

# THE ISSUE OF PRINCIPAL-AGENT IN SALE-BASED TRANSACTIONS FROM THE SHARĪ'AH PERSPECTIVE

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## Abstract

*Proper operational execution of underlying Sharī'ah principles applied in Islamic banking products is essential to ensure their validity and compliance with Sharī'ah. However, more often than not, the customers of Islamic banks expect more simplified processes when it comes to execution of a contract. Among the solutions introduced by Islamic banks is the adoption of wakālah (agency) in the execution of the contract where the bank, as the seller in a sale-based transaction, concurrently acts as the buyer on behalf of the customers. This exercise may lead to criticism as the bank assumes two roles at the same time—that of principal (muwakkil) as well as agent (wakīl) on behalf of the customers. This brief paper aims at discussing the potential Sharī'ah issue which may arise from such a practice — particularly, the issue of conflict of interest when the bank acts both as principal and agent to the transaction. The paper begins by first examining the concept and requirements of the wakālah contract; thereafter it delineates the jurists' opinions on the principal-agent acting as both principal and agent to a transaction; and finally provides an analysis of the issue in the context of the contemporary Islamic banking practice. In particular, the paper is of the view that in Islamic banking practice the issues of conflict of interest, moral hazard or potential manipulation of the price where the Islamic bank can favour itself are eliminated by the strict supervision and regulation set by the authorities which require, among others, independent Sharī'ah control such as Sharī'ah audit. The measures adopted by Islamic banks in eliminating the issue of jahālah (unknown element) in the contract execution also provide sufficient ground for rendering this practice permissible in Islamic banking transactions.*

**Keywords:** Sharī'ah, wakālah, principal, agent, sale, transaction.

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## I. INTRODUCTION

The execution of Islamic banking products should strictly observe the requirements of Sharī'ah that have been applied in such products. Failure to satisfy the tenets of the Sharī'ah principles may result in invalidation of the transactions and will require purification of the earned income. Subsequently, while Islamic banks continuously explore possible routes to simplify the execution of Islamic banking products to give a better 'customer experience', they also try to minimise potential operational lapses in the execution of Sharī'ah contracts that may lead to inadvertent financial losses to the banks.

Among the practices adopted to simplify the execution of some contracts — especially the contracts of *mu'āwadah* (exchange contracts) such as *murābahah*, *ijārah*, *istiṣnā'* or *tawarruq* — is the appointment of *wakālah* (agency) from one of the transacting parties to execute the 'aqd (contract) between them on his/her behalf. For example, in commodity *murābahah*, the customer (buyer at the first stage) appoints the bank as his/her agent to purchase the asset on his/her behalf from a broker and later on the bank (buyer at the second stage), assuming the same role as customer's agent (seller), will sell the asset to itself at a pre-determined price. Normally, this practice is used in most of the Islamic banking deposit products that would require appointment of the agent where the customer does not need to execute the 'aqd but rather the bank will execute the 'aqd all by itself as his/her agent pursuant to an appointment of agency from the customer.

However, this practice can be questioned due to several concerns and issues. One of the contentious issues that may arise is the conflict of interest when the Islamic bank is acting as the principal (on its behalf) and agent (on the customer's behalf) at the same time. Hence, this paper attempts to discuss the Sharī'ah requirements of the *wakālah* concept and examines the application of the principal-agent relationship in Islamic banking transactions from a Sharī'ah perspective.

The paper is accordingly organised as: following section I as the introduction, section II examines the concept and requirements of the *wakālah* contract; section III outlines the jurists' opinions on the agent acting as both principal and agent to a transaction; section IV provides an analysis of the issue in the context of the contemporary Islamic banking practice; and section V finally concludes the discussion.

## II. THE WAKĀLAH CONCEPT

The term *wakālah* literally means protection or authorisation; while the derived term *tawkīl* means authorising someone to carry out an action. Technically, *wakālah* refers to a contract

whereby a person is authorised to discharge a specific duty within a well-defined course of permissible action (Ibn Abidin, 3: 417).

