



ISLAMIC DEVELOPMENT BANK
ISLAMIC RESEARCH AND TRAINING INSTITUTE

AL - GHARAR

IN CONTRACTS AND ITS EFFECT ON CONTEMPORARY TRANSACTIONS

*Eminent Scholars' Lectures Series
No. 16*

ISLAMIC RESEARCH AND TRAINING INSTITUTE (IRTI)

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ISLAMIC DEVELOPMENT BANK
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***AL-GHARAR* IN CONTRACTS
AND ITS EFFECTS ON
CONTEMPORARY TRANSACTIONS**

Siddiq Mohammad Al-Ameen.Al-Dhareer

***Eminent Scholars' Lecture Series
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بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِیْمِ

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FOREWORD

In order to boost research and studies in Islamic economics, the Islamic Research and Training Institute has initiated a programme of lectures dealing with basic *Fiqhi* issues of a pivotal bearing on the infrastructure of modern Islamic economic thought. This programme started in the blessed month of Ramadan 1413H and has continued since then.

The present study is the lectures on "*Gharar* in Contracts and its Effects on Contemporary Transactions" delivered by his eminence Prof. Dr. Al Siddiq Mohammad Al Amin Al Dharir, Professor of *Shari'ah*, University of Khartoum. Prof. Dr. Al Dharir is an internationally reputed Islamic jurist, and laureate of King Faisal Prize in Islamic studies for his contributions in general and to *Gharar* jurisprudence and to related contracts sale in particular.

In his study on *Gharar* jurisprudence and its implications, Dr. Al Dharir presents the Islamic *Shari'ah* viewpoint regarding *Gharar* and its implications on contracts, particularly in connection with sale contracts and other economic and financial transactions.

While reviewing various *Fiqh* positions on the subject, Sheikh Dharir concludes his study by reviewing some modern applications of *Gharar*, particularly in connection with insurance. Allowance of *Gharar* in contributory contracts enables the reformulation of insurance relationships on cooperative principles based on gratuity and mutual solidarity *Takaful*. This conforms to the *Fatwa* of the *Fiqh* Academy of the Organization of Islamic Conference given in its second conference held in Jeddah in 1406H (1985).

We pray to Allah the Almighty for this blessed effort to be a useful addition to the Islamic literature on the topic, and that Islamic economic researchers as well as seekers of truth and righteousness and ultimately all Muslims everywhere may benefit from it.

M. Fahim Khan
Officer-in Charge, IRTI

INTRODUCTION

HADITH BANNING GHARAR

Praise be to Allah, Lord of the worlds, and peace be upon our Master Muhammad and on all Prophets and Messengers.

Reliable sources have reported through a number of the Prophet's companions that the Prophet, peace be upon him (Pbuh) has forbidden *gharar* trading.¹

Al-Nawawi *has described this Hadith as one of the law cardinal principles of the law of sale as it encompasses a vast range of questions. It is the grundnorm of all rules governing gharar contracts. This hadith gives rise to three juristic consequences:*

First, the prohibition of *gharar* sale. The *Hadith* proscribes *gharar* in words that only indicates prohibition. This is the accepted view of jurists. This form of prohibitive words can only convey a total ban may be used only *figuratively to signify other meanings*.³

Second, *the invalidity of gharar contract. Such a contract according to the consensus of scholars, is null and void*.⁴

Third, prohibition *extends to all forms of gharar* sales. It *is the view of scholars that a statement by a Companion of the Prophet to the effect that the Prophet (Pbuh) has enjoined or forbidden this or that indicates generality*.⁵

Such are, briefly, the conclusions drawn from hadith, but the questions it raises are indeed many. Some of these questions have been covered by other authentic hadiths, while others were raised by jurists under the specific heading of "buyu" (sales) or under the general heading of business transactions (mu'amalat), drawing on the general terms of the hadith under discussion.

To cover all relevant points but without going into finer details, I propose to deal *with gharar* under *the following headings:*

- Definition of *Gharar*
- General Principles of *Gharar*

DEFINITION OF *GHARAR*

Literally, *gharar* means risk or hazard. "*Taghreer*" being the verbal noun of *gharar* is to unknowingly expose oneself or one's property to jeopardy.⁶

In jurisprudential terms, *gharar* has many definitions which may be summarised under three headings:

First, *gharar* applies exclusively to cases of doubtfulness or uncertainty, as in the case of not knowing whether something will take place or not. This excludes the unknown. The definition by Ibn Abidin is a case in point: "*gharar* is uncertainty over the existence of the subject matter of sale."

Second, *gharar* applies only to the unknown, to the exclusion of the doubtful. This view is adopted by the Zahiri school alone. Thus according to Ibn Hazm : "*Gharar* in sales occurs when the purchaser does not know what he has bought and the seller does not know what he has sold."⁸

Third, a combination of the two categories above; *gharar* here covers both the unknown and the doubtful, as exemplified by the definition proposed by Al-Sarakhsy: "*Gharar* obtains where consequences are concealed."⁹ This is the view favoured by most jurists.¹⁰

I have opted for this last definition because of its more exhaustive coverage of the jurisprudential elements collated under *gharar*.

GENERAL PRINCIPLES COVERING *GHARAR*

Compared with jurists of the other schools of thought, scholars of the Maliki school have distinguished themselves by widening the scope of their discussion of *A/ Gharar*. Some Maliki jurists have even devoted separate chapters to cover all relevant points associated with *gharar*.¹¹ I have examined their classification of *gharar* compared them with those of the other schools and arrived at what may serve as the basic classification of the principles covering all elements of *gharar*, under which minor issues may be subsumed.

I. *Gharar* in the terms of the contract, includes:

1. Two Sales in One.

2. Down-Payment (*'Arboon*) Sale.
3. The "Pebble", "Touch" and "Toss" Sales.
4. Suspended (*Mu'allaq*) Sale.
5. Future (Mudhaf) Sale.

II. *Gharar* in the object of contract.

This includes :

1. Ignorance of the Genus.
2. Ignorance of the Species.
3. Ignorance of the Attributes.
4. Ignorance of the Quantity of the Object.
5. Ignorance of the Specific Identity of the Object.
6. Ignorance of the Time of Payment in Deferred Sales.
7. Inability to Deliver the Object.
8. Contracting on a Non-Existent Object.
9. Not Seeing the Object.

The following is a brief discussion of these principles pertaining to the sale contract because the ban of *gharar* is primarily aimed at this contract.

Chapter 1

GHARAR IN THE ESSENCE OF CONTRACT

GHARAR IN THE ESSENCE OF CONTRACT

This means that the contract has been concluded in words that imply *gharar*, i.e. the *gharar* relates to the essence of contract and not to its object. For instance, *gharar* occurs when a person tells another "I would sell you this house of mine at such price, if a third person sold me his" and the buyer accepts the offer. It is a *ghararsale* because its consequence is not explicit. However, *gharar* here does not relate to the object of the contract but to the contract itself because both the buyer and the seller *do* not know whether the sale will be concluded or not. This is due to the manner in which the contract has been concluded, namely, making it conditional upon a matter that may or may not obtain. This is further clarified by an examination of the details of this principle which are:

1. TWO SALES IN ONE

The ban on combining two sales in one is reported in a number of authenticated *hadiths*.¹² Jurisprudents are agreed that this is binding and they have accordingly judged that a person should not combine two sales in one.¹³ However, they have differed in interpreting this phrase or rather in specifying the instances to which it applies and those to which it does not. Several relevant interpretations are available but the one I favour has it that "two sales in one" means that a single contract relates to two sales whether in the form that one of them is concluded by the seller saying "I sold you this item at a hundred in cash today and at a hundred and ten a year hence" and the buyer says "I accept" without specifying at which price he buys the item; with the two men going their separate ways on the understanding that the sale is binding on the buyer at either price. Alternatively, the two sales are concluded jointly as when the seller says, "I sell you my house at such a price if you sell me your car at such a price". Such a sale is forbidden because of *gharar* in the contract: the person who sells the item at a hundred in cash and at a hundred and ten a year hence does not know which of the two sales will take place and he who sells his house provided the other would sell him his car does not know whether this contract will be accomplished or not since the fulfillment of the first sale is conditional upon the fulfillment of the second. *Gharar* exists in both cases: in the first case, the sale price is not

specified; in the second, the sale may or may not take place. It is clear that the *gharar* here lies in the essence rather than in the object of the contract.

2. DOWN-PAYMENT ('ARBUN') SALE

This 'Arbun' or 'Arban' Sale. means that a person buys an item and pays a certain amount of money to the seller on the understanding that if he did take the item the amount will be part of the total price but if he did not he would forfeit this money and the seller would keep it.¹⁴

There are two hadiths on the 'Arbun' (down payment) sale, the one forbidding it and the other making it permissible. The first was narrated by Malek on the authority of his trusted sources via Amr Ben Shua'ib through his father and grandfather. This hadith says that the Prophet (p.b.u.h.) has forbidden the 'Arbun' sale.¹⁵ But the other hadith which permits this sale has been included by Abd al-Raziq in his book quoting Zeid Ibn Aslam as saying that he asked the Prophet (p.b.u.h.) on 'Arbun' as part of a sale and that the Prophet (p.b.u.h.) permitted it.¹⁶

Arguments are raised in respect of the two hadiths but most scholars of *hadith* accept as valid the one forbidding such sale while most of them reject the one permitting it.¹⁷

Jurists have disagreed on the permissibility of this 'Arbun' Sale. It was prohibited by the Hanafis, the Malikis, the Shafeis, the Zeidi Shiites, Abul-Khattab of the Hanbali school, and it was reported that Ibn Abbas and Al-Hassan also forbade it. But it was approved by Imam Ahmad who narrated its permissibility on the authority of Omar and his son and a group of the followers of the Prophet's companions (*tabi'een*) including Mujahid, Ibn Sirin, Naf' Bin Abdel Harith, and Zeid Ibn Aslam.¹⁸

The majority have cited in evidence for forbidding the 'Arboon sale' the fact that it involves *gharar*. Ibn Rushd (the grandfather) has said: "The forbidden *gharar* also includes the Prophet's (p.b.u.h) injunction against the 'Arbun sale'.¹⁹ He also said: "The excessive *gharar* that invalidates a contract relates to any of three things, the contract, one of the two considerations, or the time-limit set for the delivery of either one. An example of *gharar* in the contract is the injunction by the Prophet (p.b.u.h.) against two sales in one and the 'Arbun sale'.²⁰ He further said: "The majority of scholars have forbidden it because it involves *gharar*, risk-taking, and the

taking of money without any consideration in return"?)

Gharar in this type of sale is real, since neither buyer nor seller is certain that the sale will take place. This uncertainty arises from the wording of the contract itself.

