

**NESSECESSITY AND OBLIGATORY OF ISLAMIC
SELLING CONTRACTS
IN ISLAMIC BANKS ACTIVITIES**

**ضرورة وإلزامية عقود البيوع الإسلامية في
أنشطة المصارف الإسلامية**

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ABSTRACT

This research tackles the Islamic law (Shareah) contracts that are applied by Islamic banks in brief. It has dealt with some jurisprudence aspects briefly. Then moved to their application by these banks. In addition it has displayed some problems that accompanied with the application which make it difficult to these banks to fulfill these contracts as they elaborated in (shareah). This may force Islamic banks or their clients to search for stratagems which in its turn lead to mistakes in applying the contracts from the point of view of (shareah) or to create many difficulties for these banks to play the role of financial intermediation efficiently. Obviously these contracts represent the available way to Islamic banks now to act in accordance with (shareah). Paradoxically this is not the end of the way because of two reasons, First: the aforesaid problems we referred to just above, Secondly: such contracts are not to be obliged to Islamic banks (except Sarf contract - Exchange contract-). The field was opened for them and for Islamic jurists, economists, and Islamic bankers to search for more suitable ways to act. One condition to be followed is that they to work with (shareah) accordingly.

The research ended with some conclusions and recommendations.

Keywords: Islamic banking, jurisprudence, shariah, islamic selling contracts

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1. Introduction

The emergence of Islamic banks in the midseventies of the last century was the efforts culmination of thought which began from the moment of entrance of foreign banks to the Arab and Islamic countries. That they have carried with them the working methods and concepts that are incompatible with the traditions and beliefs of these communities. These banks operate on the basis of granting loans that hold interest and attracting deposits with interest too. This interest has been regarded by Muslims as usury, and was forbidden in Islam. Therefore, Muslim jurists and economists begun to look for alternatives to these institutions which are contradictory with Islamic law.

There have been multiple proposals for such alternatives, based on an initial principle which is the refusal of interest as the basis for the banking business. The alternative will be the (Profit-Loss) sharing principle. This point is its turn does not matter what it is, the economic system and the banking and financial system must be free of interest. Many Muslim economists think that interest is neither essentially necessary nor desirable for the exercise of the banking function, and it has become a cornerstone of traditional banking as a result of a historical event.

Because of this initial refusal of interest as the basis for the banking business, there is a rejection of any banking transaction with interest, or the interest represent a component of it, this will make a banking system without fixed deposits or loans and advances, no letters of credit, and promissory notes or money orders or bills discounted or commercial paper and bonds. In other words, the refusal of interest from the traditional banking business means a radical rejection of this work, abolition of transactions referred to mean to blow up the banking business as a whole, because it (the interest) is the essence of this work. Since the function of banks has become a cornerstone of all modern economies, the refusal or blowing up of this function is not possible at all in today's world. The thinking in this matter is the necessity to find a suitable alternative that can play the same role and the same function. This is exactly what Islamic banks have been (designed) to do. It will be the alternate to the traditional banks in an Islamic environment and societies. Here, we have to find alternative methods of work that enable these banks to play their intended role. These methods should have two conditions:

- 1-To be free of interest, which is forbidden usury (Riba).
- 2-To provide a meaningful alternative to traditional methods of work which will be dispensed.

The available option to Muslim scholars, economists and bankers is to look into legitimate selling contracts (Islamic jurisprudence contracts) to find a suitable replacement for existing processes on the basis of interest. The suggested contracts which are regarded as a suitable alternative for that purpose are (

Mudarabah" speculation" and musharakah "participation". They must be then adapted to suit the contemporary conditions and to meet the needs of customers. So Islamic banks embarked its work and charted its turn based on the adoption of legitimate sales (Islamic contracts) as a resource to derive a different transactions as alternatives to traditional banking transactions that are based on interest. They have adopted (Murabaha) as a substitute for short- term trade finance. As well as sharing contracts mainly and derived from them many other contracts, including sharing contracts that ended with owning (of the contractor) the joint project. and joint investment accounts, and adopted from (Ijarah) contract the leasing alternative method of financing .(Mudarabah) used to be substitution for long-term financing, and practiced (Alsalam) contract - kind of advances- to finance agricultural activities. It also has been financed large-scale projects under contract of (Istisna) – industrial credit, and so on

2. Research Methodology

2.1 Problem

Islamic banks are practicing their credit function using the legitimate sales contracts substitute for usurious activities of traditional banks. The legitimacy of these contracts has been proved. So they are compliance with the rules of Islam through the provisions in question of the texts in the Quran and Sunnah , consensus of Muslim scholars and measurements. However, Islamic banks face many obstacles when applying these contracts in many banking transactions. While traditional banks are competing in devising financial instruments and many banking products to meet the needs of their customers and adapt to the rapid developments in the world today.

We have found that Islamic banks are struggling to catch up through its attempts to adapt the transactions used to comply with the requirements of (Shareah).

Through following-up literatures of Islamic banking and its applications, we have found that there is a trend to regard these contracts as the end up of Islamic economic thought and Islamic banking activities. Some argued that Islamic banks must operate just in accordance with these contracts in order to be described as Islamic banks.

