

Shari'ah Standard No. (25)

Combination of Contracts



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IN THE NAME OF ALLAH, THE ALL-MERCIFUL, THE MOST MERCIFUL

All praise be to Allah, the Lord of all the worlds, and blessings and peace be upon our master, Muhammad, and his household and all his companions

Preface

The purpose of this standard is to explain the process of combining more than one contract in one set. The Standard also aims to elucidate the characteristics, Shari'ah status and Shari'ah controls relating to the process of Contracts' Combining. Furthermore, the Standard indicates the Shari'ah rulings on Muwata`ah (prior agreement) and provides guidance on the main applications of combined contracts in Islamic financial Institutions (Institution/Institutions).⁽¹⁾

(1) The word (Institution/Institutions) is used here to refer, in short, to Islamic financial institutions including Islamic Banks.

Statement of the Standard

1. Scope of the Standard

This standard covers transactions that comprise more than one contract combined together in one set. The scope of the discussion in this respect covers the definition, forms, controls, characteristics, and concessions relating to the process of Combination of Contracts and explores the characteristics of Muwata`ah and the Shari'ah rulings pertaining thereto. The discussion also embarks on contemporary applications of combined contracts.

2. Concept of Combination of Contracts

2/1 Combination of contracts is a process that takes place between two parties or more, and entails the simultaneous conclusion of more than one contract. Hence, combination of contracts may take any of the following forms:

2/1/1 Combining more than one contract without imposing any of them as a condition in the other, and without prior agreement (Muwata`ah) to do so.

2/1/2 Combining more than one contract while imposing some of them as conditions in the others, without prior agreement to do so.

2/1/3 Combining more than one contract subject to prior agreement (Muwata`ah), but without imposing any of them as a condition in the others.

2/1/4 Agreement to conclude the deal through any of different contractual forms as will be finally decided in the future.

2/2 Forms of combined contracts

2/2/1 Combined contracts may have a single lump sum counter value. For instance, a party may sell his piece of land to the other and

simultaneously rents his car to the same party for one month, both against one thousand dinars.

2/2/2 Combined contracts may be concluded for separate values. For instance, one party may sell his house to the other for one thousand dinars, and rent his car to the same party for one hundred dinars per month.

2/2/3 Some of the combined contracts may be stipulated as conditions in the other contracts. One party, for instance, may say to the other party that I will sell you my house for ten thousand dinars, on condition that you undertake to rent the house to me for two years for one thousand dinars per year. The sale of the house in this manner could also be concluded on condition that the buyer of the house undertakes in return to sell his car to the seller for two thousand dinars.

2/2/4 Combined contracts may take the form of an exhaustive contractual statement comprising a number of successive parts and stages, which finally lead to realization of the desire of the two parties to conclude the deal in question. A good example in this regard may be seen in a number of present day financial transactions like *Ijarah Muntahia Bittamleek*, *Murabahah*, and *Diminishing Musharakah*.

3. Shari'ah Status of Combination of Contracts

It is permissible in Shari'ah to combine more than one contract in one set, without imposing one contract as a condition in the other, and provided that each contract is permissible on its own. Combining contracts in this manner is acceptable unless it encounters a Shari'ah restriction that entails its prohibition on exceptional basis.

4. Shari'ah Controls on Combination of Contracts

4/1 Contracts' combining should not include the cases that are explicitly banned by Shari'ah like combining sale and lending in one contract.

4/2 It should not be used as a trick for committing Riba such as agreement between two parties to practice *Bay' al-'Inah* or *Riba al-Fadl*.

- 4/3 It should not be used as an excuse for practicing Riba. The two parties could misuse, for instance, Contracts' Combining when they conclude a lending contract that, at the same time, facilitates some other compensatory gains to them. For example, they could stipulate in the contract that the borrower should offer accommodation in his house to the lender, or should grant him a present. Contracts' Combining could also be misused by imposing excess repayment in terms of quantity or quality on the borrower. [see Shari'ah Standard No. (14) on Loan (Qard) – item 1/4]
- 4/4 Combined contracts should not reveal disparity or contradiction with regard to their underlying rulings and ultimate goals. Examples of contradictory contracts include granting an asset to somebody as a gift and selling/leasing it to him simultaneously, or combining Mudarabah with lending the Mudarabah capital to the Mudarib, or currency exchange with Ju'alah, or Salam with Ju'alah for the same contract value, or leasing with selling (i.e. hire-purchase in its traditional form).

