

THE CONTRACT OF JA'ALAH AND THE MODERN BANKING BUSINESS: JURISTIC ANALYSIS

Dr. Hafiz Ali Ismail

Assistant Professor, AIKOL, IIUM, Malaysia

Abstract

In the context of Islamic law of contract Ja'alah may be classified as a unilateral contract that entered into in the absolute discretion of a person. The scope of its practice, at the present time, particularly in the banking system is limited. Like other types of contracts Ja'alah has an essential requirement of formation that is the subject-matter. The contract's main features as discussed by jurists of various schools include valid performances which are not only capable of being subject-matter of the contract, but also are much relevant to the modern banking business. This discussion by the jurists had taken place long before the emergence of the modern banking. In this paper, an attempt has been made in such a way to identify all types of performances which are relevant to our modern banking business.

The Meaning and Nature of Ja'alah

In its literal meaning, *ja'alah* (rewarding) is the term for the consideration offered to a person in return for a performance¹. In the contract of *ja'alah*, the party, who undertakes to pay a reward, is called *ja'ail* or rewarder; whereas, the party, who is required to perform, is called *majaul lahu* or rewardee².

According to the Maliki school of thought, *ja'alah* is the undertaking to pay a reward in return for a utility or *Manfa'ah*. However, to Ibn Arafah, who is a Maliki jurist, *ju'al* or reward is a contract of exchange in which the reward is given in return for a certain performance, provided that the reward does not accrue from the subject-matter of the contract of *ja'alah*. Moreover, the reward will only be earned upon complete performance, whereas the partial performance gets nothing³.

The Maliki definition emphasizes the essence of *Ja'alah* the utility which may or may not occur, as the contract of *ja'alah* involves the element of uncertainty or *Gharar*. Although the definition is consistent with that of Ibn Arafah, he gives great emphasis to separation of reward from the subject-matter. As such, the consideration in *Ja'alah* shall not be given out of the subject-matter of *Ja'alah*, in the sense that it must be a separate consideration. In contrast to the opinion of Ibn Arafah, the majority of jurists maintain that the partial performance in *ja'alah* requires the payment of wage or *Ujr* which is normally the prevailing market rate. The partial performance may not entitle a person to the reward offered, otherwise the contract is considered invalid⁴.

Ja'alah according to the majority, is legitimate unilateral contract, its legitimacy rests in a

Qur'anic verse in which Allah (s.w.t.) says "They said: "We miss the great beaker of the king; For him who produce it, Is (the reward of) A camel load; I will be bound by it"⁵. The *hadith* has also been quoted to reinforce it. This occurred when companions passed on Arab village without being hosted. The head of the village had been poisoned and was in urgent need of treatment. The group initially declined to cure him unless a flock of goats to be the consideration. The head of the village was cured when one of the groups started reciting Qur'anic verses. Subsequently the Prophet (s.a.w.) asked about the legitimacy of taking a reward (the goats) in return for the deed. The Prophet (s.a.w.) approved the taking of the reward in return for the work⁶.

In addition, *ja'alah* is permissible so as to satisfy the needs of people wherever the required performance cannot be done without the making of such contract; or the rewarder has not been able to perform the act personally and there is no one to perform the act free of charge. There may be some types of performance which by their very nature are not capable of being the subject-matter under a contract of *Ijarah*, and may be performed on *Ja'alah* basis for the satisfaction of the people's needs⁷.

On the other hand, jurists of the Hanafi school of thought do not recognize *Ja'alah* on the ground that the contract involves element of uncertainty or *Gharar* in respect of its eventual objective, as well as the contract duration. However, they recognize that the payment of a reward on *Ja'alah* basis in return for recovery of a slave who escaped from his master. The reward for recovering the slave may be fixed in term of sum of money. The Hanafi school of thought seems to regard *Ja'alah* as synonymous to *Ijarah*. Thus any specified performance must be a valid subject-matter for *Ijarah* contract rather than *Ja'alah* ⁸.

As for the requirements of formation, *Ja'alah* is a reward offered by a party in means of words, or written means to the public or to specified or unspecified person or persons demonstrates on the express intention of the rewarder to contract on a *Ja'alah* basis for specified or unspecified performance. Where the offer has been made by the rewarder to a specific person, the contract would be concluded upon the acceptance of the other. In case the offer of reward has been made to unspecified persons the contract is considered entered into upon the commencement of the actual performance. As a general rule, formal acceptance of the rewarder is not an essential requirement for formation. It may be interesting to note that an offer may not always be made by the rewarder himself in the sense that the reward can be suggested by the other party. Thus, and to that effect, al-Zarkashi has pointed out that where the rewarder himself has taken the initiative to suggest a performance of specified act in return for a fixed reward, the contract is created and would take its legal implications if, the rewarder consented⁹.

