Application of Bay’ Salam (Forward Sale) as an Islamic Personal Financing Instrument

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Abstract
The instrument of bay’ al-‘inah (same-item sale-repurchase) and organised tawarruq (commodity cost-plus sale) as Islamic personal financing have become controversial in Malaysia, especially after several prominent religious authorities in the Islamic world declared the instrument non-Sharia compliant. They include the Islamic Fiqh Academy of (OIC), the Muslim World League, Al-Azhar, the Saudi Council of Senior Scholars and the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). Their rulings have significant influence on foreign investments and market pressure in the Malaysian banking and finance industries, since many Middle Eastern investors are not in favour of the instruments. As a result, the Malaysian banking and finance industries are committed to achieve the international standards in Islamic finance, even though adopting the ruling is voluntary, in order to fulfill Bank Negara Malaysia’s aspiration to limit both concepts and to have Sharia compliant personal financing instruments. Therefore, this research, which depends on content analysis of Islamic law and jurisprudence seeks to develop a Sharia compliant personal financing model based on forward sale concept because it is practised and proved to be viable and Sharia compliant in the investment-based financing. The concept is a Sharia-based mechanism that promotes real trading between the contracting parties. It would eliminate non-Sharia compliant issues in bay’ al-‘inah and organised tawarruq such as selling unavailable items, conditional sale and fictitious transaction. This research reveals that the application of the proposed instrument complies with Sharia but its operational side should be studied further.

Keywords: Islamic Personal Financing, Bay’ al-‘Inah, Organised Tawarruq

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INTRODUCTION

The instrument of bay’ al-‘inah and organised tawarruq as Islamic personal financing have become controversial in Malaysia, especially after several prominent religious authorities in the Islamic world declared the instrument non-Sharia compliant. They include the Islamic Fiqh Academy of (OIC), the Muslim World League, Al-Azhar, the Saudi Council of Senior Scholars and the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). Their rulings have significant influence on foreign investments and market pressure in the Malaysian banking and finance industries, since many Middle Eastern investors are not in favour of the instruments. As a result, the Malaysian banking and finance industries are committed to achieve the international standards in Islamic finance, even though adopting the ruling is voluntary, in order to fulfill Bank Negara Malaysia’s aspiration to limit both concepts and to have Sharia compliant personal financing instruments. Therefore, this research seeks to develop a Sharia compliant personal financing model based on forward sale concept because it is practised and proved to be viable and Sharia compliant in the investment-based financing. The concept is a Sharia-based mechanism that promotes real trading between the contracting parties. It would eliminate non-Sharia compliant issues in bay’ al-‘inah and organised tawarruq such as selling unavailable items, conditional sale and fictitious transaction.

1. Methods

This qualitative research employs content analysis approach and depends on the primary and secondary sources of Sharia through legal analysis based on the discipline of usul al-fiqh (principles of Islamic jurisprudence) because this study represents a fully Sharia-based research. This research is an almost wholly Sharia-based study and not intended to be a legal study of any contemporary law. Firstly, in order to investigate the validity of bay’ salam, this study collects opinions of al-Hanafiyyah, al-Malikiyyah, al-Shafi’iyyah, al-Hanabilah, al-Zahiriyyah, al-Ja’fariyyah, al-Zaidiyyah and al-Ibadiyyah on the instrument. These madhhab (school) are included in this research because they represent the majority of Muslim jurists that still exist until now except al-Zahiriyah. Data collection aims at their main references within the respective madhhab. In addition, this research also examines other materials such as journals, fatwas and resolutions, legal documents, Islamic banks documents and websites, pamphlets, reports and other components related to contemporary practice of Islamic personal financing. Interviews with the experts of Islamic finance have been conducted especially from the banking sectors to seek opinions on the application of the new instrument in the real world.
2. Modus Operandi of Bay’ Salam as Financing Instrument

Banking sectors as the creditor and customers as the debtor could utilise the instrument of *salam*. The creditor orders a certain amount of a precious metal from the debtor for a fixed or agreed period of time. The price or payment of the item should be transferred to the debtor once the contract is concluded. To benefit from this instrument, the price of the ordered precious metal should be lower than the market price. However, the price should be discussed and agreed by both contracting parties. The creditor may benefit from the buying of the precious metal through monetisation. In order to facilitate the debtor to settle his debt, the creditor might want to provide options; the debtor may deliver the precious metal or its value. In this case, it is convenient to use cash money or any other valuable item. It is important to note that the creditor should not impose a condition for the debtor to settle his debt with cash money because this would invalidate the *salam* contract and lead to *riba*. The modus operandi is shown in Figure 1.

**Figure 1: Non-riba-Related Item Based On A Salam Contract Model With A Specific Period Of Time.**

<table>
<thead>
<tr>
<th>BANK (creditor)</th>
<th>50 g of platinum or its value</th>
<th>£1000</th>
<th>CUSTOMER (debtor)</th>
</tr>
</thead>
</table>

(i) After reaching an agreement, the bank buys 50 grams of platinum on a *salam* basis; the capital is delivered to the debtor upon executing the contract

(ii) The customer as the debtor is responsible for delivering 50 grams of platinum or its value at agreed period of time

(iii) The bank is allowed to gain benefit from the instrument since the *salam* item is non-riba-related.