5. Shari'ah Concessions for Combination of Contracts

- 5/1 In principle, the Shari'ah concessions that can be granted to implicit and subsidiary contracts at the time of combining contracts cannot be granted to the same contracts when concluded independently. Here, implicit and subsidiary contracts refer to contractual commitments that are not explicitly embodied in the deal agreement or those which succeed the original commitments of the transaction. The concessions to be granted in this case should be judged in the light of traditions, practice and professional experience, and subjected to clearance by the Shari'ah Supervisory Board of the Institution.
- 5/2 Concessions granted to implicit and subsidiary contracts comprise relief from the following impermissible acts:
- 5/2/1 Gharar, which affects financial contracts, may be overlooked in implicit and subsidiary contracts.
- 5/2/2 Jahalah, which also affects financial contracts, may be ignored with regard to the object of a subsidiary contract.

5/2/3 Sale-based Riba and violation of currency exchange rules (as when spot delivery is ignored in a contract that combines currency exchange with money transfer) are also forgivable in subsidiary and implicit contracts.

5/2/4 Selling of a debt for another debt may be ignored when it comes in the context of a subsidiary contract. A fitting example here is purchasing (on debt) the shares of an indebted company.

5/2/5 Subsidiary and implicit contracts may also be relieved from some prerequisites that underline the validity of contracts (such as offer and acceptance) when such relief is dictated by need or desire to achieve a permissible interest.

6. Prior Agreement (Muwata`ah) for Combination of Contracts

6/1 Muwata`ah or 'Tawatu' in Fiqh terminology has several meanings; most important among which are stated below:

6/1/1 Explicit or implicit intention of the parties to the contract to use a certain trick for practicing Riba through a Shari'ah accepted contractual form.

6/1/2 An unrevealed prior agreement between the two parties to perform a Shari'ah-permissible act or deal for the sake of finding a Shari'ah-accepted exit (acceptable trick).

6/1/3 Coincidence of the intentions of parties to the contract at the stage of preparatory negotiations that precede the signing of the contract as indicated in item (2/2/4) above.

6/2 In Fiqh perception, Muwata`ah for combining contracts has three distinct characteristics:

6/2/1 It is an agreement between two parties to conclude contracts and fulfill pledges in the future.

6/2/2 When Muwata`ah is stipulated as part of the contract it becomes a condition precedent to the conclusion of the contract, and the contract becomes subject to the relevant Shari'ah rulings with regard to permissibility, enforceability, and validity.

- 6/2/3 Enforceability of Muwata`ah in Shari'ah is similar to enforceability of conditions precedent to the signing of contracts. A condition that precedes the signing of the contract has the same validity and binding nature of the normal conditions of the contract, since the former constitutes the bases of the contract that have been mutually agreed upon between the two parties.
- 6/3 Muwata`ah to combine contracts takes several forms, which may be grouped into the following four types:
- 6/3/1 Muwata`ah to form up Riba tricks, in which the two parties agree to practice, for instance, *Bay' al-'Inah* or its reverse, or *Bay' al-Wafa'* (*Bay' al-Raja'*), or *Riba al-Fadl*. In this case, Shari'ah prohibits Muwata`ah and the contract so designed is invalid.
- 6/3/2 Muwata`ah for Riba excuses is prohibited by Shari'ah whereby the two parties agree to combine a loan with another transaction, or stipulate that the borrower has to present a gift to the lender, or make excess repayment in terms of quantity or quality.
- 6/3/2/1 Prohibition of Muwata`ah to use such tricks, which are permissible in principle, should be judged in the light of two conditions:
- First**, the intention to use the permissible act as a means of concluding a prohibited deal should be obvious and beyond all doubts.
- Second**, there should be no obvious need or lawful interest that justifies resorting to such a trick.
- 6/3/3 Muwata`ah for obtaining Shari'ah Exits, which refers to tricks that do not violate Shari'ah rules, or contradict with Shari'ah objectives, or result in any harm to others, is permissible.
- 6/3/4 Muwata`ah for combining contracts that contradict to or oppose each other is prohibited because it leads to performing of an act that has been strictly banned by Shari'ah. [see item 4/4]