3. "THE PEBBLE", "TOUCH", AND "TOSS" SALES

Authentic hadiths have been reported forbidding these types of sale.²² Hadith exegetes and jurists are agreed that the pebble, touch and toss sales were familiar to the pre-Islamic Arabs. But they have mentioned various and different types of sales that are covered by the prohibition. The majority of Muslim jurists are in agreement that the common reason for prohibition of all of these sale types is the fact that they involve gharar whether in the essence of the contract or in its object. Among the explanations that discern a gharar in the essence of the contract regarding these sales is that of the "pebble" (hasat) sale where the two parties agree upon the sale of a certain item at a certain price that the sale becomes binding with the throw of a pebble from one to the other, or of its placing on the item in question, or its falling from the hand of the one holding it.²³

The touch (Mulamasa) sale means that two parties would negotiate the price of an item but should the buyer touch it the sale becomes binding whether *the seller accepts this or not.*²⁴ In another form of this sale the seller would say to the buyer: "If you touch this robe, then it is sold to you at such and such a price." They would, thus, render the very touching into a sale.²⁵

In the toss (Munabadha) sale, a party says: "If I toss the thing to you then the sale between me and you is binding".²⁶ Or, two parties would negotiate the price of an item; should the seller then toss it to the buyer, the sale becomes binding on the latter who has no option but to accept it.²⁷ Or, the seller would say to the buyer: "If I toss this to you or you toss it to me then it is sold at such a price".²⁸ These forms imply gharar in the terms of the contract; since the sale is made dependent on the throwing of the pebble, the touching of the robe, or the tossing of the item.²⁹ Some jurists describe these types of sale as a form of gambling.³⁰

4. SUSPENDED (MU`ALLAQ) SALE

5. The suspended sale is that the conclusion of which is made conditional

*upon another uncertain event through the use of a conditional clause.*³¹ For instance, a person would say to another: "I will sell you this house of mine at such a price if so-and-so sells me his" and the other person would say: "I accept". A contract of sale cannot be suspended in this way. The *majority of jurists agree that the sale is null and void.*³²

*One of the causes that vitiates the suspended sale is gharar,*³³ *both parties to the transaction do not know whether the subject-matter of the condition will obtain and the sale will be completed or whether it will not obtain and the sale, consequently, will not be completed. It is also not known when the condition will occur, if it occurs at all. It may occur at a time when the will of the buyer or of the seller has changed. Thus, there is gharar, uncertainty, in the suspended sale since it may or may not be accomplished. There is also gharar in it regarding the time of its completion. There is, finally, gharar in it since acceptance and agreement are not guaranteed at the time the condition is fulfilled.*

The followers of the Hanafi school view conditionality of this sort as a kind of gambling. In *Al-Durr Al Mukhtar*, we read: "... because they (sales) are instruments of ownership in the present, they cannot be postponed for the future nor can they be made conditional upon realization of an event in the future for this involves gambling."³⁴

. Ibn Taymiya and Ibn Al-Qayyim, however, diverged from the majority position, and allowed suspended sale, *not seeing any gharar in it.*³⁵

5. THE FUTURE (MUDHAF) SALE

In this variety of sale the offer (to sell something) is shifted from the present to a future date; for instance, one person would say to another: "I sell you this house of mine at such a price as of the beginning of next year" and the other replies: "I accept". The majority of jurists are of the view that the sale contract cannot accept clauses of this nature; if the sale is shifted to a future date the contract becomes invalid. The majority of jurisprudents see in this postponement a *gharar just as in the case of a suspended sale, though it is apparent that the gharar in the latter case is clearer than in the former; for in most forms of the suspended contract it is not known whether or when it will be fulfilled. It is a contract with an unpredictable consequence not only as to its existence but also as to the time when it is likely to come into being. However, in most of its forms,*

the "*mudhaf*" (future sale) contract is sure to be accomplished and the time of its fulfillment is known. How, then, can it be seen as containing *gharar*?

Indeed, the only *gharar* in a future contract lies in the possible lapse of the interest of either party and to his consent with the contract when the time set therein comes. If someone buys something by a "*mudhaf*" contract and his circumstances change or the market changes bringing its price down at the time set for fulfillment of contract, he will undoubtedly be averse to its fulfillment and will regret entering into it. Indeed, the object in question may itself change and the two parties may dispute over it.

Thus, we can say that *gharar* infiltrates the "*mudhaf*" contract from the viewpoint of uncertainty over the time, that is, when the parties conclude the contract they do not know whether they will still be in agreement and have continued interest in that contract when it falls due. They also do not know what the condition of the sold object will be at that time. Again, just as they permitted the suspended sale, Ibn Taymiya and Ibn Al-Qayyim have, contrary to majority opinion, permitted the *mudhaf* sale, seeing no *gharar* in it.

Chapter II

GHARAR IN THE OBJECT OF THE CONTRACT

***GHARAR* IN THE OBJECT OF THE CONTRACT**

The object of the contract is where the effect and outcome of the contract whatever is covered by the provisions is manifested. In contracts of exchange (mu'awadhat) the object consists of two things that are exchanged.³⁸ In a contract of sale, the object covers both the item sold and the price. *Gharar* in these two can occur in any of the following cases:

1. IGNORANCE OF THE GENUS OF THE OBJECT

Want of knowledge (*Jahi*) with regard to the genus is the most exorbitant kind of ignorance because it includes ignorance of the entity, type and attributes of that object. Therefore, jurists have agreed that knowledge of the genus of the sold object is a condition for the validity of the sale. It is invalid to sell something whose genus is unknown because this involves exorbitant of *gharar*.³⁷ Among the examples mentioned by jurists to demonstrate the ignorance of the genus of the subject matter. are the following :

1. "I sell you an item at ten³⁸ (units of currency), or "I sell you something at ten".³⁹
2. "I sell you what is in my sleeve at ten".

However , we find a view in the Maliki school that permits the sale of something of an unknown genus on condition that the buyer reserves what is called "*Khiyar al-ru'ya*" or the "option of inspection», which means that the purchaser enjoys the option of rejecting the object of the sale after sight and consequently of rescinding the sale.⁴¹ The Hanafis, however, permit such sale for the reason that the buyer in their view always has the right to repudiate the sale once he is in a position to inspect the object without having to stipulate this right in the contract. The Hanafi school in other words validates this type. of sale even it the contract makes no reference to the option of inspection⁴².

2. IGNORANCE OF THE SPECIES OF THE OBJECT

Ignorance of the species of the object invalidates the sale as does ignorance of its genus because it involves excessive *gharar*, for if someone

told another "I sell you an animal at such. and such a price" without indicating what species of animal e.g. camel or sheep- the sale is invalid on account of the ignorance of species.

Some books of jurisprudence stipulate that knowledge of the species of the (sold) is a condition of the validity of contract while others only stipulate the need for its description.⁴³ Among those espousing the earlier + view is Al-Qarafi who said in Al-Furuq that "*gharar* and ignorance can be found in seven cases... the fourth of which is species as in the example of an unnamed slave".⁴⁴

3. IGNORANCE OF THE ATTRIBUTES

Jurisprudents have differed as to whether description of attributes is *a sine qua non* for the validity of the sale. However, most of them say that it is a condition of validity. The Hanafis are of the view that when the object or the money paid as its price is within sight, it needs no description. For, if someone says, "I sell you this bag of wheat for the dirhams (a currency) in your hand" and he sees those dirhams, then the sale will be valid and binding.⁴⁵

Hanafi jurisprudents, however, .have differed on the condition of describing an unidentified object (of sale). Some of them say this is a prerequisite of the validity of the sale while others say that it is not because want of knowledge with regard to the description of the subject does not lead to a dispute since the buyer is always entitled to *.Khiyar al-ru'yah*» which enables him to reject the subject-matter if he finds it unsuitable. But those who state that description of attribute is a condition do not accept this explanation since this option of repudiating the sale after seeing the object is established only as a consequence of a valid sale to remove an immaterial want of knowledge (*jahala yaseera*) but not to remove the flagrant ignorance resulting from lack of description of attributes.

Notwithstanding juristic differences on the need to describe the item offered for sale, there is no disagreement on the requirement that the price should be clearly described.⁴⁶

The Malikis. see that the validity of sale is conditional upon knowledge of the attributes of the sold object since to sell an object of an unknown description is *gharar*. They maintain the same view regarding the price of the object sold.⁴⁷

In the Shafei school, jurists have been divided into three groups with three different positions :

First . Sale is not valid until all descriptions of the object to be delivered as in *salam* sale are given.

Second: Sale is not valid until all relevant attributes are described.

Third : Sale is valid without any of the attributes being mentioned, for as long as the buyer has «*Khiyar al-ru'ya*» (i.e. « option after inspection.), reliance will be on sight and, there is no need for the seller to indicate the attributes.

This applies to the object sold. As for the price, knowledge of its description is sine qua non of a valid sale.⁴⁸

The Hanbalis maintain two positions, the stronger of which is ⁴⁹ that the sale of an object of unknown attributes is not permissible and, like the other madhahib, they make the knowledge of the price a condition for the validity of the sale contract.

It is my view that knowledge of the attributes of the exchanged counter-values should be a condition because *gharar* cannot be removed when the attributes of the object are unknown. Even if the option of seeing (the object) is mandatory, it is not justifiable to omit to describe attributes that can be described. The option of seeing is only established in a contract that fully fulfills the requirements of validity, including the absence of *gharar*. As long as description of attributes is possible, leaving it out will lead unnecessarily to *gharar*, thus rendering the contract invalid. But if description is difficult, the contract is valid and the option of seeing (the object) is established in order to ward off *gharar*.

In the following paragraphs, we note some of the sales that are forbidden on account of *gharar* resulting from want of knowledge of the description of the object. There are no differences among jurists in forbidding some of these sales because there is textual evidence to that effect. These sales are:

Selling yet-to-be-born when the mother is not part of the sale.⁵⁰

Selling fetuses, fetal material, embryos, fertilized material, and the bull's sperm.

There have been various explanations by jurists of what these things denote but in general they all indicate that which animals give birth to, whether a fetus in the womb, or a fertilized material in the uterus, or a sperm in the bull. As it appears to me, the sale of all the above is made conditional upon the actual birth of the animal, for when this happens the buyer must pay the price whatever the description of the offspring may be. But if the animal does not give birth then there will be no sale. This being the case, I believe these sales are to be forbidden on account of ignorance of the description of the thing sold. This, of course, does not exclude other reasons for forbidding them.

All these forms of sale were familiar in pre-Islamic times but were banned by Islam.⁵¹ There are other types of sale that have been forbidden by some jurists exercising *Ijtihad* (the endeavour to extract rulings for special cases by drawing on more general principles, Tr:) on account of the absence of description of attributes, making them forbidden *gharar* - sale. But other jurists have allowed them. These sales include:

Selling what lies hidden in the ground

Like carrots, onions, radishes, or garlic. This was allowed by the Hanafis provided that the option of seeing such items is established as a right of the buyer, when they are taken out of the ground. It was also permitted by the Malikis, but they require such a knowledge of the sold object that removes any *gharar* that may impair the validity of the sale.⁵² However, this was forbidden by the Shafe'is. Al-Shafe'i said: In the case of all plants of the soil, of which some part is hidden and the rest appears on the surface, it is not permissible to sell any of it but the seen part which is to be cut off. It is not permissible to sell the unseen part. Thus, in the case of carrots, radishes, onions and similar plants, it is permissible to sell their apparent leaves cut as they appear but not to sell what is hidden underneath. Should the deal cover it all, the sale is not valid."⁵³

The Hanbalis say it is not permissible to sell a thing if the intended object of sale is hidden in the ground before it is uprooted and seen, otherwise, it is sale of the unknown whose object has neither been seen nor described; it is similar to the sale of an unborn animal and is forbidden as *gharar*.⁵⁴

This is the position of Imam ' Ahmad. Abu Dawood said: "I said to

Ahmad, '(What about) selling the carrots in the ground?' He said, 'Its sale is impermissible except that which has been uprooted. This is *gharar*, how could he buy something he does not see?'"⁵⁵

I favour the Maliki view which has been supported by Ibn Taymiyya and Ibn Al-Qayyim.⁵⁶

Selling what lies hidden in shells or shucks

Jurisprudents have differed about whether it is permissible to sell what is hidden in shells like nuts, almonds, pistachios, or beans as long as they remain in their shells. The Hanafis permit such sales giving the buyer the option to revoke the deal upon viewing.⁵⁷ This is an impractical view, for how can the buyer be entitled to return the sold object after its having been shucked?

The Malikis permit such sales on condition that *gharar* or any other factor that vitiates the sale is eliminated.⁵⁸

Shafe'i's and the Hanbalis, on the other hand, have been more liberal on this point. The former differ between themselves on the status of selling what is hidden in its shell. Indeed, two views have been attributed to Al-Shafei on the sale of certain things concealed in their shucks like beans.⁵⁹ The Hanbalis have permitted the sale of most things in their shells."

I believe that the rule which can be extracted from the various views of jurisprudents and should be followed in such sales could be formulated thus: What is damaged by peeling like pomegranates, may be sold in its shucks and the same applies to what can be known without removing the shucks like dried beans. But what cannot be damaged by shelling and what cannot be known so long as it remains in its shells should not be sold because this involves unnecessary *gharar*.

4. IGNORANCE OF THE QUANTITY OF THE OBJECT

The object which could be pointed to and is in sight, whether it be a commodity or its price, is in no need of specification of quantity (or volume or mass), for if someone said to another, 'I sell you this bag of wheat or those clothes for those dirhams' and the other accepted while seeing the things thus indicated, then the sale is valid and binding although the number of the dirhams or of the pieces of clothing is not known. Pointing

at an object is sufficient to secure knowledge of it.

