

Islamic Contract Law

CONTEMPORARY SHARIAH ADVICE
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TYPES OF COMMITMENTS

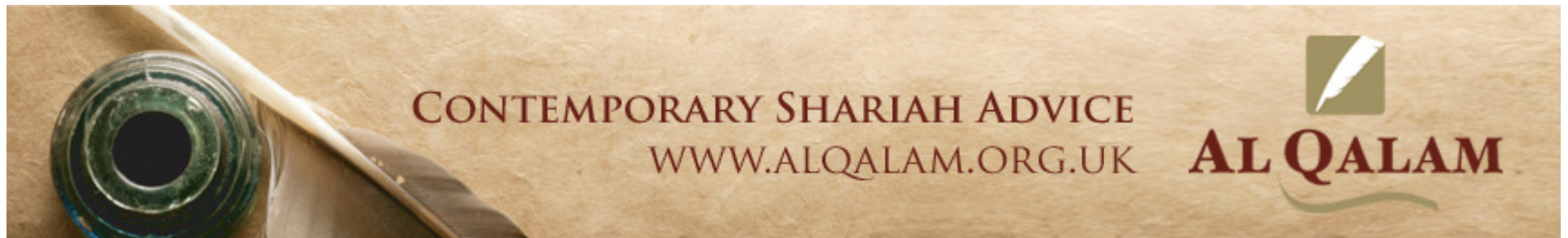
1. Wa'd (وعد) – Unilateral Promise
2. Muwaa'adah (مواعدة) – Bilateral Promise
3. 'Aqd (عقد) – Contract

Promises do not constitute contracts



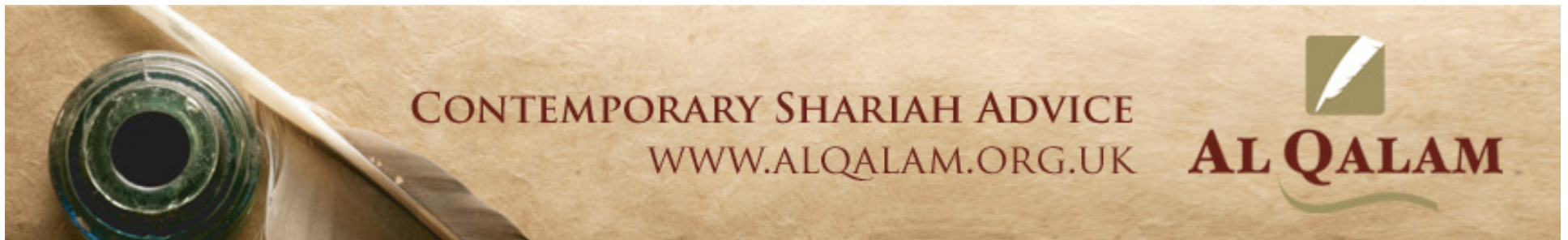
ENFORCEABILITY OF PROMISES

- Islam prohibits rolling 2 contracts into one (safaqat-fi-safaqat).
- Modern financial transactions often need to combine 2 contracts into one eg Hire Purchase.
- As Islam prohibits client signing agreement binding him to 2 contracts at the same time eg rent and purchase, how can a bank structure an Ijara Mortgage where there is a rental element and purchase element?
- How can a Bank offer an Islamic Mortgage yet still prevent itself having to hold huge assets on the balance sheet and potentially suffer massive losses on property disposals?
- Solution is to make client sign one rental contract coupled with a legally enforceable promise to purchase the property exercisable at the end of the term.
- If client defaults in property purchase, Bank has legal resource assuming promise can be enforced.



ENFORCEABILITY OF PROMISES

- **General Shariah enforceability** – All classical and modern scholars accept a promise must be kept.
- **Shariah Court** – Classical scholars are divided on a Shariah court's enforceability of such a promise. Many contemporary Ulema, including Fiqh Academy, partly in light of huge contract complexities for business have opined that promise is enforceable by Shariah courts.



