

Research Paper
No. 33

***SHARI'AH, ECONOMIC AND
ACCOUNTING 'FRAMEWORK OF
BAY' AL SALAM
IN THE LIGHT OF
CONTEMPORARY APPLICATION***

ISLAMIC RESEARCH AND TRAINING INSTITUTE
ISLAMIC DEVELOPMENT BANK
JEDDAH, SAUDI ARABIA

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CONTEMPORARY APPLICATION***

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ISLAMIC RESEARCH AND TRAINING INSTITUTE
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In the name of Allah, the Beneficent, The Merciful

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FOREWORD

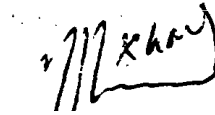
The Islamic Research and Training Institute (IRTI) of the Islamic Development Bank (IDB) has been established in order to take the initiative of contributing to the development of Islamic financing instruments and conduct research and training in Islamic Economics. IRTI is pleased to introduce to the reader this research paper prepared *by* Dr. Muhammad Abdul Halim Umar on *bay' al Salam* under the title "*Shari'ah*, Economic, and Accounting Framework of "*Bay' al Salam* in the Light of Contemporary Application". The *Salam* contract is considered as a sale technique which has been devised - as *fiqh* scholars indicate - with enough sympathy for those who practice it especially the seller. This is so because the contract is concluded on the basis of a commodity, though well defined, is still non-existent. With this flexible character, a *Salam* contract represents one of the Islamic financing techniques which can be used for financing modern economic activities. A great deal of efforts, therefore, need to be exerted so as to explore the essence of this technique and devise the most appropriate means of its utilization. The paper now presented to our honorable reader is addressed to the same type of issues. Dr. Umar indicates in his paper the significance of this contract as regards the rationale of its permissibility in *Shari'ah*, the conditions that govern its application, the controls imposed on its use and the type of transactions in which it can be applied. The author also compares the *Salam* contract to other similar contracts like: *bay'al 'ajal*, *al istisna'*, *bay'al istijrar* and other Islamic financing techniques*. Dr. Umar then discusses the issue of the purchaser's right to dispose of a *Salam's* commodity (by selling it or so) before he actually receives it. He presents the view points of the various *fiqh* schools on this subject with clear reference to the original sources of each view point. He summarizes to contemporary views concerning *Shari'ah* permissibility of disposing of a *Salam* commodity before receiving it for the sake of utilizing the *Salam* contract as a financing instrument. He makes comparisons between *Salam* and other Islamic financing techniques from economic point of view. He explains the scope of *Salam* applications and its potential as a financing technique in modern economic activities in the fields of agriculture, industry, animal raising....etc. He also refers to the degree of risk involved in a *Salam's*

For a brief meaning of Arabic juristic terms, see Glossary on page 127.

transaction and the guarantees that can be given for minimization of such risks and outlines the differences between *Salam* and various other future sales practiced in modern economic societies. Dr. Umar also highlights the difference between *Salam*, that responds to the real needs of those who practice it - to the extent that it is sometimes called *bay'al mahaweej* (sale practiced by the needy people) - and the recently devised selling techniques which aim to make gains as a result of price fluctuations. . He then concludes his essay with showing the economic impacts of the *Salam* contract and presenting the accounting issues it involves. In this connection he emphasizes accounting controls, standards and procedural requirements of a *Salam* transaction.

We pray to *Allah* to make this appreciable effort a fruitful contribution to the establishment of the fundamental pillars of an Islamic economic system based on the estimable teachings and values of Islam and an addition to knowledge that all Muslims can benefit .

At last, I would like to thank Br. Mahmoud A. Mandi who has done a great job in translating this text from Arabic. .



M. Fahim Khan
Officer-in- Charge, IRTI

INTRODUCTION

SUBJECT OF THE PAPER

As a result of the contemporary Islamic revival, a group of newly emerging financial and economic institutions have resorted to Islamic *Shari'ah* as a potential source of methods and means that could facilitate their smooth functioning. Scientific research and juristic thinking have also developed within the attempts to adapt these methods and means to the needs and conditions of the present era. It could however be noted that concentration, whether in theory or practice, has been on some particular techniques like *murabahah*, *mudarabah*, and *musharakah* in spite of the fact that Islamic *Shari'ah* is rich of other methods and means that can be quite useful in this field. One of these methods is *bay' al Salam*. This technique is based on advance payment of the price of a commodity to be supplied in the future. It therefore provides *Shari'ah* permissible, instead of interest-based financing, to producers and businessmen and helps them increase sales since settlement of the loan is to be made in terms of output. Also, the financier will gain some benefits as he will thus become able to invest his capital and to have a return on it besides guaranteeing the satisfaction of his demand for the commodity in question at a desirable future date and a relatively low price. Hence this technique satisfies the needs of both parties of the contract to the extent that it has been named by *fiqh* scholars as *bay'al mahaweej* (sale practiced by the needy people).

In this paper we shall study the *Salam* contract in order to explore its *Shari'ah*, economic and accounting aspects in relation to contemporary application in order to achieve the following objectives:

* The author would like to extend his thanks to both the fiqhi and the economic reviewers of this paper, for their valuable comments on the first draft which have been quite useful in presenting the paper in its final shape.

OBJECTIVES OF THE PAPER

This paper has been prepared in response to the request of the Islamic Research and Training Institute of the Islamic Development Bank - Jeddah in pursuance of its desire to bring out researches portraying the opinions on Islamic financing techniques. The objective of these studies is to present different points of view on the theoretical aspects of the most important Islamic financing techniques and issues relating to their contemporary applications.

Within the : framework of this overall objective the present paper on *Salam* aims to achieve the following:

1. Presenting, as far as possible, an integrated set of information available on this subject in classical as well as contemporary writings.
2. Thoroughly surveying different issues , and - problems 'relating to contemporary applications of *Salam*.
3. Comparing *Salam* to other similar Islamic techniques as well as other doctrines of contemporary economic thinking.

RESEARCH PLAN

Given its subject and objectives, this paper includes the following chapters:

Chapter I: *Shari'ah* Framework of *Salam*

- | | |
|--------------------|---|
| <i>Section (1)</i> | <i>Fiqh</i> Aspects of <i>Salam</i> |
| <i>Section (2)</i> | <i>Salam</i> Compared to other Techniques |

Chapter II: Economic Framework of *Salam*

- | | |
|--------------------|--|
| <i>Section (1)</i> | Issues of Contemporary Application of <i>Salam</i> |
| <i>Section (2)</i> | Economics of <i>Salam</i> transactions |

Chapter III:	Accounting Framework of <i>Salam</i>
Section (I)	Study and Analysis of <i>Salam</i> Operations
Section (2)	Accounting Treatment of <i>Salam</i>

Before concluding this introduction, I would like to express my deep appreciation and respect for the pioneering efforts of our Muslim *fuqaha'* who have thoroughly researched over the subject to address the situation obtaining in their era and provide a guideline for the future. The *fiqh* principles which they have laid down are now providing an adequate source of solutions to problems arising from application of *Salam*. The very limited contributions of contemporary scholars have in fact been revolving around the ideas of classical writers without, any substantial addition.

Therefore, my role in this paper is not to add new ideas, but rather to discover these valuable treasures. My efforts are quite humble and limited. If I succeed, that is an appreciable help from *Allah*, and if I fail that is a deficiency for which no body other than myself is to be blamed. My entire satisfaction stems from the fact that in making this attempt, I have been solely motivated by a sincere desire to serve the course of Islam.

Chapter One

***SHARI'AH FRAMEWORK
OF SALAM***

SHARI'AH FRAMEWORK OF SALAM

As *Salam* is one of the techniques devised by Islam for financial dealings, it could be suitable for the present paper to begin with explaining the *Shari'ah* framework of this technique according to the principal schools of *fiqh*. It may become possible for us, through elaboration on this conceptual aspect, to identify the nature, significance and limits of this technique and understand the rationale for its permissibility in *Shari'ah* as well as its basic rules and conditions. This may also facilitate a comparison between *Salam* and other *Shari'ah* based or traditional financing techniques. Our findings in this connection could then be used as a basis for solving contemporary issues of practicing *Salam*. We shall confine our discussion in this chapter to presentation of the view points of the *fiqh* schools as indicated in their renowned sources without any attempt to discuss or evaluate these views. In the second chapter, while discussing practical issues, we shall use these views as guidelines and contrast them with each other with respect to present day practices. In this chapter the study consists of the following sections:

Section (1) *fiqh* aspects of *Salam*

Section (2) *Salam* compared to other Techniques

Section I

FIQH ASPECTS OF SALAM

We shall discuss here *fiqh* aspects of *Salam* as known in *fiqh* books with respect to the following:

- I: Definition of *Salam*, *Shari 'ah* stand about it and basis and rationale of its permissibility.
2. Elements and conditions of *Salam*.
3. Rules of practicing *Salam*.
4. Prerequisites of a *Salam* Contract

Definition of *Salam*, *Shari 'ah* stand about it and Basis and Rationale of its Permissibility:

FIRST: DEFINITION

Literally, the word *Salam* is synonymous to the word *salaf* (lending) and to make *Salam* is to give or lend something to somebody'. A *Salam* transaction is so called because the principal, (i.e. price) is to be paid when the concerned parties sit together to conclude the contract. Therefore, the *Salam* principal is *salaf* since it has to be paid in advance. The first term *Salam* was common in the Hijaz area while the term *salaf* was dominant in Iraq².

1 Ibn Manzur: Lisan at Arab, The Egyptian Public Corporation for Translation and Publishing, part 15, p. 187

2 Muh'd al Khatib at Shirbini: Mughni al Muhtaj, published by Mustafa at Babi at Halabi, Egypt, 1377 (1958), Part 2, p. 102

Salam in *fiqh* terminology means:

According to the *Shafi'e* School: Sale of a well defined commodity to be delivered by the seller in the future³.

According to the *Hanbali* School: To pay at present a price for a well defined commodity that remains a liability on its seller until he delivers it at a definite future time⁴.

According to the *Hanafi* School: Sale of a deferred commodity for a present price, or purchase of a deferred commodity for a present price⁵. According to the *Maliki* School: An exchange contract according to which one of the two parties becomes indebted to the other, while his indebtedness is neither linked to a good that exists at present nor to a usufruct, and the contract involves exchange of two dissimilar commodities" ⁶.

With regard to these definitions and also those of other *fuqaha'* of the same schools the following conclusions can be made:

1. Although they differ in wording, all these definitions give the same indication that *Salam* is payment of an advanced price for a commodity that will be delivered after a time lag.
2. The difference between each of these definitions and the others is confined to the restrictions that different *fuqaha'* consider to be relevant to a *Salam* transaction.

3. Ibid.

4. Ibn Qudamah (Muafaq al Din and Shams at Din) : al Mughni wa al Sharh al Kabir, Dar al Kitab al Arabi, 1392H (1972), part 4, p. 312.

5. Ibn Abidin: Hashiyat Rad al Muhtar, published by Mustafa at Babi at Halabi, Egypt, 1386H (1966), 2nd ed, part 5, p.209.

6. al Hattab wa al Mawaq: Mawahib al Jaleel wa al Taj wa al Meet, al Najah Book shop, Libya, undated, part 4, p.514.

Concepts and Terminologies:

- *Salam*: Refers. to the contract and also the commodity sold.
- *Rab al Salam*: The purchaser, or the owner of the principal.
- *al MuSalam Ilehi*: The seller.
- *al MuSalam Fih*: The commodity sold.
- *Rasumal al Salam* or *Ras al mal*: Price*.

The Nature of *Salam*

As defined earlier, *Salam* is an exchange contract that results in future indebtedness of the receiver of the finance and in this sense has both selling as well as borrowing implications. A query could therefore be posed regarding this characteristic of *Salam* and its effects on *Salam* transactions according to *fuqaha* :

1. *Salam* as a Sale

The general consensus among *fuqaha'* is that at the stage of signing the contract, *Salam* is a sale as the author of *al Majmu* of the *Shaft'e* school says: "*Salam*, therefore is a sale and its contract is based on the same requirements and conditions of a sale contract".

Ibn Qudamah of the *Hanbali* school also says: "It is a sort of sale on which the rules of a sale contract apply"⁷. As for the *Hanafi fuqaha'*, they indicate that "its elements are the same as those of *bay'* (sale), i.e., "offer" and "acceptance" and a *Salam* contract may be concluded by using the word *bay'* according to the most accepted view"⁸. The *Maliki fuqaha'* divided sale

7. Ibn Qudamah (Muafaq al Din and Shams al Din), op.cit., part 5, p. 331.

8. Ibn Abidin, al Hashiyah, op.cit, part 5, p.209.

9. The second issue of al Majmu: al Muhathah Annotation, Muh'd Najib al Muti'i -Publ'shed by Zakariyah Ali Yousuf, (undated), part 13, p. 94.

10. Ibn Qudamah, (Muafaq al Din and Shams al Din), op.cit., part 4, p.312.

11. Ibn Abidin, op.cit., part 5, p. 209.

contracts, from the view point of the time lag between payment of price and delivery of the commodity into four types. The fourth type, according the Maliki *fuqaha'* is "when delivery of the commodity alone is postponed and that is *Salam*"¹². They have also reported that some classical *fuqaha'* showed their dislike for using the word *Salam* to refer to this contract, as this contract is in fact no more than a type of sale¹³

Ibn Hazm has a different view point regarding this issue. He says: "*Salam* is not a sale".¹⁴ He then explains the difference between *Salam* and sale. However, in spite of the fact that the majority of the *fuqaha'* consider *Salam* as type of sale, yet they disagree on the idea that a *Salam* contract can be effected by mentioning the word *bay'*. There are two different view points in this respect:

- The *Hanafi, Hanbali; Maliki* and some *Shafie fuqaha'* believe that *Salam* takes place by mentioning the word *Salam* and the word *bay'*. Ibn Qudamah in al-Mughni says. "It is a sale contract which takes its contractual form by use of terms that are appropriate for a sale contract and by mentioning the word *Salam*". He also says: "It is rightful as well to effect a *Salam* contract by using the word *bay'* and by any other word that suits a *bay'* contract". Ibn Abidin also says: "It has the same elements of *bay'* and it can be concluded by using the word *bay'*"¹⁶. The author of al Majmu adds "It can be concluded by using the words *salaf* or *Salam* while there are two opinions regarding the use of the word *bay'*"¹⁷
- The view point of some *Shafi'e fuqaha'* and Ibn Hazm as indicated "by the author of *Mughni al Muhtaj* is that "mentioning

12. al Hattab wa al Mawaq, op.cit., vol.4, p.216.

13. [ibid, p. 514.

14. Ibn Hazm, al Muhalla, Idarat al Tiba'ah al Muniriyah, 1351 H., part 9, p.105.

15. **Ibn Qudamah, (Muafaq al Din), op. cit., part 9, p. 312.**

16. Ibn Abidin, op. cit., part 5, p. 209.

17. Muhammad Najib at Muti'i, op. cit., part 13, p. 105.

the word *Salam* is a necessary condition for concluding a *Salam* contract as per the most accepted view¹⁸. Ibn Hazm does not consider it a sale at all, and therefore he does not share the view that it can be concluded with the word *bay'*.

2. *Salam* as an Indebtedness

It is well known that when a *Salam* contract is effected, the commodity in question becomes a debt burden on the seller as all *fuqaha'* agree. Ibn Qudamah says in *al-Mughni* "... that is, because the commodity sold remains as a debt and if the price is to be deferred also, the contract will lead to exchange of debt against debt which is prohibited as per the unanimous belief of the *fuqaha'*"¹⁹ Ibn Abidin says: "*Salam* is allowed in what can be precisely described, because being an in kind debt, it cannot be known except by description"²⁰. The author of *al-Majmu* also confirms that "The first condition regarding commodity sold in *Salam* is that it (temporarily) remains as a liability on the seller.

There is, therefore, no dispute that *Salam* is meant to involve a debt component²¹.

It is worth mentioning here that in spite of their unanimous belief that *Salam* is a lending and borrowing transaction, yet *fuqaha'* were in sharp disagreement regarding the applicability of some conditions of debt to *Salam* particularly with regard to transfer of debt and to guarantees as we shall see below:

(A) Transferring a *Salam*'s debt (whether by the debtor or the creditor) is prohibited according to both the *Shafi'e* and the *Hanbali* schools. The author of *al-Majmu* says: "Transferring a *Salam*'s debt is not allowed because such a debt is not confirmed. The *Salam* contract is vulnerable to termination if the

18. al Shirbini, op. cit., part 2, p.102.

19. Ibn Qudamah, (Mua faq al Din), op. cit., part 4, p. 326.

20. Ibn Abidin, op. cit., part 5, p. 209.

21. Muhammad Najib al Miti'i, op. cit., part 13, p. 97.

commodity ceased to exist. Debt transfer is allowed only when compensatory arrangements (in case of default) could be resorted to, whereas such arrangements are not permissible in the case of *Salam*²². Ibn Qudam also says: "Transferring a *Salam's* debt is not allowed because such transfer is allowed only for a confirmed debt. Being vulnerable to annulment, a *Salam's* contract does not result in a confirmed debt"²³.

- The *Maliki fuqaha*, implicitly permit transfer of *Salam* debt when they stipulate that, excluding food items, a *Salam's* commodity can be disposed of before being received as we shall explain later on in this paper. Some statements of the *Hanafi fuqaha'* also imply permissibility of *Salam* debt transfer although they do not consider disposing of a *Salam* commodity before receiving it as permissible. Ibn Abidin says in his famous *Hashiyah*: "Any debt that can be offered as a collateral can be transferred"²⁴. He also says, explaining debts that can be given as collateral, "If a debt is confirmed - a confirmed debt will be discussed in more details later- on and a *Salam* commodity becomes part of it, such a debt can be transferred". What this statement implies is that any debt that a creditor can permissibly use as a collateral, can also be transferred by the creditor.

(B) Regarding guarantees in *Salam*, whether mortgage or collateral, Ibn Qudamah summarizes in *al Mughni wa al Sharhal Kabir* the opposing view points of *fuqaha'* which comprise prohibition, dislike and permissibility²⁵. The latter is widely accepted among *fuqaha'*.

SECOND: PERMISSIBILITY OF SALAM IN SHARI'AH

In *Shari'ah Salam* is a permissible contract (*ja'iz*). The following *Shari'ah* texts can be quoted in this respect:

22. al Mut'i, op. cit., part 13, p. 426.

23. Ibn Qudamah, (Muafaq al Din and Shams al Din), op. cit., part 4, p: 342.

24. Ibn Abidin, op. cit., part 5, pp. 301-342.

25. Ibn Qudamah, (Muafaq al Din), op. cit., part 4, p. 347 and p. 342. ,

(A) In the Qur'an: *Salam* is referred to in the general meaning of the holy verse, " But God hath permitted trade and forbidden usury".²⁶

Salam is a sale as mentioned earlier, therefore, it is implicitly meant by the above holy verse. Moreover, particular reference to *Salam* has also been made in the *Qur'an*. That is; "*Ye who believe! When ye deal with each other, in transactions involving future obligations, in a fixed period of time, reduce them to writing*"²⁷. Ibn Abbas said "I bear witness that guaranteed *salaf* for a specific period of time is permitted by *Allah* in his holy Book"²⁸ then he (Ibn Abbas) read the above mentioned verse.

(B) In Sunnah: There are so many sayings of the Prophet (peace be upon him) that declare permissibility of *Salam* and indicate some of its rules. Among these is his saying that "He who makes a *salaf* should do that for a specific quantity, a specific weight and a specific period of time".²⁹ Other sayings will also be quoted throughout the paper.

(C) In Ijma': It is stated in most of the *fiqh* books that there is unanimous consensus on permissibility of *Salam*. In this respect Ibn Qudamah says "As for *Ijma' Ibn al Monzer* said: all the *fuqaha'* from whom we learnt unanrmously considered *Salam* as permissible"³⁰. Some would indicate that no one had opposed this consensus except Ibn al Musayib³¹

(D) In Qiyas: The *fuqaha'* have two different view points.

The first is that of the majority of the *fuqaha'* who believe that *Salam* is enacted at variance with *qiyas* and as an exceptional license that does not fall

26. al-Baqara, part of verse No. 275.

27. al-Baqara verse No. 282.

28. al Muti'i al Majmu, op.cit, part 13, p.93.

29. al Bukhari: In Hashiyat al Sindi - Dar al Fikr, Beirut, part 2, p.30.

30. Ibn Qudamah, (Muafaq al Din and Shams al Din), op.cit, part 4, p.312.

31. al Muti'i, op.cit, part 13, p.95.

under the basic rules of *Shari'ah* understood from the saying of the Prophet; that no one should sell what he does not have"³².

