

## CONTRACT DOCUMENTATION UNDER ISLAMIC LAW: REDEFINING ITS ROLE

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### *Abstract*

Documentation is one of the least discussed methods of contract authentication under Islamic law, presumably due to the lesser degree of importance it was given as an instrument of evidence and perhaps even contract formation and conclusion. This is unfortunately evident in the scarcity of literature, especially modern literature, which addresses contract documentation, even though its importance is manifested in the revelation of Allah (s.w.t.) where documentation was made a requirement in the longest Verse of the Holy Qur'an. This lack of academic focus on matters of documentation, the writer believes, has played a vital role in the misuse of contractual documents for the benefit of traders and companies and to the exploitation of the public. Hence, the purpose of this article is to illustrate various features of contract documentation including the requirement, purpose and method of documentation, under Islamic law, in an attempt to redefine the role which written contractual documents play and the more pressing need for such a process nowadays, as compared to the early stages of its history and its usage in the early stages of Islam. Such discussion is hoped to assist in spreading awareness of the force which contractual documents have and the need for such an issue to be given due consideration.

### **Introduction**

During the early stages of Islam, written documents were either ignored or discouraged by legal theory that refused to accept them in court, where proof was limited to the oral testimony of witnesses. However, in practice, there was a widespread usage of written documents that consequently gave rise to a separate branch of legal literature devoted to a science of drafting documents that is best known as *'ilm al-shurut*. Such works were conducted with the aim of instructing professional notaries in drawing up sound instruments, and hence contained model documents for the notaries to follow.

Islamic law of contract came to stabilise commercial transactions and settle disputes arising therefrom due to the inability of the parties to remember the terms of the contracts or due to faulty terms included in the contracts by parties who are ignorant of the lawfulness of transactions or parts thereof. Islam as such places emphasis on contract documentation and writing, evidenced by the Verse of the Holy Qur'an where Allah (s.w.t.) revealed:

*O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties; let not the scribe refuse to write: as Allah has taught him, so let him write. Let him who incurs the liability dictate, but let him fear his Lord Allah, and not diminish aught of what he owes... Disdain not to reduce to*

*writing (your contract) for a future period, whether it be small or big; it is juster in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves...<sup>1</sup>*

Written documents mainly existed for private transactions. However, many transactions, private or otherwise, were not documented for the simple reason that documents were discouraged as legal proof. "Yet, private contracts of all kinds depended on written instruments, and from the earliest Islamic times they were used extensively."<sup>2</sup> Such usage of contractual documents, hence, had mainly been for the purpose of reminding the parties and the witnesses to the contracts of the terms and contents thereof. For the purposes of this discussion, nevertheless, the writer moves to argue that contractual documents representing Islamic contracts have nowadays become mere mechanisms by which suppliers of goods and services can legalise their exploitation of the public, through using such complicated language and structure in the contractual documents as to be beyond laymen's ability to comprehend or even act upon with full knowledge of the effects and consequences of their execution.

### **What Is Documentation?**

What is meant by documentation, for the purposes of this paper, is not the writing of the contract *per se*, as that falls within the permitted methods of contract formation, where parties are permitted to conduct the contract in writing. To that effect, it is stated in the *Mejelle* that "offer and acceptance may be made by writing as well as by word of mouth."<sup>3</sup> It is also stated in the literature about Islamic law of transactions that "a contract can be concluded in writing if the writing is clear, readable and understandable; and it does not have to be in standard Arabic necessarily, it can be in dialect or slang or in any other language. Contract can be concluded in writing even if the two parties were capable of speaking."<sup>4</sup> However, the documentation referred to here is one of the five methods of authentication of contracts under Islamic law, and these are authentication by way of testimony (*shahadah*), mortgage/security (*rahn*), suretyship (*kafalah*), assignment (transfer of debt-*hawalah*) and documentation (*kitabah*).<sup>5</sup>

### **A Brief History of Documentation**

Documentation is said to have been in existence since the time of Prophet Adam (*a.s.*) as had been narrated by Ahmad on the authority of Ibn 'Abbas as saying:

When the Verse of *al-Dayn* was revealed, the Prophet (saw) said: '... Adam asked: O Lord who is that, Allah said: he is your son Dawud, Adam asked:

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<sup>1</sup> Verse (2:282). See 'Abdullah Yusuf 'Ali (trans.), *The Holy Qur'an: Text, Translation and Commentary*, (Maryland: Amana Corporation, 1989).

