

FUTURE CONTRACTS UNDER ISLAMIC LAW: DEFERRED PAYMENT AND DEFERRED DELIVERY OF GOODS WITHIN THE CONTEXT OF THE CISG

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Abstract

This article examines future contracts (deferred payment and deferred delivery of goods) within the context of Islamic law and the United Nations Convention on Contracts for the International Sale of Goods (the CISG). Although many Muslim jurists have deemed these contracts as forbidden under sharia law, the author finds that future contracts are allowed under certain circumstances, especially when a.) the goods are separate and particular, b.) the goods are delayed due to formalities such as shipping, or c.) when the sold goods will be manufactured by seller.

Keywords: future contracts, deferred payment, repayment, deferred delivery of goods, Islamic law, sharia law, Muslim law, Saudi Arabia, United Nations Convention, Contracts for the International Sale of Goods, CISG.

Introduction

The nature of international sales means that goods are usually delivered later than the contract, and international sales of goods usually occur sequentially, which drives parties to enter into a series of contract carried out at some later date. There have also been different types of contracts created and implemented that are specific to the international sales environment; among these are future, forward, and options contracts, created to meet the needs of those doing business and to manage the risk of loss as well as guarantee the availability and merchandising of the goods. Beyond those contracts, there are different types of practiced sale of goods contracts in which price and goods are forwarded such as supply or manufacturing contracts. As a result of the nature of this context and the accelerated changes to which international sales can be subject, the United Nations Convention on Contracts for the International Sale of Goods (CISG, Part of SJD decertation at Indiana University- Bloomington. USA) chose to allow parties to exchange the payment and the goods at the time of contract, or to defer both or one of them to a future time.

This article uses the terms and concepts of “Islamic law” and “sharia law” interchangeably because Saudi Arabia has adopted sharia law as sole abiding law. The matters at hand could apply to any country governed by sharia law. Under Islamic law, payment and goods can be exchanged at the time of contract or one of them may be deferred (with the exception of when the spot exchange is a condition for validity in exchanging *riba* [usury commodities]). However, deferring both (payment and delivery of goods) to a future time is a concern with regard to prohibited practices. Some scholars agree regarding the prohibition of future contracts; however, this study found that, per the original ruling, these contracts are permissible and the prohibition is only

limited to some cases. Thus, there may be a possible conflict between CISG and Islamic law if the price and goods were to be delayed, and there is possible codirection of the CISG with Islamic law.

Limitations. Discussion in this section is limited to sale of goods contracts that involve deferment of both exchanged objects and the relevant parties' intent to carry out the exchange of goods and capital, but it does not examine or discuss derivative contracts.

Future Contracts Under the CISG

The future contract is a general concept that may encompass many complex contracts. In this context, future contracts initially refer to sale of goods contracts that allow for the delivery of goods and payment of price to occur at an agreed future date. Generally, the CISG covers this sort of contractual transaction. Article 1 (1) indicates what types of contracts fall under the CISG, and articles 2, 3, and 4 explicitly indicate what types of contracts are excluded. The forward and future contracts are governed by the CISG based on the general and flexible language of the convention, and they are not excluded. Moreover, the principles and rules of the CISG can be extended to govern future contracts, and the provisions of the CISG do not require the commodity to be extant. Article 3 explicitly states the ways in which the CISG applies to supply, manufacturing, and production contracts, and it is usual for parties to enter into their contracts and for performance to begin at some later date (Article 3 (1)). Article 33 obligates the seller to deliver the goods at the time fixed by the contract. This article was established as a general article, however, and it does not distinguish between types of goods or contracts. Article 58 (1) indicates that the time of payment is the time upon which the relevant parties agreed per their contract without any limitation. Thus, parties can agree on any time for payment whether that is at the time during which the parties enter into agreement, at the time of delivery, or at some later date. If there is no agreement, then, according to the Convention, the time of payment is when the seller places either the goods or documents controlling their disposition. This article is fairly general in nature and does not distinguish between commodities. Also, international usage can be considered pursuant to article 9. It is common practice for payments and goods to be exchanged at some point after the contract has been created. Per article 3, the CISG governs supply and manufacturing contracts if the seller is responsible for materials (Article 3 CISG)

Whether there are extant goods or not, and regardless of whether payment is made in advance or deferred, the CISG is applicable and sale of goods contracts fall under the CISG (Benjamin, 2007).

