EFFECTS OF UNCERTANITY ON CONTRACTS AND ISLAMIC LAW

Thesis for LLM in Islamic Commercial Law

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Dedication

*This research work is dedicated to my beloved Father Mr. **Fazli Subhan**, dearest Mother Ms. **Naseem Akhtar**, heartfelt Brothers and loveable Sisters, whose support and prayers enable me to complete this thesis with thoroughness and tranquility.*

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Although a number of people have helped me while compiling this research work, among them one is my supervisor Dr. Muhammad Yousaf Faruqi; to him I am very much thankful due to his help and kind support. I would also acknowledge Dr. Muhammad Zia Ul Haqq, Dean Faculty of Shariah and Law, who motivated me to write on this topic at a very initial stage. It will be very unjust here, not to acknowledge all of my friends for their encouragement, and especially Mian Muhammad Sheraz, President WSF (Sherpao), by composing this research work. I want to acknowledge all those who associated with me in every walk of my life and also my well wishers.

Abstract

Gharar is totally an independent concept which could involve in any situations, i.e. existent or non existent subject matter. It is not necessary that all contracts on non existent subject matter include the element of Gharar. That is why it is not necessary that all contracts on the existence of a subject matter are totally free from the element of Gharar. Therefore Gharar must be focused rather than the existent and non existent of an object of a contract. If an object does not exist at the time of contract, the element of Gharar is avoided on the basis of future delivery.

In this modern age, many new forms of business methods have been introduced. It is suggested here that every modern business practice must be evaluated under the guidance of Islamic principles, if these practices are in conformity with Islamic principles. As regards the concept of Gharar, no specific attempt has been made. The views of modern jurists regarding the concept and the elements of Gharar Itself are not sufficient. That's why this research is an attempt to present the concept of uncertainty and its effects on various contracts, agreements and transactions that we do in our daily business.

In the very first chapter we have discussed the concept of Gharar in the light of Islamic law and jurisprudence. The holy *Quran* and *Sunnah* of the Prophet Mohammad (S.A.W.S) do not define Gharar as the concept of Gharar was clear to the people. However the classical jurists give different definitions of Gharar. They all agree that Gharar being out of the suspicious of danger because of the uncertainty of out comes of the contract. Some well known contemporary scholars like Mustafa al Zarqa and Wahabah al Zuhayli, have also defined Gharar. The meaning of Gharar to the modern jurist is similar to that of the classical, except that they attempt to give more contemporary definitions, where the concept of risk is being introduced in the context of contemporary circumstances. After discussing definitions and various kinds of Gharar we come across that Gharar does not have a single definition, in fact it is a very broad concept as we stated. However after searching and analyzing various kinds of Gharar contracts both in classical and modern jurisprudence, juristically Gharar refers to the state of uncertainty

and ignorance (*Jihala*) of an object of a transaction in terms of its *genus*, species, characteristics, quantum, time of delivery and the consideration/price. All the *fiqhi* schools are unanimous that the involvement of Gharar renders any transaction void and according to the Hanafi school of thought makes it irregular (*fasid*). The later jurist Ibn Taymiyyah says: "It is well known that ALLAH and his messenger the Prophet Mohammad (S.A.W.S) did not prohibit every kind of risk nor all kinds of transactions that involve the possibility of gain or loss are prohibited, what is prohibited is eating wealth for nothing, not mere risk". Mustafa Zarqa says: "Gharar is forbidden when uncertainty exceeds acceptable limits, and this is what the statement of our thesis that Gharar is not completely forbidden, a certain degree of Gharar is accepted. Islam does approve the taking of commercial risk; only excessive risk (*Gharar fahish*) taking is prohibited". In my opinion this view is more likely suitable to the present scenario where the people are in great need and they are taking risks in their business in order to make profits, but it is very much necessary to keep in view the principles of Islamic law, other wise their passion and desire for seeking an increase in wealth will spoil the principles of Islamic law.

In the second chapter we have discussed the effects of uncertainty on contracts in Islamic law and especially the contracts regarding Islamic banks and other financial institutions. After discussing and analyzing various contracts, i.e. *Mudarabah* (Profit Sharing Contract), *Musharakah* (Profit & Loss Sharing Contract), *Murabahah* (Trade with mark up OR Cost plus Sale Contract), *Salam* (Advance Purchase Contract), *Istisna* (Purchase Order OR Manufacturing Contract), and *Ijarah* (Lease Financing Contract). We come across that the element of Gharar is not totally avoided in most of the contracts nor a transaction is forbidden merely on the ground of Gharar without looking to the degree of Gharar involved in such transactions. Keeping in view that Islam does approve the taking of commercial risk; only excessive risk taking is prohibited, it is said, that Gharar is not completely forbidden, a certain degree of Gharar is accepted. Gharar is forbidden in that case when uncertainty exceeds acceptable limits, i.e. when uncertainty amounts to *Gharar fahish* (Major or excessive Gharar) which changes the status of a contract. However there is Gharar which does not change the status of a contract nor it effects the contracting parties, such Gharar is negligible which is

known as *Gharar yasir* (Minor or trivial Gharar). It must be noted here that according to the later jurists the prohibition of a contract is not merely on the grounds of non existence of a subject but Gharar itself. That is why their focus is not on a non existent object rather on Gharar, because for them existent and non existent subject matter is not a core issue rather Gharar is the point of issue which involves in both situations, whether the subject matter of a contract is exist or not. Thus Gharar makes the transaction void, whether the subject matter of a contract exists or not.

In the third chapter we have discussed the shariah maxims on uncertainty. The rules of Shariah regarding uncertainty described in details by the Muslims scholars through certain maxims. The most prominent maxims on the uncertainty, like "To sell what one does not have, is unlawful" and also "Gharar invalidates commutative contracts not gratuitous contracts" are discussed in details. The maxim "To sell what one does not have, is unlawful" is based on the famous sayings of The Holy Prophet Mohammad (S.A.W.S) said: "Do not sell what you do not have". The majority of classical jurists as well as the modern scholars hold that non existence of the object-subject matter- at the time of contract will make the contract null and void. On the other hand Ibn Taymiyyah and Ibn Qayyim hold that non existence of subject matter does not invalidate any contract; rather the cause of prohibition of a contract is the Gharar. This view is also supported by modern jurists and scholars like Al Sanhuri and Al Darir (as we discussed earlier). That is why in the opinion of Ibn Taymiyyah and Ibn Qayyim which is supported by the prominent jurists like Al Sanhuri and Al Darir. The *Hadith* "do not sell what is not with you" indicates that the *illah* (effective cause) of the prohibition is not the non existence of an object, but is the uncertainty (Gharar). In my opinion this view is more likely suitable to the present scenario where the people are in great need in order to meet their requirements, but keeping in view the shariah rules and Islamic principles. The second maxim of the third chapter; "Gharar invalidates commutative contracts not the gratuitous contracts" is talks about two types of contracts i.e. *Uqud al muawdat* (commutative contracts) and *Uqud al tabarruat* (gratuitous contracts). *Uqud al muawdat* are the Contracts for counter value or commutative contracts where one party gives consideration to another party for what he gets through the contract, like *Bay* (sale). *Uqud al Tabarruat* are the Gratuitous contracts such as gifts, *waqf*,

the absence and non existence of the object of a contract by way of *Istihsan* (juristic preference) in order to meet the needs of the people. Sense we know that *Salam* (advance purchase) and *Istisna* (Manufacturing contract) are exception to the general rule of Islamic law of contracts". The jurists put some conditions (as we discussed in third chapter) for these contracts in order to minimize the degree of Gharar (uncertainty). So these conditions must be observed to devoid the *Salam* and *Istisna* contract from uncertainty.

Introduction

Uncertainty (Gharar) is one of the major vitiating factors of transactions in Islamic Law. It especially effects the validity of commutative contracts such as, Sale, Leasing and Hiring contracts.

Uncertainty (Gharar) refers to the lake of knowledge of necessary terms of contract, which may lead to dispute and litigation. Uncertainty is a very important issue which is discussed in Islamic jurisprudence as well as in modern Law. It adversely effects many transactions and agreements according to Shariah Law. Uncertainty being one of such issues needs to be discussed in the light of Islamic principles and especially in this modern age, where modern Islamic banking system gained popularity in the whole world. Though this issue has been raised by various Muslims scholars from time to time, but there are some issues which are still lying untouched and also some issues which are slightly discussed.

The basic purpose of introducing the concept of uncertainty i.e. the effects of uncertainty on contracts, because of commercial activities in the modern age, where progress is being made in the field of Islamic commercial Law-Islamic banking-an attraction for the investors with the assurance that the modern commercial activities and Islamic banking system are fully governed by Islamic principles.

As we know that modern Islamic banking system is based on the principles of Islamic Law, so the requirement of time to discuss in details the topic of uncertainty and its effects on contracts, various transactions and agreements. The Muslims jurists differ on the effects of uncertainty on gratuitous contracts. To Maliki Jurists uncertainty has no effect on donations, thus it is valid to donate escaped animal, fruits before they ripen; but according to Hanafi, Shafi and Hanbli Jurists the subject matter of donation should be known and determined. They do not allow the donation of an unborn animal or milk in udders. Some schools of jurists permit Gharar (uncertainty) if there is an urgent need for it, and if it could not be avoided, Example for such a need: Contract of Salam, a prepaid forward sale, which would be prohibited according to

Gharar rules, but in special case it is allowed, since contract of Salam is used to agricultural activities that could not be financed otherwise.

Similarly, the effect of uncertainty on hire is the same as on the sale contracts. That is why the bankers need comprehension of these principles and require a working knowledge of day to day transactions in accordance with Islamic Law. So this study and research will be an attempt to analyze the concept of Uncertainty and its effects on contracts-regarding commercial and Islamic banking activities-in the light of Islamic principles and Shariah rules.

Statement of Research problem/Thesis statement

Gharar is not completely forbidden; a certain degree of Gharar is accepted. Islam does approve the taking of commercial risk, only excessive risk taking is prohibited.

An occurrence of an event about which the parties are unaware; whether such an event will take place or not? Makes the contract void or not?

A thing which is not known and not in the knowledge of the parties to a contract may cause to make the contract invalid according to Islamic Law or not?

Hypothesis of Research

Hypothesis of this research are;

1) Uncertainty (Gharar) is prohibited in Islamic Law.
2) Uncertainty (Gharar) is not completely forbidden; a certain degree of Gharar is accepted.
3) The uncertainty about an occurrence of an event makes the contract void.
4) Uncertainty about a thing which is not in the knowledge of the parties to a contract makes the contracts invalid.
5) Sale of the things whose acquisition is in doubt, whether it exist or not (like sale of fruits on trees) amounts to a form of gambling prohibited in Shariah or not?

Objectives of Research

This study or Research aims to explain and analyze the concept of Uncertainty and its effects on contracts not only but also to explain all those transaction we do in our daily business in order to fully understand the implications of uncertainty, So that we can do our business in accordance to Islamic Law and Shariah rules.

Literature Review

The theory of Laissez-Faire in the Law of contract; that a party or a person has a full freedom to enter into a contract, although this concept is not in practical, because the formation of contract needs its legal enforcement.

Looking towards the Islamic Law, classical jurists are of the opinion that the concept of freedom to contract is very much limited and this is just for the contractual justice among the contracting parties to a contract. On the other hand contemporary jurists like Mustafa Zarqa of the opinion that Islamic contracts are not limited to the nominated scheme of contracts, rather the contractual parties at their freedom to enter and formulate any type of contract which is not against the injunction of the Shariah.

So we can say that contractual parties may enter to any contract but keeping in view the prescribed rules and regulation of the Islamic Law. Now here the question is arises that what are these rules and regulation? After searching and analyzing the classical sources of Islamic Law, we come across that most of the jurists limited these rules and regulations for any contract upto three: namely; Riba (interest or usury), Gharar (Uncertainty) and Shurut (Conditions). Meaning thereby that any contract shall be null and void in the eyes of Islamic Law, if the contractual parties shall not fulfill these mentioned rules.

Islamic Law prohibited any contract which violated these rules, Riba, Gharar and Shurut. As we know that Riba and Shurut are broadly discussed by the classical as well as the

contemporary jurists, but a little attention has been given towards Gharar, which needs further research.

Looking towards the Sunnah, we can find the Hadith that prohibits the Gharar (uncertainty). The Prophet Muhammad (S.A.W.S) prohibited the sale transaction involving Gharar. The Hadith "Prohibition of sale involving Gharar" repotted by "Sahih Muslim", while on the other hand "Sahih Bukhari" does not repotted the said Hadith, it is just because that the Hadith does not meet the criteria and standards of "Bukhari" as Asqalani stated. "Bukhari" repotted the Hadith of "Habal al Habala" under the headings of Gharar (uncertainty). That's why some jurists, like Ibn Serin, are of the opinion that there is nothing to enter into a contract involving Gharar. So it does not show that the Hadith of Gharar is week personalities. Keeping in view that Muslims Jurist are unanimous on the prohibition of a contract involving Gharar.

The classical jurists provided some rules and regulations from the Hadith of Gharar that a contract must fulfill some conditions/elements to devoid of Gharar, namely; Absolute terms and condition, no material want of knowledge, subject matter of contract must exist, and must be specified with quantity and Quality, the ability of delivery, etc. So a contract if not fulfill these elements, is said to be void. On the other hand as we know that Salam, Istisna and ijarah contracts are basically the non existent subject matter, but Shariah permitted for the human needs in order to avoid hardship. That's why jurists further divided Gharar into two kinds, namely; Gharar fahish (major or excessive uncertainty) and Gharar yasir (minor or non excessive uncertainty).

The jurists are unanimous that any contract involving Gharar fahish is void. Gharar yasir has no effects to the contracts to make it invalid, as it is generally acceptable and tolerated by the contracting parties. So we can say that any Gharar which is tolerated and acceptable by the contracting parties will be considered Gharar yasir, although that there is no clear line between the Gharar yasir and Gharar fahish.

Further, to some contemporary jurists like Al Darir and Al Sanhuri are of the opinion that a contract is not voided merely on the grounds of non existent subject mater, rather uncertainty is available even when the subject mater is exists. Further more that a contract is not voided just

because of that a seller is not having the position of the sold commodity, because if the seller is able to deliver the subject matter of the contract to the purchaser, even though at the time of contract the said subject matter is not in the position of seller, or the seller does not posses the required commodity/goods by the purchaser, still the contract is valid. So we can say that a contract is not voided merely on grounds of non existent of subject matter, because if the seller is able to deliver it to the purchaser, the contract is said to be valid. As we know that nowadays in this modern age normally almost all the commodities/goods are available from the open market, and the seller can easily provide the required commodity/goods to the purchaser.

So for the sake of this research, I shall explain the concept of uncertainty, because this is very much a serious issue, as our daily business involves the element of uncertainty, especially in this modern age where Islamic banking gained popularity.

As regards of the concept of uncertainty is concern, quite a lot of books are available. It has been discussed at a large scale in classical books and as well as in modern books to some extent. But where as the concept of uncertainty is concerned not much has been said from the perspective of modern Islamic banking and commercial activities as pointed out earlier. Although there are some materials such as "Al Gharar wa Atharuhu fi Al Uqud", "Al Gharar Fi Al Uqud wa Atharuhu fi Al Tatbiqat Al Muasirah", "Nazriyat Al Gharar Fi Shariah Al Islamia", and jurisprudential views in this regard. Some papers and articles are also written on this topic like; "Bay Al Madum", Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking, "Uncertainty and Risk Taking (Gharar) in Islamic Law", and "An Economic Explication of the Prohibition of Gharar in Classical Islamic Jurisprudence". Further more that this topic is slightly discussed by our worthy teacher Dr. Muhammad Tahir Mansoori, in his books, "Shariah Maxims on financial matters" and in "Islamic Law of contracts and business transactions". Some materials are also available on internet.

Research Methodology

- This would be a descriptive but a comprehensive research based on library research.
- Methodology of classical Islamic Law and jurisprudence would be used for extracting rules regarding uncertainty.
- Original Text would be quoted wherever and whenever necessary to include.
- The Holy Prophet Muhammad (S.A.W.S) Traditions and Shariah Maxims regarding uncertainty would also be mentioned.
- Modern Scholars view points and their unanimity on the issue of uncertainty would be discussed.

Contents

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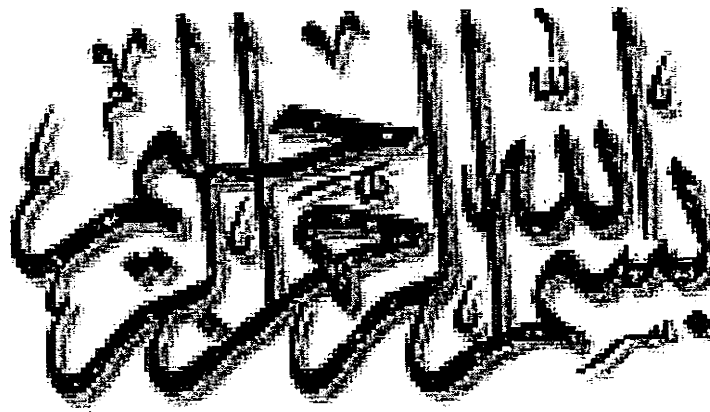

Chapter No. 1

Concept of Uncertainty

1.0) Concept of Gharar (Uncertainty)

The concept of Gharar has been broadly discussed by the Islamic jurists and defined it in two ways. Firstly; Gharar implies uncertainty, secondly; Gharar implies deceit. Gharar is one of the major causes of the invalidity of a contract, that's why the *Quran* has clearly forbidden all business transactions and agreements, which causes injustice in any form to any of the parties to any contract or agreement.

As we stated that the concept of Gharar has been broadly defined by the Islamic scholars, to the very well known Hanafi jurist Sarakhsi: "Gharar is any bargain in which the result or its consequences are hidden". To Ibn juzy, a well know maliki jurist has given a list of ten cases which constitute in his view a forbidden Gharar. These cases are as follows.[1]

A) Difficulty in putting the buyer in possession of the subject-matter; such as the sale of stray animal or the young still unborn when the mother is not part of the sale.

B) Want of knowledge with regard to the price or the subject matter, such as the vendor saying to the potential buyer: "I sell you what is in my sleeve".

C) Want of knowledge with regard to the characteristics of the price or of the subject-matter, such as the vendor saying to the potential buyer: "I sell you a piece of cloth which is in my home" or the sale of an article without the buyer inspecting or the seller describing it.

D) Want of knowledge with regard to the quantum of the price or the quantity of the subject matter, such as an offer to sell "at today's price" or "at the market price".

E) Want of knowledge with regard to the date of future performance such as an offer to sell when a stated person enters the room or when a stated person dies.

F) Two sales in one transaction, such as selling one article at two different prices, one for cash and one for credit, or selling two different articles at one price, one for immediate remittance and one for a deferred one.

G) The sale of what is not expected to revive, such as the sale of a sick animal.

[1] Ibn juzy, Qawanin Al Ahkam Al Shariyyah, Darul Ilam lil Malayih, Beirut, pp. 282, 283; Obaid Ullah, Muhammad, Islamic Financial Services, King Abdul Aziz University, Jeddah, Saudi Arabia, pp. 29, 30; Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, pp. 96, 97.

H) *Bay al hasah*, which is a type of sale whose outcome is determined by the throwing of stones.

I) *Bay munabadha*, which is a sale performed by the vendor throwing a cloth at the buyer and achieving the sale transaction without giving the buyer the opportunity of properly examining the object of the sale.

J) *Bay mulamasa*, where the bargain is struck by touching the object of the sale without examining.

From the above mentioned ten cases, it is clear that Gharar does not have a single definition, so it is a fairly broad concept as we stated earlier. That's why we will attempt to classify several categories of Gharar and its effects on various contracts, transactions and agreements from the perspective of shariah and Islamic principles in upcoming chapters.

1.1) Meaning of Gharar (uncertainty)

The word Gharar comes from the root verb *Gharar* signifying to reveal oneself and ones property to destruction with one being aware of it. Generally it means danger, peril jeopardy, hazard or risk. Literally Gharar means risk or hazard. *Taghrer* being the verbal noun of Gharar is to unknowingly expose oneself or one's property to jeopardy.[2] In Arabic language Gharar means to cheat, to tempt and to cause uncertainty. According to Islamic jurisprudence Gharar means a contract which consists upon some risk to the compensation of one of the parties and this risk relates to the actual ingredients of the contract.[3] We can say that Gharar literally means uncertainty as Omer Mustafa Ansari defined.[4]

[2] Darir, Siddiq Muhammad Amin, Al Gharar Fi Al Uqud WA Atharuhu Fi Al Tatbiqat Al Muasirah, Jeddah, Saudi Arabia, 1993, p. 11; Al Qamoos Al Muheeth, p. 101; Daradikah, Yaseen Ahmad Ibrahim, Nazriyat Al Gharar Fi Shariah Al Islamia, Oman, Jordan, 1973, vol. 1, p. 71; Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, pp. 47, 48.

[3] Samdani, Muhammad Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, p. 15.

[4] Ansari, Omar Mustafa, Managing Finances-A Shariah Compliant Way, Time Management Club, P.O. Box-12356, DHA, Karachi, 2007, pp. 186, 187.

Technically Gharar refers to uncertainty in a contract that may lead to unknown consequences or results, whereby one or both parties to the contract suffer injustice.[5] Ambiguities in a contract are intended to commit fraud, cheat and exploit on of the parties. Gharar is synonymous with *al khida* (cheat) or fraud.[6]

1.2) Definition of Gharar (uncertainty)

Looking to the holy *Quran* and *Sunnah* of the Mohammad (S.A.W.S) there is no direct definition of Gharar. Various classical jurists give different definitions of Gharar. They all agree that Gharar being out of the suspicious of danger because of the uncertainty of out comes of the contract. The contemporary well known scholars have also defined Gharar like Mustafa al Zarqa and Wahabah al Zuhayli. The meaning of Gharar to the modern jurist is similar to that of the classical, except that they attempt to give more contemporary definitions, where the concept of risk is introduced.

The jurists have devised various definitions of Gharar having to its different aspects, features and characteristic. So these definitions are as follows:

1.2.1) *Hanafi School of thought:*

قال السرخسي : " الغرر ما يكون مستور العاقبة "[7]

According to Sarakhsi: "Gharar is that whose consequences are hidden or which has invisible consequences"[8] In other words: Gharar is something that is concealed in its result or Gharar takes place where the consequences of a transaction remain unknown.

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[5] Muhammad Yousaf Saleem, a hand book on Fiqh for Economics II, p. 8.

[6] Kamali, Muhammad Hashim, Uncertainty and Risk Taking (Gharar) in Islamic Law, Law Journal, vol. 7, No. 2, 1998, IIU Malaysia, Kola Lampur, Malaysia, 1999.

[7] Sarakhsi, Abu Bakar Muhammad Ibn Ahmad, Al Mabsut, Beirut, Dar Al Maarif, 1978, vol. 13, p. 194; Darir, Siddiq Muhammad Ami, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, pp. 48, 49; Daradikah, Yaseen Ahmad Ibrahim, Nazriyat Al Gharar Fi Shariah Al Islamia, Oman, Jordan, 1973, vol. 1, p. 72; Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 95.

وقال الكاساني : " الغرر هو الخطر الذي استوى فيه طرف الوجود والعدم بمنزلة الشك "[9]

According to kasani: "Gharar is the risk (of uncertainty) in which it is equal on terms the existence and non existence (of the subject matter) and (whether the sale will be concluded or not) in doubt (uncertainty)".

وقال ابن عابدين : " الغرر هو الشك في وجود المبيع"[10]

According to Ibn Abidin: "Gharar is uncertainty about the existence of the subject matter of a sale" [11] In other words: Gharar is uncertainty concerning the existence of the subject matter.

1.2.2) *Maliki school of thought:*

جاء في المدونة : " قال ابن وهب: قال لي مالك" وتفسيرما نهى عنه رسول الله -صلى الله عليه وسلم- من بيع الغرر, ان يعمد الرجل إلى الرجل قد ضلت راحلته أو دابته أو غلامه, وثمن هذه الاشياء خمسون دينارا, فيقول : أنا اخذها بعشرين دينارا, فإن وجدها المبتاع ذهب من البائع بثلاثين دينارا, وإن لم يجدها ذهب البائع منه بعشرين دينارا, وهما لا يدريان كيف يكون حالهما في ذلك الوقت ولا يدريان أيضا إذا وجدت تلك الضالة كيف توجد, وما حدث فيها من امر الله, مما يكون فيه نقصها أو زيادتها, فهذا أعظم المخاطرة "[12]

Imam Malik interprets the *Hadith* in which the Messenger Mohammad (S.A.W.S) prohibited from risky transaction. In Mudawanah, Imam Malik stated: "and he included in Gharar and risky transactions is the case in which a man whose camel is lost or his slave has escaped, the price of which is say fifty *dinars*, so he would be told by another man: I will buy it for twenty *dinars*, thus if the buyer finds it, the seller loses thirty *dinars*, if not, the buyer loses twenty

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[8] El-Gamal, Mahmuod A, an Economic Explication of the Prohibition of Gharar in Classical Islamic Jurisprudence, First Version, May 2, 2001, p. 5.

[9] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 5, p. 163; Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, p. 48.

[10] Ibn Abidin, Radd Al Mukhtar, vol. 4, p. 147; Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, p. 48; Daradikah, Yaseen Ahmad Ibrahim, Nazriyat Al Gharar Fi Shariah Al Islamia, Oman, Jordan, 1973, vol. 1, p.72.

[11] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 95.

[12] Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, p. 49; Daradikah, Yaseen Ahmad Ibrahim, Nazriyat Al Gharar Fi Shariah Al Islamia, Oman, Jordan, 1973, vol. 1, p.73.

dinars".....So this Gharar is of serious nature or in other words high risk and uncertainty about the subject matter of the contract as Imam Malik stated.

قال ابن رشد الجد : " وبيع الغرر, هو البيع الذي يكثر فيه الغررويغلب عليه حتى يوصف به, لانه الشيء إذاكان مترددا بين معنيين لا يوصف بأحدهما دون الاخر الا أن يكون اخص به واغلب عليه "[13]

According to Ibn Rushd al Jed, He said: "Gharar sale, is a sale, as a grave element which overwhelms the essence of a particular contract, As a result, the intended contract looses its character and transforms into a new form which is considered as Gharar. This is because when a thing is uncertain between two elements it can no longer be attributed to either of them".

According to Ibn Rushd: "Gharar is to be found in the contracts of sale when the seller suffers a disadvantage as a result of his ignorance with regard to price of the article or the indispensible criteria relating to the contract or its object or quality or time of delivery".[14]

1.2.3) ***Shafi school of thought:***

نقل الكاساني : " أن الشافعي قال: الغرر هو الخطر "[15]

Kasani a well known jurist of Hanafi school of thought narrated that imam Shafi said: "Gharar is risk/uncertainty".

وقا ل الشيرازي : " الغرر ما انطوى عنه أمره وخفي عليه عاقبته "[16]

Al Shiraazi says: "Gharar is something that is folded in its nature and concealed/hidden in its consequence".[17]

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[13] Ibn Rushd Al Jed, Al Muqaddimat Al Mumahhadat, vol. 2, p. 221.

[14] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 96, (as he quoted: Ibn Rushd, Bidayat Al Mujtahid, vol. 2, p. 156)

[15] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 5, p. 163; Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, p. 50.

[16] Shiraazi, Abu Ishaq, Al Muhadhab, Cairo, vol. 1, pp.262, 269; Daradikah, Yaseen Ahmad Ibrahim, Nazriyat Al Gharar Fi Shariah Al Islamia, Oman, Jordan, 1973, vol. 1, p.74; Darir, Siddiq Muhammad Amin, Al Gharar WA Atharuhu Fi Al Uqud, Cairo, 1967, p. 50.

