

CAVEAT EMPTOR VERSUS KHIYĀR AL-'AYB

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It is an obligation in any commercial (sale-purchase) transaction that prior to entering into an agreement, the seller is to allow the buyer to inspect the goods, in order to ensure that they are free from any unknown defect. Such an obligation on the seller is known in common law as *caveat emptor*.¹ The doctrine, in other words, gives the buyer a right to determine whether the goods to be purchased are free from any defect before the actual agreement is completed, so as to protect him from any future risk from a defective product. Thus, this doctrine implies that the buyer, after such inspection or investigation of the fitness of such goods, will shoulder the responsibility of any risk on the goods after the conclusion of the said sale and purchase agreement. *Jowitt's Dictionary of English Law* explains that a buyer must be on the alert, for he has no right to remain in ignorance of the fact that what he is buying belongs to someone other than the vendor and that any buyer who fails to investigate the vendor's title does so at his own risk.²

However, *caveat emptor* does not imply any obligation on the seller to point out a defect in the goods to be sold.³ He is, therefore, only obliged to allow the buyer or purchaser to investigate the goods himself and nothing more. The buyer, in this case, can decide before any sale and purchase agreement whether to carry out such an inspection on the goods to be sold. The buyer is then at liberty whether to exercise this means of protection against any defective goods.⁴ Islamic law also provides such a safeguard against any defective products or goods in a sale and purchase agreement. The Islamic doctrine which allows such safeguard is called in Islamic commercial terminology *khiyār al-'ayb*. Thus, under Islamic commercial law, the seller, in a sale and purchase agreement, is

under the obligation to allow the buyer to inspect or examine the fitness of the goods to be sold not only before the conclusion of the agreement but also after it. If there is any defect in the goods, regardless of whether this defect is discovered before or after the conclusion of the agreement, Islam grants the option (*khiyār*) to the buyer either to continue with the agreement or to rescind. Imam Nawawi defines *khiyār al-'ayb* in the following words:

A purchaser has a right of opinion on account of defects in the thing bought, of which he has become aware only after taking possession, but which existed previously.⁵

In consideration of the definition given by Imam Nawawi above, the right of option regarding whether to continue with the sale and purchase contract or not (after the inspection and investigation by the buyer of the fitness of the goods sold once the contract has been concluded) is clear, while the right of option before the agreement is vague. However, it can be implied that the Islamic doctrine, which allows the buyer the right to investigate the fitness of the goods sold (and thus giving him the right of option, after the conclusion of the agreement) also allows such rights of inspection and option to be exercised by the buyer before the contract is concluded. Hence, as I have already mentioned it earlier, the Islamic doctrine of *khiyār al-'ayb* ensures that the seller must give the buyer an opportunity to inspect the goods and the option whether to continue with the sale and purchase agreement or not, both before and after the conclusion of the said contract.

This article examines both how *caveat emptor* and *khiyār al-'ayb* protect the rights of purchasers in sales agreements and how these doctrines differ. The article proposes solutions to some of the problems that arise in commercial dealings.

***Caveat Emptor*: A Principal Scenario**

It is an obligation on the seller under the common law principles to allow the buyer to inspect the goods to be sold before entering into a sale and purchase contract. In other words, the buyer has a legal right to carry out any inspection or investigation on the goods to be sold in ensuring that the goods are fit and free from any hidden defect before concluding the agreement. Such right and obligation is embodied in the common law doctrine of *caveat emptor*, which found its origin in the early 17th century in the case of *Chandelor v Lupos*.⁶ In this case, it had been decided that the defendant, who was selling his store to the plaintiff, was not liable for the defect of that store as the plaintiff was at liberty to inspect the store so as to ensure that the store to be sold was, in fact, in accordance with the expected quality before the conclusion of the said agreement.⁷ The course, in this celebrated case, paved the way to the birth of

a common law doctrine called *caveat emptor*⁸ which gave the buyer the right to inspect the goods to be purchased to ensure that they are free from any hidden defect before entering into a binding sale and purchase agreement. Sir Josiah Child, in *A New Discourse on Trade*, made an observation in 1693 on the development process of this doctrine; he said that “no man can be cheated except it be with his own consent.”⁹ It implies that the buyer is not supposed to be cheated in a sale and purchase contract because the common law doctrine of *caveat emptor* has given him full liberty, before concluding the said contract, to ensure that the goods to be sold are free from any unknown defect and meet his expectations. Hence, if a defect is discovered in the goods only after the contract has been concluded (due to the buyer’s careless prepurchase investigation) the responsibility for that defect will be shouldered by the buyer himself. Cheshire has pointed out the importance of buyers inspecting goods carefully before proceeding to conclude the sale and purchase contracts as such right of inspection of goods before the actual contract exists under *caveat emptor*. The buyer, after being given this right, has no right to complain of any defect found in the goods after the sale and purchase contract has been concluded, because he should have used his own judgment in assessing the goods to be sold to him. Furthermore, the buyer should not have expected the seller to depreciate his own wares.¹⁰ In *Keates v Lord Cadogan*,¹¹ the plaintiff (tenant) brought an action against the defendant (landlord) for a defect found in the agreed house. The court, however, set aside the action in reliance of the doctrine of *caveat emptor* and held that the tenant was at liberty, before signing the contract, to inspect the house so as to ensure that it was free from any defects; should any defects be found after the conclusion of the sale and purchase agreement (due to the carelessness in which the inspection has been conducted earlier by the tenant), the tenant will shoulder such risks of the defects.¹²

The general principles which govern the doctrine of *caveat emptor* could be highlighted as follows:

(a) The seller is under an obligation to allow the buyer to inspect the goods so as to ensure that they are free from any defect before the conclusion of the sale and purchase contract;

(b) The seller is under no obligation to disclose to the buyer any existing defect in his goods and, hence, the seller has a right to remain silent;¹³

(c) The buyer has no right to return the goods or seek damages for any defect found in the goods after the conclusion of said sale and purchase agreement. This is because, as far as the doctrine of *caveat emptor* is concerned, the buyer has been given full right and liberty to inspect the goods before the agreement is concluded and any defect found after the

conclusion of the said agreement due to careless inspection on behalf of the buyer will not bind the seller in any manner;¹⁴ and

