The Impact of Verb Tenses on the Conclusion of Commercial Electronic Contracts of Sale

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الكلمات الافتتاحية :
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Scope, temporal, retrospective effect, originating effect, constitutional judiciary, constitutional texts, the Federal Supreme

Abstract

New technologies in communications have accelerated daily transactions by concluding contracts instantly between persons spotted in different countries. Basically, to conclude a contract offer must match acceptance depending on parties' intentions. Intentions are naturally invisible unless unearthed explicitly by uttered verb tenses. Consequently, verb *tenses* have impacts on concluding contracts. However, contracting using past tense differs than using present or future tenses. According to Iraqi and Sharia laws, some tenses conclude the contract, others do not, while a third category is in-between. Therefore, such tenses were envisaged as criterions to measure the extent of parties' intentions or '*meeting of minds*' to make a contract. We highlighted this problem using a critical, analytical and comparative approach between Iraqi and Sharia laws to fill the gaps in the legal paradigm. As a result, we have compared these tenses and found that texts, words and even letters have significant roles in concluding contracts. Furthermore, Iraqi Civil Code is derived from Sharia law, which is dated back for more than 1400 years. At that time, there

was only the formal language when street language was not yet in existence. Nowadays especially in Facebook marketplace, countless numbers of sales are conducted hourly and the vast majority of them is performed using *slang* or street language. Therefore, applying Iraqi and Sharia laws regarding verb tenses would obstruct daily transactions patently because these laws are tailored only to fit with formal language. To sum up, some tenses affect contracts positively by considering them as criterions determining the extent of parties' intentions. However in the light of electronic contracts, another category of these tenses restricts electronic commerce as such they should be reviewed by Iraqi law-making committee to come up with new technology challenges.

١. Introduction

Parties' assent is a crucial prerequisite for the validity of any contract in Sharia. Accordingly, without mutual consent there can be no authentic trade. Yet, there is no additional elucidation regarding how this mutual consent can be said. Legitimately, it is inadequate to conclude a contract as a bare consent to conclude a contract without articulating that consent. Parties' approval is concealed in the heart as such it is not conceivable to be known unless being spoken or shown to the outside therefore, a mere consent to conclude a contract without expressing that consent shall not form a contract. Consequently, the common consent of the contracting parties is considered legally when a correlation of offer and acceptance is emerged through which the parties' consent can be established. As outlined above, the consent of the parties in the formation of offer and acceptance is a indispensable component for concluding a binding contract. Beside the fact whether offer and acceptance is created by the buyer or the seller. Hence, this article will scrutinise the tenses of offer and acceptance as the elements of the contract and their applicability to electronic contracts in terms of the slang and formal language. As a typical norm in contact, parties' assent can be articulated by any means, verbally, by sign or gesticulation , or by conduct as giving-and-taking contract .

٢. Offer and Acceptance in Iraqi and Sharia Laws– Definitions

The sole offer is inadequate to conclude a binding contract; rather an expression of acceptance must be posted to the offer for the purpose of establishing a mandatory contract. In return, acceptance is an expression released by the offeree to show his/her readiness to enter into an obligatory transaction in accordance with the conditions of the offer. Likewise, in a similar way of

an offer the acceptance must be conclusive with the willingness of being legitimately obliged with the contract. An offer is simply described as a manifestation of inclination to contract alongside with the desire of becoming legally compulsory on the party forming it (the offeror) once accepted by the party or parties to whom it is directed (the offeree). Sharia jurists have argued over the definition of offer; however, two main trends can be identified. First, according to the Hanafi school, offer has been defined as the first expression issued by one of the contracting parties; whether this party is the one that will transmit the ownership or the one that will be receiving it. Thus, the core of this attitude is that this suggestion is the first move from both buyer or seller to determine attention to entering into a contracting process. The reflecting result of this proposal is acceptance.

