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# **Islamic Financial Services Act 2013: Analysis from Islamic Deposit Product Perspective**

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# Islamic Financial Services Act 2013: Analysis from Islamic Deposit Product Perspective \*

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## *Abstract*

The Islamic Financial Services Act 2013 (IFSA) came into force on 30 June 2013 with the objective to pave way for the development of an end-to-end Shariah compliant regulatory framework for the conduct of Islamic financial operation in Malaysia. From Islamic deposit product perspective, one of the issues which have raised concern among the Islamic banks is regarding the reclassification and requirements in differentiating between Islamic deposit and investment account. In that regard, IFSA has introduced two major classifications of products for the acceptance of money from customers by the Islamic banks, namely Islamic deposits and investment accounts. This paper will discuss on this issue particularly the way forward by the industry in complying with the said requirement. In addition to that, this paper will also explain in brief the existing Islamic deposit product structure used by most of Islamic banking institutions in Malaysia and the impact of IFSA requirements on the current structure. This article is based on qualitative research approach which is purely based on primary data gathered through library research and interview. In summary, the reclassification requirement as espoused in IFSA 2013 is one of the ways to reflect and appreciate the spirit of Shariah contract. Although it would require additional works for Islamic banks, at least it is a first step in migrating and phasing out from conventional banking environment. As this initiative is still in the pipeline and has long way to go, it seems that Ijtihad is an integral part of developing new products.

*Keywords:* Islamic Financial Services Act, Transition, Islamic Deposit, Investment Account

## INTRODUCTION

The regulatory and supervisory framework of Malaysia has begun a new phase of its development as the Islamic Financial Services Act 2013 (“IFSA”) come into force on 30 June 2013. IFSA was intended to pave way for the development of an end-to-end Shariah compliant regulatory framework for the conduct of Islamic financial operation in Malaysia. With the coming into force of this legislation, several separate legislations namely the Islamic Banking Act 1983, the Takaful Act 1983, Payment Systems Act 2003 and Exchange Control Act 1953 were repealed on the same date.

In addition to IFSA, there has been a clear direction and indication from Bank Negara Malaysia (“BNM”) to strengthen the Shariah-compliance culture and also to standardise the practice of all Islamic financial institutions in Malaysia with regard to Islamic banking product structure (hereinafter refers to Islamic Product). This can be seen from the issuance series of policy documents i.e Exposure Drafts on various Shariah contracts to enhance the end-to-end compliance with Shariah. These Exposure Drafts (“ED”) outline the Shariah requirements and optional practices relating to Wadi`ah, Hibah, Kafalah, Wakalah, Wa`d, Tawarruq and Bai` `Inah respectively to facilitate IFI in developing Islamic financial services and products.<sup>1</sup>

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<sup>1</sup> Refer to [http://www.bnm.gov.my/index.php?ch=en\\_announcement&pg=en\\_announcement\\_all&ac=269](http://www.bnm.gov.my/index.php?ch=en_announcement&pg=en_announcement_all&ac=269). Referred on 10 July 2014

One of the issues which have raised concern among the Islamic banks is regarding the requirements in differentiating between deposit and investment account. IFSA has introduced two major classifications of products for the acceptance of money from customers by the Islamic banks, namely Islamic deposits and investment products. This paper will discuss on this issue particularly the way forward by the industry in complying with the said requirement from Islamic deposit product structure perspective. In addition to that, this paper will also explain in brief the existing Islamic deposit product structure used by most of Islamic banking institutions in Malaysia and the impact of IFSA requirements on the current structure.

## **Research Methodology**

The research is qualitative in nature whereby a review and an 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.

