

and the Ministry in future, on the basis of previously agreed upon rate, regardless of the current rate at the time of exchange, has been approved by Imam Showkanī as discussed in *Nayl al Awṭar* (vol. 5, pp. 254-255). Showkanī says, that in the opinion of the Hanafī and the Shāfi'ī schools, exchange at the current rate, or at a higher, or a lower, rate is lawful. This view, though it contradicts the literal meaning of the *ḥadīth* by Ibn 'Umar, which allows the current rate only, appears to be based on the opinions of above two Imāms. I, therefore, agree to the Bank's going through with the transaction, in the manner explained, based on the opinions of Imām Abū Ḥanīfah and Imām al-Shafi'ī. And Allāh Most Glorified and Most High knows best.<sup>13</sup>

#### 6. Question: A Promise to Purchase Currency

What is the legal view of a promise to purchase a designated currency, in a designated amount, for a designated price, during a designated period of time, when the seller agrees to hand over the currency, on demand, at any time during the designated period, on the understanding, that the purchaser will pay a certain amount in advance, known as the "right to buy", which he/she will lose, if the deal (to purchase the currency) is not concluded.

#### Fatwā

Such a transaction is not lawful, because it is no more than a promise to purchase currency. The only sale of currency allowed by the *Sharī'ah* is a straightforward sale, that is accompanied by direct receipt in money barter, or the exchange of price for price.

<sup>13</sup> Kuwait Finance House, *Fatāwā Shar'iyyah*, Question 168, p. 165. cf. *A compendium of legal opinions*, op. cit. pp. 80, 81.

1983, to the effect that a mutual promise, in the sale of currencies, involving a delay in payment of the price is lawful, as long as the mutual promise is not considered binding. This was the majority opinion.

If the mutual promise is considered binding, however, this transaction will not be lawful from a Shari'ah perspective.<sup>12</sup>

#### 5. Question: Agreeing to Sell Currency for a Predetermined Rate

As a facility for the pilgrims to Makkah, the Ministry of Awqaf, seeks an agreement with the Islamic Bank (of Jordan), under which, the Bank would sell it Saudi Riyals at a predetermined rate, today's for example. This (rate) would remain in effect, for a certain period of time (sixty days from the agreement, for example), and during this period, the Ministry would deliver to the Bank, the price of Saudi Riyals in Jordanian Dinars. In return, the Bank would deliver, on the same day, cheques for Saudi Riyals, drawn on the basis of the previously determined rate for this purpose, (which may be higher, or lower, than the exchange rate for the Riyal, on any particular day).

Will it be lawful (for the Islamic Bank) to go through with this transaction?

#### Fatwā

The agreement, to exchange currencies of different countries for a rate that is fixed, at the time of the agreement, with the understanding that exchange will take place between the Bank

<sup>12</sup> The Sixth Albaraka Forum, Fatwa no. 23; *al-Fatāwā al-Shari'iyah li Majmu'ah al-Baraka*, p. 70. cf. *A compendium of legal opinions*, op.cit. pp. 79-80.

difference, if the mutual promise is treated as binding, or, if it is treated as non-binding?

**Fatwā**

Such a mutual promise, if it is binding on both parties, is subject to the general prohibition against the sale of debt for debt, and is therefore unlawful. If, however, the mutual promise is not binding on both parties, it is lawful.<sup>10</sup>

### 3. Question: A Promise to Purchase Different Currencies

What is the *Shari'ah* opinion with regard to a mutual promise, to purchase different currencies at the rates current on the day of the promise? It should further be understood that the delivery of the two counter-values will be delayed to allow for the exchange, hand to hand, in the future. What is the ruling, when such a promise is considered to be binding? And what is the ruling, when such a promise is not considered binding?

**Fatwā**

Such a promise, if considered binding on both parties, will fall under the general prohibition, against the sale of debt for debt, and will therefore be unlawful. If, however, the promise is considered not to be binding on both parties, then it will be lawful.<sup>11</sup>

### 4. Question: Mutual Promises in Exchange

What is the ruling about mutual promises in the exchange of currencies?

**Fatwā**

It is necessary to emphasize the decisions taken by the Second Conference on Islamic Banking, held in Kuwait in March

<sup>10</sup> Dubai Islamic Bank, *Proceedings of the Seminar on Islamic Economics*, Madinah, 1983, pp. 53-54.

<sup>11</sup> Ibid.

and silver in future. Other jurists do not consider such promises permissible. Following are some important contemporary verdicts on the issue:

1. Question: Advance Agreement on a Rate

What is the *Shari'ah* ruling, with regard to an agreement on the sale and purchase of foreign currency, at a rate that is agreed upon in advance, in which the transaction takes place at a later date, and in which the delivery and receipt of cash take place at the same time?

