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Bayʿ wa salaf in Islamic banking current practices

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Abstract

Purpose – The purpose of this paper is to analyze the issue of *bayʿ wa salaf* (the combination of sale and loan contracts in a single arrangement) from the Sharīʿah perspective. Based on the Sharīʿah findings on the issue, the paper examines the existing Islamic banking products and services that use these two specific contracts to determine whether the current practice is in line with Sharīʿah.

Design/methodology/approach – The paper uses the qualitative method by reviewing and analyzing relevant literature and operational structures to comprehend the issues pertaining to *bayʿ* (sale) and salaf (loan). It then provides Sharīʿah parameters for *bayʿ wa salaf* before applying them in assessing some existing Islamic banking products and practices. Subsequently, the compliance status of the banking operations that use these contracts in a specific product structure can be ascertained.

Findings – The paper finds that the *bayʿ wa salaf* arrangement in the existing Islamic banking products and services, as elaborated in the paper, does not fall under the prohibited category. This deduction is made in accordance with the parameters derived from jurists' discussion on the issue of *bayʿ wa salaf*. It also takes into consideration other factors influencing the existence of such arrangements.

Research limitations/implications – This conceptual research highlights the jurists' discussion on the issue of *bayʿ wa salaf* and the compliance status of the current products and services that use the contracts in a single arrangement (specifically in the case of Malaysia) without discussing other possible structures that can be applied as an alternative to the *bayʿ wa salaf* arrangement.

Practical implications – Thorough understanding of the issue can strengthen the industry's confidence in executing operations that conform to Sharīʿah principles.

Originality/value – The paper provides comprehensive deliberation on the ruling of *bayʿ wa salaf* from various schools of thought and exhaustive elaboration on existing Islamic banking products that apply *bayʿ wa salaf* in their structures. This contributes in reinforcing the stakeholders' confidence in the operations of Islamic banking and finance.

Keywords Combination of contracts, Inter-conditionality, Islamic banking products, *Bayʿ wa salaf*

Paper type Research paper

Introduction

Among the integral principles of Sharīʿah (Islamic law) in commercial transactions is the prohibition of usury and any forms of transaction that would lead to usury[1]. This includes the interdiction of combining loan contracts with exchange transactions (*muʿāwaḍāt*), which is termed *bayʿ wa salaf* (بيع وسلف).

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During the Prophet's time, the prohibition can be comprehended as a clear-cut prohibition of making the execution of *bayʿ* (sale) and *salaf* (loan) conditional upon each other. However, as Islamic finance evolves over time, Islamic financial institutions (IFIs) need to be able to offer products that meet the current needs of the industry and the people. Thus, IFIs have to offer products formed by combining various contracts because of the complexity of banking operations and customers' diverse needs, while still observing Sharīʿah principles on the execution of such transactions. There are some contemporary arrangements which seem to resemble *bayʿ wa salaf* – either by structure or incidentally. Sharīʿah analysis needs to be done of such manifestations to determine the ruling for them, whether they fall under the said prohibition or are in fact acceptable and valid. This is because these incidents are considered as grey areas in light of the jurists' discussion on the issue being limited to the textual evidence of the *ḥadīths* (Prophetic traditions) prohibiting such. Thus, the main objectives of this research are to:

- analyze the issue of *bayʿ wa salaf*, as deliberated by jurists and scholars;
- enlist and explain the structures of relevant Islamic banking products that resemble *bayʿ wa salaf* in their execution; and
- conduct Sharīʿah analysis on the structures of relevant Islamic banking products that resemble *bayʿ wa salaf* to determine their rulings, as well as to propose solutions for the same.

Overview on the prohibition of *bayʿ wa salaf*

There are specific conditions outlined by the Sharīʿah regarding the permitted and prohibited types of combination of contracts, despite the diverse juristic opinions on their details. Generally, according to Ibn Rushd al-Ḥafīd (1994, p. 237), there are four main causes that render contracts invalid:

(1) specific prohibition of the subject matter;

(2) *ribā* (usury);

(3) *gharar* (ambiguity); and

(4) anything that leads to the earlier two causes (*ribā* and *gharar*).

These must be avoided when combining contracts to preserve the validity of such arrangements. With regard to the issue of *bayʿ wa salaf*, the prohibition arises based on the statement of the Prophet (peace be upon him) as narrated by ʿAbdullāh ibn ʿAmr:

> لا يحل سلف وبيع ولا شرطان في بيع ولا ربح ما لم يضمن (تضمن) ولا بيع (تبع) ما ليس عندك
>
> It is not permissible to arrange a loan with a sale contract, or to stipulate two conditions in a sale, or to make a profit on something that for which you assume no liability, or to sell something that you do not possess (Abū Dāwūd).

Sharīʿah assessment on the issue of *bayʿ wa salaf*

The discussion on Islamic financial transactions in most Islamic jurisprudence books comes immediately after discussions on Islamic acts of worship. This clearly indicates the importance of knowledge of Islamic financial transactions in one's life to ensure that Islam is being practised as a way of life. In fact, the outreach of Islamic principles, rulings and

guidance extends to integrate daily interactions of man's life and is not just confined to acts of worship *per se*.

Generally, jurists explain financial contracts in a very structured manner that comprises the contracts' fundamental tenets, conditions, juristic evidence on their validity and permissibility in the eyes of Sharīʿah, and many others. Jurists have thus discussed the rulings of *bayʿ* and *salaf* thoroughly.

Types of arrangement that fall under the prohibition of bayʿ wa salaf

Jurists are of the opinion that the prohibition applies regardless of whether *bayʿ* is made conditional upon *salaf* or *salaf* is made conditional upon the execution of *bayʿ*. As conditionality is the reason for the prohibition, the ruling also applies regardless of whether the *salaf* comes prior or subsequent to the execution of *bayʿ*. This opinion is supported by the general interpretation of the *ḥadīth* narrated by ʿAbdullāh ibn ʿAmr as mentioned earlier.

Al-Mubārakfūrī (2018, p. 432) mentioned in *Tuḥfat al-Aḥwadhī* that the meaning of the *bayʿ* and *salaf* arrangement prohibited by the Prophet (peace be upon him) in this *ḥadīth* is as follows:

قال إسحاق بن منصور قلت لأحمد ما معنى نهى عن سلف وبيع؟ قال: أن يكون يقرضه قرضا ثم يبايعه بيعا يزداد عليه.

