

INSTALMENT SALES IN ISLAMIC LAW

THEORY AND PRACTICE

BY

SALAH FAHD AL-SHALHOOB

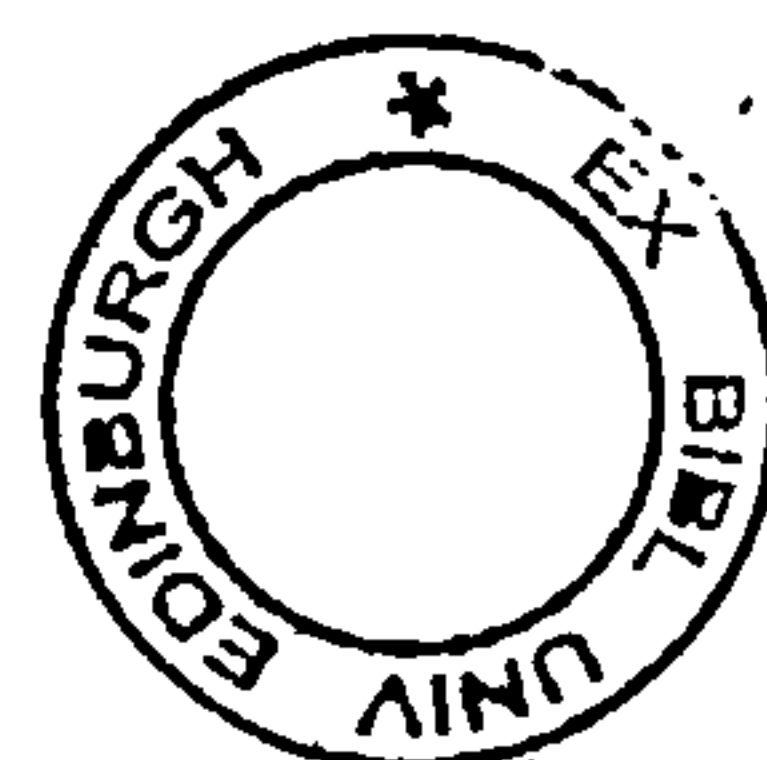
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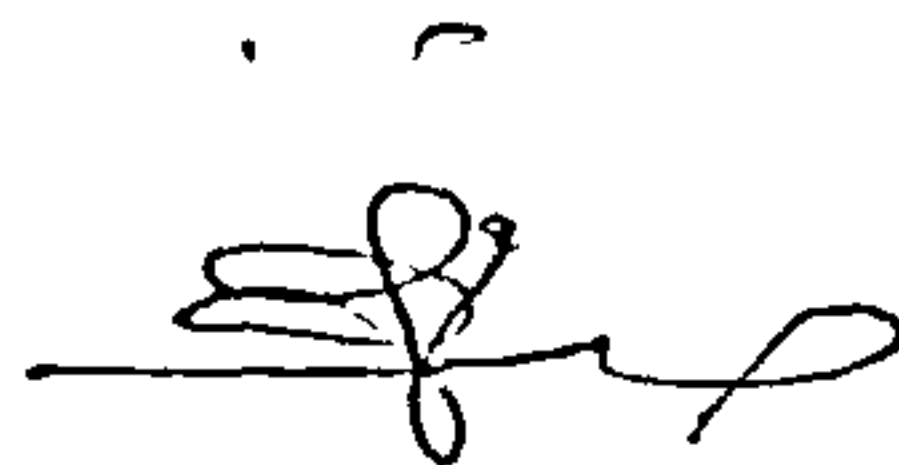


*In the name of Allah, the
Beneficent, the Merciful.
Praise be to Allah with all
due praise, and prayer
and blessings on his
Prophet, Muhammad, his
family and companions.*

DECLARATION

I, THE UNDERSIGNED, HEREBY DECLARE THAT THIS THESIS
IS WRITTEN BY MYSELF AND ANY REFERENCES MADE TO
EXTERNAL SOURCES ARE DULY ACKNOWLEDGED

SALAH F. AL-SHALHOOB

A handwritten signature in black ink, appearing to read 'S. Al-Shalhoob', with a horizontal line underneath.

Abstract

This thesis is a study of instalment sales according to Islamic law. It is divided into four parts. The first part introduces contracts in Islamic law. The second part discusses the concept, cornerstones and conditions of instalment sales. The third part discusses four types of contract: deferred sales, mark-up sales, *ʿIna* sales and *tawarruq* sales. Then, the last part discusses organised *tawarruq*.

The first part is an introduction to contracts in Islamic law. Such contracts are divided into two broad categories. The first category is permissible contracts in general according to Islamic law, including contracts of sales, partnerships, leases and loans; these are discussed in the first category. The second category introduces the category of prohibited contracts according to Islamic law; the category includes usury, *gharar* and cheating.

The second part is divided into two sections. The first section focuses on the concept of instalment sales. It discusses the linguistic definition of *taqsīṭ* which literally means instalment in Arabic, then it explains the meaning of *tanjīm* as a term of traditional Islamic *fiqh*, and discusses how scholars use it in some schools of traditional Islamic *fiqh*, to show the closeness to the meaning of instalment. The cornerstones of sales according to traditional Islamic *fiqh* in general are explained, because instalment sales are a type of sales contracts. Then, the conditions of sales

according to traditional Islamic *fiqh* are explained, both in general, and for instalment sales contracts in specific.

The third part examines the ruling on four types of contract: deferred sales, mark up sales, *ʿīna* sales and *tawarruq* sales. These four types of contract are relevant to instalment sales because they include deferred payment, with the exception of mark up sales, which may or may not include deferred payment, depending on their form. The thesis discusses some rules related to these contracts, including the definitions, the scholars' views, their forms and so on.

Lastly, the fourth part focuses on organised *tawarruq* according to Islamic law. The part is divided into two sections. The first introduces the development of Islamic financial institutions, including early Islamic financial practice, modern Islamic financial institutions approaches towards interest-free banking, current Islamic financial institutions and products of Islamic financial institutions. The second section focuses on organised *tawarruq* as it is practised in the financial institutions in Saudi Arabia, as a product to which Islamic law is applicable. The concept, examples, cornerstones and conditions of organised *tawarruq* are discussed, and a comparison is drawn with organised *tawarruq* on the one hand, and *tawarruq* sales and *ʿīna* sales on the other hand, according to the concept of Islamic business transactions in Islamic. At the end, the section discusses organised *tawarruq* in the view of Islamic law.

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Transliteration Table

ḥ	ح	th	ث
dh	ذ	kh	خ
ṣ	ص	sh	ش
ṭ	ط	ḍ	ض
‘	ع	ẓ	ظ
’	ء	gh	غ
Long vowels		Short vowels	
ā	ا	a	ا
ī	ي	i	ي
ū	و	u	و
Diphthongs		Doubled	
aw	اَ و	iyy	يَّ
ay	اَ ي		

The letter (آ) transliterated as (a) in pause form, and (at) in construct form.

Abbreviations

EI (2): Encyclopaedia of Islam, new edition.

HSDI: *Hawliyyat Kulliyyat al-Sharī'a wa al-Dirasāt al-Islāmiyya*

JCIIR: Islamic Studies Journal of the Central Institute of Islamic Research.

JKAUIE: Journal of King Abdul-Aziz University Islamic Economics.

MBFM: *Majallat al-Buḥūth al-Islāmiyya al-Mu'āṣira* (Contemporary *Fiqh* Research Journal).

MIFAC: *Majallat Majma' al-Fiqh al-Islāmī* (Islamic Fiqh Academy Journal) which is a periodical published by Islamic Conference Organisation.

MIFAW: *Majallat Majma' al-Fiqh al-Islāmī* (Islamic Fiqh Academy Journal) which is a periodical published by Islamic world league.

MTS: *Majallat al-Tijāra wa al-Ṣinā'a*.

MUQ: *Majallat Jāmi'at Umm al-Qurā li-'Ulūm al-Sharī'a wa al-Lugha al-'Arabiyya* (Journal of *Umm al-Qurā* University for Islamic Law and Arabic Sciences).

PJHC: Pakistan Journal of History and Culture.

Introduction

Instalment sales are widely practised in Islamic financial institutions nowadays. This kind of contract is considered as a form of short term finance with low risk of profit. Muslims prefer to engage in this kind of contract to buy goods which they want, rather than to apply for bank loans on which interest is charged. This is because interest is considered as usury according to the majority of the scholars of Islamic law today, and usury is strictly prohibited in Islamic law.

Islamic financial institutions offer many kinds of instalment sales under various types of contracts. These contracts have different constructions but the payment in all of these varieties is by instalment. One of the most common transactions under the contract of instalment sales is mark-up sales (*bay' al-murābaḥa*). Mark-up sales are a type of contract offered by financial institutions whereby they procure, for example, houses or cars for clients, with immediate payment, then sell them on to the clients with an extra sum as profit, the amount to be paid by instalment within a specified period of time. Another example, organised *tawarruq* (*al-tawarruq al-munazzam*) is another type of service that financial institutions offer to clients as a means of finance. The process is similar to that for mark-up sales, except that the financial institutions resell the commodities on the market on behalf of the client, and at the end of the transaction add the money to the clients' accounts.

These are just a small sample of the products and services provided by Islamic financial institutions. According to Islamic law, any contract has to be investigated to show whether it conforms to Islamic law or not. Basically, the general rule concerning business transactions is that contracts are, generally, permissible unless they include something prohibited in Islamic law, such as usury (*ribā*) or *gharar*.¹ Therefore, the scholars of Islamic law discuss many types of contracts, to show their validity according to Islamic law.

Instalment sales or in Arabic *bay' al-taqṣīṭ* is a contract between two parties. The seller delivers the commodity immediately, and the buyer pays the whole or part of the price in the future. The price is divided into two instalments or more, and every instalment has to be paid in a specific period in the future according to the agreement between the parties. This is the simple form of the contract of instalment sales. This type of contract is under the concept of contract sales, and to be more specific, deferred sales.

However, there are many forms of transaction that can be considered under the concept of instalment sales. They all belong to the category of sales contract and are characterized by payment by instalments, but these contracts are more complicated than the simple form of instalment sale. Mark-up sales and organised *tawarruq* mentioned earlier, are examples.

¹ *Gharar* means risk-taking, peril or hazard. For more details see p. 53 below.

Aim of the study

The aim of the research is to study the nature and permissibility of instalment sales under Islamic law. The study of instalment sales has to consider the factor of deferment, which may affect the permissibility of the contract depending on whether it is considered to produce usury or *gharar*.

Objectives of the study

The objectives of this study, therefore, are as follows:

1- To introduce briefly the general rules of business transactions as they are considered in Islamic law to be guidance for contemporary transactions.

2- To explore the concept of instalment and its relationship to *tanjīm* (the literal meaning is instalment) in the traditional Islamic *fiqh*. The word *tanjīm* or *munajjaman* (by instalment), in terms of the way of payment, is literally the same as the meaning of instalment, and it means to divide the payment of the price into more than one instalment to be paid at specific times, according to the agreement of the contracting parties. In order to understand instalment sales, it is necessary first to consider the cornerstones and conditions of sales in general. It is noted that because of the factor of deferment, instalment sales contracts have extra conditions in addition to the conditions applied to sales in general. This leads to the consideration of the rules on

usury by way of deferment, because, in some practical applications, the instalment sales contract could fall under the concept of usury by way of deferment, if the price and commodity belong to the same types, as considered under the rules of usury.² For instance, gold and currencies are under the same type, in terms of the rules of usury in Islamic law, according to the majority of the contemporary scholars therefore it is not acceptable to exchange between gold and pounds sterling except hand to hand. In other words the exchange between gold and pounds sterling must be at the same time. Therefore, instalment sales are not acceptable, according to the majority of scholars in Islamic law, in this kind of exchange. In addition, the sale of a debt for a debt is considered a prohibited contract. This type of contract occurs when both price and commodity are absent or in other words are to be paid in the future. Therefore the seller has to deliver the subject matter at the same time as the contract to avoid being involved in the sale of a debt for a debt. One of the conditions of instalment sales is clear information regarding the time of payment, to avoid any dispute between the contracting parties, for instance, the payments are on 28th of every month for three years.

3- To ascertain the rules applicable to instalment sales contracts, by examination of four types of contract which are related to instalment contracts in that they include

² For more details see p. 40 below.

deferred payment, namely, deferred sales (*al-bay' al-mu'ajjal*), mark-up sales (*bay' al-murābahā*), *īna* sales,³ and *tawarruq* sales.

4- To examine in detail the rules of one type of instalment sale in order to see how instalment sales are conducted in modern business practice.

The word *taqsīt*, which is the literal meaning of instalment, was not used in the early traditional *fiqh* books. However, there is another word which has the same meaning. The word is *tanjīm*, which means to divide the payment of the price into two instalments or more. The word *tanjīm*, however, is used not only to express the payment in sales contracts, but is also applied to some other classes of contract in Islamic business transactions. For instance, when someone rents a house for some months, he can pay the rent by instalment every day or week, rather than paying the rent all at once. As another example, in relation to the payment of blood money, scholars say that it has to be paid within three years, one third each year. Furthermore, payment by instalments is also discussed under the concept of mark-up sales. Thus instalment sales contract, or *bay' al-taqsīt* as they are known, are not new, but can be traced to the early *fiqh* books.⁴

³ Means that a buyer buys a commodity from a seller by instalments to be paid in a specific period for some money then the buyer sells the same commodity to the seller for less than the price in the first contract, to be paid now. For more details see p. 162 below.

⁴ Al-Turkī, *Bay' al-Taqsīt*, p. 33.

Dr Rafiq al-Miṣrī has discussed sales of a debt for debt,⁵ and he has indicated that some forms that fall under the concept of sales of a debt for a debt are not prohibited in Islamic law. One of these forms is when the exchange of the price and subject matter is in the future, while the involvement in the contract is now; for instance, A agrees with B to sell a car for £1000, and both the price and the car are to be exchanged four months later. Al-Miṣrī has made an analogy between sales of a debt for a debt and forward sales. He claims that the disadvantages of sales of a debt for a debt are not worse than those of forward sales; forward sales have a risk that the price of the subject matter may increase or decrease before it is delivered to the buyer, but the seller has already received the price. Concerning sales of a debt for a debt, the risk is shared between the buyer and seller, because neither of them have received the subject matter and the price. In this sense, sales of a debt for a debt seem more acceptable than forward sales, because the risk is shared between the contracting parties rather than borne by the buyer alone. In addition, al-Miṣrī indicated that people need sales of a debt for a debt just as they need forward sales. In addition, the ḥadīth which prohibits sales of a debt for a debt is not considered authentic; therefore, it is not acceptable as proof of prohibition.

Some scholars have discussed the Islamic point of view concerning increasing the price due to deferment. There is no doubt that deferred sales for the same price as for immediate payment is permissible according to Islamic law. However, scholars do not

⁵ Al- Miṣrī, *Al-Jāmi' fī Uṣūl al-Ribā*, pp. 341-353.

agree whether it is acceptable for the price of the object to be increased due to the deferment of payment. According to the majority of scholars, this type of sale is permissible as long as the contracting parties agree upon the price before they engage in the contract. Therefore, when they write the contract they have to state clearly the price and the method of payment. For instance, A negotiates with B the price of a car. A says that the car will cost £1000 if B wants to pay now, but the price will be £1200 if the payment is deferred for two years. The negotiation, in this case, takes place before they enter into the contract. So there is £200 difference between payment now and two years later. A contemporary scholar in the ḥadīth, ‘Abd al-Khāliq has discussed this point in his book *al-Qawl al-Faṣl fī Bay‘ al-Ajal*. However, he takes the view that increasing the price due to deferment is not permissible according to Islamic law.⁶

Tawarruq sales are types of deferred sales, and some of their forms are under the concept of instalment sales. Some scholars including Ibn Taymiyya and Ibn al-Qayyim consider that *tawarruq* sales are not permissible according to Islamic law. They claim that *tawarruq* sales involve two transactions combined in one, and this is prohibited in Islamic law. They also point to a similarity between *tawarruq* sales and usury by the way of deferment, because the buyer aims to obtain cash with an extra sum, just like the borrower in a loan contract, and *tawarruq* sales may cost the buyer more money and effort. As a result, organised *tawarruq*, which is a new form of transaction under the concept of sales, is prohibited according to this view.

⁶ ‘Abd al-Khāliq, *al-Qawl al-Faṣl*, pp. 28-32.

Methodology

We will consider in the present thesis two levels of methodology; the first comprises a theoretical study, covered in the first three parts of the thesis. The second level of methodology concerns one of the practical applications of instalment sales, as a new form, which is practised widely today in the financial institutions in Saudi Arabia. This form, which is considered as one of the instruments of Islamic finance, will be discussed in the fourth part.

Let us consider first the methodology of the theoretical study. The study is based on the view of four *madhhabs*, the Ḥanafīs, the Mālikīs, the Shāfi'īs and the Ḥanbalīs, in accordance with the methodology of the school of ḥadīth, in addition to contemporary studies regarding instalment sales, mark-up sales, deferred sales, organised *tawarruq*, interest and usury, sales of a debt for a debt and so on.

The main source for the study are the Qur'an, sunna, consensus (*ijmā'*),⁷ analogy (*qiyās*),⁸ custom (*'urf*),⁹ and blocking the means (*sadd al-dharā'i'*).¹⁰ In addition, the

⁷ Consensus (*ijmā'*) is a unanimity of opinion concerning a divine prescription, its opinion is infallible. (Aghnides, *Mohammedan Theories of Finance*, p. 60)

⁸ Analogy (*qiyās*) is the extension of a *Sharī'a* value from an original case, or *aṣl*, to a new case. (Kamali, *Principles of Islamic Jurisprudence*, p. 197; and see Schacht, *the Origin*, pp. 98-99)

⁹ Custom (*'urf*) is defined as recurring practice, which are acceptable to people of sound nature. (Kamali, *Principles of Islamic Jurisprudence*, p. 283)

study considers rules in Islamic traditional *fiqh*, such as the rules of necessity (*ḍarūra*), rules of need (*ḥāja*) and so on. The study also considers the notion of the objectives (*maqāṣid*) of Islamic law.¹¹

The ḥadīths, which are cited in this thesis, are divided into two groups; the first group of ḥadīths are quoted from *al-Jāmi‘ al-Ṣaḥīḥ* by al-Imām Muḥammad Ibn Ismā‘īl al-Bukhārī and *Ṣaḥīḥ Muslim* by Muslim Ibn al-Ḥajjāj al-Qushayrī, and these ḥadīths are considered as authentic as the opinion of many scholars of Ḥadīth; therefore, we will not discuss the level of authenticity in the thesis. The second group of ḥadīths is from other books such as *Sunan Abī Dāwūd*, *Sunan al-Tirmidhī*, *Sunan al-Nasā‘ī* and so on, and in relation to this group we will indicate the views of some Ḥadīth scholars regarding their authenticity, because ḥadīths which are not authentic can not be accepted as proofs according to the principles of Islamic law.

The data of the study are collected from the traditional Islamic sources such as the book of Tafsīr, Ḥadīth, Fiqh, Uṣūl al-Fiqh, al-Qawā‘id al-Fiqhiyya, Muṣṭalaḥ al-Ḥadīth, contemporary books which discuss Islamic law in general and Islamic business transactions in particular, and journals.

¹⁰ Blocking the means (*sadd al-dharā‘i‘*) implies the means to an expected end which is likely to materialise if the means towards it is not obstructed. (Kamali, *Principles of Islamic Jurisprudence*, p. 310)

¹¹ *Maqāṣid*, according to al-Ghazālī, the objectives of *Sharī‘a* are to promote the well-being of all mankind, which lies in safeguarding their faith (*dīn*), their human self (*nafs*), their intellect (*‘aql*), their posterity (*nasl*), and their wealth (*māl*). Whatever ensures the safeguard of these five serves public interest and is desirable (Chapra, *the Future of Economics*, p. 118).

Then, the second level of methodology, which concerns study of a practical application, includes extra sources in addition to the sources of the first three parts. The study is focused on two models of the contract of organised *tawarruq*. The first model is a contract that offers commodities from the international market, normally metal. We will discuss this contract as practised in the British Saudi Bank (SAAB), and the discussion will consider the procedure of the contract as a type of sales. The second model is offered by National Arab Bank to sell commodities from the local market; the commodity sold is iron. We will show the differences between the two models, and review the model under the concept of Islamic law. The information was obtained from Islamic financial institutions, via meetings with experts, conversation with employees in some financial institutions, from the financial institutions' brochures concerning contracts of organised *tawarruq*, and copies of the contracts, which represent the agreement between the contracting parties. In addition, contemporary studies in Islamic finance in general and organised *tawarruq* in particular are consulted.

Next, use has been made of some translations of the Qur'ān such as the translation by Muhammad al-Hilālī and Muhammad Khān, and the translation by 'Abdullāh 'Alī. In addition, use has been made also of some translations of the book of Ḥadīth, such as *Summarized Ṣaḥīḥ al-Bukhārī* by Muhammad Khan, *Summarized Ṣaḥīḥ Muslim*, and Ibn Ḥajar al-'Asqalānī's *Bulūgh al-Marām*.

It should be pointed out that financial institutions are continuously developing their products and services in order to achieve customer satisfaction, and improve their businesses. The research does not discuss all the issues under the concept of instalment sales. It has just benefited from previous studies, addressing, for example, the simple form of instalment sales and mark-up sales. Organised *tawarruq*, which is considered under the concept of instalment sales, started in the past few years as a new product offered by financial institutions to provide finance, and the study tries to discover the ruling of this form according to Islamic law. There are many other products or forms of contract that should be discussed under the concept of Islamic law, to present suggestions to improve these products to be more in conformity with Islamic law; attention will be drawn in the concluding part, as mentioned, to suggested topics for future research.

Part One

Contracts in Islamic Law

1.1 Introduction

1.2 Permissible Contracts in Islamic Law

1.3 Unlawful Contracts in Islamic law

1.1 Introduction

The general rule in Islamic jurisprudence is that any type of transaction is acceptable in Islam unless there is clear evidence in the Islamic sources to indicate that the transaction is prohibited. Therefore, all transactions that have emerged since the death of Prophet Muhammad (d. 632AD) -peace be upon him- require scrutiny from Islamic scholars, who must investigate and examine the validity of the transaction with a view to ensuring that it contains no element impermissible in Islamic law.

In support of this rule, there are foundations from the classical sources of Islamic jurisprudence. Firstly, in the Qur'ān, as says:

“He has explained to you in detail what is forbidden to you”.¹

Hence, it can be deduced that everything prohibited in Islam has been detailed in the original sources of Islam. By extension, anything that has not been addressed as prohibited is permissible within the realm of Islamic law.²

Further, from the ḥadīth collections, there is evidence supporting the aforementioned verse of the Quran. The ḥadīth is that Sa'd Ibn Abī Waqqāṣ (d. 51/671)³ narrated that the

¹ Qur., al-An'ām, 6:119.

² See al-Shanqīṭī, *Dirāsa Shar'īyya*, v. 1, pp. 97-112.

³ Sa'd Ibn Abī Waqqāṣ: Companion. See *EI (2)*, v. 6, pp. 696-697.

Messenger of Allāh said: “The worst crime in a Muslim is of that Muslim who asks about something which was not prohibited, but becomes so because of his asking.”⁴

This ḥadīth implies that Muslims have the freedom to participate in all kinds of contracts unless there exists evidence forbidding them. Moreover, from this ḥadīth it can be assumed that a Muslim should not ask about those matters which have been left undiscussed in the Islamic sources.

In addition, the Prophet, in another ḥadīth, confirmed the ruling, as he said:

“Allāh Most High has made certain things obligatory, so be sure not to neglect them; He has also laid down certain limits, which you must not exceed; and then He has prohibited certain things which have to be observed; and finally He has, out of mercy, but not forgetfulness, chosen to remain silent over certain matters, so try not to be [too] inquisitive about them”.⁵

Kamali says:

“The *Shari‘a* norm regarding commercial transactions and contracts is that they are permissible unless there is a clear injunction to the contrary. Muslim jurists have held that an injunction which overrules the basic presumption of permissibility must be decisive both in meaning and transmission (*naṣṣ qāṭi‘ al-thubūt wa al-dalāla*)”⁶

⁴ Al-Bukhārī, *al-Jāmi‘ al-Ṣaḥīḥ*, v. 6, p. 2658; Muslim, *Ṣaḥīḥ*, v. 4, p. 1831.

⁵ Al-Dāraquṭnī, *Sunan*, v. 4, p. 184; al-Bayhaqī, *Sunan Kubrā*, v. 10, p. 12; al-Ṭabarānī, *al-Mu‘jam al-Kabīr*, v. 20, p. 222; Ibn Rajab said the ḥadīth is authentic (*ḥasan*). *Jāmi‘ al-‘Ulūm wa al-Ḥikam*, v. 1, p. 275.

⁶ Kamali, *Islamic Commercial law*, p. 66; for more details see also Rayner, *the Theory of Contracts*, pp. 91-95.

1.2 Permissible Contracts in Islamic Law

Within this section, contracts relevant to the concept of instalments sales as practised now are discussed in brief.

1.2.1 Sales contracts (*'aqd al-bay'*)

1.2.1.1 Definition of sales

1.2.1.2 Ordinary sales (*bay' taqlidī*)

1.2.1.3 Forward sales (*bay' al-salam*)

1.2.1.4 Mark-up sales (*bay' al-murābaḥa*)

1.2.1.5 *Tawarruq* sales

1.2.1.6 Deferred sales (*al-bay' al-mu'ajjal*)

1.2.1.1 Definition of sales

The word *bay'*, linguistically has, in Arabic, two contrary meanings which are buying and selling. The most common meaning for the word *bay'* is selling; for example, "*bā'a al-rajulu thawbahū*" means that a man sold his cloth. In some cases, the word is used to mean buying, as reported in a ḥadīth where it is reported that the Prophet said, "*Walā ya-bī'a 'alā bay'i akhīh*",⁷ meaning that it is not permissible to buy what has already been sold to your brother

⁷ Al-Bukhārī, *al-Jāmi' al-Ṣaḥīḥ*, v. 2, p. 970; Muslim, *Ṣaḥīḥ*, v. 2, p. 1032.

(Muslim). The Prophet means in the ḥadīth buying but not selling. The relevant word is formed from the same tri-literal root. For example, the buyer and seller can be named *bayyā'*, and the thing which is offered for sale is *mabī'*. "*Istabā'ahū al-shyi*", means that a person asks another one to sell him something.⁸

Al-bay' or sales, in Islamic law, are an exchange of property for property between two parties with mutual consent.⁹ Regarding the meaning of sales, al-Zuhaylī says, "A sale (*bay'*) is an exchange of one item for another".¹⁰

There is no doubt that sales, in general, are permissible in Islamic law, and the legitimacy of sales is proved by the Qur'ān, the sunna and consensus (*ijmā'*).¹¹ Allāh mentions this in the Qur'an: "Allāh has permitted trading, and prohibits usury (*ribā*)."¹²

⁸ See Ibn Manzūr, *Lisān al-'Arab*, v. 1, pp. 556-558; al-Rāzī, *Mukhtār al-Ṣiḥāḥ*, p. 29.

⁹ Al-Khudrawi, *A Dictionary of Islamic Terms*, p. 51; and see Schacht, *An Introduction to Islamic Law*, pp. 151-152.

¹⁰ Al-Zuhaylī, *Financial Transactions*, v. 1, p. 5.

¹¹ Izzi Dien indicates a significant point regarding to consensus as he says, "It is necessary to acknowledge two forms of consensus process, one of which is historical and the other contemporary. Historical *ijmā'* has been carefully documented and treated with great respect by various Muslim scholars, particularly when founded upon unambiguous verses of the Qur'ān and ḥadīth. Agreement in contemporary times is more easily achievable than it was during the period that witnessed the rapid and global spread of Islam, a phenomenon that occurred despite limited communication facilities. Today, modern technology and instant worldwide communication have facilitated the performance of al-Ghazālī's *mushāfaha*. (*Islamic Law*, p. 47)

¹² Qur., Al-Baqara, 2:275.

Then, there is a ḥadīth that shows the permissibility of sales: “The Prophet was asked: Which are the best form of income generation. He replied: “A man’s labour, and all legitimate sales”.¹³

In addition, there is a consensus that the contract of sales, in general, is permissible in Islamic law.¹⁴

The various types of sales are discussed in the following sections:

- 1- Ordinary sales (*bay‘ taqlīdī*).
- 2- Forward sales (*bay‘ al-salam*).
- 3- Mark-up sales (*bay‘ al-murābaḥa*)
- 4- *Tawarruq* sales.
- 5- Deferred sales (*al-bay‘ al-mu’ajjal*)

1.2.1.2 Ordinary sales (*bay‘ taqlīdī*)

Ordinary sales (*bay‘ taqlīdī*) are the common form of sales in which the exchange of the subject matter (*al-mabī‘*) and the price (*al-thaman*) is at the same time as the agreement, so

¹³ Aḥmad, *Musnad*, v. 4, p. 141; al-Bazzār, *Musnad*, v. 9, p. 183; al-Bayhaqī, *Sunan Kubrā*, v. 5, p. 263; al-Ḥākim, *al-Mustadrak*, v. 2, pp. 12-13, al-Ḥākim said, “The ḥadīth is authentic (*ṣaḥīḥ*)”.

¹⁴ See Al-’Anṣārī, *Fath al-Wahāb*, v. 1, p. 271; al-Bahūtī, *Sharḥ Muntahā al-Irādāt*, v. 2, p. 5.

the seller delivers the subject matter and the seller pays the price after they agree upon the contract. This type of contract is a simple form of sales.¹⁵

1.2.1.3 Forward sales (*bay' al-salam*)

Forward sales (*bay' al-salam*) are a form of sales in which a buyer agrees to purchase goods and pays the price at the same time as the agreement, while the actual goods are to be delivered at a specified time in the future. In simple terms, the forward sale is payment on agreement and goods later.¹⁶

Forward sales are also called *al-salaf*, but *al-salam* is the term of the people of Iraq (*ahl al-'Irāq*), whereas *al-salaf* is a term of the people of Ḥijāz (*ahl al-Ḥijāz*).¹⁷ The Prophet (peace be upon him) used both terms with the same intended meaning. However, the difference between *salam* and *salaf* is that *salaf* has two meanings: both forward sales and loans.¹⁸

The legislation of the contract of forward sales is based on the sunna and consensus, although the concept of the forward sales contradicts one of the rules of the

¹⁵ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 125; Schacht, *An Introduction to Islamic Law*, pp. 151-152; Usmani, *Islamic Banking*, p. 73.

¹⁶ See Ibn 'Abdīn, *Ḥāshiyā*, v. 5, p. 209; al-Maghribī, *Mawāhib al-Jalīl*, v. 4, p. 514; al-Anṣārī, *Fatḥ al-Wahāb*, p. 45; Ibn Qudāma, *al-Mughnī*, v. 6, p. 384; Usmani, *Islamic Banking*, p. 74.

¹⁷ See al-Ṣan'ānī, *Subul al-Salām*, v. 3, p. 49; al-Fayrūzabādī, *al-Qamūs al-Muḥīṭ*, v. 9, p. 251.

¹⁸ See Ibn Qudāma, *al-Mughnī*, v. 6, p. 384; Schacht, *An Introduction to Islamic Law*, p. 153.

concept of sales in Islamic law, namely, that the seller must have the ownership over the article which is offered to be sold, before he offers it.¹⁹ Therefore, some scholars state that the contract of the forward sales is an exception to the general rule of the prohibition against selling things which you do not have under your possession.²⁰ The reason is that the prohibition of selling something not under the possession of the seller, which is one of the conditions of sales in Islamic law, is general proof (*dalīl ‘āmm*),²¹ and the permissibility of forward sales is specific proof (*dalīl khāṣṣ*),²² and according to Islamic jurisprudence (*uṣūl al-fiqh*), if there is a contradiction between a general proof and specific proof, the specific proof has precedence.²³ The exception is due to the proof that narrated Ibn ‘Abbās (d. 68/687)²⁴ : “when the Prophet (peace be upon him) came to al-Madīna, they were paying one or two years in advance for fruits, so he said: “Those who pay in advance for fruit must do so for a specified measurement and weight, for a specified time”.²⁵ The ḥadīth is agreed upon.²⁶

¹⁹ For more details see p. 69 under the conditions of sales below.

²⁰ See Ibn Ḥajar, *Fatḥh al-Bārī*, v. 4, p. 539; al-Zuhaylī, *Financial Transactions*, v. 1, p. 238; Usmani, *An Introduction to Islamic Finance*, p. 83.

²¹ General (*‘āmm*) is basically a word that has a single meaning, but which applies to an unlimited number without any restriction. (Kamali, *Principles of Islamic Jurisprudence*, p. 104)

²² Specific (*khāṣṣ*) applies to a limited number, be it a genus, species, or particular individuals. (Kamali, *Principles of Islamic Jurisprudence*, p. 105)

²³ For more details see Kamali, *Principles of Islamic Jurisprudence*, pp. 112-113.

²⁴ ‘Abdullāh Ibn ‘Abbās Ibn ‘Abd al-Muṭṭalib: Companion. See *EI (2)*, v. 1, pp. 40-41.

²⁵ Al-Bukhārī, *al-Jāmi‘ al-Ṣaḥīḥ*, v. 2, p. 781; Muslim, *Ṣaḥīḥ*, v. 3, pp. 1226-1227.

²⁶ Agreed upon means that the ḥadīth has been reported in the *Ṣaḥīḥ al-Bukhārī* and *Ṣaḥīḥ Muslim*.

So, according to the ḥadīth, forward sales are lawful in Islamic law. However, there are four conditions that must be included in the contract:²⁷

1- The price and the commodity must be permissible to be exchanged with a delay. In other words, they are not under the concept of usury by way of deferment (*ribā al-nasī'a*).²⁸

2- The subject matter must be capable of estimation either by measure, by weight or by number, that is, in case it is something that requires estimation, or it should be identified through description if it is something that requires to be described.

3- The subject matter should be something that will exist at the end of the period.

4- The price should not be delayed through an excessive period, so that it does not become an exchange of debts for debts (*bay' al-dayn bi al-dayn*).

1.2.1.4 Mark-up sales (*bay' al-murābaḥa*)

Murābaḥa is an Arabic word derived from the root, *ribḥ*, literally meaning 'profit'.²⁹ The simple form of mark-up sales (*bay' al-murābaḥa*) in Islamic law is an agreement between a

²⁷ For more details see Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, pp. 202-203, Ibn Qudāma, *al-Mughnī*, v. 6, pp. 385-387; al-Zuhaylī, *Financial Transactions*, v. 2, pp. 239-251.

²⁸ For more details regarding to usury by way of deferment see p. 105 below.

seller and buyer to add a fixed amount of profit in addition to the capital of the original price of the article. For instance, the buyer says, "I will buy your car for the price which you paid and I will add 10% or £1000 as profit". Notably, the capital must be known to the buyer.³⁰

The modern aspect of the mark-up sales, as practised in Islamic financial institutions, is that the consumer orders a specific commodity from the Islamic financial institutions then the institution buys the commodity from the market by cash. Afterwards, the Islamic financial institution resells the commodity to the client by instalments and the price includes the original price in addition to a fixed amount of profit, depending on the timescale of repayment. For example, assume a consumer wishes to buy a car from an institution, and describes all the necessary requirements. The institution would purchase the car from the market for £10,000 in cash. Next, the institution would sell the car on to the consumer, adding a fixed percentage each year depending on the period of payment. Therefore, over two years with a percentage increase of 10%, the final outstanding amount is £12,000 to be paid in instalments, as explained in the agreement.³¹

The key aspect of mark-up sales is the fact that the price has to be fixed in the agreement, at the time of the agreement. More importantly, it is not allowed for the price to

²⁹ Al-Rāzī, *Mukhtā al-Ṣiḥāh*, p. 97.

³⁰ See Vogel and Hayes, *Islamic Law*, p. 140; Usmani, *an Introduction to Islamic Finance*, p. 37.

³¹ See Vogel and Hayes, *Islamic Law*, p. 140; Usmani, *an Introduction to Islamic Finance*, p. 37.

be raised afterwards.³² Of note is the difference between mark-up sales and forward sales contracts in Islamic law. Within the latter, the money is paid in advance, while the goods are given later on. This is according to the majority of Islamic scholars.³³

1.2.1.5 *Tawarruq* sales

Tawarruq is a means to obtain cash. This transaction is between three parties. Firstly, a buyer buys a commodity from a trader in instalments or with a delay in payment. The buyer then sells the commodity again in cash for less than the original price, but not to the trader.³⁴ For instance, the buyer purchases a car from a trader for £12,000 to be paid in instalments over two years. Then, the buyer proceeds to sell the same car for £10,000 cash to any buyer except the original trader.

1.2.1.6 Deferred sales (*al-bay' al-mu'ajjal*)

Deferred sales (*al-bay' al-mu'ajjal*) are types of sales contract with delayed payment. This type of transaction is permissible in Islamic law,³⁵ and there are examples of Prophet

³² For more details see the scholars views regarding to, "Two transactions in one" on p. 136 below.

³³ See al-Rashīdī, *'Amaliyyat al-Tawarruq*, pp. 19-21; al-Zuhayfī, *Financial Transactions*, v. 1, p. 117.

³⁴ Islahi, *Economic Concepts of Ibn Taymiyya*, p. 136.

³⁵ Schacht, *an Introduction to Islamic Law*, p. 153.

Muhammad (peace be upon him) practising it. ‘Āisha (the Prophet’s wife), (d. 58/678)³⁶ narrated that the Prophet purchased food grains from a Jew on credit and mortgaged his iron armour to him, as documented in the ḥadīth collections of al-Bukhārī (d. 256/870)³⁷ and Muslim (d. 261/875)^{38,39}.

Sales with delayed payment are beneficial for both the buyer and the seller. For the seller, he is able to distribute his products for more than just cash payment even if there is no difference in price between cash and delay. For the buyer, it is obvious that offering two payment options – either cash or delayed payment - is easier than just one option of cash. Increasing the amount of money because of the delay is acceptable according to the majority of jurists.⁴⁰

The difference between mark-up sales and deferred sales in traditional *fiqh* is that mark-up sales require adding more money in addition to the capital whether the payment is made with a delay or not. However, in deferred sales the payment is delayed whether the price is the same or different. Consequently, mark-up sales are focusing on the profit, whereas deferred sales are considering the time. However, in some cases, some contracts

³⁶ ‘Āisha bint Abī Bakr al-Ṣidīq: Companion, See *EI (2)*, v. 1, pp. 307-308.

³⁷ Al-Bukhārī, Muḥammad Ibn Ismā‘īl: compiler of ḥadīth. See *EI (2)*, v. 1, pp. 1296-1297.

³⁸ Muslim, Ibn al-Ḥajjāj al-Qushayrī: compiler of ḥadīth. See *EI (2)*, v. 5, pp. 691-692.

³⁹ Al-Bukhārī, *al-Jāmi‘ al-Ṣaḥīḥ*, 1987, v. 3, p. 1068; Muslim, *Ṣaḥīḥ*, v. 3, 1226.

⁴⁰ See al-Zuhaylī, *Bay‘ al-Taqsīt*, MIFAW, 1998, p. 40.

combine mark-up and deferred sales when the payment of the contract of mark-up is deferred. For instance, A sells a car to B for £1000 and the payment is now. Then, B sells the car to C for £1,200, but the payment is within two years.

1.2.2 Partnership (*al-mushāraka*)

1.2.2.1 Definition of partnership

1.2.2.2 Partnership of *al-‘anān*

1.2.2.3 Partnership of *al-muḍāraba*

1.2.2.1 Definition of partnership

The word *sharika*, as a linguistic term, literally means sharing something whether in business, inheritance or something else. The word *tashāraka* means that two people combine some of their properties to become one property for both of them. *Al-sharīk* is the partner, and “*shāraktu fulānan*” means I become a partner of someone in a property.⁴¹ Partnership (*al-mushāraka*) is a contract between two or more parties with the intention of making a business and sharing the profit.⁴² So, we will discuss under this section two types of partnership; the first type is the partnership of *al-‘anān*, and the second type is the partnership of *al-muḍāraba*.

⁴¹ See Al-Rāzī, *Mukhtār al-Ṣiḥāh*, p. 142; Ibn Manẓūr, *Lisān al-‘Arab*, v. 10, p. 450.

⁴² See al-Zuḥayfī, *Financial Transactions*, p. 447; Usmani, *an Introduction to Islamic Finance*, p. 5.

1.2.2.2 Partnership of *al-‘anān*

Al-‘anān is a partnership between two or more parties who share the capital and profit. This type of partnership does not demand equality in investment, personal status, or the distribution of profit and liabilities. As a result, the parties have freedom in determining the ratio of capital as well as the profit.⁴³

Partnerships of *al-‘anān* are divided into two categories: general and specified. In the former, any kind of trade is acceptable, as long as it is not prohibited in Islamic law. So, there is no specific investment indicated in the agreement. By contrast, the specified *al-‘anān* partnership is between two or more people in a specific kind of trade, such as cars, electrical goods or clothes, and as explained in the agreement of their contract.⁴⁴

1.2.2.3 Partnership of *al-muḍāraba*

Muḍāraba, *qirāḍ* or *muqārada* are all names for the same type of contract. This contract is between two parties – while the first party invests money in the venture, the second party

⁴³ See Udovitch, *Partnership and Profit Sharing*, pp. 123-125; Sābiq, *Fiqh al-Sunna*, p. 147; Çizakça, *a Comparative Evolution*, pp. 4-6; Nyazee, *Islamic Law*, p. 101.

⁴⁴ See Udovitch, *Partnership and Profit sharing*, p. 123-125.

invests physical labour. The profit is shared between them, according to the terms of the agreement. In the event of there being losses incurred, it falls on the capital.⁴⁵

Muḍāraba partnership is an efficient form of investment in that it can prove prosperous for those who have wealth but have either no skill or time to invest it, as well as those with a trade but no finances to harness it. As a consequence, *muḍāraba* partnership is beneficial for both parties.

The Prophet Muhammad (peace be upon him) mentions in a ḥadīth that *muḍāraba* partnership is permissible in Islamic law, and contains blessings.⁴⁶ Moreover, the companions of the Prophet practiced this form of contract.⁴⁷

In this type of contract the person providing the capital outlay retains the right to specify the type of trade in which he wishes his finances to be invested or not as the case may be. Evidence for this comes from Ḥakīm Ibn Ḥizām (d. 52/672),⁴⁸ a companion of Prophet Muhammad who imposed a condition on a man who gave him his property to use it for trade, namely that the profit would be shared between both of them, but that any loss would be taken from the property: “You should not trade with my property in animals (*kabd*

⁴⁵ See Usmani, *an Introduction to Islamic Finance*, pp. 14-15.

⁴⁶ Ibn Māja, *Sunan*, v. 2, p. 768. Al-Kinānī said, “The ḥadīth is not authentic”. (*Miṣbāḥ al-Zujāja*, v.3, p. 37).

⁴⁷ See Al-Zuhayfī, *Financial Transactions*, v. 1, pp. 488-489; Siddiqi, *Partnership and Profit-Sharing*, pp.11-14.

⁴⁸ Ḥakīm Ibn Ḥizām Ibn Khuwayled: companion. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, v. 1, p. 194.

ratiba), transport it by sea, or settle with it at the bottom of a ravine: and if you do any of the aforesaid acts you should guarantee my property”.⁴⁹

1.2.3 Lease contracts (*‘aqd al-ijāra*)

1.2.3.1 Definition of lease contracts

1.2.3.2 Leases contracts from the Islamic point of view

1.2.3.3 Types of lease contracts

1.2.3.4 Comparison between lease contracts and sales contracts

1.2.3.1 Definition of lease contracts

Al-ijāra is, linguistically, derived from the word *al-ajr* and that means, literally, a reward due to works, whether in the world or the hereafter. An example of reward in the world is where the Qur’ān says, “*fa in arḍa’n lakum fa ātuhunna ujūrahunn*”,⁵⁰ which means, “if they give suck to the children for you, give them their due payment”.⁵¹ An example of reward in the hereafter is where the Qur’ān also says, “*fa amma al-ladhīna āmanū fa yuwafihim ujūrahum wa yazīdahum min faḍlih*”,⁵² which

⁴⁹ Al-Dāraqūṭnī, *Sunan*, v. 3, p. 63. Ibn Ḥajar said: “the ḥadīth is reported by al-Dāraqūṭnī with reliable narrators”. (*Bulūgh al-Marām*, 318)

⁵⁰ Qur., Al-Ṭalāq, 65:6.

⁵¹ Al-Hilālī and Khān, *Interpretation of the meaning of the Noble Qur’ān*, p. 740.

⁵² Qur., Al-Nisā’, 4:173.

means, “So, as for those who believed (in the Oneness of Allāh –Islamic Monotheism) and did deeds of righteousness, He will give them their (due) rewards and more out of his bounty”.⁵³ *Al-ajīr* is an employee, whether for the short or long term. *Al-ujra* also can be a reward due to the usage of something, such as renting another person’s house or car.⁵⁴ Thus, the legal term of lease contracts, in Islamic law, means to give something on rent.⁵⁵

1.2.3.2 Lease contracts in Islamic point of view.

Lease contracts are permissible, according to the four *madhhabs*, namely the Ḥanafīs, the Mālikīs, the Shāfi‘īs and the Ḥanbalīs. The argument for permissibility are based on the Qur’ān, sunna and consensus.

We will begin, firstly, with the evidence from the Qur’ān:

“Lodge them (the divorced women) where you dwell, according to your means, and do not harm them so as to straiten them (that they be obliged to leave your house). And if they are pregnant, then spend on them till they lay down their burden. Then if they give suck to the children for you, give them their due payment (*ujūrahunn*), and let each of you accept the advice of the other in a just way”.⁵⁶

⁵³ Al-Hilālī and Khān, *Interpretation of the meaning of the Noble Qur’ān*, p. 150.

⁵⁴ Al-Fayrūzabādī, *al-Qamūs al-Muḥīṭ*, p. 436.

⁵⁵ See Usmani, *an Introduction to Islamic Finance*, p. 69.

⁵⁶ Qur., Al-Ṭalāq, 65:6.

The verse shows that payment in exchange for looking after a child is considered as an acceptable contract because the man has to pay some money to his divorced wife as a compensation for looking after their child by feeding it, and this kind of contract is considered to fall under the concept of hiring or lease contracts.

And in another verse the Qur'ān says regarding the story of the Prophet Moses (Mūsā):

“And said one of them (two women): “O my father, hire him verily, the best of men for you to hire is the strong, the trustworthy”. He (the father) said (to the Prophet Moses): “I intend to wed one of these two daughter of mine to you, on condition that you serve me for eight years; but if you complete ten years, it will be (a favour) from you. But I intend not to place you under a difficulty. If Allāh wills, you will find me one of the righteous. He (the Prophet Moses) said: “That (is settled) between me and you, whichever of the two terms I fulfill, there will be no injustice to me and Allāh is surety over what we say””.⁵⁷

It can be seen that Moses was hired for eight years to do specific work to be a dower for a marriage. This kind of contract too, is considered under the concept of hiring or lease contracts.

Next, the sunna also proves the permissibility of the lease (*ijāra*). It is narrated by Abū Hurayra (d. c. 58/678)⁵⁸ that the Prophet said:

“Allāh who is Great and Glorious said, “Three whose adversary I shall be on the day of Resurrection; a man who gave a promise in My name and then betrayed; a man who sold a free man and consumed his price; and a man who

⁵⁷ Qur., Al-Qaṣaṣ, 28:26-28.

⁵⁸ Abū Hurayra, ‘Abd al-Raḥmān Ibn Ṣakhr al-Dawsī: Companion. See *EI (2)* v. 1, p. 129.

hired a servant and, after receiving full service from him, did not give him his wages.”⁵⁹

The ḥadīth indicates that it is duty upon a person, who hires someone, to pay the wage after he receives the full service, and the permissibility of money which is due in this kind of contract proves, that the contract itself is permissible. And this contract is a contract of lease or hiring in Islamic law.

In addition, there is a consensus among scholars that lease contracts are permissible in Islamic law.⁶⁰ Ibn Rush said, “*ijāra* is permissible according to the jurists of all regions and those of the first period.”⁶¹

1.2.3.3 Types of lease contracts (*‘aqd al-ijāra*)

The contracts of leases are divided into two categories:

a- Leases of usufruct

This category includes the hire of houses, cars, clothes, animals and many types of products which are beneficial; thus, the benefit from them is permissible at the

⁵⁹ Al-Bukhārī, *al-Jāmi‘ al-Ṣaḥīḥ*, v. 2, p. 792.

⁶⁰ See Ibn Qudāma, *al-Mughnī*, v. 8, p. 5; Ḥassan, *Sales and Contracts*, pp. 155-157.

⁶¹ *Bidāyat al-Mujtahid*, 2003, v. 2, p. 264.

same time. However, any benefit arising from something this is itself prohibited is not permissible either.⁶²

b- Leases of labourer

The second type of lease is the hire of a labourer to do a specific job, and this type of contract can be based on the time, or the work itself. An instance of a contract based on the time is where someone is hired to do a job for a specific time such as a day, a week or a year, and the leaser has to pay the wages depending on the time. An instance of a contract based on the work itself is a contract to build a house or to repair a car. So in this type of contract the payment depends on completion of the thing agreed upon, irrespective of the time taken.⁶³

1.2.3.4 Comparison between leases contract of usufruct and sales contract

The similarities between lease of usufruct and the contract of sales are:

- 1- The two contracts have two parties, who are the buyer and seller in the sale contract and they are the owner and leaser in the lease contract.

- 2- The price in each contract is not returnable; that means the seller does not have to return the price if the buyer receives the subject matter, and the owner does

⁶² See Ibn Rushd, *Bidāyat al-Mujtahid*, 2003, v. 2, p. 265; al-Zuḥayfī, *Financial Transactions*, v. 1, p. 413.

⁶³ al-Zuḥayfī, *Financial Transactions*, v. 1, p. 413.

not have to return the price of the lease, when the leaser agrees upon the contract.

The differences between the contract of sales and the lease of usufruct are:

- 1- In the contract of sales the ownership of the article is transferred from the seller to the buyer, whereas ownership is not transferred in the contract of lease, so the leaser has the right to the usufruct of the article then he will return it to the owner.
- 2- The time affects the contract of lease of usufruct, so the leaser uses the article for a specific period, and then he will return the article to the owner, whereas the ownership of the article is permanent concerning to the contract of sales.
- 3- The buyer can sell the article or give it to another person as a gift, whereas the leaser has to return the article when the contract is due.

