

العنوان:	Brokerage in Jurisprudence and Law
المصدر:	مجلة الكلية الإسلامية الجامعة
الناشر:	الجامعة الإسلامية
المؤلف الرئيسي:	محررى، عاطفه
مؤلفين آخرين:	أبو عطا، محمد، مسجد سرايى، حميد، ذو الفقارى، مهدي(م. مشارك)
المجلد/العدد:	ع53
محكمة:	نعم
التاريخ الميلادي:	2019
الشهر:	آب
الصفحات:	5 - 29
رقم MD:	1054777
نوع المحتوى:	بحوث ومقالات
اللغة:	English
قواعد المعلومات:	IslamicInfo
مواضيع:	الوساطة، الوكالة التجارية، الفقه الإسلامى
رابط:	http://search.mandumah.com/Record/1054777

D) Laws

- Islamic Republic of Iran Constitution
- Stock Exchange Law
- Insurance Law
- Trade Law
- Brokers Act
- Civil Code

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- (1) Article 338 of the Trade Law
 - (2) Article 6 of the Trade Law: "Every broker except for minor businessmen may have the following books by virtue of the ministry's code: 1) journal, 2) general ledger, 3) the inventory, and 4) copybook.
 - (3) A legal action is any action that is taken deliberately and has legal effects. Examples are selling, renting, marrying, divorcing, and such. A material action, on the other hand, does not call for determination and intention. Examples are the loss of another person's properties, operating, and the development of building drawings.
 - (4) Article 1 of the Trade Law

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B) Arabic

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2006: 263). Hence, if a person is selected to mediate or perform the preliminary negotiations over commercial transactions, the selected person (broker) is considered a commercial representative.

It may be claimed that a broker takes actions in propria persona rather than on behalf of someone else, because the broker's actions lack this capacity. Therefore, brokerage is not an example of representation. In this regard, it should be stated that this claim is rejected because it is important to know the broker's employer and the person granting the mediation permission for a commercial transaction to a broker. This permission is granted by virtue of a brokerage contract, and the broker works for the employer to protect the employer's interests. In addition, the profit resulting from the broker's actions eventually influences the employer's assets. Hence, the broker is a commercial representative and brokerage is deemed a form of commercial representation (Hajiani, 2007: 270).

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carried out through his/her mediation and guidance". This statement reveals the similarities between brokerage and a unilaterally revocable nudum pactum. The obligation to the outcome in these two institutions also approves this point. Furthermore, jurists believe the broker's fee is determined as a unilaterally revocable nudum pactum.

Accordingly, brokerage is a form of a unilaterally revocable nudum pactum, as a result of which the broker mediates between the employer and the customer. The employer (i.e. the party demanding the mediation) assigns the task to the mediator. For instance, the employer may ask the mediator to find a buyer or seller in return for a fee or enters into a contract with the mediator to find a customer for a commodity in exchange for money.

D. The Relationship between Brokerage and Commercial Representation

The exclusion of brokerage from the notion of agency does not prevent its description as a commercial form of representation. This is because the commercial representatives in many cases are not considered lawyers (e.g. commercial independent agents).

To generalize the notion of commercial representation its different components must be analyzed. The aforesaid components of commercial representation must also be compared to brokerage. On the second element of commercial representation it was stated that the representative must obtain the permit for activity from a principal, while the broker obtains the permit by entering into a contract with an employer. Hence, the fourth component is present in brokerage.

As regards the third element it was stated that commercial representation shall be about a commercial action. For instance, according to indent 3 of Article 2 of the Brokers Act, brokerage is deemed a commercial action. Therefore, whoever is responsible for the mediation of a transaction is considered the doer of a commercial action by the legislator. If this person chooses this act as a job, he/she is considered a merchant⁴.

There is agreement on this aspect among the lawyers, who have even argued that if someone mediates a transaction unprofessionally only once, his/her act is considered a commercial action (Katebi,

and a unilaterally revocable nudum pactum is a contract (Sabzevari, 1413AH, vol. 18: 202-203). Most lawyers believe a unilaterally revocable nudum pactum is a contract and they said this contract shall not be considered a unilateral agreement. However, a unilaterally revocable nudum pactum is a contract under which free will is not hindered by the stricture governing exchange contracts, especially lease agreements (Katouzina, 1997, vol. 2: 149).

A unilaterally revocable nudum pactum is among the legitimate agreements that can apply to any licit but unbinding action (Shahid Thani, 1410 AH, vol. 4, 439; Najafi, Bitā, vol. 35, p. 191).

A unilaterally revocable nudum pactum is expressed by any word that shows the accomplishment of a task in return for a certain fee (Najafi, Bitā, vol. 35: 189). Moreover, it may be actualized in any written form such as a notice in newspapers and other media (Sabzevari, 1413AH, vol. 18: 201).

A unilaterally revocable nudum pactum can be terminated before either party takes action, but after the agent takes action it can be terminated by the agent before the job is finished. In this case, the agent does not deserve the fee (as it is said). According to some jurists, the agent can collect the fee in proportion to the degree of progress, especially when the fee can be divided and the contract is terminated inevitably. For instance, the agent may build half a wall under such an agreement and then pass away (Najafi, Bitā, vol. 35: 198; Sabzevari, 1413AH, vol. 18, p. 215; and article 565 of the Civil Code).

