Commodity Futures: An Islamic Legal Analysis

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Executive Summary

Commentators who have disputed the permissibility of futures in Islamic law have highlighted the following five points in their critique: (1) futures proceed over goods that are nonexistent at the time of contract; a futures sale is therefore only a paper transaction and not a genuine sale; (2) futures consist of sales in which the seller does not own the item he sells, (3) futures fall short of the requirement of qabid, or taking possession of the item prior to resale; (4) deferment of both sides of the bargain to a future date turns futures into the sale of one debt for another; and (5) futures involve excessive speculation that verges on gambling.

This article presents nine sections, beginning with a statement of issues, followed by a description of the futures contract, and a literature review in the next two sections. This is followed by an analysis of the hadith “sell not what is not with you,” a similar analysis of the issue of qabid, a section on the sale of debts, another on risk taking and speculation, and a conclusion. © 2007 Wiley Periodicals, Inc.

COMMODITY FUTURES: AN ISLAMIC LEGAL ANALYSIS

Market historians have traced futures back to early commercial practices in Europe, Japan, and the United States. There are accounts of trade fairs in medieval Europe, which were initially seasonal events and then became permanent as trust was established among traders and they were consequently able to conduct forward trading. There are also accounts of forward delivery of rice in late-seventeenth-century Japan. Absentee landlords who needed funds for their expensive lifestyle in the cities often issued warehouse receipts against their anticipated crops. The merchants in turn bought these receipts in view of their antic-
ipated needs, a practice that was in many ways similar to modern-day hedging.

The Chicago Board of Trade, founded in 1848, provided a market for farmers who traded on a forward basis, which was on the whole privately negotiated, and it was in 1868 when the Board introduced a standardized agreement, known as a "futures contract," in which a margin payment was stipulated to overcome the problem of default. But futures trading on a large scale dates back to the early 1970s, when the market realized its critical mass in trading volumes in a variety of commodities ranging from grains and pulses to oils and oil seeds, sugar, coffee, livestock, cotton, rubber, precious metals, currencies, bonds and stocks, and so on. In terms of volume futures trading soon exceeded trading levels in conventional stocks, and it is now the single most voluminous mode of commerce on the global scale.

The Arabs preceded the rest of the world by several centuries in forward trading and the use of commercial paper. Reports indicate that during the early Umayyad rule in the late seventh century A.D., soldiers and government employees were issued commodity coupons (ṣukūk al-bada’i’), which were subsequently bought and sold prior to maturity.

Futures markets enable food producers and merchants to fix the price of the assets in which they trade well in advance of taking or making physical delivery. Farmers and factory owners who need to plan ahead are usually apprehensive over the adverse movement of prices in the weeks and months ahead. The conventional remedy available to them was for the buyer to buy the commodity at the desired price and then keep it until the time he needed to use it. The buyer would in that case incur costs of transportation, storage, and so on, and would also have to pay for what he bought in full. If the seller wished to keep his goods until a future date, he too incurred costs of carriage. In both cases, the costs of carriage would add to the prices that would most likely be passed on to the consumer. The futures market provided a mechanism that sought to overcome these difficulties by making it possible for buyers and sellers to enter the market whenever they needed to at considerably lower costs. These costs could, according to one estimate, be as low as one-tenth to one-twentieth of the cost of carriage of the equivalent cash market transactions (al-Tijani, 2000, p. 122).

Organized futures markets also enabled the traders to lock in a favorable position for the goods they needed or sell their goods well ahead
of time at favorable prices. The futures market opened new possibilities for management of risk over production and marketing, as well as more efficient investment planning. These benefits are also not confined to individual traders. Developing countries that need sizable investment capital can considerably improve their prospects of obtaining it from the international market if they provide the investors with effective risk management facilities. Futures and options can thus contribute to the prospects of attracting investment and enhancing the financing capabilities of developing countries.

Major producers of commodities normally want to have a greater influence over the pricing of their products. In the case, for example, of palm oil, of which Malaysia is the leading producer, until the early 1980s palm oil prices were being determined by traders and speculators in London. Since the inception of a futures market in Kuala Lumpur in 1983, Malaysia has not only become a principal player in the pricing of palm oil but also benefits by the spin-off activity from palm oil futures, such as employment opportunities, training of a skilled labor force, and so forth.

A similar initiative is long overdue with regard to petroleum products, of which the Middle East and Gulf countries are the major producers. Trading in oil products currently takes place in New York, London, Singapore, and other locales, but not in the Middle East itself. The major producers of oil are thus excluded from the benefits that flow from derivatives trading in this sector. One might even say that the establishment of a derivatives market for oil and oil products by Muslim countries is a necessity. The majority of the OPEC member countries, with the exception of Venezuela, are Muslim countries. Since Islamic financial institutions cannot invest in interest-based products, bonds, and currencies, it is all the more important for them to open derivatives markets in commodities. This would also help to at least partially alleviate the problem over the flight of capital from the Middle East to the Western markets.

The flight of capital from the oil-rich countries is partly caused by the absence of adequate investment facilities in these countries. The Financial Times of London carried the information that “acceptance of Islamic banking is growing,” but that the Qur’anic prohibition of receiving or paying interest has meant that “about 75 percent of Islamic banking funds are invested in short-term commodity trades.” To give an indication as to where the money goes, it was said that commodity trading is conducted “in return for a fee by a middleman—often a Western bank, like Citibank—that arranges for a trader
to buy goods on the Islamic bank’s behalf and the Western banks have always been happy to oblige” (Khalaf, 1994).

Notwithstanding the Shariah principle of permissibility (ibaha) that renders all commercial transactions (mu’amalat) permissible in the absence of a clear prohibition, one is confronted with the verdicts of some Fiqh Academies and scholars who have declared futures trading forbidden. This body of opinion is founded mainly in the premise that futures trading does not fulfill the requirements of the conventional law of sale as stipulated in the fiqh al-mu’amalat.

Part of the problem is also due to the fact that the Shariah advisors to Islamic banks and institutions are inclined to limit their understanding of Shariah only to the fiqh textbooks at the expense often of the dismaying economic predicament of the Muslim masses. In answer to the question of whether Islamic banks may invest in futures, the Financial Times commentator wrote that “it depends on the bank’s Shari’a board, whose members are experts in the Koran but less so in the field of bank options. It is up to each institution to say what is Islamic” (Khalaf, 1994).

The discussion that follows appears in nine sections, beginning with a statement of issues, which is followed by a description of the futures contract, and a literature review. “Sell not what is not with you” is a hadith text, which is then considered followed by an analysis of sale prior to taking possession (qabla), the sale of debts (bay‘ al-dayn), and risk taking (gharar). Next, there is an examination of offsetting transactions in futures, followed by a discussion of speculation and gambling, and a conclusion. Scope does not permit addressing other areas of derivatives, such as options and swaps, which is why I confine this analysis only to futures trading in commodities.

