Comparative analysis of islamic banking products between Malaysia and Indonesia

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ABSTRACT

Nowadays Islamic banking has shown huge progress and development all over the world, and many fatwa and products as a result of ijtihad have been made to support its growth. Some of those fatwa have been used to legitimise products offered by banks. Ulama and decision makers in Malaysia have legitimised the implementation of contracts of tawarruq, Baiul Innah and Baiul Dayn in the practice of Shariah banking, while these contracts are not considered legitimate in Indonesia. Tawarruq, Baiul Innah and Baiul Dayn were in existence in the time of Rasulullah Muhammad (peace be upon him), but today they have been modified to suit market demand. Thus this research will discuss the reasons and the background of the fatwa ikhtilaf (differences of fatwa) in Indonesia-Malaysia. Using the literature review approach, interviews, and considerable study, the authors have investigated the differences which underlie each fatwa in Indonesia and Malaysia. The findings prove that the mechanisms of tawarruq, Baiul Innah and Baiul Dayn cannot be considered as Islamic products, because of many flaws in them, and this is the reason of they are not considered legitimate in Indonesia, while Malaysia believes that selling and purchase are halal as the basic rule for the legitimisation of these akad (contract). Therefore, advanced research to analyse these mechanisms needed to be conducted.

KEY WORDS

Shariah Banking, Indonesian Islamic banking products, Malaysian Islamic banking products, Tawarruq, Bai Innah and Bai al-Dayn.

JEL CODES  
G21, G24, G28
1. Introduction

The development of Shariah banking in the World has entered a new phase. Growth of the shariah banking industry has transformed it. From merely the introduction of an alternative banking practice, shariah banking has become the way shariah banking has positioned itself as a principal player in the World economic game. Shariah banking has great potential to become the principal and prime choice for bank customers in their choice of transactions. This is indicated by the acceleration of growth and development of shariah banking in Indonesia and other countries. This is because of the profit or loss resulting from management, and which will become the joint responsibility of banks and bank customers, in accordance with the ratio on which they have jointly agreed.

The Islamic economy is an overall system of development, following underdevelopment, upholding economic development which creates Islamic solidarity and strengthening the ties between the Islamic community, the greatness and principles of the Prophet Muhammad saw (peace be upon him=puh) is a principle which has embraced all corners and aspects of life. Islam gives a basis and understanding of the economy as a study of Islamic man's behaviour, looking after resources mandated to him in order to achieve safety in the world and in the hereafter.

This definition indicates that the economy, in the Islamic paradigm is very different to that in the Western paradigm, and because of that it requires guidelines for its resolution which also differ. Economic problems are seen as part of the overall Islamic way of life.

The existence of clear regulations concerning shariah banking has opened opportunities for Islamic shariah to point out the existence of its teachings wherein a Shariah bank is the bank which is based on partnership, justice, transparency and universality, as well as carrying out banking activities on the basis of shariah. As the Word of Allah says:

وَمَا أَرْسَلْنَاكَ إِلا رَحْمَةً لِلْعَالَمِينَ

“And we do not delegate you (Oh Muhammad), other than to (become) merciful towards the whole of nature” (Q.S. Al Anbiya: 107)

As implementation of the values of Islam, which take the form of justice, in shariah banking , share of profit is the principle in conducting commercial banking activities. A shariah bank is a financial institution whose basic endeavour is to provide financing and service in payment and monetary circulation transactions, whose operations are in accord with the principles of Islamic shariah.

In shariah banking, the ‘time value of money’, like that used in a conventional bank, is not found. A conventional bank views money as something having great value, which can grow over a particular period. It is this belief which gave birth to the concept of ‘the time value of money’, which is used in a conventional bank as its basis of operations. The ‘time value of money’, or what is called by economists ‘positive time preference’, states that “The value of a commodity at this time is higher than its value in the future.”

However, the concept used in shariah banking is the concept of ‘profit and loss sharing’ that is the sharing of profit and loss. With the concept of ‘profit and loss sharing’ in its operations, certainly the customer who manages funds from shariah bank payments will not suffer a multiple burden.

Normally, the products offered by shariah banking can be divided into three parts, that is; a product involving the channelling of funds (‘financing’), a product involving the collection of funds (‘funding’), and a product involving service (‘service’).

In the modern world these days, economic life cannot be freed from the existence of and the important role played by the financial services sector in general, and the banking sector in particular. It is through this financial services sector that funds or the investment potential of the public is channelled into productive activities, so that economic growth can be realised.

The reality is that there are many shariah banking products using a number of contracts, however there are differences between the contracts used by Malaysian shariah banking and by Indonesian shariah banking. For that reason, and based on the above analysis, the writers have tried to explain this more fully in the “Comparative Analysis of Malaysian and Indonesian Shariah Banking Products”.

After observing, and collecting data on, the Malaysian and Indonesian shariah banking products, it was discovered the existence of three contracts used in the Malaysian shariah banking system, which however are not legalised by the National Shariah Council (DSN). The three contracts are: (1) Tawarruq, (2) Baiul ‘Innah and (3) Bai’ul Dayn.

The scope of this study or examination will be focussed on the Tawarruq, Baiul Innah and Baiul Dayn products practiced in Malaysian syariah banking, and which are not/not yet legalised by the Indonesian National Shariah Council.

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2. Comparison of Islamic Contracts and Products for Banking System

Contractual differences in determining shariah banking products which are the background for discussion and analysis are clarified in the Table below:

**Table 1. Contracts and Banking Products in Malaysia and Indonesia**

<table>
<thead>
<tr>
<th>Malaysian Product</th>
<th>Contract</th>
<th>Indonesian Product</th>
<th>Contract</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deposito</td>
<td>Wadiah</td>
<td>Deposito</td>
<td>Mudharabah</td>
<td>The objective of the Deposito system is investment, therefore depositos in the Indonesian [shariah] banking system use Mudharabah contract.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Giro</td>
<td>a) wadiah b) Mudharabah</td>
<td>The giro product is not to be found in the Malaysian [shariah] banking system.</td>
</tr>
<tr>
<td>Trade</td>
<td>Murabahah</td>
<td>Trade</td>
<td>Murabahah</td>
<td>Mechanisms and contracts are the same.</td>
</tr>
<tr>
<td>Salam</td>
<td></td>
<td>Salam</td>
<td></td>
<td>Mechanisms and contracts are the same.</td>
</tr>
<tr>
<td>Istimna’</td>
<td></td>
<td>Istimna’</td>
<td></td>
<td>Mechanisms and contracts are the same.</td>
</tr>
</tbody>
</table>
Malaysian shariah banking has no parallel *salam* system, because the banks themselves provide the goods required by their customers, whilst Indonesian *shariah* banks can delegate the provider of goods to a third party.