Such an approach leads Islamic banks to a kind of inertia in the field of innovating financial instruments and disrupted its work and limited their activity.

Eespecially, many of the contracts do not encounter success in the application or the economic , political and social conditions do not provide an appropriate environment for their application.Also, the nature of these contracts ,their conditions, and mechanisms of action do not fit perfectly with the requirements of the banking business.

:2.2 Research objectives

This research aims to trace the doctrinal aspects of the basic legitimate contracts that are adopted by Islamic banks in order to verify mandatory and authoritative of these contracts in the work of Islamic banks. Finding whether there is another way these banks can conduct in order to go out of the difficulties that they have bound themselves in. This can be attributed because of their commitment to the application of contracts, accompanied by considerable difficulties, and lack of the flexibility required in the banking business.

2.3: Hypotheiss

The research is based on the following hypothesis:

2.3.1 The legitimate selling contracts are committed to the limits of the rules of Islamic law, but they are not part of it.

2.3.2 The legitimate selling contracts are not binding for Islamic banks to work on.

2.3.3 The authentication of these contracts is stem from its commitment to the rules of Islamic law, but not from themselves as contracts.

: The Importance of the research:2.4

The importance of research lies in the way that it is an initial attempt to establish a new trend in the financial Islamic banking thought. This new trend is based on the tracking means to provide Islamic banks with tools and mechanisms that enable them to perform their banking function. Also their role as a financial intermediary with best way and to enable them to replace the conventional banks efficiently.

2.5 The research method:-

The research has relied on descriptive analytical method based on references available to reach the ideas and thoughts it put forward. It has also adopted some of the available data and statistics about Islamic banks activities in order to promote those views.

3. The Foundations Of Islamic Banks Work

The traditional concept of banking is that banks accept deposits and grant loans. They are institutions that intermediate between savers and investors, and the interest is the price for the use of capital, or it is the return of the capital.

On this basis, the institutions that do not accept interest-bearing deposits and interest-bearing loans granted will lose one of the elements or pillars or specifications of banking institutions.

The Islamic banks do not pay any interest on deposits and do not grant loans with interest. Their role do not restrict only in intermediation between savers and investors because they sometimes act as an investor. Therefore, many economists and bankers do not consider them as banking institutions, as in the case of the

Bank of England, which does not agree to establish Islamic banks in Britain, as the bank policy does not allow any activities of Islamic banking by institutions that licenses as banks or as institutions receiving deposits. Bank of England regarded the activity that Islamic banks are doing is located under the investment and financial systems other than the banking system in England. (Attia, 93,59)

While the granting of loans, attracting of deposits and adoption of interest are the basic elements of the traditional banking business. Therefore the basis of the work of Islamic banks are different from the conventional framework for the banking business. But in the end they are in the course of the performance of banking functions although they are doing them differently. These foundations are:

(Kashif Al-ghitaa, 2000) (Ibrahim and Al-kahf, 2000, 186)

3.1 Rejecting of all forms of interest, regarding them as forbidden usury. Relying on alternative incentives for interest rates to attract deposits and savings.

3.2 Adopting of the basis of participation in the profit and loss as a substitute for interest basis.

3.3 Adopting a social, humanitarian and legitimate goals, not only profit objectives.

3.4 Adopting of universal banking, not only the financing of commercial activities. This means the exercise of actual production investment.

3.5 Playing a legitimate role through the application of Sharia (Islamic law) in terms of important aspect of the life of the community, which is the economic and financial side. And to disseminating the principles of Islam in this field.

3.6 Working out to create some alternates for every usurious transaction. Thus, the Muslims (or any one rejecting usury) will be in no need to resort to conventional banks.

3.7 Expanding bank income that is based on profits and commissions other than interest.

3.8 The actual realization of the legitimate vision to the role of money in the society.

3.9 Funding must go to producing of goods and services.

3.10 Avoiding of accumulations of cash arising from the accumulated cash assets.

3.11 No trading with the others' funds, but mixing them with bank money and capital. Then working with the whole as partners in accordance with Islamic contracts.

4. Evaluating the work of Islamic banks

A glance at the performance and financial indicators will show that the movement of Islamic banking has been active since its inception in the mid-seventies of the last century and even today. The number of banks and

Islamic institutions is more than (560) banks and financial institutions, their activities have covered more than 54 countries and managed investments in Turkey, as an example, that grew by 1000% through one decade only. their assets have reached about one trillion euro in Germany in 2013, their deposits have grown by (23%) in Pakistan, as an example, and have grown by (15%) per year worldwide. Islamic bonds (Sukuk) issuances reached more than (85) Billions in 2011, and islamic financial institutions funded variety of investments and commercial services with various means. (Islamicbankingmagazine.com.jan,2013).

This economic activity is accompanied with scientific research activity and tirelessly jurisprudential research done in order to deepen the Islamic economic thought. Deepen the knowledge of administration and banking from Islamic perspective as well. So, Islamic banks and financial institutions, with its legitimate, philosophical, administrative, economic frameworks along with operational phenomenon have become prominent in the Islamic world.

