REVIEW OF *FATWAS* ISSUED DURING ALBARAKA BANKING GROUP SYMPOSIUMS
(THE SECOND PART)

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In the name of Allah, the most Gracious, the most Merciful. Praise is to Allah. May blessings and greetings be on the Holy Prophet s.a.w, which was sent as a mercy to the universe, his pure relatives, his noble Companions, and anyone who follows them with righteous deeds.

It is worth noting that the efforts of the Research and Development Division of the Albaraka Banking Group in organizing economic symposiums in the month of Ramadhan is unprecedented.

As at now, the number of symposiums organized so far has reached 29. In addition to that, there are also research and discussion circles, discussion of issues, and publication of economic books, academic research, and journal.

It is compulsory on the other Islamic financial institutions to emulate this practice, because with the scale of their projects, the amount of their assets and the extensiveness of their financial instruments, more research needs to be conducted.

The Islamic financial institutions must also develop financial instruments and products, so that the new products can match the growth of the industry. This is because without suitable products, problems such as defects may occur. May Allah protect us against such things.

On several occasions, I have approached those concerned to channel a percentage of their profits to research centres, so that the said centres are able to conduct comprehensive research that cover all aspects of Islamic banking, Islamic financial

engineering, and the development of products, financial instruments and relevant tools.

The research should cover all aspects of *fiqh*, economics, *maqasid shari'ah* and credit. The economic symposiums organized by the Albaraka Banking Group are playing a good role in resolving deep rooted issues relating to Islamic financial institutions, provide sizeable services for them, useful alternatives, useful products, simplified *fatwas*, except that some of them were based on juristic *rukhsah* and the removal of difficulty, in consonance with Islamic *fiqh* and its principles.

At that time, those *fatwas* were suitable, as the Islamic financial institutions had just commenced their operations, coupled with limited resources and assets, limited numbers (no critical mass) and preparation, lack of supportive institutions, non-recognition by the regulatory authorities and so on.

However, with the following developments, it is now time for the Islamic banks to be ruled by strict legal implementations in place of *rukhsah*, ruled with *fatwas* that have continuous enforcement and not ones with temporary or based on the stages/phases of the subject matter of the *fatwa*:

1. Widespread provision of Islamic banking products and services;
2. Increasing number of Islamic financial institutions;
3. Increasing amount of assets and deposits;
4. Support by many international institutions;
5. Recognition of central banks, e.g. supervision of Islamic banks, in accordance with specific standards and guidelines;
6. Enactment of special laws for Islamic banks;
7. Introduction of Islamic financial products that can serve the needs of governments, organizations and individuals; and
8. Islamic banking has expanded globally.

It is also timely for Islamic financial institutions to consider the *maqasid shari'ah* in the prohibition of *riba* and consider the requirements of being a vicegerent, which is to develop the land (with what pleases Allah). The *fatwa* (regarding Islamic finance)

should now look beyond mere validity in the *Shari'ah* and look towards the end result and the welfare of the *ummah*.

Due to this, the Albaraka Banking Group has specified part of the 29th symposium to be on the review of some *fatwas*, as a response to those standard visions mentioned, though the review will be completed next year, insha Allah.

Though, as we are confirming those driving factors and guiding principles that are embedded in the invitation to carry out this research from the honourable head of the Albaraka Banking Group, Sheikh Salih Kamil, we also value this situation and honour it, in consideration that it is a sense of fulfilling the greatest responsibility, with regard to these *fatwas* and interpretation of the *fatwas*, on a gradual basis.

This situation is also a gradual movement, alongside the development that leads to moving forward in the world of ever changing circumstances; if not, then, it will be lagging behind and suffer backwardness. The following saying of Allah applies:

Quran 74:37 "To any of you that chooses to press forward, or to follow behind".

In this verse, Allah did not say 'or he stop' because to stop is inclusive of lagging behind, while the world is progressing. Besides, all the existing living things did not know about stay-still in their inward like outward. This is how the activity of human being ought to be, so that he can actualize the best, which is the progress of civilization, continuation and moving forward. Allah said in the Qur'an, surah 67, verse 2, "that He may try which of you is best in deed".

Verily, review of *fatwas* by the same *mufti* or by others who came after him is a tradition in this *ummah*. For example, the four rightly-guided Caliphs reviewed the *fatwas* of their predecessors, except if it was within the domain of *ijma'* (consensus). There are many *fatwas* issued in the era of Umar, or Uthman or Ali that differ from the *fatwas* issued by their predecessors. A similar approach was also used by the *tabi'in* (the followers of the Companions) and their successors. In addition, even

some of those *mujtahidun* used to issue *fatwa* which is contrary to his previous *fatwa*. In such a situation, he will say that the former *fatwa* remains as it is, while the status of the latter is maintained. This is Imam Shafie, who has two *madzhab*: the former in Iraq and Hijaz while the latter in Egypt. Similar situations occurred with many other *mujtahidun*, both the classical ones and contemporary ones. This is prompted by the changing circumstances, conditions, environments and emergence of new proofs or misappropriations of the previous *fatwa* or due to taking *fiqh maqasidi* into consideration; taking the end result and *sad al-zariah* into consideration.

Accordingly, in my view, the review of these *fatwas* is a splendid effort and brings great benefits the Albaraka Banking Group and the Islamic financial system. It is confirmed through experience that *fiqh* of the original rulings and *azimah* (implementation of rulings in their strict legal sense) are the factors that lift up the *ummah* towards civilization and development, while *fiqh* of *rukhsah* is peculiar to exemptions, with the aim of removing difficulties, while not moving the *ummah* forward or accelerating it towards strength and development.

As we are delighted with this review, we also feel great to contribute to it (the review), with this humble research. We ask Allah the Exalted in Might to make it solely for His sake and cover it with the cloth of acceptance and sincerity. He (Allah) is enough for me. He is my protector, what a Protector He is and what a Supporter He is!

Introduction to *maqasid shari'ah* in the Islamic financial business

This part is an introduction to *maqasid shari'ah* in the Islamic financial business, understanding the end result and blocking the means that lead to impermissibles (*haram)* and the prohibition of tricks and differences between *rukhsah* made by the *Shari'ah* and *rukhsah* as a result of juristic *ijtihad*.

This summary is as follows:
The study of *maqasid shari'ah* has almost become a basic element in contemporary studies. This is due to its great importance in understanding the *Shari'ah* texts. For

this reason, it becomes necessary for us to treat something on *maqasid shari'ah* in economics in general and in the Islamic financial system in particular.

If we observe the verses of the Holy Quran and the authentic Hadith of the Prophet s.a.w., we arrive at a conclusion that the *maqasid shari'ah* in economics and its system, from Islamic point of view, are the following:

1. Using the soil for benefit and for settlement, with all available means. This is what the Holy Quran said, "It is He Who hath produced you from the earth and settled you therein"....[1] Allah the Exalted in might has enjoined in this verse that the soil be utilized for any favorable kind of use. It is because of this that Allah has enjoined us to move around the earth, in searching of necessities. This enjoinment is made in the same manner He enjoined prayers, pilgrimage, fasting and others. Allah says, "And when the prayer is finished, then may ye disperse through the land, and seek of the Bounty of Allah. And celebrate the Praises of Allah often (and without stint): that ye may prosper".[2] The enjoinment to get dispersed on the land, to utilize it or benefit from its bounties through trading, manufacturing and agriculture, in order to actualize the means of livelihood, is made in the same manner it is enjoined to go for prayers; to do the remembrance of Allah. This makes it apparent that sourcing for the needs of life is also considered as worshiping Allah. It is of course, a different types of worshipping. Part of it concerns the reform of human beings, so that they will be suitable as vicegerents; performing their duties on earth. The second part is the development of the land, namely for human settlement. The two parts however, are in agreement because they are both enjoined by Allah. Besides that, there are many verses in the Holy Quran that mentions that Allah subjugated this world for humans, including the heavens, the earth and everything between them; the suns, the moons, the stars, the seas, the mountains, wind, clouds, rain, the mineral resources in the earth, raw materials, and bounties and blesses. Islamic economics takes various benefits from this world, in order achieve virtue, mercy and fortune, in favour

[1] Surat Hud verse 61

[2] Surat al-jumah verse 10

of everyone. It then means that in the course of achieving this, brilliant plans need be made to achieve the intended goal and this divine objective;

2. Human development must encompass the knowledge and social aspects, healthcare and human resources. These are done by spending valuable resources to achieve real developments for humans, who have been entrusted with the development of the land; the type of development is one that encompasses all those components, as well as his (mankind) spirit, soul, intellect, reasoning, imagination, mental faculties, body, material and immaterial build-up, so that he becomes honoured. Doing this requires the provision of a suitable atmosphere, in order to actualize his human rights, as well as freedom, so that he can invent and innovate. This is so because human beings that is less honoured in his humanity and without a protected personality is unstable and not firm. This is what the Holy Quran pointed at, as follows, “Allah loveth not that evil should be noised abroad in public speech, except where injustice hath been done...” in chapter 4, verse 148. This means that someone who has been unjustly dealt with may be affected by the injustice and consequently, he will louden evil speech. Due to this reason, there will be no room to querying him on doing that. Besides, Allah the Exalted in might has made it explicit that someone without freedom is not capable of inventing and innovating, as well as executing affairs in a proper manner. In this regard, Allah said, “Allah sets forth the Parable of two men: one a slave under the dominion of another; He has no power of any sort; and (the other) a man on whom We have bestowed goodly favours from Ourselves, and he spends thereof (freely), privately and publicly: are the two equal? (By no means ;) praise be to Allah. But most of them understand not. “Allah sets forth (another) Parable of two men: one of them dumb, with no power of any sort; a wearisome burden is he to his master; whichever way be directs him, he brings no good: is such a man equal with one who commands Justice, and is on a Straight Way”? The United Nations confirmed a report, i.e. for more than one quarter of a century, despite the hundreds of millions spent on the developing countries, the countries did not achieve significant achievements because of poor human development, lack of human rights and low quality education. The report emphasized that illiteracy, injustice, dictatorship, lack of civil liberty and negligence of human rights in those

countries are the major impediments for economic development. It is the cause for their lagging behind. Therefore, it is incumbent on the Islamic economic and financial institutions to focus on investing in human development, through sponsoring educational projects and its development, social development and health development;

3. Actualization of economic development through the assessment of anything that will assist in developing sources of incomes for the Muslim *ummah* (both nations and the citizens). This is why the Qur'an repeatedly enjoined the actualization of profit, which Allah referred to as taking utilization by virtue of Allah. Allah says in surah Al-jumaat, verse 10, "And when the Prayer is finished, then may ye disperse through the land, and seek of the Bounty of Allah..." The *mufassirun* say that the meaning of the verse is that when we dispersed on the land for trading and transactions, we should seek profits. This was repeatedly mentioned in the Holy Qur'an, using different terms. Allah also permits using certain places of *ibadah*, like pilgrimage, for the achievement of profits. Allah said, "It is no crime in you if ye seek of the bounty of your Lord (during pilgrimage). Then when ye pour down from (Mount) Arafat, celebrate the praises of Allah..." What attracts attention in these verses is that after Allah has commanded that people should disperse through the land for transactions after finishing the *jumaat* prayer, He then continued with the instruction to celebrate His remembrance. It is similar for *hajj.* This means that there should be counterbalance between seeking for sustenance, profits and the remembrance of Allah, which is not supposed to be neglected in any situation. It is not the aim of Islamic economics to acquire wealth at all costs, through any means. This is why Allah prohibits *riba*. He prohibits *riba*, even if both parties agree to give and take *riba*. He cursed the taker of *riba*, as well as the giver, who does not appear to be unjust. However, the fact is that he is unjust to the rights of Allah and the rights of the society. This is why Allah called it unjust. Allah said, "But if ye turn back, ye shall have your capital sums: Deal not unjustly, and ye shall not be dealt with unjustly". This is because cash by itself does not produce cash. There is no addition that accrues to it for its circulation through buying and selling. It does not lead to any role in economics. Rather, it will increase inflation and unemployment, contrary to running transactions through commodities and services, which will

result to the operations of the market, as well as actualization of development and getting rid of inflation and unemployment. In addition to the unjust nature of *riba*, in a *riba*-based contract, the lender takes advantage of the borrower. The lender is guaranteed of his capital and addition to the capital, without bearing any responsibility and without any work, whereas the borrower is the one bearing all of these or he spent it for his needs;

4. Alleviation of poverty and hunger, let alone, actualization of well being, as well as luxury, or what the jurists called actualization minimum standards of living for individuals. Similarly, group and the generality of the *ummah*, as expressed by Imam Shafie in his discussion on the quantity of *zakat* that should be given to the poor or the needy. This is because the Qur'anic verses and the Prophetic traditions enjoin the investment in agriculture, trade, manufacturing and the actualization of livelihood and leaving behind a successor, in addition to the compulsion of giving the rights of the poor and the needy, as well as achieving the fortunes of this world and the hereafter. Doing these will warrant setting a strategic plan that will cover investments, economic projects, social developments (aside from *zakah* institutions), *sadaqah* (charity), cost of living, atonements and *waqf* (endowment fund). In line with the juristic principles of starting with the areas of priorities and counterbalancing, *dharuriyyat* (necessity) should come first, then followed by *hajiyyat* (needs) for individuals, groups, and the *ummah*, and then followed by the permissible *muhasinnat* (complementary). With regard to an individual, this requires drawing an investment plan that takes men's capabilities into consideration, in order to achieve the limit of sufficient means for living costs, then, followed by the limits of adequacy of living costs; and then, followed by the maximum level of adequacy for living costs. Social charitable plans go in *pari passu* with investment plans. This is because it is not possible to achieve the said goal with only an investment plan, or with *zakah*, *sadaqah* (charity) and *waqf* (endowment fund) only, but with an encompassing plan, with each tool having its own role in all concerned areas. What we are concerned with in this approach is for the Islamic financial Institutions to play their aspired roles, to get rid of poverty, backwardness, or make active contribution in reducing their deadly impact, as well as achieving the fortunes of this world and the hereafter;