The second view is that of Ibn Hazm, Ibn Taymiyah and Ibn al Qay'im who consider *Salam* to be in conformity with *qiyas* and not an exceptional case that is because *Salam* is an independent contract as Ibn Hazm³³ says or because, as in *bay' ajil* (deferred sale) in which price is delayed, commodity can be delayed in *Salam*. What the saying of the Prophet (peace be upon him) forbids is the sale of a specific thing that is not possessed by the seller rather than a well defined object that remains a liability of the seller like *Salam*. This reasoning follows the view point of Ibn Taymiyah and Ibn al Qay'im³⁴.

The essence of this deliberation is that if *Salam* does not conform to *qiyas*, it cannot be used as a standard of *qiyas*. That is because one of the preconditions of a *Qiyas* standard is that it is not enacted as a special case which does not conform to the basic norms of *Qiyas*. Moreover a *Qiyas* standard should not be at variance with an established rule of *Shari'ah*³⁵

THIRD: RATIONALE OF SALAM PERMISSIBILITY

A rationale of a particular rule is derived from the benefit that this rule generates for the public. This is quite obvious in the case of *Salam* which has been enacted to satisfy the needs of its two parties besides its benefits to the society at large. This can be concluded from the following statements of the *fuqaha'*:

The author of *al Mughni* says: "... and because people need *Salam* as, for instance, owners of farms, orchards, and trade undertakings need to make personal spending as well as spending on their business, they are permitted to

32. at Tirmizi, Sunan al Tirmizi, Dar al Fikr, 1394/1974 ed, part 2, p.351.

33. Ibn Hazm, op.cit, part 9, p.105.

34. Ibn Qay'im al Jawziyah, Aalam at Muwagi'in, at Saadah Printing Press-Egypt, 137414, 1st ed., part 1, pp.384 and 350.

35. Ibn al Hajib, Byan al Mukhtasar by Ibn al Hajib, verified by Muh'd Mazhar Bagha, Center of Islamic Culture, Um al Qura Univ., part 3, p.19.

deal in *Salam* so that they can benefit from the finance while the financier gets a cheaper commodity³⁶. An other *faqih* says: "The owner of principal wants to purchase fruits, and the owner of the fruits needs their price in advance in order to spend it in their production. Therefore *bay' at Salam* generates benefit through satisfaction of the needs of those who practice it, and hence *fuqaha'* named it as "*Bay' al Mahaweej*"³⁷.

The author of *Fat'h al Qadir* makes more elaboration indicating that "Each of the purchaser (financier) and the seller (borrower) has his own need. The former needs to purchase a commodity at a relatively lower price so as to make a gain and that is easier through *Salam* as the price of a commodity sold in *Salam* is usually lower than its current price. Meanwhile, the seller is in need of finance at present and has the ability to provide the commodity in the future, therefore, *Salam* enables him to utilize his future financial ability to satisfy his present need"³⁸.

It is clear from this discussion that *Salam*, as a financing technique, satisfies a financing need for the seller and an investment need for the purchaser while *Salam* as a trading practice satisfies a production need for the seller and a production or a consumption need for the purchaser.

FORUTH: ELEMENTS AND CONDITIONS OF SALAM

(A) ELEMENTS OF SALAM

Due to the fact that *salam* is considered by the *fuqaha'* a kind of sale, as we have mentioned before, it has the same elements of a sale contract according to Ibn Abidin who explicitly indicates that "The elements of *Salam* are those of *bay'*"³⁹. By referring to discussion on "*bay'* in different *fiqh*

36. Ibn Qudamah, (Muafaq al Din and Shams al Din), op.cit, part 4, p.312.

37. al Muti'i - op.cit, part 13, p.97.

38. Ibn at Humam at Hanafi: Sharh Fat'h at Qadir, al Matba'ah at Amiriyah at kubra, Egypt, 1st. ed., 1316H, part 5, p.342.

39. Ibn Abidin, op.cit., part 5, p. 209.

books we can easily notice the dispute among the *fuqaha'* in specifying the elements of *Salam*. Their different views are as follows:

- The majority of the *Maliki, Hanbali and Shafie fuqaha'* specify three global elements of *bay' viz* the form in which the deal takes place, the two parties of the deal and the objects to be exchanged. The *fuqaha'* then break down each of these three elements in two sub-elements. As al Shirbini says: "Its elements (i.e. elements of *bay'*) are three - breakable into six: the two parties of the deal which include the seller and the buyer, the objects to be exchanged which include the price and the commodity and finally the form in which the deal takes place which includes offer and acceptance"⁴⁰
- The *Hanafi fuqaha'* believe that the elements of *bay'* and of *Salam* are solely offer and acceptance as we have seen in the statement of Ibn Abidin mentioned earlier. "Its elements are those of *bay' viz* offer and acceptance". That is because according to this view offer and acceptance implicitly indicate the presence of two parties of the contract and objects that are to be exchanged.

(B) CONDITIONS OF *SALAM*

As mentioned before *Salam* is a sale. Therefore it has the same elements and conditions of sale besides its own conditions. al Shirbini says: "Besides the conditions for permissibility of *bay'* in *Shariah* - excluding inspection - *Salam* has six conditions of its own"⁴¹. According to this statement, *Salam* and *bay'* has the same conditions in that each of them should have two parties of the contract (buyer and seller) and a specific form of effecting the contract (offer and acceptance) - given the dispute around effecting *Salam* by mentioning the word "*bay'*". As for the two objects of the contract (price and commodity) there is a difference between *bay'* - whether on spot or against deferred payment - and *Salam*. Hence, *Salam* conditions that are in excess of those of *bay'* are related to *Salam* principal and commodity sold. The

40. at Shirbini al Khatib, op.cit., part (2), p.3 and see also the Maliki source: at Hattab, op.cit., part 4, p.228.

41. Ibid, part 2, p.102.

significance of these conditions is that whenever any one of them is not fulfilled, the *Salam* contract becomes null and void in *Shari 'ah*.

Conditions of *Salam* as advocated by the different fiqh schools are quite diverse as can be seen in the following summary:

The *Shafi'e Fuqaha'*

Believe that conditions of *Salam* should include the following: payment of price (principal) at the time of signing the contract, fixing a definite date for delivery of the commodity, making *Salam* only in commodities that can possibly be delivered and which can be measured in terms of quantity and quality, and finally, delivery of the commodity should take place in the future.

Some of the *Shafi'e fuqaha'* add that place of delivery of the commodity should also be specified if a cost of transportation is likely to be incurred.⁴²

The *Hanbali Fuqaha'*

Stipulate the following conditions for *Salam*: Commodity should be one that can be precisely described, characteristics of the commodity which affect its price should be clearly stated, quantity of the commodity should be known, date of delivery should be specified, availability of the commodity at the time of delivery should be probable, full amount of the principal should be paid at the time of signing the contract and the commodity sold should be delivered in the future.

They also mention two not commonly agreed upon conditions viz. specification of place of delivery and knowledge of medium of payment.⁴³

42. Ibid, part 2, p.102 and the following pages and also Shams Ed Din at Ramli, Nihayat at Muhtaj, Mustafa at Babi al Halabi Printing Press and Book shop, Egypt, 1386H (1967), part 4, p.183 and the following pages.

43. Ibn Qudamah, (Muafaq al Din and Shams al Din), part 4, p.313 and the following pages.

The *Maliki Fuqaha'*

Emphasize that principal should be paid in advance, the two exchanged items should not both be food items or currencies, date *of* delivery should be known and not less than a half month, commodity should be of a known quantity as per the dominant measurement devices at the place where the contract is effected, characteristics of the commodity which usually affect its price should be spelled out and the commodity sold should be available at the time agreed upon for its delivery.⁴⁴

The *Hanafi Fuqaha'*

Did not present a classified account of the conditions of *Salam* like other schools. However, some of those who made elaborations on their ideas have mentioned *some* scattered conditions which stipulate that commodity sold should be known and well described. This is in addition to characteristics usually mentioned as independent conditions like specification of kind, quality and form of the good sold. The *Hanafi fuqaha'* also stipulate that commodity should be delivered on a specific future date after signing the contract, it should not be specifically determined (only described), principal should be paid in advance, amount of principal paid should be known, place of delivery should be specified, the contract should not allow options, principal paid should be in the form of money, and the two transacted items should not be of the kind whose exchange would lead to *riba*.⁴⁵

Based on the preceding discussion on the view points of the different *fiqh* schools regarding conditions that govern *Salam*, the following can be observed:

1. Most of these conditions relate to the commodity sold through *Salam*. As regards principal the *fuqaha'* unanimously agree to its payment in advance,

44 al Kharshi/in Mukhtasar Khalil, Sadir Printing Press, Beirut (undated), part 5, p.202 and the following pages. al. . Hattab wa al Mawaq, op.cit, part 4, p.514 and the following pages.

45. Ibn Abidin, op.cit, part 5, p.209 and the following pages. Ibn al Huniam, op.cit.', part 5, p.323 and the following pages.

while disagreement arises concerning the idea that only a certain form of principal is to be used. also there are other conditions which relate to both principal and commodity sold.

2. What has not been stated by some *fiqh* schools as a condition is still catered for when laying down the general rules of *Salam* as the author of *Fat'h al Qadir* says: "No doubt *Salam* has other conditions, yet mentioning them in a *Salam* contract is not a prerequisite for its validity. These conditions need only be satisfied"⁴⁶.

It is clear that each of the above mentioned conditions has certain implications for each of the different *fiqh* schools. The implications of the same condition may sometimes differ from one *fiqh* school to another. In the following pages we shall discuss the most significant implications of these conditions which relate to our subject.

First : Advance Payment of Principal/Price at the Time of Signing the Contract.

There are several issues that relate to this subject:

1. Payment of Principal at the Time of Signing the Contract

According to the *Hanafi*, *Shafi'e* and *Hanbali* schools, payment of principal should not be delayed beyond the time when the contract is signed. Their justification for this is that delay of both commodity and principal is in fact sale of debt for debt which is prohibited in *Shari'ah*. Moreover principal must be paid in advance if the very objective of *Salam* is to be fulfilled, that is, had the seller not been in need of this amount of principal, the *Salam* contract would not have been initiated⁴⁷.

46. Ibn al Humam al Hanafi, op. cit., part 5, p.337.

47. Ibid, part 5, p.343. His views are also shared by fuqaha' of the schools which do not accept delay of payment. See al Shirbini, op.cit, part 2 , p. 102 and Ibn Qudamah (Muafaq al Din and Shams al Din), op.cit, part 4, p.334,

In spite of the fact that they consider advance payment of principal as one of the conditions of *Salam*, the *Maliki fuqaha'* do not restrict it to the time of signing the contract⁴⁸. Delay of payment, according to them, is possible as follows:

- 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 principal 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 for more than three days.
- Some of *the Maliki fuqaha'* believe that it is permissible to delay payment , for more than three days without prior agreement. - However, the *Maliki fuqaha'* believe that it is not, specially if the period of delay is rather long.
- The *Maliki fuqaha'* also disagree with regard to permissibility of delaying *Salam* principal when it is to be paid in kind. Some of them would accept delay in this case if it is for a short period of time. Payment according to them should not be delayed for many days or until time of delivery. Another group of *Maliki fuqaha'* believe that if such long delay happens, the *Salam* contract would still remain valid, but the act of making so long a delay is "*Makruh*" (disliked), while a third group of *Maliki fuqaha'* considers a *Salam* contract whose principal so delayed as null and void.

2. Provision of Principal in the Form of a Usufruct

This means for instance that payment of capital in the form of usufruct of a machine or a building. That is permissible in *Salam* according to *al Shirbini* who says : *Salam* principal can be a known usufruct of an asset and it is

48. al Hattab wa al Mawaq, op.cit, part 4, pp.514-517 and al Kharshi, op.cit, part 5, pp.202-204.

considered as actually received by receiving the asset.⁴⁹ Moreover, the period of benefiting from using the asset could exceed the *Salam* period as stated by *al Hattab wa al mawaq* "Salam principal could be a utility derived from using a real asset as stated in *al Mudawwanah* and the time for using the asset (by the *Salam* debtor) could exceed the date agreed upon for delivery of the good sold"⁵⁰. Hence, if two persons agree that one of them would use a car or a building owned by the other as *Salam* principal in exchange of a well defined commodity, the agreement is a valid *Salam* contract even if the period agreed upon for using the car or the building exceeds the period stipulated for delivery of the commodity.

3. Payment of Principal in Installments

If only part of the principal is paid at the time of signing the contract, all the *fuqaha'* agree that the *Salam* contract becomes invalid for the unpaid portion of the principal. As for the validity of the contract for the paid portion of the principal, the *fuqaha'* have two views. The first view considers the *Salam* contract valid so far as that portion is concerned while the second view believe that it is not. There is also another view which regards the contract as invalid for both parts of the principal as we shall see in the following statements:

The author of *Nihayat al Muhtaj* says: "If they (the two parties of the contract) conclude the agreement without payment of the principal and agreed that the principal should just become a liability of the financier, the contract is invalid. If only part of the principal remains unpaid, the contract is invalid for that part and also for its equivalent of the commodity sold and valid for the rest"⁵¹.

The author of *al Sharh al Kabir* says: "If only part of the principal is paid at the time of effecting the contract, the whole deal is invalid according to *al Khiraqi*". This is also reported about *Ibn Shibrumah* and *al Thawri*, while

49. al Shirbini, op.cit, part 2, p.102.

50. al Hattab wa al Mawaq, op.cit, part 4, p.516.

51. Shams Eddin al Ansari, Nihayat al Muhtaj, Mustafa al Babi al Halabi, Egypt, 1386, part 4, p.184.

Abu al-Khattab indicate that the *fuqaha'* are in disagreement on whether the *Salam* contract is valid for the paid portion of the principal or not.⁵²

The author of *al-Mughni* explicitly refers to the issue of payment of *Salam* principal in installments when he says "and if a person says: I shall give you one hundred *dirhams* as *Salam* principal for a certain quantity of food provided that I pay you fifty *dirhams* in advance and the other fifty later on, the contract is invalid for both amounts of principal according to *al-Khiraqi*. It has also been reported in this respect that according to Abu Hanifa, the *Salam* contract is valid for the amount of the principal paid at the time of signing the contract while it is not so according to *al-Shaft'e*. It seems that the view point of *al-Shaft'e* is more convincing because the portion of the principal paid in advance has an advantage over the portion to be provided in deferred payment. Hence the former portion of the principal is entitled to a greater portion of the exchanged commodity than the later. Since this greater portion is unknown, the whole contract becomes invalid.⁵³

Consequently, if a bank wishes to release *Salam* funds to a borrower according to his production schedule, the bank should sign more than one separate *Salam* contract with the borrower one for each stage of ending. The principal of each contract will be paid at the exact time of its conclusion.

4. Using a Debt Owed by the Seller or a Third Party as *Salam* Principal

Using a debt owed to the financier by the seller as *Salam* principal is prohibited according to all *fiqh* schools. *Ibn Qudamah* says "It is not permissible for a person to use (for instance) one *dinar* owed to him by somebody else as *Salam* principal for purchasing a certain quantity of food from that person. *Ibn al-Monzer* said: a consensus on prohibition of this has been reached by all the ulama' from whom I learned, including *Malik, al-Auza'i, al-Thauri, Ahmad, Eshaq, Ashab al-rai and al-Shafie*"⁵⁴

52. Ibn Qudamah (Shams al Din),. op.cit, part 4, pp.334/335.

53. Ibn Qudamah (Muafaq al Din and Shams al Din), op.cit, part 4, p.336..

54. Ibid.

Ibn al Qay'im and *Ibn Taymiah* have a different view point as reported in the former's own words "Canceling a previous debt in order to use its amount for creating a new debt happens when, for instance, somebody who wants to buy wheat through *Salam* uses 10 *dirhams* owed to him by the wheat owner as *Salam* principal. The wheat owner will thus get rid of a previous debt against accepting a new one. According to our *Sheikh (Ibn Taymiah)*, there is no consensus among *fuqaha'* that such a transaction is strictly prohibited. He (his *Sheikh*) subscribes to the view which advocates permissibility of such a deal and which seems to be more sound. There appears to be no harm in such a transaction as it is neither a direct form of selling debt for debt so that it can be strictly prohibited nor is it akin to that in the general sense".⁵⁵

As for the case when the financier transfers a debt owed to him by a third party in order to use it as *Salam* principal, the answer is clear since we have already come to know that *Salam* principal according to the three *fiqh* schools (*Hanbali*, *Shafi'e* and *Hanafi*) should be paid at the exact time of signing the contract. The *Maliki* school allows only short period delay. Therefore, transfer of an immature debt owned by a third party to be used as *Salam* principal is unacceptable according to all *fuqaha'*. However, if the debt is due and the debtor provides it to the *Salam* borrower at the exact time of signing the *Salam* contract, or during the period of delay allowed in the *Maliki* school, that is acceptable according to *Hanbali*, *Hanafi* and *Maliki fuqaha'* because the condition pertaining to payment of principal is fulfilled. However, the *Shafi'e fuqaha'* have an opposing view on this. They indicate that "If the financier transfers a debt owed to him by a third party to the *Salam* borrower and the borrower receives the amount in question at the time of signing the contract, the *Salam* contract is (still) invalid".

5. Depositing Received Principal with the Financier

This is permissible according to the *fuqaha'*. al Shirbini says "if he - the borrower - receives the *Salam* principal at the time of signing the contract and

55. Ibn al Qay'im, op.cit, part 2, p.9.

56. al Shirbini, op. cit, part 2, p.103.

deposits it with the financier immediately it is acceptable".⁵⁷ This implies that a *Salam* borrower may deposit the amount of principal he receives with the same bank that he deals in *Salam* with.

6. Determination of Principal According to a Floating Price

Such floating could be made either by leaving unit price to be determined according to the market price or instead leaving the quantity purchased undetermined. This becomes questionable in the light of the conditions stated by the *Hanafi fuqaha'* who explicitly stipulate that *Salam* principal should be known⁵⁸, and to the implicit understanding of other *fuqaha'* who also consider *Salam* principal as known since it is going to be paid at the time of signing the contract⁵⁹. The act of purchasing against a floating price does not allow principal to be known whether through knowledge of its amount or its actual receiving. This issue has been Raised by a contemporary researcher⁶⁰ who posed the following query :

Is it permissible to agree on fixing *Salam* price according to market price at the date of delivery (of the commodity) minus ten per cent for instance? The *Fatwa* Committee who was assigned judgment on issue gave the following reply

- Basically, *Salam* price should be determined by the two parties of the contract at the time of agreement.
- It is permissible to agree on fixing price according to a certain market price that prevails at the time of signing the contract.
- It is also permissible to agree on fixing the price at a certain level higher or lower than the prevailing market price.

57. Ibid

58. Ibn al Huinam, op. cit, part 5, p.338.

59. at Shirbini, op.cit; part 2, p.104 and Ibn Qudamah (Muafaq al Din and Shams at Din), op.cit, part 4, p.337.

60. Dr. Sami Homoud - al Wasa'il at Shari'ah Li Tadawol at Hisas al Istithmariyah Fi Halat al Salam wa at Ijar wa at Murabahah, Research Paper submitted to the 2nd Seminar of the at Baraka held in Tunisia during 4-7 November 1984 and the Fatawa issued by the Panel of ulama' participating in the Seminar.

- It is not permissible to agree on fixing the price according to a future market price.

Second : Deferred Delivery

This condition also has several implications including :

1. Postponement of Delivery

There should be a time lag between signing the contract and delivering the good sold. This condition is the peculiar characteristic that makes *Salam* different from other sales according to the three *fiqh* schools - excluding the *Shafi'e* school who believes that *Salam* could be made on spot basis, i.e. delivery of the commodity at the time of signing the contract.⁶¹

2. Specification of Delivery Time

All *fiqh* schools agree that delivery time should be specified, yet they disagree when they come to give examples of seasonal time limits like time of harvesting, return of pilgrims, and until government's grants are distributed. Such specification of time is rejected by the *Hanafi* and *Shafi'e* schools and accepted by Malik. Ahmed says: "I hope it would not be incorrect".⁶²

As regards the calendar to be used for specification of delivery time, the *fuqaha'* unanimously agree to using the Arabic (lunar) months and the occasions relating to them as *eid al fir* and *eid al adhha*. Other non-lunar months like the solar months and the occasions of non-Muslims are not considered acceptable according to some *fuqaha'*. However, other *fuqaha'* believe that it is acceptable as sufficiently serves the purpose of fixing a definite time limit.⁶³

61. Ibn Qudamah (Muafaq al Din and Shams al Din), op.cit, part 4, p.328 -al Shirbini, op.cit, part 2, p.105.

62. al Shirbini, op.cit, part 2, p.105. Ibn Al Humam, op.cit, part 5, p.223. al Hattab wa al Mawaq, op. cit, part 4, p.528. Ibn Qudamah (Muafaq al Din and Shams al Din), op.cit, part 4, p.328.

