BRILL

ARAB LAW QUARTERLY 30 (2016) 262-277

Arab Law Quarterly
brill.com/alq

Formation of Contract under the Islamic *Majallah* and UNIDROIT Principles of 2010

Mahmoud M. Dodeen
Assistant Professor, Faculty of Law and Public Administration, Birzeit University, Birzeit, Ramallah, Palestine
mdodeen@birzeit.edu

Abstract

This article focuses on the rules for creating contracts under the Islamic *Majallah* and UNIDROIT Principles of 2010. The research uses an analytical approach and comparative Arab jurisprudence. To compare the *Majallah* and UNIDROIT Principles academically, this article's focus is especially on countries where the civil law originated from the *Majallah*. Such countries include Jordan, Kuwait, and the United Arab Emirates. Here we show that the *Majallah* generally agrees with the UNIDROIT Principles regarding the rules of contract formation. The main points of disagreement between the two are seen in a very limited number of concepts.

Keywords

contract formation – Islamic law – International Institute for the Unification of Private Law (UNIDROIT) – *Majallah*

1 Introduction

The *Majallah*, which is considered the civil and general Sharīʿah law, was implemented in the recent past in many Arab countries and is still in force in Palestine. While it constitutes a main historical source for a number of contemporary civil laws and rests on general principles and theories that can accommodate many private law developments, it has not yet received sufficient study and scrutiny. This compatibility with recent legal developments is demonstrated, among other things, in the absence of amendments to the

 | DOI 10.1163/15730255-12341326

Majallah in countries that have implemented its provisions. Because of its entrenched principles and the abundance of Ḥanafī school jurisprudence, the *Majallah* is able to harmonise many of the developments at the level of civil and commercial transactions. In contrast, and despite its modernity, the UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts of 1994 were amended in 2004 and again in 2010 to keep pace with the progress of international trade.

Given the topics covered by the UNIDROIT Principles, starting from the stage of contractual negotiation and ending with the dissolution of the contract and its implications, and taking into consideration from whence these principles were drawn, UNIDROIT has been able to form a unified global legal system of fundamentals that complement important aspects of international trade law, including the United Nations Convention on Contracts for the International Sale of Goods of 1980 and the rules of the International Chamber of Commerce.

The UNIDROIT Principles, as amended in 2010, are considered to be general rules regulating international trade contracts and have received overall support on the international level. They were approved by the United Nations Commission on International Trade Law in its 45th session in 2012. The UNIDROIT Principles can be used to interpret or to complement national law and can serve as an example for a country's national legislature.

In an attempt to harmonise national legislation and the UNIDROIT principles so as to establish a globally harmonised legislative environment that will support the facilitation of international trade between different countries, considering how the Principles relate to the rules in the *Majallah* is an important exercise. Many contemporary Arab civil laws were originally derived from the *Majallah* and are interpreted in that light.

This effort ultimately contributes both towards unifying the application of common principles and draws the attention of national legislatures to some of the rules generated from the *Majallah* and Ḥanafī *fiqh* that can be developed in line with the requirements of the international business environment. This study asserts that the UNIDROIT Principles intersect with many of the rules adopted by the *Majallah* explicitly by text or implicitly by reference to the Ḥanafī School, its historical source.

Based on the foregoing, and because both the UNIDROIT Principles and the *Majallah* treat a variety of issues that include the various stages of contract formation and implementation, this study focuses on the rules of creating a contract under both systems. It uses an analytical approach and comparative Arab jurisprudence. To make an academic comparison between the *Majallah* and the UNIDROIT Principles that will support judges, researchers, and

legislators within their fields of interest, this study considers especially countries where the civil law originated from the *Majallah*. Such countries include Jordan, Kuwait, and the United Arab Emirates. It is hoped that this effort will ultimately facilitate adoption of the UNIDROIT Principles in Arab civil laws and will encourage unifying the rules that govern the formation of contracts in terms of text, interpretation, and application.

