

# Achieving Fairness and Certainty in Financial Contracts through *Khīyyār al-Rūyah* (Option of Inspection)

\*Syed Hasnat Ahmad Shah Gillani

\*\*Muhammad Zia-ul-Haq

## Abstract

This study aims to analyze the essence of the approaches towards fair contractual relation in Islamic thought. The study focuses on the variety of the approaches that have been applied to measure the establishment of a free and fair market where chances of fraud and misrepresentation are fewer and the smooth running of economy on the basis of fairness is considerably assured. The discussion begins with the concept of certainty and fairness in financial transactions and its significance in Islamic law. In the light of Holy Qur'an and Sunnah, this study contextualizes the conditions of fair negotiations as very basic principles of Islamic law with specific reference to the notion of *Khīyyār al-Rūyah* (Option of Inspection). The scholarly insights of classical jurists for whom this option is made lawful in Islamic law, ensure the absolute fairness, certainty by providing adequate opportunity to customer to think carefully about the conclusion of the contract. This study explores the concept of *Khīyyār al-Rūyah*, its role, manners of conduct, application and implications by concluding that *Khīyyār al-Rūyah* can better serve to achieve the fairness and to ensure certainty in financial contracts.

**Keywords:** Khīyyār, *Khīyyār al-Rūyah*, *Àqd*, *Al-Tarādhī*, *Itlāf Mal –Al-Aqad*, *Sahib 'Al-Khīyyār*, *Al- Ma'qud alie*, *Mūamlāt*

## Introduction:

Islamic Commercial Law; in Islamic jurisprudence is known as '*Fiqh al-Mu'amalat*', constitutes an important branch of law dealing with issues of contracts and trade. It has been endeavored in Islamic law to achieve fairness and certainty in contractual obligations by requiring precise definitions, suggesting clear terms and conditions and mentioning rights and obligations of contracting parties. Unquestionably, Shari'ah has strictly prohibited all kinds of unfair and malicious moves and tactics that may inflict harm to the parties. *Shari'ah* also has disapproved all commercial negotiations that intend to harm either vender or vendee. Along with the same lines, anything which confines or limits the freedom of contract is also dejected. Besides this Islamic law forbids those malicious tactics which could inflict the party's interest and to cause imperfections in smooth running of financial transactions. Accordingly, act of stockholding, speculation techniques, concealing important information about the specifications and condition of products as well as promoting sale by dishonest declarations are not allowed in *Shari'ah*. To this, it is considered obligatory, to ensure transparency in any commercial activity by allowing the customer for satisfactory inspection of the product. This is inevitable for enforcement of valid contract. Therefore, *Shari'ah* demands particular fair type of behavior and vigilance from economic pillars; producer, vender, vendee and even their agents to ensure economic justice in society.

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\*Faculty Member, Department of Law, AJK University, Muzaffarabad.

\*\*Professor of Shariah & Islamic Law, Director General, Islamic Research Institute, International Islamic University, Islamabad.

However, the task of this research is two-fold. Firstly, it seeks to give an accurate depiction of the approach of *Shari'ah* on fairness and certainty. It has been done through study of the mechanism of formation of contract, relying upon the fundamental conception of contracts and trading as a legal system as given in *Quran* and *Sunnah*. Secondly, it carries out a relative study of Islamic principles of *Khīyyār al Rūyah*. This research, therefore, is an attempt to present the concept of accuracy and truthfulness in financial transactions and to present the arguments for synchronization of the said principles.

Qualitative research method is used to investigate the intricately interwoven combinations of Islamic jurisprudence and financial matters. The study relies on original Islamic texts of Holy Quran and Sunnah with considerable evaluation of core texts of Islamic jurisprudence. The research is basically a legal doctrinal research which is essentially a library-based work, which aims to elaborate the issue in question through the examination of all the important angles. The focus of this piece of work is on the primary sources of *Shari'ah* in order to form the concept of fairness as liability in general and principle of *Khīyār al Rūyah* to safeguard the contractual parties in particular from an Islamic law prospective. The Holy *Qur'an* and the authentic sources on *Hadīth* such as *Sihāh e Sittāh* and *Ijma* have been referred in this research work with a view to find out the position of Islamic law on the issue. Along with these, other primary sources of Islamic law, the classical *Fīqh* literature has also been quoted to analyze the diversity and difference of different schools of thought on the issue in question. To this, it can be concluded that it is an attempt to present a useful research by adhering to the qualitative research standards during the compilation of research data, detail of those is included in the bibliography.

#### **Concept of Fairness and Certainty in Law and *Shari'ah*:**

The discussion about the theory of offer and acceptance (formation) in law suggests, that once an offer and acceptance are considered valid, an agreement is said to be concluded.<sup>1</sup>The notion of proposition and approach, consequently, leads that certainty as one of the basic requirements to make the agreement enforceable. If an agreement is not disclosing certain terms and lacks this requirement, then it will not be enforceable.<sup>2</sup> It further requires that offer or must make an offer of valid subject matter (accurate product), free from any defect and offered must accept same with his free will and consent by giving adequate consideration. As for the parties to a contract, it is mandatory that they must have legal capacity to enter into contract.<sup>3</sup>Along with all these essentials, law also imposes many other pre-contractual and post contractual liabilities for a transaction to achieve fairness and validity. With that realization, the two aspects, which need to be considered while reviewing an agreement; first is vagueness of the terms of agreement and the other is whether the outcome is fair or not. Here, our law requires that the substance of the contract must be fair, and if not, there should be genuine grounds for judicial review to redress this deficiency. As an obligation, parties are required to be fair when dealing with their contractual relations. The fact, that any legal system must embody fairness, can hardly be denied. The concept of fairness is at the heart of the

<sup>1</sup>Mansuri, Tahir, *Islamic Law of Contract and Business Transaction* (Adam publisher and Distributers, 2005).

<sup>2</sup> Charles T. Le Vines, "Caveat Emptor versus Caveat Venditor", 7 Md. L. Rev, (1943), 177, 382.

