

**APPLICATION OF WA'D (PROMISE) IN ISLAMIC BANKING  
PRODUCTS: A STUDY IN MALAYSIA AND BANGLADESH**

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**ACADEMY OF ISLAMIC STUDIES  
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**THESIS SUBMITTED IN FULFILMENT OF THE  
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**ACADEMY OF ISLAMIC STUDIES  
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KUALA LUMPUR**

**2016**

**UNIVERSITY OF MALAYA**  
**ORIGINAL LITERARY WORK DECLARATION**

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Field of Study: Islamic Economics

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## ABSTRACT

This research considers the practice of *wa'd* in Islamic banking products in Malaysia and Bangladesh and compares between them. It discusses the *Sharī'ah* issues and other challenges in the practice of *wa'd*. Finally, it determines the prospects of *wa'd*-based products in both countries. It adopts a qualitative case study approach while choosing three Islamic banks in each country for case study. Along with library research and document analysis, it conducts interviews with Islamic banking practitioners and *Sharī'ah* scholars. It follows thematic and a comparative method to analyse the data. The findings of this study show that Malaysia has innovated numerous products based on *wa'd* while Bangladesh has a limited number of products. The major challenge of *wa'd* in Malaysia is *Sharī'ah* issues. However, this study concludes that Malaysian practice of *wa'd* is free from the issues of *Sharī'ah* claimed by a few studies. Nevertheless, Malaysia should have a legal provision for *wa'd* in the Contract Act and a guideline for the practice of *wa'd*. In the case of Bangladesh, the major challenges of *wa'd* are (1) the strictness of the *Sharī'ah* scholars, (2) lack of product development initiative, (3) and the absence of a legal provision for *wa'd*. However, both countries have significant potential to develop a number of Islamic retail-banking and treasury products through using *wa'd*.

## ABSTRAK

Kajian ini bertujuan untuk menilai amalan aplikasi *wa'd* dalam produk perbankan Islam di Malaysia dan Bangladesh serta membuat perbandingan di antara keduanya. Ia akan membincangkan mengenai isu-isu Syariah dan cabaran-cabaran lain dalam pengaplikasiannya. Kajian ini juga dilakukan adalah untuk mengetahui prospek-prospek bagi produk berasaskan *wa'd* di kedua-dua buah negara iaitu Malaysia dan Bangladesh. Kajian ini menggunakan pendekatan kajian kes kualitatif dengan memilih tiga buah perbankan Islam di setiap negara sebagai kajian kes. Di samping kajian perpustakaan dan analisis dokumen, temu bual juga dilakukan dengan pengamal perbankan Islam dan para ilmuan Syariah. Kaedah tematik dan analisis perbandingan digunakan untuk menganalisis data. Hasil kajian menunjukkan bahawa Malaysia telah memperkenalkan banyak produk berasaskan *wa'd* sementara Bangladesh mempunyai bilangan produk yang terhad. Cabaran utama aplikasi *wa'd* di Malaysia adalah berkaitan isu-isu Syariah. Walau bagaimanapun, melalui hasil kajian ini dapat disimpulkan bahawa amalan aplikasi *wa'd* di Malaysia bebas daripada isu-isu Syariah seperti yang dibincangkan oleh beberapa kajian lepas. Namun begitu, Malaysia perlu mempunyai peruntukan undang-undang dalam Akta Kontrak serta garis panduan untuk amalan aplikasi *wa'd* di perbankan Islam di Malaysia. Dalam kes Bangladesh, cabaran utama *wa'd* adalah: (1) ketegasan para ilmuan Syariah, (2) kekurangan inisiatif pembangunan produk (3) dan tiada peruntukan undang-undang bagi *wa'd*. Walau bagaimanapun, kedua-dua negara mempunyai potensi besar dalam membangunkan produk-produk perbankan runcit Islam dan perbendaharaan melalui penggunaan *wa'd*.

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## TRANSLITERATION TABLE

### A. Consonant

Arabic	Roman	Arabic	Roman
ا، ء	a, ’	ط	ṭ
ب	b	ظ	ẓ
ت	t	ع	‘
ث	th	غ	gh
ج	j	ف	f
ح	ḥ	ق	q
خ	kh	ك	k
د	d	ل	l
ذ	dh	م	m
ر	r	ن	n
ز	z	ه	h
س	s	و	w
ش	sh	ي	y
ص	ṣ	ة	h, t
ض	ḍ		

### B. Vowel

Short vowel	Transliteration
َ	a
ِ	i
ُ	u

Long vowel	Transliteration
ا، ي	ā
ي	ī
و	ū

### C. Diphthong

Diphthong	Transliteration
اَؤُ	aw
اَئِ	ay
اَؤُ	uww
اِئِ	iy, ī

## LIST OF ABBREVIATIONS

AAOIFI	Accounting and Auditing Organization for Islamic Financial Institutions
ABBL	Arab Bangladesh Bank Limited
AITAB	<i>Al-Ijārah Thummah Al-Bay'</i>
ATM	Automated Teller Machine
AWS	<i>'Alayhis Salām</i>
BAFIA	Banking and Financial Institutions Act
BB	Bangladesh Bank
BBA	<i>Bay' Bi Thaman Ājil</i>
BDT	Bangladeshi Taka
BIMB	Bank Islam Malaysia Berhad
BLR	Base Lending Rate
BMMB	Bank Muamalat Malaysia Berhad
BMPO	<i>Bay' Murābahah</i> on Purchase Orderer
BNM	Bank Negara Malaysia
CSBIB	Central Shari'a Board for Islamic Banks of Bangladesh
DIBOR	Dhaka Inter-Bank Offer Rate
FSA	Financial Services Act
FSA	Financial Services Authority
FX	Foreign Exchange
HPSM	Hire-Purchase under <i>Shirkat al-Milk</i>
IBA	Islamic Banking Act
IBBL	Islami Bank Bangladesh Limited
IBFIM	Islamic Banking and Finance Institute Malaysia
IBTRA	Islami Bank Training and Research Academy

ICCS	Islamic Cross Currency Swap
IDB	Islamic Development Bank
IERB	Islamic Economics Research Bureau
IFI	Islamic Financial Institution
IFSA	Islamic Financial Services Act
IFSB	Islamic Financial Services Board
IILMC	International Islamic Liquidity Management Centre
IIMM	Islamic Interbank Money Market
IMF	International Monetary Fund
INCEIF	International Centre for Education in Islamic Finance
IPRS	Islamic Profit Rate Swap
IRS	<i>Ijārah</i> Rental Swap
ISRA	International Shari‘ah Research Academy for Islamic Finance
K	A Thousand
KFHMB	Kuwait Finance House (Malaysia) Berhad
KLIBOR	Kuala Lumpur Interbank Offered Rate
KLSE	Kuala Lumpur Stock Exchange
LC	Letter of Credit
LHC	Law Harmonisation Committee
LIBOR	London Inter-Bank Offer Rate
MIB	Maybank Islamic Berhad
MIFC	Malaysian Islamic Financial Centre
MM	<i>Mushārahah Mutanāqīshah</i>
MPI	<i>Murābahah</i> Post Import
MYR	Malaysian Ringgit
OIC	Organization of Islamic Conference

P&C	Private and Confidential
PBL	Prime Bank Limited
RA	<i>Raḍiyallāhu ‘Anh</i>
RBI	Reserve Bank of India
ROA	Return on Asset
ROE	Return on Equity
S&P	Sale and Purchase
SAC	<i>Sharī‘ah</i> Advisory Council
SAWS	<i>Ṣallallāhu ‘Alayhi Wa Sallam</i>
SC	<i>Sharī‘ah</i> Committee
SGF	<i>Sharī‘ah</i> Governance Framework
SIBL	Shahjalal Islami Bank Limited
SLR	Statutory Liquidity Requirement
SME	Small and Medium-Sized Enterprises
SWT	<i>Subḥānahu Wa Ta ‘ālā</i>
TRS	Total Return Swap
USD	United States Dollar



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## CHAPTER 1: INTRODUCTION

### 1.1. Introduction

The Islamic finance industry is holding a significant position in the global financial industry. This fastest growing industry is deeply rooted in the Middle East, South Asia, and South East Asia. Moreover, a number of non-Muslim countries have shown their interest in Islamic finance. It is currently operating in more than 75 countries. This faith-based ethical finance might be the best choice for the Muslim world comprising more than 1.3 billion Muslims.<sup>1</sup>

In order to survive in the competing market, Islamic finance is required to provide viable alternatives in every aspect of conventional finance. In this regard, product innovation is a necessary task for Islamic financial institutions.<sup>2</sup> However, *Sharī'ah* principles must be adhered to while structuring a new product. It is the duty of the practitioners to obtain *Sharī'ah* scholars' acceptance after innovating any Islamic banking product. Therefore, Islamic banking practitioners are required to put extra effort to produce alternative products that meet market demands while fulfilling the necessary requirements of the *Sharī'ah*.

*Ribā* is prohibited in the *Sharī'ah*. Islamic banks cannot simply provide loans to its customers with interest. They need to engage in real trading activities with the customers. Therefore, every Islamic banking product is developed through a number of contractual arrangements in which several *Sharī'ah* concepts are used.<sup>3</sup> *Mushārahah*, *murābahah*, *ijārah* and *muḍārabah* are the most dominant *Sharī'ah* concepts used in

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<sup>1</sup> M. Mansoor Khan and M. Ishaq Bhatti, "Islamic banking and finance: on its way to globalization", *Managerial Finance* 34, no. 10 (2008), 708-725; Robert R. Bianchi, "The Revolution in Islamic Finance," *Chicago Journal of International Law* 7, no. 2 (Winter 2007), 569.

<sup>2</sup> Fouad H. Al-Salem, "Islamic financial product innovation," *International Journal of Islamic and Middle Eastern Finance and Management* 2, no. 3 (2009), 195.

<sup>3</sup> Theodore Karasik, Frederic Wehrey and Steven Strom, "Islamic Finance in a Global Context: Opportunities and Challenges", *Chicago Journal of International Law* 7, no. 2 (Winter 2007), 381-384; Mahmoud A. El-Gamal, *Islamic Finance Law, Economics, and Practice* (New York: Cambridge University Press, 2006), 46 and 64.

Islamic banking products. *Wa'd* is one of these *Sharī'ah* concepts which plays a great role in Islamic banking product innovation.

Literally, *wa'd* denotes promise.<sup>4</sup> According to Islamic jurists (*fuqahā'*), *wa'd* is a unilateral promise which is different from a contract (*'aqd*). In *wa'd*, one party promises another to perform a certain action in the future. It is a voluntary offer<sup>5</sup> whereby the promisor is not entitled to receive any remuneration for his promise. In Islamic banking practices, *wa'd* is usually used for financial transactions to be carried out in the future.

Based on the above characteristics, it is believed that *wa'd* has great potential in Islamic finance. It might be very useful for product innovation. Among the advantages of *wa'd* is that it can be a better alternative for conventional forward transactions comparing with other *Sharī'ah* concepts (i.e. *salam*, *istiṣnā'*). This is because in the case of *salam*, the commodity type, quantity, and date of delivery etc. must be specified during the time of executing the contract. However, if *wa'd* is used in lieu of *salam* then there is no such requirements by the *Sharī'ah*. Therefore, *wa'd* is more convenient to use. In addition, *wa'd* can be used as a risk management tool. In some Islamic banking products, e.g. “*murābaḥah* on purchase orderer” *wa'd* minimises the risk of the financier when he purchases a commodity in the market for selling it to the customer with profit.<sup>6</sup>

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<sup>4</sup> Aḥmad bin Muḥammad bin 'Alī al-Fayūmī al-Maqrī, *Al-Miṣbāḥ al-Munīr* (Bayrūt: Maktabat Lubnān, 1987), 255.

<sup>5</sup> Aḥmad Muḥammad Khalīl al-Islāmbūlī, “Ḥukm al-wa'd fī al-fiqh al-Islāmī wa taṭbīqātuh al-mu'āṣirah,” *Journal of King Abdul Aziz University: Islamic Economics* 16, no. 2 (2003), 43-57; Nazīh Kamāl Ḥammād, *Mu'jam al-Muṣṭalahāt al-Māliyyah wa al-Iqtisādiyyah fī Luḡhat al-Fuqahā'* (Dimasq: Dār al-Qalam, 2007), 473.

<sup>6</sup> Muhammad Taqī Usmani, *An Introduction to Islamic Finance* (The Hague: Kluwer Law International, 2002), 84; Nurdianawati Irwani Abdullah, “Status and implications of promise (*wa'd*) in contemporary Islamic banking,” *Humanomics* 26, no. 2 (2010), 84-98; Marjan Muhammad, Hakimah Yaacob and Shabana Hasan, “The bindingness and enforceability of a unilateral promise (*wa'd*): an analysis from Islamic law and legal perspectives,” (Research paper no. 30, International Shari'ah Research Academy for Islamic Finance, Kuala Lumpur, 2011), 2; Seng Kiong Kok, Gianluigi Giorgioni and Jason Laws, “Derivative products and innovation in Islamic finance,” *International Journal of Islamic and Middle Eastern Finance and Management* 7, issue. 3 (2014), 243.

## 1.2. Research Background

*Wa'd* has different types of usage ranging from personal to financial affairs.<sup>7</sup> A simple example of *wa'd* for personal matter can be given that a person promises his friend that he will meet him at a specific place on a particular time. An important use of *wa'd* for personal matter is the *wa'd* for marriage, in which for instance, A promises B that he will marry her on a fixed date. In financial affairs, *wa'd* can be made to carry out a contract in the future. For instance, A promises B that he will sell to him a certain commodity on a specific date in the future.

The term *wa'd* existed during the early period of Islam. The *Qur'an* and *Ḥadīth* have widely used this term in different contexts. For example, Allāh promises forgiveness and paradise for the believers in the following verse of the Qur'an:

وَعَدَ اللَّهُ الَّذِينَ ءَامَنُوا وَعَمِلُوا الصَّالِحَاتِ لَهُمْ مَغْفِرَةٌ وَأَجْرٌ عَظِيمٌ  
(Al-Mā'idah 5: 9)

Translation: Allāh has promised those who believe (in the Oneness of Allāh – Islamic Monotheism) and do deeds of righteousness, that for them there is forgiveness and a great reward (i.e. Paradise).<sup>8</sup>

Similarly, *wa'd* was found in the *Ḥadīth* of the prophet (SAWS). The following is a renowned *Ḥadīth* which states that one of the characteristics of a hypocrite is that he breaks his promise.

آية المنافق ثلاث إذا حدث كذب وإذا وعد أخلف وإذا أؤتمن خان

Translation: Sign of a pretentious person are three things; when he talks he lies; when he promises he breaks it; and when he is given a trust he betrays it.<sup>9</sup>

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<sup>7</sup> Manṣūr bin Yūnus bin Idrīs Al-Buhūtī, *Kashshāf Al-Qinā' 'an Matn Al-Iqnā'*, ed. Muḥammad Amīn Al-Dīnnāwī (Bayrūt: 'Ālam al-kutub, 1997), 3:79; Muḥammad Amīn bin 'Umar bin 'Abd Al-Azīz 'Ābidīn, *Al-'Uqūd al-Ḍurriyyah fī Tanqīḥ al-Fatāwā al-Ḥāmidīyyah*, (India: n.p., 1819), 2:352-353; Abū 'Abdullāh Muḥammad bin Muḥammad bin 'Abd al-Raḥmān al-Ḥaṭṭāb, *Mawāhib al-Jalīl li Sharḥ Mukhtaṣarin Khalīl*, ed. Zakariyā 'Umayrāt (Bayrūt: Dār al-kutub al-'ilmiyyah, 1995), 5:33.

<sup>8</sup> Muhammad Taqī-ud-Din Al-Hilali and Muhammad Muhsin Khan, *Translation of the Meanings of the Noble Qur'an in the English Language* (Madinah: King Fahd complex for the printing of the holly Qur'an, n.d.), 144.

<sup>9</sup> Narrated by al-Bukhārī, *Kitāb al-Shahādāt*, Bāb man amara bi injāz al-wa'd, Ḥadīth no. 2682, and Muslim, *Kitāb al-Īmān*, Bāb Bayān Khiṣāl al-Munāfiq, Ḥadīth no. 107. See Abū 'Abdullāh Muḥammad bin Ismā'īl al-Bukhārī, *Al-Jāmi' al-Ṣaḥīḥ*, ed. Muḥib al-Dīn al-Khaṭīb, (al-Qāhirah: Maṭba'ah al-salafiyyah, 1980), 2:262 and Abū al-Ḥusayn Muslim bin Ḥajjāj al-Qushayrī al-Naysābūrī, *Ṣaḥīḥ Muslim*, ed. Muḥammad Fu'ād 'Abd al-Bāqī, (Bayrūt: Dār al-kutub al-'ilmiyyah, 1991), 1:78.

*Wa'd* captured the attention of the classical scholars of Islamic jurisprudence (*fiqh*) due to its importance in a Muslim's life. Scholars from the four school (*madhāhib*) of jurisprudence discussed different *Sharī'ah* rulings related to *wa'd*. They debated on the bindingness of *wa'd* in the *Sharī'ah* whether it is obligatory for a person to fulfil his promise or it is simply a matter of ethics. Their discussion on *wa'd* included its usage in personal as well as financial affairs.<sup>10</sup>

During the 1980s, *wa'd* came into the lime light of Islamic banking with the introduction of “*murābahah* on purchase order” financing. In this type of financing, the Islamic bank purchases a commodity in the market and sells it to the customer with a fixed profit. However, the bank may incur financial loss in case the customer does not purchase the commodity from the bank after the bank has purchased it. In order to mitigate the bank's risk, the customer is required to give *wa'd* that he will purchase the particular commodity from the bank after the bank has purchased it in the market.<sup>11</sup>

*Wa'd* is not normally used as a standalone concept in Islamic banking products. It is combined with other *Sharī'ah* concepts for the purpose of risk management. Apart from *murābahah*, several other Islamic banking products are introduced with the combination of *wa'd* e.g. *ijārah* vehicle financing, *mushārahah mutanāqishah* home financing etc. Due to the benefits of risk mitigation, *wa'd* is not limited to some banking products only but has expanded to *ṣukūk* and other Islamic capital market products. Some financial institutions have even innovated *wa'd*-based Islamic structured products. This widespread application of *wa'd* has captured the interest of contemporary *Sharī'ah* scholars who have

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<sup>10</sup> Muḥyī al-Dīn Abī Zakariyyā Yaḥyā bin Sharaf Al-Nawawī, *Al-Adhkār min Kalāmi Sayyidi al-Abrār*, (Bayrūt: Dār al-minhāj, 2005), 510-511; Muḥammad bin Aḥmad bin Muḥammad 'Alīsh, *Fatḥ al-'Alīyy al-Mālik fī al-Fatwā 'alā Madhhab al-Imām Mālik*, (al-Qāhirah: Muṣṭafā al-Bābī al-Ḥalabī, 1958), 1:254; Abī Muḥammad 'Alī bin 'Aḥmad bin Sa'īd bin Ḥazm, *Al-Muḥallā bi al-Āthār*, ed. Aḥmad Muḥammad Shākir, (Miṣr: Idārāt al-ṭibā'ah al-muniriyyah, 1352 AH), 8:28; Abū Bakr Muḥammad bin 'Abdullāh bin 'Arabī, *Aḥkām al-Qur'ān*, ed. Muḥammad 'Abd al-Qādir 'Aṭā', (Bayrūt: Dār al-kutub al-'ilmiyyah, 2003), 4:243; Aḥmad bin 'Alī bin Ḥajar Al-'Asqalānī, *Fatḥ al-Bārī' Sharḥ Ṣaḥīḥ al-Bukhārī*, ed. Muḥammad Fu'ād 'Abd al-Bāqī (al-Qāhirah: al-Maktabah al-Salafiyyah, n.d.), 5:290; Abū Ḥāmid Muḥammad bin Muḥammad bin Muḥammad al-Ghazālī, *Iḥyā' 'Ulūm al-Dīn* (al-Qāhirah: Dār al-Sha'b, n.d.), 9:1580.

<sup>11</sup> Yūsuf al-Qarḍāwī, “Al-wafā' bi al-wa'd,” *Majallah majma' al-fiqhī al-Islāmī* 5, no. 2 (1988), 616-634; Nurdianawati Irwani Abdullah, “Status and implications of promise,” 84-98.

started to study the usage of *wa'd* in different products and initiated debate on their *Shari'ah* permissibility.<sup>12</sup>

In light of the above, it can be said that *wa'd* is a popular concept among the *Shari'ah* scholars and Islamic banking practitioners around the world. All leading Islamic banking countries are utilising *wa'd* to develop various products.<sup>13</sup> Malaysia as one of the prominent countries for Islamic banking is no different. It has paid significant attention on *wa'd* in order to innovate a large number of products.

Malaysia is a Southeast Asian Muslim majority developing country. It is in the leading position to initiate Islamic finance in Southeast Asia. It started Islamic banking in 1983 with the establishment of Bank Islam Malaysia Berhad (BIMB). Malaysia has developed a comprehensive Islamic financial system which includes Islamic banking, capital market and insurance. In addition, it has diversified products and services offered by Islamic financial institutions.<sup>14</sup>

Islamic banking in Malaysia is blessed with government support. The Malaysian government has provided legal and regulatory support for Islamic banks through enacting Islamic Banking Act (IBA) 1983 and Islamic Financial Services Act (IFSA) 2013. The government has introduced several policies to assist the development of Islamic banking in Malaysia. For example, the government deposit with Islamic banks to support them. Through developing strong governance, infrastructure and human capital, the government

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<sup>12</sup> Nurdianawati Irwani Abdullah, "Status and implications of promise," 84-98; Nor Adila Mohd Noor and Mohd Ashraf Aripin, "Mechanism of al-Wa'ad (Promise): Theory and Application in Islamic Banking in Malaysia," *Canadian Social Science* 6, no. 1 (2010), 80-89; Asmadi Mohamed Naim, "Purchase Undertaking Issues in Musharakah Mutanaqisah Home Financing," *ISRA International Journal of Islamic Finance* 3, issue. 1 (2011), 25-47; Marjan Muhammad et al., "The bindingness and enforceability of a unilateral promise (wa'd)"; Shabnam Mokhtar, "A Synthesis of Shari'ah Issues and Market Challenges in the Application of Wa'd in Equity-based Sukuk," *ISRA International Journal of Islamic Finance* 1, issue. 1 (2009), 139-145; Chady C. Atallah and Wafica A. Ghoul, "The Wa'd-Based Total Return Swap: Sharia Compliant or Not?," *The Journal of Derivatives* 19, no. 2 (2011), 71-89.

<sup>13</sup> Shabnam Mokhtar, "A Synthesis of Shari'ah Issues", 139-145; Atallah and Ghoul, "The Wa'd-Based Total Return Swap", 71-89; Humayon Dar, "Promises, promises," *Newhorizon*, January - March 2010, 12-15; Priya Uberoi, Rahul Chatterji and Dany Bidar, "The wa'ad on the Street," *Risk magazine*, August 2009, 60-63.

<sup>14</sup> Rika Nakagawa, "The evolution of Islamic finance in Southeast Asia: the case of Malaysia," *The Journal of Applied Business Research* 25, no. 1 (2009), 111-126.

target to make Islamic banking the mainstream banking in Malaysia and seeking to make Malaysia the global hub for Islamic finance.<sup>15</sup>

There were 16 Islamic banks licensed under Bank Negara Malaysia (BNM) until 2013. Among these banks, five are full-fledged Islamic banks and the remaining 11 banks are subsidiaries of their respective conventional banks. In 2010, Islamic banking in Malaysia achieved its target of 20% market share.<sup>16</sup>

Product development is crucial in Malaysia. To compete with the conventional banks, it provides alternatives for nearly all conventional products. It offers a variety of saving and investments accounts. Numerous financing facilities are available including home, car, and personal financing. In addition, it provides Islamic alternative for letter of credit, accepted bills, charge cards, credit cards, and debit cards. Additionally, several Islamic treasury products have been developed to meet the demands of the customers.<sup>17</sup>

However, Malaysian Islamic banking has received criticism from the *Sharī'ah* perspective. The criticism is mostly levelled against the practice of *bay' al-ṭinah* in *bay' bi thaman ājil* (BBA) home financing. The majority of Malaysian Muslims follow *al-Shāfi'ī* school of jurisprudence. As *bay' al-ṭinah* is allowed by a few *Shāfi'ī* jurists, the Islamic banks in Malaysia take it as a reference to defend *bay' al-ṭinah*. Apart from *bay' al-ṭinah*, there are a few contracts where the Islamic banking products are claimed as the mirror image of conventional products i.e. *tawarruq munazzam* personal financing.<sup>18</sup>

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<sup>15</sup> Nakagawa, "The evolution of Islamic finance in Southeast Asia," 111-126; Mohamad Akram Laldin, "Islamic financial system: the Malaysian experience and the way forward," *Humanomics* 24, no. 3 (2008), 217-238; Bank Negara Malaysia, "Financial Services Act 2013 and Islamic Financial Services Act 2013 Come Into Force," *Bank Negara Malaysia* website, retrieved on 13 Jan 2014, [http://www.bnm.gov.my/index.php?ch=en\\_press&pg=en\\_press\\_all&ac=2837](http://www.bnm.gov.my/index.php?ch=en_press&pg=en_press_all&ac=2837)

<sup>16</sup> Mohamed Ariff and Saiful Azhar Rosly, "Islamic Banking in Malaysia: Unchartered Waters," *Asian Economic Policy Review* 6, issue. 2 (2011), 301-319; Bank Negara Malaysia, "List of Licensed Banking Institutions in Malaysia," *Bank Negara Malaysia* website, retrieved on 14 January 2013, <http://www.bnm.gov.my/index.php?ch=li&cat=islamic&type=IB&fund=0&cu=0>

<sup>17</sup> Bank Negara Malaysia, *Monthly statistical bulletin*, January 2013, 37; Nakagawa, "The Evolution of Islamic Finance," 119-120; Mohamad Akram Laldin, "Islamic financial system", 229; Bank Negara Malaysia, "Islamic banking," *Bank Negara Malaysia* website, retrieved on 13 Jan 2014, <http://www.bnm.gov.my/index.php?ch=174&pg=467&ac=370>

<sup>18</sup> Mohamed Ariff and Saiful Azhar Rosly, "Islamic Banking in Malaysia," 301-319; Ahamed Kameel Mydin Meera and Dzuljastri Abdul Razak, "Islamic Home Financing through Musharakah Mutanaqisah and al-Bay' Bithaman Ajil Contracts: A Comparative Analysis," *Review of Islamic Economics* 9, no. 2

Considering the overall aspects of Islamic banking in Malaysia, it can be regarded as a role model for the countries which are at the initial stage of Islamic banking. Malaysia's diverse product innovation, *Shari'ah* governance framework, government's prudent regulation on dual banking system, infrastructure, knowledge, and human capital development etc. render it distinct from other countries. While discussing the development of Islamic banking in Malaysia, Mohamad Akram Laldin states that the Malaysian Islamic finance industry should be taken as a benchmark for the development of Islamic finance in other countries.<sup>19</sup>

As Bangladesh is at the blooming stage in developing Islamic finance then it is appropriate for it to consider Malaysian practices for its development. Bangladesh is the third largest Muslim country in the world. Similar to Malaysia, it started Islamic banking in 1983 and the first Islamic bank was the Islami Bank Bangladesh Limited (IBBL). As of 2013, there are seven full-fledged Islamic banks in Bangladesh and 16 conventional banks have Islamic banking windows. As of December 2012, the total deposit of Islamic banking sector was BDT 1017.9 billion which was 18.9% of the total deposit of the banking sector in Bangladesh.<sup>20</sup>

Even though Islamic banking has a notable position in the overall banking sector of Bangladesh, it has been unable to achieve substantial development due to a number of challenges. Several studies state that lack of government support is one of the key challenges for Islamic banking in Bangladesh. Until now, the government did not enact a separate law for the operation of Islamic banking. There is no strong *Shari'ah* regulation and governance developed by the central bank of Bangladesh. Moreover, absence of an Islamic capital market is another significant barrier.<sup>21</sup>

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(2005), 5-30; Feisal Khan, "How 'Islamic' is Islamic Banking?," *Journal of Economic Behavior & Organization* 76, issue. 3 (2010), 805–820.

<sup>19</sup> Mohamad Akram Laldin, "Islamic financial system," 217-238.

<sup>20</sup> Bangladesh Bank, *Annual Report 2012-13* (Dhaka: Bangladesh Bank, 2014), 37.

<sup>21</sup> Abu Umar Faruq Ahmad and M. Kabir Hassan, "Regulation and performance of Islamic banking in Bangladesh," *Thunderbird International Business Review* 49, issue. 2 (2007). 251–277.



Among many challenges, the scarcity of products is one of the major challenges for Islamic banks in Bangladesh. Lack of products may render the Islamic banking industry non-competitive with its conventional counterpart. Several studies show that Islamic banks in Bangladesh mostly rely on a few classical products for providing financing facilities to its clients e.g. *bay' al-murābahah* and *bay' al-mu'ajjal*. Therefore, it is crucial for the Islamic banking industry in Bangladesh to innovate more products using different types of *Shari'ah* concepts.<sup>22</sup>

### 1.3. Problem Statement

As mentioned earlier, Malaysia has developed a variety of Islamic financial products. A significant number of these products include *wa'd* in their structures. *Wa'd*-based Islamic financial products in Malaysia include retail Islamic banking products, *ṣukūk*, and Islamic treasury products.<sup>23</sup> However, the usage of *wa'd* in different financial products brings about certain challenges. Among these challenges, *Shari'ah* issues are the most important concern raised by a number of studies.

In relation to the practice of *wa'd* in *mushārahah mutanāqishah* (MM) home financing, Asmadi Mohamed Naim stated that the practice of *wa'd* in this product invalidates the *Shari'ah* principles for *mushārahah* contract.<sup>24</sup> Azlin Alisa Ahmad and Shofian Ahmad claimed that there is an element of injustice in the practice of *wa'd* in Islamic FX forward.<sup>25</sup> Several other studies argued that the practice of *wa'd* in some Islamic financial products are fictitious means (*hīlah*) to legalise prohibited forward sale

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<sup>22</sup> Abdul Awwal Sarker, "Islamic Banking in Bangladesh,"; Ahmad and Hassan, "Regulation and performance", 251–277; Iqbal Kabir Mohon, *Islami Orthonti* (Dhaka: Zerin Publishers, 2011), 361; Md. Abdul Awwal Sarker, "Islamic Banking in Bangladesh Growth, Structure, and Performance," *Proceedings of the Third Harvard University Forum on Islamic Finance: Local Challenges, Global Opportunities* (1999), 271-290.

<sup>23</sup> Nor Adila Mohd Noor and Mohd Ashraf Aripin, "Mechanism of al-Wa'ad (Promise)", 80-89; Marjan Muhammad et al., "The bindingness and enforceability of a unilateral promise"; Shabnam Mokhtar, "A Synthesis of Shari'ah Issues," 139-145.

<sup>24</sup> Asmadi Mohamed Naim, "Purchase Undertaking Issues", 25-47.

<sup>25</sup> Azlin Alisa Ahmad and Shofian Ahmad, "Inovasi Pemakaian Prinsip Wa'dan dalam Instrumen Lindung Nilai Islam", *Islāmiyyāt* 36, no. 1, (2014), 21 – 32.

contract and contravene other major *Sharī‘ah* prohibitions i.e. *maysir* (gambling).<sup>26</sup> Finally, Hakimah Yaacob point out that the *Sharī‘ah* concept of *wa‘d* may encounter legal challenges as the contract act in Malaysia does not explicitly recognise it.<sup>27</sup>

On the other hand, the significance of *wa‘d* in product innovation cannot be neglected due to its advantage as a risk management tool and a very convenient alternative to forward sale contracts. A large number of Islamic financial products would comprise high risk if we eliminate the *wa‘d* element. Moreover, disregarding *wa‘d* may confine the product innovation in Islamic finance. Consequently, the growth of Islamic finance will be hindered. Considering the above facts, it is necessary to study the *wa‘d*-based products in Malaysia to analyse the *Sharī‘ah* issues and other challenges. It is equally important to consider the future prospect of *wa‘d* in Malaysian Islamic finance industry.

Since the Malaysian Islamic finance industry has innovated a large number of products based on *wa‘d*, it is an opportunity for the Islamic finance industry in Bangladesh to learn from Malaysian practices. Several studies recommended that product development is necessary for Islamic banks in Bangladesh.<sup>28</sup> In order to innovate new products, Islamic banks in Bangladesh should study the Malaysian banks’ practices on structuring products based on *wa‘d*. In this regard, it is necessary to investigate the existing *wa‘d*-based products in Bangladesh and the challenges associated with it. In addition, it is also essential to examine the prospects of *wa‘d* for Islamic finance industry in Bangladesh.

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<sup>26</sup> Muhammad Ayub, “Use of W‘ad and Tawarruq for Swaps in the framework of Islamic Finance,” (Paper presented in Eighth International Conference on Islamic Economics and Finance, Doha, Qatar, 19-21 December 2011); Aznan Hasan, “Pengertian al-wa‘ad, al-wa‘dan dan al-muwa‘adah,” (Paper presented in Muzakarah Cendekiawan Syariah Nusantara, International Shari‘ah Research Academy for Islamic Finance (ISRA), Kuala Lumpur, 27-28 February 2008); Marjan Muhammad et al., “The bindingness and enforceability of a unilateral promise”; Shabnam Mokhtar, “A Synthesis of Shari‘ah Issues,” 139-145.

<sup>27</sup> Hakimah Yaacob, “Does Contracts Act 1950 recognize wa‘ad?,” *Shariah Law Reports* 2, (2012), 35-43.

<sup>28</sup> Sarker, “Islamic Banking in Bangladesh”; Ahmad and Hassan, “Regulation and performance of Islamic banking”, 251–277; Mohon, *Islami Orthoniti*, 361; Sarker, “Islamic Banking in Bangladesh Growth, Structure, and Performance,” 271-290.

In light of the above, a comparative case study is required on the practice of *wa'd* between Malaysia and Bangladesh. The comparison would help ascertain the strengths and weaknesses between the two countries so that both can learn from each other. The study will assist in determining the challenges faced by both countries. Moreover, it will analyse the potentials that each of the countries may achieve.

Finally, even though a number of studies have been conducted on *wa'd* from various perspectives, there is a general lack of field studies. Considering the significance of *wa'd* in product development, a field study in both countries should be conducted to obtain in-depth and up-to-date information.

#### **1.4. Research Questions**

The following research questions are addressed to shed light on the problem statement:

- (1) What is *wa'd*, and what is its status in the *Sharī'ah*?
- (2) What are the Islamic banking products in Malaysia where *wa'd* is employed?  
What is the mechanism for the usage of *wa'd* in those products?
- (3) What is the legal status of *wa'd* in Malaysia?
- (4) What are the Islamic banking products in Bangladesh where *wa'd* is employed?  
What is the mechanism for the usage of *wa'd* in those products?
- (5) What is the legal status of *wa'd* in Bangladesh?
- (6) What are the similarities and differences between Malaysia and Bangladesh in terms of the practice of *wa'd* in Islamic banking products?
- (7) What are the *Sharī'ah* issues and other challenges of *wa'd*-based products in Malaysia and Bangladesh?
- (8) What are the prospects for *wa'd* in innovating Islamic banking products in Malaysia and Bangladesh?

## 1.5. Research Objectives

Based on the problem statement, the following are the objectives of this research:

- (1) To examine the practice of *wa'd* in Islamic banking products in Malaysia.
- (2) To examine the practice of *wa'd* in Islamic banking products in Bangladesh.
- (3) To compare the practice of *wa'd* in Islamic banking products between Malaysia and Bangladesh.
- (4) To discuss the *Sharī'ah* issues and other challenges of *wa'd* in Islamic banking products in Malaysia and Bangladesh.
- (5) To investigate the prospects for *wa'd* in innovating Islamic banking products in Malaysia and Bangladesh.

## 1.6. Scope of the Research

The study is limited to the practice of *wa'd* in Islamic banking products including the consumer banking products, trade financing products, and treasury products. The study does not cover *ṣukūk*. This is because there is no *ṣukūk* market in Bangladesh.<sup>29</sup> Therefore, to make the comparison fair, the study compares Islamic banking products only. Moreover, in order to narrow the scope of the research, it does not include Islamic structured products.

This study chooses three Islamic banks from each of the countries as a case study for in-depth analysis. This study is concerned with deep knowledge on the practice of *wa'd*. Therefore, the quantity of the banks has been minimised so that rich information can be gathered and analysed from the limited number of sources. The following three Malaysian banks have been selected for the case study:

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<sup>29</sup> BMB Islamic, *Global Islamic Finance Report (GIFR) 2011* (London: BMB Islamic UK Limited, 2011), 260; Md. Abul Kalam Azad, Mohammad Rokibul Kabir, Faruk Bhuiyan & Abdul Kadar Muhammad Masum, "Prospects Analysis of an Islamic Capital Market in Bangladesh," *Global Journal of Management and Business Research Finance* 13, issue. 6 (2013), 57.

- (1) Bank Islam Malaysia Berhad (BIMB)<sup>30</sup>
- (2) Maybank Islamic Berhad (MIB)<sup>31</sup>
- (3) Kuwait Finance House (Malaysia) Berhad (KFHMB)<sup>32</sup>

Bank Islam Malaysia Berhad has been selected because it is the first Islamic bank in Malaysia.<sup>33</sup> Maybank Islamic Berhad is the subsidiary of Maybank Berhad which is the most popular and biggest local bank in Malaysia.<sup>34</sup> The Kuwait Finance House (Malaysia) Berhad is the first and notable foreign Islamic bank operating in Malaysia.<sup>35</sup> These three banks have been chosen based on their distinctive features. They represent three different categories of Islamic banks. Bank Islam Malaysia Berhad represents the core Islamic banks in Malaysia. Maybank Islamic represents the category of Islamic banks as a subsidiary of conventional banks, while the Kuwait Finance House (Malaysia) Berhad represents foreign Islamic banks in Malaysia.

As of 2013, seven full-fledged Islamic banks and 16 Islamic banking windows are operating in Bangladesh. The following three banks are selected among them:

- (1) Islami Bank Bangladesh Limited (IBBL)<sup>36</sup>
- (2) Prime Bank Limited (PBL)<sup>37</sup>
- (3) Shahjalal Islami Bank Limited (SIBL)<sup>38</sup>

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<sup>30</sup> Bank Islam Malaysia Berhad, "Corporate Profile", *Bank Islam Malaysia Berhad* website, retrieved on 20 Sept 2014, <http://www.bankislam.com.my/en/Pages/CorporateProfile.aspx?tabs=1>

<sup>31</sup> Maybank Islamic Berhad, "Corporate Info", *Maybank Islamic Berhad* website, retrieved on 20 Sept 2014, <http://maybankislamic.com.my/info.html>

<sup>32</sup> Kuwait Finance House (Malaysia) Berhad, "Company Profile", *Kuwait Finance House (Malaysia) Berhad* website, retrieved on 20 Sept 2014, [http://www.kfh.com.my/kfhmb/v2/contentView.do?contentType=3000&displayPage=%2Fver2%2Fcontent%2Fstandard.jsp&channelPath=%2Fver2%2Fv2\\_Navigation%2FAbout+Us&programName=00+Company+Profile&tabId=5&cntName=AU01.CP1-About](http://www.kfh.com.my/kfhmb/v2/contentView.do?contentType=3000&displayPage=%2Fver2%2Fcontent%2Fstandard.jsp&channelPath=%2Fver2%2Fv2_Navigation%2FAbout+Us&programName=00+Company+Profile&tabId=5&cntName=AU01.CP1-About)

<sup>33</sup> Nakagawa, "The evolution of Islamic finance in Southeast Asia", 111-126.

<sup>34</sup> Maybank Islamic Berhad, "Corporate Info".

<sup>35</sup> Kuwait Finance House (Malaysia) Berhad, "Company Profile".

<sup>36</sup> Islami Bank Bangladesh Limited (IBBL), "IBBL at a glance", *Islami Bank Bangladesh Limited* website, retrieved on 20 Sept 2014, <http://www.islamibankbd.com/abtIBBL/abtIBBLAtaGlance.php>

<sup>37</sup> Prime Bank Limited, "About Prime Bank", *Prime Bank Limited* website, retrieved on 20 Sept 2014, <https://www.primebank.com.bd/index.php/home/about>

<sup>38</sup> Shahjalal Islami Bank Limited, "About SIBL", *Shahjalal Islami Bank Limited* website, retrieved on 20 Sept 2014, <http://www.shahjalalbank.com.bd/about.php>

The above banks are selected based on their type, precedence in establishment, size, popularity, and communication availability. The Islami Bank Bangladesh Limited (IBBL) is the oldest and biggest Islamic bank in Bangladesh, and is the most popular in the country. After that, Prime Bank Limited (PBL) is the first conventional bank in Bangladesh to start an Islamic banking window. Thirdly, Shahjalal Islami Bank Limited (SIBL) is a notable full-fledged Islamic bank in Bangladesh after IBBL.<sup>39</sup> Comparing with Malaysia, there is currently no full-fledged foreign Islamic banks in Bangladesh and there is no Islamic banking subsidiary of conventional banks.<sup>40</sup> Therefore, it was not possible to choose Islamic banks in Bangladesh similar in type to those found in Malaysia. As a substitute, one Islamic banking window and two local full-fledged Islamic banks have been chosen from Bangladesh.

### **1.7. Significance of the Research**

This research adds new knowledge on the practice of *wa'd* in Islamic banks in Malaysia and Bangladesh. The usage of *wa'd* in these two countries might be of interest to academics all around the world as these two are notable countries for Islamic finance. This study is unique because no comprehensive field study has thus far been conducted on the practice of *wa'd*. It is able to provide the most detailed and up to date information on the usage of *wa'd*. In addition, the discussion on the *Shari'ah* issues and other challenges in *wa'd*-based products is significant.

The findings and recommendations of this study may assist the government and policy makers in both countries to develop Islamic finance. This research captures the attention of the government through highlighting the necessity of enacting legal

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<sup>39</sup> Muhammad Nurul Islam, "Bangladeshe Islami bank protishthar andoloner itihash," *Amar Desh*, 21 April, 2010; Mohon, *Islami Orthoniti*, 137; Mohammad Abdul Mannan, *Islami Bank Babostha* (Dhaka: Central Shariah Board for Islamic Banks of Bangladesh, 2010), 47; Sarker, "Islamic Banking in Bangladesh", 2; BMB Islamic, *Global Islamic Finance Report*, 259.

<sup>40</sup> "Lists of Banks in Bangladesh", *BankInfo beta* website, retrieved on 20 Sept 2014, <http://bankinfobd.com/banks>

provisions for *wa'd*. The government of Bangladesh would benefit from this study by knowing the role of the Malaysian government in promoting Islamic banking.

The industry practitioners in both countries would highly benefit from this research by knowing each other's practice. Moreover, the proposed product structures would assist the product innovators in both countries develop more products based on *wa'd*. The discussion on the *Sharī'ah* issues of *wa'd* would guide the practitioners towards the *Sharī'ah*-permitted way to use *wa'd* in new product structuring.

The discussion on the *Sharī'ah* issues relating to the usage of *wa'd* might be of interest to the *Sharī'ah* scholars. It may help them in determining *Sharī'ah* rulings on different *wa'd*-based products. Moreover, this research challenges the majority view of *Sharī'ah* scholars on certain issues related to *wa'd*.

Finally, this research educates the public through revealing the *Sharī'ah* rulings for *wa'd*. Islamic banks' clients would know their rights and responsibilities when involved with *wa'd*-based products. Moreover, the discussion on the *Sharī'ah* status of *wa'd* not only guides them in financial matters but also in many other personal matters.

## **1.8. Literature Review**

In light of the objectives of this research, literature on Islamic banking in Bangladesh and Malaysia have been reviewed followed by a review of literature on the theory and practice of *wa'd*. Literature is collected by searching through different databases and library catalogues. A number of journal articles, theses, dissertations, institutional research papers, books, and newspaper and magazine articles have been reviewed. Considering the nature and scope of the research, literature in English, Arabic, Malay, and Bangla have been reviewed with most of the literature in English.

Table 1.1 Outline of Literature Review

Theme	Literatures
<i>Islamic banking in Malaysia</i>	Mohamed Ariff and Saiful Azhar Rosly (2011); Mohamad Zaid Mohd Zin et al. (2011); Khan (2010); Nakagawa (2009); Ahmad Hidayat Buang (2007); Mohamad Akram Laldin (2008)
<i>Islamic banking in Bangladesh</i>	Mohon (2011); Rahman (2010); Mannan (2010); Raqib and Muhammad (2008); Ahmad and Hassan (2007); Sarker (2005); Hassan (1999); Sarker, (1999); Alam (2000); Hussain (1996)
<i>Comparison of Islamic banking between Malaysia and Bangladesh</i>	Haron (1998)
<i>Comparison of Banking sector between Malaysia and Bangladesh</i>	Khanal (2007)
<i>Theory of Wa'd</i>	<p><i>Definition of wa'd and its status in the Shari'ah</i></p> <p>Qazi (2012); Azlin Alisa Ahmad et al. (2012)a; Azlin Alisa Ahmad et al. (2012)b; Khairun Najmi Saripudin et al. (2012); Shabana Hasan and Marjan Muhammad (2011); Atallah And Ghoul (2011); Mohd Saiful Azli Md Ali (2011); Marjan Muhammad et al. (2011); Ismail Wisham et al. (2011); International Shari'ah Research Academy for Islamic Finance (ISRA) (2011); Mohamad et al. (2011); Nurdianawati Irwani Abdullah (2010); Nor Adila Mohd Noor and Mohd Ashraf Aripin (2010); Munirah Kasim (2010); 'Abdullāh Muḥammad (2010); Mohamad Akram Laldin (2009); Shofian Ahmad and Azlin Alisa Ahmad (2008); Aznan Hasan (2008); Azizi Che Seman (2008); Al-Islāmbūlī (2003); Al-Masri (2002); Ḥammād (1988); Al-Qarḏāwī (1988)</p>
<i>Wa'd and common law</i>	Azlin Alisa Ahmad et al. (2012)b; Hakimah Yaacob (2012); Marjan Muhammad et al. (2011); Ismail Wisham et al. (2011); Nurdianawati Irwani Abdullah (2010); Bagchi (2011); Gordley (2004); Ali Mohammad Matta (1999); Fried (1981)
<i>Application of Wa'd</i>	<p><i>Application of wa'd in Islamic banking</i></p> <p>Mohd Saiful Azli Md Ali (2011); Asmadi Mohamed Naim (2011); Nurdianawati Irwani Abdullah (2010); Nor Adila Mohd Noor and Mohd Ashraf Aripin (2010); Munirah Kasim (2010); Azizi Che Seman (2008); Mohd. Fuad Md. Sawari and Md. Faruk Abdullah (2009)</p>
<i>Application of wa'd in ṣukūk</i>	Marjan Muhammad et al. (2011); Shabana Hasan and Marjan Muhammad (2011); Khairun Najmi Saripudin et al. (2012); Munirah Kasim (2010); Shabnam Mokhtar (2009); Shofian Ahmad and Azlin Alisa Ahmad (2008); Aznan Hasan (2008)
<i>Application of wa'd in Islamic derivatives</i>	Azlin Alisa Ahmad et al. (2012)a; Atallah and Ghoul (2011); International Shari'ah Research Academy for Islamic Finance (ISRA) (2011); Saadiyah Mohamad et al. (2011); Aznan Hasan (2008)



The primary literature search shows that is numerous researches on Islamic banking in Malaysia and Bangladesh, the concept of *wa'd*, the *Shari'ah* appraisal on the obligation of *wa'd*, comparison of *wa'd* with common law, and the application of *wa'd* in Islamic financial products. The table above provides a snapshot of the reviewed literature.

### **1.8.1. Islamic Banking in Malaysia**

It is necessary to apprehend the overall functions of Islamic banking in Malaysia to identify the practice of *wa'd*. Therefore, literature on Islamic banking in Malaysia has been reviewed. There are numerous literature on Islamic banking in Malaysia. However, among them only a selected number have been reviewed.

Mohamad Akram Laldin described the historical development of Islamic finance in Malaysia, which includes the establishment of pilgrimage fund in 1962 and the establishment of first full-fledged Islamic bank in 1983. He also discussed the government's ten years master plan for financial sector, points out key challenges, and offers suggestions for the development of the Islamic finance industry in Malaysia.<sup>41</sup>

While discussing the history of Islamic finance in Malaysia, Rika Nakagawa pointed out that the majority of Islamic banks in Malaysia use debt-based financing whereas the profit-sharing mode is very small. He suggested that more professionals are needed for Islamic finance in Malaysia.<sup>42</sup> Similarly, Feisal Khan mentioned that Malaysia's 'Bank Islam Malaysia Berhad' (BIMB) – the largest Islamic bank in Malaysia - along with other prominent Islamic banks in the world is heavily using non-profit and loss sharing mode of financing.<sup>43</sup>

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<sup>41</sup> Mohamad Akram Laldin, "Islamic financial system", 217-238.

<sup>42</sup> Nakagawa, "The evolution of Islamic finance", 111-126.

<sup>43</sup> Khan, "How 'Islamic' is Islamic Banking?", 805-820.

Mohamed Ariff and Saiful Azhar Rosly provided a general overview of the Malaysian Islamic banking. Their study revealed that Malaysian Islamic finance is growing rapidly with a current 20% share of the banking market. However, Islamic banking products tend to be a mirror image of conventional products i.e. *bay' al-ʿinah*. There are a few contracts i.e. *tawarruq munazzam* personal financing, which do not practice the true sale contract. The authors suggested that Malaysia should introduce new Islamic financial instruments and improve international co-operation in Islamic banking practice.<sup>44</sup>

Mohamad Zaid Mohd Zin et al. mentioned that Malaysia has the largest Islamic banking and financial market. The government has taken a 10 year master plan to develop the global Islamic financial industry in Malaysia. The International Centre for Education in Islamic Finance (INCEIF) was established to promote Islamic finance education. Among the challenges facing Islamic finance in Malaysia are the differences of scholars' opinions on *Shari'ah* issues, tax law, and harmonisation of standards. On the other hand, the prospects are the new emerging markets and international co-operation.<sup>45</sup>

Ahmad Hidayat Buang indicated an important legal issue for the operation of Islamic banking in Malaysia. Issues related to Islamic financial contracts fall under the jurisdiction of civil courts of Malaysia, which might be an obstacle for the development of Islamic finance. He suggested that civil court should work together with the *Shari'ah* court or national *Shari'ah* advisory council to resolve cases related to Islamic finance.<sup>46</sup>

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<sup>44</sup> Mohamed Ariff and Saiful Azhar Rosly, "Islamic Banking in Malaysia," 301-319.

<sup>45</sup> Mohamad Zaid Mohd Zin, Saurdi Ishak, Abdul Razak Abdul Kadir, Mohd Syahiran Abdul Latif, "Growth and Prospect of Islamic Finance in Malaysia," *International Proceedings of Economics Development and Research* 5, no. 1 (2011), 180-184.

<sup>46</sup> Ahmad Hidayat Buang, "Islamic Contracts in a Secular Court Setting? Lessons from Malaysia," *Arab Law Quarterly* 21, no. 4 (2007), 317-340.

### 1.8.2. Islamic Banking in Bangladesh

There are a few researches on the overview of Islamic banking in Bangladesh. A number of studies have been conducted on the operation and performance of “Islami Bank Bangladesh Limited (IBBL)”. The majority of the studies pointed out the challenges of Islamic banking in Bangladesh.

Abu Umar Faruq Ahmad and M. Kabir Hassan discussed banking regulations in Bangladesh. They found that banks in Bangladesh are governed by a number of acts i.e. bank companies act 1991, Bangladesh bank order 1972, securities and exchange commission act 1993, and income tax ordinance 1984. At present, there is no separate law for the operation of Islamic banking in Bangladesh. However, the Bangladesh bank (central bank of Bangladesh) has made some special provisions to regulate Islamic banks.<sup>47</sup>

Muhammad Abdul Mannan described the history of Islamic banking in Bangladesh. The first Islamic bank in Bangladesh was established on 30<sup>th</sup> March, 1983. The Islamic economics research bureau had important contribution in the establishment of Islamic banking in Bangladesh. Currently, there are seven Islamic banks in Bangladesh which are growing in terms of profitability and investment.<sup>48</sup>

A. A. M. Habibur Rahman explained the rules and regulations for the applications of *murābahah*, *bay‘ mu‘ajjal*, and *ijārah* investment in Islamic banks in Bangladesh. This study seeks to identify the practice of *wa‘d* in Islamic banking products in Bangladesh.<sup>49</sup>

Mohammed Nurul Alam showed the overall banking situation in Bangladesh and the functions of IBBL. He revealed that generally IBBL succeeded in deposit and

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<sup>47</sup> Ahmad and Hassan, “Regulation and performance of Islamic banking.” 251–277.

<sup>48</sup> Mannan, *Islami Bank Babostha*.

<sup>49</sup> A. A. M. Habibur Rahman, *Islami banking* (Dhaka: Helena Parveen, 2010).

investment. However, most of its investments were based on *bay' murābahah* and *mu'ajjal*, whereas *muḍārabah* and *mushārahah* investments were very limited.<sup>50</sup>

M. Kabir Hassan conducted a case study on IBBL. He suggested diversifying the financing with profit-sharing financing, improving human capital, choosing financier based on quality and efficiency but not collateral. Moreover, the Bangladesh Bank (BB) should create Islamic money market instruments and the government should enact separate laws for Islamic banking.<sup>51</sup>

Similarly, Abdul Awwal Sarker suggested an Islamic interbank money market and a separate Islamic banking act. He further recommended that Islamic banks in Bangladesh should extend the profit-sharing investments, give priority to small and medium enterprises, and develop expertise.<sup>52</sup> Abdur Raqib and Sheikh Muhammad also provided similar recommendations.<sup>53</sup>

Iqbal Kabir Mohon provided up-to-date information on the banking system in Bangladesh. He discussed the Islamic banking investment modes and the legal documents used for them. The study demonstrated that among the challenges of Islamic banking in Bangladesh are the compulsory interest-based deposit with the central bank, absence of related professional associations, absence of sufficient legal framework, and the lack of skilled human resources. The study also showed a proposed draft on Islamic banking law in Bangladesh.<sup>54</sup>

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<sup>50</sup> Mohammed Nurul Alam, "Islamic banking in Bangladesh: a case study of IBBL," *International Journal of Islamic Financial Services* 1, no. 4 (2000), Retrieved from <http://www.iiibf.org/journals/journal4/art2.pdf>

<sup>51</sup> M. Kabir Hassan, "Islamic banking in theory and practice: the experience of Bangladesh," *Managerial Finance* 25, issue. 5 (1999), 60-113.

<sup>52</sup> Sarker, "Islamic Banking in Bangladesh".

<sup>53</sup> Abdur Raqib and Sheikh Muhammad, *Islami banking: totto, proyog, podhoti* (Dhaka: al-Amin Prokashion, 2008).

<sup>54</sup> Mohon, *Islami Orthoniti*.

### **1.8.3. Comparison of Islamic Banking between Malaysia and Bangladesh**

Sudin Haron compared Islamic banking practices among 11 Muslim countries. He discussed the similarities and differences on the usage of *Sharī'ah* principles, services available, sources, and usage of funds in these countries. The study concluded that whereas Islamic banks in the Middle East operate with a minimum number of *Sharī'ah* principles, Malaysia and Bangladesh use an additional number of *Sharī'ah* principles. However, Malaysian usage of *Sharī'ah* principles was questioned as a legal trick. This study conducted a comparative study on Islamic banking practices amongst Muslim countries.<sup>55</sup>

### **1.8.4. Comparison between Malaysian and Bangladeshi Banking Sectors**

Dilli Raj Khanal evaluated the growth and importance of the banking and insurance sector in Bangladesh, Malaysia, and Nepal. He assessed the regulatory framework, performance, and challenges for the banking industry in these countries. The study found that private banks perform better in Nepal and Bangladesh whereas in Malaysia public banks outperform private banks. Among the challenges for the banking sector are non-performing loans and limited access to credit for poor and small businesses. This study laid the groundwork for a comparative study between Malaysia and Bangladesh.<sup>56</sup>

### **1.8.5. The Theory of *Wa'd***

There are a number of researches on the theory of *wa'd*. Several researches discussed the definition of *wa'd* and its differences from *'aqd* (contract). Some of them discussed its

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<sup>55</sup> Sudin Haron. "A comparative study of Islamic banking practices," *Journal of King Abdulaziz University: Islamic Economics* 10, no. 1 (1998), 23-50.

<sup>56</sup> Dilli Raj Khanal, "Banking and insurance services liberalization and development in Bangladesh, Nepal and Malaysia: A comparative analysis" (Working Paper Series no. 41, Asia-Pacific Research and Training Network on Trade, Bangkok, 2007).

status in the *Sharī'ah*. In addition, literature discussing the status of promise in common law have been reviewed.

#### **1.8.5.1. Definition of *Wa'd* and its Status in the *Sharī'ah***

Mushtaq Ahmad Qazi discussed the binding nature of *wa'd* in the *Sharī'ah* in the context of contemporary Islamic finance. He stated that Islamic jurists unanimously agree that *wa'd* to perform an evil action (*ḥarām*) is prohibited, *wa'd* to perform a compulsory action (*wājib*) is obligatory and *wa'd* to perform a permissible action (*mubāḥ*) is recommended. However, Islamic jurists disagree whether *wa'd* is both religiously (*diyānatan*) and legally (*qaḍā'an*) binding on the promisor. He presented two different groups of the scholars' opinions pertaining to this issue. The first group of scholars view that *wa'd* is merely recommended (*mandūb*) but not compulsory nor enforceable in the court of law. The second group opine that *wa'd* is both religiously and legally binding on the promisor. After presenting the evidences and arguments provided by the both group of scholars he concluded that *wa'd* is binding both religiously and legally. The study has a good compilation of classical sources but is limited to discussing only two different views of the scholars regarding *wa'd*.<sup>57</sup>

After defining the concept of *wa'd* in the *Sharī'ah*, Nurdianawati Irwani Abdullah divided the scholars' opinions into five on the obligation of *wa'd*. The five different opinions are: (1) fulfilling *wa'd* is recommended; (2) *wa'd* is religiously binding but not legally; (3) *wa'd* is both legally and religiously binding; (4) when *wa'd* is subject to a condition then it is both religiously and legally binding even though the promisee did not act upon the promise; (5) when *wa'd* is subject to a condition and the promisee acted on the basis of the promise then *wa'd* is both religiously and legally binding. After discussing the arguments of the scholars, she concluded that contemporary scholars agree that *wa'd*

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<sup>57</sup> Mushtaq Ahmad Qazi, "The Binding Nature of Wa'ad (Promise) and Its Application in Islamic Finance," *International Journal of Business and Social Science* 3, no. 4 (2012), 206-214.

is binding on the promisor due to necessity. However, the study is lacking sufficient evidences provided by the scholars to strengthen their positions.<sup>58</sup>

‘Abdullāh Muḥammad defined the concept of *wa‘d* and *muwā‘adah* and discussed their status in the *Sharī‘ah*. He outweighed the *Mālikī* scholars’ view on the obligation of *wa‘d*. He argued that *Sharī‘ah* permits practicing *muwā‘adah* to carry out an exchange contract (*mu‘āwaḍah*) in the future. Furthermore, it is also permissible in this case to make the *muwā‘adah* binding on both parties. The study gathered a number of scholars’ opinions from classical sources of Islamic jurisprudence (*fiqh*). However, the author’s opinion needs to be further examined.<sup>59</sup>

Mohamad Akram Laldin discussed the *Sharī‘ah* rulings (*aḥkām*) and parameters (*ḍawābiṭ*) for the concept of *wa‘d* and *muwā‘adah*. He performed a textual analysis on the obligation of *wa‘d* in the *Sharī‘ah* with reference to the views of the classical scholars and contemporary *fatāwā*. He concluded that *wa‘d* should be binding on the promisor particularly in financial dealings. However, his position on *muwā‘adah* is not clear in the paper, as he did not provide an elaborate discussion on that. Moreover, his position on *wa‘d* should be further examined.<sup>60</sup>

While discussing the scholars’ opinions on *wa‘d*, *muwā‘adah* and *wa‘dān*, Aznan Hasan summarised that the majority of scholars accept *wa‘d* as binding on the promisor. However, they do not accept *muwā‘adah* as binding on both promisors. On the *Sharī‘ah* status of *wa‘dān*, he concluded that *wa‘dān* is permitted but it should be different from *muwā‘adah*.<sup>61</sup>

Aḥmad Muḥammad Khalīl al-Islāmbūlī defined *wa‘d* and *muwā‘adah*, clarified the difference between *wa‘d* and *‘aqd*, and discussed the *Sharī‘ah* rulings on the usage of

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<sup>58</sup> Nurdianawati Irwani Abdullah, “Status and implications of promise,” 84-98.

<sup>59</sup> ‘Abdullāh Muḥammad, “Al-wa‘d wa al-muwā‘adah fī al-tabarru‘āt wa al-mu‘āwaḍāt,” *Journal of Islam in Asia* 7, no. 1 (2010), 31-53.

<sup>60</sup> Mohamad Akram Laldin, “The concept of promise and bilateral promise in financial contracts: a fiqh perspective” (Research paper no. 4, International Shari‘ah Research Academy for Islamic Finance, Kuala Lumpur, 2009), 4.

<sup>61</sup> Aznan Hasan, “Pengertian al-wa‘ad, al-wa‘dan dan al-muwa‘adah”.

*wa'd*. He argued that according to classical scholars, *wa'd* was not binding on the promisor and it could not be practiced in exchange contracts (*mu'āwadhāt*). However, based on necessity (*hājah*) and public interest (*maṣlahah*), *wa'd* can be practiced as binding on the promisor in some selected contracts within Islamic banking practices.<sup>62</sup> The study provides useful analysis of classical scholars' views but the author's opinion needs to be justified.

Contrary to the previous studies, Rafic Yunus Al-Masri asserted that unilateral promise in the banking contracts should not be compulsory. If it is compulsory then it resembles a contract. He argued that the contemporary practice of *wa'd* as binding promise is a trick to replicate the conventional banking practices in Islamic banking. He further argued that the difference between *wa'd* and *muwā'adah* does not make any sense.<sup>63</sup>

Nazīh Kamāl Ḥammād discussed three Arabic terms namely *'iddah*, *wa'd*, and *muwā'adah*. He found five different opinions of the scholars on the bindingness of *'iddah* and *wa'd* which are: (1) fulfilling the *wa'd* is obligatory; (2) *wa'd* is obligatory except where there is a valid excuse; (3) *wa'd* is recommended; (4) fulfilling the *wa'd* is better than breaking it, if there is no obstruction; (5) and *wa'd* is obligatory when it is subject to a condition. The study gathered classical scholars' opinions and arguments but the author's opinion was not evident in the paper.<sup>64</sup>

Yūsuf al-Qarḏāwī was one of the earlier scholars who allowed the practice of *wa'd* in Islamic banking practices as binding on the promisor. He argued that *wa'd* is both religiously and legally binding. There is no difference between the bindingness of *wa'd* in the exchange (*mu'āwadhāt*) and voluntary (*tabarru'āt*) contracts, but in exchange

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<sup>62</sup> Al-Islāmbūlī, "Ḥukm al-wa'd fī al-fiqh al-Islāmī," 43-57.

<sup>63</sup> Rafic Yunus Al-Masri, "The Binding Unilateral Promise (wa'd) in Islamic Banking Operations: Is it Permissible for a Unilateral Promise (wa'd) to be Binding as an Alternative to a Proscribed Contract?," *Journal of King Abdul Aziz University: Islamic Economics* 15, no. 1 (2002), 29-33.

<sup>64</sup> Nazīh Kamāl Ḥammād, "Al-wafā' bi al-wa'd fī al-fiqh al-Islāmī," *Majallah al-majma' al-fiqhī al-Islāmī* 5, no. 2 (1988), 604-615.



contracts the bindingness of *wa'd* is more logical. He further argued that majority of the classical jurists opined that *wa'd* was binding on the promisor.<sup>65</sup>

### 1.8.5.2. *Wa'd* and the Common Law

To be clear on the status of *wa'd* in the common law, a few researches on the concept of promise and promissory estoppels in the common law have been reviewed. Charles Fried is considered the pioneer to have discussed the promise principle in common law. He argued that promise principles is the basis for legal contracts and it is truly self-imposed. Although non-promissory principles i.e. reliance, benefit, and sharing play an important role in a contract but they do not displace the promise principle from its leading status. His study put a theory that a contract is binding because of the promise the parties make, not because of other things like benefit or reliance.<sup>66</sup> However, Charles Fried's theory has been criticised by other studies.<sup>67</sup>

James Gordley discussed the history and basic difference between common law and civil law in relation to the bindingness of promise. He discussed the status of promise in twelve European legal systems. The study found that in terms of the bindingness of a promise, a basic difference between the modern common law and civil law is that the common law requires a contract to have 'consideration' while the civil law does not. Each of the 12 countries has different solutions for 15 respective problems. Most of the jurisdictions require more formality for voluntary monetary gifts. The ultimate goal for each of the jurisdiction is to make fairness between the promisor and promisee.<sup>68</sup>

Ali Mohammad Matta discussed nearly all the major issues related to promissory estoppel. He stated that there is a lack of unanimity among different courts on the

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<sup>65</sup> Al-Qarḍāwī, "Al-wafā' bi al-wa'd," 616-634.

<sup>66</sup> Charles Fried, *Contract as Promise: a theory of contractual obligation* (Cambridge: Harvard University Press, 1981).

<sup>67</sup> Anthony Townsend Kronman, "Book Review: Contract as Promise" (Faculty Scholarship Series, Paper no. 1067, Yale Law School, 1981).

<sup>68</sup> James Gordley, *The Enforceability of Promises in European Contract Law* (Cambridge: Cambridge University Press, 2004).

requirements of promissory estoppels. After discussing the arguments and the cases, he concluded that the sacredness of “consideration” in promissory estoppel has been demolished. Promissory estoppel can be used for both as sword and shield and there is little importance on the pre-existing contractual relationship and promisee’s detrimental alteration. However, the only necessary element is the promisee’s reliance on the promise. He argued that the promissory estoppel, at present situation, is in line with the Islamic law of contract where it is always obligatory to fulfil a promise.<sup>69</sup>

Contrary to Ali Mohammad Matta, Aditi Bagchi argued that private promises are different from a contract. Moreover, a contract is not an instance of a promise as we normally understand. Private promise is valuable to cultivate personal relationship while the contract is important for public virtue.<sup>70</sup> This study differentiates between private and public promises but in Islamic law there is no difference between private and public promise.

Along with the studies discussed above, there are a number of studies that attempted to compare between the status of *wa’d* in the *Sharī’ah* and common law. Nurdianawati Irwani Abdullah concluded that *wa’d* is recognised in common law. In contracts, a promise is usually binding in the common law. However, in the case of independent unilateral contract, common law has very detailed rulings. The most important factor is that innocent promisee is always protected by the equitable doctrine of promissory estoppels.<sup>71</sup>

Marjan Muhammad et al. compared *wa’d* with the Malaysian contract act 1950. Their study found that Malaysian contract act 1950 does not recognise *wa’d*. It only recognises binding *muwā’adah*, which is not permissible in the *Sharī’ah*. Moreover, they

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<sup>69</sup> Ali Mohammad Matta, “Promissory Estoppels: the unchained doctrine,” *Malayan Law Journal* 2, (1999), 68-102.

<sup>70</sup> Aditi Bagchi, “Separating contract and promise,” *Florida State University Law Review* 38, (2011), 709-758.

<sup>71</sup> Nurdianawati Irwani Abdullah, “Status and implications of promise,” 84-98.

argued that *wa'd* to purchase is different from the legal term “purchase undertaking”. This is because “purchase undertaking” is similar to a contract whereas *wa'd* is not a contract. However, *wa'd* might resemble promissory estoppels as it states that a promise is binding when the promisee has acted upon based on the promise.<sup>72</sup>

Hakimah Yaacob conducted another study on the comparison of *wa'd* with Malaysian contract law. The study showed that according to Malaysian contract law, a promise is a “proposal” and when it is accepted by the promisee then it becomes binding on the parties. Moreover, according to promissory estoppels, when the promisee acts upon based on the promise of the promisor then the promisee is compensated if the promisor breaches the promise.<sup>73</sup>

Ismail Wisham et al. analysed the status of *wa'd* in common law. They concluded that *Mālikī* scholars’ opinion on the obligation of *wa'd* is similar to the bindingness of a promise in the common law.<sup>74</sup> However, their discussion was very brief on this issue.

Finally, Azlin Alisa Ahmad et al. compared the status of “bilateral promise” in Islamic and common law. The study revealed that under common law, a bilateral promise is similar to a contract. Therefore, it is enforceable in the court. Alternatively, under Islamic law, a bilateral promise is different from a contract.<sup>75</sup> The authors’ argument needs to be justified as some studies disagree with this view.<sup>76</sup>

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<sup>72</sup> Marjan Muhammad et al., “The bindingness and enforceability of a unilateral promise”.

<sup>73</sup> Hakimah Yaacob, “Does Contracts Act 1950”, 35-43.

<sup>74</sup> Ismail Wisham, Aishath Muneeza and Rusni Hassan, “Special legal features of the Islamic *wa'd* or pledge: Comparison with the conventional law on promise within the sphere of Islamic finance,” *International Journal of Law and Management* 53, no. 3 (2011), 221-234.

<sup>75</sup> Azlin Alisa Ahmad, Shofian Ahmad, Mustafa 'Afifi Ab Halim and Mat Noor Mat Zain, “Bilateral promise: comparison from the common law and Islamic law perspective,” *Malayan Law Journal* 2, (2012), 1-19.

<sup>76</sup> Marjan Muhammad et al., “The bindingness and enforceability of a unilateral promise”; Ḥammād, “Al-wafā’ bi al-wa’d,” 604-615; Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance* (Kuala Lumpur: Bank Negara Malaysia, 2010), 139.

### 1.8.6. The Application of *Wa'd*

Most contemporary studies on *wa'd* emphasised on its practice in Islamic financial products. Literature on the application of *wa'd* can be divided into three subdivisions, which are: (1) Islamic banking products; (2) *Ṣukūk* and, (3) Islamic derivatives.

#### 1.8.6.1. The Application of *Wa'd* in Islamic Banking Products

Azizi Che Seman showed that among the sale-based contracts (*buyū'*), *wa'd* is used in *'īnah* and *tawarruq*. In these contracts, *wa'd* is employed to protect the interest of the banks although it can be used to protect the interest of the clients. The study recommended that the practice of *wa'd* should not violate the objective of the contract.<sup>77</sup> The study does not elaborate on the usage of *wa'd* in *'īnah* and *tawarruq*. It is necessary to investigate whether there is an element of *wa'd* in the practice of *'īnah*.

Munirah Kasim analysed the application of *wa'd* in *mushārah* and *murābahah* products. Her study indicated that *wa'd* is an important tool for risk management in those two products. *Wa'd* helps to execute the contracts in an organised manner. She suggested that it is needed to assess the legal framework governing *wa'd* so that it becomes more effective.<sup>78</sup>

Nor Adila Mohd Noor and Mohd Ashraf Aripin studied the practice of *wa'd* in Malaysia. They revealed that in Malaysian practice, *wa'd* is actually binding upon both parties. They mentioned some new practices of *wa'd* in Islamic banking i.e. parallel *salam* and foreign exchange transactions. They concluded that there is no uniformity in the usage of *wa'd* among Islamic banks in Malaysia. Moreover, there is no governing law for *wa'd* and it is a dilemma whether cases related to Islamic finance should go under the

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<sup>77</sup> Azizi Che Seman, "Aplikasi *wa'd* dalam produk perbankan," (Paper presented in Muzakarah Cendekiawan Syariah Nusantara, International Shari'ah Research Academy for Islamic Finance (ISRA), Kuala Lumpur, 27-28 February 2008).

<sup>78</sup> Munirah Kasim, "Al-*wa'd* (unilateral promise) and its application in Islamic financial instruments," (Master thesis, International Islamic University Malaysia, Kuala Lumpur, 2010).

*Sharī'ah* or civil court.<sup>79</sup> One of the limitations of this study is that it does not discuss the mechanism of employing *wa'd* in the Islamic banking products.

Mohd Saiful Azli Md Ali conducted a case study on the practice of *wa'd* in Bank Muamalat Malaysia Berhad (BMMB). The study revealed that BMMB applied *wa'd* in three hybrid contracts namely, *mushārah mutanāqishah* (MM), *al-ijārah thummah al-bay'* (AITAB), and *tawarruq*. It pointed out issues related to the application of *wa'd* which are sale and buy back arrangement, forward forex trading, and penalty for *wa'd*.<sup>80</sup> The study added new knowledge on the practice of *wa'd* but it was limited to one Malaysian bank and the discussion on the issues was very short.

Asmadi Mohamed Naim examined the mechanism of *wa'd* in MM home financing. His study found that MM consists of *shirkat al-milk* at the commencement of the contract but it changes into *shirkat al-'aqd* after that. Therefore, *wa'd* to purchase the share of the partner with a price fixed earlier in *shirkat al-'aqd* is equivalent to giving guarantee to the partner's capital. When a partner guarantees the *mushārah* capital of another then it violates the objective of the *mushārah* contract. In addition, there is another *wa'd* given by the customer in MM home financing which is to purchase the property in the event of default. This *wa'd* is not valid in the *Sharī'ah* either as it is an oppression on the customer and is far from the Qur'anic teaching.<sup>81</sup> However, further study is required to justify the author's claim.

Mohd. Fuad Md. Sawari and Md. Faruk Abdullah explored the practice of *wa'd* in Islamic banking in Bangladesh. They found that *wa'd* is practiced as legally binding in three Islamic banking products in Bangladesh i.e. *bay' murābahah* on the purchase orderer (BMPO), hire-purchase under *shirkat al-milk* (HPSM), and *bay' mu'ajjal*. The

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<sup>79</sup> Nor Adila Mohd Noor and Mohd Ashraf Aripin, "Mechanism of al-Wa'ad (Promise)", 80-89.

<sup>80</sup> Mohd Saiful Azli Md Ali, "Wa'ad dan aplikasinya di dalam kontrak hibrid Islam: kajian di Bank Muamalat Malaysia Berhad," (Academic exercise, University of Malaya, Kuala Lumpur, 2011).

<sup>81</sup> Asmadi Mohamed Naim, "Purchase Undertaking Issues in Musharakah Mutanaqishah", 25-47.

study was a primary inquiry on the application of *wa'd* in Bangladesh. In-depth research on this subject is needed.<sup>82</sup>

#### 1.8.6.2. The Application of *Wa'd* in *Şukūk*

Shofian Ahmad and Azlin Alisa Ahmad discussed the practice of *wa'd* in *şukūk* with reference to the purchase undertaking clause. They argued that *şukūk* would be an unprotected financial instrument from the investor's perspective if there were no element of *wa'd*. They resolved that there is no *Sharī'ah* issue in the application of *wa'd* in *şukūk* as *wa'd* is not a contract.<sup>83</sup> However, the discussion of the study is very short which provides only an overview on this issue.

Shabnam Mokhtar investigated the purchase undertaking issue in equity-based *şukūk*. Her study found that purchase undertaking is a kind of guarantee to capital plus unpaid profit of the *şukūk* holder. She pointed out that when *wa'd* is considered an independent element in *şukūk*, then it fulfils the *Sharī'ah* requirements. However, when the collective outcomes of *wa'd* is examined then it is found that *wa'd* functions as a tool of guarantee.<sup>84</sup>

Shabana Hasan and Marjan Muhammad showed the application of *wa'd* and *muwā'adah* in some specific types of *şukūk* i.e. *şukūk muḍārabah* and *şukūk ijārah*. They suggested that it is crucial to have a well-defined guideline for the practice of *wa'd* and *muwā'adah* in different *şukūk* structures as well as for other Islamic financial products.<sup>85</sup>

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<sup>82</sup> Mohd. Fuad Md. Sawari and Md. Faruk Abdullah, "Al-wa'd (unilateral promise) in Islamic banking practices between theory and implementation: Bangladesh as an example," (Paper presented in The International Conference on Islamic Economics and Economies of the OIC Countries, International Islamic University Malaysia, Kuala Lumpur, 28-29 April, 2009).

<sup>83</sup> Shofian Ahmad and Azlin Alisa Ahmad, "Konsep wa'd dan aplikasinya di dalam sukuk," *Proceedings of the Malaysian National Economic Conference III*, vol.1, (2008), 222-227.

<sup>84</sup> Shabnam Mokhtar, "A Synthesis of Shari'ah Issues," 139-145.

<sup>85</sup> Shabana Hasan and Marjan Muhammad, "Principles of Wa'd and Muwa'adah: Their Application in Islamic Financial Contracts," *ISRA International Journal of Islamic Finance* 3, issue. 2 (2011), 135-140.

Khairun Najmi Saripudin et al. described the practice of *wa'd* in *ṣukūk mushārah* issued in Malaysia. The study demonstrated that *muwā'adah* was included in the terms and conditions of the *ṣukūk* term sheets without putting it in a separate document. The authors concluded that it was valid in the *Sharī'ah* to apply *muwā'adah* as binding on both promisors in the *mushārah ṣukūk* as *muwā'adah* was different from a contract (*'aqd*).<sup>86</sup>

### 1.8.6.3. The Application of *Wa'd* in Islamic Derivatives

Chady C. Atallah and Wafica A. Ghoul examined Islamic *wa'd*-based total return swap (TRS) as practiced by Deutsche bank. They revealed that the practice of *wa'd* by Deutsche bank is permitted in the *Sharī'ah* in form only but not in substance. In addition, there are several other issues in this *wa'd*-based TRS, such as (1) a *ḥalāl* asset is swapped with a non-*ḥalāl* basket of assets; (2) it may trigger *Sharī'ah* risk and reputational risk; (3) it encompasses exposure to leverage; (4) it contains high probability of loss; (5) it is exposed to bank's credit risk; (6) it is implicitly associated with *ribā* and *gharār*; and (8) it is not based on real economic activities. Therefore, they suggested alternatives for TRS.<sup>87</sup>

Azlin Alisa Ahmad et al. analysed the mechanism of *wa'd* in Islamic forward exchange contracts. Their study revealed that *wa'd* which is binding upon one party is a means to exploit the customer in the case of forward exchange contracts. They suggested *wa'dān* (two independent promise) to make justice between the client and the bank.<sup>88</sup> This research pointed out an important issue on the practice of *wa'd* but it did not clarify the permissibility of *wa'dān* in forward exchange contracts.

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<sup>86</sup> Khairun Najmi Saripudin, Shamsiah Mohamad, Nor Fahimah Mohd Razif, Sofhan Jamiela Rosli and Bahiyah Ahmad, "Application of Promise in Sukuk Musharakah Structure," *Middle-East Journal of Scientific Research* 12, no. 2 (2012), 160-167.