Al Isnawi of the Shafi school of thought said: "Gharar is that which admits two possibilities with the less desirable one being more likely".[18]

1.2.4) *Humbali school of thought:*

قال القا ضي وجماعة : " الغرر ما تردد بين امرين ليس أحدهما أظهر "[19]

According to al Qazi and his companions, "Gharar is the state of uncertainty between existence and non-existence and no one is clear or certain".

قال ابن تيمية : " بأنه هو مجهول العاقبة "[20]

Ibn Taymiyyah said: "Gharar is something that is unknown in its result or consequence" as defined by Sarakhsi, a jurist of Hanafi school of thought.

قال ابن القيم : " بيع الغرر هو ما لا يقدر على تسليمه سواء كان موجودا او معدوما "[21]

According to Ibn al Qayyim: "Gharar sale is a sale of an object which is uncertain in its acquisition or cannot be delivered or is unknown in its quantity" [22] Ibn al Qayyim, student of Ibn Taymiyyah, said: "Gharar is that which is undeliverable whether the subject matter of a contract or agreement exists or not". In other words: Gharar is something the object soled is unable to be delivered or performed and uncertain between existence and otherwise.

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[17] El-Gamal, Mahmuod A, an Economic Explication of the Prohibition of Gharar in Classical Islamic Jurisprudence, First Version, May 2, 2001, p. 5.

[18] Ibid

[19] Sharh Al Muntahe Al Iradat, vol. 2, p. 145; Daradikah, Yaseen Ahmad Ibrahim, Nazriyat Al Gharar Fi Shariah Al Islamia, Oman-Jordan, 1973, vol. 1, p.75.

[20] Al Fatwa Al kubra, Beirut, Dar Al kutub Al Ilimiyyah, Lahore, vol. 3, p. 275; Al Qawaid Al Nuraniyyah Al Fiqhiyyah, Damascus, 1951, p. 116.

[21] Ibn Al Qayyim, Ilam Al Muwaqqin, Cairo, Maktaba Al Azhariyyah, 1986, vol. 1, 357, 358.

[22] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 96.

1.2.5) ***Zahiri school of thought:***

عرف ابن حزم : " الغرر في البيع بأنه ما لا يدري فيه المشتري ما اشترى, او البائع ما باع "[23]

According to Ibn Hazam al Zahiri: "Gharar is where the buyer does not know what he has bought and the seller does not know what he has sold" In other words: Gharar occurs in the sale contract when both the buyer and seller have no knowledge of the particulars of the contract, means absolute want of knowledge.

It is now very much clear from the above definitions as defined by various jurists of several schools of thought, that Gharar does not have a single definition. It is a very broad concept that's why the discussion is limited to the contracts regarding Islamic banking. From the definition of Gharar, I personally select, firstly the definition of Sarakhsi a well know jurist of Hanafi school of thought, "Gharar is that whose consequences are hidden", which is very much conclusive and decisive one. The same holds by al Shiraazi a well known jurist of Shafi school of thought. Similarly, Ibn Taymiyyah, a very famous jurist, also holds the same definition for Gharar and his student Ibn al Qayyim also holds that.

Secondly, the definition of Imam al kasani, which is very explanatory in his nature, the same holds by Imam Ibn Abidin (also a Hanafi jurist) a summary of kasani's definition, in other words, the more explicit definition given by Imam Ibn Abidin. The maliki jurist also holds that. Lastly I want to quote the definition given by al Zuhayli and the definition of Mustafa Zarqa.

Dr. Zuhayli says, in his famous book, *Al Fiq al Islami wa Adillatuhu*, that "Gharar sale is any contact which incorporates a risk which affects one or more of the parties (to a contract, or agreement) and it may result in loss of property". Mustafa al Zarqa wrote in his book,[24] that "Gharar is the sale of the probable items whose existence or characteristics are not certain; due to the risky nature it makes trade similar to gambling". He further stated in another place that "Gharar is confined to the area of sale contract when the outcome of the sale is not certain but depends upon chance. He further stated that Gharar is forbidden when uncertainty exceeds

[23] Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, p. 51.
[24] Zarqa, Mustafa Ahmad, al fiq al Islami fi Thawbih al jaded, vol.1, pp .697-698.

acceptable limits".[25] And this is what the statement of our thesis that Gharar is not completely forbidden, a certain degree of Gharar is acceptable. Islam does approve the taking of the commercial risk, only excessive risk taking is prohibited.

It is a consensus amongst Muslims jurists that any financial contract agreement of transaction containing uncertainty shall not be considered permissible and is hence considered void from shariah perspective. It should be emphasized that Islam does not prohibit a contract or agreement just because it involves risk. Only when risk is a channel to make one party to a contract or agreement profits at the expense of the other that is becomes Gharar. Imam Ibn Taymiyyah makes this clear.

" وأما المخاطرة , فليس في ادلة الشرعية ما يوجب تحريم كل مخاطرة , بل قد علم أن الله ورسوله لم يحرما كل مخاطرة , ولا كل ما كان مترددا ,بين أن يغنم أو يغرم أو يسلم. وليس في أدلة الشرع ما يوجب تحريم جميع هذه الانواع نصا ولا قياسا , ولكن يحرم من هذه الانواع ما يشتمل على أكل المال بالباطل . والموجب للتحريم عند الشارع : أنه أكل مال بالباطل , كما يحرم أكل المال بالباطل , وان لم يكن مخاطرة , لأن مجرد المخاطرة محرم "[26]

It is well known that ALLAH and his messenger did not prohibit every kind of risk nor all kinds of transactions that involve the possibility of gain or loss or neutrality are prohibited. What is prohibited among such kind is eating wealth for nothing even if there were no risk, not which only risk as such as prohibited. This statement makes it clear that although risk as such is undesirable, the reason Gharar is prohibited, is that is involves eating wealth of others for nothing, not mere risk.[27]

[25] Zarqa, Mustafa Ahmad, Nizam Al Tamin wa Mawqif Al Shariah Minhu, paper presented at first international conference on Islamic economics, Makah, 1976.

[26] Ibn Taymiyyah, Ahmad Bin Haleem, Fatawa Misreeyah, Darul Jabal, Beirut, 1978, p. 576.

[27] Sami Al Suwailem, towards an Objective Measure of Gharar in Exchange, Islamic economic studies, vol. 7, No: 1 and 2, Oct 99 and April 2000, pp. 65, 66.

1.3) KINDS OF GHARAR (UNCERTAINTY)

Generally Gharar divided into two kinds or two categories, namely: [28]

1.3.1) *Gharar yasir* (slight, minor Gharar or trivial Gharar) and

1.3.2) *Gharar fahish* (serious, major or excessive Gharar)

Mostly scholars and jurists referred these two kinds or types when classifying whether a contract becomes invalid or not due to the presence of Gharar in a contact, agreement or transaction. The legal implications of the presence of Gharar in a contract or agreement depends that on which category the Gharar falls into.

The jurists and contemporary scholars are unanimous on the point that minor Gharar is acceptable or intolerable, regarding a contract valid or in some instance voidable until the element of uncertainty is removed. Major Gharar altogether nullifies a contract agreement of transaction.[29]

Gharar fahish or *Gharar kathir*; means excessive risk is the one that can affect a contract, that is nullifies it. Example of *Gharar fahish*; in contracts are plenty as shown by the *Ahadith* and normally is associated with the reasons why Gharar sale is prohibited.[30]

Gharar yasir means small in amount or trivial, is the uncertainty that is always present in all contracts and conducts, thus it existence is tolerated. All scholars agree that every transaction

[28] Salwani Siti Razali, paper presented to Islamic finance conference, A Revisit to Banking Financing Instruments with special reference to Bay Al Inan and Bay Al Dayn, pp. 3, 4, 5; Kamali, Muhammad Hashim, Uncertainty and Risk taking (Gharar) in Islamic Law, paper presented at international conference on Takaful/Islamic insurance, 2-3 July, 1999, Hotel Hilton, Kula Lampur; Wan Marhaini wan Ahmad, Some issues of Gharar (Uncertainty) in insurance, journal Syria, 10:2 [2002] 61-80.

[29] Salwani Siti Razali, paper presented Islamic finance conference, A Revisit to Banking Financing Instruments with special reference to Bay Al Inan and Bay Al Dayn, pp. 3, 4, 5.

[30] Zarqa (1994), Nizam Al Tamin: Haqiqatuh wa Al Ray Al Syari fih, Beirut: Muassasat Al Risalah, p. 45; Wan Marhaini wan Ahmad, Some issues of Gharar (Uncertainty) in insurance, journal Syria, 10:2 [2002] 61-80.

have some amount of Gharar in it but they start to differ when referring to the amount of Gharar contained in each.[31]

Some Muslim jurists such as al Baji try to set a measure to determine whether the Gharar is *fahish* (excessive) or *yasir* (minor or small). For him if the Gharar overwhelms the contract until the contract becomes known through it only-that is there would be no contract of the kind without the Gharar-than the Gharar is exorbitant one.[32] Other scholars approach it from the *Gharar yasir* (small or minor) is tolerable risk perspective. For them three conditions need to be fulfilled to identify the Gharar as tolerable ones. The risk should be negligible in the sense that the probability of loss is small and its magnitude is limited. It also needs to be inevitable that is out of once control and lastly it should not be intentional.[33]

Looking from a different perspective, there are types of Gharar or uncertainty in any contract.

A) Uncertainty that happens naturally
B) Uncertainty that happens to deliberate act of parties involved in the contract

Firstly the uncertainty that happens naturally or the natural uncertainty is the uncertainty that will always preside in any contract for example; the possibility of earning profits from the transaction or loss due to the lack of market for the seller is associated with market risk that remains outside the contract. So this form of uncertainty is naturally embedded before a contract of sale and cannot be eliminated. It is thus negligible in affecting the contract. In this sense it is similar to *Gharar yasir* or small Gharar. This form of uncertainty can also be regarded as a *non zulm Gharar* (non excessive uncertainty). Since it constitutes the risk one must take to justify shariah legitimacy.

Secondly the uncertainty that happens through deliberate acts of parties or by one of the parties of the contract such as putting forth vague or arising from putting uncertain terms. In this manner, many forms of Gharar will emerge like;

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[31] Wan Marhaini wan Ahmad, Some issues of Gharar (Uncertainty) in insurance, journal Syria, 10:2 [2002] 61-80
[32] Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, pp. 591, 592; Wan Marhaini wan Ahmad, Some issues of Gharar (Uncertainty) in insurance, journal Syria, 10:2 [2002] 61-80.
[33] Sami Al-Suwailem, Towards an Objective Measure of Gharar in Exchange, Islamic economic studies, vol. 7, No: 1 and 2, Oct 99 and April 2000, p. 69; Wan Marhaini wan Ahmad, Some issues of Gharar (Uncertainty) in insurance, journal Syria, 10:2 [2002] 61-80.

i) *Al Taghrer Fi'li* (arising from fraudulent acts)

ii) *Al Taghrer al Qawli* (arising from fraudulent statements)

iii) *Al Taghrer bi al Kitman* (arising from fraud or concealment)

In each of these activities, one of the contracting party or a third party will deceive the other party, thus inducing him to enter into contract. The deceived party is normally ignorant of the fraud and has no other means of knowing it. For example, in the case of "Tsariyah" the milk owner purposely tied up the udders of the livestock for few days so as to give the impression to the other party that the livestock have productive milk yield there by inducing him to buy them.[34]

Muhammad Hashim kamali, identifies three kinds of Gharar, saying that "Two Gharar, when excessive (*Gharar al kathir*) concerning the object of sale renders the transaction invalid. The jurists are equally in agreement that trifling Gharar (*Al Gharar al yasir* i.e. small or minor Gharar) is tolerated and permissible. Average Gharar (*Al Gharar al mutawassit*) which falls between these two (excessive and non excessive or *Gharar fahish* and *Gharar yasir*) extremes is perhaps most susceptible to being differently evaluated and place under one or the other of the two extremes. This is partly due to the circumstantial aspect of Gharar which may be seen as excessive and unacceptable in a certain setting but may be judge differently under different circumstances. Some specific types of contract involving the average type Gharar like:[35]

i) sale of what is hidden in the soil

ii) Lump sum sale or *Bai al juzaf*

iii) Sale at the market price (*Bai bi sir al suq*) in which the actual price is not specified

iv) Sale prior to taking possession (*Bai qabl al qabd*)

v) Sale of consecutive produce in advance

vi) Sale of the absent (*Bai al ghaib*)

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[34] Wan Marhaini wan Ahmad, Some issues of Gharar (Uncertainty) in insurance, journal Syria, 10:2 [2002] 61-80; Yusoff (1998), Defective Contracts in Islamic Commercial Law: with special reference to Al Ghaban, Al Ishtighal and Al Gharar, MCL. IIUM, pp. 206-229; Mahmuod, Nik Ramlah (1991), Takaful: The Islamic System of Mutual Insurance, the Malaysian experience, Arab Law Quarterly, vol. 6, pp. 283, 284.

[35] Kamali, Muhammad Hashim, Uncertainty and Risk taking (Gharar) in Islamic Law, paper presented at international conference on Takaful/Islamic insurance, 2-3 July, 1999, Hotel Hilton, Kula Lampur; Daradikah, Yaseen Ahmad Ibrahim, Nazriyat Al Gharar Fi Shariah Al Islamia, Oman, Jordan, 1973, vol. 1, pp. 96, 97.

1.4) Gharar (Uncertainty and related terms to it)

The Arabic word Gharar is fairly a broad concept that literally means deceit, risk, fraud, uncertainty or hazard. Gharar in Islam refers to any transaction of subject matter whose existence or description is not certain due to lack of knowledge and information. Islam has also categorically and firmly prohibited all forms of gambling like *Maysir* and *Qimar* etc. So there are some words which are inter-related with the term Gharar (uncertainty). They are as follows:

1.4.1) *Al Gharar wa al Gharor*
1.4.2) *Al Gharar wa al Jihala*
1.4.3) *Al Gharar wa al Qimar*
1.4.4) *Al Gharar wa al Ghaban*

1.4.1) *Al Gharar wa al Gharor*

Al Gharor means uncrating, that happens through deliberate act by one of the parties like, fraudulent acts, fraudulent statements or though by fraud or concealment.[36] It means that *Gharor* is the ultimate result of a person or party to a contract or agreement to deceive other party through by acts. Like fraudulent statements, acts or concealments of such thing that probable objects or connected to the subject matter of contract, agreement or transaction.

As for as Gharar is concerned, both the parties to a contract, agreement, or a transaction are unaware of the subject matter, whose existence or description are not certain due to the lack of information and knowledge.

Al Gharor some times and in some cases gives the right to revoke the contract. In other words, sometime *al Gharor* because of the presence in a subject matter gives to *Maghroor* right to revoke the contract. But as far as the Gharar is concerned, makes the contract void. So we can say that *al Gharor* clearly differs from Gharar (uncertainty). Besides that various jurists use the

[36] Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, pp. 55, 56.

word *Gharor* instead of *Gharar* like Ibn Abidin.[37] The Maliki jurists used Gharar in the meaning of *Gharor* and Shafi School of thought also taking Gharar by meaning of *Gharor* some times.[38]

1.4.2) *Al Gharar wa al Jihala*

Gharar means, uncertainty about the subject matter whether exists or not, Or uncertainty about the subject matter where the seller are not in position to hand over the things purchased; like sale of fish in the water, sale of birds in the air or sale of stray animal. In other words, Gharar arising due to non existence of the subject matter of exchange, and the seller is not in a position to hand over the subject matter to the buyer, irrespective of whether this is in existence or not.

Jihala means, where the uncertainty may be caused by lack of adequate value relevant information or lack of knowledge. Like sale of fetus in the womb. In other words *Jihala* means that the person is unaware from adequate relevant information regarding the subject matter of a contract. Scholars have described, that *Jihal* means want of knowledge with regard to the subject matter, the price or with regard to the characteristics of the price or of the subject matter, the date of settlement of contract, agreement of transaction.[39] In my view so for the reason *Jihala* is a kind of Gharar. In other words, thus information is the central element to Islamic law of contracting; an absence of accurate information, (*Jihala*) want of knowledge and lack of information is a source of Gharar. Imam Ibn Taymiyyah also holds this view.[40] We can say that Gharar is the uncertainty about the subject matter; price and the date of settlement of contract etc. whereas *Jihala* is the want of knowledge, lack of information about the features of the subject matter of a contract, agreement or transaction.

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[37] Ibn Abidin, Radd Al Mukhtar, vol. 4, pp. 86 and 224; Darir, Siddiq Muhammad Amin, Al Gharar WA Atharuhu Fi Al Uqud, Cairo, 1967, p. 56.

[38] Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, pp. 56, 57.

[39] Obaid Ullah, Muhammad, Islamic Financial Services, King Abdul Aziz University, Jeddah, Saudi Arabia, pp. 31, 32; Al Qarafi, Al Furuq, Dar Al Kutub Al Ilimiyyah, Beirut, 1986, vol. 3, p. 265.

[40] Ibn Taymiyyah Al Qawaid Al Nuraniyyah Al Fiqhiyyah, Damascus, 1951, p. 117; Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, p. 59.

1.4.3) *Al Gharar wa al Qimar*

Gharar means risk, deception or speculation; it includes also cheating and fraud. The holy *Quran* forbids all those transactions, agreements and contracts where one party is enriching itself at the expense of other parties involved. That's why "Gharar is the sale of probable items whose existence or characteristics are not certain".[41]

Qimar or *Maysir* both these referred to gambling in Arabic language, which means any activity that involves an arrangement between two or more parties, each of whom undertakes the risk of a loss, where a loss for one means a gain for the other, as it is common for the (*Qimar* or *Maysir*) gambling activities.

Islam prohibited mankind particularly the Muslims from having any affiliation to gambling activities including participating, investing or financing any business related to , or associated with the gambling industry, or associated with such industry that's doing unlawful business and transactions.[42]

Gharar (Uncertainty) and Qimar (Gambling)

These two words are not synonymous though they are inter-related to each other. Uncertainty is same to Gharar and a meaning to it under such conditions, where exchange or contracting is reduced to a gamble. Furthermore, that *Qimar* and *Maysir* are forms of gambling transactions that are totally prohibited in Islam. *Qimar* means the game of chance in which one gains at the cost of others, where as *Maysir* means the easy acquisitions of wealth by chance, whether or not it deprives others right.

It is very much clear from the above discussion that *Qimar* or *Maysir* both refers to gambling. Meaning there by that *Qimar* means gambling and it is also termed as *Maysir* in Arabic language. But Gharar (uncertainty) is not synonymous to *Qimar* (gambling), although they are related to each other.

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[41] El-Gamal, Mahmuod (2006), Islamic Finance, Law, Economics and Practice, Cambridge University Press, Cambridge, p. 587.

[42] Paper on Bay Al Madum, International Islamic Conference, Malaysia, 1997

According to Ibn Taymiyyah and his student Ibn Qayyim, Gharar (uncertainty) is a form of *Qimar* (gambling) or in other words Gharar refers to *Qimar* in view of these two jurists.[43]

1.4.4) *Al Gharar wa al Ghaban*

Ghaban means, loss suffered by a party to the contract as a result of concealment or misrepresentation, or deception of fraud practiced by the other. So if the loss is excessive (exorbitant), it is then *Ghaban fahish* (excessive *Ghaban*) and if the loss is minor or small then it is *Ghaban yasir* (non excessive *Ghaban* or simply termed *Ghaban*).

Ghaban fahish gives to purchaser right to revoke the contract in view of Hanafi school of thought; But the Shafi jurists do not admit the right of revocation for the buyer. They say that this is because of buyer negligence. *Ghaban fahish* affects the contracts and makes it voidable at the option of the party which suffered lesion irrespective of the fact that is a result of fraud or otherwise according to Hanbli school of thought.[44]

1.5) Reasons Of Gharar (Uncertainty)

As we know that there are at least two essential ingredients of a contract; subject matter and consideration. Any contract containing upon uncertainty with regard to either these two ingredients or one of them will be considered Gharar. If one muse on a sale contract, it will appear through examining, that the reasons of Gharar are three namely;

1.5.1) Uncertainty in the existence of things sold

1.5.2) Uncertainty in the possession of Subject Matter

1.5.3) Ignorance (*Jihalat*)

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[43] Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, p. 61; Ibn Taymiyyah Al Qawaid Al Nuraniyyah Al Fiqhiyyah, Damascus, 1951, p. 116.

[44] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, pp. 149, 150.

1.5.1) ***Uncertainty in the existence of things sold***

Uncertainty of the things sold means that the position of the subject matter is not certain, and it is doubtful that the subject matter is available in the position of seller or not. Meaning thereby that there is a possibility that the seller would be able to posses the subject matter and on another hand there is a possibility that the seller could not be able to posses the subject matter. So this type of uncertainty is further divided in order to fully understand various situations of uncertainty regarding the existence of things sold.

A) Sale of a thing which is not in existence
B) Sale of a thing which is not ones property
C) Sale of a thing which is not in possession

A) ***Sale of a thing which is not in existence***

It means, a thing which is sold on the grounds of presumption, that it will become in existence in some future date and time, while it does not exists at the time of its sale .in other words: sale of a thing which is not in existence. Means that a thing which is not in existence or not available or nonexistent at the time of contracting, and the seller are only insuring its delivery to some future date and time, Like a sale of fetus in the womb (the sale of fetus an animal before its birth). It implies that a man would buy unborn offspring of a she camel, known in Islamic law as '*habal al habala*'.

Ibn Umar reported that the people of pre Islamic days used to practice '*habal al habala*' which means that a person would by the unborn offspring of a she camel. ALLAH's messenger Mohammad (S.A.W.S) forbids that transaction.[45] Thus a thing which has not yet come into in existence cannot be sold, but if a nonexistent thing has been sold even though by mutual

[45] Obaid Ullah, Muhammad, Islamic Financial Services, King Abdul Aziz University, Jeddah, Saudi Arabia, p. 31.

consent, the sale is void according to shariah and Islamic principal .e.g. if person "A" sells the unborn calf of his cow to person "B" the sale contract is void.[46]

B) ***Sale of a thing which is not ones property***

Sale of a thing which is not ones property or which is not the property of seller. Means that selling of a thing by a seller which he does not have a time of the sale and intending that he will bring it from somewhere else. This type of sale has been prohibited by the ALLAH's messenger Mohammad (S.A.W.S). It is reported that he said to Hakim Bin Hazam (R.A) "don't sale a thing which is not in your possession". All the jurists are unanimous on the point that the sale of a thing which is not ones property is not legal.[47] Thus the subject of sale must be in the ownership of the seller at the time of sale. It means that what is not own by the seller cannot be sold, if he sells something before acquiring his ownership the sale is void, even though if he insures timely delivery of things that are not in possession or in the hands of seller at the time of contract e.g. If person "A" sells to "B" a car which is presently own by a third person "C" but "A" is hopeful that he will buy it from "C" and will deliver it to "B" subsequently. The sale contract is void on the grounds that the car was not own by "A" at the time of contract or sale.

C) ***Sale of a thing which is not in possession***

Sale of a thing which is not in possession means that someone after buying a thing sells it to another without taking it into his possession. In other words: we can say that the subject of the sale must in the possession of the seller, whether physical or constructive possession, when he sells it to another person. Physical possession means where the possessor has taken the actual physical delivery of the commodity that come into his control and he practically occupy the things purchased or taken the actual possession of things purchased in his custody. Whereas constructive possession means that the possessor has not taken the physical delivery of the commodity purchased, yet the commodity has come into his control, all the rights and liabilities

[46] AIMS, Academy for International Modern Studies, Islamic Rules for Sale (Bai), p. 1

[47] Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, pp. 17, 18

of the purchased commodity are passed into him including the risk of its destruction e.g. if person "A" has purchased a car from "B" and "B" after indentifying the car has placed it in a garage to which person "A" has free access , and "B" has allowed him to take the delivery from that place whenever and wherever he wishes. Thus the risk of the car has passed on to person "A". The car is in the constructive possession of "A" now. If "A" sells the car to a third person "C" without acquiring a physical possession, the contract of sale is valid according to shariah principals.[48] So we can say that the contract of sale of goods or commodity permissible after its physical and actual possession likewise it is also permissible even after its constructive possession.

After analyzing various situations we came to know that a person cannot sell some goods or commodity until and unless;

i) It has come into existence
ii) It is owned by the seller, and
iii) It is in the physical or constructive possession of the seller i.e. possessor

1.5.2) *Uncertainty in the possession of subject matter*

As far the possession of the subject matter is concerned in a contract, *Islam* stresses on that the subject matter (*mahal*) of a contract must be legally owned and must be lawfully in possession of the seller, and also must be in existence at the time of contract. Means if the supplier of goods sold is not able to hand over it to the purchaser. This situation creates uncertainty. Such risk is seen to be present when the seller has no control over the subject matter and this is called counter party risk in conventional parlance. An example is found in tradition narrated by Ibn Abbas: ALLAH's messenger Mohammad (S.A.W.S) said "he who buys food grain should not sell until he has taken possession of it". Ibn Abbas said, I regard everything as a food (so far as this principal is concerned). Furthermore that the purchaser got the possession of the things purchased but if he wants to sell it further he is not able to hand over to the new customer .e.g.

[48] Usmani, Muhammad Ashraf, Meezan Bank's Guide to, Islamic Banking, Darul Ishaat, Karachi, 2002, pp. 78, 79; Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, pp. 18, 19.

someone bought a car and got its possession but it was stolen away, it will not be permissible to sell it further to hand over the car to the next purchaser. There is a possibility that he may get back the car or he may not get it, and the possession of the car in this condition is uncertain.[49] In other words: we can say that the delivery of the sold commodity to the buyer must be known, certain and should not depend on any contingency or a chance e.g. "A" sells his car stolen by some unknown persons and the buyer purchases it on the hope that he will manage to take it back. The sale contract is void.

1.5.3) *Ignorance (Jihalat)*

Generally speaking, Islamic law has persistently emphasized at the time such a transaction is concluded. in other words: no material want of knowledge (*Jihal*) should subset with regard to the exchanged counter values, otherwise Gharar (uncertainty) have a greater chance to infiltrate the transaction. The safe way to avoid Gharar would be to have the exchanged counter values in hand.[50]

Looking towards the essential elements of a valid contract, takes place in Islamic law, when certain conditions are to met mainly, beside of offer and acceptance, subject matter of the contract. consideration/price and the time of period/the limitation of the contract, that things must be delivered in such and such times. The point is that while discussing the uncertainty arising from *Jihalat* (ignorance), these elements will be elaborated. That's why we can say that ignorance (*Jihalat*) is further divided into four kinds.[51]

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[49] Obaid Ullah, Muhammad, Islamic Financial Services, King Abdul Aziz University, Jeddah, Saudi Arabia, p. 30; Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, p. 20.

[50] Salih, Nabil A, Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking, Cambridge University Press, 1986. (Reviewed by, S.M. Hassan Uzzam, Chief Research Department, State Bank of Pakistan, Karachi, JKAU: Islamic Economic, 1991, vol. 3, pp. 115-124)

[51] Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, p. 24.

1.5.4) ***Kinds of Ignorance***

A we stated that ignorance is further divided into four kinds. These kinds are as follows, namely;

A) Ignorance in the contract
B) Ignorance in the subject matter
C) Ignorance in the period of time, and
D) Ignorance in the price

A) ***Ignorance in contract***

The main objective of the parties entering into a contract or agreement is to gain lawful ownership, i.e. the buyer may lawfully benefit from. Therefore Islamic law specifies that the subject matter of a contract must be something which can be physically and legally delivered, because uncertainty about the subject matter will make the contract invalid for the reason of Gharar. Uncertainty in a contract or agreement sometimes emerges from the words expressed by the parties. Like when a person "A "says to "B" that I sold you this thing for rupees one thousand on cash payment and for rupees twelve thousand on differed payment and both the parties "A" and "B" broke up before taking any decision.

