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Securities Commission
Malaysia

Resolutions of the Securities Commission Shariah Advisory Council

Second Edition

**RESOLUTIONS OF THE
SECURITIES COMMISSION
SHARIAH ADVISORY COUNCIL**

SECOND EDITION

Securities Commission

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FOREWORD BY DATO' ZARINAH ANWAR CHAIRMAN OF THE SECURITIES COMMISSION

Assalamu'alaikum warahmatullahi wabarakatuh and warm greetings.

I thank God almighty that this book on the *Resolutions of the Securities Commission Shariah Advisory Council* is now published to serve as a reading and reference material for those wishing to understand Shariah products and concepts applied in the Islamic capital market in this country.

It cannot be denied that the Islamic capital market, which complements the Islamic banking system and *Takaful* in this country, is growing rapidly. This positive development began in the early 1990s when many corporate bodies used Islamic capital market instruments to fund their economic activities. Investors, too, began to show interest in investing in Shariah-compliant securities and Islamic unit trust funds. The issuance of private debt securities based on Shariah principles, too, began to gain acceptance and popularity in the country's capital market.

In this context, the Securities Commission (Commission), which is the regulatory and developmental body for the capital market, will continue to focus its efforts towards further developing the local Islamic capital market. The establishment of the Islamic Capital Market Department (ICMD) in the Commission and the Shariah Advisory Council (SAC) in 1996 is seen as the pioneering effort towards creating a more organised and efficient Islamic capital market. The SAC, assisted by the ICMD, is responsible for advising the Commission on issues related to the Islamic capital market to ensure its consistency with Islamic principles. The SAC analyses Shariah principles which can be used for introducing new Islamic capital market products and services, as well as evaluates existing conventional capital market instruments to determine the extent to which these instruments comply with Shariah principles. The SAC is also responsible for analysing specific issues that are

related to the operation of the Islamic capital market to provide guidance and advice to investors, the government and industry.

In addition, the Commission also emphasised the need to determine the Shariah-compliance status of listed companies on Bursa Malaysia and, as a result, the list of Shariah-compliant securities by the SAC is published twice a year to provide a guide to investors who wish to invest in investments which comply with Shariah principles.

At the same time, the Commission also formulated short-term and long-term plans for the development of the Islamic capital market. The *Capital Market Masterplan* outlines the objectives in making Malaysia an international Islamic capital market centre. Thus, in order to achieve the objectives, comprehensive knowledge and education on Islamic capital market must be given attention to and nurtured in all investors, market intermediaries, the regulatory body and everyone directly involved in the Islamic capital market.

The role of the Commission is not only restricted to regulatory oversight but also encompasses initiating developmental activities, and educating investors and the general public in developing the country's capital market. In the context of the Islamic capital market, various efforts have been initiated by introducing investor education programmes, such as conducting seminars and workshops, as well as publishing reading materials. Thus, the publication of this book is part of the Commission's continuous efforts to educate investors on all the resolutions adopted by the SAC in their series of meetings. All views of the Shariah are presented in a brief and simple manner so that it can easily be understood by all walks of life.

In conclusion, I would like to thank the SAC, ICMD staff and everyone involved, directly and indirectly, in the production of this book. It is hoped that this book will be a useful guide to everyone and can help generate more intellectuals and investors who are knowledgeable and informed of the Islamic capital market.

Wassalam.



Dato' Zarifah Anwar

**FOREWORD BY DATUK SHEIKH GHAZALI
HAJI ABDUL RAHMAN
CHAIRMAN OF THE SECURITIES COMMISSION
SHARIAH ADVISORY COUNCIL**

Assalamu'alaikum warahmatullahi wabarakatuh and all praises to Allah the great merciful and the great compassionate who has bestowed upon human beings the enlightenment and knowledge. Prayers to God and peace be bestowed on Prophet Mohamed s.a.w.

After the publication of the *Resolutions of the Securities Commission Shariah Advisory Council* book in 2002, numerous comments and feedback were received. The second edition of this book is published to provide updates and the latest Shariah Advisory Council (SAC) resolutions for general information and reference.

To develop an Islamic capital market is not an easy task. It requires an in-depth understanding of the operations of the current capital market and contemporary analyses to fulfil the present-day needs of Muslims who wish to participate in economic activities in accordance to Shariah principles.

Members of the SAC who are well versed in the fields of *muamalah* and Islamic financial system have collaborated to resolve issues directly and indirectly related to the Islamic capital market. Collaborative efforts and ideas of people with different educational backgrounds have resulted in practical solutions for developing the Islamic capital market, in particular, and the country's capital market, in general.

It cannot be denied that there may be several SAC resolutions that differ from the opinions of Shariah experts in other countries. These variations exist due to the difference in time and place, and also divergence in needs and background of a country. If we look at the history of Islamic legislation development, such varied opinions with regards to certain principles are not uncommon among the founders. Even Imam Shafi'i, the founder of the Syafi'i *Mazhab* had two divergent opinions on a single particular issue depending

on whether it occurred in a different environment, background, time and place.

Indeed, these differences in opinions should be seen as a blessing for Muslims because, whether consciously or not, they provide a way out for every problem and ensure that Shariah is able to satisfy the needs of local communities from different geographical locations and cultural backgrounds. What is needed is that we respect any opinion offered so long as it is based on Shariah arguments.

Within the context of the Islamic capital market, differences in opinion among Shariah experts are those on matters involving peripheral issues and implementation of methodologies. These differences in opinions are not on fundamental matters that have to be strictly complied with in *muamalah* such as avoiding the practice of *riba*, cheating, *gharar* elements and other practices forbidden by Shariah.

As such, the SAC hopes that these differences in opinion will not obstruct the development of the Islamic capital market in this country. As the national SAC for the country's Islamic capital market, it is imperative for the SAC to accept only one practical view as the general and sole reference for implementing Islamic capital market activities. This will give rise to an Islamic capital market that is organised, uniform and accessible to all layers of society. This also helps reduce the community's confusion over the various divergent opinions of the Shariah.

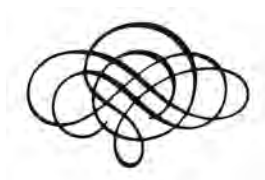
Through the publication of this book, the SAC hopes to provide clarity on the resolutions and views of the SAC, as well as the arguments used as the basis for the formulation of such resolutions. Nevertheless, the SAC always welcomes views from all parties that would contribute towards a more robust and dynamic Islamic capital market. It is hoped that efforts made so far have met with Allah's pleasure and to Allah we seek guidance and enlightenment.

Wassalam.



Datuk Sheikh Ghazali Haji Abdul Rahman

**SHARIAH ADVISORY COUNCIL
OF THE SECURITIES COMMISSION**



SHARIAH ADVISORY COUNCIL OF THE SECURITIES COMMISSION

INTRODUCTION

The Securities Commission (Commission) is a statutory body set up under the *Securities Commission Act 1993* (SCA), reporting directly to the Minister of Finance. It is the sole regulatory body for the regulation and development of the capital market in Malaysia. It is directly responsible for the regulation and supervision of the activities of the market institutions, including the stock exchanges, clearing houses, and monitoring of licensees under the *Securities Industry Act 1983* (SIA) and *Futures Industry Act 1993* (FIA).¹

The Commission, in developing the national capital market, has identified the development of the Islamic capital market as one of its main agendas.² This agenda was later incorporated into the Malaysian *Capital Market Masterplan*, launched on 22 February 2001. One of the main objectives set by this plan is to establish Malaysia as an international Islamic capital market centre.³

1 *Securities Commission Act 1993*, section 15.

2 Refer to the Securities Commission Business Plan 1998–2000 which lists in its agenda, among others, the development of the equity market, streamlining the development of Islamic debt securities, developing Islamic investment group activities and introducing new Islamic capital market products.

3 In meeting the objective of establishing Malaysia as an international Islamic capital hub, a number of strategic initiatives were outlined as follows:

- Facilitate the development of various competitive products and services related to the Islamic capital market;
- Create an independent market to mobilise Islamic funds effectively;
- Ensure an appropriate and comprehensive accounting, tax and regulatory framework; and
- Enhance the international recognition of the Malaysian Islamic capital market.

See Securities Commission, *Capital Market Masterplan*, February 2001, pp. 57, 108–114, 173–184.

The Commission has taken the following two approaches in meeting this objective:

- (a) Supply the necessary infrastructure for research, discussions and dialogues; and
- (b) Undertake specific efforts to develop and strengthen the market.⁴

Using these approaches, a dual market system will be created similar to the existing banking and insurance sectors. The Commission has taken numerous steps in priming the infrastructure for the development of the Islamic capital market. These include:

- (a) Establishing the Islamic Capital Market Department (ICMD, formerly known as Islamic Capital Market Unit);
- (b) Establishing the Islamic Instrument Study Group (IISG); and
- (c) Establishing the Shariah Advisory Council (SAC).

The following is an elaboration of the above-mentioned measures.

ISLAMIC CAPITAL MARKET DEPARTMENT

In its effort to develop the Islamic capital market, the Commission established a department under the Market Policy and Development Division called the Islamic Capital Market Department (ICMD). Its responsibilities include conducting research and developing Islamic capital market products in the equity, debt and derivative sectors, as well as analysing the securities of listed companies. It employs full-time officers with Shariah education background, especially in the disciplines of *fiqh muamalat* (Islamic commercial law) and modern finance. The combination of professional personnel from these two different backgrounds is essential in creating a working group capable of meeting the set objectives.⁵ Its research findings are then presented to the SAC for approval.

4 Nik Ramlah Nik Mahmood, "Regulatory Framework and the Role of the Securities Commission in Developing the Islamic Capital Market", National Conference on Islamic Banking and Investment", Kuala Lumpur, 19 November 1996, p. 5.

5 Khairil Anuar Abdullah, "The Issues and Prospects of Establishing a Sound Islamic Capital Market", Labuan International Summit on Islamic Financial and Investment Instruments, Financial Park Complex, Labuan, 16-18 June 1997, p. 5.

ISLAMIC INSTRUMENT STUDY GROUP

The Commission established the IISG in 1994 with a membership comprising Shariah consultants and corporate figures. The group discussed and made decisions on issues related to the Islamic capital market in Malaysia. Eight meetings were held throughout 1995–1996.

The following is a list of the IISG members (from 1994 to 15 May 1996):

- (a) Dato' Sheikh Azmi Ahmad;
- (b) Dato' Mohd Khudzairi Dainuri;
- (c) Associate Prof Md Hashim Yahaya (now Datuk);
- (d) Dato' Dr Abdul Halim Ismail;
- (e) Nor Mohamed Yacop (now Tan Sri and Second Finance Minister);
- (f) Dr Abdullah Ibrahim;
- (g) Ustaz Hassan Ahmad (now Dato'); and
- (h) Ustaz Md Nurdin Ngadimon.

SHARIAH ADVISORY COUNCIL

The ICMD carries out research activities and functions as the secretariat to the IISG. The latter succeeded in exploring the foundation for developing an Islamic capital market in Malaysia. Thus, the Commission viewed that it was important for the IISG to expand its role, and consequently, it was upgraded to a more formal body called the SAC on 16 May 1996. Its establishment was endorsed by the Minister of Finance and it was given the mandate to ensure that the implementation of the Islamic capital market complied with Shariah principles. Its scope of jurisdiction is to advise the Commission on all matters related to the comprehensive development of the Islamic capital market and to function as a reference centre for all Islamic capital market issues.⁶

6 Nik Ramlah Nik Mahmood, "Regulatory Framework and the Role of the Securities Commission in Developing the Islamic Capital Market", National Conference on Islamic Banking and Investment", Kuala Lumpur, 19 November 1996, p. 5.

In introducing the Islamic capital market instruments, the SAC adopted two approaches. The first approach was to study the validity of conventional instruments used by the local capital market from the Shariah perspective. The study focused on the structure, mechanism and use of the instruments to ascertain whether they were against Shariah principles. The second approach entailed formulating and developing new financial instruments based on Shariah principles.

The SAC is also responsible for issuing a list of Shariah-compliant securities (formerly known as list of Shariah-approved securities). Up to 28 October 2005, 857 securities were classified as Shariah-compliant securities by the SAC. This represented 85% of securities listed on Bursa Malaysia. The list is constantly updated and the Commission announces the updated list twice a year. It is essential for helping Muslim investors identify Shariah-compliant securities and at the same time, increase their confidence when making investments.

The list of Shariah-compliant securities was used as the basis for developing the Shariah Index launched by Bursa Malaysia on 17 April 1999. With the launch, investors will be able to monitor the performance of their investments more efficiently and effectively. Although the SCA does not expressly state the formation of the SAC, section 16 of the SCA stipulates that the Commission has full jurisdiction in carrying out its duties based on securities laws. Moreover, section 18 of SCA specifies that the Commission is empowered to form a committee to help it carry out its duties based on the Act, and the Commission is also permitted to appoint anyone it deems fit to be a member of such a committee.⁷

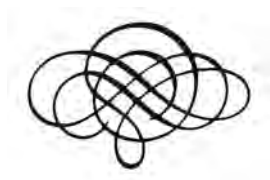
Members of the SAC are appointed by the Commission once every two years. The table on page 6 lists past and present members of the SAC.

⁷ *Securities Commission Act 1993.*

Members of the Securities Commission Shariah Advisory Council

Name/ Designation	1996– 1998	1998– 2000	2000– 2002	2002– 2004	2004– 2006
1. Dato' Sheikh Azmi Ahmad	✓	✓			
2. Dato' Dr Abdul Halim Ismail	✓	✓	✓	✓	✓
3. Dato' Dr Othman Ishak	✓	✓			
4. Dato' Dr Haron Din	✓	✓			
5. Datuk Md Hashim Yahaya	✓	✓	✓	✓	✓
6. Dato' Hassan Ahmad	✓	✓	✓	✓	✓
7. Dato' Sheikh Ghazali Abdul Rahman		✓	✓	✓	✓
8. Dato' Dr Abdul Monir Yaacob		✓	✓	✓	✓
9. Tan Sri Nor Mohamed Yakcop	✓				
10. Dr Mohd Daud Bakar	✓	✓	✓	✓	✓
11. Associate Prof Dr Abdul Halim Muhammad			✓	✓	✓
12. Dr Mohd Ali Baharum			✓	✓	✓

RESEARCH METHODOLOGIES IN THE ISLAMIC CAPITAL MARKET



SOURCES AND RESEARCH *MANHAJ* IN THE ISLAMIC CAPITAL MARKET

RESOLUTION

At its third meeting on 30 October 1996, the Shariah Advisory Council (SAC) discussed Shariah research guidelines in the capital market and passed a resolution to accept all sources and *manhaj* (methodology) of the esteemed Islamic jurists. These sources of research consist of primary and secondary sources adopted in Islamic jurisprudence.

PRIMARY SOURCES

The primary sources used by the SAC in conducting research on the capital market are the Quran and the Sunnah. This is based on the fact that Islam urges its followers to refer to these sources in solving problems that occur in their daily lives as commanded by Allah s.w.t.

Allah s.w.t. said:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِيَ الْأَمْرِ مِنْكُمْ
فَإِنْ نَزَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ

Meaning: "O you who believe! Obey Allah s.w.t. and obey the Messenger, and those charged with authority among you. If you differ in anything among yourselves, refer it to Allah s.w.t. (Quran) and His Messenger (Sunnah)."

(Surah al-Nisa': 59)

Allah s.w.t. also said:

وَمَا آتَاكُمُ الرَّسُولُ فَخُذُوهُ وَمَا نَهَاكُمْ عَنْهُ فَانْتَهُوا

Meaning: "So take what the Rasulullah s.a.w. (the Messenger) assigns to you, and deny yourselves that which he withholds from you."

(Surah al-Hasyr: 7)

SECONDARY SOURCES AND RESEARCH *MANHAJ*

Apart from the two primary sources i.e. the Quran and the Sunnah, the SAC also passed a resolution to use secondary sources and other Islamic jurisprudence *manhaj*, such as *ijmak*, *qiyas*, *maslahah*, *istishsan*, *istishab*, *sadd zari'ah*, *`urf*, *maqasid syari'ah*, *siyasah syar'iyyah*, *ta'wil*, *istiqla'*, *talfiq* and others which have already been applied in Islamic jurisprudence. This is based on a hadith (prophetic tradition) when the Prophet s.a.w. appointed Muaz as *qadhi* (judge) in Yaman. He had asked Muaz about certain important principles. He asked: "Muaz, what references do you use when you make a decision?". Muaz replied that he would refer to the Quran. The Prophet s.a.w. then asked further: "What if the matter in question is not found in the Quran?". To which Muaz replied that he would refer to any decision that had been made by the Prophet s.a.w. The Prophet s.a.w. asked again: "What if the matter had never been decided by me?". Muaz then replied that he would apply *ijtihad* (reasoning of qualified scholars) using his own thinking and wisdom to come to a decision. The way Muaz handled the questions on making judgement received the blessings of the Prophet s.a.w. He then said: "Praise be to Allah s.w.t. for giving guidance to the Prophet s.a.w. and his representative (Muaz)."⁸

Thus, all matters relating to secondary sources are included in *ijtihad*, as stated in the *hadith*.

Ijmak

Ijmak means unanimous agreement among the *mujtahidun* (see Glossary) of the Muslim community on Shariah rulings imposed during a particular period after the death of the Prophet s.a.w.⁹

8 *Hadith* as narrated by Abu Daud and Tirmizi.

9 Abu Zuhrah, *Usul al-Fiqh*, Dar al-Fikr, Cairo, p. 185.

Nevertheless, the extent of approval of a particular *hukm* (Shariah ruling) being categorised according to the *ijmak* is difficult to ascertain because of the wide territories covered by Islam and there are various trends of thoughts among Muslims. Thus, the majority of *ulama'* (Islamic scholars) believe that *ijmak* only occurred during the time of the companions of the Prophet s.a.w. before they moved to other territories and that the claim of *ijmak* after that period is quite difficult to accept.¹⁰

Qiyas

This refers to likening an original *hukm* having *nas* (explicit legal text) with a new matter having no *nas* but having the same *illah* (cause). Thus, Imam Syafi'i considered *qiyas* as the basis for *ijtihad*.¹¹ It is regarded as a source of legislation which has significant contribution in solving new issues that have not been debated.¹²

Maslahah

This means making a judgement based on the principle of general benefits on matters that have no clear *nas* from the Quran or the Sunnah.¹³

In general, Islamic jurisprudence applies the *maslahah* (public interest) in the implementation of a ruling. As such, for anything that is beneficial and necessary to the general public, it would establish *dalil* (indicative legal text) in the form of directives. However, for anything that is detrimental to the general public, *Syara'* will establish *dalil* that prohibits its implementation.¹⁴

Istihsan

This refers to disregarding a *hukm* that is backed by *dalil* and applying another *hukm* that is more convincing and stronger than the former, based on *Syara' dalil* permitting the act in question.¹⁵

10 Abu Zuhrah, *Usul al-Fiqh*, pp. 188–189.

11 Abu Zuhrah, *Usul al-Fiqh*, p. 204.

12 Al-Zarqa', *Al-Madkhal al-Fiqhi al-Am*, Dar al-Fiqh, Beirut, 1968, vol. 1, p. 68.

13 Al-Zarqa', *Al-Madkhal-al-Fiqhi*, vol. 1, p. 90.

14 Izz al-Din bin Abd al-Salam, *Qawa'id al-Ahkam*, Dar al-Makrifah, Beirut, vol. 1, pp. 2–4.

15 Al-Zuhaili, *Usul al-Fiqh al-Islami*, Dar al-Fikr, Damascus, 1986, vol. 2, p. 738. Abu Zuhrah, *Usul al-Fiqh*, p. 245. Abdul Wahab Khallaf, *Masadir al-Tasyri' al-Islami fi ma la Nassa fihi*, Dar al-Qalam, Kuwait, 1982, p. 71.

Istishab

This refers to the maintenance of the previous *hukm* as long as there is no other *dalil* that can change that particular *hukm*.¹⁶

Sadd Zari`ah

This refers to the approach used to curtail anything that can cause a Muslim to do the forbidden. It is considered an early preventive measure to prevent a Muslim from doing what is forbidden by Allah s.w.t.¹⁷

`Urf

This refers to the norms of the majority of a society whether applied in speech or deed.¹⁸ It is considered as '*adat jama`iyyah*' (customs that are collectively acceptable) and can be used as a legal basis so long as it does not contradict the *Syara`*.¹⁹ In the context of the Islamic capital market, '*urf tijari*' refers to customary practices in business that are considered a basis for guidance and *hukm*.

Maqasid Shariah

This refers to the desired objectives of the Shariah when determining a *hukm* aimed at protecting human *maslahah*.²⁰

Siyasah Syar`iyyah

This refers to the area in Islamic jurisprudence that explains rulings related to policies and approaches taken in organising the national administrative structure (and its people) in accordance with the spirit of the Shariah. It

16 Abu Zuhrah, *Usul al-Fiqh*, p. 276.

17 Abu Zuhrah, *Usul al-Fiqh*, p. 268.

18 Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, p. 131.

19 Al-Zuhaili, *Usul al-Fiqh al-Islami*, vol. 2, p. 828.

20 Ahmad al-Raisuni, *Nazariyyah al-Maqasid 'inda al-Imam al-Syatibi*, The International Institute of Islamic Thought, Herndon, 1992, p. 7.

covers the issues of central and regional administration, economy, judiciary, peace, international relations, etc.²¹

Ta'wil

This refers to an effort to explain or interpret *Syara'* principles through a *dalil* without being restricted by its literal meaning. The implicit meaning will be accepted if it is solidly backed by other *dalil* which explain what *Syara'* requires the meaning to be.²² It is important because it touches on the extensive meaning of a *dalil* and understands the requirements of *Syara'* for the *dalil*, because a *dalil* sometimes requires more than its literal meaning. In this case, it requires proof that a particular *dalil* has a meaning different from the literal meaning.

Istiqra'

This refers to a thorough scrutiny of a matter before a conclusive *hukm* is made on the matter. This *manhaj* involves examining the applications of general *dalil* on the related branches of the *hukm* and subsequently making exceptions, if any.²³

Talfiq

This means introducing an approach that has never been used or discussed by past *mujtahid*.²⁴ This *manhaj* will combine two or more opinions of the *mazhab* (school of thought) and derive a different opinion that has never been discussed by the previous *mujtahid*.

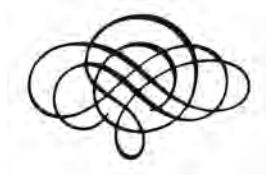
21 Wizarah al-Auqaf wa al-Syu'un al-Islamiyyah, *Al-Mausu'ah al-Fiqhiyyah*, Kuwait, 1990, vol. 25, pp. 294–310. Ahmad al-Husary, *Al-Siyasah al-Iqtisadiyyah wa al-Nuzum al-Maliyyah fi al-Fiqh al-Islami*, Maktabah al-Kulliyat al-Azhariyyah, Cairo, p. 12.

22 Al-Duraini, *Al-Manahij al-Usuliyyah*, Muassasah al-Risalah, Damascus, p. 189.

23 *Al-Mausu'ah al-Fiqhiyyah*, vol. 4, p. 77. Al-Zuhaili, *Usul al-Fiqh al-Islami*, vol. 2, p. 916.

24 Al-Zuhaili, *Usul al-Fiqh al-Islami*, vol. 2, p. 1143.

PRINCIPLES OF *MUAMALAT* IN THE CAPITAL MARKET



MUSYARAKAH MUTANAQISAH

RESOLUTION

At its 7th meeting on 1 December 1995, the Islamic Instrument Study Group (IISG) passed a resolution to accept *musyarakah mutanaqisah* as a concept that can be used to develop instruments for an Islamic capital market.

INTRODUCTION

Another term for *musyarakah mutanaqisah* is *musyarakah muntahiyah bi tamlik*.²⁵ It is a form of partnership contract whereby the financier allows his partner to buy assets in one payment or in instalments based on terms agreed by both parties.²⁶

An illustration of *musyarakah mutanaqisah* in the capital market is: ABC company buys a building worth RM80 million and sells it to its customers for RM100 million based on the principle of *bai' bithaman ajil* (BBA) within 120 months. As ABC company requires liquidity, it can get the project investors involved by issuing *sukuk*²⁷ based on *musyarakah mutanaqisah*. For that purpose, ABC company puts in its share (the smaller part, say 10%) in *musyarakah mutanaqisah* for the purchase of the building (which costs RM80 million). The investors hold the majority part (90%). ABC company

25 Muhammad Solah al-Sowi, *Musykilah al-Istithmar fi al-Bunuk al-Islamiyyah*, Dar al-Wafa, Cairo, 1990, pp. 619, 621.

26 Al-Sowi, *Musykilah al-Istithmar*, p. 619.

27 *Sukuk* is a form of financial note. Please refer to *al-Mausu'ah al-Fiqhiyyah*, vol. 27, p. 46.

will then buy back all the shares from the investors every month according to the amount and duration agreed upon i.e. 120 months. This will end at the point when ABC company owns all the shares.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF MUSYARAKAH MUTANAQISAH

Musarakah mutanaqisah is a new instrument for *musarakah* products and was introduced in Egypt.²⁸ The majority of the current Islamic jurists are unanimous in accepting it as one of the instruments in the capital market.²⁹ This is because it has features that do not contradict the *nas* and general principles of the Shariah. These features are as follows:

- (a) *ʿInan* company (form of partnership, in which each partner contributes both capital and work);
- (b) Promise from the financial institution to sell its share of the company to its partners; and
- (c) The institution sells all of its shares to its partner fully or partially.³⁰

28 Abd al-Samīʿ al-Misri, *Al-Masraf al-Islami: ʿIlmiyyan wa ʿAmaliyyan*, Maktabah Wahbah, Cairo, 1988, pp. 69–70.

29 *Dalil al-Fatawa al-Syarʿiyyah fi al-Aʿmal al-Masrafiyyah*, Markaz al-Iqtisad al-Islami, Cairo, 1989, pp. 66–67.

30 Al-Sowi, *Musykilah al-Istithmar*, pp. 619–627.

BAI` DAYN

RESOLUTION

At its 2nd meeting on 21 August 1996, the Shariah Advisory Council (SAC) unanimously agreed to accept the principle of *bai` dayn* i.e. debt trading as one of the concepts for developing Islamic capital market instruments. This was based on the views of some of the Islamic jurists who allowed this concept subject to certain conditions. In the context of the capital market, these conditions are met when there is a transparent regulatory system which can safeguard the *maslahah* (interest) of the market participants.

INTRODUCTION

From the Islamic jurisprudence point of view, *dayn* encompasses a wide scope, including payment for product, *qardh* (loan) payment, *mahr* (dowry) payment before or after cohabitation, that is *mahr* which has not been given after the marriage *`aqd* (contract), rental, compensation for crime committed (*arsy*), compensation for damages, money to be paid for divorce (*khulu`*) and for purchase orders which have not yet arrived (*muslam fih*).³¹

In the context of the Islamic capital market, *bai` dayn* is the principle of selling the *dayn* which results from *mu`awadhat maliyyah* contracts (exchange contracts), such as *murabahah*, *bai` bithaman ajil* (BBA), *ijarah*, *ijarah munthiyah bi tamlik*, *istisna`* and others.

31 Wahbah Al-Zuhaili, *Al-Fiqh al-Islami wa Adillatuhu*, Dar al-Fikr, Damascus, 1989, vol. 4, p. 432.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF *BAI` DAYN*

The *bai` dayn* principle has always been a point of contention among past and present Islamic jurists. However, there is no general *nas* or consensus (*ijmak*) among those who forbid it.³²

In general, the majority of Islamic jurists are unanimous in allowing the activity of selling debts to the debtor.³³ They only differ in opinion about selling the debt to a third party for the reason that the seller will not be able to deliver the sold item to the buyer.

At its 8th meeting on 25 January 1996, the IISG identified the *`illah* (reason) for why some Islamic jurists do not allow *bai` dayn*. The *`illah* generally touches on the risks to the buyer, *gharar*,³⁴ absence of *qabadh*³⁵ and *riba*.

Opinions of Past Islamic Jurists

The Hanafi *Mazhab* looked at *bai` dayn* from the aspects of potential risks to the buyer, debtor, and the nature of the debt itself. They were unanimous in not permitting this instrument because the risks cannot be overcome in the context of debt selling. The debt is in the form of *mal hukmi* (intangible assets) and the debt buyer takes on a great risk because he cannot own the item bought and the seller cannot deliver the item sold.³⁶

The Maliki *Mazhab* allowed debt selling to a third party subject to certain conditions to facilitate the use of this principle in the market. The conditions are as follows:

- (a) Expediting the payment of the purchase;
- (b) The debtor is present at the point of sale;
- (c) The debtor confirms the debt;

32 Ibnu Qayyim al-Jauziyyah, *flam al-Muwaqqi'in*, Dar al-Fikr, Beirut, vol. 1, p. 388.

33 Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, p. 433.

34 Please see the resolution on *gharar* for further explanation.

35 *Qabadh* means the control and ownership of the item bought. It depends a lot on *`urf* or the normal recognition of the local community. Please see the resolution on *qabadh* for further explanation.

36 Al-Kasani, *Bada'i' al-Sana'i*, Dar al-Fikr, Beirut, vol. 5, p. 148.

- (d) The debtor belongs to the group that is bound by law so that he is able to redeem his debt;
- (e) Payment is not of the same type as *dayn*, and if it is so, the rate should be the same to avoid *riba*;
- (f) The debt cannot be created from the sale of currency (gold and silver) to be delivered in the future;
- (g) The *dayn* should be goods that are saleable, even before they are received. This is to ensure that the *dayn* is not of the food type which cannot be traded before the occurrence of *qabadh*; and
- (h) There should be no enmity between buyer and seller, which can create difficulties to the *madin* (debtor).

The conditions set by the Maliki *Mazhab* can be divided into three categories:³⁷

- (a) To protect the rights of the debt buyer;
- (b) To avoid debt selling before *qabadh*; and
- (c) To avoid *riba*.

The Syafi'i *Mazhab* was of the opinion that selling the debt to a third party was allowed if the *dayn* was *mustaqir* (guaranteed)³⁸ and was sold in exchange for *'ayn* (goods) that must be delivered immediately. When the debt was sold, it should be paid in cash or tangible assets as agreed.

Ibnu al-Qayyim was of the opinion that *bai' dayn* was permissible because there was no general *nas* or *ijmak* that prohibited it. What was stated was the prohibition of *bai' kali' bi kali'*.³⁹

37 Al-Dusuqi, *Hasyiah al-Dusuqi 'ala al-Syarh al-Kabir*, Dar Ihya' al-Kutub al-Arabiyyah, Cairo, vol. 3, p. 63.

38 *Dayn mustaqir* is redemption-guaranteed debts, e.g. compensation value of damages and properties of the debtor. Please refer to Al-Syirazi, *Al-Muhazzab*, Dar al-Fikr, Beirut, vol. 1, p. 262.

39 Ibnu Qayyim, *Ilam al-Muwaqqi'in*, vol. 1, p. 388. *Bai' kali' bi kali'* is *bai' nasi'ah bi nasi'ah* which means a debt sale that is paid by debt. For example, one buys food on credit for two months. When the time comes, he should redeem his debt. However, he says to the seller: "I still have no food to pay my debt, so sell it to me for another period." The seller then sells it to him for another period and increases the price. In this case, the buyer did not receive anything in exchange when being charged for extending the period of payment.

Results of the study showed that the main reason for the clash of opinions on *bai` dayn* among the past Islamic jurists centred on the ability of the seller to deliver the items sold. This was stated by Ibnu Taimiyyah himself and was also based on statements made in the great books of the four *mazhab*.

The argument of the Islamic jurists that prohibited *bai` dayn* to a third party for fear that the buyer will have to bear great risks (Hanafi *Mazhab*) has some truth in it. This is especially true if there is an absence of supervision and control. In this context, the buyer's *maslahah* should be safeguarded because he is the party that has to bear the risks of acquiring the debt sale while making the sale contract. In the Malaysian context, the debt securities instruments based on the principle of *bai` dayn* are regulated by Bank Negara Malaysia and the Commission to safeguard the rights of the parties involved in the contract. Therefore, the conditions set by the Maliki *Mazhab* and the fears of risks by the Hanafi *Mazhab* can be overcome by regulation and surveillance.

Thus, it can thus be concluded that although there are differences in opinions on *bai` dayn* among the Hanafi and Maliki *Mazhab*, there is a convergence point which states that *bai` dayn* can be used if there is a regulatory system that protects the buyer's *maslahah* in an economic system.

The fifth condition set by Maliki *Mazhab* relates to the exchange of *ribawi* goods. In the context of the sale of securitised debt, the characteristics of securities differentiate it from currency, and hence, it is not bound by the conditions for exchanging goods.

BAI` `INAH

RESOLUTION

The SAC, at its 5th meeting on 29 January 1997, passed a resolution that *bai` `inah* is a principle that is permissible in the Islamic capital market in Malaysia.

INTRODUCTION

Bai` `inah refers to trading whereby the seller sells his assets to the buyer at an agreed selling price to be paid by the buyer at a later date. After that, the buyer immediately sells back the assets to the seller at a cash price, lower than the agreed selling price.

The majority of Islamic jurists state that there are three forms of trading⁴⁰ categorised as *bai` `inah*, whereby it can be concluded that all the assets sold

40 Forms of *bai` `inah* are as follows:

The seller sells a product to the buyer at a higher price on a deferred payment basis. After delivery to the buyer, the seller buys back the product in cash at a much lower price.

A third party is involved, the seller sells a product that is delivered later on for, say RM200. After delivering it to the buyer, the buyer then sells it to a third party for a lower price, say RM100. The third party then resells it to the first party (original owner) for RM100. This means the original owner obtained RM100 from the trade.

