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Istisna' Contract in Islamic Fiqh

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In the Name of Allah, Most Gracious, Most Merciful

Preface:

Tadamon Islamic Bank has the pleasure to present to all concerned in this field, within its series of publications, “The Istisna’ Contract in Islamic Fiqh” including the viewpoints of the original *fuqahaa* highlighting the thorough discussions that took place about the formula of istisna’.. We continuously organize Islamic transactions from their scientific foundations so as to put them under practical implementation. This implementation falls within the framework of all the various appraisals and patterns of Islamic investment, which can be practiced in industrial and financial banks and institutions. This is one way we assume our role of spreading knowledge and culture.

This recently published research on the contract of istisna’ puts a general framework for the latest transactions in the field of the istisna’ and the terms of contracting formula through the binocular of the istisna’ and its capacity to meet the individual and group requirements necessitated by the progress of industries and communities and entailed by the modern economic transactions.

This reflects the tendency of the Islamic Fiqh to satisfy these requirements throughout the ages of history due to the flexibility and capacity concealed in it, hopefully the reader will find in this research a new addition that deserves his concern.

Salah Eldin Ali Abu Alnaja

General Manager

Tadamon Islamic Bank

In the Name of Allah Most Gracious, Most Merciful

The Istisna' Formula of Contract

Chapter I: Definition of Istisna'

A. Linguistic Definition:

Istisna' (commission to manufacture) comes from the verb sana'a (manufacture), which originates from sana'a (manufacturing). The scholar Ibn Manzoor said in Arabic, "Sana'aho sunan fahowa masnoa, wasana'a 'amalaho minno" which means he manufactured it in a manufacturing way then it is manufactured and he performed his work from it. "And you will see the mountains and you think them solid, but they shall pass away as the passing away of the clouds the work of Allah"

- Ibn Manzoor also said in this subject, "istisna' somebody a ring" means he has commissioned somebody else to manufacture a ring for him. Ibn Omer narrated that Prophet Mohammed (pbuh) said, "Istisna' a ring of gold..." i.e. the Prophet (pbuh) commissioned a manufacturer to make a ring of gold for him as you may say "Ektataba". That means he gave the order to someone else to write for him. Istisna' means to commission a person to manufacture something for him and manufacturing is the vocation of the manufacturer and his work is manufacturing handicrafts. Dr. Ahmed Al Sharbasi said; "manufacturing is the vocation of the manufacturer and his work is manufacturing handicrafts and the manufacturers are those who manufacture things with their hands. From the above explanation it is evident that the istisna' in language is the request of manufacturing as the writer of the Arabic tongue has said. Therefore, we say this is a manufacture and those are manufacturers and call the vocation of them manufacture: manufacturing and his work is manufacturing and we say this thing is "masnoo" that

means its manufacturing is completed and we say about the effect of Sana'a: manufacturing.

B. The Terminological Definition:

The statements of the Fuqaha' have varied over the definition of istisna' where they sometimes differ and sometimes meet. Below are some of the definitions stated in the fiqh of the Hanafia and in the latest comparative books:

Al Kasani said when he was speaking about the definition of the istisna' their statements differed regarding this kind of sale where some of them said; it is a contract of something sold on guarantee in which the work is conditioned. In the first statement, if the manufacturer brought a commodity which has already been manufactured before the contract and the manufacturer consented on that then it would be permissible and if the condition of work come from the same contract, it would not be permissible because the condition applies to a work in future not in the past. The correct is the last statement because the istisna' is a request for manufacturing and what the work was not conditioned in, is not an istisna' and the name is an evidence for it. The contract of the sale on guarantee is called a *salam* contracted formula and the difference in names is an evidence for difference in meanings and if the manufacturers brought a commodity which he has already manufactured before the contract and the commissioner consented on it, then it would not be permitted by the first contract but by another one to be based on the consent of the commissioner.

In clarification for Al Kasani provisions definition we quote the following statement: Al Kasani says. "if someone handed over steel to a blacksmith to manufacture a specific vessel for him for a specific value, that would be permissible without option because this formula is hiring and not an istisna' formula".

In the light of the above mentioned phrase the *istisna'* according to Al Kasani entails the material of manufacturing to be supplied by the manufacture and if the commissioner provided the raw material then the contract would be a hiring and not an *istisna'* contract.

We point out, here, that there is another definition for the *istisna'* mentioned by another Hanafi *faqeeh*, namely Ibn Abidin, which (the definition) differs somehow from the previous one. Ibn Abidin said defining the *istisna'*, “According to Shari’a; it means the request to do something specific in a specific manner”. Another definition by another Hanafia *Faqeeh*: Ali Fikri said, “The *istisna'* is a request to do something specific in a specific way provided that its raw material should be supplied by the manufacturer”.

The above are some of the definition stated by Hanafia doctrine and there are other definitions for the *istisna'* in the latest books of the Fiqh and below are some of them:

Dr. Wahba Al Zuhaili defined the *istisna'* as, “it is a contract concluded with a manufacturer to manufacture a specific commodity on guarantee, which means that the contract is concluded to purchase the commodity manufactured by the manufacturer provided that the raw material is supplied by the manufacturer and the work is also performed by him. If the raw material is supplied by the commissioner then the contract becomes a hiring contract”. Al Zarga’a said in this regard, “it is a purchase of the commodity that will be manufactured on recommendation”.

Dr. Assidig Addarir said “Terminologically, the *istisna'* is contract of sale of a specified commodity on guarantee requested to be manufactured”.

We consider the unique definition that makes the *istisna'* an independent contract that observes its conditions is the definition favored by Al

Kasani, “it is a contract of sale on guarantee in which work is conditioned”.

This is the inclusive definition because it sets the condition that the material requested to be manufactured should be supplied by the manufacturer “This is evident from his statement that the delivery of materials like leather or steel to the manufacture is not considered as *istisna*’ but a hiring” and his statement “A contract on commodity sold which means that the manufacture here is considered as a seller and since he is a seller, the material of manufacturing is supplied by and the work is also performed by him. This is also an inclusive definition because he conditioned that he commodity sold is not immediate but it is on guarantee and this is to avoid the immediate sale. Then he set the condition of the work to avoid the *salam* contractual formula. Hence, this definition combines all conditions necessary to be existent in the *istisna*’ transactional formula and restricts any inclusion of anything that is not termed as *istisna*’.

As for the latest definitions, they are all identical to this definition like that one stated by Ali Fikri in which he said, “it is a request to manufacture something specific supplied by the manufacture”. And the definition of Dr. Addori, “It is a contract for the sale of specified commodity on guarantee requested to be manufactured”.

The definition of Dr. Wahba Al Zuhaili, “it is a contract with a manufacturer to do a certain type of work on guarantee which means the contract to buy the commodity which the manufacturer makes provided that the material and work undertaken by the manufacturer. All these definitions comprise the same conditions, though different worded, where they all condition that the material of manufacturing and the work are under the responsibility of the manufacture.

Generally, we can say that the latest definitions are entirely identical with the definition of Al Kasani with difference in words and not meanings. As for Ibn Abidin's definition for the *istisna'*, it is noticed that his definition is neither prohibitive nor inclusive, "It is a request to the manufacture to perform work in special thing according to a specific manner". It is noticeable that he conditioned the work to be done in a specific way only and the conditioning of work to be carried out in such a specific way can be stipulated in the formula of *istisna'* and also be cited in other formulas. For example in the hiring formula it can be conditioned that the work to be performed in a specific way i.e., the commissioner of work can bring the raw material for the hired person in order to manufacture a certain commodity in a specific way required by the commissioner of work. Hence, this definition involves other aspects which are not initially within the scope of the *istisna'* formula of transaction and, therefore, it lacks the necessary conditions of that formula. This doesn't, by any means, restrict the other contracts which contradicts with the *istisna'* from involvement into its definition. In the light of the above mentioned statements and definitions of the *istisna'* contractual formula, we consider the most appropriate and sounding definition is that one adopted by Al Kasani and supported by Addarir, Al Zuhaili and Ali Fikri.

On examining the definition that we favoured and the other definitions coinciding with it, we will find the *istisna'* an independent contractual formula of transaction different from both the living and salam formulas as it involves different conditions and all these aspects of differences will be clarified later when we compare between the *istisna'* contract and other formulas of dealing.

Definition of the istisna' in Civil Transactions Act:

The Civil Transaction Act did not dedicate an independent definition for the istisna' in its previous meaning, but instead, the Act added the istisna' to the formula of contracting which includes the istisna' and other formulas. The Civil Transaction Act defined istisna' in item 387 which reads, "the contracting formula is a contract according to which one party undertakes to perform a specific kind of work or manufacture a certain type of commodity for a value to be paid by the other party".

On examining the above definition of the contracting formula, we find that it involves the formula of istisna' in a small part of it and other formulas in the remaining parts. The first paragraph of the definition i.e., a contract according to which one party undertakes to manufacture something; is the paragraph which involves the formula of the istisna' and also involves other permissible formulas. This paragraph involves the formula of istisna' because it doesn't restrict the delivery of raw material by the manufacturer and also involves the hiring formula as well as it permits the delivery of the manufacturing material by the commissioner and contracts with the manufacturer for manufacturing the required commodity. Thus, we are in a position to say that the viewpoints adopted by the Hanafia on the formula of istisna' was not independently organized by the Sudanese Civil Transactions Act.

The Difference between the istisna' Contract and Similar Behaviors and Contracts:

Since there is similarity between istisna' and some contracts, especially leasing, and some behavior, especially the promise to sell, it becomes necessary to present the difference between it and the contracts clearer, as follows:

1- The Difference Between istisna' and the Promise to Sell:

Istisna' is similar to the promise to sell, where the manufactured is promised to be made and does not exist when the contract is ratified. Thus we find the sold is absent at the promise to sell it. This issue led to difference as to the essence of istisna'. By this existing similarity, is it sale or a promise to sell?

In order to clarify this difference we shall survey some of what was mentioned by Al Hanafiya:

The Opinion of Al Hanafiya on the Essence of istisna', i.e. whether it is a Promise or a Sale:

They differed in this. Part of them known as the majority of scholars Al Ahnaf considered it as sale; another group including Al Hakim Al Shaheed considered it as a promise to sell. Following is a demonstration of this from their authentic books:

Al Kasani said: "As to its meaning, the scholars differed. Some said it is an appointment and not a sale. Others said it is sale but the buyer has the choice. And this is the correct one. Mohamed mentioned the legal reasoning and the approval for its legality; and this cannot be in promises. Also, he proved the choice of seeing as it specializes in sales, and it is in conformity with litigation because it includes the obligation and not the promisee. After he mentioned the difference of Hanafy scholars about istisna' whether it is sale applicable to the rules of sale or it is a promise for sale, Al Kasani supported the opinion of sale and not a promise for the following reasons:

- 1- Mohamad Ibn Al Hassan Al Shaibany, a comrade of Aby Haneefa, mentioned that the legitimacy of istisna' is the application of discretion and not inference deduction. In other words: use the two bases of the application of discretion and the legal reasoning. These two bases are in the contracts and not the promises.

- 2- He proved the choice of seeing which becomes fixed in setting only.
- 3- In istisna' it is permissible to seek a decision from the law in case of a dispute. Resorting to law takes place in duties i.e. the obligations and not in promises, because the promise does not reach the extent of a contract. Therefore, it is possible to disengage from, apart from the contract.

This, in short, was the discussion of Al Kasani to the different about the essence of istisna' and he supported the opinion of the majority of scholars as we have seen.

Al Zalaie also spoke in his book titled "Demonstration of the Facts". He explained the particular's treasure about this matter and demonstrated the proof of the majority of scholars who said it is sale. He added to the majority of scholars proofs that were not mentioned above for Al Kasani. For this addition we demonstrate in the following what Al Zailaie mentioned in this concern and follow it with explanation and comments:

Al Zailaie said: "The sahih shows that manufacture is complete by selling. Al Hakim Al Shaheed said it is a promise and not selling, but it can be concluded as selling if it was presented a completely by a deal. This fixed the choice for any one of them.

The viewpoint of discretion. He also separated between what contains dealings and what not, and proved the choice of seeing even if the price was paid. The mutual promise is legal by inference and by discretion if there is a dealing; and the choice of seeing is not fixed and does not own the substitute, then what he said is null and void.

From what Al Zailaie said above it becomes clear that istisna' is a promise and not selling contrary to the majority of scholars. The proof of Al Hakim Al Shaheed is latent in separating between two matters. The first is to present the manufactured pre-fabricated and is dealt with by the

two contracting parties. The beneficiary shows the price and the maker hand out the property. This is his opinion, is called selling. The second matter is: the absolute agreement. Because, in the opinion of Al Kakim Al Shaheed, is not considered selling since it different from this aspect. And since it is not selling, there it is closer to be called mutual promise.

Al Zailaie had sided with the majority of scholars' opinion for the following reasons:

- 1- Mohamed called it buying, and mentioned inference and discretion; that means it is discretionally legal despite its difference to inference. This point agrees with what Al Kasani mentioned in the aspect of its legality. By way of comparison, the promise is legal, both discretionally and by inference.
- 2- Mohamed separated between the one with dealings and the other without it. That means he sanctioned istisna' that contains dealings; and prevented that which does not contain a dealing. By way of comparison, promise is legal for both: the one that contains a dealing and the one that does not.
- 3- He proved the choice of seeing in istisna' and comparatively, the promise has not choice of seeing. And this point is the same as what was mentioned by Al Kasani.

Our opinion in istisna' regarding its essence:

According to the mentioned evidences, istisna' is considered selling and not a promise, because as we shall see later, see that manufacture becomes requisite by mere conclusion; and only the contract requisites. Contrary to promises, whenever they come in the formula of selling: I sell you or I shall sell you, then it is not considered a requisite, for the contradiction of the stalling formula with necessity and obligation. Then our opinion is that manufacture is selling, that is a contract and not a promise to contract.

The Difference Between istisna' and the Hiring Returns of work:

With the Hanafya, there is similarity between istisna' and the hiring returns of work. Because it is possible for the seeker to ask the maker to make him a certain property after supplying him with the raw material, the maker will manufacture it from his own raw material. Here the contract is hire even though it is for the work. But there is a basic difference between those two contracts – the hire and the istisna'. This difference is latent in what they represent. The istisna' contract with the Hanafya majority of scholars represents the manufactured property. That means what is contracted is the property desired; while the hire returning to work turns to the work by their unanimous agreement. For example, if somebody asked a maker to make him a shoe from his material, then what is contracted is “making the shoe” i.e. the work is in making the shoe and not the shoe by itself, while if the seeker of the manufacture asked the maker to make him a shoe, and provide the material for the shoe, then the contracted in this case will be the shoe. For this reason Al Kasani said: ”If he handed the blacksmith a piece of iron to make him a known vessel for a known fee; or a piece of leather to a cobbler to make him a shoe for a known fee; then this is permissible and there is no choice in it, because this is not istisna' but hiring. There is an agreement between all the Hanafya that in istisna', the material is from the maker, and in hiring, the material from the seeker. But there is a controversial point in the aforesaid: Is he contracted to manufacture the property or the work?

They differ in that. The Ahnaf majority of scholars said what is contracted is the property to be made. Others like Al Bordaie said: The contracted is the work such as hire. Al Sarkhasy mentioned the opinion of the two parties and he supported the majority of scholars opinion, where he said: “Al Bordaie used to say the contracted is the work, because istisna' is engagement in work and it is work. Naming the contract by it is

evidence that it is what is contracted; and the more correct is that the contracted is the finished product, and mentioned that the workability is demonstration of quality. If he had brought it as finished product not from making it before the contract and the seeker took it, then it is permissible and the evidence is what Mohamed said: “if he brought it as finished, then the beneficiary has the choice because he brought something he did not see”.

The choice of seeing becomes fixed in the sale of property: and we knew that the sold is the finished product.

In short, Al Sorkhasy extended the evidence of those who said that the contracted is the work, Al Bordaie is one of them. He also mentioned that their evidence is based on their saying that manufacture is engaging in making; which means the linguistic meaning of the word manufacture is corrected to engaging in industry; and engaging in industry is work in itself. Therefore, since naming is connected with the engagement in work, then this is evidence that it is the contracted one. This is the general summary of Al Bordai’s opinion Al Sarkhasi disagreed with him and supported the opinion of the majority of scholars. He said the contracted in the istisna’ contract is the manufactured product for two reasons:

First: If the maker brought the product ready or he had manufactured it before the contract, and the applicant took it, then the contract is legal. This means that if what was contracted was the engagement in work, then it becomes a requisite that the property is to be made after the contract.

Second: It fixed the choice of seeing. And the choice of seeing does not fix only in selling the property. Therefore the sold is the manufactured or the manufactured property.

We think what the majority of scholars believed, i.e. that what is contracted is the manufactured product is correct. Because it is established that if the manufactured came out unlike the description, then

the choice of leaving it is fixed with the maker and does not deserve hire from the applicant. Because if the contracted was work, then he deserves wages for his work.

Ibn Al Hamam mentioned that *istisna'* has similarity to leasing and he said: "For a suspicion of rent, we said it is nullified by the death of one of them".

That means the similarity between the leasing and *istisna'* as seen by Ibn Al Hamam makes them share the rule of repealing the contract by death. This is apart from selling, whose rules are valid on the successors in case any of the contracting parties passed away.

Summing up in this connection, the substantial difference between rent and manufacture stays at the fact that manufacture is attributable to the manufactured property; while the hire is attributable to the work. Therefore in *istisna'* the material for work and the work from the maker, while in hire, the material is from the applicant and the work from the maker. It was mentioned in the Indian legal opinions: It is concluded as hire in the beginning and becomes selling at the end, one hour before delivery.