In multiple studies on the activities of Islamic banks, they have maintained the first ten on good solvency ratio identical with the Basel standard, which requires banks to maintain a ratio of 8% or more of the ratio of capital to risky assets. Besides the rate of return on assets was 1.42%, compared with 0 , 9% for the first ten banks in the world. It has maintained its rate of return on equity by 21.8% compared with 16.1% for the first ten banks in the world.

Based on these and other indicators, the Islamic banking as a model and as a business goes on in a good way (Banking and Financial Studies: 99: 109)

The modes of financing followed by Islamic banks, although many of the financial reports do not explain how the distribution of investments between the different modes of financing. but they often aggregate them in few numbers. The available statistics show us that Murabaha(short sale financing) occupies 70% of them. Sharing (Musharakah) represent of 6%, speculation (Mudarabah) represent only 7%, leasing (Ijarah) represent 5 % and the other contracts represent the rest by 12% . The distribution of these investments between different sectors shows the following ratios:

- Trade sector accounted for 42%.
- Real estate sector accounted for 12%.
- The industrial sector accounted for 12% .
- The agricultural sector accounted for 2%.
- Other activities at 19%.

5. Legitimate selling contracts adopted by Islamic banks

5.1 legitimacy and problematic aspects of the application

Islamic banks have adopted in its activities, the traditional legitimate selling contracts as a substitute for usurious transactions . While continuing to adopt other traditional banking operations which are not involving interest (regarded as usury) or suspicious that it has any kind of contradiction with the principles of Shareah (Islamic law).

But:

*have these contracts enabled Islamic banks to provide an efficient alternative to traditional banks?

*Can Islamic banks, by adoption of these modes of operation, play the role of financial intermediation with same flexibility and efficiency done by traditional banks?

*Do these contracts represent a part of the Islamic law (Islamic jurisprudence)? I mean part that obliged to be followed or applied?

*Should Islamic banks (in order to be described as Islamic banks) Be obliged to adopt these sales in its work?

To answer these questions there is a need to review aspects of the contracts that Islamic banks working with, their legitimacy and demonstration their characteristics, then to diagnose some difficulties, problems and limitations that arose when Islamic bank adopt them.

At the beginning, it is important to review the opinions of some contemporary writers who discerned from their words that Islamic banks are obliged to act in accordance with these contracts. Some of those writers are trying to impart some qualities on some contracts to be considered as a part of the Islamic jurisprudence (shareah).

5.2 The views of those who believe of the compulsory of Islamic contracts

There are some contemporary writers are motivated by enthusiasm for the application of Shareah, or to encourage Islamic banks to be as a first step to build the Islamic economic system. Those writers have turned towards this direction or that their views are in this direction . What we shall mention is the clear opinions, there is also a lot of opinions that have been realized , although they are not explicitly declared.

Saud Aldreb said: (Dreb, 68,104)

The selling contracts are legitimate ways (contracts) which **wise legislator (God)** wanted. He has suggested that the role of banks is a mediator by speculation (Mudarabah). Munzer al-kahf (Ibrahim and Al-kahf, 2002,191) said in context of some aspects of the contradiction between the traditional work of banks and Islamic religion :

"All of this (the forbidden activities), Islamic banks do not fall in, and the Islamic economy do not subject to, because it is **the law of the wise expert (God).**"

(Musleh Aldin, 76, 89): says: "Those who involved in the study of the Islamic religion, suggest that working system in banks in Islam **must be built** on the principles of sharing (Musharakah), and in the speculation (Mudarabah)". (Dr. Ali Salous (Salous, 51) goes beyond that as Ibn Taymiyyah shows evidence of speculation (Mudarabah) in Quranic verse, citing the verse (and If any one contend against the Prophet (Messenger) even after they show him guidance and follow a path other than that becoming for believers, We shall leave him in the path he has chosen.)(112 Al-Nisaa). As evidenced by this verse as an argument on consensus up on this contract. He goes on to say: "Some people have had little issues where consensus without text like (Al-Mudarabah) that says "He – i.e. the Prophet (peace be upon him) has traveled with others money before the mission also traveled with money of (Khadija) – before she became his first wife- and his companions were traveling with others' money in accordance with (al-Mudarabah contract). Thw prophet did not prohibit them from doing that, and (Al-Sunnah) (The prophet's actions and speeches) is his actions, speech, and approval. When he approved anything it will be confirmed by (Al- Sunnah) or became as a part of it. The examples that reflect their belief those Islamic banks, in order to be as well as it, must adopt these selling contracts primarily.

5.3 The opinion of the majority of scholars and specialists

The predominant opinion of the majority of scholars and specialists of Muslim economists and Islamic bankers is based on the general rule that is, the important aspect in the contracts and working methods of banking is (to be within the limits of the law and its sources). (Hammad, 2007,791) that is these contracts must adhere the requirement, conditions and rules of Islamic jurisprudence (Islamic law). (And it was sufficient for these contracts not to be contradicted with Islamic law. (Hammad, 2007,138).

