

# *Salam* Contract in Islamic Law: A Survey

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**Abstract:** Among the financing instruments used by Islamic banks, the generally most preferred are *murābaḥah*, *mushārahah* and *muḍārahah*. These instruments and the contracts regulating them are fairly well-understood. Less well understood are the terms and conditions of the *salam* contract, which Islamic banks also make use of. This contract is characterized by the advance payment of a price for a specified good that is delivered after a delay. As such, it raises many questions within both the economic and the *Shari'ah* framework. This study is an attempt to answer these questions. To do so, it presents in considerable detail, the principles and terms and conditions of the *salam* contract as discussed by the mainstream (Sunnī) schools of Islamic Law. The study will note both points of consensus and divergence among the scholars theorizing about the contract, and draw some of the implications of that theorizing for the use of the *salam* contract in Islamic financing.

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## **I. *Salam*: An Introduction**

Among the financing instruments used by Islamic banks, the generally most preferred are *murābaḥah*, *mushārahah* and *muḍārahah*. These instruments and the contracts regulating them are fairly well-understood.

*Murābaḥah* is a short-term instrument where banks buy the goods on the market to customer specification then sell the same to him at a price based on cost plus profit margin. *Mushārahah* and *muḍārahah* are long-term instruments that Islamic banks use, on the basis of profit and loss-sharing to manage or participate in mutual funds companies or to finance business enterprises in the fields of industry, commerce and agriculture.

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In a *mushārah* contract, the parties share profit or loss according to their share in the capital or as otherwise specified in the contract. In *mudārabah*, the financier carries all of any ensuing losses as reported by the working partner (*rabb al-‘amal*) who, in the event of loss, loses his time and effort spent in the project. In the event of the project being profitable, the profit is distributed according to the proportion specified beforehand in the contract.

Less well understood are the terms and conditions of the *salam* contract, which Islamic banks also make use of. This contract is characterized by the advance payment of a price for a specified good that is delivered after a delay. As such, it raises many questions within both the economic and the Sharī‘ah framework. This study is an attempt to answer these questions. To do so, it presents in considerable detail, the principles and terms and conditions of the *salam* contract as discussed by the mainstream (Sunni) schools of Islamic Law. The study will note both points of consensus and divergence among the scholars theorizing about the contract, and draw some of the implications of that theorizing for the use of the *salam* contract in Islamic financing.

To facilitate the discussion, we can begin by going over the terms that are used in the sources (see ‘Umar 1991):

- (i) The term *salam* applies to the contract as a whole and is also used to refer to the object or good which is to be delivered later.
- (ii) The term *al-musallim* refers to the owner of capital, the party purchasing the object or goods: hereafter, ‘the buyer’.
- (iii) The term *al-musallam ‘alayhi* refers to the party who takes on the obligation to deliver the object or goods at a future date: hereafter, ‘the seller’.
- (iv) The term *al-musallam fīhi* refers to the subject of the contract, the object or goods to be delivered: hereafter, ‘the sale object’.

Finally, the term *ra’s-māl al-salam* refers to the capital, the price paid in advance of delivery of the sale object, hereafter, ‘the price’.

The contract in general terms enables an advance payment (the price) for the sale of a defined good (the sale object) to be delivered later at a specified time, the minimum period before delivery being 15 days. The *salam* contract is among the kinds of sale that is exempted from the prohibition on selling something that is non-existent or that the seller does not hold in his position use of the word *salam* (or *salaf*) seals the contract

as the post-dated sale of something specified and characterized as owed (a debt) in exchange for another thing (the price) which is different from it in kind. Typically, the price is handed over at the time of contract (see Vogel and Hayes, 1998) while handing over of the sale object is postponed (Ibn Mawdud, n.d.). According to Mālikī rulings, however, it is permissible to delay the transfer to seller of the price for a maximum period of 3 days, unless the buyer has the price to hand, in which case no delay is permitted (see al-Mubārak, n.d.). Also atypically the minimum period of delay before delivery of the sale object may be shorter than 15 days if the object is nearby – say, at 2 or 3 days travel from the place of contract since the seller enters the contract at a point in time when he does not have possession of the sale object, the contract is variously described as the sale and it is deemed legally permissible precisely in order to respond to the sellers need for money without which he cannot enter into the transaction. As noted, the contract is sealed by using the word ‘*salam*’ or ‘*salaf*’ and specifying terms. Al-Nawawī (n.d.) states: “It is the sale of a defined thing [that is] owed,” *i.e.* a debt. For the Ḥanbalīs, *salam* is a contract about something that it is proper to sell and which is characterized as owed. According to Ibn Ḥanbal (n.d.) it is permitted by consensus of opinion and entered into by using any wording accepted as indicative of it.

There are nuances of variation in the general perspective of the four main Sunni schools on the *salam* contract. Shāfi‘īs define it as the selling of something that is specified and owed. They see it as a debt and therefore do not make it a condition that the period (within which the sale object is to be delivered) be defined. The Ḥanbalīs see *salam* as that which is handed over in exchange for something defined that is owed for a known period. The Ḥanafīs view is as a sale for a period, as the sale of an object bought and paid for in advance. They also see it as buying something postponed in exchange for something given in the moment, or as selling a time to come for the time now. Thus, it is a contract involving something that it is proper to sell, that is specified, that is owed; the delivery of it being postponed, in exchange for a price collected at the contract session. The condition attached here, namely that the price (the capital advanced) is handed over at the time of contract, avoids the prohibited transaction of one debt for another debt – money owed/promised in exchanged for a thing owed/promised. Ibn Qudāmah (1997) explains in *al-Mughnī*: “that is because the [to-be-] delivered article is a debt, and if the price was [also] a debt this would result in a debt-for-debt

transaction, which is prohibited by consensus". Similarly, Ibn 'Ābidīn (1966) affirms that this is "proper in relation to what is possible to describe [define] since it is a debt, which cannot be known except by description". And again in *al-Majmū'* (al-Nawawī, 2000): "The first condition of the [to be] delivered article is that it is owed, which means that it is a part of the borrowing and lending process."

The Mālikīs define *salam* as the sale of something owed and specified by description in exchange for a price, the delivery of the thing being put off for a time they permit postponement of the transfer of the price to the buyer for a period of no more than three days. For them, the *salam* contract is simply an exchange or substitution contract stipulating binding obligation on the seller to be fulfilled by him by delivery of the sale object, not any equivalent for it nor for ready money.

As *salam* is a type of exchange or substitution that results in a debt owed by the seller, it acquires the meaning of a transaction that involves both selling and buying *and* borrowing and lending ('Umar, 1991). The balance of scholarly consensus forms the view that *salam* represents a sale contract and is seen as such by the followers of Ḥanbalī, Ḥanafī, and Mālikī schools and by some Shāfi'īs.

The broad agreement among mainstream scholars that the *salam* contract has aspects resembling a debt contract has not prevented differences among them on related issues like transfer and accompanying guarantees. These differences may be summarized as follows ('Umar, 1991):

The Shāfi'ī and Ḥanbalī schools prohibit a transfer or *ḥiwālah* against a *salam* debt, as can be seen from this statement in *al-Majmū'*: "a transfer against a *salam* debt cannot be allowed because such a debt is not stable since it can be cancelled on the article for sale ceasing to be. It cannot be used for a transfer because this is only acceptable in cases where compensation can be obtained." Similarly, Ibn Qudamah (1997) states: "A transfer against *salam* debt is not allowed as this lacks stability and [this debt] is marked for cancellation."

Scholars are generally in agreement about the acceptability of securing guarantees for the *salam* such as collateral and sponsorship.