<sup>3</sup>Myerson and Satterthwaite, "Efficient Mechanisms for Bilateral Trading". 29 *Journal of Economic Theory* (1983).

requirements of a valid contract plays significant role in the formation stage of contracts and can also be introduced through statutory intervention.<sup>4</sup>The Oxford Advanced Learner's Dictionary defines "fair" as "*acceptable and appropriate in a particular situation*" in terms of "*dealing with people equally*" but then qualifies this on the basis of it being subject to law. As far as the legal system goes, the opportunity to consider whether terms or specifications of contract are fair depends on the circumstances and the prevailing laws. The consideration of fairness has to be looked at in view of the different manner and it differs in both the systems like Islamic law and common law. This is because in Islamic law it would not be on the basis of what is fair to an individual or a specific number of people, but what is fair in the context of balancing the individual's interest as against the broader public interest.<sup>5</sup>

In the arena of contract law, it often happens that a party to a transaction may at a certain point of time find itself facing consequences which he feels are unfair. This is a natural consequence of the basic underlying principle of freedom to contract. In this area of law, parties are free within the defined limits prescribed by law, which makes a contract void or voidable. It often happens that as a transaction proceeds, unfairness may appear on the horizon. This is because there may be crept into the contract elements which cause unfairness. Thus, the need to be fair is injected at the formation stage of a contract without referring to or relying on a specific doctrine, based on the assumption that parties are of equal bargaining strength. With that overview into the conceptualization, there are different ways of conceptualizing fairness. It may focus on procedure (such as behaving in a fair way) or substance (such as ensuring a fair outcome). To this, it may be simply stated that, fundamental point for examination of unfairness in the context of financial regulation is related to the concept of information deficiencies. According to Vickers "one of the obvious causes of unfairness is where consumers lack information." In the perfect market, all players (including consumers) have perfect information about the nature and value of commodities traded. Where consumers are well informed, this benefits the competition in the market<sup>6</sup>.

In a similar vein, *Shari'ah* scholars have widely recognized and have promoted the mechanism of mitigating risk of losses due to the misrepresentation and product defect, as *Khīyyārat* or options.<sup>7</sup> In Islamic law, different investigators presented numerous or several categories of these options. As *Imam Abu Hanīfah* divides it into seventeen kinds, *Shāfi'ī* divides it into sixteen types, *Hanbali* jurists increase it to eighteen. Conversely, in *Mālaki* School, we find the discussion restricted only into two major kinds.<sup>8</sup> Meanwhile *Fiqh'* manuals properly and in delicate fashion discussed this issue in a straight line "Is a sale rendered unlawful by a defect in the item sold". One may find the response with conviction by a defect in kind, in quantity, or in quality, if obvious or known to the seller and was not revealed, is a fraudulent act and transaction is void. If

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<sup>4</sup>Paul Mitchell. "The Development of Quality Obligations in Sales of Goods". LQR 117 (2001).

<sup>5</sup>Harling Done & Lieinster Enterprises Ltd v. Christopher Hull Kine Art Ltd, 1991, 1 QB 564.: Priest v. Lost, 1903, 2KB 148: Steve Hedley, "Quality of Goods, Information, and the Death of contract", (2001). JBL 114.

<sup>6</sup>J Vickers "When is Trading Unfair?" (a speech to the David Hume Institute, Edinburgh, 26th April 2001).

<sup>7</sup>Mohammed. O, "Financial Engineering with Islamic Options", Islamic Economic Studies, (1998)6(1),

<sup>8</sup>Arbouna, M.B., Option Contracts and The Principles of Sale of Rights in *Shari'ah*, edited by Ali and Ahmad, (Jeddah: Islamic Research and Training Institute, 2007), 51.

in case, defect is unidentified, then it is different and not to be counted as fraud. Yet, the vendor must make well to the purchaser for his damage and similarly the purchaser should make repayment to the vendor if he has received more than agreed upon which he paid for.<sup>9</sup> Another significant discussion is “whether the vender bound to mention any defect in the item sold?” The argument is that the vendor is bound to ensure about absence of any defect that may cause loss by decrease in the worth of the item or cause danger by which the article offered for sale becoming harmful for usage.<sup>10</sup> But on the other hand, if the defect is patent, here seller is not liable to bound himself to reveal it “by any duty of fairness.”<sup>11</sup>

Historical hermeneutics, for its part, as late as the time of companions and ‘*Tabheen*’ their immediate successors the mercantile presentments run; at the beginning life was very simple, people were enlivening very close to the soil. Particularly, the list of necessities which required protection was limited. Therefore, the merchandises which came to an unpredictable market and fell under control were very few. As the brick maker makes bricks too small, the horse dealer provides tiered jades unable to take journey with rider, miller cheats customer by putting into a sack of wheat a flask of sand of the sea. Later on, as the expertise augmented and appealed more followers, the need for the scrutiny of the community was progressively extended. Then, the quest about fair price, concerns of honesty in measures and quality goods was entertained; the intent was to ensure open and fair market. The foundations of the scheme of principle dealing ‘*bay*’ trade made upon deep analyses of matters and communications pertaining to daily life to the extent of public notice. Obviously, issues started to emerge, it was complained that someone bought measly ‘*Zabeeha*’ an animal slaughtered, and sold the sausages and puddings, unhealthy for humans in the market of Muslim cities like Samarqand and Baghdad. Similarly, it was also seen that a person bought a drowned cow and sent it to market in small pieces. Somewhere it was also found in market that cooks and bread makers warmed up their stuff and used to sell on second or third day. These practices were condemned for their detrimental repercussions. With the passage of time especially in glorious period of Spanish Muslim and early developed era of *Ottoman* dynasty to avoid malicious practices, it is being witnessed by authorities that there must have been a great deal of patching up of bad bargains. The casual reference to brawls following a bargain and different measures to settle their concerns and to manage peace between seller and buyer were also found.<sup>12</sup> Wherefore, the weights and measures were presumed to meet established test. And attempts were made to suppress deception of all kinds and accumulate fair bargains, as it was also made forbidden to make tactics which might confuse the purchaser or tempt the seller to restrain deceit. Thus, the doctrine of *Khīyyārat* or principle of option got its place in trading system rather turned to the regulation of trade.<sup>13</sup>

### **The Significance of Fairness in Financial Contracts and Transactions:**

The concept, essentially, proposes that *Shari’ah* has strictly prohibited all kinds of unfair and malicious moves and tactics that may inflict harm on the commercial activity,

<sup>9</sup>*Ibn ‘Abidīn, Radd al- Mukhtār*, 2<sup>nd</sup> edit (Cāirro: Mustafa al- Bābi, al-Halbi,1966), vol IV, 68-88.

<sup>10</sup>*Ibn’ Arafā Ad-desouki, Hāshiyat al-Dusūqi* (Bāirut: Dārr al Kutub al Ilmiyya, n.d) vol.3, 127.

<sup>11</sup>*Dayani, A.A.R*, “The comparison of the principles of *Khīyār al- ‘Aib* in ‘*Fiqh*, Civil law, European Law and French Law”, *Journal of Law & Political Science*, Tehran, (2012) 37(3), 127-154.

