APPLICATION OF *WA‘D* (PROMISE) IN ISLAMIC BANKING PRODUCTS: A STUDY IN MALAYSIA AND BANGLADESH

MD. FARUK ABDULLAH

ACADEMY OF ISLAMIC STUDIES
UNIVERSITY OF MALAYA
KUALA LUMPUR

2016
APPLICATION OF *WA‘D* (PROMISE) IN ISLAMIC BANKING PRODUCTS: A STUDY IN MALAYSIA AND BANGLADESH

MD. FARUK ABDULLAH

ACADEMY OF ISLAMIC STUDIES
UNIVERSITY OF MALAYA
KUALA LUMPUR

2016
APPLICATION OF *WA‘D* (PROMISE) IN ISLAMIC BANKING PRODUCTS: A STUDY IN MALAYSIA AND BANGLADESH

MD. FARUK ABDULLAH

THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

ACADEMY OF ISLAMIC STUDIES
UNIVERSITY OF MALAYA
KUALA LUMPUR

2016
UNIVERSITY OF MALAYA
ORIGINAL LITERARY WORK DECLARATION

Name of Candidate: Md. Faruk Abdullah (I.C/Passport No: AF6658390)
Registration/Matric No: IHA120003
Name of Degree: Doctor of Philosophy
Title of Project Paper/Research Report/Dissertation/Thesis (“this Work”): Application of Wa’d (Promise) in Islamic Banking Products: a Study in Malaysia and Bangladesh
Field of Study: Islamic Economics

I do solemnly and sincerely declare that:

(1) I am the sole author/writer of this Work;
(2) This Work is original;
(3) Any use of any work in which copyright exists was done by way of fair dealing and for permitted purposes and any excerpt or extract from, or reference to or reproduction of any copyright work has been disclosed expressly and sufficiently and the title of the Work and its authorship have been acknowledged in this Work;
(4) I do not have any actual knowledge nor do I ought reasonably to know that the making of this work constitutes an infringement of any copyright work;
(5) I hereby assign all and every rights in the copyright to this Work to the University of Malaya (“UM”), who henceforth shall be owner of the copyright in this Work and that any reproduction or use in any form or by any means whatsoever is prohibited without the written consent of UM having been first had and obtained;
(6) I am fully aware that if in the course of making this Work I have infringed any copyright whether intentionally or otherwise, I may be subject to legal action or any other action as may be determined by UM.

Candidate’s Signature Date:

Subscribed and solemnly declared before,

Witness’s Signature Date:

Name:
Designation:
The research considers the practice of *wa’d* in Islamic banking products in Malaysia and Bangladesh and compares between them. It discusses the *Sharī‘ah* issues and other challenges in the practice of *wa’d*. Finally, it determines the prospects of *wa’d*-based products in both countries. It adopts a qualitative case study approach while choosing three Islamic banks in each country for case study. Along with library research and document analysis, it conducts interviews with Islamic banking practitioners and *Sharī‘ah* scholars. It follows thematic and a comparative method to analyse the data. The findings of this study show that Malaysia has innovated numerous products based on *wa’d* while Bangladesh has a limited number of products. The major challenge of *wa’d* in Malaysia is *Sharī‘ah* issues. However, this study concludes that Malaysian practice of *wa’d* is free from the issues of *Sharī‘ah* claimed by a few studies. Nevertheless, Malaysia should have a legal provision for *wa’d* in the Contract Act and a guideline for the practice of *wa’d*. In the case of Bangladesh, the major challenges of *wa’d* are (1) the strictness of the *Sharī‘ah* scholars, (2) lack of product development initiative, (3) and the absence of a legal provision for *wa’d*. However, both countries have significant potential to develop a number of Islamic retail-banking and treasury products through using *wa’d*.
ABSTRAK

Kajian ini bertujuan untuk menilai amalan aplikasi *wa’d* dalam produk perbankan Islam di Malaysia dan Bangladesh serta membuat perbandingan di antara keduanya. Ia akan membincangkan mengenai isu-isu Syariah dan cabaran-cabaran lain dalam pengaplikasiannya. Kajian ini juga dilakukan adalah untuk mengetahui prospek-prospek bagi produk berasaskan *wa’d* di kedua-dua buah negara iaitu Malaysia dan Bangladesh. Kajian ini menggunakan pendekatan kajian kes kualitatif dengan memilih tiga buah perbankan Islam di setiap negara sebagai kajian kes. Di samping kajian perpustakaan dan analisis dokumen, temu bual juga dilakukan dengan pengamal perbankan Islam dan para ilmuan Syariah. Kaedah tematik dan analisis perbandingan digunakan untuk menganalisis data. Hasil kajian menunjukkan bahawa Malaysia telah memperkenalkan banyak produk berasaskan *wa’d* sementara Bangladesh mempunyai bilangan produk yang terhad. Cabaran utama aplikasi *wa’d* di Malaysia adalah berkaitan isu-isu Syariah. Walau bagaimanapun, melalui hasil kajian ini dapat disimpulkan bahawa amalan aplikasi *wa’d* di Malaysia bebas daripada isu-isu Syariah seperti yang dibincangkan oleh beberapa kajian lepas. Namun begitu, Malaysia perlu mempunyai peruntukan undang-undang dalam Akta Kontrak serta garis panduan untuk amalan aplikasi *wa’d* di perbankan Islam di Malaysia. Dalam kes Bangladesh, cabaran utama *wa’d* adalah: (1) ketegasan para ilmuan Syariah, (2) kekurangan inisiatif pembangunan produk (3) dan tiada peruntukan undang-undang bagi *wa’d*. Walau bagaimanapun, kedua-dua negara mempunyai potensi besar dalam membangunkan produk-produk perbankan runcit Islam dan perbendaharaan melalui penggunaan *wa’d*. 
ACKNOWLEDGEMENTS

All Praises to Allah (SWT) who has given me the strength and guidance to complete this work. May this humble work be dedicated to Allah (SWT) as a good deed for His pleasure. I am extremely grateful to my parents Md. Abdul Highe and Shanaj Begum who inspired and continuously supported me throughout the duration of this doctoral program.

I would like to express my deepest gratitude to my supervisor Dr. Asmak Ab Rahman for her continuous guidance and encouragement which have provided the basis for this thesis. She would frequently give appointments to see her despite her busy schedule. Her knowledge and experience shared during the duration of this research were extremely useful. Moreover, she was very supportive to overcome the challenges faced during the completion of this thesis.

Sincere gratitude is extended to the International Shari‘ah Research Academy for Islamic Finance (ISRA) who awarded me the Shari‘ah scholarship award. Without this scholarship, it would have been very difficult to pursue my PhD program.

I would like to express my gratitude to all the interviewees of this research which includes the Shari‘ah scholars and Islamic banking practitioners. Special thanks are extended to those who have helped me conduct the interviews.

I am grateful to my wife Sham Irzatul Mohd Nazri and my son Ammar. It would not be possible to finish this research without their enduring patience and support.

Special thanks are conveyed to my friends who have helped me carry out this research. Moreover, sincere thanks are extended to all academic and administrative staff at the Department of Shariah and Economics and the Academy of Islamic Studies.
# TABLE OF CONTENTS

| Title Page | i |
| Original Literary Work Declaration | ii |
| Abstract | iii |
| Abstrak | iv |
| Acknowledgements | v |
| Table of Contents | vi |
| List of Tables | xvi |
| List of Figures | xvii |
| Transliteration Table | xix |
| List of Abbreviations | xx |
| List of Appendices | xxiii |

## CHAPTER 1: INTRODUCTION

1.1. Introduction 1
1.2. Research Background 3
1.3. Problem Statement 8
1.4. Research Questions 10
1.5. Research Objectives 11
1.6. Scope of the Research 11
1.7. Significance of the Research 13
1.8. Literature Review 14
   1.8.1. Islamic Banking in Malaysia 16
   1.8.2. Islamic Banking in Bangladesh 18
   1.8.3. Comparison of Islamic Banking between Malaysia and Bangladesh 20
1.8.4. Comparison between Malaysian and Bangladeshi Banking Sectors

1.8.5. The Theory of Wa‘d

1.8.5.1. Definition of Wa‘d and Its Status in the Sharī‘ah

1.8.5.2. Wa‘d and the Common Law

1.8.6. The Application of Wa‘d

1.8.6.1. The Application of Wa‘d in Islamic Banking Products

1.8.6.2. The Application of Wa‘d in Şukūk

1.8.6.3. The Application of Wa‘d in Islamic Derivatives

1.9. Research Methodology

1.9.1. Rationale for Qualitative Approach

1.9.2. The Comparative Case Study Approach

1.9.3. Data Collection Method

1.9.3.1. Library Research

1.9.3.2. Document Analysis

1.9.3.3. Interview

1.9.4. Data Analysis Method

1.9.4.1. Thematic Analysis

1.9.4.2. Comparative Analysis

1.9.5. Limitations of Research Methods

1.10. Organisation of the Thesis

1.11. Conclusion

CHAPTER 2: THE THEORY OF WA‘D

2.1. Introduction

2.2. The Definition of Wa‘d

2.2.1. The Literal Definition of Wa‘d
2.2.2. The Technical Definition of *Wa‘d* 47

2.2.2.1. Classical Scholars’ Definition of *Wa‘d* 47

2.2.2.2. Contemporary Scholars’ Definition of *Wa‘d* 48

2.2.3. *Wa‘d* and ‘*Aqd* (Contract) 49

2.2.4. *Wa‘d* and ‘*Ahd* 51

2.2.5. *Wa‘d* and *Nudhur* (Vow) 51

2.2.6. *Wa‘d* and *Ju‘ālah* 52

2.2.7. Different Features of *Wa‘d* (*Muwā‘adah* and *Wa‘dān*) 52

2.2.7.1. Definition of *Muwā‘adah* 53

2.2.7.2. Definition of *Wa‘dān* 54

2.3. The Status of *Wa‘d*, *Muwā‘adah* and *Wa‘dān* in the *Sharī‘ah* 56

2.3.1. The Status of *Wa‘d* in the *Sharī‘ah* 56

2.3.1.1. *Sharī‘ah* Ruling on Using *Wa‘d* in Exchange Contracts (*Mu‘āfaqāt*) 57

2.3.1.2. The Binding Nature of *Wa‘d* on the Promisor 57

2.3.2. The Status of *Muwā‘adah* in the *Sharī‘ah* 75

2.3.2.1. Classical Scholars’ Views 75

2.3.2.2. Contemporary scholars’ Views 77

2.3.3. The Status of *Wa‘dān* in the *Sharī‘ah* 87

2.3.3.1. *Wa‘dān* is different from *Muwā‘adah* 87

2.3.3.2. *Wa‘dān* is similar to *Muwā‘adah* 88

2.3.3.3. *Wa‘dān* is a Prohibited Legal Trick (*ḥilah*) 89

2.3.3.4. Discussion of the Opinions 89

2.4. Conclusion 90
CHAPTER 3: THE APPLICATION OF *WA‘D* IN MALAYSIAN ISLAMIC BANKS

3.1. Introduction 92

3.2. An Overview of Islamic Banking in Malaysia 92

3.2.1. Historical Development of Islamic Banking in Malaysia 93

3.2.1.1. The Initial Stage of Development 93

3.2.1.2. The Second Stage of Development 94

3.2.1.3. The Third Stage 95

3.2.1.4. The Fourth Stage of Development 96

3.2.2. Development of *Takāful* and the Islamic Capital Market 97

3.2.3. The Recent Growth of Islamic Banking 97

3.2.4. A Brief Synopsis of Islamic Banking Products 99

3.2.5. Regulation and Governance 99

3.2.5.1. Bank Negara Malaysia (BNM) 100

3.2.5.2. *Sharī‘ah* Advisory Council (SAC) 101

3.2.6. Contemporary Infrastructure Development 101

3.2.7. Islamic Banking Efficiency 102

3.3. The Legal Status of *Wa‘d* in the Civil Laws of Malaysia 103

3.3.1. The Contracts Act 1950 103

3.3.2. The Law Harmonisation Committee’s Initiative 106

3.3.3. The Bank Negara Malaysia (BNM)’s Guideline 107

3.3.4. The Central Bank of Malaysia Act 2009 108

3.4. *Wa‘d*-Based Products in the Islamic Banks of Malaysia 108

3.4.1. Consumer Banking Products 110

3.4.1.1. *Mushārakah Mutanāqīṣah* (MM) Home and Property Financing 110
CHAPTER 4: THE APPLICATION OF WAD IN BANGLADESHI ISLAMIC BANKS

4.1. Introduction

4.2. Overview of Islamic Banking in Bangladesh

4.2.1. Historical Development

4.2.2. Development of Takāful and Islamic Capital Market

4.2.3. Recent Growth of Islamic Banking

4.2.4. A Brief Synopsis of Islamic Banking Products

4.2.5. Regulation and Governance

4.2.6. Contemporary Infrastructure Development

4.2.7. Islamic Banking Performance and Efficiency

4.3. The Legal Status of Wa‘d in the Civil Laws of Bangladesh

4.4. Wa‘d-Based Products in the Islamic Banks of Bangladesh

4.4.1. Consumer Banking Products
4.4.1.1. Bay‘ Murābaḥah on Purchase Orderer (BMPO) 149
4.4.1.2. Bay‘ Mu‘ajjal 152
4.4.1.3. Hire-Purchase under Shirkat al-Milk (HPSM) 155
4.4.2. Trade Financing Product 158
  4.4.2.1. Murābaḥah Post Import (MPI) 158
4.5. Conclusion 160

CHAPTER 5: COMPARISON BETWEEN THE PRACTICE OF WA‘D IN MALAYSIAN AND BANGLADESHI ISLAMIC BANKS 161

5.1. Introduction 161
5.2. Comparison on the Legal Status of Wa‘d 161
5.3. Comparison on the Practice of Wa‘d in Islamic Banking Products 164
  5.3.1. Wa‘d-Based Consumer Banking Products 165
    5.3.1.1. Bay‘ Murābaḥah Financing 166
    5.3.1.2. MM Home Financing 168
    5.3.1.3. Bay‘ Mu‘ajjal Financing 171
    5.3.1.4. Tawarruq Home Financing 172
    5.3.1.5. AITAB Vehicle Financing 174
  5.3.2. Trade Financing Products 175
  5.3.3. Treasury Products 176
    5.3.3.1. Islamic FX Forward 176
    5.3.3.2. Islamic Profit Rate Swap (IPRS) and Islamic Cross Currency Swap (ICCS) 177
    5.3.3.3. Ijārah Rental Swap (IRS) 178
  5.4. Conclusion 178
CHAPTER 6: SHARĪ‘AH ISSUES AND OTHER CHALLENGES FOR
WA‘D-BASED PRODUCTS IN MALAYSIA AND
BANGLADESH

6.1. Introduction

6.2. Sharī‘ah Issues and Other Challenges for Wa‘d-Based Products in Malaysia

6.2.1. Wa‘d as a Means for Capital Guarantee in MM Home and Property Financing

6.2.1.1. Wa‘d is an Element of Guarantee to the Mushārakah Capital

6.2.1.2. Wa‘d is Not an Instrument to Guarantee the Mushārakah Capital

6.2.1.3. Discussion on the Opinions of the Scholars

6.2.1.4. The Weightiest Opinion

6.2.2. Wa‘d as a Ḥilal in Treasury Products

6.2.2.1. Wa‘d is a Non-Permissible Ḥilal

6.2.2.2. Wa‘d is a Permissible Ḥilal

6.2.2.3. Discussion of the Opinions and the Weightiest Opinion

6.2.3. Wa‘d and Exploitation to the Opposite Party

6.2.3.1. Wa‘d as a Means to Exploit the Client

6.2.3.2. Wa‘d is Not a Means to Exploit the Client

6.2.3.3. Discussion of the Opinions and the Most Substantial Opinion

6.2.4. Similarity with Forward Contract (Bay‘ al-Ajal bi al-Ajal)

6.2.4.1. Wa‘dān is Similar to Muwā‘adah or Forward Contract (Bay‘ al-Ajal bi al-Ajal)
6.2.4.2. Wa‘dān is Not Similar to Muwā‘adah or Forward Contract (Bay‘ al-Ajal bi al-Ajal) 214

6.2.4.3. Discussion of the Opinions and the Weightiest Opinion 216

6.2.5. Legal Challenges 217

6.2.6. Lack of Comprehensive Sharī‘ah Parameters for Wa‘d 220

6.3. Sharī‘ah Issues and Other Challenges for Wa‘d-Based Products in Bangladesh 223

6.3.1. Strictness of the Sharī‘ah 223

6.3.2. Lack of Product Development Initiatives 230

6.3.2.1. Lack of Research 231

6.3.2.2. Lack of Competitive Market 232

6.3.2.3. Lack of Human Capital 233

6.3.2.4. Lack of Sincere Support from the Government 234

6.3.3. Legal Challenges 237

6.4. Conclusion 238

CHAPTER 7: THE PROSPECTS OF WA‘D-BASED PRODUCTS IN MALAYSIA AND BANGLADESH 240

7.1. Introduction 240

7.2. Prospects of Wa‘d-Based Products in Malaysia 240

7.2.1. Islamic FX Option 240

7.2.2. Islamic FX Forward Based on Wa‘dān 244

7.2.3. Ijārah Home and Property Financing under Shirkat al-Milk 245

7.3. Prospects of Wa‘d-Based Products in Bangladesh 249

7.3.1. Muwā‘adah Islamic FX Forward 249

7.3.2. Muwā‘adah Islamic Cross Currency Swap 251
7.3.3. Islamic Profit Rate Swap

7.3.4. Tawarruq Personal Financing

7.4. Conclusion

CHAPTER 8: CONCLUSION

8.1. Introduction

8.2. Summary of the Important Findings

8.2.1. The Wa‘d Concept

8.2.2. Wa‘d-Based Islamic Banking Products in Malaysia

8.2.3. Legal Status of Wa‘d in Malaysia

8.2.4. Wa‘d-Based Islamic Banking Products in Bangladesh

8.2.5. Legal Status of Wa‘d in Bangladesh

8.2.6. Similarities and Differences between Malaysia and Bangladesh

8.2.7. Sharī‘ah Issues and Other Challenges in Wa‘d-Based Products in Malaysia

8.2.8. Sharī‘ah Issues and Other Challenges in Wa‘d-Based Products in Bangladesh

8.2.9. The Prospects for Wa‘d-Based Products in Malaysia

8.2.10. The Prospects for Wa‘d-Based Products in Bangladesh

8.2.11. Conclusion of the Findings

8.3. Recommendations

8.3.1. Recommendations to the Government of Malaysia

8.3.2. Recommendations to the Government of Bangladesh

8.3.3. Recommendations to Malaysian Islamic Banking Industry

8.3.4. Recommendations to Bangladeshi Islamic Banking Industry

8.3.5. Recommendations to Sharī‘ah Scholars in Malaysia
8.3.6. Recommendations for *Sharī‘ah* Scholars in Bangladesh 281

8.3.7. Recommendations to the Clients 282

8.4. Limitation of the Research 282

8.5. Further Research Recommendations 283

8.6. Conclusion 284

References 285

Appendix A 312

Appendix B 313

Appendix C 314

Appendix D 315

List of Publications and Presentations 319
# LIST OF TABLES

Table 1.1 Outline of Literature Review .................................................. 15
Table 1.2 List of Interview Participants .................................................. 37
Table 2.1 The Difference between Binding *Muwā‘adah* and Forward Contract ................................................................. 85
Table 3.1 Overview of *Wa‘d*-Based Products in Malaysian Islamic Banks ................................................................. 109
Table 5.1 Comparison between Contract Acts in Malaysia and Bangladesh ................................................................. 162
Table 5.2 *Wa‘d* Application among Islamic Banks in Malaysia and Bangladesh ................................................................. 165
Table 5.3 Comparison between Malaysia and Bangladesh on the practice of *wa‘d* in *murābahah* financing .................................................. 168
Table 5.4 The Practice of *Wa‘d* in MM (Malaysia) and HPSM (Bangladesh) ................................................................. 170
Table 5.5 Comparison between *Bay‘ Mu‘ajjal* and *Bay‘ Bithaman Ājil* (BBA) ................................................................. 171
LIST OF FIGURES

Figure 1.1 Methodology of the Research 32
Figure 2.1 Illustration of Wa’d 49
Figure 2.2 Illustration of Muwā‘adh 54
Figure 2.3 Illustration of Wa’dān 55
Figure 3.1 Mushārakah Mutanāqišah Home and Property Financing 111
Figure 3.2 Al-Ijārah Thumma Al-Bay’ (AITAB) vehicle financing 114
Figure 3.3 Murābahah Home Financing 117
Figure 3.4 Tawarruq/Commodity Murābahah Home Financing 121
Figure 3.5 Murābahah Islamic Letter of Credit 124
Figure 3.6 Islamic FX Forward 125
Figure 3.7 Islamic Profit Rate Swap (IPRS) 128
Figure 3.8 Islamic Profit Rate Swap (IPRS) at Maybank Islamic Berhad (MIB) 129
Figure 3.9 Islamic Cross Currency Swap (ICCS) 133
Figure 3.10 Ijārah Rental Swap (IRS) 135
Figure 4.1 Bay’ Murābahah on Purchase Orderer (BMPO) 150
Figure 4.2 Bay’ Mu’ajjal 154
Figure 4.3 Hire-Purchase under Shirkat al-Milk 156
Figure 4.4 Murābahah Post Import (MPI) 159
Figure 7.1 Islamic FX Option Based on Wa’d and Commodity Murābahah 241
Figure 7.2 Islamic FX Option Based on Muwā‘adh and ‘Urbūn 242
Figure 7.3 Islamic FX Forward Based on Wa’dān 244
Figure 7.4 Ijārah Home and Property Financing under Shirkat al-Milk 246
Figure 7.5 Muwā‘adh Islamic FX Forward 249
Figure 7.6 Muwā‘adh Islamic Cross Currency Swap 252
Figure 7.7 Islamic Profit Rate Swap
Figure 7.8 Tawarruq Personal Financing
Figure 8.1 Summary of the Important Findings
### TRANSLITERATION TABLE

#### A. Consonant

<table>
<thead>
<tr>
<th>Arabic</th>
<th>Roman</th>
</tr>
</thead>
<tbody>
<tr>
<td>ا،،ء،أ،أُ</td>
<td>a, '</td>
</tr>
<tr>
<td>ب</td>
<td>b</td>
</tr>
<tr>
<td>ت،تُ</td>
<td>t</td>
</tr>
<tr>
<td>ث،ثُ</td>
<td>th</td>
</tr>
<tr>
<td>ج</td>
<td>j</td>
</tr>
<tr>
<td>ح</td>
<td>h</td>
</tr>
<tr>
<td>خ</td>
<td>kh</td>
</tr>
<tr>
<td>د</td>
<td>d</td>
</tr>
<tr>
<td>ذ،ذُ</td>
<td>dh</td>
</tr>
<tr>
<td>ر</td>
<td>r</td>
</tr>
<tr>
<td>ز</td>
<td>z</td>
</tr>
<tr>
<td>س</td>
<td>s</td>
</tr>
<tr>
<td>ش،شُ</td>
<td>sh</td>
</tr>
<tr>
<td>ض،ضُ</td>
<td>s</td>
</tr>
</tbody>
</table>

#### B. Vowel

<table>
<thead>
<tr>
<th>Short vowel</th>
<th>Transliteration</th>
</tr>
</thead>
<tbody>
<tr>
<td>َ</td>
<td>a</td>
</tr>
<tr>
<td>َ</td>
<td>i</td>
</tr>
<tr>
<td>َ</td>
<td>u</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Long vowel</th>
<th>Transliteration</th>
</tr>
</thead>
<tbody>
<tr>
<td>ا،ى</td>
<td>ā</td>
</tr>
<tr>
<td>ـي</td>
<td>ī</td>
</tr>
<tr>
<td>و</td>
<td>ū</td>
</tr>
</tbody>
</table>

#### C. Diphthong

<table>
<thead>
<tr>
<th>Diphthong</th>
<th>Transliteration</th>
</tr>
</thead>
<tbody>
<tr>
<td>َو</td>
<td>aw</td>
</tr>
<tr>
<td>َء</td>
<td>ay</td>
</tr>
<tr>
<td>َع</td>
<td>uww</td>
</tr>
<tr>
<td>َي</td>
<td>iy, ī</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>AAOIFI</td>
<td>Accounting and Auditing Organization for Islamic Financial Institutions</td>
</tr>
<tr>
<td>ABBL</td>
<td>Arab Bangladesh Bank Limited</td>
</tr>
<tr>
<td>AITAB</td>
<td>Al-Ijārah Thummah Al-Bay‘</td>
</tr>
<tr>
<td>ATM</td>
<td>Automated Teller Machine</td>
</tr>
<tr>
<td>AWS</td>
<td>‘Alayhis Salām</td>
</tr>
<tr>
<td>BAFIA</td>
<td>Banking and Financial Institutions Act</td>
</tr>
<tr>
<td>BB</td>
<td>Bangladesh Bank</td>
</tr>
<tr>
<td>BBA</td>
<td>Bay‘ Bi Thaman Ājil</td>
</tr>
<tr>
<td>BDT</td>
<td>Bangladeshi Taka</td>
</tr>
<tr>
<td>BIMB</td>
<td>Bank Islam Malaysia Berhad</td>
</tr>
<tr>
<td>BLR</td>
<td>Base Lending Rate</td>
</tr>
<tr>
<td>BMMB</td>
<td>Bank Muamalat Malaysia Berhad</td>
</tr>
<tr>
<td>BMPO</td>
<td>Bay‘ Murābahah on Purchase Orderer</td>
</tr>
<tr>
<td>BNM</td>
<td>Bank Negara Malaysia</td>
</tr>
<tr>
<td>CSBIB</td>
<td>Central Shari‘a Board for Islamic Banks of Bangladesh</td>
</tr>
<tr>
<td>DIBOR</td>
<td>Dhaka Inter-Bank Offer Rate</td>
</tr>
<tr>
<td>FSA</td>
<td>Financial Services Act</td>
</tr>
<tr>
<td>FSA</td>
<td>Financial Services Authority</td>
</tr>
<tr>
<td>FX</td>
<td>Foreign Exchange</td>
</tr>
<tr>
<td>HPSM</td>
<td>Hire-Purchase under Shirkat al-Milk</td>
</tr>
<tr>
<td>IBA</td>
<td>Islamic Banking Act</td>
</tr>
<tr>
<td>IBBL</td>
<td>Islami Bank Bangladesh Limited</td>
</tr>
<tr>
<td>IBFIM</td>
<td>Islamic Banking and Finance Institute Malaysia</td>
</tr>
<tr>
<td>IBTRA</td>
<td>Islami Bank Training and Research Academy</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>ICCS</td>
<td>Islamic Cross Currency Swap</td>
</tr>
<tr>
<td>IDB</td>
<td>Islamic Development Bank</td>
</tr>
<tr>
<td>IERB</td>
<td>Islamic Economics Research Bureau</td>
</tr>
<tr>
<td>IFI</td>
<td>Islamic Financial Institution</td>
</tr>
<tr>
<td>IFSA</td>
<td>Islamic Financial Services Act</td>
</tr>
<tr>
<td>IFSB</td>
<td>Islamic Financial Services Board</td>
</tr>
<tr>
<td>IILMC</td>
<td>International Islamic Liquidity Management Centre</td>
</tr>
<tr>
<td>IIMM</td>
<td>Islamic Interbank Money Market</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>INCEIF</td>
<td>International Centre for Education in Islamic Finance</td>
</tr>
<tr>
<td>IPRS</td>
<td>Islamic Profit Rate Swap</td>
</tr>
<tr>
<td>IRS</td>
<td><em>Ijārah</em> Rental Swap</td>
</tr>
<tr>
<td>ISRA</td>
<td>International Shari’ah Research Academy for Islamic Finance</td>
</tr>
<tr>
<td>K</td>
<td>A Thousand</td>
</tr>
<tr>
<td>KFHMB</td>
<td>Kuwait Finance House (Malaysia) Berhad</td>
</tr>
<tr>
<td>KLIBOR</td>
<td>Kuala Lumpur Interbank Offered Rate</td>
</tr>
<tr>
<td>KLSE</td>
<td>Kuala Lumpur Stock Exchange</td>
</tr>
<tr>
<td>LC</td>
<td>Letter of Credit</td>
</tr>
<tr>
<td>LHC</td>
<td>Law Harmonisation Committee</td>
</tr>
<tr>
<td>LIBOR</td>
<td>London Inter-Bank Offer Rate</td>
</tr>
<tr>
<td>MIB</td>
<td>Maybank Islamic Berhad</td>
</tr>
<tr>
<td>MIFC</td>
<td>Malaysian Islamic Financial Centre</td>
</tr>
<tr>
<td>MM</td>
<td><em>Mushārakah Mutanāqiṣah</em></td>
</tr>
<tr>
<td>MPI</td>
<td><em>Murābaḥah</em> Post Import</td>
</tr>
<tr>
<td>MYR</td>
<td>Malaysian Ringgit</td>
</tr>
<tr>
<td>OIC</td>
<td>Organization of Islamic Conference</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Definition</td>
</tr>
<tr>
<td>--------------</td>
<td>------------</td>
</tr>
<tr>
<td>P&amp;C</td>
<td>Private and Confidential</td>
</tr>
<tr>
<td>PBL</td>
<td>Prime Bank Limited</td>
</tr>
<tr>
<td>RA</td>
<td>رَحْمَةُ اللَّهِ عَلَيْهِ (Rahmahullah 'Anh)</td>
</tr>
<tr>
<td>RBI</td>
<td>Reserve Bank of India</td>
</tr>
<tr>
<td>ROA</td>
<td>Return on Asset</td>
</tr>
<tr>
<td>ROE</td>
<td>Return on Equity</td>
</tr>
<tr>
<td>S&amp;P</td>
<td>Sale and Purchase</td>
</tr>
<tr>
<td>SAC</td>
<td>Sharī'ah Advisory Council</td>
</tr>
<tr>
<td>SAWS</td>
<td>سَلَّمُ رَحْمَةُ اللَّهِ عَلَيْهِ وَ سَلَامِ (Sallallahu 'Alayhi Wa Sallam)</td>
</tr>
<tr>
<td>SC</td>
<td>Sharī'ah Committee</td>
</tr>
<tr>
<td>SGF</td>
<td>Sharī’ah Governance Framework</td>
</tr>
<tr>
<td>SIBL</td>
<td>Shahjalal Islami Bank Limited</td>
</tr>
<tr>
<td>SLR</td>
<td>Statutory Liquidity Requirement</td>
</tr>
<tr>
<td>SME</td>
<td>Small and Medium-Sized Enterprises</td>
</tr>
<tr>
<td>SWT</td>
<td>سُبْحَانَاهُ وَ تَابَالا (Subhanahu Wa Ta’alah)</td>
</tr>
<tr>
<td>TRS</td>
<td>Total Return Swap</td>
</tr>
<tr>
<td>USD</td>
<td>United States Dollar</td>
</tr>
</tbody>
</table>
LIST OF APPENDICES

Appendix A: Interview Guideline for Sharī’ah Officer 312
Appendix B: Interview Guideline for Sharī’ah Scholar 313
Appendix C: Interview Guideline for Legal Officer 314
Appendix D: Glossary of Arabic Terms and Their Meanings 315
CHAPTER 1: INTRODUCTION

1.1. Introduction

The Islamic finance industry is holding a significant position in the global financial industry. This fastest growing industry is deeply rooted in the Middle East, South Asia, and South East Asia. Moreover, a number of non-Muslim countries have shown their interest in Islamic finance. It is currently operating in more than 75 countries. This faith-based ethical finance might be the best choice for the Muslim world comprising more than 1.3 billion Muslims.\(^1\)

In order to survive in the competing market, Islamic finance is required to provide viable alternatives in every aspect of conventional finance. In this regard, product innovation is a necessary task for Islamic financial institutions.\(^2\) However, \textit{Sharī'ah} principles must be adhered to while structuring a new product. It is the duty of the practitioners to obtain \textit{Sharī'ah} scholars’ acceptance after innovating any Islamic banking product. Therefore, Islamic banking practitioners are required to put extra effort to produce alternative products that meet market demands while fulfilling the necessary requirements of the \textit{Sharī'ah}.

\textit{Ribā} is prohibited in the \textit{Sharī'ah}. Islamic banks cannot simply provide loans to its customers with interest. They need to engage in real trading activities with the customers. Therefore, every Islamic banking product is developed through a number of contractual arrangements in which several \textit{Sharī'ah} concepts are used.\(^3\) \textit{Mushārakah}, \textit{murābaḥah}, \textit{ijārah} and \textit{muḍārabah} are the most dominant \textit{Sharī'ah} concepts used in


Islamic banking products. *Wa’d* is one of these *Sharī’ah* concepts which plays a great role in Islamic banking product innovation.

Literally, *wa’d* denotes promise.⁴ According to Islamic jurists (*fuqahā’*), *wa’d* is a unilateral promise which is different from a contract (*’aqd*). In *wa’d*, one party promises another to perform a certain action in the future. It is a voluntary offer⁵ whereby the promisor is not entitled to receive any remuneration for his promise. In Islamic banking practices, *wa’d* is usually used for financial transactions to be carried out in the future.

Based on the above characteristics, it is believed that *wa’d* has great potential in Islamic finance. It might be very useful for product innovation. Among the advantages of *wa’d* is that it can be a better alternative for conventional forward transactions comparing with other *Sharī’ah* concepts (i.e. *salam*, *istiṣnā‘*). This is because in the case of *salam*, the commodity type, quantity, and date of delivery etc. must be specified during the time of executing the contract. However, if *wa’d* is used in lieu of *salam* then there is no such requirements by the *Sharī’ah*. Therefore, *wa’d* is more convenient to use. In addition, *wa’d* can be used as a risk management tool. In some Islamic banking products, e.g. “*murābāḥah* on purchase orderer” *wa’d* minimises the risk of the financier when he purchases a commodity in the market for selling it to the customer with profit.⁶

---

1.2. Research Background

\textit{Waʾd} has different types of usage ranging from personal to financial affairs.\footnote{Mašûr bin Yūnus bin Idrīs Al-Buhûrî, \textit{Kashshâf al-Qināʾ} ‘an Mâmat al-Iqân’, ed. Muḥammad Amîn Al-Dînnâwî (Bayrût: ‘Alam al-kutub, 1997), 3:79; Muḥammad Amîn bin ‘Umar bin ‘Abd al-Azîz ‘Abîdîn, \textit{Al-‘Uqûd al-Durriyyah fi Tanqîh al-Fâtâwâ al-Hâmîdiyyah} (India: n.p., 1819), 2:352-353; Abû ‘Abdullâh Muḥammad bin Muhammad bin ‘Abd al-Râhîm al-Ḥâṭîb, \textit{Mawâhib al-Jalîl li Sharh Mukhtaṣarîn Khalîlî}, ed. Zakariyâ’ ʿUmayrât (Bayrût: Dâr al-kutub al-ʾilmiyyah, 1995), 5:33.} A simple example of \textit{waʾd} for personal matter can be given that a person promises his friend that he will meet him at a specific place on a particular time. An important use of \textit{waʾd} for personal matter is the \textit{waʾd} for marriage, in which for instance, A promises B that he will marry her on a fixed date. In financial affairs, \textit{waʾd} can be made to carry out a contract in the future. For instance, A promises B that he will sell to him a certain commodity on a specified date in the future.

The term \textit{waʾd} existed during the early period of Islam. The Qurʾān and \textit{Ḥadîth} have widely used this term in different contexts. For example, Allâh promises forgiveness and paradise for the believers in the following verse of the Qurʾān:

\begin{quote}
وَعَدَ ٱللَّهُ لِلْمُؤْمِنِينَ ۤ وَلِلْمُؤْمِنَاتِ ۖ ۛ لَهُم مَّغَفِّرَةٌ وَأَجْرٌ عَظِيمٌ
\end{quote}

(\textit{Al-Māʾidah} 5: 9)

Translation: Allâh has promised those who believe (in the Oneness of Allâh – Islamic Monotheism) and do deeds of righteousness, that for them there is forgiveness and a great reward (i.e. Paradise).\footnote{Muḥammad Taqī-ud-Dîn Al-Hilali and Muḥammad Muḥsin Khan, \textit{Translation of the Meanings of the Noble Qurʾān in the English Language} (Madinah: King Fahd complex for the printing of the holly Qurʾān, n.d.), 144.}

Similarly, \textit{waʾd} was found in the \textit{Ḥadîth} of the prophet (SAWS). The following is a renowned \textit{Ḥadîth} which states that one of the characteristics of a hypocrite is that he breaks his promise.

آية المنافق ثلاث إذا حدث كذب وإذا وعد أخلف وإذا اؤتمن خان

Wa’d captured the attention of the classical scholars of Islamic jurisprudence (fiqh) due to its importance in a Muslim’s life. Scholars from the four school (madhāhib) of jurisprudence discussed different Sharī’ah rulings related to wa’d. They debated on the bindingness of wa’d in the Sharī’ah whether it is obligatory for a person to fulfil his promise or it is simply a matter of ethics. Their discussion on wa’d included its usage in personal as well as financial affairs.  

During the 1980s, wa’d came into the lime light of Islamic banking with the introduction of “murābaḥah on purchase order” financing. In this type of financing, the Islamic bank purchases a commodity in the market and sells it to the customer with a fixed profit. However, the bank may incur financial loss in case the customer does not purchase the commodity from the bank after the bank has purchased it. In order to mitigate the bank’s risk, the customer is required to give wa’d that he will purchase the particular commodity from the bank after the bank has purchased it in the market.

Wa’d is not normally used as a standalone concept in Islamic banking products. It is combined with other Sharī’ah concepts for the purpose of risk management. Apart from murābaḥah, several other Islamic banking products are introduced with the combination of wa’d e.g. ijārah vehicle financing, mushārakah mutanāqiṣah home financing etc. Due to the benefits of risk mitigation, wa’d is not limited to some banking products only but has expanded to şuкуk and other Islamic capital market products. Some financial institutions have even innovated wa’d-based Islamic structured products. This widespread application of wa’d has captured the interest of contemporary Sharī’ah scholars who have


started to study the usage of *wa’d* in different products and initiated debate on their *Sharī’ah* permissibility.\(^{12}\)

In light of the above, it can be said that *wa’d* is a popular concept among the *Sharī’ah* scholars and Islamic banking practitioners around the world. All leading Islamic banking countries are utilising *wa’d* to develop various products.\(^{13}\) Malaysia as one of the prominent countries for Islamic banking is no different. It has paid significant attention on *wa’d* in order to innovate a large number of products.

Malaysia is a Southeast Asian Muslim majority developing country. It is in the leading position to initiate Islamic finance in Southeast Asia. It started Islamic banking in 1983 with the establishment of Bank Islam Malaysia Berhad (BIMB). Malaysia has developed a comprehensive Islamic financial system which includes Islamic banking, capital market and insurance. In addition, it has diversified products and services offered by Islamic financial institutions.\(^{14}\)

Islamic banking in Malaysia is blessed with government support. The Malaysian government has provided legal and regulatory support for Islamic banks through enacting Islamic Banking Act (IBA) 1983 and Islamic Financial Services Act (IFSA) 2013. The government has introduced several policies to assist the development of Islamic banking in Malaysia. For example, the government deposit with Islamic banks to support them. Through developing strong governance, infrastructure and human capital, the government

---


target to make Islamic banking the mainstream banking in Malaysia and seeking to make Malaysia the global hub for Islamic finance.\textsuperscript{15}

There were 16 Islamic banks licensed under Bank Negara Malaysia (BNM) until 2013. Among these banks, five are full-fledged Islamic banks and the remaining 11 banks are subsidiaries of their respective conventional banks. In 2010, Islamic banking in Malaysia achieved its target of 20\% market share.\textsuperscript{16}

Product development is crucial in Malaysia. To compete with the conventional banks, it provides alternatives for nearly all conventional products. It offers a variety of saving and investments accounts. Numerous financing facilities are available including home, car, and personal financing. In addition, it provides Islamic alternative for letter of credit, accepted bills, charge cards, credit cards, and debit cards. Additionally, several Islamic treasury products have been developed to meet the demands of the customers.\textsuperscript{17}

However, Malaysian Islamic banking has received criticism from the Sharī‘ah perspective. The criticism is mostly levelled against the practice of \textit{bay’\textsuperscript{1} al-\textsuperscript{2} ṭīnah} in \textit{bay’\textsuperscript{1} bi thaman ājil} (BBA) home financing. The majority of Malaysian Muslims follow \textit{al-Shāfi‘i} school of jurisprudence. As \textit{bay’\textsuperscript{1} al-\textsuperscript{2} ṭīnah} is allowed by a few \textit{Shāfi‘i} jurists, the Islamic banks in Malaysia take it as a reference to defend \textit{bay’\textsuperscript{1} al-\textsuperscript{2} ṭīnah}. Apart from \textit{bay’\textsuperscript{1} al-\textsuperscript{2} ṭīnah}, there are a few contracts where the Islamic banking products are claimed as the mirror image of conventional products i.e. \textit{tawarruq munaẓẓam} personal financing.\textsuperscript{18}


\textsuperscript{18} Mohamed Ariff and Saiful Azhar Rosly, “Islamic Banking in Malaysia,” 301-319; Ahamed Kameel Mydin Meera and Dzuljastri Abdul Razak, “Islamic Home Financing through Musharakah Mutanaqisah and al-Bay’ Bithaman Ajil Contracts: A Comparative Analysis,” \textit{Review of Islamic Economics} 9, no. 2
Considering the overall aspects of Islamic banking in Malaysia, it can be regarded as a role model for the countries which are at the initial stage of Islamic banking. Malaysia’s diverse product innovation, Sharī’ah governance framework, government’s prudent regulation on dual banking system, infrastructure, knowledge, and human capital development etc. render it distinct from other countries. While discussing the development of Islamic banking in Malaysia, Mohamad Akram Laldin states that the Malaysian Islamic finance industry should be taken as a benchmark for the development of Islamic finance in other countries.\(^{19}\)

As Bangladesh is at the blooming stage in developing Islamic finance then it is appropriate for it to consider Malaysian practices for its development. Bangladesh is the third largest Muslim country in the world. Similar to Malaysia, it started Islamic banking in 1983 and the first Islamic bank was the Islami Bank Bangladesh Limited (IBBL). As of 2013, there are seven full-fledged Islamic banks in Bangladesh and 16 conventional banks have Islamic banking windows. As of December 2012, the total deposit of Islamic banking sector was BDT 1017.9 billion which was 18.9% of the total deposit of the banking sector in Bangladesh.\(^{20}\)

Even though Islamic banking has a notable position in the overall banking sector of Bangladesh, it has been unable to achieve substantial development due to a number of challenges. Several studies state that lack of government support is one of the key challenges for Islamic banking in Bangladesh. Until now, the government did not enact a separate law for the operation of Islamic banking. There is no strong Sharī’ah regulation and governance developed by the central bank of Bangladesh. Moreover, absence of an Islamic capital market is another significant barrier.\(^{21}\)

\(^{19}\) Mohamad Akram Laldin, “Islamic financial system,” 217-238.


Among many challenges, the scarcity of products is one of the major challenges for Islamic banks in Bangladesh. Lack of products may render the Islamic banking industry non-competitive with its conventional counterpart. Several studies show that Islamic banks in Bangladesh mostly rely on a few classical products for providing financing facilities to its clients e.g. *bay‘ al-murābahah* and *bay‘ al-mu‘ajjal*. Therefore, it is crucial for the Islamic banking industry in Bangladesh to innovate more products using different types of *Sharī‘ah* concepts.22

### 1.3. Problem Statement

As mentioned earlier, Malaysia has developed a variety of Islamic financial products. A significant number of these products include *wa‘d* in their structures. *Wa‘d*-based Islamic financial products in Malaysia include retail Islamic banking products, *şukūk*, and Islamic treasury products.23 However, the usage of *wa‘d* in different financial products brings about certain challenges. Among these challenges, *Sharī‘ah* issues are the most important concern raised by a number of studies.

In relation to the practice of *wa‘d* in *mushārakah mutanāqišah* (MM) home financing, Asmadi Mohamed Naim stated that the practice of *wa‘d* in this product invalidates the *Sharī‘ah* principles for *mushārakah* contract.24 Azlin Alisa Ahmad and Shofian Ahmad claimed that there is an element of injustice in the practice of *wa‘d* in Islamic FX forward.25 Several other studies argued that the practice of *wa‘d* in some Islamic financial products are fictitious means (*ḥīlah*) to legalise prohibited forward sale

---


Finally, Hakimah Yaacob point out that the \textit{Shar\’i}ah concept of \textit{wa’d} may encounter legal challenges as the contract act in Malaysia does not explicitly recognise it.\footnote{Hakimah Yaacob, “Does Contracts Act 1950 recognize wa’ad?”, \textit{Shariah Law Reports} 2, (2012), 35-43.}

On the other hand, the significance of \textit{wa’d} in product innovation cannot be neglected due to its advantage as a risk management tool and a very convenient alternative to forward sale contracts. A large number of Islamic financial products would comprise high risk if we eliminate the \textit{wa’d} element. Moreover, disregarding \textit{wa’d} may confine the product innovation in Islamic finance. Consequently, the growth of Islamic finance will be hindered. Considering the above facts, it is necessary to study the \textit{wa’d}-based products in Malaysia to analyse the \textit{Shar\’i}ah issues and other challenges. It is equally important to consider the future prospect of \textit{wa’d} in Malaysian Islamic finance industry.

Since the Malaysian Islamic finance industry has innovated a large number of products based on \textit{wa’d}, it is an opportunity for the Islamic finance industry in Bangladesh to learn from Malaysian practices. Several studies recommended that product development is necessary for Islamic banks in Bangladesh.\footnote{Sarker, “Islamic Banking in Bangladesh”; Ahmad and Hassan, “Regulation and performance of Islamic banking”, 251–277; Mohon, \textit{Islam Orthoniti}, 361; Sarker, “Islamic Banking in Bangladesh Growth, Structure, and Performance,” 271-290.}

In order to innovate new products, Islamic banks in Bangladesh should study the Malaysian banks’ practices on structuring products based on \textit{wa’d}. In this regard, it is necessary to investigate the existing \textit{wa’d}-based products in Bangladesh and the challenges associated with it. In addition, it is also essential to examine the prospects of \textit{wa’d} for Islamic finance industry in Bangladesh.
In light of the above, a comparative case study is required on the practice of *waʿd* between Malaysia and Bangladesh. The comparison would help ascertain the strengths and weaknesses between the two countries so that both can learn from each other. The study will assist in determining the challenges faced by both countries. Moreover, it will analyse the potentials that each of the countries may achieve.

Finally, even though a number of studies have been conducted on *waʿd* from various perspectives, there is a general lack of field studies. Considering the significance of *waʿd* in product development, a field study in both countries should be conducted to obtain in-depth and up-to-date information.

### 1.4. Research Questions

The following research questions are addressed to shed light on the problem statement:

1. What is *waʿd*, and what is its status in the *Sharīʿah*?
2. What are the Islamic banking products in Malaysia where *waʿd* is employed? What is the mechanism for the usage of *waʿd* in those products?
3. What is the legal status of *waʿd* in Malaysia?
4. What are the Islamic banking products in Bangladesh where *waʿd* is employed? What is the mechanism for the usage of *waʿd* in those products?
5. What is the legal status of *waʿd* in Bangladesh?
6. What are the similarities and differences between Malaysia and Bangladesh in terms of the practice of *waʿd* in Islamic banking products?
7. What are the *Sharīʿah* issues and other challenges of *waʿd*-based products in Malaysia and Bangladesh?
8. What are the prospects for *waʿd* in innovating Islamic banking products in Malaysia and Bangladesh?
1.5. Research Objectives

Based on the problem statement, the following are the objectives of this research:

(1) To examine the practice of *wa’d* in Islamic banking products in Malaysia.

(2) To examine the practice of *wa’d* in Islamic banking products in Bangladesh.

(3) To compare the practice of *wa’d* in Islamic banking products between Malaysia and Bangladesh.

(4) To discuss the *Sharī‘ah* issues and other challenges of *wa’d* in Islamic banking products in Malaysia and Bangladesh.

(5) To investigate the prospects for *wa’d* in innovating Islamic banking products in Malaysia and Bangladesh.

1.6. Scope of the Research

The study is limited to the practice of *wa’d* in Islamic banking products including the consumer banking products, trade financing products, and treasury products. The study does not cover *ṣūkūk*. This is because there is no *ṣūkūk* market in Bangladesh. Therefore, to make the comparison fair, the study compares Islamic banking products only. Moreover, in order to narrow the scope of the research, it does not include Islamic structured products.

This study chooses three Islamic banks from each of the countries as a case study for in-depth analysis. This study is concerned with deep knowledge on the practice of *wa’d*. Therefore, the quantity of the banks has been minimised so that rich information can be gathered and analysed from the limited number of sources. The following three Malaysian banks have been selected for the case study:

---

(1) Bank Islam Malaysia Berhad (BIMB)\textsuperscript{30}

(2) Maybank Islamic Berhad (MIB)\textsuperscript{31}

(3) Kuwait Finance House (Malaysia) Berhad (KFHMB)\textsuperscript{32}

Bank Islam Malaysia Berhad has been selected because it is the first Islamic bank in Malaysia.\textsuperscript{33} Maybank Islamic Berhad is the subsidiary of Maybank Berhad which is the most popular and biggest local bank in Malaysia.\textsuperscript{34} The Kuwait Finance House (Malaysia) Berhad is the first and notable foreign Islamic bank operating in Malaysia.\textsuperscript{35} These three banks have been chosen based on their distinctive features. They represent three different categories of Islamic banks. Bank Islam Malaysia Berhad represents the core Islamic banks in Malaysia. Maybank Islamic represents the category of Islamic banks as a subsidiary of conventional banks, while the Kuwait Finance House (Malaysia) Berhad represents foreign Islamic banks in Malaysia.

As of 2013, seven full-fledged Islamic banks and 16 Islamic banking windows are operating in Bangladesh. The following three banks are selected among them:

(1) Islami Bank Bangladesh Limited (IBBL)\textsuperscript{36}

(2) Prime Bank Limited (PBL)\textsuperscript{37}

(3) Shahjalal Islami Bank Limited (SIBL)\textsuperscript{38}


\textsuperscript{31} Maybank Islamic Berhad, “Corporate Info”, Maybank Islamic Berhad website, retrieved on 20 Sept 2014, \url{http://maybankislamic.com.my/info.html}

\textsuperscript{32} Kuwait Finance House (Malaysia) Berhad, “Company Profile”, Kuwait Finance House (Malaysia) Berhad website, retrieved on 20 Sept 2014, \url{http://www.kfh.com.my/kfhmb/v2/contentView.do?contentTypeId=3000&displayPage=%2Fver2%2Fcontent%2Fstandard.jsp&channelPath=%2Fver2%2Fv2_Navigation%2FAbout+Us&programName=00+Company+Profile&tabId=5&cntName=AU01.CP1-About}

\textsuperscript{33} Nakagawa, “The evolution of Islamic finance in Southeast Asia”, 111-126.

\textsuperscript{34} Maybank Islamic Berhad, “Corporate Info”.

\textsuperscript{35} Kuwait Finance House (Malaysia) Berhad, “Company Profile”.


The above banks are selected based on their type, precedence in establishment, size, popularity, and communication availability. The Islami Bank Bangladesh Limited (IBBL) is the oldest and biggest Islamic bank in Bangladesh, and is the most popular in the country. After that, Prime Bank Limited (PBL) is the first conventional bank in Bangladesh to start an Islamic banking window. Thirdly, Shahjalal Islami Bank Limited (SIBL) is a notable full-fledged Islamic bank in Bangladesh after IBBL. Comparing with Malaysia, there is currently no full-fledged foreign Islamic banks in Bangladesh and there is no Islamic banking subsidiary of conventional banks. Therefore, it was not possible to choose Islamic banks in Bangladesh similar in type to those found in Malaysia. As a substitute, one Islamic banking window and two local full-fledged Islamic banks have been chosen from Bangladesh.

1.7. Significance of the Research

This research adds new knowledge on the practice of wa’d in Islamic banks in Malaysia and Bangladesh. The usage of wa’d in these two countries might be of interest to academics all around the world as these two are notable countries for Islamic finance. This study is unique because no comprehensive field study has thus far been conducted on the practice of wa’d. It is able to provide the most detailed and up to date information on the usage of wa’d. In addition, the discussion on the Shari’ah issues and other challenges in wa’d-based products is significant.

The findings and recommendations of this study may assist the government and policy makers in both countries to develop Islamic finance. This research captures the attention of the government through highlighting the necessity of enacting legal

---


provisions for *wa’d*. The government of Bangladesh would benefit from this study by knowing the role of the Malaysian government in promoting Islamic banking.

The industry practitioners in both countries would highly benefit from this research by knowing each other’s practice. Moreover, the proposed product structures would assist the product innovators in both countries develop more products based on *wa’d*. The discussion on the *Sharī‘ah* issues of *wa’d* would guide the practitioners towards the *Sharī‘ah*-permitted way to use *wa’d* in new product structuring.

The discussion on the *Sharī‘ah* issues relating to the usage of *wa’d* might be of interest to the *Sharī‘ah* scholars. It may help them in determining *Sharī‘ah* rulings on different *wa’d*-based products. Moreover, this research challenges the majority view of *Sharī‘ah* scholars on certain issues related to *wa’d*.

Finally, this research educates the public through revealing the *Sharī‘ah* rulings for *wa’d*. Islamic banks’ clients would know their rights and responsibilities when involved with *wa’d*-based products. Moreover, the discussion on the *Sharī‘ah* status of *wa’d* not only guides them in financial matters but also in many other personal matters.

### 1.8. Literature Review

In light of the objectives of this research, literature on Islamic banking in Bangladesh and Malaysia have been reviewed followed by a review of literature on the theory and practice of *wa’d*. Literature is collected by searching through different databases and library catalogues. A number of journal articles, theses, dissertations, institutional research papers, books, and newspaper and magazine articles have been reviewed. Considering the nature and scope of the research, literature in English, Arabic, Malay, and Bangla have been reviewed with most of the literature in English.
<table>
<thead>
<tr>
<th>Theme</th>
<th>Literature</th>
</tr>
</thead>
<tbody>
<tr>
<td>Islamic banking in Malaysia</td>
<td>Mohamed Ariff and Saiful Azhar Rosly (2011); Mohamad Zaid Mohd Zin et al. (2011); Khan (2010); Nakagawa (2009); Ahmad Hidayat Buang (2007); Mohamad Akram Laldin (2008)</td>
</tr>
<tr>
<td>Islamic banking in Bangladesh</td>
<td>Mohon (2011); Rahman (2010); Mannan (2010); Raqib and Muhammad (2008); Ahmad and Hassan (2007); Sarker (2005); Hassan (1999); Sarker, (1999); Alam (2000); Hussain (1996)</td>
</tr>
<tr>
<td>Comparison of Islamic banking</td>
<td>Haron (1998)</td>
</tr>
<tr>
<td>between Malaysia and Bangladesh</td>
<td>Khanal (2007)</td>
</tr>
<tr>
<td>Comparison of Banking sector</td>
<td>Definition of wa’d and its status in the Sharī’ah Qazi (2012); Azlin Alisa Ahmad et al. (2012)a; Azlin Alisa Ahmad et al. (2012)b; Khairun Najmi Saripudin et al. (2012); Shabana Hasan and Marjan Muhammad (2011); Atallah And Ghoul (2011); Mohd Saiful Azli Md Ali (2011); Marjan Muhammad et al. (2011); Ismail Wisham et al. (2011); International Shari’ah Research Academy for Islamic Finance (ISRA) (2011); Mohamad et al. (2011); Nurldianawati Irwani Abdullah (2010); Nor Adila Mohd Noor and Mohd Ashraf Aripin (2010); Munirah Kasim (2010); ‘Abdullah Muhammad (2010); Mohamad Akram Laldin (2009); Shofian Ahmad and Azlin Alisa Ahmad (2008); Aznan Hasan (2008); Azizi Che Seman (2008); Al-Islāmbūlī (2003); Al-Masri (2002); Ḥammād (1988); Al-Qardāwī (1988)</td>
</tr>
<tr>
<td>and Bangladesh</td>
<td>Wa’d and common law Azlin Alisa Ahmad et al. (2012)b; Hakimah Yaacob (2012); Marjan Muhammad et al. (2011); Ismail Wisham et al. (2011); Nurldianawati Irwani Abdullah (2010); Bagchi (2011); Gordley (2004); Ali Mohammad Matta (1999); Fried (1981)</td>
</tr>
<tr>
<td>Theory of Wa’d</td>
<td>Application of wa’d in Islamic banking Mohd Saiful Azli Md Ali (2011); Asmadi Mohamed Naim (2011); Nurldianawati Irwani Abdullah (2010); Nor Adila Mohd Noor and Mohd Ashraf Aripin (2010); Munirah Kasim (2010); Azizi Che Seman (2008); Mohd. Fuad Md. Sawari and Md. Faruk Abdullah (2009)</td>
</tr>
<tr>
<td></td>
<td>Application of wa’d in sukūk Marjan Muhammad et al. (2011); Shabana Hasan and Marjan Muhammad (2011); Khairun Najmi Saripudin et al. (2012); Munirah Kasim (2010); Shabnam Mokhtar (2009); Shofian Ahmad and Azlin Alisa Ahmad (2008); Aznan Hasan (2008)</td>
</tr>
<tr>
<td></td>
<td>Application of wa’d in Islamic derivatives Azlin Alisa Ahmad et al. (2012)a; Atallah and Ghoul (2011); International Shari’ah Research Academy for Islamic Finance (ISRA) (2011); Saadiah Mohamad et al. (2011); Aznan Hasan (2008)</td>
</tr>
</tbody>
</table>
The primary literature search shows that is numerous researches on Islamic banking in Malaysia and Bangladesh, the concept of *wa’d*, the *Sharī‘ah* appraisal on the obligation of *wa’d*, comparison of *wa’d* with common law, and the application of *wa’d* in Islamic financial products. The table above provides a snapshot of the reviewed literature.

1.8.1. Islamic Banking in Malaysia

It is necessary to apprehend the overall functions of Islamic banking in Malaysia to identify the practice of *wa’d*. Therefore, literature on Islamic banking in Malaysia has been reviewed. There are numerous literature on Islamic banking in Malaysia. However, among them only a selected number have been reviewed.

Mohamad Akram Laldin described the historical development of Islamic finance in Malaysia, which includes the establishment of pilgrimage fund in 1962 and the establishment of first full-fledged Islamic bank in 1983. He also discussed the government’s ten years master plan for financial sector, points out key challenges, and offers suggestions for the development of the Islamic finance industry in Malaysia.\(^{41}\)

While discussing the history of Islamic finance in Malaysia, Rika Nakagawa pointed out that the majority of Islamic banks in Malaysia use debt-based financing whereas the profit-sharing mode is very small. He suggested that more professionals are needed for Islamic finance in Malaysia.\(^{42}\) Similarly, Feisal Khan mentioned that Malaysia’s ‘Bank Islam Malaysia Berhad’ (BIMB) – the largest Islamic bank in Malaysia - along with other prominent Islamic banks in the world is heavily using non-profit and loss sharing mode of financing.\(^{43}\)

\(^{41}\) Mohamad Akram Laldin, “Islamic financial system”, 217-238.
\(^{42}\) Nakagawa, “The evolution of Islamic finance”, 111-126.
\(^{43}\) Khan, “How ‘Islamic’ is Islamic Banking?”, 805–820.
Mohamed Ariff and Saiful Azhar Rosly provided a general overview of the Malaysian Islamic banking. Their study revealed that Malaysian Islamic finance is growing rapidly with a current 20% share of the banking market. However, Islamic banking products trend to be a mirror image of conventional products i.e. *bayʿ al-ʿīnah*. There are a few contracts i.e. *tawarruq munaẓẓam* personal financing, which do not practice the true sale contract. The authors suggested that Malaysia should introduce new Islamic financial instruments and improve international co-operation in Islamic banking practice.44

Mohamad Zaid Mohd Zin et al. mentioned that Malaysia has the largest Islamic banking and financial market. The government has taken a 10 year master plan to develop the global Islamic financial industry in Malaysia. The International Centre for Education in Islamic Finance (INCEIF) was established to promote Islamic finance education. Among the challenges facing Islamic finance in Malaysia are the differences of scholars’ opinions on *Sharīʿah* issues, tax law, and harmonisation of standards. On the other hand, the prospects are the new emerging markets and international co-operation.45

Ahmad Hidayat Buang indicated an important legal issue for the operation of Islamic banking in Malaysia. Issues related to Islamic financial contracts fall under the jurisdiction of civil courts of Malaysia, which might be an obstacle for the development of Islamic finance. He suggested that civil court should work together with the *Sharīʿah* court or national *Sharīʿah* advisory council to resolve cases related to Islamic finance.46

44 Mohamed Ariff and Saiful Azhar Rosly, “Islamic Banking in Malaysia,” 301-319.
1.8.2. Islamic Banking in Bangladesh

There are a few researches on the overview of Islamic banking in Bangladesh. A number of studies have been conducted on the operation and performance of “Islami Bank Bangladesh Limited (IBBL)”. The majority of the studies pointed out the challenges of Islamic banking in Bangladesh.

Abu Umar Faruq Ahmad and M. Kabir Hassan discussed banking regulations in Bangladesh. They found that banks in Bangladesh are governed by a number of acts i.e. bank companies act 1991, Bangladesh bank order 1972, securities and exchange commission act 1993, and income tax ordinance 1984. At present, there is no separate law for the operation of Islamic banking in Bangladesh. However, the Bangladesh bank (central bank of Bangladesh) has made some special provisions to regulate Islamic banks.47

Muhammad Abdul Mannan described the history of Islamic banking in Bangladesh. The first Islamic bank in Bangladesh was established on 30th March, 1983. The Islamic economics research bureau had important contribution in the establishment of Islamic banking in Bangladesh. Currently, there are seven Islamic banks in Bangladesh which are growing in terms of profitability and investment.48

A. A. M. Habibur Rahman explained the rules and regulations for the applications of murābaḥah, bay‘ mu‘ajjal, and ijārah investment in Islamic banks in Bangladesh. This study seeks to identify the practice of wa‘d in Islamic banking products in Bangladesh.49

Mohammed Nurul Alam showed the overall banking situation in Bangladesh and the functions of IBBL. He revealed that generally IBBL succeeded in deposit and

47 Ahmad and Hassan, “Regulation and performance of Islamic banking.” 251–277.
48 Mannan, Islami Bank Babostha.
investment. However, most of its investments were based on *bay‘ murābahah* and *mu‘ajjal*, whereas *muḍārabah* and *mushārakah* investments were very limited.\(^{50}\)

M. Kabir Hassan conducted a case study on IBBL. He suggested diversifying the financing with profit-sharing financing, improving human capital, choosing financier based on quality and efficiency but not collateral. Moreover, the Bangladesh Bank (BB) should create Islamic money market instruments and the government should enact separate laws for Islamic banking.\(^{51}\)

Similarly, Abdul Awwal Sarker suggested an Islamic interbank money market and a separate Islamic banking act. He further recommended that Islamic banks in Bangladesh should extend the profit-sharing investments, give priority to small and medium enterprises, and develop expertise.\(^{52}\) Abdur Raqib and Sheikh Muhammad also provided similar recommendations.\(^{53}\)

Iqbal Kabir Mohon provided up-to-date information on the banking system in Bangladesh. He discussed the Islamic banking investment modes and the legal documents used for them. The study demonstrated that among the challenges of Islamic banking in Bangladesh are the compulsory interest-based deposit with the central bank, absence of related professional associations, absence of sufficient legal framework, and the lack of skilled human resources. The study also showed a proposed draft on Islamic banking law in Bangladesh.\(^{54}\)

---


52 Sarker, “Islamic Banking in Bangladesh”.


54 Mohon, *Islami Orthoniti*. 
1.8.3. Comparison of Islamic Banking between Malaysia and Bangladesh

Sudin Haron compared Islamic banking practices among 11 Muslim countries. He discussed the similarities and differences on the usage of *Sharī’ah* principles, services available, sources, and usage of funds in these countries. The study concluded that whereas Islamic banks in the Middle East operate with a minimum number of *Sharī’ah* principles, Malaysia and Bangladesh use an additional number of *Sharī’ah* principles. However, Malaysian usage of *Sharī’ah* principles was questioned as a legal trick. This study conducted a comparative study on Islamic banking practices amongst Muslim countries.55

1.8.4. Comparison between Malaysian and Bangladeshi Banking Sectors

Dilli Raj Khanal evaluated the growth and importance of the banking and insurance sector in Bangladesh, Malaysia, and Nepal. He assessed the regulatory framework, performance, and challenges for the banking industry in these countries. The study found that private banks perform better in Nepal and Bangladesh whereas in Malaysia public banks outperform private banks. Among the challenges for the banking sector are non-performing loans and limited access to credit for poor and small businesses. This study laid the groundwork for a comparative study between Malaysia and Bangladesh.56

1.8.5. The Theory of *Wa‘d*

There are a number of researches on the theory of *wa‘d*. Several researches discussed the definition of *wa‘d* and its differences from *‘aqd* (contract). Some of them discussed its

status in the *Sharī‘ah*. In addition, literature discussing the status of promise in common law have been reviewed.