AQD (CONTRACT)

- ‘Aqd literally means ‘to bind’.
- 3 types of contracts in Shariah
- Mu’aawadha - معاوضة (Consideration)
- Tabarru’ – تبرع (Gift/Loan)
- Dhimniyya – ضمنية (Supplemental Contracts)



KEY CONTRACT ELEMENTS

- Offer & Acceptance (الإيجاب والقبول)
- Qabdha (Possession) – Haqiqi/Hukmi
- Instant/Absolute Sale (بيع بات)
- No contingent (معلق) elements/contracts
- Nature & Value of subject matter (مبيع)
- Identification of Subject matter
- Capacity of contractors (أهلية المتعاقدين)
- Delivery
- Price



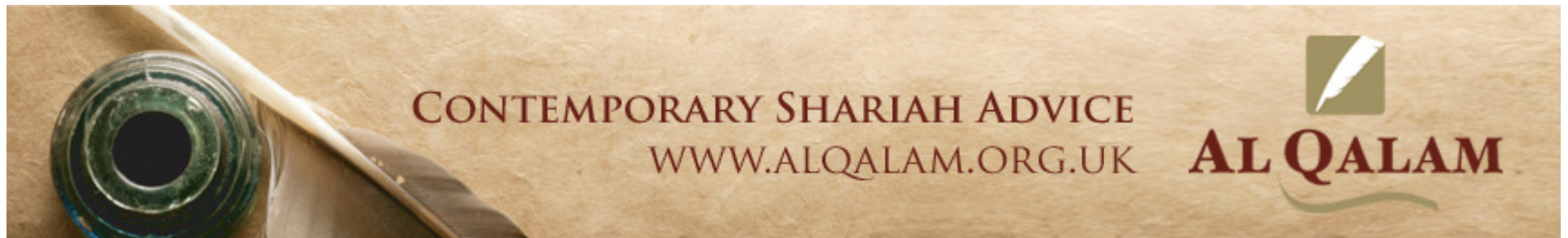
VALID CONTRACTS

- For a contract to be valid it cannot be affected by Gharar.
- *‘Gharar can be defined as the uncertainty that is present in the basic elements of an agreement eg wording, subject matter, consideration and the liabilities’*
- Other Ulema have defined Gharar as that level of uncertainty which can lead to disputes. Hence if a contract has uncertainty which is insufficient to lead to dispute then the contract is valid in the eyes of this group of Ulema.



LAW OF QABDHA

- Scholars have differing views on law of Qabdha and its applications to contracts.
- Prophet Mohammed (SAW) said *'do not sell what is not with you'*.
- Imam Abu Hanfiah, Imam Shafi & Imam Malik opine that this hadith means you cannot sell what you do not possess. Imam Ahmed Ibn Hanbal, Imam Ibn Taymiyyah & Ibn Al-Qayyim opine that possession is not the central issue it is the ability to deliver.
- Latter scholars say the Prophet (SAW) was responding to a query by Hakeem ibn Hizaam on whether or not he could enter into a contract to provide commodities which he did not have with him. These scholars feel that as Medina was a small market there was a possibility that Hakeem could have entered into a contract to supply an item and not then able to deliver it, hence the Prophet Mohammed (SAW) forbade it. This means that the real meaning behind *'do not sell what is not with you'* is not to sell what you cannot deliver and not necessarily what you do not own.
- To this group of ulema, Salam (سلم) & Istisna'a (استصناع) are not exceptions to the rule but instead legitimate contracts in their own right.
- The above differing in views can have major consequences for the permissibility of certain types on contracts in Shariah eg options.



BAI MU'AJJAL – بيع مؤجل

- Derives legitimacy from Surah Baqarah Meccans said '*sale is like Riba*' and Allah SWT replied '*Allah has made sale permissible and forbidden usury*'
- **Payment Date** – must be fixed
- **Price** – must be fixed and cannot be increased or decreased later on. Discounts can only be given by sellers consent.
- **Penalties & Default** – Must be donated to charity
- **Securities** – can be taken



