

**A REVIEW OF COMMODITY MURĀBAḤAH TRANSACTION AS OFFERED BY  
BURSA MALAYSIA;  
A CRITICAL ANALYSIS FROM FIQH PERSPECTIVE**

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**Abstract**

*Commodity Murābaḥah is an example of product innovation in Islamic banking and finance, which is based on Murābaḥah and Tawarruq transactions. Both traditional and the contemporary Islamic jurists hold different opinions on its legality in the light of Fiqh. This study is aimed at understanding of Commodity Murābaḥah trading especially the current practical operations and describing preferred structures of Commodities Murābaḥah as offered by Bursa Malaysia to overcome the highlighted controversies of Sharīʿah issues. This paper will illustrate in detail the transactional flow of Bursa Sūq Al-Silaʿ as operated by Bursa Malaysia and will shed light on related Sharīʿah issues for improvement.*

**Keywords:** Commodity, *Murābaḥah*, *Tawarruq*, Bursa, Finance.

## INTRODUCTION

The Bursa Malaysia or Malaysia Exchange, previously known as Kuala Lumpur Stock Exchange (KLSE)<sup>1</sup> is an exchange holding company approved under Section 15 of the Capital Markets and Services Act 2007. In short, the Stock Exchange (Bursa Saham) is a capital market where quoted investments namely stocks<sup>2</sup> and shares<sup>3</sup> may change hands between buyers and sellers. The Stock Exchange in Malaysia was established based on the powers<sup>4</sup> vested in the Minister of Finance. Its vision is to be the preferred partner in Asia for fund-raising, trading and investment. While its mission is as the preferred partner, Bursa Malaysia offers a fair and orderly market that is easily accessible with diverse and innovative products and services.

Here, we shall get a clear picture on how crucial the functions of BSKL which contributes to economic growth. The main function of the BSKL is to control the work of its stockbroker members as well as to establish rules and regulations for the quotation of the listed companies. Despite provides a trading room where share prices are quoted daily, a meeting place provided especially for the representatives of all stockbroker members.<sup>5</sup>

The Commodity *Murābahah* House (CMH)<sup>6</sup> infrastructure which uses Crude Palm Oil (CPO) as the underlying commodity to facilitate Islamic financing based on the concept of *Murābahah* and *tawarruq* will be developed as a spot commodity market. *Murābahah*<sup>7</sup> is essentially a form of trade credit, in which the bank actually purchases and becomes legal owner of whatever the client has ordered and then resells it to the client on deferred term payment, at a previously agreed, higher price. However, Commodity *Murābahah* concept which has been extensively

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<sup>1</sup> In Malay it is called as Bursa Saham Kuala Lumpur (BSKL).

<sup>2</sup> Stock generally refers to securities with fixed interests and the issues are usually in block units.

<sup>3</sup> Shares are dividend paying capital, e.g. ordinary shares. A share is described as that portion of the owner's capital in business. See Singh, Biliwi, *An Introduction to the Securities and Futures Industry in Malaysia*, (Selangor: The Malaysian Current Law Journal Sdn. Bhd., 1990), pp.5.

<sup>4</sup> This power is derived from Section 8 of the Securities Industry Act 1983. Section 8(2) sets out the requirements that have to be met before the Minister approves the Exchange. See Singh, Biliwi, *An Introduction to the Securities and Futures Industry in Malaysia*, pp.11.

<sup>5</sup> Goh, Chen Chuan, *Handbook on KLSE Second Board*, (Kuala Lumpur: Leeds Publications, 1997), pp.7.

<sup>6</sup> Commodity *Murābahah* House (CMH) is aimed at facilitating liquidity management and the financing of Islamic financial and investment instruments.

<sup>7</sup> *Murābahah* based financial operations are practiced by Islamic financial institutions under such various names as mark up, cost plus financing, production support programs, short-term financing or even, simple, sale-purchase contract.

used in Bursa Malaysia is basically applying the contract of *Tawarruq* as well in its transactional flow. *Tawarruq* is assigned as a sale contract whereby a buyer buys an asset from a seller with deferred payment and subsequently sells the asset to the third party on cash with a price lesser than the deferred price, for the purpose of obtaining cash.<sup>8</sup> Briefly, *Tawarruq* is used generally to refer to an arrangement whereby a person who was in need of cash bought some goods for deferred payment. Later, he sold the goods to another party (not the original seller) for cash payment of a lower price.<sup>9</sup> The researcher shall therefore explore the issue of Commodity *Murābahah* which has triggered fiery debates among Muslim scholars from *Fiqh* perspective.

### **SHARĪAH PRINCIPLES UNDERPINNING MURĀBAHAH AND TAWARUQ IN COMMODITY MURĀBAHAH**

Islamic jurists as well as Islamic economists are almost unanimous that overwhelming use of *Tawarruq* as mode of financing, practically as an alternative to Commodity *Murābahah* is permissible in Islam. This paper will explore more on the nature of Commodity *Murābahah* as practiced by Islamic Financial Institution from the *Fiqh* perspective and outline the rationale of both its permissibility and impermissibility.

*Murābahah* specifically tells the purchaser how much cost he has incurred and how much profit he is going to charge in addition to the cost.<sup>10</sup> Therefore, in Islam, as long as it is clearly stated in the document as agreed by both parties on the profit that the bank is about to charge, then the transaction is permissible.

Since *Tawarruq* is practiced widely in Commodity *Murābahah*, the researcher will elucidate the various opinions of Muslim Schools of *Fiqh* on the permissibility of *tawarruq*-based products

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<sup>8</sup> Asyraf, Wajdi Dusuki, “Commodity *Murābahah* Programme (CMP): An Innovative Approach to Liquidity Management”. Paper published in Journal of Islamic Economics, Banking and Finance, Volume 3, No.1; 2007, pp.16. This definition is accepted by the OIC *Fiqh* Academy in their deliberation on the issue on 1<sup>st</sup> November 1998 (11 Rejab 1419H).

<sup>9</sup> Ali, E. R. A. E., *Bay' al-Īnah and Tawarruq: Mechanisms and Solutions*. In *Bank Negara Malaysia (Ed.), Mudhākarah Cendekiawan Sharī'ah Nusantara 2006: Bay' al-Īnah dan Tawarruq: Isu-isu dan Penyelesaiannya Dalam Konteks Kewangan Islām*, (Kuala Lumpur: Central Bank of Malaysia, 2007), pp.142. See also Al-Zuhayli, Wahbah, *al-Fiqh al-Islāmī wa Adillatuhu*, 3<sup>rd</sup> ed., (Dimashq: Dar al-Fikr, 1989CE), v.4, pp.467-468.

<sup>10</sup> Bakar, Mohd Daud, *Islamic Commercial Law for Bankers: Paper Workshop on Interest-Free Banking and Finance*, (Kuala Lumpur: Dinamas Publishing, 1996), pp.21.

because obviously, Commodity *Murābahah* involves contract of *Tawarruq*. Briefly, *Tawarruq* is used generally to refer to an arrangement whereby a person who was in need of cash bought some goods for deferred payment. Later, he sold the goods to another party (not the original seller) for cash payment of a lower price.<sup>11</sup>

The foregoing discussion on Commodities *Murābahah* involves different perception from both traditional and contemporary Muslim jurists on its legality in the light of *Fiqh*. Next, this paper shall discuss evidently any rationale or justification leads to its acceptance and rejection as Commodities *Murābahah* which practically using *Tawarruq* transaction in its operation is being widely used in Islamic financial institutions.

### **PERMISSIBILITY OF TAWARRUQ**

In any economic transaction, everything is deemed permissible unless if there is an implications from the teachings either in the Al-Qur'ān or Hadīth that forbids it, whether directly or indirectly. Islamic jurists as well as Islamic economists are almost unanimous that overwhelming application of *Tawarruq* as mode of financing, practically as an alternative to *al-Īnah* is permissible in Islam. This paper presents the approaches in *Fiqh* in determining whether the contract is valid and permissible from *Sharī'ah* perspectives.

Precisely, both past jurists from Malikis and Hanbalis schools accepted *Tawarruq*.<sup>12</sup> Thus, majority of the past jurists were inclined to allow *Tawarruq* on the basis that the parties intended to circumvent the prohibition of *ribā* was quite remote in *Tawarruq* due to its non-binding tripartite nature.

However, this argument also concerned contemporary jurists who approved this transaction in the 15<sup>th</sup> session of Organization of Islamic Conference (OIC) Islamic Fiqh Academy conference, in September 1998, the Academy allowed the contract of *Tawarruq* as long as the customer doesn't sell the commodity to its original seller. Later in December 2003, in its 17<sup>th</sup> session, the

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<sup>11</sup> Ali, E. R. A. E., opcit., pp.142. See also Al-Zuhayli, Wahbah, *al-fiqh al-Islāmī wa adillatuhu*, 3<sup>rd</sup> ed., (Dimashq: Dar al-Firk, 1989CE), v.4, pp.467-468.

