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Disagreement On Tawarruq Among Malaysian Shariah Advisors: An Analysis From Ma'alat Perspective

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Abstract

This study aims to analyse the disputed issue on tawarruq munazzam (organised tawarruq) practised in Malaysia based on maqasid Shariah (objectives of Islamic law). In more detail, the researchers apply the principle of ma'alat (consequences of actions) which is one of maqasid principles as an approach to deal with the disputed issue on tawarruq. The methodology of this study is qualitative, in which the data are collected through library research and field studies. While the former is carried out by examining books, articles, statutes and related circulars, the latter is conducted through an unstructured interview method with some members of SAC (Shariah Advisory Council), SC (Shariah Advisor), academicians from BNM (Bank Negara Malaysia), IFIs (Islamic Finance Institutions) and public university. All data are analysed based on the content analysis method. The findings show a difference in views among informants on tawarruq munazzam contracts practised by IFIs. The study found that the tawarruq munazzam contract was a matter of dispute acceptable under Shariah discipline. However, if the dispute is not addressed properly, it might have a negative impact on industry stakeholders. Thus, this study seeks to resolve the dispute based on the method of ma'alat. Therefore, the study found that adopting a tawarruq munazzam contract can bring greater well-being to Islamic banking stakeholders rather than not practising it.

Keywords: Islamic Finance Institutions (IFI), Ma'alat, Personal Financing, Shariah Advisory Council (SAC), tawarruq munazzam (Organised Tawarruq).

Introduction

To strengthen Islamic banking operations in the country, the Government of Malaysia has introduced a comprehensive legal framework for the Islamic banking industry, known as the Islamic Financial Services Act 2013 (IFSA, 2013). This Act aims to promote financial stability and adherence to Shariah principles, as stated in clause 28, "(1) an establishment will consistently guarantee that its objectives, operations, business, affairs and activities consent to Shariah". (2) For this Act, the consistency with any decision of the Shariah Advisory Council in regard to any particular aim and operation, business, affair or activity will be considered to be consistence with Shariah in that the aspects of objectives and services, business, affair or activity (Act 759 IFSA, 2013).

In general, there is no difference between Islamic banking and its conventional counterpart as both are intermediary financial entities, and their activities are related to resource allocations, investment, and financing (Iqbal & Mirakhor, 2011; Asni, 2019). Nevertheless, the term Islamic implies some differences between Islamic and conventional banking, as the former must operate its banking activities under Islamic principles. In other words, Islamic banking is practised according to Islamic commercial law by avoiding riba (interest), gharar (uncertainty), and gambling. Alternatively, various contracts that comply with Islamic principles [such as bay' (sale), ijārah (lease) and kafālah (guarantee)] can be adopted as modern financial instruments (ISRA, 2010).

It should be noted that modern banking practices are sophisticated, and it has been claimed that the contemporary financial environment is not conducive to the progress of Islamic banking, which faces various challenges, risks and restrictions (ISRA, 2010). Therefore, a unique approach is needed to adapt Islamic banking to the modern financial system. In other words, some contracts might require modification, such as providing a third-party guarantor for muḍārabah (partnership), where its original practice is designed without a guarantor (Razak, 2015). Also, some rules might need exceptions, such as imposing a late payment penalty that is prohibited by Shariah (Ishak, 2018). All players in this industry need to consider many aspects before implementing any rule or offering any product in Islamic banking. This includes Maqasid al-Shariah, which guides scholars to consider what may be called the maṣlaḥah (well-being) in practice. This approach is vital, particularly in the Islamic banking industry, to create harmony between Shariah and current circumstances.

In Islamic banking, tawarruq munazzam could be fruitfully analysed under maqasid al-Shariah. It is argued that tawarruq

munazzam is the dominant Islamic banking products in Malaysia, of which 16 IFIs offer contract-based products (BNM, 2019). In fact, tawarruq munazzam is a hybrid product modified from the tawarruq fiqhi (individual tawarruq) product as found in classical Islamic commercial discourse. It has been modified to fit the modern financial system, which includes the introduction of wakalah (agency) contract, an underlying asset that is easy to find and sell, ibra' (rebate), wa'd (promise), and risk reduction for banks (Asni & Sulong 2018a). The concept of tawarruq munazzam was also chosen because it is one of the concepts used for cash-based financial instruments to provide cash liquidity. Therefore, the idea is compatible with most of the facilities provided by Islamic banking, such as deposits, loans, bond market instruments, and money (Bilal & Mydin Meera, 2015).

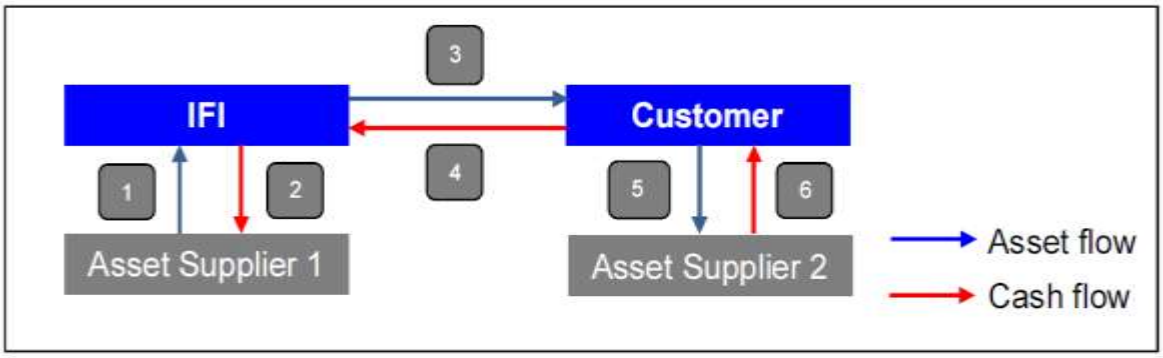
While the purpose of the modification was useful to sustain Islamic banking operations in the modern Islamic financial system, the inevitable controversy appeared when the product faced extensive criticism from the point of Shariah compliance by Islamic financial researchers both locally and internationally (Yusoff, Ahmad, & Nik Abdul Ghani, 2019; Mohamad & Ab Rahman, 2014). In this regard, this paper aims to analyse the view on tawarruq munazzam practised by IFIs in Malaysia among Shariah Advisors from the perspective of maqasid al-Shariah. Nevertheless, since maqasid is a general concept of promoting maṣlaḥah, the researchers apply the principle of ma’alat under the maqasid to deal with this issue. In more detail, the paper is organised as follows: The next section comes up with literature reviews regarding the topic of tawarruq, maqasid and ma’alat. Then, it continues to the part of the application where the dispute of tawarruq issue is analysed based on the principle of ma’alat. It then concludes with a summary of the discussion.