<table>
<thead>
<tr>
<th>Malaysian Product</th>
<th>Contract</th>
<th>Indonesian Product</th>
<th>Contract</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hire/Rent</td>
<td><em>Ijarah</em></td>
<td>Hire</td>
<td><em>Ijarah</em></td>
<td>Malaysia makes possible the ownership of hired goods known as <em>bā'ī</em> <em>at-Tājir</em>, whereas Indonesian <em>shariah</em> banks use <em>Ijarah</em> for the hiring of goods which do not need to be owned.</td>
</tr>
<tr>
<td><em>Ijarah thuma Bai</em></td>
<td></td>
<td><em>Ijarah Muntahiyah Biltamlik (IMB)</em></td>
<td></td>
<td>The mechanism and contract is the same, that is the <em>Ijarah</em> contract, then later after debts have been discharged, a trade or hibah contract is made.</td>
</tr>
<tr>
<td><em>Bā‘ī Bithaman ‘ajil (BBA)</em></td>
<td></td>
<td></td>
<td></td>
<td>At variance with the IMBT, the BBA trade contract is preceded by an agreement that the base price will have added to it a value added by the bank as profit.</td>
</tr>
<tr>
<td>Shared results</td>
<td><em>Mudharabah</em></td>
<td>Shared results</td>
<td><em>Mudharabah</em></td>
<td>Indonesian shariah banking uses the mudharabah contract, wherein the bank is the owner of the capital and the customer is the mudharib. In the Malaysian [shariah] banking system, however, the bank can be the owner of the capital or the mudharib.</td>
</tr>
<tr>
<td></td>
<td>a) <em>General investment</em></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>b) <em>Special investment</em></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Mudharabah Musyarakah</em></td>
<td></td>
<td><em>Musyarakah</em></td>
<td>Mechanisms and contracts are the same.</td>
</tr>
<tr>
<td>Loans</td>
<td>Qard</td>
<td>Qardul hasan</td>
<td>If unable to pay, the file will be expunged.</td>
<td></td>
</tr>
<tr>
<td>-------</td>
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<td>-------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Letter of Credit or L / C Service</td>
<td>wakalah</td>
<td>L/C Service</td>
<td>Wakalah</td>
<td>Mechanisms and contracts are the same.</td>
</tr>
<tr>
<td>Murabahah</td>
<td></td>
<td></td>
<td>The bank becomes the agent or representative of the customer, and receives the payment for goods, or ujrah.</td>
<td></td>
</tr>
<tr>
<td>Musyarakah</td>
<td></td>
<td></td>
<td>The bank becomes the agent or representative and the holder of authority at the same time.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Malaysian Product</th>
<th>Contract</th>
<th>Indonesian Product</th>
<th>Contract</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Letter of Guarantee (L/G)</td>
<td>Kafalah</td>
<td>L/G</td>
<td>Kafalah</td>
<td>The bank issues a guarantee on behalf of the party of the first part (the client), to the party of the third part.</td>
</tr>
<tr>
<td>IAB</td>
<td>Murabahah</td>
<td></td>
<td></td>
<td>The client puts forward the purchase of goods to the bank, then the bank appoints a third party to arrange this.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Bai’ Al-dayn</td>
<td>The bank issues a debit note which is then bought by the client. The results of the purchase are used for investment. In Indonesia, the Shariah National Council of MUI does not permit trading in debit notes.</td>
</tr>
<tr>
<td>E. Banking</td>
<td>Wakalah</td>
<td>E. Banking</td>
<td>Wakalah</td>
<td>The mechanism and the contracts are identical.</td>
</tr>
<tr>
<td>---</td>
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</tr>
<tr>
<td>ATM (Automatic Teller Machine)</td>
<td>Wakalah</td>
<td>ATM</td>
<td>Wakalah</td>
<td>The mechanism and the contracts are identical.</td>
</tr>
<tr>
<td>Credit card</td>
<td>Bai Innah Munazzam (Credit Card)</td>
<td>Kafalah, qardh, ijarah</td>
<td>Malaysian shariah banking gives a qardh to the client, and the client is obliged to pay it off in instalments, plus a predetermined profit margin. Indonesian syariah banks give a kafalah at the moment of purchase, when it is swiped at the vendor’s, using a qardh, ijarah of membership, overdrawal, lateness of payment and so forth.</td>
<td></td>
</tr>
<tr>
<td>Foreign Currency</td>
<td>Sharf</td>
<td>In the exchange of foreign currency, profit comes from exchange rate differences.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Held Security (Gadai)</td>
<td>Rahn, Qardh, and Ijarah</td>
<td>Indonesian shariah banking uses a rahn contract with a guarantee. The qardh here is free of repayment, and can be paid off in full, or by instalments. The storage of the guarantee is on the basis of the ijarah contract.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tawarruq</td>
<td>Tawarruq</td>
<td>The client purchases by instalments from the bank, then it is returned to the bank to be sold for cash. The client obtains cash, and has the obligation to pay in instalments to the bank.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 3. Problems of Islamic Products in Banking System

**Tawarruq**

In Arabic, *Tawarruq* comes from the word *wariq* that is the character or symbol for silver. Normally this word was used in order to look for silver. Later, the word *Tawarruq* came to be given a wider meaning, to mean seeking cash by various means, that is seeking silver, gold, or the like.²

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² *At-Tawarruq haqiqatu hu wa Anwa’u hu Al-Fiqhi Al-Ma’ruf wa Al-Mashrafi Al-munazzam.* (International Shariah Research Academy for Islamic Finance (ISRA) No: 179/2009)
According to the literature, *Tawarruq* is a number of methods undertaken by someone in order to get cash. Whereas according to the term, *Tawarruq* is someone needing cash then buys an item on credit, and sells it to a third party at a price cheaper than the original price, for cash. *Tawarruq* can be divided to become three mechanisms, those being:

1. A person needing cash money buys an item on an installment plan, and over a period which has been predetermined. Later on he sells the item to a third party without the knowledge of the first party, at a lower cost and for cash.

2. A person needing cash tries to borrow it, but the person whom he approaches does not wish to loan the cash, but offers his trade item to be bought by the person needing cash, whereupon he can sell the item back at a low price, or a higher price, for cash.

In this case, the *khiyar* given by the seller is a forced *khiyar* to the *mutawarriq* who is in great need of cash funds.

Classic *ulama* from the Hanafi, Syafi’i and Hambali schools of jurisprudence, view a *Tawarruq* transaction as legal. A number of contemporary *ulama* also view *Tawarruq* as a legal transaction, among them: Abdul Aziz bin Baz and Muhammad ibn Shaleh al-Uthaymin. *Shariah* Supervisory Councils also permit these *Tawarruq*, for instance the *Shariah* Supervisory Council of the al-Rajhi Bank, Arab Saudi and the *Kuwait Finance House*.

