefit would be *māl*, as it will not have any value (*mutaqawwim*). Notably, sometimes both value and benefit are absent from a commodity.[40]

To this end, *ʿain* (determining property) is classified twofold: *najas* (impure) and *ṭahar* (pure). *Najas* are classified even further: first, *najas* that are intrinsically or in their own right impure, like a dog, a swine, wine, dung and impurities along the lines of the following *hadith*:[41] "Allah has proscribed the sale of wine, dead animal, swine and idols."[42] Secondly, there exist *najas* derived from the

36. Ibn ʿābidīn, *supra* note 12, at 4:505.

37. Al-Majalla Al Ahkam Al Adaliyyah [The Ottoman Courts Manual (Hanafi)], art. 126; Ibn ʿābidīn, *supra* note 12, at 4:501.

38. Ibn ʿābidīn, *supra* note 12, at 4:501, 502.

39. Al-Nawawī, *supra* note 34, at 9:285–286; Ahmad Al-Qarāfī, Anwar al-Buruq fī Anwāʾ al-Furūq 3:370 (Dar al-Kutub al-Ilmiyah 1998).

40. Ibn ʿābidīn, *supra* note 12, at 4:501; Al-Majalla atart. 211.

41. Ibn ʿābidīn, at 4:501.

42. Al-Shīrāzī, *supra* note 35, at 2:9.

association of an object with another impure element, such as the affliction of an impurity, filth on garments or used cooking oil.[43] *Ain al-ṭahāra* (pure objects) are also of two kinds: a) things in which there is some benefit, which may consist of immovable and movable objects such as edibles, drinks, clothes, perfumes, etc. and; b) *ain*, in which there is no benefit, as is the case with insects and beasts that cannot be used for hunting or a crow which cannot be eaten.[44]

Considering the above, *māl* is something which can be accumulated or put aside, even if its use is not permissible (e.g. wine). However, *māl* constitutes *mutaqawwim* when its use is also permissible by the *Sharīʿa*. Therefore, wine is *māl* but not *mutaqawwim*, so its sale by a Muslim would be invalid.[45] Property permissible by law and having some specific value is called *mutaqqawim* and may validly be sold.[46] *Māl* amounting to *mutaqawwim* or *ghair mutaqawwim* can be distinguished in two ways: firstly, on the basis of *ʿurf* (custom) and secondly, by means of declaring something as *mutaqawwim* by *sharīʿa*, in which case it is termed *sharʿī*.[47]

A *māl* or property may be: a) moveable, namely it can be transferred from one place to another, such as animals, merchandise and things estimated in terms of their weight, number, or measurement and; b) immovable, which cannot be transferred from one place to another, such as a house and land.[48] In a sale contract, the subject matter should be *māl mutaqawwim* and what cannot be sold cannot be mortgaged,[49] donated or gifted[50]—i.e. given as *ṣadaqa* (charity),[51] *hiba*, *waqf* and *i'ara* (borrowing items).[52] By implication, the subject matter in these contracts should be *māl mutaqawwim*[53] and of a specific value.[54]

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43. Al-Nawawī, *supra* note 34, at 9:269, 270.

44. Al-Shīrāzī, *supra* note 35, at 2:10–11.

45. Ibn ʿābidīn, *supra* note 12, at4:501–505.

46. *Id.* at 7:236; Al-Majalla Al Ahkam Al Adaliyyah [The Ottoman Courts Manual (Hanafi)], art. 199.

47. Ibn ʿābidīn, *supra* note 12, at 7:241–242. This is permission for benefitting from it and the extraction of benefit is defined in negative terms; that is, commodities from which the Sharia does not allow benefit would be *ghair mutaqawwim* for Muslims.

48. Al-Majalla, at art. 126, 128, 129.

49. Al-Shīrāzī, *supra* note 35, at 2:90, 334; Ibn Qudāma, *supra* note 32, at4:338.

50. Kamāluddin Ibn al-Hummam, Al-Fatāwā al-Hindiyyah [also known as Fatawa al Alamgiriya fil madhab Imam Abu Hanifa] 4:417 (Dar al Kutub al Ilmiya 2000); Muhammad Al-Shirbīnī, Mughnī al-Muḥtāj ilā Ma'rifat Alfāz al-Minhāj 2:515 (Dar al-Kutub al-Ilmiyyah 1994); Ibn Qudāma, *supra* note 32, at 5:598.

51. Al-Shīrāzī, *supra* note 35, at 2:324.

52. Al-Shīrāzī, *supra* note 35, at 2:322; Al-Majalla, at art. 420. *Waqf* and *i'ara* is allowed only for a thing from which benefit can be extracted on a long-term basis.

53. Al-Shīrāzī, *supra* note 35, at 2:322; Al-Kāsānī, *supra* note 32, at 5:140; Al-Shirbīnī, *supra* note 50, at 2:11; Ibn Qudāma, *supra* note 32, at 4:260; Ibn ʿābidīn, *supra* note 12, at 4:501–505;7:241–42, 264.

54. Al-Majalla, at art. 709.

III. Types of Valid Contracts under Islamic Law

There are three types of contracts under Islamic law: *ṣaḥīḥ*, *fāsid* and *bāṭil*.[55] Contracts whose essence and attributes are lawful and which have no defects in their elements (*aṣl*) or characteristics (*waṣf*) are termed valid.[56] It should be stated that in respect of *fāsid* contracts only the *waṣf* may be defective, whereas in respect of *bāṭil* contracts the *aṣl* of the contract may also be defective.[57] *Fāsid* is a type of contract permitted by its intrinsic characteristics but not its features. Its irregularity negates its validity, which if cured would make this type of contract valid. The concept of *bāṭil* relates to a contract whose elements and characteristics are devoid of legality. This difference between *fāsid* and *bāṭil* results in a difference of effects.[58] Each of these contracts is divided into different types. Sometimes, the conditions incorporated in a contract determine also the nature of the contract as either valid, irregular, or void. This article discusses these contracts, as well as the requirements pertaining thereto, as well as the types of terms which are included in a contract and their effect on the validity of the contract.

A *ṣaḥīḥ* contract complies with all the conditions regarding its *aṣl* and *waṣf*. A contract under Islamic law requires three elements (*aṣl*) namely: the *ṣigha* (form), which comprises the offer and acceptance, the subject matter, and the contracting parties.[59] Several conditions (*shurūṭ*) have been prescribed for each element. A contract is valid or *ṣaḥīḥ* if it contains all the required elements, along with the attendant conditions of each element and moreover fulfils the requirements pertaining to all the external characteristics (*waṣf*), such as the rules on *ribā* and *gharar*. In this way, several conditions have been prescribed for the validity of a contract. Some of these conditions are general in nature while others are specific. General conditions include all the requirements for *ináqad* (i.e. the elements required for the formation) of a contract. Specific conditions include, among others, the absence of time restriction, as well as information about the subject matter of the contract.[60] All relevant information required to make the transaction clear should be exchanged. Similarly, contracts involving future performance should delineate their time of maturity.[61]

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55. Ibn Qudāma, *supra* note 32, at 4:189; Alā'uddīn Al-Mardāwī, Al-Inṣāf fī Ma'rifat al-Rājiḥ min al-Khilāf 'alā Madhhab al-Imām Ahmad bin Ḥanbal 4:466 (Maṭba'at al-Sunnah al-Muhammadiyyah 1956); Mohammad Naseem & Saman Naseem, Islamic Law of Contracts 201–10 (Kluwer 2021).

56. Zainuddeen Ibn Nujaim, Al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq 5:270 (Dar al-Kitab al-Islāmī 1997); Ibn 'ābidīn, *supra* note 12, at 4:518.

57. Ibn 'ābidīn, *supra* note 12, at 7:234.

58. *Id.* at 5:84; Nethercott & Eisenberg, *supra* note 2, at 52.

59. Muhammad Al-Dasūqī, Ḥāshiyat al-Dasūqī alā al-Sharḥ al-Kabīr 8:394–396 (Dar al-Fikr, n.d.).

60. Ibn 'ābidīn, *supra* note 12, at 4:500.

61. *Id.*

A. Conditions for the formation of a valid contract

Leading jurists from the Hanafi school discuss the conditions pertaining to the formation, implementation, validity, and the binding nature (*luzūm*) of a contract. The conditions for *ináqad* of a contract primarily relate to *ṣigha*, contracting parties, as well as a subject matter.[62] The *ṣigha*[63] requires conformity between offer and acceptance issued in the same session, the existence of the *ījāb* until the issuance of *qubūl*, and the means and methods of their communication.[64] Consent should be freely provided free from fraud, misrepresentation or coercion.[65] If the contract is found to have been made in jest, then it is deemed as not having been formed.[66]

Consent may be express or inferred from the conduct of the parties.[67] It should be noted that signs made by a person with a hearing and speech impediment are tantamount to the words spoken by a non-disabled person,[68] but these should be comprehendible and clear.[69] Where express, the consent should be in past tense and not in the form of a question, thus eliminating the likelihood of ambiguity or uncertainty.[70] Al-Shāfiʿī says that there are certain contracts which do not require offer and acceptance in the spoken or written word, such as those pertaining to gifts and *ṣadaqa* (charity).[71]

Offer and acceptance may precede each other. For instance, the buyer can say to the seller: 'sell it to me'.[72] However, in this case there should not be a long interval between offer and acceptance according to *ʿurf* (custom)[73] and the parties themselves should directly communicate both offer and acceptance to

62. *See id.* at 4:521; Al-Dasūqī, *supra* note 59, at 8:394; Al-Rafi, Kitab al-Dahab al-Ibriz Sharh al-Mu'jam al-Wajiz 1:273 (Dar al abi Arqm 2004); *see also* Aron Zysow, *The Problem of Offer and Acceptance: A Study of Implied in Fact Contracts in Islamic Law and the Common Law*, 34 Clev. St. L. Rev. 69, 77 (1985).