A man wants to borrow, say RM100. The creditor refuses to lend using the *qardh* principle. Instead he says: "I am not giving you *qardh* (loan) but I will sell you this shirt by deferred payment for RM100 although the market price is RM70." This is to enable the buyer to sell it for RM70 at the market. When the buyer agrees, the trade is transacted. What happens is the shirt owner makes a profit of RM30 from the transaction because the buyer will pay him a deferred payment of RM100.

come from the financier. The financier will sell a product to the buyer at an agreed price to be paid later. The financier then immediately buys back the asset at a cash price lower than the deferred selling price.⁴¹

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF *BAI` INAH*

Opinions of Past Islamic Jurists

Past Islamic jurists had differing views on determining the *hukm* on *bai` inah*. The following were their views:

The majority⁴² were of the opinion that *bai` inah* was not permissible because it was the *zari'ah* (way) or *hilah* (legal excuse) to legitimise *riba* (usury).

The Hanafi *Mazhab* was of the opinion that *bai` inah* was permissible only if it involves a third party, which acts as an intermediary between the seller (creditor) and buyer (debtor).

The Maliki and Hanbali *Mazhab*, on the other hand, rejected *bai` inah* and considered it invalid. Their opinion was based on the principle of *sadd zari'ah* that aims to prevent practices that can lead to forbidden acts such as, in this case, *riba*.

The basis for the opinion of the majority of the Islamic jurists was the *hadith* dialogue between Aishah and the slave Zaid bin al-Arqam which showed the prohibition of *bai` inah*.⁴³ They also held to the *hadith* of the Prophet s.a.w in which he warned that those who practised *bai` inah* would suffer scorn.⁴⁴

Please refer to Ibnu `Abidin, *Hasyiah Rad al-Mukhtar*, Dar al-Fikr, Beirut, 1992, vol. 5, pp. 273 & 325. Al-Syaukani, *Nail al-Authar*, Dar al-Fikr, Beirut, 1994, vol. 5, p. 294. Al-San'ani, *Subul al-Salam*, Dar al-Kitab al-Arabi, Beirut, 1987, vol. 3, pp. 76–77. Yusuf al-Qaradhawi, *Bai` al-Murabahah li al-Amir bi al-Syira'*, Maktabah Wahbah, Cairo, 1987, p. 64. Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, pp. 466–467.

41 Ibnu `Abidin, *Hasyiah Rad al-Mukhtar*, vol. 5, pp. 273 & 325. Al-Syaukani, *Nail al-Authar*, vol. 5, p. 294. Al-San'ani, *Subul al-Salam*, vol. 3, pp. 76–77. Yusuf al-Qaradhawi, *Bai` al-Murabahah*, p. 64. Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, pp. 466–467.

42 The Hanafi, Maliki and Hanbali *Mazhab*.

43 Ibnu `Abidin, *Hasyiah Rad al-Mukhtar*, vol. 5, pp. 273 & 325. Al-Shaukani, *Nailul Authar*, vol. 5, p. 294. Al-San'ani, *Subul al-Salam*, vol. 3, pp. 76–77. Yusuf al-Qaradhawi, *Bai` al-Murabahah*, p. 64. Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, pp. 466–467.

44 Al-San'ani, *Subul al-Salam*, vol. 3, pp. 76–77.

The Syafi'i and Zahiri *Mazhab* viewed *bai' `inah* as permissible. A contract was valued by what is disclosed and one's *niyyah* (intention) was up to Allah s.w.t. to judge. They criticised the *hadith* used by the majority of the Islamic jurists as the basis for their argument, saying that it (the *hadith*) was weak and therefore could not be used as the basis for the *hukm*.⁴⁵

From the study done on the opinions of past Islamic jurists on the issue of *bai' `inah*, the SAC decided to accept the opinions of the Syafi'i and Zahiri *Mazhab* in permitting *bai' `inah*. Therefore, it can be developed into a product for the Islamic capital market in Malaysia.

When institutions or individuals are in need of capital for a specific purpose they can utilise this method of payment, using their assets as mortgage. As they still need the assets, this method allows them to liquidate without losing the asset.

45 Please refer to footnote no. 43 on page 21.

BAI` MA`DUM

RESOLUTION

The IISG and SAC discussed the *bai` ma`dum* issue in a series of meetings in 1995 and 1997 in relation to warrants and futures contracts on crude palm oil, and concluded that *bai` ma`dum* is permissible.

INTRODUCTION

According to the theory of contracts in the Islamic jurisprudence, one of the conditions is that the *mahal al-`aqd* or *ma`qud alaihi* (objects in trade) to be traded must exist when the contract is being made.⁴⁶ Purchase of an object that does not exist when the contract is being made is considered *bai` ma`dum*.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF *BAI` MA`DUM*

The *bai` ma`dum* issue was discussed by past Islamic jurists when they were debating on the condition of an object in a contract of sale. An in-depth study is necessary to look for the *`illah* (reason) for the prohibition of *bai` ma`dum* in a vast majority of past Islamic jurisprudence literature to ensure that no error is made when applying the prohibition rule in many modern business transactions.

46 Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, p. 172.

Opinions of Past Islamic Jurists

The Hanafi and Syafi'i *Mazhab* pronounced that the object of sale must be in existence at the time the contract is made. Otherwise, the contract will be deemed invalid because anything that is *ma'dum* cannot be owned. This was based on the prohibition by the Prophet s.a.w. on the sale of an unborn baby camel and a sale of a non-existing object. However, exemption was made to the *salam*, *ijarah*, *musaqah* and *istisna'* contracts based on the *istihsan* principle.⁴⁷

The Maliki *Mazhab* echoed the opinion of the Hanafi and Syafi'i *Mazhab* regarding *mu'awadhat maliyah* (exchange contract), while for the *tabarru'at* (ownership contract on voluntary basis) such as *hibah*, they did not impose any condition for an existing object. What was important was that it was expected to exist in the future.⁴⁸

The Hanbali *Mazhab*, on the other hand, did not stipulate this condition. What was important was that a contract did not contain elements of *gharar*, which is forbidden by Shariah. Ibnu Taimiyah and Ibnu Al-Qayyim analysed the question of *ba'i ma'dum* and concluded a sale was forbidden not because of *ma'dum* during the contract making, but rather because of the existence of *gharar*, which is a forbidden element. This was based on two arguments:⁴⁹

- (a) Neither the Quran, the Sunnah nor the Prophet's companions stated that *ba'i ma'dum* was not permissible. There was, however, a *hadith* prohibiting the sale of certain goods with features that did not exist. The prohibition was also for goods that are available but simply did not exist at the point of trade. This showed that the prohibition was due to the existence of the *gharar* element in the trade. *Gharar* means the inability to deliver the goods sold regardless of whether they exist or not. An example is the sale of a runaway slave or an animal that ran loose. Although the goods exist, the seller is not able to deliver them to the buyer, despite the fact that it is his obligation to do so once the sale and purchase agreement is completed. This failure to fulfil his obligation implies the presence of the forbidden element of *gharar*; and

47 Al-Kasani, *Bada'i' al-Sana'i'*, vol. 5, pp. 138–139, Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, pp. 427–428. Ali al-Khafif, *Ahkam al-Mu'amalat al-Syar'iyyah*, Dar al-Fikr al-Arabi, Cairo, pp. 230–231.

48 Al-Kasani, *Bada'i' al-Sana'i'*, vol. 5, pp. 138–139. Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, pp. 427–428. Ali-Khafif, *Ahkam al-Mu'amalat al-Syar'iyyah*, Dar al-Fikr al-Arabi, Cairo, pp. 230–231.

49 Ibnu Qayyim, *I'lam al-Muwaqqi'in*, vol. 2, pp. 8–10.

- (b) There are specific situations where *bai` ma`dum* is permissible by *Syara'* and considered valid. An example is the sale of fruits and grains, which are about to mature. This is allowed by the Prophet s.a.w. This is considered *bai` ma`dum* because the buyer cannot take delivery of the goods and has to wait until the fruits or grains mature. The *salam*, *istisna'*, and *ijarah* contracts are other examples of *bai` ma`dum* which are permissible based on the principle of *istihsan*.⁵⁰ All these examples show that selling something that has not yet existed or is not yet in the seller's possession at the point of the sale transaction is not forbidden merely because of its *ma`dum* nature.

Hence, the study shows that the *`illah* for the prohibition of *bai` ma`dum* is *gharar*⁵¹ and not the non-existence of goods. *Gharar* occurs when the seller is unable to deliver the objects for sale.

50 *Istihsan* means disregarding a ruling that has *dalil* over a matter and replacing it with a stronger ruling with *dalil* based on the *Syara'*.

51 Please refer to further explanation on *bai` ma`dum* in the SAC resolution on transferable subscription rights (TSR) and *gharar*.

BAI` WAFa'

RESOLUTION

At its 11th meeting on 26 November 1997, the SAC passed a resolution that *bai` wafa'* is permissible under Islamic jurisprudence and can be developed as a principle for formulating products in an Islamic capital market.

INTRODUCTION

Bai` wafa' is also known in other terms, such as *bai` thanaya* (Maliki *Mazhab*), *bai` uhdah* (Syafi'i *Mazhab*), *bai` amanah* (Hanbali *Mazhab*) or *bai` to`ah* or *bai` jaiz*. The Hanafi book named it *bai` mu`amalah*.⁵²

Section 118 of *Majallah al-Ahkam al-Adliyyah* defined it as a sale with a condition that when the seller pays back the price of the goods sold, the buyer returns the goods to the seller.⁵³

According to al-Zarqa', it is '*aqd tauthiqiy* (security contract) in the form of a sale based on the fact that both parties to the contract have the right to reclaim the exchanged goods.⁵⁴ This means that when there is a *wafa'* sale, the seller has the right to reclaim the goods sold by paying the buyer the full price of the goods sold. It is called *wafa'* because of the obligation to fulfil the condition in the contract, i.e. returning the goods sold when the seller decides to reclaim the goods by paying back the amount.⁵⁵

52 Nazih Hammad, *Mu`jam al-Mustalahat al-Iqtisadiyyah fi Lughah al-Fuqaha'*, The International Institute of Islamic Thought, Herndon, 1993, p. 86.

53 Ali Haidar, *Durar al-Hukkam*, Dar al-Jil, Beirut, 1991, vol. 1, p. 111.

54 Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, p. 554.

55 Nazih Hammad, *Mu`jam al-Mustalahat al-Iqtisadiyyah fi Lughah al-Fuqaha'*, p. 86.

The main features of *bai` wafa`* include:⁵⁶

- (a) The seller and buyer can terminate the contract at any time;
- (b) The asset traded according to *wafa`* is not an asset obtained through *musya`*;⁵⁷
- (c) The buyer can utilise and benefit from the property bought through *wafa`*;
- (d) The buyer will be liable if there is any damage caused to the property by his own carelessness and negligence; and
- (e) The buyer cannot transfer the right of ownership of the property to another person via a sale. However, there are some Hanafi *Mazhab* scholars who consider the transfer of ownership to a third party permissible on the condition that the asset can be reclaimed.

Based on the above explanation, it can be concluded that the financier acts as the buyer of the asset from the individual who needs capital. These attributes also show the presence of *rahn* (pledge) characteristics in *bai` wafa`* despite its execution as a form of sale. For that reason, Al-Zarqa' in an analysis of the features of *bai` wafa`* stated that it is a combination of *rahn* and *bai`* (sale). Thus, it is considered a contract in itself and not fully bound by *bai`* or *rahn*.⁵⁸

To illustrate *bai` wafa`*: A sells a property to B on the condition that if A pays back the cost of the asset, B will return the asset to A. The price is fixed by both parties, and the buyer can use the asset and enjoy its benefits as long as he does not transfer the ownership right to a third party.

To illustrate the application of *bai` wafa`* in a capital market – ABC company gets a ship building contract and the order is estimated to be ready in two years. The company can issue *sukuk* using the *bai` wafa`* principle by securitising the two-year *dayn* (debt). By issuing the *sukuk*, the company can obtain liquidity to run other projects using the existing capital. The *sukuk* issued is a joint funding effort by investors of the ship building project. When

⁵⁶ Haidar, *Durar al-Hukkam*, vol. 1, pp. 432–433.

⁵⁷ *Musya`* refers to jointly-owned property. Please refer to Nazih Hammad, *Mu`jam al-Mustalahat*, p. 248.

⁵⁸ Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, p. 544. *Majallah Majma` al-Fiqh al-Islami*, OIC, Jeddah, no. 7, vol. 3, p. 12.

the project is completed, ABC will buy back the *sukuk* from the investors plus the profits, as agreed. For this type of *sukuk*, the profits are already known by the investors because the capital and costs have been determined.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF BAI` WAFa'

Opinions of Past Islamic Jurists

Past Islamic jurists were divided on determining the ruling on *bai` wafa'*. The Maliki and Hanbali *Mazhab*, and *mutaqaddimun* (the earlier generation) of the Hanafi and Syafi'i *Mazhab* considered *bai` wafa'* as not permissible because trading is not the main purpose of the *bai` wafa'* contract. They concluded that its main purpose is to legitimise *riba* which is forbidden.⁵⁹

The *mutaakhhirun* (the later generation) of the Hanafi and Syafi'i *Mazhab* permitted *bai` wafa'* on the grounds that it is an effort to prevent the occurrence of *riba*. They permitted it due to society's demand and because it had become the social *`urf* in many places.⁶⁰

Some of the Islamic jurists of the Hanafi *Mazhab* were of the opinion that both the seller and buyer can sell the *wafa'* goods to a third party on the condition that both parties (seller and buyer) had agreed to the transaction of the other party.⁶¹ In fact, some Islamic jurists such as Al-Ba'lawi from the Syafi'i *Mazhab* and Al-Sadr al-Shahid Omar Abdul Aziz and Al-Marghinani from the Hanafi *Mazhab* even permitted the buyer to sell the *wafa'* goods to a third party without referring to the *wafa'* seller.⁶²

59 Yusuf Kamal, *Fiqh Iqtisad al-Suq, Dar al-Wafa'*, Cairo, 1996, p. 195. 'Ali al-Khafif, *Ahkam al-Muamalat*, p. 399.

60 Ba'alawi, *Bughyah al-Mustarsyidin*, Dar al-Ma'rifah, p. 133. Ibnu Nujaim, *Al-Bahr al-Ra'iq*, vol. 6, pp. 8–9.

61 Haidar, *Durar al-Hukkam*, vol. 1, p. 432.

62 Ba'alawi, *Bughyah al-Mustarsyidin*, p. 133. Ibnu Nujaim, *Al-Bahr al Ra'iq*, vol. 6, pp. 8–9.

BAI` MUZAYADAH

RESOLUTION

At its 10th meeting on 16–17 October 1997, the SAC discussed the concept of *bai` muzayadah* and passed a resolution that it was permissible according to Islamic jurisprudence. Thus, this concept can be used as a reference for developing an instrument in the Islamic capital market in Malaysia.

INTRODUCTION

Bai` muzayadah is the offering of goods for sale in a market by a seller with a number of interested buyers who compete to offer the highest price. This process ends with the seller selling the goods to the highest bidder. In other words, it is similar to an auction.⁶³ Other names for this principle used by past Islamic jurists are *bai` fuqara'*, *bai` man kasadat bidha'atuhu*,⁶⁴ *bai` mahawij*, and *bai` mafalis*.⁶⁵

This concept is relevant to many issues in the Islamic capital market, especially those related to the behaviour of market participants profiteering from price differences. It is also used as an argument to permit speculation so long as it is not contrary to Shariah principles.

63 Nazih Hammad, *Mu'jam al-Musthalahat*, pp. 245–246.

64 Al-Hummam, *Al-Fatawa al-Hindiyyah*, Dar al-Fikr, Beirut, 1991, vol. 3, p. 210.

65 Nazih Hammad, *Mu'jam al-Mustalahat*, pp. 245–246.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF *BAI` MUZAYADAH*

Bai` muzayadah is a form of trading that has existed and been applied in the *muamalat* system for a long time. It was a topic of debate to determine its status among past Islamic jurists. Thus, in evaluating its status from the Shariah aspect, the opinions of the past Islamic jurists were studied.

Athar as Basis

The following are the *athar* (practice based on the Companions of the Prophet s.a.w.) supporting *bai` muzayadah*:

- (a) Imam Bukhari had written a specific topic on the concept and views of 'Ata' who said that *bai` muzayadah* was practised by society in the sale of war booty;⁶⁶ and
- (b) Anas had reported the Prophet s.a.w. selling a carpet and a water vessel and was calling out for customers. A man offered to buy them for one dirham. The Prophet s.a.w. then asked for a higher bid. Another man offered two dirham and so the Prophet s.a.w. sold the wares to him.⁶⁷

Opinions of Past Islamic Jurists

There were two opinions of the Islamic jurists in determining the *hukm* of *bai` muzayadah*.

The majority viewed it as permissible by Shariah, while the minority thought otherwise. The main reason for the difference in opinion was the interpretation of the *hadith* of the Prophet s.a.w., which prohibited bidding on another person's bidding (*saum 'ala saum akhihi*).⁶⁸

66 Al-Bukhari, *Al-Jami` al-Sahih*, Dar Ibn Kathir, Beirut, 1987, vol. 2, p. 753.

67 *Hadith* as reported by al-Tirmizi and al-Nasa'i. Al-Tirmizi, *Sunan al-Tirmizi*, Dar Ihya' al-Turath al-Arabi, Beirut, vol. 3, p. 522. Al-Nasa'i, *Sunan al-Nasa'i*, Maktabah al-Matbu'at al-Islamiyyah, 1986, vol. 7, p. 259 (*hadith* no. 4518).

68 Ibnu Rusyd, *Bidayah al-Mujtahid*, Dar al-Jil, Beirut, 1986, vol. 2, pp. 270–271.

Al-Kasani, a jurist of the Hanafi *Mazhab*, said that *bai` muzayadah* is not prohibited because the Prophet s.a.w. himself practised it.⁶⁹

Ibnu Humam, another jurist of the Hanafi *Mazhab*, also permitted the principle using the same argument.⁷⁰

Ibnu Juzaiy, a jurist of Maliki *Mazhab* permitted this principle because it is different from *saum 'ala saum akhihi* which is forbidden, and there is no element of unfairness in choosing goods.⁷¹

Ibnu Qudamah, a jurist of the Hanbali *Mazhab*, stated that *bai` muzayadah* is permitted accordingly to *ijmak* based on what was practised by the Prophet s.a.w.⁷²

69 Al-Kasani, *Bada'i al-Sana'i*, vol. 5, p. 232.

70 Ibnu Humam, *Takmilah Fath al-Qadir*, Dar al-Fikr, Beirut, vol. 6, p. 479.

71 Ibnu Juzay, *Al-Qawanin al-Fiqhiyyah*, Dar al-Qalam, Beirut, p. 175.

72 Ibnu Qudamah, *Al-Mughni*, Dar al-Fikr, Beirut, 1994, vol. 4, p. 302.

SUFTAJAH

RESOLUTION

The SAC had discussed this issue in a series of meetings and made a resolution to permit this concept as a way of risk management in the Islamic capital market. The features of this product do not contradict the Shariah principles and benefit both parties, the creditor and debtor.

INTRODUCTION

The word *suftajah* originated from the Persian language and has been adopted by the Arabs. It means a document written by a person to his representative or debtor instructing him to pay a certain sum of money to his creditor. There is little difference between its meaning in Arabic and its Islamic jurisprudence terminology, which is a credit instrument in the form of financial notes given to someone to enable the creditor to use it at another predetermined venue. The benefits given by the debtor using this method are from a risk management aspect. A creditor does not run the risk of losing money during his journey as he is only carrying *suftajah* notes.⁷³

Among the applications of *suftajah* in a modern financial world is the process of money transfer, i.e. telegraphic transfer, traveller's cheque and money order. In the context of the capital market, it is related to financial notes.

73 Nazih Hammad, *Mu'jam al-Musthalahat*, p. 154, Sa'di Abu Jaib, *Al-Qamus al-Fiqhi*, Dar al-Fikr, Damascus, 1988, p. 173. Ibnu 'Abidin, *Hasyiah Rad al-Mukhtar*, vol. 5, p. 350. Al-Dusuqi, *Hasyiah al-Dusuqi*, vol. 3, p. 224.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF *SUFTAJAH*

This concept is not new in financial risk management as seen in the writings of past Islamic jurists. From a study undertaken by the SAC, it was found that the concept was based on the following:

***Athar* as Basis**

There are many narrations in *al-Sunan al-Kubra* by al-Baihaqi that showed that *suftajah* was practised by the companions of the Prophet s.a.w. and *tabi'in* (successors), such as Ali bin Abi Talib, Ibnu Abbas, Abdullah bin Zubair and Ibnu Sirin.⁷⁴

Opinions of Past Islamic Jurists

The Islamic jurists held opposing views on permitting *suftajah* to be used as a financial instrument because it contains elements of *hawalah* (debt assignment contract) and benefit. Generally, their views can be divided into two:

Views Not Permitting *Suftajah*

Those who held this view related the concept to elements of *riba* because of the increased value in the form of benefit for the creditor. There is a *hadith* of the Prophet s.a.w. that prohibited *qardh* which gives returns to the creditor in the form of profits. The *hadith* means:

"Every qardh that benefits the creditor is riba."

Views Permitting *Suftajah*

The Maliki *Mazhab* gave some flexibility in permitting this instrument in daily dealings, with a condition that *dharurah* (necessity) must exist whereby

74 Al-Baihaqi, *Al-Sunan al-Kubra*, vol. 5, p. 352.

suftajah is used as an instrument to avoid the risk of losing money while travelling.⁷⁵

Some jurists of the Hanbali *Mazhab*, such as Ibnu Taimiyah, Ibnu Qayyim and Ibnu Qudamah, were of the opinion that the instrument of *suftajah* does not contradict Shariah principles because its benefits are enjoyed by both creditor and debtor.⁷⁶

75 Al-Dusuqi, *Hasyiah al-Dusuqi*, vol. 3, p. 225. Al-Khurasyi, *Hasyiah al-Kurasyi*, Dar al-Fikr, Beirut, vol. 4, p. 141.

76 Ibnu Qayyim, *l'lam al-Muwaqqi'in*, vol. 1, p. 391. Ibnu Qudamah, *Al-Mughni*, vol. 4, pp. 390–391.

BAI` `URBUN

RESOLUTION

In its 13th meeting on 19 March 1998, in a discussion on composite index futures contract, the SAC passed a resolution permitting *bai` `urbun* from the Islamic jurisprudence perspective.

INTRODUCTION

It can be mentioned as *`urbun*, *`arabun* and *`urban*. It is a deposit given by the buyer to the seller in a buying and selling contract. If the sale proceeds, the deposit will be part of the price of the goods. Otherwise, it will be considered as *hibah* (gift) from the buyer to the seller.⁷⁷

For example, A wishes to buy a car costing RM40,000 from XYZ Company. A is asked to pay *`urbun* of RM4,000 as booking fee, and there is a condition that this money will not be returned to him if he cancels the order. However, if he proceeds with the purchase, the deposit will be considered as part of the cost of the car. This means A needs to pay only RM36,000 for the balance.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF *BAI` `URBUN*

Based on a study done by the SAC, this concept is permissible from the Shariah perspective, based on the following arguments.

⁷⁷ Nazih Hammad, *Mu`jam al-Mustalahat*, p. 196. Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, p. 448. Al-Zarqa', *Al-Madhkal al-Fiqhi*, vol. 1, p. 495.

Opinions of Past Islamic Jurists

Past Islamic jurists were divided on determining the ruling of *bai`urbun*. The following is a summary of their opinions:

The majority were of the opinion that *bai`urbun* is not permissible as it contained elements of *gharar*, gambling and unlawful acquisition of property. They also discussed the prohibition of *bai`urbun* by the Prophet s.a.w.⁷⁸

Some *tabi'in*, among them, Mujahid, Ibnu Sirin, Nafi' bin Haris, Zaid bin Aslam and the Hanbali *Mazhab* considered it permissible based on the practices of Saidina Omar Al-Khattab. He once appointed Nafi' to be his representative to buy a house from Safwan bin Umaiyah in Mecca to be converted into a prison. Safwan asked Omar for a deposit and laid down the condition that the deposit would be his if Omar terminated the contract. Omar agreed to the condition.⁷⁹ This opinion was strengthened by Kadhi Shuraih who said that whoever caused *ta'attul* (delay) and *intizar* (waiting) had to pay compensation to the party affected by the termination of the contract.⁸⁰

Although there were two opposing views to this method of trading, the SAC concluded that the concept of *bai`urbun* is permissible and can be developed as an instrument in the Malaysian Islamic capital market. It has been a common practice in any society to pay a deposit in a business transaction so that the parties involved will not lose their rights within a certain given period. This does not contradict Shariah principles because it is *'urf sahih* to ensure the smooth running of a *muamalah*. *Bai`urbun* is permissible because the *hadith* of the Prophet s.a.w. which indicates the prohibition is weak.

78 Ibnu Rusyd, *Bidayah al-Mujtahid*, vol. 2, p. 264. Al-Zuhaili, *Al-Fiqh al-Islami*, p. 449.

79 Ibnu Qudamah, *Al-Mughni*, vol. 4, pp. 312–313.

80 A-Zarqa', *Al-Madkhal al-Fiqhi*, p. 496.

BAI` BIMA YANQATI` BIHI SI`R

RESOLUTION

At its 10th meeting on 16–17 October 1997 and 11th meeting on 26 November 1997, in discussing the issue of crude palm oil futures contract, the SAC passed a resolution permitting the concept of *bai` bima yanqati` bihi si`r* (BBMYS) which is in accordance with Islamic jurisprudence.

INTRODUCTION

BBMYS, as defined by Ibnu Qayyim is the practice of taking a certain amount of goods, such as bread, meat and oil from the seller by the buyer every day and paying for them at market price at year-end or month-end without fixing the price at the inception of the *`aqd*.⁸¹ This practice will not give rise to any dispute between buyer and seller because they have agreed on the method of payment and price determination.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF *BAI` BIMA YANQATI` BIHI SI`R*

The application of this principle in buying and selling is not something new. Past Islamic jurists had determined its status based on Shariah principles. The following sums up their opinions:

Generally, there were two opinions on buying and selling using this principle. The first opinion came from the majority of Islamic jurists, who rejected it.

⁸¹ Ibnu Qayyim, *I'lam al-Muwaqqi'in*, vol. 4, pp. 5–6.

This was based on the existence of the element of *jahalah* (ignorance) in the price of the contract that rendered it invalid.⁸²

The second opinion came from some Islamic jurists, such as Imam Ahmad bin Hanbal, Ibnu Taimiyyah, Ibnu al-Qayyim and the Hanbali *Mazhab*, who permitted this principle. Ibnu `Abidin of the Hanafi *Mazhab* also accepted it through a contract known as *ba` istijrar*. They permitted it because the price fixing method prevented any *jahalah* (ignorance) or dispute.⁸³

The Hanbali *Mazhab* used *qiyas*⁸⁴ in permitting BBMYS. According to them, this kind of buying and selling was similar to fixing the price according to *mithl* or market price which was already permitted by *Syara`*. Many existing business transactions are permitted based on the *thaman al-mithl* (market price) concept. This was further strengthened by the fact that there is no clear prohibition in the Quran, the Sunnah, or *ijmak* or the practices of the companions of the Prophet s.a.w. against this type of buying and selling. It is also a social practice that has been unanimously accepted as a facility.⁸⁵

82 Ibnu Qayyim, *I'lam al-Muwaqqi'in*, vol. 4, p. 8.

83 Ibnu Qayyim, *I'lam al-Muwaqqi'in*, vol. 4, p. 8. Ibnu Taimiyyah, *Al-Uqud*, Maktabah Ibnu Taimiyyah, Cairo, p. 223. Ibnu `Abidin, *Hasyiah Rad al-Mukhtar*, vol. 4, p. 516.

84 *Qiyas* refers to reconciling a new ruling and an existing one because they have the same *'illah*. Please refer to Al-Zuhaili, *Usul al-Fiqh*, vol. 1, p. 603.

85 Ibnu Qayyim, *I'lam al-Muwaqqi'in*, vol. 4, p. 8. Ibnu Taimiyyah, *Al-Uqud*, Cairo, p. 223. Ibnu `Abidin, *Hasyiah Rad al-Mukhtar*, vol. 4, p. 516.

KAFALAH ON MUDHARABAH CAPITAL

RESOLUTION

The SAC at its 35th meeting held on 7 November 2001 resolved that a third-party guarantee on the capital invested based on the *mudharabah* principle is permissible.

INTRODUCTION

Kafalah generally means a guarantee. It is defined as a contract which combines one's *zimmah* (liability) with another person's *zimmah*.⁸⁶

It is a contractual guarantee given by the guarantor to assume the responsibilities and obligations of the party being guaranteed on any claims arising thereof. This principle is also applied in loan guarantees whereby the guarantor assumes the liability of the debtor when the debtor fails to discharge his obligation. This is also known as *dhaman*.⁸⁷

From the aspect of a contract's objective, *kafalah* is included in the category of *'uqud tauthiqat* (contractual guarantee).⁸⁸ However, from the aspect of *tabadul huquq* (transfer of rights), it conveys the meaning of *tabarru'* at the inception of the contract and *mu'wadhah* at the end.⁸⁹

Generally, *kafalah* may be divided into two types:

⁸⁶ Haidar, *Durar al-Hukkam*, vol. 1, p. 724.

⁸⁷ Securities Commission, *Guidelines on the Offering of Islamic Securities*.

⁸⁸ Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, p. 583.

⁸⁹ Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, p. 579.

- (a) *Kafalah bi mal* is a guarantee to return an asset to its owner; and
- (b) *Kafalah bi nafs* is a guarantee to bring someone to a specific authority, such as the judiciary.⁹⁰

As for this issue, the type of *kafalah* involved is the *kafalah bi mal* and it may be divided into three main categories, including:

- (a) *Kafalah bi dayn* is a guarantee for the repayment of another party's loan obligation. It means that when a debtor fails to meet his obligation to repay a loan, then the guarantor will assume this obligation;
- (b) *Kafalah bi `ayn* or *kafalah bi taslim* is a guarantee of payment for an item or a guarantee of delivery in a transaction. For example, in a sale and purchase contract, the guarantor agrees to guarantee the delivery of the item to be sold to the purchaser. In the event the seller fails to honour his obligation according to the agreement, the guarantor will be responsible for the delivery; and
- (c) *Kafalah bi darak* is a guarantee that an asset is free from any encumbrances. This guarantee is specific for transactions that involve the transfer of titles or rights which ensures that an asset is free from any encumbrances. For example, if A claims and is able to prove that the item bought by B belongs to A, then it will be the guarantor's responsibility to ensure that B gets back the value of his purchase which has been paid to the seller.⁹¹

Mudharabah is a contract which involves agreement between two parties, namely *rabb mal* (investor) who provides 100% of the fund, and *mudharib* (entrepreneur) who manages the project in accordance with Shariah principles. Any profit from this investment will be apportioned based on the preagreed ratio at the inception of the agreement. However, any losses will be fully borne by the *rabb mal*.⁹²

90 Al-Zarqa', *Al-Makhal al-Fiqhi*, vol. 1, p. 542. Haidar, *Durar al-Hukkam*, vol. 1, pp. 732–734. Ibnu Rusyd, *Bidayah Al-Mujtahid*, Beirut, vol. 2, p. 378.

91 Al-Zarqa' *Al-Madkhal al-Fiqhi*, vol. 1, p. 542. Haidar, *Durar al-Hukkam*, vol. 1, pp. 732–734.

92 Securities Commission, *Guidelines on the Offering of Islamic Securities*.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF KAFALAH ON MUDHARABAH CAPITAL

The Original Law on Guarantees for *Mudharabah* Capital

According to the arguments of past Islamic jurisprudence, the jurists were unanimous in their opinion that when losses occur in a *mudharabah* contract, the loss is to be borne by the *rabb mal* and not the *mudharib* as the latter's status is only *amin* (trustee). However, if it could be proven that the loss was clearly due to the *mudharib*'s negligence or intentional, then the *mudharib* is to make good the capital to the investor.⁹³

Past Islamic jurists were unanimously of the opinion that in a situation where a loss occurs on a *mudharabah*, a capital guarantee by the *mudharib* is not permissible. However, they have different opinions on the status of the contract. The Hanafi and Hanbali *Mazhab* were of the opinion that the contract is valid and the conditional guarantee should be nullified. The Maliki and Syafi'i *Mazhab*, however, were of the opinion that the *mudharabah* contract is immediately nullified if there is such a guarantee.⁹⁴

Contemporary Islamic jurists have made studies on the acceptable level of capital in *mudharabah* contracts that can be guaranteed according to the perspective of Islamic jurisprudence. The main issue of concern in relation to capital guarantee is whether the guarantee given will cause the *mudharabah* contract to be nullified since it violates the *muqtadha`aqd* (the main objective of a contract).⁹⁵

They have submitted several solutions on *mudharabah* capital guarantee, including:

- (a) Third-party guarantee based on *tabarru`* (voluntarily given);
- (b) Third-party guarantee based on *qardh* (debts);

93 Al-Kasani, *Badai' al-Sana'i*, vol. 6, p. 87. Al-Nawawi *Al-Majmu' Syarh al-Muhazzab*, Maktabah al-Irsyad, Jeddah, vol. 15, pp. 194–195, 198. Ibnu Rusyd, *Bidayah al-Mujtahid*, vol. 2, pp. 303, 305. Ibnu Qudamah, *Al-Mughni*, vol. 5, pp. 147–148, 192. Ibnu Najjar, *Muntaha al-Iradat*, vol. 1, pp. 460, 466. Ibnu Juzay, *Al-Qawanin al-Fiqhiyyah*, p. 186.