5. Actualization of self sufficiency (independence) and contentment, particularly in the areas of *dharuriyyat* and *hajiyyat*, inclusive of manufacturing, agriculture and trading. Doing these will make the *ummah* independent in managing its affairs, because anyone who relies on another in his strength, manufacturing, *dharuriyyat* (the five necessities) and *hajiyyat* (basic needs) can never be fully independent in his decisions. In view of the above, it is incumbent on the Islamic financial institutions to work towards achieving this great objective, through comprehensive studies. At the very least, they should play an important role;
6. Objectives exclusively related to Islamic contracts should be actualized based on assets and landed properties, not on credit and debts. This is because majority of the Islamic economic contracts rely on the above and also on actual *musharakah* (partnership) and investment-based projects (small, medium and big). Due to this, it is incumbent on the Islamic financial institutions to observe the objectives of the *Shari'ah* in every contract. For example, the objective of the *Shari'ah* in a sale is to actualize exchange of a valuable property with another valuable property, with the consent of both parties. This must be done in a *Shari'ah*-compliant manner, without *riba*, uncertainty, whereas the objective of an *ijarah* contract is achieved by exchanging *Shari'ah* permissible usufructs with a certain payment;
7. Building contracts, financial instruments, tools and *sukuk* on realities far from tricks, way-outs that are far from the *Shari'ah*, its spirit, and its actuality, standing on juristic views on commercial paper without plunging into the global stock markets. For this reason, it is compulsory to take into consideration the jurisprudential principles of the resultants of issues (consequences of any matter), *saddu al-dhariah* (blocking the means) that lead to *riba* and other prohibited things;
8. Prohibition of tricks: There is no religion or a particular way of life adopted elsewhere that rivals Islam in its declaration of war against tricks, plot, fraud, deceit and ways that are not straight forward. Islam established its policies on the basis of clarity, plainness, transparency, and it provides three means for the achievement of this -
    a. Warning given by Allah to punish in this world and hereafter, those that indulge in tricks, plots, and are deceptive. There are tenths of verses in the

Holy Qur'an and Hadith of the Prophet s.a.w. that prohibit tricks, plot, and deceit, and serve as proofs that they deserve severe punishment in this world and the hereafter, and that Allah curses them;

b. Expedition of a divine deterrent punishment for the treacherous people, more than other sins. In this regard, Allah revealed that He had punished the Jews that used a trick, so that they can catch fish on Saturdays. Allah transformed them into monkeys and pigs. He did not punish them with this type of punishment for other sins;
c. Worldly deterrent punishments, based on different types of *tazir* (reprimand). For this reason, all tricks used in making that which is *haram* lawful or making that which is lawful to be *haram* and consequently, is not in agreement with the *maqasid shari'ah*, are strictly prohibited. Subsequently, it is incumbent on the Islamic financial institutions to desist from them and work harder towards achieving *maqasid shari'ah* and its ends. This is to keep away from *Shari'ah*-compliant way outs that will actualize permissible *Shari'ah* alternatives, or lift difficulty, but with the condition that such tricks will remain in the spectrum of exemptions, taken with gradualism and should not transform to a general fundamental or affirmative principle or a continuous application.

Difference between *Shari'ah rukhsah* and the *rukhsah* prescribed by the jurists, their way-outs or what is termed as *Shari'ah*-compliant tricks

The difference between *Shari'ah rukhsah* and permissible juristic tricks is that *shari'ah rukhsah* is from a divine text, peculiar to circumstances of *dharurah* and lifting of difficulty; for example, permitting *iftar* in the month of Ramadan (breaking of fast) for a traveller and sick person and permitting one forced by hunger to eat a dead animal that was not slaughtered (and the likes).

These circumstances are not part of tricks and way-outs; rather, they are means of lifting adversity and difficulty. However, juristic tricks or way-outs are for normal circumstances and its objective is to achieve a certain aim or goal that could not be reached through a normal form, based on normal means. According to Ibn al-

qayyim, these way-outs or tricks are divided into two types, i.e. permissibles and impermissibles.

Buying and selling by an agent, and then selling to himself on cash basis

Two *fatwas* were issued. They are mentioned in chronological order. The first *fatwa* is *fatwa* no. (6/7), i.e. about *murabahah mudawarrah* under one roof. The *fatwa* reads, as follows:

Question:
From the *fiqh* perspective, what is the view with regard to *murabahah mudawarrah* under one roof, whereby a client is appointed as an agent to purchase something for the bank? He will then sell the product to himself, at a specified profit margin that is mutually agreed upon (within a profit margin range agreed by both parties).

Fatwa:
This is a special form of *murabahah*. In most cases, it is for low transactional value customers and retailers, whose demand for partitioned goods on a regular basis makes it difficult for them to continuously return to the bank to process each and every transaction, and using separate contracts repeatedly.

The authority of the lawfulness of this type of *murabahah* is the ruling that permits the bank to appoint their client as an agent to purchase for them, on the grounds that he (the agent) will sell the item purchased for the bank to himself, at a profit margin that is mutually pre-agreed upon. This is the opinion of the majority.

The second *fatwa*, i.e. *fatwa* no. 1/15, is on the arrangement, where the agent purchases a product that will then be sold to him.

Question:
Is the following arrangement permissible?
A particular authority is appointed as an agent, to purchase a particular commodity, at a certain price and to be paid by the principal purchaser. Then, the agent will be appointed as an agent to sell the commodity, either to himself or to a third party (the

authority referred to is normally one that specializes in transacting the goods that are specified by the principal purchaser).

Fatwa:

It is permitted to appoint an agent to purchase and sell, if the sale is concluded with a third party. On the other hand, if the agent is selling to himself, then the sale is valid, provided that the selling price is determined by the principal.

Observations and guidelines:

The previous *fatwa* on this topic, i.e. if an agent purchased and sold to himself, did not prescribe enough guidelines; rather, it went straight to a juristic principle, which its authenticity cannot be denied.

However, it undermined the risk of misuse and exploitation by the traders, i.e. transforming an environment based on real assets and commodities to an environment premised on paper-based arrangements, transform reality to forms, transform from development to serving natural resources markets and international commodities, and entails a circumstance, whereby the traders refrain from bearing reasonable risks, through combined contracts in a special arrangement, which apparently end up in a result that translates the transaction to *riba*, which is *haram.*

All these make it necessary to put in place specific guidelines that will distance this contract from mere form, prevent exploitation (of the ruling that permit it) and curb means that can lead to *riba*, which the *Shari'ah* has prohibited.

There was absolutism in *fatwa* (6/7), whereby it permits, by virtue of the ruling of the majority, that it is permissible for the bank to appoint its client as an agent, on the basis that he (the agent) will purchase and sell to himself what he had purchased, at a profit margin predetermined mutually by him and the bank (principal). After the appointment is concluded, the agent receives money from the bank and buys the identified product on behalf of the bank. Subsequently, he sells it to himself. With this, the transaction is completed and the client (who has been acting as an agent of the bank) becomes liable for the price.

The second *fatwa* is a confirmation of the first one. It clearly stipulated that it is the principal who will determine the price (if he is selling for himself). However, the *fatwa* did not give attention to guidelines that are specific to the contract of agency, method of application and execution. Due to this, we will try to shed light on *wakalah* (agency) and the methods of applying it, in order to arrive at an arrangement to appoint one as an agent to purchase and sell to himself, while adhering to the required guidelines.

Definition of *wakalah* (agency)

Literal meaning of *wakalah* (agency) - With *fathi* (vowel on top of alphabet) and *kasri* (vowel under the alphabet), it has various meanings, e.g. protection and delegation of authority.

The derivatives of *wakalah*, as mentioned above, appeared in several places in the Holy Qur'an and the noble Prophetic traditions. Al-asfahani said, "Conferring an agency means you rely on another person, you make him your representative, *wakil* is on the Arabic morphology, measuring scale of *fa' il*, meaning *fau'l*. Allah says, "And enough is Allah as a disposer of affairs", "that is you should feel contented with Him as the one capable of taking care of your affairs". Sometimes, agency is taken to mean guarantor, though guarantor is more general.

The juristic technical meaning of *wakalah* (agency) - It has been defined by various definitions, but we choose the following; thus, "A contract, whereby someone entrusts on another person a task that is permitted to be done on behalf of another, which he (the one entrusting) was supposed to execute by himself, so that the other person may perform it in his lifetime".

The difference between *wakalah* and relevant terminologies

According to some scholars, w*akalah* is different from representation, because representation is more general than *wakalah*, whereas some scholars see both as synonymous. Similarly, *wakalah* is different from *wilayah* (administrative power) which in *Shari'ah*, means legal representation or mandatory representation (conferred on someone) to be capable of executing a decision, made in respect of another person, with or without his willingness, whereas *wakalah* is a representation

made on mutual consent. In the same vein, it (*wakalah*) is also different from the appointment of an executor (of will), which is the conferment of the right to execute the will after death, whereas *wakalah* is a conferment of representation, exclusively limited to one's lifetime.

The *Shari'ah* status of *wakalah*

The jurists unanimously agreed on the permissibility of *wakalah*, based on proofs from the Holy Qur'an and authentic Hadith.

The basic elements of *wakalah*

Majority of the jurists are of the view that *wakalah* has three basic elements, as follows -

1. The two parties to the contract of agency (the principal and the agent);
2. The subject matter of the agency (the object of agency); and
3. The terms of the agency (offer and acceptance).

However, according to the Hanafi School of Law, the only basic element in an agency contract is the terms (offer and acceptance). It is worth noting here that the *sighah*, i.e. terms of the contract (offer and acceptance) in a *wakalah* contract is not a condition that should be concluded on the spot; rather, it is valid to conclude the agreement, while its execution is made pending when a condition is fulfilled. This is the view of the Hanafi School and the view preferred by the Hanbali School, as opposed to the Shafie School that also held this view as valid, but **not as the preferred view** of the school.

Similarly, it is permitted to complete an agency contract, while its execution is made pending the maturity of a future period. For example, "I have appointed you as my agent to sell my house in the month of Ramadhan". This is the view of the majority, namely the Hanafis and Hanbalis, without stipulating any condition. Shafies also hold this view, but with the condition that the contract of agency was concluded on the spot, while the right to act is made pending a future period.

The nature of a *wakalah* contract in Islamic *fiqh*

1. In the view of the jurists, an agency contract is a contract of mutual consent. It is in need of a specific form. This is why its validity is not confined to writing, i.e. it is valid to conclude the contract verbally, or by writing and the likes;
2. The original presumption of a contract of agency is that it should be gratuitous (free of charge). On this ground, if both parties mutually agreed on payment, the payment then becomes obligatory. If there was an agreement to that effect, then the agent is not entitled to any payment, according to the view of the majority. However, the later Hanafi followers ruled this as an exemption to the ruling of the majority, because there are professionals who are dependent on payment in the discharge of their profession. For example, a broker who works and are paid the normal price. Article (1467) of *majjalatu ahakam al-idliyyah* clearly mentions that, "If a contract of agency is made on the agreement to pay the agent, and the agent so discharged the task upon which he had been conferred to by the agency, he shall then deserve to receive the payment. However, if there was no agreement to that effect and the agent had not been known to be one of those who perform such a task based on payment, he shall be deemed, in such an agency, as one who rendered a gratuitous service (free of charge), and shall not be entitled to demand for payment". On the occasion where there is effect to payment consideration, it is compulsory that the amount of such payment be known with certainty, and there shall be no such condition stipulating that the payment is to be taken or deducted from the subject matter of the agency. This is the view of a group of jurists, including the Shafie *madzhab*. Contrary to this, it shall render such a contract as invalid and the agent shall get a normal reward, as deemed suitable to the service which he has rendered. In addition, it is a condition of a valid agency contract that the quantity of the task be made known (not vague); and
3. The general principle is that in its primary status, an agency contract is not a binding contract. However, the Hanafi and the Maliki Schools gave an exemption to this general principle, as follows - If the agency is connected with another person's right, it becomes binding. The Hanafi School cited an example for this, i.e. agent in judicial suit, with the permission of the principal litigant. Thus, it is neither permitted for the principal to remove him, nor is it

permitted for the agent to unilaterally resign, if the agency is connected with another person's rights, e.g. if a defendant appoints him as an agent (a council) in his litigation.

The Shafie *madzhab* stipulated for the non-binding nature of *wakalah*, to be free of any reward and that the contract must not have been made with the expressed term of *ijarah* contract; contrary to this turns it into a binding contract.

Imam al-nawawi had elaborated, "What we (the Shafie School) mean by a non-binding *wakalah* contract is that it is free from a reward (payment). However, if there is a stipulated reward and the conditions of *ijarah* are found in it, it then becomes a binding contract. If the contract was made with the express term of *wakalah*, it will then be worked out; on whether what are to be considered in contracts are the words or the meanings. This is also the most popular view of the Maliki School of Law.

