



Munich Personal RePEc Archive

Issue of Bai‘ Wa Salaf (Combination of Sale and Loan Contract) in Tawarruq Based Deposit Product: A Practitioner’s Perspective

Abdul Rahim, Mohamad Syafiqe

OCBC Al-Amin Bank, Malaysia

6 January 2025

Online at <https://mpra.ub.uni-muenchen.de/123099/>
MPRA Paper No. 123099, posted 11 Jan 2025 14:18 UTC

ISSUE OF *BAI' WA SALAF* (COMBINATION OF SALE AND LOAN CONTRACT) IN *TAWARRUQ* BASED DEPOSIT PRODUCT: A PRACTITIONER'S PERSPECTIVE

Dr. Mohamad Syafiqe bin Abdul Rahim*
OCBC Al-Amin Bank, Malaysia

ABSTRACT

The Malaysia Islamic banking market has expanded rapidly and it continues to embrace innovative structure, as underlined by the launch of Islamic banking products using various Shariah concepts. One of the most popular Shariah concept used by Islamic Banks across all market segment in Malaysia is Tawarruq (Commodity Murabahah). In recent years, Centre Bank of Malaysia has been issuing various Shariah resolutions and Shariah related policies to be complied by Islamic banks. Whilst this initiative is praiseworthy in strengthening and standardising the Shariah compliance culture, there are several issues which may impact the operational aspect of a bank. This paper will focus to discuss on the Shariah and operational concerns in Tawarruq based deposit product where the analysis will focus on the issue of prohibition of Bai` Wa Salaf. In addition, this paper will also provide some example of financial structures which already in Malaysia market as case study and reference. This article is based on qualitative research approach which is purely based on primary data gathered through library research and interview.

Key Words: *Bai` Wa Salaf*, *Tawarruq*, Deposit Product, Islamic Banking, *Shariah*

INTRODUCTION

Islamic banking industry particularly in Malaysia is evolving over time and gradually maturing to reach a level where its financial instruments are on par and competitive with conventional banking products. In terms of depository instrument, whilst all banks are committed to boost their capital liquidity to meet Basel III requirements, the same also applies to Islamic banks. As a result, Islamic banks are pushing aggressively to increase the deposit acceptance especially in retail segment. Arising from that, new innovative Islamic deposit products are structured to meet such demand. One of the most widely used and popular *Shariah* concepts underlies Islamic deposit product is *Tawarruq*.

Despite the rapid development and offering of Islamic deposit products, there are several *Shariah* issues particularly involving *Bai` Wa Salaf* which somehow affect the practice of *Tawarruq*-based deposit products. This is mainly due to recent resolutions made by *Shariah* Advisory Council (SAC) of BNM with regard to products structured using *Tawarruq*. The motivation of this paper is to highlight the issues and analyse it from *Shariah* and operational perspective. In addition, the analysis will also provide current financial arrangement in the market which have *Bai` Wa Salaf* element as case study.

*

Disclaimer: *The views and information expressed in this paper are solely represent the views of the author and do not in any way reflect and represent the views, practice or the policy of any entities. Liability claims regarding damage caused by the use of any information provided, including any kind of information which is incomplete or incorrect, will therefore be rejected.*

RESEARCH METHODOLOGY

The research is qualitative in nature whereby review and analysis will be carried out on primary and secondary texts in classical and contemporary *Fiqh* literature in understanding the subject and its related issues. It also involves investigative examination on relevant literature including fatwas, resolutions, standards and relevant documents such as statutes and guidelines issued in Malaysia by the regulators. Moreover, in order to get a better understanding on the issue concerned, a series of interviews and discussions with *Shariah* Officer, academicians and practitioners are carried out.

ESSENCE AND HISTORICAL PATH OF ISLAMIC DEPOSIT PRODUCT

Malaysia is one of the unique countries which operate a dual banking system where Islamic banking system operates in parallel with the conventional system.¹ Similar to conventional banks, all banking facilities such as deposit account, financing and other products are also available in Islamic banks. In terms of deposit product, what makes Islamic deposit product different from conventional is due to the underlying transaction used in the product structure. While conventional deposit products use loan as the underlying contract with the element of interest, Islamic deposit products do not have interest element embedded. As owners of the money so deposited, customer position according to *Shariah* is that of real owners; they are not creditors imposing interest to the institutions as would be the case if they were depositors with conventional bank.

Normally there are two types of account offered by bank namely Current or Saving Account (“CASA”) or Term Deposit Account.² Generally, CASA permits the customer to deposit and withdraw money at any time. It does not have maturity date; therefore the cash can be withdrawn at any time based on customer’s demand. However, the main point which differentiates between saving and current account is the presence of cheque book in the later. As for Term Deposit Account (also commonly known as General Investment Account-GIA or Islamic Fixed Deposit), it is a type of arrangement where customer’s deposits are held at the bank for a fixed term such as 3-month, 6-month, etc. These deposits will then be deposited in a number of investment pools where it will be invested in *Shariah*-compliant investments. The money deposited can only be withdrawn at the end of the term or when it reaches its maturity.

