



BANK NEGARA MALAYSIA
CENTRAL BANK OF MALAYSIA

Tawarruq
(Shariah Requirements and Optional Practices)
Exposure Draft

Issuance date: 9 December 2013

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As part of the objective to strengthen the Shariah-compliance culture among Islamic financial institutions (IFIs), Bank Negara Malaysia (the Bank) is embarking on an initiative to develop a Shariah-based regulatory framework. The purpose of the framework is to ensure that the IFIs comply with Shariah. In this regard, the Bank is issuing a series of policy documents on Shariah contracts to enhance the end-to-end compliance with Shariah.

This Exposure Draft (ED) outlines the Shariah requirements and optional practices relating to *tawarruq* to facilitate IFIs in developing Islamic financial services and products including the features of *tawarruq* and its arrangement with other Shariah contracts or concepts.

The Bank invites written comments from your institution on this ED, including suggestions for particular issue, areas to be further clarified/elaborated and any alternative proposal that the Bank should consider. To facilitate the Bank's assessment, please support each comment with clear rationale, accompanying evidence or illustrations, as appropriate.

Written comments in the form of softcopy are preferable and may be submitted to shariahstandard@bnm.gov.my by **10 January 2014**. Hardcopy of the written feedback may also be submitted to:

Pengarah
Jabatan Perbankan Islam dan Takaful
Bank Negara Malaysia
Jalan Dato' Onn
50480 Kuala Lumpur
Malaysia

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PART A OVERVIEW

1. Objective

- 1.1 This policy document outlines the Shariah requirements and optional practices relating to *tawarruq* to be observed by the IFIs in developing Islamic financial services and products.
- 1.2 This policy document also covers the arrangement of *tawarruq* with other Shariah contracts or concepts.
- 1.3 This policy document aims to facilitate the understanding of the Shariah requirements relating to *tawarruq* that must be adhered to by IFIs in order to ensure its validity.

2. Applicability

- 2.1 This policy document is applicable to all IFIs as defined in paragraph 5.2.

3. Legal provisions

- 3.1 The requirements in this policy document are specified pursuant to section 29(1) of the Islamic Financial Services Act 2013 (IFSA).

4. Effective date

- 4.1 This policy document comes into effect on xxxxxxxx.

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5. Interpretation

5.1 The terms and expressions used in this policy document shall have the same meanings assigned to them in the Financial Services Act 2013 (FSA), IFSA and DFIA, unless otherwise defined in this policy document.

5.2 For the purpose of this policy document:

“**S**” denotes a standard, requirement or specification that must be complied with. Failure to comply may result in one or more enforcement actions;

“**G**” denotes guidance which may consist of such information, advice or recommendation intended to promote common understanding and sound industry practices which are encouraged to be adopted;

“**Islamic financial institutions**” or “**IFI**” means –

- (a) licensed Islamic banks and licensed takaful operators under the IFSA;
- (b) licensed banks and licensed investment banks under the FSA which are approved under section 15(1)(a) FSA to carry on Islamic banking business; and
- (c) prescribed institutions under the DFIA approved under section 129(1) DFIA to carry on Islamic banking business or Islamic financial business.

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6. Related legal and policy documents

6.1 This policy document must be read together with:

- (a) any Shariah Advisory Council (SAC) rulings published by the Bank¹; and
- (b) Shariah Governance Framework for Islamic Financial Institutions.

¹ Including Shariah resolutions in Islamic Finance, standards, circulars or any directive pertaining to Shariah matter issued by the Bank.

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PART B DEFINITION AND NATURE OF *TAWARRUQ*

7. Definition

7.1 *Tawarruq* refers to an arrangement that involves sale of an asset to the purchaser on a deferred basis and subsequent sale of the asset to a third party on a cash basis to obtain cash or *vice versa*.

8. Nature

- S** 8.1 Each sale contract in the *tawarruq* arrangement is binding in nature. Thus, each of the sale contracts shall not be terminated unilaterally by any of the contracting parties.
- S** 8.2 The specific inherent nature of the *tawarruq* arrangement is to obtain cash. The common inherent nature of each sale contract in the *tawarruq* arrangement is the transfer of ownership of the asset from the seller to the purchaser.