Ibnu Shas had explained their views, "The third ruling of a *wakalah* contract is that it is a non-binding contract to both parties" if it is not accompanied with a reward. This is the implied meaning of Al-qadhi Abi Al-Hasan's statement, "That it is permissible for an agent to unilaterally resign at any moment". He (Ibnu Shas) observes, binding in the statement of the later followers of the Maliki School in the context of agency is premised on the binding nature of gift, even though the beneficiary has not taken possession of it. If the *wakalah* contract is made for payment consideration in the same manner of making an *ijarah* contract, it then becomes binding on both parties. Therefore, it is compulsory then for the task to be known with certainty, as is applicable in an *ijarah* contract. If the agency contract is made as a *ja'alah*, Shaikh Abu Tahir reported three views, as follows -

1. It binds both parties;
2. It does not bind either of the parties; and
3. To be detailed as saying that, it binds the offeror (in this context, the offeror is exclusively the originator of the contract) and does not bind the offeree.

The view I see as the prevailing one is that a *wakalah* contract in itself is not binding, except when it is connected with the rights of another person, or with a reward and contained the conditions of an *ijarah* contract. In that case, it then becomes binding

on both parties. Its rulings will be like the rulings of an *ijarah* contract, with respect to the conditions of payment, the work performed, the manner of rescinding the contract and the likes. This is because in contracts, what are to be considered are the intents and the meanings, and not the words and structures.

Definition of an agency contract in civil law

Article 699 of the Egyptian Civil Law, Article 665 of the Syrian Civil Law, Article 699 of the Libyan Civil Law and Article 716 of the Qatari Civil Law defined a *wakalah* contract and stated clearly that, "*Wakalah* is a contract in which by its virtue, an agent undertakes to perform a legal work at the expense of the principal". On the other hand, the Iraqi Civil Law defined it as follows, "is a contract in which someone makes another person to stand on his position to discharge a known permissible work". This definition is closest to the preceding one.

The nature of concluding an agency contract in civil law

1. As a general principle, an agency contract is a contract of mutual consent. However, if the subject matter of the agency has a format, then the format must be followed. This is the provision of majority of the civil laws. Due to this, the following are contracts of mutual consent: *wakalah* (agency) contract in sale and purchase, *ijarah*, lending, mediation, contract to construct or to supply, safekeeping under the auspices of another, suretyship and the like. On the other hand, giving something as a gift through a *wakalah* contract, in respect of the charity maker, must take a written form for it to be deemed as valid. This is similar to the same requirements of handing out the gift itself. Also, in an official mortgage, it must be on an official document, as the same requirement is applied to document the process of mortgage itself. Similarly, the appointment of an agent in concluding a partnership contract must be written, even if it is done on normal paper. Non-compliance to these procedures render those agencies void;
2. That agency contract is a gratuitous contract, except when there is an expressed or implied condition to the contrary. This is the expressed provision of Article 729 of the Qatari Civil Law, as well as the entire Arab civil laws, as they expressly provided that "*Wakalah* is a gratuitous contract if there is no agreement to the contrary, or impliedly derived from the circumstances of the

agent". Relevant to the above is that the original presumption of *wakalah* is that it is without fee. If a fee is agreed upon, then the fee is subject to the valuation of the judge. This is the provision of the civil laws, namely Article 709 of the Egyptian Civil Law, Article 675 of the Syrian Civil Law, Article 709 of the Libyan Civil Law, Article 729 of the Qatari Civil Law and Article 940 of the Iraqi Civil Law;

3. In general, a *wakalah* contract is one of those contracts that do not bind the parties involved. This is the expressed provision of the civil laws. Based on this, it is permitted for the principal to terminate or put some restrictions to the contract at any moment, even if there is a prior agreement disallowing that. However, if the *wakalah* contract is being discharged on a pre-agreed fee, the principal is then bound to compensate the agent for the loss incurred, as a result of such termination or restriction of the terms of the contract in an unsuitable time or without an acceptable excuse. This is mentioned in Article 715, 681, 715, 810 and 735 of the Egyptian, Syrian, Libyan, Iraqi and Qatari civil laws respectively. Paragraph 2 of the Article, however, provided some exemptions, i.e. an agency made for the benefit of the agent himself or for the benefit of a third party, in which case, it is not permitted for the principal to terminate or restrict the terms of the agency without the prior assent of the beneficiary of the *wakalah*.

The civil law takes into consideration the general principle that permits either the principal or the agent to terminate the agency. It does not permit making an agreement to the contrary. This is the provision of the abovementioned articles. However, the law exempted the abovementioned situation only. The law maintains the provision of this article, i.e. even when a reward (charge/fee) is stipulated in the agency contract, the *wakalah* remains unbinding and the intention of the parties remains unrestricted.

On the other hand, where there is a predetermined reward and the principal eventually removed the agent, the following observation applies: If the removal was done due to an acceptable excuse and at a suitable time, then the principal is free from any liability. However, if the removal was done without an acceptable excuse and at an unsuitable time, the removal will still be deemed valid, albeit the agent will

have recourse to recover the loss incurred from the principal. Accordingly, the agent will be entitled for the reward completely or partially, as deemed appropriate by the presiding judge. Nevertheless, the agent will bear the cost of the trial because the original presumption is that he is not entitled to any compensation for his removal.

In the same vein, Article 716, 682, 716, 947, 736 of the Egyptian, Syrian, Libyan, Iraqi and Qatari civil laws respectively permit the agent *(wakil)* to unilaterally withdraw from the agency at any moment, even if there was prior agreement to the contrary. The agent can effect the withdrawal by informing the principal of the same. However, if the agency was based on a predetermined reward, the agent is bound to compensate the principal for losses incurred due to his withdrawal, which took place at an unsuitable time or without an acceptable excuse.

Nevertheless, there is an exemption, i.e. in a situation where a third party is the beneficiary of the agency. To this effect, paragraph two (2) of Article 716 and the like provide that, “It is not permissible for an agent to withdraw from an agency, if the agency was concluded for the benefit of a third party, except where there are strong reasons, in which case, he should give prior notice of the intended withdrawal to the third party and he must give him (third party) enough time to take the necessary actions to protect his interests”.

Wakalah in civil and commercial contracts

Knowing whether a contract falls under civil contract or commercial contract is important, so that one know which court will have jurisdiction over the contract. Due to this reason, with regard to the principal, *wakalah* may either be a civil contract or a commercial contract. This is determined by the nature of the legal disposal, which is the subject matter of the *wakalah* contract. Thus, if a *wakalah* contract’s purpose is to carry out a commercial transaction while the principal is a trader and appoints a person to be his agent in commercial transactions or in investments, such as *mudharabah*, then it is a commercial agency contract. If it involves a civil issue, then it is a civil agency contract.

As regard to the agent, if he is a trader and the agency was made to carry out commercial transactions, then the agency contract is a contract of commercial

agency. In contrast, if he is not a trader, it is regarded as a civil agency contract, even if it involves his efforts as a professional.

For example, in the case of the appointment of a broker to purchase a residential house, the contract is regarded as a commercial agency contract (in respect of the broker) and a civil agency contract (in respect of the principal).

On the other hand, the appointment of a lawyer to solicit and advocate for a businessman in a commercial issue is regarded as a civil agency contract (in respect of the lawyer) and a commercial agency contract (in respect of the businessman).

The role of *wakalah* as an alternative investment tool to *mudharabah, musharakah* and *murabahah*

From the above discussions, it has become clear that *wakalah* is a process of assigning or entrusting to another person a certain task, which by virtue of the law, is permitted to be assigned to another person. We have also stated that the primary presumption of this contract is that it is a gratuitous contract and that the provision of a reward is an exception. Thus, it is not deserving, except by virtue of a prior condition that stipulates that. However, in civil law, if there was a clause providing for a reward, such a reward will be determined by the judge and that the agreement between the parties is not enough to determine the amount of the reward.

In recent times, the use of *wakalah* in investment has gained popularity, specifically in the contractual relationship between Islamic financial institutions and conventional banks and other companies based on the conventional system. This type of contractual relationship is normally a temporary one and is not intended to be permanent. It is mainly a way to transform financing into receivables, in an obligation of someone else, at the course of purchasing for oneself.

There are other forms that are applied in these institutions. Therefore, we shall mention the commonly applied forms and their *Shari'ah* rulings, as well as the *maqasid Shari'ah*, insha Allah.

The first form: *Wakalah* contracts, with the right to purchase for oneself.

The second form: *Wakalah* contracts that have a stipulation of undertaking to carry out investment through *murabahah*, with the profit of the *murabahah* transactions being not less than 7%, for example, or stipulating that it will not fall above two points and the likes, and the consequences of breaching this condition.

We shall analytically study these two forms, in light of the juristic principles of *wakalah* and its collateral contracts.

The first form: Contracts of *wakalah* (agency) with the right to purchase for oneself

This first form is mainly made up of the following components:

1. Arrangement of duties and rights between the principal bank and agent bank, whereby they explain the procedures of the transaction, percentage of profit, the required period for the transaction, guarantees and withdrawal procedures;
2. The agent bank will purchase the international commodities and minerals resources for the benefit of the principal bank on cash basis. The principal will provide the details of the transaction, which the middle person (for example, the broker in Britain) had sent to it to the agent bank. Due to the fact that both parties are not willing to bear the risk of waiting, the approval of the principal is effected through phone or email or fax. There are already papers prepared for that;
3. Then, the agent will purchase the same mineral resources for itself and sell it to itself on deferred payment *murabahah,* either directly, without returning to the principal, on the premise that it has the right to buy for itself or it will revert to the principal through modern communication, so that the principal will sell to the agent on deferred payment, at the cost price plus profit margin, say 7%. The period and the required details will also be stated;
4. Being that the bank that is acting as the agent and the purchaser is not in need of commodities, it will sell them immediately to a third party in the stock market, through the same broker. Sometimes, the bank which is acting as the *wakil* (agent) will resell them to the same seller who had earlier sold the commodities to it; and

5. These contracts (the *wakil* (agent) purchase on behalf of the principal on cash payment > the *wakil* the buys the commodities for itself on deferred payment > the *wakil* sells the commodities to another party) must be completed within a short period, so that the negative consequences arising from waiting too long and from the fluctuation of prices will not materialize. In order to know the required sequence of periods between these contracts, it is a condition to write the date (month and year) of each of the contracts, including its hour and minutes.

Observations:
This form of contract should not be seen from the *wakalah* perspective only; rather, it should be seen as a total arrangement, aiming at **one single objective**, that is the *wakil* gets the money that he needs by adding to the profit (if you like, you can call it interest). The transaction as a whole is not in line with the objectives of *wakalah* and its implications, which are only limited to representation of the principal by the agent, in carrying out an exercise on behalf of the principal. The agent may accept a consideration for services rendered, though the original presumption is that he should not take any remuneration, as mentioned above. With this, the role of the *wakil* (agent) is fulfilled.

But in this case, the agent collaborates with the principal to carry out a group of contract arrangements to secure a certain amount of financing. Here comes the discussion on the prohibition of two transactions in one bargain. The Hadith came with various wordings, viz; "the Prophet s.a.w prohibits *safqatayni fi safqah* (two transactions in one bargain)". This Hadith was reported as *marfu'* (that is with chain of reporters up till the Prophet s.a.w.) and *mauquf* by Ahmad bin Hanbal, Ibnu Hibban, Al-baihaqi and others. The one reported as *marfu'* is weak but it has corroborative versions. The truth is that it is authentic as *mauquf* (it has a version with an authentic chain of transmission, till Ibnu Mas'ud) on Ibnu Mas'ud.

There is another version of Hadith, i.e. "is not permitted to combine lending and sale", or "is it permitted to have two conditions in one sale". Al-hakim reported it as *marfu*' and authenticated the same. Al-dhabi had also corroborated Al-hakim in his claim of the authenticity of this Hadith. Imam Al-tirmidhi also reported this Hadith and

ranked it as good and authentic. Ibnu Hibban also reported this tradition and authenticated it. Ibnu Khuzaimah also reported this Hadith and authenticated it. Ibnu Hazmi said, “This is authentic and we subscribe to it”. Ibnu Taimiyyah and Ibnu Al-hajar also reported the authentication of Al-tirmidhi, Ibnu Khuzaimah and Al-hakim of this Hadith. Al-bani also authenticated this Hadith in his authenticated version of a book of Hadith called Sahih al-Jamie.

There is another version that says, “The Prophet s.a.w. prohibits *bai’atayni fi bai’ah* (two transactions in one bargain). Al-tirmidhi reported this Hadith as *marfu’*, with his chain of transmitters taking source from Abu Hurairah. He (Al-tirmidhi) said, “Good and authentic”. Albani also authenticated it in his authenticated version of a book of Hadith called Sahih al-Jamie. Ahmad and others also reported it with a different chain of transmitters. In conclusion, the Hadith is authentic.

The scholars differed in their interpretation of these Hadiths, but the prevailing interpretation is the one that says the meaning of *safqatayni fi safqah* (two transactions in one bargain) is to conclude a contract revolving between deferred payment with higher price and cash payment with lower price and separated without certainty of which of the two bargains the contract was finalized. This is the interpretation of the great Companion who reported the Hadith and many other reporters and scholars. The effective cause is either *riba* (interest) or uncertainty or ignorance.

The meaning of prohibition of combining sale and lending, and two conditions in one sale are the combination of any contract or any stipulation that contains payment consideration with another contract or a stipulation that contains lending. The effective cause (for the prohibition) is *riba* (interest). All these Hadith are collectively blocking the doors of *riba* and preventing any means that lead to it.

