

THE APPLICATION OF COMMODITY *MURĀBAḤAH* IN BURSA SUQ AL-SILA' MALAYSIA VIS-A-VIS JAKARTA FUTURE EXCHANGE SHARIAH INDONESIA: A COMPARATIVE ANALYSIS

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I. INTRODUCTION

Tawarruq has been extensively used by Islamic financial institutions (IFIs) recently, mainly to address liquidity shortages and to structure risk management tools. The common term used in the market to denote *tawarruq* is “commodity *murābahah*” or sometimes “commodity *musāwamah*”. The concept of *tawarruq* has gained wide acceptance among market players due to its flexibility, which allows IFIs to provide cash with predetermined fixed income, just as their conventional counterparts do.

However, the widespread practice of organized *tawarruq* has been disapproved by many contemporary scholars. The International Islamic Fiqh Academy of the Organization of Islamic Cooperation (OIC Fiqh Academy), in its 19th session held in Sharjah in 2009, resolved that the current *tawarruq* practice is impermissible. This

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decision reiterated the resolution issued by the Islamic Fiqh Academy of the Muslim World League (IFA-MWL) in its 17th session held in Makkah in 2003.

The decisions by the IFA-MWL and the OIC Fiqh Academy were prompted by numerous criticisms associated with the manner in which organized *tawarruq* is structured and transacted in modern Islamic financial operations. Many Shari'ah scholars have criticized the structure for lacking credibility as a real transaction. Indeed, the concern over *tawarruq* is basically not about the essence of the contract but, rather, about several violations in its modern applications. Once the Shari'ah violations have been addressed, the concept of *tawarruq* should be accepted.

Against this backdrop, two platforms were introduced to assist IFIs in meeting their liquidity needs while addressing Shari'ah concerns over the current practice of *tawarruq*. The first platform was the Commodity Murabahah House (Suq al-Sila'), operated under Bursa Malaysia Islamic Services Sdn Bhd (BMIS), a wholly-owned Shari'ah-compliant subsidiary of Bursa Malaysia. The second was Jakarta Future Exchange (JFX) Shariah Indonesia. The two platforms are claimed to provide genuine commodity transactions in which possession and delivery of the commodity can take place without any hindrance, as opposed to the controversial practice of *tawarruq* using a platform like the London Metal Exchange (LME).

II. RESEARCH OBJECTIVES

The present study aims to compare the application of *tawarruq* by Bursa Suq al-Sila' Malaysia (BSAS) and JFX Shariah Indonesia and how the two platforms address the Shari'ah issues that surround modern *tawarruq* practice. Specifically, the study undertakes to answer the following research questions:

- i. What is the structure of organized *tawarruq* and its main features?
- ii. What are the common violations of Shari'ah principles in the modern practice of organized *tawarruq* that led to its prohibition by the OIC Fiqh Academy and the IFA-MWL?
- iii. Can the new platforms introduced by BSAS and JFX Shariah Indonesia address the concerns raised by contemporary Shari'ah scholars pertaining to the fictitious *tawarruq* transaction?

III. SHARĪ'AH ISSUES IN THE APPLICATION OF *TAWARRUQ*

There are at least four major Sharī'ah issues in the modern application of organized *tawarruq*. These relate to the issues of the commodity, possession and delivery, pre-arrangement (*tawāṭu'*) and agency.

With regard to the commodity, it is noted that many commodities used in the practice of organized *tawarruq* are spoiled commodities that no one would agree to purchase if they actually wanted the commodity for its own sake (Al-Qara Daghi, 2008). Some scholars also raised concerns about the lack of proper monitoring of the practice by certain segments in the market. This state of affairs could lead to the same commodity being the object of multiple transactions (Abu Ghuddah, 2008). This inevitably raises Sharī'ah issues about how genuine the contract is.

The issues of possession and delivery take place because the legal documents are embedded with clauses that indicate the buyer's lack of intention to take delivery. In some cases, the buyer is prevented from taking any delivery, either explicitly or implicitly, by the standard operating procedure of the market. This is particularly true in the case of transactions performed on the LME.

Furthermore, the issue of prearrangement (*tawāṭu'*) exists as the transaction is structured in such a way that, in reality, the commodity rarely gets physically transferred from the seller to the buyer as it should according to the Sharī'ah requirement of a sale contract. This is particularly true since the transacting parties operate a netting facility arrangement between their different storage facilities confirming the fact that transfer of ownership does not actually take place.