THE ISSUES INVOLVED

Commentators who dispute the permissibility of futures in Islamic law have highlighted the following five points in their critique. First, futures sales proceed over goods that are nonexistent at the time of the contract. No goods are delivered at that time, and no price is paid. The futures contract is, therefore, only a paper transaction and not a genuine sale. It is concluded for the sole purpose of speculative profit making. Second, futures consist of short selling, in which the seller does not own or possess the item he sells. The purpose of any sale is to transfer ownership of the sold item to the buyer, but when
the seller does not own the item, he cannot transfer ownership. Third, futures sales fall short of meeting the requirements of *qabid*, or taking possession of the item prior to resale. Nearly all sales and purchases in the futures market take place without physical delivery. This is also the case in offset transactions that are concluded so as to close out an open position in the market. Fourth, deferment of both sides of the bargain to a future date turns futures into the forbidden sale of one debt for another (*ba‘f al-kali’ bi al-kali’*). Fifth, futures involve speculation that verges on gambling and *gharar* (uncertainty and risk taking). The gambling element is also said to cause volatility of commodity prices in the cash market.

The first four points of this critique are premised in theoretical *fiqhi* positions on conventional sale and tend to ignore the operational procedures of futures. As for the element of gambling, the view recorded in some earlier studies that futures encourage price volatility and destabilize the cash market has not been confirmed by subsequent studies. More recent research has, in fact, supported the opposite view: futures tend to reduce price volatility and have a stabilizing influence on the market.

*Riba* (usury) is not an issue in commodity futures. Except for interest-rate futures, foreign currencies, and stock indices, futures trading in commodities do not involve *riba*, as there is no giving or taking of interest involved. Futures also do not consist of an exchange merely of money for money, but comprise sales and purchases of goods that transfer ownership of goods and their prices between the traders.

**DEFINITION AND CHARACTERISTICS**

The futures contract is defined as "a legally binding commitment to deliver at a future date, or take delivery of, a given quantity of a commodity, or a financial instrument at an agreed price." It is a firm legal agreement between a buyer/seller and an established commodity exchange in which the trader agrees to deliver, or accept delivery, during a designated period, of a specified amount of a certain commodity. The commodity so traded must adhere to the quality and delivery conditions prescribed by the exchange on which it is traded (Teweles & Jones, 1987). The price is competitively determined by "open outcry" on the trading floor or through a computer-based market.

The contract, if taken to maturity, is fulfilled by a cash payment of price and actual delivery of the item on the delivery date based on the
settlement price for that date. The parties do not negotiate the terms of their agreement, as these are all standardized and advertised in advance, except for the actual price, known as the “exercise price,” that is determined on the floor of the exchange. Standardization in respect of contract size, maturity date, product quality, time and place of delivery, and so on enables trading on the market floor to be conducted in large quantities with increased liquidity and lower transaction costs. Upon conclusion of the contract, a record of the transaction is made, and, following various checks, the contract is registered with the clearinghouse.

The obligation that flows from a duly registered contract need not end up in actual delivery by the seller and payment by the purchaser—due mainly to the feature of uniformity and standardization, which make the contracts interchangeable. The contracting parties are thus enabled to offset their commitments by entering into an opposite contract before the expiration date of their existing agreement.

A trader who enters a futures contract, whether as buyer or seller, is required to pay a margin deposit of about 10 percent of the contract value. The actual price is paid when the buyer wishes to take delivery and the countervalues change hands. Physical delivery takes place in only about 2 percent of all contracts. As for the rest, traders usually enter a reverse transaction prior to maturity and settle their accounts with the clearinghouse.

A trader who enters a futures contract may be either a genuine hedger who buys or sells futures to protect himself against drastic price fluctuations, or a speculator hoping to profit from those price movements. It is often difficult, however, to distinguish between the two; hedgers are also speculators who take a certain risk and speculate over the likely price movements. Even if a trader enters the market in order to hedge a position, later when the price moves in his favor, he may well decide to sell and then buy again when the prices go down, in which case he would too have become a speculator. Speculation and hedging are essential to futures markets, without which the market cannot function.

Hedging (Arabic: *al-tabawwut*), as a function of the futures, acquires much significance in the fast-moving goods and capital, and volatile exchange rates. These have under contemporary conditions made “hedging mechanisms a necessity by which to limit exposure to risk, avoid bankruptcy and intolerable consequences of price changes”
(Al-Sacati, 1999). The risks are so high that employing adequate hedging strategies has now become a central feature and theme of financial management (Al-Sacati, 1999).

Futures markets perform the economic function of managing the price risk associated with holding the underlying commodity over a period of time. Futures are thus used as “a risk transfer mechanism whereby those exposed to risk shift them to someone else; the other party may be someone with an opposite physical market risk or a speculator.”

The Islamic law of transactions does not provide an effective risk management mechanism. Volatility of prices and currencies, now so pronounced, is a phenomenon that the scholastic fiqh has not specifically addressed. Islamic law recognizes certain contracts such as the advance payment sale of salam, deferred payment sale (bay‘ bi-thaman ajil), and manufacturing contract (istikana) that can sometimes be used as hedging tools. But their use as a hedging device tends to be costly, and they can in any case only provide a partial answer, as they were not designed for hedging purposes, nor did they contemplate volatile market conditions (Al-Sacati, 1999, p. 75).

Since protection of property is one of the objectives (maqasid) of Shariah, it may be argued that failure to protect one’s property in the face of risk and bankruptcy is reprehensible. As one observer stated, “It is a requirement that buyers and sellers take protective measures against actual and potential harm (darar). Risk and darar may not be possible to eliminate but can be reduced by recourse to risk management strategies” (Al-Sacati, 1999, p. 71).

Following the registration of the contract, the clearinghouse interposes itself between buyer and seller and effectively becomes the other party to all contracts—buyer to all contracts sold and seller to all contracts bought. The seller has a contract with the clearinghouse to sell his/her commodity and be paid, just as the buyer has a contract with it to receive delivery of the specified commodity at maturity. This arrangement enables participants to trade freely in the market without having to worry about their counterparts’ creditworthiness.

All transactions of one day’s trading are “cleared” the same day, and timely delivery to every buyer as well as payment upon delivery (if desired) to every seller are guaranteed. Payment is also guaranteed, whenever a net position so warrants, on contracts that are closed out.
through offsetting transactions (Parker, 1985). The clearinghouse monitors the size of each trading position daily to ensure that traders do not overextend themselves by building up large positions that they will have difficulty serving (Relly, 1985). The exchange is responsible to compensate the party who has suffered from a breach of contract and undertakes necessary action to secure damages from the violator.

Commentators are not in agreement as to the juristic identification of futures within the fiqh format of nominate contracts. Majd al-Din Azzam characterized futures as sibb al-salam, or quasi-salam, but added, and rightly so, that the futures contract could not be subsumed under the salam, simply because in salam, the price of the goods is paid at the time of contract (Azzam, 1985, p. 122). Sami Hamoud considered futures as exchange of promises (muwa‘ada), which is lawful in all sales except for the sale of currencies (al-sarf). The Malikis have considered such a promise binding, and the civil law of Jordan has adopted the Maliki view (Azzam, 1985, p. 110). Mustafa al-Zarqa thought that futures did not fit the description either of salam or of a deferred sale (bay‘ al-mu‘ajjal) simply because one of the countervales is present at the time of the contract in both of these, whereas in futures both are deferred to a future date (Azzam, 1985, p. 104).