Fatwā

Such a transaction will be considered the same as a promise to sell. Then, if both parties go through with the deal in the manner it is described in the question, there will be no legal impediment to its implementation. This is, because it is lawful to carry out the promise, as described. On the other hand, if the promise is linked to anything that suggests a contract of sale, like a down payment, the deal will then become like the sale of debt for debt, (a deferred payment for a deferred payment), which is absolutely forbidden. This is especially true in an exchange contract, because its validity depends upon the taking possession of both counter values at the time of transacting. In such a case, the stipulation of a deferment is considered by all the jurists to render the contract void.<sup>9</sup>

2. Question: Mutual Promises to Buy or Sell Currencies

What is your opinion with regard to a mutual promise for the sale of various currencies, at the rate of exchange applicable on the day of the agreement, (the day of the mutual promise), on the condition that delivery of both countervalue will be delayed, so that the exchange may take place, on a spot (hand to hand exchange) basis, in the future? Will it make any

<sup>9</sup> Kuwait Finance House, *Fatāwā' Shar'iyah*, Q. 211, p. 203.

bilateral promises amount to a contract, and a contract cannot be made on a non-existent subject matter. Besides, in such an agreement both obligations are deferred.

### Promise in Banking Transactions

The modern Islamic banks, and financial institutions, rely heavily on promises in their dealings, and have incorporated them in a number of transactions, such as *murabahah* and *ijarah muntahiyah bil tamlik*, i.e. contract of lease which includes a promise, by the lessor to transfer the ownership in the leased property, at the end of lease period.

As mentioned earlier, in *murabahah* transaction, the customer gives undertaking to the institution, that it will purchase goods from the bank on the basis of *murabahah*, after the latter acquires the required goods from the supplier.

In *ijarah muntahiyah bil tamlik*, the bank includes a number of promises in the contract, such as:

- A promise by the lessor, that he will transfer the ownership in the leased property to the lessee, at the end of the term of the *ijarah* period, either for token price, or to give it as a gift.
- The promise by the customer, to take the asset on lease, whenever the institution acquires it for him. It is permissible for the institution, to require the lease promisor (customer), to pay an earnest money to the institution, to guarantee his commitment to accept lease on the asset.

### Promise in Currency Exchanges

The contemporary Muslim scholars allow mutual promises, to sell or buy currency in future, provided the promises are non-binding. This opinion is based on the viewpoint of Zahirī jurists, who allow mutual promise for the exchange of gold

promisee takes some action, and incurs some risk and liability, as a result of the promise. The First al-Barakah Seminar has also supported the notion of binding nature of promise. The declaration of the seminar provides that:

“The promise, and its binding nature, safeguard the transaction, and bring stability, and serve the interest of both, so it is lawful for the bank to insist on such promise”

In a Fatwā of the *Shari'ah* Board of Faisal Islamic Bank of Bahrain, the bank has been allowed to receive some security deposit from the *murābahah* to the purchase orderer (client), in order to compensate the loss of the bank, if the customer refuses to purchase the required goods after acquisition. If there is any remainder, after the bank has been compensated, it will have to be returned to the client. If the security deposit is insufficient as recompense, the rest should be paid by the purchase orderer, the client.<sup>8</sup>

Frank Vogel and Samuel have disagreed with the notion of unilateral promise, as prominently figured in the ruling of Islamic *Fiqh* Academy. The concept, in their opinion, has serious, legal as well as financial, implications for the contracting parties. To them, if promise in case of *murābahah* is binding for the customer, (promisor), and non-binding for the bank (promisee), it may prove to be an unjustifiable favour for the bank.

Thus, in the opinion of these authors, one-sided promise may prove harmful for the customer. In our view, the reason for Academy's emphasis on unilateral promise, and its non-recognition of the concept of bilateral promises, is that

<sup>8</sup> Yūṣuf Talal, *A compendium of legal opinions on the operations of Islamic Banks*, p. 22.

## Viewpoint of Modern Muslim Scholars

The modern Muslim scholars have applied the principle contained in this maxim to every such promise in which the promisee incurs some risk, and liability, and performs the act demanded in the promise. In modern Islamic Law, the promises in commercial transactions are generally held enforceable at law. International Islamic *Fiqh* Academy is also inclined to this position. It has, however, laid down certain conditions for the enforceability of promises in commercial dealings. These conditions are:

- It should be a one-sided promise.
- The promisor must have caused the promisee to incur some liabilities.
- If the promisor is to purchase, or sell, something from, or to, the promisee, the actual sale must take place, at the appointed time, by the exchange of offer and acceptance. Mere promise should not be taken as a concluded sale.
- If the promisor backs out of his promise, the court may enforce specific performance from him, either to purchase, or sell, the commodity, as the case may be, or to pay actual damages.<sup>7</sup>

It is worth mentioning that in *murābahah* transaction, a customer asks the bank to purchase certain goods, on the customer's specification from the supplier, and promises to purchase them from the bank, when the latter acquires goods.