From the general description of the *salam* contract, it is one that could be applied to all commodities, metals, animals and livestock, produce and manufactured goods. In the view of some scholars, it can even be applied to utility. As we shall see from the discussion to follow, the *salam* contract also permits the delivery of the sale object by installments at specified times. The

sale object may be delivered promptly or its delivery postponed. Another mark of its flexibility is that the price can be in the form of cash, commodity, food or livestock (al-Qurrah Dāghī, 2001).

## II. Salam: Its Islamic Legitimacy

The Islamic legitimacy of the *salam* contract is based, to begin with, on its concordance with the Qur'ānic verse that forbids usury but permits/enjoins commerce:

Those who eat *ribā* will not stand (on the Day of Resurrection) except like the standing of a person struck by Satan leading him to insanity. That is because they say: "Trading is only like *ribā*," whereas God has permitted trading and forbidden *ribā*. (Qur'ān, 2:275)

The *salam* contract also conforms to the Qur'ānic instruction to write down/record any debt transactions: "O you who believe! When you contract a debt for a fixed period, write it down" (Qur'ān, 2:282). This verse, according to Ibn 'Abbās, "was revealed to address the *salam* in particular" (al-Mubārak, n.d.). We should note that 'debt' is comprehensive of whatever is owed and therefore may take the form not only of monetary loans but any objects like foodstuffs (e.g. wheat and barley), manufactured articles (e.g. paper, cars, machines) or raw materials (e.g. copper, iron, petroleum etc.), duly specified as to quantity and quality (al-'Ashqar, 1995). This explains the *tafsīr* attributed to Ibn 'Abbās, that the Qur'ānic verse 2:282 was revealed to address *salam* in particular, for in permitting lending, the verse has also permitted *salam* (al-Ashqar, 1995).

Also narrated from Ibn 'Abbās is the Prophetic *ḥadīth*: "when God's Messenger came to Madīnah, the people were paying one and two years in advance for fruits, so he said: 'Those who pay in advance for anything must do so for a specified weight and for a definite time.'" (Khān, 1985). The same is suggested by the following report narrated by Muḥammad ibn al-Majalid:

'Abdullāh bin Shaddād and Abū-Burdah sent me to 'Abdullāh bin Abī Awfā and told me to ask him whether the people in the lifetime of the Prophet used to pay in advance for wheat [to be delivered later]. 'Abdullāh replied, "We used to pay in advance to the peasants of Shām for wheat, barley and olive oil of a known specified measure to be delivered in a specified period." I asked: "Was the price paid [in advance] to those who [already] had [possession of] the things to be delivered later?" 'Abdullāh ibn Abī Awfā replied, "We did not use to

ask them about that.” Then they sent me to ‘Abd al-Raḥmān ibn Abzā and I asked him. He replied, “The Companions of the Prophet used to practice *salam* in the lifetime of the Prophet; and we did not use to ask the people whether they had standing crops or not.” (Khān, 1985)

After Qur’ān and sunnah, the highest source of legitimacy in Islamic law is juristic consensus or *ijmā’*. Ibn Qudāmāh (1997) states:

As for consensus, Ibn al-Mundhir asserts that all known authorities on the subject have upheld *salam*. He also claims that *salam* is “facilitation and an extension that closes up the door against usury. That is because the owner of business [the seller] needs financing for his farm, goods or trade while for the *salam* owner [the buyer] there is the benefit of investing his money and making good (*ḥalāl*) profits.”

Ibn al-Mundhir indeed affirms the consensus, adding a wonderfully concise illustrative definition of the contract:

The consensus of opinion is that permissible *salam* is when a man delivers to another some known and described food from the produce of common land of known measure and weight for a definite period in exchange for a known amount of money, the price having to be paid before they separate and leave their place of transaction, not forgetting to name the place where the food is to be handed over. If they did that, the deal would be appropriate. (al-‘Ashqar, 1995)

By analogy (*qiyās*) with a basic principle in Sharī‘ah law, the *salam* should be disallowed, namely the principle expressed in the Prophetic *ḥadīth* reported by Ibn ‘Abbās that, “He who buys food grain should not sell it until he has taken possession of it” (al-Nawawī, 2000). Mālikī, Ḥanbalī, Shāfi‘ī and Ḥanafī scholars all regard *salam* as a permissible contract, as a necessary relaxation of or exception to that principle. Ibn al-Qayyim more forthrightly says that is *not* an exception to a general rule because it is a self-contained, independent contract. Moreover, just as it is permissible in any sale transaction to delay payment of the price, so also it is permissible to postpone the other side of the sale transaction, namely delivery of the sale object (see ‘Umar, 1991).

### III. Salam: Its Principle Elements

The principal elements of *salam* are based on the elements applicable to a sale transaction. Ḥanafī scholars recognize as a principal element, alike for

*salam* and sale, only the buyer's affirmation and the seller's acceptance of the terms. By contrast, Mālikī, Ḥanbalī and Shāfi'ī scholars hold that these are three principal elements with respect to the contracting parties, making six elements in all (Muhammad, 1999).

- (i) The contracting parties: the seller and buyer
- (ii) The contracted: the price and the sale object
- (iii) The 'formula': (the buyer's) affirmation and (the seller's) acceptance.

### 3.1. The 'formula'

The formula refers to the *salam* statement made by the buyer (the capital owner) in respect of the price for the deferred sale object, and the acceptance thereof by the seller. For the followers of the *fiqh* Mālikī and Abu Ḥanīfah, it is permissible to use the same wording as for a sale transaction provided that the contract is free from a stipulated option (*khiyār al-shart*) that gives either party a right to rescind on an otherwise binding contract, *i.e.*, the *salam* contract is meant to be and must be binding. In fact, the scholars are in the main in agreement about the appropriateness of affirmation in the wording of *salam* (Muhammad, 1999) with the Ḥanafī, Shafi'ī and Ḥanbalī schools requiring the absence of a stipulated option. For them, the transfer of the price at the contract session is a condition for the validity of *salam*, whereas a stipulated option would prevent the transfer of the price from being effected. The Mālikīs allow the transfer of the price to be delayed for a maximum of three days, if the buyer does not have the price to hand – if he does, any delay in transferring the price renders the contract void.

The *salam* contract is binding in that neither party has the right to annul it without the other's satisfaction unless the sale object proves to be other than as specified. The seller is thus obliged to discharge his obligations towards the buyer with respect to the sale object, just as in any other sale contract. Thus, *salam* is not among those contracts in which either party is permitted to abrogate the contract without the other's approval, such as *mushārahah*, *muḍārabah*, or *qirāḍ*, *wikālah* and *wadī'ah* deposit contracts (Muhammad, 1999).

### 3.2. The price

The price is the subject about which the contract is drawn, *i.e.*, the *salam* capital which the buyer in effect lends to the seller. The condition attached to this arrangement is that the price should be a known sum and collected before

dispersal of the contracting parties from the contract session. As noted, a delay of 3 days maximum is permissible according to the Maliki school.

### 3.3. The sale object

There are conditions attached to the article for sale, which the seller has promised to hand over to the buyer in exchange for *salam* capital. These conditions are as follows:

- (i) It is fully described so that it is specified beyond doubt;
- (ii) It is of a known type, kind, amount and attribution;
- (iii) It should be described as a debt owed by the seller, but it cannot be something as concrete or definite as land or real estate, on which *salam* is not allowed;
- (iv) It should be practically possible for the sale object as specified to be delivered at the specified date;
- (v) The date of delivery should be definite and known to the parties;
- (vi) The place of delivery should be specified.

The comprehensive, overall rule governing *salam* can be summarized as follows: *salam* is permitted in whatever can be characterized so that there will be no ignorance of it and with the belief in its existence. This requires the parties to the contract to mention every description that has the potential to become a cause of dispute in the contract.

