

UBUDIYYAH
BUSINESS
MODEL

A BRIEF INTRODUCTION OF
ISLAMIC CONTRACT OF SALE

UBM-C&S-002

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Shari'ah guidelines for a valid contract

Contract definition

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

The word used in Islamic terminology for “contract” is: *'Aqd*, which comes from the root: *'aqada*, which literally means: ‘to join/ tie’, technically meaning: *An obligation arising out of a mutual agreement*.

Al-Quran has used variants of this root in the following verses: “And resolve not on the marriage tie (*'uqdah*) until the prescribed period (*'iddah*) reaches its end.” (2:235)

“Allah will not call you to account for what is void in your oaths, but will call you to account for the oath which you take in earnest (*'aqqadtum*).” (5:88)

'Aqd is used in two senses, general and specific:

- a. **General:** applied to every act which is undertaken in earnestness and with firm determination regardless of whether it emerges from a unilateral intention (such as *Waqf*, remission of debts, divorce, undertaking an oath) or mutual agreement (sale, hire, agency, and mortgage).
- b. **Specific:** combination of an offer and acceptance which gives rise to certain legal consequences.

In Shari'ah a sales contract refers to an exchange through offer and acceptance. Therefore a mere undertaking will not be called a contract from a Shar'ee perspective. ¹

Basic elements of a sales contract

- i. Parties/ persons entering into a contract (*'Aqidain*).
- ii. Offer and acceptance (*Ijab / abool*).
- iii. Subject matter of the contract (specific goods or services to be sold, *Mab'ee*)
- iv. Compensation (price or rent, *Thaman* or *Ujrah*).
- v. Requisites: rights and responsibilities of contract.

Who may not enter into a contract of sale

The contract is not valid if any of the parties are:

- i. Insane
- ii. A minor

The following are exceptions:

- a. A minor less than seven years of age: He or she can enter into a contract in low significance/implication transactions such as the purchase of biscuits, etc.
- b. A minor above seven years but not fully mature: He or she can enter into a contract in areas of somewhat more significance/implication than the above, like the purchase vegetables etc.

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- iii. Not in one's full mental capacity (due to sleep, intoxication, temporary mental dysfunction, etc.)
- iv. Under coercion/force.

Initiation of a contract

Initiation of a contract and its completion takes place after the completion of two essential parts:

- i. *Ijab* (Offer): A declaration initiating a proposed obligation
- ii. *Qabool* (Acceptance): The subsequent declaration of acceptance.

Kinds of offer and acceptance

Offer and acceptance can be conveyed in a number of ways:

By words

There are no fixed words for the formation of particular contracts. Whatever conveys the meaning with clarity is considered sufficient for the formation. However, the following points must still be taken into consideration:

Use of Tenses for *Ijab* and *Qabool*:

- i. **Past tense:** In order to avoid any degree of uncertainty, Islamic Law requires that the statement of *Ijab* and *Qabool* must be constructed in the past tense. Thus, if A says to B: "I have sold this house to you for 100,000 rupees, and B replies "I have accepted" a contract is said to have come into existence.

The contract should not consist of words that imply a promise of sale rather than actual sale. For example, if the seller said "I promise to sell my house for 100,000 rupees...", it would not be considered a binding contract of sale, even if the buyer accepts this offer. It will be considered a mere promise of sale.

- ii. **Future Tense:** Offer and acceptance concluded in the future tense are invalid.
- iii. **Present Tense:** A contract made in the present tense is valid in the presence of other clear indications that the intention is to conclude the contract in the present, not in the future.

Offer and acceptance should not be phrased like a mere wish or desire, for example: "I want to sell this item."

The offer and acceptance should not be in the interrogative or imperative forms such as "Are you selling this thing?" Or: "Sell this thing!"

By writing

A contract can be concluded through writing, irrespective of whether the parties are present in one *Majlis* (sitting), or one is absent. It is common practice to make an offer in the form of a letter in the absence of one of the parties. (Note: When concluding a contract through writing, the same injunctions concerning tenses apply as in the case of a verbal contract)

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By Gesture or Indication

In normal conditions, contracts through gestures or indications are not acceptable for one who is able to speak or write, as spoken words and writing convey a stronger form of expressing willingness than gestures.

By 'give and take'

This is termed as *Ta'ati* in Islamic Law, and acceptable in common day-to-day sales transactions. This form of transaction is permissible under the following conditions:

- i. Exchange must be made from both sides: Delivery of both the item sold (*Mab'ee*) and its compensation (*Thaman*) from both sides must be simultaneously, or near simultaneously. *For example*; the buyer enquires from the seller the price of an item and the seller mentions a price. The buyer then hands over the money and the seller delivers the item to him.
- ii. The item must be of insignificant value, such as an everyday commodity like bread, meat etc., not something of high monetary value like real estate, gold or silver.

(Note: For more detail contact your Shari'ah Advisor or a Mufti)

Conditions for validity of offer and acceptance

- i. The Offer and Acceptance must correspond. If an offer is made for a subject matter, the acceptance must correspond with that very subject matter along with its details such as:
 - a. Offer and acceptance must correspond regarding price.
 - b. If offer is made on cash, acceptance must be on cash, not credit.
 - c. Offer and acceptance must correspond in quantity of subject matter.
- ii. The free will of both parties. If one of the parties is forced or pressure to purchase or sell the subject matter, he/ she shall have the option to validate or nullify the contract.
- iii. Offering party does not revoke his offer. For example: "A" offered a certain subject matter for 100 rupees. The 2nd party was still thinking about it when "A" changed his mind and revoked his offer. In this case, the contract will be invalid before inception.
- iv. Offer and acceptance must be concluded in one sitting/meeting (*Majlis*): That is, both parties are in the same place (literally or virtually) and that neither party displays his disinclination to the contract. For example: after *Ijab* (Offer) one of them stands up to leave, or turns his attention to some other work, or goes to sleep, or changes the topic of discussion. All these situations imply a change in the meeting, which, in turn, leads to an invalidation of the *Ijab* (Offer). However, if after any such change, the second party expresses his acceptance of the former offer, this acceptance shall be considered a fresh offer and if accepted by the other party it becomes a valid contract.
- v. **Offer and acceptance by Phone:** Offer and acceptance through phone are covered by the same injunctions as those of a face-to-face meeting. Changing the topic or ending the call will be considered as a change or conclusion of the meeting.
- vi. **Offer and acceptance by letter:** If offer and acceptance are being executed through a letter, the place in which the written communication is read will be considered as the sitting/meeting of contract. After concluding this sitting, an acceptance will not be valid. However, there are some cases where a delay in *Ijab* (offer) will remain valid. For example:

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- a. During office hours, Zaid is busy with written communications. When he is about to leave, he receives a letter or fax containing an offer. Zaid scans through it cursorily without responding with intent to reply after careful review. The next day he replies to the letter or fax, and expresses his acceptance of the offer. This acceptance is valid.
- b. Zaid's practice is that he reads letters and replies to them at a different time, or he delegates replying to his personal assistant, or he is waiting for more information from the seller, or he has many communications to handle and prefers to reply after reading them all. In all these cases the delay in acceptance is acceptable.

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Subject matter

Subject matter of a contract should have the following characteristics for the contract to be valid:

i. **Legality of subject matter**

The subject matter (Commodity or service) must be Halal, not Haram as per Shari'ah (Such as: wine, pork, intoxicants, prostitution, blood or animals which died naturally or have not been slaughtered according to Islamic injunctions²

Since adultery, obscenity and immorality are prohibited by Shari'ah, any contract or transaction that involves or promotes such evils in any manner is also forbidden.³

ii. **Existence of subject matter**

The subject matter must actually exist, or its existence should not be doubtful at the time of contract.

Examples of this category:

- a. The sale of an orchard before its fruit is ripe (a common practice in mango and guava orchards).

- I However, if the unripe fruit has any utility, and carries a value and can be sold in the market, it is permissible. Once the sale is concluded, it is not permissible for the buyer to stipulate that the fruit be left on the trees until ripened. However, if the seller allows the buyer to do so without being a condition of the contract, it is permissible and the fruit will have become the sole property of the buyer and leaving it on the trees will be entirely at his risk.

If fruit has appeared on most of the trees in an orchard, yet a few trees have yet to bear fruit, the fruit of this orchard can be sold while observing the above conditions.

Note: it is not permissible to sell the fruit of an orchard for years in advance, apart from the harvest of the current year, even though the trees are bearing fruit, as the fruit of subsequent years has yet to come into existence.

- b. Milk in the udder of an animal. ⁴

- c. Fetus in the mother's womb. ⁵

iii. **Ownership and possession on subject matter**

- a. Along with the existence of the subject matter the subject of sale, it must be in the physical possession of the seller at the time of sale.

- I *Physical (Haqiqi) possession*: The subject matter is actually come in the physical possession of the seller.

For example: Zaid has purchased a car from Khalid. However Zaid has not yet delivered it to Khalid or his agent. Hence, Khalid cannot sell the car to Amr until he physical possesses the car.

- II *Legal virtual (Hukmi) possession*: This is when the commodity has yet to be physically delivered to the owner, yet the commodity is under his control and all the rights and liabilities of the commodity have been passed on to him, including the risk of its loss or destruction.

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For example: Zaid has purchased a car from Khalid. Khalid after specifying the car has placed it in a garage and given Zaid free access to take the car whenever he wishes. Thus the risk of the car has passed on to Zaid. The car is now in the virtual possession of Zaid. He is now permitted to sell to a third party even though he is not in physical possession of the car.

Note: Short sale (where a re-sale of a share is made before it has been actually transferred to the re-sellers account) in a stock exchange is not allowed, as the seller of this share is not yet in possession of the share.

iv. **Exception to the previous two rules**

- a. “*Bai’ Salam*” in which the purchaser pays the price in advance while delivery of the subject matter is postponed to a specified future date with certain terms and conditions.
- b. *Istisna’* in which delivery is deferred to a latter date after manufacture. Payment is also not necessary in the beginning of the contract.⁶

(Note: Details of these two contracts to follow)

v. **Deliverability of subject matter**

- a. At the time of conclusion of contract the seller must be able or have the capacity to deliver the subject matter, as the purpose of the contract of sale is to afford the full and exclusive authority and right to the benefits of the subject matter to the buyer.
- b. Hence, the following transactions are not allowed:
 - I Sale of a stray animal whose whereabouts are unknown.⁷
 - II Sale of fish (free) in the sea.⁸
 - III Sale of birds in the air.⁹
- c. Modern examples:
 - I Sale of debts

vi. **Specification / Identification of Subject Matter**

The subject matter must be specified at the time of contract.

The subject matter’s specification / identification can be accomplished in numerous ways as under:

- a. By quantity: For example, the buyer says to the shopkeeper: “1kg sugar, please!”
- b. By indication: For example, the buyer says to the fruit seller: “I purchase these fruits for 100 rupees”, pointing towards the fruits.
- c. By counting: For example, the buyer says: “Give me 2 dozen eggs, please”.
- d. By separating the desired item(s) from the lot: For example, the byer picks some fruit out of a lot.
- e. By exactly specifying the desired item: for example, in a building there are several apartments which are made identically. Zaid says to Khalid: “I want to sell one of them to you”. Even though Khalid accepts this contract, it will not be permissible until a particular apartment is

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specified and distinguished from the other apartments, by either giving it a number, or highlighting it on the plan, or the like.

- f. By mentioning price: For example, the purchaser says: “Give me petrol for 1000 rupees.”

In short, any method by which subject matter is specifically identified in a way that should prevent any future dispute.

vii. **Pointing out any defect in the subject matter:**

It is necessary to mention and point out defects in the subject matter, if any, to insure that the buyer is not deceived. However, if the seller says: “I am selling this item as is with no responsibility for any defect that may appear later, so check it thoroughly before purchase.” This is acceptable and absolves the buyer from the responsibility of any defect.