94 Ibnu Rusyd, *Bidayah al-Mujtahid*, vol. 2, p. 305. Ibnu Qudamah, *Al-Mughni*, vol. 5, p. 187. Ibnu Juzay, *Al-Qawanin al-Fiqhiyyah*, p. 186.

95 Dallah Al-Bakarah, *Fatawa Nadawat al-Bakarah*, Jeddah, 1995, p. 71.

- (c) *Mudharib yudharib* (the entrepreneur channels the investor's capital to investing in a third party); and
- (d) Guarantee through special funds.

Third-party Guarantee Based on *Tabarru`*

The OIC Fiqh Academy⁹⁶ discussed on the matter of issuance of *Sanadat Muqaradhadh* and summarised that *mudharib* guarantee on capital and *mudharabah* profits are not permissible. However, the guarantee may be issued by a third party who has no connection whatsoever with the *mudharib* if it is done by way of *tabarru`* and is not included as a condition in the actual *mudharabah* contract sealed and signed by both parties.⁹⁷

The Shariah Council for Accounting and Auditing Organization for Islamic Institutions (AAOIFI)⁹⁸ allowed for third-party guarantees other than by *mudharib* or investment agent or business partner towards the liability of investment losses. However, this is on the provision that the guarantee given is not tied to the original *mudharabah* contract.⁹⁹ The basis of their decision is *tabarru`* which is allowed by Shariah.¹⁰⁰

Husain Hamid Hassan summarised the basis of the permissibility of third-party guarantees based on the views of the Maliki *Mazhab* which allow *wa'd mulzim* (promises that must be kept). It is further strengthened by *maqasid Shariah* (Shariah's objective) which allows for such action.¹⁰¹

Third-party Guarantee Based on *Qardh*

The Fatwa Council of Jordan legitimised third-party guarantees based on debts. This resolution was made as the basis in drafting section 12 of the *Muqaradhadh* Act which pertains to the guarantee concerned.¹⁰²

96 4th meeting on 6–11 February 1988.

97 *Qararat wa Tausiyat Majma' al-Fiqh al-Islami*, Dar al-Qalam, Damascus, 1998, pp. 69–71.

98 6th Meeting on 19–23 May 2001.

99 AAOIFI, *Al-Ma'ayir al-Syar'iyyah*, Bahrain, 2001, p. 80.

100 AAOIFI, *Al-Ma'ayir al-Syar'iyyah*, Bahrain, 2001, p. 89.

101 OIC, *Majallah Majma' al-Fiqh al-Islami*, Jeddah, 1988, no. 4, vol. 3, p. 1875.

102 This section states that "The government guarantees the payment of *sanadat muqaradhadh* upon maturity. This payment guarantee is in the form of interest-free *qardh* bestowed by the government for implemented projects". Please refer to OIC, *Majallah Majma' al-Fiqh al-Islami*, no. 4, vol. 3, p. 1980.

However, the OIC Fiqh Academy, disagrees with the basis of third-party guarantees that are based on debt and resolved that third-party guarantees have to be in the form of *tabarru'*. Otherwise, the contract is deemed to be an interest-bearing debt which is not permissible.

Mudharib Yudharib

Past Islamic jurists also delved on the issue of *mudharabah* capital guarantee in the context of *mudharib yudharib*. The *mudharib* invests the capital received from *rabb mal* to another party. In other words, the *mudharib* acts as an intermediary between the first *rabb mal* and the actual entrepreneur.

Wahbah al-Zuhaili summed up the views of past Islamic jurists on the issue of *mudharib yudharib* that all the four *fiqh* sects collectively agreed that the first *mudharib* shall be responsible for the liability of the guarantee (*dhaman*) if the capital is invested or handed over to another *mudharib* (third party).¹⁰³

Generally, the *mudharib yudharib* concept is allowable. If it bears any profit, the profit should be distributed between the *rabb mal* and the first *mudharib* based on a preagreed rate and the balance is to be distributed between the first *mudharib* and the second *mudharib*.¹⁰⁴

For financial institutions and companies that issue financial products based on *mudharabah*, the concept of *mudharib yudharib* may be applied if they invest part of the capital in other parties. If this happens, the financial institutions or companies should guarantee the capital based on the views of majority of Islamic jurists. Hence, in such a situation the interest of investors is guaranteed.

Guarantee Through Special Funds

Contemporary Islamic jurists also allow the channeling of a portion of *mudharabah* profits to a special fund created for the purpose of insuring against future losses. This may be done with the concurrence of investors.¹⁰⁵

103 Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, p. 860.

104 Ibnu Qudamah, *Al-Mudghni*, vol. 5, p. 163.

105 *Qararat wa Tausiyyat Majma' al-Fiqh al-Islami*, p. 70.

UJRAH FOR GUARANTEES

RESOLUTION

The SAC, at its 36th meeting held on 6 February 2002, resolved that *ujrah* (fees) paid for third-party guarantees in *mudharabah* is allowable on the condition that the investor cannot claim for any repayment from the issuer should there be any losses incurred in the investment. The investor is also permitted to request for collateral from the issuer to cover against any likelihood of losses due to gross negligence by the issuer.

INTRODUCTION

Ujrah refers to rental or fees for usage of labour and benefits. In the current economic context, it may be applied to salaries, wages, fees, commission and the like.¹⁰⁶

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF UJRAH ON GUARANTEES

Ujrah on Kafalah

The majority of past Islamic jurists were of the view that the charging of fees on *kafalah* is not permissible. This view is based on the argument that a *kafalah* contract falls under *`uqud tabarru`at* which is voluntary and benevolent in nature. Hence, no fee is to be charged.¹⁰⁷

106 Securities Commission, *Guidelines on the Offering of Islamic Securities*.

107 Al-Hattab, *Mawahib al-Jalil*, Beirut, Dar al-Fikr, 1992, vol. 5, pp. 111, 113.

Wahbah Al-Zuhaili was of the view that to charge *ujrah* on *kafalah* is permissible based on *maslahah* and society's needs.¹⁰⁸ Syeikh Ahmad Ali Abdullah was of the view that when there is a condition that the *kafalah* bears a fee, the said condition is considered valid. He also emphasised that *kafalah* contract is not *qardh*.¹⁰⁹ He supported his views with *qiyas*, referring to fees that are permissible to be collected on utilising someone's reputation and also on performing incantation using Quranic verses. Some of the past Islamic jurists allowed both situations and can be used as fees on the guarantee since it is similar from the aspect of work done.¹¹⁰

The OIC Fiqh Academy and the Shariah Council AAOIFI resolved that *ujrah* on *kafalah/dhama*n is not permissible. However, the guarantor may claim for actual expenses incurred on the guarantee.¹¹¹

Imposition of *Rahn* (Collateral) on the Issuer

Rahn is defined as the act of creating a valuable asset as collateral to amortise a debt in the event that the debtor fails to fulfil his obligations to the creditor.¹¹²

Hence, *rahn* may be requested as collateral from the issuer to be applied against a guarantee given by a third party. This permissibility is based on the resolution of the Fatwa Council of Jordan which views third-party guarantees in a *muqaradha* contract as a form of *qardh*.¹¹³ As such, *rahn* may be imposed on each *qardh*.

Since a third-party guarantee under this ruling is based on the *fatwa* in a form of *qardh*, no element of interest may be levied as this involves *riba*. The only costs allowed will be the actual expenses incurred by the creditor who in this context, is the guarantor.¹¹⁴

108 Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 5, p. 161.

109 OIC, *Majallah Majma' al-Fiqh al-Islami*, Jeddah, 1986, no. 2, vol. 2, pp. 1146–1147.

110 OIC, *Majallah Majma' al-Fiqh al-Islami*, no. 2, vol. 2, pp. 1134–1135.

111 OIC, *Majallah Majma' al-Fiqh al-Islami*, no. 2, vol. 2, pp. 1209–1210. AAOIFI, *Al-Ma'ayir al-Syar'iyyah*, Bahrain, 2002, pp. 75, 88.

112 Securities Commission, *Guidelines on the Offering of Islamic Securities*.

113 Please refer to section 12 of *Muqaradha* Act, Jordan.

114 OIC, *Majallah Majma' al-Fiqh al-Islami*, no. 3, vol. 1, p. 305.

IBRA' CLAUSE IN A DOCUMENT OF AGREEMENT

RESOLUTION

The SAC at its 30th meeting on 8 November 2000 and its 45th meeting on 7 March 2003, discussed the usage of *ibra'* (partial surrender of rights) in Islamic securities and resolved that:

- (a) Holders of Islamic securities may offer *ibra'* to the issuer based on the application made by the issuer of the securities concerned;
- (b) The formula for the computation of early settlement may be stated as a guide to the issuer; and
- (c) The *ibra'* (rebate) clause and the formula for the computation of early settlement may be stated in the main agreement of the Islamic securities contract which is based on *'uqud mu'awadhat*. However, the *ibra'* clause in the main agreement shall be separated from the part related to the price of the transacted asset. The *ibra'* clause shall only be stated under the section for mode of payment or settlement in the said agreement.

INTRODUCTION

Ibra' refers to the act of surrendering one's claims and rights, such as a creditor writing off the debts of a debtor. *Ibra'* falls under *uqud tabarru'at*.¹¹⁵

Among the related Shariah issues in the discussion of *ibra'* clause in Islamic securities contracts include:

¹¹⁵ Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, p. 579.

- (a) *Bai`atain fi bai`ah* (two sales and purchase contracts in one transaction);
- (b) *Safqatain fi safqah* (two sales and purchase contracts in one transaction);
- (c) Combination of contracts in a form of *mu`awadhah* and *tabarru`*;
- (d) *Bai` wa syart* (conditional buying and selling);
- (e) Inclusion of conditions in the contract;
- (f) *Dha` wa ta`ajjal*; and
- (g) *Maslahah*.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF *IBRA'*

The OIC Fiqh Academy¹¹⁶ deliberated on the issues of reduction of debts due to early settlement before the due date in *bai` bi taqsit*. They have resolved that reducing the debt in arrears due to early settlement whether at the request of the creditor or the debtor referred to as *dha` wa ta`ajjal*, is permissible by Shariah and does not include interest which is prohibited if it is not based on a prior agreement and only involves two parties that is the debtor and creditor. If it involves a third party, then it is not allowed as it falls under the law of *hasm auraq tijariah* (discounts on trade bills).¹¹⁷

Contemporary Islamic jurists are still discussing on the issue of amalgamating two or more contracts into one contract. This issue is included in the issue of *`uqud mujtami`ah* (amalgamation of contracts) which is categorised as *`uqud mustajiddah* (new contracts).

Bai`atain fi Bai`ah

Bai`atain fi bai`ah is included in prohibited sale and purchase transactions. The basis of the prohibition originates from the sayings of the Prophet s.a.w.:

¹¹⁶ The 7th conference at Jeddah on 9–14 May 1992.

¹¹⁷ OIC, *Majallah Majma'al-Fiqh al-Islami*, Jeddah, 1992, no. 7, vol. 2, pp. 217–218.

أنه نهى عن بيعتين في بيعة

Meaning: "That the Prophet s.a.w. disallowed two contracts of sale and purchase in one transaction."¹¹⁸

In another saying, the Prophet s.a.w. declared:

من باع بيعتين في بيعة فله أوكسهما أو الربا

Meaning: "Whoever commits an act of two contracts in one transaction then there is the least between the two or interest."

The Islamic jurists were unanimous in declaring that *bai'atain fi bai'ah* is not allowed based on the above sayings, but they differ in their opinions in interpreting the forms of contracts and transactions which are included in the prohibition.¹¹⁹

Ibnu Rushd¹²⁰ summarised the types of *bai'atain fi bai'ah* into three main categories:

- (a) Two items with two prices;
- (b) One item with two prices; and
- (c) Two items with one price.

The Dallah al-Barakah Shariah Advisory Council interprets *bai'atain fi bai'ah* as the amalgamation between *tabarru`* and *`iwadh*. For example, A says to B: "Sell this item to me and I will provide the price of the item together with a gift". This may also be construed as the sale and purchase of one item for two prices that is, deferred and cash, and sealed with a contract without determining the price agreed upon by the two parties to the contract. Sales and purchase contract cannot be amalgamated with several other contracts, such as *musaqah*, *syarikah*, *jī'alah*, marriage and *qiradh*.¹²¹ Nazih Hammad is of the opinion that *bai`'inah* is also another form of *bai'atain fi bai'ah*.¹²²

118 Al-Syaukani, *Nail al-Autar*, vol. 5, p. 231.

119 Ibnu Rusyd, *Bidayah al-Mujtahid*, vol. 2, p. 194.

120 Ibnu Rusyd, *Bidayah al-Mujtahid*, vol. 2, p. 194.

121 Syarikat al-Barakah li al-Istithmar wa al-Tanmiyah, *Fatawa Nadawat al-Barakah*, Jeddah, 1997, p. 108.

122 Nazih Hammad, *Al-'Uqud al-Mustajiddah: Dhawabituha wa Namazij minha*, *Majallah Majma' al-Fiqh al-Islami*, Jeddah OIC, no. 10, vol. 2, pp. 481–482.

Safqatain fi Safqah

The basis for the prohibition of *safqatain fi safqah* is the sayings of the Prophet s.a.w:

نهى النبي صلى الله عليه وسلم عن صفقتين في صفقة

Meaning: "The Prophet s.a.w prohibited two contracts (sale and purchase) in one transaction."

In general, *safqah* refers to contracts and covers more than just sale and purchase contracts as it encompasses other contracts as well.¹²³

Past Islamic jurists were of different opinions in the interpretation of the said sayings and the types of contracts prohibited by the Prophet s.a.w. The majority of the jurists were of the opinion that *safqatain fi safqah* refers to *bai'atain fi bai'ah*.¹²⁴

Amalgamation of *Mu'awadhah* and *Tabarru'*

Contemporary Islamic jurists discuss in general the law on the amalgamation of *mu'awadhah* and *tabarru'*.¹²⁵ This is based on the views of past jurists in interpreting the sayings of the Prophet s.a.w:

لا يحل سلف وبيع، ولا شرطان في بيع، ولا ربح
ما لم يضمن، ولا بيع ما ليس عندك

Meaning: "It is not allowable to combine debts with sale and purchase, two conditions in sale and purchase, taking a profit from an item which is not secured (occurrence of *qabdh*), and selling something which is not owned."¹²⁶

Some Islamic jurists do not allow the amalgamation between *mu'awadhah* and *tabarru'* type of contract. Ibn Taimiyah also held the same view

123 *Al-Mausu'ah al-Fiqhiyyah*, vol. 9, p. 266.

124 Al-Syaukani, *Nail al-Autar*, vol. 5, p. 232. Nazih Hammad, *Al-Uqud al-Mustajiddah*, no. 10, vol. 2, p. 516.

125 Abd Sattar Abu Ghuddah, "Al-Tafahum al-Janibi fi Majal al-Uqud", *Hawliyah al-Barakah*, no. 2, Dec 2000, p. 30.

126 Al-Syaukani, *Nail al-Autar*, vol. 5, pp. 261–262.

because *tabarru`* is done to facilitate transaction in a *mu`awadhah* way and not solely done voluntarily.¹²⁷

The Hanbali *Mazhab* also prohibits this amalgamation based on *qiyas* of the Prophets s.a.w. on the prohibition of the amalgamation between *bai`* and *qardh*.¹²⁸ Nazih Hammad was of the view that this *qiyas* cannot be the basis for the prohibition of the amalgamation between sale and purchase contracts and all contracts of the *tabarru`* type. This is because sale and purchase and *hibah* may be amalgamated into one contract.¹²⁹

The Hanbali *Mazhab* is the most open of all sects in issues pertaining to the inclusion of conditions in a contract. However, they clearly do not allow the amalgamation of *mu`awadhah* and *tabarru`*.

Bai` wa Syart

Some Islamic jurists consider *bai` wa syart* as a prohibited contract as evidenced by the sayings of the Prophets s.a.w.:

نهى رسول الله صلى الله عليه وسلم عن بيع وشروط

Meaning: "The Prophet s.a.w. prohibited conditional sale and purchase transactions."¹³⁰

However, the authenticity of these sayings is disputed by *hadis* experts because its *isnad* is disputed. This is further strengthened by examples of Islamic jurisprudence that allow conditional transactions as found in the scriptures of *fiqh mu`tabar*.¹³¹

Conditions in a Contract

The inclusion of conditions in a contract is a *muamalat* issue referred to as "*nazariyyah muqtadha `aqd*" (purpose of contract theory). The Hanbali

127 Ahmad bin Taimiyah, *Majmu` Fatawa*, vol. 29, pp. 62–63.

128 Nazih Hammad, *Al-'Uqud al-Mustajiddah*, no. 10, vol. 2, p. 499. Abd Sattar Abu Ghuddah, *Al-Tafahum al-Janibi fi Majal al-'Uqud*, p.30.

129 Nazih Hammad, *Al-'Uqud al-Mustajiddah*, no. 10, vol. 2, p. 499.

130 Al-Syaukani, *Nail al-Autar*, vol. 5, p. 262.

131 Al-Syaukani, *Nail al-Autar*, vol. 5, p. 262. Nazih Hammad, *Al-'Uqud al-Mustajiddah*, no. 10, vol. 2, pp. 484–485.

Mazhab is regarded as the most open in the issue of *muqtadha`aqd* where they allow for the addition of a condition in a contract to safeguard the interest of the parties to the contract so long the condition does not contradict the Shariah principles.¹³²

Ibnu Taimiyah formulated a method related to the condition:

إن الأصل في الشروط الصحة وال لزوم إلا ما دل
على خلافه

Meaning: "The original law on condition is valid and legal unless otherwise proven."¹³³

Dha` wa Ta`ajjal

Dha` wa ta`ajjal is a form of *ibra`*.¹³⁴ For contemporary Islamic jurists who allow it, the inclusion of *dha` wa ta`ajjal* is not done on the basis of preagreement between the debtor and creditor. If it was agreed upon earlier, then it will be considered as *hilah ribawiyah* (a means of allowing a transaction that has the element of interest) whereby *hilah* is not permissible. This is the view held by OIC Fiqh Academy.¹³⁵

Generally, an *ibra`* clause in a contract under Islamic financing, may be construed as a form of inclusion of a condition in a contract. Under Islamic law, the inclusion of a condition in a contract, such as a sale and purchase contract, is allowed if the inclusion is for the purpose of safeguarding the interests of the parties under the contract and it does not contradict the principle of sale and purchase.

The *ibra`* clause under Islamic financing is a form of preagreed condition between the two parties to the contract. The SAC generally allows *dha` wa ta`ajjal* without having to look into whether an element of preagreement exists between the parties or otherwise.

132 Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, pp. 482–491. Al-Buhuti, *Kasysyaf al-Qina`*, Dar al-Fikr, Beirut, 1982, vol. 3, pp. 188–192.

133 Ibnu Taimiyah, *Majmu' Fatawa*, vol. 29, p. 346.

134 Please refer to the *Resolutions of the Securities Commission Shariah Advisory Council* on *dha` wa ta`ajjal* for further details.

135 OIC, *Majallah Majma' al-Fiqh al-Islami*, no. 10, vol. 2, p. 502.

IQTA`

RESOLUTION

The SAC, at its 39th meeting on 16 May 2002, 41st meeting on 30 August 2002, 47th meeting on 27 May 2003 and 51st meeting on 14 December 2003, resolved several issues on *iqta`* as follows:

- (a) Concessionary rights can be classified as a type of asset that can be transacted based on the principle of *iqta`*;
- (b) Supply and maintenance contract with the government and government agencies can be the basic asset in the issuance of Islamic securities based on the principle of *iqta`*;
- (c) *Iqta`* can be used in government contracts on assets that are not real estates; and
- (d) The principle of *iqta`* can be used for state government contracts, statutory bodies and government-linked companies. The government-linked companies are entities which are approved by the government to take-over public agencies and manage them as private companies, such as the following:
 - (i) Parent companies and their subsidiaries under the control of the federal and state government of which the shareholdings exceed 50%; and
 - (ii) Companies where the government owns special shares or special preferential rights shares. Normally special shares or "golden shares", in the Malaysian context, exist in companies in which the government has strategic interests.

INTRODUCTION

The types of government contracts as outlined by the Ministry of Finance are as follows:¹³⁶

- (a) Work contract;
- (b) Supply contract; and
- (c) Service contract.

A work contract is a contract which involves construction and civil works, such as buildings, airports, ports, roads, dams and drainage works. It also covers mechanical and electrical works.

A supply contract is a contract on items which are supplied for certain activities, programmes or government agency projects. It is also an input to a certain work process or service. The supplies are building materials, foodstuff, clothing, vehicles and office furniture.

A service contract is a contract which involves the services of manual human labour or expertise/skills to implement and accomplish a particular job. Services are divided into two types as follows:

- (a) Consultancy services. It covers all kinds of studies, such as economic research, privatisation, management, physical development which requires input such as architecture, engineering, survey works, legal management and specialised services in the area of environment and agriculture; and
- (b) Non-consultancy services. It covers services, such as managing training and courses, maintenance and repair works, cleaning, renting and management of buildings.

There are various forms of contracts which involve the government in the privatisation process. According to the "Privatisation Masterplan" issued by the Economic Planning Unit, the Prime Minister's Department, there are four methods of privatisation:

136 Ministry of Finance, 2002, *Proses Perolehan Kerajaan*, pp. 1–2.

- (a) Sales of assets or equity;
- (b) Lease of assets;
- (c) Management contract; and
- (d) Build-operate-transfer (BOT) or build-operate (BO).

Concession contract in Arabic language is *`aqd imtiyaz*.¹³⁷ It is a contract for implementing privatisation, that is the transfer or sale of assets, organisation, functions or activities of the public sector to the private sector.¹³⁸

Generally, concession is a system whereby the government confers special rights to an organisation (private or semi-government) to build, repair, check and control and to launch an infrastructural project for a particular period. It is in a form of contract where the government requires the company (the concession holder) to invest to provide the services required with its own financing. It is required to operate the services concerned and bear all risks from the operations of the project. The company will be rewarded in the form of payment of the price of the services by the consumers and/or the government.¹³⁹

The Malaysian government through the privatisation policy has awarded concessions to private companies in implementing public projects, such as the North-South Highway Project (PLUS), Penang Bridge, Kuala Lumpur International Airport, Express Rail Link and others.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF *IQTA`*

In general, the debate on *iqta`* in the books of past Islamic jurists has been discussed under the section *ihya' mawat* (developing neglected property). This is because *iqta`* is a form of *ihya' mawat*.

137 Nazih Hammad, *Mu'jam al-Mustalahat*, p. 67. Harith Suleiman Faruqi, *Faruqi's Law Dictionary* (English-Arabic), Librairie du Liban, Beirut, 1991, p. 149.

138 Ernst & Young, *Privatisation: Investing in State-owned Enterprises Around the World*, John Wiley & Sons, Inc., New York, 1994, p. 4.

139 Franck Bousquet & Alaïa Fayard, *Road Infrastructure Concession Practice in Europe*, World Bank, 2001, p. 3.

There are two ways of *ihya'*:

- (a) *Iqta` imam* (gift of the ruler); and
- (b) *Ihya' mawat thumma ijazah amir* (developing the neglected property and then obtaining the permission from the ruler).¹⁴⁰

As such, the majority of past Islamic jurists did not define *iqta`* in detail, just clarifying its various forms because it is one of the ways of *ihya' mawat*.

There are two approaches by Islamic jurists when giving the definition of *iqta`* and they are:

- (a) Definition of *iqta`* which is related to *ardh* (real estate); and
- (b) Definition of *iqta`* in general that is on *mal* (assets or properties).

Qadhi Iyadh has defined *iqta`* as the ruler's gift of a *mal Allah* (Allah's property) to whoever he feels eligible to manage it. Usually *iqta`* occurs in respect of real estates.¹⁴¹

Iqta` is also defined as what is given by the ruler in the form of real estate. The said gift is either in the form of ownership or rights to derive benefits from the real estate.¹⁴²

Iqta` Conditions

Based on the debate of past and contemporary Islamic jurists, one can conclude that the *iqta`* conditions are as follows:

- (a) *Iqta`* is only given by the ruler with the objective of *maslahah*;
- (b) *Muqta`* (one who is conferred with *iqta`* property) is able to develop *iqta`* properties;
- (c) Property which has been *iqta`* is not owned by anybody; and

140 Muhammad Rawwas Qal'ahji, *Mausu'ah Fiqh 'Umar bin al-Khattab*, Beirut, Dar al-Nafais, 1986, pp. 34-35.

141 Ibnu Hajar al-'Asqalani, *Fath al-Bari*, Beirut, Dar al-Fikr, 1993, vol. 5, p. 323.

142 *Al-Mausu'ah al-Fiqhiyyah*, vol. 6, p. 81.

(d) *iqta`* which is given does not contradict with *maslahah `ammah*.¹⁴³

From the conditions outlined for *iqta`*, the ruler plays the most important role in an *iqta`* gift by taking into account public interest.

Based on the *iqta`* conditions which have been summarised by Abd Wahab Hawwas, there is no special condition that says *iqta`* is limited to real estate only.

***Iqta`* on Non-real Estate**

Iqta` has gone through changes and modification since the era of Saidina `Umar r.a. This can be seen from the additional forms of *iqta`* which has been recorded in the writings of Al-Mawardi and Al-Buhuti.

The question of whether *iqta`* can be applied on non-real estate is one of the Islamic jurisprudence issues which emerged while examining the application of *iqta`* in modern times. This is due to the majority of past Islamic jurisprudence debates on *iqta`* which stated that this principle was applicable to real estate. This is related to examples that were given by past Islamic jurists when debating the issue of *ihya' mawat*.

However, Imam al-Syawkani when discussing *ihya' mawat* has a special section relating to the status of neglected animals. This is based on the sayings of the Prophet s.a.w. which show that such animals can also be bred. The Prophet said:¹⁴⁴

من وجد دابة قد عجز عنها أهلها أن يعلفوها
فأخذها فأحيها فهي له

Meaning: "Whoever finds an animal neglected by the owner without any food, and is taken and bred, then the said animal becomes his."

In other sayings, the Prophet s.a.w. says:¹⁴⁵

من ترك دابة بمهالكة فأحيها رجل فهي لمن أحيها

143 Abd Wahab Hawwas, *Al-Iqta` fi al-Fiqh al-Islami wa Atharuhu fi al-Tanmiyah*, Dar al-Nahdhah Al-Arabiyyah, Cairo, 1994, pp. 25–34.

144 Al-Syaukani, *Nail al-Autar*, vol. 5, pp. 58–59.

145 Al-Syaukani, *Nail al-Autar*, vol. 5, p. 59.

Meaning: "Whoever leaves the animal at a place that can destroy the said animal, and then bred by another person, then the said animal which is being bred becomes his."

Abu Yusuf is of the view, *iqta` imam* in the form of *tamlik raqabah* (individual ownership) form is permissible whether on *`aqar* (immovable property) or *manqul* (movable property).¹⁴⁶ The permissibility of *iqta`* on *manqul* shows that there is room to widen the scope on issues that can be classified as *iqta`* by the ruler.

For *istila`* (authority) on *mal mubah* (public property which is not owned by anybody), Ali al-Khafif stressed that it can be done on an *`aqar* or *manqul* form of property.¹⁴⁷

Though *iqta`* which occurred in the past was applied on real estate¹⁴⁸ based on the above factors, there must be a conclusion in determining the forms of non-real estate which can be classified as *iqta`* by the ruler.

The Role of *`Urf* on *Iqta`*

Imam al-Syafi'i defined *mal* as something which has a value. As such, it is transacted and compensation will be imposed on whoever damages it.¹⁴⁹ This definition shows that *`urf* plays an important role in determining whether something that has a value can be categorised as *mal* because it depends largely on local and current *`urf*. As such, several forms of new *mal*, such as intellectual property has been accepted by contemporary Islamic jurists based on the above definition.

For *ihya' mawat* and *iqta`*, *`urf* also plays an important role in determining the manner and forms because the permissibility of *ihya'* was only mentioned in general by the Prophet s.a.w.¹⁵⁰

The above factors can be the arguments for widening the *iqta`* scope to the various forms of assets regardless of whether they are based on real estate or rights of broadcasting, supply, maintenance and others.

146 Ali al-Khafif, *Al-Milkiyah fi al-Syari'ah al-Islamiyyah ma'a al-Muqaranah bi al-Syara'i al-Wad'iyah*, Dar al-Fikr al-'Arabi, Cairo, p. 263.

147 Al-Khafif, *Al-Milkiyah fi al-Syari'ah al-Islamiyyah*, p. 226.

148 Hawwas, *Al-Iqta' fi al-Fiqh al-Islami*, p. 37.

149 Al-Suyuti, *Al-Asybah wa al-Naza'ir*, Beirut, Dar al-Kutub al-'Ilmiyah, 1994 p. 409.

150 Al-Mawardi, *Al-Hawi al-Kabir*, vol. 7, p. 486.

***Iqta`* in a Modern Form**

There are several current studies which attempt to scrutinise current applications of the *iqta`* principle which is debated in the books of past Islamic jurists.

Syeikh Najib Muti'i said that the question of *iqta`* is similar to *tarkhis* (concession/permit/licence)¹⁵¹ whereby, if a businessman or contractor wants to build a road, he should get permission from the government. Only upon obtaining permission is he allowed to carry out the works of construction, maintenance and so on to the road, and can impose a *mukus* (toll) to finance the cost and expenditure borne by him.¹⁵²

Some of the Islamic jurists who attended the Dallah Barakah Symposium viewed *`aqd imtiyaz* (concession contract) as a form of *iqta`* which is awarded to the concession holder for a certain period of time and thereafter, will be returned to the government.¹⁵³

The use of *iqta`* principle in the context of Islamic investment now is more suitable compared to *`aqd imtiyaz*. This is because the adoption of *iqta`* terminology reflects the use of Shariah principles in dealing with current Islamic financial issues.¹⁵⁴

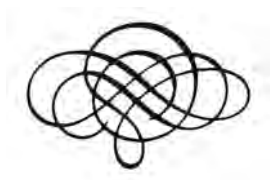
151 Hans Wehr, *A Dictionary of Modern Written Arabic*, Beirut, Librainie Du Liban, 1980, p. 332.

152 Sheikh Najib al-Muti'i, *Takmilah al-Majmu'*, Maktabah al-Irsyad, vol. 16, p. 149.

153 Fatawa Nadwat al-Barakah, pp. 220–221.

154 Hawwas, *Al-Iqta` fi al-Fiqh al-Islami*, p. 99.

CAPITAL MARKET PRODUCTS ACCORDING TO ISLAMIC JURISPRUDENCE



CALL WARRANTS

RESOLUTION

At its 4th meeting on 26 July 1995, the Islamic Instrument Study Group (IISG) passed a resolution permitting the use of call warrants on the condition that the underlying shares of the warrants in question are Shariah compliant. This instrument fulfils the features of *mal* (asset) according to Islamic jurisprudence as outlined in the *haq maliy* and *haq tamalluk* principles. *Haq maliy* can be traded if it complies with Islamic principles and conditions of buying and selling.

INTRODUCTION

A call warrant is a right, but not an obligation, to buy a fixed quantity of an asset (such as shares) for a specified price within a limited period of time.¹⁵⁵

The following are three defining features of call warrants:¹⁵⁶

Underlying Asset

Call warrants are issued based on the underlying assets, for example, the shares of a company. They give warrant holders the right, but not the obligation, to buy a certain number of shares of the underlying company at a price agreed upon before or on a future date.

¹⁵⁵ Securities Commission, *Understanding Call Warrants*, p. 2.

¹⁵⁶ Securities Commission, *Understanding Call Warrants*, p. 3.

Exercise Price

This is the price at which a warrant holder can choose to exercise his right to buy the underlying shares. The exercise price is fixed at the time the warrants are issued.

Exercise Period

The validity of the exercise period of a call warrant is limited, after which it has no value.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF CALL WARRANTS

In determining the status of call warrants, *athar* and Islamic jurisprudence are used as a reference. Although there are no such instruments in the practices of Islamic *muamalat*, the studies are nevertheless made from the perspective of general Shariah principles that are relevant to the instruments. These principles are as follows:

***Athar*¹⁵⁷ as a Basis**

There is evidence of practices similar to paying for a right by the companions of the Prophet s.a.w. The evidences were in the form of sales and purchases, and rentals.

Holding Rights in Sales and Purchases

According to Imam Ahmad, as narrated by Ibnu Qadamah in his book *al-Mughni*, Nafi' bin al-Harith was reported to have bought a house from Safwan bin Umayyah for Caliph Omar which was to be converted into a prison. He laid down a condition to Safwan that if the Caliph agreed, then he would buy the house, otherwise, Safwan would still be paid a certain sum. In the book, *I'lam al-Muwaqqi'in*, Ibnu Qayyim said that the cost of the house was 4,000 dirham, and Safwan would be paid 400 dirham if the Caliph did not agree to the purchase. In *al-Mughni*, the reason for the 400

157 *Athar* refers to a practice based on the companions of the Prophet s.a.w.

dirham was given so that the house would not be sold to someone else.¹⁵⁸ This narration showed that payment was permissible to give holding right to a property.

Holding Rights in Rentals

There was also a narration on holding rights in rentals. Such activities were reported in *Sahih Bukhari*. Ibnu 'Aun narrated, a man asked the owner of a mount-for-hire, "Prepare your mount, if I do not rent it on the promised date, I will give you 100 dirham". The tenant did not rent on the promised date and Qadhi Shuraih said the condition previously agreed upon had bound the tenant and considered it an obligation.¹⁵⁹

This narration shows that holding rights payment in the form of rental is permissible and the payment ensured that the mount was not rented out to someone else.