63. The first requirement is consent, which is derived from verse 29 of the Nissa chapter in the Quran; *see also* Nethercott & Eisenberg, *supra* note 2, at 52.

64. Al-Dasūqī, *supra* note 59, 8:394; Abdullah Al-Mauṣilī, Al-Ikhtiyār li Ta'līl al-Mukhtār 3:71 (Dar al-Kutub al-Ilmiyah 1937).

65. Al-Nafrāwī, *supra* note 15, at 140; Al-Māwardī, *supra* note 15, at 5:17.

66. Haskafī, *supra* note 16, at 394.

67. Ibn ʿābidīn, *supra* note 12, at 4:526; Khalil Al-Jundi, Al-Mukhtaṣar fī al-fiqh ʿalá madhhab al-Imām Mālik bin Uns li-Khalīl bin Isḥāq bin Yaʿqūb al-Mālikī 3:148 (Dal Al Hadith 2005). It is stipulated that the formation of contracts through conduct is allowed only for trivial matters and not for major transactions. *See* Ibn Qudāma, *supra* note 12, at 2:3–6.

68. Ibn Naqib, Umdat al Salik Wadat al Nasik 1:150 (Shau'n Al Diniyah Qatar 1982).

69. Al-Kāsānī, *supra* note 32 at 5:133.

70. Ibn Qudāma, *supra* note 12, at 2:3–6; Abu Al-Qurtubi Al-Bājī, Al-Muntaqā Sharḥ al-Muwatta' 4:157, 6:24 (Matba'at al-Sa'adah 1999); Al-Mauṣilī, *supra* note 64, at 3:71.

71. Abdurrahman Al-Suyūṭī, Al-Ashbāh wa al-Naẓā'ir 149 (Dar al-Kutub al-'Ilmiyyah 1990); Al-Nawawī, Rauḍat al-Talibīn 3:339 (Al-Maktab al-Islāmī 1991).

72. Ibn Naqīb, *supra* note 68, at) 1:150.

73. *Id.*

each other.[74] Ratification of a past offer or acceptance is also an effective way of giving consent to create a binding contract.[75] If any of the parties leaves its interlocutor before acceptance is communicated then the offer stands revoked/annulled. If offer and acceptance are completed, then the sale becomes binding without the option of session.[76]

B. Capacity of the parties and subject matter

The *ṣaḥīḥ* contract also requires that the parties possess legal capacity and competence to contract.[77] Capacity requires prudence, pubescence, and ownership of the subject matter of the contract, or may otherwise be authorized through agency, while at the same time no interdiction is imposed on a party to the contract by reason of being a minor, insanity or imbecility (*al-maʿtūh*).[78] Minors are capable of contracting in their own name. The Qatari Civil Code (CC), for example, distinguishes between the age of *majority* (*bulūgh*) and the age of *discretion* (*rushd*) or *maturity*. The age of majority is 18 years, irrespective of sex.[79] Article 49(1) CC stipulates that a person that has attained the age of majority and in possession of its mental faculties possesses full legal personality to contract in its own name and perform legal acts.[80] Such capacity is suspended under the same provision where the courts have imposed guardianship or custody of the minor and its property, or where the minor is otherwise incapacitated. In practice, the civil codes of Muslim-majority states require 'maturity' or 'discretion' for certain transactions. Maturity or discretion is not only a question of age. Article 50(1) of the Qatari CC clarifies that lack of discretion may also arise by reason of "imbecility (*al-maʿtūh*) or insanity", in which case the person is considered incompetent to exercise its civil rights, including the absolute freedom to contract. Article 51 CC further limits capacity to contract by stating that persons attaining discretion but not majority, as well as persons that have achieved majority but who are "prodigal or negligent," lack capacity. No doubt, the latter

74. Al-Dasūqī, *supra* note 59, at 8:394.

75. Ibn Abidin, *supra* note 12, at 4:524.

76. Al-Mauṣilī, *supra* note 64, at 3:73.

77. Al Haskafī, *supra* note 16, at) 396.

78. Al Jundī, *supra* note 67, at 3:144; Abu Ibrahim Al Muzanī, Mukhtasar al Muzni 173 (Dar Al Marafah 1990); Muhammad Al-Shafi'ī, Al-Umm 3:70 (Dar al-Ma'rifah 1990); Fatawy Al-Ghazali, al-Wasīṭ fī al-Madhhab3:26 (Dar al Islam 1996); Al-Mauṣilī, *supra* note 64, at 3:71; Al-Kāsānī, *supra* note 32, at 5:133.

79. Qatari Civil Code art. 49(2).

80. Article 17 of the Qatari Trading Regulation Law No. 27 of 2006 [also known as the Commercial Law] equally provides that freedom to trade is available for those reaching the age of majority. The age of majority is of seminal importance in Islamic law as it represents the dawn of full capacity. But there exist significant differences concerning the age of puberty. *See* Al-Nawawī et al., Kitāb Al-Majmūʿ: Sharḥ al-Muhadhdhab Lil-Shīrāzī 360ff (Dār Iḥyāʾ al-Turāth al-ʿArabī, 2001).

limitation (i.e. prodigality (*safah*) and negligence) can be abused and does not sit well with Western notions of contractual freedom.

The subject matter of the contract must be *mutaqawwim* (pure, permissible, beneficial), existent, deliverable, known with specificity and owned by the seller.[81] It should be specified through its measurement, weight, counting, as well as other qualities. The sale of a subject matter ascertained by inspection or description is allowed. The disposition of non-existent objects or subject matters is not permitted because of *gharar*.[82] This is so because the existence of risk (*khaṭar*) or uncertainty (*gharar*) in the subject matter, price, or the time of performance/delivery of any contract is not permitted.[83] However, a subject matter susceptible to destruction, deterioration, or loss is valid if accepted by the purchaser.[84] Contracts for the sale of usufruct, such as a right of way, are valid.[85] Anything prohibited explicitly cannot become a valid subject matter, as is the case with wine, swine, dead animals and others.[86] There are certain commodities that may give rise to *ribā*-related consequences and hence need to be exchanged simultaneously.[87]

C. Types of valid contract

A *ṣaḥīḥ*, or valid, contract is a contract whose content and qualities are lawful and suffers from no defects.[88] There are three types of *ṣaḥīḥ* contracts, namely: *nāfidh lāzim*, *nāfidh ghayr lāzim* and *mawqūf*.[89] The *aṣl* and *waṣf* of a *ṣaḥīḥ* contract, as already noted, comply with the legality requirements of Islamic law. Such a contract should produce the effects ascribed under Islamic law. Some jurists maintain, however, that a contract whose effects are predicated on the occurrence of a future event is equally a species of a *ṣaḥīḥ* contract. Such contracts are known as *mawqūf* contracts, i.e. subject to a suspensive event. This is in line with the opinion of Hanafi and Maliki as well as some Hanbali jurists.

81. Al-Mughnī, *supra* note 32, at 3:480; Ibn Naqib, *supra* note 68, at 1:152; Badruddīn Al-Zarkashī, Al Nahr la Muhit 2:26 (Dar al Kutab, 1994); Muhammad Al-Sarakhsī, Al-Mabsūṭ 5:8 (Dar al-Ma'rifah, 1993); Ibn Rushd al-Qurṭubī, Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid 3:150 (Mustafa al-Bābi al-Halabi, 1975); Al-Mauṣilī, *supra* note 64, at 3:71; Ibn Nujaim, *supra* note 56, at 5:279.

82. Al-Mughnī, *supra* note 32, at 3:480; Manṣūr Al-Buhūtī, Kashshāf al-Qinā' 'an Matn al-Iqnā' 3:162 (Dar al-Kutub al-Ilmiyyah, n.d.); Qadi Ibn Shuja, Al Ghayah wa al Taqreeb 153 (Dar Ibn Hazam, 1994).

