Syariah Analysis on Hybrid Contracts and Its Applications in Islamic Housing Financing in Malaysia

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ABSTRACT
To gain a strong position in the banking industry, by meeting a sharia-compliance as well as attractive to customers and be competitive with conventional banks, Islamic banks are extending their products by producing multi-varied contracts or known as “hybrid”. Hybrid contracts are the merger of several pact of contract that make banking products multipart and flexible especially when involved housing financing. As a result of the bank's products using the Islamic brand, then it cannot avoid the syariah issues in the legality of the product whether it is permitted or otherwise. To achieve the goal, the study will analyzed scholars’ arguments on the merger of contract using the Usul Fiqh methodology. The study will also identify hybrid products that were offered by Islamic housing financing in Malaysia and analyzing it from the Islamic perspective. This study use a qualitative method by referring to arguments in the fiqh and Usul Fiqh books as well as articles, statutes and related circulars pertaining to the issues. The study found that the legality of hybrid contracts depend on the form of the merging either based on lawful obligations such as Ijarah Muntahiyah bi al-Tamlik, Ijarah Mausufah fi al-Dhimmah and Musyarakah Mutanaqisah, or the hybrid that based on prohibited tricks such as Tawarruq and Bay' Bithaman Ajil which is unlawful.

Keywords: Hybrid Contracts, Islamic Housing Financing Products, Hilah, Musyarakah Mutanaqisah, Tawarruq

Introduction
Innovation of the muamalat product always occurs from a single contract to a multi-variation contract or hybrid. It is found that all housing finance products offered by Islamic banks recently are hybrid-based (Nagaoka, 2012).

According to Kiong Kok et al., (2014), the need for hybrid products is to restructure risk management against murabahah contracts by inserting the promise contract (wa'd). However, the permitted hybrid contract is disputed where Mihajat (2014) permit it with condition, while Yunus et al., (2016) found in reverse that hybrid products comply with Islamic law. Apparently, until now there is no clear guidance on the acceptability of this hybrid contract on the sidelines.

Based on the previous study, researchers wanted to analyze all the hybrid-based housing financing products offered by Islamic banks in Malaysia. The study is significant because there are allegations that Islamic housing financing products are non-compliant with shariah as it contains hilah elements (fraud) and prohibited contracts.

Hybrid Contract Based On Sharia Perspective
After analyzing, there are two different views that there are parties who banned the contract as well as parties that permit it. This dispute happens for several reasons, such as; the difference in deciding the basic law in muamalat whether it begins with mubah or haram, and if mubah, it contradict to hadiths that prohibit transactions which related to the merger of the contract. Hadiths clearly prohibit one to involve in the sale and purchase contracts (bay' wa salaf), combining two sales contracts in one contract (al-bay'atayn fi al-Bay'ah) and merging two contracts in one contract (safqatain fi safaqah). Based on those sources, there is a question on the positioning of hybrid products in current Islamic financial institutions.

The parties who prohibit merging of the contract are from the fuqaha Mazhab al-Zahiriyyah (al-Imrani, 2006). This party argued that the basic law for contract is haram and unlawful except permitted by the sharia. The argument is based on the narration of Aisha that the Prophet (PBUH) said,
"Whoever stipulates such conditions as are not in Allah’s Laws then those conditions are invalid even if he stipulated a hundred such conditions (al-Bukhari, 1422H)". It is clear that every condition that not in line with the Quran and Hadith is prohibited.

In contrast to the above views, the second party holds that the basic law in muamalat is mubah. The history of Abu Darda’ states that "what is stay silent (not declared law) from it, then it is forgiven". Hence, man can do all that was silent by sharia law as long as it does not contradict other principles. This general method coincides with the text of sharia where Allah does not forget to ban something (Q19: 64) and it is not an addition to religion (Asni, 2017). For this group, the conditions and contracts were only illegal if they went against the law of Allah SWT.

According to al-'Imrani (2006), the second view which accepting the application of hybrid contract involve majority of fuqaha from Hanafiyyah, Malikiyah, Shafi’iyah and Hanabilah. This party argues with the word of Allah that means, "fulfil and complete the covenants" (Q5: 1). This verse calls for the fulfilment of promises and the instruction are general to all contracts without exception. This verse also indicates that all promises or contracts are mubah as long as no dalil that prevents it (al-Jawziyyah, 1973). In addition, Allah SWT also command, "Do not consume one another's wealth unjustly but only [in lawful] business by mutual consent" (Q4: 29). Apparently, if there is a mutual contract between parties then it is permitted as long as in line with the sharia (al-'Imrani, 2006).

**Prohibited Element Hybrid Contract In Text**

Referring to the prohibition of merging contract between selling (bay’) and debting (salaf) (al-Tirmidhi, 1975), those combination denotes that it is prohibited doing conditional sale which is buyer have to pay his debt to seller.