<sup>87</sup> Atallah and Ghoul, "The Wa'd-Based Total Return Swap", 71-89.

<sup>88</sup> Azlin Alisa Ahmad, Shofian Ahmad, Hailani Muji Tahir, Shahidah Shahimi, Saadiah Mohammad and Mat Noor Mat Zain, "Islamic forward exchange contracts as a hedging mechanism: an analysis of wa'd principle," *International Business Management* 6, no. 9 (2012), 47-54.

The International Shari‘ah Research Academy for Islamic Finance’s (ISRA) book demonstrated the structure of *wa‘d*-based Islamic forward contract, Islamic forex swap, Islamic cross currency swap, Islamic profit rate swap and Islamic options. It illustrated *wa‘d*-based Islamic structured product issued by Deutsche Bank. It resolved that *wa‘d* and *wa‘dān* are permissible in the *Shari‘ah* for forward currency transactions whereas *muwā‘adah* is non-permissible.<sup>89</sup>

Saadiah Mohamad et al. showed the application of *wa‘d* in Islamic hedging products. They conducted a case study on seven Islamic banks in Malaysia. Their study revealed that Malaysian Islamic banks are using a number of hedging products, which are Islamic promissory forward currency contract, Islamic FX forward, Islamic profit rate swap, and Islamic cross currency swap etc. Unilateral promise (*wa‘d*) is used in these products whereas bilateral promise (*muwā‘adah*) is avoided as it is not permitted in the *Shari‘ah*. This study presents only an overview on the application of *wa‘d* in hedging products by Malaysian Islamic banks. Therefore, further research is needed to achieve in-depth information on *wa‘d*-based hedging instruments.<sup>90</sup>

## 1.9. Research Methodology

This study follows a number of research methods to achieve its objectives. This section describes the nature and type of research methods applied for this study including the techniques of data collection and analysis. The figure below provides the overview of the methodology for this research.

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<sup>89</sup> International Shari‘ah Research Academy for Islamic Finance (ISRA), *Islamic Financial System: Principles and Operations* (Kuala Lumpur: International Shari‘ah Research Academy for Islamic Finance (ISRA), 2011).

<sup>90</sup> Saadiah Mohamad, Azlin Alisa Ahmad and Shahida Shahimi, “Innovative Islamic hedging products: application of *wa‘d* in Malaysian banks,” *Capital Markets Review* 19, no. 1&2 (2011), 33-51.



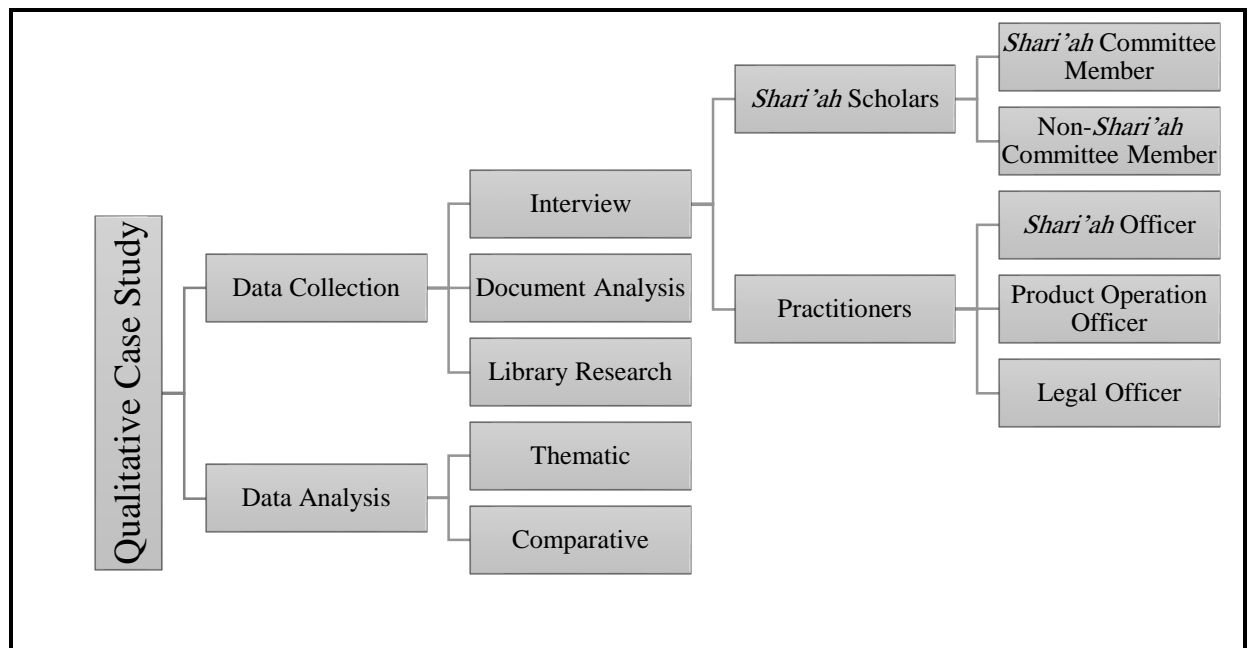


Figure 1.1 Methodology of the Research

### 1.9.1. Rationale for Qualitative Approach

Based on the objective of this study, it will adopt qualitative approach. This is because in-depth information is required to determine the practice of *wa'd* in Malaysia and Bangladesh. Moreover, determining the *Sharī'ah* status of *wa'd* requires rigorous analysis of the opinions of Islamic jurists (*fuqahā'*), which is very subjective in nature. In *Sharī'ah* research, the legal reasoning of the jurists (*ijtihād*) plays a vital role to decide the permissibility of a certain element.<sup>91</sup> For that reason, the study employs qualitative approach.

A study is defined as qualitative when the objective of the study is initially to explain a situation, phenomenon, problem, or occasion.<sup>92</sup> According to Uwe Flick, qualitative research is anticipated to approach the outside world and to comprehend, depict and occasionally explain social events in several means i.e. investigating experiences of people or a group of people, examining the dealings and exchange in the

<sup>91</sup> Ṣalāḥ 'Abbās Faqīr, "Khaṣā'is manhaj al-baḥṭh fī al-fiqh al-Islāmī," *Risālah al-Islām* website, retrieved on 6 May 2015, <http://fiqh.islammesage.com/NewsDetails.aspx?id=4060>

<sup>92</sup> Ranjit Kumar, *Research Methodology: A step-by-step guide for beginners* (London: Sage Publications Ltd., 1999), 10.

making, evaluating the documents or equivalent types of experiences or communication.<sup>93</sup>

Max Travers indicates that mainly five methods are used by qualitative researchers which are: (1) observation, (2) interviewing, (3) ethnographic fieldwork, (4) discourse analysis, and (5) textual analysis.<sup>94</sup> This study is defined as qualitative because it attempts to explain and examine the mechanism of *wa'd*-based products in Malaysia and Bangladesh. Moreover, it analyses experts' opinions and evaluates relevant documents.

### **1.9.2. The Comparative Case Study Approach**

Dawson R. Hancock and Bob Algozzine defined a case study as a type of qualitative research which requires concentrated investigation and depiction of a single unit or organisation restricted by place and period. Usually, the subjects investigated in case studies comprises persons, events, or community. By means of case studies, researchers expect to achieve extensive understanding of the conditions and meanings of those involved.<sup>95</sup> Pamela Baxter and Susan Jack stated that a qualitative case study confirms that the topic is not examined through one means but it is investigated from different types of means which leads to numerous features of the phenomenon to be discovered and comprehended.<sup>96</sup>

The nature of this study is to achieve in-depth knowledge on the application of *wa'd* in Islamic banks in Malaysia and Bangladesh. Therefore, a case study should be the most suitable approach. One of the advantages of a case study is that it permits the researcher to communicate with the respondents. This provides opportunities to explore

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<sup>93</sup> Uwe Flick, *Doing Interviews* (London: Sage Publications Ltd., 2007), x.

<sup>94</sup> Max Travers, *Qualitative Research through Case Studies* (London: Sage Publications Ltd., 2001), 2.

<sup>95</sup> Dawson R. Hancock and Bob Algozzine, *Doing Case Study Research: A Practical Guide for Beginning Researchers* (New York: Teachers College Press, 2006), 9-11.

<sup>96</sup> Pamela Baxter and Susan Jack, "Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers," *The Qualitative Report* 13, no. 4 (2008), 544-559.

more details and ask for deeper explanation of the answers.<sup>97</sup> Joachim K. Blatter mentioned that it is widely acknowledged that case studies have become the key foundation of theoretical innovation.<sup>98</sup>

This study is a comparative case study between Islamic banks in Malaysia and Bangladesh. A comparative case study investigates the contexts and characteristics of two or more instances of particular phenomenon in very details. Similar to a single case study, this study also seeks deep description. Nevertheless, the aim of the comparative case study is to determine similarities, differences, or patterns across the cases. These findings may consequently assist in the development or validation of theory.<sup>99</sup> As mentioned earlier, three Islamic banks in Bangladesh and three Islamic banks in Malaysia have been chosen for case study.

### **1.9.3. Data Collection Method**

The study employed several data collection methods. The reason behind using multiple methods of data collection is that different methods confirm the findings which could improve the credibility of the research.<sup>100</sup> The following methods were employed for data collection.

#### **1.9.3.1. Library Research**

Library research is necessary in the field of Islamic jurisprudence (*fiqh*) to extract opinions of the classical and contemporary jurists.<sup>101</sup> Library research includes reviewing

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<sup>97</sup> Dacheng Zhao and Michael Singh, "Why Do Chinese-Australian Students Out perform their Australian Peers in Mathematics: a Comparative Case Study," *International Journal of Science and Mathematics Education* 9, issue. 1 (2011), 69-87.

<sup>98</sup> Joachim K. Blatter, "Case Study," in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa M. Given (Thousand Oaks: Sage Publications Inc., 2008), 68-72.

<sup>99</sup> Shelagh Campbell, "Comparative Case Study," in *Encyclopedia of Case Study Research*, ed. Albert J. Mills, Gabrielle Durepos and Eiden Wiebe (Thousand Oaks: Sage Publications Inc., 2010), 175-177.

<sup>100</sup> Sandra Mathison, "Why Triangulate?," *Educational Researcher* 17, no. 2 (1988), 13-17.

<sup>101</sup> 'Abdullāh Al-Şāliḥ, "Manāhij al-baḥth al-mu'āşirah fī usūl al-fiqh," *Majallat Jāmi'at Dimashq* 18, no. 2 (2002), 403-423.

the classical manuscripts, contemporary literature, and *fatāwā* in the field of Islamic jurisprudence. Secondary data related to the objective of this research is collected through library research.

### **1.9.3.2. Document Analysis**

Document analysis is defined as a systematic process for evaluating and examining document including printed or electronic forms.<sup>102</sup> Margaret Olson stated that documents present a precious source of data in case study research. Together with interviews and observations, they contain one of the important types of data sources for explanation and analysis in case study research.<sup>103</sup> Glenn A. Bowen mentioned that document analysis is an economical way to get empirical data. It is less time-consuming and easily obtainable.<sup>104</sup>

In the context of this study, document analysis helps to determine the *wa 'd*-based products in the selected banks. Moreover, it validates the information received from the interviews. Document analysis for this study includes assessing the documents used by the Islamic banks. The following types of documents are examined:

- i. Annual reports;
- ii. Product disclosure sheet;
- iii. Product application form;
- iv. Product guide booklet;
- v. Product brochure; and
- vi. Government act

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<sup>102</sup> Glenn A. Bowen, "Document Analysis as a Qualitative Research Method," *Qualitative Research Journal* 9, issue. 2 (2009), 27-40.

<sup>103</sup> Margaret Olson, "Document Analysis," in *Encyclopedia of Case Study Research*, ed. Albert J. Mills, Gabrielle Durepos and Eiden Wiebe (Thousand Oaks: Sage Publications Inc., 2010), 319-21.

<sup>104</sup> Bowen, "Document Analysis," 27-40.

### 1.9.3.3. Interview

Qualitative interviews are conducted to achieve in-depth information. Qualitative interview is mandatory to get rich and in-depth information.<sup>105</sup> The study employs semi-structured interview. Semi-structured interview is usually arranged through a series of prearranged open-ended questions where further questions come out from the conversation between the interviewer and the interviewee. Semi-structured detailed interviews are predominantly practiced interviewing technique for qualitative research. It can take place with a single person or a group of individuals. Normally, it takes between 30 minutes to a number of hours to conclude.<sup>106</sup>

There are more than a few advantages for the interview method. David Wilkinson and Peter Birmingham described that through the interview method, 100% response of the questions is attained as the researcher indirectly participates in it. The interviewer has a choice to follow-up questions. He can ask more questions for more necessary information. In addition, the body language of the interviewee and the tone of the speech can be observed.<sup>107</sup>

For this study, the interview participants were divided into two major categories, which are (1) the practitioners and (2) the *Shari'ah* scholars. In order to know the practice of *wa'd* and to investigate its prospect in Islamic banking products, Islamic banking practitioners in both countries were interviewed. In addition, interviewing the practitioners helped to know whether there was any issue in the practice of *wa'd*. On the other hand, *Shari'ah* scholars were interviewed to get their opinions on the *Shari'ah*

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<sup>105</sup> Daniel W. Turner, "Qualitative Interview Design: a Practical Guide for Novice Investigators," *The Qualitative Report* 15, no. 3 (2010): 754; Nigel King and Christine Horrocks, *Interviews in Qualitative Research*, (London: SAGE Publications Ltd., 2010), 1.

<sup>106</sup> Jennifer Mason, "Semistructured Interview," in *The SAGE Encyclopedia of Social Science Research Methods*, ed. Michael S. Lewis-Beck, A. Bryman & Tim Futing Liao (Thousand Oaks: Sage Publications Inc, 2004), 1021; Philipp Köker, "Semi-Structured Elite Interviews in a Nested-Analysis Framework: Studying Presidential Activism in Central and Eastern Europe," in *SAGE Research Methods Cases*, (London: SAGE Publications, Ltd., 2014).

<sup>107</sup> David Wilkinson and Peter Birmingham, *Using Research Instruments: A Guide for Researchers* (London: Routledge, 2003), 63.

issues in *wa'd*-based products. The table below describes the types of interview participants in Malaysia and Bangladesh.

Table 1.2 List of Interview Participants

<i>Type of Interview Participant</i>		<i>Name of Interview Participant in Malaysia</i>	<i>Name of Interview Participant in Bangladesh</i>
<b>Practitioners</b>	<i>Sharī'ah Officer</i>	1) Ahmad Suhaimi Yahya 2) Ezry Fahmy bin Eddy Yusof 3) Mohd Nazri Chik 4) Muhd Ramadhan Fitri bin Ellias	1) M. Shamsuddoha 2) Md. Atiqur Rahman 3) Md. Farid Uddin 4) Nurul Kabir
	Legal Officer	1) Aizley Abd Latiff 2) Zuraihah Abdul Rahman	1) Sheikh Mahmudur Rahman
	Product Operation Officer	1) Ali Ahmad	1) Mohammad Mizanur Rahman
<b><i>Sharī'ah</i> Scholars</b>	<i>Sharī'ah Committee Member</i>	1) Ahcene Lahsasna 2) Ahmad Hidayat Buang 3) Aznan Hasan	1) Abu Bakr Rafiq 2) Ahsanullah Miah 3) M. Azizul Huq 4) Md. Manzur-e-Elahi 5) Shah Abdul Hannan 6) Shahed Rahmani
	Non- <i>Sharī'ah</i> Committee Member	1) Mohamad Akram Laldin 2) Azman Mohd Noor 3) Burhanuddin Bin Lukman 4) Hakimah Yaacob 5) Muhammad Yusuf Saleem 6) Rusni Hassan 7) Shamsiah Mohamad	1) A. Q. M. Safiullah Arif 2) Mohammad Sadequl Islam 3) Shakhawatul Islam

Practitioners interviewed for this research include (a) *Sharī'ah* officers; (b) legal officers and; (c) product operation officers of the selected Islamic banks. At first, the officers at the *Sharī'ah* management department in each of the banks were contacted for interview. After getting approval, the head of the *Sharī'ah* management department was interviewed. In addition, some other *Sharī'ah* officers in the *Sharī'ah* management department were interviewed to achieve detailed information.

The reason to choose *Sharī'ah* officers for interview is that the *Sharī'ah* management department has the most comprehensive information on *wa'd*-based products. They are involved with researching and product structuring. They are also involved with the *Sharī'ah* committee's decision making on the product through providing related information on the products. Finally, they take active part in auditing and reviewing the overall operation of the product.<sup>108</sup>

In case the information received from *Sharī'ah* officers on *wa'd*-based products was not sufficient, then the product operation officers of the respective banks were contacted for an interview. The product operation officers were interviewed to know the function of a specific Islamic banking product. In addition, legal officers were interviewed to know whether there was any legal issues in the practice of *wa'd*.

The *Sharī'ah* scholars were then interviewed. *Sharī'ah* scholars were divided into two types. The first type was the *Sharī'ah* committee member of the selected banks and the second type was the non-*Sharī'ah* committee member of the selected banks. *Sharī'ah* scholars who were the *Sharī'ah* committee member of the selected banks were interviewed to achieve in-depth information on the issues of *Sharī'ah* related to the *wa'd*-based products. *Sharī'ah* committee members have knowledge and proficiency in Islamic law and jurisprudence. They advise the bank on matters pertaining to *Sharī'ah*-compliant products and services. *Sharī'ah* committee's approval is required before a product is introduced by an Islamic bank.<sup>109</sup> Therefore, interviewing the *Sharī'ah* committee member of the selected banks helps to know their opinion on the *Sharī'ah* issues related to the application of *wa'd* in the banking products.

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<sup>108</sup> Bank Negara Malaysia, "Shariah Governance Framework for Islamic Financial Institutions," *Bank Negara Malaysia* website, retrieved on 6 May 2015, [http://www.bnm.gov.my/guidelines/05\\_shariah/02\\_Shariah\\_Governance\\_Framework\\_20101026.pdf](http://www.bnm.gov.my/guidelines/05_shariah/02_Shariah_Governance_Framework_20101026.pdf)

<sup>109</sup> Nurhastuty Wardhany and Shaista Arshad, "The Role of Shariah Board in Islamic Banks: A Case Study of Malaysia, Indonesia and Brunei Darussalam" (Paper presented in Second ISRA Colloquim, Bank Negara Malaysia, Kuala Lumpur, 27 November 2012); Hussain G. Rammal, "Corporate governance in the Islamic banking system in Pakistan: the role of the Shari'ah supervisory boards," (Doctorate thesis, University of Adelaide, Adelaide, 2010).

In addition, *Sharī'ah* scholars who were not the *Sharī'ah* committee member of the selected banks were interviewed in order to avoid bias and hear a variety of opinions on *Sharī'ah* issues related to *wa'd*-based products. This group of *Sharī'ah* scholars are selected based on their expertise, experience, and research background in Islamic banking. Moreover, they might be a member of *Sharī'ah* committee in other Islamic banks.

Interviews were mainly carried out in Dhaka, Bangladesh and Kuala Lumpur, Malaysia. This is because the headquarters of the selected banks are in these two capital cities. Interviewees were contacted by phone and then a copy of the interview guidelines along with the synopsis of this research were mailed to them. The general duration of an interview was between 45 to 60 minutes. A digital recorder was used to record the interview session after taking permission from the participants. Johnson asserted that recording confirms the exactness of the data collection as well as interview transcription and coding.<sup>110</sup>

#### **1.9.4. Data Analysis Method**

Converting data into research results is known as analysis.<sup>111</sup> According to David Stephens, analysis is the exploration of meaning corresponding to the research objective or query.<sup>112</sup> According to Amanda Coffey and Paul Atkinson, analysis does not mean sticking to one exact method or a collection of accurate procedures rather it is creative, artistic, adaptable and instinctive. Nevertheless, it is ought to be systematic, intellectual

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<sup>110</sup> John M. Johnson, "In-depth interviewing," in *The Handbook of Interview Research: Context and Method*, ed. Jaber F. Gubrium and James A. Holstein (Thousand Oaks: Sage Publications Inc., 2001), 103-119.

<sup>111</sup> Margaret D. LeCompte, "Analyzing Qualitative Data," *Theory into Practice* 39, no. 3 (2000), 146-154.

<sup>112</sup> David Stephens, *Qualitative Research in International Settings: A practical guide* (London: Routledge, 2009), 98.



and academically precise.<sup>113</sup> The data analysis of this study started with the same time of data collection. The study adopted thematic and comparative approaches for data analysis.

#### **1.9.4.1. Thematic Analysis**

Thematic analysis is the hunt for themes which appears to be crucial for the explanation of the phenomenon. It requires recognising the themes via thorough reading of the data in multiple times.<sup>114</sup> In this approach, themes and categories are formulated from the data obtained from the interview and document analysis. Omar Gelo et al. described that thematic analysis is constructed based on the inspection of the data for regular instances, and then these instances are methodically recognised throughout the data set, and assembled together via a coding system. Coding is known as a procedure of assembling evidence and putting a label on the portions of text with the intention that they exhibit increasingly wider perspectives.<sup>115</sup> Helene Joffe and Lucy Yardley pointed out that thematic analysis resembles content analysis. Nevertheless, thematic analysis emphasises much on the qualitative phase of the data investigated.<sup>116</sup>

In line with the qualitative nature of this study, thematic analysis is chosen. Data obtained from library research, document analysis, and interviews were categorised based on a number of themes and sub-themes. The major themes were country, type of *wa'd*-based products, *Sharī'ah*, and other issues. The sub-themes were specific *wa'd*-based product, the feature of *wa'd*, Islamic bank issuing the *wa'd*-based product, economic benefit of *wa'd*, scholars permitting the usage of *wa'd*, and scholars prohibiting the practice of *wa'd* etc.

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<sup>113</sup> Amanda Coffey and Paul Atkinson, *Making Sense of Qualitative Data* (Thousand Oaks: Sage Publications Inc., 1996), 10.

<sup>114</sup> Jennifer Fereday, "Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development," *International Journal of Qualitative Methods* 5, no. 1(2006), 80-92.

<sup>115</sup> Omar Gelo, Diana Braakmann and Gerhard Benetka, "Quantitative and Qualitative Research: Beyond the Debate," *Integrative Psychological and Behavioral Science* 42, issue. 3 (2008), 266-290.

<sup>116</sup> Helene Joffe and Lucy Yardley, "Content and thematic analysis," in *Research Methods for Clinical and Health Psychology*, ed. David F. Marks and Lucy Yardley (London: Sage publications Ltd., 2004), 56.

#### **1.9.4.2. Comparative Analysis**

Given the purpose of the research, a comparative analysis is performed. Comparison is the core of the majority social sciences research. It is the most important duty of case study research. A comparison is usually made between different objects e.g. interviews, themes, groups, cases, settings etc. in different steps. Comparative analysis is characterised when different entities are examined to find out the important similarities and differences.<sup>117</sup> Graham R. Gibbs mentioned that doing comparison is a significant phase of analysis where one can move beyond the descriptive stage. He pointed out that tables play an important role in comparative analysis.<sup>118</sup>

In this study, a number of tables were used to perform the comparative analysis. The comparison was made amongst a few major themes and sub-themes. The practice of *wa'd* between Malaysia and Bangladesh was compared in terms of the number of products, types of products, number of banks, features of *wa'd* etc.

#### **1.9.5. Limitations of Research Methods**

There are a few limitations in this study. Claire Anderson mentioned that qualitative research is greatly relied on the ability of the researcher and simply affected by the investigator's individual biases and characteristics. The participants' responses might be influenced by the existence of the researcher. Finally, confidentiality can be difficult when discussing the findings.<sup>119</sup>

While carrying out this research, data collection from the selected Islamic banks was difficult. This was because the bank officials had a very tight work schedule. It was not possible to interview a few practitioners. At the same time, some information was

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<sup>117</sup> Melinda C. Mills, "Comparative Analysis," in *The Sage Encyclopedia of Qualitative Research Methods*, ed. Lisa M. Given (Thousand Oaks: Sage Publications Inc., 2008), 101.

<sup>118</sup> Graham R. Gibbs, *Analyzing Qualitative Data* (London: Sage Publications Ltd., 2007), 73-90.

<sup>119</sup> Claire Anderson, "Presenting and Evaluating Qualitative Research," *American Journal of Pharmaceutical Education* 74, no. 8 (2010), 1-7.

restricted in the banks, which was labelled as “private and confidential” (P&C). Moreover, a few *Sharī‘ah* scholars could not be interviewed due to their busy work schedule. Finally, a small number of participants could not be interviewed due to no response from them to the interview invitation. Nevertheless, almost 90% of the targeted participants were interviewed. Therefore, the researcher believes that substantial amount of data was collected to fulfil the objectives of this research.

### **1.10. Organisation of the Thesis**

This thesis consists of eight chapters. The following provides an overview of the structure of the thesis in terms of chapters.

Chapter 1: Introduction, provides the research background, problem statement, research objectives, research questions, scope of the research and significance of the research. It also includes a literature review and research methodology.

Chapter 2: The theory of *wa‘d* discusses the literal and technical definitions of *wa‘d*, the differences and similarities between *wa‘d* with related terms, and the status of *wa‘d* in the *Sharī‘ah* and *Sharī‘ah* rulings for *muwā‘adah* and *wa‘dān*.

Chapter 3: The application of *wa‘d* in Malaysian Islamic banks begins with providing an overview of Islamic banking in Malaysia. It then discusses the legal status of *wa‘d* in the civil laws of Malaysia. After that, it details the *wa‘d*-based products in the Islamic banks of Malaysia.

Chapter 4: The application of *wa‘d* in Bangladeshi Islamic banks follows similar steps to those of chapter three. It starts by providing an overview of Islamic banking in Bangladesh and discusses the legal status of *wa‘d* in the civil laws of Bangladesh. Finally, it elaborates on the *wa‘d*-based products in the Islamic Banks of Bangladesh.

Chapter 5: Comparison between the practice of *wa‘d* in Malaysian and Bangladeshi Islamic banks begins by discussing the legal status of *wa‘d* in both countries.

It then compares the the *wa'd*-based products in both countries in three categories namely consumer banking product, trade financing product, and treasury product.

Chapter 6: *Sharī'ah* issues and other challenges of *wa'd*-based products in Malaysia and Bangladesh provides a thorough discussion of *Sharī'ah* scholars and practitioners' views on the *Sharī'ah* issues and other challenges related to *wa'd* in Malaysia and Bangladesh. The issues and challenges in Malaysia are discussed followed by a discussion of the issues and challenges in Bangladesh.

Chapter 7: The prospects of *wa'd*-based products in Malaysia and Bangladesh presents potential *wa'd*-based products for the Malaysian banking industry followed by the Bangladeshi banking industry. Every proposed product is discussed with figures, underlying *Sharī'ah* concepts, operational advantages, and disadvantages.

Chapter 8: Conclusion, summarises the findings of this research, provides several recommendations to the policy makers and Islamic banking practitioners in Malaysia and Bangladesh. It concludes by discussing the limitation of this research and the scope for further research.

### **1.11. Conclusion**

This chapter has introduced this study which aims to explore the practice of *wa'd* in Islamic banks in Malaysia and Bangladesh and compare between them. Moreover, it seeks to discuss the challenges and prospects of *wa'd*-based products in both countries. The background of the research, research problem, and scope and significance of the research have been provided. Literature on Islamic banking in Malaysia and Bangladesh, theory and application of *wa'd* have been reviewed. The methodology of this study, which is qualitative in nature, has also been described. The final section of the chapter outlined the organisation of this thesis.

## CHAPTER 2: THE THEORY OF *WA'D*

### 2.1. Introduction

Being familiar with the concept of *wa'd* assists in further understanding its practice in Islamic banking products. Moreover, it facilitates identifying the *Sharī'ah* issues pertaining to *wa'd*-based products. Therefore, it is necessary to elucidate the concept of *wa'd* before demonstrating its practice in Islamic banking products. The theoretical discussion of *wa'd* includes a number of issues. There is a debate whether *wa'd* can be used for exchange contracts (*mu'āwaḍāt*). In addition, scholars disagree on the binding nature of *wa'd* whether it is compulsory on the promisor to fulfil his promise or it is merely a matter of ethics. Furthermore, there are two other concepts derived from *wa'd* are *muwā'adah* and *wa'dān*. Scholars debate the *Sharī'ah* status of those concepts. Finally, there are some *Sharī'ah* concepts which appear to be similar to *wa'd* e.g. *'aqd*, *nudhur*, *'ahd* etc.

This chapter first discusses the literal and technical definition of *wa'd*, the difference of *wa'd* from its related terms. It then sheds light on the status of *wa'd* in the *Sharī'ah* which includes the permissibility of using *wa'd* in exchange contracts (*mu'āwaḍāt*) and the obligation of *wa'd* on the promisor. Finally, it explains the *Sharī'ah* rulings for *muwā'adah* and *wa'dān*.

### 2.2. The Definition of *Wa'd*

*Wa'd* is an Arabic term. It can be found in several *Qur'ānic* and prophetic texts. Normally, it is translated as 'promise'. However, classical Arabic-language scholars have provided more detailed connotations for the word *wa'd*. Although the technical and literal meanings for *wa'd* do not differ significantly, the classical and contemporary scholars define the term differently.

### 2.2.1. The Literal Definition of *Wa'd*

The morphology of the Arabic word *wa'd* shows that it is constructed upon the trilateral root *wāw* (و) – *ʿayn* (ع) – *dāl* (د). There are two words derived from this root. One is *wa'd* and the other one is *wā'id*. According to Ibn Fāris, *wa'd* can be used either for a good deed or a bad deed. However, *wā'id* is used only for a bad deed.<sup>120</sup> Similarly, Al-Jawharī agrees that *wa'd* is used for either a good or bad deed. Therefore, it can be said, “I have promised him good, or I have promised him bad”. When the adjective good/bad is omitted then *wa'd* and *'iddah* is used for good and *wā'id* is used for bad one.<sup>121</sup> Al-Fayūmī adds that *wa'd* is a transitive verb (*muta'addī*). According to the Arab tradition, breaking the *wa'd* is considered as lie while breaking the *wā'id* is regarded as generosity.<sup>122</sup>

There are two words used as substitutes for the word *wa'd*, which are *'iddah* and *maw'idah*. Ibn Manẓūr affirms that *wa'd* is the root word and *'iddah* is a noun which is used in lieu of *wa'd* and similarly the word *maw'idah*.<sup>123</sup> According to Al-Azharī, *wa'd* is the real verbal noun (*maṣdar*) and *'iddah* and *maw'idah* are placed in lieu of the verbal noun. He provides the following Qur'anic verse as an evidence to support his opinion:

وَمَا كَانَ اسْتِغْفَارُ إِبْرَاهِيمَ لِأَبِيهِ إِلَّا عَنْ مَوْعِدَةٍ وَعَدَهَا إِيَّاهُ فَلَمَّا تَبَيَّنَ لَهُ أَنَّهُ عَدُوٌّ لِلَّهِ تَبَرَّأَ مِنْهُ إِنَّ  
إِبْرَاهِيمَ لَأَوَّاهٌ حَلِيمٌ

Al-Taubah 9: 114

And Ibrahim's (Abraham) invoking (of Allāh) for his father's forgiveness was only because of a promise he [Ibrahim (Abraham)] had made to him (his father). But when it became clear to him [Ibrahim (Abraham)] that he (his father) is an enemy of Allāh, he dissociated himself from him. Verily Ibrahim (Abraham) was *Awwah* (one who invokes Allāh with humility, glorifies Him and remembers him much) and was forbearing.<sup>124</sup>

<sup>120</sup> Abū Al-Ḥossayn Aḥmad bin Fāris, *Mu'jam Maqā'is al-Lughah*, ed. 'Abdussalām Muḥammad Hārūn, (Bayrūt: Dār al-Fikr, 1979), 6:125.

<sup>121</sup> Ismā'īl bin Ḥammād Al-Jawharī, *Al-Ṣiḥḥah Tāj al-Lughah wa Ṣiḥḥah al-'Arabiyyah*, ed. Aḥmad 'Abd Al-Ghafūr 'Aṭṭār, (Bayrūt: Dār al-'Ilm li al-Malayīn, 1984), 2:551-552.

<sup>122</sup> Al-Maqrī, *Al-Miṣbāḥ al-Munīr*, 255.

<sup>123</sup> Muḥammad bin Mukarram bin 'Alī bin Aḥmad bin Manẓūr, *Lisān al-'Arab*, (Al-Qāhirah: Dār al-Ma'ārif, n.d.), 55:4871.

<sup>124</sup> Al-Hilali and Khan, 265.

*Wa'd* denotes an obligation. Mujāhid cites the following verse in which *wa'd* means an obligation:

فَرَجَعَ مُوسَىٰ إِلَىٰ قَوْمِهِ غَضْبَانَ أَسِفًا قَالَ يَقَوْمِ أَلَمْ يَعِدْكُمْ رَبُّكُمْ وَعَدًّا حَسَنًا أَفَطَالَ عَلَيْكُمُ  
الْعَهْدُ أَمْ أَرَدْتُمْ أَنْ يَحِلَّ عَلَيْكُمْ غَضَبٌ مِّن رَّبِّكُمْ فَأَخْلَفْتُم مَّوْعِدِي ۗ۸٦

Tāhā 20: 86

Then Mūsā (Moses) returned to his people in a state of anger and sorrow. He said: “O my people! Did not your Lord Promise you a fair promise? Did then the promise seem to you long in coming? Or did you desire that wrath should descend from your lord on you, that you broke your promise to me (i.e disbelieving in Allāh and worshipping the calf)?<sup>125</sup>

While *wa'd* means promise then *muwā'adah* denotes mutual promise. Abū Mu'ādh Al-Naḥwī clarifies this in the following statement:

واعدت زيداً إذا وعدك ووعدت زيداً إذا كان الوعد منك خاصة

When you have promised to Zayd and Zayd promised to you then it is *muwā'adah* (mutual promise). When only you have promised to Zayd then it is merely *wa'd* (promise).<sup>126</sup>

In some instances, *wa'd* can be used as an adjective. Al-Fayrūzabādī mentions that a cloud is sometimes called “a promising cloud” when rain is eminent. Besides, it is said that “a promising horse” when it runs nonstop.<sup>127</sup>

In light of the discussion above, it can be concluded that *wa'd* means promise which carries the meaning of an obligation. It is a verbal noun. A few words provide similar meaning e.g. *'iddah* and *maw'idah*. The word *wā'id* is derived from the same root word of *wa'd* but it is used to promise for a bad deed while *wa'd* is used to promise for a good deed. When two persons promise to each other then it is called *muwā'adah*. Finally, *wa'd* can be used as an adjective in some cases.

<sup>125</sup> Al-Hilali and Khan, 422.

<sup>126</sup> Abū Manṣūr Muḥammad bin Aḥmad al-Azharī, *Tahdhīb al-Lughah*, ed. Muḥammad 'Awḍ Mur'ab (Bayrūt: Dār Iḥyā al-Turāth al-'Arabī, 2001), 3:85-86.

<sup>127</sup> Majd Al-Dīn Muḥammad bin Ya'kūb Al-Fayrūzabādī, *Al-Qāmūs al-Muḥīṭ*, ed. Maktab Taḥqīq al-Turāth fī Mu'assasah al-Risālah, (Bayrūt: Mu'assasah al-Risālah, 2005), 326.

### 2.2.2. The Technical Definition of *Wa‘d*

The technical definition of *wa‘d* differ little from its literary definition. Nevertheless, both the classical and the contemporary scholars have defined *wa‘d* in a manner that is more precise than its literal meaning.

#### 2.2.2.1. Classical Scholars’ Definition of *Wa‘d*

Badr Al-Dīn al-‘Aynī, the commentator of al-Bukhārī defines *wa‘d* as:

الوعد في الاصطلاح الإخبار بإيصال الخير في المستقبل والإخلاف جعل الوعد خلافا

Technically, *wa‘d* is a declaration that something good will be done to someone in the future, and breaking the *wa‘d* means to turn a promise to a contradiction.<sup>128</sup>

Based on this definition, it is clear that *wa‘d* is for a good action only. While literally *wa‘d* is used for both good and bad actions then technically *wa‘d* is defined for a good action. Besides, the promised action of a *wa‘d* will be done in the future. Therefore, the promised action of a *wa‘d* is not required to be accomplished on the spot rather it can be fulfilled in the future. Similarly, another classical scholar Ibn ‘Arafah defines it as:

إخبار عن إنشاء المخبر معروفا في المستقبل

It is a declaration from the declarer that he intends to perform a good deed in the future.<sup>129</sup>

This definition also says that *wa‘d* is a declaration for performing a good action in the future. It is noteworthy to mention that *wa‘d* is made by only one party. It appears that there is no mutual agreement in *wa‘d*. It is a voluntary offer from one person to perform something good to another person. There is no condition of remuneration for the promisor. The promisor voluntarily offers to do something good to the promisee.

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<sup>128</sup> Badr Al-Dīn Abī Muḥammad Maḥmūd bin Aḥmad Al-‘Aynī, *‘Umdah al-Qārī Sharḥ Ṣaḥīḥ Al-Bukhārī*, ed. ‘Abdullāh Maḥmūd Muḥammad ‘Umar (Bayrūt: Dār al-Kutub al-‘ilmiyyah, 2001), 1:347.

<sup>129</sup> Ibn ‘Alīsh, *Fatḥ al-‘Alī al-Mālik*, 1:254.



### 2.2.2.2. Contemporary Scholars' Definition of *Wa'd*

Nazīh Kamāl Ḥammād, a contemporary Islamic jurist defines *wa'd* as follows:

هو الإخبار عن فعل المرء أمراً في المستقبل يتعلق بالغير، سواء أكان خيراً أم شراً

It is a declaration of someone for performing an act in the future, which is related to other party irrespective of whether it is good or bad.<sup>130</sup>

This definition is somehow contradictory to the classical scholars' definition. In this definition, a declaration to perform both good and bad act in the future is considered as *wa'd* whereas in the classical scholars' definition, only a good act is included in *wa'd*. Another distinctive part of the above definition is that the performance of the good/bad action should be related to other person. If a person declares to perform an action in the future for himself/herself, then it is not included in *wa'd*.

Unlike Nazīh Kamāl Ḥammād, another contemporary scholar 'Ala' al-Din Kharofa defines *wa'd* as an oral offer from an individual to carry out something for the welfare of another individual.<sup>131</sup> According to 'Ala' al-Din Kharofa, *wa'd* is restricted to something good only. However, 'Ala' al-Din Kharofa's definition does not clearly mention that the promised action in *wa'd* will be executed in the future. Besides, it is not necessary for *wa'd* to be an oral offer rather it can be done through writing as well.

Muhammad Ayub defines *wa'd* as "one party binds itself to do some action for the other."<sup>132</sup> Muhammad Ayub emphasises on the bindingness of *wa'd* where one party is bound to do some action for another party. This definition also indicates that *wa'd* is made for a good action.

The researcher views that *wa'd* should be specified for a good action. This is because a promise to perform something bad to someone is not generally permissible in the *Sharī'ah*. Therefore, *wa'd* can be defined as "a declaration to perform something good to other party in the future". The figure below provides an example of *wa'd* where A

<sup>130</sup> Ḥammād, *Mu'jam al-Muṣṭalahāt al-Māliyyah*, 473.

<sup>131</sup> 'Ala' al-Din Kharofa, *Transactions in Islamic law* (Kuala Lumpur: A. S. Noordeen, 1997), 23.

<sup>132</sup> Muhammad Ayub, *Understanding Islamic Finance* (West Sussex: John Wiley & Sons Ltd, 2007), 114.

promises B that he will purchase a car from B on a fixed date. Here, A is the promisor and B is the promisee.

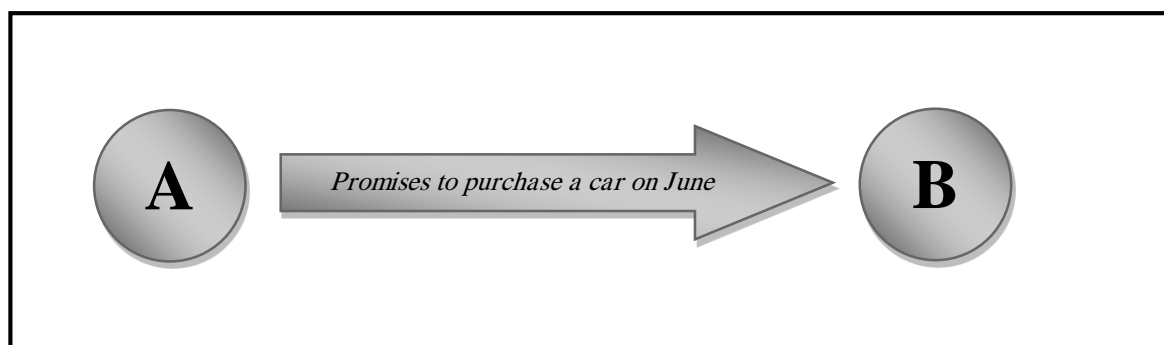


Figure 2.1 Illustration of *Wa'd*

There are some Arabic terms which appear to bear the same meaning of *wa'd*. Therefore, it is necessary to clarify the differences between these terms with *wa'd*. The following section discusses *'aqd*, *'ahd*, *nudhur*, *ju'alah* and their differences from *wa'd*.

### 2.2.3. *Wa'd* and *'Aqd* (Contract)

Literally, *'aqd* means “to tighten” which is the opposite of freeing.<sup>133</sup> According to *Majallah al-Ahkām al-'Adliyyah*, *'aqd* is “what the parties bind themselves and undertake to do with reference to a particular matter. It is composed of the combination of offer and acceptance.”<sup>134</sup> *'Aqd* is a contract where two parties are obliged to carry out a certain matter. *'Aqd* is concluded through connecting the offer (*ijāb*) with the acceptance (*qabūl*). There are several pillars (*Arkān*) for an *'aqd* to be executed. Without these pillars an *'aqd* is considered void. According to the majority of the scholars, there are three pillars for an *'aqd* which are as follows:<sup>135</sup>

- i. Offer (*ijāb*) and acceptance (*qabūl*)
- ii. The contracting parties (i.e. buyer and seller)

<sup>133</sup> Ibn Fāris, *Mu'jam Maqā'is al-Lughah*, 4:86.

<sup>134</sup> *Majallah al-Ahkām al-'Adliyyah*, (n.p., n.p., 1968), 29 (Book 1: Sale, Code: 103).

<sup>135</sup> Wahbah Al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuh* (Dimashq: Dār al-fikr, 1985), 4:92.

iii. The subject of the contract (i.e. commodity and price)

Based on the above, it can be said that there are differences between *wa'd* and *'aqd*. *Wa'd* is a declaration to perform an action in the future but *'Aqd* is a mutual agreement between two persons on a particular matter at the present time. While *'aqd* is a mutual agreement between two parties then *wa'd* is an offer to do something good to other party. *Wa'd* can be executed by one person only but there must be two persons for *'aqd*. While *wa'd* is a voluntary offer then *'aqd* is a mutual exchange where every party is rewarded. Moreover, the outcome of *'aqd* comes into effect immediately after it is concluded but the consequences of *wa'd* will be realised in the future.

'Ala al-Din Kharofa argues that a promise is obviously different from *'aqd*. *'Aqd* is an origination whereas *wa'd* is an oath.<sup>136</sup> Furthermore, Bank Negara Malaysia (BNM) in its *Sharī'ah* resolution states that:

Generally under the shariah principles, a “contract” is different from a “promise”. Each of them has its own legal implications. In a contract, the parties are bound by the terms of the contract, thus they may be obliged to compensate for the breach of the contract. On the other hand, in a promise it is not binding on the promisor to fulfil his promise. As such, no compensation could be imposed on him if he breaches of the promise.<sup>137</sup>

Based on the above statement, *'aqd* is compulsory on both parties. Each of the parties is obliged to compensate the other party if there is a breach of the contract. On the contrary, a promisor is not generally obliged to compensate the relevant party if he breaks his promise (*wa'd*).

Therefore, it can be concluded that though it appears that *'aqd* is similar to *wa'd* but there are differences between them. The fundamental difference between the two is that *'aqd* is a mutual agreement which consequences come into effect on the spot while *wa'd* is a voluntary offer from one party which outcome will come into effect in the future.

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<sup>136</sup> 'Ala' al-Din Kharofa, *Transactions in Islamic law*, 23.

<sup>137</sup> Bank Negara Malaysia, “Resolutions of Shariah Advisory Council of Bank Negara Malaysia”, 33. Retrieved on 05 Jun 2015, [http://www.bnm.gov.my/guidelines/01\\_banking/04\\_prudential\\_stds/07\\_shariah\\_resolution.pdf](http://www.bnm.gov.my/guidelines/01_banking/04_prudential_stds/07_shariah_resolution.pdf)

#### 2.2.4. *Wa‘d* and *‘Ahd*

*‘Ahd* literally means preserving something and making a covenant on it.<sup>138</sup> Al-Jurjānī states that initially, *‘ahd* was used to mean preserving something and maintaining it for a period of time. After that, it stands for the covenant which is compulsory to adhere.<sup>139</sup> So, *‘ahd* is an agreement which is binding upon both parties.

However, in some verses of the Qur’an, both *wa‘d* and *‘ahd* stand for the same meaning. The following verse is an example of that:

وَمِنْهُمْ مَّنْ عَاهَدَ اللَّهَ لَإِنِ آتَيْنَا مِنْ فَضْلِهِ لَنَصَّدَّقَنَّ وَلَنَكُونَنَّ مِنَ الصَّالِحِينَ ۝ فَلَمَّا آتَاهُمْ مِنْ فَضْلِهِ بَخِلُوا بِهِءَ وَتَوَلَّوْا وَهُمْ مُّعْرِضُونَ ۝ فَأَعَقَبَهُمُ نِقَاقًا فِي قُلُوبِهِمْ إِلَى يَوْمِ يَلْقَوْنَهُ بِمَا أَخْلَفُوا اللَّهَ مَا وَعَدُوهُ وَبِمَا كَانُوا يَكْذِبُونَ ۝

Al-Taubah 9: 75-77

Translation: And of them are some who made a covenant with Allāh (saying): “If He bestowed on us of His Bounty, we will verily give *Ṣadaqah* (*Zakāt* and voluntary charity in Allāh’s cause) and will be certainly among those who are righteous.” Then when He gave them of His Bounty, they became niggardly [refused to pay the *Ṣadaqah* (*Zakāh* or voluntary charity)], and turned away averse. So He punished them by putting hypocrisy into their hearts till the Day whereon they shall meet Him, because they broke that (covenant with Allāh) which they had promised to Him and because they used to tell lies.<sup>140</sup>

In this verse, the word *‘ahd* is used in the beginning and then at the end *wa‘d* is used while both of them provide the meaning of covenant.

#### 2.2.5. *Wa‘d* and *Nudhur* (Vow)

According to the *Sharī‘ah*, *nudhur* means a promise to perform something good in the future or, to oblige something on oneself for the pleasure of Allāh (SWT).<sup>141</sup> There is similarity between *wa‘d* and *nudhur* because both are promises to do something good in

<sup>138</sup> Ibn Fāris, *Mu‘jam Maqā‘is al-Lughah*, 4:167.

<sup>139</sup> ‘Alī bin Muḥammad Al-Sharīf Al-Jurjānī, *Kitāb al-Ta‘rīfāt*, (Bayrūt: Maktabah Lubnān, 1985), 164.

<sup>140</sup> Al-Hilali and Khan, 257.

<sup>141</sup> Shams Al-Dīn Muḥammad bin Al-Khaṭīb Al-Sharbīnī, *Mughnī al-Muḥtāj ilā Ma‘rifati Ma‘ānī Alfāz al-Minhāj*, ed. Muḥammad Khalīl ‘Ītānī (Bayrūt: Dār al-Ma‘rifah, 1997) 4: 474; Muḥammad Al-Amīr, *Al-Iklīl Sharḥ Mukhtaṣarin Khalīl*, ed. Abū Al-Faḍl ‘Abdullāh Al-Ṣiddīq Al-Ghamarī, (Al-Qāhirah: Maktabah al-Qāhirah, n.d.) 156; Ibrāhīm bin Muḥammad bin ‘Abdullāh bin Muḥammad bin Muflīḥ, *Al-Mubdi‘ Sharḥ al-Muqni‘*, ed. Muḥammad Ḥasan Muḥammad Ḥasan Muḥammad Ismā‘īl Al-Shāfi‘ī (Bayrūt: Dār al-kutub al-‘ilmiyyah, 1997), 8:120.

the future. However, *nudhur* is different from *wa'd* in a sense that the intention in making *nudhur* is to seek the pleasure of Allāh but *wa'd* is not particularly made to be closer to Allāh. Moreover, *kaffārah* (atonement) is compulsory for the one who does not fulfil his *nudhur* but there is no *kaffārah* for breaking *wa'd*.<sup>142</sup> Therefore, it can be resolved that though *wa'd* and *nudhur* require to do something good in the future but there are differences between them.

### 2.2.6. *Wa'd* and *Ju'alah*

*Ju'alah* is an exchange contract where someone declares to pay a particular amount of money to whoever accomplishes a particular outcome or performs a particular job in a stated or unstated period of time.<sup>143</sup> It is different from *wa'd* as it is an exchange (*mu'awadah*) contract. In *ju'alah*, the person who does something good for the benefit of other person is entitled to get certain reward which is declared before. This is not the case in *wa'd*. In *wa'd*, someone voluntarily declares to perform something good to another person without expecting any compensation from the promisee.<sup>144</sup>

### 2.2.7. Different Features of *Wa'd* (*Muwā'adah* and *Wa'dān*)

There are two different concepts which are derived from *wa'd* namely *muwā'adah* and *wa'dān*. While *wa'd* denotes unilateral promise then *muwā'adah* means mutual promise. On the other hand, *wa'dān* means to two separate promise. The following section discusses the definition of *muwā'adah* and *wa'dān*.

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<sup>142</sup> Hārūn Khalīf Jīlī, "Al-wafā' bi al-wa'd fī al-fiqh al-Islāmī," *Majallah majma' al-fiqh al-Islāmī* 5, no. 2 (1988), 653; Ibrāhīm Fāḍil Al-Dibū, "Al-wafā' bi al-wa'd," *Majallah majma' al-fiqh al-Islāmī* 5, no. 2 (1988), 534-589.

<sup>143</sup> Al-Buhūtī, *Kashshāf al-Qinā'*, 3:415; Wazārah al-Awqāf wa al-Shu'ūn al-Islāmiyyah, *Al-Mawsū'ah al-Fiqhiyyah*, (Al-Kuwayt: Wazārah al-Awqāf wa al-Shu'ūn al-Islāmiyyah, 1989), 15:208.

<sup>144</sup> Jīlī, "Al-wafā' bi al-wa'd," 654.

### 2.2.7.1. Definition of *Muwā'adah*

Literally, *muwā'adah* means mutual promise.<sup>145</sup> Technically, *muwā'adah* is defined mostly by the *Mālikī* scholars. Ibn Rushd defined it as:

أن يعد كل واحد منهما صاحبه لأنها مفاعلة لا تكون إلا من اثنين

Translation: To promise each one of the two to the other as it is a mutual action which will not happen except by two persons.<sup>146</sup>

This means that *muwā'adah* is a mutual action where two parties promise to each other. If only one person promises to the other then it is a unilateral promise (*wa'd*), and when two persons promise to perform something good to each other then it is *muwā'adah* (mutual promise).

A similar definition of *muwā'adah* is provided by another *Mālikī* scholar but in relation to marriage as he states:

أن يعد كل منهما صاحبه بالتزويج فهي مفاعلة لا تكون إلا من اثنين فإن وعد أحدهما دون الآخر فهذه العدة

Translation: To promise each of the two to the other for marriage. It is a mutual action therefore, it will not occur except by two persons. And, if only one person has promised then it is called *'iddah* (unilateral promise).<sup>147</sup>

This definition follows the previous definition except it defines *wa'd* in the case of persons who promise between them for marriage. It clarifies that if the promise is made by only one person then it is *wa'd* (unilateral promise). These two are the classical scholars' definition for *wa'd*. However, the contemporary definition of *muwā'adah* is more specified to financial affairs. Nazīh Kamāl Ḥammād defined *muwā'adah* as:

إعلان شخصين عن رغبتهما في إنشاء عقد في المستقبل تعود آثاره عليهما

Declaration by two persons on their interest to make a contract in the future which consequences will fall onto them.<sup>148</sup>

<sup>145</sup> Al-Azharī, *Tahdhīb al-Lughah*, 3:85-86.

<sup>146</sup> Muḥammad bin Yūsuf bin Abī al-Qāsim bin Yūsuf al-'Abdarī al-Gharnāṭī, *Al-Tāj wa al-Iklīl li Mukhtaṣarin Khalīl*, (Bayrūt: Dār al-kutub al-'ilmiyyah, 1994), 5:314.

<sup>147</sup> Al-Ḥaṭṭāb, *Mawāhib al-Jalīl li Sharḥ Mukhtaṣarin Khalīl*, 5:33.

<sup>148</sup> Ḥammād, "Al-wafā' bi al-wa'd fī al-fiqh al-Islāmī," 604-615.

Similar to the classical scholars, this definition says that *muwā'adah* is a declaration by two persons to do something good in the future. However, this definition is restricted to making contracts in the future. Therefore, according to this definition only the declaration to conclude a contract in the future is called *muwā'adah*.

In the researcher's view, *muwā'adah* should be defined as a mutual promise made by two individuals to perform something good to each other regardless of whether it is for a contract. Nazīh Kamāl Ḥammād's definition is specified to executing contracts only due to his focus on the contemporary practice of *muwā'adah* in the Islamic banking contracts.

The figure below shows an example of *muwā'adah* to conclude a sale and purchase in the future. In this example, A promises to B on 25 March that he will sell a car on 1st of May, 2015 for RM 100,000. At the same time, B promises to A that he will purchase a car on 1st of May, 2015 for RM 100,000.

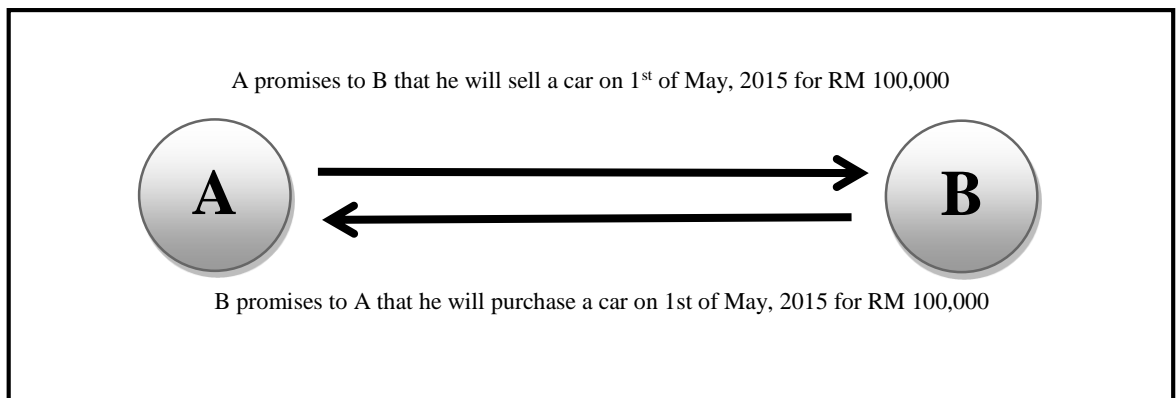


Figure 2.2 Illustration of *Muwā'adah*

#### 2.2.7.2. Definition of *Wa'dān*

*Wa'dān* is a new concept.<sup>149</sup> Therefore, its definition could not be found in the classical literatures of Islamic jurisprudence (*fiqh*). Among the contemporary scholars, Aznan Hasan defined *wa'dān* as:

<sup>149</sup> Marjan Muhammad et al., "The bindingness and enforceability of a unilateral promise (*wa'd*)", 31.

Two unilateral promises given by two parties to each other which are not interrelated and their application relies on two different conditions.<sup>150</sup>

It may seem that *wa 'dān* is similar to *muwā 'adah* but the difference between them is that the two promises are not related to each other in *wa 'dān*. This means there is no mutual relation between the first and second promise. Both of the promises are independent. Pertaining to this, Marjan Muhammad et al. pointed out that *wa 'dān* has two important characteristics, which are: (1) the promises are not dependent on each other and (2) their application depends on two separate conditions.<sup>151</sup> Therefore, we can sum up that *wa 'dān* is different from *muwā 'adah*. In *wa 'dān*, two independent promises are made by two persons to perform something good to each other which is related to two different situations. Figure 2.3 below provides an example of *wa 'dān*.

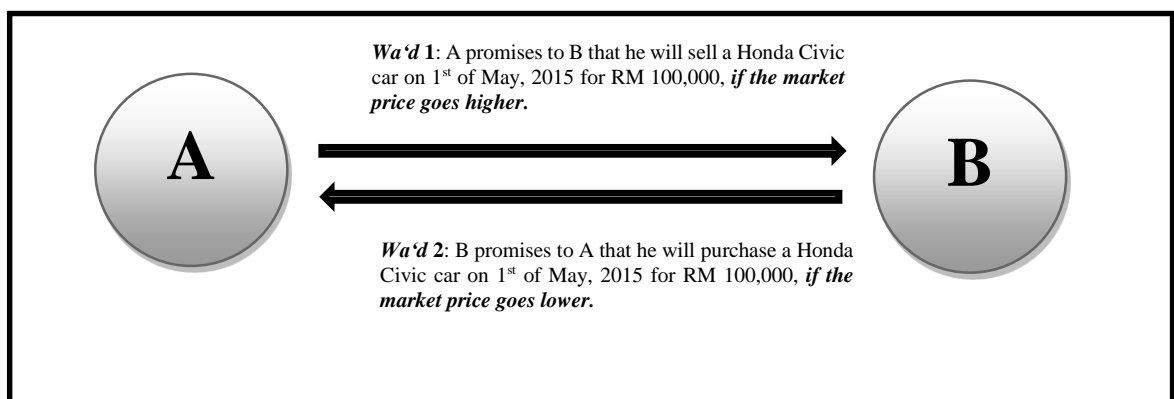


Figure 2.3 Illustration of *Wa 'dān*

In the above example, A promises to B in the beginning that he will sell a Honda Civic car on 1st of May, 2015 for RM 100,000, if the market price goes higher. This is the first *wa 'd*. After that, B promises to A that he will purchase a Honda Civic car on 1<sup>st</sup> of May, 2015 for RM 100,000, if the market price goes lower. This is the second *wa 'd*. In this example, both of the promises are independent, which are based on two different conditions. The two different situations are (1) when the market price of the car is higher

<sup>150</sup> Aznan Hasan, "Pengertian al-wa'ad, al-wa'dan dan al-muwa'adah", 1.

<sup>151</sup> Marjan Muhammad et al., "The bindingness and enforceability of a unilateral promise (*wa 'd*)", 31.



than the price fixed earlier and (2) when the market price is lower than the price fixed earlier. Eventually, only one of the two promises will be fulfilled in the future.

### **2.3. The Status of *Wa'd*, *Muwā'adah* and *Wa'dān* in the *Sharī'ah***

This section explains the basic *Sharī'ah* rulings related to *wa'd* first. After that, it discusses whether *wa'd* can be used in exchange contracts (*mu'āwaḍāt*). Subsequently, it elucidates the bindingness of *wa'd* in the *Sharī'ah*. Finally, it provides discussion on the *Sharī'ah* rulings related to *muwā'adah* and *wa'dān*.

#### **2.3.1. The Status of *Wa'd* in the *Sharī'ah***

In general, *wa'd* is permissible (*mubāh*) in Islamic law. A person who promises to perform something in the future should be sincere in his heart. If the person promises that he will perform something in the future but in his heart he does not intend to do it then it is impermissible (*ḥarām*) in Islamic law. Moreover, while making a promise the promisor should pronounce the phrase 'if Allāh wills' (*In Shā' Allāh*). This is because as human beings we do not know whether we will be able to perform something in the future.<sup>152</sup>

Moreover, it is not permissible to promise an evil action. If someone promises to commit adultery or drinking alcohol then it is not lawful in Islam.<sup>153</sup> Islamic scholars unanimously agreed on this matter. However, they disagreed whether a promise can be made to execute an exchange contract (*mu'āwaḍah*) e.g. buy, lease etc. in the future. Furthermore, there is disagreement on whether a promise is legally binding on the promisor. These two issues will be discussed in the following sections.

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<sup>152</sup> Abū Bakr Aḥmad bin 'Alī Al-Rāzī Al-Jaṣṣāṣ, *Aḥkām al-Qur'ān* (Bayrūt: Dār al-kutub al- 'arabī, n.d), 3:442; Abū 'Abdullāh Muḥammad bin Aḥmad bin Abū Bakar Al-Qurṭubī, *Al-Jāmi' lī Aḥkām al-Qur'ān* (Bayrūt: Al-Resalah Publishers, 2006), 20:434.

<sup>153</sup> Ibn Ḥazm, *Al-Muḥallā*, 8:28.

### 2.3.1.1. *Sharī'ah* Ruling on Using *Wa'd* in Exchange Contracts (*Mu'āwadhāt*)

It is generally accepted that *wa'd* can be made for voluntary contracts (*tabarru'āt*) e.g. loan, gift, donation etc. However, there is disagreement whether *wa'd* can be made to execute exchange contracts (*mu'āwadhāt*) e.g. sale, lease, marriage etc. in the future. Ibn 'Alīsh mentioned that according to the custom of Islamic jurists, only voluntary contracts (*tabarru'āt*) can be binding through *wa'd* whereas exchange contracts are excluded from this bindingness.<sup>154</sup> Al-Islāmbūlī states that classical scholars view that *wa'd* can be made to execute exchange contracts in the future but it cannot be binding on the promisor. This is because they believe that an exchange contract is itself a method to bind the parties.<sup>155</sup>

However, another classical scholar Ibn Shubrumah stated that all types of *wa'd* are compulsory on the promisor.<sup>156</sup> Al-Qarḍāwī pointed out that the verses of the Qur'an and the texts of the *Sunnah* which made *wa'd* binding, do not differentiate its bindingness in terms of exchange or voluntary contracts. All those Qur'anic verses and prophetic texts generally make *wa'd* as binding on the promisor. In addition, there is no evidence that there is any exclusion from this ruling.<sup>157</sup>

The researcher believes that al-Qarḍāwī's argument is more rational on this issue. This is because the classical scholars did not provide any evidence that the *wa'd* made for executing exchange contracts is different from the *wa'd* made for executing voluntary contracts. Moreover, breach of the *wa'd* in the case of an exchange contract may cause similar harm to the promisee as it is in the case of a voluntary contract.

### 2.3.1.2. The Binding Nature of *Wa'd* on the Promisor

This section discusses the opinions of the classical and contemporary scholars on the bindingness of *wa'd* and attempts to determine the most substantial opinion. The opinions

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<sup>154</sup> Ibn 'Alīsh, *Fath al-'Alī al-Mālik*, 1:217.

<sup>155</sup> Al-Islāmbūlī, "Ḥukm al-wa'd fī al-fiqh al-Islāmī", 48.

<sup>156</sup> Ibn Ḥazm, *Al-Muḥallā*, 8:28.

<sup>157</sup> Al-Qarḍāwī, "Al-wafā' bi al-wa'd", 631-634.

of the scholars can be classified into three major categories which are firstly, *wa'd* is recommended (*mustahabb*) but not binding. Secondly, *wa'd* is always compulsory (*wajib*). Thirdly, *wa'd* is binding but with conditions and exceptions. The details of the opinions and arguments of the scholars are provided below.

#### A. *Wa'd* is Recommended but Not Compulsory

Imām Shāfi'ī, Abū Ḥanīfah and the majority of scholars believe that *wa'd* is recommended (*mustahabb*). Therefore, if the promisor breaks the *wa'd* then it means that he has left a noble action and has committed a disliked (*makrūh*) deed. However, he is not sinful for his action.<sup>158</sup>

Badr al-Dīn al-'Aynī mentioned that *wa'd* is recommended to fulfil according to the consensus of the scholars and it is not compulsory. Allāh (SWT) praised those who fulfilled their promises. It is part of a noble character.<sup>159</sup>

Al-Sarkhasī states that *wa'd* is not binding on the promisor. He provides an example that if someone says that he will go to Allāh's house (Makkah) and he intends *wa'd* in his heart then it is not binding on him as *wa'd* is not binding. However, it is recommended for him to fulfil his *wa'd*.<sup>160</sup>

Ibn 'Ābidīn was asked about a case that if Zayd gave *wa'd* to 'Amar to donate him crops of a specific land but after harvesting he refused to give then whether it was allowed to force Zayd to fulfil his *wa'd*. Ibn 'Ābidīn replied that according to the *Sharī'ah*, it was not mandatory for him (Zayd) to fulfil his *wa'd*. If he fulfilled the *wa'd* then it was just fine.<sup>161</sup>

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<sup>158</sup> Al-Nawawī, *Al-Adhkār*, 510-511; Ibn 'Alīsh, *Fath al-'Alī al-Mālik*, 1:254; Ibn Ḥazm, *Al-Muḥallā*, 8:28.

<sup>159</sup> Al-'Aynī, *'Umdah al-Qārī*, 13:366.

<sup>160</sup> Shams Al-Dīn Muḥammad bin Aḥmad Al-Sarkhasī, *Kitāb Al-Mabsūṭ* (Bayrūt: Dār al-ma'rifah, 1989), 4:132.

<sup>161</sup> Ibn 'Ābidīn, *Al-'Uqūd al-Ḍurriyyah*, 2:352-353.

Al-Buhūtī, a Ḥanbalī scholar cited that if a person says that I will pay your debt or will fill up whatever debt you have then through this statement, he does not become a guarantor of the debt because it is a *wa‘d* which is not an obligation.<sup>162</sup>

Ibn Ḥazm mentioned that whosoever promises to someone that he will give him a specific or unspecific quantity of wealth, or he will help him in any deed – whether he swears it or not – it is not obligatory for him (promisor) to fulfil it and it is disliked for him (if he does not fulfil it); if he fulfils it then it will be good for him.<sup>163</sup>

Among the contemporary scholars, Rafic Yunus Al-Masri views that *wa‘d* is not binding on the promisor. He argues that although *wa‘d* is an alternative of forbidden sale contracts (e.g. selling something that the seller does not own) but it is not permissible for the *wa‘d* to be binding on the promisor. This is because a binding-*wa‘d* is similar to a contract (*‘aqd*). He claims that any viewpoint that makes *wa‘d* binding directly or indirectly on both parties or either one of the parties, does not stand on a legitimate ground.<sup>164</sup> The following evidence support this point of view.

(1) Scholars provide the following prophetic narration as evidence to support their opinions:

عن صفوان بن سليم أن رجلاً قال لرسول الله صلى الله عليه وسلم: "أكذب امرأتي يا رسول الله"، فقال رسول الله صلى الله عليه وسلم: "لا خير في الكذب"، فقال الرجل: "يا رسول الله أعدها وأقول لها"، فقال رسول الله صلى الله عليه وسلم: "لا جناح عليك".

Translation: Ṣafwān bin Sulaym narrated that a man asked the messenger of Allāh (SAWS): “O messenger of Allāh! Can I tell a lie to my wife?” The messenger of Allāh (peace be upon him) replied: “There is nothing good in telling a lie.” The man asked: O messenger of Allāh! Can I make promises to her and tell her [something to make her happy]?” The messenger of Allāh (peace be upon him) replied: “There is no sin on you.”<sup>165</sup>

<sup>162</sup> Al-Buhūtī, *Kashshāf al-Qinā‘*, 3:79.

<sup>163</sup> Ibn Ḥazm, *Al-Muḥallā*, 8:28.

<sup>164</sup> Al-Masri, “The Binding Unilateral Promise (wa‘d)”, 32.

<sup>165</sup> Narrated by Mālik, *Kitāb al-Jāmi‘*, Bāb Mā Jā’a fī al-Ṣidq wa al-Kajīb, Ḥadīth no. 3626. See Mālik bin Anas Al-Aṣḥabī, *Al-Muwaṭṭa‘*, ed. Muḥammad Muṣṭafā Al-A‘zamī (Abu Dhabi: Zayed Bin Sultan Al-Nahayan Charitable and Humanitarian Foundation, 2004), 5:1440.

Al-Qarāfī explains that in the above *ḥadīth*, the prophet Muḥammad (SAWS) prohibited telling a lie to make someone’s wife happy. However, the prophet (SAWS) negated the sin for breaking a promise. It means that breaking the promise is not a part of lie. There is no fault in breaking the promise. In this *ḥadīth*, the man actually asked about the promise that cannot be fulfilled because there is no need to ask here about a promise that can be fulfilled.<sup>166</sup>

(2) In another *ḥadīth*, the messenger of Allāh (SAWS) pronounces that a promise is not binding on the promisor. It reads:

عن زيد بن أرقم عن النبي صلى الله عليه وسلم قال: "إذا وعد الرجل أحاه ومن نيته أن يفني له فلم يف ولم يجيء للميعاد فلا إثم عليه"

Translation: Zayd bin Arqam narrated from the prophet (peace be upon him) that he said: “If a person promised something to his brother with the intention to fulfil it; then he did not fulfil it and did not come for the appointed meeting, there is no sin upon him.”<sup>167</sup>

The above prophetic narration denotes that a man is not sinful if he does not fulfil his promise. It means that breaking a promise is permissible (*mubāḥ*). However, the promisor is required to be sincere at the time of making the promise. Otherwise, the promisor is sinful for breaking his promise. Nevertheless, it can be concluded here that it is not compulsory (*wājib*) on the promisor to fulfil his promise.

(3) Ibn Ḥajar Al-‘Asqalānī mentioned that Muhallab argued that all scholars agree that a promise should be fulfilled as a recommended duty but not compulsory. This is because it is agreed to all scholars that the promisee cannot be treated as a creditor in terms of the promised matter.<sup>168</sup> It means that if a person promises someone to give something but he dies before giving the promised thing to the

<sup>166</sup> Shihāb Al-Dīn Abī Al-‘Abbās Aḥmad bin Idrīs Al-Qarāfī, *Al-Furūq*, ed. ‘Umar Ḥasan Al-Qiyyām (Beirut: Resalah Publishers, 2003), 4:43.

<sup>167</sup> Narrated by Abū Dāwud, *Kitāb al-Adab*, Bāb fī al-‘iddah, Ḥadīth no. 4995. See Abū Dāwud Sulaymān bin Al-Ash‘ath Al-Sijistānī, *Sunan Abī Dāwud*, ed. ‘Izzat ‘Ubayd Al-Da‘‘ās and ‘Ādil Al-Sayyid (Bayrūt: Dār ibn Ḥazm, 1997) 5:168.

<sup>168</sup> Al-‘Asqalānī, *Fatḥ al-Bāri*, 5:290.

promisee, then the promisee is not considered as a creditor to the promisor. Therefore, unlike the creditors the promisee cannot take the promised item from the inheritance of the promisor.

(4) Al-Nawawī argued that *wa‘d* can be compared to a type of donation (*hibah*) where the possession of the subject matter is yet to transfer to the beneficiary. According to the majority of Islamic jurists, a donation is not binding on the donor until the possession of the donating asset is transferred to the beneficiary.<sup>169</sup> In relation to this, Al-‘Ānī, pointed out that *wa‘d* is similar to a voluntary contract (*tabarru‘*). There is no evidence in the *Sharī‘ah* that a voluntary contract can be binding on the contracting parties. Voluntary contracts are by nature non-binding on the contracting parties. These types of contracts can be terminated until handing over the asset to the beneficiary.<sup>170</sup>

(5) Ibn Mufliḥ mentioned that according to Imām Aḥmad Ibn Ḥanble, *wa‘d* is not compulsory on the promisor. This is because it is prohibited to promise something without saying, “If Allāh wills” (*In Shā‘ Allāh*).<sup>171</sup> Ibn Ḥazm adds that Allāh says in the Qur’an:

وَلَا تَقُولَنَّ لِشَيْءٍ إِنِّي فَاعِلٌ ذَلِكَ غَدًا ۚ إِلَّا أَنْ يَشَاءَ اللَّهُ

Al-Kahf 18: 23-24

Translation: And never say of anything, “I shall do such and such thing tomorrow.” Except (with saying), “If Allāh will!”

The verse denotes that it is prohibited to promise something without saying, “If Allāh will!” Therefore, if someone promises something without uttering this phrase then he has actually committed an evil. It is not lawful in the *Sharī‘ah* to force someone to perform an evil action. On the contrary, if the promisor pronounces “If Allāh will!” and does not fulfil his promise after that, then he is not breaking his promise indeed. This is

<sup>169</sup> Al-Nawawī, *Al-Adhkār*, 510-511.

<sup>170</sup> Muḥammad Riḍā ‘Abd Al-Jabbār Al-‘Ānī, “Quwwah al-wa‘d al-mulzimah fī al-Sharī‘ah wa al-qānūn”, *Majallah majma‘ al-fiqhī al-Islāmī* 5, no. 2 (1988), 570.

<sup>171</sup> Ibn Mufliḥ, *Al-Mubdi‘ Sharḥ al-Muqni‘*, 8:138.

because he promised that he would perform the action if Allāh wished. Since Allāh did not will it to happen then he could not perform it.<sup>172</sup>

(6) Ibn Ḥazm provided another argument that *fuqahā'* unanimously ruled that if someone makes a promise under oath to Allāh and he realises after that non-fulfilment of that promise is more prudent, then he will not be sinful if he breaks his promise. Therefore, if breaking a promise confirmed by an oath is not a sinful action then it is more rational to hold that breaking a simple promise is not sinful.<sup>173</sup>

In light of the evidence mentioned above, the majority of the jurists from the *Ḥanafī*, *Shāfi'ī*, and *Ḥanbalī* school of jurisprudence conclude that *wa'd* is not compulsory (*wājib*) on the promisor. If the promisor breaks his *wa'd*, he is not sinful. However, it is recommended (*mustahabb*) to fulfil *wa'd* as a number of verses in the Qur'an commend those who fulfil their promises.

#### B. *Wa'd* is always Obligatory (*Wājib*) on the Promisor

A number of notable classical Islamic scholars hold that *wa'd* is always obligatory on the promisor. Ibn Shubrumah stated that *wa'd* is always compulsory on the promisor and he should be forced to fulfil his promise.<sup>174</sup> Ibn Ḥajar Al-'Asqalānī mentioned that 'Umar bin 'Abd Al-'Azīz, Ḥasan Al-Baṣrī, Sa'īd bin 'Amr bin al-Ashwa', Samurah bin Jundūb (RA) and Ishāq bin Ibrāhīm view that *wa'd* is compulsory.<sup>175</sup>

Ibn Al-'Arabī stated that the most accurate opinion to me is that it is compulsory to fulfil the *wa'd* in all circumstances except where there is a valid excuse (*'udhr*).<sup>176</sup> Al-Jaṣṣāṣ says that anyone who obliges himself to perform a religious act or a contract then

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<sup>172</sup> Ibn Ḥazm, *Al-Muḥallā*, 8:29-30.

<sup>173</sup> *Ibid.*

<sup>174</sup> Ibn Ḥazm, *Al-Muḥallā*, 8:28.

<sup>175</sup> Al-'Asqalānī, *Fatḥ al-Bārī*, 5:290.

<sup>176</sup> Ibn 'Arabī, *Aḥkām al-Qur'ān*, 4:243.

it is compulsory for him to fulfil it. If he does not fulfil his promise then he will be included among those whom Allāh (SWT) criticised in the Qur'an.<sup>177</sup>

In his commentary on *al-Furūq*, Ibn al-Shāṭṭ resolved that most of the evidences found in the sources of the *Sharī'ah* speaks out against breach of *wa'd*. Based on what is obvious in the *Sharī'ah*, there is sin if the *wa'd* is broken except when it is difficult to fulfil.<sup>178</sup>

Al-Ghazālī concluded that when someone understands the binding nature of *wa'd* then he must fulfil it except when there is a valid excuse (*'udhr*). At the time of making the promise, if the promisor determines that he will not fulfil the promise then it is absolutely a hypocrisy (*nifāq*).<sup>179</sup>

The contemporary scholar, Al-Qarḍāwī, agreed that *wa'd* is compulsory on the promisor, but what makes this opinion even more credible is that he said Qur'anic texts and the Prophet's *Sunnah* demonstrated that *wa'd* is binding from a religious point of view. Furthermore, he argues that classical scholars who opine that *wa'd* is compulsory do not differentiate between what is legally or religiously binding. It is apparent here that whatever is considered compulsory from a religious point of view must also be legally binding.<sup>180</sup> This group of scholars provide a number of Qur'anic verses and prophetic narrations to strengthen their position.

(1) The following verse indicates that a promise is compulsory:

يٰۤاَيُّهَا الَّذِيْنَ ءٰمَنُوْا لِمَ تَقُوْلُوْنَ مَا لَا تَفْعَلُوْنَ ؕ كَبُرَ مَقْتًا عِنْدَ اللّٰهِ اَنْ تَقُوْلُوْا مَا لَا تَفْعَلُوْنَ ؕ

Al-Şāf 61: 2-3.

Translation: O you who believe! Why do you say that which you do not do? Most hateful it is with Allāh that you say that which you do not do.

<sup>177</sup> Al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 442.

<sup>178</sup> Ibn Al-Shāṭṭ, *Idrār Al-Shurūq 'alā Anwā' Al-Furūq*, printed with Shihāb Al-Dīn Abī Al- 'Abbās Aḥmad bin Idrīs Al-Qarāfī, *Al-Furūq*, ed. 'Umar Ḥasan Al-Qiyyām (Beirut: Resalah Publishers, 2003), 4:43.

<sup>179</sup> Al-Ghazālī, *Iḥyā' 'Ulūm al-Dīn*, 9:1580.

<sup>180</sup> Al-Qarḍāwī, "Al-wafā' bi al-wa'd", 631-634.