However, with regard to an object not in sight, knowledge of its quantity is a condition for the validity of its sale. It is invalid to sell anything of unknown quantity nor to sell at an unknown price. As far as I know none of the jurists disputed this position except Al-Sharnbelali of the Hanafi school who did not make the validity of sale conditional on knowledge of the quantity of the sold object. He also did not make it a condition to acquire knowledge concerning the attributes of that object.⁶¹

The reason behind forbidding this kind of sale is *gharar* as many Shafe'i and Maliki jurists have stated. The Hanafis justify the prohibition on the analysis that ignorance of the quantity (amount, mass or volume) of both the sold object and the price is conducive to dispute that may hinder the exchange,⁶² and that is due to *gharar*.

There are many examples of sales that are forbidden as a result of *gharar* originating from ignorance of the quantity of the object. We cite one of these, namely *al-muzabana* which is explicitly banned on the basis of authentic hadiths:

Al-Muzabana

Several authentic hadiths have forbidden *muzabana* sales.⁶³ Some of these hadiths have explained what is meant by such sales. Various definitions of *muzabana* concur that it means the sale of dates on the palm trees for dried dates, measure for measure. A more comprehensive definition of *muzabana* covers the sale of fresh dates for dried dates, grapes for raisins, plant produce for food, all measure for measure.

All these explanations reported in the Hadiths should be taken into account. For if they are the words of the Prophet himself (p.b.u.h.) then we have no choice but to accept them. If they are the words of the companion who narrated the hadith we should accept his explanation since he is more knowledgeable of what he reported.

Jurists have differed in explaining *muzabana*. Some of them confined it to the cases reported in the hadiths; others have expanded its scope to cover other instances not included in those hadiths. However, they were unanimous in forbidding the sale of fresh dates on the palms against dried dates :cut from their branches (except in the case of *'araya*), the sale of grapes against raisins, and the sale of uncut vegetation against food.

These are the instances mentioned in the hadiths. Beyond that, they differed in respect of other instances.

In unequal (*ribawr*) things the cause of forbidding the exchange is variations in quality and *gharar*, but in others the cause is the *gharar* resulting from uncertainty over the quantity of the thing sold.⁶⁴

Excepting Al'Araya

Authentic traditions have excluded the *'araya* from the ban on *muzabana*. Among these hadiths is the one narrated by Al. Bokhari and Muslim on the authority of Rafe' Ibn Khodaij and Sahl Ben Abi Hathama that the Prophet (p.b.u.h) forbade the sale of *muzabana*, the sale of fresh dates on the palm tree for dried dates, except for the people with "*'araya*" whom he permitted to do so.⁶⁵

Al Tamawi said: "Sayings (of the Prophet) have been reported through many sources allowing the sale of *'araya* and all scholars have accepted these texts. They did not dispute their authority but they disputed the interpretation thereof."⁶⁶

What I draw from these hadiths is the *'araya* (pl. *is a'riyah*) is a palmtree the fruits of which have been given as a gift to someone. The sale permitted by *Shari'ah* involves the selling by owner of an *a'riya* (*i.e.* recipient of the gift) the fruits of his *a'riya*, on the tree, by way of estimation, provided that such fruits do not exceed *5.awsaq*, regardless of whether he sells them fresh or dried, to whoever he wants.

It is apparent that this type of sale, despite some of the *gharar* it involves, has been sanctioned for the sake of the needy owning these *a'raya* and the poor who have no gold or silver money to purchase fresh dates, but have instead dried dates. They have been permitted to purchase these *a'raya* by way of estimation in order to eat their fresh dates.^o

5. IGNORANCE OF THE ESSENCE OF THE OBJECT

Among the kinds of *gharar* forbidden in transactions is that which is due to ignorance of the essence of the sold object." For if the entity of the sold thing is unknown though its genus, species, type, attributes, and quantity be known, dispute may arise on specifying its identity. This will occur in things of different entities should one of them be sold without specifying it in particular such as in the sale of a piece of cloth out of

different pieces or a sheep out of a herd. In this case the object sold will be subject to flagrant ignorance conducive to problematic dispute and, hence, to the invalidation of the sale. Jurists do not differ on this ruling mainly because if the buyer is not given the option of specification. They differ, however, in case the buyer is given such an option - i.e. the right to choose one of the things and leave the others. This was forbidden by the Shafe'is, the Hanbalis, and the Zahiris whether these things be few or many since *gharar is* involved. But it was allowed by the Malikis in the many and the few because the option of determination, in their view, renders *gharar* ineffective. The Hanafis allowed it when two or three things are involved but, prohibited it if the number is more than three. Their argument is that this option has been permitted on the basis of need and if three or more things are available need will be satisfied.⁶⁹

6. IGNORANCE AS TO TIME

Jurisprudents are agreed on making knowledge of the time of payment a condition for the validity of the sale where the price is deferred, and they agree that ignorance of time is a kind of *gharar* that is forbidden in transactions.⁷⁰ Among the types of sale that have been banned by hadiths because they involve *gharar* resulting from ignorance of the term or date of the price payment we find the following:

The Sale of the Unborn Animal (*habal al-habala*):

The sale of the offspring of a pregnant animal has been known in pre-Islamic times and several hadiths forbade it.⁷¹ This sale has been variously explained. For instance, it was said to be a sale with the price deferred to a future unspecified date, as when a she-camel delivers its pregnancy or when the she-camel as well as its offspring gave birth.⁷² In these cases there is *gharar* resulting from deferment of the price to an unknown date.

7. ' INABILITY TO DELIVER

The majority of jurisprudents are agreed that the ability to deliver the subject-matter (of sale) is a condition for the validity of the sale. It is consequently invalid to sell what one cannot deliver such as a stray camel of unknown whereabouts because this entails *gharar*.⁷³ The Zahiris have, however, disagreed and held that the ability to deliver the subject-matter

is not a condition for the validity of the sale."

Among the examples mentioned by jurists for the inability to deliver is the sale of a debt against another debt, the sale of that which one does not have in possession, and the sale by a buyer of what he has bought before he takes possession.

8. CONTRACTING ON A NON-EXISTENT OBJECT

Among the kinds of *gharar* that impair the validity of sale is that which is due to the sold object being sometimes non-existent. The sale will be null and void if the sold object is not in existence at the time of the contract or if its future existence is uncertain in that it may or may not exist. An example is the sale of what a she-camel may give birth to and the sale of the fruit before it is formed. For, the she-camel may or may not give birth and the fruit may or may not be formed.

Some jurists have reported unanimity in rendering as void the sale of the non-existent and it is to be gathered from their writings that the sale of every non-existent⁷⁵ thing is forbidden. They cite in support of this view the hadith which forbids *gharar*. Al-Shirazi says: "It is not permissible to sell the non-existent such as the uncreated fruit on strength of the hadith narrated by Abu Huraira that the Prophet (p.b.u.h.) forbade the *gharar* sale. *Gharar* is anything which is not, known and whose consequences are indiscernible. The non-existent is unknown and its consequences are indiscernible. Hence, its sale is not permitted".⁷⁶ Al-Shawkani says: "Among the *gharar* sale is the sale of the non-existent".⁷⁷

This evidence indicates that the sale of the non-existent which involves *gharar* is impermissible as in the example cited by Al-Shirazi. But it does not indicate that every non-existent cannot be sold, for there are non-existent items whose sale implies no *gharar* since the consequence of the sale is not hidden from view. An example of this latter case is the sale of things which are non-existent at the time of the contract but which are customarily certain to exist as is the case of the subject-matter of salamand manufacturing contracts, or the sale of things which will come into existence in succession.

The reliable view in this regard is that of Ibn Taymiya who maintains that there is no evidence to prove that the sale of the non-existent is impermissible. The prohibition only involves certain non-existent things

just as there are injunctions against the sale of certain existing things. Thus, the point at issue is not over non-existence just as the cause of forbidding the sale of some existing things is not the mere fact of their existence. Hence, there is another cause for the prohibitions of the sale of these non-existent objects. This cause is *gharar*. The non-existent can-not be sold not because it is non-existent but because it involves *gharar*.⁷⁸

I am of the view that the rule which should be followed in the sale of the non-existent is this: Every non-existent object whose future existence is uncertain must not be sold, and every non-existent object whose future existence is normally ascertainable, may be sold.

Among the examples of the sales of the non-existent where there is a tradition (of the Prophet) forbidding them are the sales of "years" meaning that the fruits of a tree or an orchard are sold for more than one year to come.⁷⁹ There is also the "unborn" sale (*habal-al-habala*) which means the sale of the offspring of a she-camel's offspring.⁸⁰ I have not come across any credible opposition to the prohibition of the sale of fruits before they emerge even for a single year.⁸¹

Among the issues relevant to this discussion which have not been textually regulated is the sale of fruits and plants which do not all exist in one and the same time but whose elements appear successively one after the other or, as the jurists put it, come to fruition in various phases like watermelons and gherkins. Jurists have differed on selling what did not emerge along with what has already emerged and come to fruition. The majority of jurists banned such sale⁸² and the strictest stand in this regard was taken by Al-Shafei who said in Al-Umm: "If the Prophet (p.b.u.h) had forbidden the sale of the fruit before its fruition, though it can be seen, then the sale of what cannot be seen and whose fruition has not emerged presents even a stronger case for a ban because it has the further characteristic of not being seen."⁸³

The Malikis, the Imamite Shiites, and some leading Hanafi scholars⁸⁴ said that it is permissible to sell what did not emerge along with what did and whose fruition is clear. Those scholars argue that the sale of such things can only be done in this way; thus it is permissible on account of necessity regardless of the fact that some of the fruit has not yet been come into being. It is permissible by the consensus of jurists to sell the ripe fruit with the unripe in one single yield. Ibn Taymiya and Ibn Al-Qayyim

have supported *the view of the Malikis and their followers*.⁸⁵ *This is an evidently cogent view which should not be abandoned.*

9. SALE OF THE UNSEEN

The subject-matter of a sale contract may be known for its genus, species, attributes, quantity, and time; it may also be in existence, and deliverable, *and yet, for some jurists, it may still be subject to gharar* because one of the contracting parties cannot see it e.g it is not present at the site of the contract or is present there but unseen placed in a container. This is what is known as the sale of the absent object. What is meant here is that the object, owned by the seller, is present outside, but not seen by the buyer.

Jurisprudents have differed regarding the sale of the absent object. Some of them said that "it is absolutely impermissible to sell the absent object even if it were perfectly described." This is what Al-Shafei adopted *in his new and latest opinion because there is gharar involved in the sale of the absent object and because, according the Shafe'is, description is not enough to establish knowledge of the sold object*.⁸⁶

The majority of jurists have held it permissible to sell the absent object on the basis of description because this is the customary manner in the sale of the absent.⁸⁷ *The Malikis have laid down certain conditions for the validity of such sale that are designed to remove gharar*.⁸⁸ *The majority of jurisprudents differed on whether such sale is binding. The Hanafis and the Shaf'is have held in one view that the sale is not binding on the buyer. Upon viewing he can revoke it or ratify it. This means that he has the option of seeing the object even if it is found to be consistent with the manner described; for not seeing the object obstructs the completion of the transaction. Since this sale is known as the sale with the option of seeing it must include such option*.⁸⁹ *The Malikis and the Shafe'is have held, in one of their views, and so did the Hanbalis, that the sale is binding on the buyer should he find the object corresponding to the way earlier described to him. But if he found it different, he has the option either to ratify the sale or to revoke it. This is a manifestly cogent view*.⁹⁰

According to the majority of jurisprudents it is also permissible to sell an absent object on the strength of prior sight, that is, upon the buyer's seeing it before the time of the contract. Some have laid certain conditions

for this sale but they say that if the buyer finds it as he had seen it then the sale is binding and if he finds that it has changed then he has the choice.⁹¹

Some jurists of the Hanafi school are of the view that the absent object can be sold without description or prior sight with, the option of seeing for the buyer being reserved.⁹² This is also permissible with the Malikis, according to the well-known view of their school, provided that the buyer should reserve the condition of sight for himself and that he should not pay the price to the seller before seeing and accepting the sold object.⁹³

Chapter III

EFFECT OF *GHARAR* ON CONTRACTS
OTHER THAN SALE

EFFECT OF *GHARAR* ON CONTRACTS OTHER THAN SALE

So far we have been dealing with *gharar* in the sale contract. *Gharar* sale has been determined by a Prophetic tradition to be invalid. But, are the other contracts affected *by gharar* in the same way as the sale contract?