<sup>12</sup> Al-Zuhayli, Wahbah, *Financial Transactions in Islamic Jurisprudence*, v.1, (Syria: Dar al-Firk, 2003), pp.117.

Academy divided *Tawarruq* into *Tawarruq Haqīqī* (real *tawarruq*) which is permissible and *Tawarruq Munazzam* or *Tawarruq Maşrafī* (Organized *Tawarruq*) which is unacceptable because it is deemed to be synthetic and fictitious as *Bay' al-Īnah* a legal trick to circumvent the prohibition of *ribā'*.<sup>13</sup>

Regardless of the objection of many jurists towards Organized *Tawarruq*, a few contemporary scholars have approved this practice even when the contract is being used in conjunction with an organised financing or investment facility offered by an Islamic financial institution<sup>14</sup>, such as the leading Saudi *jurists*, Syeikh Abdullah ibn Sulayman al-Mani'<sup>15</sup>, Dr. Musa Adam Isa, Dr. Usamah Bahr and Dr. Sulaiman Nasir al-Ulwan.<sup>16</sup> In fact, Syeikh Abdullah ibn Sulayman al-Mani', considered *Tawarruq* as a suitable solution to overcome the problem of liquidity amongst the Muslims in a compliant manner.<sup>17</sup> Although some *jurists* might still have disputation towards Organized *Tawarruq*, at least they are not as precariously controversial as *Bay' al-Īnah*. Indispensably, the need to find alternatives and solutions towards the dilemma of liquidity shortage is faced by Muslims in the whole Islamic countries.

Furthermore, the justification of its permissibility to be used for liquidity management purposes is supported by both *Sharī'ah* Advisory Council (SAC) of the Securities Commission of Malaysia and the *Sharī'ah* Advisory Council of the Central Bank of Malaysia, in order to prevail over the problem of liquidity shortage in the country, without resorting to conventional *ribā'*-based liquidity instruments and transactions which known as public interest consideration (*maşlahah*).

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<sup>13</sup> Asyraf, Wajdi Dusuki, opcit., pp.10. See also Ali, E. R. A. E., opcit., pp.142-144.

<sup>14</sup> Ali, E. R. A. E., opcit pp.144. See also Mani', 'Abd Allah ibn Sulaiman, *al-Ta'şil al-fiqhi li al-tawarruq f' dau' al-ihtiyājāt al-tamwīliyah al-mu'āşirah*, *Majallah al-buhūth al-Islāmīyah* 1425H, no:72, pp.351-382.

<sup>15</sup> Sheikh Abdullah ibn Sulayman al-Mani' is President of the courts of the Makkah Al Mukarramah by delegation and has been a member of the Senior Ulema Board since its inception. He was also Vice General President of Scientific, interpretation, call and guidance research Department. He is a member of Shariah Supervisory Committees of various Banks in Saudi Arabia. He is Deputy Chairman of the Shariah Board of Accounting and Auditing Organisation of Islamic Financial Institutions. He has compiled a number of fatwas and has written many books on Islamic Banking. Indeed, he considered *tawarruq* as a suitable solution to overcome the problem of liquidity shortage in a compliant manner. See and Mani', 'Abd Allah ibn Sulaiman, opcit., pp.579-582 and Ali, E. R. A. E., opcit., pp.144.

<sup>16</sup> Sheikh Sulaiman ibn Nasir al-Ulwan is known to be amongst the most influential scholars in the region of al-Qaseem and he has written a number of books in the fields of fiqh and da'wah.

<sup>17</sup> Ali, E. R. A. E., opcit., pp.144. See also Mani', 'Abd Allah ibn Sulaiman, opcit., pp.579-582.

The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) approves *Tawarruq* as long as the liquidity is performed for *Sharī'ah* -complaint operations instead of interest-based lending.<sup>18</sup>

It is submitted that there are six prerequisites of a valid contract in *Sharī'ah*, namely the offeror and offerer; offer and acceptance; and the price and consideration.<sup>19</sup> As for the subject matter of the contract in Commodities *Murābahah*, *Sharī'ah* stresses on both the item and consideration the following matters i.e., lawfulness, existence, deliverability and precise determination. Lawfulness requires something which is permissible to trade, its subject matter (*mahall*) and underlying causes (*sabab*) must be lawful; it must neither proscribed by *Sharī'ah* nor a nuisance to public order or morality, and the commodity must be legally owned by the parties to a contract.<sup>20</sup>

Furthermore, the permissibility of *Tawarruq Munazzam* or *Tawarruq Masrafi* (Organized *Tawarruq*) is supported<sup>21</sup> by both ***Sharī'ah* Advisory Council (SAC) of the Securities Commission of Malaysia** and the **SAC of the Central Bank of Malaysia** for the public interest consideration (*maṣlahah*). The **SAC of the Central Bank of Malaysia** in its 51<sup>st</sup> meeting held on 28<sup>th</sup> July 2005/ 21 *Jamādil 'Akhīr* 1426 resolved that the deposit and financing product which applies the *tawarruq* concept is permissible.<sup>22</sup>

In a nutshell, the researcher is convinced of the rationale of *Murābahah* being advanced by some interest-free institutions, as a business proposition especially in commodity trading which helps the establishment of economic growth. This paper is so much engrossed in highlighting controversial issues and arguments in transactional flow of Commodity *Murābahah* market and the trading itself which are finally proposed the preferable suggestions in handling those issues in accordance to *Sharī'ah*.

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<sup>18</sup> Kindly refer to AAOIFI standard No. 30, on the *Mutawariq* (Monetization Beneficiary), item 3/2, pp.535.

<sup>19</sup> Bakar, Mohd Daud, op.cit., pp.11.

<sup>20</sup> Ibid., pp.11.

<sup>21</sup> Here, *Tawarruq Munazzam* or *Tawarruq Maṣrafi* (Organized *Tawarruq*) is supported to be used for liquidity management purposes to overcome the problem of liquidity shortage in the country, without resorting to conventional *ribā*-based liquidity instruments.

<sup>22</sup> Resolution of National *Sharī'ah* Advisory Council of Central Bank of Malaysia, 2007, pg. 24.

Taken all into account, as far as Commodity *Murābahah* is concerned, the commodity must be permissible by *Sharī'ah* determined precisely as to its essence, its quantity and its value.

### **IMPERMISSIBILITY OF TAWARRUQ**

Generally, *Sharī'ah* has concluded that the unlawfulness of a transaction may be caused by any of the following factors;<sup>23</sup> unlawful for its own sake (*harām li dzātihi*)<sup>24</sup>, unlawful due to an external reason (*harām li ghāirihi*)<sup>25</sup>, or unlawful due to invalidity/ incompleteness<sup>26</sup> of its underlying contract.

Lately in the 19<sup>th</sup> session of Organization of Islamic Conference (OIC) Islamic Fiqh Academy conference, in Sharjah, United Arab Emirates the discussion was reiterated in April 2009 where this application has been banned by the Academy because simultaneous transactions occur between the financier and the *mustawriq* as it is considered a *hīlah* (fictional device) concluded with a dubious transaction. Thus, in the resolution, OIC Islamic Fiqh Academy outlines that Islamic financial institution should avoid the instrument of Organised *Tawarruq* (*Tawarruq Maşrafī*) as it deviates from the true objective of *Sharī'ah* and contains the element of *ribā'* as the issue of prohibition the *ribā'* is mentioned largely in specific verses of the Qur'ān<sup>27</sup> as it leads to disparity and inequitable of wealth distribution between rich and poor.

Thus, the main justification for the rejection of *Tawarruq Munazzam* or *Tawarruq Maşrafī* is that its mechanism resembles *Bay' al-Īnah*, which is frowned upon by some as a form of *hīlah* (legal

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<sup>23</sup> Karim, Adiwarmān A, *Islamic Banking: Fiqh and Financial Analysis*, 3<sup>rd</sup> ed., (Jakarta: PT Raja Grafindo Persada, 2005), pp.28.

<sup>24</sup> The transaction is impermissible because the transacted objects (good and/or services) are forbidden, e.g. alcoholic drinks, carcasses, pork etc.

<sup>25</sup> This transaction is violated due to two reasons. First, violation of the principle of “*An Taraddin Minkum*”. The state of being “unknown to one party” or concealing (*tadlis*) in any of the following 4 dimensions; quantity, quality, price and delivery time. Second, violation of the principle of “*La tazlimūn wa la tuẓlamūn*” which means “inflict no evil, and be not inflicted by it.” Among the practices that violate this principle are *taghrir* (*gharar*), market frauds affecting the supply side (*ikhtikar*), market frauds affecting the demand side (*bay' najasī*), usury (*ribā'*), gambling (*maysir*), and bribery (*risywah*). See also Karim, Adiwarmān A, *opcit.*, pp.29-43.