3. Legal Bases and Issues

Since the instrument of *salam* is Sharia-based, which has been approved by the Prophet (pbuh) himself, there is no need to determine another legal basis for its permissibility. However, it is not the purpose of the instrument to provide an alternative to personal loan per se. It is utilised to buy certain items with an advance payment but deferred delivery; it is a form of trade financing.
One might ask whether this instrument can provide personal financing as well. This is where *maslahah mursalah* plays its part. The instrument fulfils the requirements for being a necessary, comprehensive and innovative-based instrument. In fact, there is no specific evidence in the Quran and Hadith that prohibits *salam* for personal financing. In addition, the model is not related to the element of a sale for a sale, a sale for a *qard*, a sale with an invalid condition or an illegitimate prior agreement.

Another issue that arises is whether or not the value of the ordered platinum in the form of another item could replace the original order, since the seller has the option to deliver the platinum or its value according to the proposed model. This issue refers to the issue of replacing the ordered item with another item. According to Ibn Qudāmah (1984), al-Bahūṭiy (1981), al-Sharbinīy (n.d), ‘Atťayish (n.d), al-Ṣanānīy (n.d), it is prohibited to replace the ordered item of a *salam* contract. According to al-Sajistānīy (n.d), al-Qazwainīy (n.d), al-Dārqāṭnīy (1966), the prohibition is based on a Hadith narrated by Abu Sa‘īd al-Khudriyy:

> “Whoever executes *salam*, he must not replace it (ordered item) with another (item)”.

However, the Hadith does not qualify as evidence in Sharia because of its weakness. One of the narrators is ‘Atiyyah ibn Sa‘īd; his narration is not authentic as claimed by Ahmad, Aba Hatim, al-Baihaqiyy and Ibn al-Qattan (al-ʿAsqalānīy, nd: 25), only al-Turmudhiyy labels the Hadith as *hasan* (al-Zailaʿīy, 1938: 51).

According to the opinion of Malik, al-Malikiyyah, and another opinion of Ahmad and Ibn al-Qayyim, changing the ordered item in a *salam* contract is permissible (Ibn Qudāmah, 1984: 201). Al-Malikiyyah allows the practice with three conditions. Firstly, the ordered item is among items that can be sold before being possessed. Apparently, if the ordered item is food, it is prohibited because according to their opinion, food is required to be possessed before selling it. Secondly, the ordered item is exchanged on a spot sale basis. Thirdly, the principal has been delivered (al-ʿAlāʾī, 1994: 197; al-Dardīr, nd: 220). According to these conditions, this model qualifies under the opinion of al-Malikiyyah.

According to Ahmad, if the ordered item is measured in weight and volume, and the buyer takes other items with the same weight and volume but with lower quality at delivery, the instrument is legitimate. The same ruling goes for other items that are not measured in weight and volume (Ibn al-Qayyim, 1995: 255). As for the aforementioned model, based on Ahmad’s opinion, it is permissible for the buyer to accept the value of 50 grams of platinum in the form of cash money from the seller. This practice is supported by the opinion
of Ibn ‘Abbás, narrated by Tawús (al-Ṣaḥāniy, 1982):

“When you order a certain item (through salam) and the item is not available at the time of delivery, you may take another item as substitute with a lower value than the original order and not make a profit twice”.

According to Ibn al-Qayyim, when there is no objection from other sahabah of the Prophet on a subject, the opinion of a sahabah is legitimate and regarded as evidence in Sharia (Ibn al-Qayyim, 1995: 257).

Another issue is whether or not the proposed model contains selling an unpossessed item because the ordered item is not yet delivered to the buyer. The act of changing the ordered item is considered a sale contract, which is not valid because the seller does not yet possess the ordered item. It is based on the Hadith from the narration of Hakim ibn Hizam (al-Busti, 1993):

“O Messenger of Allah, I am a merchant, please advise me what is permissible and what is not. (The Prophet) replied: O my nephew, when you buy something, do not sell it until it is possessed or delivered”.

However, according to Ibn al-Qayyim, the act of changing the ordered item cannot be considered as a sale contract that transfers ownership. It is rather a settlement of debt. To support this, if the seller delivers the original ordered item to the buyer, the act is not considered a sale; it is a delivery of the ordered item. Therefore, delivery of another item than that originally ordered as a replacement is not considered a sale either. Evidently, the act does not contravene the prohibition of selling unavailable items (Ibn al-Qayyim, 1995: 257).

4. Opinion of the Experts

The proposed model is Sharia compliant theoretically. However, in the real world of banking, Islamic banks in Malaysia are not allowed to own physical asset in their trading. They are indeed financial intermediaries. There would be issues in legal aspect, accounting and operational issues that needs more studies and analysis. Issues of risk should be studied further as well because assuming that banks are allowed to own asset such as high value metal, the fluctuation of metal price should be considered because it imposes financial risk in terms of profit making.

5. Solution and Suggestion

In order to resolve the issue of banks owning the asset, a third party could be added to the modus operandi. Instead of delivering the ordered precious metal to the bank directly, a customer could deliver the item to a broker that has been appointed by the bank on its behalf. The bank could obtain cash by selling the item to the broker. Hence, this resolve the issue of owning the asset by the bank.
Another option is by using a constructive possession. The customer would deliver a certificate, which indicate the ownership of the bank on that particular precious metal. Afterwards, the bank could monetise the certificate through a particular broker the issued the certificate as instructed by the customer.

CONCLUSION

The traditional concept of bay’ salam is theoretically proven to be a viable instrument of Islamic personal financing tool. It is considered as a Sharia-based tool since no modification is involved in structuring the concept as an underpinning tool. Moreover, the transaction is a real trade between the bank and the customer. This model provides an advance capital payment to the customer that represents a financing amount. This is the essence of the proposed model. However, more research needs to be done especially related to its application in the real world involving Islamic banking on how to implement this model in the financing sector.

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