

Islamic Private Equity Alternative Investment Structure based on Commodity Murabahah Structure: Analysis on the Expected Hilah Arguments and Rebuttal Grounds

Aiman Aizuddin Abdul Rashid & Rusni Hassan*

*IIUM Institute of Islamic Banking & Finance, International Islamic University
Malaysia, 53100, Selangor, Malaysia*

*Corresponding Authors

aiman.aizuddin.ar@gmail.com, hrusni@iium.edu.my*

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ABSTRACT

This study seeks to address the challenges currently encountered by the Islamic Private Equity (IPE) sector. It aims to establish the need for the development of a new Shariah-compliant alternative investment structure for the Islamic private equity industry to move forward by applying the underlying Shariah contract of Commodity Murabahah. In this regard, it attempts to anticipate the potential Shariah arguments that the proposed Alternative Structure may face against the utilization of such proposed Commodity Murabahah structure especially on the grounds of hilah (ruses/legal stratagems) and establish the relevant and appropriate rebuttal to counter such arguments.

Keywords: commodity *Murabahah*, Islamic private equity, Islamic finance, shariah investment



INTRODUCTION

The Islamic Banking and Finance (“IBF”) industry in general has accomplished its mission of producing financial products that are legally in line with *Shariah* principles. Despite the legal conformity, many of its products since the past, in substance are argued to apply *hilah* (ruses/legal stratagems) designed to achieve purposes fundamentally contrary to the spirit of *Shariah* (Ahmed, 2011; Coulson, 1978/1964). *Hilah* itself, for centuries, has been an ongoing religious issue, subject to divergence of opinion between scholars from different Islamic schools of thought on its application. However, some argue that this is merely a matter of *ijtihad* (personal reasoning) which many scholars believe that Islam has purposely left vague to show the beauty of the religion in promoting the germination of knowledge and interactions between intellectuals. In the field of Islamic Private Equity (IPE) which is traditionally built on the *Shariah* equity investment structures of *Mudarabah Musharakah* and *Wakalah* since the time of Prophet Muhammad in the 6th century, the proposal of developing a new alternative structure (Alternative Structure) has been mooted by industry practitioners in present days as a constructive solution to ease the strict restrictions faced under the *Shariah* equity structures investment rules as, *Shariah* debt structures to the contrary, provide more leniency in terms of the *Shariah* assessment requirements. Hence, the proposed creation of this Alternative Structure based on the *Shariah* debt structures consisting of Commodity *Murabahah* is expected to face the same sort of criticisms and line of arguments by the proponents of *hilah* by perhaps contending that this Alternative Structure intends to bypass certain sacred *Shariah* rules and manoeuvring another legal trick out. In anticipating such issues and preparing for the Alternative Structure defence, it is crucial to assess what is the real basis of *hilah* as per the *Shariah* and whether the Alternative Structure can be argued within the same context.

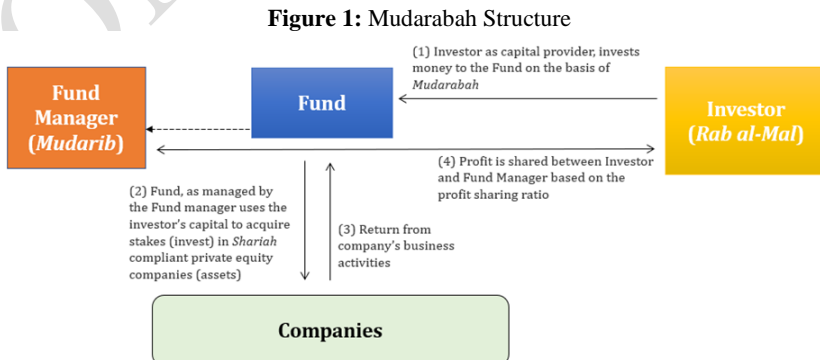
RESEARCH METHODOLOGY

This study applies a qualitative research methodology where perceptions, understandings and behaviours are measured to examine *Shariah* experts’ words and actions in narrative or descriptive ways (Maykut & Morehouse, 1994). In analysing the extent of *hilah* in IBF products, a case study method is conducted on its two most controversial structures since a case study serves as a holistic and in-depth investigation method to reach a multi-perspectival analysis from different dimensions of thought (Feagin et al., 1991). Secondary sources are mainly scrutinized with references made to the writings and opinions of renowned *Shariah* scholars and academicians.

Comparative studies on their different views are analysed as Khan and Manderson (1992) described this qualitative process as a way of understanding issues from the group's participants' perspective. Also, judicial decisions are being referred to considering their significance in setting judicial precedents for the industry players to strictly comply with. Overall, the textual analysis method will be applied where data are looked at from the angles of texts, passages, expressions and detailed wordings (Bryman, 2004). This is to achieve an authentic understanding which Gubrium and Holstein (1997) referred to as one that reflects fairly the various perspectives of participants in that setting, which in this research paper refers to the IBF industry's setting.

