

**A Comparative Critical Analysis of the Concepts of Error and
Misrepresentation in English, Scottish, Islamic, International Contract Law, and
Palestinian Draft Civil Law**

By

Nehad A A Khanfar

**A Thesis Submitted in Partial Fulfilment of the Requirements for the Degree of Doctor of
Philosophy at University of Abertay Dundee**

2010

**Dundee Business School
University of Abertay Dundee**

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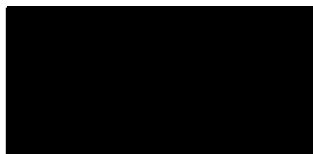
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I certify that this is the true and accurate version of the thesis

Approved by the examiners

Signed:



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Date: ...28/04/10...

Abstract

Although the laws of error and misrepresentation have a decisive impact on contract and contractual relationship, existing studies of Islamic jurisprudence, and the CISG have occasionally discussed or considered these fundamental topics. These legal systems do not assume the obvious approach found in comparison with their counterparts, English and Scottish contract laws, which form independent and comprehensive concepts in their legal research and argument. This thesis fills the gap in the literature by a comparative, critical analysis studying error and misrepresentation in Islamic contract law and the CISG, with the purpose of developing these concepts based on English and Scottish contract law in general and English law in particular as the main guidance, from which the organisational structure is derived for clear definitions of the categories of error and misrepresentation.

This thesis investigates the linguistic and historic streams of the concept of error and misrepresentation in Islamic contract law “relying on the *Qur’anic* context”, thus creating entirely different approach to both concepts, and giving further guidance to other researchers to develop and improve their view of these significant concepts.

Based on the existing studies and theories, this thesis analyses and criticises in particular the views of English and Scottish law with respect to the categories of error and misrepresentation. At the same time, this study builds a new approach to the concepts of error and misrepresentation by analysing and criticising relevant case law arguments, and by synthesising some types of error. This thesis offers a thorough comparison especially between Islamic and English contract law. These views are designed to introduce the legal systems cited in this thesis closer to each other and will establish an interactive approach, especially between Islamic and English contract law. Therefore, this thesis establishes a new Islamic-Anglo approach to misrepresentation as a result of actual interactivity between these legal systems.

As a result, the author of this thesis offers an extensive critical analysis of the concepts of error and misrepresentation in the Palestinian Draft Civil Law, producing academic recommendations to be taken into consideration by its draftspersons. These recommendations can also be applied to Egyptian and Jordanian civil law.

Acknowledgements

I would like to acknowledge the efforts of my main supervisor, Dr Maria O'Neill, who has provided me with guidance and help. To my Second supervisor, Kenneth Swinton, for giving me part of his valuable experience in Scottish and Roman law. I would like also to acknowledge and thank Professor *Mohamed Branine* who has always encouraged me to pursue my PhD research, and he has made available his support in a number of ways. As a result, University life became smooth and rewarding for me. I am indebted to him and his strong support in passing this crucial stage in my entire life.

My deepest gratitude goes to my family for their unflagging love and support throughout my life; this PhD is simply impossible without them. I am indebted to my father for his care and love. I cannot ask for more from my mother, as she is simply perfect. I have no suitable word that can fully describe her everlasting love to me. Mother, I love you, without your inspiration and support I would not have reached to this stage of life.

I would like also to express my gratitude to my sisters and brothers, *Iyad*, who offered me limitless support, I am indebted to him for all what he did for me. I am also grateful to *Ghada, Ghadeer, Riyad, Abeer, Emad, Mustafa, Hamedoo, and Isra'a* ... for their continuous inspiration. With their support I feel always stronger, ambitious, and successful.

I am heartily thankful to my best friends in the UK, Andree Ryan and Mike Whitehead, whose encouragement, generosity and support from the beginning to the final level enabled me to develop my social relations with the local community, provided me the real family atmosphere and opened their hearts and their house and always giving me the honest advice. I am very thankful to them for making my life much easier far from my beloved homeland (Palestine).

I am also deeply grateful to Professor *Rami Hamdallah*, the president of *An-Najah* National University for providing me with a scholarship to get my PhD degree, with his efforts and support; I am achieving one of the most important dreams in my entire life.

Most of all for my loving, supportive, encouraging, and patient future wife (Asia) whose faithful support during all stages of this PhD is so appreciated.

I offer my regards and blessings to all of those who supported me in any respect during the completion of this thesis especially Linda Icockram who helped me in the final stage.

Lastly, unlimited thanks for unlimited help and efforts, for the patience and accuracy, for giving a lot and not asking anything in return, I would like to say I am grateful to Margaret Geyer, who gave me a lot from her time, sacrificing her comfort, helping me to have my thesis professionally finalised; for her invaluable assistance I am indebted to her for the rest of my life.

Declaration

I hereby declare that I am the author of this thesis, that the work of which this thesis is a record has been done by my self, and that it has not previously been accepted for a higher degree.

Sign..... Date.....

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Chapter One

Introductory Chapter

Contracts and contractual relationships play important roles within people's daily lives. Contractual effects are significant and need to be studied and understood, especially with regard to commercial relations. Commercial contracts are usually connected to financial commitments, which are potentially expected to generate disputes between the contracting parties. One of the essential issues which may occur between the contracting parties is error. Error is a major issue of dispute with regard to contracts. This thesis will concentrate on the concept of error and its categories, with relation to contracts. Most of its discussion will be with regard to commercial contracts, in particular, to trading contracts for the sale of goods. In addition, this thesis will discuss disparate manifestations of error within various forms of contract, such as, construction contracts, employment contracts, credit contracts, manufacturing and partnership contracts. The thesis will not, however, scrutinise in depth at the legislative frameworks specific to these types of contracts, but rather at the concept of error itself, within those contracts. The quantities of money involved and the complexity of various financial transactions in many of these contracts leads to an importance in understanding the concept of error itself. The forms of these transactions are changing, developing rapidly and continuously.

It can be said that contracts can be expected to become involved with error or mistake. If this occurs, it can create a devastating effect on the contracting parties. Error is a crucially important issue to be anticipated by the parties during the contracting process. Error can

occur with regard to the contract's technical, financial, or legal aspects. It would be expected that these issues would be discussed by the parties. This does not imply that the parties will necessarily always make the right decisions. It is generally accepted, however, that the parties to a contract, particularly a commercial and financial contract, know best where their own interests lie. It is also apparent that the parties may make mistakes, due to imperfect information and/or uncertainty as to the future. There is a chance that at least one of the parties will make a miscalculation of the cost or benefit of the contract, based on inaccurate or incomplete information.

The concept of error carries different meanings. This relies on understanding of the implemented legal system and its legal definitions. Error will be addressed following the law applied to the contract. Differences would be expected when dealing with error under the Islamic law of Ottoman Journal of Equity as applied in Palestinian contract law, to the way the same quandary would be addressed under either the Scottish or English contract laws. Furthermore, differences would be imagined between the Ottoman Journal and the current contract law of Palestine, the Draft of Palestinian civil law and the intended future law. Further variations are, for example, the Scottish law of error and the roots of that Scottish law and the Roman law. Many of these differences can be retraced to the different roots and origins of different legal systems. In addition, modern attempts to bridge legal systems, such as by way of the International law of the Sale of Goods (CISG, 1980) contracts have differences with the legal systems within which the CISG is to be implemented.

The Main Focus of the Study

In this thesis, a central focus is to develop a theoretical concept of error and explore the misrepresentation under Islamic contract law compared to the English and Scottish contract law. This thesis demonstrates some of the key notions of error and the misrepresentation concepts in the cited legal systems, applying the comparative method as a key point to analyse and criticise these concepts. Using English contract law as a focal model, this thesis demonstrates the key differences and similarities with regard to error and misrepresentation between the cited legal systems. This thesis relies on the structure of English contract law of error and misrepresentation to understand the main aspects of error and misrepresentation under the CISG and the draft of the Palestinian Civil Law. In this case, the key laws to be referred to as a general ground of the comparison are English and Scottish contract laws, with greater focus on English contract law.

Historical and Geographical Brief

There is presently not any known history indicating that the Islamic contract law has an articulated or codified independent act or code. It previously relies on various Islamic schools or doctrines, which are still referred to by many of the Muslim scholars in most of the Arab/Muslim countries when discuss an issue related to contract and its legal effects. Historically, there are four doctrines represent the main Islamic jurisprudence schools *Hanafi, Shafe'ai, Maliki and Hanbali*. Every doctrine gained many loyal scholars to follow their understanding and interpretation in relation to the *Qur'an*. None of these doctrines have codified their own interpretation to be reflected in a code or an independent act. This situation continued until the Ottoman lawmakers decided to codify the rules of the contract and the contractual relations under a unified code, this is called the Ottoman Journal of Equity which was enacted on (1869) and started to be implemented on (1876). This code

relied mainly on the *Hanafi* doctrine; however, it derived some of its articles from the other main Islamic doctrine. The articulation and the classification method of this code were derived from the French legal systems, as the most influential Ottoman lawmaker (*Rashid Basha*) gained received his education in Franc and had good manner in French language. The Journal applied on all the Arab countries which were under the Ottoman Empire rule. Palestine with its both parts (West Bank and Gaza Strip) was also under the Ottoman Rule until the British mandate era, where the English law was applied in both parts. When the British terminated their mandate on Palestine, West Bank became under the Jordanian rule and Gaza Strip became under the Egyptian rule. In relation to contract and its effects, both Jordanians and Egyptians applied the Ottoman Journal of Equity after 1948 in the West Bank and Gaza Strip. This situation continued even after 1967 were the West Bank and Gaza Strip became under the Israeli rule. The Israeli military rule continued with the Ottoman Journal, applying it in both West Bank and Gaza Strip with regards to contract and related issues. When the Palestinian Authority was established, according to Oslo Accord in 1993, the Journal kept its position as officially applied by the Palestinian courts and still remains under the current situation. Relying completely on Egyptian and Jordanian civil law, the Palestinian Authority suggested a new draft of civil law to be applied in West bank and Gaza Strip, however, the draft is still in the drafting stage, as it will be illustrated in the following chapters of this thesis.

Section 1: The Importance of the Study, its Objectives and Methods

1.1. The Importance of the Study

Error or mistake, allied with the issue of misrepresentation, is a problematical and interesting area of contract law which has drawn the attention of many legal writers from various legal systems. Error or mistake as a concept was not a legal focus of the Islamic

law or the Islamic law writers. Islamic jurisprudence concentrated on issues similar to error, although error itself, using its classical meaning from English and Scottish law was never mentioned directly. This study derives its importance from investigating whether Islamic law recognised error, and how it is presented. In addition, this study will examine if there are different terminologies employed by the Muslim scholars to indicate error. This study will explore if the Islamic jurisprudence has developed any theoretical framework for error, as the English, and Scottish contract law has accomplished. Furthermore, this study will investigate the allied concept of misrepresentation, one of the closest concepts to error, and it will investigate whether this concept has also been established under Islamic contract law. This will be examined by testing whether the Islamic jurisprudence discusses misrepresentation directly, or whether it uses other terminology to express the meaning of misrepresentation; similarly, its close connection with error and fraud. This study will then continue to examine whether the Draft of Palestinian civil law has its own independent view with regard to error and misrepresentation. One of the prominent issues within this study is modernising the Islamic contract law concept of *gharar*. *Gharar* as meaning of misrepresentation with its relation to error, this will be discussed from a completely new perspective and within a new theoretical framework. This study will gain the major part of its importance by establishing a new legal theory of error (*khata'a*) and misrepresentation (*gharar*) under Islamic contract law. This framework will be approached and compared to the concept of misrepresentation, as used within English and Scottish contract law.

1.2. The General Objectives of the Study

This study is designed to explore the concept of error and misrepresentation under Islamic law, and to build a new theory of both of these concepts when compared with English and Scottish contract law. This study also aims to explore the concept of error and misrepresentation under the Convention for the International Sale of Goods 1980,

otherwise known as the Vienna Sales Convention, or the CISG. The CISG will be compared with English, Scottish, and Islamic contract law. This study will critically analyse the concepts of error and misrepresentation as being developed for the new Palestinian civil law, it will provide recommendations for improvement of the draft law in developing the concept of error and its classifications for use within Palestine. Through further critical analysis of all of the legal jurisdictions to be examined, this study aims to make the understanding of the concept of error and misrepresentation under the targeted legal systems to be more approachable. Of importance in this process is the use, not only of comparative critical legal study, yet still developing a historical and linguistic study, in particular with regard to error under Islamic contract law. As the researcher background is in Islamic law, the aim is to create valuable and deeper understanding of the concept of error and misrepresentation, especially under Islamic law. The intention is to develop a broader understanding for lawyers, scholars, and other interested readers in Islamic contract law.

This thesis aims to achieve an understanding of how Islamic law and the CISG precepts pertain to each element of error and misrepresentation structures, in comparison with English and Scottish contract law. Simultaneously, as abovementioned, the discussion leads to the conclusion that provides greater certainty that would be achieved by creating a new structure and a new approach to error and misrepresentation under Islamic law and the CISG rules.

1.3. The Specific Objectives

The study will be guided by the specific following objectives:

- 1- To examine the nature and characteristic of Islamic concept of error and misrepresentation compared mainly with these concepts under English contract law.

- 2- To examine the Qur'anic concepts of error (*khata'a*) and misrepresentation (*gharar*), thereby analyse them in comparison with English and Scottish contract law.
- 3- To examine the legal implication of *gharar* under Islamic law and its conventional meaning in Islamic jurisprudence and develop a new concept on the basis of linguistic and historical context.
- 4- To review thoroughly the alternative concepts and forms of error and misrepresentation under CISG in comparison with the cited legal systems especially English contract law.
- 5- To analyse and criticise the concept of error and misrepresentation under the Palestinian Draft Civil Law, and to recommend the Palestinian lawmakers to adopt recommendations that derived through studying English and Scottish contract law.
- 6- To establish a new concept with a new structure of misrepresentation as a combination between Islamic and English contract law.

1.4. The Research Methods

This study is a theoretical comparative critical analysis of the concept of error under the targeted legal systems. It relies on criticising, analysing, comparing the academic literature and the understanding of case law decisions. In addition, this study relies on the logical reasoning of analysing the targeted laws of error and misrepresentation. This study will comparatively and critically examine the availability of the concept of error under Islamic law when compared to the other legal jurisdictions examined. English contract law is the main reference to apply that. This process will also be applied to International Contract Law, under the CISG and the draft of Palestinian civil law. This study will analytically investigate the case law related to error and misrepresentation under Scottish and English contract law, exploring the concept of error and mistake. Building on that, this study will

submit new definitions for some types or categories of error and mistake; it will examine some overlapping areas between error and misrepresentation. In addition to that, this study, in order to support the comparative critical analysis method, will use descriptive and deductive methods together in order to make the concept of error and misrepresentation more approachable between the different jurisdictions and jurisprudences in general, and between Islamic and English law in particular.

Relying on the methodological instruments of the comparative critical analysis, the first task is to achieve both a comprehensive understanding of error and misrepresentation of the relevant *Islamic* principles and a precise understanding of how those principles compared, mostly point-by-point, English and Scottish law concepts. Based on that, this thesis will provide detailed description of how the concept of error and misrepresentation would be structured under English, and Scottish law model, including descriptions of the importance and legal effect of each structural element. This thesis, in turn, will provide a similar description of how the concept of error, and if any, misrepresentation would be structured under the Islamic contract law, with similar explanatory materials.

There is a considerable reverse and forth in arriving at a comparative outline of the two structures of Islamic and English law, in achieving a basic understanding of Islamic model. The thesis then will investigate the legal principles pertaining to each element of the Islamic law structure in the context of error and misrepresentation. This thesis will attempt to answer general questions: does Islamic law demonstrate the concept of error and misrepresentation with respect to a given types of English and Scottish contract law? What is the nature of the concept of error and misrepresentation under Islamic law in comparison with English contract law? How are the concepts of error and misrepresentation formed under Islamic contract law? What are the relevant concepts and implication of each of

them compared to English and Scottish contract law? Is there any possibility to have the concepts of error and misrepresentation structured as in English contract law? What are the Islamic and CISG equivalents of a given English and Scottish law, if any, and vice versa? Would a different structure of the concepts under the Islamic law better serve the requirements of the concepts of error and misrepresentation?

To apply the theoretical methods abovementioned, the thesis examined each category of error and misrepresentation under English and Scottish contract law comprising their relevant Islamic precepts with respect to each such category. Categories included: option of defect, option of description, option of inspection, and *gharar* or *taghreer*. All types connected to these concepts that fall into multiple categories were appropriately analysed. As the model of misrepresentation (*gharar*) developed during the research, the thesis expanded the comparative critical analysis method from the descriptive and deductive to include linguistic and historical context of Arabic-Islamic understanding.

Section 2: Literature Review

None clarity of the concept of error under Islamic contract law causes an ambiguity among Muslim scholars in defining this concept and its position compared to the other similar concepts. Many reasons introduced to justify this situation; one of these reasons related to the importance of error under Islamic law. Explaining this reason, (*Arabi 1995*) argued that error (*ghalat*), is the least prominent of contract defects in Islamic contract law, considering it as the most subjective type of defect. In Discussing different reasons of none clarity of error under Islamic contract law (*al-Sanhuri 1952*) suggested that the theory of error in Islamic law is fragmentary and distributed between *khiyar al-wasf* (option of description), *khiyar al-ru'ya* (option of inspection), and *khiyar al-'ayb* (option of defect). In support to *al-Sanhuri's* opinion (*Arabi 1995*) suggests that *khiyar al-wasf*, *khiyar al-ru'ya*, and *khiyar al-ayb* are all closely related to the theory of error.

As a notable indication, comparing the rules of Islamic contract with its counterparts under English contract law, under the title of “Prohibition against *Ghalat* (mistake)”, without any referencing to his statement, (David 2007) suggested that there is a consensus view among Muslim scholars uphold that if error is related to the subject matter of the contract, such contract would be voided. The reasoning to that is an absence of the “meeting of minds” in respect of subject matter.

Not indicating any relation with error or misrepresentation (Ahmad 2010) defines *khiyar al-ayb* as an option to rescind the contract, where is the defect discovered in the item sold. Another opinion by (Mian 2003), indicated, implicitly to a relation between *khiyar al-ayb* and fraud or misrepresentation by stating that if the buyer discovers a defect after the contract is made, and was any indication that the seller knew about the defect before entering the contract, the contract would be invalid. Similarly, (Mannan 1993) delivered an opinion who argued that the disclosure of defect is an obligation under Islamic contract law, and suggested that if the seller does not disclose all defects in the item sold would render the contract invalid. In the same context (Baillie 1980) suggested that the buyer has the right to rescind the contract if he discovers a defect (Major or Minor) and this defect existed in the item bought while this item was with the seller. (Hussain 2004) not mentioning misrepresentation or fraud, she classified the none-disclosure of defect in the item sold under the option of defect (*khiyar al-ayb*), where the buyer has the right to rescind the contract when he discovers the defect, if it existed in the item sold at the time of contract. (Khan 2003) adopted similar view by considering *khiyar al- ayb*, as the right to rescind the contract on discovery the defect on the subject of sale.

Neither mentioning error nor misrepresentation, but indicating to *khiyar al-ayb* as a technical issue, (*Tadamon Islamic Bank 1992*) stated that option of defect means that the commodity contracted upon is manufactured in a defective way. Dealing with *khiyar al-ayb* from the same perspective, with no indication to meaning of error or misrepresentation (*Ayub 2007*) considers *khiyar al-ayb* as a technical issue by itself. Confirming the same context of the previous studies (*Razali 2008*) suggested that *khiyar al-ayb* is about the option given to the customer to cancel or annul the contract when a defect on the goods sold is found. Using almost the same wording and indicating the same context (*Rosly, Sanusi and Yasin 2006*) pointed out that *khiyar al-Ayb* is about the option given to the customer to cancel contract when the defect is evident.

Confirming that *khiyar al-ayb* is used as a technical fault by itself, not as a meaning of error or misrepresentation (*Rosly, Sanusi and Yasin 2006*) suggested that to warrant that the contract remains valid, the bank is expected to make sure that the defects are removed and damages are rectified. They added that it will be a breach of Islamic law if the bank imposes a condition to modify the option of defect to its side. Emphasising the idea of the technical meaning of *khiyar al-ayb*, they suggested that Islamic Jurisprudence agrees that the option of defect is one of the options that would be transferable to the inheritors as it is attached to the subject of the contract. Considering *khiyar al-ayb* as a technical issue under Islamic law but with different approach, (*Kamali 1998*), used the validation of the option of defect (*khiyar al-ayb*) in Islamic law as a practical manifestation of the maxim *addarar uozal* “Harm must be eliminated” which is designed to protect the buyer against harm. (*Kamali 1998*) stated an example of car sale, when A buys a car and discovers it substantially defective; he has the option to annul the contract. *Khiyar al ru'yah* (option of inspection) is also treated as a technical term, mostly, within the contract of sale; (*Razali*

2008) defined this option to mean a choice given to the buyer either to continue or not with the contract seeing the contract subject matter.

Approaching *khiyar al-ayb* differently than the previous studies (Dupret, Berger, and Al-Zwaini 1999) indicated explicitly the direct relation between *khiyar al-ayb* and misrepresentation. They suggested that who knows about the hidden defect and does not disclose it to the other party would be involved in misrepresentation. Not different from the previous opinion (Hussain 2004) mentioned *khiyar al wasf* as the right of rescission when the desired description is absent from the item sold. Adopting the same clear approach, but with *khiyar al wasf*, and making it closer to the concept of *khiyar al-ayb*, by listing the “categories of option (*khiyar*)” under Islamic law, (Obaidullah 2001) mentioned *khiyar alwasf* as an option by misrepresentation, in this way, he would be one of few writers to be found mentioning *khiyar alwasf* as an explicit meaning of the concept of misrepresentation among hundreds of writers who wrote and explained about *khiyar alwasf*. Following the same direction but, implicitly, (Ayub 2007) considered *khiyar alwasf* as part of the concept of misdescription where the party did not receive the specific description he desires in the item bought. The Based on disagreement with some opinions that considered *khiyar al-ayb*, *khiyar alwaf*, and *khiyar al ru'yah* as the most closely terms to the concept error or mistake, but agreeing with other opinions considered these terms partially as technical issues, this thesis would be fully in agreement with the views that considered these terms as technical issues and as the most closely or equivalent to the concept of misrepresentation, rather than to error.

Gharar has been approached by many Muslim scholars from different perspectives. Some writers classified the concept of *gharar* as unstable concept with no clear or unified understanding. In this respect (Zaki Badawi 1998) suggested that there is uncertain and

precise meaning of *gharar* the. He added that the studies do not provide an agreed definition of *gharar* and scholars depend on specifying individual illustrations of *gharar* as an alternative for a particular characterization of this term. (Frank Vogel 1998) agreed with the argument of (Zaki Badawi 1998), and he states a similar opinion by suggesting that scholars do not provide an exact extent of *gharar*. The fact abovementioned confirms that scholars approached *gharar* differently, in many studies; they introduce different views and contradicted meanings.

Many of these scholars introduced *gharar* as uncertainty; according to (Rodney Wilson 2007) *gharar* is the contractual relationship comprises uncertainty. (Hassan 2005), considered *gharar* under the same meaning; not far from this view, (Arabi 1999) mentioned that *gharar* is a transaction of sale contains uncertainty. (Al-Jarhi, Iqbal 2001) followed the same opinion, but (Obaidullah 1999) added speculation to uncertainty to mean *gharar*. By adding an element of the unreasonableness or excessive to uncertainty, (Lewis 2007) considered *gharar* unreasonable uncertainty or excessive uncertainty. Taking broader approach to the meaning of *gharar*, (Tag el-Din 1996) suggested that *gharar* would be about uncertainty related to any element of the objects of exchange, sum of price for specific goods, or to the nature of the goods bought at a given price. (Saleh 1986) adopted narrow and conventional view by considering *gharar* as uncertainty and speculation. Without specifying his definition accurately (Ismail 2008) stated that *gharar* is termed as a gross uncertainty and in the same paper he then added that *gharar* represents unacceptable level of uncertainty in the principles of Islamic law. (Mohamad 2009) follows the same route and defines *gharar* as uncertainty sales and excessive speculation.

Adopting the same definition with additional element (CMS von Erlach Henrici 2009), defines *gharar* as uncertainty with ambiguous subject matter. This opinion is supported by

(*Al-Darir* 1977) who considered *gharar* as a meaning of doubtfulness or uncertainty as not knowing if something will happen or not. As many others, (*Bakhshi* 2006) described *gharar* as uncertainty and speculation, but contradicting his own opinion (*Bakhshi* 2006) suggested that an example of *gharar* is the agreement to sell the lost goods. *Gharar* is defined as uncertainty by (Harvard Business School); and by (*Obaidullah* 2008), as well as by (*Jobst* 2007), and the same with (*Birminghamfinance* 2005) but adding excessive speculation. The same definition delivered by (*Khan, Bashar* 2008) and (*Trumbull* 2006).

Gharar is also interpreted as a risk by many writers and scholars, (*El-Gamal* 2001) suggested that the sale of *gharar* is forbidden because it means “trading in risk”. Contradicted what he suggested in different places in relation to the meaning of *gharar*, (*Obaidullah* 2008), also referred to *gharar* as a simple meaning of settlement risk, (*Khan, Bashar* 2008), (*Trumbull* 2006), (*Al-Misri* 1993), and (*Saleh* 1986), all of them introduced *gharar* as a risk, in spite of some of them considered it as uncertainty or speculation.

Establishing different and new meaning of *gharar*, some studies approached it as a meaning of ignorance. By considering that, (*Ibn Hazm* N.D.), stated that *gharar* as ignorance would occur when the buyers do not know about what they have bought and the sellers do not know about what they have sold. (*Norzrul, Ridza and Hassan*, 2005) suggested that *gharar* is the ambiguity in the contracts. (*Saleh* 1986) equated *gharar* with an uncontrolled subject-matter, such as selling or buying a bird in the air or fish in the water. *Gharar* is also considered as ambiguous outcomes (*Tariq* 2004).

Some writers and scholars considered *gharar* as a meaning of gambling, as an example (*Suwailem* 2000), suggested that gambling is the pure presentation form of *gharar*. (*Tariq* 2004) also suggested that *gharar* is crushingly considered gambling. In the same context (*Birminghamfinance* 2005) stated that the concept of *gharar* based on the Qur’anic rule

against gambling. Referring to (*Mustafa Al-Zarqa*), (*El-Gamal 2006*) established a link between uncertainty, risk, and gambling; stating that the sale of *gharar* is a probable articles whose existence are uncertain, and the risky nature which makes the transaction parallel to gambling.

Few writers interpreted *gharar* as misrepresentation or deception as it is approached by this thesis. According to (*David 2007*) *taghreer* (verbal noun or action of *gharar*) would be considered as deception. He argued that if *taghreer* occur in respect of the contract subject matter, this would render the contract voidable up to the choice of the deceived party. (*Al-Shamisi 2000*) gave *gharar* the same meaning as used under English contract law by suggesting that *gharar* is inducing the other party to enter the contract where he would not enter without using it. Agreeing with the previous interpretation (*Obaidullah 2008*) suggested that *gharar* implies deceit. Relying on the comparative critical analysis with English contract law as the main comparative model in this thesis; the last three opinions would the most closely to the view of the thesis.

Similarly, discussing the concepts of error and misrepresentation under the CISG rules, gives an impression that these concepts have not been considered within the scope of the CISG rules. Arguing that the CISG has not dealt with the concepts of error and misrepresentation (*Flechtner 1999*) suggested that these concepts have to be established and interpreted within the CISG rules to solve any dispute occur between the international contractual parties. Confirming the previous opinion, (*Kazimierska 1999-2000*) argued that the concepts of error and misrepresentation can be derived from “warranty as to the quality of the goods” and “the quality of the goods or claims non-conformity of the goods” under the CISG rules. Having said that, (*Rudolf Lessiak 1989*) argued that, the CISG rules would not be applicable if mistake as to the quality of goods occurs. Disagreeing with this

opinion, (Lessiak 1994) saw the issue differently; he suggested that the scope of Article 4(a) of CISG corresponds with mistake as to quality of the goods under some national laws. Declaring that mistake is not existed or classified in the CISG rules (Landgericht Aachen Court 1994) agreed with this suggestion and argued that there is a possibility to consider mistake of the quality of goods within the scope of the CISG; relying on the rules of the defective goods. Indicating the absence of mistake as in English and Scottish contract laws, (Legislative History 1980) suggested dealing with mistake as an alternative to lack of conformity.

Arguing that, the CISG rules have not considered mistake or misrepresentation within its scope. As an example, to their argument, (Ferrari, Verona 2007), states that, the CISG discusses the issue of the goods description in contracts governed by the CISG; but no indication to mistake and no evidence to any remedy related to it as, rescission, avoidance, as used in many domestic legal systems. This direction of reasoning used as an actual case in the court, where (Landgericht Court 1997), refused to consider any link between CISG rules and the concept of mistake under national rules. Supporting this position, (Kazimierska 2007) argued that there is no need to consider any relation between the CISG rules and the concepts of mistake and misrepresentation under national legal systems. In spite of some implicit indication to good faith to include the concept of error, but (Charters 2005), argued that this might cause more confusion; this is because good faith itself is not clear or defined concept under the CISG rules.

Section 3: The Structure of the Thesis

This thesis will discuss the different concepts underlying error, which will then leads to a discussion on a selection of discussions in which the concept of error is implemented, namely the English and Scottish legal systems, international law under the CISG, Islamic

legal system as developed by the Ottoman Journal of Equity, and as they influence the laws of the Palestinian territories, of the West Bank, the Jordanian legal system, and the laws of the Gaza strip, the Egyptian legal system. In addition, the draft Palestinian civil law, which is to be implemented throughout Palestine, will also be examined.

3.1. Mistake in English Contract Law

The English law of contract uses the word “mistake” and not the word “error”. “Error” is used by the Scottish law of contract, both words are used interchangeably. The thesis therefore uses the words “error” and “mistake” as interchangeable when discussing the relevant laws of contract in the various chapters in this thesis. This however does not imply that the concept of error has the same meaning within the discussed legal systems. In general, the doctrine of mistake is recognised under the English legal system, occupying an important position under the English law of contract. From a historical view, the English doctrine of mistake and its categories or typologies, are strongly related to its origins in Roman law. The doctrine of mistake internationally is very much influenced by the type of the essential mistake.¹ The doctrine of mistake within the English law of contract has attracted a lot of discussion. It is claimed that the mistake doctrine is not stable, especially with relation to the formation of the contract at issue.²

Mistake raised many controversies. Despite this fact, it is noticed that the doctrine and its related cases are an important portion when they do arise. There are several types of mistake within the doctrine of mistake. In addition, these types are usually divided into various categories. Despite all the debates and discussion about mistake, it is believed that

¹ K Zweigert. *International Encyclopaedia of Comparative Law*. Volume VII, Martinus Nijhoff Publishers, 1981. P13. ISBN 9028602712.

² Goodhart. *Mistake as to Identity in the Law of Contract*. (1941) 57 LQR. P 228.

mistake under English contract law is still narrow. Based on this fact, it is considered that rules of misrepresentation are meant to be complementary to the rules of mistake.³

One basic rule of the doctrine of mistake is that the mistaken party is responsible about what he/she has said or written where there is no logical reason for him or her not to know about the mistake.⁴ Furthermore, some legal writers have suggested that English law does not possess a doctrine of mistake.⁵ One or both of the contracting parties would be expected to fall into a mistake for the mistake rules to apply. Since the doctrine of the mistake is categorised into different types of mistake, the remedies for mistake would be applied differently as different circumstances arise. There is also a possibility for mistake to occur which is not applicable to one of the specified categories.⁶ In some cases a mistake can occur at the time of contracting, if the parties expressed themselves poorly by incorrectly indicating their intent in their phrasing of the terms of the contract.⁷

Generally speaking, a serious mistake occurs when the subject matter contracted for turns out to be substantially different from the subject matter that was expected to be contracted for.⁸ The level of mistake would be expected to render the contract void or voidable, although, some mistakes do not have the same effect.⁹ This thesis will analyse the categories of mistake in English law under the following headings.

³ Hugh Beale. *Contract Law*. Hart Publishing, 2002. P333. ISBN 1841132373.

⁴ *Ibid.* P363.

⁵ J C Smith. *Contracts, mistake, frustration and implied terms*. 1994. 111 LQR 400, 408 et passim. And C J Slade. "The myth of mistake in the English law of contract" (1954) 70 LQR 385.

⁶ Beale, *op. cit.*, P343.

⁷ It known as an error as to expression under the Scottish Contract Law. More details will be explained within the concept of error under the Scottish contract law.

⁸ See *Bell v. Lever Bros Ltd* [1932] AC 161 at 218, [1931] All ER Rep 1 at 28 per Lord Atkin, as adopted and confirmed by this court in *Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407. [2002] 2 All ER (Comm) 999, [2003] QB 679.

⁹ Beale, *op. cit.*, P363.

3.2. Common Mistake

Common mistake imply that the contract is entered into by the parties is prepared under the same incorrect beliefs which they bear in their minds,¹⁰ although, both believe that they are acting in accordance with their beliefs. In general they think that they are contracting according to an existing fact; however, this is not the case.¹¹ In this situation the contract would be void.¹² Common mistake has no effect on the consensus as the parties have absolutely agreed to contract, although their consensus was based on a false assumption.¹³ It is noticed that English common law does not consider mistake to be actionable where the principle of *caveat emptor* is involved.¹⁴ One of the main elements to consider with regard to mistake is whether it is operative or not and, whether the non-existence of the fact is as a result of one of the contracting parties. This non-existence must render the contract impossible to be implemented.¹⁵

3.3. Mistake as to Subject Matter

Mistake as to subject matter is usually considered as a type of common mistake. This type of mistake under English law is mostly related to the perishing of the subject matter itself. The rules dealing with this issue are to be found in the Sale of Goods Act 1979. According to these rules, common mistake occur where the goods did exist; however, for some reason or other they have perished. Relying on the approach of the Sale of Goods Act, mistake as to subject-matter would be established where the parties do not know that the subject-matter has perished before they entered into the contract.¹⁶ If the contracting parties do

¹⁰ Rupert Haigh. legal English. Routledge Cavendish Law. 2004. P156. ISBN 185941950X.

¹¹ Paul Richards. Law of Contract. 7th Edition, Pearson Education Limited. 2006. P214. ISBN 1405812214.

¹² Beale, op. cit., P366.

¹³ Coram: Harms, Mpati, Brand, Nugent JJA and Lewis AJA. In the matter between: Vanreenes Steel (PTY) Limited Appellant and ERROL JOHN BARNES SMITH NO First Respondent .Richard Rosso Second Respondent. Heard: 14 March 2002. Delivered: 25 March 2002. Subject: Mistake in contract; common assumptions – their effect. P10.

¹⁴ Prof. William Tetley, Q.C. Good Faith in Contract Particularly in the Contracts of Arbitration and Chartering. McGill University. 35 JMLC 561-616. 2004. P17. <http://tetley.law.mcgill.ca/comparative/goodfaith.pdf>.

¹⁵ Ruth Sefton-Green. Mistake, Fraud and Duties to Inform in European Contract Law. Cambridge University Press. 2005. P82. ISBN 0521844231.

¹⁶ M. P. Furmston. At Al. Cheshire, Fifoot and Furmston's Law of Contract. 15th Edition, revised. Oxford University Press, 2006. P284. ISBN 0199287562, 9780199287567.

believe that the subject matter is available at the time of the contracting process, in fact the subject matter does not now exist or never existed, this might render the contract void.¹⁷ In general the court has the authority to declare the contract voidable according to the equity principles.¹⁸

3.4. Mutual Mistake

A mutual mistake can be established if the contracting parties misunderstand their intentions, they intend two different things and they are at cross-purposes.¹⁹ English law does not consider the contract enforceable under a mutual mistake. Nevertheless, where the hazard of mistake is allocated appropriately to one party, the contract would be enforceable.²⁰ In general; mutual mistake renders the contract void.²¹ Where there is a mutual mistake 'there is no binding contract'.²²

3.5. Unilateral Mistake

Two different situations give rise to unilateral mistake. The first occurs if the other contracting party knows or is supposed to know of the mistake of the other party. This would make the contract void *ab initio*.²³ The second case occurs where the other contracting party does not know, or he is not supposed to know about his contracting party's mistake. In this latter situation the contract would not be considered void based on the *caveat emptor* principle.²⁴ A unilateral mistake might not be a ground of considering

¹⁷ Olivo, Laurence M. Et AL. Fundamentals of Contract Law. 2nd Edition. Emond Montgomery Publication, 2005. P75. ISBN 1552391612. 9781552391617.

¹⁸ The English law of Equity deals with the contracts which involve unconscionable conduct such as misrepresentation, mistake, and fraud.

¹⁹ Haigh, op. cit., P156.

²⁰ Gideon Parchomovsky, Peter Siegelman and Steve Thel. Of Equal Wrongs and Half Rights. Vol. 82:738. June 2007.P95. <http://www.law.nyu.edu/journals/lawreview/issues/vol82/no3/NYU303.pdf>.

²¹ Ibid.

²² Robert W. Emerson, J.D. Emerson Robert W. Business law. 4th Edition, Barron's Educational Series. 2003. P98. ISBN 0764119842. 9780764119842.

²³ G. Treitel. An Outline of the Law of Contract. 6th Edition. Oxford University Press, 2004.P137.

²⁴ G. Treitel. The Law of Contract. 10th Edition. Sweet & Maxwell, London. 1990. P 361.

the contract void when it relates to the subject matter.²⁵ A unilateral mistake that is known by the other party would be grounds for relief if it is related to the contents of the contractual terms.²⁶

3.6. Mistake as to Law

A mistake of law arises when the parties do not realize their legal responsibilities or obligations under the contract and they carry it out mistakenly. This means that the party cannot pretend that he or she did not realise the contract terms or contents and regard it as voidable. It implies that, the parties are committed and are bound by definite legal obligations. In general, mistake as to law is connected usually to the money paid by mistake which would then be recoverable.²⁷

3.7. Mistake as to Fact

A mistake of fact could occur where the contracting parties believe mistakenly that they are contracting on a real subject, although in fact this subject is incorrect and they build the contract on this mistake.²⁸ In general, where the contract is entered under a mistake as to fact, the contract would be considered void *ab initio*. Connected to this point, there is no general rule under the English contract law enforcing the unmistaken party to inform the mistaken party that he or she is acting under a mistake as to fact.²⁹

3.8. Mistake to Identity

Mistake as to identity can be classified as a unilateral mistake. This type of mistake occurs where one of the contracting parties makes a mistake regarding the identity of the other

²⁵ P. S. Atiyah. *Essays on contract*. 2nd Edition, reprint, revised, illustrated. Oxford University Press. 1990. P253. ISBN 019825444X. 9780198254447.

²⁶ Beale, *op. cit.*, P364.

²⁷ Preparation and Review Guide for Auctioneer and Apprentice Auctioneer Licensing Examinations. Developed by the Alabama State Board of Auctioneers 2002. P12.

²⁸ Michael P. Furmston. *How Modern is English Contract Law?*. Centro di studi e ricerche di diritto comparato e straniero, diretto da M.J. Bonell. Saggi. Conferenze Seminari. 39. Roma. 2000. P2.

²⁹ Reiner Schulze. *New features in contract law*. Sellier. European law publ. 2007. P 359. ISBN 3866530366. 9783866530362.

party at the time of contracting. This arises when the contracting party deals with the other contracting party thinking he or she is the person he would like to contract with, although in the reality, they are dealing with someone else.³⁰ Where the innocent party proves that the other party's identity is crucial to the contract and he was mistaken with regard to the identity of the other contracting party, the contract would be considered void.³¹ The contract would be void if the mistake, as to identity is a result of misrepresentation,³² or fraud.³³

3.9. Mistake as to the Title

Mistake as to the title is treated similarly to a mistake to the existence of the subject-matter. Mistake to the title arises when it is unknown to the parties that the purchaser was the owner of which the vendor declares to put up for sale to him. This is when the parties anticipated making effective transfer of the ownership where this kind of transference is not possible according to the rule of *naturali ratione inutilis*.³⁴

Section 4: Misrepresentation in English Law of Contract

4.1. Legal Background of Misrepresentation

For misrepresentation to be established, must comprise a false statement.³⁵ With regard to non-fraudulent misrepresentation, English law does not treat the statement of fact as the statement of opinion. If non-fraudulent misrepresentation is not related to an existing fact it would not be actionable. The false statement of opinion would not be actionable unless it is made fraudulently.³⁶ According to section 2(1) of Misrepresentation Act 1967,

³⁰ Kenneth Smith, Denis J. Keenan. Smith & Keenan's English law. 14th Edition, Pearson Education. 2004. P312. ISBN 0582822912. 9780582822917.

³¹ Haigh, op. cit.

³² Beale, op. cit., P366.

³³ [1961] 1 QB 31.

³⁴ *Bell v. Lever Brothers Ltd* [1932], Lord Atkin at P 218.

³⁵ Haigh, op. cit.

³⁶ J. Cartwright. Misrepresentation, Mistake, and Non-Disclosure. Sweet & Maxwell, London, 2002. P110.

misrepresentation would be mostly connected to the fact. The effect of the statement in the pre-contractual stage is a central point of misrepresentation.³⁷

Misrepresentation is a false statement of fact that is made by the representor to bring the other party, the representee, into the contract.³⁸ The effective inducement of the misrepresentee is central to considering misrepresentation as being operative.³⁹ Misrepresentation would not be actionable unless the misrepresentee built his or her decision to enter the contract in reliance on the misrepresented fact.⁴⁰

4.2. Fraudulent Misrepresentation

Under the English contract law of fraudulent misrepresentation is considered to be imperative, when compared with the other types of misrepresentation. Under English law, fraudulent misrepresentation would entitle the misrepresented party to claim damages from the other party, the misrepresentor, when he or she suffers a loss.⁴¹

4.3. Innocent Misrepresentation

According to s.2 of the Misrepresentation Act 1967 of England, the responsibility that occurs under a non-fraudulent misrepresentation, otherwise known as innocent misrepresentation, would be excluded.⁴² Under innocent misrepresentation, the court would have to act according to its discretionary role in deciding whether or not to entitle the

³⁷ Furmston, op. cit., P303.

³⁸ Geoffrey Samuel. *Law of Obligations and Legal Remedies*. 2nd Edition. Routledge Cavendish. 2001. P325. ISBN 1859415660.

³⁹ Bradgate, Brownsword and Flesner, op. cit., P33. Footnote 19.

⁴⁰ Furmston, op. cit., P79.

⁴¹ Zhou, op. cit., P84.

⁴² Bowen, op. cit., P7.

misrepresentee damages in lieu of rescission.⁴³ Usually in cases of innocent misrepresentation, there is a shared mistake with the other contracting party.⁴⁴

4.4 Negligent misrepresentation

Under English law liability for negligent misstatement can be established only if there is an adequate closeness between the contracting parties and, if there is a reasonable level of duty of care.⁴⁵ In general, if the misrepresentation is not fraudulent, the plaintiff, the buyer, must submit evidence that he relied on the misrepresentation and, that he had reasonable grounds for believing and relying on the misrepresentation in entering the contract.⁴⁶

Consequently, misrepresentation requires reliance on a false statement, even though there is some mystification as to whether real reliance has to be made known⁴⁷ or just should be reasonable.⁴⁸ As a conclusion, if there is no reliance on the statement that is released by the representor, it cannot be an actionable misrepresentation. This implies that where an actionable misrepresentation is proven, the contract will be voidable and the misrepresentee will be permitted to withdraw or rescind the contract, and/or seek damages. It is worth noticing that rescission as a possible remedy of misrepresentation is optional.⁴⁹

In general where the action of deceit is established, the representor is responsible for his or her misrepresentation if he or she knowingly or recklessly, lacks caring whether the statement is true or false, provides a false statement to another person, the representee, with the intention that it shall be acted upon by the representee, who then does act upon it

⁴³ Edwin Peel. *The Law of Contract*. 12th Edition. Sweet & Maxwell, 2007. P383,389. ISBN 978 0 421 94840 2.

⁴⁴ F A R Bennion. *Mistake in the Construction of Contract*. Doc. No. 1961.002 Site Map Ref. 2.7.1. 24 MLR 4 (July 1961) 426. www.francisbennion.com

⁴⁵ Financial Markets Law Committee. Issue76 working group. *Transparency Obligations Directive Liability*. Legal assessment of the proposed statutory liability regime in the Companies Bill in relation to Transparency Obligations Directive disclosure. Bank of England. September 2006. Para 3.2.

⁴⁶ Richard Williams. *What is the Rule of Caveat Emptor and to What Extent Does Part V of the Housing Act 2004 Undermine the Rule?* *Hertfordshire Law Journal* 6(1), P7. 14-41 ISSN 1479-4195 Online / ISSN 1479-4209.

⁴⁷ *Museprime Properties Ltd v. Adhill Properties Ltd* [1990] 2 E.G.L.R. 196.

⁴⁸ *Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd.* [1995] 2 AC 501.

⁴⁹ Bradgate, Brownsword and Flesner, *op. cit.*, P69.

and thereby suffers damage.⁵⁰ Clearly the three types of misrepresentation, fraudulent, negligent, and innocent, possess the possibility to be treated under the rescission rules. The right to seek rescission, however, they would be subject to the representee's claim and not subject to the court initiative.⁵¹ Both fraudulent and negligent misrepresentation would arise to a liability in tort, which is not available in the case of innocent misrepresentation.⁵²

Section 5: Error in Scottish Contract Law

The theoretical basis demonstrates contradictory tendencies. Much of the case law has given rise to confusion for a variety of reasons: (1) the inadequacy of the judicial analysis and, the absence of academic commentary on the law at its formative stage during the nineteenth century; (2) the debatable impact of the mixture of influences on the development of Scottish law, from Canon law, Roman law and local Scottish thinking; (3) a tension between the subjective and objective approach with respect to contractual consent; (4) the effect of the process of civil jury trials on the development of the law; and (5) the inherent difficulty of the subject.⁵³ Some problematic issues also occur over the relevant time period due to insufficient illustrations connected to the subject of marriage, the contract of sale and an uncertainty related to the concept of substantial error.⁵⁴ The Scottish law calcified the error into different categories, to include essential error, mutual error and unilateral error and so on; which are derived from Roman law.⁵⁵

Under Roman law error had the effect of nullifying the contract. Where error has influenced the contract, it would be considered void due to a lack of consent. In general, under Roman law, a contract would be considered absolutely null and void if one of its

⁵⁰ *Derry v. Peek* (1889) 14 App. Ca. 337. At Zhou, op. cit., P85.

⁵¹ *TSB Bank plc v. Camfield* [1995] 1 WLR 430, CA, 438.

⁵² Peter Cane. *The Anatomy of Tort Law*. Hart Publishing, 1997. P195. ISBN 1901362086, 9781901362084.

⁵³ McBryde. W: Error, chapter3 in Reid.k. And Reinhard Zimmermann. *A history of Private law in Scotland*, Vol 2 Obligations. Oxford University press. 2000, P73. ISBN 0-19-829928-1.

⁵⁴ William W.McBryde, *the Law of Contract in Scotland*. 2nd edition, W.Green.Edinburgh 2001.p 352.

⁵⁵ *Ibid*, P352 and after.

formative essential elements was lacking.⁵⁶ Under the Scottish legal system there is more concentration on essential error and its categories than on the other types of error. Under the Scottish law of error, there is a distinction between the error of law and error of fact.⁵⁷ In theory both are subject to the same degree of control.⁵⁸ Under Scottish law, there are some disparities between essential and inessential error, collateral or concomitant error,⁵⁹ mutual error⁶⁰ and unilateral and bilateral error.⁶¹ It is also clear that the Scottish law of error distinguishes between misrepresentation and error. This thesis will concentrate on the concept of error by discussing the main categories of error under the Scottish law of contract, by critical analysing institutional and academic writings, as well as the case law related to this area.

Under Scottish law simple definitions define error as a wrong belief or wrong understanding,⁶² or the dissuading error as a misunderstanding;⁶³ or misapprehension.⁶⁴ In general, under Scottish contract law the contract would not be void due to error, although, it would be considered void if contractual consent is excluded. This would result in the contract never existing or being formed by the parties.⁶⁵ If the error was caused by a third party, this would not enable the reduction to be operative.⁶⁶ Under Scottish law, error is one

⁵⁶ E. Sabbath. Affects of Mistake in Contract A Study in Comparative Law. *International and Comparative Law Quarterly* [VOL. 18] JULY 1964. P804.

⁵⁷ David Walker. BE. QC. *The Law of Contracts and related Obligations in Scotland*. 3rd Ed. T&T Clark, Edinburgh 1995. P229. ISBN 0 567 29275 4.

⁵⁸ Beatson, J. The Scope of Judicial Review for Error of Law. *Oxford Journal of Legal Studies* Vol 4, No.1. p25.

⁵⁹ Walker. op. cit., P232.

⁶⁰ Ibid, P244.

⁶¹ Ibid, P248.

⁶² Road Safety Act 2006, Sections 53 and 54. A note for guidance from the Department for Transport. November 2007. Para 12.

⁶³ John A.K. Huntley, John Blackie, and Craig Cathcart. *Contract, Cases and Materials*. 2nd Edition. Thomson and Green. Edinburgh. 2003. 193.

⁶⁴ Walker. op. cit., P14.1.

⁶⁵ Bowen, op. cit., P26.

⁶⁶ *Young v. Clydesdale Bank Plc.* (1889) 17 R 231.

of the most complicated subjects within the law.⁶⁷ Under Scottish law, error has attracted a plethora of debate and controversy between academic writers.⁶⁸

5.1. Un-induced Error

The Scottish law of contract discussed this category of error under a variety of headings, to include error in expression, error in intention, error in motive, error in transaction, unilateral error, common error, mutual error and essential error.

5.1.1. Error in Expression

This type of error occurs where the final form of the contract did not express the exact intention of the contracting parties.⁶⁹ This could occur when the parties agree to contract on specific items, yet by mistake they contracted on something else. There are no restrictions on utilising any related evidence which could lead to the affirmation of a clerical error, whether written, oral or of any other substance.⁷⁰ Under Scottish law, it is allowed to correct a written contract that did not express the parties' intent.⁷¹ The court has a wide role to correct the contract equitably and bring the parties' intention back to the right track.⁷²

5.1.2. Error in Intention

This type of error occurs where the parties to the contract (one or both) establish their consent on the basis of an error. The consent would not be binding; as the intention to bind them was not available, which would lead to a situation where there is no *consensus ad idem*. The contract would be *void ab initio* (from the beginning).⁷³ This type of error is

⁶⁷ Chris Willett, Aidan O Donnell. *Scottish Business Law*. 2nd Ed, Blackstone Press Limited. London, 1996. P89. ISBN 1854314408.

⁶⁸ Hector L MacQueen, Joe Thomson. *Contract Law in Scotland*. 2nd Edition. Tottel Publishing, 2007. P159. ISBN 13 978 1 84592 147 7.

⁶⁹ Green, *op. cit.*, P120.

⁷⁰ *M'Laren v. Liddell's Trs.*, 1862, 24 D. 577.

⁷¹ The Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. Section 8.

⁷² William Gloag. *The Law of Contract*. 2nd Edition. W. Green & Son Ltd. Edinburg. 1929. P435.

⁷³ Green, *op. cit.*, P120.

related to the parties' mistake regarding the nature of the contract.⁷⁴ Two types of error are classified under the error in intention; error in motive and error in transaction.

5.1.3. Error in Motive

This type of error occurs in relation to the circumstances surrounding the actual deal.⁷⁵ The remedy of this type of error will not be available, unless that the mistaken party is induced by the other party. Under this type of error, the contract formation would not be affected unless the error is a fundamental one.⁷⁶

5.1.4. Error in Transaction

This type of error occurs where the contracting party misunderstands the other party's commitment, or where the contract is interpreted differently from what the other party has understood as being his or her duty or responsibility.⁷⁷ To find the remedy for this error, the question to be answered is what the exact intent of the parties when they entered their contract, but which they have now expressed incorrectly.⁷⁸

5.1.5. Unilateral Error

Unilateral error under the Scottish law of contract⁷⁹ follows the rules of *caveat emptor*, or let the buyer beware. The situation would be different when one party knows about the other party's error, even without misrepresentation being involved;⁸⁰ in this situation the contract would be void.⁸¹ The contract validity would be affected if unilateral error is fundamental. This is due to the parties would not meet the enquiries of *consensus in idem*

⁷⁴ Walker, op. cit., P 14.47.

⁷⁵ Andreas Rahmatian: Codification of private law in Scotland: observations by a civil lawyer. Edin L. R. 2004.P37.

⁷⁶ Green, op. cit., P119.

⁷⁷ Ibid, P120.

⁷⁸ Rahmatian, op. cit. P37.

⁷⁹ John A. K.Huntley. Contract, Cases and Materials. W. Green/Sweet & Maxwell, Edinburg. 1995. P189. ISBN 0 414 01010 8.

⁸⁰ *Security Pacific Finance Ltd v. T & I Filshie's Tr* 1994 SCLR 1100.

⁸¹ *Steuart's Trustees v. Hart.* (1875) 3 R 192.

which renders the contract not existing from the beginning. In other words, the contract would be void.⁸²

5.1.6. Common Error

This type of error occurs where the parties share the same error. It is an actual action of error as the consent between the parties has existed already.⁸³

5.1.7. Mutual Error

This type of error occurs where the parties fail to understand each other. This type of error would also occur where the parties establish different beliefs with regard to the contract, such as the subject matter or the price.⁸⁴ Mutual error prevents the existence of *consensus in idem*.⁸⁵

5.1.8 Essential Error (*error in substantialibus*)

This type of error is typically connected to the core of the contract. Under this type of error, the consensus would not initially exist, this makes the contract void.⁸⁶ There are various conditions which provide the essential error its legal effects, such as, proving that this error is induced by misrepresentation, or that this error is common between the two parties, or that it was mutual, or was created by fraudulent concealment.⁸⁷ In general essential error is divided into five categories: error as to subject matter, error as to the identity of parties, error as to price, error as to the quality of item and error as to the nature of the contract.⁸⁸ These categories of error are all derived from Roman law.⁸⁹

⁸² Hector L MacQueen, Joe Thomson. Contract Law in Scotland. 2nd Edition. Tottel Publishing, 2007. P159. ISBN 13 978 1 84592 147 7.

⁸³ Huntley, op. cit., P189.

⁸⁴ MacQueen, Thomson. Op. cit., P164.

⁸⁵ *Mathieson Gee (Ayrshire) Ltd v. Quigley* 1952 SC (HL) 38.

⁸⁶ Walker. Op. cit., P14.11-14.20

⁸⁷ *Stein v. Stein* 1914. S.C. 903, 908.

⁸⁸ MacQueen, Thomson. op. cit., P164.

⁸⁹ Rahmatian, op. cit., P36.

Section 6: Unilateral Error Induced by Misrepresentation of the Other Party

Under the Scottish contract law, the rules of induced error by misrepresentation are developed and influenced by the misrepresentation rules under English law.⁹⁰ In general, where error as to motive or transaction is established by the inducement of misrepresentation by the other party; the party who is induced has the right of reduction.⁹¹ If the error is not substantial, the consent will not be broken or destroyed unless the error involves fraud.⁹²

Section 7: Misrepresentation in Scottish Contract Law

Misrepresentation under the Scottish law of contract in many of the court cases and academic opinions is almost identical as the English law of misrepresentation. Misrepresentation made by the misrepresenter, in order to be considered, should not be the only reason behind the conclusion of the contract; however, it needs to have enough influence on the conclusion of the contract.⁹³

7.1. Misrepresentation by Way of Silence

Under Scottish law, when the seller fails to explain the real situation and condition of the goods, this would be considered to be misrepresentation.⁹⁴ In some cases, half truth would be deemed to be misrepresentation, such as when a party chooses to maintain silence with regard to an incomplete statement, despite a misleading indication. This situation has arisen in a case when one party failed to read a substantial part of the contract document, which led the other party to sign it.⁹⁵

⁹⁰ Ibid, P40.

⁹¹ Ibid, P40.41.

⁹² Hec. Burn Murdoch English Law in Scots Practice. The Juridical Review. 1909-1910. P60.

⁹³ Rahmatian, op. cit., P41.

⁹⁴ *Patterson v. Landsberg* (1950) 7 F 657.

⁹⁵ *Couston v. Miller* (1862) 24 D 607.

7.2. Non-Disclosure

Two situations would be excluded from the previous non-disclosure rule. The two cases are well established under the English law of contract.⁹⁶ The non-disclosure would be completely demanded in the insurance contracts, where the insured party should disclose all the material facts for the insuring party. The non-disclosure duty would include any material facts, whether or not this fact is major or minor.⁹⁷ The same duty would be demanded in regard of the contract where there is a fiduciary relationship between the contracting parties. This is demanded under Scottish law of contract⁹⁸ as well as under the English law of contract.⁹⁹

7.3. Opinion and Misrepresentation

The concept of misrepresentation in Scottish contract law is distinct from the statement of opinion.¹⁰⁰

7.4. Negligent Misrepresentation. Non-Fraudulent Misrepresentation

It has been suggested that negligent misrepresentation could be a reason behind claiming damages if it has caused financial loss.¹⁰¹ It was held¹⁰² that since the misrepresenter released a statement that is vital to the contract, he pretended to be knowledgeable with regards to this vital matter, or he has some special expertise, this would put him under a responsibility to take reasonable care to ensure that his representation is accurate. If the other party, as a conclusion of his representation, was induced to enter into contract, he

⁹⁶ Dr B. Soyer. *Reforming Pre-contractual Duty of Utmost Good Faith in Insurance Contracts- An Economic Perspective*. Dr B. Soyer. © 2007. P9.

⁹⁷ Moira MacMillan, Sally Lambie. *Scottish Business Law*. 3rd Ed, Pitman Publishing, London, 1997. P90. ISBN 0273620355.

⁹⁸ *Ibid*.

⁹⁹ Roger Halson. *Contract Law*. Pearson Education. London. 2001. P94-119. ISBN 0 582 08647 7.

¹⁰⁰ Hector L MacQueen. *Good faith in the Scots law of contract: an undisclosed principle?* in A.D.M. Forte (ed), *Good Faith in Contract and Property Law*. Hart Publishing, Oxford, (1999), 5-37. P19.

¹⁰¹ *Hedley Byrne v. Heller*. [1964] AC 465.

¹⁰² *Petroleum Co v. Mardon* [1976] QB 801; 2 All ER 5.

would be responsible to pay damages as he induced the other party to enter into contract by his negligent misrepresentation.¹⁰³

7.5. Innocent Misrepresentation

This type of misrepresentation occurs where it is made innocently.¹⁰⁴ It would be established where the party presents a statement honestly and in good faith, without knowing that the statement is misleading. For innocent misrepresentation to be considered, the innocent misrepresenter should have reasonable grounds to justify the reason for believing that the statement was true.¹⁰⁵ The induced party, the misrepresentee, has the right to seek the reduction of the contract.¹⁰⁶ The innocent misrepresentation does not create a right for the misrepresentee to seek damages.¹⁰⁷

7.6. Fraudulent Misrepresentation

This will transpire when the misrepresentee provides a statement fraudulently, knowing that the representation is false, and not believing it to be true.¹⁰⁸ Similarly, this is true when the party represents part of a material fact intending to make another statement misleading in order to induce the other party for entering into a contract.¹⁰⁹ In general, fraudulent misrepresentation would be established if the statement is wrong and fraudulent.¹¹⁰ Under Scottish contract law the damage would be available as a remedy if the contract is concluded or otherwise came into existence.¹¹¹

¹⁰³ Lord Justice Clerk, Lord Hamilton, Lord Marnoch. Second Division, Inner House. Court of Session. [2005CSIH74] A283/01. Para [50]. <http://www.scotcourts.gov.uk/opinions/2005csih74.html>.

¹⁰⁴ *Lees v. Todd* (1882) 9 R 807.

¹⁰⁵ Willett, O Donnell, op. cit., P81.

¹⁰⁶ *Lees v. Todd* (1882) 9 R 807.

¹⁰⁷ *Manners v. Whitehead* (1898) 1 F 171; 36 Sc LR 94; 6 SLT 190.

¹⁰⁸ *Derry v. Peek* (1889) 14 App Cas 337.

¹⁰⁹ MacQueen, Thomson, op. cit., P172.

¹¹⁰ McBRYDE, op. cit., P326. Para14-12.

¹¹¹ *Clelland v. Morton, Fraser and Milligan* WS 1997 SLT (Sh Ct) 57.

Section 8: Error and Misrepresentation in Islamic law, under the Ottoman Journal of Equity

Under the Islamic law of contract there is no definition of the concept of error, whether between Muslim scholars or in the Islamic literature on commercial contracts. Different Arabic words can be used to indicate what is more commonly known as error or mistake. According to some well known English-Arabic dictionaries, mistake or error in Arabic means *Khata'a* or *Ghalat*.¹¹² There is even a detailed classification of mistake and error using the *Khata'a* and *Ghalat* terminology.¹¹³ The *Qur'an* does not use the word *Ghalat* in its verses, or any in purpose. The *Qur'an* uses the word *Khata'a*, which has its linguistic roots and branches in many verses, to mean error or mistake.¹¹⁴ The *Qur'an* indicates error using *Khata'a* word in three locations.

For a deep critical analysis of the Islamic concept of error or mistake, this thesis will trace the Ottoman Journal of Equity's¹¹⁵ approach to this subject. It is useful to know that the Ottoman Journal is the first and the only formulated, or codified and organised civil law to be based completely on the Islamic doctrines or schools. The Journal relies in most of its articles and materials, on the *Hanafi* doctrine.¹¹⁶ The Journal does not make reference to mistake or error under any used Arabic accent or term, neither the popular *ghalat* nor the classical *khata'a*, except in one location, which is referred to below. In this case, it is worth mentioning that the Journal utilised different terms which encompass the concept of error or mistake, and similar concepts and terminologies, such as misrepresentation, fraud, deceit and frustration. It must be noticed that the Journal has one direct reference to error

¹¹² *Munir Ba'albaki. Al-Mawrid, A Modern English-Arabic Dictionary. 40th Ed. Dar El-Ilm Lil-Malayen. Beirut – Lebanon. 2006.*

¹¹³ *Harith Faruqi. Faruqi's Law dictionary, English-Arabic.5th revised Ed. Librairie DU liban, Beirut. 2005. PP254, 460.*

¹¹⁴ *Qur'an 2:286, 4:92, 33:5.*

¹¹⁵ It is called (*Majallat Al-Ahkam Al-Adliyah Al-Othmaniyyah*) which is the civil code of the Ottoman Empire, this code is still applying officially in Palestine and affected many of the Arabic civil codes of the Arabic countries such as Syria, Jordan, Egypt.

¹¹⁶ The introduction of the Ottoman Journal of Equity. PP8. 9.

in just one article.¹¹⁷ It is worth noticing that the Journal uses the Arabic word “*khata’a*”. The thesis will discuss the concept of error under the Islamic law of contract under the following headings.

8.1. *Khiyar Alwassf*

Khiyar Alwassf denotes an option of description, using an accurate and literal translation from Arabic to English. The situation is different when it comes to its legal context and its connotation. This can be derived after discussing the articles that discuss *Khiyar Alwassf* in the Journal. Two main articles have discussed this option with a heavy emphasis on the details. The first article¹¹⁸ considers the option of description if the seller sold the goods or commodities with a specified preferable description. If it discovered that the goods lacked the elements of such a description, the buyer has the right to rescind the contract, or to accept it at the nominated or agreed value. The second article deals with the cancellation of this option, which suggests that if the buyer deals with the sold object as an owner, the option of description would be null and void.¹¹⁹ *Ali Haydar*¹²⁰ discussed this option based on two divisions. The first allows the option of description to be part of the terms of conditions of the contract, although under another restriction, this condition should be free from *al-gharar*,¹²¹ which is considered to be the probability of nonexistence. In this case of misdescription, if it is established as part of the contract, the buyer has the right to cancel the contract and leave the sold item to the seller since the important elements of the description are missing. The other choice for the buyer is to accept the contract with its

¹¹⁷ Ottoman Journal of Equity. Article 72.

¹¹⁸ Ibid. Article 312.

¹¹⁹ Ibid. Article 313.

¹²⁰ He is the most important author or scholar who interpreted and explained the Ottoman Journal in his famous and wide spread book (*Durarr Alhukkam fi Sharrh Majallat Al-Ahkam*). Which has been mentioned above.

¹²¹ *Al-Gharar* or *Gharar* considered by another authors and scholars as uncertainty or an excessive risk.

whole nominated price or value. Simultaneously, the buyer has no right to accept the contract by reducing the agreed price due to the missing description.¹²²

The second division of *Ali Haydar* analysis suggests that the option of description is part of the sale process and the sold item, with no need to situate it as a condition. This could be a well known commercial custom between business people when dealing with specific descriptions. Under this case, when the buyer discovers the misdescription he has the right to cancel the contract.¹²³

8.2. *Khiyar Al-Ayb*

This option or right has been discussed by Journal in greater depth and detail than is the case with *Khiyar Al-Wasf*. This can be taken as an indication of the importance of this option and its strong relation with the contract. The Journal has nineteen specialised articles¹²⁴ within its texts, which discuss this option directly. The Journal also makes numerous indirect references to it in a multitude of locations.¹²⁵ According to the Journal, the sold items should be free from defect when the sale is unconditional.¹²⁶ This is when the sales transaction is implemented without anybody mentioning any existing defect, which leads to transaction being free and empty from defects.¹²⁷ It is clear that the seller should bear legal responsibility by guaranteeing that the sold item must be delivered to the buyer without the defect.¹²⁸ Furthermore, it is argued that, if the seller did not disclose the defect in the sold item, this is considered to be misrepresentation (*taghreer*), which is

¹²² *Ali Hayder. Durarr Alhukkam fi Sharrh Majallat Al-Ahkam*. The translation of the topic (Rulers Pearls for Explanation of the Journal of Equity). Investigated and translated from Turkish to Arabic by *Fihmi Alhusayni. Dar Alkutub Al-Ilmiyah*. V2.1991. Beirut-Lebanon. PP126,127.

¹²³ *Ibid*, P129.

¹²⁴ The Ottoman Journal of Equity. Articles 336-355.

¹²⁵ *Ibid*. Articles 85,360, 362,364, 406, 513-517, 529, 579, 671, 693, 1026, 1037, 1153-1356, 1378, 1461, 1486, 1489, 1548, 1746, 1782.

¹²⁶ Unconditional here means that, no conditions have been mentioned by the seller that would make him not reliable for hidden defects.

¹²⁷ Ottoman Journal, op. cit., Article 336.

¹²⁸ *Saiful Azhar Rosly, Mahmood Sanusi and Norhashimah Mohd Yasin*. The Role of *Khiyar Al-Ayb* in *Al-Bay Bithaman Ajil* Financing. *International Journal of Islamic Financial Services* Vol. 2 No.3. P1.

impermissible or forbidden (*haram*).¹²⁹ The definition of *Ayb* is different from that of error (*khata'a*), as error implies that someone intended to do something and discovering that he or she did something different unintentionally.¹³⁰

Any contracting party is normally expected to disclose any defect or fault that could affect the intended purpose of the goods negatively.¹³¹ In *Lisan Al-Arab* (the Arab tongue)¹³² the meaning of *tadlees* is interpreted as fraud, as a general meaning; however, it has also been interpreted as defrauding by hiding the item's defect from the buyer, as a particular meaning. This leads to another point mentioned by the Journal that decided "if the seller discloses the defect in the sold item at the contracting time. Up to that, if the buyer accepted the item, then he has no right to use the option for defect".¹³³ Under the Journal if the defect happened after the sold item being in the hands of the buyer and, the buyer discovers another old defect before the sold item came under his control.¹³⁴ If the buyer discovered the defect in the sold item and the defect has been removed before returning the item, there is no option of defect. If the buyer insisted on using this option he will be obliged to cover the expenses of delivery and transportation.¹³⁵

As a principle, the option of defect would result in extremely different meanings or concepts. This implies that any contracting party is normally expected to disclose any defect or fault that could affect the intended purpose of the goods negatively.¹³⁶ According to this principle, it is clear that the defect itself is not an error or the mistake; however, it is connected to error where the parties that do not realise or know about the defect. If the

¹²⁹ Hayder, op. cit., P191.

¹³⁰ *Ibin Manthour. Lisan Al-Arab* (the Arab tongue). Dar Al-Ma'aarif. Cairo. P1193.

¹³¹ Susan E. Rayner. *The Thoery of Contracts in Islamic Law*. First Published. Graham & Trotman Ltd., 1991. P205. ISBN 1-85333-617-3.

¹³² *Ibin Manthour*, op.cit., P1408.

¹³³ The articles from 341.

¹³⁴ The articles from 345.

¹³⁵ Hayder, op. cit., P194.

¹³⁶ Rayner, op. cit., P205.

party identify the defect and they do not disclose it, then the case would be deemed to be misrepresentation. It is understood from what *Ali Haydar* suggests that the defect itself is not misrepresentation (*taghreer*); however, the non-disclosure of the defect is misrepresentation. As has been understood by an Arab law writer, *tadlees* which translates into English as fraud, and that fraud has been interpreted as intending to induce the other contracting party into error by using cheating and fraud.¹³⁷ The Islamic definition of misrepresentation is not fixed or stable, whether amongst the early or modern Muslim scholars.

Some contemporary Islamic law authors suggest that the option of defect under Islamic contract law is established to achieve fairness between the contracting parties. According to this suggestion, no justice or fairness could be achieved with fraud or cheating. They connected defects to cheating or fraud, which is forbidden by God (*Allah*).¹³⁸ The four key Islamic doctrines do not mention the issue of error/mistake (*khata'a or ghalat*) under any category. *Khata'a* as a concept has been established in the *Qur'an* in the context of a mistaken murder. According to *Al-Sanhuri*, error is a defect of a contract which occupies very little room for discussion by Muslim scholars.¹³⁹

A literal formulation of the Ottoman Journal defines *taghreer* as “describing the sold item for the buyer against its real description.”¹⁴⁰ It defines *taghreer* as type of fraud (*khida'a*). On that basis, the creator of the fraud is the misrepresenter (*mugharrir*) and the person who falls for the fraud is the misrepresentee (*maghroor*)¹⁴¹ or (*mogharrar bihi*). *Ali Haydar* explained that *taghreer* examples would occur when the seller tells the buyer that the sold

¹³⁷ *Mashaal A. Alhajeri*. *Obligations & Evidence, the Defects of Consent*. Kuwait University, School of Law. 2004. P2.http://law.kuniv.edu.kw/mashaal/obli_hand.htm. Accessed at 12/6/2008.

¹³⁸ *Rosly, Sanusi and Yasin*, op. cit., P6.

¹³⁹ *Al-Sanhuri, Masader Alhaq filfiqh Al-Islami* (the resources of the right in the Islamic *Fiqh* (jurisprudence)). The Islamic Arabic Scientific Association. Muhammad Addayah Publications. 1955. P112.

¹⁴⁰ Article 164.

¹⁴¹ *Hayder*, op. cit., P264.

items are worth specific amounts of money, much more than its real value, whereas in fact, it is not. Similar, this is true when the buyer tells the seller that the sold items are worth less than their true value.¹⁴² The modern Muslim scholar's definition of *taghreer* is for one part to deceive "the other contractual party by fraudulent means, either by verbalising or acting which induce the other party to enter the contract that he would not give his consent without these means."¹⁴³

A generally speaking, *khiyar al-ayb* (option of defect) has taken a broadly within the Islamic law (*share'ah*) doctrines, it is actually covered by all of the main Islamic schools or doctrines. Generally speaking, *khiyar al-ayb*, used in a general context, can touch the borders of error in some areas and can touch upon misrepresentation in others. In some cases, *khiyar al-ayb* does not fit within. Therefore, *khiar al-ayb* is understood separately from the core of error and misrepresentation and has many points of difference. Generally, the Journal focuses on the general concepts of error and its belongings, without providing any clear categories or clarifications, such as, essential, inessential, unilateral, bilateral or mutual mistake and so on. It should be very clear that the Journal does not use error in literal expressions within the relevant articles,¹⁴⁴ such as ones which are employed in modern legal systems.

8.3. *Gharar* and Misrepresentation

Gharar is a forbidden conduct for Muslims believers as Islamic law states that there is a danger of fraud and deceit, requiring people to abandon it, as it is against God (*Allah*). *Allah* describes those who defraud or deceive as a people with diseased hearts, both

¹⁴² Ibid.

¹⁴³ *Nassir Bin Muhammad Aljoufan*. Taking the belongings of the people by the *Ihtiyal*, or the *Taghreer* or by both of them. 10/7/2006. http://islamtoday.net/questions/show_articles_content.cfm?id=71&catid=73&artid=8013. Accessed on 3/7/2008.

¹⁴⁴ *Aqeel, Fareed*. Obligations Theory in Syrian Civil law and Islamic Jurisprudence. 4th edition. Damascus University, 1994-1995. P37-38.

ethically or behaviourally. The *Qur'an* connected deceit and fraud with the habit of lying. All these conducts and behaviours are brought together to be described as a corruption, with the people who practice them as corrupters.¹⁴⁵ The *Qur'an* encourages the people to avoid dealing with delusions¹⁴⁶ implying *khida'a*, *gharar*, *tadlees*.¹⁴⁷ The meaning of a delusion here (*khida'a*, *tadlees*) is indicated as elements of *gharar* or *taghreer* in the Arabic-Arabic dictionary, in addition to considering *taghreer* as an action of *gharar*.¹⁴⁸ The *Qur'an* is aligned by teaching Muslims how they must avoid *gharar* or anything related to it, due to its connection to Satan's behaviours.¹⁴⁹ The Qur'anic teaching continues with regard to *gharar*, encouraging people not to rely on *gharar* in their life.¹⁵⁰ This suits the definition of the verbal noun of *gharar*, when the Journal states that "*taghreer*: is describing the sold item for the buyer against its real description."¹⁵¹ This brings us back to *khiyar al-wasf*, which is misdescription. *Gharar* as misrepresentation includes fraud, deception, beguiling and delusion. As illustrated, all of these words or terminologies are founded in the *Qur'an* and are forbidden (*Haram*). The *Qur'an* strongly emphasises and insists that *gharar* and all its belongings are not acceptable at all from human beings. This is implicitly obvious when the *Qur'an* connects *gharar* and the wickedness of the devil, describing *gharar* as the continuous and practiced job of Satan.

In light of the above, it is therefore difficult to deal or to accept the notion that a definite amount of *gharar* is permissible, and then to develop a discussion which then focuses on how to determine this amount of *gharar*.¹⁵² Most authors who have written about *gharar*

¹⁴⁵ *Qur'an* 2:9,10,11.

¹⁴⁶ *Ibid.* 45:35.

¹⁴⁷ *Ba'albaki*, op. cit., P259.

¹⁴⁸ *Ibin Manthour*, op. cit., P3232-3234.

¹⁴⁹ *Qur'an* 4:120.

¹⁵⁰ *Ibid.* 57:14,20.

¹⁵¹ Article 164.

¹⁵² Dipl. Ing. *Osama Abdelwahab*. Developmental Perspectives on Financial Innovation in Forward and Futures Derivatives-A Critical Discussion with Special Consideration of Islamic Banks and Financial Institutions. genehmigte Dissertation. Promotionsausschuss: Vorsitzender: Prof. Dr. Frank Heinemann. Berichter: Prof. Dr. Gernot Weißhuhn. Berichter: Ass. Prof. Dr. Seif Tag el-Din. Tag der wissenschaftlichen Aussprache: 2.5.2007. Berlin 2007.D 83. P99.

have described it as being unacceptable risk, and usually they add that the avoidance of *gharar* is an essential principle within all the Islamic contracts or transactions that rely on Islamic financial/commercial rules. Also, they considered the importance of preventing *gharar*, seeing it as a type of gambling,¹⁵³ which is also referred to directly in the *Qur'an* using a completely different meaning from *gharar*.¹⁵⁴ The forbidding (*tahreem*) of *gharar* is very clear from all Qur'anic evidence, this builds on a very logical background that prevents Muslims dealing with any transaction which includes fraud, deceit, or cheating. The translation of the English-Arabic dictionaries of misrepresentation use *khida'a*, *tadlees* (fraud) and *kathib* (lying), or releasing a false statement with regard to the fact to induce the other to achieve the misrepresenter's desires.¹⁵⁵ This notion has been translated to also mean "misleading".¹⁵⁶ Some writers attribute the prohibition of *gharar* to Prophet *Muhammad*,¹⁵⁷ which is correct, as he understood the *Qur'an* in the most appropriate manor, and very few of Muslim scholars understand his point with regards to his prohibition of *gharar*. Some authors included the element of deception as a part of the definition when they defining *gharar*.¹⁵⁸ Also, others traced a closer line to the *Qur'an*, and the logical construction of *gharar*, when they included uncertainty as an element of *gharar* as well as deceit; yet not allocating *gharar* in the meaning of uncertainty itself,¹⁵⁹ such as, using deceit to evaluate or describe the level of uncertainty in the contract; with one implying that "*gharar* means deceptive misrepresentation and the use of misleading ways and means."¹⁶⁰

¹⁵³ Christopher F. Richardson. *Islamic Finance Opportunities in the Oil and Gas Sector: An Introduction to an Emerging Field*. Texas International Law Journal Vol. 42:119. 2006. P127

¹⁵⁴ More and deep details will be discussed later on in this chapter to explain the gambling

¹⁵⁵ *Faruqi*, op. cit., P460.

¹⁵⁶ *Ibid*, P459.

¹⁵⁷ *Oussama Arabi*. *Early Muslim Legal Philosophy: Identity and Difference in Islamic Jurisprudence*. UCLA International Institute. G E von Grunebaum Center for Near Eastern Studies. (University of California, Los Angeles). Paper 1 Year 1999. P29.

¹⁵⁸ *Islamic Capital Market Fact Finding Report*. Report of the Islamic Capital Market Task Force of the International Organisation of Securities Commissions. July 2004. P7.

¹⁵⁹ *The 4 Major Forbidden Elements in Islamic Finance*. *Shirkah*. Year I. Issue 1 - July/August 2006. P49

¹⁶⁰ Dr. *Yahia Abdul-Rahman*. *Riba-Free (Islamic) Banking & Finance in the United States. A Window for Interfaith Cooperation Leading to United and Prosperous Communities*. Delivered at The 2007 INCEIF Global Forum. Leadership in Global Finance- The Emerging Islamic Horizon. August 30th 2007. P1

Section 9: Error and Misrepresentation in the CISG

The CISG 1980, otherwise known as the Vienna Sales Convention, is also worth examining in this context. It is rare to find substantial material discussing the concept of error under the CISG. There are no consistent instances or understandings in this regard. The existence of a uniform interpretation of an international contract can easily contribute in resolving disputes in international contractual relations, which are governed by the CISG.¹⁶¹ The issue of error under the CISG could have two faces. The first could be the question of the validity and the use of avoidance as a remedy under many of the national laws. The second is the question of the fundamental breach, again using avoidance as a remedy, under the CISG. This would be expected where a mistake or innocent misrepresentation occurs with respect to “the quality of the goods or claims [with regard to] non-conformity of the goods”. There is a question whether the CISG rules or the domestic rules should be applied. This issue will be critically examined in the chapter entitled “The Concept of Mistake-Error under the CISG”.¹⁶² The following issues will arise.

9.1. Mistake as to Quality

In many of the national legal systems, where the mistake occurs, this could render the contract void. This is not the case under the CISG. It is pointed out that the CISG rules, for instance, are not applied where the mistake occurred with relation to the quality of the goods.¹⁶³ It is proposed that mistake as to the quality of goods under some national laws would fit with the scope of Article 4(a) CISG.¹⁶⁴ Article 4 is considered to be a legal remedy for the mistaken party who has made a mistake regarding the quality of the goods.

¹⁶¹ H. M. Flechtner, 'The UN Sales Convention (CISG) and *MCC-Marble Ceramic Center Inc. V. Ceramica Nuova D'Agostino*, S.p.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parole Evidence Rule' in (1999) 18 *Journal of Law and Commerce* 259.

¹⁶² Anna Kazimierska, 'The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods. Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer (1999-2000), PP 158,159.

¹⁶³ Rudolf Lessiak, *UNCITRAL Kaufrechtsabkommen und Irrtumsanfechtung*, 111 *Juristische Blätter* 487, 492 (1989);

¹⁶⁴ Lessiak, *Österreichische Juristische Blätter JBI* 1989, 487 ff.; *Neumayer*, *Recht der Internationalen Wirtschaft (RIW)* 1994, 99, 101.

This approach is based on the rules on defective goods.¹⁶⁵ It may be possible to build an approach that brings mistake within the scope of the CISG rules; although, relying on the proposition that the erroneous party, on the point of the quality of goods, would be allowed to use the norms of defective goods as a refuge and there find a legal solution.¹⁶⁶ Mistake, as such, was not absent during some of the discussions leading to the drafting of the CISG, where the approach to mistake was, in the view of the Italians, lacking conformity.¹⁶⁷ There are no indications of any type of mistake within the CISG rules. There are no express suggestions for any remedies for mistake, such as rescission or avoidance. Equally, there is no treatment of the issue as to how to deal with mistake under the contracting member states domestic legal systems.¹⁶⁸ Some have even suggested that there is no necessity to discuss this subject as there are no serious implications to be discussed.¹⁶⁹

When discussing good faith with the CISG, some writers implicit mutual mistake as being found in the CISG rules. They did not state how this situation is to be treated, or what are its legal effects in relation to the existence of subject matter.¹⁷⁰ It is added that good faith contains the duty to disclose a defect, which is connected to non-conformity, according to Article 40 CISG.¹⁷¹ Some Arab-Islamic countries suggest that good faith implies the prohibition of fraud and fraudulent dealings. According to this argument, the good faith

¹⁶⁵ Stefan Kröll. Selected Problems Concerning the CISG's Scope of Application. *Journal of Law and Commerce*. [Vol. 25:39 2005-06]. P55.