<sup>26</sup> The transaction is still impermissible if it involves any of these factors; non-fulfillment of pillars (*rukun*) and condition (*sharat*), occurrence of *ta'alluq* (occurs when one is faced with two related contracts, whereby the application of one contract hinges upon the other), or occurrence of “two in one” (*shafqatain fi al-shafqah*).

<sup>27</sup> Al-Qurān Al-Karīm, Al-Rūm (30):39, Al-Nisā' (4):161, Al-Īmrān (3):130-132 and Al-Baqarah (2):275-281.

trick) and simply because it doesn't represent as *Tawarruq Haqīqī* (Real *Tawarruq*) which has been approved by the classical jurists.<sup>28</sup> Some of the classical jurists, such as, 'Umar ibn Abd al-'Aziz and Muhammad al Shaybani chose to discourage (*karāhah*) the practice of *Tawarruq*. While Ibn Taymiyyah and Ibn Qayyim decided to prohibit the practice and dismissed it as a legal trick (*hiyāl*) which is similar with *Bay' al-'Īnah*.<sup>29</sup>

In this light, Dr. Engku Rabiah Adawiyah Engku Ali in her writing argues that if *hiyāl* is perceived as a mechanism to solve the pressing needs of people and society, and not being abused to the whims and fancies of the parties, then, there could be possibilities that the practices will be accepted as *Sharī'ah* compliant alternatives. Moreover, there is neither reports nor narrations attributed to the Prophet (peace be upon him) disapproving the practice. Nevertheless, when *Tawarruq* becomes commercialized and utilized by the Islamic financial institutions to gain profits, *hīlah* issue becomes arouse again when *Majlis Majma' al-Fiqh al-Islāmī* rejected *Tawarruq Maşrafti*.<sup>30</sup>

#### **OUTLINE OF COMMODITY *MURĀBAHAH* AND *TAWARRUQ* CONCEPTS IN BSKL**

As been discussed earlier in a previous chapter, in summary, Commodity *Murābahah* is a sale of specific commodities or goods at cost plus / mark-up on a deferred payment basis. Lately, Commodity *Murābahah* instrument based on *Tawarruq* concept, which has been introduced by Central Bank of Malaysia, is deemed as an innovative approach to liquidity shortage.

As been reviewed earlier, *Tawarruq* is assigned as a sale contract whereby a buyer buys an asset from a seller with deferred payment and subsequently sells the asset to the third party on cash with a price lesser than the deferred price, for the purpose of obtaining cash. In BURSA KUALA LUMPUR, Commodity *Murābahah* which based on *Tawarruq* concept is being used in transactional flow of Commodity Market. The researcher will illustrate the business operational model of Commodity *Murābahah* as used by **IFI in financing, deposit taking and sukūk**

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<sup>28</sup> Asyraf, Wajdi Dusuki, opcit., pp.10.

<sup>29</sup> Ali, E. R. A. E., opcit., pp.142.

<sup>30</sup> Ibid., pp.163.



issuance as explained by Mr. Norfadelizan Abdul Rahman<sup>31</sup> during the interview session on 30<sup>th</sup> March 2010.

### SUMMARY ON BURSA *SŪQ AL-SILA* ʿ

In August 2009, Bursa Malaysia launched Bursa *Sūq al-Sila* ʿ, the world's first Internet commodities trading platform with crude palm oil (CPO) as its underlying asset that is *Sharīʿah* compliant. Bursa *Sūq al-Sila* ʿ (بورصة سوق السلع) is a commodity trading platform specifically dedicated to facilitate Islamic liquidity management and financing by Islamic banks. Embarked as a national project, Bursa *Sūq al-Sila* ʿ demonstrates the collaboration of Bank Negara Malaysia (BNM)<sup>32</sup>, the Securities Commission Malaysia (SC)<sup>33</sup>, Bursa Malaysia Berhad (Bursa Malaysia) and the industry players in support of the Malaysia International Islamic Financial Centre (MIFC)<sup>34</sup> initiative. On the other hand, it receives closed co-operation and strong support of the Ministry of Plantation Industries and Commodities through the Malaysian Palm Oil Board (MPOB), Malaysian Palm Oil Association (MPOA) and Malaysian Palm Oil Council (MPOC).

Bursa *Sūq al-Sila* ʿ (بورصة سوق السلع) is designed to serve as a multi-commodity and multi-currency platform, initially with trading of CPO to be followed by other *Sharīʿah* approved commodities covering both soft and hard commodities to serve the Malaysian market. As we noticed, CPO is the launch commodity in Bursa *Sūq al-Sila* ʿ whereas its trading platform is fully

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<sup>31</sup> Norfadelizan bin Abdul Rahman is the Head of Product Development, Islamic Capital Market of Bursa Malaysia Berhad. He is in charge of developing and innovating *Sharīʿah*-compliant products and infrastructure for the Exchange.

<sup>32</sup> Bank Negara Malaysia (BNM) is the Malaysian central bank which its headquarters is located in Kuala Lumpur and it was established on 26<sup>th</sup> January 1959 to issue currency, act as banker and adviser to the Government and regulate the country's credit situation. The Bank reports to the Minister of Finance, Malaysia and keeps the Minister informed of matters pertaining to monetary and financial sector policies. See [http://en.wikipedia.org/wiki/Bank\\_Negara\\_Malaysia](http://en.wikipedia.org/wiki/Bank_Negara_Malaysia), accessed in 14<sup>th</sup> January 2010.

<sup>33</sup> The Securities Commission (SC) was established on 1<sup>st</sup> March 1993 as a statutory body entrusted with the responsibility of regulating and systematically developing the Malaysia's capital markets. The SC is to promote and maintain fair, efficient, secure and transparent securities and futures markets and to facilitate the overall development of an innovative and competitive capital market. See <http://www.sc.com.my/main.asp?pageid=350&menuid=376&newsid=&linkid=&type>, accessed in January 2010.

<sup>34</sup> MIFC was launched in August 2006 to promote Malaysia as a major hub for international Islamic finance. It comprises a community network of financial and market regulatory bodies, Government ministries and agencies, financial institutions, human capital development institutions and professional services companies that are participating in the field of Islamic finance. See [http://www.mifc.com/index.php?ch=menu\\_exp&pg=menu\\_exp\\_ovr](http://www.mifc.com/index.php?ch=menu_exp&pg=menu_exp_ovr), accessed on 18<sup>th</sup> February 2010.

electronic and web-based via internet with multiple security features. Currently, trades will be Ringgit-denominated whilst efforts are being undertaken to make it multi currency capable, providing more choice, access and flexibility for international financial institutions to participate in this market.<sup>35</sup> Thus, lets embrace timeless *Sharī'ah* principles with the efficiency of technology, namely Bursa *Sūq al-Sila'* which facilitates Islamic financial transactions and suitable for Islamic liquidity management and financial structure. It is a remarkable way to trade as it is operated by Bursa Malaysia's fully *Sharī'ah*-compliant wholly-owned subsidiary Bursa Malaysia Islamic Services Sdn Bhd (BMIS), and as well it is deemed as an international spot commodity platform which facilitates commodity-based Islamic financing and investment transactions under the *Sharī'ah* principles of *Murābahah*<sup>36</sup>, *Musawamah*<sup>37</sup> and *Tawarruq*<sup>38</sup>.

### **MARKET FEATURES OF BURSA *SŪQ AL-SILA'***

As an Islamic commodity trading platform for the Islamic financial and capital market, there are some information that need to be noticed during the trading of Bursa *Sūq al-Sila'*, such as trading period, deliverable unit, contract period and expiry, and contract grade and delivery points. The comprehensive information provided below is according to the researcher's reading.<sup>39</sup>

As we noticed, Bursa *Sūq al-Sila'* is designed to accommodate multi-currency and multi-commodity which in contract specification, each commodity has its own defined requirement. For participants' requirement, only qualified participants who registered and approved by BMIS can trade in this market. There are 3 different categories of participant; those are Commodity

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<sup>35</sup> See <http://bursamalaysia.custhelp.com/app/answers/list/p/12/search/1>, accessed on 14<sup>th</sup> January 2010.

<sup>36</sup> *Murābahah* is a sale and purchase contract which states the buying price of the transaction object, and the profit margin mutually agreed by both parties the seller and the buyer. See also Karim, Adiwarman A, opcit., pp.113-118.

<sup>37</sup> *Musawamah* is a sale where the seller is not obligated to disclose the price paid to create or obtain the good or service as he may or may not have full knowledge of the cost of the item being negotiated, they are under no obligation to reveal these costs as part of the negotiation process. This defers from *Murābahah* where a buyer knows the cost of the underlying asset.

<sup>38</sup> *Tawarruq* is a sale of commodity involving three parties, which refers to an arrangement whereby a person who was in need of cash bought some commodity for deferred payment. Then, he sold it to another party (not the original seller) for cash payment of a lower price.