LITERATURE REVIEW

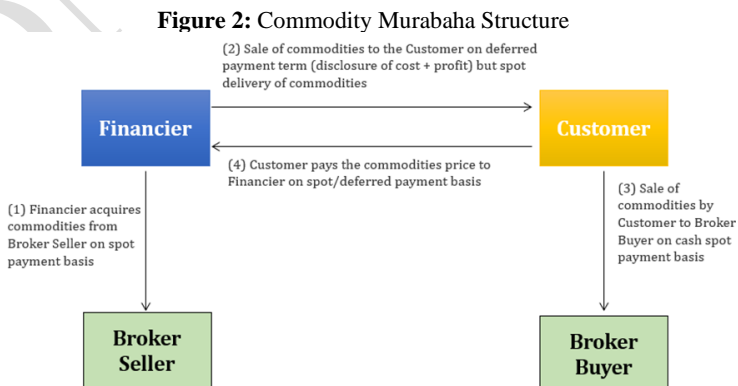
Private equity investment is a form of investment into private companies by acquiring shares in the company and becoming an equity shareholder or simply put, an owner. Although it may be considered relatively new to the broader investment community, its practice has been hundreds of years old dating back to the practice of Queen Isabella of Spain who sold her jewellery to finance Christopher Columbus' voyage across the Atlantic Ocean in return for whatever riches he could find in the new world (Anson, 2006). In a typical private equity deal, investors would buy a stake in a company with the hope that the company will do well in its business activities and that the valuation of the company will increase over time and hence, the value of the shares owned by the private equity investors will also multiply, giving a good investment return (Snow, 2007). Islamic Private Equity (IPE) meanwhile applies the same economic objectives and business models of the conventional private equity market except that the investment must adopt the applicable *Shariah* equity investment structures which typically is in the form of a *Mudarabah*, *Musharakah* or a *Wakalah* contract. A sample of a *Mudarabah* structure as stated in Dusuki (2012) is as per Figure 1:



The *Shariah* equity structures will bring the fundamental *Shariah* investment guidelines attached to them at the underlying asset level (Chatti & Yousfi, 2010) which are as follows:

1. Core business activity screening excludes investment into companies, which perform activities which are prohibited by *Shariah* for example, related to alcohol, pork, gambling, arms, tobacco, pornography and conventional financial services, amongst others.
2. Financial screening: prohibits investment into companies which has the following financial ratio thresholds: a) total conventional debt over total assets exceeding 33%, b) total interest-bearing investments/securities over total asset exceeding 33% and c) total *Shariah* non-compliant income /tainted income (from sources as per the above-mentioned *Shariah* non-compliant core business activities) over total revenue exceeding 5%.
3. Compliance to other *Shariah* guidelines like cash management policies, hedging techniques, bridging financing requirements, bank accounts, purification requirements and others.

As a result, many proposed investment deals will fail due to non-compliance to the *Shariah* investment guidelines as stated above, especially on the financial screening requirements which becomes a major hindrance, particularly in Western markets where the Islamic finance industry is still very weak/almost non-existent and Islamic product offerings are non-available or non-feasible. In light of this, in recent times, market players have proposed the creation of an Alternative Structure which adopts the *Shariah* debt structure comprising of Commodity *Murabahah* contract among others instead of a pure *Shariah* equity structure. A sample of a Commodity *Murabahah* structure as stated in Dusuki (2012) is as per Figure 2:



Adopting the above Commodity *Murabahah* structure in the IPE investment structure allows leniency in the *Shariah* investment guidelines, whereby only the core business activity screening will be applicable based on the *Shariah* rules of a Commodity *Murabahah* structure, while the rest of the *Shariah* rules under the *Shariah* equity structure will not be applicable. Consequently, this will facilitate more investment opportunities for IPE market players and spur market growth. Nevertheless, would be reasonably anticipated that this adoption of the *Shariah*-debt structure under the Alternative Structure will result in it being surrounded by controversies, especially on the long-standing argument of *hilah* and therefore, must be tackled and rebutted upfront.

To understand the ground of *hilah*, a deep dive must be made to the definition and concept of *hilah* itself from the Islamic jurisprudence point of view. The word *hilah* (plural; *hiyal*), is an Arabic term which literally means; ‘ruses, stratagem or legal device’ (Gaborieau et al., 2007). According to a famous Arabic lexicographer, Ibn Manzur (2009), *hilah* indicates the meaning of ingenuity, the raggedness of intellect and skill in management of affairs.

Technically, Ibn Nujaym (1983) from the Hanafis defined *hilah* as a person’s skill in producing a way to achieve his aims, with Al-Khassaf (1897) describing that aim as the escape from committing an illegal act to a legal act. Al-Shatibi (1999) from the Malikis defined *hilah* as an artful means to transmute an illegal established ruling, to a legally legitimate ruling, through an action which is valid in outward appearance but invalid in essence. Al-Jurjanji (1985) and Al-Ansari (1990) from the Shafi’is concurrently defined *hilah* as a legal channel for an extra-legal purpose, turning someone from something that he/she dislikes to what he/she likes. Meanwhile, Ibn Al-Qayyim (1993) and Ibn Taymiyyah (1987) from the Hanbalis described *hilah* as a hidden method requiring high intellect to achieve a specific objective and whether the *hilah* is good or otherwise depends on its underlying motive. Contemporary scholars also define *hilah* in a similar gist. Ibn ‘Ashur (1998) defined it as the committing of an act against *Shariah* through permissible ways to achieve certain objectives. Khadduri (1984) viewed *hilah* as a form of casuistry in which an act may seemingly be lawful according to the literal meaning of the law, but hardly in conformity with the spirit of the law.

The use of *hilah* has already been debatable in the past. Prophet Muhammad allowed it only in situations of extreme hardships which did not compromise justice. An example of an approved *hilah* application as cited by Ibn Al- Qayyim in his book *I’lam al-Muwaqqi’in* (Knowledge of the Time) (1993), in the section on *riba* (usury) is when a man who wishes to bequeath a greater sum of wealth to his child, which under the Islamic law of inheritance

is forbidden, declares to be indebted to a person because debt must be paid first before inheritance distribution, with the intent that the person is to give the money back to the intended child after the man's death (Khadduri, 1984). Meanwhile, an example of disproved *hilah* is the ruling of Ibnu Masud and Ibnu Abbas which rejected the acceptance of a gift from a debtor before the settlement of his debt, because the aim behind such action was to postpone the payment of the debt and a ruse to legalize interest (Mahmasani, 1961).