The Difference Between *Istisna'* and Salam:

There is great similarity between the two; rather there is no different between *istisna'* by its linguistic meaning i.e. ask for making, and *salam* with Al Malikia and Al Shafiyya and Al Hanablah. But *istisna'* by its conventional meaning with the Hanafia differs from *salam* in the following points:

First: Ibn Wahba Al Zuhaily thinks that selling in *salam* is a debt held by security; it is either measure, weighed, cultivated or approximate numerical. Selling in manufacture is property and not debt like making furniture, a shoe or wearing a garment. It means there is difference between the conceded in *salam* and the made in manufacture. The

conceded is suspended as loan without interest; but the manufactured is property ordered to be made.

We already mentioned that Al Hanafya most likely consider, the contracted in manufacture is the property desired to be made and not the work; and they called the sold in salam and istisna' sold in security; but if work was conditioned there it is manufacture. As we have seen in the definition of Al Kasani.

Second: It is stipulated that salam must be postponed by a fixed time. Manufacture does not stipulate postponement even if it was linked with a fixed time. According to Al Hanifa, it is salam and not manufacture. The two companions: Mohamed Ibn Al Hassan Al Shaibany and Abu Yousif differed in this and they mentioned that the postponement by a fixed time which is made for speedup, there is no objection to it. This will be clear later on.

Third: With the Hanafya and others, salam is a requisite contract. But istisna' is not requisite with the Hanafya majority of scholars; and it is requisite with some of them.

Fourth: In salam it is stipulated to extend the capital at the contract council with the Hanafya. But istisna' does not stipulate the supplying of capital at the contract council, but it can be paid at any time from the beginning of the contract. This is a substantial difference that separates between the natures of the two contracts, we mean the istisna' and salam contracts. They are similar by virtue of the absence of the contracted. They are also similar by virtue of the requisite of the accurate description of the property to be made.

But they differ at the point of the condition of paying the capital at the contract council. That means the non-payment of capital at salam contract council, nullifies the salam, contrary to istisna', which does not stipulate a fixed time for the payment of the capital. For this reason, many applicants

and makers must be aware of this point. That means they must be careful as to the kind of contract whether it is applicable to the conditions of manufacture, then they do not have to extend the price, or the condition of istisna' are not applicable, or rather the condition of salam are applicable; then they are object to extend the price.

This is the essence of the existence of istisna' as a separate contract. The Hanafya do not stipulate extending the price, which the other doctrine scholars such as Malikya, Shafiya and Hanabla when they add it to salam and they do not distinguish it from istisna' and thereby they stipulate all the conditions of salam on it. The more important condition is the payment of the price in the contract considered by Al Shafiya and Al Hanabla or one the limits of two days from the date of concluding the contract with Al Malikya.

If the makers, such as the owners of smith and carpentry workshops and the different factories who are required to make manufactured properties dealt with it according to the opinion of the scholars, they would be obliged to pay the price on all the contracts of istisna'.

This of course is impossible in all circumstances, especially nowadays when it is connected to probable stalling on the part of the makers, since they will not be in a hurry to manufacture, and their knowledge that this is connected with collecting their dues. The slowdown of work inflicts great harm to the beneficiaries. This can only be raised by adapting the opinion of Al Hanafya, and distinguish istisna' from Salam. Then the matter will not require the condition of extending the price or else; but the matter will be subject to the agreement of the two parties on the method of payment.

We refer to the contemporary effective practice of the Sudanese craftsmen. istisna' contracts concluded between the owners of smith and carpentry workshops, and their clients, stipulate that the raw material is to

be supplied by the maker; and he pays its price by reasonable installments. This practice agrees with the Hanafy doctrine. Therefore we say in this situation: since the peoples' customs run on this manner, then it becomes suitable to adopt the Hanafy doctrine in istisna', the way it was adapted in the personal status at the religious courts. Thus the hoped for benefit will be fulfilled without inflicting harm on the makers in case they adopted the Maliki doctrine which conclude the contracts on the basis of salam.

Chapter Two

Lawfulness of the Commission to Manufacture (Istisna')

The Hanafia spoke in details about the lawfulness of the istisna' and they permitted it favorably (istisna') due to the transaction of the people in it through the different ages through it contradicts with the analogy. Some Fuqaha'a spoke about the side of its lawfulness and we noticed that some of the fuqaha of the Sunna, with the exception of the Hanafia, did not dedicate separate researches, on the lawfulness of the istisna', save some phrases which passed which they were talking about salam transaction formula. Therefore, we will review the viewpoint of the Hanafia on the lawfulness of the istisna' relying mainly on the information registered in their certified looks and then we will follow that with the quotations mentioned in the books of the other fuqaha' on this subject.

First: The viewpoint of the Hanafia on the Lawfulness of istisna'

The Hanafia consider that istisna' is permitted (istihsaan) due to the transaction of the people on it through the different ages though analogy prohibited that as long as it is regarded as a sale of a non-existent commodity at the time of the sale. Below we copy some of their statements they had mentioned in their books about the lawfulness of the istisna':

Al Kasani said that according to analogy, istisna' is not permissible because it is a sale of a commodity which is not available an existent at the time of sale and it is, therefore, not considered as a salam.

Prophet Mohammed (pbuh) had restricted the sale of commodities, which are not under the immediate possession of the seller, and the Prophet (pbuh) had permitted the salam contractual formula. The istisna' is permitted (istihsaan) due to the unanimity of the people on it because they do that in different eras without any denial. And Prophet Mohammed

(pbuh) said, “My nation never gathers at a stray.” The Prophet (pbuh) also said “What the Mushins have seen as a good thing it is good and what they see as a bad thing it is bad.” In accordance with that hadeeth, the analogy will automatically be abandoned and the (ijma’a) adopted. Therefore, the analogy was neglected in the case of the admission to the bathroom with a specific rent without determining the duration of the Showering and the Quantity of water that will be consumed.

The fuqaha’a of the Fundamentals defined the analogy as “a demonstration of judgment on a matter to the judgment of which is not stipulated by attaching it with another matter that has a known judgment stipulated in the Qur’an and the Sunna.” They also defined analogy as “The attachment of a matter the judgment of which is not stipulated in the Qur’an or Sunna with another matter which has a stipulated judgment due to their combination in the cause of judgment. The principles of fiqh for Abu Zuhra 218 the istihsaan, according to the Hanafia, were defined by Al Karakhi as follows:

The diligent person might change his mind to issue a judgment on a specific case in the same way he had ruled over its similarities due to a stronger argument that entailed the abandonment of the first judgment “Abu Zuhra 262.

Abu Zuhra commented on that: “Istihsaan means the judgment way me contradicting with an on-going rule over a matter that makes the violation of that rule coinciding with the Shari’a” The previous reference 262.

Al Sarkhasi said in his book, the Mabsoot: “If a man commissioned another person to manufacture shoes or pots or cups of copper etc..” According to the analogy, this is not permissible because the contract involved something that was no existent and the sale of such non-existent commodities was prohibited. The analogy was abandoned due to the transaction of people, a major factor of the fundamentals of religion

owing to the hadeeth of Prophet Mohammed (pbuh) “The matter which is seen by the Muslims as a good thing is good with Allah.”

The Prophet (pbuh) also said: “My nation never gathers at a stray.” Al Sarkhasi also added that the Prophet (pbuh) had commissioned a man to manufacture a ring and shrine. So if these incidents were confirmed, then any reference to the analogy will automatically drop: So the rest of the Hanafia followed the same path in analyzing the lawfulness of the *istisna*’ due to the transaction of the people in it though the analogy was not ratified by them.

The Viewpoint of the Malikia

As we have mentioned before, the Malikia did not dedicate a separate research addressing the lawfulness of the *istisna*’. But they discussed the viewpoints of the former *fuqaha*’a about the handicrafts within the context of this speech about the *salam* contractual formula. We will examine, in the following analysis their viewpoints on the *Salaf* of the handicrafts.

It was mentioned in the Grand book of the Imam Malik narrated by Imam Sahnoun for Imam Abed Ar Rahman Ibn Algasim, “What is the fatwa of Imam Malik about a man giving an order to manufacture to another one to make a wash basin or a jar or a cap or a pair of shoes or a bottle or a saddle or something that the people use in their markets such as utensils and properties? He described his utensil and fixed a far date so that the transaction becomes a *salam*. Will that spoil the deal because he fixed that far date for delivering the capital. Or will not be a *salam* or a type of sale?

He said, “I see that if he fixed a far date for the commodity he wants to use and makes that on guarantee with the manufacturer who will manufacture, and the commodity is according to a specific quality and he has no available sample to show him and he also sets no conditions on a

certain person to manufacture the commodity, and if he delivers the value after one or two days, then the salam will be permissible. And it is binding upon the person who commits himself to it if the deadline for the delivery of the commodity comes and he has to fulfill his obligation in accordance with the specified conditions. If he strikes a far date for the delivery of the capital, and the matter remains as it is, then the transaction will be spoilt and it automatically becomes a debt according to Imam Malik. If he doesn't strike a deadline for the delivery of the capital and he sets conditions to manufacture it himself or by a certain person, this transaction will not be considered as a salam because this man transacts in a guaranteed debt with that person and sets conditions to be made by him because he delivers his money to him. He doesn't see whether or not that man will transact a salam within that date and manufacture the commodity for him. This is a mere deception because if the manufacturer dies before he hands over the commodity to that man, the salam will be null and void and the manufacturer benefits from the money he received in a deceptive way. If a man transacted in a salam with another person to manufacture for him a commodity from steel, wood or copper, which he had shown him before the manufacturing, this was not permissible according to Imam Malik because that man didn't know whether or not he would hand over these materials (steel, wood or copper) to that manufacturer and the salam transaction formula wouldn't apply in a specific material. Therefore, it was not permissible according to Imam Malik.

It was mentioned in the Introductions of Ibn Al Walid Ibn Mohammed bin Ahmed bin Rushd, "The salam transaction formula in the handicrafts is divided into four main sections as follows:

First: The man dealing in the salam does not set conditions on the work of the person who he employ and he does not specify or determine the material from which the commodity is to be manufactured.

Second: He sets conditions on the work of the person whom he employs and he determines the material from which the commodity is to be made.

Third: He does not set conditions on the work of the person whom he employs and he does not determine the material from which the commodity is to be made.

Fourth: He sets conditions on the work of the person whom he employ and he determines the material from which the commodity to be made.

The first type of transaction is a salam formula which, according to the salam judgment, is not permissible without specification of work, striking the dead line and delivering the capital.

The second type of transaction is not regarded within the salam formula of transaction and therefore it is considered a type of sale and hiring in the sold commodity. If he know the way in which that commodity came out of work or he was able to return it to work or he managed to make another commodity from the material specified for manufacturing, then it was permissible and he has two options either to common the work or delay the provided that it should be within three days or so. If he chose to commence the work, then it would be permissible provided that he had to delivery the capital in advance or postpone the delivery of the capital. If the work was to be delayed for three days or so the advancement of capital is not permissible on condition that the work should be started.

The third form of transaction is also considered a type of sale and hiring in the commodity sold though it is permissible to hasten the work agreed upon or postpones it for three days or so by delivering the capital in advance or delaying it.

The fourth type of transaction is not permissible because it involved two contradicting factors due to the fact that the material from which he commodity it was to be made was guaranteed and it was prohibited due to the condition of determining a particular person to carry out the Job.

It is permissible to transact in the salam formula to manufacture a commodity which its manufacturing is incomplete. From this clause it is permissible to deal in the salam to complete the manufacturing of an incomplete commodity which was started in a factory and moved to another factory or more. These are phrases describing the Malikia viewpoint on the permission they have granted for the salaf transactions in handicrafts.

As long as we have been busy analysing the aspects of lawfulness of the salam transaction formula, we will postpone talking about the detailed conditions (aid down by the Malikia on the perfect salaf formula in handicrafts for another research. But what we would like to notify is that we intend to show their viewpoints on the permission of some of the handicrafts and it is noted that they didn't mention the permission of the 'istisna' in its terminological meaning according to the Hanafia. It is therefore, possible to say in view of the previous texts that the contract with a specific manufacturer to make a specific commodity, provided that the raw material availed by him is permissible according to the Malikia, and on condition that the transaction should take place within the framework of the Salam formula of transaction, is unanimously agreed upon by the Sunna of Prophet Mohammed (peace be upon Him).

The Shafea Viewpoint on the Lawfulness of istisna'

As we have mentioned before, the Shafi' did not dedicate as a separate research on this subject but they talked precisely on some aspects of the salam of the handicrafts where they ratified some types and prohibited others.

Below are some of their viewpoints on this subject:

Al Nawawi said that among the different utensils there is the superior and inferior one like (the mineral bottles, flagons,) and it has two different rulings. The first is not permissible because the utensil has different parts and here the salam transaction formula is not allowed, e.g. leather. The second ruling is allowed because it is descriptive like the squared bottles and wide bottles.

What we have mentioned on the Shafea viewpoint addresses the perfection of the salam transaction formula with regard to some handicrafts which are affordable, to control their specification like the squared bottles. As for the utensils, which are difficult to control their specification, like the superior and inferior types of the utensils i.e. flagons and the like, the transaction has two faces; one of which is permissible where as the other is prohibited.

In this way, the Shafi' did not explain their viewpoint on the *istisna'* in its terminological meaning mentioned in the Hanafia fiqh. Now we can notice from the previous statements that the contracting with a specific manufacturer to make a specific commodity provided that the raw material should be provided by him is something permissible according to the Shafi' on the condition of the salam transaction formula as it is the case with the Malikia.

The Hanabla Viewpoint on *istisna'*

The Hanabla did not discuss the principles of this subject in a detailed and separate way. Alternatively, they addressed the subject in the salam manual where they ratified some types in the salam of the handicrafts and prohibited some others. Below are some of the statements that clarify their viewpoint on this subject:

Mohammed Ibn Mufleh said in his book “Alfuraa” “The commodities which are deliberately mixed and distinct like clothes spanned from two types, shoes, arrows, spears crossbows etc...”

Ali Ibn Suleiman Al Magdassi, the writer of a correction to Alfuraa, said “The second question is that; is the salam transaction right or wrong when it applies to shoes, arrows and spears? I confirm the disagreement in this issue and I know that the ruling in this question is like the ruling on textiled clothes, which has two types in this doctrine.

The writer of the Alfuraa correction has said that the textiled clothes (spinned) in two types have two rulings; namely permission and prohibition and the writer preferred permission.

In the light of the above, the salam transaction formula applicable to shoes, spears, feathered arrows and the crossbows is permissible according to the Hanabla.

Some of what the Hanabla have mentioned about the prohibition of the salam transaction formula in some of the handicrafts is what Ibn Gudama has stated, “the salam formula is not allowed in the different types of utensils which have different heads and middles because the specification is not applicable to them. The other say, it is permissible to apply the salam have on condition that the height is carefully adjusted and the upper and lower parts are tightly circled because the difference have is not that big.

It is noticeable that the previous text has spoken about the salam and we have mentioned before that the (istisna’) is a contract that is independent of the salam transaction formula. Therefore, the mentioning of this text has been made only to shorten the distance between the two types of contract and not be cause this text proves the permission of the istisna’ in its terminological sense mentioned by the Hanafia. On the contrary, the

text is considered as an evidence of the lawfulness and legitimacy of the salam transaction formula.

Therefore, and in the light of the above mentioned analysis we can rule that the order to manufacture a commodity by a certain manufacturer provided that he ought to avail the raw material of the commodity is something permissible according to the Hanabla but that should take place under the conditions of the salam transaction formula.

Viewpoints of Some of the Latest Fuqaha' on the Lawfulness of the Salam Formula

Some of the latest fuqaha' have talked about this subject and they clarified some of its principles and all of them have been influenced by the Hanafia doctrine and that is attributed to the fact that the Hanafia alone have went into details when they demonstrated the factors and principles governing the istisna'. On the light of the above, we consider that when Dr. Assidig Addarir came across this subject in his research on the 'deception' he said that he was speaking about the "The istisna'" relying on the Hanafia doctrine because the Ahnaaf doctrine is the only doctrine which spoke in details about this subject.

It is, therefore, noticeable that all of the latest fuqaha'a have spoken about this subject relying on their analysis on the Ahnaaf doctrine Judging that it is permissible "favorably" though their ruling contradicts with the analogy. But Dr. Addarir differed with the Ahnaaf doctrine with regard to the permission granted by them for the "The istisna'".

Below we state the viewpoint of Dr. Assidig Addarir on this subject:

Dr. Addarir said that, "The istisna', as it is apparent, is a contract for something non-existent and according to the analogy by the majority of the fuqaha'a it is prohibited, but it is permissible "favorably" due to the transaction of the people with it throughout all the ages without denial. This is unanimity from the majority on its permission as Al Kasani has

stated. I believe that the *istisna'*, although it is a sale of something non-existent, it is a sale of something not available but it is guaranteed to exist and there is no deception in that, particularly according to the viewpoint which makes it a binding contract as long as the commodity required is according to the required specification, as we shall see later. Therefore, according to analogy, this contract is permissible because it is regarded as a compensatory contract free of deception. In the light of the above, it is evident that Dr. Addarir believes in the permission of the *istisna'* according to analogy because it is considered a sale of something non-existent but guaranteed to exist in the future. In this respect, Dr. Addarir differed with the majority of the Ahnaaf. It is also noted that one of the recent fuqaha'a, namely Dr. Wahba Al Zuhaili confirmed that the *istisna'* is permissible (favourably), in contradiction with analogy like the Hanafia.

Below are some of his statements on this subject:

Dr. Wahba Al Zuhaili said, "As the analogy necessitated its being permissible because it is regarded as a sale of something non-existent like the *salam* formula of transaction. The sale of such a thing that is not available at the time of transaction is totally prohibited according to the hadeeth of Prophet Mohammed (Peace be upon him) in which he forbade the sale of a commodity which is not under the immediate possession of the seller. On the other hand, it is permissible with the Hanafia due to the transaction of the people with this type of sale throughout the ages without denial from any one.

In addition, Dr. Wahba emphasized that this type of transaction is lawful according to all doctrines of the Malikia, the Shafia and the Hanabla provided that it should be based on the *salam* formula of transaction. In this case, the same conditions of the *salam* apply like the delivery of the whole capital in front of the board of contract. This type of transaction is

perfect in the viewpoint of the Shafiya whether or not the date of delivery of the manufactured commodity is fixed.