(Islam accepts any format as long as it is far from usury bug.) (Hindi, 2008, 280).

That is based on another rule stated in the verse: (unless it be a trade amongst you, by mutual consent. (Al-nisaa, 29) and trade include many activities which are covering all areas of life.⁽¹⁾

The compromise, (mutual consent) represents the first condition for the exercise of trade between any two parties, i.e. that "the will has a complete freedom in the emergence of contracts as long as they neither violate (God's) rule nor contradiction (Quran) and (Al-Sunnah). (Kashif Al-Ghitaa, 2000, 34.").

(And consent is a feature for trade that is any trade conducted or issued by mutual consent contract, or the fact that the trade made in a pattern that is not forbidden). (Interpretation of Al- Nassfi, p157).

(In this verse (29 of Nisa) Trade term includes all legitimate sales. The compromise (which does not oppose Shareah) is a condition necessary ,important

(1) The Iraqi commerce Law No. (30) of 1984 (as amended) defined trade activities, in Article (5) thereof on the following business if it was intended to get profit:

First: buying or renting properties, movable or real estate, for sale or lease.

Second: the supply of goods and services.

Third: import or export of goods and activities of
Importing and exporting bureaus.

Fourth: Industry and the extraction of raw materials..

Fifth: publishing and printing, photography and media.

Sixth: Building Construction and renovation, demolition and maintenance.

Seventh: Offices of tourism Services, hotels, restaurants, cinemas and theaters.

Eighth: sales at auction stores.

Ninth: Transportation of things or people.

Tenth: cargo or unloading or take it out.

Eleventh: Warehousing goods in public warehouses.

Twelfth: Pledge requirements concerts and other social events.

Thirteenth: Banking operations.

Fourteenth: insurance.

fifteenth: Dealing in stocks and bonds.

Sixteenth: Commercial agency, and other commercial brokerage business
and so on.....

and binding, which goes out necessarily to the fact that there is not a specific form or format that is final and eternal for these contracts. As the shape and formula to be determined by agreement between the parties of the contract, which does not oppose to legal conditions.

In the same context and the same concept came verse 275 of Al-Bakara (God has permitted selling and forbidden usury.) It is obvious that this verse does not specify any form of selling as there is an agreement between scholars that is the word "selling" came in a general form in order to comply with the cases of the people and their interests. As the people in the field of financial transactions on which they depend in their livelihoods are permitted to originate any contracts within the limits of the principles of Shareah.) (Hammad, 2007, 179.) The origin of the contracts is permission, except what dictated by Shareah, and

are based on compromise between the contractors. If the compromise is to be achieved about contracts established by the people which were not contradictory to the general rules. In this case, these contracts will be regarded as legal, although there is not a specific conditions of shareah about it restrictively.)(Kashif Al.Ghita, 2000, 33).

All of the above can help Islamic banks in search of all contracts that are new, possible, and legitimate. Without prior binding specifically, the primary obligation is to comply with the limits of the Islamic law, its rules and conditions. Everything except the above mentioned is free to be adopted.

6. Some features of legitimate selling contracts

The general rules that we have talked about earlier may not be enough to prove what we went to. Therefore it is essential to take an insight in some legitimate selling contracts, for example, according to our research methodology and its basic idea, taking into consideration that this is not a call to abandon these sellings or stop working with it at least for the time being. The goal is to reach both the general perception, as well as the integrated and comprehensive framework for Islamic banks with a basic idea, that such banks must not remain in locked and limited frames of banking business confined to these sellings. But it has to be launched in a hard work to search for new and advanced formulas to meet the growing needs of Muslim investors and correspond with the requirements of the law.

6.1 Murabaha

It is one of Al-amanah (Honesty) sales, defined as (sale of a commodity with its nominal price, with known profits) (Al-Jaziri 2,2005, 155). It is also defined as (sale with an increase on the first price) (bin Said, 2001, 72).

In addition to the basic conditions of selling, the Murabaha own its terms, namely:

6.1.1 Sales to be a commodity. So the sale of money by Al-Murabaha "for example" is not valid.

6.1.2 The price must have a similarity nature like (money, things that can be measured, weighted and counted.)

6.1.3 The first price must be informed to the buyer.

6.1.4 The price must be informed to the parties of the sale.

6.1.5 The first price must not oppose with usury funds.

Murabaha types including:

Bargain*

*Selling at a specific profit on the total price.

*Murabaha sale with promising to buy.

* Any sales in the same purchase price(Tawliyah).

* Any sale for less than the purchase price (Watheeah).

As we have noted in statistics in section (4), Murabaha acquires (70%) of the overall activities of the Islamic banks in general. This is the first problems or drawbacks of the work of Islamic banks which are designed to achieve (social and development goals). In addition, the Murabaha funds go towards commercial activities with (40%) and do not move toward genuine productive activities.

Some Islamic economists and scholars criticize Islamic banks in the way they get its profits. They are referring that its profits are comparable to interest rates in force in the conventional banking transactions. Though Islamic economists strive today to put an appropriate indicator to be inferred as a guide to determine the optimal ratio of profit in Murabaha contracts.