Since IBF's inception, *hilah* has become a more critical issue due to its controversial nature in legalizing various IBF products. Sadique (2008) referred this to its usage in overcoming situations with the predicament of violating the *Shariah* principles and this involves the employment of legal procedures and transactions, sometimes including the execution of several contracts one after another to facilitate achieving certain objectives, and the 'objectives' meant here are discussed later.

Rulings on *Hilah*

There exist major divergences of opinions on the rulings of *hilah* with jurists largely from the Hanafis and Shafi'is being the main supporters. They approve *hilah* by first relying on the *Al-Quran* verse (translation by Saheeh International, 2012) as follows:

"Except for the oppressed men, women, and children who cannot devise a plan, nor are they directed to a way."

(al-Nisa, 4: 98)

The verse explains the permission granted by Allah in allowing the oppressed i.e., Muslims in Makkah to find a way (*hilah*) to move to the city of Madinah. Secondly is based on the *Sunnah* narrated by Abu Dawud where the Prophet substituted the adultery punishment with a lighter punishment because the accused was suffering from a terrible health condition. Al-Shawkani (1901) viewed that this was a form of *hilah* permissible by *Shariah* based on the *Al-Quran* verse (translation by Saheeh International, 2012) as follows:

[We said]. "And take in your hand a bunch (of grass) and strike with it"

(Sad, 38: 44)

The Malikis and Hanbalis meanwhile are known to oppose *hilah* by firstly relying on the *Al-Quran* verse (translation by Saheeh International, 2012) as follows:

“And ask them about the town that was by the sea – when they transgressed in [the matter of] the Sabbath – when their fish came to them openly on their Sabbath day, and the day they had no Sabbath they did not come to them. Thus, did We give them trial because they were defiantly disobedient”.

(al-A’raf, 7: 163)

This verse explains Allah’s condemnation to those using *hilah* against His command of forbidding fishing on Saturday where they dropped the fishing net on Friday¹ and collected the gains on Sunday. Secondly, it relies on the hadith which forbids *hilah* by mixing or segregating zakatable subjects which results in decreasing the total proceeds of zakah (Khir et al., 2011).

Criticisms on *Hilah*

Without denying its importance in reaching a justifiable *Shariah-compliant* solution, many scholars have criticized the use of *hilah* due to its high tendency to be misused or abused. They rely on the *fiqhi* method of *sad al-dharai’* (blocking the means) *i.e.*, the idea of prevention of evil before it materializes (Kamali, 1996). Ibn Al-Qayyim insisted that it is inconceivable that an act prohibited by one law could possibly be permitted by another law under the same legal system (Khadduri, 1984). Mahmassani (1961) concurred stressing that all acts should be interpreted in the light of their spirit and intent, not appearances (Ayub, 2007). Similarly, Al-Shatibi, in the 14th century CE asserted that the purpose of *hilah* itself serves as a deceitful act to nullify *Shari’ah* rulings and destroy its objectives, hence, making it illegal (Khir et al., 2011).

Realizing this potential danger, Ibn Al-Qayyim (1993) laid down principles to govern its extent of permissibility to avoid arbitrary misuse. Firstly, it is allowed to escape from what is unacceptable under *Shariah* to what is acceptable, to win the rights of *haqq* (truth) over *batil* (falsehood) and to liberate people from being oppressed by wrongdoers. Secondly, is in the situation to abort responsibility or to rationalize illegal/impermissible actions, taking advantage of becoming criminals of turmoil and modification of truth from the difficulty of falling into falsehood (Al-Jauziyah, 2005). Al-Shatibi (2011) warned against the second category and labelled it as a ‘disgraceful *hilah*’ because it serves as a means to eliminate a clear *Shariah* injunction.

Nevertheless, it seemingly appears that *hilah* in IBF may have largely fallen into this second category.

Modern Application of *Hilah* in IBF

Hilah in today's modern IBF context no longer emphasizes the Muslims' behaviour as a whole, instead, focuses on a narrower perspective concerning legal instruments/contracts to form a way to legalize what would otherwise constitute a clear prohibition under *Shariah*. This development had even concerned court judges for instance in the Malaysian case of *Arab Malaysian Finance Bhd v. Taman Ihsan Jaya Sdn Bhd [2008] 5 MLJ 631* where the judge said:

“In developing a fiqh muamalat, caution must be exercised for it is all too easy, when creating and then relying on legal fiction, to fall into the pit of complacency and inadvertently developing a fiqh hiyal.”

In another case in the United Arab Emirates; *Cassation Court – Appeal No 927/2019*, the claimant claimed that the commodity *Murabahah* contract was not in compliance and in practical reality, it was similar to an interest-based loan (which is a *riba*) and that the underlying asset (the commodity) was simply used to allow the lending of money.

The judge in the case, although he did not make a specific ruling on the permissibility of the Commodity *Murabahah* transaction as he ordered the case to be returned to the appeal court to be litigated again, did however make the following important statements, among others:

- a) A *Murabahah* transaction has indeed been defined in the Islamic school of jurisprudence such as the Maliki jurisprudence whereby it is a sale of a commodity for its purchase value plus profit at an identified percentage; and
- b) The court can rely on a report from the expert although the court must ensure that the report has considered all aspects of the case including the defences raised by the parties.

The important points above already indicate the modern judicial acceptance of the *Shariah* contract as utilized based on the laws of the Islamic school of jurisprudence since the past besides the need to refer such matters to subject matter experts which are individuals who have the best technical knowledge in such matter. This indicates that even at judicial levels, the judges

are keener to rely on third-party experts' opinions rather than determining them directly themselves. This practice is also in line with some legislation in countries whereby there already exist specific laws which require a judge to refer technical matters to subject matter experts in arriving at a decision. For example, Section 56 of the Central Bank of Malaysia Act 2009 (CBMA) requires a court to refer a *Shariah* point in an IBF case to the *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (Central Bank of Malaysia). In *JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Berhad (President of Association of Islamic Banking Institutions Malaysia & Anor Interveners) [2019] MLJ 276*, the highest court in Malaysia, the Federal Court held that the ruling of the SAC was not in breach of the Federal Constitution and thus is not unconstitutional, although the final decision of the case is still upon the adjudicating judge to decide and that the decision of the SAC is not conclusive.