<sup>12</sup>*Kotsiopoulos, Elektra "Autonomy and Federation within the Ottoman Empire: Introduction to the Special Issue" Journal of Balkan and Near Eastern Studies . (2016) 18 (6): 525–532.*

<sup>13</sup>*M Yoūsof Musa, al Amwāl wa Naziriya al Àqd* (Damuscuss: Dārr al fikar, n.d.), 466.

against fairness and certainty. The ideal of Islamic law is the establishment of free and fair market where chances of fraud and misrepresentation are fewer and the smooth running of economy on the basis of fairness is considerably assured. *Shari'ah* has disapproved all commercial activities which results firstly, any overt or implicit harm or prejudice to parties to a contract, either vender or vendee. And secondly which confine or limit the freedom of contract. Besides this, Islamic law has strictly forbidden those malicious tactics which could inflict the party's interest and to cause imperfections in smooth running of market. Accordingly, act of stockholding, speculation techniques, concealment of important information about the features, grade and fitness of products and promoting sale by dishonest declarations (like misleading advertising of current days) were not allowed in *Shari'ah*. Therefore, the code of conduct in Islamic trade fare is annulment of the outcome of economic camouflage on valuing mechanism, pricing schemes and unfair exploitation of the uninformed by the well-versed. So, *Shari'ah* demands particular fair type of behavior from economic pillars; producer, vender vendee and even their agents are required to be vigilant to ensure economic justice in society. *Shari'ah* has given great emphasis to (*Halal*) earning through legitimate way, commercial dealing through fair mutual consent, truth, honesty, honoring and fulfilling business responsibilities, fair attitude and transparency in transactions are the binding norms for the genuine trade fare. Whereas impure earnings (*Harām*) and all the means that lead to its earning, like bribery, gambling, usury, cheating, misrepresentation, and gaining profit by misleading statement have been discouraged by *Shari'ah*. Therefore, a true Muslim believer must refrain himself from deceit, deception and other dubious ways for obtaining profit of his merchandise. It is an ideal in Islamic trade that pros and cons of commodity be disclosed to the vendee, so that he buys it in full satisfaction.”

As verse in *Qur'ān* says:

“Oh, ye that believe! Betray not the trust of *Allāh* and the messenger, nor misappropriate knowingly thins entrusted to you.”<sup>14</sup>

It is also required from Muslim traders that they must fulfill their contracts and promises to keep their integrity. As it is mentioned in *Qur'ānic* verse:

“Oh, ye who believe! Fulfil (all) obligations. Lawful unto you (for good) are all four-footed animals, which the exceptions named; But the animals of the class are forbidden while ye are in the sacred precincts or in pilgrim grab; For God doth command according to his will and plan.”<sup>15</sup>

Similarly, the Hadīth of Holy Prophet ﷺ directs; “The Muslims are bound by their traditions”.<sup>16</sup> In a similar vein, another Hadīth also emphasizes the importance of keeping promises and declare promise breaking as the hallmark. In order to provide safeguard to contractual parties, it is recommended in Islamic law that all the attributes pertaining to very transaction like quality, quantity, the value, corresponding obligations and the payment schedule and mode should be clear and information about each said attribute should be revealed properly. Transparency is highly appreciated in all trade affairs. Above all, in a *Qur'ānic* verse (*ayah ul- dayn*) it is declared that all arrangements and covenants should be perfectly transparent. As it is stated:

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<sup>14</sup>*Al-Qur'ān*, Al-Anfal:27

<sup>15</sup>*Al-Qur'ān*, Al-Maidah:1

<sup>16</sup>*Imām Abu 'Isā Muhammad al Tirmidhī, Jam'ī at Tirmidhī, Edited & Referenced by Hāfiz Abu Tāhir Zubair 'Ali Za'ī (Riyadh: Maktaba Dārr-us-Salam, 2007) Kitāb al Būyu' 14, no. 1352.*

“O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as *Allāh* Has taught him, so let him write. Let him who incurs the liability dictate, but let him fear His Lord *Allāh*, and not diminish aught of what he owes. If they party liable is mentally deficient, or weak, or unable Himself to dictate, Let his guardian dictate faithfully, and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her. The witnesses should not refuse when they are called on (For evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is just in the sight of *Allāh*, More suitable as evidence, and more convenient to prevent doubts among yourselves but if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing. But take witness whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do (such harm), it would be wickedness in you. So, fear *Allāh*; For it is Good that teaches you. And *Allāh* is well acquainted with all things. If ye are on a journey, and cannot find a scribe, a pledge with possession (may serve the purpose). And if one of you deposits a thing on trust with another, let the trustee (faithfully) discharge his trust, and let him Fear his Lord conceal not evidence; for whoever conceals it, - his heart is tainted with sin. And *Allāh* knoweth all that ye do”<sup>17</sup>

As a rule, this *Qur’ānic* verse deals with the business manners and attitude of Islamic trade in absolute way, it is clearly directed that don’t leave any room for ambiguities and confusion. Future obligations must be known and specified in writing, and verified by witnesses, in fact these tenants play vital role in establishing a healthy business trend for fair trade and protection of the right of the contractual parties by means of imposing certain pre-contractual liabilities, specially fairness, permissibility, equitability and mutual consent. One more element which Islamic law dislikes is its uncertainty *Gharar* that is obviously against the disclosure principle because it leads vendee towards indecisiveness in terms of product quality, since he is unaware whether it is good or bad, unless it is not disclosed properly at pre-contractual stage. Wherefore, there is every chance that contract may give rise to a conflict.

Since, any kind of trade or business transaction achieved via cheating or fraud is not recommended, rather disapproved in Islamic law whether during or pre-contractual stage, one must be fair in transaction all time. The Holy Prophet ﷺ in number of traditions guided Muslim traders to refrain from them. As it is stated:

“It is narrated on the authority of Abu Huraira that the Messenger of *Allāh* (peace be upon him) happened to pass by a heap of eatables (corn). He thrust his hand in that (heap) and his fingers were moistened. He said to the owner of that heap of eatables (corn): What is this? He replied: Messenger of *Allāh*, these have been drenched by rainfall. He (The Holy Prophet) remarked: Why did you not place this (the drenched part of the heap) over other eatables so that the people could see it? He who deceives is not of me (is not my follower)”<sup>18</sup>

<sup>17</sup>*Al-Qur’ān*: Al-Baqarah:282

<sup>18</sup>*Abu al-Husayn Muslim ibn al-Hajjāj ibn Muslim*, *Sahih Muslim*, Edited & Referenced by *Hāfiz Abu Tāhir Zubair 'Ali Za'i* (Riyadh: Maktaba Dārr-us-Salam, 2007) *Kitab al Imān* 1, no. 102.

