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Fiqhī views on *bayʿ wa salaf* and *qarḍ*-based Islamic banking deposit accounts in Malaysia

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Abstract

Purpose – Islamic banks are obliged to carry out transactions that only comply with Islamic commercial laws. Malaysia has been championing the Sharīʿah-based banking system, and so, continuous improvement on the compliance level of the institutions offering Islamic financial services is key to its global recognition in this industry. One of the issues that can affect deposit products is existence of a sale contract and loan facility in one transaction. Famous prophetic tradition prohibits this. Hence, this paper aims to examine the linkage between *bayʿ wa salaf* (combination between a sale contract and loan in one transaction) and deposits accounts in Malaysia.

Design/methodology/approach – The subject matter of this paper is one that is researchable within library-based research. It is on this premise the research used the non-empirical qualitative research methodology. It used inductive method of analysis of both Islamic and policy documents on Islamic banking in Malaysia. Literature from Islamic jurisprudence, websites of some of the Islamic banks in Malaysia and relevant resolutions from the Shariah Advisory Council of Central Bank of Malaysia were consulted.

Findings – Based on the methodology mentioned above, the researchers arrived at the following findings: that, although there is no juristic disagreement about the prohibition of *bayʿ wa salaf*, disagreement, however, occurs in results of some contracts. The most notable area of agreement on the existence of *bayʿ wa salaf* is when there is express stipulation of sale or rendering of service and express or implied stipulation of loan alongside of the sale or service rendering. In an organized reversed *tawarruq*, the use of these deposits by the banks is regarded as loan from the depositors to the banks, who will soon put the money into sale that will generate profit to be divided between the banks and their depositors. However, this study finds that this is not *bayʿ wa salaf* prohibited by the prophetic tradition.

Originality/value – The originality of this topic is proven by the new banking regulation regime of Malaysia, which compels Islamic banks to guarantee all deposits under them. As Islamic banks carry out their banking activities through trading, there is need to conduct a research such as this. This is to examine whether Islamic banks' unilateral use of depositors' funds in non-investment accounts which is translated, constructively, as loan from the depositors to Islamic banks amounts to *bayʿ wa salaf* before the future *tawarruq*. Here there is loan and sale, which is the *tawarruq*. Hence, the need to do this research.

Keywords *Fiqhī*, *Bayʿ wa salaf*, *Tawarruq*, Deposit accounts

Paper type Research paper

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Introduction

Contemporary Islamic financial institutions (IFIs) are obliged to comply with Islamic commercial laws as well as the regulations of the central bank of their respective jurisdictions. The Malaysian central bank, Bank Negara Malaysia (BNM), issued a policy document titled *Qard* in 2016. Section 22.2 mandates all IFIs in Malaysia to revise all products based on *wadīʿah yad ḍamānah* (savings with guarantee) to *qarḍ* (loan) by 31 July 2018. This will affect deposit accounts. The bank, as borrower, is entitled to use the deposited funds and must return them upon demand to the customer/lender. Because the deposited funds are a loan to the bank, there can be no contractual benefit to the lender. This regulatory requirement poses a challenge to Islamic banks in competing for funds with conventional banks that offer interest on deposits. An instrument was therefore required by IFIs that would enable them to retain their customers and maintain their market position.

One of the alternative incentive tools considered by IFIs has been to channel Islamic deposits into *tawarruq* (tripartite sale) transactions. However, this practice raised some Sharīʿah concerns among Sharīʿah intellectuals since the Prophet (peace be upon him), in an authentic *ḥadīth*, prohibited combining a sale contract and a loan (*bayʿwa salaf*) in one transaction. The *tawarruq*-based deposit account works as follows: the bank conducts a reverse *tawarruq* transaction where it purchases a commodity on a spot basis on behalf of the customer with money deposited by the customer; then, acting as the customer's agent, it sells the commodity to itself on a *murābaḥah* (cost plus mark-up) basis with deferred payment; then it sells the commodity to a third party on a spot basis and credits the customer's account when the transaction is completed. The issue of *bayʿwa salaf* may arise in this transaction, particularly when the bank accepts the money and holds it (say for two working days) on the basis of *qarḍ* and then carries out the *tawarruq* transaction. Here, *bayʿwa salaf* has apparently occurred because the customer first gives a loan to the bank (in the form of a bank deposit) and then sells a commodity to the bank through reverse *tawarruq* (Hong Leong Islamic Bank Berhad, 2017). The question is whether this combination of loan arising from the deposit product, sale arising from the *tawarruq* transaction and *wakālah* (agency) carried out by the bank on behalf of the customer really amount to the prohibited *bayʿwa salaf*? That is the subject of research in this paper.