The clearness of the words expressed by the rewarder in making the offer is highly significant in determining whether a permission is given to commence the performance or not. Where the act has been performed without the consent of the recipient of benefit, the party, who undertakes the performance, will not be entitled to the reward, and the performance in question will only be regarded as made voluntarily of charitable basis. The rule is also applicable where the rewarder requests in his own right the rewarder to perform the act but was performed by another without a valid right.

It is established that the party who undertakes the performance must have sound knowledge of the requirement. Mere performance of the act without prior knowledge may not entitle the

other party who performed the act to get a reward in return, though the permission is given.

10

The essence of *Ja'alah* is the performance of the act. Therefore, the unspecific acts that are not capable of being good subject-matters under the contract of *Ijarah* can be performances subject to the contract of *Ja'alah* so as to satisfy the people's needs. The jurists, however, have difference of opinion regarding the performances which are specific and accordingly capable of being subject-matters for *Ijarah*. The first view seems to have supported the specific performance to be a good subject-matter for *Ja'alah* contract as well, in the sense that the party is given the option either to enter into the contract of *Ijarah* or *Ja'alah*. The second view, however, maintains that the specific performance is only restricted to *Ijarah* contract. It would seem that the first view which supports the specific performance to be a subject-matter for *Ja'alah* contract is more flexible and may also be convenient to the parties as *Ja'alah*'s main principles are in some ways different from *Ijarah*, therefore the parties may find it more beneficial to them to enter into *Ja'alah* rather than any other contract.

Ja'alah, in civil law terms, would be the promise to the public to undertake the payment of a reward in return for specific performance. The person who undertakes the performance will be entitled to the reward where he has performed the required act without a prior knowledge of the reward. As such, where a promise has been made unknown to the performer the reward would be earned upon the actual performance¹¹. The promisor would be permitted to withdraw his promise by a subsequent offer made to the public to that effect, provided this does not affect the right of any person who has completed the required performance before the withdrawal. The contract of *Ja'alah* is also relevant to other types of performances in the commercial and marketing sectors and the sport games as well. In addition rewards are also offered in return for performances which are consistent with state and government policies in different fields of knowledge made for the purpose of encouragement.

It is generally understood by many that the contract of *Ja'alah* applies only to the traditional performances which were earlier elaborated by the jurists. However, a careful examination to the writings of the jurists from various schools of law reveals that the list of performances on the basis of *Ja'alah* is comprehensive and includes all the traditional performances, in addition to some other performances which are much similar and more relevant to our modern banking business, thus, it is appropriate to attempt identifying all these performances as discussed by the jurist even before the emergence of the modern banking system. Our discussion may also slightly toughs on the view of a contemporary scholar who has tried to relate the contract of *Ja'alah* to some banking business.

Attraction of Savings

Reference to the main principles of *Ja'alah* reveals that the safe keeping of property or *Wadi'ah* is capable of being a subject-matter for *Ja'alah* contract provided that the property must be specified as well as the safe keeping has to be for a certain period of time¹². This assumption is where the safe keeping of property is made essentially as the safeguard of any sort of transgression or destruction, to illustrate this if a person says to another safe keep my property in return for a reward, then it is permissible *Ja'alah* as noted by al-Ansari, the most important requirement is the specification of the property and the time limit for safe-keeping. However, the question which may arise here is whether the concept of banking deposits, which is normally made by the depositors for the safe-keeping of their money, can be a valid

performance on the basis of which a reward is deserved. Taking into consideration the legal maxim that maintains that the rule in contracts is the permissibility *Ibaha*, unless there is a presumption to indicate the contrary. In addition to the flexibility of *Ja'alah* as the contract, the bank may offer a reward for the purpose of attracting deposits on the legal basis of *Wadiyah*.