I will here deal with two categories of contracts: 1) Commutative Contracts involving financial exchange (*mu'awadhat*) and 2) gratuitous contracts.⁹⁴

EFFECT OF *GHARAR* ON CONTRACTS OF EXCHANGE (*MU'AWADHA7*)

The general rule in Islamic jurisprudence is that by analogy with the sale contract, where a text indicates the voiding effect of *gharar*, all other commutative contracts are affected by *gharar*.

There is no disagreement among jurists on the principle underlying this rule. But they differ in its application here just as they have in respect of the sale contract⁹⁵ However, the Zahiris differ with the consensus view of Muslim scholars in a way that its consequences may affect the foundation of that rule **because** they do not recognize analogy.'

There are many kinds of commutative (*mu'awadhat*) contracts of which we here briefly deal with the lease contract and the effect of *gharar* on it.

Lease is a contract granting usufruct in return for a specified consideration.⁹⁷ It is a kind of sale where only the use of an object is sold but it has been given a special name just as the *Salam* contract (deferred) has been given a special name although both of them are contract of sale.⁹⁸

The impact of *gharar* on lease is the same as in the sale contract. It can obtain in the language of contract which may be such that would render it void. For instance, 'Arbli' (down-payment) is seen by the majority of jurists as impermissible in lease just as it is in sale;⁹⁹ suspending conditions invalidate lease just as it invalidates sale.¹⁰⁰ But lease differs from sale in that, according to the majority of jurists,¹⁰¹ 'it can be postponed to a future date unlike sale because lease is a contract on transfer of usufruct which cannot be attained at a single moment. Thus,

attachment to a time-term is in harmony with the nature of lease, contrary to sale where taking possession can be effected immediately without need for postponement.¹⁰²

*Gharar may also obtain in the object of the lease as it obtains in the object of sale. Hence, conditions laid with regard to the object of sale also apply to the object of lease. Both the rent and the leased utility should be known and identified because ignorance of either of them leads to gharar.*¹⁰³ Imam Malek says: *"The hired person can only be hired by a fixed consideration and the hiring cannot be valid except by that. For lease is a kind of sale in which the work of the employee is bought and this cannot be valid if it involves gharar because the Prophet (p.b.u.h.) forbade the sale of gharar."*¹⁰⁴

Knowledge of the time of deferment is also a condition for validity in - a deferred lease. Lease is invalid if the time-term is unknown just as is *the case in sale.*¹⁰⁵ *The lessor should be able to deliver the object of the lease and it is invalid to lease something that cannot be handed over like leasing a stray camel.*¹⁰⁶ Furthermore, *the object of lease should be known to exist, as is the case in sale; hence, it is not valid to rent out what a she-camel is expected to give birth to or what a tree is expected to bring out in fruit because these involve gharar. Jurisprudents differ on the effect produced by not seeing the leased object on the validity of the lease just as they differ in its effect on the contract of sale.*¹⁰⁷

EFFECT. OF GHARAR ON GRATUITOUS CONTRACTS

Compared with other schools of thought, the Maliki school is distinguished by providing a general rule on *gharar in the contracts of donations, to the effect that, "gharar does not affect the validity of all contracts of donations"*. Al-Qarafi clearly stated this rule as follows:

"... Malik has differentiated between the rule applying to that in which *gharar and ignorance* should be avoided and the rule applying to those cases where *gharar may not* be avoided... According to him, dealings have three elements: two extremes and a middle. Of the two extremes, one is a pure exchange transaction in which this (*gharar and ignorance*) is to be avoided except for that which is necessary according to usage. The second is a pure charity transaction (*Ihsan*) not aiming at the increase of money such as grants and gifts. For, if these latter acts are not perfectly delivered

to the beneficiary, then he will have suffered no harm since he gives nothing in return, unlike the former extreme where the recipient suffers harm as a result of *gharar* and ignorance that lead to the loss of the money paid in the exchange. Therefore, the wisdom of the Shari'a requires that ignorance be precluded here, whereas in pure charity there is no harm involved and the wisdom of the Shari'a required that it (charity) should be practiced and facilitated by all means, the known and the unknown, since this is sure to encourage its easy practice. To place restrictions here would be to curb it. For example, if someone makes a gift of his stray camel to another it is possible that the latter finds it and thus benefit. But if he does not find it, he will have suffered nothing because he has not paid anything for it. This extreme covers the case of the grantor of "Khul" divorce because the marriage knot and breaking it are not intended to be like an exchange; divorce can be like a grant; i.e. done in exchange for nothing. The hadiths did not contain anything to cover these (three) divisions and it cannot be said that a violation of the Shari'a is involved. The hadiths came to deal with sale and such like. The middle between the two commutative extremes is marriage".¹⁰⁸

Ibn Taymiyah subscribes to the view of the Malikis who limit the effect of *gharar* to commutative contracts only; it has no effect on those of donation.¹⁰⁹

I have found no general rule in other schools of thought regarding the effect of *gharar* or lack of it on gratuitous contracts. However, the Maliki jurist, Al Qarafi, in the context of stating the opinion of Imam Malik on the issue, mentions that Imam Shafe'i forbade *gharar* involved in all acts of disposition: Authentic traditions of the Prophet (p.b.u.h.) attest to the prophet's prohibition of *gharar* sale and sale of the unknown; however, bequest of an object which is non-existent at the time of the contract is exempted because it is different (in nature) and accepts of being owned by a sharecropping (*musaqat*) contract.¹⁰ A will bequeathing the unborn animals is invalid as these cannot be owned by any type of contract.'¹¹

Bequest of the unknown is permissible, where one can bequeath a part or share or a portion of his property and his heirs will be responsible for determining that part or share, for a will cannot be revoked on the ground of lack of knowledge (*jahala*), and the heirs - acting on behalf of the person making the will - are responsible for determining the share so bequeathed.¹²

According to the Maliki school bequest of both the non-existent (such as the unborn animals of one's sheep) and the unknown property is permissible.¹³

According to the Shafei school the subject-matter of a will could be unknown, such as the unborn animal, milk still in the udder, a sheep from the herd of the deceased, or a part of his property; the heirs can then give the beneficiary what they wish. Such subject-matter could be also something which cannot be delivered such as a runaway slave, for the beneficiary - according to Al Shirazi-'Shares one-third of the property of the deceased person as his legitimate heirs share the remaining two-thirds. Since it is legitimate for the heirs of the deceased to succeed him in two-thirds of his property, the beneficiary of a will of the deceased can succeed him in the remaining one-third of his property, and because of the additional reason that a will accepts of *gharar* and *jahalata* according to Al Nawawi".¹⁴

The subject-matter of a will may be non-existent, and bequest is valid of the unborn issue of an animal or the fruits to be yielded by a tree, for wills are amenable to a measure of *gharar* which has been permitted to alleviate hardship. Thus a bequest is permissible of what is non-existent or unknown. Some scholars of the Shafe'i school say that a non-existent object cannot be the subject-matter of a will, for any act of disposition requires an object to be disposed of and in such case this object does not exist.¹⁵ After that scholars differed, with one group led by Al Shafe'i spreading the prohibition to include all acts of disposition, where lack of knowledge was forbidden in gifts, *sadaqa* (alm-giving), *ibra'* (*requittal*), *khul'* divorce, conciliation and the like.."

Ibn Tamiyah agrees with Al-Qarafi where he says that Al Shafe'i, by analogy with the sale contract, extends the prohibition of *gharar* to include both gratuitous contracts and contracts of exchange."

In what follows I will examine the effect of *gharar* on two gratuitous contracts i.e., donations and wills, to illustrate the views of jurists on this issue.

EFFECT OF *GHARAR* ON GIFTS

The Malikis are of the view that *gharar* does not have any impact on the validity of a gift. This view is clearly stated by Maliki jurists. Ibn Rushd says: "There is no disagreement within the school regarding the

validity of a gift of the unknown or that which is non-existent but whose future existence is ascertainable and generally, all things that may not be sold because of *gharar* may be validly given in unilateral gratuitous contracts".¹¹⁸

Ibn Juzay says: "It is permissible to grant a gift of that whose sale is invalid like a runaway slave, a stray camel, an unknown (object), fruit before it shows signs of readiness and an usurped object".¹¹⁹

However, contrary to the Malikis, the Shafe'is are of the view that *gharar* can affect gifts exactly as it affects a sale. The general rule they apply is that conditions which apply to the object of sale also apply to the object of gift. Al-Shirazi says: "What is impermissible to sell such as the unknown, or what cannot be delivered, or what is not in one's possession, such as a thing sold before it is taken in possession, cannot be given as gift. For gift is a contract to transfer ownership of an object during one's lifetime. Hence, the things we have mentioned to be impermissible in sale are also impermissible in gifts."¹²⁰

Al-Nawawi says: "What is permissible to sell is permissible to grant as a gift; and what is not -like the unknown, the usurped, and the stray-is not."¹²¹ To these scholars, the element common to both gift and sale is that both are contracts aiming at the transfer of ownership during one's lifetime.¹²² Nevertheless, the Shafe'is exclude only a few cases from the rule of "what cannot be sold cannot be granted as gift" in which the sale is impermissible but the gift is valid. These cases include the following;

1. Fruit can be given as gift before it shows signs of readiness without the condition that they be picked. The recipient is required to pick it if the donor asks him to do so, even if the recipient (i.e. «donee») does not benefit from it;
2. If the pigeons from two pigeon houses are mixed up and the owner of either of them grants his share as a gift to the other then the gift is valid even though the gifted thing is necessarily of unknown quantity and description.¹²³

I am not aware of a general rule for the Hanafis and Hanbalis on the topic of *gharar's* effect on donations as is the case with the Malikis and the Shafe'is. But I gather from a study of the rules governing donations in the thought of the Hanafis and the Hanbalis that *gharar* greatly affects

Them, a conclusion which puts them in a position close to that of the Shafe'i school. However, to them such effect is generally of a lessee degree on these. unilateral contracts than on sale contracts.¹²⁴

EFFECT OF *GHARAR* ON BEQUESTS .

For all jurists, *gharar* which is not forgiven in sale may in the case of a testament.

For the Hanafis, the condition that must be met by a will is that its subject-matters should be capable of being owned by a contract after death of the testator.¹²⁵ Thus, for the Hanafis the will is valid that involves the bequest of the fruits of the palms though these are non-existent at the time of contract, because they can be valid for possession under a sharecropping.¹²⁸ **But** the bequest of what sheep will give birth to is invalid because this cannot be owned under any kind of contract.¹²⁷

To the Hanafis, bequeathing the unknown is valid. Thus, it is valid to name in the will a bequest of part, a share, a portion or some of a person's property. The heirs are free to specify the sum in question. For ignorance of the content of a testament does not vitiate it, and the heirs, as replacing the testator, are charged with specifying the-thing intended."

The Malikis are of the view that it is valid to name a non-existent object as the subject-matter of a testament.¹²⁹

To the Shafe'is, a testament 'is valid when the bequest is unknown such as an unborn animal, milk of the animal, a sheep out of many or part of one's money. The heirs can give the person mentioned in the will whatever they wish. The will is also valid if it includes what cannot be delivered such as a runaway slave because the person mentioned in the will, as Al-Shirazi says, "inherits the dead person up to a third of what he leaves (this is the permissible limit of the legacy to other than the relatives under the Islamic Shari'a, Tr) just as the heirs inherit up to two thirds of the legacy. Hence, 'as it is valid for the heirs to so inherit the dead person so it is valid for the one mentioned in the will." This is also so, as Al-Nawawi says, because the will can accept *gharar* and ignorance.¹³⁰

According to substantiated views, it is valid to bequeath the non-existent. A person may bequeath what an animal is to give birth to or what a tree will bear in fruit, because a measure of *gharar* may be tolerated in a testament for the sake of convenience. Therefore, it is valid when the

non-existent and the unknown are mentioned in a bequest. Some Shafe'i jurists, however, maintain that it is invalid to bequeath a non-existent thing, because dealings require something to be dealt in, which, in this case, does not exist.¹³¹

For the Hanbalis it is valid to give the unknown in bequest. For, if some one said, "I leave to that person a part, portion, or share of my money", his testament will be valid and the heirs should give that person whatever they wish. It is valid to bequeath the non-existent. If a person said, "I leave to that person the fruits of my palm tree or the offspring of my she-camel", his testament will be valid because a testament is valid regardless of *gharar*.¹³² It is also valid to bequeath what cannot be delivered such as a runaway slave or a stray animal because, as Ibn Qudama says, "if the bequest of the non-existent is valid therein, a bequest of something other than the non-existent should be valid as well."¹³³

It is clear from this that the Malikis follow their own rule. They see that *gharar* has no effect on the will just as, it has no effect on the grant. Other jurists, however, did not abide, in the case of the testament, with what they followed in the case of the grant. The other three schools nearly concur with the Maliki school in that *gharar* has no effect on the will.