1.2.4 Loan contracts (*'aqd al-qard*)

1.2.4.1 Concept of loan contracts

1.2.4.2 Loan contracts from an Islamic point of view

1.2.4.3 Loan contracts with benefit from an Islamic point of view

1.2.4.4 Comparison between loan contracts and debt contracts (*'aqd al-dayn*)

1.2.4.5 Comparison between loan contracts and sale contracts

1.2.4.1 The concept of loan contracts

The word *al-qarḍ* is derived from *qaraḍa*, which means literally ‘bite’; it is said “*qaraḍa al-fa’r al-thawb*” meaning ‘the mouse bite the cloth’. *Al-qarḍ* is the singular form. The plural is *qurūḍ* and it means money which is lent to be returned later on. *Istaqraḍa* means a person who applies for a loan, and *iqtarada* means a person who receives a loan.⁶⁴

There are different views of the definition of loans according to the jurists; the first definition is mentioned by the Ḥanafīs:

“The Ḥanafīs define the contract legally as one in which a fungible property is paid from one party to another, in exchange for a later payment of an equivalent amount. On the other hand, other schools of jurisprudence defined it as an exchange of property for a liability on the recipient equivalent to the amount he receives from the lender, where only the recipient of the loan is intended to benefit from the contract. They include different types of properties in this definition: fungible, animals, and tradable goods.”⁶⁵

Thus, the Mālikīs, the Shāfi‘īs and the Ḥanbalīs take a wider view of what can be the object of a loan contract, compared to the Ḥanafīs.

⁶⁴ See al-Rāzī, *Mukhtār al-Ṣiḥāḥ*, p. 221.

⁶⁵ Al-Zuhaylī, *Financial Transactions*, v. 1, p. 370.

1.2.4.2 Loans contract from an Islamic point of view

Loans are permissible, in general, according to Islamic law and the ruling is based on the Sunna and consensus. In this regard, Abū Rāfi‘ (d. c. 51/671)⁶⁶ narrated that the Prophet borrowed a young camel from a man, and when some charity (*ṣadaqāt*) of camels came to him he ordered Abū Rāfi‘ to repay the man his young camel. He told him, “I can find only an excellent camel in its seventh year.” He (the Prophet) said, “Give it to him, for the best person is he, who discharges his debt in the best manner.”⁶⁷ So the ḥadīth shows that the Prophet himself borrowed a camel to repay it with a same quality of camel from charity, but when his companion did not find one of the same quality, he repaid a better quality. Consequently, the ḥadīth proves the permissibility of taking a loan because the Prophet practiced it. There is another ḥadīth in which Abū Hurayra narrates that the Prophet said, “If anyone accepts other people’s belongings meaning to pay back to him, Allāh will pay back to him; but if anyone accepts them meaning to squander them, Allah the most high will squander him.”⁶⁸ The ḥadīth shows that it acceptable to borrow from other people, with the stipulation that to the borrower intends to repay the loan. In addition, the scholars agree that loans are permissible according to Islamic law.⁶⁹

⁶⁶ Abū Rāfi, Nufayyi‘ Ibn al-Ḥārith Ibn Kaladah al-Thaqafi: companion. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, v. 2, p. 306.

⁶⁷ Muslim, *Ṣaḥīḥ*, v. 3, p. 1224.

⁶⁸ Al-Bukhārī, *al-Jāmi‘ al-Ṣaḥīḥ*, v. 2, p. 841.

⁶⁹ See Ibn Qudāma, *al-Mughnī*, v. 6, p. 429.

In addition, loan contracts can be considered under the general meaning of debt, which is permitted, as the Qur'ān says, "O you who believe, when you contract a debt for a fixed period, write it down ...",⁷⁰ so the debts in general is permissible because that Allah encouraged people to write down the contract of debt, in other words, the permissibility of debt contracts comes first, then it is recommended to write them down. And loans are a subcategory under the concept of debts.

Moreover, the loan is permissible for the borrower, and it is recommended for the lender, because he helps a Muslim who is in need with any reward. It is reported that Abū al-Dardā' (d. 32/652)⁷¹ said, "It is better for me to lend two *dīnārs*, and lend them again when it has been paid, rather than just pay them once as a charity (*ṣadaqa*)."⁷² It is reported that the Prophet said, "Every two loans extended by a Muslim to another count as one charitable payment."⁷³ However, the loans are permissible for the borrower, because the Prophet used them, and he did not indicate that loans are disliked.⁷⁴

⁷⁰ Qur., Al-Baqara, 2:282.

⁷¹ Abū al-Dardā': Companion. See *EI* (2) v. 1, pp. 113-114.

⁷² Al-Bayhaqī, *Sunan Kubrā*, v. 5, p. 353; Ibn Qudāma, *al-Mughnī*, v. 6, pp. 429-430.

⁷³ Ibn Ḥibbān, *Ṣaḥīḥ*, v. 11, p. 418; al-Bayhaqī, *Sunan Kubrā*, v. 5, p. 353.

⁷⁴ See Ibn Qudāma, *al-Mughnī*, v. 6, p. 429.

1.2.4.3 Loans contracts with benefit from an Islamic point of view

It is reported that the Prophet said, “Every loan (*qard*) which leads to a benefit is usury (*ribā*).”⁷⁵ But this ḥadīth is not authentic (*ḍaʿīf*),⁷⁶ and it is reported in another chain in al-Bukhārī by ‘Abdullah Ibn Salām (d. 43/663-664),⁷⁷ but it is *mawqūf*,⁷⁸ so there is no accepted ḥadīth which shows that a loan which leads to a benefit is usury. However, Ibn Qudāma (d. 620/1223)⁷⁹ states that scholars agree that it is not permissible to stipulate any extra reward or gift to the original loan, and he also indicated that Ibn al-Mundhir (d. 318/930)⁸⁰ said that there is a consensus that if a lender requires a borrower to pay any extra reward or gift in addition to the original loan, and the lender takes the extra reward or gift, that it is considered as usury.⁸¹

⁷⁵ Ibn Ḥajar indicated that the ḥadīth is not authentic (*ḍaʿīf*). (*Bulūgh al-Marām*, p. 301)

⁷⁶ A ḥadīth which is weak (*ḍaʿīf*) is generally defined as one which fails to meet the conditions of authentic (*ṣaḥīḥ*) and *ḥasan*. (See Kamali, *a Textbook of Ḥadīth Studies*, p. 144; Burton, *An Introduction to the Hadith*, p. 111)

⁷⁷ ‘Abdullāh Ibn Salām: Companion. See *EI (2)*, v. 1, p. 52.

⁷⁸ Suspended (*mawqūf*) is a ḥadīth that is attributed to one of the Prophet’s companions; it may consist of words, action or tacit approval, but its *isnād* stops at that level and falls short of reaching the prophet himself. (See Kamali, *A Textbook of Ḥadīth Studies*, p. 157)

⁷⁹ Muwaffaq al-Dīn Abū Muḥammad ‘Abdullāh Ibn Aḥmad Ibn Qudāma al-Maqdisī, Ḥanbalī jurist. See *EI (2)*, v. 3, pp. 842-843.

⁸⁰ Abū Bakr Muḥammad Ibn Ibrahīm Ibn al-Mundhir al-Naysābūrī, jurist and *Mujtahid*, he wrote a book called *al-ijmāʿ*. See al-Ṣafadī, *al-Wāfi*, v. 1, p. 250.

⁸¹ Ibn Qudāma, *al-Mughnī*, v. 6, p. 436.

1.2.4.4 Comparison between loan contracts and debt (*al-dayn*)

Loan is under the concept of debt in general, so every loan is debt but not every debt is due to a loan, because the debt in some cases is due to deferred sales or forward sales.

1.2.4.5 Comparison between loans contracts (*'aqd al-qard*) and sales (*'aqd al-bay'*)

Under this section, al-Zuhaylī discusses this point as he says:

“Loans are generally similar to sales, since they involve the exchange of properties. It is also a form of prepayment (*salaf*), since one of the two compensations is paid prior to the other. Some of the jurists argued that loans are a subcategory of sales. However, Al-Qarāfī (d. 684/1285)⁸² listed three differences between loans and sales. Three legal violations are tolerated in loan but not sales:

- 1- Loans may be made with goods eligible for usury (*ribā*). This violates the rule of usury (*ribā*).
- 2- For goods not eligible for usury (*ribā*), loans may be conducted where a known is traded in exchange for an unknown, which is a violation of the rule of *muzābana*.⁸³
- 3- For fungible goods, loans may involve selling that which is not in the seller's possession, which is not permitted in sales.

Those three rules are observed in sales but relaxed in loans. The reason for this relaxation of the rules for loans is to facilitate charitable behaviour. In this regard, loans are permitted as a form of charity, where the lender gives up the usage of the goods for the period of the loan. This also why loans are forbidden if they do not serve such a charitable cause, e.g. if the lender gets some benefit out of extending the loan”.⁸⁴

⁸² Shihāb al-Dīn Aḥmad Ibn Idrīs al-Qarāfī, Mālikī jurist. See al-Ṣafādī, *al-Wāfī*, v. 6, pp. 146-147.

⁸³ *Muzābana* a forbidden sale in which something, whose number, weight or measure is known, is sold for something, whose number, weight or measure is not known. (Bewley, *Glossary of Islamic Terms*, p. 148)

⁸⁴ Al-Zuhaylī, *Financial Transactions*, v. 1, p. 369.

We can summarise the comparison between loan contracts and sales contracts into three points:

1- The contracts of loans are based on charity purpose (*al-tabarru'*). Therefore it is not permissible to stipulate any extra reward or gift to the original loan, as it has been mentioned above. But the contracts of sales are based on trade exchange (*mu'āwada*), and profit or rewards are one of their purposes.

2- In contracts of sales, the exchange of usurious items, which are under the same genus, has to be at the same time, such as gold for gold, or gold for silver. But in the contract of loan, the lender lends the borrower some gold to use it, and then returns the same amount after some while, so the exchange in this case is not hand to hand.

3- According to the principles of Islamic law, it is preferable to lend to a person who is in need, whereas sales contracts are permissible, in general.

1.3 Unlawful Contracts in Islamic law

1.3.1 Introduction

1.3.2 Usury

1.3.3 *Gharar*

1.3.1 Introduction

Under this section we will discuss in brief some types of contracts which are prohibited in Islamic law. The scholars of Islamic law are almost unanimous about the prohibition of the contracts below, however they do not agree on the detail of the contracts.

1.3.2 Usury (*ribā*)

1.3.2.1 Definition of usury (*ribā*)

1.3.2.2 Usury (*ribā*) from an Islamic point of view

1.3.2.3 Types of usury (*ribā*) in Islamic law

1.3.2.4 Usury (*ribā*) and interest

1.3.2.5 *Ḍina* sales

1.3.2.6 Two transactions combined in one

1.3.2.1 Definition of usury (*ribā*)

Before examining *ribā* in Islamic terms, it is necessary to explain the origin of the word, its linguistic roots and derived meanings. The original meaning of the word *ribā* in Arabic, is to increase, mount up, grow and rise.⁸⁵

⁸⁵ See Al-Rāzī, *Mukhtār al-Ṣiḥāh*, p. 98; al-Khudrawi, *a Dictionary of Islamic Terms*, p. 153; Maududi, *Economic System of Islam*, pp. 160-162; Fazlur Rahman, *Ribā and Interest*, JCIIR, v. 3, no. 1, pp. 1-2.

In the Quran, this word is used several times to convey just such meanings. For example, in the following verses variations of the word *ribā* have been used to connote the idea of growth and height:

“And among his signs, that you see the earth barren, but when We send down water (rain) to it, it is stirred to life and growth [Ar. *rabat*] (of vegetation) Verily, he who gives it life, surely is able to give life to the dead (on the day of resurrection). Indeed He is Able to do all things.”⁸⁶ and in another verse, “And the likeness of those who spend their wealth seeking Allah's pleasure while they in their own selves are sure and certain that Allah will reward them (for their spending in his cause), is the likeness of a garden on a height [Ar. *rabwa*].”⁸⁷

Notably, the linguistic definition is more broad and all-encompassing than the term as used in Islamic law, where *ribā* stands for an increase in specific things, as the next section outlines in further detail.

1.3.2.2 Usury from an Islamic point of view

1.3.2.2.1 Introduction

1.3.2.2.2 Usury in the Qur'ān

1.3.2.2.3 Usury in the Sunna

1.3.2.2.4 Usury in the consensus

⁸⁶ Qur., Fussilat, 41:39.

⁸⁷ Qur., Al-Baqara, 2:265.

1.3.2.2.1 Introduction

There is no doubt that Islam strictly forbids usury in any kind of transaction. The prohibition of usury is demonstrated in the three key sources of Islamic law: the Quran which is the book of Allah and the first source of law in Islam, coupled with the sunna which is the second source in Islamic law, and finally, consensus, meaning the opinions of all scholars in Islamic jurisprudence.⁸⁸

1.3.2.2.2 The Noble Qur'an

There are several verses in the Qur'an dealing with the prohibition of usury, urging believers to avoid it and to cancel all such contracts. In particular, the following verse clearly addresses this issue: Allāh says, in the Qur'an:

“Those who eat usury (*ribā*) will not stand (on the day of Resurrection) except like the standing of a person by Satan (*shaytān*) leading him to insanity. That is because they say: "Trading is like usury," whereas Allah has permitted trading and forbidden usury. So whosoever receives an admonition from his Lord and stops eating usury, shall not be punished for the past; his case is for Allah (to judge); but whoever returns (to usury), such are the dwellers of the Fire — they will abide therein.”⁸⁹

⁸⁸ See al-Sarakhsī, *al-Mabsūṭ*, v. 12, p. 109; Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, pp. 128-129; al-Misri, *Reliance of the Traveller*, p. 384; Ibn Qudāma, *al-Mughnī*, v. 6, p. 51; Saleh, *Unlawful Gain*, pp. 9-10; Kobreish, *Usury in Islamic Law*, p. 38-42; Ramadan, *Western Muslims*, pp. 185-188.

⁸⁹ Qur., Al-Baqara, 2:275.

Here, the state of those dealing in *ribā* is also highlighted, thereby reaffirming the gravity of the prohibition attached to such transactions. Further in the Qur'an, Allah again addresses usury:

“O you who believe, be afraid of Allāh and give up what remains (due to you) from usury (from now onward), if you are (really) believers. And if you do not do it, then take a notice of war from Allāh and His Messenger but if you repent, you shall have your capital sums. Deal not unjustly (by asking more than your capital sums), and you shall not be dealt with unjustly (by receiving less than your capital sums).⁹⁰

In this verse, the believers are urged to relinquish any outstanding usury payments, thereby paving the way for debts to be paid in full with nothing added. As further encouragement to this act, the believers are informed in the following verse that Allah blesses charity but not usury.⁹¹

1.3.2.2.3 Usury in the sunna.

The ḥadīth literature holds ample examples in support of the Quranic prohibition of usury, explaining in detail its rulings. Examples of these are as follows:

Abū Hurayra narrated: “The Messenger of Allah said: “Avoid the seven deadly sins.” He was asked, “O Messenger of Allah! What are they?” He said, “Ascribing partners to Allah, sorcery, taking the life which Allah has forbidden except through justice, devouring usury, devouring an orphan's

⁹⁰ Qur., Al-Baqara, 2:278-279.

⁹¹ See Al-Qurṭubī, *Tafsīr*, v. 3, pp. 362-363; Ibn Kathīr, *Tafsīr*, pp. 441-442.

wealth, defecting from the battlefield, and accusing and libelling chaste and pious believing women.”⁹²

“Jābir Ibn ‘Abdullāh (d. 78/697)⁹³ narrated: “The Messenger of Allāh cursed the recipient of usury and its giver, and the one who records it, and the two witnesses; and he said: "they are all equal (in sin and penalty).”⁹⁴

As can be deduced from these ḥadīth, the prohibition against dealing in usury is not just for the borrower and the lender, but for anyone who participates in the transaction at any level. Hence, a Muslim keen to implement this ruling must seek those financial alternatives permissible in Islamic law.

1.3.2.2.4 Usury in the consensus

The scholars all agree that usury is prohibited in Islamic law. And usury is one of the major sins in Islam, so it is not allowed to take it or pay it; in addition it is not allowed to be a witness of such a contract which includes usury.⁹⁵

Saleh after he discusses the reasons behind the prohibition of usury, says, “whatever the reason for an extensive and wide-ranging interpretation of the Qur’anic prohibition of

⁹² Al-Bukhārī, *al-Jāmi‘ al-Ṣaḥīḥ*, v. 3, 1017; Muslim, *Ṣaḥīḥ*, v. 1, p. 92.

⁹³ Jābir Ibn ‘Abdullāh al-Anṣārī: Companion. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, 1975, v. 1, p. 122.

⁹⁴ Muslim, *Ṣaḥīḥ*, v. 3, p. 1219.

⁹⁵ Al-Maududi indicates regarding to the wisdom behind the prohibition of usury is that usury creates a tendency among the people to hoard money and spend it to promote their private interest only. It blocks the free circulation of wealth in the society, and diverts the flow of money from the poor to the rich. Because of usury the wealth of the people at large accumulate in the hand of one class, which finally leads to the destruction of the whole society, as every learned economist knows. (*Economic System*, p. 166)

usury, this interpretation has been followed for centuries by the consensus of Muslims and has thus become a binding rule of law”.⁹⁶ Al-Zuḥayfī also says, “The Islamic nation is in consensus over the prohibition of usury.”⁹⁷

1.3.2.3 Types of usury (*ribā*) in Islamic Law

1.3.2.3.1 Introduction

1.3.2.3.2 Usury in loan contracts

1.3.2.3.3 Usury in sale contracts

1.3.2.3.1 Introduction

The general theory of usury can involve two types of contract; the first contract is the contract of loan, and the aim of this kind of contract, according to Islamic law, is to help others, so it is not acceptable to obtain a materialistic profit from it. Then, the second contract is the contract of sales, and the details of the relationship between usury and sales explained by the Prophet, and we will discuss the rules in details below.

1.3.2.3.2 Usury in loans

1.3.2.3.2.1 Introduction

1.3.2.3.2.2 Simple form of usury in loans

⁹⁶ Saleh, *Unlawful Gain*, p. 12.

⁹⁷ Al-Zuḥayfī, *Financial Transactions*, v. 1, p. 311.

1.3.2.3.2.3 Compound Usury

1.3.2.3.2.1 Introduction

Among some scholars on this topic, the types of usury are often divided into those pertaining to either loans or sales. With regard to the former, there are various types, the most famous of which is compound usury, as mentioned in the preceding section.

1.3.2.3.2.2 Simple form of usury in loans

The simple form of usury is for a person to lend someone money on the condition that he pays the money back later with an extra sum, but when the borrower does not pay the loan on time the lender does not increase the loan. For instance, A lends B £200 to be paid after a month, as £220. After the month B cannot pay the loan then A says, "I will give you another two weeks to pay £220". So, A does not increase the loan, although B does not pay on time. This kind of usury is prohibited in Islamic law, although the lender does not increase the amount of payment due to the delay.⁹⁸

⁹⁸ See Al-Miṣrī, *al-Jāmi' fī Uṣūl al-Ribā*, p. 40; Usmani, *Islamic Banking*, p. 65.

1.3.2.3.2.3 Compound Usury

Ibn al-Qayyim (d. 751/1350)⁹⁹ also focuses on *ribā al-Jāhiliyya*, which originated from the pre-Islamic period. It is a form of compound interest on a loan, whereby extra money is added to the debt, particularly if the borrower requires further time before settling the debt. For instance, if the borrower asks for further time to make the payment of his debt, the lender responds by adding extra time in exchange for more money. Often, due to the need of the borrower, he is obliged to accept such conditions. During the pre-Islamic period, such transactions were the norm in lending and borrowing.¹⁰⁰

Of note is the fact that this type of usury is mentioned explicitly in the Quran, while mention of the various other forms of usury is generally found in the ḥadīth literature. Allāh says:

“O you who believe eat not usury (*ribā*) doubled and multiplied, but fear Allāh that you may be successful.”¹⁰¹

Although, compound usury is considered by some scholars to be by far the worst form of usury in Islam,¹⁰² nowadays it is common practice, particularly in the banking business. This can lead to spiralling debt in that a borrower already unable to repay a lender is forced

⁹⁹ Ibn al-Qayyim al-Jawziyya: Syrian Ḥanbali scholar. See *EI (2)*, v. 3, pp. 844-847.

¹⁰⁰ See Ibn al-Qayyim, *I'lām al-Muwaqqi'īn*, v. 2, pp. 154-155; Saleh, *Unlawful Gain*, p. 13; Shafi, *the Issue of Interest*, pp. 19-24; Muslehuddin, *Banking and Islamic Law*, pp. 101-103; Usmani, *Islamic Banking*, p. 65.

¹⁰¹ Qur., Āl 'Imrān, 3:130

¹⁰² See Ibn al-Qayyim, *I'lām al-Muwaqqi'īn*, v. 2, pp. 154-155;

into further debt with the added interest which does not cease to rise until the entire debt is paid.¹⁰³

1.3.2.3.3 Usury in sales

1.3.2.3.3.1 Introduction

1.3.2.3.3.2 Usury by way of increase (*ribā al-faḍl*)

1.3.2.3.3.3 Usury by way of deferment (*ribā al-nasī'a*)

1.3.2.3.3.1 Introduction

Usury in sales is further divided into two categories: firstly, increased *ribā* which is the same as *ribā al-faḍl* in Islamic law and, secondly, delayed payment usury which refers to *ribā al-nasī'a*.¹⁰⁴

The categories of usury in Islamic law derive from a ḥadīth reported by Ubāda Ibn al-Ṣāmit that Allāh's Messenger said:

“Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt with salt, same for the same, weight for weight, (equal), from hand to hand (at the same time). And if the goods are different types, you can sell as you want, provided from hand to hand.”¹⁰⁵

¹⁰³ See Maududi, *Economic System of Islam*, pp. 162-163; Suhail, *What is Riba*, pp. 94-98.

¹⁰⁴ See Homoud, *Islamic Banking*, p. 56; Vogel and Hayes, *Islamic Law*, pp. 74-77.

¹⁰⁵ Muslim, *Ṣaḥīḥ*, v. 3, p. 1211; and see al-Bukhārī, *al-Jāmi' al-Ṣaḥīḥ*, v. 2, p. 761.

This ḥadīth, therefore, clearly states the two conditions required to deal lawfully with the aforementioned six substances in Islam. These conditions form the foundation of the concept of usury in Islamic business transactions.

1.3.2.3.3.2 Usury by way of increase (*ribā al-faḍl*)

The first category is banned on the notion of “weight for weight”. This indicates that where goods of the same type has exchanged, the quantities have to be equal to be acceptable in Islamic law, for instance, one kilo of gold for one kilo of gold, otherwise, it is deemed usury. This category indicates the first category of usury in Islamic jurisprudence which is usury by way of increase. Usury by way of increase means exchanging a superior product for a larger – rather than equal – amount of an inferior product of the same kind. Moreover, it is important to mention that usury by way of increase in the opinion of the majority of the scholars is not only found in the six substances mentioned in the above ḥadīth, but rather there are several substances for which this type of transaction is forbidden in Islamic jurisprudence. Hence, it is impermissible to make any excess between them also.¹⁰⁶

1.3.2.3.3.3 Usury by way of deferment (*ribā al-nasī'a*)

The second category is banned on the notion in the ḥadīth that the products being exchanged “hand to hand”, meaning their giving and taking should be conducted at the

¹⁰⁶ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, pp. 129-131; Ibn Qudāma, *al-Mughnī*, v. 6, pp. 54-59; Homoud, *Islamic Banking*, pp. 56-57.

same time. For example, if someone wants to exchange gold for gold it must be done at the same time; otherwise it is considered usury according to Islamic law. This type of transaction, where the second category is not fulfilled, is called usury by way of deferment (*ribā al-nasī'a*) in Islamic business. Usury by way of deferment concerns the exchange of two things, either those mentioned in the ḥadīth or other products, are considered in Islamic jurisprudence to have the same qualities, such as gold and silver.

	Gold	Silver	Wheat	Barley	Dates	Salt
Gold						
Silver						
Wheat						
Barley						
Dates						
Salt						

- = usury by way of increase and deferment
- = usury by way of deferment only
- = none

Figure 1.1 Types of usury in sales

1- Gold exchanges with gold have to be at the same time to avoid usury by way of deferment and with the same amount to avoid usury by way of increase.

2- Gold exchanged with silver has to occur at the same time to avoid usury by way of deferment, but does not have to be with the same amount.

3- Gold exchanged with wheat does not have to occur at the same time, nor with the same amount.

1.3.2.4 Usury (*ribā*) and Interest

Usury and interest, in the Islamic point of view, are the same and they come under the umbrella concept of *ribā* in Islamic law. However, within contemporary economic concepts there is a difference between the two in that usury is a rate of interest greater than that which contemporary man-made law allows, unlike interest.¹⁰⁷

1.3.2.5 *Ḥīna* sales

Ḥīna is a contract between two parties. A trader offers an article to a buyer on an instalments basis. Then the buyer resells the same article to the trader for a lower price in cash.¹⁰⁸ This is a form of indirect usury because the contract is just a loan for an amount of money, which is interest borne against a commodity. Hence, the majority of jurists are against *Ḥīna* sales and there is supporting evidence for this in the ḥadīth literature:

¹⁰⁷ See Buckley, *Teachings on Usury*, pp. 1-2; El Diwany, *the Problem with Interest*, pp. 22-25; al-Zuhaylī, *Financia Transactions*, v. 1, pp. 344-345; Chapra, *the Future of Economics*, p. 258; Ali, *Riba*, pp. 10-11; Akhtar, *Economics in Islamic Law*, pp. 56-58; al-Qaradāwī, *Lawful and the Prohibited*, pp. 242-246; Ramadan, *Western Muslims*, pp. 185-188.

¹⁰⁸ See Vogel and Hayes, *Islamic Law*, p. 183; Schacht, *an Introduction to Islamic Law*, p. 153.

Narrated Ibn 'Umar (d. 73/692):¹⁰⁹

I heard Allāh's Messenger say, "When you sell anything on credit to anyone on the condition that you buy it back for a lower price...Allāh will make disgrace prevail over you and will not strip it off from you till you return to your religion."¹¹⁰

1.3.2.6 Two transactions combined in one (*bay'atayn fī bay'a*)

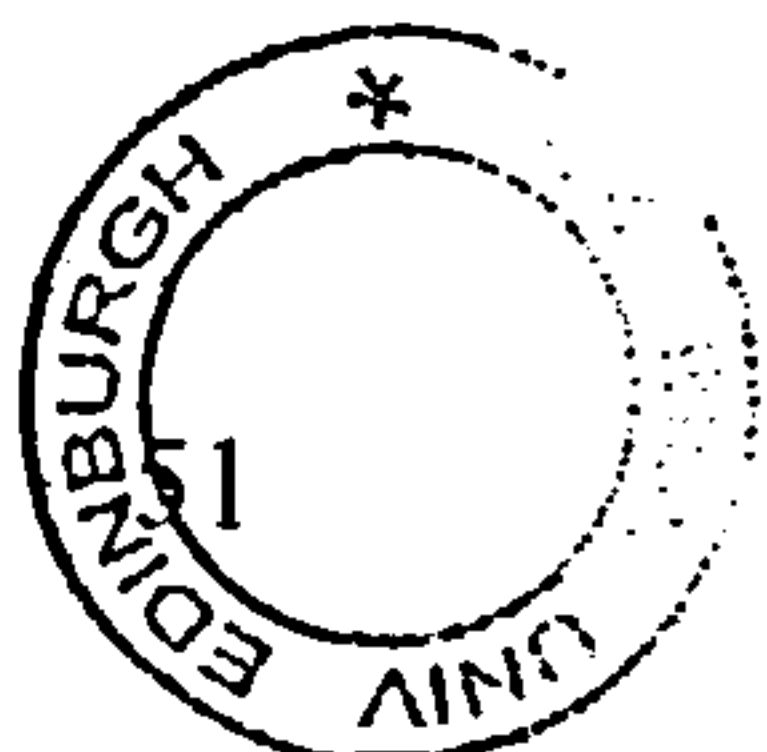
In two transactions combined in one (*bay'atayn fī bay'a*), the seller offers two prices in the contract: one for a cash payment and the other on credit for the same item but with extra money included because of the delay. However, if the trader offers two or more prices to the buyer depending on the delay or for any causes and they then agree on one of them and fix it, the contract, in the opinion of many jurists, is acceptable and does not fall under the prohibited concept of two transactions combined in one. Prophet Muhammad (peace be upon him) forbade this type of transaction. In the event of its occurrence, the seller has to take the lower price or be involved in usury.¹¹¹

There are two particular reasons for prohibiting this type of contract in Islamic law. Firstly, this type of transaction is a means for usury, because the seller writes two or more prices according to the timescale of repayment. In the event of the buyer not being able to

¹⁰⁹ 'Abdullāh, Ibn 'Umar Ibn al-Khaṭṭāb: Companion. See *EI (2)*, v. 1, pp. 53-54.

¹¹⁰ Abū Dāwūd, *Sunan*, v. 3, p. 373; al-Bayhaqī, *Sunan Kubrā*, v. 5, p. 316; Aḥmad, *Musnad*, v. 2, p. 42. Ibn Ḥajar indicated that the chain of Abū Dāwūd's report is weak, however he said Aḥmad's reporters of the ḥadīth is trusted and Ibn al-Qaṭṭān said: "the ḥadīth is authentic". Ibn Ḥajar, *Bulūgh al-Marām*, pp. 293-294.

¹¹¹ See al-Tirmidhī, *Sunan*, v. 3, pp. 533; Al-Nasā'ī, *Sunan Kubrā*, v. 4, p. 43; Aḥmad, *Musnad*, v. 2, p. 174; Ibn Ḥibbān, *Ṣaḥīḥ*, v. 11, p. 347; al-Bayhaqī, *Sunan Kubrā*, v. 5, p. 343. Ibn Ḥajar said: "Al-Tirmidhī and Ibn Ḥibbān authenticated the ḥadīth". (*Bulūgh al-Marām*, p. 279)



pay at the first indicated time, his loan will be transferred directly to the higher price. This is very similar to the tenets of compound usury, discussed earlier.¹¹² Instead, the seller writes in the contract rather than verbally stating that he will delay the repayments for further money.¹¹³

The second reason is that contracts, in Islamic law, have to be confirmed and fixed in order to fulfil the conditions of permissibility. This condition is not part of the two transactions combined in one because both seller and buyer have the right to choose from the transactions or prices after the contract, and in some cases there is dispute over such matters. Consequently, the contract, in this case, is not fixed or confirmed.¹¹⁴

1.3.3 *Gharar*

1.3.3.1 Definition of *gharar*

1.3.3.2 *Gharar* from an Islamic point of view

1.3.3.3 Types of *gharar* in Islamic law

¹¹² For more details see p. 46 above.

¹¹³ See Ibn al-Qayyim, *Hāshiyah*, v. 9, p. 240-241.

¹¹⁴ See Al-Shawkānī, *Nayl al-Awṭār*, v. 5, p. 250; al-Mubārīkfūrī, *Tuḥfat al-Aḥwadhī*, v. 4, pp. 357-358; for more details see also al-Misri, *Reliance of the Traveller*, p. 388.

1.3.3.1 Definition of *gharar*

Gharar means risk, danger or hazard.¹¹⁵ A comprehensive definition of this term is provided by Saleh where the author outlines the meaning of the term within the realms of Islamic jurisprudence:

“Gharar in sales transactions causes the buyer to suffer damage (*ghabn*) and is the result of a want of knowledge (*jahl*) which affects either the price (*al-thaman*) or the subject matter (*al-mabīʿ*). Gharar is averted if both the price and the subject matter are known to be in existence, if their characteristics are known, if the amount is determined, if the parties have such control over them as to make sure that the exchange shall take place and, finally, if the date of future performance is finalised, if any is defined.”^{116,117}

1.3.3.2 *Gharar* from an Islamic point of view

Gharar is prohibited in Islamic law. There is a ḥadīth, narrated by Abū Hurayra and reported in Muslim, where it is stated that the Messenger of Allāh forbade a transaction determined by throwing stones and the type involving deception.¹¹⁸

¹¹⁵ See Al-Rāzī, *Mukhtār al-Ṣiḥāh*, p. 197.

¹¹⁶ Saleh, *Unlawful Gain*, p. 52.

¹¹⁷ *Gharar* or *taghrīr* is a term of Islamic law normally meaning ‘deceptive’. Its root is commonly used to refer to personal deceptive attributes of a person. The word also may be used synonymously for deception. According to the *Majalla*, *taghrir* is divided into two categories; the first category is verbal (*qawli*), and the second category is positive action of fraudulence (*fiʿli*). (See *EI (2)*, v. 10, p. 93).

¹¹⁸ Muslim, *Ṣaḥīḥ*, v. 3, p. 1153; and see also Abdur Raḥmān, *Sharīʿa*, pp. 359-360.

1.3.3.3 Types of *gharar* in Islamic Law

1.3.3.3.1 Introduction

1.3.3.3.2 *Gharar* due to doubt and probability

1.3.3.3.3 *Gharar* due to ignorance (*jahāla*)

1.3.3.3.1 Introduction

The concept of *gharar* is wide and there are several types of transactions that fall within its realm. These transactions are divided into two categories and are discussed below.¹¹⁹

1.3.3.3.2 *Gharar* due to doubt and probability

In this kind of transaction, the contract is very risky because the percentage of loss is very high. There are many examples of its prohibition in Islamic jurisprudence including, for example, the sale of birds in the sky, or fish in the sea.¹²⁰ The reason behind the prohibition of such produce is that the risk is very high, rendering such transactions similar to gambling. A second example is that of the trade practised in pre-Islamic times called *bay' ḥabl al-ḥablā*. This type of transaction relates to a buyer buying a she-camel which is to be the offspring of a she-camel, still in its mother's womb.¹²¹

¹¹⁹ The contemporary scholars are widely discussing the issue of *gharar* under the concept of insurance. For more details see Siddiqi, *Insurance in an Islamic Economy*, pp. 13-15.

¹²⁰ See Vogel and Hayes; *Islamic Law*, pp. 88-91; Kamali, *Islamic commercial Law*, pp. 93-94.

¹²¹ See al-Bukhārī, *al-Jāmi' al-Ṣaḥīḥ*, v. 2, p. 753; Muslim, *Ṣaḥīḥ*, v. 3, p. 1154.

1.3.3.3.2 *Gharar* due to ignorance (*jahāla*)

Gharar because of ignorance (*jahl*) occurs in two things: money and commodities. The former occurs in some countries where more than one currency is used, in which case the seller has to inform the buyer of the preferred currency type because there is a difference between the value of currencies and these impacts on the cost of goods.¹²²

Ignorance, in commodities or goods, has two aspects. The first is ignorance of the goods themselves, for example, the seller says, “I will give you what is in my bag for £10”. The second is ignorance of the characteristics of a commodity, if it has the ability to influence the cost or the desire of the buyer. For instance, the place of production impacts on the price of some goods, therefore, the seller must inform the buyer about that.

The difference between this category and the previous one is that while in the former the buyer knows the commodities but is not sure whether or not they can be bought in the latter buyer does not have enough information about the goods, or the seller does not have enough information about the property or money. An instance of the first category is where A offers to B goods which are under the table for £10, while B cannot see the goods, so B does not know them whether they are watches, clothes or rings. An example of the second category is where A offers a watch to B for £100, but A does not mention the manufacturer

¹²² See Kamali, *Islamic Commercial Law*, pp. 90-93.

of the watch, so B knows the type of the product, but he does not know the brand of the watch, and that would obviously impact on the price of the product.¹²³

1.3.4 Cheating (*ghishsh*)

Cheating is unlawful in Islam in any aspect of life. In relation to transactions, the Prophet (peace be upon him) urged honesty and forthrightness. This is illustrated in the following ḥadīth:

Narrated Abū Hurayra: “Allāh’s Messenger once came upon a heap of grain, and when he put his hand inside it, his fingers felt some dampness, so he asked the owner of the grain, “What is this, O owner of the grain?” He replied, “Rain had fallen on it, O Allāh’s Messenger.” He said, “Why did you not put it (the damp part) on the top of the foodstuff so that people might see it? He who deceives has nothing to do with me.”¹²⁴

In another narration, the Prophet (peace be upon him) said: “Do not tie up the udders of camel and goats”.¹²⁵ This was ordered for the reason that milk has a bearing on the price of camels, sheep, goats and cows. Tying up the udder for more than the normal time deceives buyers into believing that the animal has more milk than it actually does, hence, this practice became disallowed and points to a broader dislike for deceit in transactions.¹²⁶

¹²³ For more details about *gharar* see Ḥassan, *Sales and Contracts*, pp. 47-74; El-Gamal, *an Economic Explication*, pp. 49-63.

¹²⁴ Muslim, *Ṣaḥīḥ*, v. 1, p. 99.

¹²⁵ Al-Bukhārī, *al-Jāmi‘ al-Ṣaḥīḥ*, v. 2, p. 755; Muslim, *Ṣaḥīḥ*, v.3, p. 1155.

¹²⁶ See Fazlu Rahman, *Banking and Insurance*, p. 139.

In short, cheating comes under the heading of *gharar* because the goods are not, in reality, as they appear. The reason for this is that the seller makes his commodities appear more attractive, such as tying up the udder to give the impression that it is fuller.

Part Two

Instalment sales: concept, cornerstones and conditions

2.1 The concept of instalment sales (*bay' al-taqṣīṭ*)

2.2 Cornerstones and conditions of instalment sales (*bay' al-taqṣīṭ*)

2.1 The concept of instalment sales (*bay' al-taqṣīṭ*)

2.1.1 Introduction

2.1.2 Linguistic definition

2.1.3 *Tanjīm* in traditional *fiqh*

2.1.4 Definition of instalment sales (*bay' al-taqṣīṭ*) in Islamic law

2.1.1 Introduction

Instalment sales (*bay' al-taqṣīṭ*), as a term, is not used in traditional Islamic jurisprudence. However, there are many forms that are relevant to this type of contract. For example, deferred sales or, in Arabic, *al-bay' al-mu'ajjal*, are related to instalment sales, because payment, in both sales, is deferred.

Moreover, the jurists use the word *tanjīm* or *munajjaman*, as a description of the method of payment in several contexts, and this has exactly the meaning of instalments.¹ In addition, forward sales (*bay' al-salam*), mark-up sales (*murābaḥa*), *tawarruq* and *ʿīna* sales are relevant to instalment sales. Therefore scholars today can derive the ruling governing instalment sales from these contracts.

¹ See Al-Misrī, *Bay' al-Taqsīṭ*, pp. 27-34.

The history of the pre-Islamic period (*al-jāhiliyya*) shows a form of paying by instalments which was, at the same time, a type of usury (*ribā*). Some scholars explain this kind under usury by way of deferment (*ribā al-nasī'a*), which was very common before the spread of Islam. The scenario in this kind of usury is that a usurer lends someone money; then the borrower has to pay the money plus an extra sum, as an interest charge, and the borrower has to pay the capital which he borrowed at a specific time, according to the agreement, then pay the interest by instalments at specified times, such as every month. However, if the borrower does not pay the amount due on time, the lender, usually, adds an extra charge for the delay.²

2.1.2 Linguistic definition

Instalment sales are expressed, in Arabic, by the expression *bay' al-taqṣīt*. The term consists of two words, *bay'* and *taqṣīt*; the term *bay'* means literally sale. The second word is *al-taqṣīt*, which comes from the trilateral root, *qāf*, *sīn* and *ṭā'*. These three letters give two words which are totally opposite. The first word is *qisṭ* which means justice. The Qur'ān says: "*Wa in ḥakamta fa ihkum baynahum bi al-qisṭ*," And if you judge, judge with justice between them",³ the second word is *qasṭ*, is meaning injustice. The Qur'ān also says: "*Wa amma al-qāsiṭūna fa kānū li jahannama ḥaṭabā*", which

² See al-Rāzī, *Mafatīḥ al-Ghayb*, v. 7, p. 75; al-Mitrik, *al-Ribā wa al-Mu'āmalāt al-Maṣrifīyya*, pp. 23-25.

³ Qur., Al-Mā'ida, 5:42

means, “And as for those who are unjust, they are firewood for hell.”⁴ *Al-qāsiṭūna* is the plural of *qāsiṭ*, which is an attribute of the person who is unjust.

Moreover, *qisṭ* means *ḥiṣṣa* or *naṣīb*, i.e. ‘part’ or ‘division’, and it also means an instalment of something divided into more than one part. The plural of *qisṭ* is *aqsāṭ*, meaning three or more parts.⁵

Instalments, as a way of payment, are commonly used in many kinds of trade, business and loans, for example, instalment buying and selling, instalment trading, instalment loans or debts, instalment plans and instalment credit and hire-purchase.⁶

2.1.3 *Tanjīm* in Islamic jurisprudence

Tanjīm is an Arabic word, which etymologically is derived from *najm* which literally means a star. It is used to denote a time for payments. The expression, “*najjama al-māl tanjīman*” means, “he has paid money at more than one time.”⁷ *Al-tanjīm* is a noun (*ism*) and *munajjaman* is an adjective (*ṣifa*).

⁴ Qur., Al-Jinn, 72:15

⁵ See al-Rāzī, *Mukhtār al-Ṣiḥāḥ*, p. 223; al-Rāfi‘ī, *al-Miṣbāḥ al-Munīr*, v.2, p. 503.

⁶ See www.onelook.com, “Instalment or installment”; www.encyclopedia.com, “installment”

⁷ See al-Rāzī, *Mukhtār al-Ṣiḥāḥ*, p. 270; Ibn Manẓūr, *Lisān al-‘Arab*, v. 12, pp. 568-571; al-Rāfi‘ī, *al-Miṣbāḥ al-Munīr*, v. 2, pp. 594-595.

Tanjīm, as a term in Islamic jurisprudence, means a plan to pay money by deferred payment when the payment is divided into two or more times.⁸ As a result, *tanjīm* and *taqsīf* have the same definition, in terms of Islamic jurisprudence. The difference is that *al-tanjīm* refers to the time, which is the appearance of stars (*nujūm*) whereas *al-taqsīf* refers to the payment.

Although scholars do not mention the term instalment (*taqsīf*) in the early books of Islamic law, the form of instalment sales is indicated several times in these books. However, The jurists use the term *tanjīm* instead of *taqsīf* to indicate the same type of payment, which is payment by instalments. Payment by instalments is mentioned in several contexts:

1- Sales

Al-Sarakhsī (d. 483/1090)⁹ indicates, under the *murābaḥa* contract, a kind of payment between traders. According to al-Sarakhsī, some sellers buy commodities from other traders, with immediate delivery, and the payment is by instalments (*munajjaman*). In addition, he mentions that this is often the custom ('*urf*')¹⁰ between them.¹¹ Ibn Qudāma also mentions under the contract of forward sales that

⁸ Ibn Mufliḥ, *al-Mubdi'*, v. 6, p. 335.

⁹ Al-Sarakhsī, Abū Bakr Muḥammad Ibn Aḥmad: Ḥanfi scholar. See *Hidāya*, v. 6, p. 76.

¹⁰ Custom ('*urf*') is defined as recurring practise, which are acceptable to people of sound nature. (Kamali, *Principles of Islamic Jurisprudence*, p. 283)

¹¹ See *al-Mabsūt*, v. 13, pp. 78-79.

the buyer may stipulate that he will receive a part of the subject matter every day,¹² for instance the buyer pays £20 for 50 kilos of bread and stipulates that he will receive one kilo every day for fifty days.

2- To pay *dayn al-kitāba*.

Dayn al-kitāba means a contract between a slave and his master for his emancipation. According to the contract, the slave has to pay an amount of money to his owner every specified day, week, month or year to gain his freedom. The jurists use the word *munajjaman* to indicate the manner of payment.¹³

Al-Bukhārī and Muslim report the story of ‘Ā’isha and Barīra;¹⁴ she made an agreement with her master to emancipate her for nine *ūqiyyas* (an amount of gold, 1 *uqiyya* = 122.3 or 128 grams) to be paid within nine years, one *ūqiyya* for every year.¹⁵ This ḥadīth clearly shows the use of instalments as a way of payment during the Prophet's time.

3- To pay blood money due to killing by mistake (*diyyatu qatl al-khaṭa’*)

¹² See *al-Kāfī*, v. 3, p. 161.

¹³ See Ibn Rushd, *Bidāyat al-Mujtahid*, 2003, v. 2, p. 375.

¹⁴ Barīra (d. ?): companion, *mawlāt* ‘Ā’isha (the Prophet’s wife), lived till the period of Yazīd Ibn Mu‘āwiyya (Omayyad caliph). See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, v. 2, p. 591.

¹⁵ Al-Bukhārī, *al-Jāmi’ al-Ṣaḥīḥ*, v. 1, p. 174; Muslim, *Ṣaḥīḥ*, v. 2, p. 1142.

Blood money (*diyat qatl al-khaṭa'*) is the money which has to be paid as compensation for unintentionally killing a Muslim. The Ḥanafīs,¹⁶ the Mālikīs,¹⁷ the Shāfi'īs,¹⁸ and the Ḥanbalīs,¹⁹ agree that blood money has to be paid in three instalments within three years, in addition, the prophet's companions are consensus upon this issue.²⁰ In this context, they use the term *munajjaman*, i.e. in instalments. The payment of the blood money is within three years, every year one third.

4- To pay for leasing (*ujra*)

Ibn Qudāma indicates that a leaseholder can pay the rent by instalments (*munajjaman*) whether every day, week or whatever, if there is a term in the agreement specifying such a method.²¹

We have seen that paying by instalments was discussed in Islamic traditional *fiqh*, and al-Shāfi'ī (d. 204/820), who lived during the 9th century, discussed a type of instalment sale (*bay' al-taqṣīṭ*) under forward sale (*bay' al-salam*). Not only that, but,

¹⁶ See al-Kāsānī, *Badā'i' al-Ṣanā'i'*, v. 7, p. 256.

¹⁷ See Ibn Rushd, *Bidāyat al-Mujtahīd*, 2003, v. 2, p. 411.

¹⁸ See al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 9, p. 256.

¹⁹ See al-Bahūtī, *Kashāf al-Qinā'*, v. 6, p. 6.

²⁰ See al-Kāsānī, *Badā'i' al-Ṣanā'i'*, v. 7, p. 256; Ibn Rushd, *Bidāyat al-Mujtahīd*, v. 2, 2003, p. 411; al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 9, p. 256.

²¹ See Ibn Qudāma, *al-Mughnī*, v. 8, p. 19.

as al-Sarakhsī stated, this kind of transaction was sometimes custom (*‘urf*), which means that it was common practice among traders during that period.²²

The contemporary scholar in Islamic economics Al-Miṣrī states that instalment sales (*bay‘ al-taqṣīṭ*) have widely expanded since the Second World War, because, today, there are several modes of instalment sales (*bay‘ al-taqṣīṭ*), and they are more commonly used than before.²³

According to the Columbia Encyclopedia:

Instalment buying and selling originated in Paris in the early 19th century. The practice of retailing goods on the instalment plan was first used in the United States to sell sewing machines, pianos, and household furnishing to low income consumers. After 1916, when manufacturers began to offer automobiles on the time payment plan, instalment selling rapidly came to include durable goods of every kind (household appliance, radio, oil burners), which otherwise would have been out of reach for the average income earner.²⁴

2.1.4 Definition of instalment sales (*bay‘ al-taqṣīṭ*) in Islamic law

Instalment sales are a contract between two parties. The delivery of the subject matter is immediate and the payment is in the future, although in some cases the first payment

²² For more detail see al-Miṣrī, *Bay‘ al-Taqsīṭ*, pp. 11-14; al-Sarakhsī, *al-Mabsūṭ*, v. 13, pp. 78-79.

²³ al-Miṣrī, *Bay‘ al-Taqsīṭ*, pp. 11-12.

²⁴ See the word ‘Installment buying and selling’, www.bartleby.com.

is at the time of delivery. In particular, the payments are divided into more than one part. Every part has to be paid in a series of regular payments which are determined according to the agreement of the contracting parties, whether they are on a weekly, or monthly basis, and so on, in order to pay the whole price of the product.²⁵

According to the definition, instalment sales are a type of deferred sales,²⁶ because the buyer pays all or a part of the price later on. For example, A offers a car to B by instalments for £10,000, and this amount has to be paid within three years. A can stipulate that the first instalment, which is usually due with the contract, is, for instance, 20%. Then, the rest of the price, which is the 80% or £8000, is divided into 36 instalments, and B has to pay an instalment every month. So each instalment is £222.20. Moreover, during the three years B can use the car as the owner, and is responsible for any change.

As mentioned before, although instalment sales were not commonly discussed in Islamic jurisprudence before the 19th century, the jurists discussed many issues which are relevant to instalment sales, for instance deferred sales, forward sales, *tawarruq* sales, *īna* sales, two transactions combined in one (*bay'atān fī bay'a*), sales of debt for debt (*bay' al-dayn bi al-dayn*) and usury (*ribā*) especially usury by way of deferment (*ribā al-nasī'a*).

²⁵ See al-Misrī, *Bay' al-Taqsīt*, p. 11; al-Turkī, *Bay' al-Taqsīt*, pp. 33-35; al-Hāj Ahmad, *Hukm bay' al-Taqsīt*, p. 12.

²⁶ See al-Misrī, *Bay' al-Taqsīt*, p. 11.

2.2 Cornerstones (*arkān*) and conditions (*shurūṭ*) of instalment sales (*bay' al-taqṣīṭ*)

2.2.1 Introduction

2.2.2 Cornerstones (*arkān*) and conditions (*shurūṭ*) of sales (*bay'*) in general

2.2.3 Conditions of instalment sales (*bay' al-taqṣīṭ*) in specific

2.2.1 Introduction

The cornerstones (*arkān*, single *rukn*), according to Islamic law, are the basic requirements without which contracts cannot exist. For example, an offer (*ījāb*) and its acceptance (*qabūl*) is a cornerstone in sales contracts; it is impossible to imagine that there could be sales contract without a product being offered by the seller to a buyer then the buyer accepting the offer; otherwise the contract would be incomplete. The conditions of sales (*shurūṭ al-bay'*, single *sharṭ*) means that if the contract of sale is lacking one of them, the contract would be null and void, according to Islamic law. The difference between the cornerstones (*arkān*) and the conditions (*shurūṭ*) of sales is that the contract of sale would not exist without the cornerstones (*arkān*); on the other hand if the conditions are absent, the contract may exist logically, but is null and void according to Islamic law.

