Islamic Personal Financing Instruments in the Malaysian Banking Industries: Issues and Alternatives

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Abstract

The application of Islamic personal financing instruments in the Malaysian banking industries such as bay^{c} al-^{c}īnah (same-item sale-repurchase) and organised tawarruq (commodity cost-plus sale) has suffered a worldwide ban by prominent fatwa bodies in Islamic world. The situation has led to negative consequences such as bad perceptions to the Malaysian banking industries. The aim of this article is to provide an overview related to the Islamic personal financing instruments. Analysis focuses on issues related to the unlawfulness of the instruments. This qualitative research employs content analysis approach. It reveals that Islamic personal financing instruments such as bay^{c} al-^{c}īnah and organised tawarruq that have been practised in Malaysia contain unlawful elements that violate Islamic law and its objectives. Islamic banking and finance needs alternative instruments to replace the current unlawful financing tools to maintain Sharia compliant status.

Keywords: Islamic personal financing, bay^{c} al-^{c}īnah, tawarruq, rahn-based qarḍ, commodity murābaḥah

INTRODUCTION

In the world of contemporary Islamic personal financing, certain instruments have been developed from the concepts of Islamic commercial law such as *bay^{c} al-^{c}īnah*, *tawarruq*, *rahn* (collateral) and *qarḍ* (interest-free loan). These instruments have been modified and innovated to cope with the current legal and banking requirements. However, some of the instruments violate certain principles of Islamic law but maintain Sharia compliant status, endorsed by Malaysian authorities in Islamic banking and finance. This situation has led to debates and questions on the permissibility of such instruments according to Sharia.

METHODS

This research is an almost wholly Sharia-based study and not intended to be a legal study of any contemporary law. This qualitative research employs content analysis approach and depends on the primary and secondary sources of Sharia through legal analysis based on the discipline of *uṣūl al-fiqh* (principles of Islamic jurisprudence) because this study represents a fully Sharia-based research. Firstly, in order to investigate the validity of *bay^{c} al-^{c}īnah* and *tawarruq*, this study collects opinions of al-Ḥanafiyyah, al-Malikiyyah, al-Shāfi^{c}iyyah, al-Ḥanābilah, al-Ẓāhiriyyah, al-Ja^{c}fariyyah, al-Zaydiyyah and al-Ibādiyyah on the instrument. These *madhhab* (school) are included in this research because they represent the majority of Muslim jurists that still exist until

now except al-Ẓāhiriyyah. Data collection aims at their main references within the respective *madhhab*. In addition, this research also examines other materials such as journals, fatwas and resolutions, legal documents, Islamic banks documents and websites, pamphlets, reports and other components related to contemporary practice of Islamic personal financing.

BAY^{C} AL-^{C}ĪNAH AS AN ISLAMIC PERSONAL FINANCING INSTRUMENT

The issue of *bay^{c} al-^{c}īnah*[2] has become controversial in the Malaysian Islamic banking and finance industries, especially after several prominent religious authorities in the Islamic world declared the instrument as invalid and against the teachings of Sharia. They are the Islamic Fiqh Academy of the Organization of Islamic Cooperation (OIC), the Muslim World League, Al-Azhar, the Saudi Council of Senior Scholars and the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). According to Rosly and Sanusi (2001) and El-Gamal (2003), their rulings have significant influence on foreign investments and market pressure in the Malaysian banking industries, since many Middle Eastern investors are not in favour of *bay^{c} al-^{c}īnah*. Even though Muslims around the world are not obliged to follow the rulings of the aforementioned establishments, since their role is only as advisory and standards-providing bodies (Bianchi 2007; Ibrahim 2008). It is claimed that their rulings are the most preferred and decisive, since they have gone through meticulous and lengthy researches by numbers of specialists in Sharia. In fact, their rulings represent a consensus among contemporary Muslim jurists. As a result, the Malaysian banking industries are committed to achieve the international standards in Islamic finance, even though the practice is voluntary (Robbins 2010; Anderson 2010).

1. Legality of *Bay^{c} al-^{C}Īnah*

Classical *madhhab* have different views pertaining to the legality of *bay^{c} al-^{c}īnah*. The instrument is prohibited according to a Hadith (Prophet Muhammad's tradition) but the validity of the Hadith is disputed (El-Gamal 2003). The Hadith is reported by Abū Dāwud (n.d.):

> If you are involved in trading based on *al-ʿīnah*, follow an ox's tail (busy with life), are preoccupied with farming and abandon the duty of jihad, Allah will make misfortune befall you and He will not remove it until you become conscious and return to your religion.

