

## The 179<sup>th</sup> Meeting of the Shariah Advisory Council (SAC) of Bank Negara Malaysia

The SAC of Bank Negara Malaysia in its 179<sup>th</sup> meeting dated 22 August 2017 ruled on the following:

### Determination of Contract Session and Delivery for *Bai` al-Sarf* in the Current Financial Operation

#### SAC Ruling

The SAC ruled that the contract session for *bai` al-sarf* refers to the period of time during which the contracting parties enter into a contract, commencing with an offer (*ijab*), followed by an acceptance (*qabul*) to exchange monies between each other, and ending by the disengagement of the contracting parties physically or constructively, or through the waiving of rights to revoke the contract (*takhayur*). The delivery of money in *bai` al-sarf* shall take place during the contract session.

The practice of the delivery of money in *bai` al-sarf*, for instance on day two after transaction date (T+2) is construed to have taken place after the contract session. However, this practice may be allowed due to established customary business practice (*'urf tijari*) arising from operational constraints. In addition, the delivery of money beyond the contract session may also be allowed in the event of unexpected disruptions.

#### Background

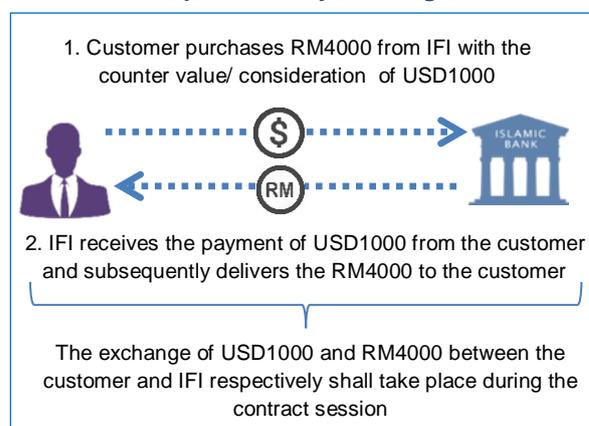
- *Bai` al-sarf* refers to a contract of exchange of money for money. In Shariah, the delivery of money (the subject matter) in *bai` al-sarf* shall take place during the contract session.
- In this regard, it is necessary to clearly define the contract session for *bai` al-sarf* in the context of current banking operations and to ascertain whether the delivery of money at T+2 is considered to have taken place during or after the contract session.
- This is important to ensure that foreign exchange (forex) trading activities undertaken by Islamic financial institutions (IFIs) are in compliance with Shariah.

#### Shariah Issue

- What is the definition of contract session for *bai` al-sarf* in the context of current banking operation?
- Would the delivery of money at T+2 be deemed to have taken place during or after the contract session?  
(Please refer to the **illustration** on the example of money exchange contract)

#### Illustration:

#### Example of money exchange contract



## Key Highlights of the SAC Discussion

### **What is the basis for the requirement of delivery of subject matter in *bai` al-sarf* during the contract session?**

- The requirement of delivery of subject matter in *bai` al-sarf* during the contract session is based on the following hadith of Prophet (PBUH):

عن عبادة بن الصامت قال: قال رسول الله صلى الله عليه وسلم: الذهب بالذهب والفضة بالفضة والبر بالبر والشعير بالشعير والتمر بالتمر والملح بالملح مثلاً بمثل سواء بسواء يداً بيد فإذا اختلفت هذه الأصناف فبيعوا كيف شئتم إذا كان يداً بيد.