Under this section we will discuss the cornerstone of sales in general because that instalment sales is belong the contract of sales in general and any condition applies in the contract of sales is basically apply in the contract of instalment sales. Consequently, we should consider the cornerstones and conditions of sales before be involved in the contract of instalment sales. Then, we will discuss the cornerstone and conditions of instalment sales in specific, and this kind of cornerstones and conditions may not be applied in other types of sales.

2.2.2 Cornerstones (*arkān*) and conditions (*shurūṭ*) of sales (*bayʿ*) in general

2.2.2.1 Cornerstones (*arkān*) of sales

2.2.2.2 Conditions (*shurūṭ*) of sales

2.2.2.1 Cornerstones (*arkān*) of sales

There are two opinions on the cornerstones of sales. The first opinion is the view of the Ḥanafī *madhhab*, which states that there is only one cornerstone for a contract of sales, which is the offer and its acceptance, and this cornerstone is divided into two, the first being the offer, which is from the seller, and the second is the acceptance, from the buyer.²⁷

²⁷ See al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, v. 5, p. 133.

However, the other *madhhabs* including the Mālikīs, the Shāfi'īs and the Ḥanbalīs divide the cornerstones of sales into three. They are the language of the contract (*ṣiġhat al-'aqd*) or in other words an offer and its acceptance, the contracting parties (*'āqidān*) and the object of the contract (*al-ma'qūd 'alayh*).²⁸

Each cornerstone is further divided into two. The language of the contract (*ṣiġhat al-'aqd*), as with the Ḥanafī *madhhab*, is divided into offer and acceptance. The contracting parties (*al-'āqidān*), are the buyer (*al-bā'i'*) and the seller (*al-mushtarī'*); the third cornerstone, the object of the contract, includes the price (*al-thaman*) and the subject matter (*al-mabī'*). The price is usually money, such as gold, silver or banknotes, whereas the subject matter is a product, such as clothes, food or electronic goods.²⁹

2.2.2.2 Conditions (*shurūṭ*) of sales

The jurists of the four *madhhabs* discuss the conditions of sales (*shurūṭ al-bay'*) in different ways. The Ḥanafīs have their own approach,³⁰ whereby they discuss the conditions of sales (*shurūṭ al-bay'*) under four categories, and they do not link between the cornerstones and conditions of sales, whereas the other *madhhab* have other ways,

²⁸ See al-Zuḥaylī, *Financial Transactions*, v. 1, pp. 8.

²⁹ Ibid, pp. 39-48.

³⁰ For more information regarding to the differences between cornerstones and conditions see Aghnides, *Mohammedan Theory of Finance*, p. 109.

in terms of discussing the conditions of sales (*shurūṭ al-bayʿ*), as it will be mentioned below.

The Mālikīs and Shāfiʿīs discuss the conditions of sales under the cornerstones of sales, and they divide the conditions of sales into three categories, as they do the cornerstones of sales.³¹

The Ḥanbalīs have a different way of indicating the conditions of sales. They just show six conditions of sales,³² so they do not link between the cornerstone of sales and the conditions of sales as the Mālikīs and the Shāfiʿīs do. However, there are no major differences, in terms of discussing the conditions of sales, between the Mālikīs and Shāfiʿīs on the one side and the Hanbalīs on the other.

We will discuss the conditions of sales for the Hanafī *madhhab* first, then combine the conditions of sales according to the view of the other three *madhhabs*, namely, the Mālikīs, Shāfiʿīs and Ḥanbalīs.

³¹ See al-Maghribī, *Mawāhib al-Jalīl*, v. 4, p. 228; al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 336.

³² See Ibn Mufliḥ, *al-Mubdiʿ*, v. 4, p. 7.

2.2.4.1.1 Conditions of sales according to the Ḥanafī *madhhab*

We will start first with the Ḥanafī *madhhab*.³³ They divide the conditions of sales into four categories: the first category is the conditions of conclusion (*shurūṭ al-in‘iqād*); secondly, the conditions of validity (*shurūṭ al-ṣiḥḥa*); thirdly, the conditions of execution (*shurūṭ al-nafādh*); and finally, the conditions of bindingness (*shurūṭ al-luzūm*).³⁴

a- Conditions of conclusion (*shurūṭ al-in‘iqād*)

These are divided into four sub-categories, as follows:

1- The contractors (*al-‘āqidān*)

There are two conditions under this category:

a- The contracting parties have to be sane (*‘āqil*) and have the ability to run their normal affairs, so a person who is insane or a child who is under the age of maturity (*sinn al-bulūgh*), does not have the legal capacity to enter into a contract, although the contract of a child who is seven years old may be accepted in some situations.³⁵

b- The multiplicity of contractors; a sale may not be concluded by one legal proxy for both of contracting parties. So there should be at least two parties; the first

³³ See al-Kāsānī, *Badā’i‘ al-Ṣanā’i‘*, v. 5, p. 133.

³⁴ See *Ibid*, p. 135.

³⁵ See *Ibid*.

party is the buyer and the second party is the seller. There is an exception to this rule when a father, a legal guardian, a judge, or a messenger acts on behalf of both parties in some specific circumstances.³⁶

2- The contract itself (*ṣīghat al-‘aqd*)

There are two conditions under this category:

a- The acceptance has to be in agreement with the offer, for example, the seller says, “I offer this car for £1,200”, and then the buyer says, “I accept to buy the car for £1,200”. Also, the agreement has to be upon the product and the price, so if the buyer, for instance, says, “I accept to buy the other car” and the car which he means is not the car which has been offered by the seller, or the buyer says, “I accept to buy the car for £1,100”, the contract in this case is not concluded, because the acceptance does not agree with the offer.³⁷

b- The expression of the offer and the acceptance must be in the past such as, “I have offered” and for the buyer “I have accepted”. An offer or acceptance in the future tense, such as, “I will sell”, and for the buyer, “I will accept”, is not acceptable.³⁸

³⁶ See Ibid, pp. 135-136; al-Zuḥayfī, *Financial Transactions*, v. 1, p. 14.

³⁷ See al-Kāsānī, *Badā’i’ al-Ṣanā’i’*, v. 5, p. 136.

³⁸ See Ibn ‘Ābdīn, *Hāshiyā*, v. 4, p. 505.

3- The place of the contract (*maḥall al-‘aqd*)

The buyer and the seller must agree upon the contract in the same session (place and time), so if one of them moves from the place, or they agree upon the contract at another time, for instance the seller offers a product to the buyer and the buyer replies on the next day, the contract, in this case, is not concluded.³⁹

4- The object of the contract (*al-ma‘qūd ‘alayh*)

There are four conditions under this category:

a- The object must exist, and so it is not permissible to sell something that does not yet exist, such as an animal which is still in its mother’s womb, although there are exceptions to this general rule in the contract of forward sales, and the contract for an object to be manufactured (*‘aqd al-istiṣnā’*⁴⁰).⁴¹

b- The object which is offered has to be under the possession of the seller (*ḥiyāza al-bā’i*), and so the contract will not be concluded if the object is not under the possession of the seller who wants to offer it. The difference between ownership and possession is that in some cases that the subject matter may be owned by the seller but not under his possession. Narrated Ibn ‘Umar: I bought some oil in the market and when I came to receive it, a man met me and offered to give me good

³⁹ See Ibid.

⁴⁰ *‘Aqd al-istiṣnā’* is a kind of sales where a commodity is transacted before it comes into existence. (Usmani, *an Introduction to Islamic Finance*, p. 88; and see Schacht, *an Introduction to Islamic Law*, p. 155; al-Badrān, *‘aqd al-istiṣnā’*, pp. 54-60)

⁴¹ See al-Kāsānī, *Badā’i’ al-Ṣanā’i’*, v. 5, p. 138; Ibn ‘Abdīn, *Ḥāshiyā*, v. 5, p. 505.

profit for it; and when I was about to seize the price from him, a man caught hold of my hand from behind. So I turned and I found Zayd Ibn Thābit (d. 45/666).⁴² He said, “Do not sell it in the place where you have bought it from, till you take it to your dwelling; for Allāh’s Messenger forbade the commodities to be sold on the spot where they were bought from, till the traders take them to their dwellings”.⁴³

So as it has been seen in the ḥadīth ownership, in some cases, is not enough to confer permissibility on the sale of the goods.⁴⁴

c- The object has to be something that can be privately owned. Things which belong to the public, such as the air, the water of a river or the sea and the sunlight, are for all people, so no one can buy them or own them, and thus have the authority to sell them.⁴⁵

d- It has to be possible to deliver the object at the conclusion of the contract. Therefore the seller cannot conclude the contract if he cannot deliver the object, such as a bird in the air or fish in the sea, even though he may own them.⁴⁶

⁴² Zayd Ibn Thābit: Ibn Ludhān al-Anṣārī, Companion. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, v. 1, p. 272.

⁴³ Abū Dāwūd, *Sunan*, v. 3, pp. 282-283; al-Bayhaqī, *Sunan Kubrā*, v. 5, p. 314; al-Ḥākim, *al-Mustadrak*, v. 2, p. 46. Ibn Ḥajar said, “The ḥadīth was authenticated by Ibn Ḥibbān and al-Ḥākim”. (*Bulūgh al-Marām*, pp. 280-281)

⁴⁴ See al-Kāsānī, *Badā’i’ al-Ṣanā’i’*, v. 5, pp. 146-147; Ibn ‘Ābdīn, *Ḥāshiya*, v. 5, p. 505.

⁴⁵ See Ibn ‘Ābdīn, *Ḥāshiya*, v. 5, p. 505.

⁴⁶ See al-Kāsānī, *Badā’i’ al-Ṣanā’i’*, v. 5, pp. 147-148; Ibn ‘Ābdīn, *Ḥāshiya*, v. 5, p. 505.

e- The Object of sales is a thing with commercial value (*mālan mutaḳawwaman*). That means the object has to be worthy to be sold. So the very small thing such as, a seed of rice or wheat is not worthy to be sold in normal circumstances, therefore, it is not *māl*.⁴⁷

b- Conditions of validity (*shurūṭ al-ṣiḥḥa*)

The conditions of validity (*shurūṭ al-ṣiḥḥa*) are of two categories: general conditions which apply to any kind of sale and specific conditions which are applicable to particular types of sales.

1- General conditions:

a- Details of the price and the object of the sale

The subject matter of sale and the price have to be detailed clearly, in case any dispute should arise between the buyer and seller. The seller has to detail the object of the sale in regard to its type, genus, quality, quantity and measurement and anything that could affect the price of the product, such as the colour in some cases. In addition, the seller and the buyer have to specify the price of the goods, and it is not acceptable if the seller says, for example, “the same price as last year”, unless the buyer knows last year’s price.⁴⁸

⁴⁷ See al-Kāsānī, *Badā’i’ al-Ṣanā’i’*, v. 5, pp. 140-141; Ibn ‘Ābdīn, *Ḥāshiyā*, 2000, p. 505.

⁴⁸ See al-Kāsānī, *Badā’i’ al-Ṣanā’i’*, v. 5, p. 156.

b- Freedom of choice (*al-tarāḍī*)

The contracting parties have the right to choose whether they want to conclude the contract or not. Therefore if one of the contracting parties has been forced to enter into the contract, he has the right to disconnect from the contract.⁴⁹

c- Tense of the verb (*ṣīghat al-fi'*) in the contract itself

One impact of the contract of sales is to transfer the complete ownership from the seller to the buyer, so it is not valid if the seller says, "I sell this car to you for just three months". The reason is that the sales contract leads to transfer of ownership from the seller to the buyer, whereas the seller in this example offers the ownership to the buyer for just three months.⁵⁰

d- Avoiding deception and *gharar*

Deception and *gharar* (excessive risk or uncertainty) are prohibited in Islamic law. "It is narrated from Abū Hurayra that the Prophet once came upon a heap of grain, and when he put his hand inside it, his fingers felt some dampness, so he asked the owner of the grain, "What is this, O owner of the grain?". He replied "Rain had fallen on it, O Allāh's Messenger." The Prophet said, "Why did you not put it (the damp part) on the top of the foodstuff so that people might see it? He

⁴⁹ See Ibn 'Abdīn, *Hāshiyā*, v. 4, p. 505.

⁵⁰ See al-Kāsānī, *Badā'i' al-Ṣanā'i'*, v. 5, p. 169.

who deceives has nothing to do with me.”⁵¹ In addition, the Prophet, in another ḥadīth, prohibited the sales of *gharar*.⁵² So the contracting parties have to be careful not to be party to any contract that includes *gharar*.⁵³

e- Not including something corrupt

Scholars indicate under this condition many kinds of corruption that could invalidate a contract of sale, such as selling something prohibited, the absence of any benefit or a sale by a person who is coerced.⁵⁴

2- Particular conditions:

a- Receiving the object

This condition means that the seller has to receive the object so that it is completely under his possession. This applies particularly to objects which are removable (*al-manqūlāt*).⁵⁵

b- Knowing the time of payment

This condition is particularly for deferred sales, because the payment in question is in the future.⁵⁶

⁵¹ See Ibn ‘Ābdīn, *Hāshiyā*, v. 4, p. 505.

⁵² For more details regarding to the Islamic point of view in *gharar* see p. 53 above.

⁵³ See al-Kāsānī, *Badā’i’ al-Ṣanā’i’*, v. 5, p. 168.

⁵⁴ See *Ibid*

⁵⁵ See Ibn ‘Ābdīn, *Hāshiyā*, v. 4, p. 505.

c- Knowing the cost of the previous contract

This condition is especially for trust sales (*buyū' al-amāna*), such as mark-up sales.⁵⁷

d- Receiving the price in forward sales.⁵⁸

c- Conditions of execution (*shurūṭ al-nafādh*):

These fall into two categories:

1- Ownership and guardianship (*al-wilāya*)

The person who wants to sell something has to have complete possession of the object in order to have the right of freely buying and selling it, whether as the owner or as a guardian. Therefore, a person who is under the age of capacity for buying and selling or who is insane cannot freely sell their own property, or buy something for them but must have permission from their guardian in order for their contract to be accepted.⁵⁹

⁵⁶ See Ibid.

⁵⁷ See Ibid.

⁵⁸ See Ibid.

⁵⁹ See Ibid.

2- There is no third party who has a right over the object

The seller has to be aware that he does not have completely free usage of the object if he already has another contract for the same object, such as a mortgage. He cannot sell something which is mortgaged until he redeems the mortgage. According to some Ḥanafīs, such a contract is suspended and depends for excitability on the consent of the people who are involved in it.⁶⁰

d- Condition of bindingness (*shurūṭ al-luzūm*)

There is just one condition for bindingness, which is that the contract is free from any option, such as the option of any stipulation (*khiyār al-sharṭ*),⁶¹ the option of concealment of defect (*khiyār al-tadlīs*),⁶² and the option of description (*khiyār al-waṣf*).⁶³

⁶⁰ See Ibid.

⁶¹ The option includes the conditions which are stipulated by the contracting parties (*al-‘āqidān*), that one or both of them have the right to decline the contract within a period of time, such as one or two days. (Al-Zuḥaylī, *al-Mu‘āmalāt al-Māliyya*, p. 26; and see Ḥassan, *Sales and Contracts*, pp. 39-40)

⁶² Such as an action that raises the price, for example, holding the water of a mill and releasing it at the time of sale to make it unusually fast in its rotation, thus deceiving the buyer into paying more for it. (Al-Zuḥaylī, *Financial Transactions*, v. 1, p. 174; and see Ḥassan, *Sales and Contracts*, pp. 44-46)

⁶³ This option comes into effect if one of the desired characteristics of the object of sales is missing. (Al-Zuḥaylī, *Financial Transactions*, v. 1, p. 168)

2.2.4.1.2 Conditions of sales according to the other three *madhhabs*, namely the Mālikīs, the Shāfi'īs and the Ḥanbalīs

The Mālikīs and the Shāfi'īs discuss the conditions of sales under three categories; the language of the contract, the contracting parties and the object of the contract.⁶⁴ The Ḥanbalīs indicate the conditions of sales regardless their relationship to the cornerstones of sales.⁶⁵ However, there are no major differences between the Mālikīs and the Shāfi'īs on the one side and the Ḥanbalīs on the other. Therefore, we will show the conditions of sales of the Ḥanbalīs under the following categories:

1- Language of the contract (*ṣiġhat al-'aqd*)

Under this category they focus on the satisfaction of the contracting parties with the contract, and they indicate that custom (*'urf*) has an impact on evidence of satisfaction, so there is no need to use a specific expression, and any kind of word that shows the satisfaction of the contracting parties is acceptable according to this view.⁶⁶ Moreover, they indicate two conditions under this cornerstone:

- a- The first condition under this category according to the Mālikīs is unity of the contract session between the contracting parties on the price and the object.⁶⁷

The Shāfi'īs use another expression which is more specific, which is that they

⁶⁴ See al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, v. 4, p. 228; al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 340.

⁶⁵ See al-Bahūtī, *Sharḥ Muntahā al-Irādāt*, v. 2, p. 7.

⁶⁶ See al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, v. 4, p. 228; al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 336; Ibn Qudāma, v. 6, pp. 7-9.

⁶⁷ See al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, v. 4, pp. 240-241.

say that the acceptance, which is the act of the buyer, has to agree with the offer which is the act of the seller.⁶⁸ The Ḥanbalīs are more general than the other *madhhabs*. They refer to mutual agreement between the contracting parties, and they do not discuss the details of how the contracting parties can show their mutual agreement, because that any kind of act that shows that the seller and buyer agree upon the contract makes the contract acceptable, and custom determines which acts show agreement.⁶⁹

- b- The offer and acceptance have to be at the same time and not be disconnected by something different from the contract. If there is a discussion on something different for quite a long time, the contract will be disconnected, but if it is for just a short time, the contract is still valid. Custom distinguishes between a long and a short time in this situation.⁷⁰

2- Contracting parties (*al-‘āqidān*)

- a- The contracting parties have to be discerning (*mumayyiz*), which means of sound mind and over seven years old. Thus, the contract of a non-discerning or insane person is invalid, and this is a condition for the validity of the contract, but not the conclusion. So in this case he needs a confirmation from his

⁶⁸ See al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 340.

⁶⁹ See Ibn Qudāma, *al-Mughnī*, v. 6, pp. 7-9

⁷⁰ See al-Haṭṭāb, *Mawāhib al-Jalīl*, v. 4, p. 240; al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 340

guardian.⁷¹ The Shāfi'īs and Ḥanbalīs stipulate that the contracting parties, who are the buyer (*al-mushtarī*) and the seller (*al-bā'i*'), have to be of legal age (*al-taklīf*), which is the age of adulthood (*al-bulūgh*),⁷² and they agree with the Mālikīs that the contracting parties (*al-'āqidān*) have to be sane.⁷³

b- The contracting parties have the authority to buy and sell, whether the authority is by ownership (*milkiyya*), agency (*wakāla*),⁷⁴ guardianship (*al-wilāya*),⁷⁵ or so on.⁷⁶

c- Freedom of choice is a condition of the contract; therefore a contract entered into under force (*ijbār*) is null and void.⁷⁷ The Qur'ān says, "O you who believe eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another).

⁷¹ See al-Haṭṭāb, *Mawāhib al-Jalīl*, v. 4, p. 241; Abū al-Ḥasan, *Kifāyat al-Ṭālib*, v. 2, p. 178; al-Misri, *Reliance of the Traveller*, p. 379.

⁷² See al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, pp. 340-341; al-Bahūtī, *Sharḥ Muntahā al-Irādāt*, v. 2, p. 7.

⁷³ See al-Haṭṭāb, *Mawāhib al-Jalīl*, v. 4, p. 246; al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 341.

⁷⁴ Agency (*wakāla*) is the delegation of one person (the principle or *muwakil*) for another (agent or *wakīl*) to take his place in a known and permissible dealing. (Al-Zuhaylī, *Financial Transactions*, v. 1, p. 631)

⁷⁵ Guardianship (*al-wilāya*) is a responsibility for other people who do not legally accepted to involve in contracts, whether because that they are under the age of maturity or they are insane.

⁷⁶ See al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 353; Al-Bahūtī, *Sharḥ Muntahā al-Irādāt*, v. 2, p. 9.

⁷⁷ Al-Haṭṭāb, *Mawāhib al-Jalīl*, v. 4, p. 248; al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 342; al-Bahūtī, *Sharḥ Muntahā al-Irādāt*, v. 2, p. 7; al-Misri, *Reliance of the Traveller*, p. 379.

Surely, Allāh is Most Merciful to you.”⁷⁸ The Ḥanbalīs, under this condition, discuss the issue of the person who sells something under necessity (*darūra*). The selling, in this circumstance, is because he needs money whether that is due to a loan or something else, and because of this need, he will sell the thing for less than its price or what it is normally worth, as for instance, if the seller sells his car which is worth £1000 for £500. The Ḥanbalīs have two views; the first view is that a sale made by a person out of necessity is acceptable, and the second view is that it is not acceptable.⁷⁹

3- The place of contract (*maḥall al-‘aqd*)

The place of contract (*maḥall al-‘aqd*) concerns the object of sales and that includes the price and the subject matter.

a- The object of sale must be existed.⁸⁰

b- It must be pure, and permissible (*mubāḥ*); thus, impure (*najis*) items such as pork are prohibited, according to the principles of Islamic law,⁸¹ and also it is not prohibited thing such as a dead animal (*mayta*).⁸²

⁷⁸ Qur., al-Nisā’, 4:29.

⁷⁹ See al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, v. 4, p. 248; al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 342; Al-Bahūtī, *Sharḥ Muntahā al-‘Irādāt*, v. 2, p. 7.

⁸⁰ al-Misri, *Reliance of the Traveller*, p. 381; Comair-Obeid, *the Law of Business*, p. 23.

⁸¹ See al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, v. 4, p. 258; al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 348; Al-Bahūtī, *Sharḥ Muntahā al-‘Irādāt*, v. 2, p. 8; Comair-Obeid, *the Law of Business*, p. 24.

- c- It must be something that is beneficial (*muntafa'un bih*) and can be owned under normal circumstances; therefore a thing which is not beneficial, such as some kinds of insect or a thing which it is permissible to own only in specific circumstances, such as a dog, cannot legally be sold.⁸³
- d- The object of sale, which is the price and the subject matter, must be known to both parties.⁸⁴
- e- The subject matters must be possible to be delivered.⁸⁵

2.2.3 Conditions of instalment sales (*bay' al-taqsiṭ*) in specific

2.2.3.1 Introduction

2.2.3.2 Sales of a debt for a debt (*bay' al-dayn bi al-dayn*)

2.2.3.3 Usury by way of deferment (*ribā al-nasī'a*)

2.2.3.4 Deferment (*al-ajal*)

⁸² See al-Haṭṭāb, *Mawāhib al-Jalīl*, v. 4, p. 263; al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 352; Al-Bahūṭī, *Sharḥ Muntahā al-Irādāt*, v. 2, p. 7; al-Misri, *Reliance of the Traveller*, p. 381; Comair-Obeid, *the Law of Business*, p. 24.

⁸³ See al-Haṭṭāb, *Mawāhib al-Jalīl*, v. 4, p. 263; al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 350; Al-Bahūṭī, *Sharḥ Muntahā al-Irādāt*, v. 2, p. 7; al-Misri, *Reliance of the Traveller*, p. 381.

⁸⁴ See al-Haṭṭāb, *Mawāhib al-Jalīl*, v. 4, p. 285; al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 368-359; Al-Bahūṭī, *Sharḥ Muntahā al-Irādāt*, v. 2, p. 12-17; al-Misri, *Reliance of the Traveller*, p. 381; Comair-Obeid, *the Law of Business*, p. 24.

⁸⁵ See al-Haṭṭāb, *Mawāhib al-Jalīl*, v. 4, p. 269; al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 355-356; Al-Bahūṭī, *Sharḥ Muntahā al-Irādāt*, v. 2, p. 11; al-Misri, *Reliance of the Traveller*, p. 381; Comair-Obeid, *the Law of Business*, p. 24.

2.2.3.1 Introduction

As has been seen, there is a difference between ordinary sales and instalment sales, or in other words, deferred sales. The factor of the deferment adds some extra conditions to instalment sales in addition to those applicable to ordinary sales (*al-bay' al-taqīdī*).

In this section we will discuss these conditions under three categories.

2.2.3.2 Sales of a debt for a debt (*bay' al-dayn bi al-dayn*)

This type of sale was named *bay' al-kali' bi al-kali'*; *al-kali'* means debt (*dayn*) or in some cases loan (*qard*). There is a ḥadīth in which Ibn 'Omar says that the Prophet forbade selling a debt to be paid at a future date for another.⁸⁶ Some scholars suggest that the ḥadīth is not authentic,⁸⁷ or in other words, is not acceptable as a proof for the issue. However, some scholars such as, Aḥmad Ibn Ḥanbal and Ibn al-Mundhir, indicate that there is a consensus on the impact of the ḥadīth that sales of a debt for a debt (*bay' al-dayn bi al-dayn*) is prohibited according to consensus (*ijmā'*). Ahmad Ibn Ḥanbal (d. 241/855)⁸⁸ says, "The consensus of the people is that sales of a debt for a debt are not

⁸⁶ See al-Bayhaqī, *Sunan Kubrā*, v. 5, 290; al-Ṣan'ānī, *al-Muṣannaf*, v. 8, p. 90.

⁸⁷ See Ibn Ḥajar, *Bulūgh al-Marām*, p. 296. Not authentic (*ghayr ṣaḥīḥ*) ḥadīth or weak ḥadīth (*da'īf*) is one which fails to qualify the condition of authentic (*ṣaḥīḥ*) and *ḥasan*. (Kamali, *a Text Book of Ḥadīth Studies*, p. 144)

⁸⁸ Aḥmad Ibn Ḥanbal al-Shaybānī: founder of the Ḥanbalī *madhhab*, and compiler of ḥadīth. See *EI* (2) v. 1, pp. 272-277.

permissible”.⁸⁹ Ibn al-Mundhir said, “The scholars are agreed that sales of a debt for a debt are not permissible”,⁹⁰ and many other scholars express the same view.⁹¹ Consequently, sales of a debt for a debt are prohibited according to Islamic law and the prohibition is based upon consensus; the ḥadīth itself is not sufficient proof.

Kamali defines the contract:

“An offsetting transaction in futures trading essentially consists of a sale in which two parties transact over a debt that one owes to the other, and settle their debts through the modality of sales and purchases”.⁹²

Consequently, the contract is simply a sale in which the payment of the price and the delivery of the subject matter are in the future, whether they are at the same time or not. So, the definition may include more than one form. The jurists discuss some forms but the number may increase in the future, since sales of a debt for a debt include any kind of contract where the price and the subject matter are deferred.⁹³

There are four forms which are discussed under the concept of sales of a debt for a debt:

- 1- Payment of both the price and the subject matter is in the future

⁸⁹ See Ibn Qudāma, *al-Mughnī*, v. 6, p. 106.

⁹⁰ See *Ibid.*

⁹¹ See al-Zurqānī, *Sharḥ al-Muwattaʿ*, v. 3, p. 392; al-Shawkanī, *al-Sayl al-Jarrār*, v. 3, p. 14.

⁹² Kamali, *Islamic Commercial Law*, p. 125.

⁹³ *Ibid.*

In this kind of contract, the contracting parties do not pay anything during the contract and they agree to pay in the future both the price and the subject matter whether the payment of them is at the same time or not. For instance, the trader offers to the buyer a car for £2000, to be received in a period of one year and the buyer will pay the price at the same time or within six months after the delivery of the car, and they enter into the contract before the payment of the price and the delivery of the car.⁹⁴

2- Debt is the price of a forward sale

In this contract, the lender and the borrower agree to make the debt which is the price of a forward sale. This means the borrower regards the debt as the price of the subject matter which has to be delivered in the future. The contract involves two transactions; the first transaction is the loan, because the lender has not received the money; the second contract is a forward sale, the price of which is the loan, and the borrower will deliver the subject matter in the future.⁹⁵ For example A has borrowed £1000 from B, to be repaid within six months. After six months, A cannot repay the money, and offers to B to make the £1000 the price of 10 tons of dates to be paid within another six months. Thus, the borrower has not repaid the loan which he borrowed, but offers to the lender to make it the price of a forward sale

⁹⁴ See al-Miṣrī, *al-Jāmi' fī Uṣūl al-Ribā*, p. 343.

⁹⁵ See al-Miṣrī, *al-Jāmi' fī Uṣūl al-Ribā*, p. 342; Kamali, *Islamic Commercial Law*, pp. 125-126.

contract for something different from what he had borrowed, to persuade the lender to give him a chance for extra delay.

3- Compound usury

This form was common in the pre-Islamic period. The lender says to the borrower, “Pay or I will increase the loan (*immā an taqdī aw turbī*)”. In other words, the lender requires the borrower to pay the loan at the time when payment is due and if he cannot, the lender increases the amount of payment in the future.⁹⁶ For instance, A lends B £1000 to be paid in a period of three months and after three months B cannot pay the loan. Then A says, “Pay £1200 after an extra two months”, so the lender adds £200 as the price of the delay.

4- Debts are the price of a new contract

This form is explained by Kamali thus, “A has borrowed two tons of wheat for his personal need from a farmer B, returnable in six months. Prior of expiry to this period, B sells the wheat, which is a debt on A, to C in exchange for a plough machine to be delivered in one month. The sale here consists of an exchange of debt, which is considered unlawful because of the uncertainty that involved over delivery, and the likelihood, therefore, of *gharar*.”⁹⁷

⁹⁶ For more details regarding to compound usury see p. 46 above.

⁹⁷ *Islamic Commercial Law*, pp. 125-126

Thus, it can be seen that there is more than one form of contract involving sales of a debt for a debt. Now the question arises, are all these forms under the concept of the sale of a debt for a debt which are prohibited according to the consensus of the scholars, or there is a difference between some of them?

In fact, some contemporary studies differentiate between these forms, which mean that not all the forms are under the concept of the sale of a debt for a debt. In other words, the consensus of the prohibition does not include all forms, as some of them are prohibited and others are not. Moreover, scholars do not agree on which forms are prohibited and which are not.⁹⁸

The first view is that the first form, which is where the payment of the price and the subject matter are in the future, is not prohibited. This is the view of al-Miṣrī.⁹⁹ He focuses on three points: the relationship between usury and sales of a debt for a debt; the relationship between uncertainty and risk-taking on the one hand, and sales of a debt for a debt on the other; and people's need of sales of a debt for a debt, just as they need forward sales and deferred sales.

Al-Miṣrī shows that sales of a debt for a debt do not fall under the concept of usury, whether it is usury by way of deferment or usury by way of increase. Sales of a

⁹⁸ See al-Miṣrī, *al-Jāmi' fī Uṣūl al-Ribā*, p. 348.

⁹⁹ Ibid, pp. 341-349.

debt for a debt are not under the concept of usury by way of deferment as long as the object of the sale is not one of the varieties which have to be paid hand to hand, or in other words, at the same time, such as gold for gold, silver for gold or wheat for salt. In addition, sales of a debt for a debt are not under the concept of usury by way of increase as long as the objects of sale are not among the usurious categories, such as gold for gold or silver for silver. Consequently, if the transaction does not fall under the concept of usury, why should it not be permissible? The transaction can be under the concept of deferred sales if the price is delayed more than the subject matter, and the transaction is under the concept of forward sales if the delay of the subject matter is greater than that of the price.¹⁰⁰

Next, al-Miṣrī states that there is no *gharar* with regard to payment and delivery if they are immediate, or in other words if the contract is an ordinary sale, but there is a *gharar* if the contract is a deferred sale or a forward sale, because, in the situation of deferred sales, the seller may be dissatisfied if the price of the product is increased or the value of money is decreased. In contrast, the buyer, in a forward sale, may be dissatisfied if the price of the product is decreased or the value of money is increased. Consequently, the situation of sales of a debt for a debt is no worse than deferred sales and forward sales. In addition, there is an advantage in sales of a debt for a debt that the contracting parties will not receive the product and the subject matter at the time of the contract, whereas the buyer, in deferred sales, may use the product

¹⁰⁰ See Ibid, p. 344.

before he pays the price to the seller, and, similarly, in forward sales, the seller uses the money before he has delivered the product to the buyer. As a result, there is no difference, in terms of the occurrence of *gharar*, between deferred sales and forward sales on the one hand and sales of a debt for a debt on the other.¹⁰¹

To clarify the above point: first of all, in an ordinary sale, A sells a car to B for £1,200, and A receives the price of the car and delivers the car to B at the same time. The price reflects the value of the car at the time of the contract, and clearly there is no *gharar* in the contract.

Secondly, in forward sales A sells two tons of wheat to B for £2,000, and according to the contract the price has to be paid now, whereas the delivery is within six months. However, after six months the price of the wheat may have decreased, for instance it may be £400 lower than the original price of £2,000, and that creates *gharar* for B, since A has already received the higher price.

Thirdly, in deferred sales, A sells a car to B for £2,000, and the delivery is now, whereas the price is to be paid within two years, so if the price in two years time becomes £3,000, that means there is *gharar* for A.

¹⁰¹ See Ibid, pp. 344-345.

Lastly, in sales of a debt for a debt, A sells a car to B for £3,000, and the delivery and the payment have to be made in a period of two years. After two years, the price of the car may have risen or fallen, to £4,000 or £2,000, and both circumstances, *gharar* occur to one of the contracting parties.

As has been seen, *gharar* may occur in the last three situations, and sales of a debt for a debt are no worse than the forward sales and deferred sales, so there is no reason to distinguish between them or to say that sales of a debt for a debt are prohibited.

In addition, according to al-Miṣrī, people may need sales of a debt for a debt, as they do forward sales and deferred sales. As a result, there is no difference, in terms of the principles of Islamic law, between these three contracts.¹⁰²

However, just because a contract does not fall under the concept of usury, that does not mean that it is lawful, because there are many types of contracts that are prohibited although they are not usury, such as *bay' al-najash*,¹⁰³ *bay' al-rajul 'alā bay' akhīh*,¹⁰⁴ and *talaqqī al-rukbān*.¹⁰⁵ Sales which contain a deferment in the price and

¹⁰² *Al-Jāmi' fī Uṣūl al-Ribā*, pp. 245-346.

¹⁰³ *Al-najash* is to bid against someone not to buy the goods but to increase the price, the bidder aims to help the trader or seller to sell his goods for more expensive price. (Al-Ṣan'ānī, *Subul al-Salām*, v. 3, p. 18)

¹⁰⁴ *Bay' al-rajul 'alā bay' akhīh* is a man who bids against another person who has already made an agreement with the trader. (Al-Ṣan'ānī, *Subul al-Salām*, v. 3, p. 23)

subject matter are under the umbrella of sales of a debt for a debt, and this type of contract is forbidden by sunna and consensus (*ijmāʿ*).

Next, there are some differences between sales of a debt for a debt on the one hand, and forward sales and deferred sales on the other; First of all, there is some evidence to show that forward sales and deferred sales are permissible, whereas sunna and the consensus declare that sales of a debt for a debt are prohibited. Secondly, forward sales and deferred sales include a deferment in one thing which is the price or subject matter. On the other hand, in the contract of sales of a debt for a debt the price and subject matter are both deferred. Lastly, the possibility of a change in the value of the object (price and subject matter) of sales is different, because the possibility of a change in the value is only in the subject matter in forward sales and the possibility of a change in the value is only in the countervalue in deferred sales. However, the change of the value can occur in both the price and the subject matter in the contracts of sales of a debt for a debt. As a result, there is more risk - or in other words *gharar* -, in sales of a debt for a debt.

Furthermore, some people may need to engage in sales of a debt for a debt, but that does not mean that they are permissible. For instance, some people may need a loan and the reason does not change the ruling of usury. Then a person who needs to

¹⁰⁵ *Talaqī al-rukbān* is to interpret a person, such as the farmer to buy his product before he arrives at the market, so the buyer aims to buy the product from the person for less than the market price. (Al-Ṣanʿānī, *Subul al-Salām*, v. 3, p. 21)

buy something in the future and wants to pay in the future can make a promise with the trader without a real contract: if the time of payment is the same as the time of delivery, the contract is considered as an ordinary sale; if the payment is first, the contract is considered as a forward sale (*bay' al-salam*); and if the delivery of the subject matter is first, the contract is a deferred sale.

Kamali says:

“A general consensus (*ijmā'*) is said to have materialised on the prohibition of *bay' al-kāli' bi al-kāli'*. Imām Aḥmad Ibn Ḥanbal has gone on record to say that common consensus (*ijmā' an-nās*) has forbidden it. But evidence shows that such a consensus would not be unfeasible bearing in mind the fact that the scholars are not in agreement about the definition of this transaction, or the various forms that it can take. The *madhhabs* have also recorded divergent rulings on this issue, which would suggest that the claim of a consensus having materialised is clearly unfounded”.¹⁰⁶

Kamali claims that consensus is unfeasible due to two reasons: the first reason is that scholars do not agree about the definition of the sales of a debt for a debt, and the second reason is that they do not agree on the forms which are considered to fall under the concept of sales of a debt for a debt.

Let us start with the first point. The scholars agree that sales of a debt for a debt (*bay' al-dayn bi al-dayn* or *bay' al-kāli' bi al-kāli'*) are prohibited according to Islamic law, and agreement or consensus has been declared by many scholars, such as Aḥmad Ibn Ḥanbal and al-Shāfi'i,¹⁰⁷ then the jurists show the definition of sales of debts for

¹⁰⁶ Kamali, *Islamic Commercial Law*, p. 127.

¹⁰⁷ See Ibn Qudāma, *al-Mughnī*, v. 6, p. 106; al-Anṣārī, *Ḥāshiyat al-Jamal*, v. 3, p. 166.

debts. Al-Sarakhsī said, “*al-kāli’ bi al-kāli’ ya’nī al-nasī’a bi al-nasī’a*”,¹⁰⁸ which means that sales of debts for debts are sales where both the price and the subject matter are deferred or delayed.

Ibn Rushd (d. 595/1198)¹⁰⁹ discusses sales of debts for debts under the conditions of forward sales. He says, “The price should not be delayed for a period that is extensive, so that it does not become an exchange of a debt for a debt, that is, on the whole”.¹¹⁰

In addition, the Shāfi’īs show that the sales of debts for debts are contracts which contain a deferment in the payment of both the price and the delivery of the subject matter, and such a contract is prohibited in Islamic law.¹¹¹

Aḥmad Ibn Ḥanbal declares the consensus of the prohibition of sales of a debt for a debt, and the Ḥanbalī jurists explain the meaning of this; for instance Ibn Taymiyya (d. 728/1328)¹¹² said, “*nahā ‘an bay’ al-kāli’ bi al-kāli’ wa huwa al-mu’akhkhar bi al-*

¹⁰⁸ See al-Sarakhsī, *al-Mabsūt*, v. 12, p. 127.

¹⁰⁹ Ibn Rushd (al-Ḥafīd), Abū al-Wafīd Muḥammad Ibn Aḥmad: Andalusian judge, Mālikī scholar and philosopher. See *EI (2)*, v. 3, pp. 909-920.

¹¹⁰ Ibn Rushd, *Bidāyat al-Mujtahid*, 2003, v. 2, p. 242.

¹¹¹ See al-Anṣārī, *Ḥāshiyat al-Jamal*, v. 3, p. 164.

¹¹² Ibn Taymiyya: Ḥanbalī scholar. See *EI (2)*, v. 3, pp. 951-955.

mu'akhkhar”,¹¹³ which means that the Prophet prohibited sales of debts for debts, which means a contract which includes a deferment in both the payment and delivery. Many jurists of this *madhhab* indicate the prohibition of the contract and agree on the meaning.

Consequently, we can derive from the above views that the four *madhhabs* are agreed that sales of a debt for a debt are prohibited by consensus. The factor which distinguishes such sales is the deferment in payment of price and delivery of subject matter.

The second point concerns the dispute on the forms which are considered to come under the concept of sales of a debt for a debt. We should understand that the dispute of some forms under the concept of sales of a debt for a debt does not make the rule unfeasible or neglected, because some scholars may not consider that the forms come under the concept of this rule. For instance, Ibn Rushd says:

“They [the jurists] disagree about the stipulation of two or three days’ delay in the payment of the price, although they agree that it should not be delayed for an extensive or unlimited period. Mālik (d. 179/795)¹¹⁴ permits a delay of two or three days, and also permits its delay without any stipulation. Abū Ḥanīfa (d. 150/767)¹¹⁵ and al-Shāfi‘ī (d. 204/820)¹¹⁶ are of

¹¹³ Ibn Taymiyya, *Fatāwa*, v. 29, p. 472.

¹¹⁴ Mālik Ibn Anas al-Aṣḥabī: Madinian faqīh, and ḥadīth scholar; ‘founder’ of the Mālikī *madhhab*. See *EI (2)*, v. 4, pp. 262-265.

¹¹⁵ Abū Ḥanīfa al-Nu‘mān,: Kufian jurist; ‘founder’ of the Ḥanafī *madhhab*. See *EI (2)*, v. 1, pp. 123-124.

¹¹⁶ Al-Shāfi‘ī, Muḥammad Ibn Idrīs: scholar of Islamic jurisprudence and law; ‘founder’ of the Shāfi‘ī *madhhab*. See *EI (2)*, v. 7, pp. 484-490.

the view that among its conditions is possession within the session, like *ṣarf*. This is an agreed upon practice”.¹¹⁷

So Mālik, as has been indicated before, agrees that sales of a debt for a debt are prohibited in Islamic law, but he distinguishes between a long period which is more than three days and a short period which is three days or less.¹¹⁸ So it is prohibited to stipulate the delay of payment of the price of forward sales for more than three days, which is a long period and would fall under the concept of the sales of a debt for a debt, whereas a short period does not fall under the concept of sales of a debt for a debt. As a result, it can be seen that the dispute is not about the rule, but about whether certain varieties fall under the umbrella of the rule, and this kind of disagreement can be considered under the concept of *ijtihād* in Islamic jurisprudence.

To conclude, as shown above, sales of a debt for a debt are prohibited in Islamic law, and a contract under this concept has two characteristics: the first characteristic is that the contract is a sale, and the second characteristic is that the price and the delivery are delayed. In addition, according to the concept of deferred sales and instalment sales, the payment is deferred, whether the payment is in a lump sum or by instalments. Consequently, the seller must deliver the subject matter during the session of the contract, because if the seller delays the delivery, the contract would fall under

¹¹⁷ Ibn Rushd, *Bidāyat al-Mujtahid*, 2003, v. 2, p. 242.

¹¹⁸ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 202.

sales of a debt for a debt, and such a contract is prohibited in Islamic law and considered as null and void.

2.2.3.3 Avoiding usury

It is known that usury is strictly prohibited in Islamic law, and there is a strong link between usury and instalment sales or deferred sales. First of all, instalment sales come under the concept of contract of sales (*'aqd al-bay'*), and usury by way of increase may be involved in a contract of sales. Secondly, there is a factor in the contract of instalment sales that may cause usury by way of deferment, and the factor is the deferment. Under this condition we will discuss the view of the jurists on usury by the way of increase and the usury by the way of deferment:

a- Usury by the way of increase (*ribā al-faḍl*)

There are several ḥadīths that show the prohibition of usury by way of increase. Abū Sa'īd al-Khudrī (d. 74/693)¹¹⁹ narrated that the Prophet said, “Do not sell gold for gold unless it is same amount for the same amount, and do not make one amount greater than the other. Do not sell silver for silver unless it is same amount and do not make one greater than the other, and do not sell for ready money some of it to be given later”.¹²⁰ In another ḥadīth, the Prophet said, “Gold is to be paid for with gold, silver with silver, wheat with wheat, barley with barely, dates with dates and salt with salt,

¹¹⁹ Abū Sa'īd al-Khudrī (d. c. 74/693): Sa'd Ibn Mālik Ibn Sinān al-Anṣārī, Companion. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, v. 1, p. 289.

¹²⁰ Al-Bukhārī, *al-Jāmi' al-Ṣaḥīḥ*, v. 2, p. 761; Muslim, *Ṣaḥīḥ*, v. 3, p. 1208.

same quantity for same quantity and equal for equal, payment being made on the spot. If these classes differ, sell as you wish if payment is made on the spot.”¹²¹ These ḥadīths show the main varieties of usury, or in other words, usurious articles. The majority of the scholars are agreed that usury by way of increase is prohibited and they also agree that the six articles, which are gold, silver, wheat, dates, barley and salt are usurious, as indicated in the previous ḥadīths.¹²² Some of the Prophet’s companions, such as Ibn ‘Abbās, Usāma Ibn Zayd (d. 54/673),¹²³ Zayd Ibn Arqam (d. c. 68/688),¹²⁴ and ‘Abdullāh Ibn al-Zubayr (d. 73/692),¹²⁵ argued that usury by way of increase is not prohibited,¹²⁶ and they rely on a ḥadīth in which the Prophet said, “There is no usury except in delay”.¹²⁷ The ḥadīth does not say that usury by way of increase is not prohibited, but the Prophet, according to this view, implies permission because we understand from his saying that there is no usury except in delay that usury by way of increase is excluded from the prohibition. This rule is called divergent meaning (*mafhūm al-mukhālafā*),¹²⁸ in Islamic jurisprudence (*uṣūl al-fiqh*). However, there are

¹²¹ Muslim, *Ṣaḥīḥ*, v. 3, p. 1210.

¹²² See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 129; Ibn Qudāma, *al-Mughnī*, v. 6, p. 52.

¹²³ ‘Usāma, Ibn Zayd Ibn Thābit: Companion. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, v. 1, p. 53.

¹²⁴ Zayd, Ibn al-Arqam: companion. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, v. 1, p. 272.

¹²⁵ ‘Abdullāh, Ibn al-Zubayr: Companion; ‘anti-caliph’, 64-73/683-692. See *EI (2)*, v. 1, pp. 54-55.

¹²⁶ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 128; Ibn Qudāma, *al-Mughnī*, v. 6, p. 52; Saleh, *Unlawful Gain*, pp. 26-27.

¹²⁷ Al-Bukhārī, *al-Jāmi‘ al-Ṣaḥīḥ*, v. 2, p. 762; Muslim, *Ṣaḥīḥ*, v. 3, p. 1218.

¹²⁸ Divergent meaning (*mafhūm al-mukhālafā*) may be defined as a meaning which is derived from the words of the text in such a way that it diverges from the explicit meaning thereof. (Kamali, *Principles of Islamic Jurisprudence*, p. 131)

many ḥadīths that show that usury by way of increase is prohibited, and some of them have been mentioned above. The implication of these evidences is *naṣṣ*,¹²⁹ and according to the principles of Islamic jurisprudence a *naṣṣ* implication has priority over the implication of divergent meaning.¹³⁰ Consequently, we would suggest that usury by the way of increase is prohibited, according to Islamic law.

The majority of the jurists are agreed that there is a reason (*'illa*) behind the prohibition and the same reason applies to other articles, which have not been mentioned in the ḥadīth but have the same characteristics as the previous six articles. However, the jurists are not agreed on the reason for the prohibition of these items so that they can find out the other items which have the same reason. Ibn Rushd says:

“The jurists are agreed that neither excess nor delay is permitted in any category, from among the categories mentioned in the tradition of ‘Ubādah Ibn al-Ṣāmit, except what is narrated from Ibn ‘Abbās. The tradition of ‘Ubādah is that he said, “I heard the messenger of Allāh prohibiting the sales of gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, except through equal measure and immediate exchange. Thus, one who increases has taken usury”. This tradition is explicit in the prohibition of excess in (exchange of) the same category of these things.”¹³¹

The jurists, who say that there is a reason for the prohibition of the six types (*anwā'*, single *naw'*), divide the species into two genera (*ajnās*, single *jins*), and the

¹²⁹ *Naṣṣ* means a definitive text or ruling of the Qur'ān or the sunna. (Kamali, *Principles of Islamic Jurisprudence*, p. 93)

¹³⁰ See al-Āmidī, *al-Iḥkām*, v. 3, pp. 106-107. And for more details see also Ibn al-Qayyim, *I'lām al-Muwaqqi'īn*, v. 2, pp. 154-155.

¹³¹ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 129.

types which are under a genus have the same reason, so there are two reasons for the prohibition of usury; the first genus includes two metals which are gold and silver. The second genus includes four commodities which are wheat, dates, barley and salt.¹³²

Before discussing the reasons for the prohibitions according to the majority of scholars, we would like to mention the reason for the view of the minority of scholars who rely on the six types which have been indicated in the above ḥadīths and do not include any other types under the concept of usury. Consequently, according to their view, a type of rice, such as Egyptian rice, can be exchanged with another type of rice, such as basmati rice, in a different amount whether the exchange of them is at the same time or the delivery of one of them is deferred, because rice has not been mentioned in the above ḥadīths or any other ḥadīth which indicates the varieties of usurious types (*anwa' ribawiyya*). The reason is that the doctrine of the Zāhirīs regarding the sources of Islamic law is that analogy (*qiyās*)¹³³ is not acceptable as a source of Islamic law, and the evidence of the majority of the jurists for the prohibition of other species, which have not been indicated in the ḥadīths, is based on of analogy.¹³⁴

¹³² See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, pp. 129-131; Ibn Qudāma, *al-Mughnī*, v. 6, pp. 54-59.

¹³³ Analogy (*qiyās*) is the extension of a *Sharī'a* value from an original case, or *aṣl*, to a new case, because the latter has the same effective cause as the former. The original case is regulated by a given text, and *qiyās*, seeks to extend the same textual ruling to the new case. It is by virtue of the commonality of the effective case or *'illa*, between the original case and the new case that the application of *qiyās* is justified. (Kamali, *Principles of Islamic Jurisprudence*, p. 197; and see Izzi Dien, *Islamic Law*, pp. 51-53)

¹³⁴ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, pp. 129-131; Ibn Qudāma, *al-Mughnī*, v. 6, pp. 54-59.

Ibn Rushd said:

“They [the minority] disagreed about what is besides these expressly mentioned six categories. Some [of the jurists], including the *Zāhirīs*, say, “Excess is prohibited only in each one of these six types and what is besides these, in it excess is not prohibited within the types”. They also said that delay is prohibited in these six types irrespective of the types being similar or different.”¹³⁵

Saleh says,

“The *Zāhirīs*, as a result of their dogmatic rejection of analogy as a way of determining the law, assume that the prohibition of usury applies solely to the six articles quoted in the ḥadīth (gold, silver, wheat, barley, dates and salt) and cannot be extended by way of analogy to other articles.”¹³⁶

However, the majority of scholars, including the four *madhhabs*, consider that analogy is the fourth source in Islamic jurisprudence, and they accept, in general, arguments which are based on it; therefore, the majority of the scholars extend, by way of analogy, the ruling of usury to include other articles or species, but they do not have the same view on the ruling of usury, or in other words, the reason for the prohibition of the usurious articles.