<sup>2</sup> Jeanette A. Wakin, *The Function of Documents in Islamic Law: The Chapters on Sales from Tahawi's Kitab al-Shurut al-Kabir*, (New York: State University of New York Press, 1972), at p. 5.

<sup>3</sup> Article 173; see Hooper, C. A. (Trans.), *The Civil Law of Palestine and Trans-Jordan*, an English translation of the *Mejelle*, (Jerusalem: Azriel Printing Works, 1933).

<sup>4</sup> Ala' Eddin Kharofa, *Transactions in Islamic Law*, (Kuala Lumpur: A.S. Noordeen, 1997), at p. 16.

<sup>5</sup> Amin 'Abd al-Ma'bud Zaghlul, *Nazariyyat al-Tawthiq fi al-Shari'ah al-Islamiyyah*, (Kuwait: Mu'asasat Dar al-Kutub, 1989), at p. 11.

how old is he? Allah said: sixty years, Adam said: O Lord increase in his age, Allah said: No unless I increase for him from your age, and Adam's age was a thousand years, so Allah increased Dawud's age by forty years, ordered that to be documented and took the Angels as witnesses. When Adam was dying and the Angels came to him he said: I have forty years left of my age, then he was told: you have given them to Dawud. Adam said: I did not, so Allah exhibited the document and made the Angels testify.'<sup>6</sup>

Moreover, documentation existed at the time of the Prophet (*s.a.w.*) where a number of traditions indicate that the Prophet (*s.a.w.*) used to order documents to be drawn up when conducting transactions, among such traditions is where the Prophet (*s.a.w.*) ordered 'Ali to draw up a document in his name at Hudaibiyyah, another is where he (*s.a.w.*) bought a slave from a Companion (al-'Adda' Ibn Hawdah al-Hanafi) and drafted a written contract.<sup>7</sup> Thus, the practice of documenting contracts existed at the early stages of Islamic law and even way before the advent of Islam, as evident by the authorities mentioned above.

### **The Requirement of Documentation under Islamic Law**

Contract documentation under Islamic law is required by virtue of Verse 2:282 of the Holy *Qur'an*, which is said to apply mainly to two types of transactions, namely the contracts of sale with delayed payment and those payable immediately.<sup>8</sup> Yet the transactions that may be implied by the Verse may include other types of contracts in addition to those of sale, as many of the commentators on and interpreters of the Verse stated and used the term "transaction" in general, and thus any kind of transaction may be implied and not only those of sale.<sup>9</sup> In addition, the word '*dayn*' in the Verse above has been interpreted to mean: any transaction where one of the counter values is present while the other is deferred.<sup>10</sup> It has also been stated that: "The original Arabic word '*dayn*' covers every obligation, for each obligation accepted by one party towards the other is in the nature of debt from the obligee to the obligor. Hence the contract of debt implies all specific transactions including mortgage, purchase of things on credit and the agreement of work."<sup>11</sup> Having said that, the documentation referred to in the above Verse of the Holy *Qur'an* applies to contracts and debts in general, but the question that arises at this juncture is whether documentation of contracts is obligatory or not?

### **The Recommended Feature of Documentation under Islamic Law**

The majority of Muslim scholars state that contract documentation is recommended and not obligatory in nature, especially that the Verse in which the order for writing was revealed

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<sup>6</sup> See Hikmat Bashir Yasin (Ed.), *Marwiyyat al-Imam Ahmad Ibn Hanbal fi al-Tafsir*, Vol. 1, (Riyadh: Maktabat al-Mu'ayyad, 1994), at p. 245. See also Ibn Hanbal, *al-Musnad*, Vol. 4, 2270, at 128, and Mohammad Burhan Arbouna, *Islamic Law of Evidence: The Function of Official Documents in Evidence*, (Kuala Lumpur: Syarikat Nurulhas, 1999), at pp. 26-27.

<sup>7</sup> See Al-Sarakhsi, *Kitab al-Mabsut*, at 145, and Wakin, *The Function of Documents*, at 6.