Literature Review

Tawarruq Munazzam and Its Issue

Tawarruq refers to a financial instrument involving two stages of a transaction. At first, a purchase occurs between the buyer and the original seller of an asset, and then the buyer sells the asset in cash to a third party. It is called tawarruq because the buyer has no intention to own or use the asset, instead of reselling it to gain cash (Figure 1) (BNM 2015).

Figure 1: Tawarruq Munazzam Financing Guidelines by BNM (BNM 2015)



Based on the above, a customer requires financing of RM100,000 from an IFI. Upon this request, the IFI offers the financing based on tawarruq munazzam as illustrated as follows: -

1. The IFI purchases the asset with the selling price of RM100,000 from Asset Supplier 1.
2. The IFI pays cash to Asset Supplier 1.
3. Subsequently, the IFI sells the asset to the customer at an agreed selling price of RM120,000 (RM100,000 + profit RM20,000).
4. The customer makes deferred payments through monthly instalments for five years.
5. Subsequently, the customer appoints the IFI as its agent to sell the asset to Asset Supplier 2 on the spot at the selling price of RM100,000.
6. The customer obtains cash of RM100,000 required for the financing.

In practice, tawarruq munazzam is known as commodity murabahah, which is utilised in various products of deposit, financing, asset and liability management and risk management (BNM, 2010). In terms of its Shariah status, the SAC of BNM has approved the tawarruq-based contract at its 51st meeting on July 28, 2005 (BNM 2010). The cash sale from the customer to the supplier will enable the customer to obtain cash, while the sale of credit from an Islamic financial institution to the customer will create a financial obligation that the customer must pay within the agreed period.

Since tawarruq is permissible by BNM, it is widely offered by IFIs in Malaysia, particularly as personal and home financings (Table 1).

Table 1: List of IFIs using the tawarruq munazzam contract (BNM 2022)

No	Islamic Banking	Personal Financing	Home Financing

1	Kuwait Finance House (Malaysia) Berhad	✓	
2	HSBC Amanah Malaysia Berhad	✓	
3	Al Rajhi Banking & Investment Corporation (Malaysia) Berhad	✓	✓
4	Alliance Islamic Bank Berhad	✓	
5	Bank Rakyat	✓	
6	Bank Islam Malaysia Berhad	✓	✓
7	Bank Simpanan Nasional	✓	✓
8	Maybank Islamic Berhad	✓	✓
9	AmBank Islamic Berhad	✓	✓
10	Hong Leong Islamic Bank Berhad	✓	✓
11	Affin Islamic Bank Berhad	✓	✓
12	Bank Muamalat Malaysia Berhad	✓	✓
13	CIMB Islamic Bank Berhad	✓	✓
14	RHB Islamic Bank Berhad	✓	
15	MBSB Bank Berhad	✓	✓
16	Standard Chartered Saadiq Berhad	✓	

Based on the above table, 16 IFIs currently offer tawarruq munazzam as a personal financing product, while 10 IFIs utilise this as a home financing instrument. As a result, tawarruq munazzam has become the most dominant practice in the Islamic financial sector in Malaysia compared to other contracts.

While BNM allows tawarruq munazzam in Malaysia and it is applied in Islamic Banking, its Shariah status is still debatable. In fact, many modern scholars and institutions prohibit tawarruq munazzam. Such institutions are Majma' Fiqh al-Islami (IIFA, 2009), Saudi Fatwa Council (2004), Fatwa Council of Jordan (2012), Islamic Fiqh Council of Sudan (2017), Indonesian Ulama Council (DSN-MUI) (Abdullah, 2017). Among the prominent scholars who forbid tawarruq are al-Salus (2004), al-Suweilam (2004), al-Sabhani (2005), Ahmad (2002), Hassan (2003), al-Darir (2004) and Ali (2004). It is also stated by Ahmed and Aleshaikh (2014) that most scholars today require individual tawarruq, not organised tawarruq. However, some scholars support organised tawarruq, namely BNM (2010), AAOIFI (2015), al-Muni' (2004), al-Qurri (2004), al-Sharif (2002) and Isa (2003).

The difference has significantly impacted Islamic banking in Malaysia as it has received widespread criticism internationally for offering tawarruq munazzam contracts in banking practice.

However, Islamic banking in Malaysia is not alone in providing tawarruq munazzam contracts, but it is followed by international Islamic banks such as Bahrain, Kuwait, Oman, Qatar, United Arab Emirate, Indonesia and Saudi (Ahmad et al. 2017). Although the official fatwa at the national level has been issued against the prohibition on practising tawarruq munazzam contracts in Indonesia, it does not bind Islamic banking to the fatwa issued (Hosen & Nahrawi 2012; Istami, 2018).

In addition, each Islamic bank also appoints Shariah advisors to advise on Shariah affairs in Islamic banking. However, there is no denying that there are Islamic banks following the fatwa issued, such as in Sudan that prohibit the practice of tawarruq munazzam contracts (Ahmad et al. 2017). According to Muneeza et al. (2020), the tawarruq munazzam contract is popular to be used among Islamic banks worldwide because, via the exchange, it is easy, swift, reliable, profitable, cheaper, convenient and has zero risks to do this type of transaction at the comfort of the office.