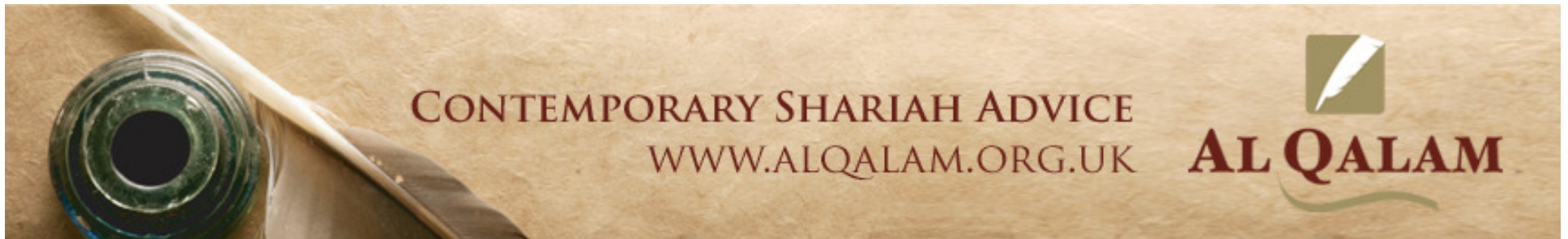
KEY DISTINCTIONS

- **Forward Sale** – Parties agree today to execute contract at some future point (typical promise in Islamic Mortgages).
- **Bai Mu'ajjal** – Contract executed today on commodity in existence with deferred payment and typically immediate delivery (as per Murabaha Mortgage).
- **Future's**– Contract (offer & acceptance) executed today on non existent commodity with consideration to a future point.
- **Option** - Contract executed today giving buyer the choice of buying non existent commodity at some future point



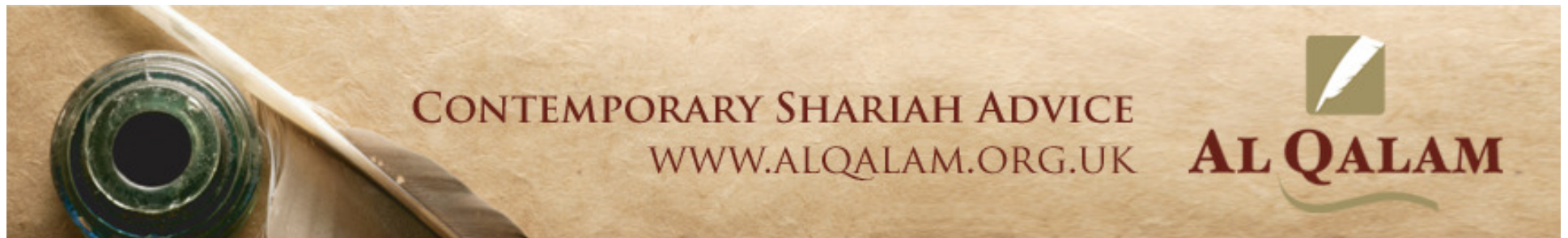
BUYER'S OPTIONS

- **Option to rescind (خيار الشرط)** - expires on contract execution
- **Option of inspection (خيار الرؤية)** – right to see and verify object of sale
- **Option of defect (خيار العيب)** – Right to return commodity if its defective
- **Option of quality (خيار الوصف)** – right to specified quality
- **Option of Price (خيار الغبن)** – right to fair price within market range



TYPES OF SALE

- **Bai Sahih** – Valid Sale where all contractual elements are present in the correct manner
- **Bai Baatil** – Void contract due to major defect e.g. gharar over subject matter
- **Bai Fasid** – Defective Sale, one which can be made sahih if defective element is corrected e.g. many contracts charge interest in case of default
- **Bai Makrooh** – Undesirable sale eg Jumma Salah time or intervention whilst 2 parties are negotiating.



SUMMARY

- Shariah had refined contractual law over a century prior to English Law
- Shariah emphasises the importance of clearly defining key contractual elements such as subject matter, delivery and price in a manner in which it cannot lead to disputes
- Dependent upon the varying contractual elements the status of the contract will either be valid or void.
- Future's sales are not valid under Shariah according to most scholars as the subject matter must be owned (Qabdha) at the point of sale.
- An alternative view to the mainstream is held by Imam Hanbal, Ibn Taymiyyah & Ibn Al-Qayyim who stress that the possession of the subject matter is not the central pillar of sale but instead the ability to deliver it.

