Hybrid Contract in Islamic Banking and Finance: A Proposed Shariah Principles and Parameters for Product Development

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Abstract:

Purpose – The main purpose of this paper **is** to provide proper understanding the concept and application over the prohibited hybrid contracts in Shariah and how they might be applied for the purpose of product development in Islamic banking and finance.

Design/methodology/approach – The paper presents basic principles in Islamic commercial transactions from classical *fiqh* point of view particularly on hybrid contracts in Islamic banking and finance from the concept and application.

Findings – This study reveals that majority of Islamic banking and finance's contracts are combination of more than one contract in their products and services. However, this concept encounters legal issues due to the hadith of the Prophet (SAW) prohibits combining several contracts in one single transaction. The paper argues that it is lawful for Islamic banking and finance to combine more than one contract to structure the Shariah complian**t** product as long as they follow the Shariah guidelines and parameters on hybrid contracts.

Research limitations/implications – Islamic banking and finance may benefits from the Shariah parameters and prcinciples that laid down in this paper prior structuring the contract on the products. So as the structured contract is not contravene with the hadith that prohibits the combination of contracts.

Originality/value – The analysis is valuable in drawing the attention of Islamic banking practitioners to the fact that majority of Islamic banking and finance's products and services are hybrid contracts. The paper tries to lay down Shariah parameters on how to combine more than one contracts in one transaction so that the products of Islamic banking and finance are in accordance with Shariah.

Keywords: Hybrid Contract, Combination of Contract, Islamic Banking and Finance

1. Introduction

The impressive development of the Islamic banking and finance Industry from day to day has to provide the competitive products and services to meet the current needs of business and trade especially in the age of electronic transactions. That means the contract that is used in Islamic banking is more complicated than the previous one and imply that the new products and services in Islamic finance will use more than one contract in one transaction. Some researchers such as Al-Shadhily (1998); Abu Guddah (2000); Arbouna (2007); and Dusuki (2009) have been examined the concept of hybrid contract in Islamic finance and its application for the purpose of product development in Islamic banking and finance. Therefore, the need for Shariah guidelines and parameters in hybrid contract in order to ease the practitioners in Islamic banking industries in Indonesia is something urgent to begin.

That is why this study focuses on discuss the Shariah parameters in hybrid contracts that use in one transaction in Islamic commercial law (Dusuki, 2009), and understanding the prohibited *caqd* that violate the transactions since the basic of *mu'āmalah* is permissible unless there are evidence that shows it is prohibited. Acknowledging the prohibited contract in Islamic law of transaction is obliged to Islamic banking's stakeholders.

However, hybrid contract is a controversial issue in Islamic finance because of the hadith that prohibits "two contracts in one transaction" (Mālik, *Muwatta'*, Vol. 2, No. 663, ed. 2005). The wrong interpretation of the hadith may potentially defeat any attempt to allow amalgamation of contracts in Islamic finance regardless of

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the nature and the feature of the contract combined and hinder the product development in Islamic banking. Nevertheless, from Shariah the transaction may comprise of more than one contract and it is lawful provided the combination has to follow the Shariah guidelines and parameters (Arbouna, 2007).

2. Historical Evolution of Contract in Islamic Commercial Law

During the era of the prophet and his companions, the contract in each transaction only uses one contract, such the contract agreement between the prophet in Siti Khadijah (RA) is *mudhārabah* where Muhammad (pbuh) acts as entrepreneur and Khadijah as the capital provider. This is reflected in the Qur'an, there are only over forty verses on a dozen types of commercial contract and only few verses which reveals a relatively advanced stage of commercial contracts such as sale and hire, personal guarantee as security and fiduciary contracts such as deposit and the like. Until the 19th century, Islamic commercial contract never developed, due to the majority of Muslim jurists only focusing on the contract of sale which cover all transactions. In the 19th century, the Islamic Civil Law Codification took place namely *Majallah al-Ahkam al-ᶜAdliyyah* and *Murshid al-Hayran.* The whole idea of having a contract is to satisfy the consent of both parties and the need of the global market. (Bakar, n.d.).