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PART C COMPONENTS OF *TAWARRUQ*

9. Contracting parties

- S** 9.1 The contracting parties in a *tawarruq* arrangement are the seller and the purchaser in two separate and independent sale contracts.
- S** 9.2 Based on the definition of *tawarruq* in paragraph 7.1, the purchaser in the first sale contract is the seller in the second sale contract.
- S** 9.3 The contracting parties shall have the legal capacity² to enter into each sale contract in the *tawarruq* arrangement.
- G** 9.4 The contracting parties in a *tawarruq* arrangement may be a natural person or a legal person.
- G** 9.5 A party to the *tawarruq* arrangement may enter into the sale contract through a third party agent.
- S** 9.6 Each sale contract in the *tawarruq* arrangement shall be entered into through an offer and acceptance between the contracting parties.³
- G** 9.7 The offer and acceptance may be expressed by appropriate documentation or by any other methods accepted by customary business practice (*`urf tijari*) which do not contravene the Shariah.
- S** 9.8 Any term or condition mutually agreed upon which does not contravene

² The legal capacity of a person is defined as capacity to assume rights and responsibilities; and capacity to give legal effect to his action. Among the important conditions are that the person must possess sound mind and the capacity to distinguish between what is harmful or beneficial to one's interests.

Legal capacity of a legal entity is defined as eligibility of an entity to acquire rights and assume responsibilities.

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the Shariah shall be binding on the contracting parties.

10. Asset

- S** 10.1 The asset to be traded in a *tawarruq* arrangement shall meet the following conditions:
- (a) the asset is recognised by the Shariah, valuable, identifiable and deliverable; and
 - (b) the asset is already in existence and owned by the seller.
- G** 10.2 The *tawarruq* asset may be a tangible or an intangible asset.
- S** 10.3 The following assets shall not be traded under *tawarruq* arrangement:
- (a) asset to be constructed or asset under construction; and
 - (b) asset which is debt in nature.
- S** 10.4 Trading of *ribawi* asset under a *tawarruq* arrangement shall meet the following conditions:
- (a) any of the sale contract in the *tawarruq* arrangement shall not be effected on *ribawi* asset within the same type and category; and
 - (b) any of the sale contract in the *tawarruq* arrangement shall not be effected on *ribawi* asset within the same category but of different type on deferred basis.
- G** 10.5 The asset may be acquired by the seller through purchasing it, either on deferred or spot basis.

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- S** 10.6 In the event where the asset is not present at the place of the contract session (*majlis al-`aqq*), the purchaser shall be given a specific description of the asset.
- S** 10.7 The ownership in the asset must be effectively transferred from the seller to the purchaser.
- S** 10.8 The transfer of ownership is effected upon entering into a valid sale and purchase contract even though there is no legal registration of the ownership, provided that the sale and purchase is supported by evidence of transaction.
- S** 10.9 The transfer of ownership shall take effect by the seller disposing of the right of ownership (*takhliyah*) resulting in the purchaser having access to the asset (*tamkin*) and assuming its risk through any mechanism permitted by the Shariah and generally accepted by business practices (*`urf tijari*).
- S** 10.10 Possession of the asset shall be either in the form of physical possession (*qabd haqiqi*) or constructive possession (*qabd hukmi*).
- S** 10.11 The rights and liabilities of the purchaser as the owner of the asset are established upon his possession of the asset.
- S** 10.12 The seller shall bear the liability for loss or damage of the asset before disposing of the right of ownership (*takhliyah*), which results in the purchaser having access to the asset (*tamkin*).
- S** 10.13 Multiple *tawarruq* arrangements shall not be entered into simultaneously on the same asset.

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- G** 10.14 A *tawarruq* arrangement may be entered into on a group of assets between the same contracting parties at the same time.
- S** 10.15 Any defect in the asset which is discovered and consented to by the purchaser at the time of entering into each sale contract in the *tawarruq* arrangement shall disqualify the purchaser from entitlement to the defect option (*khiyar al-`ayb*) with respect to the defect.
- S** 10.16 Any defect in the asset which occurred before entering into any sale contract in the *tawarruq* arrangement but is discovered by the purchaser after the execution of the contract shall entitle the purchaser to the defect option (*khiyar al-`ayb*).
- G** 10.17 Pursuant to paragraph 10.16, the purchaser has the right to terminate the contract. Alternatively, the purchaser may choose to continue with the contract as it is or with any mutually agreed variation of the terms of the contract.
- G** 10.18 The contracting parties may mutually agree to specify the period for the defect option at the time of execution of the contract.
- G** 10.19 The contracting parties may mutually agree to stipulate a condition to waive liability for any defect on the asset prior to the execution of the contract.