A contract or agreement when some conditions are attached, these must be lawful and permitted by Islamic law, i.e. their terms must be made clear, because unclear and ambiguous terms and conditions can affect the legality of a contract or agreement, and the reason for this negative effect is uncertainty (Gharar).

So we can say that the specification of terms and conditions in a contract or agreement in Islamic law is to prevent the contracts and agreements from the involvement of (Gharar) uncertainty, because the attachment of the element of uncertainty (Gharar) will block the accomplishment of contractual justice, which nullify /invalidate the contracts and agreements. Terms and condition are mostly specified by the contracting parities at the time of contract by

expression of their statements. The element of uncertainty (Gharar) which enters into a contract through terms and conditions are limited as follows:

i) Combination of two contracts of sale in one transaction (*Bay' tan fi bay*)
ii) Two contracts in one agreement (*Safaqtan fi safaqa*)
iii) Contract stipulated on another (*Aqd mullaq*)
iv) Token money (*Aqd al Urbon*)

i) *Combination of two contracts of sale in one transaction (Bay' tan fi bay)*

It means to combine two contracts of sale in one transaction. Literally means two sales in one. In other words: two bargains in one. In legal terms, Imam Shafi held that its meaning can be in two forms: Firstly when one says to another "I sold you for two thousand dirham's on credit or one thousand dirham's in cash, you can choose whichever term you wish.[52] Secondly when one says to another "I sold you my slave on a condition that you will sell me your horse". So uncertainty emerged in this agreement for the reason that the completion of the sale of salve remains dependant on the sale of horse, which creates uncertainty.

That's why one contract is dependent on another and the dependency of two contracts on each other, called Gharar (uncertainty).[53] Some scholars argued that the second form is prohibited because of the want of knowledge in the price.[54] But this argument is rejected by many scholars while some offered some compromise by stating that the sale is void, if the parties without having ascertained the price.[55]

ii) *Two Contract in one agreement*

Safaqtan fi safaqa means to combine two contracts in one agreement, as one of them is conditioned upon another, comprises upon uncertainty (Gharar). For example: when person "A" says to "B" that on the condition that you should give me loan, I have sold you my house,

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[52] Sanani, Muhammad Ibn Ismail, Subul Al Salam: Sharh Bulugh Al Maram Min Jami Adillat Al Ahkam, Dar Al Kitab Al Arabi, Beirut, 1987, vol. 3, p. 31; Showkani, Muhammad Ibn Ali Muhammad, Nayl Al Aowtar: Sharh Muntaqa Al Akhbar Min Ahadith Sayyid Al Akhyar, Maktaba Usmaniyya, Egypt, vol. 5, p. 152.
[53] Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, p. 26.
[54] Baghwai, Al Husain Ibn Masaud, Sharh Al Sunnah, Al Maktaba Al Islami, Damascus, vol. 4, p. 143.
[55] Ibid.

is not permissible for the reason of uncertainty. It means that there should not be any stipulation/condition at the time of contract which results in uncertainty. In such a situation, the condition renders the contract null and void.[56]

iii) *Contract Stipulated/conditional on another*

Al Bay al Mullaq means, a contract of sale in which the completion depends on some other event which may possibly occur in future. In other words: when the contracting parties to a contract one or both stipulates, that the conclusion of the contract of sale depends upon the occurrence of some future event, which may possibly to occur, such a contract is illegal. For example: A person says "I will sell you this house for rupees ten thousand on the condition that somebody else sells me his house". So in such a situation the completion of the first sale depends on the occurrence of the second sale, which may or may not happen.[57] Majority of jurists are of the opinion that this contract is not valid.[58] This is because that the element of uncertainty is present in such a contract. So we can say that, the completion of the second sale in future is not certain, that's why the first sale is not certain as it depends on the completion of second sale. Also the time of completion of second sale is some future event, which is not known, that's why the time of the completion of the first sale is unknown. These types of uncertainties may lead to dispute between the parties. Thus this contract *Bay al Mullaq* is invalid. According to Hanafi jurists, it is similar to gambling and *Qimar*.[59]

iv) *Token money "Bai al Urbon"*

Bai al Urbon is a sale in which a certain percentage of money-the price which is paid in advance prior to the delivery of subject matter-will not be refunded to the buyer on a condition, if the buyer changes his mind and cancels the contract.[60] In other words: the buyer deposits a certain amount of money prior to taking the delivery of subject matter on a condition that if the

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[56] Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, p. 30.

[57] Ibn Abidin, Radd Al Mukhtar, vol. 4, p. 307; Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, p. 32.

[58] Ibn Abidin, Radd Al Mukhtar, vol. 4, p. 308; Al Qarafi, Al Furuq, Dar Al Kutub Al Ilimiyyah, Beirut, 1986, vol. 3, pp. 228, 229; Ibn Qudamah, al Mughni, Dar al Fikr, Beirut, 1985, vol. 6, p. 599; Al Nawawi, Al Majmu, vol. 9, p. 34.

[59] Ibn Abidin, Radd Al Mukhtar, vol. 4, p. 324.

[60] Ibn Rushd, Bidayat Al Mujtahid, Vol. 2, p. 172.

agreement is concluded and has been finalized, the deposit will be a portion of the price. But if the buyer revokes the contract, then the deposit will belong to the seller. So we can say that token money is the advance made by buyer to seller, on a condition that, if the contract is concluded, it will be a portion of the price. Otherwise the seller will not return the money, if the buyer revokes the contract.

Majority of jurists are of the opinion that token money is legally invalid.[61] Because of the *Hadith* "The Prophet has prohibited *Bay al Urbon*".[62] While on the other hand, majority of the Hanbali jurists validated *Bay al Urbon*,[63] on the grounds that there is a *Hadith* in which Zaid Bin Asam once asked the Prophet Mohammad (S.A.W.S) about *Bay al Urbon* and the Prophet Mohammad (S.A.W.S) permitted it. That's why some scholars permitted *Bai al Urbon* on the ground that the *Hadith* is weak, although the *Hadith* is mentioned in *Sunan Ibn Majah*. But they considered as weak transmitter that had no merit in transmitting a sound *Hadith*.[64] The Islamic fiqh academy, Jeddah after a long deliberation permitted *Bai al Urbon*. [65] It is because that Umar Bin al Khattab once practiced it with another companion Safwan Bin Umayyah.[66]

B) ***Ignorance in subject matter***

Lake of knowledge in subject matter implies that being of subject matter itself is uncertain or unknown to the contracting parties. So it is a form of ignorance creating uncertainty (Gharar). This uncertainty might give rise to dispute between the parties to a contract. Ignorance or lake of knowledge in the subject matter is of several kinds namely:

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[61] Ibn Rushd, Bidayat Al Mujtahid, Vol. 2, p. 162.

[62] Sanani, Muhammad Ibn Ismail, Subul Al Salam: Sharh Bulugh Al Maram Min Jami Adillat Al Ahkam, Dar Al Kitab Al Arabi, Beirut, 1987, vol. 3, p. 17.

[63] Ibn Qudamah, al Mughni, Dar al Fikr, Beirut, 1985, vol. 4, pp. 176 And 232; Sanani, Muhammad Ibn Ismail, Subul Al Salam: Sharh Bulugh Al Maram Min Jami Adillat Al Ahkam, Dar Al Kitab Al Arabi, Beirut, 1987, vol.3, p. 17.

[64] Showkani, Muhammad Ibn Ali Muhammad, Nayl Al Aowtar: Sharh Muntaqa Al Akhbar Min Ahadith Sayyid Al Akhyar, Maktaba Usmaniyya, Egypt, vol. 5, pp. 153, 154; Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, p. 37.

[65] Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, p. 38.

[66] Showkani, Muhammad Ibn Ali Muhammad, Nayl Al Aowtar: Sharh Muntaqa Al Akhbar Min Ahadith Sayyid Al Akhyar, Maktaba Usmaniyya, Egypt, vol. 5, pp. 151, 153, 162 and 250; Ibn Qudamah, al Mughni, Dar al Fikr, Beirut, 1985, vol. 4, pp. 175, 176.

i) The unknown *Jins* (nature of the subject of matter not known) i.e. *Majhul al Jins*

Lack of knowledge of *Jins* implies that the thing sold is unknown and either the contracting parties or one of them knows nothing what so ever about the subject of matter of the contract. For Example: When the seller says "I sold to you something for ten pounds" the buyer replies "I accepted it".[67] The jurists maintain that this type of ignorance is excessive in contract or worst type of Gharar. That's why all the jurists generally invalidate the contract where the *Jins* of the subject matter is unknown. On the other hand al Sarakhsi from Hanafi school of thought, Al Baji from Maliki School, validates it on the basis of *khiyar al Ruyah*.[68] But this view is dismissed on the fact since one does not know what one is buying.

ii) The unknown *Zat* (subject matter not defined) i.e. *Majhul al Zat*

Lack of knowledge in *Zat* (subject matter not defined) Means either the contracting parties or one of them does not know a thing which is unidentified, makes the contract invalid. For example: the seller says "I sold to you an animal for fifty *dinar*" and the buyer says "I accept it. Both the parties to a contract or one of them does not know about the specification, i.e. sheep camel or cow and etc, makes the contract is invalid.[69] This transaction is not permissible according to shariah for the reason that the animal for sale is not specified.[70]

iii) The unknown *Sifah* (characteristics of the subject matter) i.e. *Majhul al Sifah*

Majhul al Sifah means to sell a particular things, qualities of which are not known. In other words: that knowledge of the characteristics of the subject matter can be obtained through indications, description, and advance inspection through a sample or specimens of the subject matter.[71] Almost all the jurists are in consensus that lack of knowledge of the characteristics of subject matter would invalidate a contract.[72] The specification or the characteristics of the subject matter depends on the situation whether this type of sale can cause quarrel between the parties or not. In case of not defining qualities of the subject matter may cause dispute between

[67] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 5, p. 157.

[68] Al Baji, Al Muntaqa, vol. 4, pp. 287, 288; Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, p. 41.

[69] Ibn Abidin, Radd Al Mukhtar, vol. 4, p. 29.

[70] Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, p. 41.

[71] Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, pp. 404, 405 and 414

[72] Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, p. 172.

the parties, it will become impermissible, and if there is not a possibility of dispute among the parties, the contract would become permissible.[73]

iv) The unknown *Qadar* (quantity of the subject matter) i.e. *Majhul al Miqdar*

Majhul al Miqdar means when the quantity of subject matter is not known to the parties. Want of knowledge in the quantum could happen in a contract, if the seller does not specify the quantity of the subject matter that parties intends to sell. Most of the jurists attribute the reason for this opinion to Gharar.[74]

Uncertainty in the quantum of subject matter also contravenes the *Riba* rules. Therefore the requirement of full knowledge of the quantum of a subject matter is very much emphasized by the jurists, especially in *Ribawi* goods. However this does not mean that the requirement of certainty in the quantum is not applicable to non *Ribawi* goods.

C) ***Ignorance in the period of time***

Ignorance in the period of time means when the delivery of subject matter or the time period of payment is not known. There is a consensus among the jurist that if the delivery of the subject is deferred to some future date, then in such a case the exact date of delivery must be fixed at the time of contract. Failure to a fixed future date of delivery will invalidate the contract because of uncertainty (Gharar).[75] The Hanafi school of thought divides ignorance regarding the time of delivery of subject matter into two categories.

i) Major Ignorance (*Al Jihalah al Mutafahishah*)

It means that when the delivery is made subject to something else, such as the occurrence of a certain events when it is not certain, makes the contract invalid.

[73] Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, pp. 41, 42
[74] Ibn juzy, Qawanin Al Ahkam Al Shariyyah, p. 248
[75] Ibn Abidin, Radd Al Mukhtar, vol. 4, p. 529.

ii) Minor Ignorance (*Al Jihalah al Yasirah*)

It means that when the delivery is made subject to the occurrence of the certain event which has to occur, but its exact time of occurrence is not certain and not known.[76] Generally, if the delivery is made subject to the occurrence of a certain event, where the exact time of such an event is known, the jurist holds that the contract is valid.

D) ***Ignorance in price***

The price can also be subject to a condition and an object of a contract to which the parties agree to accept a thing. It is necessary for the validity of a contract that the price should be mentioned in the session of agreement between the contracting parties. If the price is not mentioned at the time of agreement, makes the agreement void. Generally selling of a thing on which price is written and the parties are unaware of it, the contract is not valid. But if the parties knew the price and agreed upon it, the contract will become valid.

[76] Ibn Abidin, Radd Al Mukhtar, vol. 4, pp. 164, 165; Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 5, p. 157.

Chapter No: 2

Effects of Uncertainty on Contracts

2.0) Effects of uncertainty on contracts

Uncertainty (Gharar) refers to the lake of knowledge of necessary terms of contract, which my lead to dispute and litigation. As for the concept of uncertainty is concerned, we have discussed in previous chapter in a manner which explains the factual position of uncertainty (Gharar), its kind, related terms and its effects on those transactions we do in our daily business. As we know that uncertainty is very much important issue, it's adversely effect many transactions and agreements according to shariah and law. Now it seems appropriate to examine the effects of uncertainty on contracts-regarding commercial and Islamic banking activities, which are necessary for the people in the modern age-in the light of Islamic principles and shariah rules. So the following contracts are to be analyzed and probed in this chapter.

2.1) Mudarabah (Profit sharing) Contract
2.2) Musharakah (Profit and loss sharing) Contract
2.3) Murabahah (Trade with markup or cost plus sale) Contract
2.4) Ijarah (Leasing/lease financing) Contract
2.5) Istisna (purchase order or manufacturing) Contract
2.6) Salam (Advance purchase) Contract

2.1) Mudarabah (Profit Sharing) Contract

Mudarabah means such enterprise in which a party takes up the responsibility of work and other provide the capital.[1] Mudarabah is a form of partnership in which any or a few of the partners do not actively take part in the activities of the business, which may be termed as a dormant partnership in the modern terminology.[2]

Mudarabah is a special kind of partnership, where one partner gives money to another for investing it in a commercial enterprise. The investment comes from the first partner who called the *Rabb ul Mal* while the management and work is an exclusive responsibility of the other who is the called *Mudarib*.[3]

By the definition it is a partnership in profit between capital and efforts, i.e. one party called *Rabb ul mal*, brings capital and the other party called *Mudarib*, contributes his personal efforts. They share the profit in a ratio by mutual agreements, but the loss, if any is borne only by the capital investor, whereas the entrepreneur gets nothing for his efforts.

2.1.1) Types of Mudarabah

It is very much necessary to discuss here that there are two types of Mudarabah as follows:

A) Restricted Mudarabah or *Mudarabah al Muqayyaddah*
Whereby purpose of Mudarabah is specifically mentioned and complied with.

B) Unrestricted Mudarabah or *Mudarabah al Mutlaqah*
In which the *Mudarib* is at freedom to undertake whatever business he deems fit.[4]

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[1] Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, p. 62.

[2] Ansari, Omar Mustafa, Managing Finances-A Shariah Compliant Way, Time Management Club, P.O. Box-12356, DHA, Karachi, 2007, p. 32.

[3] Usmani, Muhammad Taqi, An Introduction to Islamic Finance, Maktaba Maariful Quran, Karachi, 2007, p. 47; Usmani, Muhammad Ashraf, Meezan Bank's Guide to, Islamic Banking, Darul Ishaat, Karachi, 2002, pp. 78, 79; Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, p. 105.

[4] Ansari, Omar Mustafa, Managing Finances-A Shariah Compliant Way, Time Management Club, P.O. Box-12356, DHA, Karachi, 2007, p. 176; Obaid Ullah, Muhammad, Islamic Financial Services, King Abdul Aziz University, Jeddah, Saudi Arabia, pp. 33, 34.

Uncertainty (Gharar) in Mudarabah

According to some jurists that there is the element of uncertainty (Gharar) in the contract of Mudarabah, on the basis that effort of *Mudarib* (entrepreneur) and the wages are uncertain. That it is hiring for unknown efforts or work, because the entrepreneur is not aware of work and also about the profit. According Imam Kasani:

" القياس أن المضاربة لا تجوز , لأنها استئجار باجر مجهول بل معدوم , ونعمل مجهول لكنا تركنا القياس بالكتاب العزيز والسنة والاجماع "[5]

Mudarabah is not permissible due to analogy because it is hiring for unknown wages and nonexistent, but we are practicing on nonexistent, because we gave up analogy for the rulings of *Quran*, *Sunnah* and *Ijma*, it is permissible.

According to Ibn Juzy:

" القرض جائز مستثنى من الغرر والاجارة المجهولة "[6]

Mudarabah (*Qirad*) is permissible an exception to uncertainty and hiring for the unknown wages. According to Imam Sarakhsi, Mudarabah is proved by way of juristic preference (*Istihsan*) not by analogy.[7] It is very much important to point out that the contract of Mudarabah is not permissible only on the basis of *Istihsan* (juristic preference) by leaving the Analogy, but the legitimacy of Mudarabah is established by the Holy *Quran*, the *Sunnah* of prophet Mohammad (S.A.W.S) and *Ijma*. So due to the Holy *Quran*, *Sunnah* and *Ijma*, the Mudarabah contract is permissible, although analogy defies it.

[5] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 76.

[6] Ibn juzy, Qawanin Al Ahkam Al Shariyyah, p. 272

[7] Sarakhsi, Abu Bakar Muhammad Ibn Ahmad, Al Mabsut, Beirut, Dar Al Maarif, 1978, vol.22, p. 19

2.1.2) **Effects of Gharar**

Mudarabah is a form of partnership, in which any or a few f the partners do not actively take part in the business activities, although the rules used in for managing Mudarabah and Musharakah (Partnership) are different. Hence we would prefer to discuss both in separate headings.

As we discussed that in Mudarabah the partners share the profit between the *Rabb ul Mal* (capital provider) and *Mudarib* (entrepreneur). That's why it is important to analyze the effects of uncertainty (Gharar) in respect of capital, profit and period.

A) *Uncertainty (Gharar) in Respect of Capital*

The capital used in Mudarabah must fulfill the following conditions to avoid uncertainty.

i) The amount of capital must be specified
ii) The amount of capital must be in the possession of worker (*Mudarib*). It should be handed over to the agent
iii) The amount of capital must be in cash, i.e. the amount of capital must not in form of loan, debt except on others
iv) The amount of capital must be absolute money

The mentioned four conditions regarding the capital are unanimously holds by all the jurists. Although there is disagreement between the jurists, if we go to in the explanation, so we will discuss it in a bit details.

i) *The amount of capital must be specified*

The amount of invested capital must be specified. According to the earlier jurists, Mudarabah is valid only in cash or money capital (i.e., *Dirham's* and *Dinars*). It also must be known to the

contracting parties, in terms of quality and quantity. Uncertainty and indeterminacy concerning the amount of capital renders the contract invalid.[8]

ii) ***The Amount of Capital must be in the Possession of worker (Mudarib)***

iii) ***The Amount of Capital must be in Cash, not debt and loan on agent (Mudarib)***

The amount of capital must be handed over to the agent (*Mudarib*). The Muslim jurists mentioned it is necessary in Mudarabah, that the working partner (*Mudarib*) must take the possession of capital in order to avoid uncertainty. All the Muslim jurists are unanimous that Mudarabah would be voided, if *Rabb ul Mal* (capital provider) and *Mudarib* (working partner) agreed by way of credit. According to Ibn Qudamah:

" ولا يجوز ان يقال لمن عليه الدين , ضا رب بالدين الذي عليك "[9]

It is not permissible, if the owner (capital provider) asks his debtor, the working partner, to consider the debt owed to him as a Mudarabah investment i.e. capital. But where if the debt or loan on others, then according to Marghenani:

" اذ قال له : اقبض ما لي على فلا ن واعمل به مضاربة جاز "[10]

It is permissible, if the owner (capital provider) says, that collects my debts from creditor (third person) and makes it a capital of Mudarabah. In other words: it is permissible and lawful to start a Mudarabah with a capital lying deposit with someone else.

Keeping in view the both forms; Firstly Mudarabah is impermissible if the capital is loan or debt on the agent (working partner). Secondly Mudarabah is permissible where the capital is debt or loan on others (Third person other than agent).

Imam Al Kasani stated, that in first form it is impermissible because it falls under the *Mudarabah bi al Urud* i.e. Mudarabah with goods, makes the contract invalid, because of the

[8] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 282.

[9] Ibn Qudamah, al Mughni, Dar al Fikr, Beirut, 1985, vol. 7, p. 182.

[10] Marghenani, Burhan Uddin, Al Hidayah: Sharh Bidayah Al Mubtadi, Maktaba imdadiyyah, Multan, Pakistan, vol. 6, p. 166

fluctuation of their price day by day, which lead to uncertainty,[11] where as the second form is concerned, it is permissible, because the *Mudarib* (working partner) collects the capital from the creditor in cash not in goods and makes it the capital of Mudarabah.[12] So we can say, that the amount of capital must not be debt and loan except on others (other than agent), and must be handed over to the working partner to avoid uncertainty.

iv) *The Amount of Capital must be in Absolute Currency*

The capital of Mudarabah must be in absolute money or in financial form. Merchandised form or goods are prohibited. However, Hanafi and Hanbali allow it in the case, financing partner first sells them out and then gives money for business to his working partner. Goods and commodities are not regarded eligible in Mudarabah, because they render the amount of profit uncertain which my lead to dispute and litigation among the parties.[13]

According to Muslim jurists, *Urud* (commodities) and goods ineligible for the formation of Mudarabah capital, because of the fluctuation of their price, which many led to uncertainty?[14] Thus the contract of the Mudarabah in its economic concept is a contractual investment of money/cash free from uncertainty to avoid dispute and litigation among the parties.

[11] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 83; Al Jaziri, Al Fiqh ala Al Madahib Al Arbaah, Cairo, 1935, vol. 3, p. 43; Sarakhsi, Abu Bakar Muhammad Ibn Ahmad, Al Mabsut, Beirut, Dar Al Maarif, 1978, vol. 12, p. 33.

[12] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 83

[13] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, pp. 281, 282.

[14] Al Jaziri, Al Fiqh ala Al Madahib Al Arbaah, Cairo, 1935, vol. 3, p. 43; Ibn Rushd, Bidayat Al Mujtahid, vol. 2, p. 237; Sarakhsi, Abu Bakar Muhammad Ibn Ahmad, Al Mabsut, Beirut, Dar Al Maarif, 1978, vol. 12, p. 33.

B) ***Uncertainty in Respect of Profit***

It is obligatory under Mudarabah contract that the proportion of profit must be settled by the parties, i.e. one quarter, one third or half and nothing left uncertain. It must be known both of the parties to contract, i.e. owner and working partner.[15]

As for the conditions of profit distribution, it is very much easy, can be done in two ways.

i) This is normally done in the form of ratio.

According to Kasani:

" منها اعلام مقدار الربح , لأن المقصود عليه هو الربح وجهالة المعقود عليه توجب فساد العقد "[16]

Both the parties should know the ratio of profit, because of the subject matter, i.e. profit is the subject matter of the contract, and ignorance of subject matter makes the contract invalid.

If the profit is not settled as proportion or in ratio at the time of agreement, but the parties are just agreed on that both will share 50% of the profit. The contract is valid.

" ولو دفع اليه الف درهم مضاربة على أنهما شريكان في الربح ولم يبين مقدار ذلك , فالمضاربة جائزة لان مطلق الشركة يقتضي المساواة "[17]

If the owner (capital provider) provides thousand, 1000/- dirham's as a capital to the working partner for Mudarabah on the condition that both will share equally in profit and they do not fix the proportion or ratio of one's share, so the contract of Mudarabah is valid because they can share the profit in equal proportions.

ii) The profit distribution can also be done jointly, (*Musha*) i.e. division of profit should be on proportional basis. Such as, one half, one third, one fourth. It is, therefore, not permissible to fix a specific amount as profit for one of the

[15] Fatawa Al Hindiyyah, vol. 4, p. 287.
[16] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 85.
[17] Fatawa Al Hindiyyah, vol. 4, p. 388; Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 85.

contracting parties.[18] For example: if the owner says, that I will take Rs.2000/- profit per month, whether the profit is smaller are bigger. So this condition is not valid, rather this makes the contract void, as Ibn Munzir narrated *Ijma* of the jurists on this condition.

" واجمعوا على ابطال القراض الذي يشترط أحدهما أو كلاهما لنفسه دراهم معلومة "[19]

According to Ibn Munzir, as mentioned above, that he narrated the *Ijma* of Jurists, it because of uncertainty, which makes the contract invalid. In such case if the profit is stipulated for investor, then the contract is no longer a contract of Mudarabah, rather it will become an *Ibda*. So it is necessary for the validity of Mudarabah that the parties agree. No particular proportion has been prescribed by the Shariah; rather it has been left to their mutual consent. They can share the profit in equal proportions, and they can also allocate different proportions for the owner (capital provider) and working partner.[20]

That's why we can say, that the parties must fix the profit ratio, if not fixed, then they can share equally, if they do not share equally then the agreement will not be valid due to uncertainty arising from ignorance.

C) *Uncertainty in Respect Period*

It is not necessary/absolutely essential that Mudarabah should be specified by a specific time period. It is possible to hold the contract of Mudarabah for an indefinite period of time. Now the question is arises, whether Mudarabah can be restricted with a period of time, i.e. the fixation of time period is possible for the Mudarabah contract or not? So, two situations in this regard are needs to be discussed:

[18] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, pp. 283, 284.
[19] Ibn Munzir, Al Ijma, p. 95.
[20] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 284.

Firstly: A maximum time period is to be specified for the contract of Mudarabah, that the *Mudarib* (working partner) may easily sale the Mudarabah purchased goods in that time, and in such case *Mudarib* is not allowed to repurchased some other goods.

Secondly: A minimum time limit is to be specified for the purpose, that neither of the parties allowed to disassociating from the contract of Mudarabah.

Keeping in view the first situation; it is not permissible and lawful according to the Maliki jurists, as Ibn Shahs stated:

" ولو ضيق بالتاقيت إلى السنة مثلا , ومنع من التصرف بعدها فهو فاسد , مثل أن يقول : قارضتك سنة "[21]

If the *Rabb ul Mal* for example; fix a time period of one year, and then terminates from work, this is not permissible.

The Hanbali jurists are of the view, as stated by Mardawe:

" وان شرط تاقيت المضاربة فهل تفسد؟ على الروايتين : أحدهما لا تفسد وهو الصحيح من المذهب والرواية الثانية : تفسد..... وإن قال : لا تبع بعد سنة بطل العقد وان قال لا : تبتع بعدها صح "[22]

The Shafi jurists are of the view, as Baghwai stated:

" إذا قال : قارضتك مدة , فله أقوال : أحدهما: أن يقول قارضتك سنة على أنك بعد مضي السنة لا تبيع.....الخ "[23]

The Hanafi are of the view, as Jassas stated:

" هذا ليس بشيء لأنهم يقولون : لو قا ل بعه اليوم ولا تبعه غدا : لم يكن له بيعه غدا وكذالك لو قال : على أن يبيعه اليوم دون غد "[24]

So, we can say in the light of mentioned saying of various jurists, that according to Malikies the first mentioned situation is impermissible and void, but according to Hanafies, Shafies and Hanbalies, it is permissible that the *Rabb ul Mal* (investor/capital provider) can restrict the *Mudarib* (working partner) from buying some other form of goods purchased for Mudarabah,

[21] Ibn Shahs, (Maliki Jurist) Aqd Jawahir Al Samaniyyah, vol. 2, p. 597.
[22] Al Mardawe, (Hanbali Jurist) Al Insaf, vol. 5, p. 430.
[23] Al Tehzeeb Fi Fiq Al Imam Al Shafi, vol. 4, p. 383; Raozatu Al Talibeen, vol. 5, pp. 121, 122.
[24] Al Takhawe, (Abu Jafar Ahmad Bin Muhammad Bin Salamata Al Takhawe) Mukhtasir Ikhtilaf Al Ulama Bi Talkhees Al Jassas, Dar Al Bashahyr Al Islamia, Beirut, 1995, vol. 4, p. 40.

but not restrict him from selling the purchased goods. Keeping in view the second situation, the Muslim jurists holds that it is not permissible in the contract of Mudarabah, if a minimum time limit is specified, neither of the parties are allowed to disassociate itself in that specified time. According to Nawawi, a Shafi Jurist stated:

" ولو قال : قارضتك سنة على أن لا أملك الفسخ قبل انقضاءها فسد "[25]

If *Rabb ul Mal* said, that I entered into Mudarabah contract for one year on the condition that may not disassociate from it; makes the contract invalid.