## IV. Conditions Related to the Price *Salam* Capital

To avoid any suspicion or uncertainty (*gharar*), the price must be made known in the contract in its kind, amount and description; it is not enough to see the price without knowing it precisely. That is because God has commanded that a debt be recorded in writing, on the grounds that this is fairer, more conducive to testimony, and less likely to engender doubt or suspicion later on. The general aim is to prevent potential disagreement (al-Ashqar, 1995). This becomes all the more important if, in the event it turns out that the seller is unable to deliver the sale object in part or whole at the time the contract matures.

The price or capital should be handed over at the contract session, and it is not permissible to delay it. This follows from the meaning of the Prophetic *ḥadīth* cited earlier which permits paying in advance “for a specified weight and a definite time.” Only the transfer of the price into the

possession of the buyer completes the act of lending, and it is required at the time of the contract. However, some researchers hold that this *ḥadīth* implies no reference to the delivery of capital at the contract session as a condition of the validity of the *salam*, and in any case present-day banking transactions distance *salam* from the risk of uncertainty (Muhammad, 1999). Separation of the parties prior to delivery of the price (the capital) would result in a debt-for-debt exchange, which is prohibited according to the *ḥadīth* quoted by al-Dāraquṭnī as reported by Ibn ‘Umar that “the Prophet prohibited sale of *al-kāli’ bi-l-kāli’*”; in other words, He prohibited the sale of *nasī’ah* to *nasī’ah*. The term *al-kāli’* sale means something delayed, and appears in a maxim forbidding it; and the sale of *al-kāli’i* to *al-kāli’* means the exchange of one delayed countervalue for another delayed countervalue, *nasī’ah* sale means a delayed sale and *ribā al-nasī’ah* means to exchange two *ribawī* (prohibited) countervalues which are due at a later time (Voge and Hayes, 1998). We have noted the three-day delay permitted by Mālikīs, which is irrespective of the nature of the price to be transferred and may be conditional or unconditional. However, any delay beyond 3 days invalidates the contract (al-Dardīrī, n.d.).

Making a *salam* contract by substituting for the price to be handed over by the buyer an outstanding loan owed by the seller is not permissible, however the seller’s debt may have originated – from a loan substitute, the price of a postponed sold article, or a right arising from warranty for a damaged article. In all cases, the reason for disapproval is the debt-for-debt result, according to Ibn Qudāmah (1997). Scholars are in unanimous agreement on this point. Some researchers do approve of treating as *salam* capital a debt owed by the seller if that debt is due at the time of contract. This is justified as follows (Muhammad, 1999):

- (i) The required collection by the seller of the price (the *salam* capital) has been realized because the seller’s debt is due;
- (ii) The prohibited sale of debt for debt has not arisen;
- (iii) There is no proof of a scholarly consensus against the practice;
- (iv) This has not resulted in a usurious practice since the requirement to deliver the capital has been met. In this case the *salam* contract becomes valid from the date of signing and not from the date of the seller paying back the previous debt. In the view of a leading researcher in the field (al-Ashqar, 1995), it is also permissible to treat assets or deposits in the keeping of the seller but still owned by the buyer as the

*salam* capital or price. In this case, the previous keeping of the buyer's assets or deposits constitutes (and replaces) taking delivery of the price at the contract session;

- (v) Pricing partial delivery of the sale object. Both Ibn al-Qayyim and Ibn Taymiyyah upheld this practice on the basis of Aḥmad Ibn Ḥanbal's approval of selling for a discontinued price. Both endorse the element of mutual agreement and satisfaction of the contracting parties, as such agreement is basic to all Islamic financial dealings. Therefore selling in this fashion should not require the setting of a price at the moment of drawing up the contract. An illustrative example of this contract is that of buying bread from a bakery or meat from a butcher shop, with the buyer receiving a known amount on a regular basis, then paying for the received amount at the end of say, a month or year. Says Ibn Taymiyyah: "They would continue to have their bread from the baker, their meat from the butcher and their fruits from the fruit seller without estimating the price. Instead, they mutually accepted the current price set by the seller for everyone else" (Muhammad, 1999). The condition attached here is a statement in the contract of the amount and price of each installment. This is considered to be appropriate if it takes one of two forms (al-Ashqar, 1995):
- a. In one form, *salam* is applied for two terms or periods. For example, *salam* in cooking oil supplied in agreed installments, with specification of the amount, time span, and price of each installment. Without such specification, *salam* would not be appropriate.
  - b. In the other form, *salam* is applied to a commodity such as meat, bread or honey, a known amount of which is supplied regularly at a specified price for the whole quantity. In case of inability to supply a part of it, the overpayment is refunded by calculating the unit price multiplied by the undelivered quantity.

This practice has been approved by mainstream scholarly authorities in parallel with selling for a postdated price to be paid in installments, and there is a consensus about its permissibility. If such a contract is terminated prior to full delivery of the agreed amount, the price will be calculated for the amount delivered, with no charge for the undelivered quantity. For example,

if the agreed quantity is 1000 loaves of bread for 500 dirhams and, on termination of the *salam* the delivered quantity is 500 loaves, then the price due is 250 dirhams.

This application of the *salam* contract would be useful to hospitals and other establishments in need of large and identical amounts of regular supplies of meat, milk and vegetables.

## V. Variations Among the Schools on the Price

There are slight, interesting differences among the four main schools of *fiqh* on how they view terms and conditions related to the price in a *salam* contract.

### 5.1. Mālikī jurisprudence

As we have seen, the Mālikīs, uniquely, do not require the price (capital) to be handed over at the time of contract before the parties separate. Rather, they permit postponement for a maximum of three days. However, there is not perfect unanimity among Mālikī scholars on this point. If the price is cash, some of them approve the delay of three days but others disapprove. If the price is in the form of tangible assets, transfer of which is postponed unconditionally for more than three days, some Mālikīs judge this to be permissible but discourage it, others that it is permissible without discouraging it, and still others judge that it invalidates the contract.

It is permissible for the price (capital) to be in the form of use of tangible assets like machines and buildings because such utility is a form of value gained by owning the kind of assets that enable it, like buildings and machines.

Dividing the price (capital) into part payments or failing to transfer the price in full invalidates the contract to the extent of what has not been transferred, but the contract remains valid for what has been transferred. (Otherwise, the debt would be like selling of debt for debt, which is prohibited.)

The Mālikīs do not permit *salam* by means of debt capital (owed by the seller or anyone else) unless the debt is due and made available to the seller at the time of the contract or within three days thereof.

It is permissible by general consent for the seller to deposit the price (capital) with the buyer *after* collecting it from him and *before* he (the seller) utilizes it. (This means that the seller can deposit the capital in his account at the bank which (as buyer) entered into the *salam* contract with him.)

Linking the price (capital) to market prices. The principle in a *salam* contract is that the price must be fixed and known at the time of drawing up the contract. The relevant value can be fixed in accordance with a particular market price at that time, or at that price plus or minus a certain percentage (+10% or -10%, for example). What is not permissible is to fix the value at a *future* market price.

### 5.2. Ḥanafī jurisprudence

The Ḥanafīs are strict about the precise specification of the price (capital) and its being received by the seller there and then, not the time of contract.

In contrast to the Mālikīs, the use of assets like machinery may not be applied to the price or *salam* capital. In the Ḥanafīs view, doing so deprives the seller of the flexibility that money (or other exchangeable form of the price) gives him.

The Ḥanafīs follow much the same line as the Mālikīs on payment of part of the price (capital).

On the use of debt to serve as the price, in a *salam* contract, the Ḥanafī view is much the same as the Mālikī, *i.e.* only debt due, produced and transferred to the seller at the time of contract (or very soon thereafter) is permissible.

On the same conditions as for the Mālikī, the seller can deposit the price (capital) with the buyer.