### ***a. Legitimacy of Wakālah***

There are a number of evidences that indicate the legitimacy of *wakālah*, with proofs available in the Qur’ān, Sunnah as authentic traditions of the Prophet (SAW)<sup>1</sup>, and consensus of the scholars (*ijma’*).

The relevant Qur’ānic verse (18:19) provides:

*Let, then, one of you go with these silver coins to the town, and let him find out what food is purest there, and bring you thereof [some] provisions.*

As evidence from the Sunnah, there are many authentic *ahadīth* which report that the Prophet (SAW) practised *wakālah* thus establishing its permissibility. For instance, al-Bukhari, al-Thirmidhi, Abu Daud and Ibn Majah narrated that the Prophet (SAW) authorised ‘Urwah al-Bariqi to purchase a goat for sacrifice (*al-udhiyyah*) on his behalf (Ibn Qudamah, 5: 203). Another narration reported that the Prophet (SAW) commissioned ‘Amr bin Umayyah as a *wakīl* to ask for the hand of Ummu Habibah Binti Abi Sufyan in marriage (Abu Daud, 1:468).

There is a consensus (*ijma’*) among the jurists on the legality of *wakālah*. They argue that, more often than not, individuals cannot administer all their affairs on their own, and thus have a need to delegate some transactions to an agent (Ibn Qudamah, 1985: 79). Thus, the *wakālah* contract is seen as a means for establishing cooperation among people and in performing good deeds; hence, deemed permissible by Sharī‘ah.

### ***b. Pillars and Conditions of Wakālah***

Islamic jurists have enumerated four pillars of *wakālah*, as follows:

1. Principal (*muwakkil*)
2. Agent (*wakīl*)
3. Subject Matter (*muwakkal fīhi*)
4. Offer and Acceptance (*ījāb* and *qabūl*)

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<sup>1</sup> SAW is the acronym for the Arabic terms *Ṣallallāhu ‘Alayhi wa Sallam* (May Allah grant him honour and peace). It is encouraged to be mentioned after the name of Prophet Muhammad is cited.

As regards to the conditions of *wakālah*, they are as follows:

1. Principal (*muwakkil*)

- a. The principal must possess and own the property and have competence to deal with that property (Ibn Muflih, 1997: 255).
- b. The principal must attain full capacity to partake in contracts (*ahliyyah*). As a result, delegation is not permitted for an insane or minor (*sabiyy gayr mumayyiz*). If one of these groups is involved in the delegation of contract to someone else, such contract will be regarded as null and void (Al-Shirāzi, 1995: 164). Ḥanafī jurists also mentioned that it is lawful for minors *al-sabiyy al-mumayyiz* (who have reasoning ability) to delegate a person that can assist them in conducting transactions which are beneficial to them (Al-Kasānī, 2005: 406). On the contrary, Mālikī, Shāfi‘ī and Ḥanbalī jurists are of the opinion that it is not permissible at all for minors to delegate people to conduct any transaction relating to the contract (Al-Shirāzi, 1995: 164).

2. Agent (*wakīl*)

- a. The *wakīl* (agent) who is one of the contracting parties must be sane (*‘aqil*). The agent should have full legal capacity (*al-ahliyyah al-kāmilah*). Thus, a lunatic or an indiscriminating minor (*sabiyy ghayr mumayyiz*) cannot become an agent; but, according to the Ḥanafī school, it is allowed for *al-sabiyy mumayyiz* to carry out the contract of *wakālah* (Al-Kasānī, 2005: 407).
- b. The agent should also be aware of his status as an agent. For instance, if someone acted on behalf of another and later on he is informed that he is an agent of the latter, the preceding act would not fall under the *wakālah* contract (Al-Kasānī, 2005: 407).

3. Subject Matter (*muwakkal fīhi*)

- a. The subject matter of *wakālah* or the act to be performed by the agent should be known to the agent. Thus, it is not permissible to delegate someone to perform unknown things (Al-Shirāzi, 1995: 165). If the agency is for the purchase of a commodity, the genuineness, kind, quality and other necessary attributes of the commodity to be bought should be mentioned (Al-Sharqāwī, 1997: 229). In addition, the agency must be a lawful action, coupled with the fact that it must represent something that can be transacted through *wakālah* (Ibn Rushd, 2004: 685). Agency is not permissible for acts not permitted by Sharī‘ah or acts of

disobedience such as theft, usurpation of property or conducting *ribā*-based business.