## **IFSA 2013 AND STANDARDISED SHARIAH POLICIES**

Prior to IFSA, the Islamic Banking Act 1983 (“IBA 1983”) was enacted to provide for the setting up and licensing of Islamic banks. The IBA 1983 stipulates that a bank licensed under the Act shall carry on “Islamic banking business” where it was defined as “banking business whose aims and operations do not involve any element which is not approved by the religion of Islam”. In contrast, Section 2(1) of the (then) Banking and Financial Institution Act 1989 (“BAFIA”) which governs conventional banks, gives the following definition for 'banking business':

*'banking business' means:*

*(a) the business of:*

- (i) receiving deposits on current account, deposit account, savings account or other similar account;*
- (ii) paying or collecting cheques drawn by or paid in by customers; and*
- (iii) provision of finance; or*

*(b) such other business as the Bank [Bank Negara Malaysia], with the approval of the Minister, may prescribe; ...*

It is worth noting that some authors viewed that Parliament intentionally gave “Islamic banking business” a general and, therefore, a very wide definition so as to give as much flexibility and scope as possible to Islamic banks to enable them to develop, expand their operations, product innovation and to evolve into viable competitors to conventional institutions.<sup>2</sup> On the other hand, the general definition does seem to have some positive aspects particularly when compared with the more comprehensive definition of “banking business” found in the BAFIA.

However, by not defining “banking business” in IBA 1983, it has either left it to be implied by the courts that the meaning of the term is to be the same as that applied in conventional banking or intended that term to acquire a meaning by custom. Again, the civil court which has no expertise in Shariah would have to rule on that issue when the occasion arises which would spark lots of problematic and polemic misinterpretation as what we have seen in several court cases involving Islamic banking transaction. The legal issues arising from the definition of just this one term (Islamic banking business) provide an indication of what legal problems may be expected in the application of the total spectrum of Shariah.

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<sup>2</sup> Refer for instance articles by Mohd Illiyas (1995) Islamic/Interest-Free Banking In Malaysia: Some Legal Considerations, 3 MLJ cxlix and Mohamed Ismail Shariff (1998), The Development Of Islamic Banking Law In Malaysia, 1 MLJ cxlv

Whilst the significance of the Shariah cannot be denied, its shortcomings must at the same time be acknowledged since there are no guidelines given and no parameters are set. As seen above, even the definition of Islamic banking business leaves a lot to be desired. It is submitted, therefore, that there is a need for the definition of “Islamic banking business” in the IBA 1983 to be appropriately amended so that it gives a more technical, specific and comprehensive meaning and description of an Islamic bank's business. Furthermore, the industry and regulators were pressured by complains, critics and allegations from the public community and several consumer's right NGO which against the Islamic banks by comparing it akin to conventional bank in terms of margin of profit or fee imposed to customer, the underlying transaction used, etc. These accusations (in author's opinion) had opened the eye of regulators on the importance of standardising the practice of all Islamic banks to obviate dissimilarity with conventional banking in terms of product structure, Shariah contract used and operational practice. In the same time, it would create awareness and inculcate the public and industry to appreciate the spirit of Shariah and differences between Islamic bank and conventional bank.

In addition, IFSA also empowers the BNM to issue standards on Shariah requirements to facilitate institutions in complying with Shariah. With this empowerment, BNM had issued series of Exposure Drafts on various Shariah contracts for industry and public feedback. These Exposure Drafts outline the Shariah requirements and optional practices relating to Wadi'ah, Hibah, Kafalah, Wakalah, Wa'd, Tawarruq and Bai' Inah respectively to facilitate IFI in developing Islamic financial services and products. As to date, only two policies which have been finalised and take effect which are Shariah Standard on Murabahah and Mudarabah respectively. Despite the fact that this proactive initiative by BNM is good for the industry but there are several issues which in turn has impacted the industry. For the purpose of this paper, the author will only focus the issue with regard to Islamic deposit account. The issue shall be deliberated in the next section of this paper.

## **ESSENCE OF ISLAMIC DEPOSIT PRODUCT**

Malaysia is one of the unique countries which operate a dual banking system where the Islamic banking system operates in parallel with the conventional system.<sup>3</sup> Similar to conventional banks, all banking facilities such as deposit account, financing and other products and services are available at 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.

In categorisation of deposit product be it Islamic or conventional, normally there are two types of account offered by bank namely Current or Saving Account (“CASA”) or term deposit.<sup>4</sup> 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 Account (also commonly known as General Investment Account-GIA), it is a type of arrangement where the 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 businesses. The money deposited can only be withdrawn at the end of the term or when it reaches its maturity. In practice, Islamic banks structure their CASA and Term Account based on Shariah contracts either in the form of Qard, Wadiah Yad Dhamanah, Mudarabah or Wakalah bi al-Istithmar. Before the inception of Tawarruq (Commodity Murabahah) concept, these four contracts are the most popular contracts being used by Islamic banks in structuring their Islamic deposit products.