2 Format for Offer and Acceptance

The *Majallah* requires, for the validity of a contract, that the contracting parties meet the following requirements: they have the legal capacity to enter into contracts;[1] they are completely free from flaws such as mistake,[2] coercion, and solicitation associated with unfair or obscene subject matter; and the offer converges with the acceptance in time and place. No contract will exist, nor will any consequent legal effect, without the convergence of the offer with the acceptance.[3] As held by the Jordanian Cassation Court: 'The contract, according to the provisions of the *Majallah*, is the commitment of the contractors and their commitment to an order, which is the offer and acceptance, and the

1 The *Majallah* addressed the performance capacity under the name of puberty and the onset of puberty. According to the *Majallah* the beginning of puberty for males is when 12 years of age are completed and when 9 years are completed for girls (1 year, according to the *Majallah* is of the lunar year). Puberty cannot be claimed before this age. If they claimed puberty after 12 for males and after 9 for females, they view the body of the plaintiffs, and if the body shows the truth in the claim, then the legal action is considered correct and the action cannot be terminated. If they claimed that they were not attainable at the time, and the attainment of a 15-year-old be male or female is valid in the law (Articles 986-989 of the *Majallah*).

2 If the species of the thing sold has been stated, and the thing sold turns out to be of another species, the sale is void. Example: The vendor sells a piece of glass stating that it is a diamond. The sale is then void. (Article 208 of the *Majallah*). See Jordanian Cassation Court Rulings (ADALA publications) when the *Majallah* was in force in Jordan: Appeal No. 27, 1945, p. 324: 'The mistake spoils the satisfaction and there is no difference if the mistake is in the facts or law'; Appeal No. 202, 1971, p. 164: '. . . in order to acknowledge consequent legal effects, the acknowledger must not fall into a fundamental mistake'.

3 Articles (103, 104 and 167) of the *Majallah*. For more details see: A. Dawwas & M. Dodeen, *The Sale Contract in the Majallah: A Comparative Study* (Ramallah, Palestinian programme to promote justice, USAID, 2013), Ch. II. See the appeal (Jordanian Cassation Court) No. 1685 for the year 2003, p. 1378.

contract of sale is to trade money with money (consideration)'.[4] In this regard, the *Majallah* agrees with the UNIDROIT Principles, which indicate that the contract is made when the offer is explicitly accepted by expressing agreement or implicitly accepted by behaviour of the offeror that indicates the approval of the accepter.[5] The Principles give the contractor whose understanding was false because of a mistake or coercion the right to request revocation of the contract.

Along the same lines, the Federal Supreme Court in the United Arab Emirates ruled as follows:

> What is agreed upon by law and pursuant to Article 611 of the Law of Transactions . . . [is] that the sale contract is considered to be a netting contract and requires in order to be made certain conditions, including an offer by one party and acceptance of another, and both the offer and acceptance should be expressed either by words or action . . . The terms of any compensating contract, particularly netting contracts, should have an offer from one side and acceptance from another. This means that if the corner of offer from one side or the corner of acceptance from another is missing, the contract is legally non-existent.[6]

The terms *offer* and *acceptance* in a contract refer to any expression or term used and known by custom to create a contract.[7] The first expression issued, whether by the seller or the buyer, is considered the offer, and the second expression issued is considered the acceptance. This understanding is exactly what the *Majallah* provides in this regard. It defines the *offer* as 'the first phrase which is issued by one of the contractors in order to create the action and with that phrase he holds himself to the action'.[8] The definition of *acceptance*,

4 See the Jordanian Court of Cassation: Case No. 387/1978, date 5 March 1979, published on p. 713 of the volume of the Bar Association Journal, dated 1 January 1979; Appeal No. 256, 1967, p. 1141; Appeal No. 387/1978, date 5 March 1979, published on p. 713 of the volume of the Bar Association Journal on 1 January 1979.

5 Articles 2.1.1, 3.2.3, 3.2.5, 3.2.6 & 3.2.7 of the UNIDROIT Principles of 2010.

6 UAE, the Federal Supreme Court, Civil and Commercial Judgments, Appeal No. 340, judicial year (24), 16 May 2005, Technical Office 27, Part 2, p. 1226.

7 M. Yousef al-Zoubi, *Explanation of the Contract of Sale in Civil Law* (Amman: the House of Culture for Publishing and Distribution, 1993), 50.