Imam Kasani, from the Hanafi jurists stated:

" أما صفة هذا العقد فهو أنه عقد غير لازم ولكل واحد منهما أعني رب المال والمضارب الفسخ لكن عند وجود شرطه وهو علم صاحبه "[26]

The contract of Mudarabah is not binding contract, in which the *Rabb ul Mal* and *Mudarib* may disassociate from the contract at any time, but with prior information to each other.

The Ibn Qudamah from Hanbali school of thought stated:

" ولا يصح أن يشترط ما ينافي مقتضي العقد نحو أن يشترط لزوم المضاربة أو لا يعزله مدة بعينها .....أنه يفوت المقصود من الشرط "[27]

It is not valid to put some conditions which may effect the fruits of the contract. For example: the condition to make the Mudarabah binding, and the condition that *Rabb ul Mal* is allowed to terminate the *Mudarib* for such and such period, makes the contract invalid.

But according to Mardawe[28] and Ibn Qudamah[29] from Hanbali jurists, hold that although in the mentioned situation the conditions are invalid but still the Mudarabah contract is valid.

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[25] Raozatu Al Talibeen, vol. 5, p. 122.
[26] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 109.
[27] Ibn Qudamah (Hanbali) Al Kafi, vol. 2, p. 270.
[28] Al Mardawe, Al Insaf, vol. 5, p. 342.
[29] Ibn Qudamah, al Mughni, Dar al Fikr, Beirut, 1985, vol. 5, p. 71.

According to Taqi Usmani:[30]

This unlimited power of the parties to terminate the Mudarabah at their pleasure may create some difficulties in the context of the present circumstances, because most of the commercial enterprises today need time to bring fruits. They also demand constant and complex efforts. Therefore, it may be disastrous to the project, if the *Rabb ul mal* terminates the Mudarabah right in the beginning of the enterprise. Specially, it may bring a severe set-back to the *Mudarib* who will earn nothing despite all his efforts. Therefore, if the parties agree, when entering into the Mudarabah, that no party shall terminate it during a specified period, except in specified circumstances, it does not seem to violate any principle of Shariah, particularly in the light of the famous *Hadith*, already quoted, which say;

" المسلمون علي شروطهم إلا شرطا أحل حراما أو حرم حلالا "

All the conditions agreed upon by the Muslims are upheld, except a condition which allows what is prohibited or prohibits what is lawful.

[30] Usmani, Muhammad Taqi, an Introduction to Islamic Finance, Maktaba Maariful Quran, Karachi, 2007, pp. 52, 53.

2.2) Musharakah (profit and Loss Sharing) Contract Partnership

Musharakah means such enterprise in which two or more persons share with their capital but some of them put their labour also, while others are not.[31]

The word Sharikah is used in literal sense, to mean mixing or mingling. Sharikah or partnership implies an underlying idea of maxing shares in such a way that one of them cannot be distinguished from other. In its technical sense, Sharikah signifies a particular relationship that exists between two contracting parties, although there may be no actual missing or mingling shares.[32]

Partnership Act Defines Partnership as: "A relationship between persons who agree to share the profits of a business carried on by all or any of them acting for all".[33]

Modern economic defines Sharikah as: "Two, three or more people combine, contribute capital and agree to share profits and bear losses in agreed proportions.[34]

2.2.1) Kinds of Sharikah

There are three kinds of Sharikah:

A) *Sharikat al Ibahah*

B) *Sharikat al Milk*

C) *Sharikat al Aqd*

[31] Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, p. 62.

[32] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 241.

[33] The Pakistan Partnership Act, 1932, Section, 34

[34] Modern Economic Theory k.k.d. Chapter: 14, p. 106.

A) ***Sharikat al Ibahah (Common Partnership)***

Means common rights of individuals to gather possess and own free commodities. *Sharikat al Ibahah* defined as, where all the human beings has the joint ownership in permissible things, likewise, woods in jungle, water and grass etc. The rules related and the principle is that, any person may gets first these things, becomes the legal owner, i.e. it is the joint claim of all human beings or persons or it is a joint ownership of all mankind in the permissible things like, woods in jungle, water and grass etc.

It must be noted that nowadays all these three things possessed and controlled by the government. So any person attempt to get possession of any one of them will be liable to punishment.

B) ***Sharikat al Milk (Partnership by Joint Ownership)***

The Mujallah defines *Sharikat al milk* as:

"The existence of a thing in the exclusive joint ownership of two or more persons due to any reason of ownership, or it is the joint claim of two or more persons for a debt that is due from another individual arising from a signal cause".[35]

According to Hanafi School of thoughts, *Sharikat al Milk* is further divided into two kinds:

i) Optional Partnership
ii) Compulsory Partnership

i) Optional Partnership: It is a partnership which becomes effective through the act of parties, e.g. Joint purchase or joint acceptance of gift or a bequest.
ii) Compulsory Partnership: It is a partnership, which becomes effective without any action on the part of the partners, such as inheritance.

[35] Mujallah, Article, 1060; Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 246.

Kasani stated for the mentioned two kinds of *Sharikat al Milk*;

" وشركة الأملاك نوعان نوع يثبت بفعل الشريكين ونوع يثبت بغير فعلهما،أ ما الذي يثبت بفعلهما فنحو إن يشتريا شيا أو يوهب لهما أو يوصي لهما أو يتصدق عليهما فيقبلا فيصير المشتري والمؤهوب والموصي به والمتصدق به مشتركا بينهما شركة ملك واما الذي يثبت بغير فعلهما فالميراث فيكون الموروث مشتركا بينهما شركة ملك "[36]

He (Kasani) says: that *Sharikat al Milk* is of two kinds; one is that which becomes effective through the act of parties, e.g. Joint purchase or joint acceptance of gift or a bequest. While another which becomes effective without any action on the part of the partners, such as inheritance.

C) ***Sharikat al Aqd (Partnership by Contract)***

Sharikat al Aqd is a partnership, which comes into being as a result of agreement between two or more persons in order to share the profit.[37] It means, a partnership effected by a mutual contract. It is also called "joint commercial enterprise".

2.2.2) Kinds of Sharikat al Aqd

Sharikat al Aqd is further divided into three kinds:

A) *Sharikat al Amwal*
B) *Sharikat al Amal*
C) *Sharikat al Wujuh*

[36] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 56.
[37] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 56; Ibn Abidin, Radd Al Mukhtar, vol. 4, p. 299; Mujallah, Article, 139.

A) ***Sharikat al Amwal (Investment Partnership)***

It is an agreement between two or more persons to invest a sum of money in business and share its profit on agreed proportions or according to the capital ratio. In other words, under the Islamic law and jurisprudence, it means a joint enterprise formed for conducting some business in which all partners share the profit according to an agreed ratio, while the lose is share and beard according to the ratio of capital contributed. It is an alternative for the interest based financing with positive effects on the economic system.[38]

B) ***Sharikat al Amal (Work Partnership)***

It is a partnership in which the partners jointly undertake to render some services for their customers in the form of labor and skills, and the fee charged from them is distributed according to an agreed ratio. For example: if two tailors undertake that they will jointly render tailoring services for their customers on the condition that the wedges so earned shall be distributed between the partners equally.[39] This form of partnership is also called *Sharikat al Abdan*, *Sharikat al Sanai*, or *Sharikat al Taqabul*.

According to Maliki and Humbali jurists, for the validity of *Sharikat al Amal*, it is necessary that the partners should have the same profession, but where they are from different profession like, one is tailor and the other is drycleaner, so in this situation the Sharikat between them is not valid. So it is necessary in the view of Maliki and Hanbali school of thought that the

[38] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 250; Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 56; Usmani, Muhammad Taqi, an Introduction to Islamic Finance, Maktaba Maariful Quran, Karachi, 2007, p. 32; Ansari, Omar Mustafa, Managing Finances-A Shariah Compliant Way, Time Management Club, P.O. Box- 12356, DHA, Karachi, 2007, p. 40.

[39] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 56; Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 266; Usmani, Muhammad Taqi, an Introduction to Islamic Finance, Maktaba Maariful Quran, Karachi, 2007, p. 32.

services of both partners labor and skill must be in same kind of work and profession, otherwise Sharikat will be not valid.[40]

C) ***Sharikat al Wujuh (Credit Partnership)***

Sarakhsi defines *Sharikat al Wujuh*, as a partnership of two people without capital upon the condition that they will buy the commodities on credit and will sell on cash. The profit so earned will be distributed between them on agreed ratio.[41]

According to Hanafi and Hanbli jurists, this form of Sharikat is permissible except where as Maliki and Shafi jurist, they are of the view that it is impermissible.[42]

2.2.3) **Kinds of Sharikat al Wujuh**

Sharikat al Wujuh or the credit partnership is of two types according to Hanafi jurist, namely:

i) *Sharikat al Mufawadah* (Credit Partnership)
ii) *Sharikat al Inan* (Credit Partnership)

i) *Sharikat al Mufawadah*, a basic contract of partnership based on *wakalah* and *kafalah* that requires full commitment from the partners and to achieve this purpose tries to maintain equality in the capital, labour, liability and legal capacity and also declares each partners to be a surety for the others it is converted into the *Inan* partnership if such equality is disturbed.

[40] Al Jamal, (Suleiman Bin Umar Mansoor Al Ghajeeli, Known as Al Jamal, Mutawafi 1204. H) Hashiyah Al Jamal Ala Al Sharh Al Minhaj, Beirut, Lebanon, Darul Kutub Al Ilimiyyah, 1996, vol. 5, p. 271.

[41] Sarakhsi, Abu Bakar Muhammad Ibn Ahmad, Al Mabsut, Beirut, Dar Al Maarif, 1978, vol. 2, pp. 152-158; Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 269; Usmani, Muhammad Taqi, an Introduction to Islamic Finance, Maktaba Maariful Quran, Karachi, 2007, p. 32.

[42] Al Qifal, (Saif Uddin Abu Bakar Muhammad Bin Ahmad Al Shahshee Al Qifal) Huliyyat Al Ulama Fi Maarifat Madahib Al Fuqaha, Jordan, Oman, Maktaba Al Risalah Al Haditha, 1988, vol. 5, p. 102.

ii) *Sharikat al Inan*, a basic contract of partnership based on agency in which participants may either are on the basis of wealth or labour or credit worthiness, and in which equality of contribution or legal capacity is not necessary.

So we can say that *Mufawadah* is a partnership in which capital, work and liabilities are shared on equal basis. The partner is an agent and as well as surety for his partner, where as *Inan* is a partnership in which capital and services are shared on proportional basis. The partner is an agent but not a surety of his partner.[43]

2.2.4) Various Kinds of Partnership from the Prospective of Uncertainty

The main kinds of Sharikat (partnership) are already been discussed. Now it seems proper to consider various kinds of partnership from the prospective of uncertainty (Gharar), in order to fully understand the basic contradiction between jurists in respect of uncertainty.

The following kinds of Sharikat will be examined namely;

A) *Sharikat al Amal* (Work Partnership)
B) *Sharikat al Wujuh* (Credit Partnership)
C) *Sharikat al Mufawadah* (Credit Partnership)

A) *Sharikat al Amal (Work Partnership)*

Sharikat al Amal is a partnership in which the partners contribute in the form of labor and skill. It is also called *Sharikat al Abdan*, because the partners perform manual labor. The Shafi[44] and the Zahiri[45] jurists hold that *Sharikat al Amal* is impermissible due to uncertainty.

[43] Haskafi, Al Dur Al Mukhtar Sharh Tanwir Al Absar, vol. 4, p. 306.
[44] Al Ghazali, (Imam Abu Hamid Muhammad Bin Muhammad Bin Muhammad Al Ghazali, Mutawafi 505. H) Al Wasit Fi Al Madhab, Beirut, Lebanon, Darul Al Kutub Al Ilimiyyah, 2001, vol. 2, p. 171.
[45] Ibn Hazam, (Abu Muhammad Ali Bin Ahmad Bin Saeed Bin Hazam, Mutawafi 405. H) Al Muhallah, Egypt, Dar Al Tibaah Al Muniriyyah, vol. 8, p. 122.

Ramli Stated:

" شركة الأبدان.....هي باطلة لما فيها من الغرر والجهل "[46]

Sharikat al Abdan.....is void, due to uncertainty (Gharar) and ignorance (*Jihal*).

Sharbini stated:

" لعدم المال فيها ولما فيها من الغرر إذ لا يدري أن صاحبه يكسب أم لا "[47]

That *Sharikat al Amal* is impermissible due to non capital and there is an uncertainty, whether other partners will earn something or not. So that's why Shafi and Zahiri hold the view of impermissibility of *Sharikat al Amal* due to uncertainty and ignorance. According to Hanafi, maliki and Hanbli jurists, this partnership is permissible as holy *Quran* stated:

" واعلموا أ نما غنمتم من شي فأن لله خمسه "[48]

"And know that out of all the booty that ye may acquire (in war); a fifth share is assigned to ALLAH".

" فجعل الغانمين شركاء فيما غنموا بقتالهم ، وهي شركة الأبدان "[49]

The forces have the share in the booty due to fighting (against non Muslims) i.e. (in war), this is called *Sharikat al Abdan*. It is also narrated from Abdullah Bin Masaud (R.A) that in the booty (which is acquired in war) it seems the validity of *Sharikat al Abdan*.[50]

The above mentioned verse of *Quran* and narration of Ibn Masaud shows the permissibility of *Sharikat al Abdan*. Although from the narration of Ibn Masaud, the Hanafi jurists are not deriving the rules of permissibility regarding *Sharikat al Abdan*. Also the Shafi jurists are not taking this narration for Sharikat.

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[46] Ramli, Nihayat Al Muhtaj, vol. 5, p. 73.
[47] Sharbini, Al Iqnah, vol. 2, p. 317.
[48] Al Quran, 10:41.
[49] Al Qarafi, (Shahab Uddin Ahmad Bin Idrees Al Qarafi) Al Zakhirah, Beirut, Darul Gharb Al Islami, 1994, vol. 8, p. 33.
[50] Ibn Al Humam, Fatah Al Qadir, Quetta, Maktaba Rashidiyyah, 1998, vol. 5, p. 409.

Q- Whether for the partners is it necessary, they must be from same profession?

Here this Question is arises that whether it is necessary for the partners, that they shall render the same services, i.e. same kind or nature of labour and skill. All those who hold the permissibility of *Sharikat al Abdan* differ on this point. According to Hanafi school of thought, it is not necessary in *Sharikat al Abdan* that the partners must be from same profession, like tailor and dry cleaner may enter into working partnership. The Maliki and Hanbli school of thought hold that it is necessary for the partners; they must be from same profession, like, tailor and tailor, or dry cleaner and dry cleaner. That's why tailor may not enter into a working partnership with dry cleaner according to them, and if they enter into a contract, the contract is void, because in this situation uncertainty (Gharar) is arises.[51] Furthermore the Maliki jurists are of the opinion that the partner must work together in one place.[52]

B) ***Sharikat al Wujuh (Credit Partnership)***

Sharikat al Wujuh is a partnership of two people without capital upon the condition that they will buy the commodities on credit and with sell on cash/spot. The profit so earned will be distributed between them on agreed ratio. Maliki and Shafi jurists are of the view that there is uncertainty (Gharar) in *Sharikat al Wujuh*. That's why it is impermissible.

Ibn Rushd, a Maliki jurists stated:

" إنها شركة بغير مال ولا صناعة ،..... وذلك غرر ومخاطرة "[53]

Sharikat al Wujuh is a partnership without capital and without manufacturing on the condition that the partners will get half profit in each other purchased commodity, so this is uncertainty (Gharar) and risk.

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[51] Al Khalid, (Khalil Bin Ishaq Bin Musa Al Maliki) Mukhtasir Al khalil Maa Sharh Minh Al Jalil, Beirut, Darul Fikr, vol. 3, p. 306

[52] Qurtabi, (Abu Umar Yousaf Bin Abdulla Bin Muhammad Bin Abdullah Al Qurtabi) Al Kafi, Riyadh, Maktaba Al Riyadh, 1980, vol. 2, p. 785.

[53] Ibn Rushd Al Jed, Al Muqaddimat Al Mumahhadat, vol. 3, p. 39.

Tasoli stated:

" هي باطلة لأنها إجارة بمجهول وتسميتها شركة مجاز "[54]

"*Sharikat al Wujuh*" is void and impermissible because this is a lease on the uncertain/unknown (wages) and to term as *Sharikat* is ultra virus. In other words: the contact of credit partnership (*Sharikat al Wujuh*) is voided because it is *Ijarah* on uncertain (wages) and to declare it as *Sharikat* is not factual.

Ramli a Shafi jurist stated:

" والكل باطل إذ ليس بينهما مال مشترك فكل من إشتري شيا فهو له ، عليه خسره وله ربحه "[55]

That all the kinds (three kinds according to Shafi) of *Sharikat al Wujuh* are void, because there is no combine capital of partners, so any one who buy something will bear the loss and will get the profit.

According to Hanafi and Hanbali school of thought, they are of the view that *Sharikat al Wujuh* is permissible; because this is a contract of surety ship and an agency. So for the liability the partners can share the profit.

Ibn Nujaim stated:

" استحقاق الربح في الشركة الوجوه بالضمان "[56]

Entitlement to profit in *Sharikat al Wujuh* based upon liability.

Kasani stated:

" إن الناس يتعاملون بهذا النوعين في سائر الأعصار من غير إنكار عليهم من أحد وقال عليه الصلاة والسلام : لا يجتمع أمتي على الضلالة "[57]

[54] Tasoli, (Abu Al Hassan Ali Bin Abdi Salaam al Tasoli) Al Bahjah Fi Sharh Al Tukhfa, Beirut, Lebanon, Darul Maarifah, 1977, vol. 2, p. 211.

[55] Ramli, Nihayat Al Muhtaj, vol. 5, p. 3; Shiraazi, Abu Ishaq, Al Muhadhab, Cairo, vol. 1, p. 346.

[56] Ibn Nujaim, Zain Al Din, Al Bahr Al Raiq: Sarah Kanz Al Daqaiq, Cairo, 1893, vol. 5, p. 306.

[57] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 58.

The people (human beings or mankind) are practicing *Sharikat al Wujuh* and *Sharikat al Abdan* in each period of time (each era) without any objection and rejection from any one jurists/*fuqaha* and Prophet Mohammad (S.A.W.S) said: My *Ummah* will not hold consensus on a strayed path (wrong path).

We can say, that without denial and rejection from anyone of the jurists, *Sharikat al Wujuh* (credit partnership) as per mentioned narration of the Holy Prophet Mohammad (S.A.W.S), is lawful, because it is a custom prevailing from so many centuries, that people have adopted this contract. In other words: *Tamul* (practice) and custom is the argument of its validity.

C) *Sharikat al Mufawadah (Credit Partnership)*

Sharikat al Mufawadah is a contract of partnership based on *wakalah* (agency) and *kafalah* (surety ship), that requires full commitment from the partners to achieve the purpose with complete equality in the capital, labour, liability, legal capacity and also declares each partner to be a surety for other.

According to Hanafi and Maliki jurists, it is a valid contract, where as Imam Shafi rejecting *Mufawadah* partnership, says:

" لا أعلم في الدنيا شيا باطلا إن لم تكن شركة المفاوضة باطلة..... ولاأعرف القمار إلا في هذا "[58]

Sharikat al Mufawadah is void, and I don't know of anything else in this world that can be declared void, if it is not the *Mufawadah* partnership.....and I don't know about gambling in any other contract that engages except in this partnership, i.e. *Sharikat al Mufawadah*.

Nawawi stated: the Prophet Mohammad (S.A.W.S) prohibited uncertainty (Gharar) and this is (uncertainty) Gharar, i.e. *Sharikat al Mufawadah*, is partnership consist on Gharar and the Holy Prophet Mohammad (S.A.W.S) prohibited uncertainty.[59]

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[58] Shafi, (Muhammad Bin Idrees Al Shafi, Mutawafi 204. H) Al Ummh, Beirut, Dar Al Qutaiba, 1996, vol. 7, p. 289; Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 261

[59] Nawawi, Al Majmu, Beirut, Dar Al Fikr; Shafi, (Muhammad Bin Idrees Al Shafi, Mutawafi 204 H) Al Ummh, Beirut, Dar Al Qutaiba, 1996, vol. 7, p. 289; Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 261; Ramli, Nihayat Al Muhtaj, vol. 5, p. 3.

2.2.5) **Effects of Gharar (uncertainty)**

After discussing various kinds of *Sharikat* (Partnership) from the prospective of uncertainty (Gharar) and also the view points of Muslim jurists, while analyzing these kinds, now we want to discuss the effects of uncertainty (Gharar) on *Sharikat* (Partnership). So it seems proper to analyze the *Sharikat* (partnership) from three important aspects, namely; capital, profit and period of time, as these three aspects needs to be discussed in respect of Gharar (uncertainty).

A) *Uncertainty in Respect of Capital*

It is very much necessary for a valid partnership, to avoid the element of Gharar (uncertainty), that the amount of capital should be known and specified, and also the capital should not in the form of loan on others, otherwise ignorance (*Jihala*) and uncertainty (Gharar) will contain, and emerge.

Kasani the Hanafi jurist says:

" منها أن يكون رأس مال الشركة عينا حاضرا لا دينا ولا مالا غائبا فإن كان غائبا لا تجوز عنانا كانت أو مفاوضة لأن المقصود من الشركة الربح وذلك بواسطة التصرف ولا يمكن في الدين ولا في المال الغائب فلايحصل المقصود "[60]

Among these conditions is the availability of the wealth (capital) in the form of an *ayn* (Goods or specific things) ascertained commodity. It should neither be a receivable *dayn* (Receivables) nor absent wealth, otherwise will the partnership not be permissible, either as *Inan* or as *Mufawadah*. The reason is that the purpose of partnership is profit and this is achievable through transactions in the capital. Such transactions are neither possible in a *dayn* nor in the wealth that is absent. The purpose cannot be achieved.

That's why the capital of the *Sharikat* must be an ascertained commodity and not a wealth that is absent, but if the capital is absent at the time of contract, does not invalidate the partnership as long as the capital is in hand when joint purchase is made, as Kasani says: The presence

[60] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 60; Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 251.

(availability of the goods), however, it is stipulated at the time of the transaction and not at the time of the contract.[61] According to Imam Malik, the capital should be present at the time of contract is concluded.[62]

B) ***Uncertainty in Respect of Profit***

It is compulsory for the validity of the partnership (*Sharikah*) that the profit of every party should be fixed proportionally at the time of agreement. If the profit is not fixed the agreement will not be valid due to uncertainty arising from ignorance, but if they agreed on the condition that both will share the profit equally, the contract or agreement is valid, even if they have not fixed their share in proportions.

Kasani says:

" ولودفع إليه ألف درهم على أنهما يشتركان في الربح ولم يبين مقدار الربح جاز ذلك والربح بينهما نصفان لأن الشركة تقتضي المساواة "[63]

If one partner provides Rs.16000/- to another on the condition that both will share in profit and they not fix the ratio of profit, the agreement is valid, and the profit will be distributed equally between them, because purpose of *Sharikah* (partnership) is equality.

We can say that for a valid contract or agreement, it is necessary that the profit of every party should be fixed proportionally at the time of agreement and if not fixed by them, and agreed on the condition that both will share equally, so in such case the profit will be distributed between the partner equally, otherwise the agreement will not be valid due to uncertainty arising from *Jihala* (ignorance).

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[61] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 60; Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 251.

[62] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 251; Ibn Qudamah, al Mughni, Dar al Fikr, Beirut, 1985, vol. 7, p. 175.

[63] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 85; Sarakhsi, Abu Bakar Muhammad Ibn Ahmad, Al Mabsut, Beirut, Dar Al Maarif, 1978, vol. 22, p. 54.

Q- Whether it is permissible to fix non-proportionate profit for a party?

It is not permissible in the partnership to fix non-proportionate profit for one of the parties. For example: if a party says to another that I pay you rupees one lac on the condition that you pay me one thousand per month and you can get the rest of profit, so it is impermissible due to uncertainty (Gharar). Because there is a possibility that the total may not exceed to the fixed profit or it may less than the fixed or there may be a loss, in such situation one can get his profit while the other may in loss and also in case of loss he shall pay the fixed profit even though he will get nothing, so this is results uncertainty (Gharar) in respect of other party, which makes the agreement invalid.

Marghenani says:

" ولاتجوز الشركة إذا شرط لأحدهما دراهم مسماة من الربح لأنه شرط يوجب إنقطاع الشركة فعساه لا يخرج إلا قدر المسمى لأحدهما ونظيره في المزارعة "[64]

It is not permissible in the *Sharikah* (partnership) to fix non proportionate profit for one of the parties, such condition terminates the *Sharikah* (partnership), because there is a possibility that the total profit may not exceed to the fixed profit of one party. And such situation is also in Muzara'at* (economic transaction, or share cropping contract).

Ibn Al Humam says:

" اشتراط لأحدهما يخرج العقد عن الشركة إلى قرض أو بضاعة "[65]

Fixation of profit for one of the parties converts the contract of partnership into loan/debt or *Buda'ah* (means goods given to another for trading without sharing profits or giving wages).

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[64] Marghenani, Burhan Uddin, Al Hidayah: Sharh Bidayah Al Mubtadi, Chapter Irregular Partnership, Maktaba imdadiyyah, Multan, Pakistan, vol. 4, p. 413; Samdani, Muhammad Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, pp. 67, 68.

*Muzara'at: "Share cropping contract, technically; contract for the cultivation of land between the owner of the land and the worker with the condition of sharing the production of the land".

[65] Ibn Al Humam, Fatah Al Qadir, Quetta, Maktaba Rashidiyyah, 1998, vol. 5, p. 402; Ibn Abidin, Radd Al Mukhtar, vol. 5, p. 250; Ibn Qudamah, al Mughni, Dar al Fikr, Beirut, 1985, vol. 7, p. 145.

C) ***Uncertainty in Respect of Period***

As for the uncertainty in respect of period is concerned, it is not necessary in Islamic law that the *Sharikat* (partnership) should be specified for a specific time period, rather it is permissible for an unspecified and indefinite period of time, because the ignorance of period does not invalidate the contract of partnership fort the reason that the parties are not bound to sustain the contract of partnership. They may detach themselves from it at any time, on the condition it may not cause effect the other party or it may not cause damages to other party.[66]

Modern scholar also of the view, it is not necessary in Islamic jurisprudence that *Sharikat* (partnership) should be specified by a specific period of time, like Al Khayyat says:

" وليست جهالة الأجل أو وسائل التوثيق بالجهالة المفضية إلى النزاع في الشركة ، إذ يجوز لأحد الشركاء فسخ الشركة إذا لم يؤد إلى ضرر في الشركة لأنهما من العقود الجائزة "[67]

Ignorance of period in partnership may not lead to dispute, because it is permissible for each and every party to detach itself from the contract at any time, and to terminate the partnership on the condition that it may not effect the partnership, because the contract of partnership is not binding. (The partnership is non- binding contract).