<sup>39</sup> See <http://www.oicexchanges.org/presentations/thirdmeeting/annex14%20AbdulRahman.pdf>, accessed on 2<sup>nd</sup> February 2010.

Trading Participant (CTP)<sup>40</sup>, Commodity Supplying Participant (CSP)<sup>41</sup> and Commodity Executing Participant (CEP)<sup>42</sup>.

The trading period of Bursa *Sūq al-Sila'* only operates during weekdays at office hours, where on Monday to Thursday, from 10.30am to 6.00pm, while on Friday, there are two sessions, firstly morning session from 10.30am to 12.30pm, and afternoon session from 2.30pm to 6.00pm. Latest time for “bid”<sup>43</sup> for the day shall be before 5.30pm.

Buyer ought to indicate his intention directly to BMIS (or via broker) or leaves open position beyond market closing for the day. However, the delivery date is to be negotiated with commodity supplier, assisted by BMIS, which is not earlier than a week from purchase date.

Additionally, all settlement to CSP will be via BMIS as settlement agent. Settlement risks which encumbered on both sides will be taken up by BMIS. Anyway, both trading fee and brokerage need to be settled every month-end while for delivery, price and delivery process fee are required to be settled on spot. As briefly stated above, these are among of the market features of Bursa *Sūq al-Sila'* which need to be taken into consideration as well.

### **TRANSACTIONAL FLOW OF BURSA *SŪQ AL-SILA'***

In this segment, the researcher will elucidate expansively on the transactional flow of Bursa *Sūq al-Sila'* as practiced in Bursa Malaysia Islamic Services Sdn Bhd (BMIS)<sup>44</sup>. In order to trade in Bursa *Sūq al-Sila'*, its market features need to be looked and understood properly before the trading began.

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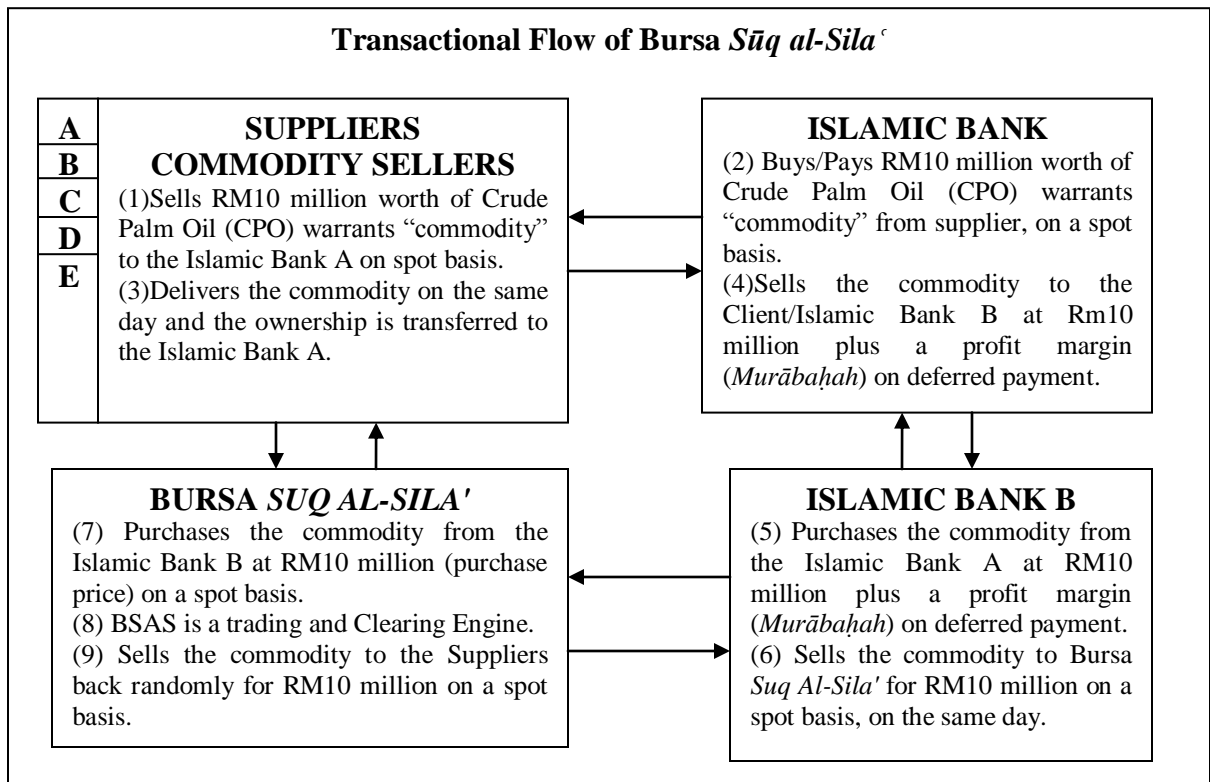
<sup>40</sup> Commodity Trading Participant (CTP) means a person for the time being admitted as a Participant of BMIS, who trades the “Approved Commodity” on the Market. “Approved Commodity” means suitable commodity to be transacted on the Market as approved by the *Shari'ah* committee of *Shari'ah* advisor of BMIS or any other *Shari'ah* Committee or Council of Board recognized by BMIS

<sup>41</sup> Commodity Supplying Participant (CSP) means a person for the time being admitted as a Participant of BMIS, who supplies the Approved Commodity to the CTP on the Market.

<sup>42</sup> Commodity Executing Participant (CEP) means a person carrying on the business of dealing in the Approved Commodity on behalf of a CTP or a CSP and for the time being admitted as a Participant of BMIS. [http://www.bursamalaysia.com/website/bm/products\\_and\\_services/islamic\\_capital\\_market/BMIS/downloads/BMIS\\_chapter1.pdf](http://www.bursamalaysia.com/website/bm/products_and_services/islamic_capital_market/BMIS/downloads/BMIS_chapter1.pdf), accessed on 3<sup>rd</sup> March 2010.

<sup>43</sup> “Bid” means a type of order from the CTP as principal or as agent for a Client to purchase an Approved Commodity from the CSP.

<sup>44</sup> BMIS operates all Islamic markets businesses and activities initiated under Bursa Malaysia.



**DIAGRAM 1**

**Diagram 1** shows comprehensively the transactional flow of Bursa *Sūq al-Sila'* where inevitably the operation involves several parties such as CPO suppliers (A, B, C, D, E), brokers, corporate customer/Islamic bank, BMIS, and commodity purchaser.

Before we proceed to the elaboration on **Diagram 1** the researcher would like to give a brief explanation on the commodity delivery. Delivery process fee is borne by the buyer plus x% delivery process fee and the total amount of fees will be made known straight away. In order to take commodity of the delivery, the buyer ought to indicate to BMIS directly or through Broker on purpose, and later, BMIS acknowledges and inform CPO supplier. Buyer proceeds with licensing under **MPOB**. Buyer's CPO cert should be endorsed by BMIS. Inevitably, delivery document is issued by CPO supplier. Eventually, buyer presents delivery document to CPO supplier to take delivery.<sup>45</sup>

<sup>45</sup> See <http://www.oicexchanges.org/presentations/thirdmeeting/annex14%20AbdulRahman.pdf>, accessed on 14<sup>th</sup> January 2010.

The illustration in **Diagram 1** happens when the Islamic Bank A purchases RM10 million worth of Crude Palm Oil (CPO) warrants “commodity” from the Supplier, on a spot basis. Later, the Supplier delivers the commodity on the same day and the ownership is transferred to the Islamic Bank A. Next, the Islamic Bank A sells the said commodity to the Client or Islamic Bank B at Rm10 million plus a profit margin (*Murābahah*) on deferred payment. So, the Client or Islamic Bank B pays the purchase price on deferred. Thereafter, the Client or Islamic Bank B sells the commodity to Bursa *Sūq al-Sila'* (BSAS) for RM10 million on a spot basis, on the same day. Consequently, BSAS purchases the commodity from the Client or Islamic Bank B at RM10 million (purchase price) who is a trading and clearing engine of the commodity. Later, BSAS sells the commodity to the Suppliers back randomly for RM10 million on a spot basis. Thus, the selling of the commodity goes back to the Suppliers randomly.

#### **ANALYSIS ON PERMISSIBILITY OF ITS MARKET**

Bursa *Sūq al-Sila'*, formerly known as Commodity *Murābahah* House, facilitates commodity-based Islamic financing and investment transactions under the *Shari'ah* principles of *Murābahah*, *Tawarruq*, *Musawamah* and *Wakālah*.

It is submitted that a valid contract is defined as a contract which its essence and attributes (*'Aṣl* and *Wasf*) are in accordance to the *Shari'ah* and which subsequently has a legal effect of enforceability that binds the contracting parties equally.<sup>46</sup> Therefore, those contracts are permissible in *Sharī'ah* which leads to the legality of Commodity *Murābahah* transactional flow. Furthermore, there must be contracting parties who have legal capacity besides expressing their agreement of offer (*'Ijāb*) and acceptance (*Qābūl*), where the minds of both parties in bilateral contract<sup>47</sup> must coincide (agree) and the declaration must relate on to the same commodity (subject matter/ *mahal al-'aqd*).