<sup>8</sup> That is according to Tahawi, as emphasised by Jeanette A. Wakin, *The Function of Documents...*, at p. 29.

<sup>9</sup> See for instance *Tafsir Ibn Kathir (abridged)*, Vol. 2, (Riyadh: Maktabat Dar al-Salam, 2003), at p. 85. See also 'Abdullah Yusuf 'Ali (trans.), *The Holy Qur'an*, at 117, and Amin 'Abd al-Ma'bud Zaghulul, *Nazariyyat al-Tawthiq ...*, at 256.

<sup>10</sup> 'Abd al-Latif Muhammad 'Amir, "Al-Duyun wa Tawthiquha fi al-Fiqh al-Islami", in *Mawsu'at al-Qada' wa al-Fiqh li al-Duwal al-'Arabiyyah*, Vol. 379, (Cairo: Dar Murjan li al-Tiba'ah, 1991), at p. 9.

<sup>11</sup> 'Abd al-Qadir 'Udah, *Criminal Law of Islam*, translated by S. Zakir Aijaz, Vol. 1, (New Delhi: Kitab Bhavan, 2005), at p. 60.

contained the statement: "it is juster in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves." This statement, the scholars emphasise, show that writing is for the purpose of securing the transaction from future doubts and for being used in evidence, so if the parties feared not from such matters they are not obliged to write down the transaction.<sup>12</sup>

The Verse as stated above indicates three matters that are further supported by the practice of the Companions of the Prophet (saw), and these are:

- 1- That Allah (s.w.t.) permitted the absence of writing when the creditor trusts the debtor and feels secure about the transaction; this implies that writing and even witnessing are not obligatory.
- 2- The Companions and successors never were too strict about having to document transactions, so had documentation been obligatory they would have not left it.
- 3- Commercial transactions are largely carried out by people, thus have documentation been obligatory to secure the obligations of both parties that would cause great hardship on people.<sup>13</sup>

Some scholars, however, state that the Verse implied the obligatory nature of documentation, until the rule was later abrogated by the statement in Verse 2:283 which states: "... and if one of you deposits a thing on trust with another, let the trustee (faithfully) discharge his trust, and let him fear his Lord..." where the Verse is said to have the effect of recommendation and not obligation for the element of trust comes under consideration.<sup>14</sup>

Only a few jurists held the view that contract documentation is obligatory under Islamic law. These jurists included Ibn Hazm, where he stated that if any transaction had any of its parts based on deferred basis then that transaction must be put into writing. The basis of his view is that the statement in the Verse "...reduce them to writing..." has the effect of a direct order, and thus no one can say "I will not write," and similarly the statement in the same Verse "...and get two witnesses..." was also revealed as a direct order and thus no one can say "I will not bear witness" otherwise that would be disobedience of a direct order from Allah (s.w.t.).<sup>15</sup>

Obligatory or not, documentation of contracts have nowadays become a matter of practice with the increase in the usage of standard form contracts in daily life and for almost every transaction and activity a person has to carry out, this fact brings into attention the purpose which contractual documents have.

### **The Purpose of Documentation under Islamic Law**

A few benefits of documentation can be deduced from the Verse including the preservation of wealth, avoiding disputes as a document may serve as a reference for the parties to the contract, serving as a guide for the parties in knowing the validity of the contractual terms and conditions as the notary documenting the contract would direct their attention to such terms, and to avoid future confusion with regards to the terms of the contract, as if the contract had not been documented the parties as time passes might forget the terms such as

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<sup>12</sup> 'Abd al-Latif Muhammad 'Amir, "Al-Duyun wa Tawthiquha..." at 131.

<sup>13</sup> Amin 'Abd al-Ma'bud Zaghlul, *Nazariyyat al-Tawthiq fi al-Shari'ah al-Islamiyyah*, (Kuwait: Mu'assasat Dar al-Kutub, 1989), at p. 258.

<sup>14</sup> These were the views of al-Hasan, al-Sha'bi and al-Hakam Ibn 'Utaybah. See *ibid*, and Abi Hafs al-Hanbali, *Al-Labbab fi 'Ulum al-Kitab*, Vol. 4, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1998), at p. 480. See also *Tafsir Ibn Kathir (Abridged)*, Vol. 2, (Riyadh: Maktabat Dar al-Salam, 2003), at p. 86.