According to the general view of the jurists, usurious articles can be divided into two categories; gold and silver in one category and wheat, barley, dates and salt in the other.¹³⁷

¹³⁵ *Bidāyat al-Mujtahid*, 2003, v. 2, p. 159.

¹³⁶ *Unlawful Gain*, p. 15.

¹³⁷ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, pp. 130-133; Ibn Qudāma, *al-Mughnī*, v. 6, pp. 54-59.

We will begin with the first category or genus, which includes gold and silver. The first view is that the cause of the prohibition relating to gold and silver is that they are measured by weight, which means that things which have the same characteristics, such as iron and copper, are considered as usurious articles. This view is the view of the Ḥanafīs,¹³⁸ and the most common view among the Ḥanbalīs.¹³⁹ The second view, which is supported by the Mālikīs,¹⁴⁰ Shāfi'īs,¹⁴¹ and some of the Ḥanbalīs,¹⁴² is that the cause for gold and silver is that they have the property of being currency.¹⁴³ Ibn Rushd says, "The cause according to them in gold and silver for the prohibition of excess is the exchange of the same commodity as well as their being the most representative currencies and measure of value for non-durable property".¹⁴⁴

The second genus includes four commodities, which are wheat, barley, dates and salt. The cause in the view of the Ḥanafīs and the Ḥanbalīs is that they are measured by volume in the same species.¹⁴⁵ For instance, the exchange of wheat for wheat has to be

¹³⁸ See al-Sarakhsī, *al-Mabsūṭ*, v. 12, p. 113; Saleh, *Unlawful Gain*, p. 16.

¹³⁹ See Ibn Qudāma, *al-Mughnī*, v. 6, pp. 55-56.

¹⁴⁰ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 130.

¹⁴¹ See al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 378.

¹⁴² See Ibn Qudāma, *al-Mughnī*, v. 6, p. 56.

¹⁴³ See Ibn Qudāma, *al-Mughnī*, v. 6, p. 56; Saleh, *Unlawful Gain*, p. 16.

¹⁴⁴ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 130.

¹⁴⁵ See al-Kāsānī, *Badā'i' al-Ṣanā'i'*, v. 5, p. 185; Ibn Qudāma, *al-Mughnī*, v. 6, p. 53; al-Zuḥaylī, v. 1, pp. 326-327.

for the same volume, namely, one *ṣā'*,¹⁴⁶ for one *ṣā'*, so two *ṣā'* for one is usury and prohibited in Islamic law, according to the view that usury by way of increase does not apply for items which are not measured by weight or volume, such as clothes which are measured by size and eggs which are measured by number.¹⁴⁷ The second view, that of the Mālikīs, is that the cause of the second genus is that they are food and stored, according to the Muwaṭṭa',¹⁴⁸ but some other jurists among the Mālikīs prefer to add other condition to foodstuff, and that is that, in addition to being stored, they are essential nutrients.¹⁴⁹ So according to their view, items like iron and cooper are not usurious types because they are not considered as currency, and clothes are not, because they are not a foodstuffs, and aubergines are not, because they are not stored. The third view is that of the Shāfi'īs, who state that the commodities which are in the second genus are foodstuffs, whether they are stored or not.¹⁵⁰ So any kind of food is a usurious species according to this view. Therefore, aubergines would be a usurious item because it is a foodstuff.

¹⁴⁶ *Ṣā'* is a certain measure used for measuring corn, and upon which depend the decisions of Muslims relating to measure of capacity. (al-Khudrawi, *a Dictionary of Islamic Terms*, p. 251)

¹⁴⁷ Al-Zuhaylī, *Financial Transactions*, v. 1, p. 318.

¹⁴⁸ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 131.

¹⁴⁹ See *Ibid.*

¹⁵⁰ See al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 378.

b- Usury by way of deferment (*ribā al-nasī'a*)

The second type of usury is usury by way of deferment. There is a consensus that usury by way of deferment is prohibited in Islamic law, and even Ibn 'Abbās who disagrees with the prohibition on usury by way of increase agrees on this. Ibn Rushd says, "The jurists are unanimously agreed that usury in sales is of two kinds, by way of deferment and by way of increase, except what has been narrated from Ibn 'Abbās about his disagreement with the prohibition of usury by way of increase ...",¹⁵¹ and many jurists report consensus on the prohibition of usury by way of deferment.¹⁵²

One of the differences between this type of usury and the first type, which is usury by way of increase, is the factor of deferment. This factor, also, distinguishes deferred sales and instalment sales from ordinary sales. However, this does not mean that usury by way of increase cannot exist in deferred sales and instalment sales, which are under the concept of sales in general, because usury by way of increase can be involved in the contract of sales. Usury by way of deferment, also, can be involved in the contract of forward sales as well as instalment sales or deferred sales, in general.

Usury by way of deferment is divided into two genera. The first genus, usury by way of increase, includes gold and silver, and the second genus includes wheat, barley, dates and salt. The views of the jurists, in terms of the things which are included under

¹⁵¹ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 129; Ibn Qudāma, *al-Mughnī*, v. 6, p. 52.

¹⁵² See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 129; Ibn Qudāma, *al-Mughnī*, v. 6, p. 52.

these two genera, are the same as their views in connection with the first type, which is usury by way of increase. For instance, according to the Hanafis, the reasons of the first and second genus related to the way they are measured (weight or volume), so iron in this case is under the first genus, because it is normally measured by weight.

The rule of usury by way of deferment is that it is not permissible to exchange between two kinds, which are under the same genus, when one of them is deferred. For instance, it is not permissible to exchange between gold and silver, if the silver is paid now and the gold is paid later on. In that case, the contract would be called usury and it is prohibited in Islamic law. In addition, the exchange of wheat for barley has to be at the same time and a delay of one of them is prohibited and such a delay, again, would be considered as usury because wheat and barley are under the same genus. But a delay of gold or wheat in a contract which is an exchange of gold for wheat is not considered as usury in Islamic law, because they are under different genera, and in this case it is permissible to exchange between them, even if the gold or wheat is delayed.

To conclude the ruling of the genera of usury we will mention some brief examples to illustrate the ruling clearly. First, an exchange of gold for gold may contain usury by way of increase or usury by way of deferment. Second, an exchange of gold for silver may contain usury by way of deferment but not usury by way of increase. Third, an exchange of gold for wheat may contain neither usury by way of increase nor usury by way of deferment.

Moreover, we would like to mention in brief the relationship between banknotes and the species of usury, especially gold and silver. The Mālikīs and Shāfi'īs, who state that the reason for gold and silver being usurious items is because they are currency, consider banknotes under the same reason, Mālik said, "*Lau anna al-nās ajāzū baynahum al-julūd ḥattā takūna lahā sikkatan wa 'aynan la karihtuhā an tubā' bi al-dhahab wa al-wariq naẓirattan*".¹⁵³ This means that Mālik considers leather, which is not a usurious item, in the same way as gold and silver, in terms of the ruling on usury, if people use it to buy and sell, or in other words, it acquires the property of being currency, so banknotes according to this view are considered as usurious items.

According to a resolution of the Islamic *fiqh* academy (under the Muslim World League),¹⁵⁴ gold and silver are the original sources of money and according to the preferred view of jurists, the cause for gold and silver being usurious items is that they are currency, and this cause is applicable to banknotes because they are commonly used today to evaluate commodities and for buying and selling. So they have now become currency. As a result, banknotes are subject to the ruling on gold and silver in terms of being considered as usurious items, and they are also considered in the same way as gold and silver in relation to charity (*zakāt*).¹⁵⁵

¹⁵³ See Mālik, *al-Mudawwanat al-Kubrā*, v. 3, p. 396; al-Miṣrī, *al-Jāmi' fi Uṣūl al-Ribā*, p. 113.

¹⁵⁴ For more details see Ḥasan, *al-Awrāq al-Naqdiyya*, pp. 212-214; al-Sālūs, *al-Nuqūd*, Ibn Munī', *al-Waraq al-Naqdī*, pp. 101-115.

¹⁵⁵ See *Ibid.*

According to the Islamic Fiqh Academy, currencies are considered as different species and under one genus which is the same genus as gold and silver, thus the Saudi riyal is considered as a species and the pound Sterling considered as another species, which means it is permissible to exchange between Saudi riyals and pounds sterling even if they are different amounts, for instance £10 for SR30. However, the payment must be at the time of exchange, so it is not permissible to pay £10 now and SR30 next month. Furthermore, different denominations under the same currency are considered as one species, like the exchange of gold for gold, for instance one note of £5 must be exchanged with five notes of £1, otherwise, it is usury.¹⁵⁶

Now, we will consider the view of scholars regarding interest as practiced in the commercial banks. Interest means a charge for a loan so that if, for instance, a person borrows £200 from a bank he must pay a percentage every year as a charge for the loan, and if the percentage is 5%, he must pay £10 which means that he pays £210 next year. As it has been mentioned, scholars do not differ in terms of the prohibition of usury between one type and another. For example, they do not distinguish between a small sum and a large amount of usury or interest, in terms of the prohibition, so a sum of 5% is as prohibited as a sum of 20%. However, Ibn al-Qayyim differentiates between hidden usury (*ribā khafī*) and manifest usury (*ribā jalī*). He defines manifest usury as usury by way of deferment and hidden usury as usury by way of increase. In his view,

¹⁵⁶ See Ibid.

the degree of prohibition is not the same in both types, but he points out that both types are prohibited in Islamic law.¹⁵⁷

However, there are some contemporary views that reconsider the ruling of usury in Islamic law and claim that a sum for a loan is not always prohibited. We will mention some of these views.

Al-Zuhaylī indicates one of these views as he says:

“Some of those who wish to permit conventional banking interest rely on the argument that their interest payments are not doubled and multiplied, but constitute a low percentage of 4% or 9%. Thus they argue that such low interest rates were not familiar to the Arabs before Islam, and are not covered in the verse “And forbade *ribā*”. We answer this claim by noting that the forbidden *ribā* is not only the *ribā al-jāhiliyya* (doubled and multiplied) mentioned in *surat* Āl ‘Imrān alone, but includes all the types of *ribā* mentioned elsewhere in the Qur’ān and ḥadīth. In this regard, all *ribā al-faḍl* and *ribā al-nasī’a*, including any increase, small or large, is forbidden in loans and sales. This is clear in the verse “But if you repent, then you shall have your principle”,¹⁵⁸ which immediately reinforces Allāh’s saying, “Without inflicting or receiving injustice”¹⁵⁹. Moreover, the “al” in “And he forbade *al-ribā*”¹⁶⁰ refers to the entire genus of *ribā*, which was further explained in the sunna of the Prophet (pbuh), with respect to the types of goods eligible for *ribā*, and the contract that it affects (sales, loans and currency exchange). However, jurists disagree over the criteria for *ribā*, where the Ḥanafīs and Ḥanbalīs make eligibility for *ribā* to storable foodstuffs and monetary numeraires”.

In this regard, it is important to reiterate that the reason for the prohibition of *ribā* is not the potential for exploitation and injustice per se. In fact, that

¹⁵⁷ Ibn al-Qayyim, *I‘lām al-Muwaqqi‘īn*, v. 2, pp. 154-155; Saleh, *Unlawful Gain*, p. 27.

¹⁵⁸ Qur., Al-Baqara, 2:275.

¹⁵⁹ Qur., Al-Baqara, 2:279.

¹⁶⁰ Qur., Al-Baqara, 2:275.

potential is one of the explanations of the wisdom of the prohibition, but it is not attached to the legal restriction, and may not be used for reasoning by analogy since it cannot be objectively measured. Thus, the argument that productive loans cannot be faulted for causing exploitation, and thus are eligible for *ribā*, is an invalid argument. Moreover, we should keep in mind that banks use compound interest, which certainly does belong in the category of “doubled and multiplied” *ribā* or increase. In this regard, we should also note that the claim made by Al-Sanhūrī that Ibn ‘Abbās only forbade *ribā al-jāhiliyya* to the exclusion of *ribā al-faḍl* and *ribā al-nasī’a* is simply wrong.¹⁶¹

There is another view that states that there is a difference between productive and unproductive loans,¹⁶² namely, there is a difference between a person who wants to borrow money to meet his need, and a person who wants to borrow money for investment. The first circumstance, which is the needy person, has been remedied by Islam through charity (*zakāt* and *ṣadaqa*), and the contract of *muḍāraba*. But some people do not borrow money for their need or a mere substance, but do so to invest the money and thereby strengthen the economy of the nation. Consequently, according to the view that Islamic law should distinguish between a productive and unproductive loan, taking interest on a productive loan is permissible, whereas it is not so for an unproductive loan.¹⁶³

However, we have to be aware that the legal prohibition, in terms of the concept of Islamic law, is derived by objective legal measure, and not by the wisdom behind the

¹⁶¹ Al-Zuhayfī, *Financial Transactions*, v. 1, p. 345.

¹⁶² One of the supporter of this view is Dr. Ma’rūf Al-Dawālibī. For more details see al-Zuhayfī, *Financial Transactions*, v. 1, p. 346; Saleh, *Unlawful Gain*, p. 29.

¹⁶³ See al-Zuhayfī, *Financial Transactions*, v. 1, p. 346; Saleh, *Unlawful Gain*, p. 29.

prohibition,¹⁶⁴ which can only be subjective in each case. So, Islamic law categorically prohibits usury, without considering any distinction between productive and unproductive loans.¹⁶⁵

In conclusion, there are many Islamic academies and scholars under the common *madhhabs* in Islamic law who state that interest which is taken due to a loan is prohibited and is considered as usury in Islamic law. The resolution of the Islamic *fiqh* academy,¹⁶⁶ which is under the Organisation of Islamic Conference, states that interest on a loan due to deferment is prohibited and usury in Islamic law, whether the deferment is because the loan contract includes interest or because the borrower cannot pay the loan on time.¹⁶⁷

The resolution of the Islamic Research Academy,¹⁶⁸ states that every kind of interest due to loans is prohibited according to Islamic law and there is no difference

¹⁶⁴ There is a difference between reason (*'illa*) which expressed as objective legal measure and wisdom (*Hikma*) which is expressed wisdom behind the prohibition. To make the point clearer, as some scholars state that the reason for gold and silver is that they are property of being currency, therefore they extent the value to modern banknotes. And regarding to the wisdom, we can consider that usury may contribute an increase of unemployment, because that some rich people will invest their money to lend with interest rather than investing in agriculture, or manufactories or so on to product opportunities of works for the communities. But we can not rely on this wisdom to prohibit something else such as the technology. (see Maududi, *Economic System*, pp. 164-165)

¹⁶⁵ See al-Zuhayli, *Financial Transactions*, v. 1, p. 346.

¹⁶⁶ In the second circle in 1985.

¹⁶⁷ See al-Qaradāwī, *Fawā'id al-Bunūk*, pp. 134-136.

¹⁶⁸ In the second conference in 1965

between consumer and productive loans. Furthermore, there is no difference, in terms of the prohibition, between small and large amounts of interest.¹⁶⁹

Al-Zuhayfī says: “Banking interest is the forbidden usury prohibited in the Qur’ān, the sunna, and the consensus of the companions of the Prophet and the later Muslim nation.”¹⁷⁰

However, banking interest is a current issue; it did not exist during the period of the Prophet and his companions. Al-Zuhayfī may mean that the rules of usury, in Islamic law, which are based on the Qur’ān, sunna and consensus, should be applied to banking interest.

2.2.3.4 Specified time of payments

The factor of deferment distinguishes instalment sales or deferred sales from ordinary sales, and the deferment affects the contract because it may attract a person who cannot pay the price at the time of the contract, so that if the buyer had been required to pay earlier, he would not have made the transaction.

¹⁶⁹ See al-Qaradāwī, *Fawā'id al-Bunūk*, pp. 129-133

¹⁷⁰ Al-Zuhayfī, *Financial Transactions*, v. 1, pp. 348-349

Next, the factor of deferment, also, makes an interrelationship between deferred sales and forward sales; the deferment in deferred sales is for the payment of the price, and in forward sales it is for the delivery of the subject matter. As a result, the ḥadīth shows that the contracting parties must specify the time of delivery as the Prophet said, “Those who paid in advance for fruit must do so for a specific measurement and weight for a specific time”,¹⁷¹

Some jurists state that the contracting parties must specify the time of payment, and for instalment sales they must specify the time of every instalment. So it is not acceptable if the contracting parties do not specify the time of payment. In addition, the contracting parties have to indicate the time accurately; it is not acceptable if they indicate times which vary. For instance, it is not acceptable if the buyer says, “I will pay when my brother comes”, and if he does not know when his brother will come. Some scholars, also, do not accept it if someone says, “I will pay during the harvest”, because this varies, and it is the same if the buyer says, “I will pay during the summer, autumn, winter or spring”, because they are periods of three months and the time is indeterminate.¹⁷²

¹⁷¹ Al-Bukhārī, *al-Jāmi‘ al-Ṣaḥīḥ*, v. 2, p. 781; Muslim, *Ṣaḥīḥ*, v. 3, pp. 1226-1227.

¹⁷² See Ibn Qudāma, *Al-Kāfī*, v. 3, p. 160; al-Ghazālī, *al-Wasīṭ*, v. 3, p. 426.

Some jurists accept the indication of a specific day, such as the 26th of October 2008 or a known day such as the day of ‘Eid al-Fiṭr,¹⁷³ ‘Eid al-Adḥā,¹⁷⁴ or Easter. In addition, it is acceptable to mention a specific month, such as December 2007, and the payment in this case is on the first day of December. Moreover, if the payment is by instalments, it is possible to indicate a specific day in every month, for instance the first day of every month,¹⁷⁵ but the period of the payment must be explained in the contract, for instance, the seller says that the payment is £200 at the beginning of every month for three years beginning from December 2006 until December 2009.¹⁷⁶

¹⁷³ It is the first day after the month of Ramadān.

¹⁷⁴ It is the tenth of *dhu al-ḥijja*.

¹⁷⁵ See al-Ghazālī, *al-Wasīṭ*, v. 3, p. 426; Ibn Qudāma, *al-Kāfī*, v. 3, p. 159.

¹⁷⁶ For more details see Uzjān, *al-Ajal fī ‘Aqd al-Bay’*, pp. 105-108.

Part Three

Deferred sales (*al-bay' al-mu'ajjal*), mark-up sales (*bay' al-murābaḥa*), *īna* sales and *tawarruq* sales

3.1 Introduction

3.2 Deferred sales (*al-bay' al-mu'ajjal*)

3.3 Mark-up sales (*bay' al-murābaḥa*)

3.4 *īna* sales

3.5 *Tawarruq* sales

3.1 Introduction

To study current issues under the principles of Islamic law we should find out the contracts which have been already discussed under the concept of Islamic law, to be guidance for the ruling of the modern issues. So these four types of contract are relevant to instalment sales because they include deferred payment, with the exception of mark-up sales, which may or may not include deferred payment, depending on their form. The thesis discusses some rules related to these contracts, including the definitions, the scholars' views, their forms and so on.

3.2 Deferred sales (*al-bay' al-mu'ajjal*)

3.2.1 Introduction

3.2.2 Definition of deferred sales (*al-bay' al-mu'ajjal*)

3.2.3 Deferred sales (*al-bay' al-mu'ajjal*) from an Islamic point of view

3.2.4 Comparison between deferred sales (*al-bay' al-mu'ajjal*) and forward sales (*bay' al-salam*)

3.2.5 Increasing the price because of deferment

3.2.1 Introduction

Deferred sales (*al-bay' al-mu'ajjal*) are a type of sale contract in Islamic jurisprudence.

Sales, in terms of the time of payment, are divided into three categories:

1- Ordinary sale (*bay' taqlīdī*)

Ordinary sales (*bay' taqlīdī*) are *ḥāl al-badalayn* which means that both delivery of the subject matter (*al-mabī'*) and payment of the price (*al-thaman*) are at the time of the contract; or in other words, there is immediate payment.¹

2- Forward sales (*bay' al-salam*)

Forward sales (*bay' al-salam*) are when the price is immediate (*ḥāl al-thaman*) and the subject matter is deferred (*mu'ajjal al-mabī'*) which means that delivery of the subject matter will come after a specific period of time.²

3- Deferred sales (*al-bay' al-mu'ajjal*)

Deferred sales are when the delivery is immediate and the price is deferred (*mu'ajjal al-thaman*) which means that payment of the price is after a specific period.³

¹ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 125.

² See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, pp. 201-202; Ibn Qudāma, *al-Mughnī*, v. 6, p. 384.

³ See Kamali, *Islamic Commercial Law*, pp. 131-132.

As has been shown, the differences between these three kinds of sales are regarding to the way of payment and delivery. The first type of sale, which is the most common kind of sale between people, is the ordinary sales and the objects of the contract, whether price or subject matter, are be paid now. The second type, which is forward sales, and the third type of sale, which is deferred sales, are different from the first type of sale because one of the objects of the contract is delayed; in the second type, which is forward sales, the delivery of the subject matter is delayed and in the third type, which is deferred sales, the payment of the price is delayed. Sales where both the subject matter and the price are delayed do not fall under the concept of sales but under the contract of sales of debts for debts (*bay' al-dayn*).⁴

	Ordinary sales	Forward sale	Deferred sale
Price	Now	Now	deferred
Subject matter	Now	Deferred	Now

Table 3.1 Comparison between ordinary sales, forward sales and deferred sales

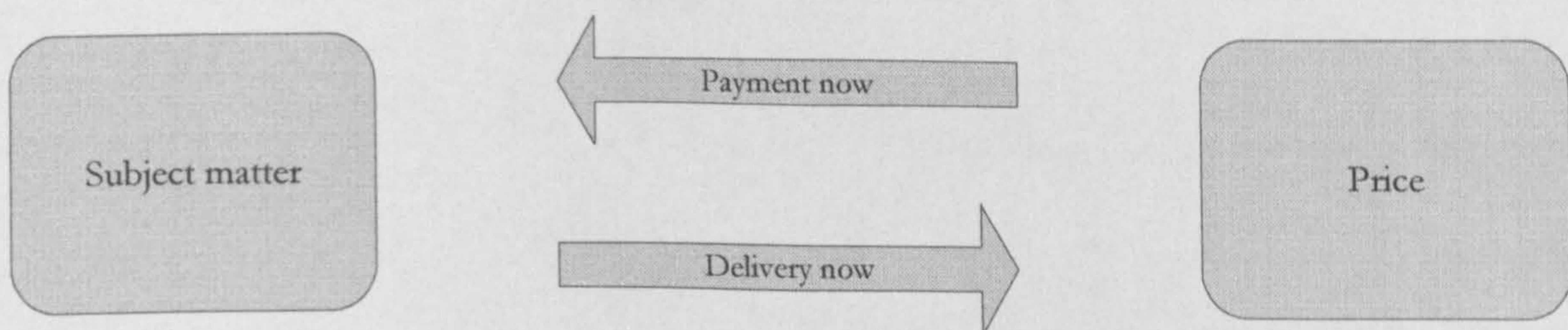


Figure 3.1 Ordinary sales

⁴ For more details regarding to sales of a debt for debt see p. 85 above.

A deferred sale is a contract where the payment of delivery of the subject matter is now,

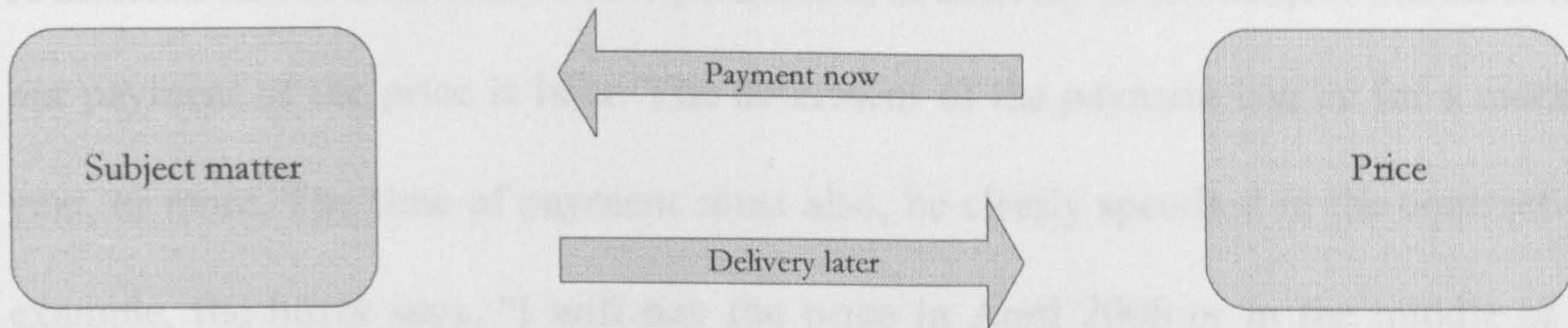


Figure 3.2 Forward sales

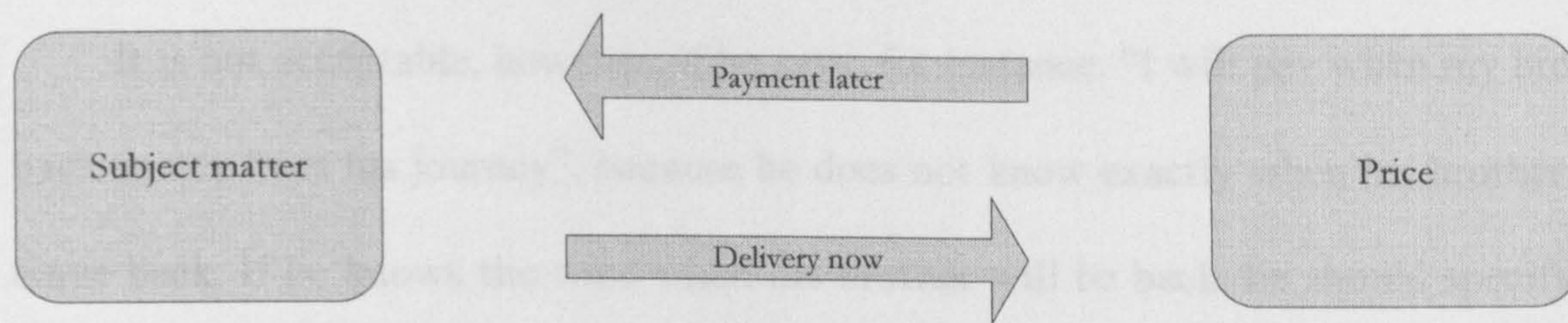


Figure 3.3 Deferred sales

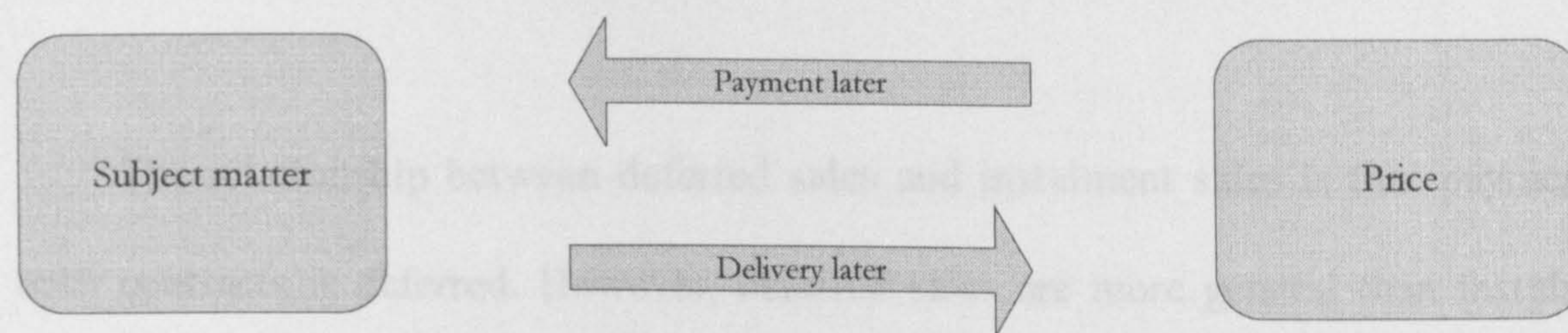


Figure 3.4 sales of a debt for debt

3.2.2 Definition of deferred sales (*al-bay' al-mu'ajjal*)

The Arabic term for deferred sales is *al-bay' al-mu'ajjal*. *Al-bay'* literally means sales and *al-mu'ajjal* is derived from *al-ajal* which means deferment. In common parlance, for instance, *ajjala 'amal al-shay'* means, he plans to do something later.⁵

⁵ See Al-Rāzī, *Mukhtār al-Ṣiḥāḥ*, p. 3.

A deferred sale is a contract where possession or delivery of the subject matter is now, but payment of the price is later. The deferment of the payment can be for a month, a year, or more. The time of payment must also, be clearly specified in the contract. For example, the buyer says, "I will pay the price in April 2006 or in the middle of this year".⁶

It is not acceptable, however, if he says, for instance, "I will pay when my brother back comes from his journey", because he does not know exactly when his brother will come back. If he knows the time when his brother will be back, he should specify the date, rather than depending on a vague formula.⁷

The relationship between deferred sales and instalment sales is that payment in both contracts is deferred. However, deferred sales are more general than instalment sales, because the payment in a deferred sale can be a single sum or divided into more than one instalment, whereas the payment in an instalment sale has to be made in more than one instalment. Consequently, every instalment sale is a deferred sale (*al-bay' al-mu'jja*) but not every deferred sale is an instalment sale.

⁶ See Kamali, *Islamic Commercial Law*, p. 131.

⁷ See al-Ghazālī, *al-Wasīṭ*, v. 3, p. 426.

3.2.3 Deferred sales (*al-bay' al-mu'ajjal*) from an Islamic point of view

Deferred sales, as a general concept, are lawful according to Islamic law. Not only had that, but even the Prophet himself practiced this type of transaction.⁸

According to the general rules of sales, which are derived from the Qur'an verses, there is proof that deferred sales are permissible in Islamic law. The Qur'an says:

“Those who eat *ribā* will not stand (on the day of Resurrection) except like the standing of a person beaten by *satān* (Satan) leading him to insanity. That is because they say: "Trading is just the same as usury (*ribā*)," whereas Allāh has permitted trading and forbidden usury ...”⁹

The verse shows that the usurers made an analogy (*qiyās*) between sales and usury, so why, they ask, if the Qur'an permitted sales did he prohibit usury? However, the Qur'an replies to their claim that the difference is that he has permitted sales and has prohibited usury.¹⁰

As a result, the Qur'an permitted sales, in general, and there is no evidence that says that deferred sales are prohibited. Consequently, deferred sales are under the rule of permitted sale.¹¹

⁸ Al-Bukhārī, *al-Jāmi' al-Ṣaḥīḥ*, v. 3, p. 1068.

⁹ Qur., Al-Baqara, 2:275.

¹⁰ See Ibn Kathīr, *Tafsīr*, v. 1, p. 437.

¹¹ See *Ibid*, v. 1, pp. 446-447.

Moreover, there is another verse which recommends people to write a contract down, whether it is for a sale, loan or so on, especially, if the payment is in the future, to serve as a proof for both parties:

“O you who believe when you contract a debt for a fixed period, write it down ...you should not become weary to write it (your contract), whether it be small or big, for its fixed term, that is more convenient to prevent doubts among yourselves, save when it is a present trade which you carry out on the spot among yourselves, then there is no sin on you if you do not write it down. But take witnesses whenever you make a commercial contract ...”¹²

Ibn Kathīr (d. 774/1373),¹³ states that this verse is a guidance from the Qur’ān to the believers, when they want to enter into any kind of deferred transaction, to write it down to safeguard their money and property.¹⁴ Consequently, the verse covers deferred sales, because this fall under the heading of deferred transactions, and the verse includes any kind of debt which is the result of a loan, forward sale or deferred sale.¹⁵

Moreover, as we have seen ‘Ā’isha reported that the Prophet bought some foodstuff on credit for a limited period and mortgaged his armour for it.¹⁶ So, the ḥadīth shows that the Prophet practiced deferred sales, which means that there is no doubt about its permissibility. Furthermore, the Prophet states that three things have

¹² Qur., Al-Baqara, 2:282.

¹³ Ibn Kathīr: historian and interpreter of the Qur’ān. See *EI (2)* v. 3, p. 817-818.

¹⁴ See Ibn Kathīr, *Tafsīr*, v. 1, p. 446.

¹⁵ See al-Andalosi, *al-Baḥr al-Muḥīṭ*, v. 2, p. 359; Al-Rashīdī, *‘Amaliyyat al-Tawarruq*, p. 55.

¹⁶ For more details see p. 23

blessing in them and one of them is deferred sales.¹⁷ In addition, Ibn Baṭṭāl (d. 449/1056-1057)¹⁸ declared consensus on the permissibility of deferred sales.¹⁹

This evidence conforms to the general rule of business transactions in Islamic law. The rule says that any contract or transaction is permissible in Islamic law, if it does not contain anything prohibited in Islam, such as usury, gambling (*maysir*) or *gharar*.²⁰

3.2.4 Comparison between deferred sales (*bay' mu'ajjal*) and forward sales (*bay' al-salam*)

There is a strong relationship between deferred sales and forward sales. Therefore, some scholars mention forward sales in Islamic law as evidence for the permissibility of deferred sales. There are some similarities and differences between the two contracts, and I will start with the similarities.

¹⁷ Ibn Māja, *Sunan*, v. 2, p. 768.

¹⁸ ‘Alī Ibn Khalaf Ibn ‘Abd al-Malik Ibn Baṭṭāl al-Ash‘arī, ḥadīth scholar. See al-Ṣafadī, *al-Wāfi*, v. 21, p. 56.

¹⁹ See Ibn Ḥajar, *Fath al-Bārī*, v. 4, p. 379.

²⁰ See Kamali, *Islamic Commercial Law*, pp. 66-70; Al-Shanqīṭī, *Dirāsa Shar‘iyya*, v. 1, pp. 97-112.

a- Similarity between deferred sales and forward sales:

1- Deferment in the two contracts

The deferment in deferred sales is that the buyer delays paying the price, whereas in forward sales the seller delays delivering the subject matter.

2- Explanation of the details of price and subject matter.

The buyer indicates the price and the kind of currency in deferred sales, if there is any potential for confusion in this respect, while the seller has to specify clearly the details of the goods in forward sales including the quality, measurement and anything that may affect the price of the subject matter and the desire of the buyer.

	Forward sale	Deferred sale
1	Deferment of subject matter	Deferment of price
2	Description of subject matter	Description of the price

Table 3.2 Similarities between forward sales and deferred sales

b- Differences between deferred sales and forward sales:

1- Possession of the deferment

The buyer defers the price in a deferred sale, whereas it is for the subject matter in a forward sale.

2- Conformation to the rule of Islamic law

Forward sales are against a basic rule in Islamic law which says that a person does not have the right to sell something which he does not own at the time of the contract, since the trader just promises to provide a product to the purchaser at a specific time, as agreed. According to a basic Islamic rule in business transactions the seller has to own the thing which he wants to sell, before he plans to sell it. The Prophet said, "To stipulate a loan combined within a contract of sale is not lawful, nor two transactions to be combined in one contract, nor the profit arising from something which is not in one's charge, nor selling what is not in your possession."²¹ Consequently, a forward sale contract is an exception to this rule.

On the other hand, deferred sales are not against the rules of Islamic business transactions, because they fall under the concept of sales in general and, obviously, sales are permissible in Islamic law.

3- The influence of custom ('*urf*)

Custom ('*urf*) determines the type of currency. For example, in the UK, people use pound sterling for buying and selling. So if the price of an item is 200, custom determines that the currency is pounds sterling. This is for deferred sales.²²

²¹ Al-Tirmidhī, *Sunan*, v. 3, p. 535; al-Nasā'ī, *Sunan*, v. 4, p. 39; Aḥmad, *Musnad*, v. 2, p. 178; al-Ḥākim, *al-Mustadrak*, v. 2, p. 21.

²² See al-Mirdāwī, *al-Inṣāf*, v. 11, p. 134; Ibn Muflīḥ, *al-Mubdi'*, v. 4, p. 34-35; Hasan, *al-Awrāq al-Naqdiyya*, pp. 256-262.

On the other hand, the seller, in forward sales contracts, has to explain the details of the subject matter, especially the characteristics which affect the price.²³

It is narrated by Ibn ‘Abbās that when the Prophet came to Madīna, the people there were paying one and two years in advance for fruit, so he said, "Those who pay in advance for fruit must do so for a specific measurement and weight at a specific time."²⁴

	Forward sales	Deferred sales
1	Deferment of subject matter	Deferment of countervalue
2	Against the rule	Conforms to the rule
3	Not affected by custom	Affected by custom

Table 3.3 Comparison between forward sales and deferred sales

3.2.5 Increasing the price because of deferment from an Islamic point of view.

It has been discussed before that deferred sales are permissible in general, and it has been shown that the Qur’ān, the sunna and the consensus of jurists support this

²³ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 202.

²⁴ For more details see p. 19 above.

permissibility. However, the scholars do not agree on whether increasing the price because of deferment is permissible as well. Some of them say that it is permissible and some others argue that it is prohibited to increase the price just because of deferment.

Before discussing the scholars' views, we will give an example of the issue. Suppose a vendor offers a car to a client for £10,000 as a cash payment or the same product for £12,000 to be paid within two years. It can be seen that the vendor adds £2000 just for the deferment without any other reason. However, we have to know that the negotiation of the offer must be done before engaging in the contract and the parties must choose one of the alternatives in the contract, whether the payment is for cash or in the future. If the contracting parties indicate the two offers in the same contract, the transaction will be null and void and it falls under the concept of two transactions combined in one contract, which was prohibited by the Prophet.

The jurists have two views on this kind of transaction. The majority of the jurists, including the Ḥanafīs,²⁵ the Mālikīs,²⁶ the Shāfi'īs,²⁷ the Ḥanbalīs,²⁸ and many other jurists,²⁹ state that increasing the price due to deferment is permissible in Islamic law,

²⁵ See al-Zayla'ī, *Tabyīn al-Ḥaqā'iq*, v. 4, p. 78.

²⁶ See al-Nafrāwī, *al-Fawākih al-Dawānī*, v. 2, p. 99.

²⁷ See al-Nawawī, *Sharḥ Muslim*, v. 10, p. 158.

²⁸ See Ibn Taymiyya, *Fatāwā*, v. 29, p. 499.

²⁹ See al-Mubarakfūrī, *Tuḥfat al-Aḥwadhī*, v. 4, pp. 357-359; Al-Shawkānī, *Nayl al-Awtār*, v. 5, pp. 249-250.

and the vendor can offer more than one price to the client whether for immediate payment or deferred payment, as long as the negotiation on the way of payment has been discussed before engaging in the actual contract, but when they plan to engage in the actual contract, they have to take a decision on one of these prices and agree on the time of payment accurately. Otherwise, the contract is null and void according to Islamic law. So according to this opinion the contracting parties have the freedom to discuss the price and the time of payment, but when they want to engage in the contract, they have to choose only one price. This view appreciates that the time or deferment can affect the price of the product, because, according to this view, paying the price now is better than paying the money in the future, and traders, in general, prefer to have the money now rather than later on, as long as the price is the same.

In the following paragraphs, some views of the jurists will be cited to show their appreciation of the changing of the price because of the time, which would mean that increasing the price because of the deferment is not prohibited.³⁰

According to some Ḥanafī jurists, the price in the future is of less value than the price now,³¹ so the person who wants to buy something finds that he pays less if he wants to pay now, compared to the payment in the future. In addition, al-Shāṭibī (d.

³⁰ For more details see al-Misrī, *Bay' al-Taqsīt*, pp. 39-43.

³¹ See al-Sarakhsī, *al-Mabsūṭ*, v. 13, p. 35.

790/1388)³² indicates that deferment normally increases the price because the seller will not prefer to sell a product for money in the future unless he gets something more, which is extra money. If there is no difference in the price, he would prefer the payment to be now.³³

Some Mālikī jurists mention that deferment accounts for a share of the price, which means that the more delay there is, the higher the price will normally be,³⁴ and they indicate that if someone wants to sell something which he has bought on a deferred payment basis as a mark-up contract, he has to explain that to the buyer before they agree upon the contract. The reason for this, in their view, is that the deferment has a share of the price, which means that the original price of the subject matter now is less than the price in the future.

Moreover, al-Shāfi'ī implies that deferment affects the price of products and more delay can result in the product being more expensive.³⁵ Furthermore, the Ḥanbalī jurists indicate that deferment has a share of the price of the subject matter.³⁶

³² Al-Shāṭibī, Ibrahīm Ibn Mūsā: Andalusian scholar of Islamic jurisprudence and Mālikī jurst. See *EI* (2), v. 9, p. 364.

³³ See al-Shāṭibī, *al-Muwāfaqāt*, v. 4, p. 42.

³⁴ See al-Nafrāwī, *al-Fawākih al-Dawānī*, v. 2, p. 99.

³⁵ *Al-Umm*, v. 3, p. 73.

³⁶ See Ibn Taymiyya, *Fatāwā*, v. 29, p. 499; al-Miṣrī, *Bay' al-Taqsīf*, pp. 39-43.

The above view shows that the scholars accept an increase of price due to deferment. They indicate various reasons for this: they say that payment now is better than payment later on; they state that traders, normally, prefer payment now if the price will be the same in the future, therefore they will sell the product to the people, who want it if they pay in the future. The scholars seem to assume that the most common reason to offer a deferred sale is to obtain more profit, and that otherwise traders will not offer deferred sales, if they can sell the product for an immediate payment. Although this is a possible reason, there are some other very significant reasons for traders to offer deferred sales to their clients.

First of all, they sometimes offer deferred sales to obtain more clients and a wider distribution of their products, because they will attract people who cannot pay the price of the product now, or people who do not want to pay now, so in the end the traders will obtain more profit without increasing the price. In addition, some traders agree to sell the product for a payment in the future in case the price of their products may change in the future. There are many examples of how the prices of some products have decreased over time, such as cars, mobile phones and some electronic products. To make the point clearer, let us take an example. Company A is a car trading company which has many cars which were produced last year, for instance (2005). Then the cars of the present year, instantly (2006) are released. People, normally, prefer the cars of this year rather than the cars of previous years if the price is the same. So the company may accept to sell the cars of previous years by instalment rather than reducing the

price, in order to attract people to buy them; paying by instalment is an advantage for the cars of last year (2005) and may attract some to buy them rather than the car of the present year (2006). Therefore, it is not true that the only reason for the traders to accept deferred sales is to obtain more profit.

A minority of jurists state that it is not permissible to increase the price due to deferment and the vendor has to offer the same price for the product whether the payment is now or in the future. This school of thought does not distinguish between discussing the price before or in the contract, and holds such a contract to fall under the concept of two transactions in one. This opinion is supported by some scholars.³⁷ Some of the jurists who support the above opinion state that increasing the price just because of delaying the time of payment is not acceptable according to the Islamic perspective because of the time delay involved, since usury is prohibited in Islamic law. The relationship between usury and increasing the price of the product due to the deferment that usury is a loan with extra sum, and the extra sum is due the time, namely the borrower in the contract of loans pays more than what he has borrowed, as a price of using the money for a specific period. For instance, A borrows £10,000 from B for two years and B charges A £2,000 for the loan, meaning that A would pay £12,000 after two years. The reality of increasing the price due the deferment is for the same purpose, because the trader increases the price of the product just for the deferment, and the

³⁷ Such as, Zayn al-Dīn ‘Ali Ibn al-Ḥusayn, al-Nāsir, al-Manṣūr bi Allāh, and among contemporary scholars, Muḥammad Nāsir al-Dīn al-Albani, and ‘Abd al-Raḥmān ‘Abd al-Khāliq. (Al-Mubārakfūrī, *Tuḥfat al-Aḥwadhī*, v. 4, p. 359; ‘Abd al-Khāliq, *al-Qawl al-Faṣl*, pp. 28-32)

difference between the price now and the price with deferred payment is the same as the charge for the loan. For instance, A offers a car for £10,000 to be paid now or for £12,000 to be paid within a period of two years, so the difference between the price now and the price after two years is £2,000. Consequently, the result of the two contracts is the same because both the borrower and the client pay an extra £2,000 and the purpose is also the same, namely, charging for time.³⁸

However, this is not enough of a reason to say that increasing the price due to deferment falls under the concept of usury. When we look at the principles of usury, according to Islamic law, we find that the jurists indicate that some goods are considered usurious objects (*aṣnāf ribawiyya*), which means that exchange between them has to take account of the ruling of usury which is hand to hand for some of them and in some cases the exchange has to be for the same amount. However, for things which are not under this category or are not classed as usurious objects, the same ruling does not apply, which means it is permissible to exchange between them whether hand to hand or not and in the same amount or not. Indeed, the Prophet said, “When the varieties are different you may sell as you want.”³⁹

To clarify the point, for instance, gold is one of the usurious objects, and it is not allowed to exchange between gold and gold if one quantity is more than the other, and

³⁸ ‘Abd al-Khāliq, *al-Qawl al-Faṣl*, pp. 28-32.

³⁹ For more details regarding to the ruling of usury by way of deferment see p. 105 above.

if anyone does so, the contract will be prohibited and the transaction will be usury according to Islamic law. It can be seen that time is not an issue in this type of contract. At the same time, if one of them is to be received in the future, the transaction is prohibited, even if the amount is the same. As can be seen, the contract does not contain any charge for the time; in addition, the two amounts of gold are the same in that case. However, if the exchange is between gold and another product, such as a car, it is acceptable for the gold to be paid in the future when the car is delivered now and no one can say it is usury. As a result, the price of the time may not be the reason for the prohibition of usury.

The proponents of the first opinion support their view with many pieces of evidence:

1- The Qur'ān says:

“Those who devour usury (*ribā*) will not stand except as stands one whom the Evil one by his touch hath driven to madness. That is because they say: “trade (*bay'*) is like usury,” but Allāh hath permitted trade and forbidden usury.”⁴⁰

The verse distinguishes between usury and sales or trade; usury is prohibited whereas sales are not prohibited. Also, the word trade or sales is general (*'amm*), which means that any kind of sale is permissible unless there is authoritative evidence to show that it is not permissible. Therefore, deferred sales (*al-bay' al-mu'ajjal*) are permissible, whether the trader increases the price because of the deferment or keep the price the same as for immediate payment, and there is no authoritative evidence to

⁴⁰ Qur., Al-Baqara, 1:275.

show that increasing the price due to the delay is prohibited according to Islamic law.⁴¹ Moreover, they mention all the evidence which comes under the ruling of deferred sales in general, such as another verse which is, “O who you believe, when you contract a debt for a fixed period, write it down ...”,⁴² and the ḥadīth which shows that the Prophet himself practiced deferred sales.⁴³ These evidences show that deferred sales are permissible, in general. Although they do not indicate an increase in the price due to the deferment, according to this school of thought, the issue of increasing the price still falls under the general umbrella of deferred sales, which are generally allowed in Islamic law. As a result, the same ruling applies, which is the permissibility of the transaction.

In addition, according to the rule regarding usury in Islamic law, it is permissible to exchange between two things which are not of the same kind or species. The Prophet said, “Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, same for same, weight for weight, but if the goods are of different types, you can sell as you want, provided it is hand to hand”.⁴⁴ For example, gold for gold has to be the same in quantity and exchanged at the same time; gold for silver has to be exchanged at the same time, but it is

⁴¹ See al-Turkī, *Bay‘ al-Taqsīt*, pp. 210-213; al-Miṣrī, *Bay‘ al-Taqsīt*, pp. 43-44.

⁴² Qur., Al-Baqara, 2:282.

⁴³ For more details see p. 23.

⁴⁴ For more details see p. 98.

permissible for the quantity to be different; but if two things are different in kind and species, such as money for wheat it is permissible for them to be exchanged at different times and in different quantities. Therefore, if the subject matter and the price are different in kind and species, the contract is lawful whether the trader increases the price or not.

Furthermore, there is a ḥadīth that shows that it is not prohibited to sell something with an extra sum in the future. It is narrated by ‘Abdullāh Ibn ‘Amr Ibn al-‘Āṣ (d. 65/684)⁴⁵ that the Prophet commanded him to equip an army, but when the camels were insufficient, he commanded him to keep back the young camels of charity (*ṣadaqa*). He said. “I was taking a camel to be replaced by two when the camels of charity came”.⁴⁶

The ḥadīth shows that it is permissible to buy something for an extra sum in the future, because the Prophet agreed to buy one camel for two to be paid in the future when the camels of charity came. Although that the ḥadīth does not mention the quality of camels, which were borrowed and repaid, in the absence of any indication to the contrary. It seems likely that camels are generally the same, and normally, two camels are more expensive than one. If there was any difference

⁴⁵ ‘Abdullāh Ibn ‘Amr Ibn al-‘Āṣ: companion. See Ibn Ḥajar, *al-Iṣāba*, v. 4, p. 192.

⁴⁶ Abū Dāwūd, *Sunan*, v. 3, p. 241; al-Ḥākim, *al-Mustadrak*, v. 2, p. 65; al-Bayhaqī, *Sunan Kubrā*, v.5, p. 287. Ibn Ḥajar says, “the reporters of the Ḥadīth are trusted”, and that means that it is authentic (*ṣaḥīḥ*). (Ibn Ḥajar, *Bulūgh al-Marām*, p. 295)

between the camels which were borrowed and the camels which were repaid the reporter should have indicated it in the ḥadīth.⁴⁷ Moreover, this kind of contract does not fall under the theory of usury because the Prophet repaid a different amount, namely, two camels for one, and according to the theory of usury the buyer should repay the same amount if they are the same kind of goods namely, camels. So, the rule of usury has not been applied in this contract.

Some scholars who support the first opinion state that sometimes deferred sales are necessary (*ḍarūra*) or needed (*ḥāja*)⁴⁸ for some people who want to buy a home or car or anything they need. Since taking a loan for an extra sum is prohibited in Islam, the only way to acquire these things is to buy them by deferred sales. Sellers, normally, will not favour payment in the future unless they find it more profitable; therefore they increase the price as a condition of accepting payment in the future. So this kind of contract may be a solution for people who do not want to be involved in something prohibited in Islam, i.e. usury.