Al-Qurṭubī pointed out that the interrogative sentence is used in the above verse to criticise the person who says by himself to perform a good deed but he does not do it.<sup>181</sup> Al-Jaṣṣāṣ reiterated that this verse is an evidence that whosoever binds himself to perform any religious action or any contract then it is obligatory for him to fulfil it. If he does not fulfil it then he is among those who say something but do not perform it. Allāh (SWT) criticised this type of person.<sup>182</sup> Al-Qarāfī argued that based on this verse, when a promise is broken then it becomes a lie which is prohibited.<sup>183</sup>

(2) The prophet (SAWS) mentions that breaking the *wa‘d* is one of the characters of a hypocrite (*munāfiq*). He says:

آية المنافق ثلاث إذا حدث كذب وإذا وعد أخلف وإذا أؤتمن خان

Translation: Sign of a pretentious person are three things; when he talks he lies; when he promises he breaks it; and when he is given a trust he betrays it.<sup>184</sup>

In this *ḥadīth*, breaking the *wa‘d* is criticised as one of the characters of a hypocrite. This denotes that breaking the *wa‘d* should be prohibited.<sup>185</sup>

(3) Another *ḥadīth* showed that Abū Bakar (RA) fulfilled the *wa‘d* of the prophet Muḥammad (SAWS) even after his death. Jābir bin ‘Abdullāh (RA) narrates:

قال النبي - صلى الله عليه وسلم - «لو قد جاء مال البحرين، قد أعطيتك هكذا وهكذا وهكذا». فلم يجرى مال البحرين حتى قبض النبي - صلى الله عليه وسلم - فلما جاء مال البحرين أمر أبو بكر فنأدى من كان له عند النبي - صلى الله عليه وسلم - عدة أو دين فليأتنا. فأتيته، فقلت إن النبي - صلى الله عليه وسلم - قال لي كذا وكذا، فحشى لي حثية فعددتها فإذا هي خمسمائة، وقال خذ مثلها .

Translation: Once the Prophet said (to me), “If the money of Bahrain comes, I will give you a certain amount of it.” The Prophet had breathed his last before the money of Bahrain arrived. When the money of Bahrain reached, Abū Bakr announced, “Whoever was promised by the Prophet should come to us.” I went to Abū Bakr and said, “The Prophet promised me so and so.” Abū Bakr gave me a handful of coins and when

<sup>181</sup> Al-Qurṭubī, *Al-Jāmi‘ lī Ahkām al-Qur‘ān*, 20:437.

<sup>182</sup> Al-Jaṣṣāṣ, *Ahkām al-Qur‘ān*, 442.

<sup>183</sup> Al-Qarāfī, *Al-Furūq*, 4:42.

<sup>184</sup> Narrated by Al-Bukhārī, *Kitāb al-Shahādāt*, Bāb man amara bī injāz al-wa‘d, Ḥadīth no. 2682 and Muslim, *Kitāb al-Īmān*, Bāb Bayān Khiṣāl al-Munāfiq, Ḥadīth no. 107. See Al-Bukhārī, *Al-Jāmi‘ al-Ṣaḥīḥ*, 2:262; Al-Naysābūrī, *Ṣaḥīḥ Muslim*, 1:78.

<sup>185</sup> Al-Qarāfī, *Al-Furūq*, 4:42.

I counted them, they were five-hundred in number. Abū Bakr then said, “Take twice the amount you have taken (besides).”<sup>186</sup>

This *ḥadīth* shows the importance of keeping *wa‘d*. Even though the prophet (SAWS) passed away, Abū Bakar (RA) fulfilled the prophet (SAWS)’s *wa‘d*. The *wa‘d* was fulfilled as paying the debt of a deceased. This incidence indicates that *wa‘d* is compulsory (*wājib*). Moreover, the lessons of this *ḥadīth* generally apply to all types of *wa‘d* as there is no indication here that the *wa‘d* of the prophet (SAWS) is different from others.

- (4) In another prophetic narration, it is clearly stated that *wa‘d* is compulsory on every Muslim. Zayd bin Aslam narrates that the prophet (SAWS) said:

وَأَيُّ الْمُؤْمِنِ حَقٌّ وَاجِبٌ.

Translation: The promise of a believer is a binding obligation.<sup>187</sup>

- (5) Ibn ‘Abbās (RA) narrated that the prophet (SAWS) said:

لَا تَمَارُ أَخَاكَ وَلَا تَمَازِحْهُ وَلَا تَعِدْهُ مَوْعِدَةً فَتُخَلِّفْهُ.

Translation: Do not quarrel with your brother; do not make fun of him; and do not make a promise with him and then break it.<sup>188</sup>

This is another evidence that prohibits breaking the *wa‘d*. This *ḥadīth* prohibits three things which are: (1) quarrelling with others, (2) making fun of others and (3) breaking the *wa‘d* with others. It is agreed to all *fuqahā’* that making fun of others and quarrelling is prohibited in the *Shari‘ah*. Hence, breaking the *wa‘d* should be prohibited as well.

Based on the above-mentioned evidence, this group of scholars conclude that *wa‘d* is binding on the promisor both religiously and legally. It is prohibited to break the

<sup>186</sup> Narrated by Al-Bukhārī, Kitāb al-Kafālah, Bāb man takaffala ‘an mayyitin daynan falaysa lahū an yarji’, Ḥadīth no. 2296. See Al-Bukhārī, *Al-Jāmi‘ al-Ṣaḥīḥ*, 2:142.

<sup>187</sup> Narrated by Abū Dāwūd, Bāb fī al-malāhī, Ḥadīth no. 8. See Abū Dāwūd Sulaymān bin Al-Ash‘ath Al-Sijistānī, *Al-Marāsīl*, ed. ‘Abd Al-‘Azīz ‘Izz Al-Dīn, (Bayrūt: Dār al-qalam, 1986), 245.

<sup>188</sup> Narrated by Al-Tirmidhī, Kitāb al-birr wa al-ṣilah, Bāb ma jā’a fī al-mirā’, Ḥadīth no. 1995. See Muḥammad bin ‘Īsā bin Sawrah Al-Tirmidhī, *Sunan al-Tirmidhī*, ed. Abū ‘Ubaydah Mashhūr bin Ḥasan (Al-Riyāḍ: Maktabah al-Ma‘ārif, 1997), 452.

*wa'd* unless there is a valid excuse (*'udhr*). An individual who breaks the *wa'd* is sinful to Allāh. In addition, he should be forced to fulfil his *wa'd* in the court of law.

### C. *Wa'd* is Binding but with Conditions

The third group of scholars opine that *wa'd* is binding but subject to conditions. Their opinions can be divided into two types. Firstly, the *wa'd* is binding when it is connected to a cause (*sabab*) even though the promisee did not enter into any action based on the promise. Secondly, the *wa'd* is compulsory when it is connected to a cause (*sabab*) and the promisee has entered into an action based on this promise.

- (1) Ibn Nujaym, Aṣḥab and others put forward that *wa'd* is binding if it is attached to a cause although the promisee did not enter into any action based on the promise. Ibn Nujaym mentions that *wa'd* is not binding except when it is attached to a cause.<sup>189</sup> Therefore, the *Ḥanafī* scholars constructed the maxim that “the promise which is attached to a cause is compulsory”.<sup>190</sup>

Ibn Rushd asked Aṣḥab about his opinion on the fulfilment of *wa'd* attached to a cause, according to the following example. When a man approached another individual and asked for a loan of 100 *dīnār*, saying that he wanted to get married, he was promised a loan of the said amount. After the marriage, the promisor revoked his promise. Aṣḥab remarked that, in this case, the promisor is required to provide the loan based on the cause attached to it. Moreover, the legal authorities might force the promisor in a court of law to make good on his promise. Then Ibn Rushd asked Aṣḥab what his opinion would be if the promisor told the man that the loan would not be forthcoming before his marriage.

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<sup>189</sup> Zayn Al-Dīn bin Ibrāhīm bin Nujaym, *Al-Ashbāh wa al-Nazā'ir*, ed. Muḥammad Muṭī' al-Ḥāfiẓ (Dimashq: Dār al-fikr, 2005), 2:344.

<sup>190</sup> Majallah Al-Aḥkām Al-'Adliyyah, 26, (Code 84).

Aṣḡagh replied that the promisor could not revoke *wa'd* in either situation because a promise linked to a cause [of marriage] becomes binding.<sup>191</sup>

(2) The famous opinion in the *Mālikī* School of jurisprudence is that *wa'd* is compulsory when it is attached to a cause (*sabab*) and the promisee has entered into an action based on the promise. Imām Mālik, Saḡnūn, Al-Lakhmī and others are the proponent of this viewpoint. Imām Mālik provides the following example. When someone has bought a slave after being told “If you buy a slave then I will help you with 1,000 dirham”, then the promisor is obliged to fulfil his promise.<sup>192</sup>

Ibn Rushd mentioned that he asked Saḡnūn about the obligation of a promise, then he replied that if a person said to another, “repair your house and I will give you loan” or “go for pilgrimage and I will give you loan” or “get married” and other similar things, then the promise becomes compulsory when the promisee embarks on the action relying on the promise.<sup>193</sup>

In a similar manner, Al-Lakhmī resolved that if a person says to another, “purchase the particular portion of the land and I will repay you”, the promise is compulsory for the promisor after the promisee has purchased the land. This is because the promise has led the promisee to purchase the land.<sup>194</sup> This opinion resembles that of Ibn Rushd.<sup>195</sup>

Moreover, most contemporary scholars outweigh this opinion. The Islamic Fiqh Academy concludes that:

According to *Sharī'ah*, a promise [made unilaterally by the purchase orderer or the seller], is morally binding on the promisor, unless there is a valid excuse. It is however legally binding if made conditional upon the fulfilment of an obligation, and the promisee has already incurred expenses on the basis of such a promise. The binding nature of the

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<sup>191</sup> Abū Al-Walīd Muḡammad bin Aḡmad bin Muḡammad bin Aḡmad bin Rushd, *Al-Bayān wa al-Taḡṣīl wa al-Sharḡ wa al-Tawjīh wa al-Ta'īl fī Masā'il al-Mustakhrājah*, ed. Muḡammad Ḥajjī, (Bayrūt: Dār al-Gharb al-Islāmī, 1988), 15:343.

<sup>192</sup> Mālik bin Anas Al-Aṣḡaḡī, *Al-Mudawwanah al-Kubrā*, (Bayrūt: Dār al-kutub al-'ilmiyyah, 1994) 3:270.

<sup>193</sup> Ibn Rushd, *Al-Bayān wa al-Taḡṣīl*, 15:343.

<sup>194</sup> Ibn 'Alīsh, *Fatḡ al-'Alī al-Mālik*, 1: 306-307.

<sup>195</sup> *Ibid*, 1:254.

promise means that it should be either fulfilled or compensation is paid for damages caused due to unjustifiable non-fulfilment.<sup>196</sup>

The scholars concluded that, while *wa'd* is always religiously binding, it only binds a promisor legally when a cause is involved or when the promisee has already taken action based on what was promised.

This group of scholars argue that the evidences from the Qur'an and *Sunnah* related to the fulfilment of *wa'd* are contradictory to each other. Therefore, it is necessary to harmonise among the different types of evidences. Al-Qarāfī stated that to resolve the problem of conflicting evidence which does/ does not necessitate the fulfilment of *wa'd*, one must consider whether the promisee has undertaken any activities based on the promise made to him; if so, *wa'd* becomes compulsory.<sup>197</sup>

Moreover, some contemporary scholars add that this opinion is based on the following *ḥadīth*<sup>198</sup>:

لا ضرر ولا ضرار

Translation: There should be neither harming nor reciprocating harm.<sup>199</sup>

If the promisee has undertaken an action based on what the promisor has already pledged but thereafter revoked, then harm may come to the promisee. The *ḥadīth* denotes that harm should be eliminated, thus making such *wa'd* compulsory for the promisor.

#### D. Discussion of the Arguments

The *ḥadīth* provided by the first group of scholars narrated by Ṣafwān bin Sulaym that says that the prophet (SAWS) allowed broke promises may not be appropriate here. In

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<sup>196</sup> Islamic Fiqh Academy, 5th session, resolution no 40-41, 1988, *Islamic Fiqh Academy* website, retrieved on 04 June 2015, <http://www.fiqhacademy.org.sa/qarat/5-2.htm>

<sup>197</sup> Al-Qarāfī, *Al-Furūq*, 4:49.

<sup>198</sup> Maḥmūd Fahad Aḥmad Al-'Amūrī, "Al-wa'd al-mulzim fī Ṣiyagh al-tamwīl al-Maṣrafī al-Islāmī" (Master thesis, Yarmouk University, Jordan, 2004), 26; Mohamad Akram Laldin, "The concept of promise and bilateral promise", 21.

<sup>199</sup> Narrated by Mālik, *Kitāb al-aqḍiyah*, Bāb al-qaḍā' fī al-mirfaq, Ḥadīth no. 2758. See Al-Aṣḥāḥī, *Al-Muwaṭṭa'*, 4: 1078.

the *ḥadīth*, the person did not mention a promise that cannot be fulfilled, rather he asked about making promises to his wife. It means that in the future he may/may not fulfil the promise. In the first part of the *ḥadīth*, the person asked about telling a lie to his wife to make her happy but the prophet (SAWS) did not allow it. While asking about making promises to his wife, the prophet (SAWS) allowed him because there is no problem to make a promise. He may fulfil his promise in the future. He will not be sinful in that case. On the other hand, he may not fulfil his promise due to difficulties that may appear later. In that case, he is not sinful either. Therefore, we can resolve that the *ḥadīth* does not allow breaking *wa‘d*.

Ibn Al-Shāṭṭī, in his commentary on *al-Furūq*, argued that the man in the *ḥadīth* did not ask about *wa‘d* that cannot be fulfilled but he asked about *wa‘d* which might or might not be fulfilled. The prophet (SAWS) did not consider making *wa‘d* a wrongdoing because if it is fulfilled, then the promisor has not sinned. Moreover, if the promisor does not fulfil the *wa‘d* due to any constraints, he has not sinned too.<sup>200</sup>

The second *ḥadīth* says that someone who cannot fulfil a *wa‘d* that was made with a sincere heart is not considered sinful. It can be argued here that anyone whose *wa‘d* is sincere will naturally do his utmost to carry out his promise and will probably only fail to do so when restricted by hardship (*mashaqqah*). This *ḥadīth* does not permit breach of *wa‘d* when the promisor has made no true effort to succeed. Ibn Al-Shāṭṭī pointed out that, in this *ḥadīth*, the promisor is not a sinner if his failure is due to an excuse that have stood in his way.<sup>201</sup>

In relation to the third evidence provided by Muhallab, it can be argued that although everyone agrees that a promisee is not like a creditor to the promisor but it cannot make the *wa‘d* only recommended (*mustahabb*). Al-‘Amūrī argued that there are some conditions to carry out *wa‘d* which are for example, to be alive, solvent etc. Therefore, if

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<sup>200</sup> Al-Qarāfī, *Al-Furūq*, 4:44.

<sup>201</sup> Al-Qarāfī, *Al-Furūq*, 4:44.

the promisor dies, the *wa'd* is nullified. In this way, the promisee is not like a creditor to the promisor. However, if the promisor is alive then he is obliged to carry out his *wa'd*.<sup>202</sup>

The fourth evidence that compares *wa'd* to a type of donation (*hibah*) where the subject matter is pending to transfer to the beneficiary, may not be suitable here. Ibn Rushd commented that this analogy is not relevant here as there are some disagreements amongst the scholars whether transferring the subject matter is a condition in a donation (*hibah*) contract. Imām Abū Ḥanīfah and Shāfi'ī viewed that it is a condition to conclude the contract. Imām Aḥmad and Abū Thawr believe that it is not a condition.<sup>203</sup> However, it might be the majority view that a donation (*hibah*) contract is not compulsory on the donor until the subject matter is transferred to the beneficiary. Nevertheless, scholars do not unanimously agree on this opinion.

Ibn Ḥazm's argument which is based on the necessity of saying '*If Allāh wills*' (*In Shā' Allāh*) at the time of making *wa'd*, should not be accepted. This is because even though the person says '*If Allāh wills*', he is still required to make his utmost effort to carry out his *wa'd*. If he cannot fulfil his *wa'd* after that due to a hardship, then he is not sinful. Furthermore, Ibn Kathīr mentioned the phrase "*In Shā' Allāh*" is mentioned in the verse to guide the messenger of Allāh (SAWS) and therefore does not mean that it suggests an obligation.<sup>204</sup>

Moreover, Ibn Ḥazm's comparison of *nudhur* to *wa'd* is perhaps not suitable in this case. This is because *nudhur* is different from *wa'd*. Usually, *nudhur* is made to become close to Allāh (SWT) and there is atonement (*kaffārah*) for breaking the *nudhur*. On the other hand, *wa'd* might be related to religious matters and other worldly matters.

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<sup>202</sup> Al-Amūrī, "Al-wa'd al-mulzim fī Ṣiyagh al-tamwīl", 34.

<sup>203</sup> Abū Al-Walīd Muḥammad bin Aḥmad bin Muḥammad bin Aḥmad bin Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* (Bayrūt: Dār al-ma'rifah, 1982), 2:329.

<sup>204</sup> Abū Al-Fidā' Ismā'il bin 'Umar bin Kathīr, *Tafsīr al-Qur'ān al-'Azīm* (Bayrūt: Dār ibn Ḥazm, 2000), 1151.

Some scholars view that it is compulsory to fulfil the *nudhur* except when there is hardship in fulfilling the *nudhur*.<sup>205</sup>

In relation to the evidences provided by the second group of scholars who hold that *wa'd* is compulsory, it is argued that the Qur'anic verse that criticises a group of people who say to carry out something but do not do so is relevant to a group of companions of the prophet (SAWS). They said that if we would know the best deed to be closer to Allāh, we would do it. However, when the verse on fighting in the path of Allāh (*jihād*) revealed, they did not fulfil what they said.<sup>206</sup> Therefore, it can be concluded that the verse criticises those who do not carry out their *wa'd* related to the religious actions, such as fighting in the path of Allāh (*jihād*), voluntary donation (*ṣadaqah*) etc.<sup>207</sup>

However, this argument can be opposed by saying that the verse addressed all the believers in general. According to Islamic jurists (*fuqahā'*), the general meaning of the verse overturns the particular restricted meaning related to the event at the time of revelation.<sup>208</sup> Therefore, we can resolve that the verse is a strong evidence to support the bindingness of *wa'd*.

Subsequently, the *ḥadīth* mentions that one of the characters of the hypocrite (*munāfiq*) is to break the *wa'd*. One may argue that the *ḥadīth* actually means the sincerity of the person at the time of making the *wa'd*. It denotes that it is the character of a hypocrite person when he makes *wa'd*, in his heart he intends to break it. Therefore, if a person is sincere at the time of giving the *wa'd* and he does not fulfil it afterward then he is not sinful.<sup>209</sup>

This argument can be reverted by saying that if the person is sincere at the time of making the *wa'd* then he should attempt to fulfil the *wa'd* unless there is an excuse. It

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<sup>205</sup> Ibn Al-'Arabī, *Aḥkām al-Qur'ān*, 4:242

<sup>206</sup> Al-Qurṭubī, *Al-Jāmi' lī Aḥkām al-Qur'ān*, 20:435.

<sup>207</sup> Ibn Ḥazm, *Al-Muḥallā*, 8:30.

<sup>208</sup> Abū Ḥāmid Muḥammad bin Muḥammad Al-Ghazālī, *Al-Mustasfā min 'Ilm al-Usūl*, ed. Ḥamzah bin Zahīr Ḥāfiẓ (Al-Madīnah Al-Munawwarah: Sharikat al-Madīnah al-munawwarah li al-ṭibā'ah, n.d.) 3:264.

<sup>209</sup> Al-'Aynī, *'Umdah al-Qārī*, 1:349.



is irrational that a person is sincere while making the *wa'd* but after that he does not fulfil it without any reason. Therefore, we can conclude that the *ḥadīth* is another proof to establish the bindingness of *wa'd*.

However, the *ḥadīth* narrated by Jābir bin 'Abdullāh does not make *wa'd* compulsory because, in this case, Abū Bakr knew that the prophet (SAWS), noble in character, would not have failed to keep his *wa'd* had he lived. Moreover, Abū Bakr paid what was promised not from his own property but rather from the public treasury (*bayt al-māl*).<sup>210</sup>

The last two *ḥadīths* (*ḥadīths* narrated by Zayd bin Aslam and Ibn 'Abbās) provided by this group of scholars have a weak chain of narration. Therefore, they are neither considered authentic nor can they provide acceptable evidence to support any position, as mentioned by Ibn Ḥazm.<sup>211</sup> Nevertheless, one might argue that these weak narrations, taken together, can still provide supporting evidence. It is generally accepted among the scholars that weak *ḥadīths* may be taken into consideration as supporting tools to the authentic *ḥadīths* to strengthen a position.

With respect to evidence provided by the *Mālikīs*, one cannot adequately argue that harmonising contradictory evidence from the *Sharī'ah* makes *wa'd* binding when it is attached to a cause because it might be possible to resolve conflicting evidence by taking a different stance, such as *wa'd* is compulsory except when there is a valid excuse. Moreover, Ibn Ḥazm comments that the opinion of the *Mālikīs* is not founded on evidence from the Qur'an and *Sunnah*.<sup>212</sup>

Although some contemporary scholars relate the *ḥadīth* about eliminating harm to the *Mālikī* position, it is important to recall that the basic principle of the *Sharī'ah* requires that justice be afforded to each individual whatever the situation. Allāh says:

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<sup>210</sup> Al-'Asqalānī, *Fatḥ al-Bāri*, 5:290.

<sup>211</sup> Ibn Ḥazm, *Al-Muḥallā*, 8:29.

<sup>212</sup> Ibn Ḥazm, *Al-Muḥallā*, 8:28.

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ

Surah al-Nisa 4: 58

Verily! Allāh commands that you should render back the trusts to those to whom they are due; and that when you judge between men, you judge with justice.

Therefore, harm must be eliminated for both the promisor and promisee. Compelling a promisor to fulfil his *wa'd* might place insurmountable difficulties on his shoulders and cause him harm. Therefore, *wa'd* should not be binding in the face of hardship.

Another important point to mention here is that some studies differentiate between religious and legal bindingness.<sup>213</sup> Such studies, however, do not mention any classical scholar's statement that declares *wa'd* is only religiously binding. Al-Qarḍawī argues that what is religiously binding should be legally binding as well. This is because all the classical scholars attempted to implement what is religiously binding as legally binding.<sup>214</sup> Hence, we can resolve here that there is no difference between religiously and legally binding.

#### E. The Most Substantial Opinion

Based on the above discussion, the researcher finds that the most substantial opinion is that *wa'd* is binding on the promisor except when there is a legitimate excuse (*'udhr*). This opinion has been chosen as most significant because evidence which corroborates that *wa'd* is compulsory is more conclusive than other evidence. For example, the verse that criticises people who break their *wa'd* strongly advises people to honour the *wa'd* they make, just as a prophetic narration reminds that breach of *wa'd* is a sign of a hypocrite. Ibn Ḥajar Al-'Asqalānī remarks in agreement that the above-mentioned

<sup>213</sup> 'Abdullāh Muḥammad, "Al-wa'd wa al-muwā'adah", 38; Al-'Amūrī, "al-wa'd al-mulzim", 13; Marjan Muhammad et al., "The bindingness and enforceability of a unilateral promise (*wa'd*)", 6; Muṣṭafā Aḥmad Al-Zarqā', *Al-Madkhal al-Fiqhī al-Ām* (Dimashq: Dār al-qalam, 1998), 2:1032.

<sup>214</sup> Al-Qarḍawī, "Al-wafā' bi al-wa'd", 631-634.

Qur'anic verse and *ḥadīth* offer strong evidence as to the obligatory nature of *wa'd* and that a breach of *wa'd* should be looked upon as more than simply a disliked (*makrūh*) act.<sup>215</sup>

Moreover, evidence that attests to whether *wa'd* is binding can generally be applied to all types of *wa'd*, regardless of whether a condition is attached. Texts that make *wa'd* compulsory and prohibit its retraction are general and unconditional and do not differentiate between *wa'd*. Therefore, we can resolve that all types of *wa'd* are compulsory on the promisor.

However, the universal principle of the *Sharī'ah* is that Allāh does not put difficulty on human being. Allāh says:

يُرِيدُ اللَّهُ بِكُمُ الْيُسْرَ وَلَا يُرِيدُ بِكُمُ الْعُسْرَ ۗ

Al-Baqarah 2: 185

Translation: Allāh intends for you ease, and He does not want to make things difficult for you. (He wants that you).

Therefore, we can resolve that when it proves impossible for the promisor to carry out his *wa'd*, then he will not be considered a sinner. Al-Ghazālī cited that when the bindingness of *wa'd* is comprehended, then it must be fulfilled except when there is a valid excuse.<sup>216</sup> Hence, we can conclude that if there is a valid excuse then the promisor is not sinful for breaking his *wa'd*.

Finally, the most comprehensive opinion might be that *wa'd* is binding, except when there is a valid excuse. When *wa'd* is mandatory on the promisor, then he will fulfil his *wa'd*. When someone fulfils his *wa'd* as he is obliged, then ultimately he is demonstrating nobility of character. Furthermore, the *Mālikīs* argue that *wa'd* is obligatory on the promisor if attached to a cause, and that the promisee will experience difficulties or harm if the promisor revokes his *wa'd*. Therefore, when it is implemented that the *wa'd* is binding on the promisor, then the promisee will be shielded from harm.

<sup>215</sup> Al-'Asqalānī, *Fath al-Bāri*, 5:290.

<sup>216</sup> Al-Ghazālī, *Iḥyā' 'Ulūm al-Dīn*, 9:1580.

### 2.3.2. The Status of *Muwā'adah* in the *Sharī'ah*

The classical and contemporary scholars have provided different viewpoints on the *Sharī'ah* status of *muwā'adah*. The contemporary scholars' debate on this issue is more extensive and complicated as their views are based on the practice of *muwā'adah* in Islamic banking operations. In this section, the researcher first discusses the classical scholars' opinions on *muwā'adah*, followed by his reflection on the contemporary scholars' debate on this matter from which he attempts to ascertain the most substantial opinion on the *Sharī'ah* status of *muwā'adah*.

#### 2.3.2.1. Classical Scholars' Views

The researcher has reviewed the classical sources of Islamic *fiqh* in different schools (*madhāhib*) to identify the opinions of classical scholars. A few scholars have discussed the *Sharī'ah* ruling for *muwā'adah*. Most of the classical scholars have discussed *muwā'adah* which is non-binding on the promisor. However, Qāḍī Khān, a *Ḥanafī* jurist talked about the *Sharī'ah* status of *muwā'adah* which is binding on the promisor. The details of the opinions of the classical scholars are provided below.

Among the classical scholars, some *Mālikīs* discussed *muwā'adah* mostly relating to *bay' al-ṣarf* (money exchange). Al-Wansharīsī mentioned two different opinions of Imām Mālik on the status of *muwā'adah*. He stated that *muwā'adah* to perform something in the future is not allowed in the *Sharī'ah* if that action is unlawful at the present. Therefore, Imām Mālik prohibited the use of *muwā'adah* to execute a marriage contract during the '*iddah*<sup>217</sup> period, for the sale of food before taking possession, for the sale of something during the call for Friday prayer, and for sale of something that someone does not own. In the case of *muwā'adah* for *bay' al-ṣarf* (currency exchange), Imām Mālik's first view is that it is prohibited. However, he has another well-known opinion that

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<sup>217</sup> '*Iddah* is a waiting period for a woman after the death of her spouse, or after a divorce. According to Islamic *Sharī'ah*, a woman cannot marry another man during this period.

*muwā'adah* for *bay' al-ṣarf* is disliked (*makrūh*) based on the grounds that if it is performed at present then it is allowed. Pertaining to this opinion, Al-Wansharīsī doubts that it may become a forward contract.<sup>218</sup>

While Imām Mālik's opinion is contradictory on *muwā'adah*, Al-'Adawī, another Mālikī scholar, clarified that there is no harm in *muwā'adah* for *ṣarf*. If someone says to another, "Let us go to the market with your silver money; if it [price] is good, then we will exchange it," and the other party accepts then it becomes *muwā'adah*. The *bay' al-ṣarf* (exchange contract) takes place after that.<sup>219</sup>

Similar to the Mālikī scholars, Imām Shāfi'ī allows *muwā'adah* for *bay' al-ṣarf*. He mentioned in his prominent book *al-Umm* that if two individuals mutually promise to each other to execute *bay' al-ṣarf* in a future date then there is no harm for them.<sup>220</sup> In agreement with Imām Shāfi'ī, Ibn Ḥazm remarked that it is permitted to make *muwā'adah* to purchase gold with gold, or gold with silver, or silver with silver, or other *ribawī* items regardless of whether the parties enter into the exchange contract after that or not. This is because *muwā'adah* is not a contract.<sup>221</sup>

Finally, Qādī Khān, a *Ḥanafī* scholar viewed that *muwā'adah* to execute a contract in the future is allowed in the *Sharī'ah* and *muwā'adah* can be binding on the promisors in case of necessity. He stated, sometimes it becomes necessary to be involved with *muwā'adah* and can be binding on the parties due to the necessity of the people.<sup>222</sup> Unlike the previous scholars, Qādī Khān clearly pointed out the status of binding *muwā'adah* in the *Sharī'ah*, which is allowed in his opinion only in cases of necessity.

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<sup>218</sup> Aḥmad bin Yaḥyā al-Wansharīsī, *Īdāh al-Masālik ilā Qawā'id al-Imām Abī 'Abd Allāh Mālik*, ed. Al-Ṣādiq bin 'Abd al-Raḥmān, (Bayrūt: Dār Ibn Ḥazm, 2006), 114.

<sup>219</sup> Abū al-Ḥasan 'Alī bin Aḥmad Al-'Adawī, *Ḥāshiyah al-'Adawī*, printed with Muḥammad bin 'Abdullāh al-Khurashī, *Sharḥ Mukhtaṣarin Khalīl li al-Khurashī*, (Miṣr: al-Maṭba'ah al-khayriyyah, 1890), 3:421.

<sup>220</sup> Abū 'Abdullāh Muḥammad bin Idrīs al-Shāfi'ī, *Al-Umm*, ed. Rif'at Fawzī 'Abd al-Muṭṭalib (Al-Manṣūrah: Dār al-wafā', 2001), 4:58.

<sup>221</sup> Ibn Ḥazm, *Al-Muḥallā*, 8:513.

<sup>222</sup> Fakhr al-Dīn Ḥasan bin Manṣūr al-Ūzjandī Qādī Khān, *Fatāwā Qādī Khān*, printed with Niẓām al-Dīn al-Balkhī with others, *Al-Fatāwā al-Hindiyyah*, (Būlaq: al-Maṭba'ah al-kubrā al-amīriyyah, 1892), 2:165.

Based on the above opinions, we can resolve that the classical scholars agreed that use of *muwā'adah* is permitted to conclude a contract in the future and in *bay' al-ṣarf*. However, they do not mention whether this *muwā'adah* is binding on the promisor. In this regard, we can look into their opinions on the obligation of *wa'd*. Imām Shāfi'ī, Ibn Ḥazm, and the *Mālikī* scholars did not allow the *wa'd* to be generally binding. Similarly, *muwā'adah* should not be binding. The *Mālikīs* allowed *wa'd* to be binding if the *wa'd* is attached to a cause (*sabab*) and the promisee has entered into an action based on the promise.<sup>223</sup> Hence, a similar ruling should be applied in *muwā'adah* as well. However, contrary to the previous scholars, Qādī Khān clearly provides his statement that *muwā'adah* can be binding in cases of necessity.

### 2.3.2.2. Contemporary Scholars' Views

Contemporary scholars unanimously agree with the classical scholars that *muwā'adah* to conclude a contract in the future is allowed in the *Sharī'ah* if it is non-binding on both or either one of the promisors. However, the contemporary scholars have different opinions on the status of *muwā'adah*, which is binding on both promisors. In this regard, scholars' opinions can be divided into three categories. The majority of the scholars opine that if *muwā'adah* is binding on both parties then it becomes a forward contract (*bay' al-ajal bi al-ajal*). Hence, it should not be allowed to conclude a contract in the future. The second group of scholars view that a binding *muwā'adah* to conclude a contract in the future should be allowed in case of necessity. Finally, the third view is that even though *muwā'adah* is binding on the promisors, differences remain between a binding *muwā'adah* and a forward contract. Therefore, it should be allowed in general.<sup>224</sup> The details of the opinions and arguments of the scholars are provided in the following sections.

<sup>223</sup> Ibn Ḥazm, *Al-Muḥallā*, 8:28; Al-Aṣḥabī, *Al-Mudawwanah al-Kubrā*, 3:270.

<sup>224</sup> 'Abdullāh Muḥammad, "Al-wa'd wa al-muwā'adah fī al-tabarru'āt wa al-mu'āwaḍāt", 46.

### A. Binding *Muwā'adah* is Non-Permissible

Nazīh Kamāl Ḥammād, a prominent contemporary Islamic jurist disallowed a binding *muwā'adah* to conclude a contract in the future. Moreover, Bank Negara Malaysia, the Central Bank of Malaysia and the Islamic Fiqh Academy of the Organisation of Islamic Conference (OIC) issued a resolution that a binding *muwā'adah* is not permissible to execute a contract in the future.

Nazīh Kamāl Ḥammād argued that none of the classical scholars mentioned that *muwā'adah* is binding on either or both parties. If both of the promisors in *muwā'adah* agree that the promised contract that will be executed in the future is binding upon them from the time of *muwā'adah*, then the *muwā'adah* itself turns into a contract. Therefore, all the *Sharī'ah* rulings pertaining to a contract will come into effect. This is based on the Islamic legal maxim (*qā'idah fiqhiyyah*) that reads, "In contracts, effect is given to intention and meaning and not words and forms."<sup>225</sup> This means that when a *muwā'adah* becomes binding on the promisors, it then turns into a contract in substance even though it appears as *muwā'adah*.

Agreeing with Nazīh Kamāl Ḥammād, Marjan Muhammad et al. further clarified that the economic effect of a binding *muwā'adah* and a contract are the same. There are similarities between them in terms of documentation, as in both of the cases only one documentation is used. Furthermore, two parties are involved in both concepts. The nature, obligation, subject matter, and price are the same in a binding *muwā'adah* and in a contract.<sup>226</sup>

Subscribing to the above opinion, Bank Negara Malaysia (BNM) prohibits binding *muwā'adah* to execute *bay' al-ṣarf* in a future date. It argues that binding mutual promise (*muwā'adah mulzimah*) is prohibited for a foreign exchange transaction (*bay' al-*

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<sup>225</sup> Ḥammād, "Al-wafā' bi al-wa'd fī al-fiqh al-Islāmī", 831.

<sup>226</sup> Marjan Muhammad et al., "The bindingness and enforceability of a unilateral promise (wa'd)", 27.

*şarf*), because it comprises selling debt for debt, which is termed by the classical scholars as ‘*bay‘ al-kāli‘ bi al-kāli‘*’.<sup>227</sup>

Finally, the Islamic Fiqh Academy prohibits binding *muwā‘adah* to execute a contract in the future arguing that a binding *muwā‘adah* is itself a contract. The resolution of the academy reads:

Bilateral promises are permitted in *murābahah* sales on the condition that either or both parties have the option to annul the sale; however, if there is no such option, such a promise is not allowed because a binding bilateral promise in a *murābahah* sale bears a similarity to the sale transaction itself. In that case the condition is laid down that the seller must be the owner of the commodity being sold in order that no dispute arises [based upon the prohibition of the Prophet (peace be upon him) of people selling what they do not possess].<sup>228</sup>

However, in a later resolution, the Islamic Fiqh Academy has become flexible with *muwā‘adah* in cases where there is a public need. It has allowed *muwā‘adah* to be binding in export and import transactions due to necessity. The details of that resolution are discussed in the subsequent section.

#### B. Binding *Muwā‘adah* is Allowed in Case of Necessity

This group of scholars hold the middle position among the three group of scholars. The well-known contemporary Islamic jurist Al-Qādī Muḥammad Taqī Uthmānī, ‘Abd al-Sattār Abū Ghuddah and others view that in cases of necessity, it is allowed to make a binding *muwā‘adah* to conclude a contract in the future. Referring to classical *Ḥanafī* jurists, Al-Qādī Muḥammad Taqī ‘Uthmānī argues that *muwā‘adah* can be binding in the *Ḥanafī* School of jurisprudence if it is a necessity for the people. As an example, in the context of export/import business (‘*aqd al-tawrīd*’), it is necessary to make the *muwā‘adah* binding on both parties.

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<sup>227</sup> Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance*, 139.

<sup>228</sup> Islamic Fiqh Academy, 5th session, resolution no 40-41, 1988, *Islamic Fiqh Academy* website, retrieved on 04 June 2015, <http://www.fiqhacademy.org.sa/qyarat/5-2.htm>



In response to the argument that a binding *muwā'adah* is a forward contract, Taqī Uthmānī elucidates that there are some differences between a binding *muwā'adah* and a forward contract. In a forward contract, the ownership (*milkiyyah*) of the subject matter (*mabī'*) is transferred to the purchaser immediately after the contract is concluded. At the same time, the purchase price (*thaman*) of the asset becomes a debt on the purchaser. On the contrary, there is no transfer of ownership between the promisors in a binding *muwā'adah*. Consequently, there is no debtor and creditor relationship between the promisors.<sup>229</sup>

Furthermore, the obligation of *muwā'adah* is not the same as that of a contract. If one of the promisors cannot fulfil the promise due to a valid excuse (*'udhr*), then he will not be obliged to conclude the contract in the future date. When the promisor does not fulfil his promise without any valid excuse then the judge may ask him to fulfil the promise. If he does not fulfil his promise at that time, then he is obliged to pay the amount of loss incurred to the promisee due to the breach of the promise. Only the actual loss incurred to the promisee will be paid but not the total contract price. In contrast, in a forward contract, the purchaser is obliged to pay the total contract price to the seller.<sup>230</sup>

Referring to the classical *Ḥanafī* and *Mālikī* scholars, Abū Ghuddah argued that when a *wa'd* or *muwā'adah* is attached to a cause (*sabab*) then it is binding on the promisor. However, if the promise is free from any indication that makes it compulsory or otherwise, then we should refer to whether it is a necessity. If there is necessity to make the *wa'd* or *muwā'adah* binding on the promisor then it should be binding.<sup>231</sup>

'Abbās Aḥmad Muḥammad al-Bāz holds a different view. He opines that *muwā'adah* can be binding when breaching the promise harms the promisee. To support

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<sup>229</sup> Muḥammad Taqī Uthmānī, “‘Uqūd al-tawrīd wa al-munāqashaḥ”, *Majallat majma' al-fiqhī al-Islāmī* 12, (2000), 675.

<sup>230</sup> Uthmānī, “‘Uqūd al-tawrīd wa al-munāqashaḥ”, 675.

<sup>231</sup> 'Abd al-Sattār Abū Ghuddah, “Ta'ahhudāt mudirī al-'amaliyyāt al-istithmāriyyah”, *Nadwah al-Barakah li al-Iqtisād al-Islāmī*, 31st Session, 2010, *Risālat al-Islām* website, retrieved on 4 Jun 2015, <http://fiqh.islammessage.com/NewsDetails.aspx?id=1335>

his position, he argues that all scholars have agreed that a non-binding *muwā'adah* is dissimilar to a forward contract. If the non-binding *muwā'adah* would be similar to a forward contract then the classical scholars would not have allowed it for *bay' al-ṣarf*. However, the non-binding *muwā'adah* can be binding on both parties in cases wherein breaking the promise will cause harm to the promisee. In that case, the *muwā'adah* can be binding to remove the harm. If the *muwā'adah* becomes binding just to remove the harm from the promisee then it does not change the *muwā'adah* to a forward contract. In such a way, a *muwā'adah* is different from a forward contract and the real contract takes place at a future date after the *muwā'adah* is made.<sup>232</sup>

The resolution from the Islamic Fiqh Academy strengthens this position. While the academy prohibited binding *muwā'adah* totally in its fifth session, it revised the resolution in its' 17<sup>th</sup> session to the effect that *muwā'adah* can be binding on both parties in cases of necessity. The resolution reads:

There may be cases where it is impossible to conclude a sale agreement due to the commodity not being in the possession of the seller while a general need exists to oblige both parties to implement a contract in the future, either by legislation or some other means, such as the recognised practices of international commerce. An example of the latter would be opening a letter of credit in order to import goods. In such cases, it is permissible to oblige both parties to fulfil their promises, either through governmental legislation or by the agreement of both parties to a clause in the agreement that will make the promises binding on each of the two parties.<sup>233</sup>

The Islamic Fiqh Academy clarifies that this binding *muwā'adah* is not a forward contract. This is because the ownership of the commodity is not transferred to the buyer, and the purchase price does not become a debt on the purchaser. The actual sale contract will be executed on the agreed upon date through offer (*ījāb*) and acceptance (*qabūl*) between the buyer and the seller. In case the promisor does not fulfil his promise without

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<sup>232</sup> 'Abbās Aḥmad Muḥammad al-Bāz, *Aḥkām Ṣarf al-Nuqūd wa al-'Umlāt fī al-Fiqh al-Islāmī wa Taṭbīqātuḥu al-Mu'āṣirah*, ('Ammān: Dār al-nafā'is, 1999), 130-131.

<sup>233</sup> Islamic Fiqh Academy, 17<sup>th</sup> Session, resolution no. 157, 2006, *Islamic Fiqh Academy* website, retrieved on 4 Jun 2015, <http://www.fiqhacademy.org.sa/qarat/17-6.htm>

any valid excuse, he is obligated to either fulfil the promise or compensate the actual loss incurred to the promisee due to the breach.<sup>234</sup>

### C. Binding *Muwā'adah* is Permissible in General

The third view is that it is generally permissible to practice a binding *muwā'adah* to conclude a contract in a future date. While the second group of scholars allow binding *muwā'adah* only in cases of necessity, this group of scholars allow it in general irrespective of whether it is a necessity. We have found only one contemporary study that advocates this view. In investigating the application of *wa'd* in *ṣukūk mushārahah*, Khairun Najmi *et al.* argued that binding *muwā'adah* is different from a forward contract in many ways. Firstly, a contract is concluded through the connection of offer (*ījāb*) and acceptance (*qabūl*) that implicates some legal effects on the subject matter. However, a binding *muwā'adah* is a promise made by two persons reciprocally that does not have any legal implications on the subject matter e.g. transfer of the ownership. *Muwā'adah* means to promise mutually that a contract will be executed in the future.<sup>235</sup>

Secondly, a future statement (*ṣīghah*) is used in *muwā'adah* e.g. “I will purchase your house in the next month.” The scholars unanimously agree that this type of expression is not a contract but a promise. This is because the contract requires either past or present expression (*ṣīghah*), e.g. the buyer says, “I bought your house” and the seller replies, “I agreed”.<sup>236</sup> Finally, unlike a contract, the possession of the commodity (*mabī'*) is not changed by *muwā'adah*. If the promisor to purchase a commodity fails to pay the purchase price then it is not considered a debt on his liability. He is only required to pay for the loss incurred to the promisee. Conversely, in a sale contract, if the purchaser fails to pay the purchase price then the total purchase price becomes a debt on his

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<sup>234</sup> Islamic Fiqh Academy, 17<sup>th</sup> Session, resolution no. 157, 2006, *Islamic Fiqh Academy* website.

<sup>235</sup> Khairun Najmi Saripudin *et al.*, “Application of Promise in Sukuk”, 163.

<sup>236</sup> *Ibid.*

responsibility.<sup>237</sup> Based on these differences between binding *muwā'adah* and forward contract, this group of scholars conclude that it is permissible to make a binding *muwā'adah* to execute a sale contract in the future without any restriction.

#### D. Discussion of the Arguments and the Weightiest Opinion

The first group of scholars view that a binding *muwā'adah* is not allowed to execute a sale contract in the future. This is because a binding *muwā'adah* in substance resembles a forward contract. The second group of scholars opine that a binding *muwā'adah* can be allowed to execute a contract in the future in cases of necessity. Even though *muwā'adah* is binding on the promisors, it is different from a forward contract because there is no transfer of ownership and no handing over of purchase price. The obligation of *muwā'adah* is not similar to a contract as the breach of the promise requires the promisor to pay only the amount of loss incurred to the promisee. The third group of scholars provides similar arguments to differentiate between binding *muwā'adah* and forward contract. However, they differ from the second group in that they generally allow a binding *muwā'adah* for a sale contract in the future irrespective of whether it is a necessity.

First, the researcher would like to assess the first group's argument that a binding *muwā'adah* is similar to a forward contract in substance. They argue that the economic benefit is the same for both of the terms. Both of the concepts involve two parties, the same subject matter, price, and a similar obligation. The Islamic Fiqh Academy adds that when none of the promisors has the option to cancel the contract then it is similar to *muwā'adah*. However, the researcher would like to oppose these arguments because there are some substantial differences between these two terms.

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<sup>237</sup> Khairun Najmi Saripudin et al., "Application of Promise in Sukuk", 163.

Firstly, the researcher advocates the argument mentioned by the second group of scholars that there is no transfer of ownership of the subject matter in *muwā'adah* and no negotiating the purchase price. In case of a sale contract ( '*aqd al-bay'* ), immediately after the offer (*ījāb*) and acceptance (*qabūl*), the purchaser has obtained the ownership of the subject matter and the seller has obtained the ownership of the purchase price. The scholars are unanimous on this matter. *Al-Mawsū'ah al-Fiḥiyyah*, the encyclopaedia of Islamic jurisprudence remarks in this regard:

A sale [contract] for example is executed with offer (*ījāb*) and acceptance (*qabūl*), which entails its effects: transfer the ownership of the sold asset to the purchaser, and transfer of ownership of the price to the seller regardless of whether they have taken possession on these items or not. This is based on the unanimity of the scholars.<sup>238</sup>

However, none claim that a binding *muwā'adah* to execute a sale contract in the future results in the similar effect on the subject matter. It is agreed that a binding *muwā'adah* does not have any immediate effect on the subject matter.

Secondly, the researcher weighs the point that there is no offer (*ījāb*) and acceptance (*qabūl*) in *muwā'adah*. While these are the fundamental pillars (*arkān*) for a sale contract, usually, a future expression (e.g. I promise to purchase/sale in the future) is used in *muwā'adah*. The *Ḥanafī* scholars resolve that a future expression cannot be considered as offer (*ījāb*) and acceptance (*qabūl*). The majority of the scholars view that a future expression can be considered for offer (*ījāb*) and acceptance (*qabūl*) but with the condition that the contracting parties ( '*āqidān* ') have intended to execute the contract on the spot. In *muwā'adah*, the intention of the parties is not to execute the contract on the spot but in a future date. Therefore, this type of expression cannot be considered as offer (*ījāb*) and acceptance (*qabūl*).<sup>239</sup>

<sup>238</sup> Wazārah al-Awqāf wa al-Shu'ūn al-Islāmiyyah, *Al-Mawsū'ah al-Fiḥiyyah*, 30:231.

<sup>239</sup> 'Alā' al-Dīn Abū Bakr bin Mas'ūd al-Kāsānī, *Badā'i' al-Ṣanā'i' fi tartīb al-Sharā'i'* ed. 'Alī Muḥammad Mu'awwaḍ and 'Ādil Aḥmad (Bayrūt: Dār al-kutub al-'ilmiyyah, 2003), 6:528-529; Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, 6:16; Shams al-Dīn Muḥammad bin Abū al-'Abbās Aḥmad bin Ḥamzah, *Nihāyatul Muḥtāz ilā Sharḥ al-Minhāz* (Bayrūt: Dār al-kutub al-'ilmiyyah, 2003), 3:375-380; Muwaffaq al-Dīn Abū Muḥammad 'Abdullāh bin 'Aḥmad bin Muḥammad bin Qudāmah, *Al-Mughnī* ed. 'Abdullāh bin 'Abd al-Muḥsin and 'Abd al-Fattāḥ Muḥammad (Al-Riyāḍ: Dār 'Ālam al-kutub, 1997), 6:7-9.

Finally, the researcher does not agree with the claim that the obligation for binding *muwā'adah* and the sale contract are the same. Some prominent Muslim scholars namely al-Ghazālī and Ibn 'Arbī opined that a promise is not obligatory on the promisor when he cannot fulfil it due to a valid excuse.<sup>240</sup> Therefore, the promisor has no liability to the promisee if he breaches the promise due to a valid excuse, e.g. bankruptcy, death etc. However, when the promisor breaches the promise without any valid excuse, then he is obliged to compensate the promisee only the amount of loss incurred, not the total contract price. This differs significantly from a forward sale contract where the full purchase price has become a debt on the purchaser. The table below summarises the above discussion on the differences between a binding *muwā'adah* and forward sale contract.

Table 2.1 The Difference between Binding *Muwā'adah* and Forward Contract

No.	Subject	Forward Sale Contract (' <i>aqd bay' al-ajal bi al-ajal</i> )	Binding <i>Muwā'adah</i> ( <i>muwā'adah mulzimah</i> )
1	Expression ( <i>Ṣīghah</i> )	Past or Present Expression	Future Expression
2	Ownership of the Subject Matter ( <i>Milkiyyat al-Mabī'</i> )	Ownership Transferred	Ownership Not Transferred
3	Price ( <i>Thaman</i> )	Price is Due on the purchaser	Price is Not Due on the Purchaser
4	Bindingness/Obligation ( <i>Ilzāmiyyah</i> )	The Purchaser is Required to make the Full Purchase Price without any excuse	The Promisor is Required to Either Execute the Contract or Pay for the damages incurred to the Promisee unless he (promisor) has any valid excuse

While evaluating the second group of scholars' position, the researcher agrees with their arguments that a binding *muwā'adah* is different from a forward sale contract. However, the researcher disagrees with their position to allow binding *muwā'adah* only in cases of necessity. It can be argued that if the binding *muwā'adah* is practically

<sup>240</sup> Ibn 'Arabi, *Aḥkām al-Qur'ān*, 4:243; Al-Ghazālī, *Iḥyā' 'Ulūm al-Dīn*, 9:1580.

different from a contract then there is no basis to make the *muwā'adah* binding upon both parties only in cases of necessity. An action is usually allowed in cases of necessity when it is normally prohibited by the *Sharī'ah*. Necessity makes the prohibited action permitted until the necessity is eliminated. When the necessity is removed, then that action becomes prohibited once again. However, when an action is generally permissible in the *Sharī'ah* from the beginning then we should not allow it only in necessary circumstances. Thus, the researcher would like to weigh the view that a binding *muwā'adah* should be generally allowed to execute a sale contract in the future.

However, the researcher agrees with the resolution of the Islamic Fiqh Academy that when it is apparent that the binding *muwā'adah* is used as an artificial arrangement to get around the restriction of *ribā* (interest), then it should be prohibited based on the legal concept of *sadd al-dharā'i*.<sup>241</sup> Considering this factor along with the discussion above, the researcher offers the following conditions that should be followed in practicing binding *muwā'adah*.

- i. *Muwā'adah* should not be used as a trick to legalise *ribā*. Whether the *muwā'adah* is a trick or not, should be decided based on what is apparent in the product structure and documentation. Furthermore, the regulatory body may decide on this.
- ii. Similarly, *muwā'adah* should not be combined with other contracts in such a way that it violates the objective (*muqtaḍā*) of that contract, or the noble objective of the *Sharī'ah* (*maqāṣid al-Sharī'ah*).
- iii. The promisor should not be forced to fulfil his promise if he has any valid excuse, e.g. bankruptcy, duress, insanity etc.
- iv. In case the promisor breaches the promise without any valid excuse, he is required to compensate the promisee only the amount of loss incurred.

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<sup>241</sup> Islamic Fiqh Academy, 17<sup>th</sup> Session, resolution no. 157, 2006, *Islamic Fiqh Academy* website, retrieved on 4 Jun 2015, <http://www.fiqhacademy.org.sa/qrarat/17-6.htm>

- v. In order to conclude the promised contract in a future date, all the mandatory conditions prescribed by the *Sharī'ah* to execute a contract i.e. existence of the subject matter, legal competence (*ahliyyah*) of the contracting parties etc. should be fulfilled during the time of concluding the contract.

### **2.3.3. The Status of *Wa'dān* in the *Sharī'ah***

As earlier concluded that a binding *muwā'adah* is permissible, it is more reasonable that *wa'dān* should be permitted in the *Sharī'ah*. While *muwā'adah* comprising mutual promise is allowed in the *Sharī'ah*, it is more likely that *wa'dān* which includes two independent promises should be compliant with the *Sharī'ah* principles. Affirming this, Khairun Najmi *et al.* concluded that whether *wa'dān* is practically different from *muwā'adah* or not, it should be allowed in the *Sharī'ah*. This is because both *muwā'adah* and *wa'dān* are just promises and different from a contract (*'aqd*).<sup>242</sup>

What is important to discuss in this section is that there is a group of scholars who do not allow binding *muwā'adah* but allow binding *wa'dān*. They argue that *wa'dān* is genuinely different from *muwā'adah*. On the contrary, some scholars do not allow *wa'dān* at all claiming that *wa'dān* does not make any real difference from *muwā'adah*. Finally, a few scholars conclude that even though *wa'dān* is generally permissible in the *Sharī'ah*, its practice in some Islamic financial products should be prohibited based on the principle of *sadd al-dharā'i'*. In the subsequent paragraphs, the researcher discusses the views and arguments of these different groups of scholars.

#### **2.3.3.1. *Wa'dān* is Different from *Muwā'adah***

While disallowing *muwā'adah*, Marjan Muhammad *et al.* upholds the permissibility of *wa'dān* in the *Sharī'ah*. They argue that *wa'dān* is a permissible legal trick (*hīlah*

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<sup>242</sup> Khairun Najmi Saripudin *et al.*, "Application of Promise in Sukuk", 165.



*shar'iyah*) to avoid the non-permissible *muwā'adah*. *Wa'dān* is different from *muwā'adah* because it consists of two different promises related to two different conditions, and between these two promises only one of them will be fulfilled in the future. Therefore, they ascertain that *wa'dān* is permissible in the *Sharī'ah*.<sup>243</sup>

Similarly, Aznan Hasan clarifies his position that when *wa'dān* includes two promises which are truly related to two distinct conditions, and they result in two different effects, then it is permissible. However, if those conditions are practically the same and have similar effects then it is not acceptable in the *Sharī'ah*. In other words, if the two different conditions in *wa'dān* are fictitious, then it is not allowed.<sup>244</sup>

### **2.3.3.2. *Wa'dān* is Similar to *Muwā'adah***

Referring to the practice of *wa'dān* in some Islamic banking products, a number of scholars conclude that *wa'dān* does not make any difference from *muwā'adah*. As the practice of *wa'dān* is similar to *muwā'adah* then it should not be allowed in the *Sharī'ah*. Muhammad Ayub argued that some banks are using *wa'dān* in Islamic swaps, hedge funds, and short selling. However, the promises used in those products are reciprocal but not unilateral. This type of promise should not be allowed because no party has the option to cancel the promise. If either one of the parties wishes not to execute the contract (*'aqd*) which is promised, he/she is required to pay compensation.<sup>245</sup>

Furthermore, while analysing the practice of *wa'dān* in an Islamic derivative instrument i.e. FX Forward, Asyraf Wajdi Dusuki remarked that the practice of *wa'dān* looks similar to *muwā'adah*. Nevertheless, a number of *Sharī'ah* scholars have allowed *wa'dān* with the understanding that it is different from *muwā'adah*. Therefore, a number

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<sup>243</sup> Marjan Muhammad et al., "The bindingness and enforceability of a unilateral promise (*wa'd*)", 36.

<sup>244</sup> Aznan Hasan, "Pengertian al-wa'ad, al-wa'dan dan al-muwa'adah".

<sup>245</sup> Ayub, "Use of W'ad and Tawarruq for Swaps".

of financial institutions have been using *wa'dān* in their products despite some disparagements.<sup>246</sup>

### 2.3.3.3. *Wa'dān* is a Prohibited Legal Trick (*hīlah*)

Yusuf Talal DeLorenzo opined that *wa'dān* is permissible in the *Shari'ah*. However, in relation to its practice in total return swap, he remarked that *wa'dān* should be prohibited based on the concept of *sadd al-dharā'i'* which denotes that if a legitimate means is employed to achieve an illegitimate end then it is unlawful.<sup>247</sup> Similarly, after analysing the characteristics of total return swap, Chady C. Atallah and Wafica A. Ghoul concluded that the usage of *wa'dān* is a prohibited legal trick (*hīlah muḥarramah*) to circumvent the prohibition of gambling in Islamic finance and legalising the prohibited forward sale contract.<sup>248</sup>

### 2.3.3.4. Discussion of the Opinions

Having mentioned the opinions of the scholars, it can be summed up that some scholars believe that *wa'dān* is different from *muwā'adah* because *wa'dān* includes two separate promises connected to two different conditions. However, another group of scholars disallow *wa'dān* arguing that it does not differ from *muwā'adah*. Finally, some scholars remark that even though *wa'dān* is initially permissible in the *Shari'ah*, it should be prohibited in some Islamic financial products i.e. total return swap based on *sadd al-dharā'i'*.

Reflecting on the above opinions, we observe that all scholars agree that *wa'dān* including two different promises that are connected to two different real conditions is

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<sup>246</sup> Asyraf Wajdi Dusuki, "Principle and Application of Risk Management and Hedging Instruments in Islamic Finance", *Islamic Economics & Finance Pedia* website, retrieved on 04 Jun 2015, <http://www.iefpedia.com/english/wp-content/uploads/2012/07/Asyraf.pdf>

<sup>247</sup> Yusuf Talal DeLorenzo, "The Total Returns Swap and the "Shariah Conversion Technology" Stratagem", *I Love the UAE* website, retrieved on 04 Jun 2015, <https://uaelaws.files.wordpress.com/2012/06/delorenzo-copy.pdf>

<sup>248</sup> Atallah and Ghoul, "The Wa'd-Based Total Return Swap", 80.

allowed. This means that if the two promises are really separated, then it is permitted by all scholars. However, the debate is whether *wa'dān* comprising two promises are really separated from each other. When the promises under the *wa'dān* do not have any genuine separation between each other, then some scholars consider it questionable. They argue that *wa'dān* in such a case has become analogous to *muwā'adah*. In order to resolve this issue, we reiterate our argument that being similar with *muwā'adah* does not affect the permissibility of *wa'dān*. This is because *muwā'adah* is simply a mutual promise that does not have any effect on the subject matter of the contract.

Furthermore, reflecting on the opinions of the scholars who prohibit *wa'dān*, we notice that their prohibition of *wa'dān* is based on their case studies on specific Islamic financial products e.g. total return swap. However, it is unfair to generally prohibit the *wa'dān* concept due to its ill-use in certain Islamic financial products. Rather, it is more appropriate to set some parameters to prevent the misuse of *wa'dān*. At this juncture, it should be agreed that whenever the usage of *wa'dān* leads to a non-legitimate end then it should be prohibited. Affirming this, an Islamic legal maxim reads, "Matters are determined by intention".<sup>249</sup> Therefore, we can conclude that *wa'dān* should be allowed in the *Sharī'ah* with the condition that it is not used as a means to reach to a non-permissible goal.

## 2.4. Conclusion

This chapter provided an in-depth discussion on the concept of *wa'd*. It concludes that *wa'd* is a declaration to perform something good to other in the future which is different from *'aqd* as there is no offer (*ījāb*) and acceptance (*qabūl*) in *wa'd* and no transfer of ownership. *Wa'd* is binding on the promisor except where there is a valid excuse (*'udhr*). *Muwā'adah* and *wa'dān* are two concepts derived from *wa'd*. While the first one denotes

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<sup>249</sup> Ibn Nujaym, *Al-Ashbāh wa-al-Nazā'ir*, 1: 22; Muḥammad Ṣadqī bin Aḥmad al-Burnū and Abū al-Ḥārith al-Ghazzī, *Mawsū'ah al-Qawā'id al-Fiqhiyyah*, (Bayrūt: Mu'assasah al-risālah, 2003), 1: 120.

mutual promise then the later one signifies two separate promise. Scholars disagree whether *wa'dān* is any different to *muwā'adah*. However, irrespective of whether *muwā'adah* and *wa'dān* are different from each other or not, both can be used as binding on both of the promisors but with the condition that they are not used as a trick (*hīlah*) to reach a non-legitimate end.

## **CHAPTER 3: THE APPLICATION OF *WA'D* IN MALAYSIAN ISLAMIC BANKS**

### **3.1. Introduction**

This chapter discusses the usage of *wa'd* in Malaysian Islamic banking products. Based on the scope of this research, the researcher discusses the practice of *wa'd* in three Malaysian Islamic banks which are:

- (1) Bank Islam Malaysia Berhad (BIMB)
- (2) Maybank Islamic Berhad (MIB)
- (3) Kuwait Finance House (Malaysia) Berhad (KFHMB).

However, it is necessary to know the overview of Islamic banking system in Malaysia before discussing the *wa'd*-based products. This will help in understanding the practice of *wa'd* in Malaysian Islamic banks. In addition, it is important to know the legal status of *wa'd* in Malaysia as it will clarify the applicability of *wa'd* in the country's legal system.

This chapter provides first an overview of Islamic banking in Malaysia that includes the history, governance, rules, and regulations. It then discusses the legal status of *wa'd* with reference to the Contract Act 1950, the Central Bank Act 2009, and BNM's guidelines. Finally, it illustrates the mechanism of practicing *wa'd* in Islamic banking products that comprises retail financing products, trade financing products, and treasury products.

### **3.2. An Overview of Islamic Banking in Malaysia**

Malaysian Islamic banking is one of the most developed Islamic banking in the world. Starting from 1963, Islamic finance in Malaysia has a very stable development to become the third largest Islamic finance industry in the world. It is the biggest *ṣukūk* issuer in the

world. Malaysia has a dual financial system where both Islamic and conventional finance function equally. Both of the systems present a full variety of products and services and compete each other in different sectors of the financial system.<sup>250</sup> It is the most comprehensive Islamic financial system in the world that comprises a very advanced Islamic banking segment, *takāful*, and Islamic capital and money market.<sup>251</sup> In the subsequent sections, the history and current situation of Islamic banking in Malaysia, overview of Islamic banking products, regulation and governance of Islamic banks, and efficiency of the Islamic banks in Malaysia will be discussed.

### **3.2.1. Historical Development of Islamic Banking in Malaysia**

In Malaysia, Islamic banks have evolved in stages. The history of Islamic banking in Malaysia can be divided into four stages. The following discussion covers every stage of development for Malaysian Islamic banking.

#### **3.2.1.1. The Initial Stage of Development**

Islamic banking in Malaysia started in 1963 with the establishment of “Tabung Haji” or, *Hajj* Fund Corporation. The existence of “Tabung Haji” was the consequence of the working paper entitled “Plan to Improve the Economy of Prospective Pilgrims” which was presented by the Royal Professor Ungku Aziz in 1959. It pointed out the necessity to develop a mechanism for Muslims that encourage them to save money to perform their *Hajj*. In the past, the Malaysian Muslim used to adopt different traditional ways to save their money. Some would sell their properties and livestock to gather enough funds to go for *Hajj*. These practices would have negative financial and social impacts on them and

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<sup>250</sup> Olga Krasicka and Sylwia Nowak, “What’s in it for Me? A Primer on Differences between Islamic and Conventional Finance in Malaysia” (International Monetary Fund (IMF) working paper, paper no. 12/151, Washington, D.C., 2012), 3; Angelo M. Venardos, *Islamic Banking and Finance in South-East Asia: Its Development and Future* (Singapore: World Scientific, 2005), 155; Beng Soon Chong and Ming-Hua Liu, “Islamic banking: Interest-free or interest-based?,” *Pacific-Basin Finance Journal* 17, (2009), 130.

<sup>251</sup> “Which Country is Enabling the Evolution of Islamic Finance?,” *Global Islamic Finance Report (GIFR) 2011*, March 2011, 3.

their families. Moreover, these practices were a threat for the rural economic structure as well as for national economic growth. Above all, there was an immense need for the Muslims to save their money in a financial institution where the investment was fully *Shari'ah* compliant.<sup>252</sup>

Considering the above facts, Tabung Haji was established to fulfil the following objectives:

- (a) To facilitate Muslims to save gradually for the purpose of performing the *Hajj* and other useful expenses.
- (b) To facilitate Muslims with their saving to take part into the investment in industry, commerce, plantation and real estates based on the *Shari'ah* principles.
- (c) To provide protection and safeguard the welfare of the pilgrims during the *Hajj* through providing different types of facilities and services.<sup>253</sup>

Since its inception, Tabung Haji has been actively involved with providing saving services to the Muslims, making investments from the accumulated funds, and overseeing the investment. Moreover, it provided services for the pilgrims in Malaysia and in the holy land of Makkah. As of 2009, Tabung Haji had more than 5 million depositors and a total deposit of more than USD 9 billion.<sup>254</sup>

### **3.2.1.2. The Second Stage of Development**

After the successful establishment of Tabung Haji, it took another 20 years to introduce a full-fledged Islamic bank in Malaysia. Several factors contributed to the establishment of an Islamic bank in Malaysia. Firstly, there was a strong need from the public and there was an urge from the Islamic political groups. Moreover, Islamic banking was part of the

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<sup>252</sup> Mohamad Akram Laldin, "Islamic financial system," 219; Sulaiman Abdullah Saif Al Nasser and Jorah Muhammed, "Introduction to History of Islamic Banking in Malaysia," *Humanomics* 29, no. 2 (2013), 82.

<sup>253</sup> *Ibid.*

<sup>254</sup> Mohd Shuhaimi Haji Ishak, "Tabung Haji as an Islamic Financial Institution for Sustainable Economic Development" (proceeding of second International Conference on Humanities, Historical and Social Sciences, Singapore, 2011), 237.

strategic Islamization process of the government at that time when the government intended to engage the Muslims in the economic development of the country. Based on this, the government organised a meeting in 1980 to discuss important matters related to introducing Islamic banking in Malaysia. In the following year, the government established a national steering committee to study different aspects to establish an Islamic bank in Malaysia. Based on the recommendations of the steering committee, the government enacted Islamic banking Act 1983. Subsequently, Bank Islam Malaysia, the first Islamic commercial bank in Malaysia was established in 1983 with the starting capital of 80 million ringgit.<sup>255</sup>

After the establishment of Bank Islam Malaysia Berhad, it was the sole Islamic bank in Malaysia for a decade. Within this time, it proved that Islamic banking was a feasible financial institution in the Malaysian financial system. Moreover, it spread rapidly throughout the country by having 80 branches and 1,200 employees after a decade of its establishment. On 17 January 1992, Bank Islam Malaysia Berhad was listed on the main board of the Kuala Lumpur stock exchange.<sup>256</sup> Additionally, to make the Islamic banking operation more efficient, the government established Islamic money market in 1994.<sup>257</sup>

### **3.2.1.3. The Third Stage**

The progress of Bank Islam Malaysia Berhad inspired others to join Islamic banking. Moreover, the government of Malaysia realised that a large number of players were necessary for the survival of the Islamic finance industry. Therefore, the government allowed the conventional banks to open “interest free banking scheme” which has become

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<sup>255</sup> Nakagawa, “The evolution of Islamic finance in Southeast Asia,” 117; Mohamad Akram Laldin, “Islamic financial system,” 223; Sulaiman Abdullah Saif Al Nasser and Jorah Muhammed, “Introduction to history,” 82-83; Daromir Rudnycky, “From Wall Street to Halal Street: Malaysia and the Globalization of Islamic Finance,” *The Journal of Asian Studies* 72, no. 4, (2013), 840.

<sup>256</sup> *Ibid.*

<sup>257</sup> Mansor H. Ibrahim and Raditya Sukmana, “Dynamics of Islamic Financing in Malaysia: Causality and Innovation Accounting,” *Journal of Asia-Pacific Business* 12, no. 1 (2011), 6.



known as Islamic windows. Because of this initiative, the number of banks offering Islamic banking services grew rapidly. At the end of 1998, 48 conventional financial institutions offered Islamic banking services with 2,382 Islamic counters. After that, the second full-fledged Islamic bank namely “Bank Muamalat Malaysia Berhad” was established in 1999. Bank Muamalat Malaysia Berhad was established because of the merger between Bank Bumiputra Malaysia Berhad and Bank of Commerce (Malaysia) Berhad.<sup>258</sup>

#### **3.2.1.4. The Fourth Stage of Development**

Nakagawa mentioned that the Asian currency crisis of 1997 was a notable factor that contributed to the development of Islamic banking in Malaysia. After the crisis, the government planned to develop a more robust financial industry. In 2001, BNM came up with “Financial Sector Master Plan” that consisted of a number of policies to develop the industry. It was among the policies to set target for Islamic banking to achieve 20% share in the total banking industry by the year 2010. To achieve this target, BNM set individual targets for every year.<sup>259</sup>

As a process to expand the industry, BNM allowed three foreign Islamic banks to operate their business in Malaysia in 2004. The three foreign banks are namely Al-Rajhi Banking and Investment Corporation (Malaysia) Berhad, Kuwait Finance House (Malaysia) Berhad, and Asian Finance Bank Berhad. Moreover, in 2005 BNM allowed domestic conventional banks to get a full-fledged Islamic banking license. Consequently, a few renowned conventional banks launched full-fledged Islamic banking.<sup>260</sup> In 2006,

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<sup>258</sup> Nakagawa, “The Evolution of Islamic Finance,” 117; Mohamad Akram Laldin, “Islamic financial system,” 223; Sulaiman Abdullah Saif Al Nasser and Jorah Muhammed, “Introduction to history,” 82-83; Rudnyckyj, “From Wall Street to Halal Street,” 41.

<sup>259</sup> Nakagawa, “The Evolution of Islamic Finance”, 117-118.

<sup>260</sup> *Ibid.*

the government initiated a set of tax exemptions and incentives for the Islamic finance industry.<sup>261</sup>

### **3.2.2. Development of *Takāful* and the Islamic Capital Market**

Together with the development of Islamic banking institutions, Islamic insurance and the Islamic capital market also grew. Islamic insurance, known as *takāful* in Malaysia was introduced in 1985 to meet the needs of the people. In 1990, Shell MDS Sdn. Bhd. introduced the first Islamic bond in the country. Subsequently, the first full-fledged Islamic stock broking company namely BIMB Securities Sdn. Bhd. was established in 1994. In 1996, the Malaysian security commission established a *Sharī'ah* advisory council to advise them on *Sharī'ah* related matters. In the following year, the *Sharī'ah* advisory council published the list of *Sharī'ah* approved securities among the listed securities in Kuala Lumpur stock exchange. Finally, the foremost development of Islamic capital market was done when Islamic equity index namely “KLSE Shariah Index” was initiated in 1999.<sup>262</sup>

### **3.2.3. The Recent Growth of Islamic Banking**

In 2011, total Islamic banking assets was 21.6% of the total banking asset in Malaysia that crossed the government target to achieve 20% market share through its financial sector master plan.<sup>263</sup> From 2008 to 2011, the growth rate of Islamic banking was 23%.<sup>264</sup> On January 2013, the total deposit of Islamic banking was more than MYR 311.384 billion. At the same time, the total asset was more than MYR 386.682 billion while capital

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<sup>261</sup> Krasicka and Nowak, “What’s in it for Me?”. 5.

<sup>262</sup> Mohamad Akram Laldin, “Islamic financial system,” 227-231; Sulaiman Abdullah Saif Al Nasser and Jorlah Muhammed, “Introduction to history,” 84; Krasicka and Nowak, “What’s in it for Me?”, 5.

<sup>263</sup> Krasicka and Nowak, “What’s in It for Me?”, 4.

<sup>264</sup> Kanika Saigal, “International Test for Malaysia’s Islamic Ambition,” *Euromoney*, September 2012, 21.

and reserve was MYR 26.963 billion. Simultaneously, the total financing facilities provided by the Islamic banks was more than MYR 238.909 billion.<sup>265</sup>

There were 16 Islamic banking institutions in Malaysia licensed under BNM until 2013. Among these banks, 10 are locally owned and the rest six have foreign owners. The locally owned banks are:<sup>266</sup>

- i. Affin Islamic Bank Berhad
- ii. Alliance Islamic Bank Berhad
- iii. AmIslamic Bank Berhad
- iv. Bank Islam Malaysia Berhad
- v. Bank Muamalat Malaysia Berhad
- vi. CIMB Islamic Bank Berhad
- vii. Hong Leong Islamic Bank Berhad
- viii. Maybank Islamic Berhad
- ix. Public Islamic Bank Berhad
- x. RHB Islamic Bank Berhad

The six foreign owned Islamic banks are:<sup>267</sup>

- i. Al Rajhi Banking & Investment Corporation (Malaysia) Berhad
- ii. Asian Finance Bank Berhad
- iii. Standard Chartered Saadiq Berhad
- iv. OCBC Al-Amin Bank Berhad
- v. HSBC Amanah Malaysia Berhad
- vi. Kuwait Finance House (Malaysia) Berhad

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<sup>265</sup> Bank Negara Malaysia, *Monthly statistical bulletin*, January 2013, 24.

<sup>266</sup> Bank Negara Malaysia, "List of Licensed Banking Institutions in Malaysia," *Bank Negara Malaysia* website, retrieved on 14 January 2013, <http://www.bnm.gov.my/index.php?ch=li&cat=islamic&type=IB&fund=0&cu=0>

<sup>267</sup> *Ibid.*

### 3.2.4. A Brief Synopsis of Islamic Banking Products

Malaysian Islamic banks offer various types of products to its customer to compete with their conventional counterparts. On the deposit side, Islamic banks in Malaysia usually offer (a) current account, (b) savings account, and (c) commodity *murābaḥah* account which are designed based on respectively *wadī'ah yad al-ḍamānah*, *mudharabah*, and *tawarruq*. Besides, there is a general/special investment account based on *muḍārabah*.<sup>268</sup>

On the financing side, Malaysian Islamic banks normally offer (a) cash line facility based on *bay' al-ṭinah* and *bay' bithaman ājil/murābaḥah*; (b) home financing based on *bay' bithaman ājil/mushārah mutanāqishah/tawarruq*; (c) car financing based on *al-ijārah thumma al-bay'/bay' bithaman ājil*; and (d) personal financing based on *bay' al-ṭinah/bay' bithaman ājil/murābaḥah*.<sup>269</sup>

In addition, there are some fee-based products namely (a) accepted bills based on *murābaḥah* and *bay' al-dayn*, (b) bank guarantee based on *kafālah*, (c) letter of credit based on *wakālah*, *murābaḥah*, *ijārah* and *bay' bithaman ājil*. Moreover, Islamic debit, credit, and charge cards are provided to the customers using the *Sharī'ah* concept of *qard/bay' al-ṭinah/bay' bithaman ājil/ujrah*. Finally, there are some treasury products which are structured based on *bay' al-ṣarf*, *wa'd*, and *murābaḥah*.<sup>270</sup>

### 3.2.5. Regulation and Governance

Along with meeting the *Sharī'ah* rulings, Islamic banking in Malaysia is required to follow the conventional regulatory framework that is practiced in all conventional banks. They are required to observe the guidelines related to capital adequacy, risk-based supervision, and improve financial disclosure standards and governance. International

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<sup>268</sup> Bank Negara Malaysia, *Monthly statistical bulletin*, 37; Nakagawa, "The Evolution of Islamic Finance," 119-120; Mohamad Akram Laldin, "Islamic financial system", 229; Bank Negara Malaysia, "Islamic banking", *Bank Negara Malaysia* website, retrieved on 13 Jan 2014, <http://www.bnm.gov.my/index.php?ch=174&pg=467&ac=370>

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.*

prudential standards i.e. safeguarding depositors' money through balancing the risk profile of bank portfolio with capital required to maintain for financing operations, Basel II and its three pillars of capital adequacy, supervisory review and market discipline etc. are completely imposed on Islamic banks.<sup>271</sup>

Islamic banks in Malaysia initially followed the Banking & Financial Institutions Act, 1989 (BAFIA). This act covers all conventional and Islamic financial institutions in Malaysia. At the same time, there is a specific Act for Islamic banking institutions called the Islamic Banking Act (IBA) 1983. This Act provides the basic laws for the operation of Islamic banks. In case the IBA contradicts with BAFIA then the previous one prevails. On 30 June 2013, the government of Malaysia enacted Financial Services Act 2013 (FSA) and Islamic Financial Services Act 2013 (IFSA). FSA and IFSA combine the BAFIA and IBA 1983. IFSA includes a complete legal framework which is wholly compliant with the *Shari'ah* in terms of regulation and supervision from licensing to the end of an institution.<sup>272</sup>

#### **3.2.5.1. Bank Negara Malaysia (BNM)**

Bank Negara Malaysia (BNM) is the central bank of Malaysia. It regulates and supervises the operation of both the Islamic and conventional banks. It was established in 1959 under the Central Bank of Malaysia Act 1958 (revised 1994). BNM dynamically takes part in promoting Islamic banking nationally and globally.<sup>273</sup> It provides necessary guidelines for the operation of Islamic banks. In 2011, BNM has issued the *Shari'ah* governance

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<sup>271</sup> Mohamed Ariff and Saiful Azhar Rosly, "Islamic Banking in Malaysia," 305.

<sup>272</sup> Venardos, *Islamic banking and finance*, 157; Chong and Liu, "Islamic banking," 130; Bank Negara Malaysia, "Financial Services Act 2013 and Islamic Financial Services Act 2013 Come Into Force", *Bank Negara Malaysia* website, retrieved on 13 Jan 2014, [http://www.bnm.gov.my/index.php?ch=en\\_press&pg=en\\_press\\_all&ac=2837](http://www.bnm.gov.my/index.php?ch=en_press&pg=en_press_all&ac=2837)

<sup>273</sup> Mohamed Hisham Yahya, Junaina Muhammad and Abdul Razak Abdul Hadi, "A Comparative Study on the Level of Efficiency between Islamic and Conventional Banking Systems in Malaysia," *International Journal of Islamic and Middle Eastern Finance and Management* 5, no. 1 (2012), 49; Hassanudin Din, *Islamic Banking and Finance (IBF): Development and it's Future Challenges in Malaysia* (Saarbrücken: Lap Lambert Academic Publishing, 2012), 58.

framework (SGF) for Islamic financial institutions (IFIs) to develop the role of the board, *Sharī'ah* committee and management pertaining to the *Sharī'ah* issues, and to develop the primary sections involved with *Sharī'ah* compliance and research. This SGF describes the functions of *Sharī'ah* review, *Sharī'ah* audit, *Sharī'ah* risk management and *Sharī'ah* research.<sup>274</sup>

### **3.2.5.2. *Sharī'ah* Advisory Council (SAC)**

The *Sharī'ah* advisory council (SAC) of BNM is the highest authority to determine *Sharī'ah* laws to resolve a *Sharī'ah* issue in Islamic banking business. It is established under section 51 of the Central Bank of Malaysia Act 2009. SAC is responsible to advise BNM as well as Islamic banks on any *Sharī'ah* issues pertaining to Islamic financial activities. Apart from SAC, every Islamic bank in Malaysia has its own *Sharī'ah* committee (SC). The SC determines the *Sharī'ah* rulings for any Islamic banking products and supervises the overall operation of the bank. It assists any related party e.g. legal counsel, auditor, on *Sharī'ah* matter upon request.<sup>275</sup>

### **3.2.6. Contemporary Infrastructure Development**

In the recent past, the Malaysian government has provided strong support to develop Islamic finance. In this regard, different institutions and organisations were established to provide a strong infrastructure for the Islamic banking industry. To make Malaysia an international hub for Islamic finance, the government established the Malaysian Islamic Financial Centre (MIFC) which provides regular updates of Islamic finance in Malaysia. Moreover, Malaysia hosts the Islamic Financial Services Board (IFSB) and the

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<sup>274</sup> Bank Negara Malaysia, "Shariah Governance Framework for Islamic Financial Institutions," *Bank Negara Malaysia* website, retrieved on 6 May 2015, [http://www.bnm.gov.my/guidelines/05\\_shariah/02\\_Shariah\\_Governance\\_Framework\\_20101026.pdf](http://www.bnm.gov.my/guidelines/05_shariah/02_Shariah_Governance_Framework_20101026.pdf).

