

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 AmIslamic 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 AmIslamic 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 *fatwa* or decisions¹.

¹ Bank Negara Malaysia (BNM), "Guidelines on the Governance of Shariah Committee for the Islamic Financial Institutions" (BNM/RH/GL/012-1), page: 4, Bank Negara Malaysia (BNM), "Shariah Governance Framework for Islamic Financial Institutions" (BNM/RH/GL_012_3), 30.

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”². 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*”³.

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 rule 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

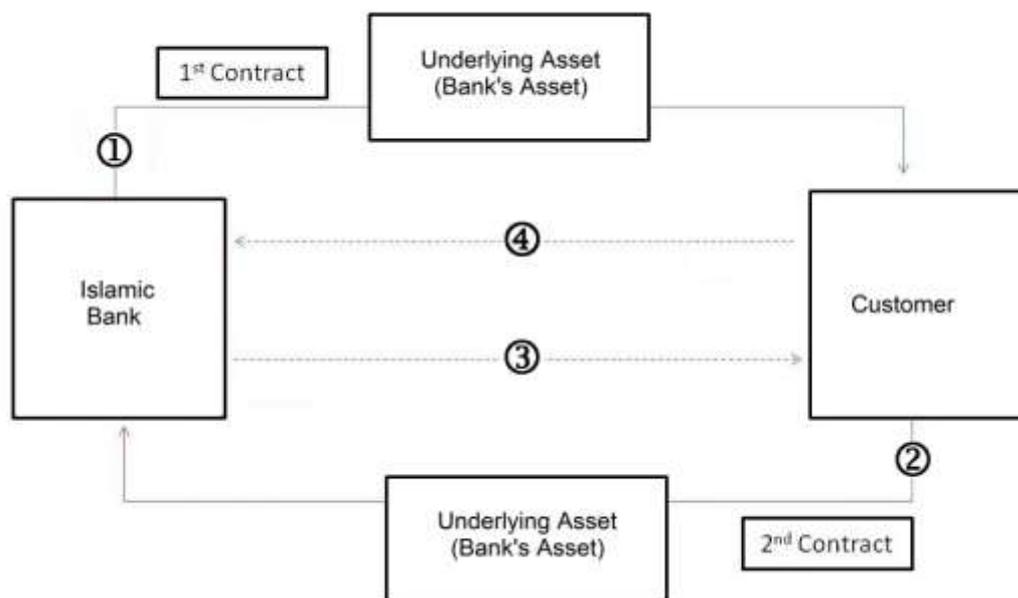
Currently, *bai' al-'inah* has been widely used by Islamic Bank as the underlying contract for personal financing and home financing products. It is noted that some of these Islamic products known as *bai' bithaman ajil* contracts. Personal financing products have been developed for providing cash assistance; 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

² International Shari'ah Research Academy for Islamic Finance (ISRA), “*Islamic Financial System; Principles & Operations*” (Kuala Lumpur: ISRA 2011), Page: 220, Ibn 'Abidin, “*Hasyiah Rad al-Muhtar*”, (Beirut: Dar Al Fikr, 1992, vol. 5, 273 & 325.

³ Zaharuddin Abd, Rahman, “*Panduan Perbankan Islam*”, (Kuala Lumpur: Telaga Biru, 2009), 27 -31.

Bai' Al 'Inah Structure (Personal Financing)



Example situation of the above structure⁴:

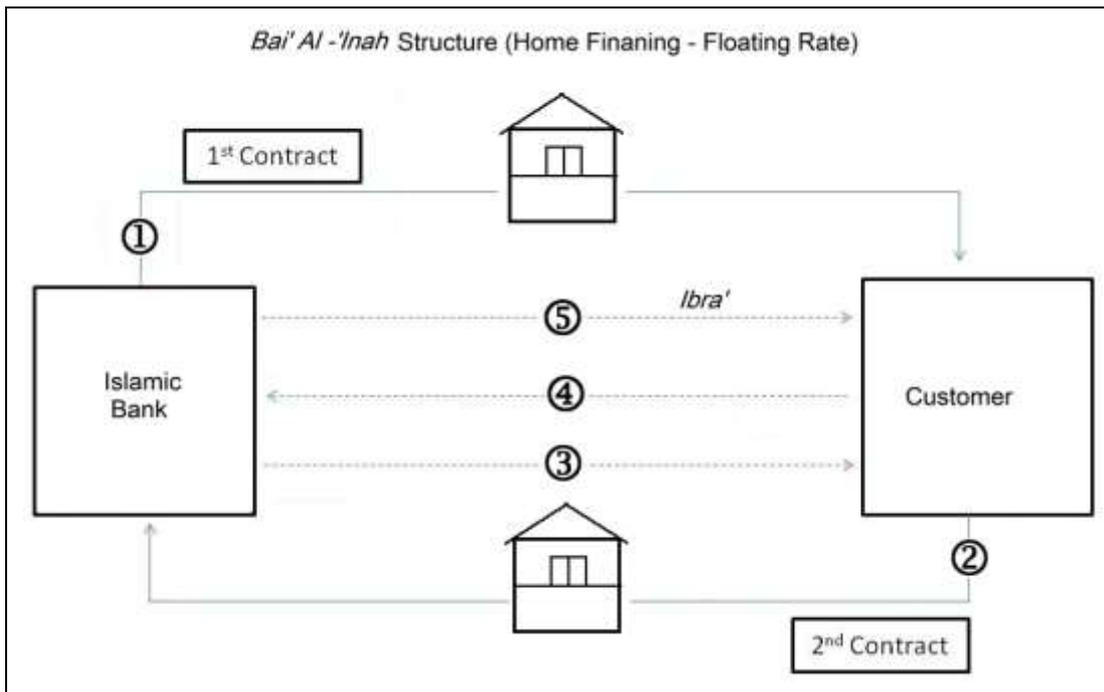
- i. In the first contract, the customer applies for personal financing of RM10,000.00 from the Islamic bank. Then the bank will offer Islamic financing product based on *bai' al-'inah* contracts. The bank will sell a bank asset (as an underlying asset) to the customer with the price of RM12,000.00, 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 agreement⁵. 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

⁴ Mohd Kamal Hafis Razali (Shariah Review and Compliance, Bank Simpanan Nasional). Interview by Researcher, 1st April 2015.