Kamali says,

“The question of whether deferment can be reciprocated by an increase in price, or the performance of a task or service, has drawn different responses from commentators. Although many are inclined to regard such increase as

⁴⁷ See al-Ṣan‘ānī, *Subul al-Salām*, v. 3, pp. 43-44; al-Turkī, *Bay‘ al-Taqsīt*, pp. 215-218.

⁴⁸ The difference between necessity (*ḍarūra*) and need (*ḥāja*) that the things which detect the five necessity (*al-ḍarūrat al-khams*), but need (*ḥāja*) may not detect the five necessity (*al-ḍarūrat al-khams*), but may make people in trouble if they do not have money. (See al-Shāṭibī, *al-Muwāfaqāt*, v. 2, pp. 8-11; and for more details see also Izzi Dien, *Islamic Law*, pp. 82-86)

usury, there is authority in the sunna in support of its validation. The evidence quoted in this connection is a ḥadīth, reported by Ibn ‘Abbās, concerning a discount granted on a loan that is paid back prior to maturity (*da' wa ta'ajjal*). It is thus reported that the Prophet granted permission for period loans to be recovered ahead of their stipulated period, and the debtors were allowed to pay less because of early repayment. The conclusion has thus been drawn, by means of analogy, that if early repayment can engender a discount in a period loan, a deferred payment of price (*al-thaman*) can similarly bring about an increase in the price because of the deferment”.⁴⁹

There are, however, significant differences between increasing the price due to deferment and the issue of a discount on a loan that it is paid back prior to maturity. The first difference is that deferred sales come under the concept of sales whereas the discount on a loan (*qard*) that is paid back prior to maturity is under the concept of loans (*qurūd*), and according to Islamic law it is permissible to obtain a profit on sales while it is not permissible to do so in a loan (*qard*) contract. Moreover, the scholars do not agree on the prohibition of increasing money due to deferment in deferred sales, but they all agree that it is prohibited to pay more as a price for time in a loan contract, which would be usury according to Islamic law.

Those who regard an increased price in a case of deferment as impermissible cite several pieces of evidence; the Prophet prohibited engagement in "Two transactions combined in one". The ḥadīth means, according to holders of this view, offering two prices for the same product; the first price for an immediate payment, and another price which is more expensive for payment in the future. Holders of this opinion do not distinguish between indicating the offers before or within the contract, because the

⁴⁹ Kamali, *Islamic Commercial Law*, pp. 134-135.

ḥadīth prohibits two transactions in one without mentioning whether the prohibition is within the contract or before. Moreover, Simāk (d. 123/741),⁵⁰ who was one of the reporters of the ḥadīth, indicates, with regard to the meaning of two transactions in one, that the seller offers two prices, one of them for cash payment and the second price for deferred payment, and according to this school of thought, Simāk did not distinguish between agreement before or within the contract. This means it is not permissible to offer two prices for the same product, and this kind of contract is under the concept of two transactions combined in one, which is prohibited according to Islamic law.⁵¹ The reason for mentioning the Simāk's view in the meaning of the ḥadīth is that the reporter of the ḥadīth knows about what he reports more than any scholar does, or in other words, his definition or explanation has priority over the other scholars' definition,⁵² and the above definition, which is by Simāk, is under this concept.

In addition, they mention the view of 'Abdullāh Ibn 'Abbās, who says, "*Idhā istaqamta bi naqd wa bi'ta bi naqd falā ba's wa idha istaqamta bi naqd wa bi'ta bi nasi'a falā, innamā dhālika wariqun bi wariq*".⁵³ They interpret this to mean that if someone evaluates the price of something now and sells it for more than that for

⁵⁰ Simāk, Ibn Ḥarb Ibn Aus al-Dhuhfī al-Bakrī (d. 123/741): Kufan jurist. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, v. 1, p. 332.

⁵¹ 'Abd Al-Khāliq, *al-Qawl al-Faṣl*, p. 44.

⁵² But that does not mean that his view has the priority too.

⁵³ See al-Ṣan'ānī, *al-Muṣannaf*, v. 8, p. 236.

payment in the future, it is prohibited and it is just money for money, which means that this contract is another way of engaging in usury.

‘Abd al-Khāliq claims that many scholars, including Muhammad Ibn Sīrīn (d. 110/728),⁵⁴ Shurayḥ (d. 76/695-6),⁵⁵ al-Shāfi‘ī, Aḥmad Ibn Ḥanbal (d. 241/855)⁵⁶ and Ibn Ḥazm (d. 456/1069),⁵⁷ support this opinion.⁵⁸ He relies on a citation from Ibn Ḥazm, which is that Abū Hurayra said that the Prophet said that if a seller engages in two transactions combined in one, he has two choices, the lower price (*awkasuhumā*) or usury.⁵⁹ The ḥadīth means that the trader has to accept the price of immediate payment, which is, normally, lower than the deferred payment. Otherwise, he is engaging in usury which is prohibited in Islamic law. ‘Abd al-Khāliq indicates the explanation of Ibn Sīrīn of the meaning of two conditions in a sale; for example, if someone says, “I will sell something to you for ten to be paid within a month and if you do not pay I will charge you another ten for the next month; then, Shurayḥ said, “The seller has to accept the lower price and the longer time”.⁶⁰ That means, for example if

⁵⁴ Ibn Sīrīn: Basran faqīh. See *EI* (2), v. 3, pp. 947-948.

⁵⁵ Abū Umayya al-Kindī: an early judge of Kūfā. See *EI* (2), v. 9, pp. 508-509.

⁵⁶ Aḥmad Ibn Ḥanbal: founder of the Ḥanbalī *madhhab*, and compiler of ḥadīth. See *EI* (2), v. 1, pp. 272-277.

⁵⁷ Ibn Ḥazm, ‘Alī: Andalusian Zāhirī scholar. See *EI* (2), v. 3, pp. 790-799.

⁵⁸ See ‘Abd Al-Khāliq, *al-Qawl al-Faṣl*, p. 31.

⁵⁹ Abū Dāwūd, *Sunan*, v. 3, p. 373; al-Ḥākim, *al-Mustadrak*, v. 2, p. 52; al-Bayhaqī, *Sunan Kubrā*, v. 5, p. 343.

⁶⁰ See ‘Abd Al-Khāliq, *al-Qawl al-Faṣl*, p. 30.

he offers £10 for a month or £15 for two months, he has to accept £10 for two months, and Aḥmad Ibn Ḥanbal said that this contract is null and void.

In addition, he also cites an interpretation by al-Shāfiʿī of the meaning of two transactions combined in one: “It is when a person says: I will sell something to you for a thousand in cash or for two thousand to be paid within a year”.⁶¹

It can be seen that ‘Abd al-Khāliq indicates these scholars’ views without explaining whether the jurists mean that the prohibition includes the time of negotiation before engaging in the contract, or not.

First of all, let us start with Ibn ‘Abbās. Ibn Abī Shayba (d. 235/849)⁶² reports that if someone says that the price of his goods is so and so as a cash payment or so and so (different from the first price) if the payment is deferred, Ibn ‘Abbās, Ṭāwūs, (d. c. 110/728)⁶³ ‘Aṭā’, (d. 114/732)⁶⁴ Ḥammād, (d. 179/795),⁶⁵ al-Ḥakam (d. 113/731),⁶⁶ and

⁶¹ *Al-Qawl al-Faṣl*, p. 30.

⁶² Ibn Abī Shayba Abū Bakr ‘Abdullāh Ibn Muḥammad Ibn Abī Shayba: kufan jurist and compiler of ḥadīth. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, v. 1, p. 445.

⁶³ Ṭawūs, Ibn Kaysān al-Ḥimyarī: Yamani jurst. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, v. 1, p. 377.

⁶⁴ ‘Aṭā’ Ibn Abī Rabāḥ: Makkan jurist. See *EI (2)*, v. 1, p. 730.

⁶⁵ Ḥammad Ibn Zayd Ibn Dirham al-Azdī: Basran jurist. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, v. 1, p. 197.

⁶⁶ Al-Ḥakam Ibn ‘Uṭayba al-Kindī: Kufan jurist. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, v. 1, p. 192.

Ibrahīm (d. 96/715)⁶⁷ said that it is acceptable if the contracting parties are satisfied and they agree on one of the two prices. This shows the paradox between the first interpretation and this report, and this clearly confirms that there is a difference between the two issues, namely, indicating two prices in the same contract and negotiation before the contract. The first view, which is prohibition, concerns the indication of the two prices in the contract, while the second view, which is permissibility, concerns negotiation before the contract, and this is agreed on by the majority of the jurists.⁶⁸

According to Ibn Ḥazm, (d. 456/1069),⁶⁹ the replies of Ibn Sīrīn, (d. 110/728)⁷⁰ Shurayḥ (d. 76/695-696)⁷¹ and Aḥmad Ibn Ḥanbal means that, if someone sells something for £10 to be paid within a month then the buyer asks for extra delay and the seller extends the time for another month for an extra £10, this form of transaction is under the concept of usury (*ribā*) in Islamic law, and the circumstance is different from the issue which we are discussing. Therefore, scholars may have different views on increasing price due to deferment.⁷²

⁶⁷ Ibrahīm al-Nakha'ī: Kufan jurist. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, v. 1, p. 46.

⁶⁸ For more details see al-Rashīdī, *'Amaliyyat al-Tawarruq*, p. 79.

⁶⁹ Ibn Ḥazm: Andalusian Zāhirī scholar. See *EI (2)*, v. 3, pp. 790-799.

⁷⁰ Ibn Sīrīn: Basran jurist. See *EI (2)*, v. 3, pp. 947-948.

⁷¹ Abū Umayya Shurayḥ al-Kindī, an early kufan judge. See *EI (2)* v. 9, pp. 508-509.

⁷² For more details see al-Ṣan'ānī, *al-Muṣanaf*, v. 8, pp. 136-137; al-Rashīdī, *'Amaliyyat al-Tawarruq*, p. 74.

Moreover, the majority of scholars state that it is prohibited to offer two prices due to a change in the time of payment, but at same time, the scholars from among the four *madhhabs* (the Ḥanafīs, the Mālikīs, the Shāfiʿīs and the Ḥanbalīs) accept that this may be done before engaging in the contract. And the scholars whom ‘Abd al-Khāliq indicates do not declare that it is prohibited to offer two prices before the contract; moreover, there is a clear difference between before and during the contract, which is that there is no commitment by the contracting parties before, so they can change their minds at any time, whereas, after the contract, both of them have to fulfill the contract.⁷³

To sum up, the above citations do not make sufficiently clear the jurists’ view regarding the discussion of the prices and the period of the payment before engaging in the contract; therefore they are not enough evidence to support the second opinion.

We would like to show Dr. al-Zuḥaylī’s view on this issue:

The Shāfiʿīs, Ḥanafīs, Mālikīs, Ḥanbalīs, Zayd Ibn ‘Ali (d. 122/740),⁷⁴ al-Mu’ayyad bi Allāh (d. 411/1020-1021)⁷⁵ and the majority of jurists ruled it valid to sell an object immediately, with a deferred price –possibly paid in instalments- greater than its cash price. They ruled these sales valid as long as the contract is independently specified as such, and contains no ignorance as in the case of two sales in one. Ibn Qudāma said: “it is agreed that sale with a deferred price is not forbidden, and it is not reprehensible”. Thus, if

⁷³ See al-Rashīdī, *‘Amaliyyat al-Tawarruq*, p. 49/62-79.

⁷⁴ Zayd, Ibn ‘Alī (d. 122/740): eponymous ‘founder’ of the Zaydī sect and presumed author of the *majmū’ al-fiqh*. See *EI (I)*, v. 4, pp. 1193-1194.

⁷⁵ Aḥmad Ibn al-Ḥusayn al-Ḥasanī: Sharīf and Zaydī jurist. See al-Qazwīnī, *al-Tadwīn*, v. 2, p. 167.

an agreement is reached to purchase a machine or commodity for 1,100 with a deferred price – possibly paid in instalments – despite its cash price being 1,000, the sale is valid even if two prices (the cash price and the instalment price) are mentioned during bargaining, but one of them is used finally to conclude the contract. However, consider the case where the seller makes the single offer: “I sell to you for 1,000 cash, or 1,100 in instalments”, and the buyer says: “I accept”, without specifying which of the two contracts he wants. In this case, the contract is invalid for the majority of scholars, and defective for the Ḥanafīs, due to its containing ignorance (*jahāla*). Some of the Zaydīs ruled that the sale of an item for (a deferred sale) more than its cash price is forbidden, due to deferment.

In reality, sales with a deferred price, possibly paid in instalments, are different from usury, even though they are similar in the increase of the price due to deferment. The difference is that Allāh has permitted sales to meet man’s needs, and has forbidden usury since the increase is purely due to deferment of payment. Moreover, usury is an increase in the genus of what one of the two parties to the contract pays in return for deferment. For example, an exchange of one container of wheat for one and a half containers of wheat to be paid later, or a loan of 1,000 *Dirhams* to be paid back as 1,100 in a few months are forbidden usury. However, in a sale with a deferred price, or a price paid in instalments, the object of sale is a commodity the value of which is 1,000 currently, and 1,100 in a few months. This is not usury, but it is an ease in sales, since the buyer receives the merchandise, and not money. Thus, what the buyer pays is not of the same genus as what he receives. It is well known that any good is preferred and has more value currently than the same good deferred to be delivered in the future. Islamic law does not conflict with the nature of things in this case, since the object for a price to be paid in instalments is sacrificing a benefit in order to make the object available to the person who is buying it with a deferred price. This sacrifice is made due to the suspension of delivery of the price; thus, the increase in the deferred price may be viewed as compensation to the seller”.⁷⁶

Furthermore, we would like to show the resolution of the Islamic *Fiqh* Academy (IFA) regarding the increase of the price due to the deferment. They say, “It is

⁷⁶ Al-Zuhayfī, *Financial Transactions*, v. 1, pp. 119-120.

permissible to increase the price of the deferment more than the price of the goods now.”⁷⁷

3.3 Mark-up sales (*bay‘ al-murābaḥa*)

3.3.1 Introduction

3.3.2 Concept of mark-up sales (*bay‘ al-murābaḥa*)

3.3.3 Mark-up sales (*bay‘ al-murābaḥa*) according to the jurists’ point of view

3.3.4 Financing by mark-up sales (*bay‘ al-murābaḥa*)

3.3.1 Introduction

Mark-up sales (*bay‘ al-murābaḥa*) are types of transactions which fall under the category of contracts of sales (*‘uqūd al-bay‘*) in Islamic law. They are examples of trust sales (*buyū‘ al-amāna*) in Islamic law. In this kind of sale, the purchaser trusts the seller’s word regarding the detail of the price (*al-thaman*) he has paid for the goods. There are three types of sale under the concept of trust sales.⁷⁸ The first contract is

⁷⁷ For more details regarding to increasing the price due to deferment see al-Miṣrī, *Bay‘ al-Taqsīf*, p. 118; Usmani, *Buḥūth fī Qaḍāya Fiqiyya Mu‘āṣira*, pp. 12-15.

⁷⁸ See al-Zuḥaylī, *Financial Transactions*, v. 1, p. 353.

named *muwāḍa'a* which means that the seller resells a product which he has already bought for less than what he has paid. For instance, the seller says that he bought a car for £1,100, and he is willing to resell it for £100 less than the original price, i.e. £1000.⁷⁹ The second type is *tawliya*. It means that the seller sells the item for the same price that he has paid, with no profit or loss. For example, the seller says that he bought the car for £1,100 and he would like to offer it for the same price which he paid.⁸⁰

The third and most common type is mark-up sales, which is opposite in meaning to *muwāḍa'a* because the seller adds a mark-up sales as profit on the capital.⁸¹

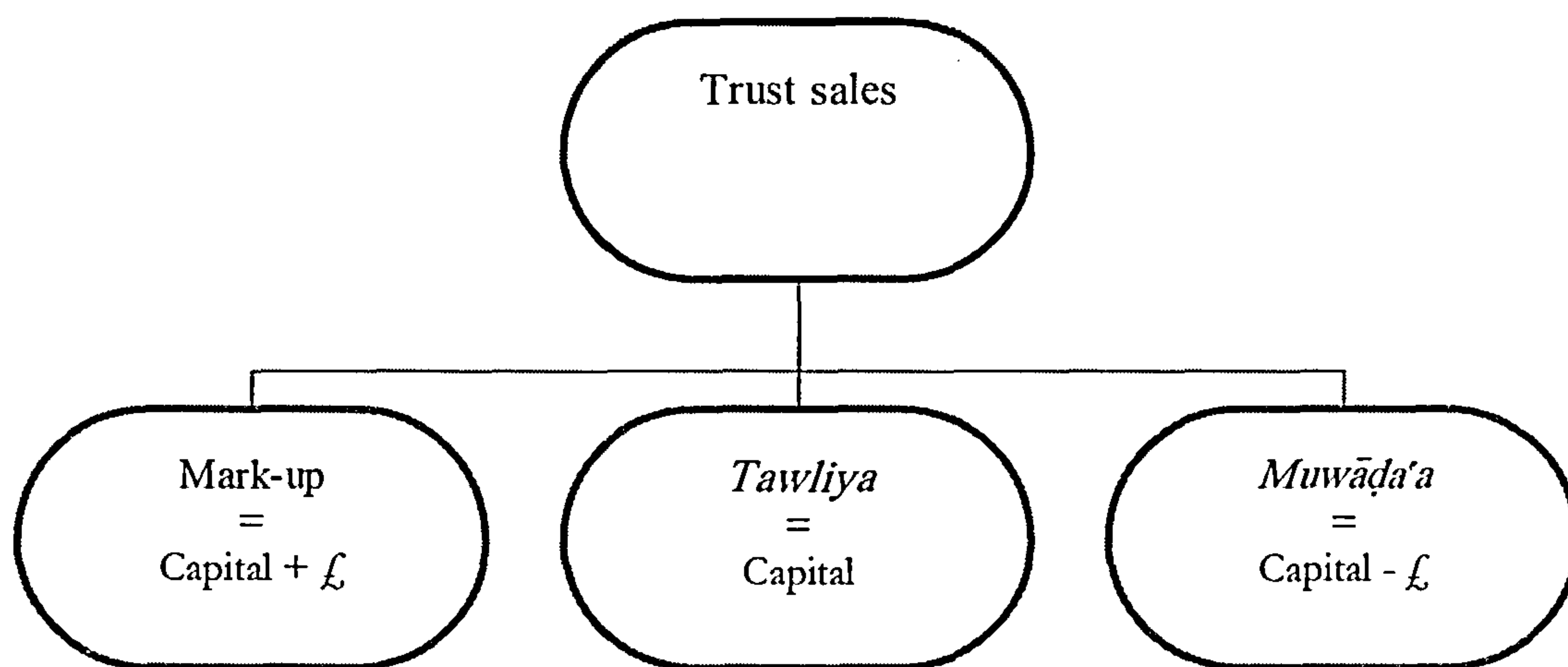


Figure 3.5 Types of trust sales

⁷⁹ See Ibid, p. 354.

⁸⁰ See Ibid, p. 353.

⁸¹ See Ibid; Schacht, *an Introduction to Islamic Law*, pp. 153-154.

3.3.2 The Concept of mark-up sales (*bay' al-murābahā*)

Mark-up sales are an Arabic term which is derived from the root *ribh*, which literally means profit. If a person *rabiḥa* £100 it means that he made a profit of £100.⁸²

However, mark-up sales are a particular kind of sale where the seller expressly mentions the cost he has incurred in obtaining the sold commodity, and sells it to another person by adding some money thereon.⁸³

Mark-up sales, as a traditional *fiqh* term, means that the seller declares the capital of an item, which he has bought, to a buyer and he stipulates an additional sum as profit.⁸⁴ For example, the seller says that the product cost him £1000 and he would like £200 extra to the capital, as profit. Consequently, the end price of the goods is £1,200. It can be seen that the seller declares the capital and the amount of the profit which he wants to make. This kind of sale therefore involves extra information compared to ordinary sales in Islamic law.⁸⁵

⁸² See Ibn Manẓūr, *Lisān al-'Arab*, v. 2, pp. 442-443.

⁸³ See Usmani, *an introduction to Islamic Finance*, p. 41.

⁸⁴ See Ibn Rushd, *Bidāyat al-Mujtahid*, 2003, v. 2, p. 256; Ibn Qudāma, *al-Mughnī*, v. 6, p. 266.

⁸⁵ Al-Zuhayfī, *Financial Transactions*, v. 1, p. 353.

The reason for using the term trust sale is that the purchaser has to trust the seller's declaration of the cost of the product.

3.3.3 Mark-up sales (*bay' al-murābaḥa*) from the jurists' point of view

Mark-up sales, in general, are lawful according to the majority of jurists of Islamic law, including the four *madhhabs* (the Ḥanafī, the Mālikī, the Shāfi'ī and the Ḥanbalī). Al-Mirghīnānī (d. 593/1196-1197)⁸⁶ said: "Both [*tawliya* and mark-up (*murābaḥa*)] modes are lawful because the conditions essential to the validity of a sale exist in them".⁸⁷ Ibn Rushd says: "The majority of the jurists are agreed that sale is of two kinds: *musāwama*, and *murābaḥa*".⁸⁸ Al-Nawawī (d. 676/1277)⁸⁹ says: "It is lawful to make a *murābaḥa* sale".⁹⁰ Ibn Qudāma gives a definition of mark-up sales as the sales of a commodity for its capital plus a profit margin known to both buyer and seller. Then he points out that there is no disagreement on the permissibility of this form. Not only that, but he indicates that he does not know of any scholar who disliked it.⁹¹

⁸⁶ Al-Mirghīnānī, Burhān al-Dien 'Alī Ibn Abī Bakr: Ḥanafī jurst. See al-Ṣafadī, *al-Wāfi*, v. 20, p. 165.

⁸⁷ See Ibn al-Humām, *Fath al-Qadīr*, v. 6, pp. 495-496.

⁸⁸ *Bidāyat al-Mujtahid*, 1986, v. 2, p. 213.

⁸⁹ Al-Nawawī, Yahyā Ibn Sharaf al-Dīn: Shāfi'ī jurist. See *EI (2)*, v. 7, pp. 1041-1042.

⁹⁰ See al-Ramli, *Nihāyat al-Muḥtāj*, v. 13, p. 59.

⁹¹ Ibn Qudāma, *Al-Mughnī*, v. 6, p. 266.

The majority of the scholars support their opinion by using certain pieces of evidence:

1- The Qur'ān says:

“Those who swallow usury cannot rise up save as he arised whom the devil hath prostrated by (his) touch. That is because they say: trade is just like usury; whereas Allāh permitted trade and forbade usury ...”⁹²

According to this verse sale, in general, is permissible and mark-up sales come under the concept of sale. It is therefore lawful as long as there is no evidence which shows that it is not lawful.⁹³

The only difference between ordinary sales and mark-up sales, as defined earlier by Ibn Qudāma, are that mark-up sales involves extra information regarding the capital and the amount of profit. There is no evidence, according to Islamic law, that the declaration of the price and profit is not lawful.⁹⁴

2- Some scholars state that there is a consensus on the permissibility of mark-up sales.⁹⁵

Regarding the way of expressing the price of the product, i.e. the way of declaring the profit, the jurists discuss two methods:

⁹² Qur., Al-Baqarah, 2:275.

⁹³ See al-Ramī, *Nihāyat al-Muhtāj*, v. 4, p. 111.

⁹⁴ See Usmani, *an Introduction to Islamic Finance*, p. 37.

⁹⁵ See al-Ḥāmid, *Bay' al-Murābaḥa*, p. 14.

- 1- A fixed sum or profit is added to the capital. For example, the seller says he would like to sell the product, as a mark-up sales, for £100 added to the capital. Consequently, if the commodity cost him £1000, its price is £1100. As indicated earlier, Ibn Qudāma mentioned that the scholars seem to be agreed on this.⁹⁶
- 2- The seller offers the product for the capital and, for instance, a pound for every £10. For example, the trader offers the product for the capital and he adds £2 for every £10, as a profit. So if the capital is £100, the price, then, is £120. This way of declaring the profit is the same as indicating the profit as a percentage. The expression of £2 for every £10 is exactly the same as 20% profit.⁹⁷

A special term is used to indicate the second way. The term is *dih yāzdih*, or *dih dwāzdih*. These two expressions are Persian words, which were used in traditional *fiqh*. *Dih* means ten,⁹⁸ *yāzdih* is eleven,⁹⁹ and *dwāzdih* is twelve.¹⁰⁰ As a result, *dih yāzdih* means ten for eleven and *dih dwāzdih* is ten for twelve.¹⁰¹

⁹⁶ See Ibn Qudāma, *al-Mughnī*, v. 6, p. 266; al-Ramī, *Nihāyat al-Muhtāj*, v. 4, p. 111; al-Ḥāmid, *Bay‘ al-Murābaḥa*, pp. 14-15.

⁹⁷ See Ibn Qudāma, *al-Mughnī*, v. 6, p. 266; al-Muḥīṭī, *Takmilat al-Majmū‘*, v. 13, p. 56; al-Ḥāmid, *Bay‘ al-Murābaḥa*, pp. 15-16.

⁹⁸ Steingass, *Persian-English Dictionary*, p. 547.

⁹⁹ *Ibid*, p. 1526.

¹⁰⁰ *Ibid*, p. 539.

¹⁰¹ See al-Anṣārī, *Fath al-Wahāb*, v. 1, p. 305; al-Bahūtī, *Sharḥ Muntahā al-‘Irādāt*, v. 2, p. 52.

The majority of the scholars accept both ways, although they prefer the first way. There is, however, a minority who dislike the second method,¹⁰² arguing that there is not enough transparency in it, because the price has not been clearly detailed during the contract. The purchaser knows that the profit is, for example, £2 for every £10, but he does not know the whole price.¹⁰³ However, Ibn Qudāma argued that the purchaser can ascertain the whole price by calculation. For instance, if the trader says £2 for every £10 and the capital is £100, it means, at the end, the price is £120.¹⁰⁴

Scholars have also discussed what other additions can be made to the original price or the capital. This is because the trader, in some cases, does not pay the price of the product only; he sometimes pays for transportation, employees and so on. This rises the question of what, according to Islamic law, can be included in the price of a commodity.¹⁰⁵

The jurists have different views on this issue. According to the Ḥanafī *madhhab*, the seller, in a mark-up sales contract, has the right to add to the capital of clothing, for example, the fees of the bleacher, the dyer, the tailor, and so on.¹⁰⁶

¹⁰² See Ibn Qudāma, *al-Mughnī*, v. 6, p. 266; al-Ramī, *Nihāyat al-Muḥtāj*, v. 4, p. 111.

¹⁰³ See Ibn Qudāma, *al-Mughnī*, v. 6, p. 266.

¹⁰⁴ See *Ibid.*

¹⁰⁵ Ibn Rushd, *Bidāyat al-Mujtahid*, 2003, v. 2, p. 256.

¹⁰⁶ See Ibn al-Humām, *Fath al-Qadīr*, v. 6, p. 498.

Moreover, anything that causes an increase in the price or value of the product is included in the capital, so the effort which the trader expends on it is included as well; for example, the portage of wheat and the transportation. The Ḥanafī *madhhab* distinguishes between two expressions. The first expression is, for example, it cost me so and so, in which case the trader can add what he has spent in addition to the original price. On the other hand, the situation is different if the trader says, for instance, I bought this commodity for something. In this case, he just takes the profit upon the price which he has paid, so he cannot add any extra money to the original price, although he spent more than the original price before he offered the commodity to the buyer.¹⁰⁷

This can be made clear by an example. A (trader) buys a car for £1000, and pays £100 for the transportation, and the amount of the mark-up (*murābaḥa*) is £200. The original price, according to the first expression which is "The product cost me so and so", is £1,100, and the total including the mark-up (*murābaḥa*) is £1,300. But, according to the second expression, which is "I purchased the goods", the original price is £1,000, and the offer would be £1,200 including the mark-up (*murābaḥa*), because he cannot add the transportation charge.

The Mālikī *madhhab* divides the cost which can be added or not to the original price, into three categories, because the trader may pay extra money in addition to the

¹⁰⁷ See Ibid.

original price due to the cost of transferring the product from place to place, but not every expense can be included in the cost of the product, as according to custom (*'urf*), traders, normally, do not include some of them. Ibn Rushd shows the categories. He says: "One of the categories is that which is to be included in the cost and on which [the trader] also has a right to earn a profit". Then he indicates some examples of this category. He says: "Acts that are considered a part of the capital and have a share in the profit are factors that are effective with regard to the essence of the goods, like tailoring and dyeing".¹⁰⁸

According to Ibn Rushd the second category is that which may be included in the price, but not in the profit. Then he mentions some examples, saying: "Another [category] may be included in the price, but has no share in the profit ... acts that are considered a part of the capital, but have no part of the profit, do not affect the essence of the goods and are those which the seller is not capable of undertaking himself, like transportation of the goods from town to town and the renting of stores in which they are stocked."¹⁰⁹

The third category is those elements which are not included in either the capital or the profit. These are, as Ibn Rushd said: "Acts that neither affect the essence of the

¹⁰⁸ Ibn Rushd, *Bidāyat al-Mujtahid*, 2003, v. 2, p. 256.

¹⁰⁹ See *Ibid*, v. 2, pp. 256-257.

goods nor is the seller able to undertake them himself, like brokerage, negotiation and bargaining”.¹¹⁰

The Shāfi‘ī *madhhab* is close to the Ḥanafī *madhhab*. According to al-Muṭī‘ī, if the purchaser says, regarding the extra cost to the original price in the contract of a mark-up sales, “for the price of the purchase,” the capital comprises only the price which has been paid. However, if the purchaser says: “for what it cost me”, the seller has the right to include, in addition to the original price, what he has paid by way of remuneration to the measurer, the broker, the watchman, the repairer and so on.¹¹¹

The Ḥanbalī *madhhab* has a different view. According to their opinion, the purchaser has to indicate just the price which he has paid, whether he says, “it cost me or I purchased” unless he explains, in detail, what he has paid, for example, to the measurer, the broker, the transporter and so on.¹¹²

According to the above, we can see that custom (‘*urf*’), which is one of the sources of Islamic law, is considered in this circumstance. It has been indicated clearly,

¹¹⁰ See Ibid, v. 2, p. 257.

¹¹¹ Al-Muṭī‘ī, *Takmilat al-Majmū‘*, v. 13, p. 57.

¹¹² See Ibn Qudāma, *al-Mughnī*, v. 6, pp. 268-269.

according to the Ḥanafī *madhhab*, that custom amongst merchants is to add some extra money to the capital, as a price for the purchaser's effort or what he has spent.¹¹³

Moreover, the examples given by both the Mālikī *madhhab* and Shāfi'ī *madhhab* support this view. On the other hand, the Ḥanbalī *madhhab* does not accept any additional cost to be add to the original price.¹¹⁴

I would suggest that custom is acceptable and regarded in this situation and there are some rules that support this opinion. For example, according to a rule in Islamic jurisprudence, "*al-ma'rūfu 'urfān ka al-mashrū'i shartān*", namely custom is like a stipulation which is included in the contract.¹¹⁵ According to this rule the Ḥanafī *madhhab* differs between the term "the capital of the product so and so", because the traders normally use this term to say that this is the price which I have paid to obtain a product which has been offered as a mark-up (*murābaḥa*) contract and the term excludes the other costs, such as the transferring of the product, whereas the term "the product costs me so and so" means the original price includes the cost of the transportation, for instance, as mentioned earlier.¹¹⁶

¹¹³ See Ibn al-Humām, *Fath al-Qadīr*, v. 6, p. 498.

¹¹⁴ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, pp. 214-215; al-Muḥī'ī, *Takmilat al-Majmū'*, v. 13, p. 57; Ibn Qudāma, *al-Mughnī*, v. 6, pp. 268-269.

¹¹⁵ See al-Zarqā, *Sharḥ al-Qawā'id*, p. 237.

¹¹⁶ See Ibn al-Humām, *Fath al-Qadīr*, v. 6, p. 498; al-Nadwī, *Jamharat al-Qawā'id al-Fiqhiyya*, v. 1, pp. 275-287/ v. 2 p. 778.

3.3.4 Financing by mark-up sales (*al-tamwīl bi al-murābaḥa*)

3.3.4.1 Introduction

3.3.4.2 *Bay' al-murābaḥa li al-āmir bi al-shirā'*

3.3.4.3 The modern perspective of *bay' al-murābaḥa li al-āmir bi al-shirā'*

3.3.4.1 Introduction

Financing by mark-up sales (*al-tamwīl bi al-murābaḥa*) is one of the most common transactions of the Islamic financial institutions. It is a way to finance people who wish to avoid usury, which is prohibited in Islamic law.

In this kind of transaction, the institutions which provide financing by mark-up sales do not have to be specialists in the products which they offer. The only thing they have to do is to obtain the product from the market after the client orders it. Then, they offer it on a deferred payment or instalment basis, with an extra charge based on the payment period.

3.3.4.2 *Bay' al-murābaḥa li al-āmir bi al-shirā'*

The term "*bay' al-murābaḥa li al-āmir bi al-shirā'*" is an Arabic term which indicates a specific transaction. According to some researchers the meaning of the term is, "sale at

a mutually agreed profit margin for the orderer of the purchase”.¹¹⁷ Another definition identifies it as “the mark-up sales of the one who orders or commissions another to purchase”.¹¹⁸

The term is not a modern expression; it has been mentioned by several scholars in the traditional *fiqh*. We should now indicate some scholars' reports regarding “*bay‘ al-murābaḥa li al-āmir bi al-shirā*” according to the four *madhhabs* (the Ḥanafīs, the Mālikīs, the Shāfi‘īs and the Ḥanbalīs):

1- The Hanafī *madhhab*

Al-Sarakhsī refers to this form of contract. He indicates that Muḥammad Ibn al-Ḥasan (d. 189/805)¹¹⁹ described a case that when a buyer wants to buy a house and he asks another person to buy the house from its landlord and after the person has the ownership upon the house, he resells it to the buyer with an extra sum as a profit, as the mechanism of the mark-up sales. For instance, the buyer pays 12,000 *dirhams* to the person he asks to obtain the house for him, 11,000 as the original price and 1000 *dirhams* as profit.¹²⁰

¹¹⁷ Alkaff, *Al-Murabaha in Theory and Practice*, p. 19.

¹¹⁸ Vogel and Hayes, *Islamic Law*, p. 140.

¹¹⁹ Muḥammad Ibn al-Ḥasan al-Shaybānī: Ḥanafī jurist. See al-Ṣafadī, *al-Wāfi*, v. 2, p. 247.

¹²⁰ See al-Ḥāmid, *Bay‘ al-Murābaḥa*, pp. 66-67.

2- The Mālikī *madhhab*

The Mālikī *madhhab* is more detailed on this issue. They divide it into three types:

a- The permissible type

Someone asks a trader about a commodity, and then the trader, without any agreement or promise, acquires and displays the commodity in his shop. After that, the person comes to his shop again and finds the commodity which he had asked about. It is permissible, in this case, for him to buy on a mark-up sales basis whether for cash or by deferment.¹²¹

b- The disliked type

In this situation, the client says, “Buy this commodity”, which he shows or describes to the trader, and the client promises that he we will buy it from him with some profit, without indicating the amount of the profit. The payment, in this case, may be in cash or deferred.¹²²

c- The prohibited type

In this situation, the client mentions the amount of profit and the payment is deferred. For example, the client tells the trader to buy a product for £10 and says he will buy it from him for £12 within a month. The reason this is prohibited, as

¹²¹ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 214.

¹²² See *Ibid.*

they claim, is that this mode is “*kulu qarḍin jarra manfa‘atan fahuwa ribā*”,¹²³ which means that every kind of loan that includes extra benefit is usury (*ribā*), which is prohibited in Islamic law.¹²⁴

According to the above, the difference between the first type and the second one is that the buyer, in the second type, promises that he will buy the commodity when the trader obtains it. But the buyer, in both types, does not indicate the amount of profit. On the other hand, in the third type, the buyer details the capital and the profit while he does not do so in either the first or second types.

3- The Shāfi‘ī *madhhab*

Al-Shāfi‘ī pointed out that it is permissible for a client to show a product or describe it with some details to a trader and for the client to say to the trader, "Buy the product, then I will buy it from you with an amount of profit," and tell him by exactly how much the client plans to profit the trader.¹²⁵

4- The Ḥanbalī *madhhab*

Ibn al-Qayyim mentions a solution for the case where someone orders a commodity from a trader and the trader fears that the client will change his mind about the

¹²³ For more details see p. 36 above.

¹²⁴ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 214; al-Ḥāmid, *Bay‘ al-Murābaḥa*, pp. 67-70.

¹²⁵ See al-Nawawī, *Rawḍat al-Ṭālibīn*, v. 3, p. 527; al-Ḥāmid, *Bay‘ al-Murābaḥa*, pp. 70-71.

commodity, and may not buy it. Ibn al-Qayyim's answer is that the trader can buy the commodity and stipulate option on approval,¹²⁶ so that he has the right to return the product within three days. If the buyer does not want it during that period, the trader can return it back to the person from whom he bought the commodity.¹²⁷

As these examples show, “*bay‘ al-murābaḥa li al-āmir bi al-shirā*” which is a sale at a mutually agreed profit margin for the orderer of the purchase, which is very common in Islamic financial institutions today, was mentioned in the traditional *fiqh* and it has been discussed by the four *madhhabs*.

As it has been shown, the majority of jurists, including the Ḥanafīs, the Shāfi‘īs and the Ḥanbalīs state that sale at a mutually agreed profit margin for the orderer of the purchase is permissible in Islamic law.

On the other hand, the Mālikī *madhhab* accepts most forms, except one, which is if the purchaser indicates the price and profit, as mentioned earlier. The reason, as they claim, is that this manner of contract leads to usury (*ribā*), because according to Islamic law, “*kulu qarḍin jarra manfa‘atan fahuwa ribā*” (every kind of loan that leads to extra

¹²⁶ *I‘lām al-Muwaqqi‘īn*, v. 4, p. 29; see Milḥim, *Bay‘ al-Murābaḥa*, p. 119.

¹²⁷ See al-Ḥāmid, *Bay‘ al-Murābaḥa*, pp. 72-73.

benefit is usury). The benefit, which is indicated in the rule, means the valuable benefit.¹²⁸

3.3.4.3 The modern perspective of *bay' al-murābaḥa li al-āmir bi al-shirā'*

The foregoing discussion has focused on some circumstances which have already been discussed in the traditional *fiqh*. We will now discuss financing by mark-up (*murābaḥa*) according to the view of various contemporary researchers and scholars, or in other words, financing by mark-up sales from a modern perspective.

Financing by mark-up sales, from a modern perspective, consists of two stages of sale and the financial institution is involved in both contracts. Essentially, the contract is between three parties. A (the client) orders a specific product, such as property or a car, from B (the Islamic financial institution) then B (the Islamic financial institution) buys it for him from C (the trader or the market). Then B (the Islamic financial institution) resells it to A (the client) on an instalment basis, with an extra sum or profit depending on the period.¹²⁹

This issue has discussed by specialist academies, *Shari'a* boards in Islamic financial institutions, and many jurists and researchers. The majority of contemporary

¹²⁸ See al-Ḥāmid, *Bay' al-Murābaḥa*, pp. 67-70.

¹²⁹ See Vogel and Hayes, *Islamic Law*, pp. 140-141; Usmani, *an Introduction to Islamic Finance*, pp. 41-42.

scholars and researchers consider that this kind of sale is permissible, although they disagree on the details.¹³⁰

3.4 *Ṭina* sales

3.4.1 Introduction

3.4.1 Definition of *Ṭina* sales

3.4.3 Forms of *Ṭina* sales

3.4.4 *Ṭina* sales according to Muslim jurists

3.4.5 Conditions of *Ṭina* sales

3.4.1 Introduction

Ṭina sales are a type of transaction which falls under the category of deferred sales (*buyū' al-nasī'a* or *buyū' al-ājal*) in Islamic business transactions. In this kind of contract, the subject matter is delivered now and the price is paid later on, whether it is in one payment for the whole price or divided into more than one instalment.

¹³⁰ See al-Ḥāmid, *Bay' al-Murābaḥa*, pp. 76-81; 'Afāta, *Bay' al-Murābaḥa*, pp. 37-74.

3.4.2 Definition of *Ṭina* sales

The word *Ṭina*, as a linguistic term, is derived from the root ‘*ayn, yā*’ and *nūn*. and this root has several meanings. For example, ‘*ayn* is *bāṣira*, which means the eyes, or *naqd* which means currency, whether gold or silver, and ‘*ayn al-mā*’ or ‘*ayn jāriya* which means a lake or river.’¹³¹

In the current context, *Ṭina* means *salaf* which refers to a loan. For instance, the expression, “*Iṭāna al-rajul*” means that someone bought something for a deferred payment. This is the expression that is the most relevant to *Ṭina* sales according to the terms of traditional *fiqh*.¹³²

An *Ṭina* sale, as a term of traditional *fiqh*, is a contract between two people, in which the buyer buys a product from the seller for a deferred payment then the buyer resells the same product to the seller for immediate payment. The price in the second transaction, which is the immediate payment, is less than the price of the first transaction, which is the deferred payment.¹³³

¹³¹ See Ibn Fāris, *Muʿjam Magayyis al-Lugha*, v. 4, p. 204.

¹³² See al-Fayyūmī, *al-Miṣbāḥ al-Munīr*, v. 2, p. 441.

¹³³ See Ibn Qudāma, *al-Mughnī*, v. 6, p. 262.

For instance, A buys a car from B for £10,000 on a deferred payment basis. Then A sells the same car to B for £9,000 immediate cash payment now. In other words, the contracting parties deal with the same product for a different price, depending on the time of payment. Moreover, the buyer seems to be not intending to have the product to use it, but to obtain the cash.

3.4.3 Forms of *ʿina* sales

Several forms have discussed under the concept of *ʿina* sales:

1- The most common form is a double sale

The contract is between two people; the first one is the trader who sells the product on a deferred sale basis and the second contracting party is the buyer who buys the product in a deferred sale and resells the same product to the seller for immediate cash. It can be seen that the aim of the buyer is to obtain money, because he immediately returns the product to the seller.¹³⁴

2- Treble sale

This sale is similar to the above contract but the contracting parties engage in a more complex procedure to complete the contract. The contract is between three parties; the first contracting party is the trader who sells a product to the second party, who is the buyer, who buys the product in a deferred sale. The buyer then resells the same product

¹³⁴ See Ibn Qudāma, *al-Mughnī*, v. 6, p. 263; al-Zuḥaylī, *Financial Transactions*, v. 1, pp. 114-115.

to another person, but not the trader, for cash. Finally, the trader buys the product from the second buyer for cash.¹³⁵

For example, A sells a car to B for £10,000 payable within three years and A agrees with C that the latter will buy the car from B for £8,000 immediate cash payment. A then buys the car from C, also for cash payment. The price may be £8,000 or more, but it will be less than the £10,000 payable in the first transaction.

3- *Tawarruq*

The contract is between three people: the first party is the trader who sells a product to the second party who is the buyer, and the contract is based on deferred payment. Then, the buyer resells the same product to a third person, who is not the trader, on a cash basis, and the reason for that is to obtain money. The majority of the jurists including the Ḥanafīs, Mālikīs and Shāfi'īs, include this kind of sale under the forms of *ʿīna* sales.¹³⁶

The Ḥanbalīs,¹³⁷ however, and some contemporary researchers¹³⁸ consider this contract a distinct category, which has the specific term, *tawarruq*. Moreover, the Islamic *Fiqh* Academy uses the same expression.¹³⁹

¹³⁵ See Ibn al-Qayyim, *Ḥāshiyā*, v. 9, p. 250.

¹³⁶ See *Ibid*, v. 9, p. 249.

¹³⁷ See al-Mirdāwī, *al-Inṣāf*, v. 11, p. 196; Ibn Mufliḥ, *al-Mubdī'*, v. 4, p. 49.

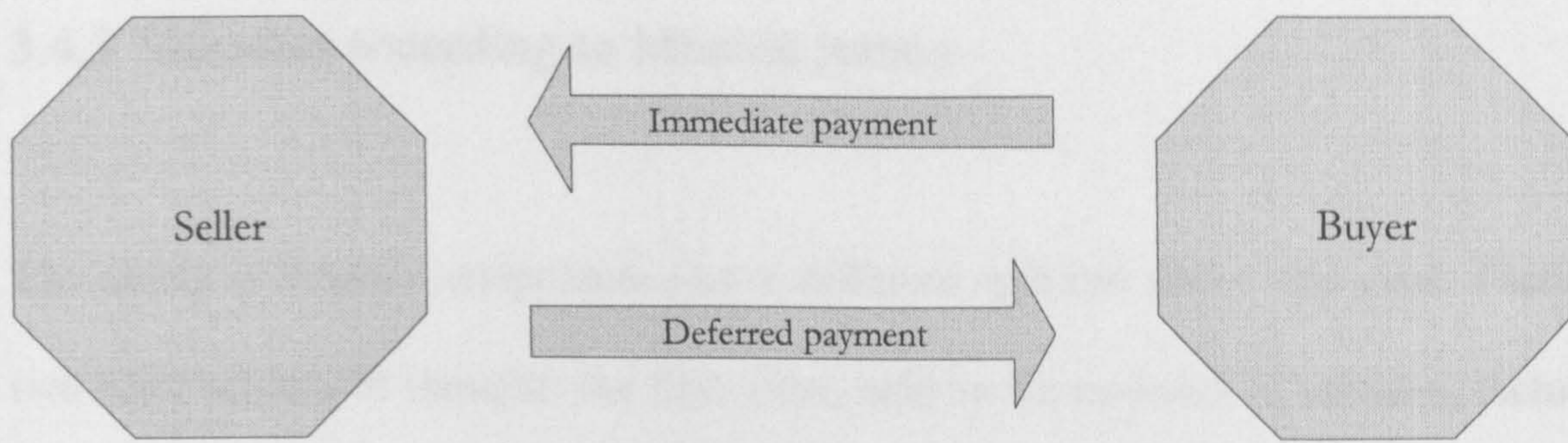


Figure 3.6 double sale

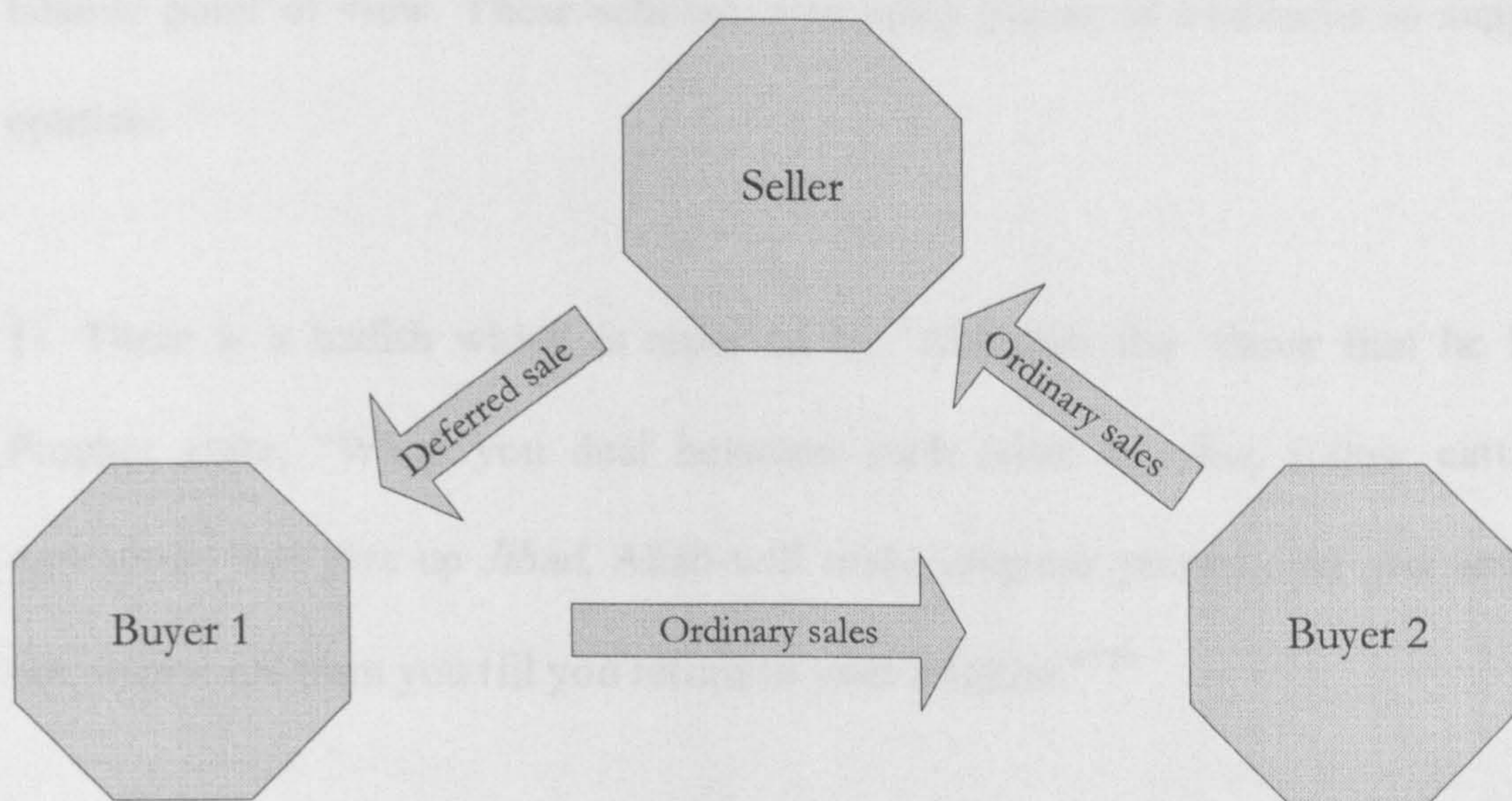


Figure 3.7 Treble sales

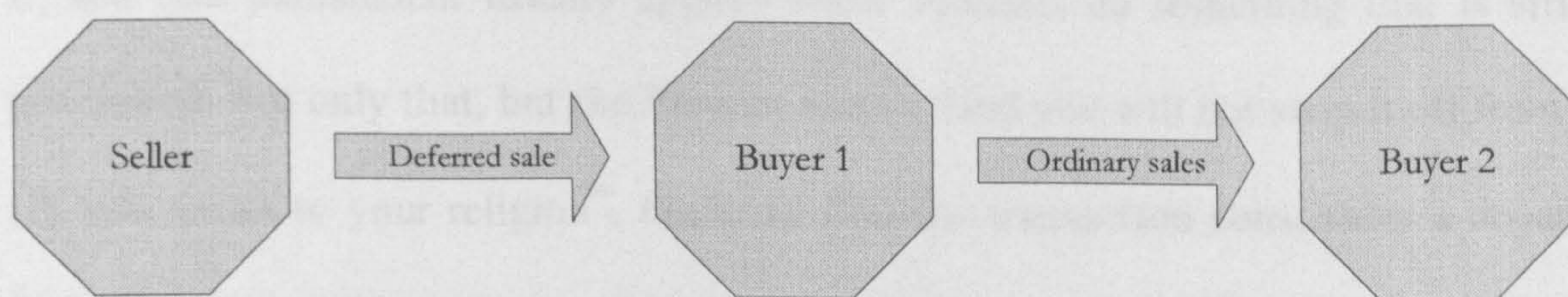


Figure 3.8 *Tawarruq*

¹³⁸ Such as, al-Miṣrī, *al-Jāmi‘ fī Uṣūl al-Ribā*, p. 174; al-Zuḥaylī, *Financial Transactions*, v. 1, p. 117.