The Conclusion and Our Viewpoint on the Subject

All of the viewpoints which we have cited here on the lawfulness (of the *istisna'*) have unanimously agreed on the lawfulness and consequently the permission of *istisna'*. However, these viewpoints have differed with respect to the way in which the permission was to be granted. The majority of the Hanafia have (favorably) ratified and approved it though that contradicted with analogy. Al Sarkhasi of the Hanafia stated that *istisna'* is permissible, though this judgment contradicts with analogy, nevertheless, he didn't rule out the possibility of its permission if it was proved that Prophet Mohammed (Peace be upon him) had given an order of manufacture for a person to make a ring and a shrine.

Dr. Assidig Addarir has approved it according to analogy. To demonstrate the ways in which *istisna'* is permissible, we will discuss hereinafter the three previous aspects of its permission and then we will conclude with our viewpoint on the subject.

First: The Viewpoint of the Ahnaaf supporters:

We have stated before, the Ahnaaf have permitted *istisna'* though that contradicts with analogy because of the need of the people and their transactions with it necessitated that.

In order to demonstrate the intention of their statements we must first define the concepts of each of the analogy and *istisna'* before we discuss our comments:

A) The analogy:

The analogy, according to the fuqaha'a of the principles of religion, is demonstration of judgment that has no text in the Qur'an or the Sunna by attaching it with another judgment which has a text from the Qur'an and

the Sunna due to the combination between both judgments in the cause which either has a text or is derived.

The analogy is primarily based on the linking between things through similarity. The analogy has four elements: First, the fundamental, which is the source of the text that demonstrates the judgment. Second, the branch, which is defined as an object, the judgment of which has no text neither in the Qur'an, nor in the Sunna. Third, the judgment that the analogy proceeded to go over from the fundamental to the branch. Fourth, the cause of judgment combined between them. In order to clarify the Ahnaaf viewpoint regarding the contradiction between the analogy and the istisna' we mention below the following implementations based on the previously mentioned elements:

- 1) The basis on which the Hanafia built their judgment of prohibition of the istisna' is the hadeeth of Prophet Mohammed (peace be upon him) to Hakim Ibn Huzam in which the Prophet (pbuh) ordered him not to sell a thing which is not under his immediate possession.
- 2) As for the branch (the object) the judgment of which has no text neither in the Qur'an nor in the Sunna is the subject of the istisna' where there is no a plain text that prohibits or permits it according to the conditions laid down by the Hanafia which bind the manufacturer with both the manufacturing and the raw material.
- 3) The judgment exceeding the fundamental to the branch is the prohibition of the sale of a commodity that is not under the immediate possession of a man and consequently this judgment oversteps the istisna' and prohibits it on the argument that it is similar to the sale of things not under immediate possession of the seller.
- 4) The cause combined between the istisna' and the sale of a thing not timely possessed by a person is the non-availability of the sold or the manufactured commodity at the time of concluding the contract.

Moreover, there is no plain text that excludes the istisna' as is the case with the salam transaction formula and the hiring formula. Therefore, the istisna' remained as it is, prohibited.

B) Istihsaan:

After we finished highlighting the aspects related to the definition of the istisna', its elements and implementations we move forward to the definition of the istihsaan and its implementations to say:

The fuqaha'a of the fundamentals of religion have defined the istihsaan as "the refrain of the diligent from a judgment on a case ruled in a way like its similarities, to an even more stronger way of judgment that necessitates the refrain of the diligent. In other words it is an abandonment of a plain analogy in favour of a concealed analogy for a reason that makes the refrain from the plain analogy to the concealed a spirit of the Shari'a.

In application of that, the Hanafia, as we have reviewed before, consider that istisna' is prohibited according to analogy because it is like the sale of a commodity not timely possessed by the seller. But they changed their minds from this plain analogy to the concealed one and permitted it in accordance to istihsaan. The face of istihsaan here is resembled by the need of the people to deal with istisna' and transacted according to it since the beginning of Islam without denial.

This means that as if they saw that the interest achieved by the istisna' amounts to the degree where analogy is to be abandoned for it.

In the light of the above-mentioned information, it becomes apparent the intention of the Hanafia when they said that istisna' is permissible according to the istihsaan through it contradicts with analogy.

Second: The Viewpoint of Dr. Addarir:

We have already examined the viewpoint of Dr. Addarir on this subject which can be summed up in his statement that the istisna', although it is a

sale of a commodity that is non-existent at the time of transaction, it is a guaranteed sale within the fixed deadline specified in the contract and there is no deception in it. Thus, it is permissible according to Dr. Addarir because it is regarded as a compensatory contract free of deception.

For further elaboration, the meaning of his phrases can easily be understood by differentiating between the sales of the non-existent but guaranteed to exist within the deadline specified in the contract. Therefore, Dr. Addarir believes that the non-existent when so ever guaranteed to exist will be a sale free of deception and consequently will be permissible.

In the light of the above, *istisna'* is permissible in his viewpoint. And according to analogy, taking into consideration the fact that the commodity contracted upon to be manufactured is not existent at the time of concluding the contract, due to the guarantee of its existence in the raw material from which the commodity will be manufactured and in the availability of the manufacturer who will make the commodity. Consequently, there is no risk in this contract by experience.

This viewpoint of Dr. Addarir coincides with that of Ibn Algaim Al Jawzia in some of its sides with differences in the details.

That is because Ibn Algaim had a general viewpoint that opposes all the statements of the *fuhaha'a* that perceive that some of the contracts like the *salam*, the hiring and the like are not permissible but they are deemed permissible as exceptional cases.

For further demonstration we examine his viewpoint below:

In an answer to the below mentioned question to Ibn Algaim Al Jawzia, “With the exclusion of the analogy and based on what has become definite by a text or a say of all or some of the Prophet’s companions and it might be unanimously agreed upon about the purity of water if dirt fell

on it – against the analogy- and the salam and hiving contracts all of which against the analogy. Is that right or wrong?”

Ibn Algaim said, “There is nothing that contradicts with analogy in Shari’a.” He went ahead in this respect saying, “He who saw something against analogy in the Shari’a that something is against the analogy which is established inside himself and not against the perfect analogy in the same matter.”

This is a general quotation for the viewpoint of Ibn Algaim. But as he had discussed the collection of subjects where the fuqaha’a had claimed that they differed from the analogy and he demonstrated their faults in their analogy of these subjects, we quote here his speech about the salam transaction formula for the similarity between that type of transaction and the istisna’ and his analysis on the sale of the non-existent in general. Below are some of the quotations that clarify the matter. Ibn Algaim said, “The salam formula of transaction coincides with analogy, he mistakably imagines the inclusion of the salam within the hadeeth of Prophet Mohammed (pbuh): “Don’t sell what you don’t possess.” Because it is a non-existent sale and the analogy prohibits that. The correct is that it coincides with the analogy as it is a guaranteed sale on warranty, describable and affordable to hand over often and it is like the compensation for the benefits in hiring which matches the analogy as mentioned before. The analogy of the salam on the sale of a commodity that is not available which no body knows whether or not the seller will be able to hand its over to the buyer who is at risk and deception and that will spoil it altogether. Our lord has created the rationales to differentiate between the sale of the non-existent and not affordable to collect, and the salam which is normally guaranteed to be delivered in future. The combination between both subjects is like the combination between the sale and the usury.

As for the hadeeth of Prophet Mohammed (peace be upon him) to Kakim bin Huzam, “And don’t sell what you don’t possess,” can be interpreted in two ways:

First to sell a specific commodity not timely possessed by him but possessed by another person; he sells it and endeavours to collect and hand it over to the buyer.

Second: To intend to sell a commodity that is not within his ability to get though it is on warranty.

Moreover, Ibn Algaim has dedicated a chapter on the falsity of those who said the sale of the non-existent is not permissible, where he said, “the judgment that said the sale of the non-existent its not permissible, has two sides to answer:

First: Restriction of the righteousness of this judgment as there is no proof for it in the Qur’an or the hadeeth or any statement by any of the Prophet’s companions that the sale of the non-existent is not permissible, neither in a general quotation or general meaning. On the contrary, the Sunna ratifies the sale of some non-existent commodities and prohibits the sale of some of the existent items. The cause is not in the prohibition or the non-existence or the availability of the item. What the Sunna has stipulated is the sale based on deception, i.e. the commodity that is beyond the ability of the seller to deliver.”

Ibn Algaim continued to say, “The other side we say the Shari’a corrected the sale of the non-existent in some aspects. The Shari’a permitted the sale of fruits after they appear and the sale of corn after ripening and it is known that the contract is to be made on the existent and the non-existent that is not yet created.

Anyone who examines the previous quotations of Ibn Algaim concludes that the salam formula of transaction doesn’t contradict with the perfect analogy and he who said the salam is against the analogy is mistaken.

This statement of Ibn Algaim, though it was about the salam, has a similarity that arises between the salam and the istisna'. We have seen when the Hanafia spoke about the istisna' how they linked it with the salam and said the istisna' is permissible contrary to analogy like the salam, except that the salam is excluded by texts and the istisna' excluded on the istihsaan due to the transactions of the people.

Therefore, owing to the similarity between them, we see that all the arguments mentioned by Ibn Algaim about salam match the permission of istisna'. In addition to that, the arguments quoted by Ibn Algaim to falsify those who prohibited the sale of the non-existent are wholly applicable to the falsification of those who said istisna', according to analogy, is not permissible because it is a sale of a non-existent item. The reason behind that is that non-existence does not totally prohibit the deal as said by Ibn Algaim.

Absolutely, there is not a single text, neither in the Qur'an nor in the Sunna that prohibits the sale of the non-existent. The only text was regarding some cases of selling the non-existent in which there is a risk and deception. This type of sale has two sides:

First: The sale of a commodity possessed by another person who is doubted whether or not to agree to this sale and he might have sold it before he gets his approval.

Second: The sale of a commodity that is beyond his ability to hand over and this is deception also. Considering the arguments mentioned by both Ibn Algaim and Dr. Addarir we can conclude that istisna' is permissible according to analogy. This viewpoint has strong justifications, thus we support it and consider that it surpasses the other arguments.

Third: The viewpoint of Al Sarkhasi:

He said as we have quoted about him before, "In the hadeeth the Prophet Mohammed (Peace be upon him) he had given an order to a man to

manufacture a ring and a shrine. If this proved definite then every analogy will have to be abandoned”. A careful study of this phrase concludes that Al Sarkhasi believes that if the incident of manufacturing the ring and shrine proved true, then every opposite analogy will be disregarded.

Before, we carry on discussing this question, we would like to point out that we have traced the hadeeths that indicate the manufacturing of the ring and the shrine for Prophet Mohammed (pbuh) and found them perfect. Below are some of them: Al Bukhari narrated for Sahal said, “Prophet Mohammed (pbuh) sent word to a woman, “order your boy, the carpenter to make a wooden stool for me to sit on”.

Al Bukhari also narrated for Nafe Ibn Abdallah who said that Prophet Mohammed (pbuh) ordered to the manufacture of a ring of gold and the people also manufactured rings of gold. The Prophet (pbuh) ascended the shrine and praised Allah and said “I had that golden ring made and I would not wear it and he threw the ring and the people also threw theirs. Imam Ahmed Ibn Hanbal narrated for Imam Anass Ibn Malik who said, “Prophet Mohammed (pbuh) manufactured a ring and said, “We have made a ring and engraved our letter on it etc...”.

From the above-mentioned hadeeths it became evident that the Prophet (pbuh) had actually ordered the manufacturing of a shrine and a ring.

In the light of the view of Al Sharkhasi we can say that *istisna'* has become definite by texts and its permission and lawfulness is based on the text and analogy will not work being opposite to the text. Someone might say, even though the previous hadeeths are correct and definite, they don't prove the legitimacy and lawfulness of *istisna'* in its sense visualized by the Hanafia because these hadeeths tell the incident of the manufacturing of a shrine by a carpenter and manufacturing an engraved

golden ring. But they don't tell us about the way in which the manufacturing took place.

Perhaps it might have taken place through hiring the boy carpenter by the Prophet (pbuh) and then it becomes a hiring contract and not a manufacturing one. It might, also, have been through an order from the woman to her boy carpenter to volunteer to manufacture the shrine for the Prophet (pbuh). The third probability is that *istisna'* might have taken place through a *salam* contractual formula, and the Prophet (pbuh) might have delivered the value of the manufactured shrine to the boy carpenter and fixed a deadline for the delivery of the shrine. What might apply to the manufacturing of the shrine might also apply to the manufacturing of the ring. In other words, all the probabilities applicable to the manufacturing of the shrine might also be applicable to that of the ring.

However, another person might argue that the hadeeth is a general proof according to which all the former examples were permissible and the other examples were deemed permissible by other evidences like the *Salam*, which was approved by the famous Salaf hadeeth, "He, who granted a debt ought to grant it in a known measurement".

The hiring was permitted by proofs from the Qur'an and Sunna, so since both of the *salam* and the hiring were deemed lawful by a pronounced text, then their legitimacy should be derived from that text and these hadeeths remain as a proof of the lawfulness of the rest of examples that had no pronounced texts. It is, therefore, concluded, if so is the case, that the *istisna'* in its description previously mentioned is to derive its lawfulness from these hadeeths and the matter, after all, bears many aspects.

The Summary of our view of the lawfulness of *istisna'*

We believe that the combination between all aspects of lawfulness of the *istisna'*, which are perceived by the fuqaha'a, is possible as long as we

intend to arrive at a conclusion that judges the lawfulness of the *istisna'*. It is, therefore, of no harm to reach that judgment by relying on any pronounced text or by the analogy. Nevertheless, we consider the argument of those who judged the legitimacy of the *istisna'* according to analogy as a strong and sound argument. This very argument should be the centre of the fatwa (Islamic legal ruling) in all similar cases. We see, at the same time, that the texts enlisted as evidence for the manufacturing of the ring and the shrine by the Prophet (pbuh) can be useful to mention in this respect even though they don't stand as a direct proof for the lawfulness of the *istisna'* in its definition and conditions laid down by the Hanafia. They can be useful to prove its legitimacy or at least indicate the advantage of the *istisna'* in any shape it might take and indicate its position since the dawn of Islam and the contribution it had made to manufacture a shrine the preaches of which still echoed in the ears of mankind till the Day of Resurrection. Thus, all types of the *istisna'* with their different terminologies remain valid and applicable.

All in all, it is possible to conclude in this respect that the *istisna'* is permissible and lawful in all its aspects and permissible, also, because it is a kind of contract which was not prohibited by any text neither from Qur'an nor from Sunna. The rule in contracts and conditions is the permission and of perfection and no prohibition imposed on contracts without texts from Qur'an or Sunna or according to analogy as the majority of the fuqaha'a believe. As Ibn Algaim has demonstrated there is no a pronounced text or a perfect analogy that invalidate the *istisna'* and the evidences that prove that the rule in contracts and terms of transaction are not confined to specific aspect as stated by Ibn Algaim and Ibn Taimia e.g. "O you who believe. Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent.

And do not kill yourselves (nor kill one another) surely, Allah is most merciful to you” “O you who believe fulfill (your) obligations”.

In the texts of the two verses mentioned above, there is a proof of the lawfulness and legitimacy of every kind of trade transacted on mutual consent. This is the general rule unless it is prohibited by a text from the Qur'an or the Sunna or a perfect analogy, otherwise it remains as it is, lawful and permissible. Due to that rule no obligation will be deemed prohibited except the usury or a transaction in which the buyer is deceived, tricked and fooled or eat up the poverty of others unjustly as that is prohibited by the Qur'an and the Sunna. With the exception of that, the rest remains lawful. Hence, the *istisna'* is in fact a contract of sale or a trade transacted on mutual consent between the two parties (the manufacturer and the buyer). It is therefore regarded within the lawful trade and there is not absolutely, any term or analogy that rule it unlawful or prohibited. Therefore, it is perfect and permissible in the height of the above mentioned evidences.

The mode of the istisna':

In the following discussion we are going to analyze all aspects pertain to *istisna'* according to the arguments of the different fuqaha beginning first with the Hanafi.

A. The Mode of the istisna' according to the Ahnaaf:

The Hanafia see that the image of the *istisna'* begins when the buyer says to the manufacturer, “manufacture a commodity for me.” Here he specifies its description and its value and the manufacturer accepts the offer. It was mentioned in the “Indian fatawi”, its example is to say to the shoe maker, “Make a pair of shoes for me from your leather to fit my feet,” and he shows him his feet, “for the value of so and so.” Or he says to the goldsmith, “Make a ring for me from your silver,” and he specifies its weight and shape, “For the amount (value) of so and so.”

Al Kasani said “the mode of the istisna’ is to say to the manufacturer of shoes or utensils or so and so: “Make a pair of shoes or utensils from your leather or copper for the amount (value) of so and so And he specifies the sample, the quantity and the description and the manufacturer says: ‘yes’. From the above, it becomes evident that the mode of istisna’ according to the Hanafia is that the buyer requests the manufacture to make a specific commodity and they mutually agree upon its specifications and value provided that the raw material should be availed by the manufacture and they set the examples of shoes rings, utensils for that.

B. The mode of the istisna’ according to the Malikia:

There are two methods for istisna’ mentioned in the books of the Malikia which can be entered in the istisna’ though they differ with it with respect to the definition of terminology specified by the Hanafia.

The First Method:

It is the manufacturing of a washbasin or a jar or a cap and the like, after carefully outlining the specification and delivering the capital or paying it within a couple of days as maximum. After making the commodity to be manufactured on guarantee by the manufacture according to a certain specification and the manufacturer has nothing available to show him, provided that the buyer doesn’t condition a particular person to do the task. So this method is like the salam but it has similarity with the istisna’ and can be related to it and may be regarded as one of its types and methods and we have named it istisna’ from a linguistic point of view and not from the Shari’a viewpoint mentioned by the Hanafia and others.

