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CONTRACTS

CONTRACTS (usually *ʿaqd*), legally enforceable undertakings between two or more consenting parties. Contract law is concerned with such questions as definition of contract, how a contract is drawn up, when it is or is not enforceable, how it may be broken, and the results of failure to comply with its terms.

i. In the Achaemenid Period

Contracts from the Achaemenid period have not yet come to light in Persia proper, though they are quite common from Achaemenid territories in Mesopotamia and Egypt. These contracts are written in Babylonian, Aramaic, and demotic Egyptian and generally conform to the legal terminology current in those places. The absence of any traces of Persian influence in these documents, aside from a few Persian loanwords, suggests that contracts may not have been common in Persia itself.

About 6,000 Babylonian legal and economic documents from private and temple archives of the Achaemenid period have so far been published. Most of

these texts are records of various transactions: promissory notes; documents concerning the sale and lease of land, houses, and other property, including slaves; agreements for hire of labor and livestock, for apprentice training in various trades, and for marriage; and the like.

Neo-Babylonian private and administrative law did not change substantially under Achaemenid rule, though some Old Persian juridical terms do appear in legal records. Private documents drawn up according to fixed legal formulas thus remained basically the same in the Achaemenid and Hellenistic periods. In Achaemenid Babylonia the formulas, some of which took the form of dialogues, varied according to the nature of the transaction. Documents dealing with the sale of movable property (slaves, livestock, boats) differed in format from those for sale of real property (fields and houses). In each contract the terms of the transaction, the place and date of its drafting, and the penalty (usually a fine) for possible breaches of its terms were set forth. The language emphasized the voluntary nature of the transaction. Normally two copies of a contract were prepared by a professional scribe in the presence of the contracting parties and several witnesses (usually between three and ten and sometimes even more), some of whom affixed their seals to both; each party then received one copy.

Medes, Persians, and other Iranians took an active part in business in Babylonia. They concluded deals, borrowed and lent money, and purchased and sold houses, plots of land, slaves, and other property. For instance, Cambyses, while still crown prince, lent money at interest through his manager. The Persian Bagasaru, director of the royal treasury, owned fields in the vicinity of Babylon and rented them to local tenants. In the second half of the 5th century B.C.E. the names of many Persian princes, Queen Parysatis, and other Iranians appear as contracting parties in agreements with the firm of Murashu in the city of Nippur.

Some Babylonian contracts were also drafted in Media, Elam, and Persia, though most of them have come to light in Mesopotamia. They demonstrate that Babylonian businessmen were active in Iran. For example, among the Persepolis Fortification tablets written in Elamite there is one Babylonian document recording the sale of slaves at Persepolis during the reign of Darius I; the contracting parties were Babylonians. All the other tablets from Persepolis, which were written between 509 and 458 B.C.E., are royal economic records and include no contracts.

Aramaic documents from the area of the former Achaemenid province of Samaria, have also been preserved. They are dated by the names of Persian kings of the 4th century B.C.E. and contain marriage contracts, documents for the sale of slaves and land, promissory notes, and the like. From Achaemenid Egypt a relatively large number of marriage contracts, leases for fields, and similar documents written in demotic Egyptian are known; the legal formulas in these documents differ substantially from those used in Babylonian contracts.

Aside from these documents, which preserve local traditions, about 200 Aramaic papyri, mostly of the 5th century B.C.E., have also been discovered in Egypt. They consist primarily of marriage contracts, deeds of purchase, and leases for land. Although Egyptian influence is apparent in these texts and Persian loanwords are common (see aramaic i-ii), the cuneiform legal tradition, expressed in the standard formulas, remained basic.

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ii. In the Parthian and Sasanian Periods