¹³⁹ See al-Raṣhīdī, *‘Amaliyyāt al-Tawarruq*, pp. 216-218.

3.4.3 *Īna* sales according to Muslim jurists

The jurists of Islamic jurisprudence have different opinions about *Īna* sales. There are two basic schools of thought: the first view, held by the majority of scholars, including the Ḥanafīs, Mālikīs and Ḥanbalīs, is that this form of sale is prohibited from an Islamic point of view. These scholars cite many pieces of evidences to support their opinion:

1- There is a ḥadīth which is reported by ‘Abdullāh Ibn ‘Omar that he heard the Prophet state, “When you deal between each other by *Īna*, follow cattle, prefer agriculture and give up *Jihād*, Allāh will make disgrace prevail over you and you will not strip it off from you till you return to your religion.”¹⁴⁰

The Prophet in this ḥadīth indicates that this kind of contract is prohibited because he states that, “Allāh will make disgrace prevail over people” if they enter into it, and that punishment usually applies when Muslims do something that is strictly prohibited. Not only that, but the Prophet states, “and you will not strip it off from you till you return to your religion”, implying that the transaction constitutes a departure from the religion. This expression is used to indicate major sins.¹⁴¹

¹⁴⁰ Abū Dāwūd, *Sunan*, v. 3, p. 373.

¹⁴¹ See al-Ṣan‘ānī, *Subul al-Salām*, v. 3, p. 42; al-Shawkānī, *Nayl al-Awṭār*, v. 5, p. 320; al-Mitrik, *al-Ribā wa al-Mu‘āmalāt al-Maṣrifīyya*, pp. 260-261.

2- It is narrated by Abū Hurayra that Allāh's Messenger forbade two transactions combined in one.¹⁴² Moreover, in another report the Prophet says: "if anyone makes two transactions combined in one he must confirm that of the lower price, or he is involved in committing usury".¹⁴³

The Prophet in this ḥadīth shows that two transactions combined in one are prohibited according to Islamic law. Some scholars regard *ṭina* sales as falling into this category,¹⁴⁴ because the contracting parties enter into two contracts for the same product at the same time.

3- *ṭina* sales are equivalent to usury, because when the trader sells the product to the buyer for a deferred payment and buys it from the buyer at the same time for less than the price of the first contract for cash payment, it is as if the seller lent the buyer some money for an extra sum to be paid in the future; the only difference between these two situations is that in the first situation there is a product involved in the contract. So, in reality, there is no significant difference between these two situations that would warrant a different decision, according to the Islamic point of view.¹⁴⁵

¹⁴² Al-Tirmidhī, *Sunan*, v. 3, p. 533; al-Nasā'ī, *Sunan Kubrā*, v. 4, p. 43; Ahmad, *Musnad*, v. 2, p. 174; Ibn Ḥibbān, *Ṣaḥīḥ*, v. 11, p. 347.

¹⁴³ Abū Dāwūd, *Sunan*, v. 3, p. 373; Ibn Ḥibbān, *Ṣaḥīḥ*, v. 11, pp. 347-348.

¹⁴⁴ See Ibn Taymiyya, *Fatāwā*, v. 29, p. 432; Ibn al-Qayyim, *Hāshiya*, v. 9, p. 240.

¹⁴⁵ See al-Zuḥaylī, *Financial Transactions*, v. 1, pp. 14-15.

Moreover, there is a rule in Islamic jurisprudence that supports the above evidence. The rule says, “*al-‘ibratu fī al-‘uqūd bi al-maqāṣidi wa al-ma‘ānī lā bi al-alfāz wa al-mabānī*”.¹⁴⁶ This means that the appearance of the contract is immaterial if it is contrary to its aim or plan; the most important consideration is the purpose or the intention. Applying this principle to *‘īna* sales, it can be argued that it is a form of usury, because the contracting parties are engaging in a different and more complex procedure but the intention is to obtain the same result as in usury.

For someone to lend money to another person on interest, that is, with an extra sum payable in the future is usury according to Islamic law. In *‘īna* sales, the first party sells a product to the second one for a deferred payment then the second person resells the same product at the same time to the first person for less than the first price in cash. The result of this form is the same as that of the previous form, in that the buyer obtains money to use immediately for an extra sum which he is committed to paying in the future.

As a result, *‘īna* sales are prohibited according to the majority of the scholars,¹⁴⁷ and the procedure does not change the reality. Therefore, Ibn ‘Abbās said, “*Darāhimu bi darāhim baynahumā ḥarīrā*”¹⁴⁸ which means that the contract is just lending money

¹⁴⁶ See al-Zarqā, *Sharḥ al-Qawā‘id*, p. 55.

¹⁴⁷ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 142; al-Zuḥaylī, *Financial Transactions*, v. 1, pp. 15-16.

¹⁴⁸ See Ibn al-Qayyim, *Ḥāshiya*, v. 9, p. 241.

for money with an extra sum and the parties use the product as a cloak to give the appearance that the contract is a permissible sale, not usury.

4- There is another rule in Islamic jurisprudence that supports the condemnation of *ṭina* sales, namely, blocking the means (*sadd al-dharā'i'*),¹⁴⁹ which means that if a contract leads to involvement in something prohibited in most circumstances, its performance is prohibited, even though the procedure may not, superficially, be a prohibited one.

This rule can be applied to *ṭina* sales; the contract of *ṭina* sales seems to be the same as a normal sale, because the first transaction between the seller and the buyer is just a kind of deferred sale, and deferred sales, in general, are not prohibited. The second transaction also is just an ordinary sale and this, too, is not prohibited. However, when these contracts are combined and the second contract, which is for a cash payment, is for a smaller sum than the first contract, which is for a deferred payment, the contract then seems to be equivalent to usury (*ribā*) when a person lends money for an extra sum in the future. The only difference between *ṭina* sales and usury is the addition of a product to give the appearance that the contract is under the concept of sales, whereas in fact it achieves the same aim as usury, which is strictly prohibited in Islamic law. Consequently, *ṭina* sales can be an excuse and mechanism for a usurer to offer usury to people who need money.

¹⁴⁹ Blocking the means (*sadd al-dharā'i'*) implies the means to an expected end which is likely to materialise if the means towards it is not obstructed. (Kamali, *Principles of Islamic Jurisprudence*, p. 310; and see Izzi Dien, *Islamic Law*, pp. 62-63)

The second school of thought is that *ʿīna* sales are not prohibited and should be viewed like any other kind of sale. This view is the opinion of the Shāfiʿīs and Abū Yūsuf (d. 182/798)¹⁵⁰ among the Ḥanafīs.¹⁵¹ They support their opinion by the following pieces of evidence:

1- Allah says

“Those who eat usury (*ribā*) will not stand (on the day of Resurrection) except like the standing of a person beaten by Satan leading him to insanity. That is because they say: “trading is only like usury,” whereas Allāh has permitted trading and forbidden ...”¹⁵²

According to the verse, any kind of sale is permissible unless there is evidence that shows that it is prohibited. *ʿīna* sales are just a kind of sale, because the first contract is a deferred sale, and the second contract is an ordinary sale. Therefore there is no regarded evidence to prove that *ʿīna* is prohibited. As a result, *ʿīna* is permissible like any other kind of permissible contract in Islamic law.¹⁵³

¹⁵⁰ Yaʿqūb Ibn Ibrāhīm: a judge in Kufa and Ḥanafī scholar. See *EI (2)*, v. 1, p. 164-165.

¹⁵¹ See Ibn ʿAbdīn, *Ḥāshiyā*, v. 5, pp. 325-326; al-Ramlī, *Nihāyat al-Muḥtāj*, v. 3, p. 477.

¹⁵² Qur., Al-Baqara, 2:275.

¹⁵³ See Ibn Ḥazm, *al-Muḥallā*, v. 9, p. 47; al-Mitrik, *al-Ribā wa al-Muʿāmalāt al-Maṣrifīyya*, pp. 267-268; al-Khudayrī, *Bayʿ al-ʿīna*, p. 47.

2- Abū Saʿīd al-Khudrī and Abū Hurayra narrated that the Messenger of Allāh appointed one of the Banu ʿAdi al-Ansārī as a governor of Khaybar.¹⁵⁴ That governor brought to him a good quality kind of dates (from Khaybar). The Messenger asked: “Are all the dates of Khaybar like this (good quality)?” He replied: “They are not, O Messenger of Allāh, but we buy one *ṣāʿ* of good quality dates for two or three of an inferior quality.” He said: “Do not do so, for that is usury, but do so exchanging (*mithlan bi mithl*) like for like, (i.e. the exchange of dates has to be equivalent regardless of the quality), or sell the inferior quality for silver coins (*dirhams*), and buy good quality dates with the money.”¹⁵⁵

As we can see, the Prophet indicated that it is not allowed to exchange dates for dates if the amount is different. On the other hand, it is permissible to sell dates and take the money, and then the person can buy good quality dates with the money. According to the ḥadīth, the contract includes two people or contracting parties. The first contracting party is the buyer in the first transaction, and he is the seller in the second transaction, and the second contracting party is the seller in the first transaction, and he is the buyer in the second transaction, and according to the ḥadīth, this kind of contract is permissible, although the consequence of the contract is to exchange between the good quality dates for inferior quality of dates. By analogy, the same applies in *ʿIna* sales, that it is not permissible to exchange between the same

¹⁵⁴ The name of the famous oasis, about 95 mile/150 km. from the Madina. (See *EI (2)*, v. 4, p. 1137-1143)

¹⁵⁵ Al-Bukhārī, *al-Jāmiʿ al-Ṣaḥīḥ*, v. 2, p. 767; Muslim, *Ṣaḥīḥ*, v. 3, p. 1215.

currencies except hand to hand and like for like, but when the contract includes two transactions, one of them is for deferred payment and the second one for immediate payment, although the consequence is an exchange of money for money with an extra sum.¹⁵⁶

Moreover, the majority of the scholars consider that it is permissible to buy a product on a deferred payment basis and resell it for cash but to a third person, who is not the seller in the first contract and this form of contract is named *tawarruq*. As a result, it is permissible for the seller, who sold the product in the first contract and wants to buy it again, to buy the product again, because Islamic law does not distinguish between the seller and any other person. The relationship between the two situations is that in the first situation the Prophet did not order his companion to sell the dates in the market, then to buy the good quality dates from someone else. It seems that it would be acceptable if the companion sold to and bought from the same person. By analogy, it is acceptable if someone buys a product for a delayed payment and sells the product to the buyer for cash payment even if it is for less than the original price.

3- Proponents of the first opinion agree that if the buyer sells the product to the seller for the same price or more than the original (deferred) price, the transaction is not prohibited. So there is no difference between selling for the same price or a higher one and doing so for less than the first price. Consequently, the contract is permissible.¹⁵⁷

¹⁵⁶ See al-Rashīdī, *‘Amaliyyāt al-Tawarruq*, p. 45; al-Khuḍayrī, *Bay‘ al-‘Īna*, pp. 47-48.

¹⁵⁷ See al-Turkī, *Bay‘ al-Taqsīt*, p. 60; al-Khuḍayrī, *Bay‘ al-‘Īna*, pp. 48-49.

For instance, A sells a car to B, as a deferred sales contract, for £10,000, to be paid within three years. Then A buys the car from B for £10,000 or 11,000, for immediate payment. Scholars agree that this form is permissible. But the scholars disagree, if A buys the car from B for £9,000.

Not only that, but scholars who support the first opinion do not prohibit the reselling of the subject matter to a third person,¹⁵⁸ but they prohibit the transaction if the product is sold to the seller from whom the buyer bought the product. In the above example, it is not allowed for B to sell the car to A for £9,000, but it is allowed to sell the car to C for £9,000.

4- The appearance of the contract is valid because it contains two kinds of contract: the first contract is a deferred sale and the second contract is an ordinary sale. Both deferred sale and ordinary sale are lawful according to Islamic law. As a result *ṭina* sales are lawful. In addition, it is not possible to be sure of the intention of the contracting parties, that is, whether their aim is to transact a loan with an extra sum, which is usury, or not, and if there is doubt about the intention, it is necessary to rely on the appearance of the contract.¹⁵⁹

¹⁵⁸ This issue is *tawarruq* and it will be explained below.

¹⁵⁹ Al-Shāfiʿī, *al-Umm*, v. 3, p. 74; al-Mitrik, *al-Ribā wa al-Muʿāmalāt al-Maṣrifīyya*, p. 270.

At this point some comment on these two opinions is appropriate. The first opinion has three main points to support it. The first is the ḥadīth which begins, “when you deal between each other by the *ʿīna* sales”. According to the ḥadīth, this kind of transaction leads to a severe punishment, and the words of the ḥadīth are those usually used to indicate major sins. This implies that the Prophet seems to regard this kind of contract, *ʿīna* sales, under the concept of usury. Moreover, many scholars state that the ḥadīth is authentic.¹⁶⁰

The second ḥadīth which concerns the prohibition of two transactions combined in one does not refer to *ʿīna* sales, according to the majority of jurists. They state that the meaning is to offer more than one price for the product without taking a decision on one of them at time of the contract; for instance, the seller offers a car for £10,000 now or £12,000 within two years and he indicates both prices in the contract without confirming one of them.

The first opinion relies, as well, on two rules which are regarded in Islamic law. The first rule is blocking the means (*sadd al-dharāʿiʿ*), and the second rule is *al-umūr bi maqāṣidihā*. These two rules support the opinion, although the scholars are not totally agreed on the rule of blocking the means.¹⁶¹

¹⁶⁰ Such as Ibn al-Qaṭṭān. For more details see al-Ṣanʿānī, *Subul al-Salām*, v. 3, p. 41.

¹⁶¹ See Ibn Rushd, *Bidāyat al-Mujtahid*, 1986, v. 2, p. 142; Ibn Qudāma, *al-Mughnī*, v. 6, p. 262; Al-Zuhaylī, *Financial Transactions*, v. 1, p. 14-17; al-Rashīdī, *ʿAmaliyyāt al-Tawarruq*, p. 41; Kamali, *Principles of Islamic jurisprudence*, pp. 315-317.

The second opinion, of those who do not prohibit *ʿīna* sales, is supported with reference to the Qurʾān, the ḥadīth and analogy (*qiyās*). The first evidence is support for sales in general and *ʿīna* sales can be regarded as falling under the umbrella of this verse if there is no specific evidence referring to it. Moreover, according to the rule of general proof (*dalīl ʿāmm*)¹⁶² and specific proof (*dalīl khāṣṣ*),¹⁶³ when there is a conflict between two proofs on a specific issue, and the first proof is general and the second proof is specific, the priority is to rely on the specific proof rather than the general proof. And the general proof is applied to other issues unless they are conflicted by other specific proofs, because according to the rule “*Iʿmāl al-dalīlayn khayrun min ihmāl aḥadihimā*”, using both proofs is better than neglecting one of them.¹⁶⁴ Comparing the verse, “and Allāh permitted sales”,¹⁶⁵ and the ḥadīth, “when you deal between each other by *ʿīna* sales”, we will find that the permissibility of sales which has been indicated in the verse applies to contracts of sales in general and it includes any kind of sales, even *ʿīna* sales which are just a type of sales, but the ḥadīth is more specific and discusses just one type of sales, which is *ʿīna* sales in specific. So as it can be seen, if we do not apply the ḥadīth of the prohibition of the *ʿīna* sales, we neglect the proof all together. But if we do not apply the permissibility which has been indicated in the verse for sales in

¹⁶² General (*ʿāmm*) is basically a word that has a single meaning, but which applies to an unlimited number without any restrictions. (Kamali, *Principles of Islamic Jurisprudence*, p. 104)

¹⁶³ Specific (*khāṣṣ*) is a word which applies to a limited number of things, including everything to which it can be applied, say one or two or a hundred. (Kamali, *Principles of Islamic Jurisprudence*, pp. 104-105)

¹⁶⁴ See al-Zarkashī, *al-Baḥr al-Muḥīṭ*, v. 1, p. 211.

¹⁶⁵ Qur., Al-Baqarah, 2:275.

general, we neglect the proof in relation to the *ʿina* sales, but it is still applicable to other types of sales.

Moreover, the second piece of evidence which is the ḥadīth which says, “Sell the inferior quality dates for silver coins (*dirhams*), and buy with the money good quality dates”, does not indicate the kind of transaction which we are discussing, namely, *ʿina* sales, because it refers to selling a product to someone for money, and then buying another product from the same person. Moreover, both contracts involve with immediate payment. In contrast, *ʿina* sales are contracts where the first transaction is for deferred payment and the payment in the second transaction is immediate, and is less than the first price. So the difference in the price for the first form, which was indicated in the above ḥadīth, is because of the quality of the two types of dates, whereas the difference in the price for the second form, which is *ʿina* sales, is because of the time of payment. In other words, the buyer pays more because that the payment is with a delay, and sells the same product to the seller, who sells the product to the buyer, for less. The ḥadīth means that A sells 3 kilos of dates of type X to B for £10 now. Then A buys 1 kilo of dates of type Y for £10 now, as well. On the other hand, *ʿina* sales means that A buys dates from B for £15, as a deferred payment. Then A sells the dates to B for £10, paid now.

The difference between reselling the same product for the same price or a higher price and reselling the product for less than the original price is that in the first

circumstance there is no possibility of doing it as a means of usury, while the second circumstance, which is reselling the product for less than the original price can be a means to engage in usury, because usurers who want to offer usury contracts only need to put the product in the contract to achieve their aim.

It is true that the appearance of the two contracts is not forbidden, when each is viewed in isolation, because selling a product for deferred payment cannot lead to lending money for some extra sum, as *ṭina* sales do, nor can ordinary sales lead to usury. However, when they are combined and involve the same people and product, the situation is completely different.

In conclusion, we would suggest that prohibiting *ṭina* sales is important to achieve the aims of Islamic law, because the ruling of Islamic law is to achieve justice between human beings, and this will not happen if the law prohibits usury and at the same time permits *ṭina* sales which have the same result. Moreover, the reason for prohibiting *ṭina* sales is because they lead to usury whether it is direct or indirect. If, however, the contract cannot be a means for usury, it is would be lawful.

3.4.5 Conditions of *Ṭina* sales

As mentioned previously, the sale of the same goods between the same people does not always fall under the concept of *Ṭina* sales. At this point, therefore, the conditions of contracts which qualify as *Ṭina* sales will be highlighted.

1- The first condition is that the second contract takes place before the full payment of the price in the first contract. This means that if the second contract is made after the payment of the first contract, the contract is not within the *Ṭina* sales category because there is no suspicion that the contracting parties want to engage in a type of usury, which is lending money for an extra sum. For example, if A bought a car from B for £10,000 and the payment is within 2 years, and A paid the last payment in August 2005, then, it is lawful for B to buy the car from A for less than £10,000 after August 2005.¹⁶⁶

2- The second condition is that the subject matter does not change during the time of payment. If there is any change which affects the product price, the contract, in this case, for less than the first price is lawful, because the decrease in price could be due to a change in the product, not to lending for an extra sum. For instance, A buys a car for £10,000 to be paid within a year, and starts to use it. After two months, he plans to sell it, and usually, the price of cars decreases due to usage and time. As a result, it is not

¹⁶⁶ See al-Khuḍayrī, *Bay' al-Ṭina*, p. 59.

prohibited to sell the car to the same person, who is the trader, for less than the original price.¹⁶⁷

3- The third condition is that the buyer, in the second contract, is the seller himself in the first contract. *Ṭina* sales, according to their definition, involve two transactions between two people for the same product.¹⁶⁸ So, if the buyer, in the first contract, resells the product to a third person, the situation is different; some scholars give a different name to this transaction, namely, *tawarruq* sales. The scholars have different views on this kind of contract. However, if the first two contracting parties aim to involve the third person as a means to return the product to the first trader, the situation would be the same as the treble *Ṭina* sales, mentioned earlier under the types of *Ṭina* sales.¹⁶⁹ The only difference between the treble *Ṭina* and the normal *Ṭina* is that the former involves more effort and extra cost, while the aim is the same.

3.5 *Tawarruq* sales.

3.5.1 Introduction.

3.5.2 Definition of *tawarruq* sales.

3.5.3 Conditions of *tawarruq* sales.

¹⁶⁷ See *Ibid*.

¹⁶⁸ See *Ibid*, pp. 60-61.

¹⁶⁹ For more details see p. 163 above.

3.5.4 *Tawarruq* sales according to Muslim jurists

3.5.5 Comparison between *tawarruq* sales and *ʿīna* sales

3.5.1 Introduction

Tawarruq sales are a contract under the concept of deferred sales. The majority of the old traditional scholars of jurisprudence, including, the Hanafī, Mālikī and Shāfiʿī *madhhabs*, discuss this contract under *ʿīna* sales and they regard it as a form of *ʿīna* sales, or under *buyūʿ al-ājāl*.¹⁷⁰

However, the Hanbalī *madhhab* does not discuss *tawarruq* sales under the concept of *ʿīna* sales, and many contemporary scholars, such as al-Misrī,¹⁷¹ and al-Zuhayfī,¹⁷² use the same expression as the Hanbalī *madhhab*.¹⁷³ In addition, the Islamic *Fiqh* Academy,¹⁷⁴ also, uses the word *tawarruq* to refer to this form of contract, as will be explained below.

¹⁷⁰ See al-Rashīdī, *ʿAmaliyyāt al-Tawarruq*, pp. 19-21.

¹⁷¹ *Al-Jāmiʿ fi Uṣūl al-Ribā*, p. 174.

¹⁷² *Financial Transactions*, v. 1, p. 117; and see also al-Zuhayfī *al-Muʿāmalāt al-Māliyya*, p. 53.

¹⁷³ Al-Mirdāwī, *al-Inṣāf*, v. 11, p. 196; Ibn Mufliḥ, *al-Furūʿ*, v. 4, p. 126.

¹⁷⁴ Al-Rashīdī, *ʿAmaliyyāt al-Tawarruq*, p. 19.

3.5.2 Definition of *tawarruq* sales.

In this section both the linguistic and jurisprudential meaning of the term will be noted, and the relationship between them explained.

Tawarruq sales, as a linguistic term, are derived from the word *waraq* or *wariq*. These two Arabic words are based on the tri-literal root *wāw, rā'* and *qāf*. The word can be used to indicate several meanings, such as papers, leaves, money. However, usually the word *wariq* is used to refer to silver currency and this expression is used in the Qur'ān: “*fa ib'athū aḥadakum bi wariqikum hadhiḥī ...*” which means, “so send one of you with this silver coin of yours”.¹⁷⁵ So, *wariq*, in this verse, means money, especially silver coins.¹⁷⁶

Tawarruq sales, as a jurisprudential term, are contracts in which the buyer buys a product in a deferred sale and then resells the same product to a third person (not the seller in the first contract), for less than the first price, for immediate cash payment.¹⁷⁷ For example, A sells a car to B for £12,000 for payment within three years, then B sells the same car to C for £10,000 payable immediately.

¹⁷⁵ Qur., Al-Kahf 18:9.

¹⁷⁶ See Ibn Fāris, *Mu'jam Maqāyyis al-Lughā*, v. 6, pp. 101-102; Ibn Kathīr, *Tafsīr*, v. 3, pp. 105-106.

¹⁷⁷ See al-Mirdāwī, *al-Inṣāf*, v. 11, p. 196; Ibn Mufliḥ, *al-Furū'*, v. 4, p. 126.

The relationship between the contract, which is *tawarruq* and silver coin (*dirhams*) is that the buyer is engaging in *tawarruq* sales not for the goods but to obtain money. And one of the most common currencies in the past was silver coins; with the buyer involve himself in the contract to obtain silver coins.¹⁷⁸ Some of contemporary jurists still use the term *tawarruq*, although the people use currencies instead of silver coins.

3.5.3 Conditions of *tawarruq* sales

This section presents the view put forward by jurists regarding this kind of transaction. There are some forms that seem to be similar to the traditional form of *tawarruq* sales, but a slight change in the form of the *tawarruq* sales changes its ruling, according to Islamic law, because the change impacts on the reason for the jurists' view. So, the conditions will clarify the issues which are the basis for the disagreement.

1- The first condition is that the transaction is a deferred sale and the second transaction is for immediate payment. So, if the second transaction is also for a deferred payment, the transaction will not be classed as a *tawarruq* sale. For example, A sells a car to B, to be paid for within three years. Then, the buyer in the first transaction sells the car to C, for payment within three or four years.

¹⁷⁸ See al-Turkī, *Bay' al-Taqsīt*, p. 68.

2- The second condition is that the price of the second transaction is less than the price of the first transaction. So, if the price of the second transaction is the same as or greater than that of the first transaction, it would not come under the concept of *tawarruq* sales. For instance, A sells a car, as a deferred sale, to B for £12,000 payable within three years. If B then sells the car to C for £12,000 or £12,500, he is not suspected of involvement in usury, because he obtains, by selling for cash now, more than he has to pay in the future as a deferred payment. Then this means that the situation is different from usury, which is lending money for an extra amount at interest.

3- The third condition is that *tawarruq* sales do not contain an agreement between the contracting parties to return the product back to the first seller who has sold the product for a deferred payment. Consequently, if there is an agreement between them to return the same product to the first seller for less than the first price by cash payment now, the contract, in this case, comes under the concept of *ʿīna* sales, and it is referred to as a treble *ʿīna* sales.¹⁷⁹

3.5.4 *Tawarruq* sales according to Muslim jurists

The jurists in Islamic law have two opinions on *tawarruq* sales:

¹⁷⁹ For more details see Al-Rashīdī, *ʿAmaliyyāt al-Tawarruq*, pp. 93-95.

The first opinion states that *tawarruq* sales are lawful according to Islamic law. This is the opinion of the majority of the jurists, including the *madhhabs* of the Ḥanafīs,¹⁸⁰ the Mālikīs,¹⁸¹ the Shāfiʿīs,¹⁸² and the Ḥanbalīs.¹⁸³ Furthermore, any scholar who states that *ʿīna* sales are lawful, obviously supports this opinion. The Mālikī *madhhab* shows conditions of the transactions which come under the concept of *ʿīna* sales, one of these being that the seller in the first contract has to be the buyer in the second contract, and if he is not, the contract, therefore, is lawful.¹⁸⁴ Consequently, we can observe the opinion of the Mālikī *madhhab* from this condition.

The second opinion states that *tawarruq* sales are unlawful according to Islamic law. This is the opinion of a minority of the jurists, including ‘Umar Ibn ‘Abd al-‘Azīz (d. 101/720),¹⁸⁵ in addition to Ibn Taymiyya and Ibn Qayyim al-Jawziyya from the Ḥanbalī *madhhab*.¹⁸⁶ ‘Umar Ibn ‘Abd al-‘Azīz says, “*al-tawarruq ukhayyat al-ribā*”

¹⁸⁰ See al-Kāsānī, *Badā’i’ al-Ṣanā’i’*, v. 5, p. 199.

¹⁸¹ They consider that it is disliked (*makrūh*) but not prohibited. See al-Ṣāwī, *Bulghat al-Sālik*, v. 3, p. 70.

¹⁸² See al-Shāfiʿī, *al-Umm*, v. 3, p. 39.

¹⁸³ See al-Mirdāwī, *al-Inṣāf*, v. 11, p. 196; Al-Rashīdī, *ʿAmaliyyāt al-Tawarruq*, p. 50.

¹⁸⁴ See al-Ṣāwī, *Bulghat al-Sālik*, v. 3, p. 70.

¹⁸⁵ ‘Umar, Ibn ‘Abd al-‘Azīz: Umayyad caliph, 99-101/717-720; formerly governor of Madīna (c. 87-c. 93/c. 706-c. 712) under al-Walīd Ibn ‘Abd al-Malik. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, v. 2, pp. 59-60.

¹⁸⁶ See al-Rashīdī, *ʿAmaliyyāt al-Tawarruq*, p. 62.

which means that *tawarruq* sales are the same as (*ukhayyat* lit. sister of) usury.¹⁸⁷ Ibn Taymiyya said:

“All transactions can be divided into three categories: the first category is the purchase of a thing for consumption, and this type of transaction is a sale contract and purchase is permitted by Allāh; the second category is the purchase of a good and the purpose of the purchase is to sell it in that city or somewhere else, and this type of transaction is trade contract or commerce, and it is also permitted by Allāh; but in the third category is a transaction where neither purchase nor commerce is intended, it is done only to acquire money. The borrower failed to get money, so he resorts to this form of transaction. This last form is called *tawarruq* (a trick to obtain money) and is invalid in the opinion of many jurists.”¹⁸⁸

Holders of the first opinion, that *tawarruq* sales are lawful, support their opinion by several pieces of evidence:

- 1- The Qur’ān says, “And Allāh permitted sales (*al-bay’*), and forbade usury (*riba*)”.¹⁸⁹ The verse shows that sales are permissible according to Islamic law, since the word sales in the verse is generally applicable (*‘āmm*) and so includes any kind of sale which is not specifically prohibited. Consequently, *tawarruq* sales come under the concept of sales, as long as there is no specific evidence to show that they are prohibited.¹⁹⁰

¹⁸⁷ See Ibid, p. 63.

¹⁸⁸ See Islahi, *Economic Concepts of Ibn Taymiyya*, pp. 135-136.

¹⁸⁹ Qur., al-Baqara, 2:275.

¹⁹⁰ See al-Rashīdī, *‘Amaliyyāt al-Tawarruq*, pp. 54-55.

2- *Tawarruq* sales contain two separate transactions. The first transaction is a deferred sale and the second transaction is an ordinary sale, and both of these transactions are lawful. Moreover, there is no relationship between the first and second transaction, although the buyer in the first contract is the seller in the second contract. It is not forbidden to buy in a deferred sale and resell the same product for cash now, whether the price is more or less than the first price. As a result, *tawarruq* sales are not prohibited according to Islamic law.¹⁹¹

3- There is a rule in Islamic jurisprudence which supports this opinion, which is, “*al-aṣl fī al-mu‘āmalāt al-ḥill, illā mā dalla al-dalīl ‘ala taḥrīmihī*”. This means that secular transactions (*mu‘āmalāt*) are lawful in Islamic law unless there is evidence to prove that they are prohibited. However, there is no accepted proof that *tawarruq* sales are prohibited.¹⁹²

The second school of thought cites the following evidence to support their opinion:

1- The first piece of evidence is the ḥadīth about *‘īna* sales which is, “when you deal between each other by *‘īna* sales, follow cattle, prefer agriculture and give up *jihād* Allāh will make disgrace prevail over you and will not strip it off from you till you return to your religion”.¹⁹³

¹⁹¹ See al-Suwaylem, *al-Tawarruq wa al-Tawarruq al-Munazzam*, MIFAW, pp. 238-239.

¹⁹² Al-Rashīdī, *‘Amaliyyāt al-Tawarruq*, pp. 57-60; Al-Turkī, *Bay‘ al-Taqsīt*, p. 72.

¹⁹³ For more details see p. 166 above.

The ḥadīth prohibits *ʿīna* sales and it uses the expression *ʿīna* sales in general, without explaining a specific form distinguishing one variety of *ʿīna* sales from another; the majority of scholars indicate that *tawarruq* sales fall under the concept of *ʿīna* sales, and so the ḥadīth, which prohibits *ʿīna* sales, includes *tawarruq* sales, as a form under the concept of *ʿīna* sales.¹⁹⁴

- 2- The Prophet prohibited two transactions combined in one, and *tawarruq* sales are two contracts in one; the first contract is for deferred payment and the second contract is for payment now. So, *tawarruq* sales are prohibited according to the ḥadīth.¹⁹⁵
- 3- Ibn Taymiyya claims that the person who enters into a *tawarruq* sale contract is in need and he mentions a ḥadīth, reported by Abū Dāwūd (d. 275/888),¹⁹⁶ that the Prophet prohibited the sale by a person who is in need. He is considered to be in need because he enters into the contract not to use the product, but to acquire money.¹⁹⁷

¹⁹⁴ See al-Rashīdī, *ʿAmaliyyāt al-Tawarruq*, p. 67.

¹⁹⁵ Ibn al-Qayyim indirectly considered *tawarruq* sales belong the ḥadīth, because he said that two transactions combined in one means *ʿīna* sales, and *tawarruq* sales are just a form of *ʿīna* sales, so at the end *tawarruq* sales are belong the ḥadīth. (*Hāshiya*, v. 9, pp. 249-250)

¹⁹⁶ Abū Dāwūd, Sulaymān Ibn al-Ashʿath al-Sajustānī: compiler of ḥadīth. See *EI* (2) v. 1, p. 141.

¹⁹⁷ See Abū Dāwūd, *Sunan*, v. 3, p. 347; al-Bayhaqī, *Sunan Kubrā*, v. 6, p. 17; Ibn al-Qayyim, *Hāshiya*, v. 9, pp. 249-250.

4- *Tawarruq* sales are a trick (*hīla*) to engage in usury, because the prohibition of usury applies to borrowing money for an extra sum due to time. A person who obtains money through a *tawarruq* sale is just exerting extra effort to acquire money for an extra sum, and it might be easier for him to engage in usury rather than *tawarruq*.¹⁹⁸

To comment on these arguments, those who accept *tawarruq* sales argue that *tawarruq* sales are included in the verse which permits sales in general. This verse is a general rule and it is valid as long as there is no other specific evidence which shows a different ruling. So, the evidence of the second opinion will confirm whether the verse is valid in regard to the issue of *tawarruq* sales or not. It can be seen in the evidence for the second opinion that the contract has been divided into two forms, each of which is permissible separately. However, there is valid evidence that shows that when these two contracts come together, the contract is invalid. The third piece of evidence indicates a primary principle in Islamic law, which is applicable only if there is no regarded evidence which shows that *tawarruq* sales are not permissible.

The opponents of *tawarruq* sales cite four pieces of evidence to support their view. The ḥadīth which indicates the prohibition of *ʿīna* sales means that according to the majority of the jurists, two contracts between the same two people. The first contract is for deferred payment and the second is for cash payment now. Also, the

¹⁹⁸ See al-Rashīdī, *ʿAmaliyyāt al-Tawarruq*, p. 69.

second price is less than the price of the first contract. However, some scholars discuss this under the concept of *īna* sales, and they (*īna* sales and *tawarruq* sales) are not subject to have the same ruling, from the scholars' point of view.¹⁹⁹ For example, the Mālikī *madhhab* stipulates that the seller in the first contract has to be the buyer in the second contract for it to be included under the concept of *īna* sales which are prohibited.²⁰⁰ Furthermore, the second ḥadīth, which indicates that it is prohibited to combine two contracts in one, does not refer to *tawarruq* sales contracts; it means, according to the majority of the scholars, to offer two prices for the same product without taking a decision on one of them in the contract.²⁰¹

The ḥadīth which prohibits the sales of a person who is in necessity is not authentic according to many scholars; some scholars states that “there is a person unknown (*majhūl*) in the chain of the ḥadīth”²⁰² which means the ḥadīth should not be considered authentic. Moreover, even if we accept the ḥadīth as authentic, it does mean that *tawarruq* is a case of selling under necessity; according to al-Khaṭṭābī (d. 386/996 or 388/998),²⁰³ selling under necessity includes two circumstances: first, the person is

¹⁹⁹ See al-Ṣan‘ānī, *Subul al-Salām*, v. 3, pp. 41-42; al-Shawkānī, *Nayl al-Awṭār*, v. 5, pp. 318-319.

²⁰⁰ See al-Ṣāwī, *Bulghat al-Sālik*, v. 3, p. 70.

²⁰¹ Al-Tirmidhī, *Sunan*, v. 3, p. 533; al-Mubārakfūrī, *Tuḥfat al-Aḥwadhī*, v. 4, pp. 357-358; al-Ṣan‘ānī, *Subul al-Salām*, v. 3, p. 16; al-Shawkānī, *Nayl al-Awṭār*, v. 5, p. 249.

²⁰² Al-‘Aḏīm Abādī, *‘Awn al-Ma‘būd*, v. 9, p. 169.

²⁰³ Al-Khaṭṭābī, Ḥamd: Shāfi‘ī jurist, tendencies and poet. See *EI (2)*, v. 4, pp. 1131-1132.

unjustly forced to make the sale; secondly, the person sells his property for an unreasonable price because he is in need to pay a loan or necessary commission.²⁰⁴

There are some differences between usury, especially usury by way of deferment, and *tawarruq*. Firstly, usury or usury by way of deferment is a loan with interest. For example, A lends B £1000 for £1200 within six months, whereas *tawarruq* sale is a type of sale. Secondly, usury by way of deferment is between two people and the lender acquires the interest in addition to the capital, whereas a *tawarruq* sale is between three people and the seller, in the first contract, does not obtain the subject matter from the buyer, and does not know whether the buyer, in the first contract, plans to resell the subject matter or not. Consequently, there is no indication to show that *tawarruq* sale is a trick (*hīla*) to practise usury. In addition, the plan to obtain money is not prohibited in itself, because there is no proof that prohibits it.²⁰⁵

	Usury by way of deferment	<i>Tawarruq</i> sales
1-	Two contracting parties	Three contracting parties
2-	Exchange of same genus	Exchange of different genus

Table 3.4 Comparison between usury by way of deferment and *tawarruq* sales

²⁰⁴ Ibid ; al-Rashīdī, *‘Amaliyyāt al-Tawarruq*, pp. 77-78.

²⁰⁵ See Ibn ‘Uthaymīn, *al-Mudāyana*, p. 7; al-Rashīdī, *‘Amaliyyāt al-Tawarruq*, pp. 81-82.

To conclude, I would suggest that *tawarruq* sales can help some people who need money for many reasons to acquire it because they are allowed to find someone to lend them an interest-free loan (*qard ḥasan*), whereas usury is a loan with interest, and *tawarruq* sales are considered under some rules which are explained in Islamic jurisprudence. The first rule is “*idhā ḍāqa al-amru ittasa*”²⁰⁶ which means that when something is prohibited in Islamic law, and people feel that they are in difficulty if they cannot do it, Islamic law provides some solutions to overcome the problem. If a person needs money and cannot obtain it by an interest-free loan, and usury is prohibited, *tawarruq* sales may be the only solution for this circumstance.

The second rule is, “*al-ḥāja tunazzal manzilat al-ḍarūra*”²⁰⁷ which means that Islamic law considers that general need has the same ruling as necessity, in terms of permitting something which is normally prohibited in Islamic law. For instance, sometimes people need money to buy a house or furnish their house, and they do not have enough money, and this circumstance is not under the concept of necessity, but the rule regards the situation is as if it is necessary to do it. According to the common rule, “*al-ḍarūrāt tubīḥ al-maḥzūrāt*”²⁰⁸ which means that when a person is in necessity,

²⁰⁶ *Idhā ḍāq al-amr ittasa* means if someone be in a necessity circumstance and cannot overcome it unless that he engages in something unlawful, it is permissible for the person to engage in the thing which unlawful to overcome the trouble, then after he overcomes the trouble the thing becomes again unlawful as the original ruling. For instance, if there are no or few proper upright persons in the country, it is permissible for judges to accept the better among the community to be witnesses in the court. (See al-Zarqa, *Sharḥ al-Qawā'id*, p. 163)

²⁰⁷ See al-Zarqa, *Sharḥ al-Qawā'id*, p. 209.

²⁰⁸ See Ḥaydar, *Durar al-Ḥukkām*, v. 1, p. 33.

it is permissible for him to do prohibited things to overcome the circumstance of the necessity.

3.5.5 Comparison between *Ḥina* sales and *tawarruq* sales

The comparison between *Ḥina* sales and *tawarruq* sales are divided into two categories: similarities and differences.

We will consider the similarities first:

- 1- *Ḥina* sales and *tawarruq* sales involve two contracts.
- 2- The first contract in each case is a deferred sale, and the second contract is an immediate payment sale.
- 3- The first price is greater than the second price.

The differences between *Ḥina* sales and *tawarruq* sales are:

- 1- *Ḥina* sales are between two contracting parties in both transactions; the seller in the first transaction is the buyer in the second transaction, while the buyer in the first transaction is the seller in the second transaction. However, *tawarruq* sales are between three contracting parties; the seller in the first contract is not the buyer in the second contract, although the buyer in the first transaction is the seller in the second transaction.

2- The contracting parties to an *ʿIna* sale are involved in both contracts. On the other hand, in *tawarruq* sales, the buyer in the first contract is the only person who is involved in both contracts.

	<i>ʿIna</i> sales	<i>Tawarruq</i> sales
1	Two contracting parties	Three contracting parties
2	Both of them are involved in both contracts	Only one is involved in both contracts

Table 3.5 Comparison between *ʿIna* and *tawarruq* sales

Part Four

Organised *tawarruq*

4.1 Development of Islamic financial institutions

4.2 Contracts of organised *tawarruq*

4.1 Development of Islamic financial institutions

4.1.1 Early Islamic financial practice

4.1.2 Modern aspects of Islamic financial institutions

4.1.3 Towards interest-free banking

4.1.4 Current Islamic financial institutions

4.1.5 Products of Islamic financial institutions

4.1.1 Early Islamic financial practice

A simple form of Islamic financial institutions has existed since the establishment of the state of Medina. During Prophet Muhammad's lifetime, people relied primarily on two types of exchange. The simplest of these was a method of exchange between commodities, i.e. barter. The second type of exchange relied on gold and silver. Arabs at that time did not produce any currency or metallic money. However, they used the currency of other civilisations, of which there were two kinds: the first was the gold of the Byzantine civilisation, while the second was the silver *dirhams* of the Persian Empire.¹

¹ See Imam-ud-Din, *Historical Background of Modern Islamic Banking*, PJHC, 1981, v. 2, p. 84; Hasan, *al-Awrāq al-Naqdiyya*, pp. 63-65.

The first pure Islamic coins were produced in the late seventh and early eighth century by Umayyad caliph ‘Abd al-Malik Ibn Marwān (d. 86/705),² of the Banū Umayya. These Islamic coins were made of gold and named the *dīnār*. The caliph was very concerned about the quality of these coins and, as a result, the *dīnār* was distinguished by both its purity and accuracy. This led to the flourishing of trade and investment among buyers and sellers, and later became highly significant for the banking business in the Islamic world.³

Exchange of currencies was another aspect of Islamic financial dealing undertaken throughout the Prophetic period. It is mentioned in the following ḥadīth:

Narrated Ibn ‘Umar: I said, “O Allah’s Messenger, I sell camels for *dīnārs* and take *dirhams* (for them), I take this for that and give that for this”. Allah’s Messenger replied, “There is no harm in taking them at the current rate so long as you do not separate leaving something still to be settled.”⁴

From this it becomes clear that the Prophet’s companions engaged in the exchange of gold currency for silver currency, and he showed them how to do it whilst avoiding usury.

² ‘Abd al-Malik Ibn Marwān: Umayyad caliph, 65-86/685-705. See *EI (2)*, v. 1, pp. 76-77.

³ See Imam-ud-Din, *Historical Background of Modern Islamic Banking*, PJHC, 1981, v. 2, pp. 76-77; Hasan, *al-Awrāq al-Naqdiyya*, pp. 66-68; Lowick, *Coinage and History*, p. 1.

⁴ Abū Dāwūd, *Sunan*, v. 3, p. 240; al-Tirmidhī, *Sunan*, v. 3, p. 544; al-Nasā’ī, *Sunan Kubrā*, v. 4, p. 34; al-Dārimī, *Sunan*, v. 2, p. 336; Aḥmad, *Musnad*, v. 2, p. 139; al-Bayhaqī, *Sunan Kubrā*, v. 5, p. 315; Ibn Ḥibbān, *Ṣaḥīḥ*, v. 11, p. 287; al-Ḥākim, *al-Mustadrak*, v. 2, p. 50.

The transfer of money was another aspect of banking business that came to be known as *suftajah*.⁵ According to Imam-ud-Din, “*Suftajah* is the Arabicized form of the Persian word *saftah* meaning paper money or letter of credit. This letter of credit, or draft as we now call it, was issued by a money-changer on receiving a certain amount of deposit instructing his agent in a distant town or country where the traveller or merchant wanted delivery of the sum to make payment on receipt of this letter”.⁶ Hence *suftajah*, or transferring money, was a means of reducing the risk by bringing money from city to city or from one country to another. Nowadays, transferring money is part and parcel of modern banking services.⁷

4.1.2 Modern Aspects of Islamic Financial Institutions

Islamic financial institutions are establishments that provide banking products and services that conform to Islamic law which prohibits all forms of *ribā*, *gharar* and gambling. In fact, they are vehicles used by people in saving money, opening accounts, transferring money, and for the issuing of debit or credit cards and so on.⁸ In addition to this, Islamic banks and financial institutions provide an array of investments derived from Islamic business transactions as alternatives to prohibited transactions. For example, many transactions can

⁵ A Persian word which, means giving a bill of exchange or a letter of credit. (See Steingass, *Persian-English Dictionary*, p. 684)

⁶ See Imam-ud-Din, *Historical Background of Modern Islamic Banking*, PJHC, 1981, v. 2, p. 83.

⁷ See Imam-ud-Din, *Historical Background of Modern Islamic Banking*, PJHC, 1981, v. 2, p. 83; Islahi, *Economic Concepts of Ibn Taymiyya*, p. 136; al-Mitrik, *al-Ribā wa al-Mu‘āmalāt al-Maṣrifīyya*, pp. 279-281.

⁸ See Khojah, *Profit Sharing an Interest Alternative*, p. 52.

be marketed under the concepts of *muḍārabā*, mark-up sales, deferred sales, forward sales, or lease.⁹

Islamic financial institutions in general cannot necessarily be equated with Islamic law.¹⁰ Islam does not explain the details and intricacies of an Islamic banking system but rather the role of Islamic law, in the financial system, is to identify prohibited transactions. By extension, Muslims are required to abstain from such dealings. In some cases, Islam suggests an alternative. For instance, in a ḥadīth reported by al-Bukhārī and Muslim, a viable alternative aimed at making the transaction permissible is proffered:

“Narrated Abū Sa‘īd Al-Khudrī and Abū Hurayra: Allah’s Messenger (peace be upon him) appointed a man over Khaybar and he brought him dates of a very fine quality. Allah’s messenger asked, “Are all the dates of Khaybar like this?” He replied, “I swear by Allah that they are certainly not, O Allah’s Messenger. We take one *ṣā‘* of this kind for two, and even for three.” So Allah’s Messenger said, “Do not do so. Sell the mixed dates for dirhams, and then buy the very fine dates with the dirhams.” And he said that the same applies when things are sold by weight.”¹¹

As can be deduced from this narration, the Prophet prohibited a direct exchange of unequal quantities of dates and suggests selling them first for *dirhams* before buying other types. This indicates the first role of Islamic jurisprudence, as mentioned earlier.

⁹ See Khan and Mirakhor, *Monetary Management*, JKAUIE, 1994, v. 6, pp. 8-9; Udovitch, *Partnership and Profit Sharing*, p. 170; Khojah, *Profit Sharing an Interest Alternative*, p. 54 ; Vogel and Hayes, *Islamic Law*, pp. 23-28.

¹⁰ As we mentioned earlier that not all contracts, which are some them be offered by Islamic financial institutions, are explain in details in Islamic law. But the general rule is that the modern contracts are permissible as long as the contracts are not against the general rules in Islamic such as the prohibition of usury.

¹¹ Al-Bukhārī, *al-Jāmi‘ al-Ṣaḥīḥ*, v. 2, p. 767; Muslim, *Ṣaḥīḥ*, v. 3, p. 1215.

Writers on Islamic finance and economics use the word 'Islamic' to distinguish establishments which conform to Islamic law from both other types of banking systems as well as the contemporary economic system in general. While the latter deems interest in commerce permissible and laudable, in contrast, the majority of Muslims' scholars believe that interest is one of the modern aspects of usury strictly prohibited in Islam.¹²

The majority of Islamic financial institutions are commercial establishments that generally endeavour to embark on transactions and financial services compatible with the teachings of Islam. Credibility in achieving this is vital if Muslim customers are to feel confident in using the services of the bank while they themselves may have limited knowledge of the Islamic jurisprudence related to such matters. In order to ensure this, and reaffirm their commitment to legitimate Islamic financial practice, the majority of Islamic financial institutions appoint a *Sharī'ah* board composed of Islamic scholars to ensure that all services and transactions conform strictly to Islamic law.

However, Islamic financial institutions - in modern terms - are not old establishments. They have only existed since the 1960s. In fact, the first attempt made at Islamic financial institutions was the experiment of Ahmed El-Naggar, who was an Egyptian doctoral student attending university in Germany. The experiment took place in the town of Mitt Ghamr in the Nile delta in Egypt. The institution was called the Local Saving Bank and

¹² Many books and articles use the expression 'Islamic' to identify the financial dealings in accordance with Islamic law; for instance, Usmani, *An Introduction to Islamic Finance* and Warde, *Islamic Finance in the Global Economy*.

began operations in 1963. Within just three years, the institution succeeded in attracting more than 60,000 Muslim depositors due to its transactions being in compliance with permissible Islamic financial practices.¹³ Although this endeavour succeeded and proved fruitful, it was brought to an end in 1967. The reason for this remains unclear, but underlying political pressure appears to have contributed. Wilson explains further:

The Egyptian government was unhappy about the new Islamic bank, especially some of Nasser's more leftist ministers who were suspicious of all Islamic institutions. The senior staff of the major state owned banks and the Central Bank of Egypt were also unhappy, especially the latter as they could not monitor the bank's activities.¹⁴

The government opted to nationalize the institution and changed the name from Local Saving Bank to Bank of Nasser.¹⁵ The Local Saving Bank became the first Islamic financial institution of its era.¹⁶

However, in the 1970s, the drive for Islamic financial institutions gained momentum, and professional financial institutions operating in accordance with Islamic law were established. In 1972, a pivotal study was undertaken in Egypt aimed at establishing an effective business system in Islamic banking with a view to founding an international Islamic financial institution for Islamic countries. Experts in Islamic jurisprudence, the

¹³ See Nienhaus, *Islamic Banking*, p. 70; Wilson, *Economics, Ethics and Religion*, pp. 155-156.