Notwithstanding such disagreements, it is ironic that many of the prohibitive judgments issued on futures have subsumed futures under the rubric of salam and declared them forbidden simply because they do not comply with the requirements of salam (al-Basit & al-Zarqa, 1985). The critics have thus ignored the market mechanism of futures, the clearinghouse guarantees, and the fact that unlike salam, futures are not available in the open market. To ignore all of this and declare futures prohibited because of failure to comply with the requirements of salam is simply unwarranted. It might have been preferable instead to recognize futures as a new contract.

LITERATURE REVIEW

In a reference to the Egyptian futures contract in cotton, al-Jaziri wrote that it was voidable (fusid) due to its failure over taking possession (qabd): “When someone buys cotton and then sells it prior to taking delivery from the seller—whether the second sale is at the same price or lower—the sale is voidable” (al-Jaziri, 1991). Sale of immovable objects, such as houses, prior to taking possession is, how-
ever, valid, as there is no fear of destruction or loss. There are exceptions, of course—for example, in the case of a house on the seashore that may be exposed to danger, in which case its sale would be subject to the same rules that apply to movable objects.

The basic rationale of taking possession of the subject matter of sale is clearly to prevent gharar on account of uncertainty over the seller’s ability to deliver. If gharar can be effectively removed, then it follows that the requirement of qabid may be relaxed or totally omitted.

According to Akram Khan, “Futures trading is alien to Islamic law as it involves trading without actual transfer of the commodity or stock to the buyer, which is explicitly prohibited by the Prophet” (Khan, 1988, p. 91). Khan relied on a literal reading of the hadith of Hakim ibn Hizam to “sell not what is not with you,” without any reference to the juristic debate over the meaning of this hadith, and yet he stated categorically that “all the transactions in these chains are unlawful” and “the Islamic position on futures market is quite clear” (Khan, 1988, p. 99).

According to Mahmassani, “contracts concerning future things (al ashy' al mustaqbala) are basically invalid, due to their nonexistence at the time of contract—except for salam and istisna, which are generally accepted” (Mahmassani, 1983, p. 327). This is because postponement of the transfer of ownership in proprietary contracts (‘uqud al tamlik), such as sale, to a future date is a form of gambling, and therefore prohibited (Mahmassani, 1983, p. 475). Sale must, in other words, transfer ownership immediately.

In an article entitled “Ra’y al Tashri’ al Islami fi Masa’il al Bursah” (“The Shariah Perspective on Futures-Related Issues”), Ahmad Yusuf Sulayman looked into such issues as the sale of objects that the seller does not own, sale prior to taking possession, deferred sale, and sale of the nonexistent. He applied the rules of conventional sale directly to futures and passed prohibitive judgments in almost every case. Sulayman also relied on the above-quoted hadith, without looking into its meaning and rationale, but stated that the Shariah has only validated the forward sale of salam and that this is the only framework within which a deferred sale involving a future delivery can be validly concluded (Sulayman, 1982).

Badr al Mutawalli ‘Abd al Basit also premised his views on salam and held futures impermissible, as they fail to fulfill the requirements of salam. Sales in which both of the countervalues are deferred to a
future date are, in other words, null and void. Muhammad Taqi Usmani wrote that “futures contracts are unlawful under the Shari‘a . . . for what happens in the futures market is not genuine trading, the purpose is profit making through sales that are more akin to gambling” (Usmani, 1995). Usmani reiterated his views in a subsequent interview:

All forward and future transactions are invalid in Shari‘a . . . no rights and obligation can emanate therefrom. Futures are totally impermissible regardless of their subject matter . . . it makes no difference whether these contracts are entered into for the purpose of speculation or for the purpose of hedging. (Idem, 1995; Usmani, 1996)

Usmani tends to take a dogmatic position over futures, as if they were a part of the dogma, which is not the case. I shall have occasion to take up the issue as the discussion proceeds.

The views of Sulayman and Abd al Basit have been challenged and refuted by two prominent commentators: Ali Abd al Qadir and Majd al Din Azzam. Both have criticized the basic approach used by Sulayman and Basit and emphasized, in turn, that futures trading was a new mode of commerce that called for a fresh response in light of the operative procedures of futures markets.5

Abd al Karim al Khatib admitted that futures contracts did not fulfill all the requirements of a conventional contract, yet they were carefully regulated and satisfied the basic purpose and rationale of the Islamic law of sale (Khatib, 1976). Azzam, al-Khatib, and Abd al Qadir share the view that the registration and clearance procedures are precise and that trading in futures is conducted by trained professionals in a highly controlled market. The contract specifications are such that the prospects of uncertainty and gharar were virtually eliminated. They concluded that futures contracts are valid contracts from the Shari‘ah perspective.

The Makkah-based Fiqh Academy has taken an ambivalent view of futures. While the Academy acknowledged the benefits of futures to farmers and commodity traders, this was not reflected in its final verdict on the subject. The Academy also acknowledged that futures trading had developed into a variety of different transactions, and needs to be evaluated on that basis, but this view was also not reflected in its final resolution, which is prohibitive on futures as a whole and does not attempt to address individual issues. Futures are forbidden, as they involve the sale of assets the seller does not own or
possess nor do they exist at the time of contract. The parties to a futures contract were also not interested in making or taking delivery, and that brings futures closer to gambling rather than trading.\(^6\)

The Islamic *Fiqh* Academy of India, in its ninth session (October 1996), had this to say concerning futures:

> As a principle it is not permissible to sell off anything before actually possessing it. Eventually, if the selling deal is struck before getting possession, the sale would be termed as *fusid* rather than *batil* (null and void) and shall become valid after getting possession. (Important Fiqh Decisions, 2001)

On the same page, the resolution stated that sale prior to taking possession involved the risk of recission and the possibility that ownership may never be transferred to the buyer. This resolution actually adds nothing to the position of the Hanafi school, and it is so cautious as to not even mention the futures contract by name, presumably because this does not occur in the *fiqh* texts.

Another observer stressed the real benefits of futures, especially their effects on supply, cost, and business planning, and recommended that these benefits should be taken into consideration (al-Ghazali, 1991, p. 639).\(^7\) Mukhtar al-Salami, then the Mufti of Tunis, emphasized that “there is a real need for future markets” and called on Muslim jurists to address juridical issues on futures according to modern circumstances. The *Fiqh* Academy scholars, Salami added, must not limit themselves to quoting what is recorded in the *fiqh* books and avoid passing prohibitive judgments on that basis (al-Amine, 2001, p. 170; al-Ghazali, 1991, p. 626). Munzir Kahf also criticized the *Fiqh* Academy position on futures and advised that despite the negative stance of the *Fiqh* Academy, Islamic alternatives must be found in order to facilitate the real benefits of these markets especially in the commodities sector (al-Amine, 2001, pp. 169–170; al-Ghazali, 1991, pp. 620–621).

