

**A Review of Islamic Credit Card Using Bay' al-'inah and Tawarruq
Instrument as adopted by Some Malaysian Financial Institution**

by

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Abstract

Islamic credit card or better known as Credit Card-i is one of the alternative banking products introduced by Islamic financial institutions in Malaysia to substitute the conventional credit card. This paper aims at reviewing the bay' al-'inah and tawarruq structure as applied by Islamic Financial Institutions in Malaysia from Shariah Compliance perspectives. The method used is descriptive and positive analytical criticism which aims at improving the existing structure.

1.0 Introduction

Islamic credit card has been recognized as the Shariah compliant product by Shariah Advisory Council of Bank Negara Malaysia (BNM). It was constituted by the BNM under the Guidelines of Islamic Credit Card dated on 1st August 2004. Generally, a number of models have been applied to produce the Islamic credit card around the world which is based on *bay' al-'inah*, *tawarruq*, *hiwalah*, *murabahah*, *ijarah* and *kafalah* or *wakalah*. In Malaysia, the Islamic credit card is executed by using the contract of *bay' al-'inah*, *tawarruq* and *ujrah*.

The *bay' al-'inah* model has been introduced by four Islamic financial institutions which are Am Bank "Al-Tasliif Credit Card" launched in December 2001, Bank Islam Malaysia Berhad "Bank Islam Card" launched in July 2002, Bank Simpanan Nasional "Al-Aiman Card" launched in December 2006 and Maybank Islamic "Ikhwan Card –P" launched in 2008.

The *tawarruq* model has been introduced by Bank Rakyat and this practice is followed by Bank Islam Malaysia Berhad (BIMB) by the end of 2008. Recently, the

model of *Ujrah* has been introduced by the HSBC Amanah¹ and EON CAP Islamic Bank Berhad.

On 29th June 2007, Bank Negara reported that, until May 2007, the total financing given by Islamic banking institutions through the Islamic credit card product had reached RM577 million.² It could be said that Islamic credit card has played a vital role in the development and success of Islamic banking in Malaysia.

Through this product, Muslims as well as non-Muslims are able to have their personal financing and make payments for high value items, foreign currency and items over the internet without being involved with *ribawi* (interest based) loans which are prohibited in Islam. At the same time, the Islamic credit card provides the added element of security through the Islamic insurance (Takaful). However, since the implementation of Islamic credit card in Malaysian financial institutions, a large number of criticisms have been made regarding its compliance to the principles of Shariah. It has been said that the structures and operations involved in its application are un-Islamic and merely a ploy (*hilah*) to legitimize interest.

2.0 Shariah Issues of Islamic Credit Card in Business Operation Framework

2.1 The Bay' al-'inah Structure Applied in Bank Islam Card and Its Business Operational Framework.³

The Shariah Advisory Council of Bank Negara Malaysia (BNM) in its 18th meeting held on 12th April 2001/22nd Muharram 1422 resolved that the mechanism of

¹ The former Chairman of Shariah Advisor of HSBC Amanah, Dr. Mohammad Akram Laldin said that the implementation of *Ujrah* concept in Islamic credit card has been approved by HSBC Shariah Advisory board in the Middle East. Dr Akram Laldin is now CEO of ISRA (International Islamic Research Academy). He was interviewed by the researcher, Kuala Lumpur, Oriental Mandarin Hotel, 11 November 2008.

² Institute of Banking and Islamic Finance (IBFIM), "Kad Kredit Islam Tawar Banyak Kelebihan", *Utusan Malaysia*, Monday, 23rd July, 2007 pg.18.

