

International Journal of

Law and Management

Special legal features of the Islamic wa'd or pledge: comparison with the conventional law on promise within the sphere of Islamic finance

Ismail Wisham

International Islamic University Malaysia, Kuala Lumpur, Malaysia

Aishath Muneeza

International Islamic University Malaysia, Kuala Lumpur, Malaysia

Rusni Hassan

International Islamic University Malaysia, Kuala Lumpur, Malaysia



International Journal of Law and Management, Vol. 53 No. 3, 2011,
© Emerald Group Publishing Limited, 1754-243X



Special legal features of the Islamic *wa'd* or pledge

Comparison with the conventional law on promise within the sphere of Islamic finance

Islamic *wa'd*

221

Ismail Wisham, Aishath Muneeza and Rusni Hassan
International Islamic University Malaysia, Kuala Lumpur, Malaysia

Abstract

Purpose – The purpose of this paper is to theoretically assess the legal position of the Islamic doctrine of *wa'd* (or pledge) in relation to *uqd* (within the sphere of Islamic finance), and compare it with the conventional viewpoint, while discussing the several modes/means/usages in terms of applied *Shariah*.

Design/methodology/approach – The paper utilizes a doctrinal approach to focus on the theoretical aspect of the concept while attempting to suggest practical adaptation and structuring, enabling smoother and more efficient use. The status quo was dependent on the *wa'd* being an operational instrument in today's world and further development in terms of bridging the understanding was the approach.

Findings – Before invoking the legal validity of *wa'd* in a court, it is important to view the practice of *wa'd* to be a dominant ideology utilized in Islamic finance. The first advocate who called for the practice of the binding promise in commutative financial contracts was probably Sheikh Mustafa Al-Zarqa who adopted the position that if it was admissible, for the unilateral promise (*wa'd*) to be binding in donations, then, in his view, it was even more justifiable for the *wa'd* to be binding in commutative contracts. According to the preponderant opinion among Maliki scholars, a unilateral promise is as binding as a contract if the reason was mentioned in it or the contract was initiated based on the promise, a view shared by scholars such as Imam Bukhari. The other point of view, according to contemporary jurists such as Al-Syntiqi and Dr Muhamed Sulaiman opine that a unilateral promise would not create any liability upon the promisor and it also does not confer any right to the promisee, although from religion point of view, it is recommended to fulfill it.

Practical implications – Fully understanding the *modus operandi* of a *wa'd* in key as today, *wa'd* has established itself within the domain of several transactions under Islamic banking and finance, such as replicating conventional short selling, structuring FOREX markets option and even operating in a double *wa'd* structure.

Originality/value – The paper would prove useful and informative on the theoretical aspect of the concept especially to students starting out in Islamic finance. For those already well versed or immersed in the field, the paper would certainly provide ideas and exploratory suggestions into the development of the concept in terms of enhancement.

Keywords Islam, Contracts, Finance

Paper type Conceptual paper

Introduction

وَأَوْفُوا بِالْعَهْدِ إِنَّ الْعَهْدَ كَانَ مَسْئُولًا

[...] fulfill (every) contract, for (every) contract will be enquired into (on the Day of Reckoning) (Surah Isra: 34 (translation by Yusuf Ali)).

It is well established that Islamic law recognizes the concept of the juristic person (Al Musa, n.d.; Zahraa, 1995). The juristic person is a presumed person, a legal entity



with separate form from the individuals who establish them. From this point, Islamic law's replication of conventional practices, or at least the attestation of which, can begin. It is not that Islamic law does not recognize the concept of juristic person, but rather admittedly, the term juristic person is not mentioned explicitly by classical Muslim jurists (*fugaha*). However, they recognize this concept based on Islamic practice rather than specific definition and explicit term (Al Musa, n.d.; Zahraa, 1995). Accordingly, entities such as commercial companies, universities, hospitals and mosques can have such a presumed person and can enter into a contractual relationship provided that such a relationship is carried out by their competent representatives (Lerrick and Main, n.d.).

Thus, perhaps is the starting point for Islamic economics. Islamic scholars, nonetheless, claim that Islamic economics is superior to its conventional counterpart due, mainly because:

- the morality of the homo Islamicus prevailing moral hazard;
- the developmental character promoting growth and wealth redistribution and most importantly; and
- the inherent stability of Islamic banking in reducing economic fluctuations and reoccurring crisis.

Recently, the aspiration to establish a comprehensive Islamic financial system has created a spill-over effect to the non-bank Islamic financial intermediaries which also started to offer Islamic financial products and services. Such institutions include the takaful companies, the savings institutions and the developmental financial institutions, whose primary purpose of Islamic finance is not profit making, but the endorsement of the social goals of socio-economic development and the alleviation of poverty. In promoting balanced economic and social development goals, Islamic finance must consistently adhere to *Shariah* guidelines including transparency in the documentation and operation, having sense of accountability to diverse stakeholder groups and respect for the *Shariah* rulings passed by the *Shariah* advisors, even when the rulings are in conflict with their profit-making goal. These findings imply that all the customers of Islamic banking place equal emphasis on social responsibility of Islamic banking. The fact that customers are also concerned with social responsibility issues suggests that Islamic banking institutions should promote it as one of its strategic marketing tools. This emphasis is by no means limited to Islamic banking. All forms of business enterprises in Malaysia, which are based on religious doctrine and ethical principles, should demonstrate their commitment to social responsibilities if they want to be perceived as ethical businesses. And internationally more so, the size of Islamic financial industry has now reached size of US\$250 billion and it is growing at 15 per cent per annum. Institutions like Accounting and Auditing Organization for Islamic financial institutions and Islamic Finance Services Board have been formed. Owing to these collective efforts, Islamic finance institutions are officially now recognized by IMF, World Bank and Basel Committee. While, 27 Muslim countries including Bahrain, UAE, Saudi Arabia, Malaysia, Brunei and Pakistan 15 non-Muslim countries including the USA, the UK, Canada, Switzerland, South Africa and Australia has already made official steps towards its attestation (Nomani and Rahnama, 1994).