### 1.8.5.1. Definition of Wa‘d and its Status in the *Sharī‘ah*

Mushtaq Ahmad Qazi discussed the binding nature of *wa‘d* in the *Sharī‘ah* in the context of contemporary Islamic finance. He stated that Islamic jurists unanimously agree that *wa‘d* to perform an evil action (*harām*) is prohibited, *wa‘d* to perform a compulsory action (*wājib*) is obligatory and *wa‘d* to perform a permissible action (*mubāh*) is recommended. However, Islamic jurists disagree whether *wa‘d* is both religiously (*diyānatan*) and legally (*qaḍā‘an*) binding on the promisor. He presented two different groups of the scholars’ opinions pertaining to this issue. The first group of scholars view that *wa‘d* is merely recommended (*mandūb*) but not compulsory nor enforceable in the court of law. The second group opine that *wa‘d* is both religiously and legally binding on the promisor. After presenting the evidences and arguments provided by the both group of scholars he concluded that *wa‘d* is binding both religiously and legally. The study has a good compilation of classical sources but is limited to discussing only two different views of the scholars regarding *wa‘d*.57

After defining the concept of *wa‘d* in the *Sharī‘ah*, Nurdianawati Irwani Abdullah divided the scholars’ opinions into five on the obligation of *wa‘d*. The five different opinions are: (1) fulfilling *wa‘d* is recommended; (2) *wa‘d* is religiously binding but not legally; (3) *wa‘d* is both legally and religiously binding; (4) when *wa‘d* is subject to a condition then it is both religiously and legally binding even though the promisee did not act upon the promise; (5) when *wa‘d* is subject to a condition and the promisee acted on the basis of the promise then *wa‘d* is both religiously and legally binding. After discussing the arguments of the scholars, she concluded that contemporary scholars agree that *wa‘d*

---

is binding on the promisor due to necessity. However, the study is lacking sufficient evidences provided by the scholars to strengthen their positions.58

‘Abdullāh Muḥammad defined the concept of wa’d and muwāʿadah and discussed their status in the Sharīʿah. He outweighed the Mālikī scholars’ view on the obligation of waʿd. He argued that Sharīʿah permits practicing muwāʿadah to carry out an exchange contract (muʿāwaḍah) in the future. Furthermore, it is also permissible in this case to make the muwāʿadah binding on both parties. The study gathered a number of scholars’ opinions from classical sources of Islamic jurisprudence (fiqh). However, the author’s opinion needs to be further examined.59

Mohamad Akram Laldin discussed the Sharīʿah rulings (ahkām) and parameters (dawābit) for the concept of waʿd and muwāʿadah. He performed a textual analysis on the obligation of waʿd in the Sharīʿah with reference to the views of the classical scholars and contemporary fatāwā. He concluded that waʿd should be binding on the promisor particularly in financial dealings. However, his position on muwāʿadah is not clear in the paper, as he did not provide an elaborate discussion on that. Moreover, his position on waʿd should be further examined.60

While discussing the scholars’ opinions on waʿd, muwāʿadah and waʿdān, Aznan Hasan summarised that the majority of scholars accept waʿd as binding on the promisor. However, they do not accept muwāʿadah as binding on both promisors. On the Sharīʿah status of waʿdān, he concluded that waʿdān is permitted but it should be different from muwāʿadah.61

Aḥmad Muḥammad Khalīl al-Islāmī defined waʿd and muwāʿadah, clarified the difference between waʿd and ‘aqd, and discussed the Sharīʿah rulings on the usage of

61 Aznan Hasan, “Pengertian al-waʿd, al-waʿdan dan al-muwaʿadah”.
wa‘d. He argued that according to classical scholars, wa‘d was not binding on the promisor and it could not be practiced in exchange contracts (mu‘āwaḍāt). However, based on necessity (hājah) and public interest (maṣlaḥah), wa‘d can be practiced as binding on the promisor in some selected contracts within Islamic banking practices.\(^{62}\)

The study provides useful analysis of classical scholars’ views but the author’s opinion needs to be justified.

Contrary to the previous studies, Rafic Yunus Al-Masri asserted that unilateral promise in the banking contracts should not be compulsory. If it is compulsory then it resembles a contract. He argued that the contemporary practice of wa‘d as binding promise is a trick to replicate the conventional banking practices in Islamic banking. He further argued that the difference between wa‘d and muwā‘adah does not make any sense.\(^{63}\)

Nazīh Kamāl Ḥammād discussed three Arabic terms namely ‘iddah, wa‘d, and muwā‘adah. He found five different opinions of the scholars on the bindingness of ‘iddah and wa‘d which are: (1) fulfilling the wa‘d is obligatory; (2) wa‘d is obligatory except where there is a valid excuse; (3) wa‘d is recommended; (4) fulfilling the wa‘d is better than breaking it, if there is no obstruction; (5) and wa‘d is obligatory when it is subject to a condition. The study gathered classical scholars’ opinions and arguments but the author’s opinion was not evident in the paper.\(^{64}\)

Yūsuf al-Qarḍāwī was one of the earlier scholars who allowed the practice of wa‘d in Islamic banking practices as binding on the promisor. He argued that wa‘d is both religiously and legally binding. There is no difference between the bindingness of wa‘d in the exchange (mu‘āwaḍāt) and voluntary (tabarru‘āt) contracts, but in exchange

---


contracts the bindingness of *wa’d* is more logical. He further argued that majority of the classical jurists opined that *wa’d* was binding on the promisor.65

1.8.5.2. *Wa’d* and the Common Law

To be clear on the status of *wa’d* in the common law, a few researches on the concept of promise and promissory estoppels in the common law have been reviewed. Charles Fried is considered the pioneer to have discussed the promise principle in common law. He argued that promise principles is the basis for legal contracts and it is truly self-imposed. Although non-promissory principles i.e. reliance, benefit, and sharing play an important role in a contract but they do not displace the promise principle from its leading status. His study put a theory that a contract is binding because of the promise the parties make, not because of other things like benefit or reliance.66 However, Charles Fried’s theory has been criticised by other studies.67

James Gordley discussed the history and basic difference between common law and civil law in relation to the bindingness of promise. He discussed the status of promise in twelve European legal systems. The study found that in terms of the bindingness of a promise, a basic difference between the modern common law and civil law is that the common law requires a contract to have ‘consideration’ while the civil law does not. Each of the 12 countries has different solutions for 15 respective problems. Most of the jurisdictions require more formality for voluntary monetary gifts. The ultimate goal for each of the jurisdiction is to make fairness between the promisor and promisee.68

Ali Mohammad Matta discussed nearly all the major issues related to promissory estoppel. He stated that there is a lack of unanimity among different courts on the

---

65 Al-Qardāwī, “Al-wafā’ bi al-wa’d,” 616-634.
requirements of promissory estoppels. After discussing the arguments and the cases, he concluded that the sacredness of “consideration” in promissory estoppel has been demolished. Promissory estoppel can be used for both as sword and shield and there is little importance on the pre-existing contractual relationship and promisee’s detrimental alteration. However, the only necessary element is the promisee’s reliance on the promise. He argued that the promissory estoppel, at present situation, is in line with the Islamic law of contract where it is always obligatory to fulfil a promise. ⁶⁹

Contrary to Ali Mohammad Matta, Aditi Bagchi argued that private promises are different from a contract. Moreover, a contract is not an instance of a promise as we normally understand. Private promise is valuable to cultivate personal relationship while the contract is important for public virtue. ⁷⁰ This study differentiates between private and public promises but in Islamic law there is no difference between private and public promise.

Along with the studies discussed above, there are a number of studies that attempted to compare between the status of wa’d in the Sharī’ah and common law. Nurdianawati Irwani Abdullah concluded that wa’d is recognised in common law. In contracts, a promise is usually binding in the common law. However, in the case of independent unilateral contract, common law has very detailed rulings. The most important factor is that innocent promisee is always protected by the equitable doctrine of promissory estoppels. ⁷¹

Marjan Muhammad et al. compared wa’d with the Malaysian contract act 1950. Their study found that Malaysian contract act 1950 does not recognise wa’d. It only recognises binding muwā’adah, which is not permissible in the Sharī’ah. Moreover, they

argued that *wa’d* to purchase is different from the legal term “purchase undertaking”. This is because “purchase undertaking” is similar to a contract whereas *wa’d* is not a contract. However, *wa’d* might resemble promissory estoppels as it states that a promise is binding when the promisee has acted upon based on the promise.\(^{72}\)

Hakimah Yaacob conducted another study on the comparison of *wa’d* with Malaysian contract law. The study showed that according to Malaysian contract law, a promise is a “proposal” and when it is accepted by the promisee then it becomes binding on the parties. Moreover, according to promissory estoppels, when the promisee acts upon based on the promise of the promisor then the promisee is compensated if the promisor breaches the promise.\(^{73}\)

Ismail Wisham et al. analysed the status of *wa’d* in common law. They concluded that *Mālikī* scholars’ opinion on the obligation of *wa’d* is similar to the bindingness of a promise in the common law.\(^{74}\) However, their discussion was very brief on this issue.

Finally, Azlin Alisa Ahmad et al. compared the status of “bilateral promise” in Islamic and common law. The study revealed that under common law, a bilateral promise is similar to a contract. Therefore, it is enforceable in the court. Alternatively, under Islamic law, a bilateral promise is different from a contract.\(^{75}\) The authors’ argument needs to be justified as some studies disagree with this view.\(^{76}\)

\(^{72}\) Marjan Muhammad et al., “The bindingness and enforceability of a unilateral promise”.
\(^{74}\) Ismail Wisham, Aishath Muneeza and Rusni Hassan, “Special legal features of the Islamic wa’d or pledge: Comparison with the conventional law on promise within the sphere of Islamic finance,” *International Journal of Law and Management* 53, no. 3 (2011), 221-234.
1.8.6. The Application of *Wa’d*

Most contemporary studies on *wa’d* emphasised on its practice in Islamic financial products. Literature on the application of *wa’d* can be divided into three subdivisions, which are: (1) Islamic banking products; (2) *Şukūk* and, (3) Islamic derivatives.

1.8.6.1. The Application of *Wa’d* in Islamic Banking Products

Azizi Che Seman showed that among the sale-based contracts (*buyū‘*), *wa’d* is used in ‘īnah and *tawarruq*. In these contracts, *wa’d* is employed to protect the interest of the banks although it can be used to protect the interest of the clients. The study recommended that the practice of *wa’d* should not violate the objective of the contract.\(^\text{77}\) The study does not elaborate on the usage of *wa’d* in ‘īnah and *tawarruq*. It is necessary to investigate whether there is an element of *wa’d* in the practice of ‘īnah.

Munirah Kasim analysed the application of *wa’d* in *mushārakah* and *murābaḥah* products. Her study indicated that *wa’d* is an important tool for risk management in those two products. *Wa’d* helps to execute the contracts in an organised manner. She suggested that it is needed to assess the legal framework governing *wa’d* so that it becomes more effective.\(^\text{78}\)

Nor Adila Mohd Noor and Mohd Ashraf Aripin studied the practice of *wa’d* in Malaysia. They revealed that in Malaysian practice, *wa’d* is actually binding upon both parties. They mentioned some new practices of *wa’d* in Islamic banking i.e. parallel *salam* and foreign exchange transactions. They concluded that there is no uniformity in the usage of *wa’d* among Islamic banks in Malaysia. Moreover, there is no governing law for *wa’d* and it is a dilemma whether cases related to Islamic finance should go under the


\(^{78}\) Munirah Kasim, “*Al-wa’d* (unilateral promise) and its application in Islamic financial instruments,” (Master thesis, International Islamic University Malaysia, Kuala Lumpur, 2010).
Sharī‘ah or civil court.79 One of the limitations of this study is that it does not discuss the mechanism of employing wa‘d in the Islamic banking products.

Mohd Saiful Azli Md Ali conducted a case study on the practice of wa‘d in Bank Muamalat Malaysia Berhad (BMMB). The study revealed that BMMB applied wa‘d in three hybrid contracts namely, mushārakah mutanāqiṣah (MM), al-ījārah thummah al-bay‘ (AITAB), and tawarruq. It pointed out issues related to the application of wa‘d which are sale and buy back arrangement, forward forex trading, and penalty for wa‘d.80 The study added new knowledge on the practice of wa‘d but it was limited to one Malaysian bank and the discussion on the issues was very short.

Asmadi Mohamed Naim examined the mechanism of wa‘d in MM home financing. His study found that MM consists of shirkat al-milk at the commencement of the contract but it changes into shirkat al-‘aqd after that. Therefore, wa‘d to purchase the share of the partner with a price fixed earlier in shirkat al-‘aqd is equivalent to giving guarantee to the partner’s capital. When a partner guarantees the mushārakah capital of another then it violates the objective of the mushārakah contract. In addition, there is another wa‘d given by the customer in MM home financing which is to purchase the property in the event of default. This wa‘d is not valid in the Sharī‘ah either as it is an oppression on the customer and is far from the Qur’anic teaching.81 However, further study is required to justify the author’s claim.

Mohd. Fuad Md. Sawari and Md. Faruk Abdullah explored the practice of wa‘d in Islamic banking in Bangladesh. They found that wa‘d is practiced as legally binding in three Islamic banking products in Bangladesh i.e. bay‘ murābahah on the purchase orderer (BMPO), hire-purchase under shirkat al-milk (HPSM), and bay‘ mu‘ajjal. The

79 Nor Adila Mohd Noor and Mohd Ashraf Aripin, “Mechanism of al-Wa‘ad (Promise)”, 80-89.
81 Asmadi Mohamed Naim, “Purchase Undertaking Issues in Musharakah Mutanaqisah”, 25-47.
study was a primary inquiry on the application of *waʿd* in Bangladesh. In-depth research on this subject is needed.\textsuperscript{82}

\subsection*{1.8.6.2. The Application of *Waʿd* in Ṣukūk}

Shofian Ahmad and Azlin Alisa Ahmad discussed the practice of *waʿd* in Ṣukūk with reference to the purchase undertaking clause. They argued that Ṣukūk would be an unprotected financial instrument from the investor’s perspective if there were no element of *waʿd*. They resolved that there is no Sharīʿah issue in the application of *waʿd* in Ṣukūk as *waʿd* is not a contract.\textsuperscript{83} However, the discussion of the study is very short which provides only an overview on this issue.

Shabnam Mokhtar investigated the purchase undertaking issue in equity-based Ṣukūk. Her study found that purchase undertaking is a kind of guarantee to capital plus unpaid profit of the Ṣukūk holder. She pointed out that when *waʿd* is considered an independent element in Ṣukūk, then it fulfils the Sharīʿah requirements. However, when the collective outcomes of *waʿd* is examined then it is found that *waʿd* functions as a tool of guarantee.\textsuperscript{84}

Shabana Hasan and Marjan Muhammad showed the application of *waʿd* and *muwāʿadah* in some specific types of Ṣukūk i.e. Ṣukūk Ṭuṭṭarabah and Ṣukūk Ḥijārah. They suggested that it is crucial to have a well-defined guideline for the practice of *waʿd* and *muwāʿadah* in different Ṣukūk structures as well as for other Islamic financial products.\textsuperscript{85}

\textsuperscript{84} Shabnam Mokhtar, “A Synthesis of Shariʿah Issues,” 139-145.
\textsuperscript{85} Shabana Hasan and Marjan Muhammad, “Principles of Waʿd and Muwaʿadah: Their Application in Islamic Financial Contracts,” ISRA International Journal of Islamic Finance 3, issue. 2 (2011), 135-140.\end{flushright}
Khairun Najmi Saripudin et al. described the practice of *wa’d* in *ṣuṭūk* *mushārakah* issued in Malaysia. The study demonstrated that *muwā’adah* was included in the terms and conditions of the *ṣuṭūk* term sheets without putting it in a separate document. The authors concluded that it was valid in the *Sharī’ah* to apply *muwā’adah* as binding on both promisors in the *mushārakah* *ṣuṭūk* as *muwā’adah* was different from a contract (*‘aqd*).\(^{86}\)

### 1.8.6.3. The Application of *Wa’d* in Islamic Derivatives

Chady C. Atallah and Wafica A. Ghoul examined Islamic *wa’d*-based total return swap (TRS) as practiced by Deutsche bank. They revealed that the practice of *wa’d* by Deutsche bank is permitted in the *Sharī’ah* in form only but not in substance. In addition, there are several other issues in this *wa’d*-based TRS, such as (1) a *ḥalāl* asset is swapped with a non-*ḥalāl* basket of assets; (2) it may trigger *Sharī’ah* risk and reputational risk; (3) it encompasses exposure to leverage; (4) it contains high probability of loss; (5) it is exposed to bank’s credit risk; (6) it is implicitly associated with *ribā* and *gharār*; and (8) it is not based on real economic activities. Therefore, they suggested alternatives for TRS.\(^{87}\)

Azlin Alisa Ahmad et al. analysed the mechanism of *wa’d* in Islamic forward exchange contracts. Their study revealed that *wa’d* which is binding upon one party is a means to exploit the customer in the case of forward exchange contracts. They suggested *wa’dān* (two independent promise) to make justice between the client and the bank.\(^{88}\)

This research pointed out an important issue on the practice of *wa’d* but it did not clarify the permissibility of *wa’dān* in forward exchange contracts.

---


\(^{87}\) Atallah and Ghoul, “The Wa’d-Based Total Return Swap”, 71-89.

\(^{88}\) Azlin Alisa Ahmad, Shofian Ahmad, Hailani Muji Tahir, Shahidah Shahimi, Saadiah Mohammad and Mat Noor Mat Zain, “Islamic forward exchange contracts as a hedging mechanism: an analysis of wa’d principle,” *International Business Management* 6, no. 9 (2012), 47-54.
The International Shari‘ah Research Academy for Islamic Finance’s (ISRA) book demonstrated the structure of *wa‘d*-based Islamic forward contract, Islamic forex swap, Islamic cross currency swap, Islamic profit rate swap and Islamic options. It illustrated *wa‘d*-based Islamic structured product issued by Deutsche Bank. It resolved that *wa‘d* and *wa‘dan* are permissible in the *Sharī‘ah* for forward currency transactions whereas *muwā‘adah* is non-permissible.\(^{89}\)

Saadia Mohamad et al. showed the application of *wa‘d* in Islamic hedging products. They conducted a case study on seven Islamic banks in Malaysia. Their study revealed that Malaysian Islamic banks are using a number of hedging products, which are Islamic promissory forward currency contract, Islamic FX forward, Islamic profit rate swap, and Islamic cross currency swap etc. Unilateral promise (*wa‘d*) is used in these products whereas bilateral promise (*muwā‘adah*) is avoided as it is not permitted in the *Sharī‘ah*. This study presents only an overview on the application of *wa‘d* in hedging products by Malaysian Islamic banks. Therefore, further research is needed to achieve in-depth information on *wa‘d*-based hedging instruments.\(^{90}\)

### 1.9. Research Methodology

This study follows a number of research methods to achieve its objectives. This section describes the nature and type of research methods applied for this study including the techniques of data collection and analysis. The figure below provides the overview of the methodology for this research.

---


1.9.1. Rationale for Qualitative Approach

Based on the objective of this study, it will adopt qualitative approach. This is because in-depth information is required to determine the practice of wa‘d in Malaysia and Bangladesh. Moreover, determining the Shari‘ah status of wa‘d requires rigorous analysis of the opinions of Islamic jurists (fiqahā‘), which is very subjective in nature. In Shari‘ah research, the legal reasoning of the jurists (ijtihād) plays a vital role to decide the permissibility of a certain element.⁹¹ For that reason, the study employs qualitative approach.

A study is defined as qualitative when the objective of the study is initially to explain a situation, phenomenon, problem, or occasion.⁹² According to Uwe Flick, qualitative research is anticipated to approach the outside world and to comprehend, depict and occasionally explain social events in several means i.e. investigating experiences of people or a group of people, examining the dealings and exchange in the

---

making, evaluating the documents or equivalent types of experiences or communication.\textsuperscript{93} 

Max Travers indicates that mainly five methods are used by qualitative researchers which are: (1) observation, (2) interviewing, (3) ethnographic fieldwork, (4) discourse analysis, and (5) textual analysis.\textsuperscript{94} This study is defined as qualitative because it attempts to explain and examine the mechanism of \textit{wa’d}-based products in Malaysia and Bangladesh. Moreover, it analyses experts’ opinions and evaluates relevant documents.

1.9.2. The Comparative Case Study Approach

Dawson R. Hancock and Bob Algozzine defined a case study as a type of qualitative research which requires concentrated investigation and depiction of a single unit or organisation restricted by place and period. Usually, the subjects investigated in case studies comprises persons, events, or community. By means of case studies, researchers expect to achieve extensive understanding of the conditions and meanings of those involved.\textsuperscript{95} Pamela Baxter and Susan Jack stated that a qualitative case study confirms that the topic is not examined through one means but it is investigated from different types of means which leads to numerous features of the phenomenon to be discovered and comprehended.\textsuperscript{96}

The nature of this study is to achieve in-depth knowledge on the application of \textit{wa’d} in Islamic banks in Malaysia and Bangladesh. Therefore, a case study should be the most suitable approach. One of the advantages of a case study is that it permits the researcher to communicate with the respondents. This provides opportunities to explore

\textsuperscript{93} Uwe Flick, \textit{Doing Interviews} (London: Sage Publications Ltd., 2007), x.

\textsuperscript{94} Max Travers, \textit{Qualitative Research through Case Studies} (London: Sage Publications Ltd., 2001), 2.


more details and ask for deeper explanation of the answers. Joachim K. Blatter mentioned that it is widely acknowledged that case studies have become the key foundation of theoretical innovation.

This study is a comparative case study between Islamic banks in Malaysia and Bangladesh. A comparative case study investigates the contexts and characteristics of two or more instances of particular phenomenon in very details. Similar to a single case study, this study also seeks deep description. Nevertheless, the aim of the comparative case study is to determine similarities, differences, or patterns across the cases. These findings may consequently assist in the development or validation of theory. As mentioned earlier, three Islamic banks in Bangladesh and three Islamic banks in Malaysia have been chosen for case study.

1.9.3. Data Collection Method

The study employed several data collection methods. The reason behind using multiple methods of data collection is that different methods confirm the findings which could improve the credibility of the research. The following methods were employed for data collection.

1.9.3.1. Library Research

Library research is necessary in the field of Islamic jurisprudence (fiqh) to extract opinions of the classical and contemporary jurists. Library research includes reviewing

---

the classical manuscripts, contemporary literature, and fatāwā in the field of Islamic jurisprudence. Secondary data related to the objective of this research is collected through library research.

1.9.3.2. Document Analysis

Document analysis is defined as a systematic process for evaluating and examining document including printed or electronic forms.102 Margaret Olson stated that documents present a precious source of data in case study research. Together with interviews and observations, they contain one of the important types of data sources for explanation and analysis in case study research.103 Glenn A. Bowen mentioned that document analysis is an economical way to get empirical data. It is less time-consuming and easily obtainable.104

In the context of this study, document analysis helps to determine the wa’d-based products in the selected banks. Moreover, it validates the information received from the interviews. Document analysis for this study includes assessing the documents used by the Islamic banks. The following types of documents are examined:

i. Annual reports;
ii. Product disclosure sheet;
iii. Product application form;
iv. Product guide booklet;
v. Product brochure; and
vi. Government act

1.9.3.3. Interview

Qualitative interviews are conducted to achieve in-depth information. Qualitative interview is mandatory to get rich and in-depth information. The study employs semi-structured interview. Semi-structured interview is usually arranged through a series of prearranged open-ended questions where further questions come out from the conversation between the interviewer and the interviewee. Semi-structured detailed interviews are predominantly practiced interviewing technique for qualitative research. It can take place with a single person or a group of individuals. Normally, it takes between 30 minutes to a number of hours to conclude.

There are more than a few advantages for the interview method. David Wilkinson and Peter Birmingham described that through the interview method, 100% response of the questions is attained as the researcher indirectly participates in it. The interviewer has a choice to follow-up questions. He can ask more questions for more necessary information. In addition, the body language of the interviewee and the tone of the speech can be observed.

For this study, the interview participants were divided into two major categories, which are (1) the practitioners and (2) the Shari‘ah scholars. In order to know the practice of wa‘d and to investigate its prospect in Islamic banking products, Islamic banking practitioners in both countries were interviewed. In addition, interviewing the practitioners helped to know whether there was any issue in the practice of wa‘d. On the other hand, Shari‘ah scholars were interviewed to get their opinions on the Shari‘ah

---


issues in \textit{wa’	extasciiacute{d}}-based products. The table below describes the types of interview participants in Malaysia and Bangladesh.

<table>
<thead>
<tr>
<th>Type of Interview Participant</th>
<th>Name of Interview Participant in Malaysia</th>
<th>Name of Interview Participant in Bangladesh</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Practitioners</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sharī‘ah Officer</td>
<td>1) Ahmad Suhaimei Yahya</td>
<td>1) M. Shamsuddoha</td>
</tr>
<tr>
<td></td>
<td>2) Ezry Fahmy bin Eddy Yusof</td>
<td>2) Md. Atiqr Rahman</td>
</tr>
<tr>
<td></td>
<td>3) Mohd Nazri Chik</td>
<td>3) Md. Farid Uddin</td>
</tr>
<tr>
<td></td>
<td>4) Muhd Ramadhan Fitri bin Ellias</td>
<td>4) Nurul Kabir</td>
</tr>
<tr>
<td>Legal Officer</td>
<td>1) Aizley Abd Latiff</td>
<td>1) Sheikh Mahmudur Rahman</td>
</tr>
<tr>
<td></td>
<td>2) Zuraihah Abdul Rahman</td>
<td></td>
</tr>
<tr>
<td>Product Operation Officer</td>
<td>1) Ali Ahmad</td>
<td>1) Mohammad Mizanur Rahman</td>
</tr>
<tr>
<td>Sharī‘ah Committee Member</td>
<td>1) Ahcene Lahsasna</td>
<td>1) Abu Bakr Rafiq</td>
</tr>
<tr>
<td></td>
<td>2) Ahmad Hidayat Buang</td>
<td>2) Ahsanullah Miah</td>
</tr>
<tr>
<td></td>
<td>3) Aznan Hasan</td>
<td>3) M. Azizul Huq</td>
</tr>
<tr>
<td>Non-Sharī‘ah Committee Member</td>
<td>1) Mohamad Akram Laldin</td>
<td>4) Md. Manzur-e-Elahi</td>
</tr>
<tr>
<td></td>
<td>2) Azman Mohd Noor</td>
<td>5) Shah Abdul Hannan</td>
</tr>
<tr>
<td></td>
<td>3) Burhanuddin Bin Lukman</td>
<td>6) Shahed Rahmani</td>
</tr>
<tr>
<td></td>
<td>4) Hakimah Yaacob</td>
<td></td>
</tr>
<tr>
<td></td>
<td>5) Muhammad Yusuf Saleem</td>
<td></td>
</tr>
<tr>
<td></td>
<td>6) Rusni Hassan</td>
<td></td>
</tr>
<tr>
<td></td>
<td>7) Shamsiah Mohamad</td>
<td></td>
</tr>
</tbody>
</table>

Practitioners interviewed for this research include (a) Sharī‘ah officers; (b) legal officers and; (c) product operation officers of the selected Islamic banks. At first, the officers at the Sharī‘ah management department in each of the banks were contacted for interview. After getting approval, the head of the Sharī‘ah management department was interviewed. In addition, some other Sharī‘ah officers in the Sharī‘ah management department were interviewed to achieve detailed information.
The reason to choose Sharī‘ah officers for interview is that the Sharī‘ah management department has the most comprehensive information on wa‘d-based products. They are involved with researching and product structuring. They are also involved with the Sharī‘ah committee’s decision making on the product through providing related information on the products. Finally, they take active part in auditing and reviewing the overall operation of the product.108

In case the information received from Sharī‘ah officers on wa‘d-based products was not sufficient, then the product operation officers of the respective banks were contacted for an interview. The product operation officers were interviewed to know the function of a specific Islamic banking product. In addition, legal officers were interviewed to know whether there was any legal issues in the practice of wa‘d.

The Sharī‘ah scholars were then interviewed. Sharī‘ah scholars were divided into two types. The first type was the Sharī‘ah committee member of the selected banks and the second type was the non-Sharī‘ah committee member of the selected banks. Sharī‘ah scholars who were the Sharī‘ah committee member of the selected banks were interviewed to achieve in-depth information on the issues of Sharī‘ah related to the wa‘d-based products. Sharī‘ah committee members have knowledge and proficiency in Islamic law and jurisprudence. They advise the bank on matters pertaining to Sharī‘ah-compliant products and services. Sharī‘ah committee’s approval is required before a product is introduced by an Islamic bank.109 Therefore, interviewing the Sharī‘ah committee member of the selected banks helps to know their opinion on the Sharī‘ah issues related to the application of wa‘d in the banking products.

In addition, Sharī‘ah scholars who were not the Sharī‘ah committee member of the selected banks were interviewed in order to avoid bias and hear a variety of opinions on Sharī‘ah issues related to wa‘d-based products. This group of Sharī‘ah scholars are selected based on their expertise, experience, and research background in Islamic banking. Moreover, they might be a member of Sharī‘ah committee in other Islamic banks.

Interviews were mainly carried out in Dhaka, Bangladesh and Kuala Lumpur, Malaysia. This is because the headquarters of the selected banks are in these two capital cities. Interviewees were contacted by phone and then a copy of the interview guidelines along with the synopsis of this research were mailed to them. The general duration of an interview was between 45 to 60 minutes. A digital recorder was used to record the interview session after taking permission from the participants. Johnson asserted that recording confirms the exactness of the data collection as well as interview transcription and coding.\textsuperscript{110}

1.9.4. Data Analysis Method

Converting data into research results is known as analysis.\textsuperscript{111} According to David Stephens, analysis is the exploration of meaning corresponding to the research objective or query.\textsuperscript{112} According to Amanda Coffey and Paul Atkinson, analysis does not mean sticking to one exact method or a collection of accurate procedures rather it is creative, artistic, adaptable and instinctive. Nevertheless, it is ought to be systematic, intellectual


\textsuperscript{111} Margaret D. LeCompte, “Analyzing Qualitative Data,” Theory into Practice 39, no. 3 (2000), 146-154.

\textsuperscript{112} David Stephens, Qualitative Research in International Settings: A practical guide (London: Routledge, 2009), 98.
and academically precise.\textsuperscript{113} The data analysis of this study started with the same time of data collection. The study adopted thematic and comparative approaches for data analysis.

1.9.4.1. Thematic Analysis

Thematic analysis is the hunt for themes which appears to be crucial for the explanation of the phenomenon. It requires recognising the themes via thorough reading of the data in multiple times.\textsuperscript{114} In this approach, themes and categories are formulated from the data obtained from the interview and document analysis. Omar Gelo et al. described that thematic analysis is constructed based on the inspection of the data for regular instances, and then these instances are methodically recognised throughout the data set, and assembled together via a coding system. Coding is known as a procedure of assembling evidence and putting a label on the portions of text with the intention that they exhibit increasingly wider perspectives.\textsuperscript{115} Helene Joffe and Lucy Yardley pointed out that thematic analysis resembles content analysis. Nevertheless, thematic analysis emphasises much on the qualitative phase of the data investigated.\textsuperscript{116}

In line with the qualitative nature of this study, thematic analysis is chosen. Data obtained from library research, document analysis, and interviews were categorised based on a number of themes and sub-themes. The major themes were country, type of \textit{wa’d}-based products, \textit{Sharī‘ah}, and other issues. The sub-themes were specific \textit{wa’d}-based product, the feature of \textit{wa’d}, Islamic bank issuing the \textit{wa’d}-based product, economic benefit of \textit{wa’d}, scholars permitting the usage of \textit{wa’d}, and scholars prohibiting the practice of \textit{wa’d} etc.

\textsuperscript{115} Omar Gelo, Diana Braakmann and Gerhard Benetka, “Quantitative and Qualitative Research: Beyond the Debate,” \textit{Integrative Psychological and Behavioral Science} 42, issue. 3 (2008), 266-290.
1.9.4.2. Comparative Analysis

Given the purpose of the research, a comparative analysis is performed. Comparison is the core of the majority social sciences research. It is the most important duty of case study research. A comparison is usually made between different objects e.g. interviews, themes, groups, cases, settings etc. in different steps. Comparative analysis is characterised when different entities are examined to find out the important similarities and differences.\textsuperscript{117} Graham R. Gibbs mentioned that doing comparison is a significant phase of analysis where one can move beyond the descriptive stage. He pointed out that tables play an important role in comparative analysis.\textsuperscript{118}

In this study, a number of tables were used to perform the comparative analysis. The comparison was made amongst a few major themes and sub-themes. The practice of \textit{wa‘d} between Malaysia and Bangladesh was compared in terms of the number of products, types of products, number of banks, features of \textit{wa‘d} etc.

1.9.5. Limitations of Research Methods

There are a few limitations in this study. Claire Anderson mentioned that qualitative research is greatly relied on the ability of the researcher and simply affected by the investigator’s individual biases and characteristics. The participants’ responses might be influenced by the existence of the researcher. Finally, confidentiality can be difficult when discussing the findings.\textsuperscript{119}

While carrying out this research, data collection from the selected Islamic banks was difficult. This was because the bank officials had a very tight work schedule. It was not possible to interview a few practitioners. At the same time, some information was

restricted in the banks, which was labelled as “private and confidential” (P&C). Moreover, a fewSharī‘ah scholars could not be interviewed due to their busy work schedule. Finally, a small number of participants could not be interviewed due to no response from them to the interview invitation. Nevertheless, almost 90% of the targeted participants were interviewed. Therefore, the researcher believes that substantial amount of data was collected to fulfil the objectives of this research.

1.10. Organisation of the Thesis

This thesis consists of eight chapters. The following provides an overview of the structure of the thesis in terms of chapters.

Chapter 1: Introduction, provides the research background, problem statement, research objectives, research questions, scope of the research and significance of the research. It also includes a literature review and research methodology.

Chapter 2: The theory of wa‘d discusses the literal and technical definitions of wa‘d, the differences and similarities between wa‘d with related terms, and the status of wa‘d in the Sharī‘ah and Sharī‘ah rulings for muwā‘adah and wa‘dān.

Chapter 3: The application of wa‘d in Malaysian Islamic banks begins with providing an overview of Islamic banking in Malaysia. It then discusses the legal status of wa‘d in the civil laws of Malaysia. After that, it details the wa‘d-based products in the Islamic banks of Malaysia.

Chapter 4: The application of wa‘d in Bangladeshi Islamic banks follows similar steps to those of chapter three. It starts by providing an overview of Islamic banking in Bangladesh and discusses the legal status of wa‘d in the civil laws of Bangladesh. Finally, it elaborates on the wa‘d-based products in the Islamic Banks of Bangladesh.

Chapter 5: Comparison between the practice of wa‘d in Malaysian and Bangladeshi Islamic banks begins by discussing the legal status of wa‘d in both countries.
It then compares the waʾd-based products in both countries in three categories namely consumer banking product, trade financing product, and treasury product.

Chapter 6: Sharīʿah issues and other challenges of waʾd-based products in Malaysia and Bangladesh provides a thorough discussion of Sharīʿah scholars and practitioners’ views on the Sharīʿah issues and other challenges related to waʾd in Malaysia and Bangladesh. The issues and challenges in Malaysia are discussed followed by a discussion of the issues and challenges in Bangladesh.

Chapter 7: The prospects of waʾd-based products in Malaysia and Bangladesh presents potential waʾd-based products for the Malaysian banking industry followed by the Bangladeshi banking industry. Every proposed product is discussed with figures, underlying Sharīʿah concepts, operational advantages, and disadvantages.

Chapter 8: Conclusion, summarises the findings of this research, provides several recommendations to the policy makers and Islamic banking practitioners in Malaysia and Bangladesh. It concludes by discussing the limitation of this research and the scope for further research.

1.11. Conclusion

This chapter has introduced this study which aims to explore the practice of waʾd in Islamic banks in Malaysia and Bangladesh and compare between them. Moreover, it seeks to discuss the challenges and prospects of waʾd-based products in both countries. The background of the research, research problem, and scope and significance of the research have been provided. Literature on Islamic banking in Malaysia and Bangladesh, theory and application of waʾd have been reviewed. The methodology of this study, which is qualitative in nature, has also been described. The final section of the chapter outlined the organisation of this thesis.
CHAPTER 2: THE THEORY OF \(WA\mathcal{D}\)

2.1. Introduction

Being familiar with the concept of \(wa\mathcal{d}\) assists in further understanding its practice in Islamic banking products. Moreover, it facilitates identifying the \(Shar\mathring{i}\mathring{ah}\) issues pertaining to \(wa\mathcal{d}\)-based products. Therefore, it is necessary to elucidate the concept of \(wa\mathcal{d}\) before demonstrating its practice in Islamic banking products. The theoretical discussion of \(wa\mathcal{d}\) includes a number of issues. There is a debate whether \(wa\mathcal{d}\) can be used for exchange contracts (\(mu\mathring{a}\mathring{wa}\mathring{d\mathring{a}}\mathring{t}\)). In addition, scholars disagree on the binding nature of \(wa\mathcal{d}\) whether it is compulsory on the promisor to fulfil his promise or it is merely a matter of ethics. Furthermore, there are two other concepts derived from \(wa\mathcal{d}\) are \(muw\mathring{a}\mathring{d\mathring{a}}\mathring{h}\) and \(wa\mathcal{d\mathring{a}}\mathring{n}\). Scholars debate the \(Shar\mathring{i}\mathring{ah}\) status of those concepts. Finally, there are some \(Shar\mathring{i}\mathring{ah}\) concepts which appear to be similar to \(wa\mathcal{d}\) e.g. \(\mathring{a}qd\), \(nudhur\), \(\mathring{a}hd\) etc.

This chapter first discusses the literal and technical definition of \(wa\mathcal{d}\), the difference of \(wa\mathcal{d}\) from its related terms. It then sheds light on the status of \(wa\mathcal{d}\) in the \(Shar\mathring{i}\mathring{ah}\) which includes the permissibility of using \(wa\mathcal{d}\) in exchange contracts (\(mu\mathring{a}\mathring{wa}\mathring{d\mathring{a}}\mathring{t}\)) and the obligation of \(wa\mathcal{d}\) on the promisor. Finally, it explains the \(Shar\mathring{i}\mathring{ah}\) rulings for \(muw\mathring{a}\mathring{d\mathring{a}}\mathring{h}\) and \(wa\mathcal{d\mathring{a}}\mathring{n}\).

2.2. The Definition of \(Wa\mathcal{d}\)

\(Wa\mathcal{d}\) is an Arabic term. It can be found in several Qur\’anic and prophetic texts. Normally, it is translated as ‘promise’. However, classical Arabic-language scholars have provided more detailed connotations for the word \(wa\mathcal{d}\). Although the technical and literal meanings for \(wa\mathcal{d}\) do not differ significantly, the classical and contemporary scholars define the term differently.
2.2.1. The Literal Definition of *Wa’d*

The morphology of the Arabic word *wa’d* shows that it is constructed upon the trilateral root wāw (ا) – ‘ayn (ع) – dāl (دل). There are two words derived from this root. One is *wa’d* and the other one is *wā’id*. According to Ibn Fāris, *wa’d* can be used either for a good deed or a bad deed. However, *wā’id* is used only for a bad deed. Similarly, Al-Jawhārī agrees that *wa’d* is used for either a good or bad deed. Therefore, it can be said, “I have promised him good, or I have promised him bad”. When the adjective good/bad is omitted then *wa’d* and *‘iddah* is used for good and *wā’id* is used for bad one. Al-Fayūmī adds that *wa’d* is a transitive verb (muta’addi). According to the Arab tradition, breaking the *wa’d* is considered as lie while breaking the *wā’id* is regarded as generosity.

There are two words used as substitutes for the word *wa’d*, which are *‘iddah* and *maw‘idah*. Ibn Manẓūr affirms that *wa’d* is the root word and *‘iddah* is a noun which is used in lieu of *wa’d* and similarly the word *maw‘idah*. According to Al-Azhārī, *wa’d* is the real verbal noun (maṣdar) and *‘iddah* and *maw‘idah* are placed in lieu of the verbal noun. He provides the following Qur’ānic verse as an evidence to support his opinion:

وَمَا كَانَ أَسْتَعَفَّا إِبْرَاهِيمُ لِأَبِيهِ إِلَّا عَن مهوۡعِدَةٖ وَعَدَهَآ إِيَّاهَا فَلَمَّا تَبَيَّنَ لََُۥٓ أَنَّهُ عَدُوّٞ للَّهِ تَبََهأ إِبۡرََّٰهِيمَ وَهَّٰهٌ حَلِيمٞ

Al-Taubah 9: 114

And Ibrahim’s (Abraham) invoking (of Allāh) for his father’s forgiveness was only because of a promise he [Ibrahim (Abraham)] had made to him (his father). But when it became clear to him [Ibrahim (Abraham)] that he (his father) is an enemy of Allāh, he dissociated himself from him. Verily Ibrahim (Abraham) was Awwah (one who invokes Allāh with humility, glorifies Him and remembers him much) and was forbearing.

---

124 Al-Hilali and Khan, 265.
We refer to the English translation in Mujahid’s commentary on the verse in which wa’d means an obligation:

فَرَجَعَ مُوسَى إِلَى قَوۡمِهِۦ غَضۡبََّٰنَ أَعَلَىۡكُمُ رَبِّكُمۡ وَعۡدًا حَسَنًا أَسۡفٗا قَالَ يََّٰقَوۡمِ أَن يََِله عَلَيۡكُمۡ غَضَبٞ رَدتُّمۡ أَمۡ أَرۡدۡنَ أَن يََِله عَلَيۡكُمۡ غَضَبٞ خۡلَفۡتُم مهوۡعِدِي مِّن رهبِّكُمۡ فَأۡنَ أَمۡ أَن يََِله عَلَيۡكُمۡ غَضَبٞ ن يََِله عَلَيۡكُمۡ غَضَبٞ كُن مِّن رهبِّكُمۡ فَأۡنَ أَمۡ أَن يََِله عَلَيۡكُمۡ غَضَبٞ افۡكُلۡفۡتُمۡ أ مۡ أۡ خۡلَفۡتُمۡ مهوۡعِدِي

Tâhâ 20: 86

Then Mūsā (Moses) returned to his people in a state of anger and sorrow. He said: “O my people! Did not your Lord Promise you a fair promise? Did then the promise seem to you long in coming? Or did you desire that wrath should descend from your lord on you, that you broke your promise to me (i.e disbelieving in Allâh and worshipping the calf)?”

While wa’d means promise then munwā’adah denotes mutual promise. Abû Mu’âdh Al-Nâhwî clarifies this in the following statement:

واعدت زيداً إذا وعدك ووعدته، ووعدت زيداً إذا كان الوعد منك خاصّة

When you have promised to Zayd and Zayd promised to you then it is munwā’adah (mutual promise). When only you have promised to Zayd then it is merely wa’d (promise).

In some instances, wa’d can be used as an adjective. Al-Fayrûzabâdî mentions that a cloud is sometimes called “a promising cloud” when rain is eminent. Besides, it is said that “a promising horse” when it runs nonstop.

In light of the discussion above, it can be concluded that wa’d means promise which carries the meaning of an obligation. It is a verbal noun. A few words provide similar meaning e.g. ‘iddah and maw’idah. The word wâ’id is derived from the same root word of wa’d but it is used to promise for a bad deed while wa’d is used to promise for a good deed. When two persons promise to each other then it is called munwâ’adah. Finally, wa’d can be used as an adjective in some cases.

125 Al-Hilali and Khan, 422.
2.2.2. The Technical Definition of *Wa’d*

The technical definition of *wa’d* differ little from its literary definition. Nevertheless, both the classical and the contemporary scholars have defined *wa’d* in a manner that is more precise than its literal meaning.

2.2.2.1. Classical Scholars’ Definition of *Wa’d*

Badr Al-Dīn al-‘Aynī, the commentator of al-Bukhārī defines *wa’d* as:

الوعد في الإصطلاح الإخبار بإيصال الخير في المستقبل والإخلاف جعل الوعد خلافاً

Technically, *wa’d* is a declaration that something good will be done to someone in the future, and breaking the *wa’d* means to turn a promise to a contradiction.\(^{128}\)

Based on this definition, it is clear that *wa’d* is for a good action only. While literally *wa’d* is used for both good and bad actions then technically *wa’d* is defined for a good action. Besides, the promised action of a *wa’d* will be done in the future. Therefore, the promised action of a *wa’d* is not required to be accomplished on the spot rather it can be fulfilled in the future. Similarly, another classical scholar Ibn ‘Arafah defines it as:

إخبار عن إنشاء المخبر معروفاً في المستقبل

It is a declaration from the declarer that he intends to perform a good deed in the future.\(^{129}\)

This definition also says that *wa’d* is a declaration for performing a good action in the future. It is noteworthy to mention that *wa’d* is made by only one party. It appears that there is no mutual agreement in *wa’d*. It is a voluntary offer from one person to perform something good to another person. There is no condition of remuneration for the promisor. The promisor voluntarily offers to do something good to the promisee.


2.2.2.2. Contemporary Scholars’ Definition of Waʿd

Naẓīḥ Kamāl Ḥammād, a contemporary Islamic jurist defines waʿd as follows:

هو الإخبار عن فعل المرء أمرًا في المستقبل يتعلق بالغير، سواء آكان خيراً أم شرًا.

It is a declaration of someone for performing an act in the future, which is related to other party irrespective of whether it is good or bad.¹³⁰

This definition is somehow contradictory to the classical scholars’ definition. In this definition, a declaration to perform both good and bad act in the future is considered as waʿd whereas in the classical scholars’ definition, only a good act is included in waʿd.

Another distinctive part of the above definition is that the performance of the good/bad action should be related to other person. If a person declares to perform an action in the future for himself/herself, then it is not included in waʿd.

Unlike Naẓīḥ Kamāl Ḥammād, another contemporary scholar ‘Ala’ al-Din Kharofa defines waʿd as an oral offer from an individual to carry out something for the welfare of another individual.¹³¹ According to ‘Ala’ al-Din Kharofa, waʿd is restricted to something good only. However, ‘Ala’ al-Din Kharofa’s definition does not clearly mention that the promised action in waʿd will be executed in the future. Besides, it is not necessary for waʿd to be an oral offer rather it can be done through writing as well.

Muhammad Ayub defines waʿd as “one party binds itself to do some action for the other.”¹³² Muhammad Ayub emphasises on the bindingness of waʿd where one party is bound to do some action for another party. This definition also indicates that waʿd is made for a good action.

The researcher views that waʿd should be specified for a good action. This is because a promise to perform something bad to someone is not generally permissible in the Sharīʿah. Therefore, waʿd can be defined as “a declaration to perform something good to other party in the future”. The figure below provides an example of waʿd where A

¹³⁰ Ḥammād, Muʿjam al-Muṣṭalḥāt al-Māliyyah, 473.
¹³² Muhammad Ayub, Understanding Islamic Finance (West Sussex: John Wiley & Sons Ltd, 2007), 114.
promises B that he will purchase a car from B on a fixed date. Here, A is the promisor and B is the promisee.

Figure 2.1 Illustration of Waʿd

There are some Arabic terms which appear to bear the same meaning of waʿd. Therefore, it is necessary to clarify the differences between these terms with waʿd. The following section discusses ‘aqd, ‘ahd, nudhur, juʿālah and their differences from waʿd.

2.2.3. Waʿd and ‘Aqd (Contract)

Literally, ‘aqd means “to tighten” which is the opposite of freeing. According to Majallah al-Ahkām al-ʿAdliyyah, ‘aqd is “what the parties bind themselves and undertake to do with reference to a particular matter. It is composed of the combination of offer and acceptance.” ‘Aqd is a contract where two parties are obliged to carry out a certain matter. ‘Aqd is concluded through connecting the offer (ʿijāb) with the acceptance (qabūl). There are several pillars (Arkān) for an ‘aqd to be executed. Without these pillars an ‘aqd is considered void. According to the majority of the scholars, there are three pillars for an ‘aqd which are as follows:

i. Offer (ʿijāb) and acceptance (qabūl)

ii. The contracting parties (i.e. buyer and seller)

---

133 Ibn Fāris, Muʿjam Maqāʾīs al-Lughah, 4:86.
iii. The subject of the contract (i.e. commodity and price)

Based on the above, it can be said that there are differences between *wa’d* and *’aqd*. *Wa’d* is a declaration to perform an action in the future but *’Aqd* is a mutual agreement between two persons on a particular matter at the present time. While *’aqd* is a mutual agreement between two parties then *wa’d* is an offer to do something good to other party. *Wa’d* can be executed by one person only but there must be two persons for *’aqd*. While *wa’d* is a voluntary offer then *’aqd* is a mutual exchange where every party is rewarded. Moreover, the outcome of *’aqd* comes into effect immediately after it is concluded but the consequences of *wa’d* will be realised in the future.

*’Ala al-Din Kharofa* argues that a promise is obviously different from *’aqd*. *’Aqd* is an origination whereas *wa’d* is an oath.\(^{136}\) Furthermore, Bank Negara Malaysia (BNM) in its *Sharī’ah* resolution states that:

> Generally under the shariah principles, a “contract” is different from a “promise”. Each of them has its own legal implications. In a contract, the parties are bound by the terms of the contract, thus they may be obliged to compensate for the breach of the contract. On the other hand, in a promise it is not binding on the promisor to fulfil his promise. As such, no compensation could be imposed on him if he breaches of the promise.\(^{137}\)

Based on the above statement, *’aqd* is compulsory on both parties. Each of the parties is obliged to compensate the other party if there is a breach of the contract. On the contrary, a promisor is not generally obliged to compensate the relevant party if he breaks his promise (*wa’d*).

Therefore, it can be concluded that though it appears that *’aqd* is similar to *wa’d* but there are differences between them. The fundamental difference between the two is that *’aqd* is a mutual agreement which consequences come into effect on the spot while *wa’d* is a voluntary offer from one party which outcome will come into effect in the future.

\(^{136}\) *’Ala’ al-Din Kharofa*, *Transactions in Islamic law*, 23.

2.2.4. Wa‘d and ‘Ahd

‘Ahd literally means preserving something and making a covenant on it. Al-Jurjānī states that initially, ‘ahd was used to mean preserving something and maintaining it for a period of time. After that, it stands for the covenant which is compulsory to adhere. So, ‘ahd is an agreement which is binding upon both parties.

However, in some verses of the Qur’an, both wa‘d and ‘ahd stand for the same meaning. The following verse is an example of that:

وَمِنۡهُم مهنۡ عََّٰهَدَ ٱللَّهَ لَئِنۡ ءَاتَىَّٰنَا مِن فَضۡلِهِ ﷺ لَََصهدهقَنه وَلَََكُونَنه مِنَ ٱلصهَّٰلِحِيََّ

Translation: And of them are some who made a covenant with Allāh (saying): “If He bestowed on us of His Bounty, we will verily give Sadaqah (Zakāt and voluntary charity in Allāh’s cause) and will be certainly among those who are righteous.” Then when He gave them of His Bounty, they became niggardly [refused to pay the Sadaqah (Zakāt or voluntary charity)], and turned away averse. So He punished them by putting hypocrisy into their hearts till the Day whereon they shall meet Him, because they broke that (covenant with Allāh) which they had promised to Him and because they used to tell lies.

In this verse, the word ‘ahd is used in the beginning and then at the end wa‘d is used while both of them provide the meaning of covenant.

2.2.5. Wa‘d and Nudhur (Vow)

According to the Sharī‘ah, nudhur means a promise to perform something good in the future or, to oblige something on oneself for the pleasure of Allāh (SWT). There is similarity between wa‘d and nudhur because both are promises to do something good in

---

138 Ibn Fāris, Mu‘jam Maqā’is al-Lughah, 4:167.
140 Al-Hilali and Khan, 257.
the future. However, *nudhur* is different from *wa’d* in a sense that the intention in making *nudhur* is to seek the pleasure of Allāh but *wa’d* is not particularly made to be closer to Allāh. Moreover, *kaffārah* (atonement) is compulsory for the one who does not fulfil his *nudhur* but there is no *kaffārah* for breaking *wa’d*. Therefore, it can be resolved that though *wa’d* and *nudhur* require to do something good in the future but there are differences between them.

### 2.2.6. Wa’d and Ju’ālah

*Ju’ālah* is an exchange contract where someone declares to pay a particular amount of money to whoever accomplishes a particular outcome or performs a particular job in a stated or unstated period of time. It is different from *wa’d* as it is an exchange (*mu’āwa’dah*) contract. In *ju’ālah*, the person who does something good for the benefit of another person is entitled to get certain reward which is declared before. This is not the case in *wa’d*. In *wa’d*, someone voluntarily declares to perform something good to another person without expecting any compensation from the promisee.

### 2.2.7. Different Features of Wa’d (Muwā’ādah and Wa’dān)

There are two different concepts which are derived from *wa’d* namely *muwā’ādah* and *wa’dān*. While *wa’d* denotes unilateral promise then *muwā’ādah* means mutual promise. On the other hand, *wa’dān* means to two separate promise. The following section discusses the definition of *muwā’ādah* and *wa’dān*.

---


2.2.7.1. Definition of *Muwā‘adah*

Literally, *muwā‘adah* means mutual promise. Technically, *muwā‘adah* is defined mostly by the *Mālikī* scholars. Ibn Rushd defined it as:

\[
\text{إِن يَعْدَلْ كَلِّ يَوْمٍ مِّنْهَامَا صَاحِبِهِ لَا تَكُونُ إِلَّا مِنْ الْيَوْمِينَ}
\]

Translation: To promise each one of the two to the other as it is a mutual action which will not happen except by two persons.

This means that *muwā‘adah* is a mutual action where two parties promise to each other. If only one person promises to the other then it is a unilateral promise (*wa’d*), and when two persons promise to perform something good to each other then it is *muwā‘adah* (mutual promise).

A similar definition of *muwā‘adah* is provided by another *Mālikī* scholar but in relation to marriage as he states:

\[
\text{إِن يَعْدَلْ كَلِّ يَوْمٍ مِّنْهَامَا صَاحِبِهِ بِالْزَّوَجَةَ فَهِيَ مَفاعَلَةٌ لَا تَكُونُ إِلَّا مِنْ الْيَوْمِينَ فَإِنْ يَعْدَلَ أَحَدَهُمَا دَوْنَ الْآخَرِ}
\]

Translation: To promise each of the two to the other for marriage. It is a mutual action therefore, it will not occur except by two persons. And, if only one person has promised then it is called ‘*iddah* (unilateral promise).

This definition follows the previous definition except it defines *wa’d* in the case of persons who promise between them for marriage. It clarifies that if the promise is made by only one person then it is *wa’d* (unilateral promise). These two are the classical scholars’ definition for *wa’d*. However, the contemporary definition of *muwā‘adah* is more specified to financial affairs. Nazīh Kamāl Ḥammād defined *muwā‘adah* as:

\[
	ext{إِعلَانُ شَخَصَيْنِ عَنْ رَايِتهِمَا إِنْ شَاءَ عَقِدَ في الْمُستَقِبلِ تَعْوُدُ أَثَرَهُمَا عَلَيْهِمَا}
\]

Declaration by two persons on their interest to make a contract in the future which consequences will fall onto them.

---

Similar to the classical scholars, this definition says that *muwā'adah* is a declaration by two persons to do something good in the future. However, this definition is restricted to making contracts in the future. Therefore, according to this definition only the declaration to conclude a contract in the future is called *muwā'adah*.

In the researcher’s view, *muwā'adah* should be defined as a mutual promise made by two individuals to perform something good to each other regardless of whether it is for a contract. Nazīh Kamāl Hammād’s definition is specified to executing contracts only due to his focus on the contemporary practice of *muwā'adah* in the Islamic banking contracts.

The figure below shows an example of *muwā'adah* to conclude a sale and purchase in the future. In this example, A promises to B on 25 March that he will sell a car on 1st of May, 2015 for RM 100,000. At the same time, B promises to A that he will purchase a car on 1st of May, 2015 for RM 100,000.

![Figure 2.2 Illustration of Muwā’adah](image)

**2.2.7.2. Definition of *Wa’dān***

*Wa’dān* is a new concept.\(^{149}\) Therefore, its definition could not be found in the classical literatures of Islamic jurisprudence (*fiqh*). Among the contemporary scholars, Aznan Hasan defined *wa’dān* as:

\(^{149}\) Marjan Muhammad et al., “The bindingness and enforceability of a unilateral promise (*wa’d*)”, 31.
Two unilateral promises given by two parties to each other which are not interrelated and their application relies on two different conditions.\textsuperscript{150}

It may seem that \textit{wa’dān} is similar to \textit{muwā’adah} but the difference between them is that the two promises are not related to each other in \textit{wa’dān}. This means there is no mutual relation between the first and second promise. Both of the promises are independent. Pertaining to this, Marjan Muhammad et al. pointed out that \textit{wa’dān} has two important characteristics, which are: (1) the promises are not dependent on each other and (2) their application depends on two separate conditions.\textsuperscript{151} Therefore, we can sum up that \textit{wa’dān} is different from \textit{muwā’adah}. In \textit{wa’dān}, two independent promises are made by two persons to perform something good to each other which is related to two different situations. Figure 2.3 below provides an example of \textit{wa’dān}.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{wa'dan_diagram.png}
\caption{Illustration of \textit{Wa’dān}}
\end{figure}

In the above example, A promises to B in the beginning that he will sell a Honda Civic car on 1st of May, 2015 for RM 100,000, if the market price goes higher. This is the first \textit{wa’d}. After that, B promises to A that he will purchase a Honda Civic car on 1st of May, 2015 for RM 100,000, if the market price goes lower. This is the second \textit{wa’d}. In this example, both of the promises are independent, which are based on two different conditions. The two different situations are (1) when the market price of the car is higher

\textsuperscript{150} Aznan Hasan, “Pengertian al-wa’ad, al-wa’dan dan al-muwa’adah”, 1.
\textsuperscript{151} Marjan Muhammad et al., “The bindingness and enforceability of a unilateral promise (\textit{wa’d})”, 31.
than the price fixed earlier and (2) when the market price is lower than the price fixed earlier. Eventually, only one of the two promises will be fulfilled in the future.

2.3. The Status of Wa‘d, Muwā‘adah and Wa‘dān in the Sharī‘ah

This section explains the basic Sharī‘ah rulings related to wa‘d first. After that, it discusses whether wa‘d can be used in exchange contracts (mu‘āwaḏāt). Subsequently, it elucidates the bindingness of wa‘d in the Sharī‘ah. Finally, it provides discussion on the Sharī‘ah rulings related to muwā‘adah and wa‘dān.

2.3.1. The Status of Wa‘d in the Sharī‘ah

In general, wa‘d is permissible (mubāḥ) in Islamic law. A person who promises to perform something in the future should be sincere in his heart. If the person promises that he will perform something in the future but in his heart he does not intend to do it then it is impermissible (ḥarām) in Islamic law. Moreover, while making a promise the promisor should pronounce the phrase ‘if Allāh wills’ (In Shā’ Allāh). This is because as human beings we do not know whether we will be able to perform something in the future.152

Moreover, it is not permissible to promise an evil action. If someone promises to commit adultery or drinking alcohol then it is not lawful in Islam.153 Islamic scholars unanimously agreed on this matter. However, they disagreed whether a promise can be made to execute an exchange contract (mu‘āwaḏah) e.g. buy, lease etc. in the future. Furthermore, there is disagreement on whether a promise is legally binding on the promisor. These two issues will be discussed in the following sections.

153 Ibn Ḥazm, Al-Muḥallā, 8:28.
2.3.1.1. Sharī‘ah Ruling on Using Wa‘d in Exchange Contracts (Mu‘āwaḍāt)

It is generally accepted that wa‘d can be made for voluntary contracts (tabarru‘āt) e.g. loan, gift, donation etc. However, there is disagreement whether wa‘d can be made to execute exchange contracts (mu‘āwaḍāt) e.g. sale, lease, marriage etc. in the future. Ibn ‘Alīsh mentioned that according to the custom of Islamic jurists, only voluntary contracts (tabarru‘āt) can be binding through wa‘d whereas exchange contracts are excluded from this bindingness.\textsuperscript{154} Al-Islāmbūlī states that classical scholars view that wa‘d can be made to execute exchange contracts in the future but it cannot be binding on the promisor. This is because they believe that an exchange contract is itself a method to bind the parties.\textsuperscript{155}

However, another classical scholar Ibn Shubrumah stated that all types of wa‘d are compulsory on the promisor.\textsuperscript{156} Al-Qarḍāwī pointed out that the verses of the Qur’an and the texts of the Sunnah which made wa‘d binding, do not differentiate its bindingness in terms of exchange or voluntary contracts. All those Qur’anic verses and prophetic texts generally make wa‘d as binding on the promisor. In addition, there is no evidence that there is any exclusion from this ruling.\textsuperscript{157}

The researcher believes that al-Qarḍāwī’s argument is more rational on this issue. This is because the classical scholars did not provide any evidence that the wa‘d made for executing exchange contracts is different from the wa‘d made for executing voluntary contracts. Moreover, breach of the wa‘d in the case of an exchange contract may cause similar harm to the promisee as it is in the case of a voluntary contract.

2.3.1.2. The Binding Nature of Wa‘d on the Promisor

This section discusses the opinions of the classical and contemporary scholars on the bindingness of wa‘d and attempts to determine the most substantial opinion. The opinions

\textsuperscript{156} Ibn Ḥazm, \textit{Al-Muhallā}, 8:28.
\textsuperscript{157} Al-Qarḍāwī, “Al-wafā’ bi al-wa‘d”, 631-634.
of the scholars can be classified into three major categories which are firstly, waʿd is recommended (mustaḥabb) but not binding. Secondly, waʿd is always compulsory (wājib). Thirdly, waʿd is binding but with conditions and exceptions. The details of the opinions and arguments of the scholars are provided below.

A. Waʿd is Recommended but Not Compulsory

Imām Shāfiʿī, Abū Ḥanīfah and the majority of scholars believe that waʿd is recommended (mustaḥabb). Therefore, if the promisor breaks the waʿd then it means that he has left a noble action and has committed a disliked (makrūh) deed. However, he is not sinful for his action.158

Badr al-Dīn al-ʿAynī mentioned that waʿd is recommended to fulfil according to the consensus of the scholars and it is not compulsory. Allāh (SWT) praised those who fulfilled their promises. It is part of a noble character.159

Al-Sarkhašī states that waʿd is not binding on the promisor. He provides an example that if someone says that he will go to Allāh’s house (Makkah) and he intends waʿd in his heart then it is not binding on him as waʿd is not binding. However, it is recommended for him to fulfil his waʿd.160

Ibn ʿĀbidīn was asked about a case that if Zayd gave waʿd to ‘Amar to donate him crops of a specific land but after harvesting he refused to give then whether it was allowed to force Zayd to fulfil his waʿd. Ibn ʿĀbidīn replied that according to the Sharīʿah, it was not mandatory for him (Zayd) to fulfil his waʿd. If he fulfilled the waʿd then it was just fine.161

---

159 Al-ʿAynī, Ṭumād al-Qārī, 13:366.
Al-Buhūtī, a Ḥanbalī scholar cited that if a person says that I will pay your debt or will fill up whatever debt you have then through this statement, he does not become a guarantor of the debt because it is a \textit{wa'd} which is not an obligation.\footnote{Al-Buhūtī, \textit{Kashshāf al-Qinā}, 3:79.}

Ibn Ḥazm mentioned that whosoever promises to someone that he will give him a specific or unspecific quantity of wealth, or he will help him in any deed – whether he swears it or not – it is not obligatory for him (promisor) to fulfil it and it is disliked for him (if he does not fulfil it); if he fulfils it then it will be good for him.\footnote{Ibn Ḥazm, \textit{Al-Muhāllā}, 8:28.}

Among the contemporary scholars, Rafic Yunus Al-Masri views that \textit{wa'd} is not binding on the promisor. He argues that although \textit{wa’d} is an alternative of forbidden sale contracts (e.g. selling something that the seller does not own) but it is not permissible for the \textit{wa’d} to be binding on the promisor. This is because a binding-\textit{wa’d} is similar to a contract (\textit{‘aqd}). He claims that any viewpoint that makes \textit{wa’d} binding directly or indirectly on both parties or either one of the parties, does not stand on a legitimate ground.\footnote{Al-Masri, “The Binding Unilateral Promise (\textit{wa’d})”, 32.}

The following evidence support this point of view.