A contract may stand alone and one stipulation is permitted; there is no confusion about that. But when another contract enters, it will lace the entire contract arrangement with *riba,* e.g. contract of *inah*, which is composed of two valid contracts that if executed separately, is valid; however, when they are combined they collectively result in *riba*, which is *haram.*

To this effect, Ibnu Abbas ruled by saying, “One dirham in consideration for two dirham with *harir* (silk material) exchanged in form”. Against this background, the legal aspects of contractual arrangements are not to be examined in isolation; rather, their end results, their objectives and intents should be taken into consideration.

For this reason, one or more stipulations may be accepted if the stipulations are in line with the contracts, without any contradiction. In contrast, two conditions may not be accepted if they are not in line with the contract agreement and they indirectly lead to *riba*. Even for man-made laws, the end results of agreements are taken into consideration. It is to this effect that many forms of hire purchase are seen as sale by installment.

With regard to this agreement that consists of multiple contracts that is based on the principle of *murabahah* in transacting international commodities and mineral resources, there has been a big confusion to majority of the contemporary scholars like Shaikh Al-qardhawi, Shaikh Salih Al-hasin, Dr. Husain Hamid, Shaikh Taqi Usmani, Shaikh Mukhtar Al-sulami and others. This confusion is prompted by the fact that the purpose of these *murahabah* contract arrangements are not for the banks to buy international mineral resources or import it to our countries. The sole motive behind these arrangements is the acquisition of cash by the agent, through these transactions.

I have made several tours for the purpose of searching for the reality and myths about these commodities and mineral resources (which are the subject matters of the international *murabahah* contract). I discovered that the contract is of three circumstances:

1. The first circumstance - The contracts are formulated on pre-prepared documents and the copies of the certificates are merely ordinary copies sent here and are only formalities. The broker who is operating in his small office is the one who prepares all these papers and sends it to all international agencies. He has become a millionaire at the expense of some banks;
2. The second circumstance - The commodities and minerals that are specified for these *murabahah* arrangements are in existence. But due to defects or

lack of market demand, they became redundant. Then, tenths of contracts would be carried out on them. I visited one of these stores in the West and found that the subject matter of the special *murabahah* for the banks exists and it consists of numerous tonnes of aluminium and I was very much delighted. Then, I asked the person in charge of the store, "How long has these minerals been in this store?" He replied, "About ten (10) years". My next question was, "Why hasn't the sale and transfer been concluded?" He replied, "This is Russian aluminium. It has defects. So, nobody wants it. That is why we keep it here to serve this purpose. We take commission for the transactions based on it and that earns us good returns"; and

3. The third circumstance - The commodities and the minerals are natural and in storage, whereby special *murabahah* transactions are carried out on them. Here comes another question, "From the many international *murabahah* transactions that are undertaken by both the Islamic and the conventional banks every day and for so many years, have they ever taken delivery of these commodities and mineral resources? If yes, where are the commodities?" Thus, these transactions are characterized by a certainty, i.e. the owner of the minerals knows that even though the commodities are bought and sold, in the end, it will return to him.

In a nutshell, there are ambiguities and *Shari'ah* issues surrounding international commodities. In addition to this, there is another question, i.e. what are the economic benefits of these transactions to the *ummah*? Are these international commodities and minerals brought to the *ummah*? If the answer is yes, then the Islamic banks have contributed to development, creating competitive prices for commodities and making them easily affordable. Assuming these are done, it would have been possible to overlook some of the defects that are not seen as strict requirements.

At the beginning, many Shari'ah Councils permitted international commodities trading because of the need for liquidities, as well as protecting the interest of Islamic banking. However, it should not be a norm or remain continuously.

Thirdly, these international *murabahah* transactions conclude when the mineral resources are resold to the original seller, which constitutes *bai' 'inah*, which is

prohibited by the *Shari'ah*. This happens because neither the agent bank nor the principal bank and the broker are in need of the commodity. There is also an issue with regard to the foreign bank that arranged this transaction and is paid for the price. Where does it (the price) go? The answer is that it goes back to the origin, if the mineral resource is available.

It is because of this the Shari'ah Councils used to stipulate a condition and restrictions on it. We used to follow-up deeply and we eventually find that the last purchaser, according to the papers, is another party that is different from the seller. Due to this, we used to stipulate that the last purchaser should be one of the factories or a company that is doing a work related to such minerals or commodities. However, it was difficult to apply this condition, as the banks used to face challenges before they are able to fulfill the condition.

Fourthly, as to the issue of an agent purchasing for himself, the jurists held two different opinions:

1. The first opinion is that it is absolutely not permitted. This is the view of the majority of the *fuqaha* (the jurists), i.e. the Hanafis, the Shafies, the Hanbalis and the Malikis. They supported this view by saying that the interests of human beings conflict with one another. The interest of the agent, while he is purchasing for himself is that he wants to buy at the cheapest price possible, while the interest of the principal is undoubtedly, to have his item sold at the highest price possible. It is possible to contest this view by saying that the grounds of this view could be circumvented if the principal fixed the price? This is why those legalizing it restricted it with restrictions that will neutralize this conflict of interest; and
2. The second opinion is that it is permitted for an agent to purchase for himself, but with restrictions. However, the proponents of this view differ in their opinions of those restrictions. The Maliki School held that it is permitted if the agent does not try to favour himself, while the Hanbali School held that it is permitted if the agent adds to the initial price or he appoints another person (subagent) to sell the goods, whereby he is one of the purchasers. With this, the aim of the principal (selling at the best price) is achieved. It is as if the sale is concluded with a third party. The author of Al-muqni said that it is not

> permitted for someone appointed as an agent in a sale contract to sell to himself. He also mentioned, “It is permitted if he adds to the original price or he appoints another person as an agent (subagent) to sell and he becomes one of the purchasers. In the book titled ‘Sharahi al-kabir’, al-qadhi said that it is likely that the appointment of another person to conduct the negotiation is compulsory, it is also probable that it is recommended, though the first view that says it is compulsory is closer to the meaning of his statement”.

Despite the fact that I prefer the second opinion if the *wakalah* is a just and independent, consequently, in my own view, there is no problem in the appointment of an agent in a separate and independent contract. But if such an appointment is combined with this arrangement, then it weakens the validity of the transaction. The specific *Shari’ah* standard on *wakalah* in article 6/11/2 prevents contracting with oneself. For this purpose, it ought to be honoured in Islamic banking contracts, which these standards are meant for.

Fifthly, in principle, there is nothing in the *Shari’ah* that prevents the payment of incentive to an agent, in addition to his fee. This could be in the form of granting him part of or the entire premium above a certain benchmark profit. This is the ruling contained in the *Shari’ah* standard on the appointment of an agent, which states the permissibility of such an incentive in article 4/2/5.

<u>The second form: Appointment of an agent to manage an investment, with a certain percentage to be given through a *murabahah* contract that stipulates as a condition that, “The loss should not be less than this and that percent...”</u>

In order to make this form more understandable, let us mention one of the contracts applied by one of the Islamic banks within the limit of what we need to discuss:

Preamble - A second party communicated his interest to appoint the first party to manage his properties in areas both determined and agreed upon by both of them and with conditions mutually agreed upon. Hence, they agreed, as follows -

1. The preceded preamble is considered as part and parcel of this contract, a requisite of its completion and an interpreting note to the clauses in the terms of the contract;
2. The first party agreed to be an agent of the second party to manage the investment of the second party's properties, in accordance with the nature of investment and as so defined in this contract, and with the venture capital of the sum of this amount XXXX (in Kuwaiti Dinar only and nothing else). Thereafter, on 1/1/2007, the second party channels the venture capital, on lump sum basis, to the first party. The second party, by virtue of this entrepreneurship arrangement, will deposit the capital in a current account (account no. XXXX and branch XXXX);
3. The second party (the principal and the owner of the capital) has appointed the first party as an agent to invest the said amount stated thereof in section (2) of this contract agreement, in a business so favoured by him and deemed suitable. The first party is conferred a general agency, with the rights to enter into a contract with himself, in accordance with the permissible means which have been agreed upon;
4. The first party, in abiding by the contract agreement, will undertake not to invest the properties of the second party, except when he is sure of realizing a return which is not less than (% annually) of the venture capital. The first party is deemed to have breached and neglected the contract agreement if he invests this money in a business having a return less than this percentage. Accordingly, he will undertake to pay the capital plus the stipulated percentage of return after the tenure of the investment, if he had breached the condition without unforeseen circumstances that were seen to be out of his control;
5. For his agency services on the management of the capital, the first party (the agent who manages the capital) shall receive remuneration from the second party, with the following variations:
    A. A constant and certain amount of annual remuneration. It will be paid in advance, i.e. when the contract is signed or when it is renewed;

B. Any premium above the percentage stipulated in 4, if realized, will be deemed as the incentive for the first party for performing his part of the contract diligently;

6. The first party shall undertake to deliver the venture capital plus the return in a lump sum basis on 1/1/2008.

There are two delicate fundamental aspects in this business arrangement:

1. This first aspect is that there is not an iota of relevance between this contract and *wakalah* in Islamic law and the civil law, except by mere name. The agent is doing it just to obtain liquidity. He is working for his own interest, while the principal is only waiting to get back his capital and his profits (which should be rather called, his interest) on a specified period. Then, the activities of the agent are investment activities, which the principal has provided because he is not confident of the following contracts -
   a. The first one, i.e. the *Shari'ah* original form of contract is the joint venture contract of sharing profits and losses among the parties to the contract (*mudharabah* and *musharakah*). However, the principal does not want to bear risks;
   b. The second one is the contract form of real *wakalah* (agency) on investment. This means that the funds will be given to the agency for the purpose of trading with it. The loss will be borne by the principal. Conversely, he enjoys the profit (if any), while the agent receives a fixed amount of remuneration. There is no prevention in granting part of the profit to the agent, as an incentive. Where there is problem is erasing the *wakalah* efficacy in reality and end result; and
   c. The third one, the implication of this form (as mentioned in the immediate preceding one) is lending with guaranteed interest. If the arrangement was explicitly made, the transaction will not gain acceptability in Islamic banking and accordingly, the Shari'ah Council would have opposed it. This is why this product is created, which is driven by *riba*-oriented mentality. Such a product guarantees the capital and sets a fixed profit, e.g. 9%. In this case, only the name is changed, from lending with interest to appointment of agent to manage an investment, in which the repayment of the capital and the profit are guaranteed. Supposing a change of name was enough to attain lawfulness and unlawfulness, then changing of the

name ‘usury’ to ‘interest’ would have been enough (but that was not the case). To this effect, I have read from the newspapers and the entire mass media that one of the Arab countries is proposing to enact a law to change the term lending with interest to ‘an investment contract’ or ‘contract of agency to manage *murabahah* investment with a percentage of this or that’. If this door is opened, it will immediately open the door of widespread evil, as there will be no justification to prohibit the bank’s interest if the form is made on agency on investment through *murabahah*, on fixed profit.

If this transaction is combined with the right to enter into a contract with oneself, then there would have been no problem. This is because the agent buys the commodities for himself with the mentioned percentage and the amount becomes debt and he is liable for it. This is why we ask, “Is it the *Shari’ah* law that Allah prohibits *riba* based on the name and the form only or based on the reality, the occurrence, the implications and the gross injustice in it, as mentioned by Allah? Allah says, “But if ye turn back, ye shall have your capital sums: Deal not unjustly, and ye shall not be dealt with unjustly”.

Of course, there is no refusal on the importance of mentioning the terms and the type of contracts, as long as they are real and the parties bear the responsibilities. However, no matter the extent to which the terms have reached, they are not capable of nullifying the realities and the *maqasid* that are to be considered in any contract.

The second issue; requirement for the agent to guarantee payment of the fixed percentage, as stated in the contract, in case he is unable to achieve the minimum profit requirement. This is the expressed provision of section 4 of the said contract. This express provision makes the agent liable for the capital and the stipulated profit. He is bound by that.

Some issues regarding this contract were brought to the Shari’ah Council of Sharikatu a’yan. Let us examine some of it:

1. Question 1/2/2000 - The text is as follows - To what extent does it comply with the *Shari’ah*, if an agent is made liable for the loss incurred by the principal,

because the agent violated the conditions of the contract? Answer - The Council has seen some jurisprudential texts of both the Maliki and the Hanbali Schools, where the followers ruled that the agent be made to pay the difference between the price determined by the principal and the selling price concluded by the agent. In the book (of Maliki School) called 'Taj wa al-iklil', in part 7, the book of *wakalah* contains the chapter of the pillars of *wakalah*, its legal status and the differences in it. In the said book, the author reported, as follows, "If he sold at the rate below the selling price given by the principal, he (the principal) has an option to approve the sale or rescind it. If the principal chooses to approve it, he should collect the price. If he opted to rescind it, then if the commodity is retrievable, he should take possession of it. However, if it is not retrievable, then he should request the value from him if he did not mention any price. But if he gave him a specified price, the scholars differed whether he should request for the price he had specified earlier or the value price (market value)? Also, in the book titled kashaf al-qina (part number 3 of the chapter on *wakalah* section: it is not permitted for the *wakil* to sell on deferred payment. The text reads, as follows; "If the *wakil* (agent) or a *mudharib* sold at a price lower than the normal price, if no price was stipulated for him or he has sold at a price lower than what was determined by the principal/the *rab al-mal*, then the sale is valid because any one whose sale was executed at the normal price, the sale is also valid with less than the normal rate like, as in the case of a sick person. They (the *wakil* and the *mudharib*) will be liable for any deficit in the price, if the sale in question is not something that can usually be manipulated. This is because there is share for the buyer by not rescinding the contract and share for the seller, therefore, the liability becomes compulsory. But the share of the *wakil* is not taken into consideration because he was neglectful. However, if it is something in which people manipulate one another, e.g. one dirham out 10 dirham, it is overlooked. So, the *wakil*/*mudarib* shall not be held liable because it is not possible to escape such a responsibility. This ruling applies to a situation where the principal did not specify a certain price. If the principal had specified the price, both the *wakil* and *mudharib* shall be held liable for any deficit in price, regardless whether it is something people can normally manipulate one another or not. If he (the principal) said, sell (it) at 10 *dirham* and the

wakil/*mudharib* sells it at 9 *dirham*, the the *wakil*/*mudharib* would be liable for the deficit of one dirham. For this reason, the Council is of the opinion that the liability for the normal price or value of the price is the original presumption. Therefore, if the company determined to uphold the resolution made by some Maliki and Hanbali School in making the *wakil* liable for the payment of the price specified for him by the principal if the agent sold below such a price, there is no prevention in making him liable.