Shariah is the set of rules and principles that Muslims believe to be revealed by God to the Prophet Mohammed. *Shariah* rulings relating to transactions in particular are extensive and pursue an objective, i.e. the establishment of justice for mankind.

Although there may be economic similarities between Islamic finance practices and their conventional counterparts, there will inevitably be some differences particularly from the perspectives of the fundamentals of contract[1]. Under conventional law, dating back centuries, a promise is held to be a unilateral warranty/assurance/pledge to undertake a certain constant or variable. A simple promise to marry is not actionable under common law and mostly all jurisdictions, primary on the footing that a promise is devoid of the legal ingredient necessary to form a legally binding contract.

Literally, the word '*aqd*' means to tie or link together. Legally, it has two interpretation either general interpretation or specific interpretation. In general terms, it means anything that is intended by a person to do/perform; either based on his own will[2], or depended on wills of at least two parties[3]. Specifically, '*aqd*' means a connection of the words of one party (*ijab*) to the words of the other party (*qabul*) which constitutes legal implication on the subject matter. '*aqd*' is not an accurate translation of the conventional "contract" because the former does not necessarily involve agreement (which is a necessary element in a conventional contract) because the term is also used to describe a unilateral juridical act which is binding and effective without the consent of the other party. For example, divorce or *talaq*, which essentially ends the marriage contract. Western Jurisprudence deems a "contract" is only enforceable if there is a consideration that moves from the promisee. On the other hand, in Islamic law an '*aqd*' does not necessarily involve consideration. For example, consider *wasiah* (wills). Having established this, it must be vital to point that the for the purposes of this paper, the term '*aqd*' is equated to the western concept of "contract", in order to better view the difference of what Islam terms as legally binding or not.

Islam has strict advice in relation to the fulfillment of promises from an ideological sense. Keeping one's promise is an ideal that is constantly advised towards in the *Quran*. It has been mentioned as one of the special and distinct features of the faithful (*Mu'min*), while conversely, breach of a covenant, be it unilateral promise/word/pledge, has been described as one of the habits of the polytheist *Mushrik* and hypocrite *Munafiq*.

The breaking of promise or trust is one of the offences that break the relation of confidence and trust in the society and thus its foundation. Islamic cannons dictate that there are three occasions when there should be no consideration of one's religion, i.e. the return of trust, fulfillment of covenant and good behavior with parents. According to Islamic law *wa'd* means a promise which connotes an expression of willingness of a person or a group of persons on a particular subject matter. In a commercial transaction though, a promise has a dual meaning. Consider what the *Quran* has to say on matters of promise and contract:

الَّذِينَ يَنْفُضُونَ عَهْدَ اللَّهِ مِنْ بَعْدِ مِيثَاقِهِ... أُولَٰئِكَ هُمُ الْخَاسِرُونَ

Those who break Allah's Covenant after it is ratified [...]. They cause loss (only) to themselves[4].

قَدْ أَفْلَحَ الْمُؤْمِنُونَ... وَالَّذِينَ هُمْ لِأَمَانَاتِهِمْ وَعَهْدِهِمْ رَاعُونَ

Successful will be the believers [...] who are faithful to their trusts and to their promises (Surah Mu'minun: 1 and 8 (translation by Yusuf Ali)).

The Holy *Quran* asks its adherents to fulfill all obligations. This obligation is of three sorts, i.e. sometimes it is between man and God, sometimes man's promise with himself

and sometimes between man and the entire humanity. If Islam has made a series of bonds and agreements as principled, it has also ordered the breaking of some, for example, relating to the foe, when is felt that he is on the verge of dishonesty and breaching trust of agreement. On this ground, fulfilling an oath has been considered as one of the signs of the faithful and the wise and as one of the salient human virtue and Islam has consistently emphasized it and has ordered to ignore a promise given to the enemies of Allah even if they happen to be ones close relatives.

Promise and contract: *wa'd* and *'aqd*

Technically, *wa'd* has no specific definition of its own, however, it can be explained as a commitment made by one person to another to undertake a certain actual or verbal disposal beneficial to the second party or a verbal proposition made by someone to undertake something to the benefit of another person (Razali, 2008)[5]. The most concise, and yet probably exhaustive description of the juristic views in Islamic schools of thought was given by Firoozye (2009):

While classical jurists had a wide range of opinions on this matter – from deliberate failure to uphold a *wa'd* being morally reprehensible (Hanafi, Hanbali, Shafi'i majority opinions), to being legally actionable subject to the promisee suffering loss due to reliance upon the promise (similar to promissory estoppel, the opinion held by majority Malikis), whereas modern jurists have for the most part said it is a cause for legal action if it is a *wa'd* given with specific conditions.