### **Qard Contract**

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<sup>3</sup> 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”.

<sup>4</sup> 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.

In the current practice of Islamic banking, Qard based deposit product is predominantly used by the Islamic bank in the Middle East. Essentially, the aim is to provide the depositors with a guaranteed safe-keeping of the amount deposited and at the same time allow the banks to utilise it for its banking and business activities. In a Qard structure, the depositor is deemed as a lender to the bank who acts as the borrower and the bank guarantees such return even if there is negligence or loss. In quick glance, this structure looks akin to conventional deposit product. However, for Islamic deposit using Qard contract, there is no contractual obligation by the borrower or lender to impose interest on top of the deposited amount.

### **Wadi`ah Yad Dhamanah Contract**

As for Wadi`ah Yad Dhamanah (safe keeping with guarantee), it is a form of Wadi`ah whereby the Islamic bank acts as the safe keeper or trustee for the fund deposited by customer. However, as the customer normally allows the Islamic bank to utilise his deposited money, the Islamic bank is obliged to guarantee the deposit. The Shariah Advisory Council of BNM (“SAC”) in its 5<sup>th</sup> meeting held on 30 April 1993 resolved that Wadi`ah Yad Dhamanah is permissible to be used in structuring Islamic banking deposit products. In addition, the SAC had also resolved in its 6<sup>th</sup> special meeting dated 8 May 2008 that the ruling on Wadi`ah Yad Dhamanah which involves money may also apply the rules of Qard in terms of its parameters (Dhawabit) and its subsequent effects.

The decision was made on the basis that Majority of fiqh scholars classify Wadi`ah as a trust contract (Yad Amanah) whereby the deposited asset for the custody of the Wadi`ah recipient is treated as a trust. The Wadi`ah recipient is obliged to replace the Wadi`ah asset within his custody in the event of damage or loss of the Wadi`ah asset due to his negligence. Nevertheless, majority of scholars view that if the financial institution utilised the deposited money, the contract becomes a contract of Qard. In other words, all rulings and principles of Qard contract shall be applicable to Wadi`ah.

In terms of the profit derived from the deposit placement, eventhough the profit gained by the bank from the use of the deposited funds belongs to the bank instead of customer, the bank usually may at its discretion, give Hibah (gift) to the customer as a reward and token of appreciation for the utilisation of the deposit. The practice of giving Hibah is deemed controversial by some scholars. Since Wadi`ah Yad Dhamanah has similar ruling as a Qard contract, any benefits given to the lender (customer) are deemed as Riba. The benefits here may include and not limited to profit/Hibah, reward or prizes to customer. This is one of the issue and impediment faced by Islamic banks in coming out with new innovative Islamic deposit product due to the practicality issue and operational constraint to meet the IFSA requirement. The detail explanation will be deliberated in next section of this paper.

### **Mudarabah and Wakalah bi al-Istithmar Contract**

Another Shariah contract that being used by Islamic banks for Islamic deposit product is Mudarabah. It is a contract between two parties to conduct a particular joint venture. It involves the customer as Rabbul Mal who provides the capital (deposited money), and the bank as Mudarib (entrepreneur) who manages the joint venture. Any profits generated from the joint venture will be shared between the bank and the customer based on the agreed terms and ratio, whereas any losses will be solely borne by the customer. On the other hand, deposit product based on Wakalah is another latest innovation of Islamic banking product. It is a form of agency contract in which a party mandates another party as his agent to perform a particular task.

In the current context of Islamic banking, an Islamic deposit product can be structured based on Wakalah bi al-Istithmar (investment agency). Under this product, a customer will deposit a certain amount of money at the Islamic financial institution with the condition that such deposit shall only be invested in an instrument with the potential to generate return at a certain minimum rate (for instance 5% per annum). The Islamic bank will act as an agent in investing the customer’s deposit and will be entitled to a fee as agreed by both parties. The principles of Wakalah bi al-Istithmar are identical to principles of Mudarabah because the agent receives the deposit money

from the customer for the purpose of investment. However, Wakalah is based on Ujrah or fee. The application of Wakalah principles in this form is not contrary to the objectives of Shariah as long as the original features of Wakalah are being preserved.