It is significant that the only relics of ancient Zoroastrian civil legislation are laws of contract (Indo-Aryan *mitrám*, Av. *miθra-*, Mid. Pers. *mihr*mehr “dowry, marriage portion,” see below) preserved in the *Vidēvdād* (4.2), in which verbal contracts (Av. *vačahina-*, Mid. Pers. *pad gōwišn*) and written contracts (Av. *zastāmaršta-*, Mid. Pers. *dast-mušt*) are distinguished. They are classified in four types, according to the level of value involved: “the size of a sheep” (Av. *pasu.maza-*, Mid. Pers. *pah-masāy*), “the size of an ox” (Av. *staorō.maza-*, Mid. Pers. *stōr-masāy*), “the size of a man” (Av. *vīrō.maza-*, Mid. Pers. *wīr-masāy*), and “the size of a field” (Av. *daiŋhu.maza-*, Mid. Pers. *deh-masāy*). In the Parthian period, after the development of a money economy based on production and marketing of commodities, this primitive system of classification was apparently not given up, but the values were restated as 3, 12, and 500 *stēr*s and upward. Some elements of the old system even persisted in the Sasanian legal literature, though with specialized applications: Not a few passages of the *Mādayān ī hazār dādistān* suggest that verbal contracts persisted. The *wīr-masāy*, evaluated at 500 *stēr*s (=2,000 *drahm*s), was designated as the average price of a woman or slave (*Mādayān*, pt. 1, p. 12) and as the marriage portion of a woman (*Vd.* 4.44; *Pahlavi Texts*, ed. Jamasp-Asana, p. 142; Darmesteter, p. 45 n. 3). It is thus probable that New Persian *mehr* “dowry, marriage portion” (traditionally considered to be derived from Arabic and read *mahr/mahrīya*mihr ī wīr-masāy “a contract the size of a man.” Furthermore, two fractions of *pah-masāy*, *pah-*srēnak-masāy* “to the amount of the rump of the sheep” (=12 *drahm*s) and *pah-bāzāy-masāy* “to the amount of the shank of the sheep” (=6 *drahm*s), were used as technical terms for the total remuneration of an “appointed” *stūr*, or guardian (*sālār*), that is, 18 *drahm*s (*Frahang ī oīm* 25b; Shaki, 1971, p. 330).

Because sources for the Parthian period are rare, knowledge of social

relations, which must have been quite unevenly developed in the vast and diverse Parthian empire over half a millennium, is severely limited. Nonetheless, a few significant discoveries related to legal issues reveal that, as a result of centuries of familiarity with Greek legal norms and practices, there had developed a highly advanced system of drawing up contracts, which evolved into a sophisticated legal specialty in Sasanian times.

Historically the earliest evidence of registration of deeds comes from the Avroman parchments (see avroman documents). Of three legal documents concerning emphyteutic leasing of vineyards the first two, dated to 88/87 and 22/21 B.C.E. respectively, are in Greek, and the third, from 53 C.E., is assumed to be in an early form of Parthian. These documents were written after the use of unwieldy clay tablets had been abandoned in favor of the more convenient Greek practice of keeping records on parchment. A parchment from Dura Europos (no. 10), written in Egyptian Greek and dated to 121 C.E., contains a contract for a loan concluded between two Parthians, a nobleman and a peasant; the peasant undertook to serve the aristocrat as a slave in payment of interest on the loan, thus also presenting his labor in servitude as security. Among the ostraca found at Parthian Nisa there are also legal documents attesting the emphyteutic lease to private individuals of royal vineyards situated in the precincts of Mihrdādkird (D'yakonov and Livshits); the lessees had thus become liable for land tax. These documents demonstrate that by the mid-Parthian period there was a strict legal procedure for drawing up binding agreements. The traditional written agreements must have given way to Greek legal norms, at least in the urban centers of Parthia proper. There contracts were drawn up, signed, sealed, and attested before a magistrate and in the presence of at least two witnesses (*šḥdyn* in the third Avroman document); dates were given in both the Seleucid and Parthian eras with the Zoroastrian month and day. Copies were made for both parties, as well as for the city or departmental archives; the copies were bound and sealed with bullae, whereas the endorsed originals were left open.

As for later Sasanian practice, the *Mādayān* attests an increasing refinement in the system and in the technicalities involved in executing contracts (*dib*, *nibēg*, *nāmag*, and *wizīr*, a sealed, hence enforceable document; *Mādayān*, pt. 2, p. 34). There is ample evidence for both registered and verbal agreements (*pašt, pašn, paymān*). More significant or long-term agreements were committed to writing, whereas transitory or less important contracts were concluded verbally, perhaps mainly among close acquaintances or within families. Some

