

An Analysis of Consensus Ad Idem: The Malaysian Contract Law and Shari'ah Perspective

Nik Ahmad Kamal Nik Mahmud^{1*}, Ida Madieha Abdul Ghani Azmi¹, Engku Rabiah Adawiah Engku Ali², Wan Abdul Fattah Wan Ismail³, Mahyuddin Daud¹ and Mohammad Deen Mohd Napiah¹

¹Ahmad Ibrahim Kulliyah of Law, International Islamic University Malaysia (IIUM), 50300 Kuala Lumpur, Malaysia

²Institute of Islamic Banking and Finance (IIBF), International Islamic University Malaysia (IIUM), 50300 Kuala Lumpur, Malaysia

³Faculty of Syariah and Law, Universiti Islam Malaysia (USIM), 71800 Nilai, Negeri Sembilan, Malaysia

ABSTRACT

Consensus ad idem (meeting of the mind), is a common law doctrine that requires all parties to the contract to understand and accept the commitments and terms outlined in the agreement. Under the Contracts Act 1950 coercion, undue influence, fraud, misrepresentation and mistake vitiate consent. Equally, under the Shariah, consent or *redha* constitutes the primary element of a contract. A contract entered into without the consent of contracting parties is either void or can be invalidated; depending on the extent of which such consent is vitiated. This paper discusses factors that vitiate consent under the Contract Act 1950 and compare them with the Shari'ah principles. The objective of this article is to identify whether there is a divergence regarding the understanding of the concept of consensus ad-idem under the Malaysian law and the Shari'ah with the intention of identifying the degree of harmony between the two. Analysis was based on secondary data, namely contract law doctrines, statues and comparing different schools of thoughts in defining Shari'ah principles related to this issue.

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E-mail addresses:

nahmad@iium.edu.my (Nik Ahmad Kamal Nik Mahmud)

imadieha@iium.edu.my (Ida Madieha Abdul Ghani Azmi)

rabiah@iium.edu.my (Engku Rabiah Adawiah Engku Ali)

wanfattah@usim.edu.my (Wan Abdul Fattah Wan Ismail)

mahyuddin@iium.edu.my (Mahyuddin Daud)

mdeen@iium.edu.my (Mohammad Deen Mohd Napiah)

* Corresponding author

INTRODUCTION

Consensus ad idem, is a concept that requires contracting parties to have a common intention to enter into binding commitments which are manifested through the expression of offer and acceptance (Baharum, 1999). It

is important that the contracting parties must agree on the same issues in the same manner that their consent is deemed to be undivided and absolute (Razali, 2010, p. 17). Similarly, under the Malaysian contract law, the presence of consensus ad-idem determines the validity of contractual obligations. Under the Contracts Act 1950 (section 14), if a contract is entered into under the influence of certain factors, i.e. coercion, undue influence, fraud, misrepresentation and mistake, the initial consent is deemed to be vitiated.

This article begins with an explanation of the doctrine of consensus ad-idem as understood in Malaysian law before it continues with a deliberation of the corresponding concept of *redha* under Shari'ah. The article then continues with a deeper analysis of the vitiating factors both under the Malaysian law and Shari'ah. It also compares the two different concepts under the Malaysian law and Shari'ah before summarising and concluding the paper.

THE DOCTRINE OF CONSENSUS AD-IDEM

Consensus ad-idem as a concept has been incorporated into s13 of the Contracts Act 1950, which defines 'consent' as when two or more persons agree upon the same thing in the same sense. Before such codification, the concept has been elucidated through judicial pronouncements. In *Household Fire and Carriage Accident Insurance Co Ltd v. Grant* (1879) 4 Ex D 216, Lord Justice Thesiger noted that 'for a binding contract to exist, the minds of the parties should

be brought together at one and the same moment.' Similarly, in *Carlill v. Carbolic Smoke Ball Company* [1893] 1 QB 256, Bowen LJ said that an acceptance of an offer made ought to be notified to the person who makes the offer for the two minds to come together. The US Supreme Court in *Baltimore & Ohio R. Co., v. United States* 261 67 L. Ed. 816 (1923) correspondingly submitted that the founding basis of an agreement lies on a meeting of minds between the contracting parties.