In a unilaterally revocable nudum pactum, the fee is paid provided that the desired outcome is achieved, and fruitless attempts at the desired outcome are feeless. This is because the agent has an obligation (in return for the fee) to the outcome and setting the scene is not enough (Katouzian, Civil Code in the Contemporary Legal System, p. 402). Hence, the agent is authorized to collect the fee after accomplishing the task completely. For instance, if he/she finds the lost being, but it flees or goes missing prior to delivery to the employer, the agent shall not receive the fee (Najafi, Bitā, vol. 35: 197-198; Article 567 of the Civil Code). Considering the definition of brokerage in Article 335 of the Trade Law and article 348 of this code "a broker may not ask for the fee unless the transaction is completely

A public hired worker is also someone that accepts the responsibility for a job. However, there is no condition about his engagement in the action or if there is such a condition, there is no time limit (Mohaqeq Hilli, 1408AH, vol. 2, 143).

A precise analysis of Article 335 of the Trade Law reveals the similarities between a broker and a public hired worker. In both contracts, the subject is the provision of a service in exchange for a predetermined fee. Moreover, as mentioned, the broker's fee is determined as a rent and is paid to him/her. Therefore, brokerage is a form of renting.

There is no doubt that a lease agreement is binding. As for brokerage, most lawyers believe it is allowed similar to a contract of mandate since the Trade Law suggests it is subject to the mandate laws.

C. Brokerage and Unilaterally Revocable Nudum Pactum

As regards the nature of brokerage, some introduce it as a form of a unilaterally revocable nudum pactum (Soylem, 2011: 49), "Ja'aleh", "Jo'aleh", and "Je'aleh" refers to a fee paid to an agent in return for accomplishment of a task (A group of researchers, 1426AH, vol. 3, p. 90).

In jurisprudence, a unilaterally revocable nudum pactum refers to the act of pledging to pay a certain price for a licit and rational action. For instance, someone may announce they will pay a certain price if someone finds a thing they have lost (Shahid Thani, 1413AH, vol. 11, pp. 149; Bohrani, Bitā, vol. 12, pp. 194-195).

In a unilaterally revocable nudum pactum, the person asking someone to accomplish a task is called the "Ja'el" (employer), the person accomplishing the task is called the "Amel" (agent), and the property/fee promised to be paid to the agent is called "Jo'l" or "Ja'alieh" (Imam Khomeini, 1425AH, vol. 2, p. 513).

There is a lack of consensus on whether a unilaterally revocable nudum pactum is a contract or a unilateral agreement. Some jurists believe it is a unilateral agreement because it calls for necessity and there is no need for acceptance (Shahid Thani, 1413AH, vol. 11, pp. 149-150; Najafi, Bitā, vol. 35, p. 189). Some others believe the accomplishment of the task by the agent is considered acceptance

agency for legal seizure; otherwise, if material seizure was also the subject of agency, “protection” would be an example of material seizure (Katouzian, 1997, vol. 3, p. 110). Hence, bailment must also be a form of agency, while no one considers bailment (which is agency for protection) a form of agency. It is concluded that agency can be assigned only for legal actions rather than both legal and material actions (Taheri, 1418AH, vol. 4, p. 396).

An author has discussed the difference between brokerage and agency. Accordingly, brokerage and agency are different in nature, because in brokerage the contract is signed to guide and introduce the parties to the contract without representing either party. In agency, on the other hand, a person that can seize appoints someone (authorized to seize) his/her representative in the scope of agency. Therefore, a broker does not represent the employer in executing the contract under a brokerage contract, because brokerage does not have such implications and a broker is not authorized to sign the contract unless the employer grants him/her the permission. In the latter case, the broker is both a mediator and an agent (Al-Atram, 1416AH, 120). Hence, there is serious doubt about the agency of a broker that does the mediation between two parties and the viewpoint is not reliable. Other certain fundamentals are required to explain the nature of brokerage.

B. Brokerage and Hiring

Some authors describe brokerage as an act of hiring people (Soylem, 2011: 49). They define hiring as the ownership of the benefits or an action in exchange for a fee (Mousavi Khooyi, Bitā, vol. 4: 9). They call the employee the “hired worker” and the employer the “hirer”. The subject of this agreement is a property such as a house and a shop or an action. The former is known as the rent of properties and the second is known as the rent of actions or people. In the case of properties the hirer is called a lessor and in the case of persons he is called a hired worker.

There are also two types of hired workers: a private hired worker and a public hired worker.

A private hired worker is someone that rents himself for a certain period of time, during which he cannot work for someone other than the employer unless with the employer’s permit.

subsequent actions with legal effects such as taking (seizing) (Katouzian, 1997, p. 153; Shahbazi, 2006: 68). However, finding the party to a contract is not a consequence of legal actions, because there is no relationship and hence no consequence. Moreover, the negotiation between the broker and the other party does not influence the formulation of the contract and is solely a material action.

Some lawyers believe a lawyer's agency under a contract of mandate is a legal action similar to the enforcement of a contract or a unilateral agreement, but it is sometimes a material action without the need for intention, which is a legal and mental deed. Sometimes the agency is both a legal action and a material action in practice (Imami, 2004, vol. 2, p. 218).

