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

Prepared by His Excellency, Al-Shaikh Abdullah bin Sulaiman Mannea, member of the Council of Eminent Ulama', Kingdom of Saudi Arabia and member of the Shariah Supervisory Board, Albaraka Banking Group.

The 29th Albaraka Banking Group Symposium on Islamic Economics was held in Hilton Hotel, Jeddah, from 6 – 7 Ramadhan 1429 AH, corresponding to 6 – 7 September 2008.

Praise be to Allah and may His mercy and peace be upon the His messenger, The Holy Prophet Muhammad s.a.w., as well as his relatives and companions, all of them. Subsequent to this, I am often delighted with the view of the general secretariat of the Albaraka Banking Group to call for a review of the *fatwas* issued in these symposiums, so that they may serve as a contribution, in affirming the pillars of *maqasid al-shari'ah* and the general principles of Islamic law, and as a way of reducing the frequent application of *rukhsah,* while upholding the principles of *a'zimah*. This happened after the Islamic banking system went through a blessed trend (providing *Shari'ah*-compliant financing), led by the players themselves.

The factor that drove the general secretariat towards this blessed dimension is that the customers of the Islamic banks started gradually, in upholding the principles of *rukhsa*h, which were permitted in temporary *fatwas*, which have some reservations, except that, these reservations cannot be extended to that which legalizes what is illegal or illegalizes that which is legal.

They are only obscures (*shubhah*), in which abstinence from them entails purification to the *dhimmah* (the liability for one to account for his actions) and purification of the personality. May Allah give His gratitude to the general secretariat, in its cautiousness of Allah and assist it (the general secretariat) in actualizing its blessed goals in verifying, deepening, searching and reviewing what has been seen as a pressing need or necessity or inconveniencing or probability at the expense of

competition from the conventional banks. This type of procedure has been one of the ways to reform and establish Islam (in the early years of Islam). During that time, those whose hearts have been (recently) reconciled (to the Truth, i.e. Islam) are part of the beneficiaries of *zakah*.

The Prophet s.a.w. used this method (giving *zakah* to individuals with the propensity towards Islam) to reconcile the souls and in curbing antagonistic factors from leaders of various tribes. The rightly guided Khalifah Abu Bakar Al-siddiq (may Allah be pleased with him) also followed the model of the Prophet s.a.w. Then, after Islam has gotten its strength, charisma and power, the Amir Mukminin at that time, Umar bin Al-khattab (may Allah be pleased with him) stopped giving *zakah* to unbelievers who are interested to embrace Islam. He supported his view by saying that Islam is no longer needs to reconcile the hearts, because it has become strong and powerful.

Now, *Alhamdulilah*, Islamic banking, with its strength, has grown beyond the local spectrum and extended to non-Muslim societies. These societies have witnessed the transparency and honesty of the Islamic banks in running its transactions and avoiding the act of acquiring other people's properties through false means, i.e. through dealings based on uncertainty, manipulation, ignorance of subject matter, interest and commercial transactions that are combined with mere imagination and form, and disposal of properties before taking possession of the properties (in which the seller does not have the right of disposal of the properties). It ought to be noted that *fatwas* change in accordance with the changing conditions, circumstances, time and place. This occurred to Imam Shafie (may Allah be pleased with him), for his opinions on a certain matter changes as the locality changes (in this case, from Iraq to Egypt).

This issue (changing *fatwas* in accordance with the change in conditions, circumstances, and place) was discussed by Ibnu Al-qayyim in his book '*I'lam Al-muwaqiin an Rab al-alamin'.* He said that the yardstick is the achievement of *maslahah* and *maqasid al-shari'ah*. They (Imam Shafie and the Ibnu al-qayyim), while doing this, were in concordance with the model of the Prophet s.a.w. In this regard, it is cited that two men came to the Prophet s.a.w One of them was a young man and the other was an elderly man, asking him about the permissibility of kissing

one's spouse while fasting. He (the Prophet s.a.w.) permitted it for the elderly man but did not permit it for the young one. This was due to the consequences of kissing.

May Allah grant His gratitude to the secretariat in its deed and grant prudency to it in this review and the correction of mistakes. All of us often commit mistakes, but the best are those that repent from their mistakes. Allah is the One we implore for help. The general secretariat requested me to review the following *fatwas*:

1. *Fatwa* no. 1/15: The *Shari'ah* ruling on agents representing the two parties to a contract;
2. *Fatwa* no. 6/7: *Shari'ah* ruling on *murabahah mudawarrah*;
3. *Fatwa* no. 6/15: *Shari'ah* ruling on selling commodity before taking possession;
4. *Fatwa* no. 2/8: *Shari'ah* ruling on taking reward (payment) for issuing letter of guarantee; and
5. *Fatwa* no. 5: Terms of real estate financing in London.