Nowadays, in the era of high technology with all the complex and modern infrastructure and variety for the needs of human beings, the contract in Muamalah also requires a combination of several contracts in one transaction to meet the market need. This combination of contracts or known as a hybrid contract has been discussed by many contemporary Muslim scholars with different term in many books of contemporary fiqh, such as *al-ᶜUqūd al-Murakkabah, al-ᶜUqūd al-Mutaᶜaddidah, al-ᶜUqūd al-Mutaqābilah, al-ᶜUqūd al-Mujtamiᶜah, and al-ᶜUqūd al-Mukhtalitah*. The most popular terms that is normally used in the contracts in Islamic banking and finance are two, namely *al-ᶜUqūd al-Murakkabah* and *al-ᶜUqūd al-Mujtamiᶜah* (Mingka, 2011).

3. Definition and Rationale of Hybrib Contracts

There is no definition as such for the combination of contracts in *Fiqh* literature (Arbouna, 2007). However, the term of combination of contracts is the Arabic word *al-ᶜUqūd al-Murakkabah* that means two or more designated contracts in one single transaction. *Al-ᶜuqud al-murakkabah* consists of two words which are *al-ᶜuqūd* (the plural form of *ᶜaqd*) and *al-murakkabah*. While the word *al-Murakkabah* (*Murakkab*) etymologically means *al-jamᶜu*, which means combination or compile, the word *al-jamᶜu* shows the combination of something (Al-Tahānawi, 1998).

While the word *Murakkab* according to Muslim scholars such Hammad (2005) and al-ᶜImrāni (2006), *al-ᶜUqūd al-Murakkabah* is the deal between two parties to carry out a particular transaction consisting of two contracts or more. For example the combination between contract of sale with *ijārah*, sale and purchase agreement with *hibah* (grant) and so on, so that all the legal consequences from the combination of contract, with all rights and obligations inflicted, are considered as a single entity that cannot be separated, the same position with the legal consequences of the contract.

Hammad (2005: 7) defined combination of contracts as "an agreement between the two parties or more to carry out a contract that contains two or more contract (such as lease and purchase agreement, *hibah* and *wakālah*, *qardh*, *muzāraᶜah*, *sharf* (currency exchange), *mushārakah, mudhārabah,* and so on) with different features and legal consequences to achieve a desired viable transaction. All legal effects and consequences from of the hybrid contract agreement, as well as all rights and obligations thereof is seen as an integral and undivided, as the legal effect of a contract."

Meanwhile, according to Al-ᶜImrāni (2006: 46) combination of contracts is: "The combination of several contracts in a particular transaction that is contained in two contracts or more - either combined or reciprocal - where all legal rights and obligations resulting from the contract is seen as a consequences of the contract".

AAOIFI (Shariah Standard No. 25/2008: 451) defines combination of contracts as "A proses that takes place between two parties or more, and entails the simultaneous conclusion of more than one contract. The combination of contracts may take either (i) combining more than one contract without imposing any of them as a condition in the other, and without prior agreement (*muataᶜah*) to do so, or (ii) combining more than one contract while imposing some of them as conditions in the other, without prior agreement to do so, or (iii) combining more than one contract subject to prior agreement (*muata*ᶜ*ah*), bu without imposing any of them as a condition in the others, or (iv) agreement to conclude the deal through any of different contractual forms as will be finally decided in the future."

The rationale for the need of amalgamation of contracts from the *Fiqh* perspective is to avoid *ribā* transaction. For example, combination of sale and currency exchange to avoid *ribā* transaction to meet the economic demands, selling currency (Indonesia Rupiah) together with a commodity in U.S. dollar on a deferred payment basis. Another example is selling two houses by the seller to the buyer with two contractual agreements, first house by a sale contract, second house by *ijārah* contract, which combine the sale and *ijārah* at the same time. The combination of contracts differs from *isytirat* ᶜ*aqd fī* ᶜ*aqd* (tying one contract with another contract) or known as *bay*ᶜ*atayn fī bay*ᶜ*ah* that prohibits by Islamic law. A typical example for this like someone says "I sell you my house at Rp100 million on the condition that you have to buy my car at Rp80 million, or on the condition that you have to sell your car at 80 million." (Arbouna, 2007).

4. Types of Hybrid Contract in Contemporary Islamic Banking and Finance Application

Mingka (2011) elucidated that there are many types of hybrid contract in Islamic banking and finance such as *bay*ᶜ *wafa*ʾ (the combination of sale contract with the promise to purchase back) and the most prominent contract that are currently used in Islamic banking particularly for home financing which is *mushārakah mutanāqishah*. This contract consist of several contracts in one transaction such as the contract of joint ownership (*syirkah al-milk*), the contract of sale (*bay*ᶜ), the contract of *ijārah* (lease), the contract of *hibah* (grant), and so on. He further divided the types of hybrid contract into four categories;

First, the hybrid contract which comes out with a new name of ᶜ*aqd*, such as *bay*ᶜ *'istighlāl, bay*ᶜ *tawarruq, mushārakah mutanāqishah*, and *bay*ᶜ *wafa*ʾ.

