The Salam contract: Law and Capital Formation in the Abbasid Empire (11th and 12th Centuries)*

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(p. 863) From the eighth century until the beginning of the eleventh, the Abbasid empire (750-1258) witnessed the rise of a textile industry, the chief centers of which were located in Andalusia, Egypt, Syria, Iraq, Iran, and Transoxiana.¹ The diffusion of styles and of the trade in fabrics, along with the etiquette involved, the migrations of individuals, dynasties, and peoples, and the spread of new techniques and sites of production — all these factors contributed to introducing a taste for foreign textiles in the Muslim world in the ninth and tenth centuries. What, in the eighth century, was considered a typical product of a region, such as the fabrics of Merv or of Bagdad, was imitated and reproduced in hundreds of workshops dispersed as far as the outermost regions.² Of course, the caliphs and, beginning in the tenth century, the princes of the local dynasties, strongly influenced the Tirāz, the workshops in which the luxury fabrics were produced. But, starting in the ninth century at the latest, a growing number of private investors participated in the commercialization of textiles, as well as of other manufactured and agricultural products, by virtue of placing orders for them directly with artisans and farmers. The fiqh, the system of legal and ethical norms which, from the

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eighth century on, spread throughout the Muslim empire, reacted to this challenge in its contract law. In the eleventh and twelfth centuries, specialists in the fiqh, when dealing with the salam – an investment contract – analyzed the theoretical and practical problems which emerged from the relationship between the standardized production of goods, their commercialization, and the concept of personal obligation. Their debates concerning these questions were without (p. 864) precedent, even if the legal matters they treated could already be found in the texts of the fiqh of the eighth and ninth centuries. It was the systematic coherence with which they were able to conceive the norms which distinguished the jurists and experts of the fiqh of the tenth through twelfth centuries from their predecessors, and which made those centuries, in the words of Chafik Chehata, the “classic period” of Muslim law.3

The salam: the structure of the contract and historical documentation

In the salam an “investor” advances a certain amount of “capital” to a “seller,” who, by accepting it, obliges himself to deliver to the former, at a date fixed by contract, a certain good which is the “object of the investment.” In other words, at the moment the contract is concluded, the investor buys an object in the form of a personal obligation. The object of this obligation can only be delivered in the future; actual fulfillment of the obligation is put off until a later time, whereas the personal obligation is the object of the salam contract4

The contract is concluded by the exchange of the investor’s offer and the seller’s acceptance of it and it remains valid if the investor hands over the capital to the seller before the two parties of the contract separate. Through this transfer of possession, the capital is transformed into an individual thing because it has been delivered in specie.

indicates that it is matter of a financial transaction aimed at increasing the sum advanced.

2. The terminology employed by the jurists shows that the capital advanced determines
the status of the participants and of the objects. The investor is the “payer of the advance”
(muhammad ou rabb al-salam); the seller is “the one who has received the advance” (al-
muqaddam ilayhi); and the object to be delivered is “the good for which the advance was
given” (al-muqaddam fDhi). The advance itself is denoted by the term “capital” (ra’s al-
mall). The investor has no right to substitute anything else in place of the capital fixed by
the contract. He must hand over this capital during the meeting in which the contract is
being negotiated or after it, but before the partners separate. The money (p. 865) or the
fungibles that he pays as capital become, by the fact of their being handed over to the
seller, “individual things.”

3. The salam contract, unlike the contract for a simple or
“absolute” sale, is therefore not completed following the exchange of declarations by the
buyer and the seller. It requires, to become effective, a material provision on the part of
the buyer which must be handed over to the seller during or immediately after the
meeting in which the contract is negotiated. The economic functions of the contract
go far beyond those that Joseph Schacht and David Santillana attribute to it. J. Schacht,
one of the rare authors to discuss the economic significance of the term “capital” in the
texts of classical Muslim law, states that “the term ra’s al-mall, ‘capital,’ which is used to
designate the price in this contract, underscores the economic aspect of the transaction:
the financing of the business of a small merchant or of an artisan by his own clients.”

Let us keep in mind that the term “capital” refers to the financing of business activities.
According to D. Santillana, the salam originated in the need felt by poor farmers, in the
period before the harvest, to borrow in order to satisfy their immediate needs. However,

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8 SARAHI, Mabsūt, op. cit., t. XII, pp.146, 147; KASANI, Badātī, op. cit., vol. V, pp. 214;

202-204; D. SANTILLANA, Istituzioni, op.cit., vol. II, pp. 168-169. The idea seems to be identical to the
Paul: West Publishing, 1990, p. 1455. For traditio in Roman Law, see W. W. Buckland, Text-Book of
Roman Law From Augustus to Justinian, Cambridge 1921, Reprint W.M.W. Gaunt & Sons, Holmes Beach
Florida, pp. 228-32.

12 J. SCHACHT, Introduction, op. cit., p. 130.

the research done by Beshara Doumani shows that in the 18th and 19th centuries, in Palestine, the big merchants and the manufacturers employed this contract to build up stocks of merchandise, to influence, on a regional scale, the choice of agricultural products cultivated, and to offer monetary credit at rates favorable to the lenders.\footnote{BESHARA DOUMANI, Rediscovering Palestine. Merchants and Peasants in Jabal Nablus, 1700-1900, Berkeley, University of California Press, 1995, pp. 14, 135-36, 138, 180, 186-87, 236-37 et 240; KENNETH M. CUNO, The Pasha’s Peasants. Land, Society and Economy in Lower Egypt, 1740-1858, Cambridge, Cambridge University Press, 1992, p. 58, ajoute à cette liste le stockage des denrées alimentaires pour les besoins des familles aisées.} The legal sources from the 10th to the 15th centuries stress the role of the salam as a tool of investment in commerce and manufacturing, as well as in the lending of money.

It is this role of the salam that obliges the jurists, at the beginning of the 10th century at the latest, to analyze the factors which determine the exchange value of the goods involved in the contract (transformation of the material, production techniques, usage, demand, and scarcity of the goods on offer). Among these factors, the time that has elapsed between the payment of the capital and the delivery of the thing sold is an element of primary importance; for it transforms the buyer into a creditor and the seller into a debtor. It turns the payment of the capital into an investment in future deliveries of the goods in question. Through his investment, the investor purchases the personal obligation of the seller to furnish the thing agreed upon in the contract. The salam is thus, at least in Hanafi law, the only contract in Muslim law which has as its object [al-ma’qūd ‘alayhi] the seller’s personal obligation. The personal obligation of the salam, like that of the contract for a simple sale, has been created by the exchange of declarations by the two partners of the contract, but, in contradistinction to the obligation of the simple sale, it remains valid solely because the capital has been paid in advance. For all these reasons, in this paper we will define the salam as an investment contract.

(p. 867) The discussion of the contract necessarily involves a cognitive dimension. The object of the salam is constituted by the obligation of the seller to deliver, at a future date, a good that he must buy or produce. At the time the contract is concluded, this good is neither in his possession nor at his disposition. It is known only by its description. It is on the basis of the latter that the two partners are able to estimate its value. For this reason,
the jurists raised the question of knowing which conditions are required to render words capable of reproducing the essential qualities of a thing in a manner that makes its value calculable. In other words, what relationship exists between the categories of the description, the qualities of the thing, and its value? The material of which a good is composed, as well as its weight and measure, have always served jurists as criteria permitting the contracting parties to calculate its value and therefore as categories that necessarily enter into its description. The texts of the 11th and 12th centuries appear to suggest that the importance of textile production fed a legal debate in which the descriptive categories of the products became increasingly focused on the techniques of their production and less on their basic material. As for calculating the value of the goods, the knowledge of the basic material becomes, in this period, less important than the methods and techniques by which the products are made — on the condition that these methods are standardized and are known to the investors and their clients. The descriptive categories must therefore refer to the standardized production techniques of the goods in question in order to enable the partners of the salam to estimate their value.

Identifying goods by reference to the techniques of their production allowed the jurists to go beyond the concept of the regional economy as the framework of the salam and to justify, by the very categories used to describe the goods, extending that framework to the entire empire, with its far-flung centers of textile production. The universalist conception of the jurists reflected and facilitated the historical process of the diffusion of the techniques of textile production in the Muslim world, and their argumentation recalls many aspects of the 20th-century debate on the globalization of the forms of production and trade.

The existing historical and legal documentation on the salam, though certainly far from complete, is nevertheless ample enough for us to affirm its commercial importance and to justify the theoretical interest that the jurists took in it. Nine papyri contain contracts of this type, concluded between Egyptian merchants and weavers in 864-878.15 Letters of

Jewish merchants of Fustat from the 11th century evoke the risks which, in a rural context, the conclusion of such a contract presented to merchants coming from the cities.\textsuperscript{16} The private archives of the great families of the city of Nablus, which have been magisterially analyzed by Beshara Doumani, show the importance of this contract as a commercial instrument \{p. 868\} of the urban and rural elites in Palestine between the 18th and the 20th centuries.\textsuperscript{17} The works of Kenneth Cuno on the economy of the Egyptian peasants between 1740 and 1858, and of Eugene Rogan on the money-lenders in Transjordan and in Syria, toward the end of the 19th century,\textsuperscript{18} help us to understand better the role this contract played in the modernization of agriculture and of manufacturing in the countries of the Fertile Crescent. Legal mechanisms allowing this contract to be integrated into various strategies, both public and private, were already in place in the writings of the Hanafi jurists of Transoxiana in the 11th and 12th centuries. The writings of Sāfakhsī (d. 1097), more than thirty volumes of commentaries and glosses on the Hanafi debates, constitute the most important testimony of that school’s doctrine concerning ownership in 11th century Iraq and Transoxiana. In the 12th century, the commentary in seven volumes by Kāsānī (d. 1192) on the work of ‘Alā’ al-Dīn al-Šārājī (d. 1144) provides the most systematized form of the Hanafi doctrine of the classical period.\textsuperscript{19} To fill out the picture, one should consult the works of the Transoxianan authors, such as Marghānānī, whose Hīdāya has been the subject of many commentaries by Near Eastern jurists of the Mamluke (1250-1517) and Ottoman (1281-1924) periods,\textsuperscript{20} as well as works of their Iraqi and Egyptian commentators of the 14th and 15th centuries, in order to grasp the full extent of the influence of the Transoxianan doctrine on the debates of the post-classical period in the Near East.