83. Al-Nafrāwī, *supra* note 15, at 140.

84. *Id.*

85. Ibn Hajar Asqalani, Al Tahzeeb fi al Fiqh al Ahmad 3:282–285 (Dar Al Kutb Al Ilmiyah, 1997).

86. Ibn Qudamah, *supra* note 12, at 2:9; Al-Māwardī, *supra* note 15, at 5:17.

87. Ibn Mazah, Muḥīṭ al-Burhānī fī al-Fiqh al-Nu'mānī 6:267 (Dar Al Kutub Al Ilmiyyah, 2004).

88. Ibn Nujaim, *supra* note 56, at 5:293; Ibn Abidin, *supra* note 12, at 4:516.

89. Ibn Nujaim, *supra* note 56, at 5:284; Nethercott & Eisenberg, *supra* note 4, at 50; Saba Habachy, *The System of Nullities in Muslim Law*, 13 Am. J. Comp. L. 61 (1964).

The Shafiʿis and some Hanbalis are reluctant to concede that a suspensive delay continues to render the contract *ṣaḥīḥ*. Rather, their line of thinking suggests that in order for a contract to be considered *ṣaḥīḥ* its objective/effects must materialize immediately, that is it must be *nāfidh* (operative). *Mawqūf* or suspended contracts thus have no existence according to these jurists. As a result, a *mawqūf* contract is not immediately enforceable.[90]

The *nāfidh* (operative or immediate) contract is that in which all essential elements are found (i.e. contracting parties, subject matter, and others), pertinent conditions are met, external attributes are lawful (i.e. there are no defects), and the contract is not dependent upon ratification. In contrast, while said essential elements may be found in a *mawqūf* contract, in addition to having met pertinent conditions, the effects of such contract are dependent upon ratification and hence it is not immediately enforceable.[91]

1. The *lāzim* contract

A *nāfidh lāzim* contract is a contract which fulfils the aforementioned conditions pertaining to elements and external characteristics of contracts under Islamic law. Furthermore, it is not subject to rights of third parties, or any option (*khayār*). This contract itself is operative and susceptible to implementation. A contract becomes *lāzim* after its *ináqad*, *nifādh* and *ṣiḥaḥ* where there is no option attached to it or, if there is no cause of suspension, according to the Hanafi school of thought. On the other hand, the Shafi'i' school stipulates that a contract becomes *lāzim* when the session ends and no *khayār* (option) is available to the parties. The difference lies in the validity of *khīyār al majlis* which is applicable to the Shafiʿi school but not to the Hanafis.[92] *Ináqad*, *ṣiḥaḥ*, and *nifādh* are required conditions for a contract to be considered *lāzim*. When a contract becomes *lāzim* it cannot be revoked by a party unilaterally, save with the consent of the other party.[93] For a contract to be considered *nāfidh* two requirements must be fulfilled. The first is *milkiyya* (ownership) and the second is *wilāya* (delegated authority).[94]

2. The *Ja'iz* or *ghayr lāzim* contract

A *nāfidh ghayr lāzim* contract is distinguishable from other contracts in that a party has the right to revoke it without the consent of its counterpart. This right is bestowed by the conferral of a right of option. In this way, the contract is not binding for the party to whom the option is given. The contract may also become

90. Abi Ya'la' Al Baghdadi, Al Riwayatain wa al Wajhain 1:349 (Maktabah Al Ma'arif 1985); Abdul Wahab, Al Ishraf 2:521–22 (Dar Ibn Hazm 1999).

91. Al Baghdadi, *supra* note 91, at 349; Wahab, *supra* note 91, at 2:521–522.

92. Al-Kāsānī, *supra* note 32, at 5:160; *see* Kourides, *supra* note 4.

93. Al-Kāsānī, *supra* note 32, at 160; *see also* Muhammad Wohidul Islam, *Dissolution of Contract in Islamic Law*, 13 Arab L. Q. 336, 356 (1998).

94. Al-Kāsānī, *supra* note 32, at 180.

ghayr lāzim due to its nature, as is the case with *wakāla*, *wadīʿa*, *sharika*, and *kafāla*, where both parties have the right to revoke the contract unilaterally.[95]

3. *Mawqūf*

Mawqūf is a suspended contract which is dependent or contingent on the occurrence of a certain event, or permission from a person with authority.[96] For instance, a contract by *faḍūlī* is suspended due to the possibility of acceptance[97] or rejection from the concerned authority.[98] *Mawqūf* contracts have been classified by some scholars as a subcategory of *ṣaḥīḥ* contracts and some have included it as a regular type of contract. For instance, Ibn Nujaim classified valid contracts into *ṣaḥīḥ*, *bāṭil*, *fāsid*, and *mawqūf*.[99] A contract procured by means of coercion has been discussed as *mawqūf fāsid* and is known as *bayʿ al-mukra/ih*.[100] This is so because the coerced person has the choice to revoke or ratify the contract.

D. Conditions for *nifadh*, *ṣiḥaḥ* and *luzūm* of a contract

There are certain conditions for the enforcement, or *nifādh*, of a contract. These are: ownership (*milkiyya*) or authority (*wilāya*). No person other than the owner possesses authority to make an offer, save through an agent, whether authorized or not (*faḍūlī*).[101] There are fifteen conditions for the validity, or *ṣiḥaḥ*, of a contract. Among these there are both general and specific conditions. General conditions include all those required for the formation (*ináqad*) of contract because what is not formed cannot be validated.[102] Specific conditions relate to the time period for a deferred sale, possession (for a buyer), specific details about the exchange where commodities are prone to *ribā*, delivery in *ṣarf* (currency exchange) before session ends, and information about the actual cost price in *murābaḥa*, *tawliyah*, *ishrak*, and *wadīʿa* contracts.[103]

Conditions for *luzūm*, or rendering a contract binding, include all those mentioned above and additionally that the contract be free from options.[104] If the aforementioned elements are present and the conditions are met the contract comes into existence. However, a contract is not considered *ṣaḥīḥ* or legally enforceable (*munʿaqid*) unless it is free from externally prohibited defects such as *ribā* and *gharar*. If a contract contains such defects, the Hanafis consider it

95. Kamaluddīn Ibn al-Hummam, Fat'h al-Qadīr 6:246 (Dar al-Fikr, n.d).
96. Al-Kāsānī, *supra* note 32, at 5:180; Wahab, *supra* note 90, at 2:521–522.
97. Al-Sarakhsī, *supra* note 81, at 12:113.
98. Al-Kāsānī, *supra* note 32, at 5:156; Al-Dasūqī, *supra* note 59, at 3:3–7.
99. Ibn Nujaim, *supra* note 56, at 5:293.
100. *Id.*
101. Ibn Abidin, *supra* note 12, at 4:521.
102. *Id.* at 521.
103. Ibn Nujaim, *supra* note 56, at 5:281.
104. Ibn Abidin, *supra* note 12, at 526.

fāsid. The Hanafis define a *ṣaḥīḥ* contract as that which is lawful in terms of both *aṣl* and *waṣf*.

IV. *Gharar* and *Riba*

Gharar (contractual uncertainty; ambiguity) is a hurdle to a valid contract. *Gharar* in a transaction exists when the conditions of the *maḥal al-ʿaqd*are not clear and the contract's effects and results are not evident.[105] In other words, *gharar* exists in a thing when it is not certain whether that particular thing can be achieved/materialize or not.[106] *Gharar* is a broader concept than *jahhala* (ignorance; lack of knowledge); that is, every *majhūl* involves *gharar* but every *gharar* does not involve *jahhala*. There may be *gharar* without any *jahhala*, such as in the sale of a lost item or a stray animal whose qualities and nature are completely known; in which case there is no *jahhala*. However, *gharar* exists on the point of its delivery by the seller to the purchaser. Still, no *jahhala* can exist without *gharar*.[107] There are three degrees of *gharar* and *jahhala*. The first is excess lack of knowledge and uncertainty, which is forbidden by all schools of Islamic jurisprudence. The second degree is minor/trivial *gharar* and *jahhala*, which is permissible—e.g. such that relates to the foundation of a house that is being sold. The third degree arises where *gharar* and *jahhala* are moderate or lie somewhere in the middle of the excess and minor degrees described above. There is some difference if this kind of *gharar* is counted with the first or the second type.[108] *Gharar* may exist when the *ṣifa* (qualities) and *qadr* (measurement, weight, number) of the subject matter, its deliverability or existence, are not known with precision.[109]

For a contract to be valid, it must be free from *gharar*.[110] The characteristics of the subject matter should be obvious.[111] *Gharar* pertains to the subject matter of the contract and potentially also to the price. Therefore, knowledge of the price is considered as one of the two cardinal requirements of a *ṣaḥīḥ* contract. If a definitive price is determined the contract is valid, whereas if it is merely mentioned, albeit without specification of amount (or currency in transnational contracts) it will not be valid. If someone offers two prices in a single

105. Al-Shīrāzī, *supra* note 35, at 2:12.

106. Al-Qarāfī, *supra* note 39, at 3:403–404.

107. *Id.* at 3:265.

108. *Id.* at 3:403–404; Ibn Abidin, *supra* note 12, at 4:528–530.