Generally the partnership does not require a time limit, and also there is no bar on the parties if they want to fix a time period for the partnership. Now the question is arises, whether in the modern age where huge companies doing partnership, May specify a specific time period or not? Whether it is permissible or not? To answer that, the following two situations are possible:

i) A maximum limit is to be specified by the end of which the contract of partnership ceases to Exist.
ii) A minimum time limit is to be specified for the purpose that neither of the parties is allowed to disassociate itself.

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[66] Ibn Abidin, Radd Al Mukhtar, vol. 4, p. 312; Samdani, Muhammad Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, pp. 64, 65.

[67] Al Khayyat, (Abdul Aziz Al Khayyat, Dean Kulliyyah Al Shariah, Jordan) Al Sharikat Fi Shariah Al Islamiyyah wa Al Qanoon Al Wade, Beirut, 1983, vol. 1, p. 325; Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 6, p. 77.

As for as the first situation is concerned, the prominent view of Hanafi school of thought, and also adopted by Hanbali jurists, that partnership is to be specified for a Maximum time period.[68] While the Maliki and Shafi holds that it is impermissible.[69]

As for as the second situation is concerned, the Hanafi, Maliki and Shafi school of thought seem silent on this situation. However, Al Mardawe from Hanbali school of thought has two views, in this regard, the prominent one that the validity of the second situation, because it does not makes the contract invalid.[70]

Keeping in view the modern age where large business companies and big financial institutions especially Islàmic banking system gained popularity in the whole world, it seems proper to take the view of permissibility in both situation, because it meets the needs of the modern business. Therefore the view of permissibility in both situations can be acted upon.

[68] Ibn Abidin, Radd Al Mukhtar, vol. 4, p. 312.
[69] Takmilat Al Majmu Sharh Al Muhadhab, vol. 14, p. 200.
[70] Al Mardawe, Al Insaf, vol. 5, p. 423.

2.3) Murabahah (trade with mark up or cost plus sale) contract

Murabahah is one of the most commonly used modes of financing by Islamic Banking and financial institution. Murabahah is a contract, where seller expressly mentions the cost of the sold commodity he has incurred, and sells it to another person; by adding some profit thereon. Thus Murabahah is a sale of a commodity for cash/deferred price.[71]

Murabahah is basically a trust sale in which the buyer depends and relies upon the integrity of the purchaser as regards the cost he mentions to the buyer, because the seller discloses the cost of sold commodity plus margin to the buyer. For example: "A" purchased the commodity for hundred rupees, if "B" wants to buy, "A" will charge ten rupees as profit over and above the original price. That's why Murabahah, means sale of commodity with charging the original price plus profit.[72]

In Islamic law of jurisprudence Murabahah means;

" نقل ما ملكه بالعقد الأول بالثمن الأول مع زيادة ربح "[73]

Sale of goods acquired lawfully and having legal possession at a price covering the purchase price plus profit, or in other words: it is a transfer of commodity/goods having its legal possession through a contract at the first price in addition of some profit.

2.3.1) Effects of Uncertainty

As we know that in Murabahah the uncertainty is of serious nature, than other contracts. We discussed in this very chapter, the uncertainty in respect of capital, period and price, but in Murabahah the uncertainty in respect of ignorance needs to be discussed, as it is not discussed

[71] Usmani, Muhammad Ashraf, Meezan Bank's Guide to, Islamic Banking, Darul Ishaat, Karachi, 2002, p. 125.
[72] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 214.
[73] Al Mawasuah Al Fiqhiyyah, Kuwait, 1986, vol. 36, p. 318; Ibn Abidin, Radd Al Mukhtar, vol. 5, p. 132

in those contracts. It is because that in Murabahah it is necessary for the owner/seller to disclose the original price and also the fixed amount of profit to the buyer, where as in other contract it is not necessary. That's why the jurists put some extra conditions for the validity of Murabahah. These conditions are as follows:[74]

2.3.2) Conditions of Murabahah

A) The first and foremost condition is that the validity of first contract. Means the first contract should be a valid contract. If the first contract is not valid *fasid* i.e. irregular, then the second sale is not permitted on the basis of Murabahah. Because Murabahah is resale of a thing with the addition of profit, and the irregular sale is not allowed with the stated price. Meaning thereby, that the validity of first contract is very much necessary in order to avoid Gharar (uncertainty). Because if the first contract is not valid then in such situation the price of first contract may lead to a kind of ignorance (*Jihalah*) which is Gharar (uncertainty).

Kasani says:

" منها أن يكون العقد الأول صحيحا ، فإن كان فاسدا لم يجز بيع المرابحة ، لأن المرابحة بيع بالثمن الأول مع زيادة ربح "[75]

Among these conditions is the validity of first contract, if the first contract is *fasid* (irregular), the Murabahah is impermissible, because the Murabahah is a sale at original price/cost plus profit in addition.

B) The second condition is the disclosure of original price. It is necessary for the validity of Murabahah that the second purchaser should have knowledge of the original price. Meaning thereby that seller should disclose the price of commodity. If the price is not disclosed in the *Majlis* of contract (session of contract), and the contracting parties leave

[74] Zuhayli, Al Fiqh Al Islami wa Adillatuhu, vol. 4, pp. 704-706; Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 217.

[75] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 5, p. 224; Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 217.

the *Majlis* (contractual place)-before disclosing the price of commodity-the contract will be invalid.[76]

C) The third condition is the fixation of profit. It is necessary that the profit so added to the original cost price should be mentioned in the contract.

The profit can be fixed in two ways:

i) The profit can be fixed in margin. For example: if the seller says to the (second purchaser) buyer that I will charge you 10/- Rupees as a profit over and above the original price which is rupees hundred.

ii) The profit can also be fixed in percentage. For example: if the seller says to the buyer that I will charge you 10% percent or 15% percent of the cost which is rupees thousand, original price. But if the seller fixed the profit whether in Margin or in percentage without disclosing the original price, this will lead to *Jihalah* (ignorance) which is Gharar (uncertainty) and this kind of ignorance in respect of original price makes the contract impressible.[77]

D) The fourth condition is the ascertainment of price. Means that for the validity of Murabahah it is necessary that the exact cost price must be ascertained. If the exact cost is not known, the commodity cannot be sold on Murabahah basis. Means that it is must not something unique, non fungible article like animal etc, because such object cannot serve as the basis for calculating Murabahah price.

So it must be noted that the price must be in *Mithli* and not in *Qimi*, i.e. the price must be in something which is easily available in the market and not in such thing which is not available in the market.

In Islamic law of jurisprudence *Mithli* means; a thing which is easily available in the market in the same shape and form such as grain and rice, i.e. the commodities if destroyed can be compensated by the similar commodities in quality and quantity. For example: wheat, rice etc.

[76] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 218; Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 5, p. 224.

[77] Al Mawasuah Al Fiqhiyyah, Kuwait, 1986, vol. 36, p. 336.

If 1000 thousand kilograms of rice or wheat are destroyed, they can easily be replaced by another 1000 thousand kilograms of wheat or rice of same quality.

Qimi means such thing which is not available in the market in the same form and shape, such as animal etc, i.e. the commodities which cannot be compensated by the similar commodities, like animals etc.

That's why for the validity of Murabahah contract, it is necessary that the price/capital must be ascertained and that is only when the price in something Fungible article and not unique, non Fungible. because if a person buy a "Fan" for his "Sheep" as a price, and then want to sell the "Fan" on the basis of Murabahah contract. Now the question is arising that on what basis he will calculate the price. So in such case the price of "Sheep" may defer from the price of "Fan", which is ignorance in price of selling commodity. Whereas for Murabahah the ascertainment of price is very much necessary and such kind of ignorance (*Jihalat*) is unbearable in the contract of Murabahah.[78]

2.3.3) **Murabahah Financing**

Murabahah is a kind of sale contract. Most of the Islamic Banks and Financial Institutions are using Murabahah as an Islamic mode of financing. As we know that most of financing operation of the Islamic Banks and Financial institutions are based on Murabahah. That is why Murabahah in the modern age is one of the famous methods in banking operations.

Nowadays Islamic Banks using Murabahah as a mode of finance for the needs of the people. This is known and termed as " المرابحة للآمر بالشراء ". The discussion in this regard is very much lengthy, but we will only focus on the ways that Islamic Banks using for the Murabahah procedure.

[78] Marghenani, Burhan Uddin, Al Hidayah: Sharh Bidayah Al Mubtadi, Maktaba imdadiyyah, Multan, Pakistan, vol. 5, p. 108.

In Islamic Banks Murabahah is practiced, therefore the following procedure is adopted:

Firstly: The client approaches the bank with the request to purchase certain goods by providing the description of the required goods. The bank and the client signed an overall agreement where the bank promises to sell and the client promises to buy, for reason that if the bank buy the required commodity for the client from the market, the client due to the agreement has to buy from the bank and to fulfill his promise.

Secondly: The bank and client when agrees, normally bank has to purchase the specific commodity is required by the client. In such case the bank appoints the client as its agent for purchasing the commodity on its behalf, and an agreement of agency is signed by both the parties, i.e. bank and client.

Thirdly: After signing the agreement of agency. The client as an agent of the bank purchases the commodity for the bank and takes its possession as an agent of the bank.

Fourthly: After taking possession, the client informs the bank that he has purchased the commodity on its behalf, and simultaneously makes an offer to purchase it from the bank.

Fifthly: The bank accepts the offer of client and the sale contract is concluded, whereby the ownership as well as risk of the commodity is transferred to the client.

All these five stages are necessary for a valid Murabahah. In the Islamic Law jurisprudence, in case of necessity and need bank may asks the client to give an "undertaking for purchase" the commodity, and this undertaking or promise is mandatory morally as well as legally. The promiser has to fulfill his promise, because such promise is building.[79]

As for the agency of the client is concerned, it is lawful and as well legal in the eyes of Islamic law, that a bank can appoint his client as an agent. It is preferable if the bank directly purchases the commodity from the supplier as required by the client, in such case, the bank will enters

[79] Al Jassas, Ahkam Al Quran, vol. 3, p. 20; Sharh Al Bukhari, Kitab Al Iman; Al Ghazali Ahyah Uloom Al Din, vol. 3, p. 133; Qurtabi, Al Jamiah lil Ahkam Al Quran, vol. 18, p. 29; Islamic Fiqh Academy, Resolution No. 2 & 3, Academy Journal No. 5, Vol. 2, p. 1509.

into a Murabahah contract with his client, which includes mark up over the cost of commodity and also the schedule of payments.

As we know that Islamic Banks appoints his client as an agent for the purpose that the Bank may not fulfill the requirements of the client and the client may reject the purchased commodity. In such a case if the client reject the commodity and refuses to buy, the Bank will suffer a heavy monetary lose. So to avoid this, with the mutual agreement of both parties, the client can be appointed as an agent to purchase the required commodity on behalf of Islamic Bank. Since the appointment of the client as an agent to purchase the commodity does not go against any principle of Shariah, so there is no reason why-client as an agent-should be regarded impermissible and against of the shariah principles.

As for the possession of the commodity is concerned, if the client appointed as an agent by the bank, purchases the commodity on its behalf, then he is supposed to take the possession of the commodity and will inform the bank. According to Islamic law the possession taken by an agent is considered as possession taken by the principle, i.e. which is bank. Hence in such case if the commodity destroyed without any negligence of the client-agent- the bank as a principle have to bear the loss and the agent shall not be responsible. So the risk of the commodity being destroyed lies with the bank until the commodity is sold to the client and after taking possession of such commodity.

2.4) Salam (Advance Purchase) Contract

Salam refers to advance payment for goods which are to be delivered later. In Arabic the word Salam means to advance; a contract where by the purchaser pays the price of goods in advance and the delivery of subject matter /goods is postponed to some specific date and time in future. Thus Salam is a sale in which advance payment is made to the seller *Muslam ilaih* for deferred supply of goods.

The history shows that Salam contract was also Prevalent before the advent of the Holy Prophet Mohammad (S.A.W.S) perhaps with different nomenclature and ways. When the Prophet Mohammad (S.A.W.S) migrated to the city of Medina, His companions and followers brought this mode of sale to His notice for seeking His guidance and Shariah rulings regarding such contract. The Prophet Mohammad (S.A.W.S) termed it as Salam and allowed it to them with some conditions (Which will be discussed at the end of this chapter and with details in the last chapter).

In the contract of Salam the buyer known as *Rabb al Salam* the seller is called *Muslam ilaih* the purchased commodity is known as *Muslam fi* and the cash price termed as *Ra's al mal*.[80]

As per Shariah ruling and principle the contract of Salam is seems to be prohibited, as the sale of a commodity which is not in the possession of the seller, is unlawful. This is what the Prophet Mohammad (S.A.W.S) is stated to have laid down as a general rule regarding sale contracts. As we know the Salam is an agreement between the parties on the condition that the seller will provide to the buyer certain goods/commodity as required by the buyer with such and such qualities, quantities at an agreed price, on some date in future, where by the seller receives the price at the time of agreement.

This kind of sale is consisting upon Gharar, for the reason that the things sold is not being handed over to the buyer/purchaser at the time of agreement. It is not certain and unknown that

[80] Marghenani, Burhan Uddin, Al Hidayah: Sharh Bidayah Al Mubtadi, Maktaba imdadiyyah, Multan, Pakistan, vol. 5, p. 222.

whether the seller will be able to provide that thing on some future date or not? However the contract of Salam has got validation on the basis of human needs. Thus the practiced of Salam is legalized as an exception to the general ruling.

The legality of Salam contract is derivable from the verse of *Quran* and various sayings of Prophet Mohammad (S.A.W.S) as the jurists hold its permissibility,[81] except Saeed Bin al Musaib holds the view of impermissibility of Salam[82] by taking the general rule and sayings of Prophet Mohammad (S.A.W.S) "ماليس عند الإنسان" The prohibition of something not in the possession of seller is impermissible and the Prophet Mohammad (S.A.W.S) not allowed a sale of commodity which is not in the possession of seller, is unlawful.[83]

The four jurists are of the opinion that as per analogy and general ruling the contract of Salam is not permissible but due to the *Quranic* verse and sayings of Prophet Mohammad (S.A.W.S), it is permissible as an exception to a general rule for the human needs. The Holy *Quran* stated:

" يأيها الذين آمنوا إذا تداينتم بدين إلى أجل مسمى فاكتبوه "[84]

"O ye believe; when ye contract a debt for a fixed term, record it in writing". Ibn Abbas the companion of Prophet Mohammad (S.A.W.S) says:

" أشهد أن الله تعالى أحل السلف المضمون وأنزل فيها أطول آية في كتابه وقرء الآية , يأيها الذين آمنوا إذا تداينتم بدين إلى أجل مسمى فاكتبوه "[85]

"Oh, I am the witness that ALLAH Almighty permitted Salam with liability, and revealed in HIS book a very lengthy verse (in the context of Salam) and then He recites the verse of *Al Baqara*: "O ye believe; when ye contract a debt for a fixed term, record it in writing". So we can say that Ibn Abbas from the mentioned verse of Holy *Quran*, deriving the rule of

[81] Marghenani, Burhan Uddin, Al Hidayah: Sharh Bidayah Al Mubtadi, Maktaba imdadiyyah, Multan, Pakistan, vol. 5, p. 222.

[82] Shafi, (Muhammad Bin Idrees Al Shafi, Mutawafi 204. H) Al Ummh, Beirut, Dar Al Qutaiba, 1996, vol. 6, p. 284; Ibn Qudamah, al Mughni, Dar al Fikr, Beirut, 1985, vol. 6, p. 385.

[83] . Showkani, Muhammad Ibn Ali Muhammad, Nayl Al Aowtar: Sharh Muntaqa Al Akhbar Min Ahadith Sayyid Al Akhyar, Maktaba Usmaniyya, Egypt, vol. 5, p 192

[84] Al Quran, 2:282.

[85] Al Nesaboori, (Al Hafiz Abu Abdullah Muhammad Bin Abdullah Al Hakim Al Nesaboori) Al Mustadrak Ala Al Sahihaan, Beirut, 1991, vol. 2, p. 314.

permissibility for the contract of Salam. In other words: according to Ibn Abbas the legality of Salam derivable from the *Quranic* verse of *Al Baqara.*

The famous *Hadith* in this context is the one narrated by Ibn Abbas in which The Holy Prophet Mohammad (S.A.W.S) said:

" من أسلف في شيئ فليسلف في كيل معلوم ، ووزن معلوم إلى أجل معلوم "[86]

"Whoever whishes enter into a Salam contract, he must effect the Salam according to the specified measure and the specified weight and the specified date/time of delivery".

Lastly, the validity of Salam contract is due to the requirements of the human beings and their needs especially for the growers and traders. The said contract of Salam is practiced before the advent of Prophet Mohammad (S.A.W.S) and also continued during the life time as qualified by the Holy Messenger Mohammad (S.A.W.S).

The jurists are also unanimously treated it to be a permissible mode of business, especially for traders to avoid them from *Riba.*[87] Taqi Usmani has stated: "that the traders of Arabia used to export goods to other places and to import some other to their homelands. They needed money to undertake this type of business. They could not borrow from the usurers after the prohibition of *Riba.* It was therefore allowed for them that they sell the goods in advance. After receiving their cash price they could easily undertake the aforesaid business".[88]

[86] Ibn Al Humam, Fatah Al Qadir, Quetta, Maktaba Rashidiyyah, 1998, vol. 5, p. 205; Sahih Bukhari, Kitab Al Salam, Hadith No. 3124 & 3125; Sunan Abe Dawood, Babb Fi Salaf (Salam), Hadith No. 3463.

[87] Ibn Qudamah, Al Mughni, Dar Al Fikr, Beirut, 1985, vol. 6, p. 385.

[88] Usmani, Muhammad Taqi, an Introduction to Islamic Finance, Maktaba Maariful Quran, Karachi, 2007, p. 186.

2.4.1) Effects of uncertainty on Salam contract

The contract of Salam is consist upon Gharar (uncertainty), for the reason that the thing sold is not being handed over to the buyer at the time of agreement. because in Salam contract the seller undertakes to supply some specific goods to the buyer at some future date in exchange of an advanced price fully paid on spot, i.e. at time of agreement. That is why it is not certain that whether the seller would be able to provide the goods required by the buyer or not?

Showkani says:

" واختلفوا هل هو عقد غررجوز للحاجة أم لا....."[89]

"Among the jurists there is disagreement, whether the contract of Salam contains the Gharar or not? Hence it is permissible due to necessity".

Ibn Taymmiah and Ibn Qayyim hold that the contract of Salam does not contain Gharar, because the contract of Salam is legally permissible.[90] In the modern jurists the famous scholar Sadiq al Darir also supported the view point of Ibn Taymmiah and Ibn Qayyim.[91] Although the majority of jurists hold that the contract of Salam contains Gharar, and to avoid an element of Gharar, the Shariah permitted it with some conditions,[92] as it (contract of Salam) is an exception to the general rule that prohibits the forward sales. It is because that the Salam contract is a kind of "the sale of thing not in possession" or "sale of non existence things" or "sale of goods /commodity not in hand", all these contracts fall under the umbrella of Gharar. But Shariah for the necessity and requirements of human beings validated this contract. Although the analogy does not permit it, rather it is the *Istihsan*-principle of preference to a strict analogy-that validates the contract of Salam due to various Traditions.[93]

[89] Showkani, Muhammad Ibn Ali Muhammad, Nayl Al Aowtar, vol. 5, p 192.
[90] Ibn Al Qayyim, Ilam Al Muwaqqin, vol. 1, p. 357.
[91] Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, p. 458.
[92] Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, p. 464.
[93] Marghenani, Burhan Uddin, Al Hidayah: Sharh Bidayah Al Mubtadi, Maktaba imdadiyyah, Multan, Pakistan, vol. 5, p. 222.

The majority of jurists hold that due to analogy (*Qiyas*) the Salam contract is invalid for the reason of non existence commodity, i.e. subject matter, at the time of contract, and this is Gharar (uncertainty). Yet the text validates the contract of Salam as on the basis of *Rukhsah* (concession), for the people in order to fulfill their needs.[94] However to reduce the degree of uncertainty in Salam contract, the jurists put some conditions. They are as follows:[95]

A) The time of delivery must be fixed

B) The quality, quantity and the characteristic of commodity must be determined

C) The availability of commodity must be established at the time of delivery

[94] Showkani, Muhammad Ibn Ali Muhammad, Nayl Al Aowtar, vol. 5, p. 176.

[95] Ibn Abidin, Radd Al Mukhtar, vol. 4, p. 284; Ibn Rushd, Bidayat Al Mujtahid, vol. 2, pp. 177 & 202; Ibn Qudamah, al Mughni, Dar al Fikr, Beirut, 1985, vol. 4, pp. 294 & 332; Ibn Hazam, Al Muhallah, vol. 9, p. 114; Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, pp. 449, 450.

2.5) Istisna (Purchase order or Manufacturing) Contract

Istisna purchase order; is a sale transaction where a commodity is transacted before it is manufactured. In other words: it is the contract for manufacturing of some specific commodity for the buyer by the seller himself or through some other manufacturer.[96] It means that Istisna is a contract in which the buyer asks the seller (manufacturer) to manufacture something required by the buyer (orderer). For example: one may engage a cobbler to make a pair of shoes for a fixed price or one may ask a tailor to make a suit for him to be delivered later.[97] So we can say that Istisna is a contract in which one asks the other to manufacture something specific for him for a known price, has to be fixed with the consent of both parties, with all necessary specification of the required thing, and mode of payment, i.e. the price may be paid according to agreed schedule of payment, that may even be an advanced, or at the time of possession of thing manufactured or even after the possession in shape of lump sum or in agreed installment during the time of manufacturing.

The point must be noted here that the material of an object must be from the manufacturer. If the material is provided by the customer and the manufacturer has used his labour and skill only, it will not be contract of Istisna rather it will be a contract of *Ijarah* instead of Istisna. Thus if a person gives the price of an iron to ironsmith to make a specific vessel or specific thing for a known price/consideration, it is permissible but it will not be a contract of Istisna rather a contract of hiring.[98] Khalid al Atasi stated: "that the material in the contract of istisna must be from manufacturer, if the material is provided by the customer and the manufacturer used only his labour and skill, the contract will not be Istisna rather it will be a contract of *Ijarah*, where by the services of a person is hired for a known consideration or specific fee paid to the person undertake to do a specific work".[99]

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[96] Ansari, Omar Mustafa, Managing Finances-A Shariah Compliant Way, Time Management Club, P.O. Box-12356, DHA, Karachi, 2007, p. 77.

[97] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 5, p. 3.

[98] Ibid

[99] Atasi, Khalid Al Atasi, Sharh Al Mujallah, vol. 2, p. 403.

As for the validity of Istisna is concerned; it is based on custom, which prevailed from the time of Holy Prophet Mohammad (S.A.W.S) and is also justified having regard to the needs of human. Kasani says:

" أما جوازه فالقياس أن لا يجوز لأنه بيع ما ليس عند الإنسان لا على وجه السلم وقد نهى رسول الله صلي الله عليه وسلم عن بيع ما ليس عند الإنسان ورخص في السلم ويجوز استحسانا لإجماع الناس على ذلك لأنهم يعملون ذلك في سائر الأعصارمن غير نكير وقد قال عليه الصلاة والسلام : لاتجتمع أمتي علي الضلالة ، وقد قال عليه الصلاة و السلام : ماراه المسلمون حسنا فهو عند الله حسن وما راه المسلمون قبيحا فهو عند الله قبيح ، والقياس يترك بالإجماع "[100]

"The legality of this form of contract is based on *Istihsan*-which is a departure from the rule of precedent-analogy would thus invalidate the Istisna contract, because it is a sale of an object which does not exist, i.e. the sale of a thing what one's does not have, neither it is a Salam contract, and the Holy Prophet Mohammad (S.A.W.S) prohibited a sale of thing what one does not have, and permitted a Salam contract. Thus the contract of Istisna is allowed on the basis of *Istihsan* as all the people are practicing this type of contract unanimously, so the permissibility of Istisna in Shariah has been constructed on way of *Istihsan* without any objection, and the people in each era are practicing, which is prevailed from the life time of Holy Prophet Mohammad (S.A.W.S). The Holy Prophet Mohammad (S.A.W.S) said: "My *Ummah* will not hold consensus on a strayed path (wrong path)", and also said: "whatever the Muslims consider good is good in the eyes of ALLAH, and whatever they consider evil is evil in the eyes of ALLAH". That's why we left analogy because of *Ijma*. In the presence of *Ijma* the analogy will not be preferred and the *Istihsan* exceptionally validates it on the authority of *Ijma* and the prevailed custom which is justified the needs of people.

[100] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 5, p. 3.

2.5.1) Effects of uncertainty on Istisna Contract

According to Ayni: "Istisna is kind of sale, where a commodity is transacted before it comes to existence, i.e. a sale of nonexistent thing. But because of the requirements and needs of the people this practice is prevailed, although the things sold are not legally in existent rather these are customary means to be in existence, as there are various examples in shariah for the validity of such kind of contract".[101] Since Istisna is a contract of nonexistent subject matter at the time of agreement. This creates Gharar (Uncertainty). That is why the jurists put some conditions in order to minimize the degree of Gharar (Uncertainty). These conditions are as follows:

A) The commodity, i.e. subject matter of contract must be defined in respect of quality, quantity and characteristic in order to avoid uncertainty and ambiguity.

B) The contract of Istisna must relate to some things which are customary among the mankind, such as manufacturing of shoes, building, head caps etc. Otherwise the contract will not be valid. Means that if the contract relates to some things which are not customary among the people, the contract of Istisna is not lawful.[102]

C) The time of the completion of work and delivery must not be fixed. This is according to Imam Abu Hanifa, in his view if the time is fixed the contract will not be Istisna, rather it will be a contract of Salam. But according to his two disciples "Imam Abu Yusuf and Imam Muhammad" disagree with his teacher "Imam Abu Hanifa" that the time must be fixed. They are also of the view that if the time is fixed or not, the contract remains Istisna, only by non fixation of time, the contract of Istisna is not converted into a contract of Salam.[103]

D) The price or consideration must also be mentioned and specified.[104]

The above mentioned conditions are put by the jurists as the validity of Istisna is an exception to the general rule of Islamic law of contracts that an object or something which does not exist

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[101] Ayni, (Badar Uddin Abu Muhammad Mehmood Bin Ahmad Al Ayni, Mutawafi 855. H) Al Binayah: Sharh Al Hidayah, vol. 3, p. 214.

[102] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 5, p. 3.

[103] Ibid

[104] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 212.

at the time of contract may not be sold and is unlawful. However the contract of Istisna is valid despite its being the sale of things which are nonexistent at the time of contract. Thus the contract of Istisna is validated on the authority of *Istihsan* or need of the people, because people are in grave need for such types of contracts. So the legality of this form of contract is based on customary law, as the people are practicing Istisna since from a long time and it has been prevailing from the life time of Holy Prophet Mohammad (S.A.W.S) which is also justified by the need and requirements of the people. That's why the contract of Istisna is an exception to the general rule of Islamic law of contracts. Thus there is no point to give exemption to each and every case where the people themselves do not need and justify the exemption.

