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Hybrid Contracts according to Islamic Perspective

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Abstract

To gain a strong position in the banking industry, by meeting a sharia-compliance as well as attractive to customers and be competitive to conventional banks, Islamic banks are extending their products by producing multi-varied contracts or known as “hybrid”. Hybrid contracts are the merger of several pact of contract that make banking products multipart and flexible especially when involved housing financing. As a result of bank's products using the Islamic brand, then it cannot avoid the syariah issues in the legality of the product whether it is permitted or otherwise. It is argued that the product only imitating the conventional practice not in it really wisdom to enhance the welfare to publics. To achieve the goal, this study will analyzed scholars' arguments on the merger of contract using the Usul Fiqh methodology. This study use a qualitative method by referring to arguments in the fiqh and Usul Fiqh books. The study found that there were two views on the merger of the contract, first who prohibit it and the other is who permitted with conditions and this is the accurate.

Keywords: Hybrid Contracts, Syariah, Islamic Banking

Introduction

The development of Islamic finance and banking industry today is very rapid. Innovation of the muamalat product continuously took place, for instance from a single contract to a multi-variation contract or hybrid. Hybrid contracts are a contract that was grouped from several contract or product. On recent, most products that are offered by Islamic banks are hybrid-based, i.e. Ijarah Muntahiah Bi Tamlik, Ijarah Mausufah Fi Zimmah, tawarruq, Bai Bithaman Ajil dan Musharakah Mutanaqisah (Nagaoka, 2012).

According to Kok, et al. (2014), the need for hybrid products unavoidable in order to restructure risk responsibilities in murabahah contracts by inserting the promise contract (wa'd). The usage of wa'd is allowed by contemporary jurists as a necessity for the interest of the contracting parties. However, the permitted hybrid contract is disputed where Mihajat (2014) permit it with condition, while Yunus et al. (2016) in view that hybrid products are absolutely permitted as its comply with Islamic law. However, until now there is no clear guidance on the acceptability of this hybrid contract in a proper argument. This situation caused the public to be hesitant with the position of a hybrid contract to be practiced. Based on previous study, this study will examine the

debates among fuqaha on hybrid contracts by analyzing references whether it is in line with the shariah or otherwise.

Hybrid Contract Based on Shariah Perspective

In joining contract law, there are two different views among fuqaha which first, who forbid the contract and second, who permit it. This dispute happens for several reasons, such as; the difference in deciding the basic law in muamalat whether it begins with mubah or haram, and if mubah, whether it contradicts to hadiths that prohibit transactions which related to the merger of the contract. In contract, hadiths clearly prohibit one to involve in the sale and purchase contracts (bay' wa salaf), combining two sales contracts in one contract (al-bay'atayn fi al-Bay'ah) and merging two contracts in one contract (safqatain fi safaqah). Based on those sources, it shows the position of hybrid contract in the nas that should not be practiced.

Fuqaha from Zahiri School is strongly (Ibn Hazm, t.t.) prohibit the combining contract. The school argued that the basic law for contract is haram and unlawful except permitted by the sharia. The argument is based on the narration of Aisha that the Prophet (PBUH) said, "Whoever stipulates such conditions as are not in Allah's Laws then those conditions are invalid even if he stipulated a hundred such conditions (al-Bukhari, 1422H)". It is clear that every condition that not in line with the Quran and Hadith is prohibited. It is also argued that Islam is perfect that it represents the complete testament of God's will (see Q3:3-4; 2:2), and Islam is the 'perfect religion' (5:3). Hence every practice and deed not mentioned by the sharia, is a non-religious transaction. Such deeds are beyond bounds (Q2: 229) and considered an innovation in religious matters while in fact such law does not exist in Islam.

In contrast to the above views, the second party holds that the basic law in muamalat is mubah. The view is based on the narration of Abu Darda' who reported that "what is stay silent (not declared law) from it, then it is forgiven". Hence, man can do all that was silent by the shariah as long as it does not contradict the law. This general principle coincides with the shariah that Allah does not forget to ban something (Q19: 64) and it is not an addition to religion (Asni, 2017). This method also shows the spirit of relief and ease (yusr) in religion as well as its appropriateness with time and place (al-'Imrani, 2006). In sum, the conditions and contracts were only unlawful if they went against the law of Allah SWT. In reverse, if condition or contract go in line with the spirit of Quran and Sunnah, it is considered belong to the sources and carry a truthful and reliable stand to follow (al-Jawziyyah, 1973).

According to al-'Imrani (2006), majority of fuqaha hold the above view which accepting the application of hybrid contract. Among them involve Hanafiyyah, Malikiyyah, Shafi'iyyah and Hanabilah. This party argues with the word of Allah, "O those who believe, fulfill the contracts" (Q5: 1). This verse calls for the fulfilment of promises and understanding from the instruction are general to all contracts without exception. This verse also indicates that all promises or contracts are mubah as long as it is not relate to something forbidden under shariah law. Understanding the notion of the nas will remain general unless there is a nas that shows otherwise (al-Jawziyyah, 1973). In addition, Allah SWT also command, "Do not consume one another's wealth unjustly but only [in lawful] business by mutual consent"(Q4: 29). Apparently, if there is a mutual contract between parties then it is permitted as long as in line with the sharia (al-'Imrani, 2006).