The following is the presentation of the abovementioned *fatwas* and then followed by my comments on them, in accordance to what I see as the *Shari'ah* view, i.e. either supporting or opposing or restricting what is too loose. Allah is the One we implore for help.

***Fatwa* no. 1/15: The *Shari'ah* ruling on agents representing the two parties to a contract**

A *fatwa* was issued, i.e. it is permitted for a bank to appoint its customer as an agent to purchase commodity and then the same customer will offer the commodity for sale, while he is in his capacity as an agent for the bank. However, if the customer sells to himself, whereby he is taking charge of both sides of the contract, it is permitted if the price is specified by the principal (in this case, the bank).

This *fatwa* is related to two issues:

1. First: If the agent sells the commodity which he has purchased to a third party, by virtue of the agency conferred to him by the principal who asked him to do so, there are no disputes among the scholars against its validity; and

2. Second: If the agent sells the commodity to himself, whereby he is taking charge of two sides of the contract, this issue is argued among the scholars. Some scholars permitted it, if there are no doubtful elements, while some did not permit it, on the grounds of purification of the personality. Ibnu Qudamah said in *Al-muqni'*, "It is not permitted for one who is appointed as an agent in a sale to sell to himself. He said in the Hashiyah, this is the *madhhab* (of Hanbali) and the majority also ruled the same. He further said, that in the Hashiyah, "This is because the custom in sale is that one sells to another person, so it is in a *wakalah* contract. Also, he is subject to suspicious in selling, so it is in buying for himself."

In another version reported from Imam Ahmad, it is permissible for an agent to take charge of both sides of the contract, if there are no doubtful elements. He said in *Al-muqni*, "It is also reported from him, that is Imam Ahmad that, it is permitted for an agent to sell to himself, if he adds to the normal price, with which the sale was done by auction, or he appoints another person as an agent and he will be one of the buyers". He mentioned in the Hashiyah about the permissibility of the agent to sell to himself; if he was permitted, then it is permissible and he represents the two sides of the contract. This is the most authentic view".

However, having observed that representation of the two sides of a contract by a customer in the banking transaction has predominantly become mere form (not the actual purpose of the contract), a situation whereby neither buying nor selling was executed by the agent and at the same time, he obtains actual profit margin through *ribawi* (interest-based) terms. It is representation by an agent of both sides of the contract that served as a justification for the prohibition of *tawarruq*, as practised by the banks.

In order to preserve the reputation of Islamic banking, I am of the view that there is a need to review the arrangement of an agent taking both sides of a contract. It should be prevented, in consideration of transparency and to prevent criticisms that Islamic banks are involved in interest based-transactions and factors that have the probability to lead to form in transaction.

There are many examples to support that it is permissible to declare something as lawful and then recommend that it should be prevented on the grounds of precaution and avoiding ambiguities. One example is *bai' inah* , in which its procedures are in accordance with a valid sale, but having observed that there is a trick to attract *riba*, the majority of the scholars disallow it. Similarly, the case of *riba al-fadhli* (*riba*, which is addition to the original amount borrowed), having seen it as a means that leads to *riba al-nasiah*, the majority of scholars prohibited it.

Another example is the tradition reported by 'Aishah, may Allah be pleased with her, who said that, Sa'd bin Abi Waqas and Abdu bin Zam'ah reported to the Prophet s.a.w. in dispute that occurred between them. Sa'd said, "O you the Apostle of Allah, this son belongs to my brother called U'tbah bin Abi Waqas. He gave me a testate that he (the son) is his child, you can see his resemblance. Indeed, the Prophet s.a.w. saw a manifest resemblance with U'tbah, but ruled by saying "he is yours O you Abdu bin Zam'ah". "A child belongs to the bed while the adulterer owns nothing". "O you Saudah the daughter of Zam'ah, veil yourself from him. She ('Aishah) said, he never saw Saudah throughout. In this verdict, the Prophet s.a.w. attributed the child to the bed owner as that is the original presumption, and he attributed him to who is not the owner of the bed on the grounds of precaution, in order not to violate principle of *maharam* (degree of consanguinity either by birth or breast feeding, precluding marriage).

The Prophet s.a.w. combined both the original presumption and precaution when he saw a strong resemblance with the one who is not the bed owner. Here, we can observe the *fatwa* that ruled that the sale is valid if the agent sells to himself, at a specific price, as **determined by the principal**. It is apparent that when the principal determines the price for the agent, it is not considered as agency in sale, because the act of determining the price by the principal is considered as offer to sell, made by him to the agent. If the agent communicates his acceptance, then, the contract has been concluded by offer and acceptance made by the eligible parties. There is neither an agent nor principal in the contract, but all that took place is that the contract was concluded between the two parties of a valid contract, who are the seller and the buyer.