Another issue is how Sharia views on such a contract, whether it is legal or not, because the motive behind the sales is to legalise usurious transactions. According to al-Shāfi^{c}iyy (1973) and al-Ẓāhiriyyah[3] (Ibn Ḥazm n.d.), such sales are to be allowed because the Hadith is invalid and not qualified as evidence in Sharia. Moreover, the validity of a contract is based on its external appearance, provided that all terms and conditions are fulfilled. The unlawful intention of the parties to engage in a fictitious purchase is immaterial and it does not invalidate their act, unless expressed in the

contract (Arabi 1997). Their argument is bona fide but to generalise the ruling of *bayᶜ al-ᶜīnah* is unacceptable since other prohibitions in Sharia, such as a sale for a sale, which is associated with the instrument, must be taken into consideration as well.

The majority[4] of Muslim jurists including the *madhhab* of Abū Ḥanīfah (d. 150 AH/767 CE), al-Ḥanafiyyah, Mālik (d. 179 AH/795 CE), al-Mālikiyyah, Aḥmad (d. 241 AH/855 CE), al-Ḥanābilah, al-Ja'fariyyah[5], al-Zaydiyyah[6] and al-Ibādiyyah[7] insist that the *bayᶜ al-ᶜīnah* is not permissible. This is because according to them, the Hadith that prohibits the instrument is valid and has authority as evidence in Sharia. They assert that it represents a usurious transaction that should be prevented through the principle of *sadd al-dharīᶜah*[8] (blocking the bad means) (El-Gamal 2008). The motive of the contracting parties determines the validity of the contract and even if the intention is not disclosed, their act will symbolise the intention. The ruling too, is based on social convention, which is acceptable as supporting evidence in Sharia, in the sense that it is utilised as an aid to the textual interpretation of the main sources of the Sharia, the Quran[9] and Hadith (Kamali 2000). In this case, the instrument represents a stratagem for usurious contract, as known through social convention. Their argument is also well founded, but the ruling cannot be generalised since not all *bayᶜ al-ᶜīnah* instruments bring harm to the public, especially in relation to unintentionally executed *bayᶜ al-ᶜīnah*.

The application of *bayᶜ al-ᶜīnah* is claimed to be unlawful according to most Muslim jurists as previously discussed (El-Gamal 2008). Despite the fact that established contemporary religious authorities in Sharia, such as the Islamic Fiqh Academy of OIC and AAOIFI after long research, have banned the concept, legal authorities in Malaysia such as the SAC of BNM and the Securities Commission continue to support its permissibility. According to Anderson (2010) and Sorenson (2008), the former cannot invalidate the latter's resolution and vice versa, which leads to a stalemate and creates uncertainty surrounding Sharia compliant products.

2. Issue of Legal Device

Many current studies on *bayᶜ al-ᶜīnah*, concentrate on the authenticity of the evidence and opinions of Muslim jurists on the instrument. The work of Rosly and Sanusi for example, have argued that al-Shafiᶜiyy, who initially permits the contract, has reached the same level as any other *madhhab*, in forbidding the instrument (Rosly & Sanusi, 2001). However, the argument does not prove that the sale is invalid and void despite its impermissibility. This is due to the fact that according to al-Shāfiᶜiyy, illegal intention or forbidden sale does not necessarily invalidate the transaction unless expressed in the contract (Arabi 1997). Other researchers such as Anwar emphasise the concept of the time value of money that contributes to the prohibition. It symbolises a rental for the use of money over a certain period of time. He views the instrument as an exchange of money with different values, but concealed by two sales contracts (Anwar 2003). From this point of view, Shaharuddin (2012) concludes that the instrument is insufficiently different from conventional banking, contrary to the SAC's stand on the instrument. However, if *bayᶜ al-ᶜīnah* is prohibited on the basis of exchanging money for money through two contracts of sale, then other permissible and undisputed

instruments in Sharia such as unplanned *bay*^{c} *al-*^{c}*īnah* will also be subject to prohibition because it involves exchanging money for money through two contracts of sale.