> Isḥāq ibn Manṣūr said that he asked Aḥmad what is the meaning of the prohibition of combining loan and sale in one contract. Ahmad replied that *it means to provide someone with a loan and then to sell him something on top of the loan provided.*

Jurists have deliberated on the prohibited scenarios of combining *bayʿ* and *salaf* that are intended by the abovementioned *ḥadīth*. The discussion can be summarized into two typical scenarios:

(1) The first scenario, as mentioned by Al-Aẓīm Ābādī (2018, p. 1499), is when a person says, "I will sell you this slave at such-and-such price on the condition that you lend me 1000 dirhams". This example elucidates that the prohibition applies to an arrangement in which execution of the sale is made conditional upon a loan contract.

(2) The second scenario is as mentioned by Ibn Qudāmah (1997, p. 437) whereby the prohibition arises when a person stipulates in the loan that he is giving it on the condition that the borrower will rent the creditor's house. This is because the loan contract is made conditional upon the execution of an exchange contract such as *ijārah* (lease).

The scope of bayʿ in the prohibition

Jurists have also discussed whether *bayʿ* here refers solely to a sale contract or comprises other exchange contracts (*ʿuqūd al-muʿāwaḍāt*) as well, such as *ijārah*. This discussion arises because of the similar nature shared by the various exchange contracts.

Ibn Qudāmah indirectly indicates that the scope of *bayʿ* in this prohibition includes all other exchange contracts by illustrating its occurrence with stipulation of a lease in a loan contract. It is also mentioned by Al-Māwardī (1994, p. 352) in *al-Ḥāwī al-Kabīr* that the prohibition in the *ḥadīth* also applies to making *ijārah* and *salaf* conditional upon each other. The fact that the prohibition is not restricted to *bayʿ per se* but, rather, includes other exchange contracts is reinforced by al-Ḥaṭṭāb (1995, p. 146) in *Mawāhib al-Jalīl* as follows:

كل عقد معاوضة لا يجوز أن يقارنه السلف

It is not permitted to make *salaf* conditional upon any other exchange contract (*ʿaqd muʿāwaḍah*).

Based on the explanations above, it can be deduced that the prohibition does not merely apply to an arrangement in which a sale contract is made conditional upon a loan contract and vice-versa. Rather, it is also applicable to *ijārah* and other exchange contracts. The reason for this is that combining exchange contracts with *salaf* and making their execution conditional upon each other will produce the same consequences as making *bayʿ* and *salaf* conditional upon each other.

Effective cause for the prohibition of combining bayʿ and salaf

The prohibition is derived from the *ḥadīth* narrated by ʿAbdullāh ibn ʿAmr, as mentioned earlier. Jurists have elaborated that the effective cause of the prohibition of *bayʿ* and *salaf* is the stipulation making the sale (or other exchange contract) conditional upon the loan contract and vice-versa.

It is clear that the prohibition arises when the execution of those two contracts are made conditional upon each other (*ʿuqūd mutaqābilah*). However, if the loan and sale contracts are combined in a single structure, yet their respective executions are independent of each other, and there are no conditions imposed for it (*ʿuqūd mujtamiʿah*), then such combination is permitted. This is concurred by Imam Al-Māwardī (1994, p. 351) as follows:

لأن البيع بانفراده جائز، والقرض بانفراده جائز، واجتماعهما معا من غير شرط جائز، وإنما المراد بالنهي بيع شرط فيه قرض . وصورته أن يقول: قد بعتك عبدي هذا بمائة على أن تقرضني مائة، وهذا بيع باطل وقرض باطل لأمور منها: نهي النبي - صلىالله عليه و سلم - عنه

[. . .]because sale on its own is permissible, and loan on its own is permissible and to combine them together without any conditions is permitted. What is actually prohibited in the *ḥadīth* is a sale contract with a stipulation of a loan. An example of it is when someone says, "I sell you my slave at the price of 100 *on the condition* that you lend me 100". *The sale contract and the loan contract are both invalid* for a number of reasons, among them that the Prophet (peace be upon him) prohibited it.

A reason behind the prohibition of such arrangement is that it may lead to *ribā*. Al-Qarāfī (2010, p. 273) mentions this in *al-Furūq* as follows:

مَا أَجْمَعُوا عَلَى سَدِّهِ أَيْ إعْمَالِ حُكْمِهِ ... وَالْمَنْعُ مِنْ الْبَيْعِ وَالسَّلَفِ مُجْتَمِعَيْنِ خَشْيَةَ الرِّبَا وَجَوَازُ هُمَا مُفْتَرِقِينَ

It is agreed [by scholars] that [it is necessary] to prevent any acts [that will lead to a prohibited act]. [An example is] prohibiting sale and loan combined [in a single transaction] for fear of [engaging] in *ribā* while permitting them when transacted separately.

Therefore, it can be understood that the prohibition in the above *ḥadīth* is because the execution of one of the contracts involved is made dependent (conditional) on the execution of the other. This is evident in all of the jurists' explanations of the meaning for the prohibition of *bayʿ wa salaf* in which the two contracts are interlinked with one another. Based on the observation of jurists' views, such prohibition is justified on the basis of the following rationales:

The conditional arrangement leads to ribawī transactions via permitted contracts. This is the opinion of Ibn al-Qayyim (2007, p. 1698). It corresponds with Al-Māwardī's explanation above that *bayʿ* is permitted on its own and *salaf* is permitted on its own and that the prohibition only arises when the execution of one is made conditional upon the other. This is because it is most likely that such arrangement has been devised to allow the lender to gain benefit from the loan. In other words, the contracting parties will engage in a *ribawī* transaction by combining contracts that are permitted individually. This will negate

the nature of the loan, for which there should be no stipulation of an additional amount to be returned to the lender on top of the amount that the borrower has borrowed. Additionally, benefits of various forms to be exclusively enjoyed by the lender should not be derived from the act of giving the loan. Any stipulated benefit exclusive to the lender will be deemed as the *ribā* that is prohibited in Islam.

Ibn al-Qayyim (2018, p. 620) in *Ighāthat al-Lahfān* reiterated the same reason for the prohibition of *bayʿ* and *salaf* as follows:

وحرم الجمع بين السلف والبيع: لما فيه من الذريعة إلى الربح في السلف بأخذ أكثر مما أعطى، والتوسل إلى ذلك بالبيع أو الإجارة، كما هو الواقع

Combining loan and sale in a contract is prohibited as it will lead to gaining profit from the loan by getting more than one gave. This is achieved by executing a sale contract or lease contract [and making the loan contract conditional upon it] as is occurring now.

In *Tahdhīb as-Sunan*, Ibn al-Qayyim (2007, p. 1708) further explained concerning this matter as follows:

وأما السلف والبيع، فلأنه إذا أقرضه مائة إلى سنة، ثم باعه ما يساوي خمسين بمائة، فقد جعل هذا البيع ذريعة إلى الزيادة في القرض الذي موجبه رد المثل، ولولا هذا البيع ما أقرضه، ولولا عقد القرض لما اشترى ذلك منه

As for [the prohibition of combining] *salaf* and *bayʿ*, it is because, if someone lends 100 to a person to be repaid after one year and then sells him something worth 50 for 100, he has made the sale contract a means to increase the [repayment of the] loan amount. But the obligation [in a loan] is that the same amount be returned. If not for this sale, the lender would not have provided the loan; and if not for the loan contract, the borrower would not have purchased from [the lender].