Along the same lines, another major frauds and dishonesty occurred in trading is in measuring, it is prohibited for traders in Islam to take recourse in giving short measures. *Shari'ah* strictly condemned this practice and Muslim traders are ordered to scale properly and ensure measure in full. As the *Qur'an* states:

“Give full measure when ye measure, and weigh with a balance that is straight: that is the most fitting and the most advantageous in the final determination”<sup>19</sup>

Similarly, to warn the true believers while narrating in *Qur'anic* verse the tale of the community of prophet *Shu'ayb*, those were known for this male practice, and Prophet *Shu'ayb* again and again warned them for the consequences, but at the end they were devastated and demolished for their stubbornness in dishonesty and fraudulence in *Allāh's* command for the exactitude in measures, *Qur'anic* verse stated;

“To the *Medīyan* People (We sent) *Shu'aib*, one of their own brethren: he said: "O my people! Worship *Allāh*: Ye have no other god but Him. And give not short measure or weight: I see you in prosperity, but I fear for you the penalty of a day that will compass (you) all round.”<sup>20</sup>

Likewise, on another occasion *Qur'an* mentioned another evil of the people, which is termed as “*Al-Mutaffifin*” those who deal in such way that to give short measures while weight to others but to receive from them in full, these people were commanded not to do such malicious practice and assured for severe punishment. As stated in *Qur'anic* verses;

“Woe to those that deal in fraud, - Those who, when they have to receive by measure from men, exact full measure-But when they have to give by measure or weight to men, give less than due. Do they not think that they will be called to account? - On a Mighty Day”<sup>21</sup>

Further, Islamic law has discouraged all such tactics that results in ambiguity, uncertainty and any practice that ends in deceitful manners, Islamic law also discourages to sell what is not clear to the parties to contract and also disproves the practice of any sort of adulteration. As mentioned in a tradition;

“Abu Huraira (*Allāh* be pleased with him) reported that *Allāh's* Messenger ﷺ forbade a transaction determined by throwing stones, and the type which involves some uncertainty.”<sup>22</sup>

Along with all these narrations and verses we can find in Islamic jurisprudence that, ‘*Fuqahā*’ the jurists, embody some very important principles on the basis of public interest (*Maslahā Mursal'ah*) after taking guidance from *Qur'an* and *Sunnāh* and endeavored to develop an inclusive scheme to regulate the contractual affairs and dealings. This can be seen, that importance of disclosure duties along with rights of buyers and sellers is also being given under different chapters of *Fiqh*’ captioned as *Khīyyārat* in *Fiqh*’ literature. Which render law of contracts in *Shari'ah* or *fiqh*’ of commercial transactions as unique and well-developed discipline, due to the verity and expansion, in respect of all contractual aspects. These all rules rotate around *Muqāsid al*

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<sup>19</sup>*Al-Qur'ān: Bani Israil:35*

<sup>20</sup>*Al-Qur'ān, Hud:84*

<sup>21</sup>*Al-Qur'ān, Al-Mutaffifin:1-15*

<sup>22</sup>*Abu al-Husayn Muslim ibn al-Hajjāj ibn Muslim, Sahih Muslim, Edited & Referenced by Hāfiz Abu Tāhir Zubair 'Ali Za'i (Riyadh: Maktaba Dārr-us-Salam, 2007) Kitab al Būyu' 21, no. 1513.*

*Shari'ah* also known as objectives of *Shari'ah*. No doubt, the core objective in eye of *Shari'ah* is the wellbeing of the mankind. As it is explained by jurist;

“It is essentially an expression for the acquisition of benefit or the repulsion of injury or harm, and that is not what we mean by it, because acquisition of benefit and the repulsion of harm represent human goals, that is the attainment of welfare of human through these goals.”<sup>23</sup>

Besides, the majority of Muslim scholars accepted through the inductive survey of the sources of Islamic law that *Shari'ah* preordained to protect and to preserve the five basic objectives. These are preservation and protection of faith, life, posterity, intellect and wealth. There are so many rules and legal phenomenal principles that revolve around these objectives and the preservation of these objectives serve the ultimate goal of *Shariah* which is well-being of human life.

Assuredly, in the context of financial transactions and in the scenario of contractual relation all the said objectives ensure the protection of each other's interests and promotion of fairness in these relationships as religious responsibility, which is also the core principle in the application of option of inspection or *Khiyār al Roya*. Such as, the first objective preservation of faith stands for to believe on *Allāh* and the prophethood of last Prophet, which require belief to speak truth and to do good deeds and to avoid any wrongful act that may cause harm to any other individual. This also makes him to determine that he would never enter into an unlawful business transaction or to render any harmful product. One should always prefer and follow the way of approved business affairs and refrain from unfair trade practices. Likewise, the theme of the objective of life is to preserve human life by ensuring the protection of individual's interests in terms of their wealth and properties. Therefore, it is not permitted to endanger human life through production of harmful, defective and flawed products in trade fairs. Another objective is called in *Shari'ah* as preservation of intellect, the primary concern of which is to enable people to take sound decision to consume their wealth. It helps parties to examine the quality of products to secure and safeguard their interests in commercial transactions. Sound judgments and rational decisions are only possible when person is sane. Islamic law renders contracts not binding when a minor or insane person is the party to contract.” In addition, Islamic law has gone to the extent that the consumption of alcohol is prohibited, as it affects the human mind. Similarly, another objective of *Shari'ah* is the preservation of posterity which can be achieved through the maintenance of healthy families and institution of marriage. This objective promotes the values of clean healthy and fair dealings of human beings. Last but not the least is the preservation of wealth of the people. It regards the property of the people sacred and inviolable, so as the *Shari'ah* has permitted all fair and trust-based ways of production of wealth as lawful and approved. In brief, all unlawful and illegitimate ways of earning are dejected in *Shari'ah* like unlawful devouring of property, embezzlement fraud etc. Thus, taking undue advantage from any trade or commercial transaction by deceitful manners like giving defective products without disclosing it to the buyer and without giving his due right is strictly prohibited.

### **The Importance of Certainty in Financial Contracts and Transactions:**

A safe bet and trust have certainly an important role in human life in terms of trade and transactions in the economic and financial realms. That's why, it is considered

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<sup>23</sup>*Al Ghazālī, al Mustasfah (Ba'rut: Dārr al Kutub al Ilmiyya, 1993), vol.1, 31.*

obligatory, to ensure certainty in any commercial activity, that purchaser may be given opportunity by the seller to check the properties or sale subject, in order to ensure certainty in terms of specification and to satisfy that they are not defective. With that recommended process, contractual parties can safeguard their interest in terms of due profit and loss. Assuredly lack of information causes material deficiencies and the role of these information deficiencies is vital for enforcement of valid contract.<sup>24</sup> For this, the Courts cannot enforce contractual terms unless it is not ensured that both the parties fulfill informational requirements and none of the parties lacks proper information (at the time of conclusion of agreement). For both, the Islamic law and the Common law, it has endeavored to achieve fairness and certainty in contractual obligations by requiring precise definitions, suggesting clear terms and conditions and mentioning rights and obligations of contracting parties. Thus, under Islamic commercial law, the vender in any commercial transaction is duty bound not to prevent customer to have fair inspection and check in order to confirm the fitness of the properties to be sold, not only earlier but also subsequent to the conclusion of the agreement. “If there is any vagueness about subject of sale or defect in the goods, regardless of whether this defect is discovered before or after the conclusion of the agreement, Islam grants the option to the buyer either to continue with the agreement or to rescind it. Further, it is also worth mentioning that the essence of the validity of offer and acceptance is mutual consent. Besides, it is also observed that majority of Muslim scholars agreed that there must be three conditions for valid constitution of offer and acceptance. First both must be clear and definite, in terms of clarity, secondly is conformity which means coherence or agreement between offer and acceptance and last and third is continuity that offer and acceptance must be connected. So, by clarity it is meant that a clear manifestation is necessary to show the real consent. In general, the rule which applies to constitute a valid transaction is however, that meanings should be clear free from any ambiguity.