The above judicial cases have clearly established the fact that the argument of *hilah* by trying to interpret the intention of the parties which is itself a very subjective matter (can vary from one person to another) has been dismissed by the judiciary functions of countries and that the legal form of the *Shariah* contract which complies to the relevant legal and *Shariah* requirements (as approved by the relevant *Shariah* authorities) shall prevail. *Hilah* therein now functions as a *fiqhi* tool dealing with black-and-white classification of actions to facilitate implementation or addressable in the courts of law. This is because it no longer considers elements such as intention and ethics as indicators to identify whether the *hilah* used is good or otherwise. Hence, *hilah* is argued to slightly, if not substantially, being moving away from its originated purposes; designed as a legal way out of a predicament to avoid being in a position of committing illegality or out of a legal responsibility which they 'inadvertently' find themselves in and to facilitate the avoidance of legal injunctions where the 'greater good' of the Muslims are achieved. Consequently, this has been argued to lead to the creation of certain proclaimed 'controversial' IBF products such as *Bai' Al-Inah*, and Commodity *Murabahah* where it is argued that the apparent motive of such innovations is to bypass fundamental Islamic law prohibitions on interest payment.

Controversial IBF Products Using *Hilah*

The *hilah* issue has already become part and parcel of the IBF industry since the majority of IBF products arguably apply *hilah* to achieve *Shariah*-compliant status. However, these *hilah*-based products are mainly debt-based products such as *Bai' Al-Inah* and Commodity *Murabahah* while equity-based products such as *Musharakah*, *Mudarabah* and *Wakalah* are exceptions since they are based on equitable partnership structures.

Commodity *Murabahah* also known as *Tawarruq* is an example of a debt-based product, surrounded by the *hilah* issue. Commodity *Murabahah* refers to a transaction which involves two sale and purchase contracts; the first involves the sale of an asset by a seller to a purchaser on a deferred basis while the second the purchaser of the first sale will sell the same asset to a third party on a cash and spot basis (Accounting and Auditing Organization for Islamic Financial Institutions [AAOIFI], 2015; Bank Negara Malaysia [BNM], 2018) with the second sale to a third party usually done at a lower price (Hasan, 2011).

The Organization of Islamic Conference, Islamic *Fiqh* Academy (IFA) in 2010, classified *Tawarruq* into three categories; classical *Tawarruq*, organized *Tawarruq* and reverse *Tawarruq*. Classical *Tawarruq* refers to the original structure of *Tawarruq* as explained above while organized *Tawarruq* refers to the simultaneous selling back of the commodity to the initial seller (financier) himself with the seller, arranges the sale agreement either by himself or through his agent. Reversed *Tawarruq* meanwhile is similar to organized *Tawarruq* except that the purchaser is the financial institution acting as the client instead of a financier. From the perspective of some *Shariah* scholars, commodity *Murabahah* in essence, is actually a form of *Bai' Al-Inah*. The main differences are the number of parties involved with Commodity *Murabahah* constituting a tripartite arrangement and that the commodity, with prior arrangement, does not return back to the initial seller (in classical *Tawarruq*) (Hasan, 2011). Uthmani (2010) affirmed this stating that the difference lies in the end direction of the commodity where in *Bai' Al-Inah*, the commodity eventually goes back to the initial seller while in Commodity *Murabahah*, sold to a distinctive third party.

As Commodity *Murabahah* is a form of *Bai' Al-Inah*, the arguments on the permissibility of *Bai' Al-Inah* also extend to Commodity *Murabahah*. The Hanafis and Shafi'is mainly approved Commodity *Murabahah* while the Hanbalis especially Ibn Taimiyyah and Ibn Al-Qayyim have strong detestation towards Commodity *Murabahah* claiming that the *i'llah* (reasoning) of *riba* is contained inside Commodity *Murabahah* with Commodity *Murabahah* being even worse because it instigates higher costs and losses. Hence, *Shariah* does not forbid a lower harm (*riba*) and allows a higher harm (Commodity *Murabahah*) (Bouheraoua, 2009). Meanwhile, contemporary jurists such as the IFA ruled on the permissibility of classical *Tawarruq* provided that it complies with *Shariah* requirements on sale but disproved organized and reversed *Tawarruq* on the basis that the simultaneous transactions between the financier and customer, as a favour or in exchange for a financial obligation constitutes a deception to obtain additional quick cash from the contracts which thus tantamount to *riba* (Hasan, 2011).

Contemporary Rulings on *Bai' Inah* and Commodity *Murabahah*

The use of *Bai' Al-Inah* (which was mainly used in limited countries such as Malaysia and Brunei) has almost been eliminated in present times due to worldwide *Shariah* contract standardization such as the adoption of AAOIFI *Shariah* standards and International Islamic Financial Market (IIFM) template product documentation. Many recent *Shariah* rulings can be seen approving the Commodity *Murabahah* with it being applied in the overall IBF industry. *Shariah* scholars primarily relied on two main grounds; firstly, that the contract was neither prohibited in the *Al-Quran* nor Sunnah; and secondly justifiable under *maslahah* (greater good) referring to the need or interest of Muslims in contemporary society (Hasan, 2006; Shaharuddin, 2012). For instance, credit card, which mainly applies to Commodity *Murabahah* has emerged as an important banking facility for Muslims' commercial transactions and without them, Muslims will have to continuously use the *riba*-based credit card facility offered by conventional banks. For the continuation of the *Bai' Al-Inah* application mainly in Malaysia, the *Shariah* Advisory Council (SAC) of the Malaysian Central Bank, also known as Bank Negara Malaysia (BNM, 2010), has laid down strict guidelines before accepting *Bai' Al-Inah* failing which will render it invalid. Accordingly, *Bai' Al-Inah* must fulfil five conditions; firstly consisting of two clear and separate sale and purchase contracts, secondly not stipulating any condition to re-purchase the asset, thirdly both contracts to be concluded at separate times, fourthly to correctly follow the proper sequence of each contract with the sale contract shall be executed first and fifthly, ensuring a transfer of ownership with a valid possession of the asset in accordance with *Shariah* and business practice (BNM, 2013).