Jurists like al-Māwardī (1999) in discussing the prohibition of *bayʿwa salaf* pointed out that lending/borrowing as a single contract is not prohibited in the Sharīʿah, nor is sale/purchase as a single contract; even having the two contracts together is permissible as long as there is no stipulation linking them. What the *ḥadīth* on *bayʿwa salaf* actually prohibits is the stipulation of a loan in a sale contract. Against that backdrop, this paper aims to conduct a theoretical study on the prohibition of *bayʿwa salaf* and its link to the *qarḍ* policy relating to Malaysian Islamic banking deposit products.

Jurists' interpretations of the *ḥadīth* on *bayʿ wa salaf*

The majority of jurists agreed that if anyone stipulated receiving a loan from, or giving a loan to, his counterparty in a sale contract, the sale contract is void and rejected. One exception is the view of Imām Mālik, who in a popular opinion of his *madhhab* (school of jurisprudence), validated the contract subject to renouncing taking delivery of the loan (Ibn ʿAbd al-Barr, 1287AH). Nevertheless, the detailed rulings derived from this *ḥadīth* and its effect on a sale contract may vary from one *madhhab* to the other. Thus, Imām al-Shāfiʿī said that the prohibited *bayʿwa salaf* occurs when the contracting parties form a contract and insert a condition to make a sale and loan binding on them, resulting in ignorance of the price. Explaining further, Imām al-Shāfiʿī (1990) said that this is because the commodity has been sold against a price, and the benefit of the loan represents a portion of the price as well,

and this portion is unknown, thereby causing ignorance of the price, a factor that renders a contract void. The concept is expressed as:

البيع بشرط القرض

A sale contract with stipulation to give or take a loan (al-Nawawi, 1991).

In the above example, ignorance of the price is established as the Shāfiʿī *madhhab's* ʿ*illah* (*ratio legis*) for the prohibition of *bayʿwa salaf*. It is expressly mentioned by al-Māwardī (1999) in his *al-Ḥāwī*. He also states that, in the Shāfiʿī *madhhab*, *bayʿwa salaf* can only occur if the combination of sale and loan contracts is in one contract with the conclusion of one depending on the other. Based on that, a contract in which a loan occurs, but it was not a condition for the performance of a sale contract between the same parties, such a contract cannot be interpreted as the prohibited *bayʿwa salaf*.

Meanwhile, the Ḥanafī School of jurisprudence interpreted *bayʿwa salaf* as interpreted by the Shāfiʿī School but with some additional terms:

صُورَةُ النَّهْيِ عَنْ بَيْعٍ وَسَلَفٍ أَنْ يَكُونَ الْبَيْعُ بِشَرْطِ مَنْفَعَةِ الْقَرْضِ أَوْ الْهِبَةِ وَالصَّدَقَةِ وَمَا أَشْبَهَ ذَلِكَ

They interpreted the prohibition of *bayʿwa salaf* when the sale is on condition that [one of the contracting parties gets] the benefit of a loan or gift or charity or the like [from the other] (al-Zaylaʿī, 1313AH).

Therefore, the ʿ*illah* identified by the Ḥanafī School for prohibiting *bayʿwa salaf* is added benefit for either of the parties. There is no effective difference between this ʿ*illah* and that inferred by the Shāfiʿīs because ignorance of price still exists in such a loan. The difference is that the Shāfiʿī School originally interpreted stipulation of the loan to come from the seller. It could, however, also come from the buyer. Thus, by extension, the Ḥanafī School sees the action as the original case for either of the two contracting parties, depending on which one has the stronger bargaining position. In either case, the same ʿ*illah* of *jahālah* will ensue, and the contract will be void (al-Māzirī, 2008). It is worth noting that despite the Shāfiʿī School's focus on the ʿ*illah* for the prohibition of *bayʿwa salaf* being ignorance of price, they also agree on other ʿ*illahs* that were expressly mentioned by the Ḥanafī School. These are:

- It amounts to a sale contract with an added stipulation (*bayʿwa sharṭ*).
- It contravenes the Prophet's prohibition of every loan that attracts benefits.

Irrespective of these other ʿ*illahs*, it can be argued that the contract would be already void due to the deficiency of an essential element for the validity of a contract, which is knowledge of the subject matter of a contract, which is the price in this case.