7. Contemporary Applications and General Rules for Combination of Contracts

- 7/1 One of the most distinguishable forms of contemporary financial transactions is the contractual arrangements which comprise a number of contracts and pledges that the parties agree beforehand to execute in a specific manner and according to agreed number of successive stages. Such arrangements aim to achieve a given purpose or interest of the parties to the contract such as performing Murabahah on Order of Purchase, Ijarah Muntahia Bittamleek, or Diminishing Musharakah.
- 7/2 Muwata'ah, when provided for in the contract and used for combination of contracts, should be observed by, and remain binding to the parties to the contract, subject to permissible commercial and banking conventions. [see item 6/2/2]
- 7/3 The pledges contained in such combined contract sets are binding to their respective parties.
- 7/4 These newly devised sets of combined contracts should observe the general rules of Shari'ah with regard to structure, rulings, requirements and conditions in order to be Shari'ah compliant. [see item 5/2]
- 7/5 These contract sets should also observe the Shari'ah rulings pertaining to combination of contracts, and may make use of the Shari'ah concessions in this respect.
- 7/6 Failure of any of the parties to combined contracts to honor its contractual commitments gives the other party right of claiming indemnity for the actual injury encountered.

8. Date of Issuance of the Standard

This Standard was issued on 23 Rabi' I, 1426 A.H., corresponding to 2 May 2005 A.D.

Adoption of the Standard

The Shari'ah standard on Combination of Contracts was adopted by the Shari'ah Board in its meeting No. (15) held in Makkah Al-Mukarramah on 22–26 Sha'ban 1427 A.H., corresponding to 26 September – 2 October 2005 A.D.

Appendix (A)

Brief History of the Preparation of the Standard

The Shari'ah Board decided in its meeting No. (10) held on 2–7 Rabi' I, 1424 A.H., corresponding to 3–8 May 2003 A.D., in Al-Madinah Al-Munawwarah to issue a Shari'ah Standard on Combination of Contracts.

On 17 Sha'ban 1423 A.H., corresponding to 13 October 2003 A.D., the Shari'ah Standards Committee decided to commission a Shari'ah consultant to prepare a draft standard on combination of contracts.

In meeting No. (10) of the Shari'ah Standards Committee (2) held on Friday and Saturday 27-28 Safar 1425 A.H., corresponding 16-17 April 2004 A.D., in the Kingdom of Bahrain, the committee discussed the Shari'ah study and advised the consultant to incorporate the necessary changes, in the light of the discussions and observations of the meeting.

In meeting No. (11) of the Shari'ah Standard Committee (2) held on Wednesday 28 Rabi' II, 1425 A.H., 16 June 2004 A.D., held in Dubai (U.A.E) the Committee discussed the draft standard on combination of contracts and introduced necessary changes in it in the light of discussions and comments of the meeting.

The revised version of the Standard was submitted to the Shari'ah Board in its meeting No. (13) held in Makkah Al-Mukarramah on 30 Sha'ban 1426 A.H., 14 October 2004 A.D., and further changes were incorporated in the document. The Board then decided to send the document to concerned experts for review and comments before discussing it in a public hearing.

AAOIFI held public hearing in the Kingdom of Bahrain on 15 Safar 1426 A.H., corresponding to 25 March 2005 A.D. More than 35 participants representing central banks, institutions, accounting firms, Shari'ah scholars,

university teachers and other interested parties attended the public hearing. Several observations were made in the public hearing to which members of the Shari'ah Standards Committees (1) and (2) duly responded.

In a meeting held in the Kingdom of Bahrain on 15-16 Safar 1426 A.H., corresponding to 25-26 March 2005 A.D., the Shari'ah Standards Committees (1) and (2) discussed the comments and observations made during the public hearing, and incorporated necessary changes in the document.

The Shari'ah Board discussed the draft standard in its meeting No. (14) held in Dubai (U.A.E) on 21-23 Rabi' I, 1426 A.H., corresponding to 30 April – 2 May 2005 A.D. and decided, in the light of the comments and observations of the meeting, to send the draft standard to the Shari'ah Standards Committee (2) for study.

In its meeting No. (15) held on 22–25 Sha'ban 1426 A.H., corresponding to 26-29 September 2005 A.D., in Makkah Al-Mukarramah, the Shari'ah Board discussed the amendments proposed by the Shari'ah Standards Committee and the Drafting Committee and made the changes in the draft Standard, where it deemed necessary. Consequently, the Shari'ah Board approved the Standard (unanimously for some clauses and with the majority for others), as indicated in the minutes of the Board's meetings.