<sup>275</sup> Venardos, *Islamic banking and finance*, 157; Rudnycky, "From Wall Street to Halal Street," 42; Bank Negara Malaysia, "Guidelines on the Governance of Shariah Committee for the Islamic Financial Institutions," *Bank Negara Malaysia* website, retrieved on 10 June 2015, [http://www.bnm.gov.my/guidelines/01\\_banking/04\\_prudential\\_stds/23\\_gps.pdf](http://www.bnm.gov.my/guidelines/01_banking/04_prudential_stds/23_gps.pdf)

International Islamic Liquidity Management Centre (IILMC). For the development of human capital in Islamic finance, the International Centre for Education in Islamic Finance (INCEIF) has been established. INCEIF is a global university that is fully dedicated to offer only Islamic finance courses at the postgraduate level. The International Shari‘ah Research Academy for Islamic Finance (ISRA) and the Islamic Banking and Finance Institute Malaysia (IBFIM) have been founded to enhance research and training in Islamic finance.<sup>276</sup>

### **3.2.7. Islamic Banking Efficiency**

Mokhtar et al. examined the efficiency of full-fledged Islamic banks, Islamic windows, and conventional banks in Malaysia from 1997 to 2003. The study found that the efficiency of the Islamic banking industry increased during the study period but the efficiency of conventional banking industry remained the same. Nevertheless, the efficiency of Islamic banking is lesser than conventional banking. The study discovered that the efficiency of full-fledged Islamic banks is higher than the Islamic windows. In addition, Islamic windows of foreign banks are more efficient than the Islamic windows of local banks.<sup>277</sup>

On the other hand, Mohamed Hisham Yahya et al. concluded that although Islamic banking in Malaysia is confined by the Islamic laws in their operations but they are capable of performing the equivalent to its conventional counterpart. There is no substantial disparity in the level of efficiency between Islamic and conventional banks.<sup>278</sup>

ElGindi et al. investigated the performance of eight banks in Malaysia that offer both Islamic and conventional banking services. The comparison is made on the

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<sup>276</sup> Mohamad Zaid Mohd Zin et al., “Growth and Prospect of Islamic Finance in Malaysia,” 182; “The Malaysian Model”, *Global Islamic Finance Report*, March 2011, 164-165; Mohamed Ariff and Saiful Azhar Rosly, “Islamic Banking in Malaysia,” 302; Rudnycky, “From Wall Street to Halal Street,” 43.

<sup>277</sup> Hamim S. Ahmad Mokhtar, Naziruddin Abdullah and Syed M. Alhabshi, “Efficiency of Islamic Banking in Malaysia: a Stochastic Frontier Approach,” *Journal of Economic Co-operation* 27, no. 2 (2006), 37.

<sup>278</sup> Mohamed Hisham Yahya et al., “A comparative study on the level of efficiency”, 48.

profitability, liquidity, and asset quality of the banks. This micro-level analysis revealed that Islamic financing modes may become equal or exceed the quantitative measures of performance while at the same time supporting social justice and economic stability.<sup>279</sup> Therefore, it can be concluded that Islamic banking in Malaysia has either similar or better efficiency compared with its conventional counterpart.

### **3.3. The Legal Status of *Wa'd* in the Civil Laws of Malaysia**

Since Islamic financial cases fall under the jurisdiction of the civil court of Malaysia, it is necessary to understand the legal status of *wa'd* in Malaysian law. This will assist in determining whether the *Sharī'ah* concept of *wa'd* is viable with the law of the country. This section analyses the Malaysian Contracts Act 1950 and discusses the initiatives taken by the law harmonisation committee and BNM to reduce the gap between *Sharī'ah* law and civil law with reference to Islamic financial matters.

#### **3.3.1. The Contracts Act 1950**

In Malaysia, the Contracts Act 1950 defines the promise in section 2 (b) as:

When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise.<sup>280</sup>

This means that a promise is made of proposal and acceptance. When one party gives his proposal and the other party accepts, it becomes a promise. Therefore, a proposal should be accepted by the promisee to become a promise.

A proposal is defined in section 2 (a) as:

When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal.<sup>281</sup>

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<sup>279</sup> Tamer Elgindi, Mona Said and John William Salevurakis, "Islamic Alternatives to Purely Capitalist Modes of Finance: A Study of Malaysian Banks from 1999 to 2006," *Review of Radical Political Economics* 41, no. 4 (Fall 2009), 516.

<sup>280</sup> Contracts Act (Malaysia), 1950, (Act No. 136, 1950).

<sup>281</sup> *Ibid.*



It appears that the concept of “proposal” in the Contracts Act resembles *wa’d* concept in the *Shari’ah*. However, the Contracts Act requires “acceptance” of the “proposal” by the other party to become a promise.

In addition, section 2 (c) of the Contracts Act 1950 defines the promisor and the promisee as “the person making the proposal is called the “promisor” and the person accepting the proposal is called the “promisee”.<sup>282</sup> Thus, it becomes clear that the party who offers to perform an act or to abstain from doing anything is in fact giving a *wa’d*.

According to the Contracts Act, a promise is binding when the promisee accepts the proposal of the promisor. When a promise becomes binding, the parties are obliged to perform according to their promise. If any one of the parties fails to honour his promise then it is considered a breach of the contract. Section 38 (1) of the Contracts Act mentions:

The parties to a contract must either perform, or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act, or of any other law.<sup>283</sup>

It can be understood here that a promise is binding on the promisor in the Contract Act 1950 whenever the promisee accepts the proposal of the promisor.

Moreover, when there is a breach in the promise, the innocent party should be compensated. Section 74 (1) of the act states:

When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.<sup>284</sup>

The promisee can sue the promisor if the promisor does not fulfil his promise and receive compensation for the loss incurred.

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<sup>282</sup> Contracts Act (Malaysia), 1950, (Act No. 136, 1950).

<sup>283</sup> *Ibid.*

<sup>284</sup> *Ibid.*

Regarding the “acceptance” of the “proposal”, it can be done through performing an action, abstinence, or promising to act something, or to abstain from something. This can be termed “consideration”. Section 2 (d) of the act mentions:

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.<sup>285</sup>

This means that when there is a “consideration” from the promisee then he has actually accepted the proposal of the promisor. In relation to this, section 8 of the Act cites “Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.”<sup>286</sup> Therefore, a promise is binding on the promisor when the promisee performs the conditions of the proposal or receives a consideration. Therefore, it is not always necessary for the promisee to use verbal expression to accept the promise.

Based on the discussion above, there is a gap between *wa‘d* and the Contracts Act 1950. Firstly, the act does not explicitly mention *wa‘d*. If we consider the “proposal” as *wa‘d*, then there is a difference between them. In the Contracts Act, when the “proposal” is accepted by the promisee then it becomes a promise and enforceable in the court. On the other hand, in case of *wa‘d* the acceptance by the promisee is not required. It appears that according to the Contracts Act, a promise is as good as a contract.

However, looking into the opinion of the *Mālikī* scholars on *wa‘d*, it can be argued that there is somehow similarity between *wa‘d* and the concept of promise in the Contracts Act. According to the *Mālikī* school of jurisprudence, *wa‘d* is binding on the promisor if the *wa‘d* is attached to a cause (*sabab*) and the promisee has started to perform an action relying upon that *wa‘d*.<sup>287</sup> In a similar manner, in the Contracts Act, a promise

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<sup>285</sup> Contracts Act (Malaysia), 1950, (Act No. 136, 1950).

<sup>286</sup> *Ibid.*

<sup>287</sup> Al-Aṣḥabī, *Al-Mudawwanah*, 3:270; Ibn Rushd, *Al-Bayān wa al-Taḥṣīl*, 15:343; Ibn ‘Alīsh, *Fatḥ al-‘Aliyy al-Mālik*, 1: 306-307.

can be binding on the promisor when the promisee has started an action or abstained from an action relying upon that promise.

Then again, there might be some difficulties in implementing the *Sharī'ah* principles for *wa'd* through the existing Contracts Act. This chapter provides the researcher's generic comparison between *wa'd* and the Contracts Act. However, chapter six provides a detailed discussion on the challenges in practicing the *Sharī'ah* principles for *wa'd* through the existing Contract Act with reference to the experts' opinions on this field.

### **3.3.2. The Law Harmonisation Committee's Initiative**

In 2010, BNM pronounced the establishment of the law harmonisation committee (LHC). The LHC is established to strengthen the legal system and infrastructure for the development of Islamic finance in Malaysia. This committee aims at building a favourable legal system that supports the development of Islamic finance industry. Moreover, its objective is to provide certainty and enforceability for Islamic financial contract in the Malaysian Laws. The committee endeavours to place Malaysia as a reference law for international Islamic financial transactions and settlement of disputes. Chaired by Abdul Hamid Mohamad, former Chief Justice of Malaysia, the committee consists of members from industry experts, *Sharī'ah* scholars, and legal experts.<sup>288</sup>

Considering the gap between the *Sharī'ah* concept of *wa'd* and the promise concept in the Contracts Act 1950, the LHC has included *wa'd* into their harmonisation initiatives. In 2013, the committee has included the *wa'd* among the issues that require further research. It stated that an assessment from the *Sharī'ah* perspective on the

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<sup>288</sup> Bank Negara Malaysia, *Law Harmonisation Committee Report 2013* (Kuala Lumpur: Bank Negara Malaysia, 2013), 5-9; Bank Negara Malaysia, "Law Harmonisation Committee", *Bank Negara Malaysia* website, retrieved on 10 June 2015, <http://www.bnm.gov.my/index.php?ch=260&pg=830&ac=861>

enforceability and binding nature of *wa'd*, *muwā'adah* and *wa'dān* is needed prior to any substantive amendments is made to the Contracts Act 1950.<sup>289</sup>

### 3.3.3. The Bank Negara Malaysia (BNM)'s Guideline

On December 2013, BNM published an exposure draft on the guidelines for the practice of *wa'd*. The exposure draft stated that it comprises the *Sharī'ah* obligations and optional practices pertaining to *wa'd* to assist IFIs in developing Islamic financial services and products involving the element of *wa'd*. It seeks suggestions and comments from IFIs to strengthen this guideline on *wa'd*. Sometime later, this guideline will be applicable on the IFIs. This document is issued according the section 29 (1) of the Islamic Financial Services Act 2013 (IFSA) which gives BNM the authority to issue guidelines for Islamic financial contracts.<sup>290</sup>

The exposure draft provides parameters for *wa'd* and its application. In section 8.1, it states that *wa'd* is not a contract and it is not an agreement either, rather it is an unilateral promise which is not usually binding. However, in section 8.2 it mentions that *wa'd* can be binding on the promisor if it fulfils some specific requirements. Unlike the contracts act 1950, the section 8.3 cites that *wa'd* will be binding upon the expression of the promisor but not by the acceptance of the promisee.<sup>291</sup>

In relation to the bindingness of *wa'd*, the section 11.1 describes that a *wa'd* shall be binding on the promisor if it is attached to a specific reason or occasion and the promisee will undergo expenses by action or abstaining from action depending on that *wa'd*. When the promisor has breached the binding *wa'd*, then the promisee can ask for compensation for the actual loss mentioned in section 12.4 of the draft.<sup>292</sup>

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<sup>289</sup> Bank Negara Malaysia, *Law Harmonisation Committee Report 2013*, 59.

<sup>290</sup> Bank Negara Malaysia, "Exposure Draft Wa'd (Shariah Requirements & Optional Practices)," *Bank Negara Malaysia* website, retrieved on 23 Jan 2014, [http://www.bnm.gov.my/index.php?ch=en\\_announcement&pg=en\\_announcement\\_all&ac=269](http://www.bnm.gov.my/index.php?ch=en_announcement&pg=en_announcement_all&ac=269)

<sup>291</sup> *Ibid.*, 4.

<sup>292</sup> Bank Negara Malaysia, "Exposure Draft Wa'd," 6-7.

In section 13.6, the exposure draft mentions that it is allowed to use *wa'd* but not a binding *muwā'adah* to conclude a *ṣarf* contract. However, it is not allowed to take fees for a *wa'd* mentioned in section 11.2. Along with this, sections 13.7 and 13.8 affirm that it is allowed for the *muḍārib/mushārik* to make a *wa'd* to purchase the underlying *muḍārabah/mushārah* venture upon maturity, suspension or in the case of default, with the condition that the price should be determined based on the market value but not the face value.<sup>293</sup>

### **3.3.4. The Central Bank of Malaysia Act 2009**

The Central Bank of Malaysia Act 2009 has given the SAC highest authority to decide on any *Sharī'ah* case. Section 56 of the act mentions that if any Islamic financial case arises to the court, the judge should either see the published rulings of SAC on that matter or refer to SAC for its ruling. Afterward, section 57 mentions that SAC's ruling in relation to the said issue should be binding on the court and the financial institution.<sup>294</sup> Even though the Contracts Act 1950 does not explicitly recognise *wa'd*, it is possible to implement the *Sharī'ah* ruling for *wa'd* in Malaysian courts through the resolutions issued by SAC.

### **3.4. *Wa'd*-Based Products in the Islamic Banks of Malaysia**

This section discusses the *wa'd*-based products in the three sampled Islamic banks in Malaysia MIB, KFHMB, and BIMB. All the three banks practice *wa'd* as binding on the promisor. The usage of *wa'd* in Islamic banking products has been divided into three categories which are (1) consumer banking products, (2) trade financing products, and (3) treasury products. The table below provides an overview of the *wa'd*-based products in these three Malaysian banks.

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<sup>293</sup> Bank Negara Malaysia, "*Exposure Draft Wa'd*," 8.

<sup>294</sup> Central Bank of Malaysia Act (Malaysia), 2009, (Act No. 701, 2009).

Table 3.1 Overview of *Wa'd*-Based Products in Malaysian Islamic Banks

No.	Name of the Product	Type of Product	The Practicing Bank		
			MIB	KFHMB	BIMB
1	<i>Mushārah Mutanāqīshah</i> (MM) home and property financing	Consumer	√	√	×
2	<i>Al-Ijārah Thumma Al-Bay'</i> (AITAB) vehicle financing	Consumer	√	√	×
3	<i>Murābahah</i> home financing	Consumer	×	√	×
4	<i>Tawarruq/commodity Murābahah</i> home financing	Consumer	√	×	√
5	<i>Murābahah</i> letter of credit	Trade Financing	√	√	√
6	Islamic FX forward	Treasury	√	√	√
7	Islamic Profit Rate Swap (IPRS)	Treasury	√	×	√
8	Islamic Cross Currency Swap (ICCS)	Treasury	√	×	√
9	<i>Ijārah</i> Rental Swap (IRS)	Treasury	×	√	×

Source: Interview with the Bankers

Among the consumer banking products, MIB and KFHMB apply *wa'd* in MM home and property financing as well as AITAB vehicle financing. On the other hand, BIMB and MIB offer *tawarruq/commodity murābahah* home financing based on *wa'd*. Among the three banks, only KFHMB offers *wa'd*-based *murābahah* home financing. Concerning trade-financing products, all the three banks offer *murābahah* letter of credit based on *wa'd*. Finally, among the treasury products Islamic FX forward is common among the three banks. However, MIB and BIMB offers IPRS and ICCS while KFHMB uniquely offers IRS.

Among these three banks, MIB applies *wa'd* in the highest number of products. On the other hand, BIMB employs *wa'd* in the least number of products. BIMB has only one *wa'd*-based product in consumer banking products. Generally, *wa'd* is most frequently used in treasury products comparing with the consumer banking products. The feature of using *wa'd* differs from product to product. While some products involve plain

*wa'd*, others include more than one *wa'd*. The details on the practice of *wa'd* in each of these products is discussed in the following sections.

### **3.4.1. Consumer Banking Products**

In consumer banking products, *wa'd* is used mostly in financing products. On the other hand, no *wa'd* element is found in the deposit products. There are four consumer banking products where *wa'd* is employed, namely (1) *mushārah mutanāqishah* (MM) home and property financing, (2) *al-ijārah thumma al-bay'* (AITAB) vehicle financing, (3) *murābahah* home financing, and (4) *tawarruq/commodity murābahah* home financing. The following section illustrates the mechanism of using *wa'd* in these consumer financing products.

#### **3.4.1.1. *Mushārah Mutanāqishah* (MM) Home and Property Financing**

*Mushārah mutanāqishah* is an Arabic term which means diminishing partnership.

KFHMB defined it as:

Diminishing *musyarakah* allows equity participation and sharing of profits in a pre-agreed ratio, and the losses to be borne by the partners according to capital contribution ratio. This provides a method through which the bank keeps on reducing its equity in the asset, ultimately transferring ownership of the asset to the partner.<sup>295</sup>

This means that the bank and the customer co-own a property. The customer then gradually purchases the bank's share in the property. At the end of the contract, the customer becomes the sole owner of the property.

In practice, the customer usually provides a small portion of the capital, for example, 10%, and the bank provides a large portion of the capital, for example, 90%, to co-purchase the house from the developer. After that, the bank leases out its share of the property to the customer. The monthly instalment paid to the bank consists of a rental

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<sup>295</sup> Kuwait Finance House (Malaysia) Berhad, *Product Guide: Retail and Consumer Banking* (Kuala Lumpur: Kuwait Finance House (Malaysia) Berhad, n.d.), 7.

payment and a capital repayment to the bank. The figure below describes the modus operandi of MM home and property financing.

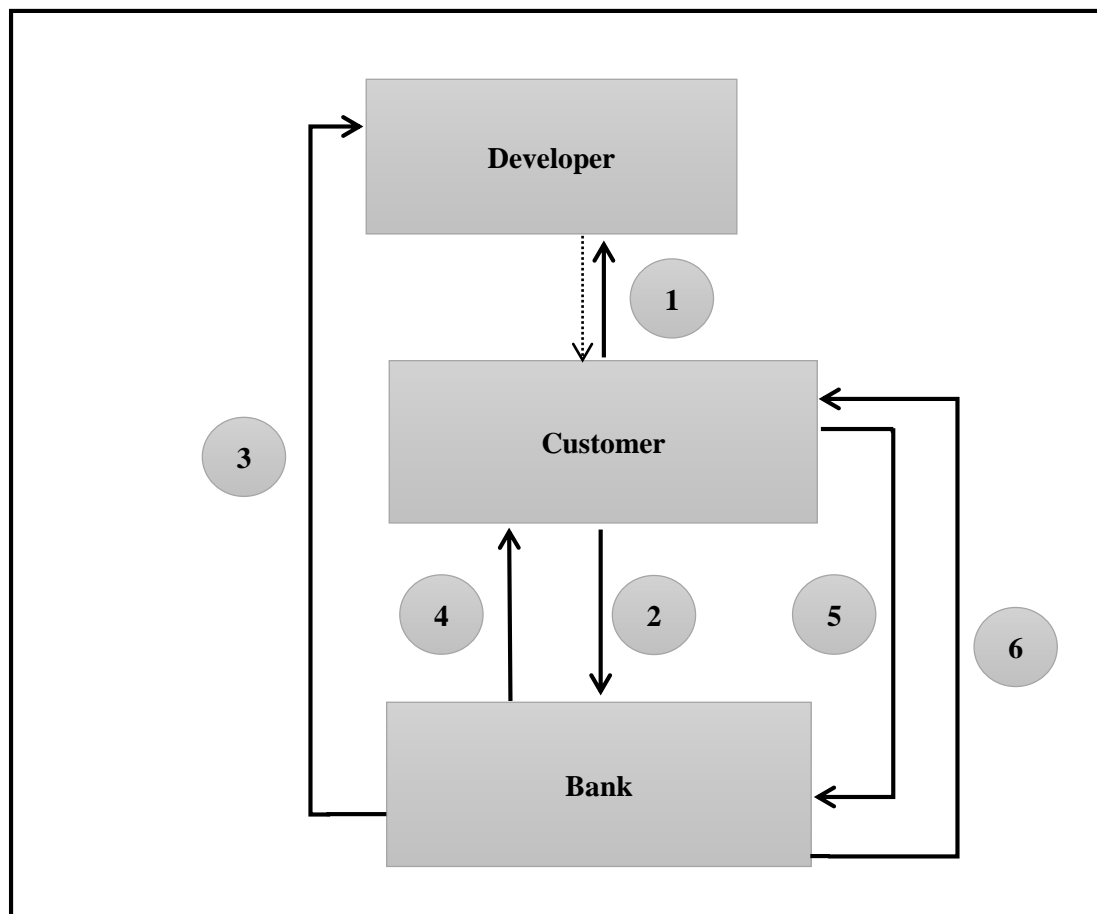


Figure 3.1 *Musharakah Mutanāqishah* Home and Property Financing  
Source: Interview with the Bankers

Operational Steps:<sup>296</sup>

- (1) Customer identifies the property and pays a deposit to developer and developer signs S&P agreement with the customer.
- (2) Customer approaches the bank for MM financing facility. Once approved, the customer makes MM co-ownership agreement with the bank and promises to gradually purchase the bank's share of the property. The initial deposit paid by

<sup>296</sup> Ezry Fahmy bin Eddy Yusof (Executive, Shariah Management Department, Maybank Islamic Berhad), interview with the researcher, 13 November 2013; Ahmad Suhaimi Yahya (Regional Head of Shariah, Kuwait Finance House (Malaysia) Berhad), interview with the researcher, 11 November 2013; Muhd Ramadhan Fitri bin Ellias (Vice President and Head of Shariah Management Department, Maybank Islamic Berhad), interview with the researcher, 13 November 2013; Kuwait Finance House (Malaysia) Berhad, *Product Guide*, 7.



the customer to the developer is considered as his contribution towards the MM agreement while the bank's contribution is the remaining financing amount.

- (3) Bank pays the remaining S&P price to the developer.
- (4) After acquiring the property, bank leases out (*ijārah*) its respective portion of the property to the customer.
- (5) Customer makes a monthly payment to the bank, which consists of the rental payment and the gradual purchase price of the bank's equity.
- (6) Co-ownership comes to an end upon full payment for the acquisition of the property by the customer. The bank transfers property to the customer.

There are several *wa'd* applied in the above structure of MM home and property financing. In the case of KFHMB, the first *wa'd* is from the customer to the bank. The customer promises to gradually purchase the bank's share. The second *wa'd* is from the bank to the customer in case the customer wants to make an early settlement. The bank promises that it will sell its share to the customer whenever the customer wishes for an early settlement. This *wa'd* is there to protect the interests of the customer if the property price suddenly increases.<sup>297</sup>

KFHMB employs another *wa'd* which is given by the customer to the bank. This *wa'd* is to protect the interests of the bank in the event of default. The customer is required to promise that upon triggering the event of default, he will purchase the property from the bank. This is clearly stated in the purchase-undertaking document. This *wa'd* is made to allow the bank to recover its loss in the event of default. Because of this *wa'd*, when there is an event of default, the bank will ask the customer to purchase the bank's portion of the property. If the customer does not purchase the property from the bank, the bank has the option to sell the property on the market to recover its loss. After the property is sold, the bank will recover the price of its share in the property. However, if the bank

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<sup>297</sup> Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013.

incurs a loss after selling the property on the market, then the customer is required to pay the bank so that it can recover its loss.<sup>298</sup>

In the case of MIB, the second *wa'd* is not practiced. There are two *wa'd* in MIB where the promisor in both cases is the customer. Therefore, there is no doubt of *muwā'adah* in MIB's practice of MM home and property financing.<sup>299</sup> In the case of KFHMB, there are three *wa'd*. The customer gives two *wa'd* and one *wa'd* is given by the bank. However, these three *wa'd* are separate from each other and relate to different conditions. The first *wa'd* which is given by the customer is related to normal cases. The second *wa'd* which is given by the bank is related to a specific situation when the customer asks for an early settlement. Finally, the third *wa'd* is related to a situation when there is a default.<sup>300</sup> Therefore, KFHMB's practice of *wa'd* may fall under the concept of *wa'dān*.

The contemporary application of *wa'd* in MM home and property financing is different from the previous findings. Nor Adila Mohd Noor and Mohd Ashraf Aripin showed that in MM there is only one *wa'd* from the bank to sell its share to the customer.<sup>301</sup> On the other hand, Mohd Sollehudin Shuib et al. showed that there is only one *wa'd* from the customer to purchase the bank's share in the property.<sup>302</sup> The reason for this difference in findings is that Islamic banking in Malaysia is continuously developing its product structures and features. Moreover, Nor Adila Mohd Noor and Mohd Ashraf Aripin did not provide enough information on the application of *wa'd* in MM financing. In addition, the study by Mohd Sollehudin Shuib et al. was not specifically

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<sup>298</sup> Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.

<sup>299</sup> Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.

<sup>300</sup> Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.

<sup>301</sup> Nor Adila Mohd Noor and Mohd Ashraf Aripin, "Mechanism of al-Wa'ad (Promise)," 86.

<sup>302</sup> Mohd Sollehudin Shuib, Ahmad Azam Sulaiman Mohamad and Mohammad Taquiuddin Mohamad, "Middle East Bank and Their Challenge Operation in Malaysia: A Case Study on Kuwait Finance House Malaysia Berhad," *African Journal of Business Management* 5, no. 11, (June, 2011), 4003.

focused on *wa'd* in MM financing. Besides, different banks may apply *wa'd* in different ways. While some banks employ a number of *wa'd*, then others may use only one *wa'd*.

### 3.4.1.2. *Al-Ijārah Thumma Al-Bay'* (AITAB) Vehicle Financing

*Al-Ijārah thumma al-bay'* means lease ending with sale. According to MIB:

AITAB is a leasing contract (*ijārah*) followed by sale contract (*al-Bai'*). Under the leasing contract, the customer leases the asset from the Bank at an agreed rental payment over a specific period. Upon expiry of the leasing period, the customer enters into a sale contract to purchase the asset from the Bank at an agreed price.<sup>303</sup>

There are two contracts in AITAB: lease and sale. These two contracts are distinct from each other. Upon the expiry of the lease period, the customer purchases the vehicle from the bank. Usually, either the bank or the customer will promise to sell or buy the vehicle at the end of the lease period. The figure below describes the steps in AITAB vehicle financing.

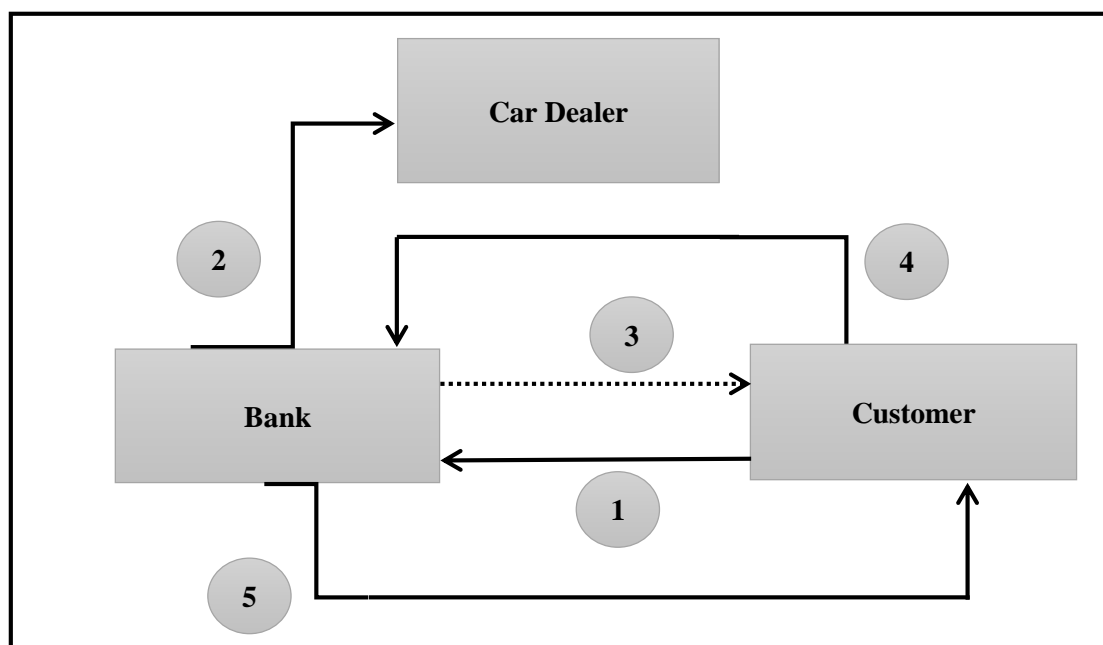


Figure 3.2 *Al-Ijārah Thumma Al-Bay'* (AITAB) vehicle financing

Source: Interview with the Bankers

<sup>303</sup> Maybank Islamic Berhad, “Al-Ijarah Thuma Al-Bai (AITAB)” (Product Disclosure Sheet, Kuala Lumpur, n.d.), 1.

#### Operational Steps:<sup>304</sup>

- (1) The client approaches the bank and requests vehicle financing with identifying the vehicle and the vendor.
- (2) The bank purchases the vehicle to be leased and obtains ownership from the dealer.
- (3) The bank leases the vehicle to the client.
- (4) The client makes a periodic payment (lease instalment) as per the contract.
- (5) The bank transfers ownership to the client at the end of the leasing period through a sale contract (or upon settlement by the customer).

In the case of KFHMB, there are two separate *wa'd* in the above product structure. One *wa'd* is from the customer and the other one is from the bank. Firstly, in normal circumstances, the bank promises to the customer to sell the vehicle at the time of maturity. Secondly, there is another *wa'd* by the customer in the event of default. It is called "purchase undertaking". The customer undertakes to purchase the leased vehicle upon triggering the event of default. Both of the *wa'd* are binding upon the related parties. The two *wa'd* are related to two different situations here. The bank's *wa'd* is related to the time of maturity. Secondly, the customer's *wa'd* is related to the time of default.<sup>305</sup> Therefore, it can be resolved that KFHMB practices *wa'dān* in this product.

In the case of MIB, there are also two *wa'd* but both are given by the customer in relation to two different situations. This *wa'd* is also binding on the customer. Firstly, the customer undertakes to purchase the leased vehicle at the end of the leased period. Secondly, the customer undertakes to purchase the leased vehicle in the event of default. In the case of MIB, the bank does not give any *wa'd* to the customer to sell the vehicle at

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<sup>304</sup> Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.

<sup>305</sup> Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013.

the end of the leased period. This is because the bank normally has no interest to retain the vehicle.<sup>306</sup>

Both in KFHMB and MIB, the second *wa'd* is employed to recover the bank's loss in the event of default. If the customer does not honour his *wa'd* at the time of default, then he is required to pay for the loss incurred to the bank due to his breach of *wa'd*. Due to this *wa'd*, the bank is able to sue the customer to cover its loss.

In light of the above discussion, it can be said that there are more *wa'd* developments and complications in this product than before. Previous studies show that there is only one *wa'd* either from the customer or from the bank to sell or purchase the vehicle at the end of the lease period.<sup>307</sup> However, currently, *wa'dān* is used to mitigate the bank's risk in the event of default and allow the bank to recover its loss at the time of default. This *wa'dān* helps the bank to follow better risk management practice for the benefit of the bank and the customer.

#### **3.4.1.3. *Murābahah* Home Financing**

*Murābahah* home financing is a classical type of home financing. It is called “*murābahah* to the purchase orderer”. Comparing with other types of home financing, *murābahah* home financing is very straightforward. In Malaysia, only KFHMB offers the *murābahah*-based home financing. *Murābahah* is defined by KFHMB as:

A contract of sale based on cost plus where the acquisition cost and the seller's profit margin are disclosed to the buyer at the time of the contract. The settlement of the price can be made on bullet or deferred payment terms.<sup>308</sup>

The bank will purchase the property first from the vendor and will then sell it to the customer on a profit determined beforehand with the customer.

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<sup>306</sup> Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.

<sup>307</sup> Nurdianawati Irwani Abdullah, “Status and implications of promise,” 91; Syeliya Md Zaini and Nosrah Mohd Isa, “The Application of Wa'd in Islamic Banking Contract,” *Malaysian Accounting Review* 10, no. 2, (2011) 38.

<sup>308</sup> Kuwait Finance House (Malaysia) Berhad, *Product Guide: Retail and Consumer Banking*, 5.

Disclosing the cost price of the property is an essential characteristic of *murābahah* financing. Usually, the customer gives *wa‘d* to the bank that he will purchase the specific property from the bank at a determined profit rate after the bank has purchased it from the vendor. Another important factor in *murābahah* is that the bank must take ownership of the property before selling it to the customer. The figure below illustrates the modus operandi of *murābahah* home financing.

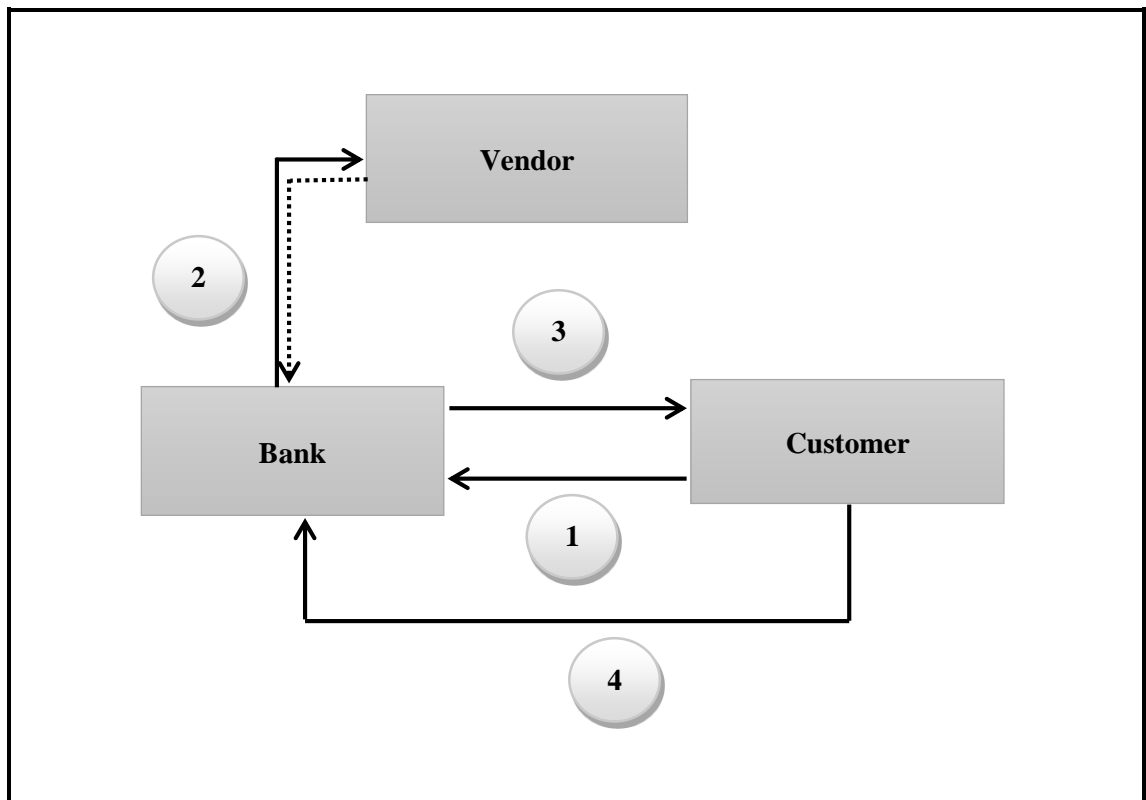


Figure 3.3 *Murābahah* Home Financing  
Source: Kuwait Finance House (Malaysia) Berhad

Operational Steps:<sup>309</sup>

- (1) Customer approaches the bank for financing of the property whereby the customer promises to purchase the property and pays the security deposit (if required) to the bank.

<sup>309</sup> Kuwait Finance House (Malaysia) Berhad, *Product Guide*, 51.

- (2) Based on the customer's promise, the bank will then purchase the property and pay the vendor at the cost price of the property (financing amount). At this point, the bank acquires the ownership right from the vendor.
- (3) The bank will sell the property to the customer at a higher marked-up price (selling price) comprising of the cost price and profit.
- (4) The customer pays the bank the selling price as agreed on either lump sum basis, instalment or bullet payment.

There is only one *wa'd* in *murābahah* home financing. Normally, the *wa'd* is from the customer. When the customer approaches the bank then the bank will approach the developer. Before the bank purchases the asset from the developer, it needs some comfort and the comfort is *wa'd*. The customer will sign "the undertaking to purchase" document which is binding on the customer.<sup>310</sup> Moreover, the customer is required to pay a security deposit while requesting the bank to purchase the property.<sup>311</sup> In case the customer does not honour his promise, the bank will use the security deposit to recover its loss. Such is the consequence of a binding *wa'd*.

In relation to the breach of *wa'd*, BNM rules that if the purchase orderer who promised to purchase the property declined the *murābahah* transaction after the bank had purchased the asset, he should be liable for the breach of *wa'd* and should compensate for the actual loss incurred by the bank for the disposal of the asset to another party.<sup>312</sup> All Islamic banks in Malaysia follow this guideline to recover their loss in *murābahah* financing whenever it is due to the clients' breach of *wa'd*.

In KFHMB, the feature of *wa'd* in *murābahah* is very simple and there is no *wa'dān* or *muwā'adah*. A similar practice of *wa'd* in *murābahah* is found in previous

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<sup>310</sup> Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013.

<sup>311</sup> Kuwait Finance House (Malaysia) Berhad, *Product Guide*, 51.

<sup>312</sup> Bank Negara Malaysia, "Draft of Shariah Parameters: Murabahah Parameter", *Bank Negara Malaysia* website, retrieved on 10 June 2015, <http://www.bnm.gov.my/documents/conceptpaper/MurabahahCP.pdf>

studies.<sup>313</sup> However, Munirah Kasim's theoretical study shows that *muwā'adah* can be practiced in *murābahah* with the condition that it is not binding upon the promisors. In the case of *muwā'adah*, the bank promises to the customer to purchase the property as specified by the customer and sell it to the customer at a cost plus a pre-agreed profit margin. Conversely, the customer promises to purchase the property from the bank at cost price with an agreed profit margin.<sup>314</sup> This non-binding *muwā'adah* might give the customer more comfort but is riskier for the bank at the end. This is because the non-binding *muwā'adah* does not oblige the customer to compensate the bank should the customer breach his *wa'd*.

MIB and BIMB do not offer this product.<sup>315</sup> The reason behind this might be both banks have an alternative to *murābahah* home financing which is *tawarruq* home financing. *Tawarruq* home financing is initially based on *murābahah* but it is more complicated than *murābahah* home financing.<sup>316</sup>

It is noteworthy to mention here that all Islamic banks in Malaysia are required to give rebates (*ibrā'*) to the customers for early settlement. However, Islamic banks do not give any *wa'd* to the clients for this. This mandatory rebate is imposed by BNM on each Islamic bank in Malaysia based on the principle of *maṣlahah*. Therefore, *wa'd* is no longer used by the banks for this matter.<sup>317</sup>

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<sup>313</sup> Nurdianawati Irwani Abdullah, "Status and implications of promise," 89; Syeliya Md Zaini and Nosrah Mohd Isa, "The application of *wa'd*," 36.

<sup>314</sup> Munirah Kasim, "Al-*Wa'd* (unilateral promise) and its application," 70-71.

<sup>315</sup> Mohd Nazri Chik (Assistant General Manager and Head of Shariah Division, Bank Islam Malaysia Berhad), interview with the researcher, 4 September 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.

<sup>316</sup> *Ibid.*

<sup>317</sup> Mohd Nazri Chik, interview with the researcher, 27 October 2014.



#### 3.4.1.4. *Tawarruq/Commodity Murābahah* Home Financing

*Tawarruq/commodity murābahah* home financing is a newly developed product in BIMB and MIB. The fundamental underlying contract of commodity *murābahah* is the ordinary *murābahah* but it is more complicated. It is defined by BIMB as:

The purchase of a commodity (i.e. the subject matter of *tawarruq*) on a deferred payment basis by way of either *Bai' Musāwamah* or *Murābahah*. The commodity is then sold for cash to a party other than the original seller.<sup>318</sup>

In a commodity *murābahah* transaction, there are normally four parties involved which are: (1) the client, (2) the bank, (3) commodity broker one and (4) commodity broker two. At first, the bank purchases a commodity from broker one and then sells it to the customer with deferred price. The bank then becomes an agent of the customer and sells that commodity to broker two with cash price. As a consequence of this transaction, the customer gets cash money and becomes indebted to the bank. Normally, the customer repays his loan to the bank on regular instalments.

Operational Steps *Tawarruq/Commodity Murābahah* Home Financing:<sup>319</sup>

- (1) The customer signs S&P agreement with developer to purchase a house valued at MYR100k, and makes down payment of MYR10k.
- (2) The customer requests for home financing and promises to purchase a commodity from the bank for MYR90k + MYR70k (Profit). The customer and bank sign “commodity *murābahah* facility agreement”.
- (3) Pursuant to the purchase request and undertaking executed by the customer, the bank purchases a commodity on a spot basis from commodity broker one.
- (4) The bank sells the commodity to the customer for RM90k + RM70k (profit) = RM 160k.

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<sup>318</sup> Bank Islam Malaysia Berhad, *Application of Shari'ah Contracts in Bank Islam's Products and Services* (Kuala Lumpur: Bank Islam Malaysia Berhad, n.d.), 3.

<sup>319</sup> Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013; Bank Islam Malaysia Berhad, “Baiti Home Financing” (Product Disclosure Sheet, Kuala Lumpur, n.d.), 1.

- (5) The customer appoints bank as agent to sell the commodity to commodity broker two on a spot basis.
- (6) The bank as agent of the customer releases financing amount of RM90k to developer.
- (7) The customer pays sale price amount of RM160k on a deferred payment basis to the bank.

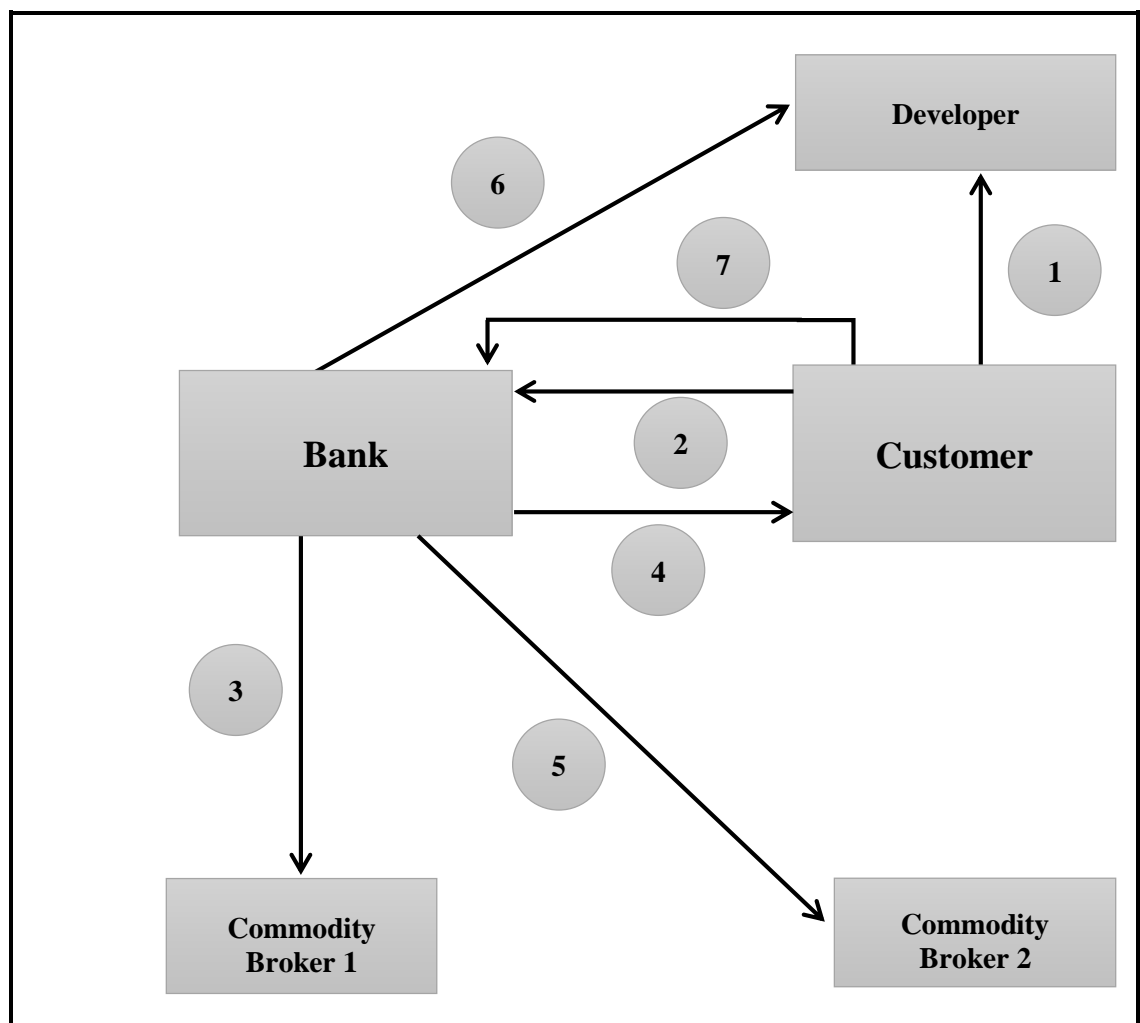


Figure 3.4 *Tawarruq/Commodity Murabahah* Home Financing

Source: Interview with the Bankers

From the above structure, it can be observed that there is a *wa'd* given by the customer to purchase a commodity from the bank. The customer instructs the bank to purchase a commodity and undertakes to purchase the same commodity from the bank upon purchase by the bank. The mechanism of *wa'd* in commodity *murabahah* is similar

to the “*murābaḥah* on purchase orderer”. Usually, there is only one *wa‘d* in commodity *murābaḥah*. Both BIMB and MIB have the similar practice of *wa‘d*-based commodity *murābaḥah* for house/shop-house financing. However, KFHMB does not offer commodity *murābaḥah*. It offers ordinary *murābaḥah* which is discussed earlier.<sup>320</sup>

It can be noticed from the above structure of commodity *murābaḥah* house financing that the house is not the subject matter (*mabī‘*) of the *murābaḥah* contract. Another commodity is used to give cash to the customer who wants to purchase the house. This commodity *murābaḥah* product is introduced to replace the *bay‘ al-‘īnah* transaction which was criticised by the majority of *Shari‘ah* scholars.<sup>321</sup>

The practice of *wa‘d* in *tawarruq* financing was not vastly mentioned in previous studies. Though Syeliya Md Zaini and Nosrah Mohd Isa showed the application of *wa‘d* in *murābaḥah*, they did not mention its usage in *tawarruq*.<sup>322</sup> Similarly, Nurdianawati Irwani Abdullah did not mention that *wa‘d* was applied in *tawarruq*.<sup>323</sup> However, Azizi Che Seman confirmed that *wa‘d* was applied in *tawarruq* and *bay‘ ‘īnah* but he did not provide sufficient information on the mechanism of using *wa‘d* in *tawarruq*.<sup>324</sup> Ali found that there is an element of *wa‘d* in *tawarruq* in BMMB.<sup>325</sup>

### 3.4.2. Trade Financing Product

Islamic trade financing products are very important to facilitate business that involves cross-border transactions. It mostly helps import and export of commodities. Among the Islamic trade financing products, some are structured under the *murābaḥah* concept. *Wa‘d* is used in the trade financing products which are based on *murābaḥah*. This study

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<sup>320</sup> Mohd Nazri Chik, interview with the researcher, 4 September 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.

<sup>321</sup> Mohd Nazri Chik, interview with the researcher, 4 September 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.

<sup>322</sup> Syeliya Md Zaini and Nosrah Mohd Isa, “The Application of *Wa‘d* in Islamic Banking,” 35.

<sup>323</sup> Nurdianawati Irwani Abdullah, “Status and Implications of Promise,” 88.

<sup>324</sup> Azizi Che Seman, “Aplikasi *Wa‘d* dalam Produk,” 5.

<sup>325</sup> Mohd Saiful Azli Md Ali, “*Wa‘ad* dan aplikasinya di dalam kontrak hibrid Islam”.

has found three *wa'd*-based trade financing products which are: (1) *murābaḥah* Islamic letter of credit, (2) Islamic trust receipt, and (3) Islamic accepted bill for import. However, all these three products share a similar mechanism. Therefore, the researcher discusses only the *murābaḥah* letter of credit to avoid replication.

#### **3.4.2.1. *Murābaḥah* Islamic Letter of Credit**

Letter of credit is a written undertaking provided by the bank at the request of the customer (the buyer) to the seller to pay a specific amount of money as mentioned in the letter of credit with the condition that the seller complies the terms and conditions of the letter of credit. The letter of credit can be offered either under the *wakālah* contract or the *murābaḥah* contract. However, there is no use of *wa'd* in a *wakālah*-based letter of credit. Therefore, the *murābaḥah*-based letter of credit will be discussed here.<sup>326</sup>

As mentioned earlier, *murābaḥah* is a cost plus sale. The bank purchases a commodity based upon the request of the customer and then sells it to the customer based on a specific profit determined before. The customer pays to the bank on a later date. In the event of a *murābaḥah* letter of credit, the following steps are followed.

Operational Steps:<sup>327</sup>

- (1) The customer (buyer) applies for letter of credit and undertakes that he will purchase the commodity from the bank after the bank has purchased it from the seller.
- (2) The bank issues letter of credit and purchases the commodity from the seller.
- (3) The bank then sells the commodity to the customer (buyer) with a predetermined price which involves the cost and a profit margin.
- (4) The customer settles the purchase price to the bank on deferred basis.

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<sup>326</sup> Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013.

<sup>327</sup> Mohd Nazri Chik, interview with the researcher, 4 September 2013; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.

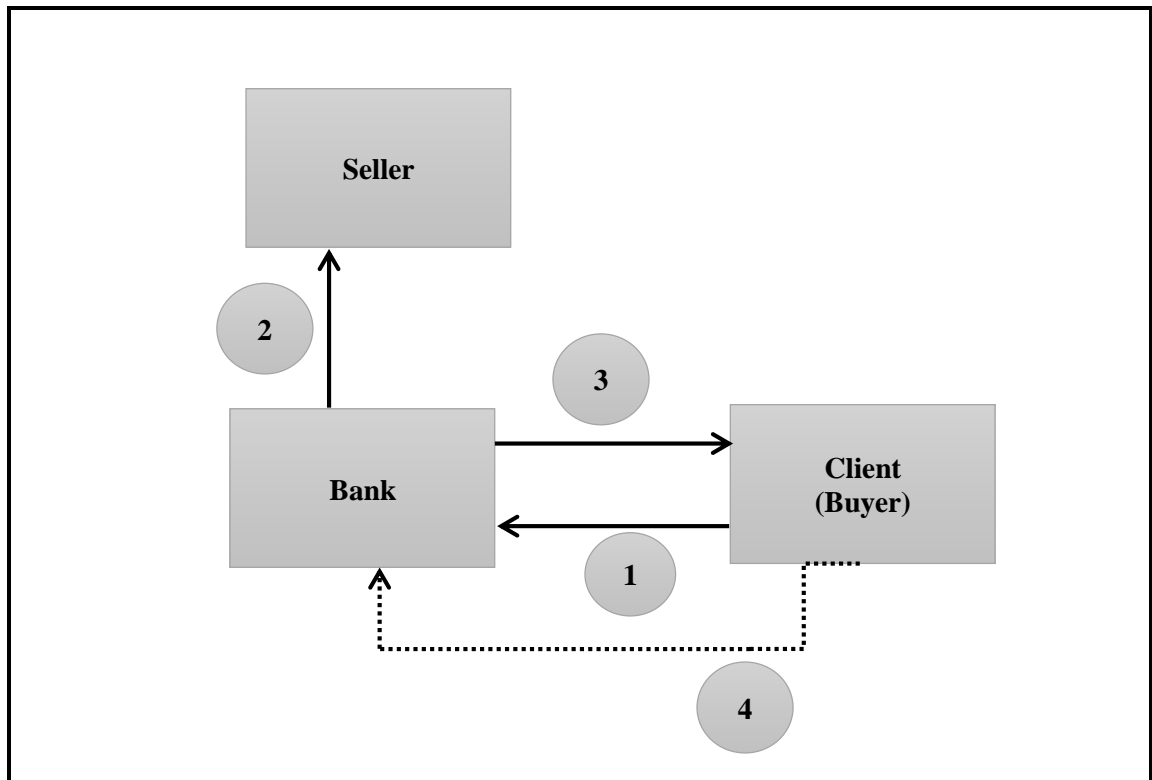


Figure 3.5 *Murābahah* Islamic Letter of Credit

Source: Interview with the Bankers

In the above structure, when the customer applies for a *murābahah* letter of credit then he gives *wa'd* that he will purchase the commodity after the bank has purchased it from the seller. The practice of *wa'd* in a *murābahah* letter of credit is more crucial than *murābahah* home financing. This is because purchasing a commodity from the overseas seller is riskier than purchasing a native property. On the other hand, it is a common practice in export and import business that no seller ships a commodity without a letter of credit from the bank. Therefore, the Islamic Fiqh Academy under OIC has allowed *muwā'adah* as binding on the promisor in the case of trade financing.<sup>328</sup>

### 3.4.3. Treasury Product

*Wa'd* plays a significant role in Islamic treasury products. In most products, *wa'd* is used along with commodity *murābahah*. This section demonstrates the modus operandi of four

<sup>328</sup> Islamic Fiqh Academy, 17th Session, resolution no. 157, 2006, *Islamic Fiqh Academy* website, retrieved on 4 Jun 2015, <http://www.fiqhacademy.org.sa/qarat/17-6.htm>

*wa'd*-based treasury products which are: (1) Islamic FX forward, (2) Islamic profit rate swap (IPRS), (3) Islamic cross currency swap (ICCS), and (4) *Ijārah* rental swap (IRS).

### 3.4.3.1. Islamic FX Forward

Islamic FX Forward is the alternative for conventional FX forward. It is basically a *wa'd* to execute *bay' al-ṣarf* in a future date. *Bay' al-ṣarf* is defined as a contract of buying and selling of currencies.<sup>329</sup> Islamic FX forward involves two parties where one party gives *wa'd* to purchase or sell a specific amount of currency to another party on a future date based on the rate agreed today. As there is only one *wa'd* here, only one party is obliged to honour his promise. On the other hand, the other party has option whether to conclude the contract. In KFHMB, this product is named as “promissory FX contract” while BIMB and MIB term it as “Islamic FX forward”. However, all of them use the same operational steps.<sup>330</sup> The figure below describes the modus operandi of Islamic FX forward.

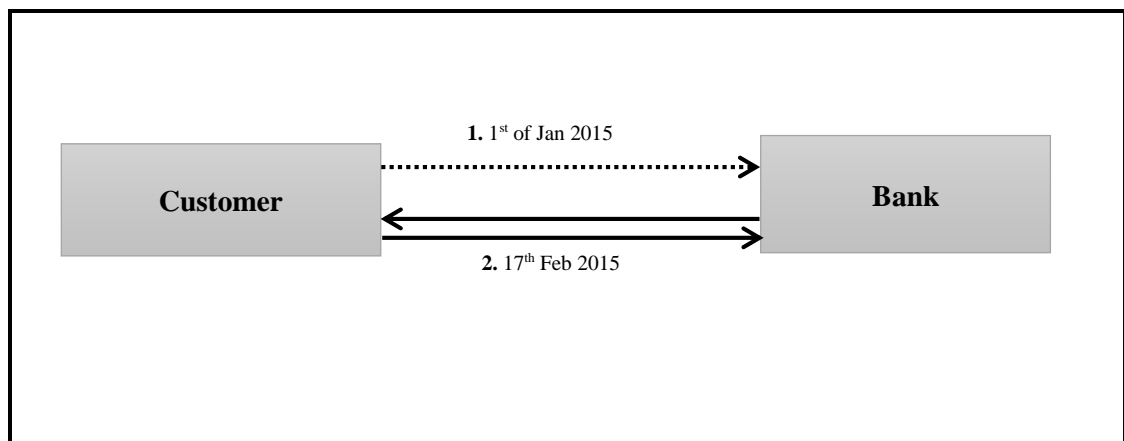


Figure 3.6 Islamic FX Forward

Source: Interview with the Bankers

<sup>329</sup> Kuwait Finance House (Malaysia) Berhad, *Product Guide*, 7.

<sup>330</sup> Mohd Nazri Chik, interview with the researcher, 4 September 2013; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.

Operational Steps:<sup>331</sup>

- (1) The customer provides *wa'd* to the bank on 1<sup>st</sup> of January 2015 to purchase USD1 million from the bank on 17<sup>th</sup> February 2015 at the exchange rate of MYR 3.2900 per USD.
- (2) On 17 February 2015, the bank pays USD1 million to the customer and receives MYR 3.29 million from the customer disregarding the market rate at that day.

The above structure shows that there is only one *wa'd* provided by the customer to the bank. The Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI), the prominent Islamic finance governing body and BNM allow this *wa'd*-based FX forward. However, these organisations do not allow *muwā'adah* in currency exchange contracts if it is binding on the promisor. According to them, *muwā'adah* can be practiced in currency trading with the condition that it is non-binding on the promisor.<sup>332</sup> In the operation of Islamic FX forward, no fee or deposit is charged upfront from the customer. This is because BNM has prohibited charging any fee for *wa'd* in relation to currency trading.<sup>333</sup> The prohibition is based on the grounds that it may lead to *ribā*.<sup>334</sup>

#### 3.4.3.2. Islamic Profit Rate Swap (IPRS)

IPRS is an agreement between two parties to exchange one's floating profit rate with other fixed profit rates. According to BIMB:

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<sup>331</sup> Mohd Nazri Chik, interview with the researcher, 4 September 2013; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.

<sup>332</sup> Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), *Shari'ah Standards for Islamic Financial Institutions*, (Manama: Accounting and Auditing Organization for Islamic Financial Institutions, 2010), 7, *Shari'ah* standard no. 1 (2/9); Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance*, 138.

<sup>333</sup> Bank Negara Malaysia, "Resolutions of the Shariah Advisory Council of Bank Negara Malaysia, Application of Wa'd (promise) in Forward Currency Transaction," *Bank Negara Malaysia* website, retrieved on 10 June 2015, [http://www.bnm.gov.my/index.php?ch=en\\_press&pg=en\\_press\\_all&ac=2111&lang=en](http://www.bnm.gov.my/index.php?ch=en_press&pg=en_press_all&ac=2111&lang=en)

<sup>334</sup> Nikan Firoozye, "Wa'd and the completeness of Islamic markets," *Opalesque Islamic Finance Intelligence*, 30 August 2009, 7.

An Islamic profit rate swap (IPRS) typically involves an agreement to exchange a floating profit rate for a fixed rate or vice versa, implemented through the execution of a series of underlying “commodity *murābaḥah*” contracts.<sup>335</sup>

The exchange of profit between the parties takes place at regular intervals. The fixed profit rate is usually determined at the beginning of the agreement that remains unchanged until the end of the tenure and the floating profit rate is referenced to an index e.g. Kuala Lumpur interbank offered rate (KLIBOR). The floating rate is determined at every settlement period. In practice, the notional amount is not exchanged but the difference between the two rates is exchanged.

The contractual arrangement in IPRS is based on a number of commodity *murābaḥah* transactions and *wa‘d*. At every settlement period, there will be two layer of commodity *murābaḥah* transactions. At the first layer, the customer sells the commodity to the bank at a fixed profit rate. At the second layer, the bank sells the commodity to the customer at a floating rate which is referenced to KLIBOR for example. The figure below shows the operational steps of IPRS.

Operational steps of IPRS:<sup>336</sup>

*The First Leg:*

- (1) The customer undertakes to execute a number of commodity *murābaḥah* transactions with the bank at different agreed upon dates in the future.
- (2) On the transaction date, the customer buys a commodity from broker B while the bank becomes the customer’s agent.
- (3) The customer sells the commodity to the bank at cost plus a fixed profit rate (e.g. 3% p. a.).
- (4) The bank sells the commodity to broker A at cost.

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<sup>335</sup> Bank Islam Malaysia Berhad, *Application of Shariah Contracts*, 94.

<sup>336</sup> Mohd Nazri Chik, interview with the researcher, 4 September 2013.



*The Second Leg:*

- (5) The bank purchases a commodity from broker A.
- (6) The bank sells the commodity to the customer with cost plus a floating profit rate (e.g. 2.5% p. a.)
- (7) The customer sells the commodity at cost to broker B through the bank as his agent.

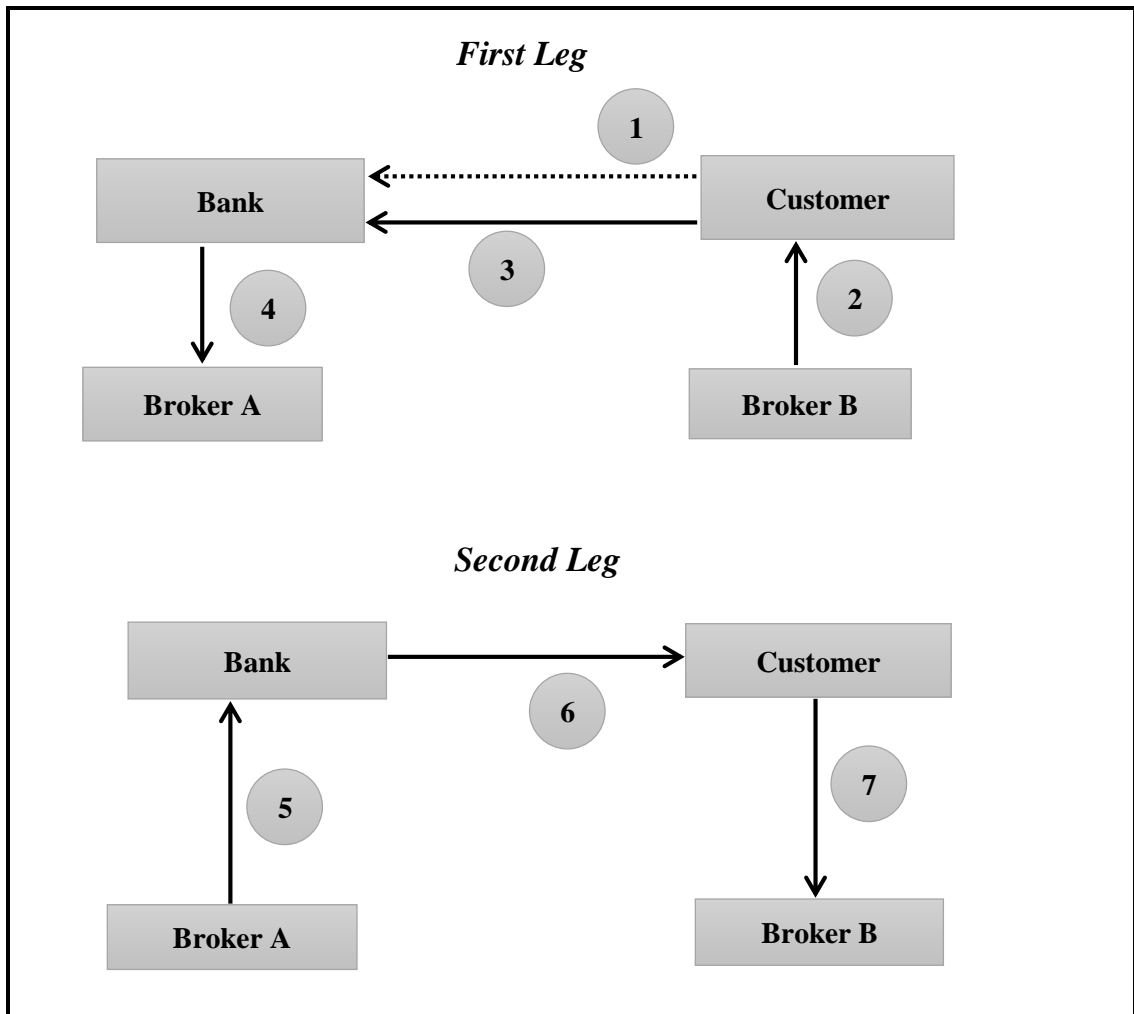


Figure 3.7 Islamic Profit Rate Swap (IPRS)

Source: Interview with the Bankers

The above structure is practiced by BIMB. However, MIB has further enhanced the above structure. It is mentioned earlier that the notional amount is not exchanged between the two parties but the net-off amount is exchanged. Therefore, MIB employs only one commodity *murābahah* transaction at every settlement date. However, MIB has

two different types of commodity *murābahah* transactions for two different situations. In case the bank receives the excess of the two profit rates, the bank becomes the commodity seller to the customer. On the other hand, if the customer receives the excess of the two profit rates, the customer becomes the commodity seller to the bank. In this product structure, *wa'd* is given only by the customer to the bank. The client undertakes that if the floating rate is more than the fixed rate then he will purchase a commodity from the bank.<sup>337</sup> The figure below describes the structure of IPRS as practiced by MIB.

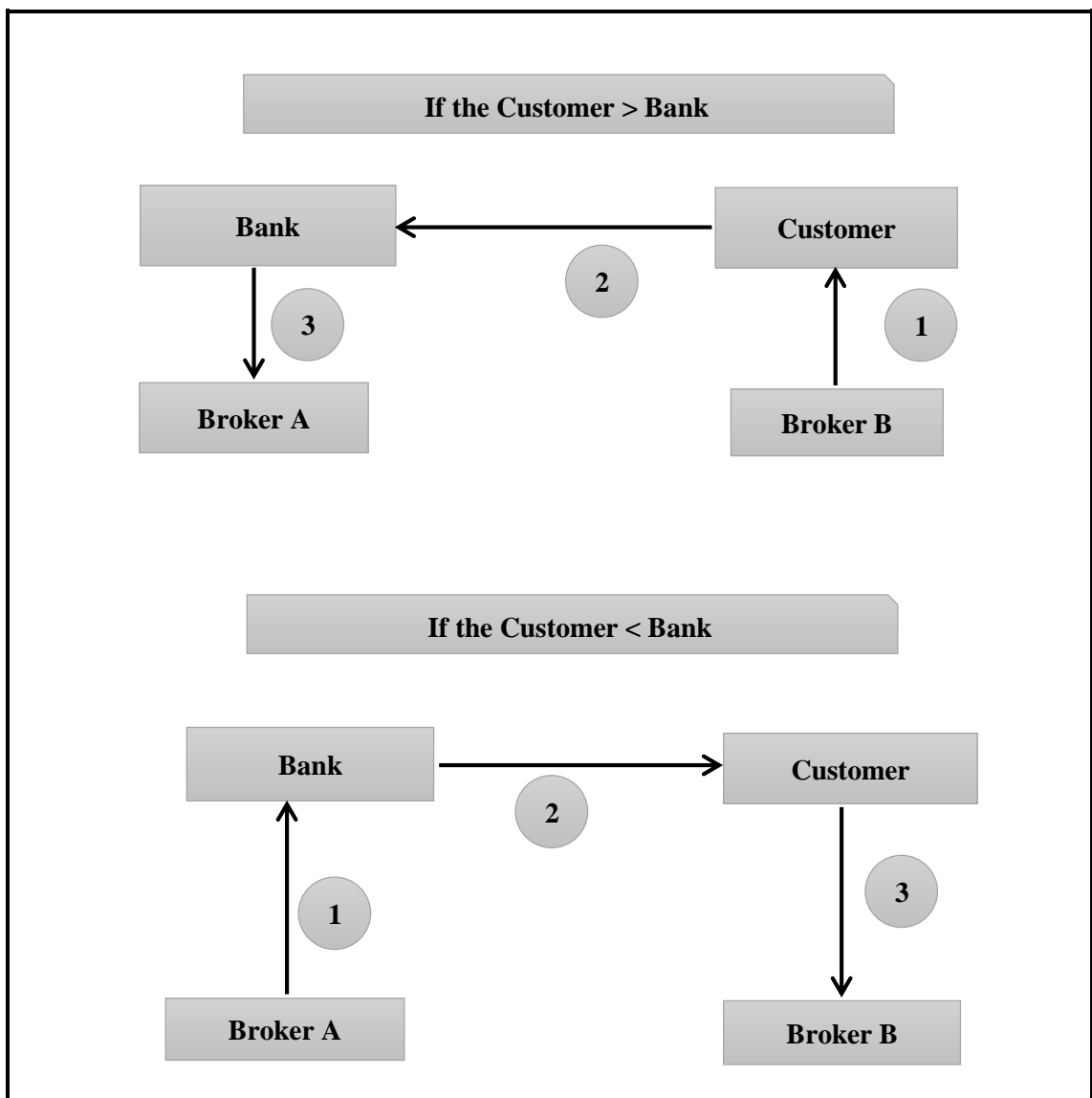


Figure 3.8 Islamic Profit Rate Swap (IPRS) at Maybank Islamic Berhad (MIB)

Source: Interview with the Bankers

<sup>337</sup> Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.

Operational Steps:<sup>338</sup>

*If the client gets the excess:*

- (1) The client purchases a commodity from broker B through the bank as his agent.
- (2) The customer sells the commodity to the bank with profit (the difference between the fix and floating rate).
- (3) The bank sells the commodity to broker A at cost.

*If the bank gets the excess:*

- (1) The bank purchases a commodity from broker A.
- (2) The bank sells the commodity to the client with profit (the difference between the fix and floating rate).
- (3) The client sells the commodity to broker B at cost through the bank as his agent.

In both structures of IPRS, there is only one *wa'd* which is given by the customer. Therefore, the customer's interest might not be protected in the case the profit rate is not in favour of the bank. Even though banks usually fulfil their commitment due to reputational risk but there is an urge from the clients to employ another *wa'd* from the bank's side.<sup>339</sup> *Wa'dān* might be a solution for this issue.

Instead of commodity *murābaḥah*, some banks use *bay' al-ṭinah* in IPRS. In such a case, there is no application of *wa'd*. In *bay' al-ṭinah*-based IPRS, there are two transacting parties where both parties directly sell and buy back a commodity between them.<sup>340</sup> However, in commodity *murābaḥah*-based IPRS, there are four transacting parties where the bank/customer purchases a commodity from third party and then sells it. There is no buy-back agreement between the buyer and seller in commodity *murābaḥah*. Though the *bay' al-ṭinah*-based structure is simpler but controversial among

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<sup>338</sup> Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.

<sup>339</sup> Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.

<sup>340</sup> Maybank Islamic Berhad, "Islamic Profit Rate Swap (IPRS)," *Maybank Islamic Berhad* website, retrieved on 10 June 2015, <http://www.maybank2u.com.my/Islamic/en/global-banking/global-markets-islamic/hedging/islamic-profit-rate-swap.page?>

the *Shari'ah* scholars.<sup>341</sup> From this perspective, the commodity *murābaḥah* and *wa'd*-based IPRS might be able to attract more customers globally.

It is important to mention here that the commodity *murābaḥah* transaction is facilitated by Bursa Malaysia's commodity market (*sūq al-sila'*). The commodity transaction is based on a real asset. Crude palm oil is usually used for the transaction. The possession and delivery of the commodity takes place between the contracting parties. The transaction is performed through an electronic system that identifies and verifies the ownership and specifies the subject matter of the contract. The transacting parties are allowed to take delivery of the commodities within seven days. However, an additional fee is charged for the delivery.<sup>342</sup>

If the client breaches the *wa'd*, the bank usually attempts to cover the loss if it is not a substantial amount. For commodity *murābaḥah* transactions, the bank only loses the brokerage fee which is not a large amount. For example, the brokerage fee is only MYR15 for any purchase of a commodity for MYR 1 million. Therefore, the bank does not penalise the customer for that. However, the bank will not make any further transactions with that client. On the other hand, if the bank incurs a significant amount of loss due to the breach of *wa'd*, the case is brought to the court. The court should decide on that matter based on the principle that the promisor has to compensate actual loss incurred by the promisee due to the breach of that promise unless there is a valid excuse (e.g. bankruptcy).<sup>343</sup>

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<sup>341</sup> Wazārah Al-Awqāf wa al-Shu'ūn al-Islāmiyyah, *Al-Mawsū'ah al-Fiqhiyyah*, 9:95-97; Amir Shaharuddin, "The Bay' al-'Inah Controversy in Malaysian Islamic Banking," *Arab Law Quarterly* 26, issue. 4 (2012), 499-511.

<sup>342</sup> Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Asyraf Wajdi Dusuki, "Can Bursa Malaysia's Sūq al-Sila' (Commodity Murābaḥah House) Resolve the Controversy over Tawarruq?," (Research paper no. 10, International Shari'ah Research Academy for Islamic Finance, Kuala Lumpur, 2010).

<sup>343</sup> Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Ali Ahmad (Head, Structured Treasury Solutions Desk, Global Markets Trading, Treasury Division, Kuwait Finance House (Malaysia) Berhad), interview with the researcher, 26 December 2013.

### 3.4.3.3. Islamic Cross Currency Swap (ICCS)

ICCS is an agreement between two parties to exchange profit and principal amount which is denominated in different currencies. ICCS actually helps the investors in Islamic finance to mitigate foreign currency risk as well as profit rate risk.<sup>344</sup> ICCS is somewhat similar to IPRS. However, ICCS involves the exchange of different currencies. Moreover, the notional amount is exchanged between the two parties in ICCS whereas the net-off amount is exchanged in IPRS.

In ICCS, the client approaches the bank and signs a master facility agreement where he undertakes to exchange MYR to USD for example in next six months based on a fixed rate, which will be executed through a series of commodity *murābahah* transactions. There will be two commodity *murābahah* transactions between the parties at every settlement date. As an example, the client first sells the commodity to the bank in MYR. Secondly, the bank sells the commodity to the customer in USD. It is necessary that the price for both commodities should be the same. The figure below illustrates the operational structure of ICCS.

#### Operational Steps of ICCS:<sup>345</sup>

- (1) The customer approaches the bank and undertakes to perform a number of commodity *murābahah* with the bank in two different currencies with a fixed exchange rate.
- (2) The client purchases a commodity from broker B through the bank as his agent.
- (3) The client sells the commodity to the bank at cost plus KLIBOR in MYR.
- (4) The bank sells the commodity to broker A and gets cash.

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<sup>344</sup> Maybank Islamic Berhad, "Islamic Cross Currency Swap (ICCS)," *Maybank Islamic* website, retrieved on 10 June 2015, <http://www.maybank2u.com.my/Islamic/en/global-banking/global-markets-islamic/hedging/islamic-cross-currency-swap.page?>

<sup>345</sup> Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.

- (5) In the second leg of transaction, bank purchases a commodity from broker A for cash.
- (6) The bank sells the commodity to the client at cost plus 5 % p.a. profit for example at USD.
- (7) The client sells the asset to broker B via the bank as his agent.

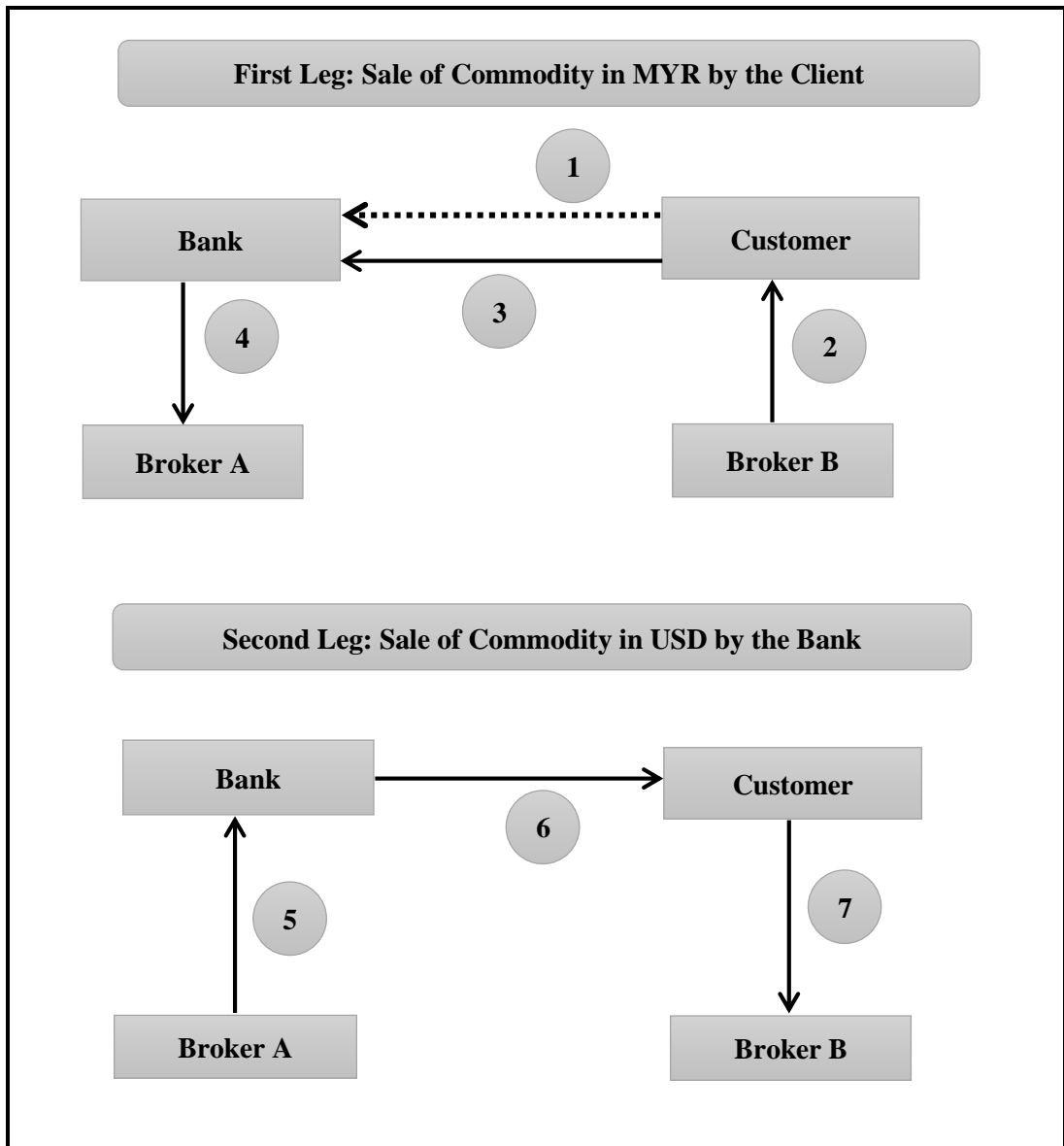


Figure 3.9 Islamic Cross Currency Swap (ICCS)

Source: Interview with the Bankers

The above structure of ICCS is followed by BIMB and MIB. There is a *wa'd* here from the client to execute a number of commodity *murābahah* transactions with the bank. The customer undertakes to sell a commodity to the bank in MYR with cost price plus a profit referenced to KLIBOR. In addition, he promises to purchase a commodity from the bank in USD at a fixed price with 5% profit.<sup>346</sup>

#### **3.4.3.4. *Ijārah* Rental Swap (IRS)**

IRS is another *wa'd*-based treasury product to hedge against floating *ijārah* financing. This product is offered by KFHMB. There is a similarity between IRS and IPRS in terms of their operation but IRS is designed for *ijārah* financing only. Different profit rates other than *ijārah* is not included in IRS. Under IRS, one can manage or modify his *ijārah* rental obligation from float to fix and vice versa. IRS can be used for different *ijārah* facilities e.g. *ijārah* auto financing, *ijārah* asset acquisition financing and *ijārah*-based *ṣukūk*.