8 Article 101 of the *Majallah*. Also see: Government of Dubai, the Court of Cassation, Civil Judgments, Appeal No. 51 for the year 2004, date 28 November 2004, Technical Office 15, Part 2, p. 1984: 'It is known that the offer is the deal that the person expresses his will through, which to conclude a particular contract so if accompanied by a matching acceptance the

according to the *Majallah*, is 'the second phrase issued by one of the contractors in order to create the contract and with that the contract is made'.[9]

The offer and acceptance formats in the *Majallah* can be in the past tense, as if the seller said, 'I sold' and the buyer said 'I bought'.[10] Alternatively, the contract can be created by using present tense,[11] if the contractors desire the contract to be immediate. The contract can also be made using order terms, if the contractors do not want to postpone the creation of the contract.[12] To conclude the contract using the formats of order and present tense, the contractors must intend to move toward immediate conclusion and creation of the contract, without delay or postponement. If the parties intend to delay their sale to the future, the contract is not considered concluded.[13] The contract of sale is also not concluded if the terms convey a promise,[14] as if the seller said to the buyer, 'I will sell you this'. Such terms suggest that the intention is not to form a contract at that time but during a later meeting.[15]

The offer and acceptance can be made orally, in writing, or by an action that is known by custom.[16] In this regard, the Kuwaiti Court of Cassation held, 'The deal or sale, according to the provisions of the *Majallah*, Article 175, as it is the applicable law in this case, is the sale in which there is actual exchange between the contractors, which in hence refers to the intention and satisfaction of both'.[17] In the same context, the Jordanian Court of Cassation decided, 'What is meant by the word *deal* or *sale* . . . [is] the actual action of exchange, such actions issued by the contractors which reflects their will. . . . [T]hese

---

contract is made, and that does not require that the offer and acceptance be made in a single editor, but may made separately as long as they are identical'. Appeal (Egyptian cassation court) No. 579 for the year 1959, on 24/06/1993, Technical Office 44, Part 2, p. 759: 'When the offer is an offer that reflects the persons will and is combined with an identical acceptance, the contract is made, and if the offer had a duration as to when the acceptance can be made then that duration is binding to the offeror unless it has fallen because it was not met with acceptance during that time'.

9 Article 102 of the *Majallah*; see: Dawwas & Dodeen, *supra* note 3 at 59.

10 *Ibid*., Article 169.

11 *Ibid*., Article 170.

12 Article 172 of the *Majallah*.

13 Zoughubi, *supra* note 7 at 51.

14 Article 171 of the *Majallah*.

15 See: Dawwas & Dodeen, *supra* note 3 at 60.

16 Articles 173-175 of the *Majallah*.

17 Kuwait, the Court of Cassation, Civil Judgments and Merchandise Trade, Appeal No. 116 for the year 1982, on 16 March 1983, 11, Technical Office, p. 780.

acts can be proven through all means of proof, including the testimony of witnesses'.[18]

An offer and acceptance may also be any act that indicates the satisfaction and intention of the contractors.[19] For instance, a contract of sale is made in a sequence of actions where previous contracts already exist between both contracting parties; the seller sends the merchandise in question to the buyer; and the buyer, in turn, pays the seller for the cost of the merchandise.

Although the UNIDROIT Principles do not pay much attention to the form in which the offer is expressed, whether in the past, present, or future tense, the *Majallah* does. The UNIDROIT Principles require only that the offer be clear and express the offeror's desire to enter into the contract. Perhaps the reason for the *Majallah*'s specificity is that the *Majallah* requires that, for a contract to exist, the offer must meet the acceptance in the same 'time and place'—whether it be physically in the same time and place or in an estoppel form where negotiations are evidence of entering into the contract. Although the physical meeting in which the contract is concluded in its technical sense within Islamic jurisprudence is not paralleled in the UNIDROIT Principles, the UNIDROIT Principles are consistent with the *Majallah* in terms of the forms of offer and acceptance that indicate satisfaction. According to both the Principles and the *Majallah*, such forms can be explicit or implicit or can vary depending on the commercial customs between traders or custom in general.[20]

The *Majallah* also agrees with the UNIDROIT Principles in its provisions addressing the silence of a contractor. Silence by itself cannot be considered acceptance, but if accompanied by circumstances and conditions that indicate satisfaction of the contractor, it can be considered as acceptance.[21] (See

18 The Hashemite Kingdom of Jordan, the Court of Cassation, Civil Judgments, Appeal No. 918 for the year 1990, p. 1135.

19 See: State of Kuwait, the Court of Cassation, Civil Judgments and Merchandise Trade Appeal No. 26 for the year 1994, date 28 November 1994, 22 Technical Office, p. 484: 'the expression of the will can either be explicit or implicit by taking any position that under the circumstances signifies the intended, and that silence is considered acceptance if surrounded by special circumstances that would support its signification; so the more the nature of the transaction or the circumstances which can be concluded by the acceptors either refusal or acceptance or silence of the offer'.