¹⁶⁶ *Clout Case No. 47* [Landgericht Aachen (Regional Court), Germany, 14 May 1993], published in *Recht Der Internationalen Wirtschaft (RIW)* 760, 761 (1993).

¹⁶⁷ Legislative History. 1980 Vienna Diplomatic Conference. *Summary Records of Meetings of the First Committee, Proposed new article 48(a)* [relates to the provision that became CISG article 4(a)]. (A/CONF.97/C.1/L.175). 24th meeting. Wednesday, 26 March 1980, at 3 p.m. <http://www.cisg.law.pace.edu/cisg/text/link4.html>.

¹⁶⁸ Franco Ferrari, Verona. The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law). *Rechts Zeitschrift für ausländisches und internationales Privatrecht* Vol.71. January 2007. P70.

¹⁶⁹ Kazimierska, op. cit., P189.

¹⁷⁰ Joseph Lookofsky. In Dubio Pro Convention? Some Thoughts About Opt-Outs, Computer Programs and Preemption Under the 1980 Vienna Sales Convention (CISG). *Duke Journal of Comparative & International Law* [Vol 13:258 Special Issue 2003]. P280.

¹⁷¹ Fatima Akaddaf. Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles. *Pace International Law Review*. Vol XIII, No1. Spring 2001. PP33,34.

concept in Islamic law would be the direct counterpart of the concept of good faith under Article 7(1) CISG.¹⁷²

There is another clear line of argument that could be taken as an obvious signal for enhancing the position of fraud, as a basic factor to be included in the concept of good faith concept under the CISG. This is based on Scottish contract law considering fraud as one of the essential factors that break good faith.¹⁷³ Simultaneously, it is noticed that error could be considered to be an essential factor that good faith based on.¹⁷⁴ Good faith is also considered to be a mechanism to control a mistake which is un-induced; however, it is known to the other party.¹⁷⁵ Some writers have raised the issue from a different point of view, an interpretative point of view. This arises where the CISG rules create disputes due to the differences between legal systems which should be expected to seek different remedies according to national laws.¹⁷⁶ The CISG does not deal with mistake or misrepresentation in the same way as the national English and Scottish contract rules do, as will be examined later. Even when the remedies are provided by domestic and CISG rules there is still a problem in deciding which rules should be implemented.¹⁷⁷

9.2. Mistake as Dealt with by Academic Commentary

Many different suggestions have been made, with substantial differences arising in the commentaries on mistake, together with its effects and remedies under the CISG rules. Some others observe that mistake is an issue of validity of the contract and, that it should

¹⁷² Akaddaf, op. cit., PP31,32.

¹⁷³ MacQueen, op. cit., PP5-37.

¹⁷⁴ Ibid.

¹⁷⁵ Tetley, op. cit.

¹⁷⁶ Rodrigo Novoa. *Culpa in Contrahendo: A Comparative Law Study: Chilean Law and the United Nations Convention on Contracts for the International Sales of Goods (CISG)*. *Arizona Journal of International & Comparative Law* Vol. 22, No. 3, 2005. P608.

¹⁷⁷ For further discussion see: Lookofsky, op. cit., P283-285.

be restricted to being dealt with under national legal rules.¹⁷⁸ Some say that the CISG drafters did not clearly indicate in Article 79 CISG whether the domestic rules on validity would be applied in the case of mistake.¹⁷⁹ Some writers suggest that mistake as to the quality of goods is not to be regarded as being connected to validity, this provides commentators with evidence to state that remedies under domestic law are not applicable.¹⁸⁰ Following the historical legislative route, no signal has been given for interpretive methodologies other than those that are mentioned in Article 7(1) CISG. This leads then to the issue that validity can be interpreted independently.¹⁸¹

It has been added that the buyer would be able to rely just on rules dealing with the conformity of the goods, if the buyer wants to make a compliant on the basis of mistake.¹⁸² There is an attempt to combine the CISG rules and their domestic law counterparts under the classical examples of mistake. In these combinations some examples have been presented for consideration under the same categories. For example, the CISG's rules on initial impossibility and, its remedy can be applied as 'a cross-reference' for mistake as to the existence of the goods. The cross-reference of the mistake as to quality of the goods would be the breach of contract rules on the conformity of the goods under the CISG. Mistake as to the character of the contracting party has also been paired with the 'CISG' rules' on the 'lack creditworthiness of the other party'.¹⁸³

¹⁷⁸ Checklist on the CISG. Written in collaboration with Axel H. Baum. Adapted excerpt from Albert H. Kritzer ed., *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Kluwer Law International (1994). Reproduced with permission of the author. Available at <http://www.cisg.law.pace.edu/cisg/biblio/kritzer2.html>. Accessed on 12/01/2009.

¹⁷⁹ Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 *Yale J. Int'l L.* 1, 51 (1993).

¹⁸⁰ Patrick C. Leyens, *CISG and Mistake: Uniform Law vs. Domestic Law the Interpretative Challenge of Mistake and the Validity Loophole*, October, 2003. Available at <http://www.cisg.law.pace.edu/cisg/biblio/leyens.html>.

¹⁸¹ Ferrari, Verona, *op. cit.*, P63,64.

¹⁸² Edited by John Felemegas, *An International Approach to the Interpretation of the United Nations*. Cambridge University Press, 2007. P172. ISBN 0521868726. 9780521868723.

¹⁸³ Leyens, *op. cit.*

9.3. Misrepresentation in the CISG

The CISG does not deal with the misrepresentation directly; however, it could be seen that some writers could not adapt misrepresentation as it is presented in national law within the CISG rules. They suggested that the best option is to retain misrepresentation outside the range of the CISG. The academic writers concluded that the CISG itself has no answer for misrepresentation cases.¹⁸⁴ Article 40 CISG presents non-conformity to be understood as a misrepresentation. Article 40 reveals that negligent sellers are less protected when compared with negligent buyers; it is justified that the seller's failure to disclose could be counted as a fraudulent misrepresentation.¹⁸⁵

Section 10: Error and Misrepresentation under the Draft of the Palestinian Civil Law

The discussion of concept of error in the Draft Palestinian civil law will focus on studying the concept of error within three legal systems. These are Jordanian and Egyptian civil laws, as well as in the Draft Palestinian civil law. The Gaza Strip is influenced by the Egyptian legal system, with its lawyers and practitioners obtaining most of their training, legal education and experience in Egypt.¹⁸⁶ The same relationship has developed in the West Bank towards the Jordanian legal system, as Jordan ruled the West Bank until 1967.¹⁸⁷

The draft of the Palestinian Civil Law is completely dependent on Jordanian and Egyptian civil law as it contains specific provisions for dealing with error. In addition, Palestinian courts rely on the Egyptian and the Jordanian civil law codes and academic commentaries

¹⁸⁴ Teija Poikela. Conformity of Goods in the 1980 United Nations Convention of Contract for the International Sale of Goods. *Nordic Journal of Commercial Law*. issue 2003 #1. PP62,63.

¹⁸⁵ Alejandro M. Garro. *Journal of Law and Commerce*. The Buyer's "Safety Valve" under Article 40: what is the Seller Supposed to Know and When? [Vol. 25:253 2005-06]. P260.

¹⁸⁶ Addahdooh, Soliman, Annajar, Fahmi, Abu Ghaith, Ghaith- *Palestinian Uniform Law*. Roaia Journal, third year, issue number 28. P94.

¹⁸⁷ *Ibid*, P95.

when deciding cases. In particular the Palestinian Court of Cassation¹⁸⁸ has issued a decision¹⁸⁹ on contract law relying on the Jordanian Court of Cassation.¹⁹⁰ The same Palestinian court, in the same decision also chose to rely upon Article 104 of the Jordanian civil law code¹⁹¹ to explain the concept of acceptance within the contract. The Palestinian Court of Cassation referred to Jordanian Court of Cassation precedents three times and also to the Jordanian civil code articles three times.¹⁹² Beside that the Palestinian Court of Cassation has also relied on Article 753 of the Egyptian Civil Code, in order to explain reasoning the level of discretion of the court in the same case.¹⁹³

The Palestinian courts also follow the precedents of the Egyptian courts to explain their decisions. For example, the Palestinian Court of Appeal in Ramallah, in order to develop its decision regarding a contract of sale case,¹⁹⁴ has built its judgment on Egyptian court decisions, in particular the Egyptian Courts of Appeal in Cairo¹⁹⁵ and Alexandria.¹⁹⁶ In addition, in the same judgment, reference was also made to a ruling of the court of *Banha* city.¹⁹⁷ This provides clear evidence that the Palestinian Draft of Civil Law would be expected to be interpreted in light of both Jordanian and Egyptian academic and judicial comments. Palestinian courts have an equal preference for Egyptian and Jordanian precedents. It would be expected that the courts would chose the precedent that fits best the case that is presented before the court. The case of error would probably be interpreted in a similar way as it is by Egyptian and Jordanian legislators, commentators and courts. Academic Palestinian commentators would be dependent on what has been written by

¹⁸⁸ It is the highest court in the Palestinian judicial system that specialised in the civil and criminal cases. All the decisions of this court are binding for all other lower Palestinian courts.

¹⁸⁹ Palestinian Cassation Court, Civil Cassation No 70/2004. Decision No 88. 4/6/2004

¹⁹⁰ Ibid, P4.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid, P5.

¹⁹⁴ Civil Appeal, No 19/2004. 21/9/2004

¹⁹⁵ Ibid, P5.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid. *Banha* is an Egyptian city, and the court has been given the name of the city.

Egyptians and Jordanians, as it is the current practice in the Palestinian courts with regard to judicial precedents.

The Egyptian legal system depends on Islamic law as one of the main sources of its civil law.¹⁹⁸ However, it simultaneously relies on the French legal system for theoretical and practical applications and interpretations. Therefore, the legislative process in Egypt is in fact a mixed legal system, as many of the articles of the Egyptian civil law that were issued in 1948 relied on rules established under French civil law, in addition to Islamic Jurisprudence.¹⁹⁹ The same situation can be applied on the Jordan, where the Civil law relied on Islamic Jurisprudence and Syrian law. Syrian law derived its legal rules from the French legal system.²⁰⁰ In this way, Jordanian law indirectly would be a mixed legal system as is the case of Egyptian legal system.

The Draft of the Palestinian Civil law discussed the concept of error as Jordanian and Egyptian Civil laws did. This thesis will illustrate how this Draft followed the Jordanian and Egyptian civil in classifying and defining the concept of error and misrepresentation. Furthermore, this thesis will discuss the concept of error under the Draft of the Palestinian Civil law under the following headings.

10.1. Meaning of Error

The understanding of error in Palestinian law is that of a psychological situation that leads a person to have an incorrect belief with regard to a fact.²⁰¹ According to another definition, the error exists or occurs when a person believes something as a fact and in reality it is not,

¹⁹⁸ Egyptian Constitution 1971, Article 2 (modified) 1980.

¹⁹⁹ *Abdullah, Fathe Abdurraheem*. Studies in the Liability of Default. *Manshaat Almaaref*, Alexandria, Egypt. 2005. P6. ISBN977-03-1369-6.

²⁰⁰ *Abdallah Kharshum*. The Sources of the Legal Commercial Rules under the Jordanian Commercial Act. *Mu'atah Journal for Researches and Studies*. Issue 4, 2009. P11.

²⁰¹ *Amin Dawwas*. Voluntarily Sources (The Contract and The Unilateral will), A Comparative Study. 1st Edition. Darrishurouq, Ramallah. 2004. P93.

or *vice versa*.²⁰² It is also defined as an incorrect belief of a fact that leads to the entering of a contract.²⁰³

10.2. Categories of Error

Various types and cases of error are discussed in the Palestinian Draft; these are classified into three categories of error which can be found in the Palestinian Draft, as well as under the Jordanian/Egyptian civil codes. These categories will be discussed under the following headings.

10.2.1. Error that Prevents Consent

The first category is error that prevents the consent of the parties.²⁰⁴ Three cases of this category of error can be found through studying the Jordanian civil code²⁰⁵ and the Egyptian civil code,²⁰⁶ and the Palestinian draft.²⁰⁷ Since all have the same articulation, they agreed that this error has three types.

The first is error as to nature of contract. This type of error can occur when one party believes that he has entered a tenancy contract and the other party believes that he has entered a sale contract. The second is as a condition or reason for contracting. This can occur as example if a person has shared an inheritance with other inheritors and, it is found that this person is not in fact an inheritor. This situation can also occur if a person made a donation to another person thinking that the other person is a relative, as it subsequently transpired that this in fact was not the case.²⁰⁸ Here, error is connected to the reason that motivates the parties to create the contract. It is also built on the

²⁰² The Memorandum of the Jordanian Civil code. P143,144.

²⁰³ *Abdunnasir Abu-Albasal*: Studies in the Jurisprudence of the Jordanian Civil Law. 1st Edition. Darunnafa'as for Publishing and Distributing. Jordan. 1999. P139.

²⁰⁴ *Dawwas*. op. cit., P95.

²⁰⁵ Article 152. The Jordanian Civil Law.

²⁰⁶ Article 121. The Egyptian Civil Law.

²⁰⁷ Article 120. The Draft of the Palestinian Civil Law.

²⁰⁸ The Memorandum of the Palestinian Draft of Civil Law. P81.

availability of a condition, so, if the reason or condition does not exist, it implies that there is no consent at all. This therefore indicates that the contract has not been established from the beginning.²⁰⁹

10.2.2. Error which Defects the Consent

The second category of error is the one that renders the parties' consent defective, although it does not prevent the contract from existing. This error arises after the contract has been established. Here, the contract would be voidable, but not void.²¹⁰

There is a requirement for a substantial or essential error for the contract to fall under this classification.²¹¹ The Palestinian Draft relies on the objective standard or circumstantial judgment in order to establish a substantial error, which is usually a matter of a judicial decision. Article 119 of the Palestinian Draft does clarify that this type of error is to be considered as being shared between the two contracting parties, as well being an error of just one of the parties. To consider this type of error as being operative, it should have been induced by the other party, who either knew about the error, or it would have been easy for him to know about it.²¹²

Three cases can be concluded under this error category. The first case is connected to the substantial description of the subject-matter of the contract. This can occur if the party intended to buy a specific item with a specific description, although he realised that the item he was provided by the seller is the same kind or sort yet it does not possess the specific description that he specified.²¹³ Here, consent would be affected, due to the buyer entering the contract of which he intended to have an item with the

²⁰⁹ *Anwar Sultan*. Sources of Obligations in the Jordanian Civil Law (Comparative Study with the Islamic Jurisprudence). 2nd Edition. The Legal Office. 1998. P96.

²¹⁰ Palestinian Draft of Civil Law. Article 119.

²¹¹ *Dawwas*, op. cit., P95.

²¹² Palestinian Draft of Civil Law. Article 119 (1).

²¹³ *Abu-Albasal*, op. cit., P149.

specified description. If this description is missing it means that the buyer would no longer be motivated to enter the contract; however, here, the specific description motivated him.²¹⁴ In general, all the principles of this category of error closely follow the same line in the Ottoman Journal of Equity.²¹⁵ The Draft provides that; ‘To consider the error as an operative error it should be induced by the other party, or he knew about the error, or it is easy for him to know about it’.²¹⁶

In the second case, error is as to the identity of parties. This type of error can occur when the identity of the parties plays a crucial role in the contracting process. This type of error can occur regularly in gratuitous contracts when the person is intended to make a donation to another specific person.²¹⁷ The third case is error as to a substantial feature or characteristic of the other party, and this type comes under one condition which is connected to the motive for contracting between the parties. It implies that the specific characteristics of the party were the only reason behind the contract.²¹⁸ In this situation, a key factor in determining whether or not an error is essential is the good faith of the party in error. In order to determine good faith, the surrounding situation of the contract must be examined, which would then rely on objective standards. Clearly the understanding of this case would then be a mix between the personal standard of good faith on the one hand, and its objective evaluation on the other.²¹⁹

²¹⁴ *Ali Al-Khafeef*. The Shari’ah Rules of Deals. 1st Edition. *Dar Al-Fikr Al-Arabi*, Egypt. 2008. P325.

²¹⁵ Article 310 of the Ottoman Journal of Equity and its explanation by *Ali Haydar*. *Durrar Alhukkam fi Sharrh Majallat Al-Ahkam*. The translation of the topic (Rulers Pearls for Explanation of the Journal of Equity). Investigated and translated from Turkish to Arabic by *Fihmi Alhusayni*. *Dar Alkutub Al-Ilmiyah*. V2.1991. Beirut-Lebanon. P129.

²¹⁶ Palestinian Draft of Civil Law. Article 119 (1).

²¹⁷ *Abdul-Qadir Al-Far*. The Sources of Obligations. Dar Athaqfah for Publication, Amman-Jordan. 1998. P80.

²¹⁸ *Ezuddeen Addnasouri, Abdul Hameed Al-Shawarbi*. The Practical Problems and the Disputes of the Sale Contract. 3rd Edition. *Addaru Al-Arabiyyah* for the Publishing and Distributing. 2003. P30.

²¹⁹ *Ibid*.

10.2.3. Error that has no Effect on Consent

The third category of error under the Palestinian Draft is that error does not affect the consent or the contract at all. Article 122 of Palestinian Draft, Article 155 of the Jordanian civil code and Article 123 of the Egyptian civil code all deal with this category of error under mistake as to calculation, as well as mistake as to writing. No effect could have occurred under this category and thus the error should be corrected. The clear example of this could occur when the contractor takes the measurement for land or a building in square meters, and when he transmits this to the contract, he does not put the sign of the square meter, or when the accountant decreases or increases the zeros, instead of 100 put 10 or *vice versa*.²²⁰ The Palestinian Draft,²²¹ the Egyptian civil code,²²² and the Jordanian civil code,²²³ have all stated that the erred party should not insist on the error of the other party in bad faith, the contracting party should keep himself committed to the contract that he intended to enter, if the other party has shown his willingness to implement the contract. The third case of error is error as to an object or subject-matter of the contract. This sort of error can occur with regard to the place of contract, like when a person intends to buy a flat on the first floor and the owner thought he is selling a flat on the fourth floor. It could also occur with regard to the type of item, like when the seller sells rice and the buyer thinks he is buying wheat.²²⁴

10.2.4. Error as to Law

Despite the fact that the Palestinian Draft did not discuss the error as to fact explicitly, it is in fact clear that the Draft has established a special position²²⁵ for error as to law. It has

²²⁰ *Al-Sanhuri. Alwasiet fi Sharhe lqanoun Al-Madani. The Labour Contracts. Part7. Vol 1. Dar-Annahdah Al-Arabiya. Cairo. 1964. P54. The topic translation (the mediator for explanation the Civil Law).*

²²¹ Article 123. The Palestinian Draft of the Palestinian Civil Law.

²²² Article 124. The Egyptian Civil Law.

²²³ Article 155. The Jordanian Civil Law.

²²⁴ *Dawwas, op. cit., P95.*

²²⁵ Palestinian Draft of Civil Law. Article 121.

followed the same line as the Jordanian civil code,²²⁶ and the Egyptian civil code.²²⁷ It is possible to notice that the three legal systems focus directly on error as to law more than they do on error as to fact. All the mentioned articles state that error as to law has the same conditions as error as to fact. In this article,²²⁸ error as to fact was the first time to be indicated through all the Palestinian Draft articles. The requirements for error as to fact are included in the articles that discuss error as to law. Based on that, the understanding of the error as to fact can be studied by implication, as nothing has been mentioned directly in the code's articles, except in Article 121 which explores error as to law.

Two main conditions are required for operating error as to law. Firstly, the error should be substantial, secondly, the error should be shared between the contracting parties.²²⁹ According to the Palestinian Draft, as well as the Egyptian civil law, the contract would be voidable, as this sort of error is considered to be a defect of consent. The effect under the Jordanian civil law is different, where the contract would be void. It is clear that the case of error as to law and ignorance under the Palestinian Draft is different from the English rule of *ignorantia legis neminem excusat*.²³⁰ Generally, in order to operate error as to law it should be connected to the substantiality of error.²³¹

10.3. Misrepresentation (*Taghreer*)

The Palestinian Draft used the word *taghreer*²³² to mean misrepresentation, following the Jordanian civil code.²³³ The Egyptian civil code²³⁴ uses *tadlees* as a parallel word for

²²⁶ Jordanian Civil Code, Article 154.

²²⁷ Egyptian Civil Code, Article 122.

²²⁸ Article 121. The Palestinian Draft of the Palestinian Civil Law.

²²⁹ Ibid, The memorandum of the Draft of the Palestinian Civil Law. P83.

²³⁰ Faruqi, op. cit., P346.

²³¹ Egyptian Cassation Court. No 129756. 29/11/1990. Para 2.

²³² Article 124. Draft of the Palestinian Civil Law.

²³³ Article 143. Jordanian Civil Law.

²³⁴ Article 125. Egyptian Civil Law.

taghreer. The Palestinian Draft shares the same articulation in one part²³⁵ of Article 124, with the Egyptian civil code.²³⁶ The Jordanian code starts with the definition of *taghreer*; however, the Palestinian and Egyptian codes started directly with the effects of *taghreer/tadlees* without a definition being provided in any of the articles. According to the Jordanian code,²³⁷ *taghreer* occurs when one of the contracting parties defrauds the other using fraudulence by means of statements or actions to induce him to enter into the contract, which would not have been entered into if these means had not been utilised. Egyptian jurisprudence defines *tadlees* (misrepresentation), when one of the contracting parties use any means or tools to convince the other contracting party against a fact and induces him into an error to enter the contract.²³⁸

The Palestinian Draft²³⁹ and the Egyptian²⁴⁰ code state that the contract would be voidable due to *taghreer/tadlees*, if one of the contracting parties or his agent uses fraud that induced the other to enter the contract, which would not be entered if fraud had not been used. Under the Palestinian and Egyptian provisions, fraud would not reflect misrepresentation as a concept; however, it would indicate that fraud is just a tool to establish misrepresentation. Fraud is one of the tools to establish misrepresentation as well as a lie or concealment.²⁴¹ Furthermore, *Sanhuri* suggested that anything that can be used to misrepresent the other is a misrepresentation (*tadlees*), anyone that has been induced by any of them, as a consequence anyone making an error would have the right to void the contract, and to claim for damages or compensation.²⁴²

²³⁵ Article 124 (1). Draft of the Palestinian Civil Law.

²³⁶ Article 125 (1). Egyptian Civil Law.

²³⁷ Article 143. Jordanian Civil Law.

²³⁸ *Mahmoud Addeep*. The Frauds in the Civil Law, Islamic Jurisprudence, and the Manlaw . Dar Al-Jamieh Al-Jadeedah for Publication. Alexandria. 2004. P54.

²³⁹ Used *taghreer*.

²⁴⁰ Used *tadlees*.

²⁴¹ *Al-Sanhuri*. *Alwasiet fi Sharhe lqanoun Al-Madani*, op. cit., P109.

²⁴² *Ibid*. P195.

The memorandum of the Palestinian Draft²⁴³ argues that fraud is a result of *taghreer*, by stating that “*taghreer* would be operative if it generates a fraud for one of the parties and induces him to accept the contracting which he would not accept without using *taghreer*”. *Ghish* (cheating) is also considered to be a tool of misrepresentation. As a general rule, misrepresentation, or any of its tools, should induce the contracting party to enter the contract.²⁴⁴ Nondisclosure is also considered to be a misrepresentation. It has been decided that the seller of a restaurant is involved in a misrepresentation when he does not disclose the fact that he cannot transfer the title to the buyer when they entered the contract.²⁴⁵ The Jordanian code²⁴⁶ and the Egyptian code²⁴⁷ count intentional silence over an actual fact or situation as a misrepresentation if it can be proved, that the induced party would not have entered the contract had he known of this fact or situation. The Palestinian Draft²⁴⁸ mentions a crucial point with regards to damages or compensation as a consequence of misrepresentation²⁴⁹, when it has been decided that the misrepresentee (*mugharrar bihi* or *maghroor*) has the right to claim damages if they are demanded. In general, the statement of “if it is demanded” has not been followed with a clarification of when the damages can or could be demanded.

For deception to be considered operative, it is submitted that it should intend to induce the other party and to benefit from this inducement, leading to a misrepresentation.²⁵⁰ It is noticed that there is no indication of negligent misrepresentation under any of the cases or articles within the Palestinian, Jordanian or Egyptian provisions. Generally speaking, any of the three civil laws, whether the Draft or the codes, do not point out any categories of misrepresentation, neither do the academic commentaries. It is also worth mentioning that

²⁴³ Draft of the Palestinian Civil Law. P85.

²⁴⁴ *Addnasouri, Al-Shawarbi*, op. cit., P31.

²⁴⁵ Jordanian Cassation Court, Civil Cassation, 371/88. Bar Association Journal. Year 38. Issues 8 & 9 1990. P1566.

²⁴⁶ Article 144. Jordanian Civil Law.

²⁴⁷ Article 125 (2). Egyptian Civil Law.

²⁴⁸ Article 124 (3). The Draft of the Palestinian Civil Law.

²⁴⁹ *Ibid.*

²⁵⁰ Egyptian Cassation Court, 0329/39. 8/2/1972.

a mere statement of opinion is not considered to be a misrepresentation.²⁵¹ The Palestinian Draft²⁵² states that if misrepresentation (*taghreer*) was established by a third party, the misrepresentee (*maghroor*) has the right to declare the contract void if he proves that the other contracting party knew or was supposed to know of this misrepresentation at the time of the contract.

Section 11: Conclusion to this Chapter

This thesis will attempt to apply the critical analysis throughout its chapters. The comparative focus will also be applied throughout this entire thesis, but the main comparative application will be within the chapter of the concept of error under Islamic contract law. This is attributed to this thesis' attempt to explore the concept of error under Islamic contract law in light of the comparative approach with English and Scottish contract law. The comparative view will be used as a main reference to establish a clear vision with regard to the concept of error and misrepresentation in the Islamic contract law. This is due to Islamic jurisprudence does not discuss the concept of error within the contract law. Based on that, a decision has been made to have the intensive comparison within the chapter of the Islamic concept of error to create a clear ground to examine the concept of error and misrepresentation under the Islamic contract law.

Having discussed the concept of error under Palestinian Draft of civil law, it will be illustrated as a very specific conclusion of the experience, that Palestinian Draft is completely built on the Jordanian and Egyptian legal systems. These legal systems, including the Palestinian Draft need clarification with regards to the categories of error. In spite of discussing error, the discussion tended to be general without concentrating on specific titles, such as mutual, unilateral, as seen under English and Scottish contract law.

²⁵¹ *Addnasouri, Al-Shawarbi*, op. cit., P31.

²⁵² Article 125 (1). The Draft of the Palestinian Civil Law.

The main ground to establish the comparative view will rely basically on English and Scottish contract law, as the concepts of error and misrepresentation are well established under both of them.

This thesis attempts to establish a new interactive approach between the discussed legal systems. This approach endeavours to create a familiarity between these legal systems, relying on the fact that these legal systems can be benefited from each other. This thesis attempts to create basic rules and routes to the legal researchers, writers, and practitioners to enhance their understanding in this particular area of research. The discussion of error and misrepresentation concepts under these legal systems begins by discussing mistake and misrepresentation concepts in English contract law.

Chapter Two

The Critical Analysis of the Concept of Mistake and Misrepresentation in English Contract Law

Section 1: Introduction

English law recognises the doctrine of mistake as one of the most important doctrines under contract law. Historically, English common law rules, in relation to mistake categories or types, descend from the Roman law traditions. On that basis, it is noticeable that English mistake doctrine depends mainly on the individual categories of essential mistake.¹ It would be said that mistake arises as one of the controversial subjects under the common contract law. This does not mean that mistake occupies a wide space under the English contract law. The discussion in relation to mistake provides an impression that mistake's doctrine is recognised as a narrow area of application. Despite this, mistake under the English law does play a large role under the contract law. Different types of which are known and classified under mistake doctrine.

Usually, types of mistake are classified under different categories. When the party makes a mistake in regard of the contract's terms, it can be mistreated with the fact that, the non-mistaken party realistically would understand that the mistaken party agreed on the terms.² It is a simple and general rule, with a simple and general conclusion without further suggestions and explanations. Consequently, this kind of mistake is a unilateral mistake (one party is mistaken), although the mentioning comes exclusively without indicating any

¹ Zweigert, *op. cit.*, P13.

² John Cartwright. Protecting Legitimate Expectations and Estoppels in English Law. Report to the XVIIth International Congress of Comparative Law, July 2006. Netherlands Vereniging Voor Rechtsvergelijking. Netherlands Comparative Law Association. Electronic Journal of Comparative Law, vol. 10.3 (December 2006), P15. <http://www.ejcl.org>.

of other factors to aid the understanding of how exactly one could deal with this kind of mistake. This is an example of how it can be concluded that English law doctrine of mistake is constricted; however, it is complemented by a liberal doctrine of misrepresentation,³ this will be discussed in detailed later within this chapter.

Likewise, the mistake doctrine is established to facilitate the mistaken parties, agreeing that incompetent contracts are to be avoided. Additionally, it also supports the parties, encouraging them to share the information that facilitates them to avoid misinterpretation. It is also avoids inefficient investments, which can be effected by them through misrepresentation.⁴ One of the main targets of the contract law is to provide the guidelines to understand the acceptable terms for the contracting parties. It is also to provide the parties with suitable grounds to enter the contract with full of knowledge about their commitments. Furthermore, it implements that in the borders of the legal rules. Additionally, it is not acceptable by the law to have terms, conditions or any way that involved the formulation of contract that could break the rules of contract law. With this point, it is useful to notice that mistake, as to the terms of contract, is usually not effective on the enforceability of the agreement.⁵

It is a matter of fact that, all modern legal systems around the world would be interested in protecting the contracting parties' interests. This can be undertaken through the rules of contract law. This revolves around safeguarding the rights of the contracting parties and preserving their interests without confusion or breach. It is concluded simply, that talking about mistake implies caring about treating any dispute that could occur at any point within contracting process. Consequently, the law of contract would be expected to discuss mistake and its effects, as it observes many details for maintaining all the contracting

³ Hugh Beale. Contract Law. Hart Publishing. 2002. P333. ISBN 1841132373.

⁴ Benjamin E. Hermalin. Avery W. Katz. and Richard Craswell. Chapter on the Law & Economics of Contracts. Forthcoming in The Handbook of Law & Economics (final draft: June 5, 2006). P62.

⁵ Tetley, op. cit. P16.

processes more secure and less risky for the contractual parties. As a logical result of caring about mistake, investment would be encouraged and increasingly productive in regard of the legal cure. It is important to mention here, as a matter of accuracy, the English contract law with its various rules, is the main adapter of the contracting operations, which involves many regulations for guaranteeing the parties' targets to be achieved.

It could be found that mistake is a fundamentally important issue that the law of contract is concerning about. This is attributed to the vital role of mistake with regard to commercial and economical operations and all the contracts types. It is also concerns the contractual legal effects that could be affected in case of mistake. By having mistake in any of commercial and/or financial relations, the descriptive form of contracting relation would be totally different than it would be without mistake. It is believed that many contractual relations can be expected to become collapsed or terminated when there is any involvement of mistake. This chapter will concentrate analytically and critically where needed on the concepts of mistake and misrepresentation under the English contract law. The comparative approach between mistake and the other related concepts would be taken into consideration to instantiate between mistake and the abovementioned.

To commence understanding of the concept of mistake itself, it is notable that the legal analysis of mistake varies from the meaning that people attach to it on a daily basis. One may admit "I made mistake when I read the newspaper" or "I entered the room by mistake", and so on. Mistake is a regular expression when it comes to the relations between family members or friends. However, it is completely different in contract terminology; here the word "mistake" is viewed from a multitude of different aspects and points of view. Due to these circumstances, it is necessary to present the meaning of the word "mistake" in relation to the contract law.

Section 2: Mistake in General

Mistake in broad terms is something that strongly affects the contract negatively, so its implementation is rendered impossible. There are numerous occasions where mistake can be expected to arise. Mistake could be made in regard to the identity of the contracting parties.⁶ Obviously, this could happen when the parties enter the contract with the wrong person which they did not intend. Mistake could also occur regarding the existence of contract itself, where a misapprehension of the subject-matter of the contract at the time of contracting. Under this situation, mistake could be connected to the quality of the contract subject-matter. It could occur in any other circumstances that may make substantial changes in the subject-matter of the contract, which would be fundamentally different from the subject-matter that the contracting parties contracted on or existing.⁷

To clarify, English law relies on an objective standard to deal with any matters connected to the offer or other contractual issues and any of the basic elements that related contracts. Mistake would not be relevant if the unmistaken party has no logical reason to know about the other party's mistake. This is due to the mistaken party must be committed to what he/she has said or written.⁸ This reassures that "English law does not give a large role to mistake".⁹

Traditionally, one or both parties could make a mistake. Therefore, depending on the category of mistake, the legal results or remedies would be expected to be different from one category to another. It is notable that there may be a mistake in the broad sense, even if the case would not be dealt with by the relevant legal system under the particular

⁶ *Philips v. Brooks* [1919] 2 KB 243

⁷ See *Associated Japanese Bank (International Ltd) v. Crédit du Nord SA* [1988] 3 All ER 902 at 912-913, [1989] 1 WLR 255 at 268 per Steyn J.

⁸ Beale, op. cit., P363.

⁹ Cartwright, op. cit., P15.

rubric.¹⁰ Occasionally, mistakes arise from wrongly expressed sentences and intentions at the time of contracting.¹¹ It occurs when the parties of the agreement fail to express the exact meaning of their wills or thoughts (usually in writing), or when they miss-expressed the proposed provisions of the agreement. In such cases, most of the mistakes will be considered as mistaken assumptions, whereby the mistaken party has an imperfect awareness of exterior reality.

Rowley explained that the USA perspective makes a distinction of a mistaken assumption from a misunderstanding, this occurs from a party's faulty awareness of the other party understandings or intention.¹² According to this notion, a misunderstanding is not a mistake, which could be possible and logical to base for dealing with mistake. This is a remarkable distinction, which can lead one to consider that, misunderstanding could be used as an expression to describe the case when the party does not understand something marginal and, that it is not effective during the contracting process. It might be not worth applying this phrase, due to misperceiving the other's sense does not avert the contract formation.¹³ Under the Scottish contract law commentaries, misunderstanding bears a similarity error,¹⁴ which will be explored in more depth in the Scottish Contract law chapter of this thesis.

It is noticeable that, under English law, mistake has mixed boundaries; sometimes it is difficult to draw the lines between these different concepts and classifications of mistake. At least, it is not in the same easiness as it could be regarding some other English law branches. Many cases in the mistake area can be considered as breaches of a contractual context. One prominent case could be related to the quality of the subject matter, or the

¹⁰ Beale, op. cit., P343.

¹¹ It known as an error as to expression under the Scottish Contract Law. More details will be explained within the concept of error under the Scottish contract law.

¹² Keith A. Rowley. *To Err is Human. Alleviating Mistakes: Reversal and Forgiveness for Flawed Perceptions*. By E. Allan Farnsworth. Oxford: Oxford University Press. 2004. Michigan Law Review Vol. 104:1407 May 2006. 1411.

¹³ Ibid.

¹⁴ Huntley, Blackie, and Cathcart, op. cit., 193.

cases in relation to frustration.¹⁵ Despite the intensive discussions and the serious argument in respect to mistake and its categories, some legal academics have argued that English law has no law of mistake.¹⁶ In the alternative context, the major mistake is the one that renders “the thing [contracted for to be] essentially different from the thing [that] it was believed to be.”¹⁷ In spite of the role of mistake within the law of contract, there are some kinds of mistake that do not render the contract void or voidable. This will become apparent further in the chapter.

Another point which is somehow a disconnected matter is that mistake in one point connects directly to the core of the contract which could be summarised in what contract is all about, that is consensual planning. This proposes that, if one of the contracting parties would certainly not approved had he known the reality, then there was no shared idea of what was happening, no *consensus ad idem*. Subjective test needs to be applied to assure that the agreement was established between the parties, which are basically not the role of the courts,¹⁸ rather than focusing on the party’s mistake as a cause of his absconding from the contract.¹⁹ In general, English law does not consider mistake as part of a combined theory of imperfections of consent.²⁰

It is necessary to have some focus on the vitiating reasons theory and its fundamental doctrines or types under the English law of contract, such as mistake, misrepresentation, duress and undue influence. It could be found that, the courts do not typically examine these headings collectively. In general, they are treated independently, in accordance with their own division of regulations. It is clear that English contract law does not show a

¹⁵ J C Smith, op. cit.

¹⁶ Ibid.

¹⁷ See *Bell v. Lever Bros Ltd* [1932] AC 161 at 218, [1931] All ER Rep 1 at 28 per Lord Atkin, as adopted and confirmed by this court in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2002] 2 All ER (Comm) 999, [2003] QB 679.

¹⁸ Paterson and Hocker, *Contract Commentary and Materials*, 8th Ed. LBC Information Services, 1998, p1.

¹⁹ Cartwright, op. cit., P15.

²⁰ Green, op. cit., P66.

willingness to permit subjective mistake in order to make the contract void. Therefore, it is correct that it should not be permitted for the party who caused the mistake to ask for the implementation of the contract.²¹ Clearly, English law of mistake has considered the offer as a prominent factor to be taken into consideration with regards to mistake rules. Based on that, mistake under English contract law in the area of offer, or any other related contractual documents, does not apply to situations where the unmistaken party has no cause to recognise the mistake.²²

2.1. Common Mistake

In common, parties enter the agreement according to the same incorrect awareness of a fact in their minds.²³ To clarify, each party bears comparative thoughts about the facts that are connected to the contract; although both of them are wrong. A simple example is when both parties believe that a painting is by Van Gogh, where in fact it is not.²⁴ It could be also understood that both contracting sides believe that they have the right or correct idea about the contract, namely that they entered the contract having an assumption that a specific fact exists, although it appears not to be so.²⁵ An expected result of this kind of mistake would be that the contract would be void, however, turning a contract void is not automatic. Still, it needs to be clear that under English law the doctrine of mistake as to substance plays a limited role. It applies only to cases in which both parties make the same mistake, the so called common mistake.²⁶ A common mistake transpires when parties have the same mistaken awareness. This type of mistake would be considered when the contracting parties have the same mistaken beliefs with regards to the same subject matter. In common mistake, the parties enter the agreement according to the same wrong awareness of a fact in

²¹ Cartwright, op. cit., P15.

²² Beale, op. cit., P363.

²³ Haigh, op. cit., P156.

²⁴ Bryan A. Garner. A Dictionary of Modern Legal Usage. 2nd Edition, revised. Oxford University Press US. 2001. P579. ISBN 0195142365. 9780195142365

²⁵ Richards, op. cit., P214.

²⁶ Beale, op. cit., P366.

their minds. This kind of mistake does not break the consensus. In this case, the parties have an absolute agreement, while their consensus is built upon a false assumption. Mistake might relate to the idea of a common underlying assumption, based on which parties construct their contract.²⁷

According to this approach, the parties are able to initiate a common motive into the conditions or the terms of the contract. It could be applied simply where the parties misunderstand the offers or the proposals of each other, or the contents of them, which is often referred to as senseless.²⁸ At common law, mistakes by contracting parties, in many cases, offer rise to a no cause of action, this is attributed to the respected rule of *caveat emptor*. This denotes that each party is ordinarily supposed to care about his own business during the contracting operation, while each is permitted to depend on the obvious agreement of the other.²⁹ Here, the point to be raised is about the meeting of the parties' mind. If it is agreed logically that the contract is to be made, or the contractual relation is to be entered into, this needs two free wills to create complete consent. There is an opinion states that 'there is undoubted agreement between the parties' under the common mistake.³⁰ Some focusing on this point can tell that, when the parties have a wrong belief with regards to being connected to the contract, so there is no agreement between them at all. The reasons behind this argument is that, since every party has had different thoughts in relation to the facts of the contract; implying that every party will want to create a commitment in a different directions and for a different contract. As it is mentioned above, common mistake occurs where the parties want to build the contract on a certain existing fact, but this fact does not exist, which demonstrates there is nothing to be contracting for.

²⁷ Harms, Mpati, Brand, JJA and AJA, op. cit., P10.

²⁸ Beale, op. cit., P345.

²⁹ Tetley, op. cit. P17.

³⁰ Richards, op. cit., P214.

Here, it can be claimed that the parties have a shared intention to create a contract; however, there are vital elements missing.

Supporting the previous point of view, it can be seen clearly that Lord Atkin has dealt similarly with common mistakes as with mutual mistakes. He justified that both of them (common mistake and mutual mistake) have an alternative approach to deal with their effects.³¹ The argument around common mistake and its understanding could motivate more controversial points in respect of the common mistake definition. This kind of argument usually arises between the legal writers and the academic commentaries, as is mentioned above and as is indicated earlier in regard of Lord Atkin's perspective that there are related to the similarities between common and mutual mistake.

The attitude of English contract law leads to more ambiguity and complexity in understanding how to deal with the cases that come within this area. The English law of contract should be examined to clarify this subject, creating clear lines between common and mutual mistake. This is attributed to some having indicated that mutual mistake is used confusingly to indicate common mistake, or shared mistake.³² Otherwise the law of contract needs to demonstrate an obvious attitude to combine the two categories. It is not clear if there is wisdom behind splitting this kind of mistake into the different classifications of common and mutual mistake. The following sections of this chapter will clarify how common and mutual mistake are close linked to each other, through their use in case law and through legal academic commentary.

It has been mentioned during the chapter that common mistake could render the contract void. In fact, this is a general rule, as in order to consider rendering a common mistake void, some requirements or demands should be taken into consideration, as this does not

³¹ *Bell v. Lever Bros Ltd* [1932] AC 161 (HL).

³² Wishar, *op. cit.*, P249. Footnote 6.

happen automatically. Many requirements or factors should be counted carefully to find out about common mistake and its remedies. The first issue is to identify a common assumption as to the existence of a state of affairs. The second is to ensure that there is no warranty by any party that state affairs of subsists. Thirdly, it is necessary to ensure that the non-existence of the state of affairs must not be as a consequence of a fault of any party. Fourthly, it should be made clear that the non-existence of the state of affairs should make the execution of the contract impossible.³³

2.2. Mistake as to Subject Matter

According to English law, the Sale of Goods Act³⁴ dealt with this subject by stating that “where there is a contract of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract was made, the contract is void”. It is thought that mistake as to subject matter is part of common mistake, is mostly about the perished existence of the subject matter itself. Based on the Sale of Goods context, it could be explained that, common mistake occurs when the goods existed already, although they have perished. It is clear that this section of the Sale of Goods Act could be applied to common mistake according to this thesis’ point of view. Additionally, the existence of the subject matter of the contract should be interpreted as the existence or nonexistence after the agreement or contract has been reached. Furthermore, according to the Sale of Goods Act, all rely on the parties’ missing knowledge after entering the contract. It is said that the common mistake case arises when the parties have not realised that the contracted subject matter is destroyed or damaged.³⁵

The Canadian approach to this issue is different. The Canadian approach is to treat the existence of the subject matter under four different issues. The first, is when the subject

³³ Green, op. cit., P82.

³⁴ Section 6 of the Sale of Goods Act. 1979.

³⁵ Furmston. Et Al. op. cit., P284.

matter never existed, second is when the subject matter has existed, although it has been ceased before entering the contract, third is when the parties think that they can contract on a specific thing but for some reasons (legal or otherwise) this thing cannot be the subject of contract; fourthly, when the parties expected the nonexistence of the subject matter but they did not agree as to how to deal contractually with this fact, should it arise.³⁶ This approach deals with the existence, or otherwise, of the subject matter at issue would be very helpful if adopted by the English contract law in the context of the common mistake doctrine. Additionally, it is better to deal with this issue in this broad manifestation as it provides more flexibility to adapt the legal effects and remedy which would be expected to arise in cases of common mistake.

An arguable point has arisen in the English case of *Couturier v Hastie*³⁷ where the plaintiff agreed to sell an Indian corn to the defendant. Meanwhile, the corn started to perish; however, without the knowledge of the two parties. To avoid more harm or losses the ship's captain decided to sell the rest of the corn. As a result, the buyer argued that the corn (the subject matter) stopped existing before the contract was entered into. The buyer argued that the contract was therefore void, implying there was no responsibility on him to pay the corn price. The seller argued that the purchaser was responsible to pay the price as he bought the venture, so he took the risk on himself. When the case was presented before the House of Lords, it was held that the buyer was not liable to pay the price. It was held that the contract was expected to be about existing goods; however, in this case, the goods no longer existed. Furthermore, the seller was not required to deliver the goods. As it is well noticed, the judges did not indicate that voidability was a remedy, so the judgement was not clear enough on the point of whether there were any other alternative remedies, such as damages. In the decision, there was no mention of any type of mistake, whether

³⁶ Olivo, Et Al. op. cit., P75.

³⁷ (1856) HL Cas 673.

common or mutual. In the entire situation, it could also be noticed that this case does not fit the application of mistake as to the existence of the subject matter.³⁸ The case does clearly reflect the approach subsequently adopted by s6 of the Sale of Goods Act 1979 in regard to perished subject matter, although it is not fully matched in its approach with regard to the subject matter's existence.

It is actually interesting to know that the defendant, relying on the English law rule, argued that when the property (the subject matter) does not exist at the time of agreement, that there 'could be no contract of sale'.³⁹ It is mentioned for this as signal of how common mistake attracted and raised different or even controversial arguments, which could be still open for more discussion. It is also useful to notice that some writers did not mention common mistake as a recognised category under the English law of contract when they presented the fundamental types of mistake.⁴⁰

The same case can be seen in *Barrow, Lane & Ballard Ltd v Phillip Phillips & Co Ltd*.⁴¹ Here the seller contracted to sell 700 bags yet most of them had been lost in one a way or another. Only 151 bags were to be delivered. Relying on section 6 of the Sale of Goods Act 1979 the contract was held to be entirely void. Here, the issue once again was about perished goods, not about the existence of the subject matter as whole. The subject matter already existed, yet for some reason, it ceased to exist either partly or in its entirety. The two cases could be a reflection of failure of consideration or even failure of delivery; however, in this writer's opinion it is not about the common mistake. It seems to be clearly

³⁸ Richards, op. cit., P215-222.

³⁹ David J. Ibbetson. A historical introduction to the law of obligations. Oxford University Press. 1999. P228. ISBN 019876412X, 9780198764120

⁴⁰ Haigh, op. cit., P156.

⁴¹ [1929] 1 K.B. 574.

that the courts could not reach the point that could establish the general rules of common mistake.⁴²

It is difficult to maintain a consistent line, when discussing common mistake as the law dictionary's definition provide various contextual impressions as to the interpretation to be followed. The dictionary definition is where "both parties make the same error to a fundamental fact".⁴³ This however, is a broad definition but is logical and fits with the practicality that gives more definitive and clearer understanding to the understanding of the term "common mistake". A similar definition is when "both parties to an agreement are under misunderstanding (single mistake shared by both)".⁴⁴

It would be better to define the common mistake in accordance with the previous view. Namely, it needs to be clear whether the misunderstanding happened between the parties before the contract, or after the contract. Practically this can strongly influence the view that the common mistake is with regard to the entire contract, including the existence of the subject matter. It would be suggested that if common mistake occurs after the contract was being entered, this should be treated as a non-performance, or a total failure of consideration, or a failure of delivery. Of course the case would be different when common mistake occurs before the point of entering the contract is reached, this would be treated as mutual mistake which is connected mostly to offer and acceptance. Since mistake was established before the contract was entered into and before the goods existed, then there would be no need to discuss the contractual relationship from the very beginning, as no contract existed; similarly, nothing needs to be discussed or disputed about. Common mistake as to the existence of the subject matter is also an arguable issue as was discussed earlier. When the use of the phrase "common mistake" is used to discuss the contract's

⁴²Smith, Keenan, *op. cit.*, P299.

⁴³ L.B. Curzon. *Dictionary of Law*. 6th Edition. Pearson Education. 2002. P279. ISBN 058243898

⁴⁴ Elizabeth A. Martin, *Jonathan Law. A Dictionary of Law*. 6th Edition. Oxford University Press. P344.

existence due to the existence or non-existence of the subject matter, then it can be said that the case would be about an agreement to have a contract. This would be resolved by establishing the existence of a “promise to contract” which would then have different approach, and different remedies.

The serious and clear discussion between the commentators is summarised in the case of *McRae v Commonwealth Disposals Commission*.⁴⁵ Here the CDC promoted a tanker of oil which was expected to be on the reef to M. When M agreed and prepared to transport the oil, he did not find the tanker and he did not find the reef, simply due to both of them did not exist and had never existed. M claimed damages and succeeded for a breach of the contract. On the other side, CDC argued that the contract was void as the parties were involved in a ‘common mistake as to the existence of the subject matter’. The high court of Australia held that this alleged mistake was irrelevant.⁴⁶ They concluded that there was no contract, what was established is only a promise that there was a tank. There was no further discussion on such issues as non-performance or non-delivery. There is a legal logic in considering promise as being more appropriate than contract under such case.⁴⁷ This Australian case brings us back to the discussion on section 6 of the UK Sale of Goods Act (1979), to differentiate between perished goods after they had been existed and goods that had never existed. An interesting point that can arise here is the possibility of misrepresentation or fraud by the seller which has not been suggested. It would be helpful to bring misrepresentation to the table of the argument. There would be very high possibility in considering the case as being one of unilateral mistake from the buyer (M) and misrepresentation (of any sort) from the seller’s side (CDC).

⁴⁵ (1951) 84 CLR 377.

⁴⁶ Wishart, op. cit., P247.

⁴⁷ Laurence Koffman, Elizabeth Macdonald. *The Law of Contract*. 6th Edition, Oxford University Press. 2007. P319. ISBN 0199207151, 9780199207152.

There is no shared concept with regard to common mistake as to the existence of the subject matter. This is attributed to many discrepancies that can be derived by the discussion of the academic writers and the commentators. For example, Richard Stone has stated that “the clearest type of mistake which renders a contract fundamentally different from what the parties thought they were agreeing to, of which will be regarded as rendering the contract void, is where the parties have made a contract about something which has ceased to exist at the time the contract is made”.⁴⁸ Stone surprisingly added an explanation for his argument, by stating that “where the subject matter ceases to exist *after* the contract is made, the doctrine of ‘frustration’, applies, rather than mistake”.⁴⁹ Stone was explaining common mistake and the non-existence of the subject matter ‘*res extincta*’. This is an example of a practical reflection of the controversies between the understandings of common mistake especially a mistake as to subject matter. However, Stone was very keen to consider common mistake within the context of section 6 of the Sale of Goods Act 1979 in the context of the subject matter ceasing to exist. Ultimately, he considered applying frustration rules to this situation and not the mistake rules. Stone did leave the door open for further debate on the matter as he was not clear whether he supports frustration in such a situation, when the subject matter has ceased to exist, or whether to follow his definition of common mistake. The existence of the subject matter is also an issue under the doctrine of frustration⁵⁰ which would, in this writers’ opinion, be a better fit to the circumstances of the case than the doctrine of common mistake.

The context of section 6 of the Sale of Goods Act 1979 is also relevant. Focusing on the direct meaning of the text which states “where there is a contract for the sale of the specific

⁴⁸ Richard Stone. *The modern law of contract*. 5th Edition, Routledge. 2002. P284. ISBN 1859416675, 9781859416679.

⁴⁹ *Ibid.*, footnote 21.

⁵⁰ Furmston, *op. cit.*, P85-95.

goods and the goods, without the knowledge of the seller have perished at the time when the contract is made, the contract is void". When it comes to understand the sentence that illustrates 'without the knowledge of the seller', it does not imply that lack of knowledge is a mistake. It could be easily imaginable that the two parties are not mistaken, as section 6 applies without the knowledge of the seller, it would be automatically and logically understood that the buyer did have the knowledge as well. So both parties have reached the contract according to a correct understanding, although that an unexpected event has occurred and destroyed or perished the goods, of which they did not know. This does not appear to have anything to do with a mistake. No one has made any mistake or misunderstanding of any of the facts of the contract. Both however, are under the lack of information with regard to what has happened to the goods after they have been contracted for.

A deeper observation into the existence of the subject matter, and its wider conceptual container "common mistake", could be examined by another hypothesis. This other hypothesis should start with the concept of the shared mistake of intent of the parties, the parties intended to create a contractual relationship yet the contract was unable to be established due to the non-existence of the subject matter. It is easy to expect that both parties might did not have knowledge that the subject matter has ceased to exist, or has never existed. In the first case section 6 of the Sale of Goods Act 1979 can be applied easily and consider the contract void. In the latter case, the easiest way to deal with it is to consider the contract void as both parties shared the same mistake in believing that the subject matter was existed although this was not true. In general, it would be better for the remedies to be decided according to the contract stipulations, whether the parties agreed to pay for the received goods (CIF) or for the goods "on board" a method of transport (FOB).

CIF and FOB terms are normally used in international sale of goods contracts. FOB means free on board where the seller would be asked to load the goods on the ship's board for the interest of the buyer.⁵¹ The seller would be responsible also to achieve the lading bill in the name of the buyer. These are two main basic rules govern the FOB sale, yet it may be followed by other demands according to the agreement between the parties such as, the seller might be asked to issue the lading bill in his name and then he might be expected to book a space on the ship's board in advance. In general, under FOB sale, the buyer is usually responsible to name the ship for seller and, to pay for the carriage cost with bearing the risk of the goods after being on the board.⁵² The other type is CIF⁵³ contract which means 'a cost, insurance and freight contract'. Under the CIF contract the seller would be responsible on the goods' carriage arrangements and 'their insurance in transit' all the arrangements would be part of the contract costs. The bill of lading, insurance document or policy, and the prices invoice would be forwarded from the seller to the buyer. The buyer would be required to pay on receipt of the documents.⁵⁴

In addition, common mistake arrive under the general umbrella of misunderstanding or misapprehension, which certainly would be generated by a kind of wrong belief. It would be supposed that an incorrect belief does not play a vital role in non-performance, failure of delivery, or the failure of consideration. A wrong or mistaken belief would be expected to take a certain form in order to apply; which should then be followed with a correct evaluation of the suggested facts of the present or the future contract between the parties for example, when the parties agree to contract on a property, the seller intends to sell his inherited flat on the fifth floor and the seller understands that he is buying the same flat. It is then discovered by both parties that the title of this flat is not transferred to the seller, as

⁵¹ <http://www.i-b-t.net/incoterms.html>. Accessed at 16/10/2009.

⁵² Furmston, op. cit., P249. For further discussion see *Wimble, Sons & Co. v. Rosenberg & Sons* [1913] 1KB 279

⁵³ <http://www.i-b-t.net/incoterms.html>. Accessed at 16/10/2009.

⁵⁴ Ibid.

the “seller” had in fact, no right to inherit it. The “seller” was unaware of this fact, so the subject matter (the flat) of the proposed and intended contract had not existed from the start. Here it is clear that, the parties understood each other very well, yet the seller had a mistaken belief that he owned the flat, which then turned out not to be the case. The buyer was not mistaken and clearly he did understand the other party. Here there are two parties, yet one party is mistaken and the other falls into the same mistake, which could be an innocent misrepresentation.

When the contracting parties believe that the subject matter exists at the time of the contract, although the contract never existed the contract will be void.⁵⁵ Also relevant, are the application by the English courts of the equity principles⁵⁶ in order to declare a contract as being voidable. This may apply when both parties have made a mistake is about a crucial point in the contract, such as the quality or the value of the subject matter.⁵⁷ Nevertheless, most mistakes in practice make a contract void *ab initio*, which from the Latin, means “from the beginning”. The contract ever existed. Some hesitation may be touched by the law to consider the contracts void *ab initio* that built on a mistake as it does not want to support fraudulent claims of mistake.⁵⁸ This is clearly understandable, as it is difficult to prove the fraud.

English equity⁵⁹ is more flexible than English common law in permitting the avoidance of a contract in the case of mutual mistake. Based on logical analysis, a mistake must be essential or substantial before the intervention of the court. In *Bell v Lever Brothers*⁶⁰ it was held that where there is an agreement between A and B to purchase a specific article, yet in

⁵⁵ Olivo, Et AL, op. cit., P75.

⁵⁶ The equity as a legal context is to deal with the contracts that involve with unconscionable conducts such as misrepresentation, mistake, and fraud.

⁵⁷ Samantha J. Hepburn, Principles of equity and trusts, 2nd Edition, Routledge, 2001. P122. ISBN 1876905077, 9781876905071

⁵⁸ Carron-Ann Russell, Opinion writing and drafting in contract law, Routledge, 1996. P75. ISBN 1859410308, 9781859410301

⁵⁹ More about equity in P79 of this chapter.

⁶⁰ [1932] AC 161 at 218.

fact, the article had perished before the date of sale. In this case the parties agreed upon the subject-matter, yet consent to transfer or take delivery of something not existent is deemed useless, so the consent is nullified and the contract is void.⁶¹ The approach is covered by the Sale of Goods Act.⁶² The contract is would be void if the vendor was unaware of the destruction or the non-existence of the subject matter.

The Court of Appeal in *Kyle Bay Limited t/a Astons Nightclub v Underwriters Subscribing*⁶³ tackled the obvious contradiction in the case law on common law mistake which arose between the judgment in *The Great Peace*⁶⁴ and in the case of *Associated Japanese Bank v Credit du Nord SA*⁶⁵ In *Associated Japanese Bank*,⁶⁶ Steyn J. held that a contract could be vitiated for common mistake if, inter alia, resulted from the mistake “the subject matter of the contract [was] essentially and radically different from the subject matter which the parties believed to exist”. The judgment of Stein J. was quoted with support by the Master of the Rolls, Lord Phillips of Worth Matravers, in *The Great Peace*.⁶⁷ However, Lord Phillips then went on to present that a fundamental factor required to vitiate a contract for common mistake was “impossibility of performance”. The Court of Appeal in *Kyle Bay* considered that the two views considered the same thing, although, in the immediate case; the examination of whether the mistake made the subject matter of the contract essentially and radically different should be taken into consideration. Lord Thankerton came to a similar conclusion when he stated that a common mistake “can only

⁶¹ Principle derived from *Couturier v. Hastie* (1856) 5 H of L Cas. 673. That case involved the sale of a cargo of corn which, unknown to the parties, no longer existed at the time that the contract was concluded. Other decisions where agreements were held not to be binding were *Strickland v. Turner* (1852) 7 Exch. 208 - the sale of an annuity upon the life of a person who, unknown to the parties, had died, and *Pritchard v Merchants' and Tradesman's Mutual Life Assurance Society* (1858) 3 CBNS 622 - an insurance policy renewed in ignorance of the fact that the assured had died.

⁶² Section 6 of The Sale of Goods Act 1893 was a statute which set out to codify the common law: “When there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.”

⁶³ [2007] EWCA Civ 57.

⁶⁴ [2002] EWCA Civ 1407, [2002] 2 All ER (Comm) 999, [2003] QB 679.

⁶⁵ [1988] 3 All ER 902.

⁶⁶ Policy No. 019057/08/01 (February 2007).

⁶⁷ [2002] EWCA Civ 1407, [2002] 2 All ER (Comm) 999, [2003] QB 679.

properly relate to something which both must necessarily have accepted in their minds as an essential and integral part of the subject matter.”⁶⁸

Interestingly, in *Associated Japanese Bank v Credit du Nord SA*⁶⁹ the court discussed the interaction of common mistake with equity in English law. It has been noticed that Steyn J. commented that “where common law mistake has been pleaded, the court must first consider this plea. If the contract is held to be void, no question of mistake in equity arises. However, if the contract is held to be valid, a plea of mistake in equity may still have to be considered”. In fact, this gives quite solid ground and strong credibility for equity to be applied where a remedy is not found under common law. Of course this rule would be applied where the mistake is essential or unconscionable.⁷⁰ Despite this fact, it was mentioned that this role of equity does not go very far into the detail of the contract and its contents, nor is it connected to its roots. It is restricted to the effects and remedies of the contract.⁷¹

2.3. Mutual Mistake

A mistake becomes mutual when the parties exchange the misunderstanding of their intents when they are at cross-purposes and they mean two different things.⁷² This situation can be addressed by demonstrating that the parties misunderstand each other, or they have failed to communicate to each other. There is an interesting note here, that the English law traditions consider such a contract unenforceable under the doctrine of mutual mistake. Nevertheless, where the hazard of the mistake is allocated appropriately to one party the contract would be enforceable.⁷³ There is a notable opinion related to understanding mutual

⁶⁸ (1932) AC 161, P235; (1931) All ER 1, P (36).258.

⁶⁹ [1988] 3 All ER 902, [1989] 1 WLR 255.

⁷⁰ Peter Gillies. Concise contract law. Federation Press, 1988. P121. ISBN 1862870012, 9781862870017.

⁷¹ Hepburn, op. cit., P123.

⁷² Haigh, op. cit., P156.

⁷³ Parchomovsky, Siegelman and Thel. op. cit., P95.

mistake which suggests that mutual mistake can be treated as two unilateral mistakes,⁷⁴ which is a point of view worth developing either in case law or by way of academic commentary. However, great care is required when dealing with this opinion as the remedy for unilateral mistake is different from that for mutual mistake. In general, unilateral mistake does not provide the authority to the mistaken party to rescind the contract, unless the other party was aware of the other party's mistake. This would then render the contract voidable.⁷⁵ Mutual mistake would generally render the contract void.⁷⁶ Logically and analytically, mutual mistake is the mistake that is made by two parties; everyone is mistaken with regard to the other party's thoughts. So it is possible to state separately that the first party is mistaken and the counter party is mistaken as well, as a result this has created two unilateral mistakes. Here something could be added to enrich this suggestion with more details to be built on, but with one provision, that this proposal could be available for further discussion if there is no misrepresentation or fraud by one or other of the contracting parties.

When the contracting parties exchange a misapprehension and fall into a mutual mistake with regard to a contract, it means that the shared consent does not exist. This leads to conclusion that there is no contract. If the issue in question is a clerical mistake, which is known as a scrivener's mistake, the court would then be in a position to correct this mistake. The contract would not therefore be considered invalid.⁷⁷ The same rule is established under the Scottish contract law, where the court has a wide space to use (Scottish) equity in order to correct a clerical error in order to reflect the real intention of the contracting parties.⁷⁸ It is clear that a mutual mistake arises if the parties are mistaken, albeit with different mistakes. When this type of mistake appears the subsistence of a

⁷⁴ Wishar, op. cit., P278, Footnote 6.

⁷⁵ Emerson, op. cit., P99.

⁷⁶ Ibid.

⁷⁷ Contracts. Encyclopedia of Business and Finance. Ed. Allison McClintic Marion. Gale Group, Inc., 2001. eNotes.com. 2006. 17 Feb/2008. P2. <http://www.enotes.com/business-finance-encyclopedia/contracts>.

⁷⁸ *Glasgow Feuing and Building Co. v. Watson's Trs.*, 1887, 14 R. 610. Lord Young. P618.

contract relies on many factors, such as a meeting of minds, or a genuine offer and acceptance. The point to be investigated under mutual mistake is to find out whether the contract was established between the parties or not. Based on that, the contract would not be binding where there is an occurrence of mutual mistake.⁷⁹ This is due to the contract does not established between the parties. It is better to answer the question whether the contract was created at all. A simple way to explain this is to argue that, originally there was no contract, this is due to the mutual consent of the parties was not created. Everyone directed his consent to a different subject and their minds did not meet to create the contract. The reasonableness standard would be applied to find out if a contract has existed or not. This would be applied by testing if a normal person would have considered whether or not the contract existed, and to discover whether the intentions of the parties have been so directed.⁸⁰

In fact, many cases would reflect a mutual mistake where the contract would not have been considered to have existed. As a leading case *Raffles v Wichelhaus*⁸¹ provides a clear example where both parties intended to contract on the same subject matter, yet, on the basis of different facts, that that could be considered as a mutual mistake. In this case where the buyer agreed to buy cotton and understood that the ship called (Peerless) would arrive from Bombay to Liverpool. In fact, the buyer and the seller did not realise that there was another ship which had the same name and it would also be arriving from Bombay. The buyer intended the ship arriving on October, but the seller intended the one which was due to arrive in December. The court backed the defendant, holding that he did not have to accept the cotton.

⁷⁹ Emerson, op. cit., P98.

⁸⁰ Stone, op. cit., P296.

⁸¹ (1864) 2 Hurl & C 906.

As with many cases of mistake, the above case attracted debate. The judgement was criticised by writers arguing that the mistake did not go to the substance of the contract; therefore, it should not have been avoided.⁸² This is a strange conclusion, as it would be very clear that the date of arrival is crucial for the buyer. The issue to be investigated is whether the parties considered the time of arrival as an essential factor of the contract or not. Clearly, the date in this case was crucial for the buyer. It would be understandable that time has crucial role within the commercial deals. An interesting comment was delivered by the US commentator⁸³ Oliver Wendell Holmes who did not agree with the English court's decision, arguing that the decision was 'misleading' as the law does not have anything to deal with the parties' minds. Wendell Holmes suggests that the judgement should be established on the basis of the external behaviours of the parties. He argued that the court decision was not established as the two parties intended different things to each other, although the two parties expressed or said 'a different thing'. Wendell Holmes pointed out, that when the plaintiff used the name of the Peerless intending the ship arriving in December and the defendant intended the ship arriving in October, that this was due to the seller used just the name of the ship without mentioning the date.⁸⁴ It is true that the judgement should be established on the behaviour of the parties not on what they bear in their minds or intents. In contrast, it is also important to realise that the behaviour is a reflection of the intent or mind. Of course, it would be considered different, as Wendell Holmes argued, when there is a fraud by the parties, where the parties can conduct or say something different from what they bear in their minds. It would be better if Wendell Holmes insisted that the judgement should follow the reasonableness which can make the balance between the internal intent and the external conduct.

⁸² Kevin M. Teeven. A history of the Anglo-American common law of contract. P184. Greenwood Publishing Group, 1990. ISBN 0313261512, 9780313261510

⁸³ He was a former judge of the US Supreme Court, and he is one of the most important common-law judges in the USA.

⁸⁴ Oliver Wendell Holmes. The Common Law. Adamant Media Corporation, 2001. PP309. 310. ISBN 1402166257, 9781402166259.

Interestingly, the discussion in *Kyle v Kavanagh*⁸⁵ which was heard in court in the USA after the ruling in *Raffles v Wichelhaus*,⁸⁶ this was despite the fact that the facts in *Kyle v Kavanagh* were exactly the same as in *Raffles v Wichelhaus*; albeit in different a time and different jurisdiction. In *Kyle v Kavanagh* the seller offered to sell land that he owned in the Prospect Street in specific town and the buyer accepted the offer. Neither party knew that there were two streets with the same name in the same town. The court dealt with this case in very simple way. Since the parties represented two different objects, it was held that no contract existed. In the U.S. case of *ITT Corporation v. LTX Corporation*⁸⁷ saw the earlier case of *Kyle v. Kavanagh* as evidence of the non meeting of minds when the parties addressed the different meaning materially to the contract. So logically where there is no meeting of minds in US law there is no place for considering the contract's existence. It is very clear that every case could have different decision even if it held the same or similar facts. The discretion of the judges is very important in understanding every specific case, and who to deliver it.

The English case of *Scriven Bros v Hindley*⁸⁸ which is a case about the confusion (mistake) between hemp and tow, both of them being offered at auction; where the defendant offered very high price for the tow believing it to be hemp. It was held that the contract was void. This case is presented as an example of mutual mistake. Building on this decision, it seems to be that the court considered that the two parties have fallen into the mistake mutually, so both were not agreeing on the same point or purpose. In this case they are not *ad idem*. It would be logical to think that the auctioneer should reasonably have known that the defendant was mistaken as he offered a much higher price than the market price. In one hand, the case could be considered as an induced unilateral mistake as the auctioneer

⁸⁵ 103 Mass. 356 (1869).

⁸⁶ (1864) 2 Hurl & C 906.

⁸⁷ 926 F.2d 1258 (1991).

⁸⁸ [1913] 3 KB 564.

should reasonably have known that the buyer was in mistake. While in contrast, the case could be dissuade a unilateral mistake as the auction might be considered to be a special situation. It is possible that some items or goods in the auction could be sold more or less than they would normally be available on the market.

Despite all the listed facts and discussions, still the categories of common and mutual mistake are not resolved in a clear manner. It has been mentioned earlier at different points that the mutual and common mistake categories were classified by some as being in the same category. This usually occurs when some cases could be a mix between the two categories, or by considering that both categories have some of the same elements. A US perspective is that of Miceli, which examines law from the perspective of economics, pointing out that the case is totally different as he considered the mutual mistake as a common mistake. Miceli did not refer to the category of common mistake at all, alternatively, he categorised the elements of the mutual mistake as exactly those considered by many of commentators as being the elements of common mistake.⁸⁹ The same opinion was indicated within an English commentary in Economic principles of law, which indicate common mistake as a mutual mistake by using both interchangeably to indicate the same meaning.⁹⁰ Generally, this brings the mixing between the two categories to the zero point, where it can create an open and unexpected argument which can be encouraging to build the clear boundaries between the two categories or to combine both categories within the same doctrine. It is clear that in the US some writers defined common and mutual mistake collectively, considering the two terminologies to reflect the same concept. That said, in the case of common or mutual mistake that ‘both parties are labouring under the same misconception’.⁹¹ This writer can understand why this approach

⁸⁹ Thomas J. Miceli. Economics of the law. Oxford University Press US, 1997. P95. ISBN 0195103904, 9780195103908

⁹⁰ C. G. Veljanovski, Institute of Economic Affairs (Great Britain) Economic principles of law. Cambridge University Press, 2007. P197. ISBN 0521873746, 9780521873741.

⁹¹ Damien Abbott. The shorter encyclopedia of real estate terms. Published by Damien Abbott, 2004. P502. ISBN 0966894618. 9780966894615.

is adopted by some commentators. There is a certain level of instability in creating one uniform definition of common or mutual mistake as either a shared or two different concepts.

2.4. Unilateral Mistake

In the case of unilateral mistake one party makes a mistake where the counterparty (other party to the contract) does not share the mistaken notion or belief with the first one, yet the second party understands, or should have realised about the first party's mistaken belief. In fact, two situations would be expected to occur where the unilateral mistake is established. Firstly, the other contracting party understands or would be expected to be aware of the mistake, which would lead to the contract being void *ab initio*⁹² as was the situation in *Hartog v Colin & Shields*.⁹³ In such case there would be no need to prove that the mistaken party suffered from a misrepresentation or deceived by the other party, whether the unmistaken party knew or is expected to have known of this mistake.⁹⁴ Secondly, the non-mistaken party did not know, nor would he have been expected to know of the mistake. In such a situation the contract could not be avoided on the basis of the *caveat emptor* rules, which requires that every party has to take care of his own interests.⁹⁵ In such a situation an objective test should be applied to know whether a reasonable person would know or have to know about the other party's mistake.⁹⁶ Usually under English law, in case of unilateral mistake regarding the terms of contract, if the mistake is known to the other party, this may

⁹² Treitel, *An Outline of the Law of Contract*, op. cit., P137.

⁹³ [1939] 3 All ER 566.

⁹⁴ *Hannah v. Blumenthal* [1983] 1 AC 854

⁹⁵ Treitel, *The Law of Contract*, op. cit., P 361.

⁹⁶ *Cf. The Unique Mariner* [1978] 1 Lloyd's Rep. 438.

render the contract void.⁹⁷ It should be mentioned, however, that unilateral mistake may not render the contract void if the mistake was just connected to the subject matter.⁹⁸

In *Hartog v Colin and Shields*⁹⁹ where the offer of selling Argentine hare skins was accepted. The seller had intended to sell the goods per piece, and not per pound, since selling per pound would be much cheaper than selling per piece. In addition it was confirmed that the trading custom in these circumstances was to trade priced per piece. On the basis of the facts the buyer should have known of the seller's mistake during the negotiation process when they formulate the offer. The question that would be logically raised is about the attitude of the buyer in keeping silent about the seller's mistake. It is true that the buyer did not make any direct misrepresentation or fraudulent statement, yet simultaneously, he had contributed in inducing the seller to fall into a mistake. It would even be said that *caveat venditor* would not be applicable in this case as the buyer knew of this mistake during the negotiation process. It might be acceptable to apply *caveat venditor* if there were no negotiations between the parties before entering into a contract.

It is obvious that a unilateral mistake only results in the contract being void under English common law if the mistake was known to the other contracting party. Additionally, mistake leads the mistaken party to express his offer or acceptance incorrectly. This could happen where the offer is expressed in terms of a price by weight, whereas the offeror intended the price quoted to be per unit and the offeree knew this to be the case.¹⁰⁰ The situation is not always considered in this way. For example, in *Smith v. Hughes*,¹⁰¹ the defendant bought oats from the plaintiff believing that the oats were old. In fact the oats were new, and the plaintiff was aware that the defendant had made a mistake with regard

⁹⁷ Chitty on Contracts, supra n. 24, para. 5-022, p. 308. P35. Emil Y M. Weitzenboeck. Electronic Agents and the Formation of Contracts International Journal of Law and Information Technology, Vol. 9 No. 3, pp. 204-23. <http://www3.oup.co.uk/inttec/>. Oxford University Press 2001.

⁹⁸ Atiyah, op. cit., P 253.

⁹⁹ [1939] 3 ALL ER 566.

¹⁰⁰ Zweigert, op. cit., P 20.

¹⁰¹ (1871) LR 6 QB 597.

to the real age of the oats yet he did not correct the defendant. Since the contract had no warranty with regard to the oats' age, it was held that the contract is valid, as there was no place to consider unilateral mistake as a ground of rescission and the defendant should bear the responsibility of his own mistake. This brings us back to the principle of *caveat emptor* where the buyer is required to take care of his own interests. *Caveat emptor* was not kept in the same position, according to John Kleinig, *caveat emptor* doctrine has been eroded in favour of *caveat venditor*,¹⁰² which is supported clearly by Atiyah.¹⁰³ When the principle of *caveat emptor* was originated in English law of Middle Ages the goods were mostly available in the open markets to be tested by the buyers, so they could rely on their own judgments. The situation became different when the trade and the commercial dealings started to rely more on the distant sellers.¹⁰⁴ This became very clear after the amendments that have been made to the Sale of Goods Act in 1994,¹⁰⁵ after enacting the Unfair Terms in Consumer Contract Regulations 1994;¹⁰⁶ *caveat emptor* doctrine seems to become weakened gradually. With regard to these developments, it is noticed that *caveat emptor* would not be able to give the lessor or seller the protection if there is a claim against their negligence in regard of defect in the sold or rented property.¹⁰⁷

In the above case *Smith v. Hughes*,¹⁰⁸ Cockburn CJ stated that, since there was no express guarantee in the contract that connected to the specific offered commodities, the buyer has the complete opportunity to test or check these commodities; he decided to rely on his own judgement, so the principle of the *caveat emptor* applies.¹⁰⁹ In commenting on the same case, Blackburn J¹¹⁰ backed the previous opinion strongly. It is strange to find this attitude

¹⁰² John Kleinig. Paternalism. Manchester University Press. 1983. P177. ISBN 0 7190 1703 3.

¹⁰³ P S Atiyah & J N Adams. The Sale of Goods. 9th Edition, London Pitman. 1995. P 111.

¹⁰⁴ John Tillotson. Contract law in perspective. Cavendish Publishing Limited. 3rd Edition, 1995. P106. ISBN 1 85941 002 2.

¹⁰⁵ Sale and Supply of Goods Act 1994, the Amendment of the Sale of Goods Act 1994.

¹⁰⁶ Statutory Instrument 1994/3159.

¹⁰⁷ Smith. Keenan, op. cit., P555.

¹⁰⁸ (1871) LR 6 QB 597.

¹⁰⁹ Ibid 604.

¹¹⁰ At 606-8.

especially when it found that the plaintiff was totally aware of the defendant's mistake. It is strange for not considering unilateral mistake as a ground of rescission in the previous case. This would be against a legal principle that prevents the unmistaken party to take advantages from the other party's mistake.¹¹¹ In fact the unmistaken party in the previous case¹¹² was benefited from the mistake of the other party. In addition, it can also be noted, that the unmistaken party acted in bad faith and caused such a loss, which can be considered within the boundaries of misrepresentation. It could be argued that this contract would be void under the rules of equity. Gillies, writing from an Australian perspective states that unilateral mistake under equity would render the contract void where the mistake is fundamental and there would be no reasonability to keep the contract valid. This case would be applied whether the unmistaken party knew or he did not know about the other party's mistake.¹¹³

The above line of argument, it is supported by the recent of *Spice Girls Ltd (SGL) v. Aprilia World Service (AWS)*¹¹⁴ Here Spice Girls Ltd entered into a contract with Aprilia World Service to fund a trip for Spice Girls. In return, Spice Girls agreed to perform some promotional activities for the defendant. The defendant believed that the pop band comprised five members, when, by this time, there were only four "Spice girls", with Ms Halliwell (Ginger Spice) having just left the pop band before the conclusion of the contract between the band and Aprilia World Service. The court had considered that when the band did not disclose the fact that the fifth member confirmed her leaving as a 'partial non-disclosure' or 'half truth'.¹¹⁵ It is in general a very rich case, in that includes many different perspectives; it includes the effect of change of circumstances making a statement

¹¹¹ Michael H. Whincup. Contract law and practice. 5th Edition. Kluwer Law International, 2006. P292. ISBN 9041125213. 9789041125217.

¹¹² (1871) LR 6 QB 597.

¹¹³ Gillies, op. cit., P241.

¹¹⁴ [2002] EMLR 27, CA.

¹¹⁵ Damian Taylor. Contract law. Oxford University Press, 2007. P169. ISBN 0199299994. 9780199299997.

untrue,¹¹⁶ non-disclosure, misrepresentation, half truth, fraud, damages and silent misrepresentation as results of unilateral mistake.

The case of *Spice Girls Ltd (SGL) v Aprilia World Service (AWS)* can attract a lot of academic commentary as it covers many legal relevant points. It has been treated under the misrepresentation rules due to the silence of SGL, despite the fact that under English contract law, silence has not been considered to be a misrepresentation. In general *Spice Girls Ltd* provided a clear example that the courts could give unpredictable and different decisions in regard of similar cases. It is strongly believed that there is no clear measurement to rely on when it comes to categorising or classifying mistakes. As has been mentioned above, *Hartog v. Colin & Shields*¹¹⁷ held that there was no contract between the parties as the buyer kept silent about the seller's mistake when he offered the hare skins by the pound weight, rather than per piece and the buyer accepted on those terms, without correcting the mistake. In both cases silence played a vital role, the unmistaken party should have been aware of the mistake due to the particular circumstances of the case, even if he had not know originally of it. Academic writers, Treitel,¹¹⁸ Stone,¹¹⁹ and Richard,¹²⁰ tend to consider that unilateral mistake renders the contract to be void *ab initio*, when the unmistaken party is aware of the mistake of the mistaken party.

Here, there have been some suggestions not to consider all unilateral mistakes which are known by the unmistaken parties as void *ab initio*. This is based on considering unilateral mistake within two categories; the first one being a mistake with regard to the subject

¹¹⁶ Smith, Keenan, op. cit., P736.

¹¹⁷ [1939] 3 All ER 566.

¹¹⁸ Treitel. An Outline of the Law of Contract, op. cit., P137.

¹¹⁹ Stone, op. cit., 7th Edition. P388.

¹²⁰ P. Richard. Law of Contract. 7th Edition. Pearson Longman, London, 2006. P225.

matter and other one is a mistake with regard to the promise. It is suggested that unilateral mistake with regard to the promise would render the relevant contract void.¹²¹

Based on the study of the mistake cases and their commentaries, different sorts of mistake generate different legal effects regarding the contracting parties and the contract itself. It is difficult to predict in advance what is the precise effect and remedy of each category before the judgement being released by the court. It is obvious that a mistake from one party regarding the contract's terms can be overridden with the fact that, the un mistaken party understood that the mistaken party agreed to his terms.¹²² As a result, mistakes with regard to the terms of a contract regularly have no outcome on the enforceability of the agreement. Nevertheless, if one party agrees on the conditions of the contract, that he never anticipated agreeing whilst the other party knew or have to be known about the mistake before the contract, this contract might be held void. In this case the enforceability of this contract would be irrational. The partial and unspoken recognition of good faith as a control mechanism for contractual relationships is evident in rulings of this sort.¹²³

It is concluded that, in English law, the doctrine of mistake is very constricted; yet, it is complemented by a liberal doctrine of misrepresentation,¹²⁴ which will be discussed in detail later on in this chapter. In a contract between A and B, where the mistake is unilateral, B's insistence on performance according to the strict terms of the contract is generally not affected by the mistaken belief of A. Whether A has any right to rescind or rectify the contract shall depend on various criteria which are well established in common law cases.¹²⁵ In English law, a unilateral mistake, which is well known by the other party

¹²¹ J. Beatson, *Anson's Law of Contract*, 28th Edition, Oxford University Press, 2002, P323.

¹²² Cartwright, *op. cit.*, P15.

¹²³ Tetley, *op. cit.*, P17.

¹²⁴ Beale, *op. cit.*, P333.

¹²⁵ Principles regarding the rectification for unilateral mistake, are set out in *Agip SpA v. Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353 at 360-362 (Slade LJ), *Commission for New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259 at 277D to G and 280D (Stuart-Smith LJ) and, more recently, in *George Wimpey UK Ltd v VIC Construction Ltd* [2005] EWCA Civ 77.

are grounds for relief only when the mistake relates to what the terms of contract are. If the mistake is one as to motive, mistake is not relevant (though there may be relief for the misrepresentation)¹²⁶ which will be discussed according to the law in regard with the unilateral mistake.

In relation to unilateral mistake, Chitty on Contracts¹²⁷ states that “Unilateral mistake is not by itself a ground for rescinding or rectifying a contract unless the other party had knowledge about the mistake. It appears that the knowledge must be actual knowledge. It is not enough that the party against whom rectification is sought may have suspected that a mistake had been made; yet if a party wilfully shuts its eyes to the obvious, wilfully or recklessly fails to make inquiries as an honest and reasonable man would make, that will count as actual knowledge”. The previous statement simply confirms that maintaining silence in regard of mistake by the unmistaken party could count as a misrepresentation and contribution in inducing the mistaken party to fall in mistake. This stand point is fully supported by this thesis point view, which believes as some others do,¹²⁸ that the contracting parties should act in good faith when they decide to enter into a contractual relationship.