Regarding the ʿ*illah* in the Ḥanbalī School, Imām Aḥmad said:

هو أن يقرضه قرضا، ثم يبايعه عليه بيعا يزداد عليه ولو قال: أقرضتك هذه العشرة على أن تبيعني عبدك ففاسد، لأن كل قرض جر منفعة فهو ربا

bayʿwa salaf refers to a contract in which a man grants a loan to another man and subsequently sells a commodity to him at an increased price. [Such a sale] is invalid because every loan that extracts added benefit [for the lender] is usury (Ishaq Ibn Mansur, 2002/1425AH).

It appears from this interpretation that the ʿ*illah* for prohibition of *bayʿwa salaf* according to the Ḥanbalī School is *ghabn* and *khidʿah* (price manipulation and deception). This means that the Ḥanbalī School also concurs with the Shāfiʿīs and Ḥanafīs on the ʿ*illah* for the

prohibition of *bayʿwa salaf* as price manipulation is caused by *jahālah*. The result is that something has been taken in excess at the expense of the other party at his ignorance.

On the legal implication of the contract of *bayʿwa salaf*, most scholars including the Shāfiʿīs, Mālikīs and Ḥanbalīs consider it void as the contract lacks the essential element of knowledge of the subject matter, either the commodity or the price. The Ḥanafīs have a rather surprising position on this issue. They consider the *ṣīghah* (contractual format) to be the only essential element of a contract and categorise other elements as conditions of a contract. Based on that, they normally declare a contract as voidable and not void if it involves ignorance regarding the subject matter. It is thus surprising that in the case of *bayʿwa salaf*, the Ḥanafīs declared it void *ab initio* in agreement with the Shāfiʿīs and Ḥanbalīs, as against the Mālikī School, which validated it if taking delivery of the loan is discontinued.

Application of the jurisprudential rulings on organised *tawarruq*-based Islamic banking deposit products

Without undermining any opposite view on organised *tawarruq*, the findings of this study will be applied on *bayʿwa salaf* based on the view of Sharīʿah scholars who approved organised *tawarruq* with conditions. The concept is not approved by the OIC Fiqh Academy (International Islamic Fiqh Academy, 2009), whereas the Shariah Advisory Council (SAC) of BNM approves it on the condition that the parties or their agents take delivery (Bank Negara Malaysia, 2016a2016b). It is also approved by some individual contemporary jurists on the condition that the commodity does not go back to the bank (Ḥammād, 2013).

Having stated the underlying principles that will guide this discussion, it should be mentioned that under Islamic commercial law, the obligation of a debtor to his creditor is limited to repayment of the loan amount, and the creditor has no other right over his debtor except that. However, it is permissible for a debtor, if he so wills, to repay the debt with a premium as a token of appreciation of the facility granted to him by the creditor (Ibn ʿAbd al-Barr, 2000/1421AH). As Islamic banks are also competitors in the banking industry, market practice compels them to give incentives to their customers that deposit with them. Otherwise, they risk the loss of depositor funds. It is from this perspective that Islamic banks in Malaysia have made efforts to conduct business with depositors' funds so that they can give such incentives to them. Part of this effort has been the initiation of *tawarruq*-based deposit products. The question remains whether the issue of *bayʿwa salaf* arises in this product when the banks treat Islamic deposits as *qarḍ* irrespective of the deposits being current or savings accounts.

To answer this question, let us take a brief look at the two underlying principles in *wadīʿah yad ḍamānah*-based deposit accounts and *qarḍ*-based deposit accounts. Under *wadīʿah*, the custodian has an obligation to protect and safeguard the item placed under his custody as *ḍamānah* (guarantee) until he returns it to the rightful owner. The custodian is not liable for any damage or loss of the *wadīʿah* unless he commits misconduct or negligence. If the custodian uses the *wadīʿah* to conduct business without the permission of the owner, while there is no disagreement among the scholars about his liability, they disagreed with regard to his entitlement of profit. The best view is that the custodian deserves the profit whilst he is liable for the capital (Ibn ʿArafah, n.d.; al-Sarakhsī, 1993). On the other hand, if he carried out business with the funds deposited with the permission of the owner, he becomes a *muḍārib*, and all the rules of *muḍārabah* apply (al-Bājī, 1332AH).