11. Price

- S** 11.1 The price and the currency used under the *tawarruq* arrangement shall be determined and mutually agreed by the contracting parties at the time of the execution of each of the two independent sale contracts.

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- S** 11.2 In the event that the price for any sale contract in the *tawarruq* arrangement is on a *murabahah* basis, all requirements relating to pricing under a *murabahah* sale shall be complied with.
- G** 11.3 The price of each sale contract in the *tawarruq* arrangement may be paid at any time and in any form agreed by the contracting parties such as spot, progressive or deferred in the form of installments or bullet payments.
- G** 11.4 The contracting parties may agree to extend or reschedule the payment period of the outstanding debt without any increase in amount to the remaining debt.
- G** 11.5 Notwithstanding paragraph 11.4, the contracting parties may agree to settle the outstanding debt obligation by entering into a new contract that may result in a new debt obligation.

12. Requirements of the *tawarruq* arrangement

- S** 12.1 Each sale contract in the *tawarruq* arrangement shall satisfy all the necessary conditions of a valid sale contract under the Shariah.
- S** 12.2 The *tawarruq* arrangement shall be executed by entering into two separate and independent sale contracts.
- G** 12.3 For purposes of paragraph 12.2, the *tawarruq* arrangement may be incorporated in other legal document such as:
- (a) the master agreement provided that master agreement does not carry the effect of the sale contract; or
 - (b) in a stand-alone document.

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- S** 12.4 The sale contracts in the *tawarruq* arrangement shall be entered into in such a way that the purchaser in the first sale contract has the right to take delivery of the asset.
- S** 12.5 Each sale contract in the *tawarruq* arrangement shall be entered into through an offer and acceptance between the contracting parties.
- S** 12.6 The offer and acceptance must be executed in the following manner, whereby the seller sells the asset to the purchaser by entering into a sale and purchase contract, and subsequently, the purchaser may enter into another sale and purchase contract of the asset with a third party.
- S** 12.7 The first sale and purchase contract of a *tawarruq* arrangement shall not stipulate any terms and conditions or create an obligation for the purchaser to sell it.
- S** 12.8 Any amount paid to the seller before entering into the sale contract shall not be treated as part of the selling price including profit.

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PART D ARRANGEMENT OF TAWARRUQ WITH OTHER SHARIAH CONTRACT OR CONCEPT

13. Arrangement of *tawarruq* with *wakalah*

- G** 13.1 *Tawarruq* may be arranged together with a *wakalah* contract in the following forms:
- (a) the purchaser appoints a third party as its purchasing agent to purchase the asset from the seller. The seller also appoints the same third party as its selling agent to sell the asset to the purchaser;
 - (b) the purchaser appoints a third party to enter into a sale contract with the seller. The seller appoints another third party to enter into the sale contract with the purchaser;
 - (c) the seller appoints the purchaser or any third party acceptable to the contracting parties as its purchasing agent to purchase an asset from the third party on a cash basis on behalf of the seller. Once the asset is possessed by the seller, the seller sells the asset to the purchaser on a deferred basis. Subsequently, the purchaser sells the asset to another third party on a cash basis;
 - (d) the seller sells the asset to the purchaser. Subsequently, the purchaser appoints the seller as its selling agent to sell the asset to the third party on a cash basis; or
 - (e) the seller appoints the purchaser or any third party acceptable to both contracting parties as its selling agent to sell the asset to the purchaser on a deferred basis. Subsequently, the purchaser sells the asset to a third party on a cash basis.
- S** 13.2 The *wakalah* contract shall be arranged in a separate contract from the sale and purchase contract.