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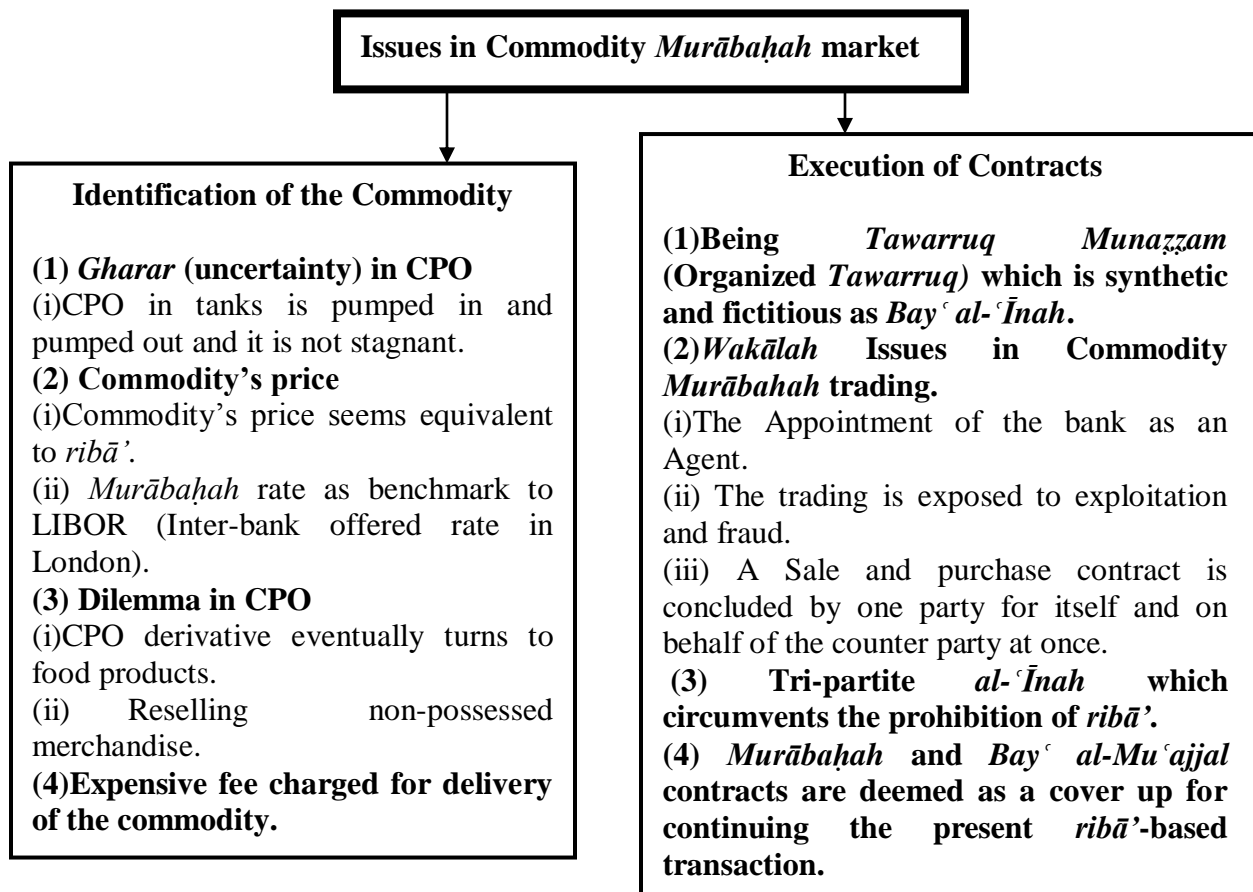
<sup>46</sup> Billah, Mohd. Ma'sum, *Modern Financial Transactions under Shari'ah*, (Selangor: Ilmiah Publisher, 2003), pp.32.

<sup>47</sup> A bilateral contract requires at least two parties, formally, in which one party shall offer a proposal (*Ijab*) and the other shall accept (*Qabul*).

According to AAOIFI, the commodity sold should be well indentified such as separating the commodity from the other assets of the seller, or recording the numbers of its identifying documents e.g. storing certificates.<sup>48</sup>

Talking about the subject matter (*mahal al-'aqd*) in Commodity *Murābahah* markets, in Malaysia basically they use CPO as a common commodity. Apart from CPO, CMH is considering the use of metal, charcoal and etc in commodity trading. Obviously, at the time of contract, the CPO as traded in Bursa Malaysia exists during the transaction.

### FORGONE ISSUES AND POSSIBLE SHARĪ'AH SOLUTION



<sup>48</sup> See AAOIFI standard No.30, on Controls on Monetization Transactions, item 4/2, pp.535. See also AAOIFI standard No.20, on Selling Commodities in Organized markets, item 4/2/2.

## **(1) Identification of the Commodity**

Briefly speaking, the study regarding the subject matter (*mahal al-‘aqd*) itself consists three basic problems which may lead to the overall impermissibility of the transaction.

### **First: The issue of *Gharar* (uncertainty) in the commodity.**

As general International Commodity *Murābahah* is concerned, there is one question in determining the traded commodity, e.g. the subject matter (*mahal al-‘aqd*) of London Metal Exchange (LME) has been strongly disputed. It carries element of *Gharar* (uncertainty), which means the commodity itself in the trading is confused as far as their identification is concerned. This amounts to *jahl* (ignorance) whether the commodity was totally sold to one party or might be to parties. Obviously the metal is there but we never sure which one is ours and most probably the commodity that sold to us is sold to other parties as well.<sup>49</sup>

To conclude such kind of contract is prohibited in *Sharī‘ah* since the subject matter of sale is unknown. According to Ibn Ḥazm:

“*Gharar* in sale occurs when the purchaser does not know what he has bought and the seller does not know what he has sold.”<sup>50</sup>

This is supported by Al-Babartī:

“*Gharar* happens when the subject matter is unknown.”<sup>51</sup>

Ibn Qayyim al-Jawziyya described *gharar* as being the subject- matter that the vendor is not in a position to hand over to the buyer, whether this subject-matter is in existence or not.<sup>52</sup>

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<sup>49</sup> The idea is discussed during the researcher’s interview with Mr. Norfadelizan bin Abdul Rahman, the Head of Product Development, Islamic Capital Market of Bursa Malaysia Berhad, who is in charge of developing and innovating Shariah-compliant products and infrastructure for the Exchange, on 31<sup>st</sup> March 2010.

<sup>50</sup> Ibn Hazm, ‘Ali bin Ahmad, *Al-Muhalla*, (Beirut: Dar Al-Aafak Al-Hadiyya, 1351 A.H.), 8/343, 389 and 43.

<sup>51</sup> Al-Babarty, *Fath-Al-Qadir*, 5/192

<sup>52</sup> Saleh, Nabil A., *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking*, (Cambridge: Cambridge University Press, 1986), pp.49-50.

Any transaction practiced by Islamic financial institution must avoid any element of neither *gharar* nor *jahālah* (lack of knowledge) as both are deemed either as factors for a contract to be void or voidable according to the degree of *gharar* or *jahālah* respectively.<sup>53</sup>

As far as CPO is concerned, the CPO in tanks is pumped in and pumped out and it is not stagnant, as it could be considered as *Bay' al-Maūṣūf fī Dhimmah* (selling an imaginary object).

The mainstream opinion of the majority of traditional Muslim *fuqahas* holds that a contract which subject matter at the time of conclusion of contract is not-determined is void. To avoid this, during the contract, the buyer must be sure that the commodity is well identified.<sup>54</sup>

In the trading of commodity, the genus, species, type, attributes and quality of sold thing are known but the identification of it is unknown then *gharar* is present and dispute may arise on specifying its tagging. This is important since the owner will be responsible for any damage or loss to the commodity. Hence, the identification of the owner and his respective commodity is crucial.

But if buyer has the (option to specification), that is the right to choose one of the things and leave the others, Mālikis permit it because in their view, this option renders *gharar* ineffective. While Shafi'ī, Ḥanbalī and Zahiri schools forbid it, and so does Ḥanafī school when there are more than three to choose from, and allows it when there are three or less.<sup>55</sup> Interestingly, the continuous flow of CPO can be remedied by the fact that the manufacturer/ vendor will guarantee the sold portion as long as the CPO is still under their custody.