The reason was salaf also has the same meaning of salam (debting) as when someone gives a few ringgit of debt to the creditor and the debtor borrows something to the creditor then says, "If you cannot afford to pay the debt, then the goods are sold to me with a few ringgit instead." Thus, method of sale and purchase above are illegal because every liability that benefits from debt is illegal (al-Mubarakfuri, t.t.). The contract also prohibited based on the actual price of the transaction is unknown when the conditions are invalid. Hence, the unknown of the price item is a form of gharar, as well as incorporating additional terms into the contract which resulting the contract to be prohibited.

As mentioned before, an act of combining two sale and purchase contracts in one settlement is prohibited by the hadith (al-Tirmidhi, 1975). The method also known as bay'atavin fi bai'ah as well as safaqatain fi safaqah or syartan fi al-bay’. This form of sale and purchase are either involving two prices in one settlement or two contract at a time.

A sale and purchase contract is also prohibited if there is no determination for the price or it involved conditions. In the case, the conditions are invalid and not required to be fulfilled but the sale is valid (al-Mubarakfuri, t.t.). It apparent that elements of gharar exists in aforementioned sale and purchase that are unknown of price, uncertainty of the method either by cash or debt and ambiguity in acquiring the sale of goods either after selling the goods in the first contract or after the second deal.

In addition to prohibit the affiliation between the salaf and the sale and purchase, fuqaha‘ also agrees to prohibit the affiliation of the contract between each transaction with debt (qard) in one transaction such as between ijrah and qard, salam and qard, ‘Originally’ and qard and others (al-Jawziyyah 1973).

Islamic scholars who permitted hybrid contract, they have set rules and guidelines that must be followed, such as:

1) Do not make hybrid contract that is clearly forbidden by the sharia. According to al-Jawziyyah (1973), the Prophet SAW prohibited the merger of the contract between the salaf (qard) and the sale and purchase. However, it is permissible to practice separately. According to al-'Imrani (2006), the ban on the merger of the qard contract and the sale and purchase is not absolute, it is permitted in the form of unconditional sale and purchase and not intended to increase the price through debt.

2) Do not merge a contract with the aim of making a prohibited hilah (al-'Imrani 2006). Prohibited hilah occurs through an agreement between two parties such as to sell and purchase ‘inah to obtain riba al-fadl.

3) Do not merge a contract that can cause riba for example merger between sale and purchase contract and salaf. The purpose of this prohibition is to prevent (dhari‘ah) from illegal deal such as the transaction of riba. Similarly, the ban on the affiliation between the qard and hibah to the lender because it could generate a riba in the deal (al-'Imrani 2006).

Hence, the above transactions are banned because those method of applications are against the sharia law. However, if the application is in line with the sharia, any appropriate innovation of
muamalat affairs is mostly permit as the sharia moving parallel with the development of time and place.

In sum, it was obvious that the opinion that permits a hybrid contract is stronger and rajih than the other as the text should not comprehend in rigid way. Hence, as long as no other dalil which prohibits the contract in total, the application is permitted.

Application of Hybrid Contracts on Islamic Housing Financing In Malaysia

Today, there are 15 banks, which offer Islamic housing financing services with different hybrid products consisting of ijarah muntahiah bi tamlık, ijarah mawsufah fi dhimmah, tawarruq, bai bithaman ajil and musharakah mutanaqisah. The majority of hybrid financing products offered are tawarruq contracts which involving ten of the banks. Three banks are offering musharakah mutanaqisah based products. While contract ijarah muntahiah bi tamlık, ijarah mausufah fi zimmah and bay’ bithaman ajil offered by two banks.

The concept of tawarruq is referring to the muamalah transactions, which involve two stages. At the first stage, the transaction involves a credit purchase between the buyer and the original seller of an asset. Meanwhile at the second stage the buyer will then sell the asset in cash to the third buyer. Majma 'al-Fiqh al-Islāmī defines bay’ al-tawarruq as buying something which is in the possession of the seller at a deferred price, then the buyer sells it to a third party in cash, to earn money (Mahyudin, 2015). It is called bay’ al-tawarruq as while buying it in credit, the buyer does not intend to use or utilize it, but only wants to sell it back for cash. It is also known as murabahah. This tawarruq process contains several settlements such as by credit as well as in cash. Based on the current practice of tawarruq as in Bank Muamalat, it happened by combining several other contracts, i.e. bay’ murabahah, wad mulzim, wakalah and bay’ wadiah (Mahyudin, 2015).

Whereas contract that based on musyarakah mutanaqisah is a partnership contract, which established a transfer of property from one party to another until it ends with the sole ownership of the latter (Samsudin et al., 2015). Musyarakah mutanaqisah contract involves several affiliated contracts which are musyarakah, ijarah and bay’-bay’. In the RHBIB’s practise, the wad’ mulzim was also added to the contract (Shuib et al., 2011). According to Shuib et al., (2011), the association of those contract are permitted as long as their obligation are fully implemented and are made separately.

