ISSUES OF BAI’ AL-‘INAH IN THE CONTEMPORARY ISLAMIC FINANCIAL PRODUCTS AND ITS SOLUTIONS ACCORDING TO THE SHARIAH PRINCIPLES

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ABSTRACT

Bai’ al-‘inah is one of the well-known sale-based contracts among Islamic financial products. This type of contract has been applied by most of the Islamic Financial Institutions (IFI) particularly in Malaysia towards their Islamic financial products. Although all the controversial issues related to bai’ al-‘inah have already been discussed before by Fiqh scholars, due to the implementation of the underlying Shariah concept of Bai’ Al-‘Inah in current Islamic financial products, it appears that new issues relating to ‘inah have appeared and need to be deliberated further by contemporary Islamic scholars to ensure that it is in line with the development of Islamic financial products. One of the main Shariah issues that has occurred in bai’ al-‘inah based contracts is the sequence of the implementation of the aqad (contract) between the bank and the customers. Hence, this research will focus on this issue from several points of view, which include the causes that lead to the issue, the best solutions according to the Shariah to rectify the issue, and the consequences of the affected accounts if the issue is a Shariah compliance issue. Besides that, this research also will try to explore the solutions and decisions from the Shariah Committees of some of the Islamic banks in Malaysia. Thus, this research will try to briefly state the decisions of the three banks that operate Islamic bank licenses, which are AmlsIslamic Bank, Bank Simpanan Nasional and Agro Bank. In order to focus on the main issue of this research, which is the sequence of aqad, the researcher will also try to explore that issue in some of the Islamic products that apply bai’ al-‘inah as the underlying Shariah contracts, mainly on personal financing and home financing.

Keywords: Bai’ al-‘Inah, Islamic Finance, Shariah Principles.

Introduction

1.0 Introduction

Islamic finance has developed from many years ago. Nowadays, the need for Islamic finance has grown rapidly, and the field needs to be developed in order to meet society’s expectations towards transactions that are Shariah compliant and do not contravene with any Shariah principles. If we delve deeper into its intricacies, Islamic finance provides some advantages compared to conventional banking. One of the main reasons for Islamic finance is to promote justice among its customers. At the same time, it can also indirectly promote an Islamic way of life.

Based on the current situations and practices in Islamic banking, particularly Islamic banking in Malaysia, there are already many products based on Islamic concepts that have been developed to meet public expectations, such as products based on bai’ al-‘inah.

The main purpose of this article is to explore and explain the Shariah issues on the application of the bai’ al-‘inah contract in the Islamic financial products. Although the classic jurists have already discussed the Shariah issues on bai’ al-‘inah, this article will try to focus on the current issues applicable to the current Islamic products and its solutions according to Shariah justifications. Besides that, this article also will try to focus on the solutions and deliberations made by the Shariah committees of the Islamic bank in Malaysia to resolve the issues pertaining to the bai’ al-‘inah contracts, especially on the issue of the sequence of the aqad (contract). Thus, there are three Islamic banks that will be examined on this article in order to study the solutions and Shariah justifications made by their Shariah committee. Those three Islamic banks are AmlsIslamic Bank, Bank Simpanan Nasional (BSN) and lastly Agro Bank. The interview method will be used between the researcher and the Shariah officers of the said Islamic banks to get further information on the Shariah issues and their solutions to rectify those issues.

2.0 Definition and Concept of Bai’ Al-‘Inah

It is very difficult for all the SCs of Islamic banks to give their views, opinions, decisions and deliberations of any issue of the Islamic finance and contracts. They must have certain fixed criteria, especially an expertise in Fiqh and Usul al-Fiqh, as they will be responsible with all of their farwa or decisions1.

In addition, in order to assist the SCs of Islamic banks to understand any services and Islamic products that will offered to the mass public, one of the most important elements is understanding the meaning and the concept of every Shariah contract available in the market. This topic will discuss on the meaning and the concept of the bai’ al-‘inah before we discuss the implementation of the bai’ al-‘inah contract applied to the Islamic financial products in depth.