63. Ibid.

3. Minimum and Maximum Limits of Delivery Time

As for the minimum limit, according to the *Shafi'e* school, it starts since the time of signing the contract as they approve practicing *Salam* on spot basis. The *Hanbali* school stipulates that delivery should be made after a period usually sufficient to affect price like a month or so.⁶⁴ The *Hanafi* school has three points of view in which such a period varies between one month, three days and more than a half day. Most of them consider the first of these three time limits as the most sound one.⁶⁵ The *Maliki* school maintains the view that there should be a definite period of time during which markets usually change. Malik did not specify a certain time span, although some Maliki *fuqaha'* specify it as fifteen days.⁶⁶

It should also be noticed that there is one case in which all *fuqaha'* agree that delivery may start at the time of signing the contract. This is when, for instance, the two parties agree that delivery is to be made by providing a given part of the commodity in question daily. This has been mentioned by the *Hanbali fuqaha'* as an exceptional case of the condition that minimum period before delivery should at least be one month.⁶⁷

The maximum period before delivery has not been discussed by the *fuqaha'* as far as I know except the Maliki *fuqaha'* who suggest treatment along the same lines of *bay' al ajal*. They say that the maximum period ranges, between ten to twenty years. The later (twenty years) is supposed to be *makruh (disliked)*. According to them, if the period exceeds that limit the contract could be terminated due to the consequent increase in *gharar*.⁶⁸

Third : Commodity Sold Must Be a Debt

The implications of this condition include the following :

64. Ibn Qudamah (Muafaq al Din and Shams al Din), op.cit, part 4, p.330.

65. Ibn al Human; op.cit, part 5, p.336.

66. al Hattab wa at Mawaq, op.cit, part 4, p. 528.

67. Ibn Qudamah (Muafaq al Din and Shams al Din), op.cit, part 4, p.328.

68. al Hattab wa at Mawaq, op.cit, part 4, p.390.

1. According to all *fiqh* schools, Salam is invalid when commodity sold is an identified item as when some body says : I pay you now one hundred *riyals* for this specific good owned at present by some body else. The good here is assumed to be owned by somebody else simply because if it is owned by the seller at that moment, there will be no reason for postponement of its delivery. If it is present but not owned by the seller then such a transaction would obviously come under the strictly prohibited practice of some body selling what he does not own.

2. Consequently, *Salam* is improper in real estates⁶⁹ because it could hardly be possible to specify all the particulars of a building while it is non-existent. It could, for instance, be rather impossible to determine the exact site of the building through mere description. As regards *Salam* with housing contractors when the beneficiary agrees with the seller (contractor) that the later constructs a house for the former on a piece of land that the former owns while the contractor provides building materials; that is not *Salam* according to al *Karshi* who says: "the activities like book binding practiced now a days are not *Salam* but *ijarah* (hiring) as when you get your house built while the bricks and mud are provided by the hired builder, therefore, no need will arise for fixing a delivery date."⁷⁰

3. One of the implications of this condition also relates to selling in *Salam* the output of a certain village, farm or factory which is regarded as unacceptable according to all *fuqaha'* because the product of such an undertaking may possibly perish. We shall come to provide further details on this in chapter two.

Fourth : Specification of the Characteristics of the Commodity

It comprises the following implications :

1. Commodities that can be sold in *Salam* according to all *fuqaha'* include any thing that can permissibly be sold and whrch can be specifically described.

69. al Muti'i, op. cit, part 13, p.131.

70. al Karshi, op. cit, part 5, p.224.

However, the *fuqaha'* disagree on whether animals, meat and poultry products can be sold in *Salam*. Those who object to selling such things through *Salam* give as justification for their ideas that these objects though can permissibly be tradable, yet cannot be precisely described, while those who believe in the contrary hold that precise description is possible.⁷¹ We shall come to add more details on this in Chapter Two. Accordingly, it can be said that the scope of *Salam* application includes most of the industrial and agricultural products as well as services as will be explained later on.

2. The characteristics to be mentioned in describing the commodity sold . should include those which could apparently affect its price without including other unnecessary details in order not to make *Salam* impracticable.

3. The *fuqaha'* have stipulated the criteria to be *used* for describing commodity sold. Some of these criteria like kind and type are generally agreed upon, while others are not: Disputable criteria are like good or bad quality which the *Shafi 'e* school does not regard as a necessary condition and also like color and place of production advocated by the *Hanbali* school. The above mentioned characteristics constitute the minimum specification to be made for any commodity. When describing a certain commodity other specific characteristics of that particular commodity need also be mentioned as the *fuqaha'* did with so many commodities. In the case of agricultural products, for instance, Ibn Qudamah says in al Mughni: "wheat can be described with four characteristics type as when some body says *sabilah* or *selmoni*, place of production like *horani*, *bulqawi* or *semali* or size of grain whether small or big and whether it is new or old. Specification is also required if the wheat to be sold has different colors and it needs to be sold in its refined form only. The same holds true for barley, cotton and all kinds of grains"⁷². Of course for the industrial products of today, specification could be made in terms of model, manufacturer, capacity, country of origin, type of raw materials, etc.

4. *Salam* in usufruct: Is it permissible to sell the usufruct of a real asset through *Salam*, as for instance, when the financier pays one thousand *riyals*

71. Ibn Qudamah (Muafaq al Din and Shams al Din), op. cit, part 4, p.313.

72. Ibn Qudamah (Muafaq al Din), op.cit, part 4, p.319.

against using a machine for a specific period of time, say a month. Such a transaction is acceptable according to the Shafi'i *fuqaha'* who say : "*Salam* can be practiced by sale of services like teaching al Qur'an because it results in obligation like sale of assets".⁷³ The Maliki *fuqaha'*, as their previously mentioned definition of *Salam* indicates, believe that usufruct cannot be traded in *Salam* "it should neither be an existing asset nor a usufruct".⁷⁴

5. *Salam* in money: It is well accepted that money can be used as price (or principal) in a *Salam* contract, but can it also be used as commodity sold ? This situation can be visualized in three forms.

The first form: when principal is money like Saudi *riyals* and the commodity sold is also Saudi *riyals*. Such a transaction is prohibited according to unanimous view of the *fuqaha'*, because exchange of money in this way is not allowed unless the two exchanged amounts are equal and paid on the spot while *Salam* necessitates deferred delivery of the commodity sold and different exchanged amounts.

The second form: when principal is money (Saudi *riyals*) and commodity sold is another type of money (US dollars). This is a currency exchange transaction that cannot be made through *Salam* which requires deferred delivery of commodity sold while such exchange requires simultaneous payment of the two exchanged amounts. As al Shirbini says "It is not permissible to pay one of them as *Salam* principal for the other because *Salam* requires payment of only one of the two exchanged objects of the contract at the time of signing the contract and currency exchange requires simultaneous payment of both of the exchanged amounts".⁷⁵

The third form: When principal is a tradable commodity and the good sold is money. The *fuqaha'* have different view points on this. The Shafi'i,

73. al Shirbini, op. cit, part 2, p.114.

74. See page 7 of this paper.

75. al Shirbini, op. cit, part 2, p.114.

Maliki and some of the Hanbali *fuqaha'* regard this as permissible.⁷⁶ The Hanafi and some of the Hanbali *fuqaha'* believe that it is not. The author of *Fat'h al Qadir* says: "As for *dirhams* and *dinars*, they cannot be exchanged with Dirhams or *dinars* in *Salam* as unanimously viewed by the *Fuqaha*. If a commodity like wheat or cloth is given in advance in exchange of ten *dinars* this also cannot be regarded as a *Salam* contract, because the object sold through *Salam* must be a commodity and its price paid in advance should be money. In case such a contract takes place; it can either be regarded as an invalid *Salam* contract or sale against deferred payment of price".⁷⁷

Fifth : Commodity Sold Should Be of Known Quantity

This condition has several implications :

1. Measuring Device : The *fuqaha'* of the four schools agree that the objective of measurement is to know the quantity of the commodity sold. As Ibn Qudamah says in al Mughni "because the objective is to know the quantity of the commodity sold and whether it can be delivered without conflict or not, any measuring device can be used for that purpose".⁷⁸ Consequently all the known methods of measurement like weighing, measuring the length or volume, counting etc. are considered acceptable, each where appropriate. Ibn Hazm has a different point of view as he restricts measurement to volume and weight following the literal text of the *hadith* which does not mention other methods.⁷⁹

2. Is it Possible to Substitute One Measuring Device for the Other? That is to say is it possible to use weighing for a commodity that is usually measured in quantity or vice versa? The Hanbali *fuqaha'* have two points of view of which permissibility is the more pronounced.⁸⁰ The Shafi'i⁸¹ and the Maliki⁸²

76. See for that: at Shirbini, op.cit, p.115 - al Hattab, op.cit, p.524, Ibn Qudamah (Muafaq al Din and Shams al Din), op.cit, part 4, p.338.

77. Ibn al Humam, op.cit, part 5, p.325.

78. Ibn Qudamah (Muafaq al Din), Op. cit, Part 4, p.247, 329.

79. Ibn Hazm, op. cit, part 9, p.106.

80. Ibn Qudamah (Muafaq al Din and Shams at Din), part 4, pp.325/326.

fuqaha' also believe in the absolute permissibility of such a practice. Also according to the Hanafi *fuqaha'* permissibility (of substituting one measurement device for another) looks more pronounced than otherwise.⁸³ It should again be noticed that it is permissible to use two measuring devices together, e.g. weighing and counting when the commodity in question consists of a number of heterogeneous items. Counting together with classifying items into big and small can be used for commodities like watermelon, pomegranate and some handicraft products.

3. Measurement should be made with a device. that is well known in the place of effecting the contract : As Ibn Qudamah says in al Mughni wa al Sharh al Kabir "Ibn al Monzer said : all those *fuqaha'* from whom we learned have agreed that *Salam* in foodstuffs is not permissible by using an unknown measuring device like a basket that is not commonly used or the length of some body's arm in measuring a piece of cloth because if such a device is destroyed or the person whose arm is used for measurement dies, the *Salam* contract would become invalid. If some body has a certain device for measuring quantity or weight of commodities it can be used for *Salam* purposes only if it is widely known and accepted in the place where the *Salam* contract is effected, otherwise it can not. "84

Sixth : Commodity Sold Should Be a Thing That Can Possibly Be Delivered

Some *fiqh* schools indicate in this respect that at the time of delivery, commodity should be abundant at the place of effecting the contract. This condition has several implications:

I. The *Maliki, Shafi'e and Hanbali fuqaha'* stipulate that availability of *Salam* commodity is required at time of delivery. If there was shortage of the commodity before delivery time or even it was non-existent at the time of

81. al Shirbini, part 2, pp. 107/108.

82. al Kharshi, op. cit, part 5, p.212.

83. Ibn Abidin, op. cit, part 5, pp. 209-211.

84. Ibn Qudamah (Muafaq al Din and Shams al Din), op.cit, part 4, p.325.

signing the contract, the *Salam* contract is still valid.⁸⁵ The Hanafi *fuqaha'* hold the view that commodity sold 'should be available since the time of signing the contract and until delivery time.'⁸⁶

2. The meaning of abundance of the commodity sold at delivery time is that the commodity should be available in the market and not necessarily in the hands of the seller. That is to say *Salam* in agricultural products can be practiced by those who do not own agricultural land. It has been reported about some *Sahabah* (companions of the Prophet) that they said "we used to gain war spoils with the Prophet (peace be upon him) while some people used to come to us from *al Sham* so that we make contracts with them in *Salam* for wheat and barley. I asked the *sahabi* (the reporter says); did they have agricultural land? He answered, we did not use to ask them this question".⁸⁷

3. Closely related to the condition of ability to deliver the commodity sold; is specification of place of delivery. Some *fuqaha'* mention this as an independent condition while others regard it as unnecessary. However, all *fuqaha'* agree that delivery is normally made at the place of initiating the contract. If the two parties have any interest to make delivery elsewhere this need to be mentioned in the contract especially if a cost of transportation will arise due to change of place of delivery.⁸⁸

Seventh : The Two Objects Exchanged Should Not Be of the Kind Whose Exchange Would Lead to "*Riba*"

This condition was mentioned by the Hanafi and the Maliki *fuqaha'* among other conditions of *Salam*, while the Hanbali *fuqaha'* mentioned it as an issue relating to *Salam*. The Shafi'i *fuqaha'* did not mention it explicitly, yet

85. at Hattab, part 4, p.534 - Ibn Qudamah (Muafaq at Din and Shams at Din), part 4, p.332 - At Muti'i, part 13, p.132, op.cit.

86. Ibn Abidin, op.cit, part 5, p.212.

87. at Muti'i, part 13, p.95 - at Bukhari at Sindi, part 2, p.20.

88. See for that : at Shirbini, part 2, p.104 — Ibn Abidin, part 2, p. 215/216 — Ibn Quda mah (Muafaq at Din and Shams al Din), part 4, p.339/341 -- al Hattab wa al Mawaq, part 4, p.545, op. cit.'

they adhere to it within the context of the Shari 'ah ruling that prohibits *riba*.⁸⁹ However, it is known that **fiqh** schools have different perceptions regarding causes of *riba*. Therefore, one fiqh school may reject a deal on the ground that it is *riba* while an other may not. Ibn Rushd has explained this issue in a comparative manner when he said about *Salam* conditions " price and commodity sold should be of the kind that can permissibly be dealt in on nasa'(deferment) basis. If they are not of that kind *Salam* cannot be practiced in them. Ibn Rushd then explains the types of transactions that involve *riba*. According to Malik, *riba* is committed when the types of utilities derived from the two exchanged commodities are the same. Abu Hanifa perceives *riba* to happen when the two exchanged commodities are of the same kind, whereas *al Shafi 'e*⁹⁰ believes that a transaction would become *riba* when the two exchanged commodities are both foodstuffs and of the same kind. *Ibn Rushd* did not mention the *Hanbali* criterion for a *riba*-ridden transaction. However, the *Hanbali* fuqaha' seem to be sharing the same views of the *Shafi'e* fuqaha'.⁹¹

We shall have more to discuss in detail in the second chapter of this paper regarding the issues relating to this condition as such issues are closely connected with payment of principal in the form of raw materials.

Eighth : The Contract should be Binding and with No Option Especially Contractual Option

This condition has been made by the Hanafi fuqaha' as an independent condition and by the Shafi'i and the Hanbali fuqaha' in the context of *bay'*. The justification made by these fuqaha' to support their view is that while *Salam* necessitates payment of principal at the time of signing the contract, contractual option. requires postponement of finalization of the contract for three days.⁹² The Maliki fuqaha' permit postponing payment of *Salam*

89. Ibn Abidin, part 5, p.217 -- al Hattab, part 4, p.524 -- Ibn Qudamah, part 4, p.338 -- al Shirbini, part 2, p.115, op.cit.

90. Ibn Rushd, *Bidayat al Mujtahid wa Nihayat al Muqtasid*, Dar al Kutub al Hadith, un-dated, part 2, p.168.

91. Ibn Qudamah, *al Kafi*, al Maktab al Islami, Beirut, 1979, 2nd Ed., part 2, pp.53/54.

92. Ibn Abidin, p.217 - al Shirbini, part 2, p.47 - Ibn Qudamah (Shams Eddin), part 4, p.67, op.cit.

principal for three days after signing the contract even if such a delay is introduced as a condition in the contract and therefore they accept contractual option.⁹³

Rules of Practicing *Salam*

After a *Salam* contract is concluded according to the previously mentioned rules and conditions, the period specified in that contract for delivery of the commodity starts. The *fuqaha'* made attempts to predict the issues that may arise during this period as well as at the time of delivering the commodity sold and explain the *Shari'ah* standpoint regarding such issues. In this part of the paper we shall discuss this issue in order to draw out a global idea about *Salam*. This can be done as follows :

Firstly : During the *Salam* Period One of the Following Events May Take Place

First Probability : *Iqalah* (Termination)

It refers to discontinuation of the deal when proposed by one party and accepted by the other. The Prophet (peace be upon him) has recommended relieving Muslims from obligations that they prove to be unable to satisfy when he said "whoever relieves a Muslim from an obligation, *Allah* will regard one of his lapses as undone".⁹⁴ Discontinuation of a sale contract is regarded as termination of the contract according to the *Shafi'e* and the Hanbali *fuqaha'*, while it resembles a counter sale contract according to the *Hanafi and the Maliki fuqaha'*,⁹⁵ and it is unanimously considered permissible, provided that it is for the whole transaction. If it is partial, e.g. for only one fourth or one half of the transaction it is regarded as acceptable by the Shafi'i, the Hanafi and

93. al Hattab, op.cit, part 4, p.515.

94. Abu Dawood, Sunan Abu Dawood, Dar Aya' at Turath at Arabi, Lebanon, undated, part 3, p.234.

95. at Shirbini, part 2, p.65 - Ibn Qudamah, part 4, p.343 Ibn al Humam, part 2, p.346 - at Kharshi, part 5, p.166, op.cit.

some of the Hanbali *fuqaha*'.⁹⁶ The Maliki *fuqaha*' do not accept partial termination of a *Salam* contract as al Mawaq says: "If, in a *Salam* transaction in which food or any other commodity is sold for dirhams, the buyer discharges the seller of the contract before or after its maturity for only a part of the contracted quantity such arrangement is not permissible".⁹⁷ The Maliki *fuqaha*' have more details on this issue subject to the type of principal in question.

Contrary to the Hanafi *fuqaha*', the *Malikis* indicate that if a discharge takes place the borrower (seller) should immediately pay back the same principal that he received from the financier. If the same principal is not available, repayment could be made in terms of an equivalent amount or value. There is disagreement among the *fuqaha*' concerning permissibility of taking *ewad* (compensation) when principal is not available. This is acceptable according to the Shafi'i *fuqaha*', unacceptable according to the Hanafi *fuqaha*' and controversial among the Hanbali *fuqaha*'. The Maliki *fuqaha*' consider it acceptable subject to some conditions.⁹⁸

Second Probability : Financier Disposes of the *Salam* Commodity before Receiving it

It is known that in a *Salam* contract ownership of the principal will go to the borrower while that of the commodity sold will go to the financier. The latter is an incomplete ownership as it is ownership of an outstanding debt. It is also a non-confirmed debt since the contract can possibly be annulled. This leads to the question whether it is permissible or not for the financier to dispose of the commodity before he receives it. Disposal here includes all types of action that lead to ownership transfer like *bay'*, *murabahah*, *tawliyah*, *shirkah*, *hewalah* and *Salam*⁹⁹, whether to the same person with whom the *Salam* contract was signed or to somebody else. The answers given by *fuqaha*' to this question are summarized in the following :

96. al Shirbini, part 2, p.65 - Ibn Abidin, part 5, p.219 - Ibn Qudamah (Muafaq al Din and Shams al Din), part 4, p.343, op.cit.

97. al Mawaq, op. cit, part 4, p.484.

98. See footnote No. 96 above.

99. See Glossary of Juristic Terminologies.

(A) The *Shafi'e, Hanafi and Hanbali fuqaha'* consider this unacceptable. Their ideas on this issue can be shown as follows :

- The *Shafi'e fuqaha'* state that : "It is not permissible to sell or exchange a commodity that is still to be delivered through *Salam*". The *Shafi'e fuqaha'* then add - after mentioning the ruling that regulates disposing of a sold commodity which is not received : "it is not permissible to sell a commodity you purchased or -to make it subject to partnership or *tawliyah* before actually receiving it be it a moveable asset or a real estate, it is generally accepted that release is prohibited whether to the original seller or somebody else" ¹⁰⁰
- The *Hanbali Fuqaha'* state that "commodity purchased in *Salam* can not be sold before being actually received. There is no dispute on this as to our knowledge. That is because Prophet Muhammad (peace be upon him) has forbidden sale of purchased food before receiving it and also sale of what one cannot assure its availability" and they add "Partnership and *tawliyah* are also prohibited in such commodities" .¹⁰¹
- According to the *Hanafi Fuqaha'* "It is neither permissible for the borrower to dispose of the principal nor is it permissible for the financier to dispose of the commodity before receiving it whether disposal is through sale, *shirkah, murabahah* or *tawliyah* and even to a contract co-partner". Some of the *Hanafi Fuqaha'* indicate that it is permissible to dispose of such a commodity through *murabahah* or *tawliyah*."

(^b) The *Maliki fuqaha'* have some details that are worth mentioning. These details include the following :

100. al Shirbini, op.cit, part 2, p.70.