The justification may be that banking has become a huge industry necessary for any community in the world. Banks have to depend heavily on the customers' deposits in the first place in order to mobilize the funds and make such funds available to the money users or the investors. One of the most important money users for the customer funds is the government represented by the central bank. The government may normally receive the customer's funds in terms of borrowings. Therefore, in order to finance vital projects through indirect borrowings the banks and the government, as a matter of policy, may encourage the habit of saving at the individual level for the well being of the whole community. It is submitted, therefore, that encouraging the habit of savings among the customers by rewarding may be acceptable performance under the contract of *Ja'alah*.

In the view of a contemporary scholar, one of the main functions of banking is to act as an intermediary between the customers and the investors. The commercial bank, for instance, mobilizes funds and makes them available to investors who may be interested in receiving funds for their investments. The bank on its capacity as a financial intermediary may offer such service to its customers. The service rendered in term of arranging capitals from the depositors fund will be made on the basis of dormant partnership or *mudaraba*, accordingly the bank may be entitled to get a reward for the service rendered¹³. Thus the service rendered by the bank has been considered valid performance whereby the bank deserves a reward in return. The reward which the bank is entitled to take in return for the service may be justified on the light of the following two factors:

1. As the consideration for the work or the performance done in which the bank will be entitled to take a wage or *Ujr*.
2. In addition to the wage, the bank will be entitled to a reward as it shares the profit generated which belong to the capital supplier (the depositors), and for that purpose the depositors will be required to donate part of their shares in the profit in favor of the bank which undertakes the performance¹⁴.

Scholars continue to maintain that there are occasions in which the bank may be in need to attract more deposits from the public so as to make such deposits or funds available for investments. The attraction of deposits from the public may be made by means of making use of the contract of *Ja'alah*, in the sense that the depositor, who originally involves in dormant partnership *Mudaraba* as the capital supplier, will be entitled to a reward in addition to the ratio of sharing the profit generated which must be fixed in advance with certainty. As such, the concept of taking reward may be justified based on the authorization given to the bank as an intermediary in investing the capitals with the respective investors and that is deemed to be a valid performance under *Ja'alah*¹⁵.

It seems that the above idea is focused mainly on the deposits that had and received on the investment account which normally operates on the basis of *mudaraba*. However, banks also accept deposits from the customers who seek safe custody of their funds and absolute convenience in their use in form of current or saving accounts. The attraction of deposits in saving or current accounts in return for a reward may also be made on the basis of *Ja'alah*

contract.

Arrangement of Loans

In Islamic banking, most money lending can be done by making use of debt financing instruments which are basically sale contracts. Lending on loan basis is still allowed in Islamic law, but it has to be without interest or *Fa'aidah*. This type of lending is known as the benevolent loan or *Qard Hasan*. This contract is therefore more relevant in the social welfare sector of the economy, or where there is a social implication such as in dealing with government rather than in the private or commercial sector of the economy¹⁶. However, arrangement of loans in return for a fixed reward is proven to be valid performance under the contract of *Ja'alah*. The legal basis for such practice has been found in scattered statements made by prominent jurists. Ibn Qu'damah while elaborating the rules which govern the contract of loan, has pointed out that where a person has requested or instructed another to arrange specified amount of money, such as one hundred in return for ten, for him on loan basis from certain person in return for a reward to be given to the requested person, it is permissible *ja'alah*¹⁷.

To the same effect, al-Mawardi has maintained that where a person has requested another to arrange a loan for him from either specific or unspecific person it is a permissible *Ja'alah*. The view of al-Mawardi gives the requested person an absolute option regarding the loan arrangement whether from specific or unspecific person. al-Mawardi has also illustrated such practice in a manner similar to that maintained by Ibn Qu'damah¹⁸. Moreover, al-Mawardi has also confirmed that such practice is approved by al-Imam Ahmed.

Further views have been attributed to al-Rawyani, where a loan has been arranged in return for a consideration such as one hundred in return for ten it is a contract of *ja'alah*¹⁹. It would be interesting to note that the illustration given by the jurists is the same, as to the amount of the loan and the rate of the reward. As such the reward would amount to 10% out of the principal amount of the loan made. However, subject to the contract of *Ja'alah* and its terms and conditions, the reward rate could be more than that as long as its rate is dependent on how beneficial the performance is to the rewarder. Therefore, in *ja'alah* it is not necessary for the reward given to commensurate with the actual efforts undertaken in the performance. However, this requirement may be necessary for the contract of *Ijarah*. It may also be interesting to note that al-Bahwati, while discussing the various aspects of *Ja'alah*, has mentioned that the arrangement of loan in return for a reward is valid as the reward has nothing to do with the loan or *Qard* contract²⁰. Rather the reward is deserved by the rewarder for being good in contact and able enough in convincing the lender to pass the loan to another person.

