

CHAPTER TWO

THE FORWARD COMMODITIES MARKET

A forward contract is an agreement to exchange assets in the future at a predetermined price. It plays a vital role in the Western financial markets and serves as the basic building block for more advanced and sophisticated financial instruments. The primary function of the forward market is to provide a vehicle to hedge against unexpected and undesirable price fluctuations. The forward market directly affects the spot market as it also offers arbitrage and speculation opportunities. Forward markets also serve the purpose of “price discovery”—the process of determining the equilibrium prices that reflect current and positive demands for current and prospective supplies, and making these prices visible to all.¹

The forward contracts in commodities are the simplest type of derivatives. In such a contract the parties could be a producer who promises to supply the product and a consumer who needs the product. Forward contracts are common in merchandise or commodities trading. Without them, business trade and planning would be greatly hindered. If a small baking company could not order flour in advance for its immediate needs, for example, it would have to buy a large quantity at a prevailing price and store it for future use. There would be uncertainty about what the price would be when the next order is placed. The miller will have a more difficult task in planning how much flour to produce without orders in hand, and shortages would be more likely to occur.²

To see how a typical forward contract works, let us examine a simple example of a cocoa farmer (producer) and a confectioner who needs cocoa for his product (consumer). To simplify matters, let us say the farmer has planted cocoa and expects to harvest 120 tons of cocoa in six months. The confectioner, on the other hand, has cocoa in his

¹ Philippe Jorion and Marcos De Silva, *The Importance of Derivatives Securities Markets to Modern Finance*, Catalyst Institute (Chicago: Catalyst Institute), p. 222.

² Anthony F. Herbst, *Commodity Futures Markets, Methods of Analysis, and Management of Risk*, John Wiley and Sons, United States, 1986, p. 3.

inventory to last him for the next six months but will need to replenish his inventory in six months with 120 tons. Though simplified, this is a very common business situation. We have a producer who will have product available at a future date and a consumer who will need the product in the future. Clearly, both parties face risk, essentially price risk. While the farmer will be fearful of a fall in the spot price of cocoa between now and six months from now, the confectioner will be susceptible to an increase in the spot price. Thus, both parties face risk, but in the opposite direction. It would be logical for both parties to meet, negotiate, and agree on a price at which the transaction can be carried out in six months. Once the terms are formalized and documented, we have a forward contract accruing to both parties. Both parties, because of the forward contract, have eliminated all price risk. The farmer now knows the price he will receive for his cocoa regardless of what happens to cocoa prices over the six months. The confectioner too has eliminated price risk since he will only have to pay the agreed upon price, regardless of spot prices in the next six months. There is a second benefit to this. Since both parties have “locked-in” their price/cost, they would be in a much better position to plan their business activities. For example, the confectioner can confidently quote to his customers the price at which he delivers them products in the future. This would not have been possible if he were uncertain about his input price. The benefits of a forward contract, therefore, are often more than merely hedging price risk.³

Economic Benefits of the Forward Contract

Some *shari‘ah* scholars have argued in favor of this contract. ‘Abd al-Wahāb Abū Sulaimān, for instance, said “The need for this contract is not a need confined to a specific nation, it is a need for all nations around the globe whatever their status of civilization, developed or developing. The principle in Islamic law is that the general need could be considered as necessity (*al-ḥājah idhā ‘ammat kānat ka al-ḍarūrah*).”⁴

³ See Obiyathulla Ismath Bacha, “Derivative Instruments and Islamic Finance: Some Thoughts for a Reconsideration,” p. 3.

⁴ ‘Abd al-Wahāb Abū Sulaimān ‘Aqd al-Tawrīd Dirāsh Fiqhiyyah Taḥlīliyyah” paper presented to the twelfth session of the Islamic Fiqh Academy, Rabat, Morocco, p. 7.

Similarly, Ḥasan al-Jawāhirī maintained that the forward contract used by companies and governments to secure the supply and export of goods becomes a necessity of modern transactions.⁵

Sheikh Mukhtār al-Salāmī also comes out very strongly in favor of this contract after giving some examples regarding its application, and arguing that the need for it is the result of the technological advancements in this world and that the Islamic world has no other alternative but to follow. It is the necessity of modern civilization which has shortened distances between places and made it necessary for any nation which wants to survive to follow suit. If we are going to make it compulsory for companies and industries to advance the payment of every transaction they want to conclude, as it is in the *salam* contract, we are forcing them not to produce and if we are making it compulsory for them not to sell what they have not manufactured yet, we are leading them to bankruptcy. Moreover, rejecting this contract will create hardship and *ḥaraj* (difficulty and hardship) to Muslims while what is important is to protect the *maṣlahah* (public interest) of the *ummah* (community) and its property.⁶

It should be noted here that despite his positive and strong analysis of different principles related to futures trading, Ibn Taymiyyah opposed the deferment of both countervalues (assets) in a contract or the forward contract. According to him, such a contract has no benefit and the *dhimmah* (liability, responsibility) of the two parties will be made liable for nothing. The objective of the contract, Ibn Taymiyyah argues, is to make delivery and since there is no delivery in this contract, the ultimate objective of the contract is not fulfilled.⁷ Ibn Qayyim followed the argument of his teacher, and reached the same conclusion.⁸ Refuting this argument, Sheikh al-Ḍarīr said:

The claim that there is no benefit in such a contract is unacceptable. The buyer will own the subject matter of the contract and the seller will own the price and the deferment of taking possession will not render the contract without benefit. Moreover, a sane or rational person will not enter

⁵ Ḥasan al-Jawāhirī, “Uqūd al-Tawrīd wa al-Munāqaṣāt” paper presented at the twelfth session of the Islamic Fiqh Academy, Rabat, Morocco, p. 3.

⁶ See Mukhtar al-Salāmī, “Ta’jīl al-Badalayn fi al-‘Uqūd,” paper presented in Nadwāt al-Barakah al-Tāsīa’h ‘asharah lil iqtisād al-Islāmī, Makkah al-Mukarramah, 2–3 December 2000, p. 5.

⁷ Ibn Taymiyyah, *Nazariyyat al-‘Aqd*, p. 235.

⁸ Ibn Qayyim, *l’lām al-Muwaqq’in an Rab al-‘Ālamīn*, vol. 3, p. 9.

into a contract without having interest in it. Therefore, if the two parties have no real interest in this contract they would not have concluded it from the beginning.⁹

Moreover, as Aḥmad Ḥassan rightly pointed out, it is likely that there was no benefit for such contracts at the time of Ibn Taimiyyah and Ibn Qayyim. They rejected this contract only on these grounds¹⁰ and not on any other genuine legal grounds. We have already shown that this contract does have benefits. Aḥmad Ḥassan stressed that the global material development brought about new economic transactions, which were unknown to early Muslim jurists. Therefore, the trend of judging such a contract as illegal without any strong legal basis is against the objectives of the *sharī'ah*. We do believe that any contract in Islamic law should fulfill the following conditions to be considered as legal:

1. It should not contradict a genuine *naṣ* (*text*).
2. It should not go against the general principles of *mu'āmalāt*. (Islamic Commercial law)
3. It should not involve a clear harm.

However, none of these three conditions is present in the forward contract. Therefore, it is a valid contract.¹¹ However in his book *'Aswāq al-'Awrāq al-Māliyyah*, and for fear that the forward contracts may be used for speculative purposes, Aḥmad Ḥassan reversed his initial position and concluded that it might be considered as an illegal contract.¹² Ironically, he allowed such a contract to be used only for import and export activities. He failed to rebut the strong arguments he advanced in his previous book for the legality of this contract. Moreover, the argument that these kinds of contract may be used for speculative purposes may not be acceptable, especially in the commodity and share markets. Hence, it could be used for that purpose in the currency, interest rate, and stock index markets. Then, this possibility should not be applied to other areas without a strong basis. Moreover, since interest rate futures

⁹ al-Ḍarīr, *al-Gharar wa Atharuhu fi al-'Uqūd*, p. 316.

¹⁰ Aḥmad Ḥassan Muhyī al-Dīn, *'Amal Sharikāt al-Istithmār al-Islāmiyyah fi al-'Aswāq al-'Ālamīyyah*, Bank al-Barakah al-Islāmī li al-Istithmār, Bahrain, 1986, p. 320.

¹¹ *Ibid.*, pp. 320–321.