From these judicial observations, the overwhelming conclusion is that without consensus ad-idem, a contract is deemed impaired and its validity prejudiced.

Consent under Shari'ah

The principle that an agreement must be based on mutual consent has been expressively stated in Surah An-nisa' verse 29, which states that Allah prohibits the taking of property belonging to another person wrongfully, and even in a business based on a contract.

The consent of contracting parties may be expressed through some form of *sighah* such as words, signs, and actions and in writing. In general, Muslim jurists agree *sighah* must be manifested in a verbal form. In the absence of that, *sighah* in the form of clear signs understood by both parties is equally acceptable. Imam Al-Khatib Al-Syarbini opines the expression of *sighah* through signs made by a dumb person is equal to verbal *sighah* in times of emergency (Al-Syarbini, 2:17). However, according to the majority of jurists, *sighah* expressed by

signs, is considered invalid for contracting parties who are not mute. The Maliki jurists, however, recognise the expression of sighthah through gestures, regardless of whether contracting parties are dumb or otherwise (Al-Mausuah, 1994, 30: 211).

With regards to sighthah through action, both Hanafi and Hambali jurists accept its validity (Al-Mua'thah, Al-Taa'thi or Al-Murawadhah; Al-Kasani, 5:134 & Fath Al-Qadir, 5: 177). A classic example is when a buyer gives money to the seller and in exchange, the seller hands over the goods. As trading money with goods is customarily made, especially for simple purchases, such a transaction is considered to be valid by 'urf' (Al-Zuhayli, 1885. 4: 99 & Al-Kibbi, 2002: 57). Shafie jurists however dissent by refusing to accept sighthah through actions as consent here is concealed and not shown explicitly through words (Al-Syarbini, 2: 3 & Al-Syiraziyy, 1: 257).

The most explicit is an expression of sighthah in writing, as reducing the contract into a piece of an agreement is encouraged in the Quran (Surah Al-Baqarah verse 282) that an agreement should be in writing.

Expressing sighthah in an online transaction has been provided for in the Shari'ah Standards of the Accounting and Auditing Organisation of Islamic Financial Institutions (AAOFI, 2010). Paragraph 5 of Shariah Standard No 38 provides that the "expression of offer and acceptance in online contracts can be in any form that indicated the consent of the two parties to conclude the contract". Similarly, Bank Negara Malaysia Shariah Standards and

Operational Requirements, in its Murabahah, Mudarabah, Musyarakah, Tawarruq and Istisna Standards (Bank Negara Malaysia [BNM], 2016), in paragraph 12.5 provides that "the murabahah contract shall be entered into through an offer and acceptance between the contracting parties". Paragraph 12.6 further provides the offer and acceptance may be expressed by appropriate documentation or by any other methods accepted by customary business practice (urftijari) which do not contravene Shariah principles.

From the foregoing, it would appear that both civil and Shariah law requires the existence of consensus ad-idem in any given contract. The discussion below will elucidate factors that may vitiate consent in a contract and render them to be inoperative.

ANALYSIS OF FACTORS VITIATING CONSENT UNDER CONTRACT LAW AND SHARIAH

A contract that is entered into freely may be binding, but if it is found that the initial consent has been impaired by certain factors, such contract may be revocable. These factors weaken the free choice of the parties, and in such instances, it could be said that the freedom of the contracting parties has been prejudiced. Under Contracts Act 1950, several factors have been identified to damage consent, such as coercion, undue influence, fraud, misrepresentation and mistake. This paper will analyse each factor, followed by its elaboration from the Shariah and civil law perspectives to point out their similarities and differences.

Coercion

Section 15 of the Contracts Act 1950 provides that coercion can occur in two ways. First, a party to the contract commits or attempts to commit any act forbidden in the Penal Code. Second, the party is unlawfully detained or has threatened to detain the property of the other with the intention of pressuring the latter to enter into an agreement. The effect of a contract tainted by coercion is voidable (Section 19). Since coercion under Section 15 merely recognises the above two instances of persuading somebody by using force or threats, it is submitted that there are many other forms of arm-twisting strategies not covered. For example, one may resort to the use of physical force to pressure the other to agree. Such force can be considered as an assault and hence, a crime under Section 351 of the Penal Code if that party commits the conduct fully intending to cause injury or hurt. This mental element or mensrea is what distinguishes between a criminal assault and tortious assault (Cheong, 2013, p. 219). For the threats to impair consent, it would have to be accompanied with the required mens rea.