(d) The seller is also under no duty to inform the buyer of his mistake in his inspection of the quality of the goods to be sold.¹⁵

The exceptions to the general principles are as follows:

(a) The buyer, after the agreement, has the right to rescind the sale and purchase contract and return the goods purchased if the defect is purposely concealed by the seller before the agreement. Hence, the seller shoulders full responsibility for any fraud made purposely by him as regards to the quality of the goods to be sold. Lord Kenyon in *Mellish v Motteaux*¹⁶ opined that the seller is liable when he "had sold 'with all faults' a brig which turned out, on examination, to be utterly unseaworthy."¹⁷ Paley meanwhile observed that "it is dishonorable to sell anything without revealing any defect known (concealed purposely by) to the seller."¹⁸ A. G. Guest remarked that if a seller of the goods deliberately conceals any defect in the quality of the goods, the seller should be found guilty of misrepresentation.¹⁹ Such fraud or misrepresentation in concealing any defect of the goods to be sold by the seller could be done in various ways such as by artificial suggestions, words, and promises or by fraudulent acts or omissions such as active concealment of the defects.²⁰

(b) Even though the seller is not bound to inform the buyer of the actual defect of the goods to be sold, he may be under an obligation to do it if so requested by the buyer. If the seller fails to disclose the actual defect upon such a request, the seller may become liable for misrepresentation should the defect be discovered after the agreement.

(c) The seller is bound to disclose the defect of the goods which are represented by the seller intentionally if the seller thinks that the buyer has made a mistake as to the actual quality of the goods.²¹

(d) The seller is also under the duty to disclose the defect of the goods to the buyer before the sale and purchase agreement if the seller has a fiduciary relationship with him.²² Such relationships include the relationship between a solicitor and his client, a trustee and his *cestui que trust*, a spiritual adviser and his devotee, a doctor and his patient, a woman and her confidential managing agent, parents (or guardians) and their child, a creditor and a debtor,²³ and a fiancée and her fiancée,²⁴ but not a husband and his wife.²⁵

Caveat Emptor: Its Impact On the Following Aspects

Defective Products

It is undeniable that the birth of the *caveat emptor* doctrine in the early 17th century served as a starting point in protecting the rights and interests of society against defective goods and products. This is because the doctrine obliges the seller to allow the buyer, before the contract, to

inspect the goods to be sold, ensuring that the goods meet the buyer's expectations for consumption and are free from any unknown defect.

The nature and spirit of this doctrine spread out in the commercial field. Previously, the doctrine was applied in simple sale and purchase contracts that imposed on the seller the obligation to let the buyer inspect the goods to be sold so as to ensure that they were free from unknown defects. Now, we find the spirit of this doctrine being applied on a much bigger scale involving manufacturers and consumers. Hence, consumers have the right to reject the goods sold to them and rescind the contract based on the defect found in the products after the sale agreement, if the manufacturers purposely concealed these defects. The affected consumers may thus claim for damages.²⁶ The UK Law Commission even held that manufacturers or producers should, as a general rule, bear the risk of and be strictly liable for injuries caused by their defective products.²⁷ If, for instance, the buyer or consumer orders a specific quantity and quality of goods from the manufacturer, the manufacturer is under an obligation to prepare the goods exactly in accordance with the specifications ordered.

Therefore, once the goods are delivered the consumer or buyer has a right to inspect the goods so as to ensure that they fulfill the requested specifications and standards. If not, the consumer has the right to rescind the contract and claim damages.²⁸ Howard Abbott views that "a product should be regarded as defective if it does not comply with the standard of reasonable safety that a person is entitled to expect of it."²⁹

Consumer Protection

We have already seen how the doctrine of *caveat emptor* plays a role in protecting buyers and consumers against defective products. It may be summed up as follows:

(a) Prior to the sale and purchase agreement, the buyer has the right to inspect the goods in order to ensure that it is free from any unknown defect.³⁰

(b) In a sale and purchase agreement, if the seller purposely conceals any defect in the goods from the buyer, the buyer may, upon realizing the defect after the conclusion of the contract, rescind the contract and the seller may be found guilty of misrepresentation.³¹

(c) If the seller is requested by the buyer to disclose any defect of the goods to be sold prior to the conclusion of the sale and purchase agreement, the seller must do so. If he fails to give such disclosure, or deliberately gives any misinformation on the quality or quantity of the goods, the buyer may rescind the agreement upon realizing the defect of the goods after the conclusion of the contract.³²

(d) When the buyer has a fiduciary relationship with the seller, the seller (regardless of any request from the buyer to disclose any defect of the goods) is obligated to disclose any defects. Should he fail to do so, the

buyer has the right to return the goods and rescind the contract even if the goods were found to be defective after the conclusion of the contract.

Since the doctrine *caveat emptor* first gained its footing centuries ago, there have also been various laws and regulations enacted for the protection of consumers' legal rights and interests, including the buyer's right to inspect the goods so as to ensure that they fulfill certain expectations and are not defective. The United Kingdom has the Unfair Contract Terms Act of 1977 (at § 4, 5, 6, and 12),³³ and the Consumer Protection Act of 1961 and 1974, the Fair Trading Act of 1973.³⁴ In Malaysia § 17 and 18 of The Contract Act of 1950 protect the consumer (buyer) from being cheated by the seller by way of fraud or misrepresentation. The Sale of Goods Ordinance of 1957³⁵ (at § 15, 16, 17, and 41) also provides protection of the consumer in the following ways:

(a) If there is an agreement for the goods to be sold by description, or by a particular purpose of the buyer on the goods known to the seller or the goods agreed by sample, in all circumstances the goods should correspond accordingly;³⁶

(b) If there is a delivery of goods to the buyer which the buyer has not examined yet, the buyer has the right to examine them before a legal acceptance.³⁷

The introduction of the doctrine of *caveat emptor* has also propelled the emergence of other independent and social bodies around the world which are concerned with the protection of the consumer's rights and interests against defective products. In Malaysia, the Consumer Association of Penang (CAP) is a good example.