Meanwhile BBA or bay’ bithaman ajil is a combination of three words, i.e. al-bay’ (sale and purchase), thaman (price) and ajil (postponed). In term of definition, BBA is a certain sale and purchase agreement between the owner of the goods and the buyer in which the owner of the goods handed the item to the buyer immediately, but the buyer postpone the payment, which has been agreed upon (Aziz 2013). In classical fiqh, BBA refers to a contract which is known as bay’ muajjal (Aziz 2013).

However in BBA contracts of Islamic housing financing today, the bay’ ‘inah element have been added to the contract (Shuib et al., 2013). The association of bay’ ‘inah in the BBA contract has brought conflict to the law as majority of the fuqaha' claimed bay’ ‘inah involve hilah riba. In the deal, client have a contact with developers to buy a home but not bank. When the client has got right to buy home and already paid 10% of the payment to the developer, they need to get the balance of payment from the bank and this requires the client to make a bay’ ‘inah contract with the bank (Shuib et al., 2013).

In a meantime, contract ijarah muntahiyah bi al-tamlık in classical fiqh is guided by ijarah contract. Ijarah or rent/hire is referring to the ownership that acquired through exchange of benefit whether in tangible assets or debt (Suhaimi, 2010). Therefore, an ijarah agreement is agreement that transfer the benefit of an asset from the owner (the bank) to the tenant (customer), without involving the transfer of property ownership. The title of the asset is still owned by the tenant (BNM, 2009).

Ijarah in its original form is not a method of financing. However, it has been invented as an asset of ownership financing instrument by ending the contract with the transfer of ownership of the asset to the tenant. This innovation yields a product named ijarah muntahiyah bi al-tamlık which comprises three contracts, ie rent, sale and wa’d mulzim (Hakimah et al., 2016). The lease contract will take effect at the initial stage of the contract where the tenant will rent and pay the leased asset to the owner (the bank) at the specified price and duration. After the rental period ends or after all payments have been made, the tenant pledges to buy the rented assets (KFH, 2018). According to Ayub (2007), ijarah muntahiyah bi al-tamlık is a hybrid contract with good prospects. This is because there is no combination of the controversial contract in the contract.

The ijarah mawsufah fi dhimmah contract is almost the same as the concept of ijarah muntahiyah bi al-tamlık, as each of them uses ijarah akad basically. However, the ijarah akad used is...
Based on ijarah al-dhimmah category. Ijarah al-dhimmah can be defined as the sale of benefits in the future to obtain by lani or salam akad to obtain benefits whether the benefits arising from the assets or services (Hammad, 2007). It was named as ijarah al-dhimmah because the asset's benefits are closely related to the lender's liability rather than being associated with the asset itself. It can also be termed as ijarah which the benefits are guaranteed by the lessor in any event. This contract is also regarded as salam where the subject is its benefit. Contract ijarah al-mawsufah fi al-dhimmah has three contracts namely istisna', rent, and wa'ed mulzim. This modus operandi of financing involves a bank as the homeowner finances some amount of funding to the developer to build a house. This is indirectly using the istisna' contract. Subsequently, the bank leased the house to the customer based on the agreed amount on rental period, which use lease contract. Then at the end of the rental period, the bank will sell the house to the customer either at a rental price or with a nominal value, using a sale and purchase agreement and wa’ (KFH, 2018).

Meanwhile an analysis from the perspective of hilah is necessary to avoid from prohibited hilah. According to Khir et al., (2010), hilah is forbidden if the aim to achieve the deal is contravene to the sharia, either to nullify the law of sharia or to convert it to another law such as leaving what is obligatory and legalising what is illegal and damaging the rules of Islam. The prohibition of hilah in this category is unanimously agreed by fuqaha.

However, the hilah is permissible if the aim is to achieve good intentions and the maqasid as well as not contrary to sharia either to abide Allah's commands or vice versa. The majority of fuqaha' accepts the authorization of hilah in this category. In sum for the above discussion, the product of musyarakah mutanaqisah, ijarah muntahiah bi tamlik and ijarah mawsufah fi dhimmah are in the category of good hilah. This is because the contracts associated with the shariah-compliance matters.

Nevertheless, tawarruq and bay' bithaman ajil involved with non-sharia hilah. There are three forms of non-sharia hilah or hilah in the tawarruq such as (i), commodity in the sale and purchase is not intended by the contracting parties. (ii) The ownership of the commodity by the buyer in tawarruq contract is uncertainty. (iii) Commodities are not something that customers want in the transaction, but what they want is money. Thus, the sales contract is solely hilah to gain money. In other words, the customer is not interested in the products that are traded, except to gain money, and the sale and purchase is just an illusion (Ajija et al., 2009).