In the early days of Islamic banking in Malaysia, majority of Islamic banks structured their CASA and Term Account based on *Shariah* contracts either in the form of *Qard* (loan), *Wadi`ah Yad Dhamanah* (guaranteed safe-keeping), *Wakalah bi al-Istithmar* (agency to invest) or *Mudarabah* (profit sharing). Before the inception of *Tawarruq* concept, these four contracts are the most popular contracts being used by Islamic banks in structuring their Islamic deposit products. Due to system limitation and lack of commodity trading platform, Islamic banks were more favour to use either *Wadi`ah* or *Mudarabah* contracts in structuring Islamic deposit products. This was also because of the complexity in doing *Tawarruq* transaction as compared to the foregoing mentioned contracts which are more ‘plain vanilla’ and involve straight forward structure.

¹ This has been clearly mentioned in Section 27 Central Bank Act 2009 which read “The financial system in Malaysia shall consist of the conventional financial system and the Islamic financial system”.

² There may be other types such as Time Deposit Account, Call Account, etc. However for the purpose of this article, the author limits the discussion only for CASA and Term Account.

Having said that, now the trend has changed. Islamic banks are more inclined to apply *Tawarruq* concept when structuring depository products. Reason being is because of the latest regulatory requirement under Islamic Financial Services Act 2013 in classifying of Islamic deposit account and investment account. In a nutshell, all Islamic banks now need to differentiate between Islamic deposit which is principal guaranteed product and investment account which is purely investment product where the principal is not guaranteed. By looking at the nature of each of *Shariah* contracts, it means that all Islamic deposit products using *Wadi'ah Yad Dhamanah* and *Qard* are principal guaranteed thus will be protected by the Malaysia Deposit Insurance Corp (PIDM). The remainders, on the other hand, which apply *Shariah* contracts like *Mudarabah* or *Wakalah bi al-Istithmar* as the underlying contract are considered investment accounts and are not-principal guaranteed hence, not be protected by the Malaysia Deposit Insurance Corp (PIDM).

For such reason, Islamic banks need to find alternative to ensure 'principal guaranteed' feature be retained so as to be classified and complied with the definition of Islamic Deposit. Furthermore, this is also due to the issue of public readiness and lack of public awareness in accepting the fact that, the money deposited by them will no longer be protected as well as they may or may not receive return. At this juncture, the only alternative structures are to use either *Wadi'ah* or *Tawarruq* concept. However, *Wadi'ah* contract has raised several controversial issue particularly on prohibition of granting *Hibah* (gift) as return by bank to customer. Moreover, the used of the contract is also very restrictive where the latest resolution prohibits bank to disclose not only the indicative return but also the historical payment of return to the public.³ As such, the only feasible concept left now is *Tawarruq*.

TAWARRUQ CONCEPT: FIQH PERSPECTIVE

The term *Tawarruq* derived from the root word *al-Wariq*, which means minted silver (dirham).⁴ The term *Tawarruq* in the juristic technical meaning of it is defined as sale of asset involving three parties where the first party sells the asset to a second party. Subsequently the second party sells it to a third part.⁵ This transaction is called *Tawarruq* because when the purchaser bought the asset, he has no intention of using or getting benefit from it, but merely to facilitate him to obtain cash (*Waraqah Maliyyah*).⁶

Generally, there are different in opinion amongst Islamic scholars with regards to the permissibility of *Tawarruq*. Dr Wahbah al-Zuhaily in his paper presentation in the 19th OIC Fiqh Academy Conference provides two classical views on *Tawarruq*; namely those who accept and reject *Tawarruq*. The scholars who allow *Tawarruq* are Abu Hanifah, Abu Yusuf, Shafiites and Ahmad.⁷ This view is supported by the Quranic verse, Allah said "...and Allah permits trade and prohibits Riba".⁸ They argue that the word trade denotes the generality of

³ The SAC of BNM had resolved and confirmed in the 147th meeting on 27 May 2014 that the giving of *Hibah* is not allowed unless it is purely based on the borrower's discretion, not pre-conditional to the *Qard* contract and not promoted or marketed to any potential lender. In addition, the bank must not reveal the historical payment of *Hibah* to the public including to the customer with the purpose of attracting potential lenders. (Refer to http://www.bnm.gov.my/index.php?ch=en_about&pg=en_sac_updates&ac=429. Retrieved on 12 July 2014)

⁴ Lisan al-'Arab, p. 374

⁵ Al-Mawsu'at al-Fiqhiyyah al-Kuwaytiyyah: 14/147

⁶ Extracted from *Shariah* Resolution in Islamic Finance. 1st Edition, Kuala Lumpur: BNM, p. 62-65.