Brokerage could be considered an example of agency, but jurisprudential and legal books as well as mandate conventions suggest that the subject of the mandate must be a legal action³ such as the act of selling, renting, marrying, and divorcing that changes the client's legal status. Therefore, it cannot be any material action such as painting, operating, and developing drawings. Nevertheless, article 656 of the Civil Code primarily implies that the subject of the mandate can be legal or a material action, but the subsequent articles more clearly suggest that the subject must be a legal action that is taken deliberate and has legal effects. For example, in Article 662 of the Civil Code it is stated:

“Agency must be granted when the client can take an action himself, and the agent/lawyer must have the capacity for the job.”

The capacity condition applies to legal actions rather than material actions. Imāmiyya jurists have not explicitly addressed the assignment of agency for legal actions, but their definition of agency (i.e. assigning someone one's agency) suggests that you can assign someone as your agent when the action has effects on the client and results in legal occupation. This point is more clarified considering the definitions of agency and bailment, because some jurists (Shahid Thani, 1413AH, vol. 3, pp. 303-332; Ameli, 1419AH, vol. 7, p. 523) believe the assignment of an agent for seizure is not the same as the assignment of an agent for protection (which is bailment). Hence, the assignment of agency for protection does not influence the notion of

the sale. They suggest that the broker is only ordered to carry out the mediation by the seller by finding a customer in line with the seller's interests (Fazel Lankarani, 1425AH, p. 247, Isfahani, 1406AH, vol. 7, p. 96; Qala'ji, 1408AH, vol. 1, p. 461).

- 4- Some jurists introduce the broker as the representative and proxy in a sale and purchase transaction. They discuss the broker's agency in some transactions (Imam Khomeini, Al-Orvah al-Vothqa Ma Ta'aliq, p. 867). Muhammad Hasan al-Najafi and some jurists also believe the broker is the agent of his/her employer and functions as the employer's lawyer (Najafi, Bita, vol. 27, p. 369; Tabatabai Yazdi, 1414AH, vol. 1, 270; Qaravi Nayini, 1413AH, vol. 2, p. 32). Some others also believe that the broker does not guarantee the transaction if he/she does not neglect because the broker is an agent and delivers similar functions (Kashef al-Qata, 1359AH, vol. 1, p. 22).
- 5- According to some jurists, a broker is like a hired worker. Most jurists refer to the act of hiring a broker and believe the authority to hire a broker is the same hiring a servant (Tabatabai Yazdi, 1409AH, vol. 2, p. 650).

Nature of Brokerage

A. Brokerage and Agency

The contract of mandate is an example of representing. In fact, a contract of mandate results in the assignment of agency and representation. The last part of Article 335 of the Trade Law states: "Brokerage contracts are basically subject to the agency and mandate laws. There is, however, disagreement among the lawyers on the nature of brokerage and whether it is an example of agency or is different from agency. Some lawyers introduce a broker a representative in charge of bringing the parties closer or finding a party to the employer's contract (Eskini, 2004, vol. 1, p. 76).

Another lawyer believes a broker is not an agent, but he is held responsible for bringing the parties to a contract together and adjusting their interests (Kheradmandi, 2003: 235-236). Seemingly, finding the party to a transaction and bringing the parties closer take place before the genesis of a legal action. However, according to some lawyers, agency refers to the act of taking legal actions or

If there is a disagreement on the broker's negligence between the owner and the broker and there is no evidence, the broker swears he did not neglect and his promise is prioritized: "ولو اختلفا فى التفريط و لا يبينه فاقول قول الدال مع يمينه" (Fazel Meghdad, 1404AH, vol., 2, p. 162; Shahid Awal, Muhammad ibn Jamal al-Din Maki Ameli, 1417AH, vol. 3, p. 124).

- 4- If someone presents a commodity to the broker but does not order him to sell it, and if the broker sells the commodity, the exchange is considered valid (similar to other contracts). However, the owner cannot cancel the transaction or sign the contract. There is no explicit remark on whether the commodity is sold in cash or sold on trust. "وإذا دفع الانسان الى السمسار (الدال) متاعاً ولم يأمره ببيعه، فباعه كان بالخيار بين إمضاء البيع و بين فسخه، فإن أمره ببيعه ولم يذكر له لانقداً ولا نسيئة فباع نسيئة، كان صاحب السلعة بالخيار، إن شاء فسخ البيع، و إن شاء أمضاه" (Sheikh Tousi, 1400AH, p. 406; Al-Hilli, 1420AH, vol. 1, p. 197).

Jurisprudential interpretations of Brokerage

The jurists' interpretations of brokerage and brokers can be classified into the following categories.

- 1- Some jurists have described brokerage as bargain hunting. They believe the bargain hunter mediates between a seller and a customer in a transaction. This person, who introduces the commodity to the customer and the price to the seller, is called a broker (Husseini Ruhani Qomi, Bita, vol. 1, p. 446; Husseini Vaseti Zobeydi Hanafi, 1414AH, vol. 6, p. 546).
- 2- Some jurists believe there is a difference between brokerage and bargain hunting. They, therefore, introduce the bargain hunter as "وسيط البيع", who facilitates and handles the transaction on behalf of the seller and customer by guiding them in the course of the transaction (Vejdani Fakhr, 1426AH, vol. 9, p. 117; Isfahani, 1406AH, vol. 7, p. 96; Saadi, 1408AH, p. 183). The broker has no role in the process of drafting the contract, but he finds a seller for a customer and a customer for a seller. He also sets the scene for the transaction involving the buyer and seller (Husseini Ruhani Qomi, 1412AH, vol. 18, p. 296).
- 3- Some jurists believe the broker is the proclaimer in an auction and argue that the broker is only a mediator and a middleman in

benefit more and dominate the customer or makes the customer benefit more and dominate the seller. There is also no middle ground where the customer is neither dominant nor dominated, because in each transaction either party wants to be dominant and thus protecting the interests of one party is contradictory to the other's party. Hence, since the parties' interests cannot be protected simultaneously, it is not right to charge both parties. As a result, the person benefiting from the transaction (i.e. the dominant party) is held responsible for the broker's fee.