Besides that, the application of Commodity *Murabahah* has also been applied widely and there are various *Shariah* standards worldwide which provide for the permissibility of Commodity *Murabahah* as a *Shariah* contract to be used in Islamic financial transactions. For example, AAOIFI has published the *Shariah* standards on Commodity *Murabahah* in standard No. 30 titled monetization (*Tawarruq*). Besides that, many *Shariah* boards worldwide have ruled on the permissibility of Commodity *Murabahah* as the basis of the underlying structure of the *Shariah-compliant* transaction, especially in major syndicated financing facilities and Sukuk transactions.

Issues on *Maslahah* (Greater Good)

The 'subjectiveness' of the reliance on the use of *maslahah* justification seems to be the most debatable and unresolved issue. *Shariah* Scholars who use this argument view that the protection of the *maslahah* of *ummah* (society)

outweighs the ‘hidden intention’ or ‘backdoor way to *riba*’ issues surrounding *Bai’ Al-Inah* and Commodity *Murabahah*. To them, these Islamic instruments, overcome the liquidity shortage problem in Islamic countries. All these whiles, Muslims were ‘trapped’ and ‘forced’ to resort to conventional products, tainted with Islamic prohibitions such as *riba* and *gharar* (uncertainties). Therefore, *Bai’ Al-Inah* and Commodity *Murabahah* should be accepted relying on the Islamic legal maxim of ‘*akhaf al-dararain*’ (lesser of two evils) as accepting the controversial Islamic structure is much better compared to resorting to clear *riba* and *gharar*-based conventional products (Bakar & Ali, 2013). Thus, this serves as a means of preserving the wealth of the wide Muslim *ummah* which then allows for the fulfilment of the *Maqasid Al-Shariah* (objectives of *Shariah*). This is also in line with the views of many Islamic scholars on the purpose of *Maqasid Al-Shariah* which is to serve the interest of humankind and protection from harm (Manaf et al., 2017). In reliance to this, the judge in the Malaysian case of *CIMB Bank Berhad vs. LCL Corporation Bhd [2011] 7 CLJ 594* stated:

“If *hilah* is regarded as a mode to solve problems that is much needed by the people, the transaction is acceptable.”

Meanwhile, scholars who reject *Bai’ Al-Inah* and Commodity *Murabahah* based their arguments on its high tendency to be misused or abused. Anwar (2003) for example viewed that scholars are merely trying to prove that Islamic commercial law has the solution to the *riba* problem in a sophisticated banking environment without even properly addressing the bigger issue of concern *i.e.* the social obligation to the *ummah*. In the end, it results in similar economic effects with conventional products with usurious transactions. This group also view that such interpretations of *maslahah* by the accepting scholars are erroneous as the nature of *hilah* underneath them serves no more than a deception which manipulates the religious notion of Muslims for banks’ economic profit (Shahrudin, 2012). Nevertheless, this debate on *maslahah* is due to the various interpretations of ‘what should constitute’ as serving the *maslahah* of *ummah* and this is a matter of *ijtihad* (personal reasoning) of scholars with no right or wrong answers.

FINDINGS AND ANALYSIS

Dismissing the Argument of *Hilah* for the Alternative Structure

Similar to the Islamic banking industry which has been historically surrounded by the argument of *hilah* in some of its products and transactions as elaborated above, the same will inevitably be the subject of contention in the proposed

Alternative Structure in the IPE industry which is proposed to be built on the underlying *Shariah* contract of Commodity *Murabahah* among others. The underlying reason behind the use of the Commodity *Murabahah* structure instead of the traditional *Shariah* equity structure of *Wakalah*, *Mudarabah* or *Musharakah* which is typically associated with the private equity market is due to the *Shariah* guidelines of a *Murabahah* contract which, unlike the abovementioned *Shariah* equity structures, do not require the financial screening aspects of the underlying investee companies which have often been the stumbling block for investment managers to find suitable investment assets and consequently, develop the IPE market. The *Murabahah Shariah* guidelines such as under AAOIFI *Shariah* standards under Standard 30 (monetization), article 3/2 (AAOIFI, 2015) only requires the core business activity screening of the underlying investee companies to be performed which therefore allows the investment managers and consequently *Shariah* investors be subjected to a wider range of assets worldwide and therefore significantly develop the overall IPE industry.

On the anticipated arguments on *hilah* grounds due to the adoption of this commodity *Murabahah* structure, in this modern time and days, such argument should already be able to be substantially rebutted based on the below bases and justifications:

1. Existence of unified international *Shariah* standards, *Fatwas* from *Shariah* Boards and *Shariah* scholars on the permissibility of such contracts.