From the above explanation, it is clear that this prohibition is to prevent arrangements that enable the contracting parties to engage in usurious transactions via permissible contracts. Undeniably, there are benefits derived by stipulating that the loan contract shall only be executed on the condition that the sale contract occurs first or vice versa. These benefits fall under the category of *ribā* as per the indication of the following *ḥadīths*:

كل قرض جر منفعة فهو وجه من وجوه الربا

Every loan which generates benefit is one of the many types of *ribā* (Al-Bayhaqī, 2003, p. 573).

كل قرض جر منفعة فهو ربا

Every loan which generates benefit is *ribā* (Al-Zaylaʿī, 2008, p. 60).

Jurists have deliberated in a very detailed manner on the prohibited types of benefits derived from loans. The discussion can be summarized as follows:

كل قرض جر منفعة زائدة متمحضة مشروطة للمقرض على المقترض أو في حكم المشروطة فإن هذه المنفعة ربا

Every loan that generates an additional benefit that is stipulated exclusively for the lender upon the borrower, or is tantamount to a stipulation, such a benefit is *ribā* (Al-ʿImrānī, 2010, p. 310).

Allowing *bayʿ* and *salaf* to be made conditional upon each other would enable the loan to generate benefit additional to the loan amount for the enjoyment of the lender. This entitlement is tantamount to usury. An example of such a benefit is a lender's stipulation that the borrower must purchase something from him at a higher price than usual on top of the loan he gets. Another is that the lender is able to purchase something from the borrower

at a lower price because of the loan that he extends. It is most likely that the sale transaction would not happen if the loan contract was not executed first. Hence, it can be concluded that it is prohibited to intentionally arrange *bayʿ* and *salaf* together to gain benefit from extending the loan as it opens the door to *ribā*.

This rationale for the prohibition is germane to the previously mentioned juristic discussion on whether the prohibition extends to combining a loan with other exchange contracts. The same concern of added benefit arises when *salaf* is conditionally linked with other exchange contracts such as *ijārah*. It can thus be understood that the term *bayʿ* mentioned in the *ḥadīth* comprises all other exchange contracts and not just *bayʿ per se*. This is evident in the scenario presented by Ibn Qudāmah where a loan is combined with *ijārah*.

However, there is an opinion in the Ḥanafī School which seems to allow a combination between a sale and loan that is termed *al-bayʿ bi al-muʿāmalah*. This matter was discussed by Ibn ʿĀbidīn (2003, pp. 396-397) in *Radd al-Muḥtār* in the text below whereby he elaborated on the issue based on two situations.

قَوْلُهُ يَجُوزُ وَيُكْرَهُ) أَيْ يَصِحُّ مَعَ الْكَرَاهَةِ وَهَذَا لَوْ الشِّرَاءُ بَعْدَ الْقَرْضِ لِمَا فِي الذَّخِيرَةِ، وَإِنْ لَمْ يَكُنْ النَّفْعُ مَشْرُوطًا فِي الْقَرْضِ،) وَلَكِنْ اشْتَرَى الْمُسْتَقْرِضُ مِنْ الْمُقْرِضِ بَعْدَ الْقَرْضِ مَتَاعًا بِثَمَنٍ غَالٍ، فَعَلَى قَوْلِ الْكَرْخِيِّ لَا بَأْسَ بِهِ، وَقَالَ الْخَصَّافُ: مَا أُحِبُّ لَهُ ذَلِكَ، وَذَكَرَ الْحَلْوَانِيُّ أَنَّهُ حَرَامٌ، لِأَنَّهُ يَقُولُ لَوْ لَمْ أَكُنْ اشْتَرَيْتُه مِنْهُ طَالَبَنِي بِالْقَرْضِ فِي الْحَالِ، وَمُحَمَّدٌ لَمْ يَرَ بِذَلِكَ بَأْسًا، وَقَالَ خُوَاهَرْ زَادَهْ: مَا نُقِلَ عَنْ السَّلَفِ مَحْمُولٌ عَلَى مَا إذَا كَانَتْ الْمَنْفَعَةُ مَشْرُوطَةً، وَذَلِكَ مَكْرُوهٌ بِلَا خِلَافٍ.

وَمَا ذَكَرَهُ مُحَمَّدٌ مَحْمُولٌ عَلَى مَا إذَا كَانَتْ غَيْرَ مَشْرُوطَةٍ، وَذَلِكَ غَيْرُ مَكْرُوهٍ بِلَا خِلَافٍ، هَذَا إذَا تَقَدَّمَ الْإِقْرَاضُ عَلَى الْبَيْعِ، فَإِنْ تَقَدَّمَ الْبَيْعُ بِأَنْ بَاعَ الْمَطْلُوبُ مِنْهُ الْمُعَامَلَةَ مِنْ الطَّالِبِ ثَوْبًا قِيمَتُهُ عِشْرُونَ دِينَارًا بِأَرْبَعِينَ دِينَارًا ثُمَّ أَقْرَضَهُ سِتِّينَ دِينَارًا أُخْرَى، حَتَّى صَارَ لَهُ عَلَى الْمُسْتَقْرِضِ مِائَةُ دِينَارٍ، وَحَصَلَ لِلْمُسْتَقْرِضِ ثَمَانُونَ دِينَارًا ذَكَرَ الْخَصَّافُ أَنَّهُ جَائِزٌ، وَهَذَا مَذْهَبُ مُحَمَّدِ بْنِ سَلَمَةَ إمَامِ بَلْخٍ، وَكَثِيرٍ مِنْ مَشَايِخِ بَلْخٍ كَانُوا يَكْرَهُونَهُ، وَيَقُولُونَ إنَّهُ قَرْضٌ جَرَّ مَنْفَعَةً إذْ لَوْلَاهُ لَمْ يَتَحَمَّلْ الْمُسْتَقْرِضُ غَلَاءَ الثَّمَنِ، وَمِنْ الْمَشَايِخِ مَنْ قَالَ: يُكْرَهُ لَوْ كَانَا فِي مَجْلِسٍ وَاحِدٍ وَإِلَّا فَلَا بَأْسَ بِهِ لِأَنَّ الْمَجْلِسَ الْوَاحِدَ يَجْمَعُ الْكَلِمَاتِ الْمُتَفَرِّقَةَ، فَكَأَنَّهُمَا وُجِدَا مَعًا فَكَانَتْ الْمَنْفَعَةُ مَشْرُوطَةً فِي الْقَرْضِ، وَكَانَ شَمْسُ الْأَئِمَّةِ الْحَلْوَانِيُّ يُفْتِي بِقَوْلِ الْخَصَّافِ وَابْنِ سَلَمَةَ، يَقُولُ: هَذَا لَيْسَ بِقَرْضٍ جَرَّ مَنْفَعَةً بَلْ هَذَا بَيْعٌ جَرَّ مَنْفَعَةً وَهِيَ الْقَرْضُ اهـ مُلَخَّصًا.

