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## The Medieval Hawale: The Legal Nature of the Suftaj and Other Islamic Payment Instruments

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# The Medieval *Hawale*: The Legal Nature of the *Suftaj* and Other Islamic Payment Instruments

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## 1. Introduction: banking and payment institutions in the Medieval Islamic world

By the middle of the eighth century CE the Arabs established their dominion from the Atlantic Ocean to west of the Persian Gulf. In the process, they spread Islam and established Islamic law<sup>1</sup> as the law of the land throughout this entire vast territory. Until the rise of the Turkish Ottoman Empire between the 13<sup>th</sup> the 16<sup>th</sup> centuries CE, that territory included North Africa (both Egypt and the Maghreb), Israel/Palestine, Lebanon, Syria, Iraq and Arabia.<sup>2</sup>

The era of the pre-Ottoman Arab domination of those lands roughly coincides with the Middle Ages.<sup>3</sup> During that time, centres of economic and financial activity were located in the Near East in the land between the rivers Tigris and Euphrates as well as along the river Nile; this respectively coincides with modern-day Iraq and Egypt.<sup>4</sup> It was observed that the business practices and instruments that had developed throughout those lands during that period heralded the bill of exchange, both as a mechanism for the

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<sup>1</sup> The Islamic legal system is traced by the classical theory to four sources: “the Koran, the *sunna* of the Prophet, that is, his model behavior, the consensus of the orthodox community, and the method of analogy.” See J. Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950, rep. 1959) at 1. For the evolution of the Islamic legal system see in general e.g. NJ Coulson, *A History of Islamic Law* (Edinburgh: University Press, 1964.). But for possible influence of local laws that existed in the newly acquired territories, see e.g. P. Crone, *Roman, Provincial and Islamic Law* (Cambridge: Cambridge University Press, 1987) at 92-93 and Appendix 2 at 102 where a view (attributed to Goldziher) on the strong influence of Roman law on Islamic jurisprudence is cited and documented. Byzantine influence is discussed by J. Schacht, “Droit byzantin et droit musulman”, in Accademia Nazionale dei Lincei, *Convegno di Scienze Morali Storiche e Filologiche: Oriente ed Occidente nel Medio Evo* (Roma: Accademia Nazionale dei Lincei, 1957) at 197.

<sup>2</sup> For a historic outline (including a map) visit <[http://en.wikipedia.org/wiki/Islam#Rise\\_of\\_empire\\_.28632.E2.80.93750.29](http://en.wikipedia.org/wiki/Islam#Rise_of_empire_.28632.E2.80.93750.29)>. Website sources are indicated only for information that is common knowledge. For Islamic law as the civil law of the Ottoman Empire, see the beginning of §2.3 below.

<sup>3</sup> The Middle Ages are commonly dated from the 5th century fall of the Western Roman Empire until the fall of the Eastern Roman Empire in the 15th century. Visit <[http://en.wikipedia.org/wiki/Middle\\_Ages](http://en.wikipedia.org/wiki/Middle_Ages)>.

<sup>4</sup> The former was the centre of the Abbasid Caliphate (between the middle of the 8<sup>th</sup> and the 13<sup>th</sup> century CE) while the latter was the centre of the Fatimid Caliphate (between the 10<sup>th</sup> and 12<sup>th</sup> CE). See respectively <<http://en.wikipedia.org/wiki/Abbasid>> and <<http://en.wikipedia.org/wiki/Fatimid>>.

transmission of funds and as a negotiable instrument.<sup>5</sup> These Islamic instruments,<sup>6</sup> the law that governs them, and hence the grounds of the aforesaid thesis are the focus of this paper.

At first blush, identifying the Islamic lands as the ‘cradle of negotiability’<sup>7</sup> is counter-intuitive. Thus, banking is premised on lending for profit out of bank deposits; in turn, deposit-taking is bound to flourish where the deposit-taker remunerates depositors, namely, pays interest on deposits. It is against the background of a thriving banking system that one expects the development of any non-cash payment system<sup>8</sup> as well as instruments designed for its operation. Islamic law prohibits the taking of interest on loans and thus does not provide for adequate legal infrastructure for banking to develop. Not surprisingly, in the Medieval Islamic world, ‘banks’ in the full sense of the word did not exist.<sup>9</sup>

And yet, the Medieval Islamic world had monetary economy which nevertheless required banking services. Those came to be provided by private money changers, called *sarrafs*, and official money changers and assayers, called *jahbads*.<sup>10</sup> It is in the context of

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<sup>5</sup> P. Huvelin, “Travaux récents sur l’histoire de la lettre de change” (1901), 15(1) *Annales de droit français, étranger et international* 1, at 21-26, arguing at 25 that “the Arab influence is certain.” (hereafter: Huvelin, Travaux).

<sup>6</sup> Throughout this Paper, ‘instrument’ and ‘document’ are usually used interchangeably.

<sup>7</sup> The expression is mine; it purports to rephrase the observation indicated in text & note 5 above. “Negotiability” is used here to denote the sum of the features of a “negotiable instrument”; briefly stated, these are transferability by delivery so as possibly to give a complete title to the instruments and the rights therein. See text & note 127, below.

<sup>8</sup> For the link among these three activities, namely, deposit-taking, lending and the provision of payment services as underlying the origin of banking in Ancient Greece, see R. Bogaert, *Les Origines antiques de la banque de dépôt* (Leyde: A. W. Sijthoff, 1966) at 137-144 (hereafter: Bogaert, *Les Origines*). To these days, “To be recognized as a bank ... an institution is expected to receive deposits of money from its customers; to maintain current accounts for them; to provide advances in the form of loans or overdrafts; and to manage payments on behalf of its customers ...” See e.g. E. Green, *Banking — An Illustrated History* (New York: Rizzoli International Publications, Inc., 1989) at 11.

<sup>9</sup> AL Udovitch, “Bankers without Banks: Commerce, Banking, and Society in the Islamic World of the Middle Ages”, in Centre for Medieval and Renaissance Studies University of California, Los Angeles (ed.) *The Dawn of Modern Banking* (New Haven and London: Yale University Press, 1979) at 255, 258-259 (Hereafter: Udovitch, Bankers).

<sup>10</sup> For an overview, see e.g. SM Imamuddin, “Bayt Al-Mal and Banks in the Medieval Muslim World” (1960), 34 *Islamic Culture* 22 at 27-30. For both categories as

banking services provided by these actors that both new instruments and novel legal doctrine emerged.

Particularly noteworthy is the banking activity of the *jahbad*,<sup>11</sup> who was both a large merchant, as well as an expert in all monetary matters, and for whom the provision of banking services was thus an incidental business activity.<sup>12</sup> As a banker, a *jahbad* could act in a formal capacity for the state and royal court; to that end, such a *jahbad* held a title which he kept for his lifetime and which was passable to an heir of his. *Jahbads* tended to act in close networks that invoked trust so as to facilitate long-distance monetary transactions, and yet stifled competition by precluding newcomers' entry to the profession.

Other than assaying, setting official rate of exchange for coins, and money changing, the banking activities of the *jahbads* were deposit taking, advancing funds to the authorities, and remitting funds. All three look like normal activities forming banking; and yet, they bore significant variations.

Thus, deposit taking was not carried out by way of borrowing from depositors and accumulating of funds to be lent. Rather, other than in conjunction with the remittance of funds as set out below, deposit taking was for safe keeping, pure and simple. Much of it was not even properly recorded as it was a means to hide wealth with trusted persons such as *jahbads*. There is however some controversy as to whether such deposits were profitably used by the *jahbad*,<sup>13</sup> and if so, it is not clear on what basis profit and loss were allocated. The supply of funds to public authorities was a major profitable activity of the *jahbad*; it was however carried out mainly not by regular lending but rather in

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successors of the Byzantine *trapezitai* of Greco-Roman Egypt, see Bogaert, *Les Origines*, above note 8 at 163.

<sup>11</sup> For an extensive discussion, on which much of the ensuing paragraphs build, see WJ Fischel, *Jews in the Economic and Political Life of Medieval Islam* (London: Royal Asiatic Society for Great Britain and Ireland, 1937) at 2 (hereafter: Fischel, *Jews*). An earlier partial version of the relevant discussion is W. Fischel, "The Origins of Banking in Mediaeval Islam: A contribution to the economic history of the Jews of Baghdad in the tenth century" 1933 *The Journal of the Royal Asiatic Society*, 339. See also CC Torrey, "The Evolution of a Financier in the Ancient Near East" (1943), 2 *Journal of Near Eastern Studies*, 295.

<sup>12</sup> It is in this sense that Udovitch, *Bankers* above note 9 at 265-268 refers to the *jahbad*'s sphere of activity as "merchant banking".

<sup>13</sup> Thus, Fischel speculates that "In all probability" amounts deposited with the *jahbads* "were made productive". Fischel, *Jews* above note 11 at 26. Conversely, Udovitch, *Bankers* above note 9 at 260, is of the view that deposits kept by a *jahbad* "could not be used as a form of productive investment."

conjunction with tax farming, that is, by way of making advance payments on account of future or deferred tax collections, of which a portion of revenue was kept by the *jahbad* as profit.<sup>14</sup>

Remittance of funds bore the closest resemblance to a normal banking activity. It was made both in the form of delivery of purses and non-cash payments. Delivery of purses containing specie of coins was a unique and unusual banking activity; it certainly indicates lack of developed banking services. Non-cash payments were both local and from place to place; their mechanisms and governing legal principles is the subject of the present paper. At the outset I should however mention that while this activity gave rise to new types of documents, it did not seem to generate standard forms and procedures; certainly it did not give rise to interbank multilateral mechanisms for clearing and settlement. Moreover, in terms of scope, it may not have been significant in the context of the entire economy.<sup>15</sup> Indeed, the modest scope of the activity reflected the restricted nature of banking during that era. At the same time, the instruments the remittance of funds activity generated were novel, which required the legal framework that governed them to break new grounds; this activity may have thus heralded the bill of exchange, and enhanced the emergence of the negotiable instrument so as to constitute an important link in the legal history of the order to pay money. The significance of the remittance of funds activity in the Medieval Islamic era was more qualitative than quantitative.

Some form of deposit taking facilitating non-cash payments was practiced in local markets by the *sarrafs*, the private money changers. Small retailers operating in those markets opened accounts with the *sarrafs*. The retailers deposited funds in those accounts on which they drew and made non-cash payments to their wholesalers.<sup>16</sup> In conjunction

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<sup>14</sup> Certainly, this profit must have been treated as a legitimate remuneration for his tax collection work rather than an illicit interest on the advances he made on the tax to be collected.

<sup>15</sup> Indeed, major works dedicated to the economic, financial and monetary system of the Medieval Near East do not mention the payment instruments, even in passing. See e.g. H. Rabie, *The Financial System of Egypt*: A.H. 564-741/A.D. 1169-1341 (London: Oxford University Press, 1972) and AS Ehrenkreutz, "Monetary Aspects of Medieval Near Eastern Economic History" in MA Cook, *Studies in the Economic History of the Middle East from the rise of Islam to the present day* (Oxford: Oxford University Press, 1970; rep. 1978) at 37. To a similar effect in the period that preceded the Ottoman conquest, see D. Ayalon, "The System of Payment in Mamluk Military Society" (1958), 1 *Journal of Economic and Social History of the Orient* 37.

<sup>16</sup> See M. Talbi, "Opérations bancaires en Ifrīqiya à l'époque d'al-Māzarī (453-536/1061-1141) – crédit et paiement par chèque", in *Études d'Histoire Ifriqiyenne et de Civilisation Musulmane Médiévale* (Tunis: Publications de l'Université de Tunis: 1982) at 420. See also M. Gill, *In the Kingdom of Ishmael* (Tel Aviv: Tel Aviv University, 1997) Volume I: *Studies in Jewish History in Islamic Lands in the Early Middle Ages*, at 497 [in Hebrew] who speaks of the use of the deposit document to make payments to the suppliers.

with such deposit accounts the *sarrafs* gave overdraft facilities to the retailers/account holders. Not having funds at hand, either in cash or in the form of credit to the account, the small retailers could thus nevertheless pay their suppliers by overdrawing the deposit accounts kept with the *sarrafs*. In compliance with the prohibition to charge interest, overdraft facilities were given by the *sarrafs* free of charge. The *sarrafs* profited from the scheme by taking advantage of the prevailing bi-metallic currency system; they thus credited in gold dinars deposits made by the retailers to the accounts in silver dirhems, using for the conversion (from silver to gold) a lower exchange rate than the going one.<sup>17</sup> In honouring payment orders drawn on the accounts, the *sarrafs* thus provided chequing services to their account holders.<sup>18</sup>

Having set out briefly in this section the institutional framework, this paper proceeds to discuss in Section 2 the *hawale*, as the legal doctrine underlying the transfer of debts under the various schools of Islamic law. Subsequently, Section 3 analyses the Medieval Islamic payment instruments, and their operation in the context of *hawale* principles. The discussion covers the *ruq'ā* and *sakk*, which were particularly used for local payments, as well as the *suftaj*, which facilitated the remittance of funds in the form of non-cash payments from place to place. Section 4 concludes by assessing the role and place of these instruments and the legal framework in which they operated as forerunners for the bill of exchange as a payment mechanism and negotiable instrument.

The major contribution of the present discussion is threefold. First, it contains an in-depth analysis of the *hawale* under the various Islamic schools of law. Among them, two major schools are the Hanafi and Maliki. The treatment of the *hawale* in the *Mejelle*, a nineteenth century codification or restatement of Hanafi civil law, is also part of the analysis, designed to provide a measure of verification to the conclusions reached on the Hanafi rules. Second, the present discussion highlights the nature of the *hawale* as a legal doctrine covering the Islamic payment instruments. It does not treat the *hawale* as a 'financial technique' or type of a payment instrument, side-by-side with others. Stated otherwise, the discussion presents the view that it is inaccurate to speak of the *hawale* and *suftaj* as two types of financial techniques or instruments.<sup>19</sup> Rather, the former is the legal doctrine or set of rules covering the operation of the latter as a financial technique or payment instrument. Third, the discussion concludes by pointing out at the Maliki rules of the *hawale* as having, in their treatment of Medieval Islamic payment instruments, a modest and yet distinct role in the overall evolution ultimately facilitating negotiability as well as a major feature of the bill of exchange.

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<sup>17</sup> Talbi, *ibid.*

<sup>18</sup> *Quare* whether funds in each account were kept separately or whether they were mingled. Regardless, I could not find in Islamic legal doctrine anything similar to the Roman irregular deposit.

<sup>19</sup> As claimed by Udovitch, Bankers above note 9 at 263. See further, note 120 below, and text around it.

## 2. Transfer of debt under Islamic law: the *hawale*

### §2.1 The Mandate for collection and the *hawale* concept

In the footsteps of earlier legal systems,<sup>20</sup> Islamic law has treated a debt or the claim to the money owed thereon as an abstract right, and as such, not as an object or item of property which the creditor could dispose of by transfer or otherwise.<sup>21</sup> However, over the years, bypassing strict orthodoxy, a few mechanisms have developed to confer on a debt the quality of a transferable item of property.<sup>22</sup>

The mandate for collection has played a principal role in that transformation. In this context, a creditor nominates the designated assignee,<sup>23</sup> typically his own creditor, as his mandatary, conferring on him the authority to collect a debt owed to the creditor by the creditor's own debtor. To achieve best results, the mandate to collect is to be reinforced by giving the 'mandatary'-assignee the additional authority to sue a defaulting account debtor. The mandate is to be further strengthened by the inclusion therein of an express term under which the mandator waives the right of revocation. Vis-à-vis the mandatary-assignee, the mandator-creditor may also waive the benefit of the debt to be collected by renouncing his claim to proceeds to be collected.<sup>24</sup> Such a claim to the

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<sup>20</sup> For Roman law, see e.g. R. Zimmermann, *The Law of Obligations-Roman Foundations of the Civilian Tradition* (Cape Town: Juta, 1990) at 58-59. For Jewish law see S. Albeck, "The Assignment of Debt in the Talmud" (1957), 26 *Tarbiz* 262 [in Hebrew].

<sup>21</sup> J. Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964, rep. 1998) at 134 (hereafter: "Schacht, *Introduction*"); and C. Chehata, *Essai d'une théorie générale de l'obligation en droit musulman* (Paris: Dalloz, 2005) at 97 [being an imprint of the author's thesis defended in Cairo in 1936 and originally published in France under the title *Essai d'une théorie générale de l'obligation en droit musulman hanéfite* (Paris: Éditions sirey, 1969)].

<sup>22</sup> The ensuing two paragraphs draw on E. Tyan, "Cession de dette et cession de créance dans la théorie et la pratique du droit musulman (d'après le madhab hanafite)" (1946), 2 *Annales de l'école française de droit de Beyrouth* no 3-4, 23 at 25-27 (hereafter: Tyan, *Cession*).

<sup>23</sup> Certainly, the mandatary, beneficiary of the transaction, is referred here as an 'assignee' (and the transaction as an 'assignment') by reference to the practical implication of the arrangement, and not its formal legal characterization.

<sup>24</sup> See e.g. *Constantine Emilianides v. Aristodemo Sophocli* (1910) 9 *Cypr. LR* 115, at 116, dealing (against the background of the *Mejelle* further discussed in §2.3 below) with a creditor appointing an assignee as an agent for collection with authority to keep the proceeds.



proceeds may anyway be lost to the mandator-assignor and accrue for the benefit of the mandatory-assignee to whom he owes by means of the operation of the right of setoff.<sup>25</sup>

Alternatively, a creditor may effectively waive his claim to a debt and confer it on a designated beneficiary, typically his own creditor, by ‘acknowledging’ that the debtor’s debt is actually owed to that assignee.<sup>26</sup> Such an ‘acknowledgement’ bestows on the designated beneficiary the power to receive payment from the account debtor and give him a discharge. To allow the beneficiary to sue directly the creditor’s debtor, the original creditor must however give him a specific power of attorney, which is treated as irrevocable.

Each such method could be used as a payment mechanism under which the creditor wishes to pay a debt he owes to the beneficiary-assignee by means of directing his own (creditor’s) debtor, to be identified as the account debtor, to pay the beneficiary-assignee. In such a case, the creditor-assignor is the debtor in the payment mechanism, his own debtor (the account debtor) is the paymaster, and the beneficiary-assignee is the creditor. The efficacy of each such method has been premised on the power of a creditor [the debtor in the payment mechanism] to effectively confer on the beneficiary-assignee [the creditor in the payment mechanism] the right to the proceeds of a debt. The debt is owed to the creditor [the debtor in the payment mechanism] by the account debtor [the paymaster in the payment mechanism]; once its proceeds have been collected, they pass to the beneficiary-assignee [the creditor in the payment mechanism].

In theory however, it is neither the right to claim the debt, nor even to the money to be collected thereunder that has been transferred. Rather, by means of his contract with the assignee [creditor], the automatic operation of set-off, or his own ‘acknowledgement’, the assignor [debtor] disabled or precluded himself from claiming the proceeds paid by the account debtor [paymaster] to the assignee [creditor]; the proceeds could thus be kept by the assignee [creditor] in satisfaction of the assignor [debtor]’s debt to him. Effectively however, each such method operates in the same way of an assignment to the beneficiary-assignee [the creditor in the payment mechanism] of the debt owed by the account debtor [paymaster] to the assignor [the debtor in the payment mechanism]; it thus does not require the consent of the account debtor [paymaster].

Beside such methods, Islamic law developed the *hawale* as a mechanism under which a debtor was able to shift his own obligation to pay his debt to another person. Thus, under Islamic law, the obligation to pay money owed, namely the indebtedness, has been considered as conferring a quality attached to, or bestowed on, the person of the debtor. Under specified conditions, it is however within the debtor’s power to pass on this quality to another person, who is to replace him and become a new debtor to the creditor.<sup>27</sup> The one thus becoming a new debtor may have already been a debtor to

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<sup>25</sup> For the operation of setoff in general, see Chehata, above note 21 at 90-92.

<sup>26</sup> This is quite analogous to the Talmudic *Oditta*. See *Talmudic Encyclopedia*, Vol. 1 (Jerusalem: Yad Harav Herzog, 1955) [in Hebrew] at 116.

another creditor; for him, the mechanism brings a new creditor. To that end, as explained below, stretching but staying within limits prescribed by Islamic doctrine, the *hawale* has developed to effect not only a change of a debtor to a creditor, but also a change of a creditor to a debtor.

## §2.2 The *hawale* in legal doctrine

*Hawale* literally means ‘removal’<sup>28</sup> or ‘turn’. It denotes the transference of an obligation from one person to another, constituted by “an agreement by which a debtor is freed from a debt by another becoming responsible for it.”<sup>29</sup> What is transferred from the debtor to another person is an obligation to pay the debt; the *hawale* is thus distinguishable from the cession, which is the transfer from the creditor to another person of the right to the money owed or payment due on a debt.<sup>30</sup> Strictly speaking, to avoid a terminological confusion, it may thus be better to speak of the *hawale* as covering the transference of an obligation rather than of a debt; the latter is ambiguous and may be taken to mean as relating to either the obligation to pay the debt or the money owed on the debt.

In a *hawale* facilitating a payment mechanism, it is the paymaster (‘transferee’) who substitutes the debtor (‘transferor’), and takes over the debt owed by the latter to the creditor. In a practical setting, a paymaster-transferee who owes money to the original debtor-transferor expects not only that his payment to the creditor will confer a discharge on the original debtor-transferor towards the creditor but that in the process he (the paymaster-transferee) will also obtain his own discharge towards the original debtor-

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<sup>27</sup> A point highlighted by Tyan, Cession, above note 22 at 24.