¹⁴ *Economics Ethics and Religion*, p. 156

¹⁵ See al-Omar and Abdel-Haq, *Islamic Banking*, p. 21; Wilson, *Economics, Ethics and Religion*, p. 156.

¹⁶ See al-Omar and Abdel-Haq, *Islamic Banking*, p. 21; Nāsir, *Uṣūl al-Maṣrifiyya al-Islamiyya*, p. 29; Wilson, *Economics Ethics and Religion*, p. 156; Aḥmad, *Developments and Problems*, pp. 2-4.

economy and law prepared the paper under the supervision of the Egyptian government.¹⁷ In 1974, an agreement between the treasury ministers of Muslim countries led to the development of an international Islamic Bank in Jeddah, Saudi Arabia. This financial institution, the Islamic Development Bank (IDB), has operated since 1975 with 44 members and a subscribed capital of 2,028.74 million Islamic *dīnārs*.¹⁸ Its role is primarily threefold: to participate in the equity capital, grant loans for productive projects in the members and to provide financial assistance in other forms for economic and social development.¹⁹ In the same year, the Dubai Islamic Bank opened as the first private Islamic financial institution in the United Arab Emirates.²⁰ Afterwards, a broad range of Islamic banking institutions have risen across the world, including non-Muslim lands.

4.1.3 Towards interest-free banking

Since the 1980s, there has been a hugely significant development in the history of Islamic financial institutions: three countries have chosen to establish interest-free banking systems in replace of interest based banking.

¹⁷ See Nāsir, *Uṣūl al-Maṣrifīyya al-Islamiyya*, p. 32.

¹⁸ See Nāsir, *Uṣūl al-Maṣrifīyya al-Islamiyya*, p. 33; Ahmad, *Islamic Banking*, p. 40.

¹⁹ Ahmad, *Islamic Banking*, pp. 40-41.

²⁰ See Nāsir, *Uṣūl al-Maṣrifīyya al-Islamiyya*, p. 33.

The first country to do so was Pakistan.²¹ Before February 1979, several studies had been conducted in the country in preparation for the transition. The Council of Islamic Ideology (CII) played a large role in this and when the president of Pakistan announced that interest was to be removed from the economy within three years, the gradual move towards Islamic banking began. Some institutions, particularly those that specialized in credit, removed interest-based transactions from their operations immediately, while others took time in adapting to the new methods of banking. In June 1984, the government announced that the use of interest in banking would have to be discontinued within a year. Consequently, on the first of July 1985, all financial operations in the banking and financial sector formally eliminated interest and became non-interest-based institutions, except for foreign currency deposits, which continue to earn fixed interest.²²

The Islamic Republic of Iran, in August 1983, also took similar steps by enacting a law which effectively aimed to replace interest-based banking with interest-free banking. The law required banks to convert deposits to an interest-free-basis within just a year, and all remaining operations within three years. By way of alternative, the government endorsed plans for two kinds of deposit systems, namely, interest free loan (*qard ḥasan*) and term investment deposits.²³

²¹ See Warde, *Islamic Finance*, pp. 112-117; Ahmad, *Present State*, pp. 66-70.

²² See Khan and Mirakhor, *Islamic Banking*, University of Chicago, 1990, p. 375-367; Ahmad, *Islamic Banking*, pp. 35-37; Saeed, *Islamic Banking and Interest*, p. 14.

²³ See Khan and Mirakhor, *Islamic banking*, University of Chicago, 1990, p. 358-361; Ahmad, *Islamic Banking*, p. 37-39; Wilson, *Economics Ethics and Religion*, pp. 146-149; Shirazi, *Islamic Banking*, pp. 5-7.

Sudan is the third country to pursue a wholly Islamic financial system. The first attempt to Islamize the entire banking system was made in 1984, when the government issued a decree to all banks to stop interest-based dealings with immediate effect and to negotiate the conversion of existing interest bearing deposits into islamically acceptable forms. However, foreign transactions were still permitted to continue on an interest-base. Notably, this attempt came to an end in 1985 due to changes in government but, more recently, there have been further attempts to pursue the re-Islamizing of the banking systems yet again.²⁴

Other predominantly Muslim countries, though abstaining from an all-out transition to Islamic banking, still continue to benefit from investors and customers attracted to Islamic financial institutions.

It is estimated that the Islamic financial institutions sector manages assets worth more than \$260 billion and the number of such institutions in 2003 was 267 compared to just 167 in 1997. And nowadays, the Islamic financial institutions control about \$350, and the number of the institutions increases up to about 300 institutions providing the Islamic products and services in 75 countries.²⁵ These financial institutions operate in several countries in the world in varying capacities. Institutions in Muslim countries co-exist with interest-based banks – as in Jordan, Egypt and Malaysia. Some Islamic financial institutions in non-Muslim countries are not recognized by the monetary authorities – for example, the

²⁴ Ahmad, *Islamic Banking*, pp. 39-40.

²⁵ See General Council for Islamic Banking and Institutions, www.cibafi.org, 16 June 2006; Al Riyadh newspaper, 27 Sep. 2003, Issue no. 12881; al-Watan al-Kuwaitiyya, 14 Jan 2007.

UK and South Africa. In contrast, some non-Muslim countries and their monetary authorities do recognize the Islamic financial system, as is the case in Denmark.²⁶

4.1.4 Current Islamic financial institutions

In discussing Islamic financial institutions, it is necessary to list key examples of modern-day Islamic banking and commerce establishments in order to illustrate the areas in which Islamic banking practices are applied.²⁷ These include the following:

1- The Dar al-Mal al-Islami/Faisal Group

Dar Al-Mal Al-Islamic (DMI) is a trust company, founded in 1981, in the Bahamas and directed from its headquarter in Geneva. It operates under the chairmanship of Prince Muhammad Al-Faisal Al-Sa'ūd.

2- The al-Baraka Group

The Al-Baraka Group (now known as the Dallah Al-Baraka Group) is a multinational financial institution based in Jeddah. It was founded in 1982 by Saleh Kamel.

²⁶ Al-Omar and Abdel-Haq, *Islamic Banking*, p. 22.

²⁷ Ray, *Arab Islamic Banking*, pp. 10-13.

3- Al-Rajhi Company for Currency Exchange and Commerce.²⁸

Al-Rajhi Company for Currency Exchange and Commerce became the first chartered Islamic bank in Saudi Arabia in late 1987 and is the largest Islamic bank in both assets and capital. The transactions focus mainly on *ṣarf* (currency exchange) and *murābaḥa* (trade financing).

4- Kuwait Finance House

Kuwait Finance House (KFH) was established in 1977. It is the second with respect to assets. KFH is 51% owned by private citizens, 49% by the Kuwait government. Most transactions are *murābaḥa* or real estate projects.

5- Qatar Islamic Bank

The Qatar Islamic bank, founded in 1983, plays a strictly national role. Its operations emphasize mark-up (*murābaḥa*) and partnership (*musharaka*).

6- Bahrain Islamic Bank

Bahrain Islamic Bank, founded in 1979, is partially owned by Dubai Islamic Bank and Kuwait Finance House. Bahrain Islamic Bank owns much of Bahrain Islamic investments, and some of Al-Baraka's investment of Bahrain.

²⁸ It is called now al-Rajhi Bank.

4.1.5 Products of Islamic financial institutions

The Islamic financial institutions provide many types of products to finance their customers. Under this section we will indicate in brief some of the products:

1- Financing by mark-up (*murābaḥa*)

Financing by mark-up (*murābaḥa*) has already been discussed in this research as a kind of sales contract, but we will discuss it now as practised in the Islamic financial institutions. Financing by mark-up is one of the most common forms in the Islamic financial institutions. The contract can be considered under deferred sales (*al-bay‘ al-mu’ajjal*) in general and it is settled by instalment payment. The financial institutions offer the product, which has been bought from the market, to the clients for the same price, but a premium is added over the profit margin depending on the period of payment.

2- Leasing ending with ownership (*ijāra muntahiya bi al-tamlīk*)

Leasing ending with ownership (*ijāra muntahiya bi al-tamlīk*) is of three kinds. The first kind is leasing ending with ownership by way of gift (*hiba*), which means the transfer of title at the end of the lease for a token consideration or price. The second kind is leasing ending with ownership through transfer of title at the end of the lease for a token consideration or at a nominal price. The third kind is leasing ending with

the ownership through sale prior the end of the lease term for a price that is equivalent to the remaining leasing (*al-ijāra*) instalment.²⁹

3- Diminution partnership (*al-mushāraka al-mutanaqīṣa*)

Diminution partnership (*al-mushāraka al-mutanaqīṣa*) is where a financier (financial institution) and his client participate either in the joint ownership of a property or equipment, or in a joint commercial enterprise. The share of the financier is further divided into a number of units and it is understood that the client will purchase the units of share of the financier one by one periodically, thus increasing his own till all the units of the financier are purchased by him so as to make him the sole owner of the property, or the commercial enterprise, as the case may be.³⁰

4- *Muḍāraba* contracts

Muḍāraba contract is a contract which belongs to the category of partnership (*mushāraka*) contracts, and it is considered under the concept of profit and loss sharing. Capital is contributed by one party (*rabb al-māl*) and the managerial oversight and entrepreneurial push is provided by another (*muḍārib*). Any profits are shared according to predetermined formula. In the event of loss, the passive capital supplier loses all or part of their money, and the entrepreneur loses the time and energy he committed.

²⁹ Rosly, *Critical Issues on Islamic Banking*, p. 104; see also Aḥmad, *Development and Problems*, pp. 20-21; Usmani, *Islamic Banking*, pp. 87-163.

³⁰ Usmani, *an Introduction to Islamic Finance*, p. 30.

These *mudāraba* arrangement can be used to finance well-established and mature business as well as new ventures with greater risk and profit potential.³¹

4.2 Organised *tawarruq*

4.2.1 Introduction

4.2.2 Concept of organised *tawarruq*.

4.2.3 Examples of organised *tawarruq*

4.2.4 Cornerstones (*arkān*) and conditions (*shurūṭ*) of organised *tawarruq*

4.2.5 Comparison between organised *tawarruq* and contracts in the traditional fiqh

4.2.6 Organised *tawarruq* according to Muslim jurists

4.2.1 Introduction

Organised *tawarruq* is a new mode of provision of personal finance by Islamic financial institutions or conventional banks which provide Islamic products. The contract was introduced in Saudi Arabia in 2000. The financial institutions consider the contract of organised *tawarruq* as an Islamic product which is subject to the rules of Islamic law,

³¹ Vogel and Hayes, *Islamic Law*, pp. 193-194.

and this type of contract is approved by the *Shari'a* board, which supervises any contract which is considered by institutions as an Islamic product or service. Private financial institutions in Saudi Arabia can be classified into two categories: first, Islamic financial institutions, which provide products and services which are supervised by the *Shari'a* board of the institution. These institutes avoid any products and services which are not approved by the *Shari'a* board. Examples of this type of institution are al-Rajhi Bank and al-Bilad Bank.

Secondly, financial institutions which perform two kinds of transaction: those which are not supervised by the *Shari'a* board of the institutions, and those which are under the supervision of the *Shari'a* board. Examples of these institutes are SABB (Saudi Arabia British Bank), Bank al-Riyadh, Samba Financial Group, Saudi France Bank and National Arab Bank.³²

As mentioned above, organised *tawarruq* was started in the financial institutions in Saudi Arabia in the last few years. The first institute to offer it was NCB (National Commercial Bank), which did so under the name, Al-Taysir. Then SABB introduced organised *tawarruq* in October 2000, under the name, Mal. Al-Jazira Bank and Samba Financial Group have offered organised *tawarruq* since the end of 2002. It is called Dinar by al-Jazira Bank, and it is called Tawarruq Al-Khair by Samba Financial Group.

³² For more details regarding the development of banking in Saudi Arabia see Wilson, *Economic Development in Saudi Arabia*, pp. 56-62.

Now, the majority of financial institutions in Saudi Arabia offer organised *tawarruq* as an Islamic approach to financing, whether for establishments or individuals.

There are several reasons, in terms of commercial purpose, why organised *tawarruq* is favoured by financial institutions:

- 1- Some scholars state that some forms of this contract are not prohibited in Islamic law and people who want to obtain money can do so without being involved in usury, which is prohibited in Islamic law. So this type of contract attracts many people and the conventional banks also offer it to their clients as an alternative to the provision of a loan with interest.³³

- 2- It is an easy way to obtain finance; in some institutions, the funds are released about two days after the application has been completed by the client.³⁴

- 3- The transaction has low risk because the institutions buy commodities which are normally stable, in terms of the price, from the market and the process of the transaction is completed within a week, which is not long enough to bring a marked change, especially in the kinds of commodities involved.³⁵

³³ See al-Sa'īdī, *al-Tawarruq Kamā Tujrīh al-Maṣārif*, MIFAW, p. 199; al-Zahrānī, *al-Tawarruq Siyāsa Jadīda*, MTŞ, pp. 38-39; and we will discuss the views of the scholars regarding to this issue below.

³⁴ See al-Sa'īdī, *al-Tawarruq Kamā Tujrīh al-Maṣārif*, MIFAW, p. 175.

³⁵ See *Ibid.*

This section will discuss organised *tawarruq* which is provided in the financial institutions in Saudi Arabia, focusing on transactions of which the subject matter is commodities. Then, the forms of contract, which are practised in the institutions, will be discussed, and the view of scholars on this kind of transaction under Islamic law will be explained.

4.2.2 Concept of organised *tawarruq*

Researchers who study this type of contract discuss it under two expressions. The first expression is banking *tawarruq* (*al-tawarruq al-maṣrifī*).³⁶ This expression is commonly used in commercial contexts because the inclusion of the word banking indicates the provider of the transaction. The second expression is organised *tawarruq* (*al-tawarruq al-munazzam*) which seems to be a more academic term, because it indicates the procedure of the contract which is arranged by the financial institutions and the arrangement differs between organised *tawarruq* and the traditional form of *tawarruq* which is explained in the traditional *fiqh*.

We will begin by considering how organised *tawarruq* is defined by the financial institutions, starting with NCB (National Commercial Bank): “Taysir al-Ahli is based on the Islamic financing mechanism of *tawarruq* whereby the client buys commodities

³⁶ See al-Qirī, *al-Tawarruq Kamā Tujrīh al-Maṣārif al-Islāmiyya*, MBFM, p. 29; al-Saʿīdī, *al-Tawarruq Kamā Tujrīh al-Maṣārif*, MIFAW, p. 183.

from NCB on credit and sells them back in the market for a spot price to get cash. NCB of course helps in making the whole process compliant with *Shari'a* and convenient so you can get the proceeds in your account quickly”.³⁷

As shown, the first part of the definition is just an explanation of the definition of the traditional *tawarruq*, but the second part, “NCB of course helps in making the whole process compliant with *Shari'a* and convenient so you can get the proceeds in your account quickly”, indicates the role of the institution in offering help to clients to obtain the cash by arranging the procedure of the contract to enable them to acquire money easily and quickly. However, the definition does not indicate the type of commodities which the institution offers, or how it buys the commodities, nor does it explain how what procedure it undertakes to help the client to obtain the money quickly.³⁸

Next, SABB (Saudi Arabia British Bank) defines its way of offering organised *tawarruq* as follows: “Mal is designed to allow you to trade on the international commodities markets whilst satisfying Islamic *Shari'a*. Here's how it works: SABB buys a commodity – usually metal – on the international market and sells it to you at a certain profit mark-up over a certain period of time. Once you own the commodity, you

³⁷ See Al-Ahli Commercial Bank, Tayseer al-Ahli, <http://www.alahli.com>.

³⁸ See al-Sa'āfi, *al-Tamwīl al-Maṣrafi*, *al-Aswāq*, p. 35.

simply issue SABB with the power of attorney to sell it on the international market and credit your account with the sum obtained”.³⁹

The above definition is more detailed than the NCB form. The bank specifies the market, which is the international market, and the type of commodity which is, normally, a metal. Then, the bank indicates the contract which is offered to the client, which is a mark-up sales (*bay‘ al-murābaḥa*). This means that they indicate the cost of commodities to the client and the amount of profit, and the price must be paid within a certain period of time. This transaction might be under the concept of deferred sales (*al-bay‘ al-mu‘ajjal*) if the payment is a single transaction or instalment sales (*bay‘ al-taqsiṭ*) if the payment is by more than one instalment. Then they say, “Once you own the commodity, you simply issue SABB with the power of attorney to sell it on the international market and credit your account with the sum obtained”. This shows that the role of the institution does not end after selling the product to the client but they also offer to the client their services as an agent to sell the commodity on his behalf and receive the price, which is credited to the client’s account.⁴⁰

ANB (Arab National Bank) also offers this kind of transaction, which they explain in the following terms: when you buy *tawarruq* commodities through the bank, you automatically authorize the bank to sell it on your behalf for cash. The

³⁹ See Saudi Arabia British Bank, Mal, www.sabb.com.

⁴⁰ We will discuss samples of this contract below.

commodities are sold at prevailing market prices, on the spot and cash proceeds are then deposited in your account. The transaction is quick, easy and low cost. You repay on an easy instalment basis of up to 60 months”.⁴¹

As it is seen, the institution takes the authority to sell the commodity when the client entered into the contract, as they say, “When you buy *tawarruq* commodities through the bank, you automatically authorize the bank to sell it on your behalf for cash”, but they do not mention whether the client must authorize the institution to sell the commodity on his behalf of him or not. Then, the institute indicates that they sell the commodity in the market for the prevailing price; they do not indicate any referral to the client to ask him whether he is satisfied with the price or not. Next, according to the definition the payment is by instalment over up to 60 months. Thus, the method of payment falls under the umbrella of instalment sales.

Next, we will discuss the definitions of organised *tawarruq* offered by researchers who study contracts. A contemporary expert in Islamic economics, al-Suwaylem indicates that organised *tawarruq* is a contract in which the seller, who is the financial institution, arranges the process of the transaction by selling a commodity to the client for deferred payment. The institution then sells the commodity, as an agent on behalf of the client to a third party, in the market and then credits the price to the account of

⁴¹ See Arab National Bank, Local al-Tawarruq al-Mubarak, www.anb.com.sa.

the client.⁴² Then he also indicates that the institution may enter into an agreement with a trader to buy the commodity from the institution, who is the agent, for less than the common price in the market.⁴³

So al-Suwaylem does not mention whether the financial institution obtains the commodities before it sells them to the clients or not, and he also does not mention who is the owner before the institution or, in other words, whether the owner before the institution is the third party who buys the commodity from the client or whether the owner is different. Al-Suwaylem's definition seems to be focused on the relationship between the institution and the client, without considering the whole process of the contract, whereas the relationship between the institution on the one hand and the first owner and the third party on the other hand is important from an Islamic point of view, because according to the conditions of sales, a seller must own a commodity before he offers it and some financial institutions buy commodities after the clients apply for the *tawarruq*. In addition, he does not mention the types of commodities which are normally offered. This is important because the types of commodity affect deferred payment according to Islamic law and the contracting parties have to consider the rules of usury when they plan to engage in any kind of deferred sales. For instance, it is not permissible to exchange between money and gold or silver when one of them is deferred.

⁴² See *al-Tawarruq wa al-Tawarruq al-Munazzam*, MIFAW, pp. 263-264.

⁴³ Ibid.

A contemporary jurist al-Sa'īdī defines organised *tawarruq* by saying that the financial institutions buy a quantity of minerals from the international market; they may have agent to act on their behalf in this matter. The commodities are held in international stores. Then, the company, which sold the commodities to the institutions, provides a certificate of storage to the institutions containing a description of the commodities, their amount, the place of storage, their reference number and the institution's ownership of them.

When the institutions own the commodities, they sell them to clients by dividing them as required, and prepare forms to complete the contract as follows:

- a- Application for purchase, where the buyer fills a form which contains an application to buy a specific commodity.
- b- An agreement which contains the terms and conditions of instalment sales. This form does not represent the offer (*ījāb*) and acceptance (*qabūl*) of the contract, but the terms and conditions specify the relationship between the contracting parties who are the client and the financial institution.
- c- Offer of sales by the institution, which represents the seller. The institution gives details of the commodity, its amount, the price and so on.

- d- Acceptance of sales by the client who represents the buyer. This form shows that the client accepts the offer which is made by the institute and he has to sign the form.
- e- The last form is to accept the institution as an agent to sell the commodity on behalf of the client. Then the financial institution may sell the commodity by itself or through another agent.⁴⁴

To make the definition clearer, we will give an example. The financial institution buys a hundred tons of copper for 2 billion pounds sterling from the international market, and then the institute divides the copper to suit the applications of the clients. The institute sells a hundred kilos of copper for 22 million pounds sterling, including the original price and mark-up. Afterwards, the institute becomes an agent on behalf of the client to sell the copper again in the international market.

The above definition delimits the commodity which is the subject matter (*al-mabīʿ*) of the contract by indicating that the institutions buy a quantity of minerals, and it also specifies the source of the minerals, as it says from the international market. However today, some financial institutions deal with local companies in Saudi Arabia and the subject matter might be not minerals, but other goods such as rice, cars and

⁴⁴ See al-Saʿīdī, *Al-Tawarruq Kamā Tujrīh al-Maṣārif*, MIFAW, pp. 185-187.

electrical goods.⁴⁵ The definition does not indicate that the institutions declare the original price to the client. Some institutions declare the original price which they have paid to obtain the commodities from the international market,⁴⁶ and there is a difference between declaring and not declaring the price in the contract according to Islamic law, because if the price is declared, the contract falls under the concept of mark-up sales.

A scholar who takes account of this distinction in his definition is al-Qirī, who identifies three forms of organised *tawarruq*.

a- Form of order then mark-up sales.

In this contract, the client applies for organised *tawarruq* before the institutions obtains the commodities. In other words, the institution waits until it receives a confirmation from the client that he wants to buy a specific commodity. Then, after the client promises that he will buy the commodity when the institution obtains it, the institution buys the commodity from the market, with the description and the amount as indicated in the contract, and receives it as an account record (*qabḍ ḥisābī* or *ḥukmī*) which means the delivery is not an actual possession (*qabḍ ḥaqīqī*).⁴⁷ Then when the institution has complete ownership of the commodity, it sells it to the client by offer and acceptance. Again, the possession also in this case

⁴⁵ See al-Qirī, *al-Tawarruq Kamā Tujrīh al-Maṣārif Islamiyya*, MBFM, pp. 31-35.

⁴⁶ See *Ibid*, pp. 29-31.

⁴⁷ For more details see Kamali, *Islamic Commercial Law*, pp. 106-108.

is an account record (*qabḍ ḥsābī* or *ḥukmī*) to the client by deferred sales. The price includes the original paid by the institution and a mark-up as agreed by the contracting parties and the payment is by instalments. Then the client offers the commodity in the local market (which is normally the case with cars) or enters into another agreement with the institution to be an agent on behalf of the client to sell the commodity in the international market, if the commodity is one that is normally sold in the international market, and credit the price to the account of client. Institutions normally offer this type of contract to companies, but some of them offer it to individuals.⁴⁸

For instance, A (institute or seller) has been asked to provide finance through organised *tawarruq* by B (company or buyer). B wants to obtain 3 millions pounds sterling, and applies for a ton of copper, which are valued at 3 millions pounds sterling in the international market, to be bought by A; B promises A to buy the copper when A obtains it. Then, A buys a ton of copper from the international market for 3 million pounds sterling. A resells the copper to B for 4 millions pounds (original price + mark-up) to be paid within five years by instalment payments. Then, B enters into another contract with A, whereby A acts as agent on behalf of B to sell the copper in the international market, and credit the price to the account of B.

⁴⁸ See al-Qirī, *al-Tawarruq Kamā Tuḥrīh al-Maṣārif al-Islāmiyya*, MBFM, pp. 29-30.

b- The second form is where the institutions already have commodities and sell them to the client on a mark-up sales basis. In this contract, the institution buys an amount of commodities wholesale from the international market on a specific day of the week, Saturday for instance, and the commodities are stocked in a storehouse with a certificate to prove the ownership of the institutions. Then, they offer the commodities in small quantities to the clients, who apply to buy the commodities, to be sold on an instalments basis. The institution sells the amount, which it has, over the next few days, until Friday, for instance, and then the client signs another form for the institution to make it his agent to sell the commodity in the international market on his behalf, wholesale. Afterwards, the institution credits the price to the account of the client.⁴⁹

For instance, A (institute or seller) buys 3 tons of copper for 30 million pounds sterling on Saturday. C1 (client no. 1) wants to buy a ton of copper from A, and C1 applies for it on Monday, then C2 (client no. 2) applies for a ton on Tuesday and C3 (client no. 3) does so on Wednesday. A sells everyone the amount, which they apply for, and the price is 12 million pounds sterling for every ton of copper, to be paid by instalments within four years. Then, C1, C2 and C3 enter into another contract appointing A as their agent to sell the copper on their behalf in the international market on Friday. Then, A credits the price to the accounts of the clients.

⁴⁹ See al-Qirī, *al-Tawarruq Kamā Tujrīh al-Maṣārif al-Islāmiyya*, MBFM, pp. 30-31.

c- The third form is a *musāwama* sale, which means that the seller does not mention the price which he paid. The contract is simply as the same as the above contract, but the only difference is that the institutions does not mention the price which has been paid in the international market.

The above definition seems to be more comprehensive than the first and second definitions, and al-Qirī indicates that it is the most common form of organised *tawarruq*. However, he does not discuss some forms which contain local commodities as the subject matter of the contract, and there is a marked difference between international and local commodities, which might affect the contract, in the view of some scholars.⁵⁰

A contemporary jurist Al-Mushayqih defines the organised *tawarruq* as a contract where the financial institution arranges to sell a commodity to a client by deferred payment then becomes an agent on behalf of the client to sell the commodity to a third party whereupon the institution pays the price to the client. Then, he elaborates on the procedure. He says that the institutions buy commodities, normally minerals, specifically zinc, bronze, nickel, tin and copper, every week. They choose these minerals because they are common in daily exchange in the international market. In the contract, clients apply to buy a specific mineral which they specify and the contract is based on instalment sales. The commodities are normally in another

⁵⁰ See ruling of organised *tawarruq* below.

country, such as Bahrain. Then, the institutions sell the minerals in many units according to the wishes of the clients. After the client buys a unit, he empowers the institution to receive and sell his commodity in the international market, and credit the price of it to his account. The clients have the power to change in the price, so they might sell their commodities for the same price or a different one. The clients also have the right to receive their commodities in the place where they are normally delivered. In addition, he also indicates that the financial institutions engage in an agreement with some brokers to obtain the metals.⁵¹

For instance, A (financial institution or seller) buys 300 tons of bronze from B1 (broker no. 1) from the international market for 3 billions pounds and the payment is immediate. C (client) applies to buy a ton of bronze to be paid in instalments within three years. The financial institution offers it to the client for 11 millions pound (original price + mark-up) to be paid in instalments within three years. After the financial institution and client have signed the contract, the financial institution offers to the client the agency of the financial institute himself or another party to sell the commodity in the international market to B2 (broker n. 2) for 10 million pounds to be paid now. At the end, the financial institution receives the price and credits it to the account of the client.

⁵¹ See *Al-Tawarruq al-Maṣrifi*, MUQ, pp. 139-140.

According to the above description given by al-Mushayqih, the financial institution is the seller in the first contract and the agent on behalf of the client in the second contract. However, it is not always the case that financial institutions become agents after they sell the commodity, because some financial institutions arrange with another party to be empowered by the client to sell his commodity on his behalf. However, the contract of agency, whether to empower the financial institution or another party, is normally signed in the financial institution after the contract of organised *tawarruq* is signed.

Next, he also indicates that the subject matter is normally a metal, but today there are many financial institutions, such as Al-Ahli Commercial Bank, al-Riyadh Bank and National Arab Bank, which offer other types of commodities such as rice, electrical goods and some others, normally local commodities.

In addition, al-Mushayqih mentions that the financial institutions obtain the commodities, before they offer them to the clients. This might be true for individual clients, but when the contract is with companies, the financial institutions often enter into the contract before obtaining the commodities, especially when the price is expensive, such as, a billion riyals.

To conclude, organised *tawarruq* is a sales contract the purpose of which is to finance people in accordance with Islamic law. The process begins in the international

or local market where the financial institutions buy commodities for immediate payment, and obtain a certificate which proves their ownership of commodity. Then the financial institutions offer the commodities to their clients who want to be financed, then the clients buy the commodities as an instalment sale, and the financial institutions often indicate the original price (*al-thaman*), which has been paid. The clients then enter into another agreement to empower the financial institutions or a third party to sell the commodities in the market, although they normally avoid selling the commodities to the traders who originally sold them to the financial institutions. However, in some cases the financial institutions and clients enter into the contract before the financial institutions obtain the commodities. At the end, the financial institution credits the price to the account of the client.

4.2.3 Examples of organised *tawarruq*

Under this section we will show two samples of the contract of organised *tawarruq*. The first sample, which is called Mal, is issued by al-Amana Islamic Bank, which is affiliated to Saudi Arabia British Bank. The second sample, called *al-tawarruq al-mubārak*, is issued by National Arab Bank. The first sample represents a contract of which the subject matter is from the international market. The second sample represents a contract of which the subject matter is from the local market.

1- Mal

Mal is a form of a contract of organised *tawarruq* which has been offered by Al-Amanah Islamic Bank which is an Islamic window belonging to the Saudi British Bank.

The contract takes the following form:⁵²

PURCHASE REQUEST

The Saudi British Bank
Al-Amanah Islamic Banking

Date:

/	/	G
/	/	H

Dear Sir,

With reference to the Instalment Sale Agreement signed with you on
I wish to purchase a metal according to the following:

Description of the metal:

Quantity:

Sale Price: (Principle + Profit)

Repayment Period: (months)

Administrative Charges:

I authorise the bank to debit my account for SARto cover the administrative charges. I understand that this amount is non-refundable against entering with the Bank in the purchase procedure. I hope this request will be accepted by you.

Name:

Signature:

Acceptance

To

Dear Sir

With reference to your request for purchase of the metal according to the above terms, we wish to advise you of our acceptance to sell to you according to the Terms & Conditions stated in the request.

For Al Amanah Islamic Banking:

⁵² See appendix 4.1 below, pp. 288-291.

Instalment sale agreement

This agreement has been made on / / AH corresponding to / / AD in the city of between:

1) Amanah Islamic Banking Services of SABB incorporated under the rules of the Kingdom of Saudi Arabia, C. R. No. 1010025779 having its Head office in Riyadh, P. O. Box: 9084, Riyadh: 11413, represented herein by:

Mr..... (First Party – Seller)

&

Mr./Mrs	
Nationality	
ID	
Issue Date	
Issued from	

And having address at

City	
District	
Street	
P.O. Box	
Fax	
Tel	

Preamble:

Whereas the Second Party has submitted from time to time a request to the First Party to purchase metals owned by the First Party at the time of the agreement by way of “Instalment Sale”, the two parties have in their legal capacity agreed to enter into this contract as per the following terms and conditions:

Article 1:

The above preamble constitutes an integral part of this contract.

Article 2: Sold items and value

The First Party will sell to the Second Party from time to time metals according to the purchase request submitted by the Second Party to the First Party including description of metals, quantity, sale price and repayment period. Afterwards, sale shall be made by contract including accede and acceptance.

Article 3: Repayment:

The Second Party shall pay the price of sold metal on monthly instalments as follows:
a) The Second Party hereby irrevocably authorizes the First Party to debit his/her current account for the monthly instalment on due date automatically without further approvals.

- b) Where the Second Party's salary is assigned to the First Party as a security hereunder, the Second Party may not stop the transfer of his/her salary to the First Party, and he/she must present an acknowledgement from his/her employer.
- c) The Second Party shall pay due instalments on due dates net of any taxes or fees of any type or source and whether payable at the signature of this agreement or imposed in the future.

Article 4: Securities

As security to the First Party's rights, the Second Party has presented the following covers:

- a) An account has been opened with the bank where his/her salary shall be transferred.
- b) An Order Note has been issued to the order of First Party for each transaction.
- c) _____ (Other securities if any)
- d) _____ (Other securities if any)

Article 5: Acknowledgement of debt and the accuracy of accounts/entries

- a) The Second Party undertakes to pay all due instalments on due dates.
- b) The Second Party acknowledges that the First Party's books and entries shall constitute a final evidence of the accuracy of amounts credited/debited to his current account, and he/she may not object thereto after the lapse of 15 days of the receipt of statement.

Article 6: Early Settlement

- a) The Second Party, with the First Party's consent, may pay all sale prices or a part thereof before maturity.
- b) Should the Second Party wish to make an early payment of full debt or part thereof, the debt shall be reduced by the sum paid, and the First Party may decrease the indebtedness as per agreement between the two parties against early repayment.

Article 7: Violation of Obligations

The terms provided for herein and all customer obligations as per the bank's records shall become due and payable, without the need for legal action, in any of the following cases:

- a) The Second Party's delay or failure to observe any of his/her obligations and commitments provided for in this contract.
- b) The Second Party's violation of the securities and warranties provided by him/her favouring First Party by taking any action which, the First Party deems, detracts from the value of such securities or warranties and consequently affects the First Party's rights ensuing therefrom.
- c) The Second Party's bankruptcy.

Article 8: Delay Penalties

The bank may not impose delay penalties in case of payment delay. However, the Bank may impose penalties on the Second Party against damages incurred where any procrastination of payment by the customer has been proved. However, such penalties shall be used for charity purposes.

Article 9: General Terms and Conditions

- a) All accounts, regardless of their titles, opened or to be opened in the name of the Second Party with the First Party shall be considered as collateral to each other. The First Party may, in case of the Second Party's failure to honour his obligations, consolidate all such accounts and recover any credit balances in any of such accounts for settlement of the outstanding balance of any account or block such credit balances until the Second Party has fulfilled his/her obligations to the First Party.
- b) In case of the Second Party's failure to meet his/her liabilities, the First Party shall be authorized to perform an offset, recover any credit balances, make settlement entries and transfers in any accounts opened or to be opened in the name of the Second Party with any SABB branch.
- c) In case of the Second Party's failure to meet his obligations to the First Party, all monies, financial and commercial papers and precious metals which may be deposited in the Second Party's name with the First Party or any of its branches shall be considered as security for all Second Party's obligations to the First Party without the need for any acknowledgement by the Second Party. The First Party shall have the right to recover his debts directly from the said funds by way of set off, and he shall have a priority over other debtors without the need for any notice or legal action.
- d) The Bank shall have the right to claim any outstanding amounts from the Second Party. The First Party's failure to claim his rights on due dates shall not be construed as a grace or waiver of any action or lien on the Second Party's funds. The Second Party acknowledges and agrees that the bank may take the action that secures recovery of his outstanding including lien on dues with private institutions and government departments in amounts that are equal to his debt and request payment thereof wherever appropriate.
- e) The Second Party may not assign his obligations hereunder to any other party without prior approval of the First Party.
- f) The Second Party shall inform the First Party in writing of any change to his address, place of work or domicile immediately upon the occurrence of such change.
- h) The Second Party undertakes hereunder to pay all amounts due to the First Party on due dates. Should the Second Party fail to pay for 3 consecutive instalments or should 90 days have lapsed after his failure to pay, the First Party shall have the right to include the Second Party's name in the C-List in which case he will not be able to get any banking services from any bank. Lifting of a customer's name from the C-List shall only be made after he has paid all amounts due to the First Party and a certificate proving same has been issued.
- i) The bank is authorized to disclose information relating to the customer to a consumer credit bureau endorsed by SAMA and this information will be available to other members of the bureau.
- j) The First Party shall have absolute right to reject purchase requests submitted by the Second Party.

Article 10: Application law and Jurisdiction

This contract shall be governed by and construed according to the regulations of the KSA and commercial practices in force therein. Any dispute not amicably solved shall be referred to the competent authority for settlement in line with the Shari'a Rules.

Article 11: (Definitions)

Monthly Instalment/Repayment

The customer will be required to make a regular repayment that is made up of principal and profit. The repayment is calculated as follows: (Principal + Total Profit) / term in months.

Annual Profit Rate (APR)

The actual profit rate charged over the term of the facility is known as the APR and is quoted on an annualized basis. This is the true cost of financing. This is calculated through a formula that is derived by dividing the profit paid by the average Principal outstanding, over the life of the facility. The profit will be calculated on a daily basis starting from executing the deal. For Home Lease (Manazil) contract, monthly rental rate revision will be applicable as determined on the lease contract.

Flat Rate

Is the rate used to derive the total profit based on the principal amount and duration in number of years as follows:

Principal (flat rate) number of years.

Delay / Late Payment

In the event of a delay in receipt of any instalment the Bank will charge minimum 16% p.a. Late Payment Charges. These will be paid to Charity.

Partial Payment

If the customer wishes to repay part of the outstanding finance amount then the Bank can, at its discretion, reschedule the remaining amount.

Prepayment/Early Settlement

If the customer decides to repay the whole of the facility before maturity then he would be required to repay the outstanding finance amount. The bank may at its discretion decide to waive some of the profit.

Management/Processing Fee

The customer may be required to pay a fee to the Bank to cover the costs of processing the finance request as detailed in the facility agreement.

Variation of Terms

If during the duration of the facility there are any changes to the terms and conditions the Bank will formally notify the customer of such changes.

Article 12

This contract is made in two original copies, each party having received one copy to act accordingly.

First Party The Saudi British Bank		Second Party Customer	
Name		Name	
Date		Date	

Signature		Signature	
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POWER OF ATTORNEY

The Saudi British Bank
Al Amanah Islamic Banking

Dear Sir

With reference to the Instalment Sale Agreement I entered into with SABB – Al Amanah Islamic Banking on [/ / G] [/ / H] and the purchase request and your acceptance thereof, I am interested to sell the metal belonging to me. I hereby irrevocably authorize SABB Treasury Department, P. O. Box 9084, Riyadh 11413 to sell on my behalf the metal purchased from the bank to a third party for the price prevailing at the time of sale without delay, according to the normal practices. I have accepted this transaction and relinquished any right of objection in case of any price change.

I also authorize the bank to receive the sale price and credit the same to my account no. [-] with SABB.

Further, I authorize the bank to deduct SAR [] from the sale proceeds against service charges of sale under this Power of Attorney.

The Bank is authorized to provide the buyer with any information about me if necessary.

This Power of Attorney is restricted to the aforesaid purpose and you have no right to act on my behalf in any matter other than herein above mentioned. The validity of this Power of Attorney shall expire upon completion of this transaction.

Principal Name:

Signature:

Date: [/ / G] [/ / H]

2- Local Al-Tawarruq Al-Mubarak

Local Al-tawarruq Al-Mubarak is a contract which is offered by the National Arab Bank. The contract is based on the concept of organised *tawarruq* or Banking *tawarruq* (*al-tawarruq al-maṣrifī*). We will not show the full details of the contract because it is very similar to the previous contract, so we will just indicate the difference.⁵³

a- Purchase request

The purchase request of Al-Tawarruq Al-Mubarak is not significantly different from the Mal, except that that more details are asked for in terms of personal information. This kind of information does not affect the contract, from an Islamic point of view.

b- Contract of sale of *al-tawarruq al-mahallī*

The contract in general is similar to the contract of Al-Amanah Islamic Bank. So we will discuss an example, and show the differences.

First party: National Arab Bank (Saudi stock share company)

Second party:

Article: 3

The first party has sold commodity/ commodities as shown below:

⁵³ The information is quoted from the National Arab Bank as a sample of their contract.

Type of commodity	Price of unit	Quantity	Total price (SR)
Bridges of iron	2,550,00	7,84	20.000.00

Table 4.1 Example for al-Tawarruq al-Mubarak

The second party accepts the sale according to the offer of the first party, and as the price which has shown above. The payments are within two years including 24 instalments, as SR920,83 every instalment. The rest of the terms and conditions are similar to the first form of contract.

4.2.4 Cornerstones (*arkān*) and conditions (*shurūṭ*) of organised *tawarruq*

4.2.4.1 Introduction.

4.2.4.2 Cornerstones (*arkān*) of sales.

4.2.4.3 Conditions (*shurūṭ*) of sales.

4.2.4.1 Introduction.

Organised *tawarruq*, like any kind of contract in Islamic law, has cornerstones and conditions. However, organised *tawarruq* is not a simple form of sale, but the contract is complicated, because it contains three transactions of sales, as has been mentioned. The first transaction is between the brokers in the international market or the traders in the local market and the financial institutions, for immediate payment; the second

transaction is between the financial institutions and the client, and the payment, in this case, is by instalments; the third or last contract is between the client and a broker who is different from the broker in the first contract, or a trader who is different from the trader in the first contract, and the payment is immediate. The common denominator between all these three contracts is the commodity. In addition, there is another contract of agency between the clients and another party, in which the client empowers the party to sell the commodity on behalf of the client. However, the contract of agency will not be discussed in this section.

4.2.4.2 Cornerstones (*arkān*) of sales.

Organised *tawarruq* basically is a type of sale, so the cornerstones of organised *tawarruq* will be discussed under the concept of cornerstones of sales. The discussion will be according to the three *madhhabs* which are the Mālikīs, the Shāfi'īs and the Ḥanbalīs.⁵⁴

1- Offer (*ījāb*) and acceptance (*qabūl*)

The first cornerstone is divided into two categories. The first category is the offer (*ījāb*) by the seller, the second category is the acceptance (*qabūl*) by the buyer. The financial institution is the seller. Financial institutions normally do not deal in the commodities

⁵⁴ The Ḥanafīs have just one cornerstone for the sales in general which is the language of contract, and according to the concept of organised *tawarruq*, the cornerstone would be the offer and acceptance between the clients and the financial institutions, then the offer and acceptance between the clients and the brokers in the international market, or the traders in the local market.

which they offer, but they obtain them according to the wishes of their clients. Therefore, they buy the commodities from the markets then resell them to the client, in a mark-up sales or ordinary sales. There are two ways to offer the commodities to the client; the first way is that the financial institution buys the commodities first then offers them to the client, whether there are some clients who have promised to buy the commodities from them or not. The second way is that the financial institutions do not obtain the commodities until the client promises them to buy the commodities. The financial institutions normally prepare some forms including a purchase request that mentions the type of commodity including quantity, description and price. The second form indicates details of the instalment agreement and it includes the terms and conditions of the financial institutions. The third form, which is optional, is an agreement with the financial institution giving the power of attorney for the institution itself or another party arranged through the financial institutions to sell the commodity on behalf of the buyer in the market, whether international or local. The buyer has the right to receive his commodity but he has to pay the delivery charge. The second category is the acceptance which is issued by the buyer or the client of the financial institution. To show the acceptance, the buyer has to sign the agreement, accept the price, and time of payment, and choose the commodities which he wants and are available in the financial institution. He also agrees to accept the terms and conditions of the financial institutes. Then he has the right to receive his commodity or empower the financial institute or another party to sell the commodity on his behalf.

To summarise, the offer, which is in the first contract, is issued by the broker or trader; in the second contract the offer is by the financial institution, and in the third contract the offer is by the client. Then, the acceptance in the first contract is by the financial institution, and in the second contract the acceptance is by the client, and in the third contract the acceptance is by brokers or the trader, but not the broker or trader of the first contract.

2- Contracting parties

There are many parties involved in the contract of organised *tawarruq*. It is possible for five parties to be engaged in the contract, one of them as an agent and the rest of them as buyers and sellers. The first party is the international market or local market from whom the financial institutes buy the commodities. The first party, who sells the commodity which is from the international market, is normally a broker who usually deals with metals in the market, whereas the party of the local market is normally a trader who sells some kinds of commodities wholesale. The second party is the financial institution which arranges the contract from the beginning until the end. Financial institutions are legal persons and their staffs represent them in the contract of organised *tawarruq*. The third party is the client who buys the commodities from the financial institution. The fourth party is the agent who sells the commodities on behalf of the client, whether in the international or local market. The fifth party is the one who buys the commodity from the client. The reason for mentioning all these parties is that the financial institutions which organise the contract normally make an agreement

with all these four parties and five parties is considered as the maximum number in the contract, while the minimum number of contracting parties is four, because the financial institutions may play two roles, as seller to the client or a third party, and as an agent on behalf of the buyer to sell the commodities in the local or international market.⁵⁵

3- Objects of sales (*al-ma'qūd 'alayh*)

The objects of sales (*al-ma'qūd 'alayh*) includes two categories; subject matter, and price. Financial institutions use many kinds of commodities to be subject matter of the contract of organised *tawarruq*. However, they prefer some kinds of commodities which are commonly exchanged on a daily basis, and whose prices are relatively stable, even in the short term.⁵⁶ We can divide the subject matters into two types, according to the market – international or local. Financial institutions which deal with the international market deal with metals, usually copper, zinc, bronze, tin, iron and nickel.⁵⁷ They avoid usurious metals such as gold and silver. As regards the commodities of the local market, the most common are cars, cement, food oils, some kinds of soft drink, rice, and some kinds of electrical goods.⁵⁸ As regards the second category, the price, this is normally banknotes, such as pounds sterling, Saudi riyals, US dollar, or Euros. The

⁵⁵ See al-Sa'īdī, *al-Tawarruq Kamā Tujrīh al-Maṣārif*, MIFAW, pp. 200-201

⁵⁶ Al-Mushayqih, *al-Tawarruq al-Maṣrifī*, MUQ, pp. 139-140; al-Sa'īdī, *al-Tawarruq Kamā Tujrīh al-Maṣārif*, MIFAW, p. 185.

⁵⁷ Al-Mushayqih, *al-Tawarruq al-Maṣrifī*, MUQ, p. 134.

⁵⁸ al-Qirī, *al-Tawarruq Kamā Tujrīh al-Maṣārif al-Islamiyya*, MBFM, pp. 31-35.

payment of the price is between the financial institutions and the international or local market is immediate, as is that between the client and the local or international market. The payment between the financial institution and the client is deferred or on an instalment basis.

4.2.4.3 Conditions (*shurūṭ*) of sales.

As mentioned previously, organised *tawarruq* is a contract under the concept of sales. Therefore, the conditions of sales in general are applicable in the contract of organised *tawarruq*. In addition, there are also extra, particular conditions for the contract, because it has extra characteristics compared to traditional sales. Therefore, in this section we will discuss the conditions of organised *tawarruq* under the concept of sales:

1- Ownership of the commodities.

The sellers, whether the broker, financial institution or client, must own the commodities, before they offer them to the buyers. Scholars agree that a seller must have the ownership of a commodity before he offers it. In some cases, the financial institutions do not obtain the commodity in advance, especially when the contract is very expensive, such as a contract for more than SR100 millions. In such a case, it is not permissible to offer the commodities before acquiring them, as that would be just a form of selling a debt for debt (*bay' al-dayn bi al-dayn* or *bay' al-kāli' bi al-kāli'*),⁵⁹ because the contract would involve a deferred or instalment payment for

⁵⁹ For more details see Al-Mushayqih, *al-Tawarruq al-Maṣrifī*, MUQ, pp. 146-152.

a commodity which has not been acquired, so the price and the subject matter are absent. However, under the concept of mark-up sales, the Mālikīs indicate that it is permissible to promise the buyer to obtain a specific commodity for him without a real contract of selling and the seller and buyer should fulfil their promise.⁶⁰ Consequently, the buyer asks the seller to obtain a specific commodity for him, and explains the detail of the commodity. Once the seller obtains the commodity, the buyer should buy it from him, according to the agreement of the promise. Moreover, the client, who has bought the commodity from the financial institution, would be the owner before he offers the commodity in the market.

2- Commodity is specified

The seller has to explain the details of the commodity to the buyer, when the buyer does not see it. In most contracts of organised *tawarruq*, the buyer does not see the commodity which he wants to buy from the financial institution. The financial institution and client perform all procedure concerning to the contract of organised *tawarruq* in the branch of the financial institution, especially when the contract is based on an international commodity, such as metals, which are normally not in the country of the contract. Some financial institutions prepare a sample of the commodity to show to the buyer before he enters into the contract, and the sample

⁶⁰ For more details regarding to the contract of mark-up with promise, see Milhim, *bay' al-Murābaḥa*, pp. 117-135; Abū Zayd, *Fiqh of Current Controversial Issues*, pp. 49-62; Abū Zayd, *Bay' al-Muwā'ada*, MIFAW, pp. 972-989.

represents the type and quality of the commodity. This kind of sale is called sample sales based on a sample (*bay' al-namūdha*).⁶¹

3- Possession of commodities

As mentioned, the commodities, which are normally used in the contract organised *tawarruq*, can be transferred from place to place, and this kind of commodity is called, in the traditional *fiqh*, a transferable commodity (*manqulāt*). Examples include metals, cement, rice and cars.⁶² It is narrated of Ibn 'Umar that he said, "I bought some oil in the market and when I came to receive it, a man met me and offered to give me good profit for it; and when I was about to accept the price which was offered, a man caught hold of my hand from behind. So I turned and found that he was Zayd Ibn thābit. He said, "Do not sell it in the place where you have bought it from, till you take it to your dwelling; for Allāh's Messenger forbade the commodities to be sold on the spot where they were bought from, until the traders take them to their dwelling.""⁶³ Consequently, the majority of scholars rely on this ḥadīth to state that the buyer has to transfer the commodity from the place of the seller in order to have the right to sell it again to another party, although there is disagreement on some details under this issue. The problem with the contract of organised *tawarruq* is that when the financial institutions offer a

⁶¹ For instance, a buyer purchases a large amount of wheat after having inspected part of the merchandise. (See al-Zuhaylī, *Financial Transactions*, v. 1, p. 225)

⁶² The other types are called non transferable commodities (*ghayr manqūl*), such as houses and trees.