From the foregoing discussion, it can be summarized that from author's experience, most of Islamic banks prefer to use either Wadi'ah Yad Dhamanah, Qard and Mudarabah as the underlying contract for CASA products whereas for Term deposit account or investment deposit, Mudarabah and Wakalah bi al-Istithmar are the two most prominent Shariah contract used by Islamic banks. This is because of the nature of these two contracts which do not entail a guarantee of neither principal or return of profit to the customer. Notwithstanding that fact, prior to IFSA implementation, regardless of the Shariah contracts used whether it is principal guaranteed or non-principal guaranteed in nature, Islamic banks would always ensure that the customers or depositors entitle to get the profit rate as mentioned upfront to them albeit it is made as indicative or discretionary by bank. In fact, even if the bank incurs losses, the bank will still give the profit rate on the basis of Hibah to top up the differences or shortfall. In other word, the conventional practice and operations of interest based lending contract are still mirroring in Islamic banking environment.

## TRANSITION OF ISLAMIC DEPOSIT PRODUCTS

Despite the fact that IFSA has established Malaysia's Islamic financial landscape into a new phase, it has also created new paradigm and standard for Islamic finance industry. As explained in the previous part of this paper, since the definition of "Islamic Banking Business" under the then IBA 1983 is too generic which may lead to various interpretation and issue, the current IFSA had defined "Islamic Banking Business" in a more limited scope which reflect the real scope of banking business. Section 2 of IFSA read as follows:

*"Islamic banking business" means the business of—*

- (a) accepting Islamic deposits on current account, deposit account, savings account or other similar accounts, with or without the business of paying or collecting cheques drawn by or paid in by customers; or*
- (b) accepting money under an investment account; and*
- (c) provision of finance; and*
- (d) such other business as prescribed under section 3; ...*

As far as Islamic deposit is concerned, the main distinction between the requirement under IBA 1983 and IFSA is the introduction of two major classifications of products for the acceptance of money from customers by Islamic banks, namely Islamic deposits and investment accounts. Prior to IFSA, under the repealed IBA 1983, all monies accepted from customers are classified as Islamic deposits, which comprise both deposit and investment products. Furthermore, all these monies are guaranteed by Perbadanan Insuran Deposit Malaysia (PIDM) or the Malaysia Deposit Insurance Corporation. However, with the new requirement, Islamic banks are required to reclassify their Islamic deposits under the then IBA 1983 into either Islamic deposits or investment accounts.

For clarity, IFSA has defined both Islamic deposits and investment accounts as follows:

*"Islamic deposit" means a sum of money accepted or paid in accordance with Shariah—*

- (a) on terms under which it will be repaid in full, with or without any gains, return or any other consideration in money or money's worth, either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and person accepting it; or*
- (b) under an arrangement, on terms whereby the proceeds under the arrangement to be paid to the person paying the sum of money shall not be less than such sum of money...*

whereas;

*“investment account” means an account under which money is paid and accepted for the purposes of investment, including for the provision of finance, in accordance with Shariah on terms that there is no express or implied obligation to repay the money in full and—*  
*(a) either only the profits, or both the profits or losses, thereon shall be shared between the person paying the money and the person accepting the money; or*  
*(b) with or without any return...*

From the foregoing excerpts, it is clear that the 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. In author's view, the reclassification is a proactive initiative by the regulator. In fact according to BNM, the differentiation will allow the Islamic banks to develop a wider range of products for both classifications to meet the diverse needs of the customers. Consequently, customers will be able to better appreciate the product offerings by the Islamic banking institutions and make an informed decision in respect of the choices of Islamic banking products.<sup>5</sup> Moreover, this would be a direct response to the critics from parties who questioned the Shariah status of Islamic banks. In this regard, Islamic banks will now be gradually phasing out from the conventional mind set and practice thus would appreciate the spirit of each of Shariah contract underlies the product structures.

Based on author's observation, majority of Islamic deposits in the banking system fall under the Islamic deposit category as per IFSA definition. By looking at the nature of each of Shariah contracts (as explained in the previous part), it means that all Islamic deposit products which use Wadi'ah Yad Dhamanah (guaranteed safe keeping) and Qard (loan) 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 (profit sharing) or Wakalah bi al-Istithmar (agency to invest) as the underlying contract are considered investment accounts and are not-principal guaranteed hence, not be protected by the Malaysia Deposit Insurance Corp (PIDM).