According to Imam Malik if a particular promise is bound to a reason although without any commitment from the other side, it becomes binding. The opinion of the majority of the Maliki School says that the promise must be fulfilled if it was made as a ground of the contract. Otherwise, its fulfillment is not obligatory regardless whether the promisor includes the promise within the ambit of the contract or not. Much like the Malikis[5], although less enthusiastically, Ibnu Qasim says the situation depends and that if a situation is created wherein the promise is held reliance on this particular promise, its performance becomes obligatory (Razali, 2008, p. 4). The Malikis support their view on the basis of these verses:

وَأَوْفُوا بِعَهْدِ اللَّهِ إِذَا عَاهَدْتُمْ وَلَا تَنْفُضُوا الْأَيْمَانَ بَعْدَ تَوْكِيدِهَا

Fulfill the Covenant of Allah when ye have entered into it, and break not your oaths after ye have confirmed them (Surah Isra: 34 (translation by Yusuf Ali).

The Maliki school of thought differentiates between promises, which are used in a transaction and a promise in fixing profit rate. If it is merely for a sale transaction, it is permissible, although, the verdict is vice versa if it is for fixing the profit rate (Razali, 2008, p. 5) [6]. The Maliki view also states that a promise is not binding and cannot be enforced in court except if the party to whom the promise had been made suffers actual loss. This is in line with western ideals presented by authors such as Gold (2009), according to whom:

[...] contracts should be understood as transfers of property in a promisor's future actions. Understanding contracts as transfers allows for a theory of contract obligations consistent with two basic features of common law adjudication: the harm principle and corrective justice. Under the harm principle, courts should only enforce an agreement if doing so will remedy or prevent a harm to the promisee.

Gold's (2009, p. 19) views dictate that contracts can be seen as legally binding promises because, promises are a basic component of a contract, i.e. to say that the parties cannot initiate a contract without at least one promise to perform. Promissory theories build on the moral significance of these promises to explain contract obligations, and in the process explain the expectation damages remedy.

The Islamic Fiqh Academy of Saudi Arabia has ruled that the concept of *wa'd* is "obligatory not only in the eyes of God but also in a court of law" as and if it is made in commercial transactions and the unilateral promise; has caused the promisee damages. Further the promisee also has the possibility to claim actual damages from the promissory, if the latter backs out on a *wa'd*. According to the Academy, a *wa'd* issued unilaterally is by religion binding upon the promisor except where otherwise justified. It is also judicially binding if it is made contingent upon a reason and if the *wa'd* entails a cost for the *wa'd*. A bilateral promise (*Muwadah*) is admissible in instances such as *Murabahah* upon the condition that the bilateral promise is optional at least one party (Majallah Majma' al-Fiqh al-Islami, n.d.). If the bilateral promise offers no choice, then it is inadmissible because, a binding bilateral promise in *Murabahah* is comparable to a normal sale where it is required that the seller be in possession of the goods sold[7]. The decision prohibited the unilateral promise to be binding on both parties but allowed it to be so on one of them. According to writers such as Masri, this "arbitrariness" does not "make sense", one should treat the unilateral promise either binding on both parties or optional for both parties (Masri, 2002).

The essential difference in Islamic law between contracts and promises, much like its conventional counterpart, is consideration. In fact, the only opinion that places little focus on the factor of the consideration is the Hanafi view as opposed against that of the majority. The basic prerequisites to establish a valid contract agreement under Islamic law relate to the legal status of the parties seeking to sign the contract, the way the contract is presented/accepted, and finally, the subject and consideration of the actual contract. More generally in Islam this covers, anything that is intended by a person to do/perform; either based on his own will, or depended on wills of at least two parties. Technically, *'aqd* specifically means a connection of the words of one party (*ijab*) to the words of the other party (*qabul*) which constitutes legal implication on the subject matter.

The Islamic law texts do not set out a comprehensive theory of contract law, which applies to all types of contracts, but rather, the texts deal with certain contracts, such as sales, hire, loans, agency and guarantees, in individual chapters. Hanbalis champion the use of the maxim, which says that "the contract is the law of the parties" (*Al Aqd Shari'at Al Muta'adin*).

Over the issue of whether the English law concept of promissory estoppel can be equated to the Islamic concept of the *wa'd*, it should be noted that equitable principles under English common law jurisprudence recognize that the doctrine of promissory estoppel can be used as a defense in a related action brought by the promisor. This is a restriction the Islamic law of *wa'd* does not have. With the *wa'd*, as if it was, an independent claim for damages for non-fulfillment of a *wa'd* could never be filed by the promisee. This would severely undermine the effectiveness of the *wa'd* as a structuring tool in *Shariah* compliant transactions.

wa'd operates within the domain of several transactions under Islamic banking finance. For instance, conventional short selling involves the selling of a security (generally a stock or a share) that the seller does not own. *wa'd* can be used to structure

FOREX markets (i.e. currency) option. Under the double *wa'd* structure, much like the conventional total return swap, the underlying economic reasons for entering into such a transaction are:

- that it allows a party to gain exposure to an asset which it does not necessarily need to hold on its balance sheet; and
- that pay-offs can be structured so that the other party can hedge against the upside or downside related to that particular asset or class of assets.

These modes/means/usages are being considered in the next part on applied *Shariah*.