109. Al-Nawawī, *supra* note 34, at 9:346–348; Al-Shīrāzī, *supra* note 35, at 2:12, 1:262; Al-Shirbīnī, *supra* note 50, at 2:18; Al-Sarakhsī, *supra* note 81, at 13, 192; Al-Kāsānī, *supra* note 32, at 5:163; Ahmad Al-Qarāfī, Anwar al-Buruq fī Anwā' al-Furūq 3:265 (Dar al-Kutub al-Ilmiyah, 1998).

110. Al-Nafrāwī, *supra* note 15, at 140; *see* AAOIFI, 'Shari'ah Standard No (31) Control on Gharar in Financial Transactions, 2/2' and AAOIFI, 'Shari'ah Standard No (31) Control on Gharar in Financial Transactions, 5/1/2'.

111. Al-Nafrāwī, *supra* note 15.

transaction, one for a spot sale and another in the event of a delayed sale, such offer is invalid. This outcome is attributed to the Prophet Muhammad who prohibited two sales in one because this had the potential of creating uncertainty in the price and ultimately gives rise to *jahhala*.[112]

Jurists generally agree that *ribā* prevails in two things; sale and liability arising out of sale, credit or other transactions. *Ribā* incurred as a matter of liability is of two kinds. The first is *ribā al-jāhiliyya*, whereby the parties agree to the extension of the loan period against an increase in the amount of the loan. The second concerns discount and early payment and it is this that has caused most disagreement among jurists. Jurists agree that *ribā* in sale agreements is of a twofold typology, namely: delay and excess.[113] The rules of *ribā* can be categorized as follows:

- things in which both excess or delay are not allowed;
- things in which excess is allowed, but not delay;
- things in which both are allowed; and
- things which are permitted in one category/genus but not in the other category.

Islamic jurists agree that neither delay nor excess (ie a person provides 1kg of wheat in order to receive 3kg. In this case the 2kg is considered an excess) is allowed on any of the commodities mentioned in the narration of ʿUbādah ibn aṣ-Ṣāmit, except what has been narrated by Ibn ʿAbbās. This is known as the hadith of six commodities in latest writings. ʿUbādah ibn aṣ-Ṣāmit reported the Holy Prophet as saying: "gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, and salt by salt, like for like and equal for equal, payment being made hand to hand. If these classes differ, then sell as you wish if payment is made hand to hand."[114]

V. Causes of suspension

The possible cause or causes due to which the effects of a *ṣaḥīḥ* contract are suspended may be summarized as following:

Defective capacity: Minors with discretion (*ṣabī mumayyaz*) or under interdiction (*ḥajr*) due to *safah* (weakness of intellect) or *atah* (lunacy or partial insanity) may be permitted to undertake certain kinds of transactions. These transactions are divided in three categories: The first category encompasses those that are purely beneficial for the person with defective capacity, such as acceptance of *hibbah*, *ṣadaqa*. These transactions concern the conferral of ownership to the minor without anything being given in return. Purely beneficial transactions are allowed for minors without permission from the guardian. This is

112. *Id.*
113. *Id.*
114. Ṣaḥīḥ Muslim, *Hadith*, 10:3853; 10:3069.

because the guardian is appointed to save the child from the pitfalls of damaging contracts and hence a contract that is beneficial for the minor requires no permission from the guardian.

The *second category* concerns transactions that are purely injurious to the minor, such as gifts, *waqf* and others. These are transactions in which the minor suffers without any return or benefit. Minors may not enter such transactions even with the permission of their guardian, on the ground that the guardian is not authorized to undertake these acts on behalf of the minor.

The *third category* concerns transactions oscillating between harm and benefit, such as *ijāra*, sale and purchase. Minors can enter these with the permission of their guardian.[115] Therefore, a transaction by a minor involving the likelihood of both benefit and harm are valid subject to ratification. Such ratification may be provided by the guardian after the transaction and before the minor attains puberty; or alternatively by the minor him or herself after majority in case the guardian did not reject the contract before attainting majority. The *ḥukm* of such a contract is that before ratification it produces no effects and ownership of goods, or the agreed price is transferred once ratification is granted. The act of ratification in this case operates retrospectively and the effects of the agreement come into being from the date the contract is ratified. In the event that ratification is refused the contract becomes void.

Suspension due to lack of proper authority: The seller possesses authority to contract if he or she is the owner, guardian, or an authorized agent. If a person enters into a contract on behalf of another without authority or permission, the contract is considered valid, but its effects are considered suspended until ratified by the owner. If ratified by a person with requisite authority, the contract becomes operative; otherwise it will be considered void. A *faḍūlī* is a person who acts without permission or an agent in breach of his mandate.[116] Where the *faḍūlī*has delivered the property and such delivery is not subsequently ratified by the owner, the *aḥkām*[117] (usurpation) shall operate against the *faḍūlī*; namely, he or she must return the property or risk becoming liable for damages.

Suspension due to rights of third parties: If the owner sells the mortgaged property, it will be subject to the ratification of the mortgagee. Where a person has capacity and authority to act, e.g. in situations of ownership of the subject matter but subject to the rights of third parties, the contract is considered suspended and must be ratified be the third party in question.

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115. Al-Kāsānī, *supra* note 32, at 5:180.

116. Al-Kāsānī, *supra* note 32, at 5:181. The preferred opinion for the Shafiʿis and Hanbalis is that the contract by a *faḍūlī* is void. *See* Al-Suyūṭī, *supra* note 71, at 150; Al-Mughnī, *supra* note 32, at 4:480; Al-Mauṣilī, *supra* note 64, at 3:71.

117. These are *aḥkām* regulating a usurper's possession of property, which the usurper intends to include in a transaction.

The Shafiʿis divide a contract into *ṣaḥīḥ* and *bāṭil*/*fāsid*. *Ṣaḥīḥ* can be *lāzim* or *jāʾiz*. Generally, *bāṭil* and *fāsid* are treated as the same, with the stipulation that *mawqūf* is a *bāṭil* contract, particularly where a *faḍūlī* is involved. In explaining this classification the Shafiʿis distinguish among four discreet categories.

First: Contracts not binding on the parties and which are unlikely to become binding in the future. These contracts are: *wakāla*, *muḍāraba*, *mushāraka*, *wadīʿa* and rīyāḥ. Here, the option is available for both parties to declare the contract void. If an option is stipulated in such contract, it will become void because it will render it binding, although it is only *jāʾiz*.

Second: Contracts not binding on the parties, but which are llikely to become binding in the future upon the fulfilment of certain conditions. In this case, the parties have the option before the contract becomes binding, following which the option is lost for the parties. Still, if the option is stipulated after the contract is binding or the option is removed prior to this, it becomes void. Five types of contracts fall within this typology, including *juʿāla*, emancipation on payment, destruction of property with liability (*istihlak al amwal bi aldaman*) and *qarḍ*.

Third: Contracts binding on one party but not on the other under any circumstances. This category encompasses three sub-species of contracts, namely: *rahn*, *ḍamān* and *kitāba* (emancipation). Hence, an option is granted to one party i.e. the mortgagee, to whom the damage has to be paid. If a stipulation is included, which effectively removes the option from the above metioned or grants it to the party not granted such option, it will be void.

Fourth: Contracts binding on both parties. This has been divided into further sub-categories. Where an option is not granted to any party (not an option of session or condition) the contract in question is *nikāḥ*, *khulʿ* and *ruju*ʿ. The second sub-category concerns those contracts in which the option of condition is not applicable, as is the case with *ijāra*, *masaqh* and *ḥawāla*. The third sub-category consists of contracts whereby the option of session is applicable but a condition is not applicable. These contracts require delivery/posession before the contract can be considered as having coming into being, as is the case with salām and *ṣarf*. There are contracts in which *khiyār al-majlis* is applicable (in built) and where all possible options can be stipulated. This category further includes all sale contracts.[118]

VI. *Fāsid* Contracts

Fāsid contracts are those whose elements (*aṣl*) are present and legal but in respect of which there may be a defect in characteristic (*waṣf*) that may be removed, upon which the status of *ṣaḥīḥ* can be attributed to it. Although not all jurists consider an irregular contract in the same sense, the Hanafis school of

118. Al-Māwardī, *supra* note 15, at 5:342, 375; *see also* Al-Suyūṭī, *supra* note 71, at 453; Al-Nawawī, *supra* note 34, at 9:225; Al-Mughnī, *supra* note 32, at 3:483, 493.

through generally agrees that a *fāsid* contract can be validated by removing its defects, whereas the Shafiʿis consider *fāsid* and *bāṭil* to be the same. The Hanbali school of thought shares the same view, although the Maliki school has created a detailed categorization of irregular contracts on account of *ribā*, *gharar* or other prohibitions.