Moreover, according to al-Ansari, the statements made by the jurists in relation to loan arrangement may be categorized under the contract of *ja'alah*. The person who moves the request may be regarded as borrower, in the sense that the loan would pass to his ownership. Hence he would be required to repay the equivalent of it to the lender at the time of settlement. In reviewing the practice, al-Ansari maintained that such practice has a relation with agency *Wakalah*²¹. Indeed, the element of agency is involved in arrangement of loan. However the reward given was not only in return for playing the role of an agent on behalf of

the borrower, but essentially for the efforts made out in looking for fund and this is the essence of the loan arrangement. Assume the borrower was able to contact the lender directly and borrow the money there would be no need for an intermediary to arrange the loan. The rewarder in arranging the loan would be required to act as an agent in adding the loan to the name of the lender inasmuch as the contract of loan would not be valid unless the agent has added the principal amount borrowed to the ownership of the loan grantor. To sum up, it would be erroneous to consider the reward given in return for acting as an agent only, the reward is given originally in return for all the efforts undertaken to locating the fund as well as passing the loan to the rewarder.

It is submitted that the statements made by jurists in respect of arrangement of loans predicates that the money is to be owned by a third party in the first place. Their statements will not in any way amount to *Riba* which is strictly prohibited, where the loan has been made from any fund belonging to a third party. To my mind, bringing such practice in commercial banking needs complete separation between shareholders fund and the depositors fund, in addition to some amendments relating to the underlying legal basis for the money had and received in the depositors fund and this will be highlighted in a separate paper.

Debt Collection

Banking commercial instruments may mainly include bills of exchange and cheques. The bill can be defined as unconditional order in writing addressed by one person to another, signed by the person giving it requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of a specified person, or to the bearer. The cheque is a bill of exchange drawn on a banker payable on demand²². A commercial bank normally extends the service of debt collection to its customers in its capacity as an agent. Accordingly the bank may charge the customer a certain sum of money on the legal basis of *Ujr*. Imam Malik is reported to have said where a person requested another for collection of debt or *Qabd al-Dayn* from a third party in return for a part of it, is permissible *Ja'alah*. The view of Imam Malik was further supported by Ibn Rushd provided the reward is a portion of the debt itself. The time for deserving the reward, however, may either be at the time of contracting or after the commencement of actual collection of the debt²³.

Further views have also been expressed as to the collection of bills of exchange. It is reported that the bank will be entitled to a reward upon the actual collection of the bill of exchange. The collection of bills of exchange has been given the same legal basis of recovering the missing objects. And no doubt the recovery of missing objects is considered permissible performance under the contract of *Ja'alah* whereby a reward is earned²⁴.

Thus, wherever the bank has collected the amount of the bill of exchange on behalf of its customer, the bank would deserve a reward for the work done or the service rendered. The bank, however, would not be entitled to take any reward if it has not collected the amount. Although some others, have said that the bank would deserve a reward once the bank has made a claim on behalf of the customer and not necessarily the collection of the bill of exchange in itself²⁵.

Letter of Guarantee

One of the banking practices is to issuance of letters of guarantee or *Khitab al-Daman* in favor of a customer. Where a letter of guarantee has been legalized on the basis of guarantee or *Kafalah* injunctions, no wage or commission should be paid in return. This argument seems to be based on a norm laid down by the jurists whereby charging hire or commission in return for the issuance of a letter may be classified under the granting of loan which accrues benefit to the issuer, because the guarantor will be required to effect the payment where a claim to that effect has been made. However, another view has based the issuance of a letter of guarantee on the agency injunctions; hence, a bank will be allowed to ask for hire in return for the service rendered.

In line with charging a wage or *Ujr* in return for the issuance, the Association of Islamic Jurisprudence holds the view that the hire is legitimate where it has been taken as a consideration for the actual expense incurred and not as the consideration for the effect of payment regarding the claim made. Subject to *Ja'alah* contract, it has been claimed that taking a consideration in connection with a personal guarantee is a permissible reward on the basis of *Ja'alah*²⁶. However, one of the principles, which has been elaborated by the jurists in conjunction with the subject-matter of the contract is that whatever, is held capable to be a subject-matter for *Ijarah* can also be a subject-matter for *Ja'alah*. Accordingly the issuance of a letter of guarantee can also be a valid performance whereby the reward may be deserved.