Section 3: Operative Mistake

3.1. Mistake as to Law

A mistake of law arises when the parties do not realise their legal responsibility or obligation under the contract and they carry out their obligations mistakenly. This demonstrates that the party cannot pretend that he/she does not realise his/her duties under

¹²⁶ Beale, op. cit., P364.

¹²⁷ 29th Ed. in para 5-100 headed “Unilateral mistake” at page 424

¹²⁸ Tetley, op. cit. P17.

the contract and regard it as voidable. Simply, the parties are committed and bound by their contractual legal obligations.¹²⁹

During 1802, Sir William Evans published an essay on the Action for Money Had and Received.¹³⁰ In his essay, Sir William strongly supported the opinion that money paid by mistake is recoverable, whether the mistake is one of fact or law.¹³¹ In a later publication in 1806, Sir William, stated that the rule is clear enough and clarifying itself by its terms, which eluded that no person can give himself an excuse to be freed from implementing his obligation by pretending that he is an ignorant of law 'or acquire an advantage, or avoid a detriment, when he has omitted using the means ordained by law for those purposes. Applied to the immediate subject matter, it has no reference to the point, of money paid under a mistaken idea of a preceding obligation.' This maxim is properly directed to cases in which a person was charged with wrongdoing.¹³² In general, there is a fact connected to the payment made under a mistake of law, in which is adopted by English law where it states that the payment would not be a ground of recovery for itself. In the contrary example, if the *prima facie* is involved in the payment made under a mistake of fact it would be recoverable.¹³³ With regard to the same issue Lord Goff concluded that the English law had no principle decided that money paid upon to void contract was irrecoverable, this is based on the mistake of law, if the contract had been completely performed within the terms which have been agreed upon.¹³⁴

¹²⁹ Preparation and Review Guide for Auctioneer and Apprentice Auctioneer Licensing Examinations. Developed by the Alabama State Board of Auctioneers. 2002. P12.

¹³⁰ This has since published in [1998] RLR 1, the text having been prepared for publication by Professor Peter Birks and Dr Lionel Smith of Oxford University.

¹³¹ And criticised the contrary view of Pothier denying recovery where the mistake is one of law.

¹³² See Professor Keener's Treatise on the Law of Quasi-Contracts .1893. P85. and Professor Woodward's the Law of Quasi-Contracts .1913. P54.

¹³³ The law commission report. law commission No 227. restitution: mistakes of law and ultra vires Public Authority Receipts and Payments. 30th September 1994.

¹³⁴ Law Reform Committee. Singapore Academy of Law. Paper on Reforms to The Law of Restitution on Mistakes of Law(The paper considers the law as it stands relating to claims for recovery of payments made under a mistake of law and the impact of the House of Lords' decision in Kleinwort Benson Ltd. v. Lincoln City Council & 3 other appeals [1999] 2 AC 349, and the implications for reform in the relevant aspects of the law of restitution. P12.

If the payments were implemented obviously under a mistake of law and the payer had realised that requirement had no need to be fulfilled with, since it was away from, the command of the related authority to make such a requirement, subsequently the payer would not need to make the payment. In this case the recovery is permitted.¹³⁵ For a long time, the rule rejecting recovery of monies paid under mistake of law had become a general one, forming a high and actually strong construction of authority for plaintiffs to defeat.¹³⁶ In *Kleinwort Benson v Lincoln City Council*¹³⁷ the House of Lords had decided that the money paid under the mistake of law should be recoverable by the claimant. As it is mentioned within the chapter, this case actually was a remarkable one as it has turned the rule of the common law, which previously considered the payment under the mistake of law as unrecoverable. It has been mentioned even that the decision that has been taken considered the unrecoverable payment under the mistake of law had no longer part of English law.¹³⁸ In the same case's commentary, Lord Goff mentioned that this case came to existence after two hundred years of applying the opposite rule (payment under mistake of law is unrecoverable) as a rule of public interest.

In general the argument with regard to the recovery under the mistake of law did not stop after *Kleinwort Benson v Lincoln City Council*,¹³⁹ it has rather continued with some recent cases. In *Anderton v Clwyd CC*¹⁴⁰ where the Court of Appeal raised the question of whether the mistake of law is established within the case. Afterward, in *Brennan v Bolt Burdon & Ors*¹⁴¹ which accepted the mistake of law to be operative and consider the contract to be void under such mistake. Notably, during this research, most of the cases that established the mistake of law were about the money paid under this mistake. It is good to mention that

¹³⁵ Andrew S. Burrows, Et Al. Cases and materials on the law of restitution. 2nd Edition. Oxford University Press, 2005. P177. ISBN 0-19-929651-0 987-0-19-929651-4.

¹³⁶ Keith Spencer. Restitution of Monies Paid Pursuant to a Mistake of Law. Vol. 12. 2004. P155.

¹³⁷ [1998] 4 All ER 513.

¹³⁸ Richards. op. cit., P397.

¹³⁹ [1998] 4 All ER 513.

¹⁴⁰ [2002] EWCA Civ 933; [2002] 3 All E.R. 813.

¹⁴¹ [2004] EWCA Civ 1017.

the earliest case was established at common law which, suggested that a mistake of law is not a ground of recovery has appeared as an *obiter dictum* in Buller J in *Lowry v. Bourdieu*.¹⁴²

3.2. Mistake as to Fact

A mistake of fact occurs when the contracting parties believe that they are contracting on a factual subject, yet in reality it is not true or incorrect and the agreement is based on this mistake. For two hundred years, the English law has had a regulation which considers a payment that paid under a mistake of fact may generally be recovered by the payer that has been mistaken.¹⁴³ This argument appears more obviously within the case of the *Australia and New Zealand (ANZ) Banking Broup Ltd v Westpac Banking Corporation*,¹⁴⁴ when the High Court opened the range for two questions, the first is to ask whether the mistake of fact must be classified as an essential mistake, the second is whether there is an adequate reason of payment. These questions have been reflected by the Australian High Court in *David Securities Pty Ltd v Commonwealth Bank of Australia*¹⁴⁵ when the High Court gave a negative answer regarding the first question, and responded positively regarding the latter. Besides that, it seemed that the court invested this chance to get rid of the old rule that rejected recovery of money paid under a mistake of law. This attitude tends to the English law attitude in this regard as it is mentioned a bit earlier.

In initial records of English law, there was no separation between the two different classifications of a mistake of fact and a mistake in law.¹⁴⁶ According to Lord Goff of Chieveley in *Kleinwort Benson v Lincoln City Council*,¹⁴⁷ the first proposition to segregate

¹⁴² [1780] 2 Doug KB 468 at 471, 99 ER 299 at 300.

¹⁴³ Furmston, op. cit., P2.

¹⁴⁴ (1987) 164 CLR 662.

¹⁴⁵ (1990) 93 ALR 271

¹⁴⁶ RM Jackson. The history of Quasi-contract in English Law. WM W Gaunt & Sons Inc. 1968. P 58-61.

¹⁴⁷ [1998] 4 All ER 513.

between mistake of fact and mistake of law derived from the *obituro dictum* of *Buller J* in *Lowrie v Bourdieu*¹⁴⁸ where his Lordship established the statute of non-recovery on the maxim *ignorantia juris non excusat*.¹⁴⁹ The differentiation between the assertions of fact and of law seems to have been enthusiastically agreed upon during the 19th century, yet it has positively been considered as an uncooperative perception within the last 50 years.¹⁵⁰ Most considerably, latest recent decision that has been realised by the House of Lords in *Kleinwort Benson v Lincoln City Council*,¹⁵¹ this established that mistakes of fact, as opposed to mistakes of law, allowed recovery benefit that the defendant had received at the claimant's expenditure.¹⁵² The same situation occurred in *Cooper v Phibbs*,¹⁵³ where the nephew used to pay the rent of the fishery for his uncles' daughters, despite the fact that the fishery was his own, yet he did not realise that. It was held that the contract is voidable.

Nevertheless, usually when the contract is involved in mistake of fact, this makes the contract void *ab initio*. This implies that the contract would be considered to have never existed. In summarise, where the mistake of fact (fundamental) is found in the contract, under this situation the mistake would prevent the contract from being formed from the beginning.¹⁵⁴ It is important to mention that there is no general rule under English law of contract that enforces the unmistaken party to inform the other contracting party in that he is acting under a mistake of fact.¹⁵⁵

¹⁴⁸ (1780) 2 Doug 468 (99 ER 299).

¹⁴⁹ Bridging the Great Divide between Mistakes of Law and Fact in Restitution: is the bridge safe to cross? Singapore Academy of Law Journal. 11S. Ac. L. J. 1999. P322.

¹⁵⁰ Furmston. op. cit., P2.

¹⁵¹ [1998] 4 All ER 513.

¹⁵² *Kleinwort Benson LTD v. Lincoln City Council* [1999] 2 AC 349 (HL).

¹⁵³ (1867) LR 2 HL 149.

¹⁵⁴ Cartwright. op. cit., P497.

¹⁵⁵ Reiner Schulze. New features in contract law. Sellier. European law publ. 2007. P 359. ISBN 3866530366. 9783866530362

3.3. Mistake as to Identity

Mistake as to identity can be one example of a unilateral mistake, where a person may make a mistake about the identity of the other contracting person, or when he enters a contract and makes a mistake in regard of the personality that he is entering the contract with. A person may believe that he is dealing with a particular person, although in reality that person is someone else.¹⁵⁶ In general in this case if the innocent party can prove that the identity of the other party was vital to the business, the contract is void.¹⁵⁷ It would also be possible to think about the probability of the mistake occurring as to identity under the mutual mistake, where the two parties are mistaken with regard of the identities of each other. It seems to be that under English law, if one party went into a contract under a mistake, as to the identity or of the other, the contract would be considered void especially if mistake was induced by misrepresentation. In English law, the only case of mistake as to the person would be operative is the mistake as to identity. It precludes the contract from being formed, this is due to English law does not recognise fraud unless when the party has effectively deceived the other contracting party.¹⁵⁸

Interestingly, fraud was considered as a reason to render the contract void under mistake as to identity of the other contracting party, even when this fraud establishes mistake as to identity where the contract is done face to face. The clear example occurred in *Ingram v Little*,¹⁵⁹ where the seller advertised the sale of a car, a person who responded to this advertisement presented himself as another person who lives in Caterham. The seller made the offer for the real name. It was held that when the seller contracted with a person who attended physically, he was not the real person to whom the offer intended to be made; additionally, he believed he was the person who physically attended. All the case events

¹⁵⁶ Smith, Keenan, op. cit., P312.

¹⁵⁷ Haigh, op. cit., P156.

¹⁵⁸ Beale, op. cit., P366.

¹⁵⁹ [1961] 1 QB 31, C.A.

are about the subject of fact. Based on that, Court of Appeal decided that the seller had the right in the sold car. The mistake as to identity is expected to be induced by fraud or misrepresentation, yet simultaneously, it would be expected to be established without fraud or misrepresentation. In the two situations, there would not be a contract as there is no meeting of the minds between the parties.¹⁶⁰

As other mistake cases, mistake as to identity attracted some arguments from some legal writers who suggested that mistake as to identity would not render the contract void.¹⁶¹ It was argued in *Phillips v Brooks Ltd*,¹⁶² that when there is an alleged contract or something similar, with one of the parties making a mistake with regard to the other party's identity, this could mean that the contract is voidable but not void *ab initio*. Waddams, Et al. built their discretion about *Phillips v Brooks Ltd* on the justification of Horridge J who suggested that the parties *Phillips v Brooks Ltd* made a bargain and the contract was established. This is apparently true; although, when it goes deeper into the case, it would be said that the seller's mistake as to identity was established by the buyer's fraud, while in reality the seller would not enter into the contract if the alleged name of the buyer was not registered in the phone directory. In this case the minds of the seller and the alleged name did not meet to form the contract. Under this situation two points would occur, the first is to elude that the contract is void *ab initio* as never existed. The second is to demonstrate that the contract is existed but it would be voidable.

More interestingly Ewan MacIntyre does not envisage the mistake as to identity renders the contract to be void, if the parties meet each other face to face.¹⁶³ Ewan discretion is

¹⁶⁰ John J. P. Krol. Construction contract law. John Wiley and Sons. 1993. P198. ISBN 0471574147. 9780471574149

¹⁶¹ S. M. Waddams, Et al. Cases and Materials on Contracts. 3rd Edition. Emond Montgomery Publication. 2005. P446. ISBN 1552391663. 9781552391662

¹⁶² [1919] 2 KB 243.

¹⁶³ MacIntyre, op. cit., P46.

against *Ingram v Little*,¹⁶⁴ which is mentioned a bit earlier where the seller and the buyer contract face to face, the seller made a mistake about the buyer's identity, as a result the contract considered void. It is visible that the points of the controversies between the academic writers on one hand with the controversies between the judges from case to another on the other hand. It demonstrates that every case could be treated totally different from the previous or the later one, it does show that sometimes, there is no fixed standard to decide about the case occurred from time to time. This is attributed to us witnessing an opinion stating that mistake as to identity renders the contract void,¹⁶⁵ which in turn came as opposite to *Phillips v Brooks Ltd*,¹⁶⁶ in which that this type of mistake would render the contract voidable not void. This controversy was repeated with regard to mistake as to identity when the parties deal with each other face to face, as it mentioned at the beginning of this paragraph.

The same level of controversy was clear in *Cundy v Lindsay*,¹⁶⁷ where the rogue pretended to be the firm of Blenkiron & Co., by setting up in the same street and signing his name (which happened to be Blenkarn) in such a way that it could be read as Blenkiron. The court was satisfied that Lindsay had only intended to contract with Blenkiron. They had sent an offer to Blenkiron & Co. only if Blenkarn knew of the truth, Lindsay would not have accepted it. It was held that the contract is void. Another example which could be helpful to explain this subject happened in *King's Norton Metal v. Edridge, Merrett & Co.*¹⁶⁸ the scoundrel set up a back street company and provided it overstated note titling to asserting to be a rich trader. It was pointed that the misled company determined to enter into contract with the scoundrel's company depending on the mistake of its attraction and not of its identity, no remedy was awarded. It is not clear why no remedy has been

¹⁶⁴ [1961] 1 QB 31.

¹⁶⁵ Haigh, op. cit., P156.

¹⁶⁶ [1919] 2 KB 243.

¹⁶⁷ [1878] 3 App Cas 459.

¹⁶⁸ [1897] 14 TLR 98.

awarded, since all the cases of this contract are built on the mistake of identity, whilst one of the contracted parties has been deceived or induced to enter the contract. It would be implied that there was no logical basis not to award the misled party under any kind of remedies such as the rectification or any others sort of compensation.

A similar attitude can be observed in *Lewis v Avery*¹⁶⁹ where Lewis advertised his car for sale. A man, whilst pretending to be Richard Green convinced Lewis to believe that he is a well-known film actor. The person paid the price by a cheque. Lewis asked him to see his identity proof, he showed him a studio pass which bore the name Richard Green and a photograph of the person. The person took the car however the cheque was dishonoured. The person sold the car to a third party who bought the car in good faith. When Lewis brought an action to the court it was held that the contract is voidable but not void. This is because Lewis dealt with the person face to face and he failed to show that he considered the identity of the rogue as a vital matter when contracted with him. It is said that the seller is responsible about his transaction when he decides to accept dealing with the buyer according to his presented identity. Lewis was just mistaken in regard of the other party's attribute not about his identity. The contract was considered voidable not void as Lewis did not void the contract before the involvement of the *bona fide* third party.

Based on the previous discussion, two attitudes would be concluded in regards of mistake as to identity to be mentioned. The first argued that the mistake as to identity of the person is different than the mistake as to an attribute of the person. Obviously this attitude suggests that a mistake as to identity, avoids the contract, yet it is not the same case when it comes to a mistake as to attributes. It does not appear that there is any difference according to this distinction as logically and legally, the name of the person is part of his/her attribute

¹⁶⁹ [1971] 3 All ER 907.

or character.¹⁷⁰ In other words, the name is the key of the identity, no one could be known without name, if someone provides wrong or false name, it would be logically held that it is the matter of a mistake as to identity. There is no reason to ask if the false name that given is a mistake as to the attribute or as to identity.

To clarify, it is difficult to agree with the cases above, as it would be as an encouragement for rogues to continue their fraud way and misrepresent more people, which is against the basic purposes of the law. So, from what the case law established, the claiming to mistake of identity should take two conditions into consideration, the claimant should present the evidence that he intended to enter the contract with definite party, while it was not any kind of negligence from the claiming party. Multiple complexities and difficulties derive from the law of mistake which extend for so many little points and branches which have completely different analysis, in many times and from one to another, especially in the courts decisions.

3.4. Mistake as to the Title

To transfer the ownership of the personal property, three essential legal demands need to be available to complete the legal procedures, the payee identity, the necessary character or description of the transferred property and the number of property. To make the agreement as an effective one, the parties should have real intent related to all three. If any mistakes occur with regards to one of the three demands, then this would be considered fundamental mistake.¹⁷¹ This subject is also connected to the existence of the subject-matter which is connected to mistake as to the title where it is not known to the parties that the purchaser was already the owner of the property that the vendor intended to sell him. In this case if

¹⁷⁰ *Citibank NA v. Brown Shiply* [1991] 2 All ER 702.

¹⁷¹ David Fox. Property in Intangible Money. Property and Trusts. SLS Society of Legal Scholars. Session 4 Friday 9th. University of Cambridge. Strathclyde Conference 2005.P10.

the parties anticipated to make an effective transfer of the ownership: this kind of transfer would not be possible according to the rule of *naturali ratione inutilis*.¹⁷²

Section 4: Misrepresentation

4.1. Legal Background of Misrepresentation

The Misrepresentation Act 1967 is implemented in England. This provides legal grounds to deal with misrepresentation. It is established or built on some fundamental pillars. For misrepresentation to be actionable there should be a false statement present.¹⁷³ *Jorden v. Money*¹⁷⁴ mentioned that the falsity would be treated differently between fraudulent and non-fraudulent misrepresentation. Under non-fraudulent misrepresentation the law treats the statement of fact differently from the statement of opinion or intention. Non-fraudulent misrepresentation would not be considered to be actionable unless it is related to an existing fact, the false statement of opinion or intention would not be considered as actionable unless it was made fraudulently. This generates a logical result that considers the statement of fact and the statement of opinion as actionable if they are established fraudulently.¹⁷⁵ In addition, *Nottinghamshire Patent Brick and Tile Co v. Butler*¹⁷⁶ explained that misrepresentation can be considered as actionable sometimes if it is established by the half truth. Generally, the fact would be represented falsely by a positive (visible) act by the representor could be by wording or conduct.¹⁷⁷ To reiterate, misrepresentation in most cases would be connected to fact as it is established in section 2(1) of Misrepresentation Act 1967. Considerably in *Avon Insurance plc v. Swire Fraser*

¹⁷² *Bell v Lever Brothers Ltd* [1932]. Lord Atkin at P 218.

¹⁷³ Haigh, op. cit., P156.

¹⁷⁴ (1854) 5 HL 185.

¹⁷⁵ Cartwright, op. cit., P110.

¹⁷⁶ (1866) 16 QBD 778.

¹⁷⁷ John Cooke. Law of Tort. 7th Edition, revised. Pearson Education, 2005. P420. ISBN 140581229X, 9781405812290

*Ltd*¹⁷⁸ it has been stated by Rix J that the parties' intention in relation to the underwriting for the next year can be considered as a misrepresentation under section 2(1) of Misrepresentation Act 1967.

Therefore, English law prevents the parties from misinforming each other, even if unknowingly- this would be applied according to the reasonable person standard. In this case, it is better for the person who does not say anything to be protected. However, contracting parties should not portray the wrong impression to each other regarding to the contract subject matter, innocently or fraudulently, they should be committed maintaining their exchanged interests.¹⁷⁹

Normally, the law expects all the parties to enter the contract with good faith, with reasonable efforts to perform the contract to achieve the interest of the contracting parties. The effect of the statement in the pre-contractual stage is a central point of misrepresentation.¹⁸⁰ This would be connected strictly to the other contracting party who claimed against misrepresentation. In order to count the misrepresentation the misrepresentee, they should have been affected by misrepresentation for entering the contract. Clearly, if the misrepresentation was established though the party was not influenced by it, and he entered the contract relying on his own checks, so no misrepresentation.¹⁸¹ In *Attwood v Small*¹⁸² where was held that there was no misrepresentation as the purchaser decided to enter the contract relying on his own experience, not on the basis of the exaggeration (misrepresentation) of the other party. It is obvious that to consider the misrepresentation to be actionable, the misrepresentee should build his decision for contracting upon to the misrepresented fact. The promise would not

¹⁷⁸ [2001] 1 All ER. 573.

¹⁷⁹ Weitzenböck, op. cit., P5.

¹⁸⁰ Furmston. Et Al, op. cit., P303.

¹⁸¹ Peter Birks. An introduction to the law of restitution. 2nd Edition, revised. Oxford University Press, 1989. P169. ISBN 0198256450. 9780198256458

¹⁸² (1838) 6 C 1 & F. 232.

be considered as a misrepresentation, as it is not counted as a statement of fact, unless the promise is mounted as a term of a contract.¹⁸³

While the parties are not obliged to unveil essential materials on the subject of the transaction to each other, nor spend sensible attempts to achieve an agreement, contract law compels an obligation on the parties of contract not to create fake statements for misrepresenting and induce the other party to enter into the contract.¹⁸⁴ Generally, it is agreed that to consider misrepresentation as an existing action, the way of the facts expression has to be false, does not express the reality as it should be, this could transpire when there is an inconsistency between the facts as represented by one of the parties and the real facts which would be believed by a reasonable person.¹⁸⁵ In this case the misrepresentation should be operative.

To consider the false representation an operative, it should be connected to fact. It should be noted that the fact would be connected to the past or present. In relation to this case, the unclear or inflated statements will not be enough to seek the relief;¹⁸⁶ it is the same situation about the expression of the parties' opinion, unless the statement or the expression was provided by an experienced or a knowledgeable person in connection with the contract subject as an essential factor to consider the liability.¹⁸⁷ The opinion would be considered also as a misrepresentation if the party intended to release his opinion wrongly as it has been explained.¹⁸⁸ One academic writer has stated that if the seller exaggerates describing his items by puffing the presented items, it would not be considered as a misrepresentation.¹⁸⁹ It would be said that for misrepresentation to be established, the exaggeration could be included within its elements. Exaggeration would be understood

¹⁸³ Furmston, op. cit., P79.

¹⁸⁴ Wishart M., op. cit., P195.

¹⁸⁵ Lord Mackay of Clashfern, Halsbury's Laws of England, 4th edn., Vol. 31 (Bath, Bath Press, 2003) para 743.

¹⁸⁶ *Smith v. Chadwick* (1884) 9 AC 187.

¹⁸⁷ *Mutual Life and Citizen's Ins Co Ltd v. Evatt*. [1971] AC 393.

¹⁸⁸ Larry May, Jeff Brown. *Philosophy of Law*. Wiley-Blackwell, 2009. P503. ISBN 140518387X. 9781405183871.

¹⁸⁹ Cartwright, op. cit., P19.

sometimes, especially in the commercial transactions as representing the fact of the product against its features. As a result it could be misleading to the other party, establishing a misrepresentation. In other words, exaggeration can easily induce a person to enter a contract, which he would not enter without the involvement of the exaggeration. This case would be imaginable, when the seller exaggerates in describing a car by saying that its loading capacity is 300 KG, yet in real the maximum is 200KG. In this case and any similar, if the other party built his/her decision to buy on this exaggeration, so the misrepresentation is established.

It is believed eventually that most areas of mistake and misrepresentation are mixed and touch the borders of each other where they occur. Due to this, where an operative misrepresentation takes place, automatically there is a mistake on behalf of the party to which the representation was made. Of course, this is just when this party does not realise that there is false representation which makes him/her able to consider that as basis of a legal remedy.¹⁹⁰

In this chapter, a very simple definition of a misrepresentation is adopted, which exposes that a misrepresentation is a false statement of fact that one party (the *representor* or the party making the representation), makes to bring the other party (the *representee* or the party to whom the representation been made) to the contract. It has been concluded from the provisions of the Misrepresentation Act 1967, and in accordance to the commentaries, that a false statement, misleading, misinforming, must be connected to the fact not to the law. It is worth mentioning the difficulties in distinguishing between an opinion and a fact in practice as sometimes an opinion can be an expression or a reflection of the fact.¹⁹¹ Nevertheless, it is possible that statements of opinion contain an implicit statement of fact.

¹⁹⁰ Bennion, op. cit., P426.

¹⁹¹ Samuel, op. cit., P325.

This mainly arises when a person in control who has an exceptional knowledge or expertise makes the statement.¹⁹² Even though this examination could not be acceptable easily due to the difficulty, which prevents the measure of the people's status of mind, this difficulty is not restricted at some point.

In English law, a misrepresentation is regarded as a representation, which maintains to be, a declaration of fact, it is not about the intention or opinion or law, which is in fact false or incorrect. To consider the misrepresentation as an operative, it must have the structure of inducing the misrepresentee to enter into the contract with the misrepresenter.¹⁹³ Nevertheless, a solution in tort for negligent misrepresentation might exist for the innocent party, who built his opinion or decision on a negligent misinformation that the other party has given him.¹⁹⁴ However, there are legal effects to distinguish between the opinion and the fact. A vital distinction with regard to statements of opinion and belief generally refers to the fact that they "have no legal effect as it is not a positive assertion that the fact stated is true."¹⁹⁵ Misrepresentation in English law encompasses the tort of deceit,¹⁹⁶ legislative responsibility for negligent and innocent misrepresentation under the Misrepresentation Act 1967,¹⁹⁷ and the common law tort of negligent misrepresentation as in *Hedley Byrne v Heller*.¹⁹⁸ This all leads to the conclusion that the subject is not easier or less complicated than the mistake, as it has many branches and many controversial areas. In addition there are many varying decisions for similar cases, and so on.

The Misrepresentation Act 1967 expands the legal remedies to include the consumers, when they enter into a contract that is affected by a misrepresentation, which was initiated by the seller. It noticed that the Act deals with the circumstances when a consumer finds

¹⁹² *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801.

¹⁹³ Bradgate, Brownsword and Flesner, op. cit., P33. Footnote 19.

¹⁹⁴ Weitzenböck, op. cit., P8.

¹⁹⁵ Treitel, The Law of Contract, op. cit., P6.

¹⁹⁶ *Derry v. Peek* (1889) 14 App Cas 337.

¹⁹⁷ The claim under s 2 (1) is linked to the making of a contract, but still tortious in nature.

¹⁹⁸ *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465.

that he/she can cancel the contract in a case of innocent or negligent misrepresentation, with the right of claiming damages as a legal remedy or solution. It was notable that the Act provides the consumer the legal right to be compensated for the loss, which happens from any misleading signal (misstatement) that induced the other party to enter a contract. The exceptional case here when the issuer of the statement will be able to submit evidence proving reasonable grounds for believing that the facts negotiated were true at the time of the contract. The consumer directly, through civil proceedings, may enforce the remedies presented by the Act.¹⁹⁹

It would be understood that, in order to establish an actionable misrepresentation under the common law as well as under s.2 (1) of the Misrepresentation Act 1967, the wronged party (the party who was under misrepresentation) must demonstrate that the representation was an explicit and included a false statement of fact. The fact should be material and create the inducement of the contract. If misrepresentation is created by silence and connected to an unambiguous false statement of fact, in this case Spencer Bower & Turner²⁰⁰ stated that 'A misrepresentation may be made by silence, when either the representee, or a third person in his presence, or to his knowledge, states something false, which indicates to the representor that the representee either is being, or will be, misled, unless the necessary correction be made. Silence, under such circumstances, is either a tacit adoption by the party of another's misrepresentation as his own, or a tacit confirmation of another's error as truth.' Silence as a case of misrepresentation was held in *Bradford Third Equitable Benefit Building Society v. Borders*.²⁰¹

It has been mentioned before that it would be expected to face many complications and the difficulties that could occur during the dealing with the legal effects of the

¹⁹⁹ Office of Fair Trading. Enforcement of consumer protection legislation. Guidance on Part 8 of the Enterprise Act. Enter price Act 2002. June 2003. P52.

²⁰⁰ The Law of Actionable Misrepresentation. 3rd Edition. Butterworths, London, 1974. P101.

²⁰¹ [1941] 2 All ER 205.

misrepresentation. It could be noticed that the contradiction touches the area of the silence and its connection with the misrepresentation. It has been found that some mentioning indicated that the silence may cause the misrepresentation, as the case that mentioned above. Simultaneously, it has been revealed that another mentioning proposed something different, that is, usually the silence cannot make up or cause the misrepresentation.²⁰² This creates some difficulties towards developing a clear understanding for the whole subject. In general, it has been mentioned that silence could be turned and considered as a misrepresentation in some cases. If the facts have been changed during the contracting process and the party did not state these changes as it has been seen in *Spice Girls Ltd (SGL) v. Aprilia World Service (AWS)*.²⁰³ It would be considered as a misrepresentation. In *Peek v Gurney*²⁰⁴ the nondisclosure of the information that could be counted as deforming the represented fact would be similar to the case of silence. It could also occur when it makes the declared true statement to become misleading as it happened in *Nottingham Patent Brick and Tile Co. v. Butler*.²⁰⁵ A similar scenario is evident in *Traill v Baring*²⁰⁶ where the representor kept acting according to the previous representation, despite the fact that this representation became false according to his knowledge. It might occur also when it is connected to material facts in insurance contracts, or where the contracting parties have a special relationship between them (relatives, fiduciary).²⁰⁷

For the functions of English law, a statement of fact is the first prerequisite of a representation, typically, that is to say, a positive affirmation competent for being confirmed as correct or false.²⁰⁸ Despite the general rule in English law, which does not require parties to disclose information, there are a few exceptions. These exceptions relate

²⁰² *Keates v Cadogan* (1851) 10 CB 591.

²⁰³ [2002] EMLR 27, CA.

²⁰⁴ (1873) L.R 6 HL 377.

²⁰⁵ (1886). 16 Q.B.D. 778.

²⁰⁶ (1864) 33 L.J. Ch. 521.

²⁰⁷ MacIntyre, op. cit., P157.

²⁰⁸ Whincup, op. cit., 4th Edition. P278.

to the fact that if certain information was not disclosed it could lead to a danger of misrepresenting. For example, if a person makes a statement which is initially true he has a duty to correct it if, later, as a result of a change in circumstances, it becomes false. Likewise, if a person creates a partial statement which is correct in itself; yet it is creating misleading impression, due to the slip of some information, he is at fault of misrepresentation.²⁰⁹

In the doctrine of misrepresentation, academic writers almost have the same opinion to assert also damages or rescission for misrepresentation, the claimant ought to demonstrate justifiable dependence on the defendant's representation. As it has been concluded from the Act of misrepresentation 1967 earlier, the false statement must be connected to the fact not to the law or the mere opinion.²¹⁰ Even though this examination would not be easy to apply, as a result, it would be difficult to establish a measure to evaluate the status of the people's mind.

While the parties are not required to unveil essential materials connected to the transaction, nor spend sensible attempts to achieve the agreement, contract law compels an obligation on the parties of contract not to create fake statements for misrepresenting and inducing the other party to enter into the contract.²¹¹ Thus, a misrepresentation renders the contract voidable at the option of the representee. Statements of law are not treated as statements of fact, but the distinction is often hard to draw. A representation in respect of a legal document may be related to its contents or to its meaning. If the former, it is a statement of fact, if the latter it may be a statement of law, yet even here, a statement of fact could be implied. Statements as to future intentions are not usually statements of facts as long as the

²⁰⁹ Bradgate, Brownsword and Flesner, op. cit., P95.

²¹⁰ Samuel, op. cit., P325.

²¹¹ Wishart M, op. cit., P195.

intention is honestly held.²¹² According to English/Common law, the misrepresentation includes three categories as following:

4.2. Fraudulent Misrepresentation

In this sort of misrepresentation, the representor implies a false statement, either knowingly or carelessly. The concept of the carelessness here is about the person, who creates the statement (representor), being not sure whether this statement was true, and he did not make enough efforts to check if it is true or not. In this case the representee has right to rescind the contract and claim damage. One of the remarkable points that could be mentioned here is that the cases of misrepresentation which affect the contract previously was considered as voidable rather than void. This opens the options for the party who was adversely prejudiced by the misrepresentation to decide whether or not to go ahead of the contract in spite of the misrepresentation.²¹³ Fraudulent misrepresentation would be the most important of the misrepresentation categories. This is due to the fact that usually, this type of misrepresentation generates damages as a legal remedy, so it needs particularly strict procedures for it to be proved. It is understood that the court would be very accurate and careful to decide about the involvement of such sort of misrepresentation. The failure of approving it might generate a defamation action against the plaintiff.²¹⁴ It would be expected to find more arguments between the legal and academic writers on the matter of the fraudulent misrepresentation as it is very integrated with the unilateral mistake which are also attracting a lot of discussion and argument.

The remedies under the Misrepresentation Act 1967 denote that, if the party entered the contract by the inducement as a conclusion of misrepresentation which alleged by the other party; and the misrepresentation never turned out to be included as a contractual phrase,

²¹² *Strachan & Henshaw Ltd v. Stein Industrie (UK) Ltd* (1998) 87 B.L.R. 52.

²¹³ Haigh, op. cit., P157.

²¹⁴ Richards, op. cit., P200.

the representee was permitted to withdraw the contract whether the misrepresentation was fraudulent, negligent or completely innocent. Beale²¹⁵ seems to have adopted a different opinion when he states that at common law, the right to withdraw from the contract would be available if the misrepresentation was fraudulent or if there was a total breakdown of consideration. Beale considered that there is a right to withdraw as the innocent misrepresentation is under the equity and not under common law. Since the Act was permitted the right of withdrawal, it is eligible, unless in the case of fraud, by the authority of the court to reject rescission and give damages in lieu.²¹⁶ It is said truly, that in the case of misrepresentation, there is no need to prove that misrepresentation was the only motive for entering the contract. It is enough for the misrepresented party to show that misrepresentation was one of vital reasons or motives for becoming involved with the contract.²¹⁷

It can be concluded that when fraudulent misrepresentation occurs, it would be treated totally differently from the other kinds of non-fraudulent misrepresentation. It would also be expected that the fraudulent misrepresentation circle is wider than the other kinds, because it might include cases of fraudulent non-disclosure, concealment, sometimes silence, and in some cases the half truth. Consequently, the fraudulent misrepresentation is a type of opportunistic behaviour in a pre-contractual context. In both civilian and common law jurisdictions the contracting party is entitled to claim damages if he/she suffers a loss from acting on the misrepresentation made intentionally by another contracting party.²¹⁸ Briefly, the fraudulent misrepresentation is a false representation which has been made with full knowledge that it is not true or even as carelessly as to whether it is true or false. All these elements are made dishonestly in order to induce the party to enter the contract.

²¹⁵ H. G. Beale, Et Al. Contract: Cases and Materials.5th Edition. Oxford University Press, 2007. P308. ISBN 0199287368. 9780199287369.

²¹⁶ Weitzenböck, op. cit., P6.

²¹⁷ Furmston, op. cit., P79.

²¹⁸ Zhou, op. cit., P84.

As a result, such misrepresentation would make the representor liable under the tort of deception. As mentioned previously, the representee would be entitled to claim for all the losses that he has suffered due to the fraudulent misrepresentation. The losses would be measured as a direct and the indirect losses.

As a result of this part, for seeking the claims on the basis of fraudulent misrepresentation, two main elements should be present. The fraudulent misrepresentation must be material and the representor intended to induce the representee to enter to the contract. In addition, the materiality in this context signifies that the representation seriously affected the decision of the representee which could be different in the absence of the misrepresentation.²¹⁹ Briefly, the basic elements of the fraudulent misrepresentation are, the intention should be directed to create the inducement, to consider this, the misrepresentor should be realised that the representation is not true and has no belief that the representation is the truth.

4.3. Innocent Misrepresentation

Section 2 of the Misrepresentation Act 1967 of England excluded the responsibility of the non-fraudulent misrepresentation (innocent misrepresentation) within the contracts.²²⁰ So there is a meaning of the innocent misrepresentation. Principally, the innocent misrepresentation is unqualified to provide a rise to claims for damages at common law, except when the representation was released as a guarantee of contract.²²¹ Some others argue that innocent misrepresentation could comprise the remedies of damages and rescission. In general, this situation would be subject to the discretionary role of the court, whether to entitle the misrepresentee damages in lieu of rescission.²²² This clarifies that the

²¹⁹ D. Sanders and T. Rattray. Interpretation of Construction Contracts. Borden Ladner Gervais LLP. November 15, 2001. P17.

²²⁰ Bowen, op. cit., P7.

²²¹ Samuel, op. cit., P325.

²²² Peel, op. cit., P383.389.

interested writers or the authors possess different point of views towards the proper remedies that should be applied when the parties face innocent misrepresentation. The same applies for the other sorts of misrepresentations (negligent and fraudulent). It is noticed that this area gives rise to much academic commentary and argument due to its connectivity with many other areas of remedial options, such as, equity, rescission, damages, termination and some others. All of this could even make the mission of the judges and the courts more difficult when it comes to the decision of similar cases that have similar situations and conditions. There is some connection should be mentioned here, when the innocent misrepresentation occurs, it means that there is a shared mistake with the other party.²²³

4.4. A Negligent Misrepresentation

A negligent misrepresentation is the one, which came into existence or was made recklessly, or without convincing justifications for considering it to be factual.²²⁴ From what the research has driven, conceptually, the developments of negligent misrepresentation started with *Hedley Byrne & Co Ltd v. Heller & Partners*.²²⁵ Nevertheless, a solution in tort for negligent misrepresentation might exist for the innocent party, who built his opinion or decision on a negligent misinformation that the other party has provided. In addition, consider that a contract would be created, yet the innocent party beard the loss based on this case.²²⁶ The Misrepresentation Act 1967 expands the legal remedies to include the consumers and allowed to them, when they come into a contract that is affected by a misrepresentation, which has been made by the seller.

²²³ Bennion, op. cit., P426.

²²⁴ Weitzenböck, op. cit., P5.

²²⁵ *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465.

²²⁶ Weitzenböck, op. cit., P8.

The Act deals with the circumstances when a consumer finds that he/she can cancel the contract under the case of an innocent or negligent misrepresentation with the right to claim damages as a legal remedy or solution. It was notable that the act gave the consumer the legal right to be compensated for the loss, which happens from any misleading signal (misstatement) that caused the inducing to enter a contract. The exceptional case here when the issuer of the statement will be able to submit evidence proving the reasonable grounds of the believing that the facts corresponded to were true at the time of the contract. The consumer, directly through civil proceedings may enforce the remedies presented by the Act.²²⁷ The Act extends to England and Wales. As is mentioned during this chapter, the English courts have indicated that liability for negligent misstatement can be established only where there is sufficient proximity between the parties, where it is just and reasonable to impose a duty of care.²²⁸ A beneficial point in this discussion is to push the sellers or the services offerors or the producers to make sure about the validity of the products they offer. Here, even the courts could use their own evaluations to decide what the suitable decision against the misrepresenter, based on the type of the misrepresentation that has been made, with keeping the right of misrepresentees to claim for the damages in all cases, unless they involved directly in making the misrepresentation. Of course the sellers, (could be any service offeror) should be committed to the obligations of the Misrepresentations Act 1967. This Act entitles the people, who entered a contract under fraudulent misrepresentation and they suffered losses as a result, to claim damages. If misrepresentation is not fraudulent, the plaintiff (buyer) must submit evidence showing that he reasonably relied on the misrepresentation to enter the contract.²²⁹ This issue is very controversial as it leads to many debates and arguments regarding the distinction between the fraudulent and non fraudulent misrepresentation for the claimants which suffered from the loss.

²²⁷ Office of Fair Trading, op. cit., P52.

²²⁸ Financial Markets Law Committee. op. cit., Para 3.2.

²²⁹ Williams, op. cit., P7.

The most appropriate method to deal with this case is to consider that all the misrepresentation cases should be counted as a sellers' responsibility to prove what the grounds of the misrepresentation are, whether they are fraudulent or not, since it is more difficult for the ordinary people to prove that especially with complicated transactions. To solve this practical difficulty, the Law Reform Committee in its tenth Report made proposals which finally resulted in Section 2(1) of the Misrepresentation Act 1967. This provides that, if a party entered a contract under the misrepresentation of the other and he suffered loss as a result of this misrepresentation, then the misrepresenter would be liable to damages if he made the misrepresentation fraudulently, he would also be liable even if he did not make the misrepresentation fraudulently; however, he would not be liable if he proves that he had reasonable ground to believe and did believe up at the contracting time that the represented facts were true.²³⁰ Though, it is not enough to imply that the declaration or the statement was false; beside that, the false statement should cause the inducement to bring the consumer for entering the contract.

Consequently, the reliance on the false statement is required to establish misrepresentation, even though still there is some mystification as to whether real dependence has to be made known²³¹ or the dependence should be reasonable.²³² As a conclusion out of this point, the lack of dependence on the provider's statement, it could not be considered that there is actionable misrepresentation. It means that, where the actionable misrepresentation is available the contract will be voidable and the misrepresentee will be permitted to withdraw or rescind the contract or even to claim for damages, yet the rescission of contract as a standard remedy of the misrepresentation is optional.²³³

²³⁰ Zhou, op. cit., P85.

²³¹ *Museprime Properties Ltd v. Adhill Properties Ltd* [1990] 2 E.G.L.R. 196.

²³² *Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd.* [1995] 2 AC 501.

²³³ Bradgate, Brownsword and Flesner, op. cit., P69.

It would be helpful to mention that a lot of shops around the country allow their customers to return items if they found anything wrong in these items. This is could be a kind of responsibility regarding the innocent or negligent misrepresentations. There is no reason to ask the purchaser to confirm the misrepresentation or to define if it is fraudulent or not. According to this rule, once the representee proves that he/she suffered a loss by acting on the pre-contractual misrepresentation made by the representor, it is the representor's duty to show his honesty rather than the representee's duty to prove the representor's fraud. Although the representee can, in theory, choose to take legal action against the representor for damages either with the²³⁴ action of deceit or under Section 2(1), it is obviously advantageous for him to choose the latter option.²³⁵ An insurance contract could be excluded from the previous rule as long as the insurer can demonstrate that the material breach of the duty has taken place, the remedy of avoidance can be deployed even if the assured has acted honestly and reasonably.

The insurer can, therefore, rescind the entire contract and with it all liability under the contract no matter how minor or innocent the non-disclosure or misrepresentation.²³⁶ Royal Court of Justice mentioned to similar principle in the *Equitable Life Assurance Society v Ernst and Young*²³⁷ where it was revealed that the duty of care is requested under the contract and all who offer professional services for reward, are implicitly under an equitable duty of care and the way of performing the services they offer. It demonstrates that in the action of deceit, a person (the representor) is liable for his/her misrepresentation if he/she knowingly or recklessly (*i.e.* not caring whether his statement is true or false) makes a false statement to another person (the representee) with intent that it shall be acted upon by the representee, who does act upon it and thereby suffers damage.²³⁸

²³⁴ Zhou, *op. cit.*, P85.

²³⁵ Zhou, *op. cit.*, P86.

²³⁶ Soyer, *op. cit.*, P9.

²³⁷ [2003] EWCA Civ 1114.

²³⁸ *Derry v. Peek* (1889) 14 App. Ca. 337. At Zhou, *op. cit.*, p85.

One useful point could be added here, which is with regard to the liability that is connected to the misrepresentation. In general, it is apparent that misrepresentation would not be considered as grounds for relief unless the contract has been induced by the misrepresentation, where the misrepresentee relied on this misrepresentation to enter the contract.²³⁹ It could be concluded that English law, with regards to misrepresentation, allows the parties who are contracted under the effect of a false statement to take various kinds of remedies such as, to rescind the contract and/or claim damages, to terminate the contract based on the breach if the false statement has been considered as a term of the contract. It is really up to the misrepresentee to choose which kind of remedial options can be applied or claimed.²⁴⁰

Clearly, the three types of misrepresentation (fraudulent, negligent, and innocent) would have the possibility to be treated under the rescission rules; however, utilising the right of rescission would be available upon to the representee's claim, not upon to the court's decision.²⁴¹ Conversely, the misrepresentee has the right to ask or claim for the rescission and damages in the same time, as it is shown in *Archer v. Brown*.²⁴² Both fraudulent and negligent misrepresentation would give arise to the tort liability, which is not be available in the case of innocent misrepresentation.²⁴³ Nevertheless, it has been noticed that the English courts are very restrictive with regard to fraudulent misrepresentation, so it would be difficult for the courts to consider the misrepresenter as a fraudulent.²⁴⁴ It might be useful to mention some facts in relation to misrepresentation. One of those facts is that some of the legal writers dealing with common law do not distinguish between fraud and misrepresentation. It is understood that "fraud is an intended misrepresentation of a

²³⁹ *Skipskreditforeningen v. Emperor Navigation* [1998] 1 Lloyd's Rep. 67 at 73.

²⁴⁰ Bradgate, Brownsword and Flesner, op. cit., P95.

²⁴¹ *TSB Bank plc v. Camfield* [1995] 1 WLR 430, CA. 438.

²⁴² [1985] Q.B. 401.

²⁴³ Cane, op. cit., P195.

²⁴⁴ Furmston, op. cit., P112.

material fact, made knowingly, with intent to defraud.”²⁴⁵ According to this definition, misrepresentation is an instrument of fraud, and making misrepresentation would bear the same meaning of defraud.

Fraud is when one party uses a deception or misrepresentation to gain an advantage on the account of the other contractual party.²⁴⁶ To clarify, the party defrauding the other party is the same as the party being misrepresented by the other party. Furthermore, it is noticed that the key word with regard to misrepresentation could be ‘intentional or unintentional’ to put the misrepresentation in the exact category of fraud and deceit. Instead of using fraudulent misrepresentation, some common law commentators used intentional misrepresentation as being parallel to deceit, so, according to this perspective the party who involved in a contract due to the intentional misrepresentation or deceit, here intentional used interchangeably with deceit, would not be committed to any legal obligation, as there was no agreement since the minds did not meet.²⁴⁷

Section 5: Conclusion

The doctrine of mistake under English contract law can be considered as one of the most important doctrines under the law of contract. This area of law has been investigated seriously and widely by the legal scholars and academic writers. Despite this serious investigation, the types of mistake still attract serious and interesting argument by the academic levels and the courts discretions. The main quandaries that can be concluded with regard to English doctrine of mistake is that there are no stable remedies which can be confirmed as a standard to a particular type of mistake. This is attributed to some of the mistake types are not stable with regard to the definitions. The clearest example is the type of common and mutual mistake, where there is still a strong argument connected to their

²⁴⁵ Emerson, op. cit., P97.

²⁴⁶ Miceli, op. cit., P93.

²⁴⁷ Emerson, op. cit., P100.

definitions. It is apparent that many of law cases related to mistake and its types did not take clear form within the courts and the judges' arguments. It is noticed that many of the cases have very similar facts and based on very similar details but they ended with totally different courts' decisions. This could impose two things; firstly, English doctrine of mistake is very rich of legal argument which can be improved and developed according to the legal facts and circumstances. Secondly, the English doctrine of mistake is not stable; it requires more legal discussion for it to be considered as stabilised and formalised. Overall, mistake under English contract law has clear categories containing clear general and specific types of mistake which allow the doctrine to be adaptable with the legal developments that occur from time to time.

Chapter Three

The Concept of Error in Scottish Contract Law

Section 1: Introduction

Error is simply defined as misapprehension or¹ misconception; a wrong or incorrect belief that is related to fact or law. It is alternatively called an uninduced error.² Generally speaking, error does not render a contract void unless it is a substantial error³ (induced or not induced)⁴ which excludes the contractual consent.⁵ It is suggested that if an error is caused by a third party, the party in question is unable to reduce the contract. According to Hector L MacQueen and Joe Thomson, error in general attracts a lot of controversies amongst academic writers.⁶ Scottish academic writers rely on conventional civilian views when they discuss the issues surrounding error.⁷ In this chapter, the concept of error and its categories are discussed with some comparative perspectives, especially in the case of English law.

1.1 Error in Law

Error under this category means that the party entering into the contract does not understand what the legal results of the contract are and, equally, when the party does not understand his or her rights. Usually, this kind of error comes under the legal maxim that says '*ignorantia juris neminem excusat*,' which means that no one is excused when

¹ Walker, op. cit., P14.1.

² Rahmatian, op. cit., P3.

³ Hec, op. cit., P60.

⁴ J M Thomson, The Effect of Error in the Scots Law of Contract. Acta Juridica. 1978. P135.

⁵ Hec, op. cit., P60.

⁶ MacQueen, Thomson, op. cit., P159.

⁷ J M Thomson, op. cit., P135.

claiming an ignorance of law.⁸ Based on this rule, error of law does not generate any negative effects in regards to the contract legality.⁹ This situation occurred in *Cloup v. Alexander*,¹⁰ when a French comedy company agreed with ‘A.’ to lease them the Caledonian theatre of Edinburgh to perform their events for five weeks. The French comedians entered another agreement with Murray to perform at the Theatre Royal within the five week term and they refused to perform at the Caledonian Theatre. ‘A.’ then raised an action against them; they defended themselves alleging that they did not realise that the law would not allow them to perform outside the Theatre Royal because it ‘was the only theatre’ where their style of performance was acceptable. It was held that their ignorance of the law would not justify their withdrawal from the agreement with A., and resultantly, the contract did not involve illegality.

Another example occurred during *Laing v. The Provincial Homes Investment Co. Ltd*¹¹ regarding the interpretation of a document which came a under error of the law. In this case ‘Mrs L.’ established an action against a building company with whom she entered into a written agreement. According to this agreement she paid certain sums. Later on Mrs L. sought to recover the money she paid by alleging that the agreement terms were not clear. Consequently she sought to reduce the agreement. It was held that Mrs L. had no right to withdraw from the agreement based on her allegation, due to the lack of clarity, which is not a reason to reduce the contract. This error is mentioned by Lord Kinnear¹²; that the parties cannot escape from their obligations which are documented in the written terms of the contract. They are bound according to these terms, and the contracting parties are not

⁸ *Baird's Trustees v. Baird.* (1877) 4 R 1005. See also: *British Hydro-Carbon Chemicals Ltd v. British Transport Commission.* 1961 SLT 280.

⁹ *Baird's Trustees v Baird.* (1877) 4 R 1005. See also: *British Hydro-Carbon Chemicals Ltd v. British Transport Commission.* 1961 SLT 280.

¹⁰ (1831) 9 S. 448.

¹¹ 1909 S.C 812.

¹² At P.822.

able to escape from the contract by alleging that they failed to understand the result or the meanings of the terms which they initially endorsed.

If a contract is reduced and there is no contract, the sums are paid to the other party in good faith on the strength of the contract and can then be recovered under the doctrine of *condictio indebiti*,¹³ the law of unjust enrichment under the Scottish law. A similar case has been referenced with regards to the concept of error under Islamic contract law which offers a clear comparative perspective, showing that both laws have very comparable attitudes towards the error of law.¹⁴ It is worth mentioning that error does not coincide with 'operative.' But, error compares to fact, as it would be considered as an operative if it is fundamental. Error would be fundamental if it was connected to the transaction subject matter. In this case, this kind of error could be considered as a ground of reducing the contract.¹⁵

Section 2: Uninduced Error

2.1. Error in Expression

This sort of error would be established if the final form of the contract did not reflect the precise intent that had been taken by the contracting parties.¹⁶ In other words, error in expression occurs when the party fails to declare his or her intention orally or in writing, or for example when the party transmits the price incorrectly.¹⁷ Another example of error in expression is when the parties have agreed about the contract verbally, but they do not write it in an accurate way. Simply put, if the oral agreement is different from the written

¹³ *Baird's Trustees v. Baird*. (1877) 4 R 1005. See also: *British Hydro-Carbon Chemicals Ltd v. British Transport Commission*. 1961 SLT 280.

¹⁴ *Hayder*, op. cit., P50.

¹⁵ *Rahmatian*, op. cit., P38.

¹⁶ *Green*, op. cit., P120.

¹⁷ *Rahmatian*, op. cit., P38.

one.¹⁸ This case has occurred with regard to an oral contract between an employer and his or her employee; where the employer has agreed orally to pay a specific percentage of the annual net profit, but it has been discovered that the written contract gave the employee a much lower percentage from what was stated in the verbal agreement. As a result, the court supports the employer's allegation because he or she relied on the written agreement in supporting his defence.¹⁹ It means that the written agreement overrides the oral one. Practically, this decision shows that every case can have different outcomes relying on the situations of the case and that they can vary considering the court specific evaluation. At the same time, this decision may be inappropriate because opposes to the concept of error in expression, when the court should investigate the intent of the contracting parties, and compare between their oral and written expression. In a similar case,²⁰ two parties agreed orally on selling a part of land, but it ended mistakenly that the seller's solicitor transferred all of the land, and it was held that the contract was void even though it was written.

Actually, with regard to the wrong calculation of price, it would not be grounds for reduction when the error generates a profit for one of the contracting parties. It does not matter if the other party knows that the expression is right but the price calculation is wrong. Under this case, when one party is aware that the other has accepted a specific price during the negotiation stage, and then quoted a lower price erroneously in the contracting time, the price would be considered as part of the essential factors of the contract. The mistaken party can seek the reduction of the contract; not on the ground of the price being incorrect, but based on the prohibition of taking advantage of the other party's error.²¹

¹⁸ Hector L. MacQueen, Reinhard Zimmermann. *European contract law: Scots and South African perspectives*. Edinburgh Studies in Law Vol. 2. Edinburgh University Press. 2006. P179-180.

¹⁹ *Krupp v. John Menzies Ltd.* 1907 SC 903.

²⁰ *Anderson v. Lambie* 1954 S.C. (H.L.) 43.

²¹ *Glasgow Feuing and Building Co. v. Watson's Trs.*, 1887, 14 R. 610. Lord Young. P. 618. Rahmatian. op. cit., P39.

This situation can be found in another case,²² regarding the reduction of a disposition, when a land owner agreed with a buyer to sell him part of his land on a farm. The land owner's solicitor, erroneously, transferred all the lands to the buyer instead of the farm only. When the case was disputed in the court, Lord Reid said,²³ since it is clearly proved that the two parties agreed to contract on one thing, but mistakenly contracted on something different, then even if the contract is a written document it cannot be considered as a valid contract. He added that if the error appeared within the document or the deed, and if the case of error can be proved beyond the deed, the error can be corrected by explaining or interpreting all of the deed. But when there is no way to prove that the error was established on the deed, as in this case, the mistaken party can seek reduction if he can prove the error beyond reasonable doubts with regard to the surrounding facts and situations. While *Anderson v. Lambie*²⁴ was decided at common law the matter is now governed by LR (MP) (S) Act 1985 s8 rectification of deeds and the case decided there under.

If error arises with regard to clerical fault, this may render the contract void as in *Verdin Brothers v. Robertson*²⁵ where Robertson sent a message by telegram to a salt trader asking him to provide a quantity of salt. The trader sent the salt to a different address because of clerical error in the posted telegram that had been sent by the salt trader. Later on, the trader delivered the salt for Robertson and asked for the price of the salt, Robertson rejected the delivery because it was too late for him. When this case was disputed in the court, it was held that there was no contract and that there was no duty to pay, so consequentially the contract was void. Generally, when clerical errors occurring in the document have been formed and implemented in a wrong way, there is a wide margin for

²² *Anderson v. Lambie* 1954 S.C. (H.L.) 43.

²³ At P 57.

²⁴ 1954 S.C. (H.L.) 43.

²⁵ (1871). 10 M. 35.

the court to play an equitable role to correct the agreement according to the real intention that guided the parties into entering the contract. As it mentioned above, it is not allowed or acceptable for anyone to gain an advantage from the other party by the clerical error.²⁶ The similar case is established under English contract law, which is known as a Scrivener's mistake, and the court will be in a position to correct this. Therefore the contract is not considered as invalid.²⁷ It is not a problem when the parties confess or declare their error. The problem could start to be disputed when it comes to the parties who do not admit error, but despite this, the fact is that it would be a possibility to rectify error if it is clear or plain.²⁸ To prove the existence of clerical error there is no specific or definitive procedure to follow. Therefore, no limitation to use of evidence, and any relevant evidence can be used to lead to assertion of clerical error, whether written, oral or of any other substance.²⁹ Eventually, wherever the court finds that the deed or the document failed to represent or to express the will of the two parties, and to give the legal effects of the agreement, the court has the power to rectify it to fit the intended purposes of the parties.³⁰

A clear example has been mentioned by the case of the *Steel's Tr v Bradley Homes*.³¹ This case summarised the case of error in expression when the written offer made from 'A' to 'B' intended to establish an action for a specific amount of money, and fixed 10 per cent interest to take effect from 16 March 1971. When B expressed his written acceptance, he repeated the same figure of interest and the same date of action. Later B realised that he had made an error. He held in his mind all the time that the interest will start to be accounted from 16 March 1969. Upon his error, he wanted to withdraw from the contract and terminate it, because his intention was to write 1969 instead of 1971. After discussion before the court, which checked the evidence during the negotiations stage, it was held that

²⁶ *Glasgow Feuing and Building Co. v. Watson's Trs.*, 1887, 14 R. 610. Lord Young, P. 618.

²⁷ Encyclopedia of Business and Finance, op. cit., P2.

²⁸ McBRYDE, op. cit., P435. Para14-11.

²⁹ *M'Laren v. Liddell's Trs.*, 1862, 24 D. 577.

³⁰ s8 and s9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

³¹ 1972 SC 48; 1974 S.L.T. 133.

B honestly intended to consider 16 March 1969 as the date from which interest would run. According to 'the reasonable situation test,' this would not be known by A (offerer). Based on that the court held that B did not have the right for reducing the contract, because his true intent was unknown to A.³² Here, for comparative purposes, it can be said that this case would never happen under Islamic contract law, since any contract or transaction involving any kind of interest would be void at the very beginning because the interest is prohibited under the Islamic legal system as it has mentioned earlier in this thesis. Apart from the interest issue, the Islamic attitude is not clear, whether the party in error would be allowed to terminate the contract because the Islamic jurisprudence does not deal with error, as has also been mentioned in this thesis.

Under Scots law, it is permitted to rectify the contract that did not express or misrepresented the parties' intention.³³ The same Act gives the court authority to apply rectification with retrospective effect, taking into consideration the effects of the rectification on the third innocent party.³⁴ But this is not the case under the English common law, because not many choices are available to the courts. It is noticed that the court has to release one decision, whether reducing the written contract or support it. In other words, any adjustment of the contract is not allowed.

Another situation can be expected to occur where there is no remedy to be found. It is when the error in expression occurs during the offer and acceptance stage, this could happen if the offerer states the conditions of the offer wrongly but unintentionally, and this offer has been accepted. Under this case, if the offeree has accepted the contract in good faith and does not realise the misstatement has been made, therefore there is no clear legal

³² Scottish Law Commission. (Scot Law Com No 144). Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods. 14 June 1993. P10.

³³ The Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. Section 8.

³⁴ Ibid. Section 9.

remedy. For example,³⁵ a person who offered to implement the work for a specific amount of money as a lump sum according to his own calculation discovered that he made a mistake by giving another price which was less than he intended. The problem started when he realised his miscalculation and refused to implement the work contract after the offer has been accepted. The court decided that the offerer was committed to do the work because the contract was valid since there was no notification to the offeree to be made aware of the error. But under another case³⁶ the decision was wholly different - where a person paid his invoice as a result of a mistaken calculation that could be clearly noticed by the other party. Based on that, it was held that the erroneous person had the right to ask for payment which was originally agreed.

Generally, the court enjoys wide authority to correct the contract equitably and bring the parties' intention back to the right track. Generally, if the parties did not admit the error and the error is clear in the document, so the document or the contract would be rectified.³⁷ Actually, when the error is not admitted, it could be proved by any kind of evidence, including parole.³⁸ It has been mentioned that a word "not" was clearly added by error which gave the court the power to correct the document (policy).³⁹ The concentration or the deep discussion in regard of the uninduced unilateral error in *Stewart v Kennedy*⁴⁰ leads to an interesting conclusion, that is to say, the party involved in the uninduced error may not have found a remedy to set the contract aside. It means that such sort of error could result in no legal remedy for the mistaken party. This situation has been demonstrated in *Young v McKellar*,⁴¹ *Royal Bank of Scotland Plc v Purvis*⁴² where none of these cases were considered as unilateral error by itself as a ground of reducing the contract. Under the

³⁵ *Seaton Brick and Tile Co v. Mitchell*, (1900) 2 F 550.

³⁶ *Wilkie v. Hamilton Lodging House Co.* (1902) 4 F 951.

³⁷ Gloag, op. cit., P435.

³⁸ *Waddell v. Waddell* 1863, 1 M. 365.

³⁹ *Glen's Trs. v. Lancashire, etc., Insurance Co.*, 1906. 8 F. 915.

⁴⁰ 1890 17R (HL) 25.

⁴¹ 1909 SC 1340.

⁴² 1990 SLT 262.

English law tradition the result is different, because if the party entered the contract under a reasonable error created by him, he would be committed to the contract and the other party may be eligible for damages.⁴³

Under Scots contract law, in order to prove the error case, it would not be adequate for the contracting parties to claim that their consent was affected by the error. For proving that the error has been established between the contracting parties, it is expected to trace two categories as following.

Section 3: Error in Intention

This type of error occurs when it is claimed that the parties which agreed on the contract (one or both) released their consent under error, the result of such kind of consent is not binding, because there was no intention to bind them, and the result will be no *consensus ad idem*. As a consequence, the contract will be *void ab initio*.⁴⁴ In fact this kind of error is also about parties' mistake with regard to the nature of the contract.⁴⁵ In general, if error in intention occurs it prevents the contracting parties from concluding their consent. Under error in intention there is a classification of error in motive, which occurs when the party misunderstands or interprets the situations around the contract differently than he or she intended. Simply, error in motive connected to the circumstances surrounding the real elements of the deal,⁴⁶ but not the deal itself. For easier understanding of this point, it could be said that the parties' intention was built on error and they thought that they have expressed it in correct way.⁴⁷

⁴³ Hec, op. cit., P61.

⁴⁴ Green, op. cit., P120.

⁴⁵ Walker, op. cit., P232. P14.47.

⁴⁶ Rahmatian, op. cit., P37.

⁴⁷ Ibid.

The legal solution to error in motive will not be available unless the erroneous party was induced by the other one. Under both categories of error, the formation of the contract cannot be prevented unless the error is connected to a fundamental element.⁴⁸ The focus on the substantial or fundamental error under the Scottish contract is concerns the gross affect this kind of error has on the legal capability of the contracting parties (one or both) which affect the consent.⁴⁹ As is mentioned above, simple error is not sufficient to produce a legal effect. It has been held that this kind of error, which is uninduced error, could reduce the contract only if it was substantial which is difficult to be defined exactly, in other words, the error in this case goes to the contract foundations.⁵⁰ It would be noted that the classification of error in transaction should be considered as part of the error in intention. Error in transaction occurs when the party misunderstands what the other party committed him or herself to, or if the contract has been interpreted differently to what the other party understood his or her duty or responsibility to be.⁵¹ To simplify the issue and make it clearer, the question to be answered in this regard is to know ‘what is the exact contract that the parties intended to form?’ This can be answered by investigating their correct intention which was expressed erroneously or wrongly.⁵² Generally the error in intention is divided into two categories, Unilateral and Bilateral error.

3.1. Unilateral Error

Regarding unilateral error under the Scottish law of contract⁵³ as well as under English contract law,⁵⁴ the general rule to be followed is the *caveat emptor* ‘buyer beware’, which is usually connected to goods or quality of services. If the error is established by one party only, there is no negative effect in respect to the contract validity. That is to say, the

⁴⁸ Green, op. cit., P119.

⁴⁹ Scottish Law Commission. Defective Consent and Consequential Matters. Memorandum 42. June 1978, Vol.I.

⁵⁰ Rahmatian, op. cit., P36.

⁵¹ Green, op. cit., P120.

⁵² Rahmatian, op. cit., P37.

⁵³ Huntley, op. cit., P189.

⁵⁴ Treitel, op. cit., P 361.

reduction remedy will not be applied just because one party is mistaken about a material fact connected to the contract, unless there is an inducement by misrepresentation or fraud from the other party. The case⁵⁵ of the true leasing period raised this kind of error, when one party understood that a sold property was to be rented for 99 years and the real period was 90 years. The decision was that the contract is valid since the error was not induced by misrepresentation of the other party. But under the Scottish contract law, the case would have a different perspective if the other party knew about the party's error. That is to say, the contract would not be enforced because the other party wanted to generate an advantage from error despite the fact of the non-availability of the misrepresentation.⁵⁶ It is clear that the contract would be void according to Scottish case⁵⁷ but under the English contract law the case seems to be totally different, as this kind of error could just go to the performance of the contract that was not implemented and the damages may be claimed for the non-performance.⁵⁸ But as usual, this is not final speak, since many different discretions could give different opinions whether for this topic or for the others.⁵⁹

In other words, unilateral error would be created when one party has erred, whether by him or herself or through inducing by the misrepresentation,⁶⁰ and this happens when the other party knows about the other party's error and tries to gain profits. Here the case will be irrelevant, unless the error is fundamental and connected to the transaction like when there is an error to the other party's identity, where the personal identity of the contracting party is the core of the contract, or the personality is the focus of the transaction.⁶¹ In the Scottish insurance rules, if the insured person has made an error (reasonable and innocent),

⁵⁵ *Spook Erection (Northern) Ltd v. Kaye*. 1990 SLT 676.

⁵⁶ *Security Pacific Finance Ltd v. T & I Filshie's Tr* 1994 SCLR 1100.

⁵⁷ *Steuart's Trustees v. Hart*. (1875) 3 R 192.

⁵⁸ *Webster v. Cecil* 1861, 30 Beav. 62.

⁵⁹ R. W. Craig, *Procurement Law for Construction and Engineering Works and Services*. Blackwell Publishing. 1999. P120. ISBN 0632049278. 9780632049271.

⁶⁰ MacQueen, Thomson, op. cit., P164.

⁶¹ Rahmatian, op. cit., P38.

discovered the error and intentionally left it uncorrected, the insurer has the right to avoid the insurance contract (policy) based on the intentional misrepresentation.⁶²

In general, the contracting parties would be expected not to act against the good faith principle between each other. It is said that the contract usually comes into 'existence' relying on good faith.⁶³ Under the Scottish law, some considered good faith as 'a best underlying principle of Scots contract law' that gives an ability to identify and solve the problems which are not solved by the current rules.⁶⁴ According to Hector L MacQueen, Joe Thomson,⁶⁵ the good faith principle was not welcomed very much under the Scottish law. Analytically, since Scottish law recognises the concepts of misrepresentation and fraud, and defines them clearly, it would be expected that good faith principle is adopted under the categories of misrepresentation and fraud. If the existence of the intentional misrepresentation or fraud breaks the contractual obligations between the contracting parties, it means good faith is highly demanded between the contracting parties. There is no point in adopting misrepresentation and fraud concepts, then to have an argument if the good faith would be welcome or not. Good faith would be expected to be as pre-contractual demand by the contracting parties as it is the case under the insurance contract. Similar analysis can be found clearly in Lord Macfadyen's opinion in *Kishwer Ahmed (Ap) v Clydesdale Bank Plc*,⁶⁶ where his Lordship connected the obligation of good faith in the credit agreement with the 'fairness of representation'. In this situation, good faith demands the creditor to correct the erroneous belief that could be established by any event before entering into the loan agreement; failing do that means that the creditor deals in bad faith.

⁶² The Law Commission, Consultation Paper No 182 and the Scottish Law Commission, Discussion Paper No 134. Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured, a Joint Consultation Paper. 21 June 2007. P169.

⁶³ Forte, op. cit., P14,15.

⁶⁴ MacQueen, Zimmermann, op. cit., P60.

⁶⁵ MacQueen, Thomson, op. cit., P158.

⁶⁶ [2000] Scot CS 232.

In fact, if the uninduced and unilateral error occurs within the gratuitous contracts, this could affect the validity of the contract as it could be seen from the comment of Lord Reid.⁶⁷ He suggested that it is not permitted to keep profit of the gratuitous contract that has been generated under fundamental error on behalf of the party conferring the profit. But in general this is not always the situation for all gratuitous contracts in regard of the essential error that induced by the misrepresentation, which means that the error may not be a ground of reduction.⁶⁸ It has been mentioned earlier that the unilateral error will not impair the contract validity, but there is an exceptional case could come out of this rule. That is to say, the unilateral error will affect the validity of the contract if this error was very serious or fundamental because the parties did not meet the requirements of the *consensus in idem* that make the contract non-existent from the beginning. That leads to rendering the contract void.⁶⁹ What could be added to this point is to say that when the error is known by the other party for the purpose of making profits, the reduction of contract could arise. One of the clear examples about this situation,⁷⁰ where the party who sold the land had an idea that the land has a commitment to pay a large feuduty, and in reality the feuduty duty are much smaller which was known by the buyer who wanted to take an advantage out of the seller's error. It has been decided that the contract should be reduced because the error fundamentally affects the price of the land. At some point the court wanted to follow a different line with regard to the case of *Steuart's Trustees* within the court's explanation of another case⁷¹ by suggesting that the *Steuart's Trustees* is an error of expression not of intention.

⁶⁷ *Hunter v. Bradford Property Trust*, 1970 SLT 173.

⁶⁸ *McCaig v. Glasgow University Court* (1904) 6F. 918.

⁶⁹ P159.

⁷⁰ *Steuart's Trustees v. Hart*, (1875) 3 R 192.

⁷¹ *Angus v. Bryden* 1992 SLT 884.

Based on *Angus v Bryden*⁷² facts, it could be seen clearly that if the contract involved an essential error of expression, the contract can be rendered void or set aside. The reflection of this case can be seen in the English case,⁷³ where the seller intended to make his offer in pounds and he did it mistakenly in a different currency. It is concluded that the unilateral error when it is not induced by the other party's misrepresentation, should be a substantial error which could be about the price, as it has been mentioned earlier or about the identity of the contracting parties, or affecting the quality of the subject-matter.⁷⁴

3.2. Bilateral Error

3.2.1. Common Error

This type of error occurs when the parties share the same error. It means that the same error affects the thoughts of the contracting parties in relation to some fact of the contract.⁷⁵ As a consequence, the parties' consent would be affected by the erroneous beliefs.⁷⁶ It means that the parties are involved in the same error related to the facts of the contract; based on that, when the error of the fact is essential or material the contract will be rendered void. It has been stated that if the parties agreed to sell/buy a specific commodity, then it has later been discovered that the commodity is damaged but the seller is not aware, the contract will be considered as void.⁷⁷ In a practical case,⁷⁸ the grain has been sold but the parties' did not know that some of the grain was rotten, that means that both parties made error with regard to the same fact which made the contract void.

⁷² Ibid.

⁷³ *Hartog v. Colin & Shields* [1939] 3 All ER 566.

⁷⁴ Atiyah, Adams, MacQueen, op. cit., P45.

⁷⁵ Walker, op. cit., P14.27.

⁷⁶ Rahmatian, op. cit., P41.

⁷⁷ The Sale of Goods Act 1979. Section 6.

⁷⁸ *Couturier v. Hastie* (1856) 5 HL Cas 673.

3.2.2. Mutual Error

This type of error occurs when the parties fail to understand each other and have formed different thoughts or beliefs in regards to the contract, such as the subject matter, or the price.⁷⁹ It would be useful to mention that, under the case of the mutual error there is no consent, in other words it could be said that the mutual error disallows the existence of a *consensus in idem*⁸⁰ which means that the offer and the acceptance do not come together to form the contract as a result of the parties' wills, because the minds of the parties did not meet to conclude the contract.⁸¹

Under the Scottish law of contract, mutual error is one of the most difficult issues to deal with,⁸² which links with the aforementioned English law concept of mistake. It is clear that under mutual error the parties keep different images in their minds about what they have agreed as a consequence of misunderstanding each other.⁸³ According to this case, one party proved that he thought that he was buying an estate according to the title, and the other one decided to buy according to the plan. Here the contract would not be formed because there is no *consensus in idem*.⁸⁴ To decide whether both the parties or just one of them entered the contract under error, the case should be tested objectively, because it is not enough for any party just to pretend that he or she contracted under the error.⁸⁵

Mutual error could raise an incidental or essential error, the case of the first sort does not affect the contract formation unless the error is induced by the misrepresentation which renders the contract to be voidable. Based on that, in case of *Cloup v Alexander*,⁸⁶ when the parties agreed about a specific performance in a particular hall and then they knew that the

⁷⁹ MacQueen, Thomson, op. cit., P164.

⁸⁰ *Mathieson Gee (Ayrshire) Ltd v. Quigley* 1952 SC (HL) 38.

⁸¹ R Black in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Vol 15 (1996), para 692.

⁸² Rahmatian, op. cit., P42.

⁸³ J M Thomson, op. cit., P136.

⁸⁴ *Houldsworth v. Gordon Cumming* 1910 SC (HL) 49.

⁸⁵ *Brooker-Simbsom Ltd v. Duncan Logan (Builders) Ltd* 1969 SLT 304.

⁸⁶ (1831) 9 S 448.

team was allowed legally to perform in this hall. The court decided that the contract should be binding because there was no mentioning for the particular performance as a part of the contract as the contract was about the hall hire. Based on that, there was no misrepresentation and the error is incidental. Generally, mutual error/mistake under the Scottish and English contract law seem to have the same elements and the same view which eventually render the contract void *ab initio*.⁸⁷ The previous reference which is related to the comparative approaches between the Scottish and English perspectives on the concept of mutual error could be part of the detailed discussion. That is to say, it is worth noticing that M. P. Furmston indicated many different cases to explain the shared ground of the understanding of the mutual error under the two laws. He mentioned some cases, such as: *Jones v Clifford*⁸⁸ which was approached by the gray group as a common and mutual mistake case.⁸⁹ It is a similar situation in *Couturier v. Hastie*.⁹⁰ David M. Walker⁹¹ William Gloag⁹² and William W. McBRYDE.⁹³ seem to have the same perspective. In general, as it has been mentioned with regard to the mutual and common mistake under English law of contract. The Scottish law of contract has fallen into the same issue that English law of contract has fallen into, because both of them do not have clear distinct between mutual and common error, and there are sometimes no clear borders between the two types. The case would be clearer if the Scottish law combined the two types into one type of error, or kept them as they are now but with clearer boundaries to enable the courts or the practitioners to differentiate between them. If mutual and common error have clear borders this would cause less difficulties in understanding the cases that involve such kind of error, and as a consequence this would result in more stability in the legal treatment.

⁸⁷ Hec, op. cit., P61.

⁸⁸ 1876, 3 CH. D 779.

⁸⁹ Furmston et al Cheshire, op. cit., PP297.298.

⁹⁰ 1856, H. L. C. 673.

⁹¹ Walker, op. cit., P14.36-38.

⁹² Gloag, op. cit., P441.

⁹³ McBRYDE, op. cit., P176. Para9-08.

Section 4: Essential Error (*error in substantialibus*)

Generally, essential error is connected to the core of the contract, which means that if this kind of error is available the consensus would not originally exist. That means the contract would be void.⁹⁴ According to Lord Skerrington the general rule of essential error under Scottish law is to say that it is not enough for essential error to void the contract by itself. Essential error can occur in a number of ways, such as; proving that the error is induced by the misrepresentation or that the error is common between the two parties, or it was mutual, or that it was created by fraudulent concealment.⁹⁵ This situation had occurred in *Gibson v. The National Cash Register Co. Ltd.*⁹⁶ Where 'G' intended to buy new cash register machines, the N.C.R Co. Ltd. sold him second hand machines but the company reconditioned them and the machines appeared as brand new. G. claimed damages against the company because they concealed that the machines that he bought from the company were second hand. The court decided in favour of G. despite the fact that the decision was held mentioned that the case is a *prima facie* of fraud, but it could be considered that the case was an induced error by fraudulent concealment.

In general essential error is divided between five categories: Error as to subject matter, error as to identity of parties, error as to price, error as to quality of item, and error as to nature of contract.⁹⁷ In *Menzies v. Menzies*⁹⁸ mentioned below, Lord Watson considered that under Scottish contract law essential error occurs when the contracting situation shows that. In other words, it may add that when the contracting operation involves error, it could affect the contract and its surrounding conditions or the contract process in serious way which has been claimed by one of the parties and built on all the previous factors the error would occur. As has been noticed earlier in this research, under the English law of

⁹⁴ Walker, op. cit., P14.11-14.20.

⁹⁵ *Stein v. Stein* 1914, S.C. 903, 908.

⁹⁶ 1925 S. C. 500.

⁹⁷ MacQueen, Thomson, op. cit., P164.

⁹⁸ *Menzies v. Menzies* (1893) 20 R (HL) 108 at 142.

contract, the mistake to be operative does not have to be essential regardless of the enormity of the mistake for vitiating the contract.⁹⁹

4.1. Error as to Subject Matter

This kind of error could occur when the two parties thought that they agreed about specific goods, services or products and in fact both of them have borne different products in their minds. In an English case¹⁰⁰ the contract was not binding for the party because when he bought the items at auction, he put in his mind that the container has different items which would have given it more value. Another case was about cotton ships called Peerless, which were expected to travel from India to England but on two different dates (one in October and the other in December). When the parties agreed about the bargains, one of them intended the ship to arrive in October and the other party thought it would arrive in December. It has been decided that the contract did not exist because there was no consensus.¹⁰¹ It is worth noticing that the same case is used in the same area in English law of mistake. In *Anderson v. Lambie*¹⁰² it was held that the contract (disposition) would be reduced because the parties involved laboured under essential error in regard of the subject-matter of the contract, as the owner thought he is selling the farm only and the buyer thought that he is buying the farm including the minerals, so there was no consensus *ad idem* since both of them intended something different to bargain on which made the subject-matter of the contract to be fundamentally different from what the two parties intended to be sold or bought.

⁹⁹ Hec, op. cit., P60.

¹⁰⁰ *Scriven v. Hindley* [1913] 3 KB 564.

¹⁰¹ *Raffles v. Wichelhaus* (1864) 2 H & C 906. (it is an English case)

¹⁰² 1954 S.C. (H.L.) 43.

4.2. Error as to Quality of Item

When this kind of error is created the contract will be rendered as void, but the quality should be the substantial issue. In other words, to operate this error it should be proved that the contract is built or relied on the quality, and any error of the quality will affect the contract purpose.¹⁰³ Generally, error of quality is connected to misrepresentation because it is important to prove that the other party's error has been created by misrepresentation.¹⁰⁴ An example¹⁰⁵ of the connection between the error as to quality and the inducement of the misrepresentation is when a party bought jewellery which was meant to be an antique item, then it was discovered that the item was fake. It was held that the contract was void because the buyer had been mistakenly led to believe something by the seller. It would be imaginable that the contract might be treated as void even if the error was not induced by the seller's misrepresentation. It is suggested that the error as to the quality will not be considered as an operative error unless the contracting parties decided expressly or implied that the quality of the subject-matter of the item is an essential term of the contract, because in this case the error will go to the roots of the contract.¹⁰⁶ Practically, the error in quality could occur in different forms, it may occur as induced or uninduced unilateral, or bilateral, or mutual/common error. Also it may be stated that this sort of error could be involved in many bargains or deals like when the parties agree to deliver 24 carat gold and the seller delivered gold 18 or 9 carat which would involve an error in quality and price, since the quality of the gold would affect the prices seriously. It is difficult to prove this kind of error if it is connected to unilateral error because it will interest one party, but it would be easier in relation to mutual or common error as it would concern the two parties. According to the discussion during this research, it could be concluded that error in quality

¹⁰³ Reinhard Zimmermann, Simon Whittaker. *Good Faith in European Contract Law*. Cambridge University Press, 2000. P591. ISBN 0521771900. 9780521771900.

¹⁰⁴ *Menzies v. Menzies* (1893) 20 R (HL) 108.

¹⁰⁵ *Patterson v. Landsberg & Son* (1905) 7 F 675.

¹⁰⁶ J M Thomson, *op. cit.*, P143.

which is caused by misrepresentation by the other party does not need to be substantial and is not demanded to be connected to the root of the contract.¹⁰⁷

4.3. Error as to Price

Error as to price occurs when the parties have a dispute with regard to the price of the articles they contracting on in a contract. According to the Sale of Goods Act,¹⁰⁸ when the parties do not mention the price or the means of settlement, the solution will be derived from the implied conditions of deals between the parties. But if there is no way to do that, the court is authorised to enforce a specific price based on the reasonability which can be established on the principle of the unjust enrichment. This principle prevents a party to enrich at the expenses of the other, and if this happens, the enriched party might be required to pay *quantum meruit*. This principle was implemented in *Sword v Sinclair*¹⁰⁹ when the agent of the company offered the tea at a much lower price than it should be, and the offeree had accepted this. It was held that the offeree acted in bad faith because the reasonable price of tea in the market was higher, and based on that the offeror was not liable for delivering the tea to the offeree. In another case¹¹⁰ when the parties mistakenly bear different ideas about the price of the cattle, the seller intended the price to be decided upon to the quality which was higher than what the buyer thought. Here, the buyer envisaged a price different to the seller; under this case there was no contract which demanded the restitution to the situation before the contract. As consequence the buyer was asked to pay the level of the market price based on the unjust enrichment rules. In a similar case¹¹¹ of the measurement units and the prices (per foot) were argued, that is both parties put different prices in their minds according to their understanding of (per foot). One of

¹⁰⁷ Atiyah, Adams, MacQueen, op. cit., P45.

¹⁰⁸ The Sale of Goods Act 1979. Section 8 (1).

¹⁰⁹ (1771) Mor 14241.

¹¹⁰ *Wilson v. Marquis of Breadalbane* (1859) 21 D 957.

