Islamic Contract Law
TYPES OF COMMITMENTS

1. Wa’d ( وعد) – Unilateral Promise
2. Muwaa‘adah (مواعدة) – Bilateral Promise
3. ‘Aqd (عقد) – Contract

Promises do not constitute contracts
ENFORCEABILITY OF PROMISES

• Islam prohibits rolling 2 contracts into one (safaqat-fi-safaqat).
• Modern financial transactions often need to combine 2 contracts into one eg Hire Purchase.
• As Islam prohibits client signing agreement binding him to 2 contracts at the same time eg rent and purchase, how can a bank structure an Ijara Mortgage where there is a rental element and purchase element?
• How can a Bank offer an Islamic Mortgage yet still prevent itself having to hold huge assets on the balance sheet and potentially suffer massive losses on property disposals?
• Solution is to make client sign one rental contract coupled with a legally enforceable promise to purchase the property exercisable at the end of the term.
• If client defaults in property purchase, Bank has legal resource assuming promise can be enforced.
ENFORCEABILITY OF PROMISES

• **General Shariah enforceability** – All classical and modern scholars accept a promise must be kept.

• **Shariah Court** – Classical scholars are divided on a Shariah court’s enforceability of such a promise. Many contemporary Ulema, including Fiqh Academy, partly in light of huge contract complexities for business have opined that promise in enforceable by Shariah courts.
AQD (CONTRACT)

- ‘Aqd literally means ‘to bind’.
- 3 types of contracts in Shariah:
  - Mu’aaawadha - معاوضة (Consideration)
  - Tabarru‘ – تبرع (Gift/Loan)
  - Dhimniyya – ضمنية (Supplemental Contracts)
KEY CONTRACT ELEMENTS

• Offer & Acceptance (الإيجاب والقبول)
• Qabdha (Possession) – Haqiqi/Hukmi
• Instant/Absolute Sale (بيع بات)
• No contingent (ملحق) elements/contracts
• Nature & Value of subject matter (مبيع)
• Identification of Subject matter
• Capacity of contractors (أهلية المتعاقدين)
• Delivery
• Price
VALID CONTRACTS

• For a contract to be valid it cannot be affected by Gharar.
• ‘Gharar can be defined as the uncertainty that is present in the basic elements of an agreement eg wording, subject matter, consideration and the liabilities’

• Other Ulema have defined Gharar as that level of uncertainty which can lead to disputes. Hence if a contract has uncertainty which is insufficient to lead to dispute then the contract is valid in the eyes of this group of Ulema.
LAW OF QABDHA

- Scholars have differing views on law of Qabdha and its applications to contracts.
- Prophet Mohammed (SAW) said ‘do not sell what is not with you’.
- Imam Abu Hanfiah, Imam Shafi & Imam Malik opine that this hadith means you cannot sell what you do not possess. Imam Ahmed IbnHanbal, Imam Ibn Taymiyyah & Ibn Al-Qayyim opine that possession is not the central issue it is the ability to deliver.
- Latter scholars say the Prophet (SAW) was responding to a query by Hakeem ibn Hizaam on whether or not he could enter into a contract to provide commodities which he did not have with him. These scholars feel that as Medina was a small market there was a possibility that Hakeem could have entered into a contract to supply an item and not then able to deliver it, hence the Prophet Mohammed (SAW) forbade it. This means that the real meaning behind ‘do not sell what is not with you’ is not to sell what you cannot deliver and not necessarily what you do not own.
- To this group of ulema, Salam (سلام) & Istisna’a (استصناع) are not exceptions to the rule but instead legitimate contracts in their own right.
- The above differing in views can have major consequences for the permissibility of certain types on contracts in Shariah eg options.
BAI MU’AJJAL – بيع مؤجل –

- Derives legitimacy from Surah Baqarah Meccans said ‘sale is like Riba’ and Allah SWT replied ‘Allah has made sale permissible and forbidden usury’
- **Payment Date** – must be fixed
- **Price** – must be fixed and cannot be increased or decreased later on. Discounts can only be given by sellers consent.
- **Penalties & Default** – Must be donated to charity
- **Securities** – can be taken
KEY DISTINCTIONS

• **Forward Sale** – Parties agree today to execute contract at some future point (typical promise in Islamic Mortgages).

• **Bai Mu’ajjal** – Contract executed today on commodity in existence with deferred payment and typically immediate delivery (as per Murabaha Mortgage).

• **Future’s** – Contract (offer & acceptance) executed today on non existent commodity with consideration to a future point.

• **Option** - Contract executed today giving buyer the choice of buying non existent commodity at some future point.
BUYER’S OPTIONS

• **Option to rescind** (خيار الشرط) - expires on contract execution
• **Option of inspection** (خيار الرؤية) – right to see and verify object of sale
• **Option of defect** (خيار العيب) – Right to return commodity if its defective
• **Option of quality** (خيار الوصف) – right to specified quality
• **Option of Price** (خيار الغبن) – right to fair price within market range
TYPES OF SALE

• **Bai Sahih** – Valid Sale where all contractual elements are present in the correct manner

• **Bai Baatil** – Void contract due to major defect e.g. gharar over subject matter

• **Bai Fasid** – Defective Sale, one which can be made sahih if defective element is corrected e.g. many contracts charge interest in case of default

• **Bai Makrooh** – Undesirable sale eg Jumma Salah time or intervention whilst 2 parties are negotiating.
SUMMARY

- Shariah had refined contractual law over a century prior to English Law.
- Shariah emphasises the importance of clearly defining key contractual elements such as subject matter, delivery and price in a manner in which it cannot lead to disputes.
- Dependent upon the varying contractual elements the status of the contract will either be valid or void.
- Future’s sales are not valid under Shariah according to most scholars as the subject matter must be owned (Qabdha) at the point of sale.
- An alternative view to the mainstream is held by Imam Hanbal, Ibn Taymiyyah & Ibn Al-Qayyim who stress that the possession of the subject matter is not the central pillar of sale but instead the ability to deliver it.