The summary of this *fatwa* is as follows:

1. It permitted for a client of the bank to represent the bank in an agency capacity, to buy the commodity required by the client of behalf of the bank, and then the client buys the commodity from the bank, after the bank has taken possession of the commodity. For this type of transaction, there are no disputes among the scholars;
2. It is not permitted for a client to take charge of the two sides of the agency contract, whereby he purchases the commodity for the bank and in turn sells it to himself, on behalf of the bank. The impermissibility is upheld, in order to avoid doubtful elements and protect the Islamic banking system against accusations that its products are merely tools to justify *riba*;
3. A group of *ulama* prohibited an agent from taking charge of both sides of a contract; agent of his principal in buying and selling on behalf of the bank. Even though some *ulama* permit it, if there are no doubtful elements, suspicious of form is in existence and it is more dangerous than the suspicious involved by way of negligence, if he buys or sells at less than the normal price; and
4. It is not considered as taking charge of both sides of the contract if the principal sets the price, in which case it is considered as offer and if accepted by the client, the sale is completed primarily from the seller and buying from the client. In this regard, there is neither agent nor principal. The contract was concluded by its primary parties, i.e. the seller and the buyer.

Fatwa no. 6/7: _Shari'ah_ ruling on _murabahah mudawarrah_

Its form: The bank appoints the client as their agent, to purchase for the bank and sell to himself, whereby, the client takes charge of two sides of the contract, with a pre-determined profit, which is mutually agreed upon. The *fatwa* ruled that this form of transaction is permitted.

I have nothing to oppose the permissibility of this contract. It is not because this type of contract is within the category of the dual role of agents (agent takes charge of both sides of the contract), but it is part of the sales that are concluded by the banks.

In this type of sale, the bank confers possession of the commodity to the client, after they have taken possession of the commodities and offered it for sale, at cost price plus profit margin, of which the margin was mutually agreed upon by the bank and the customer/agent.

Similarly, they also mutually agreed upon the mode of settlement; either by cash or deferred payment or by instalment payments. This is how *murabahah* contracts are concluded, in accordance with adherence to the agreement between the bank and its clients, in continuous bargains, as mentioned in the question.

Nothing in the question says that the client sells to himself, in his capacity as the agent of the bank. Taking charge of both sides of the contract by the agent has been discussed in the preceding fatwa no. 1/15. Allah knows best.

Fatwa no. 6/15: _Shari'ah_ ruling on selling commodity before taking possession

It is permissible to sell something that is not yet in one's possession, provided the said items are not food. This is because the prohibition of selling something that is not yet in one's possession only applies to eatables.

The scholars disputed on the permissibility of disposing a commodity, prior to taking possession of the commodity. Majority of the scholars did not permit disposal of commodities before possession takes place. Sale is one of the ways to dispose commodities. The proponents of this view adduced the following *hadith* as evidence of their stand, i.e. the Prophet s.a.w said that, "Anyone who bought food should not sell it until he has taken possession of the food". Ibnu Al-qudamah said in the book of Al-mughni, "I have not found any dissenting opinion on this, except the dissenting opinion reported from Al-batty. However, Ibnu Abdul Bari gave a ruling that rejects the opinion reported from Al-batty, by virtue of the Prophetic tradition and other proofs."

However, according to some *ulama*, for things like house, cars and animals, the condition of possession does not apply, i.e. one can sell it even before possession takes place. Ibnu Al-qudamah said that this is the prevailing view of the two views

reported from Imam Ahmad (on this issue). Among those that permitted it is Uthman bin Affan (may Allah be pleased with him), Saed bin Musayyib, Al-hakam, Hammad, Al-auzai and Ishaq. Also, in the book of Al-insaf by Al-mardawi, it is said that, if the subject matter is not something that is weighed or measured, then one is permitted to dispose it before taking possession of it. This is the view of the *madhhab* (school of law) of Imam Ahmad ibnu Hanbal.

Ibnu Al-qudamah also supported this view, by citing the *hadith*, in which the Prophet s.a.w. bought camel from Jabir and in turn gave the camel to him (Jabir), before he (the Prophet s.a.w.) takes possession of the camel. In another *hadith*, it was reported that the Prophet s.a.w. bought a camel from Umar bin al-khattab. Then, before taking possession of the camel, the Prophet s.a.w. gave the camel as a gift to Umar's son, Abdullah.

Conceptually, a sold product is considered to be within the reach of the buyer, except in a situation where the seller refuses to deliver it to the buyer. As long as the sold product is within the reach of the buyer and within his guarantee (he is responsible for it – *daman)*, he has the right to dispose product before taking possession of it, let alone after he has taken possession of it.