⁷ Refer to discussion in Wahbah Al-Zuhayli (2009) *Al-Tawarruq* Haqiqatuhu Anwanuhu al-Fiqhi al-Ma'ruf wa al-Masrafi al-Munazzam, Retrieved from <http://www.isra.my/media-centre/downloads.html?task=finish &cid=80&catid=20>

⁸ Al-Baqarah (2: 257)

all types of trade. In other words, the word ‘trade’ in the verse — because it is prefixed with the definite Arabic article, ‘al’ which indicate generality; thus, it encompasses all forms of sale transactions, including *Tawarruq*.

On the other hand, the scholars who rejected *Tawarruq* and deemed it impermissible include the Malikites, `Umar ibn Abd al-Aziz, scholars from Hanafites like Muhammad Ibn al-Hasan al-Shaybani and later generations of the Hanbalites, namely two prominent scholars, Ibn Taymiyyah and his disciple Ibn Qayyim al-Jawziyyah.⁹ The basis of its prohibition is because the application of *Tawarruq* is similar to *Bai` al-`Inah* (sale and buy back) in which, the purpose of the transactions are fictitious for liquidity purposes, i.e to get cash. Further, this kind of sale is forbidden because it is a *Zari`ah* (way) or *Hilah* (illegal excuse) to legitimate *Riba* (interest-based transaction).

Notwithstanding the foregoing discussion and differences in opinion regarding *Tawarruq*, the SAC of BNM in its 51st meeting held on 28 July 2005 had resolved that deposit and financing products based on the *Tawarruq* concept which is also known as Commodity *Murabahah* is permissible.¹⁰ The term *Tawarruq* is sometimes being used interchangeably with the term Commodity *Murabahah*. Nonetheless, regardless the terms used, both are the same. For clarity, the term Commodity *Murabahah* was introduced by academician and banker since normally the trading would involve commodities as the underlying asset for the *Murabahah* transaction.

STRUCTURE OF TAWARRUQ-BASED DEPOSIT PRODUCT

As explained in the previous section of this paper, the classical *Tawarruq* involves three parties where the first party sells an asset to a second party at mark-up (*Murabahah*) price. Subsequently the second party sells the same to a third party. By applying the classical structure of *Tawarruq*, Islamic bankers try to imitate and apply the same spirit in the financial instrument. As deposit product is an instrument to generate return or profit for customer, the *Tawarruq* arrangement should provide the same economic benefit and behave similar to normal deposit product.

However, the main challenge for contemporary *Tawarruq* structure is to ascertain the asset since *Tawarruq* requires underlying asset be initially owned by customer in order to comply with one of its tenets. This is where the role of Commodity Trading Platform comes into picture. This platform will provide the service as intermediary to find commodities supplier or vendor for buying and selling of *Shariah* compliant commodities such as metal, crude palm oil, cooper, plastic raisin, cocoa or even telecommunication airtime. Some of the well-known platforms are Bursa *Suq al-Sila`* of Bursa Malaysia, London Metal Exchange (LME) and As-Sidq. By having this platform, it will assist in identifying commodities supplier for *Tawarruq* transactions due to the fact that the main objective of *Tawarruq* arrangement is not to own asset rather to facilitate in generating cash (*Waraqah Maliyyah*).

By virtue of that, the generic banking structure of *Tawarruq* will involve four parties. Firstly, the customer purchases commodities from third party through Commodity Trading Platform and subsequently sells the commodities to the bank on mark-up basis where the profit margin will be agreed upfront. The mark-up portion will be the profit that the customer will enjoy. For that reason, the customer may get the profit upfront or upon maturity of the account. Once bank

⁹ Wahbah al-Zuhayli (2009), op. cit., p. 9-10

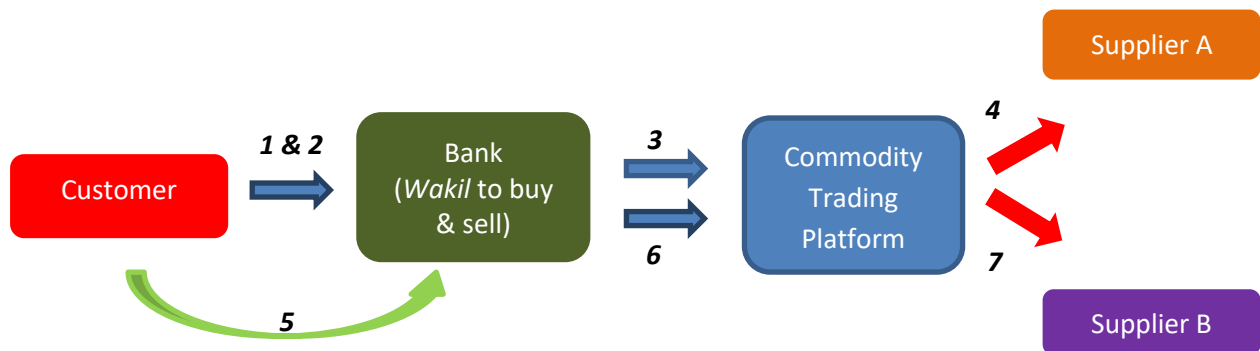
¹⁰ Resolution No. 60 and 61, *Shariah* Resolution in Islamic Finance (2010). 2nd Edition, Kuala Lumpur: BNM, p. 94-96

has purchased the commodities from customer, the bank will sell the commodities to another third party through Commodity Trading Platform. Nonetheless, normally the bank will engage directly with the Commodity Trading Platform. Arising from that, the Islamic bankers have explored using *Wakalah* (agency) arrangement to ease the purchase of commodities by customer without the need for customer to deal directly with commodity supplier.