The emergence of *fasād* (irregularity) in a contract may be due to several reasons. For instance, this is so where a commodity that is not *māl* for a Muslim is used in a contract in lieu of a price, e.g. wine, or swine; where the agreed price is ambiguous; where the subject matter may lead to dispute or; where it has not been discussed at all. A sale in jest is considered *fāsid*, not *bāṭil*.[119] The sale of something that is not deliverable, beneficial or pure is considered *fāsid* according to the Hanbalis.[120]

The involvement of *ribā* in a contract makes it *fāsid*, according to the Hanafis.[121] The contract also becomes *fāsid* by reason of *gharar*. *Gharar* may be beget in numerous ways, particularly where the price is ambiguous or not discussed at all.[122] In this case, the price or the consideration is unknown and hence may lead to conflict as the likelihood of delivery is rendered impossible. Therefore, *bayʿ al-ghāʾib* is not allowed.[123] Nonetheless, in the event of uncertainty that does not lead to conflict it is considered permissible.[124] The same is also true in respect of contracts involving elements of gambling (*qimār*),[125] which encompasses debt-based instruments and games of chance, and which is narrower than *maysir*[126] and *maysir*, which involves an agreement that is based on deception, fraud,[127] immoral inducement and bad faith. As a result of these 'limitations',

119. Ibn Abidin, *supra* note 12, at 7:234.

120. Al Madasi, *Kitab Al Sharh Al Kabir* 4:7 (Dar al Kitab al Arabi, n.d.).

121. *See* Qur'an 2:275 (stating in a discussion on *ribā* that "those who devour usury will not stand excepts as stands one whom the Evil one with his touch hath driven to madness.") *See* Mahmoud A. El-Gamal, *An Economic Explication of the Prohibition of Riba in Classical Islamic Jurisprudence*, 21 J. Islamic Banking & Fin. 45 (2001).; Mir Siadat Ali Khan, *The Mohammedan Laws against Usury and How They Are Evaded*, 11 J. Compar. Legis. & Int'l L. 233 (1929).

122. Ibn Abidin, *supra* note 12, at 7:234; Alā'uddīn Al-Samarqandi, Tuḥfat al-Fuqahā' 2:48 (Dar al-Kutub al-Ilmiyah 1994).

123. Al Ghazali, *supra* note 79, at 3:41–43; Ibn Hajar Al Haythaimi, Tuhfat Al Muhtaj Fi Sharh Al Minhaj 4:263 (Al Matba'a al Maimaniya 1987).

124. Saudi Arabia has long maintained that future trading agreements, as well as non-*takāful* based insurance constitute *gharar* and are against its public policy. *See* Kristin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy to Refuse Enforcement of Non-Domestic Arbitration Awards?* 18 Fordham Int'l L.J. 920, 954 (1995).

125. The prohibition of *qimār* is adduced from the sources of *maysir*. *See* Atikullah Hj Abdullah, *The Elements of* Qimar *(Wagering) and* Gharar *(Uncertainty) in the Contract of Insurance Revisited* 9 J. Islamic Econ., Bus. & Fin. 89, 90 (2013).

126. Qur'an, 5:90–91 (Al-Ma'ida), 2:219 (Al-Baqara).

127. There is some discussion of this in Westland Helicopters Ltd. v. Arab Organization for Industrialization, (1995) 2 WLR 126 (Switz.), but particularly in Westland Helicopters Ltd. v. Arab Organization for Industrialization, (1984) 80 ILR 600 (Switz.). Equally, in United

lender and borrower must necessarily become partners and assume the risk of the investment or transaction equally, which in turn results in more prudent financing. This risk sharing applies not only in banking-like transactions, but across all financial activities, be they bonds (*ṣukūk*),[128] insurance (*takāful*)[129] and others. On the basis of the aforementioned principles underlying Islamic finance, several standard transactions have emerged. Chief among these are: short-term trade finance agreements (*murabahah*), medium term investments (*ijarā*, *istithnā'*),[130] long-term partnerships (*mushāraka*), fee-based services (*juʿāla*, *kafāla*), demand deposits (*amāna*), investment accounts (*muḍāraba*) and special investment accounts involving sharing and profit/loss (eg PSIAs) (*mushāraka*).[131] Of course, transactions in prohibited goods or conduct, such as intoxicants,[132] or bribery,[133] render the contract void, but also constitute public policy defences.

The contract becomes *fāsid* if consent is defective, where for instance it is procured by misrepresentation.[134] If there is a condition contradicting the

Arab Emirates v. Westland Helicopters, (1994) 120 II 155 (Switz.).

128. *Sukūk* bonds are sharia-compliant alternatives to traditional bonds. Rather than the charging of interest upon maturity, *sukūk* bonds require a tangible asset over which partial ownership is established for the *sukūk* holder who may collect rent or royalties. There are a variety of *sukūks*. *See* A. Saeed & Omar Salah, Development of Sukuk: Pragmatic and Idealist Approaches to Sukuk Structures 29 J. Int'l Banking L. & Regul. 41, 45–49 (2014).

129. *Takāful* is essentially cooperative risk-sharing by using charitable donations, as opposed to commercial capital, in order to eliminate *gharar* and *ribā* that are intrinsic in the operation of conventional insurance. *See* KHALED KASSAR, OMAR CLARK-FISHER, WHAT'S TAKAFUL: A GUIDE TO ISLAMIC INSURANCE (BISC Group, 2008). It should be stressed that the majority of insurance license applications in the Gulf are *takāful*-based.

130. *Istithnā'* contracts are derived originally from salām contracts, wherein one party paid a year in advance for crops of a particular weight at the time of harvest. *Istithnā'*, or sale by manufacture, is a contract to manufacture a particular good not yet in existence, for an agreed price. The buyer need not pay for the good until its acceptance and both parties may revoke their agreement at any time before delivery. *See* Frank E. Vogel & Samuel L. Hayes, Islamic Law and Finance: Religion, Risk and Return (Kluwer Law International, 1998) and Abdulrahman Baamir & Ilias Bantekas, *Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice* 25 Arb. Int'l 239, 266 n.163 (2009).

131. *See generally* O. Masood, Islamic Banking and Finance: Definitive Texts and Cases 7–69 (Springer 2011); Nethercott & Eisenberg, *supra* note 4, at 50.

132. Qur'an 4:43;5:90.

133. Non-Muslim courts have expressed their opinion on Islamic public policy, even if not in very precise terms. In *Lemenda Trading Co Ltd v. African Middle East Petroleum Co Ltd*, the parties had gone to arbitration over a contract that envisaged illicit payments to a Qatari official in exchange for business favours. Lemenda Trading Co Ltd v. African Middle East Petroleum Co Ltd [1988] QB 448 (Eng.). An award was rendered in that case but its enforcement in England was refused on several grounds, among which was that it violated the public policy of Qatar. A different conclusion was reached in Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd and Others, [1999] 3 WLR 811, whose facts were not very different from *Lemenda*. In this case, however, the court effectively held that fraud and bribery in a contract to be executed in Kuwait, did not offend that country's public policy and could therefore be considered arbitrable under the laws of England.

134. Ibn Rushd, *supra* note 81, at 3:125–26.

essence of the contract this would render it *fāsid*.[135] A *fāsid* contract has no legal effect[136] and no right of ownership is transferred.[137] Therefore, it is mandatory to remove all irregularities before taking possession.[138] A *fāsid* contract can be revoked (*faskh*), following which the underlying agreement is deemed extinguished.[139] Nothing is a hinderance in revoking a *fāsid* contract.[140] For instance, a *fāsid nikāḥ* must be nullified as it does not justify intercourse on account of the irregularity of the *nikāḥ* contract.[141]

A. Instances of *fāsid* contracts

Bayʿ al-majhūl. This pertains to the sale of a subject matter, the quantity (number, weight, or length), nature or price of which is not known or is ambiguous as a result of *gharar*. There is little need to reiterate that contracts involving *gharar* are null and void.

Bayʿ al-inah These types of contracts are employed to sell property on credit for a certain price with a view to repurchasing the same property it at a price lower than the sale price, subject to prompt payment. It is required that both transactions take place simultaneously in the same session of the contract.[142] The Hanbali school of thought considers these types of agreements as giving rise to *ribā al*-nasīʾa.[143]

The Holy Prophet proscribed two sales in a single transaction. This entails a single contract relating to two sales, such as the sale of a single commodity for two prices, one in cash and the other on credit; or making a contract binding against one of the two prices. This sale is considered *fāsid* according to the Hanafi school,[144] because the price is indeterminate or uncertain. If this uncertainty is removed, then the contract becomes valid.[145] *Bayʿ al-inah* may take one of many forms.[146] The first is an exchange of two commodities (each has different prices)

135. Ibn Abidin, *supra* note 12, at 7:234.

136. Badr Uddin Al-Aini, Al Binayah Sharh Al Hidaya 8:202 (Dar al Kutb Al Ilmiyyah 2000).

137. Ibn Abidin, *supra* note 12, at 7:234. According to one Maliki tradition, *fāsid* contracts confer *shubha* (doubt or impression) of ownership and therefore, if a commodity in a *fāsid* contract is destroyed in the hands of the buyer, compensation (*ḍamān*) is due by the seller. *See* Al Mazri, Shar Al Talqin 2:432, 438 (Dar Al Gharb 2008).