I stop at this point in the survey of the views on the rules of *gharar* in contracts. The opinions of jurists on the effect of *gharar* on contracts have become clear to us. We can state that all jurists agree that the effect of *gharar* on other than commutative contracts (*mu'awadhat*) is less than its effect on the *mu'awadhat* contracts though they differ on the extent of that effect. The Shafe'is are most strict in their view of the effect of *gharar* on contracts while the Malikis are the least strict and the most open to take the facts of real life into account within the framework of the texts. Hence, I believe that their doctrine is the most favourable for being adopted as a reference point for the formulation of rules on *gharar* in Islamic jurisprudence.

I move now to discuss the general rule that determines the "material" *gharar* which renders a contract invalid and "immaterial" *gharar* which does not impair the validity of the contract; for, as Al-Shatbi says, "to remove all *gharar* from contracts is difficult to achieve; besides, it narrows the scope of transactions".¹³⁴ This rule is the following:

In contracts of exchange general rule governing material *gharar* is

that. the effective *gharar* is exorbitant, provided that the object of . the contract is the principal item, and that there is no pressing need for the contract.

This rule, or theory, has been drawn from the textual traditions (*hadiths*) on *gharar*, the views of jurists, and the many ramifications of the rules of *gharar*. It is clear from this rule that the effective or material *gharar* must meet the following conditions:

1. It should be excessive or exorbitant.
2. That the contract is a contract of exchange.
3. The object of the contract is the principal item. -
4. No need has impelled the concluding of the contract.

If any of these four conditions is absent, *gharar*, then, will have no effect on the validity of the contract.

Following is a brief account of these conditions:

First Condition: *Gharar* should be exorbitant

Jurists are agreed that the *gharar* which affects the contract is excessive *gharar* and that slight *gharar* has no impact at all. The wide differences that exist among jurists do not touch on this principle but they relate to its application, particularly in the "median" cases where *gharar* oscillates between being excessive and slight. One jurist would judge it to be excessive and declare the contract invalid whereas another would judge it to be slight and declare the contract valid. Among the examples agreed by jurists to represent slight *gharar* which does not affect the validity of the contract we cite:

- 1) Selling a lined overcoat though the lining is not seen. .
- 2) Selling a house though its foundations have not been seen.
- 3) Use of a (public) path or drinking water in return for a consideration despite differences among people regarding the amount of water they use and the time they spend in the bath.

Renting a house for a month, where the month can be thirty days

or only twenty-nine.¹³⁵

Among the examples agreed upon as laden with excessive *gharar* that impairs the validity of the contract we find:

1. The "pebble", "touch", and "toss" sales.
2. Selling the unborn animal without its mother.
3. Selling the fetuses and embryos.
4. Selling fruit before its emergence.
5. Selling the unborn animal (Habal-al-Habala).
6. Selling the find of the diver.
7. Selling the object of unknown identity without the buyer having the right to specify it.
8. Selling an object of unknown genus.
9. Deferment of the price to an unknown future date.
10. Salam sale of something whose future existence is unascertainable at the time of delivery.

It is clear from these examples that there is a very large divide between excessive *gharar* and slight *gharar* as agreed upon (by the jurists). In this large area is to be found the medium or middle *gharar* whose effect on the contract is disputed. In fact, this disputed *gharar* is more than the *gharar* whose effect is agreed upon. Its instances include these cases:

1. Selling what is hidden in the ground.
2. Selling in lump sum.
3. Selling at market price.
4. Selling at the price of the single unit.
5. The buyer selling the object bought before he receives it.
6. Selling produce that matures in successive phases.
7. Selling an absent object.
8. Sharecropping.

Some jurists have sought to lay down a rule, or a determinant for excessive and for slight *gharar*. Among them was Al-Baji who is of the view that slight *gharar* is that "from which hardly a contract is free; while excessive *gharar* is that which so dominates the contract that it comes to characterize it."¹³⁶ It is obvious, though, that this rule does not place a clear dividing line between the excessive and the slight because there is a large intermediate area between the *gharar* from which hardly a contract is free and that which so dominates the contract that it comes to characterize it.

I believe that it is not easy to lay down a rule which determines excessive and slight *gharar* for all cases. We shall always find that we have determined the two extremes and left the middle area undetermined, a matter that inevitably gives rise to dispute. Therefore, I am of the view that we should formulate a rule for excessive *gharar* alone saying that this is the effective *gharar* and that anything else is ineffective. The best rule is that mentioned by Al-Baji: "Excessive *gharar* is that which so dominates the contract that it comes to characterize it." The advantage of this rule is that it greatly reduces the disputes on the excessive effective *gharar* and the slight ineffective *gharar*. Moreover, it is a flexible criterion because the characterization of a contract as "*gharar* contract" is inevitably influenced by the differences in societies and times. It is society that confers such characteristic on the contract. The pre-Islamic society has known contracts of this description such as the "pebble", "touch", and "toss" sales. Hence, Islam came to specifically forbid these sales and the sale of *gharar* generally. Indeed, the term "*gharar* sale" gives the impression that the forbidden sale is that in which *gharar* dominates to such an extent that it becomes its hallmark.

Second Condition: *Gharar* should be in a Contract of Exchange

Gharar, even if excessive, affects only such commutative contracts (mu'awadhat) as sale, rent, or partnership. For the basic rule in Islamic jurisprudence is the freedom of contract, unless a text in Sharia restricts such freedom. Since a sound hadith is available forbidding *gharar* sale it must be acted upon and consequently every sale that contains *gharar*. This entails that *gharar* affects only the sale contract. Further consideration of *gharar* shows us that *gharar* has been banned in sales because it opens the way for animosity, rancour, and the unlawful devouring of the

property of others as the Prophet (p.b.u.h.) has indicated in the hadith forbidding the sale of fruits before they show signs of readiness. Since the substance of this prohibition relates to all contracts of exchange (mu'awadhat), we grouped these contracts with sales, concluding that *gharar* affects them as it does the sale contracts.

However, the substance of the *gharar* that has been forbidden in sales, does not obtain in other contracts. Therefore, *gharar* should have no effect on them because there is no evidence, such as a text (tradition) or a sound analogy to forbid *gharar* in these other contracts.

Gratuitous contracts, such as a gift, for example, do not involve disputes or unlawful gain of property. For if someone granted the other the crop of his palm tree next year, the grantee will benefit of these fruits, many or few, should the palm bear them. But if the palm did not bear fruit, the recipient will have lost nothing because he paid nothing in exchange. This is unlike the case when someone sells to another the crop yet to be borne by the palm. In most instances, such contract will lead to one of the contracting parties unjustly taking the property of the other and to dispute and haggling. For sale is normally concluded on the basis of near parity between the countervalues exchanged, the object and the price, and if it turns out that there is much discrepancy between them their will be regret, dismay, animosity, and unlawful gain. Therefore, it is both wise and just to ban every contract that may give rise to any of these so that exchanges (mu'awadhat) may be smooth and the causes of dispute eliminated.

Similar to the gratuitous contracts in that *gharar* does not affect them are the contracts of non-financial exchanges such as marriage and agreement to a "*KhuP'* divorce. For the money paid under these contracts is not an end in itself. Thus, if there is *gharar* in the dower or consideration of "*KhuP'* (agreement to divorce by the husband in exchange for money or property that he had given to his wife being returned to him by her, Tr), this should not affect the proceeding. If, for instance, a man marries or divorces a woman by *khul'* against the fruits produced by a palm tree, then this designation will be valid because *gharar* in it does not lead to the harm that occurs in the case of price or lease. This is because the contracting parties in marriage or *khul'* do not seek financial gain by this contract as is the case in sale, for instance. If one of them does not get the money he had hoped for, he will not be dismayed, since he has achieved his original purpose of the contract. Indeed, he had entered into

the contract primarily on the basis of forgiveness and disregard of its financial aspect.

Although this point is self-evident, I have dealt with it at some length since my position is that of the Malikis and not of the majority of jurists: For the majority are of the view that *gharar* affects even the gratuitous contracts and we have cited their views on *gharar's* impact on gifts and bequests.

Third Condition: *Gharar* must affect the principal object of contract

There is no disagreement among jurists on the rule that *gharar* which affects the validity of a contract is that which obtains in things originally or principally contracted. *Gharar* in that which is subsidiary or derivative to the thing intended by the contract does not affect the contract in accordance with a legal maxim of Islamic law which says: "Things may be lacking in derivatives that are not lacking in others."¹³⁷

Examples of this include:

- (1) Sale of the fruit whose signs of readiness have not yet emerged along with the principal

It is impermissible to sell only the fruit of a tree whose 'signs of readiness have not yet emerged because this involves *gharar*. But the sale will be permissible if such fruit is sold along with its principal or the tree bearing it on the strength of the Prophet's (p.b.u.h.) saying: "If a palm tree is sold after it has been fertilized then its fruit should go to the person who sold it unless the buyer demands it as a condition of sale." This means that it is permissible for the buyer of the fertilized palm tree to lay a condition that the fruit goes to him along with the principal. Should the seller accept this condition then the sale will cover the tree and the fruits even though the fruit has not yet shown signs of readiness. Ibn Qudama says in justification of this principle: "For if he sold it (the fruit) along with the principal (i.e. the tree) it becomes an ancillary to the original subject-matter of the sale contract and, consequently, the possibility of *gharar* in it will not be harmful,"¹³⁸

- (2) Selling the unborn animal with the mother Selling the fetus but not the mother is not permissible because this

entails *gharar*, But selling the fetus with the mother is permissible as when someone says to another: "I sell you this ewe", and the fetus will be included in the bargain. Any *gharar* in it (the fetus) will not be harmful because it is a subsidiary of the thing sold.¹³⁹

(3) Selling what lies in the ground

As an example of this permissible sale, some Hanafi jurists maintain that it is valid to sell what lies in the ground if the existing part is larger or more voluminous than the non-existing part because the latter is then a subsidiary to the former.¹⁴⁰ Some Hanbali jurists also said that this type of sale is permissible if the intended part of the sold object is apparent because the hidden is a subsidiary part of it and ignorance of it will not be harmful.¹⁴¹

Fourth Condition: That There is no Need to be met by the Contract

It is a condition of effective *gharar* in a contract that people should not be in need of that contract; for if there is any need for it, *gharar* will not affect it even if it were exorbitant and even if the subject is a contract of exchange (mu'awadhat). All contracts have been ordained because people need them and one of the unanimously agreed upon principle of the *Shari'a* is the principle of "removal of hardship" on the strength of the Quranic verse: "He made no hardship for you in religion."¹⁴² There is no doubt that barring the contracts that people need puts them into hardship. Hence, it is the Lawgiver's justice and mercy to permit contracts that people need even if they contain *gharar*.

What is Meant by "Need"?

According to Al-Suyouti, need is the state where a person suffers hardship and difficulty if he does not take a forbidden thing, though he 'does not die as a result.¹⁴³ Thus, need for a certain contract occurs when not concluding the contract means that a person suffers hardship and inconvenience because he loses a benefit recognized by the *Shari'a*.