The *Haq Maliy* Principle

Under Islamic jurisprudence, there are two types of rights:¹⁶⁰

- (a) *Haq maliy* are rights on assets with financial values. Examples of such rights are *haq dayn* (debt rights) and *haq tamalluk* (ownership rights); and
- (b) *Haq ghair maliy* are rights not related to assets with financial values. Examples of such rights are *haq hadhanah* (child custody rights) and *haq wali* (right to be a *wali*).

The *Mal* Principle

The majority of Islamic jurists were of the opinion that something could be regarded as *mal* if it could be controlled and benefited from.¹⁶¹

158 Ibnu Qayyim, *I'lam al-Muwaqqi'in*, vol. 3, p. 402. Ibnu Qudamah, *Al-Mughni*, vol. 3, p. 313.

159 Al-Bukhari, *Sahih al-Bukhari*, Dar al-Fikr, Beirut, 1991, p. 243.

160 Abdul Karim Zaydan, *Al-Madkhal li Dirasah al-Syari'ah al-Islamiyah*, pp. 184–186. Al-Khafif, *Al-Milkiyyah fi al-Syari'ah al-Islamiyah*, pp. 8–17.

161 Abdul Karim Zaydan, *Al-Madkhal li Dirasah al-Syari'ah al-Islamiyah*, pp. 184–186. Al-Khafif, *Al-Milkiyyah fi al-Syari'ah al-Islamiyah*, pp. 8–17.

كل ما يمكن حيازته والانتفاع به على وجه معتاد

Meaning: "Something that can be controlled and benefited from according to customs."

The Shafi'i *Mazhab* also provided general guidelines on what can be considered as a property. This principle strengthens the awarding of the status of *mal* on call warrants according to Islamic jurisprudence as outlined by Imam al-Suyuti.¹⁶²

لا يقع اسم المال إلا على ما له قيمة يباع بها ويلزم متلفه

Meaning: "Something is categorised as mal if it has value. That is why it can be traded, and compensation shall be paid by anyone who causes it to be damaged."

Opinions of Past Islamic Jurists

There were two opposing opinions of past Islamic jurists on rights and benefits; some regarded rights as not *mal* while the rest thought that rights could be divided into two types; rights that could be categorised as *mal* and otherwise.¹⁶³

According to the Hanafi *Mazhab*, rights and benefits could not be categorised as *mal*.

The Maliki, Shafi'i and Hanbali *Mazhab* and some jurists of the Hanafi *Mazhab* of the later generation regarded rights and benefits as *mal*, if they are related to *mal*, or *`urf*, if they are regarded as something of value.

The differences in opinions have a great influence on the decisions on rulings by contemporary Islamic jurists depending on how they strengthened their arguments based on the views of the Hanafi *Mazhab* or the majority of the Islamic jurists.

¹⁶² Al-Suyuti, *Al-Asybah wa al-Naza'ir*, p. 409.

¹⁶³ Zaydan, *Al-Madkhal li Dirasah al-Syari'ah al-Islamiyah*, Al-Khafif, *Al-Milkiyyah fi al-Syari'ah al-Islamiyah*, pp. 184–186.

TRANSFERABLE SUBSCRIPTION RIGHTS (TSR)

RESOLUTION

At its 6th meeting on 5 October 1995, the IISG resolved that transferable subscription rights (TSR) is an instrument permissible from the Shariah perspective. The characteristics of this instrument fulfil the principle of *mal* according to Islamic jurisprudence as outlined in the *haq maliy* and *haq tamalluk*.

The meeting resolved that what is called *baî ma'dum* (buying and selling something that does not exist) does not occur in TSR trading but such trading is, instead, *baî maujud* (buying and selling something that exists).

INTRODUCTION

TSR is a contract that gives its shareholders a right but not an obligation, to subscribe to new ordinary shares at an authorised price that has already been preagreed within a stipulated period. It loses its value after the stipulated period. In other countries, TSR is commonly known as a warrant.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF TRANSFERABLE SUBSCRIPTION RIGHTS

Several issues of Islamic jurisprudence have been studied in evaluating TSR which include holding rights and *baî ma'dum*. The question of rights and the views of the Islamic jurisprudence will not be discussed as it has been discussed in the previous chapter on call warrants.

Bai` Ma`dum

The main focus is on the purchase of something that does not exist (*bai` ma`dum*) as it involves a quantity of shares yet to be subscribed by TSR holders. Many Islamic jurists do not allow *bai` ma`dum* in general.¹⁶⁴ However, Ibnu Qayyim studied this issue from two dimensions which show the permissibility of *bai` ma`dum* based on certain conditions:

First: It is not true that *bai` ma`dum* is not permissible. This is because there is no evidence in the Quran, Sunnah and opinions of the companions of the Prophet s.a.w. which state that *bai` ma`dum* is not permissible. The only thing is a *hadith* prohibiting certain types of buying and selling, and certain non-existing products. This is similar to the prohibition of the sale and purchase of existing products that come with certain features.

Therefore, the prohibition on the buying and selling of such products is not whether they exist or otherwise, but rather because of the element of *gharar* which is uncertainty and deceit in a transaction. *Gharar* occurs when there is an element or incapability of delivering a product that has been sold whether it really exists or not. A classic example would be the selling of runaway slaves and stray animals. Although the product existed, the seller was incapable of handing it over to the buyer. It was an obligation for the seller to hand over the product immediately after the *`aqd* had been completed. The failure of the seller to fulfil his obligation meant the occurrence of *gharar*, the element of uncertainty which was prohibited.

Second: Certain conditions of *Syara`* allow *bai` ma`dum* and consider it legal. As an example, *Syara`* allows the buying and selling of fruits and grains that have a high chance of becoming food produce. The Prophet s.a.w. permitted this type of transaction. It is *bai` ma`dum* because even though the *`aqd* has been concluded, the buyer is still not able to claim the produce but has to wait until a certain period when the fruits and grains are ready to be harvested and delivered.¹⁶⁵

Al-Kasani stated that among the conditions of a legal transaction is the capability of the seller to hand over the goods sold. The important point is the capability to hand over the goods with absolute certainty even though it is some time in the future.¹⁶⁶

164 Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, pp. 427–429.

165 Ibnu Qayyim, *I'lam al-Muwaqqi'in*, vol. 2, pp. 8–10.

166 Al-Kasani, *Bada'i Sana'i*, vol. 5, pp. 147–148.

Ibnu Qudamah also addressed the same question by bringing up the issue of selling fish that are still in the water. According to him, most Islamic jurists are of the same opinion that such a transaction is illegal. The *'illah* is due to the presence of *gharar*. However, in certain conditions, it is permissible to sell fish in the water, provided that:

- (a) The pond belongs to the seller;
- (b) The water in the pond is shallow and the fish in it can be identified; and
- (c) There is a possibility of catching the fish.¹⁶⁷

All these conditions must be fulfilled before it becomes permissible to sell the fish. Otherwise, *gharar* will be present, as the seller is incapable of surrendering the goods.

Based on the texts of Islamic jurisprudence, it can be concluded that *'illah bai' ma'dum* is *gharar*. *Gharar* occurs when the seller is not able to hand over the goods sold. This means that when *bai' ma'dum* occurs without *gharar* – a sale will be made; its features, rate and price can also be determined; and the seller is able to hand over the goods within a specific time – then, such a transaction is legal.

In conclusion, the prohibition of *bai' ma'dum* is not that the goods do not exist during the *'aqd* but because of *gharar*. Therefore, what is prohibited is the element of *gharar* and not the non-existence of the goods.

On the question of subscribing to shares that have yet to be issued, it is not *bai' ma'dum* because the quantity, nature, rate, type and price of the shares have been determined, and the company will create the new shares within a specific period.

It can be concluded here that TSR instruments do not contradict the Shariah. In this context, a TSR is approved by Shariah when the shares to be created are also shares that comply with the Shariah principles.

167 Ibnu Qudamah, *Al-Mughni*, vol. 4, p. 294.

ASSET SECURITISATION

RESOLUTION¹⁶⁸

At its 7th meeting on 1 December 1995, the IISG resolved that asset securitisation is permissible if the underlying asset of the instrument is Shariah compliant.

INTRODUCTION

In general, asset securitisation is a process of issuing securities by selling financial assets identified as the underlying asset to a third party. Its purpose is to liquidate financial assets for cash or as an instrument to obtain new funds at a more attractive cost, compared to obtaining funds through direct borrowing from financial institutions.

Specifically, financial assets which have a future cash flow will be sold by a company that needs liquidity or as new funds to a third party known as a special purpose vehicle (SPV) for cash. To enable the payment for the purchase of the assets, the SPV will issue asset-backed debt securities to investors, based on the pledged future cash flow of the assets. Investors will then gain returns through future cash flows managed by the SPV.

Among the assets with future cash flows that has the potential to be securitised for the issuance of asset-backed debt securities issues are house financing receivable account, credit card account, vehicle financing receivable

¹⁶⁸ A resolution made was regarding asset securitisation in general. However, several matters related to this concept specifically are still under study.

account, highway toll collection, etc. In the Islamic context, assets must be securitised in accordance with the Shariah.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF ASSET SECURITISATION

The basis for the concept of asset securitisation is already present in Islam and has been discussed at length by past Islamic jurists, especially on the securitisation of cash flow. The basis can be examined through the following principles:

The *Mal* Principle

The use of assets as collateral in asset securitisation to facilitate the issuance of an instrument of value is part of the *mal* principle in Islam. *Mal* refers to something that has value and can be gainfully used according to the Shariah. A clear difference between the concept of *mal* and an asset lies in the features prohibited by the Shariah. In Islam, prohibited items such as liquor and pork are not included in the *mal* category for Muslims. However, if they are owned by non-Muslims, these items are *mal* for them.

Cash flow is also included in the category of *mal* if its origin is *halal* (lawful) according to the Shariah. This is because, cash flow is considered a *dayn* (debt) and according to Islamic jurisprudence, a debt with no ambiguity is *haq maliy* which is included in *mal*.¹⁶⁹

Bai` Dayn

Asset securitisation is related to the sale of debts, (*bai` dayn*) which is debated in Islamic jurisprudence. The IISG, at its 8th meeting on 25 January 1996, and the SAC at its 2nd meeting on 21 August 1996, discussed this issue. The SAC, at its 2nd meeting, agreed to accept *bai` dayn* in the structuring of Islamic capital market products.¹⁷⁰

169 See SAC resolution on call warrants for further elaboration on the *mal* concept.

170 See SAC resolution on *bai` dayn* for further details.

The *Rahn* Principle

In asset securitisation, a fixed cash flow is the main criterion of the asset. The cash flow of the asset is packaged and made the collateral for issuing securities. This form of securitisation conforms to the *rahn* principle in Islamic jurisprudence. *Rahn* is a valuable underlying asset (collateral) used to obtain funding on credit. A collateral must have the *mal* feature to enhance the confidence of creditors to provide the funds. The *mal* can be used as a collateral to redeem a debt in the event there is a failure to settle the debt.¹⁷¹

Opinions of Past Islamic Jurists

There is evidence in Islamic jurisprudence that allows the use of cash flow as a collateral to obtain new funding which enables the creditor to achieve liquidity. With this available liquidity the creditor can participate in economic activities or seize business opportunities without having to wait for a long time to recover the debt. According to a statement from the Maliki *Mazhab*, a debt can be used as a collateral for funding. This means that the Maliki *Mazhab* established a concept that packaged cash flow as an underlying asset for obtaining funds.¹⁷²

The example quoted from the Maliki *Mazhab* was wages earned by a *mudabbar*¹⁷³ (slave) from services rendered to his master. This meant that throughout his master's life, the *mudabbar* worked and earned an income for his master. The Maliki *Mazhab* stated that an income that was going to be earned by the *mudabbar* could be packaged by his master as a collateral of value for raising funds. This proves that a cash flow can be packaged and accepted as a collateral of value.¹⁷⁴ In short, say a *mudabbar* works to earn a monthly wage of RM1,000. In a year he is able to earn RM12,000. The master can turn the cash flow into a collateral of value for raising funds, e.g. RM6,000, for a period of less than a year.

Cash flows currently in the form of income from toll collection, electricity bills, water bills, telephone bills, Islamic house financing, and Islamic vehicle financing can also be packaged as underlying assets. This is because such cash flows are fixed cash flows for the company.

171 Al-Asfahani, *al-Mufradat*, Dar al-Makrifah, Beirut, p. 204. Al-Dardir, *Al-Syarh al-Saghir*, vol. 2, p. 108. Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 5, pp. 180–181.

172 Al-Dusuqi, *Hasyiah al-Dusuqi 'ala al-Syarh al-Kabir*, Dar Ihya' al-Kutub al-Arabiyyah, Cairo, vol. 3, p. 231.

173 *Al-Mudabbar* refers to types of slaves who will be free when the master dies.

174 Al-Dusuqi, *Hasyiah al-Dusuqi 'ala al-Syarh al-Kabir*, p. 233.

Wathiqah Dayn

To enable the public be more actively involved in economic activities through investments, assets with regular streams of cash flow can be packaged and used as underlying assets for issuing securities.

The Maliki *Mazhab* put forward this idea in a term known as *wathiqah dayn*.¹⁷⁵ A paper of value symbolises the total share of ownership of an ongoing project. It is also known as *sukuk* (or *shahadah*).¹⁷⁶ *Sukuk* only acts as a financial instrument. It is similar to a company share certificate that facilitates easy transfer of ownership.

Liquidity can be obtained with *sukuk*, enabling the entrepreneur to inject capital into the economic cycle. The *sukuk* issued is based on the system of *mudharabah*, *musyarakah mutanaqisah*, *ijarah*, etc. It all depends on the form of business activity that is used as collateral and how the profits will be distributed.

175 Al-Dusuqi, *Hasyiah al-Dusuqi 'ala al-Syarh al-Kabir*, p. 231. Al-Khurasyi, *Hasyiah Al-Khurasyi*, vol. 5, p. 236. Nazih Hammad, *Mu'jam al-Mustalahat al-Iqtisadiyyah*, p. 284.

176 Ma'bid Ali Al-Jarhi, *Al-Aswaq al-Maliyyah fi Dau' Mabadi' al-Islam*, *Al-Idarah al-Maliyah fi al-Islam*, *Al-Majmak al-Malaki*, Jordan, 1989, p. 137.

REGULATED SHORT SELLING AND SECURITIES BORROWING AND LENDING

RESOLUTION

At its 13th meeting on 19 March 1998, the SAC resolved to accept the existing securities borrowing and lending (SBL) principles in the securities industry. To comply with Shariah principles, SBL will be aligned to *ijarah* (leasing contract) principles. Nevertheless, the *istihsan* methodology is used as an exception to the general *ijarah* principle. This means the *ijarah* relationship between the lessee and the shareholder is not severed even though in SBL, the lessee has to surrender the share leased.

In addition, the SAC at its 69th meeting on 18 April 2006 resolved that regulated short selling (RSS) is in line with the Shariah as the inclusion of SBL principles in RSS eliminates the element of *gharar*.

INTRODUCTION

Regulated Short Selling

In general, short selling is the act of an individual selling securities which he does not own at the point of transaction.¹⁷⁷

RSS is the selling of approved securities,¹⁷⁸ where the seller does not have an exercisable and unconditional right to vest such securities in the purchaser at the time of the execution of the sale. However, prior to the execution of the

¹⁷⁷ <http://www.bursamalaysia.com/website/education/glossary.htm#S>

¹⁷⁸ Please refer to Rule 704 of the *Rules of Bursa Malaysia Securities Berhad* regarding definitions of approved securities for regulated short selling.

sale, the seller has executed an agreement to borrow the approved securities to enable delivery of the same to the purchaser under the sale, in accordance with the rules relating to delivery and settlement.¹⁷⁹

From the above definition of RSS, it can be surmised that RSS is a form of short selling that is combined with SBL and executed according to the rules set by Bursa Malaysia.

Securities Borrowing and Lending

The principle of SBL on regulated short selling was first introduced to the local capital market at the end of 1995. However, it was suspended at the end of 1997 following the economic crisis which threatened the stability of the share market activities in the Kuala Lumpur Stock Exchange (now Bursa Malaysia). However, before SBL was suspended, the SAC had already conducted studies on this principle from the Shariah perspective and resolved that it was permissible.

SBL is a securities borrowing and lending activity which involves the borrower and lender who need to fulfil their temporary needs, and such transactions must be completed according to specified regulations and guidelines. As an example, a lender who owns long-term securities (shares) agrees to lend securities to a borrower for a stipulated period. When the period expires, the borrower must return the securities either in the original form or another form of securities of the same type and amount. Meanwhile, the lender will impose a deposit and service charge on the borrower, as one of the securities borrowing conditions.

ARGUMENTS PERMITTING REGULATED SHORT SELLING

In general, short selling involves the selling of shares not owned by the seller. As a result, such transactions fall under the category of *bai' ma'dum*. Islam prohibits such transactions involving *bai' ma'dum* since the delivery of the subject matter cannot be effected and this brings about the prohibited element of *gharar*.

However, the issue of *gharar* can be overcome in RSS – the inclusion of SBL principles in RSS eliminates the element of *gharar*. In other words, the

179 Rule 704.1(1) of the *Rules of Bursa Malaysia Securities Berhad*.

introduction of SBL can increase the probability that the shares sold will be delivered. When the probability of delivery is high, then the element of *gharar* will no longer be significant. Consequently, when an obstacle that hinders the recognition of a certain activity as Shariah compliant is overcome, then that activity can be classified as Shariah compliant. This fulfils a *fiqh* methodology: *إذا زال المانع عاد الممنوع* which means: "When an issue that impedes (the permissibility) is removed, then the activity which was initially forbidden becomes permissible".¹⁸⁰

ARGUMENTS PERMITTING SECURITIES BORROWING AND LENDING

Because SBL was something new to the capital market, the SAC undertook research to determine Shariah principles that could be used as arguments in evaluating the status of SBL. Based on the research, the following principles were used as a basis for the permissibility of SBL.

Istihsan Principle

The SAC in several of its meetings attempted to identify a Shariah principle that can be used as a basis for the implementation of SBL. As a result of the studies and discussions, the SAC decided that the *istihsan* principle should be instilled in the *ijarah* methodology to form the basis for SBL after evaluating that other methods such as *i'arah* (asset borrowing), *hawalah* (debt assignment contract) and *bai' wafa'* (selling and buying back) were found to be unsuitable for the concept and implementation of SBL.

Istihsan is an exemption of a ruling that is *juz'ie* (branch) in nature compared with a general principle decision.¹⁸¹ Al-Syatibi defined *istihsan* based on the Maliki *Mazhab* as accepting *maslahah* (public interests) that has *juz'ie* as compared with accepting *dalil kulliy* (general).¹⁸² In summary, it means the use of a specific method as an exemption from the general one.

Istihsan that was popularised by the Hanafi jurists and accepted by the Maliki jurists had become a serious topic of discussion among Islamic

180 Please refer to section 24, *Majallah al-Ahkam al-Adliyyah*. Haidar, *Durar al-Hukkam Syarh Majallah al-Ahkam*, vol. 1, p.39.

181 Al-Zuhaili, *Usul al-Fiqh al-Islami*, vol. 2, p. 738.

182 Al-Syatibi, *al-Muwafaqat*, Dar al-Ma'rifah, Beirut, 1986, vol. 2, p. 562.

jurists from other schools of thought especially the Syafi'i jurists. The Syafi'i jurists rejected *istihsan* if it had no basis. Despite that, *istihsan* is still widely referred to by those who have accepted it. In truth, many contemporary problems can be overcome by accepting *istihsan*. This need is strongly felt, especially in handling issues that have arisen in a *muamalat* system which is always developing and changing from time to time.

Istihsan with Maslahah

The decision taken by the SAC that the selling of borrowed/leased shares to a third party does not nullify the *ijarah 'aqd*, because the decision is based on *istihsan* with *maslahah*. This gives a clear advantage to the original shareholder and can provide liquidity to the share market.

Istihsan with 'Urf Khas

'*Urf iqtisadi khas*¹⁸³ (a customary practice accepted in economic activities) which occurs in SBL activities is '*urf sahih* (customary practices accepted by *Syara'*). Therefore, the argument employing *istihsan* with '*urf* also strengthens the evidence.

Accepting the *Ijarah* Concept with Consent to Sell

Istihsan allows the *ijarah* concept, with the consent of the owner to sell the leased shares, to be acceptable as a basis for SBL. According to the original *ijarah* concept, the relationship between the owner and lessee will be severed when a transaction involving the sale and purchase of an asset occurs. This is because the *ijarah* contract as defined by the *ulama'* is the contract for using the asset and paying for its use.¹⁸⁴

With the sale of the assets, the *ijarah* contract will automatically be terminated. Nevertheless, as the SBL contract is similar to the terms in the *ijarah* contract in many situations, such as the authority of the owner recalling the assets, evaluating the assets according to current market value and so forth. The SAC members resolved that the *ijarah* concept, with the consent of the owner to sell the leased shares can be applied to the Islamic capital market.

183 See SAC resolution on '*urf* for further details.

184 Al-Kasani, *Bada'i*, *al-Sana'i*, vol. 4, p. 174. Ibn Qaudar, *Takmilah Fath al-Qadir*, vol. 9, pp. 57–60.

CRUDE PALM OIL FUTURES CONTRACT

RESOLUTION

At its 11th meeting on 26 November 1997, the SAC resolved that the futures contract on crude palm oil is permissible as it is in accordance with Shariah principles.

INTRODUCTION

In general, there are two types of futures contracts: commodity futures contract and financial futures contract. However, this resolution only takes into consideration the views of Islamic jurisprudence regarding commodity futures contract. This contract can be defined as an exchange-traded agreement to buy and sell a commodity in an actual market (cash market) in a standard quantity, at a future date and at a determined place of delivery. In Malaysia, there is only one type of commodity futures contract – the crude palm oil futures contract. It is a financial product innovation for those involved in crude palm oil trading to manage risks more efficiently and effectively, especially the risk of price fluctuation.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF CRUDE PALM OIL FUTURES CONTRACT

The SAC, assisted by the Islamic Capital Market Department (ICMD) conducted an in-depth study on this instrument and related Shariah issues. Among the issues were:

Gambling

There were doubts about this instrument based on the requirement imposed on a market player to place a deposit as a margin of payment before he begins trading. This action is regarded as a prohibited bet.

The SAC resolved that such a trading activity does not constitute gambling because the fluctuation of the value occurs due to the change in demand in the crude palm oil futures market. It is also a common phenomenon in the trading world. It is not appropriate to judge a contract whose value fluctuates due to the changing demands for crude palm oil futures market as a gambling activity. This is because gambling activities depend solely on luck and are not related to demand and offer.

Gharar

*Gharar*¹⁸⁵ is defined as something that is not certain.¹⁸⁶ This instrument relates to the uncertainty in obtaining goods that have been bought and in receiving potential profits. The SAC is of the opinion that profit and loss in business is a common factor, although traders aspire to earn profits. This is stated by Allah s.w.t. in several verses, such as *Surah al-Fatir* verse 29 which describes the aspiration of traders of not incurring losses. Allah s.w.t. states:

يَرْجُونَ تَجَرَّةً لَّنْ تَكُونُ

Meaning: "For them, they secretly and openly hope for a commerce that will never fail."

(*Surah Fatir: 29*)

Similarly, in *Surah al-Taubah* verse 24 which describes the worry over a losing concern. Allah s.w.t. states:

وَتَجَرَّةٌ تَخْشَوْنَ كَسَادَهَا

Meaning: "... the commerce in which you fear a decline."

(*Surah Al-Taubah: 24*)

¹⁸⁵ See SAC resolution on *gharar* for further details.

¹⁸⁶ Afzalur Rahman, *Economic Doctrines of Islam*, Islamic Publications, Lahore, vol. 2, pp. 73–75. Taqi al-Uthmani, "'Uqud al-Mustaqbaliyyat fi al-Sil'ah fi Dhau' al-Syari'ah al-Islamiyyah", OIC, *Majallah Majma' al-Fiqh al-Islami*, no. 7, vol. 1, pp. 353–355.

This shows that profit and loss is a characteristic of trading and a trader should take steps to minimise loss.

The main question in a crude palm oil futures contract is whether *gharar* really exists. An important element in trading raised by Islamic jurists is the element of *ghalat*.¹⁸⁷ This must be clarified as there is a misunderstanding that it is similar to the principle of *gharar*. The Islamic jurists see *ghalat* from the view point of *maslahah istiqrar ta'amil* which means that market players are given the freedom to trade, accept and trust each other in their transactions to ensure that the market runs smoothly. Factors that can disturb the market operations are cheating and manipulation. *Ghalat* that involves a wrong assessment of an individual (*ghalat 'aqid*) cannot be used as a basis to terminate a contract. The factor that can terminate a contract is *ghalat wadhih*, which is a mistake caused by apparent cheating.¹⁸⁸

When a crude palm oil futures contract is offered, specifications such as quantity, type, price and delivery date are made known to the market players. Therefore there is no element of *gharar* in the contract. All specifications are made clear in the contract, and surveillance and regulation are provided to ensure there is no cheating.¹⁸⁹

Buying Something That Does Not Exist (*Bai` Ma`dum*)

Ibn Qayyim had studied the issue of *bai` ma`dum*¹⁹⁰ and clarified that the prohibition of *bai` ma`dum* was actually due to presence of the element of uncertainty to hand over the goods sold. Such transactions can take place regardless of whether the goods exist or not. Nevertheless, *bai` ma`dum* that involves something that exists and the seller can obtain it or in the form that can be made tangible, is approved and valid. This often occurs in Shariah, such as *salam* (forward sale) and *istisna`* (contract of manufacture). Therefore, *bai` ma`dum* is prohibited because of the element of *gharar* rather than the element of *ma`dum*.¹⁹¹

The above situation does not occur in the crude palm oil futures market. The contract can be settled in cash before the due date or settlement by delivery

187 It means mistake. See SAC resolution on *ghalat* for further details.

188 Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, pp. 390–405.

189 See *Futures Industry Act 1993*, Business Rules (Exchange and Clearing House).

190 See SAC resolution on *bai` ma`dum* for further details.

191 Ibnu al-Qayyim, *I'lam al-Muwaqqi'in*, vol. 2, pp. 8–10.

on the due date. In addition, the clearing house ensures the delivery and settlement of a transaction. Therefore, the element of *gharar* does not exist or is insignificant.

Speculation

Speculation is also one of the issues that cast doubts on the permissibility of crude palm oil futures contracts according to the Shariah.¹⁹²

Speculation¹⁹³ refers to making profits out of the price movements of goods. In fact, speculation exists in all forms of businesses and is not limited to futures transactions. The concern is whether it is excessive or conducted under normal circumstances.

No Exchange of Goods (*`iwadh*)

Present Islamic scholars¹⁹⁴ put forward the issue that *`iwadh* does not occur in crude palm oil futures transactions. *`iwadh* means the exchange in buying and selling, but in this context no purchase of goods in the actual sense has occurred. Therefore, there is no increase in the value of economic activities. Crude palm oil futures contract trading, in actual fact, gives an increase in value to market players. For example, when producers of crude palm oil hedge,¹⁹⁵ they endeavour to cut costs. This will indirectly improve company profits and make their products more competitive.

Based on the studies, claims such as *gharar*, *bai` ma`dum*, non-existence of *`iwadh*, etc. do not occur. The SAC thus resolved that crude palm oil futures contracts are in accordance with the Shariah, for as long as they are free from the element of *riba* and gambling. So, investors who are concerned with Shariah practices can benefit from these facilities used as instruments for risk management.

192 Al-Uthmani, “‘Uqud al-Mustaqbaliyyat”, vol. 1, pp. 353–354.

193 See SAC resolution on speculation for further details.

194 Al-Uthmani, “‘Uqud al-Mustaqbaliyyat” vol. 1, p. 354. E-Kotby Hussein, *Financial Engineering for Islamic Banks*, The Institute of Middle Eastern Studies, IUI, 1990, pp. 68–69.

195 Price risk management using a concept known as hedging.

COMPOSITE INDEX FUTURES CONTRACT

RESOLUTION

At its 13th meeting on 19 March 1998, the SAC resolved that the mechanism for stock index futures contracts does not contradict Shariah principles. Therefore, stock index trading is allowed as long as it is Shariah compliant, and this is done by ensuring that the index component is made up of Shariah-compliant securities.

INTRODUCTION

A composite index futures contract is one of the instruments categorised as a financial futures contract. A crude palm oil contract is categorised as a commodity futures contract. There are two types of financial futures contracts in the futures industry in Malaysia. These are the Kuala Lumpur Composite Index (KLCI) futures contracts and KLIBOR futures contracts which are traded on Bursa Malaysia Derivative Bhd. The SAC decided that both of these contracts are not permissible by Shariah. This is because the KLCI futures contract is based on the underlying index where most of its components are securities of companies that have not been approved by the SAC. On the other hand, the KLIBOR futures contract is based on interest rates and hence, contains the element of *riba*.

Nevertheless, it is important to discuss the extent to which the stock index mechanism is permissible according to Shariah in the context of risk management. Added to this was the launch of the Shariah Index by Bursa Malaysia. It functions as a benchmark for the performance of Shariah-compliant securities. The increase in the Shariah Index depicts an increase in the share prices in this sector and vice-versa.

A composite index futures contract is created when a total number of shares which form the index components are made the underlying asset to the instrument. The share index is a benchmark which indicates the performance of the share/equity market. The contract is an agreement between a buyer and seller to receive and hand over a certain number of shares comprising the selected share components at an agreed price and at a determined future date. However, the agreed price is not paid in full, merely a margin value until a full settlement is made.

In the Malaysian context, the KLCI is a combination of 100 companies listed on the Main Board that represent various sectors and are most frequently traded on Bursa Malaysia. This index is calculated every minute during a trading day. The Shariah Index is made up of all Shariah-compliant securities approved by the SAC and are listed on the Bursa Malaysia Main Board.

As the composite index varies based on market performance, the price of a composite index futures contract will also change according to the movement of the share index value on the stock exchange. The underlying asset exists in the physical form and is the total number of shares which are components of a stock index. As the total is rather large, delivery in its physical form cannot take place in an index futures contract. The buyer will receive only its value in lieu of the physical delivery. That is why the contract is settled in cash before or on the due date.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF COMPOSITE INDEX FUTURES CONTRACTS

A composite index futures contract is a new instrument for managing risks in securities trading. It is not fully compatible with the concepts of *salam*, *istisna'*, *musyarakah*, etc. Therefore, it would be inaccurate to categorise it as the same with existing named contracts, in accordance with Islamic jurisprudence. The SAC, assisted by the ICMD carried out studies on this new contract and resolved that it does not contradict the Shariah principles, provided the index components comprise Shariah-compliant securities.

Features of a Contract Are Not Similar to *Muqamarah*, *Jahalah* and *Gharar*

The issues of *muqamarah* (gambling), *jahalah*, *gharar* and *bai' ma'dum* are

among the main issues emphasised by contemporary *ulama`* who do not permit composite index futures contracts.

Buying and selling of index is not synonymous with gambling because there is no similarity to losing a bet. In gambling, the player loses all his money if his guess is wrong. This does not happen in index trading as the total index point has its own inherent value. What happens is, the investor will experience a decrease or increase in the value depending on the demand for the total number of shares that comprise the index component. Index trading does not involve any element of betting.¹⁹⁶

This contract also does not contain elements of *jahalah* and *gharar* as it is traded in clear quantities and pricing. There is no vagueness in price and quantity. The price is determined by the market based on demand and supply.

The Issue of *Bai` Ma`dum*¹⁹⁷

In an index futures contract, there is actually no physical delivery on the due date. This is in contrast to crude palm oil futures trading where physical delivery can occur. As a solution, physical delivery can be substituted for cash value.

In general, Islamic jurisprudence can accept this. Al-Baghdadi in his book *Majma` al-Dhamanat* discussed the relevant issues. Such settlements are carried out when physical delivery cannot be done.

Solutions using cash value means pricing something according to current market value without increasing or decreasing it.¹⁹⁸ Other than the case of trading, the *ulama`* also discussed at length the same problem on issues concerning *ghasb*¹⁹⁹ and its compensations.²⁰⁰ This shows that replacing physical delivery with cash value is not something new in Islam.

196 See SAC resolution on gambling for further details.

197 See SAC resolution on *bai` ma`dum* for further details.

198 Ibnu `Abidin, *Hasyiah Rad al-Mukhtar*, vol. 4, pp. 573–576.

199 *Ghasb* refers to taking something by force. It is different from *sariqah* (theft) in the sense that a thief takes something inconspicuously while in *ghasb* it is done blatantly.

200 Al-Maidani, *al-Lubab Syarh al-Kitab*, Dar al-Kitab al-`Arabi, Beirut, vol. 2, pp. 188–196.

Ta'wil Based on Hikmat Tasyr'iyyah

Ta'wil (interpretation) based on *hikmat tasyr'iyyah* (secrets and reasons for a ruling) is very important. Prof. Dr. Fathi al-Duraini stressed that *ta'wil* based on *hikmat tasyr'iyyah* is stronger and more correct because a *mujtahid* uses his understanding to apply the secrets and intentions to be achieved by a *nas* in implementing a ruling. Therefore, it does not mean that we have digressed from a certain *dalil* but that we understand the actual intentions of the *nas* more comprehensively.²⁰¹

In the context of a market, if viewed from the angle of *hikmat tasyr'iyyah*, the stock index futures will create *maslahah* to the trader (investor) in particular and to the economic system in general as it acts as a hedging instrument.

'Urf Iqtisadi Khas

'Urf are common practices recognised by the local people in their daily lives be they in action or words. The composite index futures contract is an instrument that can be used by fund managers, underwriters and market players to transfer market price risks. In principle, it is a valid *'urf iqtisadi khas* (common practices specifically occurring in economic activities) that does not contradict the Shariah principles. What needs to be corrected is that the index component must consist of securities that are Shariah compliant. This is overcome by the establishment of the Shariah Index.

The *Mal* Concept

The recognition of *mal* is important to determine whether something can be traded. Imam Al-Suyuti outlined the *mal* concept as something that has a value that can be bought and sold, and can be compensated for its damage.²⁰²

Based on this guideline, the status of a futures contract as *mal* is confirmed. This is because it has a value within a specific period and is traded in its own market. It also fulfils *haq maliy* in Islam. In the instance of *'urbun* (deposit),²⁰³ for example, *haq maliy* is limited until the maturity date where, if it is not

201 Al-Duraini, *Al-Manahij al-Usuliyyah*, p. 208.

202 Al-Suyuti, *Al-Asybah wa al-Naza'ir*, Dar al-Fikr, Beirut, 1983, p. 409.

203 *'Urbun* refers to deposit. See Nazih Hammad, *Mu'jam al-Mustalahat*, p. 196.

utilised before that date, the right no longer has value.²⁰⁴ Likewise in a composite index futures contract, it is of value until the maturity date, after which the contract cannot be traded. However, the holder of the contract still benefits from the difference in the buying and selling price upon maturity.

204 Ibn Qudamah, *Al-Mughni*, vol. 4, pp. 312–313.

ISLAMIC BENCHMARK BOND

RESOLUTION

The SAC discussed this in a series of meetings and, at its 8th meeting on 9 June 1997, agreed to the structuring of the Islamic benchmark bond, also known as the Khazanah Bond. This bond is structured based on *murabahah* principles.

INTRODUCTION

The main function of the Khazanah Bond is not to raise capital or to finance a certain project but is created specifically as a benchmark for corporate bonds to be issued.

The *murabahah* principle is used in structuring the Islamic benchmark bond. This principle can be applied as it fulfils the features of a benchmark bond. Several main features²⁰⁵ are essential for an Islamic benchmark bond to be issued:

- (a) The bond is liquid, that is, it can be traded actively in a secondary market;
- (b) The bond will be issued in series and frequently;
- (c) The returns from the bond must be made known; and

205 It is not a Shariah criteria.

(d) The returns from the bond are determined by the market.

In this context, the Khazanah Nasional Bhd (KNB) was found to be a suitable corporate institution for issuing the bonds. It is a government corporation that manages the assets of the Malaysian government.

Under this concept, KNB will sell its Shariah-compliant assets to investors for cash, and buy them back at a higher price on a deferred basis.

What is interesting about the Islamic benchmark bond is that the asset buy-back price through the *murabahah* way is predetermined by KNB but the cash price or selling price (cost to the investor) will only be known through a tender process by bidding using the *bai' muzayadah* principle (bidding or bargaining). After the bidding is carried out, the cash selling price and buy-back price through *murabahah* for trading the KNB assets are agreed upon by both parties. This agreement is called *ittifaq dhimni*. The cash selling price is lower than the buying-back price as the latter has already included profits to the investor. For example, if the cash selling price for the investor is RM90 million and the buy-back price from the investor five years later is RM100 million, this means that the investor receives a profit of RM10 million. This trading is then structured into securities to enable it to be a capital market instrument.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF AN ISLAMIC BENCHMARK BOND

An Islamic benchmark bond is regarded permissible based on the following arguments:

***Siyasah Iqtisodiyah* Principle**

The SAC resolved that a benchmark used as a guide in price determination does not contradict Shariah based on *siyasah iqtisodiyah* which is an economic ruling. It acts as a reference for determining the price level in a more systematic way and consistent with prevailing market conditions. An appropriate price level is an important feature of an Islamic market as underlined by the principle of *istiqrar ta'amul*. In general, this principle emphasises the importance of a market that operates smoothly based on the mutual agreement of buyers and sellers, resulting from a system that is

transparent, fair and efficient, and with market integrity. Hence, participating individuals will not be ignorant of the market and will be able to facilitate trading activities to fulfil their needs.²⁰⁶ To achieve this, Islam defined the principle of *ghalat*²⁰⁷ and prevented the occurrence of *gharar*. With the establishment of benchmark, the uncertainty of pricing is minimised and the market is made more transparent and efficient.

The *Murabahah* Principle

The principle involves an *'aqd* for buying and selling assets whereby the price which includes a profit margin is agreed upon by both parties (the buyer and seller). This concept is appropriate in structuring an Islamic benchmark bond as the profit in selling the asset has been predetermined. The price of the issued bond and yield to be earned will be determined based on the total assets transacted and the *murabahah* profit.

The *Bai` Dayn* Principle

After the buying and selling of assets have been concluded according to *murabahah*, the Islamic debt securities can be structured and sold in a secondary market according to the principle of *bai` dayn*. The SAC, at its 2nd meeting on 21 August 1996, agreed to accept the principle of *bai` dayn* as an instrument for the Islamic capital market.²⁰⁸

In the context of the Islamic benchmark bond, the KNB will sell its assets in cash to a principle dealer (PD)²⁰⁹ and buys them back on *murabahah*. The *murabahah* price which is paid in instalments is a right to the debt for the PD. This right is *haq maliy* or the right on an asset that can be traded.²¹⁰ The right to the debt which is in the form of *syahadah dayn* (debt certificate) can be used to obtain cash by redeeming it from the debtor upon maturity. This *syahadah dayn* complies with *mal* according to a majority of Islamic jurists²¹¹ and can be traded.

206 Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, pp. 378–379.

207 *Ghalat* outlines the mistakes that should not happen to parties that have performed *'aqd* to build confidence in the market.

208 See resolution on *bai` dayn* for further details.

209 Principal dealer is a financial institution authorised by the central bank to deal in debt securities, such as government and private debt securities.

210 Al-Khafif, *Ahkam al-Muamalat*, p. 30.

211 Zaydan, *Madkhal li Dirasah al-Syariah al-Islamiyyah*, p. 183.

According to the *Syafi'i Mazhab*, a debt that is to be sold to a third party must comply with several basic regulations as follows:

- (a) The debt must be the result of trading activities permissible in Islam and the *`aqd* must be legal according to Shariah; and
- (b) The debt to be sold must be a debt of quality, i.e. guaranteed to be safe and has a low risk of default. This is in the interests of the investor.²¹²

In this context, the Islamic benchmark bond that is issued through the KNB, fulfils both criteria above. This is because the KNB has a sound credit rating supported and guaranteed by the Malaysian government.

The *Bai` Muzayadah* Principle

The Islamic benchmark bond is also intended to be a benchmark for the current value of an asset and also the profit level. In this context, the principle of *bai` muzayadah* can be applied. It refers to the action of the seller offering his products in the market followed by the demand of several buyers competing to offer a higher price, which results in the seller selling the product to the highest bidder. The SAC resolved that *bai` muzayadah* is permissible (please refer to the resolution regarding *bai` muzayadah*). This is based on a practice of the Prophet s.a.w. himself. Imam Bukhari has dedicated a specific topic that explains the permissibility of such trading.

This principle allows the market player to obtain the true market value of the assets sold. As many financial institutions are willing to buy the assets in cash, KNB will open tenders for the purchase of the assets. KNB will choose the best price offered at the lowest cost and with high liquidity.

The *Ittifaq Dhimniy* Principle

Ittifaq dhimniy refers to a tacit understanding that exists before a contract is sealed. The seller and buyer have made a prior agreement to sell the asset at a certain price and to buy it back at a certain price. In this context, the PD who has succeeded in securing the tender will buy the assets that have been

212 Al-Syirazi, *Al-Muhazzab*, vol. 1, pp. 262–263.

bidden on. This refers to the tacit understanding in a sale and purchase transaction, in accordance with *muzayadah* trading. It is likely that in the context of forming an Islamic benchmark bond, there is more than one PD successfully buying the assets. Therefore, several PDs will be partners in buying the assets according to their allotment.

FINANCE LEASE AND OPERATING LEASE

RESOLUTION

The SAC, at its 14th meeting on 7 May 1998 resolved that rental payments from finance leases and operating leases are Shariah-compliant products if they are free of any element of penalty.

INTRODUCTION

Finance lease facilities are usually given by finance companies registered with Bank Negara Malaysia. Most of these companies are subsidiaries of financial institutions. There are also other non-finance lease companies which offer leasing facilities commonly known as operating lease. Operating lease services can be slightly different from that of finance lease services in that an operating lease does not offer an option to customers to buy the leased assets at the end of the period.

In calculating the lease rental, the approach adopted by the finance leasing and operating leasing companies is similar, that is based on the value of asset being financed, rate of charge or returns and the period of financing.

In general, the penalty rate on late payment is high. This payment charge is imposed to discourage late payment by customers as well as to prevent leasing companies from being exposed to losses due to opportunity loss.

THE *IJARAH* PRINCIPLE: COMPARISON OF FINANCE LEASE TO OPERATING LEASE

From research carried out, the SAC resolved that finance lease and operating leases are permissible. This is based on the following:

The *Ijarah* Principle

The mechanisms that are almost similar to finance leases and operating leases in daily practices are *ijarah* and *ijarah thumma bai'*. Other terms used are *ijarah wa iqtina'* and *ijarah muntahiyah bi tamlik*.

The concept for finance and operating leases without the late payment clause is no different from *ijarah* and *ijarah thumma bai'*. In an operating lease, the lessee has the right of utilising the assets within a specific period as agreed to in the contract. As a consumer of the assets, he is required to pay for the consumption within a certain period, whereas ownership of the assets is still under the jurisdiction of the lessor.

The principle is similar to *ijarah* as the assets can benefit the lessee (*musta'jir*) within a certain period for a certain sum agreed on. Meanwhile, the assets still belong to the original owner (*mua'jir*). The *musta'jir* only has the right to benefit from the assets. However, the Islamic jurists still include *ijarah* in the category of buying and selling (*bai'*). The item traded is a benefit which is the right to use the asset.²¹³ It is to be understood that Islamic jurisprudence recognises the right as *mal*.

The basis of finance lease is similar to *ijarah thumma bai'*. This mechanism is a development of the principle of *ijarah* which is in the nominee contract as it is more of a financing feature. Unlike the first instrument, it gives a choice to the *musta'jir* at the end of the *ijarah* period whether to buy the asset or to dispose of it. If the *musta'jir* chooses to buy the asset, a new contract will be drawn up.

The SAC then resolved that finance and operating lease activities without the penalty clause do not contradict the Shariah as they are similar to our daily practices of *ijarah* and *ijarah thumma bai'*.

213 Ibnu Rusyd, *Bidayah al-Mujtahid*, vol. 2, pp. 178–180.

Penalty

Regarding the penalty on late payment for finance and operating leases, the SAC at its 20th meeting on 14 July 1999 agreed to accept the resolution of the SAC of Bank Negara Malaysia. The resolution allowed only one per cent penalty rate to be imposed on late payment and the calculation of the penalty is not based on compounded value. Based on the resolution, the SAC resolved to take into account the difference between penalty rates imposed by a company that provides finance and operating lease facilities with a permitted penalty rate of one per cent.²¹⁴

214 See SAC resolution on penalties for further details.

PREFERENCE SHARES

RESOLUTION

At its 20th meeting on 14 July 1999, the SAC resolved that the basic preference share (non-cumulative) is permissible based on *tanazul*.²¹⁵

INTRODUCTION

A preference share is among hybrid instruments that combine equity and debt in a capital market. It is in the form of hybrid equity which allows its holders to receive a fixed dividend not enjoyed by ordinary shareholders. Usually, this fixed dividend is described as a percentage of the nominal share value.

The *Companies Act 1965* defines preference share as a share that does not give a right to the shareholders to vote at its general meeting or any right to participate in any distribution of the company that is above the stated amount, whether through dividends or redemption, dissolution or otherwise.²¹⁶

There are many forms of preference share in the market, among which are:

- (a) Redeemable preference shares;
- (b) Participating preference shares;
- (c) Cumulative preference shares;

²¹⁵ *Tanazul* means to drop claims to right.

²¹⁶ *Companies Act 1965*, section 4.

- (d) Convertible preference shares;
- (e) Increasing rate preference shares; and
- (f) Perpetual/irredeemable preference shares and non-cumulative preference shares.

The SAC carried out studies on non-cumulative preference shares. It refers to preference shares whose period of holding by the investor is permanent and similar to ordinary shares except that dividends are fixed and non-cumulative. It has features similar to those of an ordinary share – no maturity date and non-cumulative dividend payment. Non-cumulative preference shares is included in the classification of equity with fixed dividends.

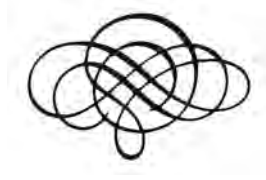
ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF PREFERENCE SHARES

The SAC ruled that non-cumulative preference shares are permissible based on *tanazul* where the right to profit of the ordinary shareholder is willingly given to a preference shareholder. *Tanazul* is agreed upon at an annual general meeting of a company which decides to issue preference shares in an effort to raise new capital. As it is agreed at the meeting to issue preference shares, this means that ordinary shareholders have also agreed to give priority to preference shareholders in dividing the profits, in accordance with *tanazul*.

In the context of preference shares, *tanazul* means surrendering the rights to a share of the profits based on partnership, by giving priority to preference shareholders. It is also known as *isqat haq*²¹⁷ in Islamic jurisprudence.

217 *Al-Mausu'ah al-Fiqhiyyah*, vol. 4, pp. 226–256.

CAPITAL MARKET ISSUES ACCORDING TO ISLAMIC JURISPRUDENCE



RIBA: PRINCIPLES AND DIVISION

RESOLUTION

The Shariah Advisory Council (SAC) resolved that *riba* is one of the main criteria causing securities of listed companies to be excluded from the SAC-compliant list. The Islamic Instrument Study Group (IISG), at its 5th meeting on 23 August 1995 resolved that securities of a company whose operations and main activity are based on *riba* are not *halal*. Examples are merchant banks, commercial banks and finance companies.

INTRODUCTION

Islam forbids *riba* in economic and financial activities. This is based on arguments in the Quran and the Sunnah. Many verses in the Quran clearly oppose *riba*. Allah s.w.t. clearly states:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنتُمْ
مُؤْمِنِينَ ﴿٢٧٨﴾ فَإِن لَّمْ تَفْعَلُوا فَأْذَنُوا بِحَرْبٍ مِّنَ اللَّهِ وَرَسُولِهِ ۖ وَإِن تُبْئِئْ
فَلَكُمْ رُءُوسٌ أَمْوَالِكُمْ لَا تَظْلِمُونَ وَلَا تُظْلَمُونَ ﴿٢٧٩﴾

Meaning: "O you who believe! Fear Allah, and give up what remains of your demand for *riba*, if you are indeed believers. If you do it not, take notice of war from God and His Messenger. But if you turn back, you shall have your capital sums: deal not unjustly, and you shall not be dealt with unjustly."

(Surah al-Baqarah: 278–279)

The threat of war as stated by Allah s.w.t. in the above verse shows that *riba* is an activity prohibited by Allah s.w.t. Muslims must purify themselves and avoid these activities.

Riba in Arabic means something that has increased,²¹⁸ but it does not mean that everything that increases is *riba*, according to Islamic jurisprudence. As narrated by al-Tabari, *riba*, was commonly practised during the *jahiliyah* (pre-Islamic times) period, for example buying on credit. When the period of credit expired and a buyer could not settle his debt, the seller would extend the loan period and increase the amount of the debt.²¹⁹

DIVISION OF *RIBA*

In general, *riba* is divided into two categories:

- (a) *Riba qurudh* is *riba* that occurs through debt/loan; and
- (b) *Riba buyu`* is *riba* that occurs through trade.

Riba Qurudh Concept

According to al-Jassas,²²⁰ *riba* as practised by the Arab *Jahiliyah* came in a few forms. When the verse prohibiting *riba* was introduced, the practice of *riba* was still being carried out. *Riba qurudh* involves lending money and imposing interest. Among the forms of *riba* practised are as follows:

- (a) The debtor borrows a certain sum for a certain period according to the agreed terms; the debtor must pay back more than the capital sum or loan;
- (b) A creditor gives a periodic loan and earns monthly interest. The loan/capital sum lasts until the period of expiry. Upon expiry, if the debtor fails to pay back the capital sum, the period to pay back will be extended. The creditor will continue collecting interest until the new expiry date. In other words, this type of *riba* is more like money lending. In other words, the money supplier lends his money to earn interest every month, until the period expired; and

218 Fairuz Abadi, *Al-Qamus al-Muhit*, Dar al-Fikr, Beirut, 1995, p. 1158.

219 Ibnu Jarir al-Tabari, *Jami' al-Bayan*, Dar al-Fikr, Beirut, 1995, vol. 5, p. 140.

220 Al-Jassas, *Ahkam al-Quran*, Dar al-Ihya' al-Turath al-'Arabi, Beirut, vol. 2, pp. 183–189.

- (c) A trader sells his product with payment deferred to a specific period. If the buyer fails to pay within that period, the period will be extended by increasing the interest on the product price.

Upon close examination, the type of *riba qurudh* prohibited by Allah s.w.t. is similar to activities practised by commercial banks and conventional finance companies. This is because banks or institutions give out loans and obtain interest from the loan.

Riba Buyu` Concept

Riba buyu` occurs in the trading of ribawi products as stated by the Prophet s.a.w. in his *hadith*:

الذهب بالذهب و الفضة بالفضة و البر بالبر و الشعير بالشعير
و التمر بالتمر و الملح بالملح مثلاً بمثل يدا بيد، فإذا اختلفت
هذه الأصناف فبيعوا كيف شئتم إذا كان يدا بيد

Meaning: "Exchange gold for gold, silver for silver, grain for grain, barley for barley, dates for dates, salt for salt in the same amount and of the same type and must be handed over in an 'aqd ceremony. If what you have exchanged differs in type, you can trade according to your wishes but it must be done on the spot."²²¹

It covers two types of *riba*; *riba nasi'ah*, trading in which the settlement is deferred and not done on the spot and *riba fadhl* which means unlawful excess gained in any exchange of *ribawi* products.²²²

In the above *hadith*, the Prophet s.a.w. explained a way to trade the goods categorised as *ribawi* products, such as gold, silver, grain, barley, dates and salt.

In general, all *ribawi* products mentioned in the above *hadith* can be classified into two categories. Any product possessing similar features can be classified according to the type of *riba* product. The two categories are, medium of exchange and non-perishable staple food.²²³

221 *Hadith* narrated by Muslim.

222 Al-Sowi, *Musykilah al-Istithmar*, pp. 333–354.

223 Islamic jurists held different opinions on the categories of *riba*. What is mentioned here is based on the dominant opinions of the Maliki *Mazhab*.

- (a) Medium of exchange – this refers to gold and silver which are used to measure value because of their strength to back currency. For example, gold has long been used to back the reserves of a country, as well as the issuance of currency. Therefore, currency is classified as a *ribawi* product because it acts as a measure of value. Money is commonly used to measure something of value (property); and
- (b) Non-perishable staple food – represented by grain, barley, dates and salt, used as staple food in a certain area and can be kept for a long time. In the Malaysian context, rice would be included as a *ribawi* product.²²⁴

Riba buyu` can be avoided as explained by the Prophet s.a.w.:

مثلا بمثل يدا بيد، فإذا اختلفت هذه الأصناف
فبيعوا كيف شئتم إذا كان يدا بيد

Meaning: "The same amount and the same type of goods must be surrendered at the `aqd ceremony. If what you exchange is different in types, then you can exchange according to your wishes but it must be on the spot."

Based on the *hadith* above, Islamic jurists have set down specific conditions for trading *ribawi* products with similar *`illah* and type as follows:

- (a) Exchange must be of the same weight or measure; and
- (b) Settled on the spot and handed over in an *`aqd* ceremony.

If the exchange involves *ribawi* products of a similar *`illah* but of different type, such as the exchange of gold for silver, it must fulfil just one condition, that it must be done on the spot and in an *`aqd* ceremony but does not have to be of the same weights and measures. Such conditions do not apply if the exchange involves different *ribawi* products of different categories, such as the exchange of a medium of exchange with staple food or with non-*ribawi* products or similar non-*ribawi* products.²²⁵

224 Al-Sowi, *Musykilah al-Istismar*, pp. 343, 347. Rafiq al-Misri, *Masraf al-Tanmiyah al-Islami*, Muassasah al-Risalah, Beirut, 1987, pp. 163–167.

225 Al-Sowi, *Musykilah al-Istismar*, pp. 343, 347. Rafiq al-Misri, *Masraf al-Tanmiyah al-Islami*, pp. 163–167.

GHARAR

RESOLUTION

The SAC resolved that the existence of *gharar* in the main activities of a company can cause the company's securities listed on Bursa Malaysia to be excluded from the list of securities approved by the SAC. The IISG at its 5th meeting on 23 August 1995, resolved that securities with *gharar* features are not *halal*. Company activities categorised as *gharar* include conventional insurance activities.

INTRODUCTION

In Arabic, *gharar*²²⁶ has the same meaning as *khatar* which means something dangerous.²²⁷ It also carries the meaning of *khida`* or cheating.²²⁸ In terms of terminology, *gharar* refers to elements of uncertainty that can expose someone to danger. In the context of buying and selling, if it is said that an *`aqd* has the element of *gharar*, it means that there is an element of uncertainty in the *`aqd*. As an example, a sale and purchase contract which does not state its price is said to possess an element of *gharar* as cheating in price can occur.

Further examples of *gharar* include conventional insurance where the buyer buys something and there is uncertainty as to whether the item bought can

226 According to Islamic jurisprudence, *gharar* differs from *taghrir* which is synonymous with *ghurur* or *tadlis*. *Gharar* has no elements of cheating while *taghrir* has. Please refer to al-Dhariri, *al-Gharar wa Atharuhu fi al-Uqud al-Fiqh al-Islammi*, Dar al-Jil, Beirut, 1990, p. 35.

227 Majma' al-Lughah al-Arabiyyah, *Al-Mu'jam al-Wasit*, Dar al-Dakwah, Istanbul, 1980, vol. 2, p. 648.

228 Fairuz Abadi, *Al-Qamus al-Muhit*, p. 577.

be obtained or not. The item bought (insurance) will only be claimed if an accident or disaster strikes the buyer, but the accident or disaster may or may not happen. Therefore, it is uncertain if the item bought by the buyer will ever materialise.

CONCLUSION OF SAC ABOUT *GHARAR*

From studies done, the SAC concluded that *gharar* is a negative element in trading. This is based on the following factors:

Hadith of the Prophet s.a.w.

The basis of prohibition of *gharar* is a *hadith* of the Prophet s.a.w.:

أن النبي عليه الصلاة والسلام قد نهى عن بيع الغرر

Meaning: "Verily, the Prophet s.a.w. forbids *gharar* trading."²²⁹

Views of Past Islamic Jurists

The esteemed *mazhab* of past Islamic jurists gave several perspectives on *gharar*. Their differing opinions had an impact on the resulting rulings. From studies of their works, three main definitions of *gharar* were derived.²³⁰

First: *Gharar* which means *jahalah* about the products. Among *ulama'* with such a view were Al-Sarakhsi and Al-Zaila'i from the Hanafi *Mazhab*. Al-Sarakhsi defined *gharar* as something with unknown consequences.²³¹

Second: *Gharar* refers to *syak* (suspicion), according to Al-Kasani and Ibnu Abidin from the Hanafi *Mazhab* and Al-Dusuqi from the Maliki *Mazhab*. According to Al-Kasani, *gharar* is the potential risk faced by a person, with the possibility that the goods may or may not eventually exist (*syak*). To Al-Khasani, *gharar* is the suspicion that a good may not exist.²³²

229 *Hadith* narrated by Muslim.

230 Yasin Ahmad Ibrahim Daradikah, *Nazariyyah al-Gharar fi al-Syar'ah al-Islamiyyah*, Wizarah al-Auqaf, Amman, vol. 1, p. 77.

231 Al-Sarakhsi, *Al-Mabsut, Dar al-Ma'rifah*, 1989, vol. 12, p. 194.

232 Al-Kasani, *Bada'i al-Sana'i*, vol. 5, p. 163.

He outlined this while discussing the trading of goods that have yet to be seen by the buyer. For the Hanafi *Mazhab*, such a trade is lawful because the buyer has the right to make a choice after he has viewed the goods. This view is based on the Prophet s.a.w. *hadith*:

من اشترى شيئاً لم يره فهو بالخيار إذا رآه

Meaning: "Whosoever buys something that has not been viewed, he has *khiyar* (choice to buy or reject) after viewing it."²³³

The Hanafi *Mazhab* was of the opinion that the risk of the buyer being exposed to uncertainty is minimum, as when the goods arrive, the buyer can make a choice based on what he sees.

Third: *Gharar* refers to something with unknown consequence. This was the opinion of a majority of Islamic jurists.

The Syafi'i *Mazhab* defined *gharar* as *khatar* (of high risks). Al-Syirazi, a jurist in this *mazhab*, defines *gharar* as something whose condition and consequence are unknown.²³⁴ Al-Ramli stated that, *gharar* is something that has two assumptions, positive and negative, with the negative being more dominant.²³⁵ Al-Sharqawi and Al-Qalyubi, also jurists from the Syafi'i *Mazhab*, defined *gharar* as something whose consequence is unknown and has two assumptions, positive and negative, the negative outweighing the positive.²³⁶

Between the views of the Hanafi and Syafi'i schools of thought, the Syafi'i *Mazhab* was of the opinion that *jahalal* about a product during the buying and selling *'aqd* is a significant *gharar*. This nullifies the *'aqd*. That is why the Syafi'i *Mazhab* stipulated that a buyer must know the specifications and features of the product he is interested to buy, at the time of the *'aqd*.²³⁷

From the views of these two *mazhab*, it can be seen how the different interpretations of *gharar* have a different impact on the relevant rulings. This case puts forward buying and selling of a product that has not been seen by

233 *Hadith* narrated by al-Daraqutni.

234 Al-Syirazi, *Al-Muhazzab*, vol. 1, p. 262.

235 Shamsuddin Muhammad al-Ramli, *Nihayah al-Muhtaj*, Dar al-Fikr, Beirut, 1984, vol. 3, p. 405.

236 Al-Syarqawi, *Hasyiah al-Syarqawi*, Matba'ah al-Babi al-Halabi, Cairo, 1941, vol. 2, p. 9. Qalyubi wa 'Umairah, *Hasyiata Qalyubi wa 'Umairah*, Dar Ithya al-Kutub al-Arabiyyah, Cairo, vol. 2, p. 161.

237 Qalyubi wa 'Umairah, vol. 2, p. 161.

the buyer. However, the two *mazhab* reached an agreement on steps taken to avoid the risks of cheating in the *`aqd* of buying and selling. In this context, the *Syafi'i Mazhab* is seen to be stricter in guarding the *maslahah* of the buyer.

Forms of *Gharar*

From the studies made, *gharar* may occur in two situations:²³⁸

- (a) *Sighah* contract: such as two sales and purchases in one transaction (*bai'atain fi bai'ah*); and
- (b) Subject contract: such as *ma'dum* sales and purchase.

Gharar is divided into three,²³⁹ that is *gharar fahisy* (plenty),²⁴⁰ *gharar yasir* (a little)²⁴¹ and *gharar mutawassit* (moderate).²⁴² *Ulama'* unanimously say that *gharar fahisy* can nullify the contract, especially *`uqud mu'awadhat* and *gharar yasir* do not give any effect on the contract. However, they have differences of opinions on *gharar mutawassit*.

According to Muhammad Beltaji, it is impossible for the buyer and seller to avoid *gharar* completely. Therefore, past *ulama'* differentiated between *gharar* which nullifies *`aqd* and *gharar* which can be excused based on the maxims of Islamic jurisprudence, such as *raf'u al-haraj*²⁴³ and *la dharar wa la dhirar*.²⁴⁴ As a result of his study, a majority of Islamic jurists placed three conditions on which *gharar* can be excused:

- (a) The *gharar* is minor and small;
- (b) Such trading is needed by society; and
- (c) The *gharar* cannot be avoided without *masyaqqah* (hardship) that is recognised by *Syara'*.²⁴⁵

238 See the example al-Dharir, *al-Gharar wa Atharuhu fi al-'Uqud*, p. 76.

239 Daradikah, *Nazariyyah al-Gharar fi al-Syari'ah al-Islamiyyah*, p. 97.

240 For example, selling fish which are still in the river.

241 For example, selling a house with the furniture therein which is not accounted in detail.

242 *Gharar mutawassit* is *gharar* which lies between *gharar fahisy* and *gharar yasir*.

243 The method in *fiqh* which bears the Shariah meaning of eradicating hardship.

244 The method in *fiqh* which bears the meaning of not hazardous and causing hazard (in Islam).

245 Muhammad Beltaji Hassan, *Al-Milkiyyah al-Fardiyyah fi al-Nizam al-Iqtisadi al-Islami*, Maktabah al-Syabab, Cairo, 1988, pp. 202–203.

GAMBLING

RESOLUTION

The SAC concluded that gambling is one of the main criteria causing a listed company's securities to be excluded from the list of Shariah-compliant securities by the SAC. The IISG, at its 5th meeting on 23 August 1995, resolved that the securities of a company carrying out gambling activities are not permissible. The activities include casinos and gaming.

INTRODUCTION

Gambling or in Arabic, *qimar* or *maisir* means any activities which involve betting, whereby the winner will take the entire bet and the loser will lose his bet.²⁴⁶

DALIL ON THE PROHIBITION OF GAMBLING

The prohibition of gambling is clear in the Quran, where Allah s.w.t. commands believers to eschew gambling by stating:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَمُ رِجْسٌ
مِّنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ

246 Nazih Hamad, *Mu'jam al-Mustalahat*, p. 226.

Meaning: "O you who believe! Intoxicants and gambling (dedication of) stones, and (divination by) arrows, are an abomination – of satan's handiwork: eschew such (abomination), that you may prosper."
(Surah al-Maidah: 90)

As gambling is prohibited by Allah s.w.t. Muslims are forbidden to be involved in contributing towards developing companies which carry out trade based on gambling. Hence, the securities of a company whose main activity is gambling will be excluded from the list of SAC-compliant securities.

GHALAT

RESOLUTION

Ghalat is a negative element that can invalidate an *`aqd* according to Islamic jurisprudence. There is, however, a number of interpretations given by past and modern Islamic jurists pertaining to *ghalat* that offer pros and cons to its practice in the present day. Hence, the SAC, when discussing crude palm oil futures contracts, outlined the scope of *ghalat* as a guidance in assessing capital market issues.

INTRODUCTION

According to the theory of *`aqd* in Islamic jurisprudence, *ghalat* is a negative element that can affect the validity of an *`aqd*. In Arabic, the word *ghalat* is used to mean error in perception.²⁴⁷

***Ghalat* from the Perspective of Islamic Jurists**

Although past Islamic jurists did not present the *ghalat* theory in a specific topic, modern Islamic jurists²⁴⁸ have tried to present the *ghalat* theory as a negative element in an *`aqd* based on principles outlined in the *muamalat*. This is based on the studies on forms of errors in *`aqd*, whereby Islamic

247 Fairuz Abadi, *Al-Qamus al-Muhit*, p. 612, *Majma` al-Lughah al-`Arabiyyah Al-Mu`jam- al-Wasit*, p. 658.

248 As an example refer to Abd Razzak al-Sanhuri, *Masadir al-Haq fi al-Fiqh al-Islami*, Dar Ihya' al-Turath al-`Arabi, Beirut, vol. 2, pp. 104–146. Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, pp. 390–407. Muhammad Yusuf Musa, *Al-Amwal wa Nazariyyah al-Aqd*, Dar al-Fikr al-Arabi, Cairo, 1996, pp. 366–369. Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, pp. 216–218.

jurisprudence has given the right to a buyer to cancel the *`aqd* should there be an error through *khiyar wasf*,²⁴⁹ *khiyar `aib*²⁵⁰ and *khiyar ru'yah*.²⁵¹

Ghalat takes place when the assumption made by a buyer about what he wants turns out to be otherwise, and this assumption is the reason why the buyer carried out the sale and purchase *`aqd*.²⁵²

An example of *ghalat* in the capital market is the case of buying shares. For example, someone buys ABC shares on the assumption that they can bring good returns. However, after the purchase, the share price falls. This situation is categorised as *ghalat `aqid* (an error on the part of the buyer). According to Islamic jurisprudence, this error does not allow the party to withdraw from the *`aqd*. This is because the consideration to buy the ABC shares was based on a personal decision after taking into account the expected future positive performance of the shares. The *`aqd* carried out does not contain any *gharar* element and what has happened is merely *ghalat `aqid* which does not nullify the *`aqd* because it is a normal situation. In Islamic jurisprudence *ghalat* can affect an *`aqd* and causes it to be annulled if it pertains to the type and feature of the traded object. For example, *ghalat* pertaining to a type of object is when someone buys jewellery assumed to be gold but which later turns out to be gold-plated copper. *Ghalat* pertaining to feature is when someone buys a watch believing it to be of a famous brand, only to discover later that it is a common brand in which he is not interested.²⁵³

In discussing the issue of *ghalat*, Islamic jurists look at *maslahah istiqrar ta'amul*.²⁵⁴ This methodology means that parties in an *`aqd* are given the freedom to trade in a normal way, in an environment of willing buyer, willing seller where mutual trust is present. The point to consider is whether fraud and manipulation exist in the sale and purchase, because both elements can affect the validity of an *`aqd*.

249 *Khiyar wasf* is the right to make a choice given to the buyer when he finds that the features of the object purchased differ from what have been described by the seller. Please refer to *Al-Mausu'ah al-Fiqhiyyah*, vol. 20, p. 157.

250 *Khiyar `aib* is the right to make a choice given to parties in a contract to cancel the *`aqd* when there is an *`aib* or defect in the object and also payment. Please refer to Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, p. 261.

251 *Khiyar ru'yah* is the right to make a choice given to a buyer on whether to proceed with a contract or cancel it when he finally sees the object for sale, which he did not at the time of the *`aqd*. Please refer to Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, p. 267.

252 Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, p. 390.

253 Musa, *Al-Amwāl*, p. 366.

254 Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, pp. 391–392.

Ghalat which involves an individual's personal judgement in deciding on a purchase is categorised as *ghalat `aqid* or the mistake of the buyer himself.

If *ghalat `aqid* is allowed to invalidate an *`aqd*, then the market will not run smoothly. The seller will always have to think of the buyer's expectations. This worry will cause the absence of *istiqrar ta'amul* (stability of business transactions) in the market, because the buyer will always take the opportunity to cancel the *`aqd* resulting in a loss to the seller. Hence, Islamic jurisprudence emphasises that the buyer is given the right to cancel the *`aqd* only in cases of *ghalat wadhih*.²⁵⁵ *Ghalat wadhih* is a clear error and it happens under two conditions, i.e. *`aqid* (party who participates in the *`aqd*) has explained clearly what he wants at the time of the *`aqd*, or if he has evidence to show what he wants, and *qarinah*, where the error is on the part of the seller and not the buyer.²⁵⁶

255 Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, p. 390. *Ghalat wadhih* means clear error.

256 Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, p. 393.

SPECULATION

RESOLUTION

The SAC, at its 10th meeting on 16–17 October 1997, and 11th meeting on 26 November 1997, discussed the issue of crude palm oil futures and resolved that speculation is permissible under Islamic jurisprudence.

INTRODUCTION

According to *Kamus Dewan*, speculation can be defined as the act of buying and selling something (shares and others) in anticipation of making a big profit but at a great risk.²⁵⁷ Meanwhile, *Kamus Ekonomi* defines speculation as the taking of risks by investors or businessmen in the hope of making profits through financial or business trades. Speculators usually buy securities for capital gains and not for dividends.²⁵⁸ For example, an investor buys shares when prices are low and sells them when prices are high. *The Dictionary of Business Terms* defines speculation as the “purchase of any property or securities with the expectation of obtaining a quick profit as a result of price change, possibly without adequate research. Compare with gambling, which is based on random chance; contrast with investment”.²⁵⁹

257 *Dewan Bahasa dan Pustaka*, *Kamus Dewan*, Kuala Lumpur, 1989, p. 1224

258 *Dewan Bahasa dan Pustaka*, *Kamus Ekonomi*, Kuala Lumpur, 1993, pp. 245–246.

259 Jack P. Friedman, *Dictionary of Business Terms*, Barron's, New York, 1987, p. 570.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF SPECULATION

Speculation was never debated by past Islamic jurists because it is a term used in the modern world of finance. Nevertheless, through Shariah principles, it can be studied to ascertain its status according to Islamic jurisprudence.

The Principle of *Bai` Muzayadah*

As a result of the studies undertaken, the SAC found that speculation is present in whatever form of trade and is not confined to the share market. The question is whether such an act is forbidden entirely in Islam. Generally, making a profit from a price difference is not a hindrance in Islamic jurisprudence. Should this activity be forbidden, then surely sale and purchase principles like *bai` muzayadah*²⁶⁰ and *murabahah* will also be forbidden because both involve making a profit from the difference in the original price. Hence, this particular principle is allowed in Islam.

The Non-interference Practice of the Prophet s.a.w. in Determining the Market Price

What is clearly forbidden in Islam are fraud and manipulation. These practices have to be monitored and supervised to ensure fairness for market players, and to minimise forbidden practices. A situation whereby a trader makes bountiful gains as a result of a price increase following an increase in demand is acceptable in Islam. It represents a blessing and an opportunity for the trader. Rasulullah s.a.w. himself said:

دعوا الناس يرزق الله بعضهم من بعض

Meaning: "Let the people seek their own livelihood provided by Allah s.w.t. for them."²⁶¹

What needs to be done is monitoring to ensure that fraud and manipulation do not occur in the market. The aim is to create a healthy market in line with the principles outlined in the Shariah.

260 Please refer to the SAC resolution on *bai` muzayadah* for further details.

261 *Hadith* narrated by Muslim.

The Prophet s.a.w. himself was loath to interfere in the fixing of prices in the market after finding that the prices were being determined by market forces, and not by any act of manipulation. This view was supported by a prophetic tradition which told of how the Prophet s.a.w. responded to a request made of him to arrest the prevalent rise in prices by fixing the prices in the market. He said:

إن الله هو المسعر القابض الباسط الرازق وإني لأرجو
أن ألقى ربي وليس أحد يطالبني بمظلمة في دم ولا مال

*Meaning: "Verily, Allah s.w.t. determines the climate of economic affluence and gloom. I do not want to take any action to fix the prices because I do not want, later in the hereafter, any among you to demand for the return of your property and blood from me because of my tyranny (in fixing the prices)."*²⁶²

The Prophet s.a.w. described the act of fixing prices as tyranny towards the seller if price fluctuations in the market were due to normal market forces. An increase in price due to increasing demand should be seen as an opportunity for the seller to make more profits from the prevalent market climate. Fixing the price means forcing the seller to sell at the fixed price and stopping him from enjoying the bounties provided by Allah s.w.t. Thus, it will not be against the *Syara`* if market players take advantage of the rise and fall in prices following the forces of supply and demand of the goods offered.

Difference Between Speculation and Gambling

At a glance, speculation and gambling appear to be similar in practice. As such, we do hear, for example, the exhortation not to treat the share market as a casino. This perception arises because speculators enter the market depending solely on luck, similar to gambling.

The share market is not a place for gambling. On the other hand, the share market is a place which allows shareholders to dispose ownership of shares to other investors in order to gain liquidity. Whether it is gambling or not depends on the conduct of the investors who enter and leave the market, as well as their motives. There are those who are well informed when they

²⁶² *Hadith* narrated by Tirmizi.

enter the market. This is good because they enter with careful consideration. There are, however, those who enter the market depending solely on luck. This not only exposes them to risk, but is also not in line with what is required in Islam.

QABADH

RESOLUTION

The IISG, at its 8th meeting on 25 January 1996, resolved that the local *`urf* be made the basis and guideline to determine the *qabadh* status in any transaction. Subsequently, whatever is accepted by the *`urf* as *qabadh* can be used as a guideline for transactions conducted in the Malaysian capital market.

INTRODUCTION

Qabadh, according to Islamic jurists, means the control and ownership of something that usually refers to an *uqud mu'awadat* (exchange contract). It can be explicitly done as claiming the goods after the sale transaction, or implicitly, as recognising that as a result of a certain action, *qabadh* has successfully taken place. Generally, *qabadh* depends on the perception of *`urf* or the common practices of the local community in recognising that the control and possession of a good has taken place.²⁶³ Islamic jurists also use a number of other terms which have the same meaning, among which are: *naqd*, *munajazah*, *hiyazah*, *yadd*, *yadd bi yadd*, *ha' wa ha'*, *qadha' wa iqtidha'*.²⁶⁴

Qabadh is closely related to the theory of *`aqd* in Islamic jurisprudence, and this relationship can be seen from two dimensions:²⁶⁵

263 Nazih Hammad, *Mu'jam al-Mustalahat*, pp. 221–222.

264 OIC, *Majallah Majma' al-Fiqh*, no. 6, vol. 1, pp. 560–561, 712–716.

265 OIC, *Majallah Majma' al-Fiqh*, no. 6, vol. 1, p. 499.

- (a) Outcome and obligation of an *`aqd*. An *`aqd* carries certain obligations binding to the parties involved. For example, in a sale and purchase *`aqd*, the seller is obliged to deliver the goods to the buyer. Similarly, the buyer is obliged to pay the seller. This transaction involving the collection of goods by the buyer and the payment for the goods to the seller is called *qabadh*; and
- (b) Completion of an *`aqd*. Some *`aqd* require *qabadh* to complete the *`aqd*. An example is the acceptance of payment in *`aqd salam*, which is *qabadh* used as a condition to complete the *`aqd*. For the sale and purchase of *ribawi* goods,²⁶⁶ *taqabudh* (exchange transaction between seller and buyer) is a requirement for the *`aqd*. If the *`aqd* partnership dissolves before the *qabadh* is effected, the *`aqd* is considered invalid.

In general, Islamic jurisprudence has outlined two forms of *qabadh*:

One: *Qabadh Haqiqi* or *Qabadh Hissi*²⁶⁷

This *qabadh* is explicit and as an example, a *qabadh* transaction occurs when the buyer is seen taking the goods sold to him. *Qabadh* in this form usually takes place when it involves two types of assets:

- (a) *`Aqar* – fixed property such as land and buildings. *Qabadh* for fixed property like land is considered to have taken place when the original owner gives permission to the buyer to take control of the land and carry out whatever activity he wishes without hindrance. In the context of administering the real estate, official transfer of ownership by changing the name on the ownership certificate and the like is enough to complete the *qabadh*;²⁶⁸ and
- (b) *Manqul* – movable property such as trading goods, food, vehicles, etc. *Qabadh hakiki* is considered to have taken place when it involves the collection of goods. For example, in the purchase of books, *qabadh hakiki* occurs when the buyer collects the books and pays the price.

²⁶⁶ *Ribawi* goods comprise various types of goods which have elements of *riba*. Exchange of such goods must follow certain set ways to avoid the incident of *riba*. Please refer to the SAC resolution on *riba* for further details.

²⁶⁷ OIC, *Majallah Majma' al-Fiqh*, no. 6, vol. 1, pp. 717–723.

²⁶⁸ *Al-Zarqa'*, *Al-Madkhal Al-Fiqhi*, vol. 2, p. 648.

Two: *Qabadh Hukmi* or *Qabadh Ma`nawi*²⁶⁹

Qabadh hukmi is the opposite of *qabadh hakiki*, in that the transaction that takes place is implicit. However, Islamic jurisprudence still equates its status with that of *qabadh hakiki*. The following conditions are considered as *qabadh hukmi*:

- (a) *Takhliyah* – that is, the seller gives permission to the buyer to take the goods sold, unhindered. For example, the seller delivers the sold goods to an agent appointed by the buyer to receive the goods on his behalf. Another example is, the seller opens up his warehouse to show the wheat to the buyer, as an indication of handing over the wheat to be sold;²⁷⁰
- (b) *Muqassah* – meaning a contra debt. In a contra debt, an implicit settlement takes place between the two parties, i.e. debtor and creditor. As a result of the contra transaction, there is no more debt between the two parties. For example, Ahmad owes Ali RM2,000. Then, Ali owes Ahmad the same amount. This means the two parties are no longer in debt with each other. In this context *qabadh hukmi* to the amount of the debt has taken place in the form of contra;²⁷¹
- (c) Earlier action – *Qabadh hukmi* can also take place due to an earlier action which shows that *qabadh* has taken place earlier, although the earlier *qabadh* differs in form from the new *qabadh*. For example, in the case of a *qabadh* rental that is followed by a purchase. During rental, the tenant occupied the rented premises. This represents a form of early *qabadh*. Then, the premises is sold to the tenant, and *qabadh hukmi* takes place although the *qabadh hakiki* is after the sale and purchase *`aqd*;²⁷² and
- (d) *Itlaf* – *qabadh hukmi* also takes place when there is *itlaf*. *Itlaf* means damage. If the goods are damaged by the buyer before the sale and purchase *`aqd* – when the goods are in the hands of the buyer, *qabadh* is still considered to have taken place. The buyer has to pay for the

269 OIC, *Majallah Majma' al-Fiqh*, no. 6, vol. 1, pp. 560–561, 712–716. Ibnu `Abidin, *Hasyiah Rad al-Mukhtar*, vol. 4, p. 562.

270 OIC, *Majallah Majma' al-Fiqh*, no. 6, vol. 4, p. 562. Haidar, *Durar al-Hukkam*, vol. 1, p. 251 (section 263, *Majallah al-Ahkam al-'Adliyyah*).

271 OIC, *Majallah Majma' al-Fiqh*, no. 6, vol. 4, pp. 726–727.

272 OIC, *Majallah Majma' al-Fiqh*, no. 6, vol. 4, p. 729.

goods, if he causes damage while examining them, e.g. dropped the goods etc. because *qabadh* for the goods is considered to have taken place.²⁷³

In the present context of the capital market, the concept of *qabadh* often touches on issues like *bai' dayn*, crude palm oil futures contract and contra trading in the capital market. Hence, understanding this concept is very important in determining whether the trading status of the instrument is in line with Shariah principles.

VIEWS OF PAST ISLAMIC JURISTS

Because the Prophet s.a.w. himself mentioned the matter of *qabadh* in a number of sale and purchase situations, Islamic jurists discussed whether it was a valid condition in transactions or otherwise.

The majority of Islamic jurists were of the view that *qabadh* represented a valid condition in the transaction of *ribawi* goods if the said goods have similar *'illah riba*, such as similarity in type (sale and purchase of gold with gold) or difference in type (sale and purchase of gold with silver). The transaction should meet the conditions of the *'aqd* ceremony whereby goods are handed over and payment is made on the spot.

Such a condition does not apply when the transaction of *ribawi* goods involves *ribawi* goods of different *'illah*, such as buying gold and paying for it with rice. Gold is categorised as a medium of exchange whereas rice is a staple food. (See chapter on *riba*).

TRANSACTION BEFORE *QABADH HAKIKI*

In general, there are two viewpoints of Islamic jurists regarding this issue:

First viewpoint: Some Islamic jurists were of the view that *qabadh* is not a valid rule for a business transaction. Hence, a person should sell his goods (without exception) before *qabadh* can take place. Among those of this view were 'Ata',²⁷⁴ 'Uthman al-Batti²⁷⁵ and Syi'ah Imamiyah.²⁷⁶

273 OIC, *Majallah Majma' al-Fiqh*, no. 6, vol. 4, pp. 731–732.

274 Ibnu Hazm, *Al-Muhalla*, Dar al-Turath, Cairo, vol. 8, p. 520.

275 Ibnu Rusyd, *Bidayah al-Mujtahid*, vol. 2, p. 237.

276 OIC, *Majallah Majma' al-Fiqh*, no. 6, vol. 1, p. 478.

Second viewpoint: The majority of Islamic jurists were of the view that *qabadh hakiki* is valid for the transaction of some types of goods.²⁷⁷ This was based on validated prophetic traditions which forbade the sale of some types of goods before *qabadh hakiki*.

Nevertheless, they were of differing views in deciding on the *'illah* and guidelines for the types of goods that should be included under this restriction. This is because the prophetic traditions which discussed *qabadh* were very generally stated and related to food. The Islamic jurists tried to find an answer as to whether the restriction was only specific for food or whether it applied to other things. Among the *hadith* used to support *qabadh hakiki* were:

عن ابن عباس رضي الله عنهما أن رسول الله
صلى الله عليه وسلم نهى أن يبيع الرجل طعاما
حتى يستوفيه، قلت لابن عباس: كيف ذلك؟ قال:
ذلك دراهم بدراهم والطعام مرجأ

Meaning: "From Ibnu `Abbas, it was narrated that the Prophet s.a.w. had forbidden a man from selling food he had not yet procured. Ibnu `Abbas was asked as to its form. He answered; dirham with dirham, and food after it has been procured."²⁷⁸

عن عبد الله بن دينار قال: سمعت ابن عمر رضي الله
عنهما يقول: قال النبي صلى الله عليه وسلم: من
ابتاع طعاما فلا يبعه حتى يقبضه

Meaning: "From Abdullah bin Dinar that he had heard Ibnu `Umar said, the Prophet s.a.w. said: Whoever buys food, he should not resell it before he procures it (*qabadh hakiki*)."²⁷⁹

Based on the above *hadith* and a few other narrations with the same understanding, the Prophet s.a.w. had forbidden the resale of food before *qabadh hakiki*. Such evidence shows the importance of *qabadh hakiki* in sale and purchase transactions involving specifically food which is perishable.

277 Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, p. 382.

278 *Hadith* narrated by Bukhari, Muslim and Tirmizi.

279 *Hadith* narrated by Bukhari and Malik.

In general, the Hanafi, Shafi'i and Hanbali *Mazhab* were of the view that the *'illah* forbidding the sale of an object before *qabadh hakiki* was due to the presence of *gharar*. This was because of the concern that the goods might not be delivered due to damage or other factors.

DHA` WA TA`AJJAL

RESOLUTION

The SAC discussed the issue of *dha` wa ta`ajjal* in a series of meetings. At its 10th meeting on 16–17 October 1997, the SAC agreed to accept the use of the *dha` wa ta`ajjal* principle in developing Islamic capital market instruments.

INTRODUCTION

Dha` wa ta`ajjal is the action of a creditor writing off part of the debt when the debtor settles the balance of his debt earlier.²⁸⁰

Generally, the *dha` wa ta`ajjal* principle is important in developing Islamic corporate bonds in a secondary market. Islamic bonds issued are based on the concepts of *ijarah*, *istisna`*, *murabahah*, *musyarakah*, and *mudharabah*. To enable the trading of these bonds in the secondary market, securities holders will sell them at a lower price based on the concept of *dha` wa ta`ajjal*.

DHA` WA TA`AJJAL PRINCIPLE

Based on the results of a study undertaken, the SAC is of the view that the principle of *dha` wa ta`ajjal* is permissible. This is based on the following *dalil*:

280 Ali al-Salus, *Al-Iqtisad al-Islami*, Dar al-Thaqafah, Doha, 1996, vol. 2, p. 568. Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, p. 693.

Hadith of the Prophet s.a.w.

عن ابن عباس قال: أمر النبي صلى الله عليه وسلم بإخراج بني نضير من المدينة. جاءه ناس منهم فقالوا: يا رسول الله إنك أمرت بإخراجهم ولهم على الناس ديون لم تحل. فقال النبي صلى الله عليه وسلم: ضعوا وتعجلوا

Meaning: Narrated from Ibnu `Abbas that the Prophet s.a.w. ordered the Bani Nadhir to leave Medinah and was then duly informed that there were still many in the city who owed them money. Said the Prophet s.a.w: "Give a discount on the debt and hasten the payment."²⁸¹

عن كعب أنه تقاضى ابن أبي حدرد دينا كان له عليه في المسجد فارتفعت أصواتها حتى سمعها رسول الله صلى الله عليه وسلم وهو في بيته فخرج إليهما حتى كشف سجد حجرتهم فنادى يا كعب. قال: لبيك يا رسول الله، قال: ضع من دينك هذا وأوماً إليه أي الشطر قال: لقد فعلت يا رسول الله، قال: قم فاقضه

Meaning: Ka'ab narrated that he had a debt owing him by Ibnu Abi Hadrad; whereby they were discussing the debt in a mosque and their voices were raised reaching the ears of the Prophet s.a.w. who was at his house. He called out to Ka'ab and Ka'ab answered: "Yes, Messenger of Allah." The Prophet s.a.w. said: "Lessen your debt (indicating to lessen a part of it)." Answered Ka'ab: "I have done so, oh Messenger of Allah", and the Prophet s.a.w. immediately said (to Ibnu Abi Hadrad): "Arise and settle your debt."²⁸²

Opinion of Ibnu `Abbas

Ibnu `Abbas is of the opinion that *dha` wa ta'ajjal* is permitted with the following argument:

أنه جائز لأنه من باب أخذ لبعض حقه وتارك لبعضه

281 Hadith narrated by al-Baihaqi.

282 Hadith narrated by al-Bukhari.

Meaning: "It (*dha` wa ta`ajjal*) is permitted because it concerns claiming part of one's right and relinquishing another."²⁸³

Views of Past Islamic Jurists

The past Islamic jurists differed in their views on *dha` wa ta`ajjal*. Generally, there were two main views regarding this issue:

The first view permitted *dha` wa ta`ajjal*. Among those advocating this view were Ibnu `Abbas, al-Nakha'i, Zufar, Abu Thaur, Ibnu al-Qayyim and Ibnu Taimiyyah. Their argument was based on the prophetic sayings explained earlier.²⁸⁴

The second view did not permit it. This was the view of the majority of Islamic jurists. Their argument was that there is a similarity between the concept of *dha` wa ta`ajjal* and *riba*, in the prohibition of the increase in payments. The similarity lies in using time/duration to determine the price. This is made clear when an extension in time results in an increase in price, and vice versa when a reduction in time results in a reduction in price.²⁸⁵

Ibnu Qayyim reinforced the view of the group permitting *dha` wa ta`ajjal* with the following conclusion:

"*Riba* is not present in this issue whether in reality, language or *`urf*. As a matter of fact, *riba* is something that increases whereas this does not happen in *dha` wa ta`ajjal*. Those who have forbidden it have compared it to *riba*, whereas there is a clear difference between the two in the words used:

- (a) Either you increase the payment (due to late payment), or settle the debt (in time) – this is *riba*; and
- (b) Quickly settle your debt with me and as an incentive I will discount part of it – this is *dha` wa ta`ajjal*."

283 Ibnu Qudamah, *al-Mughni*, vol. 4, p. 189.

284 Ibnu Rusyd, *Bidayah al-Mujtahid*, vol. 2, pp. 236–237. Al-Salus, *Al-Iqtisad al-Islami*, vol. 2, p. 569. Ibnu Qayyim, *I'lam al-Muwaqqi'in*, vol. 3, p. 371.

285 Ibnu Rusyd, *Bidayah al-Mujtahid*, vol. 2, pp. 236–237. Al-Salus, *Al-Iqtisad al-Islami*, vol. 2, p. 569. Ibnu Qayyim, *I'lam al-Muwaqqi'in*, vol. 3, p. 371.

Where is the similarity between the two? In addition, there are no *nas*, *ijmak*, and validated *qiyas* that forbid this concept.²⁸⁶ Based on these views, the SAC adopted the principle of reduced debt to be applied in the capital market.

286 Ibnu Qayyim, *I'lam al-Muwaqqi'in*, vol. 3, p. 371.

‘UMUM BALWA

RESOLUTION

The SAC, at its 2nd meeting on 21 August 1996, when discussing the issue of a benchmark for *haram* elements in a mixed company (see definition in chapter on mixed company), resolved that the situation categorised as *‘umum balwa* needs to be considered in determining the status of a mixed company.

INTRODUCTION

‘Umum balwa, according to Islamic juristic terminology, is an unfavourable widespread situation²⁸⁷ affecting most people and is difficult to avoid.²⁸⁸

EXCUSE GIVEN BY ISLAMIC JURISPRUDENCE IN ‘UMUM BALWA SITUATIONS

There is a number of maxims of Islamic jurisprudence that excuse Muslims caught in *‘umum balwa* situations. The purpose of such an excuse is to facilitate the carrying out of daily activities. Without such an allowance, the *maslahah* of the public will be affected especially in an economic field that involves the control of *mal* and trade as well as social stability.

Among the maxims of Islamic jurisprudence touching on *‘umum balwa* situations are as follows:

287 Situations categorised as *‘umum balwa* in a very small ratio are excused by Islamic jurisprudence. Please refer to *Mu‘jam al-Mustalahat*, p. 203.

288 Nazih Hammad, *Mu‘jam al-Mustalahat*, p. 203.

المشقة تجلب التيسير

Meaning: "Adversity allows for measures to bring about ease."

الأمر إذا ضاق اتسع

Meaning: "If a situation faces a problem, Syara' allows for a way out."

ما عمت بآيته خفت قضيته

Meaning: "Something forbidden which occurs widely (and which is difficult to avoid), Syara' brings relief to those affected."

Imam al-Suyuti, when explaining the maxims of Islamic jurisprudence (*المشقة تجلب التيسير*), included *'umum balwa* among factors permitting the *taisir* principle, which is the application of relief measures. This means that if something is categorised as *'umum balwa*, Syara' allows for relief so as not to burden the Muslim community.²⁸⁹

289 Al-Suyuti, *Al-Asybah wa al-Naza'ir*, pp. 77–78.

TA`WIDH

RESOLUTION

The SAC, at its 12th meeting on 14 July 1999, agreed to allow the imposition of *ta`widh* (compensation) on the late repayment of Islamic financing.

Subsequently, the SAC at its 30th meeting on 8 November 2000, resolved that *ta`widh* payment for (i) arrears and (ii) failure to pay after the due date, is permissible for Islamic financing formulated based on *`uqud mu`awadhat* (exchange contracts) including Islamic debt securities. *Ta`widh* can be imposed after it is found that *mumathil* (deliberate delay in payment) is utilised on the part of the issuer to settle the payment of the principal or profit. The rate of *ta`widh* on late payment of profit is one per cent per annum of the arrears and it cannot be compounded. While the *ta`widh* rate on failure to settle the payment of the principal is based on the current market rate in the Islamic interbank money market, it too cannot be compounded.

INTRODUCTION

The imposition of *ta`widh* or *syart jaza'i* according to Arab terminology is a penalty agreed upon by the *`aqd* parties as compensation that can rightfully be claimed by the creditor²⁹⁰ when the debtor²⁹¹ fails or is late in meeting his obligation to pay back the loan.²⁹²

290 The creditor is the financier.

291 The debtor is the issuer.

292 Uthman Syabir, *Buhuth Fiqhiyyah fi Qadaya Iqtisadiyyah Mu'asirah*, Dar al-Nafais, Jordan, 1998, vol. 2. p. 855.

Ta`widh can be imposed as follows:

- (a) For the late payment of profit, the rate of *ta`widh* which can be imposed is one per cent per year on payment in arrears of profit. However, the sum of *ta`widh* cannot be compounded;
- (b) For not settling the payments of the principal sum, the *ta`widh* which can be imposed is at the current rate of Islamic interbank money market;
- (c) The maximum amount of *ta`widh* that can be imposed on any unsettled payment of financing cannot exceed the total amount of the remainder of the financing balance; and
- (d) *Ta`widh* obtained from financing for which payment has not been settled, may be consumed by the financiers involved and distributed according to the bank's prevailing rate of profit distribution ratio.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF TA`WIDH

The permissibility of imposing *ta`widh* is based on the following arguments:

Hadith

The Prophet s.a.w. rebuked those who delay the payment of a debt:

مطل الغني ظلم

Meaning: "The rich who delay the payment of a debt are committing tyranny."

Qiyas

The delay in paying off a debt can be compared with *ghasb* (usurpation) of valuable property. This is because of the similarity of *`illah* between the two, that is obstructing the use of property and exploiting it in a tyrannical way. According to the Syafi'i and Hanbali *Mazhab*, in the case of *ghasb*, the usurper has the benefit of using the property that he has seized and therefore must

pay compensation to the owner. In the case of a delayed payment of debt, the creditor stands to lose because he is deprived of the opportunity of using the funds for other trading purposes, which he could if the debt is settled within the stipulated time frame. Therefore, this loss should be compensated by the debtor based on *qiyas*.

Maxims of Islamic Jurisprudence

There is a maxim of Islamic jurisprudence which can be used in dealing with this matter, that is:

لا ضرر ولا ضرار

Meaning: "Nothing is a loss or results in a loss (in Islam)."

Based on this principle, the debtor's act of delaying payment is a loss to the creditor. This situation has to be avoided so that businesses are conducted according to the *istiqrar ta'amul* principle, that is the smooth running of the market. It is supported by another maxim of Islamic jurisprudence:

الضرر يزال

Meaning: "Whatever loss should be removed."²⁹³

In the context of this discussion, losses that are borne by a creditor must be removed by the provision of a suitable approach. Imposing *ta'widh* on a delayed payment of debt is a suitable approach for covering the loss borne by the creditor and it encourages the debtor to settle the debt within the stipulated time frame.

Qadhi Syuraih's Resolution

There is a basis in Islamic jurisprudence to show that *ta'widh* can be imposed in a trade. An example is the resolution made by Qadhi Syuraih in a case narrated by Bukhari from Ibnu Sirin:

*A potential customer said to the owner of some animals for hire:
"Prepare for me one of your animals. Should I not hire it on such a*

293 Al-Suyuti, *Al-Asybah wa al-Naza'ir*, pp. 83–84.

date, I will pay you of 100 dirham.” Apparently, the customer did not proceed with the deal, and so, according to Qadhi Syuraih: “Whoever imposes a condition upon himself voluntarily, then that condition is binding.”²⁹⁴

Qadhi Syuraih resolved that the condition stated by the potential customer is binding. Based on this resolution, it can be used as an Islamic jurisprudence principle to permit the imposition of a condition in the form of *ta'widh* in a business transaction. The payment is for opportunity loss borne by the creditor. Al-Zarqa' sums it up by saying:

ضمان التعويض عن التعطل والانتظار

Meaning: “Compensation is for loss (borne by parties involved in a business transaction) as a result of waiting and the disruption of a transaction.”²⁹⁵

294 Al-'Asqalani, *Fath al-Bari*, vol. 5, p. 707.

295 Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, p. 496.

HIBAH RUQBA

RESOLUTION

The SAC at its 44th meeting on 15 January 2003, passed a resolution to accept the use of *hibah ruqba*²⁹⁶ principle as the Shariah basis in implementing the *hibah* declaration forms for transactions involving joint unit trust fund accounts, especially for Muslim account holders.

INTRODUCTION

Studies on *hibah 'umra*²⁹⁷ and *ruqba* were conducted with the intention of finding a solution to the possible emergence of dispute when one of the account holders of the joint account dies. According to the normal practice of unit trust funds, when one of the account holders dies, the other living person is entitled to the whole amount in the said fund. This practice is based on the "survivorship" method.

Guided by the existing trust deed, it is the condition that if either one of the joint unit trust holders dies, the other surviving joint unit trust holders have the right to all the units of the said account.

296 *Hibah ruqba* is "a conditional gift determined by the *hibah* giver whereby the *hibah* property will be owned by the *hibah* recipient in case the *hibah* giver dies. But if the *hibah* recipient dies before the *hibah* giver, the *hibah* shall be returned to the *hibah* giver". Please refer to Al-Syawkani, *Nail al-Awtar*, Dar al-Fikr, Beirut, 1994, vol. 6, pp. 112–113. Ibn Qudamah, *al-Mughni*, Dar al-Fikr, Beirut, 1994, vol. 5, p. 335. Wahbah al-Zuhaili, *al-Fiqh al-Islami Wa Adillatuhu*, Dar al-Fikr, Damascus, 1989, vol. 5, p. 10. *Wizarah al-Awqaf wa al-Syu'un al-Islamiah, al-Mawsu'ah al-Fiqhiyyah*, Kuwait, 1992, vol. 23, pp. 5–6.

297 *Hibah 'umra* is "A temporary gift referring to the life of either the giver or the recipient of the *hibah*. If the recipient of the *hibah* dies, the *hibah* property shall be returned to the *hibah* giver. Conversely, if the *hibah* giver dies, *hibah* property shall be returned to the next-of-kin of the *hibah* giver". Please refer to *Wizarah al-Awqaf wa al-Syu'un al-Islamiah, al-Mawsu'ah al-Fiqhiyyah*, vol. 30, p. 311.

The joint holder of the unit trusts means that anyone who holds unit trusts or part thereof based on the provision under the trust deed, jointly with another person will also be known as a joint holder.

Under normal circumstances, joint holding in a unit trust is established for the interest of family members, such as children or individuals who have not attained the mature age of 18 years. If an individual has not attained the permitted age, he is given the choice either to maintain the joint account or use his own individual account.

While holding unit trusts on a joint basis, unit holders can choose whether one of them or both are allowed to sign when making withdrawals or selling the units. This situation is allowed provided all of them have attained the age of 18 and above. This means that in a joint account there is an element of *hibah* or gift whereby both parties benefit from the said property while still alive. It differs from an account which has a nominee.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF *HIBAH RUQBA*

Opinions of Past Islamic Jurists

Al-Zaila'i said that Islamic jurists have unanimously agreed not to allow *hibah* which imposes a condition that ownership will only be implemented at a certain period of time in the future.²⁹⁸

The majority of Islamic jurists are of the opinion that *hibah* which is temporary in nature such as *hibah ruqba* and *hibah `umra* are permissible but that the conditions be nullified.²⁹⁹ They argued that should the conditions be applied it will mean that it is in conflict with *muqtadha al-`aqd* and also the requirement of the Shariah rules. They were also guided by the sayings of the Prophet s.a.w.:³⁰⁰

أَمْسِكُوا عَلَيْكُمْ أَمْوَالَكُمْ لَا تَعْمُرُوهَا فَإِنَّ مِنْ أَعْمَرَ شَيْئًا
فَأَنَّهُ لَمِنْ أَعْمَرِهِ

298 Al-Zaila'i, *Tabyin al-Haqai'q Syarh Kanz al-Daqa'iq*, Dar al-Kitab al-Islami, Cairo, vol. 5, p. 104.

299 Al-Kasani, *Bada'i' al-Sana'i*, vol. 6, p. 116. Al-Zaila'i, *Tabyin al-Haqai'q*, vol. 5, p. 104. Ibn 'Abidin, *Hasyiah Rad al-Muhtar*, Dar al-Fikr, Beirut, 1992, vol. 5, p. 707. Ibn Qudamah, *al-Mughni*, Dar al-Fikr, Beirut, 1994, vol. 6, pp. 339–340.

300 Al-Kasani, *Bada'i' al-Sana'i*, vol. 6, p. 116.

Meaning: "Look after your property and do not hibah it by way of `umra because whoever hibah something by way of `umra, then it becomes the possession of the person to whom it has been hibah."

Some Islamic jurists from the Hanbali, Imam Malik, Imam al-Zuhri, Abu Thur Mazhab and others, as well as the early views (*qadim*) of Imam Syafi'i are of the opinion that *hibah `umra* is permissible and its condition valid provided it is not mentioned by the giver of the *hibah* that the asset which is put on *hibah* will be owned by the *hibah* receiver's next of kin after the death of the *hibah* receiver.³⁰¹ This means that *hibah* item will be returned to the giver of *hibah* after the death of the *hibah* receiver. There are other opinions whose approach is that *hibah* being temporary in nature, in reality it is not *hibah* but *`ariyah* (lending).³⁰²

Imam Abu Hanifah and Imam Malik allowed *hibah `umra* but disallowed *hibah ruqba*.³⁰³ Their views are guided by the sayings of the Prophet s.a.w. who allowed *hibah `umra* and annulled *hibah ruqba*. However these sayings were criticised by Imam Ahmad because its validity is not known.³⁰⁴ In their opinion *hibah ruqba* is *hibah ta'liq* on something which is uncertain from the aspect of the period of implementation.³⁰⁵

Based on the above discussion, it can be summarised that among the important issues which have brought about the differing of opinions among Islamic jurists on *hibah `umra* and *hibah ruqba* are the focus on the element of *hibah* which is temporary in nature and *hibah* that is *ta'liq* with a person's life span. Both issues have drawn different reactions among the Islamic jurists.

The *mazhab* that says *hibah ruqba* and *hibah `umra* are not permissible are being guided by the sayings of the Prophet s.a.w.:³⁰⁶

لا تعمروا ولا ترقبوا

Meaning: "Do not give (hibah) either by way of `umra or ruqba."

301 Ibn Qudamah, *al-Mughni*, vol. 6, pp. 338–339.

302 Al-Ramli, *Nihayah al-Muhtaj ila Syarh al-Minhaj*, Dar al-Fikr, Beirut, 1984, vol. 5, p. 410. Al-Nawawi, *al-Majmu' Syarh al-Muhazzab*, Dar al-Fikr, Beirut, vol. 15, p. 395. Al-Zarqa', *al-Madkhal al-Fiqhi*, vol. 1, p. 273.

303 Al-Hattab, *Mawahib al-Jalil*, Dar al-Fikr, Beirut, 1992, vol. 6, p. 61. Al-Nawawi, *al-Majmu' Syarh al-Muhazzab*, vol. 15, pp. 395–396. Al-Zuhaili, *al-Fiqh al-Islami*, vol. 5, pp. 9–10.

304 Al-Nawawi, *al-Majmu' Syarh al-Muhazzab*, vol. 15, p. 396.

305 Abd al-Rahman al-Jaziri, *Kitab al-Fiqh 'Ala al-Mazahib al-Arba'ah al-Maktabah al-Taufiqiyyah*, Cairo, vol. 3, p. 258.

306 Ibn Qudamah, *al-Mughni*, vol. 6, p. 335.

The *mazhab* that allows *hibah ruqba* and *hibah `umra* made the following sayings of the Prophet s.a.w.³⁰⁷ as their argument:

العمرى جائز لأهلها والرقبى جائز لأهلها

Meaning: "(hibah) `umra and ruqba are allowed for them."

Al-Ruju` Fi Al-Hibah (Annulment of Hibah)

Studies regarding *al-ruju` fi al-hibah* was made because the features of *al-ruju` fi al-hibah* are similar to the *hibah ruqba* concept from the aspect of the rights of a *hibah* giver to get back the goods which have been *hibah*. Despite the method of getting back the goods by the *hibah* giver in the context of *al-ruju` fi al-hibah* is different from the *hibah ruqba* method, the effect is the same, that is goods which have been *hibah* can be returned to the *hibah* giver.

Islamic jurists of the Hanafi *Mazhab* are of the opinion that annulment of *hibah* is permissible but *makruh* (forbidden but not *haram*) even if delivery has taken place. This is because the right to return *hibah* property is the prerogative of the giver.³⁰⁸

Their argument was based on the saying of Saidina Umar al-Khattab which means: "Whoever gives *hibah* to their relatives or (the gift concerned) on the basis of alms, they are prohibited from asking the *hibah* item to be returned, and whoever gives the *hibah* with the hope of receiving reward in return, then he can ask for the return of *hibah* item, if he so decides".³⁰⁹

Generally, the Syafi'i and Hanbali *Mazhab*, and some of the jurists of the Maliki *Mazhab* are of the opinion that annulment of *hibah* is permissible as long as there is no *qabd* (surrender). If *qabd* happens then *hibah* contract becomes customary (binding) and at that point of time it is not permissible to annul *hibah* except *hibah* from parents to their children.³¹⁰

307 Ibn Qudamah, *al-Mughni*, vol. 6, p. 335.

308 Ibn 'Abidin, *Haysiyah Rad al-Muhtar*, vol. 5, p. 698.

309 Ibn Rusyd, *Bidayah al-Mutjahid*, vol. 2, p. 428.

310 Abd al-Rahman al-Jaziri, *Kitab al-Fiqh'ala al-Mazahib al-Arba'ah*, vol. 3, pp. 267–272.

Imam Ahmad and Islamic jurists of the Zahiri *Mazhab* do not allow the annulment of *hibah*.³¹¹ Their arguments were based on a unanimously accepted general saying which states: "Whoever takes back the *hibah* item (given by him) is just like a dog that swallows its own vomit".³¹²

Generally, Islamic jurists agree with regard to the permissibility of annulment of *hibah* provided it is done voluntarily with one another or as resolved by a judge.³¹³

311 Ibn Rusyd, *Bidayah al-Mujtahid*, vol. 2, p. 428.

312 Ibn Rusyd, *Bidayah al-Mujtahid*, vol. 2, pp.428–429.

313 Al-Zaila'i, *Tabyin al-Haqa'iq*, vol. 5, p. 101. Ibn 'Abidin, *Hasyiah Rad al-Muhtar*, vol. 5, p. 704. Al-Sanhuri, *Nazariat al-'Aqd*, Dar al-Fikr, Beirut, p. 724.

CONDITIONAL *HIBAH*

RESOLUTION

The SAC, at its 44th meeting on 15 January 2003, resolved that *hibah bi syat `iwadh* (*hibah* with return condition) is in line with the principle of Shariah and is applicable in structuring Islamic bonds.

INTRODUCTION

This principle can be used as a supporting principle in structuring Islamic bonds. For example, in the structuring of Islamic bonds based on assets, the original asset holder (originator) is allowed to sell his rights in the form of financial rights in order to receive payment which has not been received together with the *hibah* (gift) on his rights over a particular property to a special purpose vehicle (SPV). The *hibah* contract is the supporting contract attached to the main contract, that is the sales and purchase of financial rights of the original owner of the asset to the SPV.

It is one of the solutions to avoid the occurrence of *bai` dayn bi dayn* on the part of the SPV when issuing Islamic bonds. This is because if the financial right that was bought by the SPV from the original owner is being made the underlying asset to the Islamic bond which is based on *bai` bithaman ajil* (BBA), it will lead to *bai` dayn bi dayn* which is disputable. As such, the property which is being *hibah* to the SPV will be used as the underlying asset in issuing Islamic bonds based on BBA.

However, the type of *hibah* that is given by the original asset owner to the SPV is conditional *hibah*. The original owner imposes a condition on the

SPV that the property which is being *hibah* will be returned after it has been used by the SPV in issuing Islamic bonds.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF CONDITIONAL *HIBAH*

To include conditions in any contract is a *muamalat* issue called *nazariyyah muqtadha`aqd* (theory of contract objective). The Hanbali *Mazhab* is considered the most open minded with regard to this issue whereby they permit additional conditions in the contract in order to safeguard the interests of those who are bound by the contract as long as the conditions do not contradict the Shariah principles.³¹⁴

For example, it is permissible for a seller to put a condition on a buyer to forbid him from selling the merchandise to another person other than the original seller.³¹⁵

The majority of the Islamic jurists collectively allow *hibah bi syart `iwadh*. However, they have differences in opinions in deciding on the type of contract.

The Hanafi *Mazhab* is of the opinion that this contract is classified as *hibah* at the beginning of the contract that is before *qabdh*, and will end with *bai`* when *`iwadh* occurs. Whereas, the Maliki *Mazhab* is of the view that this contract is similar to *bai`*.

The Syafi'i and Hambali *Mazhab* are of the opinion that this contract is a *bai`* contract and should meet the sales and purchase conditions.³¹⁶

314 Al-Zarqa', *Al-Madkhal al-fiqhi*, vol. 1, pp. 482–491. Al-Buhuti, *Kasysyaf al-Qina`*, vol. 3, pp. 188–192.

315 Al-Zarqa', *Al-Madkha al-Fiqhi*, vol. 1, p. 491.

316 Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 5, pp. 29–30.

WHEN ISSUE PROCESS

RESOLUTION

The SAC, at its 38th meeting on 2 April 2002, agreed that the process of when issue (securities futures trading) in the Islamic bond market is in line with the Shariah requirement. It is a process that has been practised in conformity with the "*al-wa'd*" principle that is the use of a promise. This activity is permissible because it has been ascertained to be free of *riba* or *gharar* elements.

INTRODUCTION

The process of securities futures trading was created with the objective of obtaining a suitable bid price by a principle dealer when making a buying offer before the issuance of the bond. At the same time the principle dealer will be able to identify the demand level of a particular bond which is to be launched. By identifying the demand level of the bond, the principle dealer will be able to estimate the risk control which has to be taken during the purchase of the bond.

The process of securities futures trading between the investor and the principle dealer does not involve any contract but it is a promise to buy and sell. All promises to buy and sell are recorded in the system and the parties involved are responsible to fulfil their promises. If the party that promises to sell fails in the bid, then the said party will buy from the market in order to deliver to the party that has been given the promise.

The possibility of a party reneging on his promise in this process is very unlikely because the party that made the promise will endeavour to fulfil the promise

for the sake of reputation, as well as maintaining the smooth flow of the market.

At this moment, there is no specific provision regarding compensation or penalty imposed on those who renege on their promises. However, under the current method, the party that promises will normally fulfil the promise by acquiring goods from the market. As such, unfulfilled promises in the process of securities futures trading have never occurred ever since the bond market was introduced in this country.³¹⁷

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF AL-WA`D

According to the resolutions of SAC, regarding the process of issuing Mudarabah Khazanah Bonds, two Shariah principles were approved, namely:

- (a) Principle of *Bai` Muzayadah* – bidding process; and
- (b) Principle of *Ittifaq Dhimni* – it is a documented agreement between parties involved prior to sealing any official contract.

Based on the resolution of the SAC above, it is clear that the two Shariah principles play the same role in the process of securities futures trading, as in the process of Khazanah bonds. The only additional issue involving Shariah basis in the process of securities futures trading is the promise or *wa`d*.

Al-Wa`d Principle

The use of a promise or commitment between the investor and principal dealer is unavoidable in the process of securities futures trading because it is an important element to successfully process bond issuances at an efficient cost. Without the element of promises, securities futures trading will not likely exist and vice versa. The promises that take place are promises to buy and promises to sell.

According to al-Zarqa', a promise is initially not a burden to the person who makes it and also, it does not give any rights to the other party who has

317 Based on a statement from representative of Bank Negara Malaysia/Treasury.

been promised. However, in the context of divine sins and rewards, it is a requirement that one must fulfil any promises made. If it is not fulfilled, then one has committed a sinful act. So, according to the original understanding of a promise, the person who promises cannot be forced into compliance or be penalised.

Ruling on Promises to Buy and Promises to Sell

The majority of past Islamic jurists allowed the practice of promises to buy and sell. The Maliki *Mazhab* is of the opinion that if a promise is used to fix the rate of profit then it is not permissible.

Current Islamic jurists have opinions that do not allow promises to buy and sell. Their rejection of this principle is based on their understanding that it is similar to what happens in *bai` inah*. It is not allowed because there are elements of *tawatu`* (collusion) between buyers and sellers.³¹⁸

The decree by the Mufti of Saudi Arabia, Sheikh Abdul Aziz bin Baz resolved that promises to sell are permissible provided that the goods that have been pledged are owned by those who made the promises.³¹⁹

Permissibility of Promises to Buy and Sell Currencies

Imam Syafi'i allowed the promises to buy and sell currencies.³²⁰ The Maliki *Mazhab* prohibited promises in currency transactions except by spot.³²¹

Ibn Hazm allowed promises to buy and sell currencies at the agreed price of the day, followed by the actual buying and selling which is sealed by both parties. However, parties that make the promise are allowed to abort by not executing the contract for buying and selling. Promises can be aborted since they are not binding.³²²

318 Ibn Qayyim, *I'lam Al-Muwaqqi'in*, vol. 3, p. 323.

319 Mohamad Sulaiman Al-Asyqar, "*Bai` al-Murabahah Kama Tajrihi al-Bunuk al-Islamiyyah*". Working paper presented at the 2nd Islamic Finance Convention held at Kuwait on 21–23 March 1983.

320 Imam al-Syafi'i, *Al-Umm*, vol. 3, p. 27.

321 Ibn Rusyd, *Muqaddimat*, vol. 3, p. 58.

322 Ibn Hazm, *Al-Muhalla*, vol. 9, p. 583.

PRICE FIXING BASED ON FORWARD PRICING

RESOLUTION

The SAC, at its 30th meeting on 8 November 2000, resolved that the use of forward pricing is permissible for creating and cancelling units of unit trust funds which take place between the management company and unit trust holders.

INTRODUCTION

The Securities Commission provided a rule stating that the price of creating and cancelling units is equal to the net asset value per unit at the next valuation. This means that each unit price created and cancelled will only be known at the end of the transaction day (based on forward pricing).³²³

Price Fixing Based on Future Price

The objective of creating and cancelling the units based on forward pricing is to safeguard the interest of existing unit trust holders in unit trust schemes. If the said price is fixed at yesterday's price (historic pricing), the management company can manipulate the unit price to the advantage of the management company and at the same time, mistreat existing unit trust holders.

For example, if units are created based on yesterday's price, and that the management company is aware that the share market is on an uptrend, it is

323 Securities Commission, *Guidelines on Unit Trust Funds*.

able to maximise its profit by instructing the trustee to create units today (based on yesterday's price) and instruct the trustee the next day to cancel the said units. In this situation, there is a high possibility that the cancelled price was higher (because the market was on the uptrend) than the price when the units were created, and the difference has to be absorbed by the existing unit trust holders.

Apart from that, the management company can also adopt an opposite strategy if the share market is on a downtrend. The management company will instruct the trustee to cancel the units for today (based on yesterday's price) and instruct the trustee the next day to create the said units. The price to create the units in this case is possibly lower (because the market is on a downtrend) than the price of cancellation, and the difference has to be absorbed by the unit trust holders.

ARGUMENTS SUPPORTING THE PERMISSIBILITY OF FORWARD PRICING

In Islam, price is a very important element in a sales and purchase contract. If a sales and purchase contract is done without determining the price, the said contract is deemed invalid. However, there are various methods in determining the price which is part of the sales and purchase process.

Adaptability of Forward Pricing With Shariah Basis

Generally, a majority of Islamic jurists stressed that any sales and purchase contract done without determining the price is invalid. This is the general guideline that needs to be complied with.³²⁴

Shariah stipulates the need to know the price to avoid *niza'* (dispute) and *gharar*. If both parties to the contract agree on the basis that must be used in determining price according to the certain mechanism, then the issue of *niza'* and *gharar* can be solved.³²⁵

324 Al-Dharir, *al-Gharar Wa Atharuhu fi al-'Uqud fi al-Fiqh al-Islami*, p. 255. Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 2, pp. 691–692.

325 Al-Jaziriy, *Kitab al-fiqh 'Ala al-Mazahib al-Arba'ah*, vol. 2, p. 165. Al-Dharir, *al-Gharar Wa Atharuhu fi al-'Uqud fi al-Fiqh al-Islami*, p. 271.

Ibn Qayyim is of the opinion that buying and selling, without knowing the price in advance when contracting, is valid so long as the method to determine the price has been agreed by both parties, buyer and seller. This method was adopted from the views of Imam Ahmad and was further strengthened by the arguments of *`urf* and *qiyas*.³²⁶

According to him, *`urf* was used to allow buying and selling since it does not cause *niza`*. This was proven during his time, where people had already practised such buying and selling in the trading of bread and meat. What is important here is the agreement of both parties as to how a price is to be determined for buying and selling without necessarily knowing the price in advance.

He also provided an analogy for such buying and selling with *mahr mithl*³²⁷ in marriage contracts. Although the amount of *mahr* is not known when a marriage is being carried out, such marriage is valid because the method of determining the *mahr* has been agreed upon, that is based on *mahr mithl*. The same issue was also being recognised by Islamic jurists in determining *ijarah* based on the value of *mithl*.

Some modern Islamic jurists of the Hanafi *Mazhab* recognise buying and selling which they called *ba`al-istijrar*.³²⁸ This form of buying and selling is similar to *al-ba` bima yanqati` bihi al-si`r* which is permissible in the Hanbali *Mazhab*. With this, there is a point of convergence between modern Islamic jurists from the Hanafi and Hanbali *Mazhab*.³²⁹

Based on studies, using yesterday's price as a reference will encourage greater manipulation and thereafter, will result in *dharar* (adversity) to the market. In Islam, the elimination of *dharar* is a requisite. This is based on the *fiqh* method:

الضرر يزال

Meaning: "Adversity needs to be abolished."

326 Ibn Qayyim, *I'lam al-Muwaqqi'in*, vol. 4, pp. 5–6.

327 Marriage dowry based on the value of marriage dowry of close female relatives who are married.

328 Which means: to buy essential goods from a seller by paying at a later date. Please refer to Ibn 'Abidin, Hashiah, Rad al-Muhtar, vol. 4, p. 12.

329 *Al-Mausu'ah al-Fiqhiyyah*, vol. 9, pp. 43–47.

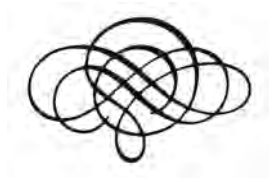
and the *fiqh* method:

الضرر يدفع بقدر الإمكان

Meaning: "Adversity needs to be abolished as much as possible."

330 Muhammad al-Zarqa', *Syarh al-Qawa'id al-Fiqhiyyah*, pp. 179, 207.

SHARIAH CRITERIA FOR LISTED SECURITIES



SHARIAH CRITERIA FOR LISTED SECURITIES

INTRODUCTION

At the end of 1995, the Islamic Capital Market Department (ICMD) of the Securities Commission (Commission) with the co-operation of the Islamic Instrument Study Group (IISG) took the initiative to begin a study of securities listed on Bursa Malaysia (formerly known as Kuala Lumpur Stock Exchange). As a result of the study, a set of criteria were formulated to be used as basic guidelines for the study of listed securities. This study was continued by the ICMD with the establishment of the Shariah Advisory Council (SAC) that replaced the IISG. The role of the SAC was to ensure that the studies carried out were conducted according to Shariah principles. In June 1997, the Commission published a list of Shariah-compliant securities based on Shariah principles. At that time, the number of Shariah-compliant securities was only 371 or approximately 57% of the total listed securities. By 28 October 2005, a total of 857 securities or 85% of the listed securities were found to comply with the Shariah principles, enabling Muslim investors to invest the Islamic way.

The IISG and SAC carried out their study from various angles, including considering the views from within and outside the country before publishing the initial list of Shariah-compliant securities. However, the criteria used as a basis to review the securities are constantly updated based on the research and case studies of all the listed securities on Bursa Malaysia. This is to ensure that Shariah-compliant securities go through the appropriate review process, in line with the requirements for the development and progress of the Islamic capital market in this country.

SHARIAH CRITERIA

In formulating the criteria, focus is placed on the primary activities of a company with regard to the goods and services offered. This is because these primary activities bring returns for the company that are subsequently distributed to its shareholders in the form of profits and dividends. Such activities need to be identified to see whether they are contrary to Shariah principles. If they are, then that particular company's securities are excluded from the list of Shariah-compliant securities.

PRIMARY ACTIVITIES CRITERIA

After a lengthy study and discussion with various parties within and outside the country, the SAC established that the following criteria can be used to analyse whether securities of a particular company can be deemed Shariah compliant or not. By applying these criteria, the Shariah-compliant securities can be separated from all listed securities. The IISG, at its 5th meeting on 23 August 1995, decided on four basic primary criteria to analyse listed securities.

In general, these criteria were established after referring to the Quran, *hadith* and general Shariah principles, and were formulated according to the activities of a particular company. The criteria are as follows:

First Criterion

The primary activity of the company is based on *riba* as practised by conventional financial institutions, including commercial banks, merchant banks, finance companies, etc.

Arguments to support the first criterion

- (a) Quranic evidence based on verses 275–276 in *Surah al-Baqarah*:

الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي
يَتَخَبَّطُهُ الشَّيْطَانُ مِنَ الْمَسِّ ذَلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ

مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا فَمَنْ جَاءَهُ مَوْعِظَةٌ
مِّن رَّبِّهِ فَانْتَهَى فَلَهُ مَا سَلَفَ وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ
فَأُولَٰئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ ﴿٢٧٥﴾ يَمْحَقُ
اللَّهُ الرِّبَا وَيُزِيهِ الصَّدَقَاتِ وَاللَّهُ لَا يُحِبُّ كُلَّ كَفَّارٍ أَثِيمٍ ﴿٢٧٦﴾

Meaning: "Those who devour *riba* will not stand except as one whom the evil one by his touch hath driven to madness. That is because they say: 'Trade is like *riba*,' but God hath permitted trade and forbidden *riba*. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for God to judge; but those who repeat (the offence) are Companions of Fire: they will abide therein (forever). God will deprive *riba* of all blessing, but will give increase for deeds of charity: for He loveth not creatures ungrateful and wicked."

(b) Evidence of *ijmak*

Islamic jurists from all the *mazhab* unanimously view that *riba* is forbidden. Because of this consensus of opinion, the prohibition on *riba* has become *ijmak*.³³¹

Second Criterion

A company whose primary activity is gambling, such as companies running casinos, gaming and others.

Arguments to support the second criterion

The prohibition on gambling is clear in the Quran, where Allah s.w.t. ordered the faithful to stay away from it, as decreed in verse 90, *Surah al-Maidah*:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَمُ رِجْسٌ

331 Ibnu Qudamah, *Al-Mughni*, vol. 4, p. 134. Al-Syirazi, *Al-Muhazzab*, vol. 1, p. 170. Ibnu Rusyd, *Bidayah al-Mujtahid*, vol. 2, p. 217. Al-Zuhaili, *Al-Fiqh al-Islami*, vol. 4, p. 670.

مَنْ عَمِلَ الشَّيْطَانُ فَأَجْتَبَاهُ لَعَلَّكُمْ تَفْلَحُونَ

Meaning: "O you who believe! Intoxicants, and gambling, (dedication of) stones, and (divination by) arrows, are an abomination of Satan's handiwork: eschew such (abomination) that ye may prosper."

Third Criterion

The primary activity of a company is the production and sale of goods and services that are prohibited in Islam, including:

- (a) Processing, producing and marketing alcoholic drinks;
- (b) Supplying non-*halal* meat like pork, etc.; and
- (c) Providing immoral services like prostitution, pubs, discos, etc.

Arguments to support the third criterion

- (a) Evidence from the Quran regarding food

Islam urges the whole of mankind to eat food which is *halal* and good. This exhortation is based on the decree of Allah s.w.t. in the Quran, verse 168, *Surah al-Baqarah*:

يَا أَيُّهَا النَّاسُ كُلُوا مِمَّا فِي الْأَرْضِ حَلَالًا طَيِّبًا وَلَا تَتَّبِعُوا
خُطَوَاتِ الشَّيْطَانِ إِنَّهُ لَكُمْ عَدُوٌّ مُبِينٌ

Meaning: "O ye people! Eat of that which is on earth, lawful and good; and do not follow the footsteps of the evil one for, he is to you an avowed enemy."

حُرِّمَتْ عَلَيْكُمْ الْمَيْتَةُ وَالْدَّمُ وَلَحْمُ الْخَنَازِيرِ وَمَا أَهَلَ لِغَيْرِ اللَّهِ
بِدِّهِ وَالْمُنْخَنِقَةُ وَالْمَوْقُوذَةُ وَالْمُتَرَدِّيَةُ وَالنَّطِيحَةُ وَمَا أَكَلَ
السَّبْعُ إِلَّا مَا ذَكَّيْتُمْ وَمَا ذُبِحَ عَلَى النُّصُبِ

Meaning: "Forbidden to you (food) are dead meat, blood, the flesh of swine, and that on which has been invoked other than Allah's name, that which has been killed by strangling, or by a violent blow, or by a headlong fall, or by being gored to death, that which has been eaten by a wild animal, unless you are able to slaughter it (in due form), and that which is sacrificed on stone altars."

(Surah al-Maidah: 3)

(b) Evidence for prohibition of alcoholic drinks

Allah s.w.t. decrees:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلُمُ رِجْسٌ
مِّنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ

Meaning: "O you who believe! Intoxicants and gambling, and (dedication of) stones, and (divination by) arrows, are an abomination of Satan's handiwork. So avoid such abomination that you may prosper."

(Surah al-Maidah: 90)

It was narrated of a *hadith*:

إِنَّ اللَّهَ تَعَالَى لَعَنَ الْخَمْرَ وَعَاصِرَهَا وَمَعْتَصِرَهَا وَشَارِبَهَا
وَسَاقِيَهَا وَحَامِلَهَا وَالْمَحْمُولَةَ إِلَيْهِ وَبَائِعَهَا وَمَشْتَرِيَهَا
وَأَكَلَ ثَمْنَهَا

Meaning: "Verily Allah s.w.t. curses intoxicants, those who squeeze grapes to produce, those who buy the grape juice for making the drinkers, suppliers of intoxicants, bearers of intoxicants, those who pour intoxicants into cups for drinkers, sellers of intoxicants, those who buy them and those who spend the money earned from the sale of intoxicants."³³²

(c) Prohibition on immoral activities

In the matter of adultery, Islam prohibits its followers from committing the abominable act, so much so that the perpetrator deserves

332 *Hadith* narrated by al-Hakim and Ibnu Hibban.

the heaviest penalty should he or she be found guilty. Allah s.w.t. decrees:

وَلَا تَقْرَبُوا الزِّنَىٰ إِنَّهُ كَانَ فَحِشَةً وَسَاءَ سَبِيلًا

Meaning: "Nor come high to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils)."

(Surah al-Isra': 32)

Similarly, with a company which carries out immoral activities like selling alcoholic drinks, running pubs and discos, prostitution, etc. because such activities encourage vice.

Fourth Criterion

The primary activity of the company is *gharar*³³³ (uncertainty) such as conventional insurance trading.

The basis of the prohibition on *gharar* is a *hadith* of the Prophet s.a.w.:

أَنَّ النَّبِيَّ عَلَيْهِ الصَّلَاةُ وَالسَّلَامُ قَدْ نَهَىٰ عَنْ بَيْعِ الْغَرَرِ

Meaning: "Verily, the Prophet s.a.w. prohibits *gharar* transactions."³³⁴

333 For further details please refer to the SAC resolution on *gharar*.

334 *Hadith* narrated by Muslim.

MIXED COMPANIES

RESOLUTION

The SAC, at its 2nd meeting on 21 August 1996, discussed the status of companies running a mix of permissible and prohibited activities. The SAC resolved that such companies, with a certain degree of prohibited elements which do not exceed the benchmark set by the SAC, can be included in the *List of Shariah-compliant Securities by the Shariah Advisory Council of the Securities Commission*. The SAC also resolved that the subject of *'umum balwa* and *gharar yasir* need to be taken into account when justifying a company with a mix of permissible and prohibited elements, whereby its core activity is permissible. At its 9th meeting on 27 August 1997, the SAC decided on a benchmark in relation to the image factor of a company.

INTRODUCTION

A mixed company is one where its core activities are permitted by Shariah, although there are some other activities that may contain a small extent of prohibited elements. For mixed companies, the SAC carries out an analysis with additional considerations before including these companies in the list of Shariah-compliant securities. These considerations are—

- (a) the core activities of the company must be activities which are not against the Shariah principles as outlined in the four primary criteria (that were explained earlier). Furthermore the *haram* element must be very small compared to the main activities;
- (b) public perception of the image of the company must be good; and

- (c) the core activities of the company have importance and *maslahah* (benefit in general) to the Muslim *ummah* and the country, and the *haram* element is very small and involves matters such as *'umum balwa* (common plight), *'urf* (custom) and the rights of the non-Muslim community which are accepted by Islam.

THE STATUS OF MIXED COMPANIES ACCORDING TO SHARIAH

The Involvement of Muslims in the Purchase of Equity

The existing structure of a company enables its majority shareholders to control it. This means that Muslims can control a company by being the largest shareholders of the company. This is a strategic and important matter that needs to be understood by the Islamic community. At the same time, a question that will possibly arise is that the transfer of the company's control to Muslims may not necessarily solve the problem of prohibited activities. Sometimes, even though the ownership of the company has changed hands, the prohibited activities still carry on. This depends on the extent of the Muslim community's observance of the religion's commandments and prohibitions, and the presence of *fasad al-zaman*.³³⁵

The question of having prohibited activities in a company is not something new. In fact, it has been discussed by contemporary Muslim scholars like Al-Khayyat. He gives the example for *riba*, where certain companies are involved in contracts with *riba* for business transactions conducted by the company's management. He separates the practice of *riba* by the company's management from the company's main activities. The sins are therefore borne by the company's management as they are not part of the company's main activities.³³⁶ Nevertheless, the prohibited status of the company is clear if the core activity is prohibited, like *riba*-based financial services, gambling, production of liquor, etc.

335 *Fasad al-zaman* means the lack of good deeds and practices at a particular time.

336 Abdul 'Aziz Khayyat, *Al-Syarikat fi Dhau' al-Islam*, Al-Idarah al-Maliyyah, Al-Majma' al-Malaki, Amman, 1989, vol. 1, p. 196.

Situation of Mixed Companies

A question arises when a company's core activity is permissible but at the same time it has other prohibited activities. For example, a big company whose core activity is the production of industrial goods, but has a subsidiary company whose activity involves *riba*. This activity occurs within the company's group, and provides loans to the subsidiaries and the holding company as a source of financing for their business activities.

An example of another mixed company is a large company whose core activity is real estate but which has a subsidiary company that operates a hotel or resort where liquor is sold within its premises. What is the status of this company according to Shariah? Is the core activity which is more significant not taken into consideration to permit Muslims to invest in the company? Whereas the permissible activity benefits the public much more compared to the prohibited activity which has minimal benefits.

The form of prohibited activity in the first case is more for financing the company's purchase of machinery, equipment and others. The form of prohibited activity in the second company is to provide a service to non-Muslims.

Opinions of Past Islamic Jurists

There are some discussions by Islamic jurists in classical works on Islamic jurisprudence which are related to the issue of mixed companies. The discussion looked at the status of companies jointly owned by Muslims and non-Muslims. They touched on a situation where the non-Muslim partners carry out *riba*-based activities and trading of liquor, which are prohibited for Muslims. Nevertheless, Islam recognises the rights of the non-Muslims. Islam classifies this matter as *mal* for them.³³⁷ Islam has also ruled that its followers cannot damage or violate the assets of the non-Muslim community even when the said assets are prohibited for Muslims. Due to the existence of such a situation, there are different views among past Islamic jurists with regards to permitting the establishment of such a company in Islam.

The next issue also addressed by the Islamic jurists concerns companies owned by Muslim partners but where one partner carries out a prohibited activity, for example, *riba*. The situation comes about because this partner

³³⁷ Zaydan, *Al-Madkhal*, pp. 186–187.

is not that observant about religious and moral practices. A matter such as this also gives rise to a difference of opinion among the past Islamic jurists because it was related to the principle about a person's sins not being transferable to another and also the principle of *muamalat* transactions being generally permissible. It means that we are allowed to practise *muamalat* among fellow Muslims who may be faithful or *fajir*³³⁸ or between Muslims and non-Muslims or vice-versa.

The past Islamic jurists did not make religion a condition for incorporating a company except when it concerns a *mufawadhah* company.³³⁹

Group of Islamic Jurists That Permit Mixed Companies

Some Islamic jurists believe that it is permissible for Muslims to partner non-Muslims in business, although it is not encouraged. The Islamic jurists were from the Syafi'i *Mazhab*, and some from the Hanafi, Maliki and Hanbali *Mazhab*.³⁴⁰

Their arguments were based on *qiyas* where both partners qualify to become official representatives. Thus they should run the *mufawadhah* company complying with how the *mufawadhah* company was formed between the Muslim and non-Muslim. Subsequently, both parties (Muslim and non-Muslim) qualify to carry out the work of the company on their own, even though they both differ on what is permissible and prohibited in carrying out an activity. According to the Islamic jurists, Muslims cannot carry out prohibited activities, such as those connected with *riba* and liquor trading, while there are no restrictions on the non-Muslims. The same religion need not be present in a *mufawadhah* company. Islam allows a *mufwadhhah* company to be formed between Majusians and the *kitabīs* (Jews and Christians) although the religions of both parties differ. Majusians worshipped fire and their altar was considered *mal*, whereas the *kitabīs* did not have the same practice.³⁴¹

338 Muslim *fajir* means a Muslim who does not follow the commandments of Allah s.w.t. and does not protect himself from doing what is prohibited.

339 A *mufawadhah* company is a company with partners who share the capital, action, debts and profits, starting from the beginning of the company's operations right up to the end. See Al-Khafif, *Ahkam al-Muamalat*, p. 458. Nazih Hammad, *Mu'jam al-Mustalahat*, p. 169.