In addition, to complement the IFSA requirement, BNM had issued on 14 March 2014, a new policy on Investment Account. The policy clearly defines that investment account as a product which is structured based on the application of Shariah contract, including such arrangement which does not create an obligation on the bank to repay on full the money accepted from customer.<sup>6</sup> For that reason, it truly reflects the nature and features of Mudarabah, Musharakah or Wakalah bi al-Istithmar. On that note, all investment accounts must observe the requirement as stated in the new BNM policy of investment account which sets out very strict oversight requirement over the management of the funds and investment asset. Further, it also requires transparency, disclosure requirements, suitability assessment and prudential requirements relating to investment account. In short, the requirements resemble the process in investing in Unit Trust.

It is worth noting that due to such extensive requirements, most of Islamic banks prefer to maintain their products under Islamic deposits category rather than investment account. Having said that, Islamic banks has now already taking steps to convert their existing Mudarabah and Wakalah bi al-Istithmar deposits into other suitable Shariah contract in compliance with the IFSA. However, there are also Islamic banks which attempt and “take the challenge” to explore the possibility to offer investment account though the process in preparing and complying with the requirements are quite tedious. In that regard, the author wishes to pose one question. CASA product is a basic and common product in any banking institution. Yet, does the public ready to accept the fact that (for Islamic banks), there are no more CASA features where the money deposited by them will no longer be protected and they may or may not receive return?

Regardless of each individual Islamic banks preferred plan, BNM has accorded a two-year transition period until 30 June 2015 in ensuring a seamless and effective process of reclassification.<sup>7</sup> Nonetheless, the issue now is what is the best Shariah contract that can be used as replacement to the existing Islamic deposit product?

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<sup>5</sup> Refer to [http://www.bnm.gov.my/index.php?ch=en\\_press&pg=en\\_press\\_all&ac=2974](http://www.bnm.gov.my/index.php?ch=en_press&pg=en_press_all&ac=2974). Retrieved on 11 July 2014

<sup>6</sup> Refer item 8.2, Investment Account Policy, issued by BNM

<sup>7</sup> Ibid.

## **Wadi`ah Yad Dhamanah or Qard as Suitable Replacement?**

Bankers might just say that the easiest way to convert to Islamic deposit category is by converting all Mudarabah and Wakalah bi al-Istithmar based product to either Wadiah Yad Dhamanah or Qard contracts. However, there are several issues with regard to the conversion which need to be tackled by Islamic bank and in the same time cause dilemma to Islamic bank. While Wadiah Yad Dhamanah contract seems to be the best Shariah contract for Islamic deposit, there is one issue on prohibition of granting Hibah by bank to customer.

As explained in the previous section, since Wadi`ah Yad Dhamanah has similar ruling as a Qard contract, any benefits given to the lender (customer) are deemed as Riba (usury). However, the bank usually gives return to customer on the basis of Hibah at the bank's sole discretion. This is also consistent with the resolution by SAC of BNM in its meeting dated 22 May 2003 which allows the practice of giving Hibah to Wadi`ah depositors provided that such practice shall not become a norm in order to avoid this practice from becoming an `Urf (customary practice) that resembles a condition in a deposit contract.

The word `Urf (customary practice) here leads to various interpretation as it is too general. For that reason, BNM has issued an Exposure Draft of Wadi`ah which clarifies the above resolution. Under the Exposure Draft of Wadiah, the practice of giving Hibah to customer must be from bank's own discretion, cannot be pre-conditional at the point of entering into contract and such practice does not become a customary practice (`Urf). The practice which is considered as customary is when the Hibah is given to majority of customer. The SAC of BNM had further resolved and confirmed in the 147<sup>th</sup> 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.<sup>8</sup>