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Remuneration (price or rent)

The price of subject matter must be specified and clearly known by both parties at the time of execution of contract. If the price is unknown to both or one of them, the contract will be void and unacceptable. For example:

- i. Zaid sells an item to Khalid without mentioning the price. When Khalid enquired about the price, Zaid said: 'We will see later'. Such a transaction is not allowed. The price must be mentioned in clear and definite terms in the same meeting in which the item is sold.
- ii. Zaid says to Khalid: "If you pay within a month, the price is 50 rupees but if you pay after two months, the price is 55 rupees". Khalid agrees. The price in this case is uncertain and therefore the sale is void unless one of the two alternatives is agreed upon and specified by the parties at the time of sale.
- iii. The shopkeeper says to the purchaser: "I'm selling you this medicine at the retail price, or the market price", whereas the buyer is not aware of either market or retail price. Such an ambiguity in price is not allowed. The price must be clear to both parties.
- iv. Someone deals with a single shopkeeper and continuously purchases various items as per need, not enquiring on the price of items at the time of purchase, but rather pays for all of his purchases together at the end of the month. This is permissible as a concession out of need. Nevertheless, it is better to enquire of the price of each commodity, and properly record all transactions to avoid dispute.
- v. It is allowed to increase the price of a credit sale, provided the price is fixed and known at the time of the contract. Any extra penalty for late payment is impermissible.

For example: Zaid says to Khalid: "I sell this item on a cash basis for 100 Rupees, and on credit over three months, for 120 Rupees." Khalid said: "I accept to buy on credit". Such a transaction is permissible, provided the time when the payment will be due is properly specified.

Caution: It is not permissible for the seller to say: "If you cannot pay by the due date, I will give you further respite against some additional payment", as this constitutes interest (*Riba*), which is totally forbidden.

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Rights & Responsibilities of Contract

- i. Rights and responsibilities regarding the contract must be clear.¹⁰
- ii. Both parties should bear responsibilities and enjoy rights congruent to the nature of the transaction.
- iii. Risk must be borne by the owner until possession of the item is transferred to the buyer. Once the possession of the item is transferred to the buyer, the risk will also be transferred, even if the sale was on a credit basis.¹¹
- iv. Any condition in opposition to the requisites of the contract is invalid. For example, it is impermissible to require the lessee to bear ownership related expenses in a lease transaction. Similarly, it is impermissible to guarantee the principle amount in a partnership, (regardless of whether the parties agree on it or not).

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Shari'ah guidelines for contract of sale

Types of Sale Transactions

- i. *Valid sale*
- ii. *Invalid Sale (Bai' Baatil)*
- iii. *Imperfect Sale* (due to a defective element within the transaction) (*Bai' Fasid*)
- iv. *Valid Reprehensible Sale (Bai' Makrooh)*

Valid sale

Conditions of a Valid Sale: ¹²

Conditions of a valid sale are those discussed above under "Basic elements of Sale" and their details.

Invalid sale (*Bai' Baatil*)

Bai' Baatil is a sale that is totally unrecognized by Shari'ah. In such a transaction an actual purchase has not taken place, and the buyer does not become the owner of the purchased goods. Hence, neither can he use them nor can sell them to anyone else. In doing so, he will have committed a sin.

Forms of *Bai' Baatil*:

- i. To sell things which have no monetary value in Shari'ah; e.g. Sale of pig, wine, animal cadavers, human body parts or bones, etc.;
- i. Sale of non-existent things;
- ii. Sale of something not in the legal ownership of seller.

Note: Sale of human blood falls in this category, and is therefore impermissible under ordinary circumstances. However, if according to an expert, *Muttaqi* doctor, there is no other way to saving the patient's life, the purchase of human blood will be permitted out of necessity. It is however not permissible for the seller (Muslim) to receive compensation. He should rather donate the blood freely.

Imperfect sale (*Bai' Faasid*)

- i. In such a sale the seller, once he takes possession of the purchased thing, will actually become the owner, however due to Shar'ee discrepancy the sale must be reversed. For example:
 - a. A person sells a commodity to a third party without having acquired actual possession of it.
 - b. The inclusion of a condition in the contract, which is not acceptable in Shari'ah.
- ii. There are three types of conditions that may appear in a sale transaction:
 - a. Valid Condition;
 - b. *Faasid* (imperfect) Condition;
 - c. *Baatil* (invalid) Condition.
- iii. **Valid Condition:**

A permissible condition in a sale transaction is basically of three types:

 - a. A condition that is *consistent with the basic objective of the contract*. For example:

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During an on the spot sale, the seller says to the buyer: "I will not hand over the item of sale to you until you have given me its full price."

- b. A condition that is meant to augment or guarantee a contract. For example:

In the contract, the seller requires the buyer to provide a guarantor or pledge (*Rahn*).

- c. A condition that is generally considered a part of the contract by traders in a particular market. For example:

I The seller of a carpet must install it at the home of the buyer upon completion of the transaction.

II Free delivery to the buyer's premises.

iv. **Faasid Condition:**

Any condition that *does not fall within the scope of the above three types*, and provides a *unilateral benefit to either the seller or the buyer*. Such a condition renders the contract imperfect. For example:

- a. "A" says to "B": I sell you my home provided that you will give it to me on rent thereafter."
- b. Selling a car with a condition that the seller may use it freely for two days every month.
- c. "A" says to "B": I sell you my home on the condition that you will give me a loan of 10,000 rupees".
- d. "A" says to "B": I sell you my home on the condition that you will sell it back to me after 1 year".

Note: If the contract at the time of execution is free of any "Faasid" condition, and after the completion of the transaction any such condition is added, it will have no effect on the original contract. For example, Zaid sold his home to Khalid without a condition of resale or rental to Zaid. Thereafter, coincidentally Khalid sells it back or rents it to Zaid. The original of sale shall continue to be valid and permissible.

v. **Baatil Condition:**

A condition that does not fall within the scope of the three types of valid condition, and does not provides any benefit to either seller or buyer. Such a condition is invalid from the time of inception. However the contract excluding the invalid condition remains permissible and valid. For example: Zaid says to Khalid: 'I will sell you my car provided that you will not sell it to any one'. Such a condition is *Baatil* and Khalid will be free to sell it or keep it.