Generally, jurists and scholars gave different technical meanings for bai’ al-‘inah due to their differences in opinions and views regarding its forms. One of the most well-known definitions stated it as “a situation whereby a person sells a commodity or asset to another for a specific price with payment delayed or by differed payment until a fixed date, and he then buys back from him at lower price by cash”. From that definition of bai’ al-‘inah, we can extract a few elements of bai’ al-‘inah itself, which are:

   i. Buying and selling involves two parties only, which are the buyer and the seller.
   ii. The first buyer or purchaser then will sell back to the first seller, or vice versa.
   iii. The underlying commodity or asset must be owned by the seller and buyer, and that asset must be Shariah compliant.
   iv. The purchase and sale contracts and transactions must be done in the correct sequence.

However, in terms of the legality of bai’ al-‘inah, the details will not be discussed here and will suffice with a general overview. It is noted that the Shafie school of thought is the only one that allows bai’ al-‘inah transactions. Most other jurists and Shariah scholars prohibited bai’ al-‘inah transactions due to several reasons. One of the reasons is the existence of the element of “force”. In Islamic transactions, we have the freedom to choose any place or any person to execute the purchase and sale transactions, while in bai’ al-‘inah transactions, it appears as if the sale or purchase is without choice. Other reasons include the opinion that bai’ al-‘inah appears to be “a back door to riba”.

However, the Shafie school of thought did not simply allow bai’ al-‘inah transactions. It has its own restrictions that ensure its compliance with Shariah regulations and principles. One of the clear rules is that no party is allowed to force any person to repurchase the asset, and must be free to sell to anybody. Besides that, there are two contracts involved in bai’ al-‘inah which are purchase and sale contracts. Thus, every contract that is involved in bai’ al-‘inah transactions must follow the proper order of the aqad process. This means that the first aqad, which can be either purchase or sale aqad, must be finished first, followed by the second aqad. Hence, by referring to the current situations to ensure that the bai’ al-‘inah contracts follows all the terms and conditions as well as requirements imposed by the Shafie school of thought, BNM has also issued guidelines and circulars pertaining to the bai’ al-‘inah contract. In addition, it is also clearly observed that, to ensure it is compliant with the requirements, we can refer to the meaning of the bai’ al-‘inah defined by BNM itself. According to BNM, bai’ al-‘inah can be defined as a “sale contract followed by repurchase by the seller at a different price”. All the requirements imposed by BNM to ensure it does not contravene with the Shariah will be explained in detail in the next topic on the implementation of the bai’ al-‘inah contract into the Islamic financial products from the current Islamic banks.

3.0 Current Application of Bai’ Al-‘Inah in the Islamic Banking and Finance Products

Currently, bai’ al-‘inah has been widely used by Islamic Bank as the underlying contract for personal financing and home financing products. It is noted that several Islamic products known as bai’ bithaman ajil contracts. Personal financing products have been developed for providing cash assistance; while, home financing products have been developed to assist customers to purchase house. Henceforth, this chapter will explain the basic structure of the personal financing products as well as home financing products that apply bai’ al-‘inah as an underlying contract to ensure a clear understanding before we discuss on the Shariah issues pertaining to the bai’ al-‘inah contracts.

3.1 Personal Financing Product Structure

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Example situation of the above structure:

i. In the first contract, the customer applies for personal financing of RM10,000.00 from the Islamic bank. Then the bank will offer Islamic financing product based on bai’al-’inah contracts. The bank will sell a bank asset (as an underlying asset) to the customer with the price of RM12,000.00, comprising of cost and profit on a deferred payment basis.

ii. In the second contract, customer then sells that asset back to the bank (to obtain the cash).

iii. The bank will pay RM10,000.00 in cash to the customer.

iv. Finally the customer will pay a monthly installment to the bank of RM500.00 for 24 months as per agreed between the bank and customer.

Thus, in the above transactions, it is noted that the purposes of the bai’al-’inah contract has been fulfilled when the customer obtains the cash and the asset has been sold back to the Islamic bank. In the customary practices within the Islamic bank, the first contract is also known as a Property Sales Agreement (PSA), and the second contract is referred to as a Property Purchase Agreement (PPA). Some banks term these transactions as Asset Sales Agreements (ASA) and Asset Purchase Agreements (APA). Usually, in personal financing, the PSA or ASA agreement will come first, followed by the PPA or APA agreement. It needs to be noted that the most important element is to ensure the first and second contracts must be in the right sequence as per bai’al-’inah requirements.