The *Islamic Fiqh Academy*, whose membership consist of Islamic countries assembled in the 15th Annual Session of the Organisation of the Islamic Conference, held in Mecca has issued a resolution supporting *Tawarruq*, on one condition, that the purchaser, or *mutawarriq*, does not resell the item he has bought to the original seller at a lower price, either directly or indirectly. If or when this condition is not adhered to, the *Tawarruq* transaction is categorised as usurious, which is forbidden.

The *ulama* who permit *Tawarruq* transactions and consider them legal do so on the basis of the Qur’anic verses and *qaidah fiqhiyah* that is: all trading transactions are *halal*, except for trading transactions about whose *haram*-inducing qualities are disputed by the holy Qur’an or the *Sunnah*.

Certainly, on the whole, trading is a *halal* transaction and the *Tawarruq* is a *halal* transaction because there is no *qath‘ii* dispute prohibiting such transactions, nor is there any remnant report from the Companions of the Prophet Muhammad *saw* (puh) prohibiting these transactions. Thus, it may be said that the *Tawarruq* trading transaction is a *halal* one.

The *ulama* who permit *Tawarruq* based on the *hadits* of Bukhari Muslim, who has been proven to support the *Tawarruq* transaction, on the occasion when a farmer from Khaybar came to the Messenger *saw* of Allah, bearing dates of the highest quality. The Messenger *saw* of Allah asked him, “Are all the dates from Khaybar of good quality” and the farmer answered, “No, I have exchanged two kilograms of low quality dates for one kilograms of superior quality.” On hearing the farmer’s answer, the Messenger *saw* of Allah forbid this, and recommended he sell all his low quality dates for cash, to obtain money, then to buy dates of a superior quality.
This hadits indicates the introduction of a legal trading method to avoid usury, without the existence of Hilah or anything of that nature, because trading conditions had been fulfilled and there was no usury in this trade transaction. Thus this matter indicates the legality of trading transactions, wherein the intent and differing goals using a medium is acceptable and may be carried out, or put into practice, as well as being free from usury explicitly or implicitly. In other words, the Tawarruq transaction is permitted and is made legal when it is indeed required.

Al-Kasani has stated that:

The transfer of ownership of goods prevents the possibility of there being usurious profit in the structure of the transaction. Meanwhile, a loan interest free or qardh is not possible to obtain from time to time, and therefore the existence of the Tawarruq method or mechanism to obtain cash there exists a transaction which is common and legal. As it happens, goods traded are only the medium. On the other hand, this transaction is not the same as the transaction in the Bai’ul ‘Innah.

Meanwhile, Ulama from the Maliki school do not agree with the sale of goods at a price lower than that of the market, when this is done by someone who obtains profit on a loan by methods which is within the usury category. Some of those from the Maliki school reject the seller invoke the Bai’ul ‘Innah. This indication makes Tawarruq a transaction which is not permitted by Maliki ulama.

Prohibition of this transaction is closely related to a specific formation which is currently practiced by the Shariah Financial Institute – known as Tawarruq munazzam (Tawarruq engineering)) – and not the practice of Tawarruq fiqh commonly practiced in past times. The Islamic Fiqh Academy of Jeddah, on the occasion of the 17th session of its annual conference, was of the view that this Tawarruq Munazzam is an illegal transaction and is also forbidden ³.

**Bai’ul Innah**

*Bai’ Al-’Innah* may be defined as follows: a trader sells his trade goods which may be paid off in installments within a predetermined time limit. After that he buys them back from the same majlis (certain place) for cash, at a price lower than the original purchase price.

*Bai’ Al-’Innah* is selling and repurchase done by the seller:’Innah is a sale in which a purchaser buys merchandise from a seller for a stipulated price on a deferred payment basis and then sells the same merchandise back to the original seller for a price lower than the original purchase price.⁴

*Imam* Asy-Syana’ani stated:

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⁴ Ayub, H; Al-Mu’amalat Al-Maliyah fil Islam. Cairo: Dar El-Salam. 2002
know that what is intended by Bai’ul Innah is that a person sells his trade goods to another at a known price, paid in instalments up to a stipulated time, and then buys them back from the purchaser at a lower price, and so his goods will return to him.

A number of ulama is of the view that Bai’ul ‘Innah is permitted, and does not contain zari’ah if it involves a third party. As an example, the purchaser buys an item on instalments made to the seller, then sells the item to a third party with the aim of obtaining cash. The buyer still has the obligation to pay off the price of the purchased item in instalments, but this aside the purchaser has obtained the cash which he wanted.

Imam Syafi’i, according to one story, permitted Bai’ul Innah on the basis of the words of the Prophet Muhammad saw (puh), as related by Abu Sa’id and Abu Hurairah, may Allah bless them, “Exchange the poor quality dates for money, then with that money buy good dates”.

In studying this problem of bai’ul ‘Innah, it is interesting to review the opinion of Ibn Taimiyah, concerning trading transactions. According to Ibn Taimiyah buying and selling is divided into three types: (1) a person buys goods with the aim of consuming them, so that is legally halal; (2) a person buys goods to resell, so legally that is also halal, because there is no prohibition against trade, and; (3) a person buys goods not for consumption or for on-trading, but to obtain cash, and because obtaining this is very difficult, he buy the goods at a high price and then sells them back to the original seller at a lower price, in order to obtain cash.

The majority of ulama, however, are of the opinion Bai’ul ‘Innah is prohibited because it contains what is meant by zari’ah. The ruling to be taken from this matter is Sadduzzarai (close off every road which leads to all things haram). As related by Anas, may Allah swt bless him, when he was questioned about bai’ul ‘Innah he answered, “In truth, Allah swt never deceives His slaves”. In other words Bai’ul ‘Innah is a transaction declared haram because there can be found within it an element of hilah, or deception.

Ibnu ‘Abbas, may Allah swt bless him, said, “All of you must take care towards bai’ul ‘Innah, don’t exchange money for other money, between the two of which is silk. Maliki and Hambali clearly reject the practice of Bai’ul ‘Innah, because it takes the form of a transaction which contains usurious manipulation.

