

**REPLACEMENT OF BAY' BITHAMAN ĀJIL WITH TAWARRUQ  
IN BANK ISLAM BRUNEI DARUSSALAM:  
ISSUES AND ITS MITIGATIONS**

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# SUPERVISION

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## DECLARATION

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## **REPLACEMENT OF BAY‘ BITHAMAN ĀJIL WITH TAWARRUQ IN BANK ISLAM BRUNEI DARUSSALAM: ISSUES AND ITS MITIGATIONS**

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## ABSTRACT

### REPLACEMENT OF *BAY' BITHAMAN ĀJIL* WITH *TAWARRUQ* IN BANK ISLAM BRUNEI DARUSSALAM: ISSUES AND ITS MITIGATIONS

Bank Islam Brunei Darussalam (BIBD) used *Bay' Bithaman Ājil* since 1993. The used of BBA, at that time, are to provide financing in which *Shari'ah* compliance to the Muslim in Brunei Darussalam as well as to fulfil the necessities of the society through personal satisfaction and social tranquillity and security. In April 2013, BIBD had taken a step forward in replacing most of their Consumer Financing of *Bay' Bithaman Ājil* (BBA) products to *Tawarruq*. Hence, the aims of the study are to identify the reasons on the replacement of the financing products along with identifying the issues arise and determine the solutions taken by BIBD to mitigate the issues. To reach objectives of the study, researcher used qualitative method via descriptive and survey approach. Descriptive approach help researcher to identify nowadays issues in which related to the research field through primary and secondary data from books, journal and internet. In term of survey approach, researcher obtained data through interview session. In this study, the researcher found that the main issue in the applications of Organised *Tawarruq* is the violations of *Shari'ah* principles done by some of the banks. Hence, by following guidelines provided by AAOIFI, the violations of *Shari'ah* principles would not happen. Hence, BIBD should continuously revise their application of *Tawarruq* in order to in line with the guidelines provided by AAOIF.

*Keywords: Bay' Bithaman Ājil, Tawarruq, Bank Islam Brunei Daussalam, Shari'ah.*

## ABSTRAK

### PERALIHAN DARIPADA *BAY' BITHAMAN AJIL* KEPADA *TAWARRUQ* DI BANK ISLAM BRUNEI DARUSSALAM: ISU-ISU DAN CARA MENANGANINYA

Bank Islam Brunei Darussalam (BIBD) telah menggunakan *Bay' Bithaman Ajil* (BBA) sejak tahun 1993. Pada masa itu, penggunaan BBA adalah untuk menyediakan pembiayaan yang mematuhi *Shari'ah* kepada orang Islam di Negara Brunei Darussalam. Pada masa yang sama, ianya adalah untuk memenuhi keperluan masyarakat melalui kehendak peribadi, keamanan dan kesejahteraan ummah. Pada April 2013, BIBD telah pun menggantikan hampir keseluruhan produk di dalam Pembiayaan Pengguna yang menggunakan BBA kepada *Tawarruq*. Oleh kerana itu, objektif kajian ini dilakukan adalah untuk mengetahui sebab peralihan BBA kepada *Tawarruq* dan ingin mengetahui isu-isu yang berbangkit sekaligus melihat bagaimana BIBD menanganinya isu-isu tersebut. Di dalam kajian ini, penyelidik menggunakan cara kualitatif melalui pendekatan deskriptif dan penelitian untuk mencapai objektif kajian. Pendekatan deskriptif dapat menolong penyelidik untuk mendapatkan isu-isu semasa yang berkaitan dengan BBA dan *Tawarruq* melalui buku-buku, jurnal dan laman sesawang. Manakala pendekatan melalui penelitian, penyelidik menggunakan temubual untuk mendapatkan data yang diperlukan. Daripada kajian ini, pengkaji mendapati bahawa isu utama yang terdapat di dalam aplikasi *Tawarruq* adalah pelanggaran prinsip-prinsip *Shari'ah* oleh sesetengah daripada pihak bank. Oleh yang demikian, untuk memastikan perkara sedemikian tidak terjadi, pihak bank seharusnya mengikuti garis panduan yang telah dibuat oleh AAOIFI. Dalam pada masa yang sama, pihak BIBD seharusnya terus meninjau aplikasi *Tawarruq* supaya ianya tidak bercanggahan dengan prinsip-prinsip *Shari'ah*.

*Kata Kunci: Bay' Bithaman Ajil, Tawarruq, Bank Islam Brunei Darussalam, Shari'ah.*

## ملخص البحث

استبدال بيع بضمن أجل بيع التورق في البنك الإسلامي بروني دار السلام:  
القضايا أو المشاكل وطريق حلها

استعمل البنك الإسلامي بروني دارالسلام بيع بضمن أجل منذ 1993م. وكان غرض استخدامه في ذلك الوقت توفير التمويل الإسلامي للمسلمين في بروني دار السلام، وكذلك فيما يتعلق بالوفاء بضرورات المجتمع من خلال الارتياح الشخصي، والهدوء الاجتماعي، والأمن. وفي أبريل عام 2013م، اتخذت البنك الإسلامي خطوة إلى الأمام في استبدال معظم منتجاتها الاستهلاكية لتمويل زبائنها من بيع بضمن أجل إلى بيع التورق. ومن ثم تهدف هذه الدراسة إلى تحديد الأسباب في الاستعاضة عن تمويل المنتجات جنبا إلى جنب مع تحديد القضايا التي تنشأ، وتحديد الحلول التي اتخذتها البنك الإسلامي التخفيف من المسائل. للوصول إلى أهداف الدراسة، استخدم الباحث الأسلوب النوعي عبر النهج الوصفي والنهج الاستقصائي. فبالنهج الوصفي استطاع الباحث في الوقت الحاضر تحديد القضايا التي تحصل بمجال البحث من خلال البيانات الأولية والثانوية من الكتب والأبحاث والإنترنت. وبالنهج الاستقصائي استطاع الباحث الحصول على البيانات من خلال المقابلة الشخصية. تكشف هذه الدراسة أن القضية الرئيسية التي حددت في تطبيقات "التورق المنظمة" انتهاكات لمبادئ الشريعة الإسلامية الذي قامت به بعض المصارف. ومن ثم، بالتباع لمبادئ التوجيهية التي قدمتها AAOIFI فإن انتهاكات لمبادئ الشريعة الإسلامية لن يحدث. ومن ثم، ينبغي على البنك الإسلامي في بروني دار السلام الاستمرار بمراجعة تطبيقها بيع التورق من أجل تمشيا مع المبادئ التوجيهية التي قدمتها AAOIFI.

الكلمات الرئيسية: بيع بضمن أجل ، بيع التورق ، البنك الإسلامي بروني دارالسلام ، الشريعة الإسلامية.



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# TRANSLITERATIONS

Transliteration Table:

Arabic	Roman
ء	'
ب	b
ت	t
ث	th
ج	j
ح	Ḥ/ḥ
خ	kh
د	d
ذ	dh
ر	r
ز	z
س	s
ش	sh
ص	Ṣ/ṣ
ض	Ḍ/ḍ
ط	Ṭ/ṭ
ظ	Ẓ/ẓ
ع	'
غ	gh
ف	f
ق	q
ك	k
ل	l

م	m
ن	n
هـ / ة	h
و	w
ي	y

### Short Vowel

Arabic	Roman
ـِ	a
ـِ	i
ـِ	u

### Long Vowel

Arabic	Latin
ـِ / ا	ā
ـِ	ī
ـِ	ū

### Diphthong

Arabic	Latin
ـِ	aw
ـِ	ay
ي	iy
و	uw

Transliterations	Arabic
'iwaḍ	عوض
Al-Karīm	الكریم
Al-Qur'ān	القرآن
Al-Rahn	الرهن
Al-Waraqā	الورق
Al-Warq	الورق
Bay' al-Ma'dūm	بيع المعلوم
Bay' al-Mu'ajjal	بيع المؤجل
Bay' al-'īnah	بيع العينة
Bay' Bithaman Ājil	بيع بثمن آجل
Bay' wa Sharṭ	بيع وشرط
Būrṣah Sūq al-Silā'	بورصة سوق السلع
Darūriyyah	ضرورية
Gharar	غرر
Hibah	هبة
Ḥīlah	حيلة
Ḥiyal	حيل
Ibra'	ابراً
Ijārah	إجارة
Ijārah Thumma al-Bay'	إجارة ثم البيع
Isqāṭ Khīyār al-'ayb	إسقاط خيار العيب
Jamād al-Akhīr	جماد الأخير
Mafāsīd	مفاسد
Maṣāliḥ	مصالح

<i>Makhārij</i>	مخارج
<i>Maqāṣid al-Sharī'ah</i>	مقاصد الشريعة
<i>Murābaḥah</i>	مراجعة
<i>Musawwamah</i>	مسومة
<i>Mushārakah Mutanāqishah</i>	مشاركة متناقصة
<i>Mutawarriq</i>	متوزق
<i>Nasi'ah</i>	نصئة
<i>Qard Hasan</i>	قرض حسن
<i>Qawā'id Fiqhiyyah</i>	قواعد فقهية
<i>Ribā</i>	ربا
<i>Sadd al-Dharā'i'</i>	سدّ الذرائع
<i>Ṣaḥih</i>	صحيح
<i>Salam</i>	سلم
<i>Sharī'ah</i>	شريعة
<i>Ṣukūk</i>	صكوك
<i>Sunnah</i>	سنة
<i>Tawarruq</i>	توزق
<i>Tawkīl</i>	توكيل
<i>Wa'd</i>	وعد
<i>Wariq</i>	ورق



## ABBREVIATION

AAOIFI	Accounting and Auditing Organisation for Islamic Financial Institutions
AH	After Hijrah
BBA	Bay' Bithaman Ājil
BFR	Base Financing Rate
BIBD	Bank Islam Brunei Darussalam
BIMB	Bank Islam Malaysia Berhad
BLR	Base Lending Rate
BMIS	Bursa Malaysia Islamic Services
BND	Brunei Dollar
BSAS	Būṣah Sūq al-Sila'
CPO	Crude Palm Oil
Credit Card-i	Islamic Credit Card
CSP	Commodity Supplying Participant
CTP	Commodity Trading Participant
Ed.	Editor
<i>et. al</i>	and others
FIs	Financial Institutions
IBB	Islamic Bank of Brunei
<i>ibid</i>	<i>ion beam induced deposition</i>
IDBB	Islamic Development Bank of Brunei
IF	Islamic Financial
IFIs	Islamic Financial Institutions
i.e	<i>id est</i> (that is)
ISRA	International Shari'ah Research Academy
ITAB	Ijārah Thumma al-Bay'
KYC	Know-Your-Customer
LME	London Metal Exchange
MPRA	Munich Personal RePEc Archive
n.d.	No date
n.pl	No publisher
No.	Number
OIC	Organisation of Islamic Conference
<i>Op.cit.</i>	<i>Opusculatumest</i>
p.	Page
pp.	Pages
PPA	Property Purchase Agreement
PSA	Property Sale Agreement
Sdn. Bhd.	Sendirian Berhad
SPA	Sale and Purchase Agreement
TAIB	Tabung Amanah Islam Brunei
USD	United State Dollar
Vol.	Volume

# CHAPTER 1

## INTRODUCTION

### 1.1 Introduction

Islamic banking had started its operation in Egypt in 1963 by Ahmad Al-Najjar. The concept that had been used in this bank is profit sharing concepts. It is aim to become the first interest-free saving investment banks.<sup>1</sup> From this initiative, there are more Islamic banks and financial institutions were established such as Dubai Islamic Bank (1975), Kuwait Finance House (1977) and Bahrain Islamic Bank (1981).<sup>2</sup> The development of Islamic bank is not only concentrated in the Middle East, it also established in Asia-Pacific region such as The Philippine (Philippine Amanah Bank, 1973) and Malaysia (Bank Islam Malaysia Berhad, 1983).<sup>3</sup>

Islamic banking now has the capability to compete with conventional banks. In 2011, there are 300 Islamic Financial Institutions (IFIs) currently operating in about 75 countries worldwide. Globally, funds in IFIs is estimated to be at USD 1.3 trillion and the market is estimated to be worth USD 400 billion in size with an annual growth rate of 12 percent to 15 percent. In term of its assets, it predicted to increase 33 percent from 2010 levels to USD 1.1 trillion by the end of 2012.<sup>4</sup>

Despite of the growing, Islamic banking is still considered less profitable compared to conventional banks by 20 percent to 25 percent. This due to the failure of Islamic banking to penetrate the mainstream segments to its fullest potential and the competition with conventional bank on the services provided to the customers.<sup>5</sup> In term of its products, many customers had questions the validity of Islamic Financial

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<sup>1</sup> Nafis Alam and Bala Shanmugam (Ed.). (2007). *Islamic Finance: The Challenges Ahead*. Malaysia: Universiti Putra Malaysia Press. p. 5.

<sup>2</sup> M. Khan, Salar (Ed.). (2008). *Islamic Banking & Finance: Shariah Guidance on Principles and Practises*. Malaysia: A.S. Noordeen. pp. 3-6.

<sup>3</sup> Muhammad Ridhwan Ab. Aziz (Ed.). (2013). *Celebrating 30 years of Islamic Banking and Financial Institutions in Malaysia 1983 – 2013*. Malaysia: Universiti Sains Islam Malaysia. p. 2.