In essence, the text explains that the first situation is when the debtor buys something from the creditor after the execution of the loan at a price higher than its normal market rate. With regard to the first situation, the author opined that it is permitted yet abhorred. Al-Karkhī also supported this ruling and viewed that such an arrangement is not prohibited. The reason for the permissibility (although it is abhorred) is because the executed contracts are not made conditional upon each other and no conditions are stipulated for the execution of the loan contract. In fact, the sale contract is executed after the conclusion of the loan contract. Thus, it can be regarded that the two contracts are executed separately and independently and this does not fall under the prohibition.

The second situation is when *bayʿ* is executed first and then *salaf* is transacted after *bayʿ*. An example is when a seller sells something at RM40 (when the market price is RM20). Then the very same seller plays the role of a creditor by providing a loan amounting to RM60 to the same buyer, who becomes his debtor. Such an arrangement will result in the debtor (buyer) owing the creditor (seller) RM100 although the debtor has only acquired the equivalent of RM80 (the market value of the object of sale + the loan), thus enabling the lender to gain an extra RM20 from the transactions. Al-Khaṣṣāf and Muḥammad ibn Salamah, the imam of Balkh, opined that it is permissible to execute contracts in such a manner. Ibn Salamah, in particular, justified this arrangement by arguing that it is not a loan contract with added benefit but, rather, a sale contract with added benefit, the benefit being the loan contract. However, all the other jurists of Balkh abhorred it and considered it to still be a loan contract with added benefit. They argued that, if the buyer was not expecting the loan, he would not agree to pay the increased price for the object of sale.

Upon analyzing the debate above, it can be deduced that the difference of opinion arises from the lack of conditionality between these two contracts. Each contract is executed separately and independently, but they are executed consecutively. Some jurists made a distinction between execution in separate sessions, which they allowed, and execution in the same session, which they prohibited.

Ambiguity in the contracts involved. A second rationale for the prohibition is that such conditional arrangement leads to the price of the subject matter becoming unknown (جهالة الثمن). This is the opinion of Imam al-Shāfiʿī as mentioned by Al-Māwardī (1994, p. 351):

> وَذَاكَ أَنَّ الْبَائِعَ إذَا شَرَطَ لِنَفْسِهِ قَرْضًا صَارَ بَائِعًا سِلْعَتَهُ بِالثَّمَنِ الْمَذْكُورِ وَبِمَنْفَعَةِ الْقَرْضِ الْمَشْرُوطِ، فَلَمَّا لَمْ يَلْزَمِ الشَّرْطَ سَقَطَتْ مَنْفَعَتُهُ مِنَ الثَّمَنِ، وَالْمَنْفَعَةُ مَجْهُولَةٌ، فَإِذَا سَقَطَتْ مِنَ الثَّمَنِ أَفْضَتْ إلَى جَهَالَةٍ نَافِيَةٍ وَجَهَالَةُ الثَّمَنِ مبطلة للعقد.
>
> This is because, if the seller imposes a condition that he also provide a loan, he will be selling the object of sale for the stated price as well as the benefit of the stipulated loan. If the condition is not fulfilled, the benefit will drop from the price, and this benefit is unknown [in its extent]. Thus, if the benefit drops from the price, it leads to obscurity that negates [the requirement that the price be known], and the unknown price will invalidate the contract.

From the above explanation, it is clear that making *salaf* as a condition to *bayʿ* or vice-versa can cause uncertainty in the sale price of the subject matter transacted. The reason is, in addition to the agreed amount, the sale price is also comprised of the unquantifiable benefit derived from the conditional loan, which makes the actual price unknown. This ambiguity results from making these contracts conditional upon each other. Such obscurity is among the many elements that may render a contract invalid. Ibn Rushd al-Ḥafīd (1994, p. 285) opined likewise as he classified the issue of *bayʿ* and *salaf* under the topic of transactions prohibited because of deception caused by uncertainty.

Preservation of the essential nature of the contracts involved (muqtaḍā al-ʿaqd). Another reason for the prohibition is that the arrangement will most likely lead to the negation of the essence of either of the contracts involved. The essential nature of *bayʿ* is an exchange contract. The essence of such a contract is that each contracting party gives up something of material benefit to acquire something of material benefit from the counterparty. *Salaf*, on the other hand, is a contract predicated on benevolence and empathy towards someone who is in need of money. This kindness engenders the obligation upon the debtor to return the same amount to the lender at a later date without decrease or increase. As the nature of *salaf* is based on goodwill and benevolence, there should be no stipulated benefit from the loan for the enjoyment of the lender. Such a stipulation will be tantamount to *ribā*. Arranging for *bayʿ* to be conditional upon the *salaf* contract or *salaf* to be conditional upon the *bayʿ* contract is likely to open up avenues for the lender to gain benefit from the loan. This occurs by formally embedding a portion of the gain from the loan in the *bayʿ* for the benefit of the lender. This negates the original nature of *salaf* and invalidates it, together with the *bayʿ* that has been linked to it.

From the above discussion, it can be concluded that if *bayʿ* and *salaf* are not made conditional upon each other and the execution of both contracts is done independently – thus not negating the essence of each individual contract – then it is permissible for such contracts to be combined.

In conclusion, all the reasons stated above are sufficient in comprehending the rationale for the prohibition of *bayʿ* and *salaf*, with the avoidance of usurious transactions being the major reason.

Consequences of the prohibition of combining bayʿ and salaf. Jurists have also deliberated on the consequences of arranging *bayʿ* and *salaf*, should the arrangement fall under the prohibition as stated by the Prophet (peace be upon him). Imam Al-Māwardī

(1994, p. 351) is of the opinion that both contracts, *bayʿ* and *salaf*, are invalid (*bāṭil*) as this conditional combination falls under the Prophet's (peace be upon him) explicit prohibition of such arrangement. It is further reinforced by the prohibition of stipulating conditions in a sale contract (*bayʿ* and *sharṭ*) and the prohibition of a loan that generates added benefit for the lender. However, Ibn Qudāmah (1997, p. 334) mentioned that Imam Mālik considered the sale contract to be valid if the condition linking it to *salaf* is removed by the stipulator. Thus, if such an arrangement of the prohibited *bayʿ* and *salaf* occurs, it is considered a *fāsid* (voidable) contract as it involves stipulating a contract in the execution of another contract (*ishtirāṭ ʿaqd fī ʿaqd*). Additionally, the prohibition arises not from the prohibition of the loan contract itself – as the original ruling of a loan contract is permissibility – but the prohibition is on making the execution of the sale contract conditional upon a loan contract and vice versa. Therefore, if the condition is removed, the sale contract will be deemed valid.