<sup>15</sup> 'Abd al-Latif Muhammad 'Amir, "Al-Duyun wa Tawthiquha..." at 132, and Amin 'Abd al-Ma'bud, *Nazariyyat al-Tawthiq*, at p. 259.

the cost price and the time and method of payment.<sup>16</sup> This general statement indicates that documentation is multi-purpose, serving at one point as a reminder for the parties of the terms of the contracts, and at another as a tool of evidence that can be used in the court of justice.

These purposes of documentation are particularly stated in the part of the Verse where Allah (..) revealed: "... it is juster in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves..." According to Ibn Kathir, this Verse means that:

Writing transactions that will be fulfilled at a later date is more just with Allah meaning better and more convenient in order to preserve the terms of the contract. Therefore, recording such agreements helps the witnesses, when they see their handwriting – or signatures – later on and thus remember what they witnessed, for it is possible that the witnesses might forget what they witnessed... This helps repel any doubt. Since if you need to refer to the contract that you wrote and the doubt will end.<sup>17</sup>

Accordingly, there are three major purposes of documentation, the first of which is achieving justice; the second is the suitability of written documents to be used in evidence, and the third is that written documents serve as a reminder for the parties to the contract of its terms, and thus prevent doubts as to the contents and terms of the contract. Hence, parties to a contract can benefit from its documentation in different ways, namely, seeking the gratification of Allah (*s.w.t.*), achieving a worldly benefit in allowing a form of evidence to be available for the parties, and preventing harm to one's self and to others by reminding them of the actual facts and characteristics of the transaction.<sup>18</sup> These benefits and purposes can be said to be of a more theological perspective; yet, other purposes exist that can be said to be of a more legalistic perspective. It is said that "since the purpose of a document in the case of a debt (as literally understood by the Verse)<sup>19</sup> is to eliminate distrust and forgetfulness, then a document ought to be drawn up for all contracts of sale for the same reason," and the general purpose as such would be "to keep conflicts between the parties at a minimum."<sup>20</sup>

The legal effects of documents are such that they are a written record of the terms of a concluded contract, and thus they are considered to be declarative instruments.<sup>21</sup> Such characterisation is supported by the view that documents are not constitutive instruments as they in themselves do not give rise to any legal obligations, as the transaction has already been completed. This is of course with particular reference to model documents that have been pre-written and where the parties only have to fill in the so-called "blank spaces" and endorse the documents by putting their signatures at the end. Furthermore, documents serve as a record of certain clauses such as guarantee clauses that may bind the parties in the future; something which, even if it would suffice to have witnesses to establish its proof, can only be emphasised and sustained with the presence of a written document.

Having said that it can only be derived that documents serve to establish the validity of any transaction. With the presence of a written document, the validity of the transaction or

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<sup>16</sup> Al-Sarakhsi, *Kitab al-Mabsut*, Vol. 30, Beirut: Dar al-Fikr li al-Tiba'ah wa al-Tawzi' wa al-Nashr, 2000, at 144.

<sup>17</sup> Safiur-Rahman al-Mubarakpuri *et al* (trans. & eds.), *Tafsir Ibn Kathir (Abridged)*, Vol. 2, (Lahore: Darussalam Publishers & Distributors, 2000), at p. 90.

<sup>18</sup> See Abi Hafs al-Hanbali, *Al-Labbab*, at 501.

<sup>19</sup> Brackets are the writer's own.

<sup>20</sup> Wakin, *The Function of Documents*, at 30.