However, if the parties reach an agreement on the commodity and the price before referring to the broker, and they only want the broker to handle the contract, the broker shall collect only one fee paid jointly by the parties. It does not matter whether they asked the broker simultaneously or one joins the other while it was possible to hold the first employer pay the fee (as described) (Shahid Thani, 1413AH, vol. 3, p. 470; Najafi, Bitā, vol. 25, p. 90).

Jurisprudential Decrees on Brokers

- 1- Brokerage is legitimate and collection of a fee by the broker is allowed and approved, because there are many sayings about the approval of the broker's fee. "لابأس بأجرة الدلال، لأنه عمل مباح، ... يحتاج إليه، فجاز أخذ العوض عنه كغيره من الاعمال المباحة" (Al-Hilli, 1412AH, vol. 15, p. 443; Sheikh Sadouq, 1413AH, vol. 3, p. 588; Sheikh Tousi, 1407AH, vol. 7, p. 156).
- 2- The broker is not deprived of his fee by the cancellation of the transaction or contract, because the broker is rightful to collect the fee prior to termination. "لا تسقط أجرة الدلال بالتقاعيل، لسبق الاستحقاق" (Al-Hilli, 1408AH, vol. 2, p. 62; Shahid Awal, Muhammad ibn Jamal al-Din Maki Ameli, 1410AH, p. 123; Hamoo, 1417AH, vol. 3, p. 244).
- 3- The broker is not held responsible for guaranteeing the transaction if no act of negligence takes place, because the broker is a trustee, and the trustee is not a guarantor according to the related rules unless the broker neglects or violates the agreement (Al-Hilli, 1410AH, vo. 1, p. 348; Hamoo, 1411, p. 103; Bojnordi, 1401, vol., 1, p. 187). The same applies if a commodity kept by the broker is lost without the broker's negligence (Fakhr-ol Mohaqeqi, 1387AH, vol.1, 507).

the actions that call for a fee by nature. Besides, the broker mediates the transaction to collect the fee and thus the employer is held responsible for the fee: “ أن أجره الدلال على من يأمره فإن أمره الإنسان ببيع متاع فباعه “ إن أجرته على البائع الأمر لأعلى المشتري، و إن أمره إنسان أن يشتري له متاعاً ولم يأمره مالكه ببيعه فأجرته على المشتري الأمر، و إنما يستحق الأجرة و إن لم يشارك عليها، لأن هذا العمل مما “يستحق عليه أجره في العادة و الدلال أيضاً ناصب نفسه للأجرة فيستحق على أمره الأجرة” (Shahid Thani, 1413AH, vol. 3, p. 469; Najafi, Bitā, vol. 25, p. 89).

Concerning the broker's fee some jurists assert that the customer bears the responsibility for the broker's fee, while the proclaimer's fee shall be paid by the seller: “أجرة الدلال على المتباع و أجره المنادى على البائع” (Al-Shaykh Al-Mufid, 1413 AH, p. 615; Tousi, 1408AH, p. 261).

If the broker facilitates the purchase or sale of a commodity without intending to collect a fee, the person that would have been in charge of the fee if he had recruited the broker is not held responsible for the broker's fee even if the broker's action calls for it. This is because the broker does not deserve a fee in return for the mediation. To wit, the broker did not do the mediation to earn a fee and does not take any action with the owner's approval, because the owner is cleared from the obligation to pay the fee to the broker “ لو تبرّع الدلال بالبيع أو بالشراء لم يستحق عليه أجره على من يلزمه الأجرة لو أمر، و إن اجاز البيع و الشراء والفعل، لأنه بالفعل لم يستحق، لمكان التبرّع و بعد الإجازة لم يعمل عملاً و الأصل براءة التهمة من استحقاق شيء” (Shahid Thani, 1413AH, vol. 3, p. 469; Najafi, Bitā, vol. 25, p. 89).

If the broker sells a vendor's commodity and buys a commodity for another person, he is eligible for receiving the fee. He shall collect one fee from the seller for mediating the sales and one fee from the customer for mediating the purchase, because he has done two actions that are not contradictory. However, if the broker mediates a transaction for the parties he shall receive one fee because the broker cannot take two actions simultaneously for one commodity. In other words, the broker cannot buy and sell a commodity concurrently so that he can receive a fee from the seller for selling the product and a fee from the customer for buying the product! Rather, he has taken only one action and thus he deserves only one fee.

Another reason is that selling always revolves around bargaining and dominance, and thus a person cannot dominate and be dominated at the same time. The broker either makes the seller

However, this definition actually pictures the broker as a bargain hunter, because the broker mediates as a middleman in the sales or purchase of a commodity regardless of the customer's interests. A bargain hunter, on the other hand, mediates the transaction, finds a customer for the seller (vendor), and finds a seller for a customer. The bargain hunter can deliver all these functions only if he values the interests of both parties (Najafi, Bitā, vol. 25, p. 89). In this case, there is a difference between a bargain hunter and a broker. The results from this discussion are clarified in the discussion of the broker's fee.