<sup>28</sup> This is the preferred word used by *The Hedya* or Guide: Commentary on the Mussulman Laws, translated, by order of the Governor-General and Council of Bengal. By C. Hamilton, 2<sup>nd</sup> ed. with preface and index, by SG Grady (Lahore: New Book House, 1957) at 330. “The Hedya or ‘guide’ .., consists of extracts from the most approved works of the early writers of Mohammadan Law, and was composed in the later half of the 12<sup>th</sup> century.” See *Louka v. Nichola*, (1901), 5 Cypr. L.R, 82 at 86, quoted by CA Hooper, *The Civil Law of Palestine and Trans-Jordan*, Volume II (Jerusalem, Azriel Press, 1936) at 24.

<sup>29</sup> For this definition see HAR Gibb and JH Kramers, *Shorter Encyclopaedia of Islam* (Leiden: EJ Brill; London: Luzac, 1953) at 137 where it is further stated that the transference of the obligation “is the angle around which this legal mechanism ‘turns’.” The word further denotes the document by which the transference of the obligation is completed. *Ibid.* Particularly for other meanings see also B. Lewis, VL Ménage, Ch. Pellat and J. Schacht, *The Encyclopaedia of Islam* New Edition Volume III (Leiden: EJ Brill; London: Luzac, 1971) at 283-285.

<sup>30</sup> For *cessio* in Roman law, see A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: American Philosophical Society, 1953) at 387.

transferor. A paymaster-transferee who does not owe money to the original debtor-transferor intends either to extend credit to him or to give him a discharge from the creditor by way of gift.

As a matter of an Islamic doctrine, the *hawale* is founded on the Prophet's injunction regarding a creditor's assent and claim against a solvent person to whom the original debtor transferred the debt. The injunction itself is however vague and open-ended.<sup>31</sup> Its full implications are explored by the four principal Islamic legal traditions which make the Hanafi, Maliki, Shafi'i, and Hanbali schools of law.<sup>32</sup>

Among these schools of law there is a disagreement<sup>33</sup> as to the legal theory underlying the *hawale*. Hence, some of its consequences are subject to controversies

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<sup>31</sup> Even translations are inconclusive if not altogether confusing. Thus, the Hedyā, above note 28 at 332 quotes the Prophet to say that "Whenever a person transfers his debt upon a rich man, and the creditor assents to the same, then let the claim be made upon the rich man." At the same time, according to the French translation and interpretation offered by Chéron and Fahmy Bey, in this saying, the Prophet is to be understood to command the creditor to accept the new solvent debtor offered to him. See A. Chéron and MS Fahmy Bey, "Le transport de dette dans les législations européennes et en droit musulman" II<sup>e</sup> partie, "Le transport de dette (*hewala*) en droit musulman" (1931), 22 L'Égypte contemporaine 137, at 139 and 148-149.

<sup>32</sup> These schools are discussed by Schacht, *Introduction*, above note 21 at 57-68. See also Coulson, above note 1 at 86-102. For a succinct account see Hooper, above note 28 Volume II at 14-16. All such schools originated mostly in the course of the second century of Islam. Among them, the Hanafi school has been prominent in the east, particularly in Iraq and Syria, while the Maliki school has been prominent in the west, particularly in Egypt and North Africa. See Schacht, *ibid.* at 65. The two original schools were the Hanafi and Maliki; the founder of the Shafi'i school was a pupil of the founder of the Maliki school, while the founder of the Hanbali school was a pupil of the founder of the Shafi'i school. The Maliki school makes heavy use of the prophetic *hadiths* (sayings of the Prophet). The Shafi'i school purports to be a synthesis of the Hanafi and Maliki systems but with greater stress on analogy. The Hanbali school is the stricter among all schools; it rejects analogy, consensus and judicial opinion as sources. For an overview, visit <<http://www.fordham.edu/halsall/med/goldschmidt.html>> and <<http://www.shunya.net/Text/Islam/IslamicRef.htm>>.

For the origins of Islamic jurisprudence prior to the emergence of these schools, see H. Motzki, *The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools* (trans. by MH Katz) (Leiden-Boston-Köln: Brill, 2002).

<sup>33</sup> Disagreement is not only among the various schools but on various points also internal to each of them. The ensuing discussion will focus on the salient lines of disagreement among the dominant theories of the four schools.

which bear practical implications.<sup>34</sup> Disputed matters relate both to the creation and the range of consequences of the *hawale*. Particularly, there is no consensus as to the identity of the parties to the agreement establishing the *hawale*; and while it is clearly stated that as a result of the *hawale* the paymaster-transferee becomes liable to the creditor to pay the amount due to the creditor by the original debtor-transferor, it is not immediately clear whether the original debtor is thereby automatically discharged altogether towards the creditor. Furthermore, it is not all that obvious whether the paymaster-transferee's liability to the creditor, resulting from the *hawala*, is on his own obligation to the original debtor-transferor (where such obligation exists), or whether it is on the obligation owed by the original debtor-transferor to the creditor. Certainly however, it is not an 'abstract' new obligation to pay to the creditor the sum owed to him; that is, the paymaster's obligation is not divorced from the transaction that gave rise to either the debt originally owed by the paymaster-transferee (to the original debtor-transferor) or to the debt originally owed to the creditor (by the original debtor-transferor).<sup>35</sup>

Specifically disputed are the answers to the following five questions:

1. Who are the parties to the agreement under which a binding *hawale* is established?
2. Must the transferee (paymaster), who is to assume vis-à-vis the creditor the debt owed by the transferor (original debtor), have been indebted to the transferor (original debtor)?

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<sup>34</sup> The ensuing discussion largely draws and develops on ND Ray, "The Medieval Islamic System of Credit and Banking: Legal and Historical Considerations" (1997), 12 Arab LQ 43, 60-65. For a comprehensive discussion, equally relied on in the analysis that follows, see article by Chéron and Fahmy Bey, above note 31. The latter but not the former work covers also the *Mejelle* (discussed below in §2.3). See also Chehata, above note 21 at 99-102, LWC van den Berg, *Principes du droit musulman selon les rites d' Abou Hanîfah et de Châfi'î* (trans. by R. de France de Tersant) (Alger: Typographie Adolphe Jourdan 1896) at 100-101. Translated primary sources relied on are the *Hedya*, above note 28 at 332-334 ; Khalîl ben Ish'âq, *Abrégé de la loi musulmane selon le rite de l'Imâm Mâlek*, Volume III: Le patrimoine (trans. by GH Bousquet) (Alger: La maison des livres, 1961) at 69; Imam Malik ibn Anas, *Al-Muwatta' of Imam Malik ibn Anas: The First Formulation of Islamic Law* (trans. by A. Abdurrahman Bewley) (London and New York: Kegan Paul International, 1989) at 309 (§36.31); GH Bousquet, traduction française annotée, *Kitâb et-Tanbîh ou Le livre de l'admonition touchant la loi musulmane selon le rite de l'Imâm Ech-Châfé'î* Volume II opérations sur patrimoine (Alger: la maison des livres, 1951) at 34-35 (hereafter: Bousquet, *Kitâb*); and H. Laoust, *Le Précis de droit d'Ibn Qudâma* (jurisconsulte musulman d'école hanbalite né à Jérusalem en 541/1146, mort à Damas en 620/1223) (Beyrouth: Institut Français de Damas, 1950) at 104.

<sup>35</sup> A point indicated by van den Berg, *ibid.* at 101.

3. Is recourse against the transferor (original debtor) available to the creditor upon the default of the transferee (the paymaster, namely, the new or replacing debtor)?
4. What defences are available to the *hawale* transferee (the paymaster) sued by the creditor?
5. What securities are available to the creditor enforcing his claim against the paymaster-transferee?

The principal dividing line is between the Hanafi school and all three others. Thus, in Hanafi law, the *hawale* is classified as a contract of surety or guarantee, under which the security of the transferee (paymaster)'s obligation is conferred on the creditor owed by the transferor (the original debtor).<sup>36</sup> Conversely, the other three schools classify the *hawale* primarily<sup>37</sup> as a sale or exchange in which from the creditor's point of view one debt extinguishes and is replaced by another.

This distinction underlies most differences in the answer to the abovementioned questions:<sup>38</sup>

1. *Who are the parties to the hawale agreement?*

■ According to Hanafi law, the *hawale* is established by the agreement of the creditor and transferee (paymaster). Indeed, since “mankind [is] of different dispositions with respect to the payment of debts,” the creditor must consent to the replacement of his debtor. The consent of the paymaster-transferee is also required “because by the contract of the transfer an obligation of debt is imposed upon him.”<sup>39</sup> At the same time, neither the agreement nor the consent of the transferor (original debtor) is required. His agreement or consent is dispensed with since the paymaster-transferee's engagement is perceived as exclusively made to the benefit of the original debtor-transferor so that it in no way adversely affects him.<sup>40</sup> Nonetheless, a paymaster may not

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<sup>36</sup> The Hedya, above note 28 at 332.

<sup>37</sup> One important qualification is the formal adherence of the Hanbali school to the Hanafi guarantee view (See Chéron and Fahmy Bey, above note 31 at 140) and yet in line with the two other schools, to all the practical implications of the sale or exchange theory.

<sup>38</sup> Granted, though, that some solutions are pragmatic and vary from school to school, not according to any prevailing underlying philosophy.

<sup>39</sup> The Hedya, above note 28 at 332.

<sup>40</sup> *Ibid.* And yet, this prevailing view in Hanafite law is not without a dissent. See e.g. I. al-Ḥalabī (d. 956/ca. 1578), *Matn multaḳā 'l-abḥur* (Misr (Egypt)): Muḥammad 'Alī Ṣabīḥ, ca. 1960) [in Arabic] at 160-161 [of which pages I had the benefit of unofficial

have recourse against a debtor who has not consented to the *hawale*.<sup>41</sup> Thus, there is nothing to preclude the *hawale* from being instigated by the debtor's order to the paymaster-transferee; the latter will act then to implement the order by reaching an agreement with the creditor. It is this agreement which gives rise to the *hawale*. Regardless of whether the *hawale* is prompted by the original debtor-transferor's order, the agreement between the paymaster and the creditor may set limits on the paymaster-transferee's liability to the creditor. Such limits may be linked to the amount due from the paymaster-transferee to the original debtor-transferor (where there is such an amount due) or the existence of a fund.

■ Conversely, under the three other schools, the *hawale* is a matter to be established by the agreement of the creditor with the original debtor-transferor; neither the agreement nor the consent of the transferee-paymaster is required. The latter is dispensed with inasmuch as the transferee-paymaster is anyway a debtor to the transferor-debtor. Since under these three schools the *hawale* is conceptualized as the exchange in the creditor's hands of one existing debt (owed by the debtor to the creditor) by another debt (owed by the paymaster to the debtor), its operation does not adversely affect the paymaster who remains charged with his original liability, though to a different person.

■ Furthermore, in that regard, Hanbali law goes even further than Maliki and Shafi'i schools, in dispensing altogether even with the creditor's consent as a formal requirement for the establishment of a *hawale*, as long as the transferee-paymaster, who is to replace the original debtor, is solvent. Hanbali law thus effectively transforms the *hawale* to a unilateral act of the transferor-original debtor.

2. *Is transferee (paymaster) to be indebted to transferor (original debtor)?*

■ According to the Hanafi school, there is no requirement for a preexisting debt owed by the paymaster-transferee to the original debtor-transferor; being a voluntary undertaking by him, the paymaster-transferee may incur liability on a *hawale* as he wishes, whether or not he is indebted to the transferor-original debtor.<sup>42</sup>

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translation] who requires the debtor's consent to be added to the paymaster-creditor agreement.

<sup>41</sup> Compared to Chéron and Fahmy Bey, above note 31 at 147-148 (as further discussed in text & note 76 below), Chehata, above note 21 at 100 is more definite on this point.

<sup>42</sup> In fact, the Hanafi school rationalizes the *hawale* not only on the Prophet's injunction, referred to around note 31 above, but also upon the voluntary undertaking of the paymaster-transferee. See the Hedya, above note 28 at 332.

■ Conversely, all other schools envisage the paymaster-transferee's liability being incurred by means of a *hawale* irrespective of his volition; as indicated, this is reasonable only as long as he has anyway been liable for the money owed, albeit to another person, namely, the original debtor-transferor.

■ Some flexibility exists, however, in Hanbali law, which facilitates the *hawale* even in the absence of a debt owed by the paymaster-transferee to the original debtor-transferor. In such a case the *hawale* is construed as a contract of agency under which the paymaster-transferee is authorized by the creditor to disburse a loan to the original debtor-transferor. Acting on this authority, the paymaster-transferee extends this loan to the original debtor-transferor by voluntarily (either paying or) incurring liability to the creditor, in discharge of the original's debtor liability to the creditor. Thereby the creditor becomes entitled to payment from the paymaster-transferee, to whom in turn, the debtor-transferor becomes liable on the loan.

■ An attempted *hawale* by a paymaster-transferee who does not owe to the transferor is treated by the adherents of the Maliki school as an undertaking to pay the debt of another (namely, that of the original debtor). Such paymaster's undertaking constitutes an "indemnity" contract.<sup>43</sup>

3. *Is recourse available to the creditor against the transferor (original debtor)?*

■ The general rule in Islamic law is that a suretyship does not discharge the liability of the principal debtor to the guaranteed debt.<sup>44</sup> Being conceptualized by Hanafi law as the paymaster-transferee's guarantee, the *hawale* ought to have accommodated a continuous original debtor-transferor's liability to the creditor.<sup>45</sup> Ultimately, however, the notion that prevailed in Hanafi law is

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<sup>43</sup> Talbi, above note 16 at 433 does not use the term 'indemnity' (or any equivalent in French) and refers to such a contract as *hamāla*. However, according to Foster, the *hamala*, which is a synonym of *kafla*, is an ordinary guarantee, so that the indemnity contract which "should not be confused with the *hamala*" is the *haml*. See NHD Foster, "The Islamic Law of Guarantees" (2001), 16 Arab Law Quarterly 133, 152. The indemnity contract is further discussed in connection with the ensuing points.

<sup>44</sup> See e.g. Schacht, *Introduction*, above note 21 at 158-159. This is so at least as long as the guarantee was given at the request of the principal debtor.

<sup>45</sup> According to this logic, it is the paymaster-transferee's liability which should have been secondary, or contingent upon the original debtor-transferor's (primary debtor's) default. But see e.g. van den Berg, above note 34 at 101 who speaks of the effect of the *hawala* under Hanafi law to confer a conditional discharge upon the original debtor, pending a default by the paymaster-transferee (which is obviously the reverse of an ordinary suretyship or guarantee).

premised on the *hawale*'s effect to 'remove' or transfer the debt from the original debtor-transferor to the paymaster-transferee; accordingly, the original debtor-transferor is to be discharged altogether, other than when collection from the paymaster-transferee becomes impossible.<sup>46</sup> Thus, the original debtor-transferor is taken to remain liable, though only contingently and in a quite limited way, in circumstances described as involving "the destruction of the debt" owed by the paymaster-transferee to the creditor. Thus, in Hanafi law, once a *hawale* has been made, the original debtor-transferor becomes liable to the creditor upon the paymaster-transferee's death in poverty, as well as when the paymaster-transferee denies the *hawale* which nevertheless cannot be proven by the creditor. This contingent liability is rationalized as analogous to the implied warranty of a seller of goods as to their quality.<sup>47</sup>

■ In contrast, consistently with their treatment of the *hawlae* as a transfer or sale of a debt, upon the paymaster-transferee's default, all other schools deny to the creditor recourse against the original debtor-transferor. Yet, other than under the Shafi'i school, this principle is subject to exceptions.

■ Thus, in Maliki law, recourse against the original debtor-transferor is available to the creditor under prescribed narrow circumstances. First, recourse is available against the original debtor-transferor when he is guilty of misrepresentation. Second, recourse is available against the original debtor-transferor where the paymaster-transferee is shown to have been insolvent already at the time of the *hawale*.<sup>48</sup> In fact, these are apparent and not real exceptions; continuous debtor-transferor's liability under Maliki law is more for misrepresentation and breach of warranty relating to the paymaster-

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<sup>46</sup> For this conceptualization of the creditor's recourse against the original debtor-transferor see E. Tyan, "Le transport de dettes en droit Ottoman" (1925), 1 *Gazette des Tribunaux Libano-Syriens*, no. 2, 25, at 29 (hereafter: Tyan, Transport).

<sup>47</sup> For this summary and the quotation see the Hedyā, above note 28 at 332-333. See also Chéron and Fahmy Bey, above note 31 at 140 and 162-167 (further elaborating on the controversies and their resolution over the centuries), and Tyan, Transport, *ibid.* at 28-29. According to the Hedyā, *ibid.*, paymaster-transferee's insolvency (or poverty) prior to death may be temporary and thus does not destroy the paymaster-transferee's debt owed to the creditor so as to revive the original debtor-transferor's liability. But *cf.* Tyan, *ibid.* who (in connection with the 19<sup>th</sup> century Ottoman codification of Hanafi law discussed further below in §2.3) nevertheless enumerates also the adjudication of the paymaster-transferee's bankruptcy as an event that revives the original debtor-transferor's liability. Certainly, bankruptcy adjudication and the ensuing bankruptcy discharge did not exist in Medieval Islam (or elsewhere during that time).

<sup>48</sup> According to Khalīl ben Ish'âq above note 34 at 69 this is so only where the original debtor-transferor was aware of the paymaster-transferee's insolvency.



transferee's obligation and solvency than under a pure recourse for non-payment by the paymaster-transferee.<sup>49</sup>

■ Hanbali law further restricts the creditor's recourse against the original debtor-transferor to a case of paymaster's insolvency, but only in circumstances of an obvious error, as well as where the debtor either expressly warranted the paymaster's solvency or deceived the creditor in that respect.

■ In general, all four schools allow creditor's recourse against the debtor when the requirements for effectuating a valid *hawale* have not been satisfied. An unresolved question in the Hanafi, Maliki and Shafi'i schools is the effect of an express stipulation<sup>50</sup> by the creditor as to either availability of recourse against, or continued liability of, the original debtor, whether in general, or under specified circumstances.<sup>51</sup>

■ As discussed, an attempted *hawale* by a paymaster-transferee who does not owe to the transferor is treated in Maliki law as an undertaking to pay the debt of another (namely, that of the original debtor). Such paymaster's undertaking constitutes an "indemnity" contract.<sup>52</sup> An indemnity contract is created by

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<sup>49</sup> Another apparent exception under Maliki law is where a person voluntarily assumes a debt of another, in which case, upon his death or insolvency, recourse is available to the creditor against the original debtor. Malik ibn Anas, above note 34 at 309 (§36.31). Per Maliki doctrine this is however not a case of *hawale*, which is established by the agreement of the original debtor and creditor, and does not involve the voluntary undertaking of the paymaster.

<sup>50</sup> Throughout this Paper, "stipulation" is used in the modern sense of the word, denoting a contractual term or undertaking. Islamic law does not have a category of a unilateral, formal, verbal, and *stricti juris* contract, such as the *stipulatio* under Roman law, whose formation requires a question to be asked by the stipulant, a would-be promisee-creditor, immediately followed by an affirmative answer given by the person to whom the question was directed, who thereby becomes the promissor-debtor. Berger, above note 30 at 716.

<sup>51</sup> Chéron and Fahmy Bey, above note 31 discuss this issue at 170-172 for all three schools but do not mention it in connection with Hanabali law. On the basis of the restrictive view of the Hanabali school on the availability of recourse (as in fact pointed out by these authors, *ibid.* at 171-172), one may speculate that this school does not treat such stipulation as effective. According to van den Berg, above note 34 at 101, in Shafi'i law, recourse cannot be made available even by contract; Chéron and Fahmy Bey *ibid.* at 172 acknowledge this to be the dominant view of the Shafi'i school but cite a Shafi'ite opinion according to which this is an effective stipulation as long as it is stated to be an essential condition to the creditor's consent.

<sup>52</sup> See text & note 43 above.

express words of the indemnifier and is treated as an undertaking by him to substitute the original debtor who is thereby released. No recourse against the original debtor is thus available to the creditor who accepted the indemnity. This is however only as long as the indemnity contract was pronounced between the indemnifier and the creditor in a clear and unambiguous language; otherwise, as where the creditor is not aware of the fact that he is paid out of an overdrawn account of the debtor,<sup>53</sup> the latter remains bound on his original debt to the creditor.<sup>54</sup>

#### 4. What are transferee (paymaster)'s defences?

■ Under Hanafi law the paymaster-transferee becomes liable to the creditor on the original debtor-transferor's engagement; he ought thus to be able to raise defences available to the original debtor-transferor against the creditor.<sup>55</sup> In principle, however, as against the creditor, the paymaster may not be able to raise his own defences arising from his relationship with the original debtor-transferor, at least insofar as the *hawale* was not stated to be conditional on the original debtor-transferor's entitlement from the paymaster-transferee.<sup>56</sup>

■ Conversely, according to all other schools, the paymaster remains liable on his original liability, which is redirected from the original debtor-transferor to the creditor. It follows that defences available to the paymaster on his original liability to the original debtor-transferor are neither extinguished nor substituted by those of the original debtor-transferor vis-à-vis the creditor; they remain fully available to the paymaster against the creditor. Certainly, the paymaster-transferee may not meet the creditor's action by raising the original debtor-transferor's defences against the creditor.

■ Under the Shafi'i school, the picture is however not as straight forward. Indeed, defences available to the original debtor-transferor against the creditor may not be relied upon the paymaster-transferee. This is however at least as long as they have been discovered after payment; an effective rescission of the obligation owed by the original debtor-transferor to the creditor, occurring prior to payment to the creditor by the paymaster-transferee, is seen by some as a basis for invalidating the *hawale*, namely for disentitling the creditor to

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<sup>53</sup> *Ibid.*

<sup>54</sup> Talbi, above note 16 at 433 and Foster, above note 43 at 152-153.

<sup>55</sup> This is also the view of Chéron and Fahmy Bey, above note 31 at 174-175. See text & note 83 below. But see the statement to the contrary (unaccompanied by analysis) by C. Chehata, above note 21 at 101.