⁶³ Abū Dāwūd, *Sunan*, 1950, v. 3, p. 282-283; Al-Ḥākim, *al-Mustadrak*, v. 2, 46; al-Bayhaqī, *Sunan Kubrā*, v. 5, p. 314.

commodity to the client, they do not distinguish the portion offered to the client from the total amount owned by the financial institution, apart from transferring the client's portion from one place to another. This problem applies to the contract, whether the commodity is in the international or local market.⁶⁴

4- Avoiding *Ṭina* sales

As has been mentioned, the majority of jurists consider that *Ṭina* sales are prohibited according to Islamic law.⁶⁵ Therefore, the financial institutions avoid buying the commodities again from the client, because they have already sold them to the client by instalment payments for more than what they normally pay to acquire the commodities. Consequently, if they were to buy the commodities from the clients for less than what the client had paid, the contract, in this case, would be under the concept of *Ṭina* sales.⁶⁶

5- Details of the time of payments

The contract between the financial institution, as the seller, and the client, as the buyer, is based on the contract of instalment sales or deferred sales in general, and one of the conditions of the both contracts is that it must explain in detail the

⁶⁴ For more details see al-Mushayqih, *al-Tawarruq al-Maṣrifī*, MUQ, pp. 152-166.

⁶⁵ This is the view of the majority of the scholars. For more details see p. 166 above.

⁶⁶ For more details see al-Mushayqih, *al-Tawarruq al-Maṣrifī*, MUQ, pp. 167-171.

manner of payment, whether in one payment after, for instance, three years, or by instalments, for instance, an instalment every month for three years.⁶⁷

6- Avoiding usury

The contracting parties have to be careful not to deal with commodities which it is not permissible to exchange for deferment, otherwise, they would be involved in the usury by way of deferment (*ribā al-nasī'a*). The price normally in the contract of organised *tawarruq* is banknotes, whether Saudi Riyals, UK pounds Sterling or US Dollars, and these types of things are under the genus (*jins*) of gold and silver, so, the financial institutions must not offer gold silver and banknotes as the subject matter of the contract, when the price is banknotes.⁶⁸

7- Delivery is immediate

As indicated previously, the contract of organised *tawarruq* is based on deferred or instalment payment, so if the delivery is also deferred, the contract would be in this case a sale of debt for debt, and this kind of sale is prohibited in Islamic law. Therefore, the delivery of the commodity in the contract of organised *tawarruq*, is when the financial institution and the client agree upon the contract, including the commodity which is already owned by the financial institute.⁶⁹ The difference

⁶⁷ For more details see al-Mushayqih, *al-Tawarruq al-Maṣrifī*, MUQ, pp. 176-179.

⁶⁸ Ibid, p. 173-176.

⁶⁹ Ibid, p. 172

between the delivery of the commodity and possession of the commodity is that the delivery transfers the ownership of the commodity, while possession transfers the commodity from one place to another; place and the delivery take place before the possession.

4.2.5 Comparison between organised *tawarruq* and contracts in the traditional *fiqh*.

In this section we will discuss the comparison between organised *tawarruq* on the one hand and deferred sales, instalment sales, traditional *tawarruq*, mark-up sales and *ina* sales on the other hand.

The relationship between organised *tawarruq* and deferred sales is that the client buys the commodity which he wants from the financial institutes for deferred payment, and this method of payment is considered under the concept of deferred sales. Sometimes the payment is by instalments, whether every month or year, and that creates a relationship also with instalment sales. The difference is that the first contract between the financial institution and the trader, for instance, is for an immediate payment, and payment is also immediate between the client and the trader in the local or international market. Therefore the latter two contracts are considered to belong to the concept of sales.

When comparing the traditional form of *tawarruq* and organised *tawarruq* the similarity is that the aim of both contracts, for the buyer, is to obtain money or cash, so he does not buy the commodity to use it for any purpose. The contracts include two transactions: the first, the purchase of the commodity for a deferred payment, and then the second, the sale of the same product for immediate payment; the second price normally is more expensive than the first price. In addition, there are more than two parties involved in the contracts; the first party is the seller who sells the commodity in a deferred sale, the second party is the first buyer, and the last party is the second buyer who buys the commodity from the first buyer for an immediate payment. The first buyer who buys the commodity by deferred payment is the seller in the second transaction which is for immediate payment.⁷⁰

There are, however, differences between the traditional *tawarruq* and organised *tawarruq*. In the traditional *tawarruq*, the first party who sells the commodity in a deferred sale does not know that the second party who buys the commodity in a deferred sale plans to sell the commodity to obtain cash, or at least the seller does not arrange the second transaction. As a result, the only one who is involved in both transactions, whether directly or indirectly is the first buyer. On the other hand, the financial institution arranges the contract from the beginning by offering the commodity to the client until the end by crediting the price in the account of the client. In other words, the financial institutions arranges with some brokers in the

⁷⁰ See al-Sa'īdī, *al-Tawarruq Kamā Tujrīh al-Maṣārif*, MIFAW, p. 195-197.

international market to buy some kinds of metals from them, or with some traders if the contract is based on a local commodity. The financial institution also arranges an agreement of agency with the client to empower the financial institution or another party with the authority to sell the commodity on behalf of the client. Not only that, but the financial institution also arranges an agreement with other brokers or traders to buy the commodity from the client with immediate payment, then at the end, the financial institution credits the price to the account of the client.⁷¹ As a result, the financial institution is involved in all the procedures of the contract, whereas in the traditional form of *tawarruq* the only one who engages in the two transactions is the buyer in the first transaction, who is also the seller in the second transaction.⁷²

It is also worth comparing between *ʿīna* sales and organised *tawarruq*. We will start with the similarities. First of all, both *ʿīna* sales and organised *tawarruq* include two transactions; the first transaction is for deferred payment and the second transaction is for immediate payment. Secondly, the seller is involved in the procedure of the contract from the beginning until the end; to clarify the point, in of *ʿīna* contract the seller is involved directly in both transactions, and he is the seller in the first transaction and the buyer in the second transaction, while in the organised *tawarruq*, the seller which is the financial institution, is involved in the first transaction as a seller and in the second

⁷¹ See Al-Mushayqih, *al-Tawarruq al-Maṣrifī*, MUQ, p. 145; al-Suwaylem, *al-Tawarruq wa al-Tawarruq al-Munazzam*, MIFAW, p. 253; al-Qirī, *al-Tawarruq Kamā Tujrīh al-Maṣārif al-Islamiyya*, MBFM, pp. 25-26.

⁷² See al-Saʿīdī, *al-Tawarruq Kamā Tujrīh al-Maṣārif*, MIFAW, p. 195-197.

transaction as an agent, In addition, the financial institution arranges the contract from the beginning until the end, although, they are not the buyers or sellers in the second transaction. Thirdly, the payment in the first transaction is deferred, and the second transaction is for immediate; fourthly, the price of the first transaction is more expensive than the price of the second transaction.

Next, there are some differences between *ʿIna* sales and organised *tawarruq*. The first difference is that in *ʿIna* sales, the seller in the first transaction is the buyer in the second transaction, whereas in the organised *tawarruq*, the seller in the first transaction is different from the buyer in the second transaction. Secondly, there are only two parties involved in *ʿIna* sales; on the other hand, there at least three parties involved in organised *tawarruq* as buyers and sellers, in addition to an extra party, who is the agent.⁷³

Finally, the relationship between organised *tawarruq* and marked up sales is that in many forms of organised *tawarruq*, the financial institutes indicate the price which they have paid to the clients, and then they indicate also the amount of profit which they add to the original price.⁷⁴

⁷³ See al-Saʿīdī, *al-Tawarruq Kamā Tujrīh al-Maṣārif*, MIFAW, p. 195-196

⁷⁴ For more details see al-Qirī, *al-Tawarruq Kamā Tujrīh al-Maṣārif al-Islamiyya*, MBFM, pp. 29-30.

To conclude, organised *tawarruq* is a new form of contract, although it has some characteristics of certain other forms of contract in traditional Islamic law, and the rulings on the forms which have interrelated characteristics are not applicable to organised *tawarruq*. Therefore, the ruling of organised *tawarruq* has to be considered under two concepts; the first concept is the ruling of the contracts which are related to organised *tawarruq*. The second concept is the general rules of Islamic business transactions.

4.2.6 Organised *tawarruq* according to Muslim jurists

In this section the contract of organised *tawarruq* will be discussed from the Islamic point of view. The discussion will not include the ruling on agency in Islamic law, except the issue of permissibility for the financial institutions to be agents on behalf of clients to sell commodities on their behalf for immediate payment for less than the price for which it was sold by the financial institution to the client.⁷⁵ The study also will not consider financial punishment in Islamic law, so we will not discuss the delay penalty which is stipulated by the financial institutions when there is delay of payment which was due on a specified date.⁷⁶

⁷⁵ The above type of agency goes beyond the scope of the agency in general, and requires a separate treatment. (For more details regarding to the ruling of agency see al-Zuhayfi, *Financial Transactions*, p. 631-636)

⁷⁶ The above type of penalty and the goes beyond the scope of financial penalty in Islamic law, and requires a separates treatment. some scholar considered that it is lawful to charge due to the delay, but it is stipulated that the money has to be paid to the charity, however before we decide to charge someone

As explained before, there is more than one form of organised *tawarruq*, and the differences may affect the ruling of the contract. There are two main views concerning the ruling of organised *tawarruq*, according to the contemporary scholars in Islamic law. The first view is that financing by organised *tawarruq* is prohibited according to Islamic law. The second view is that organised *tawarruq* in general is not prohibited in Islamic law, and it is a permissible way to finance people who need money for any purpose, although the scholars who support the second view do not agree that all forms of organised *tawarruq* conform to Islamic law.

Before discussing the view of the scholars, we should point out that when scholars say that *tawarruq* is prohibited, this obviously applies to organised *tawarruq*.

The Islamic *Fiqh* Academy, which belongs to the Islamic World League, discusses the contract of *tawarruq* in the traditional form and the contract of organised *tawarruq* as practised today in the financial institutions. The resolutions on the two contracts are different, however. According to the Islamic *fiqh* academy, the traditional form of *tawarruq* is permissible,⁷⁷ whereas the new form of *tawarruq* which is called banking *tawarruq* (*al-tawarruq al-maṣrafī*) or organised *tawarruq* (*al-tawarruq al-munazzam*) is

for anything, we should have lawful reasons to charge him, although the money would be paid for charity purpose. (see al-Zuhaylī, *Bay' al-Taqsīt*, MFIAW, pp. 61-62; al-Sālūs, *al-Bay' bi al-Taqsīt*, ḤSDI, pp. 345-350)

⁷⁷ In the Circle 15th, Makka, 1998.

prohibited.⁷⁸ According to proponents of this view, there are three differences between the two forms; the first difference is that the role of agency which is been played by the financial institutions changes the nature of the contract, bringing it close to the form of *ʿīna* sales which is prohibited in Islamic law according to the majority scholars, whether the agency of the financial institution is indicated as a condition of the contract or is very common in this type of contract. Secondly, this kind of contract, in many cases, does not reflect the concept of possession in Islamic law. Thirdly, the reality of this type of contract is to finance the client (*al-mustawriq*) who applies for some money and to charge him extra; the financial institute arranges the procedure of the contract, by obtaining the commodity and selling it in the market on behalf of the client, to achieve this purpose. However, that is not the real form of *tawarruq* which has been indicated in the traditional *fiqh*, and previously permitted by the Islamic *fiqh* academy. The traditional form of *tawarruq* is a contract in which the seller sells a commodity which is normally under his ownership and belongs to his business, to the buyer for deferred payment, and the seller delivers the commodity to the buyer to be under his full possession and responsibility. Then, after the commodity is received by the buyer, he sells it to a third party, who is not the seller, for immediate payment.⁷⁹

Those who regard organised *tawarruq* as unacceptable support their opinion with the following arguments:

⁷⁸ In the Circle 19th, Makka, 2003.

⁷⁹ See al-Qirī, *al-Tawarruq Kamā Tujrīh al-Maṣārif al-Islamiyya*, MBFM, pp. 38-41.

1- Narrated ‘Amr Ibn Shu‘ayb on his father’s authority from his grandfather that Allāh’s Messenger said, “The condition of a loan combined with a sale is not lawful, nor two conditions relating to one transaction, nor the profit arising from something which is not in one’s charge, nor selling what is not in your possession.”⁸⁰

The above ḥadīth shows that having two conditions relating to one transaction is not lawful, and organised *tawarruq* involves even more than two conditions. For instance, the contract stipulates that the client has to empower the financial institution to sell the commodity on his behalf; it also stipulates that the client has to buy the commodity for an extra sum, and sell it in the market for less than the price which he has paid.

However, the scholars do not agree on the meaning of two conditions relating to one transaction, and many scholars indicate that it refers to the contract of *‘īna*, and the meaning of the condition in this case is the price. Then the meaning is that it is not lawful to have one transaction between two people who deal with the same commodity, by selling it the first time by deferred payment, and in the second time for immediate payment. In such a case, the contracting parties are the same, and the commodity in the first exchange is itself in the second exchange; the only thing which is changed is the price. The contract appears as two transactions, but in reality it is just

⁸⁰ Al-Nasā’ī, *Sunan Kubrā*, v. 4, p. 39; al-Tirmidhī, *Sunan*, 1995, v. 3, p. 535. al-Tirmidhī declared that the ḥadīth is authentic. See also Abū Dāwūd, *Sunan*, v. 3, pp. 381-383.

an exchange of money for money with an extra sum, and that is the reality of *ʿina* sales.⁸¹

Another interpretation of two conditions in one transaction is that it is two transactions in one. So, in this case the two conditions two prices are indicated in the same contract; the first price for immediate payment, and the second price for deferred payment, the second being more expensive than the first.⁸²

2- Narrated Abū Hurayra, the Messenger of Allāh prohibited two transactions combined in one.⁸³ In another ḥadīth the Messenger said, “If anyone makes two transactions combined in one he must confirm that of a lower price, or he is involved in committing usury”.⁸⁴

These two ḥadīths show that two transactions combined in one are prohibited in Islamic law, and organised *tawarruq* includes two transactions in one contract because the financial institution prepares two forms, which are for two separate transactions; the first form is for the institution to sell a commodity to a client, and the second contains a power of attorney from the client to the financial institution to sell the

⁸¹ See Ibn al-Qayyim, *Hāshiya*, v. 9, p. 240.

⁸² See al-Shawkānī, *Nayl al-Awtār*, v. 5, p. 249.

⁸³ Al-Tirmidhī, *Sunan*, v. 3, p. 533; al-Nasāʿī, *Sunan Kubrā*, v. 4, p. 43; Ahmad, *Musnad*, v. 2, p. 174; Ibn Ḥibbān, *Ṣaḥīḥ*, v. 11, p. 347.

⁸⁴ Abū Dāwūd, *Sunan*, v. 3, p. 373; Ibn Ḥibbān, *Ṣaḥīḥ*, v. 11, pp. 347-348.

commodity. As shown, the parties are involved in both transactions and the commodity also is involved in the transactions. As a result, organised *tawarruq* can be considered under the concept of two transactions in one, which is prohibited in Islamic law.⁸⁵ In addition, the seller, which is the financial institution, normally asks more than one price, depending on the period of payment. For example, the financial institution may offer 200 kilos of copper for £20,000 if the payment is within three years or for £21,000 if the payment is within four years. This kind of transaction is considered, according to some scholars, as two transactions combined in one.⁸⁶

However, the majority of scholars indicate that the meaning of two transactions combined in one is that the seller indicates two prices in the contract without a decision upon one of them. So, the agreement upon two forms or transactions is not that they belong to one contract, although they are at the same time, because the first form is an instalment sale between the financial institution which is the seller and the client who is the buyer, and the second form is a contract for agency whereby the client empowers, the seller to sell the commodity on his behalf. The transactions are separate, even though they are at the same time for the same commodity, because the client sells the commodity to a third party. In addition, as mentioned, according to the majority of scholars, it is unlawful to indicate two prices in the same contract, but it is

⁸⁵ See Ibn al-Qayyim, *Hāshiyah*, v. 9, pp. 249-250; al-Rashīdī, '*Amaliyyat al-Tawarruq*, p. 67; Al-Mushayqih, *al-Tawarruq al-Maṣrifī*, MUQ, p. 184.

⁸⁶ For more details see p. 51 above.

permissible for the seller and buyer to negotiate upon the price before they enter officially into the contract.⁸⁷

3- The ruling of organised *tawarruq* is not be considered as the traditional form of *tawarruq*, which has been considered as a lawful transaction according to the majority of scholars in Islamic law,⁸⁸ because there are significant differences between them. Therefore the ruling of organised *tawarruq* must be considered under the general rules of Islamic law rather than applying the ruling of tradition *tawarruq*. In addition, the name organised *tawarruq* does not mean that the transaction is under the concept of *tawarruq* in Islamic law.⁸⁹

4- Organised *tawarruq* seems to be closer to the *ʿIna* contract than to any kind of sales in the traditional *fiqh*, because the seller which is the financial institutions arranges the contract from the beginning until the end by selling the commodity to the buyer on instalments for a higher price, then it sells the commodity on behalf of the client for less than what the client paid. The role of the client is merely to ask when the money will be in his account, without being really involved in performance of the contract, so there is no significant difference between selling the commodity

⁸⁷ For more details see p. 136 above.

⁸⁸ For more details see p. 183 above.

⁸⁹ Islamic Fiqh Academy has two resolution relevant to this issue the first resolution does not prohibit traditional *tawarruq* and the second resolution prohibits organized *tawarruq*, the reason for that is the differences between the two contracts. For more details see al-Qirī, *al-Tawarruq Kamā Tujrīh al-Maṣārīf al-Islamiyya*, MBFM, pp. 38-41; al-Mushayqih, *al-Tawarruq al-Maṣrīfī*, MUQ, pp. 187-188.

again to the first seller which is the financial institution, as in the *ʿīna* sales or the commodity being sold by the seller, as an agent, to a third party.⁹⁰

However, there is a significant difference between *ʿīna* sales and organised *tawarruq*. As it has been explained before, one of the conditions of *ʿīna* sales is that the seller in the first contract which is for deferred payment is the buyer in the second contract which is for immediate payment, whereas in organised *tawarruq*, the seller in the first contract is not the buyer in the second contract, although he arranges the second contract.⁹¹

5- Mālik was asked concerning this issue, what would be the position if a person bought a commodity from someone and after the contract the buyer asked the seller to sell the commodity now on his behalf, because the buyer is an expert in the trade. Mālik replied that it is not a good deed and he prohibited it.⁹² As a result, when we focus on the contract of organised *tawarruq*, we find that in many cases, the financial institution plays the role of agent to sell the commodity for immediate payment on behalf of the buyer, whether by itself or by arranging another agreement with another party to play the role, whereas the client or buyer knows nothing about the party or agent.

⁹⁰ See al-Rashīdī, *ʿAmaliyyat al-Tawarruq*, 2005, p. 67.

⁹¹ For more details see p. 180 above.

⁹² See Mālik, *al-Mudawwanat al-Kubrā*, v. 9, p. 125.

6- Looking carefully at the contract of the organised *tawarruq*, it can be argued that there is no difference, in terms of aim and result, between it and usury in Islamic law. To clarify the point, assume that there are two clients who want to be financed for any reason; the first client applies for a loan with interest, which is a form of usury by way of deferment in Islamic law, and he borrows £10,000 for £11,000 to be paid within two years. Then the second person applies for financing by organised *tawarruq* to buy copper from the financial institution for £11,000 to be paid within two years. The client knows that the financial institution has bought the copper from the international market for £10,000, and the financial institution will sell the copper in the international market on behalf of the client for £10,000. As shown, there is no difference between the forms in term of the aim, which is to finance the client, and the result, which is to charge the client more than what he receives. In addition, financing by organised *tawarruq* may cost the clients more than taking a loan with interest, because in the latter case the financial institution lends to the client directly instead of engaging in a long procedure to buy commodities and sells them again in the same market. Thus, the loan with interest may be processed faster than the organised *tawarruq*, because the client may obtain money directly after the contract, whereas the client who asks to be financed through the organised *tawarruq* would have to wait until the commodities are sold in the market.⁹³

⁹³ See al-Suwaylem, *al-Tawarruq wa al-Tawarruq al-Munazzam*, MIFAW, pp. 263-264.

The contrary view, that organised *tawarruq* is permissible according to Islamic law, is also supported by several pieces of evidence:

- 1- The general ruling of sales is given in the verse, “those who eat usury (*ribā*) will not stand (on the day of Resurrection) except like the standing of a person beaten by Satan (*Shayṭān*) leading him to insanity. That is because they say: trading is only like usury (*ribā*), whereas Allāh has permitted trading and forbidden usury.”⁹⁴

As it can be seen, Allāh has permitted trading in general, and the contract of organised *tawarruq* is just a type of sale. More specifically, organised *tawarruq* includes three or four individual contracts. In the first contract, the financial institution buys some commodities from the international market for immediate payment, and this type of sale falls under the concept of ordinary sales. The second contract is between the financial institution and the client, where the financial institution sells the commodities to the client for deferred payment or instalment payment; this kind of sale belongs to deferred sales or instalment sales, which are lawful in Islamic law. Then the third contract is between the clients and a third party but not the financial institution which sold the commodity to the client, whereby the client sells the commodity to the third party for immediate payment. The contract of organised *tawarruq* also contains an agency contract between the client and the financial institution or another agent to sell the commodity on behalf of the client in the market. None of the above contracts are prohibited as individual forms, and the

⁹⁴ Qur., Al-Baqara 2:275.

arrangement of the financial institution does not change the reality of the contracts, in terms of Islamic law, As a result, organised *tawarruq* falls under the permissible forms of sales which have been indicated in the above verse.

However, according to Islamic law, the permissibility of the individual transactions does not mean that the whole contract is permissible. For instance, *ina* sales contains two transactions; the first transaction is between the seller and buyer for a deferred sale or instalment sale, then the seller buys the commodity again from the buyer for less than the first price for immediate payment. As can be seen the first and second transactions are lawful individually, but when they are combined, the contract is unlawful according to the view of the majority of the scholars in Islamic law. As a result, the permissibility of the individual transactions, in the organised *tawarruq*, does mean that the whole contract is lawful, of the reasons indicated previously in the evidence for the first view.

2- The general rule of business transactions in Islamic law is that any kind of transaction is permissible unless there is evidence to show that it is not so.⁹⁵

Organised *tawarruq* is a new form of transaction which is a means to finance people through the concept of *tawarruq* in Islamic law with some changes by organising the procedure of the contract to make the financing easier and faster than the normal form of *tawarruq*. Consequently, there is no acceptable evidence to

⁹⁵ See al-Mushayqih, *al-Tawarruq al-Maṣrifī*, MUQ, p. 150; and For more details also see p. 2 above.

show that organised is *tawarruq* prohibited, and that means that it is lawful according to the rule.

3- People need this kind of transaction. Assume that a person needs money to obtain a house or the like, and he cannot find anyone to offer him an interest-free loan. There are not many choices to obtain money to meet his needs, so one of the options is to buy a commodity from the market for a deferred sale then resell the commodity again in the market for immediate payment, to acquire money, by what is called *tawarruq* in Islamic law. It has already been mentioned that according to the rules of Islamic law, “*al-ḍarūrāt tubīḥ al-maḥḍūrāt*” and “*al-ḥāja tunazzal manzilat al-ḍarūra*”,⁹⁶ and these rules are considered when the contract, with no doubt, is prohibited. However, in the circumstance of organised *tawarruq*, scholars do not totally agree on the prohibition or permissibility, so the rules are more applicable to it than to the contracts which are prohibited in Islamic law.⁹⁷

4- The financial institutions, which finance their clients in accordance with Islamic law or have branches which they call Islamic windows, offer to their clients a contract that helps them to obtain money more easily and faster. In addition to that they lose less than by the normal form of *tawarruq*. Therefore the financial institutions act to the benefit of the client, without any charge for the arrangement

⁹⁶ For more details regarding to necessity, and need in Islamic law see footnote p. 190 above.

⁹⁷ See al-Mushayqih, *al-Tawarruq al-Maṣrifī*, MUQ, p. 142.

itself,⁹⁸ or with some charge as an administration fee. So this kind of role does not change the view of Islamic law, because it is not prohibited in the contract.

In fact, however, organised *tawarruq*, in practice, cannot be free of problems, which might affect the permissibility of the contract in Islamic law, as can be seen if we examine the contract from the beginning. First of all, we will discuss the contract of organised *tawarruq* by means of international commodities, which are normally metals. The financial institutions obtain the commodities from the international market for one reason, which is to sell them in deferred sales with an extra sum, and when Aḥmad Ibn Ḥanbal was asked about the meaning of *ʿīna* sales, which are considered as a prohibited form of sales according to the majority of scholars, he replied that is where a trader sells just for deferred sales, but if he sells for both deferred and immediate payment, it is lawful.

Next, when we consider how the financial institutions advertise the organised *tawarruq* service, we find that they advertise it similarly to a loan with interest. For instance, they tell the client. We will finance you up to million riyals; we will charge you a low amount of profit such as 5% to be paid within ten years. These types of advertisement are the same as those for a loan with interest, which is prohibited in Islamic law. Then, when the client decides to enter into organised *tawarruq*, he applies

⁹⁸ But they obviously made a profit in the instalment sales.

for the amount, which he wants to obtain, regardless of the type of metal which he wants or also the amount.

When the financial institution sells to the client, it does not distinguish the share of every client. For instance, the financial institution has bought 10 tons of copper and it has a reference number and certificate of deposit for this metal. Then client no. 1 buys a ton of copper, and client no. 2 buys a ton of copper also. Then the financial institution sells them from the whole 10 tons. It does not separate a ton for client no. 1, and another ton for client no. 2. So, the clients do not have the complete possession of ownership of the commodities, which they have bought from the financial institutes, to sell them again in the international market. Similarly, financial institutions that deal with local commodities also do not distinguish the share of every client.

In addition, some scholars are not satisfied with the contract of agency between the client and the financial institution since, as mentioned earlier, Mālik disapproved of buying something from the seller for deferred sale and asking him to sell it on behalf of the buyer for an immediate payment.⁹⁹ However, Muḥammad Ibn Ibrāhīm Āl al-Shaykh was asked about the same kind of transaction, and he replied that it is lawful in Islamic law.¹⁰⁰ In addition, some financial institutions get another party to sell the

⁹⁹ See Mālik, *al-Mudawwanat al-Kubrā*, v. 9, p. 125; al-Suwaylem, *al-Tawarruq wa al-Tawarruq al-Munazzam*, MIFAW, pp. 261-262.

¹⁰⁰ See al-Qirī, *al-Tawarruq Kamā Tujrīh al-Maṣārif al-Islāmiyya*, MBFM, p. 37.

commodities on behalf of the client, and the clients sign the agency contract after they have signed the contract with the financial institutes.

Furthermore, let us discuss the aim of the financial institutions that offer the contract of organised *tawarruq*. The aim of the contract is to find a way to finance people for a deferred payment with an extra sum through trade in goods which they do not normally deal in especially local commodities such as cement, cars and electrical goods. They offer them to the clients to provide people with access to finance with payment of an extra sum, and the clients, normally, are not concerned what types of commodities which they buy; they just want to know how they will obtain money. This aim is similar to the aim of a person who wants to engage in usury (*ribā*) by applying for a loan with an extra sum.¹⁰¹

As discussed before, under the ruling of *tawarruq* in general, *tawarruq* as a mode of finance is better than being involved in usury which is strictly prohibited in Islamic law. However, we have to be aware that the contract of organised *tawarruq* has been criticised more than the normal mode of *tawarruq*. Therefore, the Islamic *Fiqh* Academy, which belongs to the Muslim World League, states that the normal form of *tawarruq* is lawful according to Islamic law, whereas, the organised *tawarruq* is not. However, this does not mean it is not possible to find some solutions to render the contract permissible. Therefore, the following suggestions are offered:

¹⁰¹ See al-Suwaylem, *al-Tawarruq wa al-Tawarruq al-Munazzam*, MIFAW, pp. 264-265.

- 1- The financial institution could be a trader itself or a partner with traders to do business with clients and sell the product for deferred or immediate payment. For instance, A (the financial institution) forms a company with B (a trader) to sell some commodities which are normally stable, in terms of the price, such as cement, iron, rice and sugar. Then they sell the commodities for immediate payment and deferred payment with extra sum, and deliver the commodities to clients, for them to use them or sell as a normal form of *tawarruq*.
- 2- The commodities which have been sold to the client must be completely under their possession, by distinguishing the commodity of the client and recording it under his name, so any time he wants to see it; he can do so, even if the commodity is not in the country of the financial institution or the client.
- 3- The role of financial institutions is not to be agents on behalf of clients to sell commodities again in the market. So, the clients have to take the responsibility to find another party to buy the commodity.
- 4- The financial institutions should not charge the clients for delayed payment, as a financial penalty, but should sue the clients, who delay payment, in the court, to make sure whether they can or cannot pay the instalments. If the client is able to pay, in this case, would force him to pay or punish him according the concept of Islamic law, but if he cannot pay, the court would deal with the client as Allah

says, “And if the debtor is in a hard time (has no money), then grant him to repay; but if you remit it by way of charity, that is better for you if you did but know.”¹⁰²

In conclusion, organised *tawarruq* as practised today does not seem to be acceptable in Islamic law, for the reasons mentioned above. However, organised *tawarruq* is better than involvement in usury by way of deferment, because at least the scholars do not agree that the organised *tawarruq* is prohibited in Islamic law, whereas there is a consensus that usury by way of deferment is prohibited in Islamic law. So, if a person needs money for something important, such as a house to live in, or to pay for medical treatment for his child and so on, there is a way that is permissible to acquire what he needs. But, if he wants money for something not important, the ruling does not recommend involvement in the contract of organised *tawarruq*.

¹⁰² Qur., Al-Baqara 2:280.

Summary and Conclusion

At the end of this study, a number of observations can be made.

1- In Part Two it emerged that contracts of instalment sales fall somewhere between ordinary sales, which are permissible in general according to Islamic law, on the one hand, and usury by way of deferment, which is prohibited according to Islamic law, on the other. The similarities between ordinary sales and instalment sales are that both of them belong to the concept of sales in general, and that the delivery is at the same time as the contract. On the other hand, the difference is that in instalment sales, the payment of all or part of the price is in the future. However, instalment sales also have a relationship with usury with respect to deferment; the similarity is that the price in the case of instalment sales and the subject matter in the case of usury by way of deferment are to be delivered in the future. Consequently, to adhere to the principles of Islamic law, contracting parties must take care to avoid involvement in usury by way of deferment when they plan to enter into an instalment contract. For instance, it is not permissible to exchange between gold and silver when one of the parties has agreed to pay in the future.

In addition, according to many scholars today, banknotes are considered as usurious items according to the principles of usury in Islamic law. Consequently, the exchange between pounds sterling and Saudi riyals, for example, has to be at the same time, or in other words, hand to hand. If the contracting parties agree to

deliver the Saudi riyals in the future, they are engaging in usury by way of deferment.

2- According to Part Two also, we can observe that the method of payment in the contract of instalment sales has already been mentioned in traditional *fiqh* sources. The early sources of Islamic *fiqh* use the expression *tanjīm* or *munajjaman* which literally means *taqsīt*, and the word *bay‘ al-taqsīt* is a modern expression used to denote instalment sales. According to early traditional *fiqh*, *tanjīm* is a way of payment that is made in two stages or more. The jurists discuss this concept under several categories; the first category is the contract of mark-up sales, whereby the contracting parties can agree to add a profit to the original price of the subject matter, and the payment is by instalments at a specified time in the future. The second category is *dayn al-kitāba*, a contract between a slave and his master, in which the slave promises to pay some amount of money at specific intervals, whether daily, weekly or monthly in order to obtain his freedom when he has paid the full amount agreed upon. The third category is under the contract of lease, where the landlord and the lessee of a house can agree on the payment of rent by instalments, whether every day, week or month. The fourth category is blood money; the method of payment of the blood money is to divide the payment of the money into three instalments to be paid within three years, a third each year. Thus, payment by instalment, whether as part of a sales contract or any other contract, has already been discussed in Islamic law, and the scholars have expressed their views on the meaning of instalment sales, and the applicable ruling and conditions. This

discussion can serve as guidance for contemporary forms of transactions which include payment by instalments.

3- With reference to Part Two we can point out that the sales of a debt for a debt are considered as a prohibited transaction according to Islamic law; this view is based on the sunna and consensus. Such transactions occur when both the subject matter and the price are absent at the time the contracting parties engage in the sale contract. The system of deferred sales and forward sales on the one hand and sales of a debt for a debt on the other are different, because in the circumstances of deferred sales contracts, the subject matter is ready to be delivered, and in the circumstances of forward sales the price to be paid is set out within the contract. Consequently, analogy between sales of a debt for a debt on the one hand and forward sales and deferred sales on the other hand is not acceptable according to the Islamic rules of analogy, because of the difference between them according to the concept of analogy.

In addition, sales of a debt for a debt are contrary to the general rules of sales contract. The rule is that it is not permissible to sell something which is not in the seller's possession. According to the concept of sales of a debt for a debt, the delivery of the subject matter is in the future. Although the delivery of the subject matter in the contract of forward sales too is in the future, in that case the payment of the price has to be within the contract, whereas the payment of the price in the contract of the sales of a debt for a debt is in the future. So according to the above rule, sales of a debt for a debt cannot be considered as of forward sales contracts.

Moreover, sales of a debt for a debt cannot be considered, in terms of their importance for people, as comparable to contracts of forward sales or deferred sales, because in the forward sales contract the seller needs money and he has the subject matter at the same time, and in the deferred sales contracts, the buyer needs the subject matter and he does not have money. However, in the sales of a debt for a debt, the buyer does not pay the price and the seller does not deliver the subject matter, so they do not need to enter into the contract as long as they cannot obtain the price and subject matter. When one of them is available, the contract would fall under the contract of forward sales, if the price is available, or under the contract of deferred sales, if the subject matter is available.

4- As we discuss under the conditions of instalment sales in Part Two, there is no doubt that the contracting parties have to indicate one price in the contract, whether the payment is at the time of the contract or in the future, because the Prophet prohibited two transactions combined in one, and according to the interpretations of many scholars, that includes agreements which include two prices for the same subject matter, the first for the payment now and the second, (which is higher) for payment in the future. Another reason for the prohibition of such a transaction is that there is *gharar* in the contract, and it may cause a dispute between the buyer and the seller. The reason for the prohibition is that the price is not determined, and the contracting parties may dispute the price and the time of payment in the future. Such a contract is a contrary to one of the conditions of the sales contracts, normally setting the price of the commodity.

However, the question arises, if the seller offers the buyer two or three different prices, the price increasing successively as the time of payment is increased, is increasing the price of the subject matter due to deferment before entering into the contract permissible in Islamic law? The majority of scholars consider that this kind of contract is permissible according to Islamic law, and that the prohibition of two transactions combined in one applies to the case where the contracting parties agree upon two prices in the contract, not to the negotiation before the contract.

5- With reference to Part Three, *tawarruq* sales are contracts where the buyer aims to obtain cash; therefore, he buys a product for deferred payment, and then he sells the product for cash. The price in the second transaction is normally less than that in the first transaction. This type of contract is permissible according to Islamic law, and it is not under the concept of *ʿIna* sales, which are prohibited in Islamic law. According to the concept of *ʿIna* sales, the contract involves two transactions between two contracting parties, as the seller in the first transaction is the buyer in the second transaction. However, in the *tawarruq* sales contracts, the seller in the first transaction is not the buyer in the second transaction. The *tawarruq* sales contracts includes two separate transactions, the first for deferred payment, and the second for immediate payment, and the seller in the first transaction knows nothing about the second transaction; conversely, the buyer in the second transaction knows nothing about the first. The only person, who is involved in the two transactions, is the buyer in the first transaction, who is also the seller in the second transaction, so there is no possibility of an arrangement between the contracting parties to engage in usury by way of deferment through this contract. In contrast, in the *ʿIna* sales

contract there is a possibility of involvement in usury by way of deferment, because the seller in the first contract asks the buyer to pay more as a deferred payment, then the seller buys the subject matter for less than the price in the first transaction, for immediate payment. Ultimately, the effect of the contract is to lend money for an extra sum in the future, and the involvement of a commodity is a trick to make the contract appear acceptable.

6- As indicated in Part Four, today there is a new form of contract called organised *tawarruq* or banking *tawarruq*. The first expression seems to be more academic, because it indicates the nature of the contract, and the second expression is more commercial, because it identifies the institutions which offer this kind of contract. This type of contract is offered by the financial institutions as an Islamic product to finance people and companies. It is very common in Saudi Arabia, and has been offered since 2000 by the financial institutions which apply to Islamic law.

The nature of the contract is a long contract procedure. Two types of commodities are offered by the institution. The first type of commodity is to be obtained from the international market, and it is normally metals, other than gold and silver. The second type of commodity is local commodities, such as some types of food, cement, cars and iron. The organised *tawarruq* contracts are not exactly the same as the traditional *fiqh* form of *tawarruq*, because there are some differences in terms of the procedure. Therefore, the ruling related to *tawarruq* sales does not correspond to organised *tawarruq* as it is implemented today, but the differences have to be considered in the light of Islamic law.

One of the main differences is the arrangement of the contract by the financial institution. The arrangement seems to be similar to the method employed in *ʿīna* sales, where the seller is involved in both transactions, and he arranges for them, because in the organised *tawarruq*, the financial institutions arrange for the whole procedure of the contract. In the *tawarruq* sales contracts the seller in the first contract is not the buyer in the second contract, nor does he arrange for the second contract. The arrangement may not affect the nature of the organised *tawarruq* contracts to bring it into the category of *ʿīna* sales, although the seller in the second contract is not the buyer. However, it may slightly change the view upon it, arousing some suspicions, because the arrangement shows that the original aim of the contract which is the contract of sales, has not been intended, but the contracting parties use the contract of organised *tawarruq* as a means to obtaining money with an extra sum, where it is not permissible for the lender to take more than he has lent.

Moreover, according to the procedure of organised *tawarruq*, in terms of international commodities, the financial institutions receive the commodities, and the commodities are determinate for them. However, the financial institutions do not determine the commodities of their clients in the same way. They say for instance, they sell 2 tons to A, 3 tons to B, and 5 tons to C, without distinguishing in reality each client's amount from their stock, so the ownership of the client is more like a partnership, not personal ownership. Therefore, we would suggest that the financial institutions distinguish between the clients' commodities by separating the amount which has been sold to everyone, and allocating a reference

number to each amount, as is done for the financial institutions by the international market. Furthermore, the situation when the contract involves local commodities is worse than that involving international commodities, because the traders who sell the commodities to the financial institution do not determine the commodities of the financial institutions themselves, and obviously the financial institutions do not determine the amount of each client. So, in the contract of organised *tawarruq*, the rule of sales is applicable, which prohibits traders from selling something before they have proper possession of it. Therefore, we would suggest that the financial institutions should determine their amount of commodities, and then determine the amount, which they have sold, of each client, and enable their clients to see their commodities, if they wish to do so, by informing them of the location of their commodities, and their share of the whole amount which used to be owned by the financial institutions.

Furthermore, the financial institutions play the role of agents by selling the commodities on behalf of their clients, and then crediting the price to their accounts. According to the view of some scholars, it is not permissible for sellers who sell commodities for deferred payment to sell them on behalf of the buyer for an immediate payment for less than the first price in the first transaction. Therefore, some financial institutions offer to deliver the commodities to the client then, with an extra sum as the cost of the delivery, or offer to act as agents to sell the commodities on their behalf.

In addition, we can divide the views of those who have studied those transactions into three; the first view prohibits the contract of *tawarruq* sales, so it obviously prohibits the contract of organised *tawarruq*. The second view accepts the concept of *tawarruq* sales and views organised *tawarruq* as just a modern aspect of *tawarruq* sales, so the contract is lawful according to Islamic law. The third view, considers that *tawarruq* sales are permissible but that organised *tawarruq* does not fall under the same ruling, because of the differences in practice. Therefore, the Islamic *Fiqh* Academy in one of their conferences (circle 15) ruled that *tawarruq* sales are permissible, but in another conference (circle 19), they ruled that organised *tawarruq* is not permissible.¹ We would suggest that organised *tawarruq* as practiced today is not seem to be acceptable in Islamic law, and it is also not the same to traditional form of *tawarruq*.

Last but not least, the study does not cover all sides of the concept of instalment sales according to Islamic law. There are still many issues worthy of study to show the Islamic law point of view on them. One of the most important issues is diminishing partnership, which is a contract in which financial institutions share properly with their client, and the reward (due to rent or investment) from them. Then the client buys part of the share of the financial institution at agreed intervals until he owns the whole property.

In addition, the study is focused on the contract of organised *tawarruq* for personal financing, and there are some differences, in the terms of practical applications,

¹ For more details see p. 247 above.

between organised *tawarruq* for personal financing and the financing of companies and establishments which normally apply for large amounts of money, so it is important to examine these kinds of contracts.

Moreover, some financial institutions offer credit cards, which they say are approved by their Shari'a Supervisory Board. For example, one such card offered by the Samba Financial Group is described as follows: "The al-Khair card is the latest credit card introduced and launched by Samba. in addition to being in compliance with Shari'a, the card provides its holders with the same benefits and privilege of the conventional credit card ... At the payment due, the cardholder will be asked to pay the minimum due or any amount lesser than the full amount. After that, the cardholder will settle the remaining [amount] by executing *tawarruq* transaction."² This kind of credit cards should be studied in the light of the rules of Islamic financial transaction.

² See Samba Financial Group, al-Khair Credit Cards', www.sambaonline.com.

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Appendix 4.1 Form of Mal contract

PURCHASE REQUEST

The Saudi British Bank
Al-Amanah Islamic Banking

Date:

/	/	G
/	/	H

Dear Sir,

With reference to the Installment Sale Agreement signed with you on

I wish to purchase a metal according to the following:

Description of the metal:
.....
.....

Quantity:.....

Sale Price:(Principle +Profit)

Repayment Period:(months)

Administrative Charges:

I authorise the bank to debit my account for SAR to cover the administrative charges. I understand that this amount is non-refundable against entering with the Bank in the purchase procedure. I hope this request will be accepted by you.

Name:

Signature:

Acceptance

To
Dear Sir

With reference to your request for purchase of the metal according to the above terms, we wish to advise you of our acceptance to sell to you according to the Terms & Conditions stated in the request.

For Al Amanah Islamic Banking:

INSTALMENT SALE AGREEMENT

This agreement has been made on / / AH
 corresponding to / / AD in the city of
 between:

1) Amanah Islamic Banking Services of SABB incorporated under the rules of the Kingdom of Saudi Arabia, C. R. No. 1010025779 having its Head office in Riyadh, P. O. Box 9084, Riyadh 11413, represented herein by:

Mr.....
 (First Party – Seller)

&

Mr./Mrs	
Nationality	
ID #	
Issue Date	
Issued from	

And having address at

CITY	
DESTRIC	
STREET	
P.O.Box	
FAX	
TEL	

Preamble:

Whereas the Second Party has submitted from time to time a request to the First Party to purchase metals owned by the First Party at the time of the agreement by way of “Installment Sale”, the two parties have in their legal capacity agreed to enter into this contract as per the following terms and conditions:

Article 1:

The above preamble constitutes an integral part of this contract.

Article 2: Sold items and value

The First Party will sell to the Second Party from time to time metals according to the purchase request submitted by the Second Party to the First

Party including description of metals, quantity, sale price and repayment period. Afterwards, sale shall be made by contract including accede and acceptance:

Article 3: Repayment:

The Second Party shall pay the price of sold metal on monthly installments as follows:

a) The Second Party hereby irrevocably authorizes the First Party to debit his/her current account for the monthly installment on due date automatically without further approvals.

b) Where the Second Party’s salary is assigned to the First Party as a security hereunder, the Second Party may not stop the transfer of his/her salary to the First party, and he/she must present an acknowledgement from his/her employer.

c) The Second Party shall pay due installments on due dates net of any taxes or fees of any type or source and whether payable at the signature of this agreement or imposed in the future.

Article 4: Securities

As security to the First Party’s rights, the Second Party has presented the following covers:

a) An account has been opened with the bank where his/her salary shall be transferred.

b) An Order Note has been issued to the order of First Party for each transaction.

c) _____ (Other securities if any)

d) _____ (Other securities if any)

Article 5: Acknowledgement of debt and the accuracy of accounts/entries

a) The Second Party undertakes to pay all due installments on due dates.

b) The Second Party acknowledges that the First Party’s books and entries shall constitute a final evidence of the accuracy of amounts credited/debited to his current account, and he/she may not object thereto after the lapse of 15 days of the receipt of statement.

Article 6: Early Settlement

a) The Second Party, with the First Party’s consent, may pay all sale price or a part thereof before maturity.

b) Should the Second Party wish to make an early payment of full debt or part thereof, the debt shall be reduced by the sum paid, and the First Party may decrease the indebtedness as per agreement between the two parties against early repayment.

Article 7: Violation of Obligations

The terms provided for herein and all customer obligations as per the bank’s records shall become due and payable, without the need for legal action, in any of the following cases:

a) The Second Party’s delay or failure to observe any of his/her obligations and commitments provided for in this contract.

b) The Second Party’s violation of the securities and warranties provided by him/her favoring First Party by taking any action which, the First Party deems, detracts the values of such securities or warranties and consequently affects the First Party’s rights ensuing therefrom.

c) The Second Party’s bankruptcy.

Article 8: Delay Penalties

The bank may not impose delay penalties in case of payment delay. However, the Bank may impose penalties on the Second Party against damages incurred where any procrastination of payment by the customer has been proved. However, such penalties shall be used for charity purposes.

Article 9: General Terms and Conditions

a) All accounts, regardless of their titles, opened or to be opened in the name of the Second Party with the First Party shall be considered as collateral to each other. The First party may, in case of the Second Party's failure to honor his obligations, consolidate all such accounts and recover any credit balances in any of such accounts for settlement of the outstanding balance of any account or block such credit balances until the Second Party has fulfilled his/her obligations to the First Party.

b) In case of the Second Party's failure to meet his/her liabilities, the First Party shall be authorized to perform a set off, recover any credit balances, make settlement entries and transfers in any accounts opened or to be opened in the name of the Second Party with any SABB branch.

c) In case of the Second party's failure to meet his obligations to the First Party, all monies, financial and commercial papers and precious metals which may be deposited in the Second Party's name with the First Party or any of its branches shall be considered as security for all Second Party's obligations to the First Party without the need for any acknowledgement by the Second Party. The First Party shall have the right to recover his debts directly from the said funds by way of set off, and he shall have a priority over other debtors without the need for any notice or legal action.

d) The Bank shall have the right to claim any outstanding amounts from the Second Party. The First Party's failure to claim his rights on due dates shall not be construed as a grace or waiver of any action or lien on the Second Party's funds, the Second Party acknowledges and agrees that the bank may take the action that secures recovery of his outstanding including lien on dues with private institutions and government departments in amounts that are equal to his debt and request payment thereof wherever appropriate.

e) The Second Party may not assign his obligations hereunder to any other party without prior approval of the First Party.

f) The Second Party shall inform the First Party in writing of any change to his address, place of work or domicile immediately upon the occurrence of such change.

h) The Second Party undertakes hereunder to pay all amounts due to the First Party on due dates. Should the Second Party fail to pay for 3 consecutive installments or should 90 days have lapsed after his failure to pay, the First Party shall have the right to include the Second Party's name in the C-List in which case he will not be able to get any banking services from any bank. Lifting of customer's name from the C-List shall only be made after he had paid all amounts due to the First Party and a certificate proving same has been issued.

i) The bank is authorized to disclose information relating to the customer to a consumer credit bureau endorsed by SAMA and this information will be available to other members of the bureau.

j) The First Party shall have absolute right to reject purchase requests submitted by the Second Party.

Article 10: Application law and Jurisdiction

This contract shall be governed by and construed according to the regulations of the KSA and commercial practices in force therein. Any dispute not amicably solved shall be referred to the competent authority for settlement in line with the Sharea Rules.

Article 11: (Definitions)

Monthly Installment/Repayment

The customer will be required to make a regular repayment that is made up of principal and profit. The repayment is calculated as follows: (Principal + Total Profit) / term in months.

Annual Profit Rate (APR)

The actual profit rate charged over the term of the facility is known as the APR and is quoted on an annualized basis. This is the true cost of financing. This is calculated through a formula that is derived by dividing the profit paid by the average Principal outstanding, over the life of the facility. The profit will be calculated on daily basis starting from executing the deal. For Home Lease (Manazil) contract, monthly rental rate revision will be applicable as determined on the lease contract.

Flat Rate

Is the rate used to derive the total profit based on the principal amount and duration in number of years as follows:

Principal*flat rate*number of years.

Delay / Late Payment

In the event of a delay in receipt of any installment the Bank will charge minimum 16% p.a. Late Payment Charges. These will be paid to Charity.

Partial Payment

If the customer wishes to repay part of the outstanding finance amount then the Bank can, at its discretion, reschedule the remaining amount.

Prepayment/Early Settlement

If the customer decides to repay the whole of the facility before maturity then he would be required to repay the outstanding finance amount. The bank may at its discretion decide to waive some of the profit.

Management/Processing Fee

The customer may be required to pay a fee to the Bank to cover the costs of processing the finance request as detailed in the facility agreement.

Variation of Terms

If during the duration of the facility there are any changes to the terms and conditions the Bank will formally notify the customer of such changes.

Article 12

This contract is made in two original copies, each party received one copy to act accordingly.

First Party The Saudi British Bank		Second Party Customer	
Name		Name	
Date		Date	
Signature		Signature	

POWER OF ATTORNEY

The Saudi British Bank
Al Amanah Islamic Banking

Dear Sir

With reference to the Instalment Sale Agreement I entered into with SABB – Al Amanah Islamic Banking on / / **G** / / **H** and the purchase request and your acceptance thereof, I am interested to sell the metal belonging to me. I hereby irrevocably authorize SABB Treasury Department, P. O. Box 9084, Riyadh 11413 to sell on my behalf the metal purchased from the bank to a third party for the price prevailing at the time of sale without delay, according to the normal practices. I have accepted this transaction and relinquished any right of objection in case of any price change.

I also authorize the bank to receive the sale price and credit the same to my account No. - - with SABB.

Further, I authorize the bank to deduct SAR from the sale proceeds against service charges of sale under this Power of Attorney.

The Bank is authorized to provide the buyer with any information about me if necessary.

This Power of Attorney is restricted to the aforesaid purpose and you have no right to act on my behalf in any matter other than herein above mentioned. The validity of this Power of Attorney shall expire upon completion of this transaction.

Principal Name:

Signature:

Date: / / **G** / / **H**

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