¹¹¹ *Stuart v. Kennedy* (1885) 13 R 221.

them thought that lineal foot¹¹² is the reference and the other thought that the square foot¹¹³ is the reference which resulted in serious differences between the evaluated prices by the two parties. Here the contract was void because there was no consensus, but the buyer was asked to pay according to the market prices.

It is clear that the case here is connected to the contract formation, because when the parties bear different ideas about the price or how to evaluate it, it means that there is no *consensus in idem*. Despite this case, and the decision of considering the contract as void, in *Seaton Brick and Tile Co v Mitchell*,¹¹⁴ the error in price was the point of the dispute between the parties but it was held that the contract will not be reduced, this is despite the contractor having proved that his son mistakenly provided the price which was less than it was intended by the contractor. In *Margaret McLaughlin v The New Housing Association*¹¹⁵ the case of *Seaton Brick and Tile Co v Mitchell*¹¹⁶ was discussed as a unilateral error relying on the courts discretion, and considered it as a mutual error in *substantials* relying on Walker's book *The Law of Contracts and Related Obligations in Scotland* at paragraph 14.45 by another.

It is important to notice that the party who the makes mistake in selling or purchasing goods for too little or too much are not be eligible for protection from loss.¹¹⁷ In *Morrison v Boswell*¹¹⁸ the sale includes the seller who sold his items in cheaper price than they were in the market because of his own mistake with regard to the marketing knowledge. The same stand point could be derived from *Welsh v Cousin*¹¹⁹ where the court rejected the claim of damages because the tender decreased the price from 50 to 20 GBP without being affected

¹¹² A measure of one foot, in a straight line, along the ground.

¹¹³ The area of a square with sides of 1 foot (0.333... yards, 12 inches, or 0.3048 metres) in length.

¹¹⁴ (1900) 2 F 550.

¹¹⁵ (2008) A 770/06.

¹¹⁶ (1900) 2 F 550.

¹¹⁷ Walker, op. cit., P14.45.

¹¹⁸ (1801) Hume 679.

¹¹⁹ (1899) 2 F 277.

by any inducement from the other party. The same was followed in *Seaton Brick & Tile Co v Mitchell*¹²⁰ where the court decided that the contractor was liable for breaking the contract because he refused to implement it and he claimed that the price was much lower. It was held that he was not entitled because the mistake was established by him.

4.4. Error as to Identity of Parties

Error as to identity could be understood as being directly connected to the personal role of the contracting parties in implementing the contract. It means that the contract is built on a special qualification or characteristic of the contracting parties as a crucial point to conclude the contract. The leading Scottish case *Morrisson v Robertson*¹²¹ shows how the identity of the parties is important in regard to formation of the contract, because Morriison would not sell the cows to Telford if he did not pretend (fraudulently) that he was a son of Wilson and he was acting on his behalf. This made Telford seem like an agent of Wilson who dealt with Morriison on different occasions. Wilson's character is the core of the case, since he is known and trusted by Morriison which accepted to sell the cows on credit, but if Telford expressed his real identity Morriison might not have sold the cows. Here, the point is that Wilson was qualified to buy the cows on credit which were not available for another person (Telford). Based on that, it was held that the contract between Telford and Morriison is void, because Morriison entered the contract relying on essential error as to identity of the other contracting party. Built on that, Morriison had been entitled to reclaim his cows even after selling them to the innocent third party (Robertson) by Telford. In light of this case, it can be concluded that some contracts would not be created if specific persons are not the essence of the contract, such as the loans or credits contracts.

¹²⁰ (1900) 2 F 550.

¹²¹ 1908 SC 332.

Concurrently, in *Macleod v. Kerr*,¹²² which is mentioned below, despite the essential error connected to the identity, it was not held that the contract was void but voidable. This is because the error as to the identity was not the crucial point in the contract. The advertisement by Kerr was available to the public and not strictly for any specific character. As a clear conclusion, when the essential error as to identity occurs, this would prevent the contract to be formed. In this regard, J M Thomson argued that the cases of error as to identity (personal attributes) would rarely go to the root of the commercial contracts.¹²³ It is actually an arguable opinion since the identity of the person could be the main motive to enter many contracts which makes the error as to identity goes to the foundations of the contract. Many contracts could be built (especially recently) on the very special qualifications or skills attributable to person who is the object of the contract such as a footballer or an accountant or any other professional. It is not easy to ignore the fact that essential error based on the identity could occur regularly in many commercial contracts or bargains even without fraud or misrepresentation from the other party. This also may happen if the two parties enter the contract under the wrong impression that they are dealing with specific persons, companies, or their representatives and in reality, they are dealing with the wrong persons based on wrong thoughts in relation to the identity. If the court is convinced that the party in error considered the identity of the other contracting party material, this type of error would be operative.¹²⁴ It could be suggested that the error as to identity would not be restricted in induced error by the misrepresentation, but that it could be extended to include the uninduced error without involving the fraud or misrepresentation.

¹²² 1965 SC 253.

¹²³ J M Thomson, op. cit., P140.

¹²⁴ Gloag, op. cit., P443,444.

4.5. Error as to the Nature of the Contract

When it comes to this type of error, the discussion will go to the purpose of the contract. For instance, when the party thinks that he or she signs a tenancy contract and in fact it is a sales contract, or like the case when a party has signed a document which was thought to have been a will but in fact it was a document to transfer the title of his property instantly. This rendered the transfer of the title void.¹²⁵ Here, what can be noticed is that the law does not clarify the main lines to be routed when such cases occur. It means that the law should be supported by some clear rules to govern the case when the party claims that he or she signed a document that was not understood by the signers. According to Lord Watson, it is not enough for the party to rescind the contract if he pretends that he has misguided ideas about the nature of his obligation, unless the claimant can prove that his mistake was caused by misrepresentation, and here no matter what kind of misrepresentation whether fraudulent or not.¹²⁶ The discretion here could be partly right in some cases but it would not be correct in regard to all cases or situations. It is simply because the erred party should have the complete right to prove his error or to submit evidence to show that he made a mistake in regard of his or her understanding to the nature of the signed contract or deed. It can be imaginable that many people would sign documents by mistake without any inducing by misrepresentation of the other party. Moreover, the misrepresentation should not be the main point to be proved, because it is expected from the parties to misunderstand each other in regard of the contract purposes. For instance, one party intends to sell the property title and the other thinks that the offer was to rent it, or when one party thinks that he is signing a tenancy contract and the other party thinks he is signing sale contract by instalments. This indicates that there was no *consensus in idem* because the parties misunderstood each other.

¹²⁵ *McLaurin v. Stafford* (1875) 3 R 265.

¹²⁶ *Stuart v. Kennedy* (1890) 17 R 25.

In *Wardlaw v Mackenzie*¹²⁷ it is noticed that one of the essential rules under Scottish law that the *bona fide* third party was allowed to rely on *ex facie* valid deed and it would not be allowed for the signer to justify that there was no contract because there was no consensus between the parties. In *Ellis v Lochgelly Iron and Coal Co*,¹²⁸ there is a different attitude in this regard, stating that the third party who is *bona fide* is not allowed to rely on the cheque that is signed by error. The discussion with regard to *Wardlaw v Mackenzie*¹²⁹ and *Ellis v Lochgelly Iron and Coal Co*,¹³⁰ is not about the contract law improvement related to vital changes of the legal thoughts within the Scots law, but about the circumstantial situations and details that are connected to every case separately which should be tested objectively by the court. This opinion does not mean that all the controversial decisions of the courts are due to differences that occur from one case to another. It could be connected to the various understandings from one judge to another. In contrast, the English contract law allows the party to rely on *non est factum* - to be discharged from the legal liability of *ex facie* valid document/deed where there are a third party's rights involved in the contract. This can happen if the signer proves that the deed he intended to sign was fundamentally different from what he already signed mistakenly and the mistake he made was not created by his fault only.¹³¹

Now, owing to the understanding of error as to the nature of contract, it is understood that if the party signed a deed or a document that differed from what he or she intended to sign, and where the signatory discovers the error, there is a right for reducing the contract even if this mistake is not induced by the other party. The point that could be raised here is about the principle that says; to reduce the contract it needs to prove that error is induced by the other party, which is different than the previous attitude that raised discussions with

¹²⁷ (1859) 21 D 940.

¹²⁸ 1909 SC 1228 at 1282.

¹²⁹ (1859) 21 D 940.

¹³⁰ 1909 SC 1228 at 1282.

¹³¹ J M Thomson, op. cit., P143.

regard to the discrepancies between the courts' decisions and the legal structures of the different cases. In the same time it could be said that there is no problem to reduce the contract or deed if there is uninduced essential error when the implementation causes serious loss for the erroneous party even without being induced by the other party since the error was proved.

Section 5: Unilateral Error Induced by Misrepresentation of the Other Party

When error whether in motive or in transaction is established on the inducement of misrepresentation by the other party, the party who is induced has the right for reduction.¹³² Actually, these cases and their rules are developed and influenced basically by the misrepresentation rules under the English law;¹³³ furthermore, the Scots contract law uses many English precedents and references to interpret the legal effects of the cases that occur with regard to unilateral error,¹³⁴ as well as the other categories of error. It is noticed that not all the cases of the induced unilateral error are void. The judgment could be that this kind of error is voidable. In *Macleod v. Kerr*¹³⁵ 'A' wanted to buy the car from 'B;' A introduced himself to B as C. After that he bought the car from B and took the registration book from B and paid him money by stolen cheques. A sold the car to D by claiming that he was B (the original owner). When all this was discovered the police repossessed the car from D but it was held that the car should stay with D because the contract between A and B was voidable not void. It has been seen that if the error is not substantial, the consent will not be broken or destroyed unless the error involves fraud,¹³⁶ this could be noticed above in regard of the error as to the subject matter, price, identity, quality of the subject matter, and the nature of the contract.

¹³² Rahmatian, op. cit., P40,41.

¹³³ Rahmatian, op. cit., P40.

¹³⁴ Elspeth Christie Reid, D. L. Carey Miller. A mixed legal system in transition: T.B. Smith and the progress of Scots law. Edinburgh University Press. 2005. P152. ISBN 0 7486 2335 3.

¹³⁵ 1965 S.C. 253.

¹³⁶ Hec, op. cit., P60.

Section 6: Misrepresentation

Misrepresentation or misstatement is the twin of error and it is connected with it in many ways. Many cases of error rely on misrepresentation when it comes to the categories of error. Misrepresentation occupies significant space in the doctrine – if there is any – under Scottish law of contract. Misrepresentation is quite comparable to what has been seen under the English contract law, but with less independent cases and academic argument which affects the depth of the discussion. That is to say, misrepresentation under Scottish law of contract followed the track of the English law of misrepresentation in many cases and opinions. Sometimes it can be found that this area is better investigated and clearer than under English law, and *vice versa*. There is a very thin line with regard to fraud and its relation with misrepresentation. It is worth noticing that there is a tendency from the Scottish scholars or writers to approach fraud more towards misrepresentation to be closer than what is considered by English law scholars or writers.

According to Prof Joe Thomson¹³⁷ the operative misrepresentation needs to be based on inaccurate statement of fact, and this statement would be made or released during the negotiations, inducing the other party entering the contract, and the statement being material, which means that the misrepresentee would not have entered the contract without this statement. In other words, this statement should be enough to convince any other reasonable person under reasonable situation to enter the contract. At first sight, this definition seems very similar to the English practical definition of operative misrepresentation, but in fact it is not. The reason behind this brief conclusion is connected to what Prof Joe Thomson has mentioned with regard to the inaccurate statement of fact as one of the factors of the operative misrepresentation. It can be noticed that in English definition, it uses false statement of fact,¹³⁸ not inaccurate statement, as it uses in the

¹³⁷ Joe Thomson. Misrepresentation. S.L.T. (N). 2001. P279.

¹³⁸ J. Cartwright, Misrepresentation (London, Sweet and Maxwell, 2002) P1.

Scottish definition. The core issue is to say that there is a difference between an inaccurate statement and false statement, the first one means imprecise, inexact. The second one means misleading or deceitful.¹³⁹ In other words, the operative misrepresentation is when the misrepresenter or his or her representatives release a statement that is untrue and connected to current or past fact presented before the contract is concluded, and this was a base to induce the other party (a misrepresentee) to enter the contract with the misrepresenter. It is worth mentioning that the misrepresentation that has been made by the misrepresenter should be the only reason behind the conclusion of the contract, but it should have enough influence to do so.¹⁴⁰ It has been noticed that in *Attwood v Small*,¹⁴¹ despite the exaggerated (untrue) statement that has been released in regard of the mine profits for the buyer, it was held that there is no misrepresentation because the buyer did not rely on the exaggerated statement to enter the contract, but he entered the contract relying on his expert's opinion who evaluated the situation erroneously.

It is noticed that the Insurance law does not distinct between the kinds or the levels of misrepresentation. In other words, all sorts of the misrepresentation would be treated on the same judgement, no matter if the misrepresentation was fraudulent, negligent, or innocent.¹⁴² Under this case the insurer has the right to cancel or rescind the contract, no matter whether the misrepresentation was significant or insignificant (small or big).¹⁴³ For the misrepresentation to be operative, or actionable to be considered for the vitiating elements a misstatement is required, whether innocent, negligent or fraudulent.¹⁴⁴ It would be concluded that the Scottish definition of the misrepresentation is not settled, especially in regard of the sorts of the misrepresentation.

¹³⁹ English Dictionary. Webster's Reference Library. Geddes & Grosset. Concise Edition, New Edition. 2008. P117.

¹⁴⁰ Rahmatian, op. cit., P41.

¹⁴¹ (1838) 6 Cl & Fin 232.

¹⁴² Freshfields Bruckhaus Deringer. Insurance and reinsurance news. July 2007. P2.

¹⁴³ Soyer, op. cit., P9.

¹⁴⁴ MacQueen, op. cit., P14.

Until the end of 19th century, in Scotland, the courts did not used to deal with misrepresentation inducing the contract as a ground of claiming damages unless the misrepresentation had been made fraudulently. This treatment continued in the same track despite the law in England which included the negligent misrepresentation to constitute a ground of claiming damages except when the inducer or the misrepresenter submitted an acceptable reason that he or she had a reasonable view for believing that the statement or the fact which have been presented was right. Nevertheless, this rule has been changed to follow the English path in Scotland by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73)s.10 (1), which provides that the misrepresentation whether based on fraud or negligence will establish a damages claim. Fraud is connected to the dishonest representation, or it could be said it is part of the misrepresentation especially if it is made intentionally.¹⁴⁵

6.1. Lies and Misrepresentation

Telling lies is considered as a misrepresentation, and deception is considered as a fraud¹⁴⁶ which has been described as a lie.¹⁴⁷

6.2. Misrepresentation and Silence

In general, it could be said that silence is not counted as a misrepresentation. In other words, misrepresentation would not be established by silence. Despite this general fact there are different situations that could form a ground to consider silence as a misrepresentation. If the seller failed to explain the real situation of the sold items that appear as an antique, but in reality they are not.¹⁴⁸ It was held that this is a misrepresentation. Some even went further to consider the half truth as a

¹⁴⁵ <http://fds.oup.com/www.oup.co.uk/pdf/0-19-.P6826867-X.pdf>. Accessed at 11/8/2008.

¹⁴⁶ MacQueen, op. cit., in Forte, op. cit., 5-37. P3.

¹⁴⁷ McBRYDE, op. cit., P325. Para14-11.

¹⁴⁸ *Patterson v. Landsberg* (1905) 7 F 657.

misrepresentation, like when the party keeps silent in regard of the incomplete statement despite of its misleading indication. This situation has been reflected when the party ignored to read a substantial part of the document, which led the other party to sign it.¹⁴⁹

There is another case where silence could lead to a misrepresentation. That is when some changes have been created before the conclusion of contract; in this situation the party who stated the “original statement” would be asked to inform the other party about the new changes that could give false impression.¹⁵⁰ This case had been reflected in *Shankland v Robinson*¹⁵¹ when the seller did not inform the buyer about the new changes with regard to the machine legal status, where the seller stated that the government will not take over the machine, but he kept silent in regard of the new change that is the government had “plans to requisition the machine”. It was held that the contract is void because the parties should disclose any changes happened before the contract conclusion, to keep the truth of the original representation. Under English law, a similar case was established in *Spice Girls Ltd (SGL) v. Aprilia World Service (AWS)*¹⁵² where Spice Girls Ltd entered a contract with Aprilia World Service to fund a trip for Spice Girls Ltd which was expected to make promotional activities for the defendant in return. The defendant did a mistake in regard of the Spice Girls number at the time of contracting, where the defendant thought that the members of the team are five, but in fact they were just four of them. It happened that before the contract Ms Halliwell (Ginger Spice) informed her colleagues in the Spice Girls group that she would be leaving the team before the contract’s conclusion. The Spice Girls group (plaintiff) had known about this fact which became a mistake of the defendant but they did not mention for the defendant about this. The court held that the Spice Girls group was liable for damages because of the misrepresentation according to section 2(1) of Misrepresentation Act 1967, which does not apply in Scotland.

¹⁴⁹ *Couston v. Miller* (1862) 24 D 607.

¹⁵⁰ MacMillan, Lambie, op. cit., P89.

¹⁵¹ 1920 SC (HL) 103.

¹⁵² [2002] EMLR 27, CA.

On the other hand, it was considered as a unilateral mistake of the defendant. The court decided that the conduct of the Spice Girls was a misrepresentation that induced the defendants to enter the contract. It was obvious that despite the previous knowledge of the Spice Girls that Ms Halliwell decided not to join the group in this tour, but they kept silent which made the defendant believe that there were still five members. The court had considered that when the four members of the group did not disclose the fact that the fifth member confirmed her leaving as a 'partial non-disclosure' or 'half truth'.¹⁵³ It can be noted that silence here is playing a crucial role in establishing misrepresentation, which means that silence itself can be considered as misrepresentation or can be counted as a factor of making misrepresentation. The Spice Girls band did not act and they did conduct in material way, but just they kept silent which induced the other party to enter a contract with them. So here, silence can establish misrepresentation as it was held in this case. It is in general a very rich case that includes many different perspectives; it includes the effect of change of circumstances making a statement untrue,¹⁵⁴ non-disclosure, misrepresentation, half truth, fraud, damages, and silent misrepresentation as results of unilateral mistake.

Under this category there is another similar situation connected to the non-disclosure of the material facts. This situation was reflected in *Gillespie v Russel*¹⁵⁵ where the future tenant did inform the owner of the coal mine that he discovered that the mine contained a special valuable kind of coal. The owner brought an action against the tenant trying to finish the tenancy agreement when he discovered this fact. It was held that the tenancy agreement was valid, because the tenant concealment of the information was not considered as a

¹⁵³ *Spice Girls Ltd (SGL) v. Aprilia World Service (AWS)*. [2002] EMLR 27, CA. 238-239.

¹⁵⁴ Smith, Keenan, op. cit., P736.

¹⁵⁵ (1856) 18 D 677.

fraud. Similarly, the English law of contract does not recognise the duty of disclosure as a general rule.¹⁵⁶

Two situations would be excluded from the previous disclosure rule. The two cases are well established under the English law of contract,¹⁵⁷ as well as under the Scottish law of contract, where the disclosure would be demanded in the insurance contracts. The insured party should disclose all the material facts for insurer party. The same duty would be required with regard to the contract where there is a fiduciary relationship between the contracting parties. This is required under Scottish law of contract¹⁵⁸ as well as under the English law of contract.¹⁵⁹ The case under the Islamic law of contract is totally different. Under Islamic law the seller has to disclose the defect in the sold item, if he did not disclose the defect, this would be considered as a misrepresentation (*taghreer*). *Taghreer* or misrepresentation is very strictly impermissible or prohibited (*haram*), and if the contracting parties did not disclose the defect on the contracting time, the contract would be void.¹⁶⁰

6.3. Distinction between Misrepresentation and Statement of Opinion

As in English contract law, the concept of misrepresentation in Scots contract law is distinct from the statement of opinion.¹⁶¹ It is held that when 'F' bought the car from 'S' who said that the car was in good running, but F came back after 7 days because the car was broken. Under this case the statement of S was considered as an opinion not a misrepresentation that could entitle F to reduce the contract.¹⁶² The same situation occurred

¹⁵⁶ *Ward v. Hobbs* (1878) A.C. 13.

¹⁵⁷ *Soyer*, op. cit., P9.

¹⁵⁸ *MacQueen*, op. cit., in *Forte*, op. cit., 5-37. P14.

¹⁵⁹ *MacIntyre*, op. cit., P157.

¹⁶⁰ *Hayder*, op. cit., P191.

¹⁶¹ *MacQueen*, op. cit., in *Forte*, op. cit., 5-37. P19.

¹⁶² *Flynn v. Scott* 1949 S.C. 442 (O.H.).

in *Hamilton v Duke of Montrose*¹⁶³ where the statement was released in regard of the land capacity of a specific number of livestock. It was held that the statement would not be considered as misrepresentation, because it was released as mere opinion. In general, as a mere opinion, even if it is proved as a misleading or incorrect statement it will not be considered as a misrepresentation.¹⁶⁴

6.4. Misrepresentation, Different Remedies

It has been stated by the majority of the consultees that the innocent partner cannot rescind the contract without a court order.¹⁶⁵ This could be logical opinion especially when it is known that misrepresentation and fraud are not easily proved, and in addition to the complexities, that the interests of third parties should be protected. This means, there is no automatic termination of the partnership contract due to discovering misrepresentation and fraud case.¹⁶⁶

6.5. Negligent Misrepresentation, Non-fraudulent misrepresentation

The House of Lords¹⁶⁷ states that negligent misrepresentation could be attributed to claiming damages if it causes financial loss. This is regardless of the existence of the contract between the adviser and his advisee, that is to say, the adviser is expected to have special experience that motivates the advisee to trust his abilities. In this case the adviser is committed to take care about the interest of the advisee since he knows that his opinion will affect the decision of the advisee, no matter if there is a fiduciary relationship between the two parties. Furthermore, in another case¹⁶⁸ it was held that since the misrepresenter released a statement that was vital to the contract, and pretended to be a knowledgeable.

¹⁶³ (1906) 8 F 1026.

¹⁶⁴ *Brownlie v. Miller* (1880) 7 R. (H.L.) 66

¹⁶⁵ The Law Commission and the Scottish Law Commission. (LAW COM No 283), (SCOT LAW COM No 192). Partnership Law. Report on a Reference under Section 3(1)(e) of the Law. Commissions Act 1965. November 2003. P135. 8.118

¹⁶⁶ *Ibid*, P137.8.127.

¹⁶⁷ *Hedley Byrne v. Heller*. [1964] AC 465.

¹⁶⁸ *Petroleum Co v. Mardon* [1976] QB 801; 2 All ER 5

His special experience makes him responsible to take reasonable measures to make sure that his representation is accurate. As a conclusion of his representation, the other party was induced to enter into the contract. Based on that, it was held that he was responsible for damages as he was involved in a negligent misrepresentation. When the misrepresentation arises negligently, this may establish an action of damages.¹⁶⁹ The court held that the party who suffered capital losses had the right to recover the losses, because they entered the contract under the negligent misrepresentation.¹⁷⁰

An interesting opinion/discretion has arisen in regard to dealing with the fraudulent misrepresentation in same level as with the negligent misrepresentation; that is to say, both categories should not be treated in the same remedy or in the same level. One of the raised reasons is that the measure of damages is different under the two sorts of misrepresentation, because under the fraudulent one, the misrepresentee would be enabled to recover all the loss that he suffered from the transaction including the unforeseeable losses. But it is not the case when the misrepresentation is negligent, because the misrepresentee can be allowed to recover the foreseeable losses that could be evaluated reasonably and were triggered by the misstatement.¹⁷¹

6.6. Innocent misrepresentation

If the misrepresentation is made innocently,¹⁷² it actually means that the party makes the misrepresentation honestly or in good faith without knowledge that he or she is making a misrepresentation. In other words, the parties release the statement or conduct they believe is the truth. Based on that, the innocent misrepresenter should have reasonable ground to

¹⁶⁹ Lord Justice Clerk, Lord Hamilton, Lord Marnoch. Second Division, Inner House, Court of Session. *Hamilton and others v. Allied Domecq Plc* [2005CSIH74] A283/01. Para [50]. <http://www.scotcourts.gov.uk/opinions/2005csih74.html>

¹⁷⁰ Ibid.

¹⁷¹ Joe Thomson. Misrepresentation. S.L.T. (N). 2001. P281.

¹⁷² *Lees v. Todd* (1882) 9 R 807.

justify his or her belief.¹⁷³ The induced party (misrepresentee) has the right to seek the reduction of the contract.¹⁷⁴ This situation had been reflected in *Ferguson v. Wilson*¹⁷⁵ where Wilson published an advertisement asking for a person to enter with him in a business partnership. Ferguson answered Wilson's advertisement and started negotiations with him; they reached an agreement which was implemented by both to establish a business partnership. After six months, Ferguson brought an action against Wilson to reduce the agreement claiming that he entered into this agreement by an essential error. Ferguson claimed that the error was induced by Wilson's false statement in regard of the profits and his financial and business situation. It was held that the agreement would be reduced despite the fact that it was no evidence had been presented to approve that the misstatement had been fraudulent. In general the misrepresentee also has a right to seek restitution with regard to the price, but this can be applied when there is a possibility of *restitutio in integrum*.¹⁷⁶ *Restitutio in integrum* comprises the restoration of the subject-matter as it was before the contract creation.¹⁷⁷ But if *restitutio in integrum* is impossible, there is no room for claiming damages,¹⁷⁸ but there may be overlapping claims in delict.¹⁷⁹ As a general rule, the innocent misrepresentation does not create the right for the misrepresentee to ask for damage.¹⁸⁰

6.7. Fraudulent Misrepresentation

It is worth noting Lord Herschell,¹⁸¹ who started his definition of fraudulent misrepresentation by defining fraud, which according to him must have some factors that the party would be expected to be involved in. Built on that, to decide that the fraud is

¹⁷³ Thomson, op. cit., P 297.

¹⁷⁴ *Lees v. Todd* (1882) 9 R 807.

¹⁷⁵ (1904) 6 F. 779.

¹⁷⁶ *Western Bank v. Addie* (1867) 5 M (HL) 808.

¹⁷⁷ *Boyd & Forrest v. The Glasgow and South-Western Railway Co.* 1915 S.C. (H.L.) 20.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Henderson v. Merritt Syndicates Ltd* [1995] 2 AC 145, 193 (HL).

¹⁸⁰ *Manners v. Whitehead* (1898) 1 F 171; 36 Sc LR 94; 6 SLT 190.

¹⁸¹ *Derry v. Peek* (1889) 14 App Cas 337.

created, the party must know that the representation is false (does not believe it is true), and the carelessness involved in the contract if it is released falsely or truly. The same rule would be applicable for the statement of half truth. In other words, when the party intended to say part of the material fact to make another statement misleading for inducing the other party would be considered as a misrepresentation.¹⁸² Furthermore, for the fraudulent misrepresentation to be established two factors must be available, that is to say, it should be shown that the statement is wrong and fraudulent.¹⁸³ It means that not all the lies or not every lie made by the parties could be considered as a fraudulent misrepresentation, because of that, some of the lies would not have a legal influence on the conclusion of the contract. For instance, when the owner of the flat in Edinburgh decided to sell his flat and presented an incorrect statement for the buyer about the number of residents in the city, and about the neighbour's behaviours – especially when these representations are an expression of opinion and not stating clearly the facts.¹⁸⁴ It is the same case when it comes to the wrong statement which was made truthfully, that is this kind of statement that would not be considered as a fraudulent.¹⁸⁵

It is noticed that the fraudulent misrepresentation could seek the damages without rescission. When Sim¹⁸⁶ expressed his will to sell his business, Smith, relying on the Sim's lawyer statement that he stated falsely that the business generates two times more than the reality. Despite of the fraud in this case, Smith sought damages without rescission, and his claim was supported by the court. In some cases¹⁸⁷ the reduction or rescission would be accompanied with *restitutio in integrum*, which is the case under the Scottish and the English laws of contract. It is worth noting that William W. McBryde, under a subtitle of

¹⁸² MacQueen, Thomson, op. cit., P172.

¹⁸³ McBRYDE, op. cit., P326. Para14-12

¹⁸⁴ *Brownlie v. Miller* (1864) 2 M. 848.

¹⁸⁵ *Brownlie v. Miller* (1880) 7 R. (H.L.) 66.

¹⁸⁶ *Smith v. Sim* 1954 S.C. 357 (O.H.).

¹⁸⁷ Lord Wright (at p. 76) of *Spence v. Crawford* 1939 S.C. (H.L.) 52.

fraudulent representation, suggested that some of the fraud examples occur if representors produce a false statement to maximise the profits and decrease the legal duties. This can also happen if the parties lie about foreign exchange rates, or if they misrepresent the situations around the agreement of the inheritance distribution, or if they misrepresent the nature of sub-lease.¹⁸⁸ An interesting idea that can be concluded from the abovementioned discussion, is to consider the fraud as misrepresentation. Because of that it is noticed that when he wrote the title he said fraudulent representation, but when he wanted to describe and define the fraud by the examples he kept stating “misrepresenting”. It comes to the mind that misrepresentation is used instead of fraud. It means that according to William W. McBryde, misrepresentation is one of the reflections of the practical fraud, and if there is no fraud there is no misrepresentation. This is because the author relied on fraudulent representation as a fraud and considered that misrepresentation of a statement is in fact a fraud.

However, when it comes to the damages as a remedy of the fraudulent misrepresentation, it is clear that there is an obvious and crucial difference between the treatment under the English and the Scottish contract law. Under English contract law, the damages could be applied even if the contract has not been concluded yet.¹⁸⁹ The justification stands behind this opinion simply because there would not be any loss as a result of contract, because the contract is not existent.¹⁹⁰ The case under the Scottish contract law is different because the damages remedy needs to be applied when the contract was concluded or created.¹⁹¹ Actually this applies to the fraudulent misrepresentation as well as to the

¹⁸⁸ McBRYDE, op. cit., 3rd Edition. P325. Para14-11.

¹⁸⁹ Elspeth Reid. Protecting Legitimate Expectations and Estoppel in Scots Law. Electronic Journal of Comparative Law, vol. 10.3 (December 2006). Report to the XVIIth International Congress of Comparative Law, July 2006. P10. <http://www.ejcl.org>

¹⁹⁰ MacQueen, op. cit., in Forte, op. cit., P14.

¹⁹¹ *Clelland v. Morton, Fraser and Milligan* WS 1997 SLT (Sh Ct) 57.

negligent form.¹⁹² Furthermore, the damages could be claimed by the misrepresntee when the misrepresentation is fraudulent or negligent.¹⁹³

In fact, the discussion about the misrepresentation concept under the Scots contract law could lead to gray areas. The most important area connected to misrepresentation and error together is the fraud concept which took deeper discussion in many places of the Scottish literatures in regard of contract law. Furthermore, sometimes it is found that the fraud definition is very well communicated and linked with the misrepresentation definition because in addition to the fraud definition as ‘a machination or contrivance to deceive by words or acts’. It has been described as a false representation of fact that has been made knowingly or carelessly without believing in its truth. In addition to the intention to convince the other party to rely upon the representation and eventually act upon it. As mentioned earlier, if there is an intentional dishonesty in the representation and it has been proved, the party who was affected by the fraud could reduce the contract. Furthermore, if any loss happened this may give the right for claiming damages. The same elements have been indicated in regard of the fraud definition in *Derry v Peek*.¹⁹⁴ Further conclusion could be derived from the Scottish law writers’ attitude in respect of dealing with the fraud as an alternative concept of fraudulent misrepresentation or as a parallel terminology. It has been argued that the unsubstantial error will not affect the consent unless it involves fraud,¹⁹⁵ instead of using the fraudulent misrepresentation as it is usually used. It is noticed that English law commission adopted similar attitude in regard of the fraud definition. It is suggested that ‘fraud includes any dishonest conduct which causes, or exposes another to the risk of, financial loss,’ it can be added that the lies could be included within this definition.¹⁹⁶

¹⁹² S 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

¹⁹³ Joe Thomson. Misrepresentation. S.L.T. 2001. P279.

¹⁹⁴ (1889) 14 App Cas 337. HL.

¹⁹⁵ Hec. op. cit., P61.

¹⁹⁶ The Law Commission (LAW COM No 276). Fraud. Report on a reference under section 3(1)(e) of the Law.

When it looks to the definition of misrepresentation, it is a false statement or conduct that induces a party to enter the contract and this inducement causes financial or economic loss. Here, false is parallel to dishonest and actually they are the key words of the misrepresentation and fraud, in addition to causing a financial or economic loss. This research tends to find that the fraud and misrepresentation are similar and could be mixed conceptually but the main difference that can be derived is that the fraud is an action of deceit by itself and the misrepresentation is a tool of the fraud. The point is whether the fraud could be innocent or not. It can be said that there is a possibility to consider the fraud as an innocent as well as misrepresentation. When the innocent misrepresentation is unintentional misrepresentation, theoretically this could happen with the fraud when the person does not realise that he or she is practicing fraud during the contracting process.

It is obvious that the crucial point in this relation is about the intention to deceive in both cases which leads to intentional fraud or intentional misrepresentation. But when it says representation alone it refers to demonstration or illustration but when it comes to misrepresentation, the meaning will be different. The approach would be about misleading and this means intentional deceit which will be “the essence of fraudulent misrepresentation”.¹⁹⁷ That could be modified to become fraudulent representation or misrepresentation. Here it can be followed by saying the intentional misrepresentation could give meaning of fraud but intentional representation does not mean anything in terms of misrepresentation or surrounding concepts. As an analytical conclusion, it could be said that when the party commits untrue representation intentionally to induce the other party to enter the contract, it will be a misrepresentation which will be an instrument of the action of fraud.

Commissions Act 1965. July 2002. Para 7.6. P58.

¹⁹⁷ PACE (Property Advice to the Civil Estate), Central Advice Unit. GACC (Guide to the Appointment of Consultants & Contractors). Edition 2 REV 2: JAN 2000. LE 1.6.2(S).

This viewpoint is certainly enlightened by the Scots legal background that has been explored during this research. It could be considered as a support of this researches discussion about the misrepresentation/misstatement. This means that the misrepresentation is a channel of doing fraud, or the misrepresentation is an acting tool of the fraud action. This takes the discussion back to the Islamic viewpoint in regards to the fraud; misrepresentation concepts which in many places do not differentiate between them.

Section 7: Conclusion

It can be said that the discussion of error or misrepresentation under Scots law of contract does not give an idea whether the concept of error has its own independent attitude or its clear borders from the English concept. It can be said also that the development of the concept of error under Scots law gives no clear idea that this concept will be able to develop independently far from the concept of mistake under English law of contract. Nothing can be said towards the clarifications of the error concept especially in respect of the case law. As it has been mentioned above in many places, it is found that in some occasions that one case law of error was used to explain different cases. Many cases have been borrowed from the English case law, which makes it difficult to examine whether the error concept is independent and can be treated independently when it comes to the implementation point. It happened that the same case was presented as a ground for different decisions. It is clear that the Scottish legal writers did not contribute markedly to stabilise a uniform understanding of the concept of error, as well as misrepresentation, fraud and fraudulent misrepresentation in particular. It is understood that the concentration of the Scots law of contract in regard of error is on the main categories of the substantial error but that these categories are not stable towards characterising the cases. It means that the error which could be considered an error as to quality may be considered as an error as

to subject matter in another case, or mutual error in some cases to be considered as a common error. In contrast, these various dictums could be evidence of the flexibility of the Scots doctrines of error or evidence of the discrepancy between some legal schools inside the Scots legal structure. This leads to more confused discussion in relation to the notions of discretions and their legal effects under the Scottish contract law. It could be noticed that the doctrines of error under Scots law are not distinguished clearly from one another, it can even be added that many error cases are mixed into each other. It has been shown that the remedies which could be missed or unreached within the normal legal solutions might be resolved by the equity instrument. Of course this doctrine is approached from the English law principle in this area as it has been mentioned earlier in the English mistake chapter.

When it comes to the comparative point of view, the error concept under the Scottish contract law is very similar to the mistake and misrepresentation under the English contract law.¹⁹⁸ But it does not mean that they are the same, or they bear the same mechanism to be understood or implemented. It has been seen that many different cases which are used in England are also considered by the Scottish courts when releasing decisions, which means that there are many shared areas that are well communicated and tied between the English concept of mistake/misrepresentation and the other cases of essential error under the Scottish contract law.¹⁹⁹ It is also worth mentioning that error under Scottish law of contract is still remarkably influenced by the Roman rules and divisions in the same area.

¹⁹⁸ Hec. op. cit., PP59, 74.

¹⁹⁹ William R. Anson et al. *Anson's Law of Contract*. Oxford University Press, 1998. P145.

Chapter Four

Introduction to Islamic Contract Law

Section 1: Introduction

This chapter deals with the concept of contract under Islamic law. The discussion concentrates on the Islamic legal system (*Sharia'h*) derived from the *Qur'an*¹ and *Sunnah*,² including the Islamic schools and doctrines where needed. In addition to the Ottoman Journal of Equity, this derived its principles including rules of contract from two Islamic resources (*Qur'an* and *Sunnah*). The *Qur'an* is the book revealed from God (*Allah*) showing Muslims how to organise their life, to include ethics, morals, behaviours, worships, in addition to commercial dealings. The general principles of the Islamic contract law contained in the *Qur'an* and indicated in many verses: “O you who believe fulfil all obligations”³ “You who believe, be faithful to your contracts,”⁴ and “Fulfil the covenant of God when you have entered into it, and break not your oaths after you have confirmed them.”⁵ As referred to above, the contractual relationships considered to be the most important subject in relation to commercial dealings.⁶ Theoretically, Islamic contracts implemented throughout most of the Arab and Islamic world, including Jordan, Palestine and Egypt, in the manner approved by the main Islamic doctrines. These doctrines divided

¹ The Holy Book of Islam That revealed from *Allah* (God) to his Prophet Mohammad (PBUH).

² According to the traditional Islamic understanding, *Sunnah* is the traditions of Prophet Mohammad (PBUH). Such as Speech, Acting, Behaviours, and Endorsement.

³ *Qur'an* 5:1.

⁴ *Ibid.*, 4: 33.

⁵ *Ibid.*, 16: 91.

⁶ *Hussein Hassan*. Contracts in Islamic Law: The Principles of commutative/Justice and Liberty. *Journal of Islamic Studies* 13:3 (2002). Oxford Centre for Islamic Studies. P251.

into four main schools,⁷ *Hanafi, Shafe'ai, Maliki and Hanbali*. Palestine, Jordan, and Egypt follow *Hanafi* School. Scholars (*Fuqaha'a*)⁸ consider both, binding divine sources of law (*Shari'ah*) and human interpretation of these verses (*fiqh*) when discuss the structure of the Islamic contracts.⁹ The written divine source considered as permanent framework giving basic background to the general legal aspects (legal principles); rules of justice, equity, what is permissible, etc., in addition to the interpretation of practical procedures which should be applied to individual implementation as new cases and situations arise.

Term of contracts or obligations in Arabic- Islamic context is (*Uqud*, sing, *Aqd*) which is derived from Arabic verb (*Aqada*), and means to tie or bind. Islamic contract has two basic elements to be entered or established; the first one is offer (*ijab*), the second one is an acceptance (*qubul*). These elements are also required in Scottish and English contract. The Islamic contract has also two main forms, oral, and written. Consideration under the Islamic contract law could be money, goods, or services.¹⁰ It is important to add that the contract become null or void when one of the parties dies before implementing the contract or before achieving its aims or purposes.¹¹ In addition, under Islamic law, the obligations have a divine power arises from its spiritual nature and which related to God (*Allah*). This means that if somebody undertakes mutual obligations in both forms, explicitly or implicitly, entering into commercial or social contract, these must correspond to the framework of Islam. They must be fulfilled faithfully,¹² thereby encouraging the people to implement their commitments toward others within their contractual relations. It should be

⁷ Lu'ayy Minwer Al-Rimawi. Company Lawyer. Relevance of *Shari'a* in Arab securities regulation with particular emphasis on Jordan as an Arab regulatory model. Publishers: Sweet & Maxwell Ltd ISSN 0144-1027. 2006.P1.

⁸ They are the Muslims religious specialists, they are known as *Ulama'a* also in Arabic language or *Fuqaha'a*. They are qualified people to interpret the *Qur'an* and *Sunna*, so they should have very high level of religious qualifications to be able for deriving the correct analogy from the both sources (*Qur'an* and *Sunna*).

⁹ Habib Ahmed. Islamic Law, Adaptability and Financial Development. Islamic Economic Studies. Vol. 13, No. 2, February 2006. p18-19.

¹⁰ Angelo M. Venardos. Islamic Banking & Finance in South-East Asia: Its Development and Future. Asia-Pacific Business Series Vol.3.2nd Ed. 2006. World Scientific. P50. ISBN 9812568883.

¹¹ Timur Kuran. Why the Middle East is Economically Underdeveloped: Historical Mechanisms of Institutional Stagnation. Journal of Economic Perspectives. Vol 18, Number 3, Summer 2004. P78.

¹² Hassan Salih Khalilieh. Islamic Maritime Law: An Introductio. Brill Academic. 1998. P59. ISBN 9004109552.

noted that the *Qur'an* states that promise must be fulfilled exactly in the same way as contract.

The term *Aqd* covers meaning of obligations under every field: religious obligations to God (*Allah*), marriage obligations, political relationships articulated and established in treaties, and commercial relationships between parties in a form of contracts.¹³ In fact, it is worth mentioning that marriage contract not indicated in the *Qur'an* under meaning of commercial contract. The *Qur'an* uses term *Uqdah*¹⁴ to indicate the marriage, not term used for the commercial contract, *Aqd*. This provides basis to distinguish between social relationships, and commercial transactions determining how to deal with each one of them. Various issues need to be clarified before starting discussion and explanation about the Islamic contract law. There are many specific terms used in the Islamic contract law, which derived from the Arabic language.

Section 2: Explanatory Terminologies

Discussion the Islamic contract law should be supported with explanatory terms related to meaning of most contracts in use to make them clearer. Most of these terms derived from the main nominate contracts which usually used and referred to by Muslim scholars under the Islamic commercial or trade traditions. These terms along with brief explanations will be presented below. Majority of the Muslim scholars, both early and contemporary, considered prohibition of *riba* and *gharar* as the main condition to consider the contract valid under *Sharia'h* law.

¹³ N. Mohammed. Principles of Islamic Contract Law', Journal of Law and Religion, 6 (1988). P 16-115.

¹⁴ *Qur'an* 1:235.

2.1. *Riba*

The *Qur'an* considers charging “*riba*” (usury or interest) as most vital practice to be avoided and prohibited under the Islamic commercial and financial contracts. *Riba* literally means increasing or growth. For a wider understanding - for the purpose of this chapter - the context of *riba* means all sorts of predetermined interest payable on any kind of loan.¹⁵ This would also be applicable to any other transactions that would generate any interest. According to banking terminology, interest means the premium that borrower must pay to the lender over the principal amount or an extension in its maturity.¹⁶ Any amount over the principal, big or small, in a contract is *riba*.¹⁷ To enhance a better understanding of the reasons for considering *riba* as being forbidden (*haram*) under Islamic law, it is worth mentioning that all the evidence has originated, and been derived from the *Qur'an*, which is the main Islamic legislative source. The *Qur'an* stands at the heart of the Islamic way of living, to include the way the Islamic economy operates. Therefore, as part of this evidence, there are Qur'anic verses that mention *riba* directly, for example: “Those who take *riba* (usury or interest) will not stand but as stands the one whom the demon has driven crazy by his touch. That is because they have said: ‘Trading (sale) is but like *riba*’. And *Allah* has permitted trading, and prohibited *riba*’. Therefore, whoever receives an advice from his Lord and stops, he allowed what has passed, and his matter is up to *Allah*. In addition, the ones who revert, those are the people of Fire. There they remain forever.”¹⁸ “And if the debtor is in a difficulty, grant him time till it is easy for him to repay. But if you remit it by way of charity, that is best for you if only you knew.”¹⁹ “O believers! Do not live on usury (compound interest) which compounded repeatedly. Have fear of Allah

¹⁵ Jahongirbek Burhonov. Islamic Banking Operations of Commercial Banks Under Islamic Banking Scheme(IBS) of Malaysia: The performance Analysis. A thesis submitted in partial fulfilment of the requirement for the degree of Master of Economics. Thammasat University, Faculty of Economics, 31 October 2006 P13.

¹⁶ Glossary of Islamic Banking Terminology.

https://www.ubl.com.pk/ameen/pdf/Glossary_Islamic_Banking.pdf/Accessed at 10/6/2007. p1.

¹⁷ Aurangzeb Mehmood. Islamisation of economy in Pakistan: past, present and future. Islamic Studies, 41:4 (2002). P688.

¹⁸ *Qur'an* 2: 275.

¹⁹ *Ibid.*, 2:280.

so that you may prosper.”²⁰ “That which you lay out for increase through the property of [other] people will have no increase with God; but that which you lay out for charity, seeking the countenance of God, will increase; it is these who get a recompense multiplied.”²¹

The above verses indicate that *Qur'an* prohibits *riba* through describing the people who deal with *riba*. This is to encourage people not to deal with *riba*. *Riba* is considered to be an unjust instrument to be used as part of the financial system by the people, since under *riba* the creditor asks for a fixed rate over the principal amount, even in case of losses.²² Of course, this could cause many problems with regard to the economic circle, such as making rich people richer and the poor people poorer. What could be understood from the spirit of the Islamic philosophy is that dealing with *riba* (interest) and its rate is one of the main reasons that could cause an imbalance within the financial system and with wealth distribution, which benefits rich people at the expense of poor people.²³ It could be said that any payment of *riba*, or any taking of it, as is the case in the conventional banking system, is clearly prohibited under Islamic law.²⁴ This is because trade usury is deemed to be unfair charges or gains. These are usually made by people (mostly traders or financial institutions) when exchanging the same sort of commodities but taking different quantities in return. This way applies to loans between banks and borrowers, as the loan contracts are about lending and borrowing money (the same type of commodities) but with higher money to paid in return by the borrowers (different quantities). Because of this it is clear that the *Qur'an* encourages trade but prohibits *riba*. From an economic standpoint, this means that trade involving a buyer and seller is viewed as just. The reason for this is the

²⁰ Ibid. 3:130.

²¹ Ibid. 30:39.

²² Mohamed Abdelhamid. Islamic Banking. Department of Economics, Carleton University, Ottawa, Ontario. September 9, 2005.P35.

²³ Ibid.

²⁴ Burhonov, op. Cit., P13.

parity of the arising return and the effort and time that the buyer used up in securing the goods for the seller.²⁵ This approach is clearly about using financial resources to activate economic sectors, and for there to be a sharing of the losses and profits together. This would enhance economic activities by encouraging people to implement real investments within the community. This should give a chance for more people to be involved in the economic activities and achieve benefits from them.

It can be concluded that the contract is not valid if it contains *riba* (interest, usury);²⁶ in the other words, the Islamic contract or the transactions must be interest free. Nevertheless, it should be noted that in Palestine, Jordan and Egypt the contract that contains *riba* is not deemed null, void, or even unenforceable, but rather it is considered, under legal practice, to be a valid legal contract. This is despite the fact that the civil laws implemented in these countries are based on *Sharia'h* law. The Jordanian Civil Code states that “If a profit in excess of securing the lender's right is stipulated in a loan contract, such stipulation shall be void without invalidating the whole contract.”²⁷ Moreover, the same code, at Article 636 forbids interest in a loan contract. Nevertheless, Jordanian Commercial law does allow interest in loans.²⁸ The Central Bank of Jordan determines contractual rates of interest, regardless of the limit, which are valid in Jordan.²⁹ The Egyptians engage in a similar legal practice. Palestine is very similar to Jordan and Egypt, where *Majallat Al-Ahkam* (Ottoman Journal of Equity)³⁰ the Palestinian civil law considers *riba* as *haram* (impermissible or forbidden).³¹ Actually the Journal is still valid law, and is being implemented, without any

²⁵ Spremann, op. cit., 2004.

²⁶ Tarek S. Zaher and M. Kabir Hassan. A comparative Literature Survey of Islamic Finance and Banking. Financial Markets, Institutions and Instruments, V.10, No 4, November 2001 New York. University Salmon Centre. Published by Blackwell Publishers. P158.

²⁷ Article 640. Jordanian Civil Code.

²⁸ Jordanian Commercial Law. Act Number 12. 1966.

²⁹ Al-Rimawi, op. cit., P10.

³⁰ “The *Majallah* is assortment of legal system based on the *Hanafi* School connected chiefly to business dealings. The courts used the *Majallah* as a direct for their judgements and were not obliged firmly to track it in their rulings..” *Habib Ahmed*, op. cit., p7.

³¹ *Majallat Al-Ahkam Al-Adliyyah* (Ottoman Journal of Equity). Article 34.

modifications by other legislative acts, within the Palestinian territories. Nevertheless the practice of interest persists. This leads to a conclusion that there is a contradiction between theory and application.

2.2. *Gharar*

According to the most traditional understandings, *gharar* means dishonesty, hazard, danger, risk, ambiguity, and uncertainty.³² It means any factor of complete or extreme uncertainty in any dealing or contract about the subject of contract or its price, or mere speculative risk. It leads to an unjustified loss by one party and an unwarranted enrichment of another.³³ *Gharar* is also considered as one of the most strictly prohibited elements in the Islamic financial and commercial system in *Sharia'h*. Some have justified the prohibition of *gharar* under Islamic law as *gharar* stands against moral security.³⁴ Actually, the idea of *gharar* relates to the problems of information irregularity and ethical hazard in conventional contract theory dealing with principal-agent affairs.³⁵ In other words, it means cheating through the lack of awareness of knowledge by one or more parties in the contract. The cheating is based on concealing the information or the improbability of delivery with the view of causing damage. The existence of such (*gharar*) action means that one party does not know who is going to lose or profit from the deal as the profit or loss is a result of the uncertainty.³⁶ More precisely, it also means that exposure to unnecessary risks and hazards in the course of dealing with a transaction is as a result of uncertainty about the price, quality, quantity of the counter-value, date of delivery, ability of the buyer or the seller to accomplish the obligation, or vagueness of the stipulations of

³² Islamic Financial Services Industry Development, Ten-Year Framework. A joint initiative of the Islamic Research & Training Institute/ Islamic Development Bank , Islamic Financial Services Board and Islamic Research & Training Institute. Pxii. <http://www.sbp.org.pk/ibd/2006/Ten Year Master plan.pdf>. Accessed at 16/6/2007.

³³ Glossary of Islamic Banking Terminology. Op. cit., P2.

³⁴ *Tariq*, op. cit., P11.

³⁵ Burghardt, Fuß, op. cit., P11.

³⁶ N. Comair-Obeid, The Law of Business Contracts in the Arab Middle East. London. 1996. P55.

the transaction; so, exposing each of the two parties to needless risks.³⁷ Any type of contract which is unbalanced in favour of one party, at the expense and undue loss to the other, is classified as *gharar*.³⁸ It could be concluded that the idea of the balance of profits which is required by Islamic ethics, is the basic principle behind the prohibition of *gharar* in Islamic law.

Despite all that has been said previously about *gharar*, its understanding by scholars and its definitions, there are some other facts and findings that will be explained later in the chapter on the Islamic concept of error. In this later chapter it will show that there is another understanding that is a materially different, giving a wider concept of *gharar*, that has not been discussed above. *Gharar* is very close to the concepts of fraud or misrepresentation under English and Scottish contract law. It might even be considered to be a parallel concept for misrepresentation, as will be critically discussed later in this thesis. Following the traditional understanding among scholars that consider *gharar* the second important elements that affects the contract as uncertainty, speculation, and excessive risk, and in the view of the author of this thesis, also includes misrepresentation and fraud. This means that there is no valid contract if it contains *gharar*.³⁹

However, according to the conventional standpoint, three conditions should be available for *gharar* to nullify the contract:

1. *Gharar* must be major and must affect the essence of contract,
2. The contract that is affected must be a commutative financial contract (*aqd muaawada*), and ,

³⁷ Islamic Financial Services Industry Development, op. cit.

³⁸ Burhonov, op. Cit., P23.

³⁹ Zaher, Hassan, op. cit., P158.

3. *Gharar* must affect the subject matter of the contract.⁴⁰

There are three main types of *gharar*:

1. The contract is of non-existing commodities,
2. The contract is for undeliverable goods, and
3. The contract is for unknown commodities in the sense of substance that is recognized, but stays unidentified as to specific type or quantity.⁴¹

Many different nominated contracts can be found under Islamic commercial and financial law, but due to the limited scope of this thesis, this section concentrates on the most popular contracts under Islamic law, which will be discussed below.

Section 3: Nominated Contracts

3.1. *Ijarah*

As a general concept *ijarah* means leasing⁴² and hire; but in particular, *ijarah* is the sale of the usufruct.⁴³ This means that the owner of the property has the complete right to receive or to ask for a benefit in the form of financial return ‘*manfa’ah*’, which originates from his ownership, by allowing others to use his assets or equipment.⁴⁴ This means giving a right to use an item in exchange for rent. However, the implicit practical meaning of *ijarah* in an Arabic context is the right of usage and enjoying the advantages and the right to generate the profits out of leasing the assets and properties that are owned by financial institutions or banks that operate according to the Islamic financial contract system. Of course, the same concept would be applicable with regard to individuals. *Ijarah* contracts are

⁴⁰ Ina Burghardt & Carolin Fuß. Islamic Banking Credit Products in Germany and in the United Kingdom International University Schloß Reichartshausen. European Business School, Department of Finance, Working Paper Series, No. 12-2004. October 2004. P11.

⁴¹ Spremann. op. cit., P5.

⁴² Sabahi. op. cit., P of Abstract.

⁴³ Sherman Jackson Plenary: Basics of Islamic Law, the Sources of Islamic Law University of Michigan, Ann Arbor. P26.

⁴⁴ Serlah, a Special Report for Client Sofraslan. Loon Gandree Grecht Sanwalte. Vol 2/2002. May- June 2002. P13.

comparable to the English term leasing.⁴⁵ Under Islamic contract law the contract of *ijarah* also refers to a finance lease⁴⁶ and an operating lease, but under Islamic finance the essential concept of this contract refers to the operating lease of land, equipment, buildings or other facilities to customers in exchange for a previously agreed rent.⁴⁷ It is an agreement of leasing where the financial institution (usually a bank) provides the customer a specific equipment or assets for production, and then the customer leases it back for a specific period. Under this type of contract, the customer avoid spending the initial capital. Under some situations, the customers will be able to possess the equipment at the end of the contract period.⁴⁸ It is called *ijarah wa iqtina'a* under the Islamic term that is parallel to the English term of to lease to own, but of course without any involvement of *riba*. The basic structure to this contract is built on leasing an asset by a special agreement between the clients and the financial institution. This asset must be leased for a certain time in order to open the way for the customers to have the possibility or the right to ask for ownership to be transferred at the end of the *ijarah* agreement.⁴⁹

Furthermore, to add more factors for enhancing the permissibility of *ijarah*, the rented properties must enjoy all the productive features for a long period of time. The parties would be required to agree in advance the amount of the lease payments or instalments. This would protect their agreement from speculative operations.⁵⁰ The contract of *ijarah*, under Islamic financial terms, keeps all the rights and obligations of ownership in the hands of the financial institution (the lessor).⁵¹ It is used traditionally by financial institutions in many Islamic and Arabic countries around the world to provide funding for

⁴⁵ *Abdelhamid*, op. cit., P55.

⁴⁶ North Carolina Banking Institute, op. cit., P36.

⁴⁷ Glossary of Islamic Banking Terminology, op. cit..

⁴⁸ *M. Kabir Hassan*, Issouf Soumaré. Financial Guarantee as innovation tool in Islamic project finance. November 2005.P4-5.

⁴⁹ Chiara Segrado. Islamic microfinance and socially responsible investments. Case study. Meda Project. Microfinance at the University, University of Torino. August 2005.P10.

⁵⁰ *Ibid*.

⁵¹ Islamic Financial Services Industry Development, op. cit.

the customer's major purchases.⁵² This contract works when the financial institutions purchase an asset and then lease it to the customer in return for a rent payment.⁵³ It is important to note that this contract follows a very popular Islamic financial pattern, which is widely adopted by banks which deal with Islamic system of funding long term assets.⁵⁴

3.2. Murabahah

Murabahah is cost-plus sales;⁵⁵ This is a contract between the customer and the financial institution that entitles the institution to purchase goods, and sell them again to the customer on deferred instalments, without the need for an interest bearing loan.⁵⁶ Here, when the banks undertake the transactions of *murabahah*, they actually play the role of traders.⁵⁷ The process of this contract starts when the customers request a tangible asset from a supplier, which is then sold to the financial institution. Subsequently the customer pays the money to the institution on a deferred sale basis with a mark up representing the institution's profit, which is called a cost-profit.⁵⁸ This contract is a sale transaction with a specified profit margin, where the institution funds the purchasing operation for the benefit of the customer by an indirect way. Customer should pay money back in an agreed time in instalments, or in a lump sum. It should also be noted that the financial institution bears all the risks related to the ownership of the goods until they are delivered to the customer.⁵⁹

⁵²North Carolina Banking Institute, op. cit., P36.

⁵³ Ibid. P3.

⁵⁴ *Mohammed Obaidullah*, Islamic Risk Management: Towards Greater Ethics and Efficiency. International Journal of Islamic Financial Services, Volume 3, Number 4. P12.

<http://www.isu.ac.ir/Farsi/Academics/economics/edu/obaidvol3no4.pdf>. Accessed at 10/1/2007.

⁵⁵ Jackson, op. cit., P26.

⁵⁶ *Hassan*, Soumaré, op. cit., P4-5.

⁵⁷ *Kamran Akhtar*, ACA. Islamic Economic System, Issues in Islamic Banking. The Pakistan Accountant Vol. 38, Issue4. July-August 2005. P26.

⁵⁸ Segrado, op. cit., P10.

⁵⁹ Islamic Financial Services Industry Development, op. cit.

The above method of financing used to be one of the most important tools used extensively by Islamic banks for funding commodity trade by acquisition of long-term assets.⁶⁰ In other words, the financial institution (the bank) gives the client a loan secured on commodities.⁶¹ There are some conditions for a correct *Murabahah* contract:

A- The bank (the seller) keeps the ownership rights of the commodity during the time of negotiation until the end of the contract.

B- The bank should give the client the exact cost of the commodity, and define the amount of profit in advance. That must add to the aggregate costs.⁶²

C- The contract with all its transactions must be free from usury (*riba*).

D- The bank (the seller) must disclose or discover any defect in the sold goods and inform the buyer.⁶³ As explained above impliedly, *murabaha* is one of the most famous Islamic financing forms, it is also applicable to financing commercial transactions which require short-term liquidity instruments, and it can also be used for long-term investments.⁶⁴ As stated by Tariq, "It is estimated that 70 to 80 percent of total Islamic financing is afforded by this arrangement (*murabaha*)."⁶⁵

3.3. *Istisna'a*

According to the *Istisna'a* type of contract, a manufacturer enters into an agreement with a customer to produce a manufactured commodity, at a definite price, on a set date in the future. The commodity has to be exactly specified in advance. Under this contract it is not necessary for the price to be paid in advance. It may be agreed between the parties to pay

⁶⁰ *Obaidullah*, Islamic Risk Management. op. cit., P11.

⁶¹ *Ahmed Gaber*. Risk Management: Islamic Financial Policies. Case study of Farmers' Commercial Bank. Paving the Way Forward for Rural Finance, An International Conference on Best Practices.P6. http://www.basis.wisc.edu/live/rfc/cs_06a.pdf. Accessed at 2/6/2007.

⁶² *Abdelhamid*, op. cit., P37.

⁶³ *Gaber*, op. cit., P6.

⁶⁴ Islamic finance. Shariah, Sukuk and securitisation.

<http://www.yasaar.org/pubs/20177%20Islamic%20finance%20client%20note1.pdf>. P7. Accessed at 17/6/2007.

⁶⁵ *Tariq*, op. cit., P17.

the money by instalments, or partly up front, with the balance to be paid later.⁶⁶ This contract is used primarily to finance long term and large transactions.⁶⁷ However, it should be noticed that the asset transacted by the parties is, on many occasions, not yet existing. That means that the contractor or the manufacturer is ordered by the customer to produce or build a specific asset for the purchaser before receiving the value.⁶⁸ It could be said that *istisna'a* is a type of manufacturing contract within the categories of contracts of sale. This contract has gained its legitimacy from the fact that it was extensively practiced in the Islamic commercial tradition as long as many of the other Islamic contracts referred to in this chapter. The *istisna'a* contract requires the following conditions to be met in order to come into existence. Firstly, the price must be fixed or specified in advance with the parties' consent. Secondly, the commodity should be well described, also in advance. In addition, when the manufacturer or contractor starts the work, it is then no longer possible for any party to revoke or terminate the contract⁶⁹ without the consent of the other parties.

3.4. Mudarabah

Mudarabah is an Islamic partnership.⁷⁰ It could be said that *mudarabah*, is a profit and loss sharing Islamic contract⁷¹ under participating or trust finance. Under this contract, the first party, usually a bank, provides the money or capital, and the other party is concerned with the physical efforts under the contract, such as the labour, or management and experience.⁷² This contract is also one of the most popular Islamic contracts as it provides the proper framework to conduct financial mediation.⁷³ It is clear that this contract involves a combination of capital and labour, with the Islamic expression for the capital

⁶⁶ Islamic Financial Services Industry Development, op. cit.

⁶⁷ North Carolina Banking Institute. Islamic Finance: A Growing Industry in the United States. Vol.10. 2006. Kimtacy.doc.2/21/2006. P60.

⁶⁸ *Abdelhamid*, op. cit., P44.

⁶⁹ *Ibid*.

⁷⁰ *Sabahi*, op. cit., P of Abstract.

⁷¹ *Hassan, Soumaré*, op. cit., P4-5.

⁷² *Sabahi*, op. cit., P of Abstract.

⁷³ *Dahlia El- Hawary, Wafik Grais, Zamir Iqbal*. Regulating Islamic Financial Institutions: The Nature of the Regulated. World Bank Policy Research Working Paper 3227. March 2004.p10.

representative (the financier) being (*rabbulmal*), with the other party (the entrepreneur or manager) being referred to as (*mudarib*).⁷⁴ Nevertheless, one of the most important rules governing this contract is that any “financial loss is borne only by the financier.”⁷⁵ In this situation no profit will be paid to the party who provides the labour for his labour or experience.⁷⁶ The main aim of this contract is the investment of funds according to *Sharia’h*, which is based on the concept of sharing both the profit and loss.⁷⁷ It could be added that a *mudarabah* is a financing instrument “where not all the parties need to invest capital, but the business is free to solely contribute labour”.⁷⁸ At the end, it is worth mentioning that there are two types of *mudarabah*. The first type is a restricted *mudarabah*, where the party who contributes labour, the borrower, should be committed in specific activity of work which is determined in advance. The second type of contract is referred to as an unrestricted *mudarabah*, which allows the party who contributes the labour to be free to practice any type of activity which they are going to be investing in.⁷⁹

The *Sharika* or *musharakah* contract is a kind of partnership or company under its modern definition, but it could also refer to ownership in general.⁸⁰ In addition it could be described as a type of financial participation through a joint venture between two parties, when they combine either the capital or the physical labour through sharing the profits and losses, but on the basis of pre-agreed ratios.⁸¹ This means that the partners are liable only up to the amount that they contributed in the project or the investment.⁸² Hence, “*musharakah*

⁷⁴ Faith and Finance: A Place for Faith-Based Economics. (A preliminary statement from Muslims and Christians in Manchester). Manchester Center for Public Theology, MCPT.
http://www.wtf.org.uk/documents/FAITHSANDFINANCE-Nov06_000.pdf. P17. Accessed at 13/7/2007.

⁷⁵ Ibid.

⁷⁶ Gaber, op. cit., P7.

⁷⁷ Abdel-Fattah A.A. Khalil, Colin Rickwood and Victor Murinde. “Evidence on agency-contractual problems in *mudarabah* financing operations by Islamic Banks.” *Islamic banking and finance: new perspectives on profit sharing and risk*, Cheltenham: Edward Elgar. 2002).P37.

⁷⁸ Burghardt, Fuß, op. cit., P20.

⁷⁹ Gaber, op. cit., P7.

⁸⁰ Jackson, op. cit., P26.

⁸¹ Spremann, op. cit., P6.

⁸² Tariq, op. cit., P7.

examples include equity participation in partnerships, limited companies and co-operatives.”⁸³ It could be said that a *musharakah* contract is similar to the usual concept of a partnership agreement, where the parties pay capital according to their specific capability and all the partners have an equal right to manage their shared investment in proportion to their contributions.⁸⁴ It should be noted that under a *musharakah*, the profit, which derives from the shared investment, should be distributed upon a pre-agreed profit sharing ratio. However, the situation is different regarding a loss which should be shared on the basis of equity participation.⁸⁵

3.5. Salam

Salam is a forward purchase⁸⁶ or an advance purchase.⁸⁷ In this contract there is a cash loan, which should be delivered immediately to the borrower after meeting the conditions of this contract, with the repayment being in commodity form.⁸⁸ *Majllat Al-Ahkam Al-adliyyah* considers this contract to be similar to the sale contract in terms of its basic elements, *ijab* (offer) and *qubul* (acceptance),⁸⁹ with its ability to defer the delivery of the goods to a future time. This future time, as specified by *Majallat Al-Ahkam* is to be one month, unless the parties agree otherwise.⁹⁰ *Majallat Al-Ahkam*, at Article 387, says that to consider *salam* as being a valid contract, the consideration (money) should be paid at the time of the agreement between the parties *fi majlis ala’qd* (at the same meeting). Otherwise, the *salam* would not be considered to be a valid contract. This contract was created to meet Muslims’ public needs within the Islamic community,⁹¹ as it is more supple than other possible options. Farmers prefer the *salam* contract as it enables them to have

⁸³ Spremann, op. cit., P6.

⁸⁴ Tariq, op. cit., P8.

⁸⁵ Serlah, op. cit., P3.

⁸⁶ Hassan, op. Cit., P286.

⁸⁷ Serlah, op. cit., P13.

⁸⁸ Gaber, op. cit., P8.

⁸⁹ *Majallat Al-Ahkam*, op. cit., Article 380.

⁹⁰ Ibid.

⁹¹ Vogel, Hayes, op. cit., p148.

cash in hand. The repayment of the borrowings usually takes place after harvest time, the harvest having been financed by the funds.⁹² The main aim of *salam* is to help small farmers to meet their needs to finance their crops and to manage their families' affairs until the time of the harvest.⁹³

Nevertheless, it is noticeable that modern books and references are often concerned much more with the sale contract⁹⁴ when they need to draw analogies. The reason behind this is summarized by the Qur'anic verse (2: 275): 'God has made sale lawful and usury unlawful'. This made the *bay'a* (sale) to be the original contract type and *riba* (usury) the arch antitype of Islamic contracts. *Majallat Al-Ahkam Al-Adliyyah* specified 302 articles which deal with the sale contract.⁹⁵ *Al-majalah* considers the sale contract to be the core of all other contracts. One might ask why this chapter does not describe this contract in detail. As all the contracts that are mentioned in detail with all their rules are governed by the sale contract. Therefore, all the conditions, elements, basis, factors, formations and so on that are contained by all the contracts in this chapter come from the sale contract. Anyone who would like to know about the sale contract can find its reflections in all the other contracts.

A contract in Islamic law is an agreement between two or more parties. According to *Majallat Al-Ahkam Al-Adliyyah* (the Ottoman Journal of Equity), the contract is the obligation and the undertaking of the contractual parties to make specific action with a positive connection between the offer and acceptance.⁹⁶ In fact, the main factors contained in the Islamic contract are similar to those in English and Scottish contract law.⁹⁷ This will be critically analysed in more depth in the following sections. It should be noted that

⁹² *Gaber*, op. cit., P8.

⁹³ *Abdelhamid*, op. cit., P41.

⁹⁴ N. J. Coulson. *Commercial Law in the Gulf States: the Islamic Legal Tradition*. London, 1984. P20.

⁹⁵ *Majallat Al-Ahkam*, op. cit., Articles 101-403.

⁹⁶ *Majallat Al-Ahkam*, op. cit., Article 103.

⁹⁷ *Asia-Pacific Business Series*, op. cit., P50.

Islamic law usually considers and deals with sale as the typical contract under the Islamic legal system.⁹⁸

Sharia'h has most of the modern elements and concepts of contract law, such as freedom of contract. This is made clear by the various rules that govern the contracts.⁹⁹ As an example, loans contracts are required to be written, and documented by special procedures according to the *Qur'an*.¹⁰⁰ Many contracts that require written evidence for enforcement purposes or for approval by the witnesses in relation to the oral contracts.¹⁰¹ The Qur'anic instructions (verses) establish the record of Islamic contract by adult eyewitnesses and documentation by the official officer (*katebuladl*) who is responsible for documentation procedures. This seems to be like the documentation departments in modern courts. Again prices, parties, quantity, quality, payment, periods and so on, need to be explicitly written.¹⁰²

It should be noted that the *Qur'an* respects the contract and puts it in a very high level (sanctity). This is clear since the *Qur'an* considers a contract as a metaphor for building a strong relationship with God. This is strong evidence that contractual relations under Islam have been given a high importance and respect.¹⁰³ It is useful to add that "In *Sharia'h* law there is a recognized rule articulated in a maxim (the contract is the law of the contracting parties)",¹⁰⁴ which in Arabic is, *Al-aqd Shari'at Al-muta'aqideen*. This makes an

⁹⁸ Aḥmad Ibn Muḥammad al-Ḥāwī. The Function of Documents in Islamic Law: The Chapters on Sales from Ḥāwī's Kitāb Al-shurūḥ Al-Ḥāwī. Edited with an Introduction and notes by Jeanette A. Wakin. Suny Press. 1972. foot note 1, P38. ISBN 087395100X.

⁹⁹ Paul R. Powers. Intent in Islamic Law: motive and meaning in medieval Sunni Fiqh. Brill Academic. 2006. P100. ISBN 9004145923.

¹⁰⁰ *Qur'an* 2:282

¹⁰¹ Karla C. Shippey. A Short Course in International Contracts: Drafting the International Sales Contract. 2nd Ed. World Trade Press. 2002. P122.

¹⁰² Powers, op. cit., P100.

¹⁰³ Nicholas Capaldi. Business and Religion: A Clash of Civilizations. M & M Scrivener Press. 2005. P204 ISBN 0976404109.

¹⁰⁴ *Fath el Rahman Abdalla "el" Sheikh*. The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia. 2nd Ed. Cambridge University Press. ISBN 0-521-81772-2.

interrelation with other modes, whereby an obligation might generate,¹⁰⁵ since *sharia'h* encourages Muslims to respect the contract through the divine order, which says “O you who believe fulfil all obligations.”¹⁰⁶ Moreover, the *Qur'an* adds a very strong meaning for contract sanctity when it says; “Fulfil the covenant of God when you have entered into it, and break not your oaths after you have confirmed them.”¹⁰⁷

The concept of contract in the Islamic legal system relies on essential ideas of offer, acceptance, the capacity of the parties and consideration. All of these are also required in English and Scottish contracts, with the sole exception of consideration, which is not part of the Scottish legal system. The capacity of the contracting parties is one of the most important elements for the validity of an Islamic contract. This means that under an Islamic contract no person can conclude valid bargains without having both physical and intellectual maturity, which is translated as *Bulugh* or *Rushd* in Arabic. When the consideration of either or both sides of a bargain is indeterminable *jahala* (ignorance), the contract will not be enforceable, e.g. payment of a fixed price for a diver's catch next day.¹⁰⁸

“The consideration must also be legal. For example, one cannot pay for goods with wine.”¹⁰⁹ While some of the possible considerations are not allowed under the Islamic legal system, e.g. wine, they are legal under the English or Scottish law. However, illegal drugs and brothel services are forbidden under the three legal systems considered and may serve as an example for the above rule. No items or activities forbidden in the *Qur'an* must form any element of a contract. Therefore, a contract dealing with the following items or activities would be considered illegal: “They ask you concerning wine and gambling. Say,

¹⁰⁵ *Habib Ahmed*, op. cit., p2

¹⁰⁶ *Qur'an* 5:1

¹⁰⁷ *Ibid*, 16:91

¹⁰⁸ *Sabahi*, op. cit., P5.

¹⁰⁹ Nicholas HD Foster. *Islamic Commercial Law (II): An Overview, Some principles and rules*. University of London. Barcelona. January 2007. P13.

in them is great sin, and some profit for men, but the sin is greater than the profit.”¹¹⁰ “O you who believe! Intoxicants and gambling, dedication of stones and divination by arrows are an abomination of Satan's handiwork. So eschew it all so that you may prosper. Satan's plan is to excite enmity and hatred among you, with intoxicants and gambling and hinder you from the remembrance of God and from prayer. Will you not, then, abstain?”¹¹¹

The extent of the freedom of the parties in relation to contracts under their different classifications depend on the close interaction of all these factors.¹¹² Islam gives a wide freedom to create contracts, assuming that the stipulations of the contract are not in contravention to the *Sharia'h*, and approves any agreement based on the permission of the parties involved.¹¹³ It does not mean that *Sharia'h* has to be explicitly associated with an unrestricted freedom of contract, since a breach of the Islamic prohibitions can never be valid.¹¹⁴ Islamic law does not recognise the Western approach of liberty of contract, but it provides an appreciable measure of freedom within certain fixed contract categories.¹¹⁵ The parties have the complete and wide freedom to create any type of contract without any special conditions, as long as the parties are committed to avoiding *riba*, *gharar*, and other forbidden items and activities. In other words, according to the *Sharia'h* the independence of the will of the parties is subject to the Islamic prohibition that connected to *riba*, *gharar*, or dealing in definite products specifically forbidden in *Qur'an*. As a result, the concept of freedom of Islamic contract operates to the extent that it does in common law except that independence of will needs to adapt to the requirement to comply with Islamic restrictions. Taking this into account, one is free to enter into any type of contracts.¹¹⁶ It can be concluded that the *Qur'an* does not restrict the freedom of any one to enter any kind of

¹¹⁰ *Qur'an* 2: 219.

¹¹¹ *Ibid* 5:90.

¹¹² *Habib Ahmed*, op. cit., P2.

¹¹³ *Burhonov*, op. Cit., P17.

¹¹⁴ *Hassan*, op. Cit., P261.

¹¹⁵ *Foster*, op. cit., P4.

¹¹⁶ *Hisham. M Ramadan*. *Understanding Islamic Law from Classical to Contemporary*. Rowman Altarmira. 2006. P.103. ISBN 0759109915.

contract. However, the contract should be entered without causing any harm to the other. As in other legal systems around the world, the Islamic legal system puts in many conditions as to form in order to build the contract. To say that the contract is formed or valid, the consideration¹¹⁷ should be definite at the time when the parties agree to create the contract. This means that the contract without *Iwad* (consideration) is void. This is found in the English contract law.¹¹⁸ Nevertheless, this doctrine does not exist in Scottish contract law.¹¹⁹ To say that there is a property contract, the property should be existing, and the seller cannot sell property if he does not the legal right to do that. This means that for there to be a valid property contract; the seller should be the possessor. In this context, it should be mentioned that the sale operation is generally understood as an exchange of property, and not of promises or obligations. Conditional or option contracts are generally prohibited.¹²⁰

One of schools of Islamic jurisprudence, the *Hanafi*,¹²¹ in justification of this position, quotes the Prophet *Mohammad* as having said, “no sale that has an additional stipulation attached to it is permissible (*la bay‘bi-shart*)”.¹²² At the same time, some of the Islamic scholars¹²³ said that it is not true that the Prophet forbade these transactions. They argue that what the Prophet forbade was the contract containing two additional stipulations: he allowed the contract comprising one such stipulation.¹²⁴ These views however do not rule

¹¹⁷ As in English common law, consideration may consist of money, goods or services. For further information, see Dennis J. Keenan, Kenneth Smith . English Law. 14th Ed. 2004.P268.

¹¹⁸ Keenan. op. cit., P268.

¹¹⁹ Hugh G. Beale, Et Al. Contract Law. Hart Publishing. 2002. P140.

¹²⁰ Frank E. Vogel. Islamic Contract, Commercial, and Financial Law. Islamic contract law. Harvard Law School. Zysow, aron. Res. Assoc., Islamic Legal Studies Prog., Harvard. Palnning Commettee for Joint Aals, American Society of Comparative Law and Law And Society Association Workshop on Islamic Law. p25.

¹²¹ It is belong to one of the four main Islamic Qiyas or Ijtihad (Analogy or discretion) schools or doctrines. “It is school of jurisprudence based on the teachings of Abu Hanifa.” (Nazzer Ahmad, Ph.D. Islam in Global History from the Death of Prophet Mohammad to the First World War. Xlibris Corporation. Vol.2. 2000. P380. ISBN 0738859664. and “ he established this school upon the rules of the interpretation developed by him, and he became one of the most highly acclaims scholars of his day.” Ramadan, op. cit., P.26.

¹²² Al-Sarakhsi (Hanafi jurist. d. 490 A.H.), *Al-Mabsut*, 30 vols. (Cairo: Sa‘ada Press, 1324 A.H.), vol. 13, p.13.

¹²³ This is the modern Islamic name of religious scholars nowadays.

¹²⁴ Shams al-Din ibn Qudama, *Al-Sharh al-Kabir ‘ala al-Muqni’*, published in the margin of Muwaffaq al-Din ibn Qudama, *Al-Mughni*. 12 vols. (Cairo, 1341 A.H.), vol. 4, pp. 49-51.

out the possibility of a sale contract with a stipulated option for either party or both in the *khiyar al shart* (option of condition) framework of the Islamic law of contracting.¹²⁵ For example,¹²⁶ in a contract of sale, a condition which was not necessitated by either the nature of the contract or habitual custom within a society, but give profit to the seller or to the buyer would make the transaction null and void. An example of this would be if a party sells a house, and puts a condition in the contract that obliges the seller to leave this house a month before the purchaser moves in.¹²⁷

Finally, it is clear that the legality of a sale contract containing only one irrelevant condition is accepted by a different variant of the first *hadith* (the speech of Prophet Mohammad). Appealing to this variant, the *Hanbali* jurisprudential school legists have created legal rulings which oppose those followed by the *Hanafis*,¹²⁸ when they dealt with sale contracts as being lawfully valid even through additional stipulations are attached to them. Consequently, conditions which are unrelated to major contracts that give favour for one of the transaction parties are sometimes permissible.¹²⁹ For example, if the buyer stipulated an added stipulation to his advantage like the shipping of the commodities or the styling of the cloth would be permissible.¹³⁰ It should be mentioned that *Majallat Al-Ahkam Al-Adliyyah* (Ottoman Journal of Equity) adopted the *Hanafi* jurisprudence, which has been implemented in Palestine, and was also implemented in Jordan and Egypt. However, as has been discovered by this research there are many main contradictions regarding the stipulation (*Al-shart*). This is even the case with regard to what the Islamic schools scholars claim in respect of the Prophet Muhammad *Hadith* (Speech). It has been found that there is another *Hadith* for the Prophet saying *Almuslimun inda shurutihim* (Muslims

¹²⁵ Mohammed Obaidullah. Financial Options in Islamic Contracts: Potential Tools for Risk Management J.KAU: Islamic Econ., Vol. 11, pp. 3-26 (1419 A.H / 1999 A.D). p6.

¹²⁶ These examples come according to Hanafi doctrine.

¹²⁷ Abu Bakr al-Kasani, *Kitab Bada'i' al-Sana'i' fi Tartib al-Shara'i'*, 7 vols. (Cairo, 1327-1328 A.H.), vol. 5, p. 169.

¹²⁸ *Arabi*, op. Cit., P55.

¹²⁹ *Ibn Qudama*, op. cit., PP49-51.

¹³⁰ *Ibid*, P50.

are bound by their stipulations). This means that the stipulations are allowed according to this *Hadith* (speech). Another notable point regarding this issue is that *Majallat Al-Ahkam Al-Adliyya* considered the stipulation as completely permissible in the contract.¹³¹ Here *Majallat Al-ahkam* has fallen into a clear contradiction because *Majallat Al-Ahkam* adopted the *Hanafi* doctrine, and this doctrine considered the stipulation as completely impermissible.

The *Qur'an* does not deal with the stipulation issue, despite many Qur'anic verses which discuss the issue of contracts. The argument of Muslim *Fuqaha'a* (scholars or jurists) is about the Prophet *Hadith* (Prophet *Mohammad* Speech) not related to the Qur'anic *A'ayat*, simply because it is not found in Qur'anic context as it mentioned earlier. The majority of the dealings finish with the payment of variable prices is not allowed in *Sharia'h*. Moreover, futures are completely impermissible in spite of their subject matter so no rights and obligations can be derived there from and there is no distinction whether these contracts are created with the function of assumption or for the reason of hedging.¹³² In fact most of the jurists have legalized definite contracts; *salam* (forward sale) which is mostly used for agricultural crops. *Salam* would be formed for example when the buyer pays the farmer in advance to buy the next year's orange crop.¹³³ However, the consideration to settle this contract should be paid in advance.

Islamic scholars (*Fuqaha'a*) like Imam Abu *Hanifa*, *Al-Shafi*, *Imam Ahmad* and some *Maliki* have distinguished between a contract and a promise. They consider that a promise is neither mandatory nor enforceable. This rule will, however, be different if the subject was with regard to the financial *murabahah* contract. Here the promise is binding as it is

¹³¹ *Majallat Al-Ahkam*, op. cit., Articles 186-189.

