

# Islamic Contract Law

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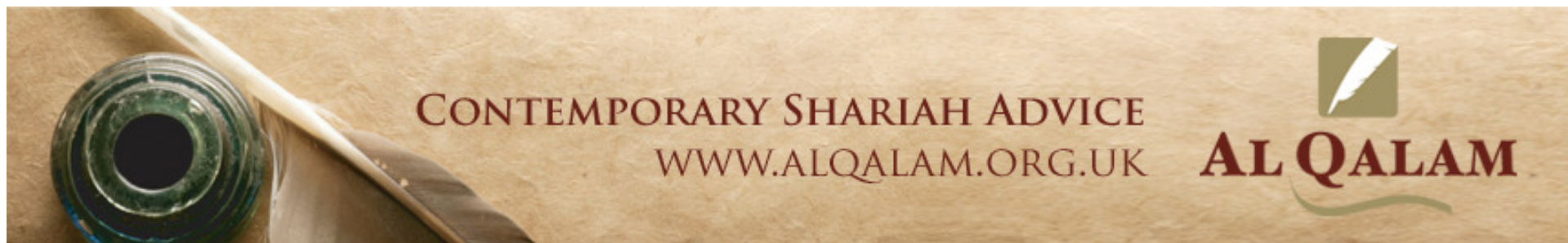


# TYPES OF COMMITMENTS

1. Wa'd – وعد – unilateral promise
  - One party binds itself to perform a function for another
  - Does not normally create legal obligation
  - Legal obligation is created:
    - Genuine need of the masses – (رد المحتار) إذ المواعيد قد تكون لازمة فيجعل لازما لحاجة الناس (رد المحتار)
    - Contingent promise
2. Muwaa'ada – مواعدة – bilateral promise
  - Two parties performing two unilateral promises on the same subject
  - Use of two unilateral promises can lead to a forward contract, which is impermissible
  - Not allowed and non-enforceable according to majority (AAOIFI, IFA and others)
  - Some Hanafi/subcontinent scholars allow it provided no other prohibition (excessive gharar or short selling)
3. 'Aqd – عقد – contract

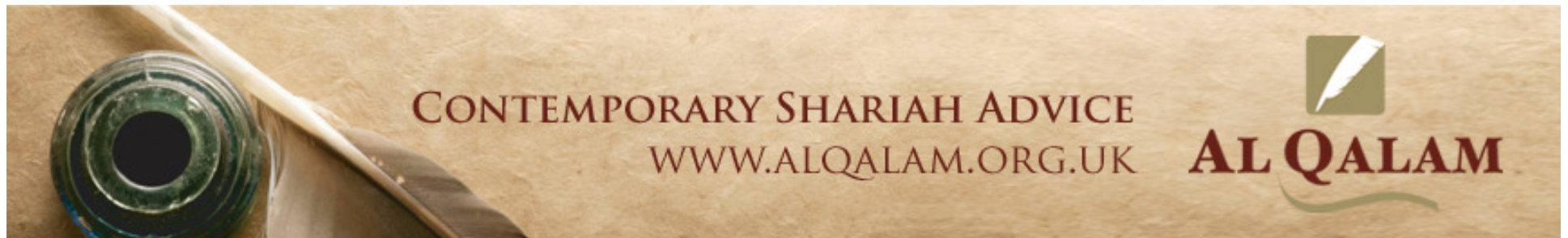
Promises do not constitute a contract

- Difference between a contract and a bilateral promise is there is no proprietary transfer in bilateral promise