#### **Mechanism of Shariah for Achieving Fairness and Certainty:**

The concept, essentially, proposes that there could be certain factors which cause uncertainty and effect the due conclusion of a valid contract. To this the contract is not valid until it is not free from these vitiated factors. These factors affect the consent of parties and stand contradictory to the basic Islamic phenomenon of fair trade as mentioned supra, and also contradict the core principle of Islamic law of financial transactions which is affirmed in the prophetic traditions of “*Al Darar Yūzāl*”<sup>25</sup> (*Haram* must be eliminated) or “*La Darar wa La Dirrār*”<sup>26</sup> “there should be neither harming nor reciprocating harm”. It can be said that where there is any vitiating factor involves contract can be either void or voidable. However, if it is void it must be annulled and cannot be executed. Moreover, in case it is voidable and vitiating factor can be removed without damaging the res, then the contract can be executed at the option of the party which suffers the loss. In the Islamic contract law, we find in the discussion about *these* vitiating factors within a rich detailed manner, jurists normally touched in quite deliberately the different types and practices of it. These practices are certain prohibitions for causes (*illah*). Whereby a sale transaction is conducted in illegal demeanors, declared

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<sup>1</sup>Charles T. Le Vines, “Caveat Emptor versus Caveat Venditor”, 7 Md. L. Rev. (1943), 177, 382.

<sup>25</sup> *Saleem, Rustam Bāzz*, (d. AH 1304), *Sharah Mujallah al-Ahkām -Adliyyah*, Art 20 (Lahore Law Publishing Company, n.d), 29.

<sup>26</sup>*Sharh Mujallah* Art 19, 29.

by *Shari'ah*, due to imperfect and deceptive nature of transaction and having affected by any undue loss to either of the parties fall under these prohibitions.<sup>27</sup>

The following headings, for their part will probe the examples of such prohibited practices as;

### 1.1 *Bay' al-Mulāmsa and al-Munābza:*

“*Mulāmsa* literally means to touch an object by hand. Technically, in this kind of transaction seller offers the buyer that ‘if you touch any cloth it would be yours’ through the payment of ‘y’ as consideration or price. Consequently, in this transaction the party was required just to touch the cloth without any examination of the sale subject. *Munābza* conversely is that form of transaction where seller should throw the cloth to the buyer without giving him any chance to have careful examination of the subject. In fact, the very act of throwing the cloth concludes the transaction. For this, the *illah* or cause of prohibition here is lack of inspection of subject property. In due course, purchasers in either case should have given opportunity to examine the subject matter sold to him and here in this case it lacks. As well as, it was not certain whether the transaction was likely to prove undue disadvantageous to one side. In the context of *Shari'ah* law these both the forms are declared illegal”. To this, Abū Hūrāira (May *Allāh* be pleased with him) reported a tradition from Prophet ﷺ:

“Two types of transactions have been forbidden by “The Holy Prophet” ﷺ  
al- *Mulāmsa and al- Munābza*.”<sup>28</sup>

### 1.2 *Bay' al-Hasafī:*

This is referred to a kind of sale transaction conducted via throwing of pebbles. As a principle, in this transaction one party probably the buyer will throw a pebble towards the goods of the seller, upon whatever goods the pebble falls, the bargain is concluded. “The *illah* cause for prohibition here is the lack of certainty and absence of proper inspection of subject matter. These both the factors may cause injustice or may result hardship and suffering of loss to any party.” Therefore, it is not allowed in *Shari'ah* and considered invalid, as it is reported that prophet ﷺ has forbidden transaction determined by throwing stones and the type which involves some uncertainty.<sup>29</sup>

“Abu Huraira (*Allāh* be pleased with him) reported that *Allāh*'s Messenger ﷺ forbade a transaction determined by throwing stones and the type which involves some uncertainty.”

### 1.3 *Bay' al-Muzabna and Bay' al-Muhaqlah:*

The basis for the prohibition of *Bay' al-Muzabna and Bay' al-Muhaqlah* is built on a hadith of Prophet ﷺ. *Sa'īd bin Musayyib* reported a tradition from Prophet ﷺ;

“The messenger of *Allāh* ﷺ prohibited *Muzabna* and *Muhaqlah* which are sale of fresh dates on the trees against dry dates and sale of field of wheat against wheat and taking or of land on rent against wheat (to be produced in it) respectively.”<sup>30</sup>

<sup>27</sup>Ali Abadi, A. Formation and breach of the liabilities in Islamic contracts (Tehran: Danesh Pazir Publication, 2013).

<sup>28</sup>*Sahih Bukhari*, no.354, 355: *Sahih Muslim*, no.3612.

<sup>29</sup>*Sahih Muslim*, no. 1513.

<sup>30</sup>*Muwatṭā Imām Mālik*, no .1827, 1828.*Sahih Muslim*, no.1536.

With that realization, Muzabna is such sort of transaction where parties agreed to exchange fresh fruits for dry fruits. “In this case point debated is that quantity of dry fruits to be rendered for exchange is fixed and measured exactly while the quantity of fresh fruits to be rendered for exchange in consideration determined via a rough estimate or through guising while still on the date palms. *Illah* cause involved here is again the uncertainty. Since, such equation of fresh fruit on trees can hardly be determined correctly.” To this point, it is just like dark transaction or blind hunch for buyer. Thus, stand prohibited in Islamic law.

#### 1.4 Bay’ al-Mu’dharr:

However, it is sort of transaction where one of the parties apply the unjust force, duress or coercion for bargain, and other party faces the compulsion. Such a sale is void, thus prohibited in Islamic law.<sup>31</sup> As it is reported by Ali Ibn Abu Talib (RZ) that:

“A time is certainly coming to mankind when people will bite each other and a rich man will hold fast, what he has in his possession (i.e. his property), though he was not commanded for that”. *Allāh*, Most High, said: “And do not forget liberality between yourselves.” “Those who are under compulsion will be bought from, while the Prophet ﷺ forbade forced contract, one which involves some uncertainty and the sale of fruit before it is ripe.”

*Illah* cause of prohibition is the duress which has affected the true intention of victim, which ultimately vitiates the consent and might cause the suffering of loss.