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<sup>53</sup> Al-Sanhūrī explains the difference between *gharar* and *jahālah* as follows: “*Jahālah* brings about *gharar* in the following circumstances: *jahālah* means to sell something which exists but whose quantity is unspecified. *Gharar*, on the other hand, means to sell something whose availability is unknown”. He further mentions that the jurists, however, mix up the two terms *gharar* and *jahālah* and use them interchangeably. Al-Sanhūrī, Abdul Ar-Razzak Ahmad, *The Source of Legal Right In The Islamic Jurisprudence (Risk Uncertainty)*, vol.2, pp.232. See also Bakar, Mohd Daud, *opcit.*, pp.17.

<sup>54</sup> See AAOIFI standard No.30, on Controls on Monetization Transactions, item 4/2, pp.535. See also AAOIFI standard No.20, on Selling Commodities in Organized markets, item 4/2/2.

<sup>55</sup> Al-Sāfī, Abdul Rahim, *The Permissible Gharar (Risk) in Classical Islamic Jurisprudence*, (Jeddah: King Abdul Aziz University, 2003), pp.13.



The confusion lies in distinguishing between *jahl* and *gharar*. Briefly speaking, *gharar* is found in the nature (*'aṣl*) of contract itself, whereas *jahl* is not the nature but the condition or *wasf* of the contract that is defective. Another difference between *jahl* and *gharar* lies in nature of defect in both the contracts. A contract based on *jahl* is voidable or defective (*fasid*) but a contract based on *gharar* is null and void (*baṭil*). *Gharar* generally affects both the parties to the contract; *jahl* may affect one party only. The jurists do not disagree on the legal position of *gharar*; it is the application of *gharar* in context of different customs at different places which is controversial.<sup>56</sup>

As regards to the conditions that in order to free from *gharar* the subject matter must be in existence, it should be noted that existence is one thing but ability to deliver the thing is different. A bird in the air or a fish in water exists but it cannot surely be delivered. The moon exists but the sites in the moon cannot, at the present, be delivered nor can these be possessed by anyone; thus the sale and purchase of sites in the moon imply *gharar*.

Despite this straightforward prohibition, however some of them qualified the result that they have apparently reached which permits it due to certain conditions. As **Al-Shafi'i** tolerate *Gharar* in case of need (*ḥajjah*) and when, *Gharar* cannot be averted except with great difficulty. While *Ibadis*<sup>57</sup> allows *Gharar* either deals with immaterial, or in case of necessity (*ḍarurah*).

**Ibn Taymiyyah** on this matter said that since the evil of *gharar* is less than *ribā*, there is a compromise or concession (*rukḥṣah*) in the form of need (*haraj*) to lift the barrier of *gharar* on certain contracts, but with the stipulation that the evil caused by the prohibition on *gharar* is more than the evil of *gharar* itself.<sup>58</sup> **Imām al-Nawawī** and **al-Kāsānī** share the same opinion as well. **Al-Kāsānī** gives an example of *khiyār al-sharṭ* (options of condition). He maintains that this option is principally prohibited because it contains *gharar* and that it is against the objective of the contract (*muqtaḍā 'alayh*). Therefore, it is permissible. The reason for the permission of such a

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<sup>56</sup> Saleh, Nabil A., *opcit.*, pp.122.

<sup>57</sup> The *Ibadis* were founded by 'Abd Allah ibn-Ibad in Basra in the 680s as a moderate Khariji group opposed to armed rebellion and political assassination and willing to live in harmony with other Muslims. The *Ibadis* are the only remnants today of the once powerful Khariji movement, the earliest Muslim sect. Because of their legalism and strict moral code they are called "the puritans of the desert". Refer to <http://www.angelfire.com/az/rescon/mgcibadi.html>, accessed in February 2010.

<sup>58</sup> See [http://www.myais.fsktm.um.edu.my/.../Some\\_Issue\\_Of\\_Gharar\\_in\\_Insurance.pdf](http://www.myais.fsktm.um.edu.my/.../Some_Issue_Of_Gharar_in_Insurance.pdf), accessed in January 2010.

condition is considering the necessity to remove *al-ghabn* (the decrease or imbalance of the price offered compared to the actual price) through consideration and observations.<sup>59</sup>

As metal trading at LME triggers forgoing debate among the Muslim jurists, Bursa *Suq Al-Sila'* uses CPO in the trading. Similarly, as far as *Shari'ah* is concerned in the trading of CPO, the subject matter in the contract must fulfill the following conditions;<sup>60</sup> Firstly, reasonable knowledge (*ma'lūm*) in its specification (*ta'yīn*), character (*ṣifah*), and quantum (*qadr*). Secondly, able to be delivered or received (*qudrah 'alā al-taslīm* or *tasallum*), and lastly rightfully owned by the offeror. Here, it can be assumed that in the case of local commodity markets such as CPO, there should be no difficulty in ensuring the existence of the relevant commodities and the truthfulness of the sales. BURSA has taken initiatives to tackle the issue by having a proper tagging and recording of the commodity for the identification.

It is learned that, in the trading of CPO in Bursa *Sūq Al-Sila'* as practiced by Bursa Malaysia Islamic Services (BMIS), the level of *gharar* is minimized because for each transaction concluded, all data and detail are recorded safely. In addition, the procedure will guarantee the replacement in the case of damage or force major as long as physical delivery does not take place.

**Second: Commodity's price.**

**First Issue: Commodity's price seems equivalent to *ribā'*.**

The commodity's price in a credit sale may be increased from the price of a cash sale. Thus, it is argued that the increase of price in a credit sale should be treated equivalent to the interest charged on a loan, because in both cases an additional amount is charged for the deferment of payment. Inevitably, open a back door for *ribā'* in Islamic banks.

Through this procedure (*Murābahah*), an agent approaches a bank, asking it to obtain a commodity, and he agrees to pay the bank an agreed-upon profit.<sup>61</sup> The only feature distinguishing

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<sup>59</sup> Al-Kāsānī, Abū Bakr ibn Mas'ūd, *Kitāb bādā'i' al-ṣanā'i' fī tartīb al-syarā'ī'*, (Egypt., 1910), vol. 5, pp. 171-174.

<sup>60</sup> Sharbīnī, al-Khatīb, *Al-iqnā' fī halli alfāz, abī shujā'*, vol. 2, (Singapore: Maktabah wa Matba'ah Sulayman Mar'ī, n.d.), pp. 2-6.

<sup>61</sup> Elteгани, Abdelgader Ahmed, *Islamic Banking: Distribution of Profit (Case Study)*, (United Kingdom: The British Library, 1990 CE), pp.55.

it from other kinds of sale is that the seller in *Murābahah* specifically tells the purchaser how much cost he has incurred and how much profit he is going to charge in addition to the cost.<sup>62</sup> This is not a back door for *ribā'* as the price is known, agreeable and not revolving compounding as it is in *ribā'*.

It is submitted that, any additional price in *Murābahah* transaction is allowable because the profit margin is agreed by the contracting parties. The price is fixed upfront and will never increase compared to *ribā'* which always revolves and compounds.

### **Second Issue: *Murābahah* rate as benchmark to LIBOR (Inter-bank offered rate in London)**

*Murābahah* financing by many institutions commonly portray their profit or mark-up on the basis of the current interest-rate, mostly using LIBOR as the criterion. This practice which profit based on a rate of interest should be forbidden.

*Murābahah* as a mode of finance has been allowed by the *Shari'ah* scholars with certain conditions.<sup>63</sup> If *Murābahah* transaction fulfills all the conditions, even using the interest rate as a benchmark for determining the profit of *Murābahah* does not render the transaction as *harām* because the deal itself does not contain interest.<sup>64</sup> For instance, to earn a profit through trading in a commodity, Islamic banks charges the same rate of profit as interest rate based on borrowing and lending interest rate benchmark. The rate of interest has been used only as an indicator or as a benchmark. As long as the requirements of a valid contract, its subject matter and other related conditions are fulfilled, the transaction is regarded to be valid.

As long as *Murābahah* is based on Islamic principles and fulfills all its necessary requirements, the profit rate determined on the basis of the interest rate is permissible. However, the Islamic banks should strive for developing their own benchmark, by creating their own inter-bank market based on Islamic principles.

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<sup>62</sup> Bakar, Mohd Daud, opcit., pp.21.

<sup>63</sup> Muḥammad Taqī 'usmānī, *An Introduction to Islamic Finance*, (Karachi: Maktaba Ma'ariful Qur'an, 1998), pp.105.

<sup>64</sup> Ibid., pp.119.

### **Third : Dilemma in CPO**

#### **First Issue: CPO derivative eventually turns to be food products.**

In CPO trading, the commodity turns to be food stuff at last which is indispensably used by public such as cooking oil, soup, et cetera. So, is it permissible to sell the CPO before taking possession over it?

Commonly, in the trading of food, there are several Hadīths which are sanctioned by the Holy Prophet (saw) about the transaction is to get full possession of the commodity before it is sold to another party.