Insurance for Goods

Many insurance companies have recognized insurance policies aimed at protecting society from being harmed by defective products. There are mainly two types of policies: property insurance and liability insurance. Let us now look at the circumstances in which these policies are used:

(a) If the buyer fails to inspect the goods properly before the actual agreement despite being given ample opportunity to do so, he may not rescind the sale and purchase agreement or return the goods (if the goods are later found to be defective) because the delay of the recovery is the result of his own careless inspection, making the buyer, therefore, solely responsible for such a defect. However, if the buyer has already entered into a property insurance policy, such insurance policy may protect him from any losses caused by the defective products or goods purchased.

(b) In the case whereby the seller deliberately conceals any defects in the goods, or, despite a request by the buyer to do so, fails to disclose the defects of the goods, or, in a fiduciary relationship between the seller and the buyer, the seller fails to disclose the defects to the buyer prior to the sale and purchase agreement, the seller is guilty of fraud or misrepresentation and will be liable for such defects even if the defects are discov-

ered by the buyer after the contract has been concluded. However, if the seller holds a liability insurance policy, he could be protected from the loss over the said liability.

It is now common in the United States to use insurance policies to protect the buyer or the seller in the above two situations. In Malaysia and Third World countries, the practice of such coverage is rapidly growing.

Warranty of Goods

Another measure aimed at protecting the society from defective products appears in the form of warranty of goods. Such a warranty, which is extremely popular in the sale and purchase of any electrical goods, offers the consumer or buyer a warranty for a certain specified period, whereby, should there be any damage or defect to the goods purchased, these defective goods could be repaired. Among the main features in a warranty of goods are the following:

- (a) The seller has an option, not an obligation, to give a warranty for the goods sold;
- (b) A warranty does not imply any right of the purchaser to return the goods or rescind the contract despite whatever damage or defect it might have; it only implies the right of the purchaser to have the defective or damaged goods repaired by the seller or manufacturer;
- (c) In a warranty, the seller must be notified about the damage or defect within the agreed specified period.

A quick glance through the above main features of a warranty of goods will reveal that there are some differences between the way the doctrine of *caveat emptor* protects the buyer/consumer from defective goods or products and the approach adopted by a warranty. First of all, while the doctrine of *caveat emptor* is always available at common law to protect the buyer from defective goods once he enters into a sale and purchase agreement with the seller, the right of the buyer for a warranty of the goods purchased is not absolute but only conditional, depending on whether the seller wishes to provide it. Second, *caveat emptor* implies the right of the buyer to return the defective goods and rescind the contract of sale, while a warranty does not imply such rights but only the right of the buyer to have the defective goods repaired by the seller or manufacturer. Third, as far as the common law doctrine is concerned, such protection of the rights of the consumer or buyer is for a very long period, while a warranty protects the buyer for a shorter specified period.

However, there is an exception, as far as warranty is concerned. Hence, in an exceptional situation whereby the seller deliberately and purposely conceals a defect that is later discovered after the conclusion of the sale and purchase agreement, or when the seller has a fiduciary relationship with the buyer, the buyer has the right, regardless of the warranty, to rescind the agreement and return the defective goods to the seller.

Caveat Emptor: The Justification

No law or regulation is enacted and no principle is introduced unless there is ground for justification, and the common law doctrine of *caveat emptor* is no exception. As a whole, the doctrine is aimed at the protection of the rights and interests of the society against the problems faced as the result of the sale of defective products. Therefore, the grounds for justifying the application of the said doctrine could be summed up as follows:

(a) In a case whereby the buyer is not given a chance to inspect the goods to be purchased (in ensuring that they are free from any defect before the conclusion of the contract), and the buyer later discovers any defect on the goods that have been purchased, he will surely bring an action against the seller in order to return the defective goods and rescind the contract and claim innocence. Since (without the right of the buyer to inspect the goods before the contract is concluded), there is no proof of the buyer's claim, this situation could lead to a very complex conflict between the seller (who claims to be innocent) and the buyer (who, indeed, has suffered a loss by buying the defective goods).³⁸

(b) The common law doctrine will also eventually save both disputing parties from unnecessary excessive litigation costs³⁹ because it provides useful guidelines to expedite a settlement.

(c) The doctrine also acts as a useful reminder to the buyer to be more careful and responsible when buying goods.⁴⁰

(d) The doctrine of *caveat emptor* also acts as a useful reminder to the seller to act honestly and justly in selling its products or goods. As Paley puts it:

It is dishonorable to sell anything without revealing any defects known to the seller.⁴¹

Comment

In spite of the above grounds which have been put forward in justifying the application of the doctrine of *caveat emptor*, one aspect of it may still be criticized, i.e., the fact that the seller has the right to keep silent and not to disclose any existing defect in the goods to the buyer⁴² while giving the buyer full right to examine and inspect the property before the conclusion of the sale and purchase agreement. It might still be slightly unfair of the seller, because the buyer may negligently overlook any defect which is naturally hidden or unseen. As such, it is sincerely hoped that this common law doctrine be reviewed so as to eliminate any element which might be detrimental to upholding justice in society.

Islamic Jurisprudential Response To the Doctrine of *Caveat Emptor*

The nature of the common law doctrine of *caveat emptor* is that the buyer is allowed to examine and inspect the goods to be purchased before entering into a sale and purchase agreement so as to confirm that the goods are free from any unknown defect. The general rule of that principle also states that the seller is not bound to disclose any defect in the goods to the buyer.⁴³

While agreeing on the nature of the common law doctrine in allowing the buyer the right of inspection of the goods before the sale, Islamic law does not approve that, as a general rule, the seller is under no obligation to disclose the defect of the goods before the agreement. This is because Islamic law determines that, for the purpose of upholding justice in a commercial transaction, the seller is under an absolute duty to disclose whatever defects the goods might have before the conclusion of the sale and purchase agreement in all circumstances and at all times, regardless of whether the parties to the agreement have any fiduciary relationship or whether such disclosure of the defects is requested by the seller. In fact, there is an implied warranty in Islamic law that the thing sold should be free from defect.⁴⁴ *The Mejella* also clarifies this point:

An accent defect is a fault which existed in the thing sold when it was in the hands of the seller.⁴⁵

This argument is further enhanced by the following holy tradition:

Uqba b. Amir said: "it is illegal for one (seller) to sell a thing if one (seller) knows that it has a defect unless one (seller) informs the buyer of that defect."⁴⁶

The Prophet himself had warned against selling goods whose defects were not disclosed:

If anyone sells a defective article without drawing attention to it he will remain under God's anger, or the angels will continue to curse him.⁴⁷

Following the above Islamic principle of an absolute obligation on the seller to disclose any defects of the goods to be sold to the purchaser, another Islamic principle states that the buyer or purchaser shall have the right of inspection of the goods before and after the conclusion of the sale and purchase agreement so as to ensure that they are not defective. This means that, in accordance with Islamic principle, the buyer or purchaser, upon discovering through his inspection any defect on the goods, has the right to return the defective goods to the seller and rescind the contract both before and after its conclusion, in all circumstances. Hence, in

Islamic Law, the buyer or purchaser does not have to wait for any of the exceptions under the common law⁴⁸ in order to have his right of returning the defective goods and terminating the contract after the agreement of sale is being concluded.