#### 1.5 Bay al-Najash:

To understand this, it could be defined as a deceptive form of sale transaction; it is defined as an act of offering a higher price for a commodity with no intention to buy it. With that realization, the real motive is just to deceive the buyer who really wants to have it. Specifically, this is sometime a trick used by the seller which switches the market index to increase his offer to outbid the first offer. The practice is illegal since it is prohibited in *hadith*, quotation from the text of hadith is as;

“One who practices Najash is ribā earning traitor ...”

Needless to say, that such practice is forbidden because it is a false trick being used in deceptive manner. Along the same lines, as it is also reported from Sa’īd bin al-*Musayyib* that Prophet ﷺ prohibited deceptive sale.<sup>32</sup>

#### 1.6 Bay’ Talaqqī al- Rukban:

To this, it refers to a situation where people go to the outskirts of the town to meet traders, before they reach the market and buy their merchandise for unfair low price or sometimes take stock of certain merchandise for dumping to hijack the market index in their favor, with intent to get sole profit. For this, they deprive both the seller and the buyer from enjoying the real blessing of the market. *Shari’ah* forbids this practice because of its unfairness and unjustness. Quotation from the portion of tradition witnesses its illegality, as narrated by Ibn Umar (RZ);

“Do not meet merchant in the way and enter into business transaction with him, and whoever meets him and buy from him, and if the owner of the merchandise comes into the market, he has the option”.<sup>33</sup>

<sup>31</sup> Tahir Mansuri, *Islamic Law of Contract and business Transaction* (Adam Publisher and Distributors, 2005): Sunan Abi Dawūd, no. 3382.

<sup>32</sup> *Sahih Bukharī*, no.35161: *Muwattā Imām Mālik*, no.1941.

Wherefore, the Islamic law in its characteristic manner of equitable remedial conception gives such victim a right to rescind the contract with the person who bargained in lesser price upon learning the real value of his commodities in the market place.

### 1.7 Bay' al-*Īnāh*:

Interestingly, this is different from all above-mentioned situations, it is sort of technique to coverup Ribā, this is referring to a situation where the seller sells the commodity on credit for a fix period of time. To this, the seller then repurchases the same commodity from the same buyer but with reduction of the price for cash payment. This injurious nature of transaction is not allowed according to majority of jurists with the authority of tradition reported by Ibn Umar, as;

“Narrated Abdullah ibn Umar that Holly Prophet “ﷺ” said: When you enter into the *Īnāh* transaction, hold the tails of oxen, are pleased with agriculture, and give up conducting jihad (struggle in the way of *Allāh*). *Allāh* will make disgrace prevail over you, and will not withdraw it until you return to your original religion.”<sup>34</sup>

It could, therefore be conceivable that in all above situations, it is evident that the contract is not valid until it is not free from these vitiated factors. it is perhaps, being argued that *Shari'ah* does not permits any transaction which would lead to uncertainty '*Gharar*' and ambiguity '*Juhāla*'. *Gharar* is an Arabic term that is associated with uncertainty, deception and risk in any arrangement, it denotes that subject of deal is not in effect to the level of misunderstanding, that exist between the parties, or to the level of uncertainty to the goods or payment which render them rather not obtainable. *Juhāla* means that commodity certainly exists but its *Wasaf* description or identification is not clearly shown.

### The Role of *Khīyār al-Rūyah* (Option of Inspection) in Financial Transactions:

Subsequent to the forgoing background, the concept essentially proposes that when a vendee gets involved in such a contract where object of sale does not physically exist at the spot for inspection. It is however, considered as voidable sale if any attribute agreed upon is not matching. In such type of deal vendee has the option, after taking careful examination of the subject of sale, either to confirm the deal or to annul it.<sup>35</sup> In this setting, examination is the act of having a careful viewing of the object as inspecting and discovering such errors or defects which will render that object unfit for being subject of that transaction. It is quoted in *Ottoman* code known as *MujAllāh* for instance that if buyer buys a property without it is shown to him, he possesses a right as option until he has seen it and wishes to confirm the sale, and this is known as option of inspection.<sup>36</sup>

*Hanafi* School<sup>37</sup> offers a particularly rich conceptualization; the official view of this school pertaining to option of inspection says that where in any sale transaction the goods are not readily available at the meeting place, and buyer had not given the fair chance of inspection chance, the sale is not valid unless two queries are to be ensured.<sup>38</sup>

<sup>33</sup> *Sahih Muslim*, no.1517,1533.

<sup>34</sup> *Sunan Abu Dawūd*, no.3462.

<sup>35</sup> *Al-Kāsānī, Badāi al Sanāi* (Cairo: *Sharika Al Mtbuat al Ilmiyya*, 1910), Vol 5.p. 292: *Mujallah al-Ahkām al-Adliyyah*, Art. 320.

<sup>36</sup> *Ibid.*, *Mujallah*.

<sup>37</sup> *Ibn al Rushed, Bidaya t al Mujtahid*, 2<sup>nd</sup> ed (Karachi: Dārr Kutub al Sadat, n.d), vol 2, 178.

<sup>38</sup> *Kāsānī, Badāi al Sanāi*, vol. 5, p. 268: *Abdullah Ibn Qudāmah. Almuḡnī*, vol. 3, 579.

- a) Where the goods belong to the vender
- b) Where there is an adequate explanation on the goods by vender is ensured its certainty.

Furthermore, where the goods are available at the place of transaction but veiled from proper checking, then the venders are bound to describe it properly in such a way which makes it clear to the vendee that specific item is the subject of sale. Such as; “I have sold to you what is in this box or carton. Particularly, where the goods are not presently available at the same spot the vender should have to explain about and specify where the goods are kept, and should also describe the necessary specifications, quality, quantity, etc.”<sup>39</sup> For example, the vender may say, “I have sold to you the animal in Mr. ‘Z’ house.” It is valid, provided that the House of Mr. ‘Z’ is known to the vendee and the animal is certain and significant to him. Further, it is also ensured that he has specific or the only one of that kind of sale property dumped in such specific dumping place. To illustrate further, if Mr. ‘G’ says that “I have sold to you my car” provided that Mr. ‘G’ does not have any other car, by this way only the sale become valid. However, it is a comprehensive practice to safeguard the interests of both the vender and the vendee. As well as that proposition carries another implication, that there is a corresponding duty on the vendee to insist to verify the particular property he is about to get and to protect himself from further complications.<sup>40</sup>

The *Hanafī* jurists further specify the circumstances where this option can arise. For instance, in a situation where the transaction becomes an obligatory debt, that vender get some quantity of rice without it get inspected physically, on condition that it will be delivered to him at later time. But with the understanding that payment made to the vender serves as debt on vender so there would be no option as it becomes *salam* sale.