340 Al-Hattab, *Mawahib al-Jalil*, vol. 5, pp. 118–119. Al-Buhuti, *Kasysyaf al-Qina'*, 1982, vol. 3, p. 496. Al-Ramli, *Nihayah al-Muhtaj*, Dar al-Fikr, Beirut, vol. 5, p. 6. Al-Rafi'i, *Fath al-'Aziz (Al-Majmu' Syarh al-Muhazzab)*, Dar al-Fikr, Beirut, vol. 10, p. 405.

341 Al-Hattab, *Mawahib al-Jalil*, vol. 5, pp. 118–119. Al-Buhuti, *Kasysyaf al-Qina'*, vol. 3, p. 496. Al-Ramli, *Nihayah al-Muhtaj*, vol. 5, p. 6. Al-Rafi'i, *Fath al-'Aziz*, vol. 10, p. 405.

Group of Islamic Jurists That Prohibit Mixed Companies

Imam Hanafi and Muhammad were from among the early generation of the Hanafi *Mazhab* who did not believe it was permissible for Muslims to collaborate with non-Muslims through *mufawadhah*. This was because Islamic and non-Islamic activities differ. What was permissible for non-Muslims was considered *mal* such as liquor and pork, which were prohibited for Muslims.

Rationale Permitting the Inclusion of Mixed Companies in the List of Shariah-compliant Securities

Views of Many Islamic Jurists Permitting

Based on the views of many Islamic jurists,³⁴² the approach towards permitting Muslims to invest in the shares of companies with a mix of permissible and prohibited activities is justified. This is because the esteemed Islamic jurists did not prohibit such companies when evaluating the status of companies jointly owned by both good Muslims and *fajir* Muslims, even though the companies were later found to carry out prohibited activities, such as *riba* and the sale of liquor.

Past Islamic jurists also discussed the issue of funding from both permissible and prohibited sources. The majority of the Islamic jurists allowed such transactions involving permissible and prohibited funding, provided the ratio of permissible funds is more.

Izz al-Din bin Abd Al-Salam said:

وإن غلب الحلال بأن اختلط درهم حرام بألف درهم
حلال جازت المعاملة

Meaning: "If the permissible money is more, that is, one dirham of prohibited money is mixed with one thousand of permissible money, then the transaction is allowed."³⁴³

342 A majority of Islamic jurists from the Hanafi, Maliki, Syafi'i and Hanbali *Mazhab* found mixed companies to be permissible. Regardless of the Islamic jurists, who came before the Hanafi *Mazhab*, not permitting such companies; the later Islamic jurists permitted them based on a differing interpretation towards the social situation which could influence a *fatwa*. The change in judgement from not permitting to permitting was seen as meeting the needs of Muslims to be involved in controlling a company in a plural society.

343 Izz al-Din bin Abd al-Salam, *Qawa'id al-Ahkam*, vol. 1, pp. 72–73.

Al-Kasani also said:

كل شيء أفسده الحرام والغالب عليه الحلال فلا بأس عليه

Meaning: "Everything will be tainted by what is prohibited, but if the larger part is *halal*, then trade is allowed."³⁴⁴

Ibnu Taimiyyah also gave the same view with regards to funds where permissible and prohibited assets are mixed:

... فإن كان الحلال هو الأغلب لم يحكم بتحريم
المعاملة... وإن كان في ماله حلال وحرام واختلط لم
يحرم الحلال بل له أن يأخذ قدر الحلال

Meaning: "Should the permissible be more, then a business transaction will not be judged as prohibited... and should one's wealth be found to have a mixture of the permissible and prohibited, then the permissible element will not be prohibited; on the contrary, the owner is allowed to take according to the permitted ratio."³⁴⁵

Islamic Jurisprudence Accepts the Reality of *Gharar Yasir* and *Ghabn Yasir*

*Gharar*³⁴⁶ and *ghabn*³⁴⁷ are two negative elements that can ruin a contract. However, should it occur in a small amount, Islamic jurisprudence considers it normal and will not adversely affect the contract's goodwill. In other words, the miniscule presence of these two negative elements in a contract is excusable. The same situation can happen in a mixed company where the permitted activity is more than the prohibited activity. Therefore, the nature of such a company is within the permissible bounds of the Islamic jurisprudence and is excusable.

344 Al-Kasani, *Badai' al-Sana'i'*, vol. 6, p. 144.

345 Ibnu Taimiyyah, *Majmu' Fatawa*, vol. 29, p. 273.

346 *Gharar* means uncertainty and cheating. Please see *Al-Mu'jam al-Wasit*, vol. 2, p. 648. Fairuz Abadi, *Al-Qamus al-Muhit*, p. 577.

347 *Ghabn* means the act of taking profits by charging above the market price. Please see Nazih Hammad, *Mu'jam al-Mustalahat*, p. 210.

The Principle of *`Umum Balwa*

Most of the small prohibited matters in today's business transactions can be categorised as *`umum balwa*.³⁴⁸ Such matters, as earlier explained, are included among those matters excusable under Islamic jurisprudence.

The Principle of *al-Dharuriyat al-Khamsah*

With reference to the *masalih dharuriah*,³⁴⁹ *Syara`* has listed *hifz al-mal*³⁵⁰ as a *masalih dharuriah* that must be regarded very seriously. The question of the Muslims' economic strength and integrity is an important factor in the continuity and progress of Muslims. Large companies whose core activity is permissible, should not be cast aside by Muslims just because there is a small number of activities that do not comply with the Shariah requirements. If Muslims are involved in these companies, they can concentrate their capital in permissible activities that outweigh those which are prohibited. Besides, this will benefit Muslims as they can participate in the economy, especially in companies that are important and strategic to them.

Change in *Hukm* (Ruling) Due to Change in Human Behaviour

Changes in environment and location greatly affect the consistency of rulings through the ages. This is because Islam is a religion that is suitable for meeting human needs at any time and any place. To meet these demands, changes in rulings always take place. Every ruling that is endorsed has a specific aim in meeting the call for justice, obtaining *maslahah*, and averting damage and destruction. Apart from the factors of time, place and environment, the change in ruling is also related to the changing morality of Muslims. Based on the history of Islamic jurisprudence, there were many rulings that were amended due to changes in time, place and environment. The Islamic jurisprudence states a maxim of Islamic jurisprudence as follows:³⁵¹

لا يَنكُرُ تَغْيِيرُ الْأَحْكَامِ بِتَغْيِيرِ الْأَزْمَانِ

348 Please refer to the SAC resolution on *`umum balwa* for further details.

349 Al-Syatibi, *Al-Muwafaqat*, vol. 2, pp. 8–10. *Al-Masalih al-Dharuriyyah* refers to the five primary concerns of mankind – preservation of religion, self, mind, genealogy and property.

350 *Hifz al-mal* means preservation of property.

351 Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 2, p. 923.

Meaning: "It cannot be denied that a change in ruling is caused by a change in time."

Even then, changes are confined to rulings that are *ijtihadi* in nature.

A ruling can change as a result of a lack of abstinence and weak adherence to religious commandments as a whole at a place or what is known as *fasad al-zaman*. Besides that, a ruling can also change due to changes in the economic system or what is known as *asalib iqtisadiyah* because if rulings do not change with the times, it ceases to be practical. As a result, the lack of changes will make the Shariah appear static and obsolete because it cannot cope with the prevailing needs, whereas according to Imam Al-Syatibi, nothing is purposeless in Shariah.³⁵²

An example of a change in ruling as a result of a change in environment for Muslims is provided by the ruling concerning the payment for teaching the Quran. The early generation of past Islamic jurists ruled that no payment should be given for teaching the Quran and religion. However, with changing times, such duties were required to be appropriately paid. Without such payment, religious education would be neglected because no one would be interested to teach. As a result, nobody would have a deep knowledge of the Quran and the religion, because specialist knowledge would not be available. Because of this, the Islamic jurists later took the approach of permitting the acceptance of payment, which was originally not permitted, in line with the changing times and environment.³⁵³

The reason for deciding on a ruling that differs completely from its original ruling, that is from not permitting to permitting, is so that the religious *maslahah* will continue to be preserved. If the ruling is not updated in line with the changing times and environment, religious study and its propagation would almost certainly be completely neglected. This contradicts the requirement of the Shariah which wants such noble efforts to continue. Thus, maintaining an old ruling which has no *maslahah* is contradictory to Shariah principles.

352 Al-Syatibi, *Al-Muwafaqat*, vol. 1, p. 137.

353 Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 2, p. 930.

Response to Views Disputing the Permissibility of Mixed Companies

There are parties opposed to the inclusion of a mixed company in the list of Shariah-compliant securities due to its non-compliance with the maxim (إذا اجتمع الحلال والحرام غلب الحرام) which means that if the permissible is mixed with the forbidden, then it should be ruled as forbidden. They are of the view that such a mixed company should not be at all included in list of Shariah-compliant securities.

It must be understood, however, that there are strong arguments to rebut the above viewpoint, as follows:

- (a) Weakness of the maxim (إذا اجتمع الحلال والحرام غلب الحرام).

The authenticity of the above maxim is also disputed. It cannot be denied that this maxim is suitable for certain cases, such as the mixing of slaughtered animals carried out by Muslims and the Majusi but it is not suitable in the case of mixed companies.

Al-Sayuti mentions that this maxim is based on a *hadith* of the Prophet s.a.w.:

ما اجتمع الحلال والحرام إلا غلب الحرام الحلال

Meaning: "Where there is a mix of the permissible and the forbidden, then it becomes forbidden."

However, Islamic scholars debated on the status of this *hadith*. According to al-Hafiz Abu Al-Fadhl al-'Iraqi, this *hadith* is of unknown origin. Meanwhile, al-Subki quoted *al-Baihaqi* that the *hadith* was conveyed by Jabir Al-Ja'fi, someone of weak status who had conveyed it from al-Sya'biy who, in turn, conveyed it from Ibn Mas'ud in the form of a *munqati'* (*hadith* of a broken reporting sequence).³⁵⁴

- (b) Existence of an opposing maxim

There is an opposing maxim mentioned in Al-Asybah³⁵⁵ at the end of the discussion of the maxim إذا اجتمع الحلال والحرام غلب الحرام. The

354 Al-Suyuti, *Al-Asybah*, pp. 139–144.

355 Al-Suyuti, *Al-Asybah*, p. 151.

maxim concerned is **الحرام لا يحرم الحلال** which means: “*That which is forbidden does not render forbidden that which is permissible.*” This maxim was formulated based on the *hadith warid* found in Sunan Ibn Majah and Al-Darqutniy conveyed from Ibn Omar.

(c) *Maslahah*

Apart from the weakness of the maxim stated above, *maslahah* is also a strong argument for permitting mixed companies. It is further strengthened by arguments pertaining to the existence of the *`umum balwa*, *fasad al-zaman*, *`urf*, *asalib iqtisodiyah* situations and the recognised rights of non-Muslims.

Because of that, the maxim as presented by Izz al-Din `Abd al-Salam³⁵⁶ regarding the mix of good and bad should be applied:

إذا اجتمعت مصالح ومفاسد فانظر ...

Meaning: “Where there is good and bad together, then it needs to be reviewed...”

If such an action is taken, and hopes of achieving good are more positive, and the disadvantage can be overcome and averted, then such an action should continue. This takes into consideration the command of Allah s.w.t.:

فَاتَّقُوا اللَّهَ مَا اسْتَطَعْتُمْ

Meaning: “So fear Allah s.w.t. as much as you can...”

(*Surah al-Taghabun: 16*)

On the contrary, if the bad cannot be overcome and the good cannot be obtained because the bad outweighs the good, then the decision not to proceed with the planned action is wiser to avoid the bad.

BASIS FOR ESTABLISHING THE BENCHMARK

To determine the status of a mixed company as a Shariah-compliant company/securities, it is necessary to draw up specific benchmarks to ensure that

356 Izz al-Din Abd al-Salam, *Qawa'id al-Ahkam*, vol. 1, p. 83.

prohibited elements are minimal and related to those excused by *Syara`*. In other words, the presence of prohibited elements do not affect the permissible part which is larger and more important.

The esteemed past Islamic jurists did not draw up a benchmark for determining the status of a mixed company. This, therefore, gives modern Islamic jurists the opportunity to think about such a benchmark.

The SAC considered a number of benchmarks as a basis that can be considered as *ihtiyat* (precautionary measure) that gives caution in classifying a mixed company under the permissible category as stated by Ibnu Subki in *al-Asybah wa al-Naza'ir*, that is, "to rule as prohibited something that is a mix of the permissible and the prohibited is *ihtiyat* and it is not necessarily prohibited."³⁵⁷

The SAC took into account additional elements like *maslahah*, *'umum balwa*, *'urf khas min asalib iqtisodiyah*,³⁵⁸ *fasad al-zaman* and *huquq ghair muslimin*.³⁵⁹ The SAC also looked at numerous *fatwa* (religious edict from a qualified scholar) which have become exceptions to the maxim *إذا اجتمع الحلال والحرام غلب الحرام* which means, if there is a mix of the permissible and the prohibited, then it is ruled as prohibited.

For example, the mixing of slaughtered animals by Muslims and the Majusi is ruled to be totally prohibited.³⁶⁰ This *fatwa* is in line with the maxim *إذا اجتمع الحلال والحرام غلب الحرام* because such a mixed item is prohibited in essence. Whereas if the essence of such an item is not prohibited, but is prohibited for other reasons, then it needs to be scrutinised differently.

Ibnu Qayyim in his *Bada'i al-Fawa'id*³⁶¹ divided the nature of prohibited assets into two groups:

- (a) Prohibited because of its *zat* (nature), for example liquor, pork, etc. This relates to the case of mixing slaughtered animals mentioned earlier; and
- (b) Prohibited due to other reasons, for example, the means by which money is earned is prohibited. Money, in essence is not prohibited, but if money is obtained as a result of theft, robbery, cheating, etc.;

357 Al-Suyuti, *Al-Asybah*, p. 151.

358 *'Urf khas min asalib iqtisodiyah* is something that is widely used, especially in economic activities.

359 *Huquq ghair muslimin* is the rights of non-Muslims.

360 Al-Suyuti, *Al-Asybah*, p. 140.

361 Ibnu Qayyim, *Bada'i al-Fawa'id*, vol. 3, p. 257.

then this money is prohibited. This is similar to the securities of a mixed company, because securities in essence is not prohibited. It becomes prohibited because the activities of such companies produce profits which can be distributed through dividends.

An exceptions to the maxim *إذا اجتمع الحلال والحرام غلب الحرام* is, for example, the *fatwa* concerning silk mixed with common thread. Silk cloth is prohibited to be worn by men as in the *hadith* of the Prophet s.a.w.:

أخذ رسول الله صلى الله عليه وسلم حريرا فجعله في
يمينه، وأخذ ذهبا فجعله في شماله، ثم قال إن هذين
حرام على ذكور أمتي، وزيادة الرواية عند ابن ماجه حل
لإنائهم

Meaning: "The Prophet s.a.w. took a piece of silk and placed it on his right. He took some gold and placed it on his left. Then he said: Both these things are prohibited unto men among my followers, but permissible for the women."³⁶²

However, it can be worn by men if the ratio of silk thread mixed with the common thread does not exceed 50%. The benchmark concerning such a mixture is 50%. In other words, if the mixture of silk does not exceed 50%, the cloth may be worn by men. The question is whether such a benchmark is suitable for application in the context of mixed securities. However, from the viewpoint of asset characteristic, both cases are essentially similar, as they appear to be assets that are not prohibited in essence.

Benchmark of One-third

The Prophet s.a.w.'s condition of 1/3 (33.33%) is a very generous limit which can also be considered for use as the benchmark for mixed companies. This statement can be supported by the legacy of Sa'ad Ibn Abi Waqas who wanted to leave his assets as alms as in the following *hadith*:

أنه عاد سعد بن أبي وقاص فقال له رسول الله صلى الله
عليه وسلم: قد بلغ مني الوجع ما ترى وأنا ذو مال ولا

362 *Hadith* narrated by Ahmad, Abu Daud, Nasa'i and Ibn Majah.

يرثني إلا ابنة لي، أفأتصدق بثلثي مالي، فقال له رسول الله صلى الله عليه وسلم: لا، فقال له سعد فالشطر، قال: لا، ثم قال له رسول الله صلى الله عليه وسلم: الثلث والثلث كثير، إنك أن تذرورتك أغنياء خير من أن تذرهم عالة يتكفون الناس.

*Meaning: "One day, the Prophet s.a.w. visited Sa'ad bin Abi Waqas who was ill. Sa'ad expressed to the Prophet s.a.w. his feelings that his illness was entering the last phase and that death was near. He asked for the Prophet s.a.w.'s opinion on giving his assets away as alms for he had only one daughter to inherit his wealth. Therefore, he wished to give as alms 2/3 of his property. However, the Prophet s.a.w. stated his objections. Then Sa'ad asked whether he could give away 1/2 of his property. The Prophet s.a.w. still said no. The Prophet s.a.w. then said: 1/3 (of Sa'ad's property to give away as alms) is enough, that too is still too much. Verily, to leave your heir wealthy is far better than to leave you heir impoverished and dependant on other people's charity."*³⁶³

Based on the Prophet s.a.w.'s words, 1/3 or 33.33% "is enough" and can be used as a guideline for the basis of formulating a benchmark. The question is whether this benchmark is suitable to be used for mixed companies, because it relates to the bequest of property and giving of alms. Even so, it cannot be denied that it can be used as a benchmark to set the upper limit of a mixture because an amount exceeding the percentage set will be considered excessive.

Benchmark Based on *Ghabn Fahisy*

The practice of *ghabn fahisy*³⁶⁴ in trading is not allowed in Islam. However, if the *ghabn* is small then it is excused. The meaning of *ghabn* is making profits which exceeds market price. The theory of *ghabn fahisy* describes gains which exceed the market price achieved through cheating. If *ghabn* happens without any act of cheating, then it is permitted.

363 Hadith narrated by al-Bukhari and Muslim.

364 *Ghabn* refers to profits arising in an exchange contract which can be divided into *ghabn fahisy*, i.e. excessive, and *ghabn yasir*, i.e. minimal. Please refer to Nazih Hammad, *Mu'jam al-Mustalahat*, p. 210.

The activity of *tanajusy*,³⁶⁵ that is manipulation, if accompanied by the element of *ghabn fahisy* can give buyers the right to cancel the sale and purchase contract, according to the majority of Islamic jurists from the Maliki, Syafi'i and Hanbali *Mazhab*.³⁶⁶ This shows that if *ghabn fahisy* is accompanied by the element of *tanajusy*, then it is not permissible. However, if it occurs below the benchmark, it is excused. The Hanafi *Mazhab* ruled that the upper limits for *ghabn fahisy* are as follows:

- (a) 5 per cent for ordinary goods;
- (b) 10 per cent for animals, including those used for riding; and
- (c) 20 per cent for fixed assets.

365 *Tanajusy* refers to a collusion between the seller and the buyer outside the actual market in order to stimulate interest among buyers to buy at a higher price, when the said buyer has no wish to buy. The motive of the collusion is to influence the market and subsequently take the opportunity to make profits. It is a form of cheating and is prohibited in Islam. Please refer to Nazih Hammad, *Mu'jam al-Mustalahat*, p. 274.

366 Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, p. 378.

IMAGE AS CRITERIA FOR LISTED SECURITIES

RESOLUTION

The SAC, at its 40th meeting on 22 July 2002, resolved that image is part of Shariah criteria which forms the basis of analysis on companies listed on Bursa Malaysia. Image is used as one of the criteria because it refers to the following three bases:

- (a) Image based on *maslahah rajihah* (tangible deeds)

Image involving public interest and a mix of activities which do not comply are small and forgivable. For example, hotel activities. Such an image has a benchmark of 25 per cent;

- (b) Image based on *sadd zari'ah*

Image involving activities where the benefits are disputed, and may lead to harm and aspersion to the public. For example, manufacturing of condoms. Such an image has a benchmark of 5 per cent; and

- (c) Image based on factors between *maslahah* and *sadd zari'ah*

Image involving activities that largely benefit the Muslim society but at the same time has its negative element which portrays a bad image of the Muslim society. For example, sale of liquor in public transport. Such image does not have a particular benchmark and its resolution is based on the discretion of the SAC.

INTRODUCTION

The SAC used two approaches in its resolution of analysing listed companies:

- (a) The first method is by way of quantitative approach. By this method, the SAC's decision is based on the percentage (%) contribution of activities which do not comply with the group income and profit before tax set by the Commission. The SAC will compare the percentage with the benchmark which has been fixed, such as 5 per cent, 10 per cent and 25 per cent; and
- (b) The second method is by way of qualitative approach (non-quantitative). By this method, the SAC's decision is based on several external factors of the company, such as image, *maslahah* and others. This method does not refer to the benchmark for activities which do not comply with the Shariah in deciding the status of the listed company.

The SAC's resolution on the status of listed securities related to image depends on the following categories:

Image with Benchmark

Determining the status of companies based on image is done using the quantitative method because the SAC has formulated the benchmark for image criteria. It is divided into two activities as seen in the following cases:

- (a) Hotel activities (inclusive of resort and chalets) – 25 per cent

The SAC resolved that hotel activities do not comply with Shariah because of image. This is due to the existence of night clubs provided by the hotel management, for which their contribution are not accounted for because they are considered as complimentary for the hotel guests. In addition, hotel activities give a negative image to the public. As such, the SAC placed a benchmark of 25 per cent on the image factor for hotel activities; and

- (b) Manufacturing/marketing of condoms – 5 per cent

The SAC resolved that the manufacturing and marketing of condom do not comply with Shariah because of the image. As such, the SAC

placed a benchmark of 5 per cent. This resolution is based on studies which show that the use of condom is for immoral activities.

Image Without Benchmark

In deciding the status of companies based on image, it is normally done on a case by case basis and it does not involve benchmarks. It is based on qualitative decisions made by the SAC. This can be seen in the following cases:

- (a) Serving of alcoholic drinks in public transport;
- (b) Pork-based business;
- (c) Sale of alcoholic drinks in restaurants;
- (d) Take-over of casino companies;
- (e) Advertisements of alcoholic drinks; and
- (f) Equity holding of listed companies that do not comply with the Shariah.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF THE USE OF IMAGE AS CRITERIA

Studies on image from the perspective of the Shariah are carried out to identify the actual meaning of image according to the views of the Shariah. At the same time, it is also to avoid any misunderstanding in the use of the image terminology which all this while has been used as the basis to assess a listed company.

Definition of image

According to Dewan Dictionary, image has two meanings,³⁶⁷ as follows:

³⁶⁷ Dewan Bahasa dan Pustaka, *Kamus Dewan New Edition*, Kuala Lumpur, 1989.

- (a) Illustration or reflection of shadow; and
- (b) Personality or character of a person as portrayed and seen from another person or perception of others.

This means that image is a mental picture or perception of others on a certain matter. In Arabic, image is "*surah zihniyyah*" which means mental picture.³⁶⁸

The understanding of image in the context of *fiqh* is vague. However, it can be defined as the Shariah's view on a certain matter because one's perception or mental picture towards something is meaningless from the aspect of law if it is not based on Shariah law. As such, it is important to differentiate between views based solely on perception and views based on the Shariah.

According to Yusuf al-Qaradhwai, the focus of man-made laws is to fulfil the needs of mankind solely based on their culture and way of life. It does not matter whether the culture and way of life deviate from the human code of ethics or one that may jeopardise mankind.

On the other hand, the focus of Shariah in formulating certain rules or laws is to place importance on the welfare of the people by avoiding all negative elements of the society, such as a culture that leads to destruction, freedom based on sexual desire, self-interest which may harm others, etc.³⁶⁹

Fundamentals of Shariah Assessment on Image Analysis

Studies on image have a close relationship with those on mixed companies. This is because most of the resolutions on the image of activities are categorised under activities of mixed companies. This means that the Shariah principles used in assessing mixed companies are also used as that for image analysis. Perhaps there are several additional principles which are more relevant to the studies of image. Among the Shariah principles that are used in the studies of image are as follows:

368 *The Concise Oxford English-Arabic Dictionary*, Edited by N.S. Doniach, Oxford University Press, 1982.

369 Yusuf al-Qaradhwai, *Madkhal li Dirasah al-Syari'ah al-Islamiyyah*, p. 104.

Principle of *maslahah rajihah*

Maslahah rajihah is the main factor of consideration by the SAC in their analyses of mixed companies. The measurement of *maslahah*, which has been the guiding principles for Islamic jurists in ascertaining that Shariah law is implemented in all fairness, is guided by *maqasid* Shariah. Among the principles which form the core of *maslahah* as stipulated by Islamic jurists is *hifz mal* (preservation of assets). The question of *hifz mal* is one of the *masalih dharuriyah*³⁷⁰ which must be given top priority. The question of economic integrity and robustness is one of the “survival” factors for the Muslims. At the same time, there is a need to be wary of *tahrib mal al-muslim* efforts تهريب مال المسلمين by those who are envious of the economic solidity of the Muslim community.

The importance of safeguarding the economy is one issue that is demanded by the Shariah. The strength of the community is closely related to the stability and the strength of economic power of the community itself. As such, Islamic jurists are of the view that if the Muslim community is poor and weak, the demand for other *dharuriyat* will be affected or mortgaged due to the Muslim community's weakness to uphold the sovereignty of their economy.³⁷¹

Principle of *sadd zari`ah*

Sadd zari`ah is among the methods acceptable and used by some Islamic jurists. In fact it was made as one of the important principles by Maliki *Mazhab* in determining certain laws.

The meaning of *zari`ah* is “an issue of which on the exterior is permissible but there is great possibility it is involved in issues prohibited by Shariah”.³⁷²

The *tazarra`* method as debated by Islamic jurists is divided into two sections. The first section refers to paths or ways that are expected, whether compulsory, optional or permissible. In this context, it is called “*fath zari`ah*” or paths which are open and permissible. The second section refers to paths which will lead to adversity and things that are prohibited. This second path becomes the basis for Islamic jurists of the Maliki *Mazhab* in determining the law.

370 Al-Syatibi, *al-Muwafaqat*, vol. 2, pp. 8–10.

371 Mas'ud al-Yubi, *Maqasid al-Syari'ah al-Islamiyyah*, pp. 283–284.

372 Mahmud Uthman, *Qa'idah Sadd al-Zarai'i*, p. 62.

373 Al-San'ani, *Subul al-Salam*, vol. 3, p. 831.

An example of *sadd zarîh* is someone who sells grapes to a person who processes them to make wine. According to the Maliki *Mazhab*, such sale is prohibited because every act of buying and selling that results in prohibited issues is prohibited by law.³⁷³

Principle of *al-Ta`arudh Bayna al-Masalih Wa al-Mafasid* (Meeting Point of the Good and Adverse)

In certain cases, with regards to studies made on a company, elements of *maslahah* to mankind are present but at the same time, adversity may arise if certain action is approved. In such a situation, Islamic jurists are of the opinion that a decision has to take into account what is more *aslah* (best) between abolishing the adversities and reaping the benefits.

Izz al-Din urged when there is a meeting point of the good and adverse, the solution is to weigh intelligently how far the good is implemented and adversity is avoided.³⁷⁴

Relationship of Image and Principle of Shariah

The Shariah principle for mixed companies as clarified earlier is also used to assess the image status. In order to make the relationship between the Shariah principle and image even clearer and more complete, the following principles were used for the image criteria. The three main principles are:

Maslahah Rajihah

A company's activity which is related to *maslahah rajihah* is an activity that benefits mankind, but incorporates mixed elements, which can be forgiven. For example, activities which involve the rights of non-Muslims or have *syubhah* elements can make it difficult to compute the ratio of contribution of such activities towards the income of the company.

Company activities which are closely related to this method are hotel activities, including resorts and chalets. Although hotel activities or rest houses were initially permissible according to the Shariah, but due to other

374 Izz al-Din 'Abd al-Salam, *Qawa'id al-Ahkam*, vol. 1, p. 83.

supporting services which are prohibited by the Shariah, such as the sale of alcohol, massage parlours, night clubs and others; hotel activities are bound by the image criteria. However, in order to honour the rights of non-Muslims, it is forgiven.

Sadd Zari`ah

Company activities classified under this method are activities whose benefits are disputed by the Islamic jurists and may give rise to detrimental acts or aspersion if they are not controlled. One such activity is the manufacturing and marketing of condoms.

The condom itself initially does not give rise to any problem if used in a permissible way. But studies showed that condoms are used for immoral activities and can give rise to aspersions, such as promiscuity which is prohibited.

Hence, such activities have to be controlled by adopting the *sadd zari`ah* method.

Meeting Point of *Maslahah* and *Sadd Zari`ah*

The meeting point of *maslahah* and *sadd zari`ah* can happen when an activity is seen as one that brings enormous benefit to mankind. However, at the same time, there are mixed activities which give a bad perception to the Islamic image and also in the eyes of Muslims.

An example of such an activity is a food and drink processing company which brings benefits to society. However, its subsidiary is involved in the rearing of pigs or processing of pork, although the contribution from this prohibited activity is below the benchmark of 0.05 per cent.

The *maslahah* is that most of the processed foods and drinks are *halal* and give benefits to society. Due to the prohibited element which also concerns food, the image implicating the unhealthy mixture of activities becomes a concern to the SAC in assessing which is more *aslah* to society.

GLOSSARY

Arabic terms commonly used throughout the book.

<i>Ahli Kitab</i>	the <i>kitabīs</i> , people of the Book i.e Christians and Jews
<i>`aqd</i>	contract
<i>`aqd tauthiqiy</i>	security contract
<i>athar</i>	deeds and precedents of the Companions of the Prophet s.a.w.
<i>baī</i>	sale
<i>baī dayn</i>	sale of debt
<i>baī kali' bi kali'</i>	sale of one debt for another
<i>baī ma'dum</i>	buying and selling something that does not exist
<i>baī maujud</i>	buying and selling something that exists
<i>baī muzayadah</i>	sale by auction
<i>baī salam</i>	sale where payment is made on the spot but delivery of goods is done on a deferred basis at a preagreed date
<i>baī wafa</i>	sale with a right in the seller to repurchase the property by refunding the purchase price

<i>dalil</i>	evidence, indicative legal text
<i>dayn</i>	debt
<i>dharurah</i>	necessity
<i>fatwa</i>	decree, religious edict from a qualified scholar
<i>fiqh muamalat</i>	Islamic commercial law
<i>fuqaha</i>	Islamic jurists
<i>ghalat</i>	error in perception
<i>gharar</i>	elements of uncertainty and cheating
<i>ghasb</i>	usurpation, the invasion of property rights in an open and flagrant manner
<i>hadith</i>	prophetic tradition
<i>halal</i>	lawful
<i>haq</i>	right
<i>haq dayn</i>	debt right
<i>haq maliy</i>	rights on assets with financial values
<i>haq tamalluk</i>	ownership right
<i>hawalah</i>	debt assignment contract
<i>hibah</i>	gift
<i>hukm</i>	Shariah ruling
<i>îarah</i>	asset borrowing
<i>ihtiyat</i>	precautionary measure
<i>ijmak</i>	consensus of Islamic scholars and jurists

<i>ijarah</i>	leasing contract
<i>ijtihad</i>	reasoning by qualified scholars to obtain legal rulings from the sources of the Syariah
<i>`illah</i>	cause
<i>`inan</i>	form of partnership in which each partner contributes both capital and work
<i>initizar</i>	waiting
<i>istihsan</i>	juristic preference, disregarding a <i>hukm</i> backed by a <i>dalil</i> and supported by another <i>hukm</i> that is sounder
<i>istiqrar ta`amul</i>	stability of business transactions
<i>jahalah</i>	ignorance or lack of knowledge
<i>jahiliyah</i>	Pre-Islamic times
<i>juz'ie</i>	branch
<i>khiyar</i>	option
<i>mal</i>	asset/property
<i>manhaj</i>	methodology
<i>masalah</i>	consideration of public interests
<i>mazhab</i>	school of thought
<i>muamalah (singular) / muamalat (plural)</i>	transaction(s)
<i>mudabbar</i>	slave
<i>mujtahid (singular) / mujtahidun @ mujtahidin (plural)</i>	person who formulates independent tradition-based opinions in legal or theological matters

<i>muqamarah</i>	gambling
<i>murabahah</i>	cost plus profit sale
<i>musya`</i>	jointly-owned property
<i>musyarakah</i>	partnership
<i>nas</i>	explicit legal text
<i>qabadh</i>	possession
<i>qadhi</i>	judge
<i>qardh</i>	loan
<i>qiyas</i>	analogy
<i>rahn</i>	pledge or collateral
<i>riba</i>	usury
<i>sadd zari`ah</i>	blocking the means to something (evil)
<i>sahih</i>	valid, authentic
<i>salam</i>	forward sale. The purchase of item known by specification or description for delivery at a later specified time, with payment of price in full at time of contract
<i>sukuk</i>	financial notes
<i>ta`attul</i>	delay
<i>tabarru`at</i>	ownership contract on voluntary basis
<i>tabi`in</i>	the successors. A successor is a person who can meet any companion of the Prophet s.a.w. (named as sahabi or sahabat) after the death(wafat) of the Prophet s.a.w.
<i>tanazul</i>	cessation of right to claim

<i>ta`widh</i>	compensation
<i>ta`wil</i>	interpretation
<i>taqabudh</i>	taking possession
<i>taqlid</i>	imitation, following the views and opinions of others
<i>thamanul mithl</i>	market price
<i>ulama'</i>	Islamic scholars
<i>ummah</i>	Muslim community at large
<i>`urbun</i>	earnest money, down payment
<i>`urf</i>	customary practices
<i>`uqud</i>	contracts
<i>`uqud mu`awadat</i>	exchange contracts

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