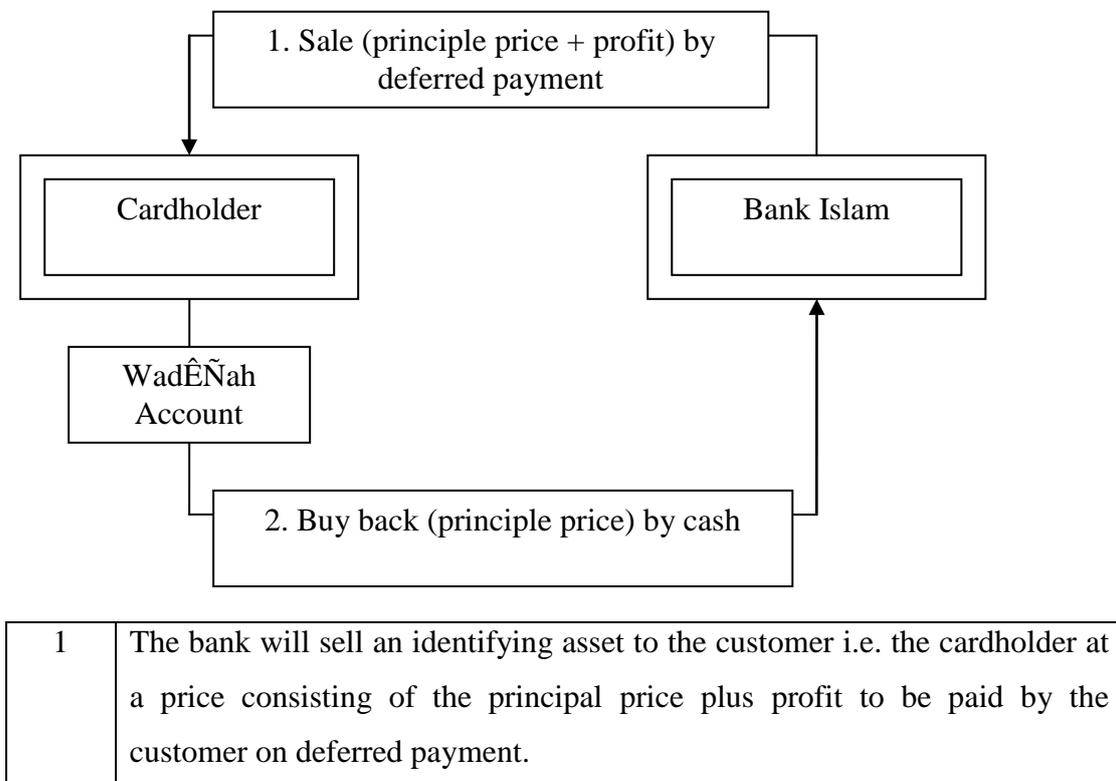
³ Mr Fakhrol Razi, Mr. Arif Arsyad and Mrs. Aliah, Interviewed by the researcher, Bank Islam Malaysia Berhad, Kuala Lumpur, 18 November 2008.

Islamic credit card which applies *bay' al-inah* concept to generate funds for credit purposes by a customer who request for Islamic credit card is permissible⁴.

Bay' al-inah has been defined as to sell a commodity and buy it back or the bank purchases a commodity from its client on a spot basis and sells it back to the client at a cost-plus price and on a deferred basis. The Shariah Advisory Council of BNM in its meeting held on 12th December 1998/23rd Sya'ban 1419 resolved that *bay' al-inah* transaction is permissible based on the condition; *bay' al-inah* transaction must strictly follow the mechanism which is accepted by Shafi'e school.⁵

Although *bay' al-inah* is permissible and has been widely used in the issuance of Islamic Credit Card in Malaysia, some of the specific practices of *bay' al-inah* in this product have been strongly criticized by scholars mostly from Middle East.

The diagram below explains the structure of *bay' al-inah* in Bank Islam Card (BIC) introduced by Bank Islam Malaysia Berhad (BIMB).



⁴ Resolution of Shar'Ah Advisory Council of Bank Negara Malaysia, 2007, 25.

⁵ Ibid.

2	Subsequently, the bank will buy back the identifying asset at principal price by way of cash payment. This cash money will be credited to the customer's account called Al-Wadiah Account through Bank Islam Card (BIC). The Wadiah Account has its own financing limit based on the type of BIC offered to the customer. The customer then can utilize the card up to its financing limit.
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First Stage: Application of Bank Islam Card by the Customer

The new applicant has to complete and sign the application form accordingly. The submission of the application must be attached with required documents; which are a photocopy of the Identification Card, 2 month's pay slip and the EA form or EPF statement. For self-employed applicant, an additional document need to be submitted which is the business registration.⁶

Second Stage: Processing and Approval by the Bank

The applications will be submitted to Bank Islam Card Centre and the officer in charge will process the application and make the evaluation and assessment of customer's credit profile. The customer's ability to make payment will be assessed through a proper review of the customer's salary or monthly income and their track record with each and every financial institution in Malaysia. Once the application has been approved, an offer letter will be issued to the customer.⁷

Third Stage: Acceptance and Execution of Agreements

All the approved Bank Islam Cards will be sent to the branches. In this stage, the buying and selling contract (*aqad al bay' al-inah*) will be concluded. Prior to the execution of *aqad*, the underlying asset which is a piece of land will be identified. The land will be divided into small lots, according to the financing limit registered in the card. The existence of the identified land is a must and it's being recorded in the finance book. The value of the land has been computerized in the system and has been approved and achieved the standard required by Bank Negara Malaysia.⁸

⁶ Researcher's Interview with the management of Bank Islam Malaysia Berhad, Kuala Lumpur, 18 November 2008.

⁷ Ibid.

⁸ Ibid.

