



Shariah Contracts : Tabarru` (Charity) Contracts

presented by

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Meaning of Tabarrua`t

- Tabarru' is derived from Arabic noun that means "donation, gift, and contribution".
- A person who makes a donation in the form of asset or benefit to other person now or in the future without any consideration with the intention to perform good deed and pious

1) *Ariyah/I`arah*

- Ariyah/I`arah is a contract where an owner puts another in possession of the usufruct of a particular property without consideration. The borrower of the property temporarily and gratuitously, owns the usufruct.
- This contract is encouraged and recommended as a form of permissible and charitable deed.
- The property is held on trust by the borrower who is therefore not liable for its destruction, loss, or diminution of value, unless caused intentionally or by his fault and negligence.

Essential Elements of Ariyyah

- Al-Mui`r (lender)
- Al- Musta`ir (borrower)
- Sighah (Contract)
- Musta`ar (object of Ariyah contract)

1) Contract of Ariyah/I`arah

(1) and (2) Lender and Borrower.

There are three necessary conditions of Lender and borrower.

- i. capable of taking responsibility. They must :
 - be of sound mind, i.e. not mad, not mentally retarded, nor children (aqil)
 - have reached the age of puberty (baligh), and

- ii. not prohibited from dealing with their property, i. e:
 - not declared bankrupts, or
 - not declared prodigals
- iii. no coercion is exerted on either of them

Note:

The essential elements and necessary conditions elaborated above are for lender and borrower who are individuals. For institutions, the applicable necessary conditions are the same following the legal practices of one's country. In addition, the individuals representing the institutions must possess all the listed necessary conditions.

3. Conditions of Object of Ariyah

- The property should be known and usable the substance of which is not consumed by its use.
- No condition is allowed which requires the return of any object other than the borrowed object.
- The borrower may lend the borrowed object to a 3rd party, but he must not hire it out or give it as a pledge or security.
- The borrower is entitled to make use of the loan without consideration or payment.

Aqad of Ariyah Contract

Contract has three conditions which are :

- i. The offer and acceptance must be **absolute** and **in definite** and **decisive** language.
 - It must ***not be conditional***
 - It must ***not be***:
 - to a certain time like a certain day or date, or
 - limited to a certain period of time like one year or ten years.
 - It must be in the present or past tense; it must not be in the future tense, imperative or with the words ***:agree to/ shall/ may/ will***
- ii. The acceptance must agree with the offer.
- iii. The offer and acceptance must be made at the one and the same meeting.

2) Hibah

Hibah - Giving one's wealth to others voluntarily without the expectation of any replacement or exchange with the transferring effect on the ownership during lifetime.

The different between Hibah, Sadaqah, Waqf, Wasiyyah and Hadiah.

- Hibah: Generic term, which include any donation whether to the poor or not, for the sake of reward in the hereafter (pahala) or not.
- Sadaqah: donation for the poor, for the sake of Allah`s reward in the hereafter (usually).
- Hadiah: a gift to a special person not for the sake of Allah but to get closer to the receiver (usually).

Hibah

- Hibah is not sadaqah (charity). The purpose of hibah is to show love to the receiver, whereas the purpose of charity is to seek Allah`s pleasure. Waqf is the transfer of the corpus of a valuable property to the ownership of Allah SWT with a declaration of dedicating its usufructs perpetually for religious, charitable or pious purposes as recognized by Syariah.
- Therefore, similar to charity, waqf the purpose is religious, charitable or pious as recognized by Syariah, though waqf is different from charity as in the case of charity the corpus of the gift may be consumed, but that cannot be done in waqf.