Although the foregoing decisions i.e Exposure Draft on Wadi`ah and SAC's resolution are yet to be finalized and published, but we can already see the direction of BNM with regard to the issue of granting Hibah for Wadi`ah deposit product. The current practice of Islamic banks with regard to Wadiah deposit products is that although Hibah is made discretionary, but majority of customer may enjoy the Hibah thus this practice is not consistent with the new requirement. It is not practical for Islamic bank not to disclose the expected return to customer since customer would normally expect the bank to grant certain return to customer from the deposited money. Furthermore, the restrictions on promotional activity and rate advertising may place Islamic banks at a disadvantage to conventional banks especially in terms of their CASA product. This is why the Islamic banking industry faces dilemma since the level of public awareness on Islamic banking is still low to understand the true nature and spirit of each Shariah contracts. Arising from that issue, the industry is now trying to find solution to phase out Wadi`ah based deposit account to other suitable Shariah contract. As such, Wadi`ah is now considered as the last resort in complying with IFSA requirement.

## **Tawarruq (Commodity Murabahah)**

One of the alternatives is to apply Tawarruq concept. Under the Tawarruq principle, the customer purchases an asset (commodity) from the vendor and sells to the bank on a "cost-plus" mark-up basis where profit margin has to 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. In Malaysia under this principle, the banks use the funds received from depositors to buy commodities either from the London Metal Exchange (LME) or Bursa Suq al-Sila' of Bursa Malaysia.

At this stage, Tawarruq would be the most viable option. Islamic banks are already taking steps to convert their existing Mudarabah deposits into Tawarruq in compliance with the IFSA. However, due to the features and nature of CASA product 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

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<sup>8</sup> Refer to [http://www.bnm.gov.my/index.php?ch=en\\_about&pg=en\\_sac\\_updates&ac=429](http://www.bnm.gov.my/index.php?ch=en_about&pg=en_sac_updates&ac=429). Retrieved on 12 July 2014.



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.

In addition, the downside to Tawarruq is that it is a slightly more expensive as it involves a transaction fee of average RM15 that would be levied on every RM1mil transaction on both the buy and sell side. This would increase the operating costs to Islamic bank that decides to pursue this route, noting that this transaction fee would be treated as an operating expense. It will be detrimental to Islamic banks' margins since Islamic banks need to put aside certain cost to pay to the commodity vendor to do the Tawarruq transaction. At the same time, IT systems may have to be upgraded to ensure the proper tagging of assets to liabilities and additional personnel may have to be employed to cope with the increase in transactional activity. This will add pressure and impact to Islamic banks' cost of funding and in view of the parallel banking system in the country, it means that Islamic banks would have to compete even more aggressively with conventional banks for funds.