Leasing Services

Leasing or *Ijarah* is defined as simply as transfer of property in usufruct for specified payment. It may also indicate the sale of usufruct which includes rendering of service. The modern banking finances businesses in terms of *Ijarah* after purchasing the assets with the view of subsequently leasing such assets to the customers at an agreed rental for fixed period of time²⁷. The specified subject-matter of *Ijarah*, in theory, is held to be a valid subject-matter for the contract of *Ja'alah* as well, in the sense that the parties have been given the option to elect which contract they intend to conclude.

The traditional performances, which were given by jurists, are those of construction, examples building of a wall, or a house etc. in addition to preparation of a thing such as sewing of clothes²⁸. The construction and preparatory performances may be extended to include industrial and manufacturing works. However, it must be taken into consideration that where work has been performed partly the rewardee deserves only the equivalent payment subject to the market price, provided the partial performance has achieved some benefit to the rewarder who undertakes to pay the reward for a complete performance.

Brokering businesses

According to a contemporary scholar, the *Ja'alah* contract includes also the works which are of brokering nature²⁹. The brokering business has been held to be permissible performance capable of being valid subject-matter of the contract. It is attributed to Imam Malik that whoever plays an intermediary role in respect of purchase and selling of goods in return for specified amount of money is entitled to a reward on *ja'alah* basis. For Imam Malik such practice cannot be categorized as *Ijarah*.

However, Ibn Sirrin and others are of the view that the broker who is acting as an intermediary in trade is entitled to get a payment in return for his efforts. Hence, the effort

undertaken by the broker is held to fall under the permissibility in general. Moreover the effort undertaken is considered similar to hiring a person to do specific work³⁰. And as mentioned earlier, the contract of *ja'alah* is capable of including all types of performances whether specific or unspecific. As such the effort undertaken by the broker may fall under the contract of *Ja'alah* rather than that of *Ijarah* by its very nature necessitate the performance to be specific and certain. Conversely, where the performance is not specific and certain, it can be valid subject-matter for the contract of *Ja'alah* which is flexible enough to cover all types of uncertain performances.

Requirement of Hardship

In connection to performance under the contract of *Ja'alah*, jurists have laid down a requirement stipulates that the performance must include hardship *Mashaqah* incurred by the rewarder³¹. Hardship, however, has been a subject of differences among the jurists, inasmuch as the hardship is always connected to the nature of the required performance. Some jurists, however, have demonstrated unlimited numbers of performances capable of being permissible subject-matter under contract of *Ja'alah*. The hardship may readily be conceivable in some of those performances, whereas in others it may hardly be established.

As a general rule, however, in establishing the degree of the hardship incurred, it is not necessary that the reward offered be in accordance with the degree of hardship incurred. As such, the reward can be surprising compared with the exact hardship incurred by the rewarder so long as it determined only by the rewarder on his absolute discretion. Conversely, where a complete performance is required in return for a reward, the rewarder would not be entitled to get the reward in case of failure at the last moment to complete the performance irrespective of the degree of the hardship incurred³². Thus, it is evident that the rewarder may lose his efforts, in addition to any expense incurred in connection with the performance. It would seem that the above mentioned requirements have been laid down by the jurists in order to justify the reward in return for performance.

On the other hand, jurists have established a rule whereby even an appointed rewarder will not be required to perform the act personally. Accordingly, the rewarder is permitted to authorize another to perform³³. Thus, where the rewarder has been given the right to transfer the performance to a third party based on the concept of agency *Wakalah*, the hardship would be transferred by the rewarder to another despite the fact that the reward would only be deserved by the rewarder. The transfer of the performance whether, wholly or partly would be valid provided that the rewarder has accepted such transfer. However, any transfer of performance must be based on reasonable grounds. Upon completion of the required performance, the rewarder would be entitled to the reward as a principal because the performance has been done by another in the capacity of agent only.

The Reward

The jurists have laid down a requirement in which the reward *ja'al* should be known and fixed in advance whether in the form of specified amount of money or otherwise. As mentioned before, the contract of *Ja'alah* has some of the main features of *Ijarah* contract. Therefore, it is a requirement that the reward must always take the form of money³⁴. The absence of the reward, however, may render the contract void. The contract is also held void where the reward involves any element which is strictly prohibited by Islamic law such as

lack of ability to deliver the reward or the reward has been given out of *ja'alah'* subject-matter.