1. Scholars provide the following prophetic narration as evidence to support their opinions:

\begin{quote}
عن صفوان بن سليم أن رجلا قال لرسول الله صلى الله عليه وسلم: “أكذب امرأتي يا رسول الله”، فقال رسول الله صلى الله عليه وسلم: "لا خير في الكذب"، فقال الرجل: "يا رسول الله أعدها وأقول لها"، فقال رسول الله صلى الله عليه وسلم: "لا جناح عليك".
\end{quote}

Translation: Şafwān bin Sulaym narrated that a man asked the messenger of Allāh (SAWS): “O messenger of Allāh! Can I tell a lie to my wife?” The messenger of Allāh (peace be upon him) replied: “There is nothing good in telling a lie.” The man asked: O messenger of Allāh! Can I make promises to her and tell her [something to make her happy]?” The messenger of Allāh (peace be upon him) replied: “There is no sin on you.”\footnote{Narrated by Mālik, \textit{Kitāb al-Jāmi‘}, Bāb Mā Jā‘a fi al-Ṣidq wa al-Kajib, Ḥadīth no. 3626. See Mālik bin Anas Al-Asbāḥī, \textit{Al-Muwatta‘}, ed. Muhammad Muṣṭafā Al-A’ẓāmī (Abu Dhabi: Zayed Bin Sultan Al-Nahayan Charitable and Humanitarian Foundation, 2004), 5:1440.}
Al-Qarāfī explains that in the above hadīth, the prophet Muḥammad (SAWS) prohibited telling a lie to make someone’s wife happy. However, the prophet (SAWS) negated the sin for breaking a promise. It means that breaking the promise is not a part of lie. There is no fault in breaking the promise. In this hadīth, the man actually asked about the promise that cannot be fulfilled because there is no need to ask here about a promise that can be fulfilled.\footnote{Shihāb Al-Dīn Abī Al-`Aẓbās Ahmad bin Idrīs Al-Qarāfī, Al-Furūq, ed. 'Umar Ḥasan Al-Qīyām (Beirut: Resalah Publishers, 2003), 4:43.}

(2) In another hadīth, the messenger of Allāh (SAWS) pronounces that a promise is not binding on the promisor. It reads:

ٌعن زيد بن أرقم عن النبي صلى الله عليه وسلم قال: "إذا وعد الرجل أخاه ومن نيته أن يفي له فلم يفي ولم يجاء للميعاد فلا إثم عليه"  

Translation: Zayd bin Arqam narrated from the prophet (peace be upon him) that he said: “If a person promised something to his brother with the intention to fulfil it; then he did not fulfil it and did not come for the appointed meeting, there is no sin upon him.\footnote{Narrated by Abū Dāwūd, Kitāb al-Adab, Bāb fī al-`iddah, Ḥadīth no. 4995. See Abū Dāwūd Sulaymān bin Al-Ash’āth Al-Sijistānī, Sunan Abī Dāwūd, ed. 'Izzat 'Ubayy Al-Da‘īs and 'Ādil Al-Sayyid (Bayrūt: Dār ibn Hazm, 1997) 5:168.}

The above prophetic narration denotes that a man is not sinful if he does not fulfil his promise. It means that breaking a promise is permissible (mubāḥ). However, the promisor is required to be sincere at the time of making the promise. Otherwise, the promisor is sinful for breaking his promise. Nevertheless, it can be concluded here that it is not compulsory (wājib) on the promisor to fulfil his promise.

(3) Ibn Ḥajar Al-`Aṣqalānī mentioned that Muhallab argued that all scholars agree that a promise should be fulfilled as a recommended duty but not compulsory. This is because it is agreed to all scholars that the promisee cannot be treated as a creditor in terms of the promised matter.\footnote{Al-`Aṣqalānī, Fath al-Bāri’, 5:290.} It means that if a person promises someone to give something but he dies before giving the promised thing to the
promisee, then the promisee is not considered as a creditor to the promisor. Therefore, unlike the creditors the promisee cannot take the promised item from the inheritance of the promisor.

(4) Al-Nawawī argued that \textit{wa’d} can be compared to a type of donation (\textit{hibah}) where the possession of the subject matter is yet to transfer to the beneficiary. According to the majority of Islamic jurists, a donation is not binding on the donor until the possession of the donating asset is transferred to the beneficiary.\footnote{Al-Nawawī, \textit{Al-Adhkār}, 510-511.} In relation to this, Al-‘Ānī, pointed out that \textit{wa’d} is similar to a voluntary contract (\textit{tabarru’}). There is no evidence in the \textit{Shari’ah} that a voluntary contract can be binding on the contracting parties. Voluntary contracts are by nature non-binding on the contracting parties. These types of contracts can be terminated until handing over the asset to the beneficiary.\footnote{Muhammad Riḍā ‘Abd Al-Jabbār Al-‘Ānī, “Quwwah al-wa’d al-mulzimah fī al-Shari’ah wa al-qānūn”, \textit{Majallah majma’ al-fiqhī al-Islāmī} 5, no. 2 (1988), 570.}

(5) Ibn Muflīḥ mentioned that according to Imām Aḥmad Ibn Ḥanbal, \textit{wa’d} is not compulsory on the promisor. This is because it is prohibited to promise something without saying, “If Allāh wills” (\textit{In Shā’ Allāh}).\footnote{Ibn Ḥazm adds that Allāh says in the Qur’ān:}

\[
\text{وَلَا تَقُولْنِ لَمْ يَكُنْ، إِلَّا إِنِّي فَاعِلٞ ذَٰلِكَ غَدًا} \, \text{إِلَّا أن يَشَآءَ ٱللَّهُُۚ}
\]

\textit{Al-Kahf} 18: 23-24

\textbf{Translation: And never say of anything, “I shall do such and such thing tomorrow.” Except (with saying), “If Allāh will!”}

The verse denotes that it is prohibited to promise something without saying, “If Allāh will!” Therefore, if someone promises something without uttering this phrase then he has actually committed an evil. It is not lawful in the \textit{Shari’ah} to force someone to perform an evil action. On the contrary, if the promisor pronounces “If Allāh will!” and does not fulfil his promise after that, then he is not breaking his promise indeed. This is
because he promised that he would perform the action if Allāh wished. Since Allāh did not will it to happen then he could not perform it.\footnote{Ibn Ḥazm, Al-Muḥallā, 8:29-30.}

(6) Ibn Ḥazm provided another argument that fiqahā’ unanimously ruled that if someone makes a promise under oath to Allāh and he realises after that non-fulfilment of that promise is more prudent, then he will not be sinful if he breaks his promise. Therefore, if breaking a promise confirmed by an oath is not a sinful action then it is more rational to hold that breaking a simple promise is not sinful.\footnote{Ibid.}

In light of the evidence mentioned above, the majority of the jurists from the Ḥanafi, Shāfi’ī, and Ḥanbalī school of jurisprudence conclude that wa’d is not compulsory (wājib) on the promisor. If the promisor breaks his wa’d, he is not sinful. However, it is recommended (mustaḥabb) to fulfil wa’d as a number of verses in the Qur’an commend those who fulfil their promises.

\section*{B. Wa’d is always Obligatory (Wājib) on the Promisor}

A number of notable classical Islamic scholars hold that wa’d is always obligatory on the promisor. Ibn Shubrumah stated that wa’d is always compulsory on the promisor and he should be forced to fulfil his promise.\footnote{Ibn Ḥazm, Al-Muḥallā, 8:28.} Ibn Ḥajar Al-‘Asqalānī mentioned that ‘Umar bin ‘Abd Al-‘Azīz, Ḥasan Al-Baṣrī, Sa‘īd bin ‘Amr bin al-Ashwa’, Samurah bin Jundūb (RA) and Ishāq bin Ibrāhīm view that wa’d is compulsory.\footnote{Al-‘Asqalānī, Fath al-Bārī’, 5:290.}

Ibn Al-‘Arabī stated that the most accurate opinion to me is that it is compulsory to fulfil the wa’d in all circumstances except where there is a valid excuse (’udhr).\footnote{Ibn ‘Arabī, Aḥkām al-Qur’ān, 4:243.} Al-Jaṣṣāṣ says that anyone who obliges himself to perform a religious act or a contract then

\begin{flushright}
\footnotesize
\begin{itemize}
\item \footnote{Ibn Ḥazm, Al-Muḥallā, 8:29-30.}
\item \footnote{Ibid.}
\item \footnote{Ibn Ḥazm, Al-Muḥallā, 8:28.}
\item Al-‘Asqalānī, Fath al-Bārī’, 5:290.
\item Ibn ‘Arabī, Aḥkām al-Qur’ān, 4:243.
\end{itemize}
\end{flushright}
it is compulsory for him to fulfil it. If he does not fulfil his promise then he will be included among those whom Allāh (SWT) criticised in the Qur’ān.\footnote{Al-Jaṣṣāṣ, Abkām al-Qur’ān, 442.}

In his commentary on al-Furūq, Ibn al-Shāṭṭ resolved that most of the evidences found in the sources of the Sharī‘ah speaks out against breach of wa‘d. Based on what is obvious in the Sharī‘ah, there is sin if the wa‘d is broken except when it is difficult to fulfil.\footnote{Ibn al-Shāṭṭ, Idrār al-Shurūq ‘alā Anwa‘ Al-Furūq, printed with Shihāb Al-Dīn Abī Al-‘Abbās Aḥmad bin Idrīs Al-Qarāfī, Al-Furūq, ed. ‘Umar Ḥasan Al-Qiyyām (Beirut: Resalah Publishers, 2003), 4:43.}

Al-Ghazālī concluded that when someone understands the binding nature of wa‘d then he must fulfil it except when there is a valid excuse (‘udhr). At the time of making the promise, if the promisor determines that he will not fulfil the promise then it is absolutely a hypocrisy (nīfāq).\footnote{Al-Ghazālī, Iḥyā’ ʿUlūm al-Dīn, 9:1580.}

The contemporary scholar, Al-Qāḍāwī, agreed that wa‘d is compulsory on the promisor, but what makes this opinion even more credible is that he said Qur’ānic texts and the Prophet’s Sunnah demonstrated that wa‘d is binding from a religious point of view. Furthermore, he argues that classical scholars who opine that wa‘d is compulsory do not differentiate between what is legally or religiously binding. It is apparent here that whatever is considered compulsory from a religious point of view must also be legally binding.\footnote{Al-Qāḍāwī, “Al-wafā’ bi al-wa‘d”, 631-634.} This group of scholars provide a number of Qur’ānic verses and prophetic narrations to strengthen their position.

1. The following verse indicates that a promise is compulsory:

\textit{Yūhā Allāhīn qa‘īdān himma‘a lim tafālūna ma lā tafālūna, kāmī ṣamulā Allāh ‘lā tafālūna ma lā tafālūn.}

Al-Ṣāf 61: 2-3.

Translation: O you who believe! Why do you say that which you do not do? Most hateful it is with Allāh that you say that which you do not do.

Al-Qurṭūbī pointed out that the interrogative sentence is used in the above verse to criticise the person who says by himself to perform a good deed but he does not do it.\(^{181}\) Al-Jaṣṣāṣ reiterated that this verse is an evidence that whosoever binds himself to perform any religious action or any contract then it is obligatory for him to fulfil it. If he does not fulfil it then he is among those who say something but do not perform it. Allāh (SWT) criticised this type of person.\(^{182}\) Al-Qaraḍī argued that based on this verse, when a promise is broken then it becomes a lie which is prohibited.\(^{183}\)

(2) The prophet (SAWS) mentions that breaking the *wa’d* is one of the characters of a hypocrite (*munāfiq*). He says:

آية المنافق ثلاث إذا حدث كذب وإذا وعد أخلف وإذا أؤمن خان

Translation: Sign of a pretentious person are three things; when he talks he lies; when he promises he breaks it; and when he is given a trust he betrays it.\(^{184}\)

In this *ḥadīth*, breaking the *wa’d* is criticised as one of the characters of a hypocrite. This denotes that breaking the *wa’d* should be prohibited.\(^{185}\)

(3) Another *ḥadīth* showed that Abū Bakr (RA) fulfilled the *wa’d* of the prophet Muḥammad (SAWS) even after his death. Jābir bin ‘Abdullāh (RA) narrates:

قال النبي - صلى الله عليه وسلم - «لو قد جاء مال البحرين، قد أعطيتك هكذا وهكذا وهكذا». فلم يجئ مال البحرين حتى قبض النبي - صلى الله عليه وسلم - فلما جاء مال البحرين أمر أبو بكر فنادى من كان له عند النبي - صلى الله عليه وسلم - عدة أو دين فلبيتاه، فقلت إن النبي - صلى الله عليه وسلم - قال لي كذا وكذا، فحثني لي حثية تعددت بما إذا هي خمسمئة، وقال خذ مثلهها.

Translation: Once the Prophet said (to me), “If the money of Bahrain comes, I will give you a certain amount of it.” The Prophet had breathed his last before the money of Bahrain arrived. When the money of Bahrain reached, Abū Bakr announced, “ Whoever was promised by the Prophet should come to us.” I went to Abū Bakr and said, “The Prophet promised me so and so.” Abū Bakr gave me a handful of coins and when


\(183\) Al-Qaraḍī, *Al-Furāq*, 4:42.


\(185\) Al-Qaraḍī, *Al-Furāq*, 4:42.
I counted them, they were five-hundred in number. Abū Bakr then said, “Take twice the amount you have taken (besides).”

This hadith shows the importance of keeping wa‘d. Even though the prophet (SAWS) passed away, Abū Bakar (RA) fulfilled the prophet (SAWS)’s wa‘d. The wa‘d was fulfilled as paying the debt of a deceased. This incidence indicates that wa‘d is compulsory (wājib). Moreover, the lessons of this hadith generally apply to all types of wa‘d as there is no indication here that the wa‘d of the prophet (SAWS) is different from others.

(4) In another prophetic narration, it is clearly stated that wa‘d is compulsory on every Muslim. Zayd bin Aslam narrates that the prophet (SAWS) said:

وأي المؤمن حق واجب
Translation: The promise of a believer is a binding obligation.

(5) Ibn ‘Abbās (RA) narrated that the prophet (SAWS) said:

لا تمار أخاك ولا تمزحه ولا تعده موعدة فتخلفه
Translation: Do not quarrel with your brother; do not make fun of him; and do not make a promise with him and then break it.

This is another evidence that prohibits breaking the wa‘d. This hadith prohibits three things which are: (1) quarrelling with others, (2) making fun of others and (3) breaking the wa‘d with others. It is agreed to all fuqahā’ that making fun of others and quarrelling is prohibited in the Sharī‘ah. Hence, breaking the wa‘d should be prohibited as well.

Based on the above-mentioned evidence, this group of scholars conclude that wa‘d is binding on the promisor both religiously and legally. It is prohibited to break the

---


wa’d unless there is a valid excuse (‘udhr). An individual who breaks the wa’d is sinful to Allāh. In addition, he should be forced to fulfil his wa’d in the court of law.

C. Wa’d is Binding but with Conditions

The third group of scholars opine that wa’d is binding but subject to conditions. Their opinions can be divided into two types. Firstly, the wa’d is binding when it is connected to a cause (sabab) even though the promisee did not enter into any action based on the promise. Secondly, the wa’d is compulsory when it is connected to a cause (sabab) and the promisee has entered into an action based on this promise.

(1) Ibn Nujaym, Aṣbagh and others put forward that wa’d is binding if it is attached to a cause although the promisee did not enter into any action based on the promise. Ibn Nujaym mentions that wa’d is not binding except when it is attached to a cause. 189 Therefore, the Ḥanafī scholars constructed the maxim that “the promise which is attached to a cause is compulsory”. 190

Ibn Rushd asked Aṣbagh about his opinion on the fulfilment of wa’d attached to a cause, according to the following example. When a man approached another individual and asked for a loan of 100 dīnār, saying that he wanted to get married, he was promised a loan of the said amount. After the marriage, the promisor revoked his promise. Aṣbagh remarked that, in this case, the promisor is required to provide the loan based on the cause attached to it. Moreover, the legal authorities might force the promisor in a court of law to make good on his promise. Then Ibn Rushd asked Aṣbagh what his opinion would be if the promisor told the man that the loan would not be forthcoming before his marriage.

190 Majallah Al-‘Aḥkām Al-‘Adliyyah, 26, (Code 84).
Aşbagh replied that the promisor could not revoke wa’d in either situation because a promise linked to a cause [of marriage] becomes binding.\(^{191}\)

(2) The famous opinion in the Mālikī School of jurisprudence is that wa’d is compulsory when it is attached to a cause (sabab) and the promisee has entered into an action based on the promise. Imām Mālik, Saḥnūn, Al-Lakhmī and others are the proponent of this viewpoint. Imām Mālik provides the following example. When someone has bought a slave after being told “If you buy a slave then I will help you with 1,000 dirham”, then the promisor is obliged to fulfil his promise.\(^{192}\)

Ibn Rushd mentioned that he asked Saḥnūn about the obligation of a promise, then he replied that if a person said to another, “repair your house and I will give you loan” or “go for pilgrimage and I will give you loan” or “get married” and other similar things, then the promise becomes compulsory when the promisee embarks on the action relying on the promise.\(^{193}\)

In a similar manner, Al-Lakhmī resolved that if a person says to another, “purchase the particular portion of the land and I will repay you”, the promise is compulsory for the promisor after the promisee has purchased the land. This is because the promise has led the promisee to purchase the land.\(^{194}\) This opinion resembles that of Ibn Rushd.\(^{195}\)

Moreover, most contemporary scholars outweigh this opinion. The Islamic Fiqh Academy concludes that:

According to Sharī’ah, a promise [made unilaterally by the purchase orderer or the seller], is morally binding on the promisor, unless there is a valid excuse. It is however legally binding if made conditional upon the fulfilment of an obligation, and the promisee has already incurred expenses on the basis of such a promise. The binding nature of the

\(^{191}\) Abū Al-Walīd Muḥammad bin Ahmad bin Muḥammad bin Ahmad bin Rushd, Al-Bayān wa al-Tahṣīl wa al-Sharḥ wa al-Tawjīh wa al-Ta’līf fi Masā’il al-Muṣṭakhrajah, ed. Muḥammad Ḥajjī, (Bayrūt: Dār al-Gharb al-Islāmi, 1988), 15:343.


\(^{193}\) Ibn Rushd, Al-Bayān wa al-Tahṣīl, 15:343.


\(^{195}\) Ibid, 1:254.
promise means that it should be either fulfilled or compensation is paid for damages caused due to unjustifiable non-fulfilment.\textsuperscript{196}

The scholars concluded that, while \textit{wa’d} is always religiously binding, it only binds a promisor legally when a cause is involved or when the promisee has already taken action based on what was promised.

This group of scholars argue that the evidences from the Qur’an and Sunnah related to the fulfilment of \textit{wa’d} are contradictory to each other. Therefore, it is necessary to harmonise among the different types of evidences. Al-Qarāfī stated that to resolve the problem of conflicting evidence which does/ does not necessitate the fulfilment of \textit{wa’d}, one must consider whether the promisee has undertaken any activities based on the promise made to him; if so, \textit{wa’d} becomes compulsory.\textsuperscript{197}

Moreover, some contemporary scholars add that this opinion is based on the following \textit{hadith}\textsuperscript{198}:

\[لا ضرر ولا ضرار\]

Translation: There should be neither harming nor reciprocating harm.\textsuperscript{199}

If the promisee has undertaken an action based on what the promisor has already pledged but thereafter revoked, then harm may come to the promisee. The \textit{hadith} denotes that harm should be eliminated, thus making such \textit{wa’d} compulsory for the promisor.

D. Discussion of the Arguments

The \textit{hadith} provided by the first group of scholars narrated by Ṣafwān bin Sulaym that says that the prophet (SAWS) allowed broke promises may not be appropriate here. In

\textsuperscript{196} Islamic Fiqh Academy, 5th session, resolution no 40-41, 1988, Islamic Fiqh Academy website, retrieved on 04 June 2015, \url{http://www.fiqhacademy.org.sa/qrarat/5-2.htm}

\textsuperscript{197} Al-Qarāfī, \textit{Al-Furūq}, 4:49.


\textsuperscript{199} Narrated by Mālik, Kitāb al-aqidah, Bāb al-qādā’ fī al-mīrfaq, Ḥadīth no. 2758. See Al-Asbāḥī, \textit{Al-Muwattā’}, 4: 1078.
the ḥadīth, the person did not mention a promise that cannot be fulfilled, rather he asked about making promises to his wife. It means that in the future he may/may not fulfil the promise. In the first part of the ḥadīth, the person asked about telling a lie to his wife to make her happy but the prophet (SAWS) did not allow it. While asking about making promises to his wife, the prophet (SAWS) allowed him because there is no problem to make a promise. He may fulfil his promise in the future. He will not be sinful in that case. On the other hand, he may not fulfil his promise due to difficulties that may appear later. In that case, he is not sinful either. Therefore, we can resolve that the ḥadīth does not allow breaking waʿd.

Ibn Al-Shāṭṭ, in his commentary on al-Furūq, argued that the man in the ḥadīth did not ask about waʿd that cannot be fulfilled but he asked about waʿd which might or might not be fulfilled. The prophet (SAWS) did not consider making waʿd a wrongdoing because if it is fulfilled, then the promisor has not sinned. Moreover, if the promisor does not fulfil the waʿd due to any constrains, he has not sinned too.200

The second ḥadīth says that someone who cannot fulfil a waʿd that was made with a sincere heart is not considered sinful. It can be argued here that anyone whose waʿd is sincere will naturally do his utmost to carry out his promise and will probably only fail to do so when restricted by hardship (mashaqqah). This ḥadīth does not permit breach of waʿd when the promisor has made no true effort to succeed. Ibn Al-Shāṭṭ pointed out that, in this ḥadīth, the promisor is not a sinner if his failure is due to an excuse that have stood in his way.201

In relation to the third evidence provided by Muhallab, it can be argued that although everyone agrees that a promisee is not like a creditor to the promisor but it cannot make the waʿd only recommended (mustahabb). Al-ʿAmūrī argued that there are some conditions to carry out waʿd which are for example, to be alive, solvent etc. Therefore, if

200 Al-Qarāfī, Al-Furūq, 4:44.
201 Al-Qarāfī, Al-Furūq, 4:44.
the promisor dies, the *wa’d* is nullified. In this way, the promisee is not like a creditor to the promisor. However, if the promisor is alive then he is obliged to carry out his *wa’d*.202

The fourth evidence that compares *wa’d* to a type of donation (*hibah*) where the subject matter is pending to transfer to the beneficiary, may not be suitable here. Ibn Rushd commented that this analogy is not relevant here as there are some disagreements amongst the scholars whether transferring the subject matter is a condition in a donation (*hibah*) contract. Imām Abū Ḥanīfah and Shāfi‘ī viewed that it is a condition to conclude the contract. Imām Aḥmad and Abū Thawr believe that it is not a condition.203 However, it might be the majority view that a donation (*hibah*) contract is not compulsory on the donor until the subject matter is transferred to the beneficiary. Nevertheless, scholars do not unanimously agree on this opinion.

Ibn Ḥazm’s argument which is based on the necessity of saying ‘*If Allāh wills*’ (*In Shā’ Allāh*) at the time of making *wa’d*, should not be accepted. This is because even though the person says ‘*If Allāh wills*’, he is still required to make his utmost effort to carry out his *wa’d*. If he cannot fulfil his *wa’d* after that due to a hardship, then he is not sinful. Furthermore, Ibn Kathīr mentioned the phrase “*In Shā’ Allāh*” is mentioned in the verse to guide the messenger of Allāh (SAWS) and therefore does not mean that it suggests an obligation.204

Moreover, Ibn Ḥazm’s comparison of *nudhur* to *wa’d* is perhaps not suitable in this case. This is because *nudhur* is different from *wa’d*. Usually, *nudur* is made to become close to Allāh (SWT) and there is atonement (*kaffārah*) for breaking the *nudhur*. On the other hand, *wa’d* might be related to religious matters and other worldly matters.

---

202 Al-Amūrī, “*Al-wa’d al-mulzim fī Ṣiyagh al-tamwil*”, 34.
Some scholars view that it is compulsory to fulfil the *nudhur* except when there is hardship in fulfilling the *nudhur*.\(^{205}\)

In relation to the evidences provided by the second group of scholars who hold that *wa’d* is compulsory, it is argued that the Qur’anic verse that criticises a group of people who say to carry out something but do not do so is relevant to a group of companions of the prophet (SAWS). They said that if we would know the best deed to be closer to Allāh, we would do it. However, when the verse on fighting in the path of Allāh (*jihād*) revealed, they did not fulfil what they said.\(^{206}\) Therefore, it can be concluded that the verse criticises those who do not carry out their *wa’d* related to the religious actions, such as fighting in the path of Allāh (*jihād*), voluntary donation (*ṣadaqah*) etc.\(^{207}\)

However, this argument can be opposed by saying that the verse addressed all the believers in general. According to Islamic jurists (*fuqahā’*), the general meaning of the verse overturns the particular restricted meaning related to the event at the time of revelation.\(^{208}\) Therefore, we can resolve that the verse is a strong evidence to support the bindingness of *wa’d*.

Subsequently, the *ḥadīth* mentions that one of the characters of the hypocrite (*munāfiq*) is to break the *wa’d*. One may argue that the *ḥadīth* actually means the sincerity of the person at the time of making the *wa’d*. It denotes that it is the character of a hypocrite person when he makes *wa’d*, in his heart he intends to break it. Therefore, if a person is sincere at the time of giving the *wa’d* and he does not fulfil it afterword then he is not sinful.\(^{209}\)

This argument can be reverted by saying that if the person is sincere at the time of making the *wa’d* then he should attempt to fulfil the *wa’d* unless there is an excuse. It

\(^{205}\) Ibn Al-‘Arabī, *Akhām al-Qur‘ān*, 4:242
is irrational that a person is sincere while making the *wa’d* but after that he does not fulfil it without any reason. Therefore, we can conclude that the *hadīth* is another proof to establish the bindingness of *wa’d*.

However, the *hadīth* narrated by Jābir bin ‘Abdullāh does not make *wa’d* compulsory because, in this case, Abū Bakr knew that the prophet (SAWS), noble in character, would not have failed to keep his *wa’d* had he lived. Moreover, Abū Bakr paid what was promised not from his own property but rather from the public treasury (*bayt al-māl*).²¹⁰

The last two *hadīths* (*hadīths* narrated by Zayd bin Aslam and Ibn ‘Abbās) provided by this group of scholars have a weak chain of narration. Therefore, they are neither considered authentic nor can they provide acceptable evidence to support any position, as mentioned by Ibn Ḥazm.²¹¹ Nevertheless, one might argue that these weak narrations, taken together, can still provide supporting evidence. It is generally accepted among the scholars that weak *hadīths* may be taken into consideration as supporting tools to the authentic *hadīths* to strengthen a position.

With respect to evidence provided by the Mālikīs, one cannot adequately argue that harmonising contradictory evidence from the *Sharī‘ah* makes *wa’d* binding when it is attached to a cause because it might be possible to resolve conflicting evidence by taking a different stance, such as *wa’d* is compulsory except when there is a valid excuse. Moreover, Ibn Ḥazm comments that the opinion of the Mālikīs is not founded on evidence from the Qur’an and Sunnah.²¹²

Although some contemporary scholars relate the *ḥadīth* about eliminating harm to the Mālikī position, it is important to recall that the basic principle of the *Sharī‘ah* requires that justice be afforded to each individual whatever the situation. Allāh says:

---
Verily! Allāh commands that you should render back the trusts to those to whom they are due; and that when you judge between men, you judge with justice.

Therefore, harm must be eliminated for both the promisor and promisee. Compelling a promisor to fulfil his *wa’d* might place insurmountable difficulties on his shoulders and cause him harm. Therefore, *wa’d* should not be binding in the face of hardship.

Another important point to mention here is that some studies differentiate between religious and legal bindingness.²¹³ Such studies, however, do not mention any classical scholar’s statement that declares *wa’d* is only religiously binding. Al-Qarḍawī argues that what is religiously binding should be legally binding as well. This is because all the classical scholars attempted to implement what is religiously binding as legally binding.²¹⁴ Hence, we can resolve here that there is no difference between religiously and legally binding.

E. The Most Substantial Opinion

Based on the above discussion, the researcher finds that the most substantial opinion is that *wa’d* is binding on the promisor except when there is a legitimate excuse (*’udhr*). This opinion has been chosen as most significant because evidence which corroborates that *wa’d* is compulsory is more conclusive than other evidence. For example, the verse that criticises people who break their *wa’d* strongly advises people to honour the *wa’d* they make, just as a prophetic narration reminds that breach of *wa’d* is a sign of a hypocrite. Ibn Ḥajar Al-‘Asqalānī remarks in agreement that the above-mentioned

---
²¹⁴ Al-Qardāwī, “Al-wafā’ bi al-wa’d”, 631-634.
Qur’anic verse and *hadīth* offer strong evidence as to the obligatory nature of *wa’d* and that a breach of *wa’d* should be looked upon as more than simply a disliked (*makrūh*) act.\(^{215}\)

Moreover, evidence that attests to whether *wa’d* is binding can generally be applied to all types of *wa’d*, regardless of whether a condition is attached. Texts that make *wa’d* compulsory and prohibit its retraction are general and unconditional and do not differentiate between *wa’d*. Therefore, we can resolve that all types of *wa’d* are compulsory on the promisor.

However, the universal principle of the *Sharī’ah* is that Allāh does not put difficulty on human being. Allāh says:

\[
\text{يُرِيدُ ٱللَّهُ بِكُمُ ٱلۡيُسَۡۡ وَلََّ يُرِيدُ بِكُمُ ٱلۡعُسَۡۡ}
\]

Al-Baqarah 2: 185

Translation: Allāh intends for you ease, and He does not want to make things difficult for you. (He wants that you).

Therefore, we can resolve that when it proves impossible for the promisor to carry out his *wa’d*, then he will not be considered a sinner. Al-Ghazālī cited that when the bindingness of *wa’d* is comprehended, then it must be fulfilled except when there is a valid excuse.\(^{216}\) Hence, we can conclude that if there is a valid excuse then the promisor is not sinful for breaking his *wa’d*.

Finally, the most comprehensive opinion might be that *wa’d* is binding, except when there is a valid excuse. When *wa’d* is mandatory on the promisor, then he will fulfil his *wa’d*. When someone fulfils his *wa’d* as he is obliged, then ultimately he is demonstrating nobility of character. Furthermore, the *Mālikīs* argue that *wa’d* is obligatory on the promisor if attached to a cause, and that the promisee will experience difficulties or harm if the promisor revokes his *wa’d*. Therefore, when it is implemented that the *wa’d* is binding on the promisor, then the promisee will be shielded from harm.

---


2.3.2. The Status of Muwā’adah in the Sharī’ah

The classical and contemporary scholars have provided different viewpoints on the Sharī’ah status of muwā’adah. The contemporary scholars’ debate on this issue is more extensive and complicated as their views are based on the practice of muwā’adah in Islamic banking operations. In this section, the researcher first discusses the classical scholars’ opinions on muwā’adah, followed by his reflection on the contemporary scholars’ debate on this matter from which he attempts to ascertain the most substantial opinion on the Sharī’ah status of muwā’adah.

2.3.2.1. Classical Scholars’ Views

The researcher has reviewed the classical sources of Islamic fiqh in different schools (madhāhib) to identify the opinions of classical scholars. A few scholars have discussed the Sharī’ah ruling for muwā’adah. Most of the classical scholars have discussed muwā’adah which is non-binding on the promisor. However, Qāḍī Khān, a Ḥanafī jurist talked about the Sharī’ah status of muwā’adah which is binding on the promisor. The details of the opinions of the classical scholars are provided below.

Among the classical scholars, some Mālikīs discussed muwā’adah mostly relating to bay’ al-ṣarf (money exchange). Al-Wansharišī mentioned two different opinions of Imām Mālik on the status of muwā’adah. He stated that muwā’adah to perform something in the future is not allowed in the Sharī’ah if that action is unlawful at the present. Therefore, Imām Mālik prohibited the use of muwā’adah to execute a marriage contract during the ‘iddah period, for the sale of food before taking possession, for the sale of something during the call for Friday prayer, and for sale of something that someone does not own. In the case of muwā’adah for bay’ al-ṣarf (currency exchange), Imām Mālik’s first view is that it is prohibited. However, he has another well-known opinion that

---

217 ‘Iddah is a waiting period for a woman after the death of her spouse, or after a divorce. According to Islamic Sharī’ah, a woman cannot marry another man during this period.
muwā’adah for bay’ al-ṣarf is disliked (makrūh) based on the grounds that if it is performed at present then it is allowed. Pertaining to this opinion, Al-Wansharīṣī doubts that it may become a forward contract. 218

While Imām Mālik’s opinion is contradictory on muwā’adah, Al-‘Adawī, another Mālikī scholar, clarified that there is no harm in muwā’adah for ṣarf. If someone says to another, “Let us go to the market with your silver money; if it [price] is good, then we will exchange it,” and the other party accepts then it becomes muwā’adah. The bay’ al-ṣarf (exchange contract) takes place after that. 219

Similar to the Mālikī scholars, Imām Shāfi’i allows muwā’adah for bay’ al-ṣarf. He mentioned in his prominent book al-Umm that if two individuals mutually promise to each other to execute bay’ al-ṣarf in a future date then there is no harm for them. 220

Finally, Qādī Khān, a Ḥanafi scholar viewed that muwā’adah to execute a contract in the future is allowed in the Sharī’a and muwā’adah can be binding on the promisors in case of necessity. He stated, sometimes it becomes necessary to be involved with muwā’adah and can be binding on the parties due to the necessity of the people. 222 Unlike the previous scholars, Qādī Khān clearly pointed out the status of binding muwā’adah in the Sharī’ah, which is allowed in his opinion only in cases of necessity.

---


221 Ibn Ḥazm, Al-Muḥallā, 8:513.

Based on the above opinions, we can resolve that the classical scholars agreed that use of *muwā‘adah* is permitted to conclude a contract in the future and in *bay‘ al-ṣarf*. However, they do not mention whether this *muwā‘adah* is binding on the promisor. In this regard, we can look into their opinions on the obligation of *wa‘d*. Imām Shāfi‘ī, Ibn Ḥazm, and the Mālikī scholars did not allow the *wa‘d* to be generally binding. Similarly, *muwā‘adah* should not be binding. The Mālikīs allowed *wa‘d* to be binding if the *wa‘d* is attached to a cause (*sabab*) and the promisee has entered into an action based on the promise.\(^{223}\) Hence, a similar ruling should be applied in *muwā‘adah* as well. However, contrary to the previous scholars, Qādī Khān clearly provides his statement that *muwā‘adah* can be binding in cases of necessity.

### 2.3.2.2. Contemporary Scholars’ Views

Contemporary scholars unanimously agree with the classical scholars that *muwā‘adah* to conclude a contract in the future is allowed in the *Sharī‘ah* if it is non-binding on both or either one of the promisors. However, the contemporary scholars have different opinions on the status of *muwā‘adah*, which is binding on both promisors. In this regard, scholars’ opinions can be divided into three categories. The majority of the scholars opine that if *muwā‘adah* is binding on both parties then it becomes a forward contract (*bay‘ al-ajal bi al-ajal*). Hence, it should not be allowed to conclude a contract in the future. The second group of scholars view that a binding *muwā‘adah* to conclude a contract in the future should be allowed in case of necessity. Finally, the third view is that even though *muwā‘adah* is binding on the promisors, differences remain between a binding *muwā‘adah* and a forward contract. Therefore, it should be allowed in general.\(^{224}\) The details of the opinions and arguments of the scholars are provided in the following sections.

---


A. Binding *Muwā‘adah* is Non-Permissible

Nazih Kamal Hammad, a prominent contemporary Islamic jurist disallowed a binding *muwā‘adah* to conclude a contract in the future. Moreover, Bank Negara Malaysia, the Central Bank of Malaysia and the Islamic Fiqh Academy of the Organisation of Islamic Conference (OIC) issued a resolution that a binding *muwā‘adah* is not permissible to execute a contract in the future.

Nazih Kamal Hammad argued that none of the classical scholars mentioned that *muwā‘adah* is binding on either or both parties. If both of the promisors in *muwā‘adah* agree that the promised contract that will be executed in the future is binding upon them from the time of *muwā‘adah*, then the *muwā‘adah* itself turns into a contract. Therefore, all the *Sharī‘ah* rulings pertaining to a contract will come into effect. This is based on the Islamic legal maxim (*qā'idah fiqhiyyah*) that reads, “In contracts, effect is given to intention and meaning and not words and forms.”\(^{225}\) This means that when a *muwā‘adah* becomes binding on the promisors, it then turns into a contract in substance even though it appears as *muwā‘adah*.

Agreeing with Nazih Kamal Hammad, Marjan Muhammad et al. further clarified that the economic effect of a binding *muwā‘adah* and a contract are the same. There are similarities between them in terms of documentation, as in both of the cases only one documentation is used. Furthermore, two parties are involved in both concepts. The nature, obligation, subject matter, and price are the same in a binding *muwā‘adah* and in a contract.\(^{226}\)

Subscribing to the above opinion, Bank Negara Malaysia (BNM) prohibits binding *muwā‘adah* to execute *bay‘ al-ṣarf* in a future date. It argues that binding mutual promise (*muwā‘adah mulzimah*) is prohibited for a foreign exchange transaction (*bay‘ al-****n**\(^{225}\) Hammad, “Al-wafā’ bi al-wa‘d fī al-fiqh al-Islāmi”, 831.

\(^{226}\) Marjan Muhammad et al., “The bindingness and enforceability of a unilateral promise (wa‘d)”, 27.
ṣarf), because it comprises selling debt for debt, which is termed by the classical scholars as ‘bay‘ al-kāli’ bi al-kāli’.

Finally, the Islamic Fiqh Academy prohibits binding muwā‘adah to execute a contract in the future arguing that a binding muwā‘adah is itself a contract. The resolution of the academy reads:

Bilateral promises are permitted in murābaḥah sales on the condition that either or both parties have the option to annul the sale; however, if there is no such option, such a promise is not allowed because a binding bilateral promise in a murābaḥah sale bears a similarity to the sale transaction itself. In that case the condition is laid down that the seller must be the owner of the commodity being sold in order that no dispute arises [based upon the prohibition of the Prophet (peace be upon him) of people selling what they do not possess].

However, in a later resolution, the Islamic Fiqh Academy has become flexible with muwā‘adah in cases where there is a public need. It has allowed muwā‘adah to be binding in export and import transactions due to necessity. The details of that resolution are discussed in the subsequent section.

B. Binding Muwā‘adah is Allowed in Case of Necessity

This group of scholars hold the middle position among the three group of scholars. The well-known contemporary Islamic jurist Al-Qādī Muḥammad Taqī Uthmānī, ‘Abd al-Sattār Abū Ghuddah and others view that in cases of necessity, it is allowed to make a binding muwā‘adah to conclude a contract in the future. Referring to classical Ḥanafī jurists, Al-Qādī Muḥammad Taqī ‘Uthmānī argues that muwā‘adah can be binding in the Ḥanafī School of jurisprudence if it is a necessity for the people. As an example, in the context of export/import business (‘aqd al-tawrīd), it is necessary to make the muwā‘adah binding on both parties.

---

227 Bank Negara Malaysia, Shariah Resolutions in Islamic Finance, 139.
228 Islamic Fiqh Academy, 5th session, resolution no 40-41, 1988, Islamic Fiqh Academy website, retrieved on 04 June 2015, [http://www.fiqhacademy.org.sa/qrarat/5-2.htm](http://www.fiqhacademy.org.sa/qrarat/5-2.htm)
In response to the argument that a binding *muwāʿadah* is a forward contract, Taqī Uthmānī elucidates that there are some differences between a binding *muwāʿadah* and a forward contract. In a forward contract, the ownership (*milkiyyah*) of the subject matter (*mabī‘*) is transferred to the purchaser immediately after the contract is concluded. At the same time, the purchase price (*thaman*) of the asset becomes a debt on the purchaser. On the contrary, there is no transfer of ownership between the promisors in a binding *muwāʿadah*. Consequently, there is no debtor and creditor relationship between the promisors.\(^{229}\)

Furthermore, the obligation of *muwāʿadah* is not the same as that of a contract. If one of the promisors cannot fulfil the promise due to a valid excuse (*ʿudhr*), then he will not be obliged to conclude the contract in the future date. When the promisor does not fulfil his promise without any valid excuse then the judge may ask him to fulfil the promise. If he does not fulfil his promise at that time, then he is obliged to pay the amount of loss incurred to the promisee due to the breach of the promise. Only the actual loss incurred to the promisee will be paid but not the total contract price. In contrast, in a forward contract, the purchaser is obliged to pay the total contract price to the seller.\(^{230}\)

Referring to the classical Ḥanafī and Mālikī scholars, Abū Ghuddah argued that when a *waʿd* or *muwāʿadah* is attached to a cause (*sabab*) then it is binding on the promisor. However, if the promise is free from any indication that makes it compulsory or otherwise, then we should refer to whether it is a necessity. If there is necessity to make the *waʿd* or *muwāʿadah* binding on the promisor then it should be binding.\(^{231}\)

‘Abbās Aḥmad Muḥammad al-Bāz holds a different view. He opines that *muwāʿadah* can be binding when breaching the promise harms the promisee. To support

---


\(^{230}\) Uthmānī, “ʿUqūd al-tawrīd wa al-munāqṣah”, 675.

his position, he argues that all scholars have agreed that a non-binding *muwā‘adah* is dissimilar to a forward contract. If the non-binding *muwā‘adah* would be similar to a forward contract then the classical scholars would not have allowed it for *bay‘ al-ṣarf*. However, the non-binding *muwā‘adah* can be binding on both parties in cases wherein breaking the promise will cause harm to the promisee. In that case, the *muwā‘adah* can be binding to remove the harm. If the *muwā‘adah* becomes binding just to remove the harm from the promisee then it does not change the *muwā‘adah* to a forward contract. In such a way, a *muwā‘adah* is different from a forward contract and the real contract takes place at a future date after the *muwā‘adah* is made.\textsuperscript{232}

The resolution from the Islamic Fiqh Academy strengthens this position. While the academy prohibited binding *muwā‘adah* totally in its fifth session, it revised the resolution in its’ 17\textsuperscript{th} session to the effect that *muwā‘adah* can be binding on both parties in cases of necessity. The resolution reads:

\begin{quote}
There may be cases where it is impossible to conclude a sale agreement due to the commodity not being in the possession of the seller while a general need exists to oblige both parties to implement a contract in the future, either by legislation or some other means, such as the recognised practices of international commerce. An example of the latter would be opening a letter of credit in order to import goods. In such cases, it is permissible to oblige both parties to fulfil their promises, either through governmental legislation or by the agreement of both parties to a clause in the agreement that will make the promises binding on each of the two parties.\textsuperscript{233}
\end{quote}

The Islamic Fiqh Academy clarifies that this binding *muwā‘adah* is not a forward contract. This is because the ownership of the commodity is not transferred to the buyer, and the purchase price does not become a debt on the purchaser. The actual sale contract will be executed on the agreed upon date through offer (*i‘jāb*) and acceptance (*qabūl*) between the buyer and the seller. In case the promisor does not fulfil his promise without


\textsuperscript{233} Islamic Fiqh Academy, 17\textsuperscript{th} Session, resolution no. 157, 2006, Islamic Fiqh Academy website, retrieved on 4 Jun 2015, [http://www.fiqhacademy.org.sa/qrarat/17-6.htm](http://www.fiqhacademy.org.sa/qrarat/17-6.htm)
any valid excuse, he is obligated to either fulfil the promise or compensate the actual loss incurred to the promisee due to the breach.234

C. Binding Muwāʿadal is Permissible in General

The third view is that it is generally permissible to practice a binding muwāʿadal to conclude a contract in a future date. While the second group of scholars allow binding muwāʿadal only in cases of necessity, this group of scholars allow it in general irrespective of whether it is a necessity. We have found only one contemporary study that advocates this view. In investigating the application of waʿd in ṣūkūk mushārakah, Khairun Najmi et al. argued that binding muwāʿadal is different from a forward contract in many ways. Firstly, a contract is concluded through the connection of offer (iẖāb) and acceptance (qabūl) that implicates some legal effects on the subject matter. However, a binding muwaʿādah is a promise made by two persons reciprocally that does not have any legal implications on the subject matter e.g. transfer of the ownership. Muwāʿadal means to promise mutually that a contract will be executed in the future.235

Secondly, a future statement (ṣīghah) is used in muwāʿadal e.g. “I will purchase your house in the next month.” The scholars unanimously agree that this type of expression is not a contract but a promise. This is because the contract requires either past or present expression (ṣīghah), e.g. the buyer says, “I bought your house” and the seller replies, “I agreed”.236 Finally, unlike a contract, the possession of the commodity (mabī) is not changed by muwāʿadal. If the promisor to purchase a commodity fails to pay the purchase price then it is not considered a debt on his liability. He is only required to pay for the loss incurred to the promisee. Conversely, in a sale contract, if the purchaser fails to pay the purchase price then the total purchase price becomes a debt on his

---

236 Ibid.
Based on these differences between binding muwāʿadah and forward contract, this group of scholars conclude that it is permissible to make a binding muwāʿadah to execute a sale contract in the future without any restriction.

D. Discussion of the Arguments and the Weightiest Opinion

The first group of scholars view that a binding muwāʿadah is not allowed to execute a sale contract in the future. This is because a binding muwāʿadah in substance resembles a forward contract. The second group of scholars opine that a binding muwāʿadah can be allowed to execute a contract in the future in cases of necessity. Even though muwāʿadah is binding on the promisors, it is different from a forward contract because there is no transfer of ownership and no handing over of purchase price. The obligation of muwāʿadah is not similar to a contract as the breach of the promise requires the promisor to pay only the amount of loss incurred to the promisee. The third group of scholars provides similar arguments to differentiate between binding muwāʿadah and forward contract. However, they differ from the second group in that they generally allow a binding muwāʿadah for a sale contract in the future irrespective of whether it is a necessity.

First, the researcher would like to assess the first group’s argument that a binding muwāʿadah is similar to a forward contract in substance. They argue that the economic benefit is the same for both of the terms. Both of the concepts involve two parties, the same subject matter, price, and a similar obligation. The Islamic Fiqh Academy adds that when none of the promisors has the option to cancel the contract then it is similar to muwāʿadah. However, the researcher would like to oppose these arguments because there are some substantial differences between these two terms.

---

Firstly, the researcher advocates the argument mentioned by the second group of scholars that there is no transfer of ownership of the subject matter in *muwāʿadah* and no negotiating the purchase price. In case of a sale contract (‘aqd al-bay’), immediately after the offer (ijāb) and acceptance (qabūl), the purchaser has obtained the ownership of the subject matter and the seller has obtained the ownership of the purchase price. The scholars are unanimous on this matter. *Al-Mawsū‘ah al-Fiqhiyyah*, the encyclopaedia of Islamic jurisprudence remarks in this regard:

A sale [contract] for example is executed with offer (ijāb) and acceptance (qabūl), which entails its effects: transfer the ownership of the sold asset to the purchaser, and transfer of ownership of the price to the seller regardless of whether they have taken possession on these items or not. This is based on the unanimity of the scholars. 238

However, none claim that a binding *muwāʿadah* to execute a sale contract in the future results in the similar effect on the subject matter. It is agreed that a binding *muwāʿadah* does not have any immediate effect on the subject matter.

Secondly, the researcher weighs the point that there is no offer (ijāb) and acceptance (qabūl) in *muwāʿadah*. While these are the fundamental pillars (arkān) for a sale contract, usually, a future expression (e.g. I promise to purchase/sale in the future) is used in *muwāʿadah*. The Ḥanafī scholars resolve that a future expression cannot be considered as offer (ijāb) and acceptance (qabūl). The majority of the scholars view that a future expression can be considered for offer (ijāb) and acceptance (qabūl) but with the condition that the contracting parties (‘āqidān) have intended to execute the contract on the spot. In *muwāʿadah*, the intention of the parties is not to execute the contract on the spot but in a future date. Therefore, this type of expression cannot be considered as offer (ijāb) and acceptance (qabūl). 239

---

Finally, the researcher does not agree with the claim that the obligation for binding *muwāʿadah* and the sale contract are the same. Some prominent Muslim scholars namely al-Ghazālī and Ibn ‘Arbī opined that a promise is not obligatory on the promisor when he cannot fulfil it due to a valid excuse.\(^\text{240}\) Therefore, the promisor has no liability to the promisee if he breaches the promise due to a valid excuse, e.g. bankruptcy, death etc. However, when the promisor breaches the promise without any valid excuse, then he is obliged to compensate the promisee only the amount of loss incurred, not the total contract price. This differs significantly from a forward sale contract where the full purchase price has become a debt on the purchaser. The table below summarises the above discussion on the differences between a binding *muwāʿadah* and forward sale contract.

Table 2.1 The Difference between Binding *Muwāʿadah* and Forward Contract

<table>
<thead>
<tr>
<th>No.</th>
<th>Subject</th>
<th>Forward Sale Contract (<em>ʿaqd bayʿ al-ajal bi al-ajal</em>)</th>
<th>Binding Muwāʿadah (<em>muwāʿadah mulzimah</em>)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Expression (Ṣīghah)</td>
<td>Past or Present Expression</td>
<td>Future Expression</td>
</tr>
<tr>
<td>2</td>
<td>Ownership of the Subject Matter (<em>Milkiyyat al-Mabīʿ</em>)</td>
<td>Ownership Transferred</td>
<td>Ownership Not Transferred</td>
</tr>
<tr>
<td>3</td>
<td>Price (<em>Thaman</em>)</td>
<td>Price is Due on the purchaser</td>
<td>Price is Not Due on the Purchaser</td>
</tr>
<tr>
<td>4</td>
<td>Bindingness/Obligation (<em>Ilzāmiyyah</em>)</td>
<td>The Purchaser is Required to make the Full Purchase Price without any excuse</td>
<td>The Promisor is Required to Either Execute the Contract or Pay for the damages incurred to the Promisee unless he (promisor) has any valid excuse</td>
</tr>
</tbody>
</table>

While evaluating the second group of scholars’ position, the researcher agrees with their arguments that a binding *muwā‘adah* is different from a forward sale contract. However, the researcher disagrees with their position to allow binding *muwā‘adah* only in cases of necessity. It can be argued that if the binding *muwā‘adah* is practically

different from a contract then there is no basis to make the *muwāʿadah* binding upon both parties only in cases of necessity. An action is usually allowed in cases of necessity when it is normally prohibited by the *Sharīʿah*. Necessity makes the prohibited action permitted until the necessity is eliminated. When the necessity is removed, then that action becomes prohibited once again. However, when an action is generally permissible in the *Sharīʿah* from the beginning then we should not allow it only in necessary circumstances. Thus, the researcher would like to weigh the view that a binding *muwāʿadah* should be generally allowed to execute a sale contract in the future.

However, the researcher agrees with the resolution of the Islamic Fiqh Academy that when it is apparent that the binding *muwāʿadah* is used as an artificial arrangement to get around the restriction of *ribā* (interest), then it should be prohibited based on the legal concept of *sadd al-dharāʾiʿ*.

Considering this factor along with the discussion above, the researcher offers the following conditions that should be followed in practicing binding *muwāʿadah*.

i. *Muwāʿadah* should not be used as a trick to legalise *ribā*. Whether the *muwāʿadah* is a trick or not, should be decided based on what is apparent in the product structure and documentation. Furthermore, the regulatory body may decide on this.

ii. Similarly, *muwāʿadah* should not be combined with other contracts in such a way that it violates the objective (*muqtaḍā*) of that contract, or the noble objective of the *Sharīʿah* (*maqāṣid al-Sharīʿah*).

iii. The promisor should not be forced to fulfil his promise if he has any valid excuse, e.g. bankruptcy, duress, insanity etc.

iv. In case the promisor breaches the promise without any valid excuse, he is required to compensate the promisee only the amount of loss incurred.

---

v. In order to conclude the promised contract in a future date, all the mandatory conditions prescribed by the Sharī‘ah to execute a contract i.e. existence of the subject matter, legal competence (ahlīyyah) of the contracting parties etc. should be fulfilled during the time of concluding the contract.

2.3.3. The Status of Wa‘dān in the Sharī‘ah

As earlier concluded that a binding muwā‘adah is permissible, it is more reasonable that wa‘dān should be permitted in the Sharī‘ah. While muwā‘adah comprising mutual promise is allowed in the Sharī‘ah, it is more likely that wa‘dān which includes two independent promises should be compliant with the Sharī‘ah principles. Affirming this, Khairun Najmi et al. concluded that whether wa‘dān is practically different from muwā‘adah or not, it should be allowed in the Sharī‘ah. This is because both muwā‘adah and wa‘dān are just promises and different from a contract (‘aqd).²⁴²

What is important to discuss in this section is that there is a group of scholars who do not allow binding muwā‘adah but allow binding wa‘dān. They argue that wa‘dān is genuinely different from muwā‘adah. On the contrary, some scholars do not allow wa‘dān at all claiming that wa‘dān does not make any real difference from muwā‘adah. Finally, a few scholars conclude that even though wa‘dān is generally permissible in the Sharī‘ah, its practice in some Islamic financial products should be prohibited based on the principle of sadd al-dharā‘i’. In the subsequent paragraphs, the researcher discusses the views and arguments of these different groups of scholars.

2.3.3.1. Wa‘dān is Different from Muwā‘adah

While disallowing muwā‘adah, Marjan Muhammad et al. upholds the permissibility of wa‘dān in the Sharī‘ah. They argue that wa‘dān is a permissible legal trick (ḥīlah

shar‘iyyah) to avoid the non-permissible muwā‘adah. Wa‘dān is different from muwā‘adah because it consists of two different promises related to two different conditions, and between these two promises only one of them will be fulfilled in the future. Therefore, they ascertain that wa‘dān is permissible in the Sharī‘ah. 243

Similarly, Aznan Hasan clarifies his position that when wa‘dān includes two promises which are truly related to two distinct conditions, and they result in two different effects, then it is permissible. However, if those conditions are practically the same and have similar effects then it is not acceptable in the Sharī‘ah. In other words, if the two different conditions in wa‘dān are fictitious, then it is not allowed. 244

2.3.3.2. Wa‘dān is Similar to Muwā‘adah

Referring to the practice of wa‘dān in some Islamic banking products, a number of scholars conclude that wa‘dān does not make any difference from muwā‘adah. As the practice of wa‘dān is similar to muwā‘adah then it should not be allowed in the Sharī‘ah. Muhammad Ayub argued that some banks are using wa‘dān in Islamic swaps, hedge funds, and short selling. However, the promises used in those products are reciprocal but not unilateral. This type of promise should not be allowed because no party has the option to cancel the promise. If either one of the parties wishes not to execute the contract (‘aqd) which is promised, he/she is required to pay compensation. 245

Furthermore, while analysing the practice of wa‘dān in an Islamic derivative instrument i.e. FX Forward, Asyraf Wajdi Dusuki remarked that the practice of wa‘dān looks similar to muwā‘adah. Nevertheless, a number of Sharī‘ah scholars have allowed wa‘dān with the understanding that it is different from muwā‘adah. Therefore, a number

244 Aznan Hasan, “Pengertian al-wa‘ad, al-wa‘dan dan al-muwā‘adah”.
245 Ayub, “Use of W‘ad and Tawarruq for Swaps”.

88
of financial institutions have been using *wa‘dān* in their products despite some disparagements.\(^{246}\)

### 2.3.3.3. *Wa‘dān* is a Prohibited Legal Trick (*ḥīlah*)

Yusuf Talal DeLorenzo opined that *wa‘dān* is permissible in the *Sharī‘ah*. However, in relation to its practice in total return swap, he remarked that *wa‘dān* should be prohibited based on the concept of *sadd al-dharā‘i’* which denotes that if a legitimate means is employed to achieve an illegitimate end then it is unlawful.\(^{247}\) Similarly, after analysing the characteristics of total return swap, Chady C. Atallah and Wafica A. Ghoul concluded that the usage of *wa‘dān* is a prohibited legal trick (*ḥīlah muḥarramah*) to circumvent the prohibition of gambling in Islamic finance and legalising the prohibited forward sale contract.\(^{248}\)

### 2.3.3.4. Discussion of the Opinions

Having mentioned the opinions of the scholars, it can be summed up that some scholars believe that *wa‘dān* is different from *muwā‘adah* because *wa‘dān* includes two separate promises connected to two different conditions. However, another group of scholars disallow *wa‘dān* arguing that it does not differ from *muwā‘adah*. Finally, some scholars remark that even though *wa‘dān* is initially permissible in the *Sharī‘ah*, it should be prohibited in some Islamic financial products i.e. total return swap based on *sadd al-dharā‘i’*.

Reflecting on the above opinions, we observe that all scholars agree that *wa‘dān* including two different promises that are connected to two different real conditions is

---


\(^{248}\) Atallah and Ghoul, “The Wa‘d-Based Total Return Swap”, 80.
allowed. This means that if the two promises are really separated, then it is permitted by all scholars. However, the debate is whether *wa’dān* comprising two promises are really separated from each other. When the promises under the *wa’dān* do not have any genuine separation between each other, then some scholars consider it questionable. They argue that *wa’dān* in such a case has become analogous to *muwā’adah*. In order to resolve this issue, we reiterate our argument that being similar with *muwā’adah* does not affect the permissibility of *wa’dān*. This is because *muwā’adah* is simply a mutual promise that does not have any effect on the subject matter of the contract.

Furthermore, reflecting on the opinions of the scholars who prohibit *wa’dān*, we notice that their prohibition of *wa’dān* is based on their case studies on specific Islamic financial products e.g. total return swap. However, it is unfair to generally prohibit the *wa’dān* concept due to its ill-use in certain Islamic financial products. Rather, it is more appropriate to set some parameters to prevent the misuse of *wa’dān*. At this juncture, it should be agreed that whenever the usage of *wa’dān* leads to a non-legitimate end then it should be prohibited. Affirming this, an Islamic legal maxim reads, “Matters are determined by intention”.

Therefore, we can conclude that *wa’dān* should be allowed in the *Sharī‘ah* with the condition that it is not used as a means to reach to a non-permissible goal.

### 2.4. Conclusion

This chapter provided an in-depth discussion on the concept of *wa’d*. It concludes that *wa’d* is a declaration to perform something good to other in the future which is different from *‘aqd* as there is no offer (*ijāb*) and acceptance (*qabūl*) in *wa’d* and no transfer of ownership. *Wa’d* is binding on the promisor except where there is a valid excuse (*‘udhr*). *Muwā’adah* and *wa’dān* are two concepts derived from *wa’d*. While the first one denotes

---

mutual promise then the later one signifies two separate promise. Scholars disagree whether \textit{wa’dān} is any different to \textit{muwā’adah}. However, irrespective of whether \textit{muwā’adah} and \textit{wa’dān} are different from each other or not, both can be used as binding on both of the promisors but with the condition that they are not used as a trick (\textit{ḥīlah}) to reach a non-legitimate end.
CHAPTER 3: THE APPLICATION OF \textit{WA\textacute{D}D} IN MALAYSIAN ISLAMIC BANKS

3.1. Introduction

This chapter discusses the usage of \textit{wa\textacute{d}} in Malaysian Islamic banking products. Based on the scope of this research, the researcher discusses the practice of \textit{wa\textacute{d}} in three Malaysian Islamic banks which are:

(1) Bank Islam Malaysia Berhad (BIMB)
(2) Maybank Islamic Berhad (MIB)
(3) Kuwait Finance House (Malaysia) Berhad (KFHMB).

However, it is necessary to know the overview of Islamic banking system in Malaysia before discussing the \textit{wa\textacute{d}}-based products. This will help in understanding the practice of \textit{wa\textacute{d}} in Malaysian Islamic banks. In addition, it is important to know the legal status of \textit{wa\textacute{d}} in Malaysia as it will clarify the applicability of \textit{wa\textacute{d}} in the country’s legal system.

This chapter provides first an overview of Islamic banking in Malaysia that includes the history, governance, rules, and regulations. It then discusses the legal status of \textit{wa\textacute{d}} with reference to the Contract Act 1950, the Central Bank Act 2009, and BNM’s guidelines. Finally, it illustrates the mechanism of practicing \textit{wa\textacute{d}} in Islamic banking products that comprises retail financing products, trade financing products, and treasury products.

3.2. An Overview of Islamic Banking in Malaysia

Malaysian Islamic banking is one of the most developed Islamic banking in the world. Starting from 1963, Islamic finance in Malaysia has a very stable development to become the third largest Islamic finance industry in the world. It is the biggest \textit{sukūk} issuer in the
world. Malaysia has a dual financial system where both Islamic and conventional finance function equally. Both of the systems present a full variety of products and services and compete each other in different sectors of the financial system.\textsuperscript{250} It is the most comprehensive Islamic financial system in the world that comprises a very advanced Islamic banking segment, \textit{takāful}, and Islamic capital and money market.\textsuperscript{251} In the subsequent sections, the history and current situation of Islamic banking in Malaysia, overview of Islamic banking products, regulation and governance of Islamic banks, and efficiency of the Islamic banks in Malaysia will be discussed.

\subsection*{3.2.1. Historical Development of Islamic Banking in Malaysia}

In Malaysia, Islamic banks have evolved in stages. The history of Islamic banking in Malaysia can be divided into four stages. The following discussion covers every stage of development for Malaysian Islamic banking.

\subsubsection*{3.2.1.1. The Initial Stage of Development}

Islamic banking in Malaysia started in 1963 with the establishment of “Tabung Haji” or, \textit{Hajj} Fund Corporation. The existence of “Tabung Haji” was the consequence of the working paper entitled “Plan to Improve the Economy of Prospective Pilgrims” which was presented by the Royal Professor Ungku Aziz in 1959. It pointed out the necessity to develop a mechanism for Muslims that encourage them to save money to perform their \textit{Hajj}. In the past, the Malaysian Muslim used to adopt different traditional ways to save their money. Some would sell their properties and livestock to gather enough funds to go for \textit{Hajj}. These practices would have negative financial and social impacts on them and

\begin{itemize}
    \item Olga Krasicka and Sylwia Nowak, “What’s in it for Me? A Primer on Differences between Islamic and Conventional Finance in Malaysia” (International Monetary Fund (IMF) working paper, paper no. 12/151, Washington, D.C., 2012), 3;
    \item Angelo M. Venardos, \textit{Islamic Banking and Finance in South-East Asia: Its Development and Future} (Singapore: World Scientific, 2005), 155;
    \item Beng Soon Chong and Ming-Hua Liu, “Islamic banking: Interest-free or interest-based?,” \textit{Pacific-Basin Finance Journal} 17, (2009), 130.
\end{itemize}
their families. Moreover, these practices were a threat for the rural economic structure as well as for national economic growth. Above all, there was an immense need for the Muslims to save their money in a financial institution where the investment was fully *Shari‘ah* compliant.252

Considering the above facts, Tabung Haji was established to fulfil the following objectives:

(a) To facilitate Muslims to save gradually for the purpose of performing the *Hajj* and other useful expenses.

(b) To facilitate Muslims with their saving to take part into the investment in industry, commerce, plantation and real estates based on the *Shari‘ah* principles.