significant bonds were given specific titles. For example, a title deed for transfer of property for pious purposes was termed *pādixšīr* (written *pʾtẖštly*). The high priest Kirdēr in his 3rd-century inscriptions claimed to have signed and sealed (*ḤTYMWN-*, *āwištan*) many such contracts during the reigns of Šāpūr I, Ohrmazd I, and Bahrām I for the establishment and maintenance of fires and their attending priests (*ʾtwlʾn W mgwny*hilišn-nāmag (*Mādayān*, pt. 1, p. 87) or, rarely, *āzād-hišt* (pt. 2, p. 31) and the manumission certificate *āzād-nāmag* (Pers. *āzād-nāma*). From a few passages in the *Mādayān*, as well as from the single surviving contract (see below; *Pahlavi Texts*, p. 142), it may be deduced that the principal party to an agreement had to repeat his undertaking three times before the legal representative (*dastwar*), a routine procedure that was by no means limited to verbal contracts, as has been suggested by Anahit Perikhanian (p. 670).

The execution of contracts was administered by *mowbeds* "priests," *dādwar*s "judges," or *dastwar*s "episcopal authorities, legal representatives," with distinct jurisdictions (*ēwarīh*), some of which are mentioned in a chapter of the *Mādayān* (pt. 2, pp. 25-28) entitled "On the jurisdiction of functionaries" (*dar ī ēwārīh ī kārdārān*). In the *Mādayān* a whole chapter is devoted to the duties of the *dastwar* (pt. 1, p. 5), to the drawing up (*nibištan*) of the documents, the signing and sealing (*āwištan*), and associated aspects (pt. 2, p. 30). These officials were competent to execute a contract only after they had examined the parties involved. In certain instances there were two *dastwar*s or *dādwar*s, a senior (*dādwar ī meh*) and a junior (*dādwar ī keh*

In Sasanian legal practice the formulation of contracts had developed into a specific field, hedged about with juridical technicalities and conventional terminology, the latter characterized by contrived meanings, a particular choice of word order, and use of prepositions and other elements that were juridically but not grammatically relevant. The use and interpretation of these technical terms and conventional expressions must have demanded high proficiency on the part of magistrates and other judicial authorities. There is also a special chapter in the *Mādayān* devoted to explanation of these formulas (pt. 2, p. 16; see Menasce, pp. 11-20). Typical examples include *rād* "revertible grant," literally "gift," versus *ḤDYYʾ* (the interpretation of the graph is uncertain) "irrevertible grant," literally "gift"; *pašt dād xwēš* "agreement on grant with rightful ownership" versus *dād pašt xwēš* "agreement on grant without rightful ownership" (pt. 2, pp. 10-11; Shaki, 1983, pp. 183-94); and *hamāg frazandān ī man mard-ē*, lit. "all my children, one man," versus *az*

frazandān ī man hamāg mard-ē, lit. “of all my children, one man” (pt. 2, p. 16), each of which assigns to the grantor or creditor a distinct title in the contract.

Contracts were executed in the presence of three (sometimes only two) witnesses (*gugāy*), who verified the seals of the contracting parties. If a legal representative (*dastwar*) was himself to furnish evidence, then, according to some jurisconsults, there was to be a second representative for the other party (pt. 1, p. 7; on the possibility of two women acting as witnesses, see citizenship). In addition to the original (*mādag*) at least two copies (*paččēn*, *hampaččēn*) were made, one for each party. If the creditors were two partners (*hambāy*), the original was held by the partner with the major claim and the copy by the other (*Mādayān*, pt. 2, p. 33).

In Sasanian juridical literature two kinds of seals are mentioned, personal seals (*muhr ī xwēš*) and seals of office (*muhr ī pad kār-framān*Mādayān, pt. 1, p. 32), of which there were actually three categories, apparently of unequal legal force: *muhr ī ēwar* “trustworthy seal,” *muhr ī wizurd* “authentic seal,” and *muhr ī wābarīgān* “credible seal.” From the *Mādayān* (pt. 1, p. 32) it follows that the *muhr ī ēwar* had greater evidential validity than the *muhr ī wizurd*, even when the latter predated the former. The *muhr ī wābarīgān* was admissible only when it was verified by a witness and thus seems to have offered less credibility (pt. 1, p. 93).

In traditional law (*kardag*) the magistrate who made out a document in duplicate (*uzēnag ī pad nāmag passāz*) was paid two *drahm*s in every nine or three *drahm*s in every ten, that is, 20 or 30 percent of the value of the property involved. For a person under sentence of death (*margarzān*) the expense could be as high as 95 *drahm*s (in every ten?). Traditionally, however, the cost of drafting a document was paid from the revenues of a fire temple and later refunded by both parties (*Mādayān*, pt. 2, p. 16).