¹² Aḥmad Ḥassan Muhyī al-Dīn, *'Aswāq al-'Awrāq al-Māliyyah wa Atharuha al-Inmā'iyyah fi al-Iqtisād al-Islāmī*, p. 323.

contracts and stock index futures contracts are excluded from the beginning from the Islamic alternative, there are no grounds for objection.

Isāwī Aḥmad also refuted the claim that there is no benefit in the forward contract. It is not acceptable because traders and manufacturers always compete in trading their products. Thus, if a manufacturer would like to guarantee the sale of his product, he will enter into an agreement with a buyer on the condition that he will receive the price later when the commodity sold is presented. The trader on his part may be in need of a specific commodity but he has no money for the time being. If he has to wait until he gets the money, another trader may take the commodity in question before him. Therefore, to avoid this risk he has to enter into the deal with the condition that he will pay the price at the time he receives the goods. In such a deal both payment for and delivery of the commodity have been deferred but there is a real interest involved. Thus, the postponement of both payment and commodity is lawful except in the case of currency trading. Moreover, we have some cases in which both countervalues have been deferred but the transaction is still considered valid in Islamic law, such as the case of *ijārah* (lease) and *ju'ālah*. In both cases, a person may request another person to do something for him in exchange for a charge which will be paid to him after the job has been accomplished. Therefore, the contract in which both countervalues have been deferred (the forward contract) is a legal contract if it does not involve *ribā* (interest) or *gharar*¹³ (risk-taking). Similar objections to Ibn Taimiyyah's opinion are advanced by Sheikh Mukhtār al-Salāmī,¹⁴ Sheikh Aḥmad 'Alī 'Abd Allāh,¹⁵ and Sheikh Ḥasan al-Jawāhirī.¹⁶

However, the forward contract as a trading instrument in its actual form has no exact counterpart in Islamic law. Some scholars have drawn a similarity between the forward contract and *bay' al-salam* on the one hand and *bay' al-istiṣnā'* on the other. Furthermore, some have tried to establish the legality of this contract under *bay' al-ṣifāh* (sale by description). Therefore, we have to look into the points of similarity and difference between *salam* (contract of future sale) and *istiṣnā'* on

¹³ Isawi Ahmad, "Bay' al-Dayn wa Naqlihi," pp. 169–170.

¹⁴ See Mukhtār al-Salāmī, "Ta'jil al-Badalain fi al-'Uqūd," paper presented in Nadwat al-Barakah al-Tāsia'h 'asharah lil iqtisād al-Islāmī, Makkah al-Mukarramah, 2–3 December 2000, p. 3.

¹⁵ Aḥmad 'Alī 'Abd Allāh, "al-Bay' 'alā al-Ṣifāh," paper presented in Nadwat Bank al-Shamāl lita'sil al-'Amal al-Maṣrifī, 20–21 June, 1997, Sudan, p. 4.

¹⁶ Ḥasan al-Jawāhirī, "Uqūd al-Tawrīd wa al-Munāqāṣāt," p. 5.

one hand, and the modern forward contract on the other. Meanwhile, if it could be accommodated under the category *bay' al-ṣifah* then what are the similarities and differences between the two contracts? However, if we consider the forward contract as a new type of contract, then, we need to study it within the general principles of Islamic commercial law. Moreover, we have to look into the authenticity of the arguments posed against it, such as the claim that it is a kind of *bay' al-kāli' bi al-kāli'*, that is, the sale of what one does not possess, the sale of *mādūm* (non-existent), and the claim that there is no benefit in such a contract.

Salam and the Forward Contract

Salam is the closest, among the contracts named in Islamic law, to the conventional forward contract. Some scholars have considered it as the Islamic alternative to the forward contract. Thus, Sudin Haron said:

Forward markets do exist in Islamic financial system but only on a limited scale. Futures markets, however, have not been established in Islamic financial system. In case of forward markets for money there is a divergence of opinion pertaining to the legality of such transaction from the point of view of *sharī'ah*... Forward markets for commodities are allowed by *shari'ah* under the principle of *bay' al-salam* (an advance purchase) and *istiṣnā'* (a contract to manufacture).¹⁷

However, it seems that to consider *bay' al-salam* as the typical Islamic alternative to the modern type of forward contract in commodities would not be totally correct without resolving some controversial issues. Thus, one of the outstanding issues here is that in *bay' al-salam* full payment at the time of agreement is a requirement according to the majority of Muslim jurists, which is not the case in the forward contract. Therefore, to accommodate the forward contract in Islamic finance such an issue should be addressed. This study will attempt to elaborate on the matter. Another issue of concern related to *bay' al-salam* and the forward contract is the claim made by many scholars that *bay' al-salam* is accepted in Islamic law but not in accordance to the norms; rather, its acceptance is considered to be an exception. Therefore, it is not possible to make an analogy between *salam* and any new contract.

¹⁷ Sudin Haron and Bala Shanmugan, *Islamic Banking System Concept and Application*, Pelanduk Publications, Kuala Lumpur, 1997, p. 180.

This issue also needs to be addressed in connection with the legality of the forward contract.

Zamīr Iqbāl considered *bay' al-salam* to be the closest substitute for the forward contract. He acknowledged that *bay' al-salam* is not practiced in the financial market for two reasons: first, compared to the western forward contract, *bay' al-salam* requires full payment at the time of agreement. Second, since interest is incorporated in the determination of the forward contract price, it is synonymous with paying or receiving interest. The point in question is whether an increase with deferred delivery is justified or not and, if such an increase is allowed, does it result in dealing with interest (*ribā*)? Zamīr Iqbāl concluded that a forward contract may not incorporate the element of interest as it is prohibited by Islam.¹⁸

However, it should be noted that the issue as to whether an increase in price with deferred delivery will be synonymous with paying or receiving interest does not arise in the forward contract at all. Moreover, several Islamic institutions have ruled for its legality.¹⁹

Thus, we may submit that the issues related to *salam* in connection to the forward contract which need to be discussed are, first, the issue of full payment at the time of agreement in *salam* and, second, the possibility of drawing an analogy with *salam* if we consider it in line with *qiyās* (analogy) and not against it. Still, some other issues may have a bearing on our discussion, namely, the relation between *salam* and futures trading contracts, such as the possibility of selling the *salam*-based goods before actual receipt of the parallel *salam*. However, these issues are more closely related to futures contracts than forward contracts; we are concerned here just with forward contracts. It is logical, nevertheless, to discuss briefly the important features of *salam* before proceeding to any comparison.

Definitions and Conditions of Salam

Salam is defined as “a sale or purchase of a deferred commodity for the present price (*bay' 'ājilin bi 'ājil*).”²⁰ Another definition is as follows:

¹⁸ See Zamīr Iqbāl, “Financial Innovation in Islamic Banking,” *Journal of Islamic Banking and Finance*, The International Association of Islamic Banks, Karachi (Asian Region), vol. 15, no. 2, April–June 1998, pp. 12–13.

¹⁹ See Islamic *Fiqh* Academy’s resolution no. 2, 6th session, 1990.

²⁰ Ibn ‘Abidin, *Ḥāshiyat Rad al-Muhtār*, al-Bābī al-Ḥalabī, Cairo, 1966, p. 209.

“A transaction where two parties agree to carry out a sale/purchase of an underlying asset at a predetermined future date but at a price determined and fully paid for today.”²¹ On the other hand, beside the general conditions of an ordinary sale in Islamic law, *salam* has its own conditions. Thus, based on the writing of classical Muslim scholars, and by the requirements adopted by the Islamic Fiqh Academy (Jeddah) in its ninth session, a *salam* contract must fulfill the following conditions:

1. It is necessary to precisely fix a period for the delivery of goods.
2. Quality, quantity, and place of delivery must be clearly enumerated.
3. A *salam* contract cannot be based on uniquely identified underlying assets. This means the underlying commodity cannot be based on a commodity from a particular farm/field.
4. Full payment should be made at the time of making the contract.²²

This last condition is not a point entirely agreed upon among the different schools of Islamic law and it is this condition which may prevent *salam* from playing a parallel role to the modern forward contract in the commodities market. According to the Ḥanafīs, Shaf'īīs and Ḥanbalīs payment of the principal should not be delayed beyond the time the contract is signed. Their justification for this is that delay of both commodity and principal is in fact a sale of debt for debt, which is prohibited in the *sharī'ah*.²³ Moreover, the principal must be paid in advance if the very objective of *salam* is to be fulfilled.²⁴ On the other hand, the Mālikīs disagree with regard to the permissibility of delaying the price of *salam*. Delay of payment according to them is possible as follows:

²¹ Fahīm Khān, *Islamic Futures and Their Market*, Research Paper no. 32, Islamic Research and Training Institute p. 14; also see Obiyathulla Ismath Bacha “Derivative Instruments and Islamic Finance: Some Thoughts for a Reconsideration,” Unpublished Paper, International Islamic University Malaysia, November, 1997, p. 18.