101. Ibn Qudamah (Muafaq al Din and Shams al Din), op. cit, part 4, pp.341/342.

102. Ibn Abidin, op.cit, part 5, pp.218/219.

1. Selling a *Salam* commodity to a third party. Al Mawaq says: "Malik said in al Mudawanah - whatever you purchase or make *Salam* for other than food stuffs and drinks, be it any commodity whether measurable in number, volume or weight, can be resold to a third party in cash or otherwise before being received and against a price equal to, less than or more than the principal you paid. It is however no good to sell such a commodity for one of its own kind - he means for less or more of a different type of that same commodity. As for selling it for an equal number, weight or volume of the same commodity it has been mentioned in *Kitab al Hibat* that "If the deal would result in a benefit to the purchaser (financier) it is prohibited, if it would result in a benefit to the seller (borrower) it is permissible and can be regarded as *qard*".¹⁰³

2. Selling a *Salam* commodity to the borrower before receiving it. According to Malik: "It is permissible to sell an unreceived *Salam* commodity to the borrower in cash or through *Salam* for an amount equal to or less than the original principal, and whether before or after the maturity date of the contract, as one will not be accused (of practicing *riba*) when offering more for less. Selling for a price above the former one is prohibited under all circumstances whether on the maturity date or not, because in this case the *Salam* becomes a veil used for gaining more than one has paid".¹⁰⁴

The Third Probability: Delivery of Commodity Sold before Due Date

If the borrower (seller) wishes to deliver the commodity sold before the date agreed upon, it is permissible if the financier (buyer) agrees to that. Otherwise, the latter should not be forced to accept early delivery provided that he has a reasonable justification. If he has no such reason for refusal he should receive it because by early delivery the benefit he is entitled to by virtue of the contract i.e. receiving the commodity will be fulfilled; in addition to the benefit he gains in early delivery. If conflict arises between the financier and the borrower the interest of the former should be regarded. This has been assured by the following statements of *fuqaha'* :

103. at Mawaq, op.cit, part 4, p.542.

104. Ibid.

- al Shirbini says in *Mughni al Muhtaj* "and if he (the borrower) delivers the commodity sold before the -date agreed upon and the financier refuses to receive it according to an acceptable reason as when the object sold is an animal which needs feeding or delivery is made during war time, the financier should not be forced to receive the commodity sold. If the borrower has an acceptable reason for advance delivery like redemption of a mortgage or relief of a guarantor, the financier is forced to accept early delivery ... while it is known that when the interests of the two parties of the contract conflict in this respect consideration should be made to that of the financier" .¹⁰⁵

Ibn Qudamah says in *al Mughni wa al Sharh al Kabir* "If he (the seller) delivers the *Salam* commodity to the financier before the date agreed upon and the latter would encounter no harm in receiving it he should do so, otherwise he should not. Harm may result, for instance, when the object is a perishable commodity- like fruits and other foodstuffs or a one that needs feeding like animals, or if time of expedited delivery is not safe".¹⁰⁶

- In spite of the fact that they follow the same basic rules, the Maliki *Fuqaha'* explicitly stated the limitation that a *Salam* commodity delivered before time must have exactly the same specifications defined in the contract. According to them "Early delivery of *Salam* is permissible only when the commodity delivered satisfies the same specifications agreed upon in the contract".¹⁰⁷ According to al Mudawanah and other references a *Salam* ' commodity can be delivered before time if it is exactly according to the specifications and quantity shown in the contract, yet the financier is not obliged to accept it. They emphasize maintaining the same characteristics agreed upon because if the financier, for the sake of early delivery, accepts a

105.a Shirbini, Op. cit, part 2, p.116.

106.Ibn Qudamah (Muafaq al Din and Shams al Din), Op. cit, part 4, p.331.

107. al Hattab, op.cit, part 4, p.541.

commodity of a lesser quality or quantity, the dealing becomes a kind of discount against early delivery.

**Secondly : At the Time of Delivery One of the Following Probabilities
Could Happen:**

**First Probability : Delivery of the Commodity as Agreed Upon in the Contract
Regarding Kind, Type, Characteristics, Quantity and
Specified Place**

In this case the financier is obliged to receive the commodity sold and reliefs the borrower of his obligation. If he does not, the judge should receive it instead because that is regarded as a sufficient alternative of reception by the refusing financier.¹⁰⁸ Other issues are also relevant in this context including the following :

(A) When the date of *Salam* is due the borrower may give money to the financier and ask him to purchase the commodity and take it for himself against the *Salam* Principal. If this happens, the act of the financier when receiving the commodity in this way is invalid. As regards acceptability of his act of just purchasing the commodity on behalf of the borrower, there are two opposing points of view. Also the borrower may ask the financier to purchase and receive the commodity on his behalf first and then take it in settlement of the debt. In this case, purchasing and receiving the commodity by the financier on behalf of the borrower is valid, contrary to the previous instance. That is because it is unacceptable for a person to be the agent of somebody else for settlement of a claim owed to him.¹⁰⁹ However, the Hanafi *fuqaha'* regard this as acceptable.¹¹⁰

(B) When the financier sells in a separate *Salam* transaction a commodity identical to the one he had purchased in *Salam* and when delivery is due the financier asks his present buyer to go and receive the commodity from his

108. Ibn Qudamah (Muafaq al Din and Shams at Din), op.cit, part 4, p.345.

109.al Muti'i, op. cit, part 13, p.155.

110.Ibn at Humam, op.cit, part 5, p.346/47.

previous seller. This is considered invalid by analogy to example A above. The financier should receive the commodity from his counterpart in the former contract and then deliver it to his counterpart in the latter contract.

(C) When the financier, after receiving the commodity, discover that it is defective. In this case he has the right to return back the whole commodity received or accept it without compensation. It is also said that he can ask for replacement of the defective portion.¹¹²

Second Probability : When The Borrower Delivers a Commodity That Does Not Satisfy Specifications Agreed Upon

Such violation of contract could be with respect to kind, type, characteristics, quantity or making delivery at the wrong place. The rulings regarding this issue can be summarized in the following :

A. When the seller delivers a commodity which is not of the kind agreed upon, as, for instance, when the two parties agree on wheat and the seller delivers clothes, such violation is not permissible according to the Shafi'i, Hanbali and the Hanafi schools and permissible according to the Maliki school. This can be presented in more detail as follow :

- The author of Mughni al Muhtaj says : "It is not permissible in *Salam* to deliver a commodity of a kind other than what has been agreed upon. Then the same author mentions a way out which can be resorted to in order to make such a practice permissible, that is, "the two parties can terminate the *Salam* contract and then the financier takes an alternative commodity as a compensation for the principal he paid". Another situation where changing the *Salam* commodity is permissible has been mentioned by the author of *Nihayat al Muhtaj*, viz. when " a *Salam* debt is guaranteed by a third party and the financier wants to take compensation for this debt from the guarantor in terms of a different type of commodity. It seems that

¹¹¹. a Hattab, part 9, p.149 - Ibn Qudamah (Muafaq al Din and Shams al Din), part 4, p.87, op.cit. ¹¹². al Shirbini, op. cit., part 2, p.155.

such a deal is permissible because the principal becomes a guaranteed and not a *Salam* debt. Hence the obligation that stems from it is payable in terms of equivalent and not necessarily same kind.¹¹³

- As regards the *Hanbali fuqaha'*, Ibn Qudamah says in *al Mughni Wag al Sharh al Kabir*: "If he (the seller) delivers a commodity of a different kind it should not be accepted. Prohibition here is based on the saying of the Prophet (peace be upon him) "He who makes *Salam* payment for receiving a certain thing should not switch to another one".¹¹⁴
- The *Malikifuqaha'* believe that an alternative commodity can be delivered for settlement of a *Salam* debt according to a condition mentioned by al Mawaq who quoted Ibn Muhriz as saying: "settlement can be made in terms of a different commodity if the commodity sold through *Salam* is of the type that can permissibly be sold before being actually received. This statement leads to exclusion of foodstuffs only¹¹⁵. Also al Kharashi has more details on this along the same lines.¹¹⁶

B. Difference in Type. If the seller provides the same kind of commodity agreed upon but not the same type, e.g. Iraqi instead of Algerian dates, of the same quality prescribed in the contract. The *fuqaha'* have two points of view regarding this. al Shirbini said "it is not permissible to replace a commodity agreed upon in *Salam* with a one that differs in terms of kind or type. It is however said that difference is permitted in type only as, being of the same kind is sufficient to make the two commodities identical. Yet the financier is by no means obliged to accept such a replacement because difference in type may imply difference in utility as well".¹¹⁷ According to another reference "if the seller delivers a commodity that is not described in the contract or of a different

113. al Ansar, op.cit, part 4, 0.214.

114. Reported by Abu Dawood and Ibn Majah.

115. al Mawaq, Op.cit, part 4, p.542.

116. al Kahrshi, op.cit, part 5, p.227.

117.al Shirbini, op. cit, part 2, p.115.

type from what has been stipulated, it may be acceptable provided that the two commodities can be used for the same purpose and that the financier accepts the alternative commodity. 118

Consequently, some commodities of today like refrigerators can be classified into different types according to trade mark. Different types become identical if each unit has the same quality and capacity.

C. Difference in Characteristics. Characteristics here concern quality. Again refrigerators can be cited as a fitting example of present day commodities. A National refrigerator for instance could be better than a Samsung one, or a non-freezing National refrigerator could be better than an *ordinary* one. The opposing view points of *fuqaha'* regarding this issue can be summarized as follows

- (i) The *Shafi'e*, *Hanbali* and *Maliki fuqaha'* approve accepting a commodity of a quality that is higher or lower than what has been stipulated in the contract, provided that it is made according to mutual consent of the two parties. It is important to note here that accepting a lower quality should not lead to a compensatory payment from borrower to the financier. In this, Ibn Qudamah says: "if the seller delivers a commodity which is not of the same characteristics agreed upon the financier is not obliged to accept it because forcing him to do so will make him lose part of his entitlement. If the two parties mutually agree to this and if the commodity to be delivered is of the same kind agreed upon, the deal is permissible. If they reach agreement on condition that the seller would, make compensatory payment to the financier this is not permissible because by so doing the financier will be making a gain against accepting lower quality. If the seller delivers a commodity of a higher quality than what has been agreed upon

118. Ibn Qudamah (Shams Eddin), op. cit, part 4, p.324

and asks the financier to pay for the excess quality this is also not permissible".¹¹⁹

- (ii) According to the Hanafi *fuqaha'*, it has been reported by Ibn Qudamah that Abu Hanifa said "it is permissible to receive a better commodity against payment for the excess in quality."¹²⁰

D. Difference in Quantity Excessive delivery. If the seller delivers more than the quantity agreed upon the financier is not obliged to accept the excess amount, yet on mutual agreement he can, and it is permissible to make payment for the additional amount received. Ibn Qudamah says: "if the seller delivers more than the quantity agreed upon and says to the financier take this additional amount and pay me for it and the latter does so, the *Salam* contract is valid, because the quantity delivered in excess of the contract could be dealt with in a separate contract".¹²¹ The Maliki *fuqaha'* go further saying that "it is permissible for the financier after the maturity of the contract - to ask for extra length (of a cloth) for instance against payment, that is to give the seller an additional amount of money for a longer piece of cloth, this is permissible provided that delivery is made immediately."¹²²

Deficient Delivery: If the seller delivers less than the quantity agreed upon the financier may accept the amount delivered and claim settlement of the difference or he may terminate the contract for the missing portion as partial termination of a *Salam* contract is permissible. The financier can also resort to the rules pertaining to delay of complete settlement as we shall explain later on.

E. Delivery at a place other than the one specified in the contract. This could be done by the seller or at the request of the financier. The *fuqaha'* agree that delivery should be made at the place agreed upon in the contract. If any of the two parties requests change of place of delivery, his request should be

119. Ibn Qudamah (Muafaq al Din and Shams al Din), op.cit, part 2, pp.346-347 - al Mut'i, part 3, p. 118 - at Kharshi, part 5, pp.226-227, op.cit.

120. Ibid, p.347.

121. bid.

122. at Hattab, op.cit, part 4, p.543.

considered as follows : If making delivery at the new place involves cost of transportation or there is any risk to be undertaken or the value of the commodity in question differs at different places, the other party is not obliged to accept the request. However, in the absence of these constraints or by mutual consent of the two parties, place of delivery could permissibly be changed.¹²³

Third Probability : Failure of the seller to make. Delivery in Due Time. Stipulations regarding failure to. make timely delivery depend on the reasons behind each particular case:

(A) FAILURE DUE TO *FAQR* (FINANCIAL INCAPABILITY)

According to *Shari'ah* financial incapability is the state of being penniless. The ruling in this case is explicitly determined by the holly verse "If the debtor is in a difficulty, grant him time till it is easy for him to repay. But if ye remit it by way of charity, that is best for you if ye only knew".¹²⁴ -

(B) FAILURE DUE TO "*EFLAS*" (BANKRUPTCY)

A bankrupt in *Shari'ah* is the one who owes due debts that exceed his total 'assets. In this case, the rulings of bankruptcy stated in *Shari 'ah* will be applied.

(C) FAILURE DUE TO A FORCE MAJEURE

Or as it is commonly known "The theory of force majeure" which can be applied when the commodity sold is completely not available in the market or delivery becomes impossible until the commodity is not available in the market. The ruling in this case is that either the contract be terminated and price repaid to the financier or the financier waits until the seller is able to make delivery. If delivery is not possible for only a part of the commodity the financier is free to choose between terminating the 'contract for the whole amount of the commodity in question and receiving back the price, waiting until delivery of

123. al Mawaq, part 4, pp. 544/545. Ibn Abidin, part 5, p. 216. al Shirbini, part 2, p.116, op.cit.

124. al Baqara, verse No.280.

the whole amount is possible, or terminating the contract for only the missing part of the commodity.¹²⁵

(D) DELAY DUE TO DELIVERY EVASION

This happens when delivery is not made on due time though the commodity is available in the nearby or far away markets, and also the seller is present and able to provide it, yet he tries to evade delivery. In this case, the rulings concerning an evading debtor mentioned in the *hadith* "The evasion of a solvent debtor makes abuse of his honor and his punishment permissible"¹²⁶ are applied. Of course, punishment and abuse of honor in this case is to be executed by the Judge and not the financier.

An issue can be raised here : Is it permissible by mutual agreement of the two parties - to introduce a clause in the contract which prescribes a specific amount payable as a fine for late delivery to compensate the financier?

This issue has not been tackled in this form by the classical *fuqaha'*, yet it has been considered by contemporary *Shari 'ah* advisory bodies and some modern writers. Below are some *fatawa* (juridical opinions) in this connection :

- (i). The *fatwa* issued by the Group of *ulama'* participating in the second seminar of the al Baraka Company held in Tunis (Safar 1405H/November 1984). The question posed to the Ulama' in that seminar was as follows:

Is it permissible for an Islamic bank to impose a penalty clause on the debtor like payment of a certain amount of money in case of delay of repayment, provided that the bank is going to utilize the money thus received for charity payments?

The *fatwa* : It is not permissible.

125. al Kharshi, part 5, p.221. al Shirbini, part 2, p.106. Ibn Qudamah (Muafaq al Din and Shams al Din), part 4, pp.333-334, op. cit.

126. Sahih at Bukhari - al Sindi - part 2, p.58.

- (ii) The *fatwa* issued by the Group of *ulama'* participating in the third seminar of the al Baraka Company held in Turkey (Muharram 1406H/September 1985). The query was :

Is it permissible in *Shari 'ah* to apply the principle of imposing a compensatory charge on the debtor who delays repayment? The gist of the answer was as follows:

(A) It is permissible in *Shari 'ah* to force a solvent debtor who evades repayment without a legitimate excuse, to compensate the creditor for the harm inflicted on the latter due to delay of repayment.

(B) Such compensation is to be estimated by the Court in the light of the amount of normal profit that the creditor misses and which he could have achieved by investing his money through means approved by *Shari 'ah* for the period of the delay.. Knowledge of experts as well as the average profit achieved by Islamic banks during the same period on the same amount can also be taken into consideration when making the estimate.

(C) It is not permissible for the creditor and the debtor to agree beforehand on the amount of compensation for default in delivery.

- (iii) Resolution No.(3) issued on 2I/8/I394 by *Hay'at Kibar al Ulama'* (Board of Highest Muslim Scholars) of Saudi Arabia which states, after reviewing different proofs, that " for all that, the Board unanimously decides that the penalty clause commonly used in contracts is a well • recognized and valid condition that could be applied whenever there is no *Shari 'ah* recognized excuse for not meeting obligations. If there is such an excuse the penalty clause remains ineffective until the excuse becomes nonexistent¹²⁷

127. Magazine of the Fiqh Academy, 2nd issue 1408H, pp.65-74.

Prerequisites of a *Salam* Contract

It should be mentioned that the Holy *Qur'an* orders in the "*al-mudayanah*"¹²⁸ verse that debt, including *Salam* contract, should be documented by reducing it to a written form. The Holy *Qur'an* has also specified the general controls for writing a debt statement. Therefore, for specifications of the requirements of a *Salam* contract, we must abide by this verse and the previously mentioned *Shari'ah* rulings relating to this contract. In this respect the following can be stated:

General Requirements

1. The necessity for effecting the contract in writing in order to adhere to the order in the verse which - according to the *Mufassirin* can be regarded as either "a must" or "a preferable" practice. We consider it as a must because of the volume of present day transactions as well as complexity and difficulty of controlling them without written statements. Writing is required for all dealings be it big¹²⁹ or small because *Allah Subhanahu wa ta'ala* says "Disdain not to reduce to writing (your contract) for a future period whether it be small or big" ¹³⁰

2. Writing should be undertaken by a third party according to the holy verse "Let a scribe write down faithfully between the parties" ¹³¹ *Allah Subhanahu wa ta'ala* did not say One of you should write in order to guarantee subjectivity. The writer should be a specialist because *Allah Subhanahu wa ta'ala* designated him as (a scribe). In this connection also a contract form may be prepared by a *Shari'ah* advisory body so that specific contents can be added later on.

128. See Ph.D. thesis of this author on "al Raqabah Ala at Amwal Fi at Fikr at Islami", Faculty of Commerce, Azhar University, 1982, pp. 216-217 and 236-241.

129. It is important to refer to the Lebanese Law in dealing with *Salam* in clauses No. 487 through 492 where it states that the contract should be made in writing however small its value is, as an exceptional case from the ruling regarding the minimum value of written contracts - See Dr. Abdel Razaq at Sanhuri, al Wasit, Dar al Nashr Lil Jamiat at Misriyah, 1960, pp. 220-223.

130. 130, 131, and 132. al Baqara, from verse No.282.

3. There should be faithfulness in writing. Some *mufassirin* believe that this condition can be fulfilled by choosing a faithful and trustworthy writer. Others consider the Arabic preposition *bi* which precedes the word *al adl* in the holy verse, as indicating "faithful" writing as such.

4. The borrower must acknowledge what he owes (to the other party) "Let him who incurs the liability dictate"¹³² Acknowledgment should be made verbally and confirmed by signing the contract. The borrower must also fear his Lord God (i. e. abide by *Shari 'ah* teachings in this respect).

5. Having witnesses for the contract as indicated in the holy verse "and get two witnesses out of your own men and if there are not two men, then a man and two women such as you choose for witnesses".¹³¹

Requirements Relating to the Content of the Contract

Most important of these are:

1. **Place of the contract.** It is the place where the two parties meet for effecting the contract. At this place, the financier delivers the principal to the borrower and also the borrower will later on deliver the good sold unless the two parties agree on its delivery elsewhere.

2. **Date of the contract.** The importance of this date relates to specification of the *Salam* period and the period of permissible delay of the principal for those who permit that, namely, the *Maliki fuqaha'*.

3. **The two parties of the contract,** the financier and the borrower and their acknowledgment of their aptitude for entering into the contract.

4. **The form** in which the transaction takes place which indicates (offer) and (acceptance). The word *Salam* should explicitly be mentioned according to those who do not believe in using the word *bay'* in this context.

131. al Baqara from verse No. 282.

5. **The commodity sold in Salam** which should be specified in terms of kind, type, special characteristics and quantity.
6. **Salam period**, which should be clearly specified and well known to both parties.
7. **Price in terms of amount and medium of payment** (e.g. dollars, *riyals*, etc.) or whether it is an asset or a usufruct, and how it is going to be paid (in cash or cheque). The contract should explicitly indicate the medium of payment through which *Salam* price has been paid at the time of signing the contract.
8. **Place of delivery** in case the two parties agree to a place other than the place where the contract is signed and how transportation costs, if any, can be dealt with.
9. **The way principal is paid** whether in one, or more than one, installment.
10. **How excessive or deficient delivery can be dealt with** and also delivery of a different type of commodity, within the scope permitted by *Shari 'ah* in this respect.
11. **Dealing with** cases of **late delivery** due to force majeure or for evasion of repayment and specification of arbitration methods as well as penalty clauses for default.