Appendix (B)

The Shari'ah Basis for the Standard

- It is permissible to combine more than one contract in a single transaction as long as each of these contracts is permissible on its own. This is so because freedom of contracting and honoring commitments is acknowledged in principle by the general teachings and directives of Shari'ah, unless such contracts and commitments lead to violation of Shari'ah rulings.⁽²⁾ Ibn Al-Qayyim said, "It is permissible in principle to form up contracts and conditions, except for what has been prohibited by Shari'ah."⁽³⁾
- According to the majority of the Hanafi, Shafi'i and Hanbali Fuqaha, the set of combined contracts can always be judged in the light of its individual components. Therefore, if the transaction comprises a number of contracts that each of them individually satisfies permissibility requirements, the combined set of such contracts is also permissible.⁽⁴⁾
- Based on the above fact the Hanbali and Shafi'i Fuqaha, as widely reported, indicate permissibility of combining two contracts, for the same contract value, even if the two contracts differ with regard to Shari'ah status and rulings.⁽⁵⁾ Ibn Taymiyyah indicated permissibility of combining two contracts having two separate values.⁽⁶⁾
- Prohibition of combining contracts in specific cases on exceptional basis, as indicated by Al-Shatibi, stems from the fact that the act of combining

(2) *"Majmu' Fatawa Ibn Taymiyyah"* [29: 132]; and *"Al-Qawa'id Al-Nuraniyyah Al-Fiqhiyyah"*, (P. 188).

(3) *"Tlam Al-Muwaqi'in"* [1: 344]; and *"Jami' Al-Rasa'il"* by Ibn Taymiyyah [2: 317].

(4) *"Kashshaf Al-Qina"* [3: 478]; *"Al-Bayan"* by Al-Umrani [5: 148]; *"Al-Majmu' Sharh Al-Muhadhdhab"* [9: 388]; *"Tabyin Al-Haqa'iq"* [4: 174], *"Al-Bada'i"* [6: 58]; and *"Tlam Al-Muwaqi'in"* [3: 354]; *"Al-Mubdi"* [5: 43].

(5) *"Al-Mughni"* [6: 39 and 355]; *"Al Majmu'"* [9: 388]; *"Sharh Al-Sunnah"* by Al-Baghawi [8: 67].

(6) *"Nazariyyat Al-'Aqd"* by Ibn Taymiyyah (P. 191); and *"Al-Ikhtiyarat Al-Fiqhiyyah Min Fatawa Ibn Taymiyyah"* (P. 122).

could sometimes generate Shari'ah restrictions that do not hold true when the combined acts are taken up individually. Examples of acts that become prohibited when combined, though they are individually permissible, include combining sale and lending, marrying two sisters, or marrying a woman and her aunt.⁽⁷⁾

- The absence of any exceptional Shari'ah restriction in the particular case of combining constitutes the first control on contracts' combining due to the directives of the Prophet (Peace be upon Him) who has been quoted to have prohibited combining sale with lending,⁽⁸⁾ or combining two sales in one deal,⁽⁹⁾ or two transaction in one transaction.⁽¹⁰⁾
- The second control, which prohibits using Contracts' Combining as a trick for practicing Riba is based on the directives of the prophet (peace be upon him) which indicate prohibition of *Bay' al-'Inah*⁽¹¹⁾ and *Riba al-Fadl*. As regards *Riba al-Fadl*, it has been reported that the Prophet (Peace be upon Him) instructed one of his employees to sell his low-quality dates first and then buy the high-quality dates he wanted, instead of resorting to exchange of more quantity of low-quality dates for less quantity of high-quality dates.⁽¹²⁾ Ibn Al-Qayyim said, "This indicates that the employee was directed to commence the process of purchasing the high-quality dates after the complete finalization of the former transaction; i.e., selling his low-quality dates. If, instead, he agreed beforehand with another party

(7) "Al- Muwafaqat" [3: 192].

(8) Al-Tirmidhi said: "This is a good authentic Hadith": "Al-Muwatta'" [2: 657]; "Mukhtasar Sunan Abu Dawud" by Al-Munziri [5: 144]; "Musnad Al-Imam Ahmad" [2: 178]; "Aridat Al-Ahwazi" [5: 249]; "Sunan Al-Nasa'i" [7: 295]; and "Nayl Al-Awtar" [5: 152].

(9) Ibn Al-Arabi confirmed that these has been the directives of the Prophet (peace be upon Him): "Al-Qabas" [2: 842]; "Mukhtasar Sunan Abu Dawud" by Al-Munziri [5: 98]; "Al-Muwatta'" [2: 663]; "Aridat Al-Ahwazi" [5: 239]; "Sunan Al-Nasa'i" [7: 295]; and "Nayl Al-Awtar" [5: 152].

(10) "Musnad Al-Imam Ahmad" [1: 198]; "Nayl Al-Awtar" [5: 152]; "Fath Al-Qadir" [6: 81]. Al-Haythami said: "Ahmad always reports from reliable sources": "Majma' Al-Zawa'id" [4: 84].