However, the Shafi'i, Maliki and Hanbali schools define offer as the expression issued by the party who receives the ownership whether it is pronounced first or second. Oppositely, the buyer can only make acceptance, whether or not the buyer's initiative is delivered firstly or after the suggestion is created. Nonetheless, the above disagreement concerning the clarity of offer and acceptance is, in effect, a terminological differentiation and has no noteworthy effect on the legitimacy of contract. This is because the fact that in accordance with the later scenario; it is valid to make an acceptance before an offer. Therefore, when acceptance is made before offer, it is not leading to contract's nullification. In principle, consideration is shown in Sharia jurisprudential view to the mutual consent which happens in each approach. Henceforth, once a contract is electronically shaped throughout a verbal exchange of offer and acceptance between parties it would be rightfully effective as this is analogous to the verbal illustration of the parties' agreement in face-to-face contracts. It is immaterial whether or not the parties are concluding the contract in the same place by the time of forming the contract, since the mutual consent is the fundamental prerequisite for the legal conclusion of a contract . On the one hand, since Sharia is not affirming how mutual consent would be conveyed, commercial practice can deliver substantial support. It was declared that a contract can be legitimately shaped by any means, verbally, or by action and this must be handed over to the people to decide on the ground of prevailing trading traditions that differ from a country to another and time to time. This illustrates the agility of Sharia to accommodate evolving approaches of communication. On the other hand, the Iraqi Code has adopted a definition that is consistent with the Hanafi' school by defining offer and acceptance as the expression used customarily to create a contract, whichever said first is an offer and the second is the acceptance. However, the position of the Iraqi Civil Code (ICC) can be critiqued because it provides, in its Article 77/1, a definition of the term 'offer', which is mainly the competence of the jurisprudence and not the legislator. In addition, the texts mentioned above referred to (described) 'offer' and 'acceptance' in its definition

as 'any expression', which contradicts both of practise and Article 79 of it. In other words, offer and acceptance can be issued in other forms such as writing, or signals, or any other forms that could be used to express the will of the party, and this is what is determined by the Iraqi legislator in Article 79 .It is clear from the above discussion, the definitions provided concern the classical concept of offer, and there is no reference in these laws (Iraqi and Egyptian) to the most recent form of offers; that is electronic offers. Therefore, it might be useful to consult some laws within the region that has regulated this new kind of offer. The EU Directive 1997/7, for instance, has clarified the definition of an e-offer as being any distance communication that includes the required elements to persuade the offeree to accept the offer directly, when the mere advertising is excluded. It is clear that this definition describes an offer as 'electronic' due to it using e-means has almost no effect because a classic offer, same as an e-offer, should be determined, specified and finalised or otherwise it is no more than an invitation to treat. Likewise, an e-offer lapses if it is a conditional offer suspended upon a term whose accomplishment has been met with failure or has been refused by the offeree. Such refusal may be revealed by the offeree using many methods such as navigating to another website, shutting down the computer or sending an e-mail refusing that offer . Finally, we agree that offer is the first statement issued by a party expressing his will to create a contract, as with such suggestion, it is easier to identify the offeror than the acceptor. The offer must be complete and fully-determined in the sense of including the essential elements for the potential contract. For example, if the offer is about a sale, the price and payment method must be included and determined specifically; otherwise, such an offer is not a legal offer but an invitation to treat. Electronic interactions of offer and acceptance with the old-style performance of two contracting parties managing selling behind walls by shouting to each other over distances are considered valid in light of law. This indicates the legitimacy of making a contract between two parties at distance and thus the aforementioned situations could be utilised as a foundation to authenticate the making of contacts using the exchange of verbal promise via the Internet or other methods of technology.