It is of course well known that effecting the contract takes place between the two parties after they conduct necessary studies relating to the transaction and complete the preparatory arrangements that precede the contract, keeping in view that no obligation could be effective before signing the contract.

COMPARISON BETWEEN SALAM AND OTHER SIMILAR TECHNIQUES IN ISLAMIC JURISPRUDENCE AND CONTEMPORARY THINKING

INTRODUCTION

We have come to know so far that *Salam* is a special technique of trade and finance. It is also well known that other techniques are available for this purpose whether in Islamic *Shari'ah* or contemporary thinking. In this section, a comparison between *Salam* and these other techniques will be made. Such a comparison could be based on the scope of application and characteristics of *Salam* on the one hand and these techniques on the other as shown below:

First : Comparison Between *Salam* and Other Islamic Financing Techniques

It is a sign of wisdom and integrity of Islamic *Shari'ah* that it has enacted a variety of financing techniques in order to cater for different conditions and circumstances and enable every body to choose the technique that best suits his own conditions and offers him the maximum satisfaction.

These techniques include *bay' najiz*, *bay' ajil*, *bay' istijrar*, *istisna'*, *Salam*, *musharakah*, *mudarabah*, *qard hasan*, and *ijarah*.

In this part of the paper we shall compare these techniques to each other, not from the view point of indicating the *Shari'ah* ruling relating to each of them, but with respect to the role that each of them could play as a financing instrument and a technique for activating production and sales. We shall begin with a brief definition of each technique followed by an account of its major characteristics as presented below:

A. Essence of each Technique

1. **Bay' Najz** *bay'* in its general sense refers to: transfer of ownership of a good against a price and according to certain arrangements¹³². Spot sale takes place when price and commodity sold both are received on the spot. Therefore, in the economic sense *bay' najiz* is a technique for distribution of goods and completion of trade transactions. It has no financing element in the sense of paying price in advance in order to receive commodity later on:
2. **Bay' AjiL** It also refers to sale in its general sense mentioned above but it differs from spot sale in that payment of price in *bay' ajil* is deferred while commodity said is delivered at the time of effecting the contract. It is therefore a technique for distribution of goods and a method of financing too.
3. **Bay' al Istijrar**. It is also a sale but it has its own form. It is based on purchasing daily a specific amount of a commodity against a specific price from a regular seller like a baker, a butcher and so on. It takes the form of either *bay' ajil* or *Salam* as the *Maliki fuqaha'* say "purchasing from a regular producer like *Salam*"¹³³, a baker is nothing but *bay'*, if the seller is not regular it is

Whether an *istijrar* transaction is to be considered as *bay'* or *Salam* depends on the way price is paid. It is considered as *bay'* when price is delayed (like *bay' ajil*) provided that actual or legal acquisition of the good sold starts. If it is to be regarded as *Salam*, principal must be received by the borrower at the time of initiating the contract. Whatever it is, *bay' al istijrar* from the economic standpoint is a technique of activating sales and a means of financing.

4. **Istisna'**. It is a technique that has not been considered by the *fuqaha'* independently, except those of the *Hanafi* school. They define it as "A contract according to which the buyer asks the manufacturer to produce

132. al Shirbini, Op.cit, part 2, p.2.

133. al Hattab, Op.cit, part 4, p.538.

something for him against a given price" ¹³⁴ Neither deferred delivery of the good sold nor advance payment of the principal is made as a condition here as in the case of *Salam*. It should be noticed here that raw materials and labor are provided by the manufacturer. If only labor is provided by the producer the deal is considered as *ijarah* (labor hiring). For other *fiqh* schools *istisna'* is not an independent technique. It is even considered as part of *Salam* which could be known as *Salam* in manufacturing.¹³⁵ What concerns us here is that *istisna'* is a means of financing.

5. ***Mudarabah***. It takes place when somebody known as the *rab al mal* pays money to somebody else known as the *mudarib* to use it in business so that profit be shared between them and loss borne by the owner of the principal alone. The *mudarib* is also supposed to run the business independently and without interference of the *rab al mal*, *i.e.*, he should independently make decisions relating to commercial utilization of the money. *Mudarabah* is therefore a pure form of financing.

6. ***Shirkah, Sharikah or Musharakah***. It is subscription of capital by two persons (or more) for performing economic activity. Each of them has the right in management. It is a form of financing.

7. ***Qard*** It is submission of money by one person to another so that the latter, later on, repays the same amount to the former. In *Shari'ah* it is considered as an act of *bir* (charity) and it represents a method of interest-free financing.

8. ***Salam*** It has been defined earlier as a technique for selling goods as well as a method of investment and financing.

134. at Ayni, Ramz at Haqa'iq Sharh Kanz at Daqa'iq, Part 2, pp. 56-57.

135. Kasib Abdul Karim at Bathran, Aqd at Istisna', M.A. thesis, the Institute of Law - Riyadh, Imam Moh'd bin Saud University, Riyadh.

B Characteristics of Each Technique

In comparing characteristics, - we shall stick to- . the economic considerations only. These include the following:

1. **Scope.** It refers to activities and commodities to which each of these techniques is more relevant. In this connection we find that *bay' najiz* and *bay' 'ajil* expand to comprise all goods and services - .with due consideration to *Shari 'ah* prerequisites of permissibility. Next to these two techniques comes *Salam* which as has been mentioned earlier is relevant to any property that can permissibly be sold and precisely described. Contrary to that of *bay' najiz* and *bay' 'ajil*, the scope of *Salam* does not include commodities that cannot be precisely described. As for *istijrar* it is restricted to permanent activities and small commodities. *Istisna'* is confined to the industrial sector especially goods produced on prior order. *Mudarabah*, as some *fuqaha'* believe is restricted to trading activities.
2. **Financing Potential.** This means the extent to which a given technique can be regarded as a suitable means of financing. From the preceding discussion, we come to know that, excluding *bay' najiz*, all these techniques can be regarded as means of financing. However, it should be noticed that financing potentials of different techniques do not tend to be the same. Financial potential turns out to be very weak in the case of *qard*, for instance, because it is hardly possible for a commercial project to rely mainly on financing through *qard hassan* due to the small size of the finance extended through this technique which is completely based on charity considerations. Next to *qard hassan is mudarabah* which seems to be lacking sufficient guarantees a fact which hinders its wide application. *Salam* and the like (*istijrar, istisna, etc.*) as well as *bay' 'ajil* have greater financing potentials.
3. **Activating Sales and Distribution of goods.** This characteristic is restricted to those techniques which either involve exchange of commodities or imply selling only and which have different roles in activating sales. *Bay' 'ajil, istijrar, istisna' and Salam* come first, followed by *bay' najiz*.

4. Guarantees. It refers to the extent to which each of the two parties who practice a given technique can have a guarantee for his rights and how he could appropriately deal with the risk involved thereof. In this connection spot sale comes in the first position followed by *musharakah* in which each partner is in a position to participate in management. Then comes *istijrar*, when it is treated as a sale because in this case two conditions must be fulfilled; that it should be from a regular producer and the buyer should start receiving the commodity since the time of effecting the contract. Next to *istijrar* is *istisna'* as an independent contract since principal (price) can permissibly be delayed.

Salam, *bay' ajil* and *qard* involve a higher degree of risk for the financier compared to the previously mentioned techniques. Therefore, some external arrangements like mortgage and collateral have been enacted for them in order to minimize the risk element they involve. As for *mudharabah*, it involves also less guarantees for the financier and therefore, a greater risk element especially when we come to know that the *mudharib* is to be independent in decision making and it is not permissible to ask him to provide any external guarantees for repayment like mortgage and collateral under all circumstances.

Second : Comparison Between *Salam* and Other Similar Transactions in Contemporary Thinking:

It has been mentioned earlier that *Salam* is a future sale in which one of the two objects of the contract, i.e., commodity sold, is delayed. In contemporary thinking and practice, so many transactions similar to *Salam* in this respect (non-existence of commodity sold at the time of signing the contract), can be found. In this part of the paper we shall come to know the essence of these transactions and the *Shari'ah* rulings concerning them. Then we shall compare them with *Salam* as shown below:

Essence and *Shari'ah* Status of Contemporary Techniques that Resemble *Salam*

We shall discuss these techniques in the light of the laws and regulations that govern their functioning and which put them into two forms:

The First Form is "Future Sales", as has been denoted by jurists.¹³⁶ This type of sale is regarded as legal according to the French and the Egyptian' laws. It can be defined in terms of the following example: When somebody sells his agricultural products, for instance, before they grow up' according to a specific total value or unit price. Principal paid or price in this case is not necessarily received at the time of concluding the contract. The *Shari'ah* ruling regarding this is that it is not permissible because both of the two transacted amounts are delayed besides *ignorance* of the value and quantity of the good sold. .

It is worth mentioning also that the Lebanese Law refers to a type of sale under the same name, *Salam*. Clause No. (487) of the Law of "Obligations and Contracts" states that: A *Salam* contract is a contract according to which one party lends a specific amount of money to the other so that the latter undertakes to deliver to the former a specific quantity of agricultural outputs or any other type of mobile property on a definite date they agree upon. Such a contract can be devised only through writing". Other clauses of the Law, 488 through 492, add conditions like payment of the price at the time of signing the contract and specification of the characteristics and quantity of the commodity sold. Consequently, this type of sale is *Salam* in *the, Shari'ah* sense because it satisfies all conditions of *Salam*.¹³⁷

The Second Form is quite similar to the first, yet it differs in that it takes place at exchange especially commodity exchange which is a market for concluding transactions on commodities. This is known in the Egyptian Law as "deferred delivery sale". What happens in a commodity exchange can be divided in two categories:

(A) Spot Commodity Exchange : dealing in this market takes place when the buyer is shown a sample representing the type and quality of the goods to be sold. Then he pays the major part of the price required and receives a receipt permit to use for receiving the goods on the same day or one day after. Another arrangement of this type can take place when payment of the whole price is delayed until the time of delivery, while price could be prefixed or kept floating with stock exchange prices for a given period of time. -

136. Dr. Abdul Razzaq al-Sanhuri, *Nazariyat al Aqd, al Majma' al Ilmi al Islami*, Beirut, p.479.

137. Dr. Abdul Razzaq al Sanhuri, *al Wasit*, Vol. One, Part 4, Dar al Nashr Lil Jamiat al Misriyah, 1960, pp.220-223.

The *Shari'ah* ruling for such transactions has been referred to by some contemporary writers and *Shari'ah* advisory boards.¹³⁸ They approved the first type of arrangement (spot payment after sample viewing) as spot sale. As regards the second type of arrangement (spot delivery against price delayed till day of clearance) can involve either a fixed price where it is regarded as bay' ajil and hence permissible, or a floating price where different view points prevail. Some would reject such an arrangement following the view point of the majority of the *fuqaha*¹³⁹ that ignorance of price prevents permissibility of contracts, while others would accept it following what Ibn al Qay'im says regarding permissibility of selling against a definite unit price though total value is still unknown¹⁴⁰

(B) Stock Exchange. In this market, contracts of commercial transactions in non-present commodities are sold against fixed prices or prices floating with market price during a fixed clearance period. Sale in this case is open, that is, a person who does not possess the commodity is allowed to sell it on the basis of his ability to acquire and deliver it on time due to continuity of the market. Such a transaction takes place in a number of ways, including simple conditional operations, compound' conditional operations and multiple operations.

According to some contemporary writers, this type of stock exchange dealings is permissible in *Shari'ah*, while according to others it is not.¹⁴¹ It should be mentioned here that none of these writers consider such operations as *Salam*. Their previously mentioned ideas are based on the belief that these operations are *ordinary* sale. What seems more likely is that such transactions are not permissible in *Shari'ah*, because both objects of the contract are not present and also one of them, the price, is unknown.

138. Dr. Muhammad Yusuf Musa, *al Buyu wa al Muaamalat al Maliyah al Muaasirah*, Dar al Kitab at Arabi, 1st edition, 1954, pp.179-189. Dr. Muhammad al Shahat al Jundi, *Muaamalat al Bursah fi al Shari'ah al Islamiyah*, Dar al Nanda at Arabiah, 1988, pp.132/171. Dr. Ahmad Yusuf Sulaiman, *al Mawsuaa al Elmiyah wa at Amaliyah lil Bunouk at Islamiyah*, 1982, part 5, pp.429-430. OIC, 9th Session 1405H., pp.122-124.

139. at Sarakhsi, at *Mabsoot*, part 3, p.7 - Ibn Rushd, *op. cit.*, part 2, p.148 -al Shirbini, *op.cit.*, part 2, pp.16-17 - at Bahwati, *Sharh Muntaha at Iradat*, part 2, p.152.

140. Ibn at Qay'im, *op.cit.*, part 4, pp. 5-6.

141. See footnote No. 140.

Third : Comparison Between *Salam* & Similar Contemporary Techniques

First, it should be made clear that Shari'ah-permitted spot transactions do not enter into this comparison as they represent an *ordinary* type of spot sale:

Comparison will be made here: between *Salam* and future or deferred delivery sales, especially those which happen in stock markets. The comparison will comprise the following points:

(A) Function

The function of *Salam* is to satisfy the needs of the seller and the purchaser of the commodity who represent the real parties of the transaction. The seller is either a producer of the commodity or a specialized trader in it and he needs funds that he can spend on his activities. The purchaser, if a consumer, wants to get the commodities at a cheap price and within a suitable time so as to, maximize satisfaction of his needs. If purchaser is a specialized trader in that commodity or a producer who buys raw materials, *Salam* will satisfy his needs with easy terms regarding price and time of delivery. For this reason, *Salam* is named by the *fuqaha'* as *bay al mahaweej* or *bay al-Mafalees*. In contrast, the basic function of deferred sales is not directly linked to the actual needs of the society. Instead, it tends to satisfy the needs of certain speculators who benefit from price changes. This is quite clear from what has been stated by one writer¹⁴² that "90% of the original operations that take place in stock markets are nothing but a sort of artificial dealings because it is neither the intention of the seller to deliver the commodity nor is it the intention of the buyer to receive it. Instead, real intentions are directed towards gaining from price changes until the circle ends up with delivery of the commodity to the final purchaser who needs it. Briefly speaking, the function of deferred sales is - in most cases - speculation about price changes."¹⁴³

142. Dr. Ahmad Yousuf Sulaiman, op. cit., p.393.

143. Dr. Abdul Razzaq al Sanhuri, op. cit, p.223.

(B) Economic Repercussions

which include the following:

1. **Field and Scope.** As has been defined earlier, the scope of *Salam* comprises most of the known commodities, i.e. agricultural and industrial products, services, etc. with only one condition, that it should be of the sort which can be identified in terms of amount and characteristics. In exchange dealings, the scope is too narrow to include anything more than material commodities which must be of the type that can be stored. Exchange commodities must also be standard commodities that are widely and repeatedly transacted.¹⁴⁴

2. **Prices.** In Islam, price is generally determined through mutual agreement in an open market which is well known to both parties of the transaction. No monopoly, *najash*, (provision of false information by one of the two parties), deceit or exploitation should take place. In exchange operations, besides the condition that prices should be changing so that dealers may find a chance to intervene, price changes may not be based on actual changes of supply and demand. A mere improvement in weather conditions may represent a determinant factor of price change, let alone deliberate practices and internal means like fraud, swindling, telling lies, deceit, monopoly practices, and whatever is apt to bid up prices, which speculators follow to get as much profits as they can. Moreover, the very nature of the market may sometimes lead to price fluctuations, which do not come as a result of mutual agreement or the interaction of the free forces of supply and demand as some would claim in defending stock markets. Forced by their greed, some speculators and traders would prefer to wait until the floating price rises due to shortage of supply, then suddenly give orders for fixing the price. Sales then increase, supply piles up and the price falls, just as it has risen before due to refraining from fixing it, despite availability of goods and effective demand of those who need it.

3. **Finance and Investment.** *Salam* satisfies the need of the owner of the commodity for finance as well as the need of the purchaser of that commodity

144. Dr. Ahmad Sulaiman, op. cit., p.392.

for investment, while stock exchange dealings concentrate on what is known as legal financing or (financing intermediary speculators) and they increase cost of financing. Exchange dealings also address satisfaction of speculators' desire for investment and gaining from price changes.

4. Risk. Risk leads to loss of capital and it results from *gharar* and lack of information. As long as *gharar* increases the degree of risk increases and so does the probability of capital losses. For this reason, Islam is very keen to prohibit any transaction that involves *gharar* like selling a good that one does not own or which is non-existent. Islam then enacted the license of *Salam*, as an exemption from the rule prohibiting sale of non-existent goods, due to the acute need for it.¹⁴⁵ Because it is *gharar*, *Salam* has been supplemented with some conditions and limitations in order to keep it far away from being an absolute form of selling things that are non-existent. These conditions and limitations also give *Salam* a peculiarity that makes it an exception which has a narrow scope.¹⁴⁶ In contrast, deferred sale practiced in stock exchange markets is surrounded with a great deal of *gharar*. It is, originally, like a fictitious project where dealing takes place on a commodity that does not exist and against a price which is neither received nor fixed. It is misleading to say that an exchange is a big and continuous market and that the buyer is sure that he will get the commodity, because this may happen or may not. It is even possible that stock exchange operators or traders could monopolize the commodity in order to trap open market buyers. Therefore this type of dealing may involve an element of gambling, and tends to be very akin to *gharar*, risk and swindling of peoples' property.¹⁴⁷

145. According to those who believe that *Salam* has been enacted at variance with *qiyas*.

146. Dr. Ahmad Yousuf Sulaiman, op. cit., pp.407-408.

147. Ibid.

Chapter Two

ECONOMIC FRAMEWORK
OF *BAY' AL SALAM*

ECONOMIC FRAMEWORK OF *BAY' AL SALAM*

INTRODUCTION

The scope of economics - as a science or a practice - is utilization of the limited available resources in order to satisfy the unlimited human needs. In this sense, a variety of subjects known as the basic economic functions such as production, finance, investment, exchange and consumption are studied.

Therefore, a discussion on the economic framework of *Salam* is closely related to these functions as it attempts to specify the economic fields where *Salam* can be applied, identify practicing issues that stem from contemporary circumstances, and establish rules of practice that conform to the *Shari 'ah* framework discussed earlier. These points will be considered in this part of the paper which relates to analyzing *Salam* from the economic standpoint and exploring its implications in relation to the basic economic functions. This will be undertaken in the following sections:

Section I - Issues of Contemporary Application of *Salam*

Section 2 - Economics of *Salam*.

ISSUES OF CONTEMPORARY APPLICATION OF SALAM

INTRODUCTION

It goes without saying that the preceding discussion on the *fiqh* aspects of *Salam* should always constitute the fundamental framework within which appropriate methods of practicing *Salam* could be envisaged. However, it could be noticed that the pioneer Muslim *fuqaha'* when discussing *Salam*, they had resorted to examples and juristic forms based on what was happening at their times. Due to the fact that contemporary circumstances have resulted in a number of new issues while the *Salam* contract has not gained a great deal of consideration in present day studies, it would be inevitable for an attempt to study the application of *Salam* to begin with identifying the most significant contemporary issues of *Salam* and seek the *Shari 'ah* ruling for them following the basic concepts of *Shari 'ah* established by pioneer Muslim *fuqaha'*. It is clear that such an attempt is not meant to challenge the views of our respectful *fuqaha'*. It is rather meant to address only those questions and issues which need re-examination in the light of present day circumstances. This task can be taken up in the following order:

1. Issues relating to Scope of *Salam* Application.
2. Issues relating to Disposing of a *Salam* Commodity before receiving it.
3. Issues relating to Contemporary Application of *Salam* by Islamic Banks.

SCOPE OF PRACTICING SALMI AND ISSUES RELATING TO IT

First : Issues of Practicing *Salam* in the Agricultural Sector A. Types of Agricultural Products in Which *Salam* Can Be Practiced

Due to the very nature of the societies to which the pioneers of our Muslim *fuqaha'* belonged, which were largely dependent on agriculture and the

activities relating to it like animal raising, and hunting, this sector gained much emphasis in the discussions of those fuqaha' regarding *Salam*. Such emphasis comprised determination of what agricultural products can be traded through *Salam* and how controls for their trading in this manner can be established.

They discussed traditional products like wheat, barley, rice and cotton, besides fruits like pomegranate, water melons, bananas, quince, orange and grapes, and vegetables like cucumber and onion. They also discussed *Salam* in animals and animal products like milk, meat, and leather as well as poultry products, fish products, pearls, and bee honey. Hence, it could be said that those fuqaha' had considered most of the known agricultural and animal products.