138. Al-Aini, *supra* note 137, at 8:202.

139. Al Babarti, Al Inayah Sharh Al Hidayah 2:254 (Dar al Fikr nd).

140. Al Mazri, *supra* note 137, at 2:417.

141. Al Aini, *supra* note 136, at 5:180.

142. Al-Ramlī, *supra* note 34, at 3:477; Ibn Abidin, *supra* note 12, at 5:542; It is not permitted for an *istithnāʾ* to be concluded on a sale and buy back basis (*bay' al-'inah*). *See* AAOIFI 'Shari'ah Standard No (11) Istisna'a and Parallel Istisna'a, 2/2/4'.

143. Ibn Qudamah, *supra* note 12, at 2:17.

144. Al Jassas, Sharh Mukhtasar Al Tahavi 3:100 (Dar al Bashair Al Islamiyyah 2010).

145. Al Samarqandi, *supra* note 122, at 2:48.

146. Al Aini, *supra* note 136, at 8:186; Al Jassas, *supra* note 144, at 3:100; Al-Samarqandi, *supra* note 122, at 2:48; Hamad Al Hamd, Sharh Zad Al Mustaqna lil Ahmad,

for two prices. This is prohibited by consensus of jurists, chiefly because of the indeterminate price. Such illegality arises in two ways: If one says I will sell you my house at such price if you sell me your commodity at such price. This is not allowed in both form (i.e. if it constitutes a sale), as well as a type of condition,[147] or; if one says, I will sell this commodity for one dinar, or this other commodity for two dinars on the condition that the sale is binding in one of the transactions. This is equally invalid because it encompasses two contracts.

The second consists of an exchange of a priced commodity for two prices, one of which is in cash while the other on credit. By way of illustration, a person might offer to buy a house from another for a price of 1000 dirham on the spot, or 2000 dirham through delayed payment, without however agreeing on the amount in the contract, leaving the specification of the amount on either party. There is no valid contract in this case because the price is not known.[148] *Bayʿ al-Inah* also falls in this situation, especially where one offers to sell a dress for cash on the condition that he buys it back from the initial buyer on credit, with such period and at such price.

The third situation concerns situations where one person offers to another to sell one of two items for a price, without ultimately specifying which.

B. Sale with defective conditions and Bayʿ al-Wafāʾ

If a person attaches a condition in a sale intending to use the sold item for a month, then the sale is considered *fāsid*. This outcome is particularly relevant to commutative contracts, but not in respect of non-commutative contracts, as the former incur *ribā*, which is not applicable to the latter.[149] This is the case with forbidden conditions, but not with every stipulation.[150] For instance, some conditions do not render the contract *fāsid* or *bāṭil*, as is true with: the requirement of witness presence for the conclusion of a sale; the existence of a guarantor; the option of defect; spot payment in currency; delay of the price to a future time; the requirement of features in the commodity; the condition that it be returned if found defective, or; a condition negating payment until the commodity is actually received. If a condition contradicts the essence of the contract or otherwise benefits one party against the other, then it is considered irregular.[151]

13:67, https://al-maktaba.org/book/852; Abdul Rahman Al Maqdasi, Al Idah Sharh Al Umdah 243 (Dar Al Hadith al Qahirah 2003); Al-Māwardī, *supra* note 15, at 5:342; Al Rafi, *supra* note 14, at 8:194; Al Ghazali, *supra* note 79, at 3:72; Al-Ramlī, *supra* note 34, at 3:150.

147. Al Aini, *supra* note 136, at 8:186.

148. Al-Māwardī, *supra* note 15, at 5:342; Al Rafi, *supra* note 14, at 8:194; Al Ghazali, *supra* note 79, at 3:72; Al-Ramlī, *supra* note 34, at 3:150; Al Aini, *supra* note 136, at 8:186.

149. *See* Hassan Hussein, *Contracts in Islamic Law: The Principles of Commutative Justice and Liberality* 13 J. Islamic Stud. 257 (2002).

150. Ibn Abidin, *supra* note 12, at 5:84.

151. *Id.*

Where the seller offers to sell a commodity against the buyer's loan to the seller upon condition that ownership to the buyer commences when he repays the loan, this is considered a sale guaranteed by the parties' consent and is called *bayʿ al-amāna*. It is assumed that the buyer will benefit from the commodity by means of usufruct, lease, use, or other.[152] There is some difference of opinion between scholars who refer to this transaction as a *fāsid* sale, option, mortgage or *ikrāh*. For instance, it is argued that the sold commodity in the hands of the buyer is tantamount to a pledge that cannot be used without the pledgee's permission. If any damage accrues it will be indemnified by him. When the loan is paid the commodity is retrieved and there is no difference between rahān and this sale. This view is countered by those scholars arguing that if a transaction takes place under the term 'sale' it cannot be rahān (mortgage), and if the parties stipulated its revocation by using the word 'sale' or *wafāʾ* it is not binding and hence is considered a *fāsid* sale. Similarly, others opine that it is a *ṣaḥīḥ* sale on the basis of *ʿurf*.[153] It is named *wafāʾ* because the underlying promise also includes a condition/promise, whereby when the seller pays back the money the commodity will be returned to him. Certain jurists have allowed such a sale, probably because it avoids recourse to *ribā*.[154]

VII. Invalidity (*Bāṭil*)

Three schools do not differentiate between *fāsid* and *bāṭil* contracts and consider *fāsid* contracts as *bāṭil*. The Hanafi school treats the *fāsid* and *bāṭil* contracts discretely. As for *fāsid* contracts only the *waṣf* of the contract is defective whereas for a *bāṭil* contract the *aṣl* of the contract is also defective.[155] Every sale is permitted, save for the type of transactions that are prohibited, which renders pertinent contracts void.[156] According to the Shafiʿis, a transaction by a *faḍūlī*is considered void, whereas Abu Hanifa declared such transactions as falling within the scope of *fāsid* contracts.[157]

Ibn ʿĀbidīn mentions that a difference between *bāṭil* and *fāsid* is that if the subject matter is not *māl* in any of the divine religionsthen the sale is *bāṭil*, whereas if it is so (even if not *māl* under Islam) it is *fāsid*.[158] If wine is the subject matter, then the contract is void; albeit, if the subject matter is the price of the

152. Al-Buhūtī, *supra* note 82, at 3:149; Al Haythaimi, *supra* note 123, at 4:296; Al Mazri, *supra* note 137, at 2:388; *see also* Nicholas HD Foster, *The Islamic Law of Real Security*, 15 Arab L. Q. 131 (2000).

153. Ibn Nujaim, *supra* note 56, at 6:9.

154. Ibn Abidin, *supra* note 12, at 5:277.

155. *Id.* at 7:234.

156. Qur'an, 2:275 (surah Al-Baqara); Shafiʿi, *supra* note 78, at 3:491.

157. Al Ghazali, *supra* note 78, at 3:17–23.

158. *Id.*; Al Kafi, *supra* note 12, at 2:4; Al Mughnī, *supra* note 32, at 4:159, 189; Ibn Abidin, *supra* note 12, at 5:84; Shafi'i, *supra* note 78, at 3:70; Al-Māwardī, *supra* note 15, at 5:13, 17; Al Ghazali, *supra* note 79, at 3:17–23.

sale or service then it is voidable. The rationale justifying this difference is that the subject matter is the objective of the contract, while the price is just a means to achieve it. It is for exactly this reason that a sale is revoked if the subject matter (objective) is destroyed and not because the price has been changed.[159] The sale of a non-existent or non-deliverable item, or an item that risks becoming non-existent is void.[160] If the subject matter of a contract is *najas*, prohibited, or has no beneficial value it will render a contract invalid.[161]

The objective of a contract also determines the *ṣiḥaḥ* of the contract. If the objective of a contract over a permissible commodity is illegal, the contract is considered invalid. For instance, the Hanbali and Maliki schools prohibit the sale of grapes, dates or wheat to a person intending to make wine;[162] the same principle applies to the sale of weapons to a person intending to use them against others.[163] Although the Shafiʿis[164] and Hanafis[165] permit such sale, the Shafiʿis consider it *makrūh*. The Shafiʿis also consider the sale of arms to rebels and dacoits *makrūh*, yet valid because such sale fulfils all the legal requirements needed for a valid contract. The Hanafis also allow the sale of land to one intending to cultivate it and make wine, but subject to *karaha* because it may lead a person to commit sins.[166]

A void contract will have no legal effect whatsoever.[167] All schools agree that even if a buyer has taken possession of a commodity based on a void contract, he will not own it.[168] There is a difference of opinion whether as to the buyer will be liable for damages or other forms of compensation if the commodity is destroyed in his possession. One opinion is that the commodity will be treated as *amāna* by the consent of the seller and if it gets destroyed without transgression then it will not be compensated. The second opinion is that compensation is due because possession by means of a void contract amounts to, or resembles, possession while a bargain is in progress.[169]

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159. Haskafi, *supra* note 16, at 420.