The Second Method:

There is a utensil, e.g. a washbasin, which is incomplete and its owner requests a specific manufacturer to complete it on condition that the manufacturer should avail the raw martial to complete the work. It is provided that he (the manufacturer) should start the work immediately

and this method is named salam; but it is a specific sale in which the work is to commence immediately. If we examine the two methods previously mentioned in the Mudawana and the commentary or Al Dusogi and the other books of the Malikia we realize that they are different from istisna' in its terminological meaning as defined by the Hanafia according to the demonstration to follow and according to its method copied from their books. The first method conditions the terms of the salam contract and the other conditions the immediate starting of work, and these terms are not found in the istisna' in its terminological definition according to the Hanafia. Hence, these two methods are called istisna'.

C. The mode of the istisna' according to the Shafea and Hanabla:

Both of the Shafea and the Hanabla have agreed upon a unified mode for the salam formula of transaction to be applied in the handicrafts. They permitted the manufacturing of the commodities the quality and specification of which can be controlled. Their arguments multiplied in some of the superior and inferior commodities where some permitted them and some others prohibited them. Their differences focused on whether or not the superior and interior items can be quality-controlled items like the flagon and bottle. Those who saw the possibility of controlling their quality, have permitted the salam formula of transaction in them and those who saw otherwise didn't permit the formula of salam to be applied here.

The salam formula of transaction in the handicrafts is not considered as an istisna' according to the definition of the Hanafia. But it is possible that istisna' can be included in it in case of the work being conditioned. Nevertheless, the salam contradicts with the istisna' in its detailed definition due to the conditions being laid down on the availability of

some factors not necessarily to be available in the case of the istisna' as a specific terminology.

In spite of that we enlist the salam as if it is an istisna' just for comparison and similarity though we are fully convinced that it is different from the istisna' as an independent contract interns of rules and principles. So the trader is requested to consider this carefully.

D. Keeping up with Modern Technological Progress

The viewpoints which we have thoroughly examined about the various types of the istisna' and its related examples express the ways of thinking of the latest fuqaha'a of doctrines and explore the different types of handicrafts prevailing in that era. But the rapid advancement in the industry, nowadays, to an imaginable extent makes it essential to renew our old Islamic fiqh and update the fiqh approaches in order to absorb the new technological progress and study the possibility of manufacturing these new inventions. In this respect we have considered some of the latest thoughts which presented a new vision for the istisna' written by Dr. Abd Alhalim Dwaise about the general rules deduced by some writers based on certain definitions for the istisna'; the various modes and examples indicated by the fuqaha'a for the istisna' here been useful for us as follows:

1. They mentioned the examples of the istisna' prevailing in their era which were the normal examples and familiar to the people. Al Sarkhasi, Al Kasani, Ibn Alhumam and Alsamragandi all of them mentioned the shoes. All of them brought the same image e.g. shoes, washbasin, cap etc...

But during the later ages of the Islamic Khilafa the civilization began to spread out and newly manufactured commodities appeared specially in the era of the Othmani Khilafa. Due to that expansion in the istisna', the

examples of the commodities manufactured also expanded to include textiles, weapons and sailing boats etc...

2. The raw material. The raw material used in the manufacturing of these commodities comprises copper and leather. But some fuqaha'a like ibn Alhumam mentioned steel, glass, frying pans made of baked bricks.

3. Finally, this doesn't mean that the new inventions and raw materials will not be incorporated in the term of the istisna' like aircrafts, missiles, automobiles, furniture and building materials along with micro-instruments like watches etc... and others needed in this modern era. These are acutely necessitated by the socioeconomic, agricultural and industrial circumstances to be dealt with within the framework of the istisna'.

The above quotation indicates the possibility of manufacturing the modern items when so ever the prevailing custom for acquiring it is the istisna'. It is noticeable that the modern industries are currently dealing with it in two methods. First is the method of sale, which is widely spreading. Second is the method of the istisna', which is relatively little used but existent to some extent where we find some of the knowledgeable houses laying down certain specifications for some commodities in accordance with their conditions and those of their clients and after that conclude contractual agreements with the big factories for the manufacturing of these commodities.

Hence we are in a position to say the transaction is under way to manufacture these commodities according to the terms of istisna'. Someone might pose a question here: Assume that the transaction is taking place in these commodities according to the istisna'. Is it possible that the manufactured items will match their technical specifications and the istisna' becomes perfect? Or will the quality of these products be difficult to control due to the complications in their industrial process?

Sheikh Mohamed Najeb Almutie answered this question when he was speaking about the salam formula of transaction in handicrafts and said: “So many new inventions have come into existence, nowadays, where they were not known to our ancient ascendants like, the radio, the television, the fridge and the electric washing machine. Each of these is absolutely different from the others in installation, diverse components and spare parts, which are difficult enough to control by the contractors. It is possible to specify the type and the trademark of the product and there is a catalogue attached to it showing the parts quantities, dimensions and power of these devices provided that the two contractors are expert enough with the secrets of these products like the certified dealers for the manufacturing and distribution of these devices. In this case the salam contractual formula can be applied between them.

Alternatively, if the dealer is not fully aware with the detailed specifications of these devices where a new motor (engine) for example can be replaced by an old one or of low quality, then the salam formula will not prevail or even be spoilt due to the lack of knowledge about the detailed technical components of such products.

The statement previously mentioned by Alshiekh Almutie though it has something to do with the salam contractual formula in the handicrafts it is tightly related with the istisna’ formula of interrelated in the detailed specification of the commodity required to be manufactured which totally eliminate ignorance of the technical components of these commodities as we shall discover when we speak about the terms of the istisna’.

We can benefit from the statements mentioned by Sheikh Almutie and conclude that the istisna’ formula can be applied in the modern micro-instruments on condition that the transaction should take place between the expert engineering contractors. This contractual formula of istisna’ should be carried out relying on designing a detailed sample of the

product in question and then the work may start. The formula of the istisna' will become perfect if the manufactured commodity matches the conditions and specifications of the sample. In case of the violation of any of the conditions of the contract and it becomes difficult to remedy, then the contract will be considered as incomplete and consequently becomes unbinding. All these aspects will be explained when we speak about the necessity of the istisna', but we only intend here to demonstrate the image and scope of the istisna' and the possibility of changing it due to the change of era, development of industry and the requirements of the people.

Chapter Three

Elements of the istisna'

Istisna' is considered one of the contracts where the general rules of the contracts are applicable and therefore its elements are the same elements of any contract. We will examine below some statements maintained by the fuqaha'a consisting of the elements of istisna' and after that we demonstrate these elements:

Sheikh Ali Fikri said when he was speaking about the istisna', "The elements of the istisna' are the affirmation and the acceptance like all sorts of contracts".

We notice that Sheikh Ali Fikri has limited its elements in the affirmation and the acceptance and therefore he doesn't include the general elements of the contract as defined by the majority of the fuqaha'a. In other words he discusses its elements in the same way as in the Hanafia doctrine which restricts the elements of contract into affirmation and acceptance.

The correct is to deal with the general elements of the contract as dealt with by the majority of the fuqaha'a which compresses the following:

- (1) The two parties of the contract.
- (2) The item (commodity) contracted upon.
- (3) The formula of the contract.

If we apply the above mentioned elements on the istisna' we will find its elements according to the majority of the fuqaha'a are:-

The two parties of the contract,

The subject of the contract,

The formula of the contract.

First: The two parties of the contract (the manufacturer and the commissioner).

The manufacturer is the person who performs the manufacturing of the commodity and the commissioner is the person who requests the

performance of manufacturing. The two parties of the contract should be legally competent to behave rationally and according to the Shari'a. The competence of the performance is confined only to the national matured person who is legally not declared incompetent. Hence if any one of the two parties proved to be legally incompetent then the contract of the *istisna'* will not be concluded.

Second: The commodity contracted upon (the subject of contract).

It is the item or commodity which is requested by the commissioner of the *istisna'* (the buyer) to be manufactured by the manufacturer. The commodity contracted upon also comprises the value agreed upon.

Third: The formula of the contract which means the request of manufacturing and the response of the manufacturer to the request be it in writing or in an understandable signal from the deaf which gives the meaning of the request of manufacturing or the affirmative response to the request of manufacturing.

The formula of contract is formed from: the affirmation which is either pronounced or signaled by one of the contractors and the acceptance which is either pronounced or signaled by the other contractor.

An example for that; if a person said to a manufacture make a pair of shoes for me for twenty pounds and he specified the quality of the shoes and the manufacture said to him I accept, then the say of the person who requested the shoes "make shoes for me" is called the affirmation and the saying of the manufacturer "I accept" is called the acceptance. The affirmation may also come from the manufacture like this, "Would you please allow me to manufacture a pair of shoes with the measurement of your feet provided that you pay me twenty pounds for that?" In this way the *istisna'* contract between the two parties will be concluded.

Therefore, it becomes apparent from the above analysis that the elements of the *istisna'* are not only limited to the affirmation and acceptance

aspects as seen by the Hanafia because these two aspects express the will and intention of the two parties of the contract, in other words the formula of the contract.

Conditions of the lawfulness of the istisna’:

We will highlight the viewpoint of the Hanafia on the conditions of the istisna’ then step forward to clarify the point of view of the Malikia on the Salam of the handicrafts and finally conclude by illustrating the viewpoints of the Shafea and the Hanafia altogether. Our comments will focus on selective aspects of these viewpoints.

First: The Hanafia viewpoint on the conditions for the permissibility of istisna’:

The Ahnaf had three conditions for the permissibility of istisna’ and they were:

- (1) Demonstration of the category, type, quantity and specification of the required item to be manufactured.
- (2) The item required to be manufactured should have a prior manufacturing transaction.
- (3) Abu Hanifa set the condition that no fixed date is to be determined for the completion of the commodity in question and his companions differed with him in this respect.

Below are some of the quotations mentioned in the Hanafia books on this subject:

Al Kasani said, in his book the wonders of handicrafts, “The conditions for the permission of the istisna’ comprise the demonstration of the category, type, quantity and specification of the commodity required to be manufactured because without these elements the istisna’ will not be known. The other condition is that the istisna’ should be within the framework of the commodities the people used to transact between themselves like; steel, copper, glass, lead shoes, sword head, knives

crossbows, all weapons, washbasins and jars etc... The istisna' is not permitted in the textiles because the analogy prohibits that and it is promoted in the textiles by (istisna') due to the transaction of the people in it. Another condition is that, there is no date to be set or fixed for the delivery of the commodity required and in case of striking a fixed date then the istisna' turns into a salam transaction formula and consequently the salam conditions prevail like the delivery of the capital (value) in front of the board of contract and there is no option for each of them if the manufacturer delivered the manufactured item in the optimum way conditioned in the contract of salam this is the viewpoint of Abu Hanifa. Abu Yusuf and Mohammed said, "This is not a condition and it is an istisna', any way, whether or not a date of delivery is fixed.

If a date of delivery is fixed in the istisna' to manufacture a commodity unappreciable to the istisna' like textiles then the transaction because a Salam transaction according to all of the Hanafia. Al Kasani goes a head saying the intention of the companions of Abu Hanifa in their statement, "The prevailing custom in the istisna' is to determine of fixed date for the delivery of the commodity – with this statement the companions meant the hastening of the work and not the postponement of the claim and this doesn't exclude the transaction from the istisna' transaction formula.

It may be said that the fixing of date may mean the delay of the claim and it may also mean the hastening of work and this doesn't exclude the contract from the formula of istisna' with a great deal of doubt and probability opposite to what the istisna' can't stand because what the istisna' cannot endure, the fixing of date in it doesn't mean the hastening of work. Therefore, the date fixing should mean the postponement of claiming the debt according to the salam formula. According to Abu Hanifa, if a date of delivery of the commodity required is fixed, then it because a salam formula as it is a postponed contract of sale on guarantee

and the significance of contracts is not in clauses and words it is in the meaning of these clauses and words don't you notice that the sale contract will be completed when the transfer of ownership or the hiring phrases are pronounced and so is the case with the marriage contract according to our doctrine therefore it became a salam formula because the istisna' formula doesn't endure to embody. The delay here means the delay of debts because it is set for the postponement of the claim which doesn't exist exception a contract where there is a claim like the salam contract because there is not debt in the istisna'. Don't you notice that each of them has the option to refrain from work on mutual agreement and if the transaction was a salam transaction then the conditions of the salam contract should be observed and if these conditions were found, then the salam contract would be perfect otherwise it would be null and void.

Ibn Abidin said in his commentary "we have restricted the deadline to that period because if it is less than one month it will become istisna' had the transaction taken place otherwise it will become invalid if he mentioned that for the respite purposes and if it is for expedition purposes like saying you have to finish it tomorrow or after tomorrow then it becomes a valid transaction".

It is evident from the quotation mentioned previously by Ibn Abidin that the striking of the dead line (fixing of date of delivery) is only for expediting the performance of work if the dead line fixed for the performance of work is less than one month that does not invalidate the formula of the istisna'. this coincides with the viewpoint of the two companions on the deadline mentioned for expedition purposes which we have already copied from Al Kasani's viewpoint.

As for the Indian fatawi it is mentioned that, "if he mentions the fixed date for the purpose of tomorrow or after tomorrow, it will not be regarded as a salam as all of them have stated".

It is understood from the statement of the Indian fatawi that it has copied the unanimity of the Hanafia that the fixed date mentioned for the purpose of expedition doesn't convert the istisna' formula into a salam one and it remains a formula of istisna' as it is.

Al Sarkhasi discussed this subject of the fixed date after he demonstrated the viewpoint of Hanafia and that of the two companions. He said, "If he set a fixed date provided that the type of manufacturing was known, then it would be a salam formula of transaction and the salam conditions were to be applied; e.g. delivery of the capital of the salam in front of the salam board. The master of the salam had no choice if the capital was delivered by the other party. This, according to Abu Yusuf and Mohammed, is an istisna' formula because, without mentioning the fixed date, it is regarded as a permissible and not a binding contract. Mentioning the fixed date in the contract will not be binding for the partnership contract because mentioning the fixed date is extend in the contract. The delaying of the claim will not alter the contract from type to another and if the istisna' formula will change into a salam formula by not mentioning the fixed date, then the salam contractual formula will change into an istisna' formula of transaction. If this is a salam formula it will become a null and valid salam because it is conditioned that the manufacturing of the commodity is to be done by a certain person and this condition spoils and invalidates the salam contract. Abu Hanifa said. "This is a sale on debt and that sort of sale doesn't presale except in the salam formula as if the word of salam is pronounced and to demonstrate the previous statement we say the commodity required to be manufactured is a kind of sale and the fixed date doesn't apply except in debts".

Al Sarkhasi proceeds forward supporting the viewpoint of Abu Hanifa and says, "What is to be considered is the intention and the meaning of the words said by the person who requests the manufacturing of the

commodity according to which the contract differs and not according to the words and phrases. Don't you notice that if he said I transfer the ownership of this commodity to you for ten dirhams this would become a sale and if he said live in this house for a month this becomes a living contract. Thus, we conclude that what is to be considered is the intention and meaning of words and phrases. Hence, the salam formula of transaction is nearer to permission than the istisna' formula and each of them is favoured but the influences of the salam are widespread and it is permitted in the commodities which the people transact between themselves and those in which the people don't transact. In the two examples mentioned above the salam contract is meant by the two different phrases except it was not possible to make it a salam contract and the mentioning of the fixed date makes that a salam contract. Date fixing delays the claim and that doesn't exist before the contract becomes binding and the binding of contract differs between the salam contractual formula. The istisna' formula of transaction and the date fixing is an indicator that the contract is a salam contract and the mentioning of manufacturing means the demonstration of the technical specification of the commodity and so if it is mentioned the acceptance of contract will be compulsory.

Therefore, the statement of the two companions of Abn Hanifa that it is a salam contract in which the manufacturing of the commodity is conditioned to be carried out by a certain person is a false statement. What the two companions have said, the salam without mentioning the fixed date of delivery will not because an istisna' is like the marriage of enjoyment which will not become a marriage if the period specified for it is committed and the true marriage contract will because an enjoyment marriage if the period is mentioned.

Al Sarkhasi went further saying that, “this is the case if the date fixing is for respite purpose and if the date fixing is mentioned for expedition purpose like tomorrow or after tomorrow then it will not be salam contract, because the mentioning of the fixed date is for the completion of the work and not for delaying the claim of delivery.

Alhindawi said, “if the mentioning of the fixed date comes from the person who requests the commodities it is for expedition and the transaction is not a salam transaction and if the fixed date is mentioned by the manufacturer himself then it is a salam contract. Ali Fikri said when he was speaking about the influence of date fixing on the istisna’ “if the fixed date is less than one month the contract is valid through istisna’ due to the custom provided that the istisna’ is well known to the people and if it is unknown then it has two options: if the date is fixed only for expedition then the contract is valid and considered an affirmative sale because the date fixed for less than one month is a very short period and therefore, it is considered within the reach and if it is for respite purposes, then the contract is invalid because the istisna’ is not a transaction between people and consequently cannot be considered as an affirmative perfect sale because the respite of the manufacture is in the same rank of condition as the delay of delivery of the commodity by the seller which is an intervening condition that makes the contract null and void.

The magazine stated some different elements for the istisna’ as follows, “Any commodity which was dealt in according to the istisna’, the formula of the istisna’ is absolutely perfect and proper and for any commodity that was not dealt according to istisna’ and the fixed date is mentioned, the contract becomes a salam contract and the salam conditions are to be applied. But if the fixed date is not mentioned, the contract is an istisna’ contract.

It is deduced from the above mentioned statements that the summary of the conditions of the istisna' as seen by the Hanafia are composed of three conditions.

The First Condition:

The origin, type, quantity and specification of the commodity requested to be manufactured are to be clearly determined so that the contract becomes a known contract in which ignorance and deception are negated. If the commodity needed is shoes, then their measurement should be determined together with the material I (e.g. whether leather or plastic) and the shape of the shoes; are they open from the upper side or from both sides or is it closed from all sides?