Second, contract that combine several ᶜ*aqd* in one transaction and come out with a new name of ᶜ*aqd*, however the name of the old ᶜ*aqd* is still mentioned, such as *bay' at-takjīry* (hire purchase or lease and purchase agreement), *mudhārabah mushtarakah* in life insurance (Fatwa DSN-MUI No. 51/2006) and time deposit in Islamic bank (Fatwa DSN-MUI No. 50/2006).

Third, hybrid contract in which several contracts are combined in one transaction however it does not come out with a new name of ᶜ*aqd*. Yet the name in each ᶜ*aqd* stated in the contract and it is practiced on that transaction. For example: (i) *qardh* and *murābahah*, or *qardh* and *syirkah al-milk*, or *qardh* and *ijārah*, or *qardh* and *ijārah muntahiyah bi al-tamlīk* in taking over the financing; (ii) *Kafālah wa al-ijārah* on Islamic credit card and *wa*ᶜ*ad* for *wakālah wa al-murābaha*, *wakālah wa al-ijārah*, *wakālah wa al-mushārakah*, and so on in current account (*Rekening Koran*) and line or overdraft financing facility; (iii) *wakālah* in *murābahah* financing or called as *murābahah bil wakālah* and *wakālah bil ujrah* on L/C financing, RTGS, Factoring. In Islamic bank, even the ᶜ*aqd wakālah bil ujroh*, which majority used in General and Life Islamic Insurance; (iv) *Kafālah bil ujroh* on L/C, Bank Guarantee, financing for multi services and multi-use, Islamic credit cards; (v) *Mudhārabah wal murābahah*, *mudhārabah wal ijārah*, *mudhārabah wal istisna*ᶜ in linkage program; (vi) *Hiwālah bil ujrah* on factoring financing and *bay*ᶜ *wal ijārah* on REPO SBIS and Sukuk; and (vii) *Qardh*, *rahn* and *ijārah* in one transaction on the product of gold pawn in Islamic bank.

Fourth, Hybrid Contract in the form of where each contract contradict each other (*mutanāqidhah*) which is prohibited in Shariah. For example, combining sale and purchase agreement with *qardh* or loan (*bay*ᶜ *wa salaf*). Another example is combining *qardh* with *ijārah* contract at the same time in one transaction or combining the *qardh* contract with promise of reward. These hybrid contracts are prohibited by the hadith (the status of hadith is *hasan sahīh*) narrated by al-Tirmizi that Prophet (pbuh) prohibited combining the contract of sale and loan. Imam Ibn Taymiyyah prohibits the combination between sale and loan in one transaction due to the contracting parties will benefit from sale instead from loan, unless there is return the loan at the same amount or return the goods at the same specification. (Al-Bakī, 1995; Jumᶜah, 2005). The prohibition of this combination of two contracts is because it opposed diametrically in the nature of contract. An example of a combination of sale and loan occurs when Ahmad says to Yasir, "Lend me Rp1 million and I will sell you my phone" or "I will sell tyou my shoes at the price of Rp100.000 with the condition you have to lend me money Rp500.000" (Dusuki, 2009).

The methods of hybrid contract or combination of several ^{c}*aqd* in one transaction should become a special feature of Islamic banking industries all over the world including Indonesia in product development. In fact, the combination of the contract in the present system of economic is a necessity. The problem is, the literature on Islamic finance in Indonesia have developed the theory that Shariah does not allow combining two or more contracts in one transactions. This prohibition was interpreted with narrow and wrong interpretation, thus narrowing the development of Islamic banking products and services in Indonesia. Whereas there is no explicit *Qur'anic* provision that directly prohibits or permits the combination of contracts. Some Shariah scholars allow the combination of the contract in one transaction in a very broad scope with conditions. The provision that seem to reject the hybrid contract concept only stated in the hadith (Arbouna, 2007).