- b. There are some subject matters which cannot be performed via agency such as personal devotional matters like prayers, fasting, purification, except in cases such as pilgrimage, marriage, and sale (Al-Kasānī, 2005, 6: 21).

### ***c. Classification of Wakālah***

Generally, *wakālah* can be divided into two categories:

1. Unrestricted/Absolute Agency (*al-Wakālah al-Mutlaqah*)

Under *wakālah mutlaqah* the agent's authority to act is not limited. For instance, it would apply to a situation where the principal appoints the agent to sell a piece of land for him but does not stipulate a particular price or a particular means of securing payment. In this case, according to the majority of jurists and two companions of Abu Hanīfah (Abu Yusuf and Muhammad al-Shaibānī), the agent has the authority to buy land within the prevailing practices and customs. However, if the agent acts contrary to the customary practice, then the transaction depends on the approval of the principal (Ibn Muflih, 1997: 256). In particular, the agent has to buy the land in such a way that the principal will not be cheated. However, Abu Hanīfah argues that an agent is not bound by customs as custom differs from one place to another (Ibn Nujaym, 1997: 283).

2. Restricted Agency (*al-Wakālah al-Muqayyadah*)

*Wakālah muqayyadah* is defined as an agency contract where the agent has to act within a definite mandate and cannot breach the stipulations agreed between both parties. For example, if the principal states 'I delegate you to buy a house at such a price, or until such a time, or based on installments'. The agent has to strictly observe these conditions. If the conditions are not met, the transaction is not binding on the principal (Ibn Muflih, 1997: 256).

## **III. JURISTIC OPINIONS ON AN AGENT REPRESENTING TWO ROLES IN ONE TRANSACTION – THAT OF PRINCIPAL AND CUSTOMER'S AGENT**

The issue of principal-agent occurs when one party (principal or agent) assumes two roles — that of buyer and seller at the same time. This issue has been discussed by classical and contemporary jurists. This section will present the opinions of the jurists on the issue and

the underlying justifications. Overall, the jurists have divergence in opinions regarding whether it is permissible for a person to be a *wakīl* to assume the role of seller/buyer on behalf of the principal and subsequently sells/buys to/for himself. The opinions can be classified as follows:

### **First Opinion: The Opponents' Views**

The majority of Islamic jurists, i.e. the Hanafites (Ibn ‘Abidin, n.d, 4: 406), the Malikites (Ibn Juzay, n.d, 1: 281), the Shafiites (Al-Sharbīnī, 2006, 2: 225), and the Hanbalites (Al-Mardāwī, n.d, 5: 275) ruled that it is not permissible for a *wakīl* to transact with himself (*wakīl* representing both parties of a contract). It is because the customary (‘*urf*) in the sale contract will involve one party as buyer who will buy from another party that is the seller. The basis of this opinion can be summarised as follows:

#### **i. There will be a sort of negative accusation (*tuhmah*) against the principal-agent.**

Under a normal sale and purchase transaction, there are few roles to be performed by the buyer and the seller. For example, the buyer takes delivery of the bought asset whilst the seller receives and possesses the price. Logically, it is hard to imagine that these rights are to be duly delivered concurrently by one party (Taqiyuddin al-Husni, 2001, 1:286). In addition, each transacting party has different motivation for entering into the transaction, e.g., the buyer wishes to get the cheapest price whilst the seller aims at maximising profit. Therefore, when the same party discharges these two roles in a transaction, there is a conflict of interest in terms of the roles that the same party is supposed to play. Thus, such an act will lead to the element of *tuhmah* to the *wakīl* — i.e. accusation of the *wakīl* conducting a fictitious transaction or committing injustice to the *muwakkil*.

According to Ibn Qayyim (n.d: 92), the word *tuhmah* refers to the accusation of someone conducting forbidden matters (e.g. theft, murder) whereby there is lack of evidence to support such actions. Therefore, in the above-mentioned transaction, since all the roles lie within one party and there is absence of any supervision from other parties involved, it may lead to *tuhmah* that the contract conducted is fictitious in nature and not a real one (Al-Sharbīnī, 2006, 2: 225).