Based on the above, another example is of hire, *Al-Ijāra*<sup>41</sup> that in such a case where a piece of land is got on *Ijāra* (hired) but inspection has not been done. Here he has a right of option to return after inspection. For this, further extension of its application could be found in cases of partition in co-ownership. In case of co-ownership when co-owner of property divided it without the other’s inspection of his portion, then farmer can operate the option of inspection. Likewise, in cases of reconciliatory claim where anyone promises to any claimant, that he will give him some another property in reconciliation but without giving him opportunity to inspect that, here that claimant can use his right of option for inspection.

## 5.2 Implication of *Khīyyār al-Rūyah*:

With that overview into the conceptualization of *Khīyyār al Rūyah*, the next step in this debate is its implication. That how this *Khīyyār* gives the party a right to annul a contract or to collect compensation to remove the unjust loss that he or she has suffered. Up to what extent this option provides the right to rescind the contract if seller cause loss to the buyer, manners of conducting the inspection and the termination of option of *Khīyyār al Rūyah*, these all issues will be probed as under;

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<sup>39</sup>*Al-Kāsānī, Badāi al Sanāi*, Vol 5, 292: Ibn ‘Ābidīn, *Radd al- Mukhtār*, 2<sup>nd</sup>ed (Cairo: Mustafa al-Bābi, al-Halbi, 1966), vol IV, 68.

<sup>40</sup> Mohd Murshidi Mohd Noor , “The Rights of *Khīyār* (Option) in the Issue of Consumerism in Malaysia” *Middle-East Journal of Scientific Research* (2013)13 (2): 154-161.

<sup>41</sup>Mujallah al-Ahkām al-Adliyyah, Art.499, 503.

### I) When Does Option of Inspection Start to Operate?

With that understanding, it can be argued that option of inspection starts to operate after the subject of sale is being seen by the party, even in case if contract was validated prior to inspection it would not bind the parties. The concerned parties entitled to this option have right to return the sale subject to buyer, where the subject matter of sale has not been checked initially at the beginning of the transaction or thereafter within time period, before the subject of sale got changed or converted into another form. Furthermore, it is also pertinent to mention that, where subject matter of sale is a known property, such as animals, lands, vehicles and description of the specifications are also described to remove any uncertainty for minimizing any risk. Thus, in these situations this option shall not arise.<sup>42</sup>

### II) Manners of Conducting the Inspection:

In terms of manners of conducting inspection, various methods have been provided by law to have inspection, as the goods or objects of sale differs in variety and extent. To this, for the purpose of the application of this option (*Khīyyār al Rūyah*) here we find distinct nature of goods. So, the inspection may differ from matter to matter. Up to this point, initially it is important to observe this fact that whether the goods will serve the purpose for which sale will be conducted. The examination of the object could be taken by any mean that will properly lead to actual detection of its soundness where the object of sale is questioned in terms of the examination of the entire sale property or part thereof by way of sample.<sup>43</sup> However, if object of sale is an edible item and its fitness can be judged through tasting, then it is up to the buyer to taste it. Along the same lines, if certain goods require the sense of smell for instances perfumes, then he may satisfy himself by taking its fragrance. If the commodity requires touching then he has rightful to take his satisfaction about its fitness by touching it like in case of cloths, gown etc. With that, one may conclude this by stating that in any possible manner buyer has right to take careful sight of the object of sale up to the extent of possibility.<sup>44</sup> Whereas if a sale transaction is concluded through sample, the transaction is considered valid subject to the fitness of remaining uninspected goods. To this, if these remaining goods are of equivalent in standard with the sample shown, the transaction stands valid. However, there may be situations where one of the parties to a transaction may be in need of expert to have Judged the item, wherever he may be of abnormal sensory organs. In such a case the abnormal person should have a *wakil* or expert as legal representative to conduct the examination of goods and whatever applicable to principle party will apply to representative as well.

Perhaps matters relating to the sale of immovable property where sampling does not satisfy the requirement of full inspection of the subject property and only the inspection on the whole of the subject could be satisfactory for the purpose such as in cases of 'House' and 'Farms'. For example, Mr. 'Z' wants to sell his eight bedrooms house. The requirement of the law here is that the purchaser 'Y' has right to see and examine each room of the house. It is not enough for the satisfactory inspection that he says 'Y' to inspect four rooms and take the other four for granted. So far, by this way it is not fulfilling the purpose of the application of *Khīyyār al-Rūyah*. Accordingly, in case of

<sup>42</sup>*Kāsānī, Badāi al Sanāi*, vol 5, 292.

<sup>43</sup>*Zuhailee Wahbā, al fiqh al Islami Wa Adillatuhū*, vol. iv, 271: Hashim Faris Abdūn, "Al Shart wa Asruhū fi 'Aqd al Bai", *Aāfaq al Shari'ah Kuwait*, vol 4 (2015).

<sup>44</sup>*Al-Kāsānī, Badāi al Sanāi*, vol 5, 292-94.

farm lands, these have to be inspected properly in the term of allocation, location and measures. Each of the farm land must be inspected separately. Similarly, in case of flock of sheep/goats the same principle will apply, all have to be inspected separately.<sup>45</sup> Along the same lines, in another situation where commodity is sold in numbers, for instances coconut, radish fruit etc. That being said, the rule is considered satisfied if all are inspected thoroughly, as inspecting randomly, but one out of them will not be considered well sufficient. In contrast, when one takes the case of other goods as the subject of sale transaction, such as wheat, crop, cotton, garlic etc., inspecting some parts thereof by way of sampling if satisfies remaining is sound enough, this is considered valid sale.<sup>46</sup>

### 5.3 Termination of Option of Inspection (*Khīyyār al Rūyah*):

Having discussed the manners of conducting the inspection, the next step in this debate is termination of option of *Khīyyār al Rūyah*; this option comes to an end if any of the following incidents take place.

#### I. *Al-Tarādhi* (Mutual Agreement):

Whereby obvious and unequivocal term, or by explicit act, there accrue any consensus *Al-Ridha*, that a contract of sale has now been perfected by both the parties to contract in such a situation this option came to an end. To illustrate, if the vender says; now contract is ‘being done between us’ or any other phrase which indicates that the execution of contract has been perfected. In time, however, as for the act is concerned where vendee has put into use the goods bought or consumed it properly with inspection or without inspection. It positively shows his consent to the maturity of contract such as usage, or disposing of the property through hire, mortgage or gift of the item.<sup>47</sup>

#### II. *Itlāf Mal –Al-Aqad* (Destruction of subject matter; goods):

Furthermore, another incident is that where the goods or the object of sale were destroyed, irrespective of the fact whether it was caused by the act of buyer, or due to interference of any third party or natural disaster, in all the above said situations the option of inspection is considered terminated.<sup>48</sup>

#### III. *Mauwt Sahib ‘Al-Khīyyār* (Death of the option holder):

It may simply be stated that where a party holds the right of exercising the option of inspection dies, then according to opinion of *Hanafī* and *Hanbali* schools the option of inspection comes to its end, as it is not heritable or transferable. However, *Mālaki* school differs with this viewpoint and opined that it is like any other right transferable.<sup>49</sup>

#### IV. *Tazyeed al- Ma’qud alie* (Increase in subject matter):

One may conclude this section by stating that where any increase or addition is consciously put to the subject of sale, after possession is taken by vendee which render the subject matter unreturnable, as an example increasing a building on a plot of land, which render the right to exercising option of inspection is terminated.

