

Analysis of Risk Management in Islamic Law

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Abstract: Wealth is the fifth necessity for mankind in order of priority within the necessities. A man cannot survive in the world without wealth because he needs to purchase food and other necessities for himself and his family. If he does not have wealth, he cannot do that. He also has to protect himself and his family from the cold in winter and this is not possible now without clothes as money is required to buy them. Hence, wealth is a necessity for mankind.

Now wealth should be protected in both positive and negative ways. Protection of wealth by positive method implies the investment of money in the business leading to its growth. Protection of wealth by negative method refers to risk management in business. If the risk is not managed, then the business does not provide benefit and profit because business always involves risk of loss, so businessmen need to avoid such types of contracts leading to risk and causing loss.

The Islamic law commands the Muslims to follow the Islamic rules and regulations because it is the law that manages the risk and guarantees the contracting parties to run their business with confidence. This article aims to elaborate on the causes of risk in the business transaction and highlights the causes resulting in the loss and destruction of wealth.

This article explains the Islamic rules minimizing the risk in business transactions whether these are relating to contract or contracting parties or the subject matter of the contract. When a businessman follows Islamic rules and regulations in his business he can minimize the risk in the transactions and he can protect his business from loss.

Keywords: Risk, Management, minimizing, controlling in Islamic Law.

INTRODUCTION:

The necessities of mankind are five according to Islamic law and these are the following in priority order:

- 1- Protection of Din, 2- Protection of life,

- 2- Protection of family, 4- Protection of intellect, 5- Protection of wealth.

Wealth is a necessity for human life. A man cannot survive in this world without it.

Necessity means: It is so important for human-being that if there is a lack of wealth human life is in trouble. Now if wealth is necessary, its protection is also necessary. There are two possible ways of wealth protection: 1- positive, 2- negative.

- 1- The protection of wealth through positive ways means: a- Wealth should be earned through lawful means such as business, farming, and performing services against the wages and salaries. Holding money from investment and commodities from selling is prohibited in Islamic law.¹
- 2- The protection of wealth through negative way means: a- Stealing property of someone person. If anyone commits theft, he is punished by amputating his right hand from the wrist. If he has taken the property of others at gunpoint, he is punished with amputating his right hand and left leg. He is punished because he has violated the right of Almighty Allah and it is, in fact, the right of the public, and such a person has created fear in society through offenses. b- Destructing someone's property is also prohibited and if someone commits such an offense, he is liable to compensate the loss of the affected person. c- Similarly, usurpation of someone's property is prohibited in Islamic law.
- 3- If anybody has committed such an offense, he is compelled to return the possession of the usurped property to its owner.
- 4- The above discussion makes it clear that wealth is very important in Islamic law and it should be protected in both positive and negative ways. Protection of wealth through positive means has several aspects but very important of all of them is business transactions according to Islamic law. It is the backbone of wealth. These transactions always involve risk causing loss, so it is necessary for the business transactions to be free from risk or to minimize it. It is to promote business and create confidence among the business community and protect the wealth from destruction.

DEFINITION OF RISK:

As the title of this article is Risk Management, it requires the definition of risk and management to clarify the concept of Risk Management. So, the word Risk is defined in two different ways by contemporary Muslim and non-Muslim scholars as follows:

- a- Risk means the possibility of occurrence of a harmful event on a future date.
- b- Risk means a probability of occurrence of a harmful event at future date.

DIFFERENCE BETWEEN BOTH:

These two words are different in their meaning regarding the occurrence of harm and it is that the possibility means: that both situations for the occurrence of harm are equal and it may occur or not while probability indicates that the situation for the occurrence of harm is more powerful than non-occurrence. For example, when the ship is passing from the sea which is in its normal situation, there is a possibility for the occurrence of harm to it but when there is a storm in the sea, there is the probability for the occurrence of harm as well. When a person is driving a car in normal speed, there is a possibility for occurrence of the accident but when he is driving car with abnormal speed, an accident is probable.²

But contemporary scholars do not differentiate between both words because they explain these words

¹- This hadith is narrated by Imam Muslim and Ibn-e-Majah/ Sahih Muslim/ Hadith: 1605, Sunan-e-Majah/ hadith: 2154-2155.

² -It is based on Logic that knowledge of named with probability is called [ظن] and it is more powerful than knowledge possibility which is named with [شك]. It means: it may occur or may not.

with the word of uncertainty regarding the occurrence of any harmful event and it is called the risk according to the terminology of contemporary scholars whether they are Muslims or non-Muslims because when they explain the types of risk they mention between them: the uncertainty regarding finance, legal liability, natural disasters, loss, disease, and errors in the digital companies.