<sup>4</sup> Tasnim Nazeer. (2012). *The Ultimate Islamic Finance Review 2011*. (n.pl): Global Islamic Finance. Retrieved on 2014, March 1 at

[http://issuu.com/gifmagazine/docs/december\\_issue\\_2011\\_web\\_version?e=2091954/2863521#search](http://issuu.com/gifmagazine/docs/december_issue_2011_web_version?e=2091954/2863521#search)

<sup>5</sup> Global Islamic Finance. (2014). *Islamic Banks to Look at Quality of Growth*. (n.pl): Global Islamic Finance Magazine: Retrieved on 2014, March 1 at

[http://www.globalislamicfinancemagazine.com/index.php?com=articles\\_list&aid=1561](http://www.globalislamicfinancemagazine.com/index.php?com=articles_list&aid=1561)

(IF) products such as the customers assume that the IF products are the duplication of conventional financial products with 'Islamic' alterations.<sup>6</sup>

### 1.1.1 *Bay' Bithaman Ajil* (BBA)

Literally, it consists of three words which are *bay'* (sale and purchase), *thaman* (price) and *ajil* (deferment).<sup>7</sup> Technically, it is where the payment of the commodity is deferred to particular time in the future date with pre-agreed payment period. The payment could be in lump sum or instalments.<sup>8</sup> Hence, BBA could be used in any sale contracts such as *Murābahah* and *Musawwamah* with the exception of *Salam* contract.<sup>9</sup>

*Bay' Bithaman Ajil* (BBA) is a popular concept that had been used in Asia-Pacific region countries such as Malaysia, Indonesia and Brunei. In Pakistan, it is called as *Bay' al-Muajjal*. In the Middle East, on the other hand, did not use BBA as their financing products in bank. This is due to the rejection of their scholar on BBA in which they assume that the process of BBA is similar with the conventional loans. BBA is assuming to put the customers and bankers in danger especially during volatile economic conditions.<sup>10</sup>

However, some scholars permitted BBA to be used in the financing. This is because the aims of BBA are to provide financing facility for one who cannot afford to pay cash upfront for a necessary property and it could become the means to avoid ones from participating with the interest (*ribā*) to get the desired commodity or good. In general, Allah had mentioned the permissibility of the sale and the prohibition of interest (*ribā*) in the Qur'an:

---

<sup>6</sup> See: Muhammad Ridhwan Ab. Aziz (Ed.) (2013). *Celebrating 30 Years of Islamic Banking and Financial Institutions in Malaysia 1983-2013*. Op. cit. pp. 155-156.

<sup>7</sup> Aznan Hasan. (2011). *Fundamental of Shari'ah in Islamic Finance*. Malaysia: IBFIM. p. 319.

<sup>8</sup> Rininta Nurrachmi, Hamida Mohamed and Nawalin Nazah. (2013). *Dispute Between Bank and Customer in Bai Bithaman Ajil (BBA). Case in Malaysia*. Malaysia: Munich Personal RePEc Archive (MPRA).

<sup>9</sup> Zahera Bani Arner. (2009). *The Application of Bay' Bithaman Ajil (BBA)*. Retrieved on 2014, March 1 <http://www.iefpedia.com/english/?s=The+Application+Of+Bay%60+Bithaman+Ajl+%28BBA%29&search=Search>

<sup>10</sup> Ahmed Kameel Mydin Meera and Dzuljastri Abdul Razak (n.d) *Islamic Home Financing through Musaharakah Mutanaqisah and al-Bay' Bithaman Ajil Contracts: A Comparative Analysis*. Malaysia: International Islamic University Malaysia.

﴿ وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا ﴾

Means: "Whereas Allah has permitted trading and forbidden (*ribā*) usury".<sup>11</sup>

During the time of Prophet Muhammad (Peace Be Upon Him), deferred payment sale had been practiced by the prophet himself as mentioned by Jābir bin 'Abd Allah, narrated by Muslim in his *Ṣaḥīḥ*.<sup>12</sup> Moreover, the following hadith is the other event where the Prophet had practiced deferred payment.

عَنْ عَائِشَةَ، قَالَتْ:

«اشْتَرَى رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ مِنْ يَهُودِيٍّ طَعَامًا بِنَسِيئَةٍ، فَأَعْطَاهُ دِرْعًا لَهُ رَهْنًا»<sup>13</sup>

Means: "'Āishah reported: Allah's Messenger (Peace Be Upon Him) bought from a Jew grain (as loan) and pledged him his iron coat-of-mail."

### 1.1.2 Tawarruq

Literally, *Tawarruq* comes from the word *al-warq* or *al-waraq* which means 'minted dirham' or any silver that issued to serve as a medium of exchange.<sup>14</sup> In addition, it also comes from the word '*wariq*' as mentioned in the Qur'an:

﴿فَاتَّبِعُونَا أَحَدَكُمْ يَوْمَ قَوْمِكُمْ هَذِهِ إِلَى الْمَدِينَةِ﴾

Means: "So send one of you with this silver coin of yours to the town"<sup>15</sup>

Technically, it is the purchasing of a commodity on credit by the seeker of cash (*mutawarruq*) and selling it to a person other than the initial seller (third party)

<sup>11</sup> Al-Baqarah. 2:275 (Al-Quran translations in this writing are based on: Al-Hilālī, Muhammad Taqī-ud-dīn and Khan, Muhammad Muhsin. (1417H). *The Noble Qur'an: English Translation of the Meaning and Commentary*. Madinah Munawwarah: King Fahd Complex.

<sup>12</sup> See: Muslim bin al-Ḥajjaj al-Naysābūrī. (n.d). *al-Musnad al-Ṣaḥīḥ*. Muhammad Fu'ad 'Abd al-Bāqī (Ed.). Beirut: Dar Iḥyā' al-Tūrāth al-'Arābī. Vol. 5. No. 715 (Ṣaḥīḥ). The following are the mentioned hadith:

حَدَّثَنِي جَابِرُ بْنُ عَبْدِ اللَّهِ، أَنَّهُ كَانَ يَسِيرُ عَلَى جَمَلٍ لَهُ قَدْ أَغْيَا، فَأَرَادَ أَنْ يُسَيِّدَهُ، قَالَ: فَلَجِئْتِي النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَدَعَا لِي، وَضَرَبَهُ، فَمَسَارَ سَيْرًا لَمْ يَسِيرْ مِثْلَهُ، قَالَ: «بِعْنِيهِ بِوَقْتِي»، قُلْتُ: لَا، ثُمَّ قَالَ: «بِعْنِيهِ»، فَبِعْتُهُ بِوَقْتِي، وَاسْتَنْتَبَيْتُ عَلَيْهِ خُمْلَانَةَ إِلَى أَهْلِي، فَلَمَّا بَلَغْتُ أَتَيْتُهُ بِالْجَمَلِ، فَتَقَدَّيْنِي لَمَنَّهُ... الخديث

<sup>13</sup> *ibid.* Vol. 5. No. 1603.

<sup>14</sup> M. Iman Sastra Mihajat (n.d). *The Real Tawarruq Concept: The Product of Islamic Bank for Liquidity Risk Management*. Malaysia: International Islamic University Malaysia. p. 5.

<sup>15</sup> Al-Kahfi. 18:19

for a lower price on cash. The classical jurists had given their own definition in this subject. For instance, Malikis had defined “*Tawarruq as selling something on deferred basis and then buying it back in cash, albeit at a lower price than the deferred price*”. Hanbalis, on the other hand, said that “*Bay’ al-‘inah by the name of Tawarruq is the need of cash, buying the equivalent of thousand and more to expand its price and there is nothing wrong with that*”.<sup>16</sup>

In Islamic banking development, *Tawarruq* had been recognised by several banks since 1421H. It has been established in the Kingdom of Saudi Arabia and operationalised under various types of names such as Easy *Tawarruq*, Blessed *Tawarruq* and Charitable *Tawarruq*.<sup>17</sup> Due to its ease of execution, it had been considered as the most used financing method in the IFIs where the global market is estimated to exceed USD 1.2 trillion per annum.<sup>18</sup> However, recently, some IFIs are reluctantly to use *Tawarruq* as their financing method due to issue arises on its concept.<sup>19</sup>

*Tawarruq* had been categorised into three types and they are as follows:

i. Classical *Tawarruq*

It is the purchase of a commodity possessed owned by the seller for a delayed payment, whereupon the buyer resell the commodity for cash to the other than original seller in order to acquire cash (*al-wariq*).<sup>20</sup> It is also known as Classical or Real *Tawarruq*.

In this situation, most of the scholar such as Islamic Fiqh Academy, the Permanent Committee for Islamic Research and Fatwa in Saudi Arabia allow Classical *Tawarruq* to be practiced in the financing. This is due its compliance with the *Shari’ah* requirements on the valid sale.<sup>21</sup>

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<sup>16</sup> Shochrul Rohmatul Ajija; Mia Fathia and Agusdiwana Suarni. (2010). *Tawarruq: Issue and Challenge*. Malaysia: International Islamic University Malaysia.

<sup>17</sup> Yusri Ahmad, Abdul Rahman. (2009). *Tawarruq, Its Concepts, Its Practises and Its Economics Implication on Its Promotion by Islamic Banks*. Egypt: Alexandra University.

<sup>18</sup> Roudini, Mohammad Amin and Karimzadeh, Majid. (2012). *Tawarruq and its role in Islamic Banking*. Radix International Educational and Research Consortium.

<sup>19</sup> See: Shochrul Rohmatul Ajija; Mia Fathia and Agusdiwana Suarni. (2010). *Tawarruq: Issue and Challenge*. *Op. cit.*

<sup>20</sup> *ibid.*

<sup>21</sup> See: Roudhini, Mohammad Amin and Karimzadeh, Majid. (2012). *Tawarruq and Its Role in Islamic Banking*. *Op. cit.*

ii. Organised *Tawarruq*.

It is when the seller handles the process by which cash is acquired for the *mutawarrig* (seeker of the cash). The seller will sell the commodity to the *mutawarrig* in a deferred payment and on the behalf of *mutawarrig*, the seller then will sell the commodity to the buyer (third party) in cash and handing it over to the *mutawarrig*.

In term of definition, both types of *Tawarruq* had the same concept which is to get cash from the sale of deferred payment commodity. However, in term of operation, there are three differences between Classical and Organised *Tawarruq*.

**Table 1:**

**Differences between Classical *Tawarruq* and Organised *Tawarruq***

Descriptions	Classical <i>Tawarruq</i>	Organised <i>Tawarruq</i>
The Original Seller	Do not contribute in the resale of the commodity and no relation with the final buyer.	Seller act as intermediaries by selling the commodity on behalf of <i>mutawarrig</i>
Collection of Cash	<i>Mutawarrig</i> collects the cash directly from the final buyer.	<i>Mutawarrig</i> collects the cash via original seller
Agreement Between Original Seller with Final Buyer to Purchase The Commodity	No	Yes

*Source: Tawarruq and Its Role in Islamic Banking (2012)*

### iii. Banking *Tawarruq*

It is the process where IFIs become the intermediaries between the *mutawarriq* and international commodity market or other market, in which the *mutawarriq* will buy the commodity in deferred payment on a binding condition that, may be stipulated in the contract or the custom and norms guiding such a commodity.<sup>22</sup> Both Organised and Banking *Tawarruq* are the same in term of its structure but different in term of entitlement of administration of the *Tawarruq*.

In the respect of Organised and Banking *Tawarruq*, the scholars of the OIC Islamic Fiqh Academy had not permit the above transactions due to the simultaneous transactions that occur between the IFI and the *mutawarriq* in which could lead to *ribā*.<sup>23</sup> They support their view with the following hadith.

«لَا يَجُوزُ سَلْفٌ وَبَيْعٌ، وَلَا شَرْطَانِ فِي بَيْعٍ، وَلَا رِبْحٌ مَا لَمْ تَضْمَنْ، وَلَا بَيْعٌ مَا لَيْسَ عِنْدَكَ»<sup>24</sup>

Means: “The condition of a loan combined with the sale is not lawful, nor (are) two conditions relating to one transaction, not (is) the profit arising from something which is not in one's charge for selling what is not in your possession”

#### 1.1.3 Bank Islam Brunei Darussalam (BIBD)

Bank Islam Brunei Darussalam is considered as the largest Islamic bank and flagship Islamic financial Institution in Brunei Darussalam in which provides various types of financial products as well as investment facilities.

With the intention to serve Brunei population in providing *Shari'ah* compliant financial services, BIBD was established in 2005 by the merger of two local IFIs, Islamic Bank of Brunei (IBB) and Islamic Development Bank of Brunei (IDBB).

Financially, at year-end 2012, BIBD had BND 6 Billion (USD 4.6 Billion) of total group assets with the net profit after zakat and taxation of BND 119 million (USD 93.11 million). With a Group tier 1 capital of above BND 1,025 million (USD

<sup>22</sup> Asyraf Wajdi Dusuki (Ed.). (2011). *Islamic Financial System: Principles & Operations*. Malaysia: International Shari'ah Research Academy for Islamic Finance. p. 227

<sup>23</sup> See: Roudhini, Mohammad Amin and Karimzadeh, Majid. (2012). *Tawarruq and Its Role in Islamic Banking*. Op. cit.

<sup>24</sup> Sulaymān bin Al-Ash'at. (n.d). *Sunan Abi Dawud*. Mohammad Maḥyuddīn 'Abd Al-Ḥamīd. Beirut: Al-Maktabah Al-'Asriyyah. Vol. 4. No. 3504.

802 million) and an adequacy ratio of 25.7 percent, BIBD has significant capacity to expand its business. BIBD maintains conservative provisioning and write-off policies, and provides a consistent dividend stream to shareholders.<sup>25</sup>

## 1.2 Problem Statement

Recently, BIBD had announced the replacement of their products of *Bay' Bithaman Ājil* with *Tawarruq*.