*Mālaki* jurists however, further articulate their opinion about the *Khīyyār al-Rūyah* slight differently than *Hanafī* jurists, they opined that if purchaser purchases some

<sup>45</sup>*Mujallah al-Ahkām al-Adliyyah*, Art .326-327.

<sup>46</sup>*Al Zarqā, Aqd al-Bai*, 46-50.

<sup>47</sup>*Al-Kāsānī, Badāi al Sanāi*, 297: *Ibn al Hamām, Fath al-Qadīr*, 141.

<sup>48</sup>*Zuhailee Wahbā Al ‘Fiqh Al Islamī Wa Adilah tu*, vol. iv, 274.

<sup>49</sup>*Kāsānī, Badāi al Sanāi*, vol. 5, 268: *Abdullah Ibn Qudāmah. Al-mughnī* vol. 3, 579.

items that he has not perceived or not shown to him, he has a right to exercise the option, relying on Hadith;

“He who buys a thing he has not inspected has his option after inspecting it”.

With that prospect in mind, *Mālaki* jurists have linked this option with two situations. The first situation is that where the goods are physically available at spot but not inspected by purchaser because they were in packing wrapped with protections and concealed such as sugar in sacks. In this situation sale is not valid unless the goods are opened to inspect, where the opening of sacks does not cause any damage to the object. For this, the second situation covers such transactions where the objects of sale or goods are not physically available at the same spot. Irrespective of the circumstances whether to make these goods available at the spot makes problem and even so, whether the goods are within or outside the town. The sale in this case is valid but after meeting two conditions:

- (1) The goods or objects of sale must be described with such precision as relating to their nature and type.
- (2) The option of inspection should be stipulated.

In case of similar goods inspecting some of their sample is sufficient; while in case of dissimilar goods mere inspection of sample does not fulfill the purpose because in this case the goods are not same *ab initio*.<sup>50</sup> This also could be applicable where description arises in written form of brochure.

Whereas in a case, if goods sheathed in proactive layer (cover) for instance almonds etc., the inspection of some selective quantity is sufficient for remaining others too. Nevertheless, where vendee finds the difference in excessive form, here he has the option of confirming the sale or to return the goods, then in case if he has already looked upon the deficiency but he has decided to waive it, he cannot attract this right irrespective of the fact that bulk of the goods are defective, it is just like implied consent. It is to be noted that in similar situation where he was given a chance to examine top of a sack and presumption was built through that view or outlook, that rest of the part is not so affected or soaked but subsequently found contrary that remaining has been badly effected as such, then he has an option to return it.

In another assumption, if there arises any conflict between parties in a transaction where vendee claims that at the time of inspection the nature of goods was different and got change at the time of purchase and the vender denies the claim about this change in nature of goods thereafter in such a case the estimation or assessment from an expert should be called and he' will assess whether customarily the period between inspection and purchase is material enough to cause change in goods sold or not and judgment will go in favor of the rightful claim on the basis of experts opinion.<sup>51</sup>

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<sup>50</sup>*Abdu al Rehman al Jazairi, Kitāb al Fiqh al Madhāhib al Arba'a* (Baīrut: Dārr al Kutub al Ilmiyya), 2003, vol II, 198.

<sup>51</sup>*Ibid.*, 199.

**Conclusion:**

Ultimately one should be cognizant of the fact that true intention of Islamic legal system is to ensure fairness and justice in *Mūamlāt*. With this realization, it is important to note that the finality of contract or sale transaction may not rest wholly on the just essential requirement namely offer, acceptance and consideration which were prescribed for the validation of contract. In other words, and in the pertinent opinion of Islamic jurists, even though a contract of sale is formed; the congruence of offer and acceptance does not become final by mere constitution of these requirements; it is still open to some other rights in form of options.

The positive thing that emerges from the discussion in this regard is that the *Khīyyār al-Rūyah* (Option of Inspection) in *Fiqh* al Mūamlāt is a tool or device which serves the objective of protecting the right of contractual parties. *Shari'ah* essentially emphasizes over ethical and moral regulation that is inevitably required in all financial negotiations. It mainly refers to a specific term of right of either or both contractual parties to meet or rescind the agreement. For this, the option is implemented into different ways, some are opted by consent of the contractual parties, while others are in the nature of right exciting (Inappropriate word) for them due to the very operation of law, as it is revealed by discussion supra that contract may still be intact under circumstances where *Gharar* being linked with the subject of exchange, price etc. But then with a provision of options for the contractual parties to be affected by the same, the provision of this tool helps to reduce *Gharar* and brings up to acceptable limits. It also reduces the risk of undue commission of any party deliberate or unintentional act. This option has justifications too on the basis of various larger benefits to the society. In this way parties are given a 'reassessment' or 'cooling off' period over which they can rethink about their contractual decisions by rational thinking to minimize the possibility of risk.

With this, one may conclude that this option by adding some further essential characteristic for the right of customers cures the rule liability comes together with gain and risk. Mutual consent in a trade should be prevailing for both parties in order to evade any bias action towards one party only. And to develop quality service and regular inspection for example, on the subject matter that meet the demand and requirements of customers and defects should be identified before conclusion of contract. Lastly, education of sellers' option will benefit them and retain their loyalty to the seller's

company. The discussion has emphasized the way in which this branch of law promotes efficiency by encouraging the rightful disclosure of relevant and socially useful information; by granting possessor of such information the right to deal with others while disclosing what he knows. This right is in essence a flow of theory of contractual obligation elaborated in *Fiqh* as “*Al Darar Yūzāl*” “*La darar wa la dirrār*”, *Haram* must be eliminated or “*La Darar wa La Dirrār*.” There is neither inflicting nor returning of harm especially where the segment for pre-contractual liabilities is being focused.

With this, the discussion may be concluded that this tool can better serve to achieve the fairness and to ensure certainty in financial contracts which are the most important aspects of contract law in modern age that is devoted to the cause of protection of rights of contractual parties from numerous unfair trade practices. The ultimate objective of such protection is to avoid exploitation and to be conscious of diverse business malpractices. Today there are variety of modern transactions in which pre-contractual disclosure of information to attain this object is of prime importance. This sort of liability lies with the producers, manufacturers, retailers and sellers for their defective products that may cause grievance to the interests of buyers or assets.