<sup>21</sup> *Ibid.*

any of its terms cannot be contested by third parties or the parties themselves in terms of invalidity or irregularity. Moreover, documenting contracts allows for the *Shari'ah* to be followed in its details when conducting the transaction, as more care is taken while documenting any transaction than when the transaction takes place without documentation. Documentation also reduces the possibility of having conflicting testimonies on the part of witnesses if they were called upon in case of conflict.<sup>22</sup>

Another important purpose of documentation lies in the fact that most people do not know how to avoid a defective contract, especially that Islamic law of contracts requires many details to be very closely adhered to, details that ordinary people are usually not aware of, whereas a notary specialised in drafting contracts is capable of avoiding defective contracts and making sure that legal and *Shari'ah* issues are adhered to.<sup>23</sup>

Furthermore, certain details for various contracts differ from one legal or jurisprudential school to another as there is a diversity of views among the legal scholars on details of positive law, and it is necessary that any contract be valid according to all schools in order to avoid conflicting or unsatisfactory judgments should the parties to the contract stand before a judge who is more inclined to the views of one school than another. Drafting contracts can help avoid such diversity of views and their effects on the validity of the transaction especially if great care was taken while drafting the contracts. A notary faced with a contract that is subject to different views on certain details must know the differences of opinion as well as the techniques for making them harmless to the validity of the transaction, and must as well be able to prevent misinterpretation by judges who are ignorant or careless about such diversity of opinion.<sup>24</sup> Hence it is observed, with reference to the early method of contract documentation, that:

The notary had to draw up the contract in a way that avoided the inclusion of elements that were subjects of difference between the legal schools or that could be interpreted by a *qadi* as grounds for judging the contract to be invalid. Many formulae in the contracts were motivated by the need for precaution (*ihdiyat, taaarruz*) against such legal defects.<sup>25</sup>

#### **The Method of Documentation under Islamic Law**

For any document to be accepted as a written proof of any transaction, certain requirements must be present in the document itself as well as in the notary or legal practitioner who has written it, these conditions being inherent by virtue of Verse 2:282 where Allah (*s.w.t.*) revealed: "...Let a scribe write down faithfully as between the parties; let not the scribe refuse to write: as Allah has taught him, so let him write..." It can be deduced from the Verse that not any person can write a legal document, as the notary must satisfy certain conditions which are:<sup>26</sup>

- 1) That the notary does not reduce or increase the amount of the counter values in the contract, whether it be the subject matter or the price, *i.e.* he must be trustworthy.
- 2) That the notary does not prejudice any of the contracting parties by giving the other preferential treatment and reflect that in the document.
- 3) Justice: in the sense that what the notary writes be agreed upon by jurists in such a way that no judge can find a way to invalidate the document or misinterpret it.

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<sup>22</sup> Ibid, at 31.

<sup>23</sup> Al-Sarakhsi, *Kitab al-Mabsut*, at p. 144.

<sup>24</sup> Wakin, *The Function of Documents*, at pp. 32-37.

<sup>25</sup> Geoffrey Khan, *Arabic Legal and Administrative Documents...*, at p. 7.

<sup>26</sup> See Amin 'Abd al-Ma'bud, *Nazariyyat al-Tawthiq*, at p. 263, and Abi Hafs al-Hanbali, *Al-Labbab*, at p. 481. These conditions are not exclusive, other conditions may exist, but these can be directly inferred from the Verse referred to above.

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- 4) That the language used in writing the document be bare of generality so that no conflict would arise due to vagueness or haziness of the document or its clauses.
- 5) That the notary must have sufficient knowledge of the rules of the *Shari'ah* and those that regulate the transaction that he is documenting, and of the opinions of the different schools on the terms of the transaction so that he can avoid any adverse effects of the diversity of opinions on the validity of that transaction.

Once these conditions are fulfilled in any person, then he can be said to have written the document "faithfully as between the parties" as the Verse orders. Furthermore, the Verse dictates that even if the document was written by a knowledgeable notary it would still be lacking unless the party incurring the liability by virtue of the transaction dictates its terms as a way of recognition of what he is liable for and of its conditions.<sup>27</sup> That is unless that party was incapable of dictation for any reason then his guardian should be burdened with it,<sup>28</sup> while such dictation should be done with fear of Allah (*s.w.t.*) meaning that the dictating party be honest and not diminish what he is liable for, as Allah (*s.w.t.*) revealed: "...Let him who incurs the liability dictate, but let him fear his Lord Allah, and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian dictate faithfully..."