All these specifications which carefully define the commodity should be clearly specified and well shown.

If the commodities manufactured are one of the modern devices that appeared nowadays in the markets like radios, TV, which are very complex in manufacturing, then their different technical components should be illustrated in a drawing and in words (e.g. a catalogue) by specialized electrical engineers as we have explained before. If the product manufactured has a model according to which the manufacturing process takes place and it is well known to the technicians, like the Japanese National television set, which is widely known that it is made according to a single, certain pattern, then it can directly be demanded from that particular factory and in accordance to the former specific model known to both parties.

The Second Condition:

The commodity requested to be manufactured should be one of those commodities in which the transaction is according to the formula of istisna' takes place like the articles made of steel, lead and glass. They prohibited the manufacturing of textiles because the istisna' transaction

formula doesn't apply here. Perhaps this was prevailing in the past due to the difficulty experienced in manufacturing identical textiles owing to the primitive manufacturing equipment used. In fact, the transaction between people is closely related with the prevailing custom and as we have mentioned before, the custom nowadays does not restrict the manufacturing of automobiles and aircraft and the like and the same custom doesn't prohibit the manufacturing of textiles due to the possibility of producing identical types of textiles. The manufacturing of textiles is now widely spreading despite the great complications that accompany the production process. In the light of the above we can expand the analysis by enlisting the previously mentioned examples of the newly invented devices and machineries.

The Third Condition:

The viewpoint of Imam Abu Hanifa is that it is not demitted to strike a fixed date for the istisna' like saying to the manufacturer: make a pair of shoes for me on condition that you hand it over to me after sixty days for example. Abu Hanifa considers the sparking of a fixed date in the istisna' will spoil the formula of the istisna' and consequently altar the contract from istisna' to a salam contract where the conditions of the salam formula should be applied e.g. delivering the capital in front of the board of contract in addition to the contract being binding upon both parties. The two companions, Abu Yusuf and Mohammed, differed with the Imam in this viewpoint on the argument that this is not a condition and we have already clarified the aspect of difference between Abu Hanifa and his two companions with respect to the mentioning of the fixed date, so please go back to it.

Second: Conditions of the Handicrafts Salam According to the Malikia

We have copied some texts from the grand fiqh book and we have also copied some statements from Ibn Rushd and the commentary of Aldusougi where they discussed the salam transaction formula in the handicrafts. We can, now, say that we have copied these texts in order to demonstrate the way in which the salam contractual formula becomes permissible in some handicrafts according to the viewpoint of the Malikia and we neglected the comments on details as they are related to the conditions of the salam formula in the handicrafts.

We would like to draw the attention of the reader to the fact that the salam formula in the handicrafts has two types:

- (1) The salam transaction in the “specified guaranteed” commodity in which the manufacturing process was begun in one factory and was moved by the owner to another factory for completion like washbasin.
- (2) The salam transaction in the handicrafts specified on warranty.

Below we examine the different conditions pertaining to each type:

First: salam conditions in the “specified guaranteed” commodities:-

The specified guaranteed commodity as we have already explained is a commodity the manufacturing of which was started in a factory and not completed. The owner of the commodity requests a certain manufacturer to finish the manufacturing process provided that the manufacture has to supply the raw material and this is one of the conditions of the covert salam: to begin immediately manufacturing the commodity as it is regarded as something on guarantee which entails immediate start and a type of sale in kind in which the immediate starting of work is conditioned and it is figuratively called salam.

Second: The salam conditions in handicrafts specified on guarantee:

The grand book of (the Mudawana) of the fiqh has outlined general condition for the salam of the handicrafts which we will amine below after we demonstrate the mode and scope of the salam in view to combine it with the conditions of the salam. From a certain manufacturer to make a cap or a pair of shoes or accommodate which the people used to manufacture in their markets and in these types of the handicrafts the following conditions are outlined by the Malikia:

- (1) To fix a far date for the manufacturing of the commodity he wants to use and we mean by fixing a far date is the far date in which the salam transaction becomes quoted the following statements “The salam is to be postponed for a fixed date” Ibn Arafa conditioned the perfect salam with fixing a known specific date “more than half a month” look at his phrase. “more than” and he, Ibn Arafa, summed it up in six statements. Ibn Algasin said in the Mudawana “it is not permitted for a man to sell what he doesn’t possess for something in kind or an offer except that it be on Salaf formula guaranteed for a fixed date during which the market fluctuates and Imam Malik did not see any limit in that and I consider the fifteen days dead line is the least period in town or village”.

The previous text explains the viewpoint of the Malikia on the least period for the dead line for delivering the commodity and as we have clarified it is the period during which the markets change which is specified by Ibn Algasim for fifteen days.

- (2) To guarantee the delivery of the required commodity within that fixed date in the description specified by the two parties. In other words the manufacturer is committed to hand it over on the fixed dated agreed upon which necessarily means that the commodity is affordable to be handed over.

- (3) To determine the specification according to which the commodity is to be manufactured, provided that no specific material available with the manufacturer is to be determined for the manufacturing of the commodity.
- (4) No specific manufacturer is to be determined for manufacturing the required commodity.
- (5) The value of the manufacturing is to be paid before the board of contract or after one or two days as maximum and if it exceeds two days the salam contract will spoil and become invalid.

We can now sum up and say, after we have review the previous conditions, that all we have mentioned is included in the salam contractual formula and exceeded from the istisna' formula of transaction in its. Previously stated meaning and it is just mentioned above for comparison only, so the attention of the readers is drawn accordingly.

Third: The salam conditions in the Handicrafts according to the Shafea and Hanabla viewpoints:

Both of the Shafea and the Hanabla did not discuss the salam as a terminology. But they spoke, when they were discussing the salam conditions, about some examples which might belong to the salam of the handicrafts which was discussed by the Malikia. The examples for that they demonstrated the salam transaction in the different, superior and inferior utensils and the square buckles. Therefore, and in accordance with that the salam conditions in the handicrafts outlined by the Malikia are the same conditions outlined by them for the salam formula. Due to that we will examine below the salam conditions as seen by the Malikia and Hanabla:

- (1) Both of the Malikia and Hanabla here agreed that the capital (value) is to be delivered in front of the board of contract. In the light of this condition if a man contracted with a manufacturer to make a certain

commodity for him like a pair of shoes, then the value of this pair of shoes should be handed over before the members of the board of contract, otherwise the contract will become null and void.

Both the value and the commodity value should be of a type in which women are allowed to transact. On the other hand women are allowed to transact in every thing except usury items.

(2) Both the Shafea and Hanabla set the condition that the capital transacted in should be a debt on guarantee and not in specific kind and us it in specified kind like say, I want to transact with according to the salam formula on this utensil or this cloth for the amount of....

This is an incorrect formula.

This condition doesn't apply to the istisna' because the commodity required to be manufactured according to the istisna' formula was not available at the time of the contract but requested to be manufactured by contract and this conditions does will not be available. Here a question arises if a person said to a manufacturer make a sword for me from your steel and he pointed to the steel and delivered the value to him, would that be considered as an include salam and consequently not permissible according to the fundamentals of the Shafea and Hanabla, or would that be considered as a debt on warranty as long as the sword was not available at the time of the manufacturing request?

The answer to this question was not tented in the books of the two doctrines. But the thing understood from their fundamentals in the prohibition of the specific kind salam, this approach is not permitted because the commodity needed to be manufactured though it is absent in specification, but apart of it is specified and that is the raw material which will later on be converted into a specific manufactured commodity. Therefore, it is considered not permissible in their viewpoints and we

have already mentioned that the Malkia have prohibited the Salam transaction formula to take place in this way.

(3) Both the Shafea and Hanabla have agreed that the commodity transacted in should of a type that can be adjusted with specifications and description according to which the value of the commodity varies like the messed items e.g. corns and the asked items e.g. cotton and the planted items e.g. textiles and so on. As the Hanabla have explained he should estimate to the standard where the deception is negated i.e. a measurement in measured items or a weight in weighted items or a count in counted items and the like. Alshafea expressed there viewpoint saying that as discipline may take place in descriptions of the scaled, measured and counted familiarities in the same way previously mentioned discipline also should take place in the measured similarities. Therefore, the two doctrine permitted the salam transaction formula in the square buckles and the utensil which have specific length and width and they have differed with regard to the different, superior and inferior utensil like flagons etc... some of the Shafea and in these utensil provided that their highest are to be adjusted and some of them (Shafea in these utensils as we have mentioned before).

All these controller sorties one due to the doubted possibility of adjusting their specifications i.e. those who see the possibility of adjusting their specification permit the salam transaction in these utensils and vice versa.. It is meant by adjusting the specification, the possibility of measuring these items in a specific way. It is well known that many measurement techniques have been inverted, nowadays, which facilitate the adjusting of all types of the handicrafts. Moreover, many mathematical operations have, also, been discovered that can be used in the measurement of these commodities.

- (4) The Hanabla conditioned the description of the commodities in which the transaction takes place in the way that can alter the values of these commodities like mentioning the, type, country of origin, model, and quality and the information which have no influence to the Hanabla. For example, if a man transacted according to the salam in an automobile, then he has to mention its place of origin i.e. Japan, Britain etc... and he also has to mention its model or the year of manufacturing. All these information are deemed necessary to mention in order to make price fixing of these commodities feasible. For example, if the price fixing is affected by mentioning the place of origin and the year of manufacturing these commodities, then it is necessary to mention that i.e. people used to prefer the Japanese products.

Alternatively if the price fixing of these commodities has nothing to do with mentioning the place of origin or the year of manufacturing, then it is not necessary to mention that information.

- (5) The Hanabla conditioned the fixing of a known date for delivery which will have an effect on the value of the commodity required to be manufactured e.g. a month and so and if the fixed date of delivery is determined as immediate or after one day, then the salam transaction formula is not permissible according to Hanabla. As for the salam formula of transaction with a fixed date of delivery till the harvest of the crops is permitted by Imam Ahmed Ibn Hanbal where he said "I hope it is not bad". This statement by Ahmed Ibn Hanbal explains as if the Imam has permitted the salam formula which has a fixed date of delivering the commodity till the season of harvesting the crops as it is regarded as a known fixed date of delivery.

The companions of the Imam have different viewpoints in this regard where some of them permitted that and some others prohibited it. Ibn

Gudama supported the viewpoint of the prohibitory relying on the statement of Ibn Abbass, “Don’t transact in sale till the harvest and don’t transact in sale except for a specific known month.

The Shafea permitted the immediate salam formula, likewise they permitted the postponed type of salam provided that the date of delivery should be determined and not unknown, like till the harvesting season or so and it is permitted to specify the Arabic, Persian or Romanian months for that date.

(6) The Shafea set a condition for the immediate and the postponed salam formula to mention the place of delivering the commodity manufactured if the delivery will take place in an area which doesn’t fit for delivery like uninhabited area. If the delivery place is convenient or safe for delivery and the salam transaction was a postponed transaction but the commodity required to be delivered is too heavy to carry, then it becomes a condition to determine a place where this commodity should be delivered. This condition drops if the place is convenient and safe for delivery and the salam is immediate or postponed and there is no hardship or difficulty in carrying the commodity ought to be delivered. The place of the contract can be specified as a place for delivery and they where the delivery of commodity should take place.

There is no specific place for the delivery of the commodity according to the Hanabla doctrine save that the place of the contract is not convenient or safe for delivery, otherwise the delivery should take place in the place of contract and if they conditioned another place then that place is where the delivery should be done.

It is noted that there is an agreement between the Hanabla and the Shafea on this condition and the formula of transaction not being approved by the Hanabla.

(7) Another condition for the salam set by the Hanabla which necessitates that the commodity required to be delivered is generally available in its position because if it is clear in position then the delivery can easily take place at the time specified for delivery.

This condition is set by the Shafea in different words as they condition the ability of delivering the commodity in question without much difficulty when it must be delivered and the delivery is not affordable without much difficulty except that the commodity is generally available. Then, as if the two conditions mentioned above are only one condition differently worded.

Istisna' and the salam of handicrafts:

The above mentioned analysis for the conditions of salam according to the Shafea and Hababla demonstrate and explain the conditions they laid down for the general salam formula and all of these conditions are applicable to the salam formula in the handicrafts which we have already indicated that has similarity with the istisna' formula of transaction at it can be an istisna' provided that some conditions are to be committed and the work is conditioned.

Due to the abovementioned analysis, Dr. Wahba Al Zuhaili has gone to say that the istisna' is permissible according to the Shafea, Hanabla and Malikia with the same conditions of the Salam. He said, "The istisna' is perfect according to Shafea, Hanabla and Malikia on the Salam conditions and the customs of the people. The same conditions apply in both the salam and the istisna' formulas. One of its conditions is the delivery of all the capital (value) in front of the board of contract and the istisna' is perfect according to the Shafea whether or not a date is fixed for the delivery of the manufactured commodity and it is also perfect according to them if the istisna' is an immediate formula of transaction".

It is understood from the statement previously quoted by Dr. Wahaba that he has considered the Salam of handicrafts mentioned in the phrases of the Shafea and Hanabla as an istisna' but with conditions different from those stated by the Hanafea. The correct is that the handicrafts salam is not an istisna' as it is a salam very similar to istisna', in our viewpoint.

Fourth: Our viewpoint in the conditions of istisna':

We consider that the conditions mentioned in the salam of the handicrafts have nothing to do with the istisna' formula of transaction in its terminological uses previously mentioned. The same thing applies in what the Shafea and Hanabla have mentioned when they were speaking about the salam conditions in the different superior and inferior utensils which we have said that it is very familiar with the salam of handicrafts according to the Malikia. They are conditions pertaining to the salam contract as a contract independent of the istisna' as will be clarified later. Therefore, we exclude these conditions from those of the istisna' and the we comment on its conditions mentioned by the Hanafia which include the three following conditions:-

- (1) Demonstrate the origin type, quantity and specification of the manufactured commodity.
- (2) The commodity manufactured should be one of the commodities in which the transaction takes place.
- (3) Abu Hanafia set a condition of no specific date is to be determined in the istisna' formula of transaction contrary to his two companions.

Below we examine the above conditions and explain our viewpoint on each of them.

(1) The first condition: Clarify the origin of the manufactured commodity:

According to our viewpoint, this condition is mandatory and essential because the deception possibility cannot be averted without mentioning this condition. Because if the origin, type and quantity of the commodity in question are not specified clearly, then nothing can be realized about the matter which can inflict the contractors with grievous ignorance from which there is no way out except by mentioning the above information about the commodity required.

(2) The Second Condition: Transaction:

We consider that whenever the manufacturing of some items is required even in a limited quantity, then this type of manufacturing is permissible though these types of handicrafts are not commonly used or manufactured by the general public of the people. This judgment is based on the viewpoint which we have already mentioned in which we consider the *istisna'* a permissible contractual formula as there is neither a text that prohibits it nor a perfect analogy which rejects it as we have illustrated before. In the light of the above and relying on the power of the will which is supported by a multiple of the Qur'an verses and hadeeths the *istisna'* remains on its fundamental principle, a permissible formula of transaction whether or not a transaction took place in the commodity manufacture before, because the restriction on transaction, as we regard, has a similar restriction on the power of will which is not supported by any evidence. Therefore, we don't see any justification for mentioning it as long as the matter remains so. The viewpoint which we have adopted here we haven't invented as it is also adopted by the magazine of the judicial judgments which is legitimized according to the Hanafia Doctrine. We have notified to the text published by the same magazine on this subject where the item No. 389 has said "Every commodity in which

the transaction took place before according to the formula of the istisna' then the same formula of the istisna' becomes an absolute transaction formula. As for the commodities in which the formula of the istisna' was not applied before, it becomes a salam formula of transaction if the fixed date is determined in that formula and consequently the salam conditions should be applied, but if the fixed date was not determined it would become an istisna'.

The previously mentioned text indicates that the magazine views the commodity in which there was no previous transaction, it would become a salam formula if the fixed date was not determined, otherwise it would be regarded as an istisna' transaction formula. The last part coincides with our doctrine in not conditioning the factor of transaction which also matches the viewpoint of Dr. Assidig Addarir because he considers the istisna' as a permissible formula according to the analogy and since his viewpoint is so, there will be no sense for conditioning the transaction factor. Notwithstanding, we noticed that Dr. Addarir has enlisted the transaction factor among the conditions of the istisna'. We would like to point out that the conditioning of the previous transaction in presses the reader with prohibition according to the analogy and the permission, which is based on the factor of transaction. Therefore, we are of the opinion that Dr. Addarir should have not enlisted the factor of transaction among the conditions of the istisna' so that he would be in conformity with his previous principle. It permitted the istisna' according to analogy because as long he has permitted it relying on analogy there would be no meaning for imposing transaction as an essential condition for istisna'. That is so because if he insisted on the transaction factor as a condition for the istisna', as if he agreed with the Hanafia in their viewpoint which prohibits the istisna' relying on the analogy, so the readers attention is drawn to this point.

According to our viewpoint, the conditioning of previous transaction in the commodity is not practical because, nowadays, there are so many invented industries a great deal of which have no previous examples and inspire of that these commodities are highly demanded by people.

For example, the industry of automobile which is widely spreading now, is proceeded by samples of the same products, but a certain person may require the manufacturing of a car with special specifications i.e. if there is a palavered person requesting the manufacture of a car that well suits his physical condition whereby he can drive it without using his legs (using hands only). So he request that specific factory to make that special car with these special specifications which match his physical condition. This type of car, if manufactured, would be absolutely unprecedented, inspire of the fact that this particular person is in a bad need for such car. So can we day to that person it is not permissible for you to manufacture such a car? Of course this I not national and we don't have any strong argument to deny him the right of manufacturing such kind of car.

Because if deny this right for him on the argument that there was no previous transaction as such, that there was no previous transaction as such, we will not be able to find any text neither from Qur'an nor from Suuna which supports the factor of transaction as an essential condition for the *istisna'*.