DEFINITION OF MANAGEMENT FOR RISK:

Contemporary scholars describes risk management in terms of the identification, evaluation, and prioritization of risk and the effect of uncertainty on the objective followed by coordinated economical application of resources to minimize, monitor, and control the probability or impact of unfortunate events. It is called risk management.³

DEFINITION OF CONTRACT:

As this article is going to elaborate on the principles and tools related to Risk Management that may occur in business transactions, it requires a defining contract for ready reference. The literal meaning of contract: The word contract is synonymous with Aqd in the Arabic language and it means the connection between two things and conjunction among them. The Quran says: [وَلَا تَعْرَمُوا عُقْدَةَ النِّكَاحِ]⁴ and do not proceed with tying the marriage-knot ere the ordained [term of waiting] has come to its end. The technical meaning of contract: there are different definitions of contract and some of these are in detail and some are brief while logically a definition must be brief and pure from the use of words of {ATF} such as {and} in the English language. I am going to mention only two definitions of contract. Majallah has defined a contract as follows: contract means

- 1- Connection of acceptance with an offer in such a legal manner from which flow legal consequences concerning the subject matter.⁵
- 2- Contract is the conjunction of offer with acceptance in such legal manners which affect the subject matter.⁶

ILLUSTRATION:

The conjunction of offer {Ijab} with acceptance {Qabool} requires two parties for the conclusion of the contract.⁷ One of them comes with the offer and the other comes with acceptance and the offer and acceptance collectively are called form {Nikah} of contract.

LEGAL MANNERS:

Legal manners of the contract require the presence of six members from each party at the time of the contract which are as follows:

- 1- Both parties utter the form of contact with their consent provided the form of contract is in the shape of words and it means: The offering party must utter the offer and say I sold this property and the accepting party must utter the acceptance and say: I have bought or accepted it.

³- Wiki Pedia The free Encyclopedia: Risk Management] by [ISO :13000] Guide: 20009 / page:73

⁴ - Surah Al-e-Imran/235.

⁵ - Majallah al Ahkam al Adaliyyah / Commission of Muslim jurists at the time Ottoman Empire/1867-77/ Istanbul/19305/ A.H/Article: 153.

⁶ - The last definition is brief, comprehensive and obstructive and it better than all others and it is supported by Logic with reason may annpy those scholars having no knowledge about Logic, so it not mentioned here.

⁷ - It is not permissible in Islamic law that an agent sells the property of his principal as an agent and buys it for himself or sells his property as owner and buys it for his principal as an agent. The same is the law for guardian of minor or executer of guardian for minor. The reason is that there is conflict of interest between the seller and buyer and two clashed and apposite things cannot assemble together [المتعارضان لا يجتمعان كالنور والظلمة].

2. Each one of them should know the meaning of the words sold and bought. If any one of them does not know the meaning of sold or bought then there is no conclusion of contract such as an illiterate person says: I have sold my camel for fifty thousand rupees but he does not know the meaning of selling.

3- Both parties apply these words in their real and figurative meaning. If any one of them uses it in its metaphorical meaning, the contract is not concluded with these words, such as a party says: I sold you my car without a price and he intends with these words: you borrow my car and use it according to your requirement. Here the intended meaning of sold is borrowing and this is the secondary meaning of sale.

4- Each one of the parties intends with these words to create a contract and everyone is serious about concluding a contract. If any one of them does not intend to create a contract but he uses these words as a joke or for any other purpose, the contract is not concluded as one of them says as a joke: I bought your car for five hundred thousand or as a teacher while teaching the subject of the contract, says: I sold you my car for two hundred thousand and the student says: I accept it. The contract between teacher and student is not concluded because this exercise of words is only for explaining the sale and purchase contract.

EXEMPTION: However, three words are always given their real meaning no matter whether these are spoken as a joke and it is based on hadith narrated from the Holy Prophet {صلى الله عليه وسلم} while saying: [ثلاث جدهن جد وهزلهن جد: النكاح والطلاق والإعتاق]⁸ There are three words which are always to be taken as serious even though they are said as a joke, and these are marriage, divorce and freeing a slave.⁹

5- The contract should be concluded according to Islamic law: It means: the contract fulfills all the prerequisites of Islamic law for the conclusion of a contract and there is no such provision or condition which invalidates the contract in Islamic law such as a contract of riba, a contract of gambling and all other prohibited things in Islamic law.

6- There are six aspects for the conclusion of the contract which is important for a Muslim for his purification and strengthening a relationship with Almighty Allah. It is that: the intend of the contracting party from the conclusion of the contract should be the consent of Allah Almighty. In this way this contract is converted to worship immediately with this intention and the contracting party gets a reward from Almighty Allah though it is a contract of sale and purchase provided it is permissible in Islamic law.

THEORIES OF RISK MANAGEMENT:

Numerous laws have been formulated by the governments for risk management in business transactions. Islamic law also provided many rules regarding risk management in business contracts. There are two theories in this regard:

a- Islamic theory of risk management.

b- Conventional theory of risk management.

This article aims to elaborate the rules given by Islamic law for risk management in business transactions and contracts. It also explains the principles formulated by contemporary economists and scholars for risk management in positive law and analyzes these two theories and explains the preferred

⁸ - It is narrated by Abu Dawood, Tirmzi and he said this hadith is Hasan Gharib, Ibn-e-Majah, al Tahavi/ Sunan-e- Abi Dawood/ hadith:2194, Jamay al Tirmzi/hadith: 1184, Sunan-e-IbneMajah/ hadith: 2039, SharahMa'ni al A'sar/ hadith: 4656.