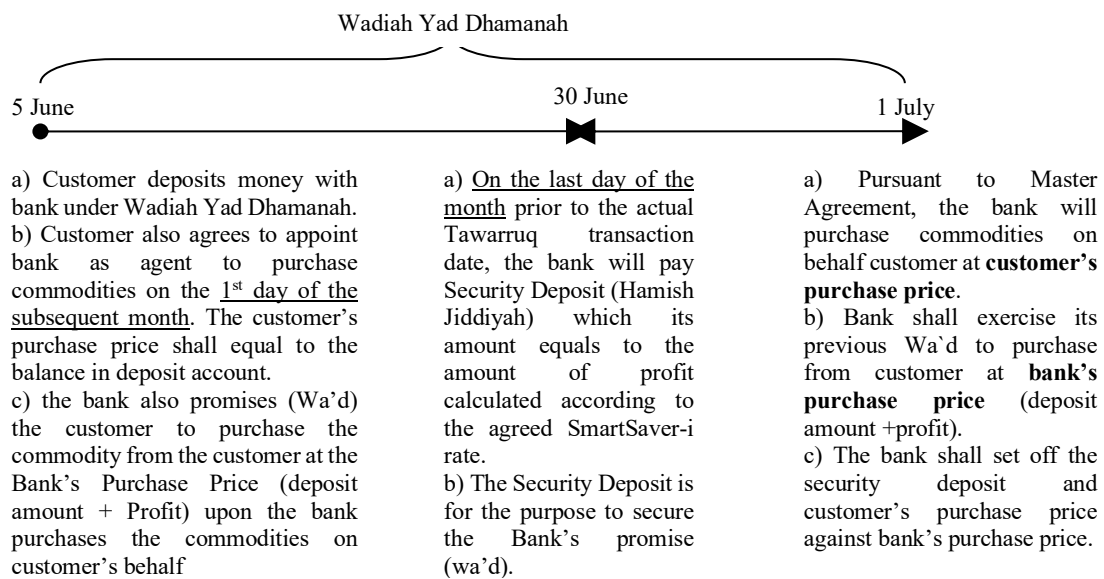
## **ALTERNATIVE SOLUTION**

From the above discussion on the issues arising from Tawarruq and Wadi'ah Yad Dhamanah, the author is of the view that Tawarruq is the closest workable solution which has the least implication and most viable alternative. Despite the fact that Tawarruq seems only suitable for deposit with a fixed term period, Islamic bank can make modification to the existing structure to meet the operational and features of normal deposit product i.e CASA. Points to take note, CASA is a non fixed term account and customer is freely to withdraw and deposit monies at any point of time. At the end of each month, customer may get return calculated on the average outstanding balance in the account.

### **Hybrid Wadi'ah Yad Dhamanah and Tawarruq**

The first alternative is by exploring combination of Wadiah Yad Dhamanah and Tawarruq (Commodity Murabahah) concept. In this structure, customer deposits money with the bank under Wadiah Yad Dhamanah contract. Pursuant to the upfront master agreement between bank and customer, the bank agrees to enter into Tawarruq transaction with customer whereby the customer appoints the bank to act as purchasing agent to purchase commodity from commodity trader (such as Bursa Suq al-Sila) on the first day of the subsequent month. The commodity price (Customer's Purchase Price) which to be purchased by the bank is equivalent to the average outstanding deposit amount at the point of Tawarruq transaction date.

In addition, under the Tawarruq arrangement, the bank also promises (Wa'd) to purchase the commodity from the customer at the Bank's Purchase Price (deposit amount + Profit) upon the latter's acquisition of the commodities from the commodity trader. Once the commodity is possessed by the customer (seller), it is sold to the bank (purchaser) and subsequently the bank may sell the commodity to third party. Prior to the Tawarruq transaction date as enumerated above, the bank, on the last day of each month, will pay to customer Hamish Jiddiyah (security deposit) which equals to the profit to be derived from the Tawarruq transactions. The Security Deposit is for the purpose to secure the Bank's promise (Wa'd) to purchase the commodity. The Bank shall set-off the security deposit together with the Customer's Purchase Price against the Bank's Purchase Price derived from the actual Tawarruq Transactions which is payable to the customer. The flow of the structure as per illustration below:



With this structure, there is no more operational issue for the bank to determine the actual selling and purchase price of Tawarruq transaction as the payment of upfront money to customer is on the basis of security deposit which to be set off against the actual purchase price on the next day upon disbursement of the profit to customer. Therefore, even if the customer make withdrawal or deposit money in his account at any time, the bank will only calculate the selling and purchase price on the last day of each month based on average outstanding balance in the account. The only setback for this structure is the cost that needs to be borne by Islamic bank in entering into Tawarruq transaction. This may require further discussion between the industry and commodity platform supplier to reduce the cost of Tawarruq arrangement.

## Ju`alah Contract

The second alternative is to apply Ju`alah contract. Ju`alah contract is one of the contracts which can be explored its possibility to resolve the issue. Jua`lah literally means compensation or reward that is given to a person for completing a task. Technically, it is an exchange contract for a known task or unknown task that is difficult to precisely determine and for which the reward is due only once the work has been completed successfully. Hanafites and Shafiites gave almost similar definition. According to them, Jua`lah is a commitment in granting a determined reward for either a specific or unspecified task that is described as difficult to perform. AAI OFI defines Ju`alah as a Shariah concept in which one party undertakes to pay a specified amount of money to another for rendering a specified service in accordance with the terms of contract negotiated between them.