²² Şiddīq al-Ḍarīr, “al-Salam wa Tatbiqātuhu al-Mu’āşirah,” *Majallat Majma’ al-Fiqh al-Islāmī*, ninth session, 1996, no. 9, vol. 1 p. 379–383; Nazīh Ḥammād, “al-Salam wa tatbiqātuhu al-Mu’āşirah,” *Majallat Majma’ al-Fiqh al-Islāmī*, ninth session, 1996, no. 9 vol. 1, pp. 553–555.

²³ The notion of prohibition of sale of debt for debt is widely cited as grounds to invalidate numerous kinds of transactions. However, in reality there is nothing in the *sharī'ah*, which prohibits the sale of debt for debt unless it involves *ribā* or high risk (*gharar*). The present study will dedicate a special chapter to investigate and analyze critically the arguments and opinions concerning the sale of debt for debt.

²⁴ See for instance Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, al-Matba’ah al-Amīriyyah, Egypt, 1937, vol. 5, p. 337; Al-Nawawī, *al-Majmū’*, vol. 9, p. 208. In Qudāmah, *al-Muḥḥanī*, vol. 4, p. 324; Ibn Ḥazm, *al-Muḥallā*, vol. 9, p. 109.

It is permissible to delay payment up to three days after the time of signing the contract, whether this is stipulated in the agreement between the two parties of the contract or not and whether the price is to be paid in cash or in kind. If such a delay is made according to what is agreed upon, payment should not be delayed more than three days. Some Mālikīs believe that it is permissible to delay payment for more than three days without prior agreement. On the other hand, if the payment is in kind some Mālikīs accept delay in this case, if it is for a short period. However, payment should not be delayed until the time of delivery. Another group of Mālikīs believes that if such a long delay happens, the *salam* contract would still remain valid, but the act of making a long delay is *makrūh* (disliked).²⁵

Based on the Mālikīs opinion, al-Ḍarīr did not see any problem in deferring the price of *salam* as long as it is for a period not exceeding the time of delivery of the commodity itself. He argued that the deferment by itself could not be the cause for *gharar* or prohibition but all these arguments are based on the assumption that the approval of *salam* in Islamic law was against the norms and not in line with *qiyās*.²⁶

Furthermore, it should be noted that the Mālikīs allow a similar delay in the case of land leasing. According to Imām Mālik, it is permissible to lease on the condition that the lessor receives the leased property one year after the time of agreement while the second party can pay the price ten years later.²⁷ This case also shows that deferment of both countervalues is not prohibited.

It should be noted here that the Ḥanafīs consider the payment of the price of *salam* at the time of contract as a condition for the continuation of the validity of the contract (*baqa'uhu'alā al-siḥḥa*) and not as a condition for its effectiveness (*infādhihi*) nor its validity (*siḥḥa*).²⁸ Some Shaf'īis, on the other hand, differentiate between the terms used in concluding the contract. If the contract is concluded as a *salam* or *salaf* (another name of *salam*), then the price must be paid at the time of concluding the contract. However, if the contract is concluded using

²⁵ For more details about the Mālikī's opinion see al-Ḥattab, *Mawāhib al-Jalil li-Sharḥ Mukhtaṣar Khalil*, Mustaphā al-Ḥalabī, vol. 4, pp. 514–517; al-Khirshī, *Sharḥ al-Khirshī 'alā Mukhtaṣar Khalil*, Dār Ṣādir, Beirut, vol. 5, pp. 202–203, and Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 202.

²⁶ Al-Ḍarīr, *Al-Gharar wa Atharuhu fi al-'Uqūd*, pp. 461–462.

²⁷ Imām Mālik, *al-Mudawwanah*, vol. 3, p. 370.

²⁸ Ibn 'Ābidīn, *Rad al-Muḥtār'alā al-Dur al-Muḥtār*, al-Bābī al-Ḥalabī, Cairo, vol. 4, p. 288.

the term sale rather than *salam* or *salaf*, then it is not necessary that the price should be paid immediately.²⁹ Despite the weakness of this differentiation, it does prove that the mere deferment of both counter-values is not *ḥarām* (prohibited). The following table summarizes the opinion of the major schools on the conditions of *salam*.

Table No. 1.1 Opinion of Major Schools on the Conditions of *Salam*

Item	Delivery period	Description	Type of commodity	Time of payment
1. Abu Hanifah	Must be precisely fixed	Clearly enumerated	Not uniquely identified underlying asset	Full payment at the conclusion of the contract
2. Imam Malik	Must be precisely fixed	Clearly enumerated	Not uniquely identified underlying asset	Could be deferred to three days or even more
3. Imam Al-Shafie	Must be precisely fixed	Clearly enumerated	Not uniquely identified underlying asset	Full payment at the conclusion of the contract
4. Imam Ahmad	Must be precisely fixed	Clearly enumerated	Not uniquely identified underlying asset	Full payment at the conclusion of the contract

It can be deduced from the above arguments that these scholars, especially the Mālikīs, regard the deferment of the price in *salam* as neither involving *ribā* nor *gharar*, which nullify a contract. Therefore, all these arguments about the prohibition of the deferment of both countervalues in a contract are based on the weak *ḥadīth* about *bay' al-kālī' bi al-kālī'*. One may ask why the Mālikīs, for instance, departed from the “general principles” and allowed deferment for three days? Some may argue that

²⁹ Al-Shirāzī, *al-Muhadhdhab*, Maktab al-Bābi al-Halabi, Cairo, 1976, vol. 1, p. 392.

this is not in essence a departure from the “general principles,” but just an application of the maxim *ma qārab al-shai’ yu’tā ḥukmahu*, which means whenever a case is very close to another they could be given the same rule. Therefore, a deferment of just three days may not be considered a real deferment. However, if the deferment of the price in *salam* can really lead to *ribā* or *gharar*, then could it be argued whether it is possible to allow it for one hour or one day and at best for three days? The answer is clear. *Ribā* or *gharar* cannot be allowed either for three days or more or less.

We may note here that one of the sources of misconception about the legality of deferring both countervalues is an opinion reported from Ibn ‘Abbās in connection with *āyat al-Mudāyanāh* to the effect that this verse is concerned with *salam* and since at this time, *salam* means the deferment of one of the countervalues, some scholars tried to confine the general meaning of the verse to the interpretation of Ibn ‘Abbās while others have a somewhat more liberal approach.³⁰ After analyzing the different arguments on the issue, Kamālī maintained that the ‘Ulamā’ (Shari’ah scholars) have held different views with regard to their interpretation of the word *dayn*. While some have confined *dayn* (debt) to certain types of debt, others have applied it generally to all deferred liability transactions that can fall within its broad meaning. The Qur’ān has evidently not specified the general meaning of *dayn* or *tadāyantun* (debt or debt exchange) and there is no compelling evidence to warrant a departure from this position. The preferred view would thus appear to be that the general language of the text should convey its general and unqualified meaning. Even if we admit Ibn ‘Abbās’s interpretation, it may be said that it was based on the occasion of revelation (*sha’n al-nuzūl*) of the *ayah*. According to the general rules of *uṣūl al-fiqh*, the *sha’n al-nuzūl* (the occasion of revelation) of a text may be specific but that does not necessarily restrict the general purport and ruling of the text.