The Need is a Step Below Necessity

We notice that in his definition of need, Al-Suyouti mentions the phrase "though he does not die". This phrase distinguishes "need" from "necessity"; for, according to Al-Soyouti, "necessity" occurs when a person

is in such a state that if he does not take the forbidden (thing) he will die or be near death."¹⁴⁴

Attention should be drawn to the fact that in their discussion of *gharar* many jurists do not distinguish between "need" and "necessity" using the latter in place of the former. In fact, "necessity", in the definition I mentioned above, rarely, if ever, occurs in our present context. Therefore, I can state that in all cases where jurists used the term "necessity" they really intended "need".¹⁴⁵

The Recognized Need is General or Special

Need may be general, where it affects all people, or it may be special affecting a group of people like the inhabitants of a town or the practitioners of a profession. It may also be personal affecting one individual or several individuals. Need, be it general or special, is described by jurists as having the status of necessity. In the *Mujallah* we read: "Need, whether general or special, has the status of necessity."^{4s}

Leasing is an instance of the general need. Al-Soyuti says on the permissibility of leasing: "Analogy calls for leasing to be banned because it is a contract on benefits which have not yet materialized. But it is permitted because of the general need for it, and need, if it is general, is like necessity." An example of the special sale is *salam* (deferred delivery of the sold object in sale) which was made permissible because farmers need it although the majority of jurists say it contains *gharar*. Al-Shawkani says: "Jurists have disagreed whether it is a *gharar* contract made permissible because of need or not."¹⁴⁷

The Recognized Need is Specific

. Need that renders *gharar* ineffective must be specific. This means that all legitimate means to attain the goal are^s blocked except for that contract which involves *gharar*. For, if it is possible to attain the purpose through another, *gharar-free* contract, then the need for the *gharar* contract will not in effect exist. Thus, it is impermissible to hire ewes to drink their milk and it is also impermissible to sell their milk while still in their udders because the need here is not specific since it is possible to buy the milk after it has been milked. But jurists agree that it is permissible to hire a woman to breast-feed a baby since suckling can only be in this

way. The need for this contract is specific.

Need Is Measured by Its True Proportions

This is one of the well-known legal maxims of Islamic law and it means : whatever is made permissible on the basis of need should only be allowed to the extent of removing that need. The following are among the relevant applications of this rule relating to our topic:

- (1) The Hanafis have held that the option of specification applies to no more than three things, because the need can be removed by examining three objects. Al-Kasani says: "...need is warded off by selection from among three, since things are only good, middling, and bad. Any increase (over this number) is to be judged in accordance with the original analogy."¹⁴⁸ The original analogy, of course, stipulates that sale of an unspecified item out of many is forbidden because it involves *gharar* resulting from ignorance.
- (2) It is permissible to set a wage for a hired hand though the work to be done is still unknown but it is impermissible to hire a person for an unspecified wage, for need applies to the ignorance of the work (to be done) but does not apply to ignorance of the sum to be paid for hiring. Al-Baji said: "The wage should not be unknown for there is no necessity requiring this. But work may be necessarily unknown."¹⁴⁹ Ibn Al- Arabi adds: "The abandonment of a rule because of necessity does not apply to cases where there is no necessity involved."

Chapter IV

**EFFECT OF *GHARAR* ON
CONTEMPORARY TRANSACTIONS**

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In non-Islamic and in many Islamic countries, modern financial dealings derive their rules from positive law which is diametrically opposed to Islamic jurisprudence *concerning the question of gharar*. As we have seen, Islamic jurisprudence studiously *avoids gharar in contracts*. Positive law, on the other hand, does *not admit that gharar has an impact on a contract* as long as the contracting parties have willingly entered into such contract, except in a very limited number of cases which positive law considers contrary to public order or morals.

There are many types of contemporary dealings in Islamic countries and international markets that contain excessive and, hence, invalidating, *gharar*. Of these we cite the following:

I. ***GHARAR* CONTRACTS IN THE LAWS OF SOME ISLAMIC COUNTRIES**

The Egyptian Civil Code speaks in Chapter 4 of Part II about four contracts - gambling, betting, a salary for life, and insurance - under the rubric of "*Gharar Contracts*". It bans gambling and *betting, with some exceptions*, and permits a salary for life and insurance.

These types of contracts that are found in the Egyptian Code, and in the laws of some Arab countries that borrowed from it, are undoubtedly *gharar contracts* under the Islamic jurisprudence as explained above. They are all forbidden because they are contracts of exchange that involve unjustifiably excessive *gharar*.

Gambling in all its forms is forbidden in Islamic jurisprudence. Betting, in the legal meaning is a form of gambling. The bet, or *rehan*, that is allowed by Islamic jurisprudence falls outside the concept of betting in the legal sense because that permissible *rehan* involves a commitment from one party only whereas the modern law concept of *rehan* both parties must make a commitment in a bet.

The exceptions specific in modern law are also unacceptable in Islamic jurisprudence. Bets between contestants in sports, a type allowed by the

law as an exception, is impermissible under Islamic jurisprudence whether *in a horse race or anything else*. *There is no difference in Islamic jurisprudence between a bet concluded among the contestants themselves and another concluded by others because both are a form of gambling so long as each of the bettors is exposed to profit or loss.*

Similarly, lottery for philanthropic purposes which is permitted by law is not permitted by Islamic jurisprudence because it is a kind of gambling, and gambling is haram (strictly forbidden by divine text) whatever the motive for it. Indeed, in pre-Islamic gambling (*maysir*), which Islam banned by a text in the Quran, the winner distributed his winnings among the poor boasting about it and hardly keeping anything for himself.¹⁵ This, in fact, is the "benefit" (*nafa'*.) of maysir referred to in the Quran which, nevertheless, is banned because its evils exceed its benefits: "They ask you concerning wine and gambling (*maysii*) ; say there are therein a great sin and benefits for people but the sin is larger than the benefits."⁶²

The law has permitted the salary for life where a person makes a commitment to another to give him a regular salary for life with or without consideration in return. By agreement of jurists, a salary for life against a consideration is not permitted pursuant to the rule of *gharar* in contracts of exchange or mu'awadhat. There is needlessly excessive *gharar* involved in the contract of a salary for life. But the salary for life without consideration in return is permissible under the principle that *gharar has no effect on gratuitous contracts*.¹⁵³

As for the insurance contract, it is as called in positive law, a *gharar* contract. The law speaks of commercial insurance which is an exchange (mu'awadhat) contract between the insurance company and the insured party. This is a new contract which has been the object of extensive disagreement among contemporary jurists ever since it spread in Islamic countries. The dispute was resolved by the Islamic Fiqh Academy in Jeddah (Saudi Arabia) at its second session in 1406 A.H.(1985 A.D.) in the following resolution:

Resolution N.2 On Insurance and Re-Insurance

The OIC Islamic *Fiqh* Academy, at its **second** session held in Jeddah on 10-16 Rabi'II, A.H. **(22-28 December 1985)**,

Having considered presentations by scholars taking part in the symposium on the topic of insurance and re-insurance,

Having discussed the studies submitted,

Having intensively studied all forms, types, principles and purposes of insurance and reinsurance,

Having examined the views of other jurisprudence councils and scholarly bodies in this connection,

Resolves That :

- (1) The commercial insurance contract with the fixed premium **offered** by commercial insurance companies is a contract that contains excessive and, hence, **contract-invalidating *gharar***. **Therefore, it** is haram (forbidden) by the Shari'a.
- (2) An alternative contract that meets Islamic principles for transactions is a cooperative insurance contract based on voluntary contributions and cooperation. The same applies to re-insurance based on **cooperative** insurance.
- (3) Islamic countries should be called upon to set up **cooperative** institutions of insurance and re-insurance in order to free Islamic economy from exploitation and from violation of the order that God has ordained for this *Ummah*.

It should be noted that all insurance and re-insurance companies in the Sudan have converted into cooperative insurance and re-insurance companies abiding by the rules of the Islamic Shari'a.

II. OTHER *GHARAR* CONTRACTS ACCEPTED UNDER POSITIVE LAW

Positive laws mentioned only the four types of contracts set down in the Egyptian code as contracts of *gharar*. However, *gharar* contracts that are in practice and are approved by positive laws are many. In the following pages we mention only two of them: the sale of futures and the sale of things not owned by the seller.

(1) THE SALE OF FUTURE THINGS

The sale of futures in positive laws and contemporary dealings finds its equivalent under Islamic jurisprudence in the sale of the non-existent (thing). We have seen that the majority of jurists have absolutely banned the sale of the non-existent although some of them only banned the sale of the non-existent which involves *gharar*. This latter is the view I favoured. However, positive laws provide that "the object of commitment may be a future object."¹⁵⁴ This means that the sale of things which do not exist at the time of the contract is permissible under the law whether their future existence is customarily ascertainable or only likely to exist. The sale of non-existent things which are certain to exist by custom is accepted in the Shari'a under the view I have chosen as in the sale of fruits after their readiness has been ascertained, the sale of *salam*, or the sale of something whose manufacture is commissioned.

There is, however, a wide difference between positive law and (Islamic) jurisprudence concerning the sale of these things if they have merely a chance to exist, i.e. they may or may not come into being. Islamic jurisprudence allows this type of sale only within narrow limits and according to only some jurists, as in the case when the postponement of the sale until these things exist or become certain to exist creates hardship and inconvenience, for example, the sale of watermelons which have not yet emerged and such like, along with those that have emerged and whose signs of readiness have become apparent. • •

Positive law, on the other hand, permits the sale of things that **are** likely to exist according to whichever formula the two parties to the sale find to their satisfaction. It only excepts the future inheritance from this license. The law, for instance, allows the farmer to sell the crop to **be** produced by his land even before this has been grown. This sale can be either conditional on the existence of the crop, much or little, or it can be

immediate with the farmer guaranteeing the existence of the crop, or still it can be immediate with the buyer taking upon himself the consequence of the crop not being available. There is also nothing against "juzaf" (or lump sum) safe covering all that the land produces, or at the price of a - unit, i.e. each *ardab* (a measure of cereals) at such and such a price.

All these forms, and others like them, that are familiar in the markets are forbidden in Islamic law. There is no scope for *ijtihad* (i.e. use of independent judgement) in some of these sales because there have been specific texts banning them in addition to the general text that forbids the *gharar* sale. These include: the farmer selling all the yield that his land and trees produce before its soundness and its safety from pests and diseases has been established. This is because there is a hadith forbidding the sale of the fruit before its soundness appears. There is no difference between the sale being immediate or conditional on the existence of the crops because *gharar* exists in both cases. In the latter case *gharar* comes from ignorance of the quantity of the sold object, and in the former case *gharar* comes from two things: ignorance of the existence of the sold object and of its quantity if it exists.

These forms of sale also include the sale by breeder of the offspring of his livestock or by the fisherman of the catch of his net. This is because there is a (hadith) forbidding the sale of what is in the wombs of females and of the diver's strike or catch.

On the other hand, among forms of the sale of future things that may be considered is when the farmer sells what his land or trees produce at the price of the single unit: by selling the fruits to be produced by his orchard or the cotton to be produced by his land at a set price per each *Ardab* or *Qentar* (a measure of weight for cotton). It may be said that such sale should be valid in Islamic Jurisprudence since it involves no *gharar* as the buyer will only pay for as much fruit or cotton he takes and as he will pay nothing if the orchard did not bring forth any fruit.¹⁵⁵

This argument may also be supported by an interpretation of the Prophet's (p.b.u.h.) saying in the hadith forbidding the sale of the fruits before their soundness has become apparent: "Do you see if God does not bring forth the fruit, how can any one take his brother's money?" This interpretation sees that what is forbidden here is the lump sum sale, i.e. the sale of all the fruits of the tree or orchard, whether many or few before

they appear. But in case there are no fruits then the sale at the price of the single unit will not be covered by the generality of this hadith because this sale does not involve an unjust taking of money.

This is a strong argument for sanctioning such sale but not sufficient to declare it permissible because there may be other evidence than this hadith that bans such sale even at the price of the single unit. Let us, then, see what such evidence may be. A ban of this sale may be supported by the following arguments:

- 1) While 'there is no *gharar* involved in the sale at the price of the unit from the point of view of ignorance of the existence of the sold object, there is *gharar* indeed from the point of view of the outcome of the contract itself. The implementation of the contract in this case is conditional upon the existence of the fruits; a matter of probability. We have seen that jurists do not permit conditional sale because it involves *gharar* and for other reasons.¹⁵⁶ There is also *gharar* here in the ignorance of the quantity of the sold thing and the amount of money to be paid: no one knows the quantity of fruit to be yielded by the orchard, if any.