⁹ - It is narrated by al Tirmzi, Abu Dawood, IbneMajah/ Jamay al Tirmzi/ hadith: 1184, Sunan-e- Abi Dawood/ hadith: 2194, Sunan-e- IbneMajah/ hadith: 2039.

theory of risk management for the business transaction.

OBJECTIVE OF ISLAMIC LAW:

It is important to explain the objective of Islamic law before starting a discussion related to risk management because the coming discussion is based on it. The objective of Islamic law is the betterment of mankind in both worlds and betterment means: seeking benefit for mankind and repelling harm from him. These are two aspects of the betterment of mankind in both worlds;

a- Positive aspect: It is seeking benefit for mankind and it means: people should earn property through lawful means such as business, agriculture, farming, and services.

b- Negative aspect of it and it is repelling harm from mankind and it means the harm should be prevented before its occurrence in property or it should be compensated after its occurrence in it. These two theories of repelling harm are named as follows:

1- Aggressive theory of repelling harm from people and it is the prevention of harm before its occurrence there are further two theories: a- Islamic theory of repelling harm and it is called Islamic theory of risk management.

b- Conventional theory of repelling harm and it is called risk management in positive law. These two theories are different in their applications and this article elaborates on the differences between these two theories.

2- Defensive theory of repelling harm means when harm and loss is occurred, then it should be compensated. There are further two theories: One is Islamic theory of compensation and second is conventional theory of compensation. Islamic theory compensation is called Fiq al Daman. b- Conventional theory of compensation is called the law of torts. This article is going to explain the Islamic theory of risk management and elaborate on the conventional theory of risk management.

a- ISLAMIC THEORY OF RISK MANAGEMENT:

Islamic law is made by Almighty Allah and this system is revealed on the prophet [blessing of Allah and peace be upon him], so, it will be definitively more comprehensive and perfect to solve the difficulties of people. It also has given the principles and rules for risk management in business transactions. It has explained the causes of risk, elaborated rules for it, prevented the means of risk, and advised the believers to minimize the sources of loss before starting the business transactions.

THE CAUSES OF RISK:

There are many causes of risk in business transactions, and these are as follows:

FIRST CAUSE OF RISK:

ILLEGALITY OF CONTRACT:

It is related to the contract itself. Islamic law stipulates legality in the contract to minimize the risk in it. It means: that it should be according to the rules and regulations of Islamic law. The Quran says: [ذَلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا]¹⁰ For they said, the sale is similar to usury, while Almighty Allah permitted the sale and prohibited the usury. So, the contract valid be valid in Islamic law. If it is prohibited in it, it leads to risk causing loss such as a contract of riba and contract of gambling. There is another verse of holy Quran which says: { يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ }¹¹ O you who believed! No doubt the wine, gambling, Idolatrous practices, and divining of the future are but a loathsome evil of Satan's doing, shun it, then, so that you might attain a happy state!

¹⁰ - Surah al Baqrah/ 275

¹¹ - Surah al Maidah/ 90

SECOND CAUSE OF RISK:

Islamic law imposes many conditions for a contracting party going to start a business. This is to avoid risk causing loss and these conditions are as follows:

- 1- Being an adult person. It is stipulated for the businessman that he should attain the age of puberty {bloogh}. If he is under the age of puberty, then his transactions are not valid according to the majority of Muslim jurists such as Malki, Shafei, and Hanbali jurists as well as according to Hanafi jurists unless these are ratified by his guardian.
- 2- Being of a sound mind {Aqil}: It means: A businessman should be able to differentiate between harmful and beneficial transactions, so being of sound mind is stipulated for the businessman and it is to protect the wealth from destruction and to minimize the risk. Both conditions are merged into one word and it is being a pubescent person. It means {Aqil and Baligh} and it is also interpreted with the word complete capacity for execution of duties according to scholars of Usool al-Fiqh. And it is based on the tradition: Prophet { رفع القلم عن ثلاثة: } صلى الله عليه وسلم { عن المجنون حتى يفيق وعن النائم حتى يستيقظ وعن الصبي حتى يحتلم }¹² liability is lifted from three persons. An Insane person until he becomes sane, a sleeping person until he wakes up and one under the age of puberty until his nocturnal discharge. The complete capacity for execution of duties is explained in the following words:

TYPES OF CAPACITY:

It is appropriate to explain the types of capacity according to scholars of Usool al-fiqh. The capacity means the capability of a person to acquire his rights or to perform his duty and this is of two types:

- 1-A capacity for the acquisition of rights means the person is capable to get his rights given by law to him. It is further divided into two types:¹³
 - a- Deficient capacity for the acquisition of rights and is found in a person who is still in the womb of his mother before birth and it is also found in a person who died before being buried. Both persons have the deficient capacity for the acquisition of rights because they are entitled to some rights given by law to them but not for whole rights, for example, a fetus is entitled to four rights: right of heirship, right of lineage genealogy, right of will, right of the endowment.
 - b- A complete capacity for the acquisition of rights given by law to him and it is found in person after his birth till his death and he is capable to gain all types of rights available to mankind.
- 2- Capacity for the execution of duties and performing of it and it is further of two types:
 - a- Deficient capacity for execution of duties and is found in an individual after the age of seven years till the age of puberty and such person does not have the capacity for execution of worship as well as does not capacity for execution of crimes and offenses and he is not punished for commission of any offense but he has the defective capacity for only execution of contracts and dispositions according to Hanafi jurists.

TYPES OF CONTRACTS AS BEING: BENEFICIAL OR HARMFUL:

The Hanafi jurists have divided the contracts into three types:

BENEFICIAL

¹²¹² - It is narrated by al Tirmzi, Abu Dawood, Ibn-e-Majah, Imam Ahmad: Jamay al Tirmzi/hadith: 1423, Sunane Abi Dawood/ hadith: 4402, Sunan-e- IbneMahjah/ hadith: 2042, Musnad Imam Ahmad/ hadith: 943.

¹³ All scholars of Usool al Fiqh discussed the capacity of person and its types under the topic of subject Makumalah [محكوم عليه] which is one element of HukumSharei. Sa'adud Din al Taftazani/ al Talveeh/ Dar al Fikr al Arabi/ 2: 164, Ibne Ameer al Ha'j/ al Taqreerwa al Tahbeer/ 2: 37, Nazamud Din al Lakhnavi/ Fawatih al Rahmut/ 1: 156

a- A contract that is completely useful for an individual such as accepting the following dispositions: a- gift, b- donation, c- endowment, and d- bequest. If any person under the age of puberty accepts such types of contracts, these are considered valid according to Hanafi jurists.

- c- A contract that is harmful to the contracting party such as gifting property to somebody or bequeathing property for somebody or crediting property to somebody or making an endowment or divorcing his wife. Such a type of disposition is not valid due to being harmful.
- c- A contract that can be beneficial or harmful. Such types of contracts are valid but not enforceable unless these are ratified by the guardian of the ward otherwise these are not valid such as a sale purchase contract.
- b- Complete capacity for execution of duties and it is found in person after the age of puberty provided he is of sound mind. A person who has complete capacity for execution of his duties is called a pubescent person {Aqil&Baligh}. The complete capacity for execution of duties is stipulated for a contracting party in Islamic law to manage the risk in the business transactions.
- 3- Being a prudent person: It means he knows the venues of business and the ethics of transactions. It is stipulated for the businessman in Islamic law according to Shafei jurists forever while it is a condition for such person according to Hanafi jurists till the age of 25 years and when such individual has attained 25 years of his age, this condition is lifted.¹⁴ This is based on the verse of the Holy Quran which says: [وَابْتَالُوا أَلْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ] you scrutinize the orphans until they reached the age of marriage. If you observe the prudence in them, hand over their property to them.¹⁵ If a businessman does not fulfill these three conditions, he is an incompetent person and is not allowed to start his business because incompetency causes loss. An example is entrepreneurship {Mudarabah} started by a leading group of Ulmas from Binnori town Madrasa during the years 2009 to 2012. They announced their entrepreneurship product of business at the time of the lecture for congressional prayer each Friday. Innocent people trusted these Ulmas and deposited their money with them. Ulmas received the capital from different principals as entrepreneurs and they handed over it to other entrepreneurs who did not know the proper business, so their business resulted in a huge loss amounting to five billion rupees. The entrepreneurship started by these Ulmas was full of risk and it was due to their incompetency as well as their negligence.

THIRD CAUSE OF RISK:

The third cause of risk is the nonexistence of the subject matter at the time of the contract concluded by the parties. Selling a nonexistent commodity causes loss in business transactions such as selling a fetus in the womb of the mother, selling milk still in the udder of an animal, and pearl inside the oyster. Islamic law stipulates the existence of the subject matter to avoid any risk of causing a loss. If the subject matter does not exist at the time of contract, selling such a commodity is not allowed in Islamic law.¹⁶

¹⁴ - Refer: Ibn-e- Abidin Muhammad Ameen/ Radd al Muhtar/ Istanbul: Dar-e-Qaraman/ 5: 105, Ibn-e- Rushd /Bidayat al Mujtahid/ 2;278, akKhateeb al Sharbeeni/ Mughni al Muhtaj/ Egypt: Mustafa al Babi al Halabi/2: 168, Ibn-e- Qudamah/ al Mughni/ Beirut: dar al Kitab al Arabi/ \$; 467

¹⁵ Surah al Nisa/6

¹⁶ -Refer: al Kasani Abu Bkr Ala ud Din/ al Badayewa al Sanaye/Beirut: Dar al Kitab al Arabi/5:128, al Sarkhasi Shams ulAimah / al Mabsut/ Berit: Dar ulMarifah/ 1406-1986/ 12:196, Ibn-e - al Hummam

There are many traditions of the Holy Prophet {صلى الله عليه وسلم} which forbid selling a nonexistent commodity.