2.6) Ijarah (Lease Financing Contract)

Ijarah is a contract of Lease or hire for a use of certain movable and immovable property or for a service for a known consideration.[105] The word Ijarah is used for two different situations. In the first place, it means to employ the services of a person on wages given to him as consideration for his hired services. The employer is called *Mustajir* while the employee is called *Ajir*. The second type of Ijarah relates to the usufructs of asset and properties, and not to service of human beings. Ijarah in this sense means to transfer the usufruct of particular property to another person in exchange for a rent claimed for him. In this case, the term Ijarah is analogous to the English term leasing. Here the lessor is called *Muajir*, the lessee called *Mustajir* and the rent payable to the lessor is called *Ujrah*.[106]

Ijarah by way of strict analogy violates the prohibition of Gharar (uncertainty), as the subject matter of services or usufructs, which is not in existent at the time of agreement or contract. So for the reason, some jurists hold that the contract of Ijarah is legally void.[107]

The contract of Ijarah is only allowed because of the text permit it. That is why the rule of analogy is ignored in the presence of textual permission. The jurists further maintained that the contract of Ijarah is not a contract of nonexistent subject matter at all, because the subject matter of the contract exists once the contract beings to be performed. So that is why the element of nonexistent of the subject matter in the contract is eliminated by the performance of a hirer or the use of property (moveable and immoveable) which appears after the contract of Ijarah is concluded, as in Salam where the contract is concluded between the parties being on the nonexistent subject matter or where the contract of Salam is concluded before the existence

[105] Al Zaili, (Imam Fakhar Uddin Usman Bin Ali Al Zaili, Mutawafi 743. H) Tabyin Al Haqaiq, Beirut, Darul Kutub Al Ilimiyyah, 2000, vol. 6, p. 77; Al Dasuqi, Hashiyah Ala al Sharh Al Kabir, vol. 4, p. 2.

[106] Usmani, Muhammad Taqi, an Introduction to Islamic Finance, Maktaba Maariful Quran, Karachi, 2007, pp. 156, 157.

[107] Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, p. 471; Ibn Rushd, Bidayat Al Mujtahid, vol. 2, p. 181; Ibn Qudamah, al Mughni, Dar al Fikr, Beirut, 1985, vol. 8, p. 6.

of the subject matter. This is why the contract of Ijarah is permitted in dire need as the Shariah text permits it.[108]

The jurists are unanimous on the point that the validity of Ijarah is based on several evidences from the text of law; there are two verses in the Holy *Quran* to which the jurists had referred in permitting Ijarah contract.

" فان أرضعن لكم فاتوهن أجورهن "[109]

i) ALLAH says: "And if they suckle your (offspring) give them their recompense".

" قالت إحداهما ياأبت استاجره إن خير من استاجرت القوي الأمين "[110]

ii) Said one of the (Damsels) "O my father: engage him on wages, 'truly the best of men for thee to employ is the man' who is strong and trusty".

The first verse of the Holy *Quran* speaks about payment to the mother who gives suck to their child/babies after being divorced by their husband. So the verse directed the father to give payment to the divorced mother for their services of wet nursing, and such a payment is considered as a price or compensation against the services of wet nursing.[111] And this is what all about the contract of Ijarah.[112]

The second verse of the Holy *Quran* implies that the contract of Ijarah is permitted, and if it is prohibited, the Holy *Quran* would not have spoken of such an example or occurrence.[113]

There are also many sayings of the Holy Prophet Mohammad (S.A.W.S) which prove the permissibility of Ijarah.

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[108] Ibn Qudamah, al Mughni, Dar al Fikr, Beirut, 1985, vol. 8, p. 6; Ibn Rushd, Bidayat Al Mujtahid, vol. 2, p. 181; Al Murtaza, (Ahmad Bin Yakhya Bin All Murtaza, Mutawafi 840. H) Al Bahar Al Zakhaar, 1947, vol. 4, p. 30.

[109] Al Quran, 6:65.

[110] Al Quran, 26:28.

[111] Qurtabi, Al Jamiah lil Ahkam Al Quran, vol. 18, pp. 168, 169

[112] Shafi, Al Ummh, Beirut, Dar Al Qutaiba, 1996, vol.3, p. 250; Qurtabi, Al Jamiah lil Ahkam Al Quran, vol. 18, pp. 168, 169.

[113] Al Behqi, (Abe Bakar Ahmad Bin Al Husain Bin Ali Al Behqi, Mutawafi 458. H) Al Sunan Al Kubra, Kitab Al Ijarah, vol. 6, p. 121.

" عن أبي هريرة رضي الله عنه قال قال رسول الله صلي الله عليه وسلم : اعط الأجير أجره قبل أن يجف عرقه "[114]

i) The Holy Prophet Mohammad (S.A.W.S) said: "Give wages to the person hired before his sweat dries up".

" عن أبي سعيد ن الخدري رضي الله عنه أن النبي صلي الله عليه وسلم نهى عن استئجار الأجير حتى يبين له أجره "[115]

ii) In another place Prophet Mohammad (S.A.W.S) said: "If someone hires a person, let him inform about the wages he is to receive".

iii) Hadrat Rafi reported that "in the age of the Holy Prophet (S.A.W.S) the owners of the land used to let their lands on rent".[116]

So the mentioned *Ahadith* permits Ijarah, so for the rule of analogy is ignored and in the presence of text the general rule of Islamic law of contracts-an object which does not exist at the time of contract may not be sold-will not be entertained.

All the companions of the Prophet unanimously held that Ijarah is a lawful contract. Kasani stated: that before the age of Abu Bakker al Asam, all the people are unanimous on the point that the contract of Ijarah is practiced from the advent of the companions of Prophet at the time without any denial and objection, and the one who disagree with the *Ijma* i.e. Consensus of opinion of Muslim jurists, his view will not be entertained. So for the *Ijma*, it is obvious that the rule of analogy will be ignored, because Almighty ALLAH permitted the contracts due to the needs of people, and the human are in great need of Ijarah contract.[117]

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[114]Al Behqi, (Abe Bakar Ahmad Bin Al Husain Bin Ali Al Behqi, Mutawafi 458. H) Al Sunan Al Kubra, Kitab Al Ijarah, vol. 6, p. 121.

[115]Showkani, Muhammad Ibn Ali Muhammad, Nayl Al Aowtar, vol. 5, p. 292 (as quoted by Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 231)

[116] Bukhari, Sahih, Kitab Kara Al Ard Bil Dhahab wa Al Fidhdhah (as quoted by Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 231)

[117] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 4, p. 174; Ibn Rushd, Bidayat Al Mujtahid wa Nihayat Al Muqtasid, Kitab Al Ijarah, vol. 1, p. 181; Shafi, Al Ummh, Beirut, Dar Al Qutaiba, 1996, vol. 4, p. 58; Al Bahuti, Kashshaf Al Qina, Babb Al Ijarah, vol. 3, p. 537; Ibn Qudamah Al Maqdasi, (Imam Shams Uddin Abe Al Faraj Abdu Rahman Bin Qudamah Al Maqdasi, Mutawafi 624. H), Al Mughni wa Sharh Al Kabir, Darul Kutub Al Arabi, Beirut, Lebanon, 1972, vol. 6, pp. 2, 3.

From the above discussion it is very much clear that the contract of Ijarah does not contains Gharar (uncertainty) and the nonexistent benefits will not be considered as *Bay al Madum* sale of nonexistent things in order to prove that because of nonexistent subject matter the element of Gharar is present, and if someone says, that it carries Gharar, his view will not be entertained on the point, that in the contract of Ijarah the subject matter exist, once the contract is being performed. So for the performance of hirer or use of property, the element of non existence of the subject matter is eliminated for the reason it is not legal to consider it as neither *Bay al Madum*, nor it is analogical.

2.6.1) **Kinds of Ijarah**

There are two main kinds of Ijarah contract as follows:

A) *Ijarat al Ashya*: Refers to hiring of the things such as houses, shops lands etc. This is also known as *Ijarat al a'yan*. The leasing of assets, goods or specific things.

B) *Ijarat al Ashkhas*: Refers to hiring of services such as to hire a painter to paint a house. This kind of Ijarah is also called *Ijarat al dimmah*, the hiring out of one's services in lieu of wages, fee or salary.

A point must be noted here a person hired for services is called *Ajir* who is either *Ajir khas* (employee for one person) or *Ajir mushtarak* (employee for all people). *Ajir khas* renders services for one person for a fix period, while *Ajir mushtarak* renders services for a large number of people like ironsmith, tailor and laundry man etc.

Ijarat al Ashya or *Ijarat al a'yan* is further divided into two kinds namely; *Ijarah Tamweeliyah* (financial lease) and *Ijarah Tashgheeliyah* (operating lease).

i) *Ijarah Tamweeliyah* (financial lease): This type of Ijarah came into being as a form of capital investment as the banks or financial institutions have financing of the assets as its primary objective, and Ijarah transaction is used as a mean to achieve this objective. In this contract lessor gives the lessee something on rent for a known period. The lessee pays its price on the agreed installments in the prescribed period or schedule, while after the completion of this term or period the lessee becomes the owner of that thing. In

other words: this kind of Ijarah is fixed for a specific period such as three years or more and the lessor acquires the value and profit of the leased asset in the form of lease rentals. When the prescribed period of Ijarah ends, the ownership of the asset is transferred to the lessee, i.e. client.

ii) *Ijarah Tashgheeliyah* (operating lease): This type of Ijarah refers to the lease in which a person or institution leases out a specific asset to a lessee for a specific time period, after which the asset is returned to the lessor. In other words: in this kind of Ijarah the objective is to get the benefits from a thing or asset on the payments in shape of rent, while the ownership of asset remains with the lessor, i.e. the original owner. For example: a house, shop or other items of daily use such as tents, motor cars and loud speakers etc.

2.6.2) Effects of Uncertainty on Ijarah contract

The contract of Ijarah, and its textual position is already been discussed. Now let's to discuss the effects of Gharar on the contract of Ijarah, and especially the effects of Gharar into the *Sighah*-the expression of offer and acceptance-of contract and the subject of contract (*Mahall e Aqd*) in order to fully understand the elements of Gharar in this particular contract.

A) *Uncertainty in respect of "Sighah"*

Sighah the expression of offer and acceptance is the essential element of a contract. So for the *Gharar fi Sighah* in the contract of Ijarah is concerned, this is different from Gharar as a result of uncertainty about the availability and characteristics of the subject matter, which is called *Gharar fi al Mabi* or *Gharar fi al Maqud Alayh* and also different from the *Gharar fi Sighah al Bay*.

The difference between *Sighah* of *Bay* and *Sighah* of *Ijarah* is that, the former neither can it depends on some other event which may possibly occur in future, nor it can deferred to a future a date. While the later also cannot depends on some other event which may possibly occur in the future, but it can be deferred to some future date.

One of the main differences between *Al bay al Mudaf* and *Al bay al Mullaq* is that in *Bay al Mudaf*, the completion and the time of the event are not certain. So in *Bay al Mudaf* there is no Gharar as regards the existence and the time of contract, but still there is Gharar as regards the condition and the value of subject matter when the specified time comes. Therefore in the case of *Bay al Mullaq* the majority jurist regards it as invalid, and also *Bay Al Mudaf*. But Ibn Taymiyyah and Ibn al Qayyim hold that *Bay al Mudaf* is legally valid and also *Bay al Mullaq*.[118]

The above discussion is mainly for, that the-*Sighah*-form of sale contract must not depend on some future event and also must not be deferred to some future date, as the-*Sighah*-form of *Ijarah* is concerned; it must not be depending on some future event, but can be deferred to some future date and time.

i) *Sighah Al Mudaf li al Mustaqbal*

Form of contract effective from future date. According to the majority of jurists such kind of contracts are not valid. They hold that the effects should be immediate without any delay in the sale contracts. However they allow the contract of Ijarah which is effective from some future date. The contract of sale must be immediately enforceable in the opinion of jurists due to uncertainty arising in it, if it delayed or postponed to some future date. Whereas leasing and other contracts made on usufructs to be effective from future date can be delayed and postponed.[119] Ibn Taymiyyah and Ibn Qayyim, hold that *Sighah al Mudaf* is permissible without distinction between sale contracts and leasing contract.[120]

ii) *Sighah Al Mullaq*

Form of contingent contract. According to the majority jurists the-*Sighah*-form of contingent contracts are void due to uncertain event, even they are sale contracts and others like the contract made on usufructs, i.e. leasing. The reason is that the parties do not known, whether

[118] Ibn Taymiyyah, Nazriyat Al Aqd, p. 127; Ibn Al Qayyim, Ilam Al Muwaqqin, vol. 3, pp. 237, 238.
[119] Darir, Siddiq Muhammad Amin, Al Gharar Fi Al Uqud WA Atharuhu Fi Al Tatbiqat Al Muasirah, Jeddah, Saudi Arabia, 1993, pp. 4, 5.
[120] Ibn Taymiyyah, Nazriyat Al Aqd, p. 127; Ibn Al Qayyim, Ilam Al Muwaqqin, vol. 3, pp. 237, 238.

the event will occur or not. Ibn Taymiyyah and Ibn Qayyim held that contingent contracts are valid and there is no Gharar in it.[121]

B) ***Uncertainty in the subject of contract***

Uncertainty in the subject of the Ijarah contract is concerned; the following points will be discussed in this regard:

i) Fixation of rent
ii) Fixation of usufructs
iii) Fixation of time period
iv) Propriety (right of ownership) of a thing leased
v) Certainty of delivery or the ability to deliver the leased things
vi) Precise determination of the things leased

i) ***Fixation of rent***

It is necessary for the permissibility of Ijarah that the rent must be fixed, to avoid Gharar (uncertainty). The rent must be fixed in cleared terms without any ambiguity. Ibn Rushd al Hafeed stated:

" إن جمهور فقهاء الأمصار مالك وأبوحنيفة والشافعي اتفقوا بالجملة أن من شرط الإجارة أن يكون الثمن معلوما "[122]

The majority of jurists 'Imam Abu Hanifa, Malik and Shafi' are unanimous on the point, among the conditions of Ijarah, that the rent must be known.

ii) ***Fixation of usufructs***

The Subject matter of Ijarah namely; the usufructs must be known and identified in order to avoid Gharar (uncertainty) about the usufructs which may lead to dispute among the contracting parties. So it is not permissible for the lessor to lease an unspecified thing. Say for

[121] Ibn Taymiyyah, Nazriyat Al Aqd, p. 127; Ibn Al Qayyim, Ilam Al Muwaqqin, vol. 3, pp. 237, 238.
[122] Ibn Rushd Al Hafeed, (Abu Al Walled Muhammad Bin Ahmad Bin Muhammad Bin Ahmad Bin Rushd, Mutawafi 595. H), Bidayat Al Mujtahid, Vol. 2, p. 182.

example: if a person says to another that I rented you one of the two houses, the contract of Ijarah will be invalid, because the subject matter is unknown and unspecified. Haskafi stated:

" وشرطها كون الأجرة والمنفعة معلومين لأن جهالتهما تفضي إلى المنازعة "[123]

Among the conditions of Ijarah, that the rent and usufructs/benefits must be known, because the ignorance (*Jihala*) regarding rent and usufructs, may lead to dispute.

So the fixation of rent and identification of usufructs must be necessary to known, and if it is not known and ambiguous, such kind of ambiguity and ignorance may lead to Gharar (uncertainty).[124]

iii) ***Fixation of time period***

The leasing period must be fixed if it is prescribed in the contract of Ijarah, whether it is long term or short.

Here a question arises that if Ijarah is deferred to some future date then in such case the fixation of time is necessary? Ibn Qudamah stated:

" الاجارة إذا وقعت على مدة يجب أن تكون معلومة كشهر او سنة ولا خلاف في هذا نعلمه "[125]

If the Ijarah is for a fixed period, then it is necessary that the period must be known, like one month or one year, and we do not know any disagreement among the jurists regarding it. He further stated:

" إن الإجارة إن كانت على مدة تلى العقد ، لم يحتج إلى ذكر ابتداءها من حين العقد وإن كانت لا تليه ، فلا بد من ذكر ابتداءها ، لأنه احد طرفى العقد ، فا حتيج إلى معرفة كا لإنتهاء "[126]

If the lease period shall commence from the date of lease contract, then it is not necessary to mention the starting date at the time of contract, and if the lease period shall commence from that date of leased contract, it is necessary to prescribe such period of time, because this is a

[123] Haskafi, (Muhammad Bin Ali Muhammad Al Mullqab Bi Ala Uddin Al Hanafi Al Damascus's Al Maaruf Bi Al Haskafi, Mutawafi 1008. H), Al Dur Al Mukhtar, vol. 6, p. 5; Samarqandi, (Ala Uddin Al Samarqandi, Mutawafi 539) Tukhfatul Al Fuqaha, 1958, vol. 2, p. 528.

[124] Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, p. 473.

[125] Ibn Qudamah, Al Mughni, Dar Al Fikr, Beirut, 1985, vol. 8, p. 8.

[126] Ibid

separate segment of contract. In such case the time period must be known likewise as the time of ending time period or the date of termination is necessary.

iv) ***Propriety of a thing leased***

To avoid Gharar it is necessary that the leased property remains in the ownership of lessor, and only its benefits/usufructs is transferred to the lessee; otherwise lease agreement will not be valid. For a valid lease contract it is necessary that the corpus of the leased property must remain in the ownership of the lessor.

In such case where the corpus of the leased property remains in the ownership of the lessor, all the liabilities emerging from the ownership shall be borne by the lessor, but the liabilities repairable to the use of property shall be borne by the lessee.[127]

v) ***Certainty of delivery or the ability to deliver leased things***

It is necessary for a valid Ijarah contract that the leased things must be capable to deliver by the lessor to the lessee. Certainty of delivery means the ability or capacity to deliver the leased thing at the time of conclusion of Ijarah contract or at the agreed time period. If such a capacity is lacking the contract is void. That's why the Muslim jurists prohibited the lease of stray animal and etc.

vi) ***Precise determination of the thing leased***

To avoid Gharar it is necessary that the leased asset must be known and must be a particular thing. This is the general rule of Islamic law that the subject matter of a contract must be precisely determined by genus, species, quality, price and value. Indetermination in the variety of things makes the contract invalid, Means that a person cannot lease out an unknown and unidentified asset. For example: if a person says to another that I leased you one of the car from my show room, the contract will be invalid because the leased asset is not identified in terms of model and other things relevant for the car.

[127] Usmani, Muhammad Taqi, an Introduction to Islamic Finance, Maktaba Maariful Quran, Karachi, 2007, p. 160.

Chapter No. 3

Shariah Maxims on Uncertainty

3.0) Shariah Maxims on uncertainty

It is pointed out earlier that Gharar (uncertainty) is one of the vitiating factors of transaction in Islamic law. It especially affects the validity of commutative contracts such as sale, hiring and leasing contracts. Thus Shariah prohibited Gharar, as the contracting parties do not know about the outcome of transaction. The rules of Shariah regarding uncertainty described in details by the Muslims scholars through certain maxims. For this purpose the most prominent maxims-on the uncertainty-related to business transaction will be discussed in this chapter. These maxims are as follows:

" بيع ما ليس عند الأنسان لايجوز "

3.1) *To sell what one does not have, is unlawful*

" الغرر يبطل عقود المعاوضات ولايبطل عقود التبرعات "

3.2) *Gharar invalidates commutative contracts not the gratuitous contracts*

3.1) To sell what one does not have is unlawful (بيع ما ليس عند الأنسان لايجوز)

This maxim is based on the famous saying of The Holy Prophet Mohammad (S.A.W.S) said: " لا تبع ما ليس عندك " "Do not sell what you do not have". As a general rule, the sale of an object must ideally/physically exist at the time when the contract is concluded. Non existence of-subject matter-an object makes the contract void, because of the Gharar (uncertainty). In other words: an object which a seller does not have at the time of contract, such sale is prohibited by Shariah due to the non existence of an object.

The majority of Traditional Muslims jurists hold that non existence of an object-subject matter-at the time of contract, will make the contract null and void.[1]

[1] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 5, p. 138.

Kasani, a Hanafi jurist, stated: "one of the conditions for the legality of subject matter of contract, is the existence of subject matter at the time of contract, a contract dealing with a nonexistent object is null and void".

Ibn Rushd, Maliki jurist, said: "to prevent uncertainty (Gharar) the subject matter must exist, a contract is devoid of uncertainty (Gharar) through certainty of an object-subject matter".[2]

Al Nawawi a Shafi jurist stated: "it is necessary that the subject matter of the contract must exist at the time of contract. The sale of nonexistent subject is null and void by consensus".[3]

Ibn Qudamah a Hanbali jurist says: "It is necessary that the object of sale is known to contracting parties through by description or either by viewing.....The sale of fetus in its mother's womb is invalid due to the non existence".[4]

From the above mentioned views of jurists of different schools of thought, that the non existence of an object-at the time when the contract is concluded-in a contract will make the contract null and void.

The famous book Mujallah in Hanafi school of thought stated: the mere non existence of the subject matter at the time of contract makes the contract invalid. In Article 197 the said book state: "يلزم أن يكون المبيع موجودا" "The existence of the sold object is necessary". It further stated: "بيع المعدوم باطل فيبطل بيع ثمرة لم تبرز أصلا" "The sale of non existing things is void, so the sale of fruits which have not appeared yet, i.e. which have not repined yet, is void".[5] Wahabah Zuhayli explains, the view point of *fuqaha* (jurists) on the said issue in this manner: "The object of a contract must be present during the contracting session. Contracting over a nonexistent object is invalid, like selling crop before it is visible, on the assumption that the crop might not appear. Equally prohibited are cases involving what is known as the fear of like the assumption that fetus might not survive upon birth.....this requirement is mandatory in Hanafi and Shafi schools, regardless of whether the transaction involves commutative or non commutative, i.e. gratuitous contracts. Any transaction involving nonexistent object is void whether the case is

[2] Ibn Rushd. Bidayat Al Mujtahid, vol. 2, p. 186.
[3] Al Nawawi, Al Majmu, vol. 9, p. 258.
[4] Ibn Qudamah, Al Mughni, Dar Al Fikr, Beirut, 1985, vol. 4, p. 209.
[5] Al Mujallah, Article No. 197 & 205.

sale, gift or pledge. This view is based on a Tradition of The Holy Prophet (S.A.W.S) wherein he is reported to have prohibited the sale of the fetus of an animal as well as the sale of an embryo and sperm. He is also reported to have prohibited people from dealing in transactions where the seller did not possess the object. This is because object was treated as nonexistent during the contract they have established an exception to this general rule, i.e. the prohibition of sale of nonexistent in cases pertaining to sale by advance, contract of manufacturing. These transactions are approved despite of the absence of the object of contract by way of juristic preferences in order to cater the needs of mankind".[6]

Ibn Taymiyyah and his disciple Ibn al Qayyim hold a totally different view from the view point of majority of jurists. Both the jurists are of the view that non existence of an object does not constitute for prohibition. They are of the opinion that, "there is nothing in the *Quran* and in the *Sunnah* about the prohibition of a contract consists upon nonexistent object. What is prohibited in the *Sunnah*, is the prohibition of certain contracts due to the element of Gharar in them; This is the subject matter of the contract cannot be delivered, in spite of that whether the subject matter exists or not at the time of contract. The *Hadith* 'do not sell what is not with you' indicates that the *illah* (effective cause) of the prohibition is not the non existence of the object, but is the uncertainty (Gharar)".[7]

As we discussed the views of classical jurists; to them nonexistent subject matter necessarily means Gharar. That is why every contract consist upon nonexistent subject matter is invalid in the eyes of majority of traditional jurists. However this view is opposed by Ibn Taymiyyah and Ibn al Qayyim. Some modern jurists and scholars also agree with them.

Al Sanhuri holds the validity of contracts consists upon nonexistent subject, when they are devoid of Gharar (uncertainty). In his view the reason for the prohibition of nonexistent sale is Gharar, not the non existence of a thing itself. The classical jurists merely on the grounds of non existence of a subject hold the view of invalidation of transaction without keeping in view the existence of a subject and degree of Gharar (uncertainty). In the view of Al Sanhuri, that

[6] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 38.

[7] Ibn Taymiyyah, Al Qiyas Fi Al Shari Al Islami; Ibn Al Qayyim, Ilam Al Muwaqqin, vol. 2, pp. 27, 28; Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 39.

classical jurist made no difference between the non existence and Gharar (uncertainty). That is why they nullify every contract merely on the ground of nonexistent of subject matter. For him-Al Sanhuri-if it is established that the subject will come into existence in some future date, so it is valid, if the contract is not involving Gharar. That is why where subject comes into existence at the time of contract and gradually after the contract is concluded, although there is certain degree of Gharar, but such type of Gharar is immaterial, especially in the contracts where mankind is in grave need, because in such a case the Gharar does not cause substantial legal damage to the validity of a contract.[8]

Al Darir an eminent modern scholar holds that, there is nothing in *Quran* and *Sunnah* to declare invalid, any contract merely on the grounds of nonexistent of subject. He also denies the view that any contract consists upon nonexistent subject is void, because it is against the principles of analogy (*Qiyas*). There is no any clear textual provision for the prohibition of contract on the grounds of mere nonexistent of subject, and if such a provision is available in Shariah, it will be a proper ground for analogy (*Qiyas*). As there is no clear provision in the text, then there is no ground for analogy, in such a case the contract consist upon nonexistent subject is against the principle of analogy is dismissed. Al Darir further stated that the underlying cause (*illah*) behind-the prohibition of contracts consist upon nonexistent subject-is not the nonexistent of an object itself, but the Gharar (uncertainty). Gharar does not necessarily exist in all contracts consist upon nonexistent subject. It exists in those contracts where the subject is fixed to some future date, is not certain. If it is established that the subject will exists to some future fixed date then in such case the element of Gharar is no longer available. That is why according to Al Darir, if a contract consists upon nonexistent subject matter, there are two cases;

i) Where the existence of the subject in some future date is not certain, the contract is void.
ii) Where the existence of the subject matter in some future date is certain the contract is valid.[9]

We can say that the cause of prohibition of a contract is not the non existence, rather the real cause for such prohibition is uncertainty in the view of Ibn Taymiyyah and Al Qayyim supported by the modern scholars Al Sanhuri and Al Darir, as they hold that the classical jurist

[8] Al Sanhuri, (Abdi al Razzaq Ahmad Al Sanhuri, Mutawafi 1971) Masadir Al Haqq, vol. 3, pp. 31-41.
[9] Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, pp. 357, 358

failed to make a difference between nonexistent and Gharar. They only nullify the contracts merely on the grounds of nonexistent of an object, which does not seem proper to meet the needs of the people. The classical jurists in my opinion made the difference between Gharar and non existence say for example; Al Samarqandi a Hanafi jurist stated: that "among the invalid sale is the sale of nonexistent subject.....Or when the existent of the subject is not certain".....[10] This is a clear example, where Samarqandi says: "when the existent of subject matter is not certain, the contract is invalid".....and in my opinion if it is certain-means certain even to some future date-the contract will be valid as Al Darir mention the two cases of nonexistent subject to some future date and that is what "Samarqandi" means from it. So the view of Al Darir and Al Sanhuri in this regard is dismissed.