The Islamic law principles seem to be more practical in ensuring the establishment of justice and fairness in commercial transaction than the common law principles. Indeed, Allah had reminded His servants:

O ye who believe! Eat not each other's property by wrongful means . . . (4:29)

The Holy Prophet remarked on the importance of truthfulness and honesty in transactions:

If both parties spoke the truth and described the defects and quantities (of the goods), then they will be blessed in their transaction, and if they told lies or concealed anything, then the blessing on their transaction will be blotted out.⁴⁹

Khiyār al-'Ayb: The Principal Scenario

As we have already highlighted earlier, the doctrine of *khiyār al-'ayb* is one of the legal methods under Islamic commercial dealings which protects society from the problems arising from purchasing defective products. Generally, the Islamic doctrine of *khiyār al-'ayb* and the common law doctrine of *caveat emptor* share some similarities in the sense that both doctrines aim at protecting society from problems surrounding the sale of defective products, and the buyer has been given the right of inspection of the goods so as to ensure that the goods are fit and free from any defects. Despite these two general similarities, we have seen how the Islamic doctrine adopts a more practical approach in holding that the buyer has the right of inspection (to ensure that the goods are not defective) and the right of option (either to continue with the contract or rescind it) both before and after conclusion of the sale and purchase agreement. On the other hand, we have seen that the common law doctrine adopts a more rigid approach in determining that the buyer can only exercise his right of inspection and option before the contract is concluded, with some exceptions determined by the common law principle.

The Islamic doctrine of *khiyār al-'ayb*, hence, allows the buyer the right of inspection of the goods (to ensure its quality, etc.) and also the right of option (whether to continue with the contract or otherwise) both before and after the contract of sale and purchase is being concluded. In fact, Islam gives an implied condition that all goods sold (or to be sold) should be free from any (hidden) defects.⁵⁰ The buyer is then authorized, by the Islamic principle of *khiyār al-'ayb*, to exercise the right of option

(either to continue with the contract or rescind it)⁵¹ upon the discovery of any defect on the goods, regardless of whether that discovery happens before or after the conclusion of that contract of sale and purchase.⁵² *The Mejella* terms such option as *khiyār al-'ayb*, or "option for defects."⁵³

The Legislative Rules of the Doctrine of *Khiyār al-'Ayb*

In practice, there are certain conditions to be met before the party exercises the option for defect (*khiyār al-'ayb*). These conditions are as follows:

(a) The existence of the defects on the goods should be before or at the delivery of the goods.⁵⁴ It is thus immaterial whether the defects in the goods exist before or after the sale-purchase agreement so long as the defects existed before the delivery of the goods or when the goods were in the hands of the seller. *The Mejella* reads:

a defect coming recently to existence after the sale and before the delivery while the thing is in the hands of the seller, . . . is a good ground for rescission.⁵⁵

(b) The purchaser/buyer should not have been aware of the defects at the time of the agreement;⁵⁶

(c) There should not be any stipulation by the seller for waiving the liability of the seller for the defects;⁵⁷

(d) The defects must have existed and been proven at the time when the purchaser wishes to exercise the option (either to accept the goods or reject them);⁵⁸

(e) There should not be any agreement by the buyer in taking all the responsibilities for the defects of the goods, thus, exempting the seller from any liability arising from those defects.⁵⁹

There are also certain circumstances whereby the buyer loses his right of option even though the goods are discovered to be defective:

(a) If the seller gives a prior notice to the buyer about the defects of the goods;⁶⁰

(b) If the seller stipulates an exemption clause to the buyer, prior to an agreement, exempting him (the seller) from any liability arising from the defects of the goods sold.⁶¹ On the contrary, if the seller, upon knowing the defect and/or concealing it, purposely stipulates such clause, it will not exempt him from the liability of that defect; hence, the buyer will not have his right of option renounced. Imam Malik referred to this when he said:

he who sells (with an exemption clause from the defects of the goods) will not be responsible for any defect unless he knew about that defect and concealed it, and if he did know of the defect of the goods and purposely concealed it, the earlier

exemption clause shall have no effect and he (the seller) shall still be responsible for that defect.⁶²

(c) If the buyer stipulates prior to an agreement that he is solely responsible for any defects of the goods bought;⁶³

(d) If the buyer accepts the defective goods upon knowing it;⁶⁴

(e) If the buyer exercises ownership over the goods even after knowing the defects on them,⁶⁵ such as eating up any portion of the goods (if in the form of eatable goods),⁶⁶ keeping the goods in possession for an unreasonable period of time,⁶⁷ inhabiting, repairing, or demolishing any part of the goods,⁶⁸ or disposing it;⁶⁹

(f) If the defect happened in the possession of the buyer.⁷⁰

Generally speaking, in accordance with the doctrine of *khiyār al-'ayb*, the buyer, upon discovery of the defect in the goods, may exercise the option of either continuing with the contract and accepting the defective goods as is or rescinding the contract and returning the defective goods to the seller, without having any right to seek compensation for it.⁷¹ However, there are certain exceptions to the above situation whereby the buyer may seek compensation. These exceptional situations are as follows:

(a) In a case whereby the defect happened while the goods were in the possession of the buyer and he afterwards learn that there was another defect that existed while the goods were in the possession of the seller;⁷²

(b) In a situation whereby the good sold is cloth or something of similar nature, and the buyer discovers a defect only after the cloth has been cut;⁷³

(c) In a case whereby the good sold is flour or some other thing of similar nature, and the buyer discovers the defect after taking it into his possession.⁷⁴

***Khiyār al-'Ayb*: Its Impact on the Following Aspects**

Consumer Protection

There is not a single Shari'ah principle that does not guarantee the protection of human life, and the present Islamic doctrine of *khiyār al-'ayb* is no exception. This doctrine not only safeguards the purchaser from the implications of the sale of defective products before the agreement is being concluded, but it also guarantees similar protection after the conclusion of the sale and purchase agreement. The purchaser or buyer then has the right, under this Islamic doctrine, to exercise his right of option (of either continuing with the contract of sale or not) upon the discovery of the defect on the goods, regardless of whether the discovery takes place before or after the conclusion of the said agreement.