As mentioned above, the two major Sharīʿah rulings on the effect of *bayʿwa salaf* are that both the loan and the sale contract are void *ab initio*, while the other ruling says that the sale

contract remains valid, subject to discontinuance of the loan. Based on the second opinion that has been preferred by the researchers, connection of an organised *tawarruq* with Islamic banks' *wadīʿah* or *qarḍ*-based deposit accounts will not immediately trigger the Sharīʿah issues of *ribā* (interest), *gharar* (uncertainty) or *jahālah* (ignorance). This decision is based on the following grounds:

- As mentioned earlier, *bayʿwa salaf* only occurs if the sale and loan contracts are related to each other in one transaction, whereby execution of one is anchored on the execution of the other. This is not the case in *qarḍ*-based deposit accounts, as there was never such an agreement between the Islamic banks and their customers. The loan comes first in the form of a mere deposit at the option of the depositor, then the debtor (Islamic bank) uses the loan to do business in which he is at liberty to give part of the profit to the depositor or not to give any profit because the only liability he owes to his depositor is refund of his deposit. The researchers argue that it is not appropriate to invoke the following *qāʿidah* (jurisprudential legal maxim) in this case:

المعروف عرفا كالمشروط شرعا

The legal maxim means that, what is known as a common practice is similar to a prior condition (Ibn Nujaym, 1999). This is because under the *qarḍ*-based deposit products, the bank does not give profit to customers on a regular basis. Also, the bank is not under any obligation to pay any profit to its depositors. This position is even clearer with the *wadīʿah*-based account as stated above.

- Regarding a deposit account being operated based on *qarḍ*, there is juristic disagreement on the commencement of ownership of *qarḍ* by the debtor. One of the opinions says that the debtor's ownership of a loan commences immediately upon taking delivery of the loan. Another opinion states that his ownership does not start until he has started using the loan (al-ʿImrānī, 2000/1421AH). In line with the Sharīʿah concept of *taysīr* (facility), the researchers choose the second opinion because it clears the bank from being obliged by the rules of loans when they channel depositors' funds into *tawarruq*. Therefore, the accumulated deposits made by customers before the bank uses the funds to conduct *tawarruq* transactions do not fall under the loan contract until the bank actually channels the funds into its commercial operations; hence, there will not be any Sharīʿah issues arising. One may argue that the withdrawal being made by other customers is a form of the bank's commencement of operation. This argument is countered by the nature of money as a fungible asset, which is only replaced by its type and not by itself. Thus, the withdrawal is from the other monies of the bank and not really from the deposits that may soon be channelled into *tawarruq*.
- Even for the *wadīʿah*-based deposit products, it should be noted that there is not one jurist from all the classical jurists that has raised the issue of *bayʿwa salaf* in their discussion of the custodian's use of the fund kept under his custody, with or without the permission of the owner.

Findings and conclusion

This paper investigated the Sharīʿah rulings on the combination of a sale and loan in one transaction and linked such rulings to the Malaysian *qarḍ*-based accounts and the Sharīʿah

stance on IFIs using such deposits to carry out *tawarruq* transactions. The paper adopted the opinion of those who permitted organised *tawarruq*.

The major findings of the research are as follows:

- The prohibited *bayʿ wa salaf* is a sale or an exchange contract in which one of the contracting parties stipulated (or acted in a manner equal to stipulation) that he will give a loan to, or receive a loan from, his counterparty alongside the sale contract, or a stipulation to sell or buy was included in a loan contract, thereby resulting in receiving the price and the benefit of the loan against the commodity or service delivered, or resulting in the seller selling a commodity and providing a loan facility to the buyer.
- There is no juristic disagreement about the prohibition of *bayʿ wa salaf*, as expressly ruled by the Prophet (peace be upon him). There is, however, disagreement among jurists on the status of such contracts that combine a sale and a loan in one transaction. Most jurists invalidated the contract *ab initio* without allowing for remedy, whilst the Mālikī School validated the contract if the prospective beneficiary does not receive the loan.
- There is unanimous agreement that whoever sealed a sale contract with a stipulation of receiving or giving a loan, the sale is invalid, except the *rukhsah* (dispensation) provided by the Mālikī School, which validated the contract formation if the loan was not received.
- There is no *bayʿ wa salaf* that causes a contract to be void if the loan agreement arises after the sale contract was concluded. This is on condition that the execution of one contract is not dependent on execution of the other and on condition that the market attitude of each towards the other in the sale contract is not influenced. The example provided by Imām Aḥmad was that the loan is accompanied by a higher-than-market price for the sold item.
- In applying the preceding *fiqhī* findings, the researchers hold that there is no violation of Sharīʿah if *qarḍ*-based Islamic deposits are used by IFIs to carry out *tawarruq*.
- In light of the above, the researchers did not find any Sharīʿah issue capable of causing *ribā, gharar* or *jahālah* in the deposit practices of IFIs, neither in the case of *wadīʿah* nor in the case of *qarḍ*-based deposit accounts. However, it is important to note that to avoid any ambiguity and confusion, the bank must not make a binding promise to the customers of *qarḍ*-based deposit accounts. Any profit given by the bank must be at its sole discretion and not on prior agreement between the bank and the depositors. The researchers opine that Islamic banks' depositors should be made to understand that they should not expect any profit from the IFIs because it is an act of worship to keep their money in non-interest deposit accounts, and if they would like to earn profits they should opt for Islamic investment accounts.