This sale can be by way of selling a "kali" (a due debt) for another, or of "salam" concerning the fruits of a particular orchard. Both of these forms are forbidden because if the buyer does not pay the price, the sale will be of one kali' for **another** and if he pays the price the sale will be a "salam" sale of a specified object.¹⁵⁷

Those who support the validity of such sale may reject this second argument on grounds that it is an immediate sale whereas the disputed sale is conditional on the existence of the fruit. It is known that the conditional sale can only come into effect when the condition is met or materializes. Thus, the second argument is refuted leaving the first which relies on the view that making the sale conditional is impermissible. But although the majority of jurists have been of the view that conditional sale is impermissible, some jurists have expressed a contrary view that conditional sale is permissible. Why not adopt this latter opinion?¹⁵⁸

I believe that conditionality should not be permitted here because there is neither need for nor interest in it. Indeed, it may lead to some difficulties. The crop may be more than the buyer had expected and he will then be unable to meet the price. The price at the time of the crop

may have varied greatly from that agreed upon and one of the contracting parties may feel dismay or sorrow, leading him either to subterfuge or to nullify the contract or to let it go through reluctantly and, hence, the satisfaction desired by Sharia in the sale will not be achieved. For me, interest will be better served if the sale of future crops before their soundness appears is banned, even if the sale has been made conditional on their existence and even if they are sold at the price of the unit.

(2) SALE OF OBJECTS NOT OWNED BY THE SELLER

In this kind of sale, Islamic jurisprudence departs widely from the practices familiar in the markets. Islamic law does not permit a person to sell that which he does not own at the time of the contract. Ibn Abidin says: "Among the conditions of the sale is that the object contracted upon is owned by the seller acting for himself. A sale of what he does not own *is* invalid *even if he comes to own it afterwards*".¹⁵⁹ *This view is based upon authentic hadiths (of the Prophet) that forbid a person to sell what he does not have. Ibn Qudama said: "We know of no disagreement over this"*

The reason for the ban here is *gharar* resulting from the inability to deliver. "The *salam*" sale has been excluded from the sale of what one does not have because a hadith has permitted it. Thus, "*salam* sale" is a special case excluded from the overall ban that is indicated by the hadith: "Do not sell what you do not have in possession." As for commodity sales on the financial markets, particularly these known as future contracts or futures, they contain many things forbidden by the Shari'a. For example, there is no condition in these contracts to stipulate that the seller should own the commodity. It is enough that he is committed to deliver the commodity at the appointed time when the buyer demands it. There is also no condition in these contracts that the price is paid in advance. Only a percentage of no more than 10% of the price must be paid in advance. Hence, this is a kind of the forbidden sale by a person of what he does not have. It does not fall within the scope of the licensed "*salam*" sale.

These sales are not valid under the Shari'a even if the seller actually has the commodity in ownership and delivers it to the buyer, a very rare case in fact. These sales mostly end in liquidating the transaction by payment of the price differential. According to market experts only 3% of them is eventually delivered and paid for, making such dealings more like gambling than sales.

Chapter V

A QUESTION REQUIRING A COLLECTIVE ANSWER

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In conclusion, I would like to deal with a question relating to the sale of what one does not own. This deals with the implication of the hadith "Do not sell what you do not have in possession" and whether the ban in it covers everything or only some of the things that the seller does not have in possession at the time of the contract such as a specific commodity, a described or characterized commodity due to him, a described commodity contracted to be delivered at once or at a certain future time. I had an old view on this hadith that I wrote twenty five years ago to the effect that the ban covers the sale of what one does not have if the object is to be delivered at once, but it does not cover it, if it is agreed to deliver the object after a set period of time. For the reason behind the ban is *gharar* resulting from the inability to deliver. This *gharar* is removed or, at least, lessened if the delivery is after a period of time during which it will be more likely that the seller gets the sold object and delivers it to the buyer.

However, I was not certain of this view when a relevant issue was put to us in the *Shari'a* Supervisory Body of the Sudanese Faisal Islamic Bank of which I am honoured to be the Chairman. The Bank wanted to enter into a tender for supplying a commodity that it did not have. The said body issued a *fatwa* that complied with the views of jurists in accepting the apparent meaning of the hadith and, thus, forbidding the sale of that which the seller does not have except in the case of "*salam*" sale. I sent a memorandum in this regard to the Higher Body of *Fatwa* and *Shari'a* of Islamic Banks asking that the subject be discussed but that did not happen. This topic has been examined in a paper - "Selling on Description"- submitted to a symposium in Khartoum by Dr. Ahmad Ali Abdullah, Director of the *Fatwa* and Research Department at the Islamic Solidarity Bank. Some member of the *Shari'a* bodies of the Islamic banks were present in that symposium but they did not reach a unified view. I believe that the best place for a collective view on this topic is the OIC Islamic *Fiqh* Academy in Jeddah.

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NOTES

1. The Hadith is reported through Abu Hurayra, Ibn Omar, Ibn Abbas and Anas, with additions in some versions. This version is contained in Muslim's Sahih **annotated** by Al-Nawawi (III/156); Ibn Majah's Sunan (11/10), Ibn **Dawood's** Sunan. Annotated by Al-Soyouti (VIII/346) and Al Termidhi's Al-Jamie Al-Sahih (11V532). Al-Bukhari's Sahih does not report this Hadith but contains a chapter entitled "Al-Gharar sale and **habal-a-habala** (i.e. sale of what is in the womb of the animal), under which he reports the Hadith forbidding the latter trading and trading by "mulamassa" (touching but not seeing) and "munabadha" (e.g. **bartering** items without inspection). Al 'Ayny comments on this omission in Al-Bukhary's Sahih: "Why is the reference to gharar contained only in the heading of a chapter which does not include a hadith on gharar as such? The answer is that the hadith forbids the habal-al-habala sale, which is a form of gharar. Al-Bukhary thus opposes the particular (Habal-al-Habala) to the general (gharar) in order to draw attention to the multiple forms of gharar, of which he has singled out "habal-al-habala" a device by which a particular item recalls all items of similar description." (Al-Ayny, Umdat Al Qare'e X1/264).

In Arabic, bay' covers both sale and purchase (Translator)

2. Al-Nawawi, Annotations to Muslim's Sahih, X / 156.
3. Al-Khodary, *Usul Al Fiqh*, p.240.
4. Al-Amidy, *Al-Ihkam fi Usul Al-Ahkam*, 11/257.
5. Ibid, 11/272.
6. For (Arabic) definition of gharar, see Lisanul Arab, Al Qamous Al-Moheit, and Misbahul Munir.
7. Ibn Abidin, *Radd al-Mukhtar*, IV/147.
8. Ibn Hazm, Al-Muhalla, VIII/343, 389 and 439.
9. Al-Sarakhsy, Al-Mabsout, X111/194.
10. For more on these definitions, see my book, Gharar and its Contractual Implications, pp.27-34.
11. These include Al Baji in *Al-Muntaqa*, V/41-42; Ibn Rushd, Sr. in *Al-Mugaddimat* IV222-224; Ibn Rushd, Jr., in *Bidayat Al-Mujtahid*,

- 11/148-156; Al-Qaraffi in *Al-Foroug*, 3/265 and Ibn Juzay in *Al-Qawaneen Al-Fighiyyeh* (principles of Islamic laws), 247 -249.
12. These include the hadith narrated by Abu Horaira: "The Messenger of Allah (pbuh) has enjoined making two sales in one"; verified by Al-Termidhi and Al-Nasal, with Abu Isa describing it as "a good, sound hadith which scholars follow". Al-Jami' Al-Sahih, 111/333; and Al-Nasai's Sunan, VII/293. See the rest of the hadiths in my book, "Gharar and its Contractual Implications", pp. 79/81.
 13. Bidayat Al-Mujtahid, IV/153.
 14. Jurisprudents are agreed on this definition. See Al-Montaqa in Explanation of Al-Muwatta', IV/.157; Al-Moqghni, IV/232, and, Nehayet Al-Muhtaj, II V495.
 15. Al-Muwatta' on the margin of Al-Montaqa, IV/157.
 16. Nayal Al-Awtar V/250.
 17. Tadrib Al-Rawi II; **and** The Musnad of Imam Ahmad annotated by Ahmad Mohamed Shaker, XV13; and Nayl Al-Awtar, V/250.
 18. **Al-Monataqa**, IV/157; Nehayet Al-Mohtaj, 111/459; Al-Moghni, IV/233; and Al-Bahr Al-Zakhkhar, **111/459**.
 19. Bidayat Al Mujtahid, IV162; and Nayl Al Awtar, V /251. 20
Al-Muqademat Al-Mumahedat, 1/221-222.
 21. Bedayat Al-Mujtahid, **11/162**
 22. These include the hadith **reported** by Abu Horaira: "The Prophet (p.b.u.h.) has **forbidden the pebble sale** and the gharar sale" quoted by Muslim's Sahih, **Annotated** by Al-Nawawi, 111/156. This hadith has been included by Ibn Taymiya in Al-Montaqa. He said that most **have reported** it **except** Al-Bukhari. **See** Al-Montaqa with Nayl Al-Awtar, V/243. The hadith of Abu Horaira that the Prophet (p.b.u.h.) **forbade the touch and toss (sales)** has been verified by Al-Bokhari in his Sahih, III/70.
 23. This **interpretation** was **mentioned** by Al-Tirmidhi. **See** his Sahih, **Annotated by** Ibn Al-Arabi, **V/238**. It was also mentioned by Al-Marghenani of the Hanafi's in Al-Hedaya with Fath Al-Qadir, V/166; by Ibn Rushed (the grandfather) of the Maliki's in Al-Muqademat Al-Mumahedat, 11/221; by Al-Ramli of the Shafies in Nehayet Al-Mohtaj, **IIV433; and by** Ibn Qudama **of the** Hanabalis in Al-Moghni,

- IV/207.
24. Al Hedaya with Fath Al Qadir, 5/169. -
 25. Muslim, Sahih, Annotated by Al-Nawawi, X/154; and Nehayat Al-Mohtaj, 111/433.
 26. Al-Termedhi, Annotated by Ibn Al-Arabi, VI/67.
 27. Al-Hedaya with Fath Al-Qadir, V/196.
 28. Muslim, Sahih, Annotated by Al-Nawawi, X/155.
 29. Al-Hedaya with Fath Al-Qadir, V/196; and Al-Moghni, IV/207.
 30. Bedayet Al-Mujtahid, 11/14; Fath Al-Qadir, V/196; Ibn Abidin, IV/151; and Al-Mudawwana, **X/38**.
 31. Ibn Abidin, XIX/307; Al-Qarafi's Al-Furuq, Heading 45; and Al-Majmoo'h IX/340.
 32. See the above notes; also see Al-Igna', 111/157; Al-Mughni, VI/599; and Al-Bahr Al-Zakhkhar, 11/293.
 33. Al-Bahr Al-Zakhkhar, 11/293; and Al-Muhadhdhab with Al-Majmoo'h, 1X/340.
 34. Al-Durr Al-Mukhtar with Ibn Abidin, IV/324; Al-Zaile'i IV/131, puts forward similar arguments.
 35. Nazariyat Al-Aqd, (The Theory of Contract), 227; , and A'lam Al-Mowa'qqe' in, **11V237**.
 36. Al-Sharh Al-Kabir, by Dardir, 111/2.
 37. • . Ibn Abidin, 1V/87; Al-Furuq, 111/265; and Al-Majmu'h, IX/288.
 38. Al-Furuq, 11V256.
 39. Ibn Abidin, '3/87.
 40. Al-Qawanin Al-Fiqhiyyeh, 247; and Ibn Abidin, 1V/92.
 41. Al-Montaqa, IV/287.
 42. Fath Al-Qadir, V/137; and Tanwir Al Absar with Ibn Abidin's Margin, • IV/87.
 43. Ibn Abidin, IV/29; Al-Furuq., XIIV265; and Al-Majmoo'h, IV/288.
 44. Al-Furuq, 111/265.
 45. Ibn Abidin, IV/92.
 46. Ibid, and Al-Hedaya with Fath Al-Qadir, V/83.