Further, cases such as *Teck Guan Trading Sdn Bhd v. Hydrotek Engineering (S) Sdn Bhd & Ors* [1996] 4 MLJ 331; *Chin Nam Bee Development Sdn. Bhd. v. Tai Kim Choo* [1988] 2 MLJ 177; *Perlis Plantations Bhd v. Mohammad Abdullah Ang* [1988] 1 CLJ 670; and *Mohd. Fariq Subramaniam v. Naza Motor Trading Sdn. Bhd.* [1998] 6 MLJ 193, are examples which show the difficulty the courts face

in defining compulsion or intimidation that does not involve physical threat or threat to property. A clear example is in the context of 'economic duress' where parties are compelled to make decisions due to some pressing financial situations as illustrated in *Perlis Plantation and Mohd. Fariq*. In both these cases, the courts downplayed financial pressure as so compelling that it impaired the consent of the parties. In economic pressures, the parties can easily walk out of the transaction if he/she wants to and find another offer that is less damaging and more lucrative monetarily (Ayus, 2009).

Shari'ah Principles. According to Mu'jam Lughah Al-Fuqaha', ikrah can be defined as an act of forcing someone to do or abstain from doing something against his own free will (Qal'ajiy, 1988: 85; Al-Nasafi, 2: 307; Article 948 of Majallah Al-ahkam Al-Adliyyah; Ali Haidar, 9: 10). More specifically, Mustafa Al-Zarqa defines ikrah as an intimidating someone through physical injury, or threat to do or abstain from doing something (Al-Zarqa', 1998, p. 452).

Wahbah Al-Zuhayli holds the view that coercion happens when someone forces the other to do something against his free will, where such actions will not be performed in the absence of such coercion. Accordingly, Al-Sarakhsi asserts that the act of coercion impairs the free will of the contracting parties (Al-Zuhayli, 2003, p. 315). On that premise, an act of ikrah can be committed either through words or actions, whether the intention is to cause actual injury or anything that may lead to such harm.

In that respect, the scholars of Hanafi School further classify coercion into two types: total coercion (*mulji*) and partial coercion (*naqis*). Total coercion occurs when an act of intimidation or threat causes death or severe bodily injury to its victim with the view of pressuring the other to agree to a particular undertaking. On the other hand, a partial coercion occurs when the threat is not life threatening or causing serious bodily injury. In such an instance, if the victim tolerates the suffering and still has the right to choose, then the contract is voidable (Al-Kasani, 9: 4479; Al-Samarqandiyy, 3: 273 & Al-Taftazaniyy, 2: 196). However, majority of Muslim scholars do not differentiate between total and partial coercion when both have the same effect, either leading to murder, amputation of limbs, imprisonment, beating, etc. According to Al-Tajwa Al-Iklil, the line between the two types of coercion is where the act causes injury either through assault, hurt and others (Al-Mawaq, 4: 45). The effect of a contract entered into through coercion is that such conduct vitiates the initial consent and the affected party has a right to affirm or avoid the contract (Al-Taftazanyy, 2: 196).

Undue Influence

Section 16 of the Contracts Act 1950 provides that undue influence occurs when one party who is said to be a dominant position, uses it to take an unfair advantage over the other by forcing him/her to enter into a contractual undertaking. The essence of 'undue influence' is the existence of the 'dominant relationship' which is further

explained in Section 16(2) as:

- (a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other;
- (b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected because of age, illness, or mental or bodily distress;
- (c) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

The effect of an agreement tainted by undue influence is spelt out in Section 20 of the Contracts Act 1950 to be voidable at the option of the party whose consent was so caused. In interpreting section 20, the Malaysian courts have been strict in insisting that all the elements under such section to exist for it to be operative. Where parties cannot prove the existence of the dominant relationship or unfair advantage the claim of undue influence will not be made up, such as the case of *Polygram Records Sdn. Bhd. v. The Search* [1994] 3 MLJ 127. Where parties are in a 'fiduciary relationship' the possibility of dominance is presumed. The term 'fiduciary relationship' refers to a bond where a party hold the

highest duty of care and trust to the other (Mohd, 2000). The typical example is the fiduciary relationship between a trustee and beneficiary. In such a situation, one person places complete confidence in the other with regards to the particular transaction or affairs. It is his legal, ethical and moral duty to undertake his responsibility in the best interest of the other and not to gain personal advantage over the other.