In Malaysia, over the years, BBA has received a number of criticisms in which some are worthy of reassessment to make room for improvement.<sup>26</sup> Moreover, according to M. M. Sanusi (2012), the application of BBA requires serious re-examination as to ensure the welfare of consumer is protected.<sup>27</sup>

Hence, this study is aim to investigate the issues arise in BBA and relationship between the issues and the replacement of BBA.

In term of *Tawarruq*, it is perceived to be the solution for *'inah* in the Islamic financing products.<sup>28</sup> However, there are Jurists such as 'Umar ibn 'Abd al-'Aziz, Ibn Taymiyyah, Ibn Qayyim and al-Shaybani disregard the application of *Tawarruq* due to the following statements.<sup>29</sup>

*Tawarruq* is considered as a forced sale where the needy are forced to obtain cash by buying a commodity from the rich. The following hadith indicate the prohibition of forced sale.

«وَقَدْ نَهَى النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَنْ بَيْعِ الْمُضْطَرِّ، وَبَيْعِ الْغَرَرِ، وَبَيْعِ الثَّمَرَةِ قَبْلَ أَنْ تُدْرِكَ»<sup>30</sup>

Means: “and the prophet had prohibited forced sale, doubtful sale and sale of fruit before it ripens.”

<sup>25</sup> Bank Islam Brunei Darussalam. (2013). BIBD Website. Retrieved from: <http://www.bibd.com.bn/about/corporate-profile/>

<sup>26</sup> See: Aznan Hasan. (2011). *Fundamental of Shari'ah in Islamic Finance*. Malaysia: IBFIM. p. 319

<sup>27</sup> See: Mahmood Mohamed Sanusi. (2012). *Islamic Banking and Fiance Shari'ah & Legal: Issues and Challenges*. Malaysia: Aslita Sdn Bhd.

<sup>28</sup> See: Aznan Hasan. (2011). *Fundamental of Shari'ah in Islamic Finance*. Op. cit.

<sup>29</sup> See: Dabu, Ibrahim Fadhil. (n.d). *Tawarruq, Its Reality and Types*. Kingdom of Bahrain. pp. 7-9.

<sup>30</sup> Sulaymān bin Al-Ash'at. (n.d). *Sunan Abi Dāwud*. Mohammad Maḥyuddīn 'Abd Al-Ḥamīd (Ed.). Beirut: Al-Maktabah Al-'Aṣriyyah. Vol. 4. No. 3382.



'Umar bin 'Abd al-'Azīz had mentioned that *Tawarruq* is the brother of Ribā.<sup>31</sup>

Hence, this study is aim to identify the reason behind the selection of *Tawarruq* to replace *Bay' Bithaman Ājil* instead of other applications.

### 1.3 Questions of the Study

The following are the main questions that are expected to explain the above problem statement.

- i. What are the applications of *Bay' Bithaman Ājil* in Bank Islam Brunei Darussalam?
- ii. What are the applications of *Tawarruq* in Bank Islam Brunei Darussalam?
- iii. Why Bank Islam Brunei Darussalam replace *Bay' Bithaman Ājil* with *Tawarruq*?
- iv. What are the issues arise in the practice of *Tawarruq*?
- v. How Bank Islam Brunei Darussalam tackle the issues raised from the practice of *Tawarruq*?

### 1.4 Objectives of the Study.

The following are the main objectives that are expected to be achieved in this study

- i. To understand the applications of *Bay' Bithaman Ājil* in Bank Islam Brunei Darussalam.
- ii. To understand the applications of *Tawarruq* in Bank Islam Brunei Darussalam.
- iii. To determine the reasons of the replacement of *Bay' Bithaman Ājil* with *Tawarruq* in Bank Islam Brunei Darussalam.
- iv. To examine the issues that arises in the implementation of the *Tawarruq* at Bank Islam Brunei Darussalam.

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<sup>31</sup> See: Muhammad bin Abi Bakr Ibn Qayyim Al-Jauziyyah. (1991). *I'lām Al-Muwaqī'in 'An Rabb Al-'Alāmin*. Muhammad 'Abd Al-Salām Ibrāhīm (Ed.). Beirut: Dār Al-Kitāb Al-'Ilmiyyah. Vol.4 p. 135. The following is the statement taken from the above book  
(..... وقد كرهه عمر بن عبد العزيز، وقال: هو أخية الربا..... )

- v. To determine and suggest the possible solutions in tackling issues arise in the practice of *Tawarruq*.

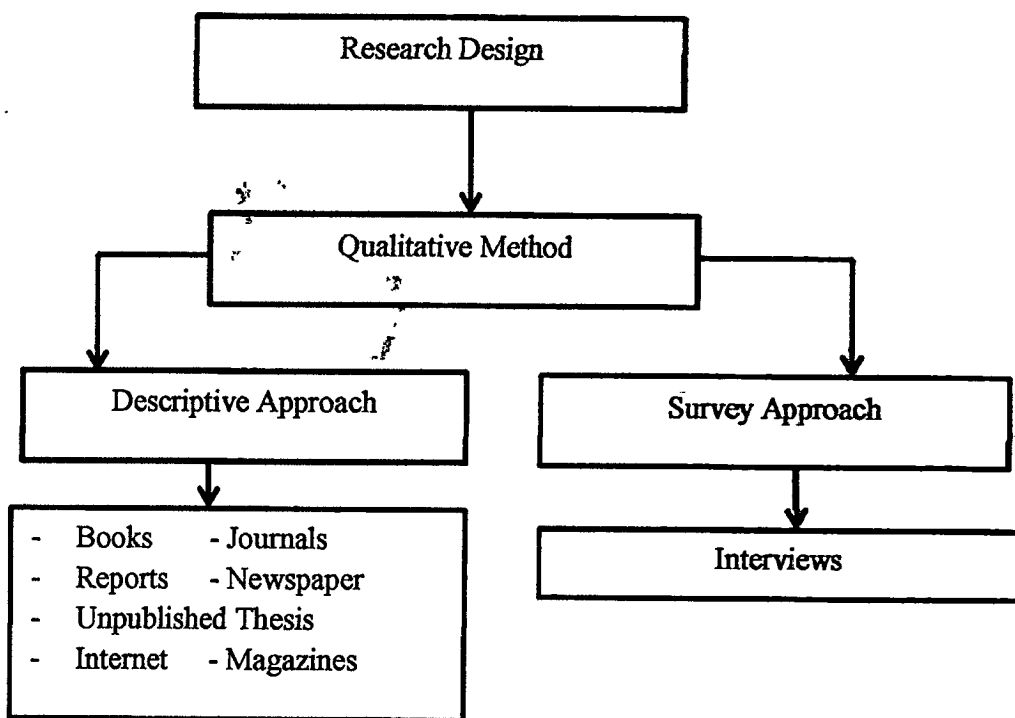
## 1.5 Methodology

### 1.5.1 Research Design

The figure below shows the research design used by the researcher to reach the objectives of the study.

**Figure 1:**

#### Research Design



### 1.5.2 Types of Research.

By looking at the nature of the research's questions, qualitative analysis is the most suitable method to be used in order to reach the objectives of the study. The researcher used descriptive and survey approaches as the tools to reach the objectives of the study. In term of descriptive approach, the researcher collected the primary and secondary data from the books, journals, annual reports, newspapers, unpublished thesis, internet and magazines. In term of survey approach, the researcher obtained the data from the interview sessions with particular organisations.

### **1.5.3 Sampling Size**

In this study, the researcher chose two organisations for the interview sessions. The following are the lists of the chosen departments that were selected for the interview session.

- i. Shari'ah Department, Bank Islam Brunei Darussalam.
- ii. Consumer Banking Department, Bank Islam Brunei Darussalam.
- iii. Product Development Department, Bank Islam Brunei Darussalam.
- iv. Islamic Financial Advisory Services, Authority Monetary Brunei Darussalam.
- v. Banking and Specialised Market Supervision Division, Authority Monetary Brunei Darussalam.

### **1.5.4 Data Collection Techniques and Procedure Gathering Data**

The following are the procedures taken by the researcher in order to obtain the data.

- i. The researchers collected all the data available by using the descriptive approach such as in the books, journals, newspaper, unpublished paper, magazines and internet.
- ii. From the extensive collection of data, some of the obtained data are used during the interview session. This helps the researcher to prepare for the interview sessions.
- iii. After the collections were attained, the analyses of the data were made. The researcher combined and analysed the data from descriptive and the survey method.
- iv. Finally, the findings from the analyses are compiled.

## **1.6 Significance of the Study.**

- i. The study are expected to enhance the understanding on the applications of *Bay' Bithaman Ājil* and *Tawarruq* in the case of Brunei Darussalam.
- ii. The finding of this study would be of interests to the bankers either from the Conventional or Islamic Institutions, the regulators, and those who are related with the applications of *Bay' Bithaman Ājil* and *Tawarruq*.
- iii. The study are expected to provide knowledge and awareness to the public on the financing products used by Bank Islam Brunei Darussalam and hopefully help BIBD in gaining the trust and loyalty from the publics.

## **1.7 Limitations of the Study.**

- i. Most of the primary sources which are related to the study are in Arabic language. For instance, the hadith from the prophet and scholars who wrote their article in Arabic language. With the lack knowledge of Arabic language, researcher had to collect some of the secondary data.
- ii. In the process of making a letter for the interview session, researcher had encountered difficulties. Researcher had to wait for almost three weeks (28<sup>th</sup> January -17<sup>th</sup> February 2014) for letter to be signed by the respective authority in university. Due to the delayed, the process of interview had to be postponed on the following month.
- iii. From the interviewee side, in term of personal interview session, BIBD gave full cooperation in answering all the questions asked by researcher. However, in term of online interview session, where researcher needs more clarification from the interviewee; the interviewee did not respond to the questions given due to their other responsibilities.

## CHAPTER 2

### LITERATURE REVIEW

#### 2.1 *Tawarruq*

- 2.1.1 Rafidah, Azman and Muhammad Azhari. (2010). "*A Review of Islamic Credit Card Using Bay' al-īnah and Tawarruq Instrument as Adopted by Some Malaysian Financial Institutions*" Brunei Darussalam: International Conference on Islamic Finance.

In this paper, the writers viewed Islamic Credit Card (Credit Card-i) as an alternative to substitute the conventional credit card. The writers reviewed on the concepts used in the credit card-i which are *al-īnah* and *Tawarruq* in term of its *Shari'ah* compliance. The writers used descriptive and positive analytical criticism approach in reviewing their concepts. In this paper, however, researcher will only review on the related topic which was the application of *Tawarruq* in Malaysian Financial Institutions.

In first section, the writers viewed at the applications of *Tawarruq* in Bank Kerjasama Rakyat Malaysia (Bank Rakyat). In this section, the writers explained on the modus operandi of credit card-i using *Tawarruq* and the operational framework or procedures that have to be done during the applications. Moreover, the writers identified and explained the commodity used in the transaction, the first (original seller) and second (final buyer) brokers as well as account used by the customers in credit card-i.

In second section, the writers identified six *Shari'ah* issues raised from the above operation. There are as follows:

- i. The promise (*wa'd*) is void due to the commodity was unidentified by the bank.
- ii. Customers were not informed the specification of the commodity during the promise (*wa'd*). This could lead to uncertainty (*gharar*).
- iii. Appointing bank as an agent is considered as forbidden. This had been resolved during the OIC Academy Fiqh in its 17<sup>th</sup> conference.
- iv. The possession of commodity by the customers is not happen during the transaction.

- v. There are conflicts of interests happen within the bank.
- vi. There are element of force and conditional sale in the transaction of credit card-i.

Furthermore, the writers suggested that *Tawarruq* applications should be reviewed from time to time to ensure the operations are in line with *Shari'ah* principles.

In this paper, however, the writer did not explain in details regarding the issues arise and there are no solutions given by the writers in handling the *Shari'ah* issues.

2.1.2 Rafe Haneef. (2009). "*Is the Ban on 'Organised Tawarruq' the Tip of the Iceberg?*" Malaysia: International *Shari'ah* Research Academy for Islamic Finance.

In this paper, the writer seen *Tawarruq*, compared to other contemporary contracts, had faced severest criticism from the customers and practitioners. Due to that, the writer wrote this paper to discuss and analyse the perspectives of both the opponents and proponents of *Tawarruq* with the view of determining the soundness of the Fiqh Academy ruling.

In this paper, there are three issues that had been raised and discussed by the writer. There are as follows:

- i. The permissibility of the classical *Tawarruq* due to the seller who had the real possession of the commodity. However, the jurists did not see that happen in the organised *Tawarruq* contract.
- ii. The *tawkiil* (authorization) to *Tawarruq* is something similar to usurious financing.
- iii. Initially, *Tawarruq* was used as the *makharij* (way out) in order to facilitate the industry growth. However, the industry now had reached its mature stage in which the jurists see higher objectives of the *Shari'ah* overriding the consideration in IF products. In respect with that, *Tawarruq* is not permissible.

However, the writer gave his own opinions on the above issues as follows:

- i. The concept that is used in *Tawarruq* is the same as used in the contract of *Murabahah*. The writer give the example of customer wanted to buy car using

*Murābahah* contract. In this transaction, the bank did not own the car at the time the customer approached it. Hence, the question arises by the writer is that why the requirement of real possession only executed on *Tawarruq* contract rather than other contemporary contract.