- 1- Prophet {صلى الله عليه وسلم}: said: Do not sell whatever is not with you. It means: that selling whatever does not exist is prohibited.¹⁷
- 2- Prophet {صلى الله عليه وسلم} has forbidden the sale of Kalei with kalei.¹⁸ It is interpreted as selling nonexistent commodities with nonexistent commodities or selling debt by debt and debt is whatever is obligatory on the person and it is a nonexistent thing.
- 2- Prophet {صلى الله عليه وسلم} has forbidden the selling fetus of the womb.¹⁹ because it does not exist at the time of contract.
- 3- Prophet {صلى الله عليه وسلم} has forbidden selling fruits before their blossoming.²⁰ because it is also non-existent at the time of contract.

EXEMPTION:

However, some contracts are permitted even though the subject matter does not exist such as 1- a contract of rent. [قَالَتْ إِحْدَاهُمَا يَا أَبَتِ اسْتَأْجِرْهُ إِنَّ خَيْرَ مَنِ اسْتَأْجَرْتَ الْقَوِيُّ الْأَمِينُ]²¹ One of these two girls said : O My father take him on rent because it is very suitable to take on rent such person who is powerful and honest.

2- Advance payment sale {bay al salam} based on hadith: Prophet {صلى الله عليه وسلم} said: Whoever sells on credit, he shall sell with a known measurement, with a known weight for a known period.²²

3- Manufacturing contract {Aqad al Istisna}.

- 4- Irrigational contract {musaqat}. These are exempted from this general condition based on the consensus of Muslim scholars to fulfill the need of the people.²³

FOURTH CAUSE OF RISK:

Abdul Wahid/ FathulQadieer/ Dar al Ihya al Turath al Islami/ 5: 1192, al Khateeb Muhammad al Sharbini/ Mughni al Muhtaj/ Maktaba al Mustafa al Babi al Halabi/ 1377- 1958/ 2: 30.

¹⁷ - It is narrated By Tirmzi, Abu Dawood, al Nasai, Ibn –e- Majah, Imam Ahmad. See: Jamayal Tirmizi/ hadith: 1232, Sunan Abi Dawood/ hadith: 3503, Sunan –e- al Nasai/ hadith: 4613, Sunan-e-Ibn-e-Majah/ hadith: 2187, Musnad Imam Ahmad/ hadith: 14887.

¹⁸ - It is narrated by al Hakim, al Daraqutni and al Baihaqi. See: al Mustadrak/ 2: 57, Sunane al Darqutni/ hadith: 3041. Al Sunanal Kubra/ 5:290

¹⁹ -It is Narrated al Bukhari, Muslim, al Tirmzi, Abu Dawood, al Nasai, Ibn-e- Majah, Imam Malik, Imam Ahmad. See: Sahih al Bukhari/ hadith: 2143, Sahih Muslim/ hadith: 1412, Jamay alTirmzi/ hadith: 1229, Sunan-e- Abi Dawood/ hadith: 3380, Sunan al Nasai/ hadith: 4623, Sunan-e-IbneMajah/ hadith: 2197, Muatta Imam Malik/ hadith: 1357, Musnad Imam Ahmad/ hadith: 396.

²⁰ -It Is Narrated al Bukhari, Muslim and Tahavi/ See: Sahih al Bukhari/ hadith: 2194, Shih Muslim/hadith:13, 16, sharhMa'ni al A'thar/ hadith: 5584, 5587.

²¹- It is Allowed by Holy Qura Surah al Qasas/ /27

²²- It is narrated by al Bukhari Muslim, al Tirmzi, Abu Dawood, al NasaniIbneMajah, Imamam Ahmad.Refer: Sahih al Bukhari/ hadith: 2241, Sahih Muslim? Hdith: 1606, Jamay al Tirmzi hadith: 1311, 3463Sunan –e- abiDawood/ hadith:3463, Sunan al Nasai / hadith: 461, Sunan n-e- Ibn Majah/ Hadith: 2280, Musnad Imam Ahmad/ hadith: 1938.

²³ - Refer: al Sarkhasi/ Al Mabsut/ 12:195, al Kasani/ Al Badaywa al Sanay/ 5: 173, Ibn al Humam/ Fath al Qadeer/ 5: 102, al ZalaiFakhrud Din Usman bin Ali/ TabyeenulHqaiq /Egypt: Maktaba al Amiriyah/ First Edition/ 1314/ 4: 12, Abu al Waleed al Baji/ al Muntqa shah al Muatta/ 4:217, Ibn Rushd/ Bidayatul Mujtahid/ 2: 148, al Nowi/ Sharfud Din/ al Majmu /11: 251- 260, al Sharbeeni al Khteeb/ Mughni al Muhtaj/ 2: 86, Ibn Qudamah/ al Mughni/ 4: 80-89, Ibn Hazam al Zahiri/ al Muhalla/ 8: 171.