20 Articles 1.9. 2.1.1, 2.1.6 & 2.1.7 of UNIDROIT 2010.

21 Dubai Government, the Court of Cassation, Civil Judgments, No. 11 for the year 2005, date 26 June 2005, Technical Office 16, Part 1, p. 1368: 'The silence is not attributed to the person whom is silent although in some cases it is considered acceptance. The silence is particularly palatable if there were previous deals between the contractors and the offer was met with that due to previous interactions'. Article 67 of the *Majallah* adopts this rule; silence

Majallah Article 67 and Article 2.1.6 of the UNIDROIT Principles read alongside Articles 1.7, 1.8, and 1.9, which affirm good faith, dealing in a fair and equitable way, and the usual business practices between the parties.) Thus, the party to whom the offer is directed should refuse if he or she does not wish to enter a contract or, under the reasonable circumstances, the offeror will believe that the party has accepted.

It must be pointed out that the offer is required to intersect or 'meet' the acceptance entirely for the contract to be formed.[22] In this regard, the Jordanian Court of Cassation decided:

> The provisions of the *Majallah*, which is considered the civil legislation that is in force in the Kingdom, requires for the validity of the contract that the contractor's acceptance meets the offer, meaning that there should be correspondence between both wills on the obligations arising out of the contract, and in following that rule, we can avoid inflicting wrong on either of the contractors.[23]

Therefore, if an acceptance does not match or is different from an offer, whether by adding to it or reducing from it, the contract will not be made. Rather, that difference from the original offer will be considered a new offer that will require the acceptance of the other party, because the intent of both parties must match. This provision is entirely consistent with the first paragraph of Article 2.1.1.1 of the UNIDROIT Principles. In contrast, no explicit text in the *Majallah* agrees with the second paragraph of that Article of the UNIDROIT Principles, which considers the nonessential amendment to the conditions of the offer as an acceptance, unless the offeror objects within a reasonable period.

Although this provision is not mentioned explicitly in the *Majallah*, it may still apply under the *Majallah*, depending on the extent to which the goal of the contract (*i.e.*, any substantive matters in the contract) is achieved, particularly with respect to the merchandise sold in a sales contract. Therefore, under the *Majallah*, as long as the amendment is simple and is tolerated by custom,

---

shall be considered an expression of an exception, when it is accompanied by the right conditions. M. Zarqa, *The Syrian Civil Law* (Damascus: Modern Art Printing, 1969), 36.

22 Article 177 of the *Majallah*.

23 The Jordanian Court of Cassation, Appeal No. 92/1953, published on p. 201 of the volume of the Bar Association Journal on 1 January 1954.

acceptance still takes place.[24] Moreover, the notion under the UNIDROIT Principles that, if not objected to by the offeror, a counteroffer can be considered acceptance, is consistent with the *Majallah*, and is also consistent with the principles of freedom of contract, good faith, and fair dealing.

In this regard, the Egyptian Court of Cassation decided:

> It is required by law for the formation of a contract that the acceptance match the offer, so if the acceptance was an amendment to the offer, then it is not considered the type of acceptance that will form the contract, but it is rather considered a new offer that will not lead to the formation of the contract unless countered with acceptance from the other party. Therefore, if the court by using its discretion and for the palatable reasons it mentions, that the difference between the offer and acceptance addresses a fundamental matter in the contract that was meant to be formed and was not made due to a material mistake by the accepting contractor, which led to the mismatch between the offer and acceptance and the contract did not originally take place between the two parties, then the court did not violate the law.[25]

However, if the addition to the acceptance forms an implicit acceptance from the accepter of the offer, the contract is considered to be formed.[26] In this regard, Article 178 of the *Majallah* provides:

> It is sufficient if the acceptance agrees with the offer by implication. Examples:
> (1) A vendor informs a purchaser that he has sold him certain property for 1000 piasters. The purchaser tells the vendor that he accepts for 1500 piasters. The contract of sale is for 1000 piasters. If the vendor, however, agrees to the increase of price at the time it is mentioned, the purchaser is bound to pay the additional 500 piasters.