The Ḥanafīs uniquely make it a condition that the price (capital) be made known to the seller. However, they accept that seeing and taking possession of the price is a sufficient substitute for specification of the price.

### 5.3. Shāfi‘ī jurisprudence

On (i) transfer of the price (capital) to the seller, (iii) part payment of the price, (iv) using debt capital as the price in *salam* and (v) the permissibility of the seller depositing the price with the buyer after taking possession of it, the Shāfi‘īs hold the same position as the Ḥanafīs and the Mālikī. Indeed, the Shāfi‘īs add to that the condition that if an indebted seller uses the price (the *salam* capital passed to him by the buyer) to pay off his debt to a third party at the time of the *salam* contract, the contract is void. On (ii), the permissibility of using as the price (*salām* capital), the utility value of assets like machinery and buildings, the Shāfi‘īs are in agreement with the Mālikī view. (vi) The Shāfi‘īs regard it as permissible that the price (*salam* capital) take the form of goods, and the sale object take the form of cash money.

#### 5.4. Ḥanbalī jurisprudence

The Ḥanbalīs also require that the price (*salam* capital) be known and specified to the seller, and transferred to him at the time of contract. The Ḥanbalīs do not consider it proper for the buyer to ask for collateral or a guarantor in respect of the sale object.

Like the Mālikīs, the Ḥanbalīs recognize the use of the utility value of assets like machinery and buildings as the price in a *salam* contract.

They hold the same position as the other schools in respect of the validity of the contract in proportion to that part of the price which the seller has taken possession of. The Ḥanbalīs do not regard payment of the price by installments as permissible.

On the use of debt capital to serve as the price, there are interesting variations within the Ḥanbalī school of thought. *Salam* by means of debt capital owed by the seller is disapproved outright by Ibn Qudāmah. But Ibn al-Qayyim and Ibn Taymiyyah hold it to be permissible provided the debt is due at the time of contract, *i.e.* provided that it does not result in selling one postponed debt for another, which is unanimously prohibited. Similarly, a debt owed to the buyer by a third party, due and produced at the time of contract, so that the seller takes possession of it, is permissible.

Some not all Ḥanbalī scholars – like the Shāfi‘īs on this point – approve of the kind of contract in which the sale object is cash and the price (*salam* capital) is a substitute or compensation for a commodity.

### VI. Conditions Pertaining to the Sale Object

The conditions pertaining to the sale object in a *salam* contract were set out in broad terms in the ‘general description’ at the beginning of this paper. The main conditions were that the sale object must be specified and specifiable and that it must be deliverable in practice at the time set for delivery for the contract to be valid, whether viewed as a type of debt/loan or as a sale transaction. In this section we look in more detail in the meaning and the entail of those conditions and then, in the next section, at the agreements or divergence among the four main schools of Islamic jurisprudence

The basis deciding this question is the *ḥadīth* reported by Ibn Mājah from ‘Abdullāh Ibn Salām: Muḥammad b. Ḥamzah reported his father [Ibn Yūsuf] to have said on the authority of his grandfather [‘Abdullāh Ibn Salām], that a man came to the Prophet and said, “The descendants of so-and-so [who belongs to a people of the Jews] have embraced Islam but they are hungry and I fear that they will revert [from Islam].” Upon this, the

Prophet asked: “Who has some money [so that I make an advance payment for some commodity delivered in the future]?” A man from amongst the Jews said, “I have such and such thing,” and he named that. I think that he said, “I have 300 dinars. [I desire to purchase] fruit from the orchard belonging to the sons of so-and-so at such-and-such rate”. God’s Messenger said: “I shall give you the fruit or corn at such-and-such rate till such-and-such time but not from the orchard (or field) of the sons of so-and-so” (Ibn Mājah, n.d.).

What is learnt from this *ḥadīth* is that the sale object cannot be specified in such a way as to make the fulfillment of the contract liable to uncertainty (*gharar*): an example of that would be to specify the fruit of a particular tree or of a small orchard, even a small village. If it is conceivable that the particular tree, orchard, *etc.* may not produce the yield contracted for, the sale object is possibly undeliverable and accordingly such specification is not permissible. Also among non-deliverables are items such as lands or houses; moreover, they are concrete, particular possessions as well as being immovable.

Some contemporary researchers (see al-Ashqar, 1995) have called for a review of this condition. They argue that the products of large modern factories, which are consistently available and of consistent quality – things like cars and TV sets – can be the sale object in a *salam* contract. Such things are not liable to uncertainty of delivery that affects a particular tree or orchard, *etc.*, and moreover quality and quantity can be readily defined so that the sale object is adequately specified. Indeed, this view has some support from classical authorities. Thus, Ibn Shās and Ibn al-Ḥājib affirm that *salam* is not accepted in the fruits of a particular garden or the offspring of a particular animal or the produce of a small village, but where a large village is the source of the produce such produce may be specified as the sale object since the contract can normally be expected to be fulfillable at the date due.

### ***Specifying the sale object by quality and quantity:***

Scholars agree that specifying the sale object in terms of those qualitative characteristics on the basis of which its price varies is a necessary condition of the validity of a *salam* contract. Similarly, issues related to either quality or quantity that affect the deliverability of the sale object at the due date must also be made known and properly understood at the time of contracting, for the contract to be valid. The scholars’ argumentation for this is as follows:

- (i) The sale object is something characterized as owed, (*i.e.* it is not present) and therefore must be knowable from its description;
- (ii) Since price varies with quality, the *salam* cannot hold unless the relevant information is provided in the contract – knowledge is a condition of validity in selling, and that knowledge, in the case of *salam* when the sale object cannot be viewed, is through adequate specifications;
- (iii) Failure in this regard can engender uncertainties and disputes.

There are very minor variations among the different schools as to whether it suffices to describe the genus or kind, type or quality of the sale object, or if finer descriptions (such as colour and dimensions) are also necessary. The general consensus is that it is good to include those characteristics that help to make the estimation of price secure, that reduce ignorance and uncertainty, and therefore prevent potential disputes. In this respect, al-Shīrāzī comments: “*Salam* is permissible in any [object] that is permissible to sell and whose characteristics can be specified” (Muhammad, 1999).

*Salam* is, thus, permitted in agricultural and livestock produce in line with the rule that a proper sale object is one whose characteristics can be specified. Whether a particular commodity is permitted or prohibited as a sale object is variable with improvements within the means of specification. Recent advances in the techniques of specification are to be considered as helpful in obviating the causes of potential disputes and therefore of enabling the *salam* contract to be used for many kinds of goods and produce.

The basis of the duty to specify quantity is the Prophetic *ḥadīth* already cited: “Those who pay in advance for anything must do so for a specified weight and for a definite time” (Khan, 1985). In all four schools, it is permitted to estimate the quantity by any means or measures (weight or volume) or combinations thereof that are expected to remove ignorance and uncertainty and prevent dispute (al-Ashqar, 1995). Ibn Ḥazm, rendering the *ḥadīth* literally, does not approve *salam* except in known weight and volume and to known term. However, the majority consensus is that the meaning of the *ḥadīth*, its intent, is to declare the quantity of the sale object and the time of delivery so as to prevent possible dispute. Accordingly, *salam* in something weighed requires a known weight, in something measured a container a known volume, and so on. The measure must be one known to the public and in common use – it is not permitted to use, for example, a particular person’s arm length or some particular container, since the absence of that person or that container would make the sale object undeliverable.