⁵ 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, 15^h April 2015.



Descriptions of the above structure⁶:

- 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 agreement⁷.

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 implemented⁸. 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,

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, Amlslamic Bank), interview by Researcher, 15^h April 2015.

⁸ Bank Negara Malaysia (BNM), "Implementation of Shariah Advisory Council of Bank Negara Malaysia's Resolution on *Bai' 'Inah*" (BNM/RH/CIR 008_21, issued on 1 November 2013), 1-8.

- 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 the 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* requirements⁹.

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 concepts* applicable to the financing facility to the customers at the pre-contractual stage¹⁰. One of the methods used is disclosing the *Shariah concept* at the website. The main purpose of this exercise is to ensure that the public is well-informed on any *Shariah contracts* 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.

No.	List of Bank	Personal Financing	Home Financing
1.	AmIslamic Bank ¹¹	AmMoney Line Facility-i Personal Financing-i	BBA Home/Property Financing-i
2.	Agro Bank ¹²	AgroCash-i	-
3.	Affin Islamic ¹³	-	-
4.	BSN ¹⁴	-	AN NAIM Home Financing-i AN NAIM Commercial-i
5.	Bank Rakyat ¹⁵	-	-
6.	Bank Islam ¹⁶	-	-
7.	Bank Muamalat ¹⁷	-	-
8.	Maybank Islamic ¹⁸	ExeCash-i	-

⁹ Bank Negara Malaysia (BNM), "Implementation of *Shariah Advisory Council of Bank Negara Malaysia's Resolution on Bai' 'Inah*" (BNM/RH/CIR 008_21, issued on 1 November 2013), pages: 1-8.

¹⁰ Bank Negara Malaysia (BNM), "Guidelines on Product Transparency and Disclosure" (BNM/RH/GL 000-3), Schedule II, Islamic Banking Products, 1.

¹¹ AmIslamic Bank <www.ambankgroup.com/eng/islamic/OurBusiness/Personal/Financing/Pages/default.aspx> (accessed on 15th May 2015).

¹² Agro Bank, <www.agrobank.com.my/product/agrocash-i-2/> (accessed on 15th May 2015).

¹³ Affin Islamic Bank, <<http://www.affinislimic.com.my/Consumer-Banking/Consumer-Financing-i.aspx>> (accessed on 15th May 2015).

¹⁴ Bank Simpanan Nasional, <<http://www.mybsn.com.my/content.xhtml?contentId=175>> (accessed on 15th May 2015).

¹⁵ Bank Rakyat, <<http://www.bankrakyat.com.my/personal-financing-i-rakan-pintar>> (accessed on 15th May 2015).

¹⁶ Bank Islam Malaysia, <<http://www.bankislam.com.my/home/personal-banking/financing-products/>> (accessed on 15th May 2015).

¹⁷ Bank Muamalat, <www.muamalat.com.my/consumer-banking/financing/mortgage> (accessed on 15th May 2015).

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 customers²⁰.

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 sequence²¹. 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 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 rectified²².

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

¹⁸ Maybank Islamic, <<http://www.maybank2u.com.my/Islamic/en/personal/financing.page>? (accessed on 15th May 2015).

¹⁹ RHB Bank, <http://www.rhb.com.my/islamic_banking/financing/pensioner_personal_financing-i.html> (accessed on 15th May 2015).

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, 15^h 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, 8^h April 2015.

²¹ Bank Negara Malaysia (BNM), "Implementation of Shariah Advisory Council of Bank Negara Malaysia's Resolution on Bai' Inah" (BNM/RH/CIR 008_21, issued on 1 November 2013), 1-8.

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, 15^h 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, 8^h 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"²³. 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*"²⁴. 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*²⁵.

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 follows²⁶:

- 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 time²⁷.
- ii. **Verbal *Aqad*:**
The issue can be detected from the *aqad* 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 issue²⁸:

- 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 issue²⁹:
 - 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

²³ Bank Negara Malaysia (BNM), "*Shariah Governance Framework for Islamic Financial Institutions*" (BNM/RH/GL_012_3), 22-23.

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, 15^h 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, 8^h April 2015.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Bank Negara Malaysia (BNM), "*Circular on Shariah Non-Compliance Reporting*" (BNM/RH/CIR 012-4, issued on: 15 March 2013), 1-10.

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 one*³¹".

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, 15^h 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, 8^h April 2015.

³¹ Al Kashmiri, Muhammad Anwar Shah Muazzam Shah, "*Al 'Arafush Shazi Sharah Sunan At-Tirmidhi*" (Beirut: Dar Ahya' At Thurath Al Arabi, n.d.), vol. 3,19.

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, 15^h 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, 8^h April 2015.

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