On that note, the current industry practice of *Tawarruq* based deposit product will always involve *Wakalah* arrangement. However, it is worth noting that due to the feature and nature of CASA product which is structured without a fixed term period unlike Term Account such as General Investment Account, *Tawarruq* is not feasible and workable to meet operational needs. *Tawarruq* based deposit product would requires an actual sale and purchase transaction be executed to generate the profit portion. For CASA product, there is no fixed term of maturity and customer can always withdraw and deposit their money at any time. As such, there is operational constraint in determining the purchase and selling price to conclude the transactions requirement. For that reason, the current *Tawarruq* concept is only workable for Term Deposit and not for CASA product.

In this regard, there are two common structures applied by Islamic banks in Malaysia namely the dual *Wakalah* arrangement and *Wakalah* with *Wa'd* (promise) arrangement. The explanations of each structure are described below (Diagram 1 and Diagram 2). The structures are also consistent with the requirement under Exposure Draft on *Tawarruq* issued by BNM.

Diagram 1: Dual *Wakalah* Arrangement for *Tawarruq* based deposit product

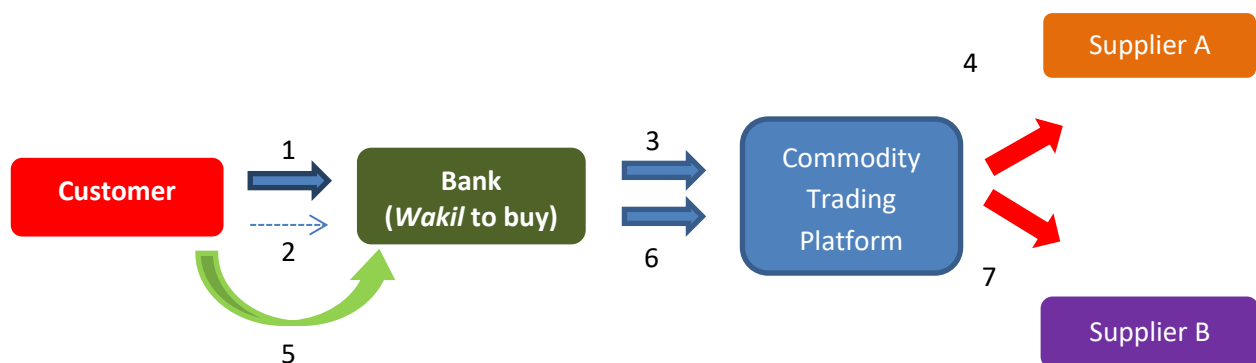


Source: Author's own

1. The Customer appoints the Bank as *Wakil* (agent) to purchase *Shariah*-compliant commodities at such quantum, pricing and time as the Bank deems fit so long as the total price is equivalent to the deposit amount made by Customer.
2. The Customer also appoints the Bank as *Wakil* to sell the same commodities to any party including to the Bank itself when the Customer has constructive possession (*Qabd al-Hukmi*), at *Murabahah* Price (deposit amount + profit rate).
3. The bank as *Wakil* will engage with Commodity Trading Platform to purchase commodities at a specified price equivalent to the deposit amount.

4. The Commodity Trading Platform will identify the supplier and purchase the commodities as requested by bank. Once the commodities are purchased from the supplier, it is deemed that customer has constructively possessed the commodities (via bank as *Wakil*).
5. Pursuant to the appointment of bank as *Wakil* to sell-off the commodities, the bank will sell the commodities to itself at an agreed *Murabahah* Price (deposit amount + profit rate). The price is payable on deferred basis upon maturity period of the account.
6. As the new owner of the commodities, the bank will engage with Commodity Trading Platform to sell the commodities to another supplier other than previous supplier.
7. The Commodity Trading Platform will identify the supplier and sell the commodities as requested by bank. Once the commodities are sold to the supplier, the bank will get cash on spot basis which equivalent to the deposit amount.