(c) To provide protection and safeguard the welfare of the pilgrims during the *Hajj* through providing different types of facilities and services.253

Since its inception, Tabung Haji has been actively involved with providing saving services to the Muslims, making investments from the accumulated funds, and overseeing the investment. Moreover, it provided services for the pilgrims in Malaysia and in the holy land of Makkah. As of 2009, Tabung Haji had more than 5 million depositors and a total deposit of more than USD 9 billion.254

### 3.2.1.2. The Second Stage of Development

After the successful establishment of Tabung Haji, it took another 20 years to introduce a full-fledged Islamic bank in Malaysia. Several factors contributed to the establishment of an Islamic bank in Malaysia. Firstly, there was a strong need from the public and there was an urge from the Islamic political groups. Moreover, Islamic banking was part of the

---


strategic Islamization process of the government at that time when the government intended to engage the Muslims in the economic development of the country. Based on this, the government organised a meeting in 1980 to discuss important matters related to introducing Islamic banking in Malaysia. In the following year, the government established a national steering committee to study different aspects to establish an Islamic bank in Malaysia. Based on the recommendations of the steering committee, the government enacted Islamic banking Act 1983. Subsequently, Bank Islam Malaysia, the first Islamic commercial bank in Malaysia was established in 1983 with the starting capital of 80 million ringgit.255

After the establishment of Bank Islam Malaysia Berhad, it was the sole Islamic bank in Malaysia for a decade. Within this time, it proved that Islamic banking was a feasible financial institution in the Malaysian financial system. Moreover, it spread rapidly throughout the country by having 80 branches and 1,200 employees after a decade of its establishment. On 17 January 1992, Bank Islam Malaysia Berhad was listed on the main board of the Kuala Lumpur stock exchange.256 Additionally, to make the Islamic banking operation more efficient, the government established Islamic money market in 1994.257

3.2.1.3. The Third Stage

The progress of Bank Islam Malaysia Berhad inspired others to join Islamic banking. Moreover, the government of Malaysia realised that a large number of players were necessary for the survival of the Islamic finance industry. Therefore, the government allowed the conventional banks to open “interest free banking scheme” which has become

256 Ibid.
known as Islamic windows. Because of this initiative, the number of banks offering Islamic banking services grew rapidly. At the end of 1998, 48 conventional financial institutions offered Islamic banking services with 2,382 Islamic counters. After that, the second full-fledged Islamic bank namely “Bank Muamalat Malaysia Berhad” was established in 1999. Bank Muamalat Malaysia Berhad was established because of the merger between Bank Bumiputra Malaysia Berhad and Bank of Commerce (Malaysia) Berhad.258

3.2.1.4. The Fourth Stage of Development

Nakagawa mentioned that the Asian currency crisis of 1997 was a notable factor that contributed to the development of Islamic banking in Malaysia. After the crisis, the government planned to develop a more robust financial industry. In 2001, BNM came up with “Financial Sector Master Plan” that consisted of a number of policies to develop the industry. It was among the policies to set target for Islamic banking to achieve 20% share in the total banking industry by the year 2010. To achieve this target, BNM set individual targets for every year.259

As a process to expand the industry, BNM allowed three foreign Islamic banks to operate their business in Malaysia in 2004. The three foreign banks are namely Al-Rajhi Banking and Investment Corporation (Malaysia) Berhad, Kuwait Finance House (Malaysia) Berhad, and Asian Finance Bank Berhad. Moreover, in 2005 BNM allowed domestic conventional banks to get a full-fledged Islamic banking license. Consequently, a few renowned conventional banks launched full-fledged Islamic banking.260 In 2006,

260 Ibid.
the government initiated a set of tax exemptions and incentives for the Islamic finance industry.  

3.2.2. Development of Takāful and the Islamic Capital Market

Together with the development of Islamic banking institutions, Islamic insurance and the Islamic capital market also grew. Islamic insurance, known as takāful in Malaysia was introduced in 1985 to meet the needs of the people. In 1990, Shell MDS Sdn. Bhd. introduced the first Islamic bond in the country. Subsequently, the first full-fledged Islamic stock broking company namely BIMB Securities Sdn. Bhd. was established in 1994. In 1996, the Malaysian security commission established a Sharī‘ah advisory council to advise them on Sharī‘ah related matters. In the following year, the Sharī‘ah advisory council published the list of Sharī‘ah approved securities among the listed securities in Kuala Lumpur stock exchange. Finally, the foremost development of Islamic capital market was done when Islamic equity index namely “KLSE Shariah Index” was initiated in 1999.

3.2.3. The Recent Growth of Islamic Banking

In 2011, total Islamic banking assets was 21.6% of the total banking asset in Malaysia that crossed the government target to achieve 20% market share through its financial sector master plan. From 2008 to 2011, the growth rate of Islamic banking was 23%. On January 2013, the total deposit of Islamic banking was more than MYR 311.384 billion. At the same time, the total asset was more than MYR 386.682 billion while capital

---

261 Krasicka and Nowak, “What’s in it for Me?”, 5.
263 Krasicka and Nowak, “What’s in It for Me?”, 4.
and reserve was MYR 26.963 billion. Simultaneously, the total financing facilities provided by the Islamic banks was more than MYR 238.909 billion.265

There were 16 Islamic banking institutions in Malaysia licensed under BNM until 2013. Among these banks, 10 are locally owned and the rest six have foreign owners. The locally owned banks are:266

i. Affin Islamic Bank Berhad
ii. Alliance Islamic Bank Berhad
iii. AmIslamic Bank Berhad
iv. Bank Islam Malaysia Berhad
v. Bank Muamalat Malaysia Berhad
vi. CIMB Islamic Bank Berhad
vii. Hong Leong Islamic Bank Berhad
viii. Maybank Islamic Berhad
ix. Public Islamic Bank Berhad
x. RHB Islamic Bank Berhad

The six foreign owned Islamic banks are:267

i. Al Rajhi Banking & Investment Corporation (Malaysia) Berhad
ii. Asian Finance Bank Berhad
iii. Standard Chartered Saadiq Berhad
iv. OCBC Al-Amin Bank Berhad
v. HSBC Amanah Malaysia Berhad
vi. Kuwait Finance House (Malaysia) Berhad

267 Ibid.
3.2.4. A Brief Synopsis of Islamic Banking Products

Malaysian Islamic banks offer various types of products to its customer to compete with their conventional counterparts. On the deposit side, Islamic banks in Malaysia usually offer (a) current account, (b) savings account, and (c) commodity murābaḥah account which are designed based on respectively wadā’ah yad al-ḍamānah, mudharabah, and tawarruq. Besides, there is a general/special investment account based on muḍārabah.268

On the financing side, Malaysian Islamic banks normally offer (a) cash line facility based on bay‘ al-‘īnah and bay‘ bithaman ājil/murābaḥah; (b) home financing based on bay‘ bithaman ājil/mushāarakah mutanāqisah/tawarruq; (c) car financing based on al-ijārah thumma al-bay‘/bay‘ bithaman ājil; and (d) personal financing based on bay‘ al-‘īnah/bay‘ bithaman ājil/murābaḥah.269

In addition, there are some fee-based products namely (a) accepted bills based on murābaḥah and bay‘ al-dayn, (b) bank guarantee based on kafālah, (c) letter of credit based on wakālah, murābaḥah, ijārah and bay‘ bithaman ājil. Moreover, Islamic debit, credit, and charge cards are provided to the customers using the Sharī‘ah concept of qard/bay‘ al-‘īnah/bay‘ bithaman ājil/ujrah. Finally, there are some treasury products which are structured based on bay‘ al-ṣarf, wa‘d, and murābaḥah.270

3.2.5. Regulation and Governance

Along with meeting the Sharī‘ah rulings, Islamic banking in Malaysia is required to follow the conventional regulatory framework that is practiced in all conventional banks. They are required to observe the guidelines related to capital adequacy, risk-based supervision, and improve financial disclosure standards and governance. International

---

269 Ibid.
270 Ibid.
prudential standards i.e. safeguarding depositors’ money through balancing the risk profile of bank portfolio with capital required to maintain for financing operations, Basel II and its three pillars of capital adequacy, supervisory review and market discipline etc. are completely imposed on Islamic banks.\textsuperscript{271}

Islamic banks in Malaysia initially followed the Banking & Financial Institutions Act, 1989 (BAFIA). This act covers all conventional and Islamic financial institutions in Malaysia. At the same time, there is a specific Act for Islamic banking institutions called the Islamic Banking Act (IBA) 1983. This Act provides the basic laws for the operation of Islamic banks. In case the IBA contradicts with BAFIA then the previous one prevails. On 30 June 2013, the government of Malaysia enacted Financial Services Act 2013 (FSA) and Islamic Financial Services Act 2013 (IFSA). FSA and IFSA combine the BAFIA and IBA 1983. IFSA includes a complete legal framework which is wholly compliant with the \textit{Sharî’ah} in terms of regulation and supervision from licensing to the end of an institution.\textsuperscript{272}

3.2.5.1. Bank Negara Malaysia (BNM)

Bank Negara Malaysia (BNM) is the central bank of Malaysia. It regulates and supervises the operation of both the Islamic and conventional banks. It was established in 1959 under the Central Bank of Malaysia Act 1958 (revised 1994). BNM dynamically takes part in promoting Islamic banking nationally and globally.\textsuperscript{273} It provides necessary guidelines for the operation of Islamic banks. In 2011, BNM has issued the \textit{Sharî’ah} governance

\textsuperscript{271} Mohamed Ariff and Saiful Azhar Rosly, “Islamic Banking in Malaysia,” 305.
framework (SGF) for Islamic financial institutions (IFIs) to develop the role of the board, Sharīʿah committee and management pertaining to the Sharīʿah issues, and to develop the primary sections involved with Sharīʿah compliance and research. This SGF describes the functions of Sharīʿah review, Sharīʿah audit, Sharīʿah risk management and Sharīʿah research.  

3.2.5.2. Sharīʿah Advisory Council (SAC)

The Sharīʿah advisory council (SAC) of BNM is the highest authority to determine Sharīʿah laws to resolve a Sharīʿah issue in Islamic banking business. It is established under section 51 of the Central Bank of Malaysia Act 2009. SAC is responsible to advise BNM as well as Islamic banks on any Sharīʿah issues pertaining to Islamic financial activities. Apart from SAC, every Islamic bank in Malaysia has its own Sharīʿah committee (SC). The SC determines the Sharīʿah rulings for any Islamic banking products and supervises the overall operation of the bank. It assists any related party e.g. legal counsel, auditor, on Sharīʿah matter upon request.  

3.2.6. Contemporary Infrastructure Development

In the recent past, the Malaysian government has provided strong support to develop Islamic finance. In this regard, different institutions and organisations were established to provide a strong infrastructure for the Islamic banking industry. To make Malaysia an international hub for Islamic finance, the government established the Malaysian Islamic Financial Centre (MIFC) which provides regular updates of Islamic finance in Malaysia. Moreover, Malaysia hosts the Islamic Financial Services Board (IFSB) and the

---

International Islamic Liquidity Management Centre (IILMC). For the development of human capital in Islamic finance, the International Centre for Education in Islamic Finance (INCEIF) has been established. INCEIF is a global university that is fully dedicated to offer only Islamic finance courses at the postgraduate level. The International Shari‘ah Research Academy for Islamic Finance (ISRA) and the Islamic Banking and Finance Institute Malaysia (IBFIM) have been founded to enhance research and training in Islamic finance.276

3.2.7. Islamic Banking Efficiency

Mokhtar et al. examined the efficiency of full-fledged Islamic banks, Islamic windows, and conventional banks in Malaysia from 1997 to 2003. The study found that the efficiency of the Islamic banking industry increased during the study period but the efficiency of conventional banking industry remained the same. Nevertheless, the efficiency of Islamic banking is lesser than conventional banking. The study discovered that the efficiency of full-fledged Islamic banks is higher than the Islamic windows. In addition, Islamic windows of foreign banks are more efficient than the Islamic windows of local banks.277

On the other hand, Mohamed Hisham Yahya et al. concluded that although Islamic banking in Malaysia is confined by the Islamic laws in their operations but they are capable of performing the equivalent to its conventional counterpart. There is no substantial disparity in the level of efficiency between Islamic and conventional banks.278

ElGindi et al. investigated the performance of eight banks in Malaysia that offer both Islamic and conventional banking services. The comparison is made on the

---

profitability, liquidity, and asset quality of the banks. This micro-level analysis revealed that Islamic financing modes may become equal or exceed the quantitative measures of performance while at the same time supporting social justice and economic stability. Therefore, it can be concluded that Islamic banking in Malaysia has either similar or better efficiency compared with its conventional counterpart.

3.3. The Legal Status of Wa‘d in the Civil Laws of Malaysia

Since Islamic financial cases fall under the jurisdiction of the civil court of Malaysia, it is necessary to understand the legal status of wa‘d in Malaysian law. This will assist in determining whether the Sharī‘ah concept of wa‘d is viable with the law of the county. This section analyses the Malaysian Contracts Act 1950 and discusses the initiatives taken by the law harmonisation committee and BNM to reduce the gap between Sharī‘ah law and civil law with reference to Islamic financial matters.

3.3.1. The Contracts Act 1950

In Malaysia, the Contracts Act 1950 defines the promise in section 2 (b) as:

When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise.\(^{280}\)

This means that a promise is made of proposal and acceptance. When one party gives his proposal and the other party accepts, it becomes a promise. Therefore, a proposal should be accepted by the promisee to become a promise.

A proposal is defined in section 2 (a) as:

When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal.\(^{281}\)


\(^{281}\) Ibid.
It appears that the concept of “proposal” in the Contracts Act resembles *waʿd* concept in the *Sharīʿah*. However, the Contracts Act requires “acceptance” of the “proposal” by the other party to become a promise.

In addition, section 2 (c) of the Contracts Act 1950 defines the promisor and the promisee as “the person making the proposal is called the “promisor” and the person accepting the proposal is called the “promisee”. Thus, it becomes clear that the party who offers to perform an act or to abstain from doing anything is in fact giving a *waʿd*.

According to the Contracts Act, a promise is binding when the promisee accepts the proposal of the promisor. When a promise becomes binding, the parties are obliged to perform according to their promise. If any one of the parties fails to honour his promise then it is considered a breach of the contract. Section 38 (1) of the Contracts Act mentions:

> The parties to a contract must either perform, or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act, or of any other law.

It can be understood here that a promise is binding on the promisor in the Contract Act 1950 whenever the promisee accepts the proposal of the promisor.

Moreover, when there is a breach in the promise, the innocent party should be compensated. Section 74 (1) of the act states:

> When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

The promisee can sue the promisor if the promisor does not fulfil his promise and receive compensation for the loss incurred.

---

Regarding the “acceptance” of the “proposal”, it can be done through performing an action, abstinence, or promising to act something, or to abstain from something. This can be termed “consideration”. Section 2 (d) of the act mentions:

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.285

This means that when there is a “consideration” from the promisee then he has actually accepted the proposal of the promisor. In relation to this, section 8 of the Act cites “Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.”286 Therefore, a promise is binding on the promisor when the promisee performs the conditions of the proposal or receives a consideration. Therefore, it is not always necessary for the promisee to use verbal expression to accept the promise.

Based on the discussion above, there is a gap between wa’d and the Contracts Act 1950. Firstly, the act does not explicitly mention wa’d. If we consider the “proposal” as wa’d, then there is a difference between them. In the Contracts Act, when the “proposal” is accepted by the promisee then it becomes a promise and enforceable in the court. On the other hand, in case of wa’d the acceptance by the promisee is not required. It appears that according to the Contracts Act, a promise is as good as a contract.

However, looking into the opinion of the Mālikī scholars on wa’d, it can be argued that there is somehow similarity between wa’d and the concept of promise in the Contracts Act. According to the Mālikī school of jurisprudence, wa’d is binding on the promisor if the wa’d is attached to a cause (sabab) and the promisee has started to perform an action relying upon that wa’d.287 In a similar manner, in the Contracts Act, a promise

286 Ibid.
can be binding on the promisor when the promisee has started an action or abstained from an action relying upon that promise.

Then again, there might be some difficulties in implementing the Sharī’ah principles for wa’d through the existing Contracts Act. This chapter provides the researcher’s generic comparison between wa’d and the Contracts Act. However, chapter six provides a detailed discussion on the challenges in practicing the Sharī’ah principles for wa’d through the existing Contract Act with reference to the experts’ opinions on this field.

### 3.3.2. The Law Harmonisation Committee’s Initiative

In 2010, BNM pronounced the establishment of the law harmonisation committee (LHC). The LHC is established to strengthen the legal system and infrastructure for the development of Islamic finance in Malaysia. This committee aims at building a favourable legal system that supports the development of Islamic finance industry. Moreover, its objective is to provide certainty and enforceability for Islamic financial contract in the Malaysian Laws. The committee endeavours to place Malaysia as a reference law for international Islamic financial transactions and settlement of disputes. Chaired by Abdul Hamid Mohamad, former Chief Justice of Malaysia, the committee consists of members from industry experts, Sharī’ah scholars, and legal experts.288

Considering the gap between the Sharī’ah concept of wa’d and the promise concept in the Contracts Act 1950, the LHC has included wa’d into their harmonisation initiatives. In 2013, the committee has included the wa’d among the issues that require further research. It stated that an assessment from the Sharī’ah perspective on the

---

enforceability and binding nature of *wa’d, muwā’adah* and *wa’dān* is needed prior to any substantive amendments is made to the Contracts Act 1950.\(^{289}\)

### 3.3.3. The Bank Negara Malaysia (BNM)’s Guideline

On December 2013, BNM published an exposure draft on the guidelines for the practice of *wa’d*. The exposure draft stated that it comprises the *Sharī‘ah* obligations and optional practices pertaining to *wa’d* to assist IFIs in developing Islamic financial services and products involving the element of *wa’d*. It seeks suggestions and comments from IFIs to strengthen this guideline on *wa’d*. Sometime later, this guideline will be applicable on the IFIs. This document is issued according the section 29 (1) of the Islamic Financial Services Act 2013 (IFSA) which gives BNM the authority to issue guidelines for Islamic financial contracts.\(^{290}\)

The exposure draft provides parameters for *wa’d* and its application. In section 8.1, it states that *wa’d* is not a contract and it is not an agreement either, rather it is an unilateral promise which is not usually binding. However, in section 8.2 it mentions that *wa’d* can be binding on the promisor if it fulfils some specific requirements. Unlike the contracts act 1950, the section 8.3 cites that *wa’d* will be binding upon the expression of the promisor but not by the acceptance of the promisee.\(^{291}\)

In relation to the bindingness of *wa’d*, the section 11.1 describes that a *wa’d* shall be binding on the promisor if it is attached to a specific reason or occasion and the promisee will undergo expenses by action or abstaining from action depending on that *wa’d*. When the promisor has breached the binding *wa’d*, then the promisee can ask for compensation for the actual loss mentioned in section 12.4 of the draft.\(^{292}\)

---


\(^{291}\) Ibid., 4.

In section 13.6, the exposure draft mentions that it is allowed to use *wa‘d* but not a binding *muwā‘adah* to conclude a ṣarf contract. However, it is not allowed to take fees for a *wa‘d* mentioned in section 11.2. Along with this, sections 13.7 and 13.8 affirm that it is allowed for the *muḍārib/mushārik* to make a *wa‘d* to purchase the underlying *muḍārabah/mushāraakah* venture upon maturity, suspension or in the case of default, with the condition that the price should be determined based on the market value but not the face value.293

3.3.4. The Central Bank of Malaysia Act 2009

The Central Bank of Malaysia Act 2009 has given the SAC highest authority to decide on any *Sharī‘ah* case. Section 56 of the act mentions that if any Islamic financial case arises to the court, the judge should either see the published rulings of SAC on that matter or refer to SAC for its ruling. Afterward, section 57 mentions that SAC’s ruling in relation to the said issue should be binding on the court and the financial institution.294 Even though the Contracts Act 1950 does not explicitly recognise *wa‘d*, it is possible to implement the *Sharī‘ah* ruling for *wa‘d* in Malaysian courts through the resolutions issued by SAC.

3.4. *Wa‘d*-Based Products in the Islamic Banks of Malaysia

This section discusses the *wa‘d*-based products in the three sampled Islamic banks in Malaysia MIB, KFHMB, and BIMB. All the three banks practice *wa‘d* as binding on the promisor. The usage of *wa‘d* in Islamic banking products has been divided into three categories which are (1) consumer banking products, (2) trade financing products, and (3) treasury products. The table below provides an overview of the *wa‘d*-based products in these three Malaysian banks.

---

Table 3.1 Overview of *Wa’d*-Based Products in Malaysian Islamic Banks

<table>
<thead>
<tr>
<th>No.</th>
<th>Name of the Product</th>
<th>Type of Product</th>
<th>The Practicing Bank</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>MIB</td>
</tr>
<tr>
<td>1</td>
<td><em>Mushārakah Mutanāqīsah</em> (MM) home and property financing</td>
<td>Consumer</td>
<td>√</td>
</tr>
<tr>
<td>2</td>
<td><em>Al-Ijārah Thumma Al-Bay‘</em> (AITAB) vehicle financing</td>
<td>Consumer</td>
<td>√</td>
</tr>
<tr>
<td>3</td>
<td><em>Murābāḥah</em> home financing</td>
<td>Consumer</td>
<td>×</td>
</tr>
<tr>
<td>4</td>
<td><em>Tawarruq/commodity Murābāḥah</em> home financing</td>
<td>Consumer</td>
<td>√</td>
</tr>
<tr>
<td>5</td>
<td><em>Murābāḥah</em> letter of credit</td>
<td>Trade Financing</td>
<td>√</td>
</tr>
<tr>
<td>6</td>
<td>Islamic FX forward</td>
<td>Treasury</td>
<td>√</td>
</tr>
<tr>
<td>7</td>
<td>Islamic Profit Rate Swap (IPRS)</td>
<td>Treasury</td>
<td>√</td>
</tr>
<tr>
<td>8</td>
<td>Islamic Cross Currency Swap (ICCS)</td>
<td>Treasury</td>
<td>√</td>
</tr>
<tr>
<td>9</td>
<td><em>Ijārah</em> Rental Swap (IRS)</td>
<td>Treasury</td>
<td>×</td>
</tr>
</tbody>
</table>

Source: Interview with the Bankers

Among the consumer banking products, MIB and KFHMB apply *wa’d* in MM home and property financing as well as AITAB vehicle financing. On the other hand, BIMB and MIB offer *tawarruq/commodity* *murābāḥah* home financing based on *wa’d*. Among the three banks, only KFHMB offers *wa’d*-based *murābāḥah* home financing. Concerning trade-financing products, all the three banks offer *murābāḥah* letter of credit based on *wa’d*. Finally, among the treasury products Islamic FX forward is common among the three banks. However, MIB and BIMB offers IPRS and ICCS while KFHMB uniquely offers IRS.

Among these three banks, MIB applies *wa’d* in the highest number of products. On the other hand, BIMB employs *wa’d* in the least number of products. BIMB has only one *wa’d*-based product in consumer banking products. Generally, *wa’d* is most frequently used in treasury products comparing with the consumer banking products. The feature of using *wa’d* differs from product to product. While some products involve plain
wa’d, others include more than one wa’d. The details on the practice of wa’d in each of these products is discussed in the following sections.

### 3.4.1. Consumer Banking Products

In consumer banking products, wa’d is used mostly in financing products. On the other hand, no wa’d element is found in the deposit products. There are four consumer banking products where wa’d is employed, namely (1) mushārakah mutanāqisah (MM) home and property financing, (2) al-ijara thumma al-bay’ (AITAB) vehicle financing, (3) murābahah home financing, and (4) tawarruq/commodity murābahah home financing. The following section illustrates the mechanism of using wa’d in these consumer financing products.

#### 3.4.1.1. Mushārakah Mutanāqisah (MM) Home and Property Financing

*Mushārakah mutanāqisah* is an Arabic term which means diminishing partnership. KFHMB defined it as:

> Diminishing *musyarakah* allows equity participation and sharing of profits in a pre-agreed ratio, and the losses to be borne by the partners according to capital contribution ratio. This provides a method through which the bank keeps on reducing its equity in the asset, ultimately transferring ownership of the asset to the partner.295

This means that the bank and the customer co-own a property. The customer then gradually purchases the bank’s share in the property. At the end of the contract, the customer becomes the sole owner of the property.

In practice, the customer usually provides a small portion of the capital, for example, 10%, and the bank provides a large portion of the capital, for example, 90%, to co-purchase the house from the developer. After that, the bank leases out its share of the property to the customer. The monthly instalment paid to the bank consists of a rental

---

payment and a capital repayment to the bank. The figure below describes the modus operandi of MM home and property financing.

---

**Figure 3.1** *Mushārah Mutanāqīṣah* Home and Property Financing

*Source: Interview with the Bankers*

**Operational Steps:**

1. Customer identifies the property and pays a deposit to developer and developer signs S&P agreement with the customer.
2. Customer approaches the bank for MM financing facility. Once approved, the customer makes MM co-ownership agreement with the bank and promises to gradually purchase the bank’s share of the property. The initial deposit paid by

---

296 Ezry Fahmy bin Eddy Yusof (Executive, Shariah Management Department, Maybank Islamic Berhad), interview with the researcher, 13 November 2013; Ahmad Suhaimi Yahya (Regional Head of Shariah, Kuwait Finance House (Malaysia) Berhad), interview with the researcher, 11 November 2013; Muhd Ramadhan Fitri bin Ellias (Vice President and Head of Shariah Management Department, Maybank Islamic Berhad), interview with the researcher, 13 November 2013; Kuwait Finance House (Malaysia) Berhad, *Product Guide*, 7.
the customer to the developer is considered as his contribution towards the MM agreement while the bank’s contribution is the remaining financing amount.

(3) Bank pays the remaining S&P price to the developer.

(4) After acquiring the property, bank leases out (ijārah) its respective portion of the property to the customer.

(5) Customer makes a monthly payment to the bank, which consists of the rental payment and the gradual purchase price of the bank’s equity.

(6) Co-ownership comes to an end upon full payment for the acquisition of the property by the customer. The bank transfers property to the customer.

There are several wa’d applied in the above structure of MM home and property financing. In the case of KFHMB, the first wa’d is from the customer to the bank. The customer promises to gradually purchase the bank’s share. The second wa’d is from the bank to the customer in case the customer wants to make an early settlement. The bank promises that it will sell its share to the customer whenever the customer wishes for an early settlement. This wa’d is there to protect the interests of the customer if the property price suddenly increases.297

KFHMB employs another wa’d which is given by the customer to the bank. This wa’d is to protect the interests of the bank in the event of default. The customer is required to promise that upon triggering the event of default, he will purchase the property from the bank. This is clearly stated in the purchase-undertaking document. This wa’d is made to allow the bank to recover its loss in the event of default. Because of this wa’d, when there is an event of default, the bank will ask the customer to purchase the bank’s portion of the property. If the customer does not purchase the property from the bank, the bank has the option to sell the property on the market to recover its loss. After the property is sold, the bank will recover the price of its share in the property. However, if the bank

297 Ahmad Suhaيمي Yahya, interview with the researcher, 11 November 2013.
incurs a loss after selling the property on the market, then the customer is required to pay the bank so that it can recover its loss.²⁹⁸

In the case of MIB, the second *wa’d* is not practiced. There are two *wa’d* in MIB where the promisor in both cases is the customer. Therefore, there is no doubt of *muwā’adah* in MIB’s practice of MM home and property financing.²⁹⁹ In the case of KFHMB, there are three *wa’d*. The customer gives two *wa’d* and one *wa’d* is given by the bank. However, these three *wa’d* are separate from each other and relate to different conditions. The first *wa’d* which is given by the customer is related to normal cases. The second *wa’d* which is given by the bank is related to a specific situation when the customer asks for an early settlement. Finally, the third *wa’d* is related to a situation when there is a default.³⁰⁰ Therefore, KFHMB’s practice of *wa’d* may fall under the concept of *wa’dān*.

The contemporary application of *wa’d* in MM home and property financing is different from the previous findings. Nor Adila Mohd Noor and Mohd Ashraf Aripin showed that in MM there is only one *wa’d* from the bank to sell its share to the customer.³⁰¹ On the other hand, Mohd Sollehudin Shuib et al. showed that there is only one *wa’d* from the customer to purchase the bank’s share in the property.³⁰² The reason for this difference in findings is that Islamic banking in Malaysia is continuously developing its product structures and features. Moreover, Nor Adila Mohd Noor and Mohd Ashraf Aripin did not provide enough information on the application of *wa’d* in MM financing. In addition, the study by Mohd Sollehudin Shuib et al. was not specifically

²⁹⁸ Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.
²⁹⁹ Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.
³⁰⁰ Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.
³⁰¹ Nor Adila Mohd Noor and Mohd Ashraf Aripin, “Mechanism of al-Wa’ad (Promise),” 86.
focused on *wa’d* in MM financing. Besides, different banks may apply *wa’d* in different ways. While some banks employ a number of *wa’d*, then others may use only one *wa’d*.

### 3.4.1.2. *Al-Ijārah Thumma Al-Bay‘* (AITAB) Vehicle Financing

*Al-Ijārah thumma al-bay‘* means lease ending with sale. According to MIB:

AITAB is a leasing contract (*ijārah*) followed by sale contract (*al-Bai‘*). Under the leasing contract, the customer leases the asset from the Bank at an agreed rental payment over a specific period. Upon expiry of the leasing period, the customer enters into a sale contract to purchase the asset from the Bank at an agreed price.³⁰³

There are two contracts in AITAB: lease and sale. These two contracts are distinct from each other. Upon the expiry of the lease period, the customer purchases the vehicle from the bank. Usually, either the bank or the customer will promise to sell or buy the vehicle at the end of the lease period. The figure below describes the steps in AITAB vehicle financing.

![Figure 3.2 Al-Ijārah Thumma Al-Bay‘ (AITAB) vehicle financing](source)

Source: Interview with the Bankers

---

Operational Steps:

1. The client approaches the bank and requests vehicle financing with identifying the vehicle and the vendor.

2. The bank purchases the vehicle to be leased and obtains ownership from the dealer.

3. The bank leases the vehicle to the client.

4. The client makes a periodic payment (lease instalment) as per the contract.

5. The bank transfers ownership to the client at the end of the leasing period through a sale contract (or upon settlement by the customer).

In the case of KFHMB, there are two separate \textit{wa’d} in the above product structure. One \textit{wa’d} is from the customer and the other one is from the bank. Firstly, in normal circumstances, the bank promises to the customer to sell the vehicle at the time of maturity. Secondly, there is another \textit{wa’d} by the customer in the event of default. It is called “purchase undertaking”. The customer undertakes to purchase the leased vehicle upon triggering the event of default. Both of the \textit{wa’d} are binding upon the related parties. The two \textit{wa’d} are related to two different situations here. The bank’s \textit{wa’d} is related to the time of maturity. Secondly, the customer’s \textit{wa’d} is related to the time of default. Therefore, it can be resolved that KFHMB practices \textit{wa’dān} in this product.

In the case of MIB, there are also two \textit{wa’d} but both are given by the customer in relation to two different situations. This \textit{wa’d} is also binding on the customer. Firstly, the customer undertakes to purchase the leased vehicle at the end of the leased period. Secondly, the customer undertakes to purchase the leased vehicle in the event of default. In the case of MIB, the bank does not give any \textit{wa’d} to the customer to sell the vehicle at

\footnotesize{304} Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.

\footnotesize{305} Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013.
the end of the leased period. This is because the bank normally has no interest to retain the vehicle.\textsuperscript{306}

Both in KFHMB and MIB, the second \textit{wa’d} is employed to recover the bank’s loss in the event of default. If the customer does not honour his \textit{wa’d} at the time of default, then he is required to pay for the loss incurred to the bank due to his breach of \textit{wa’d}. Due to this \textit{wa’d}, the bank is able to sue the customer to cover its loss.

In light of the above discussion, it can be said that there are more \textit{wa’d} developments and complications in this product than before. Previous studies show that there is only one \textit{wa’d} either from the customer or from the bank to sell or purchase the vehicle at the end of the lease period.\textsuperscript{307} However, currently, \textit{wa’dān} is used to mitigate the bank’s risk in the event of default and allow the bank to recover its loss at the time of default. This \textit{wa’dān} helps the bank to follow better risk management practice for the benefit of the bank and the customer.

\section{3.4.1.3. \textit{Murābaḥah} Home Financing}

\textit{Murābaḥah} home financing is a classical type of home financing. It is called “\textit{murābaḥah} to the purchase orderer”. Comparing with other types of home financing, \textit{murābaḥah} home financing is very straightforward. In Malaysia, only KFHMB offers the \textit{murābaḥah}-based home financing. \textit{Murābaḥah} is defined by KFHMB as:

A contract of sale based on cost plus where the acquisition cost and the seller’s profit margin are disclosed to the buyer at the time of the contract. The settlement of the price can be made on bullet or deferred payment terms.\textsuperscript{308}

The bank will purchase the property first from the vendor and will then sell it to the customer on a profit determined beforehand with the customer.

\textsuperscript{306} Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.
\textsuperscript{308} Kuwait Finance House (Malaysia) Berhad, \textit{Product Guide: Retail and Consumer Banking}, 5.
Disclosing the cost price of the property is an essential characteristic of murābahah financing. Usually, the customer gives wa’d to the bank that he will purchase the specific property from the bank at a determined profit rate after the bank has purchased it from the vendor. Another important factor in murābahah is that the bank must take ownership of the property before selling it to the customer. The figure below illustrates the modus operandi of murābahah home financing.

![Diagram of Murābahah Home Financing](image)

Figure 3.3 Murābahah Home Financing  
Source: Kuwait Finance House (Malaysia) Berhad

Operational Steps:³⁰⁹

(1) Customer approaches the bank for financing of the property whereby the customer promises to purchase the property and pays the security deposit (if required) to the bank.

Based on the customer’s promise, the bank will then purchase the property and pay the vendor at the cost price of the property (financing amount). At this point, the bank acquires the ownership right from the vendor.

The bank will sell the property to the customer at a higher marked-up price (selling price) comprising of the cost price and profit.

The customer pays the bank the selling price as agreed on either lump sum basis, instalment or bullet payment.

There is only one *wa’d in murābahah* home financing. Normally, the *wa’d* is from the customer. When the customer approaches the bank then the bank will approach the developer. Before the bank purchases the asset from the developer, it needs some comfort and the comfort is *wa’d*. The customer will sign “the undertaking to purchase” document which is binding on the customer. Moreover, the customer is required to pay a security deposit while requesting the bank to purchase the property. In case the customer does not honour his promise, the bank will use the security deposit to recover its loss. Such is the consequence of a binding *wa’d*.

In relation to the breach of *wa’d*, BNM rules that if the purchase orderer who promised to purchase the property declined the *murābahah* transaction after the bank had purchased the asset, he should be liable for the breach of *wa’d* and should compensate for the actual loss incurred by the bank for the disposal of the asset to another party. All Islamic banks in Malaysia follow this guideline to recover their loss in *murābahah* financing whenever it is due to the clients’ breach of *wa’d*.

In KFHMB, the feature of *wa’d in murābahah* is very simple and there is no *wa’dān* or *muwā’adah*. A similar practice of *wa’d in murābahah* is found in previous

---

310 Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013.
studies. However, Munirah Kasim’s theoretical study shows that *muwā‘adah* can be practiced in *murābaḥah* with the condition that it is not binding upon the promisors. In the case of *muwā‘adah*, the bank promises to the customer to purchase the property as specified by the customer and sell it to the customer at a cost plus a pre-agreed profit margin. Conversely, the customer promises to purchase the property from the bank at cost price with an agreed profit margin. This non-binding *muwā‘adah* might give the customer more comfort but is riskier for the bank at the end. This is because the non-binding *muwā‘adah* does not oblige the customer to compensate the bank should the customer breach his *wa‘d*.

MIB and BIMB do not offer this product. The reason behind this might be both banks have an alternative to *murābaḥah* home financing which is *tawarruq* home financing. *Tawarruq* home financing is initially based on *murābaḥah* but it is more complicated than *murābaḥah* home financing.

It is noteworthy to mention here that all Islamic banks in Malaysia are required to give rebates (*ibrā‘*) to the customers for early settlement. However, Islamic banks do not give any *wa‘d* to the clients for this. This mandatory rebate is imposed by BNM on each Islamic bank in Malaysia based on the principle of *maṣlaḥah*. Therefore, *wa‘d* is no longer used by the banks for this matter.

---

314 Munirah Kasim, “Al-*Wa‘d* (unilateral promise) and its application,” 70-71.
315 Mohd Nazri Chik (Assistant General Manager and Head of Shariah Division, Bank Islam Malaysia Berhad), interview with the researcher, 4 September 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.
316 Ibid.
317 Mohd Nazri Chik, interview with the researcher, 27 October 2014.
3.4.1.4. *Tawarruq*/Commodity *Murābahah* Home Financing

*Tawarruq/commodity murābahah* home financing is a newly developed product in BIMB and MIB. The fundamental underlying contract of commodity *murābahah* is the ordinary *murābahah* but it is more complicated. It is defined by BIMB as:

The purchase of a commodity (i.e. the subject matter of *tawarruq*) on a deferred payment basis by way of either *Bai‘ Musāwamah* or *Murābahah*. The commodity is then sold for cash to a party other than the original seller.\(^{318}\)

In a commodity *murābahah* transaction, there are normally four parties involved which are: (1) the client, (2) the bank, (3) commodity broker one and (4) commodity broker two. At first, the bank purchases a commodity from broker one and then sells it to the customer with deferred price. The bank then becomes an agent of the customer and sells that commodity to broker two with cash price. As a consequence of this transaction, the customer gets cash money and becomes indebted to the bank. Normally, the customer repays his loan to the bank on regular instalments.

Operational Steps *Tawarruq*/Commodity *Murābahah* Home Financing:\(^{319}\)

1. The customer signs S&P agreement with developer to purchase a house valued at MYR100k, and makes down payment of MYR10k.

2. The customer requests for home financing and promises to purchase a commodity from the bank for MYR90k + MYR70k (Profit). The customer and bank sign “commodity *murābahah* facility agreement”.

3. Pursuant to the purchase request and undertaking executed by the customer, the bank purchases a commodity on a spot basis from commodity broker one.

4. The bank sells the commodity to the customer for RM90k + RM70k (profit) = RM 160k.

---


(5) The customer appoints bank as agent to sell the commodity to commodity broker two on a spot basis.

(6) The bank as agent of the customer releases financing amount of RM90k to developer.

(7) The customer pays sale price amount of RM160k on a deferred payment basis to the bank.

Figure 3.4 Tawarruq/Commodity Murābahah Home Financing

Source: Interview with the Bankers

From the above structure, it can be observed that there is a *waʿd* given by the customer to purchase a commodity from the bank. The customer instructs the bank to purchase a commodity and undertakes to purchase the same commodity from the bank upon purchase by the bank. The mechanism of *waʿd* in commodity *murābahah* is similar
to the “murābaḥah on purchase orderer”. Usually, there is only one waʿd in commodity murābaḥah. Both BIMB and MIB have the similar practice of waʿd-based commodity murābaḥah for house/shop-house financing. However, KFHMB does not offer commodity murābaḥah. It offers ordinary murābaḥah which is discussed earlier.\(^\text{320}\)

It can be noticed from the above structure of commodity murābaḥah house financing that the house is not the subject matter (mabī') of the murābaḥah contract. Another commodity is used to give cash to the customer who wants to purchase the house. This commodity murābaḥah product is introduced to replace the bayʿ al-ʿīnah transaction which was criticised by the majority of Sharīʿah scholars.\(^\text{321}\)

The practice of waʿd in tawarruq financing was not vastly mentioned in previous studies. Though Syeliya Md Zaini and Nosrah Mohd Isa showed the application of waʿd in murābaḥah, they did not mention its usage in tawarruq.\(^\text{322}\) Similarly, Nurdianawati Irwani Abdullah did not mention that waʿd was applied in tawarruq.\(^\text{323}\) However, Azizi Che Seman confirmed that waʿd was applied in tawarruq and bayʿʿīnah but he did not provide sufficient information on the mechanism of using waʿd in tawarruq.\(^\text{324}\) Ali found that there is an element of waʿd in tawarruq in BMIMB.\(^\text{325}\)

### 3.4.2. Trade Financing Product

Islamic trade financing products are very important to facilitate business that involves cross-border transactions. It mostly helps import and export of commodities. Among the Islamic trade financing products, some are structured under the murābaḥah concept. Waʿd is used in the trade financing products which are based on murābaḥah. This study

\(^\text{320}\) Mohd Nazri Chik, interview with the researcher, 4 September 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.

\(^\text{321}\) Mohd Nazri Chik, interview with the researcher, 4 September 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.


\(^\text{323}\) Nurdianawati Irwani Abdullah, “Status and Implications of Promise,” 88.

\(^\text{324}\) Azizi Che Seman, “Aplikasi Waʿd dalam Produk,” 5.

\(^\text{325}\) Mohd Saiful Azli Md Ali, “Waʿad dan aplikasinya di dalam kontrak hibrid Islam”.
has found three *wa’d*-based trade financing products which are: (1) *murābaḥah* Islamic letter of credit, (2) Islamic trust receipt, and (3) Islamic accepted bill for import. However, all these three products share a similar mechanism. Therefore, the researcher discusses only the *murābaḥah* letter of credit to avoid replication.

### 3.4.2.1. *Murābaḥah* Islamic Letter of Credit

Letter of credit is a written undertaking provided by the bank at the request of the customer (the buyer) to the seller to pay a specific amount of money as mentioned in the letter of credit with the condition that the seller complies the terms and conditions of the letter of credit. The letter of credit can be offered either under the *wakālah* contract or the *murābaḥah* contract. However, there is no use of *wa’d* in a *wakālah*-based letter of credit. Therefore, the *murābaḥah*-based letter of credit will be discussed here.\(^{326}\)

As mentioned earlier, *murābaḥah* is a cost plus sale. The bank purchases a commodity based upon the request of the customer and then sells it to the customer based on a specific profit determined before. The customer pays to the bank on a later date. In the event of a *murābaḥah* letter of credit, the following steps are followed.

**Operational Steps:**\(^{327}\)

1. The customer (buyer) applies for letter of credit and undertakes that he will purchase the commodity from the bank after the bank has purchased it from the seller.
2. The bank issues letter of credit and purchases the commodity from the seller.
3. The bank then sells the commodity to the customer (buyer) with a predetermined price which involves the cost and a profit margin.
4. The customer settles the purchase price to the bank on deferred basis.

---

\(^{326}\) Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013.  
\(^{327}\) Mohd Nazri Chik, interview with the researcher, 4 September 2013; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.
In the above structure, when the customer applies for a murābaḥah letter of credit then he gives wa’d that he will purchase the commodity after the bank has purchased it from the seller. The practice of wa’d in a murābaḥah letter of credit is more crucial than murābaḥah home financing. This is because purchasing a commodity from the oversee seller is riskier than purchasing a native property. On the other hand, it is a common practice in export and import business that no seller ships a commodity without a letter of credit from the bank. Therefore, the Islamic Fiqh Academy under OIC has allowed muwā’adah as binding on the promisor in the case of trade financing.\footnote{Islamic Fiqh Academy, 17th Session, resolution no. 157, 2006, \textit{Islamic Fiqh Academy} website, retrieved on 4 Jun 2015, http://www.fiqhacademy.org.sa/qarat/17-6.htm}

\subsection*{3.4.3. Treasury Product}

\textit{Wa’d} plays a significant role in Islamic treasury products. In most products, \textit{wa’d} is used along with commodity murābaḥah. This section demonstrates the modus operandi of four
"wa’d"-based treasury products which are: (1) Islamic FX forward, (2) Islamic profit rate swap (IPRS), (3) Islamic cross currency swap (ICCS), and (4) *Ijārah* rental swap (IRS).

### 3.4.3.1. Islamic FX Forward

Islamic FX Forward is the alternative for conventional FX forward. It is basically a *wa’d* to execute *bay‘ al-ṣarf* in a future date. *Bay‘ al-ṣarf* is defined as a contract of buying and selling of currencies. Islamic FX forward involves two parties where one party gives *wa’d* to purchase or sell a specific amount of currency to another party on a future date based on the rate agreed today. As there is only one *wa’d* here, only one party is obliged to honour his promise. On the other hand, the other party has option whether to conclude the contract. In KFHMB, this product is named as “promissory FX contract” while BIMB and MIB term it as “Islamic FX forward”. However, all of them use the same operational steps. The figure below describes the modus operandi of Islamic FX forward.

![Diagram of Islamic FX Forward](image)

**Figure 3.6 Islamic FX Forward**

Source: Interview with the Bankers

---


330 Mohd Nazri Chik, interview with the researcher, 4 September 2013; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.
Operational Steps: 331

(1) The customer provides *wa’d* to the bank on 1st of January 2015 to purchase USD1 million from the bank on 17th February 2015 at the exchange rate of MYR 3.2900 per USD.

(2) On 17 February 2015, the bank pays USD1 million to the customer and receives MYR 3.29 million from the customer disregarding the market rate at that day.

The above structure shows that there is only one *wa’d* provided by the customer to the bank. The Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI), the prominent Islamic finance governing body and BNM allow this *wa’d*-based FX forward. However, these organisations do not allow *muwā’adah* in currency exchange contracts if it is binding on the promisor. According to them, *muwā’adah* can be practiced in currency trading with the condition that it is non-binding on the promisor. 332 In the operation of Islamic FX forward, no fee or deposit is charged upfront from the customer. This is because BNM has prohibited charging any fee for *wa’d* in relation to currency trading. 333 The prohibition is based on the grounds that it may lead to *ribā*. 334

3.4.3.2. Islamic Profit Rate Swap (IPRS)

IPRS is an agreement between two parties to exchange one’s floating profit rate with other fixed profit rates. According to BIMB:

---

331 Mohd Nazri Chik, interview with the researcher, 4 September 2013; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.


334 Nikan Firooozye, “*Wa’d* and the completeness of Islamic markets,” *Opalesque Islamic Finance Intelligence*, 30 August 2009, 7.
An Islamic profit rate swap (IPRS) typically involves an agreement to exchange a floating profit rate for a fixed rate or vice versa, implemented through the execution of a series of underlying “commodity murābaḥah” contracts.335

The exchange of profit between the parties takes place at regular intervals. The fixed profit rate is usually determined at the beginning of the agreement that remains unchanged until the end of the tenure and the floating profit rate is referenced to an index e.g. Kuala Lumpur interbank offered rate (KLIBOR). The floating rate is determined at every settlement period. In practice, the notional amount is not exchanged but the difference between the two rates is exchanged.

The contractual arrangement in IPRS is based on a number of commodity murābaḥah transactions and wa’d. At every settlement period, there will be two layer of commodity murābaḥah transactions. At the first layer, the customer sells the commodity to the bank at a fixed profit rate. At the second layer, the bank sells the commodity to the customer at a floating rate which is referenced to KLIBOR for example. The figure below shows the operational steps of IPRS.

Operational steps of IPRS.336

The First Leg:

(1) The customer undertakes to execute a number of commodity murābaḥah transactions with the bank at different agreed upon dates in the future.

(2) On the transaction date, the customer buys a commodity from broker B while the bank becomes the customer’s agent.

(3) The customer sells the commodity to the bank at cost plus a fixed profit rate (e.g. 3% p. a.).

(4) The bank sells the commodity to broker A at cost.

335 Bank Islam Malaysia Berhad, Application of Shariah Contracts, 94.
336 Mohd Nazri Chik, interview with the researcher, 4 September 2013.
The Second Leg:

(5) The bank purchases a commodity from broker A.

(6) The bank sells the commodity to the customer with cost plus a floating profit rate (e.g. 2.5% p. a.)

(7) The customer sells the commodity at cost to broker B through the bank as his agent.

Figure 3.7 Islamic Profit Rate Swap (IPRS)

Source: Interview with the Bankers

The above structure is practiced by BIMB. However, MIB has further enhanced the above structure. It is mentioned earlier that the notional amount is not exchanged between the two parties but the net-off amount is exchanged. Therefore, MIB employs only one commodity murābahah transaction at every settlement date. However, MIB has
two different types of commodity *murābahah* transactions for two different situations. In case the bank receives the excess of the two profit rates, the bank becomes the commodity seller to the customer. On the other hand, if the customer receives the excess of the two profit rates, the customer becomes the commodity seller to the bank. In this product structure, *wa‘d* is given only by the customer to the bank. The client undertakes that if the floating rate is more than the fixed rate then he will purchase a commodity from the bank. The figure below describes the structure of IPRS as practiced by MIB.

Figure 3.8 Islamic Profit Rate Swap (IPRS) at Maybank Islamic Berhad (MIB)

Source: Interview with the Bankers

---

337 Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.
Operational Steps:\(^{338}\)

*If the client gets the excess:*

1. The client purchases a commodity from broker B through the bank as his agent.
2. The customer sells the commodity to the bank with profit (the difference between the fix and floating rate).
3. The bank sells the commodity to broker A at cost.

*If the bank gets the excess:*

1. The bank purchases a commodity from broker A.
2. The bank sells the commodity to the client with profit (the difference between the fix and floating rate).
3. The client sells the commodity to broker B at cost through the bank as his agent.

In both structures of IPRS, there is only one *wa’d* which is given by the customer. Therefore, the customer’s interest might not be protected in the case the profit rate is not in favour of the bank. Even though banks usually fulfil their commitment due to reputational risk but there is an urge from the clients to employ another *wa’d* from the bank’s side.\(^{339}\) *Wa’dān* might be a solution for this issue.

Instead of commodity *murābaḥah*, some banks use *bay’ al-‘īnah* in IPRS. In such a case, there is no application of *wa’d*. In *bay’ al-‘īnah*-based IPRS, there are two transacting parties where both parties directly sell and buy back a commodity between them.\(^{340}\) However, in commodity *murābaḥah*-based IPRS, there are four transacting parties where the bank/customer purchases a commodity from third party and then sells it. There is no buy-back agreement between the buyer and seller in commodity *murābaḥah*. Though the *bay’ al-‘īnah*-based structure is simpler but controversial among

---

\(^{338}\) Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.

\(^{339}\) Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.

the Sharī‘ah scholars. From this perspective, the commodity murābahah and wa’d-based IPRS might be able to attract more customers globally.

It is important to mention here that the commodity murābahah transaction is facilitated by Bursa Malaysia’s commodity market (sūq al-sila’). The commodity transaction is based on a real asset. Crude palm oil is usually used for the transaction. The possession and delivery of the commodity takes place between the contracting parties. The transaction is performed through an electronic system that identifies and verifies the ownership and specifies the subject matter of the contract. The transacting parties are allowed to take delivery of the commodities within seven days. However, an additional fee is charged for the delivery.

If the client breaches the wa’d, the bank usually attempts to cover the loss if it is not a substantial amount. For commodity murābahah transactions, the bank only loses the brokerage fee which is not a large amount. For example, the brokerage fee is only MYR15 for any purchase of a commodity for MYR 1 million. Therefore, the bank does not penalise the customer for that. However, the bank will not make any further transactions with that client. On the other hand, if the bank incurs a significant amount of loss due to the breach of wa’d, the case is brought to the court. The court should decide on that matter based on the principle that the promisor has to compensate actual loss incurred by the promisee due to the breach of that promise unless there is a valid excuse (e.g. bankruptcy).

343 Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Ali Ahmad (Head, Structured Treasury Solutions Desk, Global Markets Trading, Treasury Division, Kuwait Finance House (Malaysia) Berhad), interview with the researcher, 26 December 2013.
3.4.3.3. Islamic Cross Currency Swap (ICCS)

ICCS is an agreement between two parties to exchange profit and principal amount which is denominated in different currencies. ICCS actually helps the investors in Islamic finance to mitigate foreign currency risk as well as profit rate risk.\(^{344}\) ICCS is somewhat similar to IPRS. However, ICCS involves the exchange of different currencies. Moreover, the notional amount is exchanged between the two parties in ICCS whereas the net-off amount is exchanged in IPRS.

In ICCS, the client approaches the bank and signs a master facility agreement where he undertakes to exchange MYR to USD for example in next six months based on a fixed rate, which will be executed through a series of commodity \(\text{murābaḥah}\) transactions. There will be two commodity \(\text{murābaḥah}\) transactions between the parties at every settlement date. As an example, the client first sells the commodity to the bank in MYR. Secondly, the bank sells the commodity to the customer in USD. It is necessary that the price for both commodities should be the same. The figure below illustrates the operational structure of ICCS.

Operational Steps of ICCS:\(^{345}\)

1. The customer approaches the bank and undertakes to perform a number of commodity \(\text{murābaḥah}\) with the bank in two different currencies with a fixed exchange rate.

2. The client purchases a commodity from broker B through the bank as his agent.

3. The client sells the commodity to the bank at cost plus KLIBOR in MYR.

4. The bank sells the commodity to broker A and gets cash.

---


\(^{345}\) Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.
(5) In the second leg of transaction, bank purchases a commodity from broker A for cash.

(6) The bank sells the commodity to the client at cost plus 5 % p.a. profit for example at USD.

(7) The client sells the asset to broker B via the bank as his agent.

Figure 3.9 Islamic Cross Currency Swap (ICCS)

Source: Interview with the Bankers
The above structure of ICCS is followed by BIMB and MIB. There is a wa’d here from the client to execute a number of commodity *murābāḥah* transactions with the bank. The customer undertakes to sell a commodity to the bank in MYR with cost price plus a profit referenced to KLIBOR. In addition, he promises to purchase a commodity from the bank in USD at a fixed price with 5% profit.³⁴⁶

### 3.4.3.4. *Ijārah* Rental Swap (IRS)

IRS is another *wa’d*-based treasury product to hedge against floating *ijārah* financing. This product is offered by KFHMB. There is a similarity between IRS and IPRS in terms of their operation but IRS is designed for *ijārah* financing only. Different profit rates other than *ijārah* is not included in IRS. Under IRS, one can manage or modify his *ijārah* rental obligation from float to fix and vice versa. IRS can be used for different *ijārah* facilities e.g. *ijārah* auto financing, *ijārah* asset acquisition financing and *ijārah*-based ṣuḵāk.

According to KFHMB, IRS is defined as:

> An arrangement between a customer and KFHMB where one party agrees to pay the other (in cash) the difference between a fixed *ijārah* rental rate and a series of floating *ijārah* rental rate over an agreed period of time.³⁴⁷

Based on this, a fixed *ijārah* rate is determined at the beginning of the transaction while the floating rate is determined on periodic reset date. Two legs of commodity *murābāḥah* transactions occur at each periodic settlement date. After the commodity *murābāḥah* transaction, only the net-off balance is transferred between the parties who receive the higher payment. A *muqāṣah* contract is applied for this purpose. The figure below describes the operational steps of IRS.

---

³⁴⁶ Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.

The Commencement of the Agreement

Bank → Customer → Broker A

On the Settlement Period: First Musāwamah

Bank → Customer → Broker B

Second Musāwamah

Bank → Customer → Broker A

Bank → Client

Figure 3.10 Ijārah Rental Swap (IRS)

Source: Interview with the Bankers
Operational Steps of IRS:348

(1) The customer approaches the bank and signs IRS master agreement, and the customer undertakes to enter into a series of musāwamah transactions.

(2) The bank also promises the customer that it will execute a number of musāwamah transactions with the customer at regular agreed upon dates.

(3) On every settlement date, the customer purchases a commodity from broker B via the bank as his agent.

(4) The customer sells the commodity to the bank with a profit referenced to KLIBOR, for example, on the spot.

(5) The bank sells the commodity to broker A and gets cash.

(6) Alternatively, the bank purchases a commodity from broker A.

(7) The bank sells the commodity to the customer with a fixed profit on the spot.

(8) The customer sells the commodity to broker B via the bank as his agent and gets cash.

(9) Because of the two commodity musāwamah transactions, only the net-off amount is transferred based on the concept of muqāṣah.

KFHMB affirms that there is wa’dān in IRS. The two wa’d are not conditional to each other. The subject matter for both wa’d is different. The bank and the customer give wa’d to execute two different musāwamah transactions. The bank promises to purchase a commodity from the customer with profit referenced to KLIBOR, for example. On the other hand, the customer promises to purchase a commodity from the bank with a fixed profit.349 The practice of wa’d in IRS is different from ICCS and IPRS. IRS employs wa’dān whereas ICCS and IPRS employ wa’d. Therefore, it can be said that IRS protects the interests of the customer and the bank at the same time.

348 Ali Ahmad, interview with the researcher, 26 December 2013.
349 Ibid.
3.5. Conclusion

This chapter provided the overview of the Islamic banking system in Malaysia. It then discussed the status of wa’d in the country’s civil law. Finally, it showed the practice of wa’d in different Islamic banking products. Islamic banks in Malaysia experienced very strong legal and regulatory support to develop products which resulted in the development of various wa’d-based products. A number of consumer, trade financing, and treasury products have been innovated utilising wa’d and wa’dān.
CHAPTER 4: THE APPLICATION OF \textit{WA'}}\textit{D} IN BANGLADESHI ISLAMIC BANKS

4.1. Introduction

Bangladesh is a prominent country for Islamic banking in South Asia. However, dissimilar to Malaysia, Islamic banking in Bangladesh has received little legal and infrastructure support. Its Sharī'a framework is known to be relatively more rigid and mostly confined to the Ḥanafī School of jurisprudence (madhhab fiqhī) making product development a significant challenge for Islamic banking in Bangladesh in order to compete with the conventional banking.\textsuperscript{350}

The previous chapter discussed the practice of \textit{wa'}}\textit{d} in Islamic banking products in Malaysia after providing the overview of Islamic banking system and the legal status of \textit{wa'}}\textit{d} in the country. In the same way, this chapter discusses the \textit{wa'}}\textit{d}-based products in the Islamic banks in Bangladesh along with discussing the overview of Islamic banking operations and the legal status of \textit{wa'}}\textit{d}. Based on the scope of this study, three Islamic banks in Bangladesh are studied:

(1) Islami Bank Bangladesh Limited (IBBL)
(2) Prime Bank Limited (PBL)
(3) Shahjalal Islami Bank Limited (SIBL)

This chapter provides an overview of Islamic banking in Bangladesh. It then discusses the legal status of \textit{wa'}}\textit{d} in relation to the contract act 1872. Finally, it sheds light on the mechanism of using \textit{wa'}}\textit{d} in Islamic banking products.

4.2. Overview of Islamic Banking in Bangladesh

The discussion in this section includes a historical overview on the establishment of Islamic banking in Bangladesh. An overview of Islamic capital market and Islamic insurance will be provided as they are related to Islamic banking. Furthermore, the status and growth of Islamic banking and its products and services are briefly described and the legal, regulatory, and governance system are explained. The last two subsections evaluate the infrastructure development and sector efficiency.

4.2.1. Historical Development

Researchers and economists submitted several proposals to establish an Islamic bank in Bangladesh at the beginning of 1980s through a number of International conferences, seminars, and workshops. In this regard, a number of socio-economic research institutions namely Islamic Economics Research Bureau, Bangladesh Institute of Bank Management, Working Group for Islamic Banking in Bangladesh, Bangladesh Islamic Bankers Associations, Bayt Al-Sharf Islamic Research Institution and Muslim Businessman Society played an important role to organise conferences, seminars, and workshops on Islamic banking.351

In 1982, a delegate from the Islamic Development Bank (IDB) came to Bangladesh and evaluated the possibility of establishing a private Islamic bank in Bangladesh. After the evaluation, the delegate recommended the IDB to invest capital to initiate the proposed Islamic bank. Following this, the “Islami Bank Bangladesh limited” was launched in 1983 as a private commercial bank through the initiatives of some Muslim business entrepreneurs with the help of the government of Bangladesh and some international Islamic financial institutions. Along with IDB, other international Islamic

financial institutions which directly contributed to the establishment of the Islamic bank in Bangladesh were the Kuwait Finance House, Dubai Islamic Bank, and Bahrain Islamic Bank.\footnote{Islam, “Bangladesh Islami Bank”; Mohon, Islami Orthoniti, 137; Mannan, Islami Bank Babostha, 47; Sarker, “Islamic Banking in Bangladesh: Achievements & Challenges”, 2; BMB Islamic, Global Islamic Finance Report, 259.}

From the establishment, the Islamic bank in Bangladesh saw steady development due to the overwhelming response of the Muslims in Bangladesh. Following the success of the Islami Bank Bangladesh Limited, the second Islamic bank in Bangladesh was initiated in 1987 through “Al-Baraka Bank Bangladesh Limited”. This bank was recently renamed as the “ICB Islamic Bank Limited”. A number of conventional banks started to open Islamic banking windows from 1995. Prime Bank Limited was the first conventional bank that opened Islamic banking windows in Bangladesh. After that, Export-Import Bank of Bangladesh Limited, Dhaka Bank Limited, The City Bank Limited and others opened Islamic banking windows.\footnote{Ibid.}

4.2.2. Development of Takāful and Islamic Capital Market

The takāful industry was introduced in Bangladesh in 1999. The “Islami Insurance Bangladesh Limited” was the first general takāful operator in Bangladesh. After its inception, takāful companies expanded rapidly in Bangladesh. In 2004, it had USD 24 million asset which was 7% of the total asset of the insurance sector in Bangladesh. Until 2010, there were six full-fledged takāful operators and 13 window operations of takāful from conventional insurers in Bangladesh.\footnote{Kazi Md. Mortuza Ali, “Takaful in Bangladesh: Achievements and Obstacles”, Middle East Insurance Review, December 2010, 73; Islami Insurance Bangladesh Limited, “Company Profile”, Islami Insurance Bangladesh Limited website, retrieved on 13 Jun 2015, http://islamiinsurance.com/profile.php}

However, Bangladesh still lacks an Islamic capital market. Until now, only two notable ṣukūk were issued. IBBL issued BDT 3000 million muḍārábah perpetual bond
and the government issued Islamic investment bond based on muḍārabah. Currently, the introduction of an Islamic capital market is under discussion among the researchers and policy makers. M A Hamid mentioned that ṣuḵūk has much potential in Bangladesh.

4.2.3. Recent Growth of Islamic Banking

Out of 47 banks in Bangladesh, there are eight full-fledged Islamic banks having more than 750 branches throughout the country. In addition, there are 16 conventional banks which are providing Islamic banking services through their Islamic banking branches. The full-fledged Islamic banks are:

i. Islami Bank Bangladesh Limited
ii. Al-Arafah Islami Bank Limited
iii. Social Islami Bank Limited
iv. Shahjalal Islami Bank Limited
v. Export Import Bank of Bangladesh Limited
vi. First Security Islami Bank Limited
vii. ICB Islamic Bank Limited
viii. Union Bank Limited (UBL)

---

The conventional banks having Islamic banking branches are:\(^{359}\)

1. Dhaka Bank Limited
2. Arab Bangladesh Bank Limited
3. Prime Bank Limited
4. Jamuna Bank Limited
5. The City Bank Limited
6. Southeast Bank Limited
7. Premier Bank Limited
8. Standard Chartered Bank Limited
9. Bank Alfalah Limited
10. Trust Bank Limited
11. Standard Bank Limited
12. Pubali Bank Limited
13. Sonali Bank Limited
14. Agrani Bank Limited
15. Bank Asia Limited
16. National Bank of Pakistan

According to the Bangladesh Bank (BB), at the end of December 2012, the total deposit of Islamic banking sector was BDT 1017.9 billion which was 18.9% of the total deposit of the banking system in Bangladesh. At the same period, the total credit of Islamic banking sector was BDT 910.1 billion which captured 21.1% of the total banking sector credit of the country.\(^{360}\) Excluding the Islamic banking windows, the full-fledged Islamic banks comprise 16.85% of the total asset, 19.85% of the total investment, 18.33%

\(^{359}\) Khan, “Huge demand for Islamic banking in Bangladesh”; Akbar, “Analysing the Islamic banking framework in Bangladesh”.

\(^{360}\) Bangladesh Bank, Annual Report 2012-13, 37.
in total deposit, 14.3% in total equity and 17.1% in total liabilities of the banking sector at the end of December 2012.\textsuperscript{361}

\subsection*{4.2.4. A Brief Synopsis of Islamic Banking Products}

Islamic banks in Bangladesh offer various types of deposit products, investment products, and services. The notable deposit products are \textit{al-wadī`ah} current account, \textit{muḍārahah} savings account, \textit{muḍārahah} term deposit account, \textit{muḍārahah ḥajj} savings account, \textit{muḍārahah} special savings (pension) account, \textit{muḍārahah waqf} cash deposit account, \textit{muḍārahah} foreign currency deposit account, and \textit{muḍārahah} savings bond.\textsuperscript{362}

The investment products known in Malaysia as financing products are the car investment scheme, construction and housing investment, small business investment scheme, agricultural investment scheme, women entrepreneurs investment scheme, non-resident Bangladeshi entrepreneurs’ investment scheme, export financing, and import financing. The underlying contracts in these products are normally \textit{bay`-murābahah}, \textit{bay`-istijrār}, \textit{bay`-mu`ajjal}, \textit{bay`-salam}, \textit{istiṣnā`}, \textit{mushārahah} and hire-purchase under \textit{shirkat al-milk}.\textsuperscript{363}

Finally, among the services foreign exchange business, trade financing, remittance card, micro financing, SME service, locker service, Islamic debit card, Islamic credit card, ATM services are significant.\textsuperscript{364}

\subsection*{4.2.5. Regulation and Governance}

There are several acts that govern the banks and financial institutions in Bangladesh which are the Bank Companies Act 1991, the Bangladesh Bank Order 1972, the Securities

\textsuperscript{363}Ibid.
\textsuperscript{364}Ibid.
and Exchange Commission Act 1993, and the Income Tax Ordinance 1984. However, there is no separate act for the operation of Islamic banks and financial institutions. Therefore, all Islamic banks in Bangladesh are required to follow the acts that govern the conventional banks and financial institutions. When Islamic banking was introduced in Bangladesh, no new act was passed but some clauses were incorporated in the Bank Companies Act and some amendments were made in the Income Tax Ordinance.365

The Bangladesh Bank (BB) is the central bank of the country which monitors, regulates, and supervises both Islamic and conventional banks. BB generally provides equal treatment to both Islamic and conventional banks. However, it has some special provisions for Islamic banks. It is among the special provisions that Islamic banks are permitted to keep their statutory liquidity requirement (SLR) with BB at the rate of 10% of their total deposit liabilities whereas the conventional banks are required to maintain 20%. Islamic banks are independent to fix their profit and loss ratio as well as the mark-up rates based on their own policy and banking situation.366 BB does not have a separate section to monitor Islamic banking but it has an Islamic economics division under the department of research to analyse the state of the Islamic finance industry in Bangladesh.367

In 2009, BB issued guidelines on the operation and management of Islamic banks. The guidelines are considered the first attempt by BB to provide an operational framework for Islamic bank. The guidelines include the mechanism of *Sharī‘ah* and corporate governance, product definition and operational framework, alternative investment modes, and conversion procedures of a conventional bank to an Islamic bank. However, these guidelines have some shortcomings. One of the major issues related to

365 Ahmad and Hassan, “Regulation and Performance of Islamic Banking,” 256-258.
these guidelines is that under these guidelines, it is optional for an Islamic bank to have a Sharī‘ah board, which is contradictory to global practice.\textsuperscript{368}

BB does not have a Sharī‘ah board to supervise Islamic banks in Bangladesh. However, a private non-corporate body is named as “Central Shari’a Board for Islamic Banks of Bangladesh (CSBIB)”. Almost all the Islamic banks in Bangladesh are the member of CSBIB. CSBIB is consist of a number of prominent scholars in Bangladesh. It arranges regular meeting to discuss the Sharī‘ah issues related to Islamic banking industry in Bangladesh. It also conducts timely research and publishes books and journals to serve its members.\textsuperscript{369}

4.2.6. Contemporary Infrastructure Development

Among the recent notable infrastructure developments in Bangladesh is the launch of the Islamic interbank money market (IIMM). After a long period of waiting, Islamic banks in Bangladesh are now able to manage their funding crisis through IIMM. However, Bangladesh is still lacking a šukūk market. The government is about to make necessary amendments in šukūk regulation to develop a šukūk market in Bangladesh.\textsuperscript{370} Apart from that, Bangladesh is mostly known for its microfinance. Revising the Grameen Bank’s interest-based model, a number of Islamic micro finance institutions have already started their work in the rural areas of Bangladesh.\textsuperscript{371}

There is a substantial scarcity of human capital and institution to educate and train Islamic finance in Bangladesh.\textsuperscript{372} However, there is no notable initiative taken by the government to develop education and research in Islamic finance. There are a few minor

\textsuperscript{368} BMB Islamic, \textit{Global Islamic Finance Report}, 260.
\textsuperscript{369} Ibid.
\textsuperscript{370} Bernardo Vizcaino and Serajul Quadir, “Bangladesh launches Islamic interbank money market”, \textit{Reuters}, 5 Jun 2012, \url{http://www.reuters.com/article/2012/06/05/islamic-finance-liquidity-idUSL5E8H45DN20120605}
\textsuperscript{371} BMB Islamic, \textit{Global Islamic Finance Report}, 261.
\textsuperscript{372} Hamid, “Streamlining Islamic finance in Bangladesh”, 8.
private initiatives to enhance knowledge in Islamic finance e.g. Islami Bank Training and Research Academy (IBTRA),
Islamic Economics Research Bureau (IERB) etc.