(11) "Musnad Al-Imam Ahmad" [2: 42, 48]; "Al-Sunan Al-Kubra" by Al-Bayhaqi [5: 316]; "Subul Al-Salam" [3: 14]; "Mukhtasar Sunan Abu Dawud" by Al-Munziri; and "Tahdhib Al-Sunan" by Ibn Al-Qayyim [5: 99, 104].

(12) Related by Al-Bukhari, Muslim, Al-Tirmidhi, Al-Nasa'i and Malik: "Sahih Al-Bukhari" [3: 97]; "Sahih Muslim" [3: 1208]; "Aridat Al-Ahwadhi" [5: 249]; "Al Muwatta'" [2: 632]; and "Sunan Al-Nasa'i" [7: 244].

to conduct the two deals successively, the second contract will not become an independent contract, because it is a mere completion of the first one. The directives of the Prophet (Peace be upon Him), apparently necessitate two separate contracts that neither of them is related to or based on the other".⁽¹³⁾

- The third control, that prohibits using combined contracts as an excuse for dealing in Riba, is based on the directives of the Prophet (Peace be upon Him) which forbid combining lending with selling.⁽¹⁴⁾ In this regard, the Fuqaha unanimously agree that when the two parties stipulate in the loan contract that the borrower should reward the lender by offering him free accommodation, or grant him a present, or the borrower should make excessive repayment in terms of quantity or quality, the contract becomes null and void. In other words, any loan arrangement that comprises a prior condition on a benefit to be rendered to the lender by the borrower is considered Riba.⁽¹⁵⁾
- The fourth control, which indicates that the contracts to be combined should not be contradicting with each other in terms of purpose or Shari'ah rulings, stems from the fact that contracts, as indicted by Al-Qarafi, are devices for using appropriate means to achieve specific objectives. Obviously, the same contracting requirement cannot always fit at the same time two contradicting positions⁽¹⁶⁾. Therefore, contracts that contradict each other in their rulings and effects cannot be combined together in the same transaction.
- The Shari'ah concessions sanctioned to subsidiary and implicit contracts are based on several statements in "*Al-Qawa'id Al-Fiqhiyyah*", including the following:
 - What can be forgiven in a subsidiary contract cannot be forgiven in other contracts.⁽¹⁷⁾

(13) "*Tlam Al-Muwaq'ir*" [3: 238]; and "*Ighathat Al-Lahfan*" [2: 103].

(14) Related by Abu Dawud, Al-Tirmidhi, Al-Nasa'i, Ibn Majah, Ahmad, Al-Shafi'i and Malik. [See footnote No. (3) in Shari'ah Standard No. (19): Loan (Qard)].

(15) "*Al-Mughni*" [6: 436]; "*Al-Sharh Al-Kabir 'Ala Al-Muqni*" [12: 432]; "*Al-Zakhirah*" [5: 289]; "*Al-kafi*" by Ibn Qudamah [2: 93]; "*Al-Mubdi*" [4: 209]; and "*Majmu' Al-Fatawa*" by Ibn Taymiyyah [29: 334].

(16) "*Al-Furuq*" [3: 142].

(17) Article (54) of "*Majallat Al-Ahkam Al-Fiqhiyyah*"; and "*Al-Ashbah Wa Al-Naza'ir*", (P. 120).

- What can be forgiven in implicit contracts cannot be forgiven in independent contracts.⁽¹⁸⁾
- Concessions that can be sanctioned to implicit provisions cannot be sanctioned to ordinary provisions.⁽¹⁹⁾
- Provisions in ordinary contracts entail more validity requirements than provisions in implicit and subsidiary contract.⁽²⁰⁾
- Implicit contracts are relieved of what independent contracts cannot be relieved of.⁽²¹⁾
- Provisions that hold true in implicit contracts may not hold true in ordinary contracts.⁽²²⁾
- Shortcomings like Gharar, which affect financial transactions such as sale contracts and the like, may be forgiven when the contract subject matter or the contract itself is subsidiary. The Prophet (peace be upon him) said: *“When somebody purchases a palm tree, that has not yet been pollinated, the fruits of the tree should belong to the seller unless the buyer stipulates in the contract that he should be entitled to the fruits”*.⁽²³⁾ This Hadith indicates that the reason for ignoring the gharar involved in the act of the buyer who stipulates in the contract that the anticipated fruits of the palm tree should belong to him, is the fact that getting the fruits is an implicit aspect of the contract. As is the case with gharar, excessive Jahalah is also forgivable in subsidiary and implicit contracts.
- Ignoring sale-based Riba and non-fulfillment of the Shari'ah requirements of currency exchange in subsidiary contracts is based on the Hadith of the Prophet (peace be upon Him) which states: *“When somebody buys a slave who has money, the slave's money should go to the seller, unless the buyer*

(18) *“Fatawa Al-Ramli”* [2: 115].