24 The *Majallah* considers usages and commercial habits as written legal text, as is the case in the UNIDROIT Principles. Such as Article 36: 'custom is an arbitrator . . .'; Article 37: 'Public usage is conclusive evidence and action must be taken in accordance therewith'; Article 40: 'in the presence of custom no regard is paid to the literal meaning of a thing'; Article 43: 'A matter recognised by custom is regarded as though it were a contractual obligation'; Article 44: 'a matter recognised by merchants is regarded as being a contractual obligation between them'; and Article 45: 'a matter established by custom is like a matter established by law'.

25 Appeal No. 142, Judicial year 28, date 5 February 1963, Technical Office 14, Part No. 2, p. 653.

26 Article 176 of the *Majallah.*

(2) A purchaser states that he has bought certain property for 1000 piasters. The vendor states that he has sold it for 800 piasters. A contract of sale has been concluded, and the 200 piasters must be deducted.

Also in the *Majallah*, when the sales contract between the contractors is repeated or consistent for the same merchandise with reduced or increased prices, the last contract made is what is taken into consideration. The same applies if there is constant interaction between contractors, whereby the seller sells a certain thing to the buyer on an agreed price, and then after a while an increase or decrease of the price is agreed to. In that case, the new price is what is taken into consideration with respect to future transactions between both for the same sales category or merchandise until they make a different agreement to modify the transaction by either an increase or a decrease.[27] This concept is consistent with the UNIDROIT Principles, because such behaviour is considered a new contract in line with the principle of freedom of contracting.

3 Meeting in which the Contract Is Concluded

The meeting in which a contract is concluded—referred to in the *Majallah* as the meeting that takes place between the contractors in order to form a contract[28] (*e.g.*, the meeting of sale)—is considered the place at which the seller and the buyer both are present to negotiate the sale contract. Given its historical context, the *Majallah* did not include explicit text that addressing meetings of contracts formed using modern means, such as the telephone or Internet, in which the seller and buyer are not physically in the same place.

However, comparable laws—especially laws relating to e-commerce—have addressed this issue and identified the place and time of forming a contract in such cases. For example, Jordanian civil law considers the time and place at which the acceptance was issued as the time and place of formation of the contract.[29] This provision is often invoked in transactions taking place under the *Majallah*, unless there is an agreement or a contradictory provision in the specified laws, because the contract originally is made only after the issuance of acceptance. Hence, the time and place at which the acceptance was issued

27 See: Dawwas & Dodeen, *supra* note 3 at 65.

28 Article 181 of the *Majallah*.

29 On the other hand, Article 97 of the Egyptian Civil Law considered the place and time of the contract is the place and time of acknowledging the acceptance.

is the exact time and place of the contract. This interpretation is also consistent with *Hanafi* doctrine, the doctrine of the *Majallah*.[30]

Therefore, the place the contract is made, when contractors do not exist physically together in time or place, is ultimately determined by the place where the accepter is located (the theory of announcement or release of acceptance). However, some comparable civil laws have adopted the theory that the place where the acceptance reaches the offeror is the place where the contract is made when contractors are not physically in the same location.

In that regard, the *Majallah* differs from the UNIDROIT Principles, which have adopted the theory of the acceptance reaching the offeror as the time and place the contract is formed. An option exists under the *Majallah* and general Islamic jurisprudence that allows the offeror to revoke his or offer before the resolution of the meeting of contract.[31] Therefore, if one of the parties reneges on the sale, for instance, after the offer and before the acceptance, the offer is invalid. Even if an acceptance is made during the meeting, the contract will not be made.[32] The same holds if an offer issued by one of the contractors and was not met by acceptance because of an act or word issued by the opposing party that indicated refusal. In that case, the offer also becomes invalid.[33] And if the offer was repeated before acceptance, the second offer is the one considered valid, and the first offer is considered invalid,[34] as if the seller said to the buyer, 'I will sell this for 50 dinars,' and then before the buyer was able to reply, the seller stated, 'I will sell this for 100 dinars'. The second offer invalidates the first.