## 6.2. More on the sale object

### 6.2.1. *Mālikī jurisprudence:*

According to the Mālikī jurisprudence, the following conditions should be fulfilled for the sale object:

- (i) The *salam* must not be in any of the usurious types like *ribā al-faḍl* and *ribā al-nasī'ah*;
- (ii) Delivery of the sale object is to be postponed for a specified period such as a fortnight or more – but not less. For agricultural produce, the due date should be near the time of harvesting;
- (iii) The sale object is characterized as owed;
- (iv) The sale object must be of a kind whose qualities can be specified, for example by weight or volume, in an appropriate accepted way. It is not acceptable, for example, to specify produce by reference to a land measure as that opens the way to uncertainty. The contract can also be vitiated by using a strange measure, for example, “weight like that of a stone”, which is too inexact to be valid;
- (v) The sale object is to be satisfactorily described as to kind and quantity so as to prevent dispute from arising as a result of ignorance of the object;
- (vi) The sale object is to be in existence when the delivery time arrives; its absence before that point does no harm;
- (vii) By consensus, *salam* is improper in a concrete thing or commodity available to the seller – there is no sense in a postponement of delivery. If the particular thing is not in the seller’s possession, it comes under the general prohibition based on the *ḥadīth* that Ibn ‘Umar reported God’s Messenger as saying: “He who bought food grain should not sell it until [after] he had taken possession of it.” (Muslim, 1987) It is not permissible to apply the *salam* contract to real estate because of its material existence. Similarly, objects subject to contract, the produce of a particular garden or village or of a particular manufacturer – insofar as these are liable to cessation, therefore undeliverable – are excluded from *salam*. On the produce of a particular garden, however, there is some exception as follows: *salam* on the fruits of a particular garden is approved if the seller owns the garden, if the garden is sufficiently large, and if the contract is entered into after the fruits have begun to ripen. In this case the contract should include mention of whether the fruits are to be collected all at once or at intervals, and the quantities

- of each part collection. Collection should commence after 15 days from the date of the contract – this being the minimum period for the maturity of the *salam* contract according to Mālikī *fiqh*;
- (viii) The characteristics mentioned to specify the sale object are all those which affect its price or value at the apparent level; the specifications must not be such as to make delivery in accordance with them practically impossible;
  - (ix) As to specification of the sale object, all scholars (with the exception of Ibn Ḥazm noted above) unanimously accept the use of the conventional means of weighing and measuring. It is permissible to use different forms of measuring (like weight or volume) as needed, or to count quantities as for example when the sale object is fruits which ripen and are delivered at intervals;
  - (x) *Salam* is permitted in the utility value of assets like machinery and buildings;
  - (xi) As for *salam* in money: it can be detailed as follows: (a) if the price (the capital) and the sale object are of the same currency, a *salam* contract is invalid, because in such a transaction like-for-like and hand-to-hand are obligatory. (b) If the price and the sale object are different currencies, *salam* is still not possible because *ṣarf* or exchange of this nature requires immediate transfer of both elements at the time of contract. (c) if the price is in the form of a commodity while the sale object is ready money, Mālikī jurisprudence allows a *salam* contract in this case;
  - (xii) The sale object must be deliverable. This entails that the sale object is commonly available in the market at the time set for delivery. However, if availability is discontinued before the time of delivery or non-existent at the time of contract, the contract is still valid. It is also not necessary that the seller should be the owner of the source or origin of the sale object (*i.e.* the underlying asset) – thus, *salam* is permitted in crops for a seller who does not own land. Deliverability of the sale object is also linked to the place of delivery – ideally this should be the place where the contract is made, otherwise the place must be specified in the contract as suits the interest of the parties.

### 6.2.2. *Ḥanafī jurisprudence*

The conditions pertaining to the sale object in Ḥanafī jurisprudence differ from the Mālikī in the following points:

- (i) In specifying the sale object there must be mention of whether it is to be shipped or transported;
- (ii) The ability to deliver the object must be known;
- (iii) The Ḥanafīs do not allow *salam* in money – if the price (*salam* capital) is an exchange or substitute like a commodity and the sale object is money. In this respect, Ibn Humām (n.d.) has this to say: “That is because that sale object must be priced and money is a price, and a contract involving this is judged to be void while some others judge it as a sale for a price”, and
- (iv) For the Ḥanafīs, it is necessary that the sale object be in existence from the date of the contract up to the time when delivery is due. By existence here they mean availability in the markets and not necessarily in the possession of the seller. Thus, as for the Mālīkīs, *salam* in crops is permissible for someone who does not own a plot of land.

### 6.2.3. *Shāfi‘ī jurisprudence*

In Shāfi‘ī *fiqh* the arguments are similar to those set out from Mālīkī jurisprudence and distinct from the Ḥanafīs in allowing a *salam* contract in the utility value of assets like machinery and buildings and whatever is beneficial like, e.g. teaching the Qur’ān.

### 6.2.4. *Ḥanbalī jurisprudence*

The notable variations among Ḥanbalī rulings from the conditions set out above for Mālīkī *fiqh* are points of emphasis and clarification rather than principle) relating to the specification of the sale object. For example, the Ḥanbalīs require that quality characteristics must be measured, such as whether it is old or new, of a high or low quality, then add that it is up to the buyer to accept something below the standard described to him if he so chooses. They also require that the colour of the sale object and its country (location) be mentioned in the terms of contract. As to the quantity specification, they require that the amount of the sale object be made known according to the *Sharī‘ah* criteria, *i.e.*, by container measurement for what is sold by volume, by weighing for what is weighed, and so on. Like the other schools, the Ḥanbalīs do not permit a *salam* contract except in what is owed, therefore not in an object designated as itself, such as a grown tree, since the object thus designated might become damaged or otherwise altered before the time due for delivery.

## VII. Conditions Pertaining to the End of the *Salam*

### 7.1. The time set for delivery

On the basis of the Prophetic *ḥadīth* already cited – “Those who pay in advance for anything must do so for a specified weight and for a definite time.” (Khan, 1985) – the term of the contract must be formally stated in accordance with convention (for example, the Muslim or Christian calendar) known and understood by the parties. This ensures that there is no misunderstanding or uncertainty which might lead to dispute. The place, to which the sale object is to be delivered, as we have seen, is the subject of some difference among the leading authorities, but it is assumed to be the place at which the contract was agreed, otherwise it must be explicitly stated. The time of delivery must be such that, for the sale object concerned, it is the time when that object is normally available. This condition ensures that it is practically possible for the seller to deliver the object at that time. Otherwise there could be uncertainty (*gharar*) which is not permitted in *salam*. The condition is needed because, for Mālikī Shāfi‘ī and Ḥanbalī scholars, the sale object need not exist or be available at the time of contracting but, instead, must be commonly available at the time set for delivery. This condition is based on the prophetic *ḥadīth* (reported by al-Bukhārī and Muslim from Ibn ‘Abbās) cited above in which the Prophet did *not* make it a condition that the sale object should exist at the time of agreeing the contract – rather, the residents of Madīnah were used to paying for dates two or three years in advance of their being available.

Moreover, establishing the proof that the sale object is owed by the seller to the buyer does not require the existence of the sale object except when the delivery is due which is when it is within his capacity to deliver it. Prior to that, there is no need for its existence.

Scholars following the Ḥanafī school differ from the others in making it a condition that the sale object be present from the time of the contract up to the time of delivery. They argue this on the basis of a Prophetic *ḥadīth* reported from Ibn ‘Umar that God’s Messenger forbade the *salam* of palm-trees until the dates began to ripen (Muslim, 1987). The Ḥanafīs also hold that delivery of the sale object may well take place in installments, which requires a lengthy term to enable the seller to complete delivery to the buyer. In the event of the seller’s death before delivery of the sale object, it will be taken (in the same way as debt is paid) from whatever possessions the seller has left behind.