<sup>56</sup> Which is the case of a restricted *hawale* defined in Article 678 of the Mejlle, and discussed in text around note 90 below.

claim from the paymaster-transferee. Furthermore, paymaster-transferee may not assert against the creditor defences available to him against the original debtor-transferor, other than when the transaction between them, namely, between the paymaster-transferee and the original debtor-transferor, is void.<sup>57</sup>

■ Regardless, so far as I can tell, no law has developed as to the availability to the paymaster-transferee against the creditor of defences that arise after the paymaster-transferee becomes liable to the creditor. Such defences may exist on the obligation on which the paymaster-transferee is now liable to the creditor, whether it is that of the original debtor-transferor to the creditor (under Hanafi law), or of the paymaster-transferee to the original debtor-transferor (according to the other schools). Alternatively, such defences may arise from any other matter in that bilateral relationship, namely either that of original debtor and creditor, or the paymaster and the original debtor.

■ As discussed, an attempted *hawale* by a paymaster-transferee who does not owe to the transferor is treated in Maliki law as an undertaking to pay the debt of another (namely, that of the original debtor); such paymaster's undertaking constitutes an "indemnity" contract. An indemnity is conceptualized in Islamic law as an undertaking to discharge another party's obligation;<sup>58</sup> prima facie, then, defences available to the debtor against the creditor may be asserted against the creditor by the indemnifier-transferee/paymaster.

5. *What securities are available to the creditor?*

■ Under Hanafi law the paymaster-transferee becomes liable to the creditor on the original debtor-transferor's engagement; it logically follows that both personal and proprietary securities supporting the original debtor's obligation remain intact. At the same time, a personal security in the form of guarantee is given to secure the liability of a party trusted by the guarantor; in our case this party is the original debtor-transferor. At least in the absence of recourse against the original debtor-transferor, it is unfair to force the guarantor to stand behind the obligation of another, in our case, the paymaster-transferee. For this pragmatic reason Hanafi law releases guarantors. Availability of proprietary securities remains contested.<sup>59</sup>

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<sup>57</sup> Bousquet, *Kitâb*, above note 34 at 34-35.

<sup>58</sup> See text & note 43, above.

<sup>59</sup> The question is thoroughly discussed by Chéron and Fahmy Bey, above note 31 at 177-182. In any event, note that when the property subject to proprietary securities is provided by a third person other than the original-debtor-transferor, discharge can be rationalized on the same grounds as applicable to the discharge of personal guarantors.

■ Conversely, according to all other schools, the paymaster remains liable on his original liability, which is redirected from the original debtor-transferor to the creditor; it would thus appear that securities given to support his obligation, whether in the form of personal guarantees or property, remain fully effective.

■ As discussed, an attempted *hawale* by a paymaster-transferee who does not owe to the transferor is treated by the adherents of the Maliki school as an undertaking to pay the debt of another (namely, that of the original debtor). Such paymaster's undertaking constitutes an "indemnity" contract. An indemnity is conceptualized in Islamic law as an undertaking to discharge another party's obligation;<sup>60</sup> prima facie, then, availability to the paymaster of securities supporting the debtor's obligation to the creditor is governed by the same rules applicable the availability of such securities to the paymaster in a *hawale* governed by Hanafi law.<sup>61</sup>

In the final analysis, the approaches of the two principal schools, the Hanafi and Maliki, can be summarized as follows:

1. Under Hanafi law, the parties to the *hawale* agreement are the paymaster and creditor. Under Maliki rules they are the debtor and creditor;
2. The paymaster must have owed the debtor under Maliki law but not necessarily according to the Hanafi school;
3. In the case of default by the paymaster, both schools usually do not permit the recourse by the creditor against the debtor. Each restricts it only to exceptional cases;
4. Under Hanafi rules, the creditor is enforcing against the paymaster the debtor's debt owed to the creditor. On the other hand, under Maliki rules, the creditor is enforcing against the paymaster the paymaster's debt against the debtor. Accordingly, under Hanafi law, when sued by the creditor, the paymaster may raise the debtor's, but not his own, defences. Conversely, under Maliki rules, the paymaster may raise against the creditor his (but not the debtor's) defences.
5. However, as towards the creditor attempting to recover from the paymaster, Hanafi rules release the debtor's guarantors; whether they also discharge proprietary securities supporting the debtor's obligation remains contested. At the same time, under Maliki law, both personal and proprietary securities given to support the paymaster's obligation are enforceable by the creditor.

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<sup>60</sup> See text & note 43, above.

<sup>61</sup> For these rules see text & note 59, above.

On the basis of the foregoing discussion, the following two complementary observations are to be made on the legal nature of the *hawale* by reference to legal mechanisms that developed in Roman law:

- I. Indeed, the underlying theory of *hawale* is that of substitution of debtors; this distinguishes it from the cession which is premised on the substitution of creditors. However, as indicated, under all Islamic schools other than the Hanafi, the *hawale* is established by the agreement between the original debtor-transferor and the creditor, with no resort whatsoever to the consent of the paymaster-transferee (namely, the debtor to the original debtor). In this framework, its mode of establishment and consequences are quite the same as that of the *cessio* under Roman law.<sup>62</sup> Specifically, other than under Hanafi law, and notwithstanding what may be the orthodox view to the contrary,<sup>63</sup> the *hawale* operates in the same way as the non-recourse outright assignment for value of debt.<sup>64</sup>
- II. Conversely, in Hanafi law, the *hawale* is established by the agreement of the paymaster-transferee and the creditor. In this framework, the mode of operation and consequences of the *hawale* are quite analogous then to the perfect execution of a delegation order under Roman law.<sup>65</sup>

### §2.3 Codification of Hanafi law: the *hawale* under the Mejlle

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<sup>62</sup> For *cessio* in Roman law see note 30 above.

<sup>63</sup> Thus, sources cited in note 34 above deal with the *hawale* as a ‘delegation’.

<sup>64</sup> In the pre-2001 Official Texts of the American Uniform Commercial Code (e.g. 1962, 1972, and 1978), Official Comment 1 to Section 9-308 set out the various arrangements for the assignment of debts under modern law and practice.

<sup>65</sup> In its narrow sense, “delegation” has been defined in Roman law as an order given by one person (“delegant”) to another (“person to be delegated”) to pay to, or assume an obligation towards, a third person (“delegatee”). In its broader sense, it has come also to include the execution of the order. For the definition of *delegatio* see e.g. Berger, above note 30 at 429. For the perfect execution by means of novation by stipulation in Roman law see a particularly comprehensive and useful discussion by S. Maxwell, *De la délégation en droit romain*, (Bordeaux: Imprimerie V<sup>o</sup> Cadoret 1895) at 55-57 and 67-105. I disagree with Tyan, Cession, above note 22 at 29 who treats the *hawale* under Hanafi law as a cession. His analysis is stated (at 28 n.7) to be limited to a restricted *hawale*, for which however, in connection with Article 693 of the Mejlle, an alternative explanation is provided in text around notes 97-98 below.

As of the 16<sup>th</sup> century CE, Hanafi law had enjoyed exclusive official recognition in the entire Ottoman Empire.<sup>66</sup> On civil matters it became the law of the land; the process culminated with the promulgation in 1877 of the Mejlle as the Ottoman Civil Code. The Mejlle is the first attempt to codify Islamic law; “derived entirely from Hanafi law,”<sup>67</sup> its stated purpose was to provide the recently created secular courts with “an authoritative statement of the doctrine of Islamic law.”<sup>68</sup> In many lands which had previously formed the Ottoman Empire, the Mejlle, at least in part, survived as a civil code, long after the dismantling of the Empire itself after World War I.<sup>69</sup> Indeed, the Mejlle was passed centuries after the early Medieval period; strictly speaking, it cannot be taken as a precise record of the law of that period. Possible gaps in our knowledge may have existed; as well, fine-tuning and resolution of some points may have taken place over the centuries. Nevertheless, for our purposes, it may be useful to examine the Mejlle provisions governing the *hawale* as a statutory embodiment of Hanafi law doctrine, and as such as an indication of an outline pertaining to, and in general confirming, the content of the Medieval law.

The *hawale* is governed by Book IV of the Mejlle (consisting of Articles 673-700).<sup>70</sup> It is defined in Article 673 as a transfer of a debt from its debtor to another

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<sup>66</sup> See Schacht, *Introduction*, above note 21 at 65 and 89-93. At its peak, the empire extended from Anatolia to west of the Bosphorus in the North, and from Mesopotamia and west Arabia to the western Mediterranean in the south. For a map visit <[http://en.wikipedia.org/wiki/Image:Ottoman\\_small\\_animation.gif](http://en.wikipedia.org/wiki/Image:Ottoman_small_animation.gif)>.

<sup>67</sup> Coulson, above note 1 at 151.

<sup>68</sup> Schacht, *Introduction*, above note 21 at 92, relying on the explanatory memorandum. One stated rationale was the fact that “the *Hanefite* school did not crystallize ... but ... has split up into innumerable sections and opposing sub-divisions.” See Report of the Commission Appointed to Draft the Mejlle, reproduced in Hooper, above note 28 Volume I at 1, 3. See also Coulson, *ibid.* at 151-152.

<sup>69</sup> For some information see Schacht, *ibid.* at 93. In Israel, particularly with the ongoing passage of laws envisaged to become part of a modern civil code, the application of the Mejlle provisions had been gradually eroded but it was repealed as a binding law only as late as 1984. See Repeal of *Mejlle* Law, 5744-1984, *Laws of the State of Israel: Authorized Translation from the Hebrew, Volume 38*. Government Printer, Jerusalem, Israel (1948-1989), p. 212. Full text can be visited at <<http://www.geocities.com/savepalestinenow/israellaws/fulltext/repealofmejlle.htm>>. In recent decades the Mejlle has gained fresh attention as seen in the codification of the new Civil Code of the United Arab Emirates in 1985. Visit: <<http://www.amazon.com/Mejlle-Complete-Code-Islamic-Civil/dp/9839541129>>.

<sup>70</sup> The *Mejlle*, translated by CR Tyser, (Lahore: All Pakistan Legal Decisions, 1967, Reprint of 1901 ed.) Another translation is that of Hooper, above note 28 Volume I., of which *Book IV: Transfer of Debt* is reproduced in the *Arab Law Quarterly*, Vol. 2, No. 3 (Aug., 1987), 311 and can be visited at: <[21](http://links.jstor.org/sici?sici=0268-</a></p></div><div data-bbox=)

person. It was judicially described in Cyprus as “a transaction in which one person assumes the obligation of another.”<sup>71</sup> In the language of Articles 674-677, the original debtor, who is described as the *hawale* maker, is the *Muhal*. His creditor is the *Muhal*. The new debtor, “who accepts a *hawale* to himself,” is called *Muhal aley-h*. Finally, the “the thing which is transferred by *hawale*,” is *Muhal bih*.

In our terminology, the participants in a *hawale* are, respectively, debtor (corresponding to the *Muhal*), creditor (corresponding to the *Muhal*), and the paymaster (corresponding to the *Muhal aley-h*). According to Article 688, the debt subject to the *hawale*, namely, the debt owed by the debtor to the creditor and taken over by the paymaster, must be for a fixed sum<sup>72</sup> and may be “any debt, for which a good guarantee can be given”. Per Articles 612 and 631 it must then be arising from an existing obligation.<sup>73</sup>

The Mejlle enumerates four alternative methods for the creation of a binding *hawale* which can thus be established:

1. By the unilateral declaration of the debtor to the creditor followed by the acceptance of the creditor and paymaster (Article 680);
2. By means of a contract concluded between the creditor and the paymaster (Article 681);
3. By means of a contract concluded between the debtor and creditor followed by the acceptance by the paymaster “after notice” (Article 682); or

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0556(198708)2%3A3%3C311%3ATMBITO%3E2.0.CO%3B2-B>. For an analysis of these provisions under the laws of Palestine and Israel as they were at the time see Z. Zeltner, *Law of Contracts General Part* Volume I (Tel Aviv: Avukah, 1963) [in Hebrew] at 360-372.

<sup>71</sup> *Hussein Mustafa v. Osman Ismael*, (1909) 8 Cypr. LR 125, at 127. See also *Imperial Ottoman Bank v. Limbouri*, (1897) 4 Cypr. LR 48, at 50 speaking of the *hawale* as contemplating the transfer of a debt in the sense of “the substitution of one debtor for another.” To a similar effect in Israel see CA 492/60, *Moral v. Karbatzov*, 15 PD 1776, at 1785 (SC) [in Hebrew].

<sup>72</sup> To that end, under Article 688, “if someone says ‘I have accepted by way of *hawale* what it shall be proved you have to receive from such a one, the *hawale* is not good”.

<sup>73</sup> Certainly, the ‘guaranteeable debt’ requirement is indication to the drafters’ adherence to the Hanafi school. For the Hanafi classification of the *hawale* as a contract or guarantee see text & note 36, above.

4. By the agreement of the debtor and paymaster, in which case it becomes a concluded contract “subject to the acceptance of the creditor” (Article 683).

All methods other than the second effectively require the agreement and consent of all three participants. In contrast, the second method dispenses with the consent of the debtor and permits the *hawale* to be established on the basis of the bilateral agreement between the paymaster and creditor. Effectively then, and in the footsteps of Hanafi law, the establishment of the *hawale* does not hinge on the consent of the debtor, but rather draws on the agreement between the paymaster<sup>74</sup> and the creditor,<sup>75</sup> to which the debtor’s agreement or consent may be added and yet is irrelevant. Another way to say it is that a *hawale* can even be made over the objections of the debtor.<sup>76</sup>

Indeed, a bilateral agreement, between either the debtor and creditor or the debtor and the paymaster, is binding on them, though only pending the acceptance by the third participant, namely the paymaster in the first case and the creditor in the second one.<sup>77</sup> Otherwise, among the three methods premised on a three-way agreement, that is, all methods other than the second, the difference is only in the chain of communication, which may give a different role to the agreement or consent of a participant. For example, while the paymaster’s acceptance is required under the fourth method for the initial creation of the *hawale*, under the first and third methods it is required in order to complete a *hawale* already agreed or declared. As well, the first method presumably envisages that all three participants, or at least the creditor and the paymaster, are to be

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<sup>74</sup> However, at least with respect to a restricted *hawale* (to be discussed further below) in which the debtor instructs the paymaster to pay the creditor out of what the paymaster owes the debtor, it was historically debated whether the consent of the paymaster is required. In support, it was acknowledged that the paymaster’s terms of indebtedness do not vary by the mere change of creditors, and yet it was argued that the paymaster may be disadvantaged by being required to pay a more demanding or harsher creditor. See Chéron and Fahmy Bey, above note 31 at 149-150.

<sup>75</sup> With respect, I do not follow Tyan, who highlights the principal role of the paymaster’s consent towards the debtor and goes on to state that “the consent of the creditor is a necessary element but not essential of the [*hawale*] contract”. See Tyan, Transport, above note 46 at 26.

<sup>76</sup> It is however possible though that a debtor who has not consented may not be liable to be sued by the paymaster for reimbursement, in which case the paymaster’s recourse may then be limited to debtor’s assets available under his hands (including a debt owed to him). The theory behind this limitation is that an honorable person is unlikely to agree that a stranger will pay his debt. See Chéron and Fahmy Bey, above note 31 at 147-148. As indicated in note 41 above, Chehata, above note 21 at 100 is more definite in stating that recourse is not available against a non-consenting debtor.

<sup>77</sup> Cf. Tyan, Transport, above note 46 at 35 speaking of the irrevocability by the debtor of his agreement with the paymaster, pending the acceptance by the creditor.



present at the same time in the same place; conversely, the third method must be taken to contemplate that the paymaster is not present at the time of the agreement between the debtor and creditor.<sup>78</sup> Either way, all methods other than the second one envisage situations in which the *hawale* is created by means of the consent and agreement of all three participants. And yet, as indicated, in the final analysis, it is the paymaster-creditor bilateral agreement that forms a binding *hawale*.

Overall, the participants are not required to be present together at the time and place of the conclusion of the *hawale*; the interpretation of Article 680 as possibly envisaging a presence-of-all-three scenario is designed only in order to distinguish the case governed by it from that governed by Article 682. Under all four methods, and regardless of the order of communication, no particular formality is mandated for the creation of a binding *hawale*. It can be made either orally or in writing, either explicitly or implicitly, and either in advance or retroactively.

The *hawale* is concerned with the transfer of an obligation from its original debtor to a new one, or in our terminology, from the debtor to the paymaster. As already indicated, it is distinguishable from the Roman *cessio*<sup>79</sup> which is concerned with the transfer by one person to another of a debt owed to the former. In our scenario, a *cessio* would be the transfer by the debtor to the creditor, of the debt owed to the debtor by the paymaster. Conversely, the *hawale* is the transfer from the debtor to the paymaster of the obligation to pay the debt owed by the debtor to the creditor; it is a matter to be agreed upon between the creditor and the paymaster. The Roman *cessio*, being in our case a cession or assignment of a debt owed to the debtor, is a matter between the ‘cessionaire’/‘assignor’ (the debtor in our case) and the ‘cessionary’/‘assignee’ (being the creditor in our case) and does not require the consent of the ‘account debtor’ (in our case the paymaster).<sup>80</sup>

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<sup>78</sup> Thus, in contrast to Article 682, Article 680 does not envisage a separate notice given to the paymaster that is thus to be taken as present with the creditor, at the time the debtor’s declaration is made. However, Article 680 may not preclude the communication of the debtor’s declaration to the creditor other than by being together with him at the same place. At the same time, the example given for the operation of Article 682 is that of “someone [who] makes a *hawale* of his creditor to the account of someone, *who is in another country*”, who subsequently “and after the creditor has accepted ... *after notice*, also accepts,” and thus is not present at the time the *hawale* is agreed between the debtor and creditor. Emphasis added.

<sup>79</sup> The distinction between these two institutions along the lines set out below was noted in Cyprus in *Hussein Mustafa* above note 71 at 127, which was followed in the British Mandate of Palestine in CA 96/42, *Kremenetzky (Administrator of the Estate) v. Anglo-Palestine Bank*, 9 PLR 559, at 564(SC) and CC Haifa 187/46, *Palestine Land Development Co. v. Yalonetsky*, 1947 SCDC 91, at 93. The distinction was subsequently endorsed by the Supreme Court of Israel in CA 352/58, *Levin v. Rehovot*, 45 PE (SCJ) 196, at 201 [in Hebrew].

<sup>80</sup> For the *cessio* in Roman law, see note 30 above.

At the same time, by comparison to Roman law, the *hawale* appears to operate very much, though as will be seen immediately below, not exactly, like the first case of a qualified delegation executed by the paymaster's undertaking to pay the creditor the debt owed by the debtor to the creditor.<sup>81</sup> It involves novation by means of a change in the debtor owing on the debtor's obligation to the creditor;<sup>82</sup> in this case, the transfer of a debt or passive obligation takes place, so that the paymaster becomes liable to the creditor on the debtor's original obligation, and hence, only to the extent that the debtor would have owed the creditor.

The consequences of the *hawale* are stated in Article 690 to be the discharge of the (original) debtor, as well as the release of any pledge or guaranty provided to secure his discharged original obligation. In turn, "the right to demand *that debt* from the person, who accepts the *hawale*, is established for the creditor" (emphasis added). To that end, per Article 697, while an agreement to the contrary is not precluded, the time in which the paymaster is to pay the creditor is the same as the time the debtor would have been required to pay. It logically follows that that the paymaster may invoke against the creditor any defence that would have been available to the debtor against the creditor.<sup>83</sup> It would have further followed that the creditor remains entitled to the benefit of all securities given by the debtor, except that as was already indicated, on that point Article 690 explicitly provides for the opposite, namely for the forfeiture of all pledges and guarantees supporting the debtor's original obligation.<sup>84</sup>

As indicated, Article 690 enumerates the discharge of the original debtor-transferor as a consequence of the *hawale*. Nevertheless, in the footsteps of Hanafi

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<sup>81</sup> The various types of delegations are discussed by Maxwell, above note 65 at 55- 57 and 88-95 (particularly 90-92).

<sup>82</sup> But *cf.* Chéron and Fahmy Bey, above note 31 at 173 who reject the novation theory, albeit overlooking the possibility of a novation by the mere substitution of parties.

<sup>83</sup> Which is indeed the conclusion of Chéron and Fahmy Bey, *ibid.* at 174-175, who further explain that in Islamic law such defences include the extinction of the debt owed by the debtor to the creditor by the automatic setoff between that debt and a debt owed by the creditor to the debtor arising prior to the *hawale*. For the availability to the paymaster of all defences to an action on the transferred debt (namely the debt owed by the debtor to the creditor) see also Tyan, Transport, above note 46 at 31.

<sup>84</sup> In the absence of a recourse against the debtor, forfeiture of guarantees (as well as of proprietary securities provided by third parties) may nonetheless be logically explained by the reliance of a guarantor (as well as a third-party securities provider) on the personal liability of the debtor (and not the paymaster) against whom he is entitled, upon payment to the creditor, to indemnity. See e.g. Tyan, Transport, above note 46 at 34-35 and text & note 59 above.

doctrine, and notwithstanding what may be its plain meaning to the contrary, Article 690 is interpreted to read that discharge of the debtor is conditional; in fact the paymaster's acceptance of the *hawale* operates to suspend the debtor's obligation pending payment by the paymaster. Otherwise, upon the latter's default, recourse is available to the creditor against the debtor, though only in specified narrow circumstances, such as the insolvency of the paymaster, at least after his death, as well as when the paymaster-transferee denies the *hawale* which nevertheless cannot be proven by the creditor.<sup>85</sup> As will be seen further below, recourse against the original debtor is stated to be available to the creditor in a restricted *hawale*, namely, one stated to be payable out of a designated fund or upon the fulfillment of another condition, but only where the paymaster's obligation to the debtor is void.