Hibah

Essential elements of Hibah

1. Aqidani (Parties to the contract)
2. Sighah (contract)
3. Mauhub (object of Hibah contract)

1 and 2 Aqidani (Donor and receiver)

- Donor
 - Owns the good
 - Capabilities to enter into contract
- Receiver
 - Capabilities to receive the object of Hibah contract
 - (the guardian to act on behalf of indiscriminating minor)

3. Object of Hibah contract

- Exist at the time of Hibah
- It must be halal according to Shariah
- Belong to the donor

4. Aqad of Hibah Contract

Contract has three conditions which are :

- i. The offer and acceptance must be **absolute** and **in definite** and **decisive** language.
 - It must ***not be conditional***
 - It must ***not be***:
 - to a certain time like a certain day or date, or
 - limited to a certain period of time like one year or ten years.
 - It must be in the present or past tense; it must not be in the future tense, imperative or with the words ***:agree to/ shall/ may/ will***
- ii. The acceptance must agree with the offer.
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The Application of Hibah Contract

- Hibah in Takaful (Tabarru` and Tabarru` Taawuni)
- Hibah in Ijarah

3) *Waqaf (Endowment)*

Waqf, in Arabic language, means hold, confinement or prohibition.

- The word waqf is used in Islam in the meaning of holding certain property and preserving it for the confined benefit of certain philanthropy and prohibiting any use or disposition of it outside that specific objective.
- This definition accords perpetuity to waqf, i.e., it applies to non-perishable property whose benefit can be extracted without consuming the property itself.
- Therefore waqf widely relates to land and buildings. However, there are waqf of books, agricultural machinery, cattle, shares and stocks and cash money.

Essential Element of Waqf

- Waqif
- Mauquf
- Mauquf Alaih
- Sighah

Essential elements of Waqaf

Waqf creation requires certain conditions, the most important among them are the following:

- 1 - The property must be a real estate or a thing which has some meaning of perpetuity. Muslim societies has waqf land, buildings, camels, cows, sheep, books, jewelry, swords and other weapons, agricultural tools, etc.
- 2 - The property should be given on a permanent basis.
- 3 - The waqf founder should be legally fit and apt to take such an action, i.e., a child, an insane or a person who does not own the property cannot make waqf.
- 4 - The purpose of the waqf must, in the ultimate analysis be an act of charity from both points of view of Shariah and of the founder. Hence waqf on the rich alone is not permissible because it is not charity.
- 5 - Finally, beneficiaries, person(s) or pur-pose(s), must be alive and legitimate. Waqf on the dead is not permissi-ble.

The Modern Application of Waqaf

- The permanent nature of waqf resulted in the accumulation of waqf properties all over the Muslim lands and the variety of its objectives provides support for widespread religious and philanthropic activities.
- The size of waqf and its objectives play important role in the sociopolitical life of Muslim societies and communities.
- Information extracted from the registers of awqaf in Istanbul, Jerusalem, Cairo and other cities indicates that lands of awqaf cover considerable proportion of total cultivated area.
- In the years 1812 and 1813 a survey of land in Egypt showed that waqf represents 600,000 feddan (=0.95 Acre) out of a total of 2.5 million feddan in Algeria the number of deeds of awqaf of the grand mosque in the capital Algiers was 543 in the year 1841 (Ajfan, p. 326); in Turkey about one third of land was awqaf (Armagan, p. 339);
- Cash Waqaf
- Takaful Model based on Waqaf

4) *Al- Rahn*

Ar-Rahn, or mortgage or collateral, is defined in the Islamic jurisprudence as “possessions offered as security for a debt so that the debt will be taken from it in case the debtor failed to pay back the due money.”

Ar-Rahn is a permissible contract in *Shari’ah*. It is known from the Sunnah that when the Prophet of Allah, Muhammad (SAW), passed away, his shield was with a Jewish man in Medina as a collateral.

Al-Rahn

Essential elements of al-Rahn

1. Aqidani
2. Dayn
3. Sighah
4. Al-Marhun

Among characteristics of Rahn/Pledge are:

- Is a binding contract to the al-rahin/debtor not murtahin/creditor
- Sale of mortgaged property is invalid
- Mortgaged property can be sold by court order to pay for the debt for which it is mortgaged. The balance if any, after payment of debt is to be returned to mortgagor.