According to Sharaiyra & Haswa (2019), there is a misinterpretation of the texts that support the practice of tawarruq munazzam contracts. Also, according to Ali & Hassan (2016), one of the critical issues given to tawarruq munazzam was the issue of using the international medium as an underlying asset and wakalah issue. However, the reported criticisms have been largely corrected to reduce Shariah issues by Malaysian banks. This is as stated by Mihajat (2014) that for the issue of underlying assets, it has been improved as Islamic banks in Malaysia use BSAS medium as an underlying asset in the tawarruq munazzam contract which is monitored by internal Shariah officers and also recognised by BNM (2010). As for Dusuki (2010) claimed that BSAS had overcome the various Shariah issues of tawarruq. These include providing real commodities which have trading value, introducing a fully electronic system that will recognise and verify ownership, facilitating the delivery of the commodity, and ensuring the sale to the commodity supplier is made on a random basis to avoid this instrument being a trick such as bay' al-ʿInah.

On the issue of wakalah, although the element remains in use in the contract, its existence is a matter of dispute among the fatwa bodies where AAOIFI (2015) decides to use the wakalah element in the tawarruq munazzam contract if no other option is available. Nevertheless, Haneef (2009) claimed that based on the Quran and Hadith, no clear evidence prohibits a seller from appointing an agent to buy a particular good and then sell it back to the agent. Moreover, according to Alkhan & Hassan (2019), the critique of

the tawarruq munazzam contract is only practical, but there is no problem with the main structure of the contract.

Similarly, Ali & Hassan (2016) also stated that the problem with the tawarruq munazzam contract was from a technical point of view, not from the main structure of the contract. Therefore, in the issue of the contract of tawarruq munazzam there is no concrete argument to prohibit it until it provokes disagreement among current Islamic scholars (Alkhan & Hassan 2019). Therefore, based on disagreement among scholars on tawaruq munazzam contracts, this study will look at the impact of SAC members of BNM, SC members of IFI, and academicians on the practice of tawarruq munazzam contracts and resolve it based on one of the methods in maqasid al-shariah is ma'alat.

The Concept of Maqasid al-Shariah

The term Maqasid al-Shariah comes from the combination of two words: maqasid and al-Shariah. As for the former is a plural word for maqsad, which signifies objectives or purpose (al-Raisuni 1999). As for al-Shariah, this term means ways; specifically, it refers to Islamic laws (Zaidan 2001). To be precise, maqasid al-Shariah can be defined as the wisdom that God emphasises in His rules (al-Raisuni 1999). In other words, maqasid al-Shariah aims to understand the objectives of Islamic law and the current reality. Many Islamic scholars such as al-Ghazali (1997), al-Shatibi (2004), Ibn' Ashur (1947), 'Abd al-Salam (2000) and al-Raisuni (1995) have emphasised the element of maqasid al-Shariah in implementing Islamic rules. In terms of terminology, al-Fasi (2001) stated that maqasid al-Shariah is the ultimate goal of Shariah affairs, which help to ensure humanity's well-being, known as maslahah.

According to al-Ghazali (1997), maslahah is defined as gaining, maintaining, developing and sustaining benefits and rejecting harm, damage and vain. Maslahah aims to safeguard the Shariah, including five matters: preserving religion, life, intellect, heredity, and wealth. Hence, every means available to protect the benefits of those five matters is considered maslahah, while any means that works vice-versa is considered mafsadah (harm). The acknowledgement of maslahah and mafsadah should be in line with the authority of the Shariah (Asni & Sulong 2017).

According to al-Shatibi (2004), there are three levels of maslahah based on priority order, which are daruriyyat - something that is deeply needed in one’s life or which is performed as basic needs, hajiyyat - a complementary need, and tahsiniyyat - a side need. Daruriyyat is the need to preserve his five basic needs in one's life.

The absence of those elements can harm and damage an individual's daily life. Meanwhile, the need for hajiyyat is only a supplementary need to facilitate life's affairs to avoid difficulty without harming or damaging. Tahsiniyyat, on the other hand, is a side requirement that is based on additional needs and is an addition to the existing conditions in society. However, its absence will neither cause difficulty nor harm and damage one's life (Ishak & Asni, 2020).

Maqasid al-shariah is a prominent guideline that helps the community deal with Shariah issues in today's era (Asni et al., 2021). Since there are drastic changes and advances in people's lives from a technological, political and economic standpoint, reforming Islamic practice based on maqasid is urgently needed (al-Qaradawi, 2006). Therefore, not surprisingly, many of the resolutions and fatwas decisions of the ruling bodies are based on maqasid al-Shariah (Ishak, 2019). Thus, according to Ishak (2019), maqasid al-Shariah plays an essential role in resolving disputes by choosing the right view.

Regarding Islamic finance, Akram Laldin & Furqani (2013) stated that the discussion of maqasid al-Shariah should be viewed from a broader perspective by looking at its macro activities. This recommendation is vital to ensure that Islamic banking continuously evolves and continuously improves its operations. In fact, it is not easy to comprehensively apply Islamic banking based on its original concept since it operates in the same field as the conventional banking system. Nevertheless, it will lead to more harm by banning any Islamic banking instrument due to technical aspects of assuming that instrument is similar to conventional. Therefore, maqasid al-Shariah plays a significant role in solving the problem instead of banning the practice. This ensures that the ecosystem, especially in the Islamic financial sector, continues to grow and improve by fulfilling Shariah-compliancy (Ishak, 2019). Although most contracts applied to Islamic banks have been innovated and incorporated into the hybrid element until it has created controversy among current scholars, it has been done to maintain the well-being of Islamic banking and customers based on the method of maqasid al-Shariah (Bin Ishak, 2018).

