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:

> ـَيْبِيُهَا الْلَّيْكُ أَنْفُقُوا أَنْسُقُوا اِلَّهَ وَزُوَّادُوا بِمِنْ أَلْبَارَ ۚ إِنْ أَنْفِقَتْ مُؤْمِنُينَ ۖ فَإِنْ لَمْ تَفْعَلُوا فَذَٰلِكَ أُحْرِبَ بِمِنْ أَلْبَارِ وَرُسُلِهِ ۗ وَإِنْ تَسْتَمِعُوا فَلَٰكِنْ رُسُولُ ۚ أَمْوَلُكُمْ لَ آنَّظِمُونَ وَلَآ نَظِمُونَ

*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

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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*:

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الذهب بالذهب والفضة بالفضة والبر بالبر والشعيروالشعيرو
والتمور بالتمور والملح بالملح مثلا بمثل يبدا بيد، فإذا اختلفت
هذه الأصناف فبيعوا كيف شئتتم إذا كان يبدا 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.”
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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

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221 Hadith narrated by Muslim.
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*.
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

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.  

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

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\text{مثلا بمثال يدا بيد، فإذا اختلفت هذه الأصناف فبيعوا كيف شئتم إذا كان يدا بيد}
\]

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

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.  

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Resolutions of the Securities Commission Shariah Advisory Council

**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* has the same meaning as *khatar* which means something dangerous. It also carries the meaning of *khida`* or cheating. 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 *taghir* which is synonymous with *ghurur* or *tadlis*. Gharar has no elements of cheating while taghir has. Please refer to al-Dhariri, *al-Gharar wa Atharuhu fi al-`Uqud al-Fiqh al-Islammi*, Dar al-Jil, Beirut, 1990, p. 35.
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.:

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أَنَّ النَّبِيَّ عِلَيْهِ الصَّلَاةُ وَالسَّلَامُ نَهَى عَنْ بِعَبَّ الْغَرْرَ
\]

*Meaning: “Verily, the Prophet s.a.w. forbids gharar trading.”*

**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

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229 Hadith narrated by Muslim.
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 شيئا 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.”*\(^\text{233}\)

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.\(^\text{234}\) Al-Ramli stated that, *gharar* is something that has two assumptions, positive and negative, with the negative being more dominant.\(^\text{235}\) 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.\(^\text{236}\)

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*.\(^\text{237}\)

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

\[^{233}\text{Hadith narrated by al-Daraqutni.}\]
\[^{234}\text{Al-Syirazi, Al-Muhazzab, vol. 1, p. 262.}\]
\[^{237}\text{Qalyubi wa `Umairah, vol. 2, p. 161.}\]
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 (*ba`atain fi ba`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

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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).
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:

ياة أهل البيت، إنما مما أُنزل من أن ي أعمال الرجس

from work of the devil, accordingly let you forbear them.

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

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

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.

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.

In discussing the issue of ghalat, Islamic jurists look at maslahah istiqrar ta`amul. 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.

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

SPEECULATION

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
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*\(^\text{260}\) 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:

\[
\text{دعوا الناس يرزق الله بعضهم من بعض}
\]

*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.

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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 المسخر القابض الباسط الراظق وإنى 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).”

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 uqad 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. 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’. Qabadh is closely related to the theory of `aqd in Islamic jurisprudence, and this relationship can be seen from two dimensions.

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

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.

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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.


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

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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.
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’, Uthman al-Batti and Syi`ah Imamiyah.

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274 Ibnu Hazm, Al-Muhalla, Dar al-Turath, Cairo, vol. 8, p. 520.
276 OIC, Majallah Majma’ al-Fiqh, no. 6, vol. 1, p. 478.
Second viewpoint: The majority of Islamic jurists were of the view that \textit{qabadh hakiki} is valid for the transaction of some types of goods.\textsuperscript{277} This was based on validated prophetic traditions which forbade the sale of some types of goods before \textit{qabadh hakiki}.

Nevertheless, they were of differing views in deciding on the `\textit{`illah} and guidelines for the types of goods that should be included under this restriction. This is because the prophetic traditions which discussed \textit{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 \textit{hadith} used to support \textit{qabadh hakiki} were:

\begin{quote}
 عن ابن عباس رضي الله عنهما أن رسول الله صلى الله عليه وسلم نهى أن يبيع الرجل طعاما حتى يستوفي، فلقت لا ابن عباس: كيف ذلك؟ قال: ذلك دراهيم بدراهم والطعام مرجا

Meaning: “From Ibn `Abbas, it was narrated that the Prophet s.a.w. had forbidden a man from selling food he had not yet procured. Ibn `Abbas was asked as to its form. He answered; dirham with dirham, and food after it has been procured.”\textsuperscript{278}
\end{quote}

\begin{quote}
 عن عبد الله بن دينار قال: سمعت ابن عمر رضي الله عنهما يقول: قال النبي صلى الله عليه وسلم: من ابتاع طعاما فلا يبيعه حتى يقبضه

Meaning: “From Abdullah bin Dinar that he had heard Ibn `Umar said, the Prophet s.a.w. said: Whoever buys food, he should not resell it before he procures it (qabadh hakiki).”\textsuperscript{279}
\end{quote}

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

\textsuperscript{277} Al-Zuhaili, \textit{Al-Fiqh al-Islami}, vol. 4, p. 382.
\textsuperscript{278} Hadith narrated by Bukhari, Muslim and Tirmizi.
\textsuperscript{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.
**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*:

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**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.”