The CISG does not specify special provisions regarding parties' obligations or contract performance for supply or manufacturing contracts. The CISG provisions have been designed to accommodate simple sale and supply contracts. However, some types of future contracts, so-called derivatives, and parties do not intend to exchange goods; instead, there are other purposes such as risk management or speculation. And in most of cases, parties do not intend actual delivery, so they are not likely to apply the CISG.

Future Contracts Under Islamic Law

Abdullah bin Umar, a prominent authority in hadith and Islamic jurisprudence (Abdullah ibn Umar bin al Khatab), declared, “The messenger of Allah forbids sale delay for delay.” (Sunan Albaihagi). It is thus fitting that Islamic sharia prohibits *gharar* (risk/uncertainty) in contracts, and the deferment of both exchanged objects (goods and payments), seems to fall under *gharar*. In addition, some scholars have noted that a consensus exists regarding this disallowance of deferment of payment and delivery of goods (Osama, 2012; Ibn Taymiyyah, 2012; Ibn Rushed, 2004). This has all raised concern regarding a possible contradiction between the CISG and Islamic sharia. This section presents a discussion of the Islamic ruling regarding the deferment of payment and delivery of goods, and it also examines cases where the consensus is applicable.

Generally, scholars agree on the prohibition of sale delay with delay (called debt with debt/*baye alkali bi alkali*). However, sale debt with debt refers to a different type of transaction, and there are arguments regarding this (Al-Lahem, 1986). Thus, because sale debt with debt is a different transaction type, and there have been numerous lengthy discussions regarding this subject, the current study focuses solely on transactions through which parties are not bound to any pre-existing obligation; rather, via these transactions, the parties establish new obligations that did not previously exist, and they do this by entering into a sales contract and agreeing to defer payment and delivery of goods. They establish new obligations but they agree to the price under the buyer’s hold, and make the goods under the seller’s hold. This kind of sale is referred to as sale debt with debt because when the parties entered into a contract and agreed to defer the payment and deliver the goods, the payment became a debt on the buyer’s hold it, and the buyer became indebted to the seller. Additionally, the goods are a debt on the seller’s hold, and the seller became indebted to the buyer.

To illustrate, assume X (the seller) sells 500 pounds of wheat (it is of the quality and quantity described in the contract) to Z (the buyer) for \$1,000. The contract was concluded on June 6, 2019. The wheat will be delivered on May 10, 2020, and the parties agreed that the payment will be made on the same day that the wheat will be delivered. X and Z had not undertaken any debt prior to June 6. However, after the formation of the contract, both the buyer and the seller are responsible for fulfilling their respective obligations (this obligation is referred to as a debt under Islamic jurisprudence). X has obligated himself to deliver the wheat at a future time, and Z has obligated himself to make a payment at a future time. The wheat became a debt on X, and the payment amount became a debt on Z. Thus, they began their transaction via debt with debt.

Are there any sales contracts that involve deferment of both payment and delivery that are prohibited? The majority of scholars consider this kind of sales contract to be prohibited, and some scholars, such as Ibn Taymiyyah and Ibn Alqayyem, have reported consensus (Al-Lahem, 1986). Contemporary Muslim researchers tend to go in one of three directions regarding this matter. Some accept the consensus and view a contract that permits deferment of both payment and delivery of goods as a prohibited contract. Other researchers challenge this consensus, as they see it as applying to a limited number of cases rather than to all instances of deferment of payment and delivery of goods. And still others challenge the entire report of consensus and claim that the

consensus does not apply to deferment of payment and delivery of goods, as it is just another kind of sale (i.e., debt with debt) (Alwehaibi, 2020). To understand this discussion, it is important to understand the contract classifications under Islamic jurisprudence. The classification of sales contracts under Islamic sharia based on the immediate or deferred delivery of the exchange objects are:

1. The two objects are spot, meaning “immediate”; this is the regular sale which is permissible.
2. The delivery of goods is immediate, but the payment is deferred; this is a postponed sale (*bai Alajil*), which is permissible unless the two commodities are usury commodities.
3. The payment is immediate, but the delivery of goods is deferred; this is *salam*.¹

If both payment and delivery of goods are deferred in one of these three categories, then there is a fourth classification:

4. Both (payment and delivery of goods) are deferred; this is called a *bai al Dain bi Al dain* sale, debt to debt or delay to delay.

There are some scholars who agree with the consensus but have noted some exceptions (e.g., *istisna*/manufacturing contract). Some other scholars challenge the consensus and claim that it is only applied to a specific case, and the original ruling is permissible. In other words, a majority of scholars agree regarding the consensus that states that debt to debt sale is prohibited. However, they differ with regard to which transactions fall under this consensus.

It is not within the scope of this study to go over all types of sale contracts, but the Islamic ruling changes based on the *gabit*, delivered and non-delivered (appointment and non-appointment) (Auditing Organization for Islamic Financial Institutions Sharia Standards) goods and prices. *Gabit* is an Arabic word originally meaning possession. In sale contracts, it means the actual gathering of a thing or any manner that takes its rule and removes the obstacles, according to the requirement of customary practice. Delivery of real estate property (which is irremovable) is completed by making the property available to the buyer and removing the obstacles that prevent the buyer from benefitting from it. Delivery (*gabit*) (or possession) of movable items can be achieved by:

- 1- actual possession (such as putting the sold object in the buyer’s physical hand)
- 2- using a manner that allows the other party to control it and entitle him for ownership, such as delivering documents controlling the items or registering the object in government records in the name of the other party.

With regard to the appointment and non-appointment of goods and prices, there are three types of contracts that allow for deferment of both delivery of goods and payments:

1. The goods (the sold object) or both of the exchanged objects (goods and payments) exist, and they are particularly appointed.

If the exchanged objects are both commodities, or there is one commodity being exchanged with money, they exist, they are ascertained (i.e., they are particularly

distinguished/identified/appointed), and the goods or payments are available to the buyer to collect, then the deferment here is acceptable (Saudi Permanent Committee for Scholarly Research and Ifta) regardless of whether the distinguished money and goods are presented at the place of contract. Conditionally, the two objects may not be *riba* commodities, or the contract is one by which money is exchanged with money. For example, say a car is sold that is particularly appointed (such as by the VIN number) with a particular certified check. In this case, even though the parties deferred the physical exchange, there was an appointment, which is enough to distinguish the objects and remove the debt description. Delivery (handover) of the goods or the payment is the way to remove the sales contract from debt by debt sale. Some scholars see that appointed and particular goods allow for implied delivery.

2. The money (payment) is particularly appointed, but the goods are sold by description. Most scholars see this is a *salam* contract, and the appointed money must be paid at the formation of the contract because the money may not be appointed. Although there are scholars who think that it is possible to appoint the money, such as via certified check, the appointment removes the debt description (Al-Lahem, 1986)

3. The two exchanged objects (goods and payments) are sold by description (neither particular nor appointed. In this case, the sale is one of two types: First is the manufacturing sale, which means that the seller is responsible for the materials and for manufacturing them. Thus, the buyer purchases a future object that the seller is required to manufacture; the seller is also responsible for procuring the materials necessary to manufacture the finished product. This is referred to as *istisna* (manufacturing). Some scholars categorize this as a *salam* contract, which requires payment to be made at the formation of contract. The Hanafi School and many contemporary scholars hold that *istisna* is an independent contract and thus allow deference regarding both payments and goods (International Islamic Fiqh Academy). An *istisna* contract is a mixed contract, which means that it is not solely a sale of goods, as it is also a hiring contract, meaning that the buyer hires the seller to produce the goods being purchased.