The other objections that some specialists and scholars said: The promise to buy which obliges the commander to purchase may lead to a suspicion of usury in the process because it is (to circumvent the usury that the seller buys the commodity and he knows it will go inevitably to the buyer with a predetermined premium . This is like selling cash with cash forwardly.) (Bin Said, 2001, 73).."

Usury suspicion arises here from committing promising partner to buy, either directly or indirectly.

Also some scholars take a criticism on this selling that there is reconciliation between doctrines (as the legalization of the process depend on an opinion of Imam Shafi'i and then have been completed with an opinion from Al- Maliki school. The process of fabrication as it is known in jurisprudence is forbidden if the intention is to take the easy opinion from every doctrine "). (Attiya,93,123, Meshhour, 90, 334).

It can be seen that there is two points of weakness in Murabaha: **one** of them is related to legitimacy side and **the other** is practical and economical. The commitment to act in accordance with this sale is not an obligation to Islamic banks in the case that there is a question (suspicion), whatever the degree of it. The only justification for adopting it, is that the contract currently available, and is completed by scholars in order to be compatible with the Islamic law (Shareah). And in order to provide Islamic banks with a legitimate alternative to short-term interest-based lending to finance commercial purposes.

6.2 Speculation (Al-Mudaraba):

Before the existence of Islamic Banks, Al-Mudaraba has been chosen to be the basic contract which the Islamic banks will operate with.

Muslim scholars relied on this contract to be the basis of the Islamic banks and an alternative method of usurious financing.

Al-Mudharaba is: (a participation in profit resulting from money provided by one partner and labor made by the other partner.). (Al-Quthah, 84,158).

It is (Negotiating the worker with a share of profit).(Subul Al-Salam, 75).

The whole jurists are in consensus on the legitimacy of Al-Mudaraba depending upon what is narrated from the Messenger of Allah (peace be upon him) that he had speculated with money of (Khadija) (may Allah be pleased with her) before he married her. The prophet companions have unanimously agreed on its legitimacy and have been working out with it before Islam . Then Islam has confirmed it.

Al-Mudaraba has many conditions of legitimacy in the jurisprudence books, including: (Mosleh Aldin, 76, 111)(Salous, 40):

6.2.1 To deliver capital to the worker. (The other party).

6.2.2 Dividends must be precise, specific and clear, not in a lump-sum.

6.2.3 Capital to be cash but not goods..

6.2.4 Capital must be known at the time of conclusion of the contract.

6.2.5 The provider of the money must not involve in working with the worker (Other party).

6.2.6 The loses must be charged on the provider of the money, the worker will lose only his efforts (if it proved that he did not cause the loss).

Scholars have made a careful attention to the drafting of the terms and conditions of Al-Mudharaba contract, and to determine the rights, duties and obligations of each party of the contract. There are no objections to the legitimacy or suspicions around it, as in the case of Al- Murabaha (in contemporary application in Islamic banks). However, we find their share of the financing of Islamic banks do not exceed the proportion of (7%) as evidenced by the some of the statistics. We generally believe that Islamic banks are reluctant to finance under this contract. Although it attracts money in investment accounts and investment deposits according to it, herein the bank plays the role of the worker and the depositor is the proprietor of the money. Therefore we can say that Islamic banks have succeeded in the use of Al-Mudharaba contract to collect financial resources, but the use of it in the side of funding has encountered many difficulties in this aspect. The reason is due to the terms of the contract, including a condition that prevents the supplier of the money (when the bank is the owner of the money) from interfering in the affairs of the project financed according to this contract. The bank must rely just on confidence, or the honesty of the worker. As well as the condition that charged the loss on the owner of the money only, while the worker will be exempts from bearing any share of it. In addition to the lack of the necessary tools to verify the accounts provided by the worker. (Hindi, 2006, 241.) (Ibrahim and Al-Kahf, 2002,176).

The importance of Al-Mudharaba contract, its prominent location in the Islamic jurisprudence of transactions as well as its role in the work of Islamic banks should not cover up the problems inherent when trying to make it as the cornerstone of banking business which has its unique nature and its own terms. Al-Mudharaba contract is convenient for work between two persons, who can

understand themselves and can negotiate about everything relates to the transaction, than in a business such as banking, where no one of the partner see the other at all, but they are dealing through documents and means of communication only.

When we turn to its mandatory, although what it has been brought by the majority of writers and scholars of the dimensions of legitimacy, as we have seen, it remains a contract that had been followed and practiced in the era of pre-Islam. When Islam came in the presence it approved exercising it. This means that the contract itself does not be considered as a part of the shareah.

In addition, Imam Ibn Hazm said: "All the sections of Jurisprudence has a root in the book (Al-Quran) and the Sunnah except (Al-Mudaraba) we did not find it at all in the Quran and Sunnah." (Salous, 43). Accordingly, it is because of the difficulties that surround the contract in the application, Islamic banks are not obliged to work with it if they find another way safer in the application and closer to the nature of the banking business.