4.2.7. Islamic Banking Performance and Efficiency

According to the financial stability report of BB, the basic financial indicators show a strong financial position and huge possibility for Islamic banks in Bangladesh. In 2012, Islamic banks managed to achieve higher profit than the conventional banks. The profit income to total asset ratio of Islamic banks was 9.74%, which was greater than the industry average of 8.14%. The return on asset (ROA) of the Islamic banks was 1.13% while it was 0.84 for the total banking industry. The return on equity (ROE) of Islamic banks reached 16.81%, which was higher than the ROE of the total banking industry that stood at 10.56%. On the other hand, the non-performing investment in the total investment of Islamic banks was only 3.9% while for the conventional banks it was 10%.

4.3. The Legal Status of Wa'ad in the Civil Laws of Bangladesh

As there is no separate law for the operation of Islamic banks in Bangladesh, any Islamic banking dispute should go under the civil court. In the civil law of Bangladesh, there are some clauses in the Contract Act 1872 where the concept of promise is discussed in relation with a contract.

Section 2 (b) of the contract law says:

When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted becomes a promise.

---

375 Bangladesh Bank, Financial Stability Report 2012, 44.
376 The Contract Act (Bangladesh), 1872 (Act No. IX, 1872).
This means that when the person to whom it is made accepts a proposal, then it becomes a promise. Therefore, a proposal is an important element of a promise. Section 2 (a) defines proposal as:

When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.\(^{377}\)

It is understood from this clause that a proposal is someone’s offer to perform or to abstain from something subject to the consent of the person to whom it is offered. Based on this, there is a difference between the concept of promise and *wa’d*. Making a *wa’d* does not rely on the acceptance of the promisee while in Contract Act 1872, the promisee should accept the offer of the promisor to make a promise. In this sense, it appears that the concept of proposal is similar to the concept of *wa’d* in Islamic law.

Apart from that, it is stated in Contract Act of 1872 that every promise is an agreement if it has a consideration and when an agreement is enforceable by law then it is a contract. Section 2 (e) mentions: “Every promise and every set of promises, forming the consideration for each other, is an agreement.”\(^{378}\) After that, section 2 (h) states, “An agreement enforceable by law is a contract.”\(^{379}\) Therefore, it can be resolved that a promise having a consideration is a contract in the Contract Act 1872. In other words, a promise is similar to a contract in the contract law of Bangladesh if it has a consideration. However, consideration is described in section 2 (d) as:

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.\(^{380}\)

This means that when a promisee starts to perform or abstain from something relying on the promise, then it is called consideration. The promise that has a

\(^{377}\) The Contract Act (Bangladesh), 1872 (Act No. IX, 1872).

\(^{378}\) *Ibid.*

\(^{379}\) *Ibid.*

consideration becomes a contract and every contract is binding in the law. Section 37 reads:

The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.\textsuperscript{381}

Consequently, if the promisor does not fulfil his promise then he should compensate the promisee in case of loss incurred to the promisee. Section 73 mentions:

When a contract has been broken the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.\textsuperscript{382}

Based on the clauses mentioned above, it seems that the Mālikī jurists’ opinion related to the binding nature of wa’d is similar to the Contract Act of 1872. The Mālikīs view that wa’d is binding on the promisor if it is attached to a cause (sabab) and the promisee has started an action based on that promise. Similarly, in the Contract Act of 1872, the term ‘consideration’ denotes that when the promisee relying on the promise starts an action or abstains from an action then it is binding on the promisor.

However, the contract law recognises a promise when it is accepted by the promisee. Thus, a promise is similar to a contract in the Contract Act of 1872. On the other hand, wa’d is a voluntary offer which does not rely on the acceptance of the promisee. Furthermore, as discussed in chapter two that Islamic jurists (fuqhā’) rule that in the case the promisor breaks his wa’d, he is required to compensate the promisee only the actual loss incurred but not the loss of opportunity.\textsuperscript{383} However, it appears that under the Contract Act 1872, the promisee may ask from the promisor more than the actual loss incurred i.e. the probable future loss. In addition, the Sharī‘ah allows the promisor to

\textsuperscript{381} The Contract Act (Bangladesh), 1872 (Act No. IX, 1872).
\textsuperscript{382} Ibid.
\textsuperscript{383} Islamic Fiqh Academy, 17th Session, resolution no. 157.
break his promise if he has any valid excuse (‘udhr Sharī‘ī). There is no such provision in the Contract Act of 1872.

4.4. Wa‘d-Based Products in the Islamic Banks of Bangladesh

Wa‘d is practiced in a limited number of products in Bangladesh. Wa‘d is mostly used in consumer banking products and trade financing products. However, there is no usage of wa‘d in treasury products. At present, discussions are ongoing among the Sharī‘ah scholars on the permissibility of Islamic FX forward. The following section discusses the consumer and trade financing products where wa‘d is utilised.

4.4.1. Consumer Banking Products

Wa‘d is used in the following three consumer banking products in Bangladesh:

1. Bay‘ Murābaḥah on Purchase Orderer (BMPO)

2. Bay‘ Mu‘ajjal

3. Hire-Purchase under Shirkat al-Milk (HPSM)

All the three banks studied in Bangladesh practice wa‘d in these products in a similar way. IBBL is the leading Islamic bank in Bangladesh in terms of product innovation whereas others follow IBBL. The usage of wa‘d in these products is discussed in the followings.

4.4.1.1. Bay‘ Murābaḥah on Purchase Orderer (BMPO)

Bay‘ murābaḥah means sale on profit. Technically, it is defined by IBBL as:

A contract between a buyer and a seller under which the seller sells certain specific goods (permissible under Islamic Sharī‘ah and the Law of the land), to the buyer at a cost plus agreed profit payable in cash or

385 Mohammad Mianur Rahman (Executive Officer, Islamic Banking Division, Prime bank Limited), interview with the researcher, 7 April 2014; Md. Farid Uddin (Junior Assistant Vice President & Muraquib, Shahjalal Islami Bank Limited), interview with the researcher, 13 April 2014.
on any fixed future date in lump-sum or by instalments. The profit marked-up may be fixed in lump-sum or in percentage of the cost price of the goods.\textsuperscript{386}

This means that \textit{murābaḥah} is a cost plus profit sale. The profit can be based on a fixed amount or in proportion of the cost price of the commodity. The purchaser can pay the price of the goods either in lump sum or in instalments.

This is the classical type of \textit{murābaḥah}. However, there is a little modification in its practice by the Islamic banks in Bangladesh. It is called “\textit{bay' murābaḥah on purchase orderer}”. In this type of \textit{murābaḥah}, there are three parties which are the buyer, the seller, and the bank as an intermediary trader between the buyer and the seller. The bank upon request of the customer purchases the goods from the seller and sells it to the customer with an agreed profit.\textsuperscript{387} Three banks studied in Bangladesh practice BMPO mostly for financing business products, house furniture and appliances. The figure below shows the practical steps of BMPO.

\begin{center}
\begin{tikzpicture}[node distance=2cm, thick, main node/.style={circle,fill=black,draw,font={\small \bf\textcolor{white}{\textbullet}}}]
  \node[main node] (1) {1};
  \node[main node] (2) [above of=1] {2};
  \node[main node] (3) [right of=1] {3};
  \node[main node] (4) [above of=3] {4};
  \node[main node] (5) [right of=3] {5};

  \node[main node] (Bank) [left of=3] {Bank};
  \node[main node] (Seller) [above of=Bank] {Seller};
  \node[main node] (Customer) [right of=Bank] {Customer};

  \path (1) edge [->] (3);
  \path (2) edge [->] (4);
  \path (3) edge [->] (2);
  \path (4) edge [->] (3);
  \path (3) edge [->, dashed] (5);
  \path (4) edge [->, dashed] (5);
  \path (5) edge [->] (3);
  \path (3) edge [->] (Bank);

\end{tikzpicture}
\end{center}

\begin{center}
\textbf{Figure 4.1 Bay' Murābaḥah on Purchase Orderer (BMPO)}
\end{center}

\textbf{Source: Interview with the Bankers}

\textsuperscript{386} Islami Bank Bangladesh Limited, “Bai Murabaha,” \textit{Islami Bank Bangladesh Limited} website, retrieved on 13 Jun 2015, \url{http://www.islamibankbd.com/prodServices/prodServBaimurabaha.php}

Operational Steps:

(1) The client proceeds to the bank and applies for murābahah financing. The client provides waʿd to purchase the goods from the bank after the bank has purchased it.

(2) The bank purchases the goods from the seller and takes possession on it.

(3) The purchase and sale agreement between the bank and the client.

(4) The bank delivers the goods to the customer.

(5) The customer pays the selling price to the bank in lump sum or instalment.

There is waʿd in the above structure of BMPO which is given by the customer to the bank. Considering the waʿd of the customer, the bank purchases the specific goods and sells it to the customer. The waʿd is very important here to minimise the market risk of the bank. If the customer does not purchase the goods after the bank has purchased it in the market then the bank may incur loss in order to sell it to another party. However, there is no practice of muwāʿadah and waʿdān in the above structure. According to the Sharīʿah scholars in Bangladesh, muwāʿadah as binding on both promisors is not allowed. Therefore, it is not applied in any Islamic banking products in Bangladesh. Besides, practitioners are unfamiliar with the concept of waʿdān.

The terms and conditions of BMPO reveal that the waʿd is binding on the customer (promisor). Islamic banks are entitled to take security money from the customer. If the promisor does not fulfil his promise, the bank can take the security money as a compensation based on the loss incurred. If there is no loss incurred to the bank in reality, the security money should be returned to the customer. However, in normal practice, no security money is charged from the customer. The customer only undertakes to purchase

---

388 Nurul Kabir (Shariah Officer, Shariah Secretariat, Islami bank Bangladesh Limited), interview with the researcher, 7 April 2014; Rahman, interview with the researcher, 7 April 2014; Uddin, interview with the researcher, 13 April 2014; Md. Atiqur Rahman (Officer, Shariah Inspection & Compliance Division, Shahjalal Islami Bank Limited), interview with the researcher, 8 April 2014.

389 M. Shamsuuddoha (Vice President, Shariah Secretariat, Research Unit, Islami Bank Bangladesh Limited), interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014.
the commodity form the bank in an official letter. In terms of documentation, IBBL and PBL use a separate document for wa’d. In case of SIBL, the application letter for murābaḥah financing and the wa’d element is combined together.

Mohammad Mizonur Rahman revealed that in many cases, the element of wa’d is ignored by the bank. This frequently happens when a fake murābaḥah transaction takes place between the bank and the client. In that case, the customer and the bank both sign the murābaḥah agreement in a single meeting and then the bank transfers money to the customer’s account. The bank does not really purchase the goods and simply provides money to the customer. However, when an actual murābaḥah is practiced then wa’d plays a significant role.

In general, the above structure of wa’d-based murābaḥah is similar to the previous findings where wa’d is given by the customer to the bank as a security for the bank to conduct BMPO. There is no development in the feature of wa’d i.e. employing muwā’adah and wa’dān. According to previous studies, the above-mentioned practice of murābaḥah financing is the most common practice of wa’d.

4.4.1.2. Bay’ Mu’ajjal

Bay’ mu’ajjal means credit sale. In Islamic banking practice, it is defined as:

An agreement between bank and client whereby bank delivers goods to the client upon deferred payment, i.e. the client shall pay the price at some future date at a time, by lump sum or by instalment. Under this mode of investment, bank is not supposed to disclose cost price and profit separately.”

---

390 Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014.
391 Uddin, interview with the researcher, 13 April 2014.
392 Interview with the researcher, 7 April 2014.
This means that *bay‘ mu‘ajjal* is a sale where the bank sells a commodity to the client on the spot but the customer pays the price at a later date by lump sum or instalment. Sale in credit is the key feature of *bay‘ mu‘ajjal*.

In Bangladesh, the practice of *bay‘ mu‘ajjal* resembles *bay‘ murābaḥah*. Similar to *murābaḥah*, the bank purchases a commodity from the market after the client has requested the bank to purchase. After that, the bank sells the commodity to the customer on credit. The bank usually determines a certain amount of profit on the goods purchased and sells to the customer on deferred basis. The client is required to pay the price within a specific date.395

There are a few differences between *bay‘ mu‘ajjal* and *bay‘ murābaḥah*. The key characteristic of *murābaḥah* is the sale on profit whereas in *bay‘ mu‘ajjal*, the main factor is the sale on credit. In *bay‘ murābaḥah*, the profit is fixed and it is certain, whereas the profit is not the main element in *bay‘ mu‘ajjal*. Therefore, *bay‘ mu‘ajjal* can occur with profit or without profit but it should be on credit.

Another important difference between *bay‘ murābaḥah* and *bay‘ mu‘ajjal* is that in case of *bay‘ mu‘ajjal*, it is not compulsory for the bank to disclose the purchase price of the goods. However, in case of *bay‘ murābaḥah*, the bank is required to disclose the purchase price of the commodity to the client. The bank and the client will determine the profit based on the purchase price. It is not possible to conclude a *murābaḥah* contract without knowing the purchase price.396

*Bay‘ mu‘ajjal* is mostly used for home financing, real estate financing, working capital financing, agricultural sector supply, and industrial materials. Apart from that, this mode of financing is used in IBBL’s rural development scheme. It is an Islamic micro-finance initiative by IBBL. Through *bay‘ mu‘ajjal*, IBBL provides equipment for

---

395 Huda and Shamsuddoha, *Islami Banker Biniog Paddhoti*, 64; Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014; Rahman, interview with the researcher, 7 April 2014.

agriculture, goods for small business and others for this micro-finance scheme. To make the transaction easy and simple, *bay‘ mu‘ajjal* is dominantly used in IBBL’s rural development scheme.  

IBBL solely practices *bay‘ mu‘ajjal* as an Islamic microfinance product while other Islamic banks are yet to introduce Islamic micro-finance in their operations. The figure below describes the operational structure of *bay‘ mu‘ajjal*.

![Diagram of Bay‘ Mu‘ajjal](image)

**Figure 4.2 Bay‘ Mu‘ajjal**

*Source: Interview with the bankers*

**Operational Steps:**

1. The customer approaches the bank and requests the bank to purchase a specific commodity. The client promises to purchase the commodity from the bank.
2. The bank purchases the goods from the vendor and takes its ownership.
3. The bank sells the goods to the client and delivers the goods to the customer.
4. The customer pays the sale price on credit within a fixed period.

---

397 Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014.
398 Rahman, interview with the researcher, 7 April 2014; Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014.
Based on the above structure, it is apparent that the customer promises to the bank to purchase the goods after the bank has purchased it. Similar to murābahah, there is wa’d from one party only. In the feature of bay’ mu’ajjal contract, IBBL mentions:

It is permissible to make the promise binding upon the client to purchase from the Bank, that is, he is to either satisfy the promise or to indemnify the damages caused by breaking the promise without excuse. It is permissible to take cash/collateral security to guarantee the implementation of the promise or to indemnify the damages.\(^{399}\) This denotes that the wa’d is compulsory on the promisor in IBBL. If the customer does not fulfil his wa’d, he is obliged to indemnify the loss incurred to the bank. The bank may charge security money in order to practice wa’d as binding on the promisor. However, in practice, the bank usually does not charge security money.\(^{400}\) PBL and SIBL follow the practice of IBBL in terms of the usage of wa’d in bay’ mu’ajjal.\(^{401}\)

4.4.1.3. Hire-Purchase under Shirkat al-Milk (HPSM)

HPSM is the combination of three contracts which are shirkat, ijārah and bay’. Shirkat means partnership. The type of shirkat used here is shirkat al-milk, which means joint ownership. Based on shirkat al-milk concept two or more individuals jointly own a property and share profit and loss in proportion to their respective share in the property. Ijārah means lease and bay’ means sale. According to the HPSM agreement, the bank and the customer co-own a property. After that, the bank leases its share of the property to the customer. The customer pays monthly rental to the bank and gradually purchases bank’s share in the property. At the end of the tenure, the customer fully owns the property.\(^{402}\)

---


\(^{400}\) Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014.

\(^{401}\) Rahman, interview with the researcher, 7 April 2014; Uddin, interview with the researcher, 13 April 2014.

Even though it seems that HPSM is similar to *ijārah muntahiyah bi al-tamlīk*, there is a difference between them. In *ijārah muntahiyah bi al-tamlīk*, the bank solely owns the property during the *ijārah* term, and when the *ijārah* term is finished then the bank transfers the title of the property to the customer with either a token price or gift. On the other hand, the bank and the customer jointly own a property at the commencing of HPSM.  

This makes it similar to the concept of *mushārakah mutanāqiṣah* (MM) which is widely applied in most of the countries. Below is the operational steps that a customer and the bank go through in HPSM:

Figure 4.3 Hire-Purchase under *Shirkat al-Milk*

Source: Interview with the Bankers

Operational steps:  

1. The bank and the customer jointly purchase a property.

2. The bank rents its share of the property to the customer for a fixed period.

---


Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014; Rahman, interview with the researcher, 7 April 2014.
(3) The customer pays monthly rentals and gradually purchases shares of the bank in the property.

(4) At the end of the tenure, the bank transfers the title of the property to the customer.405

There is an element of wa‘d in the above structure. At the beginning of the shirkat al-milk contract, the customer promises the bank to purchase the bank’s share either on gradual basis or in lump sum. There is only one wa‘d here. There is no wa‘d from the bank’s side. In the case of early settlement, the customer may face difficulty here because there is no wa‘d from the bank on this. Islamic banks in Bangladesh include in the terms and the conditions of HPSM agreement that a customer may ask for early settlement. However, there is no element in that agreement obliging the bank to accept the customer’s request to have an early settlement.406

The wa‘d from the customer allows the bank to recover loss in case the customer defaults. Based on this binding wa‘d, the bank may take compensation when the customer does not purchase the property. When the customer defaults to pay the monthly instalment then the bank will sell the property in market. If the bank incurs loss then the customer is required to compensate the loss.407 Rahman pointed out that this practice serves the interests of the bank but it is injustice on the customer as Islamic Sharī‘ah prescribes easiness with the debtor when he is in difficulty.408 In this regard, Uddin mentioned that there is no problem in implementing muwā‘adah here because wa‘d may harm the interest of the client.409

405 Huda and Shamsuddoha, Islami Banker Biniog Paddhoti, 96-97.
406 Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014; Rahman, interview with the researcher, 7 April 2014.
407 Sheikh Mahmudur Rahman (Principal Officer, Legal Affairs Division, Islami Bank Bangladesh Limited), interview with the researcher, 27 October 2014.
408 Interview with the researcher, 7 April 2014.
409 Interview with the researcher, 13 April 2014.
4.4.2. Trade Financing Product

Trade financing is known as foreign trade or export and import financing in Bangladesh.\footnote{Shahjalal Islami Bank Limited, “Islamic Mode of Investment”, Shahjalal Islami Bank Limited website, retrieved on 8 July 2014, \url{http://www.shahjalalbank.com.bd/investment.php}; Prime Bank Limited, “Hasanah Foreign Trade”, Prime Bank Limited website, retrieved on 8 Jul 2014, \url{https://www.primebank.com.bd/index.php/home/islami_foreign_trade}} There is only one wa’d-based trade financing product in Bangladesh which is termed murābahah post import (MPI). IBBL, PBL, and SIBL offer this product to their customers. Even though the basic feature of MPI is similar to BMPO, there are some differences between them in their operational steps. The next section discusses the operation of MPI in relation to the practice of wa’d.

4.4.2.1. Murābahah Post Import (MPI)

MPI is an important trade financing product in Bangladesh. Murābahah is the basic contract utilised in this product. However, the difference between this murābahah with the retail murābahah product is that trade financing involves opening a letter of credit for the customer. In this product mechanism, the bank usually purchases commodities from a foreign seller and then sells it to the customer. Unlike the classical structure, receiving the shipping document of the commodity is considered taking possession (qabḍ) of the sold item.\footnote{Huda and Shamsuddoha, Islami Banker Biniog Paddhoti, 40.} The figure below describes MPI’s operational steps.

**Operational steps:**\footnote{Huda and Shamsuddoha, Islami Banker Biniog Paddhoti, 39-41.}

1. The customer requests the bank to purchase the goods that he wishes to buy. The customer undertakes that he will purchase the product from the bank after the bank has purchased it.

2. Considering the request of the customer, the bank opens a letter of credit (LC) under the customer’s name.
(3) The customer provides a letter of authority to the bank to purchase and to import the goods for the customer.

(4) The bank offers the foreign seller to sell specific goods with specific price.

(5) The foreign seller accepts the bank’s offer and sends the shipping documents to the bank.

(6) After the bank has received the shipping documents, it pays to the foreign seller.

(7) The bank sells the goods to the customer and hands over the shipment documents.

(8) The customer pays to the bank on instalment.

Figure 4.4 Murābahah Post Import (MPI)
Source: Interview with the Bankers

The element of *waʿd* is crucial here because if the customer does not purchase the goods after the bank has purchased it then the bank will incur loss especially in goods which are purchased and imported from abroad. In the above structure, there is only one *waʿd* from the customer. The customer promises the bank that he will purchase the specific commodity after the bank has purchased it.
Even though the Islamic Fiqh Academy has allowed using muwā‘adah in the above structure, Islamic banks in Bangladesh do not practice muwā‘adah. Therefore, the customer’s interest might be undermined in the existing structure. If there would be another wa‘d from the bank that it will sell the goods to the specific customer, then it might provide more financial safety to the customer. This is because it might happen that the price of the goods rises up after the bank has purchased the goods form the foreign seller. The bank may take the opportunity to sell the goods directly in the market instead of selling it to the respective customer. Muwā‘adah or wa‘dān restricts the bank from this type of practice.

4.5. Conclusion

This chapter showed the practice of wa‘d in Islamic banking products in Bangladesh after providing an overview of Islamic banking system and the legal status of wa‘d in the country. It can be concluded that the wa‘d-based products are limited in the Islamic banks of Bangladesh. The three consumer-banking products include wa‘d in their product structures which are BMPO, bay‘ mu‘ajjal and HPSM. The only wa‘d-based trade-financing product is MPI. Wa‘d is employed in the above mentioned products. There is no usage of muwā‘adah and wa‘dān. Finally, there is no wa‘d-based Islamic treasury product in the Islamic banks of Bangladesh.
CHAPTER 5: COMPARISON BETWEEN THE PRACTICE OF WA‘D IN MALAYSIAN AND BANGLADESHI ISLAMIC BANKS

5.1. Introduction

The third and fourth chapters elaborated on the wa‘d-based products in Malaysia and Bangladesh. It is pertinent now to compare between these two countries to learn the similarities and differences between them. The comparison may help determine the strengths and weaknesses of wa‘d-based products in both countries. Both of the countries may get benefit from each other through learning different kinds of product structures.

This chapter compares the legal status of wa‘d in both countries. It then compares the wa‘d-based products in both countries. The comparison on the wa‘d-based products is divided into three types: (1) consumer banking product, (2) trade financing product, and (3) treasury product. While making the comparison, the aspect of similarities and differences in the product structure, existence, and usage of wa‘d is emphasised.

5.2. Comparison on the Legal Status of Wa‘d

Primarily, the legal status of wa‘d is similar between Malaysia and Bangladesh. In both countries, Islamic banking cases fall under the purview of civil law.\textsuperscript{413} The Malaysian Contracts Act 1950 is similar to the Bangladeshi Contract Act 1872.\textsuperscript{414} The concept and binding nature of a promise are the same in both of the acts. However, the Malaysian legal system is comparatively more developed in a sense that the SAC of BNM holds the highest authority to resolve Islamic banking disputes.\textsuperscript{415} The table below compares between the Contracts Act 1950 (Malaysia) and the Contract Act 1872 (Bangladesh).

\textsuperscript{413} Ahmad Hidayat Buang, “Islamic Contracts in a Secular Court Setting?”, 317-340; Ahmad and Hassan, “Regulation and Performance,” 256-258.
\textsuperscript{414} Contracts Act (Malaysia), 1950, (Act No. 136, 1950); The Contract Act (Bangladesh), 1872 (Act No. IX, 1872).
\textsuperscript{415} Central Bank of Malaysia Act (Malaysia), 2009, (Act No. 701, 2009).
### Table 5.1 Comparison between Contract Acts in Malaysia and Bangladesh

<table>
<thead>
<tr>
<th>Subject</th>
<th>Contract Act 1950 (Malaysia)</th>
<th>Contract Act 1872 (Bangladesh)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concept of <em>wa’d</em></td>
<td>Not explicitly recognised</td>
<td>Not explicitly recognised</td>
</tr>
<tr>
<td><strong>Definition of ‘promise’</strong></td>
<td>One party gives a proposal and the other party accepts</td>
<td>One party gives a proposal and the other party accepts</td>
</tr>
<tr>
<td><strong>Definition of ‘proposal’</strong></td>
<td>A person offers to perform an action or to abstain from an action to the other to get his consent</td>
<td>A person offers to perform an action or to abstain from an action to the other to get his consent</td>
</tr>
<tr>
<td><strong>Binding nature of a promise</strong></td>
<td>A promise is binding on the promisor when the promisee accepts the promise</td>
<td>A promise is binding on the promisor when the promisee accepts the promise</td>
</tr>
<tr>
<td><strong>Compensation for the breach of promise</strong></td>
<td>If there is a breach, the promisor should compensate the promisee</td>
<td>If there is a breach, the promisor should compensate the promisee</td>
</tr>
<tr>
<td><strong>Similarity with the Sharī‘ah law</strong></td>
<td><em>Mālikī</em> school of jurisprudence</td>
<td><em>Mālikī</em> school of jurisprudence</td>
</tr>
<tr>
<td><strong>Concept of <em>Muwā’adah</em> and <em>Wa’dān</em></strong></td>
<td>No provision</td>
<td>No provision</td>
</tr>
</tbody>
</table>

Source: Contracts Act 1950 (Malaysia) and the Contract Act 1872 (Bangladesh)

The Malaysian Contracts Act 1950 and Bangladeshi Contract Act 1872 define a ‘promise’ as one party gives a proposal and the other party accepts. In order to define the concept of ‘promise’, both acts use similar wordings in section 2 (b) of the acts. Similarly, the concept of ‘proposal’ is the same in both of the acts. Both define the ‘proposal’ as a person offers to perform an action or to abstain from an action to the other to get his consent. According to section 38 (1) of the Malaysian Contracts Act 1950, a promise is binding on the promisor when the promisee accepts the promise. Similarly, section 37 of the Bangladeshi Contract Act 1872 mentions that the promise is binding on the promisor when the promisee accepts the proposal. Furthermore, both acts mention that if there is a breach, the promisor should compensate the promisee.\(^{416}\)

\(^{416}\) Contracts Act (Malaysia), 1950, (Act No. 136, 1950); The Contract Act (Bangladesh), 1872 (Act No. IX, 1872).
Based on the above discussion, it can be said that the civil law of Malaysia and Bangladesh do not explicitly accept the *wa’d* concept. This is because both of the acts require that a promise should be accepted by the promisee. Both acts mention that a promise is binding on the promisor if it has a ‘consideration’. ‘Consideration’ means that a promisee has acted upon or abstained from something relying upon that promise.\(^\text{417}\) Based on this, the promisor is required to compensate the promisee should the promisee incurs any loss due to the breach of the promise. Hence, both Malaysia and Bangladesh indirectly adopt the Mālikī scholars’ opinion on the binding nature of *wa’d*. Mālikī scholars have two types of opinions. The second opinion is that the promise is compulsory if it is related to an action and the promisee has entered into that action relying upon that promise.\(^\text{418}\) Similarly, in the Contract Act of Malaysia and Bangladesh, the promise is binding on the promisor when the promisee has acted upon or abstained from something relying upon that promise.

However, in chapter two, we reasoned that *wa’d* is binding on the promisor except when there is a valid excuse. Based on this position, there would be a gap between the binding nature of *wa’d* in the *Sharī‘ah* and the Contract Act in Bangladesh and Malaysia. In the Act, a promise which does not have a consideration is not binding whereas it is still binding under the *Sharī‘ah*. Therefore, a separate provision for *wa’d* is required in the Contract Acts of Malaysia and Bangladesh.

Despite the similarities in the Contract Act, there are a few differences between Malaysia and Bangladesh in terms of the legal status of *wa’d*. Malaysia has further developed its legal system. The Central Bank of Malaysia Act 2009 has given the SAC of BNM the highest authority to issue rulings related to any Islamic financial dispute. Should there arise any Islamic banking case in the court, the judge should refer it to the

\(^{417}\) Contracts Act (Malaysia), 1950, (Act No. 136, 1950); The Contract Act (Bangladesh), 1872 (Act No. IX, 1872).

SAC and whatever ruling it gives regarding the case is mandatory for the judge.\textsuperscript{419} Therefore, if any dispute related to \textit{wa’d} is brought to the court then whatever ruling the SAC provides is mandatory for the court. However, the supremacy of SAC might not be a permanent solution. Therefore, the law harmonisation committee of BNM is currently conducting rigor research to harmonise the Contract Act 1950 with the \textit{Sharī’ah} ruling for \textit{wa’d}.\textsuperscript{420}

On the other hand, the CSBIB in Bangladesh is a private organisation and their resolutions are not mandatory. Moreover, there is no initiative from BB to harmonise the \textit{wa’d} concept with the Contract Act 1872.\textsuperscript{421} This is a major difference between the legal status of \textit{wa’d} in Bangladesh and Malaysia. Bangladesh is at the back seat to provide legal support for \textit{wa’d} while Malaysia is more advanced through providing authority to the SAC of BNM to determine the \textit{Sharī’ah} issues related to \textit{wa’d} while attempting to revise the Contract Act.

\section*{5.3. Comparison on the Practice of \textit{Wa’d} in Islamic Banking Products}

Malaysia practices \textit{wa’d} in nine Islamic banking products which is higher than Bangladesh which practices \textit{wa’d} in four products. Malaysia’s \textit{wa’d}-based products comprise consumer banking products, trade financing products, and treasury products whereas Bangladesh does not offer any treasury product. Along with \textit{wa’d}, Malaysia practices \textit{wa’dān} in three products whereas Bangladesh practices only \textit{wa’d}. Generally, there is no difference on the usage of \textit{wa’d} among the three banks in Bangladesh. On the other hand, there are some differences among the three banks in Malaysia on the usage of \textit{wa’d}. The table below provides a comparative overview on the \textit{wa’d}-based products in Malaysia and Bangladesh.

\begin{table}[h]
\centering
\begin{tabular}{|l|l|}
\hline
\textbf{Product} & \textbf{Malaysia} & \textbf{Bangladesh} \\
\hline
Consumer Banking Products & \textit{wa’d} & \textit{wa’d} \\
Trade Financing Products & \textit{wa’d} & \textit{wa’d} \\
Treasury Products & \textit{wa’d} & - \\
\hline
\end{tabular}
\caption{Comparison on the Practice of \textit{Wa’d} in Islamic Banking Products}
\end{table}

\textsuperscript{419} Central Bank of Malaysia Act (2009), (Act No. 701, 2009).
\textsuperscript{420} Bank Negara Malaysia, \textit{Law Harmonisation Committee Report 2013}, 59.
Table 5.2 *Waʿd* Application among Islamic Banks in Malaysia and Bangladesh

<table>
<thead>
<tr>
<th>Name of the Product</th>
<th>Type of Product</th>
<th>Malaysia Banks Offer this Product</th>
<th><em>Waʿd</em> Feature in Malaysia Bank</th>
<th>Bangladesh i Banks Offer this Product</th>
<th><em>Waʿd</em> Feature in Bangladeshi Bank</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Bay‘ Murābāḥah</em> Home Financing</td>
<td>KFH</td>
<td><em>Waʿd</em></td>
<td>IBBL, PBL &amp; SIBL</td>
<td><em>Waʿd</em></td>
<td></td>
</tr>
<tr>
<td>MM Home Financing</td>
<td>KFH &amp; MIB</td>
<td><em>Waʿdān</em></td>
<td>IBBL, PBL &amp; SIBL</td>
<td><em>Waʿd</em></td>
<td></td>
</tr>
<tr>
<td><em>Bay‘ Muʿajjal</em> Financing</td>
<td>Not offered</td>
<td>Not applicable</td>
<td>IBBL, PBL &amp; SIBL</td>
<td><em>Waʿd</em></td>
<td></td>
</tr>
<tr>
<td><em>Tawarruq</em> Home Financing</td>
<td>BIMB &amp; MIB</td>
<td><em>Waʿd</em></td>
<td>Not offered</td>
<td>Not applicable</td>
<td></td>
</tr>
<tr>
<td>AITAB Vehicle Financing</td>
<td>MIB &amp; KFH</td>
<td><em>Waʿdān</em></td>
<td>Not offered</td>
<td>Not applicable</td>
<td></td>
</tr>
<tr>
<td><em>Murābāḥah</em> Letter of Credit</td>
<td>BIMB, MIB &amp; KFH</td>
<td><em>Waʿd</em></td>
<td>IBBL, PBL &amp; SIBL</td>
<td><em>Waʿd</em></td>
<td></td>
</tr>
<tr>
<td>Islamic FX Forward</td>
<td>BIMB, MIB &amp; KFH</td>
<td><em>Waʿd</em></td>
<td>Not offered</td>
<td>Not applicable</td>
<td></td>
</tr>
<tr>
<td>IPRS</td>
<td>BIMB, MIB &amp; KFH</td>
<td><em>Waʿd</em></td>
<td>Not offered</td>
<td>Not applicable</td>
<td></td>
</tr>
<tr>
<td>ICCS</td>
<td>BIMB, MIB &amp; KFH</td>
<td><em>Waʿd</em></td>
<td>Not offered</td>
<td>Not applicable</td>
<td></td>
</tr>
<tr>
<td>IRS</td>
<td>KFH</td>
<td><em>Waʿdān</em></td>
<td>Not offered</td>
<td>Not applicable</td>
<td></td>
</tr>
</tbody>
</table>

Source: Interview with the bankers in Malaysia and Bangladesh

5.3.1. *Waʿd*-Based Consumer Banking Products

There are four *waʿd*-based consumer banking products in Malaysia:

1. *Mushārakah Mutanāqiṣah* (MM) Home and Property Financing

2. *Al-Ijārah Thumma Al-Bayʿ* (AITAB) Vehicle Financing

3. *Murābaḥah* Home Financing

The Islamic banks in Bangladesh offer three consumer products based on *waʿd*:

1. *Bayʿ Murābāḥah* on Purchase Orderer (BMPO)
2. *Bayʿ Muʿajjal*
3. *Hire-Purchase under Shirkat al-Milk* (HPSM)

Malaysia and Bangladesh jointly offer two products which are: (1) *murābāḥah* home financing and (2) MM home financing/HPSM financing. Malaysia uniquely offers AITAB vehicle financing and *tawarruq/commodity* *murābāḥah* home financing. On the other hand, Bangladesh exclusively offers *bayʿ muʿajjal* financing. There are similarities and differences between Malaysia and Bangladesh on the usage of *waʿd* in the above mentioned products. The subsequent sections provide a detailed discussion on the similarities and differences between Malaysia and Bangladesh on these products.

### 5.3.1.1. *Bayʿ Murābāḥah* Financing

The mechanism of *bayʿ murābāḥah* financing in Malaysia is similar to Bangladesh. In both countries, “*murābāḥah* on purchase orderer” is used. The customer approaches the bank and requests the bank to purchase a property for him. The bank then purchases the property and sells it to the customer with a fixed profit rate. The customer pays the purchase price in instalments. In Malaysia, the product is designed for home financing only, whereas Islamic banks in Bangladesh offer *bayʿ murābāḥah* for home financing as well as for the purchase of industrial machineries and agricultural equipment. Bangladesh practices *bayʿ murābāḥah* more widely. All the three banks studied in Bangladesh offer *bayʿ murābāḥah* financing. In contrast, the usage of *bayʿ murābāḥah* is limited in Malaysia. Only KFH offers it. This is because Malaysian Islamic banks have different
alternatives e.g. *tawarruq* home financing, MM home financing, and *bay’ bithaman ājil* home financing.\(^{422}\)

In both countries, only one *wa’d* is used in *bay’ murābahah* product. The customer promises the bank to purchase the property from the bank at a fixed profit rate. The *wa’d* is binding in both of the countries. The terms and conditions of *murābahah* financing in the Islamic banks in Bangladesh and Malaysia mention that the customer is required to compensate the bank if any loss has incurred due to his breach of the *wa’d*. However, no fee is taken for *wa’d* in both countries. Apart from this, Islamic banks in Malaysia and Bangladesh do not apply *muwā’adah* and *wa’d* in *bay’ murābahah* financing.\(^{423}\) This is because the majority of the *Sharī‘ah* scholars in both countries do not allow *muwā’adah* as binding on both of the parties.\(^{424}\) This raises the issue in both of the countries that the practice of only one *wa’d* may ignore the customer’s interest.

This *wa’d*-based *murābahah* financing structure in Malaysia and Bangladesh is the classical type of financing. A number of previous studies show the similar usage of *wa’d* in *murābahah* product.\(^{425}\) However, the product structure can be developed further with the usage of *muwā’adah*.

In the case of Bangladesh, sometimes the bank directly gives money to the customer instead of purchasing the commodity first from the market and then selling it to the customer. In this case, there is no practice of *wa’d*.\(^{426}\) However, in Malaysian practice, there is no such issue.\(^{427}\) *Sharī‘ah* issues may arise in the *murābahah* practice by the

---


\(^{423}\) Ibid.

\(^{424}\) Ahcene Lahsasna (Member of the Shariah Committee, Maybank Islamic Berhad), interview with the researcher, 23 July 2014; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ahmad Suaimi Yahya, interview with the researcher, 11 November 2013; Mohd Nazri Chik, interview with the researcher, 4 September 2013; Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014.


\(^{426}\) Shahed Rahmani (Member of the Shariah Supervisory Committee, Shahjalal Islami Bank Limited), interview with the researcher, 10 April 2014.

\(^{427}\) Ahmad Suaimi Yahya, interview with the researcher, 11 November 2013.
Islamic banks in Bangladesh due to their extensive usage. On the other hand, very limited usage of *murābaḥah* financing may not trigger any *Sharī’ah* issue in Malaysia. Based on the above discussion, the table below summarises the comparison between Malaysia and Bangladesh on the practice of *wa’d* in *murābaḥah* financing.

Table 5.3 Comparison between Malaysia and Bangladesh on the practice of *wa’d* in *murābaḥah* financing

<table>
<thead>
<tr>
<th>No</th>
<th>Subject</th>
<th>Malaysia</th>
<th>Bangladesh</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Type of <em>Murābaḥah</em></td>
<td><em>Murābaḥah</em> on purchase orderer</td>
<td><em>Murābaḥah</em> on purchase orderer</td>
</tr>
<tr>
<td>2</td>
<td><em>Wa’d Element</em></td>
<td>Customer promises the bank to purchase the property from the bank at a fixed profit rate.</td>
<td>Customer promises the bank to purchase the property from the bank at a fixed profit rate.</td>
</tr>
<tr>
<td>3</td>
<td>Binding Nature of <em>Wa’d</em></td>
<td>Binding on the promisor</td>
<td>Binding on the promisor</td>
</tr>
<tr>
<td>4</td>
<td><em>Muwā’adah/Wa’dān</em></td>
<td>No application</td>
<td>No Application</td>
</tr>
<tr>
<td>5</td>
<td>Fee for <em>Wa’d</em></td>
<td>No fee</td>
<td>No fee</td>
</tr>
<tr>
<td>6</td>
<td>Name of the Bank(s)</td>
<td>KFH</td>
<td>IBBL, PBL &amp; SIBL</td>
</tr>
<tr>
<td>7</td>
<td>Financing Facilities</td>
<td>House</td>
<td>House, Industrial machineries and agricultural equipment</td>
</tr>
<tr>
<td>8</td>
<td>Issue(s)</td>
<td>Disregarding Customer’s interest</td>
<td>(a) Disregarding customer’s interest; (b) <em>Sharī’ah</em> governance issue i.e. fake <em>murābaḥah</em> transaction</td>
</tr>
</tbody>
</table>

Source: Interview with the Bankers in Malaysia and Bangladesh

5.3.1.2. MM Home Financing

The product structure of MM in Malaysia is similar to HPSM in Bangladesh. In Malaysia, MM is a popular home financing product. On the other hand, HPSM is used for both home and car financing in Bangladesh. In Bangladesh, there is no usage of AITAB. Therefore, HPSM is used for both home and car financing. The operational structure of HPSM and MM financing are similar. In both products, the customer and the bank co-own the property and the bank then rents its portion of the property to the customer. At
the same time, the customer gradually purchases the bank’s share of the property. At the end of the tenure, the bank transfers the property to the customer.\textsuperscript{428}

In terms of the usage of \textit{wa’d}, there is a difference between HPSM and MM. In MM (as practiced by KFH), there are three \textit{wa’d} between the bank and the customer while in HPSM there is only one \textit{wa’d}. In MM, the customer firstly promises to purchase the bank’s share on a gradual basis and the bank then undertakes that it will sell its share of the property to the customer whenever he (the customer) asks for an early settlement. Thirdly, the client undertakes that he will purchase the bank’s share of the property at the time of default. However, the second \textit{wa’d} is not utilised in MIB. In case of HPSM in Bangladesh, there is only one \textit{wa’d} from the customer. The customer undertakes that he will purchase the bank’s share of the property either on gradual basis or in lump sum.\textsuperscript{429}

In the case of MM, there is no practice of \textit{muwā’adah} but the three \textit{wa’d} practiced there can be regarded as \textit{wa’dān}. This is because each of the \textit{wa’d} is subject to different conditions. On the other hand, HPSM does not employ neither \textit{muwā’adah} nor \textit{wa’dān}. However, the \textit{wa’d} given by the client in HPSM includes two different conditions which are the undertaking to purchase the property in lump sum and the undertaking to purchase the property on gradual basis.

The \textit{wa’d} applied in MM provides more financial security to the bank and the customer. The undertakings by the client to purchase the bank’s share provides the bank security of the smooth flow of MM agreement. Moreover, it provides the bank the right to recover its loss in case the customer defaults. Similarly, the bank’s promise to the client provides the client the right to have an early settlement. The early settlement is a need for

\textsuperscript{428} Kuwait Finance House (Malaysia) Berhad, \textit{Product Guide: Retail and Consumer Banking}, 7; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Huda and Shamsuddoha, \textit{Islami Banker Biniog Paddhoti}, 97-98; Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014; Rahman, interview with the researcher, 7 April 2014.

\textsuperscript{429} \textit{Ibid.}
the customer when the property price or rent goes up rapidly. In this way, the *wa’d* used in MM ensures both parties’ interests.

Table 5.4 The Practice of *Wa’d* in MM (Malaysia) and HPSM (Bangladesh)

<table>
<thead>
<tr>
<th>No</th>
<th>MM Home Financing (KFH)</th>
<th>MM Home Financing (MIB)</th>
<th>HPSM Financing (IBBL, SIBL &amp; PBL)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The customer undertakes to purchase the bank’s share of the property on gradual basis.</td>
<td>The customer undertakes to purchase the bank’s share of the house on gradual basis.</td>
<td>The customer undertakes to purchase the bank’s share of the property either gradually or in lump sum.</td>
</tr>
<tr>
<td>2</td>
<td>The bank undertakes that it will sell its share of the property to the customer whenever he (the customer) asks for an early settlement.</td>
<td>×</td>
<td>×</td>
</tr>
<tr>
<td>3</td>
<td>The customer undertakes that he will purchase the bank’s share of the property at the time of default.</td>
<td>The customer undertakes that he will purchase the bank’s share of the property at the time of default.</td>
<td>×</td>
</tr>
</tbody>
</table>

Source: Interview with the bankers in Malaysia and Bangladesh

The structure of *wa’d* in MM may raise several *Sharī‘ah* issues. As the bank and the customer mutually promise to each other on a same subject matter then it may become *muwā‘adah*. The issue is whether there is a real difference among the number of *wa’d*. Secondly, the undertaking given by the customer to purchase the property at the event of default may be a guarantee to the *mushārik* (bank’s) capital in the *mushārakah* agreement. When one *mushārik* is giving guarantee to another *mushārik*’s capital through purchase undertaking then it may be prohibited. This is because the risk of investment is eliminated whereas risk sharing is the fundamental characteristic of Islamic finance. Therefore, the next chapter of this thesis will shed some light on these issues.
5.3.1.3. Bay‘ Mu‘ajjal Financing

As discussed earlier, bay‘ mu‘ajjal is similar to bay‘ murābaḥah financing with some minor differences. There is usually a wa‘d from the customer to purchase a commodity from the bank. The product is offered by the three Islamic banks of Bangladesh.⁴³⁰ There is a popular product in Malaysia similar to bay‘ mu‘ajjal which is called bay‘ bi thaman ājil (BBA). Even though the literal meaning for both of the contracts are the same, there are differences between bay‘ mu‘ajjal and BBA in terms of the operational structure. The table below shows the differences and similarities between BBA and bay‘ mu‘ajjal.

Table 5.5 Comparison between Bay‘ Mu‘ajjal and Bay‘ Bithaman Ājil (BBA)

<table>
<thead>
<tr>
<th>Subject</th>
<th>Bay‘ Mu‘ajjal</th>
<th>Bay‘ Bithaman Ājil (BBA)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sale and buy back agreement</td>
<td>There is no sale and buy back agreement between the bank and the customer</td>
<td>There is a sale and buy back agreement between the bank and the customer</td>
</tr>
<tr>
<td>Payment of price</td>
<td>The payment of price is deferred.</td>
<td>The payment of price is deferred.</td>
</tr>
<tr>
<td>Wa‘d</td>
<td>The customer undertakes to purchase the commodity from the bank</td>
<td>There is no practice of wa‘d.</td>
</tr>
<tr>
<td>Parties involved</td>
<td>Three parties: the developer, the bank and the customer</td>
<td>Three parties: the developer, the bank and the customer</td>
</tr>
<tr>
<td>Ownership risk</td>
<td>Higher ownership risk for the bank</td>
<td>Lower ownership risk for the bank</td>
</tr>
<tr>
<td>Sharī‘ah concept used</td>
<td>Wa‘d and bay‘</td>
<td>Bay‘ al-‘īnah, muqāṣah</td>
</tr>
<tr>
<td>Sharī‘ah appraisal</td>
<td>Permissible by the scholars of all four school of jurisprudence</td>
<td>Permissible by some scholars of Shāfi‘i school of jurisprudence</td>
</tr>
</tbody>
</table>

Source: BIMB and IBBL

Under BBA home financing, the customer purchases a house from the developer and makes a down payment. After that, the customer approaches to the bank and asks for financing. If the bank approves the financing then an asset purchase agreement will be executed where the bank purchases the house from the customer. A novation agreement takes place after that and as a result, the bank pays the purchase price directly to the developer. After that, an asset sale agreement will be executed where the bank sells the

⁴³⁰ Huda and Shamsuddoha, Islami Banker Binog Paddhoti, 64; Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014; Rahman, interview with the researcher, 7 April 2014.
house to the customer with cost plus profit on deferred basis. The customer pays the bank on instalments.\textsuperscript{431}

The above structure shows that there is a sale and buy back arrangement between the bank and the client. Therefore, BBA is different from a plain \textit{bayʿ muʿajjal} contract. There is no practice of \textit{waʿd} in BBA.\textsuperscript{432} This is because the customer purchases the house first from the developer. The bank then purchases the house and immediately sells it back to the customer. Thus, the bank confronts minor risk. Therefore, there is no need to employ \textit{waʿd} to minimise the risk.

The practice of BBA by the Islamic banks in Malaysia received a major criticism by the scholars. The sale and buy back agreement between the two parties is termed as \textit{bayʿ al-ʿinah}. The majority of the scholars from the four school of jurisprudence have prohibited \textit{bayʿ al-ʿinah}. Only a few Shāfiʿī scholars have allowed it with conditions.\textsuperscript{433} Therefore, the \textit{waʿd}-based \textit{bayʿ muʿajjal} can be a better alternative for BBA. \textit{Bayʿ muʿajjal} is accepted in the \textit{Shariʿah} with the consensus of the scholars. Along with \textit{bayʿ muʿajjal}, there are a few contracts which can be the alternatives for BBA e.g. \textit{tawarruq} home financing and \textit{murābāhah} home financing. These products are based on \textit{waʿd} and can be used in lieu of BBA.

\textbf{5.3.1.4. \textit{Tawarruq} Home Financing}

\textit{Tawarruq} home financing is based on \textit{bayʿ murābāhah} but it is more complicated. Similar to \textit{murābāhah}, there is \textit{waʿd} in \textit{tawarruq} home financing where the client undertakes to purchase an asset from the bank.\textsuperscript{434} \textit{Tawarruq} is used in Islamic banks in Malaysia but the Islamic banks in Bangladesh do not offer any product based on \textit{tawarruq}. This is

\textsuperscript{431} Bank Islam Malaysia Berhad, \textit{Application of Shariʿah Contracts}, 16.
\textsuperscript{432} Mohd Nazri Chik, interview with the researcher, 4 September 2013; Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.
\textsuperscript{434} Bank Islam Malaysia Berhad, \textit{Application of Shariʿah Contracts}, 3.
because most of the Sharī‘ah scholars in Bangladesh view that *tawarruq* is not allowed in the Sharī‘ah.\(^{435}\) Similar to the Islamic Fiqh Academy, some scholars view that only organised *tawarruq* is not allowed. However, currently, there is no infrastructure developed in Bangladesh to practice the real *tawarruq*.\(^{436}\) Based on the second view, it is possible to introduce *tawarruq* home financing product in Bangladesh on the condition that there is a free commodity market to practice the real *tawarruq*.

Currently, *bay‘ murābaḥah* may substitute *tawarruq* in Bangladesh but *tawarruq* has some advantages comparing with *bay‘ murābaḥah*. Firstly, it provides cash money to the customer. As the customer can sell the asset to a third party, he receives cash money. Therefore, *tawarruq* may serve the customer’s needs better than *bay‘ murābaḥah*.

Secondly, *tawarruq* involves less risk for the bank. As mentioned earlier in the case of *tawarruq* home financing, the bank does not purchase the house rather it purchases a commodity from a broker and sells it to the customer on credit. After that, the bank becomes the customer’s agent to sell the commodity to another broker. On the other hand, in *bay‘ murābaḥah* home financing, the bank purchases a house from the developer and sells it to the customer. Therefore, the bank faces more ownership risk in *bay‘ murābaḥah* than in *tawarruq*.

*Tawarruq* may help Islamic banks in Bangladesh to meet the customer’s different types of needs as currently no such product is available in the market. However, it is a significant challenge for the Islamic banks in Bangladesh to develop the *tawarruq* commodity market to practice real *tawarruq*. Besides, the status of *tawarruq* in the *Sharī‘ah* is still a debate among the *Sharī‘ah* scholars.

\(^{435}\) Ahsanullah Miah (Member of the *Sharī‘ah* Supervisory Committee, Islami Bank Bangladesh Limited), written communication with the researcher, 10 April 2014; Shamsuddoha, interview with the researcher, 7 April 2014; Kabir, interview with the researcher, 7 April 2014.

\(^{436}\) Rahmani, interview with the researcher, 10 April 2014.
5.3.1.5. AITAB Vehicle Financing

AITAB is another type of *wa’d*-based product which is practiced in Malaysia but not in Bangladesh. Instead of AITAB, Islamic banks in Bangladesh employ HPSM for vehicle financing which is basically *mushārakah mutanāqisah*. Even though no *Sharī‘ah* and legal issue is involved with AITAB, no Islamic bank in Bangladesh practices AITAB. There is a difference between HPSM and AITAB. Based on HPSM, there is a partnership agreement between the bank and the customer and then the customer purchases the bank’s share gradually. On the other hand, there is no partnership agreement between the bank and the customer in AITAB. First, the bank purchases a vehicle and rents it out to the customer. At the end of the lease period, the bank sells the vehicle to the client through a token price. Usually, *wa’dān* is employed is AITAB while HPSM employs *wa’d* only.437

Even though no *Sharī‘ah* issue is evident in using HPSM for vehicle financing, globally AITAB is used for vehicle financing. AITAB does not involve any major *Sharī‘ah* issue. AITAB is used for car financing because it is less complicated than HPSM. Car prices always depreciate. It is not difficult for the client to purchase the car at the end of the lease period. On the other hand, house prices usually appreciate. Consequently, it is difficult for the customer to purchase the house at the end of the lease period. Therefore, AITAB is more suitable for vehicle financing whereas HPSM is more suitable for house financing. Finally, AITAB may provide more product diversity for Islamic banking in Bangladesh.438

437 Maybank Islamic Berhad, “Al-Ijarah Thuma Al-Bai (AITAB)”, 1; Ahmad Suhaimei Yahya, interview with the researcher, 11 November 2013; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Huda and Shamsuddoha, *Islami Banker Binioq Padhhoti*, 97-98.
5.3.2. Trade Financing Products

A Murāba'ah letter of credit which includes wa'd is offered by the Islamic banks in Malaysia and Bangladesh. However, it is termed murāba'ah post import (MPI) in the Islamic banks of Bangladesh. The product structure is the same for both Malaysian and Bangladeshi Islamic banks. In both countries, the customer approaches the bank and requests the bank to purchase a commodity from a foreign trader. After the bank has purchased the commodity, it sells it to the customer with a profit margin.439

The practice of wa’d is the same in both jurisdictions. The client undertakes that he will purchase the commodity from the bank after the bank has purchased it from the foreign seller. No muwā‘adah or wa’dān is used in both of the countries. It is noteworthy to mention here that considering the need in export and import business, Sharī‘ah scholars provide some flexibility on the usage of muwā‘adah here. Islamic Fiqh Academy in its 17th session resolved that when it is a necessity to apply muwā‘adah in trade financing then it is allowed to apply muwā‘adah.440 Therefore, both Malaysia and Bangladesh can improve the product structure through applying muwā‘adah when there is a need.

In Malaysia, there are two other trade financing products namely “Islamic trust receipt” and “Islamic accepted bill for import” offered to the customers which are based on the similar structure of murāba’ah letter of credit. However, there is no such product offered by the Islamic banks in Bangladesh. This is because there is a Sharī‘ah issue involved with these two products which is known as bay‘ al-dayn. Bay‘ al-dayn is not allowed by the Sharī‘ah scholars in Bangladesh as well as the majority of the Sharī‘ah scholars globally.441

440 Islamic Fiqh Academy, 17th Session, Islamic Fiqh Academy website.
5.3.3. Treasury Products

As mentioned earlier, Malaysia has developed four treasury products based on the concept of *wa’d* which are: (1) Islamic FX Forward, (2) Islamic Profit Rate Swap, (3) Islamic Cross Currency Swap, and (4) *Ijārah* Rental Swap. On the other hand, Bangladesh is yet to introduce any treasury product. The subsequent sections describe the current status of developing Islamic treasury products in Bangladesh.

5.3.3.1. Islamic FX Forward

Currently, there is an initiative by the CSBIB to structure Islamic FX forward. However, the *Sharī‘ah* scholars in Bangladesh have different views on the permissibility of FX forward in the *Sharī‘ah*. A group of scholars view that FX forward is not permissible in the *Sharī‘ah*. They argue that there is a doubt of *ribā* in FX forward. *Sharī‘ah* requires that currencies should be exchanged on the spot according to the price on the spot. If a binding promise (*wa’d mulzim*) is employed to execute a currency exchange contract (*sarf*) in the future based on today’s exchange rate then it is not allowed. Currency exchange should be based on the exchange rate at the time of executing the contract.\(^{442}\)

On the other hand, some *Sharī‘ah* scholars in Bangladesh view that FX forward should be allowed in the *Sharī‘ah*. They argue that according to the Ḥanafī school of jurisprudence (*madhhab*), it is allowed to make *wa’d* as well as *muwā‘adah* binding on the promisor based on the need of the public. As FX forward is a need for Islamic banking in Bangladesh then it should be allowed to employ a binding mutual promise (*muwā‘adah mulzimah*) in FX forward. There is a difference between a contract (*‘aqd*) and

---

\(^{442}\) Abu Bakr Rafiq (Member, Central Shari‘a Board for Islamic Banks of Bangladesh), interview with the researcher, 4 May 2014; Shakhawatul Islam (Member Secretariat, Central Shari‘a Board for the Islamic Banks of Bangladesh), interview with the researcher, 19 April 2014; Shamsuddoha, interview with the researcher, 7 April 2014.
muwāʿadah. There is no transfer of ownership, ījāb and qabūl in muwāʿadah. Therefore, no Sharīʿah ruling related to a contract is attributed to muwāʿadah. Therefore, FX forward is not issued by any Islamic bank in Bangladesh.

The above debate amongst the Sharīʿah scholars is ongoing and they have been unable to come up with a concrete decision on this matter. Therefore, FX forward is not issued by any Islamic bank in Bangladesh.

5.3.3.2. Islamic Profit Rate Swap (IPRS) and Islamic Cross Currency Swap (ICCS)

Malaysia introduced IPRS and ICCS based on waʿd. The key underlying contract in both types of swaps is tawarruq. Waʿd is used as a supporting instrument in both types of swaps. These two swaps are essential to manage floating profit rate risk and floating currency exchange rate risk. However, the majority of the Sharīʿah scholars and Islamic banking practitioners in Bangladesh rejected the idea of introducing Islamic swap. They provided a few reasons for this. Firstly, tawarruq is not an accepted Sharīʿah contract in Bangladesh. Referring to the Ḥanafī school of jurisprudence (madhhab), the majority of the Sharīʿah scholars in Bangladesh view that tawarruq is not accepted in the Sharīʿah. In addition, there is a fear that derivatives are toxic financial instruments. A number of Islamic banking practitioners in Bangladesh view that swaps are harmful for the economy and they are not a public need. Moreover, it is not necessary to have an Islamic alternative for each conventional product. Therefore, no swap is introduced in Bangladesh.

Some believe that swap is a crucial need for Islamic finance in Bangladesh. It is an effective tool to manage currency rate risk and profit rate risk. Therefore, it should be

---

443 A.Q.M. Safiullah Arif (Secretary General, Central Shariah Board for Islamic Banks of Bangladesh), interview with the researcher, 16 April 2014; Rahmani, interview with the researcher, 10 April 2014; Miah, written communication with the researcher, 10 April 2014.
444 Islam, interview with the researcher, 19 April 2014; Uddin, interview with the researcher, 13 April 2014.
445 Bank Islam Malaysia Berhad, Application of Sharīʿah Contracts, 94; Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013; Ezry Fahmy Eddy Yusof, interview with the researcher, 13 November 2013.
446 Rafiq, interview with the researcher, 4 May 2014; Shamsuddoha, interview with the researcher, 7 April 2014; Rahmani, interview with the researcher, 10 April 2014.
allowed as a risk management tool. Along with this, some Sharī’ah scholars believe that tawarruq can be permissible in Bangladesh with the condition that it is not an organised tawarruq.448

In light of the above, tawarruq might be practiced in the future when a commodity market is established to allow free commodity trading. When a real tawarruq is used in a swap structure with wa’d then there might be no Sharī’ah restriction to issue IPRS and ICCS in Bangladesh.

5.3.3.3. Ijārah Rental Swap (IRS)

IRS is another risk management instrument offered by KFHMB in Malaysia. The key underlying contract in IRS is musāwamah. Unlike IPRS, IRS uses wa’dān in its product structure. The most important characteristic of IRS is that it is used to hedge returns from ijārah only.449 In the case of Bangladesh, there is no pure ijārah financing except HPSM. Islamic banks in Bangladesh can hedge their ijārah returns in HPSM through this IPRS. However, similar to IPRS, there is tawarruq arrangement in IRS as well. Therefore, it is a significant challenge for IRS to achieve the Sharī’ah acceptance in Bangladesh.

5.4. Conclusion

This chapter compared the legal status and the practice of wa’d in Islamic banking products in Malaysia and Bangladesh. It showed that the contract acts in both countries do not explicitly recognise wa’d. However, Malaysia provides strong support for wa’d through placing the SAC as the highest authority to decide on any Islamic financial cases in the court. In terms of the practice of wa’d, there is a significant difference between Malaysia and Bangladesh. Malaysia has a wide range of products based on wa’d and

447 M. Azizul Huq (Member of the Shariah Supervisory Committee, Prime Bank Limited), interview with the researcher, 9 April 2014; Arif, interview with the researcher, 16 April 2014.
448 Rahmani, interview with the researcher, 10 April 2014.
449 Ali Ahmad, interview with the researcher, 26 December 2013.
wa‘dān, whereas Bangladesh has a limited number of wa‘d-based products. There is no practice of wa‘dān in Bangladesh. Moreover, no treasury product has thus far been launched in Bangladesh due to the strictness of the Sharī‘ah scholars.
CHAPTER 6: SHARĪ‘AH ISSUES AND OTHER CHALLENGES FOR WA‘D-BASED PRODUCTS IN MALAYSIA AND BANGLADESH

6.1. Introduction

There are a number of challenges in practicing wa‘d in different Islamic banking products. Among these challenges, Sharī‘ah issues are most significant in Malaysia. A group of Sharī‘ah scholars have raised questions on the practice of wa‘d in Malaysian Islamic banking products. However, some Sharī‘ah scholars have excluded these Sharī‘ah issues. Comparing with Malaysia, wa‘d-based products are limited in Bangladesh. Therefore, it is encountering minor Sharī‘ah issues. However, Sharī‘ah scholars and Islamic banking practitioners in Bangladesh have identified different types of challenges for the development of wa‘d-based products in Bangladesh.

This chapter discusses the Sharī‘ah issues and other challenges in wa‘d-based products in Malaysia and Bangladesh. It presents the Sharī‘ah scholars and Islamic banking practitioners’ opinions first and then makes a thorough discussion reflecting on their opinions. The first section discusses the Sharī‘ah issues and other challenges in Malaysia and the second section discusses the Sharī‘ah issues and other challenges in Bangladesh.

6.2. Sharī‘ah Issues and Other Challenges for Wa‘d-Based Products in Malaysia

There are six challenges regarding the practice of wa‘d in Islamic banking products in Malaysia. Among these challenges, four are Sharī‘ah issues which are: (1) wa‘d as a means for capital guarantee in MM home and property financing, (2) wa‘d as a ḥiḥlah in treasury products, (3) wa‘d as an instrument to exploit the opposite party, and (4) similarity with forward contract (bay‘ al-ajal bi al-ajal). Together with these Sharī‘ah
issues, two additional challenges are (1) legal challenges and (2) absence of parameters. The following sections provide details of these Sharī‘ah issues and challenges.

6.2.1. *Wa‘d* as a Means for Capital Guarantee in MM Home and Property Financing

In relation to MM home and property financing, it is claimed that the *wa‘d* given by the customer to the bank on purchasing the share of the bank at a fixed price is a kind of guarantee to the bank’s capital in the *mushārakah* business. If one partner provides a guarantee to another partner’s capital in a *mushārakah* investment, then it violates the purpose of the *mushārakah* contract. This is because the fundamental principal of a *mushārakah* contract is that all the partners in the *mushārakah* venture should share the profit and loss. Corresponding to this issue, *Sharī‘ah* scholars interviewed in Malaysia fall into two different groups. One group of scholars’ view is that the *wa‘d* used in MM is a guarantee to the capital. The other group of scholars view that the *wa‘d* here is not a capital guarantee to the partner of the *mushārakah* agreement. The details on the scholars’ opinions and their arguments are provided below.