160. Al Kafi, *supra* note 12, at 2:4.

161. *Id.*

162. Abu Al Walid Ibn Rushd, Al Bayan Wa Al Tahsil 18:513 (Dar al-Gharb al-Islami 1984); Al-Nafrāwī, *supra* note 15, at 14:295.

163. Ibn Rushd, *supra* note 163, at 18:513.

164. Al Rafi, *supra* note 14, at 8:230–231*; see also*, Al-Māwardī, *supra* note 15, at 5:270.

165. Al Jassas, *supra* note 144, at 6:391.

166. Al-Sarakhsī, *supra* note 81, at 24:26.

167. Al-Zarkashī, *supra* note 81, at 2:26; Al Mazri, *supra* note 137, at 2:438.

168. Al-Mauṣilī, *supra* note 64, at 2:23.

169. *Id.* at 2:23; Al Mazri, *supra* note 137, at 2:438; *see* Mahdi Zahraa & ShafaaiMahmor, *The Validity of Contracts when the Goods are not Yet in Existence in the Islamic Law of Sale of Goods* 17 Arab L. Q. 379 (2002).

A. Instances of invalid contracts

A sale which lacks the conditions of a valid sale is an invalid sale. Every sale is permitted save those prohibited by the Prophet. Hence, every sale that has been prohibited is not allowed and considered as giving rise to a void contract.[170] The sale of credit for new credit arises where a person owes another against a commodity he bought (so he still has to pay the price for which he remains liable), or in the event of a debt sold to a third person or to the same person with delay. Scholarly consensus dictates that this type of sale is not allowed because there is prohibition against the sale of credit (one's liability) by means of further credit (something delayed)[171] as it involves *ribā al-jāhiliyya.* This sale is not allowed in the same as well as different genus.[172] It has many forms[173] and the Maliki school has identified three forms in which this sale may occur:

The first concerns termination of credit by new credit, sale of credit by new credit, both of which give rise to *ribā al-jāhiliyya*, because credit is exchanged for another commodity or liability, or even by the very same commodity, but in excess of the original debt.

The second type may well assume two forms, namely: (i) sale of credit corresponding to other persons' debt, what X owes to A and Y owes to B each of these two (X and Y) sell to each other their respective debts and; (ii) three persons, whereby X owes to A and goes on to sell the debt to a third person against credit.

The third type involves delaying the price on.[174] Let us consider the following example. A person receives credit of 1000 dirham and at the time of repayment he promises to his creditor that he will offer him an equivalent amount of wheat at the end of year. In this manner, he sold credit against wheat. The second is a famous pre-Islamic transaction that extends the time and amount of credit paid with excess or decrease (*hat wa ta'jul*).[175] Within the Shafiʿi school, if a third person buys this credit then there is disagreement about its validity; one view allows it while another does not.[176] If X owes to Y 10 dirham and he buys from Z a cloth against these 10 dirham or says to Z: "I bought from you against 10 dirham what X owes me", there is disagreement whether this is allowed.

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170. Shafi'i, *supra* note 78, at 3:491.

171. Abu al-Hasan Al-Sughdi, An Nutan fi Al Fatawa li Sughdi 1:475 (Mu'assasah al-Risalah 1984).

172. Sulaiman Al-Bujairimi, Tuhfat al-Habib alā Sharḥ al-Khaṭib - Ḥāshiyat al-Bujairimi alā Manhaj al-Tullāb 3:24 (Dar al-Fikr 1995).

173. Al-Mardāwī, *supra* note 55, at 12:105.

174. Al-Dasūqī, *supra* note 59, at 3:61–62.

175. Al Maqdasi, *supra* note 146, at 12:106.

176. Abdullahi Ibn Yusuf Al Juwayni, *Nihayat Al Matlab Fi Darayat Al Mazhab* 5:195 (Dar al-Minhaj n.d.).

VIII. Types of *shurūṭ (*conditions)

There are four types of conditions which may have a direct impact on the *aṣl* or *waṣf* of a contract, or which may otherwise be opposite to the essence of the contract.[177] The first type of conditions is linked to the *muqtaḍa* of the contract and constitute the essence and objective of the contract and in addition stipulate the contractual liabilities which are in line with the essence of the contract. The contract will remain unaffected, irrespective if these are mentioned therein or not. For example, if the seller mentions in a deed of sale that he will retain absolute ownership of the commodity or that he is otherwise authorized to transfer or sell his property, such stipulations do not affect the contract.[178]

The second type of conditions do not pertain to the essence of the contract; rather, their inclusion is beneficial to the contract and the parties. When a party does not fulfill these conditions, the other party may revoke the contract. For example, requiring witnesses to a contract or, any guarantee in case of denial enhances the contract itself.[179] Under this condition, specific requirements or features may be demanded, such as that the land purchased must have an agricultural value or the animal purchased be suitable for milking. If consent is given on the basis of any of these conditions, their non-fulfillment by one party entitles the other to *faskh* or to continue with mitigation of loss incurred due to non-conformity.

The third group includes conditions conflicting with the essence of the contract and which are not permissible even if they bring some benefits to the stipulator, on the ground that their incorporation renders the contract *bāṭil*. The legal implication of these conditions differs across contracts. For example, the existence of an option in a *nikāḥ* will make it *bāṭil*. In equal measure, the existence of a prohibition in a sale agreement whereby the buyer is required to further sell or lease the property, or put it to some other use, will render the sale contract *fāsid* but the debt or partnership will become void or *bāṭil*.[180]

The fourth type of conditions goes against the essence of the contract but produces no adverse effect on it, because while the condition itself is void the contract remains valid. For example, a stipulation by the seller that the sold commodity will be used for a specific purpose only by the buyer is *fāsid*, but such condition does not invalidate the contract.

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177. Nethercott & Eisenberg, *supra note* 4, at 53; *see generally*, Oussama Arabi, *Contract Stipulations (Shurut) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya* 30 Int'l J. Middle East Stud. 29 (1998).

178. Al-Mughnī, *supra* note 32, at 4:480.

179. *Id.*

180. Al Haskafi, *supra* note 16, at 394.

A. Valid conditions

Valid conditions are those that have been validated by the *shar'* and are moreover based on custom, or predicated on the objective or essence of the contract.[181] They have been classified into four distinct types. These conditions concern the essentials, objectives or essence of the contract. Their explicit mention, or not, is irrelevant, as these requirements are already mandatory under the specific terms of the contract itself and nothing new is introduced. The subject matter of these conditions is an obligation to fulfil even if none of the parties has so expressly stipulated. This is true in respect of a condition stipulating that the seller deliver the commodity to the buyer, the buyer's right to return the commodity in the event of defects, the buyer's obligation to pay the price before possession,[182] the buyer's right to own, use,[183] sell, gift, or mortgage the purchased commodity.[184] These conditions do not explain, enhance, or improve the nature of the contract.[185]

Another type of valid conditions is that which emphasizes the objectives of the contract. These are not relevant to the purpose of the contract but confer a beneficial value to the object of the contract or the contracting parties. These conditions improve and complete the essence of the contract and eliminate the likelihood of denial and refusal. Examples include stipulations for guarantee or mortgage in a delayed sale, witness participation in a contract, as well as a stipulation of a particular quality in the goods.[186] These conditions are binding on those to which they are addressed and the contract is validated with these conditions. Moreover, the person who imposed these conditions will have a right to revoke or terminate the contract in case these are not fulfilled. Some other examples include conditions describing the subject matter, as is the case with land required to be free of charge, or mortgage,[187] or land susceptible to agricultural use.[188]

Yet another type of valid conditions are those validated by the *shar'*. These types of conditions are specified in the text of the contract or derived by a *ṣaḥīḥ qiyās*, like the options granted to both parties, the option of a known time period and the option of specification and cash. If a condition is based on *'urf* then it may be relied upon. Although an *'urf*-based condition is binding it is necessary

181. Ibn Hummam, *supra* note 95, at 6:367.

182. Al Haskafi, *supra* note 16, at 413; Malik Ibn Anas, *Al Mudawwanah al Kubra* 3:185 (Dar Al kutb Al Ilmiyyah 1994).

183. Al Kalughati, *Al Hidayah fil Mazhab al Hanbali* 239 (Gheeras Publications 2004); Al Ghazali, *supra* note 79, at 1:279.

184. Mustafa Al Maidani, Al Tazheeb fi Matan al Ghayah wa al Taqreeb (Matan albi Shuja') 125–27 (Dar Ibn Kathir, 1989). *al-Tahzīb fī al-Matn*.