In a UK case, *Barclays Bank plc v. O'Brien & Anor* [1993] 4 All ER 417, Lord Browne-Wilkinson further divided fiduciary relationship further into two, actual and presumed undue influence. The decision of *Barclays Bank plc* was endorsed in Malaysia through *Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff bin Shah Mohd & Ors* and other appeals [1996] 2 MLJ 26. In this case, although an organiser of an association is not considered strictly as falling under a fiduciary relationship with members of the association, he/she could easily influence the others and may have taken advantage of the close relationship to attain personal gains. The relationship where one can assume absolute trust and confidence in the other has been delineated through case law in the UK and Malaysia. In *Southern Bank Bhd v. Abdul Raof bin Rakinan* [2000] 4 MLJ 71 though a husband and wife relationship is not typically classified as a fiduciary relationship, the court nevertheless accepted the possibility of dominance. Further, in *Polygram Records Sdn. Bhd v. The Search* [1994] 3 MLJ 127, a band manager and singers under his care were not considered to be falling within a

relationship of 'fiduciary' that requires the highest duty of care.

The upshot of all these cases is that the Malaysian courts are cautious in arriving at a determination of 'undue influence' that could impair the validity of contractual transactions.

Shari'ah Principles. Sanhuri stresses the importance of two elements in a contract, i.e. freedom to choose (*hak al-khiyar*) and consent (*redha*) (Nabil, 1990, p. 108). The term '*redha*' here implies the necessity to perform an act with the feeling of ease, purity and good faith. The majority of scholars describe *redha* as an intention to do something without any force or compulsion (Ibn Majah, 2: 737 & Mawsu'ah, 30: 220).

According to Al-Zarqa', undue influence is categorised as *aib* or something that may impair consent (*redha*) or freedom of choice (*hak al-Khiyar*) (Al-Zarqa': 449). Al-Zuhayli posits that any defect in consent (*uyubar-ridha*) derived from unwillingness or incomplete intention to enter into a contract (Al-Zuhayli, 4: 212) and includes defects in will (*uyubar-ridha*) such as fraud (*tagrir/tadlis*), mistake (*Ghalat*), coercion (*ikrah*) and undue influence. On the other hand, some other jurists subsume the discussion of undue influence under the category of fraud or Al-Ghabn. The term Al-Ghabn refers to all situations where there is no disparity of power between the contracting parties. (Al-Asy'ari, 2015).

Article 97 of Majallah Al-Ahkam Al-Adliyyah further provides that any property that has been usurped through theft undue

influence or mistake must be returned to its original owner. The obligation to return the goods exists whether it is still in good shape or the in the possession of the influencer (Mejelle, 1967).

Fraud and Misrepresentation

Section 17 of the Contracts Act 1950 provides that the act of 'fraud' occurs when one party (or its agent) commits one of the following acts:

- (a) The suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
- (b) The active concealment of a fact by one having knowledge or belief of the fact;
- (c) A promise made without any intention of performing it;
- (d) Any other act fitted to deceive; and
- (e) Any such act or omission as the law specially declares to be fraudulent.

Section 17 in its Explanation explains further that the silence of a party from the disclosure of certain factual information does not render the act as an act of fraud. An obvious example of this is given in Illustration (a) where A sold an unsound horse in an auction. A does not disclose the fact that the horse is unsound and such is not considered in law as a fraud. An illustration of this principle can be seen in *Lau HeeTeah v. Hargill Engineering Sdn. Bhd. & Anor* [1980] 1 MLJ 185, where the owner of a vehicle rented it to another person without informing the buyer of two relevant information; i.e. of its manufacturing year

and that it has been involved in an accident. The Federal Court in its judgement observes that in law, there is no active duty on the seller to inform all the information about the vehicle to the buyer. The seller by keeping quiet about any defects in his product is not considered as committing fraud under Section 17 unless he is obligated to reveal the truth about such product. Illustration (b) provides further light to this, where Buyer B is the son of Seller A. In this situation, the father and son relationship imposes a duty on Seller A to reveal every single fact about the goods, even defects, to buyer B.