Under the practical application of this doctrine, we find that the rights and interests of the buyer, with respect to the sale of defective products,

are really preserved and protected. This protection against such sale of defective goods is further enhanced by the fact that, in Islam, it is implicit that any goods sold should be free of any defect unknown to the buyer.⁷⁵

The vital role played by this doctrine in the protection of society from the effects of the sale of defective products is summed up as follows:

(a) The purchaser or buyer has the implied right to inspect the goods prior to an agreement and confirm whether the goods to be purchased are free from unknown defects;⁷⁶

(b) After the delivery of the goods by the seller, if the consumer (purchaser) discovers any defect in the good which existed while it was in the hands of the seller, the consumer has the right of option to reject the item purchased or to take it at the agreed price.⁷⁷

(c) If the seller put an exemption clause of no responsibility for any defect in the goods while the defects were known to him or concealed by him purposely, the exemption clause in the situation has no effect and, thus, the consumer is not bound by the exemption clause and has the right of option to reject the goods or to take them. Imam Malik said:

... who sells ... without a liability agreement, in that he is not responsible for any defect in what he sold unless he knew about the fault and concealed it. If he knew that there was a fault and concealed it, his declaration that he was free of responsibility does not absolve him ...⁷⁸

Defective Products

It is an implied term that any goods sold should be free from defects unknown to the buyer.⁷⁹ Relying on this provision, the buyer has a legal right to protect himself from receiving a defective product. *Khiyār al-'ayb* plays a vital role in protecting the buyer from being deceived by defective products in the following manners:

(a) The purchaser has a right to inspect the goods (to be purchased) prior to an agreement and to confirm whether the goods are free from any defects.⁸⁰

(b) It is a legal duty of the seller or manufacturer to notify the buyer of the goods before the conclusion of the sale and purchase agreement. Uqba bin Amir said in one tradition:

It is illegal for one (seller) to sell a thing one (seller) knows has a defect unless one (seller) informs the buyer of that defect.⁸¹

(c) If the buyer discovers, after the conclusion of the agreement, the defect of the goods and proves that the defect occurred in the hand of the seller (or manufacturer), the buyer has the right of option either to reject the defective goods or to take it for the agreed price.⁸²

(d) If the seller (or manufacturer) stipulates to the buyer an exemption clause prior to an agreement exempting him from any liability for defects of the goods to be sold, while knowing about the defects and concealing them purposely, that exemption clause will not exempt the seller from liability. Imam Malik clarified this point:

who sells with an exemption clause exempting himself (the seller) from liability, of any defect of the goods will not be responsible for that defect unless he knew about it and concealed it. If the seller knew and concealed the defect, such an exemption clause will not exempt him from the liability of such defective products.⁸³

(e) For the sake of further protection of the buyer's rights and interests against the problems of the sale of defective goods and products, it is also the duty of the seller to tell the truth and not to conceal whatever defect the goods might have. The Prophet said:

if they (the seller or the buyer) tell a lie and conceal anything (in the transaction) the blessing on their transaction will be blotted out.⁸⁴

Such is the vital role that the Islamic doctrine of *khiyār al-'ayb* plays in sheltering society from the problems arising from the sale of defective goods and products. However, besides this doctrine, Islam also has other measures that protect victims. These protective measures, legalized by the Shari'ah, are described below.

Insurance for Goods

Contrary to the opinions of previous 'ulamā, today's 'ulamā are more inclined to accept the principle of an insurance policy. While accepting the fact that an insurance policy is in line with the Shari'ah concept of helping one another with righteousness and piety and that it does not go against any injunctions of the Qur'an and the Sunnah, still the 'ulamā find that the legality of insurance depends on the legality of its *modus operandi*, which means that all transactions involved in the running of an insurance company must be in line with the Shari'ah principles embodied in the Qur'an and the Sunnah. In other words, all transactions involved must be based on mutual trade and commerce and be free from unlawful transactions such as *ribā* (usury), *rishwah* (corruption), *maysir* (gambling), and *gharar* (unnecessary risk), as well as from unlawful substances such as pig, wine, or blood. Allah says:

Help ye one another in righteousness and piety . . . (5:2)

Thus, in light of the legal system of Islam, the insurance policy may now step in to help eradicate the problems faced by society from the sale of defective goods and products. The insurance policy acts as follows:

(a) If the buyer discovers any defect in the goods before or after the conclusion of the sale and purchase agreement, he has a legal right to exercise his option either to continue or rescind that contract. This means that should the buyer opt to rescind it,⁸⁵ the seller, in accepting the return of the defective goods, suffers an economic loss. However, should the seller hold an insurance policy, he could overcome the economic loss.

(b) An insurance policy could also protect the seller from yet another type of economic loss whereby the buyer, upon discovering the defect of the goods bought and upon learning that there was another defect which occurred earlier when the goods were still in the possession of the seller,⁸⁶ seeks compensation against the seller. For this situation the seller who holds an insurance policy could file a claim with the insurance company.

(c) An insurance policy could also protect the buyer who loses his right of option as the result of a stipulation of an exemption clause by the seller,⁸⁷ or by way of an agreement on his own behalf to bear all liability of any defect of the goods bought.⁸⁸ The buyer who holds an insurance policy could seek to recover from the insurance company in such a situation.

(d) A buyer who buys an insurance policy could also seek to recover from the insurance company in a situation whereby he loses his right of option as the result of the using of that defective product,⁸⁹ or exercising ownership over it,⁹⁰ or consuming⁹¹ or damaging⁹² any part of the defective goods.