¹³² Response of Justice *Muhammed Taqi Usmani* to the author's query, published as an article "Futures, Options, Swaps and Equity Investments", *New Horizon*, June 1996, p.10

¹³³ *Subhi Mahmassani, al Mujibat wa al Uqud fi al Fiqh al Islami, Dar al Ilm li al Malayin*. Beirut, 1983. p327.

made conditional upon a performance of an obligation and in the case where the promisee has already incurred expenses on the basis of such a promise.¹³⁴ There is no restriction in *Sharia'h* on promises to make specific payments under a promissory note. However, there are customary judicial procedures that make it difficult for an investor to act against the holder of an asset if a promissory note does not exist.¹³⁵ It is worth mentioning that Islamic law also recognises the Bill of Exchange under the term *Saftaja* as an act of depositing a definite sum of money with another one for payment, to the advantage of the depositor or his representative or agent in a different country. This is permissible whether for fees or not.¹³⁶ In general, commercial papers such as cheques, promissory notes and Bills of Exchange are permissible and lawful types of authentication of a debt under *Saria'h* law.¹³⁷

As noted above, that for a contract to be formed the property or item must exist, but a contract of *Salam (Forward Deals)* is exempt from this rule, because the commodity does not yet exist when the finance is provided.¹³⁸ Many contracts are termed permissible (*ja`iz*) but essentially cannot be made prospectively binding. This is because counter values¹³⁹ in these contracts are not subject to being known and defined.¹⁴⁰ Generally, the contracting parties should make sure to ascertain that the subject and the prices of the sale are agreed, and are able to be delivered, in addition to specifying the categories and amounts of the counter values, the quantity, quality and date of future delivery, if it needed.¹⁴¹

¹³⁴ *Habib Ahmed*, op. cit., p13.

¹³⁵ *Suleiman Abd Dualeh*. Islamic Securitisation: Practical Aspects. Jersey ii-online.com, Ltd. Geneva, Switzerland & St. Helier, Jersey, Channel Islands. World Conference on Islamic Banking. July 8 9, 1998. p 7.

¹³⁶ Islamic Development Bank, Islamic Research and Training Institute Jeddah, Islamic *Fiqh* Academy Jeddah. 1st Ed. 2000. Resolutions and Recommendations of the Council of Islamic *Fiqh* Academy 1985-2000. P184.

¹³⁷ *Ibid*. P135.

¹³⁸ UNCTAD secretariat. Islamic Finance and Structured Finance Techniques: Where The Twain Can Meet. 29 May 2006. P12.

¹³⁹ The counter value here means the equivalent consideration of the subject matter of the contract, such as the amount of money or gold or silver whatever the kind of currency, to be paid for specific service or specific sort of goods or commodities.

¹⁴⁰ Jackson, op. cit., P25.

¹⁴¹ *Md. Abdul Awwal Sarker*. Islamic Business Contracts. Agency Problem and The Theory of The Islamic Firm. International Journal of Islamic Financial Services Vol. 1 No.2. P2.

It should be noticed that the contract provisions in the Islamic legal system concentrate on business contracts, in particular, sale contracts, more than on any other type of contract. This means that the Islamic legal system is concerned more about the contracts that derive from and organise trade and business relations. Islamic business contracts can be classified into three broad categories. Firstly business contracts based on Direct Financial Accommodation or *Uqud (contracts) al-Ishtirak*: Profit Sharing Principle, Profit Loss Sharing Principle, and Output Sharing Principle. Many of these contracts, such as *Mudarabah*, *Ijara* and *Musharakah*, have already been mentioned at the beginning of this chapter. In addition, they also include the *Musaqah*¹⁴² and *Muzara'ah* contracts,¹⁴³ which were well known both before and during the *Ottoman* era. These latter two types of contracts were mentioned in *Majallat Al-Ahkam Al-Adliyyah*,¹⁴⁴ but it is rare to find these types of contracts operating nowadays. Secondly business contracts on the basis of Indirect Financial Accommodation or *Uqud al-Muawadat*: Mark-up based Principle, Lease based Principle, and Advance Purchase Principle. All these business contracts have a general framework which is based on the generated funds of credit extensions. In other words, these contracts are managed in a fund through a third party by selling the products and arranging the reselling operation to the customers, together with a mark-up.¹⁴⁵ Thirdly, the other forms of permissible contracts such as: Direct Investment, Finance on Development Charge, Rent-sharing on the basis of construction/purchase of houses/flats, sheds etc. on a co-ownership basis.¹⁴⁶

¹⁴² In this contract the bank, supply farmers orchards, grounds, or trees for harvesting on crop partaking. (*Sarker*, op. cit., P3).

¹⁴³ This contracts between landlord of agricultural ground and a farmer for agriculture it in return of a proportion of its crop. (*Sarker*, Op. cit., P3).

¹⁴⁴ *Majallat Al-Ahkam*, op. cit., Articles 1431-1448.

¹⁴⁵ Vogel, op. cit., P3.

¹⁴⁶ *Sarker*, op. cit., P4.

In addition it is necessary to note the following points:

1. Generally, it is not allowed to exchange debt for debt, except at par.¹⁴⁷ This issue raises specific and important questions about cost and expenses. It could be said that the institutions that serve the debt can charge specific fees for any type of service in relation to the debt, which are commonly referred to as administrative expenses. The institute or the person who has spent effort, time and incurred expenses in the course of processing the debt has the right to charge fees against his services.¹⁴⁸
2. In general any legal deal requires instant virtual implementation.¹⁴⁹
3. It is forbidden to discount debts, especially to third parties.¹⁵⁰

The fundamental Islamic principles, to including those underpinning contractual relations, depend on obedience to (*Allah*) God, and entail respect for the principles of Islam. Islamic precepts and morality affect the rules in a detailed, substantive way which is quite different in nature from the general philosophy underpinning Western legal systems.¹⁵¹ It should be admitted that a comprehensive Islamic legal system with all its rules is not applied in a pure way in many Arabic and Islamic countries, to include Palestine, Jordan and Egypt. There is therefore a form of contradiction between theory and application in these countries.

The provisions of the Islamic legal system dealing with contracts mostly concentrates on business and commercial relations, with more of a focus being made on the financial deals. The main derivative framework dealing with financial contracts derives from sale contracts. The basic issue facing Islamic contracts is with regard to *riba* (Usury or Interest), which is completely prohibited. However there seems to be a lack of

¹⁴⁷ Vogel, op. cit., P 25.

¹⁴⁸ Islamic Development Bank, op. cit., P101.

¹⁴⁹ Vogel, op. cit., P25.

¹⁵⁰ Ibid.

¹⁵¹ Foster, op. cit., P6.

implementation of this point even in countries using the *Shari'ah* as their main legislative source, to include Palestine, Jordan, and Egypt. This issue would raise serious issues if these countries implemented the Islamic legal system fully in practice, to the extent that they have adopted it theoretically. However, since they are a part of the international economic system, they cannot ignore the fact that all the international trade and finance is controlled by a financial system which deals with *riba* normally and without any objection.

It might be asked, why *riba* is the most prohibited issue in the Islamic legal system, especially in the financial area. The answer to that would be that countries which completely adopt the Islamic finance model could ignore trading with the prohibited goods or commodities, such as, alcohol, pork, or whatever is prohibited by Islamic law as it is their choice to deal or not with these items. However, when the issue comes to the financial dealing, none of the Islamic countries would fully implement the Islamic principles for fear that this may impede inward trade or investment. However, countries which would like to adopt the Islamic finance model could deal with an interest free system if they were the funder in the financial contract. The problems arise if these countries need to be funded by one of the countries or financial institutions that deal with interest, which is legitimized and lawful in non-Islamic countries. It is very important to say that the Islamic legal system does not classify, or differentiate between, financial and commercial contracts, but deals with all of them under the same categories or classifications, which are the commercial categories. It is also clear that the Islamic law of contract is not articulated as a general theory of contract but as regulations for a variety of defined contracts.¹⁵²

¹⁵² Vogel, Hayes, op. cit., P97.

Section 4: Conclusion

To conclude, it could be stated that the principles are often drawn from the nominate contracts and that there is no general law of contract in the *Sharia'h*. The reason for this is that the jurists did not have the same unified discourse about contract. There was no explicit overarching general theory.¹⁵³ The jurists did not try to develop a clear meaning of a contract, nor clear formulation of a theory of contract. The centre of attention of a contractual agreement was “the object of obligation, the subject matter of the particular agreement, the action to be performed, not the obligation itself.”¹⁵⁴ Contract under Islamic law is very well organised, and has all the elements of the modern contract structure. Most of the contracts under Islamic law are derived from contract of sale. It can be concluded that the Islamic law of contract is very flexible and adaptable and it could work in any legal system as long as the contract does not involve *riba*, gambling, and *gharar* (fraud or misrepresentation). The subject matter of the contract must not include dealing with any harmful material or commodities.

Considering *riaba* and *gharar* as well as gambling, as the main factors to be avoided in Islamic contracts, means that any party can cancel the contract or the transaction if he discovered that the contract is involved in *riba*. This would be applicable whether the party was induced by the *gharar* of the other party, or if both parties were mistaken in this regard. The same can be said with regard to the gambling (excessive risk or uncertainty), where the party would be allowed to avoid or rescind the contract if he was induced to enter into it by the *gharar* of the other party. It is very sensitive to have proper understanding towards Islamic contracts as mentioned above, because any wrong practice or implementation would affect the formation or the existence of the contract. In taking

¹⁵³ Foster, op. cit., P6.

¹⁵⁴ Hassan, op.cit., P261.

murabahah as an example, if the seller charges any extra money as an arrear penalty would be considered as a breaking the rules of the Islamic contract law in avoiding *riba*, and the buyer would be permitted to cancel the contract when he discovered that he was misrepresented by the *gharar* of the seller, if the seller gave him misleading information with regard to the contract terms that considered the arrear penalty as allowed under Islamic law. This leads us to the next chapter of the concept of error and misrepresentation in Islamic contract law, where we will discuss the concepts of error and misrepresentation deeply.

Chapter Five

A Comparative Critical Analysis of the Concept of Error and Misrepresentation in Islamic Contract Law

Section 1: Introductory to the Origins and the Roots

Some important questions need to be taken into consideration when study the concept of error under Islamic contract law. Answering these questions helps to understand the concept of error within the Islamic contract law. First question to be asked is whether Islamic contract law recognizes unified concept of error, and secondly, what are the main underlying issue of the concept of error under the Islamic jurisprudence. Thirdly, there is also a need to explore the influence of the Qur'anic in establishing the concept of error. Fourthly, there is a need to clarify whether variation, in Islamic law, made between error and misrepresentation.

The concept of error under the Islamic contract law has not been defined clearly as in English and Scottish contract law. Muslim scholars and jurisprudential literature have also not established or developed definition of the concept of error. This applies to the early and modern Islamic literature. This does not imply that the concept of error is not existed under Islamic contract law; but to confirm that there is no clear definition and obvious distinction between the concept of error and some other concepts, misrepresentation, fraud, and deception. Understanding the concept of error under the Islamic contract law requires an extensive searching to explore the Arabic language connotations in this area.

To indicate English and Scottish concept of error, different Arabic words are used. According to one of the well known English-Arabic dictionaries, mistake or error in Arabic

means *khata'a* or *ghalat*.¹ A detailed classification of mistake or error can also be found using terms *khata'a* and *ghalat*.² However, this is not the case with the *Qur'an*. *Qur'an* does not use *ghalat* within its verses to indicate any meaning. However, one of the most prominent Muslim and Arab scholars in contract law, *Al-Sanhuri*, uses the term *ghalat* when he refers to mistake or error.³ *Al-Sanhuri's* use gains importance, as he is one of the most influential Arab/Muslim scholars who have remarkable contribution in comparing the rules of Islamic contract law to their Western counterparts; this appeared in the civil laws of many Arab countries.⁴ This issue is raised to introduce the confusions between the authors and scholars who discuss the concept of error.

As mentioned above, *ghalat* used by *Al-Sanhuri* to express the meaning of mistake or error in English contract law, despite his long and deep experience in Islamic contract law. As mentioned earlier in this thesis, *Al-Sanhuri's* experience expected to be derived from the *Qur'an*. As meaning of error or mistake, the *Qur'an* uses the term of *khata'a* which has its linguistic roots and branches in many verses.⁵ *Al-Sanhuri* would be expected to refer to the *Qur'an* when he indicated error, as he has distinguished contribution in explaining the Islamic law and its terms. The importance of the reference meant to be shown as an evidence of the differences between the terms used by the *Qur'an* and the terms used by Arab/Muslim law scholars to indicate the concept of error or mistake. The *Qur'an* meant to be the main resource of the Islamic law and the main background of correct usage of the Arabic language.

¹ *Ba'albaki*, op. cit.

² *Faruqi*, op. cit., PP254, 460.

³ *Al-Sanhuri*. *Alwasiet fi Sharhe lqanoun Al-Madani*, op. cit., P396.

⁴ It is clear in his books, but more obvious in his book under the topic of (*Masader Alhaq fil fiqh Al-Islami*) which means the resources of the right in the Islamic *Fiqh* (jurisprudence).

⁵ *Qur'an* 2:286, 4:92, 33:5.

Al-Sanhuri has established classifications of contract defects under Islamic law putting the duress, fraud, and finally error using (*ghalat*).⁶ *Ghalat* never been used by Muslim scholars before *Al-Sanhuri*. It is worth mentioning that *ghalat* as meaning of error is used in Arabic colloquial dialect. It is also worth mentioning that the laws of many Arab countries have used *ghalat* to mean error.⁷ The author of this thesis finds that all definitions of *ghalat* in most of Arab laws almost the same. This would be clarified when discuss the Jordanian, Egyptian civil laws, and the Draft of the Palestinian civil law.⁸

As the *Qur'an* is the primary resource of the Islamic law including rules of contract, this author finds that the *Qur'an* refers to error using term *khata'a* in three situations: In the first situation the *Qur'an* considers error as type of forgetting, which does not generate any punishment against the person who does it.⁹ In the second situation the *Qur'an* refers to error in context of mistaken or unintentional killing. In this case the *Qur'an* considers financial compensation as basic solution of the remedies as a result of the mistaken action.¹⁰ This can be considered, in context of contractual relationships, similar to mistake as to fact in English contract law,¹¹ which has been discussed in detail in chapter 2 of this thesis. The author sees that the approach of this error or mistake can be highly considerable with regard to contract, because understanding the *Qur'ans* should be taken comprehensively not separately. To do that, the understanding should be linked through the entire verses using method of *qiyas* (Analogy), this provides efficient, and clear understanding and interpretation.¹² Finally, the third context of error in the *Qur'an* is about

⁶ *Al-Sanhuri, Masader Alhaq filfiqh Al-Islami* (the resources of the right in the Islamic *Fiqh* (jurisprudence). The Islamic –Arabic Scientific Association. *Muhammad Addayah* Publications. 1955. P112.

⁷ Jordanian civil code, articles 151-156. See also Kuwaiti civil code, article 147-150. See also Egyptian civil code, articles 120-124.

⁸ It will be discussed further in chapter seven of this thesis.

⁹ *Qur'an* 3:285.

¹⁰ *Ibid.* 4:92.

¹¹ Mike Molan. *Cases & Materials on Criminal Law 3/e: Cases And Materials*. 3rd Edition. Routledge Cavendish. 2005. PP77. 78. ISBN:1859419356.

¹² Charles Kurzman. *Modernist Islam, 1840-1940: A Sourcebook*. Oxford University Press US. 2002. P185. ISBN:0195154681. For more details see: *Ruqaiyyah Waris Maqsood*. Islam. Heinemann. New Edition.1995. P84. ISBN:0435303198

differentiating between mistaken belief which can be forgiven and rectified, and the intentional behaviours which should be blamed.¹³ This approach is similar to intentional misrepresentation (fraud) under English common law.¹⁴ Furthermore, this case can be extended and cover many similar cases to include rectification, damages or compensation, under English and Scottish contract law as these terms traditionally linked to mistake or error.

To discuss the concept of error or mistake under the Islamic law thoroughly, this chapter will trace the approach of the Ottoman Journal of Equity¹⁵ discussing this subject. It is important to know that the Ottoman Journal is the first and the only formulated (codified) and organized civil law completely based on the Islamic doctrines or schools. For more accuracy, however, the Journal relies in most of its articles and materials on *hanafi* doctrine.¹⁶ This doctrine has been mentioned in chapter five of this thesis when discussed the Islamic contract.

The author would like to note that applying the objectivity in this research provide that the Ottoman Journal has not mentioned mistake or error under any of the used Arabic or terms, neither in colloquial (*ghalat*) nor in classical (*khata'a*), an exception to that, the Journal has mentioned error in one position within its articles, which will be clarified below. The author of this thesis will follow the implicit meaning of mistake or error within the Journal articles exploring probable indications within the comprehensive context. It is worth

¹³ *Qur'an* 33:5.

¹⁴ James Karp, Elliot I. Klayman, Frank F. Gibson. Real Estate Law, 5th Edition. Dearborn Real Estate Education. 2003. P203. ISBN:0793149568.

¹⁵ It calls *Majallat Al-Ahkam Al-Adliyah Al-Othmaniyah*, which is the civil code of the Ottoman Empire, this code is still applied officially in Palestine and affected many of the Arabic civil codes of the Arabic countries such as Syria, Jordan, Iraq.

¹⁶ The introduction of the Ottoman Journal of Equity. PP8, 9.

mentioning that the Ottoman Journal of Equity was written in Turkish language and translated to Arabic.¹⁷

Understanding the concept of error under the Islamic contract law needs careful and an accurate discussion, saying that is because the concept of error under the Islamic contract law, including the Ottoman Journal, is not identified or classified clearly as the case under English and Scottish contract laws. Dealing with this existed fact, in this part of this thesis, the attempt will focus on deriving meaning of error from the linguistic stand point, and then to explore the interpretations of the Ottoman Journal articles related to mistake or error, assuring that nothing has been found as directly indication by the Journal linked to subject of error.

The Journal uses different terms implying the concept of error or mistake and similar concepts and terms such as misrepresentation, fraud, deceive, and frustration. Seeking the accuracy and being precise, there is no consensus, among most of the Islamic resources and scholars including all the Islamic doctrines with regard to these concepts. Some Muslim scholars, both early and contemporary, use the same terms or expressions to indicate different meanings and connotations. For example, it is clear that particular scholar or author uses a word to mean misrepresentation, and the same word being used to mean error or fraud by others. In this part of this chapter the plan is to follow terms of the Ottoman Journal as the only codified code containing the framework of the Islamic contract law. This will be followed by applying comparative approach between the Journal and the other references where needed. In addition, this chapter also raise comparative stand points with English, Scottish, and International contract laws where needed. To establish clear background related to the concept of error in the Ottoman Journal in this

¹⁷ Ibid.

research, it must be noted that the Journal has mentioned error directly in one article.¹⁸ It is worth noticing also that in this article, the Ottoman Journal uses Arabic term “*khata’a*”. This article states that “No validity is attached to an assumption concluded by error”. The Journal attached its own interpretation directly after this article by stating “if you paid money for someone thinking that you are committed to do so, and you discovered that you are not committed to pay this money, the money must be recovered”.¹⁹

According to *Ali Hayder*, if guarantor covered the debt thinking that he is committed to pay, and he discovered that the guaranteed person (the original debtor) covered this debt, he has the right to recover his money. The same would apply if the debtor discovered that the guarantor covered his debt. This is because they covered the money relying on mistaken belief, which means that the mistaken payment does not generate any legal right for the party who received the payment.²⁰ In fact, the previous case can be found in cases under English contract law, which suggested that the payment under mistake of law would be recoverable.²¹ The Journal of Equity approached the concept of error comparably to English and Scottish law approaches. Of course, the Journal did not classify error or mistake as shown seen under English and Scottish law.

This case is similar to what implemented under English and Scottish contract law, and notably the case is about borrower and lender but under the rules of the unjust enrichment.²² It is worth noting that some authors considered the mistaken payment as the core of the concept of unjust enrichment.²³ Based on the Journal of Equity and its explanation by *Ali Haydar*, it can be concluded that the focus on the mistaken payment

¹⁸ The Ottoman Journal of Equity. Article 72.

¹⁹ The attached example of the 72 article in the Ottoman Journal of Equity.

²⁰ *Hayder*, op.cit., P50.

²¹ Scottish Law Commission. (Scot Law Com No 169). Report on Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements. 23 December 1998. P5,6.

²² John Tarrant. Limitation Legislation and Loan Repayable on Demand. (2004) 1 UNELJ. PP255, 256.

²³ Peter Jaffey. Classification and Unjust Enrichment. The definitive version of this article, a review of Peter Birks, *Unjust Enrichment*. (OUP, 2003), was published at (2004) 67 *Modern Law Review* 1012, and an electronic version is available at www.blackwell-synergy.com.P15.

implied a reference to unilateral mistake or error. The Ottoman Journal states some terms and concepts can be closely considered similar to error and misrepresentation which will be discussed under the following headings:

Section 2: *Khiyar Alwassf*

Khiyar Alwassf means “option of description”; this is the accurate and literal translation from Arabic to English. When comes to the legal context and its connotation, the case is different. This can be derived by concentrating on articles of the Ottoman Journal discussed *Khiyar Alwassf*. Two main articles have discussed this option with great concentration and details. The first article²⁴ considers option of description when seller sold goods or commodities with specified and desired description, if the buyer discovers that the goods have not contained this description, he has the right to rescind the contract, or to accept it the goods according to the agreed price. An example to this case, if seller sold cow describing her as in milk and the buyer discovers she is not. The same case occur when buyer purchases precious stone described as red ruby in the dark time (night), and it appeared to be yellow or any other colour. In the two cases or any other similar cases, the buyer has the right to cancel the contract. The second article is about cancelation of this option, which suggests that if buyer deals with the object bought/sold as an owner, option of description will be null.²⁵

Similar situation rose with regard to description under the English case *Smith v Hughes*,²⁶ where the defendant agreed with the plaintiff (seller) to buy oats according shown sample. The defendant was interested only to buy an old oats. The defendant (buyer) declared that the seller provided him specified description stating that the oats is “good old oats”. The buyer (defendant) did not accept the oats delivery because oats appeared to be new.

²⁴ The Ottoman Journal of Equity. Article 312.

²⁵ Ibid. Article 313.

²⁶ (1871) LR 6 QB 597.

Despite that the seller knew that the buyer was under mistake but he did not pay his attention about the mistake. The Court of Queen's Bench considered contract valid, justifying that the buyer should care about his interest according principle of *caveat emptor*. Of course, it is not always the case under English contract law, because there is some cases consider that if the other contracting party knows about the other party's mistake, the contract would be void as will be shown below.

The examples mentioned in the Ottoman Journal and in English law case, both, are obviously about description as a key idea. In the first example the seller described cow as in milk but it discovered she was not. In the English case the seller described oats as "good old oats" but in fact it discovered that it was new; similar facts but different remedies. While in the former case the buyer was entitled to cancel the contract (void the contract), the latter was not. This provides that misdescription in the two laws can contain the principle of mistake. Both did not raise the principle of misrepresentation or fraud despite the fact that in both cases, misrepresentation and fraud were implicitly established; because the sellers supplied items contrary to desired description in object of the contracts. This situation was mentioned within the concept of error under Roman law, which stated that the party who knows that the other party in mistake without informing him about this mistake would be considered fraud (*dolus*).²⁷ It would be concluded that Roman law is more approachable to the position of the Islamic contract law regarding this point than English contract law. Furthermore, Roman law also discussed term of misdescription "*in substantia*" where contract would not be able to arise.²⁸ Scottish contract law deals with this situation under error as to quality. If this type of error occurs, the contract would be rendered void -as the case under the Islamic and Roman laws-, but to consider that, the quality of the subject matter should be substantial issue in contract. In other words, under

²⁷ W.W Buckland and Arnold McNair. Roman Law & Common Law A Comparison in Outline. 2nd Edition. Cambridge University Press, 1952. P201.

²⁸ W.W Buckland. LL.D, F.B.A. A Text-Book of Roman Law from Augustus to Justinian. 3rd Edition. Cambridge University Press, 1963. P419.

Scottish contract law, to operate this error needs to prove that contract relied essentially on quality, and any error of quality will affect the purposes of contract.²⁹ According to Scottish contract law, error as to quality is connected to misrepresentation; based on that it is important to prove that error of other party has been created by misrepresentation.³⁰

The main context of option (*khiyar*), means right to rescind. In other words, when the Journal refers to option of description means that purchaser has right to cancel contract if he discovers that the description of commodity sold he received different from he intended to buy. Two main possibilities would be discussed in this respect, on one hand, it can be understood that this apply to the mistaken belief from the purchaser, which means that he fall in unilateral mistake, because he intended one thing and he received something different.

On the other hand, there is a possibility to establish misrepresentation (*gharar*) from the seller side if description different from what he sold. Of course, this is one of the possibilities which will be difficult to prove. *Ali Haydar*³¹ discussed this option relying on two divisions; first one considers option of description as part of the contract's terms or conditions which should be free from *gharar*³² as meaning probability of nonexistence. Under this case, (misdescription if it is established as part of the contract's terms) the buyer has right to cancel contract and leave item sold to seller since the intended description was not available, or to accept contract with its agreed price. In this case, buyer has no right to accept contract and reducing the agreed price because of missing description.³³

²⁹ Zimmermann, Whittaker, op. cit., P591.

³⁰ *Menzies v. Menzies* (1893) 20 R (HL) 108.

³¹ He is the most important author or scholar who interpreted and explained the Ottoman Journal in his famous and wide spread book (*Durr al-Hukkam fi Sharh Majallat Al-Ahkam*). Which has been mentioned above.

³² *Al-Gharar* or *Gharar* considered by another authors and scholars as uncertainty or an excessive risk.

³³ *Hayder*, op. cit., PP126,127.

English contract law deals with doctrine of unilateral mistake under two categories. The first category is when unmistaken party does not know about the other party's mistake. English law does not provide legal solution in this situation. This means that contract is valid between the parties. The second category is when unmistaken party does know about the mistake; in this case contract may render void *ab initio*. As a result, both parties return goods and its prices to each other.³⁴ Interestingly, one of the cases discussed unilateral mistake in English contract law presented similar cow example as used in the Ottoman Journal, as shown earlier to explain this doctrine.³⁵ In this case it is suggested that if seller sold cow to buyer who do not know that the cow is barren (has mistaken belief), the law would consider such contract valid unless if the seller deceived the buyer.³⁶ Despite mentioning deception in this case, but there was no mention to remedy which could be remedy to fraudulent misrepresentation under English law. Under Scottish contract law, when unilateral error occurs, usually, contract would be voidable if error caused by misrepresentation. If error occurred and is connected to one of fundamental elements of contract, such as identity of the contracting party, contract would be void.³⁷ This opinion attracted an objection suggesting that, whatever the cause or reason of error, whether misrepresentation or fraud, contract still would be voidable not void.³⁸

The author of this thesis notices that the remedies for misdescription involved *gharar* decided in the Ottoman Journal as *Ali Haydar* explained similar to the case under English law for unilateral mistake without deception; where the parties should return goods and their price to each other. In other words, the Islamic remedy gives the party affected by misdescription right to cancel contract and to leave the item sold to seller or take it without reduction of the price. This corresponds to the English principle in relation to unilateral

³⁴ Zhou, op. cit., P3.

³⁵ *Keates v. Cadogan* (1851) 10 CB 591.

³⁶ *Ibid.*

³⁷ Atiyah, Adams, MacQueen, op. cit., P45.

³⁸ T.B. Smith. Short Commentary on the Laws of Scotland. W Green, Edinburgh.1962. PP 808-835.

mistake abovementioned. The author noticed, however, that English rules do not clarify if the mistaken party can accept contract if he discovers mistake, as given in the Ottoman Journal.

Furthermore, under English common law, as an application of the doctrine of unilateral mistake, if somebody enters contract under mistaken belief regarding particular description in the contract object and the unmistaken party realises this mistake, contract can be void.³⁹ It can be noted that there is an implicit indication to a probable misrepresentation from the unmistaken party. The example is about mistake from one party (unilateral) and misrepresentation from the other, which is similar to the Islamic case mentioned above. Practically, unilateral mistake is hard to prove which could cause injustice between the parties to the contract.⁴⁰ These rules can affect negatively the economic interests of the contracting party.⁴¹ Clearly this is what can be said with regard to unilateral mistake/error within Islamic contract law. This needs organisational or codified rules to compensate the absence of the relevant codification in this respect.

In addition, this case of misdescription relies on the claim of the buyer that he is not obliged to receive the sold item. There a case could occur if the dispute arises with respect to the condition of the option (means the right to rescind the contract) itself whether the parties agreed that the option is existed or not. In other words, it could happen that the buyer claims that he agreed with the seller to give him the option of description as a condition in the contract, and the seller denied this claim. Under this situation, if the seller denied that the condition is exist; his claim will be trusted, unless the buyer presents his evidence to prove that the condition has been founded.⁴²

³⁹ <http://www.singaporelaw.sg/freelaw/File/8-ContractLaw.pdf>. Para 8.9.11. Accessed at 2/10/2008.

⁴⁰ Alastair Hudson. Assessing mistake of law in derivatives transactions. *Kleinwort Benson v. Lincoln City Council and the local authority swaps cases*.1999. P5.

⁴¹ Zhou. *op. cit.*, P1.

⁴² *Hayder*, *op. cit.*, P128.

As second division of the option of description *Ali Haydar* stated that the option of description would be expected normally to be available with the sold item as a commercial custom in regard of specific description between the people without being stated as a precondition. Under this case, when the buyer discovers the misdescription he has the right to cancel the contract.⁴³ The same idea is founded in international commercial principles that considered the misrepresentation occurs when the seller fraudulently does not provide the bank with the goods that have been expected by the parties with their exact description.⁴⁴ The same duty (for goods to comply with their description) is demanded from the seller under the CIGS.⁴⁵ To be discussed further chapter 4 of this thesis. Generally, under Islamic law if the buyer dealt with the sold item as the owner -selling or transferring the title to another party-, he would not be able to use option of description.⁴⁶

In discussing the *gharar* meanings and its understanding it would be clear that there are different definitions of *gharar* are provided by the Muslim scholars. Some of them defined the *gharar* as uncertainty that means the non existence of the contract's subject matter⁴⁷ as was defined by *Ali Haydar*. Similar definition was provided by *Al-Qarafi*.⁴⁸ This perspective is adopted by both the *Hanafi* and *Shafi'i* doctrines.⁴⁹ Following the same track of checking the meaning of the *gharar*, it has been found that even in the same paper of *Salman Syed Ali*⁵⁰ that has been mentioned above, within its glossary explained the *gharar* as “deception, danger, and risk” in addition to representing someone to enter the contract

⁴³ Ibid. P129.

⁴⁴ Gao Xiang and Ross P. Buckley. A comparative Analysis of the Standard of Fraud required Under the Fraud Rule in Letter of Credit Law. *Duke Journal of Comparative & International Law* [Vol 13:293. 2003]. P295.

⁴⁵ Article 35.

⁴⁶ *Hayder*, op. cit., P131.

⁴⁷ *Salman Syed Ali & Ausaf Ahmad*. *Islamic Banking and Finance: Fundamentals and Contemporary Issues*. Islamic Development Bank, Islamic Research and Training Institute. First Published 1427H. 2007.P54.

⁴⁸ *Shehabuddein Ahmad Bin Idris Bin Abdurrahman Assenhaji*, known as (*Al-Qarafi*). *Anwar al-Buruq fi Anwa' al-Furuq*. The translation of the topic (lights of the lightings in kinds of the differences). Investigated by Khaleel Almansour. 1st Edition. 1998. *Dar Alkutub Al-Ilmiyah*. vol.1. Beirut-Lebanon. P275.

⁴⁹ *Abdul-Rahim Al-Saati*. The Permissible *Gharar* (Risk) in Classical Islamic Jurisprudence. *J.KAU: Islamic Econ.*, Vol. 16, No. 2, pp. 3-19 (1424 A.H / 2003 A.D).P6.

⁵⁰ *Ali, Ahmad*, op. cit., P54.

under excessive risk or danger with regard to one of the contract elements such as the price, quantity, contract performance and so on.⁵¹ According to this interpretation of *gharar* as risk or uncertainty, it has been established that a minor *gharar* is allowed because it does not affect the contract seriously, and the contract would remain valid. It has been added that excessive *gharar* is prohibited because it could cause a conflict and problems between the parties. Upon this perception, it has been stated that *gharar* does not affect gratuitous or donation contracts.⁵² In general, this discretion does not fit or match the analytical stand point of this research which has been derived and approached in different understanding from the *Qur'an* as it will be seen within this chapter.

When it comes to the English and Scottish perspectives, dealing with the issue of misrepresentation, English and Scottish law give the misrepresented party the right to rescind the contract whether the misrepresentation is minor or not. This comes in contradiction with the perspective of the Financial Services Authority rules that deal with the misrepresentation remedies relying on the sort of misrepresentation (innocent, careless, reckless, or intentional or fraudulent).⁵³

It can be seen clearly that different discretions have been expressed with regard to the effects of a minor misrepresentation based on the situation of the case, or based on the regulations and the acts that govern the contract. It should be noticed, however, that a minor misrepresentation subject and its effect under the English/Scottish law is different than the minor *gharar* under Islamic contract law. It has mentioned above that some of the Muslim scholars considered the contract as a valid if it involves minor *gharar* because their concept of *gharar* is restricted with regard to the level of risk or uncertainty. This means that they are allowing a minor risk or a minor uncertainty, expectedly; it will not be

⁵¹ Ibid. P303.

⁵² For more details in this regard see: *Addareer*, op. cit.

⁵³ Soyer, op. cit., P9.

the same case for those whom consider *gharar* as a misrepresentation which is *haram* (prohibited).⁵⁴ There is no differentiation between misrepresentation and fraud as such under Islamic contract law. It is true that *gharar* as a misrepresentation is not classified under different categories such as innocent, negligent, or reckless, but this gives another impression, that is to say, the Islamic rule in regard of *gharar* might be more restricted than the English and Scottish law provisions. It is believed that Islamic law does not deal with minor or excessive *gharar* as a fraud or misrepresentation because it is considered principally as a 'serious moral wrong'.⁵⁵

Saying that the subject matter of contract is not exist as a meaning of *gharar*, would be different from saying that the subject matter is exist with some uncertainty in respect of the other elements of contract. Also it is different to say you are not sure or uncertain with regard to something than to say you are deceived in this regard. Here if *gharar* involves deception, it will approach to the same level of the fraudulent misrepresentation under the English law that involves deceit⁵⁶ as well as under Scottish law.⁵⁷ The importance of understanding how to differentiate between a misdescription that involves *gharar* and a misdescription without *gharar* is to decide what is the proper remedy that can be used when this case occurs. Based on that, there are some implied indications for *gharar* as a misrepresentation as will be clarified in this chapter.

The same level of difference could be seen by more definitions and more confusion when one can find completely different implications by classifying *gharar* as an ambiguity⁵⁸ and finding that ambiguity is interpreted by some others as *jahalah*.⁵⁹ *Jahalah* has another

⁵⁴ *Hayder*, op. cit., P191.

⁵⁵ *Rayner*, op. cit., P206.

⁵⁶ *HIH Casualty & General Insurance Ltd v. Chase Manhattan Bank* [2003] U.K.H.L. 6.

⁵⁷ *Boyd & Forrest v. Glasgow & South Western Railway Co* 1912 SC (HL) 93.

⁵⁸ *Mohammed Saleh Ali Ayyash. Khiyar Al-Majlis And Its Application In 'Aqd Bay' Al Salam*. Islamic Economics and Finance Research Group. Working Paper in Islamic Economics and Finance No. 0306. Universiti Kebangsaan Malaysia. January 2003. P13.

⁵⁹ *Abu Ghuddah. al-Khiyar Wa Atharuhu fi al-Uqud*, 2nd edition. *Matba'at Mqhawi*. 1985. Kuwait.

meaning, which is ignorance.⁶⁰ *Al-Sanhuri* defined *jahalah* as a lack of knowledge, suggesting that there is a point of distinction between *jahalah* and *gharar*. *Gharar* is, when selling something with an unknown existence, but *jahalah* is selling something that already exists but with an unspecified quantity. In this regard, many of the scholars confuse and mix up both terms, attributing them the same meaning or using the words interchangeably⁶¹ as is mentioned above. The issue of *gharar* concept and the differences between its definitions had attracted critical opinions with regard to the confused interpretations in the distinction between *jahalah* and *gharar*. It has mentioned that *gharar* goes to the nature of the contract, but *jahalah* goes to the defective description of the contract. Additionally, when the contract involves *jahalah* it will be voidable, but if the contract involves *gharar*, the contract will be deemed to be void. In the case of *gharar*, the parties would be affected, but in the case of *jahalah* one party alone might be affected.⁶² According to this perspective, *gharar* and *jahalah* clearly are not the same, and do not have either the same rules or concepts. This supports the stand point that considers *gharar* as being different from *jahalah*. But a worthy opinion to be noticed with regard to ignorance suggests that *gharar* would be established when the contracting parties use deception to induce the other parties in ignorance,⁶³ with the ignorance itself not being *gharar*.

The above is quite different from the English rule of *ignorantia legis neminem excusat*.⁶⁴ That means a person can't defend a case claiming his ignorance of law is a valid excuse. "When mistake is pleaded as a defense, the mistake must be one of fact, not of law."⁶⁵ It is not the case from what could be concluded of the Islamic term that deals just with the

⁶⁰ *Faruqi*, op. cit., P346.

⁶¹ *Al-Sanhuri, Masader Alhaq filfiqh Al-Islami*, op. cit., P232.

⁶² *Nabil A. Saleh*, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking*, Cambridge University Press, 118 pp., 1986. Reviewed by: S.M. *Hasanuzzaman*. JKAU: Islamic Econ., Vol. 3, pp. 115-124 (1411 A.H./1991 A.D.), P122.

⁶³ *Sarker*, Op. cit., P2.

⁶⁴ *Faruqi*, op. cit., P346.

⁶⁵ *Curzon*, op. cit., P206.

ignorance of fact, and not of law. *Mohammed Obaidullah*⁶⁶ has another opinion or discretion related to the implication of *jahalah*. He has argued that the Islamic contract or transaction must be free from *jahalah*, which is considered by him to be a misrepresentation.⁶⁷ Notably, some others who operate the objective probabilities distinct between the risk and uncertainty, and who operate the subjective approaches look at this distinction as being irrelevant.⁶⁸ *Mohammed Obaidullah* has considered *jahalah* as a misrepresentation, using misrepresentation as meaning *Khiyar Alwasf* in the same paper but in different page.⁶⁹ In fact, this part of opinion is acceptable but partially, if *Khiyar Alwasf* contains *gharar* which could be interpreted as a misrepresentation. In going further and deeper within a different paper of *Obaidullah*, he suggests that the Islamic contract should be free from misrepresentation which is connected to the information disclosure concept, not to *jahalah* (ignorance) as stated in the paper abovementioned.⁷⁰ Furthermore, he changed his mind again when he considered that *gharar* is an excessive uncertainty like many of the other traditional interpretation of *gharar*, which is very big change in opinion for the same author or scholar. Anyway, if there is something to be said in this respect, that *Obaidullah* is one of the clear examples of the contradictions within the different understandings of *gharar* which urges a new reformulation to unify understanding under one concept and one terminology.⁷¹

In spite of the contradiction that had arisen within the two different points of view for the same author, the interpretation of *Khiyar Alwasf* as a misrepresentation could be supportable by this chapter as it will be shown during its details and its analytical explanations. Additionally, it would be more comprehensive to saying that if *Khiyar*

⁶⁶ This author is not loyal to any exact Islamic school or doctrine.

⁶⁷ *Obaidullah*, Islamic Risk Management, op. cit., P3.

⁶⁸ *Sami Al-Suwailem*. Towards an Objective Measure of *Gharar* in Exchange. *Islamic Economic Studies*. Vol. 7, Nos. 1 & 2, Oct. '99, Apr. 2000. P64.

⁶⁹ *Obaidullah*. Islamic Risk Management, op. cit., P10.

⁷⁰ *Mohammed Obaidullah*. Ethics and Efficiency in Islamic Stock Markets. International Journal of Islamic Financial Services, Volume 3, No.2. Para 3.2.3.

⁷¹ *Ibid*. Para 3.1.2.

Alwasf involves *gharar*, then it will be parallel to the concept of fraudulent misrepresentation as used in both English and Scottish contract law. This is what can be understood by *Ali Haydar* when he distinguished between *Khiyar Alwasf* as its own, and *Khiyar Alwasf* that involves *gharar*.

A contemporary Muslim scholar suggests that *gharar* is a risk but entails delusion and deception.⁷² Actually, this approach could come to suit the context of the research process which leads to conclusion that *Khiyar Alwasf* is a non-fraudulent misrepresentation, but if *Khiyar Alwasf* included the *gharar*, it could be considered as a kind of fraudulent misrepresentation, that would be comparable to the fraudulent misrepresentation under the English law when the representor's action is based on deceit, as per. section 2(1) of English Misrepresentation Act 1967.⁷³ This analysis would be clarified and supported by the Arabic-English translation, which translated *gharra* into "to mislead, to deceive".⁷⁴ *Gharra* is the past tense verb of *gharar* which is here the noun. As a result of that, *gharar* will be translated as a misleading or deception⁷⁵ and one of them could be the direct meaning of the misrepresentation (misleading), the second one could be crucial element of the fraudulent misrepresentation (deception) or fraud. Building on that, *Khiyar Alwasf* (option for description) should be translated as a misdescription. After that, probably the misdescription concept could come to the meaning of the misrepresentation.

As a deep view, it could be said that the jurists defined *gharar* in many ways or even in contradictory concepts.⁷⁶ *Abdul-Rahim Al-Saati*, in his interesting paper about *gharar* stated that the verbal noun of *gharar* is *taghreer*, stating that "it means deception or

⁷² *Addareer*, op. cit., P27.

⁷³ Zhou. A Deterrence Perspective on Damages for Fraudulent Misrepresentation, op. cit., P85.

⁷⁴ *Rohi Baalbaki. Al-Mawrid Al-Quareeb*. Arabic-English Dictionary. 16th Edition. *Dar El-Ilm Lilmalayin*. 2005. Beirut, Lebanon. P292.

⁷⁵ *M.S. Ebrahim, S. Rahman*. On the pareto-optimality of futures contracts over Islamic forward contracts: implications for the emerging Muslim economies. *J. of Economic Behavior & Org.* 56. 2005. P274.

⁷⁶ *M. El-Gamal*. An Economic Explication of the Prohibition of *Gharar* in Classical Islamic Jurisprudence. This paper is prepared for the 4th International Conference on Islamic Economics to be held in Leicester, UK, 13-15 August 2000. First version: May 2, 2001.P5.

misrepresentation.”⁷⁷ This, in fact, is what can be found in the Ottoman Journal in a literal formulation and remarkably, it follows that with a clear definition by saying “*taghreer*: describing the sold item for the buyer against its real description.”⁷⁸ There is no doubt here that *taghreer* and misdescription carry the same meaning. It can be noticed also that there is almost a clear indication for the misleading statement or conduct from the seller towards the buyer. In describing the item against its real description would be considered as an intentional doing from one party, the seller, to another, the buyer. The describing action is at the core of the issue, so misdescription is a direct meaning of misrepresentation. There would be a tiny space or a very narrow margin to consider the option of description (*Khiyar Alwasf*) as an error except one case which, would be restricted in an induced unilateral error (misrepresentor and misrepresentee).

The Journal of Equity defined *taghreer* as a meaning of fraud (*khida'a*). Based on that, the fraud maker is called the misrepresentor (*mugharrir*) and the person who falls under the fraud is called the misrepresentee (*maghroor*)⁷⁹ or (*mogharrar bihi*). But in the same time, when it comes to the detailed clarifications, *Ali Haydar* explained that the *taghreer* examples will be relevant when the seller tells the buyer that the properties worth this amount of money -and in fact it does not-. In contrary, it is the same when the buyer tells the seller that his belongings worth this amount of money and -in fact it worth more-.⁸⁰ Here the examples that *Ali Haydar* explained suit another case which is called *ghabn*, which is related and restricted in the misevaluation of goods. In general *Ali Haydar* was more successful when he clarified the definition of *taghreer*, but he totally failed when he tried to clarify the examples. The modern Muslim scholar's definition of *taghreer* is “to deceive one party the other contractual party by fraudulent means, either by saying or

⁷⁷ *Al-Saati*, op. cit., P6.

⁷⁸ Article 164.

⁷⁹ *Hayder*, op. cit., P264.

⁸⁰ *Ibid*.

acting which induce the other party to enter the contract that he would not give his consent without these means.”⁸¹ This is very similar to what has been seen during the thesis with regard to misrepresentation under English law. Also, *ghabn* indicates a similar meaning; it is used as a fraud (*khida’a or waks*) in relation to the trade contracts (selling and buying).⁸² It can be added that *taghreer* is obviously about the description of the item, which could affect the price, but not about the price itself.

It is reasonable to reach for this conclusion with regard of *gharar* especially with the different points of view that have been approached by the Muslims doctrines,⁸³ as well as the differences or it could be seen as contradictions in connection to the error or mistake area as it will be explained and discussed in next parts of this chapter.

English law rules deal with the description from a technical stand point and have built on the legislative condition which demands that the goods should be suited or equivalent to the description that has been released expressly according to the contractual terms between the contracting parties. Generally, Islamic law is less technical than the English law; the Islamic law methodology gives the general rules that govern the implementation of law. This gives the scholars a wider margin to adapt the law when new cases occur from time to time. It can be noticed that the substantial difference in this regard is that the Muslim scholars derive their discretion relying on the *Qur’an* by using the analogical methodology which relies on the reasoning method by the analogy (*qiyas*). That comes under the concept of *usul al-fiqh* (jurisprudential methods).⁸⁴ Furthermore, the main rule of the interpretation approach depends on the Prophet’s implementation of the *Qur’an*, which is available in some cases. But if the Prophet’s way of implementation is missing, the scholar

⁸¹ *Aljoufan*, op. cit.

⁸² *Ibin Manthour*, op. cit., P3211.

⁸³ For more details see: *El-Gamal*, op. cit., P6.

⁸⁴ *M. H. Kamali*. Principles of Islamic Jurisprudence. Islamic Texts Society. 2003. P12. ISBN 0946621810. 9780946621811.

or the judge would be committed by *Qur'an* to directly to find the proper approach that would fit the practical issues of case in question. If not, the decision must not be in contradiction with the Qur'anic teachings. This is what strengthens the pragmatism of Islamic law that has widened to include the agreed and acceptable traditions or customs of the people.⁸⁵ This could develop from time to time, or from one place to another and should not be contradicted by the *Qur'an* rules.⁸⁶ But English law has a similar pragmatic instrument which is addressed in the equity practice that feeds into the English legal system, implementing the law flexibly in a wide range of cases. But here, the English court that releases its decisions based on equity can release different decisions for the same type of cases depending on the judge hearing the case, of the level of discretion left to the court. The main different that can be noticed here is that the *Qur'an* is a set of divine rules, and no decision can be issued contradicting its teaching. Simply put, this is not a standard demanded or conditioned in the English law of Equity.

Anyway, reading the English contract law leads one actually to say that the purchaser who finds any misdescription has the right to terminate the contract, especially in the case of a considerable loss of profit.⁸⁷ A misdescription in this case comes to a similar approach to what has been explained in relation to the Islamic concept of *Khiyar Alwasf* (option of description). Furthermore, the similar evaluation with regard to the misdescription could be comparable to what was established under the International Sale of Goods rules in misdescription occurring during the contract's implementation.⁸⁸ Similar rules can be concluded from the CISG that require the goods to conform the description that was agreed in the contract.⁸⁹

⁸⁵ *Qur'an* 7:199.

⁸⁶ *Muhammad Rajih Yousuf Dweekat*. The Percentage of the Commercial Profit from the *Qur'an* and the Life. 20/10/2008. <http://kuno-rabbaniyeen.org/?page=details&newsID=105&cat=3>. Accessed at 22/10/2008.

⁸⁷ Poikela, op. Cit., P244, 245.

⁸⁸ United Nations Convention on Contracts for the International Sales of Goods (1980) Known as (CISG). Article 35.

⁸⁹ Ibid.

Nevertheless, misdescription could be one of the equivalent concepts of misrepresentation under the English, Scottish and international contract law under the CISG, but there is no direct reference made connecting misdescription and misrepresentation in the Islamic and international contract laws. It is important to notice that when the required description within the CISG law that mentioned above, could be concluded impliedly and it could be recommended to be included by the statutory frameworks as has been established under the English and Scottish laws. Interestingly, the law in both UK legal systems has been enacted in Trade Descriptions Act 1968 explaining the rules in the context of misdescription. This act came to the life to replace the Merchandise Marks Acts 1887 to 1953 to forbid the misdescription that connected to the trade and business. It is designed to disallow the indications that are false or misleading in respect of the goods prices, which includes all the categories of goods. This law enhances the authority for requiring the information that related to the goods to be clear and advertised.⁹⁰ In Scotland this law will be applied under the Food and Drugs Act 1955, the Food and Drugs (Scotland) Act 1956, otherwise the specific description should be mentioned as a provision in the contract.⁹¹

It is clear that the definition of a false trade description according to this Act, is a description that is materially false,⁹² even if it is not false in its own right, but misleading⁹³ but false in a sense of the material measure with regard to any indication that is connected to the capacity, size or measure, the way of manufacturing, or producing, renewing or repairing, the way of construction, the appropriate for usage purpose, effectiveness, acting, conduct or correctness.⁹⁴

⁹⁰ Trade Descriptions Act 1968. Chapter 29. P1.

⁹¹ Ibid. Section 2 (5). P3.

⁹² Ibid. Section 3 (1). P3.

⁹³ Ibid. Section 3 (2). P3.

⁹⁴ Ibid. Section 2 (1). P2.

In addition, a false indication could be considered as a false trade description or anything similar to the indication and seems to be false by anyone who recognises or approves impliedly or specifically that the indication is a false trade description.⁹⁵ From what has been explained and referred to above, the earlier conclusion that misdescription under the Islamic law of contract as a misrepresentation or very approachable to it conceptually and practically (technically), seems to have a very comparable direct notion under the law that is applied in the UK. As a remarkable signal, it has to be said; no doubt that Trade Description Act is dealing directly with the misrepresentation rules, since its purpose is to prohibit a false or misleading indication, and more than that to prohibit the concealment of information. Misrepresentation as it has been clarified earlier in this research (under English concept of mistake chapter) is a false statement as a general definition, and it has been considered at some point that non-disclosure could be a sort of misrepresentation. If we bring the factors of *Khiyar Alwasf* and compare them with English and Scottish law, the logical conclusion will be that misdescription under Islamic, English and Scottish law of contract is the reflection of misrepresentation under English/Scottish contract law. This is because false indication has been considered as a false representation⁹⁶ and a false misleading statement.⁹⁷

Furthermore, if someone has made a false statement and he was aware that he had, then that will be deemed to be an offence,⁹⁸ which impliedly means fraudulent misrepresentation. It has added that the reckless making of a false statement will be considered as an offence as well,⁹⁹ which is the parallel of the reckless misrepresentation.

⁹⁵ Ibid. Section 3 (4). P3.

⁹⁶ Ibid. Section 13. P7.

⁹⁷ Ibid. Section 14. P7.

⁹⁸ Ibid. Section 14 (1) (a). P7.

⁹⁹ Ibid. Section 14 (1) (b). P7.

Generally, misdescription is not an error or mistake (*khata'a*) in Islamic contract law, whether in the Ottoman Journal of Equity as the only codified and classified Islamic code discussing the contract, or even in the other Islamic schools or doctrines. Despite of this fact, it can be said that Islamic law in the area of contract could be clearer if it takes more room to be discussed by the Muslim scholars and jurists. There is a strong background to believing that the subject of error can be explained and interpreted by more clarification and classifications. To enrich this subject in Islamic law, there is no problem at all to invent a new classifications methodology within the Islamic directions since the error as a concept originated in the *Qur'an*. The idea is to build on the origins and the concepts of the *Qur'an* but by modernised tools to be approached for the people nowadays.

Another option will be presented to be examined in regard of the concept of error has been mentioned by the Ottoman Journal of Equity. In fact this option could have more than one approachable understanding, whether to error or to misrepresentation. This option will be discussed in light of both approaches (language and practice), in other words, it will be taken from the theory and application perspectives which will be followed by checking this option (*Khiyar Al-ayb*) technically. It will be shown that if there is any conceptual or technical approach that could be found in the other legal systems that are targeted in this research. Generally speaking, *Khiyar Al-ayb* (option of defect) took a very wide room within the Islamic law (*sharia'h*) doctrines, and actually it is covered by the heads of the main Islamic schools or doctrines. Generally speaking, *Khiyar Al-ayb* as a general concept could touch the borders of error at some areas, and could touch the misrepresentation in some other areas. Sometimes, *Khiyar Al-ayb* does not take place in both areas at all, in other words, *Khiyar Al-ayb* is considered out of error and misrepresentation concepts. However, the final conclusion will be clearer at the end of this part of the chapter after the deep discussion of this option.

Section 3: *Khiyar Al-ayb*

Regarding this option (right), the Ottoman Journal of Equity has discussed it in greater detail than it did with *Khiyar Alwasf*. This could be an indication as to the importance of this option and its strong relation with the contract. More detailed, the Ottoman Journal specified nineteen articles¹⁰⁰ within its texts to discussing this option directly. But, the Journal also refers indirectly to this option in many different articles.¹⁰¹ The sixth chapter of the Ottoman Journal is specified to discuss this option.

According to the Ottoman Journal sold items should be free from defect when the sale is unconditional.¹⁰² This is when the sale transaction is implemented without any mentioning of any existing defect, which leads to dealing with this transaction as being free and empty from defects.¹⁰³ It is clear that the seller should bear the legal responsibility by guaranteeing that the sold item must be delivered to the buyer without the defect.¹⁰⁴ So, there would be an explanation if the sale transaction contained a defect. In this regard, it is explained that the unconditional sale means; the usual and normal sale which does not need any special condition to state that the sale should be empty and free from the defect. As a general and well known rule, sale contracts should be free from defects originally, as a desired description in the contracts, habitually and traditionally. Furthermore, it is argued that, if the seller did not disclose the defect in the sold item, this is considered as a misrepresentation (*taghreer*), which is impermissible or forbidden (*haram*).¹⁰⁵ With regard to this point, the main assumption here could be that the seller has a duty to disclose the defect. Otherwise, it will be taken as a misrepresentation (*taghreer*). *Taghreer* here seems

¹⁰⁰ The articles 336-355.

¹⁰¹ Article 85,360, 362,364, 406, 513-517, 529, 579, 671, 693, 1026, 1037, 1153-1356, 1378, 1461, 1486, 1489, 1548, 1746, 1782.

¹⁰² Unconditional here means that, no conditions have been mentioned by the seller that would make him not reliable for hidden defects.

¹⁰³ The Ottoman Journal of Equity. Article 336.

¹⁰⁴ Rosly, Sanusi and Yasin, op. cit., P1.

¹⁰⁵ Hayder, op. cit., P191.

to be comparable to fraudulent concealment, which is applicable when the party is committed to a duty of disclosure under Scottish law.¹⁰⁶

English law does not deal with this situation in the same way, because it has been established¹⁰⁷ that, for example, the vendor of pigs is not responsible for fraud despite the fact that he knew that the pigs in question had a fault, namely a fever, and he did not disclose this fact to the buyer. This case is applicable in both the rules of law and equity.¹⁰⁸ The exception from this rule is when the parties rely on a confidence and trust. In other words, a party must disclose all the facts about the sold item if the other party is a son, dad, guard, and so on, otherwise the concealment would be considered as a fraud.¹⁰⁹ This point does not sound logical because the word fraud should have one legal meaning, and there is no point allowing a fraud to be done against special kind of parties, and not to be done against different criteria of people. Other English case points out that at some point fraudulent concealment would be at the same level of fraudulent misrepresentation, where a duty of disclosure is demanded.¹¹⁰ In general *Al-ayb* (defect) is defined as a fault that causes a reduction in the value of the property.¹¹¹ Even the same definition can be found in the contemporary Islamic jurisprudence (*fiqh*).¹¹² Actually, the definition of *Al-ayb* is different from that of error (*khata'a*), because error means that, if someone intended to do something and discovering that he or she did something different unintentionally.¹¹³ As a principle, the option of defect would result in an extremely different meaning or concept. It means that any contracting party is normally expected to disclose any defect or fault that

¹⁰⁶ English and Scottish Law Commissions. Insurance Contract Law. Misrepresentation and Non Disclosure. Issues Paper 1. September 2006. P102. Para A 25.

¹⁰⁷ *Ward v. Hobbs* (1878) A.C. 13.

¹⁰⁸ James O'Donovan. Lender Liability. English Edition. Sweet & Maxwell, 2005. P338 ISBN 0421885807, 9780421885806.

¹⁰⁹ Law of Contract Business Law Including Company Law. P37.

<http://www.newagepublishers.com/samplechapter/001048.pdf>. Accessed at 7/10/2008.

¹¹⁰ *Conlon v. Simms* [2006] EWCA Civ 1749.

¹¹¹ The Ottoman Journal of Equity. Article 338.

¹¹² Kingdom of Saudi Arabia. A Ministry of Islamic Affairs, endowments, preaching, and guiding. <http://feqh.al-islam.com/Display.asp?Mode=0&MaksamID=58&DocID=47&ParagraphID=442&Diacritic=0>. Accessed at 1/7/2008

¹¹³ *Ibin Manthour*, op. cit., P1193.

could affect the intended purpose of the goods negatively.¹¹⁴ According to this principle, it is clear that the defect itself is not the error or the mistake, but it is connected to error where the parties do not realise the existence of the defect. If the party knows about the defect and does not disclose it, this case would be considered for sure as a misrepresentation. Now the case seems to be stated that the parties' knowledge with regard to the existence of the defect would be judged if there is an error or misrepresentation, but the defect would never be declared to be an error or misrepresentation. Obviously, there is a big difference between the two meanings that take the research to another direction to analyse the connotation of *Khiyar Al-ayb*.

It is understood from what *Ali Haydar* has suggested that the defect itself is not the misrepresentation (*taghreer*), but that the non-disclosure of defect is the misrepresentation. This is exactly what can be found in *Lisan Al-Arab* (the Arab tongue) under the meaning of *tadlees*, which is generally interpreted as a fraud, but it has been interpreted as a defrauding by hiding the item's defect from the buyer as a particular meaning.¹¹⁵ Remarkably, as understood by *Alhajeri*, an Arab legal academic, *tadlees* has been translated into English as a fraud, and the fraud has been interpreted as intending to induce another contracting party into error by way of cheating and fraud.¹¹⁶ This context is very close to misrepresentation in the English and Scottish contract laws. Furthermore, it mentioned that *tadlees* is *haram* (prohibited) because it includes the *taghreer* and *ghish* (cheating).¹¹⁷

For more clarification, it is worth noticing that, conceptually, misrepresentation is parallel to fraud and cheating in the Islamic legal term and its understanding. But it is worth noting

¹¹⁴ Rayner, op. cit., P205.

¹¹⁵ *Ibin Manthour*, op. cit., P1408.

¹¹⁶ *Alhajeri*, op. cit., P2.

¹¹⁷ *Assayyid Sabiq. Fiqhussunnah* (jurisprudence of Sunnah). 3rd Vol. 1st Edition. Dar Al-Kitab Al-Arabi. Beirut-Lebanon. November 1971. P116.

as well that the Islamic definition of misrepresentation is not fixed or stable, whether between the early or modern Muslim scholars. As it is mentioned above in the context of *tadlees*, which is very clear example about the different Muslims' definitions and understandings of misrepresentation. Even writings emanating from the Islamic Research & Training Institute,¹¹⁸ show the difficulties of the contradictive signals given of Muslim scholars' understanding of misrepresentation and similar legal terms.¹¹⁹ In one of the institute's papers, it has been found that *tadlees* concept has three different meanings. Firstly, when it is mentioned for *khiyar al-tadlees* it is translated as a (fraud option),¹²⁰ that fits *Ibin Manthour's* interpretation¹²¹ referred to above. Secondly, on the same page of the same paper, *tadlees* interpreted as a misrepresentation, but with different interpretation of fraud which become (*ghabn*).¹²² *Ghabn* as a fraud comes to the same meaning used by *Ibin Manthour*.¹²³ Thirdly, when the paper came to the glossary, *khiyar al-tadlees* was explained as being an option of cheating, which allows the party to rescind the contract if he discovered that he has been cheated.¹²⁴ Fourthly, continuing on the same line in controversially mixing the terminologies, when the paper tried to explain why *al-ghabn* is prohibited in the Islamic contracts or transactions. It is pointed out that "*al-ghabn* in transactions implies deception and misrepresentation or cheating."¹²⁵

The same paper considered that *gharar*¹²⁶ could mean deception, or could mean danger, or could be uncertainty.¹²⁷ As can be seen, the three words give different meaning. Obviously, two points could be concluded from the above discussion: firstly, Islamic jurisprudence

¹¹⁸ This institution attracts and employs Muslim scholars from different Islamic and Arabic countries that come from various Islamic doctrines.

¹¹⁹ It is expected to be one of the best Islamic institute who is interested in improving and developing the Islamic banking and finance, in addition to issue a lot of researches and papers in this area depending on many of high qualified academic staff and practitioners.

¹²⁰ *Ali, Ahmad*, op. cit., P53.

¹²¹ *Ibin Manthour*, op. cit., P1408.

¹²² *Ali, Ahmad*, op. cit., P53.

¹²³ *Ibin Manthour*, op. cit., P3211.

¹²⁴ *Ali, Ahmad*, op. cit., P304.

¹²⁵ *Ibid*, Note 2, P21.

¹²⁶ *Gharar* will be discussed in details later on within this chapter.

¹²⁷ *Ibid*, P303.

does not differentiate between fraud, misrepresentation, cheating, and deception. In other words, *tadlees*, *gharar*, *ghabn* and *ghish* are all given the same meaning and the same connotation according to the Islamic jurisprudence schools, but they use different words for the same meaning which can be seen in the other languages. Secondly, there could be different understanding of the concept, depending on the school that the scholars come from or are loyal to. Admittedly, it is so difficult to follow all the Muslim schools in this regard as there has been no in depth academic analysis made of all these possible differences.

It is useful to mention that there are no problems between the jurists regarding the legal position of *gharar*; but problems do arise when it comes to its practical implementation, which relies on customary applications, which are different from a place to another which leads to many controversial points,¹²⁸ as is shown during this chapter. The discussion or even the argument could go further and conclude that the Islamic concept of misrepresentation that derived from the *Qur'an* directly is restricted in *gharar* and its similar meanings. This will be broadly discussed later on below. One more point could be added to the previous discussion about the origins of *tadlees* 'tadlis' as a word. *Tadlees* as a word is not mentioned at any verse of the *Qur'an*, which is recognised as being the most important source of the Arabic language. Some writers proposed that past simple verb of *tadlees* which is pronounced as *dallas* derived from the Latin word *dolus* (fraud), and then modified by the Arab to become the word used by the early Arab-Muslim people or the Arabs nowadays.¹²⁹

It could be said that the Ottoman Journal followed the logical and modern legal stand point in respect of this subject. Under English law, the case is different, because the buyer is

¹²⁸ *Saleh*, op. cit., P122.

¹²⁹ *Rayner*, op. cit., P204.

completely responsible to take care of his own interests according to the maxim *caveat emptor*.¹³⁰ But this is not, however, the case under English or Scottish consumer law.

Under a contract for sale by sample one of the main implied term to be understood and included in the contract is that the goods is expected to be free from any defect that could make the goods unacceptable or does not achieve the satisfactory of the parties. This means that the goods would correspond to the sample that has been shown by the seller.¹³¹ This is applied in England and Scotland as a condition, which means that the goods should be free from any defect, and this would be understood impliedly even without a condition to be concluded as part of the contract or transaction.¹³² In the same Act, it has mentioned that in Scotland (just applied in Scotland), when the goods are sold according to the sample, the other goods which the sample intended to be as a reference or a standard to them should be fitted in quality.¹³³ It does not give any significant differentiation between what has been mentioned in regard of the Scottish and English rules in this regard, it would not make notable difference if the rules have been combined to governing both. It could be simpler because the section that governs the English terms of quality considered that the goods to fit in quality should be free from minor defect.¹³⁴ Automatically it should be understood that the goods must be free from the flagrant defect as well. By comparing these rules, it has been found that the Ottoman Journal of Equity deals with the defect particularly in this point in the exact way of the UK rules. This is what can be found clearly from the above mentioning in this respect. Something is worth to be mentioned that the Ottoman Journal does not distinguish between the consumer and the commercial law. It deals with both of them as one, which means the protection that is given to the individual consumer will be applied automatically to the traders. The methodology of the Journal is to

¹³⁰ Giuditta Cordero Moss. Lectures on Comparative Law of Contracts. Reproduced here is a text published in the Publications Series of the Institute of Private Law. University of Oslo, No 166, 2004. P131.

¹³¹ Section 15 (2) (c). Sale of Goods Act 1979.

¹³² Ibid. Section 15 (3).

¹³³ Ibid. Section 15B (c).

¹³⁴ Ibid. Section 14 (2B) (c).

put many examples that fit and applied for the two categories (consumers and traders). Generally, this is because of the Islamic principles that deal with all permissible and impermissible issues at the same level of rules with the individuals and the community. That is, what could be applied in regard of the community will be considered as an example for the individuals.

This leads to another point that is mentioned by the Journal that decided that “if the seller discloses the defect in the sold item at the contracting time. Up to that, if the buyer accepted the item, then he has no right to use the option for defect”.¹³⁵ Obviously, this is what has been stated under the English and Scottish law, when considering that if the seller has drawn the buyer’s attention about the defect before entering the contract.¹³⁶ Then it is clear that many different rules govern this point relying on the legal system itself, and even sometimes depending in many different cases and discretions within the legal systems rules.

From what has shortly mentioned above, it is similar to the concepts of the European contract law which put the person under a duty to inform about anything hidden.¹³⁷ It is worth mentioning that the duty to inform is selected to be used here instead of the English term of duty of disclosure and misrepresentation.¹³⁸ Something worth to be noticing here, the English legal writers consider that the English law of contract does not have a duty of disclosure.¹³⁹ Accordingly, the non-disclosure of a defect in the Islamic contract is supposed to be similar to one of the misrepresentation classifications under the English contract law (fraudulent, negligent, or innocent) which will be decided separately according to the case in dispute. But probably the category of the innocent

¹³⁵ The articles from 341.

¹³⁶ Section 14 (a). Sale of Goods Act 1979

¹³⁷ Green. op. cit., footnote 3, P2.

¹³⁸ Ibid. P1.

¹³⁹ Weitzenböck. op. cit.. P6.

misrepresentation will not be considered under Islamic law because similar cases would be dealt with as a mistake (*khata'a*). This will be mentioned in more detail within this chapter. Despite the fact that the disclosure is not highly demanding under the English law, but it is clear that many questions have been raised around this area, discussing if the exclusion of the information could be considered as fraud. This could be obvious from the court's attitude when it expressed its opinion that saying the non-disclosure of a material fact could be considered as a misrepresentation.¹⁴⁰ It seems to be that the case of a non-disclosed defect could attract similar arguments and discussion because of the ambiguity of the non-disclosure of defect obligations, but the argument would not be expected about the existence of the defect itself as material fact.

Following on this opinion, it is clear that even some contemporary Islamic law authors suggest that, the option of defect under the Islamic contract is established to achieve fairness between the contracting parties. According to this suggestion, no justice or fairness could be achieved with fraud or cheating. It is because taking the people's properties by cheating or fraud is forbidden by God (*Allah*).¹⁴¹ They have supported their perspective by referring to the Qur'anic verse¹⁴² "O you who have believed, do not consume one another's wealth unjustly 'unlawfully or under false pretence'¹⁴³ but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, *Allah* is to you ever merciful." It could be understood the same when they added Prophet *Muhammad's* speech describing the *Al-ayb*; "he who cheats us is not one of us."¹⁴⁴ But from the context of this speech it is concluded that, the Prophet said this to a seller who concealed a defect in his exhibited goods. So two things could be derived from the Prophet's speech, one is the

¹⁴⁰ Kathari Pistor, Chenggang Xu. *Incomplete Law - A Conceptual and Analytical Framework - And its Application to the Evolution of Financial Market Regulation*. January 2002. P46.

¹⁴¹ Rosly, Sanusi and Yasin, op. cit., P6.

¹⁴² *Qur'an* 4:29.

¹⁴³ *The Qur'an*. English Meaning. *Al-Muntada Al-Islami*. 2004. P74. ISBN:9960-792-63-3.

¹⁴⁴ Rosly, Sanusi and Yasin, op. cit., P6.

prohibition on non-disclosure, the other is the prohibition on cheating or fraud (misrepresentation).

According to the previous explanation, a hidden defect is fraud or cheating. But for neutrality sake, this result could be considered as a correct conclusion in the same percentage of cases as it would be considered to be an incorrect conclusion. It is noticed that the Qur'anic verse¹⁴⁵ which is used to support the idea of considering the defect as parallel to fraud or cheating, is used as an indicator for *gharar*.¹⁴⁶ In the case of discovering the old defect¹⁴⁷ the Journal gives the buyer the right to return the defective item or to accept it as it is according to the nominated or agreed price. Under this case the buyer does not have the right to retain the sold item then ask the seller to recover the lost value that caused by the defect.¹⁴⁸ Lost value means here the difference between the price of the sold item when it is defective and when it is not defective.¹⁴⁹ The same rule can be found in Jordanian Civil Code.¹⁵⁰ This means that Jordanian civil law adopted the rules of the *Hanafi* doctrine, which is completely reflected in the Ottoman Journal. The *Shafiai* doctrine adopted the same perspective, as did the *Maliki* doctrine. However, *Hanbali* doctrine gives the buyer the right to detain the sold item and to ask for the lost value.¹⁵¹ For more explanation, the four main Islamic doctrines did not mention to the issue of error/mistake (*khata'a* or *ghalat*) under any category. This is strange, because *khata'a* as a concept has been established in the *Qur'an* with regard to a mistaken murder as it has been mentioned above, at the beginning of this chapter. According to *Al-Sanhuri*, error as one of the contract defects has occupied very little discussion among Muslim scholars.¹⁵²

¹⁴⁵ *Qur'an* 4:29.

¹⁴⁶ *Al-Suwailem*, op. Cit., P65. See also: *Al-Saati*, op. cit., P6.

¹⁴⁷ The defect that existed when the item was under the seller control.

¹⁴⁸ The Ottoman Journal of Equity. Article 337.

¹⁴⁹ *Amin Dawwas*. Voluntarily Sources (The Contract and The Unilateral will), A Comparative Study. 1st Edition.

Drrishurouq, Ramallah. 2004. P166.

¹⁵⁰ Articles 196,513.

¹⁵¹ *Salahu Iddin Annahi*. Sources of the Individual Rights, Sources of Commitment-Voluntarily Sources. *Al-Bayt Al-Arabi* Printer, Amman. 1984. P185, 186.

¹⁵² *Al-Sanhuri*, *Masader Alhaq filfiqh Al-Islami*, P112.

Generally this is what could interpret the logic behind the lack or even the non-existence of the Islamic doctrines scholars' references when discussing the concept of error. It is also worth noticing that these doctrines discussed *khata'a* in the context of murder in many references, which are outside the scope of this research.

The right of detaining a sold item can be concluded impliedly within Scottish and English law, particularly in the context of consumer law. It is allowed for consumers to refuse any defective goods (to return the goods) within any sale contract. It is also allowed to ask for damages (compensation) in regard to any lost value that caused by the defect.¹⁵³ It is noticed that similar rules have been established in the Ottoman Journal if the defect happened after the sold item came into the hands of the buyer, and the buyer discovered another old defect before the sold item became under his control.¹⁵⁴ As was mentioned earlier, Islamic law does not differentiate between consumer and commercial contracts.

It is argued that for the option of defect (*Khiyar Al-ayb*) to be applicable, the defect should not be seen by the buyer at the time of the purchase and receipt of the goods. Even in the case of seeing the defect, he should not have realised that the traders deal with it as a defect. There should not be any evidence showing that he expressed his satisfaction despite the defect. There should not be any condition in the contract discharging the seller from his responsibility in regard of the defect. The defect should be old. The defect cannot be moved without hardship. The defect should be obvious. The defect has not been removed before rescinding the contract. It should be noticed that it does not matter whether the defect is extrinsic or intrinsic.¹⁵⁵ In one way or another, these conditions are similar to those demanded by English and Scottish law. It is suggested that an extrinsic defect is when

¹⁵³ Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers. EC Consumer Law Compendium -Comparative Analysis-. Prepared for the European Commission under Service Contract No. 17.020100/04/389299: "Annotated Compendium including a comparative analysis of the Community consumer acquis". April 2007. P 662.

¹⁵⁴ The articles from 345.

¹⁵⁵ *Hayder*. op. cit., P192.

someone assessed a property that is free from defect for a specific price, and assessed the same property at a lower price when it is defective, and if another one assessed the same defective item as the original price is; here the defect would be classified as an extrinsic. The intrinsic or flagrant defect is when the experienced assessors (experts) together evaluated the price of the property free from defect at a specific level and the same assessors evaluated the same property when it is defective at a much lower price.¹⁵⁶ The buyer has the right to rescind the contract and return the sold item, either directly or by his agent. The sold item could also be returned to the seller or his agent, with the return of any money already paid.¹⁵⁷ Under the English and Scottish Sale of Goods, the defect will be considered existent if it has made the goods un- merchantable, and would not be seen if the normal test has been implemented.¹⁵⁸ The goods will not be merchantable if they do not suit the function that they were intended to be bought for.¹⁵⁹

But there are some exceptional cases that come out of the previous situation. Under Islamic law if the agent, trustee or guardian bought in their official positions as a trustee or an agent a property at a price less than its value, they cannot return the sold item by using the option of defect. On the other hand, they have a right of rescission of the sale by using *khiyar arru'ayah* (the option of sight or inspection).¹⁶⁰ But if a person sold a property for another and the item has already been delivered, and the seller decided to give this item as an award before receiving money, in this case the buyer has no right to return the sold item if he discovers any defect and take the money back. If the buyer bought a property from a person, then he resold it again to another buyer and delivered it to him. If the new buyer

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Section 15 (2) (c). Sale of Goods Act 1979.

¹⁵⁹ Ibid, Section 14 (6).

¹⁶⁰ *Hayder*, op. cit., P193.

discovered an old defect when the sold item was under the responsibility of the first seller, then he has no right to return the item to anyone.¹⁶¹

Here it is not clear why the buyer has no right to return the defective item when he discovered it. It is even not clear why or how *Ali Haydar* concluded this. The Journal decided that in the case of discovering the old (long standing) defect, the Journal gives the buyer the right to return the defective item or to accept it at the nominated or agreed price. Under this case the buyer does not have the right to detain the sold item then asking the seller to recover the lost value that is caused by the defect.¹⁶² This is what has been discussed above. The English and Scottish law perspective according to a shared consultative paper¹⁶³ suggested that the buyer's complaint with regard to the merchantability context (not defective products) would be based on the terms of the contract he made with the producer according to the price that has been agreed. Similar to what *Ali Haydar* has argued, the paper suggested that if the item is already oversold, and the buyer bought it from another retailer, then he has no right of complaint against the producer.

There is no reason for preventing the buyer from returning the defective item. In saying so, this allows the seller to use fraudulent ways to conceal defects in the sold items. This could lead to harm to the buyer through carrying big losses. As it will be seen shortly below, this is not acceptable at all within *Sharia'h* principles. Of course, there would appear not to be any other Islamic scholars' opinions taking a line similar to that suggested by *Ali Haydar*. Even this is in contradiction with a basic Islamic principle, adopted by the Journal, which

¹⁶¹ Ibid.

¹⁶² Article number 337.

¹⁶³ The Law Commission and the Scottish Law Commission. (Law Com. No.82) (SCOT. LAW COM. No.45). Liability for Defective Products. Report on A Reference Under Section 3(1) (e) of the Law Commission Act 1965. Presented to Parliament at June 1977. P16. Para 46.

says that there must be neither harm nor harming (*la dararah wa la dirar*).¹⁶⁴ This derives from the same saying of the Prophet *Muhammad*, and more importantly from the *Qur'an*,¹⁶⁵ which forbade any kind of harm towards humans or between each other. So, according to a logical understanding of Islamic principles the interpretation of *Ali Haydar* is not acceptable on this point. The buyer has the complete and the obvious right to return the property if it is defective, especially if that defect causes any harm.

If the buyer removes the sold item from the place of the purchase, he will not have the right to return this item as a result of using the right of defect. But the buyer can use this right (returning the item) if the buyer returns the sold item back to the place of purchase.¹⁶⁶ It is still not understandable, however, why the buyer cannot return the sold item if he originally removed it, and why he does have the right to return it if he removed it back again to the place of purchasing. Here the logic will be lost, because this might cause harm or economic loss for the buyer, especially if the bulk occupies a big place that can cost the buyer a lot of money as a rent or making some problems for his business. A similar attitude has been taken with regard to this point by CISG; where it is argued that the buyer will be responsible for proving the defect's existence in the goods if they were delivered.¹⁶⁷ It is true that the situation is different regarding the remedies provided by Islamic law and CIGS law, but the similarity is about the moving or delivering of the goods, which in both laws transferred the burden of the responsibility to the buyer from the seller. As is noticed, according to what *Ali Haydar* has explained or understood from the Ottoman Journal, the buyer will lose his right to use the right for defect (*Khiyar Al-ayb*) if he removes the goods from the place of purchase. This is comparable to what is understood by the rules of the

¹⁶⁴ The Ottoman Journal of Equity. Article 95.

¹⁶⁵ *Qur'an* 2: 231, 2:233, 2:282.

¹⁶⁶ *Hayder*, op. cit., P193, 194.

¹⁶⁷ Johan Erauw. CISG Articles 66-70: The Risk of Loss and Passing It. Journal of Law and Commerce [Vol. 25:203, 2005-06]. P204.

CISG, that the buyer might not be entitled to the right for compensation for the damage automatically after the goods being delivered.¹⁶⁸

If the buyer discovered the defect in the sold item and the defect has been removed before returning the item, then there is no right to claim an option of defect. If the buyer insisted on using this option he will be obliged to cover the expenses of the delivery and transportation.¹⁶⁹ This situation is comparable to the English position that was established by the House of Lords in the case of *Ritchie v Lloyd*¹⁷⁰ relying on the s.35 (6) (a) of the Sale of Goods Act 1979. The House of Lords decided that the buyer has no right to reject the goods that have been repaired by the seller before the receipt of them by the buyer.¹⁷¹ On the contrary, by explaining the CISG rules, it has been suggested that when the confidence or the expectation that is built on the trust have been destroyed in regard of the contract, there is no reason to believe, or it should not be anticipated, that the buyer would agree to have the goods repaired, if this destruction has been caused by the seller's fraudulent conduct.¹⁷² Furthermore, if the seller refuses to repair the defect, or when there is no possibility to repair the defect using a reasonable level of effort and within a reasonable period of time,¹⁷³ that means that an essential violation of the contract has occurred.¹⁷⁴ This opinion is not totally supported with regard to the expectation of the buyer's reaction to the seller's cure; this is built on an absolute hypothesis, which means that there will not be a standard expectation available to predict this kind of reaction. Nevertheless, if the seller

¹⁶⁸ Ibid. P209. See also. Section. Effects of Avoidance. Commentary of Article 66. <http://www.cisg-online.ch/cisg/materials-commentary.html#Article%2066>. Accessed at 9/10/2007.

¹⁶⁹ Hayder, op. cit., P194.

¹⁷⁰ [2007] UKHL 9.

¹⁷¹ *Ritchie v. Lloyd* [2007] UKHL 9. Elements of the law of contract recent developments 2008. P3. http://www.londonexternal.ac.uk/current_students/programme_resources/laws/llb_diplaw/recent_dev/elements_law.pdf. Accessed at 10/8/2008.

¹⁷² Switzerland, Handelsgericht des Kantons Aargau, 5 November 2002, CISG-online 715.

¹⁷³ Germany, BGH, 3 April 1996, CISG online 135, BGHZ 132, 290 et seq.

¹⁷⁴ Germany, LG Oldenburg, 6 July 1994, CISG online 274.

provides a remedy or the repair of the goods or provides the buyer alternative goods within a reasonable period, there would not be breach of contract.¹⁷⁵

It could be concluded that there is a possibility to consider the defect that is occurred as a result of a fraudulent conduct as a fraudulent misrepresentation under CISG rules. But the same analysis cannot be reached as obviously within the English and the Islamic rules on defects to goods. Generally, in reaching to this point, it is not easy to tell or to conclude that the option of defect under the Islamic contract law rules could be used as a parallel terminology to the error or mistake in the English or Scottish contract laws. The same could be said with regard to the rules on misrepresentation.

If the defect affects a desired description in the sold item and this description was stated as a condition in the contract after the selling but before the delivering, and the buyer chose to take the sold item with its defective description; the buyer has the right to reduce the price of the of this description from the total price of the item.¹⁷⁶ Here it is clear that the Ottoman Journal has almost the same rules as those of the other legal systems being analysed in this thesis, in the context of discovering defects in the goods. It has been referred to before that the Journal dealt with this case in different ways depending on the facts of a particular case.¹⁷⁷ Generally to claim against the defect is made in court. At the court hearing it must be proved that the defect continues to exist at the time of the trial. This means that the buyer must show the defect in the sold item. It does not matter whether the defect is old or not, but if the buyer cannot prove the existence of the defect he will not be able to go further in the trail. Under English and Scottish consumer law a similar procedure is

¹⁷⁵ CISG Advisory Council. The buyer's right to avoid the contract in case of nonconforming goods or documents. CISG Advisory Council Opinion No. 5. Nordic Journal of Commercial Law, issue 2005 #2, P8. Para cc 4.4.

¹⁷⁶ *Hayder*, op. cit., P197.