Diagram 2: *Wakalah with Wa`d Arrangement for Tawarruq based deposit product*



Source: Author's own

1. The Customer appoints the Bank as *Wakil* (agent) to purchase *Shariah*-compliant commodities at such quantum, pricing and time as the Bank deems fit so long as the total price is equivalent to the deposit amount made by Customer.
2. The Bank provides an undertaking/promise (*Wa`d*) to purchase the same commodities from the Customer once the customer has constructively possessed (*Qabd al-Hukmi*) of the commodities. The *Murabahah* Price will equivalent to the deposit amount + profit rate.
3. The bank as *Wakil* will engage with Commodity Trading Platform to purchase commodities at a specified price equivalent to the deposit amount.
4. The Commodity Trading Platform will identify the supplier and purchase the commodities as requested by bank. Once the commodities are purchased from the supplier, it is deemed that customer has constructively possessed the commodities (via bank as *Wakil*).

5. Pursuant to the undertaking (*Wa`d*) made by the bank at the outset, once the commodities are constructively possessed by customer, it is sold to the bank at the agreed *Murabahah* Price (deposit amount + profit rate). The price is payable on deferred basis upon maturity period of the account.
6. As the new owner of the commodities, the bank will engage with Commodity Trading Platform to sell the commodities to another supplier other than previous supplier.
7. The Commodity Trading Platform will identify the supplier and sell the commodities as requested by bank. Once the commodities are sold to the supplier, the bank will get cash on spot basis which equivalent to the deposit amount.

***BAI WA SALAF* AND ITS PROHIBITION IN *TAWARRUQ*-BASED DEPOSIT PRODUCT**

Bai` Wa Salaf refers to a sale contract combined with loan contract. This type of contract is prohibited based on Hadith of Rasullullah (*Sallahu `Alaihi Wassallam*): “*Ismail bin Mas`ud had told us from Khalid from Hussein al-Mu`allim from `Amru bin Shuaib from his father from his grandfather: Verily Rasulullah (Sallahu `Alaihi Wassallam) forbids combination of salaf (debt) and sale, two conditions within a sale, and profit without guarantee (without taking a risk)*”. Imam Malik defines *Bai` Wa Salaf*, the contract of selling and lending, as being like one man saying to another: “*I shall purchase your goods for such and such if you lend me such and such*”. If they agree to a transaction in this manner, it is not permitted. If the one who stipulates the loan, abandons his stipulation, the sale is permitted. Imam Ahmad explained *Bai` Wa Salaf* as if a person gives a loan to someone and then sells to him something at a higher than market price.¹¹

Technically, *Bai` Wa Salaf* is combination of sale contract and loan contract. It is prohibited despite the fact that both sale and lending are valid transactions when treated individually. This is because in every loan contract, the lender is prohibited from getting benefit from the borrower. The benefit could be in any form and not restricted in the form of money. Ibn Taymiyyah states that scholars agreed that whenever the creditor stipulates any extra benefit to be added to the amount of his loan, it is prohibited. Rasulullah (*Sallahu `Alaihi Wassallam*) prohibited combining a sale and a loan because if a man gives a loan to someone and sells him something in the same time the seller will take extra advantage for the sake of the loan.

The *Shariah* Advisory Council of Bank Negara Malaysia (“SAC”) in its 151st meeting on 30th September 2014 has discussed on the issue of prohibition of *Bai` Wa Salaf* in *Tawarruq*-based deposit product in Islamic bank in Malaysia. It was resolved that where the *Murabahah* sale in *Tawarruq* is executed by the *Wakil* (agent) on a date later than the date on which the fund is accepted from the *Muwakkil* (principal), the Islamic bank must fulfil the following requirements:

- i. The fund/deposit must be held based on trust (*Amanah*) by the *Wakil*;
- ii. Both the *Wakil* and *Muwakkil* must ensure that funds/deposits accepted from the *Muwakkil*/depositor shall not be treated as loan (*Qard*) to the agent prior to the execution of *Tawarruq* between the *Wakil* and *Muwakkil*. Such usage of the fund as a

¹¹ Muhammad Ayub (2007), *Understanding Islamic Finance*, Wiley: London, p. 145

Qard may be tantamount to *Bai` Wa Salaf* which refers to combining between loan and a sale (*Murabahah*) which is prohibited.

THE PRACTICALITY AND OPERATIONALISATION OF THE SAC RESOLUTION

From the foregoing resolution, there are several issues in terms of the practicality of doing *Tawarruq* transaction in accordance to the latest resolution.