Pledged Asset

- A pledged asset must be a valuable asset that can be lawfully owned and sold.
- It should be subject to identification by sign, name or description, and capable of being delivered to the creditor.
- Property held in common may be produced as a pledge provided the pledged percentage of it is specified, such as pledge of shares.
- It is permissible to grant more than one pledge on the same property, on the condition that the subsequent pledgee should be aware of the previous pledges, in which case such pledges would rank equally if all were registered on the same date. In this case, the recovery of their debts from the value of the pledge may take place on a *pro rate* basis. But if the pledges were registered at different dates, then their priority to recover the amount of their debts would be determined according to date of registration.

Pledged Asset

- In principle, the pledged asset should be in the possession of the creditor (possessory pledge).
- It is permissible that it be left in the possession of the debtor (security or registered pledge) and all the rules governing pledges remain applicable to such a pledge.
- It is also permissible that the pledged asset be retained in the possession of a trustworthy third party, known as '*adl*', and in this case the pledgor cannot discharge him as the holder of the pledge or recover the pledged asset from him before fulfillment of the debt.

UTILIZATION OF A PLEDGED ASSET

- It is permissible for the pledgor to use the pledged asset with the consent of the pledgee.
- However, the pledgee is not permitted to use the pledged asset at all, even if the pledgor has consented to this.

Bringing Forward Future Installments in Case of Default on Payment

- It is permissible to include a term in a debt contract to the effect that, if the debtor defaults on the payment of one or more installments, some or all of the future installments shall fall due immediately, provided the default was not caused by unforeseeable intervening events or force majeure.
- However, this term shall not be effective until the debtor has been served with a reminder notice and after a reasonable period of time has elapsed that shall not be less than two weeks.

5) KAFALAH

Kafalah literally means guarantee.

It is defined as a contract which combines one's zimmah (liability) with another person's zimmah. This is also known as dhaman.

Essential elements of Kafalah

- (i) Kafil (guarator)
- (ii) Makful lah (claimant)
- (iii) Makful 'anh (person guaranteed)
- (iv) Makful bih (obligation, debt)
- (v) Contract

NECESSARY CONDITION OF MAKFUL BIH/OBJECT OF CONTRACT

- Must be an established liability (fungible, non-fungible, a person, or an action) guaranteed by a debtor.
- Must be possible to collect from the guarantor, otherwise the contract would not be of any benefit.
- A guaranteed financial debt must be valid and binding liability. Such liabilities can only be dropped through repayment or exoneration.
- Must be Shariah compliance object of contract

Personal Guarantees

Legitimacy and types of personal guarantee

Personal guarantees are divided into two types.

- a) a guarantee where the guarantor has a right of recourse to the debtor. This guarantee is offered at the request or with the consent of the debtor.
- b) A non-recourse guarantee, which is offered voluntarily by a third party without the debtor's request or consent (voluntary guarantee).

Guarantee fee

- a) It is not permissible to take any remuneration whatsoever for providing a personal guarantee *per se*, or to pay commission for obtaining such a guarantee.
- b) The guarantor is, however, entitled to claim any expenses actually incurred during the period of a personal guarantee, and the institution is not obliged to inquire as to how the guarantee produced has been obtained by the customer .

Personal Guarantees

The effect of a personal guarantee

The creditor is entitled to claim the amount of his debt from either the debtor or the guarantor and he has the choice of claiming his right from either of them.

The guarantor is entitled to arrange the order of liability, for example, by stipulating (at the conclusion of the contract of guarantee) that the creditor shall first claim payment from the principal debtor and that the creditor is entitled to recourse to the guarantor for payment only if the principal debtor refuses to fulfill his obligation.

Guarantees and their Modern Applications

Letters of Guarantee

- It is not permissible to take remuneration for issuing a letter of guarantee, whether with cover or without cover, if the remuneration is intended as consideration for the guarantee per se, since the amount guaranteed and the duration of the guarantee are usually taken into consideration in computing remuneration.
- It is not permitted for the institution to issue a letter of guarantee in favour of an applicant who will use it to acquire an interest-based loan or to conclude a prohibited transaction.

Guarantees and their Modern Applications

Documentary Credits

- It is permissible for the institution to charge the actual expenses incurred in issuing documentary credits.
- It is permissible for the institution to charge fees for providing the required services, whether such a fee is in the form of a lump sum or a certain percentage of the credit amount, provided the duration of the credit is not considered in determining the commission.