47. Al-Montaqa, V/41, and Bedayet Al-Mujtahid, 11/148 and 172.
48. Al-Majmoo'h, IX/288.
49. Al-Moghni, IV/109.
50. Al-Asl, 66 and 92; Al-Muwatta' On the Margin of Al-Montaqa, V/42; Al-Moghni, IV/208; Al-Muhazzab **265**; and Nayl Al-Awtan,,V/245.
51. Al-Bada'e', V/164.
52. Bedayet Al-Mujtahid. IV157; and Al-Sharh Al-Kabir, annotated by Al-Dusuqi, III/184.
53. Al-Majmu'h IX/208; and Al-Omm, III/57.
54. Al-Moghni, IV/91.
55. Al-Qawa'ed Al-Nuranieh Al-Fiqhiyyeh, 123.
56. Ibid, and A'lam Al-Muwaqqa'in IV4.
57. Ibid, Ibn-Abdin, IV/56.
58. Bidayet Al-Mujtahid, IV157; and Al-Sharh Al-Kabir, annotated by Al-Dusuki, IIV24.
59. Al-Muhazzab, V264; and Al-Majmoo'h, 11/205.
60. Al-Moghni, IV/92 and 209.
61. Ibn Abdin, IV/28.
62. Ibn Abdin, XIV/28, Al **Bada'e'**, V/158.
63. **See** these hadiths in my book, Gharar and its Contractual Implications, pp. 206-211.
64. Ibn Abdin, IV/151, 'Al-Muwatta' On the Margin of Al-Montaqa, IV/246, Bedayet Al-Mujtahid, IV159; Al-Nawawi on Muslim; X/188; and Al-Moghni, IV/13.
65. Sahih of Al-Bokhari, 111/155 ("In which there is hadith forbidding of **muzabana**) and the Sahih of Muslim, X/187.
66. Fath Al-Qadir, V/196.
67. Al-Omm of Al-Shafei, III/49; and Al-Mohalla, VIII/462.
68. Bedayet Al-Mujtahid, II/148;and Al-Furuq, 111/265.
69. Al-Bada'i', V/158; Al-Sharh Al-Kabir, annotated by Al-Dusuki, III/91; A1-Muhadhdhab, 1/263; and Al-Moghni, IV/131.
70. Ibn Abdin, .IV/7; Al-Montaqa in the Margin of Muwatta', V/21;

- Muhadhdhab, IV266; and Al-Moghni, IV/209.
71. See these hadiths in my Gharar and its Contractual Implications, pp. 278-283.
 - 72.,... Sahih of the Al-Bokhari with 'UmdatAl-Qare', XIV71; Sahih of Muslim, V157; and Al-Muwatta' in the Margin of Al-Montaqa, V/21.
 73. Ibn Abidin, IV/7; Al-Montaqa in the Margin of Al Muwatta', V/42; Al-Magmoo'h, IX/149; Al-Moghni, IV/200; and Al-Mohalla, VIII/388.
 74. Al-Muhalla, VII V388.
 75. Al-Majmu' 9/258; and Bahr Al Zakhkhar, 3/381.
 76. Al-Muhadhdhab, 1/262.
 77. Nayl Al-Awtar, V/244.
 78. Al-Qiyas Fil Shar' Al-Islami, (Analogy in Islamic Law,) 26-27.
 79. Sahih of Muslim. X/95 and 200.
 80. Sahih of al-Termedhi, 111/531.
 81. Fath Al-Qadir, V/102; Bedayet Al Mujtahid, 11/149; Al-Muhazzab, V 262; and Al-Bahr Al-Zakhkhar.
 82. Al-Mabsoot, X11/197; Takmelat Al-Majmoo'h, XV461; Al-Moghni, IV/ 90; and Al-Bahr Al-Zakhkhar, 111/315.
 83. Al-Omm, III/42.
 84. Bedayet Al-Mujtahid, 2/157; Al-Mokhtasar, Al-Nafz', 154; and Al-Bada'i', 5/361.
 85. Nazariyat Al-'Aqd, The-Theory of Contract, 233; and. 'Alam Al-Muwagge'ain,¹/361.
 86. Al-Muhadhdhab, 1/263.
 87. Ibn Abidin, IV/87; Bedayet Al-Mujtahid, 11/155; Al-Muhazzab, 1/163; and Al-Moghni, IIV58.
 88. See these conditions in my: Gharar and its Contractual Implications, 405. . .
 - 89.** Al-Bada'i', V/392; Al-Muhadhdhab, 1/263.
 90. Al-Muntaqa on Al-Muwatta', 4/287; Al-Muhazzab, V263; and Al-Moghni, 3/582.
 91. Al-Sharh Al-Kabir, annotated by Al-Dusuki, III/22 and 24;

- A1-Muhazzab, V264; and A1-Moghni, 111/583.
92. See my *Gharar and its Contractual Implications*, 416.
 93. *Al-Sharh Al-Kabir*, annotated by Al-Dusuki, 111/23; and Al-Hattab, IV/294.
 94. I will here deal only with these two categories. My *Gharar and its Effect on Contracts* may be consulted for *gharar's* effect on other contracts and on contractual provisions, 543-579.
 95. Al-Qarafi's *Al-Furuq*, 1/150.
 96. See Al-Muhalla, VI11/183, 191 and 199.
 97. Tanwir Al-Absar with Ibn Abdin, 11/5.
 98. Al-Moghni, 111/398.
 99. Al-Muwatta' on the Margin of Al-Montaqa, IV/157.
 100. Ibn Abdin, IV/310; Al-Furuq, 1/229; and Moghni Al-Mohtag, 1V339.
 101. Ibn Abdin, IV/310; Bedayet Al-Mujtahid, 11/226; and Al-Moghni, V/ 400.
 102. Ibn Abdin, IV/324.
 103. Jame' al-Fosolein, 11/33; Al-Qawanin Al-Fiqhiyyeh, 265; Al-Tohfa, annotated by Al-Sharkawi, 11/85; and Al-Moghni, V/404.
 104. Al-Muwatta on the Margin of Al-Montaqa, V/126.
 105. Ibn Abdin, IV/31.
 106. Al-Bada'i', 4/187; Al-Sharh Al-Kabir, annotated by Al-Dusuki, IV/19; and Tohfat Ai-Mohtaj, annotated by Al-Sherwani, V/288.
 107. Al-Muhadhdhab, 11/400; and Al-Bahl Al-Zakhkhar, IV/45.
 108. Al-Qarafi, Al-Furuq, I/150/151, Heading 24, (with minor adaptation).
 109. The Fatawa, of Ibn Taymiya, 111/342.
 110. Al-Qarafi Al-Furuq, 11150.
 - '111. Al-Qa'wa'ed Al-Nuranieh al-Fiqhiyyeh, 122 and 216.
 112. Bedayet Al-Mujtahid, 11/331.
 113. Al-Qawaneen Al-Fiqhiyyeh, 352.
 114. Al-Muhazzab, 1/453.
 115. Moghni Al-Mohtaj, 11/399.

116. Moghni Al-Mohtaj, 11/399.
117. Ibid. and Nehayet Al-Mohtaj, V/299.
118. •Ibn Abidin, IV/314 and 317; Al-Bada'e', VV188; Kashshaf Al-Qanna', IV/251 and 258; and Al-Moghni, V/598 and 399. See also *Gharar and Contractual Implications*, 327-532.
119. *Ibri Abdin*, V/570.
120. *Ibid.* V/608.
121. *Ibid.* V/573 and 609.
122. *Ibid*, V/588.
123. *Al-Sharh Al-Kabir*, annotated by Al-Dusuqi, IV/433 and 447.
124. Al-Muhadhdhab, 1/458; and Al-Majmoo'h, IX/328.
125. Al-Muhadhdhab, 1/458; and Moghni Al-Mohtaj, III/45. As may be seen, claims by past and contemporary scholars of jurisprudence that the Shafei position is that gharar impairs all gratuitous contracts are not well-founded.
126. Al-Moghni, VI/56 and 59.
127. Ibid, VV64.
128. Al-Shatbi in Al-l'tisam, 11/143.
129. Bedayet Al-Mojtahid, 11/155; Al-Majmoo'h, (X/258; Al-l'tisam, 11/143.
130. Al-Montaqa, 1/41.
131. The Law Code, Article 54.
132. Al-Moghni, IV/82.
133. Al-Majmoo'h, IX/323.
134. Al-Dorr Al-Mokhtar and Al-Radd Al-Mokhtar, IV/140.
135. Al-Moghni, IV/91.
136. Sura Al-Hajj', Verse 78.
137. Al-Ashbah 1Nal Nazha'er by Al-Sayouti 77: Rule IV.
138. Ibid.
139. See examples for this in my *Gharar and its Contractual Implications*, 600-604.
140. Rule 33; See also Al-Ashbah Wal Nadha'er, 79.

141. Nayl Al-Awtar, 5/344; See also Fath Al-Ghazin on the Magmoo'h, 9/309; Al-Moghni, 4/293; Gharar and its Effect on Contracts, 450.
142. Al-Bada'e', V/157.
143. Al-Montaqa on Al-Muwatta', V/113.
144. Ahkam Al-Qur'an, 11111085. Note that the term "necessity" is used here to mean "need".
145. Abi Hayyan' - Tafsir Al-Bahr Al-Mohit, 2/155, and Al-Fakhr Al-Razi, 23/32.
146. Surat Al-Baqara, Verse 219. See in this regard my Gharar and its Contractual Implications, 617-628.
147. For details on this see Gharar and its Contractual Implications, 629-638.
148. The Egyptian Civil Code, Article 131, A.
149. Al-Sanhoury, Massader Al-Haq, III/57. This is the view accepted by Dr Al-Sanhoury.
150. Gharar and its Contractual Implications, 137-146
151. Ibn Taymiya's Nazariyat Al-'Aqd, 231
152. Gharar and its Contractual Implications, 140-142
153. The Margin of Ibn Abidin, IV/7.
154. See Nayl Al-Awtar, 5/164 (The A.H. 1380 edition).
155. Al-Moghni, 4/206.
156. Al-Muhadhdhab, 1/262 and 263.
157. Nayl Al-Awtar, 5/165.
158. "Al-Aswaq Al-Maliyeh", Financial Markets, by Dr. Mohamed Al-Moqri Ben Ein, 23 and 24. A paper submitted to the seventh session of the Islamic Jurisprudence Council in Jeddah.
159. See my Gharar and its Contractual Implications, 318-320.

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ISLAMIC DEVELOPMENT BANK (IDB)

Establishment of the Bank

The Islamic Development Bank is an international financial institution established in pursuance of the Declaration of Intent by a Conference of Finance Ministers of Muslim countries held in Jeddah in Dhul Oa'da 1393H (December 1973). The Inaugural Meeting of the Board of Governors took place in Rajab 1395H (July 1975) and the Bank formally opened on 15 Shawwal 1395H (20 October 1975).

Purpose

The purpose of the Bank is to foster the economic development and social progress of member countries and Muslim communities individually as well as jointly in accordance with the principles of *Shari'ah*.

Functions

The functions of the Bank are to participate in equity capital and grant loans for productive projects and enterprises besides providing financial assistance to member countries in other forms of economic and social development. The Bank is also required to establish and operate special funds for specific purposes including a fund for assistance to Muslim communities in non-member countries, in addition to setting up trust funds.

The Bank is authorized to accept deposits and to raise funds in any other manner. It is also charged with the responsibility of assisting in the promotion of foreign trade, especially in capital goods among member countries, providing technical assistance to member countries, extending training facilities for personnel engaged in development activities and undertaking research for enabling the economic, financial and banking activities in Muslim countries to conform to the *Shari'ah*.

Membership

The present membership of the Bank consists of 50 countries. The basic condition for membership is that the prospective member country should be a member of the Organization of the Islamic Conference and be willing to accept such terms and conditions as may be decided upon by the Board of Governors.

Capital

The authorized capital of the Bank is six billion Islamic Dinars. The value of the Islamic Dinar, which is a unit of account in the Bank, is equivalent to one Special Drawing Right (SDR) of the International Monetary Fund. The subscribed capital of the Bank is **3,654.78** million Islamic Dinars payable in freely convertible currency acceptable to the Bank.

Head Office

The Bank's headquarters is located in Jeddah, Saudi Arabia and it is authorized to establish agencies or branches elsewhere.

Financial Year

The Bank's financial year is the Lunar Hijra year.

Language

The official language of the Bank is Arabic, but English and French are additionally used as working languages.

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