2. The committee was asked about making the *wakil* liable absolutely (regardless of whether the act is caused by him or otherwise OR was there negligence or not), as it is popular today in the contracts of *wakalah*? It is not permitted to make an agent liable in an absolute manner. An agent is not liable, except where he had transgressed or neglected his duty. This is because his hand is hand of trustkeeping and not hand of liability. I have the following observations on this contract and this *fatwa* - This contract is a component of collection of contracts that form a transaction to achieve one goal, as explained before. Having known that in contracts, what is to be considered are the intents and the meanings, this contract cannot be taken to be *wakalah*; rather, it is an investment and trade. Therefore, the principles of *mudharabah* will be applied on it, if possible. However, the stipulated condition in the *mudharabah* renders it a void *mudharabah* because the hand of a *mudharib* is a trustkeeping hand. Secondly, the act of the *wakil* (agent) to guarantee both the capital and a stipulated profit. The Council has appraised this issue and based their observation on the grounds that the *wakil* has violated the price fixed by the principal. This is where the Council said, “If the company determined to uphold the resolution made by some Maliki and Hanbali School in making the *wakil* liable for the payment of the price specified for him by the principal, if the agent sold below such price, there is no prevention in making him liable”. I am saying that making an analogy of this contract (i.e. appointment of an agent to manage an investment) on what the Hanbali *madzhab* said is not correct. This is because what they (the referred *madzhabs*) discussed about is an agent whom a principal has given a commodity (animal or other) and said to him, do not sell it, except at the sum of 1,000 dinar, for instance. Then, the *wakil* deliberately sold it at the sum of 900 dinar, and so, he was made liable for the 1,000 dinar. This is a real

wakalah. In spite of this, the majority of jurists are at variance with the opinion mentioned in the above *fatwa* of the Council. The case of this contract is different (from the type of *wakalah* ruled upon by the two schools of law), as the bank had given the capital to the agent and stipulated that he must make a certain profit. It is a principle in Islamic jurisprudence that what a ruling of a particular *madzhab* implies is not taken to be the opinion of the *madzhab*. Also, the analogy of a new issue that is contemporary on another issue which is not related to each other is not valid. Moreover, even some points of view extracted from within a particular *madzhab* are not to be attributed to the founder of the *madzhab*; rather, they are to be attributed to the one who extracted it. This ruling that is extracted by the Council is a product of the Council and not the opinion of some Maliki and Hanbali Schools. They did not even give such a ruling. Thirdly, that this issue of agent selling below the price stipulated for him is contested by the scholars into three opinions, after they have unanimously agreed that it is not permitted for the agent to sell below the price stipulated for him. The first opinion is that the sale is subject to the approval of the principal. This is the opinion of the Hanafi and Maliki Schools of Law. They said that the principal is given the option of either approving or rescinding. If he approves it, then the sale becomes binding upon him. If he does not approve it, then it will not bind him. He is also at liberty to retrieve the commodity if it still retrievable, and he will take the value of the price, if is not retrievable. However, the Maliki School, as mentioned by Ibnu Shas, added that if the agent said, “I will complete the deficit”, do we accept from him so that the sale will be approved or should not be accepted? The first view says it is correct to do that because the aim is achieved. The other view said it should not be accepted from him because he violated (the conditions) of the sale. So, it is compulsory to retrieve it. The second opinion is that the sale is void. This is the ruling of the Shafie and Hanbali Schools of law, in the version upheld by the author of Sharh al-kabir and others. This ruling is based on the reasoning that the principal was not pleased to release his ownership, except the ownership which he has permitted on him (*wakil*). Moreover, the agent gets the authority from the approval given by the principal. He is just the principal’s deputy. The third opinion is that the sale is valid but with the liability of the agent for the price deficit. This is the view of the Hanbali School.

However, they disputed on the method of determining the value of the deficit into two opinions: The agent is liable for the difference between the normal price and the selling price. The second opinion is that the agent is liable for the rate between what people normally manipulate one another with and the rate which they are not manipulating one another with. This is because it is permitted to sell at the rate with which people normally manipulate one another; therefore, he is not liable. In the book called sharh al-kabir, it is said that if the agent sold below the normal price, in which people do not usually manipulate one another with, or he sold below the rate that has been estimated for him, the legal status is akin to the status of one who has not been permitted to sell. It is reported from Imam Ahmad that the sale is valid but the agent is liable for the price deficit. They disputed in the estimate into two opinions: The difference between the normal price and the price at which he had sold the commodity. The difference between the rate with which people normally manipulate one another and the rate with which they do not normally manipulate one another. This is because at the rate with which people normally manipulate one another, the sale is valid, and so, the agent is not liable. The first one is more analogical because it is a sale that was executed outside the sphere of permitted authority; for that, it resembles sale that was executed by someone who was a foreigner to the sale. In principle, every action in which the agent has violated the instruction of the principal has the same legal status as the status of action made by a foreigner (that is, an intruder). Then, he explained what is meant by what people normally manipulate one another with, is about one out ten, this is permitted in *muamalah*. It is also in the book of insaf, “He is liable for the price deficit. However, there are two views as to the estimate of what he is liable for. In the books, al-mughni, al-sharh, furu, al-faiq and al-kafi, the first is that his liability is the difference between the price at which he sold and the normal price. The commentator said this is more analogical. Ibnu akil preferred this. He reported it in qawaid al-fiqhiyyah. Ibnu Zarin also preferred it in the sharh. Therefore, there is nothing in *madzhab* Ahmad (Hanbali) that says, in all the reliable books of the *madzhab* that the *wakil* is liable for any instruction and stipulation given by the principal, like practised today. Rather, the prevailing view in the *madzhab* of Imam Ahmad is that, either the voidance of a contract of agency

that had violated the stipulation made by the principal or subject to the approval of the principal or valued by the normal price. This is more analogical to the general principles and justice. This is because the *wakil* is representing his principal. If he violated the principal, the legality of the representation has been eroded and consequently, it becomes void. If we validate the contract, how are we justified in holding the *wakil* liable in a valid contract? More importantly, the Muslim jurists normally resort to the normal price upon the occurrence of any defect in a contract. The second opinion is that what is to be considered is what people normally manipulate one another with. In spite of this, I did not find from *madzhab* Hanbali, any opinion or view that is considerable, which required that the *wakil* be made liable in a manner of absolutism. Notwithstanding this, whether his violation is in what people normally manipulate one another with or not. Despite my acknowledgement that there is relevance in the Hanbali and Maliki School of Law, except that such relevance could not be used to circumvent the opinion of the majority, as well as the implication of *wakalah*.

All that I have said (in the above) is on the actual *wakalah*, whereby the principal gives his commodities to the agent and stipulated the required prices for him, but he (the agent) violated the principal by selling at a price less than what the principal had stipulated. But the contract in this issue, as in the fatwa above is not a *wakalah,* whether its reality or its substance. Rather, it is a void *mudharabah* or loan with interest through arrangement of transaction that lead to that, because the contractual relationship is investment. It is not a relationship of representation of the agent in doing some of the tasks of the principal. Or, the original motive is to secure loan with guaranteed interest. This is one aspect. In another aspect of application for this contract based on my experience is that a principal will never ask his agent, which period is he going to kick-off the transaction? Also, he will never ask if the *murabahah* has been concluded or otherwise. The most important thing is that the amount mentioned together with the profit (interest) will enter the account of the principal in the fixed time.

There is an empirical event that occurred, whereby one investment company secured several million through this means and engaged them in its private benefits

in majority of the period. Until it remains only one month, it did not find who will purchase at the cost value that will give it the huge percentage that was stipulated, and then it asked its Shari'ah Board, which gave an answer, i.e., "A special section will aid you by contracting with yourself, whereby you purchase international commodities for the benefit of the principal, then you purchase it from the principal at the rate that will give you 7% annually".

When the calculation of the return was made, the percentage of the *murabahah* was very huge because it was accumulated within a period of one month and yet, it was enough for the annual percentage that was agreed upon. This form of *murabahah* is mostly executed through international *murabahah* that is joined with the right to contract with oneself and of course we have mentioned its *Shari'ah* issues earlier and mentioned also that there are various transactions within one bargain.

The valid alternative *Shari'ah*-compliant mode

The alternative *Shari'ah*-compliant mode is the contract of *mudharabah* and *musharakah* or local *murabahah* that is real and not premised on fallacies or the contract is executed with financing companies that specializes on local *murabahah*. It is possible to arrange a contract of *wakalah* to manage investment (together with the *murabahah)*. But there should not be any clause stipulating guarantee of principal and certain percentage in the contract, and with the view of taking the remaining required conditions into account.

Selling by an agent and purchasing for himself

1/1 The original presumption in *uqud al-mua'wadat* (contracts of exchange) is that each party to the contract formulates his own part of the contract (as to executing the offer and acceptance and any factor that constitutes a valid contract). This is because in contracts, both parties have conflicts of interest. This will also help to sideline any possible defect in the procedures of formulating a contract, as well as its conditions and its guidelines.

1/1/1 There is nothing preventing the formulation of contract between two parties; one of them being the principal while the other being the agent, if the conditions and guidelines of a valid contract are fulfilled.

1/1/2 It is not permissible for one party who is the agent to formulate the purchase for another person and in turn sell it to himself without making a recourse to the other party. This will transform the contract into mere form, defective in the intention, conditions of contract and its procedures.

1/1/3 It is permitted for (not applicable to the just preceded one) an agent to arrange a collection of contracts, which fulfilled the elements and conditions of the contract and the enabling circumstances, purchase goods for the principal (financial institution) as representative of the principal, with a fee charged or without any charges. Then, he will in turn go back to the principal to formulate the contract to sell to himself with him/it directly, through any reliable means of modern communication. This is subject to the following conditions and guidelines:

1. The object of the contract must be in existence and known and already been taken into possession (in accordance with the *Shari'ah*) by the principal, so that the actual selling process to the agent can been concluded, and with the view that at the time of concluding this sale, if the principal was determining to put it under his/it custody, he/it could do that. In view of this, it is not permissible to arrange contract through mere papers, while the commodities are not actually in existence in the commercial world;
2. The documents relating to the purchase (invoices, bill of lading, and certificate of the product) must bear the name of the principal, and consequently, he (the principal) will bear the loss and damages of the object of the contract, until it is completely sold to the agent;
3. The conditions agency and the price related issues and the payment should be specific and clearly known, whereby there is no ignorance and uncertainty in it; and
4. It is preferably and more far from *haram*, if these contracts are carried goods and commodities locally available or the one available in the primary market, if these contracts are connected with mineral resources or international commodities, it is compulsory to ascertain the existence and possession of

the owner. The deal is with the companies that own them, or that use them or companies that do business in stock market that that has a legal right to act. It is not enough to arrange papers and copies of certificates. Allah Knows best.

The OIC Fiqh Academy has earlier issued a resolution in its fifth session, where it stipulated as conditions for a valid *murabahah* for the one who orders for purchase, that the commodity must have entered into the ownership of the one whom the order was placed with, as well as taking possession by him, in accordance with the *Shari'ah*.

This is a valid sale contract, since the one who the order was placed with is responsible for any loss/damages before the delivery is completed. Also, the consequence of returning a purchase item if subsequently found with hidden defects, and fulfilled conditions of a valid sale contract and found not with factors that prevent the sale from becoming valid.

Selling by an agent and purchasing for himself and a type of *murabahah* called *murabahah akasiyyah* (reflexive *murabahah*)

The spectrum of *wakalah* with the right to purchase for oneself has become very broad. It comprises various products arranged on a (juristically) dangerous transaction. The most dangerous of these is the one called *murabahha akasiyyah* (reflexive *murabahah*). This product is hailed as a new initiative and a creative development.

We read in the newspapers, specifically the Arab economic newspapers, at the headline of the newspaper is 'Initiation of New Product: *al-murajahah*'.

100% guaranteed deposits with its specified profits, approved by the Shari'ah Council

Actually, without exaggeration, I was anxious to know these two terminologies, which I have never heard since my involvement in Islamic jurisprudence and Islamic economics (even in civil law) for more than 45 years. I said in my mind, I am familiar

with *murabahah*, but this is the first time I am hearing something called *murabahah akasiyyah*, I have never heard of *murajahah*.