During the sale agreement, when the system is tagged based on financing amount, the Bank will use and show the Share Certificates to check which lot of land is equivalent with the financing limit. Then, during the 'buy back' agreement, the customer or card holder will sell the land to the Bank, and the ownership of the land is transferred to the Bank. The proceed of the sale will be deposited into the customers' Wadiah Account.⁹

Fourth Stage: Activation of the Credit card

When the *aqad* is done, the Bank Islam Card will be activated and it abides by the Shariah requirement. All business and usage of the card which contradict the Shariah are not allowed by the Bank.¹⁰

Procedures in Bank Islam Card Transaction

The Financing Limit

The cardholder will get the Bank Islam card with the financing limit which has been placed in Wadiah Account. The financing limit given by the bank is based on the type of the card (Platinum, Gold or Classic). The minimum amount given is RM3, 000 and the maximum amount is RM100, 000.¹¹

The financing limit in Wadiah Account is considered as the cardholder's money. The amount can be utilized accordingly by the cardholder within three years. The Bank will charge for profit within the first three years and it is based on the usage and mode of payment.¹²

Significantly, the cardholder's ability to use the Wadiah Account can be said to be 'revolving'. When the cardholder makes repayment (e.g. RM1000) within the grace period, another RM1, 000 will be 'topped up' or added in Wadiah Account.¹³

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid

The Profit Charge

The bank will charge 18% per annum of the outstanding amount of all the purchases by the cardholder if no payment is made after the due date stated in the Statement of Account. The bank also will charge 18% per annum of the outstanding amount on the cash withdrawal if no payment is made, calculated on a daily basis from the transaction date until full repayment. The Profit Charge (18% per annum) which accrued by the bank is according to the first sale (the sale with deferred price). The percentage of the charged profit is stated in BNM regulation. It is always argued that the financing given by the Bank to the cardholder is taken from stakeholders funds. The bank has to take care of the business and funds of the stakeholders.¹⁴

Mode of Payment

If the repayment is made within the grace period (20 days) from the date of the monthly Statement Account, the Bank will not charge any profit or interest. The minimum monthly repayment is 5% of the total outstanding balance as at the Statement of Account processing date or RM50.¹⁵

Default Payment

Bank Islam's Card calculation of profit is not compounding interest-based charge. As such, if the cardholder's outstanding amount in the month of January is RM10,000, and he fails to make the repayment within 20 days (default), the Bank will charge 1% from the amount. If the cardholder fails to pay the following month (February), the Bank will only charge the profit on the outstanding amount, not on the minimum amount due. The calculation of the profit as below:

The outstanding amount	=RM10,000.
The profit charge for default payment in January	=RM100 (1% x RM10,000)
The overdue amount in January	=RM10,100.
The profit charge for default payment in February	=RM100 (1% x RM10,000)
The current balance in February	=RM10,200 (RM10,100+RM100). ¹⁶

¹⁴ Ibid.

¹⁵ Bank Islam Card Brochure.

¹⁶ Interview session, 18 November 2008.

Annual fee

Through the annual fee waiver plan, the bank will only waive the annual fee if the cardholder swipes a minimum of 12 times a year, regardless of amount.¹⁷

Cash withdrawal fee

The cardholder will be charged RM12 for every cash withdrawal or part thereof made at any Bank Islam ATM (Automatic Teller Machine). A fee of 3% of cash withdrawal amount or RM50 (whichever is higher) is charged for every cash withdrawal made at other bank ATMs.¹⁸

Compensation Handling Fee

Compensation handling fee of 1% from the minimum payment or RM5 (whichever is higher) will be charged on the cardholder if no payment is made after the due date or payment made is less than the stated minimum payment of 5%.¹⁹

Privileges given to Cardholders

Takaful Coverage and Benevolence Expenses

The BIC Takaful coverage guarantees the settlement of the cardholder's outstanding balance. If the cardholder passed away, the Bank will pay the premium to cover any outstanding amount inside the deceased's BIC account. The benevolent expenses ensure the cardholder's family will be relieved of any financial burden.²⁰

Worldwide Acceptance and Cash Advance

The cardholder can enjoy the card acceptance and emergency cash from any ATMs over the world. Card transaction which is affected in currencies other than *Ringgit Malaysia* will be converted into US Dollar and determined by MasterCard International or Visa International on the date the transaction is received and processed by the Bank. The value of the US Dollar is then converted into *Ringgit Malaysia*. The exchange may vary according to the market fluctuations and the amount converted is subject to the exchange rate at the processing time.²¹

¹⁷ Bank Islam Card Brochure.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

2.2 The Structure of *Tawarruq* Model applied in "Credit Card-i" introduced by Bank Rakyat and Its Business Operational Framework.

Tawarruq is defined as the type of transaction where a person buys a commodity with a deferred price, then sells it to a third party (other than the original seller) for an immediate cash price. The purpose of this contract is to obtain cash immediately and it is considered a reprehensible (*makruh*) sale in the opinion of Malik and one of the two opinions narrated on behalf of Ahmad.²² The OIC Islamic Fiqh Academy in its 17th meeting clarified its stand that *Tawarruq masrafiy* or organized *tawarruq* is disallowed.²³

In the context of Malaysia, the IFIs have the different justification about *tawarruq*. The BNM Shariah Advisory Council in its 51th meeting held on 28th July 2005/21 Jamadil Akhir 1426 resolved that the deposit and financing product which applies the *tawarruq* concept is permissible.²⁴

In the traditional books of Islamic jurisprudence, *tawarruq* has been discussed mainly by the Hanbali and Shafi'e jurists but they also differentiate it from *bay' al inah*. The different between *inah* and *tawarruq* is that "*mutawarrriq*" (the person who acquires liquidity) sells the commodity to a third party, while in *inah*, the buyer resells it to the same seller from whom he had bought the commodity with a difference in the sale and purchase price.²⁵

In the recent time, the concept of *tawarruq* is identified in two different figures which are the *tawarruq haqiqi* or *fardi* (traditional *tawarruq*) and the *tawarruq masrafiy* (organized *tawarruq*).²⁶

²² Wahbah Al-Zuhayli, *Financial Transactions in Islamic Jurisprudence*, V.1, (Syria: Dar al-Fikr, 2003), 117.