\textsuperscript{17} B. DOUMANI, Rediscovering Palestine, op. cit., pp. 14, 135-36, 180, 186-87, 236 et 240.
Recently, Hiroyuki Yanagihashi has undertaken an analysis of the historical rise of the Hanafi and Maliki norms in this domain.\textsuperscript{21} The jurists who in the 1930s and 1940s prepared the Egyptian civil code of 1948 very often cited the 11\textsuperscript{th} and 12\textsuperscript{th} century Hanafi sources of Transoxiana as authorities on the classical doctrine of that school. We will have occasion to look, in particular, at the interpretation of these sources by Abd al-Razzāq al-Sanhūrī, the *spiritus rector* of the Egyptian civil code of 1948, and by C. Chehata, who was a professor at the Sorbonne in the 1960s and 1970s.\textsuperscript{22} These two authors studied Muslim law in the light of the methods and theories of modern comparative law, and their books contain valuable analyses of the views of personal obligation that were developed in the Hanafi doctrine of the classical period.

The juridical construction of synallagmatic contracts: the principle of equality

Muslim jurists regulate the exchange of goods within the framework of a system of legal categories centered on the notion of equality. Starting in the 11\textsuperscript{th} century they made an effort to group together, under broadly inclusive categories, contracts which shared common characteristics. Among the different schools of the *fiqh*, which can be distinguished by their specific approaches to this topic, we are interested here in the Hanafi school, which originated in Iraq in the 8\textsuperscript{th} century. Having already become dominant in the regions of Central Asia and in India, beginning in the 8\textsuperscript{th} and 9\textsuperscript{th} centuries it struggled against the Shafi’i school (named after Muḥammad ibn Idrīs al-Shāfī’ī, who died in Egypt in 820), for juridical and ideological hegemony in Iran and Khurasan until the Mongol conquest of Iraq in the 13\textsuperscript{th} century. Later, beginning in the 14\textsuperscript{th} century, the


Hanafis became the dominant school of Muslim jurisprudence (*fiqh*) in the Ottoman Empire.

The notion of a sale, as a general category, included, among the Hanafis, all the contracts by which one exchanged objects of pecuniary value (*mubādalat al-māl bi l-māl*), such as the simple sale (*bayʿ*), the exchange of monies (*sarf*), barter (*muqāyaḍa*), and the *salam*.

These four types of sale contracts constitute part of a larger category: that of synallagmatic contracts related to assets with a pecuniary value (*muʿāwaḍāt māliyya*). These bilateral contracts serve to exchange one pecuniary value for another and are based on the equality of the two parties to the contract. The assumption is that the precise execution of all their clauses will preserve this equality and enable them to calculate the profits accruing to them from this transaction. For this reason, the four sale contracts are given a narrow and strict interpretation, in contrast to contracts of marriage or of emancipation, which, according to the jurists, (p. 870) have as their purpose the establishment of social relationships and not pecuniary gain.

**Illegal enrichment**

The equality of the contracting parties that is assumed in the synallagmatic contracts covers the conclusion of the contract, the transfer of the ownership of the goods exchanged, and their material tradition to the parties of the contract. The Koranic

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interdiction against unjustified enrichment (ribā) is presumed to guarantee this equality of the partners by declaring illicit all forms of exchange which violate it.

The jurists distinguish two forms of forbidden enrichment, one based on the simultaneous exchange of unequal quantities of fungible goods of the same kind, the other on the deferred exchange of fungible goods in any form or manner. This second interdiction is justified by the fact that the lapse of time between the first and the second tradition of the exchanged goods creates a difference in value between them. The two forms of forbidden enrichment constitute violations of the obligatory principle of equality between the parties of the contract because they create advantages for one of the parties at the expense of the other.

The first of the two forms of illegal enrichment consists in appropriating a surplus without adequate consideration (ribā al-faḍl) by the simultaneous exchange of unequal quantities of fungible goods of the same kind. Weight and measure are considered to be quantitative measures established by law. For this reason, when goods that are weighed or measured, and are of the same kind of good, are exchanged simultaneously, they must be exchanged in equal quantities. In contrast, the simultaneous exchange of one kind of fungible good for another kind, for example the sale of wheat for barley, can be carried out in unequal quantities without constituting “appropriation of a surplus without adequate consideration”.

Those things whose quantities are calculable (a number of eggs, for example) are considered fungibles in the synallagmatic contracts, but their exchange is not subject to the rules concerning “uncompensated enrichment.” Numbers, according to the Hanafi jurists, are only human conventions (ištilāḥ), replaceable by others and therefore cannot be considered (p. 871) as the ratio legis of a prohibition


imposed by the sacred law (sharī'). Cubits and other surface measures are considered as pertaining to the quality and not to the quantity of goods that are measured. Goods measured in cubits, such as textiles, may thus be exchanged in unequal numbers of cubits without that constituting an uncompensated enrichment.\(^3^9\)

The Hanafis are distinguished from the other schools of the fiqh by the fact that they define uncompensated enrichment as a purely quantitative problem, and one which does not concern the quality — and therefore the value — of the goods exchanged,\(^3^1\) the quantitative equality of which is not identical to their equivalence. The latter is measured in terms of exchange value (māliyya),\(^3^2\) whereas the quantitative surplus is measured only in terms of weights and measures, and does not constitute an illegal enrichment, unless it involves two items of merchandise which are fungible goods of the same kind exchanged in unequal quantities. The jurists construct their argument around the fact that all merchandise possesses an exchange value. If one were to single out the exchange value of goods as the ratio legis of the prohibition against illegal enrichment, then one ought to sell or exchange goods only for their equivalents. All sale contracts which do not conform to this rule would be prohibited. But since the law does not prohibit them, it is necessary to seek another reason for the prohibition of the exchange of fungibles in unequal quantities. This reason can only be the identity of the kind of merchandise being


exchanged. It is this identity of the kind of things exchanged which obliges the parties to
The equality of ownership in the simple sale: classification and circulation of goods

The analysis of synallagmatic contracts therefore presupposes an acquaintance with the jurists' classification of goods. It is based on the difference between fungibles and "individual" or "specified" goods. When the jurists speak of the material qualities of generic goods they call them "fungible goods" (mithliyyā). This expression indicates that their quantity is determined by weight, measure, or number and that they can be replaced, in case of loss, by another good of the same kind (mithl), same form and same value because all these represent, in principle, the same value. But "when this fungible good becomes the object of an obligation, it will be called da'īn." The term da'īn denotes both the debt in its form of personal obligation and the fungibles which constitute its object. The personal obligation (da'īn) – a relationship between the debtor and his creditor – is merged in a single category along with its object, the fungible good. If the debtor does not honor (p. 873) his obligation, the latter continues to exist as long as the legal personality (dhimma) of the debtor exists, that is to say, as long as the debtor is alive. The legal personality, C. Chehata writes,

is the capacity to be a subject of the law; it is, in fact, the basis of obligations concerning debt relations. Every person possesses this "virtuality" of obligating him- or herself. And it ceases only with his or her death. Then the deceased's estate alone is responsible for satisfying these debts. But, as long as the person is alive, property and dhimma merge.

The estate represents the legal personality of the deceased debtor. If it is not sufficiently large to pay his debts, then the latter remain unpaid. They are not transmissible to the debtor’s inheritors, but, instead, are extinguished along with his legal personality.⁴⁰

On all these points, the obligation to deliver a specific individual good (‘ayn) is distinguished from that of delivering fungibles. The loss of a specific individual good by its vendor annuls the contract of which it was the object. And if the specific good is destroyed by a third party, the latter must reimburse its value (qīma) because he cannot replace the individual good by another one of the same kind.