The issue that can be referred to here is that those *fuqaha'* had maintained different points of view with respect to permissibility of *Salam* in some products like pomegranate, water melons, animals, meat and eggs. Difference in view points in this connection stems out from different perceptions of fuqaha' as to whether or not these products can be specifically defined in terms of quality and quantity. In the case of some fruits like pomegranate and water melons, for instance, some fuqaha' believe that *Salam* is not permissible because a product of this kind can neither be subjected to volume or weight measurement nor can it be counted as it includes big as well as small items. Those who believe in permissibility of selling such products through *Salam* hold that if the items of a product of this kind are similar in size it can be measured through counting, otherwise weighing can solve the problem.¹⁴⁸

Regarding *Salam* in animals, some - namely the *Hanafi* fuqaha' - believe that it is not permissible because not all characteristics of animals can be subjected to standard specifications. Although these *fuqaha'* admit that animals can be distinguished in terms of number and some characteristics, they state that "there still remain sharp differences in their intrinsic characteristics which largely affect their values. There could be, for instance, two horses with the same apparent characteristics, yet the value of one of them is considerably

148. Ibn Qudamah, (Muafaq al Din & Shams al Din), part 4, pp.315-316.

higher than that of the other due to its inherent characteristics, a fact which may lead to dispute and can hardly be resolved through logical reasoning".¹⁴⁹

However, one could argue that the question of determining the exact specifications of *Salam* commodities is a relative matter. That is to say, things that were not controllable in the past are controllable today due to the development in devices of measuring quantity as well as quality. Each commodity, whether in the field of agriculture or animal husbandry, has now its own experts. Each of these well trained and knowledgeable people performs his job on the basis of predetermined scientific norms in a way that enables him to determine the characteristics of his product. Hence, no sharp differences that could seriously affect price are likely to exit. Whatever negligible differences that may result will not affect the price as we come to know from *the fiqhi* rule, concerning determination of characteristics, referred to earlier. Therefore, it seems that all the agricultural and animal products which represent a fundamental component of present day economic wealth can be sold through *Salam*. This view is based on the *fiqhi* rule that "any commodity that has characteristics known to its experts can be traded through *Salam*".¹⁵⁰

B. Payment of Price in Kind

It is well known that no problem is involved in payment of *Salam* principal in cash. If payment of principal is to be made in kind - e.g. in the form of production inputs, like seeds and fertilizers in agriculture or young animals in animal husbandry - a condition need to be imposed that the act of exchanging the two commodities should not lead to *riba* as mentioned earlier. This can be shown in more details as stated below:

1. IN CASE OF AGRICULTURAL PRODUCTS

It is permissible to pay the principal in the form of fertilizers or usufruct of a machine against wheat for instance, but not in the form of seeds of wheat

149. al Marghinani, al Hidayah - in Fat'h al Qadir - op. cit., part 5, p.328.

150. al Moti'i, op. cit. part 13, p.111.

whether produced in the same farm or other farms. This is because, according to all *fuqaha'*, seeds of wheat for wheat involve *riba* since principal paid and commodity sold are of the same kind, principal paid is a food stuff, it can be measured in terms of volume or weight, and the utilities derived from the two exchanged commodities are the same. If the financier would take the same quantity of wheat later on then the transaction is *qard* and not *Salam*. Some *fuqaha'* believe that if such a contract is concluded by mentioning the word *Salam* it becomes null and void. If the financier would receive more than what he paid the transaction becomes *riba*, because it combines both *tafadul* (excess gain) and *nasa'* (postponement).

2. IN' CASE OF ANIMAL PRODUCTS

It can take the form of a financier presenting principal to the borrower in the form of fodder, veterinary medicines, or other services and all these involve no problem. If, however, the financier would deliver young animals in order to receive bigger ones or vice versa, the *fuqaha'* have different views according to their different perceptions of *riba*:. The Hanafi *fuqaha'* consider this as prohibited in *Salam*, because according to them *Salam* is not allowed in animal trade while the shafi'i and the *Hanbali fuqaha'* believe that it is permissible because there is no *riba* in animal trade according to them.¹⁵¹

The *Maliki fuqaha'* have detailed views in which they consider this type of *Salam* as permissible.¹⁵² It may be useful to make more elaborations on these views due to the wide spread of animal husbandry in the Islamic countries where these views could be applied. They can be summed up as follows: ,

While mentioning the second condition of *Salam* the *Maliki fuqaha'* say that "it is not permissible to, exchange in *Salam* two commodities which are both foodstuffs or money. They also indicate that *Salam* is prohibited when one accepts less' for more or worse for better of the same commodity or vice versa". For food stuffs and money, the *Maliki fuqaha'* make no exception

151. al Shirbini, op. cit, part 2, p.22 - Ibn Qudamah (Muafaq al Din & Shams al Din), part 4; pp.131-132, op.cit.

152. al Hattab wa al Mawaa, op. cit., part 4, pp.524-526.

while for exchanging two amounts, of the same commodity, that differ in quality, the Maliki *fuqaha'* mention that an exceptional case could be when the exchange of different commodities is made in order to match the benefits derived from them. They give an example of one efficient donkey exchanged for two less efficient donkeys. In this case difference in utility derived makes the one efficient donkey equals to the two less efficient. They also refer to other examples of animals like horses for which difference of ability in racing could be considered or camels which differ in ability to carry loads or sheep which include some that are more milky than others and also cows which differ in strength. They come to what is more relevant to our discussion here when they say "as when two small (young) animals are exchanged for one big (grown up) animal or vice versa, that is to say it is permissible to exchange through *Salam*-except in some exceptional cases - two small animals against one big animal due to difference in benefits derived from them". Yet, they imposed a condition that "this should not lead to *muzabanah*, i.e. the period of *Salam* should not be so long that the small animal becomes big or the big animal produces a small one. In the first instance, the deal would lead to guarantee against payment. It becomes as if the financier temporarily forgoes benefiting from his small animal so that the borrower may have it against a guarantee until the small animal becomes big. If the animal dies during this period the borrower is liable for it, if it does not it will be returned back to its owner. This is strictly prohibited. In the second instance there is *Jahalah* (ignorance). The deal here looks as if the financier says to the borrower: take this animal and make use of its services against a small animal that the former will produce, while the financier is by no means sure whether a small animal is going to be produced or not".

C. *Salam* in the Products of a Certain Farm

The implications of this issue relate to the condition that the *Salam* borrower should be able to deliver the good sold. That is because limiting the contract to the production of a certain farm implies that the borrower may not be able to deliver the commodity if the production of that farm is lost due to any catastrophe. This makes delivery of the good sold uncertain and hence leads to *gharar*. Therefore, the Shafi'i, Hanafi and Hanbali Schools all prohibit making *Salam* contracts with regard to the production of a particular farm or

garden.¹⁵³ The Maliki *fuqaha'* believe that a *Salam* contract can permissibly be limited to the products of a certain garden subject 'to some conditions. "As stated in al Mudawanah,' it is- permissible to effect a *Salam* contract for purchasing the products of a certain garden, provided that the garden is at the stage of blooming, it is big in area, terms of delivery of the product are specified, the contract is signed with the farm owner, and the buyer will .start receiving the produce within at most fifteen days".¹⁵⁴ Therefore, the necessary conditions for restricting a *Salam* contract to the production of specific farm or garden according to the *Maliki*. school include the following:

1. The contract should be made only when the garden starts blooming, i.e. becomes near the stage of giving fruits. Dates fruits, for instance,' are. at this stage when they become yellow or red.
2. Area of the farm or the garden should be big.
3. Delivery process should be specified, whether continuously or at specific time intervals. Also it is permissible to make lump sum delivery.
4. Commencement of receiving the commodity is expected within at most fifteen days.
5. The Contract should be made with the owner of the garden only. It should not be with somebody else like ' a fruit trader for instance. That is because the farm owner may not sell his produce to this specific trader and therefore the latter will fail to deliver the commodity agreed upon.

It seems that the view of the *Maliki fuqaha'* with respect to ability to deliver the *Salam* commodity could prove to be applicable in present day transactions.

153. al Shirbini, part 4, p.108 - Ibn Qudamah (Muafaq al Din' & Shams al Din), part .4, p.232 - Ibn al Human, part 5, pp.236-237, op.dit.

154. at Hattab wa al Mawaq, op. cit., part 4, pp.535-536 and part 5, p.219.

D. The Person with whom the Contract is to be Signed

It is well known that *a Salam* borrower should not necessarily be the original owner of the commodity, therefore it is permissible to sign *a Salam* contract for purchasing agricultural products from somebody who does not own a farm. However, at present times and with regard to the way *Salam* is practiced by Islamic banks, and the need for guarantees for appropriate delivery and due to predominance of business specialization, we believe that a contract for purchasing agricultural products need only be signed with either the owner of the product or a trader who deals in it. Any person other than these two may find it difficult to provide the commodity with a reasonable price. Dispute may consequently arise between the bank (financier) and the borrower. This view point is based on the *Maliki* ideas explained under item (c) above, that is when risk of default increases, *Salam* should be made with the owner of the commodity. Again, it is quite natural according to habits and traditions that commodities be purchased from those who deal in them.

Second : Issues of Practicing *Salam* in the Industrial Sector

It has been mentioned earlier that *Salam* contracts in industry range between *Salam* and *istisna'*, and that all the fiqh schools - except the *Hanafi* - consider them as *Salam*. This is what we shall discuss in this part of the paper.

A. Industrial Products in which *Salam* can be Practiced

The *fuqaha'* discussed *Salam* in industries by giving examples of the products and the production patterns of their times. This is why they came to hold opposing view points regarding permissibility of *Salam* in some commodities. Difference in viewpoints among *fuqaha'* relates to two considerations:

The First. Whether only one or more than one raw material enters in the production of the commodity. It is unanimously accepted among the *fuqaha'* that commodities like swords and clothes which are produced out of only one raw material can permissibly be traded through *Salam*, while commodities produced by combining different materials (*Salam* in Mixed Commodities in

fiqh terminology) can not. Ibn Qudamah in *al Mughni wa al Sharh al Kabir* says: "*Salam* is not permissible in commodities that contain a mixture of basic components that are not combined according to a standard formula".¹⁵⁵

Accordingly, *Salam* in mixed commodities can be divided into four categories:

1. Mixture of distinct basic components like clothes produced by mixing cotton and linen or cotton and silk according to a specific formula on which *Salam* is permissible.
2. Mixture that contains basic as well as secondary components added as a catalyst or for flavor like pepsin in cheese or salt in dough. In this category also *Salam* is permissible.
3. Mixture of basic components that are not added according to a specific formula like frankincense and some pastes in which *Salam* is not permissible.
4. Mixtures which contain useless components that are not added to improve quality like milk mixed with water which also should not be exchanged through *Salam*.

It is therefore clear that prohibition of *Salam* in mixed commodities - except for the fourth category above which implies deceit - is due to the fact that the components of these commodities can not be subjected to a specific formula. Therefore, it is difficult to precisely define such commodities in terms of brand and quality.

At present times one can say that control of the ratios in which the various components are added together to produce a given commodity has become quite an easy job for those who are engaged in the field. Ingredients of commodities are often stated on small leaflets packed with them or written on the face of their packing material. Therefore, *Salam* in such commodities is permissible. This view is based on what has been stated by the classical *fuqaha* themselves when they indicate that "the reason behind prohibition of

155. Ibn Qudamah (Muafaq at Din & Shams at Din), op. cit., part 4, p.538.

Salam in this type of commodities is that their components cannot be identified".¹⁵⁶ Now a days, it is no longer so difficult to identify the components of most commodities. Therefore, we regard *Salam* in them permissible.

The Second Consideration. Relates to method of production and its effects on the possibility of subjecting the product to a specific standard. It could hardly be possible, for instance, to subject a handicraft product to standard specifications as repeating the same specifications of the product is a difficult task for a craftsman. Because handicraft was the dominant method of production in the past, difference in views regarding permissibility of *Salam* in these products emerged. The author of *Mughni al Muhtaj* says: "*Salam* is not permissible in products that originate from different (not standardized) materials like a mud or animal skin pot, a cup, a basin, or a pitcher."¹⁵⁷

The justification given for prohibition of *Salam* in these commodities is that their weight and other characteristics can hardly be standardized. Taking into consideration present day circumstances *Salam* may become permissible in what it has been prohibited in, in the past, because present day products are machine-controlled and are often subject to standard specifications that are internationally agreed upon. Even handicraft products are sometimes made according to specific drawings and standardized patterns. It is quite rarely that a product is totally handmade. Our view here is based on what has been stated by the *fuqaha'* who approve *Salam* in squared buckets as they rarely differ from each other and also in what is produced by using a certain pattern.¹⁵⁸

B. *Salam* in the Products of a Certain Factory

This issue is connected with the ability of the borrower to deliver the commodity and has been considered by the *Maliki fuqaha'* under "specification of raw materials or maker" in *Salam* in industrial products. They held different viewpoints with respect to permissibility of *Salam* in this way. Those who

156. al Mut'i, op. cit., Part 13, p.124.

157. al Shirbini, op. cit., Part 2, p.114.

158. Ibid.

oppose it .believe that it involves *gharar*. They state that "if the financier imposes a condition that the commodity should be made of a specific type of copper or iron, or that the commodity should be made by a specific person, *Salam* is not permissible even if such a condition could be met. That is because the financier is not sure that the specific ingredient or maker will survive until the commodity is made. Therefore it is *gharar*. Those who approve such a specification, state that if the maker is specified while the raw material is not and the commodity is not a customary product, the contract becomes *Salam* provided that it entails deferred delivery of commodity and advance payment of principal and is permissible due to necessity. Necessity, as explained by the author of *Mughni al Muhtaj* on other occasions is what the norms and traditions of the field of activity in question dictates. He says "It is an inevitable situation. Merchants are accustomed to purchasing varieties of silk from silk producers, freightage from freighters and selling silk to dyers".¹⁵⁹

Looking into this issue from a contemporary standpoint we find that what had given rise to fears of those who believed in prohibition of *Salam* in some commodities is no longer exiting. Those *fuqaha'* had in fact developed their ideas during a time when all industrial products were totally produced in small workshops solely operated by their owners. At present time, production takes place in big companies with so many branches. Today's products are also not produced by a single person so that his death or dismissal may jeopardize the availability of the commodity. Even small workshops in most cases employ a number of workers instead of a single one. The production of present day factories is quite similar to that of big villages and towns in which *Salam* is permissible according to general consensus of *fuqaha'* as shortage in the products of these villages and towns is not likely to happen. It could, therefore, be said that *Salam* is permissible in the products of a particular company like National or Sony for instance. However, the following should be noticed:

1. What has been stated above is true for the products of big and small factories in which production does not depend on a single worker.

159. Ibid.

2. The product should be identified with regard to trade mark, model, capacity and all other distinctive characteristics like country of origin, year of production, etc.

3. *Salam* should be in a model that is available, because some companies stop production of models successively and hence a model that is no longer produced would not be available for *Salam* transactions.

C. Payment of Principal in the Form of Production Inputs

This issue relates to the condition that the *Salam* principal and commodity sold should not be of the types whose exchange would lead to commitment of *riba*. Different *fiqh* schools have different perceptions with regard to this subject. However, the following issues need to be referred to here:

1. If the financier pays the principal in the form of production inputs that are not part of the product components, like fuel to a textile factory, in exchange of clothes, the deal is regarded as permissible because it involves no *riba* element according to all *fuqaha'*.

2. The principal could be a single raw material that enters alone in the production of the commodity like cotton in spun cotton or spun cotton in weaved cotton. The *Hanafi, Hanbali and Shaft'e* schools discussed this case in the context of *riba*, while the *Maliki fuqaha'* discussed it in details under *Salam* and referred to it as "exchange of the material for what it is extracted from". The *Maliki fuqaha'* treated this case along the same lines of their opinion that - except for foodstuffs, gold and silver - *riba* in exchanging two amounts of the same commodity stems from similarity or identity of the benefits derived from them. If the benefits derived from the two exchanged commodities entail any intrinsic or man-made differences, *Salam* in the two commodities is permissible. Therefore, the *Maliki* viewpoint regarding this issue (Exchange of raw Materials for final goods) runs as follows¹⁶⁰:

160. See details on this in al Hattab wa al Mawaq, part 4, pp. 540-541 - al Kharshi and the Hashiyah of al Adawi, Part 5, pp. 524-525, op. cit.

- If the product is easy to make, i.e. its production does not affect the original form of its raw material which can easily be reshaped back to its raw form, exchange of such product and raw material in *Salam* is not permissible. An example of this is linen and spinned Linen where the raw material is not totally transformed from its original form. *Salam* here becomes like exchanging two amounts of the same commodity which carry no difference in utilities derived from them.¹⁶¹
- When the product is not easy to make, i.e. the production process significantly changes the form of the original raw material to the extent that it can not be reshaped as "before and make the utility derived from the product different from that derived from the raw material. Textile industry can be cited as an illustrative example because in textile industry the raw material is totally changed into a completely different product compared to its original form. In this regard again *the Maliki fuqaha'* single out two cases.

The First Case. When the final product is submitted in advance in exchange of the raw material. In this case the deal is regarded as permissible without restrictions.

The Second Case. When the raw material is submitted in advance - as *Salam* principal - in exchange of the final product, this is known as "exchange of material for the product extracted from it" and considered as permissible subject to some conditions regarding the period of the contract. They state that when the financier submits the raw material of a product that is not easy to make and is irrevocable, as *Salam* principal in exchange of the final product, like Linen in exchange of a garment, permissibility of the transaction depends on the period of the contract. If the period is so long that the Linen can be

161. It is worth mentioning that judgement on difference in utilities derived from commodities is to be made by concerned experts.
al Hattab says "A person who is not a faqih may be more informed in utility differences", al Hattab, op. cit., Part 4, p.526.

made into a garment *Salam* is prohibited because of *muzabanah*. The transaction becomes *ijarah* (labor hiring) if a piece of Linen is left for the borrower after he makes the garment otherwise his effort will generate no reward. If the period of the contract is not so long *Salam* is permissible. Similarly if cotton is given in exchange of a piece of cloth and the period of the contract is long enough for transformation of the cotton into cloth *Salam* is prohibited if not it is permissible. In this case also a long period implies *ijarah* in which the reward of the borrower is the material left after making the cloth - if any - otherwise his effort is given against no reward. If, however, the period of *Salam* is shorter than the period needed for transformation of the cotton into cloth, *Salam* is permissible.

3. When the principal is only one material that enters, besides other materials, in the production of the commodity and such a material is of secondary importance to the product, i.e. not one of its basic components, *Salam* is permissible,¹⁶² like submission of thread and buttons to a shirt factory in exchange of shirts.

If the financier provides the basic raw material like cloth to a shirt factory or wood to a furniture factory, the transaction is subject to what has been mentioned in item (2) above.¹⁶³ It should be noted that in food industry it is not permissible to provide a food stuff as *Salam* principal in exchange of a processed food item or vice versa. Examples of this include providing apples to a food stuff factory and vegetables as *Salam* price of canned apple juice or cooked vegetables. It is also not permissible to sell a fruit for its juice or raw canned fruits for cooked ones. 'The *Hanafi fuqaha*' believe that selling a fruit for its juice is permissible if the Juice given in exchange is more than that in the fruit."¹⁶⁴

162. Ibn Qudamah (Muafaq at Din & Shams at Din), Op. cit., part 4, p. 145.

163. It is permissible according to the shafi'i school to provide wood as Salam principal in exchange of wood. Their view is based on the fiqh rule stipulating that no riba except in food items measured in terms of weight and volume, gold, and silver. In things other than these no harm in fadl and nasi'ah - at Muti'i, op. cit., part 13, p.118.

164. Ibn Qudamah (Muafaq al Din & Shams al Din), part 4, p.147 - Ibn at H., part 5, pp. 295-296, op. cit.

Disposing of a ***Salam*** Commodity before Receiving it

We have already shown in the part of this study which relates to *fiqh* issues the viewpoints' of *fuqaha'* on whether a ***Salam*** commodity can be disposed of before being received or not. We explained that the majority of *fuqaha'* do not accept such a transaction. The *Maliki fuqaha'* accept disposal - especially by selling the commodity - subject to some conditions as mentioned earlier.

In this part of the paper, ' we shall consider the implications of this issue on using ***Salam*** as a financing technique. In the light of present day circumstances it, could be argued that negotiability of financing instruments has become of a paramount importance. Taking into consideration the *Maliki* viewpoint on this issue, one may ask whether it is possible or not to use ***Salam*** contracts as bonds, representing secondary . financing instalments instead of primary ones? That is to say can such bonds change hands to more than one person through sale of the commodity before receiving it?