Applied *Shariah*: promise in Islamic finance

The application of promise can be seen in several Islamic transaction concepts, for example, in sale and purchase, *Murabahah*, *Ijarah*, *takaful*, etc. For instance, in *Murabahah* financing, the client and the institution sign an overall agreement whereby the institution promises to sell and the client promises to buy the commodity from time to time on an agreed ratio of profit added to the cost. In young concepts such as the "diminishing *Musharakah* (*Mutanaqisah*)", much like ordinary *Musharakah*, the client promises to the financier that he will purchase one unit periodically until the full end goal has been achieved.

The Malaysian Accounting Standards Boards in its amendment to the Financial Reporting Standard i-1 2004 had mentioned about *wa'd* when defining *Ijarah Muntahia Bi al'tamleek* which reads as follows:

Ijarah Muntahia Bi al'tamleek is an *Ijarah* contract with an undertaking by the lessor to sell the *Ijarah* asset to the lessee and/or an undertaking by the lessee to purchase the *Ijarah* asset from the lessor by, or at, the end of the *Ijarah* period. The sale and purchase is effected by a separate contract. "Undertaking" is translated from the Arabic word "wa'd".

Jurists had determined some limits to its use, though, in particular, the use of *muwa'dah* (bilateral promise) as a means of circumventing *Shariah* rules prohibiting forward transactions. But the ability to distinguish between *muwa'dah* and *wa'dan* (two unilateral promises) was the subject of some consideration. Again, Firoozye (2009, p. 7) presents the dilemma in a short and concise manner:

In other words, by a simple piece of trickery (or innovation) we avoid our transaction being classified a (prohibited) *muwa'dah* and instead classify it as a *wa'dan* but we manage to attain exactly the same goal. Similarly the use of third parties as intermediaries has been vetted as a means of avoiding the *muwa'dah* classification (in the original Deutsche Bank swap). But this ability to exchange *wa'dan* was a major breakthrough. Because there were no *Shariah* requirements on the actual conditions in the *wa'd*, as well as the promised action as long as it did not compel the Muslim investor to do anything haram (forbidden) but with no such prohibition on the non-Muslim counterparty, almost anything was allowed (Firoozye, 2009, p. 7).

The concept of *wa'd* has gained prominence over the last few years as the Islamic finance industry. It has sought to reinvent derivative products and the *Sukuk* market. It is this unilateral nature of *wa'd* that potentially makes it a very useful and flexible tool in structuring Islamic finance products. The promise here is relevant in various respects. It can show the parties' commitment to complete the transaction according to their ultimate intention and use it as an alternative to put option and call option. More commonly known as purchase undertaking, the concept is applied in a supplementary

document to the master agreement. *wa'd* is also widely adopted in Islamic capital market products as a tool for liquidity payment, as an exit mechanism, i.e. to redeem a *Sukuk* at maturity, and also for risk management and hedging purposes.

The German Bank and others subsequently saw this as an opportunity to deliver hedge funds to Muslim investors. The Muslim investor would invest in halal assets and use the *wa'd* swap arrangement to swap the returns for those of virtually any underlying held by a non-Muslim investor. Hedge funds, cross-currency swaps, exotic products, even gambling stocks, liquor and all previously prohibited investments could be delivered this way.

In Bank Negara Malaysia's (2007a) *Financial Stability and Payment Systems Report 2007*, talks of how *wa'd* is relevant in cases of *Musharakah Mutanaqisah* structures where the banking institution leases the property upon an undertaking by the customer to incrementally acquire the full ownership over an agreed period. Once fully acquired the partnership comes to an end with the customer becoming the sole owner of the property. This contract incorporates both sale and lease contracts. The bank explains that within the process of gradual transfer of ownership against the payment of the periodic sums operates the concept of *wa'd*. If the customer defaults, the partnership will be terminated. If there is no purchase undertaking or *wa'd*, the asset will be sold and the proceeds will be divided according to the latest ownership shares of the banking institution and customer. If there was a purchase undertaking, the customer is obliged to acquire the banking institution's remaining share. This creates a debt to be paid by the customer to the banking institution.

wa'd also plays a part in *Musharakah* structures. An IFI may request its customer to give a binding promise (*wa'd*) to the IFI to purchase the *Musharakah* asset or IFI's share either on a lump sum basis or gradually over an agreed period of time at market value or at a fair value or at any price to be agreed by the parties. Where a partner who has agreed to a certain profit sharing ratio may waive the rights to profits to be given to another partner on the basis of *Tanzul* (waiver) at the time of profit realization and distribution as well as at the time of the contract. However, a waiver of profit that takes place at the time of contract shall be by way of unilateral promise (Bank Negara Malaysia, 2010).

Then there is *Murabahah* as well, which is a form of trust-sale that aims to finance acquisition of assets on short- or long-term basis. It is trite now that the *Murabahah* sale price is to be determined based on the disclosed acquisition cost with an added mark-up amount or percentage to be determined prior to the conclusion of the *Murabahah* contract. *wa'd* operates as purchase orderer to purchase the asset on *Murabahah* basis. The promise by the customer to purchase the asset from the financier upon the latter's acquisition of the asset is considered binding on the purchase customer. During the purchase requisition, the purchase order application is to contain the promise, which must be duly signed by the customer. Again, Bank Negara provides a good example (Bank Negara Malaysia, 2007b):

A purchase orderer applies to an IFI to acquire a machine which costs RM50,000 through a *Murabahah* contract. The IFI approved his application and requested the purchase orderer to sign a unilateral promise to buy the machine after the acquisition of the machine by the IFI. After the IFI purchased the machine, the purchase orderer refused to buy the machine from the IFI and hence breached the promise (*wa'd*). IFI disposed of the asset at RM45,000 and incurred an additional disposal cost of RM2,500. IFI shall be compensated for RM7,500 by purchase orderer.