Through the contract of a simple sale, the jurists assert, one sells a specific individual good in return for a personal obligation (‘ayn bi-dayn).⁴¹ The essential element (rukn) of the contract consists in the exchange of two declarations: the seller’s offer and the buyer’s acceptance. The immediate effect (hukm) of the contract is the transfer of the ownership of the thing sold to the buyer and that of the price to the seller. The thing sold must be a physical object possessing a pecuniary value (māl), and also be a kind of merchandise (māl mutaqawwim) the use of which is licit.⁴² The seller must be the owner

of it and able to furnish it (p. 874) to the buyer.\footnote{Sur le vendeur comme propriétaire : SARAJI, Mabsūṭ, op. cit., t. XII, pp. 197 et 199, t. XIV, p. 14 ; KASĀNĪ, Badā'I, op. cit., vol. V, pp.146-47 et 243. Sur la capacité du vendeur de remettre la chose vendue à l'acheteur, SARAJI, Mabsūṭ, op. cit., t. XIII, pp. 11-12 ; KASĀNĪ, Badā'I, op. cit., vol. V, p. 147.} The direct effect and, with it, the first step of the contract, is completed at this stage.\footnote{L'All. al-Ḫafif, Malikīyya, op. cit., vol. I, pp. 6-7 et 71.} According to Hanafi doctrine, which differs on this point from that of the other Sunni schools of legal thought, only physical things possess an exchange value.\footnote{C. CHEHATA, Théorie générale, op. cit., t. XIX, p. 68.} Personal obligation is only an incorporeal good,\footnote{C. CHEHATA, Théorie générale, op. cit., pp. 242-46, numéro 319 qui cite une série de textes classiques donnant la même signification, et ‘ALI AL-ḪAFIF, Malikīyya, op. cit., vol. I, p. 13, n. 1, et p. 71.} “a name for that which is obligatory.”\footnote{C. CHEHATA, Théorie générale, op. cit., p. 176, numéro 278, soutient la thèse que « le dayn est un bien comme les autres » ; SANHŪRĪ, Maṣādir, op. cit., vol. I, t. I, pp. 24-26, n. 1, critique cette position de C. Chehata et insiste sur le caractère personnel du lien obligatoire : le créancier n'a pas accès à l'objet de la créance qu'en exigeant sa remise au débiteur. La même position est prise par ‘ALI AL-ḪAFIF, Malikīyya, op. cit., vol. I, pp. 16-18.} “In principle, [the object of] personal obligation is not a good as long as it has not been handed over.”\footnote{C. CHEHATA, Théorie générale, op. cit., p. 176, numéro 278, soutient la thèse que « le dayn est un bien comme les autres » ; SANHŪRĪ, Maṣādir, op. cit., vol. I, t. I, pp. 24-26, n. 1, critique cette position de C. Chehata et insiste sur le caractère personnel du lien obligatoire : le créancier n'a pas accès à l'objet de la créance qu'en exigeant sa remise au débiteur. La même position est prise par ‘ALI AL-ḪAFIF, Malikīyya, op. cit., vol. I, pp. 16-18.} It is, rather, “a good in the form of a claim [which exists only] on the legal personality of the debtor”\footnote{C. CHEHATA, Théorie générale, op. cit., p. 176, numéro 278, soutient la thèse que « le dayn est un bien comme les autres » ; SANHŪRĪ, Maṣādir, op. cit., vol. I, t. I, pp. 24-26, n. 1, critique cette position de C. Chehata et insiste sur le caractère personnel du lien obligatoire : le créancier n'a pas accès à l'objet de la créance qu'en exigeant sa remise au débiteur. La même position est prise par ‘ALI AL-ḪAFIF, Malikīyya, op. cit., vol. I, pp. 16-18.} it is only the subjective right of the creditor to require (muʿaṣira) from the debtor payment of his debt.\footnote{C. CHEHATA, Théorie générale, op. cit., p. 176, numéro 278, soutient la thèse que « le dayn est un bien comme les autres » ; SANHŪRĪ, Maṣādir, op. cit., vol. I, t. I, pp. 24-26, n. 1, critique cette position de C. Chehata et insiste sur le caractère personnel du lien obligatoire : le créancier n'a pas accès à l'objet de la créance qu'en exigeant sa remise au débiteur. La même position est prise par ‘ALI AL-ḪAFIF, Malikīyya, op. cit., vol. I, pp. 16-18.} According to the Hanafis, the ownership of a physical thing is stronger and more complete than the ownership of a personal obligation. The ownership of the seller and that of the buyer are therefore of unequal value, and this difference of value violates the principle of equality which governs synallagmatic contracts.

The second step of the contract consists, for this reason, in the equalization of the two forms of ownership. The buyer is expected to pay the price at the start in order that the
seller may also have ownership of a physical object.\textsuperscript{51} This obligation on the part of the buyer is one of the secondary effects resulting from the relations between the two forms of ownership established by the sale.\textsuperscript{52} The seller is not obliged to hand over the thing sold to the buyer before having received the price for it. The right to retain the object is not an effect of the contract. It is the result of the inequality of the two forms of ownership. It exists only as long as the seller keeps the thing (p. 875) sold in order to be sure that the buyer, in paying the price, gives him the ownership of a physical object. This right ceases to exist if the seller hands over the thing sold to the buyer before having been paid.\textsuperscript{53} The second step of the sale contract consists, thus, in the handing over of the things which constitute the price and of the thing being sold. The distinction between the two steps of the contract is explained by the difference between the value of physical things and that of personal obligations, a difference which violates the principle of the equality of the parties. The personal obligation is then transformed, by the handing over of the goods which constitute its object, into a physical and individualized thing.

According to Hanafi doctrine, physical goods are divided into three classes: specific individual things, fungibles and money. The “individual things” (‘ayn) always constitute the thing being sold (mabî), the object of the contract (al-ma‘qûd ‘alayhi). If they are exchanged for fungibles, the latter constitute the price or “the instrument” of the contract (al-ma‘qûd bihi). If the fungibles are exchanged for money, the latter represents the price and the fungible things the sold object. In this case, the contract is presumed to transform the fungibles into individual things, thereby giving them the status of the object of the contract.\textsuperscript{54} If fungible things are exchanged for other fungibles, the linguistic form of the contract attributes to one group the status of the price and to the other the status of the


\textsuperscript{52} SARAHSI, Mabsût, op. cit., t. XIX, pp. 32-34, t. XII, p. 198 ; KÂSÂNI, BadÎ, op. cit., vol. V, pp. 216 et 243.


thing being sold. SARAKHSI thus characterizes the fungibles as being "on the one hand the price, and the thing being sold, on the other." In contrast, monies in the form of gold or silver can never be individualized by the contract. They are considered to be things which, on account of their material constitution, can serve only as instruments of exchange and standards of value. The jurists apply the term "absolute prices" to monies in cases where the contracting parties mention only the character of the pieces of gold or silver but not the specific kinds. These "absolute prices" serve to designate the general and abstract functions of the instrument of exchange, of the standard of value, and of the means of payment.

Two procedures allow the contracting parties to inquire about the performances owed under their contract. The gesture by which the seller designates the thing being sold is sufficient to provide information about the nature of the material thing. The indication de visu makes the physical object of the contract evident. If it is not present at the moment of the conclusion of the (p. 876) contract, the seller must name it and describe it. The tradition of merchandise which does not conform to the description of the contractual object renders the contract null and void: the object of the contract is non-existent. In principle, the same rules apply to the price. If, at the moment of the conclusion of the contract, the price to be paid is not in the possession of the buyer, he must describe it in order to specify it. However, if the buyer shows the coins or the fungible goods to be paid as the price of the thing to be sold, he is not obliged to pay with these specific coins or these very same things. His gesture is considered as a form of naming the genus, the species, the quantity, and the quality of the money that he wishes to pay with. Since monies are not individualized by the contracts, the buyer always has the possibility of

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56 SARAKHSI, Mabsut, op. cit., t. XIV, p. 2.
replacing the objects which indicate the price to be paid by other objects of the same type and of the same value.

The goal of the contract [Sarakhsi states] is profit. It is attained by the quantity of pieces of money and not by their individuality. The goal is not the specific body ('ayn) of the pieces of silver or gold. The exclusive goal [of their acquisition] is the exchange value [innama l-maṣādū l-māliyya]. As for the rest, there are no differences between monies and stones. [Their] exchange value [is established] as a function of their circulation in the markets. In view of this function (ma'nā), their material individuality ('ayn) is not different from [that] of pieces homologous to them. 61

The thing to be sold always constitutes the object of the contract. The contract is automatically void if that thing is lost, since its object has disappeared. Property is an attribute of the thing. 62 The thing's loss or destruction, by the seller, entails, for the seller, the loss of his right to the ownership of it. The transfer of ownership by means of the contract becomes impossible. The seller's obligation to hand it over to the buyer disappears along with the object of the contract. 63 The seller, in this case, can in no way be obliged to hand over some other thing to the buyer, nor to provide some sort of compensation in place of the thing that has been lost. The obligation to deliver a specific good is never linked to the legal personality of the obligated party. This obligation, as Sanhūrī strongly emphasizes, 64 is closer to a real right (right in rem) than to a personal obligation.

61 SARAHI, Mabṣūṭ, op. cit., t. XIV, p. 16. Le texte arabe de l'édition contient plusieurs fautes qui en défigurent le sens : le mot rih (gain), est édité une fois comme rīḥ (vent), et une autre fois comme rub' (quart) ; 'ayn al-dārāhim, l'individualité des dirhams, est édité comme ġayr al-dārāhim, « autre chose que les dirhams » ce qui en inverse le sens et rend l'argument incompréhensible. Le même argument se retrouve, édité de manière moins tordue, op. cit., t. XIV, p. 28 et t. XXIV, p. 165.
On the other hand, the price, inasmuch as it is an incorporeal good and the personal obligation of the buyer, is never the object of the contract. It serves as an "instrument of the contract" (al-ma'qūd bihi). The buyer is not obliged to be the owner of the price that he is paying; he may borrow it. It is not even necessary that the buyer be capable of paying the price to the seller. The seller and the buyer have the right to replace the objects which constitute the contractual price by other considerations, provided that the latter have the same exchange value as the contractual price. The loss or destruction of the objects which constitute the price have no influence at all on the validity of the contract. The seller is not authorized to annul the contract if the buyer does not pay the price. He may lodge a complaint against the buyer in order to constrain him to pay. In this case, the judge orders the buyer to acquit himself of his obligations. If the debtor does not obey, the judge can, upon the request of the creditors, imprison him to make him pay his debts. The creditors can even request that the judge appoint a guardian for him, with the result that the debtor can no longer freely dispose of any property he may have acquired previously to having been placed under guardianship; and the judge is also authorized, if the debtors request it, to sell the debtor's goods and pay the creditors with the proceeds of this sale. However, if the imprisoned debtor turns out to be insolvent, the judge must liberate him. Then, the seller has neither the right to annul the contract on account of the buyer's insolvency nor the right to ask him to give back the thing sold. The insolvency of the buyer has no influence at all on the validity of the sale contract. By the contract, Sarakhsi states, the seller has become "the owner of a personal obligation which lasts as long as its physical basis continues to exist. The legal personality (dhimma) [of

the debtor] remains the same after the insolvency as it was before: a substrate capable of accepting obligations.\textsuperscript{72}

Concerning the conclusion of the contract, the jurists attribute two functions to the price: 1) that of an instrument of exchange which allows the transfer of ownership of the thing being sold from the vendor to the buyer; and 2) that of a standard for the value of the thing being sold. Even if the price is never paid, its existence as an object of personal obligation renders the contract valid and allows the transfer of ownership of the thing to be sold to the buyer. In other words, the function of the price as instrument of exchange and as standard of value is more important than that of instrument (p. 878) of payment.