According to Articles 699-700, the person who accepts a *hawale*, that is, the paymaster in our scenario, is discharged from his engagement<sup>86</sup> when he:

- (a) pays the debtor's debt owing to the creditor;
- (b) makes a subsequent *hawale*;<sup>87</sup>
- (c) receives an acquittance from the creditor;
- (d) accepts from the creditor the subject-matter of the *hawale* as a gift or alms; or
- (e) becomes the heir of the creditor upon the latter's death.

The Mejlle provides for a detailed scheme governing the relationship between the paymaster and the debtor. In principle, according to Article 698, prior to making

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<sup>85</sup> For the Hanafi doctrine on the point, see text & notes 46-47 above. For the interpretation by the Mejlle according to this doctrine see Chéron and Fahmy Bey, above note 31 at 162-167 and Tyan, *ibid.* at 28-29. The controversy regarding an insolvent living paymaster has to do with the possible transformation of his position which is obviously impossible for an insolvent estate of a dead paymaster. *Ibid.*

<sup>86</sup> In all cases enumerated below, discharge is absolute. According to Chéron and Fahmy Bey, above note 31 at 182-183 this is so also in connection with discharge by making a subsequent *hawale*, upon which the original debtor-transferor's obligation remains suspended while that of the paymaster-transferee (becoming a second transferor) is absolutely discharged.

<sup>87</sup> Which could be a mechanism for the circulation of credit as under Roman law as touched upon in note 228 & text below. As to *hawale* as an instrument for the circulation of credit see text & note 122 below.

payment to the creditor, the paymaster “has no claim on the debtor.”<sup>88</sup> Upon making the payment, the paymaster’s claim against the debtor is limited to “the thing which is the subject of the *hawale*,”<sup>89</sup> and yet, the method of enforcement of the claim depends on the circumstances.

To begin with, the Mejlle distinguishes between an absolute and restricted *hawale*. An absolute *hawale*, or *hawale mutlaqua*, is defined in Article 679 “not [to be] restricted for payment to be made from property of the [debtor], or in the hands of the [paymaster].” Stated otherwise, an absolute *hawale* is not sated to be paid out of a debt owed by the paymaster to the debtor. Conversely, under Article 678, a restricted *hawale*, or *hawale muqayyede*, is “a *hawale* restricted by a stipulation, for the [paymaster] to pay from the property of the [debtor], owed to him by the [paymaster], or in the hands of the [paymaster].” Stated otherwise, a restricted *hawale* is typically to be paid out of a debt owed by the paymaster to the debtor.<sup>90</sup>

It is to be noted that the distinction between a restricted and unrestricted *hawale* is not on the basis of whether the paymaster is indebted to the debtor; rather, it is on the basis of whether payment by the paymaster to the creditor is *stated* to be out, and thus dependent on the existence, of a debt owed by the paymaster to the debtor. Certainly, a restricted *hawale*, payable out of a debt owed by the paymaster to the debtor, is premised on the existence of such a debt and is irreconcilable with its absence. On the other hand, an absolute *hawale* is consistent either with the existence or absence of a debt owed by the paymaster to the debtor; rather, it is premised on the obligation of the paymaster to the creditor not being dependent on the existence of a debt owed by the paymaster to the debtor, regardless of whether such a debt exists. The absolute *hawale* is thus reconcilable with both the existence and absence of a debt owed by the paymaster to the debtor.

Accordingly, with regard to a paymaster who paid the creditor in discharge of the debt assumed under an absolute *hawale*,<sup>91</sup> Article 691 distinguishes between two

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<sup>88</sup> Strictly speaking, Article 698 deals with a paymaster who “has paid the debt.” *Quaere* whether or to what extent it also covers discharge by any other method as provided by Articles 699-700 discussed above.

<sup>89</sup> Article 698 which goes on to provide the following example: “If ... the subject of the [*hawale*] is silver [coins] and [the paymaster] pays gold, he takes from the debtor ... silver [coins], he cannot demand gold.” Chéron and Fahmy Bey, above note 31 at 156-157 analyze the situation as subrogation.

<sup>90</sup> Alternatively, per Article 696, a restricted *hawale* may be stated to be payable “from the price realised [*sic*] on the sale of fixed property of his own” in which case the paymaster “is bound to pay the creditor from the price realised on the sale of that property.”

<sup>91</sup> Strictly speaking, Article 691 speaks of “payment” by the paymaster. *Quaere* whether or to what extent it also covers discharge by any other method as provided by Articles 699-700 discussed above.

situations.<sup>92</sup> The first is the case in which the debtor “has nothing to receive from the person who accepts the *hawale*,” namely, where the debtor is not owed by the paymaster. The second case is “where there is anything to receive.” In the former case, after payment to the creditor, the paymaster who did not owe the debtor “can claim against” the debtor, namely, is entitled to be indemnified by him. In the latter case, upon making payment to the creditor, a paymaster who owed the debtor is entitled to a discharge from the debtor by offsetting his claim to an indemnification from him.<sup>93</sup>

No such distinction exists with respect to a restricted *hawale*; having paid out of a debt owed to the debtor, the paymaster must be taken to have gotten his discharge vis-à-vis the debtor to the extent of the payment. Furthermore, under Article 692, in a case of a restricted *hawale*, the debtor’s claim to the debt owed to him by the paymaster, on which the restricted *hawale* is premised, “ceases”, so that the paymaster “can no longer” pay it to the debtor; or else if he pays it to the debtor, he does it at his risk.<sup>94</sup>

The Mejlle is however silent as to the impact of an absolute *hawale* on a debt the paymaster may owe the debtor. Indeed, one may have thought that already upon his acceptance on which (under Article 690) his liability to the creditor arises and replaces that of the debtor, a paymaster owing to the debtor is to be absolutely discharged vis-à-vis the debtor. This is however not taken to be the legal position. Rather, in line with the Hanafi thinking on the matter, the acceptance of the *hawale* by the paymaster does not affect his legal relationship with the debtor; side by side with his liability to the creditor (under Article 690), a paymaster who accepts an absolute *hawale* remains liable to the debtor until the paymaster pays the creditor.<sup>95</sup> In fact, continued liability towards the debtor notwithstanding the acceptance of the *hawale* can possibly be read as a negative implication from Article 698, providing that prior to payment the paymaster who accepted a *hawale* “has no claim against the debtor”.

Upon accepting an absolute *hawale*, the paymaster’s liability to the debtor is not even suspended; until payment to the creditor the paymaster is exposed to actions from both the debtor and creditor. Payment to the debtor will not discharge the paymaster

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<sup>92</sup> Regardless, as indicated, per Article 698, no right against the debtor arises in favour of the paymaster prior to actual payment; a paymaster owing to the debtor remains so liable.

<sup>93</sup> As indicated in note 76 above, notwithstanding the silence of the Mejlle on the point, it may well be that the former, namely an action (as opposed to a setoff), is not available to a paymaster against a debtor who has not consented to the *hawale*.

<sup>94</sup> The provision goes on to state that a paymaster who nevertheless paid the debtor “is liable to make compensation” to the creditor and upon making compensation, he becomes entitled to claim back from the debtor, and where the debtor dies, he is even entitled to a priority vis-à-vis competing creditors’ claims to the debtor’s estate.

<sup>95</sup> See Chéron and Fahmy Bey, above note 31 at 155.

towards the creditor;<sup>96</sup> conversely, actual payment to the creditor will discharge the paymaster not only on his acceptance to the creditor (per Article 699), but also on his original debt to the debtor (per Article 691).

As already indicated, under Article 690, the *hawale* establishes in the creditor's hands "the right to demand ... from the person who accepts the *hawale*", that is the paymaster, payment of the debt owed to the creditor by the original debtor. It ought to follow that in the case of an absolute *hawale*, not made conditional or dependent on the debt owed by the paymaster to the debtor, a paymaster who owes the debtor may not defend the creditor's claim on the basis of defences the paymaster has against the debtor.<sup>97</sup> Under Article 693, this is generally true also in the case of a restricted *hawale*.<sup>98</sup>

However, for a restricted *hawale*, three exceptions are stated to exist. First, under Article 693, in the case of a restricted *hawale* in which the paymaster is to pay out of a debt owed to the debtor for the price of goods, the paymaster is released towards the creditor upon the successful assertion by a third party of an adverse claim to the goods for which the price is due. Second, under Article 694, in the case of a restricted *hawale* in which the paymaster is to pay out of a deposit owed by the paymaster to the debtor, the paymaster is released towards the creditor upon the successful assertion by a third party of an adverse claim to the deposit. Third, under Article 695, in the case of a restricted *hawale* in which the paymaster is to pay out of the debtor's money held by the paymaster, the paymaster is released towards the creditor where that money is lost or destroyed in circumstances for which the paymaster does not become liable to the debtor for the loss or destruction.<sup>99</sup>

In all these three cases the restricted *hawale* is stated to become void, so as to refasten the obligation to pay the creditor on the original debtor. For that to happen, it is not enough for the paymaster's obligation to the debtor, out of which payment to the creditor to be made, to be voidable, or otherwise subject to defences, even when that

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<sup>96</sup> Albeit presumably, upon payment to the creditor, a paymaster who earlier paid the debtor is entitled to reimbursement from him under Article 691.

<sup>97</sup> Tyan, *Transport*, above note 46 at 31-32.

<sup>98</sup> Strictly speaking, the provision deals only with the case of a restricted *hawale* in which the paymaster is to pay out of a debt owed by him to the debtor for the price of goods, in which case the paymaster is not released towards the creditor even "if the price can no longer be claimed [by the debtor/seller] in consequence of the thing sold being destroyed before delivery, or if the thing sold is returned under a condition giving an option, or an option on inspection, or an option for defect, or, if the sale is rescinded."

<sup>99</sup> In all three cases the paymaster is said to be released from his liability to the creditor; according to Chéron and Fahmy Bey, above note 31 at 159-160, having already paid the creditor prior to learning of circumstances that would have released him, the paymaster is to be entitled to restitution from the creditor.

obligation was rescinded or otherwise effectively terminated; rather, it must be void *ab initio*. As well, arguably along similar lines, as a matter of principle, in a restricted *hawale* in which the paymaster is to pay out of a debt owed to the debtor or out of any other fund, the paymaster's obligation is subject to the existence and amount of the debt or fund, though as indicated, not to defences to liability on the debt or for the payment of the fund.<sup>100</sup>

In fact, for a restrictive *hawale*, this distinction between a condition as to the existence of the debt and as to the availability of defences thereon, is a matter of interpretation of the stipulation providing for the condition. Indeed, under the Mejlle, the *hawale* renders the paymaster liable to the creditor on the debt owed to the creditor by the original debtor and not on the debt owed by the paymaster to the debtor. This is true for both an absolute and restricted *hawale*. The latter may however be stated to be conditional on the existence of a debt owed by the paymaster to the debtor. Unless it is stated to be conditional on lack of defences available to the paymaster against the debtor, a *hawale* stated to be conditional on the existence of a debt owed by the paymaster to the debtor is to be construed as conditional on the mere existence of the debt. In this context, the debt owed by the paymaster to the debtor is deemed to exist also when the action on the obligation to pay that debt can successfully be defended, and even when that obligation has been effectively repudiated.<sup>101</sup>

### **3. The *suftaj* and other Islamic payment instruments: the *hawale* applied**

#### §3.1 Islamic payment instruments and the *hawale*: an overview

Documentation of Islamic payment instruments is quite rich;<sup>102</sup> this is particularly true for the period of the Fatimid Caliphate, which was in power between the 10<sup>th</sup> and

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<sup>100</sup> This may be implied from Article 696, governing the obligation of the paymaster to pay “from the price realised from the sale of fixed property of his own” in which case he “is bound to pay the creditor from the price realised on the sale of that property.”

Certainly however, a paymaster who misled the creditor as to the existence or size of the debt out of which a restricted *hawale* is to be paid may be liable to the creditor on grounds other than his acceptance of the *hawale*.

<sup>101</sup> It is particularly the latter situation, based on a distinction between a void contract and a contract that has been effectively rescinded or repudiated, which I find unsatisfying. Cf. Tyan, *Transport*, above note 46 speaking at 33 of difficulties in the language of Articles 694-695.

<sup>102</sup> See e.g. SK Bakhsh and DS Margoliouth, *The Renaissance of Islam* (Translated from the German of Adam Mez) (Patna: Jubilee, 1937) at 476-477; and E. Ashtor, “Banking Instruments Between the Muslim East and the Christian West” 1 *Journal of European Economic History*, 553; rep. (with same pagination) in E. Ashtor, *East-West Trade in the Medieval Mediterranean* (edited by BZ Kedar) (London: Variorum Reprints, 1986) I. For summary and sources see e.g. Ray, above note 34 at 66-79.

12<sup>th</sup> centuries.<sup>103</sup> Approximately from that period, or more specifically, between the 11<sup>th</sup> and 13<sup>th</sup> centuries, plenty of documents<sup>104</sup> originate from the Jewish *Geniza* of Cairo.<sup>105</sup>

Islamic payment instruments have not always acquired distinct names. Thus, the withdrawal out of an account with a *sarraḥ* (private money changer) in the execution of a non-cash payment made by a small retailer to his wholesaler may be treated simply as a *hawale*.<sup>106</sup> In turn, more specialized terminology, though not necessarily uniform or precise, has also developed.<sup>107</sup> Thus, the *ruq'a* has a few meanings. First, it means an order for the delivery of goods. Second, it is a payment order issued to the payee instructing the paymaster to make payment against its presentment by the person entitled to obtain payment. Third, it denotes the paymaster's own obligation to pay, or in fact, any promissor's debt or acknowledgement of debt instrument.<sup>108</sup> The first sense is outside the

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<sup>103</sup> For the Fatimid Caliphate visit <<http://en.wikipedia.org/wiki/Fatimid>>.

<sup>104</sup> Research on *Geniza* payment instruments is still ongoing. The present discussion is obviously based on what has so far been published. For now, the ultimate source is SD Goitein, *A Mediterranean Society*, Volume I: Economic Foundations (Berkeley and LA: University of California Press, 1967) at 240-250. Other sources are indicated in note 111, below.

<sup>105</sup> For the Cairo *Geniza* in general, see SC Reif, *A Jewish Archive from Old Cairo*, The History of Cambridge University's Genizah Collection (Surrey, Richmond: Curzon, 2000). *Geniza* (or *Genizah*) is a Hebrew word denoting the store-room or depository in a synagogue, usually specifically for worn-out Hebrew-language books and papers on religious topics that were stored there before they could receive a proper cemetery burial, it being forbidden to throw away writings containing the name of God (even personal letters and legal contracts could open with an invocation of God). In practice, a *geniza* may have contained writings of a secular nature, with or without the customary opening invocation, and also contained writings in other languages that use the Hebrew alphabet. (see e.g. <<http://en.wikipedia.org/wiki/Geniza>>. Secular documents in the Cairo *Geniza*, such as payment instruments, were mostly written in Judeo-Arabic (an Arabic dialect using Hebrew alphabet) and may have contained the invocation of God.

<sup>106</sup> For this practice see text & notes 16-18, above. Certainly however, the document implementing the *hawale* could be a *ruq'a* or *sakk* discussed in the text that immediately follows.

<sup>107</sup> For the *sakk* and *suftaj* see e.g. CE Bosworth, "Abū 'Abdallāh Al-Khwārazmī on the Technical Terms of the Secretary's Art: A Contribution to the Administrative History of Mediaeval Islam" (1969), 12 *Journal of the Economic and Social History of the Orient*", 8 respectively at 125 and 140.

<sup>108</sup> For a *sakk*, from Western Sudan, in effect, in the latter sense, that of an 'IOU' (acknowledgement of debt) document, see e.g. N. Levtzion, "Ibn-Hawqal, the Cheque, and Awdaghost" (1968), 9 *Journal of African History*" 223 who nevertheless (not having in mind precise legal terminology) speaks of the document as a 'cheque'.



scope of the present study; in both the second and third senses, which are of interest in the context of the present study, the *ruq'a* overlaps with the *sakk*, from which linguistically, the modern word 'cheque' may be derived.<sup>109</sup> In fact the second and third meanings may converge; this is so, since the paymaster's obligation to pay on a *ruq'a* or *sakk* is typically in pursuance to the payment order issued to the paymaster which is at least implicit on the instrument. The express terms of the document may however reflect the debtor's order, the paymaster's promise, or both.

Typically, a *ruq'a* or *sakk* does not designate a named payee and is payable to the bearer. As an order to pay addressed to a person acting as a banker, the *ruq'a* and *sakk* correspond to the modern cheque. As a promise to pay, they correspond to the modern promissory note; being payable to the bearer, and inasmuch as the promissor usually acts as a banker, in the third above-mentioned sense, they in fact correspond more to the eighteenth century banknote.<sup>110</sup>

A payment instrument to be further discussed is the *suftaj*; it contains an obligation of a paymaster or his correspondent to pay at a place other than that of the issue of the document.<sup>111</sup> It was thus used for payment or transfer of funds between two

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<sup>109</sup> See e.g. Goitein, above note 104 at 245.

<sup>110</sup> For the modern cheque as an instrument containing an unconditional order directed to a bank and instructing it to pay on demand, as well as for the promissory note as an instrument containing an unconditional promise to pay, see e.g. the English Bills of Exchange Act 1882 (c 61), Sections 73 and 83(1), respectively. For the origin of the banknote (effectively, the forerunner of the promissory note), as an instrument containing an unconditional promise to pay made by a banker, see e.g. B. Geva, "From Commodity to Currency in Ancient History - On Commerce, Tyranny, and the Modern Law of Money" (1987), 25 Osgoode Hall LJ 115 at 145-155.

<sup>111</sup> In addition to sources noted set out in notes 102 and 104 above, various studies in Jewish history mention or reproduce original documents (usually translated to the language of the study, that is, either English or Hebrew) either (mostly) mentioning or constituting *suftajs* (and occasionally other payment orders). Original documents are either in Hebrew or Judeo-Arabic, referring either to *suftajs* or to the Hebrew equivalent, *dyokani*. Notable examples include: J. Mann, *The Jews in Egypt and in Palestine under the Fāṭimid Caliphs*, (Ktav, New York, 1970), Volume I at 114, Volume II at 125, 144, and 146; EJ Worman, "Forms of Address in Genizah Letters" (1907), 19 *Jewish Quarterly Review* 721, 727; Y. Ben-Zvi, "A Letter from a Jewish Merchant from the 11<sup>th</sup> Century" (1938), 3(NS) *Zion*, 179, at 182 [in Hebrew]; J. Mann, *Texts and Studies in Jewish History and Literature* (Cincinnati, Ohio: Hebrew Union College Press, 1931) at 143-144; M. Gill, *Palestine During the First Muslim Period (634-1099)* (Tel-Aviv: Tel Aviv University, 1983) Part I: Studies at 210, 497, Part II: Cairo Geniza Documents at 134, 150, and 633, Part III: Cairo Geniza Documents and Indexes at 112, 118, 204, and 294 [in Hebrew]; and M. Gill, *In the Kingdom of Ishmael* above note 16, Volume I: Studies in Jewish History in Islamic Lands in the Early Middle Ages at 497, 555, and

places, possibly from a debtor to a creditor,<sup>112</sup> particularly over routes serving permanent business connections. In the footsteps of the obligation on a *ruq'a* or *sakk*, the paymaster's obligation on the *suftaj* is in response to a payment order issued to him. However, unlike the *ruq'a* or *sakk*, the *suftaj* is typically payable to a named payee and not to the bearer.<sup>113</sup> The *suftaj* is said not to be transferable;<sup>114</sup> otherwise, it corresponds to the bill of exchange<sup>115</sup> or letter of credit.<sup>116</sup> It raises significant legal issues and thus will be discussed further below in greater detail.

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635-641, Volume II: Geniza Documents Concerning Babylonia and Persia at 807, Volume III: Geniza Merchants' Documents at 813 and 814, Volume IV: Geniza Merchants' Documents, at 1, and 479 [in Hebrew].

<sup>112</sup> But not exclusively: they could also be used by a traveler who wanted to avoid the risk of carrying money as well as for the purpose of payment to government and donation to pious foundations (such as for gifts to the poor). See sources cited in note 102, above.

<sup>113</sup> But *cf.* Goitein above note 104 at 242, as well as AL Udovitch, "Reflections on the Institutions of Credits and Banking in the Medieval Islamic Near East" (1975), 41 *Studia Islamica* 5, at 16 (hereafter, Udovitch, *Reflections*) and Imamuddin, above note 10 at 29 and 30 referring to the "bearer" of a *suftaj*. See also M. Ben-Sasson, *The Growth of the Jewish Community in the Islamic Lands Qayrawān, 800-1057* (Jerusalem: Magnes, 1996), at 99 [in Hebrew, free translation of title]. Possibly, they do not use the term in its technical legal sense and mean 'holder', namely the named payee in possession. In any event, Imamuddin, *ibid.* at 29 n.53 cites a source (AE Sayous, "Observations d'erivains du XV<sup>e</sup> sicle sur les changes et notamment sur l'influence d la disparité du pouvoir d'achat des monnaies" 1928 (4) *Revue économique Internationale*, 289, 293) which in fact deals with 13<sup>th</sup> century documents in Europe. But see Ashtor above note 102 at 563 (and 557) specifically noting minority of *suftaj* documents payable to the bearer.

<sup>114</sup> See e.g. Goitein, *ibid.* at 245 and Udovitch, *Reflections ibid.* at 17. For the view of Huvelin, *Travaux*, above note 5 at 24 ostensibly to the contrary, see note 203 below. For the non-transferability of the *suftaj* as existing regardless of the 'bearer' language that it may have contained (*ibid.*), see text around notes 128-129, below.

<sup>115</sup> For the modern bill of exchange as an instrument containing an unconditional order to pay money, on which the drawee becomes liable upon accepting the order, see e.g. English Bills of Exchange Act 1882 (c 61), Section 3(1), in conjunction particularly with Sections 17, 23 and 54.