- ii. Term of *tawkīl* not only used in *Tawarruq*, it had been used in the contract of *Murābahah* and *Ijārah*. Hence, products using *Ijārah* and *Murābahah* should also be prohibited.
- iii. Other contemporary contracts such as *Murābahah* and *Ijārah* are also considered as *makhārij* in which to facilitate the industrial growth. However, those contracts are not prohibit although it has the same objective with *Tawarruq*. Moreover, the writer did not agree that IF industry had reached its maturity stage. It is because the writer looked maturity stage in term of market share of the industry rather than looking at the current size of the Islamic bank.

However, the writer did not deny that the application of *Tawarruq* could spread the *mafāsīd* (harmful) to the society if it is not use properly. Hence, the writer had suggested four guidelines to prevent the spread of *mafāsīd* in the application of *Tawarruq*. There are as follows:

- i. Responsible Marketing Strategies.
- ii. Judicious Credit Offering.
- iii. Adequate Customer Suitability.
- iv. Proceed Test.

Furthermore, the writer saw contemporary contracts as the acclimatisation of classical contracts in order to fit with the needs of modern times. Furthermore, prohibition of organised *Tawarruq* could not change the way IF is operate or otherwise it could decline or exploit the growth of market share in the industry.

However, in this paper, the writer did not cover the operational issue raised such as the issue of default payment, the issue of late payment and issue on the early settlement in which researcher think it is significantly important to be considered in protecting the customers' affair.

2.1.3 Salah Al-Shalhoob. (n.d). "*Organised Tawarruq in Islamic Law: A Study of Organised Tawarruq as Practiced in the Financial Institutions in Saudi Arabia*". United Kingdom: University of Edinburgh.

In this paper, the writer reviewed and analysed *Tawarruq* which had been practiced in Saudi Arabia since 2000. The writer focused on the theory of Islamic Law under the concept of *Tawarruq* sales, the practices of the contracts under Organised *Tawarruq* and looking at the scholars' point of view regarding the Organised *Tawarruq*.

Under the concept of *Tawarruq* sales, the writer analysed and explained extensive definition given by different banks in the Saudi Arabia that used *Tawarruq* as their financing modes as well as views from the previous researchers. In order to fill the gaps of the existing knowledge, the writer added his feedbacks in every definition reviewed.

In term of practices of the contracts, the writers explained on the particular conditions that must be fulfilled by the bank. There are as follows:

- i. The ownership of the commodities should be identified.
- ii. The specifications of the commodity should be known.
- iii. Possession of the commodity.
- iv. Details of the times of payments.
- v. The delivery of the commodity must be on spot in order to avoid usury.

In the final section, the writer explained on the scholars' perspectives of the opponents and proponents on the case of Organised *Tawarruq*. However, in this section, the explanations given by the writer are too brief and general. Moreover, the writer used his assumptions to support the scholars' view.

Finally, the writer concluded that Organised *Tawarruq* practiced in Saudi Arabia was seemed to be not acceptable in Islamic Law. However, in term of *darūriyyat*, in his opinion, application of *Tawarruq* is acceptable.



2.1.4 Wahbah Al-Zuhaili. (n.d). "*Tawarruq, Its Essence and Its Types: Mainstream Tawarruq and Organised Tawarruq*". Syria: Damascus University.

In this paper, the writer anticipated to investigate the application of *Tawarruq* and *'inah* in order to know precisely the rule of the *Shari'ah* within the contracts. The writer believed that the legal development of the contracts or systems may due to the practice of the people.

In this paper, the writer saw the concept of *Tawarruq* is similar to *'inah*. This is due to several factors such as the *Tawarruq* contains all the prohibited pretexts such as explicit usury, sale of debt, buy or sell of *nasi'ah* and selling subject matter to the first seller or to third party at a price lower than original purchase price. Moreover, the writer explained the characteristics of Organised *Tawarruq* which was not in line with *Shari'ah* principle. The characteristics mentioned by the writers are as follows:

- i. Both parties, did not have intention to possess the commodity.
- ii. *Tawarruq* consists of two deals; buying the commodity from a person and to sell the commodity to a third person at an agreed amount.
- iii. *Tawarruq* had the element of *hīlah* (trick) in which forbid by the *Shari'ah*.
- iv. *Tawarruq* contains usury whereby there is increase in the cost of selling and buying the commodity and at the same time a loss occurs in the sale.

Furthermore, the writer criticised views of the scholars who permit Organised *Tawarruq*. The views that were criticised by the writer are as follows:

- i. *Tawarruq* is considered as sale in which generally it is allow by the *Shari'ah*. However, according to the writer, there are many evidences in the *Sunnah* that forbid *Tawarruq* sale. Hence, specific rule override general rule.
- ii. The scholar use legal maxim (*Qawā'id Fiqhiyyah*) : "the original rule about all things is permissibility" to allow *Tawarruq*. However, according to the writer, this legal maxim is only applied if there is no evidence on its prohibition. In term of *Tawarruq*, there are evidence on its prohibition.
- iii. *Tawarruq* is in line with the *maṣāliḥ* (interest) of the society. In this view, the writer would only accept the *maṣāliḥ* if the application did not against the *Shari'ah* principle.

Finally, the writer concluded with the evidence of resolution from the Fiqh Academy that the application of Organised *Tawarruq* is prohibited due to the existence element of *hīlah* and *ribā*. However, the writer did not mention and criticise the opinion of Shāfi‘ī School in term of *Bay‘ al-‘īnah*. This is because the practitioners who apply this concept are looking at the view of Shāfi‘ī School as the evidence of its permissibility.

## 2.2. *Bay‘ Bithaman Ājil* (BBA)

2.2.1 Rininta Nurrachmi, Hamida Mohamed and Nawalin Nazah. (2013). “*Dispute between Bank and Customer in Bai Bithaman Ajil (BBA). Case in Malaysia*”. Malaysia: International Islamic University Malaysia.

In this paper, the writers explored the BBA issues that brought to the court of Malaysia. Moreover, from the issues, the writers analysed and discussed the conflicts between the customers and bank. The writers used literature analysis and case study approaches to achieve the objectives of the paper.

In this paper, the writers came out with five concern issues in which involving *Shari‘ah* principle. The issues are as follows:

- i. The issue of *Bay‘ al-Ma‘dūm*.
- ii. The issue of *Isqāt Khiyār al-‘ayb*.
- iii. The issue of *Bay‘ wa Sharṭ*.
- iv. The issue of *Ibra’*.
- v. The issue of *Bay‘ al-‘īnah*.

In term of operational issue, through court cases, the writers pointed two issues in which the bank won both of the cases. The cases are as follows:

- i. The customers found out that the contract given by the bank were null and void. It was because there was no transfer of ownership on the subject matter.
- ii. The customer cannot pay the instalment before the end of tenure in the form of home financing facility.

From the above cases, the writers concluded that the court was not in favour of the customers. This is because; the writers assume that if the banks lose in the case, they would not able to recover the profit under BBA. Moreover, it could threaten the

industry of IFIs on Malaysia. In term of customers' side, it shows that the customers have less legal power in the court.

Moreover the writers discussed six disputes between customers and banks which are as follows:

- i. The customers were not informed on the process of early redemption or default payment.
- ii. The issue of ownership in term of default payment.
- iii. The price of the subject matter is exceeds the original price of the subject matter.
- iv. BBA fixed financing mode produces problems on the liquidity management.
- v. Profit rate used by the bank was relied on the rate of market interest.
- vi. The practice of BBA is resemblance to conventional loan.

However, the writers did not mention on what bases or ruling the court used in looking to the cases. This is because 'court was not favour of customer' is the assumption made by the writer and that statement could trigger controversial issue between the bank and customers.

2.2.2 Wan Murshida Wan Hashim and Marhaini Hassan. (2011). "*The Bai' Bithaman Ajil Contracts as a Mode of Islamic Financing: Issues and Dilemma*". Malaysia: Journal of Academic Minds.

In this paper, the writers discussed the legal issues of the BBA contract in which contrary to *Shari'ah* principle which lead to the invalid and unenforceable of the contracts. Furthermore, the writers reviewed on the ruling of the court with regard of the legal issues raised.

In this paper, the writers reviewed and discussed seven issues that contrary with *Shari'ah* and issues that brought to the court. The issues raised are as follows:

- i. Concepts of *Bay' al-'inah*.

In term of *Shari'ah* principle, there are two different views of scholars which allow and prohibit the application of *al-'inah* in *Tawarruq* contract. In Malaysia, they used opinion of scholar who allowed the application of *al-'inah*.

From the view of court, any commercial transaction which have element of tricks or fictitious should not be allowed to be used.

ii. Transfer of ownership.

In the contract of BBA, there is no evidence in the contract saying that the bank holds the ownership of the subject matter. In the view of Law, to conclude the sale between the parties, the evidence of transfer of title should be affected. However, the Law see BBA contract as credit card device instrument rather than the genuine sale transaction.

iii. Prohibition of *ribā* in a transaction.

From the court cases discussed, the writer concluded that there was element of *ribā* tainted in the contract of BBA. However, the court handled different cases of BBA contract with different approaches in which lead to different results.

iv. The element of *gharar* in the sale transaction.

The principle of *gharar* will exist in the contract of BBA when the subject matter is to be constructed or yet to exist. However, in this paper, the writers did not mention on the ruling of court when the *gharar* is found in the sale transaction.

v. The Selling Price: Modes of Calculation

In the contract of BBA, the price of subject matter to be paid by the customer is far higher than the bank paying the subject matter from the customer. From the court cases, there are no different modes of calculation of selling price with the conventional loan. Moreover, in term of default payment, the court viewed that bank should not claim the full sale price of the subject matter.

vi. The Selling price: Concept of Justice.

In the case of BBA, the writers found that the price is far more burdensome to the customers. This is because the price given by the bank did not reflect the prevalent market value. In *Shari'ah* principle, justice is the primary aim to the establishment of Islamic commercial transaction. Unfortunately, the element of justice and equity has not been taken into consideration by the court.

vii. The Application of *Ibra'* (rebate) in the contract sale.

In Malaysia, *Ibra'* had been obliged by the *Shari'ah* Advisory Council for the customer who made early settlement. This would reduce the burden suffer by the customers in paying the instalment. However, this issue is remaining unsettled between the High Court and Appeal Court due to their different decision in granting the *ibra'*.

2.2.3 Edib Somolo. (2010). "*Al-Bay' Bithaman Ajil (BBA) as Practiced in Malaysia: A Critical Review*". (n.pl): Journal of Islamic Banking and Finance.

In this paper, the writer analysed and reviewed the practices of BBA contract in the case of study. This paper could be summarized as follows:

- i. Determination of the price in the BBA contract is using LIBOR and other economic indicator. According to the writer, using LIBOR as a benchmark did not make the contract invalid.
- ii. Despite of the criticism from Middle Eastern scholars regarding the application of BBA, there are still majority of Muslim scholars whose allow the application of BBA.
- iii. Nowadays, Islamic Banks are over-dependent on the debt-based financing including BBA. The writer mentioned the views of other researchers in term of advantages and disadvantages of using debt-based financing.
- iv. From the modus operandi of BBA concepts, the writer found that bank which used BBA create extra burden to the customer and lead to the negative socio-economic consequences.
- v. The writer summarised five arguments in which related to BBA contract. The arguments mentioned are the similarity of BBA with interest rate, determination of price, using interest rate as a benchmark, the question of *'iwaq* and the issue of default.
- vi. The profit earned by the bank is fixed despite the fluctuation of interest rate. The writers saw this situation could lead to the serious problem from the bank side. Hence, the writers found two options to overcome the situation which are increasing/decreasing the *hibah* and dividend to remain competitive in deposit market or maintaining the *hibah* and dividend rates.

However, regarding the permissibility of LIBOR as the benchmarking, the writer should investigate the elements that determine the LIBOR rate. Hence, from the investigation, the writer will get clear indication on why some scholars did not allow LIBOR to be used as benchmarking.

2.2.4 Maznah Ali and Nurul Ain Othman. (n.d). "*Bai' Bithaman Ajil Yang Dilaksanakan di Bank Islam Malaysia Berhad (BIMB)*" (*The Practices of Bai' Bithaman Ajil in Bank Islam Malaysia Berhad*). Malaysia: Universiti Teknologi Malaysia.

In this paper, the writers reviewed the concept of BBA, the factors taken into consideration by the bank and the methods used by the bank to determine the profit rate. The summary of the paper are as follows:

- i. In general, customers know the concepts of BBA. However, they did not know in details the application used in the contract.
- ii. The bank did not use *al-ḥinah* concept in BBA contracts except for credit card financing applications.
- iii. The operational framework of BBA concepts is in line with *Shari'ah* compliance. This is because BIMB had their own *Shari'ah* panel to monitor the activities done by the bank.
- iv. There are several factors are taken into consideration by the bank in order to accept the applications from customers.
- v. In term of determination of profit, the bank used Base Financing Rate (BFR) rather than Base Lending Rate (BLR).

However, in this paper, the writer should clarify and explore in detail the application of BBA in BIMB. For instance, the writer did not cover the elements used in determining BFR. Furthermore, rather than saying the bank had their own *Shari'ah* panel, the writers should explore in details the modus operandi of the BBA applied by the bank. Hence, the writer could conclude by evidence whether the practices of BBA in BIMB is compliance with *Shari'ah* or vice versa.

## CHAPTER III

### APPLICATION OF BAY' BITHAMAN ĀJIL

#### 3.1 Overview of BBA Practiced in BIBD

*Bay' Bithaman Ājil* had been used by Islamic Bank of Brunei since 1993 before the bank merge with Islamic Development Bank of Brunei in 2005. BIBD used BBA contract in the Consumer and Corporate Financing. Below are the financing products and the types of contract used.