Kamālī continues his argument concluding that even if the text is revealed concerning *salam*, the language of the text is general and applies to all debts, which would imply the basic legality of deferred transactions in all its varieties in the *shari’ah*, provided, of course, that

³⁰ For more detail, see chapter 6 on the sale of debt for debt.

none of the principles of the Qurʾān and sunnah on such other themes as usury, gambling, and *gharar* are violated.³¹

Another misconception related to *salam* is the claim that it is allowed against the *qiyās* and the norms of Islamic law. This is because it is the sale of what one does not possess and the sale of the nonexistent. Therefore, it involves *gharar*. However, since there is a specific *ḥadīth* from the Prophet about its legality it could be deduced that it is allowed as an exception.³²

However, this argument is rebutted by some classical scholars, such as Ibn Taymiyyah, Ibn Qayyim, and Ibn Ḥazm as well as some prominent contemporary Muslim scholars. Before giving the legal arguments it is appropriate to mention the relevance of *salam* to our discussion on forward trading. Since *salam* is the closest contract approved or permitted by the explicit sunnah of the Prophet, we are in need of extending this permissibility to the modern type of forward contract by way of *qiyās* or analogy. However, such *qiyās* would be impossible if we consider the permissibility of *salam* as an exception and against the norm. For a valid analogy, according to the commonly agreed principle of Islamic jurisprudence, the *ʿasl* or the principle should not be allowed by way of exception.³³ Therefore, any analogy with *salam* in this regard will be in violation of this principle.

In refuting the claim that *salam* is admitted against the norms of the *sharīʿah* or against *qiyās* al-Ḍarīr, for instance, said: “The right interpretation here is the one advocated by Ibn Taymiyyah and Ibn Qayyim. According to them, there is nothing in the *sharīʿah* which is against *qiyās*. Moreover, everything which is supposed to be against *qiyās* is in fact inseparable from one of two things: either the *qiyās* or analogy itself is not valid, or there is no textual evidence to prove that the rule under discussion is from the *sharīʿah*, because a genuine *qiyās* represents the justice for which Allah (s.w.t.) has sent His Messenger. Therefore, there is nothing in the *sharīʿah* which contradicts a genuine *qiyās*.” Based on this principle, al-Ḍarīr added that it could be concluded that *salam* is in line with a *qiyās*, and the *qiyās* upon which

³¹ See Kamālī, *Islamic Commercial Law: An Analysis of Futures and Options*, p. 255.

³² See, for instance, Al-ʿAynī, *ʿUmdat al-Qārī Sharḥ Saḥīḥ al-Bukhārī*, vol. 12, pp. 61–63; Al-Shawkānī, *Nayl al-Awtār*, vol. 5, p. 239.

³³ *Ibid.*, vol. 5, p. 235.

some scholars rely to declare *salam* to be against the norm is a *fāsīd* (imperfect) *qiyās*.³⁴ Then he quoted Ibn Qayyim's arguments against the claim that *salam* is a kind of *bay' al-m'adūm*, the sale of what one does not possess and therefore a kind of *gharar*. However, since we are going to discuss these kinds of sales in relation to futures trading in general in separate sections, we will defer our elaboration on these issues to a later discussion. Nevertheless, Ibn Qayyim's conclusion is that *salam* is in accordance with *qiyās*, public interest, and the most complete and just legal principles.³⁵ Ibn Ḥajar³⁶ and al-'Izz Ibn 'Abd al-Salām³⁷ also advocated a similar opinion. Some contemporary scholars such as Nazīh Ḥammād³⁸ and Ajīl Jāsīm al-Nashmī³⁹ also endorsed the idea that *salam* is in line with *qiyās* and not against it.

Thus, we conclude that the condition that the price of *salam* should be delivered at the time of the conclusion of the contract is not based on the fear of *ribā* or *gharar* as we have seen in the Mālikīs' attitude. This stand was endorsed and extended by modern Muslim jurists such as al-Ḍarīr, who maintained that it is legal to defer the price for a short period (not necessarily three days) but it should be paid before the commodity is delivered.⁴⁰ Yet, the classical scholars may have introduced this condition in line with the nature of *salam* where the farmer would be usually in need of the money, from the beginning of the transaction to finance his agriculture and not because it is part and parcel of the validity of *salam*. More interestingly, Ibn Ḥajar in his definition of *salam* said "It is the sale of something prescribed in the *dhimma*."⁴¹ Then, he added that the phrase "On condition that the price be paid at the spot is questionable because it is not an integral part of the nature of *salam* (*laisa dākhilan fi ḥaqīqatīhi*)."⁴²

³⁴ Ṣiddīq al-Ḍarīr, "al-Salam wa Tatbīqātuhu al-Mu'āṣirah," pp. 379–383.

³⁵ Ibn Qayyim, *Ilām al-Muwaqq'īn an Rab al-'Ālamīn*, vol. 1, p. 350.

³⁶ Ibn Ḥajar, *Fath al-Bārī*, Maktabat al-Kulliyāt al-Azhariyyah, vol. 9, p. 305.

³⁷ Izz Al-Dīn Ibn 'Abd al-Salām, *Qawā'id al-Aḥkām fi Masālih al-Anām*, Maktabat al-Kulliyāt al-Azhariyyah, Cairo, 1968, vol. 2, pp. 111–112.

³⁸ Nazīh Ḥammād, "al-Salam wa taṭbīqātuhu al-Mu'āṣirah," pp. 553–555.

³⁹ Majma' al-Fiqh al-Islāmī, *Majallat Majma' al-Fiqh al-Islāmī* (discussions about *salam*) ninth session, 1996, no. 9, vol. 1, p. 643.

⁴⁰ al-Ḍarīr, *Al-Gharar wa 'Atharuhu fi al-'Uqūd*, p. 461.

⁴¹ It is the equivalent of personality in positive law receptacles for the capacity for acquisition.

⁴² Ibn Ḥajar, *Fath al-Bārī*, Maktab al-Kulliyat al-Azhariyyah, Cairo, 1978, vol. 9, p. 303.

This proposition is also confirmed by the Mālikī insistence that the maxim *ma qārab al-shai' yu'tā ḥukmahu* which means that whenever a case is very close to another they could be given the same rule could not be applied in currency exchange because it will lead directly to *ribā*. Thus, Ibn 'Abd al-Bar maintained that even a delay of one hour or just the disappearance of one of the contracting parties from the session of contract is not permissible.⁴³

It is worth noting that the Islamic fiqh Academy in its resolution regarding *salam* has opted for the Mālikī opinion that the price of *salam* could be delayed for three days.

To summarize the implications of delaying the price of *salam* for three days according to the permissibility or not of the forward contract we would like to point out to the following:

- There is no explicit *ḥadīth* (*naṣ*) which states that the price of *salam* must be paid at the formation of the *salam* contract.
- Muslim scholars relied on the '*ḥadīth*' of *bay' al-kāli' bi al-kāli'*, which prohibits the sale of debt for debt, to stipulate it as a condition in *salam* that the price of *salam* must be paid in advance to avoid the possibility of *salam* becoming a kind sale of debt for debt. However, it should be noted that the *ḥadīth* of *bay' al-kāli' bi al-kāli'* is not directly connected to *salam*. It is about a general principle extended through jurisprudential analysis to the case of *salam*.
- It is agreed among Shariah scholars that the *ḥadīth bay' al-kāli' bi al-kāli'* is weak and, therefore, could not be the basis for a genuine argument.
- Even the claim that that an *ijmā'* (consensus of Muslim scholars in specific issue) had materialized on the issue is also disputed.
- It is most probable that Muslim scholars also relied on the traditionally conceived concept of *salam* as practiced at that time where the price shall be paid in advance. However, this traditionally conceived concept of *salam* by which the price of *salam* must be paid in advance is also contested. For instance, Ibn Hajar in his definition of *salam* stated that "It is the sale of something prescribed in the *dhimmah*.". He added that the phrase that "on condition that the price is paid

⁴³ Ibn 'Abd al-Bar, *al-Kāfi*, vol. 2, p. 4.

at the spot” is questionable because it is not an integral part of the nature of *salam* (*laisa dākhilan fi ḥaḳīqatihi*).⁴⁴

- The centrality of the issue of *riba* and *gharar* in this specific issue is clear in the discussion of Muslim scholars. The whole concept of the prohibition of the sale of debt for debt of which the deferment of both countervalues is one aspect is prohibited mainly on the grounds of the possible existence of either *riba* or *gharar*.⁴⁵
- On the basis of similar grounds, the Malikis have limited the permissibility of delaying the price of *salam* for a period of three days to commodities only. This concession is not applicable to currency exchange or *ṣarf*. For the Maliki, in the case of currency exchange or *ṣarf*, even a delay of going inside a house to bring the exchanged currency is not allowed because this will lead to *riba* prohibited in an explicit authentic *ḥadīth* stating that it should be “hand to hand.” This is the difference between the permissibility of delay for three days in *salam* and the nonpermissibility of such a delay in currency exchange. It is based on the existence and nonexistence of *riba*. It is also argued that the deferment of the subject matter in *salam* constitutes by itself a *gharar* in contrast to the standard sale contract where both countervalues shall be delivered at the formation of the contract. However, *salam* is accepted by way of exception in compliance to the authentic *ḥadīth* of the Prophet. Therefore, allowing a deferment of the price besides the deferment of the subject matter would mean additional *gharar*, which will render the contract void. Therefore, a delay of three days involves only a limited degree of *gharar* and therefore should be allowed. However, as explained, the assumption that *salam* is accepted by way of exception and therefore, it involves *gharar*, is rejected by some early *Fuqahā* (Shariah scholars) as well as modern scholars such Ibn Taymiyyah ibn Qayyim, al-Izz Ibn Abdal-Salam al-Darir, Nazih Hammad, Ajil Jasim, Ahmad Ali Abdullah and others.