¹⁷⁷ *Moss*, op. cit., PP162,163.

demanded for who refuses the goods and claim the compensation on the basis of a defect.¹⁷⁸

But how is the buyer going to prove the existence of the defect? This could be by the direct admission by the seller, or by the sight in the context of a visible defect, or the testing by experts in respect of an invisible or hidden defect. In this situation, under Islamic law, the sold item does not return to the seller and the seller will not be asked to cover the loss that were caused by the defect unless the defect is old.¹⁷⁹ Here, it is understood impliedly that the Ottoman Journal gives the right to claim compensation instead for the loss that has been caused by the defect. This point leads to another contradiction. As it has been seen that the Journal has a clear attitude in relation to this situation which demands the buyer to accept the defective item according to the agreed price or to return it as it is.¹⁸⁰ It is not allowed for the buyer to detain or to keep the defective item and then ask for compensation instead of the loss that has been made by the defect. The Sale of Goods Act, as is applied in Scotland, gives the buyer the right to retain the defective goods, and to ask the seller to maintain the breach giving the right of damage or compensation.¹⁸¹ This rule seems to be restricted to Scotland, because it has specified directly to Scotland without any reference to England. Finally, under Islamic law rights as a result of a defect can be claimed when the buyer claims that the defect exists and the seller has denied this fact. In this situation, the seller will be asked to make an oath assuring that he did not know about the defect that existed. If the seller refused to make this oath the case will be brought before the court in order to start the dispute process against the seller.¹⁸² Something worth noticing generally under Islamic contract law is that there is no distinction between a sale and an agreement to sell. The Ottoman Journal codified the rules of the contract sale as a basic background for

¹⁷⁸ Reforming the Law on Consumer Remedies for Faulty Goods. An Introduction to the Law Commissions' Project.20 February 2008. P2. Para 1.8.

¹⁷⁹ *Hayder*, op. cit., P198.

¹⁸⁰ Article number 337.

¹⁸¹ Section 11 (5). Sale of Goods Act 1979.

¹⁸² *Hayder*, op. cit., P199.

the agreement to sell, consumer law, commercial or trading contracts, and any other derivative contracts such as *salam*, *istisna'a*, *murabahah*.¹⁸³ This means that an understanding of the sale contract rules is the key to dealing with other trading or commercial contracts. The sale contract is the main pillar of the other Islamic contracts when dealing with financial, commercial, and the trading issues.

Generally the option of defect will be transferred to the successor in title in the case of the death of the buyer, because the successor has the right to have the sold item free from any defect.¹⁸⁴ In the case of discovering the defect with the attendance of the seller but before the paying, the buyer can cancel the contract in using the option of defect without the need for a court decision or the consent of the seller. The buyer needs just to say, "I cancel or rescind the contract".¹⁸⁵ It should be noticed here that, under Islamic law, there is no difference between written and oral contracts.¹⁸⁶ This is can be seen clearly in the context of the hire or lease contracts that can be concluded orally or in writing,¹⁸⁷ as well as in respect of confirmation and termination of contracts.¹⁸⁸ This has been referred to earlier in the Introduction to Islamic contract law chapter, which explained the Qur'anic teachings and instructions on this point.

Section 4: *Khiyar Arru'ayah*

Some Muslim scholars have considered *khiyar arru'ayah* (option of sight or inspection) as one of the options that entitles a party, for example the buyer or hirer, to rescind a contract after inspecting the goods or object of the contract.¹⁸⁹ This option seems to be very similar to option of description as the buyer or hirer would be expected to agree with the other

¹⁸³ See more details about these terms in chapter five of this thesis.

¹⁸⁴ *Hayder*, op. cit., P202.

¹⁸⁵ *Ibid*, P203.

¹⁸⁶ *The Ottoman Journal of Equity*.Article 173.

¹⁸⁷ *Ibid*, Article 436.

¹⁸⁸ *Ibid*, Article 302.

¹⁸⁹ *Abdullah Alwi Haj Hasan*. Sales and Contracts in Early Islamic Commercial Law. Islamic Research Institute. Islamabad. 1994. P56.

party to have specific goods. If the other party inspected the goods and found them not to conform with his specifications he has the right to rescind the contract. It is simply very similar to the option of description rules, where description conformity would be the vital element of keeping or voiding the contract.

Section 5: *Gharar* and Misrepresentation

Obviously, considering *gharar* as forbidden conduct from Muslim believers came through the reference to the danger of fraud and deception, alerting people who behave in this way to stop doing so as it is against God (*Allah*). *Allah* describes those who defraud or deceive as people with diseased hearts, both ethically or behaviourally. After making this point, the *Qur'an* connected deceit and fraud with the habit of lying. All the previous conducts and behaviours brought together are described as corruption and the people those who practice them as corrupters.¹⁹⁰ Furthermore, the *Qur'an* encourages people to avoid dealing with delusions,¹⁹¹ which means (*khida'a*, *gharar*, *tadlees*),¹⁹² according to the professional English-Arabic translation. The tracking of the meaning of delusion here as *khida'a*, or *tadlees* is indicated as being elements of *gharar* or *taghreer* in the Arabic-Arabic dictionary, in addition to considering *taghreer* as an action of *gharar*.¹⁹³

It is noticed that the *Qur'an* maintained the same line of argument, teaching the people and Muslims how they must avoid *gharar* or anything could be related to it, due to its connection with Satan's behaviours.¹⁹⁴ In Islamic traditions anything connected to or referring to Satan is not acceptable either religiously or ethically. This is what can be seen in the same connotation in different verse.¹⁹⁵ For more emphasis, the *Qur'an* warned

¹⁹⁰ *Qur'an* 2:9,10,11.

¹⁹¹ *Ibid.*, 45:35.

¹⁹² *Ba'albaki*, op. cit., P259.

¹⁹³ *Ibin Manthour*, *Lisan Al-Arab* (the Arab tongue), Dar Al-Ma'aarif, Cairo, P3232-3234.

¹⁹⁴ *Qur'an* 4:120.

¹⁹⁵ *Ibid.*, 17:64.

Prophet *Muhammad* not to be misrepresented by the non-believers.¹⁹⁶ Qur'anic teaching continues with regard to *gharar* encouraging people not to rely on *gharar* in their life.¹⁹⁷ Just for more accuracy, all the verses referred to *gharar* by one of its meanings or derivative words and expressions as, *gharrah*, *ghoroor*, *yaghorranakah*, *gharrakah*, *gharrakum*. If the tracing of the terminology continued to follow the line of the translation from English to Arabic and vice versa especially within the commercial/financial dictionary, the direct meaning of misrepresentation includes all the words or expressions abovementioned.¹⁹⁸ This suits the definition of the verbal noun of *gharar* when the Ottoman Journal stated that “*taghreer*: is describing the sold item for the buyer contrary to its real description.”¹⁹⁹ This brings us back to *Khiyar Alwasf* which is defined as a misdescription.

In accordance with this research, *gharar* as a risk or uncertainty, which is the most famous and approachable definition, attracts a lot of argument and discussion among Muslim scholars and jurists. As it referred to earlier in this chapter, this concept of *gharar* is very clear from the Qur'anic teachings and their instructions. *Gharar* as a misrepresentation includes fraud, deception, beguiling, and delusion. As has been shown, all of these words or terminologies are founded in the *Qur'an* as being forbidden (*Haram*) in regard to all human behaviours or conducts. It finds that the *Qur'an* strongly emphasises and insists that *gharar* and all its trappings are not acceptable at all from human beings. This is very obvious from what can be concluded when the *Qur'an* connected *gharar* and the badness of the devil, and describes *gharar* as being a continuous and practiced job of Satan. Based on this analytical stand point, it could be said that no Muslims in general, and Muslims jurists or scholars in particular, would object to or be involved in any disagreement with

¹⁹⁶ Ibid, 40:4.

¹⁹⁷ Ibid, 57:14, 20.

¹⁹⁸ Faruqi, op. cit., P460.

¹⁹⁹ The Ottoman Journal of Equity. Article 164.

regard to the impermissibility of *gharar* in Islamic contracts, which suits all the Qur'anic and Islamic law philosophies.

In light of that, it is therefore difficult to deal with or to accept the idea that a certain amount of *gharar* could be permissible, and then lead on to a discussion on how much *gharar* is permissible.²⁰⁰ Unfortunately, this discussion had developed without any reference to what *Qur'an* has said in this regard, or what professional *Arab* linguists have said in this context. This has led to many contradictions and many controversial points, as it has mentioned above, and will be repeated again later on. The concentration on *Qur'an* teachings and meanings give the reader or the researcher a clear line of understanding of the Islamic way of life. The sturdy and consistent background of the *Qur'an* understanding starts from a good knowledge of the Arabic language as a first key for a deep understanding of the Qur'anic context. Based on that, it is strange to find most of the authors who wrote about Islamic contract law, and realised how important it is for the contract to be free from *gharar*, to find them defining *gharar* as a risk or uncertainty which could be found in any commercial transaction around the world.

It is worth mentioning here, that Islamic financial contracts in general, and the *musharakah/ mudarabah* contracts in particular, are built on risk-sharing between the partners to the contract, which is connected to profit/loss-sharing principles. In conclusion to this discussion, these contracts carry a level of uncertainty in regard to the expected results of the project,²⁰¹ otherwise, the saying that there is no risk or uncertainty in Islamic contracts as a meaning of *gharar*, turn them into the interest (*riba*)²⁰² concept.²⁰³

²⁰⁰ Dipl. Ing. Osama Abdelwahab. Developmental Perspectives on Financial Innovation in Forward and Futures Derivatives-A Critical Discussion with Special Consideration of Islamic Banks and Financial Institutions. genehmigte Dissertation. Promotionsausschuss: Vorsitzender: Prof. Dr. Frank Heinemann. Berichter: Prof. Dr. Gernot Weißhuhn. Berichter: Ass. Prof. Dr. Seif Tag el-Din. Tag der wissenschaftlichen Aussprache: 2.5.2007. Berlin 2007.D 83. P99.

²⁰¹ It would be very useful to see this subject in detail at: Tariqullah Khan. Practices and Performance of *Modaraba* Companies (A Case Study of Pakistan's Experience). Research Paper No. 37. Islamic Development Bank, Islamic Research and Training Institute. 1st Edition 1416H, 1996.

²⁰² See more about *riba* in chapter five of this thesis.

Most of the authors who wrote about *gharar* described it as being an unacceptable risk, and usually they add that the avoidance of *gharar* as an essential principle within all Islamic contracts, or transactions that rely on Islamic financial/commercial rules. Also they considered the importance of preventing *gharar*, seeing it as a kind of gambling,²⁰⁴ which is mentioned directly in the Qura'an, using a completely different meaning from that of *gharar*.²⁰⁵ Under sup topic called "permissible *gharar*", *Al-Saati*., a contemporary author, has quoted from *Shatibi*, a traditional Islamic scholar, that the *Hadith* (Prophet *Muhammad*'s speech) that prohibited *gharar*, was not intended to prohibit all *gharar* categories or types. Based on this background, Muslims scholars have allowed some kinds of transactions like selling the products that are unseen, being still growing in the ground (onions, carrots, and radish), and they have also permitted sale of houses that do not have seen foundations. *Al-Saati* argues that the *Hadith* just intended to disallow *gharar*, that could lead to conflict between the contracting parties, and which cannot be tolerated in Islamic law.²⁰⁶

The controversial point in the above is the permissibility or the impermissibility of *gharar*, according to the *Qur'an*, with *gharar* being described as deceit, fraud or misrepresentation. Therefore there is no logic in saying that some *gharar* is permissible and other *gharar* is not. Forbidding (*tahreem*) *gharar* is very clear from all Qur'anic evidence which has been built on a very logical background preventing Muslims form dealing with any transaction which includes fraud, deceit, or cheating. More contradictions can be found when *gharar* is defined as speculation; the example of "speculation" that has been given is when contracting parties have formed their contract on lost goods. It is clear that the given

²⁰³ *Rosly, Sanusi and Yasin*, op. cit., P3.

²⁰⁴ Christopher F. Richardson. Islamic Finance Opportunities in the Oil and Gas Sector: An Introduction to an Emerging Field. *Texas International Law Journal* Vol. 42:119. 2006. P127.

²⁰⁵ More and deep details will be discussed later on in this chapter to explain the gambling.

²⁰⁶ *Al-Saati*, op. cit., P10.

example refers to lost commodities selling²⁰⁷ is not the proper one, because if someone sold goods that had already been lost, this is more likely to be *gharar* as a form of misrepresentation rather speculation.

It will be clear that *gharar* is much more like the misrepresentation concept in English contract law, rather than any similar concepts. It is understood that misrepresentation under the English common law is considered as a false statement or representation about a fact that have been made has induced the other party to enter the contract. This definition, as analysed in the English concept of mistake chapter has a parallel definition in the context of fraud which was defined as being a false representation of a fact, whether this misrepresentation has made intentionally (knowingly), without believing it to be true, or carelessly.²⁰⁸ This leads to the opening of another gate of debate, which is related to the similarities between *gharar* under Islamic contract law, and the concept of misrepresentation under English contract law. It seems that fraud or deceit reflects the meaning of *gharar*, as well as cheating. This chapter's analytical approach matches the approach of the Arabic-Arabic dictionaries, with the verb *gharra* meaning to misrepresent or to defraud which puts misrepresentation and fraud in the same category or classification. As has mentioned in this chapter, English-Arabic dictionaries translate misrepresentation using the words *khida'a*, *tadlees* (fraud) and *kathib* (lying), and they stated that misrepresentation means releasing false statement by misrepresenter about a fact to induce the other to achieve his desires.²⁰⁹ This meaning has been translated to be used to mean "misleading" as well.²¹⁰ In discussing fraud and misrepresentation under English law, some

²⁰⁷ *Adil Manzoor Bakhshi*. Developing a financial model for Islamic credit card for the UK. Dissertation submitted in partial fulfilment for the degree of MSc in International Banking & Finance, University of Salford. March 2006. P14.

²⁰⁸ Curzon, op. cit., P183.

²⁰⁹ *Faruqi*, op. cit., P460.

²¹⁰ *Ibid*, P459.

authors considered that the material misrepresentation a type of fraud. This gives an entitlement to sue under the tort of deceit.²¹¹

The contradictions between Muslim scholars and their definitions of *gharar* are not based on the Qur'anic verses that talk about *gharar*. It has also raised more questions with regard to the applicability of Islamic contract in non-Muslims courts. These questions could be raised if the contracting parties expressed their clear will that the contracts are to be governed by Islamic law in non-Islamic courts. The problem starts if one of the parties claimed against *gharar* and asked the court to nullify the contract as a result of *gharar* by considering it to be a risk or uncertainty. It suggested that the court would face some difficulties in deciding this case due to the ambiguity of the elements of *gharar*. It is added that in a practice, the court concluded that one of the reasons for *gharar* as speculation being forbidden under Islamic law that only *Allah* can predict and know the future.²¹² Accordingly human beings cannot go into risky transactions or trade as they cannot predict or evaluate the level of risk, with the prohibition of *gharar* being built in order to prevent people from dealing with any business involving risk. Of course, this is not imaginable meaning of the context behind prohibition of *gharar* as many types of necessary business, trade, or commerce involve risk, and applying such an interpretation or understanding of *gharar* would stop a huge number of necessary business transactions, and make them *haram*.

The most important point is to establish whether *gharar* means risk and/or uncertainty, or if misrepresentation means a percentage of risk and/or uncertainty. In emphasising this research discretion, there is no objection to saying that some categories of risk, uncertainty, and speculation are forbidden under the Islamic law of contract, but the *Qur'an* has

²¹¹ Xiang, Buckley, op. cit., P323.

²¹² Charles P. Trumbull, Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts. *Vanderbilt Law Review* [Vol. 59:2:609, 2006]. P611, 636.

mentioned and clarified that clearly, as have all the Islamic schools, to include their jurists or scholars, both early and contemporary. These categories are restricted within the meaning of gambling (*maysir* or *qimar*) which is directly prohibited by *Allah* (God), who asks that believers to avoid it as it causes animosity and hatred between people.²¹³ This prohibition is linked with satanic behaviour. In a different verse gambling is described as a sinful and harmful activity.²¹⁴ The translation of the word “gambling” from English to Arabic becomes excessive risk or speculation with high level of uncertainty and with no guaranteed result.²¹⁵

The previous discussion with regard to the gambling concept and its prohibition gives a clear picture that *gharar* interpreted as a risk, speculation, and uncertainty is not giving a correct perspective to the meaning of *gharar*. It would be expected to see confusion by the courts in interpreting *gharar* as uncertainty or risk, which is difficult to be defined in an absolute sense. This confusion would not arise if the word *gharar* is used as it was used in the *Qur'an* to be a misrepresentation or fraud which is expected to be not acceptable under any legal system.

Gharar also, “has been translated as ‘trading in risk,’ or ‘risk-taking.’ These uses are in the context of ignorance of a material attribute of a transaction, such as the existence of the subject matter, deliverability, terms, and timing of payment”.²¹⁶ It can be noticed that almost every explanation has some contradictions one to another. Because some of the writers refer to the prohibition of *gharar* as coming from Prophet *Muhammad*,²¹⁷ which is correct, as he understood the *Qur'an* in the most proper way, and very few of Muslim

²¹³ *Qur'an*. 5:90,91.

²¹⁴ *Ibid*. 1:219.

²¹⁵ *Ba'albaki*. op. cit.. P278.

²¹⁶ Sapana Shah. Islamic Banking and Finance: Shari 'a-Compliance and the Reinterpretation of *Riba*.

http://www.calbar.ca.gov/calbar/pdfs/sections/ils/writing-competition_2007_islamic-banking_shah.pdf. P10. Accessed at 13/8/2008.

²¹⁷ *Oussama Arabi*. Early Muslim Legal Philosophy: Identity and Difference in Islamic Jurisprudence. UCLA International Institute. G E von Grunebaum Center for Near Eastern Studies. (University of California, Los Angeles). Paper 1 Year 1999. P29.

scholars understand his point with regard to the prohibition of *gharar*. Very few of the Muslim scholars refer to this prohibition to the *Qur'an* which is completely wrong. Some of them do not mention to what *Qur'an* said about *gharar*, and some other claim that there is no Qur'anic verses prohibiting *gharar*.²¹⁸ Of course, this gives an impression that most of the scholars did not focus their attention to what *Qur'an* has to say in relation to this concept, or they did not understand it properly.

It is worth mentioning that *Sami Al-Suwailem* has summarized part of the controversies between the authors in relation to *gharar*, which shows how some Muslim jurists are very much involved in causing confusion on this topic. He has argued that despite the well established legal characteristics of *gharar* under Islamic contract law, the authors who are interested in Islamic finance find problems or a “dilemma” in the way of defining *gharar* so as to give a specific meaning to this concept. *Al-Suwailem*, in order to prove this point, has stated that *Zaki Badawi* wrote that *gharar* as a specific meaning is uncertain, adding that *gharar* has not been given a definite meaning under the Islamic literature. This has driven Muslim scholars to deal with every case separately, thereby generating different meanings for the term *gharar*. The same impression has been built and expressed by Frank Vogel when he argued that Islamic jurisprudence cannot characterize the precise concept of *gharar*, which demands a deeper study and articulation for the purpose of its definition.²¹⁹

Of course, it is possible to find some authors including an element of deception as a part of their definition of *gharar*.²²⁰ Also some others have traced a closer line to the *Qur'an* and the logical construction of *gharar* when they included uncertainty as an element of *gharar*

²¹⁸ *Al-Saati*, op. cit., P6.

²¹⁹ *Al-Suwailem*, op. Cit., P61.

²²⁰ Islamic Capital Market Fact Finding Report. Report of the Islamic Capital Market Task Force of the International Organisation of Securities Commissions. July 2004. P7.

beside the deceit, but not just using *gharar* to mean uncertainty.²²¹ For example, they would use deceit to evaluate or describe the level of uncertainty in a contract. This factually could lead to another result, that *gharar* is not uncertainty or risk or ambiguity, but rather, *gharar* by its action, *taghreer*, can push people to an unknown excessive risk or an excessive uncertainty, thus causing loss and damage for the contracting parties. As it will be seen in this chapter, risk itself is not impermissible. Risk is strongly accepted and expected under Islamic law within the financial and commercial transactions, but for the purposes of motivating the people to act productivity, thereby adding new value to economic activities in general, or to individuals in particular. As has been mentioned in different places in this research, the *mudarabah* contract is a very clear and desirable example that has a very acceptable risk level associated with it.²²²

Based on the above analysis, a similar approach can be noticed when some authors interpreted *gharar* as meaning a probable or certain deception.²²³ This approach enhances the discretion of this research partly by emphasising that the prohibition of *gharar*, not because it is a risk or uncertainty, but because it contains the meaning of deception, that leads to two further points needing to be made. Firstly, the interpretation of *gharar* as uncertainty could be understood as uncertainty about the existence of the deception in the contract. In other words, the prohibition of *gharar* as being a probable deception means that *gharar* is considered to be a misrepresentation because misrepresentation and deception have the same concepts under the Islamic-Arabic term. It can be added that contracting parties under Islamic contract law would be encouraged to avoid entering a contract if there were any doubts about the existence of a misrepresentation. For the sake of simplification, the entire approach of this research regarding the concept of risk, the

²²¹ The 4 Major Forbidden Elements in Islamic Finance. *Shirkah*. Year I, Issue 1 - July/August 2006. P49.

²²² *Al-Suwailem*. op. Cit., P64.

²²³ *Ahmed Fazil Ebrahim*. A Technical Analysis of the *Murabahah* [or Cost Plus/Mark up]. Financing Technique as Applied by the Islamic Banks. Understanding Islamic Finance Conference. 19th and 20th September 2007. Geneva, Switzerland. P6.

understanding of the Islamic economic logic leads one to say that it is impossible to banish all types of risk, as no business or human activity is without risk, to include the issue of making a profit, and risk should be built into the consideration of whether or not to enter into a contract. This issue can be associated with the expectation of disappointing results from some parties to a contract, as the issues of gain and loss are key elements in commerce. The significant changes of the prices of some goods from one day to another is good example for this.²²⁴

There is something that need to be said, which is the most direct and clear definition of *gharar* as a translation from Arabic-English. This translation states that “*gharar* means deceptive misrepresentation and the use of misleading ways and means.”²²⁵ It would be useful to describe that one of the key elements in the misunderstanding of *gharar*, and many other Islamic terminologies or concepts is coming from the errors in translation from Arabic to English by the authors or the writers who write about Islamic law terms. This problem is even more serious when acknowledged Muslim scholars who do not speak or understand the Arabic fluently, which results in an altered meaning of concepts from their original and intended purposes.²²⁶

As a result of this chapter, the structural lack of knowledge of Arabic language and its context has caused a clear misconception which has led to some very serious misunderstandings of the impermissibility of *gharar* in the *Qur'an*. The *Qur'an*, dealt with, clearly and directly, the concept of *gharar* and its derivative terminologies and verbs to be as an obvious rule to clarify how this important issue is to be avoided. Built on this analysis, it will be much easier for anyone to understand and to appreciate why *gharar* is

²²⁴ Dipl. Ing. Osama Abdelwahab. Developmental Perspectives on Financial Innovation in Forward and Futures Derivatives-A Critical Discussion with Special Consideration of Islamic Banks and Financial Institutions. genehmigte Dissertation. Promotionsausschuss: Vorsitzender: Prof. Dr. Frank Heinemann. Berichter: Prof. Dr. Gernot Weißhuhn. Berichter: Ass. Prof. Dr. Seif Tag el-Din. Tag der wissenschaftlichen Aussprache: 2.5.2007. Berlin 2007.D 83. P97.

²²⁵ *Rahman*, op. cit., P1.

²²⁶ *Ebrahim*, op. cit., P3.

totally not allowed in Islamic contracts as one of the most, both moral and ethical demands of all the kinds of dealings between people.

Just for the purposes of remembering, the early trade between Muslims and other nations was almost continental trade. The situations and conditions of the trade were very risky and had uncertain results. In this regard, it would not be possible or imaginable that the *Qur'an* and the Prophet would prevent Muslims from practicing trade through the desert because it is was risky or uncertain. Otherwise, early Muslims would have had to stop working because they had built most of their economic system on trade. So *gharar* is connected directly to the subject-matter and the price, the quality, the description, the quantity, and so on. Considering *gharar* as a risk or uncertainty would contradict one of the most famous Islamic contract (*mudarabah*)²²⁷ which is mentioned in the *Qur'an* as a type of work contains risk and uncertainty.²²⁸

It would be imaginable the levels of risk early Muslim traders had to experience in that era, with all the lack of the modern facilities that are available nowadays. Some would be wonder if all the categories or types of risk, speculation, and uncertainty are forbidden under Islamic law, or whether some of them are allowed and permissible. The answer will be in accordance with what has been indicated earlier, issues such as excessive risk, speculation, and uncertainty will be dealt with under the concept of gambling (*maysir*), which is the way for some people to gain their money easily, without any effort, at no risk, and it is the way for the others to lose their money without working, and through excessive risk. In this way, the concept of productivity is missed, which is one of the most important factors to keep the economy working in a proper and healthy way. Here, the measurement of the acceptable risk, speculation, and uncertainty is imaginable or approachable since it is

²²⁷ See more details about this contract in chapter four of this thesis.

²²⁸ *Qur'an*. 73:20.

far from the gambling, which is the extreme level of risk and uncertainty. Considering excessive risk and uncertainty prohibited under Islamic law as a sort of gambling leads us to say something about the very recent international financial crisis. The financial instruments that were devised prior to the crisis were secured on mortgage receivables that bore a very high risk of not being repaid. However, a very strong example of excessive risk taking in the current financial crisis is the mortgage policy of giving mortgage almost anyone interested regardless of his ability to repay the loan. In having this policy, the financial institutions (were betting that houses prices will be soaring and the average repayment of the portfolio of the mortgage loans will not deteriorate. As this policy was very focused on the short term gains and fuelled by an appetite for excessive risk, this business models proved disastrous when the customers who should not have got the loans in the first could not afford to pay it back.

In the seventh chapter, the Ottoman Journal organised the rules of *ghabn* and *taghreer*. As has been mentioned above, *ghabn* used in the context of fraud (*khida'a or waks*), which related to trade contracts (selling and buying).²²⁹ As has been explained before, *taghreer* is the action of *gharar*, which is misrepresentation. There is another perspective could support considering *taghreer* as misrepresentation and misrepresentation as fraud (*tadlees*). This possibility comes under the title of *khiyar al-tadlis* or *khiyar al-taghreer*, as a fraud option. It is said that 'the disappointed party' would be able to rescind the contract if he can prove that he entered into the contract on the basis of 'deceit or willful misrepresentation of the other contracting party'.²³⁰ In general, this supports the idea that proposes that *taghreer*, *tadlees*, deceit, and misrepresentation bear the same meaning under the Islamic law of contract which has been mentioned within this chapter. However, the Journal has put the general rules of all these concepts together. Nevertheless the Journal

²²⁹ *Ibin Manthour*, op. cit., P3211.

²³⁰ *Haj Hasan*, op. cit., P59.

has decided that in the case of the existence of a flagrant fraud (*ghabn*) in a sale, but without misrepresentation (*gharar*), the defrauded party has no right to void the sale unless the flagrant fraud alone was connected to an orphan, an endowment, or dealing with public interest property.²³¹ In contrast with this view, the Journal has stated that if one of the parties has misrepresented the other party, and the misrepresentee proven that the sale involved a flagrant fraud, then misrepresentee has the right to void the sale.²³² It added that if the misrepresentee dies then the case of misrepresentation and flagrant fraud does not transmit to the successor.²³³ If the misrepresentee has experienced a flagrant fraud, then he uses the property as a real owner does, he does not have the right to void the contract.²³⁴

Finally, the Journal has decided that if a sold item has been destroyed or consumed, and this sold item suffered from a flagrant fraud and misrepresentation, or any defect has been found, or the buyer has built a building on the land, then there is no right for the misrepresentee to void the sale.²³⁵ The journal here has distinguished between misrepresentation and the fraud, and has dealt with the misrepresentation as having a wider meaning than fraud. This approach would be in line with the general rules of the English law of contract when dealing with misrepresentation. As has been seen earlier, the Arabic-Arabic translation does not distinguish between misrepresentation and fraud, and similar words such as cheating, deceit, lying, etc. This has also been shown in the very notable UK court cases which have dealt with misrepresentation and fraud such as *Banco Santander S.A. v. Bayfern Ltd.*²³⁶

In this context *gharar* cannot be considered to be a risk or uncertainty. It should be said that *gharar* will be applicable when one of the contracting parties has tried to change the

²³¹ The Ottoman Journal of Equity. Article 356.

²³² Ibid. Article 357.

²³³ Ibid. Article 358.

²³⁴ Ibid. Article 359.

²³⁵ Ibid. Article 360.

²³⁶ [1999] EWHC 284.

facts, or did not give the correct information with regard to the risk or uncertainty, by convincing the other party that there is no uncertainty or the level of risk is very low, when in reality it is a very high or excessive risk. Based on that, if a party induced other party to enter a contract by providing him misleading evaluation, this would be considered a *gharar* (misrepresentation). The legal effects of *gharar* would depend on the facts of the case, and these could make the contract null or voidable. This is because *gharar* is connected to fraud or at least involved fraud, which is one of the main reasons behind the prohibition. The reference to the fraud here is based on the understanding that a contract which involves fraud will involve an attempt at obtaining the property or money of another's without having the legal right to do so.²³⁷ This issue requires further research from contemporary Muslim scholars in order to properly classify the categories of *gharar*, and their legal effects in regard of the contract.

Section 6: Conclusion

Generally Islamic contract rules have not organised the rules of error or mistake. It has concentrated rather on misrepresentation, fraud, deceit and similar terminologies. This, of course, has come from Islamic jurisprudence and scholars writings which dealt with *gharar* mostly far from the Qur'anic context. The same can be said with regard to error which can really generate a lot of legal standpoints and rules. This area needs to be investigated more deeply, and may be need to be reformulated in order to be presented in a more understandable way, which would be more acceptable and approachable to the modern legal terminologies, while being founded following the Islamic law perspective. In addition, there is a need to make the terminologies more compatible to Qur'anic thoughts and instructions. This is will not be difficult as the error/mistake concept has its origins in the *Qur'an*, as is the case with the misrepresentation concept. The mission of the jurists or

²³⁷ *Haj Hasan*, op. cit., P41.

scholars would be to derive and organise the rules of the error and misrepresentation, and unify them under the same terminologies. The same situation would be demanded with regard to the English-Arabic translation and *visa versa*. This is very much needed in order to bring an end to the confusion and contradictions with and between the non-Arabic speakers who are scholars in Islamic contract law. This is needed urgently due to the notable emergence internationally of Islamic financial contracts, which need a more modern understanding of the concepts underlying contracts, in order to meet contemporary commercial demands while still fitting with the Qur'anic teachings.

With regard to *gharar* (misrepresentation), this area of contract has attracted a lot of interesting and wide ranging discussions by Islamic financial and commercial contracts writers. It noticed, however, that most of these writers have not derived their opinions from the *Qur'an*. Very few of them when they did so, did not go directly to the verses which explained *gharar* and its derivative terminologies. It is also worth noticing that those who did write about on this subject connected the Arabic practical meaning of *gharar* following respected *Arab* linguistics and dictionaries that help to enhance and strengthen the knowledge and the understanding of the realistic Islamic approach to Qur'anic teachings. At the same time, *Khiyar Al-ayb* and *Khiyar Alwasf* could have some connections or shared areas with the error concept, but neither can be classified as error. As discussed earlier in this chapter, *gharar* is very much comparable to the English and Scottish contract law concept of misrepresentation. The same conclusion can be made with regard the close connections between *Khiayr Alwasf* and the English and Scottish use of the word misdescription. As a final note to this chapter, the question can be asked; does Islamic contract law have its own concept of error? In short, this writer's answer is yes, the concept is originated by the *Qur'an* but it never been followed or been properly developed by Islamic jurisprudence.

There is a big need to revise the concepts of error and misrepresentation in the Islamic contract law. This need derives its importance from the fact that the Islamic contract law has established these two concepts, but they have not been clarified and modernised a long side with the contemporary terms. The translation issue from Arabic to English is one of the most important issues to be taken into consideration when comes to establishing a proper understanding of error and misrepresentation under Islamic law.

Chapter Six

A Comparative Critical Analysis of the Concept of Error and Misrepresentation in CISG

Section1: Introduction

There is serious lack of materials discussing the concept of mistake/error and misrepresentation under the CISG; few actual cases discussed the subject. Furthermore, there are no unified interpretations explaining these important topics. Adopting a unified interpretation of error and misrepresentation would be crucial in solving many disputes occur under the CISG.¹ This view would include the litigation of cases of mistake and misrepresentation. The author has found no direct reference to mistake or error within the CISG articles. In light of that, the discussion will rely on the analytical comparative method attempting to derive the rules of mistake and misrepresentation and their categories, if any, from the materials available. It is clear that the CISG has not discussed any type of error and misrepresentation as in English and Scottish contract law. Stating that the concepts of mistake and misrepresentation and some relevant cases can be concluded by implication when discussing the CISG; however, no clear categories are developed, (e.g. error as to motive, error as to transaction, unilateral or bilateral mistakes).

Having clear concepts of mistake and misrepresentation under the CISG gains considerable importance, however, this subject lacks clarity and raises serious debates among the writers. It is suggested that this subject derives its importance from the “warranty as to the quality of the goods”. In this situation, a serious problem would occur, which is the conflict

¹ Flechtner, op. cit., 259.

between the CISG and the national remedies. Two issues to be noticed about “warranty as to the quality of the goods”; firstly, it includes the validity of the contract using avoidance as a remedy, which used under many national laws. Secondly, it includes the concept of the fundamental breach using avoidance as a remedy under the CISG. Both rules are usually related to mistake or innocent misrepresentation about “the quality of the goods or claims non-conformity of the goods”. There is an open question whether the CISG rules or equivalent domestic rules should be implemented; it is an issue to be discussed later in this chapter.²

Section 2: Concept of Error

2.1. Mistake as to Quality

As shown earlier, mistake renders the contract void in many national legal systems; but this is not the case under the CISG. For example, some argued that the CISG rules would not be applied if a mistake as to quality of the goods occurs.³ On the contrary, different argument raised by others suggesting that mistake as to quality of the goods under some national laws corresponds with the scope of Article 4(a) of CISG.⁴

Based on the rules govern defective goods, the author of this thesis concludes that Article 4 of CISG can be considered as a remedy for the mistaken party if this mistake relates to the quality of goods.⁵ This author suggests establishing an approach considering mistake within the scope of the CISG rules; this approach allows the mistaken party as to the quality of goods to apply the norms of the defective goods as a legal solution.⁶ Mistake as such was part of some discussion meetings about the CISG rules. According to the Italian view,

² Kazimierska, op. cit., PP 158.159.

³ Rudolf Lessiak, op. cit., P487.492.

⁴ Lessiak, op. cit., P99,101.

⁵ Kröll, op. cit., P55

⁶ *Clout Case No. 47* [Landgericht Aachen (Regional Court), Germany, 14 May 1993], published in *Recht Der Internationalen Wirtschaft (RIW)* 760, 761 (1993).

mistake approached as an equivalent to the lack of conformity;⁷ mistake under domestic laws and their counter parts of invalidity and non-conformity under the CISG were the extent of discussion one of the CISG's meetings.⁸ This shows the differences between the member states whether considering mistake as part of the remedies of the CISG where occurs.⁹

This author noticed that when the CISG discusses description of goods in contracts governed by the CISG; there is no indication to mistake. Furthermore, there is no evidence to any remedy for mistake, such as rescission, avoidance, or any similar remedies, dealing with mistake as used in domestic legal systems.¹⁰ Some writers have even denied any link or relationship between error and misrepresentation concepts and the CISG rules. They argued that national rules and remedies should be the only reference to deal with cases related to error and misrepresentation. The writers have argued that there is no need to discuss these opinions; as they do not have any considerable implication in the context of the CISG.¹¹ This view followed by the German courts, where one of the District courts¹² has stated that the CISG rules do not govern the case of mistake in expression, and this case should be solved under the rules of domestic law.

This author sees no logic to reject the relationship between the CISG and mistake. Many of the member states of the CISG deal with mistake as an independent doctrine. Furthermore, many cases established assisting judges, courts, and arbitrators in reaching reasonable decisions disputes related to mistake and misrepresentation occur.

⁷ Legislative History, op. cit.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ferrari, Verona, op. cit., P70.

¹¹ Kazimierska, op. cit., P189.

¹² Germany, Landgericht [District Court] Hamburg, 19 June 1997. <http://www.cisg.law.pace.edu>.

However, many cases “dealing with Article 35(1) CISG”, address directly the issues of quality, quantity and the description of goods of the subject matter of the contract. These issues can be contained in any contract and interest the contracting parties. There must be provisions, dealing with error of the contracting parties and the intentional violation of the fundamental stipulations of contract; which related to quality, quantity, and description of the goods. The provisions must provide solutions when the contracting parties, one or both, become under mistake and misrepresentation. This author finds that there is no evidence to indicate when the party can be considered mistake inducer (misrepresentor) or misrepresentee (under mistake). The author also sees no explanation to cases related to mistake, which expected to occur at any stage of the contracts. It is difficult to settle on which analytical method to be followed to derive the concepts of error and misrepresentation when applying the CISG.

Good faith is one of the examples of supplementary issues that related to mistake and misrepresentation cause confusion when using the CISG rules. Good faith has no clear concept or definition under the CISG; it is also not clear which stage of contracting can be applied. There is no indication how good faith affects the validity of the contract, its understanding, performance, negotiations.¹³ Studying the aforementioned issues shows that all of them are logical and acceptable in terms of the general context of good faith.¹⁴ Saying good faith presumed or expected under the CISG, does not indicate precise definition of this concept.¹⁵ It early to conclude that good faith is the incubator of misrepresentation or fraud; but there is a great possibility for good faith to include the concept of mistake and misrepresentation. Some authors support this approach as they mention an implicit the existence of mutual mistake under the CISG rules; but they do not explain how to deal with

¹³ Andrea L. Charters. Fitting the “Situation”: the CISG and the Regulated Market. Washington University Global Studies Law Review. Vol 4 No 1. 2005. PP6,7.

¹⁴ Lookofsky. op. cit., P92.

¹⁵ Akaddaf. op. cit., P33s.

it. Also they do explain its legal effects in relation to existence of the subject matter.¹⁶ In supporting this hypothesis, the English case of *Raffles v. Wichelhaus*,¹⁷ indicated as a certain example of mutual mistake, to be governed by Article 8 CISG.¹⁸ This article concerns the interpretation of the related issues to the intent of the parties, which will be explained below.

There is different opinions worth to examine in relation to good faith understanding. In spite of the mentioned ambiguity earlier with regard to good faith understanding under CISG; there is discretion giving a direct indication to the concept of good faith under CISG. According to this view, good faith applies to all the features of the convention, the interpretation and implementation of the contract. It can also apply to the dealings' fairness;¹⁹ it suggested also that good faith contains duty to disclose the defect in accordance with Article 40 CISG related to non-conformity rules.²⁰

Akaddaf, in her comparative approach, between the Islamic and CISG application in the Arab-Islamic Countries, she argues that good faith implies prohibition of fraud and fraudulent dealings; according to her opinion, good faith in this context complies with the concept of good faith under Article 7(1) CISG.²¹ This opinion follows the perspective of English law related to good faith that considered as a minimum requirement for contracts. The opposite expressed through the rules of fraud and misrepresentation. This does not mean that good faith restricted only to misrepresentation and fraud; but it means, however,

¹⁶ Lookofsky, op. cit., P280.

¹⁷ (1864) 2 Hurl & C 906.

¹⁸ P. Latimer. *Australian Business Law*. 20th Edition. CCH, 2001. P327.

¹⁹ Phanesh Koneru. The International Interpretation of the UN Convention on Contracts for the International Sale of Goods. An Approach Based on General Principles, 6 Minn. J. Global Trade. 1997. P105. At <http://www.cisg.law.pace.edu.VIII>. Accessed on 7/01/2009.

²⁰ Akaddaf, op. cit., PP33,34.

²¹ Ibid, PP31,32.

that good faith is a wide concept and open to include different aspects, depending on the contract in dispute.²²

The author sees another clear logical approach to be followed enhancing fraud as a basic element the concept of good faith under the CISG. Scottish contract law deals with fraud as an essential factor of good faith;²³ good faith also considered a means to control un-induced mistake which is known by the other party.²⁴

The author proposes that error, fraud, and misrepresentation contained within the concept of good faith and considered as vitiating means of contract in most of the legal systems cited in this thesis. Relying on this analysis, this approach assists to reach the key guidelines to error and misrepresentation under the CISG. This then bring the CISG closely to English law approach on misrepresentation as being an element of good faith or “utmost good faith”.²⁵ Based on that, some authors considered the right given to the misrepresented party (misrepresentee) to rescind the contract as part of the concept of good faith under English commercial law.²⁶ Some authors raised this issue from interpretive perspective; they suggested that the CISG rules create disputes under different legal systems because CISG requires the variety of remedies to be sought under national laws.²⁷

It is believed that the CISG has rarely dealt with mistake or error.²⁸ This belief, however, provides a ground to further exploration of the CISG rules. In studying Article 8(1) CISG,²⁹ some signs can be found indicating the concept of error concentrating on understanding the

²² Vanessa SIM. Good Faith in English Contract Law: Of Triggers and Concentric Circles. Ankara Law Review Vol.1 No.2 (Winter 2004), PP229,230.

²³ MacQueen, Good Faith in the Scots law of contract: op. cit., PP5-37.

²⁴ Tetley, op. cit.

²⁵ Shi Feng. Utmost Good Faith in Marine Insurance: A Comparative Study of English and Chinese Maritime Law. Plymouth Law Review (2008) 1. P156.

²⁶ R. Bradgate, Commercial Law, 3 Ed. (London: Butterworths, 2000) P31.

²⁷ Novoa, op. cit., P608.

²⁸ Charters, op. cit., P17.

²⁹ For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

statements by the contracting parties. As Article 8(1) CISG refers to the contract interpretation, it would be expected that the drafters of the CISG considered the possibility of misinterpretation or misunderstanding by the contracting parties. This section stated that the interpretation should consider the intent of one of the contracting parties. Some points need to be examined, because there is no explanation how the intent of the party can be interpreted, and whether fraud, misrepresentation, or mistake is involved. Dealing with this point, raise additional issues to deal with, as it is difficult to be prove what the party has intended by his conduct. Another issue occurs regarding the awareness of the other party, and when he knew or must have known about the real intent of the other party.

This discussion leads one to say that the indication to the interpretation of the statement provides that there might be unseen meaning of error and/or misrepresentation, fraud which are not clear in Article 8(1) CISG.³⁰ Serious problem occurs related to mistake definition, because it is not categorised as common, mutual, unilateral, or any other type. It is not clear whether section (1) of Article 8 CISG expects one or two parties in error. If the case of mistake solved, further investigation required to know whether misrepresentation established by one party and mistake by the other. If there is an answer to the previous questions, another question occurs, regarding the intended type of misrepresentation. There is no clear category or clear legal effects of misrepresentation, whether fraudulent or negligent.³¹ This subject is widely open for theories and controversies, as will be shown later.

In order to strengthen the analytical approach regarding Article 8.2 CISG, it can be noticed that this section attempts to resolve disputes to which section 1 is not applicable. Section 2 suggests that, in the case of misunderstanding of statements and conducts, reasonableness

³⁰ For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

³¹ Lookofsky, op. cit.. P280.

should be followed as a solution of interpretation. This means that the standard is the understanding of the reasonable person under the same situation. In this way, section 2 raises another issue related to the reasonability, which might have the different understanding and application in different countries, or among different commercial contexts. In this situation, any dispute occurs between the contracting parties would not be resolved easily due to the conflict of laws under different national courts. The CISG does not deal with mistake and misrepresentation as in English and Scottish law; this creates more complications to the contracting parties. This is because there is no clear international court or judicial body to deal with the cases and disputes.

The author believes that there is an implicit, but strong link, between Article 8 CISG and some Scottish contract law rules related to intent and its interpretation. This is derived from the simple definition of error under Scottish law, which concentrates on resolving disputes between the contracting parties when there is misunderstanding between intentions and expressions.³² According to this view, the intention of the contracting parties is the core of the error law. The author finds differences between the classical rules of English and Scottish law of error and Article 8 CISG with regard to the interpretation of intention. Both about the understanding intent of the contracting parties, whether it expressed correctly or incorrectly. This approach is indicated in the Islamic-Arabic definition of error discussed earlier in this thesis. The Islamic-Arabic definition concentrates on the intention of the person, the error being considered where someone intended to do something but unintentionally he did something different.³³ Furthermore, it can be noted that under Scottish contract law, as shown earlier in this thesis, considered an independent category of error as to intention. This type of error occurs where the parties prove that their consent established on error, which makes the contract not binding as they

³² Rahmatian, *op. cit.*, P36.

³³ *Ibin Manthour*, *op. cit.*, P1193.

did not intend to bind themselves. In this case, the contract would be considered as *void ab initio* (from beginning).³⁴

It is clear that when the parties' dispute about their intention, and the case ended before the court, in this situation, the litigation is about interpreting the parties' intention. The author sees that Article 8 CISG close to Scottish law view of error as to intention. The English view is not different and the standard of reasonableness applies to interpret the real intention of the parties under the category of mutual mistake.³⁵ Following this issue, the interpretation of the parties' intention under English contract law discussed usually in case law. This point is clear in *Investors Compensation Scheme Limited v. West Bromwich Building Society*,³⁶ where Lord Hoffmann presented five principles to be used when interpreting the contract. These principles concern the method of understanding the intention of the contracting parties. These principles rely on the understanding of reasonable person having knowledge in the same field of commerce. These principles would correspond to purposes of Article 8 CISG. Error as such, is not established under the Islamic contract law.

It is noticed that Article 28 CISG mentioned that the court is a national reference with respect to the disputes of a greed specific performance that is required by one party, but the court has the option whether to accept or to refuse to look at the dispute. Based on that, as an analogical conclusion, the interpretation of misunderstanding or misrepresentation, and their similarities, would rely on the domestic courts, which of course, will have many different perspectives on this point. Even when remedies are available under domestic and CISG rules, it is still a problem in deciding what the rule should be implemented.³⁷ This leads one to mention another issue relying on the historical legislative drafting of CISG

³⁴ Green, op. cit., P120.

³⁵ Stone, op. cit., P296.

³⁶ [1997] UKHL 28; [1998] 1 All ER 98, at 912.

³⁷ For further discussion see: Lookofsky, op. cit., P283-285.

which, does not give an impression that the drafters intended to give the parties the right to rely on the national rules with regard to mistake in all situations.³⁸

2.2. Mistake in Commentators' Arguments

There are many different opinions between the commentators with regard of the discretion whether to consider mistake and its effects and remedies within CISG rules only, or, as some writers have said, to see the issue of validity as being restricted to national legal rules.³⁹ Despite the mentioning this rule, it is said that the CISG drafters did not indicate clearly in Article 79 whether domestic rules on validity would be applied in a case of mistake or not.⁴⁰ It is clear that there is no way to escape from the fact of conflict between domestic rules and CISG rules. Some authors suggest that mistake as to the quality of goods is not regarded as being connected to validity, and this has given them sufficient evidence to say that domestic law remedies are not applicable.⁴¹ There is something that should be mentioned when studying the CISG, which is the non-clarity of its interpretive rules. Based on that, the issue of validity is still moving inside the same circle because as it is not clear if there any possibility to conclude that the validity concept should be interpreted just upon to the understanding of the CISG, in order to ensure it uniformity application. Following the historical legislative route, the CISG gives no indication other than those which are mentioned in Article 7(1) CISG, which again leads to the conclusion that the issue of validity can be interpreted independently.⁴²

Of course more authors can be found supporting this line of argument which put the issue of mistake as to quality of the goods within the scope of the CISG rules, but with another restriction which decided that the mistaken party has the remedy of defective goods

³⁸ Ferrari, Verona, op. cit., P62.

³⁹ Checklist on the CISG. op. cit.

⁴⁰ Hartnell, op. cit.

⁴¹ Leyens, op. cit.

⁴² Ferrari, Verona, op. cit., P63.64.

available in the case of mistake.⁴³ In fact, it is normal to find all these arguments leading to an animated discussion between the academic authors as the rules encompassed within the articles of the CISG is not clear or specific enough to cover the gap between domestic laws and CISG rules, and because of normal reaction which would be expected is that the domestic courts would apply their national legal rules in the cases presented before them. However, it is found that there is a discretion built into the broad scope of the CISG which brings mistake into the CISG body. It is said that mistake could occur during the formation of the contract, or during the “sale of goods” process. The issues of the delivery of goods, and the conformity of the goods, and their remedies would be included.⁴⁴ The buyer should be able to rely just on the conformity rules if he would like make a compliant on the basis of mistake.⁴⁵

Some academic writers make a general conclusion that the CISG does not have any clear definition of the term “validity”, and of course this requires domestic legal systems to address this issue, and decide if its conditions are existing or not, and what the legal effects should be.⁴⁶ As has been mentioned above, the differences between domestic legal rules will affect the legal consequences of whether the contract is valid or not. At the same time, another fact is worth to be mentioning, that of invalidity issue, here the mistake, and its causes which give rise to two different remedies under national rules and the CISG. The problem which still arises is the complete difference between some domestic legal rules which give avoidance as the remedy for mistake as to the quality of the goods. For example, the German authors deny the right of the avoidance under the CISG when the mistake is connected to the quality of the goods but the Austrian authors allow the right of

⁴³ Kröll, *op. cit.*, P55.

⁴⁴ Zeller, *op. cit.*, P77.

⁴⁵ Felemegas, *op. cit.*, P172.

⁴⁶ John Honnold. *Uniform Law for International Sales under the 1980 United Nations Convention*. Kluwer Law International, 1982. P96.

avoidance as a remedy when the same mistake occurs.⁴⁷ The case under English law is a bit more complicated as it gives the right to consider the contract void when the non-mistaken party is not a misrepresenter but he knew about the mistake of the other party.⁴⁸ However this does not mean that every mistake in this category would render the contract void.

The debate is not closed yet on the topic of remedies in the case of invalidity under the CISG and national laws. Some state that if the invalidity question is raised, the buyer's ability should be restricted to the remedy given under the applicable domestic law for mistake. This approach has been strongly supported by Schlechtriem, who believes that "error about the quality of the goods" is totally governed by the CISG regulations, which therefore does not allow any space for domestic rules.⁴⁹

Interestingly, there is an attempt to combine the CISG rules and their counter parts in classical examples of mistake. In this combination some examples have been presented to be considered under the same categories. For example, it is considered that the CISG's rules on initial impossibility and its remedy can be applied in 'a cross-reference' for mistake as to the existence of the goods. The cross-reference of the mistake as to quality of the goods would be the breach of contract rules with regard to the conformity of the goods under the CISG. The mistake as to the character of the contracting party would be the cross-referenced to the 'CISG' rules' which deal with the 'lack creditworthiness of the other party'.⁵⁰ Despite this attempt, others, have found that national courts do not deal with the cases of mistake to be relevant to the CISG rules.⁵¹

⁴⁷ Ulrich Drobnig, Substantive Validity, *American Journal of Comparative law*, vol. 401992, P 636.

⁴⁸ ZHOU, Misrepresentation in English Contract Law from An Economic Perspective, op. cit., P271.

⁴⁹ P. Schlechtriem is of the opposite opinion. P. Schlechtriem, Uniform Sales Law, The UN-Convention on Contracts for the International Sale of Goods 96 (1986), P32-33.

⁵⁰ Leyens, op. cit.

⁵¹ Hartnell, op. cit., PP74.75.

Even the above suggestion brought further debates, with some suggesting that mistake is a matter for national law; with others suggesting that the CISG remedies should have been protected from conflicting with domestic law remedies.⁵² In the light of the previous discussion, the controversy still exists with regard to the position of mistake, conceptually and practically, within the CISG rules. It is said that the assessment of Article 4(a) CISG gives an impression that all points related to mistake “were intentionally excluded from the scope of the convention,” and as a consequence, mistake is governed by national law. Some say that the non-conformity remedies provided by the CISG were intended to displace the domestic law remedies for mistake.⁵³ It is a strong signal to say that domestic law will not be applied in relation to mistake.

Continuing along the same lines, it is said that, according to domestic laws, when there is a mistake with regard to one party’s ability to perform his contractual obligations, the case would be treated as it is the case with regard to the characteristic of the goods. This matter is dealt with by Article 71 CISG, and this should not be deemed to be a validity term according to the Article 4(a) CISG. Instead, it should be treated using the beginning of Article 4 CISG that refers to “rights and obligations”. Following this line of reasoning, therefore, domestic remedies should not be applied.⁵⁴

The above approach would logically this lead one to say that if a case has occurred related to the quality of goods the buyer would not have the right to claim for avoidance if the contracting parties had agreed that the CISG governs their contract. This might mean that the existing remedies for the nonconformity of goods under the CISG would replace the domestic remedy. It could clearly be noticed how much the scholars are in argument regarding the interpretation by the court and if it should follow the CISG rules to decide

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Peter Huber, Alastair Mullis. *The CISG. seller. european law publ.*, 2007. P24 ISBN 386653020X. 9783866530201

mistake cases, or whether the court should be committed to domestic law rules. This lack of clarity between the scholars is created by the drafters of the CISG, who were not clear enough on this point. The drafters did not establish the obvious and visible boundaries for the remedies of mistake, and they did not resolve the question of whether it should be dealt with by the CISG or by way of national norms and structures.⁵⁵ It would not be expected that the ambiguous attitude by the drafters would be understood as a positive given all the arguments that have arisen and the different perspectives given of the commentators. It would be always expected to find that the CISG rules are in conflict with the national rules of mistake. This is what can be shown clearly by the remedy of avoidance in relation to fundamental breach, which is provided by Article 49 CISG. It seems to be very restricted in comparison to some domestic rules which give the party the right to claim avoidance for any mistake related “to the quality of goods”.⁵⁶

It could be said, in addition to the above, that there is another, revolutionary, opinion which states that the CISG rules are capable of dealing with mistakes that are connected to the performance capacity of a party, and the conformity of the goods.⁵⁷ This point has been supported, but from a different perspective, which believes that mistakes in the area of capacity to perform give the right of retain to the creditor under the Article 71(1) CISG.⁵⁸ It follows that mistake will be considered out of the scope of the CISG when it is induced by fraudulent misrepresentation.⁵⁹ This explanation gives an opportunity to understand that other types of mistakes would be considered to be within the scope of the CISG boundaries, whether they are induced by negligent and innocent misrepresentation, or by way of common, mutual mistakes. In general, whether one agrees with this stand point or

⁵⁵ Todd Weitzmann. Validity and Excuse in the U.N. Sales Convention. CISG Database. Pace Institute of International Commercial Law. Journal of Law and Commerce. Vol 16. (1997) 265-290.

⁵⁶ Kröll. op. cit., P59.

⁵⁷ Peter Schlechtriem, Petra Butler. UN Law on International Sales. Springer, 2008. P43 ISBN 3540253149, 9783540253143.

⁵⁸ Ibid, P184.

⁵⁹ Ibid.

not, this gives an impression of how deep the differences are between the academic writers with regard to mistake and misrepresentation, and their position under the CISG rules. Following the perspective of U.S. law, it seems to have quite restorative view to approach between the CISG and the domestic law. It has been mentioned that, for example, that if the “CISG seller” was guilty of misrepresentation, whether negligent or fraudulent, with regard “to the quality of the goods”, then there is a possibility of talking about the overlap between domestic laws with regard to rescission as a remedy for misrepresentation, and avoidance, as a remedy for fundamental breach under the CISG.⁶⁰

Of course, the point here is about the direct and the indirect indication of the mistake within the CISG rules, which means that this opinion deals with the spirit of the CISG context in regard of the meaning of mistake. It is important to mention that this thesis would prefer to support this line of analysis, especially when it finds that it is difficult to ignore the crucial importance of the mistake and misrepresentation rules included within the CISG texts, at least impliedly. It is noticed that there is no stability between the commentators with regard to mistake and its connection with the CISG, as some consider mistake as being provided for by the CISG, and the others believe that mistake is not a matter covered by the CISG.⁶¹ There is also the matter of the differences between the legal systems of CISG member states, which of course affects the commentators who build their legal approaches in a way which probably supports their own domestic legal rules at the expenses of others.

Despite the fact that the CISG could give direction to the interpreters and academic writers, but still confusion is the dominant stream on the subject of mistake and misrepresentation. This is because the CISG rules do not provide clear directions to be followed with regard

⁶⁰ Joseph M. Lookofsky. *Understanding the CISG in the USA*. 2nd Edition. Kluwer Law International, 2004. P26. ISBN 904112277X, 9789041122773.

⁶¹ “Checklist on the CISG”, op. cit.

to the definitional and conceptual lines. On the one hand, some commentators interpret some articles of the CISG as parallel articles dealing with mistake and giving some legal remedies. On the other hand, other commentators take the totally opposite view adopting opinions that say that the CISG excluded the issues of mistake from its scope and left the matter to be resolved by domestic legal rules. Moreover, it can be claimed that the CISG attracted a lot of criticism due to its ambiguity in the articulation of the CISG articles. Sometimes there is no clear route showing that the CISG drafters were realistically interested in establishing a connection between the CISG texts and the national legal systems in relation to mistake and misrepresentation.

It is thought that it would have been more realistic for the CISG drafters deal with the issue of the mistake and misrepresentation clearly, rather relying on the national courts to solve anticipated problems. Ignoring this point has caused a lot of discrepancies, and even sometimes conflict between domestic rules within the same legal system. It would have been wise if the drafters had detailed the rules on mistake and misrepresentation. They must have realised how important these issues are in the process of the contracting and the consequent results. Moreover, what should be explored by studying the hypothesis of remedies for mistake being contained within the CISG is the unceasing complicated arguments between the supporters and the opponents of the subject matter of mistake being dealt with by the CISG.

It is noticed how many different views have been raised by the scholars with regard to the applicability of the CISG within domestic legal systems, and which are the preferred rules to be applied. Most of the commentators usually focus on conflicting rules, with few focusing on the combined crossing points between the CISG rules and domestic rules. The strangest thing is that the CISG drafters even did not try to clarify such an expected conflict. This somehow weakened the idea international uniformity of CISG interpretation

and application. This writer would be of the view that the drafters should have been more concerned about these issues, which has given rise to many serious differences.

Section 3: Misrepresentation in CISG

It is clear that the CISG does not deal directly with misrepresentation in the way that it is covered within English and Scottish contract law. Some writers do not even see misrepresentation, as it is understood in national law as being encompassed with CISG rules. Rather they suggest that misrepresentation be kept out of the CISG as, they conclude, the CISG itself has no answer for misrepresentation cases.⁶² This is the conclusion of the Canadian courts which have failed to find a connection between a claimed fraudulent misrepresentation and the CISG rules, either amongst academic commentators, or in CISG case law.⁶³

The reading of Article 40 CISG, according to some authors, could give new approach to the issue of material non-conformity of goods. Article 40 presents non-conformity to be understood as misrepresentation. This is concluded as Article 40 gives negligent sellers less protection when compared to negligent buyers, this being justified through the seller's failure of disclosure being counted as a fraudulent misrepresentation.⁶⁴ In presenting this opinion, does not mean that there is total agreement with it. The point being made here is to show that non-conformity could be studied as an alternative or parallel to the misrepresentation concept, or could be used instead of the misrepresentation to ease dealing with the non-conformity, when it occurs. Notably, according to discretion, the court has decided that the interpretation of Article 40 CISG gives the fraudulent seller less protection than the negligent buyer. Based on this discretion, the court has considered that the seller will not be released from his liability according to Article 35(3) CISG, in a case

⁶² Poikela. op. Cit., PP62,63.

⁶³ Antonin I. Pribetic. Arbitration and Fraudulent Misrepresentation: Another Canadian court overlooks the CISG. The Globetrotter. Volume 10, No. 3. January 2006. P6.

⁶⁴ Garro, op. cit., P260.

where the seller misrepresented the correct age and mileage of the car, despite the fact that the buyer could not have been unaware of the lack of conformity.⁶⁵ What can be clearly noticed here is that the court has used the word “misrepresented” to indicate “fraudulent seller”, which establish a new link between fraud and misrepresentation under the CISG. In other words, it means that there is a possibility to deal with misrepresentation and fraud in the same level. This can be supported by the unclearness of the CISG articles with regard to misrepresentation and fraud concepts, thus opening the doors for many controversial interpretations and many discrepancies arising from the differences between the legal systems, from country to another or even within a particular legal system.

Articles 37 and 48 CISG which give an opportunity to the seller to restore the negative effects of the non-conformity that is made by him,⁶⁶ the two articles open a space for the party who defected the contract, with regard to the quality or the quantity of the goods, to correct the intentional or unintentional wrong doing or conduct as a possible remedy for breaching the contract. Here, the intentional wrong doing can be counted as a misrepresentation or fraud, and the unintentional wrong doing can be counted as a mistake. This can be taken as an implied expression of the misrepresentation or mistake. In general some authors find it difficult to understand what justification can be presented to allow for the seller to correct his wrong doing by delivering goods that conform the quality mentioned in the contract. The raised point is about how many times could be given to the seller to meet the buyer expectations.⁶⁷ It is an indication if the type of arguments that usually arise with regard to the interpretation of CISG rules. Whether considered a misrepresentation or a mistake, some deal with the presence of non-conformity to lead to the logical demand to consider the contract void. Non-conformity for these writers, is

⁶⁵ See *CLOUT* case No. 168 [Germany: *Oberlandesgericht* [Appellate Court] Köln 21 May 1996, available online at <http://cisgw3.law.pace.edu/cases/960521g1.html>]; Ferrari ‘Gap-filling’, P89.

⁶⁶ Flechtner. *op. cit.*, P346.

⁶⁷ Silvia Ferreri. Remarks Concerning the Implementation of the CISG by the Courts (the Seller’s Performance and Article 35). *Journal of Law and Commerce*. Vol. 25:223 2005-06. P224.

parallel to mistake and misrepresentation.⁶⁸ An interesting comment, by one writer, is that the CISG did not take into consideration cases when the parties are aware or must to have aware of non-conformity in the goods.⁶⁹

In general, the main stand point of conformity is about the buyer's expectations from the seller, and when the seller does not meet these expectations the result is the seller is in breach of the contract. According to Article 49(1)(a) CISG if the seller fails to perform his contractual obligations this would be counted as a breach of contract, which would give rise, generally speaking, to the possibility of avoidance of the contract. More specifically not breaches lead to avoidance, unless the breach is fundamental. Article 25 CISG considers that fundamental breach causes loss for the buyer which prevents him from enjoying his contractual expectations. The seller, of course, would not have been aware that this would be the result.⁷⁰ After some comparative approaches, it could be concluded that avoidance is usually used as one of the remedies for mistake under English⁷¹ and Scottish⁷² contract law. Fundamental breach, which is somewhat similar to essential or substantial mistake, also required the application of avoidance or rescission as a remedy. Similarly, detriment caused by the seller's non-conformity can be seen as a parallel to the demand for the losses that caused by misrepresentation under Scottish and English contract law.

⁶⁸ Benjamin K. Leisinger. *Fundamental Breach Considering Non-Conformity of the Goods*. Sellier. European Law Publishers GmbH, München. 2007. P3.

⁶⁹ (JUR) ULI Foerstl. *The General Principle of Good Faith under the United Nations Conventions on Contracts for the International Sale of Goods (SICG) - A Functional Approach to Theory and Practice*. February. 2005. P50. Available at http://lawspace.law.uct.ac.za:8080/dspace/bitstream/2165/39/1/Uli_Foerstl_2005.pdf. Accessed on 13/01/2009.

⁷⁰ Ingeborg Schwenzer. *Avoidance of the Contract in Case of Non-Conforming Goods (Article 49(1) (a) CISG)*. *Journal of Law and Commerce*. [Vol. 25:437 2005-06]. P437.

⁷¹ Beale, *op. cit.*, P366.

⁷² Green, *op. cit.*, P120.

The expected conflict between domestic laws and the CISG with regard to mistake as to subject could also be said about misrepresentation, for the same reasons.⁷³ If there is a negligent misstatement, or misrepresentation, as “to the quality of the goods”, or the capacity of the other party to perform, this will seriously affect the interests of the parties. Some see that in spite of Article 4(a) CISG, the CISG remedies should only be implemented, thereby preventing the use of domestic rules on avoidance and rescission.⁷⁴ This stand point leads to a simple and accurate conclusion, that the CISG deals with the mistake and misrepresentation, both practically and impliedly. This view point somehow fills the gap between the two disputing groups of academic writers with regard to the implementation of the CISG rules or domestic laws. This approach creates a sort of compromise, helping to make the combination between the rules of mistake and misrepresentation under the national rules, and the other rules of the CISG. This would give implicit remedial treatment by the norms of the non-conformity or good faith, as has been mentioned many times earlier in this chapter. Furthermore, it is considered that negligent misrepresentation and mistake as to the character of the goods should be controlled and organised by the CISG rules. This, it is submitted, is a direct and obvious opinion for dealing with the CISG rules as a remedial reference for a negligent misrepresentation and mistake,⁷⁵ which has been referred to impliedly by academic authors as referred to earlier.

Trying to understand misrepresentation as a controversial issue within the CISG debate, as referred to above, leads one to go further into the study some of the articles of the CISG which might be related impliedly to misrepresentation, specifically the *gharar* concept in

⁷³ Joseph Lookofsky. CISG Case Commentary on Preemption in Geneva Pharmaceuticals and Stawski. Copyright © 1997, current 2008 Ralph Amissah. P1.

⁷⁴ Peter Schlechtriem. The Borderland of Tort and Contract -- Opening a New Frontier? Cornell International Law Journal. Vol. 21 (1988) 467-476. <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem.html#ps23>.

⁷⁵ Eduardo Grebler. Fundamental Breach of Contract under the CISG: A Controversial Rule available online at <http://www.thefreelibrary.com/The+UN+Sales+of+Goods+Convention:+perspectives+on+the+current...-a0177100796>. Accessed on 02/02/2009.

Islamic contract law. This was explained in detail, under the concept of error, in this thesis. The CISG discussed the quality of goods under Article 35(1, 2). Article 35(1) provides that “The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.” The Islamic law concept of *khiyar alwasf* (option of description), could deal with description in the same way as mentioned in Article 35(1) CISG, or under a similar remedial conceptual structure. Delivered goods that do not meet the agreed description in the contract is treated as a misdescription which could close to misrepresentation. The CISG rules in this respect, it might lead one to look at a wider range of provisions which could be similarly investigated. Generally, since the seller must deliver the goods, as described in the contract, there is an obligation to operate according to good faith, which expect goods to be free from misrepresentation or misdescription, and also free from mistake.

Article 35(2)(a) CISG could give wider range for misdescription (misrepresentation) as an applicable concept. It expects that when goods do not conform with the contract description, should at least suite the ordinary uses of the goods that have the same description. Of course, this is could be read as giving a wide meaning to the term misdescription, creating more restrictions for the contracting parties when they implement their contractual obligations. This is obviously enhanced by Article 35(2) (b) CISG, which provides that the goods should meet the requirements of an agreed specific function mentioned to the seller, either “expressly or impliedly”, unless a situation gives the impression that the buyer was not relying, “or that it was unreasonable for him to rely” on the assessment and the ability of the seller.

Another meaning can be derived from this point. Misdescription could be involved when very accurate features of the goods energise the misdescription role to occupy bigger space

in the contract with regard to the CISG as a parallel conceptual application of misrepresentation. It is quite possible to use similar approaches with regard to samples and models that are connected with the quality of the goods. Article 35(2) (c) CISG provides that the samples or models should “possess the qualities of goods which the seller has held out to the buyer as a sample or model.” This means that if the item or the sample that was agreed upon in the contract missed any of the agreed features, this might be referred to as a missample. This would be a new, different approach to developing the analysis structure for misrepresentation or mistake under the CISG. A new line of understanding would raise many issues with regard to misrepresentation, for example misrepresentation under English and Scottish contract law could be termed a misstatement. In addition, it could be seen that misrepresentation could be retermed misdescription under Islamic contract law. The point to be made here is that the idea and understanding should occupy the main stage with regard to the definition. This could very much fit with the CISG rules, which are read in many different languages around the world.

Section 4: Conclusion

To simplify the discussion with regard to mistake and misrepresentation under the CISG, it could be said that there was a serious burden on the CISG drafters to deal with many different perspectives and opinions that occur with regard to error and misrepresentation. It is noticed that the drafters were interested in uniformity of laws but unfortunately they did not design some articles to deal with anticipated disputes that occur regularly with regard to mistake or misrepresentation. This chapter would tend to take a similar approach that has been adopted with regard to the concept of error in Islamic contract law which appear to have established the same approaches, but these approaches have never been explained directly in order to govern disputes which arise during the contracting processes. The concept of error and misrepresentation is impliedly found in a different context in the

CISG articles, but this has never been made clear, whether as direct reference or through remedial contexts. It is very clear that it would be much better if there was a direct reference to mistake, in specific articles in the CISG text, which would contribute to solving a lot of legal conflicts related to the theoretical understanding and practical applications. Since the CISG rules create a legal system, it would be easier if it had its own interpretation rules, keeping it away from the many contradictions or discrepancies appear in the absence of such rules and remedies.

This chapter tends one to believe that conceptually error, as well as misrepresentation is to be found within the CISG structures, but there is no direct evidence of that. This chapter also tends to accept and support the opinion that the contracting parties are entitled to rely on the parallel CISG rules as a remedy for error and misrepresentation, rather than domestic legal solutions. It is believed that this matter will not be resolved until the CISG rules have their own remedies in general, and remedies for error and misrepresentation in particular. It has been noticed also that the drafter of the CISG did not expressly define any kind of error or misrepresentation as an independent concept, as it has been seen with regard to the Islamic concept of error and misrepresentation. Generally, if there is any chance to follow any line of analysis to find a convincing definition of mistake or misrepresentation, this analysis should be focused on the parallel ideas and concept within the CISG articles. This is in order to create some kind of balance, between the absence of the direct indication of error and misrepresentation, and between the implied concepts that could be used as parallel concepts for mistake and misrepresentation, such as non-conformity, defective goods, description, fundamental breach, and good faith.

To avoid all the confusion, conflict and discrepancies between different domestic legal systems and between them and the CISG rules, it has to be said clearly that the concept of error, as well as that of misrepresentation should have their own definition and their own

classifications and categories. It is clear that an independent approach would enrich the commentators' contribution towards the uniformity and the stabilisation of the CISG rules, and their application would cause less conflict and confusion. It would be much better to see that the CISG rules are the main point of reference to deal with problems caused by mistake or misrepresentation. It would give a new, settled, legal and economical approach to international trade transactions, particularly within the globalised economy that was not yet been fully established when the CISG came to life in 1980.

Chapter Seven

A Comparative Critical Analysis of the Concept of Error and Misrepresentation under the Palestinian Draft of Civil Law

Section 1: Introduction

As it has been indicated in the introductory chapter, the Palestinian legal system contains elements of many different legal systems; mainly Ottoman, British, Egyptian, Jordanian, and Israeli. Contract law area is affected widely by the Ottoman, Jordanian, and Egyptian legal systems. Theoretically, Ottoman law¹ is still the official source of Palestinian contract law. In practice, the Jordanian and Egyptian understandings -both case law and commentaries - are applied by Palestinians. This chapter will clarify how the Palestinian courts have been influenced by Jordanian and Egyptian law in the application of contract law.

A general introduction to Palestinian contract law has been given in the chapters on Islamic contract law. The discussion in this chapter will focus on the concept of error and misrepresentation contained in the Draft of the Palestinian Civil Law that defines the legal rules of contract including the error concept (*ghalat*). Given the lack of Palestinian commentaries on this area, reliance will be made on the Egyptian and Jordanian academic commentaries and case law. The Palestinian Court of Cassation² has released a decision³ regarding the contract law relying on the Jordanian Court of Cassation.⁴ The same

¹ The Ottoman Journal of Equity, op. cit.

² It is the highest court in the Palestinian judicial system that specialised in the civil and criminal cases. All the decisions of this court are binding for all other lower Palestinian courts.

³ Palestinian Cassation Court, Civil Cassation No 70/2004. Decision No 88. 4/6/2004.

⁴ Ibid, P4.

Palestinian court in the same decision chose to rely upon article 104 of the Jordanian code of civil law⁵ to explain the concept of acceptance within the contract. It has been noticed that the Palestinian court of cassation referred three times both to Jordanian court of cassation precedents and also to the Jordanian civil code articles.⁶ In addition, the Palestinian court of cassation justified its decision by relying on Article 753 of the Egyptian civil code in order to explain the reasoning behind the discretion of the court in the same case.⁷

Moreover, it can be noticed that the Palestinian courts also follow the precedents of the Egyptian courts to explain their decisions. The Palestinian court of appeal in Ramallah, in order to justify its decision regarding a contract of sale case,⁸ has built its judgment on the Egyptian courts' decisions, derived from the Egyptian appeal courts of Cairo⁹ and Alexandria.¹⁰ In addition, in the same judgment referred to the decision of the court of *Banha* city.¹¹ This gives clear evidence that the Palestinian Draft of Civil Law would be expected to be interpreted in light of both Jordanian and Egyptian academic and judicial comments. Analysis shows that the Palestinian courts have equal preference for Egyptian and Jordanian precedents. It would be expected that the courts would prefer the precedent which best fits the case presented before the courts. The cases of error and misrepresentation would probably be interpreted in a similar way by Egyptian and Jordanian legislators, commentaries, and courts. Furthermore, academic Palestinian commentators -if any- and courts would rely on Egyptian and Jordanian commentaries and judicial precedents; indeed this is the current practice.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid, P5.

⁸ Civil Appeal, No 19/2004. 21/9/2004.

⁹ Ibid, P5.

¹⁰ Ibid.

¹¹ Ibid, *Banha* is an Egyptian city, and the court has been given the name of the city.

Another issue arises with regard to the memorandum of the Draft of the Palestinian Civil Law which usually discusses the background and the reasons behind the articulation of the codes. The Palestinian memorandum shows how the Draft of the Palestinian Civil code has been influenced by the Egyptian/Jordanian civil codes. These influences included the contract rules in general and the error (*ghalat*), misrepresentation (*taghreer/gharar*) in particular. In this chapter it will be seen that the Palestinian Draftspersons derived the vast majority of its rules from the legal systems of Jordan and Egypt. Interestingly, it is useful to know that the Palestinian Draft copied some articles word for word as they are articulated in the Egyptian/Jordanian civil codes. This will be demonstrated later in this chapter. It would be expected that Palestinians would interpret these articles according to the Jordanian and Egyptian understandings. It is worth noting that usually Jordanian commentators refer both to decisions of Egyptian courts and to Egyptian commentators. This is not reciprocated by the Egyptian courts or commentators. It is difficult to decide whether Palestinians rely more on the Jordanian or the Egyptian point of view, but it is clear that Palestinians will refer to only one system either Jordanian or Egyptian when considering a case.

Error is dealt with directly in six articles of the Palestinian Draft,¹² five articles of the Egyptian civil code,¹³ and six articles of the Jordanian civil code.¹⁴ There are only five Egyptian articles solely because the Egyptian code does not deal with error in gratuitous contracts, not because of any explanation additional to the Jordanian code and the Palestinian Draft. Now to highlight the similarities between the Palestinian Draft, and the Jordanian and Egyptian civil codes, it is noticed that Article 119 (1) of the Palestinian Draft is a copy of Article 120 of the Egyptian civil code. Article 118 of

¹² Articles 118-123 of the Palestinian draft of Civil Law.

¹³ Articles 120-124 of the Egyptian Civil Law.

¹⁴ Articles 151-156 of the Jordanian Civil Law.

Palestinian Draft is a copy of Article 152 of Jordanian civil code. Article 120 of Palestinian Draft is a copy of Article 121 of Egyptian code, and articles 151,152 of Jordanian code. Article 121 of Palestinian Draft has copied article 122 of Egyptian code, and article 154 of Jordanian code. Article 122 of Palestinian Draft has copied article 123 of Egyptian code, and Article 155 of Jordanian code. Article 123 has copied article 124 of Egyptian code, and Article 156 of Jordanian. The main point is not to demonstrate the similarity between the Draft of the Palestinian civil law with the Jordanian and the Egyptian civil laws, but to discuss how the Egyptian and Jordanian civil laws are formulated and implemented. This is to clarify how the future Palestinian civil law will be operated by the courts and practitioners. Furthermore, the fact that these laws are couched in exactly the same terms makes it easier to expose weaknesses in the Egyptian and Jordanian civil laws, and propose some modifications and suggestions to be added to the Palestinian Draft before it becomes an applied law.

Section 2: Brief Background of the concept of Error

It is clear that the Palestinian Draft divided error into two types. First type is the error as to fact, which is implied but not directly articulated. The second type is error as to law. In general, error has no specified definition within the Jordanian & Egyptian codes, and the Palestinian Draft.

2.1. Meaning of error

The understanding of error in Palestinian law is that of a psychological situation that leads a person to have a wrong belief in regard to fact.¹⁵ According to another definition, the error occurs when a person believes something to be a fact and in reality it is not, or vice versa.¹⁶ It is also defined as an incorrect belief in a fact that motivates

¹⁵ Dawwas, op. cit., P93.

¹⁶ The Memorandum of the Jordanian Civil code. P143,144.

one party to enter the contract.¹⁷ It is said that when error is shared between the seller and purchaser, it means that the seller has good faith and intention; in this case the remedy would be to void the contract. If only the purchaser was in error, this generates two possibilities, the seller knows about the purchaser's error and he has bad faith and this could be considered as *tadlees/taghreer* (misrepresentation). The remedy would be to void the contract and enforce damages or compensation. The second possibility is that the seller could know about error easily, and in this situation he would be considered as a negligent and the remedy would be to enforce compensation.¹⁸

The term shared error needs to be more clearly defined, by indicating the difference between common and mutual error. This author believes it is necessary to adopt at least one of these types. This would give the court clearer view how to deal with and to decide about the error's legal effects. It would be expected that some misrepresentation (*tadlees/tagreer*) would occur in cases of unilateral error, but there is no cogent reason to consider that the purchaser's error would mean automatically that the seller had misrepresented to him. There is a high possibility that the buyer could be in error simply motivated by his own mistaken belief without any external intervention. The Palestinian Draft would be strengthened by defining negligent action and its impacts in the case of error, and have even greater force if it also discussed the relation between misrepresentation and negligence.

In general commentaries define error based on a theory of apparent will¹⁹ which distinguishes between two categories of error, visible and invisible error. It is considered that invisible error occurs when one party hides the error and his real will is

¹⁷ *Abu-Albasal*, op. cit., P139.

¹⁸ *Addnasouri, Al-Shawarbi*, op. cit., P28.

¹⁹ For more details about this subject under English contract law see. Prof. William Tetley, Q.C. Good Faith in Contract Particularly in the Contracts of Arbitration and Chartering. McGill University. 35 JMLC 561-616. 2004. P17. <http://tetley.law.mcgill.ca/comparative/goodfaith.pdf>.

unknown by the other party. Visible error occurs when the party shows or expresses his real will, or when this will is known through the circumstances related to the case, or according to custom.²⁰ This is found in the Jordanian civil code.²¹ The same meaning is reflected in the Egyptian civil code,²² and in the Palestinian Draft.²³ It is understood that error would occur when the contracting party declares his will clearly. Obviously, the deemed error would be established when the party declares his intent clearly.²⁴ It is said that if the parties did not express their intent directly in the written contract, the intent would be out of consideration.²⁵ This could happen if the party expresses his desire to buy an item having agreed the specific description with the seller. After that if the buyer discovered that the item does not meet the agreed specification and description, it means that his consent is affected by error and it should be considered as error case.²⁶ It is explained that if the parties agreed to sell/buy an item according to written descriptions such as in the catalogue, and the item lacks an element of its description, the buyer is under error.²⁷

Despite the fact that there is no express reference to the Ottoman Journal of Equity, the spirit of the Ottoman Journal is reflected here. It is because the consideration of error comes after discovering that the demanded description by the buyer is not available in the item. This point draws our attention to *Khiyar Alwassf* (option of description) in the Ottoman Journal rules.²⁸ This can be seen in detail in this thesis within the concept of error

²⁰ The Memorandum of the Jordanian civil code. P143.

²¹ Jordanian Civil Code, article 151.

²² Article 121.

²³ Article 120.

²⁴ *Al-Far*, op. cit., P77.

²⁵ *Munthir Al-Fadl, Sahib Al-Fatlawi*. Explanation of the Jordanian Civil Law, Nominated Contracts (Sale and Rent). Modified Edition. Dar Athaqfah for Publication, Amman-Jordan. 1996. P53.

²⁶ Egyptian Cassation Court. No 0357/52. 31/12/1985. Annual Report of the Egyptian Cassation Court.

²⁷ *Salah Addein An-Nahi*. Sources of the Personal Rights, Sources of Obligations-Voluntarily Sources. *Al-Bayt Al-Arabi* Printer. Amman-Jordan. 1984. P81.

²⁸ The Ottoman Journal of Equity. Article number 310.

under the Islamic contract law chapter.²⁹ This reference is restricted to self made error, when one party commits the error by him/her self. This means that the discussion could apply similarly to the Ottoman/Islamic concept of error with regard to *Khiyar Alwassf* and *Khiyar Al-Ayb*. As it has been explained earlier in this thesis, the option of description and the option of defect are partly connected to the unilateral error by one party. It is related more to misrepresentation by the other party, but it is not contained in the Jordanian/Egyptian civil codes, or in the Palestinian Draft.

Section 3: Categories of error

Three categories of error could be identified by studying the Palestinian Draft, along with the Jordanian/Egyptian civil codes. The three categories will be discussed as following.

3.1. Error that Prevents Consent

The first category is the error that prevents the consent of the parties,³⁰ which would be parallel to the *consensus in idem* under the English/Scottish contract law. As a result of this kind of error the contract would be void or not existent.³¹ Three cases of this category of error could be identified by studying the Jordanian civil code,³² the Egyptian civil code,³³ and the Palestinian Draft.³⁴ Since all have the same articulation, they agree that this error has three types.

The first case is error as to the nature of the contract. This kind of error could happen when one party believes that he enters a tenancy contract, and the other party believes that he enters a sale contract. This could occur for example if a landlord leases his land

²⁹ Chapter Five of this thesis.

³⁰ Dawwas, op. cit., P95.

³¹ MacQueen, Thomson, op. cit., Para 4-38. P160.

³² Article 152. The Jordanian Civil Law.

³³ Article 121. The Egyptian Civil Law.