Broker's Fee in Jurisprudence

The broker's fee is the wage he/she receives in return for doing an act of brokerage: "المراد من أجره الدلال هو ما يؤتى شخصاً يتحمّل دلالة المعاملة بين" (Vejdani Fakhr, 1426AH, vol. 7, 159). The brokerage fee is determined under a lease or unilaterally revocable nudum pactum and is paid to the broker. However, if this price is not set, the broker is authorized to charge the rental value (A group of researchers, 1426AH, vol. 3, p. 648). The broker's employer bears the responsibility for the broker's fee. If the buyer and seller are both the employers of the broker, the seller is in charge of paying the fee. If both parties recruit the broker simultaneously and they intend to make the broker accept the responsibility for a contract, both are in charge of the broker's fee.

If the parties do not recruit the broker concurrently, one party accepts the broker's role subsequently and both parties ask the broker to mediate a contract, both are responsible for the broker's fee: "أجره الدلال على أمره، ولو أمره فالسابق، فإن اقتربنا و كان الغرض تولية طرفي العقد: «فعلينا، وكذا لوتلاحقا و كان مرادهما مجردالعقد»" (Shahid Avval, 1417AH, vol. 3, p. 21; Najafi, Bitā, vol. 25, p. 91). Hence, if someone orders the broker to sell a commodity and the broker sells the commodity without intending to receive a fee, the seller is responsible for the broker's fee because the seller commanded him to sell the commodity. Moreover, if someone commands the broker to purchase a commodity but the owner of the commodity does not order the broker to sell the commodity, the customer is held responsible for the broker's fee as the broker recruited him."

After handling the transaction, the broker deserves the fee even if the fee has not been discussed, because the broker's action is among

However, some jurists believe there is a difference between brokers and bargain hunters and some of them believe brokers are completely different from bargain hunters.

These jurists argue that a bargain hunter mediates between the parties and introduces the seller and buyer to each other to mediate their transaction: "سَمَسار: و هو من يجمع بين المتبايعين، وسيط البيع" (Husseini Ruhani Qomi, Bitā, vol. 1, p. 466). To wit, a bargain hunter is a broker defined by law. A broker is also someone that takes people's commodities to sell them and receive his/her fee: "الدلال: هو الشخص الذي يأخذ من الناس متاعهم و يبيعه لهم بأجره" (Husseini Shirazi, 1425AH, vol. 1, p. 308). Moreover, "الدلال: من يأخذ المتاع من البائع لبيع له" (Isfahani, Muhammad Taqi, Majlesi Awal, 1406AH, vol. 7, p. 96).

A broker is in charge of handling the transaction at the seller's command. He/she is responsible for finding a customer for the seller's commodity: "الذي يتفق مع صاحب البضاعة أن يجلب له المشتري" (Fazel Lankarani, 1425AH, p. 247). To this end, the broker holds an auction and sells the seller's commodities. A bargain hunter, on the other hand, is an advisor to whom the buyer and seller refer to facilitate the transaction. Some jurists also refer to the broker as the proclaimer of the auction, who announces the sale loudly: "الذي يرفع صوته بالمناداة على" (Qala'chi, 1408AH, p. 461).

In many well-known jurisprudential references, a broker is also described the same in the discussions of trade. For instance, in the discussion of the decree on avoiding an increase in the price (on the customer's part) when the auction is being proclaimed by the broker, this function of the broker is of concern. In other words, when the broker puts the seller's commodity up for auction and is shouting "هل من مزيد", the customer shall not increase the price. Rather, the customer is recommended to wait until the broker is done proclaiming. Afterwards, if the customer intends to purchase the commodity, he/she can increase the price assertively and loudly so that everyone can hear him/her (Qarouni Tabrizi, 1413 AH, vol. 10, p. 413).

According to this definition, the broker is someone that is assigned the task of finding customers by the seller. In other words, he is only a mediator that makes the sale possible in line with the seller's interests.

on the similarities in jurisprudential notions to clarify the ambiguities about the nature and rules of brokerage and eliminate the need for referring to foreign laws and regulations for explaining this position.

However, the definition of brokerage in the legal system is not provided in Islamic laws and jurisprudence. Jurists have mainly referred to brokers as mediators, but based on their remarks brokerage can be described by other terms to analyze the related rules and decrees accurately.

Jurists' Definition of Brokerage and Brokers

Numerous definitions of brokerage and brokers have been provided in jurisprudential textbooks and references. These definitions are highly similar to the definitions provided in the legal discussions section. Nevertheless, it is necessary to present these definitions in this section for a more precise analysis of the notion of brokerage.

In jurisprudence, brokerage is the act of mediating the purchase and sales of commodities "المُرَاد مِنَ الدَّلَالَةِ: هُوَ إِتْخَاذُ الْوَاسِطَةِ وَالِدَّلَالِ لِبَيْعِ الْأَمْتَعَةِ" (Aushra'atha) (Vejdani Fakhr, 1426AH, vol. 9, p. 117; a group of researchers, 1426AH, vol. 3, p. 647).