6.3 Al-Salam: It is defined as (a sale described and determined then to stay in the liability "of the seller" with allowance cleared sooner) (Al-Quthah, 84, 22).

It is also defined as "selling something deferred in exchange of spot or immediate value. Or something described and stayed in the liability of the seller, in condition that the seller has the ability to deliver it later. In other words, it is selling with advanced value but with delayed delivery." (Mustafa, 2001, 69)

There is consensus about legitimacy of the contract depending on a speech (hadeeth) of the Prophet(peace be upon him) from Ibn Abbas, he said (The Messenger of Allah came to the city (Al-Medina Al-Munawara) and people are advancing in fruits for one or two years, he said: Who is advancing in fruit, must advance in a known measure, known weight and known maturity) (Bukhari).

Scholars are in consensus on the legitimacy of it, because it enters into the content of the verse of debt (O ye who believe If you are in debt "between yourselves" to a certain maturity, you must report it) (Al-Baqarah: 282), Ibn Abbas also said: I certify that this verse is revealed in (Al-Salam) particularly.

Al-Salam has several conditions in addition to regular conditions of sale and debt: "Al-Quthah, 84 -85" "Mustafa, 2001, 69" .

6.3.1 The Salam subject (sold goods) must be known as kind and type and amount (measure, weight and number).

6.3.2 It must be postponed.

6.3.3 Statement of the place of delivery.

6.3.4 The exchanged materials must not have the description of usury.

6.3.5 The capital of (Al-Salam) must be delivered when concluding the contract.

6.3.6 The Salam subject (Sold goods), must be possible to hand over.

Al-Salam importance exists in that it benefits the workers (craftsmen) because they may need to spend on their works and they do not have capital or funds. It also benefits owners of money by getting cheap prices. So, Al-Salam has been legalized in order to help all of them (Ashour: 2006: 245). It is fit for the purposes of agricultural finance when farmers resort to Islamic banks to obtain funds for their agricultural operations and the payment is in kind of the crop at harvest time according to rates determined when concluding the contract.

Not without, the application of Al-Salam (as a banking operation) of some difficulties, including: " Khan, 94, 37 ", "Mustafa, 2001, 71."

- a- The difficulty of determining the appropriate price to the satisfaction of the parties to the contract.
- b - The occurrence of disputes over the removal of injustice when prices deviate more than expectations.
- c - Delays may occur by the farmers in the delivery of Sales
- d- The owner (supplier) of money bears a high risk if returns are uncertain until receiving the goods sold.
- e- The supplier of money has no role in determining the way that the worker use money.
- f – Paying the principal of Al-Salam in kind is in consciousness between scholars.
- g- Al-Salam in some manufactured goods has disagreement between some scholars.

If we discuss Authentic of the contract in the context of Hadeeth, it does not give the impression of compulsory as a contract, but it is required (if the contract is concluded) that its specified terms must be fulfilled (known weight, known measure and known maturity) and what scholars invent of other conditions that we listed above. This means that the binding is the conditions but not the contract itself. There is no obligation for Islamic banks to operate with it.

6.4 Sharing (participation)

It defined as (proved right on something for two or more persons on the common).(Al-Husseini, 2002, 11).

It is (the situation that occurs between two or more). (Subul Al-Salam, 62), Its legitimacy depends on the Holy speech (which is narrated of God by the prophet) by Abu Huraira (ra): The Messenger of Allah (peace be upon him), said that God is saying:

I am the third of the two partners unless cheated one by the other, if this happened I shall come out of them). And by Al-Saib Al- Makhzoumi (RIP) he was a partner of The Prophet (peace be upon him) before the mission, when he came after conquer of Mecca prophet (peace be upon him) said: ((hello my

brother and my partner)). These conversations indicate that the company was existed before Islam then it proved on as it was.

Companies in Islamic jurisprudence are: (Mashhour, 1990, 265)

6.4.1 Al-Ibaha company (permission company) it is related to public ownership.

6.4.2 Ownership company: it is the company when two or more persons own valuable thing without contracting in such a company.

6.4.3 Contracts company which is based on some kinds of contractual relation between two or more persons to participate in the capital or profits. It is divided into five kinds: bargaining, business, faces, Al-Inan, and Al-Mudaraba companies.

Companies in Islamic jurisprudence are similar with its counterpart in the modern law as they are contracts with terms, conditions and basis for the distribution of profits and losses. However, they are associated with figures of partners, its financial obligation is linked by the owners (the parties) financial obligation, but in modern law, a company is a legal person, especially joint-stock company, and the financial obligation of it is independent on the obligation of owners (shareholders).

Participation contracts gain many advantages, it is far from suspicions usury and suitable alternative for activities that have usury and tricks, they link between the elements of labor and capital in productive activity that is actual, and limit the accumulation of wealth in the hands of a small number of individuals, and the expansion of ownership base in economic activity. (Mashhour, 1990, 289) as well as it allows the owner of money to participate in the management and care of the project, which is financed by him/her.