3. Issues Related to Sale Contract

The justifications are based on the end result of the transaction without considering the instrument involved. Their analysis should be based on the means and result of the transaction because both elements determine compliance with Sharia. For example, with regard to the Hadith that prohibits *bay*^{c} *al-*^{c}*īnah*, Farooq (2007) views the prohibition as contingent on the stipulation of a second sale in the contract but he did not describe the issue in detail. It means that the prohibition is not only related to *bay*^{c} *al-*^{c}*īnah* per se, but also associated with the prohibition of double sale in the contract. These arguments demonstrate the need for the SAC to re-evaluate the ruling of *bay*^{c} *al-*^{c}*īnah*, since their resolution does not reflect the actual description of applied *bay*^{c} *al-*^{c}*īnah*. In fact, they have come out with new stringent resolutions to control the practice of *bay*^{c} *al-*^{c}*īnah*. They include the need to contain two independent contracts, namely a purchase and a sale contract, no stipulation in the contract to resell the transacted item, the requirement of both contracts being finalised separately, the correct order of each contract, whereby the first sale contract must be concluded before the conclusion of the second sale contract and the transfer of beneficial ownership of the transacted item and its valid possession in conformity with Sharia and contemporary business practice (Bank Negara Malaysia 2010). These stringent requirements render Islamic banks to stay away from *bay*^{c} *al-*^{c}*īnah* by applying organised *tawarruq*. This is due to the fact that the new requirements are difficult to be realised.

The current studies on the permissibility of *bay*^{c} *al-*^{c}*īnah* as previously discussed fail to include external factors, such as the prohibition of providing a *qard* for a sale, a sale for a sale and selling an unavailable item, which have been associated with the current application of *bay*^{c} *al-*^{c}*īnah*. Their main concern focuses on the opinions of the classical Muslim jurists without much deliberation on the related evidences of Sharia on the matter. Yusoff (2014) has pointed out the aforementioned external factors in his work related to the prohibition of *bay*^{c} *al-*^{c}*īnah*. He revealed that the current practicality of *bay*^{c} *al-*^{c}*īnah* application is not entirely related to classical opinions of Muslim jurists because of different implementation. The current ruling on *bay*^{c} *al-*^{c}*īnah* does not completely demonstrate its reality in the current Malaysian banking and finance industries. *Bay*^{c} *al-*^{c}*īnah* that has been endorsed by al-Shāfi^{c}iyy is not the one that is currently practised by the industries. It is totally different especially when the aforementioned factors are present (Penerbit UTHM 2015; Yusoff 2016).

TAWARRUQ AS AN ISLAMIC PERSONAL FINANCING INSTRUMENT

Al-Hanabilah introduced *tawarruq* as a new term for a modified version of *bay*^{c} *al-*^{c}*īnah* as an alternative instrument (al-Mardawiyy n.d.). Other *madhhab* do not recognise the term, since the discussion of the subject lies within the discussion of *bay*^{c} *al-*^{c}*īnah*. It is

similar to *bayᶜ al-ᶜīnah* except that the commodity involved in the instrument is sold to a third party rather than to the creditor (Shanmugam & Zahari 2009). The customer obtains money by selling the commodity to the third party and it remains his obligation to pay the deferred sale value to the creditor. The instrument is permissible according to the majority of Muslim jurists including al- Ḥanafiyyah, al-Mālikiyyah, al-Shāfiᶜiyyah, al-Ḥanābilah, al-Jaᶜfariyyah, al-Zaydiyyah, al-Zāhiriyyah and al-Ibādiyyah. The Fiqh Council of the Muslim World League in Makkah, Saudi Arabia, issued a fatwa in 1998 permitting the practice as an alternative to interest-based lending (El-Gamal 2008). According to Robbins (2010) *tawarruq* is permissible provided that the debtor does not sell back the traded item to the creditor such as a bank. The concept is widely used and has become increasingly popular in Saudi Arabia, the United Arab Emirates (UAE) and other Gulf Cooperation Council (GCC) countries in recent years (Lubetsky 2010).

The work of El-Gamal (2008) and Robbins (2010) states in detail the concept of *tawarruq* as an alternative to *bayᶜ al-ᶜīnah*. They assert that Sharia has approved the practice with strict conditions due to the close relationship between *tawarruq* and *bayᶜ al-ᶜīnah*. Even though their studies are related to classical opinions of *tawarruq*, the descriptions concentrate on modern *tawarruq* without any attention to the classical financing model. The application of classical *tawarruq* does not interest modern Islamic banks. In fact, there is no applied model currently. Despite its legitimacy in Sharia, Islamic banks tend to isolate the concept by implementing the complicated version, the organised *tawarruq*. The application has been modified and currently does not conform to the classical *tawarruq*. The issue has given this research an opportunity to examine the possibility of classical *tawarruq* as an alternative to *bayᶜ al-ᶜīnah* by producing a new mechanism of financing instruments.