As said by As-Sanānī:

أن رسول الله صلى الله عليه وسلم قال:  
"مَنْ اشْتَرَى طَعَامًا فَلَا يَبْعُهُ حَتَّى يَكْتَالَهُ". (رواه مسلم)

Narrated by (Abū Huraira), Prophet Muhammad (saw) said:

“If anyone buys grain, he must not sell it till he weights it.” (Reported by Muslim)<sup>65</sup>

Here we noticed that any trading which deals with food stuff requires *qabaḍ* first before we can simply have the right to sell the item to the third party.

If that is so, in CPO trading, we are obliged to *qabaḍ* the commodity first before deal with any transaction. The requirement to take possession is prior than to sell it. Therefore, it is permissible to trade the commodity after the possession of the item.

#### **Second Issue: Reselling non-possessed merchandise.**

Can we simply sell any commodity which is not yet possessed or even finished the payment?

Briefly speaking, there will be two different contract applied in the transaction. First ‘*aqad* is when the customer buys the commodity with the deferred payment, and second ‘*aqad* is when the customer appoints the bank to resell the commodity to the Broker B (third party). One may argue that there will be an element of excessive risk and uncertainty when the transaction is

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<sup>65</sup> Al-Sanānī, Muhammad bin Ismail, *Bulugh al-maram. Attainment of the Objective According to Evidence of the Ordinance.* compiled by Al-Asqalani, Al-Hafiz Ibn Hajar, 1<sup>st</sup> ed., (Saudi: Dar Al-Salam Publications, 1996), pp.665.

combined or not separated. The transaction of ownership is not actually done between parties, the bank and the customer. In other words, the possession of the commodity by the customer is not really happen.

The Muslim scholars decide that the resale a movable or an immovable object before receipt is forbidden. Ḥanafis ruled unanimously that it is not valid to resell a movable object of sale before receipt. Muhammad, Zufar and Al-Shafi'ī ruled that it is not valid to sell an immovable property prior to receiving it due to the generality of the Hadith's prohibition of selling what has not been received, the inability to deliver the object of sale and the existence of excessive risk and uncertainty.<sup>66</sup>

Besides, the commodity sold to the purchaser has become his property since the contrast has been concluded, even though the payment is not completed. As a result the AAOIFI implies that *Tawarruq* is allowed because the purchaser has the right to deal with the property (*taṣarruf*) according to his own discretion or diplomacy, as Islam allows private ownership of property, as Allah S.W.T mentioned in Al-Qur'ān Al-Karīm<sup>67</sup>.

Ownership rights implies both rights to dispose and to utilize the commodity as pleased by the owner compliant with *Sharī'ah* principle. Therefore, in Commodity *Murābahah* market, the trading of the commodity with margin profit to the other party is permissible although the payment of the commodity for the first party is not completed yet because in trading (*al-Bay'*) activities, Islamic laws of contracts require the seller to be the legal owner of the tradable property.

**Forth: Expensive fee charged for delivery of the commodity.**

Initially, Bursa charges an expensive fee for the delivery of the commodity to its buyer. This is probably deemed as a mean of discourage taking delivery the commodity sold to the buyer as Bursa will buy the commodity and sell it back to the suppliers listed randomly. This is also a justification to avoid arbitrage. However, this is understood that this charge will be revised from time to time.

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<sup>66</sup> Al-Zuhayli, Wahbah, *Financial Transactions in Islamic Jurisprudence*, pp.60-61.

<sup>67</sup> Al-Qurān Al-Karīm, Al-Nisaa' (4):32.

## **(2) Execution of Contract**

Another important aspect worth looking at, is the models of executing the whole transaction.

**First: Being *Tawarruq Munazzam* or *Tawarruq Maşrafī* (Organized *Tawarruq*) transaction as claimed by many scholars in the trading of Commodity *Murābahah* market.**

*Tawarruq Munazzam* or *Tawarruq Maşrafī* (Organized *Tawarruq*) which is prohibited because it is deemed to be synthetic and fictitious transaction similar to *Bay' al-Īnah* which is criticized as a legal trick to circumvent the prohibition of *ribā'*.

In this particular *Tawarruq* transaction, the additional feature of “pre-arranged” *Murābahah* sale resembles an “organized financial intermediation” that generates profits to the Bank, which, is frowned upon by some as a form of legal trick (*hīlah*). This particular issue has been discussed previously in *Sharī'ah* Principles Underpinning Commodity *Murābahah*. However, let's give a quick look on a brief judgment towards the fiery debates among both traditional and contemporary Muslim jurists regarding this concern.

In general, *Tawarruq* contract which have been applied broadly in Commodity *Murābahah* is valid according to *Fiqh* Academy recent *fatwā*, in September 1998, particularly in its 15<sup>th</sup> session of conference and the AAOIFI.

In spite of the rejection and disputation of many jurists<sup>68</sup> towards Organized *Tawarruq*<sup>69</sup>, some of the contemporary scholars<sup>70</sup> have approved this practice even if it is used in conjunction with an

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<sup>68</sup> Some of the classical jurists, such as, 'Umar ibn Abd al-'Aziz and Muhammad al Shaybani chose to discourage (*karāhah*) the practice of *Tawarruq*. While Ibn Taymiyyah and Ibn Qayyim decided to prohibit the practice and dismissed it as a legal trick (*hīyal*) which is similar with *Bay' al-Īnah*. So does *Majlis Majma' al-Fiqh al-Islāmī* who rejected *Tawarruq Maşrafī*.

<sup>69</sup> *Tawarruq Maşrafī* (Organized *Tawarruq*) which is disallowed since it is considered to be synthetic and fictitious as *Bay' al-Īnah*.

<sup>70</sup> Such as the leading Saudi jurists, Syeikh Abdullah ibn Sulayman al-Mani', Dr. Musa Adam Isa, Dr. Usamah Bahr and Dr. Sulaiman Nasir al-Ulwan. Indeed, Syeikh Abdullah ibn Sulayman al-Mani' considered *Tawarruq* as a suitable solution to overcome the problem of liquidity shortage in a compliant manner. See also Ali, E. R. A. E., opcit., pp.144 and Mani', 'Abd Allah ibn Sulaiman, opcit., pp.579-582.

organised financing or investment facility offered by an Islamic financial institution.<sup>71</sup> To avoid this prohibition, the whole transactions must be according to proper sequences of taking possession as well as making offer and acceptance by the customers to conclude the deals. The commodities must not go back to the first vendor. The end buyer should also not be related to the first vendor where the bank purchased commodity from, in the first place.

Thus, after retting through all the said judgments above, the reader could possibly get a clear picture on the permissibility of transactional flow of Commodity *Murābahah* market. In addition, *Tawarruq* transaction is *ṣaḥ* (valid) moreover if the parties involved therein fulfill their contractual duties as clearly in *Shari'ah*.<sup>72</sup>

## **Second: *Wakālah* Issues in Commodity *Murābahah* trading.**

### **First Issue: The Appointment of the bank as an Agent.**

The scenario in CPO trading is that the customer would appoint the Bank as his agent under the contract of *Wakālah* to act on his behalf to sell the commodity to third party identified by the Bank on cash basis. The appointment of seller (bank) to be the agent of sale (*Wakālah*) in *Tawarruq* transaction had been discussed and justified by some Muslim scholars.

Many others like Sheikh Syubaylī in his fatwa said that the appointment of the seller (bank) as the agent to sell to the third party is considered as forbidden. He divides *Tawarruq* in two categories which are *al-Tawarruq al-Jā'iz* (Permissible *Tawarruq*)<sup>73</sup> and *Tawarruq al-Muharrām* (Prohibited *Tawarruq*)<sup>74</sup>.

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<sup>71</sup> Such idea has been discussed earlier in Chapter 2. Moreover, according to Mr. Norfadelizan, *Tawarruq Munazzam* or *Tawarruq Maṣrafi* (Organized *Tawarruq*) as prohibited by some Muslim *jurists* is valid because neither in the Holy Al-Qur'ān nor in the *Sunnah* has stated the prohibition of such transaction.

<sup>72</sup> Al-Qur'ān Al-Karīm, Al-Māidah (5):1, Al-Isrā' (17):34, and Al-Nisā' (4):29.

<sup>73</sup> Permissible *Tawarruq* is when a customer buys a commodity in deferred payment and sells the commodity after the possession of the asset by cash to the third party. See <http://www.shubily.com/index.php?news=131>, accessed on 25<sup>th</sup> December 2009.

<sup>74</sup> Prohibited *Tawarruq* is when the customer buys an asset with deferred payment and appoints the seller as his agent by cash payment without the possession of the commodity. See <http://www.shubily.com/index.php?news=131>, accessed on 25<sup>th</sup> December 2009.

The AAOIFI proposes that it is disallowed if the commodity sold is sold back to the (same) institution itself or to a holding institution of the seller institution with complete or majority ownership, or with effective control, amounts to a buy-back sale (*Īnah*).<sup>75</sup> Yet, if it happens to be so, Bursa will sell it back randomly to the suppliers.