An exception to the general rule is when the party whose consent was so caused had the means of discovering the truth with ordinary diligence (Exception to section 19) This exception imposes a duty on the buyer or the offeree to examine the goods by himself or ask questions to seek the truth and not to only depend on the information given by the seller. This concept is known at common law as caveat emptor and is popularly defined as 'let the buyer beware'. The rule of caveat emptor contravenes the Shariah as the agreement is binding even though the seller is not telling the truth and thus, he or she escapes from any responsibility. In principle, it is the duty of the seller to reveal every single detail about the goods sold and not up to the buyer to check the quality of the goods before a purchase is made.

Shari'ah Principles. Wahbah Al-Zuhayli has discussed fraud and misrepresentation extensively under the topic "Ghabnma'a

Al-Taghrir”. ‘Ghabn’ literally means Al-Naqs (reduction) or the difference in sale and actual market price. Taghrir refers to the fraudulent act by one party either by words or through conduct with the intention to induce someone to enter into a contract (Al-Zarqa’: 463; Al-Zuhayli, 4: 221 & Al-Mausu’ah Al-Fiqhiyyah, 20: 148). Ghabn may be divided into two categories, namely ghabnyasiir (minor fraud) and ghabnfahisy (excessive fraud). A minor fraud occurs when the difference in price is not so excessive that it amounts to not more than 10% of its actual value. A minor fraud does not necessarily cause the contract to be void since the amount is negligible. However, the Hanafi scholars assert that in some instances, such as contracts entered into by a person nearing death (*marad al-maut*) or the transaction of properties of the orphans, despite the difference in price being minor, the transaction could be avoided to safeguard the interests of the deceased and the orphans.

Accordingly, ghabnfahish occurs when a transaction involves an unreasonably huge difference in price, or it involves different goods than what was initially agreed to by the parties. On this point, some indicators can be used such as (1) the difference in the sale price is more than one-half or 50%, (2) for livestock, the actual number of goods sold is more than 1/10th and (3) for immovable property, the difference of value constitute more than 1/5 from its market value (Al-Zuhayli, 4: 221 & Al-Mausu’ah Al-Fiqhiyyah, 31: 139).

Hanafi scholars are of the view that excessive fraud in a contract does not result in the invalidation of the contract unless the goods received was not up to the expectation of the buyer or the extent of the fraud was so vivid and clear. For example, when a developer of a house advertises the house as a two-storey building but it turns out to be only a single storey house. If such an event, the contract may be rescinded (Al-Durr Al-Mukhtar, 4: 166). Hambali scholars reiterate that excessive fraud in a contract render it to be voidable regardless of whether the fraud was clear or otherwise (Ibn Qudamah, 4: 212).

The Hanafi and Shafie scholars view excessive fraud affect the validity of the contract. Article 165 of Majallah Al-Ahkam Al-Adliyyah explains that an act of extreme fraud occurs when: (1) in the context of goods – if the fraud is more than one tenth; and (2) in the context of livestock – if the fraud is more than one-fifth or of a higher amount. Article 357 of Majallah Al-Ahkam Al-Adliyyah further highlights that if one party in a contract finds the other to have defrauded in an excessive manner, the victim may rescind the contract. The Maliki and Hambali scholars have the same opinion where a contract influenced by excessive fraud may be voidable especially in instances when the victim is less experienced in such transactions compared with the other party. (Khadduri & Liebesny, 2008, p. 193).

Hambali scholars further divide the act of excessive fraud into three:-

- (1) Talaqa Al-Rukban: when one blocks traders who are carrying goods to

be sold in the city in the middle of the journey in order to buy them at a lower price. This act is forbidden or haram and in such an instance, the seller is given the right to opt (khiyar) whether to affirm or avoid the contract based on the clear tenor of a hadith of Rasulullah (s.a.w) reported in Sahih Bukhari, which means to the effect: "You should not stop traders before they reach the market". This view is also supported by scholars from the Shafie School (Ibn Qudamah 4: 212, Syarbini, 2: 36 & Muhazzab, 1: 292).