Thus, the condition of transaction is, more or less, a condition based on the *ijtihad* only laid down by the Hanafia fuqaha'a because they believe that the *istisna'* is prohibited relying on the analogy, there for they tried to find away out for the perfection of their judgment and they did find it in the transaction factor. The Hanafia are faced with the arguments which we here already mentioned on the permission and lawfulness of the *istisna'* so the reader is kindly requested to go back to them.

The third condition set by Imam Abu Hanifa and opposed by his two companions, Mohammed and Abu Yusuf, is the condition of not fixing any date for the delivery of the commodity. We reject this unpractical condition and support the viewpoint of the two companions which is also supported by Dr. Wahba Al Zuhaili as it is considered a doctrine that recognizes the practical circumstance especially at this time in which the date fixing has an import role to play in the manufacturing process. That is so because the manufacturers are faced with a wide rang, of handicrafts of mass production which they ought to carry out in due time. So they classify these commodities according to priority on the first come first served basis. This criteria become of ritual importance in the execution of work and time has greater influence in fulfilling the other obligations of the manufacturers. The owners of the commercial companies and the managers of the banks used to transact with factories on behalf of their clients and commission these factories to manufacture certain types of products for the interest of their clients. They five dates for the delivery of these products by the factories in accordance with the date they have already determined to hand over these products to their clients. If the manufacturing of these products delayed, for any season, that delay will automatically have adverse effects on the overall performance of the company and consequently on the relations of that particular company with its clients. This will undoubtedly cause huge losses to the company in question, therefore each company determines a specific date of delivery on which it can establish owners of these companies to avoid date fixing, this will cause a great deal of embarrassment to them and date fixing is an essentiality necessitated by the times and not the fiqh.

The Conditions of the istisna' in Law

As we have already mentioned the Sudanese Civil transaction Act has addressed the istisna', formula within the general framework of the terms

of contrasting which includes, according to the definition of law, the istisna' formula of transaction and others. In the light of the above, the law has laid down the general terms of as follows.

(1) Substantive conditions which include:

- A. Description of the subject of the contract, type and quantity. If the subject of the contract is a specific kind of commodity on which a man has contracted with a certain factory to manufacture, then it would be mandatory to demonstrate the type of that commodity and all the specification with which the ignorance is eliminated.
- B. The way of performing the specific work.
- C. The period specified for finishing the work, which corresponds to the fitted date according to the fuqaha.
- D. Determination or fixation of the value.

The above are the conditions mentioned in article 270 of the Sudanese Act for the year 1984. If we examine these conditions carefully, we will find some of them coincide with the conditions laid down by the fuqaha' specifically the first condition which speaks about the description of the subject of contract and its type and this condition is agreed upon by all the fuqaha' and the others are an addition to the previous conditions mentioned by the fuqaha' e.g. the way in which the work is performed and the period during which the work will be completed. As for the determination of the value, although the fuqaha' have not included it among the conditions of the istisna', yet it matches their viewpoints and principles and therefore it is an essential and acceptable condition.

B. Nominal condition:

The nominal condition was laid down by the civil transaction Act for 1984 in article 280/2 where it said, "with the exception of the terms of contracting prevailing at the time of issuing this Act, the terms of contracts should be concluded in writing and renewed in writing.

Therefore, the terms of contracting mentioned on the manufacturing and that mentioned on the work will not be legally completed except after being written on satisfaction of the substantive. Conditions previously mentioned in each contract initiated after the issuance of the civil transaction Act in 1984. As for the nominal condition mentioned above it has no similarity in the Islamic fiqh, but we believe that this condition has a great benefit for the people specially at this time as the industries are getting more complex and the components of the manufactured commodities are becoming more multiple the thing which creates many disputes between the contractors pertaining to the specifications of the manufactured commodities e.g. are they according to the required standard? Or is there any defect? This kind of dispute will not be settled without the condition of writing which demonstrates specifically the required standard of specifications. These kind of disputes can be suspended pending the referral to the written contract and it is of no doubt that this particular condition secures the general interest and the realization of the general interest is the final intention of the Shari'a.

The Description of the istisna' formally:

Here we are going to discuss the description of the formula of the istisna'. is it a binding contract according to which the manufactured is compelled to finish the manufacturing of the product and the other party of the contract is obliged to receive the commodity manufactured whenever it is manufactured according to the required specifications, or are both or each party of the istisna' have the choice to break up the contract?

Before we start discussion, we would like to point out that we will examine the Hanafia viewpoint on this subject: and then comes our preference for the selected viewpoint from all sides. We also draw the attention of the reader to the fact that all of the Malikia, Hanabla and the Hanafia have not dedicated separate researches to discuss the topic of the

istisna' description or only other principles, which address this topic. Due to that we harvest found any of their viewpoints, which we can quote in this changed. But we can generally say as long as they have permitted one method similar to the istisna' formula, namely the salam transaction formula in the handicrafts, thus and according to that permission the judgment according to all of them is the imposition, because the salam is primarily a binding contract as unanimously a greed upon between the fuqaha'a. In the light of the above, the manufactures is compelled to manufacture the commodity and deliver it on the fixed date and the man commissioning the istisna' is obliged to receive the commodity manufactured if it came relevant to the specifications outlined.

As long as the Hanafia have analyzed this issue before, we will sum up here their viewpoints as we have mentioned.

The viewpoint of the Hanafia on the description of the istisna'

The description of the istisna' according to the Hanafia with regard to its imposition (being binding or not) is thoroughly analyzed from two sides:

First: The differentiation between whether or not it is binding before the completion of manufacturing.

Second: whether or not it is binding after the completion of manufacturing.

The second side above has more details pertaining to whether or not the commodity in question is viewed after completion of work and to demonstrate all these aspects we quite being what they have said on this topic:

Al Kasani said "the description of the istisna' is that it is an unhanding contract on the two sides before the work without difference even each portly of the contract has the option to break up the contract before starting the work like the conditioned sale where the two sellers are opted to break up the contract because the analogy entails no permission

granted for that and we have defined its permission (Istihšana) due to the transaction of the people and the imposition remains on the principle of the analogy and so is the case after the completion of work and before the commodity seen by the istisna' commissioner even the manufacturer is allowed to sell the commodity to any one else and so mentioned in the principles because the contract was not on specific commodity manufactured but signed on its similarity on guarantee. As we mentioned if the manufacture bought the required commodity from another factory and delivered it to the commissioner of the istisna' then it would be permissible and if the manufacture sold the commodity in question and the commission wanted to breakup the sale it would not be permitted. If the manufacture consumed the commodity before being viewed by the commissioned, he would just be like the seller who consumed the commodity sold before delivery, so said Abu Yusuf. If the manufacturer delivered the manufactured commodity matching the specifications conditioned, then the option of the manufacture would be dropped and the commissioner of manufacturing would be opted because the manufacturer is a seller and he has no option and the commissioner is a buyer for a commodity which he hasn't seen and so he has the option. This is so because the commodity contracted upon is non-existent in reality but affordable to be existent, thus the contract is regarded permissible and the option was valid for both of them before delivery because as we said the contract was not binding and the manufacturer on the delivery of the commodity has dropped his own option and the second party's option remained as it was. Likewise the sale in which the options of the two contractors are conditioned, if one of the parties dropped his option the other party's option remained. From the above statement we have to differentiate between two things, the description of the istisna' before the starting of work and its description after the completion of work.

The First Subject:

The description of the istisna' before the starting of work is an unbinding contract in the sense that the two parties are opted to break up the contract. The manufacturer is opted to stop manufacturing the commodity and the commissioner is equally opted to order the manufacture to stop the work. In this way the istisna' is similar to the contract of sale where the two parties have equal options to break up the sale. Also in the istisna' formula the two parties are equally opted, before the starting of work, to break up the contract or sign it and the argument on which Al Kasani relied is that the istisna' is fundamentally prohibited and it is only permitted on exceptional case and it is considered binding only on the principle of the analogy in the sense that as long as it is prohibited according to the analogy and considered permissible then it is not necessarily binding in view of its prohibited principle.

The Second Subject:

The description of the istisna' after the completion of work in which there are two methods:-

A. The first method: The manufacturer completes the manufacturing of the commodity required and he doesn't show it to the commissioner of the istisna'. the judgment on this method is the same judgment issued by Al Kasani on the previous method in the sense that it is an unbinding contractual method and the two parties have equal options to the extent that the manufacturer is permitted to sell the manufactured commodity to any other person on the argument that the contract is not valid on the specific manufactured commodity but on its similarity with respect to the specification and the guaranteed manufacturing because if the manufacturer bought a specific commodity from another person and delivered it to the commissioner and its

description was typical to that specified in the contract for the commodity required to be manufactured then it would become permissible. Owing to the above mentioned analysis, the manufacturer is permitted to sell the commodity which he has manufactured provided that he has to manufacture another one for the commissioner before vision relying on the previously mentioned argument.

B. The Second Method: The manufacturer makes the required commodity according to the required specifications and he delivers the commodity to the commissioner, in this way he drops his option by delivering the commodity, and thus he becomes committed to hand over the commodity in question. The example set by Al Kasani in this case is that of the two sellers who have equate options of slinging the sale contract or abandon it and one of the two parties forgoes his option.. here the party of the counteract who doesn't forgoes his option will be opted and the option of the second party will drop. Likewise, the commissioner of the istisna' will have the Lipton and the option of the manufacturer drops. The previous viewpoint is the littoral meaning of the narrative of Abu Hanifa – two narratives were said for him and this is one of them – and the narrative of Mohammed Ibn Alhasan Alshibani and one of two narrative for Abu Yusuf and there are two narratives one of Whid is the second narrative for Abu Haniafa, not the one previously mentioned, and the second narrative for Abu Yusuf which comes in the following way.

(A) The Second Narrative of Abu Hanifa:

Abu Hanifa narrated that if the manufacturer makes the commodity according to the required specifications, then the two parties will be

entitled for equal options in the sense that the two parties are opted to break up the contract on the argument that he views, as Al Kasani has said, that the granting of options for the two parties to drive back harmful consequences is an ultimate duty, thus the options established for them.

(B) The second narration of Abu Yusuf.

Abu Yusuf narrated that in case of the delivery of the required commodity matching the required specifications, then both parties have no options in the sense that he views the contract of the *istisna'* as a binding contract after delivering the required commodity in accordance with the required specifications.

The argument of Abu Yusuf in this case is copied by Al Kasani saying, “the narrative mentioned by Abu Yusuf is that the manufacturer has spoilt his material and cut off his leather and brought the work mattering the required specifications and if the commissioner of the *istisna'* refused to take over the commodity in question, then these would be damage and harm occurring to the manufacturer. Contrary to that, if the manufacturer cut off his leather and did not manufacture the commodity required and the commissioner said, oh I don't want that; we actually don't know whether or not the manufacturing will come matching the required specifications and the refrain from the commissioner will not be harmful to the manufacturer and so the option established.

The interpretation of the above is that Abu Yusuf is of the opinion that whenever the commodity is manufactured in accordance with the required specifications and the delivery of commodity took place, then the contract would become binding for both parties because (if we granted the commissioner the option to reject then we would be causing great damages to the manufacturer. Because if he manufactured the required commodity – shoes for example – he would be passing through two stages of manufacturing; the first is the stage of cutting off the leather

and the second is the stage of tailoring it in accordance with the specifications required by the commissioner and by tailoring the leather in the way specified by the commissioner, he makes the manufacturer lose the opportunity of designing the leather in any other different method and this is harmful to him. In case. The commissioner rejected the commodity then he would be causing be much damages to the manufacturer as the latter will not be able to sell this shoes in the way manufactured for the commissioner and thus he would be spoiling his material for nothing. The damage which might inflict the manufacturer would be lifted only by compelling the commissioner to accept and take over the manufactured shoes. This method differs from that in which the option will be established for the commissioner of the manufacturing. Here the manufacturer cuts off the leather but he doesn't tailor it in the way required by the commissioner. In this case the commissioner has the option, according to Abu Yusuf, a wing to the possibility of designing the leather in any shape required and thus there is no harm or damage which may inflict the manufacturer. This is the general meaning of the statements of Abu Yusuf.

Al Kasani preference for the literal meaning of the narration:

After Al Kasani has reviewed the formerly mentioned methods along with their arguments and justifications, he stated his own viewpoint as follows: 'The correct is the literal meaning of the narrative because in establishing the option for the manufacturer is what the *istisna'* formula of transaction has legitimized for him i.e. satisfactions of the need of the commissioner, because whenever the option is established for the manufacturer, he sells whatsoever he manufactures to another person and as such the commissioner will suffer damages and his need for the commodity in question will not be satisfied. Abu Yusuf viewpoint that the manufacturer will suffer damage if the option is established for the

commissioner is something recognized but the damage that befalls the commissioner by dropping the option is over and above the damage that inflicts the manufacturer through establishing the option in favour of the commissioner because if the manufactured commodity doesn't please the commissioner and the commissioner is requested to pay the value of it he will not be able to sell the commodity for the same value of its similar commodity and this will not be difficult for the manufacturer due to his long experience and also because if the commissioner is fined the value of the commodity added that his need is not satisfied, he would be able to attain the merits legitimized for him by the *istisna'* formula of transaction i.e. satisfaction of his need. So the option is established in his favour.

It is evident from the already mentioned quotations that Al Kasani is supporting the viewpoint that judges the option to be given to the commissioner and compelling the manufacturer with the delivery of the commodity if he manufactured it according to the contractual condition. Because he has dropped his own option according to the viewpoint of the majority of Hanafia and the distinct narrative for Abu Hanifa. The reason behind Al Kasani support for this viewpoint lies in the fact that he considers the establishment of the option in favour of the manufacturer contradicts with the rights legitimized for him by the formula of the *istisna'* because the *istisna'* has been deemed legitimate the lawful mainly for the satisfaction of the commissioner's need. Alternatively, if we granted the right of option for the manufacture, we would be granting him an opportunity to sell what so ever he manufactures to persons other than the commissioner. Hence the commissioner will be subjected to harmful damage that cannot be lifted except by compelling the manufacturer to hand over the commodity manufactured in the required standard. Thus the need of the commissioner will be driven back, though Al Kasani is of

the opinion that the manufacturer is compelled and the commissioner holds the option.

The viewpoint adopted by Abu Yusuf, i.e., compelling both parties of the contract after the delivery of the manufactured commodity, has been answered by Al Kasani in which he judged the correctness of the manufacturer being subject to damage through the option granted to the commissioner because the manufacturer cuts off his leather and tailors it and then the commissioner opted to break up the contract. But the damage that may befall the commissioner is relatively more greater if it happened to find the commodity manufactured unfit as he can't sell it for the same value whereas the manufacturer can do that as he is specialized in this field. As Al Kasani has found out in both cases there is damage, but the damage that may inflict the commissioner if he found the manufactured commodity unfit is much more greater than the damage befalling the manufacturer in case the commissioner breaks the contract, which makes Al Kasani prefer the lifting of the greater damage to the lifting of the smaller one.

(1) Other viewpoints in the Hanafia doctrine:

In addition to what has already been stated, we have found two other viewpoints for the Hanafia; one of which quoted for some of the Hanafia Fugaha's in the Indian fatawi and the commentary of Ibn Abidin. The other is stated in *Judicial Judgments* magazine and in order to get the full image of the Hanafia viewpoint, we examine below the two points of view:-

A. The viewpoint quoted in the commentary and the Indian Fatawi compels the manufacturer to work.

It is stated in the Indian fatawi "The manufacturer is not opted, but compelled to work". It is narrated for Abu Hanifa in Al-Kafi, "He has the option" it is stated in Ibn Abidin commentary", the manufacturer is Addur

and mukhtasar Alwiqaya and contracting to what we have already mentioned in many books where it stated no compulsion and “according to the statement of Allbahr”. Its judgment is the permission without impositions. Therefore, we said the manufacturer can sell the commodity manufactured before being viewed by the commissioner because the contract is not binding.

In another topic in the commentary it is stated, “the manufacturer is compelled to finish his work”.

If we examine the two statements quoted above from the commentary and the Indian fatawi, we notice that there is a viewpoint favoured by them to compel the contract manufacturer to finish his work whenever the contract is concluded between the two parties. The Indian fatawi has quoted this viewpoint beside the viewpoint of optioning – Ibn Abidin considered this viewpoint contradicting with what was stated in many books of Hanafia where they judged that the manufacturer is not to be compelled but opted because the formula of the *istisna'* is permissible and not binding – Ibn Abidin has supported his viewpoint by the statements mentioned in Nour Alain book where the author of this book considers the judgment stated in Addur book that the manufacturer is to be compelled to do his work is a clear error and what they actually mean by that they consider this point of view contradicts with the doctrine.

B. The judicial magazine imposes the contract of the *istisna'*:

The judicial judgment magazine has stated a judgment that is different from what the public of the Hanafia have adopted. The magazine views that whenever the contract of the *istisna'* is completed it will be binding for both parties in the sense that the manufacturer to be compelled to work and the commissioner to be compelled to take over the commodity it came according to the required specifications.

Below we quote the material which clarifies that:-

In item 392 of the magazine it was stated, “if the contract of the *istisna*’ is concluded, the two parties have no option to brake up contract and if the commodity manufactured didn’t match the specified standard, the commissioner would be opted. He previous text indicates that the magazine has judged that since the contract is concluded it would be binding for booth parties and there is no may for the contractors to break up except that the commodity manufactured not meet the required specifications contracted upon by both parties. In this case only the commissioner will have the option to accept the commodity on reject it and this viewpoint as the reader may notice, contradicts with the total viewpoints of the Hanafia in this regard.

Sheikh Mustafa Alzarga commented on this and said, “the introduction of the magazine has chosen the statement of Abu Yusuf in which he judged no option to be granted to the commissioner if the manufacturer has delivered the commodity manufactured in the required standard and that is in accordance with the interest of time factor.

Sheikh Alzarga commented on that and said, “information quoted from the doctrine doesn’t say no option for the commissioner except after completion of manufacturing and delivery the commodity manufactured by the manufacturer in a standard identical to the required specification.

There is no difference in Albadae and Almukhtar that the completion of work and even without delivery of the commodity.