In general, there is no fixed rule regarding the method of documenting contracts in Islamic Law, yet there is a specific style of documentation as evident in the writings of early scholars, "for apart from particulars concerning the subject matter, there is not a great deal of difference among marriage contracts, agreements creating partnerships, claims for debts, or deeds of sale."<sup>29</sup> It is noticed that the early scholars have written model contracts that could be followed by notaries for all kinds of transactions, where most if not all of these contracts share a common feature of formalism that has been described by Wakin as "the rigid structure and repetition of stereotyped phrases."<sup>30</sup> However, even though the style of documentation would seem similar in the writings of most scholars, but the divisions within the documents as well as the terminologies used vary considerably among scholars from different schools. Thus to define a specific style of documentation that have been used by early scholars would seem an impossible task.

Nowadays, nevertheless, it is noticed that standard form (pre-written/printed) contracts are being used in almost every transaction, using which the parties enter into the contract according to the terms and conditions stated therein, only having to fill in the blank spaces provided for them, and any additions or changes usually occur only if one of the parties has influence on the other party, either because of his social or economic power. In this regard, it has been stated that:

It is now very common for contracts to be made on standard terms prepared by one party and presented by him to the other. Usually such terms are set out in a printed form, which is either the contractual document or one to which reference is made at the time of contracting. Such terms are meant to govern a whole class of contracts, only the individual details being completed in each case. The practice has obvious advantages. It saves time; and, by creating a

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<sup>27</sup> Amin 'Abd al-Ma'bud, *Nazariyyat al-Tawthiq*, at 263, and Abi Hafis al-Hanbali, *Al-Labbab*, at p. 481.

<sup>28</sup> It is the view of the writer that the incapability of dictation includes the lack of knowledge about the essential elements of contracts and the rules of Islamic law applicable to them, and as such that is where the notary or legal practitioner steps in to take the role of the guardian of the incapable party for the special purpose of dictating the terms of the contract.

<sup>29</sup> Wakin, *The Function of Documents*, at p. 38.

<sup>30</sup> *Ibid.*

standard pattern of dealing, it enables parties to know, in general terms, what sort of risks they will probably have to bear, and to cover by insurance. On the other hand, the practice was also open to abuse, particularly where it was used by commercial suppliers of goods or services when contracting with private consumers. The supplier might put into the printed form a clause limiting or altogether excluding a liability to which he would otherwise be subject, either by virtue of a term implied by law or even irrespective of contract. The customer would often be in a weak position to resist the imposition of such exemption clauses. For one thing, he would generally not read the printed form; indeed, if he did so, its main purpose (of saving time) would be defeated.<sup>31</sup>

These issues which standard form contracts raise actually defeat the role which contract documentation is meant to play under Islamic Law, defeats its purpose, and lead to a sort of unfair dealings in commercial transactions, or in other words, injustice. It is obvious that the element of "dictation" that was present in the early documents does not exist any longer, or it is that the stronger party does the dictation and not necessarily the party incurring the liability. In addition, it could no longer be said that the scribe writing standard form contracts is doing so "*faithfully as between the parties...*," just as Islam orders, since such contractual documents include as many "legal" mechanisms as to almost completely exclude the stronger party (the party doing the dictation!) from any liability, making any transaction he enters into practically risk-free. In his commentary on this part of the Verse, 'Abdullah Yusuf 'Ali stated that:

The scribe in such matters assumes a fiduciary capacity: he should therefore remember to act as in the presence of Allah, with full justice to both parties. The art of writing he should look upon as a gift from Allah, and he should use it in His service. In an illiterate population the scribe's position is still more responsible.<sup>32</sup>

In the writer's view, illiteracy in the above commentary includes the lack of knowledge of the law or the pillars and conditions of contracts, and not only the ability to read and write. Such illiteracy is a feature of what legal practitioners term as "laymen", and since most people who engage in everyday activities and transactions using standard form contracts are laymen, the scribe should assume more responsibility in reflecting justice in the contractual documents. In fact, such practices of giving preferential treatment to suppliers of goods and services, as reflected in standard form contracts and exemption clauses inserted therein, defeat the principles of justice and fair play that are stressed upon in the Verse of the Holy *Qur'an* where Allah (S.W.T.) revealed: "*O ye who believe! Eat not your property among yourselves in vanities: But let there be amongst you traffic and trade by mutual good-will...*" (Verse 4:029).