**Table 2:**

**Financing Contract Used in BIBD.**

Types of Financing	Types of Contract(s)
<b>Personal Financing:</b>	
Personal Financing	BBA
Overdraft Facility	BBA
Micro Financing	<i>Al-Rahn</i>
<b>Education Financing:</b>	
Children's Education	BBA
Self-Education	BBA
<b>Home Financing:</b>	
Home Financing	<i>Musharakah Mutanaqisah</i>
Home Rumah Plus	<i>Musharakah Mutanaqisah</i>
Home Improvement	BBA
<b>Corporate Financing:</b>	
Working Capital Financing	BBA
Asset/Property Financing	<i>Ijarah Thumma al-Bay' (ITAB) / Ijarah / BBA</i>
Bridge Financing	BBA
Contract Financing	BBA
Supply/Procurement Contract Financing	<i>Musharakah</i>
<b>Small and Medium Enterprise Financing</b>	
Enterprise Facilitation Scheme (EFS)	BBA/ITAB
Micro Credit Financing Scheme	BBA/ITAB

*Source: BIBD Website.*

From the above table, it shows that there are about 73 percent of financing products in BIBD used BBA. According to the *Shari'ah* Officer (2013, November 1), the bank, in 1993, using BBA during that time is considered as *daruriyyah* where BBA could facilitate the need of Muslim in Brunei Darussalam to use transaction in

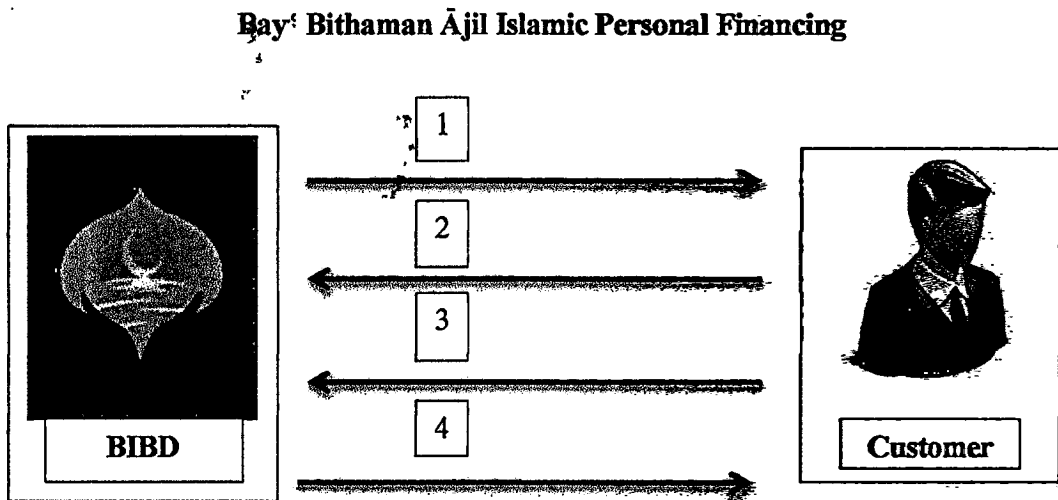
which accordance to *Shari'ah* principle.<sup>32</sup> Moreover, one of the objectives of *Shari'ah* is to fulfil the necessities of the society via accomplishing personal satisfaction and social tranquillity and security.<sup>33</sup> Hence, the application of BBA in BIBD is in line with the objective of the *Shari'ah* in banking and financing.

### 3.2 Modus Operandi of *Bay' Bithaman Ajil* Practiced by BIBD

According to *Shari'ah* Officer (2014, March 14), the modus operandi of BBA practiced by BIBD is accordance to the modus operandi practiced by the Malaysia.<sup>34</sup> Hence, the researcher will use literature analysis to determine the modus operandi applied in BIBD.

#### 3.2.1 Modus Operandi of BBA in Personal Financing

Figure 2



<sup>32</sup> The information extracted from interview session with Shari'ah Officer of BIBD on 2014, March 14 at Shari'ah Department, BIBD Headquarter, Bandar Seri Begawan, Negara Brunei Darussalam.

<sup>33</sup> Dr Mohammad Akram Laldin. (2008). *Fundamentals and Practises in Islamic Finance*. Malaysia: International Shari'ah Research Academy for Islamic Finance (ISRA). p.79.

<sup>34</sup> The information extracted from interview session with Shari'ah Officer of BIBD on 2014, March 14 at Shari'ah Department, BIBD Headquarter, Bandar Seri Begawan, Negara Brunei Darussalam.



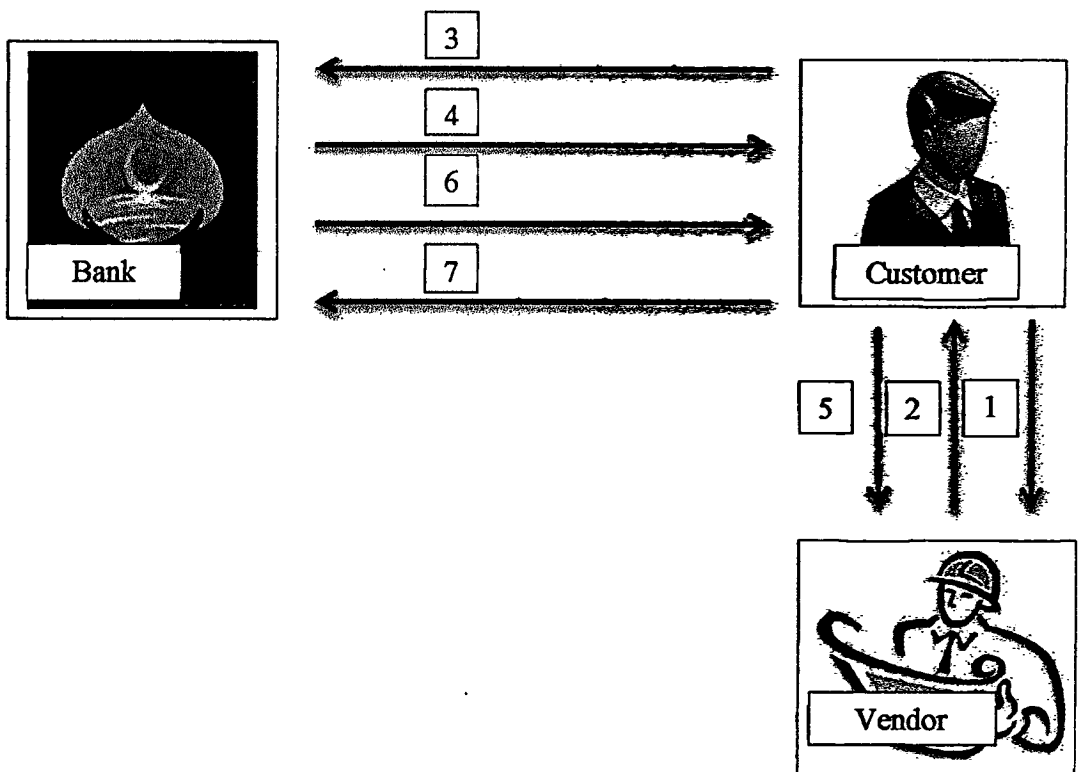
From the above figure, the modus operandi of personal financing are explained as follow:

1. The customer approaches the bank for personal financing purpose, for instance, BND 10,000. Hence, the customer and bank will enter BBA transaction in term of *Bay' al-'inah* concept. The bank will sell subject matter; *sukūk* portfolio of the bank, amounted, for instance, BND 15,000.
2. The customer will pay the bank on deferred payment with agreed financing period.
3. Now, the customer is the ownership of the subject matter. Hence, the customer sells the subject matter back to the bank amounted BND 10,000.
4. The bank agrees to buy, in term of cash, the subject matter from the customer.

### 3.2.2 Modus Operandi of BBA in Home Financing

Figure 3

#### *Bay' Bithaman Ājil* Islamic Home Financing



The modus operandi of BBA as illustrated in figure 3 above is explained in the following manner:

1. In order to build a house, the customer will approach the vendor or contractor to determine the price of desired house. After the customer agrees with the suggested price, the buyer will pay 10 percent of the agreed price as the down payment.
2. The vendor will execute Sales and Purchase Agreement (SPA) and therefore the beneficial ownership over the subject matter will be transferred to the customer.
3. For the remaining of the price (90 percent), the customer will approach bank to apply for Home Financing. In this transaction, the bank and customer will enter *Bay' al-'inah* transaction. The customer will execute Property Purchase Agreement (PPA), whereby the customer sells subject matter to the bank at a price of equivalent to the 90 percent of remaining price.
4. The bank pays the customer in cash and therefore, beneficial of the subject matter is transferred to the bank.
5. The buyer pays the remaining price to the vendor / contractor.
6. The bank executes Property Sale Agreement (PSA), whereby the bank sells the subject matter to the customer at a higher price than PPA price.
7. The customer pays the agreed price in deferred payment over the agreed financing period.

### **3.3 Issues of *Bay' Bithaman Ajil***

#### **3.3.1 Concept of *Bay' al-'inah***

Application of BBA is the combination of *Bay' al-'inah* and *Murābahah* transactions. *Bay' al-'inah*, according to Imam al-Shafi'i, is the credit purchase of an asset which is later sold to the original owner or a third party, whether at a deferred or spot, higher or lower price than the first contract, or for an exchange of goods.<sup>35</sup>

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<sup>35</sup> Wan Murshida Wan Hashim and Marhaini Hassan. (2011). *The Bai Bithaman Ajil Contract as a Mode of Islamic Financing Facility: Issues and Dilemma*. Malaysia: Journal of Academic Minds. p.36

Contemporarily, *Bay' al-'inah* is define as the sale-based on the transaction of delay where the debtor sells to the creditor some object for cash which is payable immediately; the debtor simultaneously immediately buys the same object for a greater amount at a future date.<sup>36</sup>

*Bay' al-'inah* transaction is not an agreed matter amongst the jurists of Islam in term of its legality and validity. Classically, according to Maliki and Hanbali jurists, the contract of *Bay' al-'inah* is not valid due to the motives of the contract itself which is to obtain a loan with interest. This is considered as legal device (*hiyal*) and legal device is unacceptable in Islam.<sup>37</sup> However, according to Shafi'i School, this contract is valid due to the structures and conditions of the contract were properly concluded. Shafi'i School, moreover, did not consider the motives of the contract will lead to the invalidity unless it is explicitly mentioned.<sup>38</sup>

Contemporarily, many Muslim Scholars viewed such transaction as not an act of sale since the intention of the parties clearly shows the purpose of the contract is to grant a loan with a profit.<sup>39</sup> However, in this matter, BIBD followed the Shafi'i Scholars for validating BBA in their financing modes.

### 3.2.2 Absence of *'iwad* in the contract

*'Iwad* is the major objections related to the BBA facilities offered by Islamic Bank. According to M. M. Sanusi (2012), the bank did not implement the components of *'iwad* which is possession of risks and liabilities.<sup>40</sup> By implementing *'iwad* in the financing products, this could protect the right of consumer in the transaction.<sup>41</sup> Ibn al-'Arabi cited by M. M. Sanusi (2012), said "*every increase, which is without 'iwad is riba*". Hence, majority of jurists considered *'iwad* as the conditions of lawful sale.<sup>42</sup> This will differentiate the profit made between loans and financing modes.

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<sup>36</sup> Mahmood Mohamed Sanusi. (2012). *Islamic Banking and Finance Shari'ah & Legal: Issues and Challenges*. Malaysia: Aslita Sdn. Bhd. V. 4 p. 62. as cited by Schacht. (1984). *Introduction to Islamic Law*. United Kingdom: Oxford. p.79.

<sup>37</sup> *ibid.* p.63.

<sup>38</sup> *ibid.*

<sup>39</sup> Wan Murshida Wan Hashim and Marhaini Hassan. (2011). *The Bai BithamanAjil Contract as a Mode of Islamic Financing Facility: Issues and Dilemma*. *Op. cit.* p.39.

<sup>40</sup> Mahmood Mohamed Sanusi. (2012). *Islamic Banking and Finance Shari'ah & Legal: Issues and Challenges*. *Op. cit.* p. 85.

<sup>41</sup> Saiful azhar Rosly. (2005). *Critical Issues on Islamic Banking and Financial Markets*. United States: authorhouse. p.519.

<sup>42</sup> *ibid.* p.520

In term of conventional loans, the profits (interest) rate of the loans are the amount of the interest of depositors, overhead, credit or default risk and profit margin.<sup>43</sup> In term of Islamic financing, on the other hand, should consist of cost of input, market risk / liability and effort / value added.<sup>44</sup>

In order to implement real Islamic profit, the bank should consider implementation of Option of Defect (*Khiyār al-‘Ayb*) in BBA contract. Option of Defect is “*the option given to the customer to cancel or annul the BBA contract when a defect on the goods sold is evident*”.<sup>45</sup> In term of under construction home financing, for instance, the bank should ensure that the defects are removed and the damages are repaired by dealing directly with the vendor. Hence, by doing so, the bank could present *‘iwaḍ* in BBA by taking the risks and liabilities of the subject matter.

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<sup>43</sup> Saiful azhar Rosly. (2005). *Critical Issues on Islamic Banking and Financial Market*. Op. cit. p. 520.

<sup>44</sup> See: Mahmood Mohamed Sanusi. (2012). *Islamic Banking and Finance Shari'ah & Legal: Issues and Challenges*. Op. cit. p.77.