#### **ii. There will be an element of uncertainty (*gharar*) in the transaction.**

Since the *wakīl* will act on behalf of the *muwakkil*, there is a high possibility that the *muwakkil* is left without proper disclosure on the pertinent matters relating to the transaction such as the sale price, the specification of the asset and mode of payment. The

absence of these information are considered as *gharar fahish* (major ambiguities) which may invalidate the contract itself.(Al-Sharbīnī, 2006, 2: 225)

Over and above the classical opinions, the contemporary fatwa bodies such as AAOIFI Shari'ah Council has resolved that it is impermissible for an agent to conduct deals with his own self. This resolution has been stated by the AAOIFI's Shari'ah Council in its Shari'ah Standards on *wakālah*. AAOIFI Shari'ah Standard No. 23: Agency and the Act of Uncommissioned Agent (*fudhuli*) (AAOIFI, 2008: 423, 536) provides that:

- a) Item 6/1/2: "An agent should not conduct deals with his own self or with his son/daughter who is still under his guidance ship or with his partner (*sharīk*) in the same contract."
- b) Item 6/1/3: "The agent should not act for both parties to the contract."

Based on the aforementioned opinions, the majority of classical jurists such as Hanafites, Malikites, Shafiites and Hanbalites are of the view that it is not allowable for the agent to assume two roles in the same contract i.e. seller and buyer, regardless as to whether the approval has been obtained from the *muwakkil*, as it leads to *tuhmah*, conflict of interests and possible occurrence of *gharar fahish* in the transaction

### **Second Opinion: The Proponents' Views**

Some of the Islamic jurists including Ibn Rushd (2004, 2: 303), Ibn Juzay (1982, 1: 356), Ibn Qudāmah (1985, 5: 84), and Al-Dusūqī (2005, 3: 387) hold that it is permissible for the agent to assume two roles i.e. acting as seller (on behalf of the *muwakkil*) and buyer (on his/her own behalf) in the same contract provided that consent is obtained from the *muwakkil*.

In justifying this issue, Ibn Qudāmah (1985, 5: 84) stated that the underlying reason for the prohibition of this practice is due to the existence of the element of *tuhmah* since there is a possibility that the consent from the *muwakkil* has not been sought. He thus argued that if the *muwakkil* has given the consent to the *wakīl* to act on his behalf, the element of *tuhmah* will be eliminated; thus, it is allowable. This can be analogised to the example of the concept of *talāq* (right to divorce). Originally, the right to divorce is vested with the husband. However, Islam allows that the husband can delegate the right to divorce to the wife and she has the right to divorce herself on behalf of her husband. This voluntary act of the husband does not lead to *tuhmah* as it is mutually agreed between the husband and wife.

In the event the *muwakkil* has given his consent to the *wakīl* to act on his behalf and the specific sale price quoted by the *muwakkil* has been agreed by the *wakīl*, the agency appointment and the transaction undertaken by the *wakīl* are deemed valid from the perspective of the Sharī‘ah. This is because the main intention of the *muwakkil* is to achieve the specific sale price and nothing more than that. Nevertheless, in another scenario, if the *muwakkil* has given his consent to the *wakīl* to act on his behalf even without mentioning the price of the asset to be sold, it is also allowable subject to the sale price being benchmarked to the market price (*thaman mithl*).

In another report by Imam Ahmad, it is stated that “*it is permissible for an agent to assume the role of seller (on behalf of the principal) and the buyer at the same time in the contract. It is permitted for an agent to sell to himself, if he adds to the initial price, and the sale was done by auction, or the principal appoints the seller as an agent and he will be one of the buyers*” (Mawsuah Fiqhiyyah al-Kuwaitiyyah, n.d, 5: 40).

Based on the text of Imam Ahmad, it is permissible for the *wakīl* to assume both roles of seller (on behalf of the principal) and buyer in the same contract subject to fulfilling those above-mentioned conditions. According to him, this practice is permissible once the element of *tuhmah* can be eliminated. This element may be removed, among others, by way of the *wakīl* putting a higher price than the market price at the time of sale via an auction and the sale to be offered to other buyers in the auction even if the *wakīl* is one of them. In this way, this practice will minimise the element of *tuhmah* to the *wakīl* in a sale transaction.