Potential incidents in Islamic banking products which might trigger the issue of *bayʿ wa salaf* and Sharīʿah analysis on the incidents

The complexities of financial needs have amplified as time goes by because of the ever-changing requirements of life, whether for individuals or businesses. With such complexities, banking products are often structured to address the needs of customers.

For Islamic banking products, the distinctive feature of their structures is that the underlying contracts must not contradict with Sharīʿah principles. That means the contracts must be devoid of *ribā* (usury), *gharar* (excessive uncertainty), *maysir* (gambling), deception and other prohibited elements. In structuring Islamic banking products, the element of *bayʿ wa salaf* must also be avoided in accordance with the general prohibition of it by the Prophet (peace be upon him). This clear-cut prohibition on making the two contracts conditional upon each other is definitely understood by bankers; thus, they avoid making such arrangement when structuring Islamic banking products. The prohibition must be understood in light of the parameters derived from jurists' deliberation on the precise meanings of the Prophet's statements. However, there are still grey areas in the mechanism of Islamic banking products whereby the element of *bayʿ* and *salaf* apparently exists in the structure. Such arrangements need to be further analyzed to determine whether they fall under the prohibition. As the earlier discussion made clear, not all *bayʿ* and *salaf* arrangements fall under the category of prohibition.

This understanding is highlighted in the Qard Policy Document (QPD) issued by Bank Negara Malaysia (BNM) (2018). Islamic banks that use *qarḍ* (loan) as the underlying contract for some of their product offerings have to comply with the QPD. In the QPD, there is a clause stating that the *qarḍ* contract may be arranged with an exchange contract subject to the following paragraph, which states that *bayʿ wa salaf* is prohibited where such arrangement results in:

- inter-conditionality and contingency between the exchange contract and *qarḍ* contract; and
- the borrower provides contractual benefit exclusively to the lender.

The resolution issued by the Shariah Advisory Council (SAC) of Bank Negara Malaysia (BNM) in its 176th meeting on 24 May 2017, which deliberated on the issue of 'Combination of Exchange Contract with Loan Contract (*Bayʿ Wa Salaf*)', also reiterated the same point. The SAC mentioned the provisions of inter-conditionality and added benefit to the lender, but it added another consideration. The resolution explained that in case the loan is an intended (not incidental) contract and is combined with an exchange contract that gives exclusive benefit to the lender, it is also regarded as the prohibited *bayʿ wa salaf*. This is so

even though there is no explicit provision on inter-conditionality and contingency between the two contracts.

Structures of Islamic banking products that might resemble *bayʿ wa salaf*

In this section, we first explain the structures of Islamic banking products and services in which the arrangement of *bayʿ wa salaf* might exist. The Sharīʿah analysis to determine the ruling on the products will be delineated in the next section.

Tawarruq-based structures used for financing

Tawarruq is also known as commodity *murābaḥah* in some practices by the banks. Normally, the steps as stipulated in Table I will be involved for financing products that are structured using the principle of *tawarruq*.

It is observed from the steps above that the element of *bayʿ wa salaf* may resemble the description in the following instance (Table II).

Below are some of the *tawarruq*-based products where the above *bayʿ wa salaf* arrangement is applied and it can be better understood by considering the purpose of financing.

Home financing-i and other term financing products

Home financing-i is among the products that banks offer for the purpose of financing home buyers. It is used for both completed homes and houses under construction. The proceeds generated from the sale of the commodity, as explained in Step 5 in Table II, will be used to pay the purchase price of the house. For this purpose, the customer as the owner of the proceeds agrees to emplace such proceeds in their financing account for disbursement/payment by the bank to the developer as per the agreed terms and conditions.

In the case of financing for completed property, the bank holds the proceeds for a while before making full disbursement to the developer. This holding gap normally occurs

Step	Details
1	Customer approaches the bank applying for financing facility
2	Once approved, the bank purchases commodity from commodity trader 1
3	Upon purchase of commodity from commodity trader 1, the bank is the owner of the commodity
4	As the owner, the bank sells the commodity to the customer at the bank's selling price based on *murābaḥah* (cost-plus-profit). The customer will pay the bank's selling price on a deferred payment basis
5	Upon sale of the commodity, the customer is then the commodity owner. As per agreed upfront in the Facility Agreement (prior to the execution of commodity *murābaḥah* trading), the bank shall act as an agent to the customer and sell the commodity to commodity trader 2 on spot basis at cost price The proceeds of the sale will be channelled to the customer's designated account **Wakālah* occurs here *Relationship between bank and customer* Bank = Agent of customer Customer = Principal
6	Customer pays the bank's selling price based on the agreed schedule and instalment

Source: Authors' own

Table I.
Structure for *tawarruq*-based financing

Contract	Explanation
Bayʿ	*Step 4* As the owner, the bank sells the commodity to the customer at the bank's selling price based on *murābaḥah* (cost-plus-profit). The customer will pay the bank's selling price on a deferred payment basis. *Relationship between bank and customer in bayʿ* Bank: Seller Customer: Buyer
Salaf	*Step 5* Upon sale of the commodity, the customer is then the commodity owner. As per agreed upfront in the Facility Agreement (prior to the execution of commodity *murābaḥah* trading), the bank shall act as an agent to the customer and sell the commodity to commodity trader 2 on spot basis at cost price. *The proceeds of the sale will be channelled to the customer's designated account.* In the event that the customer's designated account is based on *salaf/qard*, the arrangement of *bayʿ wa salaf* can be observed in this structure. *Salaf/qarḍ* is the underlying contract that justifies the bank's use of the proceeds for its usual business. Utilization by the bank will normally occur if it is held by the bank for more than a day. Depending on the type of financing, the *salaf/qarḍ* will be transacted by conduct or by proper documentation such as opening of an account. *Relationship between bank and customer in salaf* Bank: Borrower Customer: Lender

Source: Authors' own

Table II.
Bayʿ and *salaf* in *tawarruq*-based financing structures

because the bank requires a few days or weeks to complete the documentation necessary for disbursement.