1. The arrangement of the bank holding money deposited by customer prior to actual *Tawarruq* transaction is currently being practiced in *Tawarruq* based deposit product in the market. For instance, if customer deposits money under *Tawarruq* based deposit account, most of the time, the bank will only do the *Tawarruq* transaction on the subsequent date upon such placement. This is because, depending on the Commodity Trading Platform, the bank needs to observe the cut-off time stipulated by the Trading Platform hence it is beyond bank's control. It is not practical for the bank to conclude *Tawarruq* transaction on the same day as it may raise operational constraint on bank's part. For that reason, bank needs to set a certain cut off time everyday to determine whether *Tawarruq* transaction can be concluded on the same day or on the next day.
2. Operationally, it is not practical to execute *Tawarruq* transaction on the same day since for some Islamic banks, *Tawarruq* transaction is normally handled by one department and centralised in Bank's headquarter instead to be done at branch level. The problem will arise due to different working day at certain states in Malaysia such as Kelantan, Terengganu, Kedah and Johor. For example, if a customer opens a *Tawarruq* deposit product at Kelantan branch on Sunday (working day in Kelantan), the *Tawarruq* transaction can only be done on the next working day since the department in charge of doing *Tawarruq* transaction is not working (Sunday is public holiday in KL).
3. If the *Tawarruq* is not executed on the placement date, the bank must hold the money as trust (*Amanah*) where according to *Shariah*, it cannot be utilised by the bank since it will be considered as *Qard* hence, triggering the prohibition of *Bai` Wa Salaf*. Operationally, it is not practical since as part of bank's role of doing "banking business" as per Islamic Financial Services Act 2013 (IFSA), it is always bank's practice and in accordance to bank's policy to invest funds and not to treat it in idle position even for one day. Therefore, Treasury department will normally invest the funds in any *Shariah* compliance investment to generate return for example in overnight placement.

ANALYSIS FROM SHARIAH PERSPECTIVE

From *Shariah* perspective, the analysis will look into the following essential discussions with regard to the issue.

The status of money deposited by customer

The main issue concern is on the status of money deposited by customer if the actual *Tawarruq* transaction is performed not on the placement date. Based on the SAC resolution, the funds shall be deemed as trust (*Amanah*) by the bank until the *Tawarruq* is concluded. The Author

agrees with this view in which to regard it as *Wadi`ah* contract or safekeeping guaranteed contract. This arrangement is consistent with the view which can be referred as follows:

الْمَالُ الَّذِي قَبَضَهُ الْوَكِيلُ بِالْبَيْعِ وَالشِّرَاءِ وَإِيفَاءِ الدَّيْنِ وَاسْتِيفَائِهِ وَقَبْضِ الْعَيْنِ مِنْ
جِهَةِ الْوَكَالَةِ فِي حُكْمِ الْوَدِيعَةِ فِي يَدِهِ فَإِذَا تَلَفَ بِلَا تَعَدٍّ وَلَا تَقْصِيرٍ لَا يُلْزَمُ الضَّمَانُ

“Property received, under his appointment as *Wakil*, by a person, who is *Wakil* to sell or buy, or to pay or receive a debt, or to receive an existing specific thing is like a thing deposited for safe keeping. If it is destroyed without fault and there is no neglect, no compensation is necessary.”¹²

From the above deliberation, in the case of *Tawarruq* deposit based product, the bank who is the appointed *Wakil* to purchase commodities, will keep the funds on its custody for the purpose of *Tawarruq* transaction as agreed by the bank and customer. This arrangement seems to be in line with the above view. However, according to the SAC resolution with regard to this issue, it specifies that the status of funds shall be considered as *Amanah*, only if the funds are not used for *Tawarruq* transaction on the same placement day.

On that note, there will be holding period of minimum one night or more in which the bank will keep and hold customer’s money before completing the *Tawarruq* transaction on the subsequent date. Having said that, this resolution is arguable on the basis that even the *Tawarruq* transaction is done on the same day of the placement date, the element of *Wadi`ah* still exists. For example, if placement is made by customer at 10am and the bank will only do the *Tawarruq* transaction at 12pm on the same day, there is still holding period between 10am to 12pm in which the bank shall hold the money as *Wadi`ah*.

As such, it makes no different if the *Tawarruq* is done on the same or later date as the element of *Wadi`ah* is always embedded in *Wakalah* arrangement whenever *Muwakkil* provides upfront money to *Wakil* as purchasing agent. In another simple example, if Syafiqe asks Aizat to safe keep his money for 5 minutes, it is still considered as *Wadi`ah* similar to if Syafiqe requested Aizat to safe keep her money for 1 or 2 days. In both scenarios, *Wadi`ah* contract still apply regardless of the period is short or long. To the best of Author’s knowledge, there is no nas or dalil in al-Quran, *Hadith* or *Ijma`* which differentiate validity of *Wadi`ah* contract depending on its period.

The permissibility for bank to utilise customer’s money which is held under *Amanah* prior to *Tawarruq* transaction

It is worthnoting that in the current Islamic financial context, trust (*Amanah*) is considered under *Wadi`ah* contract whereby the asset owner deposits his asset to another party on trust basis for safe keeping. Majority of *fiqh* scholars classify *Wadi`ah* as a trust contract (*Amanah*) whereby the deposited asset for the custody of the *Wadi`* (custodian) is treated as a trust. To understand better, under *Wadi`ah* concept, the asset i.e, money cannot be utilized by the holder without prior consent from the owner.