<sup>116</sup> For the modern "credit" (namely, a letter of credit) as an "arrangement ... that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation" see Article 2 of the ICC UCP 600, *Documentary Credits*, 2007 Revision.

An Islamic payment instrument is not said to incorporate a written formal abstract unilateral obligation;<sup>117</sup> nor does it require any formality in its execution;<sup>118</sup> the payment engagement thereon is binding on the paymaster according to its terms as agreed between him and the debtor (to whom he owes).<sup>119</sup> The operation of the instrument as a payment mechanism is premised on the transfer from the debtor to the paymaster, of the debt obligation owed (originally by the debtor) to the creditor. Transfer is implemented by means of a *hawale*, as a result of which the paymaster becomes obligated to the creditor. As discussed above in §2.2, this means that under the Hanafi rules the paymaster becomes liable to the creditor on the debtor's debt obligation to the creditor; conversely, according to the non-Hanafi schools, the paymaster becomes liable to the creditor on the paymaster's own debt obligation to the debtor.

Indeed, by itself, in the broad sense, the *hawale* is not a distinct type of an Islamic payment instrument; rather, in light of the previous discussion, the *hawale* is the legal concept under which such instruments, and even oral agreements, operate as payment mechanisms.<sup>120</sup> To that end, the term is also used to denote any document or arrangement which triggers the application of the *hawale*. It is a bilateral contract<sup>121</sup> of the creditor, with the paymaster-transferee under Hanafi law, and with the debtor-transferor according to the other schools.

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<sup>117</sup> As were the Greek *chirograph* and *syngraph*. See F. De Zulueta, *The Institutes of Gaius*, Part I: Text with Critical Notes and Translation (Oxford: Clarendon Press, 1946) at 195 and Part II: Commentary (Oxford: Clarendon Press, 1953), at 166. By way of comparison, the *stipulatio* in Roman law was an oral (and not written) formal abstract unilateral obligation. See e.g. Berger, above note 30 at 716; R. W. Lee, *The Elements of Roman Law*, 4th ed. (London: Sweet & Maxwell, 1956) at 298-304 and B. Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962) at 193-196.

<sup>118</sup> Even a signature requirement may be bypassed for one whose handwriting on the document "was testimony enough to his being the issuer of the order." See e.g. Goitein, above note 104 at 241. This appears consistent with the restricted circle of those that have dealt with such instruments. *Cf.* text that follow note 12, above.

<sup>119</sup> Per general requirements of Islamic contract theory set out in text & notes 130-133, below. Most restrictive is Shafi'i law which requires mutual assent to be orally expressed in clearly spoken words. *Ibid.*

<sup>120</sup> The term is not mentioned in the *Geniza* (see Goitein, above note 104 at 460 note 63 (for text at 241); arguably, this is so since, unlike the *ruq'a*, *sakk* and *suftaj*, the *hawale* is not a distinct category of a payment instrument. And yet it is quite common to refer to the *hawale* as a financial technique, side by side with the other instruments. See e.g. Udovitch, *Reflections*, above note 113 at 10; and Udovitch, *Bankers* above note 9 at 263.

<sup>121</sup> As explained below, this is notwithstanding Rayner who asserts the *hawale* is a unilateral contract. See SE Rayner, *The Theory of Contracts in Islamic Law* (London; Graham & Trotman, 1991) at 307.

Through the circulation of Islamic payment instruments, the *hawale* may facilitate not only the transfer, from the debtor to the paymaster, of the debt obligation owed (originally by the debtor) to the creditor; rather, where needed, it may also facilitate the transfer from the creditor to the paymaster, of the debt obligation owed by the creditor to his own creditor, and onward in an indefinite chain. In the process, the paymaster's obligation to the debtor, 'turns' away from the debtor, first to the creditor, and then onward to a subsequent transferee-creditor of each preceding transferor-creditor. The *hawale* thus facilitates the circulation of the paymaster's obligation on the Islamic payment instrument from the hands of each creditor to those of his own creditor.<sup>122</sup>

Transferability of the entitlement to the debt due from the paymaster, and hence, the circulation of Islamic payment instruments, is available under the rules of all schools; however, circulation runs more smoothly under the non-Hanafi rules. This is so since the latter do not require the paymaster's consent or agreement for each transfer. Indeed, for an effective *hawale*, all schools require a bilateral rather than trilateral agreement. For the Hanafi school, this is however almost a fiction; by nature of things, it is the debtor who is interested in the carrying out the *hawale*; after all, it is the debt he owes, which is to be discharged without the actual payment on his own part. A *hawale* is thus typically initiated by the debtor; hence, dispensing with the debtor's consent or agreement under the Hanafi school, does not really simplify the procedure. Conversely, the other schools truly bypass the paymaster's agreement or consent. Thus, in each non-Hanafi school, suffice it for a bilateral agreement between the debtor and creditor to carry out a *hawale*; similarly under non-Hanafi rules, a sequence of ensuing bilateral agreements between each creditor and his own creditor, creates a *hawale* chain. In practice, as will be elaborated further below, each required bilateral agreement can be reached in conjunction with the physical delivery of the instrument reflecting the debt owed by the paymaster to the debtor; hence, circulation is easily facilitated under the non-Hanafi schools. Conversely, Hanafi rules require the agreement of the paymaster for each transaction; certainly, this hinders the circulation of the instruments.<sup>123</sup>

The predominance of the Maliki rules in Egypt may thus explain the abundance of transferable *ruq'a* and *sakk* instruments among the Cairo *Geniza* documents. This conclusion is however not irrefutable. Thus, there may not be adequate information on the extent and geographical scope of actual circulation of the *ruq'a* and *sakk* instruments;<sup>124</sup> in an environment of a limited circulation, it is possible for the

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<sup>122</sup> On this point see Huvelin, Travaux above note 5 at 24. Re-delegation is touched upon in note 228 & text below.

<sup>123</sup> On this point, see Ray, above note 34 at 62-63 and 79-80.

<sup>124</sup> In fact, an instrument payable to bearer might indicate the purpose of, namely, the underlying transaction for, its issue. Goitein, above note 104 at 241 cites such an example, which may be seen as inconsistent with circulation. Certainly however, there were also '*riqā' sayārif*' payable to bearer serving as 'banker notes' which fully

instruments to function as payment mechanisms transferring the paymaster's debt obligation from being owed to the debtor to being owed to the creditor, even under Hanafi rules, requiring the paymaster's agreement to confer entitlement on the creditor or transferee. In other words, Hanafi rules hinder but not preclude circulation. Moreover, an order to pay the *ruq'a* or *sakk* could operate as a mere authority to the paymaster to pay as well as to the payee to collect, without giving the creditor the benefit of a direct right against the paymaster; this will allow the use of the instruments to carry out a non-cash payment without even invoking the *hawale* to explain their operation.

In any event, there may be an alternative, historic rather than analytic, explanation, to the circulation of the *ruq'a* and *sakk* payable to the bearer. Thus, it is noteworthy that *ruq'a* and *sakk* payable to the bearer revived an ancient Near Eastern practice that had existed prior to the invention of coins, and that did not hit roots in Greek or Roman law. Indeed, instruments payable to the bearer go back to Ancient Mesopotamia, or more specifically, to as early as to the Old Babylonian Period (2000-1600 BCE) which included the reign of Hammurabi (1792-1750 BCE). Relevant 'instruments' were clay tables payable in metal or grain. Possibly, the original purpose of a bearer clause may have had nothing to do with transferability; rather, the clause was inserted on an instrument reflecting a debt owed to temple or palace authorities, for the purpose of enabling any, rather than a specific, representative of such authorities to collect from the debtor and give him a discharge. Subsequently, however, particularly during the Neo-Assyrian and Neo-Babylonian Kingdoms (745-539 BCE), the bearer clause came to facilitate circulation. While it is contested whether a debt payable to the bearer was truly transferable, it is agreed that the obligor was bound by his obligation (or acknowledgement of an obligation) to pay to the bearer; that is, a paymaster/obligor liable on such an instrument could not lawfully resist making payment to whoever presented to him the document containing the bearer clause.<sup>125</sup>

It is thus possible that the circulation of the *ruq'a* and *sakk* payable to the bearer was premised on the revival of this old practice rather than on the application of the Maliki rules pertaining to the *hawale*. In other words, it cannot be ruled out that the circulation of such paper was based on an ambiguity as to the bearer's title or claim against the paymaster. The bearer's title or claim could thus be derivative to the (debtor's) claim to enforce the paymaster's obligation on the basic transaction that had

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circulated: *Ibid.* at 246. For the money changers, called *sarrafs* serving as 'bankers' see Section 1 above.

<sup>125</sup> Bogaert, *Les Origines*, above note 8 at 55, 66 73-74, 94-96, 100, as well as 123-124 and 129. Tablets containing such a clause, are compiled by AH Pruessner, "The Earliest Traces of Negotiable Instruments" (1928) 44:2 *The American Journal of Semitic Languages and Literatures* 88, who further attests to the compliance of the instruments he examined with other formal requirements of negotiability under modern law, such as signature, unconditional promise or order, and certainty as to the time the instrument is payable. Certainly, there is nothing to support full negotiability, in the sense of transferability free from adverse claims and defences of these tablets.

given rise to the issue of the instrument; in such a case, title to the *ruq'a* or *sakk* payable to the bearer would be transferable. Alternatively, it could be an original title to a claim, on the very terms of the paymaster's obligation, to pay a sum of money to the bearer. In the final analysis, however, either way, there was a system that worked well without giving an opportunity for its legal ramification to be ascertained.

It may however be more plausible to see the two explanations as not mutually exclusive. Stated otherwise, the revival of an old practice does not negate its accommodation by the contemporary legal doctrine. From this perspective, non-Hanafi law remains more conducive; certainly, it is the Hanafi rules that are still to be viewed as detrimental to the circulation of debt instruments, whether or not they are payable to the bearer.

In any event it is noteworthy that even under non-Hanafi rules, transferability by delivery of Islamic payment instruments falls short of 'negotiation' in a few fundamental ways. Thus, in the modern sense of the word, 'negotiation' is the transfer of an instrument by its holder by means of its delivery, plus, other than for instruments payable to the bearer, the endorsement of the holder.<sup>126</sup> Transfer by negotiation may confer on a transferee a better title than that of the transferor, free of defences of prior parties and adverse claims; hence an instrument transferable by negotiation is 'negotiable'.<sup>127</sup>

Even under non-Hanafi rules facilitating circulation by delivery, these requirements are not met in several respects. First, there is no rule under which the mere delivery *constitutes* a transfer; doctrine requires an agreement between the debtor and the creditor. Whether such an agreement *can be derived from* the mere delivery is another matter, dealt with further below. Second, in principle, the mechanism is not limited to instruments payable to the bearer. Nor does it necessarily cover all instruments payable to bearer. Indeed, the *ruq'a* and *sakk* are payable to the bearer, while the *suftaj* is typically payable to a named payee. However, while the former are transferable by delivery and the latter is not, there is no indication that this is a matter of legal doctrine relating to the identification of the payee, rather than a matter of practice differentiating between types of instruments. Stated otherwise, under non-Hanafi rules, there is nothing to preclude the transfer of an instrument payable to a named payee by its mere delivery (plus an agreement); no predecessor for an endorsement in the form of a signature by the transferor is to be found in Islamic legal doctrine.<sup>128</sup> Under this reasoning, as will be

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<sup>126</sup> See for example, in England, Bills of Exchange Act 1882 (c 61).

<sup>127</sup> For the definition of "negotiable instrument" as a document of title to a sum of money, transferable by delivery (plus an endorsement as may be necessary) so as possibly to give the transferee a complete title, better than that of the transferor, to the document and the rights embodied therein, see DV Cowen & L Gering, *Cowen The Law of Negotiable Instruments in South Africa*, 5<sup>th</sup> ed. Volume I: General Principles (Cape Town: Juta, 1985) at 52.

<sup>128</sup> For the inaccurate use of 'endorsement' in relation to the *suftaj*, see note 226, below.

explained further below,<sup>129</sup> the non-transferability of the *suftaj* is a matter of practice relating to the function of the *suftaj* and not to its being an instrument payable to a named payee; a *suftaj* payable to bearer is thus equally not transferable.

Third, there is no indication as to the ability of a transferee of an instrument transferable by delivery to obtain a good indefeasible title to it. The entitlement of the person to whom the instrument is issued as well as of any subsequent transferee is explained under the principles governing the *hawale*. Hence, instruments transferable by delivery were not ‘negotiable’ in the full sense of the term.

Thus, in the final analysis, under non-Hanafi rules, by reference to the mutual assent of the debtor and creditor, transferability by delivery of a debt instrument, creates a *hawale*; that is, it ‘turns’ the paymaster’s obligation away from the debtor onto the creditor. In the process, it facilitates the circulation of the aforesaid debt instrument, and yet falls short of its negotiation.

### §3.2 The *suftaj* under *hawale* principles

This subsection deals with the formation of the bilateral *hawale* agreement underlying the operation of the *suftaj*. It is this bilateral agreement that facilitates under the various Islamic schools the conferment of an entitlement on the creditor. The subsection further discusses the function of the *suftaj*. Ensuing subsections deal with (a) the nature of the paymaster’s payment obligation on a *suftaj*, and his position towards a correspondent that may be nominated to pay in the designated place of payment; (b) the transferability under a *suftaj*, from the debtor to the paymaster, of the debt obligation owed (originally by the debtor) to the creditor, (c) the non-transferability of the *suftaj*, namely, of the paymaster’s obligation, to the creditor’s own creditor (as well as onward), and finally, (d) the objections in Islamic legal doctrine to the very function of the *suftaj* to transmit payment from one place to another.

Islamic contract theory emphasizes mutual consent; to that end, Islamic law “does not choose the avenue of formality, beyond requiring that words be exchanged that convey, explicitly or implicitly, an unambiguous offer ... and acceptance ...”<sup>130</sup> In

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<sup>129</sup> See text & notes 202-206, below.

<sup>130</sup> FE Vogel, “Contract Law of Islam and the Arab Middle East” Chapter 7 in A. Von Mehren (chief ed.) *Contracts in General*, Volume VII of U. Drobniig and K. Zweigert (responsible eds.) *International Encyclopedia of Comparative Law* (Tübingen: JCB Mohr, 2006) at 44. See also GH Bousquet, *Précis de Droit Musulman* principalement malékite et algérien 2. éd. rev., 3. éd. du Précis élémentaire (Alger; la maison des livres, 1950) at 256. In detail for the expression of consent in Islamic law, see Y. Linant de Bellefonds, *Traité de droit musulman comparé* Volume I: Théorie générale de l’acte juridique (Paris; Mouton & co., 1965) at 116-156 and MA Hāmid, “Mutual Assent in the Formation of Contracts in Islamic Law” (1977), 7 *Journal of Islamic and Comparative Law* 41. The various elements of ‘consent’, though technically only in connection with a contract for sale, are also discussed by Rayner, above note 121 at 105-121.

applying this principle, most restrictive is Shafi'i law which requires mutual assent to be orally expressed in clearly spoken words.<sup>131</sup> At the same time, as long as assent is unambiguously expressed, the other schools are satisfied with both written and oral contracts, agreed explicitly or implicitly. For all schools, it is normally required that the offer and acceptance are to be exchanged between the parties in the same meeting or session; stated otherwise, both are usually expected to be present together at the time the contract is concluded.<sup>132</sup> Nothing however precludes a contract from being reached between distant parties on the basis of an exchange of unambiguous messages between them, and the use of messengers to convey such messages. Messages exchanged between parties who are away from each other may be oral; other than under Shafi'i law, messages could also be communicated exclusively in writing.<sup>133</sup>

According to Ray, in contrast to their Hanafi counterparts, Maliki rules<sup>134</sup> facilitate the use of *hawale* to transmit funds from place to place. As he explains, under Maliki law, a debtor owed by a paymaster who is situated in one place and who wishes to pay a creditor located in another place, “can transmit [the paymaster’s] recognisance of debt to [the creditor]”, thereby causing the paymaster to become liable to the creditor. This, however, does not work under Hanafi law that requires the presence of the paymaster.<sup>135</sup>

Indeed, for a *hawale* to work, Hanafi law requires the paymaster’s agreement: such an agreement may be expressed orally, and according to one view, may even be derived from the paymaster’s silence.<sup>136</sup> At the same time, other than under Hanafi law,

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<sup>131</sup> Linant de Bellefonds, *ibid.* at 136-137; and Vogel, *ibid.* at 32 and 44.

<sup>132</sup> See e.g. Schacht, *Introduction*, above note 21 at 145, according to whom, in Islamic law, “The contract is a bilateral transaction, and it requires an offer ... and an acceptance..., both made normally in the same meeting ... of the contracting parties”. Other than under the Maliki school (Linant de Bellefonds, *ibid.* at 155), an offer may be withdrawn until accepted (Schacht, *ibid.*); according to one view, both offer and acceptance can respectively be withdrawn as long as the contractual session has not been terminated. See Coulson, above note 1 at 46, Vogel, *ibid.* at 44. For the contractual session see also Chehata, above note 21 at 117-118.

<sup>133</sup> In general, rules that govern the ‘contractual session’ apply with the necessary modifications to the case where the parties are not present together. See Linant de Bellefonds, *ibid.* at 154-155.

<sup>134</sup> In fact this would be the case for all other, namely, non-Hanafi schools.

<sup>135</sup> Ray, above note 34 at 62.

<sup>136</sup> MD Santillana, *Code civil et commercial tunisien* avant-projet discuté et adopté (Tunis: Imprimerie générale, 1899), note on Article 2011 at 704.



an agreement reached between the debtor and creditor suffices to establish a *hawale*.<sup>137</sup> However, under the non-Hanafi schools, the formation of a *hawale* by means of the delivery by the debtor to the creditor of the paymaster's acknowledgement of debt owed by the paymaster to the debtor, as claimed by Ray, requires some analysis. As explained immediately below, the delivery by the debtor to the creditor of the paymaster's acknowledgement of debt is not a unilateral contract; nor, as was already noted, is it a 'negotiation' constituting a transfer of a debt by the mere physical delivery of the debt document. Rather, it can lead to a bilateral contract to be created by the exchange of an offer and acceptance.

First, the *hawale* is not a unilateral contract. Indeed, it is true that in principle, both the discharge of a debtor<sup>138</sup> and the acknowledgement of a debt<sup>139</sup> may operate as unilateral contracts.<sup>140</sup> As such they may be created by the mere transmittal or delivery of a document by one party to another; it is however the creditor who is to transmit a discharge and the debtor who is to transmit an acknowledgement. *Hawale* based on the delivery of an acknowledgment results in the discharge of the debtor;<sup>141</sup> nevertheless, in a *hawale*, it is the debtor who delivers the document to the creditor rather than the other way around. This cannot operate as a discharge for the debtor. As well, while the transmittal of the document by the debtor results in the discharge of the paymaster towards the debtor, it further results in positioning the paymaster as owing to the creditor; to speak of the *hawale* as resulting in the paymaster's discharge is thus an incomplete, and hence, inadvertently potentially misleading, description of its features. Moreover, the acknowledgement the debtor delivers to the creditor is not of a debt owed by the debtor to the creditor, confirming the debtor's liability to the creditor; rather, it is an acknowledgement by the paymaster of a debt owed by the paymaster to the debtor, which is said to create a debt owed by the paymaster to the creditor (and discharging the debtor on his debt to the creditor). For all these reasons, the *hawale* cannot be rationalized as a unilateral contract.

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<sup>137</sup> For the differences among the various schools, particularly between Hanafi and non-Hanafi law, see §2.2 above.

<sup>138</sup> For the acquittal of a debtor as a "unilateral disposition ... with immediate legal effect" see Schacht, *Introduction*, above note 21 at 145.

<sup>139</sup> For the 'acknowledgement' as a unilateral "disadvantageous transaction" see Schacht, *ibid.* at 151. See also *ibid.* at 144.

<sup>140</sup> But *cf.* Linant de Bellefonds above note 130 at 166-168, particularly questioning whether the remittance or cancellation of a debt (*'remise de dette'*) does not require the acceptance by the debtor.

<sup>141</sup> *Cf.* Schacht, *Introduction*, above note 21 at 148 who speaks of the *hawala* as a "way of extinguishing an obligation ... by transforming it into a new one ..."

Second, the *hawale* is not created by “negotiation”. As indicated,<sup>142</sup> it is certainly premature to view the paymaster’s debt document as endowed with the attributes of negotiability. Treating the mere physical transfer of the document as adequate to transfer the debt claim would be to confer on the debt instrument an important attribute of negotiability. Effectively viewing the delivery of the debt document as ‘negotiation’ thus strikes me as anachronism, inappropriate in terms of contemporary legal doctrine.

At the same time, in the footsteps of Ray,<sup>143</sup> I see how the transmittal by the debtor to the creditor of the paymaster’s recognizance of debt may lead to the formation of a *hawale*. However, in my view, it is not the delivery on its own which unilaterally creates the contract. Rather, as indicated, a bilateral contract is created upon the creditor’s acceptance of the debtor’s offer embodied in the debtor’s message which accompanies the paymaster’s debt document. Such acceptance is to be manifested but not necessarily communicated, and certainly not to the debtor himself; indeed, “The necessity for the communication of the offer and the acceptance appears to have played a very little part in the Islamic law scheme of contracting.”<sup>144</sup> What is required is the expression of mutual assent, and not necessarily its communication; it is enough for the parties to express their assent in the presence of each other at the meeting place.<sup>145</sup> Hence, there is no difficulty in finding mutual assent where delivery of the debt document occurs face-to-face. By the same token, in the case of a contract between distant parties, the offeror’s messenger is to be treated as “a conduit pipe for conveying the words of the offeror”,<sup>146</sup> in which case, suffice it for the offeree’s acceptance is to be manifested at the meeting place between the offeror’s messenger and the offeree.