From their analyses of synallagmatic contracts, the Egyptian jurists of the twentieth century have drawn some broad conclusions. Chafik Chehata emphasizes the weakness of an ownership of which the object is a personal obligation.\textsuperscript{73} According to him, in Hanafi law the contract “is a phenomenon linked to an object. It is not set up with a view to creating obligations” but with a view to changing the status of the thing being sold. He stresses this point: “Nothing, moreover, in the classic definition of the Muslim contract evokes the idea of obligation. In it the conjunction of the two declarations has always been considered an accessory creation a new state of things in the object.”
the status of the object of a contract. For this reason he ranks ownership of a personal obligation on a lower level than ownership of a physical object.

**The salam contract: personal obligation as object of the contract**

The salam contract inverts the relationship between personal obligation and individual goods that governs the contract of a simple sale. In the contract session, the description of the merchandise which the vendor has to deliver constitutes the only information about the value of the things sold that is available to the investor and the seller. Their calculation of the value of the things to be delivered is entirely based on this description. The jurists hold that this calculation is possible if the description refers to the genus, the species, the quantity, and the quality of the goods. Fungible goods, as well as merchandise produced according to standardized procedures, satisfy this criterion. These goods are accepted by the jurists as objects of the vendor’s personal obligation. The salam constitutes a deferred exchange of two performances: the immediate payment of the capital and the delayed delivery of the goods bought. The (p. 879) parties to the contract must therefore avoid doing anything which might fall under the second form of illegal enrichment: the exchange, in equal or unequal quantities, of goods belonging to the same kind or to the class of things that are weighed or measured with the same weights or measures. Therefore, the capital and the things being sold must not belong to the same kind of goods nor be measured or weighed by the same measures or weights.

As in the simple sale, individual things can in no case become an object of personal debt: the individual bodies represent unequal values and cannot be substituted for one another as objects of personal obligation. On the other hand, they can, in the salam, constitute the capital. They then become part of the price. The loss or the destruction of the price, as we have seen, does not annul synallagmatic contracts; for this reason, in the salam the loss of

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77 SARAKHSÎ, Mabsûû, op. cit., t. III, pp. 124-125, 142 et 155
a specific individual thing does not at all have the same legal consequences as in the simple sale.\textsuperscript{78}

As in the simple sale, monies in the form of silver or gold cannot constitute the object of the contract, the thing being sold. They necessarily form part of the capital. It is the latter, in fact, which fulfils the functions of means of exchange, standard of value and of means of payment; in short, it functions as the price. Because of its being handed over to the buyer during the contract session, the capital is conceived as a specific good, an individual thing.\textsuperscript{79} The notion of price in the \textit{salam} is therefore clearly distinct from that in the case of the simple sale: the capital has by law to be paid in advance, its tradition transforms it into a specific good, and once the contract is validly concluded it no longer constitutes a personal obligation. Whereas the contract of the simple sale is conceived as being the purchase of a specific good by means of a personal obligation, the \textit{salam} contract is defined as the purchase of a personal obligation by means of a certain good.

All Muslim jurists accept as objects of the vendor’s personal obligation not only fungible things but also all things that can be described by reference to their material and their production techniques in a way that allows one to understand their specific use and to calculate their exchange value. This includes measured things such as pieces of wood — as long as they can be cut in a manner that allows one to measure their height, their length, and their width, and as long as the date and place of delivery is known —,\textsuperscript{80} as well as textiles and other products manufactured according to standardized techniques.

According to the Hanafis, who, on this point, differ from other schools of the \textit{fiqh}, living beings cannot constitute objects of the \textit{salam}, because one cannot calculate their value on the basis of their description. Sarakhsi explains this as follows:

\begin{itemize}
\item[78] \textit{Sara\u0281\textregistered}i, \textit{Mabs\u0282\textregistered}t, \textit{op. cit.}, t. XII, pp. 158 et 169-70 ; \textit{K\u0131\u011f\u00ei\u0131}, \textit{Bad\u0131\textregistered}i, \textit{op. cit.}, vol. V, p. 214.
\item[79] \textit{Sara\u0281\textregistered}i, \textit{Mabs\u0282\textregistered}t, vol. XII, pp. 27, 143, 144 et 159 ; \textit{Marg\u0131\u011f\u00ei\u0131}, \textit{Hidaya, op. cit.}, vol. VII, p. 92 ; \textit{Ibn Al-Hum\u0131}, \textit{Fath al-\u015bdir, op. cit.}, vol. VII, p. 92 ; \textit{B\u00eabart\u0131}, \textit{\u011f\u0131\u011f\u0131, op. cit.}, vol. VII, p. 92.
\item[80] \textit{Sara\u0281\textregistered}i, \textit{Mabs\u0282\textregistered}t, \textit{op. cit.}, t. XII, pp. 131 et 138 ; \textit{Samarqandi}, \textit{Tuhfa, op. cit.}, vol. II, p. 14.
\end{itemize}
Just as the individual thing constitutes the goal (maqṣūd) of the contract, so too the exchange value (māliyya) [is a goal of the contract]. It is even more so. The goal of the contract is (p. 880) profit, and the profit will be attained by the exchange value. By the enumeration of its attributes, an animal will not be counted among the fungible goods with respect to the exchange value. We therefore say that the salam is not admissible for [the purchase] of animals. The case of textiles is different. They are the product of the work of men (fa‘innahā maṣnū rāni Ādām). Textiles that have been woven according to the same model and in the same form (fi minwālin wāḥida) differ very little in their exchange value, and this degree is not pertinent; it is like the difference in the exchange value between wheat of good and of bad quality. But an animal is the product of God. It will be as God wishes it to be. It perhaps will not have an equal (naẓīr). Even if [the investor] took the greatest pains to enumerate all its attributes in an exhaustive manner, it would perhaps still be without equal. All [the jurists] agree that an object [as incalculable as that] is not admissible in the salam.  

Human beings are unable to calculate the value of things unless they have produced them or measured their quantity. The production of living beings belongs only to God. For this reason the value of animals and slaves cannot be established by the descriptions that the seller could give of them. On the other hand, the value of a product of human labor is only partially determined by the material from which it has been made; and the models or patterns and procedures of its production are more important than the material as criteria of kind. According to the Hanafis of Transoxiana of the 11th century, a type of merchandise can be defined by its material, but it can be even better defined by the model.

(minwal) of its production, the use foreseen for it (maqsud), and its name, as well as by the fact that it can no longer be transformed back into its basic material.\textsuperscript{82}

According to the jurists, the transformation of material determines the various uses of the goods made from it and, for this reason, determines their names and types.\textsuperscript{83} The genus of things depends, in the last analysis, on the methods and models of their production. This approach makes it possible to distinguish a multiplicity of types produced starting from the same basic material. As independent kinds they escape the second interdiction against illegal enrichment and are therefore freely exchangeable for one another in the salam contract.

This Hanafi doctrine from 11\textsuperscript{th} century Transoxiana is clearly distinguished from the one developed in Irak by the qadi of Kufa, Ibn Abi Layla (693–765), a (p. 881) contemporary of Abu Hanifa with whom he was often in disagreement.\textsuperscript{84} This jurist, according to Sarakhisi, forbade the exchange, in the salam, of one fabric for another. Sarakhisi interprets this opinion in the following manner:
common material constitutes a single type or [as if] taking into consideration
the similarity in use, one made the fabrics of Herat and of Merv into a [single]
type. The same thing is reported concerning wheat and barley, [i.e] that they
belong to the same type because they serve similar purposes.\(^8\)

The Hanafis, while accepting the idea that the use for which a good has been fabricated
\((maqṣūd)\) is one of the factors which determine its type, emphasize that it is not a general
use, such as nourishment or clothing the body which defines it. The key points are rather
the specific uses made of the various kinds of merchandise, which depend on the way
they were made.\(^8\) On the other hand, the Hanafis do not accept the idea that the type a
good belongs to can be determined solely by its material basis. Sarakhsī underscores this
point:

\[\text{The product } (maṣnū) \text{ fashioned from a material does not belong to this kind}
\]
\[\text{of material. As for example: the cloths and cotton. It belongs even less to the} \]
employed in the production of various merchandise, a kind of merchandising avan la lettre. Everything is taken into account: textiles, mats of papyrus and reeds, wood and leather, tiles, glass instruments, packaging, milk products, dried and salted fish, little pearls sold by weight, metal products, and many other things as well. Thus, the great treatises on the salam read at times like merchandise catalogues offering information on the production processes of the goods described.