¹² Article 1463, Majallah al-Ahkam al-‘Adliyyah

Nevertheless, the *Wadi'* (in this case is bank), may utilise the money provided that prior consent is given by the *Mudi'* (*Wadi'ah* depositor). The contemporary scholars view that the situation of trust (*Amanah*) in *Wadi'ah* will change to guaranteed (*Dhamanah*) custody when the *Wadi'* has utilized the fund with consent from the *Mudi'*. Under *Dhamanah* contract, the Islamic banking institution acts as the safe keeper or trustee for the fund deposited by customer of the Islamic banking institution. However, as the customer normally allows Islamic bank to utilise the deposited money, the Islamic bank is obliged to guarantee the deposit.

It has been emphasized in Hadith by Prophet Muhammad (*Sallahu 'Alaihi Wassallam*) and Islamic legal maxim which state as follows:

المسلمون على شروطهم إلا شرطاً أحل حراماً أو حرم حلالاً

“Muslims are bound by their stipulations/commitments provided that such stipulations shall not permit the haram and disallow the halal (do not contravene the principles of Islam)”¹³

الأصل رضى المتعاقدين ونتيجته هي ما التزمه بالتعاقد

“The original ruling for a contract is the consent of the contracting parties and its effect is based on what have become the rights and duties as agreed in the contract”¹⁴

For that reason, the bank may use the funds and utilize any profit gained from it in which the bank has exclusively the right over the profit. The bank may not separate or segregate the deposited money since the bank has right to utilize it. In addition, customer/depositor can withdraw back the fund/deposit at any time they want.¹⁵ Furthermore, although there is no clear nas in al-Quran or Hadith, majority of scholars view that if the Islamic bank utilised the deposited money, the contract will apply the rules of *Qard* in terms of its parameters (*dhawabit*) and its subsequent effects.¹⁶ The OIC Fiqh Academy has resolved that “deposits in current accounts, either deposited at Islamic or conventional financial institution, is a kind of *Qard* from *fiqh* perspective since the financial institution that receives the deposit guarantees such deposit and it must refund the deposit upon request”.¹⁷ Nonetheless, it is important to highlight that this arrangement which applies the rules of *Qard* should not be treated the same in the context of *Tawarruq* arrangement. As the acceptance of money is due to the *Wakalah* arrangement and not outside or separate from the scope of *Wakalah* arrangement, the funds deposited is not accurate to be treated as *Qard* to the bank prior to the *Tawarruq* transaction. Further explanation will be deliberated in the next section.

Issue of *Bai` Wa Salaf*

As explained in the previous part of this paper, the main justification of SAC of BNM disallowing conclusion of *Tawarruq* transaction not on the placement day is to avoid the issue of *Bai` Wa Salaf*. This is because, if the customer gives his consent for bank to utilise the funds, the funds placed on trust shall follow the parameter (*Dhawabit*) of *Qard* (loan) contract. For

¹³ Abu Daud (1999), Sunan Abi Daud (Hadith no. 3594), Bait al-Afkar al-Dawliyah

¹⁴ Ahmad al-Zarqa' (1989), Syarh al-Qawa'id al-Fiqhiyyah, Dar al-Qalam, p. 482

¹⁵ Dr. Aznan Hassan, Fundamentals of *Shariah* in Islamic Finance, p. 584.

¹⁶ OIC Fiqh Academy (1996), Majallah Majma' al-Fiqh al-Islami, no. 9, v. 1, p. 198

¹⁷ OIC Fiqh Academy (1995), Majallah Majma' al-Fiqh al-Islami, 9th Convention, resolution no. 86 (9/3)

that reason, the resolution specifies that if the funds be considered as *Qard* (loan) due to funds utilisation, it may tantamount to combining between loan and sale contract (*Bai` Wa Salaf*) which is prohibited. This is because, the ‘so-called’ loan will subsequently be combined with *Murabahah* contract when the *Tawarruq* be executed.

As far as *Tawarruq* is concerned, it is important to understand that the *Wadi`ah* contract is realised due to the *Wakalah* contract. In other word, the *Wadi`ah* contract is embedded part of and related to the *Wakalah* agreement only. It is not inter-related and there is no interconnectivity with the *Murabahah* transaction. The money deposited by customer is due to the appointment of bank as *Wakil bi al-Shira`* (purchasing agent) and not a condition upon *Tawarruq* transaction. Moreover, although the funds utilised by the bank will apply *Qard`*s parameter, it is baseless and cannot be construed as the customer has the intention to give *Qard* to bank since the fact is that the money is given to bank on the basis of *Wakalah* agreement for the bank as *Wakil bi al-Shira`*.

In other words, it can be argued that *Bai` Wa Salaf* is not applicable in the current *Tawarruq*-based deposit products on the basis that the sale contract is not related or pre-condition upon *Qard* contract. Although customer is required to deposit money with bank in order for bank to proceed with *Murabahah* contract to generate the agreed profit rate, the placement is due to appointment of bank as *Wakil* to purchase commodities and not a condition to conclude *Murabahah* contract.