Similar to law, a broker is considered a mediator that facilitates the exchange between a buyer and a customer in jurisprudence: "الدَّلَالُ وَهُوَ الْوَسِيطُ بَيْنَ الْبَائِعِ وَالْمَشْتَرِي لِتَسْهِيلِ الصَّفَقَةِ" (Saadi, 1408 AH, p. 183; Isfahani, 1406AH, vol. 7, p. 96). The broker in fact manages the parties to transactions: "الدَّلَالُ: هُوَ الَّذِي يَدُلُّ الْبَائِعَ وَالْمَشْتَرِي عَلَى الْمَعَامَلَةِ" (Vejfani Fakhr, 1426AH, vol. 7, p. 385). He/she also carries out research on the buyer and seller and paves the way for the transaction: "الدَّلَالُ وَالْوَسِيطَةُ إِذَا هُوَ الْفَحْصُ عَنِ الْبَائِعِ وَالْمَشْتَرِي وَتَهْيِئَةُ مَقَدِّمَاتِ الْمَعَامَلَةِ" (Husseini Ruhani Qomi, 1412AH, vol. 18, p. 296). In jurisprudence, brokerage is also described as the act of bargain hunting and the broker is called a "bargain hunter".

Some jurists believe a bargain hunter is a broker: A bargain hunter is someone that mediates a transaction between a buyer and a seller. He is called a broker by people because he introduces the commodity to the customer and the purchase price to the seller: "سَمْسَارٌ: الْمُتَوَسِّطُ بَيْنَ الْبَائِعِ وَالْمَشْتَرِي لِإِمْضَاءِ الْبَيْعِ وَهُوَ الَّذِي يَسْمِيهِ النَّاسُ الدَّلَالَ، فَإِنَّهُ يَدُلُّ الْمَشْتَرِي عَلَى السَّلْعِ وَالْبَائِعَ وَالْمَشْتَرِي عَلَى الْإِثْمَانِ" (Huseini Zobeydi, 1414AH, vol. 6, p. 546).

In addition, article 9 of the Commercial Brokers Code states, a transaction must be carried out by drafting three copies of a written contract that are signed by the parties and the broker. Two copies are provided to the parties and one copy is kept by the broker (as asserted in indent 4 of Article 15 of the Real Estate Brokers Code).

8- The broker is obliged to make sure the transaction does not violate the rules and is not a prohibited transaction. The broker cannot mediate such transactions assuming that he/she is not responsible for the qualities of the commodity being exchanged. This point has not been raised explicitly in the Brokers Act, because it is contingent upon general rules and regulations. Besides, people who take part in prohibited transactions or facilitate such transactions, are deemed partners in crime that can be prosecuted by criminal law. However, the following articles have been included in the Trade Law and the Commercial Brokers Code (Sotoodeh Tehrani, 2011, vol. 4, pp. 48-51).

Article 353 of the Trade Law:

“Brokerage of prohibited transactions is feeless.”

Article 13 of the Commercial Brokers Code states:

“Brokers are obliged to adhere to the state tariffs when prices are set by the state for the commodities of concern.”

Article 12 of the Commercial Brokers Code:

“Brokers shall not mediate the export of consumer goods that are considered to be non-exportable by law.”

Brokerage in Jurisprudence

As mentioned, brokerage has been discussed as a legal institution in the Iranian law, and chapter six of the Trade Law also presents the brokerage rules and regulations. However, the articles in the Trade Law that do not address all of the issues that might be raised in the relationships between brokers and the parties to transactions.

Since jurisprudence is a source of law and conformity of the laws to the Islamic jurisprudence and laws is a must by virtue of principle 4 of the Constitution, the broker’s position must be determined based

“If the parties to a transaction or one of them carry out the transaction by trusting the broker, the broker is held responsible.”

6- The broker does not basically benefit from the transaction and is not considered a party to the transaction. However, since the Trade Law does not prevent the broker's involvement, the broker sometimes is involved in other dimensions of a transaction and keeps the commodity that is being exchanged. In this case, the broker loses his brokerage role and cannot judge the case impartially. If the other party is informed of this action, that party carries out the transaction more carefully.

Hence, according to Article 346 of the Trade Law:

“If the broker benefits from the transaction itself, he must inform of the other party; otherwise, he is held responsible for the damage and will be sentenced to 500 to 3000IRR in fines.”

7- Since the broker is considered a merchant, he/she shall have a legal book as mentioned in Article 6 of the Trade Law. Moreover, since the broker mediates a transaction, he/she is legally obliged to keep other books to be able to refer to them in the case of disagreements between the parties.

By virtue of Article 13 of the Brokers Act of 1939, articles 335 and 356 of the Trade Law were formulated after the release of the codes for fees and books. According to these codes (article 8 of the Brokers Act and article 15 of the Real Estate Brokers Code), the broker is obliged to allocate a book to the brokerage operations in addition to the books identified in Article 6 of the Trade Law² and record the operations in the following order.

- a. Full name of the client, their ID number and the issuance place
- b. Transaction type
- c. Transaction subject (with the specifications and conditions of the transaction)
- d. Duration of the transaction to be carried out by the broker
- e. Broker's fee

Note: If the transaction is not carried out duly, the broker must record the case in the related column of the book with dates.

“The broker is not responsible for the value or quality of the commodity being exchanged unless his/her negligence is proved.”

- 2- The broker is mainly in charge of introducing the parties. Hence, the broker must acknowledge and guarantee the identities of the parties to the transaction.