Valid reprehensible sale (*Bai' Makrooh*)

A sale transaction is valid but reprehensible in certain situations such as:

- i. Sale after the first *Azan* of *Jumu'ah* Salah
- ii. Sale of a hoarded item
- iii. Sale by intervention of a third party while two are negotiating
- iv. Purchasing something from a person in dire necessity at a rate far below the market rate, taking advantage of the person's necessity.

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- v. The buyer demands an increase in the quantity of goods, or a lowering of the price after the completion of the sale transaction.

Contract of *Istisna'*

Definition: *Istisna'* is technically a sale transaction of a commodity before it comes into existence. This is the form of transaction used when placing an order with a manufacturer to manufacture a specific commodity for the buyer. The manufacturer provides the material needed to manufacture the goods ordered. ¹³

- i. Before the actual manufacturing begins, either of the parties may cancel the contract after giving notice to the other. ¹⁴
- ii. Pricing terms must be clear and agreed upon.
- iii. Description of goods must be clearly specified. ¹⁵
- iv. Time period for delivery of goods must be agreed upon, be it a one time delivery or in installments.
- v. The re-sale of the subject matter of *Istisna'* is not permissible until completion of the manufacturing and actual possession of the buyer.
- vi. *Istisna'* contract is not permissible upon goods already produced.
- vii. There must not be any ambiguity of the nature of the contract, it must be clear to both parties that this is an *Istisna'* contract.
- viii. If the manufacturer is to sell these goods as an agent of the buyer after delivery to the buyer, a separate agreement other than *Istisna'* must be made for this transaction.
- ix. **Uses of *Istisna'*:**
 - a. Home financing
 - b. Financing of a plant, factory or building
 - c. Booking of apartments
 - d. Bill of Trade arrangements
 - e. Construction of buildings, plants, etc.

Contract of *Salam*

Definition: The undertaking of a seller to supply specific goods to a buyer at a future date in exchange of a fully paid advance payment. So basically it is a sale transaction wherein the payment is made in advance, whereas the delivery of goods purchased is deferred to a later date. ¹⁶

- i. The full price must be paid in advance. The quantity and the quality of the subject matter should be agreed and specified in clear terms.
- ii. The time and place of the delivery of goods must be predetermined whether it be a one time delivery or in installments. ¹⁷
- iii. If the advance payment is in the form of barter, the absence of *Riba* must be ensured. ¹⁸
- iv. The commodity should customarily be available at the delivery time.

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- v. The subject matter can be altered before the delivery with mutual consent.
- vi. The re-sale of the subject matter of *Salam* is not permissible until it is in the actual possession of the original buyer.
- vii. The *Salam* contract is not permissible on goods already produced.
- viii. The *Salam* contract must not be ambiguous.
- ix. If the manufacturer is to sell these goods as an agent of the buyer after delivery to the buyer, a separate agreement other than *Salam* must be made for this transaction.
- x. If the subject matter is not delivered on time, the buyer has two options:
 - a. To wait.
 - b. To cancel the transaction and take back the principal amount.
- xi. *Salam* can be made only on fungible, homogenous (*mithli*) goods that the specifications, by which its value varies, can be clearly and accurately defined and measured.¹⁹
- xii. *Salam* is permissible only in items that are:
 - a. Measured by weight or volume;
 - b. Are continuously and always available in the market.²⁰
- xiii. Penalties for late/ non-delivery are not permissible.²¹

Contract of *Murabahah*

Definition: *Murabahah* is a sale transaction where the seller expressly mentions the incurred cost of the sold commodity, and sells it to another person by adding a specified amount of profit thereupon.²²

- i. As it is a type of sale, there must be a seller and buyer and something that is bought and sold.
- ii. The parties must agree upon the cost and profit.
- iii. Once the sale has been completed, and the price including the profit has been specified, it is not permissible to increase or decrease any terms thereafter.
- iv. If goods of the *Murabahah* are being stored in a facility where there are other goods being stored not related to the *Murabahah*, goods of the *Murabahah* should be kept separate by means of color schemes, boards, markings or any other effective means of identification and distinction up to the time of delivery.²³
- v. Invoices are to be signed by an authorized representative of the Trader/ Manufacturer.
- vi. Rescheduling is allowed, but any increase in the original price is not allowed.
- XVI. If the customer fails to pay his dues on a *Murabahah* sale, then it is not permissible to change the price of the goods or to charge any penalty. (Some jurists however, allow a penalty to discourage late payments.²⁴
- vii. If the *Murabahah* involves credit terms, the price and date of maturity must be fixed.
- viii. Advice from Shari'ah Advisor is essential for goods that cannot be segregated.,

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- ix. Traders, manufacturers trade representatives, persons at various levels in finance and relevant persons in procurement and stores should all be trained and educated in *Murabahah* transactions related to their respective fields. ²⁵

The *Murabahah* model is used extensively in the Islamic finance/banking sector. When entering into such transactions with banks it is very critical to have a competent Shari'ah Advisor/Mufti oversee and audit all such transactions. Some examples of issues that need attention:

1. If a second party makes the purchase on behalf of someone else, a bank for example, the following things should be clear and known:
 - a) Who shall inform the bank at the time the goods are delivered?
 - b) How shall delivery and possession of goods take place?
2. If the original agreement of payment was to be at a particular time, but payment was not possible at that particular time, it is not permissible to initiate a new agreement (rollover).
3. If a rebate has been agreed upon in a credit *Murabahah*, the conditions of the rebate must be documented within the agreement. ²⁶
4. It cannot be used as a cash facility, which provides cash for fulfilling various needs.
5. *Murabahah* is not permissible on goods already purchased to avoid buyback (Al 'Eenah)
6. Seller should be informed about any advance order made for this *Murabahah*. If the *Murabahah* has appointed a purchasing agent (Wakeel), for whom the purchase is being made for must be clear before any actual purchase. ²⁷