1. Violation to Sale Contract

Eventually, after comprehensive research, the Fiqh Academy of OIC in 2009 through declaration no. 179 (5/19) and the Fiqh Academy of the Muslim World League in 2003 through declaration no. 2 in their 17th session, forbade the currently applied *tawarruq* as it is not properly executed according to Sharia (Muslim World League 2016). The instrument violates the obligation to deliver the traded item or the requirement to possess it. Moreover, the concept is widely abused when the bank itself executes the sales as an agent to the third party, which should have been exercised by the customer. Hence, it was nothing more than the prohibited and controversial *bayᶜ al-ᶜīnah* (Robbins 2010; Warde 2009). The modified concept is called organised *tawarruq* (Shinsuke 2012). Despite being banned, SAC of BNM continue to support the application through a resolution in its 51st meeting dated 28 July 2005, which resolved that financing products based on the concept of organised *tawarruq* is permissible (Bank Negara Malaysia 2010). In fact, a newly Sharia standard on *tawarruq* had been issued by BNM on 17 November 2015, signifying a continuous support for it but with more stringent conditions. Still, the new standard could not fulfil the requirements of *tawarruq* standard according to the Islamic Fiqh Academy of OIC because it contains the

permission of promise to sell back and appointment of agency in the trading process between the customer and the bank.

Many current studies on organised *tawarruq* support the declaration of the illegitimacy of the instrument by the OIC, AAOIFI and the Muslim World League. According to Shinsuke (2012), Robbins (2010) and El-Gamal (2008), their justifications are based on the similarity between *bay*^{c} *al-*^{c}*īnah* and organised *tawarruq*, the involvement of illegitimate *hilah* and the invalidity of the sales contract involved. For example, some London Metal Exchange (LME) brokers sell the same commodity to multiple buyers, which render the sales invalid (Khnifer 2010). According to Kahf, the instrument might be valid with some adjustments or alterations to the concept or modus operandi, as long as it adheres to the requirements of Sharia instruments (Shinsuke 2012). However, there is no mention of specific design in his work to improve the instrument. Even though the modus operandi of organised *tawarruq* in Malaysia through *suq al-sila*^{c} involves genuine sales contracts with physical commodities, other critical Sharia issues such as the promise to sell back the commodities to the bank and the prohibition of sale for a sale still exist in the transaction.

2. Solutions to the Problem

Yusoff (2016) has come out with several solutions to the problem. In order to be Sharia compliant, the instrument should not contain a condition or promise that the customer is obligated to appoint the bank as his agent in the selling process to the third party. This is to ensure that the customer is at liberty to sell his commodity to any party he desires and to prevent illegitimate prior agreement between the bank and the customer. Allowing the obligatory appointment as an agent to the customer through condition or promise contradicts the objective of the sale contract and eventually invalidates it, according to Sharia. It represents a conditional sale, which is invalid and should be terminated. Additionally, the sale transaction between the contracting parties should be a genuine one that involves real trade items held physically or through constructive possession that has particular information on the item. Yusoff's recommendation is theoretical and there is no specific model that is currently being practised in the banking industries in Malaysia. His recommendation is based on the avoidance of prohibited elements in organised *tawarruq* standards provided by Islamic Fiqh Academy of OIC.

The requirements of organised *tawarruq* provided by Islamic Fiqh Academy of OIC are favourable because they are meant to guarantee a fully Sharia compliant instrument. In fact, various experts in Sharia from all over the world approved the standard. On the other hand, standards provided by BNM should be seen as temporary solutions to the problem and it could not escape from continuous criticism and remains questionable as Sharia compliant instrument. Therefore, BNM should enforce organised *tawarruq* standard of OIC to the industries.