Despite the absence of such a term as *meeting of contract* in the UNIDROIT Principles, the provisions of offer and acceptance that take place in the

30 Article 101 of the Jordanian Civil Code states that 'if the contracting parties at the time of contracting are not in the same meeting of contract, then the place in which the contract was concluded, is the place and time that the acceptance was issued in unless there is an agreement or legal provision to the contrary'. As stated in the explanatory notes of the Jordanian Civil Code: 'different legislations include varying provisions on the appointment of the time and place of the contract using correspondence and the bill has taken the opinion of the Ḥanafī Jurisprudence in which the contract is concluded when the acceptance is announced . . . expression of the will has no effectiveness unless it reaches the offeror in a way where he can fully have knowledge of the acceptance. Therefore acceptance, as an expression of the will, is not valid only if the offeror can know about it'. Explanatory Notes (Amman: the Bar Association, 1992) vol. 3, part 1, p. 110. Also see Article 346 of the *al-Hiran Guide* (*Murshed al-Hiran*).

31 Article 182 of the *Majallah*.

32 Article 184 of the *Majallah*.

33 *Ibid.*, Article 183.

34 *Ibid.*, Article 185.

meeting in the *Majallah* are largely consistent with the UNIDROIT Principles, as previously described, as is the possibility of withdrawing the offer that is not associated with a certain time before receiving acceptance from the opposite contractor (Article 10.1.2 of the Principles). What reinforces the existence of the non-physical meeting of contract in the *Majellah*, although not explicitly mentioned, is its explanations of the dissolution of the meeting. According to the *Majallah*, the meeting is dissolved when the contractors can no longer see each other.[35] This broadens the meaning of the meeting of contract beyond the physical convergence between the contractors. The dissolution of the meeting of contract is always determined by the inability of the contractors to communicate with each another. And that requirement can be applied to means of modern communication. If both parties remain in contact, the meeting of contract remains in session, because each party is able to negotiate with the other and each can express his or her will in a way that the other can recognize. Thus, the meaning of *sight* in the *Majallah* is not the actual sense of vision but rather the ability of the parties to communicate with one another and express satisfaction with the contract.

This interpretation is confirmed by the *Majallah*, which indicates that 'viewing' is achieved in examining the offer by seeing it, touching it, hearing it, or tasting it, and so on, depending on the nature of the underlying sale. This concept is evident also in the *Majallah*'s explicit adoption of the idea of a 'messenger' as a means of communication between the contractors.[36] The messenger does not express his or her personal will but rather transmits statements from one party to another. Thus, this discussion of a messenger in the *Majallah* reinforces the understanding that a non-physical meeting of contract can take place using modern methods of communications that are akin to use of a messenger.

In accordance with the preceding, the time at which the acceptance is made in modern contractual methods, according to the *Majallah*, varies depending on the means of expression used, whether oral or through correspondence. If the contractors communicate orally by telephone, as long as the conversation was about the contract, the meeting of contract is dissolved at the end of the

35 In that sense Ali Haider states that: 'If the contractors were far apart from one another, but they can still see each other, their distance does not contradict the Federation of the meeting to contract and does not prevent the sale from taking place . . . if such distance did not lead to confusion and suspicion in their words, meaning their offer and acceptance between both'. A. Haider, *Durer al-Hukkam* (Amman: House of Culture for Publishing and Distribution, vol. 1), 139.

36 See, for example, Articles 334, 1450 & 1454 of the *Majallah*.

call if no agreement is reached. In this regard, the *Majallah* is consistent with Article 2.1.7 of the UNIDROIT Principles, which states that if both parties use correspondence to communicate, such by e-mail or fax, the meeting of contract ends at the end of the period specified for acceptance in the e-mail or fax letter. And if the duration is not specified, it is defined in accordance with customs between traders, taking into consideration the circumstances of both parties, because customs are considered obligating under the *Majallah*.

Nonetheless, in the absence of customs or usual practices between the parties, nothing is mentioned in the *Majallah* that prevents the parties from taking into account a reasonable duration under the circumstances. Giving effect to an offer has priority over negating it, but if, after a reasonable period, it is certain that the offeror did not intend to bind himself or herself, the offer is negated (Article 60 of the *Majallah*). To say otherwise would be to allow a person who has obligated himself or herself to do something to also dissolve that obligation, which would contradict the principle of good faith in contracts, which calls for obligating a person legally to what that person has bound himself or herself to.[37] Hence, the *Majallah* is also consistent with Article 2.1.7 of the UNIDROIT Principles regarding reasonable duration, taking into consideration the circumstances and the given the course and speed of the means of communication used.