Contract of *Ijarah*

Definition: *Ijarah* is the transfer of the utility of an asset or service, from the *Mu'ajjir* (owner) to the *Musta'jir* (the party renting the asset) for an agreed period, at an agreed compensation. ²⁸

- i. Subject of *Ijarah* (lease) must be something of value, identified and quantified.
- ii. *Ijarah* of a consumable item is not permissible. ²⁹
- iii. *Ijarah* can only be contracted for a Halal purpose and for Halal things.
- iv. The period and purpose for which it is being taken on rent must be specified. ³⁰
- v. At the time of the signing of the contract, the rental amount must be specified for the total period of the *Ijarah*. ³¹
- vi. The period of *Ijarah* would start when the *Ijarah* asset is handed over to the *Musta'jir*, or at the start of a service provided. ³²
- vii. Any advance payment must be specified and mentioned in the contract as advance rental, security deposit, etc.
- viii. All expenses related to *operational use* of the asset are borne by *Musta'jir* and *ownership related* expenses (major maintenance, property tax, etc.) are borne by the *Mu'ajjir*. ³³
- ix. In case of loss of the utility of the asset, the *Ijarah* agreement will be terminated. ³⁴
- x. Once the *Ijarah* terms and compensation are agreed, the *Mu'ajjir* has no right to increase the rent or ask the *Musta'jir* to vacate the property before the stipulated rental period comes to

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an end. However if an abnormal variance in rent value occurs, the party bearing the loss can terminate the *Ijarah*.

- xi.* The *Ijarah* agreement may be cancelled on the basis of *Khiyaar Shart* or '*Aib Ru'yah*'.³⁵
- xii.* The asset is not to be used for any purpose other than what was stipulated in the agreement. If the asset is damaged while used for any other purpose, compensation for the damage must be borne by the *Musta'jir*.
- xiii.* If the *Mu'ajjir* has allowed a sub-*Ijarah*, the sub-*Ijarah* will be permissible, but it must be for the same compensation as the original *Ijarah*, unless the original *Musta'jir* has made some amendments/value addition to the asset. In that case, higher rental compensation is permissible. Otherwise, in the absence of any value addition, any amount above the original amount is impermissible, and if inadvertently taken, should be disposed of in charity without intention of reward.³⁶
- xiv.* If the asset has been rented on *Ijarah* but the agreement was found to be *Faasid*, the lesser of either; 1. *The agreed amount* or 2. *The prevailing market rate of rent* should be given for the period the asset has already been utilized.³⁷
- xv.* In the event of death of the *Mu'ajjir* or *Musta'jir*, a new agreement must be made between the new parties (original party and the other party's heirs).³⁸
- xvi.* Token money received by the *Mu'ajjir* from the *Musta'jir* cannot be retained unless it is in lieu of, and equivalent to, actual damages to the property.
- xvii.* Barter of rental is also allowed.
- xviii.* Rental must be a fixed amount free from any ambiguity. Fixing a set rate for some portion of an asset and a variable rate for another portion is impermissible.

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Contract of *Sianah*

In this contract, a party undertakes the responsibility to maintain a machine, software etc. and charge for the service. It can be the manufacturer of that product or can be a third party. Maintenance could include:

1. Periodical checking / service
2. Repair job as and when required
3. Both the above

Following is an explanation of the above:

Periodical checking / service

This is a simple *Ijarah* contract. In such case all *Ijarah* conditions shall be applicable (as mentioned in the relevant section).

Repair job as and when required

The vendor undertakes to rectify the problem as and when it occurs. The agreed fee shall however be paid even if the problem does not occur – provided the following conditions are met:

- a. To avoid any conflict details of the service shall be specified
- b. Agreed duration of contract
- c. Agreed compensation
- d. At least one visit / practical service provided in the period, other than repair.

Note: If not a single visit is required during the period and the compensation is just for taking the responsibility to rectify the problem, not for actual rectification, then the contract becomes void due to the unknown subject of contract (*maaquod alaih*) – which is a cause of *gharar*.

Both the above

It is a permissible contract, but the duration of the contract and kind of work should be stated in the contract.

[Reference: LC-001]

Impermissible terms and conditions

Certain payment terms could be unlawful. For example, additional payment after a certain date.

Similarly, sometimes one of the parties requires insurance cover. Since insurance is unlawful, *takaful* should be availed.³⁹

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Appendix

1

DEFINITION:

وَشَرُّ عَا: (مُبَادَلَةٌ شَيْءٍ مَرْغُوبٍ فِيهِ بِمَثَلِهِ) (الدر المختار وحاشية ابن عابدين (رد المحتار) (4 / 502)

هُوَ مُبَادَلَةُ أَمَالٍ بِأَمَالٍ بِالتَّرَاضِي بِطَرِيقِ الاكْتِسَابِ (العناية شرح الهداية (6 / 246)

2

Legality of material:

{حَرَمَتْ عَلَيْكُمُ الْمَيْتَةَ وَالدَّمَ وَلَحْمَ الْخَنزِيرِ وَمَا أُهْلَ لِغَيْرِ اللَّهِ بِهِ وَالْمُنْخَنِقَةُ وَالْمَوْفُوذَةُ وَالْمُتَرَدِّيَةُ وَالنَّطِيحَةُ وَمَا أَكَلَ السَّبُعُ إِلَّا مَا ذَكَّيْتُمْ} [المائدة: 3].