The story is told by by the two imam, ad-Darquthni and al-Baihaqi, from the wife, ‘Aliyyah, of Abu Ishaq, may Allah swt bless his name, that he once met ‘Aisyah, may Allah swt bless her name, together with Ummu Walad Zaid bin Arqam and another woman. Ummu Walad Zaid said, “I have sold a slave to Zaid at a price of 800 dirham, the payment being postponed, and I bought him back at 600 dirham cash”. ‘Aisyah, may Allah swt bless his name, said, “That is truly not a good method of buying and selling. Say to Zaid that he has voided his reward (pahala) from the jihad and his hajj with the

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5 Nahrawi, A.S; Al-Imam Asy-Syafi’i Fi Mazhabaihi Al-Qadim Wa Al-Jadid. (Jakarta: Yayaysan An-Nahrawi, 1994)

6 Asy-Syafi’i; Al-Umm. (Beirut: Dar Al-kutub Publishing, 1993)
Prophet Muhammad saw unless he repents.” The woman asked, “How about if what I took was only my capital?” Aisyah answered, “Allah swt has said” And whosoever has known the prohibition of his God, and ceased – consuming usury, then for him what he took previously before it was prohibited, he can used it because he did not know.

Al-Amien Ahmad stated that Bai‘ul ‘Innah is when someone sells silk at 100 dinar, then buys it back at 50 dinar, then this practice cannot be rectified if the second transaction is carried out before the handover/takeover of money as payment for the first contract or transaction. And if this is done after the payment of the first transaction, and the initial purchase is merely as a condition for the second contract, then it is still not permitted, because there are two transactions for the same goods. If it is not made a condition, in law it is still makruh, because in this case the buyer does not need the silk, but rather needs the cash, and the seller is a stingy person, who does not wish to do a charitable deed or even to assist his brother, then the buyer is forced to the trade goods and then resell them to [the seller]. The attitude of a seller such as this is one criticised by ethics and Islamic morals. 7

**Bai‘ul Dayn**

Bai’ al-dayn or bai’ nasiah bi nasiah or as it was often called by the Prophet Muhammad saw bai’ kaly bi kaly is selling a debt with a debt. The mechanism is to buy goods on credit, and with the money being also the result of a debt.

Bai’ al-dayn is a contract for the supply of financing for trading in goods by the issuance of a letter of trade credit, or letter stating another price, on the basis of a price which has been agreed upon earlier. This financing is short term (less than a year) and only entails costing documents having a good investment rating value. 8

Bai’ al-dayn refers to debt financing. Within this principle, financing is made on the basis of the sale/purchase of trading documents, and the financing is used for the goal of payment. What determines al-dayn is:

1. A client, who has received trading facilities from a shariah bank, will issue a promissory note, whilst the shariah bank itself cannot issue a promissory note, so the promissory note is endorsed to become the underlying transaction for acceptance from a conventional bank.
2. It so happens that compensation in the placing of funds and the taking of funds still point towards calculations which are determined by the conventional bank, wherein the shariah bank at the time has to optimalize the excess of its funds and enter as a newcomer with a system unknown to a conventional bank.


Neither Bank Muamalat Indonesia (BMI) nor any in the whole of the shariah banking system in Indonesia have the bai’ al-dayn product, because the National Shariah Council (DSN) has not issued a fatwa supporting this type of transaction. This is based upon the words of the Prophet Muhammad saw (puh) according to the hadits of Umar, may Allah swt bless his name:

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saw forbid the sale of debt with debt. Muhammad the Truly Prophet

Besides this, also according to Ibn Taimiyah, bai’ al-dayn is of no benefit, and will result only in usury. In another tale, bai’ al-dayn can cause damage to the religious service of going on the hajj, and indeed to the religious service of engaging in jihad.⁹

Al-Kasani said that if a person borrows with the conditions he will pay his debt with a little benefit or addition, thus exceeding the amount borrowed, then the loan is not legal. An extract of the original text is:

“Still in relation to the loan, it must be said that the loan should not contain any form of benefit, and, if there is a benefit, the loan is not legal. For instance, if someone gives coins with a set value, on the condition that the borrower will pay out the loan with coins to a greater value, or give something as a benefit at the moment of repayment, then this transaction is not legal, as the Prophet saw has forbidden any form of loan which brings in a benefit. The main principle in this matter is that a benefit which is determined in a transaction is usury. So, therefore is is the duty of every Muslim to prevent usury actually occurring, as well as the possibility that there might be usury occurring”.

Persons learned in Islamic Law, shariah courts and committees, and the shariah supervisory boards of various Islamic banks will not accept this sort of transaction or contract. In this matter, the principle reference is the Holy Qur’an, sunnah from the Prophet saw and many references from the books of such as Badai’ As-Shanai’, al-Mabsut, Kitabul Fiqh (Al Jaziri) and many opinions of classic ulama, inter alia; Al-Ghazali, Abou Yusuf, Ibnu ‘Abidin Shami, Imam Maliki, Imam Abu Hanifah, and so forth.

When clarifying Imam Hanafi’s Qardh conditions, al-Jaziri gave an interesting and very light example, viz: buying four pounds of meat on credit, at five qirsy or coins per pound, so that the total to be paid would be 20 qirsy. If at the time of payment the price of meat had risen or fallen, the buyer still would have to pay 20 qirsy, regardless of market turbulence or the price of meat at the time of the payment of the debt.

4. Comparative Analysis of Islamic Banking Product between Malaysia and Indonesia

**Tawarruq**

These days, there is a tendency amongst Muslims to loosen and make easier religious law, particularly in matters of *muamalah (social relationships)*. The excuse of an emergency, for instance, is used as a means to justify the making *halal* something which has clearly been declared to be religiously forbidden in authoritative *shariah* quotations, as in the issue of usury.

Certainly Islamic *shariah* endorses the emergency principle being used when one is faced with a pressing situation, so that it is not possible for an individual to carry out *shariah* demands perfectly. In Islam, the emergency principle is said to be one of the well-known rules on ritual obligations, that is: “al-*darurat* tubih al-*mahzurat*”, meaning when there is an emergency, then a person is permitted to perform something which is forbidden. (Imam Al-Sayuti).

As an example, Islam gives latitude (*rukhsah*) to consume religiously forbidden food such as pork, in accordance with the degree of need to sustain life when faced with an emergency, that is a pressing situation which does not permit the obtaining of religiously acceptable food, and if nothing is eaten, extinction or death will result. This is based on the Qur’anic passage:

*In truth Allah forbids the consumption of corpses, blood, pig meat and animals which, (when they were slaughtered), there was said (a name) other than that of Allah. However, whosoever is in a situation forcing him (to eat those) whilst he does not wish to and does not (also) overstep the limits, then there is no sin committed by him. In truth Allah is the Most Merciful and the Most Loving.* (Al-Baqarah: 173)

Such a matter is also used in *muamalah maliyah* when facing *darurah*. Although this is so, there are several *dhawabith*/rules which have to be fulfilled in order that such an emergency is reached.