In terms of the concept of classical *tawarruq*, Yusoff (2016) has proposed two models of financing instrument could be applied in modern banking:

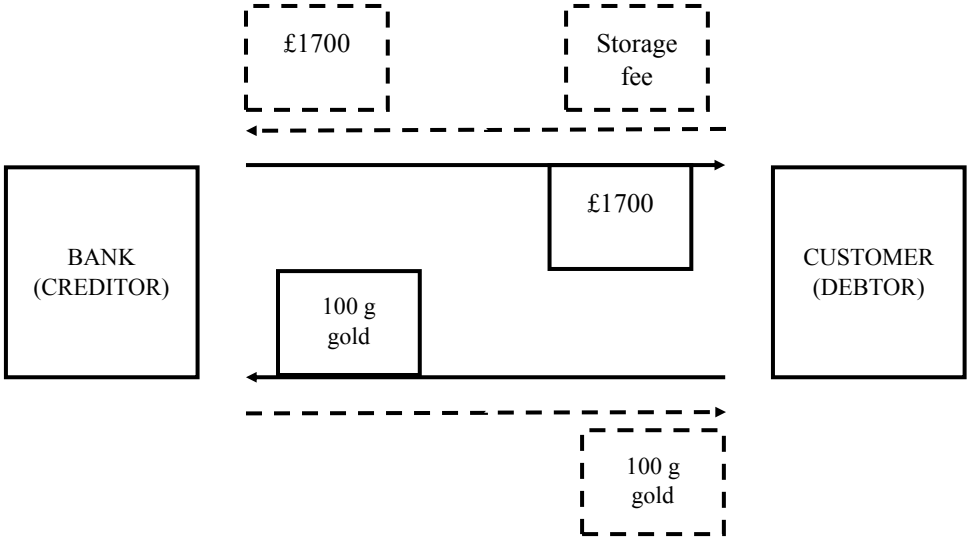
i. The first model involves a trade of a physical item between the bank as a creditor and customer as a debtor. The bank may sell a precious metal such as

platinum at a price higher than its market value in a deferred payment to the customer. The customer is obligated to settle the debt in an agreed period of time. The role of the bank as a creditor ends here. Subsequently, in order to obtain cash money, the customer is required to monetise the platinum by selling it to a brokerage firm or any precious metal market.

ii. The second model involves a trade of a virtual item with constructive possession. In this case, the bank only needs to buy the platinum from the brokerage firms without delivery and sell the item to the customer in a deferred payment. In addition, this model requires the brokerage firm to allow banks to order a warrant, for the purpose of transferring the ownership from bank to the customer. After endorsement, the possession of the merchandise is officially with the customer and he has full control over it. Eventually, the customer can claim his property from the brokerage firm and sell it in the market for liquidity. The customer is obligated to settle his debt to the bank. This model differs from the currently practised organised *tawarruq* in Malaysia because there is no element of agency and promise between the customer and the bank.

RAHN-BASED *QARḌ* AS AN ISLAMIC PERSONAL FINANCING INSTRUMENT

Apart from *bay^{c} al-^{c}īnah* and *tawarruq*, some Malaysian banking and financial providers utilise the application of *qard* as an Islamic financing tool. In fact, the concept of *qard* has been modified to be a profitable financing product, with a combination of *rahn* to produce a *rahn*-based *qarḍ* by charging a fee for *rahn* safekeeping. Since 1992, Muassasah Gadaian Islam Terengganu and Permodalan Kelantan Berhad have been implementing the concept and were followed by Permodalan Kelantan Berhad and Bank Rakyat Malaysia in 1993, Bank Islam Malaysia Berhad (BIMB) in 1997 and Agrobank in 2002 (Yaacob et al. 2012). Even though the product follows guidelines of Sharia, it too cannot escape from controversial issues. The modus operandi is shown in Figure 1.



- The bank delivers £1700 to the customer as *qarḍ*.
- The customer pledges 100 grammes of gold to the bank.
- The customer pays a monthly storage fee for the gold throughout the plan.
- The customer repays back the *qarḍ* within the agreed time.
- The bank delivers back the pledge item, the gold, to the customer.

Figure 1: *Rahn*-based *qarḍ* or Islamic pawnbroking modus operandi

1. Element of *Ribā*

The work of Khan (2004), Naim (2004), Khir (2011) and Sharif et. al (2013) reveals that the practice of *rahn*-based *qarḍ* still carries the element of *ribā*[10] in its modus operandi. There is no doubt that the instrument represents the permissible contract of *qarḍ*, but charging a fee for *rahn* safekeeping, when added to the contract, resembles charging interest on the *qarḍ* principal. The problem becomes worse when the fee is linked to the amount of the *qarḍ*. In contrast, Sabri et al. (2013) asserts that the fee does not represent the interest-bearing *qarḍ* because it is based on *ujrah* (service charge) concept for keeping the *rahn* under the creditor's guardianship, which is permissible in Sharia. Alternatively, Khir (2011) has proposed the application of *wadīʿah bi ajr* (the combination of trust and fee) and *tawarruq-rahn* (the combination of *tawarruq* and *rahn*), but the instruments may also contain the element of *ribā* indirectly, as well as *hilah* (legal ruse). A combination of *murābaḥah* and *rahn* could be an alternative to the concept as suggested by Mukhlas (Sharif et al. 2013). However, his model obviously constitutes *ribā* because gold bars are being used as a medium of exchange in a deferred payment. Perhaps, using a non *ribā*-related item such as platinum could solve the issue.