The fourth cause of risk is the uncertainty of the subject matter. Uncertainty of subject matter means: the subject matter is unknown {Majhul}. When the subject matter of the contract is unknown [majhul], it causes risk in the business transaction, as well as causes, a dispute among the contracting parties. Islamic law stipulates certainty in the subject matter for the management of risk in the contract. It should be known {malum}. If the property is not fungible, it should be known through examination as valuable {Qimi} properties.²⁴ If it is fungible {Mithli} property, it should be known through the description provided it is not present in the session of contract, so selling one sheep from the flock of sheep is prohibited in Islamic law due to uncertainty of the subject matter.

FIFTH CAUSE OF RISK:

The fifth cause of risk in a business transaction is that the subject matter of the contract is not owned by the seller, such as selling stolen property or usurped property because Islamic law does not allow anyone to sell a stolen or usurped property to anybody else. So, selling birds before hunting which are in the air, and selling fish that is still in the water of the sea or river is not valid because it is not owned by the seller.

Islamic law manages such type of risk in business transactions and stipulates ownership for the subject matter and it should be owned by the seller otherwise the contract is not valid. This is established by many traditions of prophet (ﷺ)

1- Prophet (ﷺ) said: Do not sell whatever is not with you. This hadith is interpreted by some Muslim scholars to say: Do not sell whatever is not owned by you.²⁵

2- Prophet (ﷺ) said: It is not valid for man to sell whatever he does not own. { ليس على الرجل أن يبيع ما لا يملك }²⁶

SIXTH CAUSE OF RISK:

The SIXth cause of risk is the Gharar in the subject matter and Gharar means: the delivery of subject matter to the purchaser is doubtful such as selling a stray camel that is owned by the seller and is known to both parties i.e, seller and purchaser but it is not deliverable due to being missing. There is doubt about its delivery because the seller does not know whether the stray camel is alive or not, if it is alive then the seller does not know where it is? Islamic law stipulates the delivery of subject matter in the transactions for risk minimization. If its delivery is uncertain, the contract is not valid.²⁷ It is based on the tradition of the prophet (ﷺ) while saying:

1- [لا تبيع ما ليس عندك] Do not sell whatever is not with you.²⁸ According to some Muslim scholars, it means: Do not sell whatever is not deliverable.

2- [نهى النبي صلى الله عليه وسلم عن شراء العبد وهو أبق] Prophet has forbidden from the selling of an escaped slave.²⁹

SEVENTH CAUSE OF RISK:

²⁴ - Refer: al QrafiShihabud Din/ al Faruq/ 2:65, al Sharkhasi/ al Mabsut/ 13:26, 49, al Kasani/ al BadayWa al Sansay / 5: 158, Abu al Waleed al Baji/ al Muntaqa/ 4; 2, al Sharbeeni/ Mughni al Muhtaj/ 2: 216, Ebn al Qudamah/ 4: 209, 234.

²⁵ - It is narrated by al Tirmzi, al Nasai, Imam Ahmad. Refer: Jamay al Tirmzi/hadith: 1232, Sunan e- Ibn-e-Majah/ hadith: 2187, Sunan al Nasai/ hadith: 4611, Musnad Imam Ahmad/hadith: 6633,14887.

²⁶ - It is narrated by al Bukhari, Abu Dawood, al Nasai. See: Sahih al Bukhari/ hadith: 2117, Sunan-e- Abi Dawood/ hadith: 3500, Sunan-e- al Nasai/ hadith: 4484.

²⁷ - Refer: al Kasani/ al Badayewa al Sanaye/ 4:187, Ibn-e- Rushd/ Bidayat al Mujtahid/ 2: 156, al Sharbeeni? Mughni al Muhtaj/ 2: 12, Ibn-e- Qudamah/ al Mughni/ 4: 200

²⁸ - All source of this are mentioned above.

²⁹ - It is narrated by Ibn-e- Abi Shaibah/ am Musannaf/ hadith:20506.

The seventh cause of risk in business is that the right of a third party is related to subject matter such as selling mortgaged or plugged property in the hand of a third party before paying a debt of this party unless the right of this party is paid off before selling it. Islamic law stipulates for the risk management in the business that the subject matter should be free from any type of liability otherwise the contract is not enforceable.³⁰

EIGHTH CAUSE OF RISK:

The eighth cause of risk in business is the illegality of the subject matter. It means: If the subject matter is not fit to be the subject matter of the contract according to Islamic law the contract is not valid such as selling wine or swine for Muslims because Islamic law does not allow it to Muslims. Qur'an says: [يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالدَّمَ وَلَحْمَ الْخُزْزِيرِ وَمَا أُهِلَّ بِهِ لِغَيْرِ اللَّهِ فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ [عَفُورٌ رَحِيمٌ] ³¹ He has forbidden to you only carrion, blood, the flesh of swine, and that over which any name other than God [Allah]'s has been invoked [at the time of slaughtering] if one is driven by necessity- neither coveting it nor exceeding his immediate need -no sin shall be upon him: for, behold, God is much- forgiving, Dispenser of grace.³²

