

# **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 تُبْئِئْتُمْ  
فَلَکُمْ رُءُوسُ أَمْوَالِکُمْ 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,<sup>218</sup> 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.<sup>219</sup>

## 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,<sup>220</sup> *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

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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 والفضة بالفضة والبر بالبر والشعير بالشعير  
والتمر بالتمر والملح بالملح مثلا 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."<sup>221</sup>

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

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.<sup>223</sup>

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.<sup>224</sup>

*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.<sup>225</sup>

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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*<sup>226</sup> has the same meaning as *khatar* which means something dangerous.<sup>227</sup> It also carries the meaning of *khida`* or cheating.<sup>228</sup> 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

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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."<sup>229</sup>

### **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.<sup>230</sup>

First: *Gharar* which means *jahalāh* 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.<sup>231</sup>

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.<sup>232</sup>

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."<sup>233</sup>

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.<sup>234</sup> Al-Ramli stated that, *gharar* is something that has two assumptions, positive and negative, with the negative being more dominant.<sup>235</sup> 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.<sup>236</sup>

Between the views of the Hanafi and Syafi'i schools of thought, the Syafi'i *Mazhab* was of the opinion that *jahalah* 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*.<sup>237</sup>

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

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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 Ihya 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:<sup>238</sup>

- (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,<sup>239</sup> that is *gharar fahisy* (plenty),<sup>240</sup> *gharar yasir* (a little)<sup>241</sup> and *gharar mutawassit* (moderate).<sup>242</sup> *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*<sup>243</sup> and *la dharar wa la dhirar*.<sup>244</sup> 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'*.<sup>245</sup>

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.<sup>246</sup>

### 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 وَالْأَزْلَامُ رِجْسٌ  
مِّنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ

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246 Nazih Hammad, *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.<sup>247</sup>

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

Although past Islamic jurists did not present the *ghalat* theory in a specific topic, modern Islamic jurists<sup>248</sup> 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

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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-Arwal 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*,<sup>249</sup> *khiyar `aib*<sup>250</sup> and *khiyar ru'yah*.<sup>251</sup>

*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*.<sup>252</sup>

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.<sup>253</sup>

In discussing the issue of *ghalat*, Islamic jurists look at *maslahah istiqrar ta`amul*.<sup>254</sup> 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*.

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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-Awwal*, 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 wadhah*.<sup>255</sup> *Ghalat wadhah* 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.<sup>256</sup>

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255 Al-Zarqa', *Al-Madkhal al-Fiqhi*, vol. 1, p. 390. *Ghalat wadhah* 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.<sup>257</sup> 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.<sup>258</sup> 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”.<sup>259</sup>

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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*<sup>260</sup> 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."*<sup>261</sup>

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.

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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)."*<sup>262</sup>

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

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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.<sup>263</sup> 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'*.<sup>264</sup>

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

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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,<sup>266</sup> *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 Hiss***<sup>267</sup>

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*;<sup>268</sup> 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.

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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*<sup>269</sup>

*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;<sup>270</sup>
- (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;<sup>271</sup>
- (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*;<sup>272</sup> 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.<sup>273</sup>

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',<sup>274</sup> `Uthman al-Batti<sup>275</sup> and Syi`ah Imamiyah.<sup>276</sup>

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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.<sup>277</sup> 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."<sup>278</sup>

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*)."<sup>279</sup>

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.<sup>280</sup>

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*:

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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."*<sup>281</sup>

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 حجرته 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."*<sup>282</sup>

## 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."<sup>283</sup>*

## 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.<sup>284</sup>

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.<sup>285</sup>

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*."

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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, *Ilam 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, *Ilam 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.<sup>286</sup> Based on these views, the SAC adopted the principle of reduced debt to be applied in the capital market.

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286 Ibnu Qayyim, *l'lam al-Muwaqq'în*, 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 situation<sup>287</sup> affecting most people and is difficult to avoid.<sup>288</sup>

### **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:

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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 بليته 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.<sup>289</sup>

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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 creditor<sup>290</sup> when the debtor<sup>291</sup> fails or is late in meeting his obligation to pay back the loan.<sup>292</sup>

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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."<sup>293</sup>*

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*

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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.”<sup>294</sup>*

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.”<sup>295</sup>*

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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*<sup>296</sup> 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*<sup>297</sup> 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.

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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.<sup>298</sup>

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.<sup>299</sup> 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.:<sup>300</sup>

أَمْسِكُوا عَلَيْكُمْ أَمْوَالِكُمْ لَا تَعْمُرُوهَا فَإِنَّ مِنْ أَعْمَرِ شَيْئًا  
فَإِنَّهُ 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.<sup>301</sup> 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).<sup>302</sup>

Imam Abu Hanifah and Imam Malik allowed *hibah `umra* but disallowed *hibah ruqba*.<sup>303</sup> 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.<sup>304</sup> In their opinion *hibah ruqba* is *hibah ta'liq* on something which is uncertain from the aspect of the period of implementation.<sup>305</sup>

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.:<sup>306</sup>

**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.<sup>307</sup> 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.<sup>308</sup>

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".<sup>309</sup>

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.<sup>310</sup>

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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*.<sup>311</sup> 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".<sup>312</sup>

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.<sup>313</sup>

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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.<sup>314</sup>

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.<sup>315</sup>

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 *qabd*, 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 Hanbali *Mazhab* are of the opinion that this contract is a *bai`* contract and should meet the sales and purchase conditions.<sup>316</sup>

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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-Madkhal 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.<sup>317</sup>

## **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

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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.<sup>318</sup>

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.<sup>319</sup>

## Permissibility of Promises to Buy and Sell Currencies

Imam Syafi'i allowed the promises to buy and sell currencies.<sup>320</sup> The Maliki *Mazhab* prohibited promises in currency transactions except by spot.<sup>321</sup>

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.<sup>322</sup>

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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).<sup>323</sup>

### 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

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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.<sup>324</sup>

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.<sup>325</sup>

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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*.<sup>326</sup>

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*<sup>327</sup> 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 *bai`al-istijrar*.<sup>328</sup> This form of buying and selling is similar to *al-bai` 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*.<sup>329</sup>

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."*

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330 Muhammad al-Zarqa', *Syarh al-Qawa'id al-Fiqhiyyah*, pp. 179, 207.