However, the Iraqi doctrine of the 8th and 9th centuries did not attribute to all forms of work the capacity to transform the same material into different types. Shaybani (died in 804), one of the three Iraqi founders of the Hanafi doctrine, refused to recognize slaughtering as a form of production and meat as a kind of thing different from the unslaughtered animal. He justifies this refusal in the following manner:

Meat is not produced by slaughtering (wa l-lāḥmu lā yuḥdahu bi l-ţabīḥ) [...] Slaughtering [causes] a pure flaw, as if one slashed a cloth. It extinguishes life and destroys the power of reproduction. It is analogous to boiling wheat, which also destroys the wheat’s capacity to bud. As it is established that the meat existed before the slaughter, it is not allowed to sell it [for a living animal], except in a process which guarantees the equality of the quantities exchanged (biṣṭarīqi l-Ītibār).³⁸

The Hanafi authorities of Transoxiana considered slaughtering a productive work which creates new kinds of produce. But they used the kind of reasoning that Shaybānī applied

³⁸ Ibid., p. 180.
to the slaughtering of sheep to the transformation of wheat and other agricultural products. For these jurists, the meal and the fine flour are already contained in the wheat and merely represent, in fact, wheat that has been milled. The three things thus constitute, despite their different forms, the same kind with regard to their content (bi'tibār mā ḥī l-dimn). The meal and the fine flour, Sarakhsi states, certainly lose some important attributes of wheat; for example, neither the meal nor the fine flour can be utilized as seed grains. Similarly, cooking the wheat does not create a new type. “This transformation can be summed up in the fact that the fine flour loses several functions, and that does not constitute a difference of type.”

On the other hand, if the transformation of the agricultural products adds new elements to the original product – in cases like the elaboration of vinegars, oils, and unguents enriched by other products – it is considered an operation which transforms the object’s type. Labor which alters the products, putting them into metrological classes different from those which applied to their original material, counts as transformative work: the milk from which cheese is produced can serve as capital in a salam which has as its object the delivery of this cheese.

At the center of this legal debate lay the standardized procedures for the production of manufactured goods. Compared to the Hanafi doctrine of 11th century Transoxiana in this

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90 SARAḩISI, Mabsūt, op. cit., t. XII, pp. 176-177.
matter, that of the Iraqis of the 8th and 9th centuries seems quite limited. It ties the manufactured products to their geographical origins, pointing to the fact that the jurists, in the 8th century at the latest, conceived of the *salam* as an economic instrument on the regional scale. According to their doctrine the types of goods which constitute the objects of a *salam* must be — up through the time of their delivery date - in circulation in the region in which the parties concluded the contract. It is not necessary that they circulate at the place where the *salam* is concluded. One can always, according to Sarakhsi, transport them from nearby towns and cities to the place of delivery. The fact that they do not circulate in all the cities of the region does not signify that (p. 883) their stocks have been exhausted. If the goods circulate constantly on the markets of the region between the moment the contract is made and the date of delivery, the contract is valid even if the same goods can no longer be found there after that date. If the seller, in such a case, has not bought or produced the objects of the contract before they disappear from the markets, the investor has the choice of either canceling the contract or maintaining it. He may either request the restitution of his capital or put off the delivery date until the moment when the goods are circulating again in the region. This option is open to him, states Sarakhsi, because the object of the contract is a personal obligation which exists even in the absence of the goods which constitute its objects.\(^9\) By maintaining the contract, the investor preserves his right to the acquisition of the merchandise; by cancelling it, he uses it as a loan of capital to the borrower, who must pay him back.

Goods cannot be sold through the salam unless they are regularly produced in sufficient quantities to supply the markets. Therefore, it is not permitted to invest capital in the production of a single plantation or of a single village.\(^3\) The quantities of wheat produced by these small units would not be capable of supplying an entire region. Only wheat produced at the scale of a region like Iraq, Khorasan, or Ferghana, and not only in and around the major cities, is allowed as an object of the salam, because, say the jurists, it is extremely rare that the entire harvest of a region is destroyed by a natural catastrophe. In normal times, the wheat coming from these regions is assumed to be deliverable.\(^4\)

Shaybānī had rejected, as an object of the salam, the wheat of Herat, a great city in the northwestern part of what is now Afghanistan, stating that the quantity of wheat produced by this city was not sufficient to assure a guaranteed circulation.\(^5\) On the other hand, he had accepted the textiles of this same city as objects of investment, making the assumption that they were defined by their regional origin. The cloths of Herat, Bukhara or Merv could not be considered authentic types, according to this doctrine, unless they were produced in the cities that give them their names. “The Herati robe,” states Shaybānī, “is produced only at that place. That is its name. No one can give it another name.”\(^6\)

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\(^3\) SARAHSĪ, Mabrūṭ, op. cit., t. XII, pp. 130, 174 et 175; KĀSĀNĪ, Badāṭī, op. cit., vol V, p. 211; SAYBĀNĪ, Aṣl, op. cit., p. 48, numéro 137.

\(^4\) SARAHSĪ, Mabrūṭ, op. cit., t. XII, p. 175; SAYBĀNĪ, Aṣl, op. cit., p. 48, n. 137; KĀSĀNĪ, Badāṭī, op. cit., vol V, p. 211.


\(^6\) SAYBĀNĪ, Aṣl, op. cit., p. 50, numéro 145.
The arguments used by the Hanafis of Transoxiana to defend the cereal production of the
great cities of Central Asia as an object of investment display a development in their
doctrine between the 8th and 11th centuries. The Transoxianan jurists assert, in the first
place, that Shaybānī would not have been speaking of the city of Herat {p. 884} but
rather of an Iraqi village bearing the same name. Then, they distinguish the products of
the artisans and manufacturers of Herat, which are always permitted as objects of the
salam, from the grain production imputed to the city. One can consider it certain that the
“business activity of Heart” (harakat) would never cease there and that one would always
find its textiles and cloths on the markets. “Herati wheat,” on the contrary, might
disappear from the markets because of natural catastrophes or for other reasons. Sarakhsi
judges this a “weak” argument. He states that the jurists of Bukhara give another
interpretation to the attribution of wheat to a city or region. According to them, such
denominations do not mean that the wheat grows there, but instead refers to a type of
wheat.97 In other words, “Herat wheat” might just as well be grown in Iraq or elsewhere.
The name is merely an indication of the type to which the merchandise belongs.

Nevertheless, according to the Iraqi Shaybānī, a garment produced in Damascus cannot
legally be sold as a “Herati robe.” He admits, however, that the “Herati robes,” unlike the
wheat which is said to come from that city, are acceptable as object of the salam. The
Hanafis of Transoxiana propose several explanations in order to justify this difference in

est toujours défendue au XIXe siècle par le hanéfite damascain IBN ‘ÂBIDIN, Radd al-muhtâr ‘alî al-durr
exemples, Ibn ‘Âbidîn renvoie clairement à une tradition transoxianienne.
treatment between the two products. Sarakhsi rejects all of them and then gives his own explanation.

The true meaning of this distinction is [the following]: the attribution of the robe of Herat serves to explain the type of object of the salam; it does not serve to determine the place [of its production]. The robe of Herat is, in fact, that which is woven according to a known process (‘Alā ṣifatīn ma’lūma). It is called robe of Herat, but it matters little if it has been woven in this manner in Herat or in other places. In that it is like the zandanījī and the widār.  

(p. 885).

In the Aşl, [Shaybānī’s main work], he writes: the robe of Herat is produced only in that place. This is false. It is correct (ṣaḥīḥ) to say, rather, that it is also produced (maṣnu‘) in other places. As we have already explained, it is the name given to a cloth (mansūj) [produced] by a [known] (bi-ṣifā)

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process. It will be named thus even if it is produced in places other than Herat. 109

For Kāsānī, too, the attribution of the robe to Herat is an account based on type and not a specification of the robe in terms of the place mentioned. The proof: if the seller delivers a robe that has not been woven in Herat but on the model (šab) of the robe of Herat, then...
Sarakhsi explains why, in the salam, different fabrics made of cotton, wool or silk may be exchanged as capital, on the one hand, and as, salam goods on the other:

*He may invest the robe of Quhistān* \(^{103}\) *as capital to [buy as objects of his investment] a robe of Herat or of Merv or other kinds of robes which are distinguished (p. 886) by the countries [in which they originated] and by the processes of their manufacture (ṣurā). He may conclude the salam by investing one of them to obtain the other. Similarly, he may invest the robe of zatī \(^{104}\) in order to [acquire] the robe of Herat, wool fabric (kisā) for the ṭaylasān shawl [worn over head and shoulder], the ṭaylasān shawl for wool fabric, [and] linen robe for that of cotton; [these exchanges are lawful]*
of the siqlāṭín ¹⁰⁶ and of the black shawl, it is a matter of two types, even if

their basic material is the same (wa‘in ittahada l-aṣlū): silk.¹⁰⁷

A product’s type is determined by the identity of the techniques of its production, and by
the type of intended use, as well as by its denomination, which indicates its inherent
characteristics. Its basic material determines its type only to the degree to which these
three properties that identify it need a material basis in order to exist.¹⁰⁸ It is, therefore,
the identity attributed to an object by its producers and (p. 887) its consumers that
determines its type, which is
Unequal exchange

The legal debate on the respective values of the capital and the objects of the *salam* is governed by the following principle: the capital and the things are not exchanged.
The same inequality occurs in the exchange of information concerning the thing sold and the capital. The merchandise is not present at the time the contract is concluded. The investor must therefore specify the type, the species, the quality and the quantity of the object of the contract, as well as the date and place of delivery.\textsuperscript{111} On the other hand, the information about the capital is rather summary. If the capital consists of a robe or of another individual good, all the Hanafi authorities agree that the simple gesture which indicates the capital provides the seller with sufficient information about it.