<sup>45</sup> *ibid* p.82

## CHAPTER IV

### APPLICATION OF *TAWARRUQ*

#### 4.1 Overview of *Tawarruq* Practiced in BIBD

*Tawarruq* financing products had been established by BIBD on April 2013. Hence, since then, most of the Consumer Financing products which used BBA concept were replaced with *Tawarruq*. However, in term of Corporate Financing, BIBD has not yet replaced the application of BBA into other concept of financing. According to Consumer Banking Officer (2014, March 14), in term of portfolio money wise, it is easier to replace Consumer Financing products concepts due to its small financing compared to Corporate Financing. However, BIBD did not deny that Consumer Financing is very important stakeholder since it is the biggest market share in BIBD.<sup>46</sup> The following table shows the concepts used in Consumer Financing before and after the development of *Tawarruq*.

**Table 3:**

**Consumer Financing Before and After the Development of *Tawarruq***

Types of Financing	Before	After
<b>Personal Financing:</b>		
Personal Financing	BBA	<i>Tawarruq</i>
Overdraft Facility	BBA	<i>Tawarruq</i>
Micro Financing	<i>Al-Rahn</i>	<i>Al-Rahn</i>
<b>Education Financing:</b>		
Children's Education	BBA	<i>Tawarruq</i>
Self – Education	BBA	<i>Tawarruq</i>
<b>Home Financing:</b>		
Home Financing	<i>Musharakah Mutanaqisah</i>	<i>Musharakah Mutanaqisah</i>
Home Rumah Plus	<i>Musharakah Mutanaqisah</i>	<i>Musharakah Mutanaqisah</i>
Home Improvement	BBA	BBA

Sources: BIBD Websites.

From the above table, it shows that BIBD had made an effort to replace the application of BBA in the Consumer Financing product. It is about 80 percent of the consumer financing which before use BBA concept had been replaced with *Tawarruq* concept.

<sup>46</sup> The information is extracted from the interview session with Consumer Banking Officer on 2014, March 14, at Shari'ah Department, BIBD Headquarters, Bandar Seri Begawan, Negara Brunei Darussalam.

## 4.2 Replacement of BBA with *Tawarruq*

### 4.2.1 Strategic Plan

Generally, Islamic banks have two strategic choices. The strategies are exploiting the niche or compete head-on against conventional banks.<sup>47</sup> Exploiting the niche is the strategy where the bank only concern with the customers who are deeply care about *Shari'ah* compliance in their transaction and offers products and services which is specifically for Muslim society. Competing head-on with conventional bank, on the other hand, means targeting customers who place less importance on *Shari'ah* compliance in their transaction.<sup>48</sup>

In term of replacement of BBA with *Tawarruq*, BIBD applied both strategies in their development plan. *Tawarruq* application would be better in term of its *Shari'ah* compliance compared to BBA and this would increase trust between the Muslim customer and the bank. Moreover, using *Tawarruq* could attract non-muslim customer to arrange financing with BIBD since BIBD could provide the customer with real financing and the rate given to the customer is fixed.

Moreover, BIBD wanted to become main key player in the Islamic Financial Institutions (IFIs). There are several IFIs in Brunei Darussalam. There are Tabung Amanah Islam Brunei (TAIB), BIBD At-Tamwil Berhad, Insurans Islam TAIB General Takaful Sdn Bhd, Insurans Islam TAIB Family Takaful Sdn Bhd, Syarikat Takaful Brunei Keluarga Sdn Bhd and Syarikat Takaful Brunei Am Sdn Bhd.<sup>49</sup> Hence, by replacing BBA to *Tawarruq* in which more *Shari'ah* compliance, the other IFIs would reconsidered to used application of *Tawarruq* for their products.

### 4.2.2 Marketing

According to The Chartered Institute of Marketing (2009), marketing is “*the management process responsible for identifying, anticipating and satisfying customer*

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<sup>47</sup> Cyril Garbois, Cyril Gourp, Dr Alexander Von Pock and Mukund Bhatnagar. (2012). *The Future of Islamic Banking*. Korea: A.T. Keraney Inc. Retrieved on 2014, March 17 at <https://www.atkearney.com/documents/10192/654853/Future+of+Islamic+Banking.pdf/27167edf-a96d-4465-b88a-83beb25ed4bd>

<sup>48</sup> *ibid.*

<sup>49</sup> Autoriti Monetari Brunei Darussalam. (2012). Financial Institutions Directory. Retrieved on 2014, March 17 at <http://www.ambd.gov.bn/index.php/regulatory/financial-institutions-directory>.

*requirement profitably*".<sup>50</sup> In term of Islamic perspective, Syed Ali Hussnain (2011) had defined marketing as "*the process of identification and implementation of value maximization strategies for the welfare of the stakeholders in particular and the society in general governed by the guidelines given in al-Qurān and Sunnah*".<sup>51</sup>

Hence, from the above definition, it could be concluded that the main objective of the marketing is to satisfy the stakeholder, including customer, shareholder and public. However, in Islamic view, the tools used in marketing should be accordance to Qurān and Sunnah.

In BIBD, according to *Shari'ah* Officer (2014, March 14), one of the reason to replace BBA with *Tawarruq* is due to its widely applied by the Islamic Bank. If BIBD wanted to open its branches, for instance, in Middle East, the bank has to considered several factors. One of the factors that should be taken into consideration is types of product offered by the bank.<sup>52</sup> As researcher concerned, BBA concept is not accepted by the Middle East scholars due to practices of *Bay' al-'inah*. Hence, by replacing BBA with *Tawarruq*, the chances to market their product would be easier and lead to satisfaction of their stakeholders.

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<sup>50</sup> The Chartered Institute of Marketing. (2009). *Marketing and The 7Ps: A Brief Summary of Marketing and How It Works*. p. 2. Retrieved on 2014, March 17 at <http://www.cim.co.uk/files/7ps.pdf>

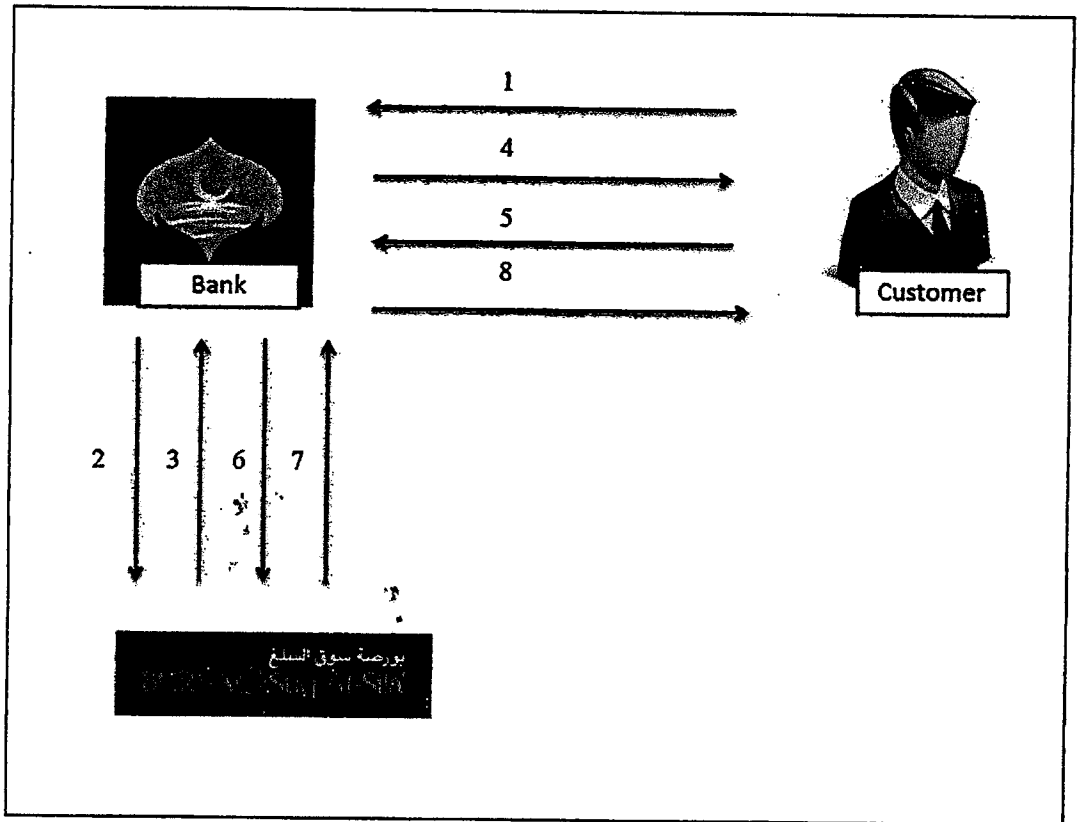
<sup>51</sup> Syed Ali Hussnain. (2011). *What is Islamic Marketing*. USA: Global Journal Inc. Vol. 11 p. 103. Retrieved on 2014, March 17 at <https://globaljournals.org/GJMBR.../10.What-Is-Islamic-Marketing.pdf>

<sup>52</sup> The information is extracted from the interview session with *Shari'ah* Officer on 2014, March 14, at *Shari'ah* Department, BIBD Headquarters, Bandar Seri Begawan, Negara Brunei Darussalam.

### 4.3 Modus Operandi of *Tawarruq* Practiced by BIBD

Figure 4

#### Modus Operandi of *Tawarruq*



The modus operandi of *Tawarruq* as illustrated in figure 4 above is explained in the following manner:

- i. The customer approaches the bank to get, for instance, Education Financing for his children. After gathering all the information needed for the financing, the bank set another appointment with the customer on other day. This is to give the bank time to prepare the contract and their transaction with *Būrṣah Sūq al-Sila'* (BSAS).
- ii. On the day of appointment, the bank calls BSAS to buy the commodity with specific amount needed, for instance, BND 100 000 for that day on spot.
- iii. After the transaction occur, the ownership of the commodity will be transferred to the bank. BSAS will send the detailed specification of the commodity bought by the bank.



- iv. During the appointment with the customer, the bank executes the agreement where the bank sells the commodity with agreed price, which is, needed amount by the customer plus the profit. The customer pays the agreed price in deferred payment over the agreed financing period.
- v. Now, the customer had the ownership of the commodity. In the practice of BIBD, the bank give the customer options whether the customer would like to sell the commodity by himself or the customer could appoint the bank to become his agent to sell the commodity. Usually, the customer will apoint the bank to sell the commodity. This is because, usually, customer had lack knowledge on the process in capital market. Hence, to alleviate hardship, the customer appoints bank as an agent to sell the commodity to market.
- vi. At the end of the day of appointment, the bank, as an agent, sells back the commodity to BSAS with the same price as the bank buys the commodity i.e. BND 100,000. However, if the bank sells the commodity the next day of the appointment, the bank will sell the commodity at market price.
- vii. *Būrṣah Sūq al-Sila'* buys the commodity and pays the bank on cash basis.
- viii. After receiving the cash from BSAS, the bank transfers the cash into the customer's account.

#### 4.4 *Būrṣah Sūq al-Sila'* (BSAS)

##### 4.4.1 Overview of *Būrṣah Sūq al-Sila'*

*Būrṣah Sūq al-Sila'* (BSAS) is the subsidiary of Bursa Malaysia Islamic Services (BMIS) Sdn Bhd. It is an Islamic commodity trading platform for the Islamic financial and capital market.<sup>53</sup> It also considered as the world's first multi-commodity and multi-currency commodity trading platform to support *Murābahah* transaction.<sup>54</sup> In BSAS, they offer hybrid market whereby the member could do transaction either using secured web-based system or traditional voice broking.

<sup>53</sup> Bursa Malaysia Islamic Services Sdn Bhd. (n.d.) *Bursa Suq al-Sila'*. Retrieved on 2014, March 17 at <http://www.oicexchanges.org/docs/third-meeting-istanbul-panel-discussions/commodity-murabahah-house-mr.-norfadelizan-bin-abdul-rahman-vice-president-head-islamic-markets-bursa-malaysia.pdf>.

<sup>54</sup> Bursa Malaysia (n.d.) *The Use of Commodities in Islamic Finance – Commodity as Underlying on Bursa Suq al-Sila'*. Retrieved on 2014, March 17 at [http://www.giff.com.my/c/document\\_library/get\\_file?uuid=35fdf85c-2e0f-40b6-9cd8-9f85b4ce75de](http://www.giff.com.my/c/document_library/get_file?uuid=35fdf85c-2e0f-40b6-9cd8-9f85b4ce75de).

The following table are the market feature of the *Būrṣah Sūq al-Sila'* .