As for financing of property under construction and project/contract-based financing, the proceeds will be held by the bank for two to three years for the purpose of progressive disbursement to the developer. This is because, for property under construction, the developer requires capital from time to time to bear the construction cost. Thus, the bank will not disburse the total financing amount in a lump sum. Instead, the sum will be disbursed progressively based on the claims submitted by the developer with verification made by certified architects of the construction work that has been completed. The developer and customer have agreed with such payment schedules that, among others, include the number of payments to be made, the gap between those payments, the amount for the respective payments and their due date. The bank will then simply ensure that these payments are made directly to the developer as stipulated in the schedule.

The arrangement of *bayʿ wa salaf* can also be seen in other term financing products where the customer's money is held by the bank for at least more than a day after *tawarruq* is completed such as in car financing-i and share margin financing-i. In most cases of these types of financing, the *salaf* (also known as *qarḍ*) is transacted by conduct on the ground that the customer agrees for the proceeds to be held by the bank.

Cash line-i, credit card-i and personal financing-i

Cash line-i is a type of demand facility that is offered by banks to enable customers to withdraw more money than they have in their accounts (current accounts). This is made possible by making reference to the facility limit that has been determined by the bank for the customer. This facility is also commonly known as an overdraft facility. Generally, cash

line-i is granted for the purpose of financing working capital or purchasing assets/commodities or for personal consumption. The distinctive feature of a cash line is that the customer can draw down any amount that he wishes to use as long as it is within the facility limit granted to him.

Tawarruq is used to create the approved facility limit for a particular customer. Upon completion of Step 5 above, the sale proceeds will be held in the customer's current account, which is normally based on the *qarḍ* contract. Disbursement to the customer will then be made based on the customer's utilization in the form of cash withdrawals or issuance of cheques or other methods. The customer may draw down the proceeds at any point of time as per the terms and conditions agreed with the bank, and no restrictions are imposed on the customers' utilization so long as it is within the facility limit.

However, there are also instances when the customer uses more than the facility limit granted, which is often known as "excess". Each morning, respective branches shall check on cash line's customers who are in excess, and the branches shall decide whom to grant the amount to cover for their excess during that short time period. This is done at the bank's discretion, and there is no guarantee that the bank will advance its money to the customer each time he/she is in excess. Usually, customers who are in excess will receive a call from the bank informing them that they are in excess and that the bank shall cover the excess amount. The customer is expected to pay that particular amount within the day. The underlying Sharīʿah contract during the period that the bank provides such cover can be considered as *qarḍ*, as it is a mere grant of money to help the customer during that particular period of excess.

Credit card-i on the other hand – which has more or less similar objectives and features with cash line-i facility – also uses *tawarruq* in creating the customer's facility limit approved by the bank. The sale proceeds held by the bank are considered a loan to the bank from the customer. At the same time, the bank is deemed the paying agent for the customer for any transaction done via its credit card-i. For example, in the case of the customer making a purchase, the bank as paying agent will pay the purchase price to the respective merchant by deducting the amount under the limit.

As for personal financing-i, the sale proceeds will be credited into the customer's existing account with the bank, or if the customer is new to the bank, the customer is required to open a new account for the proceeds to be channelled to him/her. In opening a new account, customers may opt for either *qarḍ* or investment-based accounts.

Tawarruq-based structures for deposit/placement

An overview on the mechanism of *tawarruq*-based deposit/placement is as described in Table III.

The element of *bayʿ wa salaf* might exist in the following manner in which *salaf* comes first as compared to the arrangement in the *tawarruq*-based financing where *salaf* takes place after *bayʿ*, as illustrated in Table IV.

An example of the *tawarruq*-based deposit product is the fixed deposit-i as explained below.

Fixed deposit-i

Fixed deposit-i is among the many products offered by banks to their customers. Generally, fixed deposit-i is a financial instrument offered by banks that provides placements with a fixed return for a given maturity date. Islamic fixed deposit generates fixed return that is Sharīʿah-compliant to the customers because of the underlying contract being *tawarruq* rather than lending. Thus, the return is justified through the profit attained via the act of sale and purchase of asset.

However, there are times when placements are made after the cut-off time set for *tawarruq* transactions. For example, some banks put 11 a.m. each day as the cut-off time. Hence, for each placement made after the cut-off time, the trading for the commodity will be done on the next working day. In this situation, theoretically, the bank which acts as the agent for the customer will then need to hold the customer's money based on trust until the bank is able to execute the *tawarruq* transaction. However, in actual practice, the bank will not merely hold the customers' money on trust until they are able to do *tawarruq*. In other words, the bank will not merely leave the money idle within the bank. Instead, the bank will use or invest the money even though the holding is only for a very short period of time, i.e. overnight. Thus, this changes the basis for the bank in holding the customers' money – from holding the money on trust basis to *qarḍ*, as the bank uses the money. Thus, the arrangement of *bayʿ wa salaf* exists when the customer acts as the lender while waiting for the *tawarruq* transaction to be executed and then as a seller upon the sale of commodity to the bank.

Step	Details
1	The customer places money with the bank
2	The bank as agent for the customer purchases a commodity from commodity trader 1 at a cost price that equates to the placement amount
3	Upon purchase of commodity by the bank, the customer (as the owner of the commodity) then sells that commodity to the bank at a selling price comprising cost-plus-profit to be paid by the bank at a later date, which is at the end of the agreed tenure
4	The bank (as the owner of the commodity) will then sell the commodity to commodity trader 2 at a price that equates to the amount placed by the customer for the bank to use during the placement period

Source: Authors' own

Table III. Structure for *tawarruq*-based deposits/placements

Contract	Explanation
Salaf	*Step 1* *The customer places money with the bank.* In most cases, the purchase of commodity will only take place on the next business day. Thus, the money will be held by the bank on a *qarḍ* basis and will thus be used by the bank for its usual banking business. *Relationship between bank and customer in salaf* Bank: Borrower Customer: Lender
Bayʿ	*Step 3* *The customer then sells that commodity to the bank* at a selling price comprising cost-plus-profit to be paid by the bank at a later date, which is at the end of the agreed tenure. *Relationship between the bank and customer in bayʿ* Bank: Buyer Customer: Seller

Source: Authors' own

Table IV. *Bayʿ* and *salaf* in *tawarruq*-based deposit/placement structures

Fee-based structures

Briefly, they refer to services offered by the bank in exchange for fees to be paid by the customer. The issue of *bayʿ wa salaf* arises when *qarḍ* is also offered to the customer at the same time. This mechanism will be further explained in the following products.

Fee-based credit card-i

The customer applies for credit card-i to enjoy all services, benefits and privileges provided under the card in exchange for the payment of a fixed fee called the Fixed Monthly Management Charge (FMMC), which uses the principle of *ujrah* (fee). The FMMC (some banks may use different names) is charged as a fixed amount, with the quantum being in accordance with the card type: Classic, Gold, Platinum, World Class or other. These different cards offer different types and number of services, benefits and privileges including, among others, advances made by the bank to be used by customers upon retail purchases, cash withdrawals, balance transfer or any other mode of utilization determined by the bank.