**THE HADITH “SELL NOT WHAT IS NOT WITH YOU”**

This is a verbatim translation of the hadith text, *la tabī’ ma laysa ‘in-dak*, which is widely quoted to the effect that the subject matter of sale must exist and be owned by the seller at the time of contract. Futures trading, which consists of short selling, is, therefore, contrary to the requirements of this hadith.
Hadith scholars have noted a certain discrepancy in the transmission of this hadith. Neither al Bukhari nor Muslim have recorded it in their collections, although Abu Dawud and Tirmidhi have. Abu Dawud, Ahmad ibn Hanbal, and Ibn Hibban stated that it was narrated by Ja'far ibn Abi Wahshiyah, from Yusuf ibn Mahak, from Hakim ibn Hizam, whereas a fourth name, that of 'Abd Allah ibn 'Ismah, occurs in other hadith collections between Yusuf and Hakim. Al Dhatabi stated in Misaq al-T'idal that this intermediate name is totally unknown (la yu'raf). Even the principal narrator of this hadith, Hakim ibn Hizam, is said to be “obscure” (majhul al bal). Only Ibn Hibban includes him among reliable narrators (al thiqqat). While al Nasa'i has recorded only one hadith narrated by him, others have considered him “obscure.”

The hadith is also open to interpretation. Does it convey a total ban (tahiram), or abomination (karabiya), or a mere guidance of no legal import? The phrase la tabi (do not sell) could sustain any of these interpretations. Specialists in usul al-fiqh (Islamic jurisprudence) admit all of these meanings within the purview of a prohibition (naby). Only when a prohibition is espoused with a warning (wa'id), or a specified effective cause ('illah), is its meaning elevated to a total ban (tahiram). Since there is a weakness in the transmission of this hadith, and it is also open to interpretation, it only conveys abomination (karabiya), with a view, as al Khatib noted, to provide guidance (irsad) rather than a prohibition per se.

The full version of the hadith is as follows:

Ja'far ibn Abi Wahshiyah reported from Yusuf ibn Mahak, from Hakim ibn Hizam (who said): “I asked the Prophet: ‘O Messenger of God. A man comes to me and asks me to sell him what is not with me. I sell him (what he wants) and then buy the goods for him in the market.’ The Prophet replied: ‘Sell not what is not with you.’”

Muslim jurists have advanced three different interpretations of this hadith:

1. “Sell not what is not with you” means not to sell what you do not own at the time of sale. The seller must own the object of sale when selling it, failing which the sale is not concluded, even if the seller acquires ownership later. The only exception here is the salam sale, where ownership is not a prerequisite (Kasani, 1910). Al-Sancani, Ibn al Humam, and Ibn Qudama have similarly held that sale of what the
seller does not own is not permissible, even if he buys and delivers it later (Humam, 1970; Qudama, 1981; Sancani, 1353 A.H.).

The Hanafis maintain that the seller’s ownership is not a condition of validity (shart al sibha), but of effectiveness (nifadib) only of the sale. Hence, they validate a bona fide sale by an unauthorized person (jiduli) who does not own the object but sells it nevertheless. In this case, the sale is valid but not effective, and becomes effective upon obtaining the owner’s consent (Kasani, 1910).

2. Hadith scholars have generally held that this hadith applies only to the sale of specified objects (a‘yan) and not to fungible goods, as these can be substituted and replaced with ease. Al Baghawi and his commentator, Mulla ‘Ali Qari, al-Khattabi, and many others have stated that the hadith applies only to the sale of objects in rem (buyu‘ al a‘yan) and not to fungible goods. Hence, when salam is concluded over fungible goods that are readily available in the locality, it is valid even if the seller does not own the object at the time of contract (Baghawi, 1974; Khattabi, 1949). Imam Shafi‘i has ruled that one may sell what one does not own provided that it is not a specific object, for delivery of a specific item cannot be guaranteed if the seller does not own it (Shafici, 1940). Al-Khattabi confirmed that the Prophet, peace be on him, permitted deferred sales of various kinds in which the seller did not have the object of sale at the time of contract. The hadith thus seeks to prevent gharrar in sales that involve uncertainty over delivery (Khattabi, 1949; Qaradawi, 1987).

Ibn Qayyim al Jawzija, the commentator of Sunan Abu Dawud, and al-Mubarakfuri, commentator of Jami‘ al Tir-midbi, agreed that this hadith contemplated the sale of specified objects and not the sale by description of goods that are readily available in the market (al Jawziya, 1991; Mubarakfuri, 1965). This analysis would effectively take futures out of the purview of this hadith, for futures trading only proceeds over fungible commodities and precludes objects of unique qualities.

3. According to Ibn Taymiyya, sale of “what is not with you” means the sale of what is not present and what the seller cannot deliver. The emphasis is on the seller’s inability to deliver, which entails risk and uncertainty (mukhatara wa gharrar). If the hadith were taken at face value, it would proscribe salam and a variety of other sales. But this is obviously not intended. The Prophet forbade Hakim ibn Hizam to sell particular
objects probably because of uncertainty over his ability to deliver (Jawziya, 1991; Taymiyya, 1978). The Maliki jurist al Baji also stated “what is not with you” means “a specific object that is not in one’s ownership and one’s power to deliver” (Baji, 1332 A.H.). It is possible that the seller owns the object but is unable to deliver it, or that the seller possesses the object but does not own it. In either case, the seller would fall within the purview of this hadith. The emphasis is therefore on neither ownership nor possession, but rather on the seller’s effective control and ability to deliver.

Yusuf Musa, Ali ‘Abd al Qadir, and Yusuf al Qaradawi have noted that the marketplace of Madina during the Prophet’s time was small and could not guarantee regular supplies, which is why the hadith prohibited the sale of items that were not available at the time of sale. This is indicated, as Musa noted, by Hakim ibn Hizam’s statement that people would ask him for items he did not have. In other words, they wanted to secure goods that they could not find in the market. In contrast, modern markets are better equipped, which enables the seller to buy the goods at almost any time. Futures contracts also give the seller time to buy what is required in order to make delivery, if necessary, within the contract period (Musa, 1954; Qadir, 1982). When the Madinan market is compared to its modern counterpart, one is faced with a different reality, and the fear therefore of not being able to make delivery is not relevant to futures (Qaradawi, 1987).

THE ISSUE OVER TAKING POSSESSION (QABD)

Literally, qabid means taking and holding something in one’s hands. Juridically, qabid implies legal custody and possession in a proprietary capacity, even if it does not involve the physical act of holding. The seller must deliver the goods sold, and the buyer must pay the price. The buyer, however, is not obliged to receive the goods or take possession, as it is his right/privilege, which he may or may not choose to exercise (Taqabud, 1987).

The following three ahadith need to be reviewed on the subject of qabid:

‘Abd Allah ibn ‘Umar reported that the Prophet said: “He who buys foodstuff should not sell it until he has received it (man ibta’a ta’aman fa- la yuburhu hatta yaqbidahu).”\textsuperscript{12}
According to another report by ʿAbd Allah ibn ʿUmar, the Prophet said: “He who buys foodstuff should not sell it unless he is satisfied with the measure with which he has brought it” (man ʿibtāʿa taʿaman fi-š-la yubiʿuḥu batta yastawfīḥi).

Ibn ʿAbbas has also reported the following from the Prophet: “He who buys foodstuff should not sell it until he has taken possession of it.” Ibn ʿAbbas said: “I think it applies to all other things as well (man ʿibtāʿa taʿaman fi-š-la yubiʿuḥu batta yaqbidahu wa azunnu kull shayʾin mithlalhu).