**Second Issue: The trading is exposed to exploitation and fraud.**

Simultaneous transactions occur between the financier and the *mustawriq* for it is considered a deception, i.e. heedless to get additional quick cash from the contract, it enclose with a dubious transaction. The trading of CPO is exposed to exploitation and fraud (*Tadlīs, Taghrīr, Khilābah*).

Lately in April 2009, the 19<sup>th</sup> session of Organization of Islamic Conference (OIC) Islamic *Fiqh* Academy conference, in Sharjah, United Arab Emirates has banned this application due to the consideration of deception. Furthermore, it is sanctioned by the saying of Allah (swt)<sup>76</sup> that there is a strict warning to those who cheat in transaction. Consequently, in the resolution, OIC Islamic *Fiqh* Academy delineates that Islamic financial institution should have avoid the instrument as it deviates from the true objective of *Sharī'ah*. Hence the biggest question posed indirectly by the resolution is how many of those so-called Islamic finance practitioners are sincerely willing to wear the title of genuine traders in their activities, and not as money-lenders in disguise.

In transactional flow of *Tawarruq* trading, each commodity sold is given with specific information in detail which written in black-and-white document. Hence, commodity *Murābahah* is permitted in Islam. As authorized by the Prophet (saw):

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<sup>75</sup> Kindly refer to AAOIFI standard No. 20, on the Sale of Commodities in Organised Markets, item 4/2/6, pp.366. See also AAOIFI standard No.8, regarding *Murābahah* for the Purchased Ordered, and item 2/2/4 of AAOIFI standard No.11, on *Istiṣna'* and Parallel *Istiṣna'*.

<sup>76</sup> Al-Qur'ān Al-Karīm, Al-Muṭaffifiin (83):1.



عن حكيم بن حزام عن النبي صلى الله عليه وسلم قال: البيعان بالخيار ما لم يتفرقا فإن صدقا وبينا بورك لهما في بيعهما، وإن كتما وكذبا محقت بركة بيعهما.

“Narrated by Hakim bin Hizam (r) the Prophet (saw) said: the buyer and the seller have the option to cancel or confirm the deal as long as they have not parted or till they part, and if they spoke the truth and told each other the defects of the things, then blessings would be on their deal, and if they hid something and told lies, the blessing of the deal would be lost.” (Bukhari)

Furthermore, the Securities Commission has been entrusted with particular duties and responsibilities; one of them is as having to monitor and supervise the activities of any exchange, clearing house and central depository, and to safeguard the interest of those dealing in securities and the trading of future contracts.<sup>77</sup> Besides, the SC is required to check on any illegal and improper conduct or practice in securities dealing. Thus, it is within the SC’s jurisdiction to reform the regulations of the law relating to the securities and futures contracts<sup>78</sup> as well as of the regulations of any exchange and its clearing house. Moreover, in order to uphold harmony in any transaction, The Holy Prophet (saw) reminds us that:

عن عبد الله بن عمر، أن رجلا ذكر للنبي صلى الله عليه وسلم انه يخدع في البيوع فقال إذا بايعت فقل لا خلابة.

“Narrated by Abdullah Ibn Umar (r), a person came to the Prophet (saw) and told him that he was always betrayed in purchasing. The Prophet (saw) told him to say at the time of buying “No Cheating”. (Bukhari)

From both the Qur’ānic and Hadīth sanctioned as well as the practice of companions<sup>79</sup>, we can ponder that in Commodity *Murābahah*, the *Tawarruq* transaction itself must be cleaned from any fraud or misappropriates or else the transaction itself is forbidden in *Sharī‘ah*.

<sup>77</sup> Goh, Chen Chuan, opcit., pp.58.

<sup>78</sup> The problem with future contracts is that "goods" are sold before they are owned by the respective party. The basic general *Sharī‘ah* rule regarding sale is that you must own first only afterward you can sell.

<sup>79</sup> It sanctions by the saying and practice of companions: “وقال عقبه بن عامر: لا يحل لامرئ يبيع سلعة يعلم أن بها داء إلا أخبره.” Translation: Uqbah bin ‘Amar (r) said, it is illegal for one to sell a thing if one knows that it has a defect unless one informs the buyer of the defect. Refer to Bukhārī, Muhammad bin Ismā‘īl, *Ṣaḥīḥ Bukhārī*, vol.3, p.166.

**Third Issue: A Sale and purchase contract is concluded by one party for itself and on behalf of the counter party at once.**

The *Sharī'ah* issue may arise when the account is not being separated between the customer and the bank. If the separation of account is not being done by the bank (as the bank acts as two entities), they may involve in fictitious transaction, give the guaranty on itself or *Wakālah 'alā Nafsihi*. If the bank appoints the customer (*Mutawarriq*) as its agent to purchase the commodity on its behalf and then to sell the same to himself, the transaction will not be valid, as the two transactions of purchase and sale are interdependent and the bank has not taken the possession and the business risk. However if the bank appoints him as an agent only for the purchase of a commodity on behalf of the bank, then, once it is purchased ; the bank itself sells it to him through a separate contract with proper offer and acceptance, the transaction is valid.<sup>80</sup>

**Third : Tri-partite *al-Īnah* which circumvents the prohibition of *ribā'*.**

It is argued here that Commodity *Murābahah* which applied the form of Organised *Tawarruq* resembles to tri-partite *al-Īnah*, which is frowned upon by some as a form of *hīlah* (legal trick).

However, the question of Commodities *Murābahah* transaction deviates from the true objective of *Sharī'ah* and contains the element of *ribā'* in trading activities is irrelevant because the said transaction does not inflict any legal effect on the sale of contract as the nature of profit is agreed upon in the contract by both parties.

As argued on the issue of *hiyāl*, Hanafis and Shafī'īs schools generally approve the use of *hiyāl* (a plural for *hīlah*) as long as it does not deny the rights of people or involve falsehood (*batīl*) or even demeaning the religion.<sup>81</sup> Moreover, here in Malaysia, the Malaysian scholars argue that not all *hīlah* is rejected, e.g. the *Sharī'ah* Advisory Council (SAC) of the Central Bank of Malaysia argued that *hīlah* as evident in the practice of Islamic instruments in Islamic Inter-bank Money Market (IIMM), which is considered as a mode to solve problems (*makhraj*) that is much needed by the people, as well as to avoid any abuse of such contract which may lead to dispute or

<sup>80</sup> See also AAOIFI standard no 20, 4/1/3 on trading of commodities.

<sup>81</sup> Asyraf, Wajdi Dusuki, opcit., pp.11.

injustice, necessary conditions are attached. Thus, Commodity *Murābahah* which extensively practices *Tawarruq* is allowed and to avoid tri-partite *Īnah*, the commodity should not be sold back to the first buyer from whom the commodity is sold.

**Forth: *Murābahah* and *Bay' al-Mu'ajjal* contracts are deemed as a cover up for continuing the present *ribā'*-based transaction.**

The mark up tends to be higher, the longer the period of time involved. By this way, the banks will have the guarantee of receiving back the price they actually pay plus a predetermined return as the result of the mark up.

Indeed, the client is not obliged to accept the commodity which has been bought for him. As a result, the banks may lose if the price of the rejected commodity falls. The banks always face this risk. Thus, in Commodity *Murābahah* transaction which uses several contracts such as *Murābahah*, *Bay' al-Mu'ajjal* and *Tawarruq* is valid according to the *Sharī'ah*.

## CONCLUSION

As presented, among the *Sharī'ah* issues are identifications of the commodity, taking ownership prior to sell, charging expensive fee for delivery of the commodity and being the artificial fancy contract to get liquidity. The Commodity *Murābahah* programme as offered by Bursa Malaysia is a distinctive device in its structures especially to cater the identified *Sharī'ah* issues. It is a breakthrough and a good example of innovation of alternative products vis a vis conventional banking and finance. Those *Sharī'ah* issues according to some standards are tolerable. Whereas, according to other jurisdictions, stricter requirements are imposed. It is submitted that Bursa Malaysia will reconsider and review from time to time their standards operations, business operation model and subject matter of the contracts as per demanded by the industry. Hence *Sharī'ah* Advisory Committee of each Islamic financial institution plays important role to improve the transactions from time to time. It seems that Bursa always welcomes those suggestions and criticisms. This positive stance will actually attract Islamic financial institutions from around the

global to do their commodity transactions. Definitely, some of the *Sharī'ah* issues such as being fictitious or (Organized *Tawarruq*) can be resolved and avoided by the respective financial institutions. For example, they may not allow bank to become the customer's agent in concluding the transaction on behalf of the customer and at the same time on behalf of itself as the counter party. It must be concluded by the customer himself at least via teleconference. Likewise they may also ensure that the end buyer who will buy the commodity from the customer is not the vendor of the commodity who sold the commodity to the bank. Any controversial issues related to the transactions which might affect the legality of the contract from *Sharī'ah* perspective should be avoided.

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