Thus, the entire transaction is to earn money immediately. This sale and purchase are considered simply illusion as the bank does not acquire any commodities that was purchased from the dealings. These commodities are traded in the stock market and handed from one buyer to another until it climax at the end users who will owned what they have purchased. While customers do not take ownership of the product in the true sense or on the paper. Therefore, the buyer only sells something he has never acquired and knows about the specifics of the commodity, as the bank sells commodities to the customers something owned by a known bank with a number to identify the commodity. The number does not represent a small number of commodities but it is the number used for large units where banks divide among those who use tawarruq (Ajija et al., 2009).

Secondly, third party who exists in the tawarruq transaction is considered a kind of hilah to make the contract halal and achieve the ultimate goal of sale and purchase, which is the occurrence of an exchange of ownership of goods. In other words, an existence of the third party is a hilah way to ensure the goods of selling does not return to the seller but has been transferred to another person. Fuqaha' allows tawarruq contract on this basis as an existence of the third party shows that the contract is real. However, problem arise in the current tawarruq practice when the third party pledged with the bank to continue in buying commodity, while in the actual tawarruq concept, the third party was irrelevant and did not know about the first transaction that was carried out (Ajija et al., 2009).

Thirdly, hilah exist when bank is appointed as an agent to sell. The tawarruq transaction involves an initial agreement between the bank and the final buyer guaranteeing that the latter will buy whatever the former offers at the same price when the bank purchases it. Whereas in the classical tawarruq that is allowed is the customer (mustawriq) himself is the person who sells the commodity either at the same price, more or less. This is because tawarruq is an independent contract whereby every individual involved in the transaction will do each transaction without intervention, but the tawarruq practice is the existence of a wakalah agreement whereby the bank is appointed as a representative to sell the commodity to ensure the bank receives a fixed return from this instrument. Therefore the existence of wakalah contract is a hilah because it is included in a contract as a trick whereas the wakalah agreement is not required by the parties who carry out tawarruq transactions, but it is added to achieve cost effectiveness and smoothening currency liquidity (Ajija et al., 2009). However, Mahyudin (2015) states that most tawarruq transactions by Islamic financial institutions in
Malaysia are a representative of customers who sell their assets to third parties who are also the same bank (themselves) and this will lead to the issue of the bay’ wakil inaafihi. Based on the AAOIF (2010), the representative is not allowed to sell the goods that he buys on behalf of muwakkil to himself and his representative is not allowed to do contract by himself for no interest.

Basically BBA is not a controversial product in the beginning because it is a bay’ muajjal which is sharia-compliance. However, when BBA is applied in the home financing instrument, bay’ inah method has been included in the application. The majority of fuqaha comprising Abu Hanifah, Malik and Ahmad argue that bay’ inah is invalid because it has an element of gharar and riba (al-Zuhaili, 1989). There are two elements that are banned in bay’ inah which are first, the intention of selling assets is to earn money. However in the mode of operation, the customer's original purpose is to earn money, but for the benefit of the bank and its transaction, bay’ inah contract is introduced to prevent the occurrence of riba openly. In the bay’ inah, the assets sold by the customer to the bank will be returned to the customer's ownership. In this contract, there is also an agreement between the customer and the bank that the bank will resell the assets to the customer. The asset is merely a tool to earn money required by the customer to settle the remaining payment to the bank. At the same time the bank has benefited from the process through deferred payment which is postponed within the agreed time (al-Zuhaili, 1989).

The second hilah in the bay’ inah is the asset only as a tool. In general concept, sale and purchase activity is an act that involve the exchange of property with property in a specific way or the exchange of property with property that carries the submission and acceptance of property. However, in the case of bay’ inah, there is no exchange in property and ownership in the real sense (al-Zuhaili, 1989). The original owner of the item will re-acquire the assets that have been sold. Hence, the nature of the transaction is actually a loan contract rather than a sale. Hence, the majority of Islamic scholars believe that bay’ inah is only a legal tricks to allow riba.

For solution, the researcher suggest that every Islamic bank should apply bay’ muajjal and wa’ad contract in BBA, where bank need to purchase home from developer and sell it to customers at some profit. During purchasing process from developer, customer must make an agreement to buy the house from the bank.

Conclusion

Not all hybrid contracts that was implemented in Islamic housing finance in Malaysia today are mubah. Although in general, fuqaha permit hybrid contract that does not contain elements which are forbidden by the sharia such riba, gharar and hilah fasidah, however the opposite contracts are not authorized and considered haram. Especially contract that involved hilah fasidah which is still produce the effects of riba al-nasi’ah such as in the BBA and modern tawaruq products. All those products should be avoided and forbidden by the sharia.

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