O you who believed! No doubt the wine, gambling, Idolatrous practices, and divining of the future are but a loathsome evil of Satan's doing, shun it, then, so that you might attain a happy state.³⁴

Islamic law stipulates the legality of the subject matter of the contract. If the subject matter is a prohibited thing in Islamic law, then it is not capable to be the subject matter of a contract for the Muslim people, and such a contract is void due to legal hazards.³⁵

NINTH CAUSE:

Uncertainty of period. If the sale contract differed, the period should be known to both parties and it is to avoid dispute between the parties. It is based on Qur'an and hadith. Qur'an says: [يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَى أَجَلٍ مُسَمًّى فَاكْتُبُوهُ] Prophet [صلى الله عليه وسلم] said: [من أسلف في شيء فليسلف في كيل معلوم ووزن] O believers! When you conclude the differed payment sale or advance payment sale, the weight, measurement, and period should be known.

TENTH CAUSE:

Providing debt without writing. If the contract is based on debt, it should be in writing and it is based on Qur'an:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَى أَجَلٍ مُسَمًّى فَاكْتُبُوهُ وَلْيَكْتُب بَيْنَكُمْ كَاتِبٌ بِالْعَدْلِ وَلَا يَأْبَ كَاتِبٌ أَنْ يَكْتُبَ كَمَا عَلَّمَهُ اللَّهُ فَلْيَكْتُبْ وَلْيُمْلِلِ الَّذِي عَلَيْهِ الْحَقُّ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا يَخْشَ مِنْهُ شَيْئًا فَإِنْ كَانَ الَّذِي عَلَيْهِ الْحَقُّ سَفِيهًا أَوْ ضَعِيفًا أَوْ لَا يَسْتَفْهِمُ أَوْ لَا يَسْمَعُ فُلْيُمْلِلْ وَلْيُتَّقِ اللَّهَ رَبَّهُ وَلَا يَخْشَ مِنْهُ شَيْئًا فَإِنْ لَمْ يَكُنْ مِنْكُمْ رَجُلٌ فَاجْعَلْ أَمْرًا ثَانًى مِمَّنْ تَرْضَوْنَ مِنَ الشُّهَدَاءِ أَنْ تَضِلَّ إِحْدَاهُمَا فَتُذَكِّرَ إِحْدَاهُمَا الْأُخْرَى وَلَا يَأْبَ الشُّهَدَاءُ إِذَا مَا دُعُوا وَلَا تَسْأَلُوا أَنْ تَكْتُبُوهُ صَغِيرًا أَوْ كَبِيرًا إِلَى أَجَلِهِ ذَلِكَ أَوَسَطُ عُذٍّ عِنْدَ اللَّهِ وَأَقْوَمُ لِلشَّهَادَةِ وَأَدْنَى أَلَّا تَرْتَابُوا إِلَّا أَنْ تَكُونَ تِجَارَةً حَاضِرَةً تُدِيرُونَهَا بَيْنَكُمْ فَلَيْسَ عَلَيْكُمْ جُنَاحٌ أَلَّا تَكْتُبُوهَا وَأَشْهَدُوا إِذَا تَبَايَعْتُمْ وَلَا يُضَارَّ كَاتِبٌ وَلَا شَهِيدٌ وَإِنْ تَفْعَلُوا فَإِنَّهُ فُسُوقٌ بِكُمْ وَاتَّقُوا اللَّهَ وَيُعَلِّمُكُمُ اللَّهُ وَاللَّهُ بِكُلِّ شَيْءٍ عَلِيمٌ. وَإِنْ كُنْتُمْ عَلَى سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهَانٌ مَقْبُوضَةٌ فَإِنْ أَمِنَ بَعْضُكُم بَعْضًا فَلْيُؤَدِّ الَّذِي أُؤْتِمِنَ أَمَانَتَهُ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا تَكْتُمُوا الشَّهَادَةَ وَمَنْ يَكْتُمْهَا فَإِنَّهُ آثَمُ قَلْبُهُ وَاللَّهُ بِمَا تَعْمَلُونَ عَلِيمٌ ³⁶

³⁰ - al Kasani/ al BadayeWa al Sanaye/ 5:125, 148

³¹ Surah al Barah/ 173

³² - Muhammad Asad/ The Message of the Qur'an/ 35

³³ - Surah al Maidah/ 90.

³⁴ - Asad/ The Message of The Qur'an/162.

³⁵ - al Kasani/ BadayeWa al Sanaye/ 5: 142, Ibn-e- al Humam/ Fath al Qadeer/ 5: 188, 8:1232, al Hattab/ Mawahib al Jalil/ Beirut:Dar al Fikr/ 4: 258, Ibn-e- Rushd/ Bidayat al Mujtahid/ 2:125, al Khateeb al Sharbeeni/ Mughni al Muhtaj/ 2: 11, Ibn-e- Qudamah/ al Mughni/ 4:251-255.