An Islamic financing instrument based on *rahn* is a non customer-friendly product, since a debtor needs tangible *rahn* to secure a *qarḍ*; it is a major constraint for non-property holders (Abdouli 2009). The practice is difficult to realise unless the *rahn* is made available through *murābaḥah* (cost-plus sale) and *rahn* application, which is not derived from the customer's property. With regard to the critique on the *rahn* safekeeping fee, it does not incorporate valid evidence from authentic sources of the Sharia. The element of similarity is not convincing enough to invalidate the instrument.

2. Solutions to the Problem

Yusoff (2016) has re-evaluated those concepts and explored the possibility of modifying the models to eradicate the element of *ribā* if the claim is proved to be true:

(1) Firstly, the storage fee should not reflect the amount of *qarḍ* or pledge item value. It is important to determine storage fee based on the amount of Islamic insurance covered, and the actual safety box fee, without a direct link to the amount of *qarḍ* or pledge item value.

(2) Secondly, the storage fee should not be seen as gaining benefit from the *qarḍ* because the pledger is responsible for bearing any cost related to the pledge item according to the majority of Muslim jurists.

QARḌ WITH SERVICE CHARGE AS AN ISLAMIC PERSONAL FINANCING INSTRUMENT

The service charge idea was introduced in 1976 at the first International Conference on Islamic Economics held in Mecca. Uzair (1980) stresses that an Islamic bank is a business institution that should prove its feasibility and viability and customers should compensate their assistance and effort for providing credits. Banks can charge a small amount as service charges from the borrowers in order to cover the administrative expenses involved in the activity. Gafoor (1995) supports the idea by providing *qarḍ* with a service charge using deposits from savings and current accounts. He maintains that more benefits could be derived from this mechanism, such as capital guarantee to depositors and smaller charges compared to interest charged by conventional banks.

In the case of Iran, the expenses incurred are to be calculated on the basis of directives issued by Bank Markazi Jomhouri Islami Iran and collected from the borrower, while in Pakistan, the maximum service charge permissible to each bank are to be determined by the state bank from time to time (Gafoor 1995). Siddiqui suggests that service charges should be the same regardless of the amount required, the term of the *qarḍ* or whether the application is successful or not. He adds that the service charge should reflect the actual overhead cost and not be made a source of income to the banks. In fact, Islamic banks in Malaysia already use the application through a *qarḍ*-processing fee (Gafoor 1995).

1. Element of *Ribā*

AAOIFI (2010) has declared that the service charge should not correspond to the amount of *qarḍ*, since it represents *ribā*. Abdus-Shahid (1984) argues that if the service charge is a fixed amount, it will resemble interest on basic *qarḍ* even though the charge does not correspond to period of *qarḍ* or amount of the principal. It may be justifiable to impose certain overheads or service charges as well as a membership fee to obtain a *qarḍ*, but it would not be practical for a big amount of a *qarḍ* (Qasmi 2008). The whole idea is good but not many banks are willing to sacrifice a big amount of capital for that purpose. It is better for them to invest their money in a more profitable account. Hence, another mechanism should be proposed for a fair deal between banks and customers.