عن عائشة قالت لما انزل الآيات في سورة البقرة في الربوا خرج النبي صلى الله عليه وسلم إلى المسجد فقرأهن على الناس ثم حرم تجارة الخمر) صحيح البخاري
عَنْ جَابِرٍ، قَالَ: سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَامَ الْفَتْحِ يَقُولُ: «إِنَّ اللَّهَ وَرَسُولَهُ حَرَمَ بَيْعَ الْخَمْرِ، وَالْخَنَازِيرِ، وَالْأَصْنَامِ، وَالْمَيْتَةِ» (مصنف ابن أبي شيبة)

3

Legality of material:

وَمِنَ النَّاسِ مَنْ يَشْتَرِي لَهْوَ الْحَدِيثِ لِيُضِلَّ عَنْ سَبِيلِ اللَّهِ بِغَيْرِ عِلْمٍ وَيَتَّخِذَهَا هُزُوًا أُولَئِكَ لَهُمْ عَذَابٌ مُهِينٌ (6) [لقمان: 6]

وَقَالَ الْحَسَنُ الْبَصْرِيُّ: أَنْزَلَتْ هَذِهِ الْآيَةُ: {وَمِنَ النَّاسِ مَنْ يَشْتَرِي لَهْوَ الْحَدِيثِ لِيُضِلَّ عَنْ سَبِيلِ اللَّهِ بِغَيْرِ عِلْمٍ} فِي الْعِنَاءِ وَالْمَزَامِيرِ: تَفْسِيرُ ابْنِ كَثِيرٍ تَسْلَامَةَ (6 / 331) (مكتبه شامله)

4

Existence of material:

قَالَ (وَلَا يَبِيعُ الْحَمْلَ وَلَا النَّتَاجَ) «لِنَهْيِ النَّبِيِّ - عَلَيْهِ الصَّلَاةُ وَالسَّلَامُ - عَنْ بَيْعِ الْحَبْلِ وَحَبْلِ الْحَبْلَةِ» وَلِأَنَّ فِيهِ غَرَرًا.

(وَلَا اللَّيْنُ فِي الضَّرْعِ لِلْعَرَرِ) فَعَسَاهُ انْتِفَاحٌ، وَلِأَنَّهُ يُنَازَعُ فِي كَيْفِيَّةِ الْحَلْبِ، وَرُبَّمَا يَزْدَادُ فَيَحْتَلِطُ الْمُبِيعُ بِغَيْرِهِ: الْعِنَايَةُ شَرْحُ الْهَدَايَةِ (6 / 411) (مكتبه شامله)

5

Existence of material:

قَالَ (وَلَا يَبِيعُ الْحَمْلَ وَلَا النَّتَاجَ) «لِنَهْيِ النَّبِيِّ - عَلَيْهِ الصَّلَاةُ وَالسَّلَامُ - عَنْ بَيْعِ الْحَبْلِ وَحَبْلِ الْحَبْلَةِ» وَلِأَنَّ فِيهِ غَرَرًا.

(وَلَا اللَّيْنُ فِي الضَّرْعِ لِلْعَرَرِ) فَعَسَاهُ انْتِفَاحٌ، وَلِأَنَّهُ يُنَازَعُ فِي كَيْفِيَّةِ الْحَلْبِ، وَرُبَّمَا يَزْدَادُ فَيَحْتَلِطُ الْمُبِيعُ بِغَيْرِهِ: الْعِنَايَةُ شَرْحُ الْهَدَايَةِ (6 / 411) (مكتبه شامله)

6

Existence of Material:

روي أن النبي صلى الله عليه وسلم نهى عن بيع ما ليس عند الانسان وخص في السلم: نصب الراية برهان الدين المرغيناني - (ج 6 / ص 478) (مكتبه شامله)

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7

Deliverability :

"ولا يجوز بيع الأبق" لنهي النبي عليه الصلاة والسلام عنه ولأنه لا يقدر على تسليمه: الهداية في شرح بداية المبتدي (3 / 45) (مكتبه شامله)

8

Deliverability:

ولا يجوز بيع السمك قبل أن يصطاد" لأنه باع مالا يملكه "ولا في حظيرة إذا كان لا يؤخذ إلا بصيد"؛ لأنه غير مقدور التسليم: الهداية في شرح بداية المبتدي (3 / 44) (مكتبه شامله)

9

Deliverability:

ولا بيع الطير في الهواء" لأنه غير مملوك قبل الأخذ، وكذا لو أرسله من يده لأنه غير مقدور التسليم: الهداية في شرح بداية المبتدي (3 / 44) (مكتبه شامله)
أن يكون مقدور التسليم حين العقد: فلا ينعقد بيع السمك في الماء والطير في الهواء. (الفقه الإسلامي وأدلته)

10

Requisites (rights and responsibilities) of contract

لقد حرص الإسلام على إرساء المحبة والألفة بين المسلمين، وسد كل باب يفضي إلى النزاع والفرقة، ولذلك نهى عن بيوع ومعاملات تفضي إلى الفرقة والنزاع، وتفسد المحبة والألفة بين المسلمين. (شرح بلوغ المرام لعطية سالم)

11

Requisites (rights and responsibilities) of contract

عن أشعث عن الحسن وابن سيرين قالوا الضمان على البائع حتى يقبضه المبتاع (مصنف عبدالرزاق)

12

Some expressly prohibited sale contracts of Islamic law:

- Bai' al-Mukhadarah:
- Bai' al-Juzaf
- Bai' al-Munabathah
- Bai' al-Mulamasah
- Bai' al-Muhaqalah
- Bai' al-Muzabanah
- Bai' al-Haml
- Bai' al-Hasa'
- Mu'awamah
- Dharbat al-Gha'is
- 'Asb al-Fahl
- Sale of fish in water
- Bai' Habl al-Hablah
- Bai' al-Kali bi al-kali
- Bai' wa Salaf (Selling and lending)
- Sale of Milk in the Udder of Animals
- Sale of food before possession

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CONTRACT OF ISTISNA

13

هُوَ عَقْدٌ عَلَى مَبِيعٍ فِي الذِّمَّةِ ، ---- (بدائع الصنائع 9 / 4348 ط العاصمة) ----

14

فهي أنه عقد غير لازم قبل العمل في الجانبين جميعاً، بلا خلاف، حتى كان لكل واحد منهما خيار الامتناع قبل العمل. (بدائع الصنائع في ترتيب الشرائع 3 / 5)

15

(فمنها) : بيان جنس المصنوع، ونوعه وقدره وصفته؛ لأنه لا يصير معلوماً بدونها. (بدائع الصنائع في ترتيب الشرائع 3 / 5)