(19) *“Bada’i’ Al-Fawa'id”* by Ibn Al-Qayyim [4: 27].

(20) *“Bada’i’ Al-Sana’i”* [5: 58].

(21) *“Al-Manthur Fi Al-Qawa'id”* by Al-Zarkashi [3: 378].

(22) *“Radd Al-Muhtar”* [4: 170].

(23) *“Sahih Al-Bukhari”* with *“Fath Al-Bari”* [5: 49]; *“Sahih Muslim”* with Al-Nawawi elaborations [10: 191]; *“Sunan Abu Dawud”* [2: 240]; *“Sunan Al-Nasa’i”* [2: 260]; *“Sunan Ibn Majah”* [2: 745]; *“Muwatta’ Al-Imam Malik”* [2: 617]; *“Musnad Al-Imam Ahmad”* [2: 6, 9, 54, 63, 78, 102 and 150]; and *“Aridat Al-Ahwazi”* [5: 253].

stipulates in the contract that he should get the money.⁽²⁴⁾ The justification for this is that the buyer may have taken into consideration (at the time of making his offer) the amount of money the slave could have, be it big or small, and explicitly determined a portion of the price for it, though he did not declare such portion independently. Hence, it becomes clear from this Hadith that it is permissible to buy a slave along with his money without observing the Shari'ah requirements of currency exchange, and regardless of whether the amount of money that the slave has is big or small, known or unknown.⁽²⁵⁾

- Permissibility of *Bay' al-Kali` Bil-Kali`* (selling a debt for another debt) in subsidiary and implicit contracts although it is prohibited in original and independent contracts, is based on the previous Hadith about purchasing a slave along with the money he has. In this respect, Imam Malik indicated in "*Al-Muwatta`*" the permissibility of selling a slave and providing in the contract for the status of the money he owns, even if that money is a debt owed to the slave by a third party and the slave is himself sold on deferred payment. That is to say, Malik seems to have based his opinion on the apparent and general meaning of the Hadith and the ruling practice in Al-Madinah.⁽²⁶⁾
- Permissibility of relieving, upon need or probable interest, subsidiary and implicit contracts from some of the bases and conditions of contracts' validity, can be derived from a statement by Al-Sayuti in "*Al-Ashbah Wa Al-Naza`ir*". In that statement, Al-Sayuti indicates permissibility of abandoning offer and acceptance (the form) in case of implicit sale, or accepting deferred, instead of spot, delivery/payment in such sales. Such rulings in fact come as further ramifications of the Fiqh principle that "Subsidiary contracts can be relieved from what other contracts cannot be relieved from"⁽²⁷⁾

(24) "*Sahih Al-Bukhari*" with "*Fath Al-Bari*" [5: 49], "*Sahih Muslim*" [3: 1173]; "*Sunan Abu Dawud*" [2: 240]; "*Sunan Al-Nasa`i*" [7: 261]; "*Sunan Ibn Majah*" [2: 746]; "*Muwatta` Al-Imam Malik*" [2: 611]; "*Musnad Al-Imam Ahmad*" [2: 9 and 78]; and "*Aridat Al-Ahwazi*" [5: 252].

(25) "*Al-Qabas*" by Ibn Al-'Arabi [2: 805]; "*Al-Mughni*" by Ibn Qudamah [6: 96]; and "*Al-Zurqani 'Ala Al-Muwtt`a`*" [3: 253].

(26) "*Al-Zurqani 'Ala Al-Muwtt`a`*" [3: 253].

(27) "*Al-Ashbah Wa Al-Naza`ir*" by Al-Sayuti (pp. 120 and 377).

- Muwata'ah for combining contracts is considered as an enforceable condition that precedes the signing of the contract, because Muwata'ah, traditionally as well as in fiqh terminology, is an agreement between the two parties to sign contracts and honor pledges in the future. Therefore Ibn Taymiyyah said, "When the two parties agree beforehand to do specific things, and then sign a general contract, the contract should honor that prior agreement".⁽²⁸⁾
- A condition that precedes the contract should be regarded as binding and enforceable as a one that comes in the text of the contract, because traditionally there is no difference between the conditions stated in the contract and those agreed upon beforehand, even if such prior conditions are not mentioned at the time of signing the contract. This is only natural since these conditions form the bases of the contract, which the two parties have agreed to observe. This viewpoint is supported by a number of traditionally accepted norms such as:
 - A condition, which the two parties agree to observe, resembles a one explicitly mentioned in the contract.
 - Traditionally acceptable conditions resemble explicitly stated conditions.
 - Intentions in contracts deserve observation.