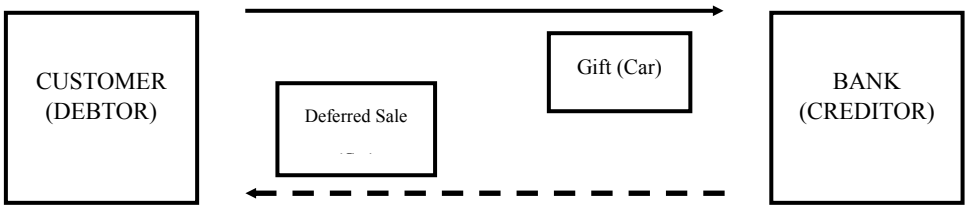
NEW ALTERNATIVE INSTRUMENTS IN ISLAMIC PERSONAL FINANCING

1. *Hibah* (gift)-Sale Based Financing

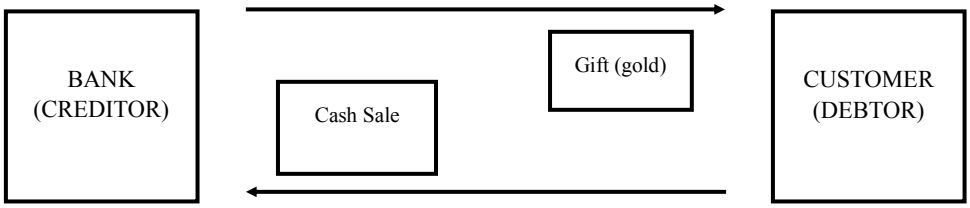
Recently, a new mechanism of Islamic financing as an alternative to *bay^{c} al-^{c}īnah* and organised *tawarruq* has emerged. The mechanism represents a *hibah* (gift)-sale based financing. Based on the conditional *hibah*, there are two things involved in debt financing, namely *hibah* and contract of sale and purchase. According to the modus operandi, the customer gives certain merchandise to an Islamic bank. After *qabḍ*[11]

(possession) occurs, the customer buys back the merchandise at the cost of deferred payment. After the bank transfers possession of merchandise to the customer and after a *qabḍ*, the bank buys back the merchandise for cash. In this way, the purpose of financing required can be achieved (El-Seodi et al. 2012). The modus operandi is shown in Figure 2.

Step 1



Step 2



- The customer delivers the car as a *hibah* to the bank.
- The bank sells the car back to the customer for £12000 in a deferred payment for a one-year period.
- The bank deliver 325 grammes of gold to the customer as a *hibah*.
- The customer sells back the gold to the bank for £10000 in cash.

Figure 2: Modus Operandi of *Hibah*-Sale Based Financing

Yusoff (2016) has examined this newly developed theory of financing and investigated the validity of the product according to Sharia. Not much discussion can be found on this subject since it is still new. El-Seoudi's approach in linking the instrument with conditional *hibah* is out of context. Conditional *hibah* is a contract whereby a contributor gives *hibah* to another person with an intention to get a reward as an exchange for his *hibah*. According to the majority of Muslim jurists, conditional *hibah* is not a *hibah* at all (al-Sarakhsiyy n.d.). In fact, it is a sale contract since the contract represents an exchange of certain items. Moreover, a conditional *hibah* requires an exchange of two trade items. It does not constitute an exchange of an item with a sale contract. For example, a person gives a bicycle to his friend with a condition that he gives him a CD player as a reward. If the reward of the *hibah* represents a sale contract rather than an item, the contract could be described as a sale for a sale, which is prohibited in Sharia. For example, a person gives a bicycle to his friend with a condition that he sells his CD player to him. In this case, based on the opinion of the majority of Muslim jurists, the bicycle is traded for the selling of CD player. This contract evidently

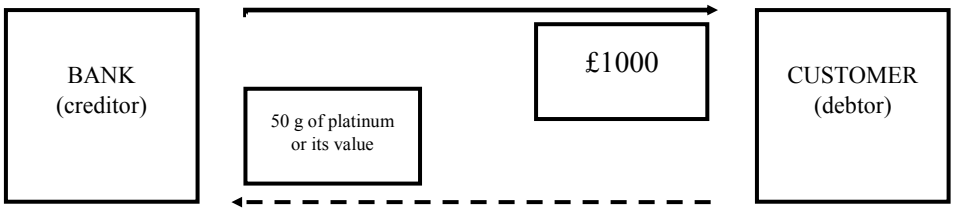
represents the prohibited two sales in a deal or a sale for a sale. Therefore it cannot be a Sharia compliant financing instrument.

2. *Hibah* for a Reward Financing

As an alternative, Yusoff (2016) has proposed a financing instrument of *hibah* for a reward that exploits the mechanism of conditional *hibah*. Through this model, a bank as a creditor provides cash money as a *hibah* to a customer as an exchange for a certain valuable item that has to be delivered to the bank in a deferred payment. In essence, it is sale contract between the contracting parties. Even though the reward is not required to be specific, Islamic banks may request a specific reward such as platinum to prevent dispute with their customers. This model is a genuine sale contract and could be a viable Sharia financing instrument because it does not promote illegitimate prior agreement and does not contain prohibitions of Sharia as occurred in *bay^{c} al-^{c}īnah* and organised *tawarruq*. However, a further research is required to provide an insight in terms of practicality in the Malaysian banking industries.