⁴⁴ See Ibn Hajar al-Asqalānī. *Fath al-Bārī. bi Sharḥ Saḥīḥ al-Bukhāri*, Maktab al-Kulliyāt al-Azhāriyyah, vol. 9, p. 305. Dasūqī, Mohammad Ibn Aḥmad Ibn ʿArafah (n.d.) *Hāshiyat al-Dasūqī ʿalā al-Sharḥ al-Kabīr*, vol. 3, p. 197. Ibn Rushd., Mohammad Ibn Aḥmad. *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, vol. 2, p. 204. Nihāyat al-Muhtāj, vol. 4, p. 187. al-Fatāwāal-Hindiyyah, vol. 3, p. 187.

⁴⁵ See Ibn Rushd., Mohammad Ibn Aḥmad. *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, vol. 2, p. 202; Ibn Qudāmah, Muwaffāq al-Dīn al-Mughnī. vol. 4, p. 328; Ṣiddīq al-Ḍarīr. 1996. “al-Salam wa Tatbiqatuhu al-Muʿasirah”, *Majallat Majmaʿ al-Fiqh al-Islāmī*, ninth session.9 (1) vol. 1, pp. 392; Mohammad al-Mukhtār al-Salāmī. 2000. “Taʿjil al-Badalayn fi al-ʿUqūd” *Nadwat al-Barakah*, no. 19, 2000, pp. 2–5.

Thus, a standard *salam* contract does not involve *gharar* despite the deferment of the subject matter because it is allowed by the Shariah as a standard rule, not an exception, and therefore there is no *gharar*.⁴⁶ In addition, as it is well explained by al-Darir, Muslim scholars agree that “even if there is a level of *gharar* in a specific contract and there is a real need for this contract this *gharar* would be tolerated and it will not invalidate the contract.”⁴⁷

- The possible justification to this limitation of three days by the Malikis, in the case of *salam* in commodity and not in *ṣarf*, is primarily the application of the maxim *ma qārab al-shai’ yu’tā hukmahu*, which means that whenever a case is very close to another they could be given the same rule. First of all, the Malikis consider the sale of debt for debt where both countervalues are deferred as the weaker form of the sale of debt for debt for the simple reason that there is no possibility of *riba* in this case. Second, *gharar* is less in this case than it is in other cases of sale of debt. Another possibility is the prevailing custom. Thus, Ibn Shas, a Maliki scholar said “It is not permissible to include *khiyār al-sharṭ* in currency exchange. However, it is permissible in *salam* for a delay in payment of two or three days because he (the buyer) may need to consult others for a period during which the subject matter will not be affected by any change. Otherwise, the transaction will be a *kind of bay’ al-kāli’ bi al-kāli’*.”⁴⁸ Therefore, it is clear that “The condition that the price of *salam* should be paid at the formation of the contract is stipulated by early scholars in line with their economic conditions” as rightly observed by Mukhtar al-Salami.⁴⁹
- On the other hand, the Maliki’s option to delay the price of *salam* for three days seems to be a subjective limitation. Why three days and not one day or even twenty or thirty days? Does this differ from one *salam* contract to another *salam* contract? Is this different from one

⁴⁶ See Ibn Qayyim, *‘Ilam al-Muwaqq’in an Rab al-‘Alamin*, vol. 1 p. 350; Ibn Hajar al-Asqalānī. *Fath al-Bārī. bi Sharḥ Saḥīḥ al-Bukhārī*, Maktab al-Kulliyāt al-Azhāriyyah, vol. 9, p. 305; ‘Izz Al-Dīn Ibn ‘Abd al-Salām. 1968. *Qawā’id al-Aḥkām fi Maṣāliḥ al-Anām*. vol. 2, pp. 111–112; Nazih Ḥammād. 1996. “al-Salam wa Taṭbiqātuhu al-Mu’āshirah”, *Majallat Majma’ al-Fiqh al-Islāmī*, pp. 553–555; Majma’ al-Fiqh al-Islāmī, *Majallat Majma’ al-Fiqh al-Islāmī*, (discussions about *salam*), ninth session, 1996, no. 9, vol. 1, p. 643; Şiddiq al-Ḍarīr (1995), *Al-Gharar wa Atharuhu fi al-‘Uqūd*, p. 461.

⁴⁷ See *Majallat Majma’ al-Fiqh al-Islāmī*, no. 9, vol. 2, p. 325 & pp. 333–334; Ibn Qudāmah, *al-Mughnī*, vol. 4, p. 326; Ibn Abidin, *Ḥashiyat Ibn Abidin*, vol. 4, p. 284.

⁴⁸ See Ibn Shas, *al-Jawahir al-Thaminah*, vol. 2, p. 461.

⁴⁹ See *Majallat Majma’ al-Fiqh al-Islāmī*, 1996, no. 9, vol. 234.

subject matter of *salam* of contact to another and from one custom to another? The application of this concept by the Maliki school reflects its subjective nature. Thus, even within the Maliki school the ruling may differ if the delay of three days or more is agreed upon by the parties at the formation of the contact or not, and whether the price of *salam* is paid in kind or not.⁵⁰ As al-Ashgar rightly put it in his argument against the Maliki opinion, “If delay for two or three days is permissible it should be permissible for more than that if the economic conditions changed and such a delay will lead to instability and dispute.”⁵¹ Al-Ashgar seems to be right in concluding that if delay for two or three days is permissible, it should be permissible for more than three days if the economic conditions changed. However, his argument that such a delay may lead to dispute is questionable. The practice of the modern forward contract is obvious and shows that there is no instability or dispute in such cases.

- Thus, for the *Fiqh* Academy to follow the Maliki opinion is enough by itself to show that delay of both countervalues in *salam* does not invalidate the contract regardless whether this delay is for three days or more or less if the economic conditions have changed. Yet, as we have explained, the limitation to three days is subjective. Therefore, if it is permissible to delay the price in *salam* for three days it will be permissible to delay it even for more than three days. In contrast, if the delay by itself invalidates the contract, and the length of the delay, even of one day or one hour will invalidate the contract as is the case with currency exchange or *ṣarf*. Moreover, if a delay for three days is permissible in *salam*, which is allowed not as an exception but as a principle, it will be permissible to delay longer than that with regard to the forward contract by way of analogy based on the argument followed in the present study that *salam* is in line with *qiyās* and not against it, and, therefore, it could be the basis for *qiyās*.

Based on the above argument and the fact that *salam* is in line with *qiyās* and not against it, we could say that the modern forward contract is a valid contract by way of analogy to *salam*.

⁵⁰ See al-Hattab, *Mawahib al-Jalil Sharh Mukhtasar Khalil*, Maktabat al-Najat, vol. 4, pp. 514–517; *al-Khirshi ala Mukhtasar Khalil*, Dar Sadir Beirut, vol. 5, pp. 202–204.

⁵¹ al-Ashqar, “Aqd al-Salam” in *Buhūth Fiqhiyyah fi Qadāyā Iqtisādiyyah Mu’asirah*, Dār al-Nafā’is, 1998, vol. 1, p. 193.