The three ahadith are substantially concurrent. The only variation in them is concerned with the use of words that may be said to be synonymous: the word yaqbidahu (takes possession) in the first hadith is substituted with yastawfīḥi (obtains full measure). This variation does not change the substance of the message, which is conveyed in all three reports. The third hadith has an added phrase, which consists of Ibn ʿAbbas’s own speech. The word taʿam (foodstuff) occurs in precisely the same way in all three texts.

As for the basic rationale of the hadith, it is stated that the Prophet prohibited the sale of goods, especially perishable ones, that the seller did not possess, because of uncertainty and doubt over their delivery. All leading fiqaha' have consequently held that one may not sell foodstuff before taking possession. According to Imam Shafiʿi, one may not sell anything, movable or otherwise, before taking possession. Imams Abu Hanifa and Ahmad Ibn Hanbal held, however, that possession is not a requirement in the sale of real property (al-Marghinani, 1975). Possession is also not required either of foodstuffs or real property if ownership of the goods in question has been obtained by way of gift or inheritance, for these involve no financial exchange and the seller is not committed to paying a price to someone else (Jundi, 1988; Shafici, 1901).

The Fiqh Academy of Jeddah confirmed that “the effective cause (ʿillah) of the prohibition of sale prior to taking possession is ghurar, on account of the possible failure to deliver the goods purchased. The buyer takes the risk of not receiving the goods, as the seller may delay the delivery or wish to revoke the contract.” There was additional ghurar in the sale of foodgrains and agricultural crops due to climatic factors and disease (Islami, 1989). Unlike the Academy of Jeddah, Dalla al-Baraka, the Shariah Committee of the Islamic Bank of Sudan, and that of the Kuwait Finance House have held that the prohibition of sale prior to taking possession is con-
fined to foodstuffs only and does not apply to all goods (al-Amine, 2001).

The Hanafi jurist, al-Kasani, wrote that a valid sale can be concluded prior to qabād but will remain in abeyance until qabād has taken place (Kasani, 1910, p. 156). To this, al Sarakhsi added that qabād signifies the effect or outcome of the contract that only materializes after its conclusion. Qabād is, therefore, not a prerequisite of a valid contract, and it is perfectly lawful to postpone it to a later date. Only in the case of sale of currency for currency (sarf) is qabād elevated to a prerequisite of a valid contract (Sarakhsi, 1986). Imam Malik held that the hadith only applies to foodstuffs, which means that other commodities may be sold prior to qabād (Juzay, 1975). Ibn Rushd confirmed this and stated that “there is no disagreement in the Maliki school that only foodstuffs may not be sold prior to qabād” (Qadir, 1982; Qurtubi, 1981). Ibn Hazm al-Zahiri held that the ruling of these ahadith is confined only to wheat, simply because the word ta‘am that occurs in them means only wheat and nothing else (al-Zahiri, 1988).

Whereas the majority opinion confined the meaning of qabād to retention (habbs) and evacuation (takhliya), Ibn Taymiyya stated that neither the Arabic language nor the Shariah has given a specific meaning to qabād. The precise meaning of qabād is, therefore, to be determined by reference to prevailing custom (Taymiyya, 1978). Ibn Qudama stated that qabād in all things refers to an appropriate manner of taking possession. The Shariah stipulated qabād, but the manner in which it is accomplished is determined by custom (Qudama, 1981). Sale prior to qabād is also lawful in the case of a person who sells his share in inheritance or bequest as well as sale by a woman of her dower (al-Jawziyya, 1991).

With the exception perhaps of the Shafi‘is, no other school requires qabād prior to resale in the case of immovable goods. In at least two varieties of sale—namely, salam and istisna—the requirement of qabād has been waived by the express authority of hadith. Salam and istisna were validated on grounds of utility and convenience for the people.15

One can readily say perhaps that qabād is not a requirement in futures trading in such nonfoodstuff items as cotton, rubber, and tin. In addition, measurement and weighing, the recommended mode of qabād in the sale of foodstuffs, was designed to ensure accuracy in weighing and prevent fraud. This is not an issue in futures, as contracts and commodities are bought and sold in standardized quanti-
ties and packages that are weighed and measured once. After this, the packages are sealed and labeled and need not be weighed each time they are sold, as the relevant documents provide sufficient evidence of the total weight. Thus, the prevailing commercial custom in futures trading has made repeated weighing and measurement unnecessary and impractical. It is conceivable that modern technology and computerization may bring further changes into the conventional methods of qabd, which may gain popularity and customary approval. Even the foodstuffs can now be preserved for a long time. No case of failure of a futures transaction has, for example, been noted in such things as orange juice and eggs, due to perishability and destruction.

This analysis of qabd would apply naturally to futures transactions involving physical delivery. As for the bulk of futures contracts, in which the contracting parties close out their positions by entering a reverse transaction, this is another issue that will presently be addressed. But before I do so, I propose to turn to one of the most controversial aspects of the debate over futures—namely, the issue over the sale of debts.

SALE OF ONE DEBT FOR ANOTHER (BAYC AL DAYN BI AL DAYN)

Sale may consist of either a physical object (bay’ al-’ayn) or that which is basically an unpaid debt (bay’ al-dayn). The main difference between them is that delivery and qabd in the latter is not a matter of physical taking or retention of an actual commodity, but one of appointment (ta’in), computation, and recording of a debt established on the person (dhimma) of the debtor.

A debt is normally created by a trader who enters the market either as buyer or seller without any physical exchange of values. The debt may subsequently become the subject of an offset or a reverse transaction, and a chain of sales and purchases may follow that amounts essentially to the sale of debts. The offsetting transactions in futures also consist of sales involving a debt that one party owes to another and settles it through the modality of sale and purchase.

Many types of sales have been included under bay’ al duyin (literally, sale of debts, also known as bay’ al kali’ bi al kali’), and it has been disputed as to whether some of them do in fact qualify as “sale of debts.” It will be noted that the fiqh concept of bay’ al-dayn referred
basically to transactions over debts in the open market without any guarantees. *Bay‘ al-dayn* thus envisaged sale over an unpaid debt involving either two, or in some cases, three, parties. The basic rationale of the prohibition of *bay‘ al-dayn* was over uncertainty in its repayment. *Bay‘ al-dayn* could proceed over a bad debt or one in which the debtor simply wanted a further delay due to his inability to pay on time. Subsequent unfavorable price changes also added to that uncertainty. The position is very different in the futures market, where all transactions are concluded over guaranteed debts. The critics have not hesitated, however, to pass sweeping judgments and argue as follows: since the buyer in futures does not pay the price to the seller nor does the latter take delivery, they transact over debts and indulge in *bay‘ al-kali‘ bi‘l-kali‘*, which is prohibited.\(^{16}\) Some instances of *bay‘ al-dayn bi‘l-dayn* that occur in *fiqh* texts are as follows:

1. A borrows two tons of wheat for his personal needs from B, to be returned in six months. Prior to the expiration date, B sells the wheat, which is a debt on A, to C in exchange for a plowing machine to be delivered in one month. This transaction proceeds over an exchange of debts and is considered unlawful due to uncertainty over delivery and the likelihood of *ghurar* (Darir, 1967; Hasan, 1986).