SALAM

16

اعلم بأن السلم أخذ عاجل بأجل وهو نوع بيع لمبادلة المال بالمال اختص باسم أما الكتاب فقولته: - تعالى - يا أيها الذين آمنوا إذا تداينتم بدين إلى أجل مسمى فاكتبوه [البقرة: 282] والسنة ما روي أن النبي - صلى الله عليه وسلم - «نهى عن بيع ما ليس عند الإنسان ورخص في السلم» المبسوط للسرخسي 12 / 124

17

وفي الحديث عن ابن عباس - رضي الله تعالى عنه - أن «النبي - صلى الله عليه وسلم - دخل المدينة فوجدهم يسلفون في الثمار السنة والسنتين فقال: - صلوات الله تعالى عليه - من أسلم فليسلم في كيل معلوم ووزن معلوم إلى أجل معلوم» فقد قررهم على أصل العقد عند أبي حنيفة سبعة (إعلام) الجنس في المسلم فيه (وإعلام النوع) (وإعلام القدر) و (إعلام الصفة) و (إعلام الأجل) و (إعلام المكان) الذي يوفيه فيه فيما له حمل ومؤنة. (المبسوط للسرخسي 12 / 124)

18

وإن كان شيئاً مما يكال أو يوزن فأتاه بمثل ذلك الكيل الذي عليه غير أنه أجود مما اشترط فقال خذ هذا وزدني درهماً لم يكن في هذا خير ولا يجوز ألا ترى أنه لا يصلح مختوم حنطة بمختوم حنطة وزيادة درهم وكذلك كل ما يكال أو يوزن فأما الثياب فلا بأس أن يأخذ ثوباً ويعطي مثله وزيادة درهم. (الأصل المعروف بالمبسوط للشيباني 5 / 20)

19

فالسلم في جميع ما يكال وجميع ما يوزن مما لا ينقطع من أيدي الناس جائز (الأصل المعروف بالمبسوط للشيباني 5 / 3)

20

(والسلم جائز فيما يكال أو يوزن مما لا ينقطع من أيدي الناس) والأصل فيه أن كل ما كان مضبوطاً بوصفه معلوماً بقدره موجوداً من وقت عقده إلى حين أجله يجوز السلم فيه وما لا فلا. (المبسوط للسرخسي 12 / 131)

21

وقد «نهى الرسول - عَلَيْهِ السَّلَامُ - عن قرض جر نفعاً» (البنائبة شرح الهداية 8 / 493)

MURABAHAH

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(قال) ش: أي القُدوري م: (المرابحة: نقل ما ملكه بالعقد الأول بالثمن الأول مع زيادة ربح) (البنائية شرح الهداية 8/ 231)

23

لأن التخلية قبض، وحكم البيع يتم ويتناهى بالقبض والثمرة تكون بينهما لاختلاط ملك أحدهما بالآخر اختلاطاً لا يمكن التمييز بينهما فكان الكل مشتركاً بينهما. (بدائع الصنائع في ترتيب الشرائع 5/ 173) وإما أن يكون مما لا مثل له فإن كان مما لا مثل له من المذروعات، والمعدودات المتفاوتة فالتخلية فيها قبض تام بلا خلاف، (بدائع الصنائع في ترتيب الشرائع 5/ 244)

24 AAOIFI Murabahah Standards

25

«لَا رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «طَلَبُ الْعِلْمِ فَرِيضَةٌ عَلَى كُلِّ مُسْلِمٍ، (سنن ابن ماجه 1/ 81)

26

(فمنها) ما ذكرنا وهو أن يكون الثمن الأول معلوماً للمشتري الثاني؛ لأن المرابحة ببيع بالثمن الأول مع زيادة ربح، والعلم بالثمن الأول شرط صحة البياعات كلها. (بدائع الصنائع في ترتيب الشرائع 5/ 220) - وإذا اشترى الرجل متاعاً فله أن يجعل عليه من الخباطة والقصاراة والكراء ويقول قام على بكذا كذا ولا يقول اشتريته بكذا وكذا فإن ذلك كذب لأنه لم يأخذه به إنما قام. (الأصل المعروف بالمبسوط للشيباني 7/ 15) - وإذا باع الرجل متاعاً مرابحة فخانته في المرابحة ودلس له فإن المشتري بالخيار إذا اطلع على ذلك إن شاء رد المتاع وإن شاء أخذه بالثمن الذي اشتراه به لا ينقص منه شيئاً فإن كان المشتري قد أهلك المتاع أو بعضه فالثمن له لازم ولا يحط عنه منه شيء. (الأصل المعروف بالمبسوط للشيباني 5/ 165)

IJARAH

27

(ومنها) أن يكون الربح معلوماً لأنه بعض الثمن والعلم بالثمن شرط صحة البياعات (ومنها) أن يكون رأس المال من ذوات الأمثال. (ومنها) أن لا يكون الثمن في العقد الأول مقابلاً بجنسه من أموال الربا، فإن كان بأن اشترى المكيل أو الموزون بجنسه مثلاً بمثل لم يجز له أن يبيعه مرابحة؛ لأن المرابحة ببيع بالثمن الأول وزيادة، والزيادة في أموال الربا تكون ربا لا ربحاً. (بدائع الصنائع في ترتيب الشرائع 5/ 221)

28

(هي بَيْعٌ مَنْفَعَةٌ مَعْلُومَةٌ بِأَجْرٍ مَعْلُومٍ) وَقِيلَ هِيَ تَمْلِيكُ الْمَنَافِعِ بَعْوَضٍ. (تبيين الحقائق شرح كنز الدقائق وحاشية الشلبي 5 / 105)