According to KFHMB, IRS is defined as:

An arrangement between a customer and KFHMB where one party agrees to pay the other (in cash) the difference between a fixed *ijārah* rental rate and a series of floating *ijārah* rental rate over an agreed period of time.<sup>347</sup>

Based on this, a fixed *ijārah* rate is determined at the beginning of the transaction while the floating rate is determined on periodic reset date. Two legs of commodity *murābahah* transactions occur at each periodic settlement date. After the commodity *murābahah* transaction, only the net-off balance is transferred between the parties who receive the higher payment. A *muqāṣah* contract is applied for this purpose. The figure below describes the operational steps of IRS.

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<sup>346</sup> Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.

<sup>347</sup> Kuwait Finance House (Malaysia) Berhad, *KFHMB Ijarah Rental Swap-I "IRS"* (Kuala Lumpur: Kuwait Finance House (Malaysia) Berhad, 2009), 2.

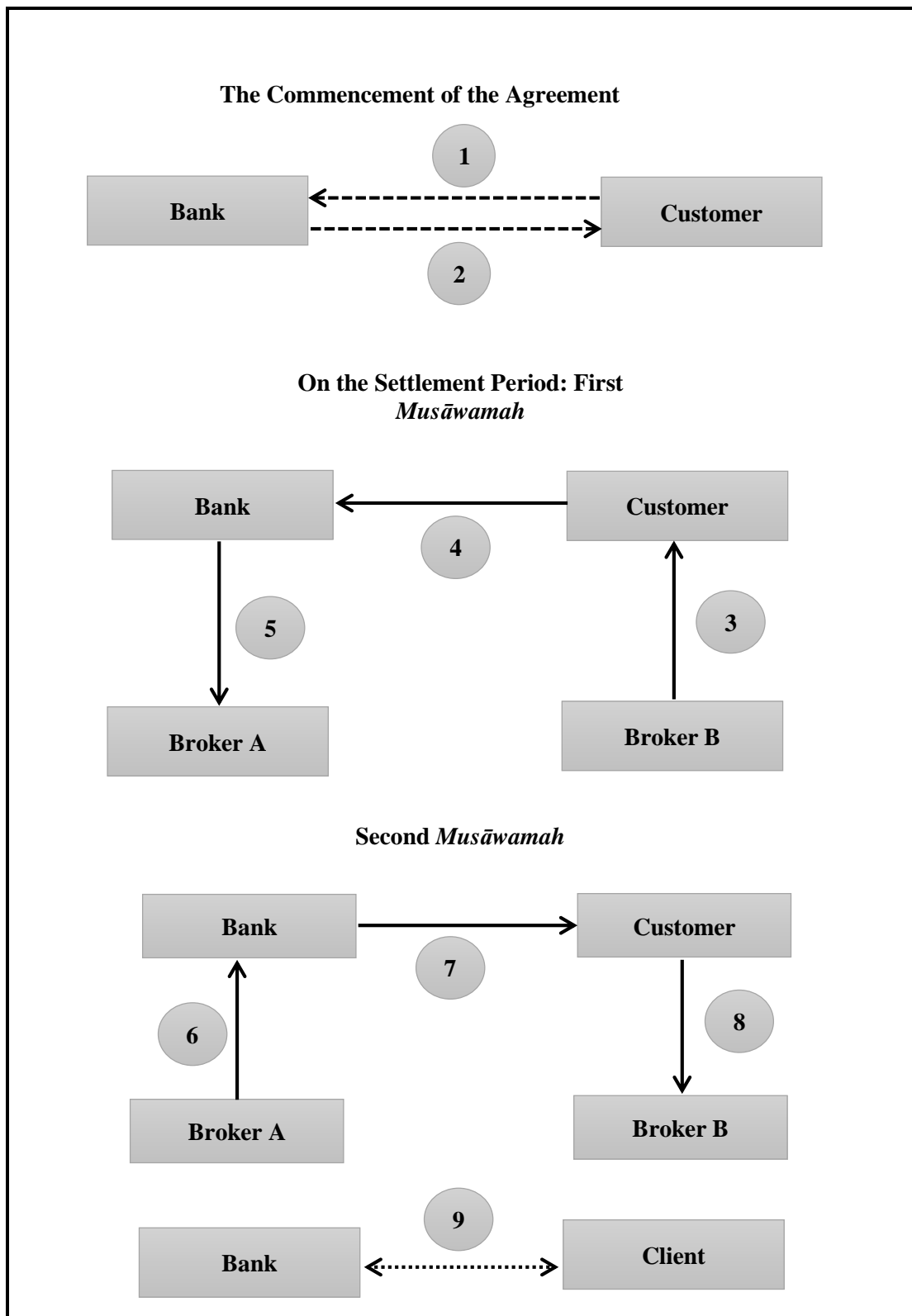


Figure 3.10 *Ijārah* Rental Swap (IRS)

Source: Interview with the Bankers



### Operational Steps of IRS:<sup>348</sup>

- (1) The customer approaches the bank and signs IRS master agreement, and the customer undertakes to enter into a series of *musāwamah* transactions.
- (2) The bank also promises the customer that it will execute a number of *musāwamah* transactions with the customer at regular agreed upon dates.
- (3) On every settlement date, the customer purchases a commodity from broker B via the bank as his agent.
- (4) The customer sells the commodity to the bank with a profit referenced to KLIBOR, for example, on the spot.
- (5) The bank sells the commodity to broker A and gets cash.
- (6) Alternatively, the bank purchases a commodity from broker A.
- (7) The bank sells the commodity to the customer with a fixed profit on the spot.
- (8) The customer sells the commodity to broker B via the bank as his agent and gets cash.
- (9) Because of the two commodity *musāwamah* transactions, only the net-off amount is transferred based on the concept of *muqāṣah*.

KFHMB affirms that there is *wa'dān* in IRS. The two *wa'd* are not conditional to each other. The subject matter for both *wa'd* is different. The bank and the customer give *wa'd* to execute two different *musāwamah* transactions. The bank promises to purchase a commodity from the customer with profit referenced to KLIBOR, for example. On the other hand, the customer promises to purchase a commodity from the bank with a fixed profit.<sup>349</sup> The practice of *wa'd* in IRS is different from ICCS and IPRS. IRS employs *wa'dān* whereas ICCS and IPRS employ *wa'd*. Therefore, it can be said that IRS protects the interests of the customer and the bank at the same time.

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<sup>348</sup> Ali Ahmad, interview with the researcher, 26 December 2013.

<sup>349</sup> *Ibid.*

### **3.5. Conclusion**

This chapter provided the overview of the Islamic banking system in Malaysia. It then discussed the status of *wa'd* in the country's civil law. Finally, it showed the practice of *wa'd* in different Islamic banking products. Islamic banks in Malaysia experienced very strong legal and regulatory support to develop products which resulted in the development of various *wa'd*-based products. A number of consumer, trade financing, and treasury products have been innovated utilising *wa'd* and *wa'dān*.

## CHAPTER 4: THE APPLICATION OF *WA'D* IN BANGLADESHI ISLAMIC BANKS

### 4.1. Introduction

Bangladesh is a prominent country for Islamic banking in South Asia. However, dissimilar to Malaysia, Islamic banking in Bangladesh has received little legal and infrastructure support. Its *Shari'ah* framework is known to be relatively more rigid and mostly confined to the *Hanafi* School of jurisprudence (*madhhab fiqhī*) making product development a significant challenge for Islamic banking in Bangladesh in order to compete with the conventional banking.<sup>350</sup>

The previous chapter discussed the practice of *wa'd* in Islamic banking products in Malaysia after providing the overview of Islamic banking system and the legal status of *wa'd* in the country. In the same way, this chapter discusses the *wa'd*-based products in the Islamic banks in Bangladesh along with discussing the overview of Islamic banking operations and the legal status of *wa'd*. Based on the scope of this study, three Islamic banks in Bangladesh are studied:

- (1) Islami Bank Bangladesh Limited (IBBL)
- (2) Prime Bank Limited (PBL)
- (3) Shahjalal Islami Bank Limited (SIBL)

This chapter provides an overview of Islamic banking in Bangladesh. It then discusses the legal status of *wa'd* in relation to the contract act 1872. Finally, it sheds light on the mechanism of using *wa'd* in Islamic banking products.

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<sup>350</sup> Bangladesh Bank, *Annual Report 2005-2006* (Dhaka: Bangladesh Bank, 2014) 38; Abdul Awwal Sarker, "Islamic Banking in Bangladesh: Achievements and Challenges," *Journal of Islamic Economics, Banking and Finance* 1, no. 1 (2005), 2; Nowrin Tamanna, "Personal Status Laws in Morocco and Tunisia: A Comparative Exploration of the Possibilities for Equality-Enhancing Reform in Bangladesh," *Feminist Legal Studies* 16, issue. 3 (2008), 329.

## **4.2. Overview of Islamic Banking in Bangladesh**

The discussion in this section includes a historical overview on the establishment of Islamic banking in Bangladesh. An overview of Islamic capital market and Islamic insurance will be provided as they are related to Islamic banking. Furthermore, the status and growth of Islamic banking and its products and services are briefly described and the legal, regulatory, and governance system are explained. The last two subsections evaluate the infrastructure development and sector efficiency.

### **4.2.1. Historical Development**

Researchers and economists submitted several proposals to establish an Islamic bank in Bangladesh at the beginning of 1980s through a number of International conferences, seminars, and workshops. In this regard, a number of socio-economic research institutions namely Islamic Economics Research Bureau, Bangladesh Institute of Bank Management, Working Group for Islamic Banking in Bangladesh, Bangladesh Islamic Bankers Associations, Bayt Al-Sharf Islamic Research Institution and Muslim Businessman Society played an important role to organise conferences, seminars, and workshops on Islamic banking.<sup>351</sup>

In 1982, a delegate from the Islamic Development Bank (IDB) came to Bangladesh and evaluated the possibility of establishing a private Islamic bank in Bangladesh. After the evaluation, the delegate recommended the IDB to invest capital to initiate the proposed Islamic bank. Following this, the “Islami Bank Bangladesh limited” was launched in 1983 as a private commercial bank through the initiatives of some Muslim business entrepreneurs with the help of the government of Bangladesh and some international Islamic financial institutions. Along with IDB, other international Islamic

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<sup>351</sup> Islam, “Bangladeshe Islami Bank”; Mohon, *Islami Orthoniti o Banking*, 137; Mannan, *Islami Bank Babostha*, 47; Sarker, “Islamic Banking in Bangladesh: Achievements & Challenges”, 2; BMB Islamic, *Global Islamic Finance Report (GIFR) 2011*, 259.

financial institutions which directly contributed to the establishment of the Islamic bank in Bangladesh were the Kuwait Finance House, Dubai Islamic Bank, and Bahrain Islamic Bank.<sup>352</sup>

From the establishment, the Islamic bank in Bangladesh saw steady development due to the overwhelming response of the Muslims in Bangladesh. Following the success of the Islami Bank Bangladesh Limited, the second Islamic bank in Bangladesh was initiated in 1987 through “Al-Baraka Bank Bangladesh Limited”. This bank was recently renamed as the “ICB Islamic Bank Limited”. A number of conventional banks started to open Islamic banking windows from 1995. Prime Bank Limited was the first conventional bank that opened Islamic banking windows in Bangladesh. After that, Export-Import Bank of Bangladesh Limited, Dhaka Bank Limited, The City Bank Limited and others opened Islamic banking windows.<sup>353</sup>

#### **4.2.2. Development of *Takāful* and Islamic Capital Market**

The *takāful* industry was introduced in Bangladesh in 1999. The “Islami Insurance Bangladesh Limited” was the first general *takāful* operator in Bangladesh. After its inception, *takāful* companies expanded rapidly in Bangladesh. In 2004, it had USD 24 million asset which was 7% of the total asset of the insurance sector in Bangladesh. Until 2010, there were six full-fledged *takāful* operators and 13 window operations of *takāful* from conventional insurers in Bangladesh.<sup>354</sup>

However, Bangladesh still lacks an Islamic capital market. Until now, only two notable *ṣukūk* were issued. IBBL issued BDT 3000 million *muḍārabah* perpetual bond

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<sup>352</sup> Islam, “Bangladeshe Islami Bank”; Mohon, *Islami Orthoniti*, 137; Mannan, *Islami Bank Babostha*, 47; Sarker, “Islamic Banking in Bangladesh: Achievements & Challenges”, 2; BMB Islamic, *Global Islamic Finance Report*, 259.

<sup>353</sup> *Ibid.*

<sup>354</sup> Kazi Md. Mortuza Ali, “Takaful in Bangladesh: Achievements and Obstacles”, *Middle East Insurance Review*, December 2010, 73; Islami Insurance Bangladesh Limited, “Company Profile”, *Islami Insurance Bangladesh Limited* website, retrieved on 13 Jun 2015, <http://islamiinsurance.com/profile.php>

and the government issued Islamic investment bond based on *muḍārabah*.<sup>355</sup> Currently, the introduction of an Islamic capital market is under discussion among the researchers and policy makers.<sup>356</sup> M A Hamid mentioned that *ṣukūk* has much potential in Bangladesh.<sup>357</sup>

#### **4.2.3. Recent Growth of Islamic Banking**

Out of 47 banks in Bangladesh, there are eight full-fledged Islamic banks having more than 750 branches throughout the country. In addition, there are 16 conventional banks which are providing Islamic banking services through their Islamic banking branches.

The full-fledged Islamic banks are:<sup>358</sup>

- i. Islami Bank Bangladesh Limited
- ii. Al-Arafah Islami Bank Limited
- iii. Social Islami Bank Limited
- iv. Shahjalal Islami Bank Limited
- v. Export Import Bank of Bangladesh Limited
- vi. First Security Islami Bank Limited
- vii. ICB Islamic Bank Limited
- viii. Union Bank Limited (UBL)

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<sup>355</sup> BMB Islamic, *Global Islamic Finance Report*, 260.

<sup>356</sup> Islamic Financial Services Board (IFSB), "IFSB and BB Spearhead Discussions on the Prospects and Challenges in the Development of Islamic Finance for Bangladesh," *Islamic Financial Services Board (IFSB)* website, retrieved on 13 Jun 2015, [http://www.ifsb.org/press\\_full.php?id=232&submit=more](http://www.ifsb.org/press_full.php?id=232&submit=more); BMB Islamic, *Global Islamic Finance Report*, 261; Azad et al., "Prospects Analysis of an Islamic Capital Market in Bangladesh," 57.

<sup>357</sup> M A Hamid, "Streamlining Islamic finance in Bangladesh", *The Financial Express*, 06 April 2013, 8.

<sup>358</sup> Salahuddin Yousuf, Md. Ariful Islam and Md. Rayhan Islam, "Islamic Banking Scenario of Bangladesh," *Journal of Islamic Banking and Finance* 2, no. 1, (March 2014), 25-26; Md Touhidul Alam Khan, "Huge demand for Islamic banking in Bangladesh," *Islamic Finance News*, 27 Feb 2014, [http://islamicfinancenews.com/listing\\_article\\_ID.asp?nm\\_id=34645](http://islamicfinancenews.com/listing_article_ID.asp?nm_id=34645); Chowdhury Shahed Akbar, "Analysing the Islamic banking framework in Bangladesh," *New Age*, 9 May 2014, <http://newagebd.net/9712/analysing-the-islamic-banking-framework-in-bangladesh/>

The conventional banks having Islamic banking branches are:<sup>359</sup>

- i. Dhaka Bank Limited
- ii. Arab Bangladesh Bank Limited
- iii. Prime Bank Limited
- iv. Jamuna Bank Limited
- v. The City Bank Limited
- vi. Southeast Bank Limited
- vii. Premier Bank Limited
- viii. Standard Chartered Bank Limited
- ix. Bank Alfalah Limited
- x. Trust Bank Limited
- xi. Standard Bank Limited
- xii. Pubali Bank Limited
- xiii. Sonali Bank Limited
- xiv. Agrani Bank Limited
- xv. Bank Asia Limited
- xvi. National Bank of Pakistan

According to the Bangladesh Bank (BB), at the end of December 2012, the total deposit of Islamic banking sector was BDT 1017.9 billion which was 18.9% of the total deposit of the banking system in Bangladesh. At the same period, the total credit of Islamic banking sector was BDT 910.1 billion which captured 21.1% of the total banking sector credit of the country.<sup>360</sup> Excluding the Islamic banking windows, the full-fledged Islamic banks comprise 16.85% of the total asset, 19.85% of the total investment, 18.33%

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<sup>359</sup> Khan, "Huge demand for Islamic banking in Bangladesh"; Akbar, "Analysing the Islamic banking framework in Bangladesh".

<sup>360</sup> Bangladesh Bank, *Annual Report 2012-13*, 37.

in total deposit, 14.3% in total equity and 17.1% in total liabilities of the banking sector at the end of December 2012.<sup>361</sup>

#### 4.2.4. A Brief Synopsis of Islamic Banking Products

Islamic banks in Bangladesh offer various types of deposit products, investment products, and services. The notable deposit products are *al-wadī'ah* current account, *muḍārabah* savings account, *muḍārabah* term deposit account, *muḍārabah ḥajj* savings account, *muḍārabah* special savings (pension) account, *muḍārabah waqf* cash deposit account, *muḍārabah* foreign currency deposit account, and *muḍārabah* savings bond.<sup>362</sup>

The investment products known in Malaysia as financing products are the car investment scheme, construction and housing investment, small business investment scheme, agricultural investment scheme, women entrepreneurs investment scheme, non-resident Bangladeshi entrepreneurs' investment scheme, export financing, and import financing. The underlying contracts in these products are normally *bay'-murābahah*, *bay'-istiḡrār*, *bay'-mu'ajjal*, *bay'-salam*, *istiḡnā'*, *mushārah* and hire-purchase under *shirkat al-milk*.<sup>363</sup>

Finally, among the services foreign exchange business, trade financing, remittance card, micro financing, SME service, locker service, Islamic debit card, Islamic credit card, ATM services are significant.<sup>364</sup>

#### 4.2.5. Regulation and Governance

There are several acts that govern the banks and financial institutions in Bangladesh which are the Bank Companies Act 1991, the Bangladesh Bank Order 1972, the Securities

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<sup>361</sup> Bangladesh Bank, *Financial Stability Report 2012* (Dhaka: Bangladesh Bank, 2013), 43.

<sup>362</sup> Islami Bank Bangladesh Limited, *Annual Report 2012* (Dhaka: Islami Bank Bangladesh Limited, 2013), 37-38; Social Islami Bank Limited, *Annual Report 2012* (Dhaka: Social Islami Bank Limited, 2013), 34; Rahman, *Islami Banking*, 82-102; Mohon, *Islami Orthoniti o Banking*, 151-178.

<sup>363</sup> *Ibid.*

<sup>364</sup> *Ibid.*



and Exchange Commission Act 1993, and the Income Tax Ordinance 1984. However, there is no separate act for the operation of Islamic banks and financial institutions. Therefore, all Islamic banks in Bangladesh are required to follow the acts that govern the conventional banks and financial institutions. When Islamic banking was introduced in Bangladesh, no new act was passed but some clauses were incorporated in the Bank Companies Act and some amendments were made in the Income Tax Ordinance.<sup>365</sup>

The Bangladesh Bank (BB) is the central bank of the country which monitors, regulates, and supervises both Islamic and conventional banks. BB generally provides equal treatment to both Islamic and conventional banks. However, it has some special provisions for Islamic banks. It is among the special provisions that Islamic banks are permitted to keep their statutory liquidity requirement (SLR) with BB at the rate of 10% of their total deposit liabilities whereas the conventional banks are required to maintain 20%. Islamic banks are independent to fix their profit and loss ratio as well as the mark-up rates based on their own policy and banking situation.<sup>366</sup> BB does not have a separate section to monitor Islamic banking but it has an Islamic economics division under the department of research to analyse the state of the Islamic finance industry in Bangladesh.<sup>367</sup>

In 2009, BB issued guidelines on the operation and management of Islamic banks. The guidelines are considered the first attempt by BB to provide an operational framework for Islamic bank. The guidelines include the mechanism of *Sharī'ah* and corporate governance, product definition and operational framework, alternative investment modes, and conversion procedures of a conventional bank to an Islamic bank. However, these guidelines have some shortcomings. One of the major issues related to

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<sup>365</sup> Ahmad and Hassan, "Regulation and Performance of Islamic Banking," 256-258.

<sup>366</sup> *Ibid*, 255.

<sup>367</sup> BMB Islamic, *Global Islamic Finance Report*, 260.

these guidelines is that under these guidelines, it is optional for an Islamic bank to have a *Sharī'ah* board, which is contradictory to global practice.<sup>368</sup>

BB does not have a *Sharī'ah* board to supervise Islamic banks in Bangladesh. However, a private non-corporate body is named as “Central Shari’a Board for Islamic Banks of Bangladesh (CSBIB)”. Almost all the Islamic banks in Bangladesh are the member of CSBIB. CSBIB is consist of a number of prominent scholars in Bangladesh. It arranges regular meeting to discuss the *Sharī'ah* issues related to Islamic banking industry in Bangladesh. It also conducts timely research and publishes books and journals to serve its members.<sup>369</sup>

#### **4.2.6. Contemporary Infrastructure Development**

Among the recent notable infrastructure developments in Bangladesh is the launch of the Islamic interbank money market (IIMM). After a long period of waiting, Islamic banks in Bangladesh are now able to manage their funding crisis through IIMM. However, Bangladesh is still lacking a *ṣukūk* market. The government is about to make necessary amendments in *ṣukūk* regulation to develop a *ṣukūk* market in Bangladesh.<sup>370</sup> Apart from that, Bangladesh is mostly known for its microfinance. Revising the Grameen Bank’s interest-based model, a number of Islamic micro finance institutions have already started their work in the rural areas of Bangladesh.<sup>371</sup>

There is a substantial scarcity of human capital and institution to educate and train Islamic finance in Bangladesh.<sup>372</sup> However, there is no notable initiative taken by the government to develop education and research in Islamic finance. There are a few minor

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<sup>368</sup> BMB Islamic, *Global Islamic Finance Report*, 260.

<sup>369</sup> *Ibid.*

<sup>370</sup> Bernardo Vizcaino and Serajul Quadir, “Bangladesh launches Islamic interbank money market”, *Reuters*, 5 Jun 2012, <http://www.reuters.com/article/2012/06/05/islamic-finance-liquidity-idUSL5E8H45DN20120605>

<sup>371</sup> BMB Islamic, *Global Islamic Finance Report*, 261.

<sup>372</sup> Hamid, “Streamlining Islamic finance in Bangladesh”, 8.

private initiatives to enhance knowledge in Islamic finance e.g. Islami Bank Training and Research Academy (IBTRA),<sup>373</sup> Islamic Economics Research Bureau (IERB)<sup>374</sup> etc.

#### **4.2.7. Islamic Banking Performance and Efficiency**

According to the financial stability report of BB, the basic financial indicators show a strong financial position and huge possibility for Islamic banks in Bangladesh. In 2012, Islamic banks managed to achieve higher profit than the conventional banks. The profit income to total asset ratio of Islamic banks was 9.74%, which was greater than the industry average of 8.14%. The return on asset (ROA) of the Islamic banks was 1.13 while it was 0.84 for the total banking industry. The return on equity (ROE) of Islamic banks reached 16.81%, which was higher than the ROE of the total banking industry that stood at 10.56%. On the other hand, the non-performing investment in the total investment of Islamic banks was only 3.9% while for the conventional banks it was 10%.<sup>375</sup>

#### **4.3. The Legal Status of *Wa‘d* in the Civil Laws of Bangladesh**

As there is no separate law for the operation of Islamic banks in Bangladesh, any Islamic banking dispute should go under the civil court. In the civil law of Bangladesh, there are some clauses in the Contract Act 1872 where the concept of promise is discussed in relation with a contract.

Section 2 (b) of the contract law says:

When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted becomes a promise.<sup>376</sup>

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<sup>373</sup> Islami Bank Training and Research Academy (IBTRA), “Status, Objectives and Functions,” *Islami Bank Training and Research Academy (IBTRA)* website, retrieved on 13 Jun 2015, <http://ibtra.com/>

<sup>374</sup> Islamic Economics Research Bureau (IERB), “About”, *Islamic Economics Research Bureau (IERB)* website, retrieved on 13 Jun 2015, <http://www.ierb-bd.org/about/>

<sup>375</sup> Bangladesh Bank, *Financial Stability Report 2012*, 44.

<sup>376</sup> The Contract Act (Bangladesh), 1872 (Act No. IX, 1872).

This means that when the person to whom it is made accepts a proposal, then it becomes a promise. Therefore, a proposal is an important element of a promise. Section 2 (a) defines proposal as:

When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.<sup>377</sup>

It is understood from this clause that a proposal is someone's offer to perform or to abstain from something subject to the consent of the person to whom it is offered. Based on this, there is a difference between the concept of promise and *wa'd*. Making a *wa'd* does not rely on the acceptance of the promisee while in Contract Act 1872, the promisee should accept the offer of the promisor to make a promise. In this sense, it appears that the concept of proposal is similar to the concept of *wa'd* in Islamic law.

Apart from that, it is stated in Contract Act of 1872 that every promise is an agreement if it has a consideration and when an agreement is enforceable by law then it is a contract. Section 2 (e) mentions: "Every promise and every set of promises, forming the consideration for each other, is an agreement."<sup>378</sup> After that, section 2 (h) states, "An agreement enforceable by law is a contract."<sup>379</sup> Therefore, it can be resolved that a promise having a consideration is a contract in the Contract Act 1872. In other words, a promise is similar to a contract in the contract law of Bangladesh if it has a consideration. However, consideration is described in section 2 (d) as:

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.<sup>380</sup>

This means that when a promisee starts to perform or abstain from something relying on the promise, then it is called consideration. The promise that has a

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<sup>377</sup> The Contract Act (Bangladesh), 1872 (Act No. IX, 1872).

<sup>378</sup> *Ibid.*

<sup>379</sup> *Ibid.*

<sup>380</sup> *Ibid.*

consideration becomes a contract and every contract is binding in the law. Section 37 reads:

The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.<sup>381</sup>

Consequently, if the promisor does not fulfil his promise then he should compensate the promisee in case of loss incurred to the promisee. Section 73 mentions:

When a contract has been broken the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.<sup>382</sup>

Based on the clauses mentioned above, it seems that the *Mālikī* jurists' opinion related to the binding nature of *wa'd* is similar to the Contract Act of 1872. The *Mālikīs* view that *wa'd* is binding on the promisor if it is attached to a cause (*sabab*) and the promisee has started an action based on that promise. Similarly, in the Contract Act of 1872, the term 'consideration' denotes that when the promisee relying on the promise starts an action or abstains from an action then it is binding on the promisor.

However, the contract law recognises a promise when it is accepted by the promisee. Thus, a promise is similar to a contract in the Contract Act of 1872. On the other hand, *wa'd* is a voluntary offer which does not rely on the acceptance of the promisee. Furthermore, as discussed in chapter two that Islamic jurists (*fuqhā'*) rule that in the case the promisor breaks his *wa'd*, he is required to compensate the promisee only the actual loss incurred but not the loss of opportunity.<sup>383</sup> However, it appears that under the Contract Act 1872, the promisee may ask from the promisor more than the actual loss incurred i.e. the probable future loss. In addition, the *Sharī'ah* allows the promisor to

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<sup>381</sup> The Contract Act (Bangladesh), 1872 (Act No. IX, 1872).

<sup>382</sup> *Ibid.*

<sup>383</sup> Islamic Fiqh Academy, 17<sup>th</sup> Session, resolution no. 157.

break his promise if he has any valid excuse (*'udhr Sharī'*).<sup>384</sup> There is no such provision in the Contract Act of 1872.

#### **4.4. *Wa'd*-Based Products in the Islamic Banks of Bangladesh**

*Wa'd* is practiced in a limited number of products in Bangladesh. *Wa'd* is mostly used in consumer banking products and trade financing products. However, there is no usage of *wa'd* in treasury products. At present, discussions are ongoing among the *Sharī'ah* scholars on the permissibility of Islamic FX forward. The following section discusses the consumer and trade financing products where *wa'd* is utilised.

##### **4.4.1. Consumer Banking Products**

*Wa'd* is used in the following three consumer banking products in Bangladesh:

- (1) *Bay' Murābahah* on Purchase Orderer (BMPO)
- (2) *Bay' Mu'ajjal*
- (3) *Hire-Purchase under Shirkat al-Milk* (HPSM)

All the three banks studied in Bangladesh practice *wa'd* in these products in a similar way. IBBL is the leading Islamic bank in Bangladesh in terms of product innovation whereas others follow IBBL.<sup>385</sup> The usage of *wa'd* in these products is discussed in the followings.

##### **4.4.1.1. *Bay' Murābahah* on Purchase Orderer (BMPO)**

*Bay' murābahah* means sale on profit. Technically, it is defined by IBBL as:

A contract between a buyer and a seller under which the seller sells certain specific goods (permissible under Islamic *Sharī'ah* and the Law of the land), to the buyer at a cost plus agreed profit payable in cash or

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<sup>384</sup> Ibn 'Arabī, *Aḥkām al-Qur'ān*, 4:243; Al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 442; Al-Ghazālī, *Iḥyā' 'Ulūm al-Dīn*, 9:1580.

<sup>385</sup> Mohammad Mizanur Rahman (Executive Officer, Islamic Banking Division, Prime bank Limited), interview with the researcher, 7 April 2014; Md. Farid Uddin (Junior Assistant Vice President & Muraquib, Shahjalal Islami Bank Limited), interview with the researcher, 13 April 2014.

on any fixed future date in lump-sum or by instalments. The profit marked-up may be fixed in lump-sum or in percentage of the cost price of the goods.<sup>386</sup>

This means that *murābahah* is a cost plus profit sale. The profit can be based on a fixed amount or in proportion of the cost price of the commodity. The purchaser can pay the price of the goods either in lump sum or in instalments.

This is the classical type of *murābahah*. However, there is a little modification in its practice by the Islamic banks in Bangladesh. It is called “*bay’ murābahah* on purchase orderer”. In this type of *murābahah*, there are three parties which are the buyer, the seller, and the bank as an intermediary trader between the buyer and the seller. The bank upon request of the customer purchases the goods from the seller and sells it to the customer with an agreed profit.<sup>387</sup> Three banks studied in Bangladesh practice BMPO mostly for financing business products, house furniture and appliances. The figure below shows the practical steps of BMPO.

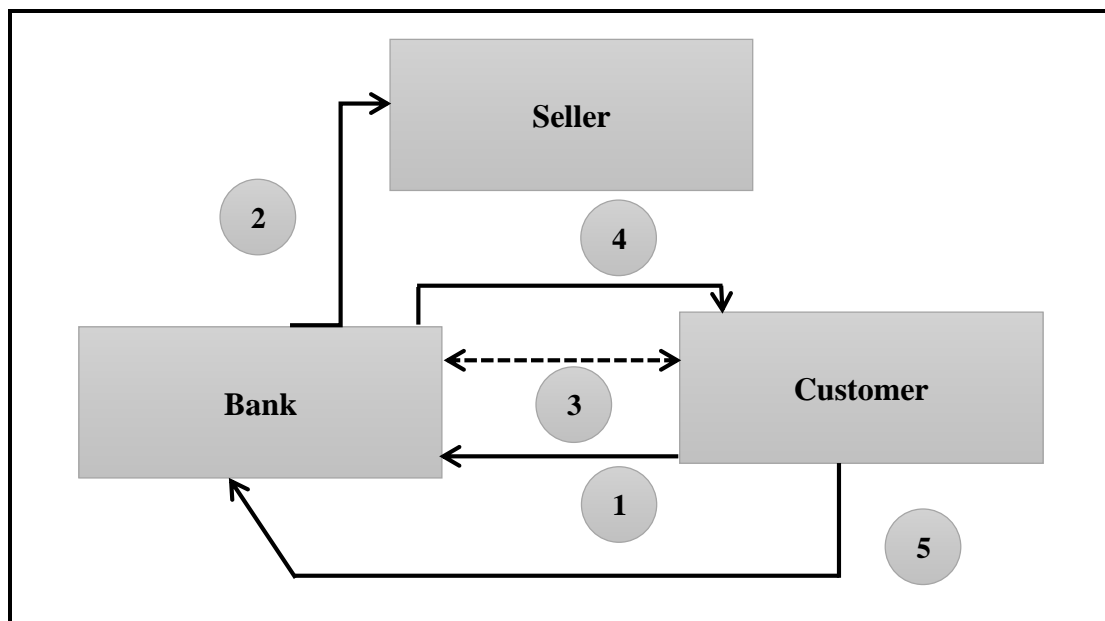


Figure 4.1 *Bay’ Murābahah* on Purchase Orderer (BMPO)

Source: Interview with the Bankers

<sup>386</sup> Islami Bank Bangladesh Limited, “Bai Murabaha,” *Islami Bank Bangladesh Limited* website, retrieved on 13 Jun 2015, <http://www.islamibankbd.com/prodServices/prodServBaimurabaha.php>

<sup>387</sup> Muhammad Shamsul Huda and Muhammad Shamsuddoha, *Islami Banker Biniog Paddhoti: Shari’ahr Neetimala* (Dhaka: Islami bank Bangladesh Limited, 2011), 17.

### Operational Steps:<sup>388</sup>

- (1) The client proceeds to the bank and applies for *murābahah* financing. The client provides *wa'd* to purchase the goods from the bank after the bank has purchased it.
- (2) The bank purchases the goods from the seller and takes possession on it.
- (3) The purchase and sale agreement between the bank and the client.
- (4) The bank delivers the goods to the customer.
- (5) The customer pays the selling price to the bank in lump sum or instalment.

There is *wa'd* in the above structure of BMPO which is given by the customer to the bank. Considering the *wa'd* of the customer, the bank purchases the specific goods and sells it to the customer. The *wa'd* is very important here to minimise the market risk of the bank. If the customer does not purchase the goods after the bank has purchased it in the market then the bank may incur loss in order to sell it to another party. However, there is no practice of *muwā'adah* and *wa'dān* in the above structure. According to the *Sharī'ah* scholars in Bangladesh, *muwā'adah* as binding on both promisors is not allowed. Therefore, it is not applied in any Islamic banking products in Bangladesh. Besides, practitioners are unfamiliar with the concept of *wa'dān*.<sup>389</sup>

The terms and conditions of BMPO reveal that the *wa'd* is binding on the customer (promisor). Islamic banks are entitled to take security money from the customer. If the promisor does not fulfil his promise, the bank can take the security money as a compensation based on the loss incurred. If there is no loss incurred to the bank in reality, the security money should be returned to the customer. However, in normal practice, no security money is charged from the customer. The customer only undertakes to purchase

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<sup>388</sup> Nurul Kabir (Shariah Officer, Shariah Secretariat, Islami bank Bangladesh Limited), interview with the researcher, 7 April 2014; Rahman, interview with the researcher, 7 April 2014; Uddin, interview with the researcher, 13 April 2014; Md. Atiqur Rahman (Officer, Shariah Inspection & Compliance Division, Shahjalal Islami Bank Limited), interview with the researcher, 8 April 2014.

<sup>389</sup> M. Shamsuddoha (Vice President, Shariah Secretariat, Research Unit, Islami Bank Bangladesh Limited), interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014.



the commodity form the bank in an official letter.<sup>390</sup> In terms of documentation, IBBL and PBL use a separate document for *wa'd*. In case of SIBL, the application letter for *murābahah* financing and the *wa'd* element is combined together.<sup>391</sup>

Mohammad Mizanur Rahman<sup>392</sup> revealed that in many cases, the element of *wa'd* is ignored by the bank. This frequently happens when a fake *murābahah* transaction takes place between the bank and the client. In that case, the customer and the bank both sign the *murābahah* agreement in a single meeting and then the bank transfers money to the customer's account. The bank does not really purchase the goods and simply provides money to the customer. However, when an actual *murābahah* is practiced then *wa'd* plays a significant role.

In general, the above structure of *wa'd*-based *murābahah* is similar to the previous findings where *wa'd* is given by the customer to the bank as a security for the bank to conduct BMPO. There is no development in the feature of *wa'd* i.e. employing *muwā'adah* and *wa'dān*. According to previous studies, the above-mentioned practice of *murābahah* financing is the most common practice of *wa'd*.<sup>393</sup>

#### **4.4.1.2. Bay' Mu'ajjal**

*Bay' mu'ajjal* means credit sale. In Islamic banking practice, it is defined as:

An agreement between bank and client whereby bank delivers goods to the client upon deferred payment, i.e. the client shall pay the price at some future date at a time, by lump sum or by instalment. Under this mode of investment, bank is not supposed to disclose cost price and profit separately".<sup>394</sup>

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<sup>390</sup> Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014.

<sup>391</sup> Uddin, interview with the researcher, 13 April 2014.

<sup>392</sup> Interview with the researcher, 7 April 2014.

<sup>393</sup> Syeliya Md Zaini and Nosrah Mohd Isa, "The Application of Wa'd in Islamic Banking Contract," 36; Nurdianawati Irwani Abdullah, "Status and implications of promise (wa'd)," 89; Al-Qarḍāwī, "Al-wafā' bi al-wa'd", 616-634.

<sup>394</sup> Shahjalal Islami Bank Limited, "Islamic Mode of Investment," *Shahjalal Islami Bank Limited* website, retrieved on 13 Jun 2015, <http://www.shahjalalbank.com.bd/investment.php>

This means that *bay' mu'ajjal* is a sale where the bank sells a commodity to the client on the spot but the customer pays the price at a later date by lump sum or instalment. Sale in credit is the key feature of *bay' mu'ajjal*.

In Bangladesh, the practice of *bay' mu'ajjal* resembles *bay' murābaḥah*. Similar to *murābaḥah*, the bank purchases a commodity from the market after the client has requested the bank to purchase. After that, the bank sells the commodity to the customer on credit. The bank usually determines a certain amount of profit on the goods purchased and sells to the customer on deferred basis. The client is required to pay the price within a specific date.<sup>395</sup>

There are a few differences between *bay' mu'ajjal* and *bay' murābaḥah*. The key characteristic of *murābaḥah* is the sale on profit whereas in *bay' mu'ajjal*, the main factor is the sale on credit. In *bay' murābaḥah*, the profit is fixed and it is certain, whereas the profit is not the main element in *bay' mu'ajjal*. Therefore, *bay' mu'ajjal* can occur with profit or without profit but it should be on credit.

Another important difference between *bay' murābaḥah* and *bay' mu'ajjal* is that in case of *bay' mu'ajjal*, it is not compulsory for the bank to disclose the purchase price of the goods. However, in case of *bay' murābaḥah*, the bank is required to disclose the purchase price of the commodity to the client. The bank and the client will determine the profit based on the purchase price. It is not possible to conclude a *murābaḥah* contract without knowing the purchase price.<sup>396</sup>

*Bay' mua'jjal* is mostly used for home financing, real estate financing, working capital financing, agricultural sector supply, and industrial materials. Apart from that, this mode of financing is used in IBBL's rural development scheme. It is an Islamic micro-finance initiative by IBBL. Through *bay' mu'ajjal*, IBBL provides equipment for

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<sup>395</sup> Huda and Shamsuddoha, *Islami Banker Biniog Paddhoti*, 64; Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014; Rahman, interview with the researcher, 7 April 2014.

<sup>396</sup> Huda and Shamsuddoha, *Islami Banker Biniog Paddhoti*, 65.

agriculture, goods for small business and others for this micro-finance scheme. To make the transaction easy and simple, *bay' mu'ajjal* is dominantly used in IBBL's rural development scheme.<sup>397</sup> IBBL solely practices *bay' mu'ajjal* as an Islamic microfinance product while other Islamic banks are yet to introduce Islamic micro-finance in their operations. The figure below describes the operational structure of *bay' mu'ajjal*.

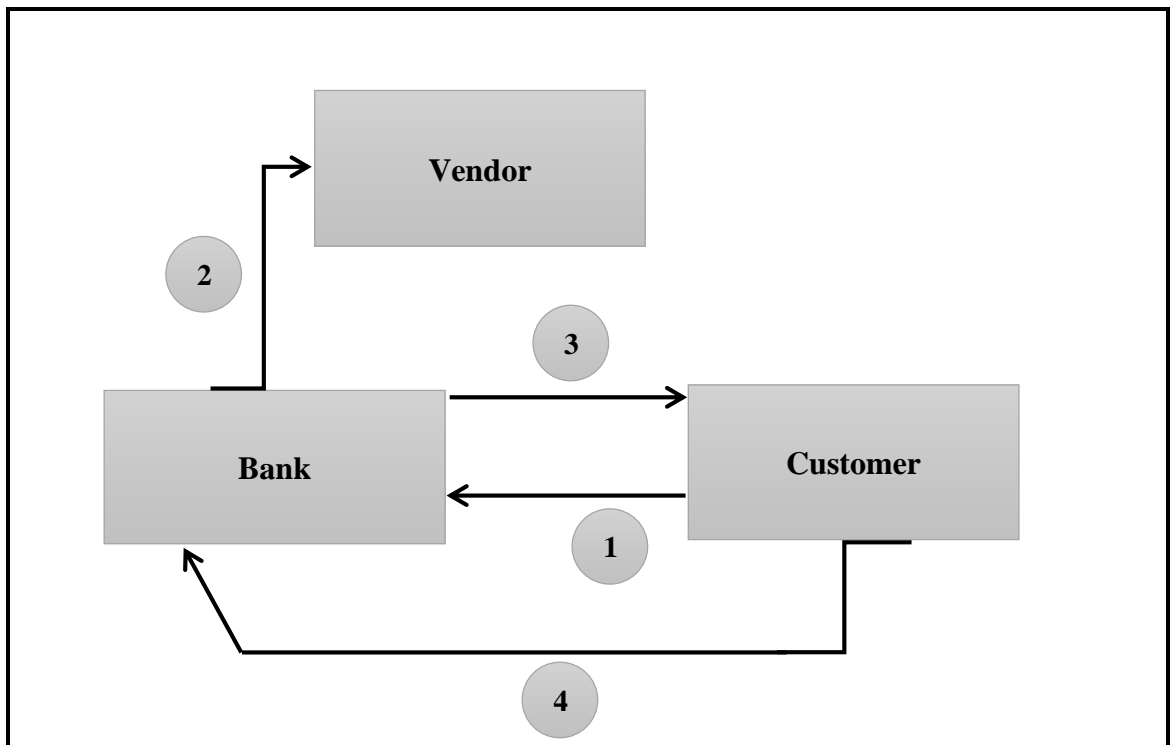


Figure 4.2 *Bay' Mu'ajjal*

Source: Interview with the bankers

Operational Steps:<sup>398</sup>

- (1) The customer approaches the bank and requests the bank to purchase a specific commodity. The client promises to purchase the commodity from the bank.
- (2) The bank purchases the goods from the vendor and takes its ownership.
- (3) The bank sells the goods to the client and delivers the goods to the customer.
- (4) The customer pays the sale price on credit within a fixed period.

<sup>397</sup> Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014.

<sup>398</sup> Rahman, interview with the researcher, 7 April 2014; Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014.

Based on the above structure, it is apparent that the customer promises to the bank to purchase the goods after the bank has purchased it. Similar to *murābahah*, there is *wa'd* from one party only. In the feature of *bay' mu'ajjal* contract, IBBL mentions:

It is permissible to make the promise binding upon the client to purchase from the Bank, that is, he is to either satisfy the promise or to indemnify the damages caused by breaking the promise without excuse. It is permissible to take cash/collateral security to guarantee the implementation of the promise or to indemnify the damages.<sup>399</sup>

This denotes that the *wa'd* is compulsory on the promisor in IBBL. If the customer does not fulfil his *wa'd*, he is obliged to indemnify the loss incurred to the bank. The bank may charge security money in order to practice *wa'd* as binding on the promisor. However, in practice, the bank usually does not charge security money.<sup>400</sup> PBL and SIBL follow the practice of IBBL in terms of the usage of *wa'd* in *bay' mu'ajjal*.<sup>401</sup>

#### **4.4.1.3. Hire-Purchase under *Shirkat al-Milk* (HPSM)**

HPSM is the combination of three contracts which are *shirkat*, *ijārah* and *bay'*. *Shirkat* means partnership. The type of *shirkat* used here is *shirkat al-milk*, which means joint ownership. Based on *shirkat al-milk* concept two or more individuals jointly own a property and share profit and loss in proportion to their respective share in the property. *Ijārah* means lease and *bay'* means sale. According to the HPSM agreement, the bank and the customer co-own a property. After that, the bank leases its share of the property to the customer. The customer pays monthly rental to the bank and gradually purchases bank's share in the property. At the end of the tenure, the customer fully owns the property.<sup>402</sup>

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<sup>399</sup> Islami Bank Bangladesh Limited, "Bai-muajjal", *Islamic Bank Bangladesh Limited* website, retrieved on 8 Jul 2014, <http://www.islamibankbd.com/prodServices/prodServBaimuajjal.php>

<sup>400</sup> Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014.

<sup>401</sup> Rahman, interview with the researcher, 7 April 2014; Uddin, interview with the researcher, 13 April 2014.

<sup>402</sup> Prime Bank Limited, "Hire Purchase under Shirkatul Melk concept", *Prime Bank Limited* website, retrieved on 8 Jul 2014, [https://www.primebank.com.bd/index.php/home/hire\\_purchase\\_under\\_shirkatul\\_melk](https://www.primebank.com.bd/index.php/home/hire_purchase_under_shirkatul_melk); Islami Bank

Even though it seems that HPSM is similar to *ijārah muntahiyah bi al-tamlīk*, there is a difference between them. In *ijārah muntahiyah bi al-tamlīk*, the bank solely owns the property during the *ijārah* term, and when the *ijārah* term is finished then the bank transfers the title of the property to the customer with either a token price or gift. On the other hand, the bank and the customer jointly own a property at the commencing of HPSM.<sup>403</sup> This makes it similar to the concept of *mushārahah mutanāqīshah* (MM) which is widely applied in most of the countries. Below is the operational steps that a customer and the bank go through in HPSM:

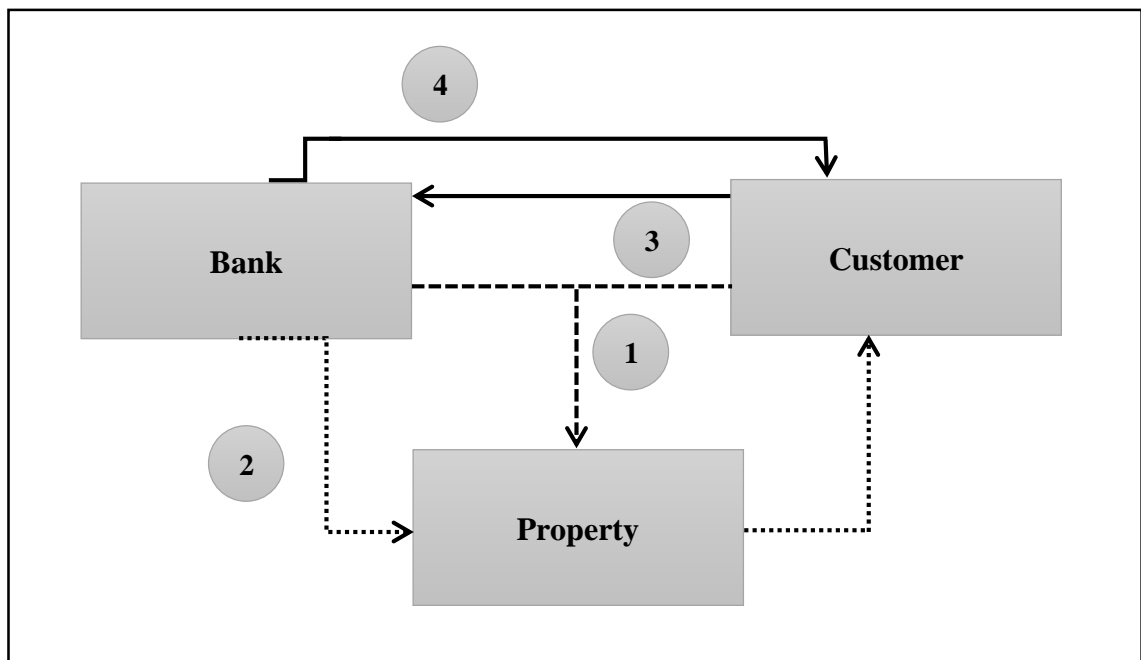


Figure 4.3 Hire-Purchase under *Shirkat al-Milk*

Source: Interview with the Bankers

Operational steps:<sup>404</sup>

- (1) The bank and the customer jointly purchase a property.
- (2) The bank rents its share of the property to the customer for a fixed period.

Bangladesh Limited, “Hire Purchase under Shirkatul Meelk”, *Islami Bank Bangladesh Limited* website, retrieved on 8 Jul 2014, <http://www.islamibankbd.com/prodServices/prodServHPUSM.php>

<sup>403</sup> Huda and Shamsuddoha, *Islami Banker Biniog Paddhoti*, 97-98.

<sup>404</sup> Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014; Rahman, interview with the researcher, 7 April 2014.

- (3) The customer pays monthly rentals and gradually purchases shares of the bank in the property.
- (4) At the end of the tenure, the bank transfers the title of the property to the customer.<sup>405</sup>

There is an element of *wa'd* in the above structure. At the beginning of the *shirkat al-milk* contract, the customer promises the bank to purchase the bank's share either on gradual basis or in lump sum. There is only one *wa'd* here. There is no *wa'd* from the bank's side. In the case of early settlement, the customer may face difficulty here because there is no *wa'd* from the bank on this. Islamic banks in Bangladesh include in the terms and the conditions of HPSM agreement that a customer may ask for early settlement. However, there is no element in that agreement obliging the bank to accept the customer's request to have an early settlement.<sup>406</sup>

The *wa'd* from the customer allows the bank to recover loss in case the customer defaults. Based on this binding *wa'd*, the bank may take compensation when the customer does not purchase the property. When the customer defaults to pay the monthly instalment then the bank will sell the property in market. If the bank incurs loss then the customer is required to compensate the loss.<sup>407</sup> Rahman pointed out that this practice serves the interests of the bank but it is injustice on the customer as Islamic *Sharī'ah* prescribes easiness with the debtor when he is in difficulty.<sup>408</sup> In this regard, Uddin mentioned that there is no problem in implementing *muwā'adah* here because *wa'd* may harm the interest of the client.<sup>409</sup>

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<sup>405</sup> Huda and Shamsuddoha, *Islami Banker Biniog Paddhoti*, 96-97.

<sup>406</sup> Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014; Rahman, interview with the researcher, 7 April 2014.

<sup>407</sup> Sheikh Mahmudur Rahman (Principal Officer, Legal Affairs Division, Islami Bank Bangladesh Limited), interview with the researcher, 27 October 2014.

<sup>408</sup> Interview with the researcher, 7 April 2014.

<sup>409</sup> Interview with the researcher, 13 April 2014.

#### 4.4.2. Trade Financing Product

Trade financing is known as foreign trade or export and import financing in Bangladesh.<sup>410</sup> There is only one *wa'd*-based trade financing product in Bangladesh which is termed *murābaḥah* post import (MPI). IBBL, PBL, and SIBL offer this product to their customers. Even though the basic feature of MPI is similar to BMPO, there are some differences between them in their operational steps. The next section discusses the operation of MPI in relation to the practice of *wa'd*.

##### 4.4.2.1. *Murābaḥah* Post Import (MPI)

MPI is an important trade financing product in Bangladesh. *Murābaḥah* is the basic contract utilised in this product. However, the difference between this *murābaḥah* with the retail *murābaḥah* product is that trade financing involves opening a letter of credit for the customer. In this product mechanism, the bank usually purchases commodities from a foreign seller and then sells it to the customer. Unlike the classical structure, receiving the shipping document of the commodity is considered taking possession (*qabḍ*) of the sold item.<sup>411</sup> The figure below describes MPI's operational steps.

Operational steps:<sup>412</sup>

- (1) The customer requests the bank to purchase the goods that he wishes to buy. The customer undertakes that he will purchase the product from the bank after the bank has purchased it.
- (2) Considering the request of the customer, the bank opens a letter of credit (LC) under the customer's name.

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<sup>410</sup> Shahjalal Islami Bank Limited, "Islamic Mode of Investment", *Shahjalal Islami Bank Limited* website, retrieved on 8 July 2014, <http://www.shahjalalbank.com.bd/investment.php>; Prime Bank Limited, "Hasanah Foreign Trade", *Prime Bank Limited* website, retrieved on 8 Jul 2014, [https://www.primebank.com.bd/index.php/home/islami\\_foreign\\_trade](https://www.primebank.com.bd/index.php/home/islami_foreign_trade)

<sup>411</sup> Huda and Shamsuddoha, *Islami Banker Biniog Paddhoti*, 40.

<sup>412</sup> Huda and Shamsuddoha, *Islami Banker Biniog Paddhoti*, 39-41.

- (3) The customer provides a letter of authority to the bank to purchase and to import the goods for the customer.
- (4) The bank offers the foreign seller to sell specific goods with specific price.
- (5) The foreign seller accepts the bank's offer and sends the shipping documents to the bank.
- (6) After the bank has received the shipping documents, it pays to the foreign seller.
- (7) The bank sells the goods to the customer and hands over the shipment documents.
- (8) The customer pays to the bank on instalment.

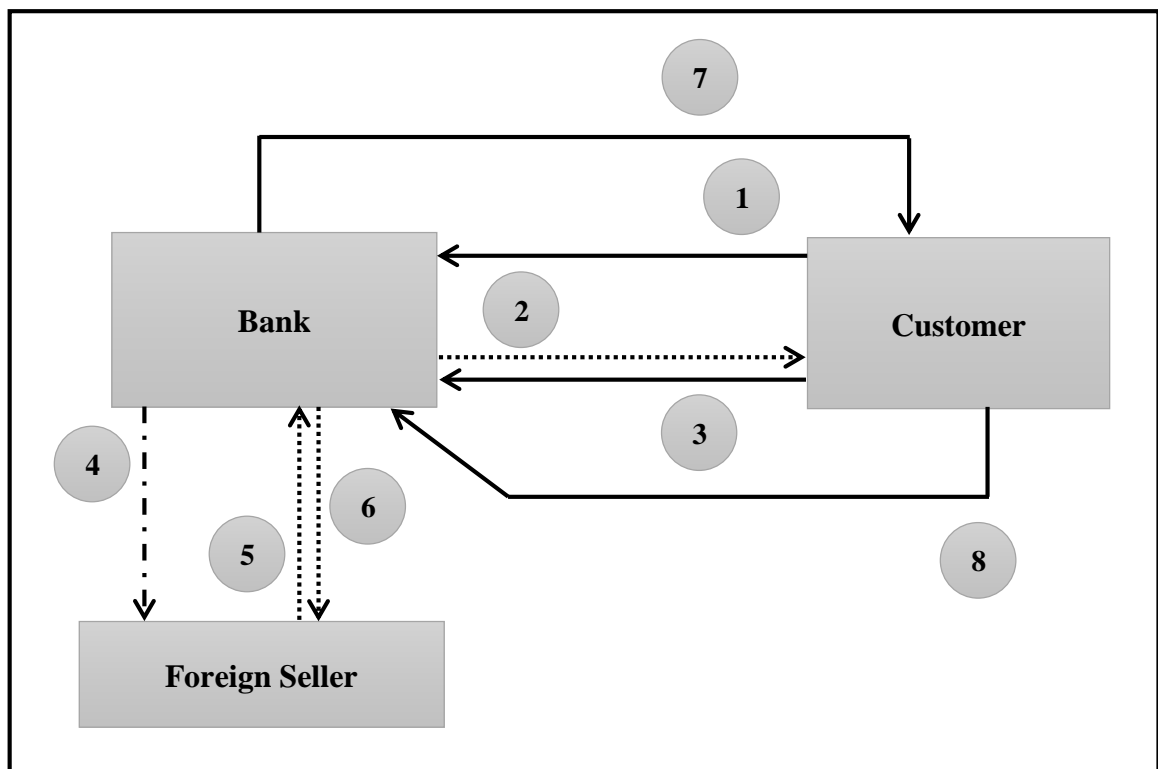


Figure 4.4 *Murābahah* Post Import (MPI)

Source: Interview with the Bankers

The element of *wa'd* is crucial here because if the customer does not purchase the goods after the bank has purchased it then the bank will incur loss especially in goods which are purchased and imported from abroad. In the above structure, there is only one *wa'd* from the customer. The customer promises the bank that he will purchase the specific commodity after the bank has purchased it.



Even though the Islamic Fiqh Academy has allowed using *muwā'adah* in the above structure, Islamic banks in Bangladesh do not practice *muwā'adah*. Therefore, the customer's interest might be undermined in the existing structure. If there would be another *wa'd* from the bank that it will sell the goods to the specific customer, then it might provide more financial safety to the customer. This is because it might happen that the price of the goods rises up after the bank has purchased the goods from the foreign seller. The bank may take the opportunity to sell the goods directly in the market instead of selling it to the respective customer. *Muwā'adah* or *wa'dān* restricts the bank from this type of practice.

#### **4.5. Conclusion**

This chapter showed the practice of *wa'd* in Islamic banking products in Bangladesh after providing an overview of Islamic banking system and the legal status of *wa'd* in the country. It can be concluded that the *wa'd*-based products are limited in the Islamic banks of Bangladesh. The three consumer-banking products include *wa'd* in their product structures which are BMPO, *bay' mu'ajjal* and HPSM. The only *wa'd*-based trade-financing product is MPI. *Wa'd* is employed in the above mentioned products. There is no usage of *muwā'adah* and *wa'dān*. Finally, there is no *wa'd*-based Islamic treasury product in the Islamic banks of Bangladesh.

## **CHAPTER 5: COMPARISON BETWEEN THE PRACTICE OF *WA'D* IN MALAYSIAN AND BANGLADESHI ISLAMIC BANKS**

### **5.1. Introduction**

The third and fourth chapters elaborated on the *wa'd*-based products in Malaysia and Bangladesh. It is pertinent now to compare between these two countries to learn the similarities and differences between them. The comparison may help determine the strengths and weaknesses of *wa'd*-based products in both countries. Both of the countries may get benefit from each other through learning different kinds of product structures.

This chapter compares the legal status of *wa'd* in both countries. It then compares the *wa'd*-based products in both countries. The comparison on the *wa'd*-based products is divided into three types: (1) consumer banking product, (2) trade financing product, and (3) treasury product. While making the comparison, the aspect of similarities and differences in the product structure, existence, and usage of *wa'd* is emphasised.

### **5.2. Comparison on the Legal Status of *Wa'd***

Primarily, the legal status of *wa'd* is similar between Malaysia and Bangladesh. In both countries, Islamic banking cases fall under the purview of civil law.<sup>413</sup> The Malaysian Contracts Act 1950 is similar to the Bangladeshi Contract Act 1872.<sup>414</sup> The concept and binding nature of a promise are the same in both of the acts. However, the Malaysian legal system is comparatively more developed in a sense that the SAC of BNM holds the highest authority to resolve Islamic banking disputes.<sup>415</sup> The table below compares between the Contracts Act 1950 (Malaysia) and the Contract Act 1872 (Bangladesh).

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<sup>413</sup> Ahmad Hidayat Buang, "Islamic Contracts in a Secular Court Setting?", 317-340; Ahmad and Hassan, "Regulation and Performance," 256-258.

<sup>414</sup> Contracts Act (Malaysia), 1950, (Act No. 136, 1950); The Contract Act (Bangladesh), 1872 (Act No. IX, 1872).

<sup>415</sup> Central Bank of Malaysia Act (Malaysia), 2009, (Act No. 701, 2009).

Table 5.1 Comparison between Contract Acts in Malaysia and Bangladesh

Subject	Contract Act 1950 (Malaysia)	Contract Act 1872 (Bangladesh)
<b>Concept of <i>wa'd</i></b>	Not explicitly recognised	Not explicitly recognised
<b>Definition of 'promise'</b>	One party gives a proposal and the other party accepts	One party gives a proposal and the other party accepts
<b>Definition of 'proposal'</b>	A person offers to perform an action or to abstain from an action to the other to get his consent	A person offers to perform an action or to abstain from an action to the other to get his consent
<b>Binding nature of a promise</b>	A promise is binding on the promisor when the promisee accepts the promise	A promise is binding on the promisor when the promisee accepts the promise
<b>Compensation for the breach of promise</b>	If there is a breach, the promisor should compensate the promisee	If there is a breach, the promisor should compensate the promisee
<b>Similarity with the <i>Sharī'ah</i> law</b>	<i>Mālikī</i> school of jurisprudence	<i>Mālikī</i> school of jurisprudence
<b>Concept of <i>Muwā'adah</i> and <i>Wa'dān</i></b>	No provision	No provision

Source: Contracts Act 1950 (Malaysia) and the Contract Act 1872 (Bangladesh)

The Malaysian Contracts Act 1950 and Bangladeshi Contract Act 1872 define a 'promise' as one party gives a proposal and the other party accepts. In order to define the concept of 'promise', both acts use similar wordings in section 2 (b) of the acts. Similarly, the concept of 'proposal' is the same in both of the acts. Both define the 'proposal' as a person offers to perform an action or to abstain from an action to the other to get his consent. According to section 38 (1) of the Malaysian Contracts Act 1950, a promise is binding on the promisor when the promisee accepts the promise. Similarly, section 37 of the Bangladeshi Contract Act 1872 mentions that the promise is binding on the promisor when the promisee accepts the proposal. Furthermore, both acts mention that if there is a breach, the promisor should compensate the promisee.<sup>416</sup>

<sup>416</sup> Contracts Act (Malaysia), 1950, (Act No. 136, 1950); The Contract Act (Bangladesh), 1872 (Act No. IX, 1872).

Based on the above discussion, it can be said that the civil law of Malaysia and Bangladesh do not explicitly accept the *wa'd* concept. This is because both of the acts require that a promise should be accepted by the promisee. Both acts mention that a promise is binding on the promisor if it has a 'consideration'. 'Consideration' means that a promisee has acted upon or abstained from something relying upon that promise.<sup>417</sup> Based on this, the promisor is required to compensate the promisee should the promisee incurs any loss due to the breach of the promise. Hence, both Malaysia and Bangladesh indirectly adopt the *Mālikī* scholars' opinion on the binding nature of *wa'd*. *Mālikī* scholars have two types of opinions. The second opinion is that the promise is compulsory if it is related to an action and the promisee has entered into that action relying upon that promise.<sup>418</sup> Similarly, in the Contract Act of Malaysia and Bangladesh, the promise is binding on the promisor when the promisee has acted upon or abstained from something relying upon that promise.

However, in chapter two, we reasoned that *wa'd* is binding on the promisor except when there is a valid excuse. Based on this position, there would be a gap between the binding nature of *wa'd* in the *Sharī'ah* and the Contract Act in Bangladesh and Malaysia. In the Act, a promise which does not have a consideration is not binding whereas it is still binding under the *Sharī'ah*. Therefore, a separate provision for *wa'd* is required in the Contract Acts of Malaysia and Bangladesh.

Despite the similarities in the Contract Act, there are a few differences between Malaysia and Bangladesh in terms of the legal status of *wa'd*. Malaysia has further developed its legal system. The Central Bank of Malaysia Act 2009 has given the SAC of BNM the highest authority to issue rulings related to any Islamic financial dispute. Should there arise any Islamic banking case in the court, the judge should refer it to the

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<sup>417</sup> Contracts Act (Malaysia), 1950, (Act No. 136, 1950); The Contract Act (Bangladesh), 1872 (Act No. IX, 1872).

<sup>418</sup> Al-Aṣḥabī, *Al-Mudawwanah*, 3:270; Ibn Rushd, *Al-Bayān wa al-Taḥṣīl*, 15:343; Ibn 'Alīsh, *Fatḥ al-'Aliyy al-Mālik*, 1: 306-307.

SAC and whatever ruling it gives regarding the case is mandatory for the judge.<sup>419</sup> Therefore, if any dispute related to *wa'd* is brought to the court then whatever ruling the SAC provides is mandatory for the court. However, the supremacy of SAC might not be a permanent solution. Therefore, the law harmonisation committee of BNM is currently conducting rigor research to harmonise the Contract Act 1950 with the *Shari'ah* ruling for *wa'd*.<sup>420</sup>

On the other hand, the CSBIB in Bangladesh is a private organisation and their resolutions are not mandatory. Moreover, there is no initiative from BB to harmonise the *wa'd* concept with the Contract Act 1872.<sup>421</sup> This is a major difference between the legal status of *wa'd* in Bangladesh and Malaysia. Bangladesh is at the back seat to provide legal support for *wa'd* while Malaysia is more advanced through providing authority to the SAC of BNM to determine the *Shari'ah* issues related to *wa'd* while attempting to revise the Contract Act.

### **5.3. Comparison on the Practice of *Wa'd* in Islamic Banking Products**

Malaysia practices *wa'd* in nine Islamic banking products which is higher than Bangladesh which practices *wa'd* in four products. Malaysia's *wa'd*-based products comprise consumer banking products, trade financing products, and treasury products whereas Bangladesh does not offer any treasury product. Along with *wa'd*, Malaysia practices *wa'dān* in three products whereas Bangladesh practices only *wa'd*. Generally, there is no difference on the usage of *wa'd* among the three banks in Bangladesh. On the other hand, there are some differences among the three banks in Malaysia on the usage of *wa'd*. The table below provides a comparative overview on the *wa'd*-based products in Malaysia and Bangladesh.

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<sup>419</sup> Central Bank of Malaysia Act (2009), (Act No. 701, 2009).

<sup>420</sup> Bank Negara Malaysia, *Law Harmonisation Committee Report 2013*, 59.

<sup>421</sup> BMB Islamic, *Global Islamic Finance Report 2011*, 260.

Table 5.2 *Wa'd* Application among Islamic Banks in Malaysia and Bangladesh

Name of the Product	Type of Product	Malaysia n Banks Offer this Product	<i>Wa'd</i> Feature in Malaysia n Bank	Bangladesh i Banks Offer this Product	<i>Wa'd</i> Feature in Bangladeshi Bank
<i>Bay' Murābahah</i> Home Financing	Consumer	KFH	<i>Wa'd</i>	IBBL, PBL & SIBL	<i>Wa'd</i>
MM Home Financing		KFH & MIB	<i>Wa'dān</i>	IBBL, PBL & SIBL	<i>Wa'd</i>
<i>Bay' Mu'ajjal</i> Financing		Not offered	Not applicable	IBBL, PBL & SIBL	<i>Wa'd</i>
<i>Tawarruq</i> Home Financing		BIMB & MIB	<i>Wa'd</i>	Not offered	Not applicable
AITAB Vehicle Financing		MIB & KFH	<i>Wa'dān</i>	Not offered	Not applicable
<i>Murābahah</i> Letter of Credit	Trade Financing	BIMB, MIB & KFH	<i>Wa'd</i>	IBBL, PBL & SIBL	<i>Wa'd</i>
Islamic FX Forward	Treasury	BIMB, MIB & KFH	<i>Wa'd</i>	Not offered	Not applicable
IPRS		BIMB, MIB & KFH	<i>Wa'd</i>	Not offered	Not applicable
ICCS		BIMB, MIB & KFH	<i>Wa'd</i>	Not offered	Not applicable
IRS		KFH	<i>Wa'dān</i>	Not offered	Not applicable

Source: Interview with the bankers in Malaysia and Bangladesh

### 5.3.1. *Wa'd*-Based Consumer Banking Products

There are four *wa'd*-based consumer banking products in Malaysia:

- (1) *Mushārahah Mutanāqīshah* (MM) Home and Property Financing
- (2) *Al-Ijārah Thumma Al-Bay'* (AITAB) Vehicle Financing
- (3) *Murābahah* Home Financing
- (4) *Tawarruq/Commodity Murābahah* Home Financing

The Islamic banks in Bangladesh offer three consumer products based on *wa'd*:

- (1) *Bay' Murābaḥah* on Purchase Orderer (BMPO)
- (2) *Bay' Mu'ajjal*
- (3) *Hire-Purchase under Shirkat al-Milk* (HPSM)

Malaysia and Bangladesh jointly offer two products which are: (1) *murābaḥah* home financing and (2) MM home financing/HPSM financing. Malaysia uniquely offers AITAB vehicle financing and *tawarruq/commodity murābaḥah* home financing. On the other hand, Bangladesh exclusively offers *bay' mu'ajjal* financing. There are similarities and differences between Malaysia and Bangladesh on the usage of *wa'd* in the above mentioned products. The subsequent sections provide a detailed discussion on the similarities and differences between Malaysia and Bangladesh on these products.

#### **5.3.1.1. *Bay' Murābaḥah* Financing**

The mechanism of *bay' murābaḥah* financing in Malaysia is similar to Bangladesh. In both countries, “*murābaḥah* on purchase orderer” is used. The customer approaches the bank and requests the bank to purchase a property for him. The bank then purchases the property and sells it to the customer with a fixed profit rate. The customer pays the purchase price in instalments. In Malaysia, the product is designed for home financing only, whereas Islamic banks in Bangladesh offer *bay' murābaḥah* for home financing as well as for the purchase of industrial machineries and agricultural equipment. Bangladesh practices *bay' murābaḥah* more widely. All the three banks studied in Bangladesh offer *bay' murābaḥah* financing. In contrast, the usage of *bay' murābaḥah* is limited in Malaysia. Only KFH offers it. This is because Malaysian Islamic banks have different

alternatives e.g. *tawarruq* home financing, MM home financing, and *bay' bithaman ājil* home financing.<sup>422</sup>

In both countries, only one *wa'd* is used in *bay' murābaḥah* product. The customer promises the bank to purchase the property from the bank at a fixed profit rate. The *wa'd* is binding in both of the countries. The terms and conditions of *murābaḥah* financing in the Islamic banks in Bangladesh and Malaysia mention that the customer is required to compensate the bank if any loss has incurred due to his breach of the *wa'd*. However, no fee is taken for *wa'd* in both countries. Apart from this, Islamic banks in Malaysia and Bangladesh do not apply *muwā'adah* and *wa'dān* in *bay' murābaḥah* financing.<sup>423</sup> This is because the majority of the *Sharī'ah* scholars in both countries do not allow *muwā'adah* as binding on both of the parties.<sup>424</sup> This raises the issue in both of the countries that the practice of only one *wa'd* may ignore the customer's interest.

This *wa'd*-based *murābaḥah* financing structure in Malaysia and Bangladesh is the classical type of financing. A number of previous studies show the similar usage of *wa'd* in *murābaḥah* product.<sup>425</sup> However, the product structure can be developed further with the usage of *muwā'adah*.

In the case of Bangladesh, sometimes the bank directly gives money to the customer instead of purchasing the commodity first from the market and then selling it to the customer. In this case, there is no practice of *wa'd*.<sup>426</sup> However, in Malaysian practice, there is no such issue.<sup>427</sup> *Sharī'ah* issues may arise in the *murābaḥah* practice by the

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<sup>422</sup> Kuwait Finance House (Malaysia) Berhad, *Product Guide: Retail and Consumer Banking*, 5; Huda and Shamsuddoha, *Islami Banker Biniog Paddhoti*, 17; Islami Bank Bangladesh Limited, "Bai Murabaha," *Islami Bank Bangladesh Limited* website.

<sup>423</sup> *Ibid.*

<sup>424</sup> Ahcene Lahsasna (Member of the Shariah Committee, Maybank Islamic Berhad), interview with the researcher, 23 July 2014; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Mohd Nazri Chik, interview with the researcher, 4 September 2013; Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014.

<sup>425</sup> Nurdianawati Irwani Abdullah, "Status and implications of promise", 89; Syeliya Md Zaini and Nosrah Mohd Isa, "The application of *wa'd*", 36.

<sup>426</sup> Rahman, interview with the researcher, 7 April 2014; Shahed Rahmani (Member of the Shariah Supervisory Committee, Shahjalal Islami Bank Limited), interview with the researcher, 10 April 2014.

<sup>427</sup> Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013.



Islamic banks in Bangladesh due to their extensive usage. On the other hand, very limited usage of *murābaḥah* financing may not trigger any *Sharī'ah* issue in Malaysia. Based on the above discussion, the table below summarises the comparison between Malaysia and Bangladesh on the practice of *wa'd* in *murābaḥah* financing.

Table 5.3 Comparison between Malaysia and Bangladesh on the practice of *wa'd* in *murābaḥah* financing

No	Subject	Malaysia	Bangladesh
1	Type of <i>Murābaḥah</i>	<i>Murābaḥah</i> on purchase orderer	<i>Murābaḥah</i> on purchase orderer
2	<i>Wa'd Element</i>	Customer promises the bank to purchase the property from the bank at a fixed profit rate.	Customer promises the bank to purchase the property from the bank at a fixed profit rate.
3	Binding Nature of <i>Wa'd</i>	Binding on the promisor	Binding on the promisor
4	<i>Muwā'adah/Wa'dān</i>	No application	No Application
5	Fee for <i>Wa'd</i>	No fee	No fee
6	Name of the Bank (s)	KFH	IBBL, PBL & SIBL
7	Financing Facilities	House	House, Industrial machineries and agricultural equipment
8	Issue (s)	Disregarding Customer's interest	(a) Disregarding customer's interest; (b) <i>Sharī'ah</i> governance issue i.e. fake <i>murābaḥah</i> transaction

Source: Interview with the Bankers in Malaysia and Bangladesh

### 5.3.1.2. MM Home Financing

The product structure of MM in Malaysia is similar to HPSM in Bangladesh. In Malaysia, MM is a popular home financing product. On the other hand, HPSM is used for both home and car financing in Bangladesh. In Bangladesh, there is no usage of AITAB. Therefore, HPSM is used for both home and car financing. The operational structure of HPSM and MM financing are similar. In both products, the customer and the bank co-own the property and the bank then rents its portion of the property to the customer. At

the same time, the customer gradually purchases the bank's share of the property. At the end of the tenure, the bank transfers the property to the customer.<sup>428</sup>

In terms of the usage of *wa'd*, there is a difference between HPSM and MM. In MM (as practiced by KFH), there are three *wa'd* between the bank and the customer while in HPSM there is only one *wa'd*. In MM, the customer firstly promises to purchase the bank's share on a gradual basis and the bank then undertakes that it will sell its share of the property to the customer whenever he (the customer) asks for an early settlement. Thirdly, the client undertakes that he will purchase the bank's share of the property at the time of default. However, the second *wa'd* is not utilised in MIB. In case of HPSM in Bangladesh, there is only one *wa'd* from the customer. The customer undertakes that he will purchase the bank's share of the property either on gradual basis or in lump sum.<sup>429</sup>

In the case of MM, there is no practice of *muwā'adah* but the three *wa'd* practiced there can be regarded as *wa'dān*. This is because each of the *wa'd* is subject to different conditions. On the other hand, HPSM does not employ neither *muwā'adah* nor *wa'dān*. However, the *wa'd* given by the client in HPSM includes two different conditions which are the undertaking to purchase the property in lump sum and the undertaking to purchase the property on gradual basis.

The *wa'd* applied in MM provides more financial security to the bank and the customer. The undertakings by the client to purchase the bank's share provides the bank security of the smooth flow of MM agreement. Moreover, it provides the bank the right to recover its loss in case the customer defaults. Similarly, the bank's promise to the client provides the client the right to have an early settlement. The early settlement is a need for

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<sup>428</sup> Kuwait Finance House (Malaysia) Berhad, *Product Guide: Retail and Consumer Banking*, 7; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Huda and Shamsuddoha, *Islami Banker Biniog Paddhoti*, 97-98; Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014; Rahman, interview with the researcher, 7 April 2014.

<sup>429</sup> *Ibid.*

the customer when the property price or rent goes up rapidly. In this way, the *wa'd* used in MM ensures both parties' interests.

Table 5.4 The Practice of *Wa'd* in MM (Malaysia) and HPSM (Bangladesh)

No	MM Home Financing (KFH)	MM Home Financing (MIB)	HPSM Financing (IBBL, SIBL & PBL)
1	The customer undertakes to purchase the bank's share of the property on gradual basis.	The customer undertakes to purchase the bank's share of the house on gradual basis.	The customer undertakes to purchase the bank's share of the property either gradually or in lump sum.
2	The bank undertakes that it will sell its share of the property to the customer whenever he (the customer) asks for an early settlement.	×	×
3	The customer undertakes that he will purchase the bank's share of the property at the time of default.	The customer undertakes that he will purchase the bank's share of the property at the time of default.	×

Source: Interview with the bankers in Malaysia and Bangladesh

The structure of *wa'd* in MM may raise several *Sharī'ah* issues. As the bank and the customer mutually promise to each other on a same subject matter then it may become *muwā'adah*. The issue is whether there is a real difference among the number of *wa'd*. Secondly, the undertaking given by the customer to purchase the property at the event of default may be a guarantee to the *mushārik* (bank's) capital in the *mushārah* agreement. When one *mushārik* is giving guarantee to another *mushārik*'s capital through purchase undertaking then it may be prohibited. This is because the risk of investment is eliminated whereas risk sharing is the fundamental characteristic of Islamic finance. Therefore, the next chapter of this thesis will shed some light on these issues.

### 5.3.1.3. *Bay' Mu'ajjal* Financing

As discussed earlier, *bay' mu'ajjal* is similar to *bay' murābahah* financing with some minor differences. There is usually a *wa'd* from the customer to purchase a commodity from the bank. The product is offered by the three Islamic banks of Bangladesh.<sup>430</sup> There is a popular product in Malaysia similar to *bay' mu'ajjal* which is called *bay' bi thaman ājil* (BBA). Even though the literal meaning for both of the contracts are the same, there are differences between *bay' mu'ajjal* and BBA in terms of the operational structure. The table below shows the differences and similarities between BBA and *bay' mu'ajjal*.