The second type of sale here does not require the seller to manufacture the good or object being purchased. This is a *bai Al-ma'asof fi aldimah* (debt sale of a described object). In this case, all four schools and the majority of scholars prohibit selling a deferred good with a deferred price. The majority of scholars rely on texts from the sunnah; Abdullah bin Umar said, "The messenger of Allah forbids sale delay for delay." In addition, some scholars have stated that there is a consensus regarding the prohibition of selling a deferred good with a deferred price (Al-Lahem, 1986). Many scholars consider this to be a *salam* contract, because even though the name of the transaction is different, the concepts of both contracts are the same (Al-Lahem, 1986). Therefore, it seems that the consensus on prohibition of deferred goods and payments applies to *bai Al-ma'asof fi aldimah* (the debt sale of a described object), the *salam* contract, and the exchange of objects, all of which involve usury commodities. There are important points with regard to this:

- To avoid the prohibited debt by debt sale, as required, is to perform delivery (handover/*gabid*). How one fulfills this obligation can vary based on the object, usage, and circumstances. For example, in an international sale of goods, the goods are considered

delivered once there is a transfer of ownership and documentation indicating control of said goods.

- Most schools and scholars see the appointment of the goods and their distinctness from other commodities as enough to fulfill the delivery requirement and avoid a debt with debt sale.
- If the deferment is *not* contractually or customarily conditioned and the parties immediately start to perform the contract, the contract is valid even if the delivery and payment takes some time.
- Some contemporary researchers challenge the consensus by noting some transactions that scholars have been allowed even though the payments and goods are deferred.
- However, some scholars have responded to the challenge of consensus by saying that the consensus is reported, and the scholars' words are clear on this. Yet, the sale transaction that some scholars have allowed despite the deferred payments and delivery of goods has not been permitted because the scholars see delay with delay sale as permissible, but because the allowed transactions contain some descriptions, this changes the nature of the contract and shifts them away from being debt with debt (Al-Lahem, 1986). Examples of these descriptions include the following:
 - 1.) The contract is a mixed contract but not solely a sale, such as a manufacturing contract (*istisna*).
 - 2.) The objects are appointed even if they are not physically exchanged. *Gabid* (handover/delivery/possession) is a way to shift the contract away from being a debt to debt sale. Some scholars see that appointed and particular goods imply delivery.
 - 3.) The parties do not agree regarding the deferment, the parties do not deliberate so as to defer the exchange, and the deferment is not an obligation of the contract.
 - 4.) The parties start performing the contract, but the performance needs time before the contract can be fully realized, such as an *istijrar* contract.
 - All these notes are not applicable if the exchanged objects are *riba* commodities. *Riba* commodities must be hand-to-hand. If one buys gold, for example, the exchange of gold with money has to be immediate. Because the *riba* commodities have to be exchanged rapidly, and because in international contracts this is very costly and complicated, some scholars suggest agency on behalf of parties to take and deliver sold objects, or the buyer can authorize the shipper to act on his behalf to take delivery, whereas the seller authorizes a bank to act on his behalf to take payment.

It is worth noting that in all of the transactions researchers have used these ideas as a means by which to challenge the consensus containing one or more of these descriptions; some scholars see that this permitted the transactions to take place without committing the prohibited debt to debt sale (Al-Lahem, 1986)