What is more, Islamic Foreign Exchange Swap is structured based on *Shariah* principles and contracts to achieve the same objectives of its conventional counterpart,

which is to hedge against currency rate fluctuation risks. For the Islamic Foreign Exchange Swap, there are two structures are commonly offered in the market. One structure is based on the contract bay al-tawarruq⁹ and the other adopt the concept of *wa'ad*. The Islamic Foreign Exchange Swap based on *wa'd* structure involves exchange of currencies at the beginning, and promise or undertaking to carry out another exchange at the future date based on the rate determined today. At the expiry date, the second exchange will be implemented to get back the original currency. This is in line with AAOIFI's Council of Shariah Advisors' Resolution No. 25 where they prescribed that combining more than one contract is permitted, provided that each contract itself is permitted in *Shariah* and each contract must stand independently, that is, without binding one another (*uqud mustaqillah*).

Contract and promise: comparative view

Gold's views on the relationship of contract and promise which have been mentioned above, are also complimentary to those of Bagchi who propagate that contracts are conceptualized as a species of promise, while famously citing, Charles Fried who argued that contracts should be enforced essentially because they are promises^[8]. According to the author, treating contractual promise as a kind of promise highlights certain important aspects of contracting, including the communication of a commitment to future action and the delegation of partial authority over future conduct to another person, while sadly "because of their familial relations, the similarities between contract and promise are often too easily assumed and often over-emphasized" (Bagchi, 1995, p. 3)^[8]. Promising, in Fried's view, should be seen as a device that free individuals "have fashioned on the premise of mutual trust, and which gains its moral force from that premise (Bagchi, 1995, p. 17)^[8]".

It may also be the case that, in their application of doctrine, which presupposes a better disposition for unilateral promises, American courts are more amenable to enforcing promises made outside of personal relationships (Peter, 1988-1989). Promises made to support family members are not usually enforced, apparently not falling within the exceptions created by the famous US case of *Ricketts v. Scothorn*^[9]. It has to be kept in mind that the USA is the jurisdiction which dictates that a contract is described as a legally enforceable promise; which means that to make a contract, there needs to be in existence a promise. Much like the Islamic School of Malikis, which predominantly were the followers that emerged from the base of the Prophet, i.e. Medina, American contract law only regards as enforceable promises that are exchanged for something on or which the promisee has reasonably relied to her loss. Moreover, from the moment the breach occurs, the legal doctrine of mitigation kicks in and places the burden on the promisee to make positive efforts to find alternative providers.

As per Hogg (2009), the Scottish legal system is not merely the traditional mix of Roman and Common Law typical of mixed legal systems, but a mix also of natural law ideas with a respect for the rational and free choices of the parties. Respect for free will is seen not just in certain contractual rules such as the absence of a requirement of consideration, but in the existence of a separate obligation of unilateral promise as well. Over in Australia, *Woollen Mills Pty Ltd v. The Commonwealth*^[10] (1954), the High Court of Australia held that, for a unilateral contract to arise, the promise must be made "in return for" the doing of the act. The court distinguished between a unilateral contract and a conditional gift. The case is generally seen to demonstrate the connection between the requirements of offer and acceptance, consideration and intention to create

legal relations. This is also in line with the common law requirement prescribed in the case of *Carhill v. Carbolic Smoke Ball Co*[11] where a kind of a unilateral contract, one in which the offeree accepts the offer by performing an act which indicates their agreement with the bargain was held to be actionable. It can be contrasted with a bilateral contract, where there is an exchange of promises between two parties. In Australia, though, case law reflects the apprehension between, the desire to hold parties to their bargains in accordance with the principle *pacta sunt servanda* and, on the other hand, the courts' reluctance to make a bargain for the parties. According to the Australian courts, the categories of uncertainty, incompleteness and illusory promises are not always clearly distinguished and often overlap[12].

The English doctrine of consideration as in *Currie v. Misa*[13], seems to be that:

A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

"Consideration" in English law is a requirement that every contract must be supported by something of "economic value" from all parties, distinguished from ostensibly intangible things such as "natural affection"[14]. Interesting thing is that the doctrine says that consideration should exist, although there is close to no requirement as to it being of equal value, i.e. it can even be a nominal US\$/\$RM 1[15]. A vital distinction in contracts exists between:

- those where each party promises some performance; and
- those where only one party promises performance, the consideration from the promisee being actually given.

The earliest use of the words bilateral or unilateral in American law, seems to have been by Judge Dillon, in *Barrett v. Dean*[16]. Though Judge Story in *D'Wolf v. Rahaud*[17], speaks of contracts where one consideration is furnished by A in exchange for two several promises by B & C as "if one might use the phrase, a trilateral contract (Williston, 1922)".