³⁴ Article 120. The Draft of the Palestinian Civil Law.

for one thousand Jordanian Dinar (JD) per year, but the tenant thinks that he is buying the land for one thousand JD per year to be paid to the landlord until he dies.³⁵ This also could occur if a person asks another for money, and he is given the money as a loan or debt to be recovered later, but thinks that the money is a gift.³⁶

The second case of error is as a reason for the contracting between the parties. This could occur for example if a person shared an inheritance with other inheritors, and it is found that this person is not an inheritor. This also could occur if a person donated to another person because he thought that he donated to one of his relatives, but he has found that the other is not in fact a relative.³⁷ It is noticed here that error is connected to the reason that motivates the parties to create the contract. It is also built on preexistence of a condition, so if the reason or condition does not exist, it means that there is no consent at all. This therefore means that the contract is not established from the beginning.³⁸

The third case of error is error as to an object or subject-matter of the contract. This sort of error could occur with regard to the place of contract, as when a person intends to buy a flat on the first floor and the owner thinks he is selling a flat on the fourth floor. It could also occur with regard to the type of item, as when the seller sells rice and the buyer thinks he is buying wheat.³⁹ More examples could represent this case of error when a person buys a ring thinking that he is buying golden ring but in fact the ring is just aluminum, silver, or Copper.⁴⁰ It would be the same case when the buyer buys a piece of jewelry thinking it is a real diamond and in fact it is piece of glass. *Abu Al-Basal* argues that the reason for considering the contract void under this type of error is

³⁵ The Memorandum of the Palestinian Draft of Civil Law. P80.

³⁶ *Abu-Albasal*, op. cit., P145.

³⁷ The Memorandum of the Palestinian Draft of Civil Law. P81.

³⁸ *Dawwas*, op. cit., P96.

³⁹ *Ibid*, P95.

⁴⁰ *Memorandum of the Jordanian Civil Code*. P145.

because the offer intended something and the acceptance has been released for something different. He argued also that because the described and articulated subject-matter of the contract became nonexistent, the nonexistent subject-matter is not capable of being contracted for.⁴¹

In principle, there is no problem in agreeing with *Abu Al-Basal* with regard to the difference between the offer and acceptance point, and in respect of the nonexistence of the subject-matter as well. The point of disagreement is about the described subject-matter of the contract and its relation with error. He stated that if the described subject-matter is not available it means that there is an error by the buyer and a misdescription on the part of the seller.

The error would be established after the articulation of the contract, which must include the described subject-matter. When this description is not available it means there is a misrepresentation (misdescription) as it has been discussed earlier in this thesis. It was noticed that the Jordanian, as well as the Egyptian commentaries ignored this aspect of the problem. This could bring the discussion back to the same argument of the concept of error under Islamic contract law in general, and under the Ottoman Journal of Equity in particular (as currently applied in Palestinian contract law). That is to say, when the Ottoman Journal dealt with this subject, it implied error and misrepresentation when it talked about description, but never mentioned directly either of them.

Some would argue that it is not necessary to talk about error as to an object or subject-matter of the contract under the classification of error that prevents the consent. It is because the three legal systems, Egyptian, Jordanian and the Palestinian Draft discussed error in the context of defects of consent. It is argued that these examples of error are

⁴¹ *Abu-Albasal*. op. cit., P147.

not so much about the defects of consent, but rather about the offer and acceptance stage. It means that the discussion with regard to this type of error would aim to establish that a common understanding has been reached about the offer and acceptance to create the intended contract between the parties. As a conclusion with regard to this type of error, it can be argued that the above types of error should be excluded from this category, with a new category being formed. It is understood that the main reason behind rendering the contract void is because there is no meeting between the offer and the acceptance. It is worth considering this category of error as being related to an error in the offer and acceptance, rather than considering it as an error resulting in a defect in the consent. There is no need to discuss this error as a defect of consent and in fact the error occurs after the establishment of contract, which is considered as the after-contracting stage.

3.2. Error which Defects Consent

The second category of error is the one that renders the parties' consent defective, which means that this error affects the consent but does not prevent the contract from existing. The error arises after the contract has been established. Under this category the contract would be voidable, but not void.⁴² For this category of error to be considered it should be a substantial or essential error.⁴³ The substantiality or the essentiality to be taken into consideration here needs to involve one of the subject-matter descriptions that have been agreed in the contract. Moreover, it is important that the description should be the motive or reason behind the contracting.⁴⁴ It is clear that the Palestinian Draft relied on the objective standard or circumstantial judgment in order to decide about substantial error, which is usually a matter for the court or judicial decision.

⁴² Palestinian Draft of Civil Law. Article 119.

⁴³ *Dawwas*, op. cit., P95.

⁴⁴ The Memorandum of the Palestinian Draft of Civil Law. P81.

It has been noticed that Article 119 of the Palestinian Draft did clarify that this type of error could either be shared between the two contracting parties or be an error of just one of the parties. Despite this fact, the memorandum has complicated the situation because it stated clearly that the draft was not clear whether error should be shared between the two parties or just by one party.⁴⁵ It should be mentioned that if the error is not shared between the two contractual parties, this would not render the contract void.⁴⁶ In the same time it is not clear whether the contract would be voidable. To consider the error as being operative it should be induced by the other party, or he should have known about it, or it should have been easy for him to know about it.⁴⁷ It makes no sense to consider the essential error only when it is known by the other party or was easy for him to know. It could be caused by an uninduced unilateral error. As is mentioned earlier, this part of the article has the same articulation as that of the Egyptian Civil Code.⁴⁸ Both of them consider the substantiality of error as being the main factor in deciding whether or not the error is operative. However this factor is missing under the Jordanian Civil Code.⁴⁹ This omission did not prevent the Jordanian commentaries following the same track as that established by the Egyptian code and the Palestinian Draft. It is found that substantiality is considered as a main factor in determining whether error is operative. Accordingly, substantiality would be demanded with regard to the special description of the item, or to the character of the contracting party.⁵⁰

Three cases can be included under this error category. The first case is connected to the substantial description of the subject-matter of the contract. This could occur if the

⁴⁵ Ibid, P82.

⁴⁶ Ibid.

⁴⁷ Palestinian Draft of Civil Law. Article 119 (1).

⁴⁸ Article 120. The Egyptian Civil Law.

⁴⁹ Article 153. The Jordanian Civil Law.

⁵⁰ *Dawwas*, op. cit., P95.

party intended to buy a specific item with a specific description, but he found out that the item he was provided with by the seller is the same kind or sort but does not have the specific description that he had required.⁵¹ Here, of course, consent would be affected, because when the buyer entered the contract he intended to have an item with the specified description. If this description is missing it means that the buyer would no longer wish to enter the contract, the specific description having motivated him.⁵² In general, it could be noticed that all the principles of this error category closely follow the practice of the Ottoman Journal of Equity.⁵³

The most notable point here is when the article and the commentaries mention error from one side, there is no mention of misrepresentation at all from the other side. There is no indication of any category of misrepresentation even at the minimum level, neither intentional nor unintentional. There is therefore a direct indication of the involvement of the other party by inducing the erred party in the error. This is clear from the Palestinian Draft which stipulates; ‘To consider the error as an operative error it should have been induced by the other party, or he should have known about the error, or it should have been easy for him to know about it’.⁵⁴ The inducement action is considered, but without any clarification. It is not clear why there is no mention of any of the inducing instruments; such as fraud, misrepresentation, or the act of misleading someone. Based on that, it would be recommended for the Palestinian draftspersons to add some articles within the civil code dealing with the inducement act and its instruments. It would be better if the memorandum included clear explanation in this regard in order to establish the independent Palestinian concept about this important subject.

⁵¹ *Abu-Albasal*, op. cit., P149.

⁵² *Al-Khafeef*, op. cit., P325.

⁵³ The Ottoman Journal of Equity. Article 310 and its explanation by *Haydar*. Op. cit., P129.

⁵⁴ Palestinian Draft of Civil Law. Article 119 (1).

The second case is error as to the identity of the parties. This kind of error could occur when the identity of the parties plays a crucial role in the contracting process. Clearly a contract with a doctor or lawyer in their professional capacity, who then turns out not to be so qualified, would be a typical example of this type of error. This kind of error could occur regularly in the gratuitous contracts when the person intended to donate to another specific person.⁵⁵ In an instance of error related to gratuitous contracts there is no need for the other party to be aware of the error. To be considered as an error, it would be enough for it to be discovered by the donor.⁵⁶ It is useful to note that the Jordanian and Egyptian civil codes do not specify any articles in the context of a gratuitous contract, unlike the Palestinian Draft, which does.⁵⁷

The third case is error as to a substantial feature or characteristic of the other party: the motive for the contracting between the parties, this being the only reason behind the contract.⁵⁸ It should be noted that both the Palestinian Draft,⁵⁹ and the Egyptian code⁶⁰ concentrate more on the substantiality of error and its explanation. This obviously leads one to say that essential error is the most important category of error, and in comparison, essential error has great importance under the contract laws of Egypt, Palestine, and Scotland.⁶¹ To emphasize the importance of essential error, it should be noted that the Palestinian Draft followed the Egyptian route in articulating a special article⁶² to describe what essential or substantial error means. The key point is essentiality, which is connected to the intent of the party in entering the contract,

⁵⁵ *Al-Far*, op. cit., P80.

⁵⁶ The Memorandum of the Palestinian Draft of Civil Law. P82.

⁵⁷ Palestinian Draft of Civil Law. Article 119 (2).

⁵⁸ *Addnasouri, Al-Shawarbi*, op. cit., P30.

⁵⁹ Palestinian Draft of Civil Law. Article 120.

⁶⁰ Egyptian Civil Code, article 121.

⁶¹ For wider understanding of the comparative point of view it could refer to the concept of error under the English/Scottish chapters in this thesis.

⁶² Palestinian Draft of Civil Law. Article 120 (1).

without this intent the party would not be involved in the contracting process.⁶³ In this situation, a key factor in determining whether or not an error is essential is the good faith of the party in error. In order to determine good faith the circumstances surrounding the contract would have to be examined, which would then rely on objective standards. Clearly the understanding of this case would then be a mix between the personal standard of good faith on the one hand, and its objective evaluation on the other hand.⁶⁴

Relying on the analysis above, all aspects could be crucial in deciding on essential error, for example the price, the description, and the identity of the other party. The most important issue is the intent of the parties in deciding which factor has been established as the motive for involvement in the contract. In general, the operative error or mistake as it is known under the English/Scottish contract law is not established under the Palestinian Draft or under the Egyptian/Jordanian civil law. One category of error or mistake which can be found as a concept common to these the jurisdictions, albeit with some differences, is essential error, which can be seen clearly within the five legal systems, English, Scottish, Jordanian, Egyptian and the Palestinian. One more point worth mentioning it that according to the Egyptian Cassation Court the evaluation and the decision on whether the error is essential or not would always be the responsibility of the court.⁶⁵

From a comparative perspective, it could be said that concept of error under the Palestinian Draft has many similarities with the English and Scottish concept of error or mistake. The main issue to be raised is with regard to the methodology for dealing with error categories. English and Scottish contract law is classified clearly into unilateral

⁶³ The Memorandum of the Palestinian Draft of Civil Law. P82.

⁶⁴ Ibid.

⁶⁵ Egyptian Cassation Court. No 00039/38. 13/03/1973. Para 2.

and bilateral error, but this classification is not found in the Palestinian Draft, and the same can be said of Jordanian and Egyptian contract law. Of course it does not mean that the Palestinian Draft did not deal with the unilateral and bilateral error. Rather, it does so by implication, following the Egyptian and Jordanian civil law, and as a result it would not be expected that Palestinian commentaries would create their new own methodology. This is because the Palestinian courts relied on the Egyptian and Jordanian courts and commentaries to explain their decisions in civil law. An interesting example is in the case of a contract sale,⁶⁶ where the Palestinian appeal court derived and established its judgement based on three Egyptian judicial precedents.⁶⁷ In addition, in the same case, the Palestinian court referred to an Egyptian commentary.⁶⁸ It can also be noted that the Palestinian Cassation Court,⁶⁹ built its judgment on Jordanian precedent,⁷⁰ and Jordanian legislation.⁷¹ The Palestinian Cassation Court referred to more than one Jordanian judicial precedent,⁷² as well as to Jordanian legislation.⁷³ It is noticed that many precedents and legislation have been referred to by the Palestinian court, derived from the Jordanian legal rules. Notably, in the same case the court referred to Egyptian legislation⁷⁴ and an Egyptian commentary.⁷⁵ It is very clear that the Palestinian courts would be expected to decide cases using both Jordanian and Egyptian legal rules where they fit in with the case before the court. At the same time, it would be difficult to decide whether the Palestinian courts, and as a result the commentaries,

⁶⁶ Civil Appeal, No 19/2004. 21/9/2004.

⁶⁷ Appeal Court of Cairo. 20 April 1930, No 438, Bar Journal. p868. The Domestic (*al-ahliyah*) Court of Alexandria. 28th February 1925, No 562, Bar Journal. p684. The Court of Banha city. 3rd June 1925, No 383, Bar Journal. P450.

⁶⁸ *Al-Sanhuri*. The General Theory of the Obligation, Para 753. P829. This Citation is according the Civil Appeal, No 19/2004. 21/9/2004. P3.

⁶⁹ Civil Cassation No 70/2004. Decision No 88. 4/6/2004.

⁷⁰ Jordanian Cassation. 625/83. P1389, Bar Journal. 19848. This citation is according to Palestinian Cassation Court. Civil Cassation No 70/2004. Decision No 88. 4/6/2004.

⁷¹ Article 4. Code of the Jordanian Civil Law.

⁷² Jordanian Cassation. 915/88, Bar Journal. 1990. P1792. This citation is according to Palestinian Cassation Court. Civil Cassation No 70/2004. Decision No 88. 4/6/2004.

⁷³ Article 204. Code of the Jordanian Civil Law.

⁷⁴ Article 753. Code of the Egyptian Civil Law.

⁷⁵ *Al-Sanhuri*. P1365. This citation is according to Palestinian Cassation Court. Civil Cassation No 70/2004. Decision No 88. 4/6/2004.

would also follow Egyptian and Jordanian law or not, as there has, to date, been no Palestinian court decision focusing directly on error. In the case of a direct conflict between Egyptian or Jordanian law on a particular point dealing with error it would be difficult to anticipate which line of jurisprudence the Palestinian courts would prefer to adopt. At the moment individual judicial experience or preference appears to favour the choice in the Palestinian courts of Jordanian law over Egyptian law.

Bilateral and unilateral error or mistake under the English and Scottish contract law⁷⁶ is just an example of other categories of error. Under the Palestinian Draft there is no direct mention of error as to motive, error as to intention, common mistake, mutual mistake, or error in expression. As indicated earlier, the Palestinian Draft does recognise error as to identity as part of essential error, which is in the same category as *error in substantialibus* under Scottish contract law.⁷⁷ Error or mistake as to identity is classified under English contract law, with both the courts and the commentaries dealing with it using different criteria.⁷⁸ Error in expression, which is established and classified under Scottish contract law,⁷⁹ is not found under any classification within the Jordanian or Egyptian civil law, nor in the Palestinian Draft. Error as to the quality of an item has also been categorized literally under the Scottish law of contract⁸⁰ and is also mentioned directly under mistake as to the subject matter within the English law of contract.⁸¹ It can also be clearly noticed that the Palestinian Draft has included it as one of the most obvious errors, classifying it as an error that prevents the consent of the parties, as mentioned earlier in this chapter. It is noticed that the category of mistake as

⁷⁶ Peel, *op. cit.*, P311-349.

⁷⁷ More details can be found under sub-title of Error as to identity of parties. A Concept of error in the Scottish Contract Law.

⁷⁸ More details can be found under sub-title of Mistake as to identity. A Critical Analysis of the Concept of Mistake in English Contract Law.

⁷⁹ More details can be found under sub-title of Error in Expression. A Concept of error in the Scottish Contract Law.

⁸⁰ More details can be found under sub-title of Error as to Quality of Item. A Concept of error in the Scottish Contract Law.

⁸¹ More details can be found under sub-title of Mistake as to Subject-Matter. A Critical Analysis of the Concept of Mistake in English Contract Law.

to fact is not mentioned directly, either in the Palestinian Draft, or in the Jordanian/Egyptian civil codes. Of course it could be derived by implication from the error cases and categories, but it is not an explicit or independent classification of error.

3.3. Error that has no Effect on the Consent

The third category of error under the Palestinian Draft is error that does not affect the consent or the contract at all. Article 122 of Palestinian Draft, Article 155 of Jordanian civil code, and Article 123 of Egyptian civil code all deal with this category of error under mistake as to calculation, and mistake as to writing. No legal action could be taken under this category; this omission should be corrected. For example, where a land owner contracted with a buyer to sell him his land, the exact location of the land sold was specified in the contract. They registered the contract according to the rules demanded. After some time they realised that the lands department had made an error in respect of the location. They asked the lands registration department to correct this error, but this was refused. The Jordanian Cassation Court⁸² has held that the head of the lands registration department has complete authority to correct the error in the registration statement or document if this error is founded on clerical error or incorrect measurement.

The Palestinian memorandum is expected to contain the main explanations and interpretations of the articles of the Draft code. It gives the reasoning behind the articulations and their purposes. Usually it gives some examples for further clarification for the benefit of the courts and the practitioners. It is supposed to be the main guidance for understanding the law codes. In general there is not much to be found in the Palestinian memorandum about this category of error that does not affect consent, except that it repeats what has been mentioned within the draft code itself. It takes the

⁸² Jordanian Cassation Court, civil Cassation, 284/81. Bar Association Journal. 1981. P525.

same approach as that taken by both the Jordanian and Egyptian civil laws. It would appear, therefore, that the commentaries did not add anything of significance on this subject. A clear example of this could occur when the contractor takes the measurement of the land or building in square meters, but fails to record this as square meters in the contract, or when the accountant decreases or increases the number of zeros, e.g 10 instead of 100 or *vice versa*.⁸³ In general, any error in respect of the parties' skills or qualifications does not affect the contract when this characteristic is not essential to the contract or does not play a substantial role in the contracting process. This means that personal features are not the motive behind entering into the contract.⁸⁴ Error would not be actionable or operative if it was connected to inessential description of the contract subject-matter.⁸⁵ No cases have been cited by Jordanian commentators or courts to establish how errors of this type would be treated. It could be understood, however, that where this type of error occurs, it would be treated as not having existed because it is not connected to one of the substantial elements of the contract.

The Palestinian Draft,⁸⁶ the Egyptian civil code,⁸⁷ and the Jordanian civil code,⁸⁸ have all stated that the party in error should not insist on the error of the other party in bad faith, and the contracting party should keep himself committed to the contract he intended to enter if the other party showed his willingness to implement the contract. This article ignores the theory of fraud or misrepresentation and their effects, such as damages or compensation, as has happened with the other categories of errors mentioned above. The author of this thesis suggests that the provisions dealing with this subject would benefit from adding two further criteria for differentiating between induced error with bad faith

⁸³ *Al-Sanhuri. Alwasiet fi Sharhe lqanoun Al-Madani*, op. cit., P54.

⁸⁴ *Al-Far*, op. cit., P81.

⁸⁵ *Ahmad Al-Dmour*. The Brief of Explanation of the Nominated Contracts in the Jordanian Civil Law. 2006.P18.

⁸⁶ Article 123. The Palestinian Draft of the Palestinian Civil Law.

⁸⁷ Article 124. The Egyptian Civil Law.

⁸⁸ Article 155. The Jordanian Civil Law.

and the uninduced error with good faith. This would make this kind of error more definite and clearer. It would not be fair to deal with a party who entered a contract in good faith in the same manner as with a party who entered a contract in bad faith.

In principle English and Scottish contract laws, particularly the English one, have discussed the subject of error and its categories more widely than is the case with the Palestinian Draft. As has been mentioned earlier, the Palestinian Draft discussed three categories of error with a brief explanation being given for each. The English law of contract has considered more categories, with many details attracting much argument and discussion by the commentators and the courts. Under the English law of contract it is possible to find almost every single category of mistake followed by sub-categories with further details covering the area of that mistake type. It can be found that, for instance, a common mistake is discussed clearly and defined within clear borders in detail, especially within the case law.⁸⁹ This is usually followed by more classifications and defined types of mistake, such as mistake as to the existence of the subject-matter,⁹⁰ mistake as to quality,⁹¹ and mistake as to quantity.⁹² This would also apply to mutual and unilateral mistake categories, which have been covered earlier in this thesis. This comment would also apply to the categories of error in the Scottish law of contract. It might be argued that the Palestinian Draft did not go further in its classifications because it was totally influenced by the Egyptian and Jordanian civil laws. It might, however, be worthwhile for the Palestinian Draftspersons to develop a new and wider analysis based on clear classifications or categories of error in Palestinian law.

⁸⁹ *Associated Japanese Bank v. Credit du Nord SA* [1988] 3 All ER 902.

⁹⁰ *Griffith v. Brymer* (1903) 19 TLR 434.

⁹¹ *Kennedy v. Panama, New Zealand and Australian Royal Mail Co.* LR 2 QB 580.

⁹² *Bell v. Lever Brothers Ltd.* [1932] A.C. 161; [1931] All ER 1.

3.4. Error as to law

Despite the fact that the Palestinian Draft did not discuss the error as to fact explicitly, it is clear that the Draft has established a special position⁹³ for error as to law. It is not strange to find this because it has followed the same line of analysis as both the Jordanian⁹⁴ and Egyptian civil codes.⁹⁵ For the sake of a comparative perspective, it is possible to note that the three legal systems focused directly on error as to law rather than focusing on error as to fact. Remarkably all the articles mentioned say that error as to law has the same conditions as for error as to fact. In this article,⁹⁶ the indication of error as to fact is proposed for the first time in any article discussing error and its effects. The indication of error as to fact is included in articles discussing only error as to law. Therefore, the understanding of error as to fact would be implied because nothing has been mentioned directly by the code's articles except in Article 121 that is basically about error as to law.

The memorandum of the Palestinian Draft of Civil law⁹⁷ clarified that the case of error as to law is not about the parties' ignorance of the law. Two main conditions would be demanded for operating error as to law. Firstly, the error should be substantial, and secondly, the error should be shared between the contracting parties.⁹⁸ Here there is a discrepancy created by the Palestinian memorandum, which states that if error as to law is not shared (with both parties falling into the same error), there is no reason to operate this kind of error. It is added that in order to operate this error the other party must have known about the error, or he was able to know about it.⁹⁹ It could be understood that the

⁹³ Palestinian Draft of Civil Law. Article 121.

⁹⁴ Jordanian Civil Code, Article 154.

⁹⁵ Egyptian Civil Code. Article 122.

⁹⁶ Article 121. The Palestinian Draft of the Palestinian Civil Law.

⁹⁷ The memorandum of the Draft of the Palestinian Civil Law. P83.

⁹⁸ Ibid.

⁹⁹ Ibid.

Draft demands the error to be shared between the contracting parties to operate the error as to law. The draft gives no indication why the other party should have known or was able to know about the error to operate error as to law as an operative error. It would be possible that error as to law could be made by one of the contracting parties, as well as by both parties. It is clear that the Palestinian Draft would not consider unilateral error as an error of law. This author recommends that the Palestinian Draftspersons look again at error as to law, in order to ensure that it is operative in both cases. It would be clearer and easier to consider error as to law an operative one where either one or both the parties are acting under mistake.

Following the above analysis, there is no possibility to operate a unilateral error under the Palestinian Draft. It is also noticed that when the Palestinian Draft discussed error as to law it does not discuss the possibility of establishing misrepresentation or fraud within error as to law. Misrepresentation and fraud would be expected under this kind of error, relying on previous knowledge of the other party in respect of error. The hypothesis of misrepresentation is totally ignored here, despite the clear indication that appears in Article 121 of the Palestinian Draft, which talks about induced or uninduced unilateral or mutual error. As is well known, where unilateral error occurs, misrepresentation and fraud could be one cause of the error. According to both the Palestinian Draft, and the Egyptian civil law, the contract would be voidable, because this sort of error is considered a defect of consent. The effect under Jordanian civil law is different, where the contract would be void. It is clear that in cases of error as to law and ignorance the Palestinian Draft is different from the English rule of *ignorantia legis neminem excusat*.¹⁰⁰ It is not clear why Jordanian civil law considered a remedy different from that of the

¹⁰⁰ Faruqi. op. cit.. P346.

Egyptian law. The Palestinian memorandum does not explain its reason for following the Egyptian rather than the Jordanian approach.

Error as to law is not discussed at all under the Ottoman Journal of Equity, either by the code or in its commentaries. The Egyptian¹⁰¹ and Syrian¹⁰² civil codes are deemed to be the historical background of the Jordanian concept of error as to law.¹⁰³ Consequently, the historical background of the Palestinian Draft in this area would be understood automatically as being influenced by the Egyptian code, because it is noticed that the Palestinian Draft has adopted the exact articulation and remedy as in the Egyptian code. Error as to law should generally operate when connected to the substantiality of contract¹⁰⁴ as has been mentioned earlier with regard to essential error cases.

Section 4: Misrepresentation (*Taghreer*)

The Palestinian Draft used the word *taghreer*¹⁰⁵ to mean misrepresentation, following the Jordanian civil code.¹⁰⁶ The Egyptian civil code¹⁰⁷ uses *tadlees* as parallel in meaning to the word *taghreer*. The Palestinian Draft shares the same articulation in one part¹⁰⁸ of Article 124, with the Egyptian civil code.¹⁰⁹ The Jordanian civil code starts to discuss *taghreer* in a different way from that taken in the other two jurisdictions. The Jordanian code starts with the definition of *taghreer*, but the Palestinian and Egyptian codes started directly with the effects of *taghreer/tadlees* without a definition being provided in any of the articles. According to the Jordanian code¹¹⁰ *taghreer* is when one of the contracting

¹⁰¹ Article 122. The Egyptian Civil Law.

¹⁰² Article 123. The Syrian Civil Law.

¹⁰³ *Abu-Albasal*, op. cit., P152.

¹⁰⁴ Egyptian Cassation Court. No 129756. 29/11/1990. Para 2.

¹⁰⁵ Article 124. Draft of the Palestinian Civil Law.

¹⁰⁶ Article 143. Jordanian Civil Law.

¹⁰⁷ Article 125. Egyptian Civil Law.

¹⁰⁸ Article 124 (1). Draft of the Palestinian Civil Law.

¹⁰⁹ Article 125 (1). Egyptian Civil Law.

¹¹⁰ Article 143. Jordanian Civil Law.

parties defrauds the other using fraudulent means by inducing him by word or deed to enter into the contract, into which he would not otherwise have entered. Egyptian jurisprudence states that *tadlees* (misrepresentation) occurs when one of the contracting parties misleads the other contracting party by any means, and induces him by error to enter the contract.¹¹¹

The Palestinian Draft¹¹² and the Egyptian¹¹³ code state that the contract would be voidable because of *taghreer/tadlees* if one of the contracting parties or his agent uses fraud that induces the other to enter the contract which would not be entered if fraud had not been used. It could be concluded that the Palestinian and Egyptian laws considered fraud as an act or a means of *taghreer/tadlees*, but Jordanian law considered fraud as a meaning of *taghreer*. This means that under Jordanian law the definition of *taghreer* (misrepresentation) no distinction is made between misrepresentation and fraud. If the word “fraud” is used, it would indicate misrepresentation and *vice versa*. Under the Palestinian and Egyptian provisions fraud would not reflect misrepresentation as a concept, but it would indicate that fraud is just a means to establish misrepresentation. Fraud is one way to establish misrepresentation as well as a lie or concealment.¹¹⁴ Furthermore *Sanhuri* suggested that anything that can be used to mislead is a misrepresentation (*tadlees*) and any one that has, as a consequence of such a misrepresentation, fallen into error would have the right to void the contract, and claim for damages or compensation.¹¹⁵

¹¹¹ *Addeep*, op. cit., P54.

¹¹² Used *taghreer*.

¹¹³ Used *tadlees*.

¹¹⁴ *Al-Sanhuri. Alwasiet fi Sharhe lqanoun Al-Madani*, op. cit., P109.

¹¹⁵ *Ibid*, P195.

Since the codes did not list the means of misrepresentation, it would be understood that any action (physical or oral) inducing a person into a substantial error with regard to a contract would be considered as a misrepresentation.¹¹⁶ Interestingly, the memorandum of the Palestinian Draft¹¹⁷ argues that fraud is a result of *taghreer*, by stating that “*taghreer* would be operative if it generates a fraud against one of the parties inducing him to enter the contract which he would not enter without the use of *taghreer*”. This contradicts the formulation of the Draft’s article,¹¹⁸ which considers fraud as a means of *taghreer*. It would be useful to add that *ghish* (cheating) is also considered a means of misrepresentation. As a general rule if misrepresentation or any of its aspects is to be operative that should be the main reason that the contracting party enters the contract.¹¹⁹

In the Palestinian Draft, *taghreer* (misrepresentation) - i.e. using any trickery to induce the other party, by means of fraud, cheating, or lying - is comparable to the use of the term *taghreer* within the Ottoman Journal of Equity.¹²⁰ This point has its equivalence under Scottish contract law, which also considers lies as misrepresentation and fraud.¹²¹ It has been mentioned earlier¹²² that the term *taghreer* would be parallel to misdescription in the Ottoman Journal. Misrepresentation can also be considered if an insured party did not disclose vital information about his health situation in order to induce the insurer to enter into the insurance contract.¹²³ It is clear that nondisclosure here is considered as misrepresentation. Based on that, there has been a case in which the seller of a restaurant was involved in misrepresentation when he did not disclose the

¹¹⁶ *Jameel Al-Sharqawi*. The General Theory of Obligation. Book 1. Sources of Obligations. Dar-Annahdah Al-Arabiya. Cairo. 1981. P135.

¹¹⁷ Draft of the Palestinian Civil Law. P85.

¹¹⁸ Article 124. Draft of the Palestinian Civil Law.

¹¹⁹ *Addnasouri, Al-Shawarbi*, op. cit., P31.

¹²⁰ The Ottoman Journal of Equity. Article 164.

¹²¹ Chapter Three of this Thesis.

¹²² Under chapter of “A Comparative Critical Analysis of the Concept of Error in the Islamic Contract Law. *Khiyar Alwaysf*”.

¹²³ *Dawwas*, op. cit., P87.

fact that he did not have the right to transfer the title to the buyer when they entered the contract.¹²⁴ Both the Jordanian¹²⁵ and Egyptian codes¹²⁶ count intentional silence regarding an actual fact or situation as a misrepresentation if it can be proved that the induced party would not have entered the contract had he known about this fact or situation.

The Palestinian Draft¹²⁷ has established a new approach with regard to silence and its connection with misrepresentation. This approach has adopted a slightly different articulation from the Jordanian and Egyptian civil law. Article 124 (2) of the Palestinian Draft states that intentional silence, hiding or concealing a matter, would be considered as misrepresentation if it is proved that the induced party would not enter the contract if he knew about the concealment. Despite this slight difference of articulation, there was no special interpretation by the memorandum of the Palestinian Draft giving an understanding distinct from that of Jordanian or Egyptian civil law. The author of this thesis recommends that the phrase “hiding or concealing” should be omitted from the article, because its addition could cause misunderstanding. If the Draftpersons intend to convey a particular idea it would be recommended that this be clarified either in the memorandum or within the code itself. The memorandum would be the primary source of reference for the courts interpreting the code.

In general, the three Arab legal systems seem to be clearer than English contract law when dealing with the issue of silence as misrepresentation. Some cases¹²⁸ considered silence as misrepresentation and some argued that silence would never establish a

¹²⁴ Jordanian Cassation Court, Civil Cassation, 371/88. Bar Association Journal. Year 38. Issues 8 &9 1990, P1566.

¹²⁵ Article 144. Jordanian Civil Law.

¹²⁶ Article 125 (2). Egyptian Civil Law.

¹²⁷ Article 124 (2). The Draft of the Palestinian Civil Law.

¹²⁸ *Hartog v. Colin & Shields* [1939] 3 All ER 566.

misrepresentation.¹²⁹ In the same respect, Scottish contract law clearly and firmly decided that silence cannot establish a misrepresentation as a general rule, but it appears that there are many cases in which silence was considered as misrepresentation.¹³⁰ English and Scottish law have no clear approach in deciding whether or not silence is a misrepresentation.

The Palestinian Draft¹³¹ mentions a crucial point with regard to damages or compensation as a consequence of misrepresentation when¹³² it has been decided that the misrepresentee (*mugharrar bihi* or *maghroor*) has the right to claim damages if it is demanded. In general, the statement “if it is demanded” has not been followed with a clarification of when the damages can be demanded. It would be useful if the Palestinian Draft or its memorandum clarifies the reasons or the causes that entitle the misrepresentee to claim damages. This subject has not been mentioned at all under the Jordanian or Egyptian civil codes. It might be useful to mention that Article 119 of the Egyptian code states that if a minor (under 18) used trickery to hide his minority he should be obliged to pay compensation or damages. Trickery might or might not lead to misrepresentation. The position of Article 119 is not clear whether this case would be restricted to minors or would include others who hide facts or information, including age. It is important to mention that intent is crucial in deciding whether there is misrepresentation. For trickery to be considered as operative, it is submitted that there should be an intention to induce the other party and to benefit from this inducement, leading to misrepresentation.¹³³ One could therefore say that if there is no intention to mislead the other party then there is no misrepresentation. This case might occur where

¹²⁹ *Keates v. Cadogan* [1851] 10 C.B. 591.

¹³⁰ *Spice Girls Ltd (SGL) v. Aprilia World Service (AWS)* [2002] EMLR 27, CA.

¹³¹ Article 124 (3). The Draft of the Palestinian Civil Law.

¹³² *Ibid.*

¹³³ Egyptian Cassation Court, 0329/39. 8/2/1972.

a shopkeeper tries to promote his goods by exaggerating when describing the features of the goods in order to attract clients, but does not go so far as to misrepresent the characteristics of the goods to those clients. It has been held¹³⁴ that a broker did not misrepresent to his client when describing land as good land, because the buyer viewed the land himself from a distance of 800 meters and agreed to buy it. The intention to establish misrepresentation was not proved because the broker gave the buyer the opportunity to see the land at first hand, taking the chance that the buyer would later refuse it.

According to English and Scottish contract law, the latter case would be considered similar to innocent misrepresentation, as mentioned earlier. As shown earlier, innocent misrepresentation under English law of contract is a misrepresentation which has not been made fraudulently; consequently this type of misrepresentation would not result in any damages as remedy against the misrepresenter. For example, it would not be included in any of the remedies under s 2(1) of the Misrepresentation Act 1967. This type of misrepresentation would be expected when the misrepresenter delivers a statement that he believes honestly to be true.¹³⁵ Under Scottish law of contract the situation is the same and it has the same rules.¹³⁶ Of course, this does not mean that Jordanian and Egyptian civil laws, and the Palestinian Draft recognise this kind of misrepresentation. No mention could be found of the known or classified categories of misrepresentation directly under the Palestinian Draft, or under the Jordanian and Egyptian civil codes. In general it can be concluded that the three legal systems¹³⁷ used fraudulent and innocent misrepresentation by implication under intentional or

¹³⁴ Jordanian Cassation, Civil Cassation, 475/91. Bar Association Journal. Year 41. Issues 4 & 5 1993. P645.

¹³⁵ Chris Turner. Contract Law. 2nd Edition. Hoder Arnold, 2007. P223. ISBN 9780340941966

¹³⁶ *Manners v. Whitehead* (1898) 1 F 171; 36 Sc LR 94; 6 SLT 190.

¹³⁷ Palestinian Draft, Jordanian, and Egyptian Civil Law.

unintentional *taghreeer*, but without using any of the terminologies used in English or Scottish contract law. It is noticed that there is no indication of negligent misrepresentation under any of the cases or articles within the Palestinian, Jordanian, or Egyptian provisions. Generally speaking, none of the three civil laws, whether the Draft or the codes, points out any category of misrepresentation; neither do the academic commentaries. It would be advisable for the three Arab legal systems to establish clear and classified categories of misrepresentation in order to ease dealing with expected legal effects of misrepresentation, and to enable the courts and the judicial body to create a clear differentiation from one to another. This type of improvement would have positive results in a legal system in the context of error and misrepresentation. This would be advantageous for domestic users, and it would ease international trade with other countries, where traders would be familiar with the concept of misrepresentation. It is also worth mentioning that a mere statement of opinion is not considered to be a misrepresentation.¹³⁸ This writer recommends a differentiation between the ordinary person's statement of opinion and an expert's statement of opinion which can strongly influence the parties to enter a contract, or at least create a greater motive for them to establish a contractual relationship.

4.1. Misrepresentation and the Third Party

The Palestinian Draft¹³⁹ stated that if misrepresentation (*taghreeer*) was established by a third party, the misrepresentee (*maghroor*) has the right to declare the contract void if he proves that the other contracting party knew or should have known about this misrepresentation at the time of the contract. Both the Egyptian civil code¹⁴⁰ and the

¹³⁸ *Addnasouri, Al-Shawarbi*, op. cit., P31.

¹³⁹ Article 125 (1). The Draft of the Palestinian Civil Law.

¹⁴⁰ Article 126. The Egyptian Civil Law.

Jordanian civil code¹⁴¹ have adopted the same point of view in this respect. It might also be said that the Palestinian Draft adopted the Jordanian and Egyptian perspective, as has been seen in many places in this chapter. On the same point, the Palestinian Draft¹⁴² has added an additional issue with regard to gratuitous contracts. It is stated that if the misrepresentee (*maghroor*) made a gratuitous contract, he has the right to void the contract even if the other contracting party did not know about the misrepresentation that was made by a third party at the time of contracting. Under English law of contract the case would be similar, except that, if misrepresentation is made by a third party, the third party would be liable to recover the loss of the principal and he would be committed to pay damages if the loss occurred for not using the money.¹⁴³ This is not the case under Scottish law of contract, where it is considered that if the misrepresentee entered the contract under error made by a third party; this would not cause reduction of the contract.¹⁴⁴ The reason behind this exception is to liberate donors from any defect that could affect their will.¹⁴⁵ Generally, the Egyptian Cassation Court¹⁴⁶ considered *ghish* (cheating) as *taghreer* (misrepresentation), and decided that when *taghreer* is done by a third party with the knowledge of one contracting party, it would be counted as if it was done by the contracting party.

It is clear now how crucial it is to have organised and clarified categories of *taghreer/tadlees* (misrepresentation). It is also clear that error as a concept and category needs to be improved and developed more than has been done through in all three Arab legal systems referred to, (Palestinian, Jordanian and Egyptian). These two perspectives that would improve error and misrepresentation provisions under Egyptian civil law did not prevent some of the Egyptian commentators pressing for a removal of the concept of

¹⁴¹ Article 148. The Jordanian Civil Law.

¹⁴² Article 125 (2). The Draft of the Palestinian Civil Law.

¹⁴³ *First National Commercial Bank Plc v. Humberts* [1995] 2 ALL ER 673.

¹⁴⁴ *Young v. Clydesdale Bank Plc.* (1889) 17 R 231.

¹⁴⁵ The Memorandum of the Palestinian Draft of Civil Law. P86.

¹⁴⁶ Egyptian Cassation Court. Legal Rules Collection. 2-438-16. 18/5/1933.

tadlees (misrepresentation), and to concentrate only on *ghalat* (error).¹⁴⁷ In other words, they suggested that misrepresentation, under current provisions, could be replaced by error. They argued that error theory would be sufficient to cover the two areas of law, and then there would be no need to deal with misrepresentation, eliminating unnecessary details in the law.¹⁴⁸ As reflected in some legal authors' arguments, which seem at times incomprehensible and are not acceptable to this writer, it can be noticed that Egyptian civil law jurisprudence underestimated the position of misrepresentation within the law. It has been said that misrepresentation (*tadlees*) is a reflection of error (*ghalat*), and should not be characterized as an independent defect of consent. This is justified by claiming that *tadlees* would not render the contract voidable unless it resulted in error for the other party.¹⁴⁹

First of all, it is true that *ghalat* could be established independently because the contracting parties have an incorrect belief with regard to the facts of the contract. This occurs when the parties have a shared error (a common or mutual error), or when one party has erred by an uninduced unilateral error. The induced unilateral error should have a counter-part factor (the misrepresenter) to make the inducement and push the other party into error. This usually can be seen clearly in English¹⁵⁰ and Scottish¹⁵¹ contract law on misrepresentation and the category of error or mistake. This was very clear also in the context of *gharar/taḡhreer* under Islamic contract¹⁵² law. However, to say that misrepresentation is not a necessary part of consent defect is neither logical nor realistic. As is well known, misrepresentation leads to error, but it is difficult to imagine any situation when an error can lead to misrepresentation. For the sake of accuracy,

¹⁴⁷ Mukhtar Al-Qadi. *Origins of Obligations in the Civil Law. Dar-Annahdah Al-Hadeethah.* 1967. P39-41.

¹⁴⁸ Mahmoud Al-Sharoud. *The Brief of the Will's Defects. Dar Al-Ittiḥad Al-Arabi for Printing.* 1988. P48. Para 13.

¹⁴⁹ Mahmoud Al-Munji. *Practical Cases Encyclopaedia (Vol. 9). A Case of Contract Voiding.* 2nd Edition, *Munsha'at Al-Ma'arif.* Alexandria. 2002. P345.

¹⁵⁰ Peel, *op. cit.*, P344.46

¹⁵¹ MacQueen, Thomson, *op. cit.*, P171.

¹⁵² Al-Saati, *op. cit.*, P6.

nothing has been found on this point in Jordanian commentaries, so it is difficult to anticipate whether the Palestinian courts and commentaries would be likely to follow either the Egyptian or the Jordanian perspective on this point.

Furthermore, *ghalat* (error) as explained earlier occurs when a person believes something to be a fact when in reality it is not, or *vice versa*.¹⁵³ Error can be established or motivated by internal and personal psychological factors without intervention by others. It can also be established through the inducement of others. Obviously, the conditions for error to be established are different from the conditions required for the establishment of misrepresentation. The misrepresenter, according to Egyptian law, should use trickery with intent in order to induce the other party to achieve illegal goals, and the trickery should be influential in persuading the party to enter into the contract.¹⁵⁴ According to *Anwar Sultan*, trickery means an error that is made by the misrepresenter and makes him liable to pay compensation.¹⁵⁵ Error could generate compensation especially if there was any financial loss. To consider misrepresentation as an error from the misrepresenter's side draws attention to the need for clarification in this area of law, in order to develop a better understanding. In general, it has been noticed that Jordanian and Egyptian civil laws do not deal fully with error. This might be because they were influenced by Islamic jurisprudence that almost ignores the error issue within the law of contract. It clear that most conditions of misrepresentation are not present in cases of error. Therefore, it is insufficient to have rules that define error and misrepresentation; further clarification and detail is necessary in order to assist the contracting parties to establish how to deal with these situations should they occur. It is true that error and misrepresentation are closely connected and have many areas in common, but this does

¹⁵³ The Memorandum of the Jordanian Civil code. P143, 144.

¹⁵⁴ *Anwar Sultan*, op. cit., P131.

¹⁵⁵ *Ibid*, P137.

not mean that one should be replaced by the other. It is also true to say that misrepresentation and error could cause confusion in some cases, but this means that lawmakers, legislators, and commentators should expend more effort in addressing and resolving any confusion which could occur in practice from time to time.

Section 5: Conclusions and Recommendations

It would very much to be expected that the Palestinian courts will not establish a distinctive judicial method to be followed by the Palestinian legal system. This expectation is built on the judicial practice in the Palestinian courts, especially at the appeal and cassation level. These courts, as has been mentioned earlier in this chapter, in many instances relied on Egyptian and Jordanian appeal and cassation courts and jurisprudence, and in some cases derived their judgements directly from the commentaries from the two legal jurisdictions. This is despite the fact that Egyptian and Jordanian civil law have become detached from the Ottoman Journal of Equity, and consequently their legal procedure would differ from that operating within Palestinian civil law, which is still based on the Ottoman Journal of Equity. It should also be noted that the Draft of the Palestinian civil law is almost all derived from the Jordanian and Egyptian civil codes. It would appear that no Palestinian commentators are interested in producing either a critical analysis of the Palestinian Draft or comparing applied law with the proposed Draft; there are very few valuable books or articles published, to date, on this point.

In addition the Palestinian Draft, with its origins in both Egyptian and Jordanian law, does not establish organised and specific categories of error or misrepresentation, and this will have a consequence for courts and commentaries within Palestine in two ways.

Firstly, it is clear that there is confusion among commentators on the cases. This is evidenced through ignoring the effects of misrepresentation on error, or arguing against the proposal that misrepresentation could or should be replaced by error. Secondly, error and misrepresentation are discussed from one perspective only, without classifying them into clear categories which could deepen understanding of this area.

It is recommended that the Palestinian Draft should be improved, taking into account the Palestinian legal environment and the historical background from which it has been derived. The Palestinian Draft should develop its provisions with regard to error and misrepresentation by defining both of them with their categories. This provides more opportunities for the commentators and courts to establish their own legal opinion in this area. It is useful for the Palestinian Draft to take guidance from the Jordanian, Egyptian, and Ottoman legal systems, but it would be more useful to distinguish it by creating clear borders between types of error based on bilateral and unilateral classifications, making them easier to understand and avoiding confusion and unnecessary arguments and consequent case law. The same point could be made with regard to *taghreeer* (misrepresentation). It would be useful for the Palestinian Draft to adopt one term to express the meaning of misrepresentation and to adopt a definition with clear classifications or categories. It has been noticed that the Palestinian Draft does not deal with the legal effects of misrepresentation and error sufficiently. Merely stating that a contract should be void or voidable as a result of error or misrepresentation is not sufficient in order to establish a robust legal framework and a rich legal background for the commentators, courts and practitioners. The draft would be improved by more details in this regard.

It is to be hoped that the Palestinian Draft would create obvious answers to many questions about error and misrepresentation, by specifying the main categories and their legal effects, because it is not helpful to have only general rules, without detailed guidance, which is missing in the Palestinian Draft in the area of error and misrepresentation. The Palestinian Draft should include rules for rectification as a result of error, and establish rules with regard to the remedies of restitution and damages. This is an opportunity which should be seized while this law is still in draft form, and can be easily amended.

Chapter Eight

Comparative Conclusions and Comments

Section 1: Comparative Conclusions

1.1. Different Approaches on Error/Mistake

It has been found that English and Scottish contract laws have many shared ideas in regard to the concept of error/mistake and its categories. However, this is not the case for all issues relating to mistake or error; for example to categorise error, Scottish law of error uses terms different from those used under English law of contract. Scottish contract law established a category of error in motive which does not exist in English contract law. Scottish law has established error in intention as a clear and an independent category which includes error in transaction, derived from *Error in Negotio* of Roman law. This is not the case in English law, where mistake in intention is not considered independently but needs to be derived from the category of mutual mistake. Scottish law of contract divides error into more precise categories where as in English law of contract categories of mistake are more general.

For example, under Scottish law error as to price is found clearly classified as essential error, and discussed independently by Scottish legal writers. Under English law it is more difficult to find consistency in cases of essential mistake or its sub-category mistake as to price; cases of error as to price are distributed throughout many categories of mistakes but are not treated independently. In this respect, it likely that Scottish contract law will be more easily understood and interpreted than English law. Essential error, one of the most

important categories of error under Egyptian civil law and the Draft of the Palestinian civil law is dealt with specifically in both and indeed an Article in each is devoted solely to the concept of essentiality. However, this is not established under Islamic contract law, because error was not discussed within Islamic jurisprudential studies.

Scottish law of contract contains a more detailed and precise discussion and classification of error than the other legal systems discussed here. Despite this, the most thorough discussion of mistake and misrepresentation and their categories is found in English law of contract. This is true of English academic writers, commentators, and case law, and to a lesser extent of Scottish law of error which however requires to be updated and modernised. This, in this author's opinion, would provide an academic and judicial basis for opinions in commonly occurring cases. In comparison, Islamic, Jordanian, Egyptian laws, the Draft of the Palestinian civil law, and the CISG rules do not draw sufficiently on academic discussion. Judgments under Scottish law of error are demonstrably more stable than their counter parts under English law of mistake. Even in cases where the facts are very similar, contradictory judgments are found in disputes relating to mistake with consequent variations in case law. Contradictory decisions are also found where the same case has been under judgment by different judges or courts. There are two short conclusions from this: English law of mistake may be improved because greater freedom allows judges to think more creatively resulting in improvement in the rules. On the other hand, in this situation English law of contract may suffer from instability causing uncertainty as to remedy for all parties in dispute.

1.2. Mutual and Common Mistake

As shown, English law of mistake lacks clear classification, to distinguish different concepts. This is in contrast with other branches of English law. Many cases of mistake can be considered as breaches of contract. In general, it is noticed that English law does not consider mistake as part of a combined theory of imperfections of consent.¹ Despite the fact that English law of contract discussed thoroughly the concept of mistake and its related issues, it is suggested that the method followed in English law leads to ambiguity and complexity in many cases. English law of contract should be examined to clarify this subject and to distinguish between common and mutual mistake, there being confusion when the latter term is used to indicate common mistake (shared mistake).² Alternatively the law of contract requires a clearer definition combining both categories. There is no clear justification for the two classifications, common and mutual mistake, which as shown earlier are closely related in both case law and academic legal commentary.

It is vital to know whether a mistake occurred before or after the contract between the parties. This can significantly affect the understanding of common mistake including the existence of the subject matter. This author suggests that if common mistake as such occurs after the contract is entered it should be treated as non-performance, or total failure of consideration, or failure of delivery. Of course the case would be different when common mistake as such occurs before the point of entering the contract is reached, when this would be treated as mutual mistake which is connected chiefly to offer and acceptance. Since mistake was established before the contract being entered and before the goods were available, there would, at the outset, be no need to discuss the contractual relation, because no contract existed to be discussed or disputed.

¹ Green, *op. cit.*, P66.

² Wishar, *op. cit.*, P249, Footnote 6.

As discussed, under English law of contract, much debate is caused by the issue of common mistake as to the existence of the subject matter. When we go further to discuss contract existence through existence or non-existence of subject matter, it can be said that the case would be about an agreement to have a contract. It can be established as a promise to contract which will have different approach, and different remedies.

Many debatable cases have been cited to support the conclusion with regard to common mistake and its connection to the existence of the subject-matter. One disputable case discussed in the earlier chapter on English contract law of common mistake is that of “*Couturier v Hastie*”³: the plaintiff having agreed to sell Indian corn to the defendant, the corn, unknown to both parties, began to perish. To avoid more harm or losses the ship’s captain decided to sell the rest of the corn. As a result, the buyer argued that the corn (subject matter) stopped existing before the contract was entered. Based on that, the buyer argued that the contract was void, and there was no responsibility on him to pay the price of corn. The seller argued that the purchaser was responsible for paying the price because he bought at a venture, so the risk was his. When the case was presented before the House of Lords, it was held that the buyer was not liable to pay the price. It was also held that the contract was expected to be about existing goods, but in this case the goods no longer existed. In this case also the seller was not required to deliver the goods. Clearly, the judges did not indicate voidability as a remedy, so the judgement was vague as to whether there was any alternative remedy such as damages. The decision did not mention any kind of mistake, either common or mutual.

³ (1856) HL Cas 673.

Throughout this case, the application of mistake as to the existence of the subject matter is irrelevant.⁴ The case clearly reflected s6 of the Sale of Goods Act 1979 in regard to perished subject-matter but is not concerned with the existence of subject matter.

It is interesting to note that the defendant relying on the provisions of English law argued that when the property (subject matter) is not existent at the time of agreement, there 'could be no contract of sale'.⁵ This is mentioned to illustrate how common mistake attracted and raised different or even controversial arguments, which could be still open for more discussion. It is also useful to notice that some writers did not mention common mistake as a recognised category under the English law of contract when they presented the fundamental types of mistake.⁶ This brings us back to the discussion on section 6 of the UK Sale of Goods Act (1979), which was mentioned earlier to differentiate between the perished goods which did exist, and goods that had never existed.

The author of this thesis noticed that there was no mention or suggestion about the possibility of misrepresentation or fraud from the seller's side. This leads us to suggest that misrepresentation should be included in the argument. It would be strongly recommended to consider the case as unilateral mistake from the buyer (M) and misrepresentation (any type) from the seller's side (CDC). This view is supported by Richard Stone⁷ who states "the clearest type of mistake which renders a contract fundamentally different from what the parties thought they were agreeing to, and which will be regarded as rendering the contract void, is where the parties have made a contract about something which has ceased to exist at the time the contract is made". Surprisingly Stone's explanation for his argument seems contradictory, stating that "where the subject matter ceases to exist *after* the contract

⁴ Richards, op. cit., P215-222.

⁵ Ibbetson, op. cit., P228.

⁶ Haigh, op. cit., P156.

⁷ Stone, op. cit., P284.

is made, the doctrine of ‘frustration’, applies, rather than mistake”.⁸ Stone was explaining common mistake and the non-existence of the subject matter ‘*res extincta*’. This example illustrates in practice the controversies in relation to the understandings of common mistake especially a mistake as to subject matter. Stone did leave the door open for controversial discussion as he is not clear whether he supports frustration in such a situation, or follows his definition of common mistake when the subject matter ceases to exist. The existence of the subject matter has also been approached as an issue under the doctrine of frustration⁹ which the author sees as more relevant to this case than the doctrine of common mistake.

In general, there is no clear route establishing a consistent view of common mistake. Even the English Dictionary of Law does not elucidate the context in which common mistake applies, defining it as “both parties make the same error to a fundamental fact”.¹⁰ In fact, though this is a broad definition it is logical and in practice gives a more definitive understanding of common mistake. A similar definition states “both parties to an agreement are under misunderstanding (single mistake shared by both)”.¹¹ This researcher has identified a definition stating ‘both parties are labouring under the same misconception’,¹² thus combining common and mutual mistake. This inconsistency in definitions explains why different understandings are adopted by some commentaries. This shows lack of stability in creating commonly recognised definitions of common and of mutual mistake as different concepts.

The main suggestion to be made with regard to common mistake is to simplify the understanding of this concept by separating common mistake as a shared misunderstanding

⁸ Ibid, Footnote 21.

⁹ Furmston, op. cit., P85-95.

¹⁰ Curzon, op.cit., P279.

¹¹ Martin, op. cit., P344.

¹² Abbott, op. cit., P502.

between contracting parties, from the idea of the subject-matter being perished or no longer in existence. A distinction must be drawn between two types of common mistake: a case where contracting parties fall under the same mistake in which case both would be exempted from their legal duties; and a case where the subject-matter is compromised and one party has to bear the responsibility according the circumstances in each case.

As has been shown under English contract law, in Scottish contract law, problems also remain in understanding mutual error.¹³ The same elements and the same legal effects are found in mutual error/mistake under both Scottish and English contract law, eventually rendering the contract void *ab initio*.¹⁴ Scottish law of contract holds that if error was caused by a third party, this will not enable reduction to be operative.¹⁵

As Islamic jurisprudence does not contain any clear view about the concept of mistake under contract law it is unclear whether Islamic law holds an established view with regard to mutual and/or common error. This author would recommend that Muslim scholars develop a theoretical framework of error based on the structure of English contract law. This would enable scholars to develop a strong clear argument with regard to any case of error which may occur. The situation under the CISG is similar to the Islamic one, because CISG does not discuss error rules in a direct way and mutual or common error are not mentioned under any of CISG rules. Article 119 in the draft of Palestinian contract law defines mutual error as error shared between two contracting parties. The draft considers a contract that involves this kind of error to be void.

¹³ Rahmatian, *op. cit.*, P42.

¹⁴ Hec. Burn Murdoch English Law in Scots Practice. The Juridical Review. 1909-1910. P61.

¹⁵ *Young v. Clydesdale Bank Plc.* (1889) 17 R 231.

1.3. Unilateral Error

In English contract law unilateral error concerns the performance of the contract that was not implemented and the damages that may be claimed for the non-performance.¹⁶ The case under Scottish contract law seems to be totally different, as it is clear that here the remedy would be to declare the contract void.¹⁷ Unilateral error is not considered under Islamic contract law explicitly, but it can be derived implicitly from the rules of *khiyar alwasf*.¹⁸ This type of error is also not discussed in the CISG rules.

1.4. Un-induced Unilateral Error

In English law tradition, the party entering a contract under a reasonable error created by him/her would be committed by the contract and the other party might be eligible for damages.¹⁹ The thorough discussion of the Scottish contract law on un-induced unilateral error in *Stewart v Kennedy*²⁰ leads to an interesting conclusion, namely, that the party who is involved in the un-induced error may not find that the remedy is to set aside the contract. This means that such an error could result in no legal remedy for the mistaken party. This type of error is not mentioned under both Islamic contract law and the CISG rules. Article 121 of the Palestinian Draft mentions this type of error but without details.

1.5. Essential Error

As noticed earlier in this research, under the English law of contract mistake, which need not be essential, will be operative regardless of the extent of the mistake which vitiates the contract.²¹ Under Scottish law of contract, error must be essential and goes to the root of the contract. Under Islamic contract law, there is no such category as error, because

¹⁶ *Webster v. Cecil* 1861, 30 Beav. 62.

¹⁷ *Stewart's Trustees v. Hart*. (1875) 3 R 192.

¹⁸ For more details see: Chapter Five, A Comparative Critical Analysis of the Concept of Error and Misrepresentation in Islamic Contract Law. Section 2: *Khiyar Alwassf*.

¹⁹ Murdoch, op. cit., P61.

²⁰ 1890 17R (HL) 25.

²¹ Murdoch, op. cit., P60.

Islamic jurisprudence contains no discussion of the concept of error. This author's analysis shows that fundamental breach in Article 25 CISG causes loss for the buyer preventing him from enjoying his contractual expectations, although the seller would not have been aware that this would be the result.²² This would be considered as an essential mistake under English and Scottish contract law. The Palestinian Draft of Civil Law²³ considered essential error as the main category among the other types of errors.

1.6. Mistake as to Identity

Under English contract law, the most important point when discussing mistake as to identity is that there is considerable controversy. This issue is connected to the theory of mistake as to identity. The author finds that as a general rule the seller is responsible for his transaction once he has decided to deal with the buyer at face value.²⁴ In practice this rule contradicts the case where fraud was considered as a reason to void the contract under mistake as to identity of the other contracting party, even when this fraud established mistake as to identity where the contract was done face to face.²⁵ In cases of this kind if the innocent party can prove that the identity of the other party was vital to the business, the contract is void.²⁶

This is also true under Scottish law of contract; when essential error as to identity occurs this would prevent the contract being formed. In this regard, J M Thomson argued that cases of error as to identity (personal attributes) would rarely go to the root of commercial contracts.²⁷ Under English contract law, error as to identity will generally operate when the

²² Schwenzer, op. cit., P437.

²³ Palestinian Draft of Civil Law. Article 120.

²⁴ Para 922[2004] 1 A.C. 919. *Shogun Finance Ltd v. Hudson*. House of Lords. 2003 July 14, 15; Nov 19.

²⁵ *Ingram v. Little* [1961] 1 QB 31.

²⁶ Haigh, op. cit., P158.

²⁷ Thomson, op. cit., P140.

court is convinced that the party in error considered the identity of the other contracting party as a vital motive for entering the contract.²⁸ A similar situation can be seen under the Draft of Palestinian Civil Law.²⁹ Error as to identity is not mentioned under any category either in Islamic contract law or within the CISG rules.

1.7. Error as to Law

In fact English law states that payment made under a mistake of law would not of itself be a ground for recovery. On the contrary, if *prima facie* is involved in a payment made under a mistake of fact it would be recoverable.³⁰ With regard to the same issue Lord Goff concluded that no principle in English law means that, a contract being void, money paid was irrecoverable based on mistake of law if the contract had been completely performed within the agreed terms.³¹ Under Scottish law of contract, it has been noted that under the law of error a payment would be recoverable, but notably this rule was not derived from contract law, but it was supported by the equity rules of *condictio indibiti* which require the repayment of money where this money has been paid under the mistaken impression that the party is legally committed to pay.³² According to *Ali Haydar*, Islamic law of contract recognises this kind of error, and he mentions a similar case under the concept of error in Islamic contract law.³³ In comparison, Scottish and Islamic contract laws have very similar attitudes towards the law of error. CISG rules have no indication in respect of error as to law. It is noticed that the Draft of Palestinian Civil Law has established a special position³⁴ for error as to law, but defined it differently from English, Scottish, and Islamic contract laws. Interestingly, the draft focused directly on error as to law rather than on

²⁸ Gloag, op. cit. P443,444.

²⁹ *Al-Far*, op. cit., P80.

³⁰ The law commission report, law commission No 227, restitution: mistakes of law and ultra vires Public Authority Receipts and Payments, 30th September 1994.

³¹ Law Reform Committee, Singapore Academy of Law, op. cit., P12.

³² *Baird's Trustees v. Baird*. (1877) 4 R 1005. See also: *British Hydro-Carbon Chemicals Ltd v. British Transport Commission*. 1961 SLT 280.

³³ *Hayder*, op. cit., P50.

³⁴ Palestinian Draft of Civil Law. Article 121.

error as to fact. It is important to note that the draft states that error as to law has the same conditions as for error as to fact.³⁵

Section 2: Different Approaches to Misrepresentation

It is been found that misrepresentation under Scottish contract law has been investigated more thoroughly than in English law. Under Scottish contract law, there is a very thin line between fraud and misrepresentation. It can be seen that there is a tendency by Scottish scholars or writers to relate fraud and misrepresentation more closely than is the case with English law. It appears that the Scottish definition of misrepresentation is very similar in practice to the English definition of operative misrepresentation, but in fact this is not so. The reason for this brief conclusion is derived from Prof Joe Thomson's discussion of inaccurate statement of fact as one of the factors of operative misrepresentation under Scottish contract law. It is noticed that under English contract law the definition is quite different: English contract law uses "false statement of fact" as part of its definition,³⁶ not "inaccurate statement", as is used in the Scottish definition. In fact, saying that the statement is not accurate is different from saying that the statement is false.

According to the Ottoman Journal of Equity, misrepresentation (*gharar, taghreer*) under Islamic contract law means that the description of the item sold to the buyer is contrary to its real description."³⁷ This definition tells us that misrepresentation under English contract law and *gharar/taghreer* under Islamic contract law has the same meaning. But another definition of *gharar/taghreer* under Islamic jurisprudence, which defines it as deception,³⁸ brings the definition of misrepresentation closer to Scottish contract law which has tended to make misrepresentation closer to fraud than English law does.

³⁵ Ibid.

³⁶ J. Cartwright, *Misrepresentation* (London, Sweet and Maxwell, 2002) P1.

³⁷ Article 164.

³⁸ *Al-Saati*, op. cit., P6.

Under International contract law (CISG) it is also evident that the court³⁹ used the word “misrepresented” to indicate the “fraudulent seller”, establishing a new link between fraud and misrepresentation under the CISG. In other words, it means that there is a possibility of using the terms misrepresentation and fraud interchangeably. This gives a strong indication that the concept of misrepresentation, if there is any, under CISG rules corresponds more closely to the concept under Scottish contract law, rather than under English contract law. A similar situation is established under the Draft of the Palestinian Civil Law, where the fraud is considered as a means of *taghreer*.⁴⁰ This indicates that the view of the Palestinian Draft with regard to misrepresentation is more similar to Scottish than English contract law.

2.1. Remedy for Fraudulent Misrepresentation

It has been shown that English contract law and Scottish contract law have different points of view in relation to damages as a remedy for fraudulent misrepresentation. Under English contract law, damages can be applied even if the contract has not yet been concluded;⁴¹ the justification for this is simply that there would not be any loss as a result of the contract, because the contract does not exist.⁴² The case under Scottish contract law is different because for damages to be applied as a remedy the contract needs to have been concluded or already in existence.⁴³ This applies both to fraudulent misrepresentation, and to negligent misrepresentation.⁴⁴ Furthermore, damages could be claimed by the misrepresentee when the misrepresentation is fraudulent or negligent.⁴⁵ According to the Ottoman Journal of Equity, if the contract of sale involved fraudulent misrepresentation, then the

³⁹ See *CLOUT* case No. 168. Germany: *Oberlandesgericht*, op. cit., P 89.

⁴⁰ Article 124. Draft of the Palestinian Civil Law.

⁴¹ Reid, op. cit., P10.

⁴² MacQueen, op. cit., P14.

⁴³ *Clelland v. Morton, Fraser and Milligan* WS 1997 SLT (Sh Ct) 57.

⁴⁴ S 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

⁴⁵ Thomson, op. cit., P279.

misrepresentee has the right to void the contract.⁴⁶ Under the CISG there is no clear category or clear legal effects of the vendor's misrepresentation, whether fraudulent or negligent.⁴⁷ This would make it more difficult to find a standard remedy for misrepresentation (fraudulent or negligent); as a result the remedy in each case would be subject to the rules of the domestic legal system where this type of misrepresentation occurred.

The memorandum of the Palestinian Draft⁴⁸ argues that fraud is a result of misrepresentation (*taghreer*), by stating that “*taghreer* would be operative if it generates a fraud for one of the parties and induces him to accept a contract which he would not accept in the absence of *taghreer*”. This contradicts the formulation of the article in the Draft,⁴⁹ which considers fraud as a means of *taghreer*. In this case the Palestinian draft considers misrepresentation and fraudulent misrepresentation as synonymous, so that, the Palestinian Draft would consider⁵⁰ the contract as voidable if it involves fraudulent misrepresentation.

2.2. Silence and Misrepresentation

In this thesis, the author found that silence usually cannot establish or cause misrepresentation under English common law.⁵¹ However, in *Bradford Third Equitable Benefit Building Society v. Bolders*⁵² another view proposing silence to be a case of misrepresentation contradicts this rule. The author of this thesis agrees with the logic of considering silence as misrepresentation. This view relates to the fact that if certain information was not disclosed it could lead to a danger of misleading. For example, if a person makes a statement which is initially true he would have a duty to correct it if later,

⁴⁶ The Ottoman Journal of Equity. Article 357.

⁴⁷ Joseph Lookofsky, op. cit., P280.

⁴⁸ Draft of the Palestinian Civil Law. P85.

⁴⁹ Article 124. Draft of the Palestinian Civil Law.

⁵⁰ Ibid.

⁵¹ *Keates v. Cadogan* (1851) 10 C.B. 591.

⁵² [1941] 2 All ER 205.

as a result of a change in circumstances, it becomes false. Likewise if a person creates a partial statement which is correct in itself but would be misleading because it lacks some information, he is at fault of misrepresentation.⁵³ Some cases⁵⁴ considered the probability of considering silence as misrepresentation and some argued that silence would never establish misrepresentation.⁵⁵ This is interesting because it shows the extent of controversy among academic writers on one hand; on the other hand there is much controversy among judges between different cases. It shows that every case could be treated sometimes entirely differently from the previous or the later ones, and in some cases there is no recognised standard upon which to base a decision.

In the same respect, as a general rule Scottish contract law clearly and strictly decided that silence cannot establish a misrepresentation, but it appears that many cases have considered silence as misrepresentation.⁵⁶ English and Scottish law have no clear approach in deciding whether or not silence is misrepresentation. Neither the CISG nor Islamic contract laws discuss the issue of silence, simply because they do not have any clear concept of misrepresentation. The situation under the Draft of Palestinian Civil Law is different. The draft is clearer than English and Scottish contract law when dealing with the issue of silence as misrepresentation. Article 124 (2) of the Palestinian Draft states that intentional silence to hide or conceal a matter would be considered as misrepresentation, if it is proved that the induced party would not enter the contract if he knew about this matter. In general, the three Arab legal systems seem to be clearer than English contract law when dealing with the issue of silence as misrepresentation. Of course, this does not mean that Jordanian, and Egyptian civil laws, and the Palestinian Draft, recognise this kind of misrepresentation. This concept is not identified or classified directly in under any

⁵³ Bradgate, Brownsword and Flesner, *op. cit.*, P95.

⁵⁴ *Hartog v. Colin & Shields* [1939] 3 All ER 566.

⁵⁵ *Keates v. Cadogan*, *op. cit.*

⁵⁶ *Spice Girls Ltd (SGL) v. Aprilia World Service (AWS)* [2002] EMLR 27, CA.

categories of misrepresentation in the Palestinian Draft, or the Jordanian and Egyptian civil codes.

2.3. Misrepresentation and Opinion

Under English contract law mere opinion would not be considered as a misrepresentation,⁵⁷ unless this opinion was established fraudulently;⁵⁸ if the opinion was provided by a person with experience or knowledge of the subject of the contract, this would be an essential factor in considering liability.⁵⁹ The opinion would also be considered as misrepresentation if the party intended to express his opinion wrongly.⁶⁰ Here Scottish contract law⁶¹ adopts the same view as English contract law. Islamic and CISG rules do not discuss any aspects of the relation between opinion and misrepresentation. The Palestinian draft does not consider a mere statement of opinion to be misrepresentation.⁶²

2.4. Misdescription and Misrepresentation

According to section 2(1) of the English Misrepresentation Act 1967 fraudulent misrepresentation would be established when the representor's action is based on deceit.⁶³ It can be concluded that under Islamic contract law if *khiyar alwassf* (misdescription) includes *gharar*, it would be considered parallel to fraudulent misrepresentation under both English⁶⁴ and Scottish⁶⁵ contract law. This view leads to the conclusion that *khiyar alwassf* on its own is non-fraudulent misrepresentation. Therefore, most Muslim scholars do not realise the importance of differentiating, as *Ali Haydar* does, between misdescription that involves *gharar* (intentional or fraudulent) and misdescription without *gharar*

⁵⁷ Samuel, op. cit., P325.

⁵⁸ Cartwright, Misrepresentation, Mistake, and Non-Disclosure, op. cit., P110.

⁵⁹ *Mutual Life and Citizen's Ins Co Ltd v. Evatt*, [1971] AC 393.

⁶⁰ May, Brown, op. cit., P503.

⁶¹ MacQueen, op. cit., P19.

⁶² *Addnasouri, Al-Shawarbi*, op. cit., P31.

⁶³ Zhou, A Deterrence Perspective on Damages for Fraudulent Misrepresentation, op. cit., P85.

⁶⁴ *HIH Casualty & General Insurance Ltd v. Chase Manhattan Bank* [2003] U.K.H.L. 6.

⁶⁵ *Boyd & Forrest v. Glasgow & South Western Railway Co* 1912 SC (HL) 93.

(unintentional or innocent), when deciding the proper remedy to be used when this case occurs.

Misdescription is obviously a concept equivalent to misrepresentation under English and Scottish law. For example the Ottoman Journal (as a codified Islamic law) cites a case where the seller⁶⁶ described a cow as being in milk but it was discovered that she was not. Similarly English law cites a case in which the seller described oats as “good old oats”⁶⁷ but in fact it was discovered that they were new. Both examples are obviously about description. In general the facts were similar, but the remedies were different. In the Islamic case the buyer is entitled to cancel the contract (void the contract), but is not under English. Neither legal system gives the option of considering unilateral error where misdescription occurs. This omission should be rectified. Interestingly, the law in both UK legal systems as enacted in Trade Descriptions Act 1968 explains the rules in the context of misdescription. This law was enacted to replace the Merchandise Marks Acts 1887 to 1953 to prevent misdescription in trade and business. It is designed to disallow false or misleading indications in the pricing of all categories of goods. This law strengthens for the requirement that information about goods must be clear and well advertised.⁶⁸ In Scotland this law will be applied under the Food and Drugs Act 1955, and the Food and Drugs (Scotland) Act 1956; if this is not the case the contract must specify any variation in the description of the goods.⁶⁹

Similarly, misdescription could be comparable to what was established under the rules of the International Sale of Goods (CISG) about misdescription occurring during the

⁶⁶ Article 313. The Ottoman Journal of Equity.

⁶⁷ *Smith v. Hughes* (1871) LR 6 QB 597.

⁶⁸ Trade Descriptions Act 1968. Chapter 29. P1.

⁶⁹ *Ibid.*, Section 2 (5). Chapter 29. P3.

contract's implementation.⁷⁰ The CISG also requires the goods to conform to the description that was agreed in the contract.⁷¹ It is important to note that there is no direct mention connecting misdescription and misrepresentation in Islamic and international contract laws. The Palestinian draft has not discussed misdescription as the legal systems cited in this thesis do.

2.5. Non-disclosure and Misrepresentation

As mentioned earlier in this thesis, the contracting parties would not have a commitment to non-disclosure under English and Scottish contract law. Two situations would be excluded from the previous non-disclosure rule. The two cases are well established under both the English and Scottish laws of contract,⁷² where non-disclosure would be essential in insurance contracts, where the insured party must disclose all the material facts to the insurer. The duty of disclosure would include any kind of material fact whether major or minor.⁷³ The same duty would be required in a contract where there is a fiduciary relationship between the contracting parties, again under both Scottish⁷⁴ and English⁷⁵ laws of contract. The case is totally different under the Islamic law of contract where the contracting parties have to disclose all the facts connected to any type of contracts. If any of these facts was not disclosed, this would be considered as misrepresentation or fraud (*taghreer*) which is strictly prohibited (*haram*).⁷⁶ The duty of disclosure in the CISG is established within the concept of good faith which is connected to non-conformity in accordance with Article 40 CISG.⁷⁷ Under the Palestinian draft non-disclosure is also considered as misrepresentation.⁷⁸

⁷⁰ United Nations Convention on Contracts for the International Sales of Goods (1980). Article 35.

⁷¹ *Ibid.*, Article 35.

⁷² Soyer, *op. cit.*, P9.

⁷³ MacMillan, Lambie, *op. cit.*, P90.

⁷⁴ *Ibid.*

⁷⁵ MacIntyre, *op. cit.*, P157.

⁷⁶ Hayder, *op. cit.*, P191.

⁷⁷ Akaddaf, *op. cit.*, PP33,34.

⁷⁸ Dawwas, *op.cit.*, P87.

2.6. Defect and Misrepresentation

Clearly, English, Scottish, and Islamic law have similar rules in relation to defect. Under Islamic contract law if the buyer discovers a defect in the item sold and the defect has been removed before the item is returned, there is no option of defect. If the buyer insists on this option he will be obliged to cover the expense of the delivery and transportation.⁷⁹ The author finds this case comparable to the English case established by the House of Lords relying on the s.35 (6) (a) of the Sale of Goods Act 1979. The House of Lords decided that the buyer had no right to refuse the goods that had been repaired by the seller before the buyer received them.⁸⁰ A similar situation occurs with regard to the procedures that should be followed when there is a claim about a defect before the court. Under Islamic law, the existence of defect must be proved at the time of the trial. This means that the buyer must show the defect in the item sold, whether or not the defect is old, but if the buyer cannot prove the existence of the defect he will not be able to continue with the case. Under English and Scottish contract laws similar procedures are required if a person refuses goods and claims compensation because of the defect.⁸¹

The right of retaining the sold item is implied within Scottish and English law, particularly in consumer law. Consumers may refuse any defective goods (return the goods) within any sale contract. Damages (compensation) may also be sought in respect of any value lost as a result of the defect.⁸² The Ottoman Journal rules are similar if the defect happened after

⁷⁹ *Hayder*, op. cit., P194.

⁸⁰ *Ritchie v. Lloyd* [2007] UKHL 9. Elements of the law of contract recent developments 2008. P3. http://www.londonexternal.ac.uk/current_students/programme_resources/laws/11b_diplaw/recent_dev/elements_law.pdf. Accessed at 10/8/2008.

⁸¹ Reforming the Law on Consumer Remedies for Faulty Goods. An Introduction to the Law Commissions' Project.20 February 2008. P2. Para 1.8.

⁸² Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers. EC Consumer Law Compendium - Comparative Analysis -. Prepared for the European Commission under Service Contract No. 17.020100 / 04 / 389299; "Annotated Compendium including a comparative analysis of the Community consumer acquis". April 2007. P 662.

the item sold was purchased, and the buyer discovered another old defect which existed before the sold item came into his possession.⁸³

In England and Scotland, goods should be free from any defect, and this would be required even if not specified as part of the contract or transaction.⁸⁴ In the Sale of Goods Act 1979, it is stipulated that in Scotland (only), when goods are sold according to a sample, the goods should match the quality of the sample which established the standard of the goods.⁸⁵ Obviously the goods must be free from both flagrant and hidden defect. By comparing these rules, it has been found that the Ottoman Journal of Equity deals with defect in almost the same way as UK's rules do. It can be concluded that defect as a technical term would not be parallel to error or misrepresentation under any of the legal systems mentioned in this thesis.

2.7. Disclosure of Defect and Misrepresentation

Under the English and Scottish Sale of Goods Act,⁸⁶ a defect will be considered as existent if it makes the goods unmerchantable, even if not visible under initial inspection. The goods will not be merchantable if they are not fit for purpose.⁸⁷ Under English and Scottish law, the defect will not be considered if the seller has drawn the buyer's attention to the defect before they enter the contract.⁸⁸ In both laws, declaring the defect to the buyer relates to the concept of disclosure where non-disclosure may lead to misrepresentation or fraud. As has been shown, Islamic law also deals widely with defect under *khiyar al- ayb*. It has also been shown that this option can be treated as a case of misrepresentation or fraud in hiding the defect, but not as a result of the defect itself. When the defect is

⁸³ The articles from 345.

⁸⁴ Section 15 (3) Sale of Goods Act 1979.

⁸⁵ Ibid, Section 15B (c).

⁸⁶ Ibid, Section 15 (2) (c).

⁸⁷ Ibid, Section 14 (6).

⁸⁸ Ibid, Section 14 (a).

discovered the buyer has the right to rescind the contract and return the item sold himself or through his agent. The sold item can also be returned to the seller or his agent and the buyer has the right to recover the money.⁸⁹ This leads to another point mentioned in the Ottoman Journal which states “if the seller discloses the defect in the item sold at the time of the contract, and the buyer accepted the item, then he has no right to use the option of defect”.⁹⁰

Under English law there is no duty on the party to disclose the defect. For example⁹¹ a person selling pigs’ is not responsible for fraud even if he knew that the pigs had a fault (e.g. fever), and he did not disclose this fact to the buyer. This case is applicable in the rules both of law and of equity.⁹² The exception to this rule is a relationship between the parties relying on confidence and trust. In other words, the party must disclose all the facts about the contract if the other party is a close relation (e.g. son, father or guardian); if this is not done the concealment would be considered as a fraud.⁹³ The main assumption in Islamic law is that the seller has a duty to disclose the defect. Otherwise, it will be taken as a misrepresentation (*taghreer*). *Taghreer* here seems to be comparable to fraudulent concealment which is applicable when the party is committed to a duty of disclosure under Scottish law.⁹⁴ An English case⁹⁵ can be cited to show that in some instances fraudulent concealment would be equivalent to fraudulent misrepresentation where the duty of disclosure is required.

Defect in Islamic law of contract is a technical reason to establish misrepresentation or fraud, but it would not be parallel to either of them. If a buyer, having bought a property,

⁸⁹ *Hayder*. op. cit., P192.

⁹⁰ The articles from 341.

⁹¹ [*Ward v. Hobbs* (1878) A.C. 13].

⁹² O'Donovan. Op. cit., P338.

⁹³ Law of Contract Business Law Including Company Law. P37. Accessed at 7/10/2008.

⁹⁴ English and Scottish Law Commissions. Insurance Contract Law. Misrepresentation and Non Disclosure. Issues Paper 1. September 2006. P102. Para A 25.

⁹⁵ *Conlon v. Simms* [2006] EWCA Civ 1749.

resells it to another buyer who takes possession of it, and then discovers a defect pre-dating the sale, the second buyer has no right to return the property to either of the former sellers.⁹⁶

As shown, the Ottoman Journal discussed very specific details with regard to the option of defect and decided that, in the case of a long standing defect being discovered, the buyer has the right to choose either to return the defective item or to accept it as it is according to the agreed price. In this case the buyer does not have the right to retain the item sold and also expect the seller to refund the lost value caused by the defect.⁹⁷ English and Scottish law, according to a shared consultative paper, suggests that a buyer's complaint in relation to the merchantability of goods (not defective products) would depend on the terms of the contract he made with the producer including the price agreed. This paper suggests that if the item has already been resold several times to other buyers, successive buyers have then no right to complain against the producer.⁹⁸ The duty of disclosing the defect under CISG comes under the concept of good faith which is connected to non-conformity in accordance with Article 40 CISG.⁹⁹ If the seller fails to disclose the defect, this would be counted as fraudulent misrepresentation.¹⁰⁰ The non-disclosure or concealment of a defect can create misrepresentation or fraud, by one party and error by the other. Islamic law of contract deals with defect as a result of *gharar* or *taghreer* (misrepresentation or fraud), but does not discuss defect as a result of error or mistake, this important aspect should be added to the Islamic legal view as a complementary part of *gharar* or *taghreer* which is misrepresentation.

⁹⁶ *Haydar*, op.cit., P193.

⁹⁷ Article 337.

⁹⁸ The Law Commission and the Scottish Law Commission. (LAW COM. No.82) (SCOT. LAW COM. No.45). Liability for Defective Products. Report on A Reference Under Section 3(1) (e) of the Law Commission Act 1965. Presented to Parliament at June 1977. P16. Para 46.

⁹⁹ *Akaddaf*, op. cit., PP33,34.

¹⁰⁰ *Garro*, op.cit., P260.

2.8. Comments on Fraudulent Misrepresentation in English Law

As shown, fraud is defined as “an intended misrepresentation of a material fact, made knowingly, with intent to defraud.”¹⁰¹ According to this definition, misrepresentation is an instrument of fraud, and word misrepresent would bear the same meaning as defraud. Fraud is said to occur when one party uses deceit or misrepresentation to gain greater advantage from the terms of contract than the other party.¹⁰² Furthermore, it is noticed that key words regarding misrepresentation could be ‘intentional or unintentional’ putting misrepresentation into the precise category of fraud and deceit. Instead of using the term fraudulent misrepresentation, some common law commentators used intentional misrepresentation as equivalent to deceit; thus the party who entered into a contract because of intentional misrepresentation or deceit, here using intentional interchangeably with deceit, would not be committed to any legal obligation, there being no agreement because the intention of each party was different.¹⁰³

This author finds that Lord Herschell¹⁰⁴ in English law, expressed an opinion in terms, which defined fraudulent misrepresentation as synonymous with fraud. According to him certain factors must be involved: to decide that the fraud is created the party must know that the representation is false and believes it to be untrue. From this it is clear that Lord Herschell, equated fraud with misrepresentation. His opinion was about “fraudulent representation”, but when he cited examples of fraud he used the word “misrepresenting”. He spoke of “fraudulent representation” as “fraud” and considered that misrepresenting a statement is fraud. Another opinion from the law commission, which quotes Scott regarding the definition of fraud, supported this. The commission suggested that ‘fraud includes any dishonest conduct which causes, or exposes another to the risk of, financial

¹⁰¹ Robert W., op. cit., P97.