In case where the rewarder has provided the necessary expense for the performance of the work, the reward has to be paid as a consideration for the work done. However, where the rewardee has undertaken to provide the materials, tools and any other essential expense in connection with the performance the rewardee is expected initially to make an estimation of all the operational costs with reference to the prices of the materials and tools, wages to be paid and the amount and arrangements that the rewardee has envisaged for receipt of his own fees and then declare a definite and fixed amount as a reward acceptable to him³⁵.

It may be appropriate to distinguish between wage or *Ujr*, reward or *Ja'al*, and Commission or *umulah*. As pointed out before, there is a distinction between the three. The wage which is the consideration of *Ijarah* should always commensurate with the level of the required performance. Hence, and most probably the amount of the wage may be estimated according to the market price. Normally, the reward *Ja'al* in the contract of *Ja'alah* can be more than the amount of the wage. The main characteristic regarding the *Ja'al* is that it is not subjected to the market price in any way. As such *Ja'al* can go much higher, and it cannot be controlled in amount unless by the rewarder himself, because the contract of *Ja'alah* in Islamic law was made lawful in order to satisfy the people's need. Therefore, its amount depends mainly on how and to what extent the performance is beneficial to the rewarder, and of course the rewarder is in a better position to decide on his own benefit and interest after making the necessary calculations according to the ordinary surrounding circumstances.

On the other hand, the commission or commitment fee *umulah* has been used as synonymous to wage or *Ujr*, Hence the commission would be legitimate where it has been given as the consideration for real service rendered. The criterion in deciding whether such commission is legitimate or not under Islamic law is whether the commission which normally takes the form of specified amount of money, is a consideration given in return for a work done, service rendered or effort made. If the answer positive then the commission will be legitimate, otherwise it is not. It should be noted, however, the term "service charge" in the context of banking practice may indicate the actual expense incurred in providing the service to its customer.

Expense of Reward

Reward or *ja'al* is originally given in return for performance of the act. The necessary expense needed for the performance is dependent on the nature of the performance required. Therefore, where a complete performance is required the rewardee may lose any expense incurred by him in order to facilitate such performance upon failure to complete the performance within specified period. Moreover, any failure in making the performance available is going to have the same legal effect.

The loss of the expense may normally occur in cases where there has been no direct link between the parties such as the reward offered to the public which by its very nature necessitates the rewardee to incur the normal expense needed for the required performance. As mentioned earlier, *Ja'alah* is flexible contract, in the sense that the finance of a certain work or project can be made by the rewardee himself. For instance the promise to reward any one of the public for translation of a book may require the expense to be borne entirely by the rewardee.

Therefore, the rewardee will be required to provide all the materials such as paper, dictionaries, a computer and other equipment in order to translate the book. As such the reward offered is expected to cover all the expenses incurred, in addition to some specified amount over and above the expense incurred. Hence, in response to the offered reward the rewardee may calculate all the expenses to make sure that the reward is eventually profitable.

However, once the complete performance has been successfully done within the specified period of time, the reward will be due. In line with this type of performance where there is a condition whereby the reward will be given to the first one who completes the performance, the rest of rewardees may take the risk of losing any expense incurred. Furthermore, where the utilization is not satisfied unless upon the complete performance the rewardee may lose his efforts made, in addition to any other expense.

Reward as the rule necessitates the necessary expense to be incurred by the rewarder, for instance where the subject matter of *Ja'alah* is the construction or building of a house, the rewarder may provide all the necessary materials, equipments or tools to facilitate the performance. However, and as far as the contract of *ja'alah* is flexible in nature the necessary expense may also be borne by the rewardee based on the permissibility which is the general rule in contracts. Accordingly, the rule of creditor debtor relationship will be crucial in governing contractual obligations of the parties and as such the rewardee will be allowed to secure such debt.

Negotiability of Reward

The general rule is that the reward is binding upon completed performance, whereas the Maliki school of thought maintains that once an agreement is put into commencement, the reward is binding on the respective parties³⁶. The reward is negotiable in nature before the commencement of the performance, however, it becomes binding after the commencement of the performance, in the sense that the reward is no more negotiable between the parties. Another view, however, has extended the negotiability of the reward until before the completion of the performance³⁷.