These are the other protective measures offered by any insurance policy to the society effected by the problems of sale of defective goods and products. The Shari'ah, as we have stressed earlier, approves of such principles so long as the *modus operandi* does not contravene any Shari'ah principles as embodied in the Holy Qur'an and the holy tradition of the Prophet.

Warranty of Goods

In addition to the Islamic doctrine of *khiyār al-'ayb*, there is yet another protective measure recognized by the Shari'ah and aimed at sheltering society from the effects of the sale of defective products. Today it is commonly known as a warranty of goods.

A warranty of goods is usually issued by the seller in a sale and purchase transaction and guarantees that the seller or manufacturer will take responsibility for repairing any damage or defect that might occur after the goods are bought by the buyer. A warranty is normally valid for only a specified period (one year or so). Specifically, a warranty operates as follows:

(a) In a sale and purchase contract that offers a warranty, the buyer enjoys the right to have any damaged or defective product repaired by the seller or the manufacturer if the damage or defect occurs and the seller is notified within the warranty period.

(b) The warranty is no longer operative after the expiration date; hence, any damage or defect reported to the seller or manufacturer after this period shall not be covered by the warranty.

(c) The buyer is entitled by a clause in the warranty to have free repair of the damaged goods.

(d) A warranty does not authorize the buyer to reject the defective goods.

(e) A warranty will not be effective in a case whereby it is proven that the defects occurred before the agreement and the seller deliberately conceals them. This is because the Islamic principle, "the option for defect" or *khiyār al-'ayb*, will automatically become available for the buyer to exercise his right of option either to reject the defective goods or accept them for the agreed price.⁹³

(f) A warranty differs from the doctrine of *khiyār al-'ayb*: a warranty only gives the buyer the right to have the damaged goods fixed or repaired, whereas *khiyār al-'ayb* effectively gives the buyer the option either to reject or accept the defective goods⁹⁴ on account of defects which occurred while the goods were in the possession of the seller.⁹⁵

***Khiyar al-'Ayb*: The Justification**

No principle or doctrine could be effective in its application and no transaction could be implemented successfully unless justice and honesty are also present. The Prophet himself outlined the ethics of the parties involved in transactions in order to ensure their success. He said:

. . . If both parties spoke the truth and described the defects and quality (of the goods), there would then be blessings in their transaction, and if they told lies or concealed something then the blessings of their transaction would be blotted out . . .⁹⁶

Clearly, the doctrine of *khiyār al-'ayb* is solely based on the principle of justice. Its application is further justified on the following grounds:

(a) The doctrine gives the buyer the opportunity to inspect the goods before any agreement is finalized in order to ensure that the goods are indeed free from any defect.⁹⁷ After all, there is an implied condition in Islamic commercial law that the goods sold should be free from any unknown defect.⁹⁸

(b) It will also be unjust to the buyer if the seller conceals any defect of the goods or if he remains silent about any defect. The Prophet reminded the seller:

If anyone sells a defective article without drawing attention to it, he will remain under God's anger, or the angels will continue to curse him.⁹⁹

Uqba bin Amir also regarded such transactions illegal:

It is illegal for one (seller) to sell a thing if one (seller) knows that it has a defect . . .¹⁰⁰

(c) It is also the buyer's legal right¹⁰¹ to reject the defective goods if the defect occurred in the hands of the seller. This is because in any transaction there must be honesty and free consent so as to ensure that both parties enjoy maximum benefits from a transaction and nobody suffers from any injustice or dishonesty. Allah says:

Eat not up your property among yourselves in vanities. . . (4:29)

(d) The doctrine also ensures the establishment of justice for the seller, in the sense that, should the buyer upon realizing the defect of the goods continue to enjoy or consume the defective property in any way, the buyer shall lose his right of option.¹⁰² Such a principle is also in line with the concept of natural justice as Allah says to the effect in the Qur'an:

Verily, Allah commands [not to go against] justice . . . (16:90)

(e) The doctrine also gives the buyer the right to seek a compensation in an exceptional case whereby the buyer, who discovers the defect of the property after the agreement of sale, later finds out that there was indeed another defect which occurred while the property was in the possession of the seller.¹⁰³ To ensure fairness to the seller, Islamic law has determined that, in such an exceptional situation, the buyer who has already obtained the right to seek compensation shall not have the right of option as well as it would create a hardship for the seller. This is because Allah has commanded mankind to cooperate and help each other in righteousness and piety:

Help ye one another in righteousness and piety. . . (5:2)

Final Remarks

We have already seen how the common law doctrine of *caveat emptor* and the Islamic doctrine of *khiyār al-'ayb* differ from each other. In conclusion, let us summarize the fundamental points underlining both legal doctrines.

Summary of the Conflict

(a) The common law doctrine gives the right to the buyer expressly to inspect the goods (so as to ensure that it is free from any unknown defect) prior to an agreement.¹⁰⁴ Meanwhile, the Islamic doctrine of *khiyār al-'ayb* gives an implied right to the buyer to carry out an inspection on the fitness and quality of the goods to be bought.¹⁰⁵

(b) Generally, under *caveat emptor*, the seller is not under a duty to disclose any defect to the buyer¹⁰⁶ as the buyer has been given an opportunity to inspect the goods before any agreement; therefore, if, after the conclusion of the contract of sale, the buyer discovers any defect in the goods bought, he loses any right of option, except in cases when the seller has purposely, before the contract, concealed the defect,¹⁰⁷ or the defect has been so requested by the buyer before the agreement, or when there is a fiduciary relationship between the seller and the buyer.¹⁰⁸ Hence, it is clear that, as a general rule, the right of option according to the doctrine of *caveat emptor* exists only before the conclusion of the sale and purchase agreement and not after (with some exceptions). *Khiyār al-'ayb*, on the other hand, reserves the right of inspection of the goods to the buyer both before and after the conclusion of any sale and purchase agreement and as such, the right of option either to continue the contract or rescind it¹⁰⁹ is also reserved to the buyer both before and after the agreement of sale and purchase.