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- G** 13.3 Pursuant to paragraph 13.2, the *wakalah* may be incorporated in other legal documents such as:
- (a) a master agreement ,provided that master agreement does not carry the effect of the sale contract; or
 - (b) in a stand-alone document.
- S** 13.4 Inclusion of the *wakalah* contract in the *tawarruq* arrangement shall not restrict any of the contracting parties as the principal to the agent from taking delivery of the asset.
- S** 13.5 Ownership of the asset shall be transferred from the seller to the purchaser although the sale and purchase contract is entered into by the agent.
- S** 13.6 Roles and responsibilities of the agent, whether as the purchasing agent or the selling agent, shall be incorporated clearly in the *wakalah* contract.
- S** 13.7 The agent shall not be held liable except in the event of his misconduct (*ta`addi*), negligence (*taqsir*) or breach of specified terms (*mukhalafah al-shurut*).
- S** 13.8 The principal shall be held liable for the sale and purchase contract entered into by the agent.
- G** 13.9 The name of the principal in the *wakalah* contract may be disclosed in documents related to the sale and purchase contract between the third party and the principal that are executed by the agent on behalf of the principal.
- G** 13.10 Notwithstanding paragraph 13.9, the agent and the principal may agree that only the name of the agent may be disclosed in all documents

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related to the sale and purchase contract between the third party and the agent.

- G** 13.11 The name of the agent, either as the purchasing agent or as the selling agent, may be disclosed in all documents related to the sale and purchase contract between the third party and the seller.
- S** 13.12 In the event that the principal requires the purchasing agent to provide several quotations for the asset, the principal shall clearly specify to the purchasing agent the quotation which the principal has chosen.
- G** 13.13 The purchasing agent may advance his own money for partial payment of the purchase price to the third party.
- S** 13.14 Pursuant to paragraph 13.13, the advanced amount shall be reimbursed by the principal or shall be off-set from the selling price to be concluded with the purchasing agent.

14. Arrangement of *tawarruq* with *wa`d*

- G** 14.1 Under the *tawarruq* arrangement, the purchaser may undertake to purchase the asset from the seller upon its acquisition from the third party. Once the asset is possessed by the seller, it is sold to the purchaser and, subsequently, the purchaser may sell the asset to the third party or appoint the seller as its selling agent to sell the asset to the third party on a cash basis.

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15. Arrangement of *tawarruq* with assurances

- G** 15.1 For the purpose of assurances, *tawarruq* may be arranged with other Shariah contract or concept such as *kafalah*, *takaful* cover, *rahn*, or *hamish jiddiyah* (security deposit).

a) Assurance through *kafalah*

- G** 15.2 A guarantee may be arranged to guarantee the payment of the outstanding debt amount of the sale and purchase contract in the event of default by the purchaser.

b) Assurance through *takaful* cover

- G** 15.3 The seller may require the purchaser to subscribe to a *takaful* cover to guarantee payment of the obligation under *tawarruq* arrangement in the event of loss of legal capacity by the purchaser.

c) Assurance through *rahn*

- S** 15.4 Collateral (*marhun*) in the sale and purchase contract of the *tawarruq* arrangement (if any) shall be a Shariah-compliant asset.
- G** 15.5 Notwithstanding paragraph 15.4, interest bearing debt based asset such as Conventional Fixed Deposit Certificate, may be used as collateral provided the collateral is valued up to the principal amount.

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- S** 15.6 The collateral shall be utilised to recover payment of the outstanding debt amount.
- G** 15.7 The contracting parties may agree to include coverage of actual costs incurred for the recovery of the outstanding debt payment from the collateral.
- G** 15.8 For the purpose of extension or variation of the outstanding debt, the seller may demand additional securities from the purchaser.

d) Assurance through *hamish jiddiyah*

- G** 15.9 The seller may require the purchaser to place a security deposit (*hamish jiddiyah*) to secure an undertaking to purchase the asset.
- G** 15.10 The security deposit may be used to compensate against actual loss incurred in the event the purchaser fails to purchase the asset from the seller.
- S** 15.11 Pursuant to paragraph 15.10, the excess portion of the security deposit after compensation against actual loss shall be returned to the purchaser.
- G** 15.12 The seller may utilise the security deposit prior to the execution of the sale contract in the *tawarruq* arrangement subject to the consent of the purchaser.
- S** 15.13 Pursuant to paragraph 15.12, the seller shall be held liable to guarantee the security deposit. The seller is entitled to any benefits or revenue gained from the security deposit.