Table 5.5 Comparison between *Bay' Mu'ajjal* and *Bay' Bithaman Ājil* (BBA)

Subject	<i>Bay' Mu'ajjal</i>	<i>Bay' Bithaman Ājil</i> (BBA)
<b>Sale and buy back agreement</b>	There is no sale and buy back agreement between the bank and the customer	There is a sale and buy back agreement between the bank and the customer
<b>Payment of price</b>	The payment of price is deferred.	The payment of price is deferred.
<b><i>Wa'd</i></b>	The customer undertakes to purchase the commodity from the bank	There is no practice of <i>wa'd</i> .
<b>Parties involved</b>	Three parties: the developer, the bank and the customer	Three parties: the developer, the bank and the customer
<b>Ownership risk</b>	Higher ownership risk for the bank	Lower ownership risk for the bank
<b><i>Sharī'ah</i> concept used</b>	<i>Wa'd</i> and <i>bay'</i>	<i>Bay' al- 'īnah, muqāṣah</i>
<b><i>Sharī'ah</i> appraisal</b>	Permissible by the scholars of all four school of jurisprudence	Permissible by some scholars of <i>Shāfi'ī</i> school of jurisprudence

Source: BIMB and IBBL

Under BBA home financing, the customer purchases a house from the developer and makes a down payment. After that, the customer approaches to the bank and asks for financing. If the bank approves the financing then an asset purchase agreement will be executed where the bank purchases the house from the customer. A novation agreement takes place after that and as a result, the bank pays the purchase price directly to the developer. After that, an asset sale agreement will be executed where the bank sells the

<sup>430</sup> Huda and Shamsuddoha, *Islami Banker Biniog Paddhoti*, 64; Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014; Rahman, interview with the researcher, 7 April 2014.

house to the customer with cost plus profit on deferred basis. The customer pays the bank on instalments.<sup>431</sup>

The above structure shows that there is a sale and buy back arrangement between the bank and the client. Therefore, BBA is different from a plain *bay' mu'ajjal* contract. There is no practice of *wa'd* in BBA.<sup>432</sup> This is because the customer purchases the house first from the developer. The bank then purchases the house and immediately sells it back to the customer. Thus, the bank confronts minor risk. Therefore, there is no need to employ *wa'd* to minimise the risk.

The practice of BBA by the Islamic banks in Malaysia received a major criticism by the scholars. The sale and buy back agreement between the two parties is termed as *bay' al-'inah*. The majority of the scholars from the four school of jurisprudence have prohibited *bay' al-'inah*. Only a few *Shāfi'ī* scholars have allowed it with conditions.<sup>433</sup> Therefore, the *wa'd*-based *bay' mu'ajjal* can be a better alternative for BBA. *Bay' mu'ajjal* is accepted in the *Sharī'ah* with the consensus of the scholars. Along with *bay' mu'ajjal*, there are a few contracts which can be the alternatives for BBA e.g. *tawarruq* home financing and *murābahah* home financing. These products are based on *wa'd* and can be used in lieu of BBA.

#### **5.3.1.4. Tawarruq Home Financing**

*Tawarruq* home financing is based on *bay' murābahah* but it is more complicated. Similar to *murābahah*, there is *wa'd* in *tawarruq* home financing where the client undertakes to purchase an asset from the bank.<sup>434</sup> *Tawarruq* is used in Islamic banks in Malaysia but the Islamic banks in Bangladesh do not offer any product based on *tawarruq*. This is

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<sup>431</sup> Bank Islam Malaysia Berhad, *Application of Shari'ah Contracts*, 16.

<sup>432</sup> Mohd Nazri Chik, interview with the researcher, 4 September 2013; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.

<sup>433</sup> Wazārah al-Awqāf wa al-Shu'ūn al-Islāmiyyah, *Al-Mawsū'ah al-Fiqhiyyah*, 9:95-97; Amir Shaharuddin, "The Bay' al-'Inah Controversy," 499-511.

<sup>434</sup> Bank Islam Malaysia Berhad, *Application of Shari'ah Contracts*, 3.

because most of the *Sharī'ah* scholars in Bangladesh view that *tawarruq* is not allowed in the *Sharī'ah*.<sup>435</sup> Similar to the Islamic Fiqh Academy, some scholars view that only organised *tawarruq* is not allowed. However, currently, there is no infrastructure developed in Bangladesh to practice the real *tawarruq*.<sup>436</sup> Based on the second view, it is possible to introduce *tawarruq* home financing product in Bangladesh on the condition that there is a free commodity market to practice the real *tawarruq*.

Currently, *bay' murābaḥah* may substitute *tawarruq* in Bangladesh but *tawarruq* has some advantages comparing with *bay' murābaḥah*. Firstly, it provides cash money to the customer. As the customer can sell the asset to a third party, he receives cash money. Therefore, *tawarruq* may serve the customer's needs better than *bay' murābaḥah*.

Secondly, *tawarruq* involves less risk for the bank. As mentioned earlier in the case of *tawarruq* home financing, the bank does not purchase the house rather it purchases a commodity from a broker and sells it to the customer on credit. After that, the bank becomes the customer's agent to sell the commodity to another broker. On the other hand, in *bay' murābaḥah* home financing, the bank purchases a house from the developer and sells it to the customer. Therefore, the bank faces more ownership risk in *bay' murābaḥah* than in *tawarruq*.

*Tawarruq* may help Islamic banks in Bangladesh to meet the customer's different types of needs as currently no such product is available in the market. However, it is a significant challenge for the Islamic banks in Bangladesh to develop the *tawarruq* commodity market to practice real *tawarruq*. Besides, the status of *tawarruq* in the *Sharī'ah* is still a debate among the *Sharī'ah* scholars.

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<sup>435</sup> Ahsanullah Miah (Member of the *Sharī'ah* Supervisory Committee, Islami Bank Bangladesh Limited), written communication with the researcher, 10 April 2014; Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014.

<sup>436</sup> Rahmani, interview with the researcher, 10 April 2014.

### 5.3.1.5. AITAB Vehicle Financing

AITAB is another type of *wa‘d*-based product which is practiced in Malaysia but not in Bangladesh. Instead of AITAB, Islamic banks in Bangladesh employ HPSM for vehicle financing which is basically *mushārah mutanāqīshah*. Even though no *Sharī‘ah* and legal issue is involved with AITAB, no Islamic bank in Bangladesh practices AITAB. There is a difference between HPSM and AITAB. Based on HPSM, there is a partnership agreement between the bank and the customer and then the customer purchases the bank’s share gradually. On the other hand, there is no partnership agreement between the bank and the customer in AITAB. First, the bank purchases a vehicle and rents it out to the customer. At the end of the lease period, the bank sells the vehicle to the client through a token price. Usually, *wa‘dān* is employed in AITAB while HPSM employs *wa‘d* only.<sup>437</sup>

Even though no *Sharī‘ah* issue is evident in using HPSM for vehicle financing, globally AITAB is used for vehicle financing. AITAB does not involve any major *Sharī‘ah* issue. AITAB is used for car financing because it is less complicated than HPSM. Car prices always depreciate. It is not difficult for the client to purchase the car at the end of the lease period. On the other hand, house prices usually appreciate. Consequently, it is difficult for the customer to purchase the house at the end of the lease period. Therefore, AITAB is more suitable for vehicle financing whereas HPSM is more suitable for house financing. Finally, AITAB may provide more product diversity for Islamic banking in Bangladesh.<sup>438</sup>

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<sup>437</sup> Maybank Islamic Berhad, “Al-Ijarah Thuma Al-Bai (AITAB)”, 1; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Huda and Shamsuddoha, *Islami Banker Biniog Paddhoti*, 97-98.

<sup>438</sup> Seif I. Tag El-Din and N. Irwani Abdullah, “Issues of Implementing Islamic Hire Purchase in Dual Banking Systems: Malaysia’s Experience,” *Thunderbird International Business Review* 49, (March–April 2007), 225–249; Ryan Dong Chen, Christopher Gan, Baiding Hu and David A. Cohen, “An Empirical Analysis of House Price Bubble: A Case Study of Beijing Housing Market,” *Research in Applied Economics* 5, no. 1 (2013), 77-97; Karl Storchmann, “On the Depreciation of Automobiles: An International Comparison,” *Transportation* 31, no. 4 (2004), 371.

### 5.3.2. Trade Financing Products

A *Murābahah* letter of credit which includes *wa'd* is offered by the Islamic banks in Malaysia and Bangladesh. However, it is termed *murābahah* post import (MPI) in the Islamic banks of Bangladesh. The product structure is the same for both Malaysian and Bangladeshi Islamic banks. In both countries, the customer approaches the bank and requests the bank to purchase a commodity from a foreign trader. After the bank has purchased the commodity, it sells it to the customer with a profit margin.<sup>439</sup>

The practice of *wa'd* is the same in both jurisdictions. The client undertakes that he will purchase the commodity from the bank after the bank has purchased it from the foreign seller. No *muwā'adah* or *wa'dān* is used in both of the countries. It is noteworthy to mention here that considering the need in export and import business, *Sharī'ah* scholars provide some flexibility on the usage of *muwā'dah* here. Islamic Fiqh Academy in its 17<sup>th</sup> session resolved that when it is a necessity to apply *muwā'adah* in trade financing then it is allowed to apply *muwā'adah*.<sup>440</sup> Therefore, both Malaysia and Bangladesh can improve the product structure through applying *muwā'adah* when there is a need.

In Malaysia, there are two other trade financing products namely “Islamic trust receipt” and “Islamic accepted bill for import” offered to the customers which are based on the similar structure of *murābahah* letter of credit. However, there is no such product offered by the Islamic banks in Bangladesh. This is because there is a *Sharī'ah* issue involved with these two products which is known as *bay' al-dayn*. *Bay' al-dayn* is not allowed by the *Sharī'ah* scholars in Bangladesh as well as the majority of the *Sharī'ah* scholars globally.<sup>441</sup>

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<sup>439</sup> Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Shahjalal Islami Bank Limited, “Islamic Mode of Investment”, *Shahjalal Islami Bank Limited* website; Prime Bank Limited, “Hasanah Foreign Trade”, *Prime Bank Limited* website.

<sup>440</sup> Islamic Fiqh Academy, 17<sup>th</sup> Session, *Islamic Fiqh Academy* website.

<sup>441</sup> Hanudin Amin, “An Analysis of the Classical and Contemporary Juristic Opinions on Bay Al- Dayn,” *Labuan e-Journal of Muamalat and Society* 1, (2007) 40; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Shahjalal Islami Bank Limited, “Islamic Mode of Investment”, *Shahjalal Islami Bank Limited* website; Prime Bank Limited, “Hasanah Foreign Trade”, *Prime Bank Limited* website.



### 5.3.3. Treasury Products

As mentioned earlier, Malaysia has developed four treasury products based on the concept of *wa'd* which are: (1) Islamic FX Forward, (2) Islamic Profit Rate Swap, (3) Islamic Cross Currency Swap, and (4) *Ijārah* Rental Swap. On the other hand, Bangladesh is yet to introduce any treasury product. The subsequent sections describe the current status of developing Islamic treasury products in Bangladesh.

#### 5.3.3.1. Islamic FX Forward

Currently, there is an initiative by the CSBIB to structure Islamic FX forward. However, the *Shari'ah* scholars in Bangladesh have different views on the permissibility of FX forward in the *Shari'ah*. A group of scholars view that FX forward is not permissible in the *Shari'ah*. They argue that there is a doubt of *ribā* in FX forward. *Shari'ah* requires that currencies should be exchanged on the spot according to the price on the spot. If a binding promise (*wa'd mulzim*) is employed to execute a currency exchange contract (*ṣarf*) in the future based on today's exchange rate then it is not allowed. Currency exchange should be based on the exchange rate at the time of executing the contract.<sup>442</sup>

On the other hand, some *Shari'ah* scholars in Bangladesh view that FX forward should be allowed in the *Shari'ah*. They argue that according to the *Ḥanafī* school of jurisprudence (*madhhab*), it is allowed to make *wa'd* as well as *muwā'adah* binding on the promisor based on the need of the public. As FX forward is a need for Islamic banking in Bangladesh then it should be allowed to employ a binding mutual promise (*muwā'adah mulzimah*) in FX forward. There is a difference between a contract (*'aqd*) and

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<sup>442</sup> Abu Bakr Rafiq (Member, Central Shari'a Board for Islamic Banks of Bangladesh), interview with the researcher, 4 May 2014; Shakhawatul Islam (Member Secretariat, Central Shari'a Board for the Islamic Banks of Bangladesh), interview with the researcher, 19 April 2014; Shamsuddoha, interview with the researcher, 7 April 2014.

*muwā'adah*. There is no transfer of ownership, *ījāb* and *qabūl* in *muwā'adah*. Therefore, no *Sharī'ah* ruling related to a contract is attributed to *muwā'adah*.<sup>443</sup>

The above debate amongst the *Sharī'ah* scholars is ongoing and they have been unable to come up with a concrete decision on this matter. Therefore, FX forward is not issued by any Islamic bank in Bangladesh.<sup>444</sup>

### **5.3.3.2. Islamic Profit Rate Swap (IPRS) and Islamic Cross Currency Swap (ICCS)**

Malaysia introduced IPRS and ICCS based on *wa'd*. The key underlying contract in both types of swaps is *tawarruq*. *Wa'd* is used as a supporting instrument in both types of swaps. These two swaps are essential to manage floating profit rate risk and floating currency exchange rate risk.<sup>445</sup> However, the majority of the *Sharī'ah* scholars and Islamic banking practitioners in Bangladesh rejected the idea of introducing Islamic swap. They provided a few reasons for this. Firstly, *tawarruq* is not an accepted *Sharī'ah* contract in Bangladesh. Referring to the *Ḥanafī* school of jurisprudence (*madhhab*), the majority of the *Sharī'ah* scholars in Bangladesh view that *tawarruq* is not accepted in the *Sharī'ah*. In addition, there is a fear that derivatives are toxic financial instruments. A number of Islamic banking practitioners in Bangladesh view that swaps are harmful for the economy and they are not a public need. Moreover, it is not necessary to have an Islamic alternative for each conventional product.<sup>446</sup> Therefore, no swap is introduced in Bangladesh.

Some believe that swap is a crucial need for Islamic finance in Bangladesh. It is an effective tool to manage currency rate risk and profit rate risk. Therefore, it should be

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<sup>443</sup> A.Q.M. Safiullah Arif (Secretary General, Central Shariah Board for Islamic Banks of Bangladesh), interview with the researcher, 16 April 2014; Rahmani, interview with the researcher, 10 April 2014; Miah, written communication with the researcher, 10 April 2014.

<sup>444</sup> Islam, interview with the researcher, 19 April 2014; Uddin, interview with the researcher, 13 April 2014.

<sup>445</sup> Bank Islam Malaysia Berhad, *Application of Shari'ah Contracts*, 94; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.

<sup>446</sup> Rafiq, interview with the researcher, 4 May 2014; Shamsuddoha, interview with the researcher, 7 April 2014; Rahmani, interview with the researcher, 10 April 2014.

allowed as a risk management tool.<sup>447</sup> Along with this, some *Sharī'ah* scholars believe that *tawarruq* can be permissible in Bangladesh with the condition that it is not an organised *tawarruq*.<sup>448</sup>

In light of the above, *tawarruq* might be practiced in the future when a commodity market is established to allow free commodity trading. When a real *tawarruq* is used in a swap structure with *wa'd* then there might be no *Sharī'ah* restriction to issue IPRS and ICCS in Bangladesh.

### **5.3.3.3. *Ijārah* Rental Swap (IRS)**

IRS is another risk management instrument offered by KFHMB in Malaysia. The key underlying contract in IRS is *musāwamah*. Unlike IPRS, IRS uses *wa'dān* in its product structure. The most important characteristic of IRS is that it is used to hedge returns from *ijārah* only.<sup>449</sup> In the case of Bangladesh, there is no pure *ijārah* financing except HPSM. Islamic banks in Bangladesh can hedge their *ijārah* returns in HPSM through this IPRS. However, similar to IPRS, there is *tawarruq* arrangement in IRS as well. Therefore, it is a significant challenge for IRS to achieve the *Sharī'ah* acceptance in Bangladesh.

## **5.4. Conclusion**

This chapter compared the legal status and the practice of *wa'd* in Islamic banking products in Malaysia and Bangladesh. It showed that the contract acts in both countries do not explicitly recognise *wa'd*. However, Malaysia provides strong support for *wa'd* through placing the SAC as the highest authority to decide on any Islamic financial cases in the court. In terms of the practice of *wa'd*, there is a significant difference between Malaysia and Bangladesh. Malaysia has a wide range of products based on *wa'd* and

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<sup>447</sup> M. Azizul Huq (Member of the Shariah Supervisory Committee, Prime Bank Limited), interview with the researcher, 9 April 2014; Arif, interview with the researcher, 16 April 2014.

<sup>448</sup> Rahmani, interview with the researcher, 10 April 2014.

<sup>449</sup> Ali Ahmad, interview with the researcher, 26 December 2013.

*wa'dān*, whereas Bangladesh has a limited number of *wa'd*-based products. There is no practice of *wa'dān* in Bangladesh. Moreover, no treasury product has thus far been launched in Bangladesh due to the strictness of the *Sharī'ah* scholars.

## CHAPTER 6: *SHARĪ'AH* ISSUES AND OTHER CHALLENGES FOR *WA'D*- BASED PRODUCTS IN MALAYSIA AND BANGLADESH

### 6.1. Introduction

There are a number of challenges in practicing *wa'd* in different Islamic banking products. Among these challenges, *Sharī'ah* issues are most significant in Malaysia. A group of *Sharī'ah* scholars have raised questions on the practice of *wa'd* in Malaysian Islamic banking products. However, some *Sharī'ah* scholars have excluded these *Sharī'ah* issues. Comparing with Malaysia, *wa'd*-based products are limited in Bangladesh. Therefore, it is encountering minor *Sharī'ah* issues. However, *Sharī'ah* scholars and Islamic banking practitioners in Bangladesh have identified different types of challenges for the development of *wa'd*-based products in Bangladesh.

This chapter discusses the *Sharī'ah* issues and other challenges in *wa'd*-based products in Malaysia and Bangladesh. It presents the *Sharī'ah* scholars and Islamic banking practitioners' opinions first and then makes a thorough discussion reflecting on their opinions. The first section discusses the *Sharī'ah* issues and other challenges in Malaysia and the second section discusses the *Sharī'ah* issues and other challenges in Bangladesh.

### 6.2. *Sharī'ah* Issues and Other Challenges for *Wa'd*-Based Products in Malaysia

There are six challenges regarding the practice of *wa'd* in Islamic banking products in Malaysia. Among these challenges, four are *Sharī'ah* issues which are: (1) *wa'd* as a means for capital guarantee in MM home and property financing, (2) *wa'd* as a *ḥīlah* in treasury products, (3) *wa'd* as an instrument to exploit the opposite party, and (4) similarity with forward contract (*bay' al-ajal bi al-ajal*). Together with these *Sharī'ah*

issues, two additional challenges are (1) legal challenges and (2) absence of parameters. The following sections provide details of these *Shari'ah* issues and challenges.

### **6.2.1. *Wa'd* as a Means for Capital Guarantee in MM Home and Property Financing**

In relation to MM home and property financing, it is claimed that the *wa'd* given by the customer to the bank on purchasing the share of the bank at a fixed price is a kind of guarantee to the bank's capital in the *musharakah* business. If one partner provides a guarantee to another partner's capital in a *musharakah* investment, then it violates the purpose of the *musharakah* contract. This is because the fundamental principal of a *musharakah* contract is that all the partners in the *musharakah* venture should share the profit and loss. Corresponding to this issue, *Shari'ah* scholars interviewed in Malaysia fall into two different groups. One group of scholars' view is that the *wa'd* used in MM is a guarantee to the capital. The other group of scholars view that the *wa'd* here is not a capital guarantee to the partner of the *musharakah* agreement. The details on the scholars' opinions and their arguments are provided below.

#### **6.2.1.1. *Wa'd* is an Element of Guarantee to the *Musharakah* Capital**

Asmadi Mohamed Naim is a proponent of the view that *wa'd* is an element of guarantee to the *musharakah* capital in MM home financing. He argues that the type of partnership (*shirkah*) applied in MM home financing is *shirkat al-'aqd*. Even though it is *shirkat al-milk* at the initial stage but it changes into *shirkat al-'aqd* after that. In MM, both customer and bank make an agreement to invest the property through leasing it either to the customer himself or to third party. In this way, the partnership has been converted to *shirkat al-'aqd*. MM home financing violates all the characteristics of *shirkat al-milk*. The bank's intention is neither to own the house nor to use it but to invest it through lease with the intention of gaining profit. Moreover, in *shirkat al-milk*, all the partners are free to

perform any transactions with their own portions. However, in this product, the partners are not allowed to do so as they are bound to an arrangement before.<sup>450</sup>

Asmadi Mohamed Naim concludes that the *wa'd* given by the customer to the bank on purchasing the bank's share at the time of default is prohibited (*ḥarām*) due to a number of reasons. Firstly, it contradicts the Qur'anic guidance that asks the creditors to free the debtors or to postpone the repayment when the debtor is truly incapable of settling the debt. With this *wa'd*, the financier places the customer in difficulty by forcing him to purchase the remaining share of the bank on credit although he is in a difficult situation. Secondly, there is no risk-sharing by the bank. When the property is under the joint-ownership then the bank is entitled to receive the proceeds from the property auction based on its share in the property. However, with the use of this *wa'd*, the bank can claim the full amount of the proceeds from the property auction. This type of procedure completely goes against the prophetic narration (*ḥadīth*) which says: "profit comes with taking risk".<sup>451</sup>

Furthermore, this *wa'd* arrangement is a kind of oppression (*ẓulm*) on the person who is presently unable to purchase the share of the bank and unable to pay the *ijārah* rental by imposing greater obligation, which is to purchase the remaining share of the house in credit. In addition, all the partners in a *mushārah* contract should meet the same rights and liabilities. However, this *wa'd*-based arrangement facilitate the bank to escape from the *mushārah* liability.

Asmadi Mohamed Naim asserts that it is not precise to claim that there is no other way to mitigate the risk in MM home financing except through this *wa'd*. This is because the bank utilises a number of risk mitigation techniques prior to approving this product, e.g. credit scoring of the customer, keeping required risk premiums for *mushārah*

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<sup>450</sup> Asmadi Mohamed Naim, "Purchase Undertaking Issues," 40-41.

<sup>451</sup> *Ibid.*

financing etc.<sup>452</sup> Therefore, this *wa'd*-based arrangement should not be allowed in the *Shari'ah*.

When interviewed, Azman Mohd Noor stated that some Islamic banks in Malaysia employ *wa'd* in MM home financing that the customer will purchase the bank's share of the house on gradual basis. In case the customer does not fulfil his *wa'd*, the bank sells the house in auction. If any loss incurs to the bank, the bank will cover it from the customer's portion of the proceeds received from the house auction. This is a kind of capital guarantee to the bank's share of the property by the promisor (customer). This is an example of the inappropriate use of *wa'd*. He argues that this practice is similar to the case of a *muḍārabah* where the *muḍārib* promises to fill up necessary amount of money if he cannot achieve the targeted amount of profit. The same thing goes with the *mushārah* financing here where one partner obligates another partner to purchase the *mushārah* asset with face value along with other costs. Therefore, there is no difference here between *mushārah* and BBA. Consequently, the purpose of the contract (*muqtaḍā al-'aqd*) is violated through this *wa'd* disregarding whether it is *shirkat al-'aqd* or *shirkat al-milk*.<sup>453</sup>

Azman Mohd Noor adds that some prominent scholars i.e. Sheikh Nedham Yaqoobi have allowed this and some banks in Malaysia are practicing it. However, it is the dangerous part of *wa'd* which many people are not aware of. It is true that *wa'd* is a risk mitigation tool, but at the same time it may serve as the conventional interest-based banking facility. Therefore, this practice should be prohibited.<sup>454</sup>

Respecting the majority opinion, Mohamad Akram Laldin views that *wa'd* is used in MM home financing to guarantee the capital of the bank. If the customer promises that if he defaults then he will purchase the property from the bank at a fixed price then, it is

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<sup>452</sup> Asmadi Mohamed Naim, "Purchase Undertaking Issues," 43-44.

<sup>453</sup> Azman Mohd Noor (Deputy Chairman, Shariah Board, Al Rajhi Banking & Investment Corporation (Malaysia) Berhad), interview with the researcher, 24 July 2014.

<sup>454</sup> *Ibid.*



actually guaranteeing the capital plus the profit of the bank. This is because the price of the property fixed at the beginning of the contract includes the original purchasing price plus profit as well as other costs. This is a matter of concern because the purpose of the *mushārah* contract has been changed here. Looking into this product from a micro-level perspective, it seems that everything is sound. However, when we look into this product from a macro-level perspective analysing the purpose of all the underlying contracts, it appears that there is an arrangement of guarantee to the capital plus profit. It means that there is no profit and loss sharing in this *mushārah* contract whereas the purpose of *mushārah* is that there must be profit and loss sharing between the parties.<sup>455</sup>

Relating to this issue, Hakimah Yaacob mentions that *shirkat al-milk* means to co-own a house or a car without having any intention to get profit from it. Once the partners have decided to get profit from this *mushārah* asset, it becomes *shirkat al-'aqd*. Therefore, it is dangerous to inject *wa'd* in MM home financing because it may lead to guaranteeing the capital of the *mushārik* which is not legitimated in the *Sharī'ah*. In some Islamic bank's product documentation, it is stated that the customer must purchase the bank's share of the house disregarding anything happens to the house. The element of guarantee is found here. The *wa'd* is injected in the MM home financing in a way that it has no profit and loss sharing. Hence, the purpose of the contract (*muqadā al-'aqd*) has been violated.<sup>456</sup>

Hanirah Hanafi mentioned that the *wa'd*-based arrangement in the case of default which includes some unreasonable actions to safeguard the bank's interest hampers the government's initiative to develop equity-based products. She pronounces that the *wa'd* clause in the MM home financing somehow undermines the essence of Islamic law (*maqāsid al-Sharī'ah*). Therefore, she recommends that it is the duty of the *Sharī'ah*

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<sup>455</sup> Mohamad Akram Laldin (Deputy Chairman, Shari'ah Advisory Council of Bank Negara Malaysia), interview with the researcher, 14 October 2014.

<sup>456</sup> Hakimah Yaacob (Member, Shariah Committee, Citibank Berhad), interview with the researcher, 30 October 2014.

committee to make sure that the *Sharī‘ah* rules are both theoretically and practically followed in all situations.<sup>457</sup>

#### **6.2.1.2. *Wa‘d* is Not an Instrument to Guarantee the *Mushārah* Capital**

Contrary to the previous opinions, Ahcene Lahsasna views that MM home financing in fact involves *shirkat al-milk*. It is the common ownership in the property. Therefore, the issue of capital guarantee collapses because it is not a partnership business (*shirkat al-‘aqd*) where the issue of capital guarantee is relevant. This is a common ownership on an asset. Therefore, all the arguments related to capital guarantee is irrelevant here.<sup>458</sup>

Moreover, there is no violation of the objective of the contract (*muqtaḍā al-‘aqd*) here, which might be related to some *mushārah sukūk* structure. People may argue on this but if we look beyond the theory, the issue might be clear. When a product is put into practice then usually a number of problems occur. To adjust those problems, the facilities are required to be tied up with many terms and conditions. This is why when we employ *ijtihād taṭbīqī* then due consideration is paid to a number of facts. What has been done in MM home financing is the enhancement of the contract. There is a difference between corrupting the contract (*ifsād al-‘aqd*) and enhancement of the contract (*taḥsīn al-‘aqd*). Too many terms and conditions may violate the purpose of the contract (*muqtaḍā al-‘aqd*) but what has been practiced so far regarding *wa‘d* is actually on the enhancement of the contract.<sup>459</sup>

Another *Sharī‘ah* scholar, Shamsiah Mohamad viewed that MM home financing is based on *shirkat al-milk*. She argued that based on the classical sources of Islamic jurisprudence, *shirkat al-milk* is the property that is jointly owned through inheritance for

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<sup>457</sup> Hanira Hanafī, “Critical Perspectives on Musharakah Mutanaqisah Home Financing in Malaysia: Exploring Legal, Regulative and Financial Challenges,” (Doctoral Thesis, Durham University, United Kingdom, 2012), 237.

<sup>458</sup> Lahsasna, interview with the researcher, 23 July 2014.

<sup>459</sup> *Ibid.*

example. If two individuals jointly purchase a computer for example then it is *shirkat al-milk*. On the other hand, in *shirkat al-'aqd*, both partners share an asset to get profit through business. In the case of MM home financing, the bank and the customer jointly purchase the house. It is not their intention to profit from this investment. Based on this, it can be said that MM home financing involves *shirkat al-milk* but not *shirkat al-'aqd*.<sup>460</sup>

Furthermore, it is not accepted that MM home financing is *shirkat al-milk* at the initial stage, and then it transforms into *shirkat al-'aqd*. This is because based on the classical scholars' opinions, it should be decided at the time of establishing the partnership. If two persons jointly own an asset and after that they decide to rent it out or to sell it in the market then it does not change into *shirkat al-'aqd*.<sup>461</sup>

In addition, Ahmad Suhaimi Yahya argues that purchase undertaking is not a guarantee to the capital in general. Referring to Taqi Usmani, he argues that purchase undertaking is a kind of guarantee when the *mushārik* (partner) promises to purchase the property with a nominal value or face value. However, if the *mushārik* undertakes to purchase the property with fair value then it is not a problem. This is because the purchase of the property by the *mushārik* at the end of the tenure depends on the availability of the property. If the property is lost then there is no purchase. Therefore, it should not be generally concluded that purchase undertaking is a guarantee to the *mushārah* capital.<sup>462</sup>

Furthermore, Muhd Ramadhan Fitri Ellias argues that MM home financing is a *shirkat al-milk*. This is because there is no intention of pure investment here rather it is for acquiring an asset. As *shirkat al-milk*, it is not a requirement here to purchase the property on fair value. It is allowed to fix the price upfront e.g. one MYR per unit.<sup>463</sup>

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<sup>460</sup> Shamsiah Mohamad (Member, Shari'ah Advisory Council of Bank Negara Malaysia), interview with the researcher, 13 November 2014.

<sup>461</sup> *Ibid.*

<sup>462</sup> Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013.

<sup>463</sup> Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.

According to BNM,<sup>464</sup> the *wa'd* by the customer to purchase the *musharakah* property in case of default can be incorporated with the condition that it is exercised with justice and without refuting the profit and loss sharing component between the contracting parties. Due to this *wa'd*, banks are allowed to claim any loss incurred from the customer. However, BNM instructs the following procedures to be followed:

- (1) The bank can take the client's portion from the proceeds of the auction to recover loss.
- (2) In case the proceeds from the customer's portion is not sufficient to cover bank's loss then it can claim the outstanding amount from the customer if he is financially solvent.
- (3) When the client is proven financially insolvent to pay the remaining amount of loss, the bank should bear the loss.
- (4) In case there is a surplus from the proceeds of the auction, the bank should share it with the client according to their proportion of ownership on the property.

Referring to Al-Zarqā', BNM justifies its position on the ground that *Sharī'ah* permits the contracting parties (*'āqidān*) to stipulate conditions according to their rights in a certain contract (*'aqd*). Pertaining to some unique conditions (*shurūṭ*) in a few modern contracts (*'uqūd mustajaddah*), they should be compared with conditions in a few recognised contracts (*'uqūd musammāt*) in Islamic jurisprudence (*fiqh*) and that can be analysed along with the following points:<sup>465</sup>

- (1) When the stipulation (*sharṭ*) eradicates any textually required condition by the sources of the *Sharī'ah* then it is prohibited.
- (2) When the stipulation eradicates a condition that is set up by the analogical reasoning (*ijtihād*) of the scholars then its ruling is subject to the effective

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<sup>464</sup> Bank Negara Malaysia, Shariah Resolutions in Islamic Finance, 45-46.

<sup>465</sup> *Ibid.*

cause (*'illah*) of the latter, pertinent custom (*'urf*) and existing economic situation.

- (3) When the stipulation of the modern contract is unfamiliar in Islamic legal (*fiqh*) books then that stipulation is regarded as legitimated provided that it bears the interest of the parties making the contract and does not violate the purpose of the contract. If the stipulations result in prohibited substance and violate the purpose of the contract then they are regarded as voidable (*fāsīd*).

Another *Sharī'ah* scholar, Burhanuddin Lukman views that MM home financing is *shirkat al-milk*. In this case, the bank's intention might be investment and gaining profit but the intention to get profit from the capital does not negate the *shirkat al-milk*. It is allowed under the category of *shirkat al-milk* to generate profit and the shared asset may appreciate.<sup>466</sup>

However, there are differences among the banks in terms of the application of *wa'd* in MM home financing. Some banks do not ask the customer to fulfil his *wa'd* if the property does not exist. On the other hand, some banks ask the customer to purchase the property even though the property has disappeared. This practice is clearly prohibited. He recommends that in the case of default, the bank should ask the customer to purchase on the market price or a price that is agreed between them at the time of purchase. However, if the price is determined upfront and the promisor is bound to purchase on that price, then it negates the essence of *mushārahah*.<sup>467</sup>

### **6.2.1.3. Discussion on the Opinions of the Scholars**

Based on the above opinions of the scholars, the differences among the scholars circulate around whether the MM home financing falls under the *shirkat al-milk* or *shirkat al-'aqd*

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<sup>466</sup> Burhanuddin Lukman (Member, Shari'ah Advisory Council of Bank Negara Malaysia), interview with the researcher, 31 December 2014.

<sup>467</sup> *Ibid.*

category. In the following sections, definition, characteristics, and conditions for both types of partnership are provided to clarify this issue. After that, scholars' opinions are discussed on (1) *wa'd* and capital guarantee, (2) *wa'd* in the case of default, (3) *wa'd* and the purpose of the contract (*muqtaḍā al-'aqd*). Finally, the preferred opinion is provided.

#### A. *Shirkat al-Milk* and *Shirkat al-'Aqd*

In the classical books of Islamic jurisprudence (*fiqh*), the *Ḥanafī* scholars broadly discussed different issues related to *shirkat al-milk* and *shirkat al-'aqd*. They are the proponents of dividing the partnership (*shirkah*) into these two main categories while scholars from other schools (*madhhab*) do not explicitly mention this categorisation.

'Alā' Al-Dīn Al-Kāsānī, a prominent *Ḥanafī* jurist defines *shirkat al-milk* as:

الشركة في الأصل نوعان: شركة الأملاك وشركة العقود، وشركة الأملاك نوعان: نوع يثبت بفعل الشركيين، ونوع يثبت بغير فعلهما. (أما) الذي يثبت بفعلهما فنحو أن يشتريا شيئا، أو يوهب لهما، أو يوصى لهما، أو يتصدق عليهما، فيقبلا فيصير المشتري والموهوب والموصى به والمتصدق به مشتركا بينهما شركة ملك. (وأما) الذي يثبت بغير فعلهما فالميراث بأن ورثا شيئا فيكون المورث مشتركا بينهما شركة ملك.

Translation: Basically, partnership is of two kinds: (1) *shirkat al-amlāk* (joint-ownership) and (2) *shirkat al-'uqūd* (contractual partnership). *Shirkat al-amlāk* is of two types. The first type is realised through the action of the partners, and the second type is realised without their actions. The first type which is realised through the action of the partners is that, they [the partners] jointly purchase something, or they are gifted something, or given by will, or given by charity; and then, they have accepted it. Therefore, the purchasers, the gift recipients, the bequeathed, the charity recipients become partners between them in *shirkat al-milk* (joint ownership). Another type [of *shirkat al-milk*], which is not realised through the actions of the partners, is through inheritance. In this case, they [partners] are inherited something. Therefore, the inheritors become partners between them in *shirkat al-milk* [joint ownership].<sup>468</sup>

Based on the definition above, *shirkat al-milk* is a kind of joint ownership where two or more people own something either they purchase it together or they have received

<sup>468</sup> Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 7: 499-5002.

it through gift, will, charity, and inheritance. Therefore, when two or more individuals jointly own an asset then their partnership can be named as *shirkat al-milk*.

In discussing the *Sharī'ah* rulings (*aḥkām*) relating to *shirkat al-milk*, scholars mention that every partner is like a stranger in another partner's portion in the asset. It is not allowed for a partner to perform any transaction on another partner's portion without his permission. This is because the authority to have any transaction on any property requires either ownership or custodianship but no partner has any ownership or custodianship on another partner's portion. Further, every partner is free to perform any transaction on his own share of the asset. It is allowed by a partner to sell his share of the asset to a third party without taking permission from another partner. However, in the case of undivided joint-ownership, a partner is required to get permission from another partner to sell his share to a third party.<sup>469</sup>

Followed by *shirkat al-milk*, the *Ḥanaḥī* jurists define *shirkat al-'aqd* as a contractual partnership. Ibrāhīm bin Muḥammad Al-Ḥalabī defines it as follows:

أن يقول أحدهما شاركتك في كذا ويقبل الآخر، وركنها الإيجاب والقبول، وشرطها عدم ما يقطعها  
كشرط دراهم معينة من الربح لأحدهما

Translation: It is to pronounce by one partner, "I entered into a partnership with you in this matter" and the other partner accepts. Its pillars are *ījāb* [offer] and *qabūl* [acceptance]. Its condition is not to stipulate something that shuts it down e.g. stipulating a fixed amount of *dirham* [silver coin] from the profit for one of the partners.<sup>470</sup>

This definition reveals that *shirkat al-'aqd* is a contract where *ījāb* and *qabūl* are necessary. The basic condition for *shirkat al-'aqd* is that there should not be any stipulation of a fixed amount of profit for a specific partner. From this condition, it can be realised that the intention to profit is involved with *shirkat al-'aqd*. In another

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<sup>469</sup> Muḥammad Amīn bin 'Umar bin 'Abd Al-Azīz 'Ābidīn, *Radd al-Muḥtār 'alā al-Durr al-Mukhtār*, ed. 'Ādil Aḥmad 'Abd al-Mawjūd and 'Alī Muḥammad Mu'awwaḍ (Al-Riyāḍ: Dār al-kutub al-'ilmiyyah, 2003), 6:467; Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 7:523.

<sup>470</sup> 'Abd Al-Raḥmān bin Muḥammad bin Sulaymān Al-Kalyubūlī, *Majma'u al-Anhur fī Sharḥi Multaqā al-Abḥur*, ed. Khalīl 'Imrān Al-Manṣūr (Bayrūt: Dār al-kutub al-'ilmiyyah, 1998), 2:543-544.

definition provided by ‘Alā’ Al-Dīn Al-Ḥaṣkafī, it becomes clear that the intention to profit is an integral part of *shirkat al-‘aqd*. He states:

عبارة عن عقد بين المتشاركين في الأصل والربح

Translation: It is a contract between the contributors in principal and profit.<sup>471</sup>

The above definition states that *shirkat al-‘aqd* is a contract between the partners where every partner’s contribution in the capital and the ratio of profit is decided. While discussing the conditions for *shirkat al-‘aqd*, Badr Al-Dīn al-‘Aynī cites that as the intention in *shirkat al-‘aqd* is to get profit through business then the *Sharī‘ah* condition for this type of partnership is that the subject matter of the contract should be capable of accepting *wakālah* (trusteeship).<sup>472</sup> Therefore, we can determine that *shirkat al-‘aqd* is a contractual partnership where the intention is to get profit through business. The partners decide their capital contribution and profit sharing ratio at the beginning of the contract.

It can be concluded from the discussion above that *shirkat al-milk* is a partnership where two partners co-own an asset. The intention in *shirkat al-milk* is to achieve ownership on an asset. However, after establishing the *shirkat al-milk*, every partner is free to execute any transaction on his own portion unless it is an undivided ownership. In an undivided ownership, the partners are required to take permission from another partner to make any transaction on the asset. On the other hand, *shirkat al-‘aqd* is a partnership where two partners agree the capital contribution and the profit sharing ratio between them with the intention to do business.

After discussing the types of partnerships, it is pertinent now to reflect on the opinions of the scholars on MM financing. Considering the argument provided by Asmadi Mohamed Naim, it can be argued that in MM home financing, the *shirkat al-milk* does

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<sup>471</sup> Ibn ‘Ābidīn, *Radd al-Muḥtār ‘alā al-Durr al-Mukhtār*, 6:466.

<sup>472</sup> Badr Al-Dīn Al- ‘Aynī, *Al-Bināyah Sharḥ al-Hidāyah*, ed. Ayman Ṣāliḥ Sha‘bān (Bayrūt: Dār al-kutub al-‘ilmiyyah, 2000), 7:374.



not change into *shirkat al-‘aqd*. This is because *shirkat al-milk* is already realised through co-purchasing the property by the bank and the customer. After the *shirkat al-milk* is executed, every partner is free to perform any transaction in relation to his own portion. In MM home financing, the bank rents his portion of the property to the customer. Therefore, there is no agreement here on the mutual investment of the property. If one partner invests only his portion of the property with the intention to get profit then the *shirkat al-milk* does not change into *shirkat al-‘aqd*. The *shirkat al-milk* will only change into *shirkat al-‘aqd* when both of the partners mutually agree to invest the whole partnership property.

In the case of an undivided ownership, one partner is required to get permission from another to lease his portion of the property. In MM home financing, since the bank leases his portion of the property to the customer who is the other partner in the undivided ownership then implicitly the permission is given. Furthermore, Muhammad Taqi Usmani mentions that there is no objection from the scholars if one partner leases his portion of the property to the other partner in an undivided ownership. He further argues that the first step in MM home financing is to create *shirkat al-milk* which can be made in various ways including joint-purchase by the individuals. Hence, there should not be any question related to initiating this *shirkat al-milk*.<sup>473</sup>

#### B. *Wa‘d* and Guarantee to the Capital

When MM home financing comprises *shirkat al-milk* then the issue of *wa‘d* as a mechanism to guarantee the capital is eliminated. In *shirkat al-milk*, one party is allowed to purchase another party’s portion with a price mutually agreed between them. Therefore, it should be allowed to purchase the bank’s portion of the property with a fixed

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<sup>473</sup> Usmani, *An Introduction to Islamic Finance*, 59-60.

price which is decided earlier disregarding the market price. However, it is preferable to follow the market price. In this regard, Usmani states:

It will be preferable that the purchase of different units by the client is effected on the basis of the market value of the house as prevalent on the date of purchase of that unit, but it is also permissible that a particular price is agreed in the promise of purchase signed by the client.<sup>474</sup>

Finally, even though the bank sells its share to the customer at face value but still there are some elements of risk there. The *wa'd* to purchase at face value only minimises certain risk factors but there are possibilities that the property might be disappeared. Moreover, there are certain cases whether the customer is not bound to fulfil his promise e.g. death, bankruptcy and other *Shari'ah* permitted excuses.

### C. *Wa'd* in the Case of Default

Prohibiting the *wa'd* which is given by the customer to purchase the bank's share in case of default is subject to further discussion. It is agreed by the scholars that the creditor should free the debtor or postpone the debt settlement in case of difficulty. Nonetheless, this *wa'd* acts as a deterrent for the customer to abuse this *musharakah* financing. Similar to BMPO, the *wa'd* is an instrument here to recover the bank's loss when the customer does not fulfil his commitment. This is because the bank has an expectation that the customer will purchase the bank's share along with paying the monthly rentals. Therefore, when the customer defaults then *wa'd* caters the recovery process. As discussed in chapter two, the promisee can seek compensation if there is a loss incurred due to the breach of the promisor. Therefore, it is fair for the bank to recover loss if the customer defaults.

There is still justice and fairness in handling the default case using *wa'd*. The financier cannot force the client to purchase the property in case the property is not available. The property must be available. This is because *wa'd* is not a contract.

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<sup>474</sup> Usmani, *An Introduction to Islamic Finance*, 62.

Therefore, the bank cannot ask the customer to purchase something which is not in existence. Besides, the bank can take only the actual loss incurred from the proceeds of the property action. If there is a profit, the financier should share it with the customer according to their ownership ratio. The bank will bear loss if the proceeds from the property auction is not sufficient to recover loss and at the same time, the client becomes bankrupt.

#### D. *Wa 'd* and the Purpose of the Contract (*Muqtaḍā al- 'Aqd*)

When MM home financing is considered as *shirkat al-milk* then *wa 'd* does not violate the purpose of the contract (*muqtaḍā al- 'aqd*). As mentioned earlier, the purpose of *shirkat al- 'aqd* is to make investment with sharing profit and loss which is not the purpose of *shirkat al-milk*. The purpose of *shirkat al-milk* is just to create ownership. Therefore, there is no violation of *muqtaḍā al- 'aqd* if the bank does not share profit and loss with the client.

However, the researcher believes that using the term “*mushārah*” for this home financing product is inappropriate. This is because many consider it as *shirkat al- 'aqd* due to this name. They argue that the financier should share profit and loss with the client to execute the true *mushārah*. However, the word “*shirkah*” is basically used in the classical literature of Islamic jurisprudence. Accordingly, “*ijārah* under *shirkat al-milk*” should be more appropriate name for this product.

#### **6.2.1.4. The Weightiest Opinion**

From the contractual perspective, it should be legitimate to use binding *wa 'd* in MM home financing because it is *shirkat al-milk*. In *shirkat al-milk*, the financier is allowed to sell his share to the client with a price fixed earlier. Moreover, as the purpose of *shirkat al-milk* is to create ownership, then it does not violate the *muqtaḍā al- 'aqd*. Using *wa 'd* is

not the total elimination of risk due to the existence of certain risk factors. Furthermore, the *wa'd* in case of default is suitable to deter the client abusing the facility and it is fair both for the bank and the customer.

From the macro-level perspective, in the present banking industry in Malaysia, it is quite difficult for the bank to offer MM home financing without this *wa'd*. *Wa'd* is a need to minimise the bank's market risk as well as the default risk. Burhanuddin Lukman, former *Shari'ah* board of Al-Rajhi Banking & Investment Corporation (Malaysia) Berhad reveals that the *Shari'ah* board in Al-Rajhi attempted to introduce MM home financing using a non-binding *wa'd* but it was not possible due to high market risk.<sup>475</sup> Therefore, the binding *wa'd*-based MM home financing is the practical solution for now.

Furthermore, if MM home financing is not used then the possible alternatives for home financing are BBA, *tawarruq* and *murābahah*. However, those types of financing are fully debt-based. Under those financing modes, the purchase price of the property is always a debt on the client. In that case, the client has a bigger obligation than MM home financing. In MM home financing, the client has no debt with the financier at the beginning of the contract. The client only gives *wa'd* to purchase the bank's share on gradual basis and at the time of default. As mentioned earlier, *wa'd* is not a contract (*'aqd*). Therefore, the purchase price is not a debt on the client in MM home financing. There are differences between a binding-*wa'd* and a contract.

In fact, *wa'd* is injected in MM home financing due to some practical needs. When the theory is put into practice then a number of problems come across. Among these problems are for example, capital reserve requirement. When there is no *wa'd* in the product, the bank is required to reserve a larger amount of money against this MM financing. This creates hardship for the bank and they opt for alternative debt-based financing e.g. BBA and *tawarruq*. Therefore, considering the needs and challenges of the

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<sup>475</sup> Burhanuddin Lukman, interview with the researcher, 31 December 2014.

industry on the ground, the applied juristic reasoning (*ijtihād taṭbīqī*) suggests that the binding *wa‘d*-based MM home financing should be allowed for the time being.

However, it is recommended to practice a higher risk sharing product by the bank where the financier takes more risk and consequently, there is less burden on the client. Therefore, it is highly encouraged for the banks to make an effort to keep out from the *wa‘d* which is given by the customer with reference to the case of default. Using only one *wa‘d* to purchase the property on a gradual basis should be the ideal practice.

### **6.2.2. *Wa‘d* as a *Ḥīlah* in Treasury Products**

*Ḥīlah* means trick. Islamic jurists (*fuqahā’*) generally divide *ḥīlah* into two types which are: (1) permissible *ḥīlah* and (2) non-permissible *ḥīlah*.<sup>476</sup> Pertaining to the usage of *wa‘d* in Islamic treasury products i.e. Islamic FX forward, IPRS, ICCS and IRS, a number of scholars claim that *wa‘d* is a non-permissible trick to legalise prohibited conventional derivatives in Islamic finance. However, another group of scholars argue that *wa‘d* is a permissible trick to innovate Islamic treasury products. The following sections provide a detailed discussion on this matter.

#### **6.2.2.1. *Wa‘d* is a Non-Permissible *Ḥīlah***

A number of studies argue that *wa‘d* is a non-permissible *ḥīlah* to allow the conventional derivatives in Islamic finance. The usage of *wa‘d* in the derivatives is a form over substance to achieve an illegitimate outcome. Therefore, this practice should stop. Although these studies mostly criticise the “total return swap” and do not directly question the validity of the *wa‘d*-based treasury products which are found in this study but the

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<sup>476</sup> Shamsiyah Muḥammad, “al-ḥiyal min manzūrin Islāmī,” *Journal Fiqh I*, (January 2004), 71-94.

arguments provided by those studies indirectly relate to all the *wa'd*-based treasury products.<sup>477</sup>

In the Malaysian context, Azman Mohd Noor strengthens the issue that the usage of *wa'd* in the Islamic treasury products is similar to the conventional practice. He argues that the *wa'd* is a *hīlah* to reach a goal which is similar to a conventional derivative. The scenario of *wa'dān* is fictitious and it is not acceptable. Furthermore, it involves gambling. This is because an exchange rate between two currencies is fixed for example, USD 1 = MYR 3.2. Party A promises that if the price of USD goes up from this fixed rate then he will sell to party B on this fixed rate. On the other hand, party B promises that if the price of USD goes down then he will purchase from the party A on this fixed rate. Let say, in the transaction date, if USD 1 = MYR 3.5, then based on the promise earlier, the party A is bound to sell to party B on USD 1 = MYR 3.2. In this event, the party A will lose because he is bound to sell the USD to party B below the market price. Therefore, it is gambling.<sup>478</sup>

Comparing with the previous view, Burhanuddin Lukman holds a flexible position. He views that *wa'd* is a kind of *hīlah* in Islamic treasury product. However, whether it is permissible *hīlah* or otherwise depends on how the industry is using it. The existing *wa'd*-based swaps (IPRS, ICCS and IRS) might be allowed for the time being as it is lesser of the two evils. He suggests commodity *murābahah* as a better alternative for *wa'd*.<sup>479</sup>

#### **6.2.2.2. *Wa'd* is a Permissible *Hīlah***

Opposing the first opinion, the majority of the scholars in Malaysia allow the usage of *wa'd* in treasury products with the condition that it is only for hedging purpose. Lahasna

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<sup>477</sup> Ayub, "Use of W'ad and Tawarruq for Swaps"; DeLorenzo, "The Total Returns Swap"; Atallah and Ghoul. "The Wa'd-Based Total Return Swap".

<sup>478</sup> Azman Mohd Noor, interview with the researcher, 24 July 2014.

<sup>479</sup> Burhanuddin Lukman, interview with the researcher, 31 December 2014.

believes that *wa'd* is a permissible legal trick (*hīlah*) in swaps (i.e. ICCS, IPRS and IRS). He argues that *wa'd* is the best solution which has been achieved so far to accommodate some products. There may be something better in the future but right now *wa'd* is the best solution to accommodate swaps, FX forwards, and other derivatives in Islamic finance. Others may invalidate the practice of *wa'd* in Islamic derivatives arguing that in substance, they are similar to the conventional derivatives. However, this may lead the clients to purchase the conventional products right away. Therefore, we can say that *wa'd* is the lesser evil between the two. Even though there is an element of doubt in *wa'd*, it is still regarded the best solution.<sup>480</sup>

Similarly, Muhammad Yusuf Saleem states that as long as the treasury products are used for the purpose of hedging then it should be fine.<sup>481</sup> Responding to the *hīlah* issue, Shamsiah Mohamad argues that if the *hīlah* does not contravene the texts of the *Sharī'ah*, the objective of Islamic law (*maqāṣid al-Sharī'ah*) and the purpose of the contract (*muqtaḍā al-'aqd*) then it is allowed. However, she points out that it is quite difficult to decide the intention of the parties in the case of derivatives. Sometimes, one party's intention is to mitigate the risk while the other party's intention is to speculate. Nevertheless, it is also not fair to disallow derivatives arguing that mostly the derivatives are for speculation.<sup>482</sup>

Regarding the intention of the parties using derivatives, Mohamad Akram Laldin suggests that the regulatory body e.g. central bank, securities commission etc. is the most eligible party to set parameters on this. He cites that it is agreed that there are some elements of *hīlah* in the Islamic swaps but then, it is up to the regulator to decide when

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<sup>480</sup> Lahsasna, interview with the researcher, 23 July 2014.

<sup>481</sup> Muhammad Yusuf Saleem (Member of the Shari'ah Advisory Committee, HSBC Amanah Malaysia Berhad), interview with the researcher, 1 October 2013.

<sup>482</sup> Shamsiah Mohamad, interview with the researcher, 13 November 2014.

these products can be used, when cannot be used and what the limit is. This is because the regulatory body understands the market, knows when someone intends to speculate.<sup>483</sup>

Emphasising on the permissibility of Islamic hedging instruments in Malaysia, Mohamad Akram Laldin adds that if we do not allow some hedging products then people will choose conventional products. Therefore, we should allow these products for hedging purposes. In general, most of the *Shari'ah* scholars who allow Islamic derivatives always mention that these instruments must be used as risk management tools and not for speculative purposes.<sup>484</sup>

After having allowed the Islamic treasury products in Malaysian banks, Aznan Hasan explains the mechanism to find out someone's intention to hedge. He discusses that there is no gambling in Islamic treasury product. This is because the intention here is to hedge. Therefore, these instruments are named as Islamic hedging instruments but not derivatives. In case of ICCS and IPRS, the underlying *Shari'ah* concept is *tawarruq* and *wa'd*. The party who is asking for derivatives should show that he has some underlying to ensure that his intention is to hedge. If the party cannot show that he has some underlying which require hedging, he is not allowed to enter into any derivative transaction. Underlying means the contracts that the financial institution has entered into which require hedging. For example, if a financial institution has *ijarah* financing in a different currency then he is eligible to enter into ICCS. Therefore, these instruments are not *hīlah* to legalise gambling.<sup>485</sup>

Corresponding to the usage of *wa'd* in treasury products, Rusni Hassan states that not only the treasury products but most of our Islamic banking products have the issue of *hīlah*. However, in case of treasury products, the issue is more relevant due to *wa'd*. Therefore, it is mandatory to consider a few factors while determining the *Shari'ah*

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<sup>483</sup> Mohamad Akram Laldin, interview with the researcher, 14 October 2014.

<sup>484</sup> *Ibid.*

<sup>485</sup> Aznan Hasan (Chairman of the Shariah Committee, Maybank Islamic Berhad), interview with the researcher, 13 January 2015.



rulings for this issue. Firstly, the necessity of these instruments in Islamic finance depends on whether Islamic finance can survive without these instruments, and whether these instruments bring about welfare (*maṣlaḥah*) for Islamic finance. Secondly, the decision on this issue should not be taken individually rather a country or the *Shari'ah* board representing the country should decide on this. Finally, responding to this issue may differ from case to case or country to country.<sup>486</sup>

Based on the above factors, the Malaysian scholars believe that without the commencement of these Islamic hedging instruments, the future of Islamic finance will be handicapped in one side. This is due to our target that Islamic finance should provide the comprehensive alternative for conventional finance. This means that Islamic finance should provide appropriate alternative to whatever product conventional finance have. Furthermore, at this point of time, Islamic finance is very small compared with the conventional finance. Therefore, Islamic finance is always under the dominance of conventional finance which requires that the bank would be just a financial intermediary but not a trader or business partner. Based on this situation, there must be someone to pioneer these hedging instruments in Islamic finance. These instruments may not be perfect at this situation due to the dominance of conventional finance but there must be some initiative. Afterword, we should improve the things. As a result, we can conclude that *wa'd* is a way out (*makhraj*) rather than a trick (*ḥīlah*) to initiate these hedging instruments in Islamic finance.<sup>487</sup>

### **6.2.2.3. Discussion of the Opinions and the Weightiest Opinion**

Based on the above discussion, we can say that all scholars agree that when the Islamic hedging instruments are used for speculation then it is prohibited. This is because

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<sup>486</sup> Rusni Hassan (Member, Shari'ah Advisory Council of Bank Negara Malaysia), interview with the researcher, 12 January 2015.

<sup>487</sup> *Ibid.*

speculation is the opposite of risk management. The speculator intentionally takes higher risk to achieve higher profit. At the same time, the speculator may encounter a greater loss if his anticipation does not come true.<sup>488</sup> Furthermore, it is unproductive and abusive in nature. Although minor speculation is tolerable but excessive of it is harmful. It is a kind of non-productive practice of society's scarce resources.<sup>489</sup> Therefore, it may bring about harm (*mafsadah*) in Islamic finance. Rodney Wilson mentions in this regard:

If trading is viewed as productive and socially desirable, then speculative behaviour is clearly precluded. The latter is virtually by definition both unproductive and socially undesirable because of its potentially exploitative nature. Speculation can be both deliberate and unintentional, but because of the moral unambiguity of the latter, practices which might result in speculation should be avoided. It is for this reason that forward, futures and options dealing are viewed as potentially corrupting by modern specialists in Islamic finance.<sup>490</sup>

Speculation should not be allowed in Islamic finance as Islamic finance is based on justice and fairness. Furthermore, speculation is an unproductive way to gain wealth. In this sense, there is similarity between gambling and speculation because gambling also is an unproductive way to gain wealth. In this regard, Sami Al-Suwailem mentions that whenever taking risk is commended in Islam is due to the creation of wealth and the value added. Therefore, we can differentiate between legitimated and illegitimated risk. Risk is legitimated when it is a need for value creation.<sup>491</sup>

The classical Islamic scholar Ibn Taymiyah outlined the border between permissible and non-permissible risk in Islamic *Sharī'ah* with his following statement:

والخطر خطران، خطر التجارة: وهو أن يشتري السلعة بقصد أن يبيعها بربح، ويتوكل على الله في ذلك، فهذا لا بد منه للتجار، والتاجر يتوكل على الله ويطلب منه أن يأتي بمن يشتري السلعة بربح،

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<sup>488</sup> Ephraim Clark and Dilip Kumar Ghos, *Arbitrage, Hedging, and Speculation: The Foreign Exchange Market* (Westport: Greenwood Publishing Group, 2004), 2.

<sup>489</sup> Seif El-Din Tag El-Din and M. Kabir Hassan, "Islam and speculation in the stock exchange," in *Handbook of Islamic Banking*, ed. M. Kabir Hassan and Mervyn K. Lewis (Massachusetts: Edward Elgar Publishing, Inc. 2007), 240.

<sup>490</sup> Rodney Wilson, "Islamic Financial Instruments", *Arab Law Quarterly* 6, no. 2 (1991), 209.

<sup>491</sup> Sami Al-Suwailem, "Hedging in Islamic Finance" (Occasional paper no. 10, Islamic Development Bank, Jeddah, 2006), 57.

وإن كان قد يخسر أحياناً، فالتجارة لا تكون إلا كذلك. والخطر الثاني: خطر الميسر الذي يتضمن أكل أموال الناس بالباطل، فهذا الذي حرمه الله ورسوله، مثل بيع الملامسة والمنابذة.

Translation: Risk is of two kinds. [The first type is] Commercial risk: it exists in purchasing a commodity with the intention to sell it with profit and relying on Allāh (SWT) in that. This type of risk is necessary for the merchant and he relies on Allāh (SWT) and ask from Him that may someone come to purchase his commodity with profit. Even though sometimes the merchant loses but a business cannot be done without this. The second type of risk is the risk of gambling, which involves eating someone's wealth illegally. This is what Allāh (SWT) and his messenger (SAWS) have prohibited e.g. touch sale (*bay' al-mulāmasah*), toss sale (*bay' al-munābadhah*).<sup>492</sup>

Based on Ibn Taymiyah's above statement, excessive speculation should go under the non-permissible risk. This is because it is not involved with trading risk rather it is closed to the risk of gambling. Therefore, any financial instrument intended for excessive speculation should not have any room in Islamic finance. In many cases, although the product structure looks fine, but based on the objective of the *Sharī'ah* (*maqāṣid al-Sharī'ah*), it should be obstructed. The *Sadd al-dharā'i'* (blocking the means) principle may be applied in this regard.

Looking back to the opinions of the scholars, the majority have allowed the Islamic treasury products for hedging purposes. Hedging is defined as a process to mitigate any risk exposure. It is an underlying safety net to protect the investor from any potential economic loss. In the case of currency hedging as an example, the intention of the hedger is to protect the existing position of the currency against any unpredictable movements of exchange rates in the future. Hedging is insurance for future risk. Conventional finance has developed a number of hedging instruments based on the types of risk e.g. futures, forward, swap, option etc.<sup>493</sup>

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<sup>492</sup> Aḥmad bin 'Abd Al-Ḥalīm bin 'Abd Al-Salām bin Taymiyyah, *Tafsīru Āyāt Ashkalat*, ed. 'Abd Al-'Azīz bin Muḥammad Al-Khalīfah (Al-Riyāḍ: Maktabah al-Ruḥd lī al-Naṣh wa al-Tawzī', 1996), 1:700-701.

<sup>493</sup> Clark and Ghos, *Arbitrage, Hedging, and Speculation*, 2; Brian Coyle, *Hedging Currency Exposures: Currency Risk Management* (Kent: Financial World Publishing, 2000), 14; El-Din and Hassan, "Islam and speculation in the stock exchange," 243.

In general, hedging is a necessity for both Islamic and conventional finance. While justifying the need for currency hedging, Saadiah Mohamad et al. pointed out that it is currently difficult for a country to survive without international trade of export and import. When engaging with international trade then it certainly involves the exchange of foreign currency. Depending on the type of business and the distance between the parties, it sometimes requires longer than a month prior to the actual exchange. As a result, the majority of international trades are subject to exchange rate risk. Therefore, it is crucial for the business to estimate the required foreign exchange in the future along with adopting some earlier arrangements to hold the favourable exchange rate to protect itself from any undesirable situation.<sup>494</sup>

Considering the need for profit rate hedging, Asyraf Wajdi Dusuki pointed out that Islamic finance is not safe from the risk of interest rate volatility. This is because Islamic finance is required to use interest rate related benchmarks e.g. London Inter-Bank Offer Rate (LIBOR) or Base Lending Rate (BLR) in its financial practices due to the absence of a profit rate benchmark. As a result, Islamic finance is inevitably exposed to the interest rate risk in terms of its revenue and expense flows along with the value of the assets. Thus, profit rate risk mitigation is important for Islamic financial institutions for their sustainability, viability, and competitiveness in the market.<sup>495</sup>

However, Islamic hedging instruments are limited to cater for the demand of the investors globally. It is difficult to mitigate market risk for Islamic finance because of the limited number of hedging instruments. Therefore, Islamic financial institutions require their own hedging instruments which are not the copy of conventional derivatives. The Islamic finance industry should meet the requirements of the *Sharī'ah* compliant financial

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<sup>494</sup> Saadiah Mohamad, Jaizah Othman, Rosmimah Roslin and Othmar M. Lehner, "The use of Islamic hedging instruments as non-speculative risk management tools," *Venture Capital: An International Journal of Entrepreneurial Finance* 16, no. 3 (2014), 208.

<sup>495</sup> Asyraf Wajdi Dusuki, "Shariah Parameters on Islamic Foreign Exchange Swap as Hedging Mechanism in Islamic Finance," (paper presented in International Conference on Islamic Perspectives on Management and Finance, University of Leicester, United Kingdom, 2-3 July 2009), 2.

system and at the same time it is in need to mitigate the risk exposures of Islamic financial institutions and to enhance their creditworthiness in general.<sup>496</sup>

Based on the need for hedging tools in the Islamic finance industry as mentioned above, if the primary sources of Islamic *Shari'ah* are studied then it can be seen that both the Qur'an and the *Sunnah* provide a strong support for risk management in financial practices. The Qur'an provides two distinct examples of risk management. In *Sūrah al-Baqarah*, the creditor is advised to take pledge from the debtor if both are travelling and writing down the debt agreement is not possible.<sup>497</sup> This is a risk management tool to prevent any fraudulence in the future and any loss to the creditor's assets. Moreover, it is observed in the story of prophet Yusuf (SAW) that he adopted a risk management mechanism when he asked the people of Egypt to save the surplus crops for seven consecutive years to encounter the droughts in the next seven consecutive years.<sup>498</sup>

Furthermore, the following prophetic narration suggests that Muslims should take necessary actions to manage the risk of loss towards his property and then rely upon Allāh (SWT).

أنس بن مالك يقول: قال رجل يا رسول الله أعقلها وأتوكل أو أطلقها وأتوكل؟ قال اعقلها وتوكل.

Translation: Anas bin Mālik (RA) narrates that a man asked [about his camel], "O messenger of Allāh (SAWS)! Should I tie it [camel] and rely on Allāh (SWT) or, should I leave it untied and rely on Allāh (SWT)?" The messenger of Allāh (SAWS) replied, "Tie it and then rely on Allāh (SWT)."<sup>499</sup>

The above prophetic statement is a guiding principle for every Muslim's life where a Muslim is required to take all necessary actions based on his capability to manage his risk and after that, he should rely on Allāh (SWT). It is not an Islamic practice to

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<sup>496</sup> Saadiah Mohamad et al., "The use of Islamic hedging instruments", 209; Muhammad Al-Bashir Muhammad Al-Amine, "Risk and Derivatives in Islamic Finance: A Shariah Analysis," in *Contemporary Islamic Finance: Innovations, Applications, and Best Practices*, ed. Karen Hunt-Ahmed (New Jersey: John Wiley & Sons, Inc. 2013), 332-333.

<sup>497</sup> Al-Qur'an, Sūrat Al-Baqarah: 282-283.

<sup>498</sup> Al-Qur'an, Sūrat Yūsuf: 47-49.

<sup>499</sup> Narrated by Al-Tirmidhī, Kitābu šifati al-qiyāmah wa al-raqā'iq wa al-war', Bāb 60, Ḥadīth no. 2517. See Al-Tirmidhī, *Sunan al-Tirmidhī*, 567.

ignore mechanisms for protection and completely rely on Allāh (SWT) for either his own safety or his property. Therefore, we can resolve that this prophetic statement advises to adopt means for the protection of wealth.

Another narration allows stipulation in a *muḍārabah* venture to avoid risk.

كان العباس بن عبد المطلب إذا دفع مالا مضاربة اشترط على صاحبه أن لا يسلك به بحرا ولا ينزل به واديا ولا يشتري به ذات كبد رطبة فإن فعل فهو ضامن فرفع شرطه إلى رسول الله - صلى الله عليه وسلم - فأجازه.

Translation: When ‘Abbās bin ‘Abd al-Muṭṭalib (RA) handed over his assets for *muḍārabah* then he used to stipulate on the partner (*muḍārib*) that he should not take this asset across the sea, nor take them down to the bottom of a dry river bed, nor trade them for live animals. If he did any of these then he had to bear the compensation. Al-‘Abbās’s stipulation was reported to the messenger of Allāh (peace be upon him) and he allowed it.<sup>500</sup>

Al-‘Abbās (RA) did not allow the *muḍārib* to perform certain actions which involved the risk that the business capital might destroy. The prophet (SAWS) permitted that stipulation. Therefore, we can come across that it is allowed in a business venture to take necessary precautions to avoid any risk of loss to the capital.

Furthermore, the practice of hedging is in line with the noble objective of the *Sharī‘ah* (*maqāṣid al-Sharī‘ah*). Islamic jurists (*fuqahā’*) come across that the noble objective of the law giver in prescribing the *Sharī‘ah* rulings are five which are: (1) the protection of religion, (2) protection of life, (3) protection of offspring, (4) protection of intellect, and (5) protection of wealth. Protecting the wealth is one of the five objectives of the *Sharī‘ah*. It means that people’s property should be protected from any loss or destruction. Islamic *Sharī‘ah* disallows any action that leads to the destruction of wealth.

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<sup>500</sup> Narrated by Al-Bayhaqī, Kitāb al-qirāḍ, Ḥadīth no 11611. See Aḥmad bin Al-Ḥusayn bin ‘Alī Al-Bayhaqī, *Al-Sunan al-Kubrā*, ed. Muḥammad ‘Abd Al-Qādir ‘Aṭā, (Bayrūt: Dār al-kutub al-‘ilmiyyah, 2003), 6:184.

Therefore, consuming other's property illegally, destroying other's property, wasting the wealth without its prudent use, interest, gambling etc. are prohibited in the *Sharī'ah*.<sup>501</sup>

As hedging is a means to protect the wealth of the hedger, then it should be a tool to achieve *maqāṣid al-Sharī'ah*. Affirming this view, Al-Suwailem cites:

Hedging is used generally to denote neutralizing and minimising risk. In this respect, it naturally belongs to Islamic economic objectives. As such, this is not an issue and should not raise any concern. The issue, however, is how to reach this goal, and what means is used to meet this end. If the means involves pure speculation and gambling-like activities, it would be illegitimate, even if the objective is [noble]. Ends do not justify means, and thus noble ends necessitate noble means.<sup>502</sup>

Based on the above, hedging is in line with the objectives of Islamic economics. Naturally, Islamic economic objectives should correspond the *Sharī'ah* objectives. However, there is a crisis to find out the *Sharī'ah*-compliant means to reach this goal. If a *Sharī'ah*-compliant instrument is used for hedging then it is not an evil. This is because if a legitimated means is used to reach to a legitimated end then it is allowed in the *Sharī'ah*. Abū Ishāq Al-Shāṭibī mentions in this regard:

الحيل التي تقدم إبطاها ودمها والنهي عنها ما هدم أصلا شرعيا وناقض مصلحة شرعية فإن فرضنا أن الحيلة لا تدم أصلا شرعيا ولا تناقض مصلحة شهد الشرع باعتبارها فغير داخله في النهي ولا هي باطلة.

Translation: A trick which was proceeded by annulment, disparagement and prohibition was the one that destroyed the root of the *Sharī'ah* and violated the welfare of the *Sharī'ah*. However, if we assume that a trick does not destroy the foundation of the *Sharī'ah* and does not violate the *Sharī'ah* testified welfare is not included in that prohibition and is not null.<sup>503</sup>

The following prophetic narration provides the ground for adopting a legitimat means to reach to a legitimated end.

أن رسول - صلى الله عليه وسلم - استعمل رجلاً على خبير فجاءه بتمر جنيب، فقال له رسول الله - صلى الله عليه وسلم -: أكل تمر خبير هكذا؟ فقال لا والله يا رسول الله، إنا لنأخذ الصاع

<sup>501</sup> Al-Ghazālī, *Al-Mustasfā*, 2:481-482; Muḥammad Sa'd bin Aḥmad bin Mas'ūd Al-Yūbī, *Maqāṣid al-Sharī'ah al-Islāmiyyah wa 'Ilāqatuhā bi al-Adillah al-Sharī'iyah* (Al-Riyāḍ: Dār al-Hijrah, 1998), 283-286.

<sup>502</sup> Sami Al-Suwailem, "Hedging in Islamic Finance," 57.

<sup>503</sup> Abū Ishāq Ibrāhīm bin Mūsā Al-Shāṭibī, *Al-Muwāfaqāt*, ed. Abū 'Ubaydah Mashhūr bin Ḥasan (Jīzah: Dār Ibn 'Affān, 1997), 3:124.

من هذا بالصاعين، والصاعين بالثلاثة، فقال رسول الله - صلى الله عليه وسلم - فلا تفعل، بع  
الجمع بالدراهم ثم ابتع بالدراهم جنيهاً.

Translation: Allāh’s Apostle (peace be upon him) appointed a man as the ruler of Khaybar who later brought some *janīb* [dates of good quality] to the Prophet. On that, Allāh’s Apostle (peace be upon him) said [to him]. “Are all the dates of Khaybar like this?” He said, “No, by Allāh, O Allāh’s Apostle! But we take one *ṣā’* of these [dates of good quality] for two *ṣā’* of other dates [of inferior quality] or, two *ṣā’* [dates of good quality] for three *ṣā’* [of inferior quality].” On that, Allāh’s Apostle (peace be upon him) said, “Do not do so, but first sell the inferior quality dates for money and then with that money, buy *janīb* [dates of good quality].”<sup>504</sup>

In this prophetic narration, the prophet (SAWS) describes a sound mechanism to get out from *ribā*. Here, the goal is noble which is to avoid *ribā*, and the means to reach that goal is noble too which is selling the inferior quality of dates in the market first and then purchasing the good quality of dates with that money.

Based on this, Malaysian *wa’d*-based hedging instruments namely FX forward, ICCS, IPRS, and IRS should be allowed. This is because all these products have underlying contracts. It is unanimous among the scholars that the contractual arrangements are valid for all these hedging instruments. Therefore, these instruments are legitimate means to reach to a goal which is legitimated as well. Based on this argument, the issue that *wa’d* is a non-permissible *ḥīlah* should be disregarded.

Along with this, it is noteworthy to mention that there is no issue of gambling involved with these instruments because of the underlying contracts in them. Every hedging instrument has some underlying contracts of sale and purchase as well as the *wa’d*. These hedging instruments are different from gambling in a sense that they do not involve pure bet where one party gains another party’s wealth totally while the other party suffers a total loss of his asset.

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<sup>504</sup> Narrated by Muslim, Kitāb al-musāqāt, Bāb bay’ al-ṭa’ām mathalan bi mathalin, Ḥadīth no. 1593. See Al-Naysābūrī, *Ṣaḥīḥ Muslim*, 3:1215.



Finally, there is a debate among the scholars on how to ensure that an Islamic treasury product is used solely for hedging purposes.<sup>505</sup> There should be a clear borderline between hedging and speculation. Corresponding to this issue, Mohamad Akram Laldin has mentioned that the regulatory body should decide on this, as they are the most familiar with the market environment.<sup>506</sup> However, Aznan Hasan has furnished the most precise standard to draw the borderline between hedging and speculation. He cites that when a financial institution intends to enter into any hedging instrument then it is required to show the underlying which requires hedging. When a financial institution has some underlying contracts which needs hedging then it should be allowed to use the hedging instruments.<sup>507</sup> This mechanism might be the most preferred standard to make a distinct line between hedging and speculation.

### **6.2.3. *Wa'd* and Exploitation to the Opposite Party**

The issue of exploitation is related to the ordinary *wa'd*. While only one *wa'd* is used in some products then it may overlook the interest of the other party. The issue is brought up in relation to FX forward and BMPO. In both products, only the customer provides *wa'd* to the bank to purchase a commodity or currency in a future date. However, the bank does not provide any *wa'd* to the customer. Therefore, the bank has no obligation to sell to the customer. As a result, it is possible that the bank will take advantage by not selling the item to the customer in case the market price of the item is higher than the *wa'd* price. In BMPO financing, it may not be a great concern but it is a notable issue in FX forward. However, a group of scholars hold that even though the bank does not give

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<sup>505</sup> Mohammad Hashim Kamali, "Prospects for an Islamic Derivatives Market in Malaysia," *Thunderbird International Business Review* 41, no. 4/5 (July-October 1999), 534; Asyraf Wajdi Dusuki and Shabnam Mokhtar, "The Concept and Operations of Swap as a Hedging Mechanism for Islamic Financial Institutions," (ISRA research paper no. 14, 2010, Kuala Lumpur), 48.

<sup>506</sup> Mohamad Akram Laldin, interview with the researcher, 14 October 2014.

<sup>507</sup> Aznan Hasan, interview with the researcher, 13 January 2015.

any *wa'd* to the client but it does not lead the bank to exploit the client. The following sections provide details on this issue.

### 6.2.3.1. *Wa'd* as a Means to Exploit the Client

Azlin Alisa Ahmad and Shofian Ahmad concluded that using only one *wa'd* is a kind of injustice on the client in FX forward. They suggested using *wa'dān* to avoid injustice on the other party.<sup>508</sup> A number of *Sharī'ah* scholars supported their view. Shamsiah Mohamad agrees that only *wa'd* from the customer is an exploitation to the customer. This is because the customer may face losses due to no obligation on the bank to sell. For example, in the case of MM house financing, if the housing project is abandoned then the bank is not bound to provide house to the customer. Therefore, *wa'd* from the bank is needed. She concludes that in this case *muwā'adah* is better than *wa'd* to exercise justice.<sup>509</sup>

Furthermore, Aznan Hasan mentions that *wa'dān* has come out to cater justice for the customer. Previously, there was only one *wa'd* from the customer to execute a *ṣarf* contract in the future with the bank. It was commonly understood that the bank would never default. However, after having a number of cases where the bank defaulted, there is an urge to use two *wa'd*. At present, there is nothing called too big to fail. Therefore, two *wa'd* should be used. Alternatively, one *wa'd* and one commodity *murābahah* can be employed in FX forward.<sup>510</sup>

Along with the *Sharī'ah* scholars, practitioners also agree that more than one *wa'd* is needed to be fair with the customer. Ahmad Suhaimi Yahya argues that in the case of MM house financing, the bank should provide *wa'd* as well. This is to protect the welfare of the customer when he asks for an early settlement. In some occasions, the house price

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<sup>508</sup> Azlin Alisa Ahmad and Shofian Ahmad, "Inovasi Pemakaian Prinsip Wa'dan," 21 - 32.

<sup>509</sup> Shamsiah Mohamad, interview with the researcher, 13 November 2014.

<sup>510</sup> Aznan Hasan, interview with the researcher, 13 January 2015.

doubles after a few years. If there is no sale undertaking by the bank, then the bank may take the opportunity to sell.<sup>511</sup>

### **6.2.3.2. *Wa'd* is Not a Means to Exploit the Client**

Contrary to the previous opinion, some *Sharī'ah* scholars view that even though no *wa'd* is given from the bank's side but, it does not lead the bank to exploit the customer. Lahsasna states that customers provide *wa'd* to the bank in order to mitigate the risk which is on the bank. Another *wa'd* from the bank's side is not necessary because banks are highly regulated, monitored, and audited. The strong corporate governance of the banks ensures that they will be committed with their customers. A similar type of monitoring cannot be done on the customer. Customers may disappear. Therefore, it is reasonable that the *wa'd* is from the customer's side only. Furthermore, until now, there is no such instance where the bank did not fulfil his commitment with the customer.<sup>512</sup>

Mohamad Akram Laldin points out that *wa'd* from the customer's side only is not injustice on the customer. This is because if the bank does not fulfil any of his obligation then it will be exposed to a huge reputational risk. In the occasion of FX forward, the bank is obliged to fulfil his obligation due to a huge reputational risk. Banks have no difficulty to provide another *wa'd* to the customer but it is not needed.<sup>513</sup>

### **6.2.3.3. Discussion of the Opinions and the Most Substantial Opinion**

Reflecting on the above opinions of the scholars, it can be seen that their concern is whether the customer's risk is protected. The first group views that banks should provide *wa'd* to the customer to protect the customer's interest. The ground for this opinion is that at the current economic situation, banks may default as well. There is a possibility that

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<sup>511</sup> Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013.

<sup>512</sup> Lahsasna, interview with the researcher, 23 July 2014.