The obligation of merging the contract is based on the word of Allah SWT, "Allah has permitted trade and has forbidden interest (Al-Baqarah: 275)." The word al-bay' in verse is pronounced in

general which includes every sale is permitted except what is prohibited by the sharia (al-Shafi'i, 1990). To elaborate further, the sharia does not prohibit association of condition in contract unless there is an 'illah for the prohibition. Hence, status of a contract is mubah as long as no element that contrary to the teaching of sharia (al-Jawziyyah, 1973).

Prohibited Element of Hybrid Contract in the Nas

Referring to the prohibition of merging contract between selling (bay') and debting (salaf) (al-Tirmidhi, 1975), the nas strictly prohibit a deal which resulted conditional sale among parties. For instance, a seller say to a buyer who owed him before, "I will sell this item to you at a price of RM20 on the condition that you pay me your debt RM20." This sale also happens when someone gives debt money to someone else then the debtor buys something from the creditor at a higher price than the real value of the goods (Awang, 2005).

The reason was salaf also has the same meaning of salam (debting) as when someone gives a few ringgit of debt to the creditor and the debtor borrows something to the creditor then says, "If you cannot afford to pay the debt, then the goods are sold to me with a few ringgit instead." Thus, method of sale and purchase above are illegal because every liability that benefits from debt is illegal. The contract also prohibited based on the actual price of the transaction is unknown when the conditions are invalid. Hence, the unknown of the price item is a form of gharar, as well as incorporating additional terms into the contract which resulting the contract to be prohibited.

As mentioned before, an act of combining two sale and purchase contracts in one settlement is prohibited by the hadith (al-Tirmidhi, 1975). The method also known as bay'atain fi bai'ah as well as safaqatain fi safaqah or syartan fi al-bay'. This form of sale and purchase are either involving two prices in one settlement or two contract at a time. According to al-Mubarakfuri, (t.t.), this method of buying and selling occurs when the seller says, "I sell you this garment for RM10 in cash or RM20 in debt." But if the buyer chooses one of the two options whether to buy in cash or debt as the buyer said, "I bought at a price of RM10 cash" or "I bought at a price of RM20", then the sale and purchase is permitted.

However, if the seller says, "I sell you my house with such price as you sell me your servant at such price." According to al-Syafi'i (1990), the law of sale and purchase is prohibited according to sharia law because it has gharar elements. A sale and purchase contract is also prohibited if there is no determination for the price or it involved conditions. In the case, the conditions are invalid and not required to be fulfilled but the sale is valid (al-Mubarakfuri, t.t.). It apparent that elements of gharar exists in aforementioned sale and purchase that are unknown of price, uncertainty of the method either by cash or debt and ambiguity in acquiring the sale of goods either after selling the goods in the first contract or after the second deal (Awang, 2005).

In addition to prohibit the affiliation between the salaf and the sale and purchase, fuqaha' also agrees to prohibit the affiliation of the contract between each transaction with debt (qarḍ) in one transaction such as between ijarah and qarḍ, salam and qarḍ, ṣarf and qarḍ and others (Ibn Qudamah, 1405H).

Islamic scholars who permitted hybrid contract, have set three rules and guidelines that must be followed in ensuring the joining contract are authorize by the shariah, as below:

- 1) Do not make hybrid contract that is clearly forbidden by the sharia. According to al-Jawziyyah (1973), the Prophet SAW prohibited the merger of the contract between the salaf (qard) and the sale and purchase. However, it is permissible to practice separately.

According to al-'Imrani (2006), The ban on the merger of the qard contract and the sale and purchase is not absolute, it is permitted when it is unconditional and not intended to increase the price through debt as a person lends to others, shortly afterwards he sells goods to the debtor, while the loan time has not yet expired.

- 2) Do not merge a contract with the aim of making a prohibited hilah (al-'Imrani 2006). Prohibited hilah occurs through an agreement between two parties such as to sell and purchase 'inah to obtain riba al-fadl. For example, sell something at a price of RM200 in a deferred with a condition the buyer must sell it back to the seller at a price of RM100 in cash.
- 3) Do not merge a contract that can cause riba for example merger between sale and purchase contract and salaf. The purpose of this prohibition is to prevent (dhari'ah) from illegal deal such as the transaction of riba. Similarly, the ban on the affiliation between the qard and hibah to the lender because it could generate a riba in the deal (al-'Imrani 2006).

Hence, the above transactions are banned because those method of applications are against the sharia law. However, if the application is in line with the sharia, any appropriate innovation of muamalat affairs is mostly permit as the sharia moving parallel with the development of time and place. For example, among the examples of innovations that took place during the time of the Prophet (pbuh) was about pollination of date tree in which a hadith mentions that after arriving in Medina, the Prophet (pbuh) passed by some people who were fecundating some date palms, so he asked them what they were doing. When they told him, he said, "It would be better if you didn't do that." So they refrained from doing it, and that year the crop was not as good. They mentioned it to him (pbuh), and he replied: "You know better of your worldly affairs." (Muslim, 2006). This Hadith instructs humans that they can innovate in various fields as long as they do not conflict with the Islamic law.

Conclusion

As sum based on the above views on authorization of hybrid contract, the opinion that permits a hybrid contract is stronger and rajih than the forbidden opinion because the Nas come in general order that should not be understood in rigidity. The shariah always work on benefitting people in their daily life. Therefore, comprehension of the sacred text should be examined thoroughly concerning its restriction and prohibition, where some deed are authorized as long as there is no exact dalil which prohibits the doing. This mubah is in line with the purpose of syariah to facilitate and make ease human life (maqasid al-Syariah) as well as to provide facilities in muamalat. Instead of putting people in trouble and harm, it is the shariah aim in providing solutions as Islam is a way of life.

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