The Prophet said in one of his traditions:

If anyone sells a defective article without drawing attention to it, he will remain under God's anger, or the angels will continue to curse him.¹¹⁰

(c) While the common law doctrine of *caveat emptor* does not, generally, give any room to the buyer to exercise any rights of inspection and option after the conclusion of the sale and purchase contract, the Islamic doctrine of *khiyār al-'ayb* does provide such rights to the buyer after the agreement. These rights of the buyer could, however, be annulled if the seller inserts an exemption clause, exempting him from any liability arising out of the defective product,¹¹¹ or if the buyer himself has promised to be responsible for any defect.¹¹²

(d) The common law doctrine does not allow the buyer to seek compensation as a result of any defect discovered after the conclusion of the sale agreement. This is because the buyer has been given ample opportunity to carry out an inspection on the goods before the agreement to ensure that it is free from any defect, which means that there is no compensation for any defect not seen during the buyer's careless inspection.¹¹³ The Islamic doctrine of *khiyār al-'ayb*, however, does allow the buyer to seek compensation only (without any right of option) if the buyer who has created a defect of the goods after the agreement, later

realizes that there was another defect which had occurred while the goods were in the hands of the seller.¹¹⁴

The Proposed Solutions to This Conflict

The following are among the possible solutions to the conflict between the doctrines of *caveat emptor* and *khiyār al-'ayb* protecting society from the problems arising out of the sale of defective products and goods:

(a) The seller, prior to an agreement of sale and purchase, should notify the buyer of the defects (if any) of the goods to be sold;¹¹⁵

(b) The buyer should be allowed, before entering into the agreement, to inspect the item to be purchased so as to ensure that it is fit and free from any unknown defect,¹¹⁶ and if the buyer is unable to do so the seller himself should assist him in doing so;

(c) The buyer should be given the right, after the transaction, to reject the purchased goods if they are found to be defective while in the hands of the seller;¹¹⁷

(d) The seller should not be held responsible for any defect in the goods should he add an exemption clause exempting him from such liability;¹¹⁸

(e) The seller should also not be responsible for any defect of the goods should the buyer agree to bear such responsibility;¹¹⁹

(f) There must be a situation whereby the buyer has the right to seek compensation (without having any right of option) if he creates a defect on the purchased goods after the agreement and realizes afterwards that there was another defect when the goods were in the possession of the seller;¹²⁰

(g) The buyer's right of option and to seek compensation should be revoked if he discovers the defect of the goods bought but continues to exercise an ownership over those defective goods;¹²¹

(h) The buyer should not be granted the rights of option and for seeking a compensation if the defect in the goods occurs in his own possession.¹²²

Justifications for the Solutions

The above solutions to the conflict between the two rival doctrines could well be justified by the following grounds:

(a) Allowing the buyer the rights of inspection (of the goods) and option before the agreement is in line with the principles of fairness and justice, as the buyer is fairly treated by the seller in a situation whereby he (the buyer) is at liberty to determine that the goods are free of defect. Allah has indeed commanded all mankind to embrace the concept of justice:

Verily, Allah commanded (to practice) justice. (16:90)

(b) Prior to a transaction, the seller is under an obligation to notify the buyer of any defect in the goods to be sold. The Prophet said:

It is illegal for one (seller) to sell a thing if one (seller) knew that it has a defect. unless one (seller) notifies the buyer of that defect.¹²³

Furthermore, there should be no concealment of any defect of goods to be sold; because that practice amounts to cheating.

A person came to the Holy Prophet and told him that he was always betrayed in purchasing. The Prophet advised him to say at the time of buying: "No cheating."¹²⁴

(c) Selling defective goods or products to the buyer when the seller is, at all times, aware of that damage or defect to the goods would amount to an unjust enrichment on behalf of the seller and is against the concept of natural justice. Allah says concerning such unjust enrichment:

. . . eat not up your property, among yourselves in vanities. . .
(4:29)

(d) Presenting the buyer a right of option whether to continue with the agreement or rescind it in the case of any defect in the goods purchased is also in harmony with the general concept of mutual cooperation as there is always a possibility for the seller to innocently deliver defective goods unknowingly. In this situation the seller, with the spirit of brotherhood and mutual cooperation, should accept back the defective goods sold. Allah says:

Help ye one another in righteousness and piety . . . (5:2)

(e) The fact that the buyer has the right to seek for compensation only in a situation whereby he discovers the defect after the agreement of sale and purchase, and also discovers that there was indeed another defect which occurred earlier on while the goods were in the hands of the seller¹²⁵ is also in consonance with the general principle of mutual help enshrined by Allah in the Holy Qur'an.¹²⁶

(f) It is also in line with the general concept of justice and fairness to revoke the rights of the buyer to option and to seek for compensation for the defect of the goods bought if the buyer, upon knowing of the said defect, exercised ownership over the defective goods. Allah commanded:

Verily, Allah commanded [not to go against] justice. (16:90)

Notes

1. See "caveat emptor" in *Mozley & Whiteley's Law Dictionary*, 1993.
2. *Ibid.*, p. 300.
3. T.S. Venkatesa Iyer, *The Law of Contract*, Vol. 2, 5th ed. (Hyderabad: Asia Law House, 1990), p. 100.
4. Cheshire Fifoot & Furnston's *Law Contract*, 12th ed. (London: Butterworth, 1991), p. 136.
5. Mahiuddin Abu Zakaria Yahya bin Sharif al-Nawawi, *Minhaj al-Tahibin* (trans. E. C. Howard). (Lahore: Law Publishing Co., n.d.), p. 131.
6. (1603) Cro. Jac. 4, 79, ER 3.
7. See P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, (Oxford: Clarendon Press, 1979), p. 179.
8. *Ibid.*, p. 178.
9. *Ibid.*, p. 179.
10. Cheshire, p. 136.
11. (1851) 10 C.B. 591.
12. A.G. Guest, *Anson's Law of Contract*, 26th ed. (Singapore: Oxford Univ. Press, 1984), p. 210.
13. *Ibid.*
14. Cheshire, p. 136.
15. Venkatesa, p. 100.
16. (1792) Peake, 115, 170 ER 113.
17. Atiyah, p. 466.
18. *Ibid.*
19. Guest, p. 211.
20. See *The Contract Act (Malaysia) 1950* at § 17.
21. Venkatesa, p. 100.
22. See generally in G.H. Treitel, *An Outline of the Law of Contract*, 3rd ed. (London: Butterworth, 1984), p. 140f.
23. See Artar Singh, *Law of Contract*, 3rd ed. (India: Eastern Book Co., 1980), p. 121f.
24. Treitel, p. 144.
25. *Ibid.*
26. See, for example, the fact and decision in *Donoghue v. Stevenson* (1932) AC 562.
27. See Howard Abbott, *Product Risks Management*, (London: Pittman Publishing, 1992), p. 13.
28. See *The Contract Act (1950)*, §§ 15-17.
29. Abbott, p. 13.
30. Guest, p. 210.
31. *Ibid.*, at 211.
32. *Ibid.*, at 210f.
33. See in Ian Brown et al., *Law of Contract* (London: Blackstone Press Ltd, 1994), p. 90f.
34. See "Consumer Protection" in *Jowitt's Dictionary of English Law*, 1977.
35. See §§ 17-18.
36. *Ibid.*, §§ 15-17.
37. See *Ibid.*, § 41.
38. See Cheshire, p. 136.
39. See Atiyah, p. 465.
40. *Ibid.*, at 466.
41. *Ibid.*
42. Guest, p. 210.
43. Except in cases such as when the defects are purposely concealed by the seller, or when the seller is requested by the buyer to disclose the defects of the goods, or when there is a fiduciary relationship between the seller and the buyer.
44. *The Mejella*, at Art. 336.
45. *Ibid.*, at Art. 339.
46. Mohd Muhsin Khan (trans.) , *Sahih al-Bukhari*, Vol. III, no. 292 (Darul Fikir, n.d.), p. 166.
47. Ibn Majah (compiled in) *Mishkatul Masabih* (trans. Eng.) James Robson, *Mishkatul Masabih*, vol. I, Sh. Mohammad Ashraf, Lahore, 1981 at 613.