In the view of a contemporary scholar, (Muhammad, 1999) the leading authorities, with whom followers of the Ḥanafī school disagree, appear to have a more firmly based position in that the *ḥadīth* used by the Ḥanafī's has a weak element in its *isnād*, such that a legal ruling should not be based on it. According to the Mālikīs, if the seller dies before the time is due for delivery; an embargo is to be imposed on his possessions until the time of delivery arrives, and then those possessions can be divided. Ḥanbalīs argue on the same lines, that the *salam* is not dissolved on the death of the seller but continues up to the agreed term.

## 7.2. Disposing of the sale object

After the buyer takes possession of the sale object all the legitimate means of disposing of it are open to him, such as *bay'* or sale, *mushārahah*, *tawliyah*, *ijārah*, *muḍārabah*, *murābahah*, etc. There is no difference of opinion on this. But there is considerable divergence about what is possible before the buyer collects the sale object.

- (i) Acceptance of a substitute from the seller when delivery is due. Shāfi'īs do not permit seeking a substitution for the sale object specified in the *salam* contract. Mālikīs permit it if the sale object is not of the kind measured by volume or weight, and in that case permit a substitute that is the same in kind and amount, such as the substitution of barley for wheat. Followers of the Ḥanbalī school permit taking a substitution at any value except in what is counted or weighed. Ibn 'Abbās holds that it is not permissible to take a substitution for the sale object except at its value or less (al-Qurrah Dāghī, 2001). The evidence adduced by scholars who prohibit substitution is the *ḥadīth*: "Abū Sa'īd reported that God's Messenger said: 'When you pay in advance for something, do not exchange it for something other than it.'" This is also interpreted as selling something before having possession of it and making a profit from a transaction that cannot be guaranteed, both of which are not permitted in Islamic law. Further evidence is adduced from a *ḥadīth* reported from Ibn 'Abbās from the Prophet that "He who buys food grain should not sell it until he has taken possession of it." There is absolute consensus that selling of the sale object before taking possession of it is prohibited. (al-Qurrah Dāghī, 2001).

A contemporary commentator who reviewed the above evidence stated that the *ḥadīth* from Ibn 'Abbās ("When you pay in advance

for something, do not exchange it for something other than it”) is considered by experts in *ḥadīth* as weak and unsafe to be adduced in a legal ruling. According to some major Islamic Shari‘ah authorities including Imām Aḥmad Ibn Ḥanbal, al-Nasā’ī, Ibn Ḥayyān and Ibn Taymiyyah, a *ḥadīth* is weak if its *isnād* includes a narrator whose unreliability is unanimously agreed. According to Ibn Taymiyyah, the *ḥadīth* is meant to prevent the sale object being entered into another *salam* contract and thereby falling under the prohibition of selling a debt for a debt. That is a different matter from the substitution done before the term of the contract.

For the followers of the Mālikī school, it is permissible to fulfill a *salam* contract in foodstuffs by substituting barley for wheat, for example, by taking the specified amount from the seller at the time agreed. Before the term, it is permitted to take the capital or the food in which the *salam* was done by *iqālah*; *iqālah* refers to a change of mind about the deal by consent of the contracting parties, and it is commended by the Prophet. It is not permissible for the buyer to sell foodstuff which is the subject of the *salam* contract before coming into possession of it, but other than foodstuff it is permitted to sell to someone other than the seller at any price before the term is due. It is also possible to sell to the seller but not at a higher price before the term is due, although it is permitted at the same or a lower price with immediate collection.

The evidence in support of substitution is based on Ibn ‘Umar’s account in which he said:

I used to sell camels at al-Baqī‘ for dinārs (gold coins) and take dirhams (silver coins) for them, and sell for dirhams and take dinārs for them. I would take these for those and give these for those. I went to God’s Messenger who was in the house of Ḥafṣah (the Prophet’s wife). I said: “O Messenger of God, take it easy, I shall ask you [a question]: I sell camels at al-Baqī‘. I sell [them] for dinārs and take dirhams and I sell for dirhams and take dinārs. I take these for those, and give these for those.” God’s Messenger (peace be upon him) then said: “There is no harm in taking them at the current rate so long as you do not separate leaving something to be settled.” (Abū Dawūd, 2010)

This indicates substitution on condition that it is at the price of the day of substitution, in order not to make a profit in what cannot be guaranteed. (al-Qurrah Dāghī, 2001)

- (ii) Selling the sale object to another person before collection: There are different scholarly opinions concerning this issue. While it is not permissible according to the Shāfi‘ī, Mālikī and Ḥanbalī schools, it is permissible in absolute selling according to the Ḥanafī school.
- (iii) Disposal of the sale object by the buyer by sale, *mushārah*, *ijārah*, *muḍārabah*, *murābahah*, *ḥiwālah* and *wikālah*: Scholars are in agreement that *wikālah* (agency) and *samsarah* (brokering) are both permissible in the *salam* contract. But they are in disagreement about *mushārah* (al-Shanqīṭī, 2000).

The Mālikī school holds that such disposal of the sale object is permissible, on the grounds that the Prophet reportedly sanctioned the sale of food before taking possession except for what is involved in *mushārah* and *iqālah*, in which case the buyer receives cash in return for the same. Meanwhile, followers of Ḥanafī, Shāfi‘ī and Ḥanbalī have ruled that the *mushārah* is not permissible.

A contemporary researcher believes that it is permissible to dispose of the sale object before its collection through *mushārah*, following Imām Mālik on the strength of his evidence and reasoning, and its consistency with the basic maxim that permissibility is the norm for contracts and conditions except for what is proven to be prohibited by evidence from the Qur’ān and/or *sunnah*. There is, however, a condition, namely that the price must be collected in cash on the spot to safeguard against the usurious practice of selling a debt for a debt or *ribā al-nasī’ah* (al-Qurrah Dāghī, 2001).

As for a transfer by means of *salam* debt, the followers of the Shāfi‘ī, Ḥanafī and Mālikī schools have opted for permitting it if the two substitutions are not food, irrespective of whether the transfer is by the *salam* debt or against it.

Followers of Ibn Ḥanbal and some followers of Shāfi‘ī consider the transfer to be not permissible by or against the *salam* debt.

However, a contemporary commentator pronounces such a transfer by the *salam* debt or against it permissible because of the weakness of the arguments for its prohibition. First, the conditions tied to the transfer are different from those of debt. The second reason is the weak status of *ḥadīth*: “When you pay in advance for something, do not exchange it for something other than it” (al-Qurrah Dāghī, 2001).

- (iv) Abrogating the *salam* contract by *iqālah*: For followers of Imām Abū Ḥanīfah and for Ibn al-Qayyim (Ḥanbalī), it is not allowed to accept a

substitute for the sale object (the *salam* debt) different in kind from it. But this is allowed by the Shāfi‘ī and Ibn Taymiyyah (Ḥanbalī).

- (v) Termination of the *salam* contract by *iqālah*: *Iqālah* is subject to different rules in the different schools. Followers of the Mālikī and Ḥanafī schools define it as a sale while followers of the Ḥanbalī and Shāfi‘ī schools see it as the process of dissolving the sale. *Iqālah* is permissible by general agreement of the scholars if it involves the whole deal. If the *iqālah* affects part of the deal (half or a quarter, say), it is not permitted by Mālikīs, school but is permitted by the other schools. In this case, the seller returns the collected debt. If the seller at the time has no money, according to all schools except the Ḥanafīs, it is permissible for the buyer to accept a substitute for the *salam* capital.
- (vi) The buyer’s disposal of the sale object before taking delivery of it, with transfer of ownership through any of the various lawful means (*murabahah*, *musharakah* etc.) and then entering a *salam* contract with the new buyer or with a third party, or taking a substitution for the items which are supposed to be delivered such as wheat for barley: on this issue *Shari‘ah* scholars are in disagreement:

The Mālikīs and Shāfi‘īs consider that an agency or *wikālah* in *salam* contract is permissible. The Shāfi‘īs, Ḥanbalīs and Ḥanafīs make it a condition that the sale object cannot be sold on or handed over to a third party before the seller has taken possession of it. Mālikīs consider it permissible to sell the sale object to a third party before the collection and at any price. As to selling it to the seller before taking possession of it, the Mālikīs permit this at a lower cash price before the term is due, but not at a higher price (Muhammad, 1999) then permit selling of the sale object before taking possession of it, whether to the seller or to a third party, provided certain conditions are adhered to: (a) the known usurious practices are avoided – for example, if the price (*salam* capital) is in the form of money and the sale object is a foodstuff, then it is permitted to sell the object for another foodstuff but not for money *i.e.* cash or gold or copper; (b) There must be on-the-spot collection of the substituted object to avoid the prohibited sale of one debt for another; (c) The sale object must be of the type whose sale before taking possession of it is permissible (for the Mālikīs, as we saw above, this is everything except foodstuffs). The price must be the same or lower than the price set in the *salam* contract if the new buyer is the seller in that contract; if the new buyer is a third party the price may be the same or different.