When the customer makes a retail purchase from any merchant, the bank will advance its money to pay the purchase price to the merchant and then bills the customer for settlement of the same amount. The advance made by the bank is considered *qarḍ* granted to the customer and he/she has an obligation to settle the debt. Similarly, when a customer withdraws cash from an ATM or OTC with no balance to cover it, the amount will be deemed a *qarḍ* to the customer.

The element that may resemble *bayʿ wa salaf* in *ujrah*-based credit cards-i can be described as in Table V.

Ar-Rahn

In the Malaysian context, *ar-rahn* or *ar-rahnu* (Islamic pawnbroking) refer to a type of micro-financing facility, whereby customers pledge their valuable assets or goods to get a loan from the bank. The loan granted is based on *qarḍ* while the pledge given is based on *ar-rahn* (pledge) contract. Normally, gold or jewelleries are the most acceptable pledged assets because of their value.

The bank will then impose a fee for its service in safe-keeping the pledged assets. The fee is normally calculated based on the value of the pledged asset and the tenure for the pledged asset to be safe-kept by the bank. The fee is to be paid upfront to the bank or according to another payment method agreed with the bank. When the customer pays back the loan on the maturity date of the facility, the pledge will then be released and the

Contract	Explanation
Bayʿ	Fixed fee paid by the customer for the services, benefits and privileges provided under the card. *Relationship between the bank and customer in bayʿ* Bank: Seller Customer: Buyer
Salaf	Advances by the bank to be used upon retail purchases, cash withdrawals, balance transfer, among others. *Relationship between the bank and customer in salaf* Bank: Lender Customer: Borrower

Table V.
Bayʿ and *salaf* in Fee-Based credit card-i structures

Source: Authors' own

bank will return the pledged asset to the customer. If the customer fails to repay the loan, the bank has the right to liquidate the pledged asset and use the proceeds to settle the loan. If there is any excess after liquidation of the pledged asset, the amount shall be given to the customer.

The element that may resemble *bayʿ wa salaf* in *ar-rahn* facility can be described as per Table VI.

Bank guarantee-i

The bank provides bank guarantee-i or any other types of guarantee facility by way of *kafālah* (guarantee). In a business deal, this facility will benefit the buyer in the form of a guarantee provided by the bank to pay a sum of money to the seller or beneficiary in the event the buyer does not fulfil the stipulated obligations under the contract or the performance criteria are not met. The bank then has the right to have recourse from the buyer for any payment it has made to the beneficiary in the case of non-performance. If the seller is a customer of the bank for the bank guarantee-i facility, such payment made by the bank can be construed as *qarḍ* to the customer.

Kafālah in its original form is considered one of the many *tabarruʿāt* (unilateral benevolent) transactions. However, the current practice allows fees to be charged for providing *kafālah* or guarantee service because of its economic value. Thus, this makes *kafālah* to be categorized under fee-based services.

The element that may resemble *bayʿ wa salaf* in the bank guarantee-i facility can be described as in Table VII.

Sharīʿah analysis on the products that might resemble *bayʿ wa salaf*

The analysis will be guided by the following factors.

Existence of a conditional element in the arrangement of bayʿ wa salaf

Analysis of the jurists' discussion in previous sections depicted that the existence of a conditional element in the *bayʿ wa salaf* arrangement is the main reason for its prohibition. If a sale or any other exchange contract is made conditional upon a loan contract or vice-versa, the ruling of prohibition prevails. The analysis also suggested that the presence of the conditional element should be measured by the following acceptable parameters:

Contract	Explanation
Salaf	Loan from the bank to the customer when customer pledges his asset. *Relationship between the bank and customer in salaf* Bank: Lender Customer: Borrower
Bayʿ	In return for the bank's service in safe keeping the pledged asset, an agreed fee is paid by the customer to the bank *Relationship between the bank and customer in bayʿ* Bank: Seller Customer: Buyer

Source: Authors' own

Table VI.
Bayʿ and *salaf* in *ar-rahn* structures

- that the arrangement of *bayʿ wa salaf* involves a verbal understanding between the parties (*muwāṭaʾah*) to realize benefits for the lender because of the loan he has provided, which may tantamount to *ribā*;
- that the exchange contract involved in the arrangement is affected by ambiguity; and
- that the essential nature of at least one of the respective contracts is negated as a result of the arrangement.

The execution of *bayʿ* and *salaf* in the identified *tawarruq* and fee-based banking products or services is made in sequence whereby *salaf* only happens after the *bayʿ* is concluded or vice versa. This brings about the understanding that both contracts are executed independently, regardless of whether *salaf* is performed by conduct or is supported by proper documentation. This in turn means that the completion status for the execution of each contract does not depend on the other. There is also transfer of ownership of the subject matter in the *bayʿ* with consideration in return, and the customer is able to take out his money as and when he/she wishes, with the bank guaranteeing the amount because of its liability as a result of the *salaf*. Thus, the essence of both *bayʿ* and *salaf* is duly preserved, thus bringing about the expected consequences – rights and liabilities – of each respective contract.

The practice is also far from ambiguity with respect to the price of commodity for the *murābaḥah* sale contract or the fee charged for the bank's service. The methodology to calculate the price and fee has been disclosed to and agreed by the customer prior to him/her entering into the contract. Besides stating the price and fee in the letter of offer of each facility, the explanation on the calculation method is also mentioned in the product disclosure sheet of each facility. The product disclosure sheet is a document required by the regulatory authorities to be given to the customer. The customer is deemed to be aware of the disclosure made and agreeable with it when he signs the documents. Thus, the issue of ambiguity does not arise.

Regarding the lender attaining added benefit for extending the *salaf*, it may occur in some scenarios. In the case of *tawarruq*-based home financing-i, cash line-i and credit card-i, normally, the amount that has yet to be disbursed by the bank will be used as a benchmark for rebate calculation on the bank's sale price. In other words, the customer will pay a lesser amount of the bank's sale price if there is still some amount being held in the customer's account pending its disbursement or utilization. As the customer is the lender in these *tawarruq*-based facilities, the rebate on the bank's sale price could be perceived as a benefit to the customer. However, this fact might be challenged by the other fact that the rebate is

Contract	Explanation
Salaf	Payment by the bank to the beneficiary as agreed by the customer and the bank. *Relationship between the bank and customer in salaf* Bank: Lender Customer: Borrower
Bayʿ	Fee paid by the customer to the bank for providing the guarantee regardless of payment made by the bank to the beneficiary or otherwise. *Relationship between the bank and customer in bayʿ* Bank: Seller Customer: Buyer

Table VII.
Bayʿ and *salaf* in bank guarantee-i structure

Source: Authors' own

discretionary in nature. There is a possibility for the lender/customer to receive the rebate, or he/she may end up paying the bank's sale price in full.