48. See footnote 43.
49. Khan, no. 293, p. 166; see also Abdul Hamid Siddiqi (trans.), *Sahih Muslim*, vol. III, no. 3661 (Lahore: Sh. Muhammad Ashraf, 1976), p. 805.
50. See *The Mejella*, Art. 336.
51. Charles Hamilton (trans.), *The Hedaya*, vol. II (India: Kitan Bhavan, 1985), p. 406.
52. E.C. Howard (trans.), *Minhaj-et-Talibin* (Lahore: Law Publishing Co, n.d.), p. 131.
53. *Ibid.*, Sect. VII.
54. See Neil D.E. Bailie, *The Mohammadan Law of Sale* (India: Delhi Law House, n.d.), p. 99.
55. *The Mejella*, Art. 340.
56. *Ibid.*
57. *Ibid.*
58. S.E., Rayner, *The Theory of Contract in Islamic Law*, (London: Graham & Trotman, 1991), p. 331.
59. *Ibid.*
60. *The Mejella*, Art. 341.
61. *Ibid.*, Art. 342; see also Aisha Abdurrahman Bewley, *Al-Muwatta of Imam Malik ibn Anas* (London: Kegan Paul International, 1989), no. 31.4, p. 248.
62. *Al-Muwatta*, p. 249.
63. *The Mejella*, Art. 343.
64. Rayner, p. 340.
65. Bailie, p. 105.
66. *The Hedaya*, p. 415.
67. Nawawi, p. 133.
68. *Ibid.*, at 108.
69. *The Mejella*, Art. 344.
70. *Al-Muwatta*, no. 31.4, p. 249.
71. S.C. Sircar, *Al-Shari: Sunni & Imamia Codes*, Vol. I, (Lahore: Law Publishing Co., n.d.), p. 496; Liaquat Ali Khan Niazi, *Islamic Law of Contract*, research cell, (Lahore: Dyal Singh, Trust Lib., n.d.), p. 188.
72. *The Hedaya*, p. 410.
73. *Ibid.*
74. *Ibid.*
75. *The Mejella*, Art. 336.
76. *Ibid.*
77. *The Hedaya*, p. 406.
78. *Al-Muwatta*, no. 31.4, p. 249.
79. See *The Mejella*, Art. 336.
80. *Ibid.*
81. *Sahih al-Bukhari*, no. 292, p. 166.
82. *The Hedaya*, p. 406.
83. *Al-Muwatta*, no. 31.4, p. 249.
84. *Sahih Muslim*, no. 3661, p. 805.
85. See *The Hedaya*, p. 406.
86. *Ibid.*, p. 410.
87. See *Al-Muwatta*, no. 31.4, p. 348f.
88. See *The Mejella*, Art. 343; see also Rayner, p. 335.
89. Nawawi, p. 133.
90. Bailie, p. 105.
91. *The Hedaya*, p. 415.
92. Bailie, p. 108.
93. *The Hedaya*, p. 406.
94. Rayner, p. 333.
95. *The Mejella*, Art. 339.
96. *Sahih al-Bukhari*, no. 293, p. 166.
97. Guest, p. 210.
98. *The Mejella*, Art. 336.
99. Ibn Majah (compiled in) *Mishkat*, p. 613.
100. *Sahih al-Bukhari*, no. 292, p. 166.

101. Rayner, p. 327.
102. Baillie, p. 107.
103. *The Hedaya*, p. 410.
104. See "Caveat Emptor" in Mozley.
105. *The Mejella*, Art. 336.
106. Guest, p. 210.
107. See footnote 16.
108. See footnote 22.
109. *The Hedaya*, p. 406.
110. Ibn Majah (compiled in) *Mishkat*, p. 613.
111. See *Al-Muwatta*, no. 31, p. 249.
112. *The Mejella*, Art. 343.
113. See Cheshire, p. 136.
114. *The Hedaya*, p. 410.
115. See Ibn Majah (compiled in) *Mishkat*, p. 613.
116. For instance, see "Caveat Emptor" in Mozley.
117. See *The Mejella*, Arts. 337 and 339.
118. *Al-Muwatta*, no. 31.4, p. 249.
119. *The Mejella*, Art. 343.
120. *The Hedaya*, p. 410.
121. Baillie, p. 107.
122. *The Mejella*, Art. 339; the buyer has the right to reject the goods purchased on accounts only for defects that occurred in the hands of the seller and not for defects that occurred in the hands of the buyer.
123. *Sahih al-Bukhari*, p. 410.
124. *Ibid.*, no. 328, p. 186.
125. *The Hedaya*, p. 410.
126. *Al-Qur'an*, 5:2.