Some scholars opine that even though delay to delay sale is prohibited, it can be permissible as an exception if the contract exists out of necessity and is justified via the rules of necessity. For

example, government and public institutions need materials that they procure via supply contracts. Because they cannot afford to pay for all of the materials in advance or to make the full payment in advance without experiencing economic hardships and difficulty running the government, a necessity is born. In this case, even though the contract is a delay to delay sale, it may be permissible as an exception based on the rule of necessity. However, this exception must be limited and based on specific circumstances and needs. Some scholars assess the production costs, which are high, and look at how long it would take an organization to procure the raw materials needed for its end products; if it is a financial necessity, then the seller can enter into a future sales contract even if the contract contains a debt with debt sale. However, the construct must meet the conditions of both *gharar* and necessity, as *gharar*, in this context, could not be avoided, and the parties' interests could not be achieved via any permissible contracts (such as *salam* or *istisna*). Additionally, the necessity is limited to a specific case, not in all cases and peoples. A variety of permissible Islamic contract types (e.g., *salam*, *istisna*, and *istijrar*) exists that can properly address the need for future contracts (Khan, 1995)

Conclusion

While future contracts are forbidden per consensus of Muslims jurisprudents, those that include deferment of payment and unidentified goods are coverable and allowed under the CISG. Deferment occurs when parties conclude the contract and agree contractually or customarily to defer the performance of the contract to a future time. If the goods are appointed and become particular and distinguished from others' goods, that removes the prohibition. In addition, if the parties start performing the contract, but the nature of the contract requires some time for performance, then it is not a delay to delay contract. For example, if a Saudi buyer buys a large load of cell phones from an American seller, the payment may take a few days because processing time and extra documentation may be required. In addition, the shipment needs a few days or maybe even weeks to be delivered because of the distance and, again, necessary documentation. In such as case, the contract is considered spot even though the delivery may take some time because the deferment here is not intended for itself, but it is a result of the nature and necessity to perform the contract. However, if the parties agree on deferring the performance of the contract to a future time, then it is disallowed.

In sum, here the deferment of both payment and delivery of goods is a different type, which is permitted, while still others may not be. The CISG recognizes future contracts and does not require the identification or existence of goods, and the provisions of the CISG allow both goods delivery and payments to be deferred, as it does not distinguish between appointed and unappointed goods. Thus, it may conflict with Islamic sharia if both payment and goods are deferred in the following contracts or contexts:

1. *Salam* contracts.
2. If the contract is a sale for goods that are sold via description and the goods will not be manufactured by the seller.
3. If the exchanged commodities are *riba* commodities.

The deferment is allowed based on some Islamic jurisprudence scholars' opinions:

1. If both exchanged objects are identified particularly (the majority allow it).
2. *Istisna*/manufacturing (most contemporary scholars allow it).
3. If the deferment is not intended by itself and not agreed upon by the parties but is necessary to perform the contract.
4. If the contract is the result of necessity.

Under Islamic law if the contract is *salam*, the price must be paid at the formation of the contract. Additionally, when the contract is for a sale of described goods that are not particularly identified at the conclusion of the contract and no manufacturing is required on behalf of the seller, the price must be paid at the conclusion of contract. If the exchange objects are the same kind among the six *riba* commodities, or if those that are joined together share the same reasoning, or if the exchange is one that involves exchanging money with money (money here includes gold, silver, and paper money), they must be hand-to-hand and equal in quantity. If the two exchange money or the *riba* commodities are from different kinds, they must be hand-to-hand but must not be equal. However, the CISG does not distinguish between goods, and it generally allows deferment of both delivery of goods and payment.

If the contract is for a sale of goods that are particularly identified at the formation of the contract (conditionally, they are not money or the same kind of *riba* commodities), or the contract is *istisna* (manufacturing), then parties can defer both payment and delivery of goods per many scholars' opinions. In this case, there is no conflict.

Therefore, the only possible conflict exists when the contract is for the sale of nonexistent goods or unidentified goods, and the parties explicitly or implicitly agree to defer the exchange of payment and delivery of goods to a future time. The CISG recognizes such as agreement, but it is disallowed under Islamic sharia.

When the future contract is considered invalidated under national law that applies Islamic Sharia, such as Saudi Arabia, and even if the CISG is adopted, the CISG may not be applicable according to article 4, which excluded validity of contract from its scope. Another possibility is that the CISG may be applicable since the CISG provisions allow for the deferment of delivery of both payment and goods to a future time.

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