٢.١ Verb tenses to express offer and acceptance in commercial electronic contracts

According to Iraqi Civil Code, it is permissible to contract using writing, by words, handover process or any means that proves the compatibility of offer and acceptance

٢.٢ Expressing offer and acceptance by writing in commercial e-contracting

The prominent medium to form an offer is writing, it will mostly be issued in circumstances that allow the offeror to think carefully of it. As long as it achieves its purpose, issuing an offer in a written form is acceptable whether the contract is between attendees or absentees. Furthermore,

it would be valid to express the will in any written form, whether it is through a message or an advertisement. The Iraqi legislator has chosen in Article 79 to consider writing as one of the methods that can express the willingness to contract. Iraqi legislation has, therefore, confirmed this in Article 79 by considering writing as one of the methods to show willingness. The writing style shows a vital part in electronic contacts and it is the system by which the exchange of offer and acceptance is made. Email is the most largely used method of digital communication and it is predictable to endure as such for some time. Nevertheless, it is worthy to note that email communication has established its own distinctive style and, in many means, its own language. Conversely, the email language as an amalgamation of words and letters that is not much different to conventional writing other than the means that carries such writing. The written work in email is organised via the computer and shifted between clients via the Internet. Conventionally, writing is created on paper using a pen, however with the arrival of computers writing is shaped in an up-to-date means by typing on a keyboard . The rationality of forming a contract using writing is a matter of discussion among lawyers. According to a legal researcher, writing is a binding instrument to show the contracting parties' consent to enter into an obligatory contract legitimately. It is, therefore, rightful to conclude a contract by writing either in contract inter or attendees contract inter absentees so long as it is agreed by both of the contracting parties. Yet, an opposite solicitors contemplate that writing is not valid as a tool between parties to exchange offer and acceptance and thus a contract cannot be validly shaped by writing except for some people who are speech-impaired and as such they cannot talk because of their disability. As for the later school of thought and in observance with mutual commercial practises, parties' covenant is naturally substituted in the formula of verbal expressions, and it is not commercially communal during the Prophet's period that writing was utilised to practise trades. Furthermore, there is no considerable rationalisation to move from verbal expression to writing for the purpose of exchanging parties' promise in inter absentees' contract, when the parties in such transactions can pose for an agent to form the deal with the other contracting party on behalf of the principal by verbal expression. Additionally, writing is at risk of counterfeit; consequently, it should not be considered as a legal method to explicit the parties' promise to practise a binding transaction. Nevertheless, it may be contended that though written contracts were not the main method to conclude contacts during the Prophet's era they shall not be decreed inacceptable. Mutual consent is the necessary requisite for acceptable dealings in Sharia doctrine and its accomplishment is not restricted in the law to particular verbal terminologies or formula. However, it can be reached by any method utilised in commercial trade. Besides, in terms of the prospective of counterfeit this can be confronted using a variety of means

and rules to protect its evidence. For such purpose, this analysis and discussion here is, fundamentally, about the legitimacy of the usage of writing to signify parties' promise in contract rather than its reliability . Similarly, Sharia authenticates the usage of writing to formulate all categories of dealings as a method to extent and urge people to Islam. Like this, by analogy, it should also be considered as a binding style to practise commerce. If writing was not used to arrange contacts throughout the Prophet's period it maybe because writing, by that time, was simply not typically utilised to form dealings instead of indicating it as inacceptable. Furthermore in Sharia, it has clarified elsewhere that mutual consent is necessitated to be swapped between the contracting parties without demanding definite formalities or particular formulas. Therefore, this is to be determined according to commercial traditions. In general, when writing is the traditional method to articulate contacts according to a particular commercial marketplace, it must constantly provide legitimacy. Thus, this determines that writing would be deemed as a binding method to swap the parties' promise to enter into an obligatory transaction, identical to verbal expression, as it undoubtedly signifies the parties' consent . Consequently, according to the above-mentioned opinions, Sharia admits that writing is an effective means to show the consent of the parties to formulate contracts. Moreover, the assertion of writing as inacceptable would lead to substantial obstacles and susceptible future progress, specifically in the arena of e-commerce. Likewise, this assertiveness can instigate severe disorder to the progress of electronic contract as a huge number of dealings performed on a day-to-day basis by writing could confront the danger of invalidation. Hence, this could lead to exclude the supporters of Sharia from attaining considerable advantage from e-commerce. Thus, this attitude of not deeming writing as a binding method to perform transactions appears to be unreliable with the essences and values of Sharia's doctrine that necessitates contemplation for community significance and the elimination of prospective damage to its people. Henceforth, this drives to the conclusion that writing is deemed a lawful instrument to conclude a contract under Sharia law. when writing in conventional or electronic systems is essentially the same, electronic writing must also be considered acceptable to practise electronic dealings. In light of the escalating using e-means of communication throughout the world everything other than acceptance of e-writing would have serious consequences on a state's capability to contract in online commercial action . Nevertheless, it is worth to note that a juristic interpretation affirming that for writing to be a lawful style to express the parties' promise in contract, it must be performed in a physical formula, i.e. papers. Therefore, writing on the surface of water or in air has no legitimate recognition. Consequently, according to this term, a contract shaped using e-writing