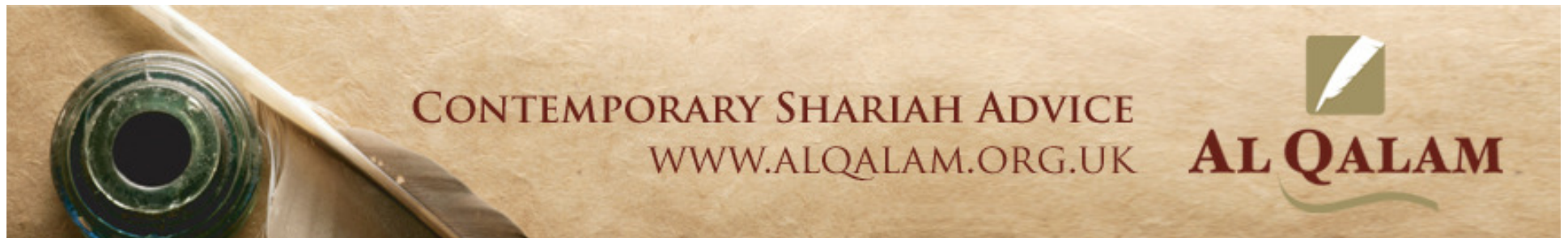
# ENFORCEABILITY OF PROMISES

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



# Types of 'AQD (CONTRACT)

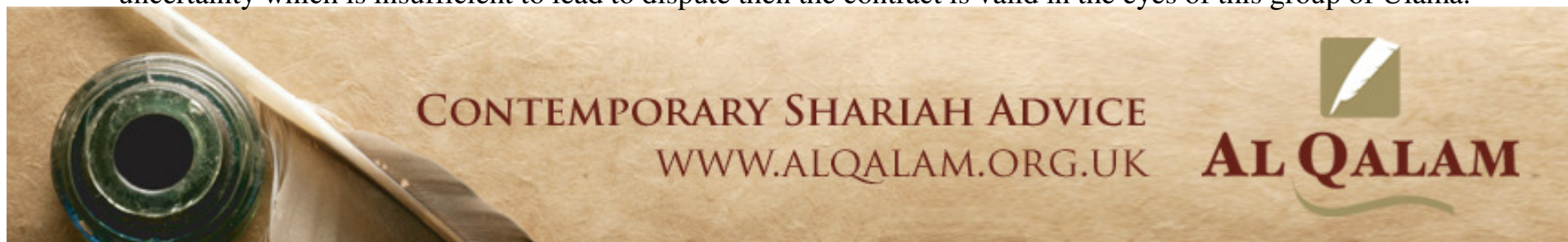
- 'Aqd literally means 'to bind'.
- 2 types of contracts in Shariah with respect to countervalue in exchange
  1. Mu'aawadha - معاوضة (commutative/compensatory)
    - Void conditions and gharar void the contract
    - E.g., sale, purchase, lease, wakala
  2. Tabarru' – تبرع (gratuitous) - proprietary transfer without consideration
    - Void conditions are void themselves and gharar is tolerated
    - E.g., gift, bequest, waqf, kafala, 'aariya, qardh, hawala



# VALIDITY OF CONTRACTS

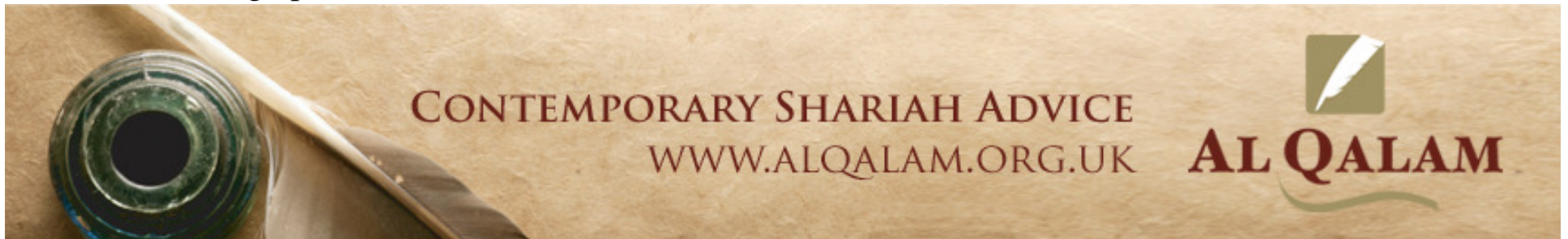
- Validity depends on:
  - Legality/illegality of the subject matter
  - Existence and precise determination of the subject matter
  - Delivery or deliverability of the subject matter
  - Absence of excessive uncertainty
  - Precise determination of consideration (price)
- **Valid (Sahih) contract** – is legal both in its *asl* - fundamentals [rukn (offer and acceptance) and object] and *wasf* - ancillary components
- Ancillary components are those that are in addition to rukn and object – e.g., a condition that violates the nature of the contract or if the object is not deliverable
- Contract is concluded and exchange of ownership takes effect
- **Void (Batil) contract** – rukn and conditions on the object are not satisfied or that is illegal in both rukn and ancillary characteristics
- Contract is not concluded and exchange of ownership does not take effect
- **Voidable (Fasid) contract** – legal in its *asl* (has all the elements of a contract) but is not legal in its *wasf* – ancillary component
- Contract is concluded and ownership is realised upon possession
- **Riba and gharar** are causes of irregularity according to Hanafis and invalidity according to other schools.
- Gharar can be defined as:  
*‘uncertainty that is present in the basic elements of an agreement eg wording, subject matter, consideration and the liabilities’*