Moreover, enforceability of prior conditions was the ruling practice in Al-Madinah and the predominant opinion in Al-Imam Ahmad's School.⁽²⁹⁾

- Prohibition of Muwata'ah for devising Riba tricks is because Muwata'ah in this case is a means used for practicing Riba. Consequently, since the end objective (which is Riba) is prohibited, the means used for achieving it must also be prohibited. As indicated in "*Al-Qawa'id Al-Fiqhiyyah*", "means are discarded on discarding of objectives"⁽³⁰⁾

(28) "*Nazariyyat Al-'Aqd*" by Ibn Taymiyyah (p. 204).

(29) "*Tlam Al-Muwaqqi'in*" [3: 105, 145, 212 and 241]; "*Kashshaf Al-Qina*" [5: 98]; "*Bayan Al-Dalil 'Ala Butlan Al-Tahlil*" (P. 533); "*Majmu' Al-Fatawa*" by Ibn Taymiyyah [29: 336]; "*Al-Fatawa Al-Kubra*" by Ibn Taymiyyah [4: 108]; "*Al-Madkhal Al-Fiqhi Al-'Aam*" by Al-Zarqa [1: 487]; and "*Al-'Uqud Wa Al-Shurut Wa Al-Khiyarat*" by Ahmad Ibrahim (P. 711).

(30) "*Al-Furuq*" by Al Qarafi [2: 33]; and "*Al-Qawa'id Al-Kubra*" by Al-'Izz Ibn Abdul-Salam [1: 161 and 168].

- Prohibition of Muwata`ah as an excuse for Riba, originates from the application of the principle of *Sadd al-Zara`i*. This principle aims to prohibit permissible practices that could be used as a means for accomplishing Shari'ah-banned objectives.⁽³¹⁾
- However, application of the principle of *Sadd al-Zara`i* should be based on two requirements as indicated by the Maliki Fuqaha. The first requirement is that resort to the *Zari'ah* (excuse) should be very frequent and excessive in view of normal practice, and the second requirement is the presence of a strong accusation that rules out the possibility of any good intention behind using the excuse⁽³²⁾. Application of the principle of *Sadd al-Zara`i* should also observe the non-existence of any need or lawful interest for using the *Zari'ah*, as has been emphasized by several fiqh principles such as:
 - Prohibition for the sake of blocking the way to excuses is less forceful than prohibition per se⁽³³⁾
 - Practices that originate from the need for devising acceptable Shari'ah exits deserve more Shari'ah concessions than other practices.⁽³⁴⁾
 - Acts that are prohibited for the sake of blocking the way to excuses become permissible in case of need or desire to achieve a lawful interest.⁽³⁵⁾
- Permissibility of Muwata`ah for devising acceptable Shari'ah exits can be derived from the statements of several Fuqaha who indicate that using Shari'ah accepted means to achieve permissible objectives is permissible. According to those Fuqaha practicing acceptable Shari'ah exits and helping others to devise them is a permissible and reward-worthy practice as long as it abides by the directives of Allah, Exalted be He, leads to avoidance of sins, and facilitates achievement of lawful interests.⁽³⁶⁾

(31) "Sharh Tanqih Al-Fusul" (P. 449); "Al-Furuq" by Al-Qarafi [2: 32]; and "Al-Qabas" [2: 876].

(32) "Al-Muwafaqat" [4: 198]; "Al-Ma'unah" by Al-Qadi Abdul-Wahhab [2: 996]; and "Iqd Al-Jawahir Al-Thaminah" [2: 441].

(33) "Tlam Al-Muwaqqi'in" [2: 140].

(34) "Al-Ashbah Wa Al-Naza'ir" by Al-Sayuti (P. 158).

(35) "Zad Al-Ma'ad" [4: 78]; "Tafsir Ayat Ashkalat" by Ibn Taymiyyah [2: 682]; "Majmu' Al-Fatawa" by Ibn Taimaih [23: 214-215], [32: 228-229]; and "Tlam Al-Muwaqqi'in" [2: 142].

(36) "Ighathat Al-Lahfan" [1: 339, 383 and 385] and [2: 86].