Asy-Syathibi in the book of al-Muwafaqat states that an emergency is: a situation which is overly urgent, so that is forced a person not to be able to defend the five matters in *shariah*, i.e. religion, life, sanity, descendants and wealth. From the understanding given by asy-Syathibi, *darurah* means where it is not possible for someone to defend the five matters above, then he may do something which according to the law is religiously forbidden.  

Whilst this is so, careful study must be made previously to determine that all alternative avenues are closed, before a decision is made that there is truly a *darurah* and it cannot be avoided.

*Darurah* is validated here as an excuse, by *ulama* who permit *tawarruq* on a clear excuse, that is that the presence of Islamic banks in the world is very limited, and their business is also very limited, and this situation is a *darurah* situation, pressing for permission to be given for *tawarruq*. Besides being

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10 Ayub, H. *Al-Mu'amalat Al-Maliyah fil Islam.* (Cairo: Dar El-Salam. 2002)
able to make the process of transactions easier, it can also increase the loyalty of bank customers, and certainly it will increase liquidity, which is very beneficial for Islamic banks throughout the world.

Several products with tawarruq have been created for the comfort and advancement sections of the Islamic market, as has been done in Malaysia. On the excuse that the world of Islamic economics has to grow in line with the times and market needs. The platform which has been licensed for Islamic banking in the world has to be renewed and brought into accord with current the situation and needs. Murabahah, ijarah and many other contracts are contemporary contracts which have developed, and are no longer in accord with murabahah, ijarah and so forth contracts at the time of Muhammad saw, or even his associates and tabi’in. Thus tawarruq have obviously undergone development and change in their mechanisms, in line with changes in the times and needs of current Islamic banking.

Risks will caused to arise by tawarruq, as they will also by contemporary contracts, such as murabahah, musyarakah, ijarah etcetera, and therefore what is needed is alignment and mechanisms which are correct, to raise Islamic banking and avoid or minimalist risks which possibly will arise in the future.

As an example, we can meet tawarruq transactions in the murabahah commodity products (MCP), wherein contracts required in this product are several combined in one, that is:

1. Trading contracts performed by banks through a broker. This trading tends towards haggling trading, or musawamah, if viewed from the viewpoint of the original price. Banks here represent their bank customers to buy a commodity. Basically these banks do not buy the commodity from a broker, however the banks order the broker to buy the commodity distantly, in an exchange. Because it is only the broker who can make a transaction at the exchange, it can be said that the bank deputises the broker. The system of buying and selling at an exchange is not in accordance with shariah, because the trading done by the bank through the broker is actually futures trading, as will be clarified later, at the end of the discussion.

2. Murabahah trading. This is trading on the basis that the purchase price is increased by costs and profit as desired. The commodity purchased by the bank customer from the exchange is sold to the bank using murabahah trading, which will be paid by deferred payment, in accordance with the pledge. Alternately, the bank customer deputises the bank to sell it back to another broker, by the murabahah system. Here this means the position of the bank is that of an agent, for the second time. And the bank only gets a fee from this transaction. In Islam, trading in the murabahah way is permitted by shariah.

3. The existence of a wakalah contract. This contract can occur under two conditions, Firstly when the bank customer banks at the bank, that is deputises the bank to buy the commodity at the same price as the money deposited at the bank; Secondly when the bank customer appoints the bank as his representative to buy the commodity. In Islamic Law, wakalah is a legal contract, which may be carried out for payment or commission, or free of charge/gratis.

4. Wa’ad. Besides these matters above, there is an article of which we should be aware, that in this combination contract there is a one-sided pledge. This is a one sided pledge (wa’ad) to buy
the commodity by the bank customer, which is still the subject of debate as to whether the pledge may be enforced or not. If both parties make an pledge together on a trading transaction which will carried out, then Imam Shafi’i says the transaction is not legal. However, if only one of the parties promises to buy the commodity, this will not be too influential. Some ulama say that a one-party pledge cannot be enforced, whilst contemporary ulama – who support this concept – are of the opinion that in the interests of the smoothness of current commercial transactions, the one-party pledge must be binding.

This product is a short-term deposit on a fixed margin. The gist of a borne transaction is murabahah to claim a fixed return. In concept and in practice, there are two schemes which differ slightly. In the First the bank is an agent when buying and selling, and in the Second the bank is merely a representative to buy. Below there is an example of the first position.

For example, a bank customer deposits Rp.1,000,000 at a return of 3%, over a three month period. The margin is determined beforehand, when the contract for a new account is made. When looked at from the above story, this certainly makes no sense, wherein a profit of only 3% is obtained. And at a glance, there is nothing wrong here, or the transaction is in accordance with shariah, because this is trade with a profit (murabahah). In commercial transactions, of a surety there are two characteristics, ‘natural certain contracts’ (NCC), and ‘natural uncertain contracts’ (NUC), wherein the differentiator between the two characteristics is the result. With NCC, profit is determined up front, whilst with NUC, profit cannot be determined. One of the NCC is the murabahah transaction, that is, profit is determined beforehand. In this, we are often trapped, and because of this it is necessary to recall that the profit can be decided when the trading contract happens, whilst in a CMP the return is determined by the bank, and in this the position of the bank is not as a seller, but as an agent or wakil with the agreement of the bank customer. This means the trade transaction has not yet occurred, but will still occur later on, so there is still the potential for the failure of the trade which will be carried out.

This transaction is no different to the usurious practice currently existing in conventional banks, the difference is only that it uses shariah details. Because, how is it possible for a bank or bank customer to be able to determine a fixed return up front, when the trade transaction has not yet taken place? This is even more so, if we look at the bank customer as more resembling a trader, because he will buy a commodity and will sell a commodity. Remember that a trader is a person who conducts trade. The profit he gains is variable dependent on the condition of the market at that moment. Therefore, in trading profit cannot be determined before the event, in contravention with the rule of al-Kharaj bil Dhaman (the results of the endeavour emerge together with the cost), and al-Ghunmu bil Ghurmi (the profit emerges together with the risk). With the determination being up front, and the existence of certainty, this puts this in the category of riba nasi’ah. Trade which is conducted by a bank is uncertain, there may be profit and there may be a loss. Therefore, the profit cannot yet be determined, although a murabahah sale has been made, because in a murabahah agreement, the purchase has not yet been made. What is sure is that purchase has not yet been made. For sure the profit can be declared fixed only after it has occurred.
This practice of short term deposits, or commodity murabahah deposit is similar to a certificate of deposit in a conventional bank. This means that this product can be bought and sold between customers (banks/institutions). Therefore this product can be included in the product category of derivative, which is issued by a bank. With the existence of this product, the possibility of carrying out speculation will increase greatly for shariah financial institutions. Then, what is the difference between it and conventional transaction patterns at this time?