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- S** 15.14 Pursuant to paragraph 15.9, security deposit paid to the seller before entering into the sale and purchase contract shall not be treated as part of the selling price including profit.
- G** 15.15 Upon entering into the sale and purchase contract, the security deposit may be treated as part of the payment of the agreed selling price for the sale and purchase contract.
- S** 15.16 The security deposit shall be returned to the purchaser if it is not treated as part of the payment of the selling price.

16. Arrangement of *tawarruq* with *ibra'*

- G** 16.1 The seller may consider waiving part of the outstanding or remaining unpaid price of the sale and purchase contract in the *tawarruq* arrangement in the form of a discount to the purchaser upon pre-payment and/or early settlement.
- S** 16.2 A rebate clause shall be incorporated in the sale and purchase contract provided that it is a requirement imposed by the authority.
- G** 16.3 In the event that the sale and purchase contract in the *tawarruq* arrangement contract involves payment of the deferred price in instalment, the seller may provide periodic *ibra'* based on certain benchmark agreed by the contracting parties.

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17. Arrangement of *tawarruq* with *ta`widh* and/or *gharamah*

- G** 17.1 The contracting parties may agree to include a clause in any of the sale and purchase contracts in the *tawarruq* arrangement stipulating late payment charges as determined by the relevant authorities.
- S** 17.2 Pursuant to paragraph 17.1, the late payment charges shall consist of:
- (a) *ta`widh* (compensation) for actual loss suffered by the seller, which may be recognized as income to the seller; and/or
 - (b) *gharamah* (penalty), which shall not be recognized as income. Instead, it shall be channelled to charitable bodies.

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PART E DISSOLUTION (*FASAKH*) AND COMPLETION (*INTIHA'*) OF *TAWARRUQ*

18. Dissolution of *tawarruq*

- S** 18.1 A *tawarruq* arrangement is dissolved upon dissolution of any sale and purchase contract entered into under the *tawarruq* arrangement.
- S** 18.2 The sale and purchase contract in a *tawarruq* arrangement is dissolved under the following circumstances:
- (a) the purchaser exercises the defect option (*khiyar al-'ayb*) to terminate the sale and purchase contract;
 - (b) any of the contracting parties exercises the mutually agreed options to terminate the sale and purchase contract within the agreed time period;
 - (c) the contracting parties exercise the option to terminate the sale and purchase contract due to breach of terms;
 - (d) both contracting parties mutually agree to terminate the sale and purchase contract.
- S** 18.3 Upon dissolution of any of the sale and purchase contracts in the *tawarruq* arrangement, the asset shall be returned to the respective seller and the price shall be returned to the respective purchaser.
- S** 18.4 Pursuant to paragraph 18.3, the dissolution of contract shall be effective provided that the asset can be returned to the seller.

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19. Completion of *tawarruq*

- S** 19.1 The *tawarruq* arrangement ends upon fulfilment of the contracting parties' obligations which include the following:
- (a) full settlement of the remaining or outstanding deferred selling price;
 - (b) transfer of the obligation to pay the remaining or outstanding selling price to a third party (*hiwalah*);
 - (c) waiving the right by the seller to receive the remaining or outstanding selling price through a rebate (*ibra*); or
 - (d) set-off (*muqassah*) of debt obligations between the contracting parties.
- S** 19.2 Upon completion of the *tawarruq* arrangement contract, the contracting parties are free from any contractual obligations.

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APPENDICES

20. Appendix 1 Legitimacy of *tawarruq*

20.1 The legitimacy of the *tawarruq* arrangement is derived from the Quran and founded on the Sunnah of Prophet Muhammad (peace be upon him).

The Quran

20.2 The following verse of the Quran implies the general permissibility of sales contract including *tawarruq*:

وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا

“...whereas Allah SWT has permitted trading and forbidden usury...” (*Surah al-Baqarah, verse 275*)

The Sunnah of Prophet Muhammad (peace be upon him)

20.3 There is no direct juristic authority from the Sunnah of the Prophet (peace be upon him) regarding the legitimacy of the *tawarruq* arrangement. It is deemed permissible based on the general permissibility of sales in Islamic law.