3. *Salam* (Forward Sale) Personal Financing

Another alternative is by using a *salam* model. An Islamic bank may order a certain amount of platinum from a customer, based on the customer's requirement of cash money, for example 50 grammes of platinum with advance payment of £1000. In this case, the bank provides £1000 financing to the customer with the payment of 50 grammes of platinum. The bank may provide an optional mode of payment to the customer such as another type of precious metal or its value in cash in the event of default, or failure to deliver the ordered item. These models were initially *qarḍ* models that turned into sale and *salam* models (Yusoff, 2016). The modus operandi is shown in Figure 3.



- After reaching an agreement, the bank buys 50 grammes of platinum on a *salam* basis; the capital is delivered to the debtor upon executing the contract.
- The customer as the debtor is responsible for delivering 50 grammes of platinum or its value at agreed period of time.
- The bank is allowed to gain benefit from the instrument since the *salam* item is non-*ribā*-related.

Figure 3: Non-*ribā*-related item based on a *salam* contract model with a specific period of time

This model does not differ much from the previous conditional *hibah* for a reward. It provides cash money to the customer by requiring certain item as an exchange in the future. It is a real sale contract and could be a feasible Sharia financing tool because it does not advocate illegitimate prior agreement and does not consist of prohibitions of Sharia as evident in *bayᶜ al-ᶜīnah* and organised *tawarruq*. However, an extended research is needed to produce a marketable in terms of practicality in the Malaysian banking industries.

CONCLUSION

The development of Islamic banking and finance in Malaysia is open to innovations. The industries are willing to adhere to the international standards providers in Islamic financing such as AAOIFI in order to resolve disagreements. The move to replace *bayᶜ al-ᶜīnah* with organised *tawarruq* for example has shown Malaysia's commitment to comply with the standard. Still, it is insufficient because the application does not also comply with international standards. Hence, further research is crucial and beneficial to the industries in producing Sharia compliant financing instruments as alternatives to *bayᶜ al-ᶜīnah* and organised *tawarruq* in order to maintain as one of the leaders in Islamic banking and finance. The newly proposed concepts and instruments are theoretically suitable to replace the currently practiced instruments but they should be explored further in order to determine its practicality and viability in the Malaysian banking industries.

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ENDNOTE:

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[2] A sale contract, whereby a person sells an item on deferred payment, then buys back at a lower price for cash. Example: A requires a loan of £10 from B. Instead of generating interest on this loan, B applies a device. He sells an item to A for £15 on deferred payment and then buys back from him the same item for cash at £10. A ends with cash of £10 and agrees to pay back £15, as price of the item.

[3] The *madhhab* that insists on sticking to the *ẓahir* (manifest) or literal meaning of expressions in the Quran and the Hadith and rejects the authority of *qiyās* (analogical reasoning).

[4] The majority of Muslim jurists refer to the larger numbers of Muslim scholars. Normally the four *madhhab*, which comprise al-Ḥanafiyyah, al-Mālikiyyah, al-Shāfiᶜiyyah and al-Ḥanābilah represent the majority if they agree on certain issues, since the jurists and followers of the four *madhhab* represent the larger number of Muslims around the world.

[5] The Twelve Shia *madhhab*, which reject many traditions of the prophet, the principle of *ijmāᶜ* and legal analogy.

[6] The moderate Shia *madhhab*, which is closer to Sunni and differs significantly from other Shia.

[7] It is one of the earliest *madhhab*, which differs from Sunni and Shia. Their founder is ᶜAbd Allah ibn Ibād.

[8] *Sadd al-dharīʿah* is a principle of Islamic jurisprudence that safeguards the stability of the means and ends of Sharia rulings by preventing the effort to utilise a legal means for an illegal end – such as prohibiting the sale of weaponry at the time of war or banning a sale, which may act as a fictitious usurious instrument. It also operates as protective actions that are carried out even before the real occurrence of a concerned incident, such as prohibiting a demonstration that is expected to cause violence.

[9] The book of Allah revealed to the Prophet Muhammad as a supreme source of Islamic law and transmitted to the present age through a continuous chain.

[10] Technically, it means an increase over the principal in a *qarḍ* contract, or a debt or in trading transactions, paid to the creditor or a party, as an exchange without similar counter value.

[11] *Qabḍ* literally means to possess. Technically, it means to take delivery of the merchandise sold and to pay its price according to the agreement of sale.

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