This issue has also been deliberated by some of the contemporary fatwa bodies such as Nadwah Al-Barakah (Abu Ghuddah, 2010: 23) whereby the issue was resolved based on two scenarios. First, it is permissible for the *muwakkil* to appoint a *wakīl* to purchase the asset at a specific price on behalf of the *muwakkil* and subsequently acts as a *wakīl* to sell the asset to the other contracting parties. Second, in case of appointment of the *wakīl* on behalf of the *muwakkil* to purchase the assets at the specified price and subsequently act as an agent to sell the asset to himself, it is permissible subject to the price of the asset in the sale contract being determined by the *muwakkil* in the first place.

Sheikh Sulaiman al-Mani` (2008) commented on the above resolution and highlighted some important points as follows:

- a) It is permissible for the bank as *muwakkil* to appoint the customer as its *wakīl* to purchase the assets on behalf of the bank and subsequently to sell the assets to others after the ownership of the assets has been transferred to the bank.



- b) It is prohibited for the bank to appoint the customer as its *wakīl* to purchase the assets on its behalf and subsequently to sell the assets to itself. This is to avoid from *tuhmah* to the bank as it may lead to a fictitious transaction.
- c) However, in the case where the bank has determined the price of the asset at the time the customer has been appointed as agent to purchase the assets on the bank's behalf and subsequently sell it to himself at a pre-determined price, it is then allowable. This is because there is no issue of the *wakīl* assuming two roles of seller and buyer at the same time since the bank as *muwakkil* has indicated the offer (*ijāb*) by determining the asset's price at the time of appointment of agent. Thus, the completion of the sale contract will be concluded once the customer accepts to purchase the assets at the pre-agreed price between the bank and the customer earlier. Pursuant to that, the contract is concluded between the seller (bank) and the buyer (customer) and therefore the ruling of the *wakīl* transacting with himself shall not be applicable.

The Shariah Advisory Council (SAC) of Bank Negara Malaysia (BNM) (2013) has discussed this issue of dual agency in the context of *tawarruq*-based deposit products where it involves an action of a party acting as an agent to purchase an asset on behalf of the other contracting parties and the party subsequently acts as an agent to sell the asset on behalf of the same contracting parties to itself.

The SAC of BNM approved this application of dual agency subject to its implementation satisfying the following conditions:

- (i) Execution of the sale and the purchase transactions shall be in a proper sequence and specific notification shall be made in respect of each completed transaction to the principal as follows:
  - a. Agent purchases the asset on behalf of the principal;
  - b. Agent notifies the principal of the purchase of the asset;
  - c. Agent sells the asset on behalf of the principal to himself (agent); and
  - d. Agent notifies the principal of the sale of the asset.
- (ii) In the event where:
  - a. The *murabahah* sale under the *tawarruq* arrangement is executed on a date later than the date on which the funds are accepted from the principal; and
  - b. The profit of the *murabahah* sale is calculated from the day the funds are accepted,

the agent shall notify the selling price to the principal.

- (iii) The method of notification shall be in any form accepted by customary business practices (*‘urf tijari*) and supported by documentary evidence.

Based on the aforementioned opinions, some of the Islamic jurists opine that the agent may play the two roles of seller and buyer in the context of sale contracts provided that the main element of *tuhmah* is eliminated. According to Ibn Qudāmah, this element of *tuhmah* can be removed once the *muwakkil* gives the consent to the agent to transact on his behalf. Thus, if this requirement is fulfilled, then it is allowable. Another view of Imam Ahmad also allows this kind of practice subject to some conditions and requirements to be satisfied. The contemporary authorities such as Nadwah al-Barakah and SAC of BNM also allow the practice of dual agency subject to some conditions in order to eliminate the prohibited element in the sale transactions.