<sup>513</sup> Mohamad Akram Laldin, interview with the researcher, 14 October 2014.

banks also breaches its obligation. Another group of scholars believe that *wa'd* from the bank's side is not required as the bank usually fulfils its obligation due to reputational risk. In addition, banks are highly monitored. Therefore, it is commonly understood that they will fulfil their commitments.

From the *Sharī'ah* perspective, all transactions should be free from injustice. Islamic *Sharī'ah* requires that every party is treated fairly in any contractual binding. Ibn Taymiyah mentioned in this regard:

فإن عامة ما نهي عنه الكتاب والسنة من المعاملات يعود إلى تحقيق العدل والنهي عن الظلم

Translation: Indeed, whatever the Qur'an and *Sunnah* have prohibited in transactions as a whole fall into realising justice and preventing injustice.<sup>514</sup>

If there is an element of injustice in the practice of *wa'd* then it should not be allowed in the *Sharī'ah*.

The *Sharī'ah* also allows the contracting parties to stipulate conditions in contracts with the conditions that it does not lead to legalising *ribā*, *maysir*, and *gharār*. The stipulation should not violate the purpose of the contract (*muqtaḍā al-'aqd*) and they should not lead to consuming other's property illegally.<sup>515</sup> The prophet (SAWS) said:

الصلح جائز بين المسلمين إلا صلحا حرم حلالا أو أحل حراما والمسلمون على شروطهم إلا شرطا حرم حلالا أو حل حراما

Translation: It is permitted for the Muslims to make reconciliation among themselves except the reconciliation that prohibits the lawful (*ḥalāl*) and permits the unlawful (*ḥarām*). Muslims are required to fulfil the stipulations made among themselves except the stipulation that prohibits the lawful (*ḥalāl*) and permits the unlawful (*ḥarām*).<sup>516</sup>

Based on the above *ḥadīth*, it can be argued that *wa'd* from only one party does not lead to an oppression on the other party. This is because it is similar to stipulating

<sup>514</sup> Taqī Al-Dīn Aḥmad bin Taymiyah, *Majmū'atu al-Fatāwā*, ed. Anwar Al-Bāz and 'Āmir Al-Jazzār (Al-Manṣūrah: Dār al-wafā' li al-ṭiba'ah wa al-nashr wa al-tawzī', 2005), 28:213.

<sup>515</sup> Muḥammad Uthmān Shubayr, *Al-Mu'āmalāt al-Māliyyah al-Mu'āṣirah fī al-Fiqh al-Islāmī* ('Ammān: Dār al-Nafā'is, n.d.), 20.

<sup>516</sup> Narrated by Tirmidhī, *Kitāb al-aḥkām 'an rasūli Allāh sallallāhu 'alayhi wa sallam, Bāb mā dhukira 'an rasūli Allāh sallallāhu 'alayhi wa sallam fī al-ṣulḥ bayna al-nās, Ḥadīth no. 1352. See Al-Tirmidhī, Sunan al-Tirmidhī, 318.*

conditions on other party in a contract. There is an element of consent (*riḍā*) between the parties when one party is providing *wa'd*. Hence, we can resolve that *wa'd* from one side should be allowed in the *Sharī'ah*.

Nevertheless, looking into this issue from an economic perspective, it can be seen that the customer's interest is not protected in FX forward. This is because the customer is at the risk that the bank may not fulfil its *wa'd*. Even though it is argued that banks are highly monitored and because of that they will fulfil the commitment, it is still unacceptable. The world has recently seen that a number of giant reputed banks default. The recent financial crisis of 2007-2008 taught us that there is no such financial institution called "too big to fail".<sup>517</sup> Felix Roth pointed out that after the financial crisis in 2008, people in Europe have lost trust on their financial institutions.<sup>518</sup> Therefore, even though banks are highly monitored, it is still possible that those banks are breaching their commitments. Therefore, the customer's interest should be protected, especially those who are vulnerable.

#### **6.2.4. Similarity with Forward Contract (*Bay' al-Ajal bi al-Ajal*)**

The issue of forward contract (*bay' al-ajal bi al-ajal*) is triggered in relation to MM home and property financing, AITAB vehicle financing, and one treasury product which is IRS. The issue is whether *wa'dān* in the above mentioned products makes any difference to *muwā'adah*. A group of scholars believe that *muwā'adah* as a binding promise on both parties is not allowed as it is similar to a forward contract (*bay' al-ajal bi al-ajal*). They question the application of *wa'dān* in these three products opining that the application of *wa'dān* in these products are similar to *muwā'adah*. Therefore, it is not allowed as it is as

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<sup>517</sup> Hyun Song Shin, "Reflections on Northern Rock: The Bank Run that Heralded the Global Financial Crisis," *The Journal of Economic Perspectives* 23, no. 1 (Winter 2009), 101-120; Andreas Barth and Isabel Schnabel, "Why banks are not too big to fail – evidence from the CDS market," *Economic Policy* 28, no. 74 (April 2013), 335-369.

<sup>518</sup> Felix Roth, "The Effect of the Financial Crisis on Systemic Trust," *Intereconomics* 44, issue. 4 (July 2009), 203-208.

good as a forward contract (*bay' al-ajal bi al-ajal*). Some view that the practice of *wa'dān* in the above-mentioned products is different from *muwā'adah* and should be allowed in the *Sharī'ah*.

#### **6.2.4.1. *Wa'dān* is Similar to *Muwā'adah* or Forward Contract (*Bay' al-Ajal bi al-Ajal*)**

Muhd Ramadhan Fitri Ellias cites that in *wa'dān*, the different events referred to seem to be fictitious. Usually, an exchange rate between MYR and USD is fixed. If the market rate of USD is higher than the fixed rate then one party promises to sell, and if the market rate of USD is lower than the fixed rate then another party promises to purchase. It is a kind of *muwā'adah* because the rate of USD will either go up or down. There is no option for that.<sup>519</sup>

Burhanuddin Lukman reveals that he has come across a few products, which are based on *wa'dān* as claimed by some scholars. These products are actually based on *muwā'adah* because the promise is given on the same subject matter. In the case of currency transactions, it is inevitable that one of the events will occur. The price will either go up or down. It is merely playing with words. In essence, it is actually *muwā'adah*.<sup>520</sup>

Similarly, Azman Mohd Noor does not accept the difference between *wa'dān* and *muwā'adah*. He argues that the end effect of *wa'dān* is similar to a forward contract (*bay' al-ajal bi al-ajal*). This is because the obligation of *wa'dān* is similar to the obligation of a contract (*'aqd*). An exchange rate between two currencies is fixed beforehand and then both parties are obliged to execute the *ṣarf* contract disregarding the market rate at that

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<sup>519</sup> Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.

<sup>520</sup> Burhanuddin Lukman, interview with the researcher, 31 December 2014.

time. Should one of the parties does not fulfil the undertaking, he is bound to pay compensation. This outcome is similar to a contract (*'aqd*).<sup>521</sup>

#### **6.2.4.2. *Wa'dān* is Not Similar to *Muwā'adah* or Forward Contract (*Bay' al-Ajal bi al-Ajal*)**

Disagreeing with the previous opinion, Mohamad Akram Laldin argues that in the case of IRS, there are two obligations but they are different in terms of the subject matter. Even though it is bilateral, these two *wa'd* are different because there are some elements in the subject matter that differentiate between the first *wa'd* and the second *wa'd*. This is why it is named *wa'dān* which means two separate *wa'd*. Therefore, *wa'dān* should be allowed in AITAB as well as in currency transactions (IRS). The practice of *wa'dān* in currency transactions (IRS) is allowed by BNM. Another reason to consider *wa'dān* as two separate *wa'd* is that between the two *wa'd* only one of them will be triggered in the future. The two *wa'd* will not be triggered together at one time. This is different from *muwā'adah* where both of the *wa'd* will be triggered at the same time.<sup>522</sup>

In relation to AITAB and MM home and property financing, Mohd Nazri Chik mentions that the concept of *wa'dān* is employed here but it is not *muwā'adah*. This is because the subjects of the *wa'd* are different. As an example, the first *wa'd* is to sell the commodity in this type of scenario, and the second *wa'd* is to purchase the commodity in another scenario. Here, the scenario A and the scenario B are different. Pertaining to IRS, he pointed out that the *wa'd* used there is not to execute a currency exchange contract (*bay' ṣarf*) in the future but it is to conclude a number of commodity *murābahah* (*tawarruq/musāwamah*) transactions in the future. This is an innovation in Islamic finance due to contemporary business needs.<sup>523</sup>

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<sup>521</sup> Azman Mohd Noor, interview with the researcher, 24 July 2014.

<sup>522</sup> Mohamad Akram Laldin, interview with the researcher, 14 October 2014.

<sup>523</sup> Mohd Nazri Chik, interview with the researcher, 4 September 2013.

Likewise, Lahsasna argues that in *wa'dān* there are two different events or conditions in the undertakings where the first undertaking is connected to event A, and the second one is conned to event B. Even though the subject matter of the *wa'd* is the same but as long as there are two different events then it is allowed.<sup>524</sup>

However, Shamsiah Mohamad opines that whether it is *wa'dān* or *muwā'adah* both should be allowed in the *Sharī'ah*. According to her, *muwā'dah* as a binding promise on both of the parties is allowed in the *Sharī'ah*. There are some differences between a binding-*muwā'adah* and a forward sale contract (*bay' al-ajal bi al-ajal*). Firstly, a future expression is used in *muwā'adah* which is “I will purchase” and “I will sell”. It is unanimously agreed among the classical jurists (*fuqahā'*) that a future expression does not form a contract (*'aqd*) rather a past or present expression is required to form a contract (*'aqd*). Secondly, there are some differences between these two concepts in terms of their effects. While a forward contract immediately transfers the ownership of the asset to another party then *muwā'adah* does not transfer the ownership of the asset to the promisor/promisee. Besides, the purchase price becomes a debt after a forward contract is executed but *muwā'adah* does not create any debt obligation. Therefore, *muwā'adah* is not similar to a forward contract (*bay' al-ajal bi al-ajal*) both in form and in substance. It is only a mutual promise to execute a contract in a future date.<sup>525</sup>

Corresponding to the above opinion, Saleem argues that a future expression e.g. “I will purchase” cannot execute a contract (*'aqd*). There should be either a past expression e.g. “I purchased”, or a present expression e.g. “I purchase” in order to conclude a contract (*'aqd*). Therefore, whether *wa'dān* or *muwā'adah* applied in the aforementioned products, they do not turn into a forward contract (*bay' al-ajal bi al-ajal*).<sup>526</sup>

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<sup>524</sup> Lahsasna, interview with the researcher, 23 July 2014.

<sup>525</sup> Shamsiah Mohamad, interview with the researcher, 13 November 2014.

<sup>526</sup> Saleem, interview with the researcher, 1 October 2013.



### 6.2.4.3. Discussion of the Opinions and the Weightiest Opinion

Having observed the opinions of the scholars, the first group of scholars have prohibited *wa'dān* due to their doubt that it is similar to *muwā'adah*. Their argument is that the two different conditions in *wa'dān* are not real. In addition, the ultimate result for both *wa'dān* and a forward contract (*bay' al-ajal bi al-ajal*) is the same. This group of scholars would agree that, if *wa'dān* involves two different real conditions then it is not *muwā'adah*. Furthermore, when the ultimate result of *wa'dān* is different from a forward contract (*bay' al-ajal bi al-ajal*) then *wa'dān* should be allowed.

Based on this, if we investigate MM home and property financing and AITAB vehicle financing then we can see that there is no *muwā'adah* in these two products because each of the *wa'd* is related to a different specific event. While the bank's *wa'd* is connected to the time of maturity of the contract then the customer's *wa'd* is related to the event of default. Therefore, we can conclude that the usage of *wa'dān* should be allowed in both of the products. Similarly, there is no *muwā'adah* in IRS. This is because the two *wa'd* are linked to two different subject matters. While the bank's *wa'd* is to perform one type of *musāwamah* contract, then the customer's *wa'd* is to perform another *musāwamah* contract. Here, not only the conditions but also the subject matter for both *wa'd* are different. Therefore, the researcher prefers the opinion that *wa'dān* is used in the above three products where each of the *wa'd* is related to a genuine different situation.

However, if it is assumed that *muwā'adah* is employed in the above mentioned products then it can be reiterated from the discussion in chapter two that there are some fundamental differences between a binding-*muwā'adah* and a forward sale contract (*bay' al-ajal bi al-ajal*). In *muwā'adah*, there is no offer (*ījāb*) and acceptance (*qabūl*) in the agreement which are the fundamental elements to conclude a contract (*'aqd*). Moreover, in a forward contract, the ownership of the commodity is transferred to the purchaser and the purchase price has become a debt on the purchaser immediately after the contract is

executed. However, there is no transfer of ownership in *muwā'adah*. When the promisor breaches the *wa'd* without any valid excuse then he is obliged to compensate the promisee only the amount of loss incurred but not the total contract price. This is very much different from a forward contract where the full purchase price has become a debt on him.<sup>527</sup> Therefore, it can be concluded that the outcome of *muwā'adah* is different from a forward contract rendering it permissible to use *muwā'adah* in MM home financing, AITAB, and IRS.

### 6.2.5. Legal Challenges

Even though Islamic banking in Malaysia is highly regulated with IFSA 2013 and the Central Bank of Malaysia Act 2009, it is not free from legal issue. The issue is related to the Contract Act 1950. Firstly, IFSA does not have any specific provision for *wa'd*. Therefore, product documentation related to *wa'd* mainly relies on the Contract Act 1950. There is no separate provision for *wa'd* in the Contracts Act 1950. In chapter three, the researcher has discussed that there is a gap between *wa'd* and the concept of promise in the Contracts Act 1950. Although it seems that the binding nature of a promise in the Contracts Act is similar to *mālikī* scholars' view regarding *wa'd*, a promise in the Contracts Act is as good as a contract whereas *wa'd* is different from a contract.

If *wa'd* is treated as a contract based on the Contract Act 1950, it may trigger a big *Sharī'ah* issue. Rusni Hassan warns that when *wa'd* is treated as a contract then it may invalidate a number of Islamic banking products. It may fall into the *Sharī'ah* prohibition of combining two contracts into one (*bay'atayni fī bay'atin*). Therefore, when a banking product is not valid from the *Sharī'ah* perspective, then it may cause harm to the bank along with the customer. This is because the bank might have disbursed some

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<sup>527</sup> Wazārah al-Awqāf wa al-Shu'ūn al-Islāmiyyah, *Al-Mawsū'ah al-Fiqhiyyah*, 30:231; Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 6:528-529; Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, 6:16; Ibn Ḥamzah, *Nihāyatul Muḥtāz*, 3:375-380; Ibn Qudāmah, *Al-Mughnī*, 6:7-9; Ibn 'Arabī, *Aḥkām al-Qur'ān*, 4:243; Al-Ghazālī, *Iḥyā' 'Ulūm al-Dīn*, 9:1580.

amount of money to the customer under the product agreement. The customer may argue that he has no obligation to pay to the bank as the contract is invalid due to the *wa'd*.<sup>528</sup>

Apart from that, the customer may be the victim under the Contracts Act 1950. This is because breaching the promise under the Contracts Act is similar to breaching the contract. Therefore, the remedies for the breach under the Contracts Act is different from the *wa'd*. From the *Sharī'ah* perspective, if the customer breaches the *wa'd* then his obligation is to pay the actual loss incurred. However, in the Contracts Act, the customer is required to pay the full purchase price if the promise is broken. Furthermore, *Sharī'ah* has some flexibilities regarding *wa'd*. If the breach of a *wa'd* is due to a lawful excuse e.g. bankruptcy, death, duress etc., then there is no obligation on the customer to pay. However, there is no such flexibilities in the Contracts Act unless it is mentioned in the terms and conditions of the contract.<sup>529</sup>

Furthermore, when the customer provides *wa'd* to purchase an asset from the bank, then *Sharī'ah* requires that the asset is in existence during the execution of the actual sale contract. However, there is no such requirement in the Contracts Act. Therefore, there happened a number of cases where the customer is obliged to pay the purchase price of the asset even though the asset has been disappeared. Abandoned housing project is one of the basic examples of this issue. Therefore, it can be said that the customer is the victim here due to the absence of any provision for *wa'd* in the Contracts Act.<sup>530</sup>

Additionally, Yakoob mentions that the term “consideration” in the Contracts Act 1950 has a wider sense than the *mālikī* scholars’ explanation of “*sabab/ta'liq*”. If a person changes his position relying on the promise then it has a “consideration”. Abstinance from

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<sup>528</sup> Rusni Hassan, interview with the researcher, 12 January 2015.

<sup>529</sup> Hakimah Yaacob, interview with the researcher, 30 October 2014; Rusni Hassan, interview with the researcher, 12 January 2015.

<sup>530</sup> Rusni Hassan, interview with the researcher, 12 January 2015.

performing an action is also a “consideration”. It is not necessarily restricted to whether any loss has incurred to the promisee or not.<sup>531</sup>

It may be argued that the contradiction between the Contracts Act 1950 and the *Shari'ah* concept of *wa'd* does not create any legal problem due to the superiority of SAC in giving judgments relating to any Islamic financial case. The Central Bank of Malaysia Act 2009 places SAC as the highest authority to do decide on any dispute regarding Islamic banking cases. Whatever decision SAC provides is binding in the court of law. In addition, when interviewed the legal officers in Islamic bank, they mentioned that they do not encounter any problem in preparing legal documentations for *wa'd*. They believe that the existing legal system is sufficient to accommodate *wa'd* in Islamic banking operations in Malaysia.<sup>532</sup>

However, Rusni Hassan and Hakimah Yaacob pointed out that Malaysia should revise the Contracts Act 1950 to make Islamic banking more sustainable. This will have a long-term impact for the smooth operation of Islamic banking in Malaysia. This is because the court will refer to the SAC's resolution to resolve any dispute. In case the SAC does not have any resolution pertaining to that matter, it will require a long period to issue a resolution, as it needs to conduct rigorous research to come to a decision. This lengthy procedure may upset the court of law and the related parties. Therefore, the Contracts Act 1950 should be revised through incorporating some provisions of *wa'd*. Alternatively, provisions of *wa'd* can be included in the IFSA 2013 and then it will be an exception to the Contracts Act 1950.<sup>533</sup>

According to the researcher's opinion, the Contracts Act 1950 should be revised to accommodate *wa'd*. Revising the Contracts Act might be a positive step for Malaysia

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<sup>531</sup> Hakimah Yaacob, interview with the researcher, 30 October 2014.

<sup>532</sup> Aizley Abd Latiff (Manager, Corporate Legal Services Department, Maybank Islamic Berhad), interview with the researcher, 3 December 2014; Zuraihah Abdul Rahman (Senior Executive, Corporate Legal Services Department, Maybank Islamic Berhad), interview with the researcher, 3 December 2014.

<sup>533</sup> Hakimah Yaacob, interview with the researcher, 30 October 2014; Rusni Hassan, interview with the researcher, 12 January 2015.

to become the law of reference to settle international Islamic financial disputes. Islamic banking is growing rapidly and many cross border transactions among the countries are taking place. Considering the needs in the future, Malaysia should have a comprehensive legal system to resolve international financial disputes. In this juncture, Abdul Hamid Mohamad, former chief justice of Malaysia remarks:

Producing the highest standard of *Sharī'ah* compliant products is not the end of the matter. It is equally important that the implementation and the settlement of disputes, if they arise later, be done in a *Sharī'ah* compliant environment. Our laws, in so far as they are applicable to Islamic finance, should be *Sharī'ah* compliant.<sup>534</sup>

With the development of infrastructure, the law should be upgraded to keep Islamic financial system sound and to attract foreign lawyers to make litigation in Malaysia.

#### **6.2.6. Lack of Comprehensive *Sharī'ah* Parameters for *Wa'd***

*Sharī'ah* scholars and practitioners have expressed their concern over the absence of comprehensive guidelines for the usage of *wa'd*. There is a possibility that *wa'd* will be abused by the industry if a *Sharī'ah* parameter is not developed. Mohamad Akram Laldin mentions that *wa'd* is vastly used in the Islamic banking products in Malaysia but the fear is that it may change the basic characteristics of the contract. Though *wa'd* is a risk management tool, when it is used extensively then it may change the product to debt-based. It could possibly transfer all the risks related to the product to one of the parties only. In fact, anything can be done through utilising *wa'd*. Whatever is allowed in the conventional finance can be easily put into Islamic finance through *wa'd*. For instance, preference share can be allowed in Islamic finance through *wa'd* where someone promises, "I enter into a partnership (*mushārah*) but I promise to waive my right".<sup>535</sup>

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<sup>534</sup> Abdul Hamid Mohamad, "Malaysia as an Islamic Finance Hub: Malaysian Law as the Law of Reference and Malaysian Courts as the Forum for Settlement of Disputes", *Malayan Law Journal* 4, no. 5 (2012), ci.

<sup>535</sup> Mohamad Akram Laldin, interview with the researcher, 14 October 2014.

Considering the above factor, Mohamad Akram Laldin suggests that there should be some parameters set by the regulators for the usage of *wa'd*. The parameters should specify what constitutes *wa'd*, the characteristics of *wa'dān* and *muwā'adah*, the permissibility of *wa'd*, the purpose of using *wa'd*, places where *wa'd* cannot be used etc.<sup>536</sup>

Similarly, Aznan Hasan admits that Islamic banks in Malaysia are excessively using *wa'd*. The reason behind this is that there is no alternative for *wa'd* at this moment. *Wa'd* is the best solution for the time being to be used in so many things. It can be used either for good or bad purpose. It may be done on either real assets or non-real assets. Therefore, there should be a guideline for the usage of *wa'd*. However, until now we do not have guideline for *wa'd* which is a big challenge for us.<sup>537</sup>

Considering the parameters for *wa'd*, Rusni Hassan cites that Islamic banks are using *wa'd* too much because they want to get certainty of their income. This is because they are very much used to the conventional banking system. However, not only the bank but also the customer asks for certainty. Therefore, the important fact here is that we are very much used to the conventional system. If *wa'd* is not employed then banks will probably will not be interested to offer that product. Therefore, it is better to have *wa'd* alongside efforts to introduce regulations.<sup>538</sup>

Similarly, Lahsasna views that *wa'd* is an important instrument which should be used wisely to innovate more products. Rather than reducing the usage of *wa'd*, it is preferable to innovate more products based on *wa'd* as long as it is permissible and is structured in a *Sharī'ah* compliant manner. However, there should have some parameters to regulate and monitor *wa'd*.<sup>539</sup>

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<sup>536</sup> Mohamad Akram Laldin, interview with the researcher, 14 October 2014.

<sup>537</sup> Aznan Hasan, interview with the researcher, 13 January 2015.

<sup>538</sup> Rusni Hassan, interview with the researcher, 12 January 2015.

<sup>539</sup> Lahsasna, interview with the researcher, 23 July 2014.

Based on the above scholars' opinion, when *wa'd* is overwhelmingly used in numerous number of products, it may lead to an illegitimate end. Therefore, all scholars have agreed that a guideline on the usage of *wa'd* is necessary. This is because a guideline on the practice of *wa'd* ensures that it is not abused by the industry. It confirms that *wa'd* does not become a legitimate means to reach to an illegitimate goal. When the regulatory body, which is BNM in the case of Malaysia, develops a comprehensive guideline then several concerns regarding *wa'd* can be dissolved.

BNM has recently issued an exposure draft on the *Shari'ah* requirements and optional practices pertaining to developing Islamic banking products and services based on *wa'd*.<sup>540</sup> However, this guideline might not be sufficient to regulate the industry to develop *wa'd*-based products. This is due to the reason that it covers only the basic feature of *wa'd*. There is no clear guideline on the usage of *wa'dān* and *muwā'adah*. There should be a detailed framework for *wa'dān* and *muwā'adah*. Furthermore, a guideline on the circumstances where *wa'd* violates the purpose of the contract (*muqtaḍā al-'aqd*) should be provided. In addition, a thorough guideline on the binding nature of *wa'd* should be provided including the circumstances where the promisor is lawfully excused from fulfilling the promise.

In the researcher's point of view, the importance of *wa'd* in Islamic banking products cannot be overlooked. There is a strong need for *wa'd* in the industry to mitigate market risk in the retail products e.g. MM home financing. Moreover, *wa'd* is a key element to develop treasury products. Therefore, product innovation through *wa'd* should not be discouraged in the fear of evil use. In this regard, it is preferable to issue guidelines that are comprehensive for *wa'd* along with the innovations. Product innovations and applications should be continuously followed by regulations for when problems occur. At the same time, it is preferable to look for better alternative for *wa'd*.

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<sup>540</sup> Bank Negara Malaysia, "Exposure Draft Wa'd (Shariah Requirements & Optional Practices)".

### **6.3. *Sharī'ah* Issues and Other Challenges for *Wa'd*-Based Products in Bangladesh**

There are three major challenges for Bangladeshi Islamic banking industry in innovating products based on *wa'd*. These challenges are strictness of the *Sharī'ah*, lack of product development initiative, and legal challenges. The following sections provide a detailed discussion on these challenges including the opinions of *Sharī'ah* scholars and practitioners.

#### **6.3.1. Strictness of the *Sharī'ah***

The practice of *wa'd* in Bangladeshi Islamic banks is limited to some consumer products. This is due to the stringent position of the *Sharī'ah* in Bangladesh. The *Sharī'ah* scholars in Bangladesh heavily rely on *sadd al-dharā'i'* principle. Therefore, they do not allow a number of *wa'd*-based treasury products and consumer products. It is a common fear among the scholars that if one of the treasury products is allowed in Bangladesh, then eventually the rest will follow. While using *wa'd*-based treasury products then there is a risk of being similar to the conventional banking operation through involving with *ribā*, *gharār* and *maysir*. Scholars have negative connotation towards the usage of *wa'd*. Shamsuddoha pointed out that Islamic banking industry completely survives on *wa'd* but it is not a satisfactory solution. This is because *wa'd* is a controversial concept in the *Sharī'ah* and it is not based on something real. Therefore, rather than *wa'd*, actual sale and purchase should be practiced.<sup>541</sup>

The foremost example for the strict position of *Sharī'ah* scholars is the prohibition of FX forward. FX forward is not allowed in IBBL as well as in all other Islamic banks in Bangladesh. Rafiq, a prominent *Sharī'ah* scholar in Bangladesh argues that there are a few *Sharī'ah* violations in FX forward. Firstly, Islamic *Sharī'ah* requires that currency exchange should be on the spot. The following prophetic narration says:

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<sup>541</sup> Shamsuddoha, interview with the researcher, 7 April 2014.



عن عبادة بن الصامت قال: قال رسول الله - صلى الله عليه وسلم -: الذهب بالذهب والفضة بالفضة والبر بالبر والشعير بالشعير والتمر بالتمر والملح بالملح مثلاً بمثل سواء بسواء يدا بيد فإذا اختلفت هذه الأصناف فبيعوا كيف شئتم إذا كان يدا بيد.

Translation: ‘Ubādah bin Al-Ṣāmit (RA) narrated that the messenger of Allāh (peace be upon him) said: Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, and salt by salt, like for like and equal for equal, payment being made hand to hand. If these classes differ, then sell as you wish if payment is made hand to hand.<sup>542</sup>

Based on the above narration, different currencies should be exchanged based on the exchange rate at that day. It is not permissible to fix an exchange rate between two currencies three months earlier for example and then exchange those currencies after that on that fixed rate ignoring that day’s exchange rate in the market. It violates the rule of spot transaction prescribed in the above prophetic narration. *Shari‘ah* only allows that the bank may promise that after three months it will sell to the customer USD 10,000 for example. Alternatively, customer may promise that he will purchase USD 5,000 from the bank after three months. However, they are not allowed to fix an exchange rate beforehand. In reality, if an exchange rate cannot be fixed earlier, this type of promise is worthless for the bank and the customer.<sup>543</sup>

Furthermore, FX forward involving *wa‘d* from one party may cause harm to the other party. For example, the customer promises to purchase from the bank after three months USD 1,000 at the rate of USD 1 is equivalent to BDT 80. After three months, if the exchange rate of USD 1 is equal to BDT 75 in the market then the customer is obliged to fulfil his promise. If the customer does not fulfil his promise then he is required to compensate the bank. On the other hand, after three months, if the exchange rate of USD 1 is equal to BDT 85 in the market and the bank does not want to sell the USD to the customer at the rate fixed earlier, then there is no liability on the bank. This type of

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<sup>542</sup> Narrated by Muslim, Kitāb al-musāqāt, Bāb al-ṣarf wa bay‘ al-dhahab bi al-waraq naqdan, Ḥadīth no. 71. See Al-Naysābūrī, *Ṣaḥīḥ Muslim*, 3:1211.

<sup>543</sup> Rafiq, interview with the researcher, 4 May 2014.

arrangement allows the bank to take advantage and may cause harm to the customer. The principle of the *Sharī'ah* says:

لا ضرر ولا ضرار

Translation: Harm shall not be inflicted not reciprocated.<sup>544</sup>

The above prophetic narration says that harm should be removed from people. Therefore, FX forward is not allowed in IBBL.<sup>545</sup>

Similarly, Shah Abdul Hannan mentions that he did not allow the practice of FX forward because one cannot fix an exchange rate today and execute the transaction on a later date. One should be very cautious here because it is *bay' al-ṣarf*. Therefore, he took the strict position even though AAOIFI has allowed it.<sup>546</sup>

Furthermore, Md. Manzur-E-Elahi states that sometimes customers involved in export and import business ask the bank to fix the exchange rate of USD three months earlier than the transaction date. However, bank cannot accept it because it is a violation of the *Sharī'ah* principle. This is *bay' al-ṣarf*. It should be done on an on the spot basis as mentioned in the *ḥadīth*. It is not permissible to decide an exchange rate today and conclude the transaction another day.<sup>547</sup> Likewise, Islam also agrees that FX forward is not allowed due to the *Sharī'ah* requirement of concluding the contract on the spot.<sup>548</sup>

However, contrary to this strict position there are a few scholars in Bangladesh who opine that FX forward should be allowed in Bangladesh. Since the previous group of scholars' opinion dominate the industry, this group of scholars can be described as the minority. Rahmani argues that in FX forward, the customer first gives a *wa'd* to the bank to execute *bay' al-ṣarf* at a later date. The *Sharī'ah* ruling that says that the transaction

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<sup>544</sup> Narrated by Mālik, Kitāb al-aqḍiyah, Bāb al-qaḍā' fī al-mirfaq, Ḥadīth no. 2758. See Al-Aṣḥāḥī, *Al-Muwatta'*, 4:1078.

<sup>545</sup> Rafiq, interview with the researcher, 4 May 2014.

<sup>546</sup> Shah Abdul Hannan (Member of the Shariah Supervisory Committee, Shahjalal Islami Bank Limited), interview with the researcher, 20 April 2014.

<sup>547</sup> Md. Manzur-E-Elahi (Member of the Shariah Supervisory Committee, Islami Bank Bangladesh Limited), interview with the researcher, 10 April 2014.

<sup>548</sup> Islam, interview with the researcher, 19 April 2014.

should be on the spot is not applicable on *wa'd*. *Wa'd* is different from a contract (*'aqd*). *Sharī'ah* principles related to a contract is not applicable on *wa'd*. Therefore, even though *muwā'adah* is applied here then still there is no problem from the *Sharī'ah* perspective. There are many differences between *muwā'adah* and *al-bay'* (contract of sale).<sup>549</sup>

Rahmani further explains that *muwā'adah* is a promise to purchase or sell while *al-bay'* is a contract of sale. There are differences between these two expressions, which are “I will purchase” and “I purchased”. There must be *ījāb* and *qabūl* in *al-bay'* but it is not required in *muwā'adah*. In *muwā'adah*, the *'aqd* will be executed on a later date. On the mentioned date, there will not be any *'aqd* automatically but it will be executed through *ījāb* and *qabūl*. Finally, *muwā'adah* does not have any effect on changing the ownership of the subject matter. Thus, there are many differences between *muwā'adah* and *al-bay'*.<sup>550</sup>

In addition, Rahmani points out that the *Sharī'ah* scholars in Bangladesh mainly follow *Ḥanafī* school of jurisprudence (*madhhab*). Therefore, FX forward can be based on *muwā'adah*. This is because according to *Ḥanafīs*, *muwā'adah* can be used as binding on the promisor when there is a need. Qāḍī Khān, a prominent *Ḥanafī* scholar cites:

المواعدة قد تكون لازمة، فتجعل لازمة لحاجة الناس

Translation: Sometimes, bilateral promise can be binding. Therefore, it can be made binding due to people's need.<sup>551</sup>

Therefore, a binding-*muwā'adah* can be applied in FX forward due to public need.<sup>552</sup>

Consistent with the above argument, Arif adds that Islamic banks in Bangladesh should start FX forward first. Afterward, if any mistake is found, it can be revised with the passage of time. There are amendments in every law around the world. It is natural to

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<sup>549</sup> Rahmani, interview with the researcher, 10 April 2014.

<sup>550</sup> *Ibid.*

<sup>551</sup> Khān, *Fatāwā Qāḍī Khān*, 2:165.

<sup>552</sup> Rahmani, interview with the researcher, 10 April 2014.

have amendments. *Sharī'ah* rulings may change due to changes in situations and times. There are many examples in the *Sharī'ah* that something is lawful in some situations but in other circumstances is unlawful. Besides, the scope for exercising juristic reasoning (*ijtihād*) in the field of transactions (*mu'āmalāt*) is wider than other areas. In this regard, it is not an obligation to confine oneself to one school of jurisprudence (*madhhab*). Wherever anything beneficial is found, it should be taken.<sup>553</sup>

Responding to the scholars' arguments prohibiting FX forward in Bangladesh, Mohamad Akram Laldin argues that the *Sharī'ah* requirement of spot transaction (*yadan bi yadin*) is related to the period of executing the contract. This *Sharī'ah* principle is not applicable before executing the contract. For instance, A promises B that A will sell to B USD 1,000 on 1<sup>st</sup> of December, 2015. In this case, there is no problem from the *Sharī'ah* perspective if they fix the price of USD today. It does not violate the *Sharī'ah* principle for spot transaction (*yadan bi yadin*). This is because the contract is not concluded yet.<sup>554</sup>

In addition, one can agree on the price today and execute the contract on the fixed future date. The buyer and seller are always free to decide the price. They are free to sell and purchase at any price even it is different from the market rate at that day. For example, on the day of executing the contract, 1 USD is equal to 3.2 MYR but both parties decide to exchange 1 USD equal to 3.1 MYR, then it is not a problem from the *Sharī'ah* perspective as there is consent between the two parties. Therefore, it is permissible to lock the price first, and when the time comes both parties may enter into the contract and the possession of the currency (*qabḍ*) should be done at that point of time.<sup>555</sup>

Bangladesh's position in FX forward is contrary to some notable *Sharī'ah* authorities' resolutions, namely those of AAOIFI, Kuwait Finance House, and BNM. In *Sharī'ah* standard no. 1 (2\9), AAOIFI mentions:

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<sup>553</sup> Arif, interview with the researcher, 16 April 2014.

<sup>554</sup> Mohamad Akram Laldin, interview with the researcher, 14 October 2014.

<sup>555</sup> *Ibid.*

A bilateral promise to purchase and sell currencies is forbidden if the promise is binding, even for the purpose of hedging against currency devaluation risk. However, a promise from one party is permissible even if the promise is binding.<sup>556</sup>

AAOIFI does not allow binding *muwā'adah* in FX forward but it allows *wa'd*.

Likewise, BNM also allows *wa'd* in FX forward. It resolves:

Islamic financial institutions are allowed to conduct forward foreign exchange transactions based on unilateral *wa'd mulzim* (binding promise) which is binding on the promisor. In addition, the party who suffers losses due to non-fulfilment of promise may claim compensation. The forward foreign exchange transactions may be carried out by the Islamic financial institutions with their customers, among Islamic financial institutions, or between the Islamic and conventional financial institutions.<sup>557</sup>

Along with BNM, the Kuwait Finance House issued a resolution that it is allowed to sell or purchase a currency for a rate agreed upon in advance with the condition that the contract is executed later where the delivery and the receipt of the subject matter is made on the spot.<sup>558</sup>

In the researcher's opinion, the reason behind the prohibition of FX forward in Bangladesh is that the scholars have different understanding of the prophetic narration. It appears that according to their understanding, the "*yadan bi yadin*" (hand-to-hand) concept requires the seller and purchaser to exchange the currency on that day's market price. However, the commentaries of this *ḥadīth* mention that "*yadan bi yadin*" means that the transaction should be on spot basis.<sup>559</sup> This means that the delivery and reception of different currencies should be concluded immediately during the period of the contract. However, there is no condition here to follow market price in sale and purchase. Instead,

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<sup>556</sup> Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), *Shari'ah Standards for Islamic Financial Institutions*, 7.

<sup>557</sup> Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance*, 138.

<sup>558</sup> Bayt al-Tamwīl al-Kuwaytī, "Al-Fatāwā al-Shar'iyyah fī al-Masā'il al-Iqtisādiyyah," Fatwā no. 171, *Mawsū'atu al-Iqtisād wa al-tamwīl al-Islāmī* website, retrieved on 07 July 2015, <http://iefpedia.com/arab/>

<sup>559</sup> Muḥyī Al-Dīn Abī Zakariyyā Yaḥyā bin Sharaf Al-Nawawī, *Al-Minhāj Sharḥ Ṣaḥīḥ Muslim bin al-Ḥajjāj* (Al-Qārirah: Al-Maṭba'ah al-miṣriyyah bi al-azhar, 1929), 11:14-16; Shams Al-Dīn Al-Kirmānī, *Al-Kawākib al-Dirārī fī Sharḥ Ṣaḥīḥ al-Bukhārī* (Bayrūt: Dār iḥyā' al-turāth al-'arabī, 1981), 9:191.

it is clearly mentioned in the *ḥadīth* that both buyer and seller are free to decide the price.

It says:

فإذا اختلفت الأجناس فبيعوا كيف شئتم إذا كان يدا بيد

Translation: If these classes differ, then sell as you wish if payment is made hand-to-hand.

When there is a transaction between two different items among the six types of items mentioned earlier, then it is not a requirement that both of the item should be equal. The purchaser and seller can freely exchange with whatever price they want. However, the only condition here is that it should be on spot basis.

Based on the above, the researcher opines that there should not be any problem to accept FX forward in Bangladesh from the *Sharī'ah* perspective. Moreover, FX forward is a need for the customers who are involved in export and import business. The foreign trade is significantly increasing in Bangladesh.<sup>560</sup> Therefore, Islamic banking should respond to the growing needs of the customer. Otherwise, customers may resort to conventional banking to fulfil their needs.

The *Sharī'ah* scholars should be flexible to accommodate FX forward. Islamic *Sharī'ah* is based on ease. It does not prescribe any ruling which brings hardship for people. Allāh (SWT) says:

وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ

Translation: And, [He] has not laid upon you in religion any hardship.<sup>561</sup>

There is nothing in the religion which puts human being in hardship. Whenever there is a hardship, there is a way out. Even the prayer (*ṣalāt*) which is the second biggest pillar of Islam was reduced due to travel and fear.<sup>562</sup> Flexibility and ease are the basic

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<sup>560</sup> Mohammad Masudur Rahman and Laila Arjuman Ara, “Bangladesh trade potential: a dynamic gravity approach”, *Journal of International Trade Law and Policy* 9, issue. 2 (2010), 130 – 147; Rubayat Jesmin, “Maximizing the potentials of Bangladesh’s export to the EU market,” *Asia Europe Journal* 6, issue. 3-4 (November 2008), 519-529.

<sup>561</sup> Al-Qur’ān, Sūrah al-Ḥajj: 78.

<sup>562</sup> Ibn Kathīr, *Tafsīr al-Qur’ān al-‘Azīm*, 1288.

characteristics of the *Sharī'ah*. Accordingly, scholars should balance between *sadd al-dhrā'i*' and the public need (*maṣlahah*) while exercising their juristic reasoning (*ijtihād*).

### 6.3.2. Lack of Product Development Initiatives

Among the reasons for the limited number of *wa'd*-based products in Bangladesh is that there is no sufficient product development initiative by the industry. Shamsuddoha confesses that the product innovation in IBBL is lesser than the demand of the customer. In relation to the concept of *wa'd*, he mentions that practitioners do not have much awareness on developing numerous products based on *wa'd*. Customers also do not understand *wa'd*. However, it is very important to develop more products in IBBL.<sup>563</sup>

Moreover, Kabir points out that Islamic banking in Bangladesh is lacking several number of products especially personal financing products e.g. education financing, *hajj* financing, event financing etc. Some financing products are needed for foreign workers. It is very important to develop more products. Islamic banks will be at the back of the competition if the product is not developed.<sup>564</sup>

Huq mentioned that a few products were introduced at the beginning of Islamic banking in Bangladesh. Islamic banks in Bangladesh still rely on those products. He strongly believes that Islamic banking in Bangladesh should introduce many more products. Without the introduction of new products, Islamic banking will not have smooth growth. Currently, Islamic banking is covering only 20 to 25% of total banking in Bangladesh. It is only a reserve market. However, if Islamic banking would like to be the mainstream banking, then they should better serve the various needs of the people.<sup>565</sup>

Based on our field study, there are a few reasons for the lack of product developments which are: (1) lack of research, (2) lack of competitive market, (3) lack of

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<sup>563</sup> Shamsuddoha, interview with the researcher, 7 April 2014.

<sup>564</sup> Kabir, interview with the researcher, 7 April 2014.

<sup>565</sup> Huq, interview with the researcher, 9 April 2014.

human capital, and (4) lack of sincere support from the government. The following subsections provide details on these points.

### **6.3.2.1. Lack of Research**

The scarcity of research is the foremost impediment to develop more products in Bangladesh. Conducting research is the initial condition to innovate more banking products and services. However, bankers and *Shari'ah* scholars in Bangladesh do not have a positive attitude to conduct research. Arif points out that the benefit of research is not clear among the bankers, academics and *Shari'ah* scholars in Bangladesh. This is due to their short-sightedness. This is why the industry is not ready to spend money for research. There is very little research in Islamic banks. Banks are generous to finance different big events but they are not willing to finance research. This big problem covers not only the bankers but also the whole nation.<sup>566</sup>

In this regard, Kabir mentions that we should see the overall outcome of research. Perhaps one or two research projects for a certain product cannot bring any outcome but another may bring about a beneficial outcome. Sufficient funding is very important for research. Some people may think that the expenditure for research does not bring any income while spending in other sectors may bring income. This attitude should be changed.<sup>567</sup>

Rahman argues that research should be done to cater the needs of the customer. It should be done in such a way that Islamic banking can create something new rather than simply imitating conventional products. In addition, many *Shari'ah* violations are taking place due to the lack of research. In many cases, due to the lack in research, the risk in

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<sup>566</sup> Arif, interview with the researcher, 16 April 2014.

<sup>567</sup> Kabir, interview with the researcher, 7 April 2014.



certain products cannot be minimised. If a comprehensive research is conducted, then many types of risks can be minimised.<sup>568</sup>

The researcher believes that BB can play a strong role to develop research in Islamic banks. It should provide a guideline that every Islamic bank in Bangladesh should have a *Sharī'ah* research division. This research division should conduct research on the existing products of the banks to identify the shortcomings in those products. Moreover, it should introduce more innovative products for Islamic banks. The research division should help the *Sharī'ah* advisory board determine the potential *Sharī'ah* violations in products and the alternative *Sharī'ah* mechanism for conventional products.

### **6.3.2.2. Lack of Competitive Market**

There is no competition among the Islamic banks in Bangladesh. Normally, IBBL, the oldest and biggest Islamic bank in Bangladesh issues new products and other Islamic banks follow IBBL. It is very rare that other Islamic banks have come out with new innovative products. All Islamic banks are dependent on IBBL. Hannan states that there is no competing system among the Islamic banks in Bangladesh. IBBL is the father of all Islamic banks. All other banks follow IBBL. They even use the same product manual.<sup>569</sup>

However, competition is very important for the overall development of Islamic banking. Stijn Claessens mentions that competition is important in the financial sector for the efficiency of financial services, quality of financial products, and the level of innovation as well as for the overall economic growth.<sup>570</sup> As the competitive environment is yet to exist, there is no pressure on product innovation and services development. Thus, the lack of competition among the Islamic banks may weaken their overall performance.

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<sup>568</sup> Rahman, interview with the researcher, 7 April 2014.

<sup>569</sup> Hannan, interview with the researcher, 20 April 2014.

<sup>570</sup> Stijn Claessens, "Competition in the Financial Sector: Overview of Competition Policies," (IMF working paper, paper no. 09/45, Washington, D.C., 2009), 3.

Therefore, Islamic banks should exert effort to become independent and should decrease their reliance on IBBL.

### **6.3.2.3. Lack of Human Capital**

Human capital is a significant element for the overall progress of the organisation. Skilled competent people are needed for Islamic banking product innovation. In the Bangladeshi context, there is a lacking of individuals who are expert in *Sharī'ah* and banking. Rahman cites that actually those who are the *Sharī'ah* scholars in our country have limitation of knowledge in Islamic finance and banking. There is a lack of people who know Arabic and English well enough to conduct research in Islamic finance. Those who have knowledge in *Sharī'ah* have little knowledge in banking and finance. Most of the *Sharī'ah* scholars do not have knowledge on the practice of Islamic banking. Sometimes, *Sharī'ah* scholars disregard some proposed products from the bankers without properly understanding them. Alternatively, the *Sharī'ah* scholars sometimes allow certain proposed products from the bankers without understanding them also. Both aspects are not right.<sup>571</sup>

In addition, Arif affirms that a *Sharī'ah* scholar who understands *Sharī'ah* and Islamic banking is lacking in Bangladesh. Most of the *Sharī'ah* scholars only understand the *Sharī'ah*. There is a strong need for people who are expert in English, *Sharī'ah*, and banking. If a new generation emerges who have knowledge in *Sharī'ah* and banking, then it will be easy to develop more products.<sup>572</sup>

The shortage of human capital is one of the biggest challenges for the overall development of Islamic banking in Bangladesh. Sarker found that the shortage of a dedicated, skilled, and trained work force is one of the basic problems for Islamic banks

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<sup>571</sup> Rahman, interview with the researcher, 7 April 2014.

<sup>572</sup> Arif, interview with the researcher, 16 April 2014.

in Bangladesh.<sup>573</sup> The shortage of qualified *Sharī'ah* scholar is a global challenge for Islamic banking that includes not only Bangladesh but most countries. There are only a handful of qualified *Sharī'ah* scholars in the world. In this regard, Theodore Karasik et al. states:

One problem that currently constrains the growth of Islamic banking institutions is the paucity of qualified Islamic scholars who can interpret the classical sources in light of today's modern fiscal challenges. In order for Muslims to perceive a particular banking service as “*Sharī'ah*-compliant” it must receive a *fatwā* (religious ruling) from a credentialed, established cleric. This scholar must possess a rare combination of intellectual assets – a thorough grounding in classical *fiqh* (jurisprudence), as well as a solid understanding of modern micro- and macro-economics. According to Dār al-Istithmār, a London-based consultancy, there are roughly a dozen such scholars worldwide.<sup>574</sup>

In the researcher's opinion, long term planning and investment are required to develop human capital for Islamic banking in Bangladesh as well as in the world. Firstly, more universities should offer Islamic banking courses that combine both *Sharī'ah* and banking courses. All the Islamic banks along with the BB should organise seminars and workshops to develop the banking knowledge of the *Sharī'ah* scholars. In this regard, Islamic banking institutions can offer a short-term certificate course for *Sharī'ah* advisors. Along with this, research activities should be intensified under the *Sharī'ah* division in every Islamic bank so that the *Sharī'ah* officers become expert in Islamic banking practices as well as in *Sharī'ah* issues.

#### **6.3.2.4. Lack of Sincere Support from the Government**

BB has provided incentives for Islamic banking in Bangladesh but the support from the government is insufficient for the growth of Islamic banking. Huq highlights that the government rules and regulations are flexible with the conventional banking but they are quite strict with the Islamic banking. For example, in 1997, PBL got a license to open

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<sup>573</sup> Sarker, “Islamic Banking in Bangladesh: Achievements & Challenges,” 8.

<sup>574</sup> Karasik, Wehrey and Strom, “Islamic Finance in a Global Context,” 390.

five Islamic banking branches but until now, it did not receive a license to open any Islamic banking branch while at the same time it received permission to open more than hundred conventional banking branches. From 2005, the Arab Bangladesh Bank Limited (ABBL) did not receive any license to open an Islamic banking branch. Similarly, more the 23 conventional banks did not get permission to open Islamic banking branches after they started with a few Islamic banking branches. At present, six conventional banks are waiting for licenses from BB to convert into an Islamic bank. With this, we can conclude that the regulator is confining Islamic banking. Islamic banking could be the mainstream banking in Bangladesh if licenses were regularly issued.<sup>575</sup>

Pertaining to this, Rafiq added that the government does not sincerely want that Islamic banking system to spread in the country. Islamic banking is growing due to the overwhelming response from the public. As the public are spontaneously choosing Islamic banking and turning from conventional banking, BB is somehow forced to permit Islamic banking. However, the government support is not like the Malaysian government where the government directly patronises Islamic banking. In Bangladesh, Islamic banking is moving forward due to public support even though the government has not been friendly toward it.<sup>576</sup>

It becomes clear that the government does not sincerely support Islamic banking when the minister of finance in Bangladesh recently made a statement against Islamic banking in the parliament. Even though the minister did not plan to stop Islamic banking in Bangladesh, he said that the Islamic banking system appeared to him as fraudulent. Furthermore, he remarked that it is unfortunate that Islamic banking is getting popular around the world and many international organisations like the International Monetary

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<sup>575</sup> Huq, interview with the researcher, 9 April 2014.

<sup>576</sup> Rafiq, interview with the researcher, 4 May 2014.

Fund (IMF) are showing interest in it.<sup>577</sup> With this statement it becomes obvious that the government does not sincerely believe in Islamic banking.

While some non-Muslim governments are gradually showing their interest in Islamic banking, Bangladesh as a Muslim majority country should provide pleasant support towards Islamic banking.<sup>578</sup> Khan and Bhatti pointed out that the Monetary Authority of Singapore is attempting to make changes in its tax system and regulatory systems for the proper growth and development of Islamic financial institutions in the country. Furthermore, it supported Islamic banking and finance training programs which are conducted by native *Shari'ah* scholars to promote Islamic finance in Singapore. Besides, the UK's Financial Services Authority (FSA) has planned to make London a hub for Islamic finance and investment. It eliminated the double stamp duty provision on Islamic mortgage contracts in 2006. Moreover, it has made necessary amendments in the UK Tax Law to ease the practice of *murābahah*, *ijārah* and *mushārahah mutanāqishah*. Lately, India, Bangladesh's neighbouring country is attempting to establish Islamic bank. The Reserve Bank of India (RBI) has recently carried out a feasibility study to introduce a full-fledged Islamic bank.<sup>579</sup>

The expansion of Islamic banking would encourage Muslims to actively participate in Islamic investments and thus it will contribute to the national economic development. Confining Islamic banking may trigger public dissatisfaction towards the government and reduce the participation of pious Muslims in economic activities. Therefore, the government of Bangladesh should provide at least equal treatment for Islamic banking to that awarded to its conventional counterpart.

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<sup>577</sup> "Muhith Finds Islamic Banking Fraudulent", *The Financial Express*, 01 February 2015.

<sup>578</sup> Islamic Financial Services Board (IFSB), *Prospects and Challenges in the Development of Islamic Finance for Bangladesh* (Kuala Lumpur: Islamic Financial Services Board, 2014), 17.

<sup>579</sup> Khan and Bhatti, "Islamic banking and finance: on its way to globalization," 708-725.

### 6.3.3. Legal Challenges

Generally, the legal framework in Bangladesh supports Islamic banking operations. There are some provisions for Islamic banking in the Bank Companies Act 1991. Moreover, there are some exceptions for Islamic banks in the Income Tax Ordinance 1984. Therefore, Islamic banks are allowed to involve in *muḍārabah* and *mushārahah* business with their customers. While the conventional banks cannot own real estate property, Islamic banks are allowed to own real estate property under its Islamic banking mechanism.

However, there is a legal issue in relation to the practice of *wa'd*. As mentioned earlier in chapter four, Contract Act 1872 does not recognise *wa'd*. Under the Contract Act 1872, *wa'd* is as good as a contract. Therefore, if *wa'd* is a contract then it cannot be made to execute another contract in the future. According to the *Shari'ah*, one cannot sell an asset before he owns it. If *wa'd* is used in BMPO financing then it would be questionable. This is because the real contract should take place between the bank and the customer after the bank has purchased the commodity according to the customer's request. However, when *wa'd* itself is a contract then a contract is taking place before the bank owns the subject matter of the contract. Here, the bank is selling something that it does not own. Moreover, the binding nature of *wa'd* differs from the binding nature of a contract. Finally, *Shari'ah* has some flexibilities for the promisor if he breaches the *wa'd* but the Contract Act does not have such flexibilities.

When interviewed, Sheikh Mahmudur Rahman revealed that IBBL did not face any legal issue related to *wa'd* so far. In the case of default, the bank usually charges actual loss incurred to it from the customer.<sup>580</sup> In the researcher's perspective, if the legal status of *wa'd* in Bangladesh is examined from a balanced perspective then it can be seen that banks may not face problems under the existing act because the Contract Act is in

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<sup>580</sup> Rahman, interview with the researcher, 27 October 2014.

favour of them. However, if no clause for *wa'd* is incorporated in the Contract Act then the customer's welfare might not be protected. The customer could be the victim in this case. However, the absence of a provision for *wa'd* in the Contract Act may raise concern for the banks as well because when a banking contract is invalidated by the *Sharī'ah* then the bank may also suffer loss.

Therefore, it is necessary for the banks to urge the government to incorporate a *wa'd* clause in the Contract Act 1872. It is highly recommended that there should be a separate comprehensive law for the operation of Islamic banks where a clause for *wa'd* is included. A separate law for Islamic banking would be the permanent solution for the Islamic banks in Bangladesh. In fact, several studies recommended a separate law for Islamic banking in Bangladesh.<sup>581</sup> When Islamic banking in Bangladesh gets complete legal support then it might provide more confidence to foreign investors to participate in the Islamic banks.

#### **6.4. Conclusion**

This chapter has discussed the *Sharī'ah* issues and other challenges in relation to the *wa'd*-based products in Malaysia and Bangladesh. In the Malaysian context, many *Sharī'ah* issues have been raised due to its widespread application of *wa'd*. However, the discussion in this chapter concluded that the practice of *wa'd* in Malaysian Islamic banks is in accordance with the *Sharī'ah* and free from the issues raised. Nevertheless, a comprehensive *Sharī'ah* parameters for the usage of *wa'd* should be developed. Moreover, a legal provision for *wa'd* either in the Contracts Act 1950 or IFSA would be a permanent legal solution for *wa'd*.

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<sup>581</sup> Sarker, "Islamic Banking in Bangladesh: Achievements & Challenges", 8; Ahmad and Hassan, "Regulation and Performance of Islamic Banking in Bangladesh", 275; Abu Umar Faruq Ahmad, "Islamic banking in Bangladesh", (Master thesis, University of Western Sydney, 2002) 187; Hassan, "Islamic banking in theory and practice", 74-75.

In the context of Bangladesh, the practice for *wa'd* is restricted due to the stringent opinion of the *Shari'ah* scholars. After examining the scholars' opinion, it is observed that the scholars are rigid due to their heavy reliance on *sadd al-dharā'i'*, different understanding of the *Shari'ah* rulings, and paying little attention to the public needs (*maṣlahah*). Furthermore, another challenge for innovating *wa'd*-based products is that there is a lack in product development due to lack of research, competitive market, human capital, and sincere support from the government. Finally, a legal provision for *wa'd* is needed in the contract act of the country.



## CHAPTER 7: THE PROSPECTS OF *WA'D*-BASED PRODUCTS IN MALAYSIA AND BANGLADESH

### 7.1. Introduction

There is a significant prospect of *wa'd* for the Islamic banking industry in Malaysia and Bangladesh. This chapter suggests a number of *wa'd*-based products which can be practiced by the Islamic banks in both countries. Considering the *Sharī'ah* framework, clients' needs and suitability with the industry different types of product structures have been proposed separately for each banking industry. The following sections illustrate proposed product structures for Malaysian banking industry first followed by the Bangladeshi banking industry. Each product structure is explained with figures, underlying *Sharī'ah* concepts, and the advantages and disadvantages in its operation.

### 7.2. Prospects of *Wa'd*-Based Products in Malaysia

The three different products have been suggested for the Islamic banks in Malaysia are Islamic FX option, Islamic FX forward based on *wa'dān*, and *Ijārah* home and property financing under *shirkat al-milk*. The details of the product structures with figures and *Sharī'ah* concepts used are provided below.

#### 7.2.1. Islamic FX Option

The Islamic option is a significant risk management tool. Globally, different models have been proposed for Islamic options. However, these models are receiving condemnation from the *Sharī'ah* perspective.<sup>582</sup> Therefore, the researcher proposes *wa'd*-based Islamic FX Option. The Islamic FX option can be the future *wa'd*-based hedging instrument in

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<sup>582</sup> Kok et al., "Derivative products and innovation", 242- 257; Al-Amine, "Risk and derivatives in Islamic finance"; Imran Iqbal, Sherin Kunhibava and Asyraf Wajdi Dusuki, "Application of options in Islamic finance," (ISRA Research Paper No. 46, Kuala Lumpur, 2012).

Malaysia. Two different models for Islamic FX option have been suggested. The first is based on *wa'd* with commodity *murābahah*. The second model is based on *muwā'adah* and *'urbūn*. Figure 7.1 below describes the operational steps of Islamic FX option based on *wa'd* and commodity *murābahah*.

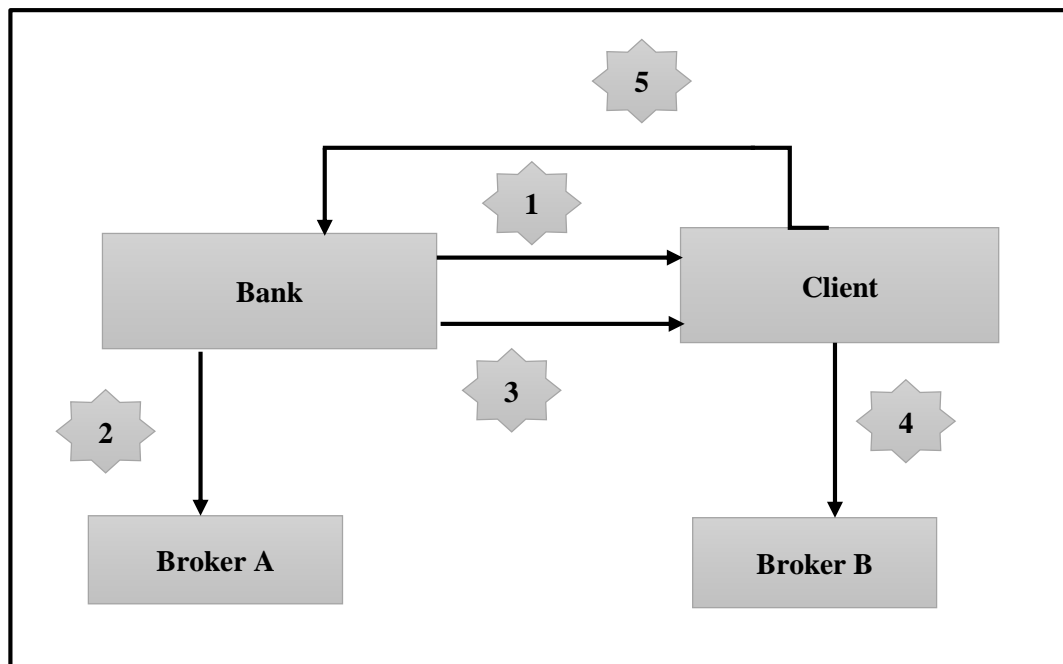


Figure 7.1 Islamic FX Option Based on *Wa'd* and Commodity *Murābahah*

Operational Steps:

- (1) On 23 February 2015, the bank promises to sell USD 1 million to the client at the rate of MYR 3.2 at any day from 1 April 2015 to 30 April 2015.
- (2) At the same day, the bank purchases a commodity from broker A at MYR 10,000.
- (3) At the same time, the bank sells the commodity to the customer at MYR (10,000 cost +5,000 profit) 15,000. MYR 5,000 is considered as the option premium for the bank.
- (4) On the above date, the customer appoints the banks as his selling agent to sell the commodity to broker B at MYR 10,000.
- (5) After that, from 1 April 2015 to 30 April 2015, if the exchange rate of USD is in favour of the customer, he may ask the bank to realise its *wa'd*.

The above model is most suitable for Malaysian Islamic banks. This is because both of the *Sharī'ah* concepts used in the above structure are allowed by the Malaysian *Sharī'ah* authority. The majority of the *Sharī'ah* scholars in Malaysia allow *wa'd* and commodity *murābahah*. In chapter three, it has been discussed that these two concepts are used in Islamic swaps ICCS, IPRS, and IRS. Therefore, the above model should be consistent with Malaysian *Sharī'ah*. However, there is another model for Islamic FX option based on *muwā'adah*. Figure 7.2 illustrates the operational steps of the *muwā'adah*-based Islamic FX option.

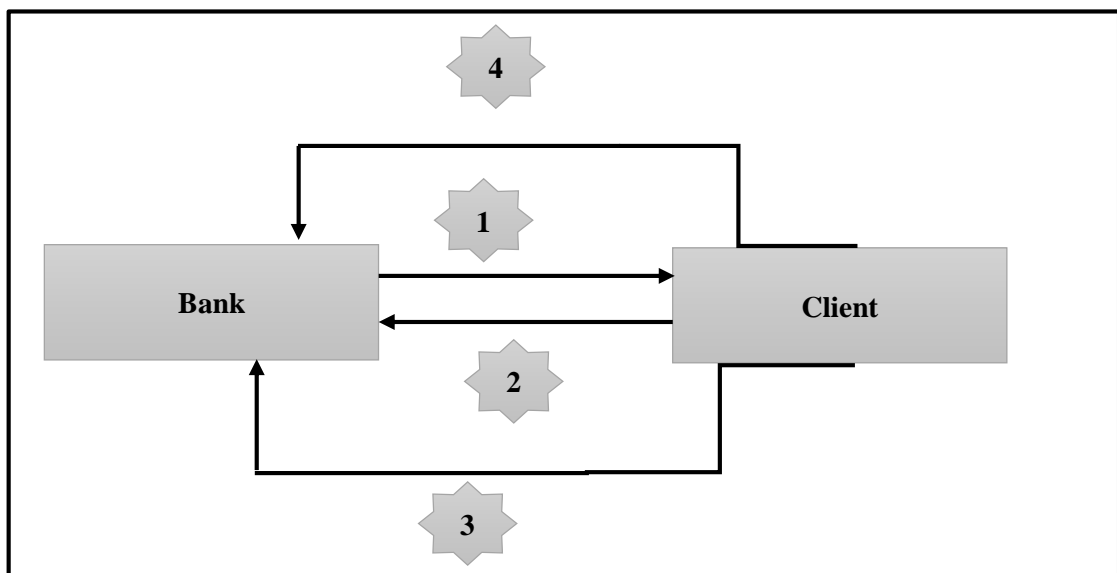


Figure 7.2 Islamic FX Option Based on *Muwā'adah* and *'Urbūn*

#### Operational Steps:

- (1) On 23 February 2015, the bank undertakes to sell USD 1 million to the client at the rate of MYR 3.2 at any day from 1 April 2015 to 30 April 2015.
- (2) At the same date, the customer undertakes to purchase USD 1 million from the bank at the rate of MYR 3.2 at any day from 1 April 2015 to 30 April 2015.
- (3) On the same day, the customer pays MYR 5,000 as *'urbūn* to the bank. The *'urbūn* is considered as the option premium for the bank.

(4) After that, from 1 April 2015 to 30 April 2015, if the exchange rate of USD is in favour of the customer, he may ask the bank to fulfil its *wa'd*.

The above model might be controversial in Malaysia due to *muwā'adah*. However, the researcher has concluded in chapter two that *muwā'adah* is different from a contract (*'aqd*) even though it is obligatory on both parties to fulfil their promises. Hence, *muwā'adah* can be used for currency transaction. Apart from this, the concept of *'urbūn* should be allowed in Malaysia. Even though there are some disagreements among the *Sharī'ah* scholars on the permissibility of *'urbūn* but the weightiest opinion is that it is permissible. According to BNM, *'urbūn* is allowed.<sup>583</sup> The advantage of the *muwā'adah*-based model is that it is simple and less costly. In the first model, commodity *murābahah* arrangement is costly but there is no such costly arrangement in the second model. If the *Sharī'ah* scholars in Malaysia become more flexible to accept *muwā'adah*, the second model might be an admirable hedging instrument in Malaysia.

Another model proposed by some scholars for Islamic option is based on *wa'd* only.<sup>584</sup> In that model, the bank provides *wa'd* to sell a certain amount of foreign currency to the customer at a fixed rate on a future date. In return, the client pays fees to the bank due the bank's *wa'd*. However, *Sharī'ah* scholars in Malaysia do not accept this model. BNM has prohibited taking a fee for *wa'd*. This is because *wa'd* cannot be a financial right. Moreover, when there is a consideration or counter value for *wa'd* then it becomes similar to a contract (*'aqd*).<sup>585</sup> Therefore, it is suitable to use either commodity *murābahah* or *muwā'adah* for Islamic FX option.

The Islamic FX option would be a viable alternative for conventional options in Malaysia. It may strengthen Islamic finance in Malaysia through providing more flexible

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<sup>583</sup> Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance*, 18.

<sup>584</sup> Imran Iqbal et al., "Application of Options in Islamic Finance", 24-25; BMB Islamic, *Global Islamic Finance Report (GIFR) 2010* (London: BMB Islamic UK Limited, 2010), 139.

<sup>585</sup> Mohamad Akram Laldin, interview with the researcher, 14 October 2014; Shamsiah Mohamad, interview with the researcher, 13 November 2014; Bank Negara Malaysia, "Resolutions of the Shariah Advisory Council of Bank Negara Malaysia, Application of Wa'd (promise) in Forward Currency Transaction," *Bank Negara Malaysia* website.

currency hedging comparing with FX forward. However, Islamic FX option should be used for hedging purposes only but not for speculative purposes. Moreover, it cannot be traded to a third party as a financial right.

### 7.2.2. Islamic FX Forward Based on *Wa'dān*

Islamic FX forward is another hedging instrument that can be developed through *wa'dān*. The difference between the *wa'd*-based FX forward and *wa'dān*-based FX forward is that the latter provides more financial protection to the customer. In the *wa'd*-based FX forward, the customer only provides *wa'd* to purchase foreign currency at a fixed exchange rate but the bank does not provide any *wa'd*. However, in the *wa'dān*-based FX forward both the bank and the customer provide *wa'd* to purchase or sell foreign currency at a fixed rate. The two *wa'd* are related to two different conditions. Therefore, they are not *muwā'adah*. *Wa'dān*-based model ensures that the bank fulfils the commitment with the customer and it does not exploit the opportunity when the exchange rate of the foreign currency is not in its favour. Therefore, there is no question of injustice (*ẓulm*) in this model of FX forward. Figure 7.3 below shows the operational steps of *wa'dān*-based FX forward.

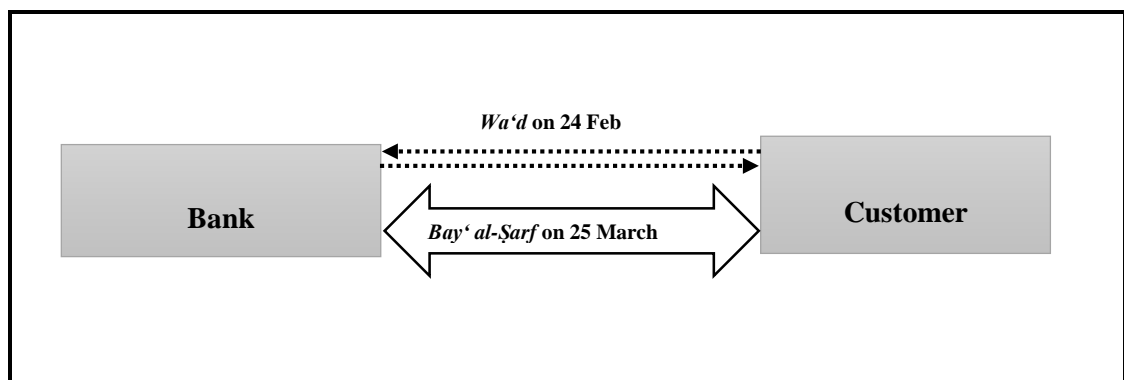


Figure 7.3 Islamic FX Forward Based on *Wa'dān*

### Operational Steps:

- (1) On 24 February 2015, the customer undertakes to purchase USD 1 million on 25 March from the bank at the rate of MYR 3.3 per USD with the condition that the market rate of USD goes below this rate.
- (2) At the same time, the bank promises to sell USD 1 million on 25 March to the customer at the rate of MYR 3.3 per USD with the condition that the market rate of USD goes up from this rate.
- (3) On 25 March, the bank and the customer enter into a currency exchange contract (*bay' al-ṣarf*) based on either one of the party's promises subject to which condition is fulfilled. If the price of USD is below 3.3 then the bank will ask the customer to fulfil his *wa'd*. If the rate of USD is above 3.3 then the customer will ask the bank to fulfil its *wa'd*.

As discussed earlier in chapter six, there is a debate on the permissibility of *wa'dān* in currency exchange contract (*bay' al-ṣarf*). However, the most preferred opinion is that it is permissible. The majority of the scholars in Malaysia have accepted it. Currently, there are some other products in the industry which are based on *wa'dān* e.g. IRS, AITAB vehicle financing etc. Therefore, it can be resolved that the *wa'dān*-based FX forward model is suitable for the Malaysian banks. Apart from the *Sharī'ah* status, this FX forward model is less costly because there is no commodity *murābaḥah* in it. Finally, it is expected that this model will bring about fairness between the bank and the client through serving both party's interests.

### **7.2.3. *Ijārah* Home and Property Financing under *Shirkat al-Milk***

*Ijārah* home and property financing under *shirkat al-milk* is a retail-financing product which is different from MM home and property financing. There is no diminishing partnership here. This is based on *ijārah* with the *wa'd* to give *hibah* (gift) to the customer

if the customer fulfils the commitment with the bank. However, this product is different from AITAB because in AITAB, the bank has the total ownership of the asset but in this product, the customer and the bank jointly own the asset. This product is a combination of *ijārah*, *wa‘d*, *hibah* and *shirkat al-milk*. It is similar to MM home financing but there is no gradual purchase of bank’s share by the customer. Besides, there is only one *wa‘d* from the bank’s side but no *wa‘d* from the customer. As the bank holds the majority share of the property until the end of the tenure then no *wa‘d* is required from the customer’s side. Figure 7.4 below shows the operational steps of *ijārah* home and property financing under *shirkat al-milk*.

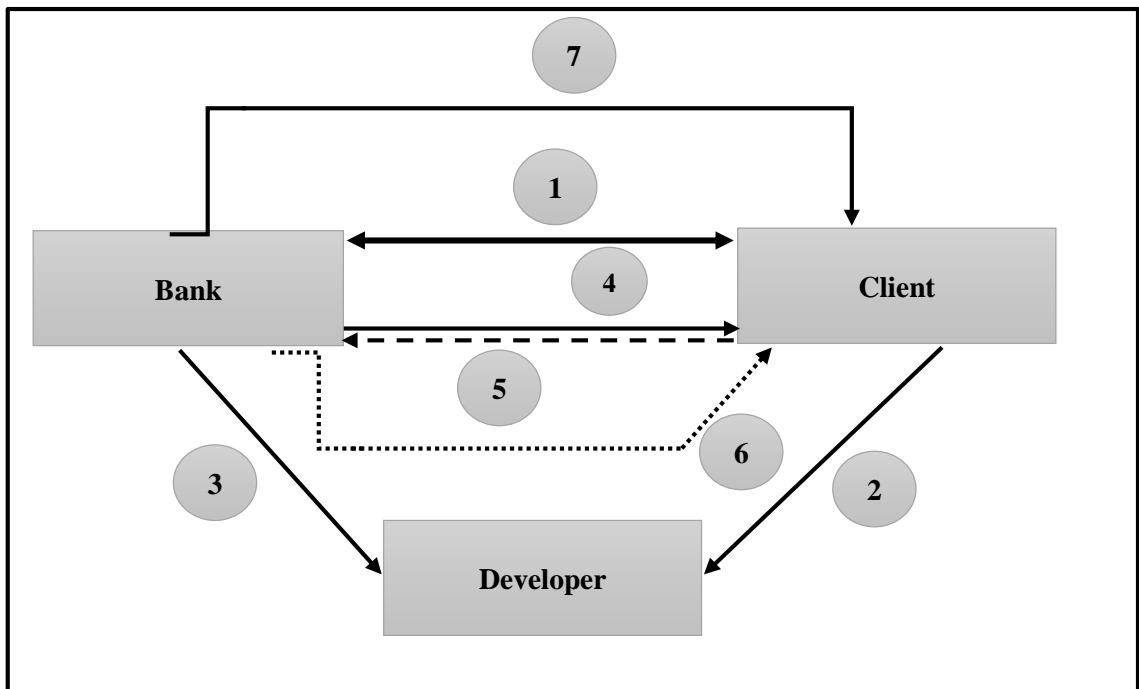


Figure 7.4 *Ijārah* Home and Property Financing under *Shirkat al-Milk*

Operational Steps:

- (1) The bank and the customer enter into a *shirkat al-milk* agreement where the customer owns 10% share of the property and the bank owns the rest 90% share of the property.

- (2) The customer approaches to the property developer and pays 10% of the property price.
- (3) The bank disburses the remaining 90% of the property price to the developer.
- (4) The bank leases out its portion of the property to the customer for a fixed tenure.
- (5) The customer pays rental payment on monthly basis with an agreed upon rate between the bank and the customer.
- (6) The bank undertakes that if the customer pays the monthly rentals on time until the end of the tenure then it will transfer its portion of the property to the customer as *hibah* (gift).
- (7) At the end of the tenure, the bank transfers the title of the property to the customer if the customer has settled all the monthly rental payments on time.

This model allows the bank to provide house-financing facility to the customer even though the house is under construction. In case the developer abandons the house under construction, the bank will bear the loss and will return the advance *ijārah* payment to the customer. So, the customer's right is protected in this model. Moreover, the bank holds the 90% ownership of the house until the end of the tenure. Therefore, the bank's risk of loss is lesser when the customer defaults. In addition, there is only one *wa'd* by the bank to transfer the title of the house to the client provided that the client has fulfilled his *ijārah* commitment. Hence, it can be said that the model is quite simple comparing to MM home financing.

While comparing with AITAB home financing, the advantage of this model is that the customer purchases 10% share of the house at the beginning of the financing tenure. This can show the seriousness of the client with this financing arrangement. On the other hand, in AITAB, the bank holds the complete ownership of the asset. The customer is not required to pay any money at the beginning of the financing tenure. Therefore, the seriousness of the client with AITAB financing arrangement might not be assessed.



From the *Shari'ah* perspective, *ijarah* home and property financing under *shirkat al-milk* is acceptable. Scholars unanimously agree on the permissibility of *ijarah* and *shirkat al-milk* concept. Furthermore, the *wa'd* by the bank to transfer the title of the property to the client as *hibah* is a *wa'd* that is subject to a condition that the client has to fulfil the *ijarah* commitment. The weightiest opinion among the scholars is that this type of *wa'd* is permissible in the *Shari'ah* and legally binding on the promisor when the promisee (client) has fulfilled the condition.

There might be some concern related to the maintenance of the house. According to the *Shari'ah*, the bank is required to bear the essential maintenance of the property.<sup>586</sup> This means that if the property is damaged without the negligence of the client, the bank has to bear the cost to repair the property. From this perspective, this model might be more costly for the bank and more difficult in terms of operation. However, the customer should bear the supplementary operating maintenance.

Another problem related to this model is that the bank has to take the market risk. As the bank holds the property until the end of the tenure then it has to take the market risk in case the customer defaults. The customer may not prefer this model because he is only allowed to own the property at the end of the tenure. If he defaults just before the end of the tenure, then he will not get the property even though he has paid monthly rentals for a long period. Protecting the client's interest might be difficult in this case.

Despite these disadvantages, the *ijarah* under *shirkat al-milk* model might be useful for the Malaysian Islamic banking industry due to the advantages mentioned earlier. Every financing model has some disadvantages along with benefits. When this model is put into practice then answers to the problems might be found while also conducting further research.

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<sup>586</sup> Accounting and Auditing Organization for Islamic Financial Institution, *Shari'a Standards for Islamic Financial Institutions*, Shari'a Standard no. 9, 144-145.

### 7.3. Prospects of *Wa'd*-Based Products in Bangladesh

There is a vast potential for Islamic banks in Bangladesh to practice a number of *wa'd*-based products if the *Sharī'ah* scholars become flexible with *wa'd*. The following sections demonstrate four *wa'd*-based products suggested for Bangladesh namely: (1) *muwā'adah* Islamic FX forward, (2) *muwā'adah* Islamic cross currency swap, (3) Islamic profit rate swap, and (4) *tawarruq* personal financing.

#### 7.3.1. *Muwā'adah* Islamic FX Forward

As discussed earlier, Islamic banks in Bangladesh are in need of an Islamic FX forward product. Therefore, *muwā'adah* Islamic FX forward is suggested for Islamic banking industry in Bangladesh to hedge against currency risk. In this product structure, both bank and client provide *wa'd* that they will execute *bay' al-ṣarf* contract in a future date with a fixed exchange rate between two different currencies. On the transaction date, the bank and the client enter into *bay' al-ṣarf* contract with a rate fixed earlier and immediately transfer the possession of the subject matter between them. Figure 7.5 below shows the operation of proposed *muwā'adah* Islamic FX Forward.

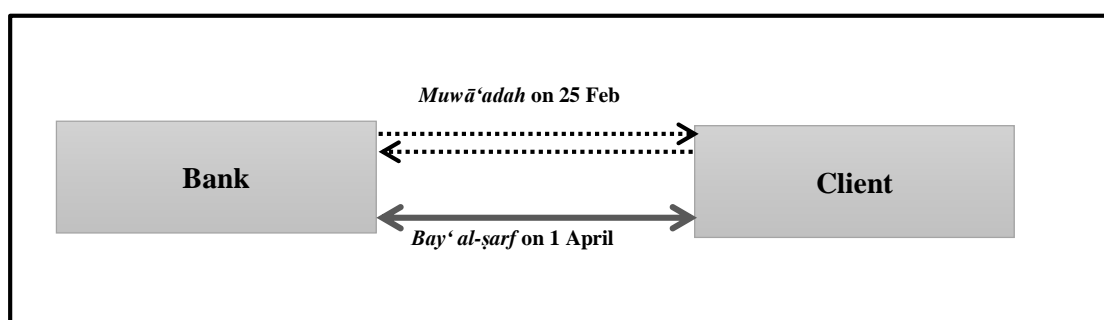


Figure 7.5 *Muwā'adah* Islamic FX Forward

Operational Structure:

- (1) On 25 February 2015, the bank undertakes to sell USD 1 million to the client on 1<sup>st</sup> of April 2015 at the rate of BDT 85 per USD.