If we take a closer look again, and we relate it to previous trading, that is trading done by a bank with a broker, then trading at an exchange is not trading, but merely a promise to conduct trading which is noted down. Trading has not yet occurred, so this murabahah trading is really the selling of a promise to conduct commodity trading in the future. This means selling something which is not yet owned, nor held in the hand. This is in contravention with the words of the Prophet Mohammad saw: “Don’t sell something you don’t have.” (H.R.Abu Daud dari Hakim bin Hizam).

Surely conceptually murabahah is permitted by shariah. However, in practice its object is not property, which is what is meant by shariah. In its concept, the object of the transaction is considered to have fulfilled its conditions and essential principles, whereas, if looked at from the concept of its process, long term transactions in an exchange have no transactional object. This trade is better termed an ad-dain bi ad-dain trade, sold under the murabahah system. Because this transaction is sourced from an exchange, this murabahah transaction is the same as ‘offsetting’, or an inversion of an earlier contract from a ‘long’ position to become ‘short, and vice versa. The question here is where are the moral values pinned, touted as the differentiator between conventional concepts and shariah, whereas the goal of shariah is to make mankind head towards success (falah).

From this concept the impression is one should follow one’s desires, i.e. obtain profit in any way at all, (hilah) even though this is usury, which is forbidden. Abdullah Saeed, in his book questions if shariah banking is critical over neo-revivalists discussing at length just how dangerous is usury, if one does not pay attention to the moral and ethical aspects, because one promotes hilah to achieve one’s goal. Transactions like those above are known as tawarruq – as is admitted by their practitioners – that is trading contracts made with the aim not for material benefit, but to reap cash for the buyer.

From the data obtained, it appears that this CMP concept consists of a number of contracts, both the principal contract and sub-contracts. The principal contract is what is called a murabahah commodity contract, that is a murabahah trading contract, where one sub-contract is musawamah trading, whilst the final sub-contract is wakalah. These contracts cannot be separated, they are all interconnected. Therefore, this cannot be viewed partially.

In this murabahah contract, the conditions not fulfilled from the viewpoint of ma’qud alaih (object of transaction) is in regard to the object and price being unwholesome, unable to be exploited according to cannon law, unable to be handed over, and the goods sold are not owned by the seller. Particularly, for an additional conditions, for murabahah there is one condition which cannot be fulfilled. This occurs as a result of the previous transaction. The condition, that is the previous transaction must be legal, whilst in a murabahah transaction the previous transaction is not legal, because the first
transaction includes a *bai’ dain bi dain* or *bai’ kali bi kali* transaction, forbidden by *shariah*. Because there are conditions unfulfillable in primary contract, it is illegal in the principal contracts for *bai’ musawamah* and *bai’ murabaha* contracts.

The principal goal of the bank is how to obtain fresh and cheap funds, whereas the goal of the bank customer is to obtain a set profit from the funds entrusted to the bank. In truth this concept is the same as interest (*fixed return*) however to avoid it being called usury what is used is *hilah*, that is, it is interspersed with *murabahah* trading. Therefore, the aim of the bank from the outset it an intention to obtain cash, by paying out a quantity of additional funds in the future by *hilah* through a contract, the appointment of a representative and an Memorandum of Understanding (MoU), as if to draw the picture that the transaction is permitted under *shariah*. Therefore, at its base, the motive for this transaction is the same as the conventional type.

From the examination made, it is clear that the principle of ‘emergency’ cannot be used or brought up arbitrarily, let alone religiously to make *halal* an action which at its root is *haram*, only to satisfy the desires of greedy mankind.

In this matter, the writers are of the opinion that an emergency situation is not suitable to be used in any *muamalah maliyah* at all, connected with usurious matters. Perhaps this principle was suitable and fitting to be applied during the period before the existence of Islamic banking, wherein it was necessary that Islamic banks to institute this emergency principle, however today this principle is no longer valid.

In the investigation of the literature which the reviewers obtained, the idea is that generally the concept of *tawarruq* gives a greater *mafsadah (worse off)* than any benefit obtained. The essential of the CMP concept – as an example – is to use a *tawarruq* contract, and the principal aim of the concept is a way to obtain liquidity from the viewpoint of either the bank customer or that of the bank itself.

As the researchers have said previously, to see if this product is in accordance with *shariah* or not, it must be examined from not only the scheme or plot of the transaction, but also from the economic aspects.

The researchers reject the concept or *tawarruq* with the mechanism which is currently in vogue, because the *mafsadah (worse off)* is bigger than the *maslahah (better off)*, if seen from the viewpoint of the interests of the public. Below there are the *mafasdah* which have been clamped by the researchers.

1. *Tawarruq* causes the creation of a debt, the volume of which tends to grow.
2. The outcome of the exchange of money for money in the future is unfair from the viewpoint of risk, and includes uncertainty.
3. This causes a continuous proliferation of debt, leading in the direction of gambling, like a speculative transaction.
4. This causes continuous debt financing, increasing the instability of the economy. In a debt-based economy, the supply of money is connected to debt, the tendency towards which is the growth of inflation. (Nejatullah Sidqi, 2007)

5. This results in injustice in income distribution and welfare, and produces continuous debt financing, resulting in inefficiency in the allocation of resources.

6. By consolidating financing on the basis of debt (debt financing), this contributes to the raising of levels of concern and the destruction of the environment.

If looked at from the banking viewpoint, the mafsadah/mudharat (worse off) to which this gives rise is as follows:

1. The beginnings of the emergence of Islamic (shariah) banking was to get rid of usury, with the concept of profit and loss sharing. Up to this time, this concept has not yet been realised, because the composition of the financing largely used is murabahah. The existence of CMP short term deposits, tied to the derivative market, will increasingly distance shariah banks from the original concept. Eventually the paradigm of shariah banks’ thinking will be the same as that of conventional banks.

2. Shariah packages which funnel towards the development of the Tawarruq/Tawriq concept in the form of murabahah commodities are really only beneficial for one party, because they negate the function most touted in shariah banking, that is shariah banking as, “the true financial intermediary between the financial sector and the real sector. And it is only this product which is tightly involved with the financial sector.

3. As was originally explained, this product is more focussed towards corporations and institutions – an obvious example is when the HSBC shariah bank issued this product, the bank customer was the Danamon shariah bank. This means that in this case the shariah bank funds would increase the concentration of funds in the financial sector, as is the conventional practice, and those who would enjoy this are a few people only. The morality of ta’awun (help each other) in the economy is not realised. What is the morality of profit

4. If more shariah banks carry out commodity murabahah/tawarruq transactions to attract murabahah deposits from their local customers, and then the purchasing of the commodities is made overseas, what will occur is a major cash outflow from within the country to overseas, whilst in Indonesia there is a need for large quantities of funds to finance the development of the real sector. This will increase the suffering of the Indonesian people and abandon the function of shariah banks in Indonesia as links between the financial sector and the real sector.