It has been established above that the *Shariah* contract of Commodity *Murabahah* has been resolved by various *Shariah* bodies as permissible. These include the AAOIFI *Shariah* standards, the *Fatwas* by various *Shariah* Boards of Islamic financial institutions or Islamic window operations and the legal court rulings among others. This therefore should be strong and legal backing on the permissibility of such *Shariah* contract application without any hesitance. It is of course, impossible for anyone to prevent any person who still wishes to raise such an argument of the structure being their entitled legal rights, especially when more often than not, the person may be motivated by other external considerations such as credit issues (making him unable to pay the financing facility within time) or simply deployed as a common legal strategy e.g. legal case delay tactics to buy time. However, if one is to assess thoroughly the strength of such arguments, it would be rather clear that there are already so many clear precedents in these sorts of cases which will eventually result in a negative outcome to the claimant.

2. *Maslahah* (Greater Good) ground

The *Maslahah* ground of justification has previously been relied upon by *Shariah* bodies for example by the Malaysian SAC in permitting certain *Shariah* contracts to be applied such as the *Shariah* contract of *Bai' Al Inah* and Commodity *Murabahah* (as discussed above). This is to facilitate the growth of the Islamic banking industry which at the early stage, faced many constraints. Eventually, these permissions based on the *Maslahah* have indeed successfully grown the Islamic banking industry where at present the industry's total market share is at 34.2% and 29% compared to total banking assets in Malaysia and UAE respectively (DDCAP Group, 2021; Fitch Ratings, 2021).

The same argument is hoped to facilitate the growth and penetration of the Islamic Private Equity (IPE) market which at present is still substantially insignificant compared to the conventional private equity market where available data shows that Islamic asset management size is only a tiny fractional proportion of the overall asset management industry. For example, the largest Islamic asset manager i.e., SNB Capital only accounts for 0.08% of the size of the largest conventional asset manager of the world i.e., BlackRock. Meanwhile, the total AUM of the top 10 Islamic fund asset managers as per Table 2 is US\$41,810 which is only 0.11% of the total overall conventional asset managers' AUM which stands at US\$37,417,989 (Horne, 2017; Thinking Ahead Institute, 2021). To make it even more difficult, compliance with the *Shariah* requirements under equity investments is much tougher than the Islamic banking business activities as private equity investments rely on continuous monitoring of the underlying companies and such ratios will change constantly making the status of the company prone to move from being compliant to non-compliant at any time.

This uncertainty has fundamentally become the major "pushing factor" for investment managers to deal with IPE investments due to the high risks posed especially when it comes to constant monitoring requirements and the processes and costs involved in liquidating assets when it changes status to be *Shariah* non-compliant. Furthermore, liquidating an asset in the private equity market is much more difficult compared to the listed equity market where the sale of stocks can easily be done over the counter. In a private equity secondary market, the availability to find immediate buyers is not easy coupled with the fact that the negotiation process will be very lengthy and such a sale process will be expensive. Eventually, this will result in the sale transaction being at a loss and prejudicial to the interest of

the *Shariah* investors. This is not how the IPE wanted to showcase itself to the public audience in growing the industry to greater heights. Therefore, certain permissions and flexibility are craved by the IPE players, and it should start with the *Shariah* structuring aspects. This proposed Alternative Structure is a much-needed breakthrough as the *Shariah* investment guidelines attached to it will be much more lenient compared to the stricter *Shariah* rules under the traditional *Shariah* equity structures of *Wakalah* and *Mudarabah* for instance. It is worth emphasising that it is never the intention to circumvent any established *Shariah* rules or to find the easiest *Shariah* application but rather to find an appropriate solution which is still within the overall *Shariah* framework in order to address the prolonged unsolved issue at hand.

3. Eliminating conflict of interest issues

When it comes to *hilah*, one of the main arguments attached to it is the issue of conflict of interest. For example, it is argued that the *Shariah* scholars may be conflicted when they make *Shariah* Board resolutions in favour of the financial institution as their remuneration is paid by the financial institution itself and this could affect their impartiality and objectivity of their decisions (Mohamad & Sori, 2016). However, this argument can easily be rebutted as countries have already moved towards having a separate *Shariah* Board at the financial institutions level and the national *Shariah* Board which sits at the central bank. The same can be seen in the practice of countries like Malaysia, where the SAC sits at the Central Bank of Malaysia level; in the UAE where the Higher *Shariah* Authority (HSA) sits at the Central Bank of UAE level and the *Shariah* Advisory Committee (SAC) of the Central Bank of Nigeria, being samples of practice in the different worldwide justifications to name a few. In these countries, a different *Shariah* committee/board is appointed at the financial institutions level; and thus ensures no conflict of interest in their *Shariah* rulings.

Building on the same ground of argument is the point of *tuhmah* (negative accusation) whereby such an Alternative Structure may be argued as a fictitious transaction to circumvent the established *Shariah* rules. Furthermore, it is claimed that the absence of any possible external supervision may lead to *tuhmah* that the transaction conducted is fictitious in nature and not a real one (Al-Sharbini, 2006). This would therefore give rise to other negative elements in transactions such as *gharar* (ambiguities) and *jahalalah* (unknown elements). However, these arguments may be eliminated and removed by establishing detailed terms of the Alternative Structure investment transaction that are to be agreed upon by the parties involved in the investment transaction.

Strict supervision and regulation set by relevant authorities which among others, require independent *Shariah* governance and controls such as continuous *Shariah* monitoring and periodical *Shariah* audits may be implemented to eliminate the conflict-of-interest argument. These controls will also remove the possibility of manipulations and potential moral hazard by the IPE players in circumventing any fundamental *Shariah* rules in the adopted structure (Ellias et al., 2014). This is also in line with the *Shariah* legal maxim of “*Shariah* ruling resolves within its *i’llah* (cause) that determine its presence and absence” (Al-Asmari, 2000).