In Shariah however, the hybrid contract that has been banned limited only in two cases in accordance with the sayings of the Prophet Muhammad (pbuh). Hybrid contract should not be extended to other issues that are not relevant and does not match with the context. All Islamic banking stakeholders should study in depth on view of the scholars regarding the hybrid contract in Islamic perspective to avoid wrong interpretation. Especially understanding on how to form the contract in each particular product and services, could be more comprehensive, dynamic, and not rigid. The rigidness occurs due to the shallowness of knowledge and lack of Shariah literature that discusses the hybrid concept of ^{c}*aqd*.

Indeed, there are four *ahadith* of the Prophet (pbuh) in respect to the prohibition of hybrid contract in business transaction. These four *ahadith* contain four restrictions, the first prohibition is combination between *bay*^{c} (sale) and *salaf* (loan) that is reported by Mālik (*Muwatta'*, Vol. 2, No. 657, ed. 2005), the second is the prohibition of *bay*^{c}*ataini fī bay*^{c}*ah* (two contracts in one transaction or two sales in one transaction) (Mālik, *Muwatta'*, Vol. 2, No. 663, ed. 2005), the third prohibition is of *shafqataini fī shafqah* (two transactions into one transaction) (Ahmad, *Musnad Imam Ahmad*, Vol. 1, No. 198), and the fourth prohibition is *bay*^{c} *wa shart* (sale with condition). These four *ahadith* are always used as a wrong reference with the majority of Islamic banking stakeholders in Indonesia by prohibiting hybrid contract in general to develop the ^{c}*aqd* in each Islamic banking products and services.

Pertinent to the *ahadith*, Dusuki (2009) highlights some opinion of the jurists such as Imam Shāfi'i interpreted that two sales in one contract occurs when one agreement puts a condition by influencing another agreement. For example, Ibn Taymiyyah and Ibn Qayyim interpreted the hadith as *bay*^{c} *al-*^{c}*īnah* that prohibited in Shariah (Al-Bassam, ed. 1997). However, Imam Shāfi'i gave two interpretations. The first one, when the seller says to the buyer: "I sell you this laptop for Rp10 million in deferred payment or Rp8 million in cash". However the buyer does the choosing of any one of it. The contract is *fāsid* due to the involvement the element of uncertainty. Uncertainty in terms of the modes of payment by the buyer which is by cash or in deferred payment. Second, when the seller says to the buyer that"Sellmeyour house with the condition that you have to sell your car" (Al-San^{c}āni, ed. 1960). Imam Mālik (ed. 2005) had a similar opinion pertinent to this wherehe explains "The meaning of two sales in one is an agreement which is binding against the purchase of one of the goods". For example, "I will sellyou my shoes for Rp1 million but you have to sell your phone at Rp1.2 million."

5. The Views of Islamic Scholars on Hybrid Contract

Majority of Hanafi's school of law, some of Māliki's school of law, some of Shāfi'i's schools of law and Hanbali's school of law is of the opinion that the hybrid contract is valid and permissible according to Islamic law and judged in the light of its individual components. The scholars who argue that the hybrid contract is permissible on the basis of Islamic legal maxim (*Qawāid Fiqh*) on Islamic business transaction (*mu*^{c}*āmalah*) where the origin of the contract is permissible and legitimate, not forbidden and unlawful since there is no proposition of law that shows it is prohibited and banned (Al-'Imrāni, 2006). Therefore, it is permissible to combine the contracts if the transaction comprises a number of contracts that each of them individually satisfies permissibility requirements (Al-Buhuti, ed. 1997; Ibn Qoyyim, ed. 1999). Unless combining two contracts that resembles *ribā*, as a combination of *qardh* with another contract due to the prohibition in merging the contract of sale with *qardh* in the hadith. Similarly, combining installment and lump sum payment in single transaction in sale contract is prohibited because it will cause *gharar* (uncertainy) in the contract.

According to majority of Shariah scholars including Ibn Taymiyyah (ed. 1978), the origin of law on *mu^{c}āmalah* transaction is allowed as far as there is no explicit prohibition source in the Qur'an and the Sunnah. The contracting parties are free to conclude whatever contracts they deem necessary to meet their expectation. Za'tary (2008) stresses out that "there is no prohibition in Shariah about merging the two contracts in one transaction, whether it is the exchange contract (*mu'āwadhāt*) or charity contract (*tabarru^{c}*). This concept is based on the generality of the arguments on the validity of the *^{c}aqd* when it meets the terms and the conditions of the *^{c}aqd*."