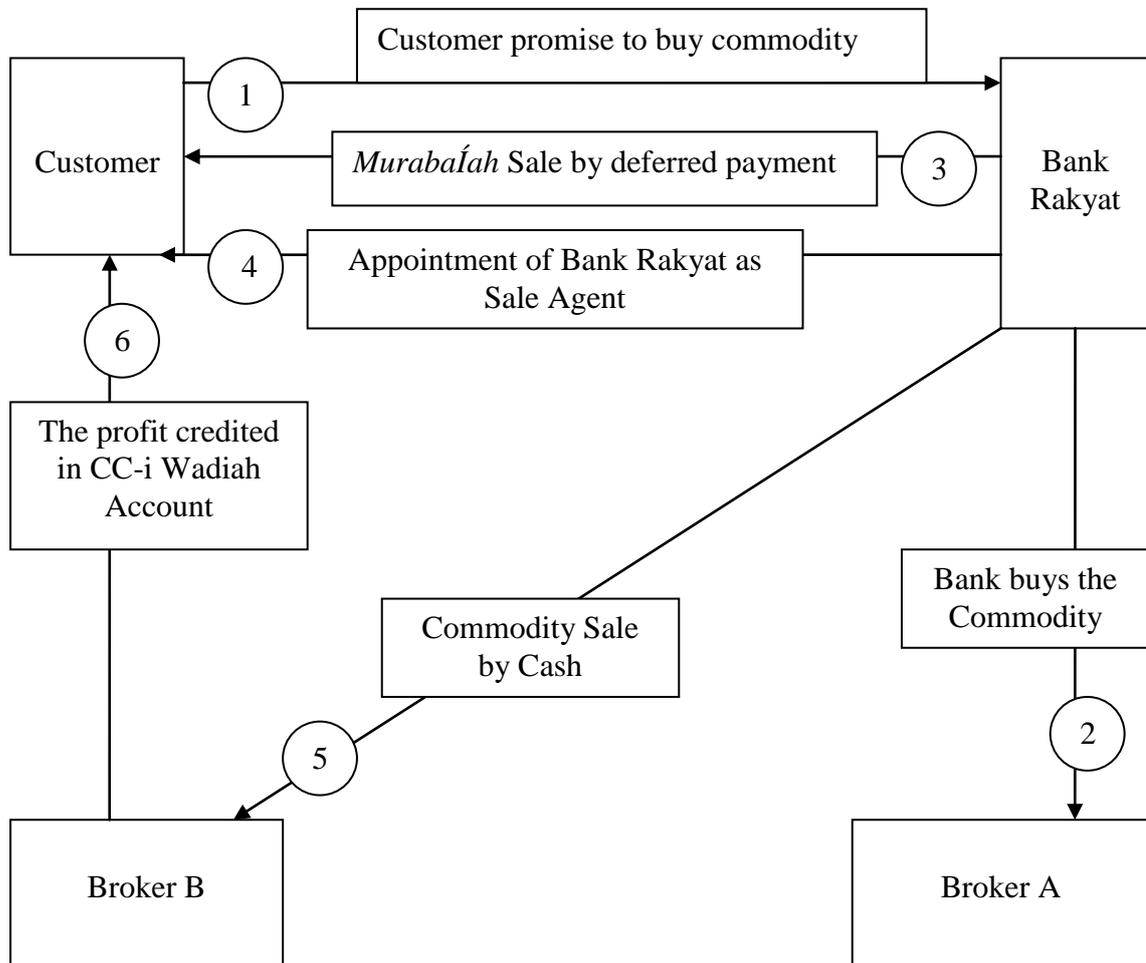
²³ Session Seventeenth Conference of OIC Fiqh Academy, 2007.

²⁴ Resolution of Shariah Advisory Council of Bank Negara Malaysia, 2007, pg. 24.

²⁵ Muhammad Ayub, *Understanding Islamic Finance*, (United Kingdom: John Wiley & Son, 2007), 349-350

²⁶ [https://eprints.kfupm.edu.sa/14894/1/Organosed_tawarruq_in_Islamic_Law\(conf_23_Apr_2007\).pdf](https://eprints.kfupm.edu.sa/14894/1/Organosed_tawarruq_in_Islamic_Law(conf_23_Apr_2007).pdf), retrieved on 3rd March 2009.