For two of the three Hanafi authorities of the 8th century, Shaybânî and Abû Yûsuf, the same rule applies if the capital consists of several kinds of money or merchandise. In contrast, Abû Ḥanîfa obliges the investor, in this case, to inform the (p. 888) seller of the type, the species, the quality, and the quantity of the capital. He justifies this obligation by the fact that among the monies paid in capital there are always coins of inferior alloy that the seller has the right to return to the investor. If the latter has not declared the quantity of the capital, the seller does not know by what amount the capital offered is reduced by this return of the coins of lower value. He therefore cannot calculate his remaining debt to the investor.\textsuperscript{112}

If the thing to be sold consists of two or more objects, the investor, according to Abû Ḥanîfa, must specify the parts of the capital which correspond to each of the objects of the contract. Only such a specification allows the seller to calculate the relationship of the

\textsuperscript{111} SARAHSI, Mabûṣî, op. cit., t. XII, pp. 124-25 et 127 ; KÂSAŅI, Badîî, op. cit., vol. V, pp. 207 et 213. 
value between the capital and the object of the *salam*. The calculation becomes complicated when the vendor delivers several things and the investor seeks to resell them individually. The modalities of the sale discussed by Abū Ḥanīfa are those of a “sale with declared profit” (*murābaha*), in which the seller must declare at what price he bought the merchandise. In such a contract, the profit requested by the seller is calculated in fractions of the amount of the first price paid by the vendor. In this case, the investor of the *salam* must carry out two operations. As long as the merchandise exists only as objects of the seller’s personal obligation, it is sufficient to divide the capital by the number of these objects in order to establish the price of each of them. As objects of a personal obligation, nothing distinguishes them from one another. They are only concepts, abstract obligations. But from the moment when these objects, by being handed over to the investor, become individualized things, it is their materiality that determines the value of each of them. By delivering the objects of his obligation, the seller transforms the object of the contract from a personal obligation into a number of physical things. Abū Ḥanīfa conceives this transformation as a legal fiction (*taqdir*) according to which the two parties of the contract have renewed their contract at the moment when the goods were handed over. It is this renewal which would have allowed the things in question to be treated as if they, and not the personal obligation, were the object of the contract. This concept of calculation is, according to Sarakhshi, the original Hanafi doctrine of the *salam*. It depends on the model of the two-stage contract that we discussed above for the simple sale contract. By contrast, in the *salam*, the calculation of the prices, according to Abū Ḥanīfa, changes with the transition of the object-as-concept into the

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object-as-thing. Abū Yūsuf and Shaybānī do not follow these rules. In their opinion, even after their delivery to the investor the price of the individual objects of the contract is established by the simple division of the capital by the number of objects in the contract.¹¹⁴

These differences should not obscure the common foundations of the Hanafi doctrine. All the 8th century Iraqi Hanafi authorities, like the Hanafis of Transoxiana later on, endorse the idea that the personal obligation to deliver (p. 889) goods is created by the contract, and validated by the handing over of the capital, and that the contract transfers the ownership of this obligation to the investor.¹¹⁵ The property under discussion here is neither the attribute of the thing nor the ownership of a personal obligation which might be thought to function as a price, as an instrument of the contract (al-ma'qūd bihi). It is, rather, a matter of a right which has as its object a personal obligation, an obligation which is the object of the contract and which will continue to exist as long as the seller is alive. The payment of the capital gives the investor the right to request the delivery of the objects of the personal obligation at a time fixed by the contract; but it is the taking possession (qabḍ), the handing over of physical things, which effects the transfer of ownership of the goods to the investor. This mechanism is underlined by the fact that fungible things the value of which is determined by measure or weight have, to be measured or weighed by the vendor and the investor at the moment when they are

delivered. The weighing and measuring by both partners constitutes the act of tradition. This is why the jurists attribute to the handing over of physical things a quasi-contractual character. The transformation of the personal obligation into physical merchandise governs the concept of the constitution of ownership in the case of both the sale contract and the salam in the doctrine common to the great majority of the Hanafis.

The contract of the insolvent (ṣaqd al-mafāls)

The contracting parties have the right to agree to annul the contract by returning the considerations handed over by the two partners (iqāla). The seller is therefore obliged to return the capital to the investor. If he has destroyed or consumed capital consisting of an individual good, he must reimburse its value. If the capital consists of money or of fungible goods, he must return the same quantities of the same types.

The complete cancellation of the salam greatly reduces the investor's sphere of action. Under a valid and binding salam, the investor can use this type of contract as an instrument for lending money, for stocking up on merchandise, for preparing a strategy for selling it, or for exercising an influence on the diffusion of agricultural products and techniques in his region. The salam is of interest because it allows the investor to impose on the vendor a price (p. 890) below that of the market. On the other hand, the complete cancellation of the contract leaves the salam with only the function of providing a monetary loan, an important function, of course, for the investors' business activities, but
therefore cancels only a part of the contract with his partner, thus following the advice of [of the Prophet]. He thus obtains a portion of the objects of the contract, allowing him to attain his goal of making a profit. This solution takes into consideration the interests of both parties, and that is “recognized, good and charitable.”

The partial cancellation of the contract protects the interests of the investor by assuring his profit and his capital, and it is meant to protect the seller by partially freeing him from a business deal in which he is losing money. The jurists justify the salam by the merchants’ need to dispose of an investment contract which gives to the investors the opportunity to let their capital grow, and to the sellers the means of buying or producing
The salam [says Sarakhsi] belongs to the contracts of the insolvents, and it is [for this reason] concluded below the market price. If the thing to be sold had been the property [of the seller], he would have sold it at the highest price, and he would not have concluded a salam below its value.\textsuperscript{123}

Kāsānī observes that the salam, unlike the sale contract, does not offer the seller the possibility of opting for or against the maintenance of the contract. In the sale contract, this option serves to protect the contracting parties against damage to their interests. This reasoning, says Kāsānī, does not apply to the salam: “The basis of the salam is the damage (gābn) and pressure on the prices (wāks al-tamān), because it is a contract of the insolvent (aḍd al-mafālīs). Accordingly, the same jurist states, the salam is concluded “at the lowest possible price” (bī’awkas al-atmān) or “at a derisory price” (aḥtas al-atmān).\textsuperscript{124}

The characterization of the salam as a “contract of the insolvents” remained a legal topos for centuries. It is also found among the Hanbalis.\textsuperscript{125} In the 15th century, an important Egyptian jurist, Ibn al-Humām, protested against this terminology, remarking that the majority of the sellers fulfill their obligations. He too, however, stressed that investors

profit from the *salam* because they buy the merchandise below its value. “There is no
doubt that the thing is sold below its value and that the buyer profits in this manner.”126
The same argument appears in a work of another Iraqi author of the 14th century, Bābartī:

In spite of their great capacity for reasoning (ma’a wufur ‘uqulihim) and
although they may be extremely prudent in seeking to avoid suffering damage
through sales, and notwithstanding their strong desire for lucrative business
deals (kaṣrat rağbatihim fi l-iijārati l-rābiḥa), men take on the risk [of
concluding] *salam* contracts, even if, at the moment of the contract’s
conclusion, they have no need of the thing being sold. This is clear proof that
the object of the *salam*, even if it is of poor quality, surpasses [the value of
the capital].127

The two authors refer, in the same context, to the insolvency of the seller 128 for that is
thing that has been acquired, must deliver it to the investor, for a derisory price, in order to acquit himself of his debt to him.

**Diminishing the risks of unequal exchange**

Concluding business transactions with insolvent partners obviously meant taking risks. In Palestine, before 1840, bankruptcies of investors do not appear to have been rare. B. Doumani explains them in terms of institutional deficiencies: neither the political system nor the courts engaged in the legal recovery of debts before that year. Consequently, investors sought to diminish their risk by forming partnerships with urban merchants, village notables, and political dignitaries. Well-to-do farmers and village notables also acted as authorized agents or mandataries for investors or as sureties for sellers.  

The Hanafi doctrine—like that of the other schools—provided legal roles which could fulfill these functions. The law of partnerships allowed several investors to conclude a salam with one or several sellers and thus to distribute the risk among several individuals. The mandate served the same function for the investor. According to the Hanafi jurists, the mandatary is bound by the orders of his mandator, who orders him to conclude a salam contract, but it is the mandatary who concludes the contract through his own personal capacity and in his own name. He alone, therefore, is authorized to

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manage and carry out the provisions of the contract. If the mandatary is charged with concluding a salam, the seller is not entitled to ask the mandator to pay him the capital; instead, he must turn to the mandatary. The latter must advance the capital in the place of the investor, and it is he who manages the relations with the sellers, without the intervention of his mandator. In principle, the mandatary alone is authorized (p. 893) to require the handing over of the salam object. He may require some form of collateral, or a surety or guarantee for the thing being sold. He also has the right to be satisfied with an object which is of lesser value than that agreed upon in the contract. He may postpone the due date of the object of the contract, and, if he compensates his mandator, he may even renounce collecting payment of the debt. At the moment when the seller hands over the object of the contract to the mandatary, he has fulfilled his obligations towards the investor who created the mandate, and, at the same time, the ownership of the thing handed over to the mandatary becomes, by right, the property of the mandator or original investor.

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133 Ibid., t. XII, pp. 203-204, 211, 212 et 218. Mais voir ibid, pp. 211-212 pour la solution par équité qui permet au mandat de collecter directement les objets du salam d'un vendeur qui a conclu le contrat avec son mandataire. Ce texte montre, cependant, que si le mandant exige du vendeur la remise des objets dû par le salam, le vendeur n'est pas obligé de les lui remettre parce qu'il ne les doit qu'au partenaire investisseur du contractant. Seulement celui-ci a le droit d'exiger la remise des objets de la dette. La solution par équité demande donc l'accord du vendeur. H. YANAGIHASHI, Property, op. cit., pp.175-75, cite Saraşi (vol. XII, p. 209) pour prouver que l'investisseur aurait le droit de collecter les objets du contrat directement du vendeur. Il ne voit pas qu'il s'agir d'un cas dans lequel le mandataire a violé le mandat et que, pour cette raison, l'investisseur annule le contrat s'il reprend le capital directement du vendeur. Il ne s'agit pas, dans ce cas, de l'exécution des clauses d'un contrat.