On the other offset, there is the consideration over common law's deference directed towards the concept of promissory estoppel. For instance, a city entered into a contract with another party. The contract stated that it had been reviewed by the city's counsel and that the contract was proper. Promissory estoppel applied to estop the city from claiming the contract was invalid[18]. Reliance-based estoppels involve one party relying on something the other party has done or said. Equitable principles under English common law jurisprudence recognize that the doctrine of promissory estoppel can only be used as a shield and not as a sword, i.e. while it can form the basis of defense in a related action brought by the promisor, it cannot form the basis of an independent claim in itself[19].

The party who did or said the act is the one who is estopped. Under English law, this class includes estoppel by representation of fact, promissory estoppel and proprietary estoppel. Estoppel by representation of fact and promissory estoppel are mutually exclusive, i.e. the former is based on a representation of existing fact, while the latter is based on a promise not to enforce some pre-existing right:

[. . .] it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course

of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which are thus taken place between the parties Lord Cairnes in *Hughes v. Metropolitan Railway Co*[20] (House of Lords, 1887).

Lord Denning explains it as the principle applies where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, "the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his words"[21]. For illustration, consider the case in *Stamford Wrecking Co. v. United Stone America, Inc.*[22], where complaint alleged that the defendants' refusal to subcontract the agreed amount of work to the plaintiff constituted a breach of contract or, alternatively, a ground for recovery on the basis of the equitable doctrines of promissory estoppel and unjust enrichment. The defendants alleged that the evidence would have refuted the plaintiff's breach of contract and promissory estoppel claims by showing that the federal laws and regulations applicable to special trade contracts prevented them from awarding the plaintiff 85 per cent of the work on the project. The court decided that the defendant's suggest that the Navy was required by federal law to classify the project as a special trade contract, and the Navy's failure to categorize it as such was illegal. The court established that they did not reach this issue for the reasons explained previously in the analysis, but noted, however, that the defendants performed their responsibilities as general contractor in accordance with the Navy contract. As such, the defendants' argument that the Navy contract being illegal for subcontracting purposes is quite ironic in the eyes of the court[23].

Promissory estoppel establishes some kind of functional connection to the European *culpa in contrahendo* or "fault in conclusion of a contract". Originally it was a judicially crafted doctrine of the German law of obligations. Literally translated from the Latin, it means "culpable conduct during contract negotiations". The doctrine was developed by the courts to impose a mutual duty of care upon persons who were not yet in privity of contract[24]. Dietrich (2001), in his comparative study about pre-contractual liability and *culpa in contrahendo*, proposed that the issue of *culpa in contrahendo* in common law should be considered "as lying between contract and tort and drawing on ideas and principles from both categories". But this is also exclusive of the common law doctrines of pre-contractual liability. Consider Giliker's (2003) assessment on the issue:

A claim for pre-contractual expenses is essentially one for pure economic loss and English law adopts a restrictive approach to such claims. The spectre of "liability in an indeterminate amount for an indeterminate time to an indeterminate class" continues to haunt English tort law. In seeking recovery, the claimant must therefore identify a tort for which the courts are prepared to award damages for pure economic loss. As a result of the English system of nominate torts, the emphasis immediately falls on finding a tort which provides a suitable "fit" rather than a more principled consideration of the merits of the particular case. The most logical options would appear to lie with the intentional torts protecting economic interests (the so-called "economic torts"), for which damages for pure economic loss are awarded without question, or with the tort of negligence.

Conclusion

Islam is a system of belief that encompasses not only man's relationship with God, but also provides Muslims with a code that regulates their entire way of life. The *Quran* sets out its notions of equity, justice, fairness, morality and many other values, which underpin the entire Islamic system. Islamic law has always been organic, dynamic, practical and pragmatic in its form and practice to meet the need and demand of the ever challenging and changing world. In a nutshell, Islamic law is never exhaustive in describing the availability of concepts, and practicing them in the Islamic framework.

Islam promotes a market free from interferences such as price fixing and hoarding. Government intervention, however, is tolerated under specific circumstances. Government interference, more often than not, comes in the form of regulations. Government interference in the market is justified in exceptional circumstances, such as the protection of public interest. Under normal circumstances, government non-interference should be upheld. When Muhammad was asked to set the price of goods in a market he responded, "I will not set such a precedent, let the people carry on with their activities and benefit mutually" (Zahraa, 1995). Moreover, Islam provides basic freedom to enter into transactions. The *Quran* and the traditions of the Prophet emphasize on freedom to contract and recognizes this freedom too. However, this freedom does not imply unbridled freedom to contract. Exchange is permitted only when undertaken in permissible commodities or property (*al-mal*). Another aspect of the Islamic contract would be the avoidance of detriment or (*darar*). Avoiding whatever is likely to cause injustice, disputes or general animosity between the contracting parties. In addition, any contract between two parties concluded with their mutual consent should be not detrimental to the interests of a third party, thus such contract is considered unethical and is not permissible.

wa'd, i.e. a unilateral promise without consideration, is a concept that has been used since close to the start of institutionalized Islamic finance, and has been used primarily alongside *Murabahah* for purchase order prior to its more recent by-product. Rather than a standard contract in Islamic finance the *wa'd* was seen as having no or relatively few standards legislated purely to its use and applicability by international bodies such as IFSB and AAOIFI (Firoozye, 2009).