Hammad (2005) argues that, "the basic principle of hybrid contract in business transactions is from Shariah perspective is permissible, as long as each contract is done separately (*^{c}uqūd mustaqillah*) and there is no evidence that expressly prohibits it in the Qur'an and the Sunnah." When there is legal basis in the hadith shows the combination of contracts is prohibited, this argument does not apply in general, but excludes the cases outside the forbidden one according to the hadith. Therefore, the case was said to be the exception to the general rule applies that the freedom to make a contract and execute the agreements that have been agreed upon.

Similarly, Ibn al-Qayyim (ed. 1999) argues that the origin of forming the contract in business transaction is permissible as long as the terms and conditions are met, unless it is revoked or prohibited by Shariah.

Al-Shātibi (ed. 2003) argues that in *mu^{c}āmalah* (business transaction) the legal origin is permissible and is based on the substance and does not lie on the practice (*al iltifāt ilal ma^{c}āni*) and widely opens the opportunity to develop a new product and changes. According to him, the combination of contract is valid if concluded separately (*^{c}uqūd mustaqillah*). For example, combining *murābahah* and *wakalah* in home financing, can also be seen when combining *ijārah*, and *wakalah*, and so on. However, there are some prohibitions of combining contracts as an exceptional case, though they are individually permissible, such as combining sale and lending, marrying two sisters, and marrying a woman and her aunt. This opinion is based on the text (Qur'an) that shows the permissibility of multi-contracts and contracts in general in sūrah al- Māidah Verse 1, which means: "O ye who believe please fulfill the contract agreement."

All above arguments supported by the act of Umar bin Al-Khattāb while dispatching Ya'la bin Munyah to Yemen and his order was generally on the distribution of land. He allowed this transaction and permitted the two contracts in one contract because the original agreement occured between both of them without knowing either one. It can be concluded that the combination of contracts is permissible as long as the contract does not influence another contract (Al-'Asqalāni, n.d.).

6. Parameters on Hybrids Contracts

In general, amalgamation of several contracts in one transaction is a permissible structure. This legality however, is circumscribed with certain parameters, criteria and conditions that need to be followed. The discussion on parameters, criteria, restrictions and conditions of hybrid contract in Shariah will be highlighted as follow:

6.1 Restriction Limit and Standard of Multi-Contract

In the previous discussion, it highlighted the issue of hybrid contract and how the majority of Muslim scholar allows the hybrid contract as long as there is no prohibition from the Qur'an and Hadith of the Prophet. However, Islamic scholars who allow the hybrid contract stated a number of restrictions, parameters and criteria that should be followed such as the contract from one another should stand independently and not binding or *^{c}uqud mustaqillah* that may assist one to determine whether it comply with Shariah requirements (al-Shādhily, 1998; Arbouna, 2007; Dusuki, 2009). Among the Muslim scholars some agreed to this parameters and restrictions some of them disputed it. In general, the clear guideline over the combination of contract in which is expressly prohibited in the hadith is the combination between sale and loan contract in a single transaction and it is agreed upon by Muslim scholars. Other than that, such as *bay^{c}atayn fi bay^{c}ah*, *shafqatayn fi shafqah* and *bay^{c} wa shart* are not included in the combination of contract if it is transacted separately and followed the Shariah parameters.

In general, the Shariah principle in respect to formation of contracts is that any form of contract structured for instrument in Islamic banking and finance is valid and acceptable in Islamic law unless explicitly prohibited and proclaimed as forbidden (Ibn Qoyyim, ed. 1999). The Hybrid contract will be permissible if the subject matter, the price, and the time of transaction are known and clear to the contracting parties. If one these elements are not clear, the contract becomes unlawful.

Ibn Qayyim (ed. 1999) argues that the Prophet (pbuh) forbids hybrid contract between contract of sale and loan (*qardh*), even though each contract stands up individually or separated. The prohibition of combining the contract of *salaf* (loan contract) and sale in the contract is to avoid the forbidden *ribā*. This combination of contract is prohibited because if someone lends Rp1000 to his friend, then he sells the goods worth Rp800 with Rp1000 in order to get paid additional two hundred from the transaction. In this transaction he receives a surplus of two hundred in the second transaction, although it looks likr he is giving a loan without any additional charges in the first contract (Ibn al-Qoyyim, ed. 1999). Majority of Muslim scholars agreed to prohibit combination of sale with loan contract in a single transaction (Ibn Rushd, ed. 1981). This argument is strengthened by Hammad (2005), where he argue that any product in Islamic banking and finance structured on the basis of hybrid contract is unacceptable in Islamic law hence it contradicts with an explicit source. For example, it is unlawful in Shariah to disburse the loan facility for Islamic bank and at the same time, the customer sells a particular asset to the Islamic bank. This transaction falls under the category of combining loan contract with sale in order to accrue benefit (Arbouna, 2007).