5. The practice applied these days is that of deposits of the certificate of deposit (CD) type, meaning that this deposit can be traded back. Therefore there is no difference with existing conventional practices. This CD includes derivative products being used, and eventually it will head towards speculative activities, full of the aspects of gharar (uncertain).
6. This product will increase the gap between the real sector and the monetary sector even more, whereas the gap between the monetary and real sectors is currently of the ratio of 6:500. The growth of the gap indicates the increase in the level of poverty and unemployment in the real world.

From the analysis above, the writers can stress that the *mafsadah/mudharat* which has been caused to arise is greater than the *mashlahah* which may be achieved. We recall that in one of the legal sources, that is the *saddudzariah* (preventative steps) it states that we must take preventative steps prior to the advent of disaster, and also the *fiqhiyah* rule which states:

درء المفسدة مقدم على جلب المصلحة

‘Avoid damage/risk and give greater priority to attracting benefit.


‘Danger/ worse condition must be made to disappear’

So, in order to avoid an even greater *mafsadah* this transactional practice is forbidden because it is not in accord with Islamic *shariah* goals (*maqasid syariah*) that is the guarding of wealth. Wealth here is not restricted to personal wealth, but also has the meaning of the Islamic economy within a country.

It cannot be denied that there were those amongst the classic *ulama* to allow in using *tawarruq*, with certain conditions, that is those being when someone did not succeed in obtaining liquidity from a loan and it was not also conditional upon trade.

When *Tawarruq* is seen as an alternative which can build up Islamic finances and economy, then it is appropriate that *tawarruq* be implemented without reducing or abandoning existing established elements or Islamic principles from authoritative Qur’anic quotations and traditions, and without employing *hilah* which could result in *mudharat* as analysed above, so that *tawarruq* can be acceptable as an additional pure *shariah* product, without there being any *syubuhat* over its validity and transparency.

*Baiul Innah*

Although the majority of the classic *ulama* reject it, nonetheless in Malaysia, through the Shariah Advisory Council *bai’al-innah* is still used as a concept for the development of Islamic financial products, with the justification that *bai’ innah* is greatly needed – so that it is in the category of an emergency – for the building and development of Malaysia, and that there is no Qur’anic quotation which forbids it, and indeed this question is still included in the problem of *khilafiyah (contraversion)*, and finally because the *ulama* and Islamic academician of Malaysia do not accept Islamic tradition as a legal reference.
It came to the point that some public circles later were of the opinion that there is no significant difference between *shariah* banks and conventional banks. On the other hand, Malaysian banking has experienced difficulties in attracting investment capital from the Middle East, because the majority of investors there are of the opinion that *bai’ al-innah* is a religiously forbidden transaction from the viewpoint of Islamic law. 

In Indonesia itself, the National *Shariah* Council (DSN) of the Council of Indonesian Ulama (MUI) is of the opinion that *bai’ al-innah* may not be carried out in *Shariah* banking, as what is clear is that it contains a lot of *ikhtilaf* (contraversion). Besides the un-readiness of the public to accept it, the DSN or the MUI look even further, that is the qualities of *maslahat* and *mudharat* which would surface from the legalisation/fatwa which this endorsement of *bai’ al-innah*.

This indicates that authorities in this country (Indonesia) still hold fast to the principle of taking great care by keeping themselves close to true Islamic concepts. Thus the public will more tend to believe that *Shariah* banking is surely a solution which is no longer merely a matter of choice for Muslim people in Indonesia.

An example of the application of *Biy’ al-innah* can be found in the Islamic credit card system, wherein the credit card holder can use a loan obtained from his card up to a pre-established monetary limit determined by the Islamic bank. Later on, the card holder is obligated to pay the loan by instalments within a pre-determined period of time, however when the loan is not paid back then interest will be charged on the balance of the loan. (Adil, 2006). In issuing a credit card, the bank will ask the aspirant card holder to explain what assets he holds, such as property, land, and so forth.

Ibnu Qudamah said that if someone sells a commodity at a price, he may not buy that commodity back at a lower price, and it is the same also with people who sell a commodity for cash then buy it back on credit at a higher price.

After reviewing the aspirant Islamic credit card holder’s application, the bank will determine what type of credit card is appropriate to the income and assets of the applicant. As the bank’s first step, it will sell a piece of land to the applicant at a price – for example 20,000 Malaysian Ringgits (RM), then buy it back at a price of RM 15,000. This money is deposited in a special new account to be used by the credit card holder. After obtaining his credit card, the holder is free to conduct transactions as he wishes, using the money made ready in his *wadiah* account, however the holder is obliged to pay/pay out the money he has used within the period determined by the bank. If this is not done, there will be an additional amount on top of that, in accordance with the debt he has incurred.

The writers in this matter reject the application of *bai’ul ‘Innah* by such a mechanism, because the matter of the need for *bai’ al-‘innah* characterised as emergency by Malaysian *ulama* is merely an

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insignificant additional detail to legalise the bai’ ‘innah mechanism required at this time in Malaysian shariah banking.

In the example above, there is one of the essential Islamic pillars which is not fulfilled, that is al ma’qud ‘alaihi/the goods for trade do not exist, there is no documentation held, and if one of the pillars of the contract is unfulfilled then the contract is a bathil (illegal)contract, and not legal. As is already known, a person may not sell something which he does not own. The sale conducted is merely hilah in order to legalise the subsequent contracts.

Besides this, the approach which they have taken in order to remove the elements of usury in a transaction, so that that transaction becomes clean according to shariah is purely the discovered truth that they have failed to eradicate the element of usury. Thus the decision makers and academics of Malaysia are strongly urged to rethink the purity of the approach which they have achieved at this time, so when they develop a new product related to usury, it is hoped that they will be more careful and wise in making a decision, so that the product emerging in the future will really be in accordance with maqasid syariah and ahkam syariah.

Bai’ul Dain

The prohibition against Bai al-dain is a logical consequence of the prohibition against ‘usury’, or interest. A ‘debt’ is a claim in a monetary matter is in accordance with money, and every transaction exchanged must have a nominal value, so each increase or decline of one side is the same as usury, so that such a matter cannot be accepted or legalised by shariah.

This normally occurs in the primary market, wherein in finalising a debt, a company will issue a certificate of debt or obligation to an investor, and that document will be legal only when it is supported by assets, so the certificate of debt is secure, such as al-murabahah assets and BBA (Bay bithaman Ajil) assets. If the assets involve an ijarah contract, then it is called sukuk ijarah, and if they involve an istisna’ contract, then it is called a sukuk istisna’ and so forth.