Some scholars argue that Islamic hedging instruments do not compliment Islamic philosophy because they are artificial products and they are created to suit conventional products, which are based on either interest or speculation. Some also argue that Islamic Hedging is needed for protecting real businesses and not just for speculation purposes, in the sense for forward currency or currency swap to protect real import and export activities involving two different currencies; and profit rate swap to manage real asset and liability potential variance of a financial institution (Bakar, 2010).

In issues such as the Forward FOREX, which involves essentially two dissimilar *ribawi* items, i.e. two different currencies. Currency is a *ribawi* item and Islamic law requires delivery to be made on the day of the contract. However, Islamic law does not prohibit promise to buy and sell currencies on one date and delivery to be made on another date because the proper contract only concludes on the day of delivery. This premise of argument has led to the argument/construction of *wa'd* in structuring Islamic version of FOREX. Under *wa'd* structure, only one party (obligor/promisor) promises to buy/sell as the case may be wherein he is bound by that promise (binding promise). The other party/promisee/obligee is not bound, however, to proceed with the promise undertaken by the promisor.

The Shariah Advisory Council of Bank Negara Malaysia, has approved the application of *wa'd* in forward currency transactions for hedging purposes and, on the issue of *Takaful*, benefits payable from participants' risk fund. On the other hand, the council also warns that "no consideration (or fee) is allowed to be charged on the promisee in view of the fact that upfront cash payment for forward currency transactions would lead to a bilateral *wa'd* which is not allowed by the Shariah (Bank Negara Malaysia, 2010)". This comes ten years after the perhaps the initial ruling of the council on the concept of *wa'd* which came in the form its resolution dated 10 April 2000. The initial problem arose over the sale and buy-back agreement (repo) refers to sale and purchase of an asset whereby both contracting parties promise to buy or re-sell the asset in future. The council resolved that resolved that *wa'd* in the sale and buy-back agreement is permissible provided that *wa'd* is not stipulated as a condition for the sale and purchase of the asset. The council's earlier mentioned resolution on using *wa'd* in forward currency transaction seems complimentary to their resolution dated 25 April 2005 which established that resolved that an Islamic banking institution is allowed to enter into forward foreign currency transaction based on unilateral binding promise (binding only on the promisor) and the compensation for breaching of promise could be implemented. This permissibility is only applicable for currency hedging purposes.

In her paper, Abdullah (2010), analyzed the status and implications of *wa'd* in Islamic banking practices and the extent of its enforceability in the court of law. The study revealed that the usage of *wa'd* is allowed by contemporary jurists as a necessity for the interest of the contracting parties. Admittedly, *wa'd* has become an innovative tool in structuring many forward contracts that require flexibility with full commitment of the parties involved without jeopardizing the basic principles and *maqasid Al-Shari'ah*.

Notes

1. Although risk perspective is also important as a difference, the scope of this paper does not include the discussion thereof.
2. For example, endowment (*waqaf*), divorce (*talaq*).
3. For example, sale (*al-bay'*), marriage (*nikah*).
4. Surah Baqarah: 27 (translation by Yusuf Ali) Commentators have given several meanings of the "covenant of Allah" but what is obvious is that it means those promises which men give to god and obviously the words given to the Holy messengers and the Imams are also the words given to God, and it includes the promises related with Faith, jihad, etc.
5. Umar bin Abdul Aziz, Hasan al Basri, and Imam Bukhari also share the same opinion.
6. This line of thought is similar to the *fatwa* by Sheikh Abdul Aziz bin Baz, the Saudi Arabia mufti.
7. The prohibition by the Prophet on the sale by a seller of that which is not in his possession is relevant here.
8. See Bagchi (1995); according to Charles Fried "in order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself. It is necessary that I be able to make non-optional a course of conduct that would otherwise be optional for me. By doing this I can facilitate the projects of others, because I can make it possible for those others to count on my future conduct, and thus those others can pursue more intricate, more far-reaching projects".

9. 52 77 N.W. 365 (Neb. 1898), see also *Terry v. Terry*, 217 S.W. 842 (Mo. Ct. App. 1919) where the case revolved around refusing to enforce agreement among siblings to pay those who had cared for parents.
10. (1954) 92 CLR 424 at p. 457 per the Full High Court; [1954] ALR 453; (1954) 28 ALJ 94.
11. [1893] 1 Q.B. 256 (defendant's newspaper advertisement to public that £100 reward would be paid by the defendant to any person who contracted influenza, after having used preparation according to printed directions, was held to be an offer to public which is the same as a unilateral contract).
12. See for example *G Scammell & Nephew Ltd v. Ouston* [1941] AC 251; [1941] 1 All ER 14.
13. [1875] LR 10 Ex 153.
14. *Bret v. JS* (1600) Cro Eliz 756.
15. This is a widely practiced line of thinking. Entrepreneurs, businessmen and their like have resorted to exchanging nominal amounts in the form of a dollar or a ringgit so as to formalize the transaction as being contractual, although in actual fact it may not be.
16. 21 ls. 423.
17. 1 Pet 476, 500, 7 L. Ed. 227.
18. See *American case of Speckman v. City of Indianapolis* 540 N.E.2d 1189, 1191 (Ind. 1989).
19. See *Combe v. Combe* [1951] 2 K.B. 215, 219; *Lark v. Outhwaite*, [1991] 2 Lloyds Rep. 132, 142.
20. (1877) 2 AC 439.
21. *Lord Denning in Combe v. Combe*, [1951] 2 KB 215.
22. 99 Conn. App. 1, 912 A.2d 1044 (2007).
23. See p. 13.
24. This duty was derived from the collection of several sections of the Bürgerliches Gesetzbuch, the German Civil Code, including ss.122 (Mirmina, 1992).