¹⁰² Miceli, op. cit., P93.

¹⁰³ Robert W., op. cit., P100.

¹⁰⁴ *Derry v. Peek* (1889) 14 App Cas 337.

loss'; it can be added that lying could be included within this definition.¹⁰⁵ The Law Commission of England which was used as a reference in the previous opinion stated that "if the defendant's dishonest act is a misrepresentation, and there is the necessary intent to make a gain or cause a loss, there will in any event be liability for the new fraud offence."¹⁰⁶

Section 3: Comments on Error and Misrepresentation in Islamic Contract Law

3.1. Differences between *Qur'anic* Rules and Scholars' Understanding under Islamic Law

This author finds differences between the terms in the *Qur'an* and the terms used by Arab/Muslim law scholars with regard to error or mistake. This is at variance with the fact that the *Qur'an* is the source of Islamic law, and the main background of correct and professional Arabic. As a general rule, it is concluded that the context of indication to error in the *Qur'an* differentiates between mistaken and intentional belief: the former could be forgiven and rectified where as the latter involves practical action which would be reckoned and incur blame.¹⁰⁷ This type could be comparable to intentional misrepresentation or fraud under English contract law.¹⁰⁸

3.2. Concentration on *Gharar* (misrepresentation) rather than *Khata'a* (error)

This author noticed that jurisprudence under Islamic law does not discuss the concept of error, but instead focuses on *gharar* (misrepresentation). Also, Muslim scholars do not define *gharar* sufficiently clearly to distinguish it from the other concepts. They confuse uncertainty and *gharar*; Islamic jurisprudence does not differentiate between fraud,

¹⁰⁵ The Law Commission (LAW COM No 276). Fraud, Report on a reference under section 3(1)(e) of the Law Commissions Act 1965. July 2002. Para 7.6. P58.

¹⁰⁶ Ibid. Para 8.12. P83.

¹⁰⁷ *Qur'an* 33:5.

¹⁰⁸ James Karp, Elliot I. Klayman, Frank F.Gibson. Real Estate Law. 5th Edition. Dearborn Real Estate Education. 2003. P203. ISBN:0793149568.

misrepresentation, cheating, and deception. In other words, *tadlees*, *gharar*, *ghabn* and *ghish* are given the same meaning and the same connotation in schools of Islamic jurisprudence using different words for the same meaning as also occurs in other languages. Islamic jurisprudence deals widely with misdescription (*khiyar al wasf*) and its remedies. Based on that, it is noticed that the remedies which are provided by the Ottoman Journal as explained by *Ali Haydar* in respect of misdescription based on *gharar* is similar to the case of unilateral mistake without deceit under English law.

The author has shown that Islamic law gives the party who is affected by misdescription the right to cancel the contract and return the item to the seller, or keep it without any reduction of the price. The author has also found that this case corresponds with the application of English rules to unilateral mistake. However, English rules suggest that the mistaken party may accept the contract if he discovered the mistake. In other words a misrepresentation renders the contract voidable at the option of the representee;¹⁰⁹ as shown in the Ottoman Journal of Equity; English contract law gives the purchaser who finds any misdescription the right to terminate the contract especially in the case of considerable loss of profit.¹¹⁰ In this situation misdescription is treated similarly to the practical application of the Islamic concept of *khiyar alwassf* (option of description).¹¹¹ Furthermore, similar evaluation of the concept of misdescription in the provisions of the International Sale of Goods “CISG” shows it to be comparable to that explained in the rules of misdescription occurring during the implementation of contract.¹¹²

Thus, it can be concluded that *gharar* as a meaning of misrepresentation is not clearly classified as a specific category such as innocent, negligent or reckless, and fraudulent. The

¹⁰⁹ *Strachan & Henshaw Ltd v. Stein Industrie (UK) Ltd* (1998) 87 B.L.R. 52.

¹¹⁰ Poikela, op. Cit., P244, 245.

¹¹¹ The Ottoman Journal of Equity. Article 95.

¹¹² CISG, op. cit., Article 35.

Islamic rules with regard to *gharar* are stricter than those of misrepresentation under English law. Islamic law does not distinguish minor from excessive *gharar* as categories of misrepresentation are classified under English law. This is justified because *gharar* as misrepresentation under Islamic law is considered principally as ‘serious moral wrong’.¹¹³ Minor misrepresentation and its effect under English and Scottish law are different from minor *gharar* under Islamic contract law. As mentioned earlier most Muslim scholars consider the contract as valid if it involves only minor *gharar* because they interpret the concept of *gharar* as risk or uncertainty. This means that they allow minor risk or minor uncertainty. This thesis adopts a new view in defining *gharar* by considering it as misrepresentation which is *haram* (prohibited).¹¹⁴

The author finds that *taghreer* relates to the description of the item; it can affect the price, but is not *per se* about the price. “*taghreer*: is describing the item sold to the buyer contrary to its real description.”¹¹⁵ This leads us back to the author’s definition of *khiyar alwasf* as misdescription. Here if the *gharar* involves deception, it will be equivalent to fraudulent misrepresentation under both English¹¹⁶ and Scottish¹¹⁷ law in cases where deceit is involved. This supports the proposal discussed earlier that *taghreer*, *tadlees*, deceit, and misrepresentation bear the same meaning under the Islamic contract law. In other words, most Muslim scholars use different expressions referring to the same meaning. For example, it is possible to find one scholar using a certain word to refer to misrepresentation, while others use the same word to mean fraud. It can be concluded that there are different understandings of the concept depending on the school to which the scholars loyal.

¹¹³ Rayner, op. cit., P206.

¹¹⁴ Hayder, op. cit., P191.

¹¹⁵ The Ottoman Journal of Equity, Article 164.

¹¹⁶ *HIH Casualty & General Insurance Ltd v. Chase Manhattan Bank* [2003] U.K.H.L. 6.

¹¹⁷ *Boyd & Forrest v. Glasgow & South Western Railway Co* 1912 SC (HL) 93.

3.3. A New Understanding and Reformulation of *Gharar*

The differences between the concepts of *gharar* show an urgent need to reformulate and unify its understanding as one concept and using one term.¹¹⁸ Considering the issue as a whole it is clear that if *khiyar alwasf* involves *gharar*, then it will correspond exactly to fraudulent misrepresentation in both English and Scottish contract law. This echoes *Ali Haydar's* distinction between *kiyar alwasf* on its own, and *khiyar alwasf* that involves *gharar*.

Reformulating *gharar* will strengthen the pragmatism of Islamic law to include generally accepted traditions and customs,¹¹⁹ enabling Islamic law to be improved without contradicting the Qur'anic rules; allowing variation from time to time, or from place to place.¹²⁰ English law of Equity is similarly pragmatic when dealing with a wide range of legal cases as they occur. But here, English courts making decisions based on equity can release two different decisions for the same case depending on the discretion of the judge or the court. This would depend on the circumstantial conditions in each case. The main difference is the dependence of Islamic law on the *Qur'an* as divine authority; no decision can be issued against its teaching. Simply, this is not required in English law of Equity.

Section 4: Comments on Error and Misrepresentation in the CISG

The author has found that the CISG rarely deals with mistake or error directly.¹²¹ A reading of article 8 (1) of the CISG¹²² shows that there are some signs implying the concept of mistake or error. These signs concentrate on the understanding of statements by one of the contracting parties. A study of the concept of error within the CISG reveals a serious

¹¹⁸ *Obaidullah*, op. cit., Para 3.1.2.

¹¹⁹ *Qur'an* 7:199.

¹²⁰ *Dweekat*, The Percentage of the Commercial Profit from the *Qur'an* and the Life, op. cit.

¹²¹ *Charters*, op. cit., P17.

¹²² For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

problem; its definition of mistake is ambiguous, as is the distinction between common, mutual, unilateral, or any other category of error. If a case of mistake is solved, further investigation is required as to misrepresentation this being connected to the concept of mistake. Even if it is possible to find the concept of misrepresentation, the problem of categorizing the types of misrepresentation remains. It is noticed that the CISG has no clear categories and has not defined the legal effects of misrepresentation at any level, innocent, fraudulent or negligent.¹²³

The CISG does not establish the concept of mistake and misrepresentation as English and Scottish contract law do. On the international level, this may cause complications to the contracting parties as there is no international court to deal with such cases. The CISG has not set up any legal body to deal with resulting disputes. This author finds that there is a strong link between the interpretations of intent in Article 8 of CISG and some rules in Scottish contract law. The main purpose of the rules of error under Scottish law is to solve disputes concerning the contracting parties' intents and their expression.¹²⁴ Both are about understanding whether the wording of the contract expresses the underlying intent accurately. This approach is established and reflected in the Islamic-Arabic definition of error, which concentrates also on the intent of the person; error would be established when someone intended to do something but unintentionally did something different.¹²⁵ It is concluded that the historical legislative track of the CISG does not give an impression that the drafters intended to give the contracting parties the right to rely on their national rules of mistake in all the disputable cases or situations.¹²⁶

¹²³ Lookofsky, op. cit., P280.

¹²⁴ Rahmatian, op. cit., P36.

¹²⁵ *Ibin Manthour*, op. cit., P1193.

¹²⁶ Ferrari, Verona, op. cit., P62.

This study finds that the CISG rules greatly lack clarity as to the interpretive rules including those relating to mistake and misrepresentation. This has led to a circular argument about error and validity, because it is not clear whether the concept of validity should be interpreted only according to the CISG rules applying the concept of uniformity, which could include the concept of error by implication.

The rules and the articles of the CISG are not sufficiently clear or precise to fill the gap between domestic laws and the CISG rules. This would affect the procedures followed by domestic courts when applying their national legal rules to the CISG cases presented before them. However, it is found that within the original structure of the CISG there is discretion contained in the wider context of the rules considering mistake as part of the CISG. This discretion suggested that mistake could occur during the contract formation, or during the “sale of goods” process.¹²⁷

This lack of clarity among the scholars with regard to error under the CISG is created by the drafters who were not clear enough in this regard. They also did not establish obvious boundaries for remedies of mistake; nor did they solve the question of whether cases of error should be ruled by the CISG or by national legal norms.¹²⁸ Conflict is to be expected between the CISG rules and national rules of mistake. A different opinion states that the CISG rules are capable of dealing with mistake related to the performance capacity of the party, and the conformity of the goods.¹²⁹ The author sees no stability between the commentators’ argument with regard to the issue of mistake and its relation with the CISG; some consider mistake as contained within the CISG rules, and others consider the issue of mistake to be absent from the CISG.¹³⁰ The author also finds that the drafters of the CISG

¹²⁷ Zeller, *op. cit.*, P77.

¹²⁸ Weitzmann, *op. cit.*, P265-290.

¹²⁹ Schlechtriem, Butler, *op. cit.*, P43.

¹³⁰ “Checklist on the CISG”, *op. cit.*

were not aware of the relation between the articles of the CISG and the concepts of mistake and misrepresentation in national legal systems. Furthermore, it is clear that the court used the word “misrepresented” to indicate “fraudulent seller”, establishing a new link between fraud and misrepresentation under the CISG rules. In other words, it is possible to deal with misrepresentation and fraud as equivalent.

Article 35 (1, 2), of the CISG discusses the concept of the quality of goods; Article 35 (1) states “The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.” This Article deals with the issue of description in the same way as the Islamic law deals with *khiyar al-wasf* (option of description). The same article treats goods delivered and not meeting the description specified in the contract as a misdescription; this is comparable to misrepresentation. A study of section (2) (a) of Article 35 provides a wider usage of misdescription (misrepresentation) as an applicable concept. It expects that goods which do not conform to the contracting description should -at least- be fit for the ordinary uses of goods with same description. This provides a broad interpretation of misdescription imposing more conditions on the contracting parties when they carry out their contractual obligations. Section (2) (b) of Article 35 of the CISG elaborates on this, stating that goods should serve the specific purpose agreed with the seller “expressly or implicitly”. An exception to this is a situation where has been implied that the buyer did not rely, “or that it was unreasonable for him to rely” on the seller’s assessment.

Section 5: Comments on Error and Misrepresentation in the Draft of Palestinian Civil Law

5.1. Types of Error

In the Palestinian Draft there is no direct mention of error as to motive, error as to intention, common mistake, mutual mistake, or error in expression. Error as to quality of an item is categorized literally in Scottish contract law¹³¹ and is also mentioned directly under mistake as to the subject matter within the English contract law.¹³² It is clear that the Palestinian Draft has included this type of error as one the most important error, classifying it as an error that prevents the consent of the parties. The author finds that the category of mistake as to fact is not mentioned directly, either in the Palestinian Draft, or in the Jordanian/Egyptian civil codes. This type of error is not independently classified but can be derived by implication from the cases of error and its categories. In principle English and Scottish contract laws, particularly the English; have discussed the subject of error and its categories more widely than is the case with the Palestinian Draft. As mentioned earlier, the Palestinian Draft discussed three categories of error with a brief explanation being given for every one of them.

5.2. Error as to Law

Following the earlier discussion, there is no possibility to regard unilateral error under the category of error as to law in the Palestinian Draft. It can also be noted that the Palestinian Draft does not discuss the possibility of misrepresentation or fraud under the category of error as to law. The author would recommend consideration should be given to the

¹³¹ More details can be found under sub-title of Error as to Quality of Item. A Concept of error in the Scottish Contract Law.

¹³² More details can be found under sub-title of Mistake as to Subject-Matter. A Critical Analysis of the Concept of Mistake in English Contract Law.

hypothesis of misrepresentation, as implied in Article 121 of the Palestinian Draft, which discusses induced or uninduced unilateral or mutual error.

Section 6: A Unified Islamic-Anglo Legal Framework of Misrepresentation

The author has taken the opportunity to establish a new legal framework combining the concept of misrepresentation under English law, and *gharar*, *taghreer*, *khiyar alwasf* under Islamic law. This framework relies on a new understanding of the concept of misrepresentation or fraud under Islamic contract law as an equivalent concept to that of misrepresentation under English law. This framework is based on the comparative critical analysis of English and Islamic contract laws in this thesis. In order to establish a new Islamic-Anglo doctrine of misrepresentation some main issues need to be clarified. Firstly, it is concluded that there is no differentiation between misrepresentation and fraud under Islamic contract law. Secondly, Muslim scholars do not agree on a unified Islamic definition of misrepresentation or fraud. Thirdly, different words are used to indicate misrepresentation or fraud under Islamic contract law.

Tadlees is one example of this. *Assayyid Sabiq* stated that *tadlees* is *haram* (prohibited) because it contains *taghreer* and *ghish* (cheating).¹³³ The Islamic Research & Training Institute¹³⁴ introduces many different interpretations and translations: it interprets *tadlees* as fraud¹³⁵ corresponding to *Ibin Manthour's* interpretation;¹³⁶ it interprets *tadlees* as misrepresentation,¹³⁷ while also referring to it as “option of cheating” which allows the party to rescind the contract;¹³⁸ it considers *ghabn* as fraud,¹³⁹ following the definition

¹³³ *Sabiq, op. cit.*, P116.

¹³⁴ This institution attracts and employs Muslim scholars from different Islamic and Arabic countries that come from various Islamic doctrines. It is expected to be one of the best Islamic institute who is interested in improving and developing the Islamic banking and finance, in addition to issue a lot of researches and papers in this area depending on many of high qualified academic staff and practitioners.

¹³⁵ *Ali, Ahmad, op. cit.*, P53.

¹³⁶ *Ibin Manthour, op. cit.*, P1408.

¹³⁷ *Ali, Ahmad, op. cit.*, P53.

¹³⁸ *Ibid.*, P304.

provided by *Ibin Manthour*.¹⁴⁰ To explain why *ghabn* is prohibited in Islamic contracts, the same paper points out that “*ghabn* in transactions implies deception, misrepresentation, and cheating.”¹⁴¹

The term *taghreer* is also used to denote fraud or misrepresentation under Islamic contract law. In explaining *taghreer*, *Ali Haydar* defined it as fraud (*khida'a*); the defrauder is called the misrepresenter (*mugharrir*) and the person who falls under the fraud is called the misrepresentee (*maghroor*)¹⁴² or (*mogharrar bihi*). The Ottoman Journal of Equity states that “*taghreer*: is describing the sold item to the buyer contrary to its real description.”¹⁴³ Under this definition *taghreer* and misdescription bear the same meaning, so misdescription (*khiyar al-wasf*) under Islamic law is equivalent to fraud or misrepresentation. This is supported by *Abdul-Rahim Al-Saati*, when he stated that the verbal noun of *gharar* is *taghreer*, “it means deception or misrepresentation.”¹⁴⁴ *Abdullah Hasan* considered *khiyar al-tadlis* and *khiyar al-taghreer* as “option of fraud”. He stated that the defrauded party would be able to rescind the contract if he could prove that he had entered into it misled by deceit or wilful misrepresentation by the other contracting party.¹⁴⁵ It is clear that the core issue in *khiyar alwassf* is describing the item contrary to its real description. This would be considered as an intentional action from one party (seller) to another (buyer). In this case *khiyar alwassf* directly means misrepresentation. Thus, it is not possible to consider *khiyar alwassf* as an error except in one case which would be an induced unilateral error. Therefore, *khiyar Alwassf* (option of description) should be translated as misdescription; it would have the same meaning as misrepresentation.

¹³⁹ *Ibid.*, P53.

¹⁴⁰ *Ibin Manthour*, op. cit., P3211.

¹⁴¹ *Ali. Ahmad*, op. cit., P21.

¹⁴² *Hayder*, op. cit., P264.

¹⁴³ The Ottoman Journal of Equity. Article 164.

¹⁴⁴ *Al-Saati*, op. cit., P6.

¹⁴⁵ *Haj Hasan*, op. cit., P59.

Interestingly, the question of misdescription was addressed under English law in Trade Descriptions Act 1968. This Act explains the rules of misdescription, replacing the Merchandise Marks Acts 1887 to 1953 which prevent misdescription in trade and business. It is designed to disallow indications that are false or misleading in respect of the prices of goods and enhances the requirements for information about goods to be clear and advertised.¹⁴⁶ Clearly this Trade Description Act deals directly with the rules of misrepresentation, and prohibits false or misleading indication, and the concealment of the information. This research has made it clear earlier that false statement constitutes misrepresentation under English law; and non-disclosure has also been considered as a type of misrepresentation. When these facts are brought together, the logical conclusion is that Islamic and English contract law both consider the terms misdescription and misrepresentation as having the same meaning. *khiyar Alwassf* under Islamic law is equivalent to misdescription under English law which means misrepresentation. This author finds that *khiyar Alwassf* should be classified as unintentional misrepresentation under the Islamic law; which corresponds to innocent misrepresentation under English law. Establishing the unintentional misrepresentation, there should be intentional misrepresentation under Islamic law as corresponds to fraudulent misrepresentation under English law.

This author believes that the terms *gharar* or *taghreeer* convey the same meaning as intentional misrepresentation under Islamic law, or fraudulent misrepresentation under English law. As mentioned earlier, *taghreeer* is the verbal noun of *gharar*, the past tense of *gharar* is *gharra*; in Arabic-English translation *gharra* means misled, or deceived.¹⁴⁷ As a result, *gharar* is translated as a misleading or deception.¹⁴⁸ Both could be considered as

¹⁴⁶ Ibid, Chapter 29, P1.

¹⁴⁷ *Rohi Baalbak*, op. Cit., P292.

¹⁴⁸ *Rahman*, op. cit., P274.

exactly meaning fraudulent misrepresentation under English law.¹⁴⁹ Under the Islamic law, fraud or deceit conveys the meaning of *gharar* and cheating.

Relying on Arabic-Arabic dictionary, the author has shown by his analysis in this thesis, that the verb *gharra* means to misrepresent or defraud.¹⁵⁰ In this way, misrepresentation and fraud convey the same concept under the Islamic law. As this thesis has shown, in translating misrepresentation, English-Arabic dictionaries use *khida'a*, *tadlees* (fraud) and *kathib* (lying), and releasing a false statement of fact by the misrepresenter to induce the other party to achieve the misrepresenter's desires.¹⁵¹ This meaning is also translated as misleading.¹⁵²

The finding of this thesis proves that *gharar* corresponds more closely to the concept of fraudulent misrepresentation under English contract law than to other similar concepts. It is clearly understood that misrepresentation under English common law is considered as false representation of a given fact in order to induce the party to enter the contract. This definition, as shown earlier, was considered as a fraud made intentionally (knowingly), or recklessly, or without believing it as a correct fact.¹⁵³

In discussing the English approach to fraud and misrepresentation, some notable opinions and discretions considered material misrepresentation as a type of fraud under English law. Lord Diplock supports this approach in association with Raymond Jack, both considering that material misrepresentation has many factors in common with fraudulent misrepresentation, which would be treated under tort of deceit.¹⁵⁴ Interestingly, when the

¹⁴⁹ Martin, Oxford Dictionary of Law. op. cit., P344.

¹⁵⁰ *Ibin Manthour*, op. cit., P1487.

¹⁵¹ *Faruqi*, op. cit., P460.

¹⁵² *Ibid*, P459.

¹⁵³ Curzon, op. cit., P183.

¹⁵⁴ Gao Xiang and Ross P.Buckley. A Comparative Analysis of the Standard of Fraud Required under the Fraud Rules in Letter of Credit law. Duke Journal of Comparative & International Law. [Vol 13:293. 2003]. P323.

case of *Banco Santander S.A. v. Bayfern Ltd.*¹⁵⁵ was disputed before the court, it was stated that some documents presented were fraudulent; the fraud was established in a judgment of the Queen's Bench Division which was supported by the Court of Appeal. Furthermore, the two courts agreed with Lord Diplock's interpretation which considered material misrepresentation as a type of fraud according to the regulations of letters of credit under the law of the UK.¹⁵⁶

Intending to create an Islamic-Anglo legal framework of misrepresentation, this author suggests two categories of misrepresentation. The first category is an intentional misrepresentation, which is equivalent to fraudulent misrepresentation under English contract law, and *Khiyar Alwassf* that involves *gharar* or *taghreer* under Islamic contract law, because *gharar* or *taghreer* exactly means deception. The second category is unintentional misrepresentation, which is equivalent to innocent misrepresentation under English law and *Khiyar Alwasf* without *gharar* or *taghreer* under Islamic law.

Section 7: Summary of the Conclusion

The great importance of error and misrepresentation, or *gharar (taghreer)* has been shown under the cited legal systems within this thesis. It is also shown that error and misrepresentation play a vital role in setting up the contract. In practice, error and misrepresentation and their similar concepts would be considered as key concepts in or to understand the legal remedies regarding many contractual disputes. This author strongly believes that there are many similarities between the cited legal systems concerning error and misrepresentation; but many serious differences can be noticed among them.

¹⁵⁵ [1999] EWHC 284.

¹⁵⁶ Xiang, Buckley. op. cit., P324.

As shown with reference to the Islamic-Anglo approach, the author strongly believes that a new approach can be adopted to redefine the concept of misrepresentation in the future, in English, Islamic, Scottish, Palestinian, and the CISG contract laws. This approach suggests that misrepresentation should be classified under only two main simple categories: intentional misrepresentation to include fraud and deceit, and unintentional misrepresentation to include error.

English, Scottish, Islamic, Jordanian, Egyptian, and the Draft of the Palestinian civil law almost agree about the main elements of essential error as a vitiating factor of the contract. The Islamic contract law discussed the option of rescission only when related to misrepresentation from one party and an induced unilateral error from the other party. As a result, it can be strongly concluded that all the legal systems cited in this thesis can interact with each other, and exchange experiences. It can be also noted that every legal system has different perspectives towards and issues with error and misrepresentation. However, for each one of them there is a possibility to derive great benefits from sharing experience with the other legal systems; thus improving different aspects and ideas. There is an also strong ground for developing the interactivity between the legal systems in the future especially in the areas of error and misrepresentation.

Bibliography

Journal Articles

Akaddaf, F 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles' *Pace International Law Review* (Vol XIII, No1. 2001).

Akhtar, K 'Islamic Economic System, Issues in Islamic Banking' *The Pakistan Accountant* (Vol. 38, Issue no 4, July-August 2005).

Anon (1913) 'Professor Woodward's the Law of Quasi-Contracts'.

Bridging the Great Divide between Mistakes of Law and Fact in Restitution: is the bridge safe to cross? *Singapore Academy of Law Journal*. 11S. Ac. L. J. 1999.P322.

Charters, A 'Fitting the "Situation": the CISG and the Regulated Market' *Washington University Global Studies Law Review* (Vol 4 No 1. 2005).

CISG Advisory Council 'The buyer's right to avoid the contract in case of nonconforming goods or documents' (2005) *Nordic Journal of Commercial Law* (Issue No. 2).

Davis, P and Ludlam, G 'Wynn or Lose? A Frustrating Case' *Art Antiquity and Law* (Vol. XII, Issue 2 June 2007).

Drobnig, U 'Substantive Validity' *American Journal of Comparative law* (Vol. 40, 1992).

Ebrahim, M and Rahman, S 'On the pareto-optimality of futures contracts over Islamic forward contracts: implications for the emerging Muslim economies' (2005) *Journal of Economic Behavior & Org.*

Erauw, J 'The Risk of Loss and Passing It' (2005) *Journal of Law and Commerce* (Vol. 25:203) Available at: <http://www.cisg-online.ch/cisg/materials-commentary.html#Article%2066>. (Accessed on October, 9th, 2007).

Feng, S 'Utmost Good Faith in Marine Insurance: A Comparative Study of English and Chinese Maritime Law' *Plymouth Law Review* (2008).

Ferrari, F 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)' *Rechts Zeitschrift für ausländisches und internationales Privatrecht* (Vol.71 January, 2007).

Ferreri, S 'Remarks Concerning the Implementation of the CISG by the Courts (the Seller's Performance and Article 35)' *Journal of Law and Commerce* (Vol. 25:223 June, 2005).

Flechtner, H 'Buyers' Remedies in General and Buyers' Performance-Oriented Remedies' *Journal of Law and Commerce* (Vol. 25:339 June, 2005).

Flechtner, H 'The UN Sales Convention (CISG) and MCC-Marble Ceramic Center Inc. v Ceramica Nuova D'Agostino, S.p.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parole Evidence Rule' in (1999) *Journal of Law and Commerce* 259.

Garro, A 'The Buyer's "Safety Valve" under Article 40: what is the Seller Supposed to Know and When?' *Journal of Law and Commerce* (Vol. 25:253, June, 2005).

Goodhart 'Mistake as to Identity in the Law of Contract' (1941) *57 Law Quarterly Review*.

Habib, A 'Islamic Law, Adaptability and Financial Development' *Islamic Economic Studies* (Vol. 13, No. 2, February 2006).

Hartnell, H (1993) Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods *18 Yale Journal of International Law* (1, 51, 1993).

Hassan, H 'Contracts in Islamic Law: The Principles of commutative/Justice and Liberality' *Journal of Islamic Studies* (2002: Oxford Centre for Islamic Studies).

John Cartwright. Protecting Legitimate Expectations and Estoppels in English Law. Report to the XVII the International Congress of Comparative Law, July 2006. Netherlands Vereniging Voor Rechtsvergelijking. Netherlands Comparative Law Association. *Electronic Journal of Comparative Law*, vol. 10.3 (December 2006), P15.
<http://www.ejcl.org>.

Kotzur, W 'Termination of contracts - frustrated parties' *Journal of International Banking Law* (1998).

Kröll, S 'Selected Problems Concerning the CISG's Scope of Application' *Journal of Law and Commerce* (Vol. 25:39 2005).

Kuran, T 'Why the Middle East is Economically Underdeveloped: Historical Mechanisms of Institutional Stagnation' *Journal of Economic Perspectives* (Vol. 18, No 3, 2004).

Latimer, P (2001) *Australian Business Law* (CCH).

Law Reform Committee (1999) 'Singapore Academy of Law. Paper on Reforms to the Law of Restitution on Mistakes of Law'.

Lessiak, R (1989) 'Kaufrechtsabkommen und Irrtumsanfechtung' *UNCITRAL 111 Juristische Blätter* (1989).

Lessiak, R 'Neumayer, Recht der Internationalen Wirtschaft' *Österreichische Juristische Blätter* (1994).

Lookofsky, J 'Waling the Article 7(2) Tightrope between CISG and Domestic Law' *Journal of Law and Commerce* (Vol. 25:87 2005).

Mehmood, A 'Islamisation of economy in Pakistan: past, present and future' *Islamic Studies* (2002, 41:4).

Mohammed, N 'Principles of Islamic Contract Law' *Journal of Law and Religion* (1988).

Murdoch, H 'English Law in Scots Practice' *The Juridical Review* (1909 – 1910).

Novoa, R 'Culpa in Contrahendo: A Comparative Law Study: Chilean Law and the United Nations Convention on Contracts for the International Sales of Goods (CISG), *Arizona Journal of International & Comparative Law* (Vol. 22, No. 3, 2005).

Obaidullah, M 'Islamic Risk Management: Towards Greater Ethics and Efficiency' *International Journal of Islamic Financial Services* (Vol. 3, Number 4) Available at: <http://www.isu.ac.ir/Farsi/Academics/economics/edu/obaidvol3no4.pdf> (Accessed on January 10th, 2007).

Obidullah, M 'Financial Options in Islamic Contracts: Potential Tools for Risk Management' *J.KAU: Islamic Econ.* (Vol. 11, 1419 A.H / 1999 A.D).

Pearce, D and Halson, R (2007) *Damages for breach of contract: compensation, restitution, and vindication* (Oxford Journal of Legal Studies).

Poikela, T 'Conformity of Goods in the 1980 United Nations Convention of Contract for the International Sale of Goods' *Nordic Journal of Commercial Law* (Issue 2003, No 1).

Pribetic, A 'Arbitration and Fraudulent Misrepresentation: Another Canadian court overlooks the CISG' *The Globetrotter* (Vol. 10, No. 3. January, 2006).

Richardson, C 'Islamic Finance Opportunities in the Oil and Gas Sector: An Introduction to an Emerging Field' (2006) *Texas International Law Journal* (Vol. 42:119).

Rosly, S, Sanusi, M and Yasin, N 'The Role of *Khiyar Al-Ayb* in *Al-Bay Bithaman Ajil* Financing' *International Journal of Islamic Financial Services* (Vol. 2, No.3).

Al-Saat, A 'The Permissible Gharar (Risk) in Classical Islamic Jurisprudence' *J.KAU: Islamic Econ.* (Vol. 16, No. 2, 1424 A.H, / 2003 A.D).

Sabiq, A (1971) *Fiqhussunnah [Jurisprudence of Sunnah]* (Beirut: Dar Al-Kitab Al-Arabi).

Saleh, N 'Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking' (1986) *Cambridge University Press* (Vol. 3, 1411 A.H./1991 A.D.).

- Sarker, M 'Islamic Business Contracts, Agency Problem and The Theory of The Islamic Firm' *International Journal of Islamic Financial Services* (Vol. 1 No. 2.).
- Schlechtriem, P 'The Borderland of Tort and Contract - Opening a New Frontier?' *Cornell International Law Journal* (Vol. 21, 1988) Available at:
<http://www.cisg.law.pace.edu/cisg/biblio/slechtriem.html#ps23>.
- Schwenzer, I 'Avoidance of the Contract in Case of Non-Conforming Goods' *Journal of Law and Commerce* (Vol. 25:437 June, 2005).
- Sim, V 'Good Faith in English Contract Law: Of Triggers and Concentric Circles' *Ankara Law Review* (Vol.1 No.2, Winter 2004).
- Slade, C 'The myth of mistake in the English law of contract' (1954) *70 Law Quarterly Review*.
- Smith, J 'Contracts, mistake, frustration and implied terms' (1994) *111 Law Quarterly Review*.
- Al-Suwailem, S 'Towards an Objective Measure of *Gharar* in Exchange' (2000) *Islamic Economic Studies* (Vol. 7, Nos. 1 & 2).
- Weitzenboeck, E 'Chitty on Contracts' Electronic Agents and the Formation of Contracts *International Journal of Law and Information Technology* (Vol. 9, No. 3). Available at:
<http://www3.oup.co.uk/inttec/> (Oxford University Press: 2001).
- Weitzmann, T 'Validity and Excuse in the U.N. Sales Convention. CISG Database, Pace Institute of International Commercial Law' *Journal of Law and Commerce* (Vol. 16, 1997).
- Williams, R 'What is the Rule of *Caveat Emptor* and to What Extent Does Part V of the Housing Act 2004 Undermine the Rule?' *Hertfordshire Law Journal* 6 (1).

Xiang, G and Buckley, R 'A comparative Analysis of the Standard of Fraud required Under the Fraud Rule in Letter of Credit Law' (2003) *Duke Journal of Comparative & International Law* (Vol. 13:293).

Zhou, Q 'A Deterrence Perspective on Damages for Fraudulent Misrepresentation' (2007) *The Journal of Interdisciplinary Economics* (Vol. 19, The University of Manchester).

Zhou, Qi 'A Deterrence Perspective on Damages for Fraudulent Misrepresentation' (2007) *The Journal of Interdisciplinary Economics* (The School of Law, the University of Manchester).

Books

Abbott, D (2004) *The shorter encyclopedia of real estate terms* (Published by Damien Abbot).

Abdelhamid, M (2005) *Islamic Banking* (Department of Economics, Carleton University, Ottawa, Ontario).

Abu-Albasal, A (1999) *Studies in the Jurisprudence of the Jordanian Civil Law* (Jordan: Darunnafa'es for Publishing and Distribution).

Addeep, M (2004) *The Frauds in the Civil Law, Islamic Jurisprudence, and the Manlaw* (Alexandria: Dar Al-Jamieh Al-Jadeedah for Publication).

Addnasouri, E and Al-Shawarbi, A (2003) *The Practical Problems and the Disputes of the Sale Contract* (Addaru Al-Arabiyah for the Publishing and Distributing, 3rd Edition).

Ali, S and Ahmad, A 'Islamic Banking and Finance: Fundamentals and Contemporary Issues' (2007) *Islamic Development Bank, Islamic Research and Training Institute* (First Published 1427 A.H.).

Al-Amein, A (1990) *Al-Gharar wa Atharuhu filuqud* The translation of the topic (*Al-Gharar and its effect on Contracts*). (Beirut: Dar Iljeel, 2nd Edition).

- Annahi, S (1984) *Sources of the Individual Rights, Sources of Commitment-Voluntarily Sources* (Amman: Al-Bayt Al-Arabi Printer).
- An-Nahi, S (1984) *Sources of the Personal Rights, Sources of Obligations-Voluntarily Sources* (Amman: Al-Bayt Al-Arabi Printer).
- Bower, G (1974) *The Law of Actionable Misrepresentation* (London: Butterworths, 3rd Edition).
- Anson, W Et Al (1998) *Anson's Law of Contract* (Oxford University Press).
- Assenhaji, S (known as Al-Qarafi) 'Anwar al-Buruq fi Anwa' al- Furuq' (The translation of the topic: Lights of the lightings in kinds of the differences) Investigated by Khaleel Almansour (1998) *Dar Alkutub Al-Ilmiyah* (Beirut: Vol. 1., 1st Edition).
- Atiyah, P (1990) *Essays on contract* (Oxford University Press, 2nd Edition).
- Atiyah, P and MacQueen, A (2005) *Sale of goods* (Pearson Education, 11th Edition).
- Ba'albaki, M (2006) *Al-Mawrid, A Modern English-Arabic Dictionary* (Beirut: Dar El-Ilm Lil-Malayan, 40th Edition).
- Baalbaki, R (2005) *Al-Mawrid Al-Quareeb Arabic-English Dictionary* (Lebanon: Dar El-Ilm Lilmalayin, 16th Edition).
- Bakhshi, A 'Developing a financial model for Islamic credit card for the UK' (2006) *Dissertation submitted in partial fulfillment for the degree of MSc in International Banking & Finance* (University of Salford).
- Bank of England (2006) 'Legal assessment of the proposed statutory liability regime in the Companies Bill in relation to Transparency Obligations Directive disclosure'.
- Barnett, E and Becker, M (1987) *Beyond Reliance: Promissory Estoppels, Contract Formalities, and Misrepresentations*.
- Beale, H (2002) *Contract Law* (Hart Publishing).

- Beale, H Et Al (2007) *Contract: Cases and Materials* (Oxford University Press, 5th Edition).
- Beale, H, Tallon, D Et Al (2002) *Contract Law* (Hart Publishing).
- Beatson, J (2002) *Anson's Law of Contract* (Oxford University Press, 28th Edition).
- Birks, P (1989) *An introduction to the law of restitution* (Oxford University Press, 2nd Edition revised).
- Black, R (1996) *In The Laws of Scotland: Stair Memorial Encyclopaedia*.
- Borkowski, A and Plessis, P (2005) *Roman Law* (Oxford University Press, 3rd Edition).
- Bradgate, R (2000) *Commercial Law* (London: Butterworths).
- Bradgate, R, Brownsword, R and Twigg-Flesner, C (2003) *The Impact of Adopting a Duty to Trade Fairly. Institute for Commercial Law Studies*.
- Buckland, W (1963) *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge University Press, 3rd Edition).
- Buckland, W and McNair, A (1952) *Roman Law & Common Law A Comparison In Outline* (Cambridge University Press, 2nd Edition).
- Burdick, W (2007) *The principles of Roman law and their relation to modern law* (The Lawbook Exchange, Ltd, 3rd printing).
- Burhonov, J 'Islamic Banking Operations of Commercial Banks Under Islamic Banking
- Burrows, A et al (2005) *Cases and materials on the law of restitution* (Oxford University Press, 2nd Edition).
- Cane, P (1997) *The anatomy of tort law* (Hart Publishing).
- Capaldi, N (2005) *Business and Religion: A Clash of Civilizations* (M & M Scrivener Press).
- Cartwright, J (2002) *Misrepresentation* (London: Sweet and Maxwell).

- Cartwright, J (2007) *Misrepresentation, Mistake, and Non-Disclosure* (London: Sweet & Maxwell).
- Chen – Wishar, M (2007) *Contract Law* (Oxford University Press, 2nd Edition).
- Chen-Wishart, M (2005) *Contract Law* (Oxford: Oxford University Press).
- Coulson, N (1984) 'A vital element of the contract of sale in Islamic law is that there be an instant remove of possession from the seller to the buyer'. *Commercial Law in the Gulf States: the Islamic Legal Tradition* (London).
- Comair-Obeid, N (1996) *The Law of Business Contracts in the Arab Middle East* (London).
- Cooke, J (2005) *Law of Tort* (Pearson Education, 7th Edition, revised).
- Craig, R (1999) *Procurement Law for Construction and Engineering Works and Services* (Blackwell Publishing).
- Curzon, L (2002) *Dictionary of Law* (Pearson Education Limited, 6th Edition).
- Curzon, L (2002) *Dictionary of Law* (Pearson Education, 6th Edition).
- Al-Dareer, S 'Al-Gharar in the contracts and its effects on contemporary transactions' (1997) *Islamic Development Bank, Islamic Research and Training Institute* (Eminent Scholars' Lecture Series No. 16, 1st Edition, 1417 A.H).
- Davenport, P (2006) *Construction Claims* (Federation Press, 2nd Edition).
- Al-Dmour, A (2006) *The Brief of Explanation of the Nominated Contracts in the Jordanian Civil Law*.
- Dawwas, A (2004) *Voluntarily Sources (The Contract and The Unilateral will), A Comparative Study* (Ramallah: Drrishurouq, 1st Edition).
- Martin, E *Oxford Dictionary of Law* (Oxford University Press, 6th Edition).

Emerson, R, Emerson, J (2003) *Business law* (Barron's Educational Series, 4th Edition). Evans – Jones, R (2000) *Roman Law in Britain 2000* (Berlin: Duncker & Humblot GmbH).

Al-Fadl, M and Al-Fatlawi, S (1996) *Explanation of the Jordanian Civil Law, Nominated Contracts [Sale and Rent]* (Amman: Dar Athaqfah for Publication, Modified Edition).

Al-Far, A (1998) *The Sources of Obligations* (Amman: Dar Athaqfah for Publication).

Faruqi, H *Faruqi's Law dictionary, English-Arabic Dictionary* (Beirut: Librairie DU liban, 5th Edition).

Felemegas, J (2007) *An International Approach to the Interpretation of the United Nations* (Cambridge University Press).

Forte, A (1999) *Good faith in contract and property* (Hart Publishing).

Foster, N (2007) *Islamic Commercial Law (II): An Overview, Some principles and rules* (University of London).

Furmston, M (2000) *Sale and supply of goods* (Routledge, 3rd Edition revised).

Furmston, M, Et Al (2006) *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford University Press, 15th Edition revised).

Garner, B (2001) *A Dictionary of Modern Legal Usage* (Oxford University Press, 2nd Edition revised).

Ghuddah, A (1985) *Al-Khiyar Wa Atharuhu fi al-Uqud* (Kuwait: Matba'at Mqhawi, 2nd Edition).

Gillies, P (1988) *Concise contract law* (Federation Press).

Gloag, W (1929) *The Law of Contract* (Edinburgh: W. Green & Son Ltd, 2nd Edition).

Gubby, H (2004) *English Legal Terminology: Legal Concepts in Language* (Den Haag: Boom uitgeverij).

Haigh, R (2004) *Legal English. Routledge Cavendish Law*.

- Hayder, A (1991) *Durarr Alhukkam fi Sharrh Majallat Al-Ahkam*. (The translation of the topic: Rulers Pearls for Explanation of the Journal of Equity). Investigated and translated from Turkish to Arabic by Fihmi Alhusayni (Beirut: Dar Alkutub Al-Ilmiyah).
- Hepburn, S (2001) *Principles of equity and trusts* (Routledge, 2nd Edition).
- Hermalin, B, Katz, A, and Craswell, R (final draft: June 5, 2006) *Chapter on the Law & Economics of Contracts. Forthcoming in the Handbook of Law & Economics*.
- Holmes, O, (2001) *The Common Law* (Adamant Media Corporation).
- Honnold, J (1982) *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer Law International).
- Huber, P and Mullis, A (2007) 'The CISG' (Sellier, european law publ.).
- Huntley J (1995) *Contract, Cases and Materials* (Edinburg: W. Green/Sweet & Maxwell).
- Huntley, J, Blackie, J and Cathcart, C (2003) *Contract, Cases and Materials* (Edinburgh: Thomson and Green, 2nd Edition).
- Ibbetson, D (1999) *A historical introduction to the law of obligations* (Oxford University Press).
- Ibn Qudama, S Al-Sharh al-Kabir 'ala al-Muqni' Published in the margin of Muwaffaq al-Din ibn Qudama, Al-Mughni (Cairo: Vol. 12, 1341 A.H.).
- 'Insurance and reinsurance news' *Freshfields Bruckhaus Deringer* (July, 2007).
- Jackson, R (1968) *The history of Quasi-contract in English Law* (WM W Gaunt & Sons Inc).
- Johnston, D and Zimmermann, R (2002) *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press).
- Kamali, M (2003) *Principles of Islamic Jurisprudence* (Islamic Texts Society).
- Karp, J, Klayman, E and Gibson, F (2003) *Real Estate Law* (Dearborn Real Estate Education, 5th Edition).

- Al-Kasani, A 'Kitab Bada'i' al-Sana'i' fi Tartib al-Shara'i' (Cairo, Vol. 5, 1327-1328 A.H.).
- Al-Khafeef, A (2008) *The Shari'ah Rules of Deals* (Egypt: Dar Al-Fikr Al-Arabi, 1st Edition).
- Kazimierska, A (1999-2000) *The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods. Pace Review of the Convention on Contracts for the International Sale of Goods* (Kluwer).
- Keenan, D and Smith, K (2004) *English Law* (14th Edition).
- Khalilieh, H (1998) *Islamic Maritime Law: An Introduction* (Brill Academic).
- Khorshid, A (2004) *Islamic Insurance. A modern approach to Islamic banking* (RoutledgeCurzon).
- Koffman, L, Macdonald, E (2007) *The Law of Contract* (Oxford University Press, 6th Edition).
- Kötz, H Et Al (2002) *European contract law* (Cambridge University Press).
- Krawiec, K and Zeiler, K (1877) *Common Law Disclosure Duties and the Sin of Omission: Testing the "Meta-theories"* (Joseph Story).
- Krol, J (1993) *Construction contract law* (John Wiley and Sons: 1993).
- Kurzman, C (2002) *Modernist Islam, 1840-1940: A Sourcebook* (Oxford University Press).
- Leisinger, B (2007) *Fundamental Breach Considering Non-Conformity of the Goods* (München: European Law Publishers GmbH).
- Lookofsky, J (1997) *CISG Case Commentary on Preemption in Geneva Pharmaceuticals* (Ralph Amisshah).
- Lookofsky, J (2004) *Understanding the CISG in the USA* (Kluwer Law International, 2nd Edition).
- MacIntyre, E (2008) *Business Law* (Pearson Education, 4th Edition).

Mackay of Clashfern, Lord (2003) *Halsbury's Laws of England* (Bath Press, 4th Edition).

Mackintosh, J (1995) *Roman Law in modern practice* (W. Green, Edinburgh).

MacMillan, M and Lambie, S (1997) *Scottish Business Law* (London: Pitman Publishing, 3rd Edition).

MacQueen, H (1999) *Good Faith in Contract and Property Law* (Oxford: Hart Publishing).

MacQueen, H and Thomson, J (2007) *Contract Law in Scotland* (Tottel Publishing, 2nd Edition).

MacQueen, H and Zimmermann, R (2006) *European contract law: Scots and South African perspectives* (Edinburgh University Press).

Mahmassani, S (1983) *Al Mujibat wa al Uqud fi al Fiqh al Islami, Dar al Ilm Ii al Malayin* (Beirut).

Manthour, I (no year) *Lisan Al-Arab (the Arab tongue)*. (Cairo: Dar Al-Ma'aarif).

Maqsood, R (1995) *Islam* (Heinemann, New Edition).

Martin, E, Law, J A *Dictionary of Law* (Oxford University Press 6th Edition).

Martin, J (1985) *Modern Equity* (Stevens & Sons, 12th Edition).

May, L and Brown, J (2009) *Philosophy of Law* (Wiley-Blackwell).

McBryde, W (2007) *The Law of Contract in Scotland* (Edinburgh: W. Green, 3rd revised Edition).

Miceli, T (1997) *Economics of the law* (Oxford University Press).

Molan, M (2005) *Cases & Materials on Criminal Law 3/e: Cases And Materials* (Routledge Cavendish: 3rd Edition).

Mulcahy, L (2008) *Contract Law in Perspective* (Taylor & Francis, 5th Edition).

Mulcahy, L and Tillotson, J (2004) *Contract Law in Perspective* (Routledge Cavendish, 4th Edition).

- Al-Munji, M (2002) *Practical Cases Encyclopaedia. A Case of Contract Voiding* (Alexandria: Munsha'at Al-Ma'arif, Vol. 9, 2nd Edition).
- Office of Fair Trading (2003) 'Enforcement of consumer protection legislation. Guidance on Part 8 of the Enterprise Act' (Enterprise Act 2002).
- Olivo, L, et al (2005) *Fundamentals of Contract Law* (Emond Montgomery Publication, 2nd Edition).
- Oughton, D and Davis, M (2000) Sourcebook on Contract Law (Routledge, 2nd Edition).
- PACE (Property Advice to the Civil Estate), Central Advice Unit, *Guide to the Appointment of Consultants & Contractors* (January 2000, 2nd Edition).
- Panagopoulos, G (2000) *Restitution in Private International Law* (Hart Publishing).
- Paterson and Hocker (1998) *Contract Commentary and Materials* (LBC Information Services, 8th Edition).
- Peel, E (2007) *The Law of Contract* (Sweet & Maxwell, 12th Edition).
- Perillo, J (1996) *Hardship and its Impact on Contractual Obligations: A Comparative Analysis* (Rome).
- Powers, P (2006) *Intent in Islamic Law: motive and meaning in medieval Sunni Fiqh* (Brill Academic).
- Al-Qadi, M (1967) *Origins of Obligations in the Civil Law* (Dar-Annahdah Al-Hadeethah).
Qura'an
The Qura'an. English Meaning (Al-Muntada Al-Islami). (2004).
- Rahmatian, A (2004) *Codification of private law in Scotland: observations by a civil lawyer* (Edinburgh).
- Ramadan, H (2006) *Understanding Islamic Law from Classical to Contemporary* (Rowman Altarmira).
- Rayner, S (1991) *The Theory of Contracts in Islamic Law* (Graham & Trotman Ltd.).

- 'Resolutions and Recommendations of the Council of Islamic Fiqh' *Academy Islamic Development Bank, Islamic Research and Training Institute Jeddah, Islamic Fiqh Academy* (Jeddah: 2000, 1st Edition).
- Richard, P (2006) *Law of Contract* (London: Pearson Longman, 7th Edition).
- Richards, P (2006) *Law of Contract* (Pearson Education Limited, 7th Edition).
- Al-Rimawi, L (2006) *Relevance of Shari'a in Arab securities regulation with particular emphasis on Jordan as an Arab regulatory model* (Sweet & Maxwell Ltd).
- Rowley, K (2004) *To Err is Human. Alleviating Mistakes: Reversal and Forgiveness for Flawed Perceptions* (Oxford: Oxford University Press).
- Russell, C (1996) *Opinion writing and drafting in contract law* (Routledge).
- Saders, A (1997) *Unfair competition law* (Oxford University Press).
- Samuel, G (2001) *Law of Obligations and Legal Remedies* (Routledge Cavendish, 2nd Edition).
- Sanders, D and Rattray, T (2001) *Interpretation of Construction Contracts* (Borden Ladner Gervais LLP).
- Schlechtriem, P (1986) 'Uniform Sales Law, The UN-Convention on Contracts for the International Sale of Goods'.
- Schlechtriem, P and Butler, P (2008) *Law on International Sales* (Springer).
- Schulz, F (1951) *Classical Roman Law* (Oxford at the Clarendon Press).
- Schulze, R (2007) *New Features in Contract Law* (Sellier, European law publ).
- Sefton-Green, R (2005) *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge University Press).
- Al-Sharoud, M (1988) *The Brief of the Will's Defects* (Dar Al-Ittihad Al-Arabi for Printing).

- Al-Sharqawi, J (1981) *The General Theory of Obligation* (Cairo: Dar-Annahdah Al-Arabiya).
- Sheikh, F *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press, 2nd Edition).
- Sherman, C (1924) *Roman Law in the Modern World* (New York: Baker Voorhis & Co., 2nd Edition).
- Shippey, K (2002) *A Short Course in International Contracts: Drafting the International Sales Contract* (World Trade Press, 2nd Edition).
- Al-Sanhuri (1955) 'Masader Alhaq filfiqh Al-Islami' (the resources of the right in the Islamic Fiqh (jurisprudence) *The Islamic –Arabic Scientific Association* (Muhammad Addayah Publications).
- Al-Sanhuri (1981) *Alwasiet fi Sharhe lqanoun Al-Madani* (Cairo: Dar-Annahdah Al-Arabiya, Vol. 1., 3rd Edition, The topic translation (the mediator for explanation the Civil Law).
- Al-Sanhuri (1952) *The General Theory of the Obligation*.
- Simpson, A (2001) *Leading cases in the common law* (Oxford University Press).
- Smith, K, Keenan, D (2004) *Smith & Keenan's English law* (Pearson Education, 14th Edition).
- Sohm, R Et Al (2002) *The Institutes of Roman Law* (Gorgias Press.com, 1st Edition).
- Stone, R (2002) *The modern law of contract* (Routledge, 5th Edition).
- Stone, R (2008) *The Modern Law of Contract* (London: Routledge Cavendish, 7th Edition).
- Sultan, A (1998) *Sources of Obligations in the Jordanian Civil Law [Comparative Study with the Islamic Jurisprudence]* (The Legal Office, 2nd Edition).
- Al-tahāwī, A (1972) *The Function of Documents in Islamic Law: The Chapters on Sales from Al-tahāwī's Kitāb Al-Shurūḥ Al -Al-tahāwī* (Suny Press).

- Tamm, D (1997) *Roman Law and European Legal History* (DJOF Publishing, 1st Edition).
- Taylor, D (2007) *Contract law* (Oxford University Press).
- Teeven, K, (1990) *A History of the Anglo - American Common Law of Contract* (Greenwood Publishing Group).
- 'The 4 Major Forbidden Elements in Islamic Finance' (2006) *Shirkah* (Year I, Issue 1).
- Thomson, J (1978) *The Effect of Error in the Scots Law of Contract* (Acta Juridica).
- Thomson, J (2001) *Misrepresentation S.L.T.*
- Treitel, G (1990) *The Law of Contract* (London: Sweet & Maxwell, 10th Edition).
- Treitel, G (2003) *The Law of Contract* (London: Sweet & Maxwell, 11th Edition).
- Treitel, G (2004) *An Outline of the Law of Contract* (Oxford University Press, 6th Edition).
- Trumbull, C 'Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts' (2006) *Vanderbilt Law Review* (Vol. 59:2:609).
- Turner, C (2007) *Contract Law* (Hoder Arnold, 2nd Edition).
- Usmani, M 'Futures, Options, Swaps and Equity Investments' *New Horizon* (June, 1996).
- Veljanovski, C (2007) *Institute of Economic Affairs (Great Britain) Economic principles of law* (Cambridge University Press).
- Venardos, A 'Islamic Banking & Finance in South-East Asia: Its Development and Future' *Asia-Pacific Business Series* (2006: World Scientific).
- Vogel, F and Hayes, S (1998) *Islamic Law and Finance: Religion, Risk, and Return* (Netherlands, Kluwer Law International).
- Vogel, F and Hayes, S (1998) *Islamic Law and Finance: Religion, Risk, and Return* (Kluwer law international, Laws series).
- Waddams, S et al (2005) *Cases and Materials on Contracts* (Edmond Montgomery Publication, 3rd Edition).

Walker, D (1995) *The Law of Contracts and Related Obligations in Scotland* (Edinburgh: T&T Clark, 3rd Edition).

Walker, D (1995) *The Law of Contracts and Related Obligations in Scotland* (Edinburgh: T&T Clark, 3rd Edition).

Wheeler, J (2006) *Essentials of the English Legal System* (Pearson Education, 2nd Edition).

Whincup, M (2001) *Contract Law and Practice* (The Hague: Kluwer Law International, 4th Edition).

Whincup, M (2006) *Contract law and practice* (Kluwer Law International, 5th Edition).

Willett, C and O'Donnell, A (1996) *Scottish Business Law* (London: Blackstone Press Limited, 2nd Edition).

Youngs, R (1998) *English, French and German comparative law* (Routledge, 1998).

Zaher, T and Hassan, M (2001) *A comparative Literature Survey of Islamic Finance and Banking. Financial Markets, Institutions and Instruments* (New York: Blackwell Publishers).

Zeller, B 'CISG and the Unification of International Trade Law' (Routledge).

Zimmermann, R (2004) *Roman law, contemporary law, European law* (Oxford University Press).

Zimmermann, R and Whittaker, S (2000) *Good Faith in European Contract Law* (Cambridge University Press).

Zimmermann, R *The Law of Obligations* (Oxford University Press).

Zweigert, K (1981) *International Encyclopaedia of Comparative Law* (Martinus Nijhoff Publishers).

Conference Papers

Abd Dualeh, S' Islamic Securitisation: Practical Aspects' *World Conference on Islamic Banking* (8th and 9th July, 1998, Jersey ii-online.com, ltd. Geneva, Switzerland & St. Helier, Jersey, Channel Islands).

Anon 'Legislative History. 1980 Vienna Diplomatic Conference. Summary Records of Meetings of the First Committee. Proposed new article 48(a) Available at: <http://www.cisg.law.pace.edu/cisg/text/link4.html>.

Ebrahim, A 'A Technical Analysis of the Murabahah. Financing Technique as Applied by the Islamic Banks' *Understanding Islamic Finance Conference* (Geneva: 19th and 20th September 2007).

Elspeith Reid. Protecting Legitimate Expectations and Estoppel in Scots Law. *Electronic Journal of Comparative Law*, vol. 10.3 (December 2006). Report to the XVIIth International Congress of Comparative Law, July 2006. <http://www.ejcl.org>

Fox, D (2005) *Property in Intangible Money. Property and Trusts* (SLS Society of Legal Scholars. Session 4 Friday 9th. University of Cambridge. Strathclyde Conference).

Gaber, A 'Risk Management: Islamic Financial Policies, Case study of Farmers' Commercial Bank. Paving the Way Forward for Rural Finance' *An International Conference on Best Practices* Available at: http://www.basis.wisc.edu/live/rfc/cs_06a.pdf (Accessed on June 2nd, 2007).

El-Gamal, M 'An Economic Explication of the Prohibition of *Gharar* in Classical Islamic Jurisprudence' (2001) This paper is prepared for the 4th *International Conference on Islamic Economics* to be held in Leicester, UK, 13-15 August 2000.

Nottage, L 'Changing Contract Lenses: Renegotiations in English, New Zealand, Japanese, US and International Sales Law and Practice' *CPLC Conference* (Toronto, Sydney Law School Research Paper, 9 - 10 November 2006).

Web Sites

A joint initiative of the Islamic Research & Training Institute, Islamic Development Bank , Islamic Financial Services Board and Islamic Research & Training Institute 'Islamic Financial Services Industry Development, Ten-Year Framework' Available at: http://www.sbp.org.pk/ibd/2006/Ten_Year_Master_plan.pdf (Accessed on June 16th, 2007).

Albert H. Kritzer ed. (1994) 'Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods' (Kluwer Law International) Available at <http://www.cisg.law.pace.edu/cisg/biblio/kritzer2.html> (Accessed on January 12, 2009).

Aljoufan, N 'Taking the belongings of the people by the *Ihtiyal*, or the *Taghreer* or by both of them' (2006) Available at: http://islamtoday.net/questions/show_articles_content.cfm?id=71&catid=73&artid=8013 (Accessed on March 7, 2008).

Begg, P 'Fiduciary content in joint ventures and partnering contracts in the construction industry' Available at: <https://openair.rgu.ac.uk/bitstream/10059/180/1/fiduciaryobligations+paper-+3-10-03.pdf> (Accessed at September 25th, 2009).

Bennion, F (1961) Mistake in the Construction of Contract. Available at: www.francisbennion.com.

Checklist on the CISG. Written in collaboration with Axel H. Baum. Adapted excerpt from 'Critically assess the rules on risk in relation to CIF and FOB contracts' Available at:

Dwaikat, M 'Rabbaniyeen School' (Nablus, Palestine) Available at: <http://kuno-rabbaniyeen.org/Default.asp?page=details&newsID=81&cat=2> (Accessed at August, 31st 2008).

Dwaikat, M 'The Percentage of the Commercial Profit from the *Qura'an* and the Life'
Available at: <http://kuno-rabbaniyeen.org/?page=details&newsID=105&cat=3> (Accessed on October 22, 2008).

'Faith and Finance: A Place for Faith-Based Economics. A preliminary statement from Muslims and Christians in Manchester' (Manchester Centre for Public Theology).
Available at: http://www.wtf.org.uk/documents/FAITHSANDFINANCE-Nov06_000.pdf.
(Accessed on July 13th, 2007).

Foerstl, U 'The General Principle of Good Faith under the United Nations Conventions on Contracts for the International Sale of Goods (SICG) - A Functional Approach to Theory and Practice' (2005) Available at
http://lawspace.law.uct.ac.za:8080/dspace/bitstream/2165/39/1/Uli_Foerstl_2005.pdf.
(Accessed on June 13, 2009).

Glossary of Islamic Banking Terminology Available at:
https://www.ubl.com.pk/ameen/pdf/glossary_islamic_banking.pdf/ (Accessed on June 10, 2007).

Grebler, E 'Fundamental Breach of Contract under the CISG: A Controversial Rule'
Available online at:
<http://www.thefreelibrary.com/The+UN+Sales+of+Goods+Convention:+perspectives+on+the+current...-a0177100796> (Accessed on February, 2nd 2009).

'Islamic finance, Shariah, Sukuk and Securitisation' Available at:
<http://www.yasaar.org/pubs/20177%20Islamic%20finance%20client%20note1.pdf>.
(Accessed on June 17th, 2007).

Jaffey, P 'Classification and Unjust Enrichment' (2004) 67 *Modern Law Review* 1012
Available at www.blackwell-synergy.com.

Kingdome of Saudi Arabia 'A Ministry of Islamic Affairs, endowments, preaching, and guiding' Accessed at: <http://feqh.al-islam.com/Display.asp?Mode=0&MaksamID=58&DocID=47&ParagraphID=442&Diacritic=0>. (Accessed on July 1, 2008).

Koneru, P (1997) *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods. An Approach Based on General Principles* Available at: <http://www.cisg.law.pace.edu.VIII> (Accessed on (January 7th, 2009).

Leyens, P (2003) 'CISG and Mistake: Uniform Law vs. Domestic Law the Interpretative Challenge of Mistake and the Validity Loophole' Available at <http://www.cisg.law.pace.edu/cisg/biblio/leyens.html>.

McClintic, A (2001) Contracts. Encyclopedia of Business and Finance (Gale Group, Inc.) Available at: <http://www.enotes.com/business-finance-encyclopedia/contracts> (Accessed at February 17th, 2008).

O'Donovan, J (2005) *Lender Liability* (English Edition, Sweet & Maxwell). Available at: <http://www.newagepublishers.com/samplechapter/001048.pdf>. (Accessed on October 7th, 2008).

Parchomovsky, G, Siegelman, P and Thel, S (2007) *Of Equal Wrongs and Half Rights* Available at: <http://www.law.nyu.edu/journals/lawreview/issues/vol82/no3/NYU303.pdf>.

Shah, S 'Islamic Banking and Finance: Shari 'a-Compliance and the Reinterpretation of Riba' Available at: http://www.calbar.ca.gov/calbar/pdfs/sections/ils/writing-competition_2007_islamic-banking_shah.pdf. (Accessed at August 13th, 2008).

Smith, T (1962) *Short Commentary on the Laws of Scotland* (Edinburgh: W Green). Available at: <http://www.singaporelaw.sg/freelaw/File/8-ContractLaw.pdf> (Accessed on October 2nd, 2008).

Soyer, B (2007) 'Reforming Pre-contractual Duty of Utmost Good Faith in Insurance Contracts- An Economic Perspective' Available at:

<http://www.canlecon.org/submissions/docs/Soyer%20Final%20Paper.pdf> (Accessed at September 20th, 2008).

Tariq, A (2004) *Managing Financial Risks of Sukuk Structures* Available at:

<http://www.islamicfinance.de/sukukrisks.pdf> (Accessed at June 15th, 2007).

Tetley, W (2004) *Good Faith in Contract Particularly in the Contracts of Arbitration and Chartering* (McGill University). Available at:

<http://tetley.law.mcgill.ca/comparative/goodfaith.pdf>

Zhou, Q 'An Economic Perspective on the Doctrine of Unilateral Mistake in English

Contract Law: A Remedy-Based Approach' (2008) Northern Ireland Legal Quarterly.

Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1125587# (Accessed on October 2nd, 2008).

Other Sources

Abdelwahab, O 'Developmental Perspectives on Financial Innovation in Forward and Futures Derivatives-A Critical Discussion with Special Consideration of Islamic Banks and Financial Institutions' *Genehmigte Dissertation. Tag der wissenschaftlichen Aussprache: May 2, 2007* (Berlin).

Abdul-Rahman, Y 'Riba-Free (Islamic) Banking & Finance in the United States. A Window for Interfaith Cooperation Leading to United and Prosperous Communities' Delivered at The 2007 INCEIF Global Forum, *The Emerging Islamic Horizon* (August 30th, 2007).

Alhajeri, M (2004) *Obligations & Evidence, the Defects of Consent Kuwait University* (School of Law).

Alabama State Board of Auctioneers, (2002) 'Preparation and Review Guide for Auctioneer and Apprentice Auctioneer Licensing Examinations'.

Arabi, O 'Early Muslim Legal Philosophy: Identity and Difference in Islamic Jurisprudence' (1999: UCLA International Institute, G E von Grunebaum Center for Near Eastern Studies, Paper 1, University of California, Los Angeles).

Ayyash, M 'Khiyar Al-Majlis And Its Application In 'Aqd Bay'Al Salam' (2003) *Islamic Economics and Finance* (Malaysia: Islamic Economics and Finance Research Group, Working Paper No. 0306, Universiti Kebangsaan Malaysia).

Bowen, A (2005) Central Law Training Seminar: Hot Topics in Contract Litigation (Edinburgh).

Burghardt, I and Fuß, C 'Islamic Banking Credit Products in Germany and in the United Kingdom' *Working Paper Series* (International University Schloß Reichartshausen, European Business School, Department of Finance, October, 2004).

Hasan, A 'Sales and Contracts in Early Islamic Commercial Law' (1994) *Islamic Research Institute* (Islamabad).

Hassan, M and Soumaré, I (2005) Financial Guarantee as innovation tool in Islamic project finance.

El-Hawary, D, Grais, W and Iqbal, Z 'Regulating Islamic Financial Institutions: The Nature of the Regulated' *World Bank Policy Research Working Paper* (March, 2004).

'Islamic Finance and Structured Finance Techniques: Where The Twain Can Meet' *UNCTAD Secretariat* (29th May 2006).

Jackson, S 'Plenary: Basics of Islamic Law, the Sources of Islamic Law' (University of Michigan, Ann Arbor).

Khalil, A, Rickwood, C and Murinde, V (2002) *Evidence on agency-contractual problems in mudarabah financing operations by Islamic Banks. Islamic banking and finance: new perspectives on profit sharing and risk* (Cheltenham: Edward Elgar).

Khan, T 'Practices and Performance of *Modaraba* Companies. A Case Study of Pakistan's Experience' (1996) *Islamic Development Bank, Islamic Research and Training Institute* (Research Paper No. 37, 1st Edition).

Moss, G 'Lectures on Comparative Law of Contracts' (2004) *Publications Series of the Institute of Private Law, University of Oslo* (No 166).

Pistor, K and Xu, C (2002) *Incomplete Law - A Conceptual and Analytical Framework - And its Application to the Evolution of Financial Market Regulation*.

Sabahi, B 'Islamic Financial Structures as Alternatives to International Loan Agreements: Challenges for American Financial Institutions' *ExpressO Preprint Series* (Paper 385, 2004).

Scheme (IBS) of Malaysia: The performance Analysis. A thesis submitted in partial fulfilment of the requirement for the degree of Master of Economics' *Thammasat University, Faculty of Economics* (31st October, 2006).

Schulte-Nölke, H, Twigg-Flesner, C and Ebers, M (2007) *EC Consumer Law Compendium -Comparative Analysis-*. Prepared for the European Commission.

Segrado, C (2005) *Islamic microfinance and socially responsible investments, Case study*. Meda Project, Microfinance at the University (University of Torino).

Spremann, K 'Islamic Banking. Doctoral Seminar "International Finance" (03/04) *Swiss Institute of Banking and Finance* (University of St. Gallen – HSG, 28th January, 2004).

Tacy, K 'Islamic Finance: A Growing Industry in the United States' (North Carolina Banking Institute, Vol. 10 2006).

Tarrant, J (2004) *Limitation Legislation and Loan Repayable on Demand* (UNELJ).

Weitzenböck, E 'Good Faith and Fair Dealing in the Context of Contract Formation by Electronic Agents' (Proceedings of the AISB 2002 Symposium on Intelligent Agents in Virtual Markets, 2-5 April 2002, Imperial College London).

Zhou, Q 'Misrepresentation in English Contract Law from An Economic Perspective. A thesis submitted to the University of Manchester for the degree of Doctor of Philosophy in the Faculty of Humanities' (2008).

Reports

Islamic Capital Market Fact Finding Report. Report of the Islamic Capital Market Task Force of the International Organisation of Securities Commissions. July 2004. P7

Lloyd's Rep 353 at 360-362 (Slade LJ).

Scottish Law Commission. (Scot Law Com No 144). Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods. 14 June 1993.

Scottish Law Commission. (Scot Law Com No 169). Report on Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements. 23 December 1998.

Scottish Law Commission. Defective Consent and Consequential Matters. Memorandum 42, June 1978, Vol. I.

Serlah, a Special Report for Client Sofraslan. Loon Gandree Grecht Sanwalte. Vol 2/2002, May- June 2002.

The Law Commission (LAW COM No 276). Fraud. Report on a reference under section 3(1)(e) of the Law Commissions Act 1965. July 2002.

The Law Commission and the Scottish Law Commission. (LAW COM No 283), (SCOT LAW COM No 192). Partnership Law. Report on a Reference under Section 3(1) (e) of the Law. Commissions Act 1965. November 2003. P137.8.127.

The Law Commission and the Scottish Law Commission. (Law Com. No.82) (SCOT. LAW COM. No.45). Liability for Defective Products. Report on A Reference Under Section 3(1) (e) of the Law Commission Act 1965. Presented to Parliament at June 1977. P16.

The law commission report (law commission No 227, restitution: mistakes of law and ultra vires Public Authority Receipts and Payments, 30th September 1994).

The Unique Mariner [1978] 1 Lloyd's Rep. 438.

Consultation Papers

English and Scottish Law Commissions (2006) *Insurance Contract Law Misrepresentation and Non Disclosure* (Issues Paper 1).

English and Scottish Law Commissions 'Insurance Contract Law. Misrepresentation and Non Disclosure' (2006: Issues Paper 1).

The Law Commission, Consultation Paper No 182 and the Scottish Law Commission, Discussion Paper No 134. Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured, a Joint Consultation Paper. 21 June 2007.

Table of cases

A. Roberts & Co. Ltd.v. Leicestershire County Council [1961] Ch 555.

Agip SpA v. Navigazione Alta Italia SpA [1984].

Amlgamated Investment & Property Co. Ltd. v. John Walker & Son Ltd [1977] 1 W.L.R. 164.

Anderson v. Lambie 1954 S.C. (H.L.) 43.

Anderton v. Clwyd CC [2002] EWCA Civ 933; [2002] 3 All E.R. 813).

Angus v. Bryden 1992 SLT 884.

Appeal Court of Cairo. 20 April 1930, No 438, Bar Journal. p868.

Archer v. Brown [1985] Q.B. 401.

Associated Japanese Bank (International Ltd) v. Crédit du Nord SA [1988] 3 All ER 902 at 912–913, [1989] 1 WLR 255.

Associated Japanese Bank v. Credit du Nord.SA [1988] 3 All ER 902.

Attwood v. Small (1838) 6 C 1 & F. 232.

Australia and New ealand (ANZ) Banking Broup Ltd v. Westpac Banking Corporation (1987) 164 CLR 662.

Avon Insurance plc v. Swire Fraser Ltd [2001] 1 All ER. 573.

Baird’s Trustees v. Baird. (1877) 4 R 1005.

Banco Santander S.A. v. Bayfern Ltd [1999] EWHC 284.

Barrow, Lane & Ballard Ltd v. Phillip Phillips & Co Ltd. [1929] 1 K.B. 574.

Bell v. Lever Bros Ltd [1932] AC 161 at 218, [1931] All ER Rep 1.

Boyd & Forrest v. Glasgow & South Western Railway Co 1912 SC (HL) 93.

Boyd & Forrest v. The Glasgow and South-Western Railway Co. 1915 S.C. (H.L.) 20.

Bradford Third Equitable Benefit Building Society v. Borders. [1941] 2 All ER 205.

Brennan v. Bolt Burdon & Ors [2004] EWCA Civ 1017.

British Hydro-Carbon Chemicals Ltd v. British Transport Commission. 1961 SLT 280.

British Steel Corporation v. Cleveland Bridge and Engineering Co Ltd [1981] 1 All ER 504.

Brooker Simbson Ltd v. Duncan Logan (Builders) Ltd 1969 SLT 304.

Brownlie v. Miller (1864) 2 M. 848.

Brownlie v. Miller (1880) 7 R. (H.L) 66.

Brownlie v. Miller (1880) 7 R. (H.L.) 66.

Buller J in Lowrie v. Bourdieu (1780) 2 Doug 468 (99 ER 299).

Citibank NA v. Brown Shiply [1991] 2 All ER 702.

Clelland v. Morton, Fraser and Milligan WS 1997 SLT (Sh Ct) 57.

Cloup v. Alexander (1831) 9 S 448.

Conlon v. Simms [2006] EWCA Civ 1749.

Cooper v. Phibbs (1867) LR 2 HL 149

Couston v. Miller (1862) 24 D 607.

Couturier v. Hastie (1856) HL Cas 673.

Couturtier v. Hastie 1856, H. L. C. 673.

Crane v. Hegeman-Harris Co Inc [1939] 1 All ER 662.

Cundy v. Lindsay [1878] 3 App Cas 459.

David Securities Pty Ltd v. Commonwealth Bank of Australia (1990) 93 ALR 271.

Derry v. Peek (1889) 14 App Cas 337.

Doyle v. Olby (Ironmongers) Ltd. [1969] 2 QB 15.

Egyptian Cassation Court, 0329/39. 8/2/1972.

Egyptian Cassation Court. Legal Rules Collection. 2-438-16. 18/5/1933.

Egyptian Cassation Court. No 00039/38. 13/03/1973.

Egyptian Cassation Court. No 0357/52. 31/12/1985.

Egyptian Cassation Court. No 129756. 29/11/1990.

Ellis v. Lochgelly Iron and Coal Co 1909 SC 1228.

Esso Petroleum Co Ltd v. Mardon [1976] Q.B. 801.

Ferguson v. Wilson (1904) 6 F. 779.

First National Commercial Bank Plc v. Humberts [1995] 2 ALL ER 673.

Flynn v. Scott 1949 S.C. 442 (O.H.).

Frederick E. Rose (London) Limited v. William H. Pim Junior & Co Limited [1953] 2 QB 450.

George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd. [1983] Q.B. 284.

George Wimpey UK Ltd v. VIC Construction Ltd [2005] EWCA Civ 77.

Gibson v. The National Cash Register Co. Ltd 1925 S. C. 500.

Gillespie v. Russel (1856) 18 D 677.

Glasgow Feuing and Building Co. v. Watson's Trs., 1887, 14 R. 610.

Glen's Trs. v. Lancashire, etc., Insurance Co., 1906, 8 F. 915.

Great Peace Shipping Ltd v. Tsavlis Salvage (International) Ltd [2002] EWCA Civ 1407,
[2002] 2 All ER (Comm) 999, [2003] QB 679.

Griffith v. Brymer (1903) 19 TLR 434.

Hamilton and others v. Allied Domecq Plc [2005CSIH74] A283/01.

Hamilton v. Duke of Montrose (1906) 8 F 1026.

Hannah v. Blumenthal [1983] 1 AC 854.

Hartog v. Colin & Shields [1939] 3 All ER 566.

Hedley Byrne & Co Ltd v. Heller & Partners Ltd [1964] AC 465.

HIH Casualty & General Insurance Ltd v. Chase Manhattan Bank [2003] U.K.H.L. 6.

Houldsworth v. Gordon Cumming 1910 SC (HL) 49.

Hunter v. Bradford Property Trust. 1970 SLT 173.

Ingram v. Little [1961] 1 Q.B. 31, C.A.

Jones v. Clifford 11876, 3 CH. D 779.

Jordanian Cassation Court, civil Cassation, 284/81.

Jordanian Cassation Court, Civil Cassation, 371/88.

Jordanian Cassation, Civil Cassation, 475/91.

Jordanian Cassation. 625/83.

Jordanian Cassation. 915/88.

Jorden v. Money (1854) 5 HL 185.

Joscelyne v. Nissen [1970] 2 Q.B. 86.

Keates v. Cadogan (1851) 10 CB 591.

Kennedy v. Panama, New Zealand and Australian Royal Mail Co. LR 2 QB 580.

King's Norton Metal v. Edridge, Merrett & Co. [1897] 14 TLR 98.

Kishwer Ahmed (Ap) v. Clydesdale Bank Plc [2000] Scot CS 232.

Kleinwort Benson LTD v. Lincoln City Council [1999] 2 AC 349 (HL).

Kleinwort Benson v. Lincoln City Council [1998] 4 All ER 513.

Krell v. Henry 2 K.B. 740 (1903).

Krupp v. John Menzies Ltd. 1907 SC 903.

Laing v. The Provincial Homes Investment Co. Ltd. 1909 S.C 812.

Lees v. Todd (1882) 9 R 807.

Lewis v. Avery [1971] 3 All ER 907.

Lowry v. Bourdieu [1780] 2 Doug KB 468 at 471, 99 ER 299 at 300.

M'Laren v. Liddell's Trs., 1862, 24 D. 577.

Macleod v. Kerr 1965 SC 253.

Manners v. Whitehead (1898) 1 F 171; 36 Sc LR 94; 6 SLT 190.

Mathieson Gee (Ayrshire) Ltd v. Quigley 1952 SC (HL) 38.

McCaig v. Glasgow University Court (1904) 6F. 918.

McLaurin v. Stafford (1875) 3 R 265.

McRae v. Commonwealth Disposals Commission (1951) 84 CLR 377.

Menzies v. Menzies (1893) 20 R (HL) 108.

Morrison v. Boswell (1801) Hume 679.

Morrisson v. Robertson 1908 SC 332.

Museprime Properties Ltd v. Adhill Properties Ltd [1990] 2 E.G.L.R. 196.

Mutual Life and Citizen's Ins Co Ltd v. Evatt. [1971] AC 393.

National Carriers Ltd. v. Panalpina (Northern) [1981] A.C. 675.

New Towns v. Cooper (Great Britain) Ltd [1995] Ch 259.

Nottingham Patent Brick and Tile Co. v. Butler. (1886). 16 Q.B.D. 778.

Nottinghamshire Patent Brick and Tile Co v. Butler (1866) 16 QBD 778.

Palestinian Cassation Court, Civil Cassation No 70/2004. Decision No 88. 4/6/2004

Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd. [1995] 2 AC 501.

Patterson v. Landsberg (1905) 7 F 657.

Peek v. Gurney (1873) L.R 6 HL 377.

Philips v. Brooks [1919] 2 KB 243.

Raffles v. Wichelhaus (1864) 2 Hurl & C 906.

Ritchie v. Lloyd [2007] UKHL 9.

Royal Bank of Scotland Plc v. Purvis 1990 SLT 262.

Royscott Trust Ltd v. Rogerson [1991] 3 WLR 57.

Scriven v. Hindley [1913] 3 KB 564.

Seaton Brick and Tile Co v. Mitchell. (1900) 2 F 550.

Security Pacific Finance Ltd v. T & I Filshie's Tr 1994 SCLR 1100.

Shankland v. Robinson 1920 SC (HL) 103.

Shogun Finance Ltd v. Hudson. House of Lords. 2003 July 14, 15; Nov 19.

Skipskreditforeningen v. Emperor Navigation [1998] 1 Lloyd's Rep. 67 at 73.

Smith v. Chadwick (1884) 9 AC 187.

Smith v. Hughes (1871) LR 6 QB 597.

Smith v. Sim 1954 S.C. 357 (O.H.).

Spence v. Crawford 1939 S.C. (H.L.) 52.

Spice Girls Ltd (SGL) v. Aprilia World Service (AWS) [2002] EMLR 27, CA.

Spook Erection (Northern) Ltd v. Kaye. 1990 SLT 676.

Steel's Tr v. Bradley Homes 1972 SC 48; 1974 S.L.T. 133.

Stein v. Stein 1914, S.C. 903, 908.

Steuart's Trustees v. Hart. (1875) 3 R 192.

Stewart v. Kennedy 1890 17R (HL) 25.

Strachan & Henshaw Ltd v. Stein Industrie (UK) Ltd (1998) 87 B.L.R. 52.

Sword v. Sinclair (1771) Mor 14241.

Taylor v. Caldwell (1863) 3 B & S 826; 122 Eng. Rep. 309 (K.B. 1863).

The Court of Banha city. 3rd June 1925, No 383.

The Domestic (al-ahliyah) Court of Alexandria. 28th February 1925, No 562. Bar Journal.
p684.

Traill v. Baring (1864) 33 L.J. Ch. 521.

TSB Bank plc v. Camfield [1995] 1 WLR 430, CA, 438.

Verdin Brothers v. Robertson (1871). 10 M. 35.

Waddell v. Waddell 1863, 1 M. 365.

Ward v. Hobbs (1878) A.C. 13.

Wardlaw v. Mackenzie (1859) 21 D 940.

Webster v. Cecil 1861, 30 Beav. 62.

Welsh v. Cousin (1899) 2 F 277.

Western Bank v. Addie (1867) 5 M (HL) 808.

Wilkie v. Hamilton Lodging House Co. (1902) 4 F 951.

Wilson v. Marquis of Breadalbane (1859) 21 D 957.

Wimble, Sons & Co. v. Rosenberg & Sons [1913] 1KB 279.

Young v. Clydesdale Bank Plc. (1889) 17 R 231.

Young v. McKellar 1909 SC 1340.

Table of Statutes

Amendment of the Sale of Goods Act 1994.

Code of the Egyptian Civil Law.

Code of the Jordanian Civil Law.

Commissions Act 1965.

Jordanian Commercial Law. Act Number 12, 1966.

Misrepresentation Act 1967.

Ottoman Journal of Equity.

Sale and Supply of Goods Act 1994.

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

The Sale of Goods Act 1979.

Trade Descriptions Act 1968.

United Nations Convention on Contracts for the International Sales of Goods (CISG)
(1980).

Law Draft

The Palestinian Draft of the Palestinian Civil Law.

Memorandums

The Memorandum of the Draft of the Palestinian Civil Law.

The Memorandum of the Jordanian civil code.