Therefore, it can be concluded that all combined contracts that contain any sale element is prohibited to be combine with a *qardh* contract in a single transaction, such as *ijārah* contract with *qardh* contract, *salam* contract with *qardh* contract, *sharf* contract with *qardh* contract, and so on.

Another issue in combining contracts that is expressly banned by the hadith is combining two sale contract in a transaction (*bay^ctayn fi bay^cah*). Majority of Muslim scholars agreed that any product that is structured on the basis of a combination of contracts which is intended to circumvent the unlawful transaction such as *ribā*, *gharar*, and *maysir* is unacceptable. In other words, it implies the combination between *ijārah* contract with loan in *rahn* product in Islamic bank in Indonesia in order to benefit from a loan contract in the name of *ijārah* and combination of sale and buy back agreement in *bay^c al-^cinah* financing product in order to benefit from unintended sale is impermissible. In *bay^c al-^cinah*, there is a combination of contract between deferred payments with cash payment which leads to *ribā* (Hammad, 2005). Normally, someone who sells something with credit, with the condition that the buyer shall sell it back in cash with a lower price. This kind of transaction somehow is *hīlah* or manipulation to legalize *ribā*, where in fact there is no real transaction done in the contract.

AAOIFI (No. 25/2008) laid down four Shariah restrictions in combining contracts, the first combining contract that has been quoted to combine sale with lending (Mālik, *al-Muwatta*', Vol. 2 No. 657, ed. 2005), or combining two sales in one deal (Mālik, *al-Muwatta*', Vol. 2 No. 663, ed. 2005), or two transaction in one transaction (Ahmad. *Al-Musnad*, Vol. 1, No. 198). The second, it is prohibited to combine the contracts as a trick for practicing *ribā*, based on the directive of the Prophet (pbuh) which indicates the prohibition of *bay^c al-^cinah* and *ribā fadhl*. The third, it is prohibition to use the combination of contracts as an excuse for dealing in *ribā*, based on the hadith of the Prophet which forbids combining lending with selling. The fourth, the combination of contracts should not be contradicting with each other in terms of purpose or Shariah rulings.

6.2 *Hybrid Contract as Hīlah Ribawi*

Generally, the contemporary hybrid contracts that is commonly used in Islamic financial institution for a *hilah ribawi* occurs through the contract of (i) *bay^c al-'inah* and (ii) organized *tawarruq* (*tawarruq munazzham*) as backdoor tolegalize *ribā* (Ayub, 2007; Rosly 2007; Rosly and Sanusi, 1999 and 2001; Bakar, 2009; Shaharuddin, 2009; Hanasudin, 2009).

First, the contract of *bay^c al-^cinah* that has been banned by Islamic law is referring to the majority opinion of jurists. *Bay^c al-^cinah* is a contract of a sale in a particular asset or commodity and repurchases it back at a different price; the deferred price would be higher than the cash price (Al-Nawawi, ed. 1996; Al-Zuhaili, 2007). The purpose of this transaction is to trick the transactions in order to acquire benefits from the actual loan contract given (Tuasikal, 2012). According to Imam Shafi'I (ed. 1973), *bay^c al-^cinah* is "a credit purchase of an asset which is later sold to the original owner or third party, either on cash or deferred, higher or lower than the original contract, or for an exchange of goods."

Similarly, the reverse is of *bay^c al-^{c}inah* transaction also forbidden, as someone sells something at theprice of eighty in cash with the condition he buys it back for a hundred. This transaction involves the element of *ribā* (Ibn al-Qoyyim, ed. 1999).

The above opinion is supported by the hadith that is reported by Ibn Umar, He said that he heard the Prophet (pbuh) said "When you enter into the *^{c}inah* transaction, hold the tails of oxen, are pleased with agriculture, and give up conducting *jihad*, Allah will make disgrace prevail over you, and will not withdraw it until you return to your original religion" (Dawud, *Sunan Abu Dawud*, No. 3455).