References

- Abdullah, N.I. (2010), "Status and implications of promise (*wa'd*) in contemporary Islamic banking" (*Emerald Humanomics*, Vol. 26 No. 2, pp. 84-98).
- Al Musa, M. (n.d.), "Sharikat Al Ashkhas Bain Al-Shari'ah Wa Al Qanun", published MPhil thesis, Imam Muhammad Ibn Sa'ud University, pp. 113-115.
- Bagchi, A. (1995), "Separating contract and promise (August 06, 2010)", in Barnett, R. (Ed.), *Excerpted in Perspectives on Contract Law*, 4th ed. (2009), Public Law Research Paper No. 07-35, U Penn Law School, Philadelphia, PA.
- Bakar, M.D. (2010), *Islamic and Non-Islamic Finance in Contemporary Perspective*, President/CEO, International Institute of Islamic Finance (IIIF), Bank Negara Publications, available at: www.bnm.gov.my/microsites/giff2007/pdf/iif/Session4_c3.pdf (accessed 4 November 2010).
- Bank Negara Malaysia (2007a), "Distinct features of Islamic financial transactions: perspective on Musharakah Mutanaqisah (diminishing partnership)", Financial Stability and Payment Systems Report 2007, pp. 94-8, available at: www.bnm.gov.my/files/publication/fsp/en/2007/cp03_002_whitebox.pdf (accessed 1 November 2010).
- Bank Negara Malaysia (2007b), "Draft of Shariah parameter reference 1: Murabahah contract (SPR1)", p. 27, available at: www.bnm.gov.my/guidelines/05_shariah/01_murabahah_02.pdf (accessed 1 November 2010).

9. 52 77 N.W. 365 (Neb. 1898), see also *Terry v. Terry*, 217 S.W. 842 (Mo. Ct. App. 1919) where the case revolved around refusing to enforce agreement among siblings to pay those who had cared for parents.
10. (1954) 92 CLR 424 at p. 457 per the Full High Court; [1954] ALR 453; (1954) 28 ALJ 94.
11. [1893] 1 Q.B. 256 (defendant's newspaper advertisement to public that £100 reward would be paid by the defendant to any person who contracted influenza, after having used preparation according to printed directions, was held to be an offer to public which is the same as a unilateral contract).
12. See for example *G Scammell & Nephew Ltd v. Ouston* [1941] AC 251; [1941] 1 All ER 14.
13. [1875] LR 10 Ex 153.
14. *Bret v. JS* (1600) Cro Eliz 756.
15. This is a widely practiced line of thinking. Entrepreneurs, businessmen and their like have resorted to exchanging nominal amounts in the form of a dollar or a ringgit so as to formalize the transaction as being contractual, although in actual fact it may not be.
16. 21 ls. 423.
17. 1 Pet 476, 500, 7 L. Ed. 227.
18. See *American case of Speckman v. City of Indianapolis* 540 N.E.2d 1189, 1191 (Ind. 1989).
19. See *Combe v. Combe* [1951] 2 K.B. 215, 219; *Lark v. Outhwaite*, [1991] 2 Lloyds Rep. 132, 142.
20. (1877) 2 AC 439.
21. *Lord Denning in Combe v. Combe*, [1951] 2 KB 215.
22. 99 Conn. App. 1, 912 A.2d 1044 (2007).
23. See p. 13.
24. This duty was derived from the collection of several sections of the Bürgerliches Gesetzbuch, the German Civil Code, including ss.122 (Mirmina, 1992).

References

- Abdullah, N.I. (2010), "Status and implications of promise (*wa'd*) in contemporary Islamic banking" (*Emerald Humanomics*, Vol. 26 No. 2, pp. 84-98).
- Al Musa, M. (n.d.), "Sharikat Al Ashkhas Bain Al-Shari'ah Wa Al Qanun", published MPhil thesis, Imam Muhammad Ibn Sa'ud University, pp. 113-115.
- Bagchi, A. (1995), "Separating contract and promise (August 06, 2010)", in Barnett, R. (Ed.), *Excerpted in Perspectives on Contract Law*, 4th ed. (2009), Public Law Research Paper No. 07-35, U Penn Law School, Philadelphia, PA.
- Bakar, M.D. (2010), *Islamic and Non-Islamic Finance in Contemporary Perspective*, President/CEO, International Institute of Islamic Finance (IIIF), Bank Negara Publications, available at: www.bnm.gov.my/microsites/giff2007/pdf/iif/Session4_c3.pdf (accessed 4 November 2010).
- Bank Negara Malaysia (2007a), "Distinct features of Islamic financial transactions: perspective on Musharakah Mutanaqisah (diminishing partnership)", Financial Stability and Payment Systems Report 2007, pp. 94-8, available at: www.bnm.gov.my/files/publication/fsp/en/2007/cp03_002_whitebox.pdf (accessed 1 November 2010).
- Bank Negara Malaysia (2007b), "Draft of Shariah parameter reference 1: Murabahah contract (SPR1)", p. 27, available at: www.bnm.gov.my/guidelines/05_shariah/01_murabahah_02.pdf (accessed 1 November 2010).