Article 342 of the Trade Law states:

“When a transaction is mediated by a broker, who enables the parties to sign the documents of that transaction, if the signatures belong to the parties carrying out the transaction with his/her aid, the broker guarantees the validity of the signatures on the aforesaid documents.”

- 3- The broker must be impartial and if he/she carries out the brokerage only for one party or if one party has granted him special powers and authorities, the other party must be informed of these powers.

According to Article 338 of the Trade Law:

“The broker may not collect a payment or a debt or fulfill their obligations unless he/she has a rental agreement.”

Article 341 of the Trade Law also states:

“A broker can act as the broker of several employers in one field or different fields, but the employers must be informed of these arrangements and the other actions that may change their opinions.”

- 4- The broker is a trustee of the parties and in the case of any disagreement over the terms and conditions of the transaction between the parties, the broker shall explain the conditions impartially.

Hence, article 340 of the Trade Law states:

“If a product is sold based on a prototype, the broker shall keep the prototype by the end of the transaction, unless the parties free him/her of this obligation.”

- 5- If the parties do not know each other, they may ask the broker to guarantee the other party's obligations and duties.

Therefore, Article 345 of the Trade Law asserts:

mediating that transaction is not considered an act of brokerage. Some lawyers also believe brokerage is only limited to the exchange of movable properties and commodities (Katebi, 2006: 9).

D. Brokerage Contract

To allow for the manifestations of brokerage a contract needs to be signed between the broker and the employer. As regards the nature of this contract (i.e. being reciprocal), there is no explicit information in the law and lawyers' writings. However, Article 335 implies the necessity of the reciprocity of such contracts. Although it is conventionally possible to imagine a charge-free brokerage contract, the commercial aspect of brokerage is only contingent upon the reciprocity of the contract.

The broker may practice brokerage without a contract and only with the employer's permission. However, the broker title must originate from a contract as described in the Trade Law as a commercial action. Therefore, only a broker that works under a contract is called a merchant.

Broker's Duties and Obligations

A broker is held responsible for the following duties according to the Trade Law.

1- Article 337 of the Trade Law

"A broker must inform the parties of the details of the transaction with good intentions and utmost sincerity even if he/she is working as a broker only on behalf of one of the parties. The broker is also responsible for his/her cheatings and failures to either party."

As seen, a broker is responsible for explaining the details of the transaction. After describing the details honestly and sincerely to the parties and introducing them to each other, he/she has no responsibility for the quality of the product or the parties' reputation."

Article 343 of the Trade Law asserts:

"A broker is not responsible for the reputation of his/her employer(s) or for carrying out the transactions he/she mediates."

Article 344 adds:

and transaction possible (Eskini, 2004: 75). As mentioned, any form of brokerage is deemed a commercial action and the broker is considered to be a merchant.

Hence, the general rules of the Trade Law such as having an office, enforcement of bankruptcy rules and regulations, and other rules on brokerage (such as the Brokers Act of 1939) apply to the broker.

B. Employer

The employer is someone that commands the broker to take actions. The broker finds a party to the employer's transaction, mediates a transaction, and facilitates a transaction if the employer orders him to do so and pays him in return. In other words, in all manifestations of brokerage there is a person that orders the broker to find a party or do the mediation.

The employer is not necessarily a merchant and the transaction does not necessarily have to be a commercial transaction; rather, a broker can also be involved in civil actions. An example is the broker involved in real estate transactions discussed in the Real Estate Transactions Code of 1940.

C. The Subject of Brokerage

As asserted in Article 335 of the Trade Law, brokerage is only about mediating transactions. In fact, this element is the distinction between brokerage and other legal institutions such as commission agency, agency, and commercial deputy.

Therefore, if someone has the authority to draft a contract as a broker or under a brokerage contract, he/she will also function as the agency of another person besides being a broker, because having the authority to take a legal action as an agent is not part of the brokerage functions.

Brokerage reflects the scope of authorities of the broker, who is allowed to work only within this scope¹. Moreover, brokerage must have a legitimate subject. According to Article 335 of the Trade Law, the brokerage of prohibited transactions is feeless, and thus these transactions are not under the umbrella of "brokerage". This is because mediation in transactions is the consideration and the brokerage fee is the reciprocity. When the brokerage is feeless,

on the position of brokerage was stressed for preventing abuse of this position.

According to the Brokers Act of February 26, 1939, there are requirements for engaging in brokerage and working this job is considered to be contingent upon a license.

Despite these rules, some unlicensed people still serve as brokers continuously or occasionally. The Iranian courts also do not have a strict approach to this violation. Besides, often when a person claims to be a broker with no license, a decree is issued in his/her favor to be able to be paid for this job (Sotoodeh, Tehrani, 2011, vol. 4, p. 46).

Elements of Brokerage

A. Broker (Auctioneer)

Article 335 of the Trade Law defines brokers as follows.

“A broker is someone that serves as a mediator in a transaction or finds the party to a transaction in return for money.”

Some lawyers define brokers as follows: “A broker is a person that introduces the parties to a transaction, explains the conditions and effects of the transaction to the parties, tries to make a transaction possible by adjusting the parties’ interests, and sometimes also takes part in formulating the contract (Sotoodeh Tehrani, 2011, vol. 4, p. 50).