Because of this, I immediately started to learn about them, so that I will know what they are all about. This is because knowledge is from cradle to grave. When I was furnished with both contracts, I discovered that they are *murabahah* by name, but the name has been changed and covered with this new 'cloth'. It is popular in one of the banks in Qatar under the name *murajahah*, whereas in Burgan Bank in Kuwait, it is popularly known as *murabahah akasiyyah*.

A member of the Shari'ah Council of Burgan Bank has written to justify this type of *murabahah*. He said, "The Burgan Bank has developed a new product. It is a situation, whereby the bank invests the funds of the depositors through a contract of *wakalah* (agency) on the investment (of a depositor's deposits in the bank)".

Contract of *wakalah* is one of the more widespread contracts used by the various financial institutions. However, the uniqueness of Burgan Bank's new *wakalah*-based product is that this principle is used for the purpose of investing the depositors' funds.

Throughout the past years, *mudharabah* is the normal principle that is used for the investment of depositors' funds. The fact that Burgan Bank has started using this type of principle (*wakalah)* is considered an improvement and represents a diversification in investment principles.

<u>Our observation on this newly initiated principle</u>

This principle is not a newly initiated one and there is nothing new about it. It is nothing but a combination of a number of funds, which will result in a product that will symbolize the Islamic banks (only be Islamic in form) and differentiate it from the conventional banks and open cash flows for the Islamic banks. It combines some precepts that are objects of sharp criticisms by friends and foes. It consists of organized *tawarruq*, which has been given the ruling of prohibition by the OIC Fiqh Academy, which is under the auspices of the Muslim World League in Makkah. It also consists of international *murabahah*, which is mired with ambiguities from all

angles and problems from various aspects. It also consists of contracting with oneself, which has been prohibited under AAOIFI's Shari'ah standard, obliging of an agent with specific profits and capital based on a predetermined amount.

It tries to get rid of the last wall of *mudharabah* that remained, i.e. investment deposits. Some Islamic banks and Islamic windows have tried to get approval from the Qatari Central bank to operate *murajahah*/*murabahah akasiyyah.* The central bank did not grant the approval; rather, it sent a letter dated 30/04/2007 to all Shari'ah Councils, enquiring about the S*hari'ah* compliance aspect of the product.

There was a good word (the letter), as follows; If the Islamic banks change their normal way of accepting deposits from customers and investing them based on *mudharabah*, which is premised on profit and loss sharing to *murabahah akasiyyah*, which is all about creation of constant obligations **guaranteed** by the banks over a period of time and with specified return, what will be the consequences?

Actually, it is a strange legal device! Instead of moving towards the actualization of the fundamental objectives of Islamic economics regarding encompassing development, implementation of its *musharakah* tools and the penetration of the global market in reality (both in form and substance), some Islamic banks and Islamic windows want to follow to the footsteps of *riba*-based banks by merely changing names and terminologies.

The situation now has gone to the extent that if the *riba*-based banks enter into the hole of a dab lizard, some of these (Islamic) banks would follow suit. This is why they (some Islamic banks) are searching for similarities in all things with the conventional banks. With regard to this, one of the great scholars said, "The saying of Allah in respect of the Israel is almost applicable to them". Allah says, "they (Israel) said "O Moses! Fashion for us a god like unto the gods they have." (Quran 7:138). The surprising thing is that the Islamic banks are not emulating the good attributes of conventional banks; not in creativity in development and serving the interest of the customers; rather, it is just like what the Prophet s.a.w. said of entering the hole of a dab lizard, which is very disorganized. The emulation is not with respect to the good

qualities or with respect what could attract the quotation of the popular saying, “Wisdom is the lost property of the Muslims”.

Instruments and procedures of *murabahah akasiyyah*

A customer will come to the bank, intending to acquire enough guarantees of the money that he deposited with the bank. He will know accurately the percentage of his return. But the reality is that it was this bank, the owner of the new product that requested from the customers to do that, whereby it announced to them that whosoever is interested to invest in a product that guarantees the capital and returns should forward an application. In any case, the fact is that the customer comes to the bank and follows the following procedures:

1. The customer will appoint the bank as his agent to purchase international commodities by cash and in the account of the customer, and then appoint the bank to sell the commodities to itself, within a specified period, at a specified return, using the principle of *murabahah;*
2. The customer gives the necessary funds to the bank (this procedure may be done in advance or delayed);
3. The bank purchases commodities on cash basis using the customer’s funds and in turn sell the commodities to itself using a *murabahah* contract, in which the investment duration and the returns are specified;
4. In order to obtain liquidity, the bank sells the commodities which it has bought from the customer; and
5. The bank uses the acquired funds together with its other original assets, i.e. assets that are owned by the bank (its general *murabahah* portfolio) for financing and investment.

The practical procedures that were recorded by the Qatari Central Bank are shown below:

A. The bank engages in organized *tawarruq*, which has been ruled negatively by the OIC Fiqh Academy, under the auspices of Islamic World League in Makkah;
B. The purchase of commodities by the bank, which is in turn immediately sold to itself is barred from the *Shari’ah* point of view, as mentioned in the *Shari’ah*

standards regarding *wakalah*, “It is not befitting for an agent to take charge of both sides of the contract...”;

C. *Murabahah* in international commodities, which we have already highlighted its problems in the first part of this research; and
D. Changing the Islamic banking system, as underscored by the Qatari Central Bank, in its letter to the Shari’ah Councils. This is because the apparent difference (product differentiation) that we focus on is that investment deposits in the Islamic banks is based on profit-sharing *mudharabah* and that profit **must not** be pre-specified, but in accordance with the outcome of the investment. This is why the Islamic banks were distributing 8% in some years and more or less in other years. But this new product removes this principle altogether. This is because the customer has made an agreement with the bank at 5%, for example. So, he has no right to request for more, no matter how much profit is generated by the investment. In the same vein, he is not subject to loss, even if the investment suffers losses. Is this not the same as with lending with interest, with two fundamental differences, as described below?
    1. Lending with interest is clear and obvious. It does not bear the name of Islam. It did not ‘wear’ a *jubbah* (garment) or a turban. However, this new product bears the name of Islam, its mark and its title; and
    2. The second difference is that a conventional loan facility does not require from the customer anything more than depositing the funds and signing a contract of lending with interest. But this new product requires long contractual procedures, fees and the signing of many contracts. We seek Allah’s refuge from this legal device that may get rid of the Islamic banks.
E. This new product requires the agent to purchase on *murabahah* basis at a specified percentage, coupled with his obligation to indemnify if he violates (the stipulated conditions). Consequently, what we have said earlier on this type of *murabahah* is applicable to this product.

<u>The summary:</u>

This product comprises some other contracts, which if each was to made stand on its own, we might not have ruled on its prohibition. It contains prohibited contracts, acts and conditions. These are; the bank’s type of organized *tawarruq*, purchasing

for oneself. For this purpose, when these contracts and procedures are combined, they gave the result of a perfected transaction, which could not be approved by a jurist that observes the *maqasid as-shari'ah*.

It is like lending with interest, except for two aspects, as mentioned above. But the most dangerous element of this product is that this product strikes at the very bone joint from among the joints of the Islamic banks; that is, the joint of investment deposit which has been based on *mudharabah*, of which the bank is not responsible for losses, except when it transgresses or the losses are due to its negligence. However, under the new product, the bank becomes the debtor, whereas under the ideal Islamic banking scenario, the customer is the *rab al-mal,* whereby he bears the risk of losing his money and shares in the profits, based on a predetermined percentage, as per the agreement.

Mudharabah is one of the elements of an Islamic economic system that is formed on the foundation of ownership and partnership and the principle of *alkharaj bi adhaman* (one who bears liability deserves to gain from the rewards that emanate from assuming that liability. This is because if that something that yields the reward was damaged/lost, he would have been liable for such misfortunes. Similarly, he should enjoy the rewards of bearing that liability), and the principle of *al-ghurmu bi al-ghunmi* (there is no reward/profit without bearing losses). But under this new product, he (previously *rab al-mal*) has become the creditor, i.e. the bank guarantees the customer's capital and the interest/returns.

In terms of credit, how is it possible for the Islamic bank, whose capital is only one million riyal, for example, bear the liability of twenty million or more? Due to the great risks that are involved in *riba-based* loans that are guaranteed by the conventional banks, the capitalist economic system completely prevents the Islamic banks from conducting normal trading business or any other contract that involves risk, as regards to the deposits. The conventional banking system has no interest in the deposits, except to lend it at the rate of interest higher than the rate at which it borrowed. This barring that stands on counterbalance is the basis of conventional banks. Without it, they will be vulnerable to big risks and consequently, they will go bankrupt. Similarly, the depositors' funds are in danger.

Due to this, I want to direct my question to these banks that are practising *murabahah akasiyyah*. Suppose these banks take all their deposits or majority of their deposits on this basis, what are they going to do with them? Are they going to enter into contracts that involve risks, coupled with guaranteeing the funds and their interest? Will the central banks allow this product called *murajahah*, and without counterbalance (balance between the capital of the bank, i.e. the shareholders fund and the deposits that it garners from its customers?) Ideal Islamic banks are counterbalance and stand on the scale of justice, whereby they take deposits on the basis of *mudharabah*, in which the *rab-mal* bears the loss. Then, the banks enter into sale contracts, *istisna'* (order to manufacture) and partnerships on the same basis of participating in the profit and sharing the loss incurred.

However, in a situation where Islamic banks practise double standards, i.e. following the practice of conventional banks in guaranteeing the capital and the interest of the deposits and applying *Shari'ah*-compliant practices by investing the funds on the basis of sharing loss and participating in the profits, I think this will cause a big defect at the monetary and economic level. Needless to say, it will also cause bankruptcies and following the scale (standard/practice) of the *riba*-based banks in granting loans also.

The Qatari Central Bank has issued a resolution in which it absolutely forbids the recognition of *murabahah akasiyyah* as a means of investment, specifically amongst Islamic financial institutions and individuals. The resolution continues that *murabahah akasiyyah* is also not permitted for inter-banks transactions, except in circumstances of *dharurah*. This is also the resolution issued by AAOIFI. Alhamdulillah.

The second topic: Appointment of the ordering customer as an agent in a *murabahah* sale

On the above, *fatwa* number 9/7 was issued, as follows: In light of the recommendation made by the OIC Fiqh Academy, Jeddah, in its resolution number 80/7, the 9th session, the fifth recommendation:

“Minimization, to the best possibility, of the use of *murabahah* for the customer who orders to purchase, so that it should be limited to the bank’s implementations, with the view of guaranteeing adherence to *Shari’ah* principles. The recommendation also mentioned that the scope of other terms of investment, like *mudharabah*, *musharakah* and *ijarah*, to be regularly monitored and evaluated. The benefits generated from all acceptable aspects of *mudharabah* ought to be exploited, that allows for compliant *mudharabah* and the accurate auditing of its results”.

The committee examined the first *fatwa* of the Albaraka Banking Group’s first symposium, which permitted the appointment of an agent to purchase a particular commodity and then, in turn sell to himself with the price fixed by the principal. The committee noticed that such agency is a general one in an absolute sale (absolute sale here refers to a genuine sale). It does not concern the situation of *murabahah* where the banks appoint the customer as its agent. This is because *murabahah* has special features that are different from a normal sale, whereby in *murabahah*, the bank must play an apparent and fundamental role in purchasing the commodities for itself first and take delivery of the commodities. The said commodities will only be sold to the customer after the bank has taken delivery of it, in order to avoid *riba*-based form of financing, as well as preserving the form that makes the seller responsible for any future defects of what he has sold. Consequently, the profit becomes a profit that is valid from the Islamic point of view.

Due to this, the committee chose to adopt the opinion that ruled against this type of agency in *murabahah*. I am in support of this *fatwa* that considers the fundamentals of/and the actualization of the *maqasid as-shari’ah*. I support it and see that it is time to put it into effect and execution. Allah Knows best.

The third topic: *murabahah mudawwarah* under the same roof: *fatwa* 6/7 was in its regard

Question:

What is the *fiqhi* view (jurisprudential view) in what is termed as *murabahah mudawwarah* under the same roof, whereby the customer will be appointed as an agent to purchase (a commodity) on behalf of the bank and in turn sell the

commodity to himself at a specified profit rate (with a maximum profit rate), which is agreed upon by both parties?

Fatwa:

The presented form of *murabahah* with this attribute is a peculiar situation to small clients and retailers that want to purchase single materials repeatedly, of which it is difficult for them to:

1. Repeatedly go to the bank for each transaction; and
2. Enter into a separate contract for each transaction.

The proof of permissibility of this form is the permissibility for a bank to appoint its client as an agent to purchase on behalf of it, on the grounds that he (the agent) will sell to himself what he has purchased, at a specified profit, as pre-agreed upon, which will not exceed a certain profit ceiling.

This *fatwa* is no different from the *fatwa* of the preceding topic because it is based on the permissibility for a bank to appoint its client as its agent in purchasing on its behalf, so that the customer will in turn sell the product to himself (which he had bought on mark-up profit, as predetermined).

The distinction of this contract (*murabahah mudawwarah)* is the repetitive factor, i.e. the transactions are repeated through a special *murabahah* under the same roof. However, there are problems and the contract is subject to doubts, such as 'Is the contract mere form rather than substance?' and the lack of reflection of (real) *wakalah* intention, whereby mistakes are encountered as when the client operates multiple *murabahah mudawarah*, he might not have performed any transaction; he just comes to the bank to calculate profits, with the price as a **debt obligation** on him.