2. A borrows $2,000 from B for a period of one year, but before repayment is made, B suggests to A that he will rent A’s house in exchange for the sum in question. This too involves selling one debt for another without delivery on either side. If the proposed exchange is advantageous to one party, it will also involve unlawful gain, amounting to *riba*.\(^{17}\)

3. A owes B RM 1,000 payable in six months. Upon the expiry of six months, B asks A to give him a ton of wheat in exchange to be delivered in one year.

4. A sells a garment to B for RM 1,000 cash, and then buys from B the same or a similar garment for RM 1,200 payable in one year. This transaction, known as *al-qinah*, although validated by the Shafis, is proscribed by other schools as it involves *riba* and, according to some, also a sale of debts (Hasan, 1986; Qaradawi, 1987). The following hadith is quoted as evidence on the subject: Musa ibn ‘Ubayd reported from ‘Abd Allah ibn ‘Umar simply that “the Prophet, peace be on him, prohibited *bay‘ al kali‘ bi al kali‘*” (Shawkani, n.d.).\(^{18}\)

This last hadith only appears in some collections, such as Darqutni. Al-Shawkani reproduced Darqutni’s version in saying that al-Hakim al-Nishapuri considered it to be sound conforming to the conditions of Muslim, but that many prominent scholars consider it unreliable. Its precise meaning is also subject to doubt as the word *kali‘* is some-
what unfamiliar even to native Arab speakers. However, it is generally understood to mean the sale of one debt for another. According to al-Shawkani, only Musa ibn ’Ubayda al Rabdhi reported it, and its authenticity is weak. Imam Ibn Hanbal said that he knew of no other hadith transmitted by Ibn ’Ubayda, and taking the hadith from him was therefore not advisable. The Imam added, however, that there seemed to be a people’s consensus (ijma‘ al-nas) on the prohibition of ba‘ al-kali’ bi‘l-kali’. Yet Imam Shafi‘i had commented even earlier that the hadith scholars considered this hadith to be weak (Shawkani, n.d.). Ibn Qudama and Ibn Taymiyya concurred and stated that no hadith prohibiting the transaction at issue had been verified. Ibn Taymiyya stated that no words or statements prohibiting the “sale of one debt for another” had been transmitted from the Prophet and that the hadith at issue had a broken chain of transmission (munqati‘) (Taymiyya, 1902).19

Imam Ibn Hanbal’s reference to “people’s ijma‘” on this is vague, as it does not meet the requirement of a conclusive ijma‘. A decisive ruling of ijma‘ must meet three conditions: (1) it is explicit and verbal (qawli) as opposed to a tacit (sukuti) ijma‘; (2) it has reached us by means of continuous transmission (tawatur); and (3) the transmission conveys positive and indisputable knowledge. Since the said ijma‘ does not fulfill these conditions, it is doubtful (zanni) and can only convey a speculative ruling that remains open to ijtihad. It is therefore permissible for us to question it, based on the evidence that is stronger than the alleged ijma‘.”20 Moreover, the claim of an ijma‘ in a situation of obvious disagreement is out of place since the ulama are not in agreement over the definition of this transaction nor on the various forms it can take.

Ibn Qayyim has explained that not all varieties of ba‘ al-dayn are prohibited. The prohibited variety is one that involves the sale or exchange of one deferred debt for another. The reason given is that ba‘ al-dayn of this kind prolongs the liabilities of the parties for no useful purpose. Ibn Qayyim also wrote that “there is neither explicit nor implicit text in the Shari‘a on its prohibition. On the contrary the principles of Shari‘a indicate its permissibility” (al-Jawziyya, 1991). Ibn Taymiyya also thought the meaning of ba‘ al-kali’ bi-kali’ was unclear. The Prophet did not prohibit payment of one debt in exchange for another, both of which are established and proven, especially if it involved only the debtor and not a third party. This manner of clearance absolves both sides of their debts, and this is clearly permissible (Taymiyya, 1978).21 Many have illustrated ba‘ al-kali’ bi-kali’ through salam, saying that an outstanding debt could
not be assigned into the price of *salam*, as this would amount to *bay' al-kali' bi-kali*.

Nazih Hammad has summarized the argument against *bay' al-kali' bi'l-kali* in the following five points: (1) there is no valid legal benefit in it; (2) it becomes a means to *riba*; (3) it may lead to disagreement and conflict between the parties; (4) it leads to *gharar*; and (5) the risk in it is excessive.

Both Hammad and his commentator Tijani have discounted three of these to be less than accurate and not relevant to futures, and discussed only two—namely, the absence of a lawful benefit and excessive risk. Then it is added that modern research has clearly shown that *bay' al-dayn* does serve a useful purpose, a conclusion that many have upheld. With regard to the point over excessive risk taking in *bay' al-dayn* and in futures, it is noted that the clearinghouse guarantee over fulfillment of contract, daily clearance, and margin taking eliminate or minimize the risk over the parties’ inability to fulfill their obligations.

The Maliki school has furthermore upheld the permissibility of certain types of *bay' al-dayn*, especially when the debts involved therein do not arise from the exchange of foodstuffs or usurable goods, and the transaction was also free of *gharar* (Darir, 1967, p. 335).

Al-Darir categorically wrote: “In my opinion, *bay' al-dayn* is absolutely lawful, whether the sale is to the debtor or to a third party, for cash or for credit, provided that the sale is clear of *riba* and no textual injunction has declared it forbidden.” He stated further that the claim of uncertainty in delivery is unwarranted if the debt is not disputed by the debtor, who admits his/her obligation and shows readiness to discharge it (Darir, 1967, p. 316).

Rafiq al-Misri has argued that there is no extra *gharar* in deferring both countervalue compared to the deferment of one of them alone. If one of the countervaleues has been delivered while the other is deferred to a future date, or when both are so deferred, the level of risk would be the same, and no additional *gharar* is likely when both are deferred. Suppose that the buyer in a deferred payment sale receives the commodity but defers the payment of price. It is possible that the price fluctuates during the interval, and one of the parties suffers the consequences. It could be the seller if the spot price goes up or the buyer if it goes down. This is the likely scenario in the *salam* sale, but the risk will be about the same even if both countervaleues were deferred. When one of the countervaleues is deferred, one
party will benefit from the receipt of the commodity, in the case of
defered sale, or of receipt of the price, in the case of salam. If both
countervales were to be deferred, both parties will share the risk,
and the expected gharar would be about the same. Thus, there is no
ground for the claim that gharar would be greater if both
countervales are deferred. Misri added that the hadith of al-kali’ bi’l-kali’ is

Mukhtar al-Salami also rejected the claim of gharar, leading to dis-
putes when both of the countervales are deferred. The basic possi-
bility of dispute is admittedly present in nearly all transactions, but
this did not render them invalid. The claim that the possibility of dis-
pute is greater in the case of deferment of both of the countervales
is simply untrue. When the contract clearly specifies the subject, the
price, time of payment, and delivery, and the agreement is docu-
mented, the prospects of dispute are minimized. The history of trans-
actions in the futures markets bears this out (al-Amine, 2001, p. 80;
al-Salami, 2000).

Tijani has quoted Sami Hamoud, who wrote that “in the entire his-
tory of the London’s futures exchange over the last 100 years, there
has not been a single case in which the broker has fallen back over a
transaction.” If the ‘illah of the alleged prohibition of futures is
gharar, then there is no gharar in the futures market given the clear-
inghouse guarantees and careful market regulation (al-Tijani, 2000;
Hamoud, 1985).