If, in the event, the seller is unable to pay the debt in the *salam* contract by delivery of the sale object to the buyer, Ibn Tamiyyah and Ibn al-Qayyim authorize the buyer to sell the sale object agreed in the contract to the seller at the same price or less. They do so on the basis of the *fiqh* of Imam Ahmad ibn Hanbal, so that the seller can clear his conscience. In this situation the substitute or replacement for the sale object must be valued at the price of the day but not higher, because of the injunction in the Prophetic *ḥadīth* recorded by al-Tirmidhī, against profiting from something that could not have been guaranteed (al-Ashqar, 1995).

Thus, the parties to the *salam* contract are allowed at the appointed time of delivery to reach an agreement about handing over the sale object as cash or any other substitute valued at an equivalent price but not higher. That being mutually agreed, payment must follow on the spot, and it is not permitted to defer it (al-Ashqar, 1995). Some researchers in the field hold that it is permissible to dispose of the sale object upon entering into the *salām* contract and prior to delivery of it, except in the case of foodstuffs (al-Qurrah Dāghī, 2001).

Given that, by general consensus *iqālah* and substitution are valid in the *salam* contract, the contemporary view is that the buyer is entitled to accept as substitute for the sale price (the debt owed to him) anything from the seller that is of the same kind and value, for example cash if the price was cash, but not cash if the price was not paid in the form of cash. Then after revocation of the *salam* contract the buyer is entitled to purchase something else with the *salam* capital provided that the guidelines concerning usury in money and foodstuffs are observed. The buyer is not allowed to use the *salam* capital it for the purpose of hire purchase because it is prohibited to sell debt on credit. Apart from that, the buyer is entitled to *ḥiwālah* and *mushārahah* conciliation and the like (al-Qurrah Dāghī, 2001).

- (i) Delivery of the sale object before the time due: The consensus is that the buyer must consent to premature delivery for the transaction to be valid. If the buyer does not consent, the reason for his objection is examined. If his objection is sound, he is not obliged to take possession; if it is not, he must accept possession of the sale object so that the aim of the *salam* can be realized.
- (ii) Delivery of the sale object at the time due: If the delivery meets the conditions of the contract, the buyer must take possession of the sale object and testify to the seller's fulfillment of his obligation. It is not

permissible, at the time due, for the seller to repay the buyer in cash and/or command him to purchase the sale object specified in the *salam* contract from a different source and take possession of that. What is permissible is for the seller, at the time due, to appoint the buyer as his agent and empower him on his behalf to purchase the sale object from a different source; after that has been done, the buyer can take possession himself from the seller. The buyer being authorized as the seller's agent makes the purchase and the possession valid – it is not permissible to act as another's agent in taking possession of what is owed to oneself. However, we may note in passing that even this is permitted by followers of the Ḥanafī school.

If the buyer has entered a second *salam* contract as a seller, and the sale object is the same in both contracts, he may not require the second buyer to take possession of the sale object from the first seller directly. He must, instead, himself take possession of the sale object from the first seller and make delivery of it to the buyer in the second contract. If the sale object on delivery is defective or deficient in respect of the contract conditions, the buyer may accept it or refer the cost of the defect or deficiency to the seller. A difference in kind (for example, barley being offered instead of wheat) is permissible according to the Mālikīs on condition that the buyer is allowed to arrange the sale of what is offered before taking delivery thereof. By contrast, Shāfi'īs prefer doing *iqālah* first, then substituting the *salam* capital for the delivered goods. But the Ḥanbalī school, in strict adherence to the letter of the Prophetic *ḥadīth*, “When you pay in advance for something, do not exchange it for something other than it”, do not approve of this. (Some difference in type of the sale object (for example, European wheat instead of American wheat) without a difference in quality is permissible as long as the buyer consents to that and so long as there is no compensation for the difference. Scholars generally approve also, on the same conditions, differences in quality and variations in minor specifications, if the buyer consents. Ḥanafīs however, approve taking possession of the substitute *and* permit compensation for the difference in quality.

A difference in quantity, of the sale object, the delivery of more or less than what was agreed upon, can also occur. Mālikīs permit an increase in the quantity only after the due date of the *salam* contract and provided that the cost of the increase is paid, and that the delivery is made without delay. The Ḥanbalīs hold that the buyer is not obliged to accept the increase but such

increase is permissible by mutual consent of the parties and the increase is paid for. Ibn Qudāmah, stipulates the payment of an equivalent in proportion to the increased quantity. If the delivery is short of the quantity agreed upon, the buyer may take possession of what is present and demand the rest, or he may accept it as it is, or he may apply the rule governing delayed delivery. The seller's failure to deliver the sale object at the appointed time may be due to financial distress. In this case, the ruling in the Islamic law is in accordance with the Qur'ānic verse (al-Baqarah, 2: 280): "And if the debtor is in hard times then grant him time till it is easy for him to repay; but if you remit it by way of charity, that is better for you if you but knew." If the failure to deliver the sale object has resulted from bankruptcy – the bankrupt in the Islamic law is one who owes a debt exceeding his financial resources – the rules of bankruptcy apply.

Failure to deliver at the time due can also be the result of unforeseen circumstances – for example if supply of the sale object is cut off from the market, or if, for evident reasons, it is impossible to deliver the sale object. In this case, either abrogation or *iqālah* of the contract and repayment of the *salam* price is applied, or the parties wait until the delivery becomes possible. Another option is to take possession of what is deliverable at the time due and demand the rest.

Place of delivery is not a necessary element of the contract, and variation therein is permissible by mutual consent of the contracting parties. If failure to deliver on time at the agreed place is attributable to delaying tactics on the part of the seller, a way of putting off the payment of the debt, the rules relating to the procrastinating creditor are applied through the courts.

There are a few other conditions, pertaining to delivery of the sale object, which vary between the four schools. They may be summarized as follows:

For the Mālikīs

- (a) It is permissible to postpone delivery of the sale object for a time after entering into the contract.
- (b) It is permissible to fix the time limit for delivery at any time as long as the condition of making it known is met in this way.
- (c) The earliest time to make delivery is the time of entering into the contract, as when there is delivery of fixed daily portions, which is allowed. The underlying consideration here is that there is a known time-period

during which markets may witness fluctuations and developments. Some Mālikīs fix the earliest time at 15 days.

For the Ḥanafīs the same conditions as for the Mālikīs, but the Ḥanafīs envisage longer periods within which the delivery of the sale object is due, or through which it is due.

For the Shāfi'īs the same conditions but they require that the place of delivery should be stated.

For the Ḥanbalī the same conditions but they fix the lower and upper limits of the period for delivery in the light of the time frame that affects price and value – a month or so.