Istiṣnāʿ and the Forward Contract

Besides *salam*, the conventional forward contract has also some similarities with the contract of *istiṣnāʿ*, which is a contract for selling a manufacturable thing with an undertaking by the seller to present it manufactured from his own material, with specified descriptions and at a determined price.⁵² As in the case of *salam*, for the contract of *istiṣnāʿ* to be legal, several conditions should be fulfilled. Those conditions are:

1. The object of the contract must be precisely determined both in its essence and quality.
2. The time of delivery must be specified (short or long) to avoid confusion of date of delivery, which may otherwise lead to conflict between the parties.
3. The manufacturer should supply the material. If the material is supplied by the buyer, the contract is *ijāra* and not *istiṣnāʿ*.
4. The place of delivery should be specified if the commodity needs loading or transportation expenses. In addition, it is important to note that unlike *salam* it is not a condition in *istiṣnāʿ* to advance the payment, though it is permissible to do so. Otherwise it could be deferred or made in instalments. Moreover, it is not a condition that the seller be an expert in manufacturing.⁵³

Thus, *istiṣnāʿ* is more in line with the conventional forward contract where the price is not paid in advance as well. However, according to the majority of Muslim jurists, *istiṣnāʿ* cannot be applied to commodities that are normally available in the market. It is basically a manufacture or production contract unlike *salam*, which is basically a trading contract. Thus, a seller agreeing to provide a product in the future under *istiṣnāʿ* will have to be a producer or have to establish a parallel contract with a producer.⁵⁴ It is clear from the contractual specifications of *istiṣnāʿ*

⁵² Muṣṭaphā al-Zarqā, 'Aqd al-Istiṣnāʿ wa madā Ahammiyatuhu fi al-Istithmārāt al-Muʿāṣirah, (Lecturer series of renowned scholars no. 12.), Jeddah Islamic Development Bank, 1995, p. 12.

⁵³ See Islamic Fiqh Academy's resolution no. 66 /3/7 on *istiṣnāʿ*; Muṣṭaphā al-Zarqā 'Aqd al- *istiṣnāʿ* wa madā ahammiyatuhu fi al-Istithmārāt al-Islāmiyah al-Muʿāṣirah, Islamic Development Bank, Jeddah, 1995, p. 11; Muhammad al-Bashir Muhammad al-Amine, *Istiṣnāʿ in Islamic Banking and Finance: The Law and Practice*, A.S. Nordin, Kuala-Lumpur, Malaysia, 2001, pp. 48-53.

⁵⁴ Ibid.

that it is almost the same as the modern forward contract. It should be noted that the deferment of price in *istiṣnā'*, according to the classical scholars, is allowed on the basis of *istiḥsān* and need rather than norms. Therefore, one may argue that the need for the modern forward contract is similar to that of *istiṣnā'* if not *moreso*. Thus, it should be allowed on the same grounds. The difference between *istiṣnā'* as a production contract and the modern forward contract as a trading contract should not be used as an excuse to reject the forward contract.

It is noteworthy that although *salam* and *istiṣnā'* are not typical forward contracts, they do fulfill some of its benefits. The following example will illustrate. Suppose the defense department of a country needs for its army one million uniforms which would require about six million meters of cotton cloth. It is not possible for any supplier to provide these uniforms from its ready stock. The supplier approaches the largest textile manufacturer. Looking at his present commitment, the manufacturer would require about twelve months to manufacture and deliver six million meters of cloth. The manufacturer will not be able to deliver the cloth on time if for some reason the raw cotton goes into short supply after six months, when he would need it. Therefore, to be on the safe side he enters into a firm commitment with wholesale dealers of raw cotton to start supplying after five months and continue its supply over the next six months. The wholesale dealers enter into an agreement with farmers to supply raw cotton at the required future date. The price to the farmers is settled in advance. Looking at their costs and the sale price, the farmers can decide on their acreage for cotton and make efforts to control their expenses.

In this chain, a number of agreements take place. The farmers agree to supply raw cotton to the wholesalers, who agree to supply it to the textile manufacturer. The manufacturer agrees to supply the cloth to the contractor supplier who arranges to stitch uniforms and supply them to the defense department. At each stage the price is settled in advance while the object of sale is not in existence.

The contract between the supplier of the uniforms and the defense department and between the supplier of the uniforms and the textile manufacturer is covered by the rules of *bay' al-istiṣnā'*. Under *bay' al-istiṣnā'* the two parties can agree on the sale of a nonexistent product as it is elaborated. A certain percentage of the sale price as an advance is also permissible. The contracts between the textile manufacturer and the wholesaler and between the wholesaler and the farmer are covered

by the law of *bay' al-salam*.⁵⁵ Thus, in this transaction *istiṣnā'* and *salam* achieved some of the benefits of the conventional forward contract. However, this may not be always the case and there is a need for the adoption of the forward contract in Islamic finance.

Ibtidā' Al-Dayn Bi Al-Dayn and the Forward Contract

The sale of debt for debt, called by the Mālikīs *ibtidā' al-dayn bi al-dayn* (deferment of both countervalues), is at the core of forward trading. Therefore, we shall try to discuss it briefly here while deferring the detailed discussion on debt trading to our analysis of *bay' al-dayn bi al-dayn* in general. The different schools of law have prohibited this form of sale of debt, for various reasons. For some the sale involves *ribā* while for others it is *gharar*. The Mālikīs consider this form of *bay' al-dayn bi al-dayn* as one of the lesser evils.⁵⁶

Rafīq al-Maṣrī, for instance, argued that no extra *gharar* is involved in deferring both countervalues compared to the deferment of one of them only. In other words, if one of the countervalues has been delivered while the other is deferred for a future date or both of them are deferred, the level of risk is the same and there is no possibility of extra *gharar*. Let us assume a case where a buyer receives a commodity but defers the payment of the price; there is a possibility that during this period the price of the commodity may fluctuate. Therefore, one of the parties will bear the impact of this fluctuation. It could be the seller if the spot price goes up or the buyer if the opposite happens. This is what always occurs in the case of *salam*. The risk will be the same even if both countervalues are deferred. Of course, in the case of deferment of just one countervalue, one of the parties to the contract will benefit from his receipt either of the commodity in the deferred sale or the price in the case of *salam*. However, the *gharar* remains the same, even if both countervalues have been deferred. Both parties will share the instant

⁵⁵ See Muhammad Akram Khān, "Commodity Exchange and Stock Exchange in Islamic Economy," *American Journal of Islamic Social Science*, vol. 5, issue. 1, 1988, pp. 96–97.

⁵⁶ See for instance, al-Jaṣṣaṣ, *Aḥkām al-Qur'ān*, Dār al-Fikr, Beirut, vol. 1, p. 483; al-Shāfiī, *al-Umm*, al-Sha'ab, Cairo, vol. 3, p. 87; al-Nawawī, *al-Majmū'*, vol. 9, p. 435. Ibn Taymiyyah, *al-Qiyās*, Dār al-Āfāq al-Jadīdah, Beirut, 1982, p. 16.

risk, as it is in the case of *mushārah*. Therefore, in a case where the price remains stable both parties will not be affected. However, if the prices go down, the buyer will be affected as opposed to the seller. Thus, there is no difference in the level of risk in both situations, and there are no grounds for the claim made by some scholars that the risk or *gharar* would be greater if both countervalues were deferred.

On the other hand, it should be noted that there is a need for such a sale (where both countervalues are deferred, that is, the forward contract), similar to the need for *salam*. It is possible that someone may be in need of a commodity in the future and he may not possess the money for it at the time of the contract or he may want to pay it by installments. Therefore, the forward contract will solve such a problem. At the same time, the seller may not be in need of the payment as the case of *istiṣnāʿ* and *tawrīd* contracts (forward contracts).

Rafiq al-Maṣrī went on to argue that only the Ḥanafīs allowed the deferment of both countervalues in *istiṣnāʿ* based on *istiḥsān*, making it a separate contract from *salam*. Therefore, it will be useful if the deferment of both countervalues is allowed in the sale using a *tawrīd* or (forward contract) on the same ground.⁵⁷ He concluded that the sale where both countervalues are deferred may sometimes involve a benefit for the contracting parties and since the *ḥadīth* concerning the prohibition of *bayʿ al-kāli bi al-kāli* is not authentic, then it is irrelevant to think that this contract and other similar contracts are against *sharīʿah* rules. Indeed, we acknowledge that some cases involving the deferment of both countervalues may involve harm or a suspected interest. However, this does not apply to all cases, such as, for example, the contract of *tawrīd* (forward contract). It is possible to accommodate this contract on the basis of the general principles without resorting to *istiḥsān* (departure from a ruling in a particular situation in favour of another ruling, which brings about ease).⁵⁸ Furthermore, the objective of the forward contracts or *ʿuqūd al-tawrīd* is to satisfy the need of some public institutions, factories, and construction companies, which are in need of certain materials on a specific date and may not be in need of the money at the time of the contract. This is in contrast to the

⁵⁷ For more details, see Rafiq al-Maṣrī, *al-Jāmiʿ fiʾUṣūl al-Ribā*, Dār al-Qalam, Damascus, 1991, pp. 339–344.