This question was posed in the second seminar of the al Baraka Company held in Tunisia during Safar I405H (November 1984). The Speaker summarized his view in the following example: Suppose that company (A) deals in ***Salam***. For a period of six months, A purchases ***Salam*** commodities of US\$100,000 and makes ***Salam*** sales of US\$106,000.. This implies that a profit of US\$1000 per month is realized by this company. Therefore the share of the ***Salam*** contract of this . company has an increasing value. It starts at US\$101,000 at the first month, then US\$102,000 at the second and so on. Hence, ***Salam*** bonds could be exchanged against an increasing price equal to the par value of the contract plus the profits earned during a given period of time. The speaker asked the *fiqhi* opinion on this arrangement so that Islamic banks may look into its application.

The gathering of *fuqaha'* at the Seminar gave the following answers:

1. It is not permissible to sell a ***Salam*** Commodity before receiving it.

2. It is permissible for a person to be a financier (purchaser) of the commodity in one *Salam* contract and a borrower (seller) of the same type of commodity in a second *Salam* contract provided that obligations in the two contracts are kept separate.

3. The privilege given in (2) above should not be used for the sole purpose of trading because *Salam* is enacted as an exceptional rule meant to satisfy the needs of producers in particular cases and not to be used as a mere trading device.

4. Therefore, if due to certain economic circumstances in a Muslim country it is found to the benefit of the society to apply *Salam* in this manner in some specific cases, it is permissible for the sake of public interest. Public interest in this case should be judged by *fatwa* boards and *Shari'ah* advisory institutions.

Looking into this issue in the light of the discussions that took place in the seminar, it seems that the above mentioned ideas of *fugaha* are rather partially acceptable. This may become more obvious when we consider the fact that prohibition here is when specification of the price of the *Salam* bond is to be made subject to unrealized assumptions. That is, specification of selling price of the bond and the expected profit margin that need to be added to it as it changes hands through time.

Does this imply that *Salam* is not suitable as an investment technique for Islamic banks? This is what we shall consider below:

ISSUES OF CONTEMPORARY PRACTICING OF SALAM BY ISLAMIC BANKS

What we have considered in this paper so far relates to *Salam* as such regardless of the person or institution dealing in it. In case Islamic banks invest their money in *Salam*, some special issues could emerge besides what we have already discussed. Such issues include the following:

1. Suitability of *Salam* as an investment technique for Islamic Banks.

2. Procedural arrangements for practicing *Salam* by Islamic Banks.
3. Modern fields of practicing *Salam* by Islamic Banks.
4. Major controls of practicing *Salam* by Islamic Banks.

At this stage of our analysis, we shall consider the most important aspects of these issues:

Firstly : Suitability of *Salam* as a Financing Technique in Islamic Banks

The role of banks, as financial intermediaries, comprises mobilization of savings and their reinvestment through extending finance to individuals and institutions of the society. While in a conventional banking system investment is based on the well-known interest-based methods of financing, the Islamic banking system has its own interest-free methods like *musharakah*, *mudarabah*, and trade in goods and services. Trade also comprises various techniques including *murabahah*, *bay' 'ajil*, *Salam* ... etc. Practically, *murabahah* is widely and to some extent successfully used by Islamic banks.¹⁶⁵

Practicing *Salam* by Islamic banks, however, is still limited,¹⁶⁶ in spite of the fact that *Salam* as an investment technique is often explicitly referred to in the statutes of these banks. This has been due to the fact that more efforts are still - needed for resolving some *Shari'ah* related issues surrounding this technique at present times.¹⁶⁷

The history of Muslim countries indicates that some forms of *Salam* have often been closely linked with exploitation of small producers by owners of capital in such a way that *Salam* has become a method of exploitation rather than support to these people. Therefore Islamic banks should exert a great deal

165. See, by this author, al Tafaseel al Amaliyah Li Aqd al Murabahah Fi al Nizam al Masrifi al Islami, Sixth Conference of The Al Bait Foundation -Jordan, Shawal 1407H.

166. Abd Allah al Hajiri, Istithmarat al Masarif al Islami al Khalijiyah, Ph.D. thesis, Um al Qura University, 1409H.

167. Dr. Sami Homoud, Siyaq al Tamwil al Islami, Seminar on Contribution of Islamic Thought to Contemporary Economics Thinking, Sheik Saleh Kamil's Center, Azhar University, 1409H, p.46.

of efforts in order to make *Salam* capable of satisfying present day needs and hence fulfilling the objective for which it has been enacted.

In view of this discussion we can conclude that if *Salam* is a trading technique like *murabahah*, and if *murabahah* is now practiced by Islamic banks, *Salam* can also be regarded as suitable for Islamic banks. Not only that, but *Salam* seems to be much more relevant to the very nature of banking which is more inclined towards guaranteed profits.¹⁶⁸

Secondly : Procedural Arrangements for Practicing *Salam* by Islamic Banks

It is possible for Islamic banks to practice *Salam* according to any one of the following arrangements:

First Arrangement

An Islamic bank can practice *Salam* through a specialized section within its investment division. Through this section it could undertake the task of looking for commodity markets, receiving and evaluating applications for finance, signing contracts, issuing finance, as well as receiving and marketing of commodities. This arrangement is useful when there are only few operations of *Salam* practiced in a limited number of commodities.

Second Arrangement

The Bank can establish a trading company in which its role of the bank could be confined to financing whether at initial stage or at the stage of operations. This company can take care of all trade operations of the bank including *murabahah*, *Salam* and *bay' 'ajil*. This type of arrangement enables the bank to expand its trade operations, reap the benefits of specialization while maintaining its basic function as a financing institution. This idea becomes more obvious when we take into consideration the fact that practicing *murabahah*

168. Dr. Rafique al Misri, Comments on an article on al Islam wa al Wasata al Maliyah, Journal of Islamic Economics, KAU (Jeddah), Vol. (1) 1409H, Footnote, p.76.

by Islamic banks encounters a lot of difficulties which include - as stated by a bank official - shortage of trained staff in the field of commodity marketing and shortage of infrastructural facilities like transportation and storage.¹⁶⁹

Third Arrangement

An Islamic Bank can move a step further towards specialization by establishing branches or specialized banks, e.g., Islamic bank for agricultural development or Islamic bank for industrial development. These banks can undertake financing operations within their respective sectors. Different Islamic financing techniques, including *Salam*, can be used by such banks for financing production inputs especially for small farmers and craftsmen who may use the output of their undertaking for settlement of these loans.

No doubt, this type of arrangement will be appreciated by rural inhabitants and craftsmen in Muslim countries because of their strong faith and loyalty to Islam and their ever rising suspicions against *riba*-based financing. This very fact has led the Egyptian' agricultural development banks to establish Islamic branches in rural areas. However, the inhabitants of these areas are still reluctant to enter into dealings with such branches since they are parts of *riba*-based institutions.

Thirdly : Some Modern Fields of Practicing *Salam* in Islamic Banks

Salam as a trading activity can be practiced with individuals and for the exchange of most goods and services. This could be practiced by Islamic banks. Yet, due to the nature of the developmental role of these banks and the huge financing capability which they can assume, some newly emerging areas of practicing *Salam* may constitute a field that Islamic banks could approach.

Most important of these are:

169. See; by the author of this paper, at Tafaseel at Amaliyah Li Aqd at Murabahah Fi at Nizam at Islami, op. cit., pp. 6-10.

A. Foreign Trade Financing

It is well known that the predominant characteristic of foreign trade in Islamic countries is that imports exceed exports. Exports of these countries are usually confined to primary products, like cotton, petrol and tea, while imports comprise a vast range of food stuffs and other industrial products. Exporting business usually takes place through international monopolies which exert every effort to stagnate or depress prices of primary products. Some Islamic countries may even sell their products in international markets before producing them and against unduly low prices. The negative trade balance resulting from failure of export earnings to finance imports is catered for through *riba-based* borrowing a fact which has led these countries to so many problems of debt servicing.

Therefore as a contribution to the efforts made for solving this problem, Islamic banks can practice *Salam* in foreign trade financing according to two perspectives:

First Perspective

Islamic Banks can purchase - in *Salam* - primary products directly from producers or government and sell them in the international markets against fair prices either in cash or through *Salam* arrangements in exchange of industrial products. They can also do the reverse by receiving first industrial products as *Salam* principal and supplying primary products later on.

Second Perspective

Encouragement of industrialization in Islamic countries in order to transform primary products into industrial goods, and thus increase their export prices. This can be practiced through different Islamic financing techniques including *Salam* in which finance can be extended to producers in the form of machinery and equipment against deferred delivery of industrial products that can be exported.

B. Financing Fixed Assets

The predominant - production pattern in Islamic countries reveals 'excessive' dependency on primary production in addition to some assembling industries characterized with backward technology and extreme specialization that goes to the extent of complete dependency on only one or two commodities.

In order to resolve these issues, Islamic countries need to diversify their products and attempt processing of their primary commodities instead of exporting them in their present form against low prices. This transformation requires establishing industrial plants with large capacities and thus leads to incurring high costs.

Therefore Islamic banks can help in this process by using *Salam* as a substitute for lease financing. In this case the bank can finance provision of fixed assets required for establishing a new factory or for replacement of existing old assets. The finance thus extended can be regarded as *Salam* principal paid for receiving part of the products of the factory in installments at predetermined delivery times.

C. Financing Producers

In spite of the need for financing big production units with the aim of accelerating development, small producers are more worthy of support. That is because production in most of the Islamic countries takes place in small units especially in the fields of agriculture and handicrafts. This type of production has a significant contribution to the national products of these countries. Such small units of production usually encounter difficulties in marketing and finance. Hence an Islamic bank could contribute to financing craftsmen and small farmers by providing them with production inputs as *Salam* principal in exchange of part of their products.

In countries like Japan, similar arrangements were found useful in enhancing industrialization and contributing to development of rural societies and environment. For this purpose, the third arrangement for practicing *Salam*

referred to earlier can be adopted. Agricultural and industrial development banks can be established with branches scattering all over the rural areas and handicrafts groupings in Islamic countries.

Fourthly : Most Important Controls on Practicing *Salam* by Islamic Banks

In order to ensure that *Salam* practiced by Islamic banks can fulfill its desired role in providing adequate finance for those who need it, and as a sign of Muslim's adherence to the teachings of the *Shari 'ah* pertaining to the banking activity, and due to the need for purification of *Salam* as a *riba-free* financing technique, practicing *Salam* should be subject to some strict controls. Most important of which are:

(A) In order to reinforce the social objective of Islamic banks, *Salam* operations should be directed towards those activities which satisfy the basic needs of the society.

(B) In pursuance of the *Shari 'ah* goals behind enacting *Salam* which aim at providing finance to those who need it, *Salam* should remain as a primary financing technique. Hence banks should not approach dealings in *Salam*, with the mere aim of price speculation. If a bank does so it becomes like an exchange operator and prices of goods will consequently be pushed up due to increase of brokers and speculators who deal in *Salam* bonds. In addition to that the bank will commit the offence of selling a *Salam* commodity before receiving it which is strictly prohibited in *Shari 'ah*. When the bank needs liquidity before the date of receiving the commodity, it may sell through *Salam* a commodity of the same type contracted upon, as the previously mentioned *fatwa* permits.

(C) Refraining from financing middlemen and brokers who purchase seasonal products from farmers against low prices and sell them against higher prices. If finance, is extended to such people it is likely to strengthen their financial position and weaken that of actual producers.¹⁷⁰

170. Dr. Sami Homoud, *Siyah al Tamwil al Islamiyah*, op. cit., p.20.

(D) Islamic banks should adhere to the just price in *Salam* operations. This control deserves much consideration, because the history of Islamic countries reveals a great deal of exploitation in the name of *Salam*. Some owners of capital in these countries are used to providing finance to farmers and craftsmen by purchasing their products before harvesting against unduly low prices. A businessman from this group is even known as a "*murabi*" i.e. a *riba* practitioner. In some Islamic countries like Bangladesh some local and foreign institutions purchase tea from Muslim farmers, through *Salam* arrangements, against a price not exceeding 25% of the price of tea at harvesting time. Price at harvesting time is of course the lowest possible price according to the norms of supply and demand. Hence if a company of this type enters into a *Salam* contract of six months duration, it could realize a 600% annual rate of return on capital.¹⁷¹

Islamic banks should, therefore, carry away *Salam* from the scope of exploitation to that of justice through adherence to just prices. It is well known that as a basic rule in *Shari'ah*, no intervention should be made for fixing prices or profits¹⁷². Since mutual agreement or stable equilibrium of supply and demand - is apt to do that. Islamic *Shari'ah* has therefore imposed some controls on the market so that complete mutual agreement can be reached: Monopolistic practices, secret agreements, *Khars*, *najash*, receiving caravans, and *gharar* are all prohibited practices in *Shari'ah*. In short, *Shari'ah* prohibits all practices that could jeopardize mutual agreement. If any one of the two parties of a transaction or a third party tries to use any means to hinder mutual agreement, concerned authorities intervene in order to keep the price equal to that of the equivalents or the just price. Moreover, it should be mentioned that *Salam* price is usually less than the price of the commodity at delivery time, a fact which is acceptable in *Shari'ah* as well as in common sense. The bank should not reduce this price to the extent of exploiting needy borrowers.

In conclusion, it could be stated that *Salam*, if widely practiced within its *Shari'ah* controls, could result in a great deal of benefits to the national economy and to those who practice it as we shall explain in more details in the following section.

171. Ibid, p. 46.

172. Layachi, Faddad, Mafhoum al Riba ti al Iqtisad al Islami, M.A. Thesis, Um al Qura University, 1408H.

ECONOMICS OF SALAM

Economic analysis of *Salam* in' this context refers to presentation of the effects that practicing *Salam* could have on the various economic functions of the society which can be summarized as follows:

(A) SCOPE

Due to diversity of goods and services that can be dealt in through *Salam* especially after the impact of modern technology on the means whereby control on specifications of goods can be achieved, it could be said that the scope of *Salam* transactions comprise most of the economic activities of the society.

(B) FINANCING POTENTIAL

The significant financing potential of *Salam* exhibits itself in the following:

1. Usefulness of *Salam* for short-term financing operations like financing of agricultural products which have less than one year production cycle.
2. Usefulness of *Salam* for long-term financing operations like financing of fixed assets. It has been mentioned earlier that the period of a *Salam* contract could be up to 10 years.
3. Possibility of indirect liquidation of a *Salam* operation before maturity. This could be done indirectly when the bank sells in a separate *Salam* contract a commodity similar to what it has purchased in *Salam* as per the *fatwa* referred to earlier.
4. Achievement of reasonable profit as *Salam* price is usually less than price at delivery time.

(C) FINANCIAL BURDEN

Comparing the financial burden of *Salam* to that of interest-based borrowing we find that the former is considerably less than the latter. In interest-based borrowing financial burden includes predetermined interest to be deducted in advance from the principal of the loan in addition to conditions often imposed on the borrower like depriving him the right of borrowing from others throughout the period of the loan, using the loan for asset replacement, or forcing him to use the loan for purchasing from a specific source... etc. In interest-based borrowing, no consideration is given to unforeseen circumstances of the borrower which may force him to delay repayment. Moreover, besides his right in liquidation of the guarantees, the lender charges more interest for delay if he is to accept delay of repayment.

The financial burden of *Salam* is confined to the obligation of the borrower to deliver the commodity agreed upon in due time. If unforeseen circumstances prevail, the contract can either be terminated or the two parties wait without any additional obligations - until such circumstances are over.

(D) JUST DISTRIBUTION

In *Salam* contracts, distributive justice is based on the fact that the two parties of the contract mutually agree on their respective rights without practicing exploitation on each other by imposing a fixed claim that remains fixed under all circumstances. In contrast, interest-based financing guarantees a fixed return (interest) for the lender while the borrower has to count on what may result from investing the borrowed amount. Under the risk thereof, a case could happen where the borrower realizes profits just sufficient to pay interest. Hence his gain from the transaction will turn out to be zero. He may realize no profit at all or may even achieve a negative return (loss) in addition to loss of his effort. Under other circumstances the borrower could realize a profit which considerably exceeds interest and therefore injustice falls on the lender.

In *Salam*, no predetermined- return is fixed for -any .one of the two parties. For the borrower the return depends on the difference between the *Salam* principal and the cost of providing the good sold while for the financier

it is the difference between the *Salam* principal and the value of the good purchased at delivery time. In both cases the return depends on ability to make rational economic decision. For the borrower the decision relates to cost minimization while it relates to marketing so far as the financier is concerned. It is true that under extraordinary circumstances, e.g. crop failure in agriculture, demand may exceed supply resulting in a net price rise. The financier may therefore make more profits than expected when he sells the commodity purchased through *Salam*. Or the reverse could happen when an abnormal increase in supply may depress price and lead to less profits for the financier. Such risk factors though very crucial in determination of profit, yet they could not violate the general rule that the two parties of a *Salam* contract do not influence the decisions of each other.

(E) COUNTER - INFLATIONARY EFFECTS

One of the most important contemporary issues is how to achieve justice among the parties of financial operations. Under inflationary conditions that characterize all contemporary economies, the purchasing power of a cash loan tends to deteriorate during the period between providing the loan and its repayment. This is quite obvious in the case of loan financing, as the financier will receive the principal of the loan at the date of repayment, after deterioration of its purchasing power. Interest paid will not cancel the effect of inflation because the former is usually far less than the latter. Moreover interest is paid as a return on capital and if it is to be considered as a compensation for the deterioration of the purchasing power of the loan, capital will be entitled to no return. For this reason some would argue in favor of indexation of loans.

If we look into financing through *Salam*, we find that it achieves a direct connection between loans and price index and therefore caters for inflationary effects. The financier receives commodities in exchange of his money. Since the prices of these commodities increase during inflation, the financier is not going to loose due to deterioration of the purchasing power of the loan. In addition to that the financier will get profits resulting from the difference between the purchasing and selling prices of the commodity. The borrower also will not be affected by inflation, because he can use the *Salam* principal - when it is received in cash - in financing production by purchasing raw

materials. The prices of such materials will also increase during periods of inflation.

(F) ENHANCING PRODUCTION .

Since the borrower has to repay the *Salam* principal in terms of goods and if he is the producer of such goods, he will spare no effort in producing at least - the quantity needed for settlement of the-loan. In case of interest-based borrowing the obligation of the borrower will be only repayment of the loan. he may have no incentive to use the. loan for production since he can, for instance, make settlement through further borrowing: -.

(G) CREATION OF PRODUCTIVE UNITS

This could take place through inducement of hired craftsmen to become self-employed businessmen. Many craftsmen accept to be employed by other producers, due to their lack of adequate finance for purchasing equipment and production inputs. They fail to get loans-which require fiscal guarantees and business name that may not be available to most-of them. *Salam* contracts could be effected with these people so that equipments and production inputs be made available to them against part of their output.. This process will lead to creation of new productive units which will add to the productive capacity of the national economy besides the fact that a self-employed person is supposed to be more productive than a hired person.

(H) . STABILITY OF PRODUCTION

There are so many on-going projects that suffer lack of finance for purchasing production inputs or making asset replacement and therefore tend to produce at less than full capacity or irregularly. Such projects may not accept equity participation or *riba-based* borrowing. Hence it could be reasonable for them to borrow through *Salam* against part of their output.

(I) MINIMIZING PRODUCTION COSTS

Profit in its simplest form reflects the difference between sales revenue and costs. In case of *Salam*, sales revenue is known before production. In order for the borrower to make profit he could minimize the cost of providing the commodity agreed upon through better use of materials, minimization of waste and damage... etc.

(J) ACTIVATING COMMODITY MARKETS

Dealing in *Salam* leads to creating a stable market for commodities - especially seasonal commodities - a fact which results in stability of the prices of these commodities. It will also enable savers to direct their savings to investment outlets without waiting, for instance, until the harvesting time of agricultural products or the time when they actually need industrial goods and without being forced to spend their savings on consumption. Again purchasing production inputs through *Salam* helps avoiding risks of purchasing before the time of actual use and hence eliminates risks of damage or increase in storage and maintenance costs. For the borrower, *Salam* helps in activating sales and securing pre-known demand which leads to proper planning of production. It should also be noticed that *Salam* takes place in the form of a real transaction in which one of the two exchanged goods - price - is known and payable at the time of effecting the contract. Moreover, each of the two parties of the transaction, has a real need to acquire what he pays for in the transaction contrary to what happens in stock exchanges where the deal takes place in the absence of price and commodity and to the mere benefit of speculators and brokers and therefore bids up prices and increases *gharar* which in the final analysis results in serious problems, for both the producer and the consumer.

Chapter Three

**ACCOUNTING FRAMEWORK
OF *SALAM***

ACCOUNTING FRAMEWORK OF SALAM

INTRODUCTION

One of the requirements of modern practicing of *Salam* is identification of its appropriate accounting framework. This is because performing economic activities at present times requires well organized administrative and accounting systems. An accounting framework in general is governed by several factors including the nature and structure of the project as well as the major activity it performs. Therefore, we shall assume, for this purpose, that *Salam* is practiced by an Islamic bank, hence the most important issues need to be resolved by the accounting system include the following:

1. Because *Salam* involves indebtedness we need to know the various aspects relating to the position of the borrower and his ability to meet his obligations. We also need to know the profitability of the commodity in question and the possibilities for its marketing at delivery time.
2. We also need to display the final result of the *Salam* transaction with regard to profit and loss and show how claims and obligations could be reflected in the financial statement of the bank.
3. We need to provide necessary information for concerned parties to facilitate rational decision making.