Lastly, the issue of agency arises because the customers involved in an organized *tawarruq* do not buy the commodity themselves. Instead the bank plays its classical role as a financial intermediary whereby, upon authorisation from the customer to act as his/her agent, it buys the commodity from an exchange on behalf of the customer and arranges for its deferred price to be paid. Then, by a condition either stipulated in the contract or known by custom, the bank proceeds to act as the customer's agent to sell the commodity to another party for cash. The custom adopted in many banks is that the bank will not pay the price of the commodity to the original seller (the exchange platform) but, rather, to the customer, as it represents the customer's agent in buying and selling the commodity.

The addition of this *tawkīl* (agency) to the *tawarruq* contract, authorising a party to buy the commodity on behalf of another and arranging to sell the commodity to itself, renders the contract similar to the prohibited *īnah* (Al-Zuhayli, 1989). It further accentuates the issue of transferring ownership or taking possession, which is required to be effected as one of the pillars of a valid contract. Some scholars even go further to argue that the inclusion of *tawkīl* in the *tawarruq* contract makes it similar to usurious finance because the *mustawriq* (seeker of liquidity) will take the smaller amount from the bank, while the higher amount will be paid by him when the fixed time lapses.

IV. COMPARING THE APPLICATION OF *TAWARRUQ* BY BURSA SUQ AL-SILA' MALAYSIA VIS-A-VIS JFX SHARIAH INDONESIA

Two platforms, namely BSAS and JFX Shariah Indonesia, have been introduced in the market to address the Shari'ah concerns over the practice of organized *tawarruq*. BSAS is an Islamic commodity trading platform for the Islamic banking industry and capital market, introduced by Bursa Malaysia in 2009. It is purposefully designed as an exchange of multiple commodities using *tawarruq* transactions. It started by trading in local crude palm oil (CPO) and plastic resin (PE) but plans to move on to other Shari'ah-approved commodities, including cars, air conditioning units, oil, copper and aluminium. In April 2012, BSAS added refined, bleached and deodorised (RBD) palm olein as a new commodity to meet greater demand from local and international players for commodity-based Islamic financing.

Pursuant to the introduction of BSAS, JFX Indonesia launched JFX Shariah Indonesia in late 2011. Initiated by the National Shari'ah Board-Indonesian Council of Ulama (DSN-MUI), JFX Shariah Indonesia is only allowed to be used for banks' liquidity management purposes. The study found that most of the Shari'ah issues in organized *tawarruq* have been well taken care of by both BSAS and JFX Shariah Indonesia. The following discussion sheds light on how the two platforms address the Shari'ah issues in the practice of *tawarruq*.

A. Issues Pertaining to Commodities

The issue of the commodity is resolved by BSAS as it only allows real Sharī'ah-compliant commodities to be transacted on the platform. With regard to potential redundancy in the commodities used, BSAS provides a fully electronic system that recognizes and verifies ownership through e-certificates. Furthermore, contract specifications are given for every single asset and are made known to all parties (Mansor, 2009). Nevertheless, many industry players are still sceptical about the amount of CPO available for banks to transact, especially in the case of treasury operations, which normally involve huge transaction volumes. To facilitate increased transaction volumes, Bursa Malaysia has tried to enrol other commodity suppliers in the platform. The latest underlying commodity added is RBD palm olein.

Similarly, JFX Shariah uses various Sharī'ah-compliant underlying commodities, including palm oil, rubber, tea and chocolate. The platform, through its Sharī'ah Supervisory Board and Board of Directors, assures the availability of the asset to be transacted and that the same commodities will not be transacted with multiple deals.

B. Issues Pertaining to Possession and Delivery

BSAS allows for delivery of the commodity, which eliminates another concern about the fictitious nature of organized *tawarruq*. According to the BSAS procedure of delivery, the buyer needs to indicate his intention directly to BMIS. Once acknowledged by BMIS, the commodity supplier will then be notified. The delivery by the commodity supplier to the buyer will take place within seven days upon receipt of the commodity certificate endorsed by BMIS.

In JFX Shariah, the buyer has legal ownership over the commodity represented by the electronic certificate. He also has direct control over the commodity and the option to receive delivery within seven days. In fact, the mechanism of JFX Shariah is designed to make the delivery of commodities the first option in transactions to ascertain that the sale contract is real and not fictitious.