Though the ruling of International *Fiqh* Academy, mentioned above, specifically deals with the particular case of *murābahah*, yet, it can be extended to all such cases, where the

<sup>7</sup> Resolution no. 2, 3, Islamic Fiqh Academy, Academy's Journal No. 5, vol. 2, p. 1509.

where a person, offers a certain amount of money, or property, as reward to any person who brings about desired results. For example, "I will pay ten dinars to anyone who returns my lost camel".<sup>6</sup>

An important area, in the contemporary context, in the domain of *ju'alah*, is the need for inventions, and innovations. An individual, or company, already involved in research, may be motivated to work out a certain specific innovation, or invention, against the payment of reward on realization of a task. Such promises, according to Muslim jurists, are binding and enforceable at law.

It may also be used for exploration of minerals, and extraction of water, in situations where entitlement to wages is contingent upon finding of water, or minerals, without reference to the amount of time, or the extent of period.

In the field of finance, it can be used for following purposes.

- Collection of debt(s), in cases where entitlement to compensation is contingent upon collection of debt(s).
- Securing permissible financing facilities, provided the subject matter of *ju'alah* is valid, such as creation of debt through *murābahah*, on deferred payment, or *ijārah* with deferred rentals, raising of loans without interest, and issuance of letter of guarantee.
- For brokerage activities, in cases where the entitlement to compensation is contingent upon the conclusion of the contract, for which intermediation is undertaken.

<sup>6</sup> *Islamic Law and Finance*, op.cit. p. 149.



## Viewpoint of Classical Jurists

The Muslim jurists hold divergent views regarding the enforceability of a promise.

- Shafi'i and Hanbali jurists are of the view that promises are not mandatory. They just represent a moral obligation on a promisor to fulfil his promise.
- Mālikī jurists regard promises binding. This view is attributed to Ibn al 'Arabī and Ibn Shubrumah.<sup>3</sup>
- The Hanafī jurists acknowledge the validity of *bay' al-wafā* which establishes the fact that Hanafī jurists also favour the concept of the binding nature of promises.<sup>4</sup> In *bay' al-wafā*, the purchaser of an immoveable property, undertakes that he will return it to the seller, if he, (the seller), returns the price to him. Such a promise is binding on the purchaser.<sup>5</sup>

The Muslim jurists are, however, unanimous on the enforceability of a promise that is made in form of a guarantee such as, when a person asks a seller to sell a commodity on credit, to a particular person, and promises to pay its price, if the buyer does not make payment at the stipulated time. The seller relying on this commitment sells commodity to the buyer. Here, the promisor has guaranteed the payment of price, on behalf of the buyer, and the promisee has taken certain action, and has incurred a risk, by relying on the promisee, so, he is entitled to demand its enforcement at law. Similar to case of guarantee, is *Ju'alah* (reward), promise. It is,

<sup>3</sup> Ibn Juzī, *al-Qawānīn al-fiqhiyyah*, p. 258; *al-Mughnī*, op.cit. vol. 4, p. 195.

<sup>4</sup> See, *Radd al-Muhtār*, op.cit. vol. 4, p. 135.

<sup>5</sup> See, *al-Ashbāh wa al-Nazā'ir*, op.cit. vol. 2, p.11; Atāsī, *Sharḥ al-Majallah*, op.cit. vol. 2, p. 415.

## Status of Promise in Islamic Law

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### Promises that Entail Guarantee are Binding<sup>2</sup>

The predominant view point in classical Islamic law is that simple promises are not legally enforceable and binding, though morally, and religiously, a promisor is bound to fulfill his promise. The Qur'an enjoins upon every believer to fulfill his commitments. It says:

“And fulfill every engagement, for every engagement will be enquired into (on the day of reckoning)”  
(17 : 34).

It also says:

“(But righteous) are those who fulfill the contract which they made (2: 177)”.

Thus, the breaking of promise is an act of sin and disobedience. It may also occasion social disapproval, or ethical demerit. Its enforcement at law, however, cannot be demanded.

The Holy Prophet said; “*La Dina Laman La Abadalla hu*”. Which means, ‘he who does not keep his word does not have faith.’

<sup>1</sup> Mawsū'at al-Qawā'id al-Fiqhiyyah, op.cit. vol. 11, p. 1121.

<sup>2</sup> Corresponds with Majallah, Article 83