20.4 The following *hadith* implies the general permissibility of *tawarruq* arrangement.

عن أبي هريرة رضي الله عنه أن رسول الله صلى الله عليه وسلم استعمل رجلا على خيبر، فجاءه بتمر جنيب، فقال رسول الله صلى الله عليه وسلم: أكل تمر خيبر هكذا؟ فقال: لا والله يا رسول الله، إنا لناخذ الصاع من هذا بالصاعين والصاعين بالثلاثة، فقال رسول الله صلى الله عليه وسلم: لا تفعل، بع الجمع بالدرهم ثم ابتع بالدرهم جنيبا.

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From Abu Huraira (r.a.), the Prophet (peace be upon him) appointed a person as governor of Khaybar, who [later] presented him with an excellent type of dates. The Prophet asked, “are all the dates of Khaybar like this?” He replied, “[No, but] we barter one sa` of this (excellent type) for two sa` of ours, or two sa` of it for three of ours.” Allah’s apostle said, “Do not do that (as it is a kind of usury) but sell the mixed dates (of inferior quality) for money, and then buy the excellent dates with that money (*Sahih Bukhari, Hadith no. 2201*).”

21. Appendix 2 Glossary

Terms	Definition
<i>Gharamah</i>	Penalty.
<i>Hamish jiddiyyah</i>	A security deposit placed to secure the undertaking to purchase an asset before execution of the sale and purchase agreement contract.
<i>Hiwalah</i>	Assignment of debt from the liability of the original debtor to the liability of a third person so that the original debtor becomes free of liability.
<i>Ibra'</i>	Rebate.
<i>Kafalah</i>	A contract of conjoining guarantor's liability to the guaranteed party's liability in a way that the obligation of the guaranteed party is established as a joint liability of the guarantor and guaranteed person.
<i>Khiyar al-`ayb</i>	Option arising from a defect; the option of dissolving or continuing the contract upon discovery of a defect in the asset purchased.
<i>Majlis al-`aqd</i>	Place of the contract session.
<i>Marhun</i>	Collateral
<i>Mukhalafah al-shurut</i>	Breach of terms and conditions.
<i>Muqassah</i>	Offsetting.
<i>Murabahah</i>	Contract a sale and purchase of an asset where the acquisition cost and the mark-up are disclosed to the purchaser.
<i>Qabd haqiqi</i>	Physical possession. It refers to a state where a person has actual possession and the rights to control an asset.

<i>Qabd hukmi</i>	Constructive possession. It refers to a state where a person does not have actual possession but has the legal rights to control an asset.
<i>Rahn</i>	Pledge/Charge.
<i>Ribawi asset</i>	<p>Assets which are subject to specific rules in sales to avoid the implication of <i>riba</i>. These assets consist of six (6) types and are classified into two (2) categories:</p> <ul style="list-style-type: none"> (a) Medium of exchange (currency) represented by gold and silver and any items used as currency; and (b) Staple food represented by wheat, barley, dates, and salts. <p>If an exchange involves the same type of asset such as gold for gold or wheat for wheat, then it must be of equal counter-value and on spot basis. If the exchange involves assets of different type but within the same category such as the exchange of gold for paper currency, then it has to be done on spot basis.</p>
<i>Takaful</i>	An arrangement based on mutual assistance under which <i>takaful</i> participants agree to contribute to a common fund providing for mutual financial benefits payable to the <i>takaful</i> participants or their beneficiaries upon the occurrence of pre-agreed events
<i>Ta`addi</i>	Misconduct.
<i>Takhliyah</i>	Relinquishing or abandoning the rights of ownership.
<i>Taqsir</i>	Negligence.
<i>Tamkin</i>	Enabling the person who has the ownership of an asset transferred to him to make full use and assume liability of the asset.
<i>Tawarruq</i>	An arrangement that involves sale of in which an asset

	to the purchaser is purchased with on a deferred basis, and subsequently subsequent sale of the asset sold to a third party on spot a cash basis to obtain cash or vice versa.
<i>Ta`widh</i>	Compensation.
<i>`Urf tijari</i>	Common business practice which is accepted by the community and does not contradict Shariah rulings.
<i>Wa`d</i>	An expression of commitment given by one party to another to perform certain action(s) in the future.
<i>Wakalah</i>	A contract in which a party mandates another party as his agent to perform a particular task in matters that may be delegated either voluntarily or with imposition of fee.