may not entirely satisfy this juristic requisite. In e-transactions, exchanging letters, via email or any other electronic devices i.e. telex, is performed using an electronic formula that might not be reflected as a physical shape. Accordingly, this term seems to postulate constraint to the usage of email, and other e-devices, to authentically formulate e-contacts by writing. Nevertheless, it could be contended in contradiction of the authority of this term since writing in air determines a denotation which is, undoubtedly, comprehended by the parties, it should be regarded acceptable to prompt the parties' assent in contract. As a crucial standard, the parties' consent may be articulated by any method so long as it is comprehended by the mentioned parties. Consequently, since it is traditional in a marketplace to use up-to-date technological devices to correspond by writing the promise of the parties to formulate a commercial transaction, this would bear legitimate perception in law. It is immaterial whether or not writing is performed in tangible or intangible formulas since the writing used can be read and comprehended by the parties. Likewise, this methodology is in harmony with the fundamental standard of 'technology-neutral', as it is widespread adequate to adapt future progress of new writing means. The basic requisite is the exchange of mutual consent between the contracting parties, and so, as a rule in Sharia doctrine, any writing form can meet this requisite so long as the parties' consent can be exchanged in a form coherent to both contracting parties .

.٢.٣ Expressing offer and acceptance by vocals and handover processes:Offer and acceptance may be also expressed via merchandise handover; i.e. the actual exchange which means that the offeree submits the sold to the offeror as an expression of his acceptance of the contract. Muslim scholars have differed about the adequacy of exchange as a means of offer. The first approach (Hanafi, Maliki and Hanbali) allows merchandise handover when denoting consent, and when the act fully reflects the offeror's willingness. In other words, as this method of selling was used historically for many generation and was not denied or rejected by anyone, therefore, it could be said there is consensus about its validity as evidence of acceptance. The second approach, followed by Shafi'i scholars, argues for the inadmissibility of exchange as a means of making an offer, alleging that such acts are not a clear way to denote will. As a Shafi'i jurist stated, 'consent is a hidden and unseen idea and the verdict must depend on a substantial cause such as wording, as such exchange is insufficient'. Furthermore, the ICC has accepted the expression of will by merchandise handover to denote consent. To sum up, it can be suggested that offer and acceptance may be issued by any means as long as it is admitted by custom, whether that is speaking, writing, signal, or merchandise handover. However, the question that arises is whether an agreement upon a particular tense to

issue the offer or acceptance? In this regard, the vocal expression is considered by Sharia and the ICC the key tool in expressing both the offer and the acceptance. In principle, any language (it can be a lay man or any foreign language) can be used as long as it illustrates the will to contract, and the words used for this purpose should be clear. In fact, the Islamic jurisprudence has paid considerable attention to the tenses that can be used in contracting. In terms of the past tense, it can be said that there is consensus amongst different schools about the permissibility of using this tense in expressing the offer. For example, if the buyer wishes to buy something and says 'alright, I bought it', through the lens of the custom, this formula has a decisive connotation in expressing the will of the contracting party, and accordingly, it shows that this will exceed the stage of thinking and bargaining . As for the use of the present tense, the basic principle is that it does not illustrate clearly the will of the offeror. The reason for this is that the present tense is likely used for both – present and future tenses Therefore, it would become necessary to exclude the future meaning of this tense and ascertain the present one. However, it is possible to express an offer using the present tense if indicating the present time. In other words, if there are (sufficient) evidence that supports the offer, which in total denotes the desire of the offeror to make the offer. As such, the offer and acceptance may be in the past and present tenses; the latter format is when the seller says: 'I am selling you this thing for such and such', and the buyer says, 'I am buying', and if this is accompanied with full intention, the contract is concluded. This is also confirmed by the Mejelle .