6.2.1.1. *Wa‘d* is an Element of Guarantee to the Mushārakah Capital

Asmadi Mohamed Naim is a proponent of the view that *wa‘d* is an element of guarantee to the *mushārakah* capital in MM home financing. He argues that the type of partnership (*shirkah*) applied in MM home financing is *shirkat al-‘aqd*. Even though it is *shirkat al-milk* at the initial stage but it changes into *shirkat al-‘aqd* after that. In MM, both customer and bank make an agreement to invest the property through leasing it either to the customer himself or to third party. In this way, the partnership has been converted to *shirkat al-‘aqd*. MM home financing violates all the characteristics of *shirkat al-milk*. The bank’s intention is neither to own the house nor to use it but to invest it through lease with the intention of gaining profit. Moreover, in *shirkat al-milk*, all the partners are free to
perform any transactions with their own portions. However, in this product, the partners are not allowed to do so as they are bound to an arrangement before.\textsuperscript{450}

Asmadi Mohamed Naim concludes that the \textit{wa’d} given by the customer to the bank on purchasing the bank’s share at the time of default is prohibited (\textit{ḥarām}) due to a number of reasons. Firstly, it contradicts the Qur’anic guidance that asks the creditors to free the debtors or to postpone the repayment when the debtor is truly incapable of settling the debt. With this \textit{wa’d}, the financier places the customer in difficulty by forcing him to purchase the remaining share of the bank on credit although he is in a difficult situation. Secondly, there is no risk-sharing by the bank. When the property is under the joint-ownership then the bank is entitled to receive the proceeds from the property auction based on its share in the property. However, with the use of this \textit{wa’d}, the bank can claim the full amount of the proceeds from the property auction. This type of procedure completely goes against the prophetic narration (\textit{ḥadīth}) which says: “profit comes with taking risk”.\textsuperscript{451}

Furthermore, this \textit{wa’d} arrangement is a kind of oppression (\textit{ẓulm}) on the person who is presently unable to purchase the share of the bank and unable to pay the \textit{ijārah} rental by imposing greater obligation, which is to purchase the remaining share of the house in credit. In addition, all the partners in a \textit{mushārakah} contract should meet the same rights and liabilities. However, this \textit{wa’d}-based arrangement facilitate the bank to escape from the \textit{mushārakah} liability.

Asmadi Mohamed Naim asserts that it is not precise to claim that there is no other way to mitigate the risk in MM home financing except through this \textit{wa’d}. This is because the bank utilises a number of risk mitigation techniques prior to approving this product, e.g. credit scoring of the customer, keeping required risk premiums for \textit{mushārakah}

\textsuperscript{450} Asmadi Mohamed Naim, “Purchase Undertaking Issues,” 40-41.
\textsuperscript{451} \textit{Ibid.}
financing etc.\footnote{Asmadi Mohamed Naim, “Purchase Undertaking Issues,” 43-44.} Therefore, this *wa’d*-based arrangement should not be allowed in the *Sharī‘ah*.

When interviewed, Azman Mohd Noor stated that some Islamic banks in Malaysia employ *wa’d* in MM home financing that the customer will purchase the bank’s share of the house on gradual basis. In case the customer does not fulfil his *wa’d*, the bank sells the house in auction. If any loss incurs to the bank, the bank will cover it from the customer’s portion of the proceeds received from the house auction. This is a kind of capital guarantee to the bank’s share of the property by the promisor (customer). This is an example of the inappropriate use of *wa’d*. He argues that this practice is similar to the case of a *muḍārabah* where the *muḍārib* promises to fill up necessary amount of money if he cannot achieve the targeted amount of profit. The same thing goes with the *mushārakah* financing here where one partner obligates another partner to purchase the *mushārakah* asset with face value along with other costs. Therefore, there is no difference here between *mushārakah* and BBA. Consequently, the purpose of the contract (*muqtaḍā al-‘aqd*) is violated through this *wa’d* disregarding whether it is *shirkat al-‘aqd* or *shirkat al-milk*\footnote{Azman Mohd Noor (Deputy Chairman, Shariah Board, Al Rajhi Banking & Investment Corporation (Malaysia) Berhad), interview with the researcher, 24 July 2014.}.

Azman Mohd Noor adds that some prominent scholars i.e. Sheikh Nedham Yaqoobi have allowed this and some banks in Malaysia are practicing it. However, it is the dangerous part of *wa’d* which many people are not aware of. It is true that *wa’d* is a risk mitigation tool, but at the same time it may serve as the conventional interest-based banking facility. Therefore, this practice should be prohibited.\footnote{Ibid.}

Respecting the majority opinion, Mohamad Akram Laldin views that *wa’d* is used in MM home financing to guarantee the capital of the bank. If the customer promises that if he defaults then he will purchase the property from the bank at a fixed price then, it is
actually guaranteeing the capital plus the profit of the bank. This is because the price of the property fixed at the beginning of the contract includes the original purchasing price plus profit as well as other costs. This is a matter of concern because the purpose of the *mushārakah* contract has been changed here. Looking into this product from a micro-level perspective, it seems that everything is sound. However, when we look into this product from a macro-level perspective analysing the purpose of all the underlying contracts, it appears that there is an arrangement of guarantee to the capital plus profit. It means that there is no profit and loss sharing in this *mushārakah* contract whereas the purpose of *mushārakah* is that there must be profit and loss sharing between the parties.  

Relating to this issue, Hakimah Yaacob mentions that *shirkat al-milk* means to co-own a house or a car without having any intention to get profit from it. Once the partners have decided to get profit from this *mushārakah* asset, it becomes *shirkat al-ʿaqd*. Therefore, it is dangerous to inject *waʿd* in MM home financing because it may lead to guaranteeing the capital of the *mushārik* which is not legitimated in the *Sharīʿah*. In some Islamic bank’s product documentation, it is stated that the customer must purchase the bank’s share of the house disregarding anything happens to the house. The element of guarantee is found here. The *waʿd* is injected in the MM home financing in a way that it has no profit and loss sharing. Hence, the purpose of the contract (*muqtaḍāʾ al-ʿaqd*) has been violated.  

Hanirah Hanafi mentioned that the *waʿd*-based arrangement in the case of default which includes some unreasonable actions to safeguard the bank’s interest hampers the government’s initiative to develop equity-based products. She pronounces that the *waʿd* clause in the MM home financing somehow undermines the essence of Islamic law (*maqāṣid al-Sharīʿah*). Therefore, she recommends that it is the duty of the *Sharīʿah*
committee to make sure that the *Sharī'ah* rules are both theoretically and practically followed in all situations.\(^{457}\)

### 6.2.1.2. *Waʿd* is Not an Instrument to Guarantee the *Mushārakah* Capital

Contrary to the previous opinions, Ahcene Lahsasna views that MM home financing in fact involves *shirkat al-milk*. It is the common ownership in the property. Therefore, the issue of capital guarantee collapses because it is not a partnership business (*shirkat al-ʿaqd*) where the issue of capital guarantee is relevant. This is a common ownership on an asset. Therefore, all the arguments related to capital guarantee is irrelevant here.\(^{458}\)

Moreover, there is no violation of the objective of the contract (*muqtaḍā al-ʿaqd*) here, which might be related to some *mushārakah ṣukūk* structure. People may argue on this but if we look beyond the theory, the issue might be clear. When a product is put into practice then usually a number of problems occur. To adjust those problems, the facilities are required to be tied up with many terms and conditions. This is why when we employ *ijithād taṭbīqī* then due consideration is paid to a number of facts. What has been done in MM home financing is the enhancement of the contract. There is a difference between corrupting the contract (*ifsād al-ʿaqd*) and enhancement of the contract (*taḥsīn al-ʿaqd*). Too many terms and conditions may violate the purpose of the contract (*muqtaḍā al-ʿaqd*) but what has been practiced so far regarding *waʿd* is actually on the enhancement of the contract.\(^{459}\)

Another *Sharī'ah* scholar, Shamsiah Mohamad viewed that MM home financing is based on *shirkat al-milk*. She argued that based on the classical sources of Islamic jurisprudence, *shirkat al-milk* is the property that is jointly owned through inheritance for

---


\(^{458}\) Lahsasna, interview with the researcher, 23 July 2014.

\(^{459}\) *Ibid.*
example. If two individuals jointly purchase a computer for example then it is shirkat al-
milk. On the other hand, in shirkat al-‘aqd, both partners share an asset to get profit
through business. In the case of MM home financing, the bank and the customer jointly
purchase the house. It is not their intention to profit from this investment. Based on this,
it can be said that MM home financing involves shirkat al-milk but not shirkat al-‘aqd.⁴⁶⁰

Furthermore, it is not accepted that MM home financing is shirkat al-milk at the
initial stage, and then it transforms into shirkat al-‘aqd. This is because based on the
classical scholars’ opinions, it should be decided at the time of establishing the
partnership. If two persons jointly own an asset and after that they decide to rent it out or
to sell it in the market then it does not change into shirkat al-‘aqd.⁴⁶¹

In addition, Ahmad Suhaimi Yahya argues that purchase undertaking is not a
 guarantee to the capital in general. Referring to Taqi Usmani, he argues that purchase
undertaking is a kind of guarantee when the mushārik (partner) promises to purchase the
property with a nominal value or face value. However, if the mushārik undertakes to
purchase the property with fair value then it is not a problem. This is because the purchase
of the property by the mushārik at the end of the tenure depends on the availability of the
property. If the property is lost then there is no purchase. Therefore, it should not be
generally concluded that purchase undertaking is a guarantee to the mushārakah
capital.⁴⁶²

Furthermore, Muhd Ramadhan Fitri Ellias argues that MM home financing is a
shirkat al-milk. This is because there is no intention of pure investment here rather it is
for acquiring an asset. As shirkat al-milk, it is not a requirement here to purchase the
property on fair value. It is allowed to fix the price upfront e.g. one MYR per unit.⁴⁶³

---

⁴⁶⁰ Shamsiah Mohamad (Member, Shari’ah Advisory Council of Bank Negara Malaysia), interview with
the researcher, 13 November 2014.
⁴⁶¹ Ibid.
⁴⁶² Ahmad Suhaimi Yahya, interview with the researcher, 11 November 2013.
⁴⁶³ Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.
According to BNM,\textsuperscript{464} the \textit{wa’d} by the customer to purchase the \textit{mushārakah} property in case of default can be incorporated with the condition that it is exercised with justice and without refuting the profit and loss sharing component between the contracting parties. Due to this \textit{wa’d}, banks are allowed to claim any loss incurred from the customer. However, BNM instructs the following procedures to be followed:

1. The bank can take the client’s portion from the proceeds of the auction to recover loss.
2. In case the proceeds from the customer’s portion is not sufficient to cover bank’s loss then it can claim the outstanding amount from the customer if he is financially solvent.
3. When the client is proven financially insolvent to pay the remaining amount of loss, the bank should bear the loss.
4. In case there is a surplus from the proceeds of the auction, the bank should share it with the client according to their proportion of ownership on the property.

Referring to Al-Zarqā’, BNM justifies its position on the ground that \textit{Sharī’ah} permits the contracting parties (\textit{āqidān}) to stipulate conditions according to their rights in a certain contract (\textit{‘aqd}). Pertaining to some unique conditions (\textit{shurūt}) in a few modern contracts (\textit{‘uqūd mustajaddah}), they should be compared with conditions in a few recognised contracts (\textit{‘uqūd musammāt}) in Islamic jurisprudence (\textit{fiqh}) and that can be analysed along with the following points:\textsuperscript{465}

1. When the stipulation (\textit{shart}) eradicates any textually required condition by the sources of the \textit{Sharī’ah} then it is prohibited.
2. When the stipulation eradicates a condition that is set up by the analogical reasoning (\textit{ijtihād}) of the scholars then its ruling is subject to the effective

\textsuperscript{464} Bank Negara Malaysia, Shariah Resolutions in Islamic Finance, 45-46.
\textsuperscript{465} Ibid.
cause (‘illah) of the latter, pertinent custom (‘urf) and existing economic situation.

(3) When the stipulation of the modern contract is unfamiliar in Islamic legal (fiqh) books then that stipulation is regarded as legitimated provided that it bears the interest of the parties making the contract and does not violate the purpose of the contract. If the stipulations result in prohibited substance and violate the purpose of the contract then they are regarded as voidable (fāsid).

Another Shari‘ah scholar, Burhanuddin Lukman views that MM home financing is shirkat al-milk. In this case, the bank’s intention might be investment and gaining profit but the intention to get profit from the capital does not negate the shirkat al-milk. It is allowed under the category of shirkat al-milk to generate profit and the shared asset may appreciate.466

However, there are differences among the banks in terms of the application of wa‘d in MM home financing. Some banks do not ask the customer to fulfil his wa‘d if the property does not exist. On the other hand, some banks ask the customer to purchase the property even though the property has disappeared. This practice is clearly prohibited. He recommends that in the case of default, the bank should ask the customer to purchase on the market price or a price that is agreed between them at the time of purchase. However, if the price is determined upfront and the promisor is bound to purchase on that price, then it negates the essence of mushārakah.467

6.2.1.3. Discussion on the Opinions of the Scholars

Based on the above opinions of the scholars, the differences among the scholars circulate around whether the MM home financing falls under the shirkat al-milk or shirkat al-‘aqd

466 Burhanuddin Lukman (Member, Shari‘ah Advisory Council of Bank Negara Malaysia), interview with the researcher, 31 December 2014.
467 Ibid.
category. In the following sections, definition, characteristics, and conditions for both types of partnership are provided to clarify this issue. After that, scholars’ opinions are discussed on (1) wa’d and capital guarantee, (2) wa’d in the case of default, (3) wa’d and the purpose of the contract (muqtaḍā al-’aqd). Finally, the preferred opinion is provided.

A. Shirkat al-Milk and Shirkat al-’Aqd

In the classical books of Islamic jurisprudence (fiqh), the Ḥanafī scholars broadly discussed different issues related to shirkat al-milk and shirkat al-’aqd. They are the proponents of dividing the partnership (shirkah) into these two main categories while scholars from other schools (madhhab) do not explicitly mention this categorisation. ‘Alā’ Al-Dīn Al-Kāsānī, a prominent Ḥanafī jurist defines shirkat al-milk as:

الشريكة في الأصل نوعان: شركة الأملاك وشركة العقود، وشركة الأملاك نوعان: نوع يثبت بفعل الشريكين، ونوع يثبت بغير فعلهما. (أما) الذي يثبت بفعلهما فنحو أن يشتريا شيئا، أو يوهب لهما، أو يوصيهما، أو يتصدق عليهما، فيقبلا فيصير المشترى والموهوب والموصى به والمتصدق به مشتركا بينهما شركة ملك. (وأما) الذي يثبت بغير فعلهما فالميراث بأن ورثا شيئا فيكون الموروث مشتركا بينهما شركة ملك.

Translation: Basically, partnership is of two kinds: (1) shirkat al-amlaḵ (joint-ownership) and (2) shirkat al- ‘uqūd (contractual partnership). Shirkat al-amlaḵ is of two types. The first type is realised through the action of the partners, and the second type is realised without their actions. The first type which is realised through the action of the partners is that, they [the partners] jointly purchase something, or they are gifted something, or given by will, or given by charity; and then, they have accepted it. Therefore, the purchasers, the gift recipients, the bequeathed, the charity recipients become partners between them in shirkat al-milk (joint ownership). Another type [of shirkat al-milk], which is not realised through the actions of the partners, is through inheritance. In this case, they [partners] are inherited something. Therefore, the inheritors become partners between them in shirkat al-milk [joint ownership]. 468

Based on the definition above, shirkat al-milk is a kind of joint ownership where two or more people own something either they purchase it together or they have received

---

it through gift, will, charity, and inheritance. Therefore, when two or more individuals jointly own an asset then their partnership can be named as shirkat al-milk.

In discussing the Sharī‘ah rulings (aḥkām) relating to shirkat al-milk, scholars mention that every partner is like a stranger in another partner’s portion in the asset. It is not allowed for a partner to perform any transaction on another partner’s portion without his permission. This is because the authority to have any transaction on any property requires either ownership or custodianship but no partner has any ownership or custodianship on another partner’s portion. Further, every partner is free to perform any transaction on his own share of the asset. It is allowed by a partner to sell his share of the asset to a third party without taking permission from another partner. However, in the case of undivided joint-ownership, a partner is required to get permission from another partner to sell his share to a third party.469

Followed by shirkat al-milk, the Ḥanafī jurists define shirkat al-‘aqd as a contractual partnership. Ibrāhīm bin Muḥammad Al-Ḥalabī defines it as follows:

ان يقول أحدهما شاركتك في كذا ويقبل الآخر، وركنها الإيجاب والقبول، وشرطها عدم ما يقطعها كشرط دراهم معينة من الربح لأحدهما

Translation: It is to pronounce by one partner, “I entered into a partnership with you in this matter” and the other partner accepts. Its pillars are ījāb [offer] and qabūl [acceptance]. Its condition is not to stipulate something that shuts it down e.g. stipulating a fixed amount of dirham [silver coin] from the profit for one of the partners.470

This definition reveals that shirkat al-‘aqd is a contract where ījāb and qabūl are necessary. The basic condition for shirkat al-‘aqd is that there should not be any stipulation of a fixed amount of profit for a specific partner. From this condition, it can be realised that the intention to profit is involved with shirkat al-‘aqd. In another

---


definition provided by ‘Alā’ Al-Dīn Al-Ḥāṣkaḥī, it becomes clear that the intention to profit is an integral part of *shirkat al-‘aqd*. He states:

عبارة عن عقد بين المشاركين في الأصل والربح

Translation: It is a contract between the contributors in principal and profit.\(^{471}\)

The above definition states that *shirkat al-‘aqd* is a contract between the partners where every partner’s contribution in the capital and the ratio of profit is decided. While discussing the conditions for *shirkat al-‘aqd*, Badr Al-Dīn al-‘Aynī cites that as the intention in *shirkat al-‘aqd* is to get profit through business then the *Sharī‘ah* condition for this type of partnership is that the subject matter of the contract should be capable of accepting *wakālah* (trusteeship).\(^{472}\) Therefore, we can determine that *shirkat al-‘aqd* is a contractual partnership where the intention is to get profit through business. The partners decide their capital contribution and profit sharing ratio at the beginning of the contract.

It can be concluded from the discussion above that *shirkat al-milk* is a partnership where two partners co-own an asset. The intention in *shirkat al-milk* is to achieve ownership on an asset. However, after establishing the *shirkat al-milk*, every partner is free to execute any transaction on his own portion unless it is an undivided ownership. In an undivided ownership, the partners are required to take permission from another partner to make any transaction on the asset. On the other hand, *shirkat al-‘aqd* is a partnership where two partners agree the capital contribution and the profit sharing ratio between them with the intention to do business.

After discussing the types of partnerships, it is pertinent now to reflect on the opinions of the scholars on MM financing. Considering the argument provided by Asmadi Mohamed Naim, it can be argued that in MM home financing, the *shirkat al-milk* does


not change into *shirkat al-‘aqd*. This is because *shirkat al-milk* is already realised through co-purchasing the property by the bank and the customer. After the *shirkat al-milk* is executed, every partner is free to perform any transaction in relation to his own portion. In MM home financing, the bank rents his portion of the property to the customer. Therefore, there is no agreement here on the mutual investment of the property. If one partner invests only his portion of the property with the intention to get profit then the *shirkat al-milk* does not change into *shirkat al-‘aqd*. The *shirkat al-milk* will only change into *shirkat al-‘aqd* when both of the partners mutually agree to invest the whole partnership property.

In the case of an undivided ownership, one partner is required to get permission from another to lease his portion of the property. In MM home financing, since the bank leases his portion of the property to the customer who is the other partner in the undivided ownership then implicitly the permission is given. Furthermore, Muhammad Taqi Usmani mentions that there is no objection from the scholars if one partner leases his portion of the property to the other partner in an undivided ownership. He further argues that the first step in MM home financing is to create *shirkat al-milk* which can be made in various ways including joint-purchase by the individuals. Hence, there should not be any question related to initiating this *shirkat al-milk*.473

B. *Wa‘d* and Guarantee to the Capital

When MM home financing comprises *shirkat al-milk* then the issue of *wa‘d* as a mechanism to guarantee the capital is eliminated. In *shirkat al-milk*, one party is allowed to purchase another party’s portion with a price mutually agreed between them. Therefore, it should be allowed to purchase the bank’s portion of the property with a fixed

price which is decided earlier disregarding the market price. However, it is preferable to follow the market price. In this regard, Usmani states:

   It will be preferable that the purchase of different units by the client is effected on the basis of the market value of the house as prevalent on the date of purchase of that unit, but it is also permissible that a particular price is agreed in the promise of purchase signed by the client.\textsuperscript{474}

Finally, even though the bank sells its share to the customer at face value but still there are some elements of risk there. The \textit{wa’d} to purchase at face value only minimises certain risk factors but there are possibilities that the property might be disappeared. Moreover, there are certain cases whether the customer is not bound to fulfil his promise e.g. death, bankruptcy and other \textit{Sharī’ah} permitted excuses.

\textbf{C. \textit{Wa’d} in the Case of Default}

Prohibiting the \textit{wa’d} which is given by the customer to purchase the bank’s share in case of default is subject to further discussion. It is agreed by the scholars that the creditor should free the debtor or postpone the debt settlement in case of difficulty. Nonetheless, this \textit{wa’d} acts as a deterrent for the customer to abuse this \textit{mushārakah} financing. Similar to BMPO, the \textit{wa’d} is an instrument here to recover the bank’s loss when the customer does not fulfil his commitment. This is because the bank has an expectation that the customer will purchase the bank’s share along with paying the monthly rentals. Therefore, when the customer defaults then \textit{wa’d} caters the recovery process. As discussed in chapter two, the promisee can seek compensation if there is a loss incurred due to the breach of the promisor. Therefore, it is fair for the bank to recover loss if the customer defaults.

There is still justice and fairness in handling the default case using \textit{wa’d}. The financier cannot force the client to purchase the property in case the property is not available. The property must be available. This is because \textit{wa’d} is not a contract.

\textsuperscript{474} Usmani, \textit{An Introduction to Islamic Finance}, 62.
Therefore, the bank cannot ask the customer to purchase something which is not in existence. Besides, the bank can take only the actual loss incurred from the proceeds of the property action. If there is a profit, the financier should share it with the customer according to their ownership ratio. The bank will bear loss if the proceeds from the property auction is not sufficient to recover loss and at the same time, the client becomes bankrupt.

D. Wa‘d and the Purpose of the Contract (Muqtadā al-‘Aqd)

When MM home financing is considered as shirkat al-milk then wa‘d does not violate the purpose of the contract (muqtadā al-‘aqd). As mentioned earlier, the purpose of shirkat al-‘aqd is to make investment with sharing profit and loss which is not the purpose of shirkat al-milk. The purpose of shirkat al-milk is just to create ownership. Therefore, there is no violation of muqtadā al-‘aqd if the bank does not share profit and loss with the client.

However, the researcher believes that using the term “mushāarakah” for this home financing product is inappropriate. This is because many consider it as shirkat al-‘aqd due to this name. They argue that the financier should share profit and loss with the client to execute the true mushāarakah. However, the world “shirkah” is basically used in the classical literature of Islamic jurisprudence. Accordingly, “ijārah under shirkat al-milk” should be more appropriate name for this product.

6.2.1.4. The Weightiest Opinion

From the contractual perspective, it should be legitimate to use binding wa‘d in MM home financing because it is shirkat al-milk. In shirkat al-milk, the financier is allowed to sell his share to the client with a price fixed earlier. Moreover, as the purpose of shirkat al-milk is to create ownership, then it does not violate the muqtadā al-‘aqd. Using wa‘d is
not the total elimination of risk due to the existence of certain risk factors. Furthermore, the *wa’d* in case of default is suitable to deter the client abusing the facility and it is fair both for the bank and the customer.

From the macro-level perspective, in the present banking industry in Malaysia, it is quite difficult for the bank to offer MM home financing without this *wa’d*. *Wa’d* is a need to minimise the bank’s market risk as well as the default risk. Burhanuddin Lukman, former *Sharī‘ah* board of Al-Rajhi Banking & Investment Corporation (Malaysia) Berhad reveals that the *Sharī‘ah* board in Al-Rajhi attempted to introduce MM home financing using a non-binding *wa’d* but it was not possible due to high market risk.\footnote{Burhanuddin Lukman, interview with the researcher, 31 December 2014.} Therefore, the binding *wa’d*-based MM home financing is the practical solution for now.

Furthermore, if MM home financing is not used then the possible alternatives for home financing are BBA, *tawarruq* and *murāba‘ah*. However, those types of financing are fully debt-based. Under those financing modes, the purchase price of the property is always a debt on the client. In that case, the client has a bigger obligation than MM home financing. In MM home financing, the client has no debt with the financier at the beginning of the contract. The client only gives *wa’d* to purchase the bank’s share on gradual basis and at the time of default. As mentioned earlier, *wa’d* is not a contract (*‘aqd*). Therefore, the purchase price is not a debt on the client in MM home financing.

There are differences between a binding-*wa’d* and a contract.

In fact, *wa’d* is injected in MM home financing due to some practical needs. When the theory is put into practice then a number of problems come across. Among these problems are for example, capital reserve requirement. When there is no *wa’d* in the product, the bank is required to reserve a larger amount of money against this MM financing. This creates hardship for the bank and they opt for alternative debt-based financing e.g. BBA and *tawarruq*. Therefore, considering the needs and challenges of the
industry on the ground, the applied juristic reasoning (\textit{ijtihād taḥbīqī}) suggests that the binding \textit{wa’d}-based MM home financing should be allowed for the time being.

However, it is recommended to practice a higher risk sharing product by the bank where the financier takes more risk and consequently, there is less burden on the client. Therefore, it is highly encouraged for the banks to make an effort to keep out from the \textit{wa’d} which is given by the customer with reference to the case of default. Using only one \textit{wa’d} to purchase the property on a gradual basis should be the ideal practice.

6.2.2. \textit{Wa’d} as a \textit{Ḥīlah} in Treasury Products

\textit{Ḥīlah} means trick. Islamic jurists (\textit{fuqahā’}) generally divide \textit{ḥīlah} into two types which are: (1) permissible \textit{ḥīlah} and (2) non-permissible \textit{ḥīlah}.\textsuperscript{476} Pertaining to the usage of \textit{wa’d} in Islamic treasury products i.e. Islamic FX forward, IPRS, ICCS and IRS, a number of scholars claim that \textit{wa’d} is a non-permissible trick to legalise prohibited conventional derivatives in Islamic finance. However, another group of scholars argue that \textit{wa’d} is a permissible trick to innovate Islamic treasury products. The following sections provide a detailed discussion on this matter.

6.2.2.1. \textit{Wa’d} is a Non-Permissible \textit{Ḥīlah}

A number of studies argue that \textit{wa’d} is a non-permissible \textit{ḥīlah} to allow the conventional derivatives in Islamic finance. The usage of \textit{wa’d} in the derivatives is a form over substance to achieve an illegitimate outcome. Therefore, this practice should stop. Although these studies mostly criticise the “total return swap” and do not directly question the validity of the \textit{wa’d}-based treasury products which are found in this study but the

\textsuperscript{476} Shamsiyah Muḥammad, “\textit{al-hiyal min manẓūrin Islāmī},” \textit{Journal Fiqh 1}, (January 2004), 71-94.
arguments provided by those studies indirectly relate to all the \( wa'd \)-based treasury products.\(^{477}\)

In the Malaysian context, Azman Mohd Noor strengthens the issue that the usage of \( wa'd \) in the Islamic treasury products is similar to the conventional practice. He argues that the \( wa'd \) is a \( hīlah \) to reach a goal which is similar to a conventional derivative. The scenario of \( wa'dān \) is fictitious and it is not acceptable. Furthermore, it involves gambling. This is because an exchange rate between two currencies is fixed for example, USD 1 = MYR 3.2. Party A promises that if the price of USD goes up from this fixed rate then he will sell to party B on this fixed rate. On the other hand, party B promises that if the price of USD goes down then he will purchase from the party A on this fixed rate. Let say, in the transaction date, if USD 1 = MYR 3.5, then based on the promise earlier, the party A is bound to sell to party B on USD 1 = MYR 3.2. In this event, the party A will lose because he is bound to sell the USD to party B below the market price. Therefore, it is gambling.\(^{478}\)

Comparing with the previous view, Burhanuddin Lukman holds a flexible position. He views that \( wa'd \) is a kind of \( hīlah \) in Islamic treasury product. However, whether it is permissible \( hīlah \) or otherwise depends on how the industry is using it. The existing \( wa'd \)-based swaps (IPRS, ICCS and IRS) might be allowed for the time being as it is lesser of the two evils. He suggests commodity \( murābahah \) as a better alternative for \( wa'd \).\(^{479}\)

6.2.2.2. \( Wa'd \) is a Permissible \( Hīlah \)

Opposing the first opinion, the majority of the scholars in Malaysia allow the usage of \( wa'd \) in treasury products with the condition that it is only for hedging purpose. Lahsasna

---

\(^{477}\) Ayub, “Use of \( W'ad \) and Tawarruq for Swaps”; DeLorenzo, “The Total Returns Swap”; Atallah and Ghoul, “The \( Wa'd\)-Based Total Return Swap”.

\(^{478}\) Azman Mohd Noor, interview with the researcher, 24 July 2014.

\(^{479}\) Burhanuddin Lukman, interview with the researcher, 31 December 2014.
believes that *wa’d* is a permissible legal trick (*ḥīlah*) in swaps (i.e. ICCS, IPRS and IRS). He argues that *wa’d* is the best solution which has been achieved so far to accommodate some products. There may be something better in the future but right now *wa’d* is the best solution to accommodate swaps, FX forwards, and other derivatives in Islamic finance. Others may invalidate the practice of *wa’d* in Islamic derivatives arguing that in substance, they are similar to the conventional derivatives. However, this may lead the clients to purchase the conventional products right away. Therefore, we can say that *wa’d* is the lesser evil between the two. Even though there is an element of doubt in *wa’d*, it is still regarded the best solution.480

Similarly, Muhammad Yusuf Saleem states that as long as the treasury products are used for the purpose of hedging then it should be fine.481 Responding to the *ḥīlah* issue, Shamsiah Mohamad argues that if the *ḥīlah* does not contravene the texts of the *Sharī‘ah*, the objective of Islamic law (*maqāṣid al-Sharī‘ah*) and the purpose of the contract (*muqtaḍā al-‘aqd*) then it is allowed. However, she points out that it is quite difficult to decide the intention of the parties in the case of derivatives. Sometimes, one party’s intention is to mitigate the risk while the other party’s intention is to speculate. Nevertheless, it is also not fair to disallow derivatives arguing that mostly the derivatives are for speculation.482

Regarding the intention of the parties using derivatives, Mohamad Akram Laldin suggests that the regulatory body e.g. central bank, securities commission etc. is the most eligible party to set parameters on this. He cites that it is agreed that there are some elements of *ḥīlah* in the Islamic swaps but then, it is up to the regulator to decide when

---

480 Lahsasna, interview with the researcher, 23 July 2014.
481 Muhammad Yusuf Saleem (Member of the Shari‘ah Advisory Committee, HSBC Amanah Malaysia Berhad), interview with the researcher, 1 October 2013.
482 Shamsiah Mohamad, interview with the researcher, 13 November 2014.
these products can be used, when cannot be used and what the limit is. This is because the regulatory body understands the market, knows when someone intends to speculate.\textsuperscript{483}

Emphasising on the permissibility of Islamic hedging instruments in Malaysia, Mohamad Akram Laldin adds that if we do not allow some hedging products then people will choose conventional products. Therefore, we should allow these products for hedging purposes. In general, most of the \textit{Sharī’ah} scholars who allow Islamic derivatives always mention that these instruments must be used as risk management tools and not for speculative purposes.\textsuperscript{484}

After having allowed the Islamic treasury products in Malaysian banks, Aznan Hasan explains the mechanism to find out someone’s intention to hedge. He discusses that there is no gambling in Islamic treasury product. This is because the intention here is to hedge. Therefore, these instruments are named as Islamic hedging instruments but not derivatives. In case of ICCS and IPRS, the underlying \textit{Sharī’ah} concept is \textit{tawarruq} and \textit{wa’d}. The party who is asking for derivatives should show that he has some underlying to ensure that his intention is to hedge. If the party cannot show that he has some underlying which require hedging, he is not allowed to enter into any derivative transaction. Underlying means the contracts that the financial institution has entered into which require hedging. For example, if a financial institution has \textit{ijārah} financing in a different currency then he is eligible to enter into ICCS. Therefore, these instruments are not \textit{ḥīlah} to legalise gambling.\textsuperscript{485}

Corresponding to the usage of \textit{wa’d} in treasury products, Rusni Hassan states that not only the treasury products but most of our Islamic banking products have the issue of \textit{ḥīlah}. However, in case of treasury products, the issue is more relevant due to \textit{wa’d}. Therefore, it is mandatory to consider a few factors while determining the \textit{Sharī’ah}

\textsuperscript{483} Mohamad Akram Laldin, interview with the researcher, 14 October 2014.
\textsuperscript{484} \textit{Ibid.}
\textsuperscript{485} Aznan Hasan (Chairman of the Shariah Committee, Maybank Islamic Berhad), interview with the researcher, 13 January 2015.
rulings for this issue. Firstly, the necessity of these instruments in Islamic finance depends on whether Islamic finance can survive without these instruments, and whether these instruments bring about welfare (maşlahah) for Islamic finance. Secondly, the decision on this issue should not be taken individually rather a country or the Šarī‘ah board representing the country should decide on this. Finally, responding to this issue may differ from case to case or country to country.\textsuperscript{486}

Based on the above factors, the Malaysian scholars believe that without the commencement of these Islamic hedging instruments, the future of Islamic finance will be handicapped in one side. This is due to our target that Islamic finance should provide the comprehensive alternative for conventional finance. This means that Islamic finance should provide appropriate alternative to whatever product conventional finance have. Furthermore, at this point of time, Islamic finance is very small compared with the conventional finance. Therefore, Islamic finance is always under the dominance of conventional finance which requires that the bank would be just a financial intermediary but not a trader or business partner. Based on this situation, there must be someone to pioneer these hedging instruments in Islamic finance. These instruments may not be perfect at this situation due to the dominance of conventional finance but there must be some initiative. Afterword, we should improve the things. As a result, we can conclude that \textit{wa‘d} is a way out (makhraj) rather than a trick (hi̇lāh) to initiate these hedging instruments in Islamic finance.\textsuperscript{487}

\textit{6.2.2.3. Discussion of the Opinions and the Weightiest Opinion}

Based on the above discussion, we can say that all scholars agree that when the Islamic hedging instruments are used for speculation then it is prohibited. This is because

\textsuperscript{486} Rusni Hassan (Member, Šarī‘ah Advisory Council of Bank Negara Malaysia), interview with the researcher, 12 January 2015.
\textsuperscript{487} \textit{Ibid.}
speculation is the opposite of risk management. The speculator intentionally takes higher risk to achieve higher profit. At the same time, the speculator may encounter a greater loss if his anticipation does not come true.\textsuperscript{488} Furthermore, it is unproductive and abusive in nature. Although minor speculation is tolerable but excessive of it is harmful. It is a kind of non-productive practice of society’s scarce resources.\textsuperscript{489} Therefore, it may bring about harm (\textit{mafsadah}) in Islamic finance. Rodney Wilson mentions in this regard:

If trading is viewed as productive and socially desirable, then speculative behaviour is clearly precluded. The latter is virtually by definition both unproductive and socially undesirable because of its potentially exploitative nature. Speculation can be both deliberate and unintentional, but because of the moral unambiguity of the latter, practices which might result in speculation should be avoided. It is for this reason that forward, futures and options dealing are viewed as potentially corrupting by modern specialists in Islamic finance.\textsuperscript{490}

Speculation should not be allowed in Islamic finance as Islamic finance is based on justice and fairness. Furthermore, speculation is an unproductive way to gain wealth. In this sense, there is similarity between gambling and speculation because gambling also is an unproductive way to gain wealth. In this regard, Sami Al-Suwailem mentions that whenever taking risk is commended in Islam is due to the creation of wealth and the value added. Therefore, we can differentiate between legitimatized and illegitimatized risk. Risk is legitimatized when it is a need for value creation.\textsuperscript{491}

The classical Islamic scholar Ibn Taymiyah outlined the border between permissible and non-permissible risk in Islamic \textit{Sharī‘ah} with his following statement:

\begin{quote}
والخطر خطران، خطر التجارة: وهو أن يشتري السلعة بقصد أن بيعها بربح، ويتولى على الله في ذلك، فهذا لا بد منه للتجار، والتاجر يتوكل على الله ويطلب منه أن يأتي بمن يشتري السلعة بربح،
\end{quote}

\textsuperscript{488} Ephraim Clark and Dilip Kumar Ghos, \textit{Arbitrage, Hedging, and Speculation: The Foreign Exchange Market} (Westport: Greenwood Publishing Group, 2004), 2.
\textsuperscript{490} Rodney Wilson, “Islamic Financial Instruments”, \textit{Arab Law Quarterly} 6, no. 2 (1991), 209.
\textsuperscript{491} Sami Al-Suwailem, “Hedging in Islamic Finance” (Occasional paper no. 10, Islamic Development Bank, Jeddah, 2006), 57.
Translation: Risk is of two kinds. [The first type is] Commercial risk: it exists in purchasing a commodity with the intention to sell it with profit and relying on Allāh (SWT) in that. This type of risk is necessary for the merchant and he relies on Allāh (SWT) and ask from Him that may someone come to purchase his commodity with profit. Even though sometimes the merchant loses but a business cannot be done without this. The second type of risk is the risk of gambling, which involves eating someone’s wealth illegally. This is what Allāh (SWT) and his messenger (SAWS) have prohibited e.g. touch sale (bay‘ al-mulāmasah), toss sale (bay‘ al-munābadhah).

Based on Ibn Taymiyah’s above statement, excessive speculation should go under the non-permissible risk. This is because it is not involved with trading risk rather it is closed to the risk of gambling. Therefore, any financial instrument intended for excessive speculation should not have any room in Islamic finance. In many cases, although the product structure looks fine, but based on the objective of the Sharī‘ah (maqāṣid al-Sharī‘ah), it should be obstructed. The Sadd al-dharā‘i’ (blocking the means) principle may be applied in this regard.

Looking back to the opinions of the scholars, the majority have allowed the Islamic treasury products for hedging purposes. Hedging is defined as a process to mitigate any risk exposure. It is an underlying safety net to protect the investor from any potential economic loss. In the case of currency hedging as an example, the intention of the hedger is to protect the existing position of the currency against any unpredictable movements of exchange rates in the future. Hedging is insurance for future risk. Conventional finance has developed a number of hedging instruments based on the types of risk e.g. futures, forward, swap, option etc.

In general, hedging is a necessity for both Islamic and conventional finance. While justifying the need for currency hedging, Saadiah Mohamad et al. pointed out that it is currently difficult for a country to survive without international trade of export and import. When engaging with international trade then it certainly involves the exchange of foreign currency. Depending on the type of business and the distance between the parties, it sometimes requires longer than a month prior to the actual exchange. As a result, the majority of international trades are subject to exchange rate risk. Therefore, it is crucial for the business to estimate the required foreign exchange in the future along with adopting some earlier arrangements to hold the favourable exchange rate to protect itself from any undesirable situation.\footnote{Saadiah Mohamad, Jaizah Othman, Rosnimah Rosin and Othmar M. Lehner, “The use of Islamic hedging instruments as non-speculative risk management tools,” \textit{Venture Capital: An International Journal of Entrepreneurial Finance} 16, no. 3 (2014), 208.}

Considering the need for profit rate hedging, Asyraf Wajdi Dusuki pointed out that Islamic finance is not safe from the risk of interest rate volatility. This is because Islamic finance is required to use interest rate related benchmarks e.g. London Inter-Bank Offer Rate (LIBOR) or Base Lending Rate (BLR) in its financial practices due to the absence of a profit rate benchmark. As a result, Islamic finance is inevitably exposed to the interest rate risk in terms of its revenue and expense flows along with the value of the assets. Thus, profit rate risk mitigation is important for Islamic financial institutions for their sustainability, viability, and competitiveness in the market.\footnote{Asyraf Wajdi Dusuki, “Shariah Parameters on Islamic Foreign Exchange Swap as Hedging Mechanism in Islamic Finance,” (paper presented in International Conference on Islamic Perspectives on Management and Finance, University of Leicester, United Kingdom, 2-3 July 2009), 2.}

However, Islamic hedging instruments are limited to cater for the demand of the investors globally. It is difficult to mitigate market risk for Islamic finance because of the limited number of hedging instruments. Therefore, Islamic financial institutions require their own hedging instruments which are not the copy of conventional derivatives. The Islamic finance industry should meet the requirements of the Shari‘ah compliant financial
system and at the same time it is in need to mitigate the risk exposures of Islamic financial institutions and to enhance their creditworthiness in general.\footnote{Saadiah Mohamad et al., “The use of Islamic hedging instruments”, 209; Muhammad Al-Bashir Muhammad Al-Amine, “Risk and Derivatives in Islamic Finance: A Shariah Analysis,” in 

Based on the need for hedging tools in the Islamic finance industry as mentioned above, if the primary sources of Islamic \textit{Sharī‘ah} are studied then it can be seen that both the Qur‘an and the \textit{Sunnah} provide a strong support for risk management in financial practices. The Qur‘an provides two distinct examples of risk management. In \textit{Sūrah al-Baqarah}, the creditor is advised to take pledge from the debtor if both are travelling and writing down the debt agreement is not possible.\footnote{Al-Qur‘ān, Sūrat Al-Baqarah: 282-283.} This is a risk management tool to prevent any fraudulence in the future and any loss to the creditor’s assets. Moreover, it is observed in the story of prophet Yusuf (SAW) that he adopted a risk management mechanism when he asked the people of Egypt to save the surplus crops for seven consecutive years to encounter the droughts in the next seven consecutive years.\footnote{Al-Qur‘ān, Sūrat Yūsuf: 47-49.}

Furthermore, the following prophetic narration suggests that Muslims should take necessary actions to manage the risk of loss towards his property and then rely upon Allāh (SWT).

\begin{quote}
آنس بن مالك يقول: قال رجل يا رسول الله أعقلها وأتوكل أو أطلقها وأتوكل؟ قال اعقلها وتوكل.
\end{quote}

Translation: Anas bin Mālik (RA) narrates that a man asked [about his camel], “O messenger of Allāh (SAWS)! Should I tie it [camel] and rely on Allāh (SWT) or, should I leave it untied and rely on Allāh (SWT)?” The messenger of Allāh (SAWS) replied, “Tie it and then rely on Allāh (SWT).”\footnote{Narrated by Al-Tirmidhī, \textit{Kitābu sifati al-qiyāmah wa al-raqā‘iq wa al-war‘}, Bāb 60, Ḥadīth no. 2517. See Al-Tirmidhī, \textit{Sunan al-Tirmidhī}, 567.}

The above prophetic statement is a guiding principle for every Muslim’s life where a Muslim is required to take all necessary actions based on his capability to manage his risk and after that, he should rely on Allāh (SWT). It is not an Islamic practice to
ignore mechanisms for protection and completely rely on Allāh (SWT) for either his own safety or his property. Therefore, we can resolve that this prophetic statement advises to adopt means for the protection of wealth.

Another narration allows stipulation in a *muḍārabah* venture to avoid risk.

كان العباس بن عبد المطلب إذا دفع مالاً مضاربة اشترط على صاحبه أن لا يسلك به بحراً ولا ينزل به وادياً ولا يشترى به ذات كبد رطبة فإن فعل فهو ضامن لفوق شرهه إلى رسول الله - صلى الله عليه وسلم - فاجاه.

Translation: When ‘Abbās bin ‘Abd al-Muṭṭalib (RA) handed over his assets for *muḍārabah* then he used to stipulate on the partner (*muḍārib*) that he should not take this asset across the sea, nor take them down to the bottom of a dry river bed, nor trade them for live animals. If he did any of these then he had to bear the compensation. Al-‘Abbās’s stipulation was reported to the messenger of Allāh (peace be upon him) and he allowed it.

Al-‘Abbās (RA) did not allow the *muḍārib* to perform certain actions which involved the risk that the business capital might destroy. The prophet (SAWS) permitted that stipulation. Therefore, we can come across that it is allowed in a business venture to take necessary precautions to avoid any risk of loss to the capital.

Furthermore, the practice of hedging is in line with the noble objective of the *Sharī‘ah* (*maqāṣid al-Sharī‘ah*). Islamic jurists (*fuqahā’*) come across that the noble objective of the law giver in prescribing the *Sharī‘ah* rulings are five which are: (1) the protection of religion, (2) protection of life, (3) protection of offspring, (4) protection of intellect, and (5) protection of wealth. Protecting the wealth is one of the five objectives of the *Sharī‘ah*. It means that people’s property should be protected from any loss or destruction. Islamic *Sharī‘ah* disallows any action that leads to the destruction of wealth.

---

Therefore, consuming other’s property illegally, destroying other’s property, wasting the wealth without its prudent use, interest, gambling etc. are prohibited in the Sharī‘ah.\textsuperscript{501}

As hedging is a means to protect the wealth of the hedger, then it should be a tool to achieve \textit{maqāṣid al-Sharī‘ah}. Affirming this view, Al-Suwailem cites:

Hedging is used generally to denote neutralizing and minimising risk. In this respect, it naturally belongs to Islamic economic objectives. As such, this is not an issue and should not raise any concern. The issue, however, is how to reach this goal, and what means is used to meet this end. If the means involves pure speculation and gambling-like activities, it would be illegitimate, even if the objective is [noble]. Ends do not justify means, and thus noble ends necessitate noble means.\textsuperscript{502}

Based on the above, hedging is in line with the objectives of Islamic economics. Naturally, Islamic economic objectives should correspond the \textit{Sharī‘ah} objectives.

However, there is a crisis to find out the \textit{Sharī‘ah}-compliant means to reach this goal. If a \textit{Sharī‘ah}-compliant instrument is used for hedging then it is not an evil. This is because if a legitimated means is used to reach to a legitimated end then it is allowed in the \textit{Sharī‘ah}. Abū Ishāq Al-Shāṭibi mentions in this regard:

الحيل التي تقدم إبطالاً وذمها وإنهى عنها ما هدم أصلاً شرعياً وتناقض مصلحة شرعية فإن فرضنا أن الحيلة لا تدم أصلاً شرعياً ولا تناقض مصلحة شهد الشرع باعتبارها فغير داخلة في النهي ولا هي باطلة.

Translation: A trick which was proceeded by annulment, disparagement and prohibition was the one that destroyed the root of the \textit{Sharī‘ah} and violated the welfare of the \textit{Sharī‘ah}. However, if we assume that a trick does not destroy the foundation of the \textit{Sharī‘ah} and does not violate the \textit{Sharī‘ah} testified welfare is not included in that prohibition and is not null.\textsuperscript{503}

The following prophetic narration provides the ground for adopting a legitimat means to reach to a legitimated end:

أ ن رسول - صلى الله عليه وسلم - استعمل رجلاً على خيبر جفاه، فسأله شريف - صلى الله عليه وسلم -: آكل تم خبره هذا؟ فقال لا والله يا رسول الله، أنا لأخذ الصاع

\textsuperscript{502} Sami Al-Suwailem, “Hedging in Islamic Finance,” 57.
Translation: Allāh’s Apostle (peace be upon him) appointed a man as the ruler of Khaybar who later brought some ِjanīb [dates of good quality] to the Prophet. On that, Allāh’s Apostle (peace be upon him) said [to him], “Are all the dates of Khaybar like this?” He said, “No, by Allāh, O Allāh’s Apostle! But we take one ِsā‘ of these [dates of good quality] for two ِsā‘ of other dates [of inferior quality] or, two ِsā‘ [dates of good quality] for three ِsā‘ [of inferior quality].” On that, Allāh’s Apostle (peace be upon him) said, “Do not do so, but first sell the inferior quality dates for money and then with that money, buy ِjanīb [dates of good quality].”

In this prophetic narration, the prophet (SAWS) describes a sound mechanism to get out from ribā'. Here, the goal is noble which is to avoid ribā', and the means to reach that goal is noble too which is selling the inferior quality of dates in the market first and then purchasing the good quality of dates with that money.

Based on this, Malaysian wa‘d-based hedging instruments namely FX forward, ICCS, IPRS, and IRS should be allowed. This is because all these products have underlying contracts. It is unanimous among the scholars that the contractual arrangements are valid for all these hedging instruments. Therefore, these instruments are legitimate means to reach to a goal which is legitimated as well. Based on this argument, the issue that wa‘d is a non-permissible hīlah should be disregarded.

Along with this, it is noteworthy to mention that there is no issue of gambling involved with these instruments because of the underlying contracts in them. Every hedging instrument has some underlying contracts of sale and purchase as well as the wa‘d. These hedging instruments are different from gambling in a sense that they do not involve pure bet where one party gains another party’s wealth totally while the other party suffers a total loss of his asset.

504 Narrated by Muslim, Kitāb al-muṣāqāt, Bāb bay‘ al-ṭa‘ām mathalān bi mathalin, Ḥadīth no. 1593. See Al-Naysābūrī, Ṣaḥīḥ Muslim, 3:1215.
Finally, there is a debate among the scholars on how to ensure that an Islamic treasury product is used solely for hedging purposes. There should be a clear borderline between hedging and speculation. Corresponding to this issue, Mohamad Akram Laldin has mentioned that the regulatory body should decide on this, as they are the most familiar with the market environment. However, Aznan Hasan has furnished the most precise standard to draw the borderline between hedging and speculation. He cites that when a financial institution intends to enter into any hedging instrument then it is required to show the underlying which requires hedging. When a financial institution has some underlying contracts which needs hedging then it should be allowed to use the hedging instruments. This mechanism might be the most preferred standard to make a distinct line between hedging and speculation.

6.2.3. *Wa‘d* and Exploitation to the Opposite Party

The issue of exploitation is related to the ordinary *wa‘d*. While only one *wa‘d* is used in some products then it may overlook the interest of the other party. The issue is brought up in relation to FX forward and BMPO. In both products, only the customer provides *wa‘d* to the bank to purchase a commodity or currency in a future date. However, the bank does not provide any *wa‘d* to the customer. Therefore, the bank has no obligation to sell to the customer. As a result, it is possible that the bank will take advantage by not selling the item to the customer in case the market price of the item is higher than the *wa‘d* price. In BMPO financing, it may not be a great concern but it is a notable issue in FX forward. However, a group of scholars hold that even though the bank does not give

---

506 Mohamad Akram Laldin, interview with the researcher, 14 October 2014.
507 Aznan Hasan, interview with the researcher, 13 January 2015.
any *waʿd* to the client but it does not lead the bank to exploit the client. The following sections provide details on this issue.

### 6.2.3.1. *Waʿd* as a Means to Exploit the Client

Azlin Alisa Ahmad and Shofian Ahmad concluded that using only one *waʿd* is a kind of injustice on the client in FX forward. They suggested using *waʿdān* to avoid injustice on the other party. A number of *Sharīʿah* scholars supported their view. Shamsiah Mohamad agrees that only *waʿd* from the customer is an exploitation to the customer. This is because the customer may face losses due to no obligation on the bank to sell. For example, in the case of MM house financing, if the housing project is abandoned then the bank is not bound to provide house to the customer. Therefore, *waʿd* from the bank is needed. She concludes that in this case *muwāʿadah* is better than *waʿd* to exercise justice.

Furthermore, Aznan Hasan mentions that *waʿdān* has come out to cater justice for the customer. Previously, there was only one *waʿd* from the customer to execute a *ṣarf* contract in the future with the bank. It was commonly understood that the bank would never default. However, after having a number of cases where the bank defaulted, there is an urge to use two *waʿd*. At present, there is nothing called too big to fail. Therefore, two *waʿd* should be used. Alternatively, one *waʿd* and one commodity *murābaḥah* can be employed in FX forward.

Along with the *Sharīʿah* scholars, practitioners also agree that more than one *waʿd* is needed to be fair with the customer. Ahmad Suhaimi Yahya argues that in the case of MM house financing, the bank should provide *waʿd* as well. This is to protect the welfare of the customer when he asks for an early settlement. In some occasions, the house price

---

509 Shamsiah Mohamad, interview with the researcher, 13 November 2014.
510 Aznan Hasan, interview with the researcher, 13 January 2015.
doubles after a few years. If there is no sale undertaking by the bank, then the bank may take the opportunity to sell.\textsuperscript{511}

6.2.3.2. \textit{Waʿd} is Not a Means to Exploit the Client

Contrary to the previous opinion, some \textit{Sharīʿah} scholars view that even though no \textit{waʿd} is given from the bank’s side but, it does not lead the bank to exploit the customer. Lahsasna states that customers provide \textit{waʿd} to the bank in order to mitigate the risk which is on the bank. Another \textit{waʿd} from the bank’s side is not necessary because banks are highly regulated, monitored, and audited. The strong corporate governance of the banks ensures that they will be committed with their customers. A similar type of monitoring cannot be done on the customer. Customers may disappear. Therefore, it is reasonable that the \textit{waʿd} is from the customer’s side only. Furthermore, until now, there is no such instance where the bank did not fulfil his commitment with the customer.\textsuperscript{512}

Mohamad Akram Laldin points out that \textit{waʿd} from the customer’s side only is not injustice on the customer. This is because if the bank does not fulfil any of his obligation then it will be exposed to a huge reputational risk. In the occasion of FX forward, the bank is obliged to fulfil his obligation due to a huge reputational risk. Banks have no difficulty to provide another \textit{waʿd} to the customer but it is not needed.\textsuperscript{513}

6.2.3.3. Discussion of the Opinions and the Most Substantial Opinion

Reflecting on the above opinions of the scholars, it can be seen that their concern is whether the customer’s risk is protected. The first group views that banks should provide \textit{waʿd} to the customer to protect the customer’s interest. The ground for this opinion is that at the current economic situation, banks may default as well. There is a possibility that

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{511} Ahmad Suhaيمي Yahya, interview with the researcher, 11 November 2013.
\item \textsuperscript{512} Lahsasna, interview with the researcher, 23 July 2014.
\item \textsuperscript{513} Mohamad Akram Laldin, interview with the researcher, 14 October 2014.
\end{itemize}
\end{footnotesize}
banks also breaches its obligation. Another group of scholars believe that \textit{wa’d} from the bank’s side is not required as the bank usually fulfils its obligation due to reputational risk. In addition, banks are highly monitored. Therefore, it is commonly understood that they will fulfil their commitments.

From the \textit{Sharī’ah} perspective, all transactions should be free from injustice. Islamic \textit{Sharī’ah} requires that every party is treated fairly in any contractual binding. Ibn Taymiyyah mentioned in this regard:

في عامّة ما نهى عنه الكتاب والسنة من المعاملات يعود إلى تحقيق العدل والنهي عن الظلم

Translation: Indeed, whatever the Qur’an and Sunnah have prohibited in transactions as a whole fall into realising justice and preventing injustice.\textsuperscript{514}

If there is an element of injustice in the practice of \textit{wa’d} then it should not be allowed in the \textit{Sharī’ah}.

The \textit{Sharī’ah} also allows the contracting parties to stipulate conditions in contracts with the conditions that it does not lead to legalising \textit{ribā}, \textit{maysir}, and \textit{gharār}. The stipulation should not violate the purpose of the contract (\textit{muqtaḍā al-‘aqd}) and they should not lead to consuming other’s property illegally.\textsuperscript{515} The prophet (SAWS) said:

الصلح جائز بين المسلمين إلا صلحا حرم حلالا أو حلال حراما والمسلمون على شروطهم إلا شروط حرام

Translation: It is permitted for the Muslims to make reconciliation among themselves except the reconciliation that prohibits the lawful (\textit{ḥalāl}) and permits the unlawful (\textit{ḥarām}). Muslims are required to fulfil the stipulations made among themselves except the stipulation that prohibits the lawful (\textit{ḥalāl}) and permits the unlawful (\textit{ḥarām}).\textsuperscript{516}

Based on the above \textit{ḥadīth}, it can be argued that \textit{wa’d} from only one party does not lead to an oppression on the other party. This is because it is similar to stipulating


conditions on other party in a contract. There is an element of consent (riḍā) between the parties when one party is providing wa‘d. Hence, we can resolve that wa‘d from one side should be allowed in the Sharī‘ah.

Nevertheless, looking into this issue from an economic perspective, it can be seen that the customer’s interest is not protected in FX forward. This is because the customer is at the risk that the bank may not fulfil its wa‘d. Even though it is argued that banks are highly monitored and because of that they will fulfil the commitment, it is still unacceptable. The world has recently seen that a number of giant reputed banks default. The recent financial crisis of 2007-2008 taught us that there is no such financial institution called “too big to fail”.517 Felix Roth pointed out that after the financial crisis in 2008, people in Europe have lost trust on their financial institutions.518 Therefore, even though banks are highly monitored, it is still possible that those banks are breaching their commitments. Therefore, the customer’s interest should be protected, especially those who are vulnerable.

6.2.4. Similarity with Forward Contract (Bay‘ al-Ajal bi al-Ajal)

The issue of forward contract (bay‘ al-ajal bi al-ajal) is triggered in relation to MM home and property financing, AITAB vehicle financing, and one treasury product which is IRS. The issue is whether wa‘daān in the above mentioned products makes any difference to muwā‘adah. A group of scholars believe that muwā‘adah as a binding promise on both parties is not allowed as it is similar to a forward contract (bay‘ al-ajal bi al-ajal). They question the application of wa‘dān in these three products opining that the application of wa‘dān in these products are similar to muwā‘adah. Therefore, it is not allowed as it is as

good as a forward contract (bay’ al-ajal bi al-ajal). Some view that the practice of wa’dān in the above-mentioned products is different from muwā’adah and should be allowed in the Sharī’ah.

6.2.4.1. Wa’dān is Similar to Muwā’adah or Forward Contract (Bay’ al-Ajal bi al-Ajal)

Muhd Ramadhan Fitri Ellias cites that in wa’dān, the different events referred to seem to be fictitious. Usually, an exchange rate between MYR and USD is fixed. If the market rate of USD is higher than the fixed rate then one party promises to sell, and if the market rate of USD is lower than the fixed rate then another party promises to purchase. It is a kind of muwā’adah because the rate of USD will either go up or down. There is no option for that.519

Burhanuddin Lukman reveals that he has come across a few products, which are based on wa’dān as claimed by some scholars. These products are actually based on muwā’adah because the promise is given on the same subject matter. In the case of currency transactions, it is inevitable that one of the events will occur. The price will either go up or down. It is merely playing with words. In essence, it is actually muwā’adah.520

Similarly, Azman Mohd Noor does not accept the difference between wa’dān and muwā’adah. He argues that the end effect of wa’dān is similar to a forward contract (bay’ al-ajal bi al-ajal). This is because the obligation of wa’dān is similar to the obligation of a contract (’aqd). An exchange rate between two currencies is fixed beforehand and then both parties are obliged to execute the šarf contract disregarding the market rate at that

519 Muhd Ramadhan Fitri Ellias, interview with the researcher, 13 November 2013.
520 Burhanuddin Lukman, interview with the researcher, 31 December 2014.
time. Should one of the parties does not fulfil the undertaking, he is bound to pay compensation. This outcome is similar to a contract (‘aqd).\textsuperscript{521}

6.2.4.2. Wa’dän is Not Similar to Muwā’adah or Forward Contract (Bay‘ al-Ajal bi al-Ajal)

Disagreeing with the previous opinion, Mohamad Akram Laldin argues that in the case of IRS, there are two obligations but they are different in terms of the subject matter. Even though it is bilateral, these two wa’d are different because there are some elements in the subject matter that differentiate between the first wa’d and the second wa’d. This is why it is named wa’dän which means two separate wa’d. Therefore, wa’dän should be allowed in AITAB as well as in currency transactions (IRS). The practice of wa’dän in currency transactions (IRS) is allowed by BNM. Another reason to consider wa’dän as two separate wa’d is that between the two wa’d only one of them will be triggered in the future. The two wa’d will not be triggered together at one time. This is different from muwā’adah where both of the wa’d will be triggered at the same time.\textsuperscript{522}

In relation to AITAB and MM home and property financing, Mohd Nazri Chik mentions that the concept of wa’dän is employed here but it is not muwā’adah. This is because the subjects of the wa’d are different. As an example, the first wa’d is to sell the commodity in this type of scenario, and the second wa’d is to purchase the commodity in another scenario. Here, the scenario A and the scenario B are different. Pertaining to IRS, he pointed out that the wa’d used there is not to execute a currency exchange contract (bay‘ ṣarf) in the future but it is to conclude a number of commodity murābaḥah (tawarruq/musāwamah) transactions in the future. This is an innovation in Islamic finance due to contemporary business needs.\textsuperscript{523}

\textsuperscript{521} Azman Mohd Noor, interview with the researcher, 24 July 2014.
\textsuperscript{522} Mohamad Akram Laldin, interview with the researcher, 14 October 2014.
\textsuperscript{523} Mohd Nazri Chik, interview with the researcher, 4 September 2013.
Likewise, Lahsasna argues that in *wa’dān* there are two different events or conditions in the undertakings where the first undertaking is connected to event A, and the second one is conned to event B. Even though the subject matter of the *wa’d* is the same but as long as there are two different events then it is allowed.\(^{524}\)

However, Shamsiah Mohamad opines that whether it is *wa’dān* or *muwā‘adah* both should be allowed in the *Sharī’ah*. According to her, *muwā‘adah* as a binding promise on both of the parties is allowed in the *Sharī’ah*. There are some differences between a binding-*muwā‘adah* and a forward sale contract (*bay’ al-ajal bi al-ajal*). Firstly, a future expression is used in *muwā‘adah* which is “I will purchase” and “I will sell”. It is unanimously agreed among the classical jurists (*fuqahā’*) that a future expression does not form a contract (*‘aqd*) rather a past or present expression is required to form a contract (*‘aqd*). Secondly, there are some differences between these two concepts in terms of their effects. While a forward contract immediately transfers the ownership of the asset to another party then *muwā‘adah* does not transfer the ownership of the asset to the promisor/promisee. Besides, the purchase price becomes a debt after a forward contract is executed but *muwā‘adah* does not create any debt obligation. Therefore, *muwā‘adah* is not similar to a forward contract (*bay’ al-ajal bi al-ajal*) both in form and in substance. It is only a mutual promise to execute a contract in a future date.\(^{525}\)

Corresponding to the above opinion, Saleem argues that a future expression e.g. “I will purchase” cannot execute a contract (*‘aqd*). There should be either a past expression e.g. “I purchased”, or a present expression e.g. “I purchase” in order to conclude a contract (*‘aqd*). Therefore, whether *wa’dān* or *muwā‘adah* applied in the aforementioned products, they do not turn into a forward contract (*bay’ al-ajal bi al-ajal*).\(^{526}\)

---

\(^{524}\) Lahsasna, interview with the researcher, 23 July 2014.  
\(^{525}\) Shamsiah Mohamad, interview with the researcher, 13 November 2014.  
\(^{526}\) Saleem, interview with the researcher, 1 October 2013.
6.2.4.3. Discussion of the Opinions and the Weightiest Opinion

Having observed the opinions of the scholars, the first group of scholars have prohibited wa‘dān due to their doubt that it is similar to muwā‘adah. Their argument is that the two different conditions in wa‘dān are not real. In addition, the ultimate result for both wa‘dān and a forward contract (bay‘ al-ajal bi al-ajal) is the same. This group of scholars would agree that, if wa‘dān involves two different real conditions then it is not muwā‘adah. Furthermore, when the ultimate result of wa‘dān is different from a forward contract (bay‘ al-ajal bi al-ajal) then wa‘dān should be allowed.

Based on this, if we investigate MM home and property financing and AITAB vehicle financing then we can see that there is no muwā‘adah in these two products because each of the wa‘d is related to a different specific event. While the bank’s wa‘d is connected to the time of maturity of the contract then the customer’s wa‘d is related to the event of default. Therefore, we can conclude that the usage of wa‘dān should be allowed in both of the products. Similarly, there is no muwā‘adah in IRS. This is because the two wa‘d are linked to two different subject matters. While the bank’s wa‘d is to perform one type of musāwamah contract, then the customer’s wa‘d is to perform another musāwamah contract. Here, not only the conditions but also the subject matter for both wa‘d are different. Therefore, the researcher prefers the opinion that wa‘dān is used in the above three products where each of the wa‘d is related to a genuine different situation.