3.2 Home Financing Product Structure
Descriptions of the above structure:

i. The customer identifies the house that he wants to purchase (usually with a 10% deposit to the developer). Then, the customer applies for Islamic home financing with the Islamic Bank. The bank will offer an Islamic home financing product to the customer based on bai’ al-‘inah concept. The bank then purchases that house (as an underlying asset) from the customer.

ii. The bank then pays out cash to the customer.

iii. Afterwards, the bank sells the same house back to the same customer. The payment is on a deferred payment basis with monthly installments, as per agreed earlier in the contract between the bank and customer.

iv. The bank can grant Ibra’ or rebate (if any) to the customer in certain circumstances e.g. upon early settlement by the customer.

Thus, in the above transactions, it is noted that the purpose of the bai’ al-‘inah between the Islamic bank and the customer has been fulfilled accordingly. Contrary to the personal financing product, whereby the asset will be sold back to the Islamic bank, in the home financing product, the asset will be sold back to the first and same customer. Similar to the Islamic personal financing, the aqad or contracts involved are also known as PPA and PSA, or APA and ASA. Usually, in Islamic home financing, the PPA or APA agreement will come first, followed by the PSA or ASA agreement.

4.0 Roles and Responsibility of BNM

Bank Negara Malaysia (BNM) has to play an important role by imposing related guidelines and circulars on bai’ al-‘inah to all the Islamic banks as a guide in ensuring that the bai’ al-‘inah products are properly structured and implemented. Among the important elements stated in these guidelines are as follows:

i. To avoid any inter-conditionality elements, each sale agreement and purchase agreement must be documented in two separate sets of documents.

ii. The sale agreement or the purchase agreement must not contain any provisions which create a conditional obligation on either party to repurchase assets already sold or to resell the assets already purchased under the respective agreements.

iii. The sale and purchase agreements must be executed in the proper sequence, whereby the first contract must be completed first before starting the second contract or agreement. Hence, to ensure its execution in the proper sequence,

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6 Mohd Kamal Hafis Razali (Shariah Review and Compliance, Bank Simpanan Nasional), interview by Researcher, 1st April 2015.
7 Mohd Kamal Hafis Razali (Shariah Review and Compliance, Bank Simpanan Nasional), interview by Researcher, 1st April 2015; Mohamad Kamil Abu Talib (Shariah Governance, AmIslamic Bank), interview by Researcher, 15th April 2015.
Islamic banks are expected to record the time (time stamp) of execution or signing of both agreements as evidence of compliance with this Shariah requirement.

iv. To ensure that the parties involved in bai’ al-‘inah transaction observe the conditions on ijab (offer) and qabul (acceptance) as approved by the Shafie school of thought and ensure its proper sequence, both contracting parties in bai’ al-‘inah transaction are required to fully observe the following Shariah requirements:
   a) The seller must endorse the offer to sell the asset to the purchaser by initiating the signing of the sale and purchase agreement, followed by the signing of the same agreement by the purchaser as endorsement of acceptance to purchase the asset.
   b) Pre-signing elements are prohibited for both purchaser and seller.
   c) Any contracting party must not provide either written or verbal promise to repurchase or resell the asset.

v. The ownership in the asset sold in the bai’ al-‘inah transaction must be effectively transferred from the seller to the purchaser.

vi. The Islamic bank is also expected to conduct regular operational reviews on bai’ al-‘inah transactions to ensure that all conditions are fulfilled to ensure compliance with all the Shariah requirements.

In addition to above requirements, it is also suggested that the Islamic bank may record the date (date stamp) besides the time stamp on both agreements, either purchase agreement or sale agreement.

5.0 The Application of Bai’ al-‘Inah among Banks in Malaysia

This topic will try to explore the Islamic products, particularly Islamic personal financing and Islamic home financing, that apply bai’ al-‘inah as underlying contracts within the local banks in Malaysia. This research has been done by using surveys through an internet-based approach, whereby all the information was found in each of the banks’ websites. According to the guidelines on Product Transparency and Disclosure imposed by BNM, every Islamic bank needs to explain briefly on the Shariah concept applicable to these Islamic products before applying for the real contract. It also helps in avoiding the element of gharar (uncertainty). Below is the list of banks in Malaysia which operate Islamic financial products that apply bai’ al-‘inah as underlying contracts. This data has been taken from the websites of each of the banks as of May 2015.