29

أَمَّا الْكِتَابُ فَمِنْهُ قَوْلُهُ تَعَالَى {فَإِنْ أَرْضَعْنَ لَكُمْ فَارْتُدُّنَّ عَنْكُمْ فَارْتَدُّنَّ عَنْكُمْ} [الطلاق: 6] ورفعنا بعضهم فوق بعض درجات ليتخذ بعضهم بعضاً سخرياً [الزخرف: 32] أي في العمل بالجر على أن تاجرني ثماني حجج فإن أتممت عشرا فمن عندك [القصص: 27] وَمِنْ السُّنَنِ مَا رَوَاهُ أَبُو سَعِيدٍ الْخُدْرِيُّ رَضِيَ اللَّهُ عَنْهُ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: مَنْ اسْتَأْجَرَ أَجِيرًا فَلْيُعَلِّمَهُ أَجْرَهُ، (3) وَقَوْلُهُ: أُعْطُوا الْأَجِيرَ أَجْرَهُ قَبْلَ أَنْ يَجِفَّ عَرَقُهُ، (4) وَقَوْلُهُ: ثَلَاثَةٌ أَنَا حَصْمُهُمْ يَوْمَ الْقِيَامَةِ وَعَدَّ مِنْهُمْ رَجُلًا اسْتَأْجَرَ (الموسوعة الفقهية الكويتية 1/ 254)

30

وعلى هذا يخرج الاستئجار على المعاصي أنه لا يصح لأنه استئجار على منفعة غير مقدورة الاستيفاء شرعاً كاستئجار الإنسان للعب واللهو، وكاستئجار المغنية، والناحثة للغناء، والنوح. (بدائع الصنائع في ترتيب الشرائع 4/ 189)

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وأما الذي يرجع إلى ما يقابل المعقود عليه وهو الأجرة والأجرة في الإجازات معتبرة بالثمن في البياعات لأن كل واحد من العقدين معاوضة المال بالمال فما يصلح ثمنا في البياعات يصلح أجرة في الإجازات وما لا فلا وهو أن تكون الأجرة مالا متقوما معلوما وغير ذلك. (بدائع الصنائع في ترتيب الشرائع 4/ 193)

31

وشرط جوازه أن تكون العين المستأجرة معلومة والأجرة معلومة والمدة معلومة بيوم أو شهر أو سنة لأنه عقد معاوضة كالبيع وإعلام المبيع والثمن شرط في البيع فكذلك ههنا إلا أن المعقود عليه ههنا هو المنافع فلا بد من إعلامها بالمدة والعين والذي عقدت الإجارة على منافعه. (تحفة الفقهاء 2/ 347)

32

فالحاصل أن الأجرة لا تملك عندنا إلا بأحد معان ثلاثة: أحدها: شرط التعجيل في نفس العقد، والثاني: التعجيل من غير شرط: والثالث: استيفاء المعقود عليه. (بدائع الصنائع في ترتيب الشرائع 4/ 202) فإن عقد مطلقاً فالحكم يثبت في العوضين في وقت واحد، فيثبت الملك للموآجر في الأجرة وقت ثبوت الملك للمستأجر في المنفعة، (بدائع الصنائع في ترتيب الشرائع 4/ 201)..... ومنها تسليم المستأجر في إجارة المنازل، (بدائع الصنائع في ترتيب الشرائع 4/ 179) وأما أحكام هذا النوع من الإجارة فكثيرة منها أنه يجب على الأجر تسليم المستأجر عقيب العقد وليس له أن يحبس المستأجر لاستيفاء الأجرة كما في باب البيع لأن الأجرة لا تجب بنفس العقد عندنا لكون المعقود عليه وهو المنافع معدومة وإذا لم يجب الأجر فليس له حق حبس المستأجر لأخذ الأجرة. (تحفة الفقهاء 2/ 347)

33

وتطيين الدار، وإصلاح ميزابها، وما وهى من بنائها على رب الدار دون المستأجر، لأن الدار ملكه وإصلاح الملك على المالك، (بدائع الصنائع في ترتيب الشرائع 4/ 208)

34

ومنها هلاك المستأجر، (بدائع الصنائع في ترتيب الشرائع 4/ 223) "وإذا خربت الدار أو انقطع شرب الضيعة أو انقطع الماء عن الرحي انفسخت الإجارة"؛ لأن المعقود عليه قد فات، وهي المنافع المخصوصة. (الهداية في شرح بداية المبتدي 3/ 247)

35

فإن كان به عيب يضر بالانتفاع فالمستأجر بالخيار إن شاء فسخ الإجارة وإن شاء مضى عليها. (تحفة الفقهاء 2/ 349)

36

ولو أجزها المستأجر بأكثر من الأجرة الأولى فإن كانت الثانية من خلاف جنس الأولى طابت له الزيادة، وإن كانت من جنس الأولى لا تطيب له حتى يزيد في الدار زيادة من بناء أو حفر أو تطيين أو تجصيص. (بدائع الصنائع في ترتيب الشرائع 4/ 206)

37

فإذا فسدت وجب المصير إلى الموجب الأصلي، وهو أجر المثل ههنا؛ لأنه قيمة المنافع المستوفاة، إلا أنه لا يزداد على المسمى في عقد فيه تسمية عند أصحابنا الثلاثة، (بدائع الصنائع في ترتيب الشرائع 4/ 218)

38

لأن العقد انفسخ حقيقة بالموت، (بدائع الصنائع في ترتيب الشرائع 4/ 223)

³⁹ شرح الآثار : التعزير بالمال كان في ابتداء الإسلام ثم نسخ. والحاصل أن المذهب

عدم التعزير بأخذ المال". (4/61)

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(رد المحتار)(4/ 61)

"مطلب في التعزير بأخذ المال (قوله لا بأخذ مال في المذهب) قال في الفتح: وعن أبي يوسف يجوز التعزير للسلطان بأخذ المال. وعندهما وباقي الأئمة لا يجوز. اهـ. ومثله في المعراج، وظاهره أن ذلك رواية ضعيفة عن أبي يوسف. قال في الشرنبلالية: ولا يفتى بهذا لما فيه من تسليط الظلمة على أخذ مال الناس فيأكلونه اهـ ومثله في شرح الوهبانية عن ابن وهبان (قوله وفيه إلخ) أي في البحر، حيث قال: وأفاد في البزازية أن معنى التعزير بأخذ المال على القول به إمساك شيء من ماله عنه مدة لينزجر ثم يعيده الحاكم إليه، لا أن يأخذه الحاكم لنفسه أو لبيت المال كما يتوهمه الظلمة إذ لا يجوز لأحد من المسلمين أخذ مال أحد بغير سبب شرعي".