However, if it is assumed that muwā‘adah is employed in the above mentioned products then it can be reiterated from the discussion in chapter two that there are some fundamental differences between a binding-muwā‘adah and a forward sale contract (bay‘ al-ajal bi al-ajal). In muwā‘adah, there is no offer (ijāb) and acceptance (qabūl) in the agreement which are the fundamental elements to conclude a contract (‘aqd). Moreover, in a forward contract, the ownership of the commodity is transferred to the purchaser and the purchase price has become a debt on the purchaser immediately after the contract is
executed. However, there is no transfer of ownership in *muwāʿadah*. When the promisor breaches the *waʿd* without any valid excuse then he is obliged to compensate the promisee only the amount of loss incurred but not the total contract price. This is very much different from a forward contract where the full purchase price has become a debt on him.\footnote{Wazārah al-Awqāf wa al-Shuʿūn al-Islāmiyyah, Al-Mawsūʿah al-Fiqhiyyah, 30:231; Al-Kāsānī, *Badāʿ iʿ al-Ṣanāʿīʿ*, 6:528-529; Al-Ḥaṭṭāb, *Mawāhib al-Jālīl*, 6:16; Ibn Ḥamzah, *Nihāyatul Muḥtaẓ, 3:375-380; Ibn Qudāmah, *Al-Mughnī*, 6:7-9; Ibn `Arabī, *Aḥkām al-Qurʾān*, 4:243; Al-Ghazālī, *Iḥyāʾ ʿUlūm al-Dīn*, 9:1580.} Therefore, it can be concluded that the outcome of *muwāʿadah* is different from a forward contract rendering it permissible to use *muwāʿadah* in MM home financing, AITAB, and IRS.

6.2.5. Legal Challenges

Even though Islamic banking in Malaysia is highly regulated with IFSA 2013 and the Central Bank of Malaysia Act 2009, it is not free from legal issue. The issue is related to the Contract Act 1950. Firstly, IFSA does not have any specific provision for *waʿd*. Therefore, product documentation related to *waʿd* mainly relies on the Contract Act 1950. There is no separate provision for *waʿd* in the Contracts Act 1950. In chapter three, the researcher has discussed that there is a gap between *waʿd* and the concept of promise in the Contracts Act 1950. Although it seems that the binding nature of a promise in the Contracts Act is similar to *mālikī* scholars’ view regarding *waʿd*, a promise in the Contracts Act is as good as a contract whereas *waʿd* is different from a contract.

If *waʿd* is treated as a contract based on the Contract Act 1950, it may trigger a big *Sharīʿah* issue. Rusni Hassan warns that when *waʿd* is treated as a contract then it may invalidate a number of Islamic banking products. It may fall into the *Sharīʿah* prohibition of combining two contracts into one (*bayʿatayni fī bayʿatin*). Therefore, when a banking product is not valid from the *Sharīʿah* perspective, then it may cause harm to the bank along with the customer. This is because the bank might have disbursed some
amount of money to the customer under the product agreement. The customer may argue that he has no obligation to pay to the bank as the contract is invalid due to the \textit{wa’d}.\footnote{Rusni Hassan, interview with the researcher, 12 January 2015.}

Apart from that, the customer may be the victim under the Contracts Act 1950. This is because breaching the promise under the Contracts Act is similar to breaching the contract. Therefore, the remedies for the breach under the Contracts Act is different from the \textit{wa’d}. From the \textit{Sharī’ah} perspective, if the customer breaches the \textit{wa’d} then his obligation is to pay the actual loss incurred. However, in the Contracts Act, the customer is required to pay the full purchase price if the promise is broken. Furthermore, \textit{Sharī’ah} has some flexibilities regarding \textit{wa’d}. If the breach of a \textit{wa’d} is due to a lawful excuse e.g. bankruptcy, death, duress etc., then there is no obligation on the customer to pay. However, there is no such flexibilities in the Contracts Act unless it is mentioned in the terms and conditions of the contract.\footnote{Rusni Hassan, interview with the researcher, 12 January 2015.}

Furthermore, when the customer provides \textit{wa’d} to purchase an asset from the bank, then \textit{Sharī’ah} requires that the asset is in existence during the execution of the actual sale contract. However, there is no such requirement in the Contracts Act. Therefore, there happened a number of cases where the customer is obliged to pay the purchase price of the asset even though the asset has been disappeared. Abandoned housing project is one of the basic examples of this issue. Therefore, it can be said that the customer is the victim here due to the absence of any provision for \textit{wa’d} in the Contracts Act.\footnote{Hakimah Yaacob, interview with the researcher, 30 October 2014; Rusni Hassan, interview with the researcher, 12 January 2015.}

Additionally, Yakoob mentions that the term “consideration” in the Contracts Act 1950 has a wider sense than the \textit{mālikī} scholars’ explanation of “\textit{sabab/ta’līq}”. If a person changes his position relying on the promise then it has a “consideration”. Abstinence from

\begin{footnotesize}
\begin{itemize}
  \item \footnoteref{Rusni Hassan, interview with the researcher, 12 January 2015.}
  \item \footnoteref{Rusni Hassan, interview with the researcher, 12 January 2015.}
  \item \footnoteref{Rusni Hassan, interview with the researcher, 12 January 2015.}
\end{itemize}
\end{footnotesize}
performing an action is also a “consideration”. It is not necessarily restricted to whether any loss has incurred to the promisee or not.\textsuperscript{531}

It may be argued that the contradiction between the Contracts Act 1950 and the Shari’ah concept of \textit{wa’d} does not create any legal problem due to the superiority of SAC in giving judgments relating to any Islamic financial case. The Central Bank of Malaysia Act 2009 places SAC as the highest authority to do decide on any dispute regarding Islamic banking cases. Whatever decision SAC provides is binding in the court of law. In addition, when interviewed the legal officers in Islamic bank, they mentioned that they do not encounter any problem in preparing legal documentations for \textit{wa’d}. They believe that the existing legal system is sufficient to accommodate \textit{wa’d} in Islamic banking operations in Malaysia.\textsuperscript{532}

However, Rusni Hassan and Hakimah Yaacob pointed out that Malaysia should revise the Contracts Act 1950 to make Islamic banking more sustainable. This will have a long-term impact for the smooth operation of Islamic banking in Malaysia. This is because the court will refer to the SAC’s resolution to resolve any dispute. In case the SAC does not have any resolution pertaining to that matter, it will require a long period to issue a resolution, as it needs to conduct rigorous research to come to a decision. This lengthy procedure may upset the court of law and the related parties. Therefore, the Contracts Act 1950 should be revised through incorporating some provisions of \textit{wa’d}. Alternatively, provisions of \textit{wa’d} can be included in the IFSA 2013 and then it will be an exception to the Contracts Act 1950.\textsuperscript{533}

According to the researcher’s opinion, the Contracts Act 1950 should be revised to accommodate \textit{wa’d}. Revising the Contracts Act might be a positive step for Malaysia

\textsuperscript{531} Hakimah Yaacob, interview with the researcher, 30 October 2014.
\textsuperscript{532} Aizley Abd Latiff (Manager, Corporate Legal Services Department, Maybank Islamic Berhad), interview with the researcher, 3 December 2014; Zuraihah Abdul Rahman (Senior Executive, Corporate Legal Services Department, Maybank Islamic Berhad), interview with the researcher, 3 December 2014.
\textsuperscript{533} Hakimah Yaacob, interview with the researcher, 30 October 2014; Rusni Hassan, interview with the researcher, 12 January 2015.
to become the law of reference to settle international Islamic financial disputes. Islamic banking is growing rapidly and many cross border transactions among the countries are taking place. Considering the needs in the future, Malaysia should have a comprehensive legal system to resolve international financial disputes. In this juncture, Abdul Hamid Mohamad, former chief justice of Malaysia remarks:

Producing the highest standard of *Sharī‘ah* compliant products is not the end of the matter. It is equally important that the implementation and the settlement of disputes, if they arise later, be done in a *Sharī‘ah* compliant environment. Our laws, in so far as they are applicable to Islamic finance, should be *Sharī‘ah* compliant.\(^{534}\)

With the development of infrastructure, the law should be upgraded to keep Islamic financial system sound and to attract foreign lawyers to make litigation in Malaysia.

### 6.2.6. Lack of Comprehensive *Sharī‘ah* Parameters for *Wa‘d*

*Sharī‘ah* scholars and practitioners have expressed their concern over the absence of comprehensive guidelines for the usage of *wa‘d*. There is a possibility that *wa‘d* will be abused by the industry if a *Sharī‘ah* parameter is not developed. Mohamad Akram Laldin mentions that *wa‘d* is vastly used in the Islamic banking products in Malaysia but the fear is that it may change the basic characteristics of the contract. Though *wa‘d* is a risk management tool, when it is used extensively then it may change the product to debt-based. It could possibly transfer all the risks related to the product to one of the parties only. In fact, anything can be done through utilising *wa‘d*. Whatever is allowed in the conventional finance can be easily put into Islamic finance through *wa‘d*. For instance, preference share can be allowed in Islamic finance through *wa‘d* where someone promises, “I enter into a partnership (*mushārakah*) but I promise to waive my right”.\(^{535}\)

---


\(^{535}\) Mohamad Akram Laldin, interview with the researcher, 14 October 2014.
Considering the above factor, Mohamad Akram Laldin suggests that there should be some parameters set by the regulators for the usage of *wa’d*. The parameters should specify what constitutes *wa’d*, the characteristics of *wa’dān* and *muwā’adah*, the permissibility of *wa’d*, the purpose of using *wa’d*, places where *wa’d* cannot be used etc.\(^{536}\)

Similarly, Aznan Hasan admits that Islamic banks in Malaysia are excessively using *wa’d*. The reason behind this is that there is no alternative for *wa’d* at this moment. *Wa’d* is the best solution for the time being to be used in so many things. It can be used either for good or bad purpose. It may be done on either real assets or non-real assets. Therefore, there should be a guideline for the usage of *wa’d*. However, until now we do not have guideline for *wa’d* which is a big challenge for us.\(^{537}\)

Considering the parameters for *wa’d*, Rusni Hassan cites that Islamic banks are using *wa’d* too much because they want to get certainty of their income. This is because they are very much used to the conventional banking system. However, not only the bank but also the customer asks for certainty. Therefore, the important fact here is that we are very much used to the conventional system. If *wa’d* is not employed then banks will probably will not be interested to offer that product. Therefore, it is better to have *wa’d* alongside efforts to introduce regulations.\(^{538}\)

Similarly, Lahsasna views that *wa’d* is an important instrument which should be used wisely to innovate more products. Rather than reducing the usage of *wa’d*, it is preferable to innovate more products based on *wa’d* as long as it is permissible and is structured in a *Sharī’ah* complaint manner. However, there should have some parameters to regulate and monitor *wa’d*.\(^{539}\)

\(^{536}\) Mohamad Akram Laldin, interview with the researcher, 14 October 2014.
\(^{537}\) Aznan Hasan, interview with the researcher, 13 January 2015.
\(^{538}\) Rusni Hassan, interview with the researcher, 12 January 2015.
\(^{539}\) Lahsasna, interview with the researcher, 23 July 2014.
Based on the above scholars’ opinion, when *wa’d* is overwhelmingly used in numerous number of products, it may lead to an illegitimate end. Therefore, all scholars have agreed that a guideline on the usage of *wa’d* is necessary. This is because a guideline on the practice of *wa’d* ensures that it is not abused by the industry. It confirms that *wa’d* does not become a legitimate means to reach to an illegitimate goal. When the regulatory body, which is BNM in the case of Malaysia, develops a comprehensive guideline then several concerns regarding *wa’d* can be dissolved.

BNM has recently issued an exposure draft on the *Sharī‘ah* requirements and optional practices pertaining to developing Islamic banking products and services based on *wa’d*. However, this guideline might not be sufficient to regulate the industry to develop *wa’d*-based products. This is due to the reason that it covers only the basic feature of *wa’d*. There is no clear guideline on the usage of *wa’dān* and *muwā’adah*. There should be a detailed framework for *wa’dān* and *muwā’adah*. Furthermore, a guideline on the circumstances where *wa’d* violates the purpose of the contract (*muqtaḍā al-’aqd*) should be provided. In addition, a thorough guideline on the binding nature of *wa’d* should be provided including the circumstances where the promisor is lawfully excused from fulfilling the promise.

In the researcher’s point of view, the importance of *wa’d* in Islamic banking products cannot be overlooked. There is a strong need for *wa’d* in the industry to mitigate market risk in the retail products e.g. MM home financing. Moreover, *wa’d* is a key element to develop treasury products. Therefore, product innovation through *wa’d* should not be discouraged in the fear of evil use. In this regard, it is preferable to issue guidelines that are comprehensive for *wa’d* along with the innovations. Product innovations and applications should be continuously followed by regulations for when problems occur.

At the same time, it is preferable to look for better alternative for *wa’d*.

---

540 Bank Negara Malaysia, “Exposure Draft Wa’d (Shariah Requirements & Optional Practices)”. 
6.3. *Sharī‘ah* Issues and Other Challenges for *Wa‘d*-Based Products in Bangladesh

There are three major challenges for Bangladeshi Islamic banking industry in innovating products based on *wa‘d*. These challenges are strictness of the *Sharī‘ah*, lack of product development initiative, and legal challenges. The following sections provide a detailed discussion on these challenges including the opinions of *Sharī‘ah* scholars and practitioners.

6.3.1. Strictness of the *Sharī‘ah*

The practice of *wa‘d* in Bangladeshi Islamic banks is limited to some consumer products. This is due to the stringent position of the *Sharī‘ah* in Bangladesh. The *Sharī‘ah* scholars in Bangladesh heavily rely on *sadd al-dharā‘i‘* principle. Therefore, they do not allow a number of *wa‘d*-based treasury products and consumer products. It is a common fear among the scholars that if one of the treasury products is allowed in Bangladesh, then eventually the rest will follow. While using *wa‘d*-based treasury products then there is a risk of being similar to the conventional banking operation through involving with *ribā*, *gharār* and *maysir*. Scholars have negative connotation towards the usage of *wa‘d*. Shamsuddoha pointed out that Islamic banking industry completely survives on *wa‘d* but it is not a satisfactory solution. This is because *wa‘d* is a controversial concept in the *Sharī‘ah* and it is not based on something real. Therefore, rather than *wa‘d*, actual sale and purchase should be practiced.541

The foremost example for the strict position of *Sharī‘ah* scholars is the prohibition of FX forward. FX forward is not allowed in IBBL as well as in all other Islamic banks in Bangladesh. Rafiq, a prominent *Sharī‘ah* scholar in Bangladesh argues that there are a few *Sharī‘ah* violations in FX forward. Firstly, Islamic *Sharī‘ah* requires that currency exchange should be on the spot. The following prophetic narration says:

---

541 Shamsuddoha, interview with the researcher, 7 April 2014.
Based on the above narration, different currencies should be exchanged based on the exchange rate at that day. It is not permissible to fix an exchange rate between two currencies three months earlier for example and then exchange those currencies after that on that fixed rate ignoring that day’s exchange rate in the market. It violates the rule of spot transaction prescribed in the above prophetic narration. Shari‘ah only allows that the bank may promise that after three months it will sell to the customer USD 10,000 for example. Alternatively, customer may promise that he will purchase USD 5,000 from the bank after three months. However, they are not allowed to fix an exchange rate beforehand. In reality, if an exchange rate cannot be fixed earlier, this type of promise is worthless for the bank and the customer.\footnote{Rafiq, interview with the researcher, 4 May 2014.}

Furthermore, FX forward involving wa‘d from one party may cause harm to the other party. For example, the customer promises to purchase from the bank after three months USD 1,000 at the rate of USD 1 is equivalent to BDT 80. After three months, if the exchange rate of USD 1 is equal to BDT 75 in the market then the customer is obliged to fulfil his promise. If the customer does not fulfil his promise then he is required to compensate the bank. On the other hand, after three months, if the exchange rate of USD 1 is equal to BDT 85 in the market and the bank does not want to sell the USD to the customer at the rate fixed earlier, then there is no liability on the bank. This type of

\footnote{Narrated by Muslim, Kitāb al-muṣāqāt, Bāb al-ṣarf wa baγ al-dhahab bi al-waraq naqdan, Ḥadīth no. 71. See Al-Naysābūrī, Sahih Muslim, 3:1211.}

arrangement allows the bank to take advantage and may cause harm to the customer. The principle of the Sharī’ah says:

لا ضرر ولا ضرار

Translation: Harm shall not be inflicted not reciprocated. 544

The above prophetic narration says that harm should be removed from people. Therefore, FX forward is not allowed in IBBL. 545

Similarly, Shah Abdul Hannan mentions that he did not allow the practice of FX forward because one cannot fix an exchange rate today and execute the transaction on a later date. One should be very cautious here because it is bay‘ al-ṣarf. Therefore, he took the strict position even though AAOIFI has allowed it. 546

Furthermore, Md. Manzur-E-Elahi states that sometimes customers involved in export and import business ask the bank to fix the exchange rate of USD three months earlier than the transaction date. However, bank cannot accept it because it is a violation of the Sharī’ah principle. This is bay‘ al-ṣarf. It should be done on an on the spot basis as mentioned in the hadīth. It is not permissible to decide an exchange rate today and conclude the transaction another day. 547 Likewise, Islam also agrees that FX forward is not allowed due to the Sharī’ah requirement of concluding the contract on the spot. 548

However, contrary to this strict position there are a few scholars in Bangladesh who opine that FX forward should be allowed in Bangladesh. Since the previous group of scholars’ opinion dominate the industry, this group of scholars can be described as the minority. Rahmani argues that in FX forward, the customer first gives a wa‘d to the bank to execute bay‘ al-ṣarf at a later date. The Sharī’ah ruling that says that the transaction

545 Rafiq, interview with the researcher, 4 May 2014.
546 Shah Abdul Hannan (Member of the Shariah Supervisory Committee, Shahjalal Islami Bank Limited), interview with the researcher, 20 April 2014.
547 Md. Manzur-E-Elahi (Member of the Shariah Supervisory Committee, Islami Bank Bangladesh Limited), interview with the researcher, 10 April 2014.
548 Islam, interview with the researcher, 19 April 2014.
should be on the spot is not applicable on waʿd. Waʿd is different from a contract (ʿaqd). Sharīʿah principles related to a contract is not applicable on waʿd. Therefore, even though muwāʿadah is applied here then still there is no problem from the Sharīʿah perspective. There are many differences between muwāʿadah and al-bayʿ (contract of sale).  

Rahmani further explains that muwāʿadah is a promise to purchase or sell while al-bayʿ is a contract of sale. There are differences between these two expressions, which are “I will purchase” and “I purchased”. There must be ʿijāb and qabūl in al-bayʿ but it is not required in muwāʿadah. In muwāʿadah, the ‘aqd will be executed on a later date. On the mentioned date, there will not be any ‘aqd automatically but it will be executed through ʿijāb and qabūl. Finally, muwāʿadah does not have any effect on changing the ownership of the subject matter. Thus, there are many differences between muwāʿadah and al-bayʿ.  

In addition, Rahmani points out that the Sharīʿah scholars in Bangladesh mainly follow Hānafī school of jurisprudence (madhhab). Therefore, FX forward can be based on muwāʿadah. This is because according to Hānafīs, muwāʿadah can be used as binding on the promisor when there is a need. Qāḍī Khān, a prominent Hānafī scholar cites:

المواعدة قد تكون لازمة، فتجعل لازمة لحاجة الناس
Translation: Sometimes, bilateral promise can be binding. Therefore, it can be made binding due to people’s need.  

Therefore, a binding-muwāʿadah can be applied in FX forward due to public need.  

Consistent with the above argument, Arif adds that Islamic banks in Bangladesh should start FX forward first. Afterword, if any mistake is found, it can be revised with the passage of time. There are amendments in every law around the world. It is natural to

---

549 Rahmani, interview with the researcher, 10 April 2014.  
550 Ibid.  
551 Khān, Fatāwā Qāḍī Khān, 2:165.  
552 Rahmani, interview with the researcher, 10 April 2014.
have amendments. *Sharīʿah* rulings may change due to changes in situations and times. There are many examples in the *Sharīʿah* that something is lawful in some situations but in other circumstances is unlawful. Besides, the scope for exercising juristic reasoning (*ijtiḥād*) in the field of transactions (*muʿāmalāt*) is wider than other areas. In this regard, it is not an obligation to confine oneself to one school of jurisprudence (*madhhab*). Wherever anything beneficial is found, it should be taken.\(^{553}\)

Responding to the scholars’ arguments prohibiting FX forward in Bangladesh, Mohamad Akram Laldin argues that the *Sharīʿah* requirement of spot transaction (*yadan bi yadin*) is related to the period of executing the contract. This *Sharīʿah* principle is not applicable before executing the contract. For instance, A promises B that A will sell to B USD 1,000 on 1\(^{st}\) of December, 2015. In this case, there is no problem from the *Sharīʿah* perspective if they fix the price of USD today. It does not violate the *Sharīʿah* principle for spot transaction (*yadan bi yadin*). This is because the contract is not concluded yet.\(^{554}\)

In addition, one can agree on the price today and execute the contract on the fixed future date. The buyer and seller are always free to decide the price. They are free to sell and purchase at any price even it is different from the market rate at that day. For example, on the day of executing the contract, 1 USD is equal to 3.2 MYR but both parties decide to exchange 1 USD equal to 3.1 MYR, then it is not a problem from the *Sharīʿah* perspective as there is consent between the two parties. Therefore, it is permissible to lock the price first, and when the time comes both parties may enter into the contract and the possession of the currency (*qabād*) should be done at that point of time.\(^{555}\)

Bangladesh’s position in FX forward is contrary to some notable *Sharīʿah* authorities’ resolutions, namely those of AAOIFI, Kuwait Finance House, and BNM. In *Sharīʿah* standard no. 1 (2\(^9\)), AAOIFI mentions:

---

553 Arif, interview with the researcher, 16 April 2014.  
554 Mohamad Akram Laldin, interview with the researcher, 14 October 2014.  
A bilateral promise to purchase and sell currencies is forbidden if the promise is binding, even for the purpose of hedging against currency devaluation risk. However, a promise from one party is permissible even if the promise is binding.\footnote{Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), Shari‘ah Standards for Islamic Financial Institutions, 7.}

AAOIFI does not allow binding \textit{muwā‘adah} in FX forward but it allows \textit{wa‘d}. Likewise, BNM also allows \textit{wa‘d} in FX forward. It resolves:

Islamic financial institutions are allowed to conduct forward foreign exchange transactions based on unilateral \textit{wa‘d mulzim} (binding promise) which is binding on the promissor. In addition, the party who suffers losses due to non-fulfilment of promise may claim compensation. The forward foreign exchange transactions may be carried out by the Islamic financial institutions with their customers, among Islamic financial institutions, or between the Islamic and conventional financial institutions.\footnote{Bank Negara Malaysia, Shariah Resolutions in Islamic Finance, 138.}

Along with BNM, the Kuwait Finance House issued a resolution that it is allowed to sell or purchase a currency for a rate agreed upon in advance with the condition that the contract is executed later where the delivery and the receipt of the subject matter is made on the spot.\footnote{Bayt al-Tamwil al-Kuwayfi, “Al-Fatāwā al-Shar‘īyyah fī al-Masā’il al-Iqtisādiyyah,” Fatwā no. 171, Mawsū‘at al-Iqtisād wa al-Tamwil al-Islāmi website, retrieved on 07 July 2015, \url{http://iefpedia.com/arab/}.}

In the researcher’s opinion, the reason behind the prohibition of FX forward in Bangladesh is that the scholars have different understanding of the prophetic narration. It appears that according to their understanding, the \textit{“yadan bi yadin”} (hand-to-hand) concept requires the seller and purchaser to exchange the currency on that day’s market price. However, the commentaries of this \textit{ḥadīth} mention that \textit{“yadan bi yadin”} means that the transaction should be on spot basis.\footnote{Muhuyī Al-Dīn Aḥmad Zakariyyā Yaḥyā bin Sharaf Al-Nawawī, \emph{Al-Minḥāj Sharḥ Ṣaḥīḥ Muslim} bin al-Hājjāj (Al-Qāhirah: Al-Maṭbā‘ah al-miṣrīyyah bi al-azhar, 1929), 11:14-16; Shams Al-Dīn al-Kirmānī, \emph{Al-Kawākib al-Dirārī fī Sharḥ Ṣaḥīḥ al-Bukhārī} (Bayrūt: Dār iḥyā’ al-turāth al-‘arabī, 1981), 9:191.} This means that the delivery and reception of different currencies should be concluded immediately during the period of the contract. However, there is no condition here to follow market price in sale and purchase. Instead,
it is clearly mentioned in the hadīth that both buyer and seller are free to decide the price.

It says:

فإذا اختلفت الأجناس فبيعوا كيف شئتم إذا كان يدا بيد

Translation: If these classes differ, then sell as you wish if payment is made hand-to-hand.

When there is a transaction between two different items among the six types of items mentioned earlier, then it is not a requirement that both of the item should be equal. The purchaser and seller can freely exchange with whatever price they want. However, the only condition here is that it should be on spot basis.

Based on the above, the researcher opines that there should not be any problem to accept FX forward in Bangladesh from the Sharī‘ah perspective. Moreover, FX forward is a need for the customers who are involved in export and import business. The foreign trade is significantly increasing in Bangladesh. Therefore, Islamic banking should respond to the growing needs of the customer. Otherwise, customers may resort to conventional banking to fulfil their needs.

The Sharī‘ah scholars should be flexible to accommodate FX forward. Islamic Sharī‘ah is based on ease. It does not prescribe any ruling which brings hardship for people. Allāh (SWT) says:

وَمَا جَعَلَ عَلَيۡكُمۡ فِۡي ٱلۡيَنِ ۡمِ فِۡي ٱلۡيَنِمِ مِنۡ حَرَجٖ

Translation: And, [He] has not laid upon you in religion any hardship.

There is nothing in the religion which puts human being in hardship. Whenever there is a hardship, there is a way out. Even the prayer (ṣalāt) which is the second biggest pillar of Islam was reduced due to travel and fear. Flexibility and ease are the basic

---

characteristics of the Sharī‘ah. Accordingly, scholars should balance between sadd al-dhrā‘i‘ and the public need (maṣlaḥah) while exercising their juristic reasoning (ijtihād).

6.3.2. Lack of Product Development Initiatives

Among the reasons for the limited number of wa‘d-based products in Bangladesh is that there is no sufficient product development initiative by the industry. Shamsuddoha confesses that the product innovation in IBBL is lesser than the demand of the customer. In relation to the concept of wa‘d, he mentions that practitioners do not have much awareness on developing numerous products based on wa‘d. Customers also do not understand wa‘d. However, it is very important to develop more products in IBBL.563

Moreover, Kabir points out that Islamic banking in Bangladesh is lacking several number of products especially personal financing products e.g. education financing, hajj financing, event financing etc. Some financing products are needed for foreign workers. It is very important to develop more products. Islamic banks will be at the back of the competition if the product is not developed.564

Huq mentioned that a few products were introduced at the beginning of Islamic banking in Bangladesh. Islamic banks in Bangladesh still rely on those products. He strongly believes that Islamic banking in Bangladesh should introduce many more products. Without the introduction of new products, Islamic banking will not have smooth growth. Currently, Islamic banking is covering only 20 to 25% of total banking in Bangladesh. It is only a reserve market. However, if Islamic banking would like to be the mainstream banking, then they should better serve the various needs of the people.565

Based on our field study, there are a few reasons for the lack of product developments which are: (1) lack of research, (2) lack of competitive market, (3) lack of

563 Shamsuddoha, interview with the researcher, 7 April 2014.
564 Kabir, interview with the researcher, 7 April 2014.
565 Huq, interview with the researcher, 9 April 2014.
human capital, and (4) lack of sincere support from the government. The following subsections provide details on these points.

6.3.2.1. Lack of Research

The scarcity of research is the foremost impediment to develop more products in Bangladesh. Conducting research is the initial condition to innovate more banking products and services. However, bankers and *Sharī‘ah* scholars in Bangladesh do not have a positive attitude to conduct research. Arif points out that the benefit of research is not clear among the bankers, academics and *Sharī‘ah* scholars in Bangladesh. This is due to their short-sightedness. This is why the industry is not ready to spend money for research. There is very little research in Islamic banks. Banks are generous to finance different big events but they are not willing to finance research. This big problem covers not only the bankers but also the whole nation.\(^{566}\)

In this regard, Kabir mentions that we should see the overall outcome of research. Perhaps one or two research projects for a certain product cannot bring any outcome but another may bring about a beneficial outcome. Sufficient funding is very important for research. Some people may think that the expenditure for research does not bring any income while spending in other sectors may bring income. This attitude should be changed.\(^{567}\)

Rahman argues that research should be done to cater the needs of the customer. It should be done in such a way that Islamic banking can create something new rather than simply imitating conventional products. In addition, many *Sharī‘ah* violations are taking place due to the lack of research. In many cases, due to the lack in research, the risk in

---

\(^{566}\) Arif, interview with the researcher, 16 April 2014.

\(^{567}\) Kabir, interview with the researcher, 7 April 2014.
certain products cannot be minimised. If a comprehensive research is conducted, then many types of risks can be minimised.568

The researcher believes that BB can play a strong role to develop research in Islamic banks. It should provide a guideline that every Islamic bank in Bangladesh should have a *Sharī‘ah* research division. This research division should conduct research on the existing products of the banks to identify the shortcomings in those products. Moreover, it should introduce more innovative products for Islamic banks. The research division should help the *Sharī‘ah* advisory board determine the potential *Sharī‘ah* violations in products and the alternative *Sharī‘ah* mechanism for conventional products.

### 6.3.2.2. Lack of Competitive Market

There is no competition among the Islamic banks in Bangladesh. Normally, IBBL, the oldest and biggest Islamic bank in Bangladesh issues new products and other Islamic banks follow IBBL. It is very rare that other Islamic banks have come out with new innovative products. All Islamic banks are dependent on IBBL. Hannan states that there is no competing system among the Islamic banks in Bangladesh. IBBL is the father of all Islamic banks. All other banks follow IBBL. They even use the same product manual.569

However, competition is very important for the overall development of Islamic banking. Stijn Claessens mentions that competition is important in the financial sector for the efficiency of financial services, quality of financial products, and the level of innovation as well as for the overall economic growth.570 As the competitive environment is yet to exist, there is no pressure on product innovation and services development. Thus, the lack of competition among the Islamic banks may weaken their overall performance.

---

568 Rahman, interview with the researcher, 7 April 2014.
569 Hannan, interview with the researcher, 20 April 2014.
Therefore, Islamic banks should exert effort to become independent and should decrease their reliance on IBBL.

6.3.2.3. Lack of Human Capital

Human capital is a significant element for the overall progress of the organisation. Skilled competent people are needed for Islamic banking product innovation. In the Bangladeshi context, there is a lacking of individuals who are expert in *Sharī’ah* and banking. Rahman cites that actually those who are the *Sharī’ah* scholars in our country have limitation of knowledge in Islamic finance and banking. There is a lack of people who know Arabic and English well enough to conduct research in Islamic finance. Those who have knowledge in *Sharī’ah* have little knowledge in banking and finance. Most of the *Sharī’ah* scholars do not have knowledge on the practice of Islamic banking. Sometimes, *Sharī’ah* scholars disregard some proposed products from the bankers without properly understanding them. Alternatively, the *Sharī’ah* scholars sometimes allow certain proposed products from the bankers without understanding them also. Both aspects are not right.  

In addition, Arif affirms that a *Sharī’ah* scholar who understands *Sharī’ah* and Islamic banking is lacking in Bangladesh. Most of the *Sharī’ah* scholars only understand the *Sharī’ah*. There is a strong need for people who are expert in English, *Sharī’ah*, and banking. If a new generation emerges who have knowledge in *Sharī’ah* and banking, then it will be easy to develop more products.

The shortage of human capital is one of the biggest challenges for the overall development of Islamic banking in Bangladesh. Sarker found that the shortage of a dedicated, skilled, and trained work force is one of the basic problems for Islamic banks

---

571 Rahman, interview with the researcher, 7 April 2014.
572 Arif, interview with the researcher, 16 April 2014.
in Bangladesh. The shortage of qualified Sharī‘ah scholar is a global challenge for Islamic banking that includes not only Bangladesh but most countries. There are only a handful of qualified Sharī‘ah scholars in the world. In this regard, Theodore Karasik et al. states:

One problem that currently constrains the growth of Islamic banking institutions is the paucity of qualified Islamic scholars who can interpret the classical sources in light of today’s modern fiscal challenges. In order for Muslims to perceive a particular banking service as “Sharī‘ah-compliant” it must receive a fatwā (religious ruling) from a credentialed, established cleric. This scholar must possess a rare combination of intellectual assets – a thorough grounding in classical fiqh (jurisprudence), as well as a solid understanding of modern micro- and macro-economics. According to Dār al-Istithmār, a London-based consultancy, there are roughly a dozen such scholars worldwide.

In the researcher’s opinion, long term planning and investment are required to develop human capital for Islamic banking in Bangladesh as well as in the world. Firstly, more universities should offer Islamic banking courses that combine both Sharī‘ah and banking courses. All the Islamic banks along with the BB should organise seminars and workshops to develop the banking knowledge of the Sharī‘ah scholars. In this regard, Islamic banking institutions can offer a short-term certificate course for Sharī‘ah advisors. Along with this, research activities should be intensified under the Sharī‘ah division in every Islamic bank so that the Sharī‘ah officers become expert in Islamic banking practices as well as in Sharī‘ah issues.

6.3.2.4. Lack of Sincere Support from the Government

BB has provided incentives for Islamic banking in Bangladesh but the support from the government is insufficient for the growth of Islamic banking. Huq highlights that the government rules and regulations are flexible with the conventional banking but they are quite strict with the Islamic banking. For example, in 1997, PBL got a license to open

---

five Islamic banking branches but until now, it did not receive a license to open any Islamic banking branch while at the same time it received permission to open more than hundred conventional banking branches. From 2005, the Arab Bangladesh Bank Limited (ABBL) did not receive any license to open an Islamic banking branch. Similarly, more the 23 conventional banks did not get permission to open Islamic banking branches after they started with a few Islamic banking branches. At present, six conventional banks are waiting for licenses from BB to convert into an Islamic bank. With this, we can conclude that the regulator is confining Islamic banking. Islamic banking could be the mainstream banking in Bangladesh if licenses were regularly issued.575

Pertaining to this, Rafiq added that the government does not sincerely want that Islamic banking system to spread in the country. Islamic banking is growing due to the overwhelming response from the public. As the public are spontaneously choosing Islamic banking and turning from conventional banking, BB is somehow forced to permit Islamic banking. However, the government support is not like the Malaysian government where the government directly patronises Islamic banking. In Bangladesh, Islamic banking is moving forward due to public support even though the government has not been friendly toward it.576

It becomes clear that the government does not sincerely support Islamic banking when the minister of finance in Bangladesh recently made a statement against Islamic banking in the parliament. Even though the minister did not plan to stop Islamic banking in Bangladesh, he said that the Islamic banking system appeared to him as fraudulent. Furthermore, he remarked that it is unfortunate that Islamic banking is getting popular around the world and many international organisations like the International Monetary

575 Huq, interview with the researcher, 9 April 2014.
576 Rafiq, interview with the researcher, 4 May 2014.
Fund (IMF) are showing interest in it. With this statement it becomes obvious that the government does not sincerely believe in Islamic banking.

While some non-Muslim governments are gradually showing their interest in Islamic banking, Bangladesh as a Muslim majority country should provide pleasant support towards Islamic banking. Khan and Bhatti pointed out that the Monetary Authority of Singapore is attempting to make changes in its tax system and regulatory systems for the proper growth and development of Islamic financial institutions in the country. Furthermore, it supported Islamic banking and finance training programs which are conducted by native Shari‘ah scholars to promote Islamic finance in Singapore. Besides, the UK’s Financial Services Authority (FSA) has planned to make London a hub for Islamic finance and investment. It eliminated the double stamp duty provision on Islamic mortgage contracts in 2006. Moreover, it has made necessary amendments in the UK Tax Law to ease the practice of murābaḥah, ijārah and mushārakah mutanāqīṣah.

Lately, India, Bangladesh’s neighbouring country is attempting to establish Islamic bank. The Reserve Bank of India (RBI) has recently carried out a feasibility study to introduce a full-fledged Islamic bank.

The expansion of Islamic banking would encourage Muslims to actively participate in Islamic investments and thus it will contribute to the national economic development. Confining Islamic banking may trigger public dissatisfaction towards the government and reduce the participation of pious Muslims in economic activities. Therefore, the government of Bangladesh should provide at least equal treatment for Islamic banking to that awarded to its conventional counterpart.

578 Islamic Financial Services Board (IFSB), Prospects and Challenges in the Development of Islamic Finance for Bangladesh (Kuala Lumpur: Islamic Financial Services Board, 2014), 17.
579 Khan and Bhatti, “Islamic banking and finance: on its way to globalization,” 708-725.
6.3.3. Legal Challenges

Generally, the legal framework in Bangladesh supports Islamic banking operations. There are some provisions for Islamic banking in the Bank Companies Act 1991. Moreover, there are some exceptions for Islamic banks in the Income Tax Ordinance 1984. Therefore, Islamic banks are allowed to involve in *muḍārabah* and *mushārakah* business with their customers. While the conventional banks cannot own real estate property, Islamic banks are allowed to own real estate property under its Islamic banking mechanism.

However, there is a legal issue in relation to the practice of *waʿd*. As mentioned earlier in chapter four, Contract Act 1872 does not recognise *waʿd*. Under the Contract Act 1872, *waʿd* is as good as a contract. Therefore, if *waʿd* is a contract then it cannot be made to execute another contract in the future. According to the *Shariʿah*, one cannot sell an asset before he owns it. If *waʿd* is used in BMPO financing then it would be questionable. This is because the real contract should take place between the bank and the customer after the bank has purchased the commodity according to the customer’s request. However, when *waʿd* itself is a contract then a contract is taking place before the bank owns the subject matter of the contract. Here, the bank is selling something that it does not own. Moreover, the binding nature of *waʿd* differs from the binding nature of a contract. Finally, *Shariʿah* has some flexibilities for the promisor if he breaches the *waʿd* but the Contract Act does not have such flexibilities.

When interviewed, Sheikh Mahmudur Rahman revealed that IBBL did not face any legal issue related to *waʿd* so far. In the case of default, the bank usually charges actual loss incurred to it from the customer. In the researcher’s perspective, if the legal status of *waʿd* in Bangladesh is examined from a balanced perspective then it can be seen that banks may not face problems under the existing act because the Contract Act is in

---

580 Rahman, interview with the researcher, 27 October 2014.
favour of them. However, if no clause for *waʾd* is incorporated in the Contract Act then the customer’s welfare might not be protected. The customer could be the victim in this case. However, the absence of a provision for *waʾd* in the Contract Act may raise concern for the banks as well because when a banking contract is invalidated by the *Sharīʿah* then the bank may also suffer loss.

Therefore, it is necessary for the banks to urge the government to incorporate a *waʾd* clause in the Contract Act 1872. It is highly recommended that there should be a separate comprehensive law for the operation of Islamic banks where a clause for *waʾd* is included. A separate law for Islamic banking would be the permanent solution for the Islamic banks in Bangladesh. In fact, several studies recommended a separate law for Islamic banking in Bangladesh.\textsuperscript{581} When Islamic banking in Bangladesh gets complete legal support then it might provide more confidence to foreign investors to participate in the Islamic banks.

6.4. Conclusion

This chapter has discussed the *Sharīʿah* issues and other challenges in relation to the *waʾd*-based products in Malaysia and Bangladesh. In the Malaysian context, many *Sharīʿah* issues have been raised due to its widespread application of *waʾd*. However, the discussion in this chapter concluded that the practice of *waʾd* in Malaysian Islamic banks is in accordance with the *Sharīʿah* and free from the issues raised. Nevertheless, a comprehensive *Sharīʿah* parameters for the usage of *waʾd* should be developed. Moreover, a legal provision for *waʾd* either in the Contracts Act 1950 or IFSA would be a permanent legal solution for *waʾd*.

In the context of Bangladesh, the practice for *waʿd* is restricted due to the stringent opinion of the *Sharī'ah* scholars. After examining the scholars’ opinion, it is observed that the scholars are rigid due to their heavy reliance on *sadd al-dharāʾiʿ*, different understanding of the *Sharī'ah* rulings, and paying little attention to the public needs (*mašlahah*). Furthermore, another challenge for innovating *waʿd*-based products is that there is a lack in product development due to lack of research, competitive market, human capital, and sincere support from the government. Finally, a legal provision for *waʿd* is needed in the contract act of the country.
CHAPTER 7: THE PROSPECTS OF \textit{WA‘D}-BASED PRODUCTS IN
MALAYSIA AND BANGLADESH

7.1. Introduction

There is a significant prospect of \textit{wa‘d} for the Islamic banking industry in Malaysia and Bangladesh. This chapter suggests a number of \textit{wa‘d}-based products which can be practiced by the Islamic banks in both countries. Considering the \textit{Sharī‘ah} framework, clients’ needs and suitability with the industry different types of product structures have be proposed separately for each banking industry. The following sections illustrate proposed product structures for Malaysian banking industry first followed by the Bangladeshi banking industry. Each product structure is explained with figures, underlying \textit{Sharī‘ah} concepts, and the advantages and disadvantages in its operation.

7.2. Prospects of \textit{Wa‘d}-Based Products in Malaysia

The three different products have been suggested for the Islamic banks in Malaysia are Islamic FX option, Islamic FX forward based on \textit{wa‘dān}, and \textit{Ijārah} home and property financing under \textit{shirkat al-milk}. The details of the product structures with figures and \textit{Sharī‘ah} concepts used are provided below.

7.2.1. Islamic FX Option

The Islamic option is a significant risk management tool. Globally, different models have been proposed for Islamic options. However, these models are receiving condemnation from the \textit{Sharī‘ah} perspective.\footnote{Kok et al., “Derivative products and innovation”, 242- 257; Al-Amine, “Risk and derivatives in Islamic finance”; Imran Iqbal, Sherin Kunhibava and Asyraf Wajdi Dusuki, “Application of options in Islamic finance,” (ISRA Research Paper No. 46, Kuala Lumpur, 2012).} Therefore, the researcher proposes \textit{wa‘d}-based Islamic FX Option. The Islamic FX option can be the future \textit{wa‘d}-based hedging instrument in
Malaysia. Two different models for Islamic FX option have been suggested. The first is based on \textit{wa’d} with commodity \textit{murābaḥah}. The second model is based on \textit{muwā’adah} and \textit{‘urbūn}. Figure 7.1 below describes the operational steps of Islamic FX option based on \textit{wa’d} and commodity \textit{murābaḥah}.

![Diagram of Islamic FX Option Based on Wa’d and Commodity Murābaḥah](image)

**Figure 7.1 Islamic FX Option Based on \textit{Wa’d} and Commodity \textit{Murābaḥah}**

**Operational Steps:**

1. On 23 February 2015, the bank promises to sell USD 1 million to the client at the rate of MYR 3.2 at any day from 1 April 2015 to 30 April 2015.
2. At the same day, the bank purchases a commodity from broker A at MYR 10,000.
3. At the same time, the bank sells the commodity to the customer at MYR (10,000 cost +5,000 profit) 15,000. MYR 5,000 is considered as the option premium for the bank.
4. On the above date, the customer appoints the banks as his selling agent to sell the commodity to broker B at MYR 10,000.
5. After that, from 1 April 2015 to 30 April 2015, if the exchange rate of USD is in favour of the customer, he may ask the bank to realise its \textit{wa’d}. 

241
The above model is most suitable for Malaysian Islamic banks. This is because both of the Sharī‘ah concepts used in the above structure are allowed by the Malaysian Sharī‘ah authority. The majority of the Sharī‘ah scholars in Malaysia allow wa‘d and commodity murābaḥah. In chapter three, it has been discussed that these two concepts are used in Islamic swaps ICCS, IPRS, and IRS. Therefore, the above model should be consistent with Malaysian Sharī‘ah. However, there is another model for Islamic FX option based on muwā‘adah. Figure 7.2 illustrates the operational steps of the muwā‘adah-based Islamic FX option.

![Diagram of Islamic FX Option Based on Muwā‘adah and ‘Urbūn]

**Figure 7.2 Islamic FX Option Based on Muwā‘adah and ‘Urbūn**

**Operational Steps:**

1. On 23 February 2015, the bank undertakes to sell USD 1 million to the client at the rate of MYR 3.2 at any day from 1 April 2015 to 30 April 2015.

2. At the same date, the customer undertakes to purchase USD 1 million from the bank at the rate of MYR 3.2 at any day from 1 April 2015 to 30 April 2015.

3. On the same day, the customer pays MYR 5,000 as ‘urbūn to the bank. The ‘urbūn is considered as the option premium for the bank.
(4) After that, from 1 April 2015 to 30 April 2015, if the exchange rate of USD is in favour of the customer, he may ask the bank to fulfil its wa’d.

The above model might be controversial in Malaysia due to muwā‘adah. However, the researcher has concluded in chapter two that muwā‘adah is different from a contract (‘aqd) even though it is obligatory on both parties to fulfil their promises. Hence, muwā‘adah can be used for currency transaction. Apart from this, the concept of ‘urbūn should be allowed in Malaysia. Even though there are some disagreements among the Sharī‘ah scholars on the permissibility of ‘urbūn but the weightiest opinion is that it is permissible. According to BNM, ‘urbūn is allowed.\(^{583}\) The advantage of the muwā‘adah-based model is that it is simple and less costly. In the first model, commodity murābahah arrangement is costly but there is no such costly arrangement in the second model. If the Sharī‘ah scholars in Malaysia become more flexible to accept muwā‘adah, the second model might be an admirable hedging instrument in Malaysia.

Another model proposed by some scholars for Islamic option is based on wa’d only.\(^{584}\) In that model, the bank provides wa’d to sell a certain amount of foreign currency to the customer at a fixed rate on a future date. In return, the client pays fees to the bank due the bank’s wa’d. However, Sharī‘ah scholars in Malaysia do not accept this model. BNM has prohibited taking a fee for wa’d. This is because wa’d cannot be a financial right. Moreover, when there is a consideration or counter value for wa’d then it becomes similar to a contract (‘aqd).\(^{585}\) Therefore, it is suitable to use either commodity murābahah or muwā‘adah for Islamic FX option.

The Islamic FX option would be a viable alternative for conventional options in Malaysia. It may strengthen Islamic finance in Malaysia through providing more flexible

---

\(^{583}\) Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance*, 18.


\(^{585}\) Mohamad Akram Laldin, interview with the researcher, 14 October 2014; Shamsiah Mohamad, interview with the researcher, 13 November 2014; Bank Negara Malaysia, “Resolutions of the Shariah Advisory Council of Bank Negara Malaysia, Application of Wa’d (promise) in Forward Currency Transaction,” *Bank Negara Malaysia* website.
currency hedging comparing with FX forward. However, Islamic FX option should be used for hedging purposes only but not for speculative purposes. Moreover, it cannot be traded to a third party as a financial right.

7.2.2. Islamic FX Forward Based on Wa’dān

Islamic FX forward is another hedging instrument that can be developed through wa’dān. The difference between the wa’d-based FX forward and wa’dān-based FX forward is that the latter provides more financial protection to the customer. In the wa’d-based FX forward, the customer only provides wa’d to purchase foreign currency at a fixed exchange rate but the bank does not provide any wa’d. However, in the wa’dān-based FX forward both the bank and the customer provide wa’d to purchase or sell foreign currency at a fixed rate. The two wa’d are related to two different conditions. Therefore, they are not muwā’adah. Wa’dān-based model ensures that the bank fulfils the commitment with the customer and it does not exploit the opportunity when the exchange rate of the foreign currency is not in its favour. Therefore, there is no question of injustice (zulm) in this model of FX forward. Figure 7.3 below shows the operational steps of wa’dān-based FX forward.

![Diagram of Islamic FX Forward Based on Wa’dān](image)

Figure 7.3 Islamic FX Forward Based on Wa’dān
Operational Steps:

(1) On 24 February 2015, the customer undertakes to purchase USD 1 million on 25 March from the bank at the rate of MYR 3.3 per USD with the condition that the market rate of USD goes below this rate.

(2) At the same time, the bank promises to sell USD 1 million on 25 March to the customer at the rate of MYR 3.3 per USD with the condition that the market rate of USD goes up from this rate.

(3) On 25 March, the bank and the customer enter into a currency exchange contract (bay‘ al-ṣarf) based on either one of the party’s promises subject to which condition is fulfilled. If the price of USD is below 3.3 then the bank will ask the customer to fulfil his wa‘d. If the rate of USD is above 3.3 then the customer will ask the bank to fulfil its wa‘d.

As discussed earlier in chapter six, there is a debate on the permissibility of wa‘dān in currency exchange contract (bay‘ al-ṣarf). However, the most preferred opinion is that it is permissible. The majority of the scholars in Malaysia have accepted it. Currently, there are some other products in the industry which are based on wa‘dān e.g. IRS, AITAB vehicle financing etc. Therefore, it can be resolved that the wa‘dān-based FX forward model is suitable for the Malaysian banks. Apart from the Sharī‘ah status, this FX forward model is less costly because there is no commodity murābaḥah in it. Finally, it is expected that this model will bring about fairness between the bank and the client through serving both party’s interests.

7.2.3. Ijārah Home and Property Financing under Shirkat al-Milk

Ijārah home and property financing under shirkat al-milk is a retail-financing product which is different from MM home and property financing. There is no diminishing partnership here. This is based on ijārah with the wa‘d to give hibah (gift) to the customer
if the customer fulfils the commitment with the bank. However, this product is different from AITAB because in AITAB, the bank has the total ownership of the asset but in this product, the customer and the bank jointly own the asset. This product is a combination of *ijārah, wa’d, hibah* and *shirkat al-milk*. It is similar to MM home financing but there is no gradual purchase of bank’s share by the customer. Besides, there is only one *wa’d* from the bank’s side but no *wa’d* from the customer. As the bank holds the majority share of the property until the end of the tenure then no *wa’d* is required from the customer’s side. Figure 7.4 below shows the operational steps of *ijārah* home and property financing under *shirkat al-milk*.

![Diagram](image)

**Figure 7.4 Ijārah Home and Property Financing under Shirkat al-Milk**

**Operational Steps:**

1. The bank and the customer enter into a *shirkat al-milk* agreement where the customer owns 10% share of the property and the bank owns the rest 90% share of the property.
(2) The customer approaches to the property developer and pays 10% of the property price.

(3) The bank disburses the remaining 90% of the property price to the developer.

(4) The bank leases out its portion of the property to the customer for a fixed tenure.

(5) The customer pays rental payment on monthly basis with an agreed upon rate between the bank and the customer.

(6) The bank undertakes that if the customer pays the monthly rentals on time until the end of the tenure then it will transfer its portion of the property to the customer as hibah (gift).

(7) At the end of the tenure, the bank transfers the title of the property to the customer if the customer has settled all the monthly rental payments on time.

This model allows the bank to provide house-financing facility to the customer even though the house is under construction. In case the developer abandons the house under construction, the bank will bear the loss and will return the advance ijārah payment to the customer. So, the customer’s right is protected in this model. Moreover, the bank holds the 90% ownership of the house until the end of the tenure. Therefore, the bank’s risk of loss is lesser when the customer defaults. In addition, there is only one wa’d by the bank to transfer the title of the house to the client provided that the client has fulfilled his ijārah commitment. Hence, it can be said that the model is quite simple comparing to MM home financing.

While comparing with AITAB home financing, the advantage of this model is that the customer purchases 10% share of the house at the beginning of the financing tenure. This can show the seriousness of the client with this financing arrangement. On the other hand, in AITAB, the bank holds the complete ownership of the asset. The customer is not required to pay any money at the beginning of the financing tenure. Therefore, the seriousness of the client with AITAB financing arrangement might not be assessed.
From the Sharī‘ah perspective, ījārah home and property financing under shirkat al-milk is acceptable. Scholars unanimously agree on the permissibility of ījārah and shirkat al-milk concept. Furthermore, the wa’d by the bank to transfer the title of the property to the client as hibah is a wa’d that is subject to a condition that the client has to fulfil the ījārah commitment. The weightiest opinion among the scholars is that this type of wa’d is permissible in the Sharī‘ah and legally binding on the promisor when the promisee (client) has fulfilled the condition.

There might be some concern related to the maintenance of the house. According to the Sharī‘ah, the bank is required to bear the essential maintenance of the property. This means that if the property is damaged without the negligence of the client, the bank has to bear the cost to repair the property. From this perspective, this model might be more costly for the bank and more difficult in terms of operation. However, the customer should bear the supplementary operating maintenance.

Another problem related to this model is that the bank has to take the market risk. As the bank holds the property until the end of the tenure then it has to take the market risk in case the customer defaults. The customer may not prefer this model because he is only allowed to own the property at the end of the tenure. If he defaults just before the end of the tenure, then he will not get the property even though he has paid monthly rentals for a long period. Protecting the client’s interest might be difficult in this case.

Despite these disadvantages, the ījārah under shirkat al-milk model might be useful for the Malaysian Islamic banking industry due to the advantages mentioned earlier. Every financing model has some disadvantages along with benefits. When this model is put into practice then answers to the problems might be found while also conducting further research.

586 Accounting and Auditing Organization for Islamic Financial Institution, Shari‘a Standards for Islamic Financial Institutions, Shari‘a Standard no. 9, 144-145.
7.3. Prospects of *Waʿd*-Based Products in Bangladesh

There is a vast potential for Islamic banks in Bangladesh to practice a number of *waʿd*-based products if the *Sharīʿah* scholars become flexible with *waʿd*. The following sections demonstrate four *waʿd*-based products suggested for Bangladesh namely: (1) *muwāʿadah* Islamic FX forward, (2) *muwāʿadah* Islamic cross currency swap, (3) Islamic profit rate swap, and (4) *tawarruq* personal financing.

7.3.1. *Muwāʿadah* Islamic FX Forward

As discussed earlier, Islamic banks in Bangladesh are in need of an Islamic FX forward product. Therefore, *muwāʿadah* Islamic FX forward is suggested for Islamic banking industry in Bangladesh to hedge against currency risk. In this product structure, both bank and client provide *waʿd* that they will execute *bayʿ al-ṣarf* contract in a future date with a fixed exchange rate between two different currencies. On the transaction date, the bank and the client enter into *bayʿ al-ṣarf* contract with a rate fixed earlier and immediately transfer the possession of the subject matter between them. Figure 7.5 below shows the operation of proposed *muwāʿadah* Islamic FX Forward.

![Figure 7.5: *Muwāʿadah* Islamic FX Forward](image)

**Figure 7.5 Muwāʿadah Islamic FX Forward**

Operational Structure:

(1) On 25 February 2015, the bank undertakes to sell USD 1 million to the client on 1st of April 2015 at the rate of BDT 85 per USD.
(2) On the same date, the client undertakes to purchase USD 1 million from the bank on 1st of April 2015 at the rate of BDT 85 per USD.

(3) On 1st of April 2015, the bank and the client execute the *bay‘ al-sarf* at the exchange rate of 85 BDT per USD. The bank pays USD 1 million to the client. The client pays BDT 85 million to the bank.

Generally, one *wa‘d* is used in FX forward. The reason behind choosing *muwā‘adah* is that Ḥanafī school of jurisprudence (*madhhab*) allows *muwā‘adah* to be binding on both parties in case of public need.587 As the Ḥanafī school of jurisprudence is mostly followed in Bangladesh, then *muwā‘adah* should be in consistent with the *Sharī‘ah* framework of Bangladesh. Furthermore, the discussion in chapter two clarified that even though *muwā‘adah* is binding on both parties then still it is different from a contract (*‘aqd*).

The *muwā‘adah*-based Islamic FX forward provides more financial protection to the client. This is because the bank also provides *wa‘d* that it will sell a certain amount of currency to the client on the fixed date. Therefore, in case the currency exchange rate is against the favour of the bank, the bank is still obliged to fulfil its *wa‘d* to sell the currency on the specific date. Hence, comparing with *wa‘d*-based model, *muwā‘adah*-based model better serves the interest of both parties. Moreover, this *muwā‘adah*-based model is more coherent to the *Sharī‘ah* principle which states that harm should be eliminated from each of the individuals in all Islamic transactions.588

Even though *wa‘dān* can serve the same interest of *muwā‘adah*, *wa‘dān* is more complicated than *muwā‘adah*. As *muwā‘adah* is accepted in the Ḥanafī school of jurisprudence, then it is better to choose the less complicated option. Islamic *Sharī‘ah*

---

encourages preferring the easier one between the two choices if both are lawful.\textsuperscript{589} Therefore, \textit{muwāʿadah} should be the best option.

However, if the \textit{Sharīʿah} scholars in Bangladesh are not sufficiently convinced to employ \textit{muwāʿadah} then \textit{waʿd}-based FX forward can be introduced as an alternative. In that case, there will be no \textit{waʿd} from the bank’s side. Whether \textit{waʿd} or \textit{muwāʿadah} is used, it cannot be denied that an FX forward would be a very useful tool for Islamic banks in Bangladesh. With this product, Islamic banks would be able to fulfil the need of the client who are involved with export and import business in Bangladesh. Therefore, \textit{Sharīʿah} scholars should consider this real need of the client.

7.3.2. \textit{Muwāʿadah} Islamic Cross Currency Swap

Similar to Islamic FX forward, Islamic cross currency swap can be developed through \textit{muwāʿadah}. While FX forward is structured to hedge against currency risk for one time then Islamic cross currency swap is used to hedge against fluctuations of a currency for a longer period. In this product structure, the contracting parties execute a number of \textit{bayʿ al-ṣarf} within a certain period. For instance, the bank and the customer fix an exchange rate of 85 BDT per one USD for a period of one year. Within this time, both parties exchange two different currencies in every three months intervals at the rate fixed. Figure 7.6 illustrates the operational steps of \textit{muwāʿadah} Islamic cross currency swap.

Operational Steps:

(1) On 25 February 2015, the bank provides \textit{waʿd} to execute a number of \textit{bayʿ al-ṣarf} transaction with the client at every three months interval starting from 1 April until 1 October at the exchange rate of 85 BDT per 1 USD. The bank undertakes

\textsuperscript{589} See Ḥadīth narrated by Al-Bukhārī, Kitāb al-adab, Bāb qawl al-nabī ṣallallāhu ‘alyhi wa ṣallam: yassirū wa lā tuʿassirū, Ḥadīth no. 6126, in Al-Bukhārī, Al-Jāmiʿ al-Ṣahīḥ, 4:114.
to sell a fixed amount of USD to the client at every three months until the end of the tenure.

(2) On the same date, the client provides *wa’d* to execute a number of *bay’a*-*al-ṣarf* with the bank at every three months interval starting from 1 April until 1 October at the exchange rate of 85 BDT per USD. The client undertakes to purchase a fixed amount of USD from the bank at every three months until the end of the tenure.

(3) On 1 April 2015, the bank and the customer conclude the *bay’a*-*al-ṣarf* contract based the *wa’d* provided by both parties. The bank sells for instance USD 1 million to the customer and the customer purchases it for BDT 85 million. The similar type of *bay’a*-*al-ṣarf* takes place between the two parties at every three months interval until the expiry of the swap.

![Diagram of Muwā’adah Islamic Cross Currency Swap](image)

**Figure 7.6 Muwā’adah Islamic Cross Currency Swap**

Usually, Islamic banking practitioners use commodity *murābahah* for Islamic cross currency swap, but *muwā’adah* is suggested for Bangladesh as the *Sharī’ah* scholars in Bangladesh who do not allow commodity *murābahah*. Scholars prohibit *tawarruq* which is the essence of commodity *murābahah*. In addition to this, there is no commodity market developed in Bangladesh to exercise commodity *murābahah*. Since a binding-
muwāʿadah is accepted in the Ḥanafi school of jurisprudence in the case of people’s need, then it is preferable to use muwāʿadah. Muwāʿadah-based Islamic cross currency swap holds the similar Sharīʿah ruling of FX forward. This is because making waʿd to execute a number of bayʿ al-ṣaraf is similar to making waʿd for a single bayʿ al-ṣaraf.

There are some benefits of using muwāʿadah in Islamic cross currency swap. Firstly, it is less costly than commodity murābahah as there is no brokerage fee. Secondly, the product structure is less complicated. There is no complicated arrangement here like the commodity murābahah.

Similar to Islamic FX forward, Islamic cross currency swap is also a need for Islamic banking for a long term hedging. As long as it is used for hedging purposes then there should not be any Sharīʿah issue in relation to this. In the researcher’s opinion, it is not fair to conclude generally that swap is a toxic element for the economy. As long as it is fairly used for hedging against currency risk, then it is not harmful for the economy. In this regard, strong regulation and monitoring are required to ensure that this instrument not being used for excessive speculation and gambling.

7.3.3. Islamic Profit Rate Swap

Islamic profit rate swap is a hedging instrument that allows one party to swap its floating rate of profit with another party’s fixed rate of profit. For example, if a bank has floating ijārah profit referenced to Dhaka Inter-Bank Offer Rate (DIBOR) then it can swap its floating profit with another bank’s fixed murābahah profit. In the product structure, both parties provide waʿd to execute a series of musāwamah contract within a fixed period. On every transaction date, they execute two different musāwamah transactions where the profit in the first musāwamah is referenced to DIBOR and the profit in the second musāwamah is fixed based on the agreement between the parties. Figure 7.7 explains the operational steps of Islamic profit rate swap.
Figure 7.7 Islamic Profit Rate Swap

Operational Steps:

(1) On 1 March 2015, the client approaches to the bank and undertakes to enter into a series of musāwamah transactions from 1 April 2015 to 1 October 2015. The bank also undertakes to perform a number of musāwamah transactions with the client at regular agreed upon dates within the mentioned date.

(2) On every settlement date, the client purchases a commodity from broker B.

(3) The client sells the commodity to the bank with a profit referenced to DIBOR for example on the spot.

(4) The bank sells the commodity to broker A at cost and gets cash.

(5) On the other hand, the bank purchases a commodity from broker A.
(6) The bank sells the commodity to the client with a fixed profit decided earlier between the bank and the client.

(7) The client sells the commodity to broker B and gets cash.

The Sharī‘ah concept used in the above structure is wa‘dān and musāwamah. Based on the discussion in chapter two, wa‘dān should be acceptable here. However, the musāwamah concept used here is actually based on tawarruq. As the Sharī‘ah scholars do not allow organised tawarruq then a real tawarruq should be practiced here. In order to practice this product, a commodity market should be developed.

At present, it may appear that Islamic profit rate swap is not a need for Islamic banks in Bangladesh. However, considering the fact that Islamic banks in Bangladesh are involved with ijārah financing then it may be a need for the banks in the near future. When involving with floating ijārah profit, banks may require to hedge its position. As tawarruq is the only mechanism so far to structure this product then establishing a commodity market to facilitate the genuine practice of tawarruq should be among the future development agendas for Islamic banking in Bangladesh. In this respect, Malaysia’s sūq al-sila‘ (commodity murābahah house) can be taken into account. Even though there are some minor issues concerning its operation but it is a positive initiative to create a platform for practicing genuine tawarruq.\(^{590}\)

7.3.4. Tawarruq Personal Financing

Tawarruq personal financing is a retail-banking product which is very much needed for the industry. The basic Sharī‘ah concept used for this product structure is murābahah and wa‘d. The customer approaches the bank and requests for personal financing. The client promises the bank that if the bank purchases the specific commodity then he will purchase it from the bank at a fixed rate of profit. The bank purchases the commodity and sells it

\(^{590}\) Asyraf Wajdi Dusuki, “Can Bursa Malaysia’s Sūq al-Sila‘ (Commodity Murābahah House) resolve the controversy?”.
to the client with deferred payment. After purchasing the commodity from the bank, the client immediately sells it in the market with cash price. In this way, the customer fulfils its needs for cash. At the same time, the bank profits from the commodity sold.

In this *tawarruq* personal financing model, the bank is not appointed as the client’s agent to sell the commodity to third party. The customer is taking market risk to sell the commodity to third party with cash price. Moreover, there is no connection between the third party (broker B in Figure 7.8) and the bank. Therefore, it should be different from organised *tawarruq*. Figure 7.8 below illustrates the operational steps of *tawarruq* personal financing.

![Figure 7.8 Tawarruq Personal Financing](image)

Operational Steps of *Tawarruq* Personal Financing:

1. The client approaches the bank and undertakes to purchase a commodity with a certain profit agreed upon between them.

2. Based on the *wa’d* from the client, the bank purchases a commodity from commodity broker A.

3. Afterword, the bank sells the commodity to the client with deferred payment.

4. The client pays the purchase price to the bank with monthly instalments.
(5) Later, the client sells the commodity to broker B with cash price.

Currently, Islamic banks in Bangladesh are facing difficulties to find out a suitable product structure for Islamic personal financing. Therefore, this *tawarruq* personal financing model can be a crucial product to fulfil the needs of the customer. However, similar to Islamic profit rate swap, *tawarruq* personal financing is also subject to the development of a commodity market that allows the parties to practice the genuine *tawarruq* instead of an organised *tawarruq*.