As regards the *Hadith* "Sell not what is not with you" other jurists have advanced three different interpretations, which are as follows:

1) "Sell not what is not with you" means not to sell what you do not own at the time of sale. Many prominent *Ulama* of the various schools have recorded the view that the seller must own the object of sale when he sells it, failing which the sale will not be concluded, even if the seller acquires ownership afterwards. The only exception to note is this context is forward sale of *Salam* where ownership is not a pre requisite.
2) The jurists and *Ulama* of *Hadith* have generally held the view that the *Hadith* under discussion applies only to the sale of specified object but not to fungible goods as these can easily be substituted and replaced. It is thus stated that prohibition in question is confined to the sale of object in rem (*buyu al a'yan*) and does not apply to sale of goods by description. Hence when *Salam* is concluded over fungible goods that are commonly found in the locality, it is valid even if the seller does not own the object at the time of contract. Imam Shafi has also held that one may sell what is not with him provided that it is not a specified object for delivery of specified object cannot be guaranteed if the seller does not own it.
3) The third position is that some *Ulama* have interpreted the *Hadith* "the sale of what is not with you" means sale of what is not present and the seller is unable to deliver. This is the view of Ibn Taymiyyah and the Maliki jurist Al Baji. They contend that the

[10] Al Samarqandi, Tukhfatul Al Fuqaha, 1958, vol. 2, p. 68.

emphasis in the *Hadith* is on the seller's inability to deliver, which entails risk taking and uncertainty. If the *Hadith* were to be taken on its face value, it would prescribe *Salam* and a variety of other sales, but this is obviously not intended. It is quite possible that the seller owns the object and yet is unable to deliver it or that he possess the object but does not won it, in either case his position would fall within the purview of this *Hadith*. The emphasis in the *Hadith* is, therefore, neither on ownership, nor on possession, rather it is on the seller's effective control and ability to deliver. Thus the effective cause (*illah*) of the prohibition is Gharar on account of inability to deliver.[11]

From the *Hadith* "Sell not what is not with you", Kasani, a Hanafi jurist, has given some example of those contracts which are invalid on the grounds of nonexistent subject. These contracts are as follow:[12]

a) Sale of flour in wheat
b) Sale of olive oil in the olive fruit
c) Sale of juice in grapes
d) Sale of butter in milk.
e) Sale of meat in a living sheep
f) Sale of sesame oil in sesame seed
g) Sale of any particular part of living animal
h) Sale of a young animal which is yet to be born
i) Sale of fetus in the mother's womb
j) Sale of milk in the udders
k) Sale of fruits on trees before they ripen
l) Sale of services of male animal

In the above mentioned sale contracts, the subject matter seem to be nonexistent at the time of contract. That is why these contracts are considered null and void.

[11] Mansoori, Muhammad Tahir, Shariah Maxims on Financial Matters, IIIE, IIU Islamabad, Pakistan, 2007, PP. 186, 187. (Dr Mansoori quoted Zia Uddin Zafar, Bay Al Madum: An Analysis, Paper presented in International Islamic Capital Market Conference, Malaysia, 1997)

[12] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 5, pp. 138, 139.

A very famous among these contracts is one of the "sales of fruits on trees before they ripen"

This is a sale of nonexistent subject matter, i.e. the sale of fruits on trees before they come to existence. This kind of sale is prohibited in Islamic law. Because in such a contract the subject matter which is fruit do not exist at the time of contract and there is no certainty about the existence of fruits in future, because they are not free from being spilled and destroyed as a result of some natural calamity, which may lead to gambling as there is no guarantee that the seller will be able to deliver it to the buyer or not. It is reported from Ibn Umar "That the Prophet Mohammad (S.A.W.S) forbid the sale of fruits until they ripe", i.e. clearly in good condition or almost come to existence.[13] It is narrated by Anas Ibn Malik that ALLAH's Messenger Mohammad (S.A.W.S) forbids the sale of fruits until they were almost ripe" ALLAH's Messenger Mohammad (S.A.W.S) further said: "if ALLAH spoiled the fruits what right would one have to make money of one's brother".

Commenting on the practice of selling fruits before they begin to blossom. Anwar Iqbal Qureshi write: it is unfortunately a custom with us that the fruits on tree are sold before they begin to have blossom upon them. This is known as spring sale. This spring sale for instance, of mangoes is affected before trees begin to have blossoms. The natural consequence of this is a definite loss to one of the parties to the transaction. What happens usually in such transactions is that people make general estimate of the produce in fruits. But no one can be aware of unknown in which this amounts to a form of gambling.[14]

The majority of Muslim jurists are, unanimous on the point that it is prohibited to sell an agricultural product which is not ripened and also not pick from trees, because in such case the buyer cannot take their possession. That is why what right would the seller have to make money or receive payments from the buyer in advance.[15]

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[13] Al Termidi, (Muhammad Ibn Isa Ibn Surah Al Termidi) Al Jami Al Sahih, Sunan Al Termidi, Cairo, 1956, vol. 3, p. 527.

[14] Mansoori, Muhammad Tahir, Shariah Maxims on Financial Matters, IIIE, IIU Islamabad, Pakistan, 2007, P. 186. (As he quoted Anwar Iqbal Qureshi, Islam And the Theory of interest, p. 90)

[15] Al Hashmi, (Al Hafiz Noor Uddin Ali Bin Abe Bakar Al Hashmi, Mutawafi 652. H) Majmu Al Zawaid, Kitab Al Buyu, Cairo, 1934, vol. 4, pp.103, 104.

3.2) Gharar invalidates commutative contracts not the gratuitous contracts

(الغرر يبطل عقود المعاوضات ولايبطل عقود التبرعات)

The maxim talks about two types of contracts, i.e. *Uqud al muawadat* (commutative contracts) and *Uqud al tabarruat* (gratuitous contracts).

3.2.1) *Uqud al Muawadat*

Contracts for counter value or commutative contracts, these are the contracts where one party gives consideration to another party for what he gets through the contract. For example: Sale (*bay*), an important contract of the Islamic commercial law; a transaction in which the ownership of an asset (legal property or commodity) is transferred from one party to another in exchange of a known consideration (price of commodity). As for *Uqud al muawadat* is concerned, Gharar is found in such contracts like sale, hiring, leasing etc, and renders these transactions invalid.

In the Islamic law of jurisprudence the validity of a contract depends upon the subject matter whether the subject is legal as per Shariah standards. So it is not allowed to sell an object which does not exist or undeliverable or whose genus, kind, quality and quantity, etc. is not known. Similarly to lease an object which is yet to be produce or which is not in the possession of lessor is not allowed, because there is uncertainty with regard to delivery of these objects. Contracts are not valid if they involve Gharar (uncertainty). Gharar in sale and in *Ijarah* is generally belonging to the following forms:[16]

1) Uncertainty and lack of knowledge about the nature of object
2) Uncertainty and lack of knowledge with regard to specie or kind of object
3) Ignorance of the attributes of object
4) Ignorance of identity of object
5) Ignorance of the quantity of object
6) Ignorance about time of delivery
7) Uncertainty about one's ability to deliver the object

[16] Mansoori, Muhammad Tahir, Shariah Maxims on Financial Matters, IIIE, IIU Islamabad, Pakistan, 2007, pp. 191, 192.

8) Non existence of the object
9) Contingent transaction

Gharar belonging to any of these categories, when found in commutative contracts such as sale, hiring and leasing renders them invalid.

3.2.2) *Uqud al Tabarruat*

Gratuitous contracts such as gifts, *waqf, hibah*, interest free loans and bequest (*wasiyah*) etc.

Question arises whether in Islamic law of contracts, Gharar uncertainty affects the validity of the gratuitous contracts or not? The jurists differ on this point, whether the Gharar (uncertainty) has a legal effect in gratuitous contracts, i.e. *Uqud al Tabarruat*. The majority of jurists are of the view that Gharar nullifies the gratuitous contracts such as gift, as it nullifies the contracts for counter value such as the sale contract.[17] In the majority view, Gharar in commutative contract has the same effects as in the gift contract, i.e. gratuitous contracts. It is not valid to make a gift on nonexistent or unknown thing, when the delivery is uncertain.

The Maliki jurists are of the opinion that Gharar does not effect the validity of gratuitous contracts. Hence Gharar in the *Uqud al Tabarruat* is legally immaterial. Ibn Rushed stated: it is valid to gift something which may not legally valid to sold, like a thing unknown or nonexistent subject.[18] Ibn Juzy maliki jurist writes: An unknown thing which cannot be sold but can be gifted as such to make gift of a runaway animal and fruits before their benefit is evident is permissible.[19] The Maliki and Shafi jurists even allow making bequest on an unknown thing such as bequest on, whatever the pregnant animal will produce, or an unidentified sheep from the herd of sheep.[20]

Imam Malik, while elaborating on the principle of Gharar and the effect of it on transactions, has given the rationale and wisdom at work behind the distinction between commutative

[17] Ibn Abidin, Radd Al Mukhtar, vol. 4, pp. 225 & 314-322; Al Bahuti, Kashshaf Al Qina, vol. 4, pp. 251-258.
[18] Ibn Rushd, Bidayat, vol. 2, p. 239.
[19] Mansoori, Muhammad Tahir, Shariah Maxims on Financial Matters, IIIE, IIU Islamabad, Pakistan, 2007, p. 192. (As he quoted Al Qawanin Al Fiqhiyyah, p. 532)
[20] Mansoori, Muhammad Tahir, Shariah Maxims on Financial Matters, IIIE, IIU Islamabad, Pakistan, 2007, p.193. (As he quoted Al Muhadhab, vol. 1, p. 458)

3.3) Exception to the general Ruling

It is the general rule and principle in Islamic law of contracts that a man cannot sell anything what he does not have. The Holy Prophet Mohammad (S.A.W.S) said: "Do not sell what you do not have" He also said: "whoever buys food stuff let him not sell them until he has possession of them. The Prophet Mohammad (S.A.W.S) forbids the sale what is in the wombs, sale of the contents of the udder, and sale of a slave when he is runaway. He also forbids the sale of grapes until they become black and the sale of grain until it is strong.

The Muslims jurists are unanimous on the point that it is prohibited to sale an object which is not available and not present at the time of contract. So an object which a seller does not have at the time of contract is like a nonexistent object in the eyes of Shariah, which is prohibited and unlawful.

The exception to this rule of Islamic law of contract is, *Salam* and *Istisna*, i.e. advance purchase and manufacturing contract. Zuhayli says: that the *fuqaha* have established an exception to the general rule, i.e. the prohibition of sale of nonexistent in cases pertaining to sale by advance purchase (*Salam*) and Manufacturing contract (*Istisna*). These transactions are approved despite the absence and nonexistent of the object of a contract by way of *Istihsan* (juristic preference) in order to meet the needs of the people.[22]

3.3.1) Salam (Advance purchase) contract

Salam refers to advance payment for goods which are to be delivered later. In Arabic the word Salam means to advance; a contract where by the purchaser pays the price of goods in advance and the delivery of subject matter /goods is postponed to some specific date and time in future. Thus Salam is a sale in which advance payment is made to the seller (*Muslam ilaih*) for deferred supply of goods.

The history shows that Salam contract was also Prevalent before the advent of the Holy Prophet Mohammad (S.A.W.S) perhaps with different nomenclature and ways. When the Prophet Mohammad (S.A.W.S) migrated to the city of Medina, His companions and followers brought

[22] Zuhayli, Wahabah, Al Fiq Al Islami wa Adillatuhu, vol. 4, p. 174.

this mode of sale to His notice for seeking His guidance and Shariah rulings regarding such contract. The Prophet Mohammad (S.A.W.S) termed it as Salam and allowed it to them with some conditions (Which will be discussed later in this chapter).

In the contract of Salam the buyer known as *Rabb al Salam* the seller is called *Muslam ilaih* the purchased commodity is known as *Muslam fi* and the cash price termed as *Ra's al mal*.[23]

As per Shariah ruling and principle the contract of Salam is seems to be prohibited, as the sale of a commodity which is not in the possession of the seller, is unlawful. This is what the Prophet Mohammad (S.A.W.S) is stated to have laid down as a general rule regarding sale contracts. As we know the Salam is an agreement between the parties on the condition that the seller will provide to the buyer certain goods/commodity as required by the buyer with such and such qualities, quantities at an agreed price, on some date in future, where by the seller receives the price at the time of agreement.

The legality of Salam contract is derivable from the verse of *Quran* and various sayings of Prophet Mohammad (S.A.W.S) as the jurists hold its permissibility,[24] except Saeed Bin al Musaib holds the view of impermissibility of Salam[25] by taking the general rule and sayings of Prophet Mohammad (S.A.W.S) "مالیس عند الإنسان" "The prohibition of something not in the possession of seller is impermissible" and the Prophet Mohammad (S.A.W.S) not allowed a sale of commodity which is not in the possession of seller, is unlawful.[26]

The four jurists are of the opinion that as per analogy and general ruling the contract of Salam is not permissible but due to the *Quranic* verse and sayings of Prophet Mohammad (S.A.W.S), it is permissible as an exception to a general rule for the human needs. The Holy *Quran* stated:

" یاأیها الذین آمنوا إذا تداینتم بدین إلی أجل مسمی فاکتبوه "[27]

[23] Marghenani, Burhan Uddin, Al Hidayah: Sharh Bidayah Al Mubtadi, Maktaba imdadiyyah, Multan, Pakistan, vol. 5, p. 222.
[24] Ibid
[25] Shafi, (Muhammad Bin Idrees Al Shafi, Mutawafi 204. H) Al Ummh, Beirut, Dar Al Qutaiba, 1996, vol. 6, p. 284; Ibn Qudamah, al Mughni, Dar al Fikr, Beirut, 1985, vol. 6, p. 385.
[26] Showkani, Muhammad Ibn Ali Muhammad, Nayl Al Aowtar: Sharh Muntaqa Al Akhbar Min Ahadith Sayyid Al Akhyar, Maktaba Usmaniyya, Egypt, vol. 5, p 192.
[27] Al Quran, 2:282.

"O ye believe; when ye contract a debt for a fixed term, record it in writing." Ibn Abbas the companion of Prophet Mohammad (S.A.W.S) says:

" أشهد أن الله تعالى أحل السلف المضمون وأنزل فيها أطول آية في كتابه وقرء الآية . ياأيها الذين آمنوا إذا تداينتم بدين إلى أجل مسمى فاكتبوه "[28]

"Oh, I am the witness that ALLAH Almighty permitted Salam with liability, and revealed in HIS book a very lengthy verse (in the context of Salam) and then He recites the verse of *Al Baqara*: "O ye believe; when ye contract a debt for a fixed term, record it in writing". So we can say that Ibn Abbas from the mentioned verse of Holy *Quran*, deriving the rule of permissibility for the contract of Salam. In other words: according to Ibn Abbas the legality of Salam derivable from the *Quranic* verse of *Al Baqara.*

The famous *Hadith* in this context is the one narrated from Ibn Abbas in which The Holy Prophet Mohammad (S.A.W.S) said:

" من أسلف في شيئ فليسلف في كيل معلوم ، ووزن معلوم إلى أجل معلوم "[29]

"Whoever whishes enter into a Salam contract, he must effect the Salam according to the specified measure and the specified weight and the specified date/time of delivery".

Lastly, the validity of Salam contract is due to the requirements of the human beings and their needs especially for the growers and traders. The said contract of Salam is practiced before the advent of Prophet Mohammad (S.A.W.S) and also continued during the life time as qualified by the Holy Messenger Mohammad (S.A.W.S).

The jurists are also unanimously treated it to be a permissible mode of business, especially for traders to avoid them from *Riba.*[30] Taqi Usmani has stated: "that the traders of Arabia used to export goods to other places and to import some other to their homelands. They needed money to undertake this type of business. They could not borrow from the usurers after the prohibition

[28] Al Nesaboori, (Al Hafiz Abu Abdullah Muhammad Bin Abdullah Al Hakim Al Nesaboori) Al Mustadrak Ala Al Sahihaan, Beirut, 1991, vol. 2, p. 314.

[29] Ibn Al Humam, Fatah Al Qadir, Quetta, Maktaba Rashidiyyah, 1998, vol. 5, p. 205; Sahih Bukhari, Kitab Al Salam, Hadith No. 3124 & 3125; Sunan Abe Dawood, Babb Fi Salaf (Salam), Hadith No. 3463.

[30] Ibn Qudamah, Al Mughni, Dar Al Fikr, Beirut, 1985, vol. 6, p. 385.

of *Riba*. It was therefore allowed for them that they sell the goods in advance. After receiving their cash price they could easily undertake the aforesaid business".[31]

3.3.2) **Conditions of Salam**

The majority of jurists hold that due to analogy (*Qiyas*) the Salam contract is invalid for the reason of non existence commodity, i.e. subject matter, at the time of contract, and this is Gharar (uncertainty). Yet the text validates the contract of Salam as on the basis of *Rukhsah* (concession), for the people in order to fulfill their needs.[32] However to reduce the degree of uncertainty in Salam contract, the jurists put some conditions. They are as follows:[33]

A) The advance payment of price
B) The time of delivery must be fixed
C) The quality, quantity and the characteristic of commodity must be determined
D) The availability of commodity must be established at the time of delivery

A) ***The advance payments of price***

It is necessary for the validity of Salam that the buyer pays the full price of the object to the seller in advance at the time of Salam contract. If the price is not paid at the time of contract it will amount to a sale of debt for debt, which is prohibited by the Holy Prophet Mohammad (S.A.W.S). The payment of price in advance is the basic purpose of Salam transaction, therefore all the Muslim jurists are unanimous on the point that full payment of the price is necessary while effecting Salam contract. However Imam Malik is of the opinion that the seller may give a concession of two or three days to the buyer, but this concession should not form of the agreement.

[31] Usmani, Muhammad Taqi, an Introduction to Islamic Finance, Maktaba Maariful Quran, Karachi, 2007, p. 186.
[32] Showkani, Muhammad Ibn Ali Muhammad, Nayl Al Aowtar, vol. 5, p. 176.
[33] Ibn Abidin, Radd Al Mukhtar, vol. 4, p. 284; Ibn Rushd, Bidayat Al Mujtahid, vol. 2, pp. 177 & 202; Ibn Qudamah, al Mughni, Dar al Fikr, Beirut, 1985, vol. 4, pp. 294 & 332; Ibn Hazam, Al Muhallah, vol. 9, p. 114; Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, pp. 449, 450.

B) ***The time of delivery must be fixed***

It is necessary that the time of the subject matter of Salam must be fixed at the time of contract. As for the minimum period of delivery of commodity is concerned, according to Hanafi and Hanbali schools of thought; the time of delivery is at least one month from the date of agreement. If the time of delivery is fixed less than one month the Salam contract is not valid on the argument that Salam has been validated for the needs of farmers and traders. That's why they should be given enough time and an opportunity to acquire the specified commodity. And the said commodity in Salam, one may not be able to supply it before one month. It also be noted that a period of less than one month does not normally affect the price, therefore the minimum time of delivery of commodity must not be less than one month. Imam Malik also support this view (minimum period for Salam) but he is of the opinion, that it should not be less than fifteen days on the argument that price in the market may change within fortnight. According to Shafi jurists Salam can be immediate and delayed. The view of minimum period for the delivery of commodity of Salam is opposed by some jurists like Imam Shafi and also some Hanafi jurists stated: that the Holy Prophet Muhammad (S.A.W.S) has not specified a minimum period for the validity of Salam. The condition-fixation of time limit-lies in *Hadith* is only for delivery of the commodity, that it must be clearly defined. Means that no minimum period can be prescribed, so that is why the contracting parties may fix any time for delivery of commodity with their mutual consent.

C) ***The quality, quantity and the characteristic of commodity must be determined***

The object of Salam should be defined by description of the commodity in form of quality, quantity and characteristics. If the commodity is not determined with specifications cannot be sold through contract of Salam. Precise description and identification of an object includes *Genus*, species, color and all other related features which have an effect on the price. The quality and quantity of the commodity intended to be purchased through Salam must be fully specified without any ambiguity which may lead to litigation and dispute among the contracting parties. So that is why all the required and possible details regarding commodity must be expressly mentioned in order to devoid the transaction from vagueness and uncertainty.

D) ***The availability of commodity must be established at the time of delivery***

The availability of commodity must be established at the time of delivery. the jurists differ on this point, according to Hanafi school of thought, the commodity must remain available in the market from the date of contract to the date of delivery, if a commodity is not available in the market at the time of contract, Salam cannot be effected even though if it is expected that the commodity will be available in the market at the time of delivery. The Shafi, Maliki and Hanbali are of the view that the availability of commodity at the time of contract is not a condition for the validity of Salam rather than it must be available at the time of delivery.

3.3.3) **Parallel Salam Contract**

Islamic banks and other financial institutions often use an option to enter into another independent Salam (advance purchase) transaction to sell the commodity which they have purchased on Salam basis. This is generally called parallel Salam.

Parallel Salam is a new method which is introduced in this modern age, especially in the Islamic banks and in other financial institutions have opted this transaction. In this very type of Salam contract, the banks and financial institutions sometimes sell the commodity through a parallel Salam contract. The period in the second contract is shorter than the first actual Salam contract, and the price is fixed a little higher than the price of first transaction. In other words: in this arrangement of parallel Salam, the banks and financial institution enter into two different contracts. The bank and financial institution acts in one as a buyer/purchaser and in the other as a seller. Means that the bank purchases something and sells it on the basis of parallel Salam. This is not a sale contract but a mere promise because the buyer will not have to pay the price in advance. So each one of these contracts must be independent from one another and cannot be tied up in a manner that the rights and obligations of one contract-first contract-are dependent on the right and obligations of the second contract (parallel Salam). Means that each contract must have its own force and the performance must not be contingent on the other contract. We can say that parallel Salam is meant a Salam contract whereby the seller depends for executing his obligation on receiving what is due to him in his capacity as purchaser from a sale in a

previous Salam contract without making the execution of the second Salam contract dependent on the execution of the first contract.

Shariah standards provides; it is permissible for the seller to enter into a separate independent Salam contract with a third party in order to acquire goods of a similar specification to those specified in the first Salam contract, so that the first Salam obligation will be discharged by delivering these goods. Hence the seller in first Salam contract becomes buyer in the second Salam contract. It further says; it is not permissible for the parties to link the obligations under the two Salam contracts together, so that the execution of the obligations of one contract is contingent on the outcome of the other. Hence, it is necessary that both the obligations and rights under the two contracts stand alone in all respect. Therefore, if one party breaches his obligation under the first Salam contract, the other party (the injured party) has no right to relate his damage or loss to the party with whom he concluded a parallel Salam. Consequently, he has no right on the basis of his loss or damage under the first Salam contract to terminate the second Salam contract or to delay in performing it.[34]

3.3.4) **Conditions of Parallel Salam**

It is necessary that the transaction-Parallel Salam Contract-must be according to the conditions discussed earlier for the Salam contract. Besides these conditions the banks and financial institutions must observe the following two, while entering into parallel Salam contract:

i) Every contract of Salam must be separate and independent from another. It is not permissible to stipulate the rights and obligations of one contract in another contract. Each and every contract must be independent. For example: If "A" enters into a contract of Salam with "B" to deliver 1000 bags of rice in the month of September, "A" in this contract acts as a buyer/purchaser, while "B" acts as producer/seller. "A" further can enter into a parallel Salam contract with "C" to deliver him 1000 bags of rice in the month of September. This arrangement is only permissible where the parallel Salam contract is not conditional upon the first contract. means that "A" while contracting

[34] Shariah Standards, AAOIFI, Manama Bahrain, May 2003, Standard No. 10, Sub Article 6/3, pp. 167, 168

parallel Salam with "C", the delivery of rice by "A" to "C" must not conditioned with taking the delivery from "B" by "A". "A" must deliver the said commodity to "C" even if "B" may not deliver him in the prescribed time. So it is necessary for the validity of parallel Salam contract that it must not depend on the first contract. In such a case if the second contract depends on the first contract, this condition render the parallel Salam impermissible due to Gharar (uncertainty).

ii) Parallel Salam contract must be with third party. Means that it is not permissible that the seller in first contract becomes the purchaser in the second. In such a case it will become *Bay al Inah* (buy back) contract, which is not permissible in Shariah.

A point must be noted, that it is even not permissible for a big financial institution to enter into parallel Salam with its subsidiary institutions, even if it is a separate legal entity but fully owned by the financial institution. Because in such a case this arrangement is amounts to *Bay al Inah* (buy back) contract, which is not allowed in Shariah.[35]

[35] Mansoori, Muhammad Tahir, Shariah Maxims on Financial Matters, IIIE, IIU Islamabad, Pakistan, 2007, pp. 208, 209; Usmani, Muhammad Taqi, an Introduction to Islamic Finance, Maktaba Maariful Quran, Karachi, 2007, pp. 194, 195; Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty, Darul Ishaat, Karachi, 2007, pp. 54, 55; Shariah Standards, AAOIFI, Manama Bahrain, May 2003, Standard No. 10, Sub Article 6, pp. 167, 168.

3.4) **Istisna (Manufacturing contract)**

Istisna purchase order; is a sale transaction where a commodity is transacted before it is manufactured. In other words: it is the contract for manufacturing of some specific commodity for the buyer by the seller himself or through some other manufacturer.[36] It means that Istisna is a contract in which the buyer asks the seller (manufacturer) to manufacture something required by the buyer (orderer). For example: one may engage a cobbler to make a pair of shoes for a fixed price or one may ask a tailor to make a suit for him to be deliver later.[37] So we can say that Istisna is a contract in which one asks the other to manufacture something specific for him for a known price, has to be fixed with the consent of both parties, with all necessary specification of the required thing, and mode of payment, i.e. the price may be paid according to agreed schedule of payment, that may even be an advanced, or at the time of possession of thing manufactured or even after the possession in shape of lump sum or in agreed installment during the time of manufacturing.

The point must be noted here that the material of an object must be from the manufacturer. If the material is provided by the customer and the manufacturer has used his labour and skill only, it will not be contract of Istisna rather it will be a contract of *Ijarah* instead of Istisna. Thus if a person gives the price of an iron to ironsmith to make a specific vessel or specific thing for a known price/consideration, it is permissible but it will not be a contract of Istisna rather a contract of hiring.[38] Khalid al Atasi stated: "that the material in the contract of Istisna must be from manufacturer, if the material is provided by the customer and the manufacturer used only his labour and skill, the contract will not be Istisna rather it will be a contract of *Ijarah*, where by the services of a person is hired for a known consideration or specific fee paid to the person undertake to do a specific work".[39]

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[36] Ansari, Omar Mustafa, Managing Finances-A Shariah Compliant Way, Time Management Club, P.O. Box-12356, DHA, Karachi, 2007, p. 77.

[37] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 5, p. 3.

[38] Ibid

[39] Atasi, Khalid Al Atasi, Sharh Al Mujallah, vol. 2, p. 403.

As for the validity of Istisna is concerned; it is based on custom, which prevailed from the time of Holy Prophet Mohammad (S.A.W.S) and is also justified having regard to the needs of human. Kasani says:

" أما جوازه فالقياس أن لا يجوز لأنه بيع ما ليس عند الإنسان لا على وجه السلم وقد نهى رسول الله صلي الله عليه وسلم عن بيع ما ليس عند الإنسان و رخص في السلم ويجوز استحسانا لإجماع الناس على ذلك لأنهم يعملون ذلك في سائر الأعصارمن غير نكير وقد قال عليه الصلاة والسلام : لاتجتمع أمتي علي الضلالة ، وقد قال عليه الصلاة و السلام : ماراه المسلمون حسنا فهو عند الله حسن وما راه المسلمون قبيحا فهو عند الله قبيح ، والقياس يترك بالإجماع "[40]

"the legality of this form of contract is based on *Istihsan*-which is a departure from the rule of precedent- analogy would thus invalidate the Istisna contract, because it is a sale of an object which does not exist, i.e. the sale of a thing what one's does not have, neither it is a Salam contract, and the Holy Prophet Mohammad (S.A.W.S) prohibited a sale of thing what one does not have, and permitted a Salam contract. Thus the contract of Istisna is allowed on the basis of *Istihsan* as all the people are practicing this type of contract unanimously, so the permissibility of Istisna in Shariah has been constructed on way of *Istihsan* without any objection, and the people in each era are practicing, which is prevailed from the life time of Holy Prophet Mohammad (S.A.W.S). The Holy Prophet Mohammad (S.A.W.S) said: "My *Ummah* will not hold consensus on a strayed path (wrong path)", and also said: "whatever the Muslims consider good is good in the eyes of ALLAH, and whatever they consider evil is evil in the eyes of ALLAH". That's why we left analogy because of *Ijma*. In the presence of *Ijma* the analogy will not be preferred and the *Istihsan* exceptionally validates it on the authority of *Ijma* and the prevailed custom which is justified the needs of people.