4 Mutual Assent on Fundamental Matters

For a contract to be formed between the contractors, they must agree on the fundamental matters of the contract, whereas the contractors' agreement on secondary issues is not a requirement to conclude the contract, unless one or both of the contractors postpone the formation of the contract until such details are agreed on.[38] This last action transforms these secondary details into

37 Article 100 of the *Majallah* provides: 'If any person seeks to disavow any act performed by himself, such an attempt is entirely disregarded'.

38 See the Gaza Cassation Court Judgment No. 179 for the year 2003, on 27/4/2004: 'originally contracts are considered correct as long as it contain sits elements and conditions, and is consistent with the law and does not violate the public manners'. See also: the Emirate of Abu Dhabi, the Court of Cassation, civil and commercial judgments, Appeal No. 323 for the year 2010, the date of session 5 April 2010, technical office, Part 2, p. 623: 'The contract does not take place unless there is mutual assent between both contractors on the basic elements of the commitment and other legitimate conditions other legitimate which the parties consider essential'.

fundamental matters that prevent the contract from being concluded until agreement is reached.

But if the contract was made without raising these details, or if such matters were raised but without suspension of the contract, the parties can resort to a subsequent agreement between them on any conflicts that may arise in regard to such details. And if such an agreement is not made, they can reference the complementary provisions of the *Majallah*, such as custom and requirements of justice, to resolve their disputes, thereby allowing the survival of the contract. In this regard, the Jordanian Cassation Court, pursuant to the provisions of the *Majallah*, held that:

> If the parties have agreed on the basic points of the contract and did not identify the period of time in which to take out and complete the action that was agreed upon, that does not affect the contract completely, because determining the period is considered a sub-point to the basic points, and in the case that it was not mentioned it can be designated by the Court according to the nature of the contract, the contractors' goals, custom, and habit.[39]

We can summarise the fundamental matters necessary for the conclusion of the contract as follows:

- *The nature of the contract.* The parties must have intended to conclude a contract of a certain class, such as a sales contract. Thus, if a dispute arises between them over the existence of a sales contract, the judges must use their discretion to ascertain whether such a contract exists by determining whether it was the common intention of the contractors to form such a contract, according to the circumstances and the contract negotiations.
- *The services or goods of the contract.* There should be mutual consent and agreement on the services or goods the parties contract for, such as the merchandise in sales contracts and the price.[40] Hence, a requirement for concluding a sales contract is the existence of consideration—that is, a sales price—because of the exchange principle.

39 Appeal No. 256, year 1967, p. 1141.

40 Article 104 of the *Majallah* defines contracting as: 'The conclusion of a contract consists of connecting offer and acceptance together legally in such a manner that the result may be perfectly clear'. See: Dawwas & Dodeen, *supra* note 3 at 68.

In this regard, it is necessary to differentiate between two cases, which are treated differently in accordance with the provisions of the *Majallah*. In the first case, there is no price, and therefore the sales contract is not concluded because of the absence of an even exchange. In this regard, the Federal Supreme Court of the United Arab Emirates held:

> In order for the contract to be concluded, the parties must have mutual assent on the fundamental matters of the obligation and the remaining conditions which they consider basic in the agreement and that the things contracted on are possible and certain or capable of being certain and are permitted to deal with. It is agreed that the fundamental matters in sale contracts are, first, the agreement on the sold services or goods and, second, the agreement on price. So if the contractors left the price without rate, or without the potential to be estimated, the sale is not concluded because of the absence of a fundamental matter to the contract, which is the price, and setting the price or its potentiality to be set must be agreed upon between the contractors.[41]

The second case concerns the absence of agreement on the amount and description of the price, or silence in that regard. Although the contractors intended the existence of a contract not naming the price, the contract is considered voidable. This gives either contractor the opportunity to dissolve the contract if the cause of voidability is not corrected (in this case, if the price is not named).[42]

As previously mentioned, agreement on secondary matters is not necessary for a contract to be concluded. Failure to agree on secondary matters or details, such as place of delivery, transport costs, and other expenses of delivery, does not result in the invalidity or suspension of the contract, unless the parties agree otherwise. So if the contracting parties do not agree on these matters, the provisions of the law are applied, and the court, in this case, can complete the contract and decide on these matters, according to the nature of the sale, the provisions of law, customs, and the requirements of justice.[43] The judge's work, in such cases, exceeds the original scope of work, and the judge's mission

41 UAE Federal Supreme Court, Civil and Commercial Judgments, Appeal No. 140, judicial year (22), date 26 March 2002, 24, Technical Office, part 1, p. 727.