Contract documentation, as such, could not be said to be a mere method for preserving contracts and providing evidence in cases of disputes, it is rather to be looked upon as a mechanism for achieving justice and enforcing honesty in daily transactions; to protect the weak and the poor rather than to allow them to be exploited by the strong and influential parties. "Mutual good-will" does not only mean the mutual consent of both parties

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<sup>31</sup> Liaquat Ali Khan Niazi, *Islamic Law of Contract*, (Lahore: Research Cell, Dyal Sing Trust Library, 1991), at pp. 74-75.

<sup>32</sup> See 'Abdullah Yusuf 'Ali (trans.), *The Holy Qur'an: Text, Translation and Commentary*, at p. 117.

to a contract, but also the equal bargaining power which contractual documents can ensure. A scribe is under a religious, moral as well as legal duty to ensure that such equal bargaining power exists, by explaining the contract and its contents to the parties, educating them about its terms and conditions and highlighting their rights and obligations under it. Although scribes writing standard form contracts may not have the opportunity to meet the parties to the contracts and explain their terms to them, but the duties of such scribes still have to be carried out, and that can be achieved by simplifying the wording and structure of contractual documents, thus enabling the parties who are less familiar with the law or the effects of the contracts to understand their rights and obligations. Scribes can, in great many different ways, embody the Islamic rules and conditions governing each transaction in the contractual documents, taking into account the views of the different schools of jurisprudence on each term and condition, thus limiting the possibility of the contracts being disputed due to one of the parties, or the judge hearing the dispute, being more inclined towards the views of one school or another.

Hence, proper documentation of contracts in accordance with the letter and spirit of the *Shari'ah* can in fact lessen the number of commercial disputes; help achieve economic prosperity by reducing exploitation of the public and ensuring a balanced circulation of wealth in the Muslim communities, aside from being a tool for reminding people of their rights and duties under various contracts. Thus documentation of contracts should be given due consideration and approached with diligence like any other professional activity or work, and even more imperatively.

### **Conclusion**

It is clear from the above discussion that documents that were written in the early periods of Islam played more or less the role of a reminder, while nowadays they have more evidential value, and generally speaking, it is difficult to believe that any contract would have a strong effect, if none at all, if it were not documented. Thus the need is more pressing for documents to be worded correctly, embodying every detail of the transaction and avoiding any flaw that is the result of carelessness or unawareness of the diversity of opinions on the validity of the transaction or any of its terms. Hence, any document should not only reflect the terms that the parties wish to stipulate to govern the transaction, but also the rules of the *Shari'ah* that give every single term the stamp of validity in addition to the laws by which both the parties and their transaction are governed. Only once these general guidelines are taken into consideration would the process of contract documentation be up to the expected standards of Islamic law.

Furthermore, what is striking nowadays is that contracts are being formed and documented using such terminology that is difficult, if not impossible, for laymen to understand. The writer believes that the main purpose of documents have been forgotten, that is to remind the parties to a contract of their contractual obligations, and documents have simply become instruments of evidence the language of which is only meant for legal practitioners to understand. It also seems that the assumption, when documenting contracts, have become that the contract would eventually be reviewed or examined by courts, and thus documents are worded in such a way as to enable the parties to use the document for evidence, while forgetting the value of the document as a reminder of the obligations of the parties while executing the contract, and as a reflection of their rights and liabilities thereunder. The writer is not attempting here to deprive the contractual documents of their evidentiary value, but is trying to stress on the fact that documents are, in the first place, for

the parties and should thus be written in such a way that is easy for laymen (who are usually the parties to everyday contracts) to understand.

To conclude, contract documentation should reflect the spirit of Islam, as well as the general Islamic principles that govern contracts and transactions, including the principles of justice, trustworthiness, honesty and good faith. To borrow the words of 'Abdullah Yusuf 'Ali:

Commercial morality is here taught on the highest plane and yet in the most practical manner, both as regards the bargains to be made, the evidence to be provided, the doubts to be avoided, and the duties and rights of scribes and witnesses. Probity even in worldly matters is to be, not a mere matter of convenience or policy, but a matter of conscience and religious duty. Even our every-day transactions are to be carried out as in the presence of Allah.<sup>33</sup>

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<sup>33</sup> 'Abdullah Yusuf 'Ali (trans.), *The Holy Qur'an: Text, Translation and Commentary*, at p. 118.