Nevertheless, since maqasid al-Shariah is subjective and general, it should be applied practically. In this regard, the principle of ma'alat could be a practical approach of maqasid in dealing with any issues related to Islamic banking.

The Principle of Ma'alat

It is argued that Al-Shatibi is a scholar who introduces the concept of ma'alat (consequences of actions) (Bin Ishak, 2018). This principle estimates impacts based on a decision taken, either to attain maslahah or to undergo mafsadah (harm). Under the principle, permissible actions under shariah could be prohibited if the deed will bring mafsadah. Similarly, in the case of prohibited actions, it can be permitted if it leads to maslahah and is capable of avoiding harm. Islamic law may change according to its rule of law, suitability, needs, and environment (al-Abaidi, 1992).

Based on this principle, the implementation of Shariah does not merely rely on the outward practice based on the text (dalil), but it also clings to the wisdom behind the law, which is practically used to achieve maslahah and to avoid harm. Al-Shatibi (2004) relies on this concept with arguments from the Quran and the hadiths. Among the verses put forth by al-Shatibi is based on surah al-Baqarah verse 21, which means, “O ye people! Adore your Guardian-Lord, who created you and those who came before you, that ye may have the chance to learn righteousness.” Several verses (Q2:183, Q2:216, Q6:108) encourage works that are good and bring good results. In short, a suitable method will navigate to good results.

While through hadith of the Prophet (PBUH), a similar emphasis is also found. Among cases found was the Prophet's prohibition from taking any action against the munafiq (a hypocrite). Even though they deserve punishment for their dishonesty, the consequences of punishing them may bring more mafsadah (harm) to Islam. People may get wrong perceptions, such as the Prophet had killed some of his Companions (al-Bukhari, 2001). The same measures based on ma’alat were also applied in the resolution to stop altering the shape of Kaaba (al-Bukhari, 2001) and in the case of scolding a Bedouin who was urinating in the mosque of Nabawi. All those considerations purposely bring maslahah by looking into the consequences of such action (al-Bukhari, 2001).

Al-Shatibi (2004) also brings principles in Islamic jurisprudence to support the ma'alat concepts, and they are sad al-dhari’ah, hiyal and istihsan. Sad al-dhari'ah is a restriction from initiating or continuing any actions that may harm and mafsadah. Meanwhile, hiyal (stratagem) is forbidden because it is a kind of manipulation in Shariah by doing something in a manner which externally authorised by Shariah. Likewise, istihsan, al-Shatibi (2004) argues that the concept of ma'alat has a similar principle with the method

which preferred indistinct things rather than the obvious for the reason of attaining maslahah.

Hence, the concept of ma'alat serves as a principle for determining maslahah in reality (al-Shatibi, 2004). As Islamic law aims to attain maslahah and declining mafsadah, the focus is working towards measuring maslahah rather than predicting the virtue. For that reason, an application of ma'alat plays its role in the aspects of correction and prevention. If there is any damage, then it should be corrected. If it is assumed that harm would occur, then it should be avoided (al-Raisuni, 1999). However, according to Bin Ishak (2018), the concept of ma'alat is not absolutely or extremely used until denying the wisdom of Quran and hadith and take logic, since the logic must be following the dalil as well as in line with the concept of ijtihad, maqasid shariah and current reality. Therefore, in certain circumstances, if holding to the past majority view will lead towards harmful, and if holding to weak views will consequence towards goodness under Shariah perspective, then the latter view should be adopted (Kamali, 2016). That is a dynamic of Shariah that inclines towards reality in achieving maqasid al-Shariah, by harmonising between dalil and current life. As long as the practice fulfils the intent outlined between daruriyyat, hajiyyat and tahsiniyyat, then the practise should be permissible or if in contrary, it should be forbidden (Akram et al., 2013; al-Shatibi, 2004).

In this regard, this research aims to analyse the dispute on tawarruq munazzam practised by IFIs based on the principle of ma'alat. This is vital to understand the dispute issues of tawarruq based on maqasid al-Shariah.

Methodology

Research Design

This study uses a cross-sectional narrative review conducted using qualitative data collection methods, specifically the semi-structured interviews. Interview methods were used in this study to gain a deeper understanding of the subject matter of the research and have been used in previous studies (Robertson and Samy, 2015; Gunarathne and Senaratne, 2017).

Narrative research design is a design of inquiry from humanities in which the researcher studies the experiences of individuals and asks those individuals to provide stories about their experiences (Creswell, 2014; Riessman, 2008). According to Creswell (2014), the information is then often retold or re-storied by the researcher

into a narrative chronology. In the context of this study, stories from respondents about their experiences and knowledge to get a holistic view of tawarruq munazzam (organized tawarruq) practised in Malaysia based on maqasid (objectives of Islamic law) point of view were recorded and handwritten by the researchers.

Selecting the respondents, data management and analysis

The researchers used a purposive sampling method in conducting the interview technique by interviewing experienced and knowledgeable respondents about the problems of the study (Ethics & Alkassim 2016). In this regard, the researchers have interviewed ten interviewees: two of them are SAC (Shari'ah Advisory Council) members of BNM (Bank Negara Malaysia), six SC (Shari'ah committees) members of IFI (Islamic Financial Institutions) (SC) and two academicians. The respondents from the members of the SAC were selected as they are the primary interpreters of the law relating to Islamic banking practices in Malaysia. Likewise, members of the SC were also chosen because they were executives and provided work papers to be endorsed by members of the SAC.

On the other hand, two academicians were specialising in Shariah, consisting of professor and associate professor, and the researchers took steps to interview them to get their perspective on the contract of tawarruq munazzam from a Maqasid perspective. Thus, the respondents were among the most expert in consulting and knowledge about Islamic banking in Malaysia. The interviews lasted for between 50 and 60 minutes.