### VIII. Conditions Pertaining to the *Salam* Contract as a Whole

It is a requirement of the *salam* contract that it be written and declared, in line with all other debts as instructed by the Qur'ānic verse (2: 282): “When you contract a debt for a fixed period, write it down.” As we have seen in the foregoing discussion, it is not permissible for the buyer to take collateral or accept a sponsor in respect of the price (the *salam* capital) the buyer's property and belongs to the seller. For the sale object, on the other hand, there is general consent for the permissibility of taking collateral or accepting a sponsor. Then, if it proves impossible for the seller to fulfil his obligation to deliver the sale object, there is recourse to the collateral or sponsor to fulfil the obligation. While followers of the Ḥanbalī school regard this as impermissible, the majority opinion is more convincing on this point, as evidenced from the Qur'ānic verse (2:283): “And if you are on a journey and cannot find a scribe, then let there be a security taken”.

The majority of scholars representing the Ḥanafī, Shāfi'ī and Ḥanbalī schools are in agreement that the contract must be binding and mandatory for both parties, and neither has the right to revoke it without the other's consent. This being the case, a stipulated option or *khiyār al-sharṭ* is not allowed in the *salam* contract. Such an option in *salam* requires postponement of a ruling about the validity of the contract for three days, which is incompatible with the condition of taking possession of the capital at the contract sitting. Nevertheless, scholars of the Mālikī school do approve of the stipulated option *khiyār al-sharṭ* in *salam* if the price is not paid in cash because they allow a delay of three days for handing over of the price. If the price is paid in cash, the *khiyār al-sharṭ* is not permissible.

Followers of the Shāfi'ī school, and according to the views of al-Shirbīnī in particular, approve of the period of the *salam* being extended.

## IX. Sundry Issues Relating to *Salam* Transactions

### 9.1. *Salam al-ḥāl* or on-the-spot *salam*

On the face of it, this version of *salam* does not seem to make sense. *Salam* has been legitimized on the basis that it is the selling of what a person does not hold in his possession at the time. The Prophet is reported to have prohibited the sale of what a person does not own except in the case of *salam* – as an exception – in view of the seller’s inability to deliver the sale object on the spot. So, a time period for delivery is agreed to meet the seller’s need.

Nevertheless some scholars of the Mālikī and Shāfi‘ī schools and Ibn al-Qayyim of the Ḥanbalī school hold that *salam* is permissible, the delivery being set at a point in the future. A contemporary researcher (Muhammad, 1999) makes the case as follows:

- (i) The *salam* contract is valid when a future time is set, therefore it should be valid when, analogously to a sale on credit;
- (ii) It is more effective in reducing *gharar* (uncertainty) for the parties to the contract, the delayed time of delivery in the usual *salam* being comparatively more uncertain in respect of achieving the intended outcome of the contract;
- (iii) *Salam* permits selling in the absence of the sale object, which is something normally disallowed. *Salam-al-ḥāl* allows the seller to enter into a contract with the buyer to take possession of the price there and then, while pledging to deliver the sale object to the seller later on. Some commentators argue that the Prophetic *ḥadīth*: “Those who pay in advance for something must do so for a specified weight and for a definite time” expresses the condition of the postponed *salam* and is not a condition of the validity of the *salam* as such. (This interpretation is analogous with the *ḥadīth* stating that: *salam* must be in a known measure, weight or volume, while the scholars’ general opinion is that *salam* is also permissible in sale objects that are counted or whose measure is known by other means.

In *salam-al-ḥāl* it is a condition that the sale object is present or existent at the time of contract, as also the ability to deliver it. The delayed period is specified in *salam* so as to prevent conflict between the parties to the contract, and on this Ibn al-Qayyim states: “By extension, if the *salam*

is immediate and the seller is able to deliver, then the transaction is valid” (Muhammad, 1999).

### 9.2. Punitive conditions attached to the contract

Is it permissible to include in the *salam* contract a condition whereby the seller is penalized (fined) for delaying delivery?

According to the verdict or *fatwā* of the Islamic *Shari‘ah* board of Al Barakah Second Conference of Islamic Banks held in Tunisia in 1984, it is not permissible to do this. What is permissible is to compel a procrastinating seller in default (*i.e.*, it is known that he has the means to fulfill his obligation) by making an estimate on the basis of the alternative profit opportunity of the debt (the price). This arrangement cannot be set in advance by the contracting parties, *i.e.* it is to be practiced as a solution to a problem that has arisen, after the event – according to the *fatwā* of the *Shari‘ah* board of Al Barakah Third Conference of Islamic Banks held in Turkey in 1985. However, according to the fatwa in Saudi Arabia (see Muhammad, 1999), a penalty *can* be set down in the contract.

### 9.3. Fixing the price of the sale object by reference to a particular market

We noted above that the contracting parties can agree, at the time the *salam* capital is transferred to fix the price of the sale object by reference to the price in a particular market on the date of delivery, plus or minus a certain amount (say, 10%). This is permitted as it prevents unfair or exploitative transactions. This possibility of nominating a particular market price plus or minus 10% was the focus of inquiry at the second forum organized by Al Barakah in Tunisia, 4–7 November, 1984. The forum agreed to the following principles:

- (i) The basic rule in *salam* sales is the agreement of the parties on the price of the sale object at the time of drawing up the contract;
- (ii) It is permissible to agree that the price is in accordance with the price of the sale object on a particular market at the time of the contract;
- (iii) It is permissible to agree that the price is in accordance with the price of a particular market at the time of the contract plus or minus an agreed percentage;
- (iv) It is not permissible to fix the price in accordance with that of a particular market in the future, *i.e.* at the time of delivery of the sale object.

## X. Summary and Recommendation

The simple definition of the *salam* contract is that the customer agrees to purchase goods to be delivered at a specified point in the future and they are paid for at the time of making the contract of *salam* (Vogel and Hayes, 1998).

As a general rule, the scholars are in agreement on the nullity of selling a thing that is not owned – the thing may be non-existent at the time of signing the sale contract or its existence or deliverability may be liable to excessive uncertainty (*gharar*) – for instance selling birds on the wing, or fish swimming free, or milk in the udder or wool on a sheep, *etc.* (al-Zuḥaylī, 1997). The *salam* contract is an exception to this general rule.

Based on the decision of the 9th meeting of the International Islamic Fiqh Academy, the *Shari'ah* standards issued by the regulatory body the Accounting and Auditing Organization of Islamic Financial Institutes (AAOIFI), and of some contemporary scholar (see Umar, 1992), the proposed structure of a *salam* contract as a contemporary business transaction can be outlined as follows:

- (i) The sale object must be specified in detail and established as a liability (debt) whether in the form of a manufactured good or agricultural produce or raw material;
- (ii) The contract must specify date of maturity as per international banking best practice;
- (iii) The price (*salam* capital) must be paid at the time of concluding the contract or within three days thereof;
- (iv) The party financing the transaction (the bank) can take pledge, lien or collaterals or letter of guarantee from the party undertaking the debt (the customer);
- (v) It is permissible for the financing party to accept, in exchange for the specified sale object, some other thing, provided this is not ready money and provided this substituted thing is of a kind whose sale is permitted;
- (vi) If the party undertaking the debt (the seller/customer) cannot deliver the sale object as and at the time specified, there are three options:
  - (a) The parties agree to hold off until the sale object becomes available on the market (and the seller is able to make good his obligation);
  - (b) The parties agree to invalidate the contract and the seller pays back the price (the *salam* capital);

- (c) If the seller has been declared bankrupt, the parties may agree to hold off until his financial position improves;
- (vii) Any claim to ‘interest’ or other opportunity cost on the *salam* capital because of late delivery of the sale object mars the contract;
- (viii) A debt (for example owed by the seller to the buyer or by the buyer to a third party) cannot be used as the price in a *salam* contract.

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