Thus, “the rule in all schools” appears to be that “when the parties are contracting *inter absentes*, the acceptance need not be communicated. The contract is complete as soon as the offeree declares his acceptance.”<sup>147</sup> In principle, other than under Shafi’i law, the creditor’s acceptance may be manifested by his mere silence in receiving the paymaster’s debt recognizance,<sup>148</sup> that is, by not rejecting it within a reasonable time

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<sup>142</sup> See discussion at the end of §3.1, above.

<sup>143</sup> Above, text that follows note 137.

<sup>144</sup> Hāmid, above note 130 at 47.

<sup>145</sup> This is a principal theme throughout Hāmid’s article, *ibid*.

<sup>146</sup> *Ibid.* at 51.

<sup>147</sup> *Ibid.* at 52.

<sup>148</sup> For expression of consent by silence see Linant de Bellefonds above note 130 at 141-145.

after receipt.<sup>149</sup> In the final analysis however, under non-Hanafi law, the exchange of messages between the debtor and creditor may evolve around the delivery by the debtor of the paymaster's debt document followed by the expression of its acceptance by the creditor; it is this chain of events which creates the *hawale* as a bilateral contract between the debtor and creditor.

Indeed, as a matter of Islamic legal doctrine, under non-Hanafi law, an agreement reached between the debtor and the creditor is effective to compel the paymaster to pay the creditor rather than the debtor. As already indicated, the theory behind this rule is the indifference of the paymaster as to the identity of the payee who is to discharge him on his payment obligation.<sup>150</sup> This rationale sets the limits of rule; the debtor-creditor agreement is obviously ineffective to modify otherwise the terms of the paymaster's payment obligation. In our context, such an agreement to which the paymaster is not a party is incapable of requiring him to change the place of payment,<sup>151</sup> and thereby effectively assume the risk of carrying the money from the debtor's location to that of the creditor.

Accordingly, under non-Hanafi law, the consent of the paymaster can be bypassed only where as a result of the *hawale* the paymaster is to pay the creditor at the location originally designated for payment for the paymaster's obligation to the debtor. This means that even under non-Hanafi law a creditor located in a place<sup>152</sup> different from that of the debtor will benefit from a *hawale* agreed without the consent of the paymaster only under narrow circumstances. A case to the point is where as a result of the *hawale* the paymaster who originally agreed to pay the debtor at the debtor's place is to pay at the same place to an agent duly appointed by the creditor.<sup>153</sup> Another case is in which the paymaster originally agreed with the debtor to pay at the creditor's location.<sup>154</sup> Risk of

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<sup>149</sup> For the reasonable time available for acceptance by the recipient of a message containing an offer see Linant de Bellefonds *ibid.* at 155.

<sup>150</sup> See text that follows paragraph containing notes 40-41, above.

<sup>151</sup> Discussion does not deal with *de minimis* changes that are unlikely to change risk materially; rather, it assumes significant change of location.

<sup>152</sup> As immediately above, 'different' or 'designated' (as well as 'same') 'location' or 'place' is broadly used by reference to a 'city', or any other venue which respectively does or does not materially change the risk assumed by the paymaster in the payment obligation he incurred to the debtor.

<sup>153</sup> More broadly, such a case is whenever payment is to be made at a place other than of the creditor; it would not matter if it is the debtor's place or anywhere else.

<sup>154</sup> A similar case will be where the paymaster, who is in business also in the creditor's location, agreed to pay wherever a proper demand is presented to him.

money-transport is fastened on the creditor in the former case and is left with the debtor in the latter; either way, the risk incurred by the paymaster has not been altered.

In the final analysis, to require the paymaster to pay the creditor in a place different from the one designated in the paymaster's contract with the debtor, the paymaster's agreement or consent is required under both Hanafi and non-Hanafi law. Under Hanafi law, the paymaster's agreement is required to effectuate the *hawale*; under the other schools, the paymaster's consent is required to effectuate the modification in the terms of his original payment obligation. It is only where there is no change in the place in which the paymaster is to pay, that is, where no modification in the terms of his original payment obligation is involved, that non-Hanafi rules do not require an additional agreement by the paymaster and hence benefit the creditor more than Hanafi law.

Thus, under non-Hanafi law, the paymaster's consent in his original agreement with the debtor can benefit the creditor who has concluded the *hawale* agreement with the debtor. At the same time, under Hanafi law, a creditor wishing to enforce the paymaster's payment undertaking contained in the paymaster's agreement with the debtor, must subsequently reach a separate agreement with the paymaster, even where the terms of that agreement are identical to those of the earlier agreement between the paymaster and the debtor. This is so since under Hanafi law, the *hawale*, without which the creditor is not entitled to receive payment from the paymaster, is to be formed by an agreement reached between the paymaster and the creditor.

In sum, the paymaster's engagement under his contract with the debtor to pay him in a place other than that of the debtor can be transferred and become owed to a creditor located in the designated place of payment. This may be accomplished according to all schools, by means of a *hawale*; the *hawale* requires an additional, in fact confirming, agreement of the paymaster, under Hanafi rules, but not otherwise. It is from this perspective that the use of *hawale* to transmit payment between a distant debtor and creditor is more practical under non-Hanafi law.<sup>155</sup>

Certainly, this distinction between the Hanafi and the other laws is important in an environment in which documents of debts circulate, namely, are intended to pass freely from the hands of the creditor to a transferee, and onwards to an indefinite chain of subsequent transferees. In such an environment, seeking each time the paymaster's consent, as required under Hanafi law and dispensed with by the other rites, is tantamount to a nuisance, which depending on the circumstances of a given case, may become an obstacle. However, the significance of that distinction is not to be overstated in an environment which does not purport to facilitate the movement of a debt document beyond the hands of the original creditor; a paymaster who agreed with the debtor to pay

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<sup>155</sup> With respect, this limitation, to the case in which the paymaster's engagement under his contract with the debtor is to pay him in a place other than that of the debtor, seems to be overlooked by Ray, who above note 34 at 65, notes that the use of *hawale* to transmit payment between a distant debtor and creditor is more practical under non-Hanafi law.

in a place other than that of the debtor may anyway be easily disposed to reconfirm his agreement to the creditor, as required under Hanafi law and dispensed with under the other schools. The crucial step is the initial agreement to pay other than at the debtor's place, a step that as indicated is by no means bypassed in non-Hanafi law.

A paymaster is likely to agree to pay other than at the debtor's place where the paymaster's debt arises in the first place with the view of transmitting payment from place to place, whether as a primary objective or an incidental feature of the transaction. To that end the *suftaj* developed to achieve the binding agreement of the paymaster to pay in a location other than that of the transaction that gave rise to the paymaster's obligation to the debtor. Indeed, in a *hawlae*, the paymaster may be, and other than Hanafi law, must be, indebted to the debtor; the debt thus owed by the paymaster is preexisting, and has not been created a part of the *hawale* transaction. At the same time, in a *suftaj*, the paymaster must owe money to the debtor; such debt is however owed under a transaction created under the *suftaj* transaction, specifically with the view of making repayment elsewhere.<sup>156</sup> The delivery of money to the paymaster with the view of transmitting its sum to another destination is often referred to as 'remittance', in which case, the person delivering the money to the paymaster is the 'remitter'.

Repayment by the paymaster of the sum received under the *suftaj* is to be made in a place designated under the *suftaj* which is different from the place where the paymaster received the equivalent sum of money. As provided in the *suftaj*, repayment may be to the remitter, who delivered the money to the paymaster (and thus became his creditor). Alternatively, repayment by the paymaster may be stated to be made in the designated place to another person nominated by the remitter. Thus, the *suftaj* does not necessarily entail the transfer of the obligation to pay so as to invoke *hawale* principles. Stated otherwise, the distinctive feature of the *suftaj* is the repayment of a debt in a place other than of the original debt transaction, and not necessarily to a different party.

Where the designated payee is the remitter himself the *suftaj* serves as an equivalent of the modern traveler's cheque<sup>157</sup> or its predecessor, the traveler's letter of credit;<sup>158</sup> thereunder, a traveler forgoes the risk of carrying cash with him by delivering money to a paymaster at the place where the travel commences and arranging (with the paymaster) to have the equivalent sum made available to him (the remitter/traveler) at the place of destination. A payee other than the remitter may be a donee or a creditor of the

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<sup>156</sup> See e.g. Schacht, *Introduction*, above note 21 at 149.

<sup>157</sup> For the traveler's cheque see e.g. HG Beale (General Editor), *Chitty on Contracts*, 29<sup>th</sup> ed. Volume II: Specific Contracts (London: Sweet & Maxwell, 2004) at ¶¶34-174 to 185, pp. 333-338.

<sup>158</sup> Traveler's letter of credit is defined eg. in BA Garner (ed. in chief), *Black's Law Dictionary*, 8<sup>th</sup> ed. (St. Paul, Minn: Thomson West, 2004) at 924. Such letters of credit are "in the nature of traveler's checks". See JF Dolan, *The Law of Letters of Credit*, 4<sup>th</sup> ed (Austin, Tx: AS Pratt & Sons, 2007) at ¶3.02, p. 3-6 n.28.

remitter. A *suftaj* payable to a person other than the remitter is thus functionally the forerunner of the commercial bill of exchange, with which the remitter is to pay his debt to a distant creditor without physically carrying the money from place to place.<sup>159</sup> A *suftaj* payable to a person other than the remitter may also be used to fulfill a function of the modern commercial letter of credit, under which a designated payee would not release goods to be sold to the remitter other than against the paymaster's obligation to pay for them.<sup>160</sup>

Certainly, the *suftaj* payable to a payee other than the remitter falls short of fulfilling all the functions of its above-mentioned successors. Particularly, unlike the early Medieval Continental bill of exchange, the *suftaj* is payable in the same currency as the one given by the remitter to the paymaster,<sup>161</sup> it involves no currency exchange element.<sup>162</sup> As well, unlike the documentary letter of credit, the *suftaj* provides no protection to the remitter; it anticipates payment on the payee's demand with no mechanism to ensure that he fulfilled his part of the contract.<sup>163</sup> As such, the *suftaj* payable to a payee designated by the remitter is a payment mechanism pure and simple, used for payment between distant parties, usually, a debtor and creditor. Being unconditionally payable upon presentment, it is thus more akin to the bill of exchange than to the commercial letter of credit.<sup>164</sup>

### §3.3 The legal nature and operation of the *suftaj*

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<sup>159</sup> For the modern bill of exchange, see note 115, above.

<sup>160</sup> For the modern letter of credit, see note 116, above.

<sup>161</sup> In contrast, currency exchange was at the heart of the early bill of exchange transaction in Continental Europe. See e.g. MT Boyer-Xambeu, G Deleplace, and L Gillard, *Private Money & Public Currencies – the 16<sup>th</sup> Century Challenge* (Armonk NY and London, England: ME Shape, 1994; translated by A Azodi) at 25-35.

<sup>162</sup> Ashtor, above note 102 at 562-565 enumerates three grounds on which the *suftaj* is distinguished from the bill of exchange: currency, number of participants, and availability of endorsements. Among these three points, the second is dubious. As for lack of endorsements, see text and notes 126-129 above, as well as text and notes 202-206 and 226 below.

<sup>163</sup> In contrast, the commercial letter of credit requires payment to the beneficiary (creditor) only against documents strictly complying with specifications laid out by the applicant (debtor). The classic authority on this point is *J.H Rayner v. Hambro's Bank* [1943] KB 37, 40.

<sup>164</sup> For the bill of exchange in modern law, as an unconditional order of payment, payable upon the (usually) physical presentation of the instrument, see e.g. the English Bills of Exchange Act 1882 (c 61) Sections 3(1) in conjunction with 45 and 52(4).

The analysis of the legal nature of the *suftaj* is designed to provide answers to three key questions. The first is the nature of the paymaster's obligation and his position towards a correspondent that may be nominated to pay in the designated place of payment. This question comes up whether or not this obligation is stated to be payable to the remitter or to a payee designated by him. With regard to a *suftaj* payable to a payee other than the remitter, a second question arises, that is, as to the redirection of the paymaster's obligation from being owed to the remitter to being owed to the payee. Finally, the third question is as to the non-transferability of the *suftaj*.

So far as the first question is concerned, the paymaster's obligation is classified under Islamic law as that of a borrower; that is, under all schools of Islamic law, the *suftaj* gives rise to a loan repayable in a place different from that of the loan.<sup>165</sup> The loan is constituted by the delivery of the money by the remitter to the paymaster who agrees to repay an equivalent sum in the same currency, at the designated location, to the designated person, the latter being the remitter himself or someone nominated by him. The paymaster expresses his agreement by placing his signature on the *suftaj* document.

The *suftaj* is thus a document reflecting a borrower's undertaking to repay a monetary loan in the currency of the loan,<sup>166</sup> to a payee usually identified in the document, and who is to present it and obtain payment in a designated place other than the place of the loan. The designated payee could either be the original lender or his nominee. A designated nominee could well be the lender's own creditor. In the scenario on which the present discussion focuses, the debtor (in the transaction to be paid by *suftaj*) is the lender (to whom the *suftaj* is issued), the paymaster (*suftaj* issuer) is the borrower, and the designated payee is the creditor (in the transaction to be paid by *suftaj*); the debtor 'lends' the paymaster money to be repaid by the paymaster ('borrower') to the creditor in discharge not only of the 'loan' made to the paymaster by the debtor, but also of a debt owed by the debtor to the creditor, and incurred prior to and irrespective of, the *suftaj*.

As a rule, a *suftaj* was issued by a paymaster of high repute;<sup>167</sup> it entailed a high commission<sup>168</sup> and was hard to get.<sup>169</sup> The operation of the *suftaj* system is premised on

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<sup>165</sup> See e.g. Schacht, *Introduction*, above note 21 at 149, defining the *suftaj* as "a loan of money in order to avoid the risk of transport." See further, §3.4 below.

<sup>166</sup> I suppose that the identity between the currency of the loan and of its repayment was a matter of practice rather than a requirement derived from any legal doctrine.

<sup>167</sup> The point is highlighted by Goitein above note 104 at 242-243, who goes on to say that otherwise, in the *Geniza* documents, "Payment though a third party in another city fell under the general category of transfer of debt" and was not treated as a *suftaj*. However, for the purpose of our discussion, no such distinction is to be made.

<sup>168</sup> For questioning the conformity of the practice with the prohibition to take interest see Ray, above note 34 at 77. Regardless, presumably, the commission was waived for small amounts sent for charity. See Goitein, *ibid.* at 244.

the presence of the paymaster or his correspondent in each of the places, that of the debtor and that of the creditor.<sup>170</sup> That is, the paymaster may be a large merchant who operates in both places. He takes the money in one place and returns an equivalent sum in another without physically carrying it from place to place. In other words, he uses the borrowed money at the place of the loan, and repays it out of money available to him at the place of the repayment. He may act as a single intermediary in an operation which may thus be a tripartite arrangement.

Alternatively, the paymaster, located at the place of the loan, may employ an agent or business associate, such as another merchant with whom he has ongoing dealings, as a correspondent, who is to make the payment to the payee, at the designated place of payment. In the absence of an institutionalized mechanism for settlement between the paymaster and his correspondent, they are to settle in the course of a mutual business relationship, giving rise to reciprocal debts, created not necessarily exclusively from the transmission of payments for third parties.<sup>171</sup>

It has been attempted to explain legal relations under the *suftaj* in the framework of the *qirâd*. The *qirâd* is a Maliki term for a bilateral arrangement under which one party (owner or *mâlik*) invests capital and another (*âmil*) manages or trades with it on the understanding that they share the profit, but not the loss; rather, any loss resulting from a

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<sup>169</sup> A fact that contributed to the continued parallel practice of sending purses of money from place to place. See e.g. Goitein, *ibid.* at 244.

<sup>170</sup> Ashtor, above note 102 at 556, 563 and 566 points out that most documentation refers to the *suftaj* as a three-party arrangement. Yet it is not always clear whether the party to be deleted is the creditor (in which case the *suftaj* is payable to the debtor) or the correspondent (in which case it is payable to the creditor by the paymaster). In fact, there is nothing to preclude the possibility of a two-party *suftaj* payable by the paymaster to the debtor, obviously at a place other than where the money was ‘lent’ by the latter to the former.

<sup>171</sup> Generally speaking, in this respect, the financial system in the Islamic lands did not go further than its predecessors in Ancient Greece (See: R. Bogaert, *Banques et banquiers dans les cités grecques* (Leyde: A.W. Sijthoff, 1968) at 344-345 and 413.), Ancient Rome (See: J. Andreau, *Banking and Business in the Roman World*, translated by J. Lloyd (Cambridge: Cambridge University Press, 1999) at 43, notwithstanding Maxwell, above note 65 at 111 to the contrary) as well as Greco-Roman Egypt (See: R. Bogaert, “Les opérations des banques de l’Égypte Ptolémaïque” (1998), 29 *Ancient Society* 49 at 135), none of which institutionalized any mechanism for the multilateral clearing and settlement; the latter is traced to 12<sup>th</sup> century medieval fairs in Europe. See P. Huvelin, *Essai historique sur le droit des marchés & des foires* (Paris: Arthur Rousseau, 1897) at 534, 552-577.



normal activity is borne by the owner.<sup>172</sup> Unfortunately however, as will be seen immediately below, as a framework of enhancing the understanding of the *suftaj*, *qirâd* analysis has been confusing and not particularly helpful.

Thus, the Hedyā discusses the situation in which the managing partner (*âmil*) in a *qirâd* becomes liable on a *suftaj* he issues to a third party outside of the *qirâd* venture.<sup>173</sup> In such a case the investing partner (*mâlik*) is said to become jointly liable with the managing partner (*âmil*) to the third party for the amount ‘borrowed’ under the *suftaj* only upon ratification by the investing partner.<sup>174</sup> Grasshoff discusses this Hedyā text.<sup>175</sup>

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<sup>172</sup> See e.g. definition by AL Udovitch, “Credit as a Means of Investment in Medieval Islamic Trade” (1967), 87 *Journal of American Oriental Society*, 260, 261 n.12 [hereafter: Udovitch, Credit]. In fact, *qirâd*, or its equivalent, *muqârada* is used by both the Maliki and Shafi’i schools. In Hanafi terminology this arrangement is called *mudâraba*. *Ibid.* Briefly, the *qirâd* works as follows: suppose the investor provides the managing partner with \$100 capital. Where the latter works it to produce \$20 profit, this profit is shared between the parties (in an agreed upon ratio) and the \$100 investment is returned to the investor. Conversely, where as a result of normal trading by the managing partner the capital shrank to \$80, the investor takes back this amount (so that the entire financial loss falls on him); the managing partner’s loss is limited to his wasted time and effort. The *qirâd* is said to be the forerunner of the Medieval European *commenda*. See AL Udovitch, “At the Origins of the Western Commenda: Islam, Israel, Byzantium?” (1962), 37 (2) *Speculum*, 198, particularly at 207 (hereafter: Udovitch, Commenda).

<sup>173</sup> Hedyā, above note 28 at 466, discussing the *mozaribat*, defined at 454 in terms of a *qirâd*.

<sup>174</sup> For the amount borrowed on the *suftaj* the two *qirâd* partners become parties to a credit partnership (*sharikat al-wujūh*), and thus jointly liable. *Ibid.* According to Udovitch, “Credit partnership (*sharikat al-wujūh*) ... is simply an arrangement in which the capital of the parties consists not of their own cash or merchandise, but of credit either in the form of a loan or of purchases of goods for which payment was deferred.” AL Udovitch, “Theory and Practice of Islamic Law: Some Evidence from the Geniza” (1970), 32 *Studia Islamica*, 289 at 299-300 (hereafter: Udovitch, Theory). The ‘*sharikat al-wujūh*’ was also known as “the partnership of those with good reputations”, in which the partners invested in credit. See Udovitch, Credit, above note 172 at 262. Between the partners, both liability and profit must correspond to the investment.

<sup>175</sup> R. Grasshoff, *Das Wechsel Recht der Araber* (Berlin: Verlag von Otto Liebman, 1899) at 24-25 [in German. I relied on an unofficial translation]. It should be noted that the Hedyā, *ibid.* appears to speak of two alternative scenarios; one of the giving and the other of taking of the *suftaj* by the managing party. This ambiguity reappears in Grasshoff’s passage, *ibid.* as well. On his own, Grasshoff can thus be alternatively understood to say that an *âmil* under a *qirâd* who outside the *qirâd* venture lends and takes a *suftaj* from a third party paymaster cannot bind the *mâlik* who is to become bound and thus effectively liable to the *âmil* jointly with the third party paymaster (*suftaj* issuer) only upon the *mâlik*’s ratification. In any event, the Hedyā, *ibid.* (on which Grasshoff relies) specifically

Huvelin understands Grasshoff to analyze the *qirâd* as governing in a *suftaj* the relationship between the paymaster and his correspondent where they have an ongoing business relationship.<sup>176</sup> Huvelin draws from the application of this *qirâd* framework to the *suftaj* two implications. First, in his view, the *qirâd* relationship explains the liability of the correspondent to the paymaster.<sup>177</sup> Second, according to him, the *qirâd* relationship explains the joint liability of the paymaster and his correspondent to the third party creditor, and hence the recourse of the third-party creditor against the paymaster in case of non-payment by the correspondent.<sup>178</sup>

Elsewhere, Grasshoff speaks of a situation in which the investing partner in a *qirâd* requests the managing partner to return the invested capital plus his (the investing partner's) share in the profit to another location by means of a *suftaj*.<sup>179</sup> In such a case, the *qirâd mâlik* is the *suftaj* lender (i.e. the debtor in our generic paradigm), while the *qirâd âmil* is the *suftaj* paymaster (i.e. the borrower under the *suftaj* and its issuer). Remde may have understood Grasshoff to say that under such circumstances the risk under the *suftaj* is allocated by the law applicable to a *qirâd*.<sup>180</sup> Remde thus appears to interpret Grasshoff as arguing that the *qirâd* relationship continues to govern the *suftaj*.<sup>181</sup> Under this interpretation, per rules applicable to the *qirâd*, the risk of loss of the *suftaj* money falls on the *suftaj* lender (the debtor in our generic paradigm), acting as the *qirâd mâlik*, the party who used the *suftaj* in the first place to avoid that risk.