(It is the system that ensures success of small businesses with a high failure rates for reasons related to failure of studies and lack of management and planning, etc. The entry of the Islamic bank in the financing of such projects forced the bank to pursuit their plans and contribute to the management, giving them a greater capacity for growth and progress.)(Bashir, 87, 95) However, we find that the percentage of participations in the activities of Islamic banks is low. it does not exceed (6%) and the reason is that, this contract may not be appropriate for the banking business because the entrance of the bank as a partner with the investor requires him to practice many activities outside the framework of banking job. The application shows some troubles for Islamic banks, which invited them to downsize financing through participation contract, as practice revealed in bad honesty of some partners and they do not behave honesty in dealing with Islamic banks. (Hindi, 2008, 47)

Also, the participation contracts involved in Islamic jurisprudence, have some differences in jurisprudential terms and forms, for example, Al-Abdan "characters" company is invalid in Shafi'i jurisprudence. (Al-Majmou'e of Al-

Nawawee 14.72) (Fat'h Al- Aziz of Al-Rafii, 10.423, (But Malik regarded it as admissible) (Al-Sharh Al-Kabeer, 3,361). Also Abu Hanifa did that.(Badaa'i Al-Sanai of Cassani, 6.56) ,(Ashour, 2006, 265).

Laws in force in the Islamic world have addressed the subject of companies according to the traditional codification (ie into joint stock companies and limited partnerships and solidarity etc.) do not codify the companies according to the division idiosyncratic known therefore (it is who wants to establish a company he/she would be subjected directly to the provisions of their own legal and not for the provisions of the Islamic jurisprudence of the company he/she wanted).(Attia, 93, 117).

In addition ,Albaraka forum about (Al-Musharakah problems) adressed some problems facing application of this mode. Some of them are:"Islamicbankingmagazine,2016"

- a- Shortage and weakness in financing with it.
- b- Multitude of problems when applcation.
- c- There is high default and bankruptcy risk.
- d- Absence of laws helping application of the contract.
- e- There is differences in the application in every county.
- f- Absence of portfolios in order to spread risks.
- g- There is no equilibrium between risks and returns.
- h- Absence of long term mutual funds.

Based on all of the above, we do not find in idiosyncratic rooting of the company contract anything that imposes on the Islamic banks to work out with it. The Holy speech imposes on partners that one of them must not betrays the other, if the betrayal occurred; Rahman (God) is knocked out of them. The speech of conquer of Mecca day, only indicates that there are participations (of some kind, and according to a certain formula) among the people whom the Prophet (peace be upon him) and Al-Saib Al-Makhzoumi are among them. No other significance for these speeches or other refer to the obligation or imposing on the contractors to work out with it. On the subject of compulsory of the company contract (with respect to the contract itself)Ibn Rushd(Averroes) think that the company contracts is admissible, and not of compulsory contracts, i.e. for one partner to be separated from the company's contract whenever he wants. (Bidayat Al-Mujtahid wa Nihayat Al-Muktasid 2/192). This reinforces the view referred to earlier.

6.5 Leasing:(Ijarah)

It is a contract on a benefit against compensation, or a contract on a benefit that is known, intended, and able to be granted or allowed with a compensation informed by description.(Jaziri, 2005, 52) (Ashour, 2006,281).

It is legitimate by Qur'an and Sunna and consensus, God has said for the daughter of prophet Shoaib (peace be upon him), (O my father hired him, the best one you may hire, is the strong, the honest.) (Al-Qasas, 26).

The Prophet (peace be upon him), has said: (Give the employee his right "fees" before his sweat dries). Narrated by Ibn Majah and Tabarani and Al-Baihaqi. The importance of leasing is that (it makes an investment for objects and human resources and exploitation of skills. Many assets belonging to someone, others are lacking it and do not have the ability to own, but they can rent them for a limited period). (Abu Suleiman, 92, 11) It is a way of appropriate funding which is not based on debt, through which investing production capacities and skills is possible, then it is to be rented to others who need services from those who rent their property or themselves. In this way, integration between members of the community is accomplished.

Leasing has some important characteristics as follows:

(Ibrahim & Al-Kahf, 2002, 181)(Khan, 94, 41)

6.5.1 Control of financier (Owner of the capital) on the management of capital remains in effect for the duration of the contract.

6.5.2 Owner of the capital exposed to a high risk until the end of the contract, or the end of the age of the leased premises as they remain in his possession.

6.5.3 There are no sure of return because the age of the leased asset is unknown. And uncertain, as it may still be a long time without being leased.

6.5.4 The cost of capital is fixed and predetermined.

6.5.5 There is no relationship between the cost of capital and the interest rate.

6.5.6 With regard to the tenant, leasing is off-balance sheet funding. The funding for this alternative of well-known advantages.

Islamic banks exercised the lease, as described above and with modes of leasing (Ijarah) ended with ownership, which have many forms including:

a – Leasing (Ijara) contract coupled with the endowment of the subject of the contract so that ownership transferred at the end of the contract without compensation.

b - Leasing contract coupled with selling item subject of the contract so that ownership transferred at the end of the contract with agreed compensation.

c – Leasing contract coupled with the promise of selling the item or endowment of it.