The *Mādayān* deals circumstantially with various sorts of contract for barter (*guharēn, guharīg kardan*), sale of property, lease (*thk/tʾk*abām), conveyance of property, pledging (*graw, grawagānīh*), marriage (*zanīh*), adoption (see Supplement; children iii), revertible and irrevertible grants, partnership (*hambāyīh*), all manner of commitments, promises, and so on. Reciprocity in transaction or equivalent exchange (*guharēn rāst kardan*) was considered meritorious, but an unequal transaction in which the profit did not exceed one-fourth of the property exchanged was permissible (pt. 1, p. 37). Even a wife could be authorized to enter into an equal exchange. The contract for sale

of property could be canceled by the vendor within three days (*3 šabag*) and by the buyer within three days after the vendor's grace period had elapsed (pt. 2, p. 37).

Cases involving guarantees (*pāyandānīh*), including joint guarantees (*ham-pāyandānīh*) and the creditor's right to redress from the guarantor (*rāh pad pāyandān*) in the event of a debtor's insolvency (*atuwānīgīh*) or default, are duly treated in the *Mādayān* (pt. 1, pp. 56-57). When there were several guarantors for a loan of money, they were considered joint guarantors (*ham-pāyandān*) or persons with joint liability (*ham-xwāstagān*), individually liable for payment of the debt; furthermore, in the case of breach of contract by one of them, the creditor could exact indemnity (*tāwān*) from any of them (pt. 1, p. 56).

The penalty (*tāwān*) for breach of an agreement, false declarations, or tergiversation (*waštag-saxwanīh*) was usually stipulated in the document; in addition, when stipulated, compensation (**ōwāw*, cf. Parth. *abgāw* "increase") and *ahlawdād* (the legal meaning of the term is uncertain) were also demanded from the debtor (*Mādayān*, pt. 1, p. 71). Another legal instrument for safeguarding against nonfulfillment of a contract was taking property or a slave (in this instance called *tan*) as security (*graw, grawagān*) for a loan of money and drawing up of a deed of pledge (*wizīr ī grawagān*agraw kardan) the debtor had first to return the deed to the creditor (pt. 1, p. 38).

In the event of disagreement the defendant (*pasēmal*) was entitled to appeal the verdict of the junior judge (*dādwar ī keh*), whereupon the case would be heard by the senior judge (*dādwar ī meh*Mādayān, pt. 1, p. 3). If neither party objected to the judge's ruling (*wizīr*), then no right of appeal was conceded unless there were clear reasons for revocation of the decree (pt. 1, p. 3).

The only surviving complete specimen of a Sasanian contractual document is a marriage contract (*paymān ī zanīh* Pahlavi Texts, pp. 141-43); it bears a Yazdegerdī date (with the Zoroastrian month and day) equivalent to 1278 C.E., but in its design and composition it preserves many original Sasanian marriage articles. Although the bride's commitment not to renounce Iranian noble-mindedness (*ērīh*) and her faith in the Good Religion (*weh-dēnīh*) are post-Sasanian stipulations, the general tenor of the entire document attests its historicity. The names of the couple, of their fathers and grandfathers (an ancient mode of recording genealogy going back to Achaemenid times), and of the bride's guardian are given, and the domicile (province and district), type of

marriage (*pādixšāyīhā* “legitimate”), and bride’s marital and filial status (maidenhood, adoption) are registered; it is also stipulated that she is exempt from the obligation of *stūrīh* (*ayōkēnīh*). The bride’s father declares his consent three times and characterizes his giving her in marriage as a pious gift (*ahlawdād*). The bride and bridegroom make their vows: she to revere and obey (*tarsagāhīh*) him, he to care for and protect (*sālārīh*) her. The bridegroom declares that he has taken her to wife in exchange for 2,000 *drahm*s (one *wīr-masāy*pāyandānīh, a late euphemism used for the original *dāsr ī wīr-masāy* “a gift to the amount of one human being,” summary of *Nigādum nask* in *Dēnkard*, ed. Madan, II, p. 715, ed. Dresden, p. 287; properly “marriage portion” or “bride price”) to her father and promises her half his property (another late innovation; in Sasanian times a *pādixšāyīhā* wife was entitled only to the property that she had brought from her paternal home, that is, her own private property, *wāspuhragān*, and dowry, *passāzagān*Mādayān, pt. 1, pp. 4, 30, 60; cf. Shaki, 1974, pp. 327-36). The bride’s father accepts the security and agrees to act as his daughter’s representative (*jādaggōw*). At the end of the document (*dib*) three named witnesses attest to the signatures.