### 7.4. Conclusion

There is a huge potential in *wa’d* for innovating a number of products for Islamic banks in Malaysia and Bangladesh. Considering the needs and appropriateness of the industry, a number of *wa’d*-based products’ models have been proposed for both countries. Islamic FX option, Islamic FX forward based on *wa’dan* and *ijarah* home and property financing under *shirkat al-milk* have been proposed for Malaysia. On the other hand, Bangladesh has the potential to practice *muwā’adah* Islamic FX forward, *muwā’adah* Islamic cross currency swap, Islamic profit rate swap, and *tawarruq* personal financing product.

591 Kabir, interview with the researcher, 7 April 2014.
8.1. Introduction

The study was conducted to explore the practice of \( \text{wa'd} \) in Islamic banking products in Malaysia and Bangladesh and to compare between them. Furthermore, the study discussed the \( \text{Sharī'ah} \) issues, other challenges, and future prospects of \( \text{wa'd} \) in Islamic banking products in both countries. In achieving these objectives, Islamic banking practitioners and \( \text{Sharī'ah} \) scholars in Malaysia and Bangladesh have been interviewed. Moreover, relevant official documents of the banks have been reviewed. The findings from the interviews have been analysed with the classical and contemporary sources of Islamic jurisprudence (\textit{fiqh}) as well as related literature. Moreover, a comparison is made between Malaysia and Bangladesh on the practice of \( \text{wa'd} \). Finally, some \( \text{wa'd} \)-based product structures have been proposed for Islamic banks in both countries according to their needs and suitability with the industry.

The findings of this research are significant for the Islamic banking practitioners as it shows the practice of different types of \( \text{wa'd} \)-based products and suggests innovative \( \text{wa'd} \)-based products. \( \text{Sharī'ah} \) scholars may get benefit from these findings as it provides the weightiest opinion pertaining to the \( \text{Sharī'ah} \) issues in \( \text{wa'd} \). The findings are important for the government, legal, and regulatory body as it reveals the gap between the existing law of the country and \( \text{wa'd} \). Moreover, it demonstrates the role of the government and the regulatory authority to overcome the challenges in innovating new Islamic banking products based on \( \text{wa'd} \). Finally, the findings are unique for academics as it is a combination of \( \text{Sharī'ah} \) research and qualitative field study.

This chapter briefly summarises the findings of this study. It provides recommendations to policy makers as well as Islamic banking practitioners in Malaysia
and Bangladesh. Finally, it discusses the limitation of this research and the scope for further research.

8.2. Summary of the Important Findings

The important findings of this research are provided below in the subsequent sections.

8.2.1. The Wa‘d Concept

The study resolves that wa‘d is a voluntary declaration to perform something good to another party in the future. Therefore, it is different from ‘aqd as ‘aqd is a mutual agreement which consequences come into effect on the spot. Moreover, ‘aqd is always compulsory to fulfil but scholars have different opinions on the binding nature of wa‘d. In addition, wa‘d is different from nudhur, ‘ahd and ju‘alah. However, in some verses of the Qur‘ān, both ‘ahd and wa‘d provide the same meaning.

Among the different features of wa‘d are muwā‘adah and wa‘dān. Muwā‘adah is a mutual promise made by two persons to perform something good for each other in the future. It is different from ‘aqd because muwā‘adah is merely a declaration to perform something good in the future that does not have any effect on the spot whereas the consequences of an ‘aqd comes into effect on the spot. In addition, wa‘dān is a new concept developed by the industry that denotes two wa‘d given by two individuals which are subject to two different situations.

Concerning the Sharī‘ah status of wa‘d, scholars have different opinions on the binding nature of wa‘d. The majority of the classical scholars believe that wa‘d is recommended but not compulsory. The second group of scholars believe that wa‘d is always obligatory on the promisor. The third group of scholars slightly differ into two types of opinions. The first opinion is that wa‘d is binding on the promisor if it is attached to a cause even though the promisee has not entered into an action based on that wa‘d.
Another view is that *wa’d* is binding on the promisor if it is attached to a cause and the promisee has entered into an action relying upon that *wa’d*.

The weightiest opinion to the researcher is that *wa’d* is binding on the promisor except where there is a valid excuse (*’uqr Shar’ī*). This is because the verses that criticise breaking the *wa’d* and the prophetic narration that states breaking the *wa’d* as one of the characteristics of the hypocrites (*munāfiq*) are stronger than the evidences provided by other group of scholars. However, because the basic principle that *Sharī’ah* does not put difficulty on human being, *wa’d* cannot be binding on the promisor when the promisor has valid excuse to break the *wa’d*. In this regard, there is no difference between religiously binding and legally binding. This is because the texts of the *Sharī’ah* generally make the *wa’d* binding without distinguishing between religious and legal binding and there is no evidence found in the *Sharī’ah* separating between religious and legal binding.

Regarding the *Sharī’ah* status of *muwā’adah*, the classical scholars permit *muwā’adah* to execute a *ṣarf* contract. However, it is understood that *muwā’adah* is not binding in their opinion. Qāḍī Khān, a *Hānafī* scholar, viewed that *muwā’adah* can be binding due to necessity of the people. The *Sharī’ah* status of a binding *muwā’adah* (*muwā’adah mulzimah*) is an ongoing debate among contemporary scholars. The majority of the scholars believe that if *muwā’adah* is binding on both promisors then it is similar to a forward contract (*bay’ al-ajal bi al-ajal*). However, a group of scholars believe that there are differences between a binding *muwā’adah* and a forward contract (*bay’ al-ajal bi al-ajal*). Another group of scholars’ position is that *muwā’adah* can be allowed in cases of necessity. The researcher concludes that *muwā’adah* is different from a forward contract (*bay’ al-ajal bi al-ajal*) even though it is practiced as binding on both promisors subject to fulfilling certain conditions.

In the case of *wa’dān*, scholars debate whether *wa’dān* is different from *muwā’adah*. The researcher resolves that whether *wa’dān* resembles *muwā’adah* does not
affect its permissibility in the *Sharī‘ah* since a binding *muwā‘adah* is also permissible in
the *Sharī‘ah*. However, if the practice of *wa‘dān* leads to an illegitimate end then it should
not be allowed based on *sadd al-dharā‘i*.

8.2.2. *Wa‘d*-Based Islamic Banking Products in Malaysia

With the support from the government, highly developed infrastructure, robust
governance system, and legal support, Islamic banks in Malaysia have developed various
products based on *wa‘d*. Among the consumer banking products, *wa‘d* is employed in
MM home and property financing, AITAB vehicle financing, *murābahah* home financing
and *tawarruq/commodity murābahah* home financing. In addition, *wa‘d* is used in
*murābahah* letter of credit which is a trade financing product. Finally, some treasury
products are innovated based on *wa‘d* which are Islamic FX forward, IPRS, ICCS and
IRS. Along with *wa‘d*, Islamic banks in Malaysia employ *wa‘dān* in MM home and
property financing, AITAB vehicle financing and IRS. However, there is no application
of *muwā‘adah* in these products. Among the Islamic banks in Malaysia sampled for this
study, MIB practices *wa‘d* in seven products, KFHMB practices *wa‘d* in six products and
BIMB applies *wa‘d* in five products. All the three banks practice *wa‘d* as binding on the
promisor.

In MM home and property financing, there are three *wa‘d* in KFHMB and two in
MIB. Firstly, the customer undertakes to purchase the bank’s share on gradual basis.
Secondly, the bank undertakes that it will sell its share of the property to the customer
whenever he asks for an early settlement. Thirdly, the customer gives *wa‘d* that upon
triggering the event of default, he will purchase the property from the bank. In case of
MIB, the second *wa‘d* is not practiced. The first *wa‘d* is a normal practice in MM home
and property financing. However, the second *wa‘d* is introduced to safeguard the interest
of the customer in case he needs an early settlement. The third wa‘d is employed to allow the bank recovering its loss in case of customer’s default.

The practice of AITAB vehicle financing in KFHMB includes wa‘dān where the bank undertakes to sell the vehicle to the client at maturity and the customer undertakes to purchase the vehicle upon triggering the event of default. The first wa‘d safeguards the interest of the customer and the second wa‘d assists the bank to recover its loss at the event of default. However, in case of MIB, the client firstly undertakes to purchase the vehicle at the end of the lease period. Secondly, the client again promises to purchase the vehicle at the time of default. In MIB, the client provides two wa‘d as the bank usually does not have any interest to retain the vehicle.

The murābaha home financing as practiced by KFHMB includes only one wa‘d. The client undertakes to purchase the property from the bank. Security deposit may be taken from the customer. Similar to murābaha home financing, tawarruq/commodity murābaha home financing includes only one wa‘d given by the customer. In addition, the similar application of wa‘d is found in murābaha Islamic letter of credit.

Among the treasury products, Islamic FX forward involves one wa‘d where the client undertakes to purchase a fixed amount of foreign currency with a fixed rate in a future date. The wa‘d allows the contracting parties to fix a currency exchange rate to minimise the risk of loss from exchange rate fluctuations. However, as the bank does not provide any wa‘d here then the client’s interest might not be protected.

In IPRS, the client gives wa‘d to perform a number of commodity murābaha transactions with the bank at different agreed upon dates in the future. Similar type of wa‘d is given by the customer in ICCS. However, in ICCS, the client promises to perform a number of commodity murābaha in two different currencies with a fixed exchange rate. The wa‘d in both treasury products ensures that the customer is committed to perform a number of commodity murābaha in the future with the bank.
In the case of IRS, both bank and client give \textit{wa’d}. The client undertakes to enter into a number of \textit{musāwamah} transactions with the bank. The bank also undertakes to perform a series of \textit{musāwamah} transactions with the clients. The subject matter for both \textit{wa’d} are different because they promise to perform two different types of \textit{musāwamah} transactions. Therefore, \textit{wa’dān} is practiced here which protects both bank and client’s interests.

The practice of \textit{wa’d} in Malaysian Islamic banking products has been expanded and enhanced from earlier practices, as shown by previous literatures. However, along with the development, several \textit{Sharī‘ah} issues are associated with these products. The \textit{Sharī‘ah} issues raised in the practice of \textit{wa’d} are firstly, \textit{wa’d} is a means for bank’s capital guarantee in MM home and property financing. Secondly, \textit{wa’d} is used as a \textit{hilah} in all the treasury products. Thirdly, in the case of FX forward, \textit{wa’d} is a tool to exploit the client. Fourthly, the practice of \textit{wa’dān} resembles \textit{muwā‘adah} or forward contract (\textit{bay‘ al-ajal bi al-ajal}) which is prohibited in the \textit{Sharī‘ah}.

8.2.3. Legal Status of \textit{Wa‘d in Malaysia}

The Contract Act 1950 does not explicitly mention \textit{wa’d}. According to the Contract Act, a promise is as good as a contract while \textit{wa’d} is different from a contract. The binding nature of a promise somehow resembles some \textit{Mālikī} scholars’ opinion that a promise is binding when it is subject to a condition and the promisee has started to perform an action relying upon the promise. However, in the case of breach, the \textit{Sharī‘ah} allows taking compensation from the promisor of only the actual loss incurred to the promisee due to the breach but the Contract Act imposes more than that.

Even though the Contract Act does not recognise \textit{wa’d} but the Central Bank of Malaysia Act 2009 places SAC of BNM as the highest authority to decide on any Islamic banking case. It is possible to implement the \textit{Sharī‘ah} ruling for \textit{wa’d} in Malaysian court
through the resolutions issued by SAC. In addition, BNM has published an exposure draft on the guideline for practicing *wa’d* but it is yet to come into effect. Furthermore, the law harmonisation committee of BNM included *wa’d* into their harmonisation initiative but they are yet to come out with a conclusion.

### 8.2.4. *Wa’d*-Based Islamic Banking Products in Bangladesh

Contrary to Malaysia, Islamic banking in Bangladesh lacks sufficient legal and infrastructural support by the government. Islamic banks have a limited number of products based on *wa’d*. There are three consumer banking products where *wa’d* is employed, which are BMPO, *bay’ mu’ajjal*, and HPSM. Moreover, there is one *wa’d*-based trade financing product which is MPI. The three banks studied in Bangladesh namely IBBL, PBL and SIBL practice *wa’d* in these products in a similar way.

The practice of *wa’d* in these products are quite simple as only a single *wa’d* is used in these products. There is no development of *wa’d*-based products in Bangladesh from the previous findings. Furthermore, there is no usage of *muwā’adah* and *wa’dān*. No *wa’d*-based Islamic treasury product is developed so far by Islamic banks in Bangladesh.

In the case of BMPO, the customer provides *wa’d* to purchase the commodity when the bank purchases it in the market for the client. The *wa’d* is binding on the customer. The customer is obliged to compensate the bank the actual loss incurred if he breaches the promise. This *wa’d* supports the bank to minimise its market risk. Similarly, in *bay’ mu’ajjal* financing, the client gives *wa’d* to purchase a commodity from the bank after the bank has purchased it.

In HPSM, at the beginning of the contract, the client undertakes to purchase the bank’s share either on gradual basis or in lump sum. This *wa’d* assists the bank to recover its loss in case the customer defaults. If the customer fails to purchase the property, then
the bank will sell the property in market, and if bank incurs any loss then the client is required to compensate the bank. However, there is no waʿd from the bank’s side. Therefore, the client may face difficulty in case he needs an early settlement.

Finally, the practice of waʿd in MPI is similar to BMPO. The Islamic Fiqh Academy allows the practice of muwāʿadah in this case as the usage of muwāʿadah is very crucial here to protect the interest of the customer. However, no muwāʿadah is applied in this product so far.

8.2.5. Legal Status of Waʿd in Bangladesh

Similar to the Malaysian Contract Act, the Bangladeshi Contract Act 1872 does not recognise waʿd. According to the Contract Act 1872, a promise is similar to a contract. If the promisor breaches the promise then he is obliged to compensate the promisee the actual loss incurred or the possible loss known between the parties at the time of making the promise. Furthermore, there is no separate law for the operation of Islamic banking in Bangladesh.

8.2.6. Similarities and Differences between Malaysia and Bangladesh

In terms of the legal status of waʿd, both Contract Act in Malaysia and Bangladesh are similar to each other. In both countries, the act does not recognise waʿd. However, Malaysian legal system is better supportive to waʿd than Bangladesh since SAC holds the highest authority to resolve any Islamic banking dispute. Moreover, the law harmonising committee is conducting research to harmonise between waʿd and the Contract Act.

In terms of waʿd-based products, Malaysia has a large number of products than Bangladesh. In consumer banking products, both countries jointly offer murābaha financing and MM financing/hire purchase under shirkat al-milk financing. Malaysia uniquely offers AITAB vehicle financing and tawarruq/commodity murābaha home
financing while Bangladesh separately offers bayʿ muʿajjal financing. In the case of trade financing, both Malaysia and Bangladesh are offering the same waʿd-based product which is based on murābahah. While Malaysia has innovated four Islamic treasury products based on waʿd then Bangladesh is yet to introduce any treasury product due to strictness of the Sharīʿah scholars.

In the case of bayʿ murābahah financing, both Malaysia and Bangladesh practice “murābahah on purchase orderer” where there is only one waʿd given by the customer to the bank. The customer undertakes to purchase a commodity from the bank. This promise in binding on the promisor in both countries but no fee is taken upfront from the client. All the three banks studied in Bangladesh practice bayʿ murābahah financing but in Malaysia, only KFHMB practices this financing. KFHMB practices this product for house financing. However, Bangladesh is extensively using this product for financing houses, industrial machinaries and agricultural equipments. The extensive usage of bayʿ murābahah in Bangladesh triggered some issues pertaining to Sharīʿah governance.

The MM home financing in Malaysia resembles HPSM in Bangladesh. However, Bangladesh uses HPSM for both house and car financing. In MM home financing, there are three waʿd where the client gives two waʿd and the bank gives one. The client promises to purchase the bank’s share of the property on gradual basis. And then, the bank undertakes that it will sell its share of the property to the customer whenever the client requests for an early settlement. Finally, the client undertakes that he will purchase the bank’s share of the property at the time of default. On the other hand, in HPSM, there is only one waʿd given by the customer to the bank. The customer promises to purchase the bank’s share of the property either gradually or in lump sum.

The practice of bayʿ muʿajjal financing in Bangladesh is different from BBA which is practiced in Malaysia. BBA involves sale and buy back arrangement between the bank and the customer. Therefore, there is no use of waʿd in BBA as it involves very
low ownership risk for the bank. However, *wa’d* is used in *bay’ mu’aijajal* due to high ownership risk for the bank. In *bay’ mu’aijajal*, the client promises to purchase a commodity from the bank.

The *tawarruq* home financing in Malaysia is based on *bay’ murābahah*. In this financing product, similar to *bay’ murābahah*, the client promises to purchase an asset from the bank. However, Islamic banks in Bangladesh do not offer *tawarruq*. This is because most of the *Sharī’ah* scholars in Bangladesh do not allow *tawarruq*. Even though *bay’ murābahah* may substitute *tawarruq* in Bangladesh but *tawarruq* has more benefits than *bay’ murābahah* financing.

AITAB is another *wa’d*-based product which is practiced in Malaysia but not in Bangladesh. Instead of AITAB, Bangladesh is using HPSM for car financing. Even though no *Sharī’ah* issue is involved with using HPSM for vehicle financing but AITAB is more suitable for vehicle financing.

In trade financing, both Malaysia and Bangladesh employ *bay’ murābahah* which involves a *wa’d* from the customer to the bank. It is termed as “*murābahah* letter of credit” in Malaysia and “*murābahah* post import” in Bangladesh. The practice of *wa’d* is the same in both countries. However, if it is a need, *muwā’adah* can be used in this type of product.

In the case of Islamic FX forward, it is not allowed in Bangladesh due to the doubt of *ribā*. *Sharī’ah* scholars require that currencies should be exchanged on the spot according to the market price. Furthermore, IPRS, ICCS and IRS are not introduced in Bangladesh as *tawarruq* is not allowed by the *Sharī’ah* scholars. Moreover, there is a fear that derivatives are toxic financial instruments and they are not a public need. However, a minority group of scholars view that Islamic swaps are crucial for Bangladesh. Moreover, *tawarruq* can be allowed if a commodity market is established to practice real *tawarruq*. 
8.2.7. *Sharī‘ah* Issues and Other Challenges in *Wa‘d*-Based Products in Malaysia

The researcher concludes that the practice of *wa‘d* in Malaysian Islamic banks are in accordance with the *Sharī‘ah* and are free from the *Sharī‘ah* issues raised. Corresponding to the issue that *wa‘d* is a mechanism to guarantee the capital in MM home and property financing, the researcher concludes that MM home and property financing is actually based on *shirkat al-milk*. *Shirkat al-milk* is a joint ownership. Therefore, *wa‘d* is not a means for guaranteeing the capital here as *shirkat al-milk* allows one party to purchase another party’s share with a price mutually agreed between them. The objective of *shirkat al-milk* is to achieve ownership but not to make investment. The partners are not required to share profit and loss from the investment. From the contractual perspective, the usage of *wa‘d* is legitimate. Furthermore, from the macro level perspective, *wa‘d* is a need for Islamic banking industry to minimise the market risk. If *wa‘d* is not used then the banks would prefer fully deb-based financing e.g. BBA, *murābaḥah* etc. Considering the need of the industry, *wa‘d* should be allowed in MM home and property financing.

Furthermore, *wa‘d* is not a ḥilah in Islamic treasury products. All the Malaysian *wa‘d*-based treasury products namely FX forward, ICCS, IPRS and IRS are based on some specific contracts along with *wa‘d*. *Sharī‘ah* scholars agree that the contractual arrangement are valid for all these products. In addition, hedging is the underlying objective for these instruments which is in line with the *maqāṣid al-Sharī‘ah*. These *wa‘d*-based treasury products are legitimate means to achieve a legitimated objective.

Looking into the issue of *wa‘d* as a means to exploit the customer in FX forward and *murābaḥah* on purchase orderer, the researcher resolves that there is no oppression (*zulm*) on the customer here from the *Sharī‘ah* perspective. According to the *Sharī‘ah*, it is similar to stipulating condition (*sharţ*) in a contract. In a contract, the contracting parties (*‘aqidān*) are free to stipulate any conditions as long as there is consent between the parties and it does not violate the rules of the *Sharī‘ah*. However, based on the recent
economic experience that there is no such financial institution called “too big to fail”, the customer’s interest should be protected.

Concerning the issue that the practice of wa’dān in some products is similar to a forward contract (bay’ al-ajal bi al-ajal), the researcher concludes that wa’dān is not similar to a forward contract. In MM home and property financing and AITAB vehicle financing products, each of the wa’d is connected to different specific event. In IRS, the two wa’d are connected to two different subject matter. Furthermore, there are some basic differences between wa’dān and a forward contract. In the case of forward contract, there should be offer (ijāb) and acceptance (qabūl). After the execution of the contract, the ownership of the subject matter is transferred immediately to the purchaser and the purchase price becomes a debt on the purchaser. However, there is no offer and acceptance in wa’dān and no effect on the subject matter e.g. transfer of ownership and liability of purchase price.

At present, there is no legal provision for wa’d in the IFSA and the Contract Act 1950. According to the contract act, wa’d is as good as a contract. When wa’d is treated as a contract then the practice of wa’d in many products may fall into the Sharī‘ah prohibition of combining two contracts into one (bay’atayni fī bay’atīn). Consequently, many wa’d-based products can be invalidated which may harm the bank. Even though SAC holds the highest position to issue ruling on any Islamic banking case in Malaysia but to make Islamic banking more sustainable and to make Malaysian law as the law of reference to settle international Islamic financial disputes, it is necessary to incorporate a provision for wa’d either in the Contract Act or IFSA.

Moreover, some scholars have raised their concern over the usage of wa’d in a large number of products without any comprehensive Sharī‘ah parameter. It is a fear that wa’d might be used to achieve an illegitimate end without a Sharī‘ah parameter. The researcher concludes that wa’d is a need for the industry. Therefore, product innovation
through *waʿd* should not be discouraged for the fear of evil use. However, it is better to develop comprehensive guidelines to direct the practice of *waʿd*.

8.2.8. *Sharīʿah* Issues and Other Challenges in *Waʿd*-Based Products in Bangladesh

One of the major challenges to develop *waʿd*-based products in Bangladesh is the rigidity of the *Sharīʿah* scholars. Due to their heavy reliance on *sadd al-dharāʾiʿ*, it was not possible to introduce some *waʿd*-based products. As an example of strictness, FX forward is not allowed in Islamic banks in Bangladesh even though prominent *Sharīʿah* authorities like AAOIFI has allowed it. It is prohibited based on the understanding that *bayʿ al-ṣarf* should be concluded on spot basis according to the market price at that time. However, a minority group of *Sharīʿah* scholars in Bangladesh view that FX forward should be allowed in Bangladesh. Even *muwāʿadhah* can be applied in FX forward as it is different from a contract (*ʿaqd*), and *Hanafi* school of jurisprudence (*madhhab*) allows practicing *muwāʿadhah* as a binding promise whenever it is a need. The researcher views that the prohibition of FX forward in Bangladesh is due to the scholars’ different understanding of the prophetic narration “*yadan bi yadin*”, which indicates that we should exchange different currencies on spot basis. However, it does not impose following the market price. The contracting parties are free to exchange currencies with whatever rate they want. Therefore, responding to the need of the clients in Bangladesh, *Sharīʿah* scholars should be flexible to allow FX forward.

Another challenge in developing *waʿd*-based products in Bangladesh is that there is a lacking of adequate product development initiative by the industry. In fact, there are a number of elements contributing to this situation which are lack of research, absence of competitive market, shortage of human capital and lack of sincere support from the government.
Finally, even though the legal framework of Bangladesh generally supports the operation of Islamic banking, there is no provision for wa’d in the Contract Act. The existing Contract Act 1872 does not recognise wa’d. According to the Contract Act, wa’d is as good as a contract. If wa’d is considered as a contract, then its practice in some Islamic banking products might be invalidated. Moreover, the client might be the victim in many cases if wa’d is a contract. Therefore, a legal provision for wa’d is needed either in the Contract Act or in a separate law for Islamic banking operation in Bangladesh.

8.2.9. The Prospects for Wa’d-Based Products in Malaysia

There is a considerable prospect in wa’d for Islamic banking industry in Malaysia. Islamic FX option can be developed with either wa’d and commodity murābahah or muwā’adah and ‘urbūn. Wa’d with commodity murābahah model should be accepted in Malaysia but the muwā’adah and ‘urbūn model may not be accepted as muwā’adah is not accepted by BNM. However, as the researcher view that muwā’adah is permissible then muwā’adah and ‘urbūn-based model is suggested for the future as it is less complicated and less costly than the previous model.

Furthermore, the existing practice of FX forward in Malaysia can be replaced with wa’dān-based Islamic FX forward to protect the interest of the client in currency hedging. The wa’dān-based model should be accepted in Malaysia as most of the banks currently using wa’dān in some other products.

Finally, ijārah home and property financing under shirkat al-milk is a consumer-banking product which can be developed as an alternative for MM home and property financing. This product is based on ijārah, wa’d, hibah and shirkat al-milk. This model allows the bank to provide financing to a client for a house under construction while bank takes the risk of project abandonment. Moreover, the risk of loss in case of customer’s
default is lesser as the bank holds 90% ownership until the end of the tenure. The model is comparably simple and less burdensome on the customer as it contains only one \textit{wa’d}.

\subsection*{8.2.10. The Prospects for \textit{Wa’d}-Based Products in Bangladesh}

There is a great potential in \textit{wa’d} for Islamic banking in Bangladesh. Considering the need of the industry and suitability with the \textit{Sharī‘ah} framework, four products have been suggested which are \textit{muwā‘adah} Islamic FX forward, \textit{muwā‘adah} Islamic cross currency swap, Islamic profit rate swap and \textit{tawarruq} personal financing.

\textit{Muwā‘adah} Islamic FX forward is based on \textit{muwā‘adah} and \textit{bay‘ al-ṣarf}. \textit{Muwā‘adah} is chosen due to the flexibility of \textit{Ḥanafī} school towards \textit{muwā‘adah}. It provides more protection to the client. Alternatively \textit{wa’d}-based FX forward can be introduced if the \textit{Sharī‘ah} scholars do not accept \textit{muwā‘adah}.

Similar to FX forward, Islamic cross currency swap can be developed through \textit{muwā‘adah} to meet the long-term currency hedging needs of the clients. Instead of commodity \textit{murābāhah}, \textit{muwā‘adah} is proposed as there is no commodity market in Bangladesh to practice commodity \textit{murābāhah}. On the other hand, there is flexibility regarding \textit{muwā‘adah} in \textit{Ḥanafī} school of jurisprudence.

In addition, Islamic profit rate swap is proposed for Bangladesh considering the future needs of the industry to hedge against a floating profit rate. The product is based on \textit{wa‘dān} and \textit{tawarruq}. However, a commodity market should be developed to practice this swap.

Lastly, due to substantial need of personal financing, \textit{tawarruq} personal financing is proposed for Islamic banks in Bangladesh. The product is designed based on \textit{murābāhah} and \textit{wa‘d}. A real \textit{tawarruq} model is proposed where the bank does not become the agent of the client either to sell or purchase the commodity. However, the launching of this product depends on the establishment of a commodity market which
allows the practice of genuine tawarruq. Figure 8.1 below shows the summary of important findings of this research.

8.2.11. Conclusion of the Findings

Having presented the summary of the findings, it can be said in a nutshell that wa’d is both religiously and legally binding in the Sharī’ah. Both muwā’adah and wa’dān for executing a contract (‘aqd) in the future are permitted in the Sharī’ah even though they are binding on the promisor. This is because a binding muwā’adah/wa’dān is different from a contract (‘aqd).
Malaysia has developed a number of products based on *wa’d* due to the support from the government and the flexibility of the *Sharī’ah* scholars. There are many developments on the usage of *wa’d* in Malaysia. Though several studies claim that a number of *Sharī’ah* issues are involved with the usage of *wa’d* in Malaysia but it is concluded that Malaysian practice of *wa’d* are free from those issues of *Sharī’ah*. However, Malaysia needs to include a separate provision for *wa’d* either in the Contract Act or IFSA. Furthermore, there requires a comprehensive parameter for the usage of *wa’d* in different product structures.

Comparing with Malaysia, Bangladesh has very few products based on *wa’d*. There is no substantial development of *wa’d*-based products in the Islamic banks of Bangladesh. This is due to the stringent position of the *Sharī’ah* scholars and the lack of product development initiative which is the consequence of lack of support from the government, lack of research, lack of human capital and an absence of competitive market. Therefore, Bangladesh can learn from Malaysia in terms of the flexibility of the *Sharī’ah* scholars, government’s patronization of Islamic finance, legal support, prudent regulation, infrastructural development and strategies for human capital development.

Finally, both Malaysia and Bangladesh have a lot of prospects in *wa’d* for developing numerous products. Malaysia can introduce Islamic option, *wa’dān*-based FX forward and *ijārah and shirkat al-milk* home financing. On the other hand, Bangladesh can develop *muwā’adah* Islamic FX forward, *muwū’adah* Islamic cross currency swap, Islamic profit rate swap and *tawarruq* personal financing.

8.3. Recommendations

In light of the findings, discussions in different chapters of the thesis and observations during the field study, the researcher provides recommendations to different group of people or organisations related to Islamic banking in Malaysia and Bangladesh. The
recommendations are provided to (1) the Government of Malaysia, (2) the Government of Bangladesh, (3) the Islamic banking industry in Malaysia, (4) the Islamic banking industry in Bangladesh, (5) Sharī‘ah scholars in Malaysia, (6) Sharī‘ah scholars in Bangladesh, and (7) the clients.

8.3.1. Recommendations to the Government of Malaysia

Recommendations to the government of Malaysia and related authorities are provided in the following points:

i. The government through the help of related regulating authority should provide a guideline on the usage of Islamic derivative instruments so that the instruments are used for their real purposes. This guideline should clarify in details the circumstances when Islamic derivatives are used for speculation. Furthermore, it should include the necessary requirements that a party should fulfil to enter into an Islamic derivative instrument. Furthermore, the government should ensure that the guideline is strongly followed by the industry players.

ii. There should be a legal provision for wa‘d in the Contract Act 1950 that includes the definition of wa‘d and muwā‘adah, binding nature of wa‘d, necessary remedies for the breach of wa‘d. However, the legal provisions for wa‘d can be included in the IFSA as a substitute. In that case, whatever legal provisions mentioned in IFSA should be exceptions to the Contract Act 1950.

iii. The government through BNM should issue guidelines on the practice of wa‘d. The guideline should include more details on the concept of wa‘d, muwā‘adah and wa‘dān, the binding nature of wa‘d, the necessary remedies for the breach of wa‘d, the valid excuses for the breach of wa‘d, Sharī‘ah ruling on connecting wa‘d with some contracts e.g. muḍārabah, mushārahakah, murābāḥah, bay‘ al-ṣarf etc. and circumstances where wa‘d is violating the purpose of the contract
(muqtada al-’aqd). BNM should ensure that the guideline is followed by Islamic banks while innovating products based on wa’d.

8.3.2. Recommendations to the Government of Bangladesh

The researcher provides the following recommendations to the government of Bangladesh and related regulatory authorities:

i. The government should include some legal provisions for wa’d in the Contract Act 1872. It should state the definition of wa’d, its binding nature, required remedies for the breach of wa’d and valid excuses to break a wa’d. However, it is better to enact a separate comprehensive law for the operation of Islamic banking in Bangladesh. There should be some provisions for wa’d in that law and those provisions would be exceptions from the Contract Act 1872.

ii. The government is recommended to enhance research in Islamic banking. In this regard, BB should expand its Islamic banking research division with Sharī’ah research. Moreover, BB should impose on every Islamic bank to establish a Sharī’ah research division. Moreover, government should provide sufficient fund to the academics to conduct scholarly research in Islamic banking.

iii. Educational institutions are required that teach Islamic finance to develop human capital in Islamic banking. The government should establish educational institutions dedicated for Islamic banking. Moreover, the government universities should include Islamic banking courses in their curriculum. Besides, BB can organise workshops, seminars, and conferences on different topics in Islamic banking regularly to develop Islamic finance knowledge.

iv. Sincere support from the government is required to lead Islamic banking towards mainstream banking in Bangladesh. BB should continuously provide Islamic banking license to conventional banks which want to convert to Islamic banks.
Furthermore, BB is recommended to be flexible to issue license to conventional banks which wants to open Islamic banking window. However, in this case, BB should develop guidelines for the operation of Islamic banking windows. If it is difficult to monitor Islamic banking windows, then BB can instruct the conventional banks to establish Islamic bank as a subsidiary entity of the leading conventional bank. The subsidiary system ensures that there is no co-mingling of funds between Islamic and conventional banking. Besides, it would help BB to monitor Islamic banking more easily.

v. Furthermore, as a sign of sincere support, the government should establish a commodity market where financial institutions and their clients can practice genuine tawarruq. This commodity market will ease for Islamic banks to develop numerous products based on tawarruq. Thus, product innovations would be expanded in Bangladeshi Islamic banks.

vi. There is a need for a central Sharī‘ah board under BB with the authority to monitor and oversee the Sharī‘ah committees of all Islamic banks as well as the overall application of Sharī‘ah principles in all these banks. The central Sharī‘ah board should issue resolutions regarding different Sharī‘ah matters which would be binding on all Islamic banks.

vii. The government should establish strong collaboration with leading Islamic banking countries and should take lessons from them especially from Malaysia. Collaboration with Malaysia for example would help the government learn the procedure to develop a strong Islamic banking governance system in Bangladesh.
8.3.3. Recommendations to Malaysian Islamic Banking Industry

The following points comprise recommendations for the Islamic banking industry in Malaysia:

i. Malaysian Islamic banks should be confident to innovate more products based on *waʿd* in light of the *Sharīʿah* requirement to cater the need of the client. In this case, industry should not diminish the usage of *waʿd* as a consequence of the *Sharīʿah* issues asserted by some *Sharīʿah* scholars.

ii. It is recommended that Islamic banks should be more flexible with customers and should reduce the burden on them. Therefore, Islamic banks should attempt to exclude several features of *waʿd* in some product structures where it puts extensive burden on the customer. As for example, the second *waʿd* given by the customer in the case of MM home and property financing that the customer promises to purchase the property at the event of default, should be eliminated.

iii. Islamic banks should take care of the interest of the customers. Considering the present economic situation, banks have a duty to provide *waʿd* in case of FX forward so that customers’ interests are protected. As shown in chapter seven, *waʿdān*-based Islamic FX forward can settle this matter.

iv. Furthermore, Islamic banks should be cautious to implement the bindingness of *waʿd*. They should consider the valid excuses prescribed in the *Sharīʿah* to break a *waʿd* e.g. duress, death, bankruptcy etc. Besides, in case of a breach, banks can charge from the customer only the amount of loss incurred but not the potential loss. Finally, banks need to take into consideration that it is prohibited from the *Sharīʿah* perspective to force a customer to purchase a property due to his *waʿd* even though the property is not in existence.
v. Additionally, Islamic banks should explain the concept of *wa’d* to the clients so that the client is able to know his rights and responsibilities regarding the *wa’d* in a specific product.

vi. Finally, the researcher suggests that the Islamic banking industry in Malaysia should be supportive towards research activities so that research can be carried out without difficulty. Researches are conducted mostly to serve the industry in the end. Therefore, practitioners are urged to be responsive and approachable towards researchers.

### 8.3.4. Recommendations to Bangladeshi Islamic Banking Industry

The researcher recommends the followings to Islamic banks in Bangladesh:

i. There should be a significant awareness of *wa’d* among the practitioners. Product innovators should study the concept of *wa’d* in details and the vast potentiality of innovating numerous products based on this concept to satisfy the current and future needs of the clients. In light with the findings of this research, it is urged to eradicate the pessimistic notion towards *wa’d*.

ii. It is a duty for Islamic banks in Bangladesh to establish a *Sharī’ah* research division in each bank. The research division would help *Sharī’ah* advisors to find out issues in Islamic banking products. Moreover, it might help the product development division to structure innovative *Sharī’ah*-compliant products. Above all, this division would increase *Sharī’ah* knowledge for Islamic banks in Bangladesh. Islamic banks should allocate sufficient budget for this division to conduct rigorous research.

iii. Rather than relying upon IBBL, other Islamic banks in Bangladesh should be independent in terms of product development and other operations. Each of the Islamic banks should attempt to introduce unique products. This will create a
competitive market among the Islamic banks in Bangladesh, and in general, will develop the industry.

iv. Islamic banks in Bangladesh are advised to invest for creating some qualified Sharī‘ah scholars. In this regard, a talent development program can be developed. Under this program, banks may employ some Sharī‘ah graduates for a certain period. Within this period, banks should rotate the participants in different departments of the bank to make them familiar with the operation and different functions of an Islamic bank. It is expected that a generation of qualified Sharī‘ah scholars can be created through this program.

v. Islamic banks are advised to expand their international collaborations with Malaysian Islamic banks to enhance research activities. Moreover, it will help Islamic banks in Bangladesh to be familiar with Malaysia’s different types of innovative products.

8.3.5. Recommendations to Sharī‘ah Scholars in Malaysia

In light of the findings of this study and the experiences gained through the field study, the researcher proposes some suggestions to the Sharī‘ah scholars in Malaysia in the following points:

i. Scholars are recommended to re-think their opinions on the Sharī‘ah appraisal for wa‘d and muwā‘adah. As the majority of the Sharī‘ah scholars’ opinions are different from the findings of this study. Therefore, it is urged to the scholars to re-examine this matter through looking into the classical texts of Islamic jurists (fuqahā‘) and contemporary practice.

ii. It is recommended to choose wa‘d and related issues as a theme for discussion either in a national or international Sharī‘ah scholars’ forum. This forum will help
further understanding of *Sharī‘ah* issues related to *wa‘d*, exchange opinions among the scholars and come up with a substantial conclusion on this matter.

iii. It is urged to the *Sharī‘ah* committee members of different Islamic banks in Malaysia to make their resolutions on different *Sharī‘ah* products publicly available with considerable amount of justifications. This will educate the public and the researchers on those matters.

### 8.3.6. Recommendations for *Sharī‘ah* Scholars in Bangladesh

Recommendations to the *Sharī‘ah* scholars in Bangladesh are as follows:

i. Scholars in Bangladesh are suggested to revisit their opinions on the *Sharī‘ah* status for Islamic FX forward. In this regard, they are required to make rigorous research on the *Sharī‘ah* principles for *bay‘ al-ṣarf* and the concept of *wa‘d*. Furthermore, a balanced position between *sadd al-darā‘i‘* and the need (*ḥājah*) of the industry should be adopted.

ii. *Sharī‘ah* scholars are strongly recommended to conduct extensive research before issuing any *Sharī‘ah* resolution on any banking product. It is their duty to make their utmost effort to find out a *Sharī‘ah* ruling in the sources of Islamic jurisprudence (*fiqh*) for the specific product. A deep study should be conducted to identify any classical Islamic jurist’s opinion regarding the issue. At the same time, a clear understanding of the product structure and documentation is needed. Finally, scholars should oversee the need and impact of the product in the economy.

iii. Scholars in Bangladesh are advised to organise or participate in International *Sharī‘ah* scholars’ forums to discuss *Sharī‘ah* issues in Islamic banking. Exchanging opinions among International *Sharī‘ah* scholars may open up their minds, fill the knowledge gap and create tolerance towards the views of others.
8.3.7. Recommendations to the Clients

Islamic banks’ clients are advised to have general understanding on the concept of wa’d and its Sharī‘ah ruling. Furthermore, when engaging with any wa’d-based products then they are required to be aware of their rights and responsibilities towards the practice of wa’d in that particular product. They ought to know the remedies for the breach of wa’d and the valid excuses to break wa’d.

8.4. Limitation of the Research

Considering the field study conducted and the classical Islamic jurisprudential (fiqh) literatures reviewed, this research should be able to achieve its goal. As a universal rule that every work has some limitations, this study is not free from limitations and shortcomings. There are a few limitations for this study which are as follows:

i. Firstly, the study does not include the application of wa’d in ṣukūk. There are some Sharī‘ah issues related to the application of wa’d in ṣukūk. If ṣukūk were studied then more Sharī‘ah issues related to wa’d could be found out. Moreover, the research does not study the “structured products”. There are some Sharī‘ah issues related to the practice of wa’d in “Islamic structured products”. However, ṣukūk and structured products were not studied due to the limitation of a PhD research. It is beyond the scope of a PhD research to study a large volume of things within a limited period. Furthermore, as Islamic finance in Bangladesh is at the very initial stage to develop these products then to make a balance between these two countries only the banking products are studied.

ii. Secondly, the case study is limited to three Islamic banks in Malaysia and three others in Bangladesh. If more Islamic banks were studied then more wa’d-based products might be discovered. If some Islamic banks in the Middle East could be studied, then this research might be more rigorous. However, because of the
inadequacy of funds and limitation of time, it was not possible for the researcher to study more than the six banks in these two countries.

iii. Finally, there are shortcomings in the field study of the research. Firstly, a few documents related to wa’d-based products could not be reviewed due to the restriction of the bank to keep their documents private and confidential. Secondly, it was not possible to interview some Sharī‘ah scholars due to their busy schedule and lack of response to interview invitation. Despite the shortcomings, a substantial amount of data was obtained from interviews conducted and documents reviewed to achieve the objectives of this research.

**8.5. Further Research Recommendations**

After having identified the limitations of this study, the researcher recommends the scope for further research in the following:

i. Further research can be carried out on the usage of wa’d in ṣukūk and structured-products. The research should analyse the application of wa’d in different types of ṣukūk and structured-products to find out the possible Sharī‘ah issue pertaining to the practice of wa’d. Moreover, it should assess the possibility to innovate more ṣukūk and structured-products based on wa’d.

ii. The case study can be developed by including a large number of banks so that more rigorous research is conducted. Alternatively, different banks other than the banks studied e.g. al-Rajhi Banking and Investment Corporation (Malaysia) Berhad can be chosen for case study to look for different findings. Moreover, a comparison can be done between Malaysian practices with other leading Islamic banking countries e.g. Bahrain, U.A.E., Kuwait etc.

iii. Finally, research should be done to look for alternatives for wa’d. Rigorous research can be carried out to discover a Sharī‘ah-based instrument that provides
similar benefit of \textit{wa’d} but at the same time it is based on real economic activities. This research might help the Islamic banking industry in diversifying their products and moving forward from heavy dependence on \textit{wa’d}.

8.6. Conclusion

In conclusion, the researcher believes that this study has succeeded in examining the practice of \textit{wa’d} in Malaysia and Bangladesh, comparing between them, and providing fruitful discussions on \textit{Sharī’a}h issues related to their practices. It has demonstrated the future prospects of \textit{wa’d} in innovating different types of products for both countries. Several recommendations have been provided to the government and related authorities, Islamic banking practitioners, \textit{Sharī’a}h scholars and customers in both countries. It is expected that they would follow some of these recommendations and benefit from this research.
REFERENCES

A. Books and Book Chapters


Al-Hilali, Muhammad Taqi-ud-Din and Khan, Muhammad Muhsīn. Translation of the Meanings of the Noble Qur’an in the English Language. Madīnah: King Fahd complex for the printing of the holly Qur’an, n.d.

286


**B. Journal Articles**


Azlin Alisa Ahmad, Shofian Ahmad, Hailani Muji Tahir, Shahidah Shahimi, Saadiah Mohammad and Mat Noor Mat Zain. “Islamic forward exchange contracts as a hedging mechanism: an analysis of wa’d principle,” *International Business Management* 6, no. 9 (2012), 47-54.


Gelo, Omar, Braakmann, Diana and Benetka, Gerhard. “Quantitative and Qualitative Research: Beyond the Debate,” *Integrative Psychological and Behavioral Science* 42, issue. 3 (2008), 266-290.


Ismail Wisham, Aishath Muneeza and Rusni Hassan, “Special legal features of the Islamic wa‘d or pledge: Comparison with the conventional law on promise within the sphere of Islamic finance,” *International Journal of Law and Management* 53, no. 3 (2011), 221-234.

Jesmin, Rubayat. “Maximizing the potentials of Bangladesh’s export to the EU market,” *Asia Europe Journal* 6, issue. 3-4 (November 2008), 519-529.


Khan, M. Mansoor and Bhatti, M. Ishaq. “Islamic banking and finance: on its way to globalization”, Managerial Finance 34, no. 10 (2008), 708-725.


Mohd Sollehudin Shuib, Ahmad Azam Sulaiman Mohamad and Mohammad Taqiuddin Mohamad. “Middle East Bank and Their Challenge Operation in Malaysia: A


D. Magazine and Newspaper Articles


Hamid, M A. “Streamlining Islamic finance in Bangladesh”, *The Financial Express*, 06 April 2013, 8.


E. Legal and Corporate Documents


**F. Interviews**

Ahmad Suhaimi Yahya (Regional Head of Shariah, Kuwait Finance House (Malaysia) Berhad), interview with the researcher, 11 November 2013.

Aizley Abd Latiff (Manager, Corporate Legal Services Department, Maybank Islamic Berhad), interview with the researcher, 3 December 2014.

Akram Laldin (Deputy Chairman, Shari‘ah Advisory Council of Bank Negara Malaysia), interview with the researcher, 14 October 2014.

Ali Ahmad (Head, Structured Treasury Solutions Desk, Global Markets Trading, Treasury Division, Kuwait Finance House (Malaysia) Berhad), interview with the researcher, 26 December 2013.

Arif, A.Q.M. Safiullah (Secretary General, Central Shari‘a Board for Islamic Banks of Bangladesh), interview with the researcher, 16 April 2014.

Azman Mohd Noor (Deputy Chairman, Shariah Board, Al Rajhi Banking & Investment Corporation (Malaysia) Berhad), interview with the researcher, 24 July 2014.
Aznan Hasan (Chairman of the Shariah Committee, Maybank Islamic Berhad), interview with the researcher, 13 January 2015.

Burhanuddin Lukman (Member, Shari‘ah Advisory Council of Bank Negara Malaysia), interview with the researcher, 31 December 2014.

Elahi, Md. Manzur-E (Member of the Shariah Supervisory Committee, Islami Bank Bangladesh Limited), interview with the researcher, 10 April 2014.

Ezry Fahmy Eddy Yusof (Executive, Shariah Management Department, Maybank Islamic Berhad), interview with the researcher, 13 November 2013.

Hakimah Yaacob (Member, Shariah Committee, Citibank Berhad), interview with the researcher, 30 October 2014.

Hannan, Shah Abdul (Member of the Shariah Supervisory Committee, Shahjalal Islami Bank Limited), interview with the researcher, 20 April 2014.

Huq, M. Azizul (Member of the Shariah Supervisory Committee, Prime Bank Limited), interview with the researcher, 9 April 2014.

Islam, Shakhawatul (Member Secretariat, Central Shari‘a Board for the Islamic Banks of Bangladesh), interview with the researcher, 19 April 2014.

Kabir, Nurul (Shariah Officer, Shariah Secretariat, Islami Bank Bangladesh Limited), interview with the researcher, 7 April 2014.

Lahsasna, Ahcene (Member of the Shariah Committee, Maybank Islamic Berhad), interview with the researcher, 23 July 2014.

Miah, Ahsanullah (Member of the Shari‘ah Supervisory Committee, Islami Bank Bangladesh Limited), written communication with the researcher, 10 April 2014.

Mohd Nazri Chik (Assistant General Manager and Head of Shariah Division, Bank Islam Malaysia Berhad), interview with the researcher, 4 September 2013.

Muhd Ramadhan Fitri Ellias (Vice President and Head of Shariah Management Department, Maybank Islamic Berhad), interview with the researcher, 13 November 2013.
Rafiq, Abu Bakr (Member, Central Shari’a Board for Islamic Banks of Bangladesh), interview with the researcher, 4 May 2014.

Rahman, Md. Atiquur (Officer, Shariah Inspection and Compliance Division, Shahjalal Islami Bank Limited), interview with the researcher, 8 April 2014.

Rahman, Mohammad Mizanur (Executive Officer, Islamic Banking Division, Prime bank Limited), interview with the researcher, 7 April 2014.

Rahman, Sheikh Mahmudur (Principal Officer, Legal Affairs Division, Islami Bank Bangladesh Limited), interview with the researcher, 27 October 2014.

Rahmani, Shahed (Member of the Shariah Supervisory Committee, Shahjalal Islami Bank Limited), interview with the researcher, 10 April 2014.

Rusni Hassan (Member, Shari‘ah Advisory Council of Bank Negara Malaysia), interview with the researcher, 12 January 2015.

Saleem, Muhammad Yusuf (Member of the Shari‘ah Advisory Committee, HSBC Amanah Malaysia Berhad), interview with the researcher, 1 October 2013.

Shamsiah Mohamad (Member, Shari‘ah Advisory Council of Bank Negara Malaysia), interview with the researcher, 13 November 2014.

Shamsuddoha, M. (Vice President, Shariah Secretariat, Research Unit, Islami Bank Bangladesh Limited), interview with the researcher, 7 April 2014.

Uddin, Md. Farid (Junior Assistant Vice President & Muraquib, Shahjalal Islami Bank Limited), interview with the researcher, 13 April 2014.

Zuraihah Abdul Rahman (Senior Executive, Corporate Legal Services Department, Maybank Islamic Berhad), interview with the researcher, 3 December 2014.

G. Web Sources


APPENDIX A: INTERVIEW GUIDELINE FOR SHARĪ‘AH OFFICER

Introduction
What is the role of Sharī‘ah department in product development?
Is wa‘d binding in your bank?

Products where wa‘d are applied and the mechanism for the application of wa‘d
What are the products in your banks where wa‘d is currently being applied?
Is muwā‘adah applied in any of the products in your bank?
Do you use wa‘dān in your products?

What is the mechanism of wa‘d/muwā‘adah/wa‘dān in those products?
What is the mechanism of using wa‘d in murābahah? (If it is used in your bank)
What is the mechanism of using wa‘d in MM? (If it is used in your bank)
What is the mechanism of using wa‘d in AITAB? (If it is used in your bank)
What is the mechanism of wa‘d in tawarruq? (If it is used in your bank)
Is there any wa‘d in bay‘ al-‘īnah? If yes, how does that apply? (If it is used in your bank)
Do you apply wa‘d in parallel salam?
Do you apply wa‘d in parallel istiṣna’?
Do you apply wa‘d/muwā‘adah/wa‘dān in bay‘ al-ṣarf?

What are the features and benefits of these wa‘d-based products?
What are the terms and conditions of these wa‘d-based products?
What is the uniqueness of wa‘d-based products in your bank?
What are the legal documents used for wa‘d?
Are the contracts of a product combined in a single agreement or separated in different papers?

Challenges in using wa‘d
In your opinion, is there any challenge/obstacle for developing products based on wa‘d?
If yes, please explain.
What is your opinion on the application of wa‘d in MM home financing?
Do you think that in practice, both muwā‘adah and wa‘dān are the same?
In your opinion, is there any wa‘d-based product that contradicts the purpose of the contract?
What is your opinion on the penalty for wa‘d?
Do you think, there needs any legal framework or guideline for wa‘d-based products?
Is there any possibility that wa‘d is used as a hīlah to allow conventional banking products in Islamic banks?

Suggestions and Prospects of wa‘d
What do you suggest to overcome the existing challenges of wa‘d?
Do you suggest any Sharī‘ah parameters that should be followed in wa‘d-based products? If yes, how should that be?
In your opinion, what other new products can be developed based on wa‘d? How to achieve further development of wa‘d and wa‘d-based products?
APPENDIX B: INTERVIEW GUIDELINE FOR SHARĪ‘AH SCHOLAR

(1) What is your opinion on the binding nature of muwā‘adah and wa‘dān?

(2) What is your opinion on the application of wa‘d in MM? What is your opinion on the promise by the customer to purchase the property from the bank at the event of default? Is it a guarantee by the mushārik? Is the mushārakah here a shirkat al-milk or shirkat al-‘aqd? Does the condition of wa‘d violate muqtadā al-‘aqd? Does the wa‘d change the equity financing to debt financing?

(3) What is your opinion on wa‘d in AITAB vehicle financing? Is the promise by the customer to purchase the vehicle at the event of default permissible? Is promise to give hibah better than promise to sell?

(4) What is your opinion on wa‘d in FX forward? Can we do wa‘d or muwā‘adah for ṣarf? Is muwā‘adah mulzimah permissible for executing bay‘ al-ṣarf? Does FX forward comply with the principle of yadan bi yadin (spot transaction) in the Ḥadīth?

(5) What do you think about the application of wa‘d/wa‘dān in IPRS and ICCS? Is wa‘dān used as ḥilāh to make the derivatives ḥalāl? Can sadd al-dharā‘i be used to stop applying wa‘dān in these products? How are these Islamic swaps free from gambling?

(6) Can wa‘d be used for options? Can wa‘d be a financial right? In your opinion, is there any difference between the classical and contemporary concept of wa‘d?

(7) What would you say about the claim of excessive usage/reliance on wa‘d? Do you suggest any Sharī‘ah parameter that should be followed in every wa‘d-based products? If yes, how is that?

(8) What is your opinion on the application of wa‘d in murābahah? Do you think that wa‘d from one party (customer) is an exploitation by the bank?

(9) Is there any other Sharī‘ah issue related to wa‘d you would like to mention?

(10) In your opinion, can wa‘d be used in other new types of products e.g. structured products, options etc.? Do you have any suggestion in relation to the further development of wa‘d-based products?
APPENDIX C: INTERVIEW GUIDELINE FOR LEGAL OFFICER

(1) What is the role of legal department in product development?

(2) Is wa‘d legally binding in your bank?

(3) How is the documentation for wa‘d? Is wa‘d combined with the main ‘aqd or, it is put in separate letter?

(4) How the wa‘d clause is written in the product agreement?

(5) Would you like to mention any legal issue relating to wa‘d? Is there any problem in developing products based on wa‘d? What do you suggest to overcome these problems?

(6) How the “purchase undertaking” clause is written in MM financing?

(7) How is the wa‘d structure in AITAB financing?

(8) How is the wa‘d in murābaḥah and tawarruq financing?

(9) How is the wa‘d feature in treasury products (FX forward, Swaps etc.)?

(10) What are the legal steps taken if the customer does not fulfil his wa‘d? What about the compensation for wa‘d?

(11) Has your bank ever experienced any breach of wa‘d?

(12) Is the wa‘d element in line with the contract act of the country?

(13) Do you think that the existing legal framework is enough to support wa‘d-based products? Do you think, there needs a legal framework for wa‘d-based products?
### APPENDIX D: GLOSSARY OF ARABIC TERMS AND THEIR MEANINGS

<table>
<thead>
<tr>
<th>Arabic Term</th>
<th>English Translation</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘Ahd</td>
<td>Covenant</td>
</tr>
<tr>
<td>‘Alayhis Salām</td>
<td>Peace be upon him</td>
</tr>
<tr>
<td>‘Aqd Al-Tawrīd</td>
<td>Export/Import Contract</td>
</tr>
<tr>
<td>‘Aqd</td>
<td>Contract</td>
</tr>
<tr>
<td>‘Āqidān</td>
<td>Two parties making a contract</td>
</tr>
<tr>
<td>‘Iddah</td>
<td>Unilateral Promise</td>
</tr>
<tr>
<td>‘Iddah</td>
<td>Waiting period for a woman after the death of her husband or divorce</td>
</tr>
<tr>
<td>‘Ilāh</td>
<td>Cause of a Sharī‘ah ruling</td>
</tr>
<tr>
<td>‘Udhr Shar‘ī</td>
<td>Sharī‘ah Permissible Excuse</td>
</tr>
<tr>
<td>‘Udhr</td>
<td>Excuse</td>
</tr>
<tr>
<td>‘Uqūd Musammāt</td>
<td>Contracts recognised by the Sharī‘ah</td>
</tr>
<tr>
<td>‘Uqūd Mustajaddah</td>
<td>Modern Contracts</td>
</tr>
<tr>
<td>‘Urbūn</td>
<td>Earnest money</td>
</tr>
<tr>
<td>‘Urf</td>
<td>Custom</td>
</tr>
<tr>
<td>Aḥkām</td>
<td>Sharī‘ah rulings</td>
</tr>
<tr>
<td>Ahliyyah</td>
<td>Legal competence</td>
</tr>
<tr>
<td>Al-Ijarah Thumma Al-Bay‘</td>
<td>Islamic hire-purchase</td>
</tr>
<tr>
<td>Al-Ṣarf</td>
<td>Currency exchange</td>
</tr>
<tr>
<td>Al-Wadī‘ah</td>
<td>Safekeeping</td>
</tr>
<tr>
<td>Arkān</td>
<td>Pillars of a contract</td>
</tr>
<tr>
<td>Awwah</td>
<td>One who invokes Allāh with humility, glorifies Him and remembers Him much</td>
</tr>
<tr>
<td>Bay‘ al-‘Īnah</td>
<td>Sale with immediate repurchase</td>
</tr>
<tr>
<td>Bay‘ Al-Ajal Bi Al-Ajal</td>
<td>Forward sale contract where both subject matters are deferred</td>
</tr>
<tr>
<td>Bay‘ Al-Dayn</td>
<td>Sale of debt</td>
</tr>
<tr>
<td>Bay‘ Al-Kāli‘ Bi Al-Kāli</td>
<td>Sale of a debt for a debt</td>
</tr>
<tr>
<td>Bay‘ Al-Mu‘ajjal</td>
<td>Deferred payment sale</td>
</tr>
<tr>
<td>Bay‘ Al-Mulāmasah</td>
<td>Touch sale</td>
</tr>
<tr>
<td>Bay‘ Al-Munābadhah</td>
<td>Toss sale</td>
</tr>
<tr>
<td>Bay‘ Bi Thaman Ājil</td>
<td>Deferred payment sale</td>
</tr>
<tr>
<td>Bay‘</td>
<td>Contract of sale</td>
</tr>
<tr>
<td>Bay‘ Al-Istijrār</td>
<td>Supply sale</td>
</tr>
<tr>
<td>Bay‘atayni Fī Bay‘atīn</td>
<td>Two sale contracts in one sale contract</td>
</tr>
<tr>
<td>Bayyt Al-Māl</td>
<td>State treasury</td>
</tr>
<tr>
<td>Buyū‘</td>
<td>Sales</td>
</tr>
<tr>
<td>Da‘wābiṣṭ</td>
<td>Parameters</td>
</tr>
<tr>
<td>Dinār</td>
<td>Gold coin</td>
</tr>
<tr>
<td>Dirham</td>
<td>Silver coin</td>
</tr>
<tr>
<td>Fāsid</td>
<td>Voidable</td>
</tr>
<tr>
<td>Fatāwā</td>
<td>Plural of Fatwā</td>
</tr>
</tbody>
</table>
Fatwā
Religious decree
Fiqh
Islamic jurisprudence
Fuqahā’
Islamic jurists
Gharār
Uncertainty
Hadīth
Prophetic tradition
Hājah
Need
Hajj
Pilgrimage to Makkah
Halāl
Permissible in Islamic law
Hanafī
A school of Islamic jurisprudence
Hanbalī
A school of Islamic jurisprudence
Haram
Prohibited in Islamic law
Hibah
Gift
Hīlah Muḥarramah
Prohibited legal trick
Hīlah Shar‘iyyah
Permissible legal trick in Islamic law
Hīlah
Legal trick
Ibrā’
Rebate
Ifsād Al-‘Aqd
Corrupting the contract
Ījāb
Offer
IJārah Muntahiyah Bi Al-Tamlīk
Lease ending with ownership
IJārah
Lease
Ijtihād Taḥbīqī
Applied juristic reasoning
Ijtihād
Juristic reasoning
Ilzāmiyyah
Obligation
In Shā’ Allāh
If Allāh wills
Istīṣnā’
Manufacturing contract
Janīb
A good quality of date
Jihād
Striving in the path of Allāh
Ju‘ālah
Stipulated price for performing a service
Kafālah
Guarantee
Kaffārah
Atonement
Mabī
Sold item
Madhāhib
Plural of madhhab
Madhhab
School of thought in Islamic jurisprudence
Mafsadah
Harm
Makhraj
Way out
Makrūh
Disliked
Mālikī
A school of Islamic jurisprudence
Maqāṣid Al-Sharī‘ah
The objective of Islamic law
Maṣdar
Infinitive
Mashaqqah
Hardship
Maṣlaḥah
Public interest
Maw‘idah
Unilateral promise
Maysir
Gambling
Milkiyyah
Ownership
Mu‘āmalāt
Commercial transactions
Mu‘āwaqād
Exchange contract
Mubāḥ
Muḍārabah
Muḍārib
Munāfiq
Muqāṣah
Muqāta Al-‘Aqd
Murābaḥah
Musāwamah
Mushārakah Mutanāqīṣah
Mushārakah
Mushārik
Mustahabb
Muta‘addī
Muwā‘adah Mulzimah
Muwā‘adah
Nifāq
Nudhur
Qā‘idah Fiqhiyyah
Qabḍ
Qabūl
Qarḍ
Qur‘ān
Rađiyallāhu ‘Anh
Ribā
Ribawī
Riḍā
Ṣā‘
Sabab
Ṣadaqah
Sadd Al-Dharā‘ī’ī
Salam
Ṣalāt
Sallallāhu ‘Alayhi Wa Sallam
Shāfī‘ī
Shāfī‘ī
Sharī‘ah
Sharṭ
Shirkat Al-‘Aqd
Shirkat Al-‘Uqūd
Shirkat Al-Amlāk
Shirkat Al-Milk
Shirkat
Shurūṭ
Ṣighah
Subḥānahu Wa Ta‘ālā

Permissible in Islamic law
Trust investment partnership
Entrepreneur
Hypocrite
Offset
Purpose of the contract
Purpose
Cost plus profit sale
Spot sale
Diminishing partnership
Partnership
Partner
Recommended
Transitive verb
Binding mutual promise
Mutual promise
Hypocrisy
Vow
Islamic legal maxim
Possession of the subject matter
Acceptance
Loan
The primary source of Islamic law
May Allah be pleased with him
Usury
Items subject to Sharī‘ah rules on ribā in sales
Consent
Volume measurement
Cause
Voluntary alms
Blocking the means
Advance purchase
Prayer
Peace and blessings of Allāh be upon him
A school of Islamic jurisprudence
A school of Islamic jurisprudence
Islamic law
Stipulation
Contractual partnership
Plural of shirkat al-‘aqd
Plural of shirkat al-milk
Joint-ownership
Partnership
Plural of sharṭ
Contractual expression
The most glorified, the most high
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Şukūk</td>
<td>Islamic bond</td>
</tr>
<tr>
<td>Sunnah</td>
<td>Prophetic tradition</td>
</tr>
<tr>
<td>Şuq Al-Sila‘</td>
<td>Commodity market</td>
</tr>
<tr>
<td>Sūrah</td>
<td>A chapter of Al-Qur’an</td>
</tr>
<tr>
<td>Ta‘liq</td>
<td>Making conditional</td>
</tr>
<tr>
<td>Tabarru‘</td>
<td>Voluntary alms</td>
</tr>
<tr>
<td>Tabarru‘āt</td>
<td>Plural of tabarru‘</td>
</tr>
<tr>
<td>Tahṣīn Al-‘Aqd</td>
<td>Betterment of the contract</td>
</tr>
<tr>
<td>Takāful</td>
<td>Islamic insurance</td>
</tr>
<tr>
<td>Tawarruq Munazzam</td>
<td>Organised means of cash procurement</td>
</tr>
<tr>
<td>Tawarruq</td>
<td>Cash procurement</td>
</tr>
<tr>
<td>Thaman</td>
<td>Price</td>
</tr>
<tr>
<td>Ujrah</td>
<td>Fee</td>
</tr>
<tr>
<td>Wa‘d Mulzim</td>
<td>Binding unilateral promise</td>
</tr>
<tr>
<td>Wa‘d</td>
<td>Unilateral promise</td>
</tr>
<tr>
<td>Wa‘dān</td>
<td>Two independent promise</td>
</tr>
<tr>
<td>Wā‘id</td>
<td>Threat</td>
</tr>
<tr>
<td>Wadī‘ah Yad Al-Ḍamānah</td>
<td>Guaranteed custody</td>
</tr>
<tr>
<td>Wājib</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Wakālah</td>
<td>Agency contract</td>
</tr>
<tr>
<td>Waqf</td>
<td>Charitable endowment</td>
</tr>
<tr>
<td>Yadan Bi yadin</td>
<td>Hand to hand/spot transaction</td>
</tr>
<tr>
<td>Zakāt</td>
<td>Obligatory wealth levy</td>
</tr>
<tr>
<td>Zulm</td>
<td>Injustice</td>
</tr>
</tbody>
</table>
LIST OF PUBLICATIONS AND PRESENTATIONS

Journal Articles:

Presentations:
Md. Faruk Abdullah and Asmak Ab Rahman, “Application of Wa’d (Promise) in Islamic Banking Products: a Study in Malaysia and Bangladesh,” University of Malaya Three-Minute Thesis Competition, Academy of Islamic Studies, University of Malaya, 28 May 2015. (Awarded 2nd Place in Faculty Level).