The interviews were conducted to find out the respondents' views on tawarruq munazzam in Islamic banking operations in Malaysia. This is because, in literature studies, there have been disagreements in the tawarruq munazzam contract. Therefore, this study seeks to explore the views of respondents who have been identified with the practice of tawarruq munazzam contracts in Malaysia. The interviews have been recorded through audio recording methods and manual writing in the notebook as an additional storage so that if the audio recording is damaged or destroyed, the manual recording is still available for reference. The responses were then transcribed to obtain emerging themes through a methodology suggested by Miles and Huberman (1994).

Qualitative data study involves three linked sub-processes (Miles and Huberman, 1994), and these are data reduction, data display and concluding. Specifically, the stories that were told during interviews were written by the researchers and subsequently

transcribed. The post-interview analysis of the transcripts encompassed a detailed search for underlying themes in the evidence collected. Following the initial transcripts studied, a comprehensive coding system was developed intuitively to facilitate the identification of issues and topics emerging from the transcript analysis ("open coding"), as outlined by Parker and Roffey (1997). Further, in line with Miles and Huberman (1994), matrices and templates summarizing the themes identified by each interview were developed in order to display the core issues that emerged from the coding process and this aided in identifying cross-case patterns in the data, with predominant ones becoming evident partially by mapping the relative incidence of different codes. Lastly, detailed field notes, memos, interview summaries and post-interview analyses were studied and analysed together with the matrices and templates outlined above. Subsequently, a secondary analysis of the theme was conducted to gain insight into the practice of tawarruq munazzam among the respondents.

For the respondent profiles, two members of the SAC and six members of the SC represented six Islamic banks in full charge of Islamic banking product development and two academicians from public universities. To safeguard the respondents' information, their names are encrypted as this was their request. The interviewees are listed in Table 1.

Table 2: The list of interviewees

Interviewees	**Positions**
Interviewees 1, 2, 3, 4, 5 & 6	SAC Members of IFI
Interviewees 7 & 8	SC Members of BNM
Interviewees 9 & 10	Members of Academic

Validity and reliability

To ensure reliability and validity, our data were subjected to triangulation. In research, triangulation helps address the limitations of a given methodology by complementing its weaknesses with the strength of other methods (Brewer and Hunter, 1989). Denzin (1984) identified four forms of triangulation and these are; data source triangulation (retrieve data from a number of different sources to form one body of data), investigator triangulation (using multiple observers instead of a single observer in the form of gathering and interpreting data), theoretical triangulation (using more than one theoretical position in interpreting data) and methodological triangulation (using more than one research method or data collection technique).

This study used data source triangulation to ensure accuracy, credibility and validity of the data. Therefore, to strengthen the accuracy, credibility and validity of the data, the researchers did several things by interviewing two SAC of BNM members from the same institution to provide accurate and comprehensive information on the objective of the study. Besides, the researchers also refer to official data released by the relevant authorities from BNM or IFIs on the tawarruq contract practice so that it can add value to the data from the interview results. Further, to ensure validity, interviews were read through and even played back to the respondents to ensure that what has been captured is exactly what respondents have actually said.

Result

In terms of operation, all SAC members of IFIs agree that the practice of tawarruq munazzam in Malaysia follows the guidelines provided by BNM. As mentioned by IV2, he claimed as follows:

"In the tawarruq munazzam contract, elements of wa'd (promise) and wakalah have been included for the smooth running of the contract, reducing risks to Islamic banking and facilitating customer financing processes. The element of wa'd mulzim (binding promise) is included for the customer to promise to buy the commodity from the bank at the sale price after the bank has purchased the commodity from the first supplier. While the wakalah element is included on behalf of the customer to delegate the bank to sell the commodity purchased from the same bank to the second supplier. The duration of the bank's purchase of the commodity from the first supplier to the representative on behalf of the customer to sell the commodity to the second supplier is within two hours. This is to avoid the risk of depreciation on commodity assets."

In terms of the viewpoint of Shariah, it is understood that the respondents have different opinions towards tawarruq munazzam. Three of them (IV1, IV2 & IV3) argued that the tawarruq munazzam becomes a debatable issue among Muslim scholars. Since some scholars allow this instrument, so it would be acceptable to consider tawarruq munazzam contract. In more details, the respondent (IV1) claimed that: -

"The tawarruq munazzam contract is a matter of dispute among Islamic scholars, so it is a clear issue of dispute reconised by Shariah (khilaf muktabar) between which two opinions can be followed. Thus, in the area of dispute, Islamic banking is free to execute the tawarruq munazzam contract as a financing product.

The tawarruq munazzam contract is also not a hindrance to practice in any financing."

In contrast, the rest of the seven respondents believe that the main issue on tawarruq munazzam from the point of Shariah happened when this instrument is replicated from a conventional banking product. As a result, there are the elements of hilah (trick) to legalise the interest (IV4, IV5, IV6, IV7, IV8, IV9 & IV10). This is as stated by one of the respondents (IV7),

"The reconised disputation (khilaf muktabar) in this matter is about the tawarruq fiqhi, which is a dispute among sect scholars. However, tawarruq munazzam is not a reconised disputation (khilaf muktabar) because it has been adapted to conventional products until it differs from tawarruq fiqhi. Thus, most scholars have banned the tawarruq munazzam contract, including the Majma' Fiqh al-Islami, the elements of trick and interest banned by Shariah. In my opinion, the prohibition of tawarruq munazzam contract is the same as the prohibition of bay' 'inah contract. But in Malaysia, many still accept it while in the Middle East, for the most part, many scholars reject it. In my opinion, the SAC of BNM has approved the tawarruq munazzam contract as no alternative could replace it in terms of cash liquidity-based products, but it is only temporary."

