CHAPTER NINE

KHIYĀR AL-SHARȚ, RISK MANAGEMENT AND OPTIONS

The first Islamic alternative to conventional options advanced by modern Muslim jurists is khiyār al-shart or option of stipulation. Among those who have drawn an analogy between the two concepts and concluded that conventional options could be accommodated in Islamic law through khiyār al-shart are Kamālī,1 Youssouf Sulaimān,2 ʿAli Abd al-Qādir,3 Shahhāt al-Jundi,4 and Obaidullah.5 Meanwhile, some other scholars have made an analogy between the two concepts but concluded that there are no grounds for legalizing options by making an analogy to khiyār al-shart or option of stipulation. Yet, the theory of contract in Islamic law has discussed the notion of option within the framework of giving the contracting parties a right whether to confirm the contract or to cancel it within a determined period. Thus, around thirty-three different types of options with varying degrees of importance have been identified in Islamic law.6 However, of these various kind of options, the one that is potentially promising in designing new financial instruments is khiyār al-shart or the option of stipulation and its variant or subdivision, namely khiyār al-naqd or the option of paying the price as an indicator of the confirmation of the contract.

Although the possibility of designing new instruments as an alternative to the conventional options has been addressed to some extent by

1 Islamic Commercial Law: An Analysis of Futures and Options (unpublished Manuscript), Law Center International Islamic University.
some scholars before, the introduction of the option of paying the price or \textit{khiyār al-naqd} will add a new dimension to the possibility of risk management through the theory of \textit{khiyārāt} in Islamic law. Hence, we discuss the legal aspect of these contracts and the possibility of using them as an alternative to the conventional options.

\textit{Concept of Khiyār Al-Shart}

\textit{Khiyār al-shart} is an option in the nature of a condition stipulated in the contract whether to confirm the contract or to cancel it in a specific period.\footnote{Ibid., p. 194.} It provides a right to either of the parties, or both or even to a third party to confirm or to cancel the contract within a stipulated period of time.\footnote{\textit{ʿAbd al-Rahmān al-Jizārī, \textit{al-Fiqh ʿalā al-Madhāhib al-ʿArbāʿ}, Dār al-Rayyān li al-Turāth, Cairo, n.d., vol. 3, p. 155.}

The basic validity of \textit{khiyār al-shart} is proven by the authority of a \textit{ḥadith} in which it is reported that Ḥībān Ibn Munqīdhd complained to the Prophet that he was the victim of frequent cheating in sale. The Prophet responded, “When you concluded a sale, you may say there must be no fraud and you reserve for yourself an option lasting for three days”\footnote{\textit{Sahīh Al-Bukhārī} with \textit{Fath al- Bàrī}, vol. 4, p. 337; \textit{Sahīh Muslim} with \textit{Sharh} al-Nawawī, vol. 10, p. 177.}. It is also asserted by the \textit{ḥadith} of ʿAbd Allāh Ibn ʿUmar to the effect that “the parties to a contract of sale have a right of option as long as they are not separated except in a sale that is subject to option”.\footnote{\textit{Sahīh Al-Bukhārī} with \textit{Fath al- Bàrī}, vol. 4, p. 326.} Another general \textit{ḥadith} is also cited in this regard. “Muslims are bound by their stipulation unless it be a stipulation which declares unlawful what is lawful or permits what is unlawful”. Besides the above \textit{ḥadiths}, some scholars have even reported \textit{ijmāʿ} as a proof of the validity of \textit{khiyār al-shart}. Al-Nawawī, for instance, said in this regard “The strongest basis for \textit{khiyār al-shart} is \textit{ijmāʿ} . . . and it is enough”.\footnote{Al-Nawawī, \textit{al-Majmūʿ Sharḥ al-Muhazzab}, vol. 9, p. 225.} A similar statement has been recorded by Ibn al-Humām.\footnote{Ibn al-Humām, \textit{Fath al-Qādir}, vol. 5, p. 111.}

However, Ibn Rushd has reported the disagreement of al-Thawrī, Ibn Shubrumah and some of the Zūhirī school especially Ibn Ḥāzm who has advanced several arguments to back his claim. However, one