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iii. In Traditional Islamic and Modern Persian Law

In traditional Islamic law

Western scholars like Joseph Schacht, Norman Anderson, and Noel Coulson have emphasized the absence of a general Islamic theory of contract applicable to all types of contracts. As evidence they cite traditional texts on *feqh* (Islamic jurisprudence) in which detailed rules governing a number of individual kinds of contracts are set forth but no general conception of contract is defined. This view has been accepted by modern civil lawyers, who claim that the Islamic law of obligations, like its Roman predecessor, is a law of contracts but not of contract. Most scholars have, however, overlooked the

traditional literature devoted to general principles, *qawāʾed-e feqh* (elements of jurisprudence). Among many works on this subject two by Sunni scholars (Ebn Rajab Ḥanbalī, d. 795/1393; Soyūṭī, d. 911/1505) and a number by Shiʿite authors (e.g., ʿĀmelī, d. 786/1384; Fāżel Meqdād Soyūrī, d. 826/1423; Narāqī, d. 1245/1828; Marāgī, d. 1250/1834; Anṣārī, d. 1281/1864; Āl Baḥr-al-ʿOlūm, d. 1326/1908; Āl Kāšef-al-Ḡeṭāʾ, 1373/1954; Mūsawī Bojnūrdī) have particular relevance to law in Persia. It is clear from these works that the koranic verse 5:1, containing the prescription *awfū be'l-ʿoqūd* ("fulfill the obligations"), affords a conception of contract applicable to all possible agreements, however diverse (see, e.g., the commentary on this passage in Jazāʾerī, p. 124). It is further qualified in a number of traditions from the Prophet Moḥammad, for example, "Believers are bound by their stipulations, except a stipulation that makes unlawful what is lawful." Under Islamic law therefore all mutually concluded private arrangements are enforceable as long as they conform to prescribed norms. The contract of sale is usually taken as the model for all other contracts, even those for marriage. Only the specific details of the transaction differ from one contract to another.

In modern Persian civil law

In modern Persian law the rules governing contracts, set forth under the rubric "Contracts and undertakings in general" in Articles 183-300 and 397-407 of the Civil code of 1307 Š./1928, were derived from principles of Islamic law. Nevertheless, the drafters of the code followed the arrangement of the French Code Civil (Emāmī, I, pp. 159-60; Amīrī Qāʾemmaqāmī, p. 37).

The meaning of "contract" in Persian law. According to Article 183 of the Civil code, "a contract (*ʿaqd*) comes into being when one or more persons negotiate a mutual obligation with one or more other persons and all of them accept it." A contract is therefore a special form of agreement (*qarārdād*) with two distinctive characteristics. First, it requires the mutual consent of two or more willing parties and thus differs from a unilateral legal act (*īqāʿ*) like divorce or testamentary disposition (*Kātūzīān*, I, pp. 4, 8). Second, it creates an obligation. By these standards any other kind of agreement should not be considered a contract. For example, in Articles 283-88, the consent of both parties to the breaking off of a transaction is called a "cancellation" (*eqāla*), not a "contract" (Kātūzīān, I, pp. 4, 8). The Persian code is not, however, always consistent in observing the distinction spelled out in Article 183; for example, in Articles 219-20 (translated from Articles 1134-35 of the Code Civil) the term *ʿaqd*, rather than *qarārdād*, was used to render "agreement." Some lawyers have thus

justifiably argued that the distinction between contract (*ʿaqd*) and agreement (*qarārdād*) has no practical validity and that in fact the two terms are synonymous in Persian law, each including certain legal acts not included in the original definition of "contract" in Article 183, for example, supplementary contracts and subcontracts (Amīrī Qāʾemmaqāmī, II, p. 31; Kātūzīān, I, p. 9).