(2) On the same date, the client undertakes to purchase USD 1 million from the bank on 1<sup>st</sup> of April 2015 at the rate of BDT 85 per USD.

(3) On 1<sup>st</sup> of April 2015, the bank and the client execute the *bay' al-sarf* at the exchange rate of 85 BDT per USD. The bank pays USD 1 million to the client. The client pays BDT 85 million to the bank.

Generally, one *wa'd* is used in FX forward. The reason behind choosing *muwā'adah* is that *Ḥanafī school* of jurisprudence (*madhhab*) allows *muwā'adah* to be binding on both parties in case of public need.<sup>587</sup> As the *Ḥanafī school* of jurisprudence is mostly followed in Bangladesh, then *muwā'adah* should be in consistent with the *Sharī'ah* framework of Bangladesh. Furthermore, the discussion in chapter two clarified that even though *muwā'adah* is binding on both parties then still it is different from a contract (*'aqd*).

The *muwā'adah*-based Islamic FX forward provides more financial protection to the client. This is because the bank also provides *wa'd* that it will sell a certain amount of currency to the client on the fixed date. Therefore, in case the currency exchange rate is against the favour of the bank, the bank is still obliged to fulfil its *wa'd* to sell the currency on the specific date. Hence, comparing with *wa'd*-based model, *muwā'adah*-based model better serves the interest of both parties. Moreover, this *muwā'adah*-based model is more coherent to the *Sharī'ah* principle which states that harm should be eliminated from each of the individuals in all Islamic transactions.<sup>588</sup>

Even though *wa'dān* can serve the same interest of *muwā'adah*, *wa'dān* is more complicated than *muwā'adah*. As *muwā'adah* is accepted in the *Ḥanafī school* of jurisprudence, then it is better to choose the less complicated option. Islamic *Sharī'ah*

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<sup>587</sup> Khān, *Fatāwā Qāḍī Khān*, 2:165.

<sup>588</sup> See Ḥadīth narrated by Mālik, *Kitāb al-aqḍiyah*, Bāb al-qaḍā' fī al-mirfaq, Ḥadīth no. 2758, in *Al-Aṣḥāḥī, Al-Muwaḥḥa'*, 4: 1078.

encourages preferring the easier one between the two choices if both are lawful.<sup>589</sup>

Therefore, *muwā'adah* should be the best option.

However, if the *Sharī'ah* scholars in Bangladesh are not sufficiently convinced to employ *muwā'adah* then *wa'd*-based FX forward can be introduced as an alternative. In that case, there will be no *wa'd* from the bank's side. Whether *wa'd* or *muwā'adah* is used, it cannot be denied that an FX forward would be a very useful tool for Islamic banks in Bangladesh. With this product, Islamic banks would be able to fulfil the need of the client who are involved with export and import business in Bangladesh. Therefore, *Sharī'ah* scholars should consider this real need of the client.

### **7.3.2. *Muwā'adah* Islamic Cross Currency Swap**

Similar to Islamic FX forward, Islamic cross currency swap can be developed through *muwā'adah*. While FX forward is structured to hedge against currency risk for one time then Islamic cross currency swap is used to hedge against fluctuations of a currency for a longer period. In this product structure, the contracting parties execute a number of *bay' al-ṣarf* within a certain period. For instance, the bank and the customer fix an exchange rate of 85 BDT per one USD for a period of one year. Within this time, both parties exchange two different currencies in every three months intervals at the rate fixed. Figure 7.6 illustrates the operational steps of *muwā'adah* Islamic cross currency swap.

Operational Steps:

- (1) On 25 February 2015, the bank provides *wa'd* to execute a number of *bay' al-ṣarf* transaction with the client at every three months interval starting from 1 April until 1 October at the exchange rate of 85 BDT per 1 USD. The bank undertakes

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<sup>589</sup> See Ḥadīth narrated by Al-Bukhārī, Kitāb al-adab, Bāb qawl al-nabī ṣallallāhu 'alyhi wa ṣallam: yassirū wa lā tu'assirū, Ḥadīth no. 6126, in Al-Bukhārī, Al-Jāmi' al-Ṣaḥīḥ, 4:114.

to sell a fixed amount of USD to the client at every three months until the end of the tenure.

- (2) On the same date, the client provides *wa'd* to execute a number of *bay' al-ṣarf* with the bank at every three months interval starting from 1 April until 1 October at the exchange rate of 85 BDT per USD. The client undertakes to purchase a fixed amount of USD from the bank at every three months until the end of the tenure.
- (3) On 1 April 2015, the bank and the customer conclude the *bay' al-ṣarf* contract based the *wa'd* provided by both parties. The bank sells for instance USD 1 million to the customer and the customer purchases it for BDT 85 million. The similar type of *bay' al-ṣarf* takes place between the two parties at every three months interval until the expiry of the swap.

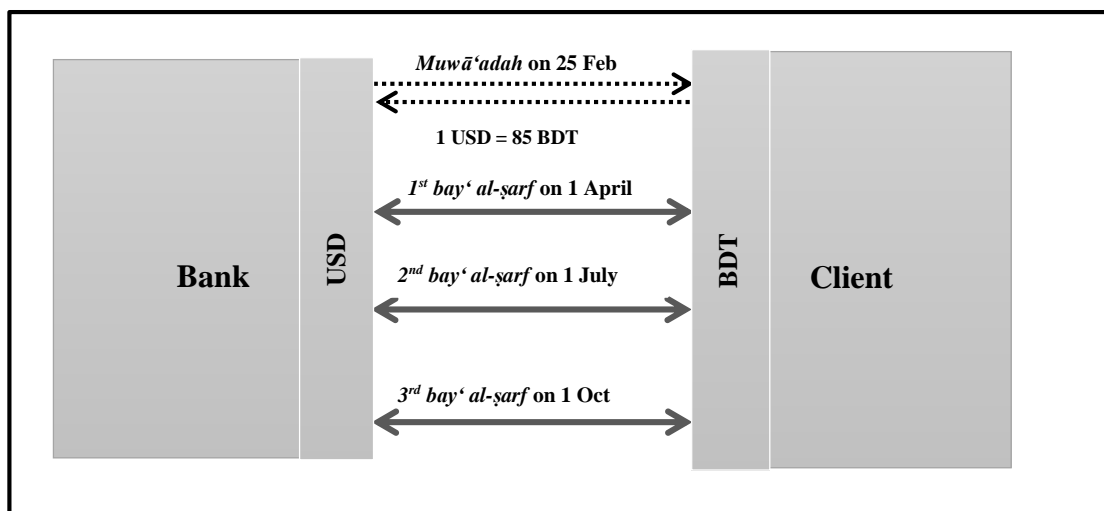


Figure 7.6 *Muwā'adah* Islamic Cross Currency Swap

Usually, Islamic banking practitioners use commodity *murābaḥah* for Islamic cross currency swap, but *muwā'adah* is suggested for Bangladesh as the *Sharī'ah* scholars in Bangladesh who do not allow commodity *murābaḥah*. Scholars prohibit *tawarruq* which is the essence of commodity *murābaḥah*. In addition to this, there is no commodity market developed in Bangladesh to exercise commodity *murābaḥah*. Since a binding-

*muwā'adah* is accepted in the *Ḥanafī* school of jurisprudence in the case of people's need, then it is preferable to use *muwā'adah*. *Muwā'adah*-based Islamic cross currency swap holds the similar *Sharī'ah* ruling of FX forward. This is because making *wa'd* to execute a number of *bay' al-ṣārf* is similar to making *wa'd* for a single *bay' al-ṣārf*.

There are some benefits of using *muwā'adah* in Islamic cross currency swap. Firstly, it is less costly than commodity *murābahah* as there is no brokerage fee. Secondly, the product structure is less complicated. There is no complicated arrangement here like the commodity *murābahah*.

Similar to Islamic FX forward, Islamic cross currency swap is also a need for Islamic banking for a long term hedging. As long as it is used for hedging purposes then there should not be any *Sharī'ah* issue in relation to this. In the researcher's opinion, it is not fair to conclude generally that swap is a toxic element for the economy. As long as it is fairly used for hedging against currency risk, then it is not harmful for the economy. In this regard, strong regulation and monitoring are required to ensure that this instrument not being used for excessive speculation and gambling.

### **7.3.3. Islamic Profit Rate Swap**

Islamic profit rate swap is a hedging instrument that allows one party to swap its floating rate of profit with another party's fixed rate of profit. For example, if a bank has floating *ijārah* profit referenced to Dhaka Inter-Bank Offer Rate (DIBOR) then it can swap its floating profit with another bank's fixed *murābahah* profit. In the product structure, both parties provide *wa'd* to execute a series of *musāwamah* contract within a fixed period. On every transaction date, they execute two different *musāwamah* transactions where the profit in the first *musāwamah* is referenced to DIBOR and the profit in the second *musāwamah* is fixed based on the agreement between the parties. Figure 7.7 explains the operational steps of Islamic profit rate swap.

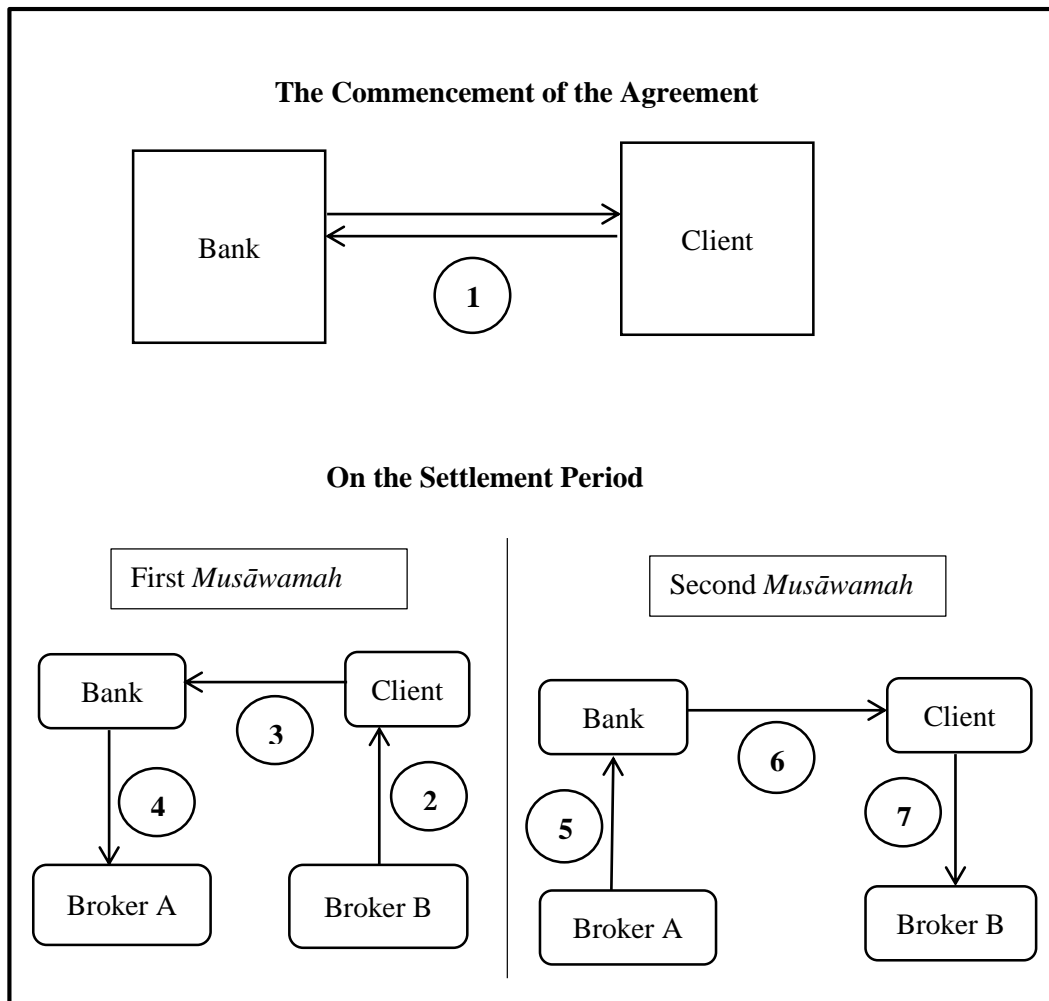


Figure 7.7 Islamic Profit Rate Swap

**Operational Steps:**

- (1) On 1 March 2015, the client approaches to the bank and undertakes to enter into a series of *musāwamah* transactions from 1 April 2015 to 1 October 2015. The bank also undertakes to perform a number of *musāwamah* transactions with the client at regular agreed upon dates within the mentioned date.
- (2) On every settlement date, the client purchases a commodity from broker B.
- (3) The client sells the commodity to the bank with a profit referenced to DIBOR for example on the spot.
- (4) The bank sells the commodity to broker A at cost and gets cash.
- (5) On the other hand, the bank purchases a commodity from broker A.

(6) The bank sells the commodity to the client with a fixed profit decided earlier between the bank and the client.

(7) The client sells the commodity to broker B and gets cash.

The *Sharī‘ah* concept used in the above structure is *wa‘dān* and *musāwamah*. Based on the discussion in chapter two, *wa‘dān* should be acceptable here. However, the *musāwamah* concept used here is actually based on *tawarruq*. As the *Sharī‘ah* scholars do not allow organised *tawarruq* then a real *tawarruq* should be practiced here. In order to practice this product, a commodity market should be developed.

At present, it may appear that Islamic profit rate swap is not a need for Islamic banks in Bangladesh. However, considering the fact that Islamic banks in Bangladesh are involved with *ijārah* financing then it may be a need for the banks in the near future. When involving with floating *ijārah* profit, banks may require to hedge its position. As *tawarruq* is the only mechanism so far to structure this product then establishing a commodity market to facilitate the genuine practice of *tawarruq* should be among the future development agendas for Islamic banking in Bangladesh. In this respect, Malaysia’s *sūq al-sila‘* (commodity *murābaḥah* house) can be taken into account. Even though there are some minor issues concerning its operation but it is a positive initiative to create a platform for practicing genuine *tawarruq*.<sup>590</sup>

#### **7.3.4. Tawarruq Personal Financing**

*Tawarruq* personal financing is a retail-banking product which is very much needed for the industry. The basic *Sharī‘ah* concept used for this product structure is *murābaḥah* and *wa‘d*. The customer approaches the bank and requests for personal financing. The client promises the bank that if the bank purchases the specific commodity then he will purchase it from the bank at a fixed rate of profit. The bank purchases the commodity and sells it

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<sup>590</sup> Asyraf Wajdi Dusuki, “Can Bursa Malaysia’s Sūq al-Sila‘ (Commodity Murābaḥah House) resolve the controversy?”.



to the client with deferred payment. After purchasing the commodity from the bank, the client immediately sells it in the market with cash price. In this way, the customer fulfils its needs for cash. At the same time, the bank profits from the commodity sold.

In this *tawarruq* personal financing model, the bank is not appointed as the client's agent to sell the commodity to third party. The customer is taking market risk to sell the commodity to third party with cash price. Moreover, there is no connection between the third party (broker B in Figure 7.8) and the bank. Therefore, it should be different from organised *tawarruq*. Figure 7.8 below illustrates the operational steps of *tawarruq* personal financing.

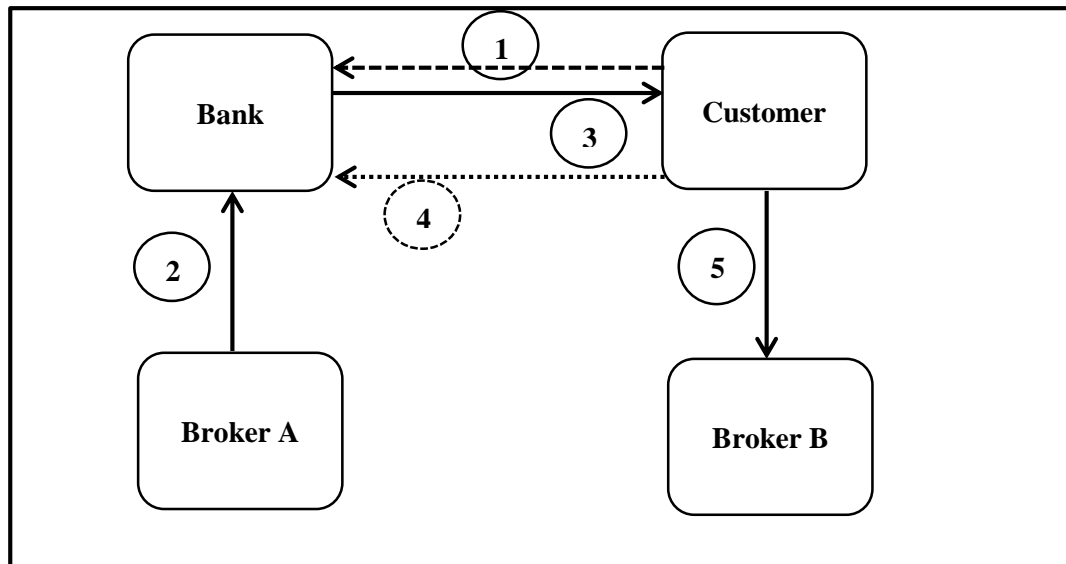


Figure 7.8 *Tawarruq* Personal Financing

Operational Steps of *Tawarruq* Personal Financing:

- (1) The client approaches the bank and undertakes to purchase a commodity with a certain profit agreed upon between them.
- (2) Based on the *wa'd* from the client, the bank purchases a commodity from commodity broker A.
- (3) Afterword, the bank sells the commodity to the client with deferred payment.
- (4) The client pays the purchase price to the bank with monthly instalments.

(5) Later, the client sells the commodity to broker B with cash price.

Currently, Islamic banks in Bangladesh are facing difficulties to find out a suitable product structure for Islamic personal financing.<sup>591</sup> Therefore, this *tawarruq* personal financing model can be a crucial product to fulfil the needs of the customer. However, similar to Islamic profit rate swap, *tawarruq* personal financing is also subject to the development of a commodity market that allows the parties to practice the genuine *tawarruq* instead of an organised *tawarruq*.

#### **7.4. Conclusion**

There is a huge potential in *wa'd* for innovating a number of products for Islamic banks in Malaysia and Bangladesh. Considering the needs and appropriateness of the industry, a number of *wa'd*-based products' models have been proposed for both countries. Islamic FX option, Islamic FX forward based on *wa'dān* and *ijārah* home and property financing under *shirkat al-milk* have been proposed for Malaysia. On the other hand, Bangladesh has the potential to practice *muwā'adah* Islamic FX forward, *muwā'adah* Islamic cross currency swap, Islamic profit rate swap, and *tawarruq* personal financing product.

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<sup>591</sup> Kabir, interview with the researcher, 7 April 2014.

## CHAPTER 8: CONCLUSION

### 8.1. Introduction

The study was conducted to explore the practice of *wa'd* in Islamic banking products in Malaysia and Bangladesh and to compare between them. Furthermore, the study discussed the *Sharī'ah* issues, other challenges, and future prospects of *wa'd* in Islamic banking products in both countries. In achieving these objectives, Islamic banking practitioners and *Sharī'ah* scholars in Malaysia and Bangladesh have been interviewed. Moreover, relevant official documents of the banks have been reviewed. The findings from the interviews have been analysed with the classical and contemporary sources of Islamic jurisprudence (*fiqh*) as well as related literature. Moreover, a comparison is made between Malaysia and Bangladesh on the practice of *wa'd*. Finally, some *wa'd*-based product structures have been proposed for Islamic banks in both countries according to their needs and suitability with the industry.

The findings of this research are significant for the Islamic banking practitioners as it shows the practice of different types of *wa'd*-based products and suggests innovative *wa'd*-based products. *Sharī'ah* scholars may get benefit from these findings as it provides the weightiest opinion pertaining to the *Sharī'ah* issues in *wa'd*. The findings are important for the government, legal, and regulatory body as it reveals the gap between the existing law of the country and *wa'd*. Moreover, it demonstrates the role of the government and the regulatory authority to overcome the challenges in innovating new Islamic banking products based on *wa'd*. Finally, the findings are unique for academics as it is a combination of *Sharī'ah* research and qualitative field study.

This chapter briefly summarises the findings of this study. It provides recommendations to policy makers as well as Islamic banking practitioners in Malaysia

and Bangladesh. Finally, it discusses the limitation of this research and the scope for further research.

## **8.2. Summary of the Important Findings**

The important findings of this research are provided below in the subsequent sections.

### **8.2.1. The *Wa'd* Concept**

The study resolves that *wa'd* is a voluntary declaration to perform something good to another party in the future. Therefore, it is different from *'aqd* as *'aqd* is a mutual agreement which consequences come into effect on the spot. Moreover, *'aqd* is always compulsory to fulfil but scholars have different opinions on the binding nature of *wa'd*. In addition, *wa'd* is different from *nudhur*, *'ahd* and *ju'alah*. However, in some verses of the Qur'ān, both *'ahd* and *wa'd* provide the same meaning.

Among the different features of *wa'd* are *muwā'adah* and *wa'dān*. *Muwā'adah* is a mutual promise made by two persons to perform something good for each other in the future. It is different from *'aqd* because *muwā'adah* is merely a declaration to perform something good in the future that does not have any effect on the spot whereas the consequences of an *'aqd* comes into effect on the spot. In addition, *wa'dān* is a new concept developed by the industry that denotes two *wa'd* given by two individuals which are subject to two different situations.

Concerning the *Shari'ah* status of *wa'd*, scholars have different opinions on the binding nature of *wa'd*. The majority of the classical scholars believe that *wa'd* is recommended but not compulsory. The second group of scholars believe that *wa'd* is always obligatory on the promisor. The third group of scholars slightly differ into two types of opinions. The first opinion is that *wa'd* is binding on the promisor if it is attached to a cause even though the promisee has not entered into an action based on that *wa'd*.

Another view is that *wa'd* is binding on the promisor if it is attached to a cause and the promisee has entered into an action relying upon that *wa'd*.

The weightiest opinion to the researcher is that *wa'd* is binding on the promisor except where there is a valid excuse (*'ujr Shar'i*). This is because the verses that criticise breaking the *wa'd* and the prophetic narration that states breaking the *wa'd* as one of the characteristics of the hypocrites (*munāfiq*) are stronger than the evidences provided by other group of scholars. However, because the basic principle that *Sharī'ah* does not put difficulty on human being, *wa'd* cannot be binding on the promisor when the promisor has valid excuse to break the *wa'd*. In this regard, there is no difference between religiously binding and legally binding. This is because the texts of the *Sharī'ah* generally make the *wa'd* binding without distinguishing between religious and legal binding and there is no evidence found in the *Sharī'ah* separating between religious and legal binding.

Regarding the *Sharī'ah* status of *muwā'adah*, the classical scholars permit *muwā'adah* to execute a *ṣarf* contract. However, it is understood that *muwā'adah* is not binding in their opinion. Qāḍī Khān, a *Ḥanafī* scholar, viewed that *muwā'adah* can be binding due to necessity of the people. The *Sharī'ah* status of a binding *muwā'adah* (*muwā'adah mulzimah*) is an ongoing debate among contemporary scholars. The majority of the scholars believe that if *muwā'adah* is binding on both promisors then it is similar to a forward contract (*bay' al-ajal bi al-ajal*). However, a group of scholars believe that there are differences between a binding *muwā'adah* and a forward contract (*bay' al-ajal bi al-ajal*). Another group of scholars' position is that *muwā'adah* can be allowed in cases of necessity. The researcher concludes that *muwā'adah* is different from a forward contract (*bay' al-ajal bi al-ajal*) even though it is practiced as binding on both promisors subject to fulfilling certain conditions.

In the case of *wa'dān*, scholars debate whether *wa'dān* is different from *muwā'adah*. The researcher resolves that whether *wa'dān* resembles *muwā'adah* does not

affect its permissibility in the *Sharī'ah* since a binding *muwā'adah* is also permissible in the *Sharī'ah*. However, if the practice of *wa'dān* leads to an illegitimate end then it should not be allowed based on *sadd al-dharā'i'*.

### **8.2.2. *Wa'd*-Based Islamic Banking Products in Malaysia**

With the support from the government, highly developed infrastructure, robust governance system, and legal support, Islamic banks in Malaysia have developed various products based on *wa'd*. Among the consumer banking products, *wa'd* is employed in MM home and property financing, AITAB vehicle financing, *murābahah* home financing and *tawarruq/commodity murābahah* home financing. In addition, *wa'd* is used in *murābahah* letter of credit which is a trade financing product. Finally, some treasury products are innovated based on *wa'd* which are Islamic FX forward, IPRS, ICCS and IRS. Along with *wa'd*, Islamic banks in Malaysia employ *wa'dān* in MM home and property financing, AITAB vehicle financing and IRS. However, there is no application of *muwā'adah* in these products. Among the Islamic banks in Malaysia sampled for this study, MIB practices *wa'd* in seven products, KFHMB practices *wa'd* in six products and BIMB applies *wa'd* in five products. All the three banks practice *wa'd* as binding on the promisor.

In MM home and property financing, there are three *wa'd* in KFHMB and two in MIB. Firstly, the customer undertakes to purchase the bank's share on gradual basis. Secondly, the bank undertakes that it will sell its share of the property to the customer whenever he asks for an early settlement. Thirdly, the customer gives *wa'd* that upon triggering the event of default, he will purchase the property from the bank. In case of MIB, the second *wa'd* is not practiced. The first *wa'd* is a normal practice in MM home and property financing. However, the second *wa'd* is introduced to safeguard the interest

of the customer in case he needs an early settlement. The third *wa'd* is employed to allow the bank recovering its loss in case of customer's default.

The practice of AITAB vehicle financing in KFHMB includes *wa'dān* where the bank undertakes to sell the vehicle to the client at maturity and the customer undertakes to purchase the vehicle upon triggering the event of default. The first *wa'd* safeguards the interest of the customer and the second *wa'd* assists the bank to recover its loss at the event of default. However, in case of MIB, the client firstly undertakes to purchase the vehicle at the end of the lease period. Secondly, the client again promises to purchase the vehicle at the time of default. In MIB, the client provides two *wa'd* as the bank usually does not have any interest to retain the vehicle.

The *murābaḥah* home financing as practiced by KFHMB includes only one *wa'd*. The client undertakes to purchase the property from the bank. Security deposit may be taken from the customer. Similar to *murābaḥah* home financing, *tawarruq/commodity murābaḥah* home financing includes only one *wa'd* given by the customer. In addition, the similar application of *wa'd* is found in *murābaḥah* Islamic letter of credit.

Among the treasury products, Islamic FX forward involves one *wa'd* where the client undertakes to purchase a fixed amount of foreign currency with a fixed rate in a future date. The *wa'd* allows the contracting parties to fix a currency exchange rate to minimise the risk of loss from exchange rate fluctuations. However, as the bank does not provide any *wa'd* here then the client's interest might not be protected.

In IPRS, the client gives *wa'd* to perform a number of commodity *murābaḥah* transactions with the bank at different agreed upon dates in the future. Similar type of *wa'd* is given by the customer in ICCS. However, in ICCS, the client promises to perform a number of commodity *murābaḥah* in two different currencies with a fixed exchange rate. The *wa'd* in both treasury products ensures that the customer is committed to perform a number of commodity *murābaḥah* in the future with the bank.

In the case of IRS, both bank and client give *wa'd*. The client undertakes to enter into a number of *musāwamah* transactions with the bank. The bank also undertakes to perform a series of *musāwamah* transactions with the clients. The subject matter for both *wa'd* are different because they promise to perform two different types of *musāwamah* transactions. Therefore, *wa'dān* is practiced here which protects both bank and client's interests.

The practice of *wa'd* in Malaysian Islamic banking products has been expanded and enhanced from earlier practices, as shown by previous literatures. However, along with the development, several *Sharī'ah* issues are associated with these products. The *Sharī'ah* issues raised in the practice of *wa'd* are firstly, *wa'd* is a means for bank's capital guarantee in MM home and property financing. Secondly, *wa'd* is used as a *hīlah* in all the treasury products. Thirdly, in the case of FX forward, *wa'd* is a tool to exploit the client. Fourthly, the practice of *wa'dān* resembles *muwā'adah* or forward contract (*bay' al-ajal bi al-ajal*) which is prohibited in the *Sharī'ah*.

### **8.2.3. Legal Status of *Wa'd* in Malaysia**

The Contract Act 1950 does not explicitly mention *wa'd*. According to the Contract Act, a promise is as good as a contract while *wa'd* is different from a contract. The binding nature of a promise somehow resembles some *Mālikī* scholars' opinion that a promise is binding when it is subject to a condition and the promisee has started to perform an action relying upon the promise. However, in the case of breach, the *Sharī'ah* allows taking compensation from the promisor of only the actual loss incurred to the promisee due to the breach but the Contract Act imposes more than that.

Even though the Contract Act does not recognise *wa'd* but the Central Bank of Malaysia Act 2009 places SAC of BNM as the highest authority to decide on any Islamic banking case. It is possible to implement the *Sharī'ah* ruling for *wa'd* in Malaysian court



through the resolutions issued by SAC. In addition, BNM has published an exposure draft on the guideline for practicing *wa'd* but it is yet to come into effect. Furthermore, the law harmonisation committee of BNM included *wa'd* into their harmonisation initiative but they are yet to come out with a conclusion.

#### **8.2.4. *Wa'd*-Based Islamic Banking Products in Bangladesh**

Contrary to Malaysia, Islamic banking in Bangladesh lacks sufficient legal and infrastructural support by the government. Islamic banks have a limited number of products based on *wa'd*. There are three consumer banking products where *wa'd* is employed, which are BMPO, *bay' mu'ajjal*, and HPSM. Moreover, there is one *wa'd*-based trade financing product which is MPI. The three banks studied in Bangladesh namely IBBL, PBL and SIBL practice *wa'd* in these products in a similar way.

The practice of *wa'd* in these products are quite simple as only a single *wa'd* is used in these products. There is no development of *wa'd*-based products in Bangladesh from the previous findings. Furthermore, there is no usage of *muwā'adah* and *wa'dān*. No *wa'd*-based Islamic treasury product is developed so far by Islamic banks in Bangladesh.

In the case of BMPO, the customer provides *wa'd* to purchase the commodity when the bank purchases it in the market for the client. The *wa'd* is binding on the customer. The customer is obliged to compensate the bank the actual loss incurred if he breaches the promise. This *wa'd* supports the bank to minimise its market risk. Similarly, in *bay' mu'ajjal* financing, the client gives *wa'd* to purchase a commodity from the bank after the bank has purchased it.

In HPSM, at the beginning of the contract, the client undertakes to purchase the bank's share either on gradual basis or in lump sum. This *wa'd* assists the bank to recover its loss in case the customer defaults. If the customer fails to purchase the property, then

the bank will sell the property in market, and if bank incurs any loss then the client is required to compensate the bank. However, there is no *wa'd* from the bank's side. Therefore, the client may face difficulty in case he needs an early settlement.

Finally, the practice of *wa'd* in MPI is similar to BMPO. The Islamic Fiqh Academy allows the practice of *muwā'adah* in this case as the usage of *muwā'adah* is very crucial here to protect the interest of the customer. However, no *muwā'adah* is applied in this product so far.

#### **8.2.5. Legal Status of *Wa'd* in Bangladesh**

Similar to the Malaysian Contract Act, the Bangladeshi Contract Act 1872 does not recognise *wa'd*. According to the Contract Act 1872, a promise is similar to a contract. If the promisor breaches the promise then he is obliged to compensate the promisee the actual loss incurred or the possible loss known between the parties at the time of making the promise. Furthermore, there is no separate law for the operation of Islamic banking in Bangladesh.

#### **8.2.6. Similarities and Differences between Malaysia and Bangladesh**

In terms of the legal status of *wa'd*, both Contract Act in Malaysia and Bangladesh are similar to each other. In both countries, the act does not recognise *wa'd*. However, Malaysian legal system is better supportive to *wa'd* than Bangladesh since SAC holds the highest authority to resolve any Islamic banking dispute. Moreover, the law harmonising committee is conducting research to harmonise between *wa'd* and the Contract Act.

In terms of *wa'd*-based products, Malaysia has a large number of products than Bangladesh. In consumer banking products, both countries jointly offer *murābahah* financing and MM financing/hire purchase under *shirkat al-milk* financing. Malaysia uniquely offers AITAB vehicle financing and *tawarruq/commodity murābahah* home

financing while Bangladesh separately offers *bay' mu'ajjal* financing. In the case of trade financing, both Malaysia and Bangladesh are offering the same *wa'd*-based product which is based on *murābaḥah*. While Malaysia has innovated four Islamic treasury products based on *wa'd* then Bangladesh is yet to introduce any treasury product due to strictness of the *Sharī'ah* scholars.

In the case of *bay' murābaḥah* financing, both Malaysia and Bangladesh practice “*murābaḥah* on purchase orderer” where there is only one *wa'd* given by the customer to the bank. The customer undertakes to purchase a commodity from the bank. This promise is binding on the promisor in both countries but no fee is taken upfront from the client. All the three banks studied in Bangladesh practice *bay' murābaḥah* financing but in Malaysia, only KFHMB practices this financing. KFHMB practices this product for house financing. However, Bangladesh is extensively using this product for financing houses, industrial machineries and agricultural equipments. The extensive usage of *bay' murābaḥah* in Bangladesh triggered some issues pertaining to *Sharī'ah* governance.

The MM home financing in Malaysia resembles HPSM in Bangladesh. However, Bangladesh uses HPSM for both house and car financing. In MM home financing, there are three *wa'd* where the client gives two *wa'd* and the bank gives one. The client promises to purchase the bank's share of the property on gradual basis. And then, the bank undertakes that it will sell its share of the property to the customer whenever the client requests for an early settlement. Finally, the client undertakes that he will purchase the bank's share of the property at the time of default. On the other hand, in HPSM, there is only one *wa'd* given by the customer to the bank. The customer promises to purchase the bank's share of the property either gradually or in lump sum.

The practice of *bay' mua'ajjal* financing in Bangladesh is different from BBA which is practiced in Malaysia. BBA involves sale and buy back arrangement between the bank and the customer. Therefore, there is no use of *wa'd* in BBA as it involves very

low ownership risk for the bank. However, *wa'd* is used in *bay' mu'ajjal* due to high ownership risk for the bank. In *bay' mu'ajjal*, the client promises to purchase a commodity from the bank.

The *tawarruq* home financing in Malaysia is based on *bay' murābahah*. In this financing product, similar to *bay' murābahah*, the client promises to purchase an asset from the bank. However, Islamic banks in Bangladesh do not offer *tawarruq*. This is because most of the *Sharī'ah* scholars in Bangladesh do not allow *tawarruq*. Even though *bay' murābahah* may substitute *tawarruq* in Bangladesh but *tawarruq* has more benefits than *bay' murābahah* financing.

AITAB is another *wa'd*-based product which is practiced in Malaysia but not in Bangladesh. Instead of AITAB, Bangladesh is using HPSM for car financing. Even though no *Sharī'ah* issue is involved with using HPSM for vehicle financing but AITAB is more suitable for vehicle financing.

In trade financing, both Malaysia and Bangladesh employ *bay' murābahah* which involves a *wa'd* from the customer to the bank. It is termed as “*murābahah* letter of credit” in Malaysia and “*murābahah* post import” in Bangladesh. The practice of *wa'd* is the same in both countries. However, if it is a need, *muwā'adah* can be used in this type of product.

In the case of Islamic FX forward, it is not allowed in Bangladesh due to the doubt of *ribā*. *Sharī'ah* scholars require that currencies should be exchanged on the spot according to the market price. Furthermore, IPRS, ICCS and IRS are not introduced in Bangladesh as *tawarruq* is not allowed by the *Sharī'ah* scholars. Moreover, there is a fear that derivatives are toxic financial instruments and they are not a public need. However, a minority group of scholars view that Islamic swaps are crucial for Bangladesh. Moreover, *tawarruq* can be allowed if a commodity market is established to practice real *tawarruq*.

### 8.2.7. *Sharī'ah* Issues and Other Challenges in *Wa'd*-Based Products in Malaysia

The researcher concludes that the practice of *wa'd* in Malaysian Islamic banks are in accordance with the *Sharī'ah* and are free from the *Sharī'ah* issues raised. Corresponding to the issue that *wa'd* is a mechanism to guarantee the capital in MM home and property financing, the researcher concludes that MM home and property financing is actually based on *shirkat al-milk*. *Shirkat al-milk* is a joint ownership. Therefore, *wa'd* is not a means for guaranteeing the capital here as *shirkat al-milk* allows one party to purchase another party's share with a price mutually agreed between them. The objective of *shirkat al-milk* is to achieve ownership but not to make investment. The partners are not required to share profit and loss from the investment. From the contractual perspective, the usage of *wa'd* is legitimate. Furthermore, from the macro level perspective, *wa'd* is a need for Islamic banking industry to minimise the market risk. If *wa'd* is not used then the banks would prefer fully deb-based financing e.g. BBA, *murābaḥah* etc. Considering the need of the industry, *wa'd* should be allowed in MM home and property financing.

Furthermore, *wa'd* is not a *ḥīlah* in Islamic treasury products. All the Malaysian *wa'd*-based treasury products namely FX forward, ICCS, IPRS and IRS are based on some specific contracts along with *wa'd*. *Sharī'ah* scholars agree that the contractual arrangement are valid for all these products. In addition, hedging is the underlying objective for these instruments which is in line with the *maqāṣid al-Sharī'ah*. These *wa'd*-based treasury products are legitimate means to achieve a legitimated objective.

Looking into the issue of *wa'd* as a means to exploit the customer in FX forward and *murābaḥah* on purchase orderer, the researcher resolves that there is no oppression (*ẓulm*) on the customer here from the *Sharī'ah* perspective. According to the *Sharī'ah*, it is similar to stipulating condition (*sharṭ*) in a contract. In a contract, the contracting parties (*'āqidān*) are free to stipulate any conditions as long as there is consent between the parties and it does not violate the rules of the *Sharī'ah*. However, based on the recent

economic experience that there is no such financial institution called “too big to fail”, the customer’s interest should be protected.

Concerning the issue that the practice of *wa’dān* in some products is similar to a forward contract (*bay’ al-ajal bi al-ajal*), the researcher concludes that *wa’dān* is not similar to a forward contract. In MM home and property financing and AITAB vehicle financing products, each of the *wa’d* is connected to different specific event. In IRS, the two *wa’d* are connected to two different subject matter. Furthermore, there are some basic differences between *wa’dān* and a forward contract. In the case of forward contract, there should be offer (*ījāb*) and acceptance (*qabūl*). After the execution of the contract, the ownership of the subject matter is transferred immediately to the purchaser and the purchase price becomes a debt on the purchaser. However, there is no offer and acceptance in *wa’dān* and no effect on the subject matter e.g. transfer of ownership and liability of purchase price.

At present, there is no legal provision for *wa’d* in the IFSA and the Contract Act 1950. According to the contract act, *wa’d* is as good as a contract. When *wa’d* is treated as a contract then the practice of *wa’d* in many products may fall into the *Sharī’ah* prohibition of combining two contracts into one (*bay’atayni fī bay’atin*). Consequently, many *wa’d*-based products can be invalidated which may harm the bank. Even though SAC holds the highest position to issue ruling on any Islamic banking case in Malaysia but to make Islamic banking more sustainable and to make Malaysian law as the law of reference to settle international Islamic financial disputes, it is necessary to incorporate a provision for *wa’d* either in the Contract Act or IFSA.

Moreover, some scholars have raised their concern over the usage of *wa’d* in a large number of products without any comprehensive *Sharī’ah* parameter. It is a fear that *wa’d* might be used to achieve an illegitimate end without a *Sharī’ah* parameter. The researcher concludes that *wa’d* is a need for the industry. Therefore, product innovation

through *wa'd* should not be discouraged for the fear of evil use. However, it is better to develop comprehensive guidelines to direct the practice of *wa'd*.

#### **8.2.8. *Sharī'ah* Issues and Other Challenges in *Wa'd*-Based Products in Bangladesh**

One of the major challenges to develop *wa'd*-based products in Bangladesh is the rigidity of the *Sharī'ah* scholars. Due to their heavy reliance on *sadd al-dharā'i'*, it was not possible to introduce some *wa'd*-based products. As an example of strictness, FX forward is not allowed in Islamic banks in Bangladesh even though prominent *Sharī'ah* authorities like AAOIFI has allowed it. It is prohibited based on the understanding that *bay' al-ṣarf* should be concluded on spot basis according to the market price at that time. However, a minority group of *Sharī'ah* scholars in Bangladesh view that FX forward should be allowed in Bangladesh. Even *muwā'adah* can be applied in FX forward as it is different from a contract (*'aqd*), and *Hanafī school* of jurisprudence (*madhhab*) allows practicing *muwā'adah* as a binding promise whenever it is a need. The researcher views that the prohibition of FX forward in Bangladesh is due to the scholars' different understanding of the prophetic narration "*yadan bi yadin*", which indicates that we should exchange different currencies on spot basis. However, it does not impose following the market price. The contracting parties are free to exchange currencies with whatever rate they want. Therefore, responding to the need of the clients in Bangladesh, *Sharī'ah* scholars should be flexible to allow FX forward.

Another challenge in developing *wa'd*-based products in Bangladesh is that there is a lacking of adequate product development initiative by the industry. In fact, there are a number of elements contributing to this situation which are lack of research, absence of competitive market, shortage of human capital and lack of sincere support from the government.

Finally, even though the legal framework of Bangladesh generally supports the operation of Islamic banking, there is no provision for *wa'd* in the Contract Act. The existing Contract Act 1872 does not recognise *wa'd*. According to the Contract Act, *wa'd* is as good as a contract. If *wa'd* is considered as a contract, then its practice in some Islamic banking products might be invalidated. Moreover, the client might be the victim in many cases if *wa'd* is a contract. Therefore, a legal provision for *wa'd* is needed either in the Contract Act or in a separate law for Islamic banking operation in Bangladesh.

### **8.2.9. The Prospects for *Wa'd*-Based Products in Malaysia**

There is a considerable prospect in *wa'd* for Islamic banking industry in Malaysia. Islamic FX option can be developed with either *wa'd* and commodity *murābahah* or *muwā'adah* and *'urbūn*. *Wa'd* with commodity *murābahah* model should be accepted in Malaysia but the *muwā'adah* and *'urbūn* model may not be accepted as *muwā'adah* is not accepted by BNM. However, as the researcher view that *muwā'adah* is permissible then *muwā'adah* and *'urbūn*-based model is suggested for the future as it is less complicated and less costly than the previous model.

Furthermore, the existing practice of FX forward in Malaysia can be replaced with *wa'dān*-based Islamic FX forward to protect the interest of the client in currency hedging. The *wa'dān*-based model should be accepted in Malaysia as most of the banks currently using *wa'dān* in some other products.

Finally, *ijārah* home and property financing under *shirkat al-milk* is a consumer-banking product which can be developed as an alternative for MM home and property financing. This product is based on *ijārah*, *wa'd*, *hibah* and *shirkat al-milk*. This model allows the bank to provide financing to a client for a house under construction while bank takes the risk of project abandonment. Moreover, the risk of loss in case of customer's



default is lesser as the bank holds 90 % ownership until the end of the tenure. The model is comparably simple and less burdensome on the customer as it contains only one *wa'd*.

#### **8.2.10. The Prospects for *Wa'd*-Based Products in Bangladesh**

There is a great potential in *wa'd* for Islamic banking in Bangladesh. Considering the need of the industry and suitability with the *Sharī'ah* framework, four products have been suggested which are *muwā'adah* Islamic FX forward, *muwā'adah* Islamic cross currency swap, Islamic profit rate swap and *tawarruq* personal financing.

*Muwā'adah* Islamic FX forward is based on *muwā'adah* and *bay' al-ṣarf*. *Muwā'adah* is chosen due to the flexibility of *Ḥanafī* school towards *muwā'adah*. It provides more protection to the client. Alternatively *wa'd*-based FX forward can be introduced if the *Sharī'ah* scholars do not accept *muwā'adah*.

Similar to FX forward, Islamic cross currency swap can be developed through *muwā'adah* to meet the long-term currency hedging needs of the clients. Instead of commodity *murābaḥah*, *muwā'adah* is proposed as there is no commodity market in Bangladesh to practice commodity *murābaḥah*. On the other hand, there is flexibility regarding *muwā'adah* in *Ḥanafī* school of jurisprudence.

In addition, Islamic profit rate swap is proposed for Bangladesh considering the future needs of the industry to hedge against a floating profit rate. The product is based on *wa'dān* and *tawarruq*. However, a commodity market should be developed to practice this swap.

Lastly, due to substantial need of personal financing, *tawarruq* personal financing is proposed for Islamic banks in Bangladesh. The product is designed based on *murābaḥah* and *wa'd*. A real *tawarruq* model is proposed where the bank does not become the agent of the client either to sell or purchase the commodity. However, the launching of this product depends on the establishment of a commodity market which

allows the practice of genuine *tawarruq*. Figure 8.1 below shows the summary of important findings of this research.

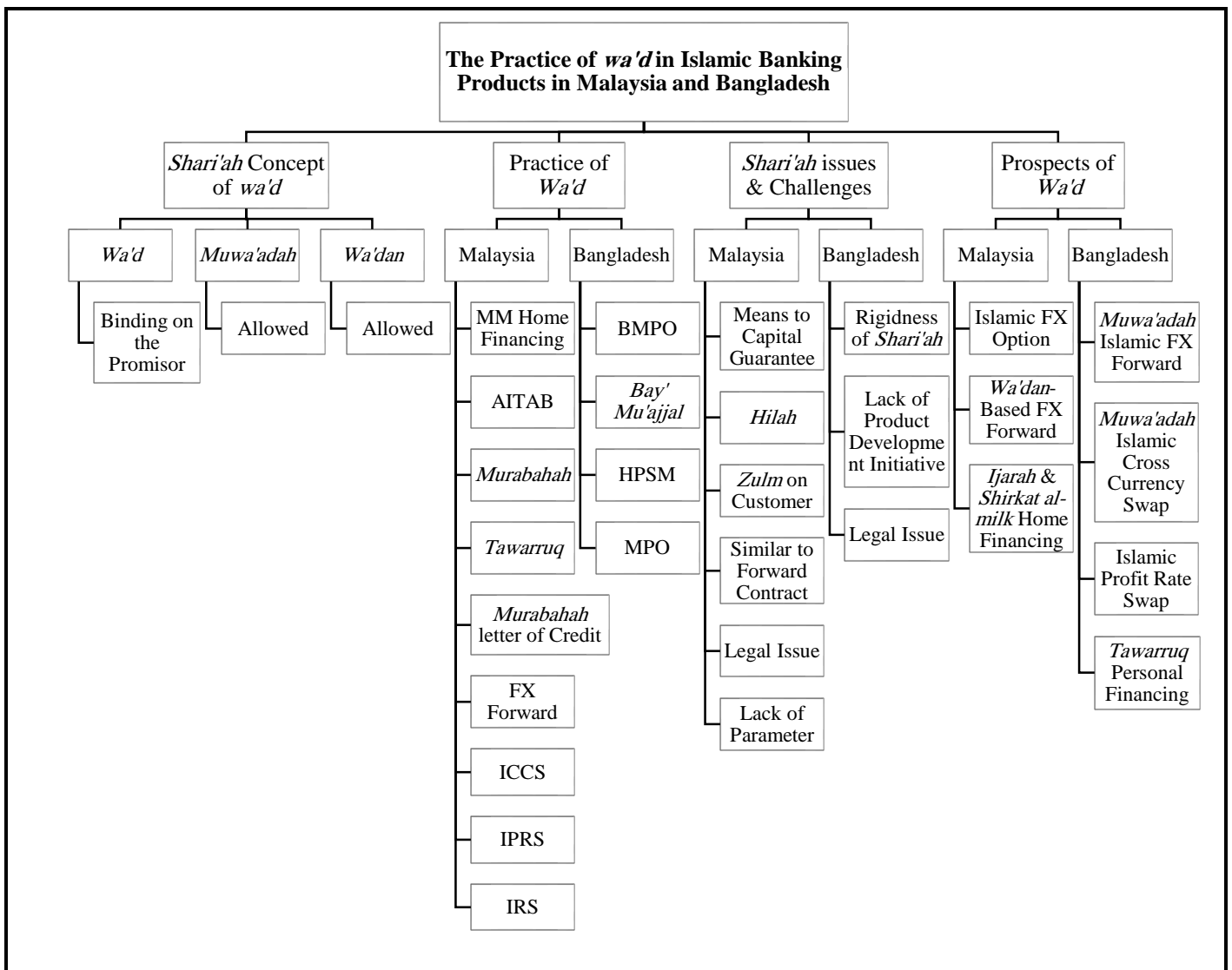


Figure 8.1 Summary of the Important Findings

### 8.2.11. Conclusion of the Findings

Having presented the summary of the findings, it can be said in a nutshell that *wa'd* is both religiously and legally binding in the *Shari'ah*. Both *muwa'adah* and *wa'dan* for executing a contract (*'aqd*) in the future are permitted in the *Shari'ah* even though they are binding on the promisor. This is because a binding *muwa'adah/wa'dan* is different from a contract (*'aqd*).

Malaysia has developed a number of products based on *wa'd* due to the support from the government and the flexibility of the *Sharī'ah* scholars. There are many developments on the usage of *wa'd* in Malaysia. Though several studies claim that a number of *Sharī'ah* issues are involved with the usage of *wa'd* in Malaysia but it is concluded that Malaysian practice of *wa'd* are free from those issues of *Sharī'ah*. However, Malaysia needs to include a separate provision for *wa'd* either in the Contract Act or IFSA. Furthermore, there requires a comprehensive parameter for the usage of *wa'd* in different product structures.

Comparing with Malaysia, Bangladesh has very few products based on *wa'd*. There is no substantial development of *wa'd*-based products in the Islamic banks of Bangladesh. This is due to the stringent position of the *Sharī'ah* scholars and the lack of product development initiative which is the consequence of lack of support from the government, lack of research, lack of human capital and an absence of competitive market. Therefore, Bangladesh can learn from Malaysia in terms of the flexibility of the *Sharī'ah* scholars, government's patronization of Islamic finance, legal support, prudent regulation, infrastructural development and strategies for human capital development.

Finally, both Malaysia and Bangladesh have a lot of prospects in *wa'd* for developing numerous products. Malaysia can introduce Islamic option, *wa'dān*-based FX forward and *ijārah and shirkat al-milk* home financing. On the other hand, Bangladesh can develop *muwā'adah* Islamic FX forward, *muwā'adah* Islamic cross currency swap, Islamic profit rate swap and *tawarruq* personal financing.

### **8.3. Recommendations**

In light of the findings, discussions in different chapters of the thesis and observations during the field study, the researcher provides recommendations to different group of people or organisations related to Islamic banking in Malaysia and Bangladesh. The

recommendations are provided to (1) the Government of Malaysia, (2) the Government of Bangladesh, (3) the Islamic banking industry in Malaysia, (4) the Islamic banking industry in Bangladesh, (5) *Shari'ah* scholars in Malaysia, (6) *Shari'ah* scholars in Bangladesh, and (7) the clients.

### **8.3.1. Recommendations to the Government of Malaysia**

Recommendations to the government of Malaysia and related authorities are provided in the following points:

- i. The government through the help of related regulating authority should provide a guideline on the usage of Islamic derivative instruments so that the instruments are used for their real purposes. This guideline should clarify in details the circumstances when Islamic derivatives are used for speculation. Furthermore, it should include the necessary requirements that a party should fulfil to enter into an Islamic derivative instrument. Furthermore, the government should ensure that the guideline is strongly followed by the industry players.
- ii. There should be a legal provision for *wa'd* in the Contract Act 1950 that includes the definition of *wa'd* and *muwā'adah*, binding nature of *wa'd*, necessary remedies for the breach of *wa'd*. However, the legal provisions for *wa'd* can be included in the IFSA as a substitute. In that case, whatever legal provisions mentioned in IFSA should be exceptions to the Contract Act 1950.
- iii. The government through BNM should issue guidelines on the practice of *wa'd*. The guideline should include more details on the concept of *wa'd*, *muwā'adah* and *wa'dān*, the binding nature of *wa'd*, the necessary remedies for the breach of *wa'd*, the valid excuses for the breach of *wa'd*, *Shari'ah* ruling on connecting *wa'd* with some contracts e.g. *muḍārabah*, *mushārahakah*, *murābahah*, *bay' al-ṣarf* etc. and circumstances where *wa'd* is violating the purpose of the contract

(*muqtaḍā al-‘aqd*). BNM should ensure that the guideline is followed by Islamic banks while innovating products based on *wa‘d*.

### **8.3.2. Recommendations to the Government of Bangladesh**

The researcher provides the following recommendations to the government of Bangladesh and related regulatory authorities:

- i. The government should include some legal provisions for *wa‘d* in the Contract Act 1872. It should state the definition of *wa‘d*, its binding nature, required remedies for the breach of *wa‘d* and valid excuses to break a *wa‘d*. However, it is better to enact a separate comprehensive law for the operation of Islamic banking in Bangladesh. There should be some provisions for *wa‘d* in that law and those provisions would be exceptions from the Contract Act 1872.
- ii. The government is recommended to enhance research in Islamic banking. In this regard, BB should expand its Islamic banking research division with *Shari‘ah* research. Moreover, BB should impose on every Islamic bank to establish a *Shari‘ah* research division. Moreover, government should provide sufficient fund to the academics to conduct scholarly research in Islamic banking.
- iii. Educational institutions are required that teach Islamic finance to develop human capital in Islamic banking. The government should establish educational institutions dedicated for Islamic banking. Moreover, the government universities should include Islamic banking courses in their curriculum. Besides, BB can organise workshops, seminars, and conferences on different topics in Islamic banking regularly to develop Islamic finance knowledge.
- iv. Sincere support from the government is required to lead Islamic banking towards mainstream banking in Bangladesh. BB should continuously provide Islamic banking license to conventional banks which want to convert to Islamic banks.

Furthermore, BB is recommended to be flexible to issue license to conventional banks which wants to open Islamic banking window. However, in this case, BB should develop guidelines for the operation of Islamic banking windows. If it is difficult to monitor Islamic banking windows, then BB can instruct the conventional banks to establish Islamic bank as a subsidiary entity of the leading conventional bank. The subsidiary system ensures that there is no co-mingling of funds between Islamic and conventional banking. Besides, it would help BB to monitor Islamic banking more easily.

- v. Furthermore, as a sign of sincere support, the government should establish a commodity market where financial institutions and their clients can practice genuine *tawarruq*. This commodity market will ease for Islamic banks to develop numerous products based on *tawarruq*. Thus, product innovations would be expanded in Bangladeshi Islamic banks.
- vi. There is a need for a central *Sharī'ah* board under BB with the authority to monitor and oversee the *Sharī'ah* committees of all Islamic banks as well as the overall application of *Sharī'ah* principles in all these banks. The central *Sharī'ah* board should issue resolutions regarding different *Sharī'ah* matters which would be binding on all Islamic banks.
- vii. The government should establish strong collaboration with leading Islamic banking countries and should take lessons from them especially from Malaysia. Collaboration with Malaysia for example would help the government learn the procedure to develop a strong Islamic banking governance system in Bangladesh.

### 8.3.3. Recommendations to Malaysian Islamic Banking Industry

The following points comprise recommendations for the Islamic banking industry in Malaysia:

- i. Malaysian Islamic banks should be confident to innovate more products based on *wa'd* in light of the *Sharī'ah* requirement to cater the need of the client. In this case, industry should not diminish the usage of *wa'd* as a consequence of the *Sharī'ah* issues asserted by some *Sharī'ah* scholars.
- ii. It is recommended that Islamic banks should be more flexible with customers and should reduce the burden on them. Therefore, Islamic banks should attempt to exclude several features of *wa'd* in some product structures where it puts extensive burden on the customer. As for example, the second *wa'd* given by the customer in the case of MM home and property financing that the customer promises to purchase the property at the event of default, should be eliminated.
- iii. Islamic banks should take care of the interest of the customers. Considering the present economic situation, banks have a duty to provide *wa'd* in case of FX forward so that customers' interests are protected. As shown in chapter seven, *wa'dān*-based Islamic FX forward can settle this matter.
- iv. Furthermore, Islamic banks should be cautious to implement the bindingness of *wa'd*. They should consider the valid excuses prescribed in the *Sharī'ah* to break a *wa'd* e.g. duress, death, bankruptcy etc. Besides, in case of a breach, banks can charge from the customer only the amount of loss incurred but not the potential loss. Finally, banks need to take into consideration that it is prohibited from the *Sharī'ah* perspective to force a customer to purchase a property due to his *wa'd* even though the property is not in existence.

- v. Additionally, Islamic banks should explain the concept of *wa'd* to the clients so that the client is able to know his rights and responsibilities regarding the *wa'd* in a specific product.
- vi. Finally, the researcher suggests that the Islamic banking industry in Malaysia should be supportive towards research activities so that research can be carried out without difficulty. Researches are conducted mostly to serve the industry in the end. Therefore, practitioners are urged to be responsive and approachable towards researchers.

#### **8.3.4. Recommendations to Bangladeshi Islamic Banking Industry**

The researcher recommends the followings to Islamic banks in Bangladesh:

- i. There should be a significant awareness of *wa'd* among the practitioners. Product innovators should study the concept of *wa'd* in details and the vast potentiality of innovating numerous products based on this concept to satisfy the current and future needs of the clients. In light with the findings of this research, it is urged to eradicate the pessimistic notion towards *wa'd*.
- ii. It is a duty for Islamic banks in Bangladesh to establish a *Sharī'ah* research division in each bank. The research division would help *Sharī'ah* advisors to find out issues in Islamic banking products. Moreover, it might help the product development division to structure innovative *Sharī'ah*-compliant products. Above all, this division would increase *Sharī'ah* knowledge for Islamic banks in Bangladesh. Islamic banks should allocate sufficient budget for this division to conduct rigorous research.
- iii. Rather than relying upon IBBL, other Islamic banks in Bangladesh should be independent in terms of product development and other operations. Each of the Islamic banks should attempt to introduce unique products. This will create a



competitive market among the Islamic banks in Bangladesh, and in general, will develop the industry.

- iv. Islamic banks in Bangladesh are advised to invest for creating some qualified *Sharī'ah* scholars. In this regard, a talent development program can be developed. Under this program, banks may employ some *Sharī'ah* graduates for a certain period. Within this period, banks should rotate the participants in different departments of the bank to make them familiar with the operation and different functions of an Islamic bank. It is expected that a generation of qualified *Sharī'ah* scholars can be created through this program.
- v. Islamic banks are advised to expand their international collaborations with Malaysian Islamic banks to enhance research activities. Moreover, it will help Islamic banks in Bangladesh to be familiar with Malaysia's different types of innovative products.

### **8.3.5. Recommendations to *Sharī'ah* Scholars in Malaysia**

In light of the findings of this study and the experiences gained through the field study, the researcher proposes some suggestions to the *Sharī'ah* scholars in Malaysia in the following points:

- i. Scholars are recommended to re-think their opinions on the *Sharī'ah* appraisal for *wa'd* and *muwā'adah*. As the majority of the *Sharī'ah* scholars' opinions are different from the findings of this study. Therefore, it is urged to the scholars to re-examine this matter through looking into the classical texts of Islamic jurists (*fuqahā'*) and contemporary practice.
- ii. It is recommended to choose *wa'd* and related issues as a theme for discussion either in a national or international *Sharī'ah* scholars' forum. This forum will help

further understanding of *Sharī'ah* issues related to *wa'd*, exchange opinions among the scholars and come up with a substantial conclusion on this matter.

- iii. It is urged to the *Sharī'ah* committee members of different Islamic banks in Malaysia to make their resolutions on different *Sharī'ah* products publicly available with considerable amount of justifications. This will educate the public and the researchers on those matters.

### **8.3.6. Recommendations for *Sharī'ah* Scholars in Bangladesh**

Recommendations to the *Sharī'ah* scholars in Bangladesh are as follows:

- i. Scholars in Bangladesh are suggested to revisit their opinions on the *Sharī'ah* status for Islamic FX forward. In this regard, they are required to make rigorous research on the *Sharī'ah* principles for *bay' al-ṣarf* and the concept of *wa'd*. Furthermore, a balanced position between *sadd al-darā'i'* and the need (*ḥājah*) of the industry should be adopted.
- ii. *Sharī'ah* scholars are strongly recommended to conduct extensive research before issuing any *Sharī'ah* resolution on any banking product. It is their duty to make their utmost effort to find out a *Sharī'ah* ruling in the sources of Islamic jurisprudence (*fiqh*) for the specific product. A deep study should be conducted to identify any classical Islamic jurist's opinion regarding the issue. At the same time, a clear understanding of the product structure and documentation is needed. Finally, scholars should oversee the need and impact of the product in the economy.
- iii. Scholars in Bangladesh are advised to organise or participate in International *Sharī'ah* scholars' forums to discuss *Sharī'ah* issues in Islamic banking. Exchanging opinions among International *Sharī'ah* scholars may open up their minds, fill the knowledge gap and create tolerance towards the views of others.

### **8.3.7. Recommendations to the Clients**

Islamic banks' clients are advised to have general understanding on the concept of *wa'd* and its *Sharī'ah* ruling. Furthermore, when engaging with any *wa'd*-based products then they are required to be aware of their rights and responsibilities towards the practice of *wa'd* in that particular product. They ought to know the remedies for the breach of *wa'd* and the valid excuses to break *wa'd*.

### **8.4. Limitation of the Research**

Considering the field study conducted and the classical Islamic jurisprudential (*fiqh*) literatures reviewed, this research should be able to achieve its goal. As a universal rule that every work has some limitations, this study is not free from limitations and shortcomings. There are a few limitations for this study which are as follows:

- i. Firstly, the study does not include the application of *wa'd* in *ṣukūk*. There are some *Sharī'ah* issues related to the application of *wa'd* in *ṣukūk*. If *ṣukūk* were studied then more *Sharī'ah* issues related to *wa'd* could be found out. Moreover, the research does not study the “structured products”. There are some *Sharī'ah* issues related to the practice of *wa'd* in “Islamic structured products”. However, *ṣukūk* and structured products were not studied due to the limitation of a PhD research. It is beyond the scope of a PhD research to study a large volume of things within a limited period. Furthermore, as Islamic finance in Bangladesh is at the very initial stage to develop these products then to make a balance between these two countries only the banking products are studied.
- ii. Secondly, the case study is limited to three Islamic banks in Malaysia and three others in Bangladesh. If more Islamic banks were studied then more *wa'd*-based products might be discovered. If some Islamic banks in the Middle East could be studied, then this research might be more rigorous. However, because of the

inadequacy of funds and limitation of time, it was not possible for the researcher to study more than the six banks in these two countries.

- iii. Finally, there are shortcomings in the field study of the research. Firstly, a few documents related to *wa'd*-based products could not be reviewed due to the restriction of the bank to keep their documents private and confidential. Secondly, it was not possible to interview some *Shari'ah* scholars due to their busy schedule and lack of response to interview invitation. Despite the shortcomings, a substantial amount of data was obtained from interviews conducted and documents reviewed to achieve the objectives of this research.

### **8.5. Further Research Recommendations**

After having identified the limitations of this study, the researcher recommends the scope for further research in the following:

- i. Further research can be carried out on the usage of *wa'd* in *ṣukūk* and structured-products. The research should analyse the application of *wa'd* in different types of *ṣukūk* and structured-products to find out the possible *Shari'ah* issue pertaining to the practice of *wa'd*. Moreover, it should assess the possibility to innovate more *ṣukūk* and structured-products based on *wa'd*.
- ii. The case study can be developed by including a large number of banks so that more rigorous research is conducted. Alternatively, different banks other than the banks studied e.g. al-Rajhi Banking and Investment Corporation (Malaysia) Berhad can be chosen for case study to look for different findings. Moreover, a comparison can be done between Malaysian practices with other leading Islamic banking countries e.g. Bahrain, U.A.E., Kuwait etc.
- iii. Finally, research should be done to look for alternatives for *wa'd*. Rigorous research can be carried out to discover a *Shari'ah*-based instrument that provides

similar benefit of *wa'd* but at the same time it is based on real economic activities.

This research might help the Islamic banking industry in diversifying their products and moving forward from heavy dependence on *wa'd*.

## **8.6. Conclusion**

In conclusion, the researcher believes that this study has succeeded in examining the practice of *wa'd* in Malaysia and Bangladesh, comparing between them, and providing fruitful discussions on *Shari'ah* issues related to their practices. It has demonstrated the future prospects of *wa'd* in innovating different types of products for both countries. Several recommendations have been provided to the government and related authorities, Islamic banking practitioners, *Shari'ah* scholars and customers in both countries. It is expected that they would follow some of these recommendations and benefit from this research.

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## APPENDIX A: INTERVIEW GUIDELINE FOR *SHARĪ'AH* OFFICER

### Introduction

What is the role of *Sharī'ah* department in product development?

Is *wa'd* binding in your bank?

### Products where *wa'd* are applied and the mechanism for the application of *wa'd*

What are the products in your banks where *wa'd* is currently being applied?

Is *muwā'adah* applied in any of the products in your bank?

Do you use *wa'dān* in your products?

What is the mechanism of *wa'd/muwā'adah/wa'dān* in those products?

What is the mechanism of using *wa'd* in *murābahah*? (If it is used in your bank)

What is the mechanism of using *wa'd* in MM? (If it is used in your bank)

What is the mechanism of using *wa'd* in AITAB? (If it is used in your bank)

What is the mechanism of *wa'd* in *tawarruq*? (If it is used in your bank)

Is there any *wa'd* in *bay' al-īnah*? If yes, how does that apply? (If it is used in your bank)

Do you apply *wa'd* in parallel *salam*?

Do you apply *wa'd* in parallel *istiṣna'*?

Do you apply *wa'd/muwā'adah/wa'dān* in *bay' al-ṣarf*?

What are the features and benefits of these *wa'd*-based products?

What are the terms and conditions of these *wa'd*-based products?

What is the uniqueness of *wa'd*-based products in your bank?

What are the legal documents used for *wa'd*?

Are the contracts of a product combined in a single agreement or separated in different papers?

### Challenges in using *wa'd*

In your opinion, is there any challenge/obstacle for developing products based on *wa'd*? If yes, please explain.

What is your opinion on the application of *wa'd* in MM home financing?

Do you think that in practice, both *muwā'adah* and *wa'dān* are the same?

In your opinion, is there any *wa'd*-based product that contradicts the purpose of the contract?

What is your opinion on the penalty for *wa'd*?

Do you think, there needs any legal framework or guideline for *wa'd*-based products?

Is there any possibility that *wa'd* is used as a *ḥīlah* to allow conventional banking products in Islamic banks?

### Suggestions and Prospects of *wa'd*

What do you suggest to overcome the existing challenges of *wa'd*?

Do you suggest any *Sharī'ah* parameters that should be followed in *wa'd*-based products? If yes, how that should be?

In your opinion, what other new products can be developed based on *wa'd*? How to achieve further development of *wa'd* and *wa'd*-based products?

## APPENDIX B: INTERVIEW GUIDELINE FOR *SHARĪ'AH* SCHOLAR

- (1) What is your opinion on the binding nature of *muwā'adah* and *wa'dān*?
- (2) What is your opinion on the application of *wa'd* in MM? What is your opinion on the promise by the customer to purchase the property from the bank at the event of default? Is it a guarantee by the *mushārik*? Is the *mushārah* here a *shirkat al-milk* or *shirkat al-'aqd*? Does the condition of *wa'd* violate *muqtaḍā al-'aqd*? Does the *wa'd* change the equity financing to debt financing?
- (3) What is your opinion on *wa'd* in AITAB vehicle financing? Is the promise by the customer to purchase the vehicle at the event of default permissible? Is promise to give *hibah* better than promise to sell?
- (4) What is your opinion on *wa'd* in FX forward? Can we do *wa'd* or *muwā'adah* for *ṣarf*? Is *muwā'adah mulzimah* permissible for executing *bay' al-ṣarf*? Does FX forward comply with the principle of *yadan bi yadin* (spot transaction) in the *Ḥadīth*?
- (5) What do you think about the application of *wa'd/wa'dān* in IPRS and ICCS? Is *wa'dān* used as *ḥīlah* to make the derivatives *ḥalāl*? Can *sadd al-dharā'i'* be used to stop applying *wa'dān* in these products? How are these Islamic swaps free from gambling?
- (6) Can *wa'd* be used for options? Can *wa'd* be a financial right? In your opinion, is there any difference between the classical and contemporary concept of *wa'd*?
- (7) What would you say about the claim of excessive usage/reliance on *wa'd*? Do you suggest any *Sharī'ah* parameter that should be followed in every *wa'd*-based products? If yes, how is that?
- (8) What is your opinion on the application of *wa'd* in *murābahah*? Do you think that *wa'd* from one party (customer) is an exploitation by the bank?
- (9) Is there any other *Sharī'ah* issue related to *wa'd* you would like to mention?
- (10) In your opinion, can *wa'd* be used in other new types of products e.g. structured products, options etc.? Do you have any suggestion in relation to the further development of *wa'd*-based products?

## APPENDIX C: INTERVIEW GUIDELINE FOR LEGAL OFFICER

- (1) What is the role of legal department in product development?
- (2) Is *wa'd* legally binding in your bank?
- (3) How is the documentation for *wa'd*? Is *wa'd* combined with the main *'aqd* or, it is put in separate letter?
- (4) How the *wa'd* clause is written in the product agreement?
- (5) Would you like to mention any legal issue relating to *wa'd*? Is there any problem in developing products based on *wa'd*? What do you suggest to overcome these problems?
- (6) How the “purchase undertaking” clause is written in *MM* financing?
- (7) How is the *wa'd* structure in AITAB financing?
- (8) How is the *wa'd* in *murābaḥah* and *tawarruq* financing?
- (9) How is the *wa'd* feature in treasury products (FX forward, Swaps etc.)?
- (10) What are the legal steps taken if the customer does not fulfil his *wa'd*?  
What about the compensation for *wa'd*?
- (11) Has your bank ever experienced any breach of *wa'd*?
- (12) Is the *wa'd* element in line with the contract act of the country?
- (13) Do you think that the existing legal framework is enough to support *wa'd*-based products? Do you think, there needs a legal framework for *wa'd*-based products?

## APPENDIX D: GLOSSARY OF ARABIC TERMS AND THEIR MEANINGS

‘Ahd	Covenant
‘Alayhis Salām	Peace be upon him
‘Aqd Al-Tawrīd	Export/Import Contract
‘Aqd	Contract
‘Āqidān	Two parties making a contract
‘Iddah	Unilateral Promise
‘Iddah	Waiting period for a woman after the death of her husband or divorce
‘Illah	Cause of a Sharī‘ah ruling
‘Udhr Sharī‘	Sharī‘ah Permissible Excuse
‘Udhr	Excuse
‘Uqūd Musammāt	Contracts recognised by the Sharī‘ah
‘Uqūd Mustajaddah	Modern Contracts
‘Urbūn	Earnest money
‘Urf	Custom
Aḥkāṃ	Sharī‘ah rulings
Ahliyyah	Legal competence
Al-Ijarah Thumma Al-Bay‘	Islamic hire-purchase
Al-Ṣarf	Currency exchange
Al-Wadī‘ah	Safekeeping
Arkān	Pillars of a contract
Awwah	One who invokes Allāh with humility, glorifies Him and remembers Him much
Bay‘ al-‘Īnah	Sale with immediate repurchase
Bay‘ Al-Ajal Bi Al-Ajal	Forward sale contract where both subject matters are deferred
Bay‘ Al-Dayn	Sale of debt
Bay‘ Al-Kāli’ Bi Al-Kāli	Sale of a debt for a debt
Bay‘ Al-Mu’ajjal	Deferred payment sale
Bay‘ Al-Mulāmasah	Touch sale
Bay‘ Al-Munābadhah	Toss sale
Bay‘ Bi Thaman Ājil	Deferred payment sale
Bay‘	Contract of sale
Bay‘ Al-Istijrār	Supply sale
Bay‘atayni Fī Bay‘atin	Two sale contracts in one sale contract
Bayt Al-Māl	State treasury
Buyū‘	Sales
Ḍawābiṭ	Parameters
Dīnār	Gold coin
Dirham	Silver coin
Fāsīd	Voidable
Fatāwā	Plural of Fatwā

Fatwā	Religious decree
Fiqh	Islamic jurisprudence
Fuqahā'	Islamic jurists
Gharār	Uncertainty
Ḥadīth	Prophetic tradition
Ḥājah	Need
Ḥajj	Pilgrimage to Makkah
Ḥalāl	Permissible in Islamic law
Ḥanafī	A school of Islamic jurisprudence
Ḥanbalī	A school of Islamic jurisprudence
Ḥarām	Prohibited in Islamic law
Hibah	Gift
Ḥīlah Muḥarramah	Prohibited legal trick
Ḥīlah Shar'iyah	Permissible legal trick in Islamic law
Ḥīlah	Legal trick
Ibrā'	Rebate
Ifsād Al-'Aqd	Corrupting the contract
Ījāb	Offer
Ijārah Muntahiyah Bi Al-Tamlīk	Lease ending with ownership
Ijārah	Lease
Ijtihād Taṭbīqī	Applied juristic reasoning
Ijtihād	Juristic reasoning
Ilzāmiyyah	Obligation
In Shā' Allāh	If Allāh wills
Istiṣnā'	Manufacturing contract
Janīb	A good quality of date
Jihād	Striving in the path of Allāh
Ju'ālah	Stipulated price for performing a service
Kafālah	Guarantee
Kaffārah	Atonement
Mabī'	Sold item
Madhāhib	Plural of madhhab
Madhhab	School of thought in Islamic jurisprudence
Mafsadah	Harm
Makhraj	Way out
Makrūh	Disliked
Mālikī	A school of Islamic jurisprudence
Maqāṣid Al-Sharī'ah	The objective of Islamic law
Maṣdar	Infinitive
Mashaqqah	Hardship
Maṣlaḥah	Public interest
Maw'idah	Unilateral promise
Maysir	Gambling
Milkiyyah	Ownership
Mu'āmalāt	Commercial transactions
Mu'āwaḍah	Exchange contract

Mubāḥ	Permissible in Islamic law
Muḍārabah	Trust investment partnership
Muḍārib	Entrepreneur
Munāfiq	Hypocrite
Muqāṣah	Offset
Muqtaḍā Al-‘Aqd	Purpose of the contract
Muqtaḍā	Purpose
Murābahah	Cost plus profit sale
Musāwamah	Spot sale
Mushārahah Mutanāqiṣah	Diminishing partnership
Mushārahah	Partnership
Mushārik	Partner
Mustaḥabb	Recommended
Muta‘addī	Transitive verb
Muwā‘adah Mulzimah	Binding mutual promise
Muwā‘adah	Mutual promise
Nifāq	Hypocrisy
Nudhur	Vow
Qā’idah Fiqhiyyah	Islamic legal maxim
Qabḍ	Possession of the subject matter
Qabūl	Acceptance
Qarḍ	Loan
Qur’an	The primary source of Islamic law
Raḍiyallāhu ‘Anhu	May Allah be pleased with him
Ribā	Usury
Ribawī	Items subject to Sharī‘ah rules on ribā in sales
Riḍā	Consent
Ṣā‘	Volume measurement
Sabab	Cause
Ṣadaqah	Voluntary alms
Sadd Al-Dharā’i‘	Blocking the means
Salam	Advance purchase
Ṣalāt	Prayer
Sallallāhu ‘Alayhi Wa Sallam	Peace and blessings of Allāh be upon him
Shāfi‘ī	A school of Islamic jurisprudence
Shāfi‘ī	A school of Islamic jurisprudence
Sharī‘ah	Islamic law
Sharṭ	Stipulation
Shirkat Al-‘Aqd	Contractual partnership
Shirkat Al-‘Uqūd	Plural of shirkat al-‘aqd
Shirkat Al-Amlāk	Plural of shirkat al-milk
Shirkat Al-Milk	Joint-ownership
Shirkat	Partnership
Shurūṭ	Plural of sharṭ
Ṣīghah	Contractual expression
Subḥānahu Wa Ta‘ālā	The most glorified, the most high

Şukūk	Islamic bond
Sunnah	Prophetic tradition
Şūq Al-Sila‘	Commodity market
Sūrah	A chapter of Al-Qur’an
Ta‘līq	Making conditional
Tabarru‘	Voluntary alms
Tabarru‘āt	Plural of tabarru‘
Taḥsīn Al-‘Aqd	Betterment of the contract
Takāful	Islamic insurance
Tawarruq Munazzam	Organised means of cash procurement
Tawarruq	Cash procurement
Thaman	Price
Ujrah	Fee
Wa‘d Mulzim	Binding unilateral promise
Wa‘d	Unilateral promise
Wa‘dān	Two independent promise
Wā‘id	Threat
Wadī‘ah Yad Al-Ḍamānah	Guaranteed custody
Wājib	Compulsory
Wakālah	Agency contract
Waqf	Charitable endowment
Yadan Bi yadin	Hand to hand/spot transaction
Zakāt	Obligatory wealth levy
Zulm	Injustice

## LIST OF PUBLICATIONS AND PRESENTATIONS

### Journal Articles:

- Md. Faruk Abdullah and Asmak Ab Rahman, "The Theory of 'Promise' (*Wa'd*) in Islamic Law," *Arab Law Quarterly* 29, no. 2 (2015), 168-189.
- Md. Faruk Abdullah and Asmak Ab Rahman, "Development of *Wa'd*-Based Products in the Islamic Banks of Bangladesh: A Case Study," *Shariah Journal* 23, no. 1 (2015), 103-140.
- Md. Faruk Abdullah and Asmak Ab Rahman, "Is *Wa'dan* any different to *Muwa'adah*? Empirical evidence from Malaysia," *International Journal of Islamic and Middle Eastern Finance and Management* 8, issue. 3 (2015), 310-328.
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- Md. Faruk Abdullah and Asmak Ab Rahman, "Application of *Wa'd* (Promise) in Islamic Banking Products: a Study in Malaysia and Bangladesh," Poster exhibition in Minggu Terbuka Akademik (MiTA) 2015, Academy of Islamic Studies, University of Malaya, Kuala Lumpur, 20-24 April 2015. (Awarded Gold Medal).
- Md. Faruk Abdullah and Asmak Ab Rahman, "Application of *Wa'd* (Promise) in Islamic Banking Products: a Study in Malaysia and Bangladesh," University of Malaya Three-Minute Thesis Competition, Academy of Islamic Studies, University of Malaya, 28 May 2015. (Awarded 2<sup>nd</sup> Place in Faculty Level).