**Table 4**

**Market Features of *Būrṣah Sūq al-Sila'***

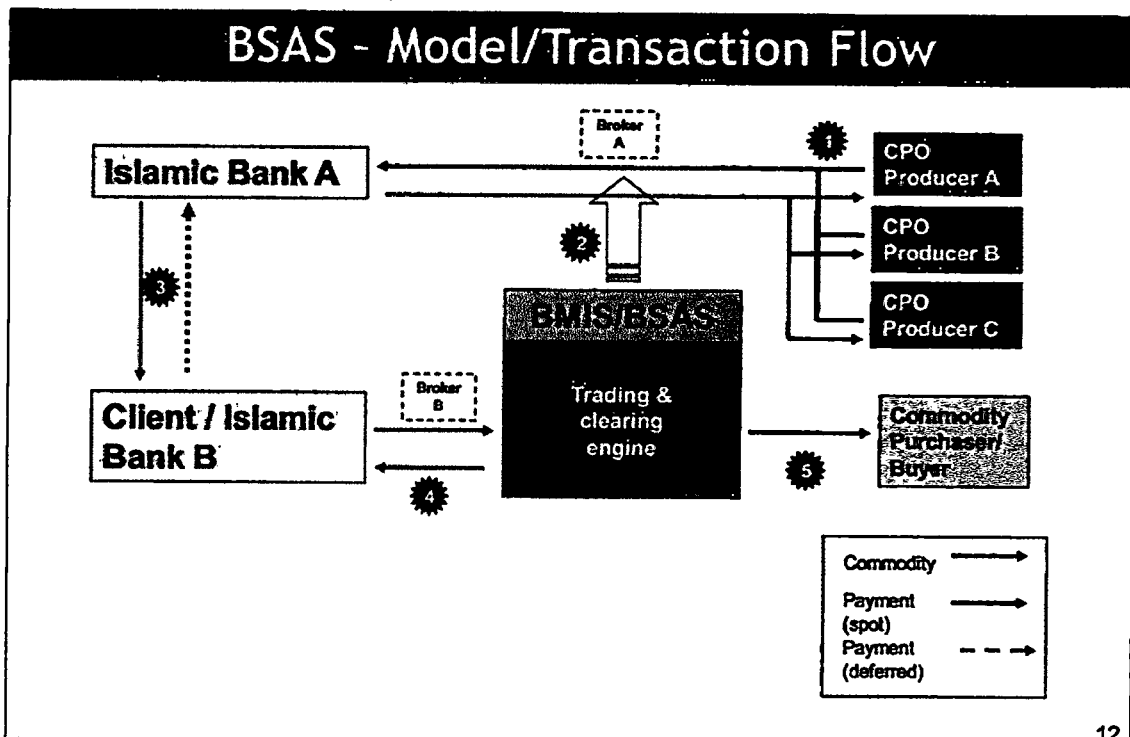
Item	Details
Basic Features	<ul style="list-style-type: none"> <li>➤ Real deliverable market – delivery is by default</li> <li>➤ Allows periodical <i>Shari'ah</i> verification audit.</li> </ul>
Underlying	<ul style="list-style-type: none"> <li>➤ E-cert representing ownership of commodity BSAS</li> <li>➤ Contract Specification</li> </ul>
Participants	<ul style="list-style-type: none"> <li>➤ Commodity Supplying Participant (CSP)</li> <li>➤ Commodity Trading Participant (CTP)</li> </ul>
Taking Delivery	<ul style="list-style-type: none"> <li>➤ Buyer indicates intention directly to BMIS</li> <li>➤ Leaves open position beyond market closing for the day.</li> </ul>

Source: Bursa Malaysia

#### 4.4.2 Transaction Flows in *Būrṣah Sūq al-Sila'*

**Figure 5**

**Transaction Flow of *Būrṣah Sūq al-Sila'***



Source: Bursa Malaysia

The transaction flow in *Būrṣah Sūq al-Sila'* as illustrated in figure 5 above is explained in the following manner:

- i. During the pre-market opening, bid and offer happen between the bank and the Crude Palm Oil (CPO) supplier. When the market is open, which is, 10.30a.m. Malaysia time, BSAS engine will randomly match the trade and the CPO supplier will sell the commodity directly to the bank.
- ii. During this stage BMIS will ensure the performance of CPO supplier in order to avoid strict Know-Your-Customer (KYC) appraisal by Islamic banks. Then BMIS will send the confirmation to all parties. After receiving the confirmation, the bank will pay the agreed price by accrediting into BMIS account. The ownership of the commodity will be transferred to the bank using E-cert.
- iii. Transaction between the bank and the customer happens.
- iv. The customer or the bank (an agent) will sell the commodity to BMIS. The BMIS will pay the customer by instructing the bank to debit its account in favour of customer. Hence, the ownership of the commodity is transferred BMIS.
- v. BMIS sells the commodity to the CPO purchaser on random basis and matching.

#### **4.5 Issues on the Practiced of *Tawarruq***

##### **4.5.1 Impermissibility of *Tawarruq* by Organization of Islamic Conference (OIC) Fiqh Academy.**

The following are the resolution that had been made by the OIC Fiqh Academy.<sup>55</sup>

“Resolution 179 (19/5) in relation to

*Tawarruq*: Its meaning and types (Classical applications and Organised *Tawarruq*) The International Council of Fiqh Academy, which is an initiatives of the Organization of Islamic Conference (OIC), in its 19<sup>th</sup> session which was held in

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<sup>55</sup> Global Islamic Finance. (2009) *OIC Fiqh Academy Ruled Organised Tawarruq Impermissible*. Retrieved on 2014, March 17 at <http://www.global-islamic-finance.com/2009/07/oic-fiqh-academy-ruled-organised.html>.

Sharjah, United Arab Emirates, from 1-5 of Jamādil Ūla 1430 AH, corresponding to 26-30 April 2009, decided on the following:

Having reviewed the research papers that were presented to the Council regarding the topic of *Tawarruq*, its meaning and its type (Classical applications and Organised *Tawarruq*) a resolution was passed. Furthermore, after listening to the discussions that revolved about the applications of *Tawarruq*, the resolutions were presented at the International Council of Fiqh Academy, under auspices of the Muslim World League in Makkah.

The following were the resolutions:

First: definition of both Classical and Organised *Tawarruq*

Second: It is not permissible to execute both *Tawarruq* (Organised and Reversed) because simultaneous transactions occurs between the financier and the *mustawriq*, whether it is done explicitly or implicitly or based on common practiced, in exchange for a financial obligation. This is considered as deception, i.e., in order to get the additional quick cash from the contract. Hence, the transaction is considered as containing the element of *ribā*.

The recommendation is as follows:

To ensure that Islamic Banking and Financial Institutions adopt investment and financing techniques that are *Shari'ah*-compliant in all its activities, they should avoid to conform to *Shari'ah* rules and so that the techniques will ensure the actualisation of the *Shari'ah* objectives (*Maqāsid al-Shari'ah*). Furthermore, it will also ensure that the progress and actualisation of the socio-economic objectives of the Muslim world. If the current situation is not rectified, the Muslim world would continue to face serious challenges and economic imbalances that will never end.

To encourage the financial institutions to provide *Qard Hasan* (benevolent loans) to needy customer in order to discourage them from relying on *Tawarruq* instead of *Qard Hasan*. Again these institutions are encouraged to set up special *Qard Hasan* Fund.”

Although OIC Fiqh Academy had disallow the practice of Organised *Tawarruq*, there are still organisation or jurists such as Accounting and Auditing

Organisation for Islamic Financial Institutions (AAOIFI), Dr Aznan Hasan and Sheikh Nizam Yaquby that allow the practice of Organised *Tawarruq* with certain conditions.

In order to make sure the Organised *Tawarruq* application is genuine, AAOIFI had created guidelines and parameters to comply with *Shari'ah* principle. The guidelines and parameters are tabulated as follow.

**Table 5**

**AAOIFI's *Shari'ah* Parameters in the Application of *Tawarruq***

No.	Parameters and Guidelines
i.	The requirement of the contract for purchasing the commodity on a deferred basis should be completely fulfilled.
ii.	The commodity sold should be well identified so as to become distinct from the other assets of the seller.
iii.	If the commodity is not made available at the time of signing the contract, the client should be given a full description or a sample that indicates the quantity of the commodity and the place of storage.
iv.	The commodity should be actually or impliedly received by the buyer and there remains no further condition or procedure for receiving it.
v.	The commodity should be sold to a party other than the one from whom it was purchased on deferred payment basis so as to avoid ' <i>inah</i> .
vi.	The contract for purchasing a commodity on a deferred payment basis and the contract for selling it for a spot price should be linked together in such a way that the client loses his right to receive the commodity. Such a linkage between the two contracts is prohibited whether it is stipulated in the documents or regarded as a normal tradition or incorporated in the procedures.
vii.	The client should not delegate the institution or its agent to sell on his behalf a commodity that he purchased from the same institutions and similarly, the institution should not accept such a delegation. If, however, the regulations do not permit the client to sell the commodity except through the same institution, he may delegate the institution to do so after he might have actually or impliedly received the commodity.
viii.	The institution should not arrange a proxy of a third party to sell the commodity on behalf of the client that purchased it from the institution.
ix.	The client should not sell the commodity except by himself or through an agent other than the institution and should duly observe the other regulations.
x.	The institutions should provide the client with the information that he or his appointed agent may need order to sell the commodity.
xi.	Monetisation is not a mode of investment or financing. It has only been permitted when there is a need for it and subject terms and conditions. Therefore, the institutions should not use monetisation as a means of mobilising liquidity for their operations; instead, it should exert effort for fund mobilisation through other modes. The institutions should resort to monetisation only when it faces the danger of liquidity shortage that could interrupt the flow of its operations and cause losses for its clients

xii.	The institutions should avoid the use of proxy in selling the monetisation commodity, even if the proxy is to be arranged with the third party. In other words, institutions should use their own personnel for selling the monetisation commodity, through using brokers for this purpose is permissible.
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Source: *Fatwa in Islamic Finance (September 2013), ISRA*

Furthermore, according to Dr Aznan Hasan, the application of *Tawarruq* is not apparently prohibited. However, due to violation of its practice by the banks, the application of *Tawarruq* is seen to have contradicted with *Shari'ah* principle.<sup>56</sup> Sheikh Nizam Yaquby said that the application of *Tawarruq* would be considered as useful and can be used if the proper procedures are implemented and checks and balances are put.<sup>57</sup>

Moreover, the prohibition of *Tawarruq* should not be concluded as prohibited due to of its systematic structure. It is because, in the modern financing system, it is very hard to implement financing on an individual basis.<sup>58</sup>

#### 4.5.2 Legal Trick (*Hilah*) to *Ribā*

One of the reasons that some jurists did not allow the practice of *Tawarruq* is due to its legal trick (*Hilah*) to circumvent *ribā*-based transaction. Imam al-Shātibī as cited by Asyraf Wajdi Dusuki (2010), said “legal trick is generally held that their true nature is to present a deed that is apparently lawful, in order to circumvent a *Shari'ah* ruling and transform it on the surface to a different ruling.”<sup>59</sup>

In the Qur'ān, Allah had recorded on how the Jews had used legal trick to catch the fish on the prohibited day (Sabbath) and Allah had punish them. Below are the verses refers to the incident:

<sup>56</sup> Dr Aznan Hasan. (2009). *Why Tawarruq Needs to Stay*. Retrieved on 2014, March 17 at <http://askprof.mifc.com/index.php?ch=151&pg=734&ac=535&bb=file1>.

<sup>57</sup> Islamic Finance Resource. (2009). *Organised Tawarruq is Permissible: Sheikh Nizam Yaquby*. Retrieved on 2014, March 17 at <http://ifresource.com/2009/07/23/organized-Tawarruq-is-permissible-sheikh-nizam-yaquby/>.

<sup>58</sup> Dr Aznan Hasan. (2009). *Why Tawarruq Needs to Stay*. *Op. cit.*

<sup>59</sup> Asyraf Wajdi Dusuki. (2010). *Can Bursa Malaysia's Suq al-Sila' (Commodity Murabahah House) Resolve The Controversy Over Tawarruq?* Malaysia: ISRA. p. 11. Retrieved on 2014, March 17 at <http://islamicbankers.files.wordpress.com/2010/04/suq-al-sila-and-tawaruq-controversy.pdf>

﴿وَلَقَدْ عَلِمْتُمُ الَّذِينَ اعْتَدَوْا مِنْكُمْ فِي السَّبْتِ فَقُلْنَا لَهُمْ كُونُوا قِرَدَةً خَاسِئِينَ﴾

Means: “And indeed you knew those amongst you who transgress in the matter of the Sabbath (i.e. Saturday), We said to them: “Be you monkey, despised and rejected”<sup>60</sup>

﴿وَسَأَلَهُمْ عَنِ الْقَرْيَةِ الَّتِي كَانَتْ حَاضِرَةَ الْبَحْرِ إِذْ يَعْدُونَ فِي السَّبْتِ إِذْ تَأْتِيهِمْ حِيتَانُهُمْ

يَوْمَ سَبَّوهُمْ شُرْعًا وَيَوْمَ لَا يَسْتَبِئُونَ<sup>٦١</sup> لَا تَأْتِيهِمْ<sup>٦٢</sup> كَذَلِكَ نَبْلُوهُمْ بِمَا كَانُوا يَفْسُقُونَ﴾

Means: “And ask them (O Muhammad) about the town that was by the sea: when they transgressed in the matter of the Sabbath (i.e. Saturday): when their fish came to them openly on the Sabbath day, and did not come to them on the day had no Sabbath. Thus We made a trial of them, for they used to rebel against Allah’s command (disobey Allah)”<sup>61</sup>

From the above verses of the Qurān, majority of scholars did not allow the practice of *hilah* to circumvent *Shari’ah* prohibitions.<sup>62</sup>

According to Sheikh Muhammad Tāqī Uthmāni (n.d.), if the *hilah* practices are widely used in the IFIs, it will impede the natural path for the Islamic economy.<sup>63</sup> By practising *hilah*, it would narrow the economic activities on which Islamic *Shari’ah* needs and covers the way to establish a desired economic community.<sup>64</sup> Moreover, it could encourage the financier to have usurious mentality which is seeking profit without taking any risk. Hence, in the basis of *Sadd al-Dharā’i’* (Blocking the means to evil), Sheikh Muhammad Tāqī Uthmāni urged that application of Organised *Tawarruq* should be prohibited.<sup>65</sup>

However, Dr Engku Rabiah Adawiah (2008), considered *Tawarruq* as positive solutions (*makhārij*) to meet the liquidity need of the people without having to resort

<sup>60</sup> Al-Baqarah. 2:65.