- (2) Al-Najsyu: when A raises the price in an auction with no intention of buying but only to induce B to offer a higher price. According to a few Shafie and Hambali scholars, B is entitled to an option to rescind the contract (khiyar) if he was not aware that A's intention was only to deceive others (Ibn Abd Al-Bar Al-Qurthubi, 2: 739, Al-Mawardi, 5: 343, Al-Syabini, 2: 37 and Al-Hijawi 2: 91). On the other hand, some Shafie and Hanafi scholars perceive that such a person does not have the right to option (khiyar) and the contract remains valid (Ibn Qudamah 4: 212, Ibn Nujaim, 6: 107, Syarbini, 2: 37 & Muhazzab, 1: 291).
- (3) Al-Mustarsil: where A is ignorant about the value of an asset or goods but buys it solely based on trust

(Amanah) he places on B. After the purchase, A finds he had been g defrauded. In this instance, A has the right to option (khiyar), and he is free to either affirm or rescind the contract (Ibn Qudamah 4: 212).

Mistake

The effect of a contract tainted by a mistaken assumption by parties has been explained by Lord Atkin in *Bell v. Lever Bros Ltd* [1932] AC 161 to 'negate or in some cases to nullify consent'. However, the effect of bilateral mistake is void under section 21, but not voidable for unilateral mistake under section 23. On this point, Liatat is of the view that a mere unilateral mistake of fact by one party could not impair the validity of the transaction. The reason why the law treats unilateral mistake as being negligible is due to the principle of caveat emptor which has been developed in the common law and endorsed in the Contracts Act 1950 (Niazi, 1991, p. 106).

The difference between a unilateral and bilateral mistake highlights the importance of identifying how major the mistaken assumption is; either it is committed by both parties or only one party. In this regard, Sinnadurai (2004), asserts that the common law concepts derived from *Cundy v. Lindsay* (1878) 3 AC 459, *HL and Lewis v. Averay* [1972] 1 QB 198, CA to be applicable in Malaysia. In these cases, where a unilateral mistake is with regards to the identity of the person, this may be a major operative mistake while the mistake as to the attribute of a person may not be an operative one.

Shari'ah Principles. The Maliki scholars are of the view that a unilateral mistake may render the contract voidable (Al-Hattab, 1992). However, the majority of scholars' view that even in the case of unilateral mistake, the contract is considered to be void and the mistaken parties may avoid the contract. If the mistaken party affirms the contract, then he loses the right to avoid the contract in the future. In the opinion of the Muslim jurists, consent derived in this manner is defective since if the victims know that they will be cheated or defrauded, they will surely not agree to sign the contract (Rayner, 1991, p. 178).

The Securities Commission Shariah Advisory Council (2007) in its resolution stated that *ghalat* takes place when the assumption made by a buyer about what he wants turns out to be otherwise, and this assumption is the reason why the buyer carried out the sale and purchase '*aqd*'. In such a transaction, *ghalat* can affect the *aqd* and causes it to be annulled if it pertains to the type and feature of the traded object (Securities Commission, 2007). Type refers to the genus of the goods while feature refers to the quality of the goods. The example given by the Securities Commission is in the context of type of traded goods, in this case if it gold or gold-plated and feature refers to whether the good is of a famous brand or a common one.

CONCLUSION

Comparing the factors that vitiates consent under the Contracts Act 1950 and the juristic opinions of the Shari'ah pointed to

a substantial degree of harmony between them. However, the position relating to 'caveat emptor' could be revised to be fairer to the consumers. Buyers should not be allowed to get away from defective goods merely by keeping silent. Such a stand goes against the principle of justice in a commercial transaction. The emphasis on 'mutual consent' or *redha* must constitute the thesis of any commercial transaction. Its importance as the keepers of the free will of the contracting parties means that any activities that impair such mutual consent will prejudice the validity of the contract. Ultimately, the difference in the effect of such vitiating factors, either it is void or voidable may result in negligible consequence as long as the affecting parties are given the option to affirm or rescind the contract. At that instance, the parties are given a second chance to determine, with certainty, whether they indeed consented to the contractual undertaking or not, knowing the actual situation. It is indeed a true testimony of the concept of freedom of contracting parties, which is upheld by both the Contracts Act 1950 and the Shari'ah.

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