In terms of the consequences of banning tawarruq munazzam, all respondents agreed that it would negatively affect IFIs. The respondent (IV4) explained his view on this matter as follows:

"If the tawarruq munazzam contract is terminated, it will affect the growth of the Islamic banking sector as Islamic financing products are declining in the market. This is because the tawarruq munazzam contract is offered for financing to obtain cash. However, other contracts are not able to provide financing for cash. This will cause customers to go into conventional banking as they can meet customer requirements. This is because, today, the need for financing to obtain cash is essential. For example, if a customer wants to obtain personal financing based solely on tawarruq munazzam, but if the facility is stopped, then the customer will go to conventional banking that Shariah prohibits for engaging in lending (riba) transactions. This will be detrimental to the customer for engaging in the illegal transaction banned by Shariah. Meanwhile, Islamic banking is losing customers, which will affect the development of Islamic banking schemes, especially in Malaysia."

Meanwhile, the respondent (IV3) believes that the practice of tawarruq munazzam in Malaysia has become better in term of Shariah compliance. He argued as follows:

“Shariah's compliance by Islamic banking has grown considerably, especially in the tawarruq munazzam contract when it involves Shariah-compliant commodity assets and the BSAS-compliant Shariah exchange to not engage with the gharar element. Therefore, all BSAS activities are monitored by Shariah advisors to ensure that all activities comply with Shariah's requirements.”

In fact, to change tawarruq munazzam as its original concept (tawarruq fiqhi) is impractical. In this regard, the respondent (IV8) mentioned as follows: -

“Considering the financing facilities obtained from the funds of the depositors and stakeholders, it is difficult to implement the concept of tawarruq fiqhi sanctioned by Shariah as Islamic banks want to guarantee their returns to generate profits and provide financing facilities to more customers. If the concept of tawarruq munazzam is not implemented, the bank cannot guarantee the return on financing offered. This will result in the loss of trust by depositors and stakeholders and will affect the Islamic banking system. Besides, the customer does not want to subscribe to the tawarruq fiqhi contract as they would be burdened to sell the commodity assets to a third party if the bank stopped the concept of wakalah in the tawarruq contract.”

Furthermore, to ensure Islamic products are competitive, tawarruq munazzam would be among the best products, as mentioned by the respondent (IV2): -

“As of today, the conventional system is dominant and well-rounded for several factors, such as robust legislation that can safeguard the interests of stakeholders. It has also been in the market for so long that stakeholders believe it. This, in turn, drives Islamic banking to follow the conventional system's design within the Shariah framework by undertaking several modifications and hybrids in the muamalat contracts to suit conventional systems such as tawarruq munazzam. This will attract customers to involve in Islamic banking schemes and carry out activities as financial intermediaries. It is also the KPI set by BNM as the body that licenses the IFIs. Hence, the IFIs need to follow the KPI provided to compete with conventional banking and achieve the specified profit. Therefore, if the IFIs do not make modifications and hybrids to their products, it will affect the KPI set by BNM.”

Since Islamic products compete with conventional ones, it is essential to ensure the viability of Islamic banking institutions. As claimed by the respondent (IV5):

"For banks licensed by BNM that offer two banking systems, namely Islamic and conventional banking systems, the bank has provided KPI to both systems. Suppose Islamic banking does not compete with conventional banking on a variety of factors such as limited product availability, unfriendly customer products, difficult to implement, non-marketable and so on. In that case, it will cause the top bankers to shrink Islamic banking entities. It will affect the growth of the Islamic banking sector, especially in conventional banks. As such, the Islamic banking system has sought to compete with the conventional system by undertaking several modifications to its products to maintain the Islamic banking system's viability."

Regarding the best alternative to tawarruq munazzam, the respondents have different views due to their different opinions towards Shariah status on tawarruq munazzam. For those who consider the issue of tawarruq munazzam as a part of khilaf muktabar (recognised dispute), tawarruq munazzam could be utilised as the basis of financing either for personal financing or asset financing products (IV1, IV2 & IV3). As mentioned by the respondents (IV2):

"The tawarruq munazzam is a matter of khilaf muktabar, thus there is not a problem for Islamic banking to offer it in any financing. However, Islamic banking must ensure that contract practices are not trapped with non-Shariah elements such as gharar and interest."

In contrast, the respondents who believe that the tawarruq munazzam contract is non-Shariah compliant still can apply this instrument in case there is no alternative left. For example, personal financing is a method that could not utilise contracts like murabahah, ijarah and musharakah. However, it is prevented from being implemented in financing with Shariah-compliant contracts (IV4, IV5, IV6, IV7, IV8, IV9 & IV10). This can be understood based on the statement given by the respondents (IV6),

"…the tawarruq munazzam contract was non-Shariah compliant. However, considering the adverse effects of not practising the tawarruq munazzam contract, it is permissible to apply the tawarruq munazzam contract to products with no other alternative such as personal financing. However, it is prohibited to

be used in products with other Shariah-compliant alternatives. This solution aligns with the maqasid al-Shariah method, which seeks to maintain well-being and avoid harm. It also complies with the recommendations made by AAOIFI. However, permission to practice the contract is temporary. If there is a Shariah-compliant alternative, it will be banned in total. However, it is advisable for Islamic banking to work towards improving its business operations while not engaging into any non-Shariah contracts."

Discussion

The findings of the study show that there are five main findings; all respondents agree that there is a wakalah element in the practice of tawarruq munazzam contract. Second; The respondents disagreed over the tawarruq munazzam contract, where the minority of respondents said that the tawarruq munazzam contract was included in the category of khilaf muktabar (recognised dispute), while the majority of respondents said that the tawarruq munazzam contract was not included in the category of khilaf muktabar. Third; All respondents agreed that not offering the tawarruq munazzam contract could harm Islamic banking as they could not meet all of the financing requirements required by customers, especially personal financing. Fourth; The practice of tawarruq munazzam contract has avoided Shariah risk elements such as using the BSAS medium as an underlying asset.