Second is the contract of *tawarruq*, it is a purchase of an asset on deferred payment to a third party (other than the original seller) in cash; the deferred price would be higher than a cash price (Al-Zuhaili, 2009; Khayat, 2006). AAOIFI (No. 30/2008) defines *tawarruq* as "The process of purchasing a commodity for a deferred price determined through *musāwamah* (bargaining) or *murābahah* (mark-up sale), and selling it to a third party for a spot price so as to obtain cash." Majority of jurists forbid *bay^c al-^{c}inah* and allow *tawarruq* except Ibn Taymiyyah and Ibn al-Qoyyim (Al-Zuhaili, 2009).

OIC Islamic Fiqh Academy in the 15th session in September 1998 (Rajab 1419H) permitted *tawarruq* subject to the condition that the customer does not sell the commodity to its original seller, to avoid *bay^c al-^{c}inah* as a trick legalize *ribā*. However, in December 2003 in the 17th session, the Academy distinguishes and classifies between the permissible (*tawarruq haqīqi*) and the forbidden one (*tawarruq munazzam*, organized *tawarruq*) which is widely practiced by Islamic banks is deemed to be synthetic and fictitious as *bay^c al-^{c}inah* and trick to circumvent the prohibition of *ribā*. In April 2009, at its 19th session the Academy banned the application of organized tawarruq because the transaction between Islamic bank and customer as it is considered a deception and resembles *bay^c al-^{c}inah*.The Islamic bank acts as an agent to the customer (*mustawriq*) to sell the asset to the third party who initially owned the asset (Dusuki, 2007; Dusuki 2009; Noor &Farhah, n.d.).

Similarly, Alhadad (2003) and Khayat (2006) divided *tawarruq* into two cateogries to distinguish between the permissible *tawarruq* (tawarruq *haqīqi*) with the forbidden one (organised *tawarruq*), the first is *tawarruq munazzham* (organized *tawarruq*), and the second is *tawarruq fiqhi* or *haqiqi*. The first *tawarruq* is organised *tawarruq* that is widely used by Islamic banks in Europe and the Middle East. This is due to the fact that Islamic banks takes part in determining the sales line and makes all arrangements to provide cash to the customer. Islamic banks will determine who is the broker for the purposes of purchase and to whom the buyer (customer) will resells the goods (Al-Zuhayli, 2006; Al-Suwaylim, 2009; Bouheraoua, 2009). The prohibition of the organised *tawarruq* is because its mechanism resembles *bay^c al-'inah* which is frowned as a form of *hīlah* (legal trick).

The second concept of *tawarruq* is where Islamic bank really buys the assets or goods from the market, and sells it to customers who need something without no-frills to sell it to any party. The customer is free and has the right to decide to whom he wants to sell the asset. Since the ownership has been transferred from the Islamic bank to the customer, the customer has full of right pertinent to the asset. It has no *hilah ghairu syar'iyyah* therein that causes the product to not be Shariah compliance. AAOIFI (No. 30/2008) laid down several parameters to approve *tawarruq* to be Shariah compliant and permissible as follows:

1. The requirements of the contract for purchasing the commodity on deferred payment should be fulfilled where the commodity is real.
2. The commodity should be well identified to distinct it from other assets.
3. If the commodity is not available at the time of contract, the customer should be given a full description over the commodity such as the quantity and the place.
4. The commodity should ctually be received by the customer.
5. The commodity must be sold to a party other than the original seller to avoid *bay^c al-^{c}inah*.
6. The contract for purchasing the commodity on deferred payment and the contract for selling it for a spot price should not be linked together in such a way that the client losses his right to receive the commodity.
7. The customer should not delegate the Islamic bank or its agent to sell the commodity on his behalf after he actually receives the commodity.

8. The Islamic bank should not arrange proxy to a third party to sell on behalf of the customer.
9. The customer should sell the commodity by himself.
10. The Islamic bank should provide the information to the customer where to sell the commodity.

6.4 Shariah Parameters of Hybrid Contract

The validity of hybrid contracts for the purpose of the development of Islamic banking and finance instruments required to structure in a way that does not conflict with an explicit source (Za^{c}tary, 2008). In other words, a product structured on the basis of hybrid contracts does not intend to legalize the unlawful transaction such as *ribā*, *gharar* and *maysir* (Arbouna, 2007). The Shariah parameters or Shariah restrictions have been applied also by international Shariah standard such as AAOIFI in making a limit restriction on products and services that make use of hybrid contracts.