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<th>No.</th>
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<th>Home Financing</th>
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<td>BBA Home/Property Financing-i</td>
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6.0 Shariah Issues in Bai’ al-‘Inah: Sequence of Aqad in Bai’ al-‘Inah Transaction and Its Solutions

There have been many Shariah issues that have arisen due to the execution of the bai’ al-‘inah concept towards Islamic financial products. However, this chapter will try to focus on only one issue, which is the issue of the implementation of the sequence of aqad. This issue has always been a hurdle in bai’ al-‘inah based concepts and is a crucial issue that needs to be rectified. The impact of this issue may lead to voiding of the aqad contracts, which would require drastic solutions from the Shariah committees of the banks. Hence, to ensure a better understanding of the issue pertaining to the sequence of aqad, this chapter will focus on Islamic personal financing and Islamic home financing products in terms of Shariah implementation aspects and operation aspects of the products. However, it needs to be stated that this research will only examine three Islamic banks, which are AmIslamic Bank, Bank Simpanan Nasional (BSN) and lastly Agro Bank. Interview sessions will be conducted to obtain the data needed between the researcher and the Shariah Officers within those banks.

Before we discuss the main issue in further depth, it needs to be noted that there is a difference between Islamic personal financing products and Islamic home financing products that are based on the bai’ al-‘inah concept pertaining to the execution of the aqad process. For Islamic personal financing products, the execution of the aqad process will be done between the bank and the customer with the execution of the sale and purchase contract. Meanwhile, in the Islamic home financing product, the aqad process will be executed between the solicitors as a wakil (an agent) for the bank and the customers.

6.1 Issue of the Sequence of the Implementation of Aqad

The issue of aqad sequence in bai’ al-‘inah concept can be stated as an improper sequence of aqad in each sale and purchase agreement, whereby the aqad process in both agreements are not in different intervals in a proper sequence. This issue might have happened in the events of pre-signing the agreement, whereby the customer may have signed both of the agreements first before completing the first agreement. According to the Shariah requirements, the first aqad must be completed first, followed by the second agreement. In current industry practices, as a sign of aqad as well as the ijab and qabul process, the first agreement needs to be signed by both the contracting parties, which are the bank and customer, to complete the first agreement, followed by the second agreement. For example, in the execution of Islamic personal financing, in the first agreement, the bank will sign off first as the aqad of ijab (offer) to the customers, and subsequently, the customers need to sign off as the aqad of qabul (acceptance). In this stage, the asset belongs to the customers. After the first agreement is completed, the second agreement must to be executed whereby customers will offer to sell back the asset to the bank. Thus, in the second agreement, customers will sign first as the aqad of ijab to the bank, and the bank will sign off as the aqad of qabul. In the final stage, the bank possesses the asset again and the customer will get their cash from the personal financing contract. In reality, the bank will usually ask the customer to sign off both of the agreements at the same time in order to simplify the process. Hence, due to that event, the issue of non-Shariah compliance pertaining to the sequence of aqad occurs, which needs to be rectified.

6.2 Detection of the Issues

In order to assist the Shariah committees in carrying out their duties and responsibilities in ensuring all the services and Islamic products are in line with the Shariah requirements, the banks are expected to establish Shariah compliance functions through reviews and audits, and support these functions through risk management control functions and internal research capabilities. This task is usually carried out by qualified Shariah audit and Shariah review and compliance functions. According to the Shariah Governance Framework (SGF) by BNM, the Shariah Audit refers to “the periodical assessment conducted from time to time in order to ensure Shariah requirements are being met by the bank or institution, that the bank or institution is in compliance with its Aqad ‘Inah programs,“ 18