Some scholars supported their view of impermissibility of disposing a sold property before possession takes place, citing the following *hadith* as evidence, i.e. it was reported that the Prophet s.a.w. prohibits taking profit from a commodity that you are not responsible for (*daman)*. Some groups of scholars said that if possession of the sold product has transferred to the buyer through a sale contract, then it is considered to be within the reach of the buyer, except if the seller refuses to deliver the product.

It was reported in *Mudawwanah* of Imam Malik, while discussing about the issue of a commodity that is within the reach of the buyer, that Abdurahman bin Auf bought a horse from Uthman bin Affan for 12,000 silver dirham. In addition to that, he paid 4,000 dirham to Uthman, as consideration for the horse to remain as the liability of Uthman, until he sends his representative to take possession of the horse. Uthman accepted the offer. Later, the horse died under the custody of Uthman and he paid

12,000 dirham to Abdulrahman bin Auf. This is because he had accepted to be liable for the period the horse remains with him.

Fatwa no. 2/8: _Shari'ah_ ruling on taking reward (payment) for issuing letter of guarantee

The eight symposiums did not issue a *fatwa* on this issue. Rather, the issuance of a *fatwa* was postponed until a more thorough understanding of the processes of issuing LGs is obtained. I hope that the postponement will not be for long, as there is a pressing need to know the *Shari'ah* ruling on the existing practice of issuing letters of guarantee, both in the Islamic and the conventional banking sector.

To give guarantee to someone is an obligation and the letter of guarantee is the basis of the guarantee. So, is it permissible to charge a fee for the obligation being discharged by the bank?

It is necessary to expedite the research on this issue, so that a *fatwa* can be issued. For this matter, Allah's help is implored.

Fatwa no. 5: Terms of real estate financing in London

In my observation, this *fatwa* is related to *musharakah mutanaqisah*. Its nature is that the bank will have an agreement with its client, to purchase and jointly own several units of houses. In terms of the capital contribution for this *musharakah* venture, the bank will undertake to provide more capital than the customer, e.g. 90% against 10%.

Then, the bank will make a binding promise to sell their own shares of the houses to the client, on periodical basis, which is based on a predetermined price that is agreed upon by both parties. Thereafter, the *sharikah* will lease the houses to a third party and share the returns on a pro rata basis, until the bank's shares is totally transferred to the client.

The client, who is the *musharakah* partner of the bank, may, at the same time, be the lessee. In this regard, the bank owns 90% of the house, until the client has fully acquired the house. The initial *fatwa* ruled that this product is permitted. I have no remark on the ruling in general, except that I have some observations on the *fatwa*, as follows:

First

When the client is the lessee, the present practice makes him responsible for all the financial requirements of the house. Such financial requirements are fees, taxes and basic expenditure of the house. This is invalid, because the client will not be responsible, except for his own shares of the *musharakah*. The client is nevertheless responsible for the operational expenses (e.g. maintenance) of the house. This is because he is also the lessee. I suggest that this be reviewed.

Second

Regarding buying insurance policy for the asset, the authentic view is that the partnership bears the cost of the insurance policy. On this basis, each of the partners will bear the cost of insurance, in proportion to his share of the asset. Thereafter, they will recover the insurance premium paid from the asset's yield, provided that it is stipulated in the contract. However, I disagree with the suggestion that the bank may add the cost of the insurance to the rental, in order to recover the insurance premium. This, in reality, constitutes using tricks, in order to mimic the conventional banking concept. For this reason, it is incumbent upon the responsible *Shari'ah* authority to state clearly the truth and the right direction of the *Shari'ah* and avoid using tricks. It is the responsibility of the Islamic banks to search for replacements and alternatives (*Shari'ah*-compliant products). They should also abide by the requirements of Islamic banking.

Third

If there is a probability that the client may default in paying the shares of the bank, it is permitted for the bank to hold the client's shares in the *musharakah* as pawn. In the event of default, the bank may sell the pawned shares of the client, at the market

price, so that they can recover the receivables. This is more just for both parties, as opposed to forced mutual rescission, which is unjust to the client.

In conclusion, I am comfortable with this good view, which was issued by the general secretariat in the Al-barakah banking group. It is true that the Al-barakah banking group symposium has a magnitude of *fatwas*, most of them are based on *ijtihad*. It is alright to change *ijtihad*, if something more authentic appears. I hope this exercise of reviewing the *fatwas* of the Al-barakah banking group will be part of the activities for future symposiums. This will assist us in ensuring the authenticity and correctness of the *maqasid al-Shari'ah*, without violating any text from the Quran, Prophetic traditions and *ijma*', because a legal maxim says, "Where there is a text, there is no *ijtihad*. Allah is the One implored for help.