The diagram below explains the structure of *tawarruq* in Credit Card-*i* introduced by Bank Kerjasama Rakyat Malaysia Berhad.²⁷



1	For the purpose of the application of Bank Rakyat's Card Credit- I, the Customer has to promise (<i>Wa'ad</i>) to purchase the commodity from Bank Rakyat. According to Manager of Bank Rakyat's Credit Card Centre, Mr. Khairil Datuk Hamzah, the Customer acts as the promiser to buy the identified commodity that was introduced by the Bank.
2	After the process of <i>Wa'ad</i> has been done, the Bank will purchase the commodity from Broker A.

²⁷ Interview with Khairil Datuk Hamzah, Bank Rakyat's Card Credit Centre, Kuala Lumpur, 2 December 2008.

3	The Bank as the promisee and the beneficial owner of the commodity agrees to sell the commodity to the customer by <i>Murabahah</i> Sale or at Sale Price (Principle Price + Profit). At the same time the Customer agrees to purchase the commodity on the deferred payment basis for the contract period of the financing facility.
4	The customer would appoint the Bank as his agent under the contract of <i>Wakalah</i> to act on his behalf to sell the commodity to third party identified by Bank Rakyat on cash basis at the Purchase Price which is equivalent to the amount of Bank Rakyat's Credit Card-I financing as Bank Rakyat deems fit.
5	The Bank sells the commodity to the second Broker (Broker B) by cash at Purchase Price.
6	The profit from the commodity sale will be credited to the customer's Wadiah Account.

The Commodity

The commodity which has been used in the transaction of Bank Rakyat's *Tawarruq* model is the crude palm oil (CPO). The Bank has decided that Broker A be the permanent producer or the first trader of the CPO whenever it is needed or ordered by the Bank. For example, when the Bank Rakyat has to fulfill the customers' financing limit of about one million (RM1, 000, 000) on 14 December 2008, they will order the CPO on that measure from the first trader. Instead of buying the CPO in individual, the Bank will purchase it in a big amount or in a bulk to make the tagging system easier.²⁸

Instead of *bay' al-inah* transaction, for the purpose of giving credit card financing to a certain customer, the *tawarruq* process acquires the Bank to purchase the commodity from the first trader and sell the commodity to the second trader on behalf of the customer. The Bank will buy another unit of commodity to be sold to the second trader on behalf of the next cardholder or customer.²⁹

²⁸ Ibid.

²⁹ Ibid.

The First Broker or Trader

The first trader is identified as a big company which trades the CPO and it is not only subject to Bank Rakyat, but also provides commodity to other institutions or companies. In the process of purchasing the CPO, the ordered commodity will be sent to the Bank's industry port by/in a container. The trading system is done by issuing the invoice number. The customer will be provided with the Log Number in Bank Rakyat's Credit Card-*i* Financing Commodity Table which is attached with the Letter of Offer. In addition, the customer will be informed of the commodity. Normally, the Bank will state the commodity type such as "OC-BLACK RESIDUE".³⁰

The Second Trader

The second trader acts as the third party which has been selected by the Bank to the permanent buyer of the commodity. Actually, the Bank has made certain agreement with both of these traders. The first trader acts as the producer of the commodity, and the second trader acts as the purchaser. From the information given, these traders are identified as different entities. The trader will pay the Bank on the cash basis at a price equivalent to the amount of Bank Rakyat's Credit Card-I Financing as Bank Rakyat deems fit.³¹

Furthermore, from the interview session made by the researcher with the management, the Bank will sell the CPO to the second trader at the Purchase price plus profit. The profit will be credited to the Bank and the Purchase Price will be credited to the customer's Wadiah Account. According to the management, the customer has appointed the Bank to make the trading on behalf of him, so any action must be subjected to the decision of the Bank.³²

Wadiah Account

The Purchase Price paid by the second trader will be credited to the customer account called the Wadiah Account. The amount is known as the financing limit of Bank Rakyat's Credit Card-*i*. According to the Bank's Terms and Conditions, the

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

Bank will incur 18% profit charge annually from the outstanding amount for the purchases and cash withdrawal if there is no payment made by the customer after the due date stated in Monthly Card Statement.³³

The Shariah issue arises after the bank incurred the profit on the "Purchase Price" placed in customer's Wadiah Account, as the commodity belongs to him and Bank only trades it to the second Broker on behalf of the customer.

The bank management would argue that the Bank has the right to charge profit on the customer's outstanding amount because he has to settle the deferred payment which had been agreed between them on the first sale (after the promise (*wa'ad*)). He also claimed that the Bank did not take the profit at the first sale. And they will only take the profit in the first sale when the customer uses the card and fails to make the payment before the grace period. If the customer makes the repayment of the credit card before the grace period, the Bank's profit at the first sale will be rebated by the Bank.

The Operational Framework of Bank Rakyat's Credit Card-³⁴

First Stage: Application for Islamic Credit Card

The customer has to fulfill the sequent of the application regarding to the *aqad* stated by the Bank. First, the customer has to promise to buy or purchase the certain commodity offered by the Bank. Second, there will be the appointment of Bank Rakyat Credit Card Centre as the buying and selling agent, and they will act on behalf of the customer.