From the findings of the study that there is a wakalah element in the practice of tawarruq munazzam contract. The inclusion of the component was included following BNM's (2015) tawaruq munazzam offering guidelines whereby every Islamic banking licensed in Malaysia is obligated to comply (Lee & Oseni, 2015). The element of wakalah was included for several reasons, namely following the tawarruq contract guidelines issued by BNM (2015). The second is to facilitate the sale of assets as banks are experts in a commodity platform. The third is to save time because the purchase and sale of assets from two brokers should be short-term. After all, they want to avoid the risk of depreciation of underlying assets (Ahmad et al. 2017).

Based on the second finding, there was disagreement among respondents where the minority of respondents considered tawarruq munazzam to be in the category of khilaf muktabar because the inclusion of wakalah element and substituted with the issue of tricks is the issue of dispute among current scholars without involving a concrete argument about its ban. While the majority of the respondents said that it was not an issue of khilaf muktabar where the tawarruq munazzam contract was Shariah's

non-compliance. This is because it is a tricky issue when it comes to the wakalah element and it is involved with the gharar issue because the transfer of underlying assets is not done correctly between the bank and the customer (Asni, 2021).

However according to Hassan (2003), al-Darir (2004) and Ali (2004), the inclusion of the wakalah element has led to controversy among current scholars regarding its legal status where a few scholars who have banned give reasons that tawarruq munazzam was involved with the issue of trick, the assets are not executed properly, the assets are returned to the first seller and are equated with the concept of bay' 'inah which is also structured or organised (Ali, 2018). Apparently, the issue of the trick was due to the inclusion of wakalah element in the contract so that the contract was controlled by only one party that is the bank can make a profit regularly, easy-to-sell the underlying assets as a temporary buyer and zero risk (Kahf & Habbani, 2019; Mohamad & Ab Rahman 2014).

The element of the trick is also to highlight when an underlying asset is not the primary purpose of the sale, but rather as an instrument for cash. The element of trick that clearly causes the contract of tawarruq munazzam is prohibited because the fundamental law of trick (hilah) is illegal (al-Suweilam 2004; Fa-Yusuf & Ndiaye, 2018). Besides, since the underlying asset is not the primary purpose of the sale, the asset transfer is not performed properly in that it is not in line with the purchase order and return assets to the first or original seller as prohibited in bay' 'inah (Alkhan & Hassan 2019).

However, the alleged issues have been disputed where the introduction of wakalah element is allowed by several parties including AAOIFI (2015), BNM (2015), al-Muni' (2004), al-Qurri (2003), al-Sharif (2002) and Isa (2003) state that if a rule in a commodity platform does not allow the customer to sell commodity assets except through the bank, then the customer may represent the bank institution to do so after the customer actually or constructively, receives the commodity. This shows that the bank can represent the buyer as long as the terms of the asset transfer between the bank and the customer are met. Also, the inclusion of wakalah element in the contract is allowed based on the hybrid concept and the concept of wakalah is the concept agreed by Islamic law (Asni & Sulong, 2018b).

Similarly, when dealing with the issue of a trick, there has also been disagreement among scholars where Ibrahim (2009) states that some scholars allow it and others prohibit it. Even some

scholars allow the element of trick in the contract of tawarruq munazzam as not opposed to the arguments of the Quran, hadiths, ijma' (the consensus or agreement of Islamic scholars) and qiyas (Analogical Reasoning) and parallel with maqasid al-Shariah. Even the practice of tawarruq munazzam can encourage great benefit as it facilitates financing for banks and clients to achieve the objective of obtaining financing especially for personal financing as well as not making it difficult for customers to sell their assets to others for cash (Ismon, 2012).

Besides, the issue of transferring an underlying asset is not a contract structure issue as it can be fixed when the transfer of the underlying asset is appropriately done. Similarly, the problem of underlying asset returning to the first seller is not an issue of the contract structure as it can be remedied to ensure that the underlying asset does not return to the first seller (Ahmad et al., 2017). Equating tawarruq munazzam with bay' 'inah is also inaccurate as the two contracts are different where bay' 'inah involves two parties namely bank and customer, while tawarruq munazzam involves four parties namely bank, customer, broker 1 and broker 2 (BNM, 2015).

Based on the disagreement among scholars regarding the contract of tawarruq munazzam, it is included in the category of khilaf muktabar as both views are based on the opinions of ijtihad (the process of legal reasoning) according to the expertise of their arguments. Thus, based on the method that means, "the ijtihad cannot cancel the other ijtihad" as well as the technique that says "cannot be denied in the matter of dispute" (al-Yusof, 2008). Both ijtihads are recognised because they are not in conflict with the arguments of the Quran, Sunnah, ijma' and qiyas. Moreover, according to the method in the fiqh muamalat which means "the original law of muamalat matters is to be allowed as long as no proposition prohibits it" (al-Yusof, 2008). Therefore, based on the understanding of the method, the contract of tawarruq munazzam is allowed because there is no solid argument to prohibit it (Alkhan & Hassan 2019). Therefore, the researchers agree with the respondents' view that the tawarruq munazzam is a khilaf muktabar.

Based on the third finding in which all respondents agreed that not offering the tawarruq munazzam contract could harm Islamic banking as it could not meet all the financing requirements required by customers, especially fulfil personal financing. The negative impact is significant because the offer of a tawarruq munazzam contract is important in providing an instrument for

personal financing. If not implemented, it could cause the Muslim community to lend money to conventional banks, which is worse than adopting tawarruq munazzam which is still in the category of khilaf muktabar (Ahmad et al., 2017).

Likewise, adopting a more agreeable tawarruq fiqhi (individual tawarruq) also harms stakeholders, especially banks and customers. For the customer, it will bring a significant burden on them in terms of cost, expertise, and time to get the backup assets from the warehouse will cost a lot and the expertise to sell the asset to others (Mihajat, 2014). Also, procuring a buyer requires a period where it will be detrimental to the asset's depreciation and instalment payments will have to be paid to the bank, while the customer has not yet received the cash that the financing is intended for. To appoint representatives from outside parties to represent the client for the sale of commodities also requires a high cost of wages. While the negative impact on banks is that they do not get a good return on the instruments offered because the customer has been affected (Yusoff & Nik Abdul Ghani, 2019). These factors can affect the development of Islamic banking.