“Ubadah bin al-Samit reported Allah's Messenger (PBUH) as saying: Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, and salt by salt, like for like and equal for equal, payment being made hand to hand. If these classes differ, then sell as you wish if payment is made hand to hand.”<sup>1</sup>

- There is consensus among Muslim jurists that the term يداً بيد (hand to hand) in the above hadith means that the delivery of both subject matters in *bai` al-sarf* to the contracting parties shall take place during the contract session before the disengagement of contracting parties.<sup>2</sup>
- The delivery of money after the contract session does not fulfil the requirement of spot delivery in *bai` al-sarf* and will give rise to *riba nasi'ah*.<sup>3</sup>

### **In what situations would the delivery of money in *bai` al-sarf* be made at T+2?**

- The delivery of money at T+2 occurs in the inter-bank foreign exchange (forex) transactions in which contracting parties are not physically at the same place, but execute the *bai` al-sarf* contract through one of the following mediums:
  - (a) Electronic Platform
    - The *bai` al-sarf* contract is concluded through an automated matching system where a dealer expresses an offer (*ijab*) of bid or ask price of a particular currency. The acceptance (*qabul*) from the other dealer in the market will be automatically matched with such offer.
  - (b) Over-the-counter (via telephone or chatroom)
    - The *bai` al-sarf* contract is concluded between the contracting parties, directly or through a broker, using telephone or chatroom.
- The delivery of money at T+2 is an established customary practice (*`urf tijari*) for the execution of *bai` al-sarf* via electronic and online mediums, but not applicable for a physical medium such as money changer/ bureau de change.

### **What are the opinions of Muslim jurists and contemporary scholars on the contract session?**

- Contract session refers to a meeting (*ijtima`*) to execute the sale contract.<sup>4</sup>
- The majority of Muslim jurists opine that the contract session ends with the physical dispersal (*iftiraq*) of contracting parties.<sup>5</sup>

<sup>1</sup> Imam Muslim, *Sahih Muslim*, Dar Ihya' al-Turath al-'Arabi, Beirut, vol. 3, page 1211, hadith no. 1587.

<sup>2</sup> Hammad, Nazih, *Al-Qabd al-Haqiqi wa al-Hukmi*, Majallah Majma' al-Fiqh al-Islami, Jeddah, vol. 6, page 539.

<sup>3</sup> Al-Juwayni, *Nihayah al-Matlab fi Dirayah al-Mazhab*, Dar al-Minhaj, Jeddah, vol. 5, page. 96.

<sup>4</sup> Ali Haidar, Khawajah Amin Afandi, *Durar al-Hukkam fi Syarh Majallah al-Ahkam*, Dar al-Jil, vol. 1, page 153, article 181.

<sup>5</sup> Al-Kasani, *Bada'i al-Sana'i fi Tartib al-Syara'i*, Dar al-Kitab al-'Arabi, Beirut, vol. 5, page 215.

Al-Nawawi, *Al-Majmu` Syarh al-Muhadzzab*, Dar al-Fikr, Beirut, vol. 9, page 180.

- Contemporary scholars offer several interpretations on the contract session, which include:
  - (a) The contract session refers to a situation where two contracting parties face each other to negotiate on a particular contract. It is specified as a duration of time that commences with an offer and ends with the conclusion of contract; dispersal of contracting parties; refusal of one of the contracting parties to proceed the contract; or the shift of attention to another matter which not related to the contract.<sup>6</sup>
  - (b) The contract session refers to a situation in which the contracting parties execute a contract; or a situation in which the same topic of conversation that relates to the execution of contract takes place.<sup>7</sup>
  - (c) For a contract executed by telephone, the contract session ends when the phone conversation between the contracting parties ends.<sup>8</sup>
  - (d) For a contract executed by email, telegraph or fax, the contract session commences when the offer reaches the counter party (offeree) and ends when the counterparty rejects the offer or shifts attention to another matter without accepting the offer.<sup>9</sup>

#### **What types of contract sessions exist in current practice?**

- Contemporary scholars classify the contract session into two categories:<sup>10</sup>
  - (a) Actual contract session: Both contracting parties are physically at the same place and time; and
  - (b) Constructive contract session: Both contracting parties are not at the same place but at the same session/time where the contract is concluded through modern technology.

### **Basis of Ruling**

- The definition of the contract session confined to the “same place” is less relevant to current banking practice since most *bai` al-sarf* transactions in the banking operations do not involve physical meetings but rather through online or electronic platform. Hence, the most important factor that needs to be focused on in defining the contract session in current banking practice is “time/session” during which the *bai` al-sarf* is concluded.
- The ending of a contