PRINCIPLES OF *MUAMALAT* IN THE CAPITAL MARKET
MUSYARAKAH MUTANAQISAH

RESOLUTION

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

INTRODUCTION

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

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

27 Sukuk is a form of financial note. Please refer to al-Mausu’ah al-Fiqhiyyah, vol. 27, p. 46.
will then buy back all the shares from the investors every month according to the amount and duration agreed upon i.e. 120 months. This will end at the point when ABC company owns all the shares.

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF MUSYARAKAH MUTANAAQISAH

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

(a) ‘*Inan* company (form of partnership, in which each partner contributes both capital and work);

(b) Promise from the financial institution to sell its share of the company to its partners; and

(c) The institution sells all of its shares to its partner fully or partially.³⁰

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

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

INTRODUCTION

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

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

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF 
BAI' DAYN

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

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

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

**Opinions of Past Islamic Jurists**

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

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

(a) Expediting the payment of the purchase;

(b) The debtor is present at the point of sale;

(c) The debtor confirms the debt;

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34 See SAC resolution on *gharar* for further explanation.
35 *Qabadh* means the control and ownership of the item bought. It depends a lot on *`urf* or the normal recognition of the local community. See SAC resolution on *qabadh* for further explanation.
(d) The debtor belongs to the group that is bound by law so that he is able to redeem his debt;

(e) Payment is not of the same type as dayn, and if it is so, the rate should be the same to avoid riba;

(f) The debt cannot be created from the sale of currency (gold and silver) to be delivered in the future;

(g) The dayn should be goods that are saleable, even before they are received. This is to ensure that the dayn is not of the food type which cannot be traded before the occurrence of qabadh; and

(h) There should be no enmity between buyer and seller, which can create difficulties to the madin (debtor).

The conditions set by the Maliki Mazhab can be divided into three categories:\(^{37}\)

(a) To protect the rights of the debt buyer;

(b) To avoid debt selling before qabadh; and

(c) To avoid riba.

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

Ibnu al-Qayyim was of the opinion that bai` dayn was permissible because there was no general nas or ijmak that prohibited it. What was stated was the prohibition of bai` kali` bi kali`\(^ {39}\).

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38 Dayn mustaqir is redemption-guaranteed debts, e.g. compensation value of damages and properties of the debtor. Please refer to Al-Syirazi, Al-Muhazzab, Dar al-Fikr, Beirut, vol. 1, p. 262.
39 Ibn Qayyim, I’lam al-Muwaqqi’in, vol. 1, p. 388. Bai` kali` bi kali` is bai` nasi’ah bi nasi’ah which means a debt sale that is paid by debt. For example, one buys food on credit for two months. When the time comes, he should redeem his debt. However, he says to the seller: “I still have no food to pay my debt, so sell it to me for another period.” The seller then sells it to him for another period and increases the price. In this case, the buyer did not receive anything in exchange when being charged for extending the period of payment.
Results of the study showed that the main reason for the clash of opinions on *bai` dayn* among the past Islamic jurists centred on the ability of the seller to deliver the items sold. This was stated by Ibnu Taimiyyah himself and was also based on statements made in the great books of the four *mazhab*.

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

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

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

**BAI` `INAH**

**RESOLUTION**

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

**INTRODUCTION**

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

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

40 Forms of bai` `inah are as follows:

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

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

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

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF BAI` INAH

Opinions of Past Islamic Jurists

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

The majority\footnote{Ibnu `Abidin, Hasyiah Rad al-Mukhtar, vol. 5, pp. 273 & 325. Al-Shaukani, Nail al-Authar, vol. 5, p. 294. Al-San`ani, Subul al-Salam, vol. 3, pp. 76–77. Yusuf al-Qaradhawi, Bai` al-Murabahah, p. 64. Al-Zuhaili, Al-Fiqh al-Islami, vol. 4, pp. 466–467.} were of the opinion that bai` `inah was not permissible because it was the zari`ah (way) or hilah (legal excuse) to legitimise riba (usury).

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

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

The basis for the opinion of the majority of the Islamic jurists was the hadith dialogue between Aishah and the slave Zaid bin al-Arqam which showed the prohibition of bai` `inah.\footnote{Ibnu `Abidin, Hasyiah Rad al-Mukhtar, vol. 5, pp. 273 & 325. Al-Syaukani, Nail al-Authar, vol. 5, p. 294. Al-San`ani, Subul al-Salam, vol. 3, pp. 76–77. Yusuf al-Qaradhawi, Bai` al-Murabahah, p. 64. Al-Zuhaili, Al-Fiqh al-Islami, vol. 4, pp. 466–467.} They also held to the hadith of the Prophet s.a.w in which he warned that those who practised bai` `inah would suffer scorn.\footnote{The Hanafi, Maliki and Hanbali Mazhab,}
The Syafi’i and Zahiri Mazhab viewed bai‘ `inah as permissible. A contract was valued by what is disclosed and one’s niyyah (intention) was up to Allah s.w.t. to judge. They criticised the hadith used by the majority of the Islamic jurists as the basis for their argument, saying that it (the hadith) was weak and therefore could not be used as the basis for the hukm.45

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

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

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45 Please refer to footnote no. 43 on page 21.
**BAI’ MA’DUM**

**RESOLUTION**

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

**INTRODUCTION**

According to the theory of contracts in the Islamic jurisprudence, one of the conditions is that the *mahal al-ʾaqd* or *maʾqud alaih* (objects in trade) to be traded must exist when the contract is being made. Purchase of an object that does not exist when the contract is being made is considered *baiʾ ma’dum*.

**ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF BAIʾ MAʾDUM**

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

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Opinions of Past Islamic Jurists

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

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

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

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


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

Hence, the study shows that the ‘illah for the prohibition of *baiʾ maʿdum* is *gharar* and not the non-existence of goods. *Gharar* occurs when the seller is unable to deliver the objects for sale.

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

*51* Please refer to further explanation on *baiʾ maʿdum* in the SAC resolution on transferable subscription rights (TSR) and *gharar*. 
BAI’ WAFA’

RESOLUTION

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

INTRODUCTION

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

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

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

The main features of *bai‘ wafa‘* include:\(^56\)

(a) The seller and buyer can terminate the contract at any time;

(b) The asset traded according to *wafa‘* is not an asset obtained through *musya‘*;\(^57\)

(c) The buyer can utilise and benefit from the property bought through *wafa‘*;

(d) The buyer will be liable if there is any damage caused to the property by his own carelessness and negligence; and

(e) The buyer cannot transfer the right of ownership of the property to another person via a sale. However, there are some Hanafi *Mazhab* scholars who consider the transfer of ownership to a third party permissible on the condition that the asset can be reclaimed.

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

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

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

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

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF BAI` WAFA’

Opinions of Past Islamic Jurists

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

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

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

BAI` MUZAYADAH

RESOLUTION

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

INTRODUCTION

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

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

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ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF BAI` MUZAYADAH

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

Athar as Basis

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

(a) Imam Bukhari had written a specific topic on the concept and views of `Ata` who said that bai` muzayadah was practised by society in the sale of war booty;⁶⁶ and

(b) Anas had reported the Prophet s.a.w. selling a carpet and a water vessel and was calling out for customers. A man offered to buy them for one dirham. The Prophet s.a.w. then asked for a higher bid. Another man offered two dirham and so the Prophet s.a.w. sold the wares to him.⁶⁷

Opinions of Past Islamic Jurists

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

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

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

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

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

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

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SUFTAJAH

RESOLUTION

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

INTRODUCTION

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

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

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF SUFTAJAH

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

**Athar as Basis**

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

**Opinions of Past Islamic Jurists**

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

**Views Not Permitting *Suftajah***

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

“Every qardh that benefits the creditor is riba.”

**Views Permitting *Suftajah***

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

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suftajah is used as an instrument to avoid the risk of losing money while travelling.\(^\text{75}\)

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

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RESOLUTION

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

INTRODUCTION

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

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

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF BAI` `URBUN

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

Opinions of Past Islamic Jurists

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

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

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

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

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79 Ibnu Qudamah, Al-Mughni, vol. 4, pp. 312–313.
80 Al-Zarqa’, Al-Madkhal al-Fiqhi, p. 496.
BAI` BIMA YANQATI` BIHI SI`R

RESOLUTION

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

INTRODUCTION

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

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

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

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

81 Ibnu Qayyim, I`lam al-Muwaqqi`in, vol. 4, pp. 5–6.
This was based on the existence of the element of *jahalah* (ignorance) in the price of the contract that rendered it invalid.\(^{82}\)

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

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


\(^{84}\) *Qiyaṣ* refers to reconciling a new ruling and an existing one because they have the same *‘illah*. Please refer to Al-Zuhaili, *Usul al-Fiqh*, vol. 1, p. 603.

KAFALAH ON MUDHARABAH CAPITAL

RESOLUTION

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

INTRODUCTION

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

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

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

Generally, kafalah may be divided into two types:

87 Securities Commission, Guidelines on the Offering of Islamic Securities.
(a) *Kafalah bi mal* is a guarantee to return an asset to its owner; and

(b) *Kafalah bi nafs* is a guarantee to bring someone to a specific authority, such as the judiciary.\(^9^0\)

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

(a) *Kafalah bi dayn* is a guarantee for the repayment of another party’s loan obligation. It means that when a debtor fails to meet his obligation to repay a loan, then the guarantor will assume this obligation;

(b) *Kafalah bi `ayn* or *kafalah bi taslim* is a guarantee of payment for an item or a guarantee of delivery in a transaction. For example, in a sale and purchase contract, the guarantor agrees to guarantee the delivery of the item to be sold to the purchaser. In the event the seller fails to honour his obligation according to the agreement, the guarantor will be responsible for the delivery; and

(c) *Kafalah bi darak* is a guarantee that an asset is free from any encumbrances. This guarantee is specific for transactions that involve the transfer of titles or rights which ensures that an asset is free from any encumbrances. For example, if A claims and is able to prove that the item bought by B belongs to A, then it will be the guarantor’s responsibility to ensure that B gets back the value of his purchase which has been paid to the seller.\(^9^1\)

*Mudharabah* is a contract which involves agreement between two parties, namely *rabb mal* (investor) who provides 100% of the fund, and *mudharib* (entrepreneur) who manages the project in accordance with Shariah principles. Any profit from this investment will be apportioned based on the preagreed ratio at the inception of the agreement. However, any losses will be fully borne by the *rabb mal*.\(^9^2\)


\(^{92}\) Securities Commission, *Guidelines on the Offering of Islamic Securities*. 
ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF KAFALAH ON MUDHARABAH CAPITAL

The Original Law on Guarantees for Mudharabah Capital

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

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

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

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

(a) Third-party guarantee based on tabarru` (voluntarily given);

(b) Third-party guarantee based on qardh (debts);


(c) Mudharib yudharib (the entrepreneur channels the investor's capital to investing in a third party); and

(d) Guarantee through special funds.

**Third-party Guarantee Based on Tabarru'**

The OIC Fiqh Academy\(^{96}\) discussed on the matter of issuance of *sanadat muqaradhah* and summarised that *mudharib* guarantee on capital and *mudharabah* profits are not permissible. However, the guarantee may be issued by a third party who has no connection whatsoever with the *mudharib* if it is done by way of *tabarru’* and is not included as a condition in the actual *mudharabah* contract sealed and signed by both parties.\(^{97}\)

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

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

**Third-party Guarantee Based on Qardh**

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

\(^{96}\) 4th meeting on 6–11 February 1988.


\(^{100}\) AAOIFI, *Al-Ma’ayir al-Syar’iyyah*, Bahrain, 2001, p. 89.


\(^{102}\) This section states that “The government guarantees the payment of *sanadat muqaradhah* upon maturity. This payment guarantee is in the form of interest-free qardh bestowed by the government for implemented projects”. Please refer to OIC, *Majallah Majma’ al-Fiqh al-Islami*, no. 4, vol. 3, p. 1980.
However, the OIC Fiqh Academy, disagrees with the basis of third-party guarantees that are based on debt and resolved that third-party guarantees have to be in the form of tabarru’. Otherwise, the contract is deemed to be an interest-bearing debt which is not permissible.

**Mudharib Yudharib**

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

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

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

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

**Guarantee Through Special Funds**

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

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104 Ibnu Qudamah, Al-Mudghni, vol. 5, p. 163.
105 Qararat wa Tausiyat Majma’ al-Fiqh al-Islami, p. 70.
RESOLUTION

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

INTRODUCTION

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

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF *UJRAH* ON GUARANTEES

*Ujrah on Kafalah*

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

\(^{106}\) Securities Commission, *Guidelines on the Offering of Islamic Securities*.

Principles of Muamalat in the Capital Market

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

The OIC Fiqh Academy and the Shariah Council AAOIFI resolved that *ujrah* on *kafalah/dhaman* is not permissible. However, the guarantor may claim for actual expenses incurred on the guarantee.\(^ {111}\)

**Imposition of Rahn (Collateral) on the Issuer**

*Rahn* is defined as the act of creating a valuable asset as collateral to amortise a debt in the event that the debtor fails to fulfil his obligations to the creditor.\(^ {112}\)

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

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

\(^{112}\) Securities Commission, *Guidelines on the Offering of Islamic Securities*.
\(^{113}\) Please refer to section 12 of *Muqaradhah Act*, Jordan.
Resolutions of the Securities Commission Shariah Advisory Council

**IBRA’ CLAUSE IN A DOCUMENT OF AGREEMENT**

**RESOLUTION**

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

(a) Holders of Islamic securities may offer *ibra’* to the issuer based on the application made by the issuer of the securities concerned;

(b) The formula for the computation of early settlement may be stated as a guide to the issuer; and

(c) The *ibra’* (rebate) clause and the formula for the computation of early settlement may be stated in the main agreement of the Islamic securities contract which is based on ‘*uqud mu’awadhat*. However, the *ibra’* clause in the main agreement shall be separated from the part related to the price of the transacted asset. The *ibra’* clause shall only be stated under the section for mode of payment or settlement in the said agreement.

**INTRODUCTION**

*Ibra’* refers to the act of surrendering one’s claims and rights, such as a creditor writing off the debts of a debtor. *Ibra’* falls under *uqud tabarru’at*.\(^{115}\)

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

\(^{115}\) Al-Zarqa’, *Al-Madkhal al-Fiqhi*, vol. 1, p. 579.
(a)  *Ba‘atāin fī bai‘ah* (two sales and purchase contracts in one transaction);  
(b)  *Safqātān fī safqāh* (two sales and purchase contracts in one transaction);  
(c)  Combination of contracts in a form of *mu‘awadhah* and *tabarrū‘*;  
(d)  *Ba‘ī wa syart* (conditional buying and selling);  
(e)  Inclusion of conditions in the contract;  
(f)  *Dha‘ wa ta‘ajjal*; and  
(g)  *Maslahah*.

**ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF IBRA‘**

The OIC Fiqh Academy\(^{116}\) deliberated on the issues of reduction of debts due to early settlement before the due date in *bai‘ bi taqsit*. They have resolved that reducing the debt in arrears due to early settlement whether at the request of the creditor or the debtor referred to as *dha‘ wa ta‘ajjal*, is permissible by Shariah and does not include interest which is prohibited if it is not based on a prior agreement and only involves two parties that is the debtor and creditor. If it involves a third party, then it is not allowed as it falls under the law of *hāsm auraq tijariyah* (discounts on trade bills).\(^{117}\)

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

**Ba‘atāin fī Bai‘ah**

*Ba‘atāin fī bai‘ah* is included in prohibited sale and purchase transactions. The basis of the prohibition originates from the sayings of the Prophet s.a.w.:

\(^{116}\) The 7th conference at Jeddah on 9–14 May 1992.  
Resolutions of the Securities Commission Shari`ah Advisory Council

١١٨

Meaning: “That the Prophet s.a.w. disallowed two contracts of sale and purchase in one transaction.” ١١٨

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

من بائع بيعتين في بيعة فله أوكسهما أو الربا

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

The Islamic jurists were unanimous in declaring that bai`atain fi bai`ah is not allowed based on the above sayings, but they differ in their opinions in interpreting the forms of contracts and transactions which are included in the prohibition. ١١٩

Ibn Rushd ١٢٠ summarised the types of bai`atain fi bai`ah into three main categories:

(a) Two items with two prices;

(b) One item with two prices; and

(c) Two items with one price.

The Dallah al-Barakah Shari`ah Advisory Council interprets bai`atain fi bai`ah as the amalgamation between tabarru` and `iwadh. For example, A says to B: “Sell this item to me and I will provide the price of the item together with a gift.”. This may also be construed as the sale and purchase of one item for two prices that is, deferred and cash, and sealed with a contract without determining the price agreed upon by the two parties to the contract. Sales and purchase contract cannot be amalgamated with several other contracts, such as musaqaq, syarikah, ji`alah, marriage and qiradh. ١٢١ Nazih Hammad is of the opinion that bai` `inah is also another form of bai`atain fi bai`ah. ١٢٢

Safqatain fi Safqah

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

> نهى النبي صلى الله عليه وسلم عن صفقاتين في صفقة
>
>
> Meaning: “The Prophet s.a.w prohibited two contracts (sale and purchase) in one transaction.”

In general, *safqah* refers to contracts and covers more than just sale and purchase contracts as it encompasses other contracts as well.\(^{123}\)

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

Amalgamation of *Mu`awadhah* and Tabarru`

Contemporary Islamic jurists discuss in general the law on the amalgamation of *mu`awadhah* and *tabarru`*.\(^{125}\) This is based on the views of past jurists in interpreting the sayings of the Prophet s.a.w:

> لا يحل سلف وبيع، ولا شرطان في بيع، ولا ربح ما لم يضمن، ولا بيع ما ليس عندك
>
>
> Meaning: “It is not allowable to combine debts with sale and purchase, two conditions in sale and purchase, taking a profit from an item which is not secured (occurrence of qabdh), and selling something which is not owned.”\(^{126}\)

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

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123 Al-Mausu`ah al-Fiqhiyyah, vol. 9, p. 266.
because tabarru` is done to facilitate transaction in a mu`awadhah way and not solely done voluntarily.\(^{127}\)

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

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

**Bai` wa Syart**

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

\[
\text{نهي رسول الله صلى الله عليه وسلم عن بيع وشرط}
\]

Meaning: “The Prophet s.a.w. prohibited conditional sale and purchase transactions.”\(^{130}\)

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

**Conditions in a Contract**

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

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Principles of Muamalat in the Capital Market

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

Ibnu Taimiyah formulated a method related to the condition:

إن الأصل في الشروط الصحة واللزموم إلا ما دل على خلافه

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

**Dha` wa Ta`ajjal**

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

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

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

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

RESOLUTION

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

(a) Concessionary rights can be classified as a type of asset that can be transacted based on the principle of *iqta*;

(b) Supply and maintenance contract with the government and government agencies can be the basic asset in the issuance of Islamic securities based on the principle of *iqta*;

(c) *Iqta* can be used in government contracts on assets that are not real estates; and

(d) The principle of *iqta* can be used for state government contracts, statutory bodies and government-linked companies. The government-linked companies are entities which are approved by the government to take-over public agencies and manage them as private companies, such as the following:

(i) Parent companies and their subsidiaries under the control of the federal and state government of which the shareholdings exceed 50%; and

(ii) Companies where the government owns special shares or special preferential rights shares. Normally special shares or “golden shares”, in the Malaysian context, exist in companies in which the government has strategic interests.
INTRODUCTION

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

(a) Work contract;

(b) Supply contract; and

(c) Service contract.

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

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

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

(a) Consultancy services. It covers all kinds of studies, such as economic research, privatisation, management, physical development which requires input such as architecture, engineering, survey works, legal management and specialised services in the area of environment and agriculture; and

(b) Non-consultancy services. It covers services, such as managing training and courses, maintenance and repair works, cleaning, renting and management of buildings.

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

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

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

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

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

ARGUMENTS THAT SUPPORT THE PERMISSIBILITY OF IQTA`

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

139 Franck Bousquet & Alaian Fayard, Road Infrastructure Concession Practice in Europe, World Bank, 2001, p. 3.
There are two ways of *ihya*:

(a) *Iqta* `imam (gift of the ruler); and

(b) *Ihya* mawat thumma *ijazah amir* (developing the neglected property and then obtaining the permission from the ruler).

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

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

(a) Definition of *iqta* which is related to *ardh* (real estate); and

(b) Definition of *iqta* in general that is on *mal* (assets or properties).

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

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

### *Iqta* Conditions

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

(a) *Iqta* is only given by the ruler with the objective of *maslahah*;

(b) *Muqta* (one who is conferred with *iqta* property) is able to develop *iqta* properties;

(c) Property which has been *iqta* is not owned by anybody; and

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142 *Al-Mausu`ah al-Fiqhiyyah*, vol. 6, p. 81.
(d) *Iqta* which is given does not contradict with *maslahah `ammah*.\(^{143}\)

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

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

**Iqta` on Non-real Estate**

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

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

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

\[
\text{من وجد دابة قد عجز عنها أهلها أن يعلفوها فأخذها فأحياها فهي له}
\]

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

In other sayings, the Prophet s.a.w. said:\(^{145}\)

\[
\text{من ترك دابة بمهلكة فأحياها رجل فهي لمن أحياها}
\]

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Principles of Muamalat in the Capital Market

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

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

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

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

The Role of `Urf on Iqta`

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

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

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

147 Al-Khafif, Al-Milkiyah fi al-Syari`ah al-Islamiyyah, p. 226.
Iqta` in a Modern Form

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

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

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

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

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