In another definition it is said: “A broker or middleman is someone that does mediation in a transaction in return for money. In other words, he/she finds a customer/buyer for a product that belongs to someone else and receives money in return (Rasayinia, 2002: 53). In other words, a broker is a mediator that facilitates and accelerates a transaction (Rashedi Ashrafi, 2005: 105).

According to these definitions, a broker is in charge of facilitating a transaction by finding the party to a transaction and mediating it in exchange for money.

Basically, the broker does not carry out a transaction in his own name or on his own behalf or in the name of another person. The broker changes the stands of the parties by introducing the product and the parties. He advises them and attempts to make the contact

1. Literal Definition of Brokerage

The word “brokerage” is the “Mobaleghe” version of the gerund “Dalal”, which means “someone who gives many reasons” (Rashedi Ashrafi, 2005: 105). The word “Dalali” also is a derivative of the word “Delalat”, which means guidance and the link between two things (Katebi, 2006: 261).

2. The Term Brokerage

Brokerage refers to the mediation between people in exchange for money (Jafari Langeroudi, 2002, vol. 3: 14). It refers to the mediation between a seller and a buyer (Katebi, 2006: 261). A broker or mediator is someone who tries to convince the parties to engage in a transaction by providing reasons (Rashedi Ashrafi, 2005: 105). Brokerage is a form of service commercial action, which is about mediating and finding the parties to a transaction. To wit, a broker is only a mediator in a transaction and finds the party to a transaction for his/her employer (Faraji, 2007: 53). This is because the means of disseminating and advertising were not available in the past and thus brokerage was significantly important. Therefore, in some countries, brokerage was an official state position (Sotoodeh Tehrani, 2011, vol. 4, 45).

By virtue of indent 3 of Article 2 of the Iranian Trade Law any form of brokerage is considered a commercial action. It is noteworthy that taking any form of brokerage action is considered a primary business transaction, and this action is considered an act of brokerage even if it is done once. In other words, if someone mediates a transaction even only once, his/her action is considered an act of brokerage and a commercial transaction. However, this person is not considered a merchant, because continuity is requisite for brokerage as a commercial action, and thus brokerage is considered a business position whether it is mediating reported or non-reported transactions (Faraji, 2007: 53).

In Iran, brokerage is a freelance job and there are articles on brokerage in the Trade Law. However, a requirement has been identified in this law for taking the brokerage position. With the changes and developments of commerce, the need for a specific law

Abstract:-

With the industrial and technologic developments, business and economic relationships have evolved and changed considerably. Despite these changes, it is impossible and even irrational to rule out some conventional business institutions.

As a result of the diversity of products as well as the new needs of societies, people who know the consumers' needs provide them with the products they need from the point of production and distribution of products to the delivery of the products to the consumers. In addition, these people facilitate exchanges by mediating between the buyers and the sellers. Brokerage is one of these institutions, because it has not been omitted from the cycle of trade, and these evolutions have set the scene for the evolution of this activity which has adapted to the contemporary needs.

Brokers and middlemen play a major role in the execution of contracts and fulfillment of business exchanges. Hence, brokerage has existed for a long time, but it does not have a long history in the Iranian law.

In the Iranian law, brokerage is an independent commercial action with an independent legal nature. However, the Iranian legislator believes brokerage is subject to the mandate laws. In other words, its independent being has been overlooked and it is considered a form of agency, because by virtue of Article 656 of the Civil Code, the effect of the power of attorney is the power of proxy.

Keywords: brokerage , power of attorney , business agency, Definition of Brokerage.

المخلص:-

مع التطورات الصناعية والتكنولوجية، تطورت العلاقات التجارية والاقتصادية وتغيرت بشكل كبير، وعلى الرغم من هذه التغييرات، فإن من المستحيل بل ومن غير المنطقي استبعاد بعض مؤسسات الأعمال التقليدية ونتيجة لتنوع المنتجات وكذلك الاحتياجات الجديدة للمجتمعات، فإن الأشخاص الذين يعرفون احتياجات المستهلكين يوفرون لهم المنتجات التي يحتاجونها من نقطة إنتاج وتوزيع المنتجات إلى لحظة تسليم المنتجات إلى المستهلكين، فضلاً عن إن هؤلاء الناس يعملون على تسهيل التبادل عن طريق التوسط بين المشتري والبائع، فالوساطة داعمة لهذه المؤسسات، لأنها لم تلغ دور التجارة، بل أسهمت في زيادة تطور هذا النشاط ليتكيف مع الاحتياجات المعاصرة.

ورغم أن السمسرة كانت موجودة منذ مدة طويلة ولعب الوسيط دوراً رئيسياً في تنفيذ العقود وتحقيق التبادلات التجارية، إلا أن تأريخها ليس بقديم في القانون الإيراني، ففي هذا القانون تعد الوساطة إجراءً تجارياً مستقلاً ذات طبيعة قانونية مستقلة، ولها طوابع حقوقية متميزة من غيرها ومع ذلك وضعها المشرع الإيراني تحت قانون الوكالة، وبعبارة أخرى، فإن القانون يتجاهل الطبيعة المستقلة لها ويعتبر الوساطة شكلاً من أشكال التوكيل، إذ أن المادة ٦٥٦ من القانون المدني تشير إلى أن نتيجة الوكالة هي التوكيل .

الكلمات المفتاحية: الوساطة، التوكيل، وكالة تجارية، تعريف الوساطة.

Brokerage in Jurisprudence and Law

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