⁵⁸ *Ibid.*, pp. 346–347.

objective of paying the cost at the time of the contract in *salam*, which is to finance the seller.

Refuting the claim of involvement of *gharar* that might lead to dispute due to the deferment of both countervalues, Mukhtār al-Salāmī observed that the basic possibility of dispute is present in all forms of transactions, which did not render these transactions invalid. However, if it is argued that the possibility of dispute is higher in the case of the deferment of both countervalues, then this is not true. The contracting parties will specify clearly the price and the subject matter in a written agreement. Therefore, the possibility of dispute is minimal and the history of transactions in the future contracts market testifies to that.⁵⁹

It should be noted in this connection that the very conservative view taken by the majority of classical Muslim scholars is based on their misconception that a *salam* contract is admitted or legalized against the norms or *qiyās*.⁶⁰

Bay' Al-Şifah and the Forward Contract

Bay' al-şifah is the sale of something, well described, that is not present at the time of contract but will be delivered in future.⁶¹ Although the sale by description or *bay' al-şifah* is accepted by the Ḥanafīs⁶² and Ḥanbalīs,⁶³ the approach taken by the Mālikīs⁶⁴ is more in line with our analogy between *bay' al-şifah* and the forward contract. The Ḥanafīs validate the sale by description or *bay' al-şifah* and they guarantee the buyer the option of inspection (*khiyār al-ru'yah*) whether the subject matter of the contract is presented according to the agreed upon conditions or not.⁶⁵ On the other hand, the Mālikīs and Ḥanbalīs guarantee

⁵⁹ Mukhtār al-Salāmī, "Ta'jil al-Badalain fi al-'Uqūd," paper presented in Nadwat al-Barakah al-Tāsia'h 'Asharah lil iqtisād al-Islāmī, Makkah al-Mukarramah, 2–3 December 2000, p. 3.

⁶⁰ Al-Kāsānī, *Badā'ii al-Sanā'ii*, al-Matb'ah al-Jamāliyyah, Egypt, 1967, vol. 5, p. 201; Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaşid*, Dār al-Kutub al-Ḥadīthah, Egypt, vol. 2, p. 228; and al-Buhūti, *Sharḥ Muntahā al-Irādāt*, Egypt, vol. 2, pp. 218–221.

⁶¹ See Ibn Rusd, *al-Muqaddimāt al-Mumahhadāt*, Beirut, Dār al-Gharb al-Islāmī, 1988, vol. 2, p. 76.

⁶² See Ibn 'Ābidīn, *Rad al-Muhtār 'alā al-Dur al-Mukhtār*, Dar al-Kutub al-'Ilmiyyah, Beirut, vol. 4, p. 21.

⁶³ al-Buhūti, *Sharḥ Muntahā al-Irādāt*, Egypt, vol. 2, pp. 218–221.

⁶⁴ Al-Dirdīr, *al-Sharḥ al-Kabīr 'alā Khalīl*, Beirut, Dār al-Fikr, Beirut, vol. 3, p. 27.

⁶⁵ *Ibid.*

the buyer the right to *khiyār al-ru'yah* only when the commodity is presented without fulfilling the conditions required.⁶⁶ However, the Mālikīs and Ḥanbalīs differ in the mode of payment. It is a principle in the Mālikī school⁶⁷ that the price must not be paid at the time of the conclusion of the contract in contrast to the principle in the Ḥanbalī school.⁶⁸ Moreover, according to the Mālikīs, *bay' al-ṣifah* is permissible in everything, while the Ḥanbalī school restricts it to what is permissible in *salam* only. The above concept of *bay' al-ṣifah* in the Mālikī school is in line with our analogy.

On the possibility of accommodating the conventional forward contract as a kind of *bay' al-ṣifah*, 'Abd al-Wahhāb Abū Sulaimān maintained that first, *bay' al-ṣifah* and then, the forward contract, are based on a detailed description of the subject matter, relying on previous observation. Second, in both contracts the subject matter is absent and the parties have a real intention to fulfill the contract and want it to be executed according to the time and place specified. Third, both contracts fulfill the characteristics of *bay' al-ṣifāt* (sale by description) and not *bay' al-'a'yān* (the sale of objects in rem). Lastly, in both contracts both contrevalues are deferred although the price could be paid by installments as well.⁶⁹

Given the close similarities between the two contracts and the fact that the conventional forward contract is immune from *ribā* and *gharar*, which are the most commonly advanced arguments to invalidate it, we could say the forward contract is a valid contract in Islamic law. The forward contract is immune from *gharar* in the sense that the possibility of the seller not being able to make delivery (due to difficulties in getting the subject matter of the contract) is very remote and could not be compared to cases of "birds in the sky" or "fish in the deep sea," which represent the standard concept of *gharar*. Similarly, there is no risk regarding the subject matter of the contract since it is well defined and not similar to cases such as "I am selling to you what is in my hand" or "what is in my box" without showing it.⁷⁰

⁶⁶ al-Zurqānī, *Sharḥ al-Zurqānī 'alā Muqtaṣar Khalīl*, Beirut, Dār al-Fikr, Beirut, 1978, vol. 5, p. 38; Ibn Qudāmah, *al-Mughnī*, Dār al-Fikr, Beirut, vol. 4, p. 56.

⁶⁷ Al-Dirdir, *al-Sharḥ al-Kabīr 'alā Khalīl*, Beirut, Dār al-Fikr, Beirut, vol. 3, p. 27.

⁶⁸ al-Buhūtī, *Kashshāf al-Qinā'*, vol. 3, p. 164.

⁶⁹ See 'Abd al-Wahhāb Abū Sulaimān, "Aqd al-Tawrīd Dirāsah Fiqhiyyah Taḥlīliyyah," paper presented to the twelfth session of the Islamic Fiqh Academy, Rabat, Morocco, pp. 2–3.

⁷⁰ *Ibid.*, pp. 44–47.

Aḥmad ‘Ali ‘Abd Allāh has also argued in favor of the permissibility of the forward contract by analogy to *bay‘ al-ṣifah*. He maintained that *salam* is accepted according to the norms of *shariah* and it is not against *qiyas* as it is claimed by many scholars. Therefore, we can make an analogy by considering the *salam* a kind of *bay‘ al-ṣifah* in order to accommodate the conventional forward contract. He also refuted the claim that it is part of the prohibited sale of debt for debt or the sale of what is not with you.⁷¹

*Nonexistence of the Subject Matter and
the Forward Contract*

The importance of studying the existence of the subject matter of a contract during the conclusion of a forward contract lies, first of all, in the fact that the forward contract is basically a future trading contract where the matter is nonexistent at the time of the contract. Second, due to their interpretation of the *ḥadīth*, “Do not sell what is not with you,”⁷² many scholars have rejected the forward contract because it is not similar to *salam*. They argued that it must fulfill all conditions of *salam* in order to be legal. However, for Ibn Qayyim there is nothing in the *sharī‘ah* which is against *qiyās*. Moreover, everything which is supposed to be against *qiyās* is in fact inseparable from one of two things: either the *qiyās* or analogy itself is not valid or there is no textual evidence to prove that the rule under discussion is from the *sharī‘ah*, because the genuine *qiyās* represents the justice for which Allah (s.w.t.) has sent His Messenger. Therefore, there is nothing in the *sharī‘ah* which contradicts the genuine *qiyās*.⁷³ Even the contract of *salam*, which has been accepted by some scholars only due to the specific *ḥadīth* concerning it, is considered against *qiyās*, although for Ibn Qayyim it is in accordance with *qiyās*.⁷⁴ Ibn Qayyim refutes the claim of certain scholars that the sale of nonexistent things is prohibited in Islamic law. He argues that there is no evidence from the Book of Allah, the Sunnah of His Prophet, or the saying of any of the Companions that the sale of a nonexistent item is

⁷¹ Aḥmad ‘Ali ‘Abd Allāh, “al-Bay‘ ‘alā al-Ṣifah,” pp. 3–15.