It may be concluded then that bay’ al-dayn, which is incurred in
futures, is in the nature of the fulfillment of outstanding obligations
and repayment of debts. This is clearly permissible and conforms to
the Qur’anic norm on the fulfillment of contracts.

OFFSET AND CLEARANCE

The availability of offsetting sales and purchases in the futures mar-
et enables the traders to close out an open position by entering a
matching transaction in the opposite direction. The question of
whether Islamic law validates this has received a negative response
from al-Basit, who wrote in a reference to salam: “Sale of the sub-
ject matter of salam prior to taking it into possession is forbidden
and I know of no one to have held otherwise.” Al-Basit further
explained that repeated sales of the same commodity in a chain event
wherein none of the participants took possession “adds to the bur-
den of the consumers as profits that are taken by the traders are eventually added to the price and passed on to consumers” (Al-Basit & Al-Zarqa, 1985).

Al-Basit and Al-Zarqa likened offset sales in futures to a chain of inchoate *salam* in which the buyer sells the goods he has paid for to someone else before taking them into possession, and then this latter person sells the same to a third person, and so on. What happens here is “a succession of sales and purchases proceeding over one and the same debt.” Al-Zarqa then adds: “This manner of trading over the subject matter of *salam* is unlawful in *fiqh* as it amounts the sale of the subject matter of *salam* prior to maturity, delivery and possession” (Al-Basit & Al-Zarqa, 1985).

Azzam disputed, and rightly so, the point that the profits made in the chain of offsetting trades in futures added to the burden of the consumer. It is incorrect to assume that everyone in the chain of sales makes a profit. They may make profits, but it is possible they may sell at a loss or make no profit. One must also bear in mind that buyers and sellers in futures and in every offsetting transaction buy and sell at the market price, on which they both agree. The price is advertised in advance and implemented by the exchange. Since the exchange-quoted price is the market clearing price arrived at by the interaction of many buyers and sellers, it would by definition be a “fair” price. Traders in the chain of offsetting trades observe the market price of the day, and the question over a chain of profits made at every step to the detriment of the consumer is therefore irrelevant. Azzam also spoke approvingly of the availability of offsetting trades in futures: some people may need to resort to a reverse transaction before taking delivery. Suppose that a person bought a certain amount of wheat in a remote locale for his son to start a business, but before he takes delivery, circumstances change and his son secures a good job. The father may now wish to enter a reverse trade prior to taking possession. If the market provides that facility, then so much the better. People may need to sell what they have bought prior to taking delivery, especially in view of the increased variety of modern trades and financial products. To subsume these variations under one or the other of the conventional contracts may be neither beneficial nor justified (Azzam, 1985, pp. 121–122).

If it is uncertain whether the initial sale was *salam* in the first place, then to subsume the reverse transactions again under *salam* is even more doubtful. The validity of the offsetting trade should therefore
be ascertained under the principle of permissibility (*ibaha*). To apply *ibaha*, one would need only to ensure that the reverse trade did not violate any injunction or principle of the Shariah, and if none could be specified, then offset transactions may be said to be lawful.

**SPECULATION AND GAMBLING**

The critics of futures tend to regard speculation and gambling as synonymous. One hears of “investing in securities” and “gambling in futures.” Others regard them as distinctly different activities. The main difference between them relates to the nature of risk and potential contribution to the social good. Gambling involves creation of risk for the sake of risk. Horse racing and poker, for example, create risks that would not be present otherwise. The gambler chooses to seek out risks that were not there before. Even if they had been there before, they had not concerned him personally, and no social good is accomplished by gambling. Investing, on the other hand, consists of committing capital to an enterprise in the hopes of earning a profit. The difference between investment and speculation is largely semantic, but most would agree that commitments with time horizons longer than several months qualify as investment regardless of whether the commitment is in securities, real estate, or commodities (Fink, 1988; Siddiqi, 1985).

Defining speculation is difficult, as the distinguishing lines between investment, speculation, and gambling are not always clear. Speculation consists of risks that are necessarily present in the process of marketing goods and services in a free-market economy. For example, as a wheat crop grows and is harvested, the obvious risks of price changes must be taken by those who own the wheat or have a commitment to buy it. These risks would be present whether futures markets existed or not. If speculators were unwilling to take them, someone else would have to. The issue is whether the winners and losers would be the producers and consumers or the speculators, who are willing to take the risk.

The motivation of individual speculators could well be identical with that of gamblers, the main difference being that futures speculation reallocates risk from those who do not want it to those who do. Futures markets are basically risk-transfer mechanisms that redistribute price risk, and speculators are those who assume it. Without them, there would be no one to whom hedgers could shift their risks. Speculation in the positive sense consists of intelligent and rational
forecasting of future price trends on the basis of evidence and knowledge of past and present conditions. Speculators in commodities are not simply gamblers, for the risks are real commercial risks, quite a different matter than the activity of a gambler, who assumes no risk other than that created by the rules of the game (Courtney, 1986).

The critics say that futures speculation causes volatile price moves that bring considerable hardship on traders in the cash market. Wide publicity is given to the relatively rare but dramatic manipulations that cause many to conclude that speculation is synonymous with gambling. Some early instances of scandalous manipulation in America are Hutchinson, Leiter, and Patten in the late nineteenth century and, in 1980, Bunker Hunt’s foray into the silver market, all of which resulted in price distortions. Since then, however, balance has returned to the market, and subsequent introduction of regulatory and punitive legislation has diminished the prospects for such manipulation.

Existing data does not confirm the suspicion that futures trading is dominated by large speculators. Data may vary from market to market, but the total holdings of large speculators’ long and short positions are less than 20 percent of the total holdings of small traders. Large speculators probably constitute about 2 percent of the total futures trading population (Courtney, 1986; Teweles & Jones, 1987, p. 31). Major price movements are usually caused by basic changes in supply and demand and only rarely by a group of speculators creating a self-fulfilling prophecy. Evidence obtained from considerable research suggests that “speculation probably does more to smooth price fluctuation than to increase it” (Courtney, 1986; Teweles & Jones, 1987, p. 13). Research on such goods as onions and live beef cattle before and after the institution of futures markets supported, on the whole, the conclusion that futures trading has not increased price fluctuation in the cash market (Courtney, 1986, p. 51). Statistical analysis shows that the volatility of futures prices is approximately the same as that of equity prices. What makes futures more prone to speculative risk is the high degree of leverage that results from low margin requirements. This facility is not available in the stock market and it is the main factor accountable for the high volume of speculative trading in futures.

Ibn Qayyim al-Jawziyya’s description of qimar, maysir, and riban (betting) underscored the element of play in them, which is staged for no other purpose than beating the opponent in a game in order to appropriate his assets. Maysir is synonymous with qimar; the bot-
tom line in both is “either of us who wins take the other’s property.” Betting (rihan) differs from maysir in that betting involves four parties, two of whom are involved in a game while the other two are outsiders who bet over its outcome. These outsiders are otherwise playing exactly what is involved in maysir (al-Jawziyya, 1990).