3.4.1) Conditions of Istisna Contract

Since Istisna is a contract of non existence subject matter at the time of agreement. This creates Gharar (Uncertainty) that is why the jurists put some conditions in order to minimize the degree of Gharar (Uncertainty). These conditions are as follows:

A) The commodity i.e. subject matter of contract must be defined in respect of quality, quantity and characteristic in order to avoid uncertainty and ambiguity.

[40] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 5, p. 3.

B) The contract of Istisna must relate to some things which are customary among the mankind, such as manufacturing of shoes, building, head caps etc. Otherwise the contract will not be valid. Means that if the contract relates to some things which are not customary among the people, the contract of Istisna is not lawful.[41]

C) The time of the completion of work and delivery must not be fixed. This is according to Imam Abu Hanifa; in his view if the time is fixed the contract will not be Istisna rather it will be a contract of Salam. But according to his two disciples "Imam Abu Yusuf and Imam Muhammad" disagree with his teacher "Imam Abu Hanifa" that the time must be fixed. They are also of the view that if the time is fixed or not, the contract remains Istisna, only by non fixation of time, the contract of Istisna is not converted into a contract of Salam.[42]

D) The price or consideration must also be mentioned and specified.[43]

These above mentioned conditions are put by the jurists as the validity of Istisna is an exception to the general rule of Islamic law of contracts that an object or something which does not exist at the time of contract may not be sold and is unlawful. However the contract of Istisna is valid despite its being the sale of things which are nonexistent at the time of contract. Thus the contract of Istisna is validated on the authority of *Istihsan* or need of the people, because people are in grave need for such types of contracts. So the legality of this form of contract is based on customary law, as the people are practicing Istisna since from a long time and it has been prevailing from the life time of Holy Prophet Mohammad (S.A.W.S) which is also justified by the need and requirements of the people. That's why the contract of Istisna is an exception to the general rule of Islamic law of contracts. Thus there is no point to give exemption to each and every case where the people themselves do not need and justify the exemption.

[41] Kasani, Badai Al Sanai Fi Tartib al Shariah, Cairo, 1906, vol. 5, p. 3.

[42] Ibid

[43] Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, p. 212.

3.4.2) Parallel Istisna (manufacturing contract)

The Islamic banks and other financial institutions are using an option to enter into another contract of Istisna with some other person and to sell the manufacturing goods in advance. This is called parallel Istisna contract. Parallel istisna is a new method adopted by Islamic banks and also financial institutions.

Parallel Istisna is a contract, where the institution entering into contract with another party in order to sell in the capacity of manufacturer, builder or supplier the commodities whose specifications conforms to the wishes of the other party, on the basis of parallel Istisna. In such a case there are two separate deals of Istisna. There is no link between the two contracts; hence this is not an instance of two sales in one deal, which is prohibited. The separation of the two contracts also has the effect of making the transaction a type of non *Riba* based.[44]

We can say that parallel Istisna is another form of Istisna known in modern age as a parallel Istisna, which takes effects through two separate contracts. In the first contract the Islamic bank and other financial institution act as a manufacturer or builder, and enter into a contract with the client. In the second contract the Islamic bank and other financial institution acts as a purchaser and enters into a contract with a manufacturer or builder, in order to fulfill the contractual obligations towards the client in the first contract, with this process a little profit is realized through the difference in the price between the two contracts. In such a case mostly the second contract between the bank and the manufacturer is concluded firstly while the contract between the bank and client is concluded later.

It must be noted, that the parallel Istisna must not depend upon the first contract. Therefore it is not permissible to make any link between the Istisna and parallel Istisna contract. The obligation must not be dependent on one another contract. So each and every contract must be independent if it is conditioned upon another, such arrangements are not permissible in Shariah.

[44] Shariah Standards, AAOIFI, Manama Bahrain, May 2003, Standard No. 11, Appendix (B), P. 194.

3.5) Conclusion of the thesis

In this modern age, many new forms of business methods have been introduced. It is suggested here that every modern business practice must be evaluated under the guidance of Islamic principles, if these practices are in conformity with Islamic principles. As regards the concept of Gharar, no specific attempt has been made. The views of modern jurists regarding the concept and the elements of Gharar Itself are not sufficient. We can safely conclude here that "Gharar is a form of uncertainty over the subject matter of a contract, the price, and the delivery etc".

It is very much clear that there are some principles/rules which govern Islamic law of contract in general and the effects of Gharar in these contracts in particular. These rules or principles are as follows:

1) The rule/ principle of avoidance dispute between the parties, i.e. contracting parties
2) The rule/ principle of contractual justice (contractual obligations)
3) The rule/ principle of legitimate public needs (*Hajah*) and legal interests of mankind

These rules/principles are very important in order to fully understand the main objective of Islamic law of contract. The disagreement among the Muslim jurists in the law of contract does not mean that the jurists treat these principles differently, but the disagreement among the jurists in the area of law of contract, mean that the jurists treat the importance of these principles/rules differently. In fact, it is a result of the different methods used to protect and realize those principles/rules in the contractual agreements. Keeping in view these rules/principles, Gharar is classified into two kinds, namely; *Gharar fahish* (excessive uncertainty) which is legally effective and *Gharar yasir* (trivial uncertainty) is legally ineffective. Any Gharar which nullifies the achievements of a contract in the view of these principles/rules will be considered as *Gharar fahish*, i.e. excessive Gharar, serious Gharar or major Gharar. Whereas the Gharar which does not nullify the achievements of a contract will be considered as *Gharar yasir*, i.e. trivial Gharar, slight Gharar or minor Gharar.

The very important issue in Islamic law of contracts is the existent of a subject matter at the time of contract. The jurists are unanimous on the point that the non-existence of an object

makes the contract invalid due to the emergence of Gharar. Some later jurists like Ibn Taymiyyah and Ibn Qayyim hold that non existence of a subject matter does not invalidate any contract; rather the cause of prohibition of a contract is the Gharar. This view is also supported by modern jurists and scholars like Al Sanhuri and Al Darir, are of the view that the classical jurists failed to make the difference between nonexistent subject matter and Gharar. Al Sanhuri and Al Darir are of the view that the classical jurists nullify the contract merely on the grounds of nonexistent of an object which does not seem proper to meet the needs of people. In fact in my opinion the classical jurists made the difference between Gharar and non existence, say for example; Al Samarqandi a Hanafi jurist stated: that "among the invalid sale is the sale of nonexistent subject matter.....or when the existence of the subject is not certain". So this is the clear example where Samarqandi says; when the existence of subject matter is not certain the contract is invalid, and in my opinion if it is not certain-means certain even to some future date-the contract will be valid as Al Darir said.

Gharar is totally an independent concept which could involve in any situations, i.e. existent or nonexistent subject matter. It is not necessary that all contracts on nonexistent subject matter include the element of Gharar. That is why it is not necessary that all contracts on the existence of a subject matter are totally free from the element of Gharar. Therefore Gharar must be focused rather than the existent and nonexistent of an object of a contract. If an object does not exist at the time of contract, the element of Gharar is avoided on the basis of future delivery. So for the needs of the people the view; that if an object is not in existence at the time of contract but its delivery established to some future fixed date is certain, the arrangement is legal and lawful as it is neither leading to any dispute nor affecting the right of any contracting parties.

Many kinds of contract on nonexistent subject matter such as Salam, Istisna and Ijarah permitted on the ground of human needs (*Hajah*) and juristic preference (*Istihsan*). In this modern age where Islamic banks and other Islamic financial institutions gained popularity, the need for such contracts seems to be much greater. For the reason almost all the modern jurists are in favour of the opinion of Ibn Taymiyyah and Ibn al Qayyim as they hold different opinion with the majority of classical jurists, for example the basis of prohibition of a contract is, nonexistent object in the eyes of these classical jurists, but for Ibn Taymiyyah and Ibn al Qayyim the basis of prohibition is Gharar itself, not is non existence of the subject matter.

Another important issue in the Islamic law of contracts is that the element of Gharar is ignorance about the nature, quality and quantity of the subject matter or the price. It is a basic principle in the law of contract that all necessary aspects of the subject and the price must be known to the contracting parties through *Genus*, species, characteristics, quantum and time of delivery, in order to prevent the element of Gharar which may lead to dispute and litigation. That is why the full knowledge over the subject matter is accomplished only when it is present at the session of contract.

In the first portion we have discussed the concept of Gharar in the light of Islamic law and jurisprudence. The holy *Quran* and *Sunnah* of the Prophet Mohammad (S.A.W.S) do not define Gharar as the concept of Gharar was clear to the people. However the classical jurists give different definitions of Gharar. They all agree that Gharar being out of the suspicious of danger because of the uncertainty of outcomes of the contract. Some well known contemporary scholars like Mustafa al Zarqa and Wahabah al Zuhayli, have also defined Gharar. The meaning of Gharar to the modern jurist is similar to that of the classical, except that they attempt to give more contemporary definitions, where the concept of risk is being introduced in the context of contemporary circumstances. After discussing definitions and various kinds of Gharar we come across that Gharar does not have a single definition, in fact it is a very broad concept as we stated. However after searching and analyzing various kinds of Gharar contracts both in classical and modern jurisprudence, juristically Gharar refers to the state of uncertainty and ignorance (*Jihala*) of an object of a transaction in terms of its *genus*, species, characteristics, quantum, time of delivery and the consideration/price. All the *fiqhi* schools are unanimous that the involvement of Gharar renders any transaction void and according to the Hanafi school of thought makes it irregular (*fasid*). The later jurist Ibn Taymiyyah says: "It is well known that ALLAH and his messenger the Prophet Mohammad (S.A.W.S) did not prohibit every kind of risk nor all kinds of transactions that involve the possibility of gain or loss are prohibited, what is prohibited is eating wealth for nothing, not mere risk". Mustafa Zarqa says: "Gharar is forbidden when uncertainty exceeds acceptable limits, and this is what the statement of our thesis that Gharar is not completely forbidden, a certain degree of Gharar is accepted. Islam does approve the taking of commercial risk; only excessive risk (*Gharar fahish*) taking is prohibited". In my opinion this view is more likely suitable to the present

scenario where the people are in great need and they are taking risks in their business in order to make profits, but it is very much necessary to keep in view the principles of Islamic law, otherwise their passion and desire for seeking an increase in wealth will spoil the principles of Islamic law.

In the second portion we have discussed the effects of uncertainty on contracts in Islamic law and especially the contracts regarding Islamic banks and other financial institutions. After discussing and analyzing various contracts, i.e. *Mudarabah* (Profit Sharing Contract), *Musharakah* (Profit & Loss Sharing Contract), *Murabahah* (Trade with mark up OR Cost plus Sale Contract), *Salam* (Advance Purchase Contract), *Istisna* (Purchase Order OR Manufacturing Contract), and *Ijarah* (Lease Financing Contract). We come across that the element of Gharar is not totally avoided in most of the contracts nor a transaction is forbidden merely on the ground of Gharar without looking to the degree of Gharar involved in such transactions. Keeping in view that Islam does approve the taking of commercial risk; only excessive risk taking is prohibited, it is said, that Gharar is not completely forbidden, a certain degree of Gharar is accepted. Gharar is forbidden in that case when uncertainty exceeds acceptable limits, i.e. when uncertainty amounts to *Gharar fahish* (Major or excessive Gharar) which changes the status of a contract. However there is Gharar which does not change the status of a contract nor it effects the contracting parties, such Gharar is negligible which is known as *Gharar yasir* (Minor or trivial Gharar). It must be noted here that according to the later jurists the prohibition of a contract is not merely on the grounds of non existence of a subject but Gharar itself. That is why their focus is not on a nonexistent object rather on Gharar, because for them existent and nonexistent subject matter is not a core issue rather Gharar is the point of issue which involves in both situations, whether the subject matter of a contract is exist or not. Thus Gharar makes the transaction void, whether the subject matter of a contract exists or not.

Another important issue is the effectiveness of Gharar, means that what kind of Gharar is effective which makes the transaction void or invalid. Off course it is the *Gharar fahish* (Major, Serious or excessive Gharar) as we discussed. It is very much clear from the discussion of Gharar especially in chapter two, that Gharar may emerge in various forms, so each and every Gharar may not renders the transaction void or invalid. It is because that a certain degree

of Gharar is acceptable in shariah. That is why Gharar in all cases does not render any transaction impermissible. According to the jurists there are certain conditions for the effectiveness of Gharar. These conditions are as follows:

1) Profusion of Gharar
2) Originality of Gharar
3) Public need or *Hajah*
4) Commutative contracts

These are the four conditions for the effectiveness of Gharar. Firstly the profusion of Gharar; means excessive Gharar. A small or minor Gharar does not invalidate a contract. According to the majority jurists, Gharar which nullifies the contracts is *Gharar al kathir* (major or excessive Gharar). *Gharar al yasir* (minor or trivial Gharar) will not affect the contract. The problem is how to draw a clear line between *Gharar al kathir* (major or excessive Gharar) and *Gharar al yasir* (minor or trivial Gharar). While evaluating the legal position of various contracts we come across that there is no clear line between *Gharar al kathir* and *Gharar al yasir* which is accepted by all jurists. That is why we find disagreements among the jurists in the area between the *Gharar al kathir* and *Gharar al yasir*. After searching and analyzing this issue we find that an attempt has been made by the Maliki jurists while assessing the area between the *Gharar al kathir* and *Gharar al yasir*. Al Dasuqi a prominent jurist in the Maliki school of thought says: "*Al Gharar al yasir* is the Gharar which people voluntarily accept and tolerate it". Al Baji says: "*Al Gharar al kathir* is a large degree of Gharar which is significantly connected with the contract to the extent that the contract itself could be called the Gharar contract". On the other hand some of the contemporary jurists like al Sanhuri, al Darir and Daradikah, suggest a safer way to the issue of major and minor degree of Gharar. They says that it must be left to the people themselves to decide which compatible to their needs and requirements. This view is more suitable in this modern age to be taken but in my opinion such a legal decision should not be left to a common people. It should be treated by competent and qualified Jurists. Secondly Originality of Gharar means that Gharar must emerge in the contract originally or contract must contain an element of Gharar itself. If the element of Gharar is associated with the subject and not in the subject itself, in such a case Gharar will be considered immaterial and negligible. For example, it is not permissible to sell fetus of a pregnant animal separately due to uncertainty.

But there is no bar on the sale of a pregnant animal, rather it is legal that the pregnancy of an animal is keep into consideration, and the price of such an animal is exceed at the time of its sale contract to an animal that is not pregnant. Thirdly Public need; means the legitimate and legal requirements of human beings. The element of Gharar is negligible and hence considered as immaterial when it is unavoidable in such contracts to which the mankind are in grave need. For example, *Salam* contract, in fact a sale of a nonexistent object, but shariah permitted it on the basis of human needs. Thus Gharar is negligible where the pressing need of people is involved in a transaction. Fourthly Gharar must relate to commutative contracts (*uqud al muawdat*) such as sale, hiring, and leasing renders these transactions invalid. Gharar if relates to the gratuitous contracts (*uqud al tabarruat*), such as gift, *hibah*, *waqf*, bequest etc, does not affect the validity of a transaction. So this is a general rule that Gharar invalidates commutative contracts not gratuitous contracts. The jurist differs on the point whether Gharar affects gratuitous contracts (*uqud al tabarruat*) such as gift, *hibah*, *waqf*, bequest etc. the majority of jurists hold that Gharar nullifies the gratuitous contracts as it nullifies the contracts for counter-value. On the other hand, the Maliki jurists are of the view that, Gharar in gratuitous contracts is legally immaterial. Ibn Rushd says: "it as valid to make a gift of something which is legally not valid to be sold". The view of Maliki jurists is the minority view, but in my opinion this is more suitable for the reason that Gharar in the gratuitous contracts (*uqud al tabarruat*) does not harm the interest of the contracting parties. Thus Gharar in gratuitous contracts (*uqud al tabarruat*) is considered as immaterial and illogical.

In the third portion we have discussed the shariah maxims on uncertainty. The rules of Shariah regarding uncertainty described in details by the Muslims scholars through certain maxims. The most prominent maxims on the uncertainty, like "To sell what one does not have, is unlawful" and also "Gharar invalidates commutative contracts not gratuitous contracts" are discussed in details. The maxim "To sell what one does not have, is unlawful" is based on the famous sayings of The Holy Prophet Mohammad (S.A.W.S) said: "Do not sell what you do not have". The majority of classical jurists as well as the modern scholars hold that non existence of the object-subject matter- at the time of contract will make the contract null and void. On the other hand Ibn Taymiyyah and Ibn Qayyim hold that non existence of subject matter does not invalidate any contract; rather the cause of prohibition of a contract is the Gharar. This view is also supported by modern jurists and scholars like Al Sanhuri and Al Darir (as we discussed

earlier). That is why in the opinion of Ibn Taymiyyah and Ibn Qayyim which is supported by the prominent jurists like Al Sanhuri and Al Darir. The *Hadith* "do not sell what is not with you" indicates that the *illah* (effective cause) of the prohibition is not the non existence of an object, but is the uncertainty (Gharar). In my opinion this view is more likely suitable to the present scenario where the people are in great need in order to meet their requirements, but keeping in view the shariah rules and Islamic principles. The second maxim of the third chapter; "Gharar invalidates commutative contracts not the gratuitous contracts" is talks about two types of contracts i.e. *Uqud al muawdat* (commutative contracts) and *Uqud al tabarruat* (gratuitous contracts). *Uqud al muawdat* are the Contracts for counter value or commutative contracts where one party gives consideration to another party for what he gets through the contract, like *Bay* (sale). *Uqud al Tabarruat* are the Gratuitous contracts such as gifts, *waqf*, *hibah*, interests free loans and bequest (*wasiyah*) etc. All the jurists agreed that Gharar invalidates *Uqud al muawdat* (commutative contracts). But the jurists differ on this point, whether the Gharar (uncertainty) has a legal effect in gratuitous contracts i.e. *Uqud al Tabarruat* or not? The majority of jurists are of the view that Gharar nullifies the gratuitous contracts such as gift, as it nullifies the contracts for counter value such as the sale of contract. On the other hand Maliki jurist, Ibn Rushd and Ibn Juzy are of the opinion that Gharar does not affect the validity of gratuitous contracts. Hence Gharar in the *Uqud al tabarruat* is legally immaterial. Also Shafi jurists even allow making bequest on a known thing. So in my opinion the view of the Maliki jurists in the mentioned point whether uncertainty effects gratuitous contracts is the minority view, because the majority of the jurists hold otherwise for the reason, the prohibition of Gharar in contracts is to avoid injustice to any of the contracting parties to a contract, which may lead to litigation and dispute. However in the *Uqud al tabarruat* i.e. gratuitous contracts the issue of injustice may hardly be arises as none of the parties suffer to loss anything in the contract of gift. That is why the element of Gharar in my opinion as regarding to the gratuitous contracts are concerned, is legally immaterial as it is not harmful.

The very important issue is the issue of Contractual certainty. It is the fundamental rule of the Islamic law of contracts, that contracts must be free from uncertainty. This rule is known as "the rule against Gharar (uncertainty). "Nabil Saleh stated in his book, any transaction should be devoid of uncertainty and speculation, and this can only be secured by the contracting parties, having perfect knowledge of the counter values intending to be exchanged as a result of

their transaction. As regards the-contractual certainty-conditions in order to be free from uncertainty the subject matter in existence. It must be noted that existence of an object is one thing, while the ability to deliver is different. For example, a bird in the air or a fish in water exist, but it cannot surely be delivered nor these things can be possessed by any one at the present". The contractual certainty is all about to be devoid of Gharar (uncertainty) and indeterminacy i.e. the object of contract should be either in actual existence at the time of contract or it should be capable of being delivered in some future date, because contracting over a nonexistent object is disallowed only when there is a grave /serious uncertainty regarding the acquisition of the subject matter and delivery to the buyer. We can say that contractual certainty means; "knowledge about the material terms of contract". So the lack of knowledge about the material terms of contract is called uncertainty, which relates to the occurrence of an event, the subject matter whether exist, or not, its quantity and quality, and also the time period of payment whether price, rent, profit and etc. It must be noted that the contractual certainty is necessary for commutative contracts i.e. non gratuitous, like sale, lease and etc, where as it is not necessary for gratuitous contracts such as *gift*, *waqf* and donations etc.

The rule of certainty in the Islamic law of contracts is expressed very clearly and necessary in all such cases where uncertainty arises in the existence of things. The contractual certainty is the condition upon the contracting parties to devoid of uncertainty, speculation and indeterminacy any transaction, agreement or contract which the Shariah accords to a contract, agreement or any transaction in order to secured the parties, and this is only where the contracting parties having perfect knowledge of the counter values to be exchanged or transferring the ownership of subject matter as a result of their transaction, agreement or contract. The ownership say for example in a contract of sale once concluded, is established by some certain evidence. The reason is that sale contracts unlike the contracts exempted from general ruling does not necessarily be concluded until and unless it is clear in terms of quantity, quality of the subject matter, the time period of payments etc, as uncertainty refers to the lack of knowledge about the necessary terms of the contracts which may lead to dispute and litigation. That is why contractual certainty is necessary for the contracting parties to know about the outcome of their transactions and agreements.

Lastly we have discussed the contracts an exception to the general ruling. As we know that it is the general rule and principle in Islamic law of contracts that a man cannot sell anything what he does not have. The Holy Prophet Mohammad (S.A.W.S) said: "Do not sell what you do not have". He also said: "whoever buys food stuff let him not sell them until he has possession of them". The Prophet Mohammad (S.A.W.S) forbids the sale what is in the wombs, sale of contents of the udder, sale of a slave when he is runaway. He also forbids the sale of grapes until they become black and the sale of grain until it is strong. The Muslims jurists are unanimous on the point that it is prohibited to sale an object which is not available and not present at the time of contract. So an object which a seller does not have at the time of contract is like a nonexistent object in the eyes of Shariah which is prohibited and unlawful. The exception to this rule of Islamic law of contract is *Salam* and *Istisna* i.e. advance purchase and manufacturing contract. Zuhayli says: that the *fuqaha* have established an exception to the general rule i.e. the prohibition of sale of nonexistent in cases pertaining to sale by advance purchase (Salam) and Istisna (Manufacturing contract). These transactions are approved despite the absence and non existence of the object of a contract by way of *Istihsan* (juristic preference) in order to meet the needs of the people. Sense we know that *Salam* (advance purchase) and *Istisna* (Manufacturing contract) are exception to the general rule of Islamic law of contracts". The jurists put some conditions (as we discussed in third chapter) for these contracts in order to minimize the degree of Gharar (uncertainty). So these conditions must be observed to devoid the *Salam* and *Istisna* contract from uncertainty.

Findings

- Gharar refers to the state of uncertainty and ignorance (*Jihala*) of an object of a transaction in terms of its *genus*, species, characteristics, quantum, time of delivery and the consideration/price.
- Uncertainty (Gharar) is forbidden and prohibited in Islamic Law, when uncertainty exceeds acceptable limits.
- Uncertainty about an occurrence of an event makes the contract void.
- Uncertainty about a thing which is not in the knowledge of the parties to a contract makes the contracts invalid.
- Sale of the things whose acquisition is in doubt, whether it exist or not (like sale of fruits on trees) amounts to a form of gambling prohibited in Shariah.
- The element of Gharar is not totally avoided in most of the contracts, nor is a transaction forbidden merely on the ground of Gharar without looking to the degree of Gharar involved in such transactions.
- Uncertainty is not completely forbidden; a certain degree of Gharar is accepted. Islam does approve the taking of commercial risk; only excessive risk (*Gharar fahish*) taking is prohibited.
- *Gharar fahish* (excessive uncertainty) which is legally effective and *Gharar yasir* (trivial uncertainty) is legally ineffective.
- Any Gharar which nullifies the achievements of a contract will be considered as *Gharar fahish*, i.e. excessive Gharar.
- Any Gharar which does not nullify the achievements of a contract will be considered as *Gharar yasir*, i.e. non excessive Gharar. *Gharar al yasir* is the Gharar which people voluntarily accept and tolerate it.
- Non existence of subject matter does not invalidate any contract; rather the cause of prohibition of a contract is the Gharar (uncertainty).
- All the contracts on the existence of a subject matter are not totally free from the element of Gharar.
- Gharar involves in both situations, whether the subject matter of a contract is exist or not.

- Gharar makes the transaction void, whether the subject matter of a contract exists or not.
- The basis of prohibition of a contract is not a nonexistent object in the eyes of Islamic Law but the basis of prohibition is Gharar itself.
- All the *fiqhi* schools are unanimous that the involvement of *Gharar fahish* renders any transaction void and according to the Hanafi school of thought makes it irregular (*fasid*).
- Sale of fetus of a pregnant animal separately is impermissible. But there is no bar on the sale of a pregnant animal.
- It is legal to keep into consideration the pregnancy of an animal, and the price of such an animal can be exceed at the time of its sale contract to an animal that is not pregnant.
- The element of Gharar is negligible and hence considered as immaterial when it is unavoidable in such contracts to which the mankind are in grave need.
- Gharar invalidates commutative contracts (*uqud al muawadat*) not gratuitous contracts (*uqud al tabarruat*).

Recommendations

I recommend here for further study that; According to the majority jurists, Gharar which nullifies the contracts is *Gharar al kathir*. *Gharar al yasir* will not affect the contract. The problem is how to draw a clear line between *Gharar al kathir* and *Gharar al yasir*. While evaluating the legal position of various contracts we come across that there is no clear line between *Gharar al kathir* and *Gharar al yasir* which is accepted by all jurists. That is why we find disagreements among the jurists in the area between the *Gharar al kathir* and *Gharar al yasir*. After searching and analyzing this issue we find that an attempt has been made by the Maliki jurists, Al Dasuqi and Al Baji, while assessing the area between the *Gharar al kathir* and *Gharar al yasir*, but still the issue needing further work and elaboration, because it is not very much clear nor readily apparent to the mind. On the other hand some of the contemporary jurists like al Sanhuri, Al Darir and Daradikah, suggest a safer way to the issue of major and minor degree of Gharar, says that it must be left to the people themselves to decide which compatible to their needs and requirements. But in my opinion such a legal decision should not be left to a common people. It should be treated by competent and qualified Jurists.

Further I recommend the issue; where Al Sanhuri and Al Darir are of the view that the classical jurists nullify the contract merely on the grounds of non existence of an object which does not seem proper to meet the needs of people. In fact in my opinion the classical jurists made the difference between Gharar and non existence, say for example; Al Samarqandi a Hanafi jurist stated: that "among the invalid sale is the sale of nonexistent subject matter.....or when the existence of the subject is not certain". So this is the clear example where Samarqandi says; when the existence of subject matter is not certain the contract is invalid, and in my opinion if it is not certain-means certain even to some future date-the contract will be valid as Al Darir said; "A contract consist upon nonexistent subject matter, but where the existence of the subject matter in some future date is certain, the contract is valid". That is what the statement of Samarqandi, we meant from it.

So both these mentioned issues are recommended for further study, as these issues needing further research work and elaboration, because it is neither very much clear nor readily

apparent to the mind. The researcher are advised to explore a clear line between *Gharar al kathir* and *Gharar al yasir*, and also to analyze the issue, whether the classical jurists really nullify the contract merely on the grounds of non existence of an object, without looking towards Gharar and considering the degree of Gharar, involved in any contract, in order to fully understand the views of classical jurists, and also the view point of the contemporary scholars in this regard.

Lastly I recommend that, Faculty of Shariah and Law (FSL), and also International Institute of Islamic Economics (IIIE), International Islamic University Islamabad, must include a subject regarding; "*Effects of Uncertainty on Contracts in Islamic Law*", covering all aspects of Islamic Commercial Law-Especially Islamic Banking Contracts- and also those transactions we do in our daily business, in order to fully understand the implications of uncertainty, so that we do our business in accordance to Islamic Law and Shariah principles/rules.

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