⁷² Abū Da‘ūd, *Sunan*, *ḥadīth* No. 2187.

⁷³ Ibn al-Qayyim, *I‘lām al-Muwaqqi‘in ‘an Rabbi al-‘Ālamīn*, Dār al-Kutub al-‘Ilmiyyah, Beirut, Lebanon, 1991, vol. 1, pp. 383–4.

⁷⁴ *Ibid.*, vol. 1, p. 399.

illegal, but rather what is reported in the Sunnah is the prohibition of some existing items and some nonexistent ones as well. Therefore, the *ratio decidendi* of this prohibition is not the existence or the nonexistence of the subject matter. What is at issue in the Sunnah is the prohibition of any kind of sale involving risk (*gharar*), where it is impossible to deliver the item, whether it exists or not.

Furthermore, the Lawgiver has permitted the sale of some nonexistent items in certain cases, such as the sale of fruits, which have appeared on the trees but have not yet ripened and are therefore not of immediate use at the time of the contract.⁷⁵

After elaboration of the basic principles related to this *ḥadīth*, we now move on to the issues concerning interpretations of the *ḥadīth*. They are as follows:

1. “Do not sell what is not with you” means not to sell what one does not own (*la tabi‘ma laisa ‘indaka*) at the time of sale. One of the basic requirements of sale, as al-Kāsānī stated, is that the seller owns the object of sale when selling it, failing which the sale is not concluded, even if the seller acquires ownership later. The only exception is the *salam* sale, where ownership is not a prerequisite. According to this interpretation, al-San‘ānī stated that this phrase implies that it is not permitted to sell something before owning it. Ibn al-Humām and Ibn Qudāmah similarly concluded that a sale involving something that the seller does not own is not permitted even if he/she buys and delivers it later.⁷⁶
2. Some other jurists and *ḥadīth* scholars hold that this *ḥadīth* applies only to the sale of specified objects (*al-‘a‘yān*) and not to fungible goods, as these can be substituted or replaced with ease. Al-Baghawī⁷⁷ and al-Khattābi,⁷⁸ in contrast, are among the scholars who stated that this prohibition is confined to the sale of objects in rem (*buyū‘ al-‘a‘yān*) and does not apply to the sale of goods by description (*buyū‘ al-ṣifāt*). Hence, when *salam* is concluded for fungible goods that are readily available in the locality, it is valid even if the seller

⁷⁵ Ibn Qayyim, *I‘lām al-Muwaqqi‘in*, vol. 1, p. 219.

⁷⁶ Muhammad Ibn Ismā‘il al-San‘ānī, *Subul al-Salām Sharḥ Bulūgh al-Marām*, al-Maktabah al-Tijāriyyah, Cairo, n.d., vol. 3, p. 17.

⁷⁷ al-Baghawī, Abū Muhammad al-Ḥusayn, *Sharḥ al-Sunnah*, al-Maktab al-Islāmī, Damsqus, n.d., vol. 8, pp. 140–141.

⁷⁸ Al-Khattābi, *Ma‘ālim al-Sunan*, Cairo, Matb‘at al-Sunnah, n.d., vol. 5, p. 143.

does not own the object at the time of contract. Al-Khattābī has said that this *ḥadīth* refers to the sale of specific objects for the Prophet permitted deferred sales of various kinds, in which the seller did not have the object of sale at the time of contract. In essence, this prohibition seeks to prevent *gharar* in sales (e.g., a runaway camel, uncertainty over delivery, and sale of someone's property without his or her permission).

3. A third position is that a sale of "what is not with you" means the sale of what is not present and what the seller cannot deliver. This is the view of Ibn Taymiyah, who stated that the emphasis is on the seller's inability to deliver, which entails risk-taking and uncertainty (*mukhāṭarah wa gharar*). If the *ḥadīth* were taken at face value, it would proscribe *salam* and a variety of other sales. However, this is obviously not intended. The Prophet forbade Ḥakīm Ibn Ḥizām to sell the particular objects either because he might not own them or because he might not be able to deliver them. The latter reason is more likely to be the basis for the prohibition, otherwise the cause or 'illah is available even in *salam*. Some Mālikis held similar views. It is quite possible that the seller owns the object but is unable to deliver it, or that the seller possesses the object but does not own it. In either case, the sale would fall within the purview of this *ḥadīth*. Therefore, the *ḥadīth* underlines neither ownership nor possession, but rather the seller's effective control and ability to deliver. Therefore, the only effective cause of the prohibition ('illah) is *gharar* on account of one's inability to deliver.⁷⁹

Finally, some contemporary legal writers such as 'Alī Abd al-Qādir,⁸⁰ Yusuf Mussā,⁸¹ and Yusuf al-Qaradāwī⁸² have considered the changes of the market in the present circumstances compared to the time of the Prophet. During the Prophet's time the market was so small that it did not give the assurance of regular supplies at any given time. In contrast, the modern markets are regular and extensive, which means that the seller can find the goods at almost any time and make delivery

⁷⁹ al-Baghawī, Abū Muhammad al-Ḥusayn, *Sharḥ al-Sunnah*, vol. 8, pp. 140–141.

⁸⁰ 'Alī Abd al-Qādir, "Ta'qīb 'alā Rai' al-Tashrī' al-Islāmī fi Masā'il al-Burṣah," p. 439.

⁸¹ Muhammad Yousuf Musa, al-Buyū' wa al-'Amaliyyāt al-Māliyyah al-Mu'āshirah, Cairo, Dār al-Kitāb al-'Arabī, 1954, p. 193.

⁸² al-Qaradāwī Youssuf, *Bay' al-Murābahah li al-'Āmir bi al-Shirā' Kamā Tujrīh al-Mašārif al-Islāmiyyah Dirāsah fi Daw' al-Nuṣūṣ wa al-Qawā'id al-Shar'iyyah*, Cairo, Maktabat Wahbah, 1987, p. 19.

as may be required.⁸³ Therefore, the possibility of *gharar* or a dispute is not present here.

However, despite the numerous Islamic principles by which the conventional forward contract could be accommodated and despite the weakness of the different arguments advanced against its legality, some scholars⁸⁴ still insist that if the forward contract is considered a binding contract, then it is an invalid contract. Therefore, according to these scholars, to meet the real need for such a transaction, it must be considered as a mutual promise between the two parties but not a contract. Thus, both parties must fulfill their promise but if one of them cannot do so for genuine reasons, he will not be obliged to do so. But if he fails to meet his obligations without genuine reasons, he shall be obliged by the court to pay damages to the affected party.

However, it should be noted that despite the fact that these scholars attempted to draw a distinction between a contract and a promise that is binding upon both parties, it seems difficult to maintain these differences in practice.

Thus, we argue that the conventional forward contract has great benefits and it could be accommodated in Islamic law whether under the general theory of contract and conditions or by analogy to *salam*, *'istiṣnā'*, or *bay' al-ṣifah*, since it does not involve *ribā* or *gharar*. Moreover, it is not included in the prohibited forms of sale of debt nor does it oppose the principle "do not sell what is not with you."

Before concluding our discussion of the forward contract in commodities, it is worth noting that although spot trading is basically a contract for the physical delivery, sometimes the contract may involve some elements of forwarding. Thus, for instance, in crude oil a spot trading is a contract for the physical delivery of crude oil as soon as possible. Because of the volume of the commodity involved in oil trading and the logistic difficulties of transporting it from place to place, it is fair to say that in respect to oil nearly all "spot" trading involves an element of passage of time or forwarding. Refineries often book oil into their refining runs several weeks in advance and although these are considered "spot" orders, the distinction between spot, forward,

⁸³ For further details, see Kamālī, "Islamic Commercial Law, An Analysis of Futures," *The American Journal of Islamic Social Sciences*, vol. 13, Summer 1996, no. 2, pp. 205–7.

⁸⁴ See Taqī al-Usmānī, "Uqūd al-Tawrīd wa al-Munāqaṣāt," paper presented at the twelfth session of the Islamic Fiqh Academy, pp. 3–11.

and other derivatives trading is not clear in all business.⁸⁵ Furthermore, if the permissibility of the forward contract in commodities is established as it has been elaborated, how about the exchange of gold on a deferred basis?

⁸⁵ Edward J. Swan, McKenna & Co., "Derivatives and the Control of Oil," Edward J. Swan, (ed.) *Derivatives Instrument Law*, Cavendish Publishing Limited, p. 52.