³⁶ - Surah al Baqarah/ 282-283

O you who believed! Whenever you give or take credit for a stated term, set it down in writing. And let a scribe write it down equitably between you: and no scribe shall refuse to write as God has taught him: thus shall he write. And let him who contracts the debt dictate; and let him be conscious of God, his Sustainer, and not weaken anything of his undertaking. And if he who contracts the debt is weak of mind or body, or, is not able to dictate himself, and then let him who watches over his interest dictate equitably. And call upon two of your men to act as witnesses: and if two men are not available, then a man and two women from among such as are acceptable to you as witnesses, so that if one of them should make a mistake, the other could remind her. And the witnesses must not refuse [to give evidence] whenever they are called upon.³⁷

And be not loath to write down every contractual provision, be it small or great together with the time at which it falls due; it is more equitable in the sight of God, more reliable as evidence, and more likely to prevent you from having doubts [later]. If, however, [the transactions] concerns ready merchandise which you transfer directly unto one another, you will incur no sin if you do not write it down.³⁸

And have witnesses whenever you trade with one another; for if you do [them harm], behold, it will sinful conduct on your part. And remained conscious of God, since it is God Who teaches you [herewith]- and God has full knowledge of everything.³⁹

And if you are on a journey and cannot find a scribe, pledge [may be taken] in hand: but if you trust one another, then let him who is trusted fulfill his trust, let him be conscious of God, his sustainer. And do not conceal what you have witnessed for, verily, he who conceals it is sinful at heart; and God has full knowledge of all that you do.⁴⁰

ELEVENTH CAUSE:

Conclusion of a contract without bargaining because bargaining at the time of conclusion of the contract is recommended in Islamic law and it is to avoid the loss and repel the harm. It is narrated by Abdullah bin Jabir that he was riding on a camel and it was very tired and did not walk and I intended to sell it out and Prophet [صلی اللہ علیہ وسلم] came behind us and beat the camel and it started to walk very speedy did not walk in such position before it. Prophet said: sell it to me with one qiyas, I replied no. Prophet said again to sell it to me. I sold it to him and I exempted my riding on it till to reach my family at Madinah and when I reached there, I came with this camel to Prophet [blessing of Allah Almighty and peace be upon him] he paid me its price and I came back Prophet sent behind a person and said to me: Did I bargain with you in the purchase of camel [Prophet did not bargain with me is this purchase] said: Take your camel and your money [Drahim] because these are for you.⁴¹

This hadith supports that bargaining in sale and purchase is valid and it is to educate the Muslim people but not for himself. There is another hadith: Suwaid bin Qais said: that I and Khaimah al Abdi came with the cloths from [Hajar] to Makkah Prophet [ﷺ] came to us and he bargains with us in [Saravil] and we sold it to him.⁴²

CONDITIONS FOR RISK MANAGEMENT:

³⁷ - Asad/ The Message of The Qur'an/ 62-63

³⁸ - Ibid.

³⁹ - Ibid.

⁴⁰ -Ibid.

⁴¹ - It is narrated by al Bukhari, Muslim. See: Sahih al Bukhari / hadith: 1991, Shahih Muslim/hadith: 715.

⁴² - It is narrated by al Tirmzi, Abi Dawood, al Nasai, Ibn-e- Majah, al Tirmzi said this hadith is hasan and Sahih. See: Jamaye al Tirmzi/ hadith: 1305, Sunan-e- Abi Dawood/ hadith: 3336, Sunan-e- al Nasai/ hafidith; 4592, Sunan-e- Ibn-e- Majah/ hadith:2220.

There are certain conditions suggested by Islamic law. If these are adopted in business, help to minimize the risk in the contract and these are as follows:

- 1- The contract should be valid in the eyes of Islamic law and it will be valid if it fulfills all the elements mentioned above and the following conditions.
 - a- The contracting party should be pubescent {Aqil&baligh}.
 - b- The contracting party should be prudent.
 - c- The subject matter of the contract should be legally valid. If the subject matter is prohibited, the contract will not be valid.
 - d- The subject matter of the contract should exist at the time of the contract otherwise it will not be valid.
- 6- The subject matter of the contract should be known at the time of the conclusion of the contract. If it is not known, the contract will not be valid.
- 7- The subject matter of the contract should be owned by the contracting parties otherwise it will not be valid.
- 8- The subject matter of the contract should be deliverable otherwise it will not be valid.
- 9- The right of the third party is not related to the subject matter otherwise the contract will not be valid.

CONCLUSION:

The Islamic law is the divine law given by Almighty Allah, the Creator of the universe. The law given by Him is complete and comprehensive and it provides the solution to every problem being faced by human-being. It protects the rights of the consumer. It also lays down such conditions by which the risk in the business is managed. It also prescribes the precautions by which the loss in the business transaction can be minimized or eliminated.