Second Stage: Islamic Credit Card Process

The application will be assessed by the Credit Card Centre officers and they will check the creditworthiness of the customer. Hence, the applicant must fulfill the requirement stated by the Bank which are; the Principal Cardholder must be 21 years and above, the Supplementary Cardholder must 18 years and above, the income is not less than RM18, 000 per annum for Classic Card applicant and RM36, 000 per annum for Gold Card applicant.

³³ Ibid.

³⁴ Ibid.

Third Stage: *Tawarruq* Process

1	The Bank Rakyat Treasury Department (on behalf of Bank) will purchase the commodity from the first trader at the principle price and the trading is subjected to the total amount of the credit card application approved by the Credit Card Centre.
2	Subsequently, the Treasury Department will sell the commodity to the buying agent (Credit Card Centre) at the Principle Price plus Profit.
3	Credit Card Centre (as the customer's selling agent) will appoint the Treasury Department to sell the commodity at the Principal Price, and the Department as required by the Credit Card Centre, will sell the commodity to the second Broker at the same day.
4	Credit Card Centre will issue the notice to the customer to inform of the transaction.

Fourth Stage: Preparation of Issuing for Islamic Credit Card

The bank will prepare some documents to be mailed to the customer. The documents are carrier card, Received Account Card and Terms and Conditions. The pin number of the credit card will be impressed and delivered to the customer.

Scholars' opinion about *Tawarruq* and *Bay al-inah*

Some Hanafi jurists of later days have held that *tawarruq* is *inah*, and hence abominable. But the majority of the Hanafi jurists have preferred the view of Ibn Hummam that *inah* is restricted to a situation where the commodity is sold back to the person from whom it was purchased; if it sold in the market the transaction is valid and permissible. However *Qardul Hasan* (lending money without interest) is more preferable. Thus, the preferred view in all the four schools of Islamic Fiqh is that *Tawarruq* is permissible. The AAOIFI has also taken up the view that if a commodity is sold back, either directly or indirectly (through any agent), to the original seller from it was purchased on a deferred payment basis, this will be invalid, while if the commodity is sold to the third party, it is acceptable in the

Shariah. This is the position with regard to the original concept of *Tawarruq*, but the ruling changes if the transaction is infiltrated by some other elements.³⁵

Ibn Qayyim in his book *I'lam al-muwaqi'in* said that:³⁶

1. The intention in contracts are legalise (القصد في العقود معتبرة)
2. The means / instrument (which can lead to *riba*) must be close up (الذرائع يجب سدها)
3. The misleading of actions is as same as the misleading of word (التغريب الفعلي كالتغريب القولي)
4. *Tawarruq* is the sister (as same as) *inah* (التورق شقيقة مسألة العينة)

In *bay al-inah*, the asset is repurchase by the bank (as the seller) and in *tawarruq*, the asset is sold to the third party. What is the different between the destiny of the asset to the bank and to the third party? Rather, the returning back of the asset to the bank is more lead to gentle and lenient of the customer, less trouble, less convenience and it can eliminate his loss or damage.³⁷

How can they prohibits the slight harm and permit the greater one. Actually in both situations, it refers to single meaning.³⁸ That is the customer has to pay the bank e.g RM4620 by deferred payment and at the same time he get the cash or financing limit in credit card for RM3000.

SHARIAH ISSUES ON THE APPLIED STRUCTURES

³⁵ Muhammad Ayub, *Understanding Islamic Finance*. United Kingdom: John Wiley & Son, 2007, pg. 349-350.

³⁶ Ibn Qayyim, *I'lam al-muwaqi'in*, vol.3, 174-175.

³⁷ Ibid

³⁸ Ibid

In general, it is observed that Islamic credit card is a replicate of conventional major features especially in providing the credit facility and imposing excessive charges on the customer upon financing and late payment.

Dr. Aznan Hassan³⁹ asserted that the bankers or practitioners are always accept the market familiarities; which only accept financial instrument that behave almost in the same way their conventional banking worked. It is also can be considered as replication of conventional financial products. It is closely resemble to and be modeled after the conventional products. Although it may differ largely from the technicalities and legal form perspective, the essence, substance and result are the same.⁴⁰

The identified issues are as follows:

Issue 1: The Fictitious Transaction

The issue of fictitious transaction will be raised when the transaction of ownership is not real done between the bank and customer. As has been discussed in the previous chapter, the transformation of the commodity is only being informed to the customer through the issuance of invoice number stated in the offer letter. The customer also did not know the period of the ownership transference, even the price of the commodity until the receipt of the offer letter. This is because the ownership transference is only done through the tagging system.

Issue 2: The Pre-arrangement of Sale

From the discussion, we can analyze that the *tawarruq* process which has been practiced is organized and it is arranged by the bank. These are because of some reason; firstly, both of the brokers are permanent entity (although both of the traders are different), secondly, the customer requests not the commodity but the financing limit in credit card.

³⁹ Dr. Aznan Hasan is an Assistant Professor in Islamic law and the former head of Islamic law Department, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia. He was a member of Shariah Advisory Council of Bank Negara Malaysia.