42 Article 237 of the *Majallah*.

43 See Appeal (Jordanian Cassation Court) No. 256 for the year 1967, p. 1141; the Government of Dubai, the Court of Cassation, Civil Judgments, Appeal No. 134 for the year 2004, on 31 October 2004, Technical Office 15, Part 2, p. 1865.

becomes not only interpreting and determining what has been agreed on between the contractors, but also completing what was lacking in their intentions, thus contributing to the establishment of the contract. This unusual act by the judge can be justified by the contractors' intent to replace themselves with the judge in addressing the issues they disagreed on. If such an intent does not exist, whether explicitly or implicitly, the scope of the judge's work would be restricted to what is actually in the agreement.[44]

The *Majallah* does not provide an explicit answer regarding cases in which the contractors agree that a contract is not concluded because secondary matters are not agreed to. However, if the contract is not concluded in such case, it is as if the contracting parties did not agree on the fundamental matters, despite the principles of will and freedom to contract. Thus, as long as nothing to prevents the contractors from agreeing that the secondary matters are fundamental, the contract is not considered to be concluded until these matters are settled,[45] because no mutual assent exists in this situation. In essence, the offer was never accepted, so the contract was never made.[46]

The preceding statements regarding the conclusion of a contract by the contractors' agreement on the fundamental matters are in accordance with Articles 2.1.13 and 2.1.14 of the UNIDROIT Principles because what is important in the *Majallah* is the extent to which the intention of the contract has been achieved. Hence, if the intent can be achieved by agreement on the fundamental matters, the two systems are identical. A difference could arise regarding the contractors' referral to a third party to define a specific item in the contract. In that case, the contract would be voidable under the *Majallah* if the item was of a fundamental matter. But in all other cases, the referral would be valid if custom, previous dealings between contractors, or the text of law could be used to fill in the missing term.[47] Agreeing to refer to a third party can also be considered a valid basis for assessing such a matter, as long as the issue in

44 A. al-Aboudi, *Explanation of the Provisions of Civil Law Contracts: Sale and Lease* (Amman: the House of Culture for publishing, 2011), 54. The Jordanian Cassation Court has sentenced in the Appeal No. 583/83, on 29/3/1984 that 'We have entrusted the Articles of 100/2 civil law and 174/3 of due process rights, the right of the judiciary body in the appointment of the detailed issues and sub-issues as long as there is a contract with agreed upon fundamental matters between contractors'.

45 Al-Aboudi, *ibid.*, p. 54.

46 Alzoubi, *supra* note 7 at 56.

47 See M. Zarqa, *Nominal Contracts in Islamic Jurisprudence: Contract of Sale* (Damascus: al-Kalam House, 1999), 84; also see Haider, *supra* note 35 at 198.

question would not raise dispute at the time of implementation, especially if it was known by custom (Article 29 of the *Majallah*).[48]

5 Conclusion

This article shows that the *Majallah* generally agrees with the UNIDROIT Principles regarding the rules of contract formation, either explicitly or by reference to Ḥanafī jurisprudence, the *Majallah*'s historical source. The main points of disagreement between the two are seen in *Hanafi* jurisprudence's adoption of the theory of taking the moment of issuing acceptance rather than the arrival of the acceptance to the offeror as the point at which the contract is formed. Moreover, the contract is not concluded if it is made using future terms, such as a future promise. And although the meaning of the meeting of the parties in the same time and place of contract, in its technical sense in the *Majallah* and in Islamic jurisprudence, is unparalleled in the UNIDROIT Principles, the provisions of offer and acceptance that take place in the meeting of contract are largely consistent with the Principles.

48 In confirmation of such, Ḥanafī jurisprudence authorised what is known as selling Ensnarement (ESTIJRAR), the prevalence of work done at the people, to the effect, that people buy everyday their business from the seller without asking about the price, that is the account between them and pay the price later, as time the buyer receives his salary, so then you may the two sides agreed to adopt the time of the sale price; the markets price when the buyers receives the sold items. See W. Alzuhayle, *Nominal Contracts in the UAE Civil Transactions Law and the Civil Code of Jordan* (Damascus: Dār al-Fikr, 1987), 46.