To support the foregoing justification, in *Muamalah* transaction, every rule is based on the intention or objective of its creation. For instance, if the intention of the *Wadiyah Yad Dhamanah* is not related or as part of condition to enter into *Murabahah* contract, it cannot be assumed that it falls under the scope of *Bai` Wa Salaf*. To support the above justification, the scholar (*Fuqaha*) has set out the fundamental rule in *Muamalah* when determining any *Hukm*:

الأصل في المعاملات الإلتفات إلى المعاني

“The fundamental ruling in the affairs of *Muamalat* is the consideration of its intent and well-being (that can be acquired from it)

The above is also consistent with another maxim taken from the *Majallat al-Ahkam al-Adliyyah* which provides the following:

العبرة في العقود للمقاصد والمعاني لا للألفاظ والمباني

“The real reason of contracts is for the objectives”

EXISTING FINANCIAL ARRANGEMENT INVOLVING *BAI` WA SALAF*

In current Islamic banking practice in Malaysia, there are several financial arrangements that can be used as case study in relation to *Bai` Wa Salaf*. However, arguably, these financial structures are so far not be classified having the issue of *Bai` Wa Salaf*. The explanations are as follows:

Opening of *Wadi`ah* based deposit product as pre-condition in disbursing financing amount

Normally for any financing facilities, the bank would require customer to open and maintain a deposit account with the bank. The purpose of such account is either as the disbursement account where the financing amount will be disbursed into it or to be used in debiting instalment payment. Most of saving or current account products are using *Wadi`ah Yad Dhamanah* contract which applies the parameter of *Qard*. In view of that, if the bank requires customer to open such account as a condition prior to financing disbursement, this can also be considered as *Bai` Wa Salaf* which is prohibited if the financing is based on contracts of exchange (*`Uqud Mu`awadhat*) such as *Ijarah* or any sale-based contract like *Tawarruq*, *Bai` al-`Inah* or *Murabahah*. If this practice is also not allowed, then the current practice in the market should also be changed. However, from practitioner view, the intention of opening the current account is basically for operational requirement to facilitate disbursement of financing amount or payment of instalment.

Ujrah based Credit Card Facility

There are several Islamic banks in Malaysia that offer Islamic credit card product based on the concept of *Ujrah* (fee). In general, *Ujrah* is a kind of payment that is paid by someone as a counter value for service rendered by the other party. Such payment is derived from *Ijarah* contract which covers two categories namely tangible asset (*al-`Ayn*) and labour or non-tangible asset (*al-`Amal*). The first category of *Ijarah* is traditional leasing of homes, stores, and any items which have usufruct. The second type of *Ijarah* is for hiring a worker and *Ujrah* is given to him as consideration for the service rendered.¹⁸

In the context of Islamic credit card, the cardholder is imposed with *Ujrah* as a consideration for the service provided as well as the benefits and privileges offered by the Islamic bank to the cardholders. In addition to that, the customer will be given credit limit which can be utilised by customer. Such utilisation is considered as loan (*Qard*) contract from the bank e.g. for retail purchase or cash withdrawal or any other mode of utilisation determined by the bank from time to time. From the explanation, it can be argued that such arrangement of *Qard* and also charging of *Ujrah* can be considered as *Bai` Wa Salaf*. This is because, in order for the customer to get the loan from the bank, the facility is always related and subject to the arrangement of *Ujrah* which is part of *Ijarah* contract and under *`Uqud Mu`awadhat* category.

Although there is view which stated that such product is permissible on the basis that each of the contracts stand on its own and concluded independently, but the loan will not materialise if the *Ujrah* arrangement is not combined together with the *Qard* arrangement under one facility. In addition, although the *Ujrah* amount is fixed upfront, it is still subject to rebate which shall be calculated according to the amount of loan given to customer as reference. In other words, both the loan and *Ujrah* arrangements are interconnected and inter-related to achieve the economic benefit and mechanic of a credit card features.

CONCLUSION

¹⁸ Dr. Nazih Hammad, *Mukjam al-Mustalahat al-Iqtisadiyah fi Lughah al-Fuqaha*, p. 26

From the foregoing discussion, it can be summarized that despite the encouraging growth and development of Islamic Banking market, it seems that there are still controversial issues that need prompt solutions in order to sustain the development of the industry. *Tawarruq* seems to be the only *Shariah* contract that is widely used by Islamic banks in Malaysia for its products across all segment and financial facilities. Due to the new requirement and resolution imposed by the *Shariah* Advisory Council of BNM, this requires a close cooperation among financial experts and *Shariah* scholars on one hand, and more interaction and discussion among *Shariah* boards on the other. The focus of the Islamic Banking shall not be only on how to raise the funds, structuring innovative product and be acceptable to international financial institutions, although these are valid and well needed objectives, but ensuring *Shariah* compliant and in the same time ensuring survival of Islamic banking industry should be the utmost priority.