AAOIFI in 2007 and 2008 has provided resolution No. 25 that says that the entire hybrid contract agreement is permissible provided that the contract should be separated from one another and each contract is permissible on its own, unless combination of sale and loan contract. AAOIFI then laid down the regulations and Shariah parameters on hybrid contract with the following rules:

1. The combination of contract agreements may not incorporate with the contract that has been clearly prohibited in Shariah such as combination between of sale and loan in one transaction.
2. The combination of contract agreement may not be used as a trick (*hīlah*) to justify *ribā*. Like sale contracts and buy back agreement sbetween two parties (*bay^{c} al-^{c}īnah*) or *ribā fadl*.
3. The combination of contract agreement may not be used as a tool for *ribā* such as creditor lends money in order to obtain a gift from a debitor or provides other benefits such as providing a ride or offering accommodation in his house.
4. The combination of contract agreement must not contradict to the essence of the contract. For example, like in *mudhārabah* contract, there should be no profit guarantee using *hibah* agreement in the first place or a combination between currency exchange with *ju'ālah* contract, or *bay^{c} al-salam* with *ju^{c}ālah* (AAOIFI No. 25, 2007; 2008).

In the meeting of Shariah Advisory Council Kuwait Finance House No. 23/2006 at September 19, 2006 in Kuwait, where at the time of evaluation *ijārah* Rental Swap Product combined with the contract of *wa'ad mulzim min tharaf wāhid* (unilateral binding promise contract) on transaction of *musāwamah* and *tawarruq*, where they gave four requirements needed in order to comply with Shariah conditions (Yahya, 2008; Dusuki, 2009);

1. The contract agreement in the transaction must be real, not a fictitious contract. These mean that where one transaction happens theremust be a real transaction, where the desire of the seller to sell and the desire of the buyer want to buy the real subject matter. Otherwise it is the same concept with fictitious *tawararruq* (*tawarruq mashrofi*) that has been applied with many Islamic banks in the world. In fact from the data collected, only 2.7% of commodity *murābahah* transaction and *tawarruq* that really takes delivery by end user, and 97.3% used for derivative transaction for speculators.
2. Any contract that is being transacted as it has its own consequences such as once a sale contract has been transacted it has to transfer ownership of the asset from the seller to the buyer.
3. One contract to another has to be separated (*'uqūd mustaqillah*)
4. This contract does not put any conditions in the transaction between the buyer and the seller.

Pertaining to the Shariah parameters, Mihajat (2012) augments several parameters to make the transaction comply with Shariah rules and principles which are;

1. The subject matter that is going to be transacted has to be real, not a fictitious asset which will lead into dispute in the future.
2. The subject matter that is being transacted can be delivered to the buyer if the buyer wishes. This condition is to ensure the availability of the transacted subject matter.
3. The price of the subject matter has to be based on the market price, no manipulation in term of the price.

4. The place of the subject matter should be known among the parties.
5. The subject matter that is being transacted is *halal* according to Shariah as stated in fatwa DSN-MUI No. 82 2011 in endorsing the product of Komoditi Syariah for Islamic Money Market of Bursa Berjangka in Indonesian Islamic Banking Industry.
6. The objective of the transaction is for real sale and not for short-selling purposes.
7. The last one is the subject matter has to be ready to use not the subject matter that is still undergoing process to used.

7. Conclusion

In Islam, the transaction in trade and commerce must conform to the requirement of Shariah which means the abstinence from prohibitions (prohibited matters) and observing that every contract possesses all its essential elements and every essential element meets its necessary conditions (Abdullah and Ramli, 2011).

This paper highlights general understanding on combination of contracts (*ijtimā' al-'uqūd*) for the purpose of product development in Islamic banking which is very important following the fact that majority of products in Islamic banks are combination of more than one contracts. The paper also laid down **Shariah** pearameters on hybrid contract in order to comply with Shariah. In spite of the Shariah compliance standard in Islamic banking products and services in every jurisdictions is deffer one another, yet they must conform to the ruquirement of the agreeable fatwas and regulations. The understanding of *Fiqh* in commercial transaction to meet the callenges of growth that may further strengthen Islamic banks is a must toward exploring various effective banking products. Although some argue that the need to obtain Shariah requirements is a hurdle in the path of Islamic banking product innovations (Benaissa, Parekh, and Wiegand, 2005).

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