<sup>61</sup> Al- A’raf. 7:163.

<sup>62</sup> Asyraf Wajdi Dusuki. (2010). *Can Bursa Malaysia’s Suq al-Sila’ (Commodity Murabahah House) Resolve The Controversy Over Tawarruq?* Op. cit. p.11.

<sup>63</sup> Muhammad Taqi Uthmani (n.d.) *Verdict on At-Tawarruq and Its Banking Applications*. p.17 Retrieved on 2014, March 1 at [www.kantakji.com/media/7245/a-68-.pdf](http://www.kantakji.com/media/7245/a-68-.pdf)

<sup>64</sup> *ibid.*

<sup>65</sup> *ibid.* p.19

to *ribā*-based bearing transaction.<sup>66</sup> This opinion had been used by BIBD to allow the application of *Tawarruq* in their products.

### 4.5.3 Violations of *Shari'ah* Principle

#### 4.5.3.1 Subject Matter used as the Asset for *Tawarruq*

One of the concerns on the application of *Tawarruq* is the subject matter used as its asset. In Islamic principle, the subject should meet all the specification required and conditions of good commodity.<sup>67</sup> However, in the modern *Tawarruq*, the banks used junk metal for their subject matter. This situation is really happen in the modern *Tawarruq* where the commodity sold was spoiled aluminium from Russia that had been storage for more than 10 years.<sup>68</sup> Hence, this could lead to the invalidity of contract. Moreover, lack of proper monitoring of the practices by certain segment in the market could lead to the redundancy of the commodities being transacted.<sup>69</sup> This is considered as selling the commodity which not belongs to you and it is prohibited.

However, in BSAS, they ensure that the above situation would not happen. This is because they only allow real commodities which have value to be conducted on the platform. Moreover, they provide fully electronic system that will acknowledge and authenticate the ownership of the commodity. Hence, redundancy of transaction would not happen.<sup>70</sup>

#### 4.5.3.2 Delivery of the Subject Matter

In the modern *Tawarruq*, the issue of non-delivery becomes more apparent in certain application. The worst case is when the bank in his legal document embedded with clauses indicated that there shall be no intention by the buyer to take delivery. According to Khan (2009), most of the cases in modern *Tawarruq* are not compliant with the AAOIFI guidelines. This is due to the prior agreement or collusion between the parties in which at the end of the day the commodity will return to the original

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<sup>66</sup> Dr Mohd Daud Bakar and Dr Engku Rabiah Adawiah Engku Ali. (Ed.) (2008). *Essential Readings in Islamic Finance*. Malaysia: CERT Publication Sdn Bhd. p.143.

<sup>67</sup> Asyraf Wajdi Dusuki. (2010). *Can Bursa Malaysia's Suq al-Sila' (Commodity Murabahah House) Resolve The Controversy Over Tawarruq?* Op. cit. p.15.

<sup>68</sup> Dr Aznan Hasan (2009) *Why Tawarruq Needs to Stay*. Retrieved on 2014, March 17 at <http://askprof.mifc.com/index.php?ch=151&pg=734&ac=535&bb=file1>.

<sup>69</sup> Asyraf Wajdi Dusuki. (2010). *Can Bursa Malaysia's Suq al-Sila' (Commodity Murabahah House) Resolve The Controversy Over Tawarruq?* Op. Cit.

<sup>70</sup> *ibid.* p.21



seller. The following table will illustrate how the commodity will go back to the original seller.

Table 6

**Illustration of Commodity *Murābahah* London Metal Exchange (LME) Standard Transaction**

10.00 a.m., 10 <sup>th</sup> September 2009	Seller-1 books 4 tons of aluminum for a deferred sale @ US\$2,500 per ton to Customer, for a US\$10,000 Sale
10.30 a.m., 10 <sup>th</sup> September 2009	Customer takes constructive possession (never sees the metal, and may at the most simply receive a certificate, usually indicating his consignment is placed in some named warehouse) and sells same aluminum to Buyer-1, for, say, an US\$8,000 spot price
11.00 a.m., 10 <sup>th</sup> September 2009	According to the netting facility, 4 tons of aluminum is netted off between the storage facilities of Seller-1 and Buyer-1, through some direct or indirect method, without the metal needing to physically move at all.

Source: *Why Tawarruq Needs To Go*

In term of BSAS, however, they would allow the delivery of the commodity to the buyer. Operationally, the buyer should inform BMIS directly or through a broker about his intention to ask for delivery. Once informed, the commodity supplier will then notified by BMIS and ask to deliver the commodity within seven days.<sup>71</sup>

#### 4.5.3.3 Issue on Authorisation (Tawkīl)

During OIC in its 17<sup>th</sup> session, the Fiqh Academy disallow the application of *Tawarruq* due to its continuation of being *wakīl* in the contract of *Tawarruq* to sell or to make arrangement to sell the commodity, this makes the contract similar to the prohibited *īnah*. Furthermore, it does not matter whether the agency role is stipulated in the contract or due to customary practices.<sup>72</sup>

Sheikh Tāqī Uthmāni had categorised two types of authorisation that happened in *Tawarruq*. There are authorising *al-mutawarrīq* on the purchase of the commodity

<sup>71</sup> Asyraf Wajdi Dusuki. (2010). *Can Bursa Malaysia's Suq al-Sila' (Commodity Murabahah House) Resolve The Controversy Over Tawarruq? Op. cit. pp.21-22.*

<sup>72</sup> Prof. Dr. Wahbah Al-Zuhaili (n.d). *Tawarruq, Its Essence and Its Types: Mainstream Tawarruq and Organized Tawarruq.* p.17. Retrieved on 2014, March 1 at <http://www.iefpedia.com/english/wp-content/uploads/2009/09/TAWARRUQ-ITS-ESSENCE-AND-ITS-TYPES-MAINSTREAM-TAWARRUQ-AND-ORGANIZD-TAWARRUQ-ByProf.-Dr.-Wahbah-Al-Zuhaili1.pdf>

for the seller and authorising the seller *al-mutawarriq* with the selling of the commodity in the market.<sup>73</sup> The following table is the determination of the validity of authorisation.

**Table 7**

**Validity of the Authorisation**

	Authorising <i>al-mutawarriq</i>	Authorising the seller <i>al-mutawarriq</i>
Invalid Transaction	The bank appoints the <i>mutawarriq</i> as their agent to purchase the commodity on their behalf, and then buys it for himself.	The authorisation is conditioned in the contract of the sale.
Valid Transaction but falls under detestation ( <i>karāhah</i> )	The bank appoints <i>mutawarriq</i> for the purchase only, and then he buys it from the bank through an independent contract agreement through principle offer and acceptance.	The authorisation is not conditioned in the sale and <i>mutawarriq</i> authorise the bank after the completion of the purchase.

Source: *Verdicts on At-Tawarruq and Its Banking Application*

In term of authorising *al-mutawarriq* to buy the commodity, this type of authorisation did not happen in the application of *Tawarruq* in BIBD. It is because, according to modus operandi of *Tawarruq* practiced by BIBD, the bank buys the commodity from BSAS without appointing the customer as an agent.

In term of appointing bank as an agent to sell the commodity to the market, after signing purchase agreement, the customer had given options either they wanted to appoint BIBD as an agent to sell the commodity or vice versa. Hence, in this situation, according to Sheikh Tāqī Uthmāni, the transaction practiced by BIBD is valid but falls under detestation.

<sup>73</sup> Muhammad Tāqī Uthmāni (n.d.) *Verdict on At-Tawarruq and Its Banking Applications*. p.17  
Retrieved on 2014, March 1 at [www.kantakji.com/media/7245/a-68-.pdf](http://www.kantakji.com/media/7245/a-68-.pdf)

## CHAPTER V

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Conclusions

The following statements are the conclusions of the study:

5.1.1 The replacement of *Bay' Bithaman Ājil* with *Tawarruq* in Bank Islam Brunei Darussalam (BIBD).

- i. BIBD had effectively replaced some of BBA financing modes with *Tawarruq* on April 2013.
- ii. BIBD had used 80 percent of *Tawarruq* application on the Consumer Financing. However, in term of Corporate Financing, BIBD had not yet replaced the application of BBA due to portfolio of money-wise.
- iii. The reasons of the replacement of BBA are due to two main factors. There are strategic plan factor and the marketing factor. In term of strategic plan, BIBD would like attract more customers either Muslim or non-Muslim and BIBD wanted to be the main key player in the Islamic Financial Institutions (IFIs) of Brunei Darussalam. In term of marketing, since *Tawarruq* had been acceptable widely, it would be easier for BIBD to open thier branches on other countries where the application of BBA is not acceptable by their scholars.

5.1.2 The application of BBA in BIBD.

- i. BBA had been used in 1993 before the merger of Islamic Bank of Brunei and Islamic Development Bank of Brunei in 2005. The application of BBA, at that time, is considered as *darūriyyah* in which to fulfil the necessities of the Muslims in Brunei Darussalam
- ii. Since then, BBA had been used widely in BIBD Financing Modes. Before April 2013, there were 73 percent of financing product in Consumer and Corporate Financing used the application of BBA.
- iii. The concepts that had been practiced in the application of BBA are *Bay' al-ʿinah* and *Murābahah*. *Bay' al-ʿinah* is when BIBD sells the

commodity (*ṣukūk* portfolio) to the customer and the customer sells back to BIBD with lower price. *Murābahah* is when BIBD sells the commodity to customer with higher price (capital with profit).

- iv. Despite of its widely practice in Asia-Pacific region countries, there are some issues that had been arise by some scholars regarding its permissibility. There are the concepts of *Bay' al-īnah* and the absence of *'iwad* in BBA. In term of *Bay' al-īnah*, most of the classical and contemporary scholars did not allow the application of *Bay' al-īnah* due to the intention of the transaction. However, BIBD followed the Shāfi'i Scholar where the validity of the contract is based on the conditions and structures that had been used without looking at the intention of the transaction. In term of *'iwad*, majority of jurists considered *'iwad* as important component to determine the profit taken by the seller. *'Iwad* consists of capital, market risk / liability and effort / value added. However, in the application of BBA, there is no risk / liability taken by the bank.

### 5.1.3 The application of *Tawarruq* in BIBD

- i. *Tawarruq* is when BIBD sells the commodity to the customer with higher prices at deferred payment and then the customer sells the commodity to the third party (*Būrṣah Sūq Al-Sila'*) via BIBD as his agent. Third party pays the customers at lower price in cash than the former transaction. BIBD as agent will credit the money to the customer's account.
- ii. The commodity used in *Tawarruq* is bought from *Būrṣah Sūq al-Sila'* (BSAS). BSAS is the subsidiary of Bursa Malaysia Islamic Services (BMIS) where it provides Islamic commodity trading platform for the Islamic financial and capital market.
- iii. In Organised *Tawarruq* which had been practiced widely by Islamic banks had encountered some issues. The issues are the impermissibility of *Tawarruq* by OIC Fiqh Academy in 2009, practice of *Tawarruq* in Islamic banks had the element of *ḥīlah* circumvent to *ribā* and violations of *Shari'ah* made by some of the Islamic banks in practising the organised *Tawarruq*.

- iv. Despite of impermissibility of *Tawarruq* by Fiqh Academy, there are still an organisation such as AAOIFI and some scholars such as Dr Aznan Hassan and Sheikh Nizam Yaquby that allow its application in Islamic banks. However, according to them, there are guidelines that should be followed in practising organised *Tawarruq*. Hence, BIBD had used their opinions in allowing *Tawarruq* to be implemented in their products.
- v. In term of the practice of *hīlah* to circumvent *ribā*-based transaction, majority of scholar did not allow its practice based on some verses in the Qur'ān whereby Allah had punished the Jews who used *hīlah* to catch the fish on the prohibited day. Moreover, Sheikh Tāqī Uthmānī had defined harmful effect (*mafāsīd*) if *hīlah* is used widely in Islamic banks. However, Dr Engku Rabiah Adawiah considered the application of *Tawarruq* in Islamic banks as positive solutions (*makhārij*).
- vi. Violations of *Sharī'ah* principle had resulted on the permissibility of *Tawarruq*. However, in the case of BIBD, the violations of *Sharī'ah* could be avoided by following guidelines and parameters that had been provided by AAOIFI.

In summary, replacement of BBA to *Tawarruq* enhances the credibility and accountability of the bank to provide more *Sharī'ah* compliance product which is widely acceptable. Moreover, BIBD is aware the issues of *Tawarruq* that had been rise by some of the jurists. Hence, by following the guidelines and parameter sets by AAOIFI, the issues arise could be mitigate.

## 5.2 Recommendations

There are some recommendations that researcher would like to suggest for the improvement of Islamic banks. The recommendations are as follow:

- i. The bank should continuously revise the application of the *Tawarruq* either from its legal procedure or its structure. The bank should make sure that guidelines of the *Sharī'ah* principle made by AAOIFI are followed.
- ii. In term of product development process, the bank should consider to use equity-based financing in Corporate Financing rather than using debt-based financing.

This is due to its nature of the financing which is to provide funding for the businesses. The bank could consider using either *Muḍārabah* or *Mushārah* concepts for the financing.

- iii. However, if BIBD would still to continue BBA concept in their financing product, researcher suggested that BIBD would consider *Khiyār al-'ayb* in their agreement. This would help to protect the welfare of the customer.

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