Gharar is a broad concept and has been given many definitions. It is sufficient for our purposes to highlight an aspect of gharar that coincides with maysir and qimar—namely, the uncertainty over gain and loss that is in common between gharar and gambling. Although many jurists in the Maliki and Shafi’i schools have defined gharar by this description, it is not an accurate definition, as this would also apply to contracts such as partnerships and mudarabah (C. R. al-Misri, 1993, pp. 31–33). It is evidently difficult to draw a clear distinction between gharar and maysir. One thing that merits attention is that maysir is played for its own sake, whereas gharar proceeds over transactions. Gharar is usually not the purpose of a contract but incidental to it, whereas maysir is the purpose of the game played in order to beat one’s opponent to take his property (C. R. al-Misri, 1993, p. 34).

Ibn Taymiyya noted that if a sale contains gharar and devours the property of others (akl al mal bi al batil), then it is the same as gambling. He added that gharar sales, which the Prophet forbade, generally partook in gambling. Certain types of sales were common among the Arabs and were subsequently forbidden (Taymiyya, 1978, p. 229).

Ibn Taymiyya thus established a common denominator between gharar and gambling, which is devouring and unlawful appropriation of the property of others. A commercial transaction cannot be equated with gambling unless it is accompanied by this factor. He based this conclusion on the Qur’an (4:29), where unlawful devouring and appropriation is declared forbidden and Muslims are encouraged to conduct “trading by mutual consent.” Unlawful appropriation is a broad Qur’anic concept that includes gambling, fraud, usurpation, bribery, and profit gained from unlawful transactions and the like. The text under discussion was revealed concerning the touch-and-throw sales (al mulamasah wa al munabadha), consisting usually of clothes, in which the deal was struck when the buyer touched the material or when it was thrown in his direction, and sale of yet-to-be-born animals. Ibn Taymiyya commented that if such sales became final prior to the buyer’s viewing the object, it involved risk taking and gambling (mukhatara wa qimar). If the
buyer is bound by the sale without actually knowing about the object, this would be gambling. But if both parties have seen the cloth and one tells the other that the deal is done “if I threw it to you” or “when you took it” or the like, this is a conditional sale that contains no element of gambling. If one of the parties involved received its due but the other did not and the latter remained open to risk in a way that frustrated and nullified his right, the sale would contain ghurar and gambling simultaneously (Taymiyya, 1978, pp. 228–239).

It thus appears that risk taking, which involves unlawful appropriation and the gain of one party at the expense of the other, is central to Ibn Taymiyya’s understanding of the Qur’anic concept of maysir. When this is applied to futures, the question is whether financial speculation in futures exposes the other party to risk and, if so, whether it also involves unlawful gain and appropriation of someone else’s property. Evidently, there is no misappropriation of another’s property in futures, for the buyer in such a contract is engaged in a transaction aimed at making profit through trading and not through dishonest appropriation of another’s property. Speculative risk taking in commerce, which involves investment of assets, labor, and skill, is not forbidden; what is forbidden is excessive ghurar and gambling. Financial risk taking is likely to involve gambling if it is staged and created for its own sake, but not if it is incidental to beneficial activity and trade (Maysir, 1965; al-Misri, 1991, p. 35). Speculation in futures does not necessarily involve a combative game played in order to beat an opponent or acquire his property. The risk so taken bears greater affinity to commercial risk for profit rather than gambling and maysir (Maysir, 1965; al-Misri, 1993, p. 71; Patton, 1913; Rosenthal, 1975).

The exchange authorities and the government must be vigilant to ensure that commercial speculation is genuinely reflective of the natural flow of market forces. Imposing quantitative limits on daily trading volume and position limits, as normally practiced in futures markets, is one way to contain speculation. But this is a matter that can best be dealt with through operative floor procedures by the exchange authorities. Legislative guidelines should continue to regulate contractual relations between the parties, brokerage activities, and disciplinary procedures in serious violations. Legislative and government supervision should not, however, be overimposing, as that would restrict the market flow and initiative on the part of the exchange authorities.
CONCLUSION

Our analysis of the hadith “sell not what is not with you” showed that it applies only to sales involving specific objects and not to fungible goods. Since futures normally proceed over fungible goods, they fall outside the purview of this hadith. To this, I have added that the above hadith is concerned not so much with ownership or possession, but with prevention of gharar due to the seller’s inability to deliver. Since delivery and fulfillment are always guaranteed by the market procedures, the seller’s ability to deliver is not a matter of concern in futures.

The requirement of qabd in the hadith, which we also reviewed, is clearly confined to foodstuffs, and extending it to other commodities is not supported by the text. But even in foodstuffs, it probably contemplated perishable foodstuffs that are not the focus of commodity futures. The issue over qabd is, on the other hand, related to the question of liability for loss. However, since delivery and qabd are not dominant factors in futures, it is submitted that the question of liability and loss should be determined not by reference to qabd but by reference to the contract: liability is assumed upon the conclusion of contract and not upon delivery and qabd.

Our analysis of the sale of debts especially of bay fi al kali’ bi al kali’ also showed that there is no conclusive proof in the Sunna on its prohibition. We conclude that the direct analogy between futures sales and conventional sales that the critics have attempted is not justified, due mainly to trading procedures in futures that eliminate uncertainty over delivery and payment. And lastly, we conclude that speculation is basically lawful, but its propensity toward gambling must be tackled through constant supervision and effective position limits that would curb excessive speculative risk taking.

Modern commerce has witnessed a large number of new and unprecedented modes of trading that were not known in earlier times. To promote the people’s prosperity through trade is eminently beneficial and partakes in maslaha. To take an unduly prohibitive view of commodity futures simply because they were not known to the fuqaha of earlier times and then pass negative judgments on them without clear Shari'ah evidence is tantamount to acting contrary to maslaha. The basic norm of Shari'ah is prohibition (al-bazar) in the realm only of cibadat, and it is permissibility (ibaha, idbm) in mu'amalat and commerce. Nothing in this latter area must be declared forbidden without clear evidence. Since there is no decisive
proof on the prohibition of futures, then its permissibility in Shariah is established. A transaction is valid from the Shariah perspective when it does not violate a decisive principle, is clear of riba and gambling, and does not partake in excessive ghbarar. When these requirements are met, the transaction in question is valid and may be practiced even if all doubt concerning it cannot be dispelled. This is where we should stand, I believe, with regard to commodity futures. We need to remain engaged, nevertheless, in a continuous process to enhance vigilance and develop more refined safeguards against abuse, excessive speculation, and ghbarar.

NOTES

4. See note 3, p. 76ff; Kolb (1985, p. 6).
5. For the text of Sulyman’s opinion and ‘Abd al Qadir’s response, see their respective articles in al Mawsu‘ah 15, 387ff and 438 ff. The text of ‘Abd al Basit’s opinion and ‘Azzam’s response can be found in Bayt al Tamwil al Kuwaytu, al Fatawa al Shari‘iyah fi Masa’il al Ijtissadiyyah, 2nd ed. (Kuwait, 1985), pp. 113–130.
18. Al-Sacati (1999, n. 4, p. 97) has noted that “the ulama have generally considered this hadith to be weak (da‘if) and broken (munqati‘).”
23. Teweles and Jones (1987, n. 9, pp. 4–6).
25. For details on these studies, see Relly (1985, pp. 792–793).

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