Regarding *Judicial Judgment* magazine, it has confirmed the imposition of the contract on both parties save that the commodity is manufactured below the required standard.

Our viewpoint on the imposition of the *istisna*’

We consider the most correct viewpoint among all viewpoint mentioned above is that one adopted by the judicial judgment magazine through the emphasis it puts on the imposition of the contract of the *istisna*’ saying

whenever the contract is concluded it becomes binding on the two contractors to execute the conditions stipulated thereof. The reason behind our support to this viewpoint lies in the fact that it coincides and cope up with the sprit of the era after the enormous advancement in light and heavy industry and if we granted one of the contractors the option to reject the contract, the other party would be inflicted by magnificent damage specially fi this option is granted to the commissioner.

The other contractor is a factory requested by a certain commissioner to manufacture for him a car with special specification and distinct design. The factory carried on manufacturing the car and availed all the accessories of the car and at last the work finished but the factory has not delivered it to the commissioner who rejected the contract using the option granted to him. Now, let us imagine the size of damage that weight befall the factory due to the rejection of the contract by the commissioner. It is well known that the contracts have the power of imposition in the Islamic Fiqh as they are regarded as obligations. Hence, it is not permissible to violate the contracts as stipulated by the Holy Qur'an, "O you who believe fulfill the obligations..." And the fulfillment of obligations will not take place without the compliance of the two parties. The to much concessions contradict with the spirit of the important contracts and relying on the fundamental of the Shari'a in contracts we consider it of vital importance to give the formula of the istisna' much move mandatory power whereby the transaction between contractors can become move established.

The viewpoint we have already adopted is the same viewpoint of dr. Wahba Al Zuhaili when he commented on the statement published in the judicial magazine, "we believe that the point of view mentioned in the magazine primarily aims at avoiding the occurrence of disputes between the two parties of the contract and also aims at driving back the damages

that may inflict the factories because the needs of some people differ qualitatively and quantitatively in accordance with the differences in the commodities manufactured. This viewpoint also coincides with the principle of power necessary for the contracts in general as stipulated by Shari'a and also fits the currently prevailing contracts in which the two parties agree upon the manufacturing of extremely dangerous and valuable products like ships and aircraft and due to that it is not rational that the contracts of the *istisna'* to be unbinding.

We also believe that the viewpoint we have adopted has an origin in the Hanafi doctrine and by origin we mean the statements mentioned in the Indian *fatawi* that the manufacturer is to be compelled to manufacture. Therefore, and in the light of the above, we judge the imposition of the *istisna'* formula provided that the commodity is manufactured in accordance with the required specifications.

Description of the *istisna'* in law

(The extent to which the *istisna'* is binding in law)

The general conditions of the contract embodied in the civil transaction Act makes all the contracts established according to this Act, including the terms of contracting binding for both parties i.e. item 114/1 civil transactions states, "the texts of the contract should be executed in accordance with what it was based on, in a way that coincides with the good faith". This is a general rule, but in an exception to this item the Act has granted one or both parties, in all contracts that can be broken up, an opportunity to set condition of *binge* given the option for himself or somebody else for a specific period to be mutually agreed upon and this is what has been stated in item 104/1 of the civil transaction Act.

This is called the option of the condition on the basis that if the party granted the option chases to sign the contract, it became binding and if he chases to break up the contract, it became null and void.

The option of condition in its previous method applies in a limited extent to the terms of contracting where the contractor or the entrepreneur is permitted to set the condition of being grouted the option for himself or to anybody else relying on the previously mentioned legal rules specially in the contracting that commissions the manufacturing of a specific commodity e.g., shoes.

One of the exceptions that emphasizes the imposition of contract in the said Act is the option of vision which is stipulated in contracts that are vulnerable to break up by the party who is entitled for the option event though he didn't condition to be greeted that option if the opted party didn't see the commodity upon which the contract is signed and the contract is concluded only through description.

Item 108 has taxied the option of vision where it is permitted in away similar to that mentioned in contracts vulnerable to break up and it determined the validity of the contract till the vision is complied in the fixed date mutually agreed upon or otherwise the drops. The item also stated that the option of vision doesn't forbid the execution of contract but it forbids the imposition of contract. The item specified the states in which the option of vision drops i.e., viewing the commodity contracted upon and its acceptance frankly or by implication. This vision option also drops on of a pact or all of the commodity in question or on criticizing it. This option also drops on the behaviour of the party granted it in a way that doesn't endure the break up of contract. The said item also specified that the break up of contract in accordance with the vision option is done through pronounced words or through action in a frank way or by implication provided that the other party should be aware of the break up of the contract.

The vision option as previously clarified can be applicable to istisna' transaction formula where the option is established for the commissioner

if he found the manufactured commodity doesn't match the required standard of specifications.

There is a third option which has nothing to do with terms of contracting and that is the option of identification which means the selection of an item from among two or three items and the option of identification is given to one of the contractors (item 109 civil transactions).

The reason why the option of identification is not related to the terms of contracting is the fact that it contracts with nature of contracting because it is not possible for a person to sign a contract with another person for the manufacturing of three commodities and then he is opted to choose one of the three commodities. Due to the said justifications the option of identification has nothing to do with the terms of contracting. Another exception mentioned by the Act of civil transactions is the option of defect which means that the commodity contracted upon is manufactured in a defective way and the option of defect is permitted without being conditioned in the contract if the three following conditions exist.

- (1) The defect must be an old one.
- (2) The defect has an adverse effect on the value of the commodity contracted upon.
- (3) The buyer is ignorant with the defect and the seller doesn't condition in occurrence from the defect. If the above conditions exist in the option of defect then the contract becomes unbinding for the owner of the option before receiving the value and subject to break up after it.

Item 110 of the civil transaction Act has organized the rules of the defect option as it specially in its manufacturing side where it is possible that the commodity manufactured might not match the required specification agreed upon or mixed with a major defect like for example if the shoes proved to be smaller or bigger than the required measurement. All the

above defects are considered major defects in manufacturing that grant the manufacturer the option of rejecting the commodity manufactured or, otherwise, sign the contract despite the said defects. Hence, the Fiqh judgments, we have already stated, meet with the civil transaction Act in this point. Also the entire options previously mentioned don't only contradict with the judgments of fiqh in contracts in general but also completely match them.

We notice that the Act of civil transaction, with respect to the imposition of the terms of contracting, has pointed out to this subject of defect as it grants the entrepreneur the option to break up the contract; item 283 stated, "The contractor should execute the work according to the conditions specified in the contract and if it is found that he carries out his obligations in a defective manner or contradicting to the conditions, then the owner of the work is permitted to break up the contract immediately if the repairing of work is not possible, but if the repairing is possible then the owner of the work is allowed to request the contractor to comply with terms of the contract and execute the work within a reasonable period of item'.

In the light of the above, it is evident that this item is too trunk to say that the imposition of the contract is not applicable in the case of the defective execution and applicable in the case of the non-defective execution. Finally, the viewpoint of the civil transaction Act coincides with that of the judicial judgment magazine with regard to the imposition of the contract of the istisna'.

The judgment of the istisna':

By the judgment of the istisna' we mean the effect resulting or the consequences culminating from the istisna'. The Hanafia alone have mentioned the effects of the istisna', Al Kasani said, "The judgment of the istisna' is the establishment of ownership of the commodity specified

on guarantee for the commissioner and the establishment of the unbinding ownership in the value of the commodity as we shall explain afterwards. From the above it becomes apparent that the judgment of the istisna', according to the public of the Hanafia, is the establishment of ownership of the commodity manufactured for the commissioner of the istisna' and the establishment of unbinding ownership of the value of the commodity for the manufacturer, depending on their doctrine will consider the istisna' an unbinding contract.

As for the Shafea, Hanabla and Malikia who didn't address the subject of istisna' independently, but they spoke about the salam in handicrafts which is very similar to the istisna' therefore, and relying on their fundamental principles the judgment of salam is the same as that of the salam in general. The salam formula, on unanimity of the fuqaha'a, is a binding contractual formula and hence the judgment of the handicrafts salam is the establishment of ownership of the commodity contracted upon for the commissioner of the istisna' and the manufacturer will be granted the ownership of the value of the commodity which he should receive before the board of the contract.

Our viewpoint on the istisna':

As we have already seen the judgment of the istisna' is the establishment of ownership of the commodity manufactured for the commissioner and establishment of the its value for the manufacturer in a binding way and that is so because we consider the istisna' a binding contractual formula of transaction.

Subtitle: judgment of person who commissions manufacturing of a commodity and then denied it:

Since we have been speaking about the formula of the istisna', there is a small part of it which we ought to elaborate. In case someone commissioned a manufacturer to make a certain commodity for him and

the manufacturer completes the work but the commissioner absents himself from taking over the commodity and the manufacturer chases him to take it and pay the value and the commissioner denies the transaction altogether. If such a case took place, what would be the judgment over it? Another example: if the two contractors differed with each other on whether or not the manufactured commodity came matching the required standard of specifications; what will be the judgment?

These two questions have been answered by the Indian fatawi as follows, “A man commissioned another to manufacture a certain commodity for him and after on they disputed with one another, the commissioner said: you didn’t make what I ordered you, the manufacturer said: I did; here they said no oath on one of them against the other.

If a manufacture claimed against a person saying: “you have commissioned the manufacturing of so and so and the defender denied the incident, then no oath on both of them”.

The text which we have quoted for the Indian fatawi discusses this issue in case of no witness, because if there are evidences of witness or writing then such dispute will never take place. But due to non-existence of witnesses of writing, the matter after depends on oath as a decisive factor because the evidences (witness or writing) is responsibility of the plant and the oath is on the defender who devise. Hence can oath be taken in the previous case? Indian fatawi answered, No.

We consider the negation stated in the Indian fatawi is attributed to the public of Hanafia who perceive the *istisna*’ formula as an unbinding contract and if denial happened from one party the entire contract would collapse because it is permissible, according to the public of Hanafia, to adopt the approach of optioning in this case. As if they have considered the denial from the commissioner or the difference between the two parties like adoption of optioning approach and consequently the contract

collapses and will not need an oath from neither party. This is the abstract of vision which can be extracted from the previous text and we see the contrary to their viewpoint and believe that the istisna' formula of transaction is a contract in which the normal conditions of contracts and civil transactions are applicable where the evidences one the responsibility of the plaintiff according to the Hadeth of prophet Mohammed (pbuh) which founded a general rule of transaction, the prophet (pbuh) said, "if people were to be given the things they want for their claims, men would claim the money and blood of others, but evidence on the plaintiff and oath on the denier".

The above rule didn't executed a certain type of contract but it is a general rule which is considered applicable to all kinds of disputes and the exclusion of the istisna' from this rule is unjustifiable and without evidence and consequently this exclusion drops.

The guarantee in the istisna':

The istisna' is different from hiring with respect to guarantee. In hiring, if the manufacturer spoilt the commodity and also spoilt the material of manufacturing deliberately or negligently, then would be compelled to Guarantee the damage). With regard to the istisna' and since the material of manufacturing is to be supplied by the manufacturer then we don't imagine there should be a guarantee because if he spoilt the material then the damage would inflict him and will be bound to manufacture another commodity for the commissioner in fulfillment his obligation. For the commissioner in fulfillment of his obligation. There is an issue which the Fuqaha'a did not discuss and that is the issue of delay and its effects on the commissioner and manufacturer, because sometimes it may happen that a commissioner may over the manufacturing of a certain commodity and he signs a contract with the manufacture who performs the work in a

slow motion and the damage may inflict the commissioner owing to that delay; what is the judgment in this case?

Also the manufacture may do the manufacturing and the delay comes from the side of the commissioner in taking over the commodity without executes and the damage occurs to the manufacturer for that delay; what the judgment?

Sheikh Alzurga'a examined this case and said, "The value of time continued to increase in the economic transactions and therefore, the delay from one side of the contractors or his refusal to execute the work in time specified in contract constitutes harmful damages to the second party interns of item and money. If a dealer in industrial materials, who supplies the owner of a laboratory. Delayed delivery of these materials to the Lab owner, the work would ultimately delay) after Sheikh Alzurгаа has reviewed the results culminating from delay of work, a particularly in the no wades swiftly economic movement, he also condition in the istisna' contractual formula whereby it becomes among the conditions mutually agreed upon by both parties specially in contracts where a fixed date of delivery is determined. The statements mentioned by Sheikh Alzurгаа in this regard is correct for many considerations the most important of which is the establishment of stability in transaction in the domains of industry as it is one of the highly important fields nowadays. Not only that but also the industry is regarded as the main gate for development in any country and the industrially developed countries are counted the first class countries in terms of political, military and economical position whereas the industrially backward countries are classified among the underdeveloped countries. Therefore, and since the industry takes this vital importance, then it is equally significant to secure sufficient stability for it so that it can move forward and develop.

To achieve these preconditions for the industry, it is essential to fulfill the industrial obligations in time in the sense that if one party of the contractors violated the conditions of the contract, he should be penalized by indemnification to be paid by him to the other party inflicted by the damage and to drive back any likely dispute in this regard, this penal condition should be incorporated within the general framework of the contractual formula of the *istisna'* between the commissioners and the manufacturers be they ordinary persons or outstanding figures. The penal conditions are conditions on which the current laws are established and the Islamic Shari'a doesn't refuse them as they are permissible conditions upon which the contractual parties should agree. Dr. Wahba Al Zuhaili commented on the extent to which the different parties of the contract are free to set their conditions, "The Islamic Ijtihad agreed that consent" is the base of contracts relying on the verse from the Holy Qur'an in the financial transactions, "O you who believe! What not up your property among yourselves unjustly except it be a trade amongst you by mutual consent....".

It is only the consent between the contractors that creates the contractual obligations without need to practice certain formalities and the will is absolutely free in concluding contracts without being subjected to any type of contractual compulsion. All transactions are deemed equal be they financial or non-financial transactions except what the principles of justice and the interest of the community necessitates.

It is then concluded that consent is the major or factor in contracts in the sense that when so ever the two parties have consented set certain contractual conditions, not prohibited, these conditions will be regarded as permissible. The conditions that preserve the rights of each party are considered of vital importance as they drive back the likely damages that may befall each party and it is known in fiqh "No harm, No foul". Hence

it is essential to eliminate harmful damage and mutual consent between the two parties to eliminate the damage is the corner stone justifying this elimination. From this point we can decide the permission for mutual agreement to imbrues an indemnification should the manufacturer delayed the delivery of the commodity manufactured in due time or the commissioner refused to receive the commodity in question in the specified time if and only this will cause damages to the manufacturer the thing which depends on evaluation facts.

Chapter Four

The End of the Contract of istisna'

The istisna' contractual formula of transaction ends up at the completion of commodity manufacturing and delivering it to the commissioner, it ends or collapses on the death of one of contractors as seen by the Hanafia.

In the judgment of death there are other issues though they did not point out to in direct way, and according to the principles and the general theirs of the Islamic Shari'a these issues are considered like death; they end the contract e.g., if the manufacturer becomes incompetent (insane) the contract will automatically become invalid because madness contradicts with full compliance which began at the competence of the manufacture who became instance or incompliant and the incompetence of the manufacture makes the contract invalid.

Some other matters that also make the contract collapse is the mutual consent between the two party to terminate the contract or the termination may come as a result of a verdict form judicial court justifying the termination on legal grounds. We didn't these issues discussed in details in their speech about the contract of the istisna', but when we examined the Civil Transactions Act, 1984 we found although discussion on these issue when the Act was addressing the end of contracting in item 395 where it pointed out that the contract ends on the completion of work or termination of contract either on consent or on a verdict from a court of law.

Article 396 also permitted the termination of contract due to the difficulties facing the completion of work; the item stated. "In case there is a strong excuse which makes the execution of contract or the completion of work impossible, it becomes permissible for one of contractors to request the termination of the contract".

As for the death of the contractor who is like the manufacturer in the contract of *istisna'*, the contract is to be terminated in accordance to Article 339 if the qualifications of the deceased contractor is a place of consideration in the contractual formula, or the condition in the contract is that the contractor is to work himself to complete the work. If the qualifications of the deceased contractor were not a place of consideration and that he was not supposed himself to complete the work, then paragraph two of Article 369 it was permitted that for the commissioner of the manufacturing to request the termination of the contract if the inheritors were not well qualified to finish the work in an optimum way.

We would like to point out that according to the *fiqh* of the Hanafia the *istisna'* contractual formula is to be terminated immediately on the death of one of the contractors, but the civil transactions Act mentioned the death of the contractor (entrepreneur) provided that his death should have an impact on the execution of the work.

As the industry has become more complex nowadays, the manufacturer is not an only one person but in each factory there is a group of manufacturers. Therefore, we consider in case of transaction with the major factories the death of one or two of the manufacturers will not affect the contracts of the *istisna'*. Suppose that a commissioner has concluded a contract with an owner of a factory to manufacture a certain type of commodity but the owner of the factory died often the contract is established and the manufacturers of the factory knew about it, then it would be natural in such case that the contract would not be terminated as long as the factory is in progress except that the factory was liquidated due to the death of the owner or any other reason. But if the above probabilities did not happen, then the contract of the *istisna'* would be binding and mandatory to be carried on without any hindrance. Then it is important to differentiate, when speaking about *istisna'*,

between two different subjects. The first is the contract of the istisna' with the large factories and the second is the contract of the istisna' with individual manufacturers like shoes-makers cooperators who work on individual basis. In the first case of the large factories, the contract of the istisna' will not collapse on the death of one of the manufacturers or one of the owners of the factory but in the case of the individual manufacturers the work and contract will automatically stop or break up on the death of the manufacture and this viewpoint is correct to the best of our knowledge.

The possibility of implementing an istisna' contractual formula in the banking system

From the above analysis for the principles of the istisna' contractual formula it is evident that in the case of the istisna' contract the material of manufacturing and the work should be the responsibility of the manufacturer and this is the fundamental difference between the hiring contract and the istisna', hence, to impatient this type of contract in the banking system this aspect should be put into consideration.