20 Mohd Kamal Hafis Razali (Shariah Review and Compliance, Bank Simpanan Nasional), interview by Researcher, 1st April 2015; Mohamad Kamil Abu Talib (Shariah Governance, AmIslamic Bank), interview by Researcher, 15th April 2015; Mohd Syarif Amin Abdul Rahim (Shariah Review and Compliance, AmIslamic Bank), interview by Researcher, 15th April 2015; Ahmad Humaizi Deraman (ex-Shariah Review, Agro Bank), interview by Researcher, 8th April 2015.
22 Mohd Kamal Hafis Razali (Shariah Review and Compliance, Bank Simpanan Nasional), interview by Researcher, 1st April 2015; Mohamad Kamil Abu Talib (Shariah Governance, AmIslamic Bank), interview by Researcher, 15th April 2015; Mohd Syarif Amin Abdul Rahim (Shariah Review and Compliance, AmIslamic Bank), interview by Researcher, 15th April 2015; Ahmad Humaizi Deraman (ex-Shariah Review, Agro Bank), interview by Researcher, 8th April 2015.
time, to provide an independent assessment and objective assurance designed to add value and improve the degree of compliance in relation to the Islamic Financial Institutions (IFI’s) business operations, with the main objective of ensuring a sound and effective internal control system for Shariah compliance. Meanwhile the Shariah Review function refers to “regular assessment on Shariah compliance in the activities and operations of the IFI by qualified Shariah officer(s), with the objective of ensuring that the activities and operations carried out by the IFI do not contravene with the Shariah. Usually, Shariah issues may be detected from the Shariah Audit planning conducted by Shariah Audit Functions and regular Shariah Review assessment performed by Shariah Review Functions. One of the approaches is checking the documentation involved in the Islamic financial products.

There are many types of aqad processes that are endorsed by Shariah principles. The two most important aqad types broadly used in current Islamic financial products are written aqad (aqad bi al-kitabah) and verbal aqad (aqad bi al-khitabah). The signatures of all contracting parties involved in the agreements are considered as a written aqad process. Meanwhile, a verbal aqad process is performed by two-way communication between the contracting parties through telephone conversations. Usually, in verbal aqad, the communication process will be recorded to legally enforce the aqad.

Therefore, from both aqad processes, which are aqad bil kitabah and aqad bi al-khitabah, the issue pertaining to the sequence of aqad can be detected as follows:

i. Written Aqad:
   Failure to sign off in the column provided in the agreements and failure to insert the date and time stamps in the agreements. Besides that, pre-signing performed by contracting parties can be detected when the signing between contracting parties in the both agreements is shown to be recorded at the same time.

ii. Verbal Aqad:
   The issue can be detected from the script recorded by the bank.

6.3 Shariah Solutions According to the Current Shariah Committee’s Decision

This topic will try to briefly explain the steps that taken by the Shariah committee (SC) to resolve the issue pertaining to the sequence of aqad as well as their opinions and Shariah justifications towards the issue:

i. First Step:
   The Shariah officer presents the issue of non-compliance which happened at the execution of the contracts for the SC to give a clear picture of the issue in terms of Shariah perspectives and operation perspectives. Besides, the SC will also be informed of the causes that lead to the issue, whether it was human error or system error.

ii. Second Step:
   After deliberations made by Shariah officer, the SC will decide whether the issue is a potential issue or an actual issue:

   a) Potential Issues:
      Any pending decision by the SC on the identified issue shall be treated as potential Shariah non-compliance event. Hence, any potential Shariah issues made by the SC will need further deliberation and investigation by Shariah officer. Then, the same issues will be presented in the next meeting. If the issue is decided as an actual Shariah non-compliance issue, then the next process will be explained in the next point. If the issue is determined as a non-issue, that issue will be removed from the list of Shariah issues.

   b) Actual Issue:
      If the issues are treated as an actual Shariah non-compliance, there will be two implications that need to be considered, which comprise of financial implications and non-financial implications. If the issue impacts

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24 Ibid.
25 Mohd Kamal Hafis Razali (Shariah Review and Compliance, Bank Simpanan Nasional), interview by Researcher, 1st April 2015; Mohamad Kamil Abu Talib (Shariah Governance, AmIslamic Bank), interview by Researcher, 15th April 2015; Mohd Syarif Amin Abdul Rahim (Shariah Review and Compliance, AmIslamic Bank), interview by Researcher, 15th April 2015; Ahmad Humaizi Deraman (ex-Shariah Review, Agro Bank), interview by Researcher, 8th April 2015.
26 Ibid.
27 Ibid.
28 Ibid.
financial income, the income derived will need to be cleansed through charity. If the issue is treated as a non-financial impact, corrective actions will need to be taken to rectify the issue.