Charging the *suftaj* lender (i.e. the debtor in our generic paradigm) with the risk of loss, per Remde's interpretation of Grasshoff, is obviously contrary to principle. Thus, disagreeing with what he appears to understand Grasshoff to say, Remde suggests that in

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speaks of a *sharikat al-wujûh* between the *âmil* /paymaster and the *mâlik* which excludes this alternative understanding from Grasshoff.

<sup>176</sup> Huvelin, *Travaux*, above note 5 at 23-24. And yet, in the footsteps of the Hedyā, Grasshoff does not even treat the correspondent as a party to the *qirâd* arrangement. *Ibid.*

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> Grasshoff, above note 175 at 29.

<sup>180</sup> A. Remde, *Lettera di cambio und Suftadja Eine rechtsvergleichende Studie als Beitrag zur Entstehungsgeschichte des Wechsels* (Köln: Inaugural-Dissertation, 1969) at 88 [in German. I relied on an unofficial translation].

<sup>181</sup> Unfortunately, he is quite vague on this point. He is saying, however, that “[w]ere the *qirâd* to be regarded as the cause [of the *suftaj*], then the *âmil* must be the issuer of the *suftadja* and the issuance of the *suftadja* occurs against the commitment of the *qirâd*” *Ibid.* at 88. The interpretation proposed in the text above is consistent with Remde's ensuing critique.

the course of the transmission of funds under a *suftaj* a *qirâd* could nevertheless be constructed, and yet, only between the paymaster and his correspondent;<sup>182</sup> he thus assigns the role of the *qirâd* investor (*mâlik*) to the paymaster, who is indeed to bear the loss by reimbursing his *qirâd* managing partner (*âmil*), the *suftaj* correspondent.<sup>183</sup> From this perspective, the added value of the *qirâd* analysis to our understanding of the *suftaj* is however, rather limited; it only strengthens the correspondent's claim for recourse against the paymaster. As well, possibly,<sup>184</sup> under non-Hanafî rules, recourse of the correspondent against the paymaster on a *qirâd* provides a legal basis for the operation of the *suftaj* even where the paymaster does not owe in advance to the correspondent,<sup>185</sup> other than as the *qirâd* investor.

It seems to me that both Huvelin and Remde read too much into Grasshoff and thus misinterpret him; I do not understand Grasshoff to analyze any aspect of the *suftaj* as a *qirâd* relationship; rather, he only deals with the *suftaj* in two separate situations in which a *qirâd* pre-exists the *suftaj*. In the first case he deals with the liability of the investing party for the amount of a *suftaj* issued by his managing partner. In the second case he discusses the use of the *suftaj* to transfer the *qirâd* investment and profit share of the investing partner to another location. In the former case the ratifying *mâlik* becomes liable under the law applicable to *qirâd*; in the latter, the relationship under a *suftaj* issued by the *âmil* to the *mâlik* is nevertheless governed by the law applicable to *suftaj*; being the *suftaj* issuer, it is thus the former who bears the risk of loss of the *suftaj* money, exactly as if he were a stranger to whom the *qirâd* investor (*mâlik*) gave the money he just received from the *qirâd* *âmil* at the termination of the *qirâd*. In neither case the law of *qirâd* is superimposed on and supercedes the law of *suftaj*.

A *suftaj* is usually drafted to be payable on demand; it may be properly authenticated so as to be easily provable<sup>186</sup> and may further be drafted to impose heavy

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<sup>182</sup> Remde is unclear as to whether his analysis is limited to the case of a *suftaj* issued by an *âmil* to transmit payment owed to an investor (*mâlik*) under a *qirâd*. If so, Remde is to be understood as saying that the *âmil* in the *qirâd* whose principal amount and (investor's) share in profit is to be transmitted by means of a *suftaj*, becomes the *mâlik* in the *qirâd* under which the *suftaj* is carried out.

<sup>183</sup> For the *mâlik*'s obligation to reimburse the *âmil* in a *qirâd* arrangement see text & note 172, above. For the paymaster's obligation to reimburse the correspondent under a *suftaj*, see text & note 171, above.

<sup>184</sup> The hesitation stems from the fact that a *qirâd* appears to require actual advance on the part on the investor/owner (paymaster) (and not merely an undertaking to invest), in which case there is anyway a debt owed to him by the managing partner (correspondent).

<sup>185</sup> For the indebtedness requirement under non-Hanafî rules, see text that follows paragraph containing note 42, above.

<sup>186</sup> For the *suftaj* as instrument, see Grasshoff, above note 175 at 30-34.

penalties for any delay in payment.<sup>187</sup> Payment on a *suftaj*, namely, repayment of the loan that gave rise to it, whether by the paymaster or his correspondent, is typically made against its proper presentment by the payee at the place designated for payment.<sup>188</sup> Thus, a remitter is likely to carry with him a *suftaj* payable to himself and to send to the creditor a *suftaj* of which that creditor is the payee. And yet, the entitlement to enforce the paymaster's obligation on the *suftaj* is not on the basis of possession by the named payee; from a legal perspective, the paymaster-borrower is bound under the *suftaj* to the debtor-lender, even where the repayment obligation is to be discharged by payment to the third party-creditor; the paymaster's engagement on the *suftaj* does not inure to the benefit of the creditor, who thus, as a matter of a strict legal doctrine, is not entitled to enforce it. Rather, the engagement is enforceable exclusively by the debtor ('lender') to whose benefit the paymaster's obligation inures. This takes us to the second aforesaid question<sup>189</sup> relating to the legal underpinning of the *suftaj*, namely, to the redirection of the paymaster's obligation from being owed to the debtor-'lender', to being owed to the payee-creditor.

Indeed, on his part, the creditor may wish to have a direct right against the paymaster: this is particularly so when the creditor obtains the *suftaj* before its stated due date,<sup>190</sup> before he is entitled to payment under his contract with the debtor, or else, where he is either prepared to give the paymaster an extension, wishes to be paid on it in installments,<sup>191</sup> or seeks to enforce payment against the paymaster. To all such ends, the creditor may be given a direct right against the paymaster by means of a *hawale*. Certainly, according to the non-Hanafī schools, a *hawale* may be established without the consent of the paymaster, by the bilateral agreement of the debtor and the creditor. In the footsteps of Ray and as explained above, this can be achieved by the creditor's

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<sup>187</sup> See e.g. Udovitch, Reflections, above note 113 at 16. Goitein above note 104 at 243 is to the same effect; at 245 he even mentions the possibility of a paymaster making advances on a forthcoming *suftaj* prior to its arrival. For questioning the validity of the penalty clauses as possible violation of the prohibition to take interest, see Ray, above note 34 at 77.

<sup>188</sup> According to Imamuddin, above note 10 at 29, "Each *suftajah* had its own time limit which was generally forty days"; it must thus be presented prior to expiry date.

<sup>189</sup> For the enumeration of key questions, see above, first paragraph in §3.3.

<sup>190</sup> For such *suftajs* see e.g. Ashtor, above note 102 at 557 n. 31. The text on which Ashtor relies, At-Tanūkhī, Revue de l'Académie Arabe, 678 at 680 [in Arabic], is a literary text speaking of a *suftaj* presented on due date, and on which payment was requested by its beneficiary who presented it to be made in installments. I relied on an unofficial translation.

<sup>191</sup> The practice, noted by Imamuddin, above note 10 at 30 (as well as by At-Tanūkhī, *ibid.*), "is not mentioned in legal works". Ray, above note 34 at 71.

acceptance from the debtor of the paymaster's recognizance of indebtedness.<sup>192</sup> And yet, as explained, for this to work, the paymaster's recognizance of debt must have expressed an obligation to pay other than in a place of the loan, and would thus normally be on a *suftaj*.<sup>193</sup>

At the same time, under Hanafi law, the *hawale*, giving the creditor a direct right against the paymaster on the *suftaj*, requires the agreement of the paymaster, effectively confirming to the creditor, and thus inuring to his benefit, the paymaster's early agreement on the *suftaj*. Indeed, it may be arguable that the transmittal to the creditor of the *suftaj* document with the consent of the paymaster may be viewed as a confirmation to the creditor of the paymaster's undertaking and hence constitutes his agreement with the creditor;<sup>194</sup> but even then the creditor is likely to insist on being presented with a tangible evidence as to the paymaster's consent.

In any event, according to all Islamic schools, it is thus the *hawale*, with the full implications and incidents, as discussed in §2.2 above, that 'perfects' the creditor's right to be paid on the *suftaj*. Accordingly, in the case of default by the paymaster, both major schools, the Hanafi and Maliki, usually do not permit the recourse by the creditor against the debtor; each restricts it only to exceptional cases. As well, under Hanafi rules, the creditor is enforcing against the paymaster the debtor's debt owed to the creditor. On the other hand, under Maliki rules, the creditor is enforcing against the paymaster the paymaster's debt against the debtor. Accordingly, under Hanafi law, when sued by the creditor, the paymaster may raise the debtor's, but not his own, defences. Conversely, under Maliki rules, the paymaster may raise against the creditor his (but not the debtor's) defences.<sup>195</sup>

The picture gets more complex but the analysis does not materially change where the creditor seeks a direct cause of action against the paymaster's correspondent located in the creditor's place. In such a case, two successive *hawales* are required. Under a first *hawale*, the paymaster becomes liable to pay the creditor; this agreement is to be followed by a second *hawale*, under which the paymaster's correspondent becomes liable to pay the creditor.<sup>196</sup> Following the previous discussion, under non-Hanafi law, parties

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<sup>192</sup> See text & notes 134-146, above.

<sup>193</sup> See discussion in text around notes 150-156, above.

<sup>194</sup> Of course, this could work only with the schools that recognize the possibility of an implicit contract, which excludes Shafi'i law which (as indicated in text & note 131, above) requires mutual assent to be orally expressed in clearly spoken words.

<sup>195</sup> In a *suftaj*, the paymaster owes the debtor. As well, neither personal nor proprietary securities are involved. Hence, per discussion at the end of §2.2 above, these issues, on which the Islamic schools vary, do not arise.

<sup>196</sup> In fact, such a second *hawale* will be required also to benefit the payee where he is the remitter himself.

to the first *hawale* agreement are the debtor and the creditor, and parties to the second *hawale* agreement are the paymaster (who replaces the debtor) and the creditor. Under Hanafi law, parties to the first *hawale* are the paymaster and creditor, while parties to the second *hawale* are the correspondent (who replaces the paymaster) and the creditor.

This ‘chain transaction’ facilitating the creditor’s cause of action against the correspondent works as follows. Under non Hanafi law, the first *hawale* is established by the creditor’s acceptance from the debtor of the *suftaj* document containing the paymaster’s engagement. This creates the paymaster’s obligation to the creditor. The second *hawale*, generating the correspondent’s obligation to the creditor, is formed by the paymaster’s transmittal of advice to the creditor. This paymaster’s advice may be constituted through the same delivery by the debtor to the creditor of the *suftaj* containing the paymaster’s direction to the correspondent to pay the creditor; that is, in authorizing the debtor to send the *suftaj* to the creditor, the paymaster may be seen as authorizing the debtor to convey to the creditor the paymaster’s agreement with the creditor. Under non-Hanafi rules, this paymaster’s agreement is not needed to support the paymaster’s own liability to the creditor; the agreement is however essential to make the correspondent, who is indebted to the paymaster, liable to the creditor instead.<sup>197</sup> Effectively then, in delivering to the creditor a *suftaj* document containing both the paymaster’s undertaking and direction to the correspondent, the debtor acts both as a principal (under the first *hawale*) and agent for the paymaster (under the second *hawale*). The ensuing presentation of the *suftaj* by the creditor to the correspondent serves then as a demand for payment rather than a request designed to procure a binding agreement.

In Hanafi law, the first *hawale*, leading to the paymaster’s engagement to the creditor, is formed by the paymaster’s agreement with the creditor. This agreement is created by the acceptance by the creditor of either the transmittal of confirmation from the paymaster to the creditor, or an authorized undertaking on the paymaster’s behalf by the correspondent. As was indicated, arguably, the transmittal to the creditor of the *suftaj* document with the consent of the paymaster may be viewed as a confirmation to the creditor of the paymaster’s undertaking and hence constitutes his agreement with the creditor.<sup>198</sup> In turn, the second *hawale*, generating the correspondent’s engagement to the creditor, is established under Hanafi law by the correspondent’s agreement with the creditor. In practice, the creditor (or his agent) may procure the agreement of the paymaster and/or his correspondent upon presenting the *suftaj* document to the party to be charged with liability.

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<sup>197</sup> Of course, similarly to the case discussed in text & note 194 above, this could work only with the schools that recognize the possibility of an implicit contract, which excludes Shafi’i law which requires mutual assent to be orally expressed in clearly spoken words.

<sup>198</sup> See text & note 194, above.

In the case of default by the correspondent, both major schools, the Hanafi and Maliki, usually do not permit the recourse by the creditor against the debtor or the paymaster;<sup>199</sup> each restricts it only to exceptional cases. As well, under Hanafi rules, the creditor is enforcing against the correspondent the paymaster's debt owed to the creditor; as discussed, under Hanafi rules, this is in fact the debtor's debt owed to the creditor. On the other hand, under Maliki rules, the creditor is enforcing against the correspondent the correspondent's debt owed to the paymaster. Accordingly, under Hanafi law, when sued by the creditor, the correspondent may raise the debtor's, but not his own, defences. Conversely, under Maliki rules, the correspondent may raise against the creditor his (but neither the debtor's nor the paymaster's) defences.<sup>200</sup>

Certainly, the operation of the *suftaj* appears to be smoother under the non-Hanafi rules, which do not require the correspondent's consent; furthermore, under non-Hanafi law, the paymaster is liable to the creditor without a separate engagement on his part, other than the original one to the debtor. And yet, under the non-Hanafi rules, for the paymaster and the correspondent to be liable to the creditor (respectively under the first and second *hawales*), the paymaster must have owed to the debtor (for the first *hawale* to be effective), and the correspondent must have owed to the paymaster (for the second *hawale* to be effective).<sup>201</sup> The *suftaj* document sent by the debtor to the creditor usually attests to the paymaster's engagement, and hence to the paymaster's debt to the debtor. Conversely, that document, as well as any other communication that may be involved in the process, is unlikely to incorporate any indication, and certainly not one emanating from the correspondent, as to his liability, not to mention his indebtedness to the paymaster. Surely then, a creditor is likely to seek confirmation as to the correspondent's liability; while, unlike under Hanafi law, a correspondent who is indebted to the paymaster is liable to the creditor even in the absence of a confirmation on his part, the creditor is unlikely to know on his own as to whether the correspondent is in fact indebted to the paymaster. Stated otherwise, in practice, the creditor is likely to seek the correspondent's engagement not only under Hanafi law but also under non-Hanafi rules, except that under the latter, a correspondent indebted to the paymaster is liable to the creditor anyway, even without the knowledge of the creditor.

Finally, as to the third question, relating to the non-transferability of the *suftaj*. It is universally agreed that *suftajs* are not transferred by the creditor,<sup>202</sup> and certainly do

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<sup>199</sup> As discussed in §2.2 above, and notwithstanding Huvelin, Travaux, above note 5 at 24 to the contrary, who (inexplicably in my view) learns of the creditor's recourse against the paymaster (and *quare* if not also from the debtor) from the correspondent's recourse against the paymaster.

<sup>200</sup> The differences among the various Islamic Schools are set out in §2.2 above and summarized at its end. See paragraph ending at note 195 above.

<sup>201</sup> For the non-Hanafi law requirement under which the *hawale* transferee (paymaster) is to owe money to the *hawale* transferor (debtor) see text that follows note 42, above.

<sup>202</sup> See text & note 114, above.

not circulate.<sup>203</sup> It however seems that the reason is not doctrinal,<sup>204</sup> but rather practical. Thus, the paymaster's or correspondent's engagement on a *suftaj* is to pay at the creditor's place; it is however possible that in the course of the relevant period there was no commercial need for its use as a local payment mechanism, carrying out payment to a local creditor of the creditor, namely, for its circulation at the designated place of payment. At the same time, as indicated, even non-Hanafī rules do not facilitate the imposition on the paymaster or his correspondent of a duty to pay other than at the agreed place of payment;<sup>205</sup> a *suftaj* could thus not be transferred with the view of carrying out payment from the creditor to his own creditor at another place. Indeed, upon receiving instructions from a creditor who declined to be paid in money, there is nothing to preclude a paymaster or his correspondent from issuing his own *suftaj* payable to the creditor's creditor at a place other than that of the creditor; this however effectuates a new *suftaj*, payable at the place of the creditor's creditor. Where it was available,<sup>206</sup> such a new *suftaj* may have been drawn on a correspondent of the issuer at the latter place, and in any event, cannot be conceptualized as the transfer of the original *suftaj*.

### §3.4 The objections to the *suftaj*

As was discussed, as a matter of the application of *hawale* principles, the *suftaj* can be effectuated by all schools; and yet, it has not fared well in Islamic law. Doctrine considers it abomination founded on a loan conferring profit on the lender. Profit is in the form of “exempt[ing] the lender from the danger of the road”, that is, the avoidance of the risk, and in fact the cost, of physical transport of money from place to place,<sup>207</sup> in violation of the Koranic prohibition against “acquiring profit upon a loan.”<sup>208</sup> It is

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<sup>203</sup> Notwithstanding Huvelin, Travaux, above note 5 at 24, who must be taken to refer to the transferability and circulation of the *suftaj* as a matter of strict legal doctrine rather than practice.

<sup>204</sup> For transferability and circulation of Islamic payment instruments as a matter of legal doctrine, see §3.1, above.

<sup>205</sup> See text around note 151, above.

<sup>206</sup> Which was not always the case; thus, a creditor in one city who received a *suftaj* payable in another city had to make his arrangements for the delivery of money between the two cities; in the absence of correspondent arrangements between the two cities transportation had to be physically made. See the example given by Goitein, above note 104 at 245 n. 86.

<sup>207</sup> In this context, however, attention has not been paid to the commission or fee paid out by the debtor to the paymaster for the issue of the *suftaj* and hence arguably, to cover the cost of the physical transport from place to place. For the debtor's commission see text & note 168 above.

<sup>208</sup> The Hedyā, above note 28 at 333-334.



stressed that this prohibition applies “where a person gives something by way of loan”; the prohibition does not apply where instead, a person gives something by way of “deposit, to a merchant, in order that he may forward it to his friend at a distance”.<sup>209</sup> At the same time, has not been sought to redefine the delivery of the money to the paymaster-merchant as a deposit and not a loan.<sup>210</sup> An agreement to pay other than in the place of the transaction is approved in connection with the sale of goods but not otherwise.<sup>211</sup>

Thus, being characterized as a loan, as a matter of strict doctrine, the *suftaj* is disapproved, though not forbidden, under the Hanafi law, and is virtually forbidden altogether under all other three schools. Maliki law permits it only in the case of extreme necessity; on their part, Shafi’i and Hanbali laws go only as far as to give a legal effect to the engagement of the paymaster-‘borrower’ where it is voluntarily assumed and not on the basis of his agreement with the debtor-‘lender.’<sup>212</sup>

Ultimately however, major schools may have converged: Maliki lawyers have come to recognize the validity of the *suftaj* on the basis of ‘necessity’ and Hanafi doctrine has come to adhere to the fiction of a voluntary undertaking by the paymaster-borrower; that is, Hanafi law effectively forbids to lend on the explicit condition of repayment elsewhere, but not to borrow and undertake repayment elsewhere.<sup>213</sup> Another version of the ‘rapprochement’ is that some Maliki scholars have been prepared to recognize a general danger in transit, and not merely a specific danger on the road to a given merchant, as permissible grounds for the use of the *suftaj* instead of the physical transport of money along that route. On their part, Hanafi scholars have come to embrace the *suftaj* as long as the repayment obligation elsewhere is implicit and yet non-obvious. Finally, even Shaifi’i rules have come to allow the use of the *suftaj* where it is in conformity with a local usage.<sup>214</sup>

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<sup>209</sup> *Ibid.*

<sup>210</sup> Grasshoff, above note 175 at 22 cites a source rationalizing the ‘loan’ (as opposed to the ‘deposit’) conceptualization on the basis of repayment of an equivalent sum as opposed to the same coins originally delivered.

<sup>211</sup> Santillana, above note 136, note on Article 1964 at 689-691.

<sup>212</sup> Ray, above note 34 at 64-65.

<sup>213</sup> Santillana, above note 136, note on Article 1964 at 689-691.

<sup>214</sup> See Ashtor, above note 102 at 568-569. The two versions are not identical: ‘necessity’ under Santillana, *ibid.* is not the same as ‘general danger’ according to Ashtor (for the Maliki school) and unlike Ashtor, Santillana does not preclude an explicit condition of repayment elsewhere, as long as it appears to emanate exclusively from the paymaster-borrower (for the Hanafi School).

Wherever the use of a *suftaj* was unlawful, undesirable or unavailable,<sup>215</sup> payment to a distant place ought to be made in specie, namely, by the physical transport and delivery of money.<sup>216</sup> In such a case, the debtor bears the risk of loss in transit, unless of course he delivers the money in his own place to the creditor's agent. As well, at least in theory, payment to a distant place could be carried out in two other ways. First, it could be made by means of a *hawale* on an obligation that happened to be payable at the desired place. Second, possibly, one obligated on an existing debt to the debtor, may be persuaded to agree to pay at a place (and possibly to a party) other than the original. However, I suspect that other than in connection with the obligation to pay the price of goods sold,<sup>217</sup> both these methods, particularly the latter, may be perceived as conferring on the debtor "profit upon a loan" and thus unlawful, not less than the *suftaj*.<sup>218</sup>

What however remains enigmatic is the geographic distribution of *suftaj* operations in the Medieval Islamic Near East. As recalled, while Hanafi law prevailed in Iraq and Syria, Maliki rules prevailed in North Africa, both in Egypt, and throughout the Maghreb, to the west of it. Indeed, the thesis under which Hanafi commercial law better reflected actual practice<sup>219</sup> does not seem to apply to Islamic payment instruments;<sup>220</sup> as indicated,<sup>221</sup> Maliki rules, which prevailed in Egypt, had an edge in facilitating the operation of the *hawale* in connection with the *suftaj* as well as the other instruments. At the same time, while compared to Hanafi law, Maliki rules facilitated the operation of the *suftaj* with greater ease, they were stricter as to the unlawfulness of the arrangement.