As long as the mandatory acts within the framework of his mandate, chooses partners who are not family members or part of his household, and makes deals at price levels which do not damage the interests of this mandator,\textsuperscript{137} no one has the right to interfere with his management of the business transactions. In commercial practice, the role of the mandatory is filled by an urban merchant or a well-off village notable who represents the interests of one or of several investors and finds them partners with whom he concludes the \textit{salam} and for whom he is the sole contracting party. His knowledge of the state of solvency of people in his area is very probably one of the criteria he uses in choosing partners for the \textit{salam}. If he advances the capital for his mandators, he acts both as their banker and their mandatory. That is why a relationship of trust between the investor and the mandatory is essential for the smooth functioning of this institution and the reason why the right of the mandatory to name other mandataries in his place is extremely restricted.\textsuperscript{138}

The mandate, in commercial practice, therefore serves to mobilize the resources of a wealthy merchant, who likely has a good grasp of the regional commerce, of its products and its actors, and (p. 894) thus helps to diminish the risk to potential investors. By contrast, the seller's capacity to name a mandatory is reduced to his obtaining the capital during the contract session and as long as the two contracting parties have not yet separated.\textsuperscript{139} But the seller is not entitled, for example, to give to a third person the mandate to find an investor for the wheat that he intends to sell in four weeks or three

\textsuperscript{137} Pour ce qui est de la lésion, voir SARAHSI, \textit{Mabsüt, op. cit.}, t. XII, pp. 208 et 214-15, et, sur les contrats du mandataire avec les membres de sa propre maison, p. 218.

\textsuperscript{138} \textit{Ibid.}, t. XII, pp. 208, 216, 218 ; SAMARQANDI, \textit{Tuhfa, op. cit.}, vol. III, pp. 235.

\textsuperscript{139} SAMARQANDI, \textit{Tuhfa op. cit.}, vol. III, p. 230, souligne le fait qu'un tel mandat n'est pas valable hors de la séance du contrat et sans la présence du mandant ; voir aussi KÁSÁNI, \textit{Bada'i, op. cit.}, vol. VI, p. 23.
months: “The acceptance of the salam,” writes Sarakhsi, “is part of the way the insolvents do business (min șanī al-maftūḥs) and the mandate for that is as null as [the mandate] to beg.”

On the other hand, the seller’s suretyship contract (kafla) is admissible. In the first place, this surety bond serves to diminish the investor’s risk. It can, accordingly, be established without the debtor’s agreement. Such a solution, however, has the disadvantage that the person who stands surety, i.e., the guarantor, has neither the right to require of the debtor the reimbursement of his expenses nor the payment of his claims stemming from obligatory rights. These rights with respect to the debtor arise only if the latter agrees to them. The jurists thus try to compensate the guarantor’s risk by allowing him to make a profit at the expense of the creditor or of the debtor.

Several forms of reasoning are used to justify the gain derived by the surety or guaranty. The principal argument analyzes the surety as a separation of the debt (debitum, Schuld) from the obligation to pay (lien obligatoire, Haftung). Sarakhsi formulates this doctrine as follows:

The contract is called suretyship because it joins the legal personality of the guarantor to that of the debtor, in a way that consolidates [the latter]. One of the two [methods to justify this concept is to think that] the addition [of the

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140 SARAKSHI, Mabsûf, op. cit., tome XII, p. 209; à comparer à C. CHEHATA, Théorie générale, op. cit., p. 145, numéro 197; YANAGIHASHI, Property...op. cit., pp. 174-175, ne mentionne pas le fait que Sarakhsi refuse au vendeur le droit de se faire représenter dans la recherche d’un capital avant la séance du contrat.
legal personality of the guarantor to that of the debtor] concerns only the request (*mutālaba*) for the payment of the sum due to the exclusion of the principal debt. The debt remains as such tied to the legal personality of the debtor. Payment is required from the guarantor as well as from the debtor. Concerning the person who has the right to require payment, it is possible, from the start, to separate the debt owed from the right to require payment: in a sale contract the mandatary is entitled to require the [payment] of the price whereas the [title to the ownership of the] price is assigned to the mandator (*mandant*). In the same way, it is allowed to separate [the right of] requiring the payment [of the sum owed] from the principal debt with respect to the obligor, so that, after the suretyship, the payment of the amount due is asked of the guarantor while the principal debt remains a personal obligation of the [original] debtor. Similarly, the establishment of a delay [for the payment] separates the right to require (p. 895) the payment of the sum owed from the principal debt by suppressing the right to require payment [until the date established]. The obligation arising from the suretyship contract has the same effect. To require the payment of the sum due has the same relationship to the debt as the right to dispose of a thing compared to the [absolute] ownership of the thing itself. It is licit to separate the power of disposition over a thing from the [absolute] ownership of the thing itself as far as the request for payment is concerned. It is also licit, concerning the pledgor, to separate the right of control over a thing from the [absolute] ownership of the thing itself.149 In the same way it is admissible to separate the obligation to accept

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149 SARAHIŠI, *Mabsūt, op. cit.*, t. XIX, p. 161; [the editors of the volume have misread *milād al-ḡayr* instead]
the request for payment that arises from the suretyship contract from the
obligation [to satisfy all claims] concerning the principal of the debt.

The guarantor does not share the debtor's debt. He guarantees only that the latter will
honor his obligations. He is not obliged to take any action unless the creditor requires him
to, whereas the debtor is obliged to pay his debts even he is not asked to. Based on this
separation between the principal debt and the obligation arising from the suretyship
contract, the doctrine envisages the following consequences: the creditor can require
repayment of his loan from the principal debtor, from the person standing surety for him,
or from both of them. If the debtor fulfills his obligation or if the creditor makes a gift
of his debt to the debtor, the guarantor is legally freed from all his obligations. However,
if the guarantor settles with the creditor by paying him the sum that is due, or if
the creditor discharges him from his obligations, the debtor is in no way exonerated from
his debt. The guarantor thereby acquires the right of demanding it from him. The profit

of milk al-'ay. Their reading makes absolutely no sense in this context. It just shows that they did not follow
Sarakhsi's argument. I reinstalled the milk al-'ayn, the property of the thing itself. See also ibid., t. XX, pp.
30-31, 91-93, 96 où Sarakhsi tire les conséquences de cette approche; cf. aussi KĀŠĀNI, Badā'ī, op. cit.,
v ol. VI, p. 10 et pp. 11-12. MARGĪNĀNI, Hidāya op. cit., vol. II, p. 583, résume la différence de manière
succincte: « Un garant est responsable pour ce qui est exigé et non pour ce qui est dû »; pour la séparation
entre la chose dû (le debitum), et l'obligation de payer (l'obbligatio) dans le cadre du cautionnement, voir C.
CHEHATA, Théorie générale, op. cit., pp. 170-71, numéro 262. Contrairement à ce que dit C. Chehata,
cette distinction me semble avoir une importance pratique: elle est la base des bénéfices que la caution
doit effectuer aux frais du débiteur ou du créancier.

143 MARGĪNĀNI, The Hidāya/Hamilton, op. cit., vol. II, p. 580; sur d'autres conséquences pratiques de la
séparation entre dette et obligatio voir SARAJSI, Mabsūt, op. cit., t. XX, p. 85.
144 Ibid., t. XX, pp. 28-29 voir aussi Ibid., t. XIX, p. 163; KĀŠĀNI, Badā'ī op. cit., vol. VI, pp. 10 et 14;
comprendre la séparation entre lien obligatoire et dette, voir IBN AL-HUMAM, Fath al-Qadīr, op. cit.,
145 SARAJSI, Mabsūt, op. cit., t. XIX, p. 165 et tome XX, p. 3; KĀŠĀNI, Badā'ī, op. cit., vol. VI, pp. 11,
146 SARAJSI, Mabsūt, op. cit., vol. XX, pp. 58-59; KĀŠĀNI, Badā'ī, op. cit., vol. VI, pp. 10-11;
ce cette construction ouvre à la caution, voir SARAJSI, Mabsūt, op. cit., tome XX, p. 58.
that the guarantor can derive from his position between the creditor and the debtor depends on the way in which he settles with the creditor: by making a settlement with him he acquires the right to demand that the debtor pay him his debt: “The surety (caution) becomes the owner of the debt, having given a compensation for it.” If the guarantor pays the sum due to the creditor with his own means, he can then make an arrangement with the debtor regarding objects of his choice. Since his relationships with the debtor is not governed by the salam contract, but by that of suretyship (cautionnement), he is, likewise, not constrained by the content of the salam concluded between the creditor and the debtor.\footnote{\textsuperscript{148}}

(p. 896) The guarantor’s ability to reap the benefits of his position as intermediary between creditor and debtor presupposes that the creditor who is not able to cover the obligations arising from his debt, is at least willing to reach a compromise. If this condition is not fulfilled, the surety must have recourse to his social rank or to his political power in order to succeed. The examples cited by B. Doumani of wealthy farmers who acted as sureties and lost property on account of uncooperative debtors clearly show that wealth alone did not ensure success. The urban merchants, in Egypt as well as in Palestine, therefore sought to involve the village notables in a network of guarantors for the farmers’ debts. For these notables, agreements with the debtors were

integrated into a promising strategy with other partners that made it possible to transform the insolvency of the debtors into a source yielding access to economic and social gains.