Other Ulama have defined Gharar as that level of uncertainty which can lead to disputes. Hence if a contract has uncertainty which is insufficient to lead to dispute then the contract is valid in the eyes of this group of Ulama.



# LAW OF POSSESSION

- Scholars have differing views on law of Qabdh and its applications to contracts.
- Prophet Mohammed (SAW) said: *'Sell not what is not with you'*. (Abu-Dawud, al-Tirmidhi)
- **Imam Shafi & Imam Muhammad al-Sheybani** opine that sale prior to possession is not permitted whatever the commodity – foodstuffs or otherwise, moveable or immovable – **ربح ما لم يضمن** is not permitted
- **Imam Abu Hanifah & Imam Abu Yusuf** opine that sale prior to possession is not permitted in moveable property, foodstuffs or otherwise, but is permitted in immovable property –  
**مغل بخشية الهلاك استحسانا**
- **Imam Ahmad** opines that the prohibition is restricted to foodstuffs – other opinions also reported
- **Imam Malik** is reported to opine that sale of commodities sold by weight or measure prior to possession is not permitted – some restrict this to foodstuffs
- **Ibn Taymiyyah & Ibn Qayyim** opine that cause of prohibition is sellers inability to deliver and not lack of possession - Prophet (SAW) was responding to a query by Hakeem ibn Hizaam on whether or not he could enter into a contract to provide commodities which he did not have with him. As Medina was a small market there was a possibility that Hakeem could have entered into a contract to supply an item and not then be able to deliver it, hence the Prophet Mohammed (SAW) forbade it.
- Accordingly, Salam & Istisna' are not exceptions to the rule but instead legitimate contracts in their own right.
- Above views can have major consequences for the permissibility of certain types on contracts in Shariah, eg options.



# BAI' MU'AJJAL

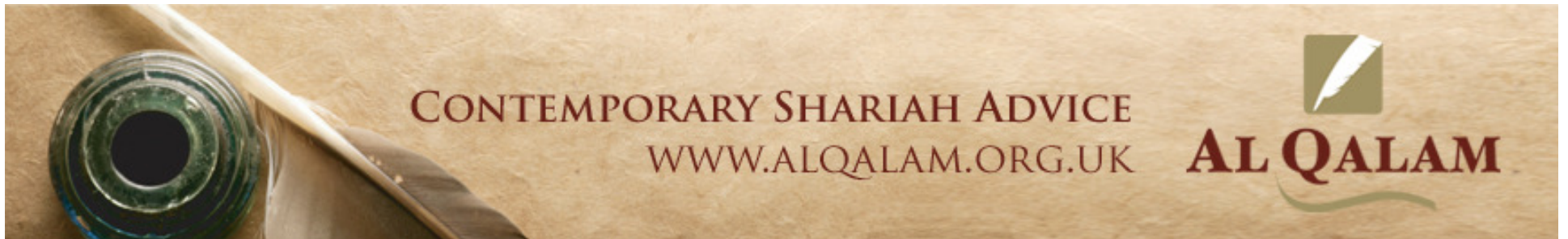
- Derives legitimacy from Surah Baqarah Meccans said '*sale is like Riba*' and Allah SWT replied '*Allah has made sale permissible and forbidden usury*'
- **Payment Date** – must be fixed
- **Price** – must be fixed and cannot be increased or decreased later on. Discounts can only be given by sellers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

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# BUYER'S OPTIONS

1. **Option to rescind (خيار الشرط)**- within a specified period (3 days) if stipulated
2. **Option of inspection (خيار الرؤية)** – right to see and verify object of sale if stipulated
3. **Option of defect (خيار العيب)** – Right to return commodity if it is found defective even if not stipulated
4. **Option of quality (خيار الوصف)** – right to specified quality
5. **Option of Price (خيار الغبن)** – right to fair price within market range



# SUMMARY

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