Based on the fourth finding, the bank has avoided elements that could lead to non Shariah-compliant tawarruq munazzam contract, which ensure that the transfer of backup assets takes place properly between the customer and the bank, ensuring that the asset does not return to the first or the same seller, using Shariah-compliant assets, avoiding the issue of gharar in which information on the content of the asset, type and price is clearly communicated to the customer (Mohamad & Ab Rahman, 2014). It also avoids elements prohibited by the prohibition party.

Based on the results of the discussion, the respondents disagree about the practice of the tawarruq munazzam contract from the point of Shariah law. Therefore, the researchers will choose the views and resolve the dispute based on the methods of ma'alat and maqasid al-Shariah. This is because it is understood that the issue of dispute becomes the freedom for one party to hold and believe their views based on ijtihad. Therefore, this requires a concrete method to select one of the prevailing opinions.

Based on the ma'alat method of taking into account the effect of the action, either doing well or otherwise. Therefore, if the consequences of an action can be harmful, then it must be avoided, but if it can lead to benefit, it must be maintained (Al-Shatibi, 2004). To be a benchmark in determining the impact of a practice that can be harmful or well-being, it requires real data and facts, in which it they are taken from experts in Islamic

banking and finance (Bin Ishak, 2018). Therefore, based on the data from the study show that all the respondents agreed that the effect of not practising the tawarruq munazzam contract could be as damaging to the bank and the customer as in the previous discussion compared to the practice of the tawarruq munazzam contract where the issue on it is technical and can be improved, also contract structure of tawarruq munazzam is the issue of khilaf muktabar.

Besides, this study also avoids allowing something illegal if a concrete argument prohibits it. However, since the issue of tawarruq munazzam is an issue of khilaf muktabar, there is an opportunity to choose one or an accurate opinion based on the method of ma'alat by taking into account the expected impact of both views and to consider between the two opinions which is more harmful based on the data and facts collected if practiced.

The impact of the findings and discussion of the study is a guide to selecting the most accurate view of the tawarruq munazzam contract issue based on the ma'alat method. This is because it is understood that in current Islamic financial issues, many issues of dispute (al-Uthmani 2015). Therefore, based on the methodological guidelines, it can be referred to in resolving disputes debated in the Islamic banking world, especially involving tawarruq munazzam issues. However, ma'alat method is not practised absolutely, but according to the following standards,

1. The method is practised in contexts involving differences of opinion in the category of khilaf muktabar without involving a khilaf that is not recognised by Shariah law because of the strong prohibition from the Quran, hadith, ijma' and qiyas (Kamali, 2016). Therefore, since the tawarruq munazzam contract is proven to be a khilaf muktabar as in the previous discussion, this method can be used to reinforce the view that allows the tawarruq munazzam contract.
2. Because the method works to take into account the effects either lead to harm or well-being, it needs to be on the actual data and facts. If it can be proven from the data and the fact that practice can do great harm, it should be avoided (Bin Ishak, 2018). Thus, in the issue of the tawarruq munazzam, the data indicate that if it is not practised, it can cause great harm to both the customer and the bank.
3. Although the issue of khilaf muktabar may cause both dissenting opinions to be adopted, but in choosing between dissenting views based on the method of ma’alat, it should also look at the arguments presented by the opposite opinion

(Asni, 2018). For example, involving the tawarruq munazzam contract, the opposite arguments can be taken into account such as avoiding the gharar issue in the contract, the transfer of assets not being done properly, the assets returning to the first seller and the backup assets not recognized by Shariah need to be avoided in the tawarruq munazzam contract can minimize the issue of disputes in the contract.

The positive impact of the analysis of the tawarruq munazzam contract based on the ma'alat method is that it can increase Muslim confidence in Islamic banking. This is because conflicting opinions among respondents who are directly involved in Islamic banking can undermine Muslims' belief in Islamic banking. This could affect the development and progress of the ever-expanding Islamic banking system.

Also, the reason for using the contract that is prohibited by Shariah temporarily as stated by one of the respondents is dangerous as it may cause the public to think that the contract offered by Islamic banking is not Shariah-compliant and that it is possible to subscribe to conventional products because it assumes that both are the same. Therefore, the results of this study can increase the confidence of Muslims in the tawarruq munazzam contract offered by Islamic banking.

Conclusion

The fundamental of establishing Islamic banking as an alternative to conventional banking that practices interest activities prohibited by Shariah. The principle of Islamic banking is based on the Shariah law in each of its operations, and it is embodied in the rules and regulations of Islamic banking. In fact, it is required of each IFI to appoint Shariah advisors to ensure the compliance of Shariah in each of its operations. However, there is a difficulty in applying the principles of Islamic practice in the current context because the conventional banking system is pioneering the current business situation, and Islamic banking has modified and hybridised its products to suit the contemporary system. Among the modified products is the tawarruq munazzam contract. However, the modification caused the tawarruq contract to be controversial when some scholars currently banned it because it contained elements of trick and interest. While others allow it because there is no concrete argument to prohibit it. As such, it has been analysed those disagreements over the contract of tawarruq munazzam fall into the category of khilaf muktabar.

Therefore, based on the issue of disagreement, the researchers have used the method of ma'alat and maqasid al-Shariah to choose one opinion by making the result as the primary data to measure the expected impact of well-being and harm. After analysing, the study found that stopping the practice of tawarruq munazzam contract in Islamic banking could have a significant effect on the Islamic banking sector and its customers. Thus, the practice of tawarruq munazzam contract leads to greater well-being than not being practised even though it is a marjuh (weak) opinion on some scholars. Therefore, the tawarruq munazzam contract can be practised in the current context.

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