CONCLUSION

Despite the continuous *Shariah* controversies surrounding the issues of *hilah* in the IBF industry, these *Shariah* products which are claimed to be tainted by the *hilah* issues had contributed much towards the innovative literature on Islamic finance. It is therefore crucial to distinguish between the argument of *hilah* from a negative perspective i.e. in circumventing established *Shariah* rules and the need to offer alternative *Shariah* solutions in finding a way out from the ongoing conundrum. While the latter may be argued as still adopting *hilah* strategy, such arguments may be countered by laying down the safeguards against any of its potential misuse. These include the three main justifications of the global *Shariah* resolutions on its permissibility, *Maslahah* (the greater good) and eliminating conflict of interest issues which are able to provide the necessary defence against the proponents of such *hilah* argument. In the end, it is for the benefit of everyone to see the IPE market flourish and thrive and not remain within its existing impediments without any viable solution being worked upon. The Islamic banking industry has already benefited from such a strategy being applied successfully and the same is desired for the IPE moving forward.

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CONFLICT OF INTERESTS

The authors declare no competing interests such as financial or personal relationships regarding the writing of this article.

AUTHORS' CONTRIBUTIONS

Both authors designed the study, gathered the literature, analysed the results and wrote the article.

REFERENCES

- Accounting and Auditing Organization for Islamic Financial Institutions. (2015). *Shari'ah Standards-Full text of Shari'ah standards for Islamic financial institutions as at Safar 1437 A.H./ December 2015 A.D.* Manama: The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI)
- Ahmed, H. (2011). Maqasid al-Shariah and Islamic financial products: A framework for assessment. *ISRA International Journal of Islamic Finance*, 3(1).
- Al-Ansari, Zakaria. (1990). *Al-Hudud Al-Aniqah Wa Al-Ta'rifat Al-Daqiqah*. Beirut: Dar Al-Fikr Al-Mu'asir.
- Al-Asmari, S. S. M. H. (2000). *Majmu'ah al-Fawaid al Bahiyyah 'ala Manzumah al-Qawaid al-Fiqhiyyah*. Riyadh: Dar al-Sami'ie.
- Al-Jauziah, I. Q. (2005). *Manajemen Qalbu [Heart Management]*. Darul Falah, Jakarta: Penerbit Buku Islam Kaffah.
- Al-Jurjani, A. M. (1985). *Al-Ta'rifat*. Beirut: Dar Al-Kitab Al-'Arabi.
- Al-Khassaf, A. B. (1897). *Fi Al-Hiyal*. Kaherah.
- Al-Sharbini. S. M. M. (2006). *Mughni al-Muhtaj*. Cairo: Dar al-Hadith.
- Al-Shatibi, A. I. (1999) *Al-Muwafaqat Fi Al-Usul Al-Shariah* (vol. 4). Dar Al-Ma'rifah, Beirut.
- Al-Shatibi, I. I. (2011). *Al-Muwafaqat fi Usul al-Shari'a [The reconciliation of the fundamentals of the Islamic law]* (I. A. K. Nyazee, Trans.) Garnet Publishing Limited, Reading.
- Al-Shawkawi, M. (1901). *Nayl al-Awtar, Idarah Al-Tiba'ah* (vol. 7). Cairo: Idarah al-Tiba'ah al-Muniriyyah.
- Anson, M. J. P. (2006). *Handbook of alternative assets* (2nd ed.). New Jersey: Wiley Finance.
- Anwar, M. (2003). Islamicity of banking and modes of Islamic banking. *Arab Law Quarterly*, 18(1).
- Ayub, M. (2007). *Understanding Islamic finance*. Hoboken, New Jersey: John Wiley & Sons.
- Bakar, M. D., & Ali, E. R. A. E. (Eds.). (2013). *Essential readings in Islamic finance*. Kuala Lumpur: CERT Publications.
- Bank Negara Malaysia. (2010). *Shariah resolutions in Islamic finance* (2nd ed.). Kuala Lumpur. Bank Negara Malaysia.
- Bank Negara Malaysia. (2013). Circular on Implementation of Shari'ah Advisory

- Council Bank Negara Malaysia's Resolution on Bai' Inah. BNM.
- Bank Negara Malaysia. (2018). *Tawarruq*. Kuala Lumpur: Bank Negara Malaysia,
- Bouheraoua, S. (2009). *Tawarruq in the banking system: A critical analytical study of juristic views on the topic*. Paper presented at the nineteenth session on tawarruq its essence and different forms (the classical and the organised), 26-30 April 2009, Sharjah, the United Arab Emirates organized by The International Islamic Fiqh Academy (IIFA).
- Bryman, A. (2004). *Social research methods* (2nd ed.). New York: Oxford University Press.
- Chatti, M. A., & Yousfi, O. (2010). *Islamic private equity. CPI financial. Opportunities in Islamic finance unconventional answers to the credit crisis*. <https://hal.science/hal-00813902/document>.
- Coulson, N. J. (1978/1964). *A history of Islamic law* (Reprint ed.). Edinburgh: Edinburgh University Press.
- DDCAP Group. (16 June 2021). *Malaysia's 34.2% Islamic banking market share edges towards 50% parity with the conventional sector by 2030 as the sector reinforces its resilience and relevance during the COVID-19 Pandemic*. <https://www.ddcap.com/malaysias-34-2-islamic-banking-market-share-edges-towards-50-parity-with-conventional-sector-by-2030-as-sector-reinforces-its-resilience-and-relevance-during-covid-19-pandemic/>
- Dusuki, A. W. (Ed.). (2012). *Islamic financial system principles & operations*. Kuala Lumpur: International Shari'ah Research Academy for Islamic Finance (ISRA).
- Ellias M. R. A., Haron, M. N., & Mohammed M. F. (2014). The issue of principal-agent sale-based transactions from the Shari'ah perspective. *ISRA International Journal of Islamic Finance*, 6(2).
- Feagin, J., Orum, A., & Sjoberg, G. (Eds.). (1991). *A case for case study*. Chapel Hill, NC: University of North Carolina Press.
- FitchRatings. (2021, June 16). *UAE Islamic banks dashboard: 2020 results*. <https://www.fitchratings.com/research/islamic-finance/uae-islamic-banks-dashboard-2020-results-16-06-2021>
- Gaborieau, M., Krämer, G., Nawas, J., & Rowson, E. (2007). *Encyclopaedia of Islam* (3rd ed.). Laiden: E J Brill.
- Gubrium, J. F., & Holstein, J. A. (1997). *The new language of qualitative method*. New York: Oxford University Press.
- Hasan, A. (2011). *Fundamentals of Shariah in Islamic Finance*. Kuala Lumpur: IBFIM.
- Hasan, Z. (2006). *Legal thoughts on Madhhab Al-Shafi'i in the implementation of Islamic banking in Malaysia*. Paper presented at the International Seminar on Legal Thought of Madhhab Shafi'i , 19-20th January 2006, University of Brunei Darussalam.