References

Al-Bājī, S. (1332AH), *al-Muntaqā sharḥ al-Muwaṭṭa'*, Dār al-Kitāb al-Islāmī, Vol. 5.

Al-ʿImrānī, A. (2000/1421AH), *al-Bayān fī madhhab al-Imām al-Shāfiʿī*, Dār al-Minhaj, Jeddah.

Al-Māwardī, M. (1999), *al-Ḥāwī al-kabīr*, Dār al-Kutub al-ʿIlmiyyah, Beirut.

Al-Māzirī, M.A. (2008), in *Sharh al-Talqīn*, Muḥammad al-Sulamī, N.P., Dār al-Gharb al-Islāmī, Beirut.

Al-Nawawī, Y.S. (1991), *Rawḍat al-ṭālibīn wa ʿumdat al-muftīn*, 3rd ed., al-Maktab al-Islāmī, Beirut.

Al-Sarakhsī, M.A. (1993), *al-Mabsūṭ*, Dār al-Maʿrifah, Beirut.

Al-Shāfiʿī, M.I. (1990), *al-Umm*, Dār al-Maʿrifah, Beirut.

Al-Zaylaʿī, U.ʿA. (1313AH), *Tabyīn al-ḥaqāʾiq, sharḥ Kanz al-daqāʾiq wa Ḥāshiyat al-Shilbī*, al-Maṭbaʿah al-Amīriyyah Bulāq, Cairo.

Bank Negara Malaysia (2016a), *Qard*, BNM, Kuala Lumpur.

Bank Negara Malaysia (2016b), *Sharīʿah Standards and Operational Requirements Series 1*, ISRA, Kuala Lumpur.

Ḥammād, N. (2013), *Fiqh of Contemporary Financial and Banking Transactions: New Reading*, AlBaraka, Bahrain.

Hong Leong Islamic Bank Berhad (2017), "Hhong Leong Islamic Bank" website, available at: www.hlisb.com.my/personal-i/basic-savings-account-i (accessed 10 March 2017).

Ibn ʿAbd al-Barr, A. (1287AH), *al-Tamhīd li mā fī al-Muwaṭṭaʾ min al-maʿnī wa al-asānīd*, Ministry of General Awqaf and Islamic Affairs.

Ibn ʿAbd al-Barr, A. (2000/1421AH), *al-Istidhkār, Dār al-Kutub al-ʿIlmiyyah*, Beirut.

Ibn ʿArafah, M.I. (n.d.), *Ḥāshiyat al-Dasūqī ʿalā al-Sharḥ al-kabīr*, Dār al-Fikr, Beirut.

Ibn Nujaym, Z.I. (1999), *Al-Ashbāh wa al-naḥāʾir*, Dār al-Kutub al-ʿIlmiyyah, Beirut.

International Islamic Fiqh Academy (2009), *Qarār bi shaʾn al-Tawarruq: ḥaqīqatuhu anwāʿuhu al-Fiqhī al-Maʿrūf wa al-Maṣrafī al-Munaẓẓam*, Organisation of Islamic Cooperation, Sharjah.

Ishaq Ibn Mansur Ibn, A.B. (2002/1425AH), *Masāil al-Imam Ahmad Ibn Hanbal and Ishaq Ibn Rāhūyah*, Imādah al-Baḥth al-Ilmi, Madinah.

Further readings

Al-Baghawī, H.M. (1983/1403AH), *Sharḥ al-Sunnah*, al-Maktab al-Islāmī, Beirut.

Bank Negara Malaysia (2005), *Deposit and Financing Products Based on Tawarruq*, BNM, Kuala Lumpur.

Ibn al-ʿArabī, A.B. (2007), *Al-masālik fī sharḥ muwaṭṭaʾ mālik, Dār al-Gharb al-Islāmī*, Beirut.

Ibn Ḥanbal, A. (1995/1416AH), *Musnad al-Imām Aḥmad ibn Ḥanbal*, Dār al-Ḥadīth, Cairo.

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