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عن كعب أن نقم عليه ابن أبي حدرد دينا كان له عليه في المسجد فارتقت أصواتها حتى سمعها رسول الله صلى الله عليه وسلم وهو في بيته فخرج إليهما حتى كشف سجف حجرته فنادى يا كعب قال: لبيك يا رسول الله قال: ضع من ديناك هذا وأومنا إليه أي الشطر قال: لقد فعلت يا رسول الله قال: قد 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.”

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**Opinion of Ibnu `Abbas**

Ibnu `Abbas is of the opinion that dha` wa ta`ajjal is permitted with the following argument:

أ أنه جائز لأنه من باب أخذ لبعض حقه وتأرك لبعضه

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281 Hadith narrated by al-Baihaqi.
282 Hadith narrated by al-Bukhari.
Capital Market Issues According to Islamic Jurisprudence

Meaning: “It (dha` wa ta`ajjāl) is permitted because it concerns claiming part of one’s right and relinquishing another.”

Views of Past Islamic Jurists

The past Islamic jurists differed in their views on dha` wa ta`ajjāl. Generally, there were two main views regarding this issue:

The first view permitted dha` wa ta`ajjāl. 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`ajjāl 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`ajjāl 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`ajjāl. 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`ajjāl.”

Where is the similarity between the two? In addition, there are no *nas*, *ijmak*, and validated *qiyas* that forbid this concept. Based on these views, the SAC adopted the principle of reduced debt to be applied in the capital market.

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`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 affecting most people and is difficult to avoid.

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.
Meaning: “Adversity allows for measures to bring about ease.”

Meaning: “If a situation faces a problem, Syara’ allows for a way out.”

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.\footnote{Al-Suyuti, Al-Asybah wa al-Naza’ir, pp. 77–78.}
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.
Resolutions of the Securities Commission Shariah Advisory Council

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:

مظلل 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.”*

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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Resolutions of the Securities Commission Shariah Advisory Council

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.”

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 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 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 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.


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.:\(^{300}\)

أمسكوا عليكم أموالكم لا تعمروها فإن من أعمار شيئا فإنه لمن أعماره

\(^{300}\) Al-Kasani, Bada’i’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.\textsuperscript{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).\textsuperscript{302}

Imam Abu Hanifah and Imam Malik allowed hibah `umra but disallowed hibah ruqba.\textsuperscript{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.\textsuperscript{304} In their opinion hibah ruqba is hibah ta’liq on something which is uncertain from the aspect of the period of implementation.\textsuperscript{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.:\textsuperscript{306}

Meaning: “Do not give (hibah) either by way of `umra or ruqba.”

\textsuperscript{301} Ibn Qudamah, al-Mughni, vol. 6, pp. 338–339.
\textsuperscript{304} Al-Nawawi, al-Majmu’ Syarh al-Muhazzab, vol. 15, p. 396.
\textsuperscript{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.\(^{310}\)

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\(^{307}\) Ibn Qudamah, *Mughni*, vol. 6, p. 335.


Imam Ahmad and Islamic jurists of the Zahiri Mazhab do not allow the annulment of hibah.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{313}

\textsuperscript{312} Ibn Rusyd, \textit{Bidayah al-Mujtahid}, vol. 2, pp. 428–429.
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’aqdd* (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.\(^{316}\)

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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

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320 Imam al-Syafi‘i, *Al-Umm*, vol. 3, p. 27.
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).\textsuperscript{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

\textsuperscript{323} Securities Commission, \textit{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

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.\textsuperscript{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\textsuperscript{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 bai‘al-istijrar.\textsuperscript{328} 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.\textsuperscript{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:

\begin{quote}
الضرر يزال
\end{quote}

\textit{Meaning: “Adversity needs to be abolished.”}

\textsuperscript{326} Ibnu Qayyim, \textit{I‘lam al-Muwaqqi‘in}, vol. 4, pp. 5–6.
\textsuperscript{327} Marriage dowry based on the value of marriage dowry of close female relatives who are married.
\textsuperscript{328} Which means: to buy essential goods from a seller by paying at a later date. Please refer to Ibn ‘Abidin, \textit{Hashiah, Rad al-Muhtar}, vol. 4, p. 12.
\textsuperscript{329} \textit{Al-Mausu‘ah al-Fiqhiyyah}, vol. 9, pp. 43–47.
Resolutions of the Securities Commission Shariah Advisory Council

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.