The most important thing that he (the customer) may perform is signing papers that will then be handed over to the financing bank (the bank that has assigned the agent to perform the *murabahah*). For instance, for a client that has secured funding amounting to USD100,000 and then went to another place and performed several *murabahah*, will the time and exposure be at his aid, even by formality (will he know

the peculiarities of a certain place to enable him to comply with the *Shari'ah*, even if it is only compliance in form?) to understand the conditions and the required guidelines that were outlined by the scholars that legalized the arrangement of sales by an agent and then purchasing the subject matter for himself?

Due to this, I am of the opinion that this form should be barred absolutely for the reasons mentioned here and in the preceding topic. *Fatwa* number 9/v above had also discussed *murabahah* and barred the above form. Praise is to Allah. We have mentioned in the conclusion of the first topic the procedures for performing *muarbahah* for the purchase orderer.

The fourth topic: Sale of commodity on cash before taking possession

Question:

What is the *fatwa* for the following arrangement?

Agencies that request from companies and banks which will purchase commodity that it has no ownership of, the companies/banks will communicate with the industry and purchase the commodity from it and then sell the commodity to the requesting agency?

Fatwa:

This is lawful if the said commodity is not food because the prohibition of selling what you do not possess is restricted to food.

Comments:

This summarized *fatwa* relied on one of the juristic views to be mentioned later, after mentioning the confirmed *fatwa*. I am of the view that the permissibility should be restricted by specifying the object of sale and should be limited in scope or restricted with what is termed as 'constructive possession', as will be mentioned later.

The transaction mentioned by the *fatwa* requires the following transactional procedures, which are peculiar to *murabahah* for the client who is the purchase orderer. These are:

1. The first step - The financial institution (bank or the like) will actually purchase the commodity and take delivery of it in a manner that complies to the *Shari'ah,* and the financial institution should bear the responsibility, while the commodity remains in their possession (this is subsequent to undertaking a binding promise by the purchase orderer); and
2. The second step - The commodity will be sold and delivered by the financial institution to the client.

The second one is *fatwa* number 2/2 about selling the subject matter of *salam* before taking possession of it. The text is as follows:

Question -

Is it permitted to sell the subject matter of *salam* (*almuslamu fiihi*) before taking possession of it? If it is not permitted, is it then permitted for the buyer (*almuslim*) in a *salam* contract to sell the subject matter of *salam* for a consideration (*almuslamu bihi*) of a similar type (e.g. paying rice to buy rice) in reliance upon what he is going to receive in the future (rice) and without connecting between the earlier *salam* subject matter and the one to be received in the future? Is it permitted for the buyer in a *salam* contract to constitute trading from this type of transaction?

Fatwa -

A. It is not permitted to sell the subject matter of a *salam* contract before taking possession of it;
B. However, the buyer is permitted to sell the subject matter of *salam* with payment consideration of the same genre, without connecting between the first subject matter of the first *salam* and the later obligation in the second contract;
C. It is not permitted to use this transaction that is ruled to be *Shari'ah*-compliant in the second paragraph, as a trading instrument. This is because in the *Shari'ah*, *salam* is permitted on exception basis, so that the demands of the needy can be met. But if an economic crisis occurs in some Muslim countries, which may warrant the use of *maslahah al-kubrah* in trading with it, in some circumstances and to eliminate an injustice, then it is permitted based on

maslahah al-kubrah which must be determined by the council for *fatwa* and *Shari'ah* compliance monitoring.

Shari'ah ruling on selling something before taking possession of it (in summary)

The jurists disagreed on the issue of selling something before taking possession of it. The most important views are as follows:

1. A group of *fuqaha* ruled that such is not permitted completely, citing an authentic Hadith reported by Ibnu Abbas (may Allah be pleased with him), that the Prophet s.a.w. said, "Anyone who purchased food should not sell until he takes possession of it." In another version of this Hadith, until he measured it; in another version of this Hadith, until he received it; in another version, if you purchase something, do not sell it until you take possession of it. Ibnu Abbas, the reporter of this Hadith said that, "I see every other thing to be similar to food (i.e. the same ruling applies to everything). This is the *madzhab* of Imam Shafie, Muhammad, and Abu Musa's first ruling and a version from Ahmad (Hanbali School of Law). In addition to the Hadith, they also substantiated this view by saying that the ownership is weak prior to taking possession (conversely, ownership becomes 'stronger' after possession has taken place) because if damage occurs, the sale will be rescinded. Also, there is profit of something which you have not guaranteed (because you have not possessed the item sold, you cannot guarantee that it will be possessed by the buyer), which is prohibited and the existence of double responsibilities (i.e. when a retailer sells a product that is not in his possession to a customer and subsequently, the product becomes spoiled, the act constitutes 'double responsibilities' on the part of the supplier, which is now responsible to both the retailer and the end customer);
2. Some groups of *fuqaha* (among them is Imam Ahmad, as the opinion adopted by *madzhab*) opine that things that are measured or weighed or counted or measured by length are not permitted to be sold before one takes possession of it from the seller. This is reported from Uthman (may Allah be pleased with him), Said bin Musayyib, Alhasan, Alhakam, Hamad bin Abi Sulaiman, Al-auzai and Ishaq. They substantiated this with the Hadith that indicates the prohibition of selling food before taking possession of it, because food is measured or weighed. Consequently, *qiyas* (analogy) of things counted and

measured by length were made on them (food), due to their need of taking possession;

3. Some *ulama,* out which Ahmad is one of them, held that it is not permissible to sell anything before taking possession of it, except if getting such a product is inevitable. In that case, it is permitted to sell it before possession takes place;
4. In another opinion, Abu Hanifah and Abu Yusuf held that it is invalid to sell moveable things before possession takes place, whereby they interpreted the above Prophetic traditions to have referred to moveable things only. In light of that, on the grounds of *istihsan*, it is permitted to sell real estate before taking possession of it;
5. The Maliki School holds that it is permissible to sell anything before taking possession of it, except for food, as they restricted the prohibition to the express wordings of the Hadith, whereby only food is mentioned specifically. The ruling of Ibnu Abbas is an *ijtihad* from him; therefore, it cannot be used as a specifying term. In spite of this, two conditions must be present for the valid prohibition of selling food before taking possession of it -
    a. The food must have been one that was acquired through *muawadhah* (exchange), like sale or *ijarah* and the like. So, if the food was acquired by way of inheritance or gift, the sale of the food before possession takes place is valid; and
    b. The *muawadhah* must be through measurement or weighing or counting. If it was bought randomly, i.e. without measurement, he is entitled, from the *Shari'ah* point of view, to sell it before possession occurs.

Preference:

The nature of this research does not permit us to analyze all the proofs of each group with discussions, replies and alternatives. However, what is preferred by us after observing the proofs and correlating between them and the warrants of standard of contracts, transactions and their *maqasid shari'ah*, is to correlate between two things:

1. Firstly, stipulation of taking of possession of the sold item and taking a particular sold item to be in the occupancy, i.e. in possession (apart from *salam*) (also, apart from *bai tauliyyah,* that is resale at cost price) and any

other thing that could follow through analogy, like contracts that are based on *muawadhah* between two parties, e.g. a specific *ijarah,* and gift that was accepted with payment consideration and the likes -

A. This is because there are many proofs that capitalize on taking possession, such as the authentic Hadith agreed upon by Bukhari and Muslim, with the wordings, “Anyone who purchased food should not sell it until he has taken its possession.” This ruling is further supported by other Hadith, one of which is the Hadith reported by Hakim bin Hizam, “If you purchase something, do not sell it until you take possession of it.”; and his Hadith on the prohibition of selling what one does not possess; and the Hadith of Ibnu Umar, where the Prophet s.a.w. said that it is not permissible to combine loan and sale in one contract or to combine two conditions in a sale; and it is not permissible to take profit of that which he does not guarantee; and you cannot sell what is not in your possession. The majority of the commentators of the Hadith are in agreement that the meaning of taking profit of that which you do not guarantee is to sell something before possession take place. This type of sale is *batil* (void) and *fasid* (invalid). Consequently, such profit is unlawful and is not good for consumption (benefiting from such a profit is not good). This is because as long as the possession of an item has not been transferred, it (the item) remains the liability of the vendor. Also, according to the Hadith of Zaid bin Thabit, the Prophet s.a.w. prohibited the selling of commodities in the same place of the purchase until the traders have brought it back to their houses. *Hiyazat* means *al-qabdh* (taking possession). Also, the Hadith of Uthman, in which he said, “I was buying dates from a Jewish dynasty called Bani Qaynuqa, and I in turn sell it to get profit. The information was relayed to the Prophet s.a.w. and he said, ‘O you Uthman, if you purchase anything you should measure it, and when you want to sell the same you should measure it also”. Also, Jabir’s Hadith that says, the Prophet s.a.w. prohibits the selling of food until two cubic measures have passed through it; the cubic of the seller, the cubic of the buyer. Also, the saying of Ibnu Umar, “I saw those

buying food at random, i.e. without measurement being reprimanded in the era of the Prophet s.a.w. for selling it before taking it to their houses". Also, he said, "We used to purchase food from the caravans at random without measurement; the messenger of Allah prohibits us from selling it until we have transferred it from its place". This ruling is also supported by the Prophetic traditions that prohibit contracts with the elements of uncertainties and ignorance that may lead to disputes. The rationale of the impermissibility of selling a commodity before possession takes place lies in the fact that that commodity may be damaged before possession is transferred. In such a case, dispute and conflicts among the buyers and the sellers will arise if such a transaction is allowed; and

B. Similarly, this ruling could also be supported by many of the sayings of the great Companions, and their Jurists, like Uthman, Abdullah bin Umar (may Allah be pleased with him), coupled with the fact that the narrator of the Hadith, which is Ibnu Abbas, the learned of the *ummah* and the interpreter of the Holy Qur'an, extended the Hadith of food, through *qiyas* and effective cause, to cover non-food. This is because by the view of Ibnu Abbas, there is not enough effective cause that will have a great impact on food. Therefore, the *illah* (effective cause) of the ownership or taking reward of that which has not been guaranteed or following of two guarantees (double responsibilities) consecutively, all these are found in food and non-food is weak, even though food has its own peculiarities that are taken into consideration as to the nature of taking possession either through measurement or transferring it or actual occupation whereas other things are taken into possession by evacuation, or specifying it or others as will come below.

2. The second thing is that the complement of the first one is that the *Shari'ah* does not specify the manner of taking possession in a peculiar way; it is subject to custom. Any method that people consider to constitute taking of possession is regarded as taking possession, except in the case of *sarf*

(exchange of currency). For this type of exchange, there is specific proof that stipulates that the transfer of possession must be hand to hand, i.e. reciprocal taking of possession, with the view of taking into consideration the widened scope of 'hand-to-hand', as will be mentioned later in the resolution made by the Fiqh Academy in Jeddah. In this regard, taking possession of food is completed when it is measured or weighed. But if the food was bought at random and the seller affirmed it, then the transfer of possession is regarded as completed. This is because the seller has left it for him (the buyer has consented); he (the seller) has severed his connection to it (the possession has been transferred from the seller to the buyer). In the contemporary world, the delivery of the bill of lading is regarded as taking possession in all commodities and also specifying certain commodity is regarded as taking of possession. Similarly is releasing the sold property and allowing it for usage. In a nutshell, we give preference to the opinion that stipulates the taking of possession. At the same time, we also give preference to the opinion of widening the scope of taking of possession to cover every act made by the seller or the buyer, in which occupation or delivery or allowing for usage or specifying are consequent to it. In other words, there must be something that shows that the seller has left the buyer and the sold item, and it is no longer in his occupation, rather, he has taken it out of his occupation through any act that customarily shows that. This is for transactions other than *sarf* (exchange of money), as mentioned before.

Resolution number (55/4/6) was issued on the issue of transfer of possession; its forms, specifically the new financial structures and the rulings on those structures. The resolution is as follows, "The Islamic Fiqh Academic Council organized its sixth conference session in Jeddah, Kingdom of Saudi Arabia from 17 - 23 of Shaaban or 14 - 20 March 1990. Having looked at the research that were presented before the Council regarding the topic of taking possession, its forms, specifically the new financial structures and the rulings on those structures, having listened to the discussions that were made about it, it resolved the following -

Taking possession, as it could be effected when it is through delivery by hand, or measuring, or weighing by scale if it is food, or transporting the sold item, or transferring it to the possession of the one who takes possession, it is also

actualized by deeming or constructively, by releasing and allowing for usage, even though there was no physical transfer of possession. The manner of taking possession differs, depending on the item transacted. Secondly, it is part of constructive taking of possession that is recognized in the *Shari'ah* and customarily:

1. The bank registers an of amount of money to be held in an account of a customer, with the following conditions -
    a. When an amount of money is deposited in the account of a customer directly or through inter-bank money transfer;
    b. If a customer executes a contract of money exchange which is instantaneous between him and the bank, in the sale of currency with another currency through the account of the customer; and
    c. If the bank deducted an amount from the customer's account with his permission, in order for that deducted amount to be transferred to another account and in a different currency. The transfer may be made to the same bank or to another bank, for the benefit of the customer or for another beneficiary. Accordingly, it is compulsory on the banks to take the *Shari'ah* principles of contract of money exchange in *Shari'ah* law. Delay of bank registration is overlooked within the limit that will allow the beneficiary to have actual taking of possession, in view of the period that is known in the market. However, it is not permitted for the beneficiary to use the money in that period, until there is implication of the bank's registration that allows for the actual possession.
2. Taking delivery of checks if there is balance that is withdrawable in the currency that it is issued with when it is received and the bank booked it.