The writers, in this matter, reject the existence of Islamic legal opinion in the baiul dain problem is caused by a qat’i Qur’anic quotation about the declaring illegal of this contract. This aside, when it is categorised as emergency, then in this matter dharurah (emergency) is not valid, because this contract is not the only contract which could assist the Islamic economy and support it advancement, but there are many other contracts which are legal which form the nucleus and pillars of Islamic economic development, so that the concept of dharurah in this matter fails, and is not suitable to be made the reason for the use of an al-Dain contract.

5. Conclusion

Tawarruq

Ulama still debate about Tawarruq transactions. Tawarruq fiqh transactions are pure trade, wherein there is a transfer of ownership of goods, whilst the practice of Tawarruq munazam, currently
practiced by a number of shariah banks, is a process of obtaining cash, wherein the trad transaction is made merely on paper, and there is no transfer of ownership or assets bought.

The Islamic Fiqh Academy of Jeddah, in it’s 17th annual conference, forbid the practice of Tawarruq munazam which was in force in a number of syariah banks at that time, caused by the practice of Tawarruq munazam being merely transactions on paper to obtain cash.

The practice of Tawarruq munazam in shariah banking is for the needs of personal financing, sukuk and the international commodity market. In Tawarruq munazam contracts there are three murabahah contracts, (1) trade between the bank and the commodity seller, (2) trade between the bank and the bank’s customer, and (3) trade between the bank’s customer and a third party (another party which is not the bank and not the primary seller of the commodity).

In this transaction there is also found two wakalah contracts, (1) the customer appoints the bank as his representative to buy the commodity from the seller, and (2) the customer appoints the bank as his representative to resell the commodity to a third party. Contained in this there is a third wakalah contract between the bank and the seller/dealer to negotiate the selling price for the third Murabahah sale. Normally in this process the commodity does not change hands from the first seller, or the commodity which is purchased in the international commodity market, wherein this is not physical manifestation of the goods. This process involves four parties: (1) the first seller, (2) the customer, (3) the bank, and (4) the purchaser (the third party).

The procedures or mechanisms of each shariah bank differ, there are banks which have already bought the commodity previously, and the customer does not need to make an agreement to purchase, the bank offers the commodity directly to the customer by the musawamah method, wherein the price may be negotiated and the customer does not know the base price nor the profit obtained by the bank as a result of this sale, so that the validity of one contract which should be transparent is not met, whereas the condition of muamalah is transparency between seller and buyer. In this way, Tawarruq is merely a word game in the contract, which in the end can cause suffering to and deceive the bank customer so as to obtain a profit.

Assuredly this cannot be accepted by Islam. In transactional conditions, or muamalah maliyah, there must be transparency, free of elements of trickery or shubuhat, whilst Tawarruq contains a large amount of shubuhat.

Bai’ Al-Innah

Pro and contra arguments about the religious legality of Bai’ Al-Innah are triggered by the status and reality of whether it’s seen as “hilah” or as “Muslihat” in order to avoid usury. Efforts to manipulate, or hilah to avoid the law is trickery, and trickery is forbidden in shariah, as is clarified in many verses of Quran and hadits. Meanwhile, the fiqh and fatwa from the classic ulama state that several types of muslihat are legal, and can be used to avoid the prohibition against usury.

The text of the contract or agreement is not indicated on the deed itself, but on the degree or level of interest owned. Therefore, all steps must be interpreted paying attention the spirit and intent, not with trickery, manipulation or hilah. This is like the giving of gifts by the debtor prior to the debt being cleared, because this is interpreted not as a pure gift, but containing a veiled purpose, that is the postponement of paying the debt and hilah to legalise interest.

Al-Mahmasani is of the opinion that muslihat or hilah in shariah is at variance with the spirit of shariah and the noble purpose of shariah (Maqasidusy-syari’ah).
Ulama Syafi’i, Hanbali and Maliki state that the use of *hilah* or *hiyal* have characteristics of illegality, and are truly prohibited. Meanwhile, according to the opinion of the *ulama* Hanafi, the *hilah* or *hiyal* which is acceptable is that in accordance which does not contravene *maqasidusy-Syari’ah*.

In *Bai’ Innah* transactions, many *ulama* are of the opinion that there is *muslihat hiyal* or *hilah* in this type of transaction to legalise an illegal goal by undertaking legal/*halal* methods.

On the basis of this, the Al-Barkah Shariah Committee does not agree with the purchase of a commodity by a company on credit at a price of – for instance - $20, then the sale back for cash at a price of $15 to a related company (one group of companies) because this is *bai’ ‘Innah*. This is, in fact, a commodity which has been bought by the same seller, who conducts the transaction merely to obtain interest.

On the basis of the above explanation, then in order to avoid *syubuhat* and uphold the noble *maqasidusy-Syariah* the Sadduzzarai’ regulation, so that the practice of *Bai’ Al-Innah* is not legalised in Indonesia.

**Bai’ Al-Dayn**

Trade in the primary or secondary markets in debt and letters of credit on the basis of debt is permitted through *Bai’ al-Dayn*, as is the case in various *sukuk* issued in Malaysia. However, *Jumhur Ulama* does not accept this matter, although debt represented by *sukuk* is supported by the assets on which it is based.

The classic *ulama* agree that *bai’ al-Dayn* with a premium is not legal, and not permitted in *shariah*. Indeed, many contemporary *ulama* are of the same opinion.

However, several Malaysian *ulama* have legalised this contract, relying on the *Syafi’i* opinion, but nor taking into consideration that the *Syafi’i ulama* permit this contract only in cases where a debt is sold at the nominal value of that debt.

The obligatory position of Malaysia cannot be accepted by Middle Eastern *ulama*, or even the *Islamic Fiqh Council* (OIC) of which Malaysia is one of the members. The OIC, whose members are representatives of a all Islamic countries in the world, agrees that *bai’ al-Dayn* may not be conducted without there being any change at all.

The granting of a loan in Islam is a philanthropic and magnanimous step; the person granting the loan does so over a fixed short term, with no return. Because of this, the *Fiqh* Council of the OIC clearly strongly rejects the suggested solution concerning indexation between the rise in the price of gold or any other commodity.

The settlement of a loan which exceeds the value of the base loan, without there having been a previous agreement is a praiseworthy deed, and in accord with the *sunnah* of the Prophet Muhammad *saw*. This additional payment depends upon the individual and may not be adopted as a financial system for any reason. However, the settlement which exceeds the basic loan after an initial agreement is not in accord with noble Islamic philosophy, because profit on a loan is usury.

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