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<sup>215</sup> According to Goitein, above note 104 at 243 *suftajs* "were not always easy to come by". He associates it with the fact (alluded to at the beginning of §3.3, above) that "they were issued by and drawn upon well-known bankers or representatives of merchants, a fee was charged for their issue, and after presentation a daily penalty had to be paid for any delay in payment." *Ibid.*

<sup>216</sup> One specific practice for making cash payments to distant places was that of dispatching money in sealed purses. See e.g. Goitein, *ibid.* at 240. See also at 245 where he speaks of the "circulation of purses" as being an alternative for the "remittance by *suftajas*."

<sup>217</sup> See text & note 211, above.

<sup>218</sup> See text around notes 207-209, above.

<sup>219</sup> See AL Udovitch, "The 'Law Merchant' of the Medieval Islamic World", in GE von Grunebaum, *Logic in Classical Islamic Culture* (Wiesbaden: Otto Harrassowitz, 1970), at 113. He restates the same view in e.g. Udovitch Theory, above note 174 at 290. The view is however stated to particularly apply to commercial associations.

<sup>220</sup> This critique is in the footsteps of Ray, above note 34 at 79-80.

<sup>221</sup> See §3.3, particularly text around note 201, above.

Thus, availability of the *suftaj* in Iraq may be explained by the relative leniency of Hanafi rules with regard to the unlawfulness of the arrangement; by the same token, unavailability in the North African Maghreb may be attributed to the greater strictness of Maliki law with regard to that point.<sup>222</sup> On the other hand, abundance in Egypt, whether for payments going to or coming from the East, and particularly, for domestic payments, may be explained by the greater ease in which the *suftaj* could be facilitated under the Maliki law.

This however does not explain the different situation in Egypt compared to that in the Maghreb; that is, it is hard to see why illegality considerations prevailed in the Maghreb, while operational advantages tipped the balance in Egypt. Nor does convergence of rules explain availability of the *suftaj* in Egypt and its unavailability in the Maghreb. Hence, one may speculate that it is not legal reasons, but rather, business and practical considerations, which determined the result in each location. For example, it may well be the case that adequate networks of paymasters and their correspondents existed both inside Egypt and throughout the area between Egypt and Iraq, but not over the Sahara, namely, between Egypt and the Maghreb.<sup>223</sup>

#### **4. Conclusion: *hawale*, *suftaj* and the bill of exchange**

In his monumental work on the history of English law, Holdsworth is skeptical as to whether the modern bill of exchange is a true derivation from the business practices of the Arabs. He nevertheless speaks of the Arabs using “something very much like the modern bill of exchange” that as early as the eighth century CE:

[C]ould pass from hand to hand by something very much like an indorsement; and, to use modern terms, the payee [thereof] had a right of recourse against the drawer in the event of non-payment by the acceptor.<sup>224</sup>

The present study does not support this specific observation. First, eighth century may be too early a milestone, at least for a solid record of Medieval Islamic payment instruments.<sup>225</sup> Second, there is no indication that at any time Medieval Islamic payment

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<sup>222</sup> This indeed appears to be the explanation of Ashtor, above note 102 at 568-569 (in conjunction with 567).

<sup>223</sup> To that end, see e.g. Goitein, above note 104 at 244-245.

<sup>224</sup> W. Holdsworth, *A History of English Law* Vol. VIII (London: Methuen, Sweet and Maxwell, 1922) at 133, whose observation to that effect is the starting point of JM Holden, *The History of Negotiable Instruments in English Law* (London: University of London The Athlone Press, 1955, rep. 1993, WM. W. Gaunt & Sons) at 1. Holdsworth is explicitly relying on Huvelin, Travaux, above note 5.

<sup>225</sup> Huvelin, *ibid.* at 24 vaguely points to the 8<sup>th</sup> century CE as the starting point for the financial system that gave rise to the Islamic payment instruments. In fact, the earliest documented *sakk*, operating as a *hawale*, may go back to late seventh century CE. See FD

instruments were endorsable, that is, that their transfer was accomplished by the delivery plus the endorsement signature by the transferor of the instrument.<sup>226</sup> Third, in the case of default by the paymaster (corresponding to the drawer), both Hanafi and Maliki rules permit recourse by the creditor-payee against the paymaster-drawer (as well as against the debtor-remitter) only under narrow circumstances.<sup>227</sup>

Furthermore, even some premises underlying Holdsworth's observation may appear to be exaggerated.

To begin with, already before the advent of Islamic law, both the circulation of credit<sup>228</sup> and the non-cash payment between distant parties<sup>229</sup> had been available under Roman law by means of a series of either delegations or cessions. As already indicated,<sup>230</sup> the *hawale* operates in a similar manner to that of the Roman delegation

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Chester, "On early Moslem promissory notes" (1896), 16 *Journal of American Oriental Society*, 43 as analyzed by Ray, above note 34 at 67. However, Ashtor, above note 102 at 558 speaks of the *suftaj* as going back to "the ninth century." Extensive use nevertheless dates from a later period. See the beginning of §3.1, above.

<sup>226</sup> But *cf.* Ashtor, *ibid.* at 564 who maintains that "the Arabs had been using endorsements since the days of the caliphs as can be deduced from tenth century texts." Huvelin *ibid.*, at 24 speaks of endorsing a *suftaj* in the sense of transferring the debt obligation on it by means of a *hawale*. Even Ashtor, *ibid.* at 570 appears to use "endorsee" in the sense of "transferee", hence, not in its technical and usual sense. For the *suftaj* as transferable in theory but not in practice, see text around notes 202-206, above, and for the Islamic payment instruments as non-endorseable, see text & note 128, above.

<sup>227</sup> See text around notes 44-53. The point is conceded by Huvelin, *ibid.* at 23, who, as already indicated in text around notes 174 – 176 nevertheless goes on to argue (at 24) that recourse is available to the creditor. As indicated, his position on the point appears to be erroneous. See text that precedes paragraph containing note 186 above.

<sup>228</sup> Credit can be circulated where the delegate, having become entitled to receive payment from the paymaster, re-delegates the paymaster to make payment to the delegatee's own creditor. See K. Verboven, "*Faeneratores, Negotiatores* and Financial Intermediation in the Roman World (late Republic and early Empire)" in K. Verboven, K. Vandorpe, and V. Chankowski, (ed.), *Pistoi Dia Tèn Technèn -Banks, Loans and Financial Archives in the Ancient World: Studies in Honour of Raymond Bogaert* (Leuven: Peeters, 2008) at 227, touches upon the service of arranging *delegationes* to transfer existing debts from one person to another.

<sup>229</sup> For intercity non-cash payments in Ancient Rome see e.g. G. Platon, *Les Banquiers dans la législation de Justinien* (Première Partie) (Paris: Librairie Recueil Sirey, 1912), at 108-109.

<sup>230</sup> See text around notes 62-65, above.

under Hanafi rules, and like a cession under the Maliki school. From that perspective, Islamic law did not move legal doctrine any further than Roman law had already done. Moreover, by way of a setback from Roman law, Islamic law does not facilitate the accrual in the hands of a creditor of an ‘abstract’ right, namely an entitlement from the paymaster (or his correspondent) to the sum of the money to which the obligation relates, free of defences available to the parties in their bilateral relationships.<sup>231</sup>

Holdsworth’s observation appears to be exaggerated also in another respect. Transferability of a debt in association with the physical transfer of the debt instrument is not an Islamic innovation. Thus, as was already indicated, a bearer clause binding a paymaster to pay the presenter of the document containing that clause had been effective in the ancient Near East, that is, in Mesopotamia, both in the Old Babylonian Period (2000-1600 BCE), and during the Neo-Assyrian and Neo-Babylonian Kingdoms (745-539 BCE), way back before the advent of Islam.<sup>232</sup> As well, in Mesopotamia, during the Old Babylonian Period (2000-1600 BCE), there is evidence to the transferability of loan documents from the hands of one creditor to those another,<sup>233</sup> albeit in a procedure whose both practice and legal underpinning are not entirely clear. Furthermore, the transferability by delivery of a loan document payable by the borrower to his lender almost<sup>234</sup> as if it were an ordinary chattel,<sup>235</sup> goes back to the Jewish Talmud, where it is extensively discussed,<sup>236</sup> and thus preceded Islam.<sup>237</sup>

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<sup>231</sup> For this result in Roman law under the absolute (or pure) delegation see Maxwell, above note 65 at 95-105.

<sup>232</sup> See paragraph concluding with note 125, above.

<sup>233</sup> See e.g. M. Van de Mieroop *Society and Enterprise in Old Babylonian Ur* (Berlin: Dietrich Reimer Verlag, 1992) at 207 and M. Van de Mieroop, “Credit as a Facilitator of Exchange in Old Babylonian Mesopotamia” in M. Hudson and M. Van de Mieroop (eds.), *Debt and Economic Renewal in the Ancient Near East* (Bethesda, Md.: CDL, 2002) at 163, 166. The Old Babylonian Period (2000-1600 BCE) included the reign of Hammurabi (1792-1750 BCE).

<sup>234</sup> The qualification is designed to point out that while *mesira* (delivery) is available for the transfer of a loan document, not all methods for transferring a chattel, such as *hagbaha* (lifting) and *meshicha* (drawing near or pulling), as well as *chalifin* (barter, namely, the exchange of two chattels) are available for acquiring ownership in a loan document. For such modes of acquisition for chattels in general, see Talmud Bavli, *Kiddushin* at 25B (as well as 22B) and *Bava Batra* at 84B, as well as *Bava Metzia* at 46A. For the inadequacy of *meshicha* (drawing near or pulling) (and hence the need for physical delivery by the transferor, i.e. *mesira*) see e.g. Talmud Bavli, *Bava Batra* at 76A, commentary by both Rashi D”H “Ve-otiyot bimsira”, and Tosafot, D”H “Iy”. For the inadequacy of *chalifin* for the acquisition of a documentary note of indebtedness on a loan see Talmud Bavli, *Bava Batra* at 77A, commentary by Tosafot, D”H “Amar Ameimar.”

In any event, even assuming similarity between the *suftaj* and the bill of exchange, and recognizing that Continental Europe may have been familiar with the *suftaj*,<sup>238</sup> one may share Holdsworth's skepticism as to actual parenthood; the latter cannot be asserted with certainty. As Udovitch stated in another context:<sup>239</sup>

Determining cultural and institutional influences between civilizations and peoples is a complex and elusive undertaking. In the absence of clear and decisive evidence it is difficult to decide whether similar ideas and techniques are the result of direct transmission from one group to another or are independent responses to similar challenges.

And yet, we are not precluded from observing the evolution of human thought from one civilization to another, even without being able to factually determine parenthood for concepts and institutions. To that end, one may take note of the fact that unlike under any earlier legal doctrine or institution, under Maliki law, the *hawale* heralds the negotiable instrument in two ways.

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<sup>235</sup> This is so even though it is recognized that unlike an ordinary chattel the loan document has no intrinsic value. See e.g. Talmud Bavli, *Bava Kamma*, at 62B (dealing with a thief's exemption to pay the double payment for which a thief of an ordinary chattel is liable) and 98A (dealing with loss incurred when a loan document is burnt). Lack of intrinsic value in a loan document is also alluded to e.g. in Talmud Bavli, *Kiddushin* at 9A, 26A and 48A.

<sup>236</sup> See text around notes 240-245 below. In contrast, in the Ancient Near East, an acknowledgment of debt document was transferable only subject to the debtor's consent. See Bogaert, *Les Origines* above note 8 at 123-124.

<sup>237</sup> The Talmudic era is said to come to its end in 500 CE, a year that marks the final reduction of the Talmud Bavli (that is, Babylonian Talmud). See e.g. A. Steinsaltz, *The Talmud-The Steinsaltz Edition - A Reference Guide* (New York: Random House, 1989) at 2 and 32. This preceded the advent of Islam in the seventh century. The Talmud is written in Hebrew and Aramaic.

<sup>238</sup> Both aspects are discussed by Ashtor, above note 102, respectively at 562-565 (focusing on distinctions) and 570-572 (focusing on Venice's trade in the Near East at the time of the Crusaders). Familiarity with the *suftaj* may have been the result of trade relations between the Eastern and Southern Mediterranean for which see e.g. EH Byrne, "Commercial Contracts of the Genoese in the Syrian Trade of the Twelfth Century" (1916), 31 *Quarterly Journal of Economics* 128 at 157; and AE Sayous, "Le commerce de Marseille avec la Syrie au milieu du XIII siècle" (1929), 95 *Revue des études historiques* 391.

<sup>239</sup> Udovitch, *Commenda*, above note 172 at 207.

First, in providing a legal framework facilitating the transferability (though not full negotiability) of the *ruq'a* and *sakk* payable to bearer, the *hawale* under Maliki rules goes beyond the mere recognition of instruments payable to bearer in the Ancient Near East. Moreover, Maliki rules do not distinguish between the transferability of instruments payable to the bearer and instruments payable to a named payee; effectively, both are transferable by delivery. In sum, Maliki law thus provides for solid rules to govern a simplified procedure for the transfer by delivery of informal debt instruments. In contrast, under the Talmud, to be transferable, a documentary note of indebtedness may have to comply with formality requirements,<sup>240</sup> even if only as to adequate witnessing.<sup>241</sup> Furthermore, the Rabbis disagreed as to whether by itself, the delivery of the documentary note of indebtedness is adequate to transfer the right to collect the debt,<sup>242</sup> or whether, to that end, an accompanying properly-executed bill of sale is also required from the transferor-lender.<sup>243</sup> In the footsteps of the transferable debt document, such a

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<sup>240</sup> Formal debt documents may go back to the Greek *chirograph* and *syngraph* mentioned in note 117; however they were not transferable. Under the Talmud, a formal legal document, or deed, is called *shetar*. “Every *shetar*, as a formal document, requires the signatures of witnesses”. Otherwise, an informal unwitnessed document is a mere piece of evidence for an oral contract. See AM Fuss, “*Shetar*”, in M. Elon (ed.) *The Principles of Jewish Law* (Jerusalem: Keter, 1975) (Reprinted from *Encyclopaedia Judaica*, 1st ed), Columns 183-190 at 184. But according to the Rambam (Maimonides who lived between 1135 and 1204), for a documentary note of indebtedness on a loan (*shetar hov*) manually written by the debtor there are no formal requirements other than as witnessing. See Rambam, *Mishpatim: Hilchot Malveh ve-Loveh*, Section 11, Rule 2, as well as Section 27 Rule 1. The Rambam’s work is in Hebrew.

<sup>241</sup> The Talmud records a disputation as to whether a documentary note of indebtedness (*Shtar Hov*) has to meet witnessing requirements. See Talmud Bavli, *Gitin* at 86B. Maimonides upholds witnessing requirements with respect to either the signature of the debtor or the delivery by him of the document to the creditor. See Rambam, *ibid.* Section 11 Rules 2 and 3. According to the Magid Mishna commentary to the Rambam, *ibid.*, this reflects the majority view among the post-Talmud Rabbis. Delivery witnesses as a replacement for signature witnesses are discussed e.g. by Rashi, Talmud Bavli, *Bava Batra* at 176 D”H “Vegoveh”. Witnessing requirements are also discussed in Choshen Mishpat Sections 40 and 51 in both *Tur* (Rabbi Jacob ben Asher: 1270-1343) and *Shulchan Aruch* (Rabbi Josef Karo: 1488-1575). Both sources are in Hebrew.

<sup>242</sup> Those satisfied with the power of the mere delivery of the document to transfer the right to collect the debt nevertheless disagreed as to whether a transferee or in fact any person in possession of a documentary note of indebtedness payable to another person is required to prove title (namely receipt by way of transfer or by way of gift from the named payee or someone deriving title from him) or suffice it for him to rely on his possession. See Talmud Bavli, *Bava Batra*, at 173A.

<sup>243</sup> See Talmud Bavli, *Kiddushin* at 47B-48A where it is further disputed as to whether to effect a transfer the bill of sale (if needed) is required to contain prescribed language as

bill of sale may have to comply with formality requirements, even if only as to witnessing.<sup>244</sup> Indeed, it is undisputed that in conjunction with the physical delivery<sup>245</sup> of the debt instrument, the Talmudic sages uphold the transferability of the right to collect on it; nevertheless, ironically, in thriving to provide for clear and certain rules, and yet in disagreeing on what they are, the Talmudic sages increased uncertainty. Thus, taking into account the requirements and disputations just discussed, compared to Maliki law, the applicable legal framework under the Talmud is less certain and possibly more cumbersome. In the final analysis, one cannot fail to note the contribution of Maliki rules to the facilitation of the transferability by the simple delivery of an informal debt instrument.

Second, without formally invoking cession, and though by itself (at least in practice) non-transferable, the *suftaj* accords to the creditor a direct entitlement against the paymaster as well as his correspondent. Under Maliki rules, the creditor's entitlement to enforce the obligation of the paymaster is on the paymaster's obligation to the debtor; the creditor's entitlement to enforce the obligation of the correspondent is on the correspondent's debt due to the paymaster. Either way, the creditor's entitlement does not require a reaffirmation or a renewed obligation to be undertaken by the party liable. Rather,<sup>246</sup> the accrual in the creditor's hands of an entitlement towards first the paymaster and second the correspondent is on the basis of the transfer of the *suftaj* document by the debtor to the creditor. Compared to the Talmud, entitlement against the correspondent is certainly a Maliki innovation;<sup>247</sup> since the correspondent's undertaking is not recorded on

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well as to whether the transfer of the right to collect on a documentary loan forfeits altogether the power of the lender to release the borrower. See also Talmud Bavli, *Bava Batra*, 75B-77B (with Tosafot at 77A D"H "Amar Ameimar"), Talmud Bavli, *Sanhedrin* at 31A, and Talmud Bavli, *Yevamot* at 115B. On the post transfer release by the lender see also Talmud Bavli, *Bava Metzia* 20A and *Ketuvot* 85B-86A. For a summary that appears to support a bill of sale requirement for the transferability of the documentary note of indebtedness see Choshen Mishpat above note 241 Section 66. See in general, AM Futh, "Assignability of Debt and Negotiable Instruments in Jewish Law" (1984-85), 12 *Diné Israel* 19.

<sup>244</sup> Being a legal document, the bill of sale is a *shetar* (for this term see note 240 above); as such it is subject to the same requirements and disputations as the documentary note of indebtedness.

<sup>245</sup> Even commentators who are satisfied with 'constructive delivery' for ordinary chattels (e.g. Tosafot, D"H "Behema" commenting on Talmud Bavli, *Kiddushin* at 25B) insist on the physical (or actual) delivery (from hand to hand) for a documentary note (e.g. Tosafot, D"H "Iy" commenting on Talmud Bavli, *Bava Batra* at 76A).

<sup>246</sup> See text around note 197, above.

<sup>247</sup> For the Maliki innovation with respect to the creditor's entitlement towards the paymaster, see discussion in the immediately preceding paragraph.



the *suftaj* document as issued by the paymaster to the debtor and sent to the creditor,<sup>248</sup> no such entitlement can be made available to the creditor under the Talmud.<sup>249</sup>

While the transferability by delivery feature is the forerunner of negotiation, the direct entitlement feature is the precursor of the acceptor's liability to the payee on a bill of exchange. Indeed, Islamic law and practice ended up arresting the development of their own innovation; Islamic practice did not encourage the circulation of the *suftaj*, and Islamic doctrine was hostile to the paymaster's obligation on the *suftaj*. In the final analysis, however, fundamental elements of the bill of exchange, both as a negotiable instrument and machinery for the transfer of funds, are traceable to Islamic instruments and legal doctrine. True, Roman law had facilitated the circulation of credit in the form of a series of re-delegations or re-assignments; in turn, Jewish law had sown the seeds of transferability by delivery of debt instruments. Early Medieval Islamic law, particularly Maliki rules in Egypt, combined and enhanced both achievements. By giving effect to a mere delivery accompanied by an informal agreement, these rules provide for a simple mechanism to accomplish the circulation of informal instruments of credit. Each such instrument contains the explicit undertaking of a paymaster, and as applicable, the implicit liability of his correspondent. Improvements, particularly in the form of full negotiability for the instrument and party's liability on an absolute abstract obligation to pay a sum of money were to come later and elsewhere.

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<sup>248</sup> See text around note 197, above.

<sup>249</sup> Certainly, under the Talmud, liability on a documentary note of indebtedness, whether to the original creditor or his transferee, is on the basis of the undertaking on the note. For post-Talmudic adaptation to Islamic legal environment on the point per Gaonic Response No. 423, reproduced in A. A. Harkavy (ed.) *Gaonic Reponsa* (NY: Menora, 1959) [recorded in the original Judeo-Arabic and Hebrew translation], see G. Libson, *Jewish and Islamic Law: A Comparative Study of Custom During Geonic Period* (Cambridge, Mass: Harvard University Press, 2003) at 96-97 & notes 26-33. The *Gaonim*, or 'excellencies', were post-Talmudic sages and scholarly leaders, first in Babylonia and then beyond, in a period that extended approximately from the 7<sup>th</sup> to around the middle of the 13<sup>th</sup> century CE, prior to the ascent of European Jewry. More information can be found online: <<http://www.britannica.com/eb/article-9036016?query=gaon&ct=>>.