- Prohibition of Muwata`ah for combining contracts that contradict each other in rulings and objectives is because Muwata`ah in this case is used as a means of doing an unacceptable act. According to Shari'ah, means always follow ends with regard to permissibility and prohibition⁽³⁷⁾. It has been indicated in "*Al-Qawa'id Al-Fiqhiyyah*" that: "Disregarding the ends leads to disregard of the means".⁽³⁸⁾
- Recognition of Muwata`ah when it precedes contemporary transactions, that comprise a set of successive and inseparable contracts forming up a single transaction, is the present day commercial and banking tradition that considers Muwata`ah in this case as binding to the two parties. In fact, Muwata`ah in this sense is part of a whole system that tends to completely collapse when any of its individual components loses balance. Violating Muwata`ah in this case will jeopardize the fulfillment of the objectives of the contracting parties, and may cause them serious injuries.
- The pledges that relate to an agreement are binding to the two parties since, according to its nature and Fiqh status, and as perceived by most of the Fuqaha, such pledges are similar to the conditions stipulated in the agreement. Enforceability of such pledges also stems from the fact that they constitute the basis for the transaction. It is well known that Shari'ah-accepted conditions stipulated in a contract are binding from both the fiqhi as well as the legal viewpoints. Moreover, in present day commercial and banking traditions, such pledges are also considered as binding. Otherwise, it will not be possible for the two parties to form up a definite perception about the purpose and objectives of the contract, and hence they will not be able to sign it.

(37) "*Al-Muafaqat*" [2: 212].

(38) "*Al-Qawa'id*" by Al-Muqri [1: 329].

Appendix (C)

Definitions

Zara`i`

Zara`i` are the apparently permissible practices used as a means of doing a prohibited act. Therefore, *Sadd al-Zara`i`* means prohibition of permissible practices that can be used for committing Shari'ah-restricted acts. However, prohibition in this sense is subject to two restrictions. The first is the existence of a clear intention of the person in question to use the permissible practice for the sake of accomplishing Shari'ah-banned objectives, and the second is that resorting to prohibition should be only after wide spread of such misconduct in the society.

Subsidiaries

Subsidiary contracts or objectives in financial transactions refer to the consequent contracts or objectives that follow the original ones. The subsidiary status of these contracts or objectives is usually determined according to tradition, practice and the experience of those who are in the field.

Transaction

It is a binding contractual relationship that carries no optional choices.

'Inah

It is a sale whereby one party, for instance, sells the commodity to the other for one hundred dollars, on deferred payment basis, and repurchases it from the other for eighty dollars payable on spot. In fact, the sale transaction here is nothing but a mere trick for practicing usurious lending, and the commodity is used for no purpose other than facilitating the usurious transaction. The deal in this case has nothing to do with the purposes and objectives of sale, nor does it contain any element of them. In other words 'Inah takes place when one party buys a commodity from the other

on deferred payment basis and before making payment sells back the same commodity to the other for a less amount of money payable on spot.

Reverse 'Inah

It takes place when one party sells the commodity to the other party for a spot price, and the seller repurchases the same commodity from the buyer or from his agent for a higher deferred price.

Bay' al-Raja' (Bay' al-Wafa')

It is a sale whereby the seller keeps the intention to buy back his sold commodity. One of the most popular forms of this type of sale is when one party, who wants to obtain an interest-bearing loan, agrees to sell an income-earning asset to the lender. The lender will thus become entitled to the income of the asset as long as it remains in his ownership. The buyer then undertakes to return the sold asset to the seller whenever the seller pays back the same price to him. In this manner, the borrower (artificial buyer) succeeds to get the loan amount against payment of the agreed upon interest.

Shari'ah-Banned Tricks

It refers to those permissible contractual arrangements and other practices, which may be used to achieve prohibited goals like permitting what Shari'ah has prohibited, like escaping duties, deceiving people and performing other Shari'ah-banned practices.

Shari'ah Exit (Shari'ah-Acceptable Trick)

A Shari'ah exit is an act that is performed for the sake of avoiding commitment of sins, or achieving a permissible objective, or refraining from prohibited acts, or realizing a Shari'ah-acceptable interest.

Separation of the Transaction

Separation of a transaction means dividing the object of the same contract, into portions. To Fuqaha, it means a situation in which the provisions of the contract do not cover all the components of its object, or they may cover all of them first, and then shrink down to cover only some of them later on. Thus, either the single transaction is broken down into a number of portions, or only

some parts of it are separated in this manner. When separation takes place in this manner in a single transaction between a single buyer and a single seller and for a single price, the buyer should have the option to conclude the deal or not.