6.4 Sequence of Aqad Issues in Bai’ al-Inah Contract

Regarding to the issue of the sequence of aqad, the decision will be deliberated by the SC as either a potential or actual non-compliance issue30:

i. Potential Issue:
   According to the interview session organized between the Shariah officers, usually the issue will be treated as potential non-compliance issue due to human error. Some of the bank’s officers or solicitors may also have forgotten to write down the time and the date in the agreements.

ii. Actual Issue:
   The issue will be decided as an actual non-compliance issue after several factors have been considered. After deep investigations between the Shariah officer and the bank’s personnel and representatives for the aqad process, as well as the solicitors, they will confirm whether the issue is an actual Shariah non-compliance issue, possibly due to pre-signing events or any other events that may be considered as a cause towards the issue.

6.5 Justifications of the Shariah Committee According to Shariah Principles

From this procedure, the issue was confirmed by the SC, as the aqad has already been voided, breaching the aqad process. The violation is the performance of the two aqad in the bai’ al-inah process, which consist of the sale and purchase contracts, at the same time, without the completion of the first contract. As mentioned in the Hadith of Prophet Muhammad (peace be upon him): “Rasulullah (peace be upon him) prohibited two transaction within one31”.

6.6 Impact Resolution by Shariah Committee

Considering the agreements in the personal financing and home financing products have already decided as null and void according to Shariah principles, some steps will need to be taken to rectify and resolve the issue32:

i. Financial Impact:
   If financial impacts happen when the contracts have already been drawn, the contracts need to be executed once again between the bank and the customers. For example, the customer has already committed by paying monthly installments, or receiving the cash disbursement. In addition, the profit derived from that transaction (before corrective measures are taken) is considered as non-Shariah compliant profit and will be cleansed by directing it to charity.

ii. Non-Financial Impact:
   If a non-financial impact occurs in the early stages of the contract, or if the cash is still not disbursed to the customers’ accounts, the bank only needs to re-execute the aqad to ensure that it is compliant with Shariah requirements.

7.0 Conclusion

In conclusion, it is observed that the bai’ al-inah contract is a controversial contract. To avoid from any Shariah non-compliance event, certain requirements, terms and conditions according to the Shafie school of thought need to be observed properly. It is also observed that the main factor that leads and contributes to the Shariah non-compliance issues is the human factor. Thus, it is suggested that every bank improves their bank personnel with Shariah related knowledge and understanding, especially on the basic requirements of the Shariah contracts and their applications towards the bank’s products. Besides that, it is suggested that Islamic banks should explore other Shariah concepts that are suitable for their Islamic financial products, especially in Islamic personal financing and Islamic home financing, to ensure that they are in line with all the Shariah requirements and principles. At the same time, this practice can help avoid bad impacts to the bank from either financial impact, or reputational risk impact.

30 Mohd Kamal Hafis Razali (Shariah Review and Compliance, Bank Simpanan Nasional), interview by Researcher, 1st April 2015; Mohamad Kamil Abu Talib (Shariah Governance, AmIslamic Bank), interview by Researcher, 15th April 2015; Mohd Syarif Amin Abdul Rahim (Shariah Review and Compliance, AmIslamic Bank), interview by Researcher, 15th April 2015; Ahmad Humaizi Deraman (ex-Shariah Review, Agro Bank), interview by Researcher, 8th April 2015.


32 Mohd Kamal Hafis Razali (Shariah Review and Compliance, Bank Simpanan Nasional), interview by Researcher, 1st April 2015; Mohamad Kamil Abu Talib (Shariah Governance, AmIslamic Bank), interview by Researcher, 15th April 2015; Mohd Syarif Amin Abdul Rahim (Shariah Review and Compliance, AmIslamic Bank), interview by Researcher, 15th April 2015; Ahmad Humaizi Deraman (ex-Shariah Review, Agro Bank), interview by Researcher, 8th April 2015.
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