Guarantees and their Modern Applications

Documentary Credits (cont.)

- In charging a fee for a documentary credit, the institution must take the following into consideration:
 - (a) The aspect of guarantee *per se* must not be taken into account when estimating the fees for a documentary credit. It is not permissible for an institution to charge an additional amount to the actual expenses incurred if it endorses a credit facility issued by another bank, because endorsing a credit facility is merely giving a guarantee.
 - (b) The issuance of credit facility should not involve *riba* or a transaction potentially involving *riba*.

Guarantees and their Modern Applications

7/3 Use of Cheques or Promissory Notes

- There is no Shari'a objection to obtaining cheques or promissory notes from the debtor as a means to force the debtor to make timely payment of installments in cash, whereby if the debtor pays on time such cheques or promissory notes shall be returned to him, and in the event of default on payment they may be produced for recovery.
- The party providing these cheques or promissory notes as security is entitled to obtain an undertaking from the institution that they will be used only for timely recovery of its due debts without any addition.

6) QARDH (HASAN)

Qard is the transfer of ownership in fungible wealth to a person on whom it is binding to return wealth similar to it.

Essential Elements of Qardul Hasan

- Muqridh (lender)
- Muqtaridh (borrower)
- Mal (loan)
- Contract

Necessary condition for Muqridh and Muqtaridh

- The muqridh/lender and Muqtarid/borrower must be capable of taking responsibility. They must : be of sound mind, i.e. not mad, not mentally retarded, nor children (aqil), have reached the age of majority (rasyeed)- as explained in detail in the sale contract
- should possess legal capacity to enter into contract.(no coercion is exerted on either of them.
- The principal should have the right to dispose of the asset.

Qardh

Rules for Excess Benefit Stipulated in the Qard Contract

- The stipulation of an excess for the lender in loan is prohibited, and it amounts to riba, whether the excess is in terms of **quality** or **quantity** or whether the excess is **a tangible thing** or **a benefit**, and whether the excess is **stipulated** at the time of the contract or while determining the period of delay for satisfaction or during the period of delay and, further, whether the stipulation is in writing or is part of customary practice.

Qardh

Rules for Excess Benefit Not Stipulated in the Qard Contract

- It is not permitted to the borrower to offer tangible property or extend a benefit to the lender during the period of the qard when this is done for the sake qard, unless the giving of such benefits is a practice continuing among the parties from a time prior to the contract of qard.
- An excess over qard is permitted in terms of quantity or quality, or the offering of tangible property or extending of a benefit, at the time of satisfaction when it is not stipulated or is part of custom, irrespective of the subject-matter of qard being cash or kind.

Service Charges for Qard

- It is permitted to a lending institution to charge for services rendered in loans equivalent to the actual amount directly spent on such services.

7) *Ibraa'*

Ibraa' is where a creditor lets go of his right to a debt.

Normally it is given for early settlement of debt. The most important characteristics of Ibraa' are:

- ii. The amount of Ibraa' must be known and specified, and when the Ibraa' is given and accepted it is forbidden and invalid for the party who gives to withdraw it.
- iii. Ibraa` on profit or principal?
- iv. Ibraa is tamlik or isqat (gift or waive)?
- v. Ibraa` is binding promise or non binding promise?

8) Hawalah

Hawala of debt is the transfer of debt from the transferor (Muheel) to the payer (Muhai Alaihi). The transfer of right, on the other hand, is a replacement of a creditor with another creditor.

Hawala is divided into restricted and unrestricted Hawala.

- Restricted Hawala is permissible. It is a transaction where the payer is restricted to settling the amount of the transferred debt from the amount of a financial or tangible asset that belongs to the transferor and is in the possession of the payer.
- Unrestricted Hawala is permissible. It is a kind of transfer-of debt in which the transferor is not a creditor to the payer and the payer undertakes to pay the amount of the debt owed by the transferor from his own funds and to have recourse afterwards to the transferor for settlement, provided that the transfer for payment was made on the order of the transferor.

THANK YOU

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