⁴⁰ Aznan Hassan, *Shariah Compliance or Shariah Driven Approach? Towards Full Appreciation of the Philosophical Roots of Islamic Finance*, seminar proceeding of ISRA launching.

Issue 3: The Profit is charged on the first sale

There is another issue which need to justify which is the profit charges accrued on the first sale of *bay al-inah*. This can be derived from the Article I and Article III of Bay al-Inah Sale Agreement:

“Profit margin” means the difference between the Sale Price payable herein and the BIC Financing and the method of recognition of the profit margin as the Bank's income shall be in accordance with the bank's accounting policy prevailing at the material time.

The Sale Price or such part thereof remaining unpaid shall be paid by the Card member in accordance with the Card Statement issued by the bank under the BIC Financing Agreement on the Payment Due date either in the amount constituting the Minimum Payment Due or in such other amount as stated therein in the Card Statement⁴¹

From the clause we understand that the Bank will charge the Profit according to the mode of payment by the Cardholder. The Cardholders get the Financing Limit via the *Wadiah* Account and this transaction is done when the Bank buy back the asset from the Customer by cash and at the principle price (the second transaction). The question arises when the Bank accrued the profit through the Sale Price (the first transaction) which is considered as deferred payment (*Bay al-ajal*) and logically it is not related to each other. As Prophet Muhammad said:

“لا يجل سلف وبيع”⁴²

It is not permissible to combine a loan with a sale.

⁴¹ Bank Islam Bay al-inah Sale Agreement.

⁴² Narrated by Amru ibn Shu'aib from his father and his grandfather, from the Prophet Muhammad (S.A.W), 'Ali ibn 'Umar al-Dar al-qutniy, *Sunan Dar al-qutniy*, no.3073 (Bayrut: Mu'assah al-Risalah, 2004),vol.4, 46. It is hadith hassan. See *Musnad Ah mad* no.6628, 6671, 6918.

As for *tawarruq*, the bank will charge some profit on the unpaid repayment of the credit card given to the customer. One may ask that on what basis the bank can charge the unpaid repayment of the credit limit. This is because the 'profit' which credited to the customer's account is the sale prices from the Broker A (third party) and not from the bank. Why it is regard as the credit limit of the bank? Why the bank simply accrued profit from the unpaid repayment? The first sale is cannot be related to the second sale. If there is any relation, it seems to be an arrangement to give the financing limit or cash to customers and the profit is charged upon the cash (indirectly).

Issue 4: The Revolving Credit Limit

The 'topped-up' or revolving credit limit which will be given by the bank after full repayment within the grace period may appear as a serious issue, which is related to the prohibition of combination between a sale and a loan. The operation statement shows that after the sale and repurchase of *bay al-inah* has been done; the agreed financing limit will be credited into the customer account. The amount (e.g. RM3000) is considered as the price of the asset which has been used in the sale. When the Bank revolves the amount or makes some addition in the customer's account, it is not considered as sale price but appears as a 'loan'.

Ibn Qudamah said in his book *Al-Mughni*⁴³:

"ولو باعه بشرط أن يسلفه أو يقرضه أو شرط المشتري ذلك عليه
فهو محرم، والبيع باطل وهو مذهب مالك والشافعي ولا أعلم فيه
خلافاً"

"And if the person sell (the item) with a condition to give credit or a loan or conditioned something as such to the purchaser so it is forbidden, and the sale is defeated. And this is what had been decided by Malik and Shafi'i and I don't know any disputation (about this matter) between them"

⁴³ Ibn Qudamah, *Al-Mughni*, Vol.4, (Egypt: Maktabah Al-Jumhuriyyah Al-Arabiyyah, (n.d)),259-260.

Ibn Qayyim in his book *I'lam al-muwaqi'in*⁴⁴ also said:

" إن النبي صلى الله عليه وسلم نهى أن يجمع الرجل بين سلف وبيع وهو حديث صحيح ومعلوم أنه لو أفرد أحدهما عن الآخر صح، وإنما ذاك: لأن اقتران أحدهما بالآخر ذريعة إلى أن يقرضه ألفا ويبيعه سلعة تساوي ثمان مائة بألف أخرى، فيكون قد أعطاه ألفا وسلعة بثمان مائة ليأخذ من ألفين وهذا هو معنى الربا"

"The Prophet S.A.W prohibited someone who combined a loan (or credit) with a sale and that is the soundest hadith and known, if the person separate between both, it is hold good. The reason is the conjugation of one to another is pretence to give someone a loan 1000 and at the same time sells to him an asset 1800. So it is likely the seller gives the purchaser 1000 and an item priced 800, in the way to get 2000 and this action brings the meaning of interest."

Particular Criticism on Tawarruq Structure

Issue 1: The Appointment of the bank as an Agent.