Conclusion

In their elaboration of the rules concerning the salam, the Hanafi jurists sought to establish a compatibility between the justice of exchange and the justice of contracts, on the one hand, and the question of licit profit, on the other. The justice of exchange is defined by the relationship between things; that of contracts, by the equality of the partners. Interpreting profit and things in terms of exchange value (maliyya), the jurists introduced the logic of value into legal reasoning and used it as a means to integrate into the legal doctrine the new technological and commercial situation of the Muslim world during the first centuries of the Abbasid empire (750-1258). They offered to the merchants an instrument for the investment of capital into agricultural production and manufacturing through accepting the personal obligation of the seller as the licit access to future goods.

The Hanafi texts on the salam discuss the commercial value of the objects of investment. They focus on the calculation of the profit (istirbah, ribh) made by the investors. If the investor is to make a profit, he must be able to calculate the value of the goods that are exchanged. The exchange value (maliyya), according to the jurists, is a quality common to all commercial goods, and they came up with a succinct formula for it: the exchange value is the type or genus common to all merchandise. Sarakhsi explains why the pledgee
who destroys the thing pledged to him realizes, by this very act, his claim to the outstanding debt: "He executes [his right to] his outstanding debt only with respect to its exchange value. With regard to the attribute of the exchange value, all merchandise belongs to a single type or genus,"\textsuperscript{149} in other words: even if the original debt concerned a textile and the pledge is constituted by hides tanned and cut, the destruction of the hides extinguishes the debt stemming from the textiles. For that reason, any given pecuniary value can serve to pay any given debt: "With regard to the function of the exchange value, all goods are a single genus (wa l-amwālu kulluhā fi ma'na l-māliyya jinsun wāḥid) » says Kāsānī, explaining why the buyer is free to replace the agreed-upon price by other things having the same value.\textsuperscript{150}

A good is determined by the categories of genus, species, quantity, and quality. In everything concerning enrichment without adequate consideration (\textit{ribā}) by means of a simultaneous exchange the quality of goods is not taken into account. On the other hand, in everything concerning exchange value, quality is always taken into account; it is one of the factors which determine exchange value. The Hanafi doctrine thus distinguishes between the equivalence and the quantitative equality of goods.

Exchange value is a category common to all kinds of merchandise, but, in the \textit{salam}, the Hanafis accept as objects of investment only those goods that can be described by genus, species, quantity, and quality, because this is the only way by which the investors can calculate the value of goods that they are going to see only in the future. The categories

\textsuperscript{149} SARAHSĪ, \textit{Mabsūṭ, op. cit.}, tome XII, p. 152.
\textsuperscript{150} KĀSĀNĪ, \textit{Badā́}, \textit{op. cit.}, vol. V, p. 234. Kāsānī utilise (vol. II, pp. 20–2) la même formule pour justifier le fait que le contribuable doit payer les impôts pour ses biens en or ou en argent et non en nature.
of the description must therefore correspond either to the measures, weights, and numbers of fungible things, or to the techniques of the goods’ production. That is why living beings are excluded as objects of investment in the Hanafi salam. The verbal description of goods renders profit calculable only if it focuses on those qualities that constitute their value. These reside in material, measures, weights and standardized procedures of production. Consequently, a description which, by its naming of the product, refers to the techniques of its production allows everyone to know its value, rendering the product authentic and calculable.

On the basis of this reasoning, the jurists envisage the universal spread of production methods that were originally linked to local products characteristic of certain regions. The spread of these production models brings about the “globalization” of the products that become entirely independent of their geographic origins and the regions in which they were first produced. It remains a subject of further research to check whether the thesis of the jurists that in the last instance the production models are more important than the material from which the products are derived was taken so seriously – or was based on such important commercial practices - that it gave, in fact, rise to textiles produced according to the same models but produced from different materials, such as silk and cotton. The fact of the empire-wide diffusion of production models can hardly be doubted.
value, according to the Hanafi doctrine, exists only for physical things. The relationship between the physical object, the capital, and the personal obligation, in which it is invested and which is always an incorporeal good, is determined by the inequality of their exchange values. At the same time, investment in the purchase of future goods can be made only through the personal obligation of the seller: nothing can replace it. For this reason, it is considered to be the object of the contract. The salam serves precisely to create, first, this type of personal obligation and, second, its inequality relative to the capital involved; it thus establishes a personal relationship between the creditor and the debtor. The invocation of the justice of synallagmatic contracts serves to justify the inequality inherent in this exchange.

The legal doctrine, of course, is not reducible to the economic functions that it regulates. It organizes a vision of economic activities in the light of a system of legal thought. It determines the categories which define the goods, the content of the verbal acts which create the personal obligations, and their ties to the physical handing over of the goods, at the same time harmonizing them with or restricting them in relation to the other spheres of law (such as marriage and household relations). It regulates the exchange of goods by the exchange of declarations and of things, as well as by defining the functions of the linguistic symbols which are part of the process. By means of the definition of these terms, the jurists circumscribe the legal roles of the investor and of the seller, as well as the relations of force between them. Personal obligation thus becomes the indestructible object of the contract, because the seller has no way of liberating himself unilaterally from the contract. It is the only means which gives the investor access to the goods that
will be delivered to him in the future. The effects of the relationship between two forms of unequal ownership determine the relationship between the contracting parties.

The jurists' ability to determine the legal roles of the contracting parties through the terminology of the law and the definition of its terms is not at all remarkable in itself. What is remarkable, however, is the way in which the jurists constructed their terminology as a technical language using terms taken from everyday forms of speech, developing their own theory of speech acts, and giving new and distinctive meanings to the terms used as elements of legal discourse. Through this technical legal idiom they created for the contracting partners legal roles well suited to supporting the needs and interests of the investors. This way of speaking and of acting displays an understanding of the relationships between, on the one hand, the production, the description, and the commercialization of goods and, on the other, the personal obligation of the insolvent seller – an understanding that this was the only way of providing the investor access to future goods. Their grasp of the situation allowed the jurists to integrate present investments and future performances in a model of unequal exchange oriented around the notion of exchange value. The fact that for a period of more than a thousand years, in many regions and under differing circumstances, the salam provided the legal framework for this unequal exchange shows the great adaptability of this legal construction of the creditor-debtor relationship – linked to the production and acquisition of merchandise – to the social and economic conditions in which investors and insolvent sellers were entering into contracts. Twentieth-century research on the 18th and 19th centuries reveals that the salam was an effective instrument employed by the new economic and political
elites to create a modern agriculture. Studies of Egypt, Palestine, and Transjordan, as well as — from a different point of view — of Tunisia, confirm the practicability of the propositions of the Hanafi jurists in this matter. B. Doumani observes that starting in the middle of the 19th century, the majority of trials coming before the courts of Nablus were concerned with conflicts between investors and sellers over the terms of a salam; and he also emphasizes that by separating the price of the salam from the market price, the merchants used the salam contracts as a means of putting pressure on prices. The more the sellers' debts increased, the more the price of the salam decreased. This relationship between the volume and duration of the debts, on the one side, and of the price level of the salam, on the other, makes it easier to understand the patience of investors with regard to their insolvent debtors. E. Rogan and B. Doumani explain it by the advantage for the investors in maintaining business relationships with partners who had to accept the conditions that they imposed on them.

The salam allowed the new economic and political elites, in Egypt and Palestine, to establish with the farmers relations of dependence which were indispensable for the rise of the new notables. K. Cuno has concluded from this that, in Egypt, this contract, emerging from the Islamic legal tradition, facilitated the transition of agriculture toward a

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capitalist mode of functioning. B. Doumani, for his part, shows that in Palestine in the 19th century, the salam made possible the concentration of capital and of all the stages of the production process of soap, which, before that time were controlled by a variety of groups, in the hands of a single group of notables. This concentration occurred without a change in the mode of production or the organization of work. The concentration of capital was thus not accompanied by a modernization of the forms of work and of the tools of production.

Thus, the indispensable condition of this exchange is the ability of the seller to bind himself by his verbal acts. The debtor must be capable of carrying out legal acts, be free to contract debts, in short, be his own master. If the debtors had been slaves, authorized to engage in commerce, or salaried employees subject to the orders of their employers, their capacity to take on debt would have been greatly limited. In order for the salam to be used to its full potential and on a large scale, it was necessary that the debtor be capable, free, and formally independent in terms of his economic situation. It was only under these conditions that he was able to form contractual relationships which turned his personal obligation into a practically unlimited object of investment. The formal economic independence of the debtor was, for these reasons, indispensable for the proper functioning of the salam. Thus, while the structure of this contract constituted a hindrance for the capitalist organization of salaried work and production, it was no barrier at all to the concentration of capital or to the ability of a small group of entrepreneurs to dominate an industry.

155 B. DOUMANI, Rediscovering Palestine, op. cit., pp. 188 et 252.
Historically, the forms of the salam described in the texts of the 11th and 12th centuries turned out to be closely linked to contemporary developments in techniques and in manufacturing, and to a new comprehension of the relationships between things and verbal acts, between the production of goods and the modes of their description, between their geographical origins and their coming to be produced on a universal scale, and, finally, between investment and personal obligation. The Hanafi construction of the salam constituted an important step towards the rationalization of synallagmatic contracts and towards the extension, in space and time, of their influence on the production and exchange of goods. Like other processes of rationalization, the elaboration of the salam occurred at the price of an increased inequality among the actors involved, who, while formally independent, were linked to each other in the production and exchange of goods through the bond of credit and debt.

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