#### **IV. ANALYSIS OF BOTH ARGUMENTS AND ITS APPLICABILITY IN CURRENT ISLAMIC BANKING PRACTICE**

After examining the jurists’ opinions, it can be concluded that the main reason of impermissibility of a *wakil* executing a transaction with him/herself is due to the occurrence of *tuhmah* where the transaction is claimed to be fictitious and such practice gives rise to other negative elements in the transactions such as conflict of interest, ambiguities (*gharar*) to the agent who act as seller (on behalf of the principal) and buyer at the same time.

However, this practice is not an absolute prohibition as such forbidden element can be eliminated and removed by implementing several measures including the establishment of detailed terms of the transaction that are to be agreed by the *muwakkil* and *wakil* before the *wakil* executing the transaction. This is in line with the legal maxim which means: “*Sharī‘ah ruling revolves within its cause (‘illah) that determine its presence and absence*” (Al-Asmari, 2000: 112).

In view of the application of principal-agent in Islamic banking practices, particularly in term deposit products, all the above-mentioned elements that are prohibited by the Islamic jurists can be eliminated by the strict supervision and regulation set by the authorities which require, among others, independent Sharī‘ah control such as Sharī‘ah audit.

In term deposit products based on *tawarruq*, the bank as an agent to the customer acquires the consent first from the principal (customer) to purchase the asset on behalf of the customer and subsequently sells it to itself (bank). The customer also makes known to the

bank the price of the asset that will be sold later to the bank at the time of appointment of the bank as the customer's agent. Therefore, in this context the element of *tuhmah* will be avoided as the *muwakkil* (customer) has given a mandate to the bank as his/her agent to conduct the transaction within his/her knowledge since all the details of transaction have been disclosed to both the customer and the bank.

Interestingly, in term deposit products the customer as principal appoints the bank as his/her agent to purchase the asset and the bank subsequently sells the asset to itself at a pre-determined price as agreed by the principal (customer). Taking into consideration a flexible opinion of Sheikh Sulaiman al-Mani` that the offer (*ijāb*) to sell from the principal (customer) has come in picture since the parties have agreed on the price upfront but the acceptance (*qabūl*) is to be completed by the *wakīl* (bank) later once the customer's asset is bought. Thus, there is no issue of the bank as agent to sell the asset to itself as the offer is from the principal, not from the bank.

Hence, as a measure to ensure the robustness of all the processes in place and ensure compliance with Sharī'ah requirements, Sharī'ah audit and Sharī'ah review units would conduct regular assessments on the transactions undertaken by the bank and would escalate their reports to the Sharī'ah Committee. These control mechanisms will remove the possibility of price manipulation by the bank that will cause injustice to the customer. Hence, the issue of conflict of interest and moral hazard will be eliminated and permissibility of the transactions would prevail. This fulfils a *fiqh* maxim which states: "*When the preclusion no longer exists, the precluded shall return*" (Majallah Ahkam 'Adiliyyah, n.d, article no. 24). Thus, the activity which was initially forbidden becomes permissible.

## V. CONCLUSION

Based on the preceding discussion, it is apparent that several jurists have disallowed the arrangement that a principal in a contract is also appointed as an agent to execute the same contract on behalf of the other parties. The basis of the jurists' argument is that it will lead to possible manipulation and exploitation or fraud in transactions. However, there is a group of jurists including Imam Ahmad who opined that there is no wrong in this practice so long as the *muwakkil* (principal) grants mandate to the *wakīl* (agent) to act on his/her behalf and the agent does not attempt to favour himself. Some other jurists including Ibn Qudamah provide a flexible opinion that such dual agency is permitted if there is consent from the principal obtained by the agent. Views from contemporary scholars such as from Dallah al-Barakah and SAC of BNM provide that the banking practice of principal-agent is allowable subject to few conditions being met.

After assessing the arguments extended by both the proponents and the opponents of this practice, this article is of the view that the concerns of the opponents can be duly addressed by implementation of strict Sharī‘ah governance and control in Islamic banks, for instance through supervision and regulation set by the authorities which require, among others, independent Sharī‘ah control such as Sharī‘ah audit. The measures adopted by Islamic banks in eliminating the issue of *jahālah* (unknown element) in the contract execution also provide sufficient ground for rendering this practice permissible in Islamic banking transactions.

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