Features of the Persian law of contracts. According to Article 190, the following conditions are essential for a valid contract: the intention and mutual consent of both parties, the competence of both parties, a defined subject, and a legal purpose. Intention and consent are established by any objective "factor that proves that there was such an intention" (Art. 191). Conveying or receiving delivery of property usually also signifies intention and acceptance. A party to a contract may be declared incompetent because of minority, insanity, or bankruptcy (Art. 212; cf. Arts. 540-80 of the Persian Commercial code). Corporate entities are legally competent to enter into agreements or contracts, with all the rights and obligations granted by law to natural persons, except for those arising from paternity, affiliation, and the like (Art. 588 of the Commercial code). The subject matter of the contract must be identifiable or ascertainable; its provisions are deemed sufficiently defined if they can be understood at a later time, that is, if they are based on a specified standard, customary practice, or previous dealings between the parties. The subject of a transaction can be ambiguous only when general knowledge of the matter is sufficient (Art. 216). The purpose of concluding a contract need not be mentioned, but it must be lawful.

Provided that these requirements are met, the concurrence of the contracting parties is binding, even in areas not covered by legislation. A contract thus becomes valid as soon as the parties reach an agreement, whether or not it is subsequently written down (Art. 192). There are certain additional requirements and exceptions for specific categories of contract, however. For example, those involving endowments, real estate, and the formation of particular kinds of companies must be notarized in order to be recognized by the courts and government agencies (Arts. 46-47 of the Qānūn-e ṯabt-e asnād wa amlāk [Law for registration of documents and property]).

Persian civil law, specifically Article 3 of the Code of civil procedures, expressly provides that the courts must issue judgments in accordance with the law but that, when the applicable law is imperfect, vague, contradictory, or nonexistent, they must take into account the spirit and purport of both the code as a whole and established usage. In determining prevalent custom and

practice, the courts are to judge according to locality and subject matter. Article 223 provides that any contract is to be assumed to be genuine unless proved otherwise. The precise terms of a contract may be specified, or the details may be left to be worked out subsequently. Any ambiguity in a written contract is to be construed against the party who drafted it and thus had the most opportunity to clarify the position but failed to do so. Gaps left by the parties can also be filled by resort to custom and usage. For example, the parties are bound not only by the specific provisions of the contract but also by its consequences in accordance with custom, practice, and law (Art. 220). The wording of the contract is to be interpreted according to prevailing and customary meaning (Art. 224). When certain points customarily included in a contract are not specifically covered, they are nevertheless to be treated as if they were (Art. 225). If, according to common usage and practice, a particular item is considered part of or attached to the object sold, it belongs to the purchaser, even though it is not clearly mentioned in the contract of sale and even though the parties had not been aware of the common usage (Art. 356). Under the Commercial code certain contracts, including those for brokerage, commission agency, transport, and insurance, are governed by special provisions, but there, too, usage and custom play a considerable role.

Freedom of contract in Persian law. In Article 10 of the Civil code the principle of freedom of contract is declared: “Private agreements, if they do not contravene any law, are binding on the persons who have concluded them.” In Article 754 agreements to transfer property are declared to be enforceable, with the exception of agreements to do something illegal (Jaʿfarī Langarūdī, 1363 Š./1984, pp. 172-74). This broad definition of freedom of contract has given rise to a dispute over whether Persian civil law is or is not compatible with Imami Shiʿite law. In the latter, according to one widely accepted interpretation, a primary undertaking (*taʿahhod-e badwī*), that is, an initial agreement between two parties, becomes an enforceable contract only after it has been drawn up in the form of a specific agreement (*ʿaqd-e moʿayyan*) or stipulation in an agreement (*šarṭ-e żemn-e ʿaqd*ʿaqd-e ṣolḥ), and the terms are determined solely by the agreement of the parties (Jaʿfarī Langarūdī, 1363 Š./1984, p. 43, 138; Sanglajī, p. 111). The modern Persian civil law of contracts is compatible with the latter interpretation of Islamic law but contravenes the first and narrower interpretation.

Despite this controversy, the prevailing opinion among the various modern schools of Islamic law is opposed to the formalist notion that each type of

contract must be drawn up according to a distinct formula (*ṣīḡaʿ*aqd-e moʿayyān) or not. Intention and consent, however expressed, lead to contractual obligations. It is the fact of mutual agreement, rather than specific forms, expressions, or other technicalities, that determines whether or not a contract exists.

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