However, there are some doctrinal objections to these forms, especially the first two; some of the objections is about making of two simultaneous contracts on the same commodity so that the last image in (c) is the only admissible.

There are also objections on the traditional leasing contract as its terms may lead to cut off all connection between it and the nature of the lease and ending it to be just a financial loan, for example, when bank buys equipment from the

owner and lease it to him/her again with a requirement for selling by the end of the lease's term.)(Attia, 93.156).

6.6 Manufacturing (Istisna'a)

It is defined as requesting a workmanship from the manufacturer in what he/she is manufacturing or what he/she creates, it is a contract on the sale in obligation needs to be done according to a defined manner with known price, or it is buying what is made according to demand. (Mashhour, 90.348)

Its religious judge is that it is passed in order to facilitate the convenience of the people and the need for it, although it inhibits based on measurement because it is selling what is not available for the seller. And also because it is more like (Al-Salam) which is permissible. As well as Ijarah (Leasing).

Istisna'a has some conditions set by the jurists, including:

- 6.6.1 The price of the item must be known.
- 6.6.2 The item descriptions must be known to the parties of the contract.
- 6.6.3 The parties must contract about something that is ordinary to be dealt with.
- 6.6.4 Materials and labor must be from the manufacture.
- 6.6.5 The manufactured item must be subject to industrial operations.

It is an appropriate contract for investing in the Islamic economy and a means to encourage small-scale producers and manufacturers on production to satisfy the needs of the community, producer need the money he/she takes in exchange of his/her production, and the consumer needs someone to provide him/her with what he/she needs in the manner he/she desires.

The Islamic banks can exercise financing in accordance with this contract in a manner of (Istisna'a and parallel Istisna'a). The bank shall be contracted with its client as a manufacturer, and in financing the buyer and seller together or anyone of them as a financier. (Ibrahim and Al-Kahf, 2002, 180).

6.7 Exchange (Al-Sarf)

It is selling dirhams (Silver) with gold and vice versa.

It is the process of exchanging currencies to each other. (Mashhour, 90, 246). Or it is selling values with each other. (Hindi, 2008, 36)

The origin of the legitimacy of exchange in many speeches of the Prophet (peace be upon him) one of them is:

(gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, such as such, alike with what is alike, hand by hand . If these items varied, then sell as you like, if they are delivered hand by hand). (Bukhari and Muslim).

And he said again (peace be upon him): (gold with silver is usury except if they take and give). (Bukhari).

Al-Bukhaari (may Allah have mercy upon him) tell for Bara bin Azib and Zayd ibn Arqam that the Prophet (peace be upon him) forbade the sale of gold with silver in debt.

The exchange based on these speeches and others which we did not mention here are two:

6.7.1 Exchange of usurious item with another item from the same kind, as it requires equality and immediate delivering.

6.7.2 Exchange of usurious item with another usurious item from different kind, this does not require equality, but requires the immediate delivery.

Islam stressed so much on the exchange of usurious things (i.e., commodities and precious metals, which was decided in the sharia'ah, that the exchange may lead to a fall in usury, if not done according to the conditions prescribed by wise God), and the reason for this militancy is sparing Muslim dealers from suspicions of usury, and this what made the exchange to have received special attention by scholars, and to be one of the important part in the jurisprudence of transactions.

Accordingly, the exchange or (Al-Sarf) contract is the only contract that is associated with Sharia law, and that its provisions are a part of it, so it is binding to the Islamic banks. This obligation is due to that banks are trading with money of others, i.e. the mode of their work is money. Therefore, exchange acquires this importance and mandatory to work - so to speak - because the provisions of the exchange must be applied to most activities of the bank, and that the bank must uphold for the purpose of sparing the bank and customers suspicion of usury or risk of getting into it. These risks that Muslim customers are keen to avoid.

7. Conclusions and recommendations

7.1 Conclusions:

7.1.1 The shareah selling contracts represent a legitimate means consistent with Islamic Shareah enabled banks to obtain means to work away from usury.

7.1.2 Some of selling contracts include some features and elements make it difficult to be applied by Islamic banks.

7.1.3 Insisting on the application of some of the contracts in accordance with their terms will put Islamic banks in front of real difficulties or be forced to adoption of some legitimate tricks to deal with those difficulties.

7.1.4 The legal terms of contracts have been drafted for the purpose of making these contracts consistent with the provisions and rules of shareah and is not part of it.

7.1.5 Exchange (Al-Sarf) contract is excluded from what stated in (4) above. Since its provisions are part of the provisions of the law (shareah) and they are binding for Islamic banks.

7.2 Recommendations:

7.2.1 Islamic banks should not commit itself to work according to these contracts (excluding exchange contract).

7.2.2 Islamic Bank must choose the most appropriate formulas for their work on the condition that they must be with a commitment to the limits of the law (shareah) and its conditions.

7.2.3 The Islamic scholars, bankers and economists must be in the search for formulas sophisticated and appropriate for the banking business. This will enable Islamic banks to perform the role of financial intermediation and banking function more efficiently and to enable them to offer an alternative can work instead of traditional banks and replace them.

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