This chapter with therefore, comprise the following sections:

Section (1): Analytical Examination of *Salam* Operations.

Section (2): Accounting Treatment of *Salam* transactions.

ANALYTICAL EXAMINATION OF SALAM OPERATIONS

INTRODUCTION

Because *Salam* involves finance as well as investment we need, before initiating a *Salam* contract, to examine the position of our client to make sure of his ability to deliver the commodity. On the investment side the commodity agreed upon need to be examined with the aim of assessing its profitability. Such examinations depend on accounting data and need to be made by an accountant as follows:

FIRST : EXAMINATION OF THE POSITION OF THE BORROWER

The aim behind examination of the position of the borrower is to make sure of his ability to deliver the commodity on time. This ability does not solely depend on availability of the commodity, but also on how the client behaves with regard to his obligations. As known in *fiqh* terminology "He must be well-off and trust worthy". Several criteria can be used to assess a clients position including :

A. Personality Criterion

It means assessing the keenness of the client to meet his obligations on time. This is, no doubt, a behavioral characteristic which can be assessed by resorting to so many sources of information including reputation in the market,

173. By the Author: *Muhadharat Fi al Fahs wa al Muraja'ah*, Um al Qura University, Unpublished.

It should be noted that the relative importance of these criteria in conventional banks starts with guarantees, followed by property, then comes ability, and finally personality while in Islamic banks their relative importance follows the order shown in this paper. Also the implications of these criteria differ from one bank to the other.

credit worthiness as judged by the same bank and other banks, opinion of government agencies with which the client has work relations like taxation authorities, chamber of commerce, records of courts and whether they show any condemnation or protest issued against the client, in addition to examination of the accounting records of the client. It should also be noticed that in a Muslim society adherence of the client to the rulings of Islamic *Shari 'ah* in general is also indicative of his credit worthiness.

B. Ability Criterion

The objective behind this criterion is to assess the ability of the client to meet his obligations, This can be made through examination of the level of his activities to make sure that it is • reasonable in relation to his obligations in the *Salam* transaction. Examination should also include his managerial abilities which can be known through studying his final accounts and analyzing his operating results. If the project is still at the initial stage, the ability of the client can be judged according to his professional specialization and the time he devotes to the project, because it may not be reasonable, for instance, to sign a *Salam* contract for delivery of furniture with a university teacher who has no relation with carpentry and furniture industry:

C. Property Criterion

The property of the client is the first guarantee for settlement of his obligations in case of default. However, because *Salam* is a loan provided to a needy person the essence of this criterion may not always lie with the volume of property. It may lie with how efficient the client uses his property and how far his work is affected by his technical expertise. In the absence of technical expertise the client must have sufficient property to be used as a guarantee, if the operation solely depends on technical know-how, such knowledge can be accepted as a substitute for property.

D. Guarantees Criterion

It has been mentioned earlier that, according to the majority of the *fuqaha'*, a *Salam* financier can take guarantees from the borrower in the form

of surety or lien. The guarantees thus provided need to be examined in order to ensure their acceptability in relation to the commodity to be delivered, whether they belong to the client, and" how easy they can be liquidated in case of default. It is also important to make sure that the guarantor has a strong financial position, because provision of guarantee is nothing but adding the financial ability of the guarantor to 'that of the borrower in order to constitute one strong financial position. If both abilities are weak the final position could also be weak.

It should, however, be noticed that because *Salam* principal is provided for needy people, a *Salam* borrower may have no sufficient fiscal guarantees especially in activities that mainly depend on technical know-how rather than capital input. In this case personal guarantee becomes the most significant among all other guarantees as all other guarantees can be considered as dependent on it.

SECOND : EXAMINATION OF A SALAM'S TRANSACTION

Examination could be done in the light of the following criteria:

A. Permissibility

1

It should be ascertained that the commodity in question is one in which dealing is permitted by *Shari 'ah* and that *Salam* conditions and requirements are duly recognized. The examiner could seek for this purpose a report from the *Shari 'ah* advisory board of the concerned institutions as a major source of information required.

B. The Nature of the Commodity to be Purchased through *Salam*

The examiner here should make sure that the commodity in question falls within the scope of client's activity. He also needs to study the market for that commodity in order to see the possibility of its marketing at time and place of delivery.

C. Profitability ,

Profitability could be judged by comparing the cost to be incurred in payment of principal and any other expenses to the expected revenue obtainable from sale of the *Salam* commodity. Expected profit could then be seen in relation to profits generated by other *non-Salam* operations or with regard to the average rate of return on capital normally achieved by the bank.

D. Conformity of the Operation to the General Policies of the Bank

Conformity could be visualized with regard to the type of the commodity and whether the bank could be able to resell it , or not. It also includes investigation on whether a project whose owner approaches the bank as *a Salam* client, is well established, infant or at the stage of experimental production. Under this criterion also the examiner is to see that the operation falls within the limits of the optimal distribution of investment operations among various financing techniques or the sectoral distribution of such operations.

After thorough examination of the operation, a report is prepared indicating the results of the examination and the consequent recommendations.

ACCOUNTING TREATMENT OF SALAM OPERATIONS

Because accounting treatment does not solely depend on the operation but also on the type and nature of the project, we shall discuss such treatment under the following assumptions:

1. The *Salam* Operation takes place in an Islamic bank.
2. The bank purchases commodities through *Salam* and then sells, what it has purchased or any other commodity, through *Salam* also. It should be noted here that the bank can also sell the commodity in question through other techniques like spot sale, *murabahah and bay'ajil*.
3. No treatment will be attempted with regard to the Seller's accounts.

FIRST : INTRODUCING SALAM ACCOUNTS IN THE ACCOUNTING GUIDE OF THE BANK

Because *Salam* is an investment technique - a short-term investment technique in most cases - its accounts appear among the assets as follows:

1. Assets
 - 1.1 Cash on hand and bank balances
 - 1.2 Short term Investment
 - 1.2.1 *Murabahah*
 - 1.2.2 *Musharakah*
 - 1.2.3 *Salam*
 - 1.2.4 *Mudarabah*
 - 1.2.5 External Investment Operations

SECOND : IDENTIFICATION OF SEPARATE ACCOUNTS OF SALAM

A *Salam* operation undergoes several stages starting from payment of principal and related expenses, receiving and reselling the commodity, dealing with partial or complete termination of the contract - if any - in addition to other related operations like guarantees. Therefore, the separate accounts that can display this information include the following:

<i>Salam</i> Debtors/Ac.	Which reflects the liability of the borrower with the principal paid.
<i>Salam</i> Goods/Ac. :	Reflecting the Commodity received.
<i>Salam</i> Expenses/Ac. :	Representing direct expenses of the operation like transportation and repacking expenses, if any.
<i>Salam</i> Sales/Ac. :	Represents the revenue generated from sale of the <i>Salam</i> goods.
<i>Salam</i> creditors/Ac. :	Showing the amounts of money received from those who want to purchase from the bank commodities of the same type purchased by the bank through <i>Salam</i> .
<i>Salam</i> Guarantees/Ac.:	Which is a contra account matched with the "owners of <i>Salam</i> guarantees account". These two accounts are used for receiving and reimbursement of guarantees.
P/L <i>Salam</i> /Ac. :	Which shows the result of the <i>Salam</i> operations before being transferred to the P/L Investment/Ac.

THIRD : DOCUMENTS AND BOOKS REQUIRED FOR SALM OPERATIONS

(A) Documents required for *Salam* do not differ from those normally used in a bank like receipts for payment of the *Salam* principal, receipts for receiving the goods and documents of storing them. What is new here is that a copy of the *Salam* contract need to be attached to payment and collection documents.

(B) Books. The following books and records should be kept within the general system of the bank's accounts:

- Book of original entry for *Salam* to show entries of the goods purchased in *Salam*. It should contain two sides, the first for payments of value and the second for receipts of goods.
- Subsidiary ledger book for *Salam* debtors: An account in this book should be opened for each client. Transfer of entries from the *Salam* book of original entry should immediately take place to the clients accounts to make each client indebted with the value he receives and credited with the goods he will provide at delivery time or the cash amounts he pays when the contract is terminated.
- An explanatory book for recording information about the client and the whole operation.

FOURTH : MAKING ACCOUNTING ENTRIES FOR SALAM

This we shall explain *in* terms of a numerical example:

- An Islamic bank signed contracts with three clients for purchasing wheat through *Salam*. Details are shown below:
- tons from the client Monzer at a price of SR.2000 per ton. Delivery after one month., The client received the money in cheque through a correspondent bank.
- tons from the client Hassan at a price of SR.1950. Delivery after two months. The client received the money in cheque payable at one of the bank branches.
- tons from the client Muhammad at a price of SR.1900. Delivery after three months. The client received the money in cash.

- Hassan provided personal guarantee while Muhammad and Monzer each provided a fiscal guarantee equals three fourths of the total value.

Monzer delivered the total amount of the goods on time, Hassan provided only one half of the amount agreed upon while the contract with him for the rest was terminated and he paid back half the money he had received.

- tons of wheat were sold by the bank for a price of SR.3000 per ton.

These entries could be made as follows:

371,000		Dr./Salam Debtors Ac.	Cr./Mentioned
	120,000	120,000 Monzer	Correspondents Ac (Bank)
	156,000	156,000 Hassan	Branches Ac.(X Branch)
	95,000	95,000 Muhammad	Treasury Ac.
		Signing a contract for purchasing wheat through Salam and payment of value.	
161,250	161250	Dr.Salam Guarantees Ac.	Cr. Owners of Salam Guarantees Ac.
		Receiving guarantees (of such type) from the clients Monzer to the value of 90,000 and Muhammad to the value of 71,250.	
198,000	198,000	Dr.Salam Goods Ac.	Cr./Salam Debtors Ac.
			120,000 Monzer
			78,000 Hassan
		Receiving the whole of the Salam commodity from Monzer and half of it from Hassan	
2,000	2,000	Dr./Salam Expenses Ac.	Cr./Treasury Ac.
78,000	78,000	Dr./Treasury Ac.	Cr./Salam Debtors Ac. (Hassan)
		Termination of the contract for half the amount and receiving the equivalent in cash.	

90,000	90,000	Dr./Owners of Salam Guarantees Ac. Cr./Salam Guarantees Ac. Refund of guarantee to Monzer after fulfilling his obligation.
210,000	210,000	Dr./Treasury Ac. Cr./Salam Sales Ac Sale of 70 tons of wheat out of Salam Goods at 'a price of SR. 3000 per ton.
2,000	2,000	Dr./Salam Goods Ac. Cr./Salam Expenses Ac. Closing Salam expenses in Salam Goods Ac. in order to determine its cost.

FIFTH : IDENTIFYING SALAM RESULTS AND REFLECTING THEIR DETAILS IN THE FINAL ACCOUNTS AND THE BALANCE SHEET ¹⁷⁴

A. Identification of *Salam* Results

Salam results can be identified by extracting out of the explanatory book a separate list for each *Salam* operation so that its result whether profit or loss can be identified without closing the accounts.

Then, a P/L account for all *Salam* operations can be prepared indicating in its debit side *Salam* goods Ac. and in its credit side *Salam* sales and closing inventory as shown in the following figure (using the data in the previous example).

174. By the Author, at Tanzeem al Muhasabi Lil Bunook at Islamiyah, Faculty of Commerce (Azhar University), 1985.

Salam P/L Ac.

Dr.	Cr.
200,000 Cr./Salam Goods Ac.	210,000 Dr. Salam Sales Ac.
70,000 'Cr./Investment P/L Ac.	60,000 Dr. Closing Inventory Ac.
270,000	270,000

1. Cost of closing inventory has been determined as follows:

$$\frac{30 \times 200,000}{100} = 60,000$$

It is 30 tons at the cost of SR.2000 per ton.

2. *Salam profit* can be subdivided into purchasing profit and selling profit. The former is the difference between purchase price at the time of signing the contract and purchase price at delivery time, while the later is the difference between sale and purchase prices at delivery time. This could be done for the sake of assessing the relative efficiency of the various stages of processing a *Salam* transaction within the bank.

B. Presenting *Salam* Information in Final Accounts and Balance Sheet

1. In the Final Accounts. It is known that the final accounts of Islamic banks comprise a number of "subsidiary result accounts" indicating the results of various banking and investment operations of the bank. A general profit and loss account is prepared including the results of these subsidiary accounts as well as the bank overheads. Therefore, *Salam* operations, as operations for investment of deposits and bank equity, appear in the investment profit and loss account as the following entry:

70,000 Dr./ *Salam* P/L Ac. 70,000 Cr./ Investment P/L Ac.

The following entry also shows the same result: Investment

P/L Ac: for the Year Ending XYZ.

Dr.	Cr.
	Dr./Musharakah P/L Ac.
	Dr./Murabahah P/L Ac.
70,000	Dr./Salam P/L Ac.

The result of this account is transferred to the P/L Ac of the Current year as the following entry.

x x Dr./Investment P/L Ac.	x x Cr./ P/L Ac.
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2. **In the Balance Sheet.** The amounts invested in *Salam* appear in the balance sheet in details as follows:

Balance Sheet as at

	Assets	Liabilities
xx	Cash on Hand and at Bank	
	Short Term Investments	
	Murabahah	
	Musharakah	
155000	<i>Salam</i>	
	95000 Salam Debtors	
	60000 Salam Goods	
	+++++++	
	+++++++	
	Contra Accounts	Contra Accounts
71250	Salam Guarantees	71250 Owners of Salam Guarantees

CONCLUSION

1. *Salam* is an Islamic technique that satisfies so many needs in the fields of finance, investment, production and marketing. It constitutes, with other Islamic financing techniques, a rich field of operation for Islamic banks.
2. Classical Muslim *fuqaha'* gave much consideration to *Salam* contrary to contemporary *fiqh* scholars whose emphasis on this contract can hardly be regarded as fair enough in relation to our present day needs.
3. Because *Salam* has not yet been widely practiced by Islamic banks, there are no practicing issues that can be discussed. Therefore, we tried our best in this study to imagine certain issues to which more could still be added.
4. In the part of this study which relates to *Shari'ah* we tried to depend on the voluminous classical literature on the subject. We resorted to the four known *fiqh* schools and sometimes to the *Dhahiri* school. After surveying a great deal of writings of these schools we selected about four basic references for each of them.
5. Regarding contemporary writings, although we have consulted so many sources in Saudi Arabia and Egypt, yet we could not find but few references that deal with *Salam* from a *fiqh* perspective. Even in these few references which deal with *Salam*, there is in fact nothing more than collection and summaries of the ideas scattered in the classical *fiqh* books without any addition that relates to contemporary application of *Salam* or its economic and accounting aspects. However, there could still be some references that we failed to get access to.

Finally, we do not claim that we have been able to cover the various aspects, issues and problems of *Salam*, yet one would feel satisfied to have been able to cast some light on the *Salam* objectives.

We pray to *Allah* to make our efforts fulfill their ends.

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GLOSSARY OF JURISTIC TERMS

This Glossary is added by the translator to the original text in order to acquaint the reader with the meanings of some juristic terms used in the text.

<i>Bay'</i>	:	Sale
<i>Bay' al 'ajal</i>	:	Sale against deferred payment of price.
<i>Bay' al istijrar</i>	:	A sale' technique in which the purchaser purchases regularly portions of the good sold during a certain period of time and agrees to pay the total value of the amounts he receives at the end of the period.
<i>Bay'al Mahaweej</i>	:	Description of a sale contract induced by the urgent need of both of its two parties. Sale practiced by the needy people.
<i>Bay' Najiz</i>	:	Spot sale.
<i>Bir</i>	:	Piety or benefaction.
<i>Dinar, Dirham</i>	:	Islamic currency units.
<i>Eid al Fitr and Eid al Adh'ha</i>	:	Muslim religious occasions.(1 Shawwal and 10 Dhul Hajjah Lunatic calender respectively) (1 Shawwal and 10 Dhul Al Hajjah Lunatic Calendar respectively)
<i>Ewad</i>	:	Compensation.
<i>Eflas</i>	:	Bankruptcy
<i>Fiqh</i>	:	Islamic jurisprudence
<i>Fatawa</i>	:	Plural of <i>fatwa</i> or advice of a <i>faqih</i> on a <i>fiqhi</i> issue.
<i>Fatwa Board</i>	:	<i>Shari 'ah</i> Advisory Board
<i>Fuqaha'</i>	:	Plural of <i>faqih</i> , Muslim Jurist or Scholar who is knowledgeable in <i>fiqh</i> .
<i>Gharar</i>	:	Uncertainty
<i>Hewalah</i>	:	Debt transfer
<i>Hanafi fuqaha'</i>	:	Followers of Abu Hanifa (pioneer <i>fiqh</i> scholar)
<i>Hanbali fuqaha'</i>	:	Followers of Ibn Hanbal (pioneer <i>fiqh</i> scholar)
<i>Istisna'</i>	:	A contractual arrangement whereby one party (purchaser) orders a specifically defined product

		to be produced for him by the other party (Seller) in the future against a specific price. Raw materials to be supplied by the producer.
<i>Iqalah</i>	:	Termination of contract
<i>Imam</i>	:	Leader
<i>Jahalah</i>	:	Ignorance
<i>Khars</i>	:	Estimation
<i>Mufassirin</i>	:	Those who interpret the meanings of the Qur'an. Commentators..
<i>Mudarabah A:</i>		contract in which one side provides , capital while the other provides work (labor). Profits are to be • shared . according to predetermined proportions whereas losses - if any - are to be borne by the provider of the capital unless there is violation of the contract or neglect from the part of the working partner.
<i>Mudarib</i>	:	The Mudarabah party who provides labor and expertise -
<i>Murabahah :</i>		A sale technique in which the buyer, for the sake of having easy terms of repayments, accepts the object sold at a price higher than its purchase price at the time of agreement. As a financing technique it takes place when the financier purchases -certain goods needed by the borrower and resells them to the latter on cost plus basis. Both profit (Mark-up) and time for repayment (usually in installments) are specified in the contract.
<i>Maliki fuqaha' :</i>		Followers of Imam Malik.
<i>Nasa'</i>		Postponement of one of the two objects of an exchange transaction.
<i>Muzabanah :</i>		A contract which involves <i>gharar</i> stemming from exchange of two unequal objects (e.g. a fetus for a full-grown animal or raw dates for ripe dates). The period of such a contract is usually made long enough so that the transaction ends up in

<i>Najash</i>	equal reward to the two parties. Bidding up of price by a third party with the mere aim of exploiting the purchaser.
<i>Qiyas</i>	Derivation of <i>Shari 'ah</i> rulings by resorting to analogy between the event in question and other similar events that have explicit rulings in <i>Shari 'ah</i> .
<i>Qard</i>	Loan
<i>Rab al mal</i>	Owner of the capital
<i>Shari'ah Shafi'e</i>	The Islamic Legal System
<i>fuqaha' Salaf</i>	Followers of Imam al <i>Shaft 'e</i>
<i>Sahabah</i>	Borrowing
<i>Shirkah/Sharika</i>	Companions of the Prophet (pbuh).
<i>h/Musharakah</i>	Partnership
<i>Sheikh</i>	A title of respect used for addressing <i>fuqaha'</i> old men, native Leaders, etc.
<i>Tawliyah</i>	Sale without profit (on cost basis).
<i>Tafadul</i>	Difference in quantity or quality.
<i>(Ilama'</i>	Knowledgeable persons (rn this context those who are well versed in <i>fiqh</i>).

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ISLAMIC DEVELOPMENT BANK (IDB)

Establishment of the Bank

The Islamic Development Bank is an international financial Institution established in pursuance of the Declaration of Intent by a Conference of Finance Ministers of Muslim countries held in Jeddah in Dhul Qa'da 1393H (December 1973). The Inaugural Meeting of the Board of Governors took place in Rajab 1395H (July 1975) and the Bank formally opened on 15 Shawwal 1 395H (20 October 1975).

Purpose

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

Functions

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

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

Membership

The present membership of the Bank consists of 48 countries. The basic condition for membership is that the prospective member country should be a member of the Organization of the Islamic Conference and be willing to accept such terms and conditions as may be decided upon by the Board of Governors.

Capital

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

Head Office

The Bank's head office is located in Jeddah in the Kingdom of Saudi Arabia and the Bank is authorized to establish agencies or branch offices elsewhere.

Financial Year

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

Language

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

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