In negotiating the reward it is immaterial whether the rewardee who undertakes the performance of the act accepts less than the reward offered, for instance where the rewarder offers \$1000.00 (reward) in return for specific performance, he will be bound to pay the specified amount even if the rewardee accepts the sum of \$ 500.00 in return for the performance. Thus, the reward always remains as pointed out by the rewarder mainly because the acceptance of rewardee is not a requirement for the contract formation.

The general rule in the contract of *Ja'alah* is that the reward should not be delivered to the rewardee who undertakes the performance unless upon the completion. There may be occasion, however, in which the reward may pass to the rewardee before the commencement of the performance or after the commencement but before the completion of the performance. The delivery of the reward although it is contrary to the practice, however, is held acceptable so long as it has done by the consent of the rewarder. Accordingly, the reward can pass to the rewardee on the basis of *al-Wadiah*. The rewardee, however, may also be permitted to utilize and make use of the *Wadiah* as the reward, but he will not be permitted to acquire any title to it. In case the reward has been destroyed on his hand, then he would be required to guarantee

the refund of the same.

According to Maliki school of thought, it is a requirement that the period of the contract must be made open, in the sense that no time limit is fixed for the contract³⁸. The above requirement seems to be a preventive measure against the occurrence of unfair dealing and also disputes between the contracting parties, as the fixing of a certain period as the contract limit may cause damage to the rewardee resulting in losing his efforts and expense. Others, however, are of the view that the determination of the contract limit must be in accordance with the very nature of the performance itself.

Legal Implications

According to the majority reward is classified as non-binding contract, in the sense that the parties have the right to rescind the contract before the completion of the performance. However, after completion, the parties would not be allowed to rescind the contract. On the other hand and according to the Maliki school of thought, reward has been considered a binding contract to the rewardee upon the commencement of the performance. The reward is due once the performance has been completed³⁹.

There has been considerable debate as to the effect of invalid reward. Most of the jurists are unanimous that the invalid form of reward necessitates the payment of an equivalent hire to the rewardee who undertakes the performance. The hire should be given according to the prevailing market price⁴⁰. Thus it is evident that since the contract of *Ja'alah* is held lawful for satisfaction of the people's need the reward will always be much higher than the amount of hire. The reward in arranging loans for instance, as has been illustrated by a number of jurists is 10% of the loan amount. However, as mentioned before the amount of reward can be much higher than the hire amount, and in fact it is difficult to draw a limit for the reward.

It is submitted, however, that the only factor, that we may depend on in order to draw certain limit to the reward, is the consent of the rewarder himself. The rewarder can make careful assessment of his needs and determine how beneficial the performance to him is. Thus, it would be erroneous after all to consider the wage or *Ujr* as synonymous to reward. The hire is always determined in accordance with the level of performance and subject to the prevailing market price. Therefore, offering a reward on the basis of contract of *Ja'alah* is always much higher than *Ujr*.

One of the issues not discussed by most of the jurists in connection with *Ja'alah* contract is the liability of the rewardee over any properties provided by the rewarder in order to facilitate the performance. However, al-Nawawi has maintained that the hand of the rewardee over the property provided to facilitate the performance is the hand of a trustee. Hence, the rewardee is not required to guarantee the property unless upon fault, negligence or transgression attributed to him. Moreover, al-Nawawi has continued to maintain that the rewardee can also claim any expense needed in connection with the performance where there has been a custom to that effect. This view, however, is made with respect of the normal expense necessary for the performance.

Ja'alah is a permissible contract for the parties to enter into. Therefore, any of the contracting parties enjoys the right to rescind the contract before the completion of the required performance. In all cases however, *Ja'alah* is a binding contract after the completion of the

required performance, accordingly the rewarder will not be allowed to rescind the contract any more⁴¹. It is submitted that since the subject matter of *Ja'alah* is the performance of an act in return for a reward, the Maliki view seems to be the reasonable because it prevent the occurrence of any damages to the parties and in particular to the party who undertakes the performance. The view is also helpful in stabilizing commercial dealings. Hence when the performance commences the contract become binding in nature and no party is allowed to rescind it unless upon the mutual consent of the parties.