- Horne, J. (2017). *The 50 biggest managers of Islamic fund*.
<https://www.asianinvestor.net/article/the-50-biggest-managers-of-islamic-funds/436588>.
- Ibn 'Ashur, M. T. (1998). *Maqasid Al-Shariah Al-Islamiyyah*. Amman: Al-Basa'ir li'l-Intaj al-'Ilmi.
- Ibn Al-Qayyim. (1993). *I'lam al-Muwaqqi'en 'An Rabb Al-'Alamin*. (vol. 3). Beirut. Dar Al-Kutub al-'Ilmiyyah.
- Ibn Manzur, M. M. (2009). *Lisan Al-'Arab*. Beirut: Dar al Kutub Al-Ilmiyah.
- Ibn Nujaym. (1983). *Al-Ashbah Wa Al-Naza'ir*. Damsyik: Dar Al-Fikr.
- Ibn Taymiyyah. (1987). *Al-Fatawa Al-Kubra* (vol. 6). Beirut: Dar Al-Kutub Al-'Ilmiyyah.
- Kamali, M. H. (1996). *Principles of Islamic jurisprudence*. United Kingdom: Islamic Text Society.
- Khadduri, M. (1984). *The Islamic conception of justice*. Maryland: The John Hopkins University Press.
- Khan, M., & Manderson, L. (1992). Focus group in tropical diseases research. *Health Policy and Planning*, 7(1). doi: 10.1093/heapol/7.1.56.
- Khair, M. F. A., Muhammad, M., Md. Hashim, A., Bouheraoua, S., Hussain, L., Iqbal, I. (2011). *Parameter Hiyal dalam Kewangan Islam [The Parameters of Hiyal in Islamic Finance]* (Research Paper No: 23/2011). Paper presented at the International Shari'ah Research Academy for Islamic Finance, 9 May 2011, Kuala Lumpur.
- Mahmasani, S. (1961). *Falsafat al-tashri fi al-Islam* (F. J. Ziadeh, Trans.). Leiden: E. J. Brill.
- Manaf, A. W. A., Mahyut, S. M., Shakri, A. K. (2017). Analysis on Islamic Home Financing in Malaysia. *Journal of Contemporary Islamic Studies, Volume 3 Issue 2*.
- Maykut, P., & Morehouse, R. (1994). *Beginning qualitative researchers: A philosophical and practical guide*. Washington, DC: Falmer.
- Mohamad, S., & Sori, M.Z. (2016). Effectiveness of Shariah committees in the Malaysian Islamic Financial Institutions: The practical perspective. *Middle East Insights Islamic Finance Special (MEI Insight IFS 2)*. doi: 10.23976/ifs.2016002.
- Sadique, M. A. (2008). Early juristic approaches to the application of hiyal (legal devices) in Islamic law. *International Islamic University Law Journal*, 16(2).
- Saheeh International. (2012). *The Quran: English meanings and notes*. Riyadh: Al-Muntada Al-Islami.
- Shaharuddin, A. (2012). The Bay al-Inah controversy in Malaysian Islamic banking. *Arab Law Quarterly*, 26(4) doi: 10.1163/15730255-12341245.
- Snow, D. (2007). *Private equity: A brief overview: An introduction to the fundamentals of an expanding global industry*.

https://www.law.du.edu/documents/registrar/adv-assign/Yoost_PrivateEquity%20Seminar_PEI%20Media's%20Private%20Equity%20-%20A%20Brief%20Overview_318.pdf.

Thinking Ahead Institute. (2021). *The world's largest 500 asset managers*. <https://www.thinkingaheadinstitute.org/research-papers/the-worlds-largest-asset-managers-2021/>

Uthmani, M. T. (2010). *Verdicts on at-Tawarruq and its banking applications*. <https://www.scribd.com/doc/35096309/Twarruq-by-Taqi-Usmani>

Case Law

Arab Malaysian Finance Bhd v. Taman Ihsan Jaya Sdn Bhd [2008] 5 MLJ 631
Cassation Court – Appeal No 927/2019

CIMB Bank Berhad vs. LCL Corporation Bhd [2011] 7 CLJ 594

JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Berhad (President of Association of Islamic Banking Institutions Malaysia & Anor Interveners) [2019] MLJ 276

Statute

Central Bank of Malaysia Act 2009 (CBMA)

¹ The verse from Surah Al-A'raf in the Quran (7:163) refers to a story about a town called Al-Aqaba, inhabited by Jewish people, who were tested by Allah because of their disobedience. Allah had commanded them to observe the Sabbath day and refrain from fishing on that day, but some people in the town continued to fish on the Sabbath day. As a test of their obedience, Allah caused the fish to appear on other days of the week, but not on the Sabbath. The story serves as a reminder of the importance of obeying Allah's commands and the consequences of disobedience.