Therefore, if we try to apply this rule and the preceding principle of the istisna' on the banking system we will come out with the following approaches:-

- (1) Admission of the Bank as a manufacturer: the bank can enter the field of the istisna' as a manufacturer in the following cases.

First: Production of commodities:

The bank can establish factories for the production of important products and this entails the provision of skilled labour force and required raw materials thus the bank can implement the istisna' formula of transaction with the commissioners of manufacturing provided that it should preserve the Islamic Shari'a principles of the istisna' already mentioned.

The bank can also act as a partner for the manufacturers or the factories in the field with the manufacturers or factories may breed another partnership between these manufacturers, or factories and their clients. If such case happens, the bank should make sure that the transactions are complying with the Shari'a.

Second: In addition to the previously demonstrated aspects, the banking system can also enter into the construction contracting either through establishing construction firms or enter as a partner with the other contractors in their construction activities that is because the field of construction is one of the most important fields of the istisna' contractual formula. Not only that but also most of the construction firms in this era apply the formula of transaction of the istisna' in their contractions.

In the light of the in above mentioned information the banking system can enter partnership with these construction firms through contractual agreements of financing either in their current construction activities or the bank can task these firms with some construction words the bank becomes a first contractor and the contracting firm becomes a second contractor.

But such kinds of operations require a special consideration for certain important relations and also require equal consideration for the prevailing regulations and the different technical aspects. Here we are not going to demonstrate these aspects in details but, instead, we will highlight some problem areas that are likely to occur in this regard. Some of these problems were raised by a research paper presented and published by the Bank of Qatar on the formula of the istisna' and some others were noticed form the daily work and the prevailing regulations.

Below we will by to sum up the most important aspects parenting to problems and obstacles that one likely to happen should the istisna'

contractor formula of transaction in the construction field be implemented by the banking system.

1. Guarantee:

Some civil transaction acts, including the Sudanese act, set conditions of providing a guarantee for a specific period of time in the field of construction contracting. An example for that is the statement mentioned in Article 686 of the Sudanese Civil Transactions Act, for 1984 which reads:

1. If the contracting agreement was based on construction of a building to be designed by the engineer and executed by the contractor under his direct supervision, they are both responsible to indemnify the owner of the building for what can happen to the building within ten years. This holds even if it be a total or a pivotal collapse in the buildings they have constructed; both will be held responsible for any defect that may endanger the safety and the solidification of the building, if the contract does not contain a longer period.
2. The commitment in the said indemnification remains effective even if the defect or the collapse is due to a defect in the ground itself or due to the consent of the owner of work to contract these defective buildings.
3. The ten years' duration text in paragraph (1) above commences with effect from the day on which the work is taken over by the contracting company.

In perusal for the above text, it becomes evident for the reader that the Sudanese act has laid down a continuous guarantee, which lasts for ten years for any buildings to be constructed, and both of the contractor and the engineer will be committed with this guarantee during this period specified in the act. This is so even if the damage occurring during this

period is due to a cause that both the contractor and the engineer have nothing to do with. If this matter is looked at through the criteria of safety, it will involve some risks, which may cause the banking system to refrain from entering the field of contracting. But these risks are possible to avoid if the bank cooperated with a qualified and honest contractor who doesn't desire instant profit maximization. In other words, he doesn't accept to construct the building in any kind of land; instead, he endeavors to choose the land suitable for that building and chooses the solid building materials to use or avoids these risks through the insurance of specific projects against disasters and other risks resulting from technical designing and construction.

2. The problem of the bank's position:

One of the major problems in the field of construction contracting is the problem pertaining to the bank position in financing the construction operations. Is the bank involved in financing the construction operations? Is the bank going to undertake the entire contracting by itself or through a partnership with other contractors, or will entrust the construction contracting to a second contractor? The core problem for the bank is the extent of its needs and the extent of responsibility it has to shoulder in each case.

The first case is the case in which the bank undertakes the entire responsibility of contracting by itself or by partnership with contractors, which necessitates the foundation of a counteracting company by the bank. In the case of partnership with other contractors, for example if the bank enters into partnership with a specific contractor whereby the bank finances the said contractor executing the partnership, this would be permissible from an Islamic point of view. But there arises a problem of follow up by the bank to execute the project and the follow-up

necessitates the existence of specialized engineers by the bank to be dedicated especially for this purpose.

The second case of tasking another contractor with the activities of contracting is legally and Islamically feasible to implement, but the Act binds the entrusting of the contracting to another contractor with two conditions mentioned in item civil transaction and these are:-

First: There should be no condition in the contract that ban the tasking of another contractor with the contracting activities.

Second: If the nature of contracting does not condition the contracting operations to be done by the contractor himself.

In fact the two conditions do not apply to the case of the commercial bank because the client of this bank is well aware that his bank is not a technical institution but a financial institution then it is natural that he doesn't condition that the contracting should be carried out by the bank. In addition to that the nature of the contracting works match the contracting firm as a specialized unit works, unlike the contracting firms, then it is natural to say, here, that the person who requests the bank to manufacture a specific commodity, doesn't necessarily mean the manufacturing of that commodity but he means the financing of that manufacturing and the bank way finance such wolvees by entrusting them to a specialized firm but these still remains the problem of tasking the contracting works to another contractor which can be divided into two things:-

First: The bank is absolutely responsible in the first place and before the owner of business (the entrepreneur) as it is the first contractor. This divert responsibility compels the bank to follow up closely the running of business so that it can avoid any tickle damages that make the bank should a heavy burden.

Second: Determination of the extent of responsibility should a third party enters in the contracting operation like, for instance, the bank may entrust the designing of the building to a specific engineer and entrust the execution of entire the contacting to a second contractor, then a partial or a total damage may occur in the building before the expiry of the guarantee period. In this case the extent of the responsibility gets more complex where a dispute may arise over the percentage of responsibility culminating from this damage and its distribution between the two parties, namely the designing engineer and the executive contractor. But, to the best of our knowledge, this despite can be a vented, should the terms of contacting specified in details the extent of responsibility for any damage occurring by the designing engineer and the executive contractor. Anyway, the issue has other technical aspects which can be deduced by the specialized persons.

We are in a position, now, to say that all the likely problem areas raised above do not actually constitute any obstacle that may hinder the financing of the construction constricting by the commercial banks, on the contrary all these obstacles can easily be avoided or overcomes. In addition to the fact that the specialized bank and institutions operating in financing real estate constructions never find any problems in this field due to their long experience and well established managerial system.

3. Credit Policy:

If the bank desires to enter the field of construction contracting, it has to observe the credit policy of the central bank as the prevailing credit policy of the central bank of the Sudan restricts the commercial banks from financing the evidential constructions but it doesn't ban the financing of constructing washhouses and the like. All in all, the commercial banks in the Sudan may enter the field of financing the real

estate constructions like warehouses, storage, industrial and agricultural facilities and so on.

Third: The field of excavations:

In implementation of a transaction through an istisna' contract, the bank may also enter the field of exculpation of water wells, water pools and so on like excavation of water canals etc. Its aim is to benefit from the abundant potential in the agricultural sector through the establishment of an excavation company or entrusting the entire excavation works to a specialized drilling firm. Tadamon Islamic Bank has penetrated this field through its branch at Souq Araby that arranged the financing of excavating underground water wells based on the istisna' contractual formula of transaction where the bank was the first responsible contractor and tasked the responsibility of execution to a specialized drilling company. Tadamon Islamic Bank has achieved remarkable success and contributed considerably in financing the agricultural sector which is an extremely important sector using the Islamic approach of financing bedside on the istisna' contractor formula of transaction. It is widely known that the Sudanese Civil Transactions Act does not restrict the tasking of a second contractor to act on behalf of the bank in carrying out the contracting obligations unless the conditions stipulated in the contract direct otherwise or the nature of work undertaken forbids such delegation of power and that is in accordance with Article 392 of the above mentioned Act.

The bank as a commissioner of manufacturing:

The bank connector the field of manufacturing as a commissioner either for its own benefit by commissioning the manufacturing its needs such as furniture equipment, automobiles, buildings etc... or for its clients who demand the manufacturing of commodities according to certain

specifications and afterwards the bank sell these commodities to them through a sale contract based on profitability or partnership.

The above is an abstract for the most important points deduced from the implementation of the contractual formula of the istisna'.

Conclusion: Research findings

Below are the most outstanding finding reached by the researcher:-

1. In this research there are many definitions for the term istisna' in the Hanafi doctrine and others. The writer of this research has founded the definition that was primarily favored by Al-Kasani when he said, "the istisna' is a contract on commodity sold on guarantee in which work is conditioned", this definition for the istisna' restricts the admission of other formulas of transaction like the salam and the hiring in the concept of the istisna' besides its combination of the istisna' conditions.
2. The terms of contracting stipulated in the Sudanese Civil Transaction Act for 1984 deal with the contract of istisna' if the contracting formula was applied for manufacturing of a commodity provided that the raw material is to be supplied by the contractor and not the owner of work.
3. The istisna' contractual formula is considered one of the permissible contracts according to the analogy.
4. The old transactional formula of istisna' can be modified to cope up with the modern technological progress and apply it in manufacturing the latest scientific invention like aircraft, automobiles, prefabricated houses the experts with the help of technical catalogues to specify their complex components.
5. Elements of the istisna' transactional formula in the Islamic Fiqh:
 - A. The two contractors i.e., the manufacturer and the commissioner.
 - B. The commodity contracted upon i.e. the value manufactured commodity.
 - C. The formula of transaction, which is, composed of the affirmation which means the first statement said by one of the two parties in

which he expresses his desire to manufacture something. The acceptance comes from the other contractor matching the affirmation.

6. According to majority of the Hanafia there are three conditions for the perfection of the contractual formula of the istisna':-
 - A. Demonstration of the origin, type and quantity of the commodity.
 - B. This commodity required to be manufactured should have a previous transaction.
 - C. Imam Abu Hanifa set the condition that no date to be fixed in the istisna' whereas his two companions saw otherwise. The researcher considers that the previous transaction is not a condition in the formula of the istisna' and the date fixation is not harmful.
7. The researcher believes that it is permissible to arrive at a penal condition in the transactional formula of the istisna'. In case of delay in the delivery of the commodity on the fixed date or if the commissioner is late to take over the manufactured commodity in the mutually fixed date then these should be an agreement to indemnify for the damages resulting from that delay.
8. The contract of the istisna' ends when the manufacturer completes the work or on termination of contract either on mutual consent for through are edict from a court of law.

Tadamon Islamic Bank

Contract Form No. (8)

Istisna' Contract Draft:

No: _____

This contract of istisna' is concluded between:

First Hereinafter referred to, for the purpose of this contract, as the First Party.

Second Hereinafter referred to, for the purpose of this contract as the Second Party.

The Party request from the Party to manufacture (construct) for him and the party accepted the request. Therefore, the contract of istisna' is agreed upon on mutual consent according to the principles of the Islamic Shari'a with following conditions:

(1) The two parties agreed to enter into a contract of istisna' according to which the party shall manufacture (construct)
.....
.....
.....

(2) The party undertakes to execute the required work as in item (1) according to the above mentioned specifications and with the specified period.

(3) The Party shall pay the total cost mentioned in item (1) in the following way:
.....
.....
.....
.....

- (4) The Party undertakes to indemnify the a compensation of for any damages resulting for delay of delivery
- (5) The Party or any person tasked with the work undertakes to provide all materials and equipment necessary for completion of work.
- (6) If the Party desires to insert any amendment that may affect the contractual conditions mutually agreed upon, he contractual conditions mutually agreed upon, he shall refer the matter to the Party for mutual agreement on the amendments, otherwise the contract will be implemented according to the conditions agreed upon.
- (7)
.....
.....
.....
- (8)
.....
.....
.....
- (9)
.....
.....
.....
- (10) Should any dispute arises over the interpretation or execution of the conditions of this contract, the matter should be referred to a three-member arbitration board, each party shall nominate one member of the board and the two members mutually agree on a third person to become the head of the arbitration board. In case of failure to

select the head of the board, or failure of one party to specify a court within seven days from the date of notification, the matter shall be referred to the specific court for nominating the person or persons required for the board. The nominated board of arbitration shall act and judge according to Shari'a law, the provisions of this contract and laws prevailing in the country, provided that the resolutions arrived at, unanimously or by majority, shall be final and binding upon both parties.

This contract signed on this day

Corresponding

.....

Attadamon Islamic Bank, theparty

Signed:

The party

Witnesses:-

(1) :

(2):

Authentication No. / /

I am The advocate and commissioner for oaths, presented themselves before me the two parties of this contract and put their signatures on its and they are well aware of its contents in the presence of the above witnesses.

Issued under my seal and signature on this day

.....

the Advocate and Commissioner for Oaths.

Explanatory Memorandum for the proposed istisna' contract

Preface This is a precise memorandum containing brief reasoning for the paragraphs of the proposed istisna' contract (filed and unfilled paragraphs). Thorough which we intend to brief our brothers in the department of investment with the intentions of the contract paragraphs, so that they can be able to fill them in a correct manner. Below we present the reasoning of each paragraph separately:

First paragraph.

This paragraph is dedicated to outline four topics:

1. The consent of the two parties to enter into the contract of the istisna'.
2. Demonstration of origin, type and quantity of the manufactured commodity.
3. The fixed date of manufacturing.
4. The Grand total value of the contract.

It is worthwhile here to comment briefly on each of the above mentioned points.

1. Consent of the two parties:

The two parties mentioned in this paragraph are the first and the second party. What we would like point out is that the first party may be the bank or another manufacturer or a construction firm. If the client requests the manufacturing of something from the bank, then the bank here will be the First Party and the client will be the Second Party. If the bank request a certain manufacturer to manufacture something and it signs a contract with him, the bank here will be as mentioned before.

2. Demonstration of type and quantity of the commodity:

By this phrase we mean to demonstrate in the first paragraph the type of the project contracted upon whether it is a normal commodity or a building or an excavation project. By demonstrating the type of project, we mention the category to which it belongs i.e. furniture, buildings,

automobiles, water wells etc..... In addition to that a full description of the project is required plus its quantity in number and measurement and if the commodity manufactured is multiple i.e. five chairs for example, it is important to explain the number of units in the contract.

(3) The fixed date of manufacturing:

By fixed date we mean the date mutually agreed upon by both parties to accomplish manufacturing of the required project. The paragraph addressing this maker was prepared in a way that accepts a maximum period for manufacturing plus it permits the reference to the attached schedule in plus it permits the reference to the attached schedule in projects to be handed over in different dates like buildings where contractor agree to hand over one building before the other or the furniture which are agreed to be delivered one before the other.

Second paragraph:

This paragraph is dedicated for the text that indicates the commitment of the manufacturer to execute the work.

Third paragraph:

This paragraph addresses the mode of remuneration of the value of the commodity whether lump sum or in installments according to the conditions of the contract.

Fourth paragraph:

This paragraph is dedicated for indemnification of damages which may occurs due to negligence form the slide of manufacturer for not complying to execute the work on the fixed date. In this paragraph we cite the penal condition so that the final intention of the istisna' contract may be reached.

Fifth paragraph:

This paragraph deals with aspects of providing raw materials in observation for the istisna' conditions where the raw material are to be

supplied by the manufacturer, we have pointed out in this paragraph that these materials may be made available by the person tasked with the performance of work. Through this text, we are trying to observe the nature of the commercial banks, which may entrust the entire work to a second contractor who undertakes the business and supplies raw materials, and necessary equipment of work.

Six paragraph:

This paragraph includes the essential amendments which are not initially embodied in the contract and the manufacturer considers them necessary to include. By this paragraph, we intended to observe the technical nature of the industrial projects because the executed of the project may find it necessary for proper execution to include an important amendments, so we gave him the chance to do the necessary amendments on condition of the project owner's consent.

Seventh paragraph:

This paragraph is left unfilled for writing the guarantee if the contract entails a guarantee of any kind.

Eights paragraph:

This paragraph is left unfilled for insurance purposes as some businesses necessitate the insurance of the project undertaken for a version pertaining to guarantee after completion of work as it is the case in the building contracting in which a guarantee for ten year period is conditioned law after accomplishment of work. We have discussed all these aspects in the research when we addressed the possibility of implementing the istisna' formula of transaction in the banking system; so please refer to it.

Ninth paragraph:

This paragraph is left unfilled for the inclusion of any additional condition deemed necessary by both parties of the contract.

Tenth paragraph:

This paragraph is clear as it is related to the conditions to be imposed in case of dispute.

Appendix:

1. The Sudanese Civil Transaction Act for 1984 did not stipulate the istisna' contractual formula, but it cited a contract which involves istisna' e.g. the contracting formula. The said Act has defined the contracting formula in item 378, which reads. "The contracting formula is a contract according to which one party undertakes to manufacture something or perform a work for a value the second party submits to pay.

The above mentioned definition combines the contracting and the istisna' formulas in one concept, because it inserted the agreement on manufacturing into the formula of contracting and agreement on manufacturing may be regarded as an istisna' if the raw material is be supplied by the manufacturer. In light of the above, the inclusion of the istisna' formula and others in the formula of contracting becomes evident for the reader,.

Therefore, our brothers in the investment department who fill the paragraphs of this contract are kindly requested to note that:-

- (1) All the legal judgments prevailing in the contracting formula also prevail in the formula of the istisna' because the istisna' is a contracting formula.
- (2) The bank may task the work of the istisna' to another manufacturer or contractor. For example if a client requested the bank to construct a building for him according to certain drawings and specifications, the bank might accept this request and sign a contract of istisna' with this client. Then it may entrust the entire work to a contractor who will perform the work on behalf of the bank taking into account that the prevailing Civil Transact Act permits this type of transaction.
- (3) The proposal made for the istisna' contract doesn't restrict the bank from signing other contracting formulas which may comprise many

technical aspects like the contracts which the bank signs with drilling companies or contracting firms which normally have pre-printed contracts where the unsuitable conditions may be excluded in of his clients interest.

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