The customer would appoint the Bank as his agent under the contract of *Wakalah* to act on his behalf to sell the commodity to third party identified by Bank Rakyat on cash basis. The appointment of seller (bank) to be the agent of sale (*Wakalah*) in *Tawarruq* transaction had been discussed and justified by some Muslim scholars. Many others like Sheikh Syubayli in his fatwa said that the appointment of the seller (bank) as the agent to sell to the third party is considered as forbidden. He divides *tawarruq* in two categories which are *al-Tawarruq al-Jaiz* (permissible *tawarruq*) and *Tawarruq al-Muharram* (prohibited *Tawarruq*). Permissible *Tawarruq* is when a customer buys a commodity in deferred payment and sale the commodity after the possession of the asset by cash to the third party.⁴⁵ The prohibited *Tawarruq* is when the customer buys an asset with deferred payment and appoints the seller as

⁴⁴ Ibn Qayyim, *I'lam almuwaqi'in*, Vol.3,187.

⁴⁵ <http://www.shubily.com/index.php?news=131>.(accessed by 18th February 2009).

his agent by cash payment without the possession of the commodity. This matter has been resolved by the OIC Academy Fiqh in 19th Conference.⁴⁶

Issue 2: Reselling non-possessed merchandise

Analyzing the Bank Rakyat's *Tawarruq* model, generally we can understand that there will be two different contract applied in the transaction. First *aqad* is when the customer buys the commodity with the deferred payment, and second *aqad* is when the customer appoints the bank to resell the commodity to the Broker B (third party). One may argue that there will be an element of excessive risk and uncertainty when the transaction is combined or not separated. The transaction of ownership is not actually done between both sides, the bank and the customer. In other words, the possession of the commodity by the customer is not really happen.

The Muslim scholars decide that the resale a movable or an immovable object before receipt is forbidden. Hanafis ruled unanimously that it is not valid to resell a movable object of sale before receipt. Muhammad, Zufar and Al-Shafi'i ruled that it is not valid to sell an immovable property prior to receiving it due to the generality of the Hadith's prohibition of selling what has not been received, the inability to deliver the object of sale and the existence of excessive risk and uncertainty.⁴⁷

Issue 3: A Sale and purchase contract is concluded by one party for itself and on behalf of the counter party at once.

Referring to the information given, the Credit Card Centre will act on behalf of the customer, and the Treasury Department will act on behalf of the bank. The Shariah issue may rise when the account is not being separated between the customer and the bank. If the separation of account is not being done by the bank (as the bank acts as two entities), they may involve in fictitious transaction, give the guaranty on itself or *wakalah ala nafsihi*. If the bank appoints the customer (*Mutawarriq*) its agent to purchase the commodity on its behalf and then to sell the same to himself,

⁴⁶ Session Nineteenth Conference of OIC Fiqh Academy, 26-30 April 2009/ 1-5 Jamadil Ula 1430 in Sharjah, United Arab Emirates.

⁴⁷ Wahbah al-Zuhayli, *Financial Transactions in Islamic Jurisprudence*, 60-61.

the transaction will not be valid, as the two transaction of purchase and sale are interdependent and the bank has not taken the possession and the business risk. However if the bank appoints him as an agent only for the purchase of a commodity on behalf of the bank, then, once it is purchased ; the bank itself sells it to him through a separate contract with proper offer and acceptance, the transaction is valid.⁴⁸

Conclusion

It is submitted that Shariah law is open to interpretation and Shariah boards often have divergent views on key Shariah issues. In this regard, there is no practical guide as to what constitutes an acceptable Islamic financial instrument. A structure may be accepted by one Shariah board but rejected by other Shariah board.

It is observed that Islamic banking industry in Malaysia is moving away from *bay al-inah* and switch to *tawarruq* because of global criticism against *bay al-inah*. Nevertheless, *tawarruq* is not also safe from criticism. The criticized *tawarruq* is *tawarruq munazzam* (organized *tawarruq*) where the bank will act on behalf of customer to sell the very commodity sold by the bank to the customer without taking possession over the commodity by the customer, and other related arrangements which make the transaction looks fictitious. The way out is to get rid from the fictitious elements in concluding the transactions, in other words, the real *tawarruq* which is permitted by the jurists where the customer takes possession over the commodity purchased from the bank and sells it for cash by him/herself.

Analyzing the structures of Islamic credit card applied in Malaysian IFIs, it is suggested that the business operations and the models should be reviewed from time to time towards more Shariah compliant. The Shariah committees and the Shariah scholars might have approved some structure on the interim basis while more studies are done on finding the alternatives. In this light a due diligent Shariah compliant inspection and audit are necessary.

⁴⁸ See also AOFII standard no 20, 4/1/3 on trading of commodities.

As for the top up credit (revolving facility), it is suggested that it should be done through a new *tawarruq* arrangement as the bank cannot charge profit from the new loan (new credit facility). Alternatively, the bank can use *qard hasan* (benevolent loan) for the top up credit, but cannot charge management charge service (*Ujrah*) which is normally benchmarked with the conventional credit cards as it does not reflect the actual fees of services. It should be borne in mind that the very nature of credit cards is to provide loan and to make profit from the interest charged that absolutely amounts to *riba*. Nonetheless, the bank can still generate incomes from the commissions paid by merchants or services centres from all over the world (interchange fees paid by merchant acquirers).

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