Conclusion

The contract of *Ja'alah* is legitimate based on the Qur'an and the tradition of the Prophet (s.a.w.). The people may resort to such contract for satisfaction of their needs. *Ja'alah* signifies the consideration offered to a person in return for a performance which may be specified or unspecified. It is generally understood by many that the contract's subject-matter is only restricted to the traditional performances. However, the elaboration of the principles of *Ja'alah* by jurists reveals that there are other performances which are similar and much relevant to the modern banking business. The performances that related to banking business, as identified, include attraction of savings, arrangement of loans, debt collection, letter of guarantee, leasing services, and brokering businesses. In connection to performance under *Ja'alah* contract jurists have laid down a stipulation that the performance must include hardship incurred by the rewardee. It is also requirement that the reward must be fixed in advance with certainty, and only it can be earned upon the complete performance. Any expense needed to facilitate the performance can be incurred by the rewardee and the amount of the reward may remain negotiable until before the completion of performance. *Ja'alah* is classified as non-binding contract. Therefore, any party is permitted to revoke the contract at any time before the completion of performance.

References

1. Shams al-Din Mohamad al-Ansari, *Nihayat al Muhtaj ila Sharh al-Minhaj*, (Cairo: Maktabat al-Halabi, 1967), pp. 465.
2. Throughout the paper the writer is using the terms rewarder and rewardee to indicate the Ja'ail and Majaul lahu respectively.
3. Abd Allah Mohamad Ibn al-Maghrabi al-Hatab, *Mawahib al-Jalil* (Cairo: Dar al-Fikr, 1978), Vol. 5. p.452.
4. Ibid
5. Surah Yusuf, v.72.
6. See *Sahih Muslim* at 10/169

7. See al-Ansari at p. 465
8. Wahbah al-Zuhili, *Al-Fiqh al-Islami wa Adilatuhu* (Beirut: Dar al-Fikr, Beirut, 1989), Vol.4, p.784.
9. Yahyah ibn Sharaf al-Nawawi, *Rawdat al-Talibin* (Beirut: al-Maktab al-Islami, 1405 H) Vol. 4, p. 335
10. See al-Ansari at p.466
11. Civil Transactions Act of Sudan, Section, 137
12. See al-Ansari at p. 467.
13. Mohamad Baqir al-Sadr, *al-bank al-larabwi fi al-Islam* (Beirut: Dar al-Ta'aruf, 1983), p 41.
14. Ibid
15. Ibid
16. Islamic Banking Practice, *Bank Islam Malaysia Berhad, Kuala Lumpur, 1994*, p.21.
17. Muwaffaq al-Din Abdallah ibni Qudamah, *al-Mughni* (Cairo: Maktabat al-Kahirah, 1969), Vol, 4, p. 244.
18. Abi al-Hassan Ali ibni Mohamad al-Mawardi, *al-Hawi al-Kabir* (Beirut: Dar al-Fikr,1994), Vol, 5, p.212.
19. See al-Ansari at p. 481
20. al-Shikh Mansor ibni Yunus al-Bahwati, *Sharh Muntaha al-Iradat* (Cairo: Alam al-Kutub, 1996), Vol. 2, p 373.
21. See al-Ansari at p. 481.
22. D.P. Whiting, *Elements of Banking* (London: Macdonald & Evans Ltd. 1985), p. 78.
23. Mohamad al-Atabi al-Qurtubi, *Al-Bayan wa al_Tahsil* (Beirut: Dar al-gharb al-Islami, 1988), Vol 8, p.414.
24. See Baqir al-Sadr at p. 223.
25. Ibid
26. Ibid
27. See Islamic Banking Practice at p. 38.
28. Mansor ibni Yunus al-Bahwati, *Kashf al-Qina* (Beirut: Dar al-Fikr, 1982), Vol 4, p. 578
29. Mohamad Kamal Atiah, *Muhasabat al-Sharikat wa al-Massrif fi al-Nizam al-Islami* (Beirut: Dar al-Fikr1984), p.100.
30. Mustafa Abdallah al-Hamshari, *al-Amal al-Masrafiah wa al-Islam* (Beirut: al-Maktab al-Islami, (1983), p. 125

30. See al-Nawawi at p. 337
31. For more details see al-Ansari at p. 465.
33. Ibid
32. See al-Bahwati at p. 578.
33. Habib Shirazi, *Islamic Banking*, 1990, p.73.
36. See al-Hatab at p. 455.
37. See al-Nawawi at p. 340.
38. See al-zuhili at p. 788.
39. See al-Hatab at p. 455.
40. See al-Nawawi at p. 338
41. See al-Hatab at p. 455.