185. Al Kalughati, *supra* note 183, at 239.

186. Al-Mardāwī, *supra* note 55, at 127.

187. Al Maidani, *supra* note 184, at 125–127.

188. *Id.* at 25–127; Al-Māwardī, *supra* note 15, at 5:342,375.

that both parties are accustomed with it and that it is applicable in the place of work or residence of both parties. If it is foreign to at least one party it is not considered a valid *ʿurf*.[189] This is true, for example, where a buyer buying a lock stipulates that the seller will fix it on the door, or the seller will provide maintenance for a certain period for the sold commodity. If a practice does not amount to a custom in the jurisdiction where the contract is formed, then a *condition* based on an alien *ʿurf* is considered *fāsid* and so is the contract.[190] An *ʿurf* by default is only valid where it does not contradict Islamic law.

B. *Fāsid* Conditions

These conditions may give rise to a conflict as they encompass uncertainty (*gharar*) or incorporate a prohibited term or benefit one of the two parties.[191] Conditions carrying *gharar* cannot be determined with certainty.[192] If any prohibited matter is stipulated as a condition, this is considered a *fāsid* condition, like the sale of an animal for fights as the Prophet has prohibited it.[193] According to the Hanafi school if a *fāsid* condition is imposed in a commutative contract then it will become *fāsid*, but if the contract is non-commutative then it does not become *fāsid* merely because of the introduction of a *fāsid* condition. Rather, the condition will be void but the contract will remain valid. Ibn ʿĀbidīn narrates that every *fāsid* condition leads to *ribā*. *Ribā* consists of any profit without liability and is applicable only in commutative contracts[194]

C. *Bāṭil c*onditions

These conditions are devoid of any characteristics pertaining to ṣaḥīḥ conditions and do not benefit any of the parties or any third party. These conditions do not emphasize the objective of the contract, nor do they relate to the objectives or essence of the contract or to *ʿurf* (practice). When these conditions are abrogated and the contract is restored it becomes free of these conditions.[195] In *fatawa Bazaziyah* it is mentioned that a *fāsid* condition will not void the contract if this is not of a commutative nature. Contracts pertaining to loans, gifts, charity, *nikāḥ*/marriage, divorce, *khulʿ* and emancipation are not void by the insertion of a void condition; rather, the condition is void and once removed the contract is validated.[196]

These conditions can be categorized in two groups. The first concerns conditions which negate/contradict the essence of the contract, or which negate and

189. Al Haskafi, *supra* note 16, at 413.
190. Ibn Abidin, *supra* note 12, at 5:51.
191. Al-Kāsānī, *supra* note 32, at 5:139.
192. Ibn Nujaim, *supra* note 56, at 5:300.
193. Al Zaili, *Tabyin Al Sharh Kanz Al Daqaiq* 4:133 (Al Maktba Al Amiriyah 1896).
194. Ibn Abidin, *supra* note 12, at 5:49.
195. Ibn Mazah, *supra* note 87, at 7:130.
196. Ibn Abidin, *supra* note 12, at 5:80.

nullify the conditions necessary for the validity of the contract, which effectively vitiate it. This includes e.g. two sales in one.[197] Similarly, the stipulation that the buyer will not become the owner of property after the purchase vitiates the contract. The same is true with the condition that a partner will receive only a fixed amount from the profit of a partnership because this condition becomes a hurdle in the objective of the contract which intended to confer a share in the profit and here the predetermined/fixed amount is not a share in the profit.[198]

The second concerns conditions which are void as such, albeit the contract remains valid. This consists of conditions which are in conflict with the essence of the contract, but which do not terminate it altogether because they have no effect on the contract. The rationale is that these conditions have no use and thus by removing them from the contract nothing is lost and the will/consent of the parties is not altered or affected.[199] This is the same as a condition imposed by the seller that the buyer will not sell, benefit or donate the purchased commodity; such a stipulation hinders the buyer's right of use and ownership. Equally, in the event of *muḍāraba*, if the *rabb-ul māl* imposes on *al ʿamil* (the person contributing capital) that he will give credit to *the rabb-ul māl* or dress him, or residence, or indemnify the investment /money, such conditions are *fāsid.*[200]

IX. Conclusion

In *Dana Gas PJSC v Dana Gas Sukuk Ltd & Ors*,[201] Dana Gas had raised 1 billion USD in *sukūk* bonds, issued under a *muḍāraba* agreement governed by the law of the United Arab Emirates (UAE). In addition, the parties executed a purchase undertaking governed by English law. The Purchase Undertaking granted an irrevocable right to the trustee to oblige Dana Gas to purchase all of the trustee's rights and entitlements in relation to the *muḍāraba* assets at the relevant "exercise price". At some point, Dana Gas announced its refusal to satisfy the terms of the Purchase Undertaking, arguing that the *muḍāraba* agreement had turned out not to be *Sharīʿa* compliant, although at the time of its conclusion this was certainly not the understanding of the parties. The English High Court refused Dana Gas's claim as to non-enforcement of the Purchase Undertaking. It held that under the specific terms of the Purchase Undertaking Dana Gas's obligation to pay the Exercise Price was distinct from its obligation to enter into the Sale Agreement. Moreover, in response to Dana Gas's argument that it entered into the Purchase Undertaking under the mistaken notion that it was Sharīʿa compliant under the law of the UAE, it held that the Purchase Undertaking expressly contemplated the possibility that the *muḍāraba* Agreement may be unlawful and

197. Ibn Qudama, *Umdah fi Fiqh* 241 (Al Maktabah Al Asriyyah 2004).
198. Al-Mardāwī, *supra* note 55, at 4:357–64.
199. *Id.*
200. Al Kalughathi, *supra* note 183, at 239.
201. Dana Gas PJSC v Dana Gas Sukuk Ltd & Ors, [2017] EWHC 2928 (Comm).

unenforceable and went on to allocate this risk to Dana Gas. The High Court's approach was sensible, showing how English and Islamic law can operate well concurrently, especially if the courts of the forum weigh form over substance in particular cases. This case exemplifies how Western courts are willing and able to handle disputes concerning Islamic contract law and ascertain the legality of the contract's terms, however without a concrete understanding of what might be ultimately turn out to be *bāṭil* or *fāsid*. Indeed, without trustworthy expert advice by which Western courts can ascertain whether a contract governed by Islamic law is invalid or ineffective it is more likely than not that such niceties will be dispensed with in favor of a manageable legal analysis. In the case at hand, the court was fortunate in that the governing law was both English and Islamic law. However, with the rise of Islamic finance instruments globally that containing choice of court clauses with a preference towards London and other non-Muslim metropolitan centers, it is important that courts lacking an expertise in Islamic private law gain insights in the English language.

Although this article focused chiefly on what distinguishes valid contractual stipulations (ṣaḥīḥ) from those that may be considered *bāṭil* and *fāsid*, it should be noted that the subject matter of the contract itself and its underlying cause (*maḥal al-ʿaqd*) is of equal importance to its survival and legality. As noted, in respect of *fāsid* contracts only the *waṣf* may be defective, whereas in respect of *bāṭil* contracts the *aṣl* of the contract may also be defective. *Fāsid* is a type of contract permitted by its intrinsic characteristics but not its features. Its irregularity negates its validity, which if cured would make this type of contract valid. The concept of *bāṭil* relates to a contract whose elements and characteristics are devoid of legality. This difference between *fāsid* and *bāṭil* results in a difference of effects. A *fāsid* contract may be salvaged, but this is not the case with contracts suffering from *bāṭil* considerations. It is important for lawyers dealing with contracts involving an element of Islamic private to be aware of these constraints.

Even beyond litigation in Western courts, Islamic finance disputes exhibit some preference for transnational arbitration. In 2017 the International Chamber of Commerce (ICC) issued a report on Islamic finance arbitration, which clearly promises significant revenues if it is able to tap into its end users. The report recommended that the ICC take the lead in setting up a fast track and cost-effective rules and procedures for such disputes, in collaboration with institutions and experts, including arbitrators, in Islamic finance. It further recommended the establishment of a task force on the development of a *lex Islamica* with a view to the drafting of a harmonized set of procedural rules for the resolution of Islamic finance disputes.[202] Muslim nations have embraced international arbi-

202. ICC, *Workstream on Arbitration of Islamic Finance Disputes*, (2017), https://iccwbo.org/publication/financial-institutions-international-arbitration-icc-arbitration-adr-

tration[203] and end users feel a sense of security that they can refer disputes to expert institutions and at the same time choose substantive laws and arbitrators that reflect the Islamic nature and ethics of their transactions,[204] while at the same time knowing that awards rendered are enforceable globally. It is hoped that an enhancement of our understanding of underlying principles of Islamic contract law will not only increase the expertise of Western lawyers but that moreover it will extinguish the idea that this body of law is primitive or not worthy of scholarly attention.

commission-report.

203. *See* Muhammad Abu Sadah, *International Arbitration Contract Principles: Analysis of Middle East Perceptions*, *9 J Int'l Trade L. Policy* 148 (2010), *(2010)*.

204. In fact, this article advocates in favor of faith-based substantive and procedural arbitral rules. *See Michael A. Helfand, Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders, 86 N. Y. U. L. Rev. 1231 (2011);* Michael J. Broyde, *Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society, 90 Chi.-Kent. L. Rev.* 111 *(2015)*.