Although both platforms allow for delivery, the Sharī'ah issue might still be invoked since they are designed to make delivery of the physical commodity improbable, even if it is technically possible. That is because these platforms are mainly designed to expedite the financial market's ability to meet liquidity shortages using the *tawarruq* instrument. Since the prices of commodities traded on the platforms are higher than those of the actual market, it creates a practical disincentive to players seeking delivery or selling the commodities outside the platforms. Sceptics may argue that this arrangement makes the transactions tantamount to fictitious transactions. That is because juristic consideration is based on predominant market practice rather than infrequent occurrence. This argument corresponds with a legal maxim: "*Consideration is given to widespread occurrences, not to rare ones*" (Zarqa, 1989, 1:235).

C. Issues Pertaining to Prearrangement (Tawāṭu')

Another major concern raised by scholars is that the commodity must not be sold to the party from whom it was purchased, nor should it return to the seller by way of netting arrangement, as a result of prior agreement or collusion between the two parties or customary practice.

To overcome this issue, BSAS has arranged that the sale to the commodity supplier be done on a random basis. The suppliers place their bids which replicate the real market. Once ownership goes back to a supplier, all unencumbered commodities may or may not be re-offered into the BSAS market for other trades.

Meanwhile, to address the issue of collusion and market manipulation in JFX Shariah, Circular III of Bank Indonesia does not allow a commodity trader member to conduct transactions with a party that acts as both the commercial member and the commodity consumer. The transaction is also done on a random basis to assure that the same commodity does not go back to the same person via a netting arrangement.

d. Issues Pertaining to Agency

BSAS has no specific measure to address the issue of authorization since the issue lies largely in the hands of the platform users. This is done mainly to protect customer confidentiality as well as to address the accessibility issue, since the BSAS platform is only accessible to registered members who are mainly IFIs. The issue of agency arrangement, therefore, might still arise, particularly in case of transactions involving non-members such as retail customers. However, it is beyond the control of the BSAS since the decision is exclusively the right of the contracting parties; BSAS merely serves as a platform to facilitate the transaction.

On the other hand, the issue of authorization in the case of JFX Shariah is well taken care of, as the business model allows commodity users (customers) to transact online and deal directly with commodity brokers.

V. CONCLUSION

The present study concludes that despite the criticisms and some unresolved Sharī'ah matters entangling the practice of *tawarruq*, the effort made by Bursa Malaysia and Jakarta Future Exchanges to introduce platforms such as BSAS and JFX Shariah is commendable. Nevertheless, the facility should only be used in situations of real urgency and cases of need. As AAOIFI has made clear in its Sharī'ah Standard Number 30, Paragraph 5/1, *tawarruq* should only be resorted to as a last option when an institution faces the danger of a liquidity shortage that could harm its viability and sustainability. AAOIFI has also stressed that *tawarruq* should not be used as a mode of investment or financing with the aim to make more profits.

References

- Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) (2010). *Shari'a Standards for Islamic Financial Institutions*. Bahrain: AAOIFI.
- Abu-Ghuddah, A. A. K. (2008). *Al-Sila' al-Dawliyyah wa Dawābiḥ al-Ta'āmul fihā*. Presented at Nadwah al-Barakah al-Tāsi'ah wa al-'Ishrīn li al-Iqtisād al-Islāmī. Retrieved from <http://www.isra.my/media-centre/downloads.html?task=finish&cid=91&catid=21&m=0>
- Al-Qara Daghi, A. M. (2008). Murāja'at Fatāwā Nadwat al-Barakah. *Nadwah al-Barakah al-Tāsi'ah wa al-'Ishrīn li al-Iqtisād al-Islāmī*. Retrieved from <http://www.isra.my/media-centre/downloads.html?task=finish&cid=102&catid=21&m=0>
- Al-Zuhayli, W. (1989). *Al-Fiqh al-Islāmī wa Adillatuhu*, 3rd ed. Beirut: Dār al-Fikr.
- Mansor, A. H. M. (2009, September). Commodity Murābahah. *Islamic Finance News*, 6. Retrieved from <mhtml:file:///H:\tawarruq\tawarruq\IFN\Islamic Finance News-tawarruq3.mht>
- Zarqa, A. (1989). *Sharḥ al-Qawā'id al-Fiqhiyyah*. Damascus: Dār al-Qalam.