The issue of the lender attaining benefits also does not appear in fee-based banking products or services. The income received by the bank in credit card-i, *ar-rahn* and bank guarantee-i facility – in which the bank is acting as the lender – is purely generated from the services it provided. It should not be considered as a benefit from the loan. The same goes for the *tawarruq*-based deposit and cash line-i facility in the event of excess, where the bank generates its income from the sale price in both situations.

Based on the above, only one issue is left in justifying that the lender attains no contractual benefit. This is whether in practice the rebate granted to the lender is purely at the bank's discretion, or is it compulsory to be granted? Further deliberation might need to be done on this issue, considering that in some cases the authority might want to see that the act of granting rebate is enforceable for the purpose of certainty. Thus, in general, it can be established that the conditional element in those banking products seems to have been avoided – in the context of jurists' parameters above – with only one issue that requires further deliberation.

Incidental salaf/qarḍ

Looking from another perspective, the existence of *salaf* in the product structure can also be considered incidental or secondary to facilitate the manner in which the sale proceeds is disbursed in *tawarruq*-based facilities. For example, in the case of financing for property under construction, the objective is more towards ensuring the amount is successfully paid to the developer for the purpose of owning the property in which it can be best achieved by keeping the amount with the bank for it to make the necessary disbursements. Such practice safeguards the customers' interest regardless of them being the lender or otherwise, so long as the bank fulfils its obligation with regard to the disbursement. The same holds in the case of completed property. The *salaf* occurs incidentally when the amount is held temporarily by the bank pending the completion of disbursement documentation.

As for *tawarruq*-based cash line, if it facilitates the same objective – i.e. is meant for specific disbursement to a third party – then the existence of *salaf* can be considered secondary or unintended. The excess granted by the bank in some cases under this facility can also be construed as incidental as it may or may not occur subject to the bank's discretion.

Thus, by regarding *salaf* as incidental or secondary, the ruling of the *tābiʿ* (auxiliary) can be applied, which in turn makes the arrangement permissible notwithstanding the existence of *bayʿ* and *salaf*. This is based on the following legal maxim:

يغتفر في التوابع ما لا يغتفر في غيرها

Issues may be excused in auxiliaries that are not excused in other things (Al-Suyūtī, 1983, p. 120).

Salaf also occurs incidentally because of the inability of the bank to immediately execute *tawarruq* in the case of fixed deposit-i. There is no doubt that the placement made by the customer is for the purpose of entering into a *tawarruq* transaction and to gain return from the deferred sale price. The bank in this situation will be the borrower. And afterwards it becomes the buyer of the commodity when *tawarruq* is being executed. However, it can be understood that *salaf* is never intended in the product's structure, as its existence is unavoidable because of certain limitations experienced by the bank for *tawarruq* to be transacted on an immediate basis.

In relation to the above, BNM in its Tawarruq Policy Document (TPD) also gives some flexibility where the bank is allowed to use the placement because of reasonable circumstances prior to the execution of *tawarruq*. The TPD states:

> S 25.22 Notwithstanding paragraph 25.21 and pursuant to paragraph 16.16, the IFI as an agent shall be allowed to treat the funds received as *qarḍ* when the IFI is not able to execute the *tawarruq* on the same day because of the following circumstances:
>
> - normal close of business/operation including public holidays and other state holidays;
> - unexpected disruptions to operation e.g. system breakdown, force majeure event, unexpected holiday; or
> - reasonable period required for the processing of *tawarruq* application from the customer which shall be no later than 3 working days from the date that the funds were received, i.e. T+2.

The question that ensues is as follows: To what extent is the customer's money held by the bank on a trust basis acceptable to Sharīʿah? Knowing that money will not be left idle by the bank without "investing" it. This idea proposes that there will be no breach of trust if the customer's money is being used by the bank so long as the money can be made available to the customer when he/she requires it. Breach of trust will only occur if the bank fails to return the money to the customer. This unique situation has a different objective from the bank's saving, deposit or placement products although their nature looks identical.

Conclusion

Jurists' discussions on *bayʿ wa salaf* are mostly on the arrangement of stipulating *bayʿ* in a *salaf* contract or making *salaf* conditional in a *bayʿ* contract. The discussion does not expand to incidents whereby *salaf* is incidental or secondary to *bayʿ*. Thus, there is no clear-cut ruling on such arrangements as evidenced in the mechanism of the relevant Islamic banking products. However, based on their deliberation, acceptable parameters (which are non-exhaustive) have been established which can be used in determining whether a conditional element does exist in the arrangement of *bayʿ wa salaf* in a particular banking product that then may lead to its prohibition.

Each arrangement having an apparent element of *bayʿ* and *salaf* must be examined in the light of these parameters to ensure that it does not fall under the prohibition stated by the Prophet (peace be upon him) in the *ḥadīth*. As for the potential incidents of *bayʿ* and *salaf* in the identified *tawarruq* and fee-based facilities, the structure of each product has been analyzed in accordance with these parameters and other related juristic evidence. Thus, it is found that the arrangement of *bayʿ* and *salaf* in those products is not intended to attain benefits because of the loan provided. The one possible exception is in the issue of the lender getting benefit in the form of rebate, which may require further scrutiny. The essence of the contracts involved is also not negated as a result of the arrangement. Additionally, the case studies showed that the executions of *bayʿ* and *salaf* are made independently from each other and that the arrangement does not lead to uncertainties and deception.

Thus, it can be concluded that the potential incidents of *bayʿ wa salaf* in the relevant Islamic banking products that have been mentioned above do not fall under the prohibited arrangement of *bayʿ wa salaf*; this also takes into consideration other factors influencing the existence of such arrangements.

Some may suggest for the bank to hold the customer's money via investment-based accounts as a solution for *tawarruq*-based financing facilities. The rationale is simply because an investment account is normally backed by *muḍārabah* (profit sharing) or *wakālah* (agency) contracts. This would mean that the arrangement of *bayʿ* and *salaf* would not exist at all. However, it appears to be irrational when on one side, the customer is in need to get cash via financing, while on the other side, he is risking the same cash by putting it in the investment account.

Note

1. Parts of this article have been published by Mohamad and Mahmud (2018). This article is also an enhanced version of a paper presented at the 11th Muzakarah Cendekiawan Syariah Nusantara organized by the International Shari'ah Research Academy for Islamic Finance (ISRA) in collaboration with the Association of Islamic Banking Institutions Malaysia (AIBIM), 16-17 May 2017, Putrajaya, Malaysia.

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