The fifth topic: Accepting payment for the issuance of letters of guarantee (LGs)

Question:

Is it permitted for a bank to accept payment (fee) for the issuance of LGs, either on the basis that the transaction is a agency connected with the payment of certain amount, or on the basis of the bank's goodwill (i.e. the strength and financial stability of the bank will create confidence)?

Fatwa:

It appears that the topic concerning LGs, particularly on the way it is actually practised in the banks needs further research and study. This issue has been debated in many conferences, symposiums and study circles, whereby many *fatwas* have been issued. The most significant of these *fatwas* were the resolution issued by the International Islamic Fiqh Academy during its second conference.

Resolution number 5 regarding LGs

After that, the International Council of Fiqh Academy, which is an offshoot of the Organization of Islamic Conferences (OIC), organized its 2nd conference in Jeddah, from 10 - 16 Rabi' Al-akhir 1406AH, corresponding to 22 – 28 December 1985. After reviewing the research papers and having a thorough discussion with the relevant parties, it became clear that:

1. The two types of letters of credit (LCs), namely the initial and the final, may either be with coverage (with cash deposit) or without coverage. If it is without coverage, it is considered as joining of *dhimmah* (liability) of the guarantor to the liability of another person, in an obligation that is to be discharged now or later in the future. This is actually what is termed in Islamic *fiqh* as guarantee or suretyship. If it is with coverage, then the contractual relationship between the applicant of the letter of credit and the issuer is one *wakalah* (agency) in nature. *Wakalah* (agency) is permissible, with fee and without fee, whilst the relationship of guarantee still exists in favour of the beneficiary (whose benefit, e.g. payment is guaranteed.); and
2. Suretyship is a gratuitous contract, which is aimed at providing ease and benevolence. The Muslim jurists had ruled against taking payment for giving suretyship because when the guarantor is paying the guaranteed sum. If payment is taken, then it is like a loan that attracts benefits in favour of the lender, which is prohibited in Islam.

The Council resolved the following:

1. **It is not permissible to accept fees** for providing LGs in consideration of issuing the credit, in which the amount and period related to the letter are normally taken into consideration, whether it is with or without coverage; and

2. The administrative charges for issuing the two types of LGs are permissible in the *Shari'ah*. However, care must be taken, so as not to charge beyond the normal charges. In the occasion that full or partial coverage is given, it is permissible to take into consideration the actual tasks that need to be done to conclude the issuance of the LGs. Allah Knows best. However, the practice in many Islamic banks is contrary to this resolution. This is because it (the Islamic banks) takes commission that is similar to that of the conventional banks, i.e. in terms of percentages. Needless to say that it is actually even more than that, on the grounds that the Islamic banks do not charge interest when it liquidates the LG, while the Islamic banks paid the value of the guarantee. The only difference is that the Islamic banks do not charge interest when liquidating the LGs, whereas the conventional banks include interest in calculating the amount incurred in issuing the LGs, so long as the guarantee is not covered with a pre-deposited value due. It is a material difference.

The councils of *fatwas* and *Shari'ah* compliance monitoring in those Islamic banks that charge based on percentages justify it by saying that it is permissible to take commission charged on *wakalah* (agency) on percentage basis, in the opinion of some *fuqaha* (Muslim jurists), e.g. the Hanafi School of Law, as in the case of brokerage. They said that the *wakalah*, in this regard, is found in the administrative work in issuing the LG; this is the same whether the LG is covered or not. But this percentage may become a huge amount, whereby it cannot be regarded as a reasonable amount that corresponds to the **actual cost** incurred by the bank in issuing the LG. Due to this, the resolution of the Fiqh Academy Council is clear and decisive, as it connects between the permissibility to take administrative charges and the non-permissibility to take more than the normal price (actual cost incurred). Needless to say that, the resolution is express and clear on the non-permissibility of charging a commission on the issuance of LGs, which is a percentage of the amount of the guarantee. It stipulated that the banks are not permitted to take reward on it, in considerationfor the issuance of the guarantee (in which, normally, the amount and term of the guarantee are taken into consideration). This is same whether it is with coverage or without coverage.

Some Islamic banks have tried to comply with this resolution by being categorical in the way they charge the customers for the issuance of LGs. One example is as follows:

Amount guaranteed	Fee
$100,000 and below	$50
$100,000 - 500,000	$1,000

Referring to the table, if the value of the LG is $100,001, then $1000 will be charged, which is the same amount that will be charged for the issuance of an LG valued at $500,000. This is another injustice. Due to this, some see that charging based on percentage is better or is the lesser of the two evils. However, is it reasonable, for instance, for administrative charges to be $1,000,000 on an LG that amounts to $100 million or more? (i.e. for the issuance of an LG worth $100 million, is the cost incurred $1 million? Is this logical?)

The second issue is in respect of the fact that the Islamic banks cannot charge interest when liquidating the LGs. Because of this, they are 'compelled' to increase the percentage of commission that they charge and strictly emphasize on the percentage of the coverage and the credit. Consequently, this becomes a barrier to the clients of the Islamic banks. This leads to lack of effectiveness of LGs in many Islamic banks. This requires a solution. I hope that we will obtain a solution in this blessed symposium. Another discussion that could be made here is with regard to the formation of mutual cooperative fund amongst the Islamic banks for these types of circumstances. Also, the topic of other effective instruments, e.g. the bank may enter into partnership or the like.

Sixth topic: Formula for real estate financing of al-Barakah (London Branch)

Fatwa number 6/4 was issued, as follows:

Question:

A contractual relationship is established between the applicant and the bank for the acquisition of real estate, in order to sell it for the benefit of both parties, in proportion to

the capital. This proportion is termed as shares, where the value of each share is pre-agreed upon at the time of contracting.

The amount of each share is only £1. This value remains unchanged throughout the contract period. However, the real estate is saleable. So, it will be possible for the bank to sell its shares (in the real estate) periodically (for example, every month) to the purchaser. Consequently, the ownership will gradually transfer to the purchaser within the period agreed upon. In view of the fact that it is the purchaser who is the beneficiary of the real estate, he will be obliged to pay profit or rental to the bank, in consideration of the usufruct.

The profit due to the bank is determined in proportion to the bank's share of ownership in the real estate. The value is calculated every year, in accordance to a guideline already laid down; it cannot be changed. In this arrangement, the percentage charged on real estate financing in London is used as the benchmark to determine the returns. Based on this, the rentals due on the buyer decreases over time, as the bank's **ownership in the real estate decreases, while the ownership of the buyer increases.** This is effected through the purchase of shares by the buyer until he becomes the full owner of the real estate. What is the *fiqhi* point of view of this transaction?

Fatwa:

The *ulama* that are participating in this conference discussed the Albaraka Banking Group's method of real estate financing in London, under the relevant laws for this type of contract. They see it as significant, as Muslims need to own houses to meet their residential demands. The *ulama* observed numerous points that are related to this topic, as follows:

A. Registration of the resident in the name of the partner (the client that is interested in purchasing the house) at the beginning of the transaction;
B. Obliging the partner, the charges and expenses of registration;
C. Insurance premiums on the residence;
D. Method of calculating the annual rent;
E. Method of liquidating and covering the concession of the bank's rights in a situation where the proceeds of the sold property are not enough.

After the discussion, all the views were unanimously agreed on the following:

A. That registration of the resident in the name of the partner to prevent fraud is a something permitted by the *Shari'ah*. The said registration is not in conflict with the partnership agreement, particularly that the rights of the partner to utilize the asset remain restricted until he has acquired full ownership. In making this decision, the *ulama* took into consideration that the registration is a documentation that is secured with an official pledge on the ownership, in accordance with the agreement;

B. The obliging of the partner, registration fees, the plot, stamp duty and other minor expenses related to the joint ownership, without the involvement of the bank, is permitted based on the mutual agreement of both parties. What is important is to ensure that the partner will be the owner of the real estate at the end of the transaction;

C. With regard to insurance, originally, it was stipulated that both partners will bear the insurance premium because it is considered the expense of the partnership. It is allowed to take the premiums into consideration at the time of determining the rentals, so that insurance expenses would be covered;

D. The original presumption in *sharikatu al-milk* is equality in profit and loss, in proportion to the percentage of ownership. This is premised on the legal maxim that says, "Reward is deserved by the one who takes responsibility". In view of the nature of laws which do not allow the banks to bear any loss during disassociation of the partnership of ownership, this requires amendments to the sample of the transaction, whereby the arrangement of the transaction is made as follows:

    1. The bank and the client will jointly purchase a residence, based on percentage agreed upon by both parties;
    2. The bank will sell his shares to the client, i.e. selling to him real ownership, while preserving its shares of the usufruct till the time the partner has fully paid for the entire balance;
    3. The bank will be claiming the annual rental from the usufruct, in proportion to the actual amount payable as the price of the sold property; and
    4. If the partner delayed in paying his installments, it is lawful for the bank to either sell the residence and claim the balance from the proceeds, through forceful means of disclosure OR to rescind the sale and withhold the ownership with the consent of the partner, but, on the grounds that it will return to that partner what

he had paid. This is because such an action is considered as *iqalah* (mutual rescission). This article number 4 was approved by the majority.

Comment:

In my view, this *fatwa* is peculiar to a particular circumstance and particular environment and for a specific period. This *fatwa* was issued at the time when the Islamic banks were not allowed to play their roles in Britain or apply the *Shari'ah* laws of financing and partnership. Due to this, the *fatwa* will remain as an exception.

However, now, some laws, including British laws have changed and allowed for the establishment and operations of Islamic banks. It is incumbent on the Islamic banks in Britain and elsewhere to practise their activities in accordance with the general *Shari'ah* principles, and not rely on exceptions. Even Britain's Minister of Finance recommended in his 2007 budget report, and appropriation 2008, which was presented to the House of Common that the solution to the budget deficit is to adopt the idea of s*ukuk,* which can solve the problem of deficit, so that it will not lead to additional inflation and unemployment.

In consideration of this (the British's adoption), it is compulsory on the Islamic banks in Britain and elsewhere to come up with an ideal practice of Islamic economics that is based on assets, partnerships and aims at encompassing development. To this effect, it should be noted that the solution to assisting nationals to own real estate, industries, automobiles and the like are *al-murabahah;* or partnership that ends with ownership; or *ijarah* that ends with ownership; or *istisna*.

In this regard, the International Islamic Fiqh Academy issued *fatwa* number 25/1/6 regarding real estate financing for the construction and purchase of residential houses. The *fatwa* is as follows:

The International Council of Islamic Fiqh in its sixth conference, held in Jeddah, Kingdom of Saudi Arabia from 17 – 23 Shaban 1410 or 14 – 20 March 1990, having observed the research that were presented to the *majma*' regarding the issue of real estate financing and the construction and purchase of residential houses, and having listened to the discussions that were made about it, resolved the following:

1. Residential houses are one of the basic needs of human beings. They are ought to be provided through *Shari'ah*-compliant means, using *halal* (lawful) money. The methods used by the mortgage banks and the like, i.e. lending interest bearing loans, notwithstanding whether small or huge, are methods that are prohibited from the *Shari'ah* point of view, as they contain *riba*;
2. There are lawful means that are alternatives to the unlawful means to provide residence for possession. Needless to say, domiciles could also be provided via renting.
    a. The state should provide loans specifically for the acquisition of homes to those in need of homes, and then it (the state) will reclaim the loans back on a suitable installment basis, **without any interest**. This exemption clause is the same, whether the interest is taken in expressed terms or under the guise of service charges. However, if there is a need to recover the expenses incurred in the loan granting process and follow-up, then it is compulsory to limit such charges to the actual expenses incurred in the loan granting process, in accordance with what is explained in paragraph (a) of resolution number (1) of the third session of this Council;
    b. Well-off states should take charge of the construction of residential houses and then sell it to interested parties, to be paid on deferred payment and installment basis, with the guidelines spelt out in resolution number 53/2/6 of this session;
    c. Well-off individual investors or companies should take charge of building residential houses and then selling them on deferred payment;
    d. It also possible to make residential houses affordable through *istisna'* (commission to manufacture), on the premise that it is a binding contract. With this, it is possible to buy a residential house before building it, in accordance with the accurate description that will prevent any ignorance that leads to disputes, but without obliging spot payment of the whole price. Rather, it is permissible to defer the payment based on installments agreed upon by both parties, with the view to take into consideration the conditions and circumstances that were laid down for a valid contract of *istisna'*, with clear distinctions, as compared to the contract of *salam*.

The Council recommends the following:

Other *Shari'ah*-compliant means of providing ownership of residential houses should continuously be searched. I hope that the Arab world is not in need of *riba*-bearing formulas or legal devices. Rather, it is in need of a productive economy, ethics and development that combines the interests of both parties. This is what many of its good thinkers have expressed in many conferences and symposiums.

We ask Allah to grant success to those working in Islamic financial institutions for the purpose of actualizing the *maqasid shari'ah* in Islamic economics, and actualizing *maqasid shari'ah* in urbanization and civilization and comprehensive development, and cover all our deeds with the clothes of sincerity and clothes of acceptance. Allah is the one that grants success and the Guider to the right path.

Written by the needy servant of Allah, Prof. Dr. Ali Algari Dagi.