For the proposed structure, customer deposits money with the bank on trust and pursuant to the Ju`alah offer agreed in the agreement between bank and customer, the bank as Maj`ul may accept customer (Ja`il) offer to carry out investment to achieve certain target rate (the return as specified upfront). In carrying the investment, the bank will use the money deposited as the tool (Wasilah) in generating return. In return, Bank gets rewards (Ju`ul) from customer for doing the work (Maj`ul `Alaih). The Ju`ul is in the form of surplus/excess on top of the targeted rate. The flow of the structure as follows:



- a. Customer deposits money with the Bank on trust and agrees with the Terms and Condition including the Ju`alah agreement;
- b. Customer (Ja`il) will reward the Bank (Maj`ul) if it can carry out investment using the money deposited to earn the targeted return as agreed in the Terms and Conditions (Maj`ul `Alaih).
- c. For the reward (Ju`ul), the bank will retain the excess/surplus on top of the targeted return. In other words, the reward depends on bank's performance in generating the targeted return where it will be in the form of surplus from the agreed return. For example, if the work is to invest to get a targeted return of 2.90% p.a., should the bank successfully get a profit in excess of that, it will be treated as the reward which will be retained by the Bank.
- d. In the event the Maj`ul fails to achieve the targeted return, subject to agreement between Ja`il and Maj`ul, Ja`il may retain the prevailing return (if any) eventhough it is below the targeted return. For example, if the targeted return is 3% and Maj`ul only manage to achieve 2.5%, Maj`ul can pass the 2.5% return to Ja`il without any reward.
- e. Customer can at any time withdraw the money and the targeted return for the Ju`alah work shall be adjusted proportionately according to the average account balance as agreed in the Ju`alah Terms and Conditions.

From product development perspective, Ju`alah is a traditional contract which requires several adjustment to meet the objective of the product. Ju`alah contract as proposed in the product is more sophisticated and a "structured Ju`alah" compare to the classical Ju`alah. For example, the nature of classical Ju`alah is a one-off transaction whereas for structured Ju`alah, it is revolving in nature. In the proposed product, the bank will be rewarded if it manages to achieve the target (return) set by customer and this will revolve every month until any of the parties decide to revoke the contract.

Notwithstanding that fact, this would require product innovation and market breakthroughs in Islamic banking. Product development has taken the form of putting existing contracts into a new perspective and structure to suit the banking environment. This is because the existing Shariah contract for instance Ju`alah, though acceptable, may not totally feasible in contemporary banking business. In other words, this contract needs some adjustments to qualify as financial tools in the strict sense and also, more importantly to enable the bank to involve in the financial activities. As such, this area can be explored for future research and idea. Notwithstanding, the author keens to pose the following potential Shariah issues that requires further deliberation and research in justifying the suitability of Ju`alah contract be used for deposit product:

- a. The difference between Ju`alah and Ujrah based contract such as Ijarah and Wakalah;
- b. The suitability of Ju`alah contract be used for investing money (deposit product);
- c. If the Maj`ul fails to achieve the return, does the Maj`ul need to return the money;
- d. Can the Ja`il restrict the task only for specific party;
- e. Issue regarding reward of the Ju`alah contract;
- f. Can the amount of reward be changed during the period;
- g. Issue on specification of Ju`alah period and termination of contract.

## CONCLUSION

The idea of reclassification of Islamic deposit account is a proactive way to show to the public and industry the importance of Shariah as the core fundamental aspect in Islamic banking. Since the inception of Islamic bank in Malaysia almost 30 years, Malaysia has been recognised as one of the leader and Islamic banking hub in the world with its extensive product innovation across the board to meet customer's needs. Nonetheless, it is worth noting that the innovation and world's recognition do not match the level of public and industry awareness with regard to Islamic banking. While most of Islamic bankers and public are still in the spectrum of conventional thinking, perhaps the initiatives by regulators may help to gradually shift the paradigm of public and industry in Islamic banking. As mentioned several times in the previous section, Islamic banking products should be looked from the nature of Shariah contract underlies it. From there, we can appreciate the spirit of each Shariah contract and how it works in the accurate mechanic of banking product.

In that regard, the reclassification of Islamic deposit is one of the ways to reflect and appreciate the spirit of Shariah contract. Although it would require additional works for Islamic banks, at least it is a first step in migrating and phasing out from conventional banking environment whereby Islamic banking will one day has its own paradigm without comparing with conventional banking products and business strategy. As this initiative is still in the pipeline and has long way to go, it seems that Ijtihad is an integral part of developing new products. This would require the ability of Shariah Committee and SAC to harness the wisdom of Shariah to facilitate the structuring of product features that are competitive and innovative. It is also important to ensure that the concept of Maslahah and Maqasid Shariah should always be taken into consideration at all time.

## References

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