In terms of order and future tenses, there are two approaches. First, the Hanafi doctrine argues that such formulas are no longer valid as an offer because they imply a future event, even if such an offer is intended by the offeror. In other word, the question and order formulas imply a 'request of an offer' not an 'offer'. Furthermore, the future tense, which is associated with the word 'will' or 'going to', is clearer than the previous one to denote future. Although, according to one scholar, 'supplies resulted from a future, such as those linked (associated) with 'will'...shall not make an offer'. The reason behind this argument is that the future tense does not imply the connotation of creation, in fact, it is only a promise, and this promise, according to the Hanafi school, is not obligatory to fulfil. Therefore, Mejelle did not approve the validity of the promise of sale. Second, the other three schools (Shafi'i, Maliki, and Hanbali) do not distinguish between these formulas and the present tense in issuing the offer, as long as the formula used denotes the will to contract in an undoubted in the contractor's customs . In this regard, the ICC states that the 'offer and acceptance will be in the past tense, and may be in the present or order (future) forms where immediate performance is intended'. Article 78 mentions that 'future tense which has the meaning

of only a promise, will be considered binding where the same was the intention of the contracting parties'. Accordingly, it could be said that the Iraqi legal position is consistent with the Sharia law about the permissibility of the issuance of an offer in past and present tenses, and according to the ICC, the latter tense requires immediate performance. However, a difference between the Iraqi law and the Hanafi doctrine can be observed in the scenario of issuing an offer in the order formula. Since the Hanafi doctrine does not consider this formula as an acceptable form of offer, the Iraqi law permitted it subject to the condition that there should be other evidence that supports it. This position of the Iraqi law conforms with the other three Islamic schools. Additionally, another difference can be highlighted between the Iraqi law and Hanafi doctrine; that is if the offer is issued in the future tense. This scenario is not permissible in the Hanafi doctrine, but allowed in the Iraqi Code (Article 78) as a binding promise, of course, if the offeror intended so. As the former scenario, this position of the Iraqi law, in this situation, is compatible with the Shafi'i, Maliki, and Hanbali doctrines . The Iraqi Code was clearly influenced by the views of Sharia jurists on the above tenses.

This Article argues that identifying particular forms to express an offer may be inappropriate because the majority of scholars do not confine the formula to be in a specific tense, it can be in the present, past, or future tense. Therefore, an offer may be achieved by any form denoting an offeror's consent, bearing in mind the prevailing custom. Thus, it could be suggested that a reconsideration of Paragraph 2 of Article 77 of the ICC is necessary to assess whether it should be deleted from this law or not. In fact, Article 79 is sufficient in dealing with the expression formula because it is comprehensive in a way that allows some flexibility to include various forms of expressions to be considered as offers .

٣. Conclusion: New technologies in communications have accelerated daily transactions by concluding contracts instantly between persons spotted in different countries. Basically, to conclude a contract offer must match acceptance depending on parties' intentions. Intentions are naturally invisible unless unearthed explicitly by uttered verb tenses. Consequently, verb tenses have impacts on concluding contracts. However, contracting using past tense differs than using present or future tenses. According to Iraqi and Sharia laws, some tenses conclude the contract, others do not, while a third category is in-between. Therefore, such tenses were envisaged as criterions to measure the extent of parties' intentions or 'meeting of minds' to make a contract.

We highlighted this problem using a critical, analytical and comparative approach between Iraqi and Sharia laws to fill the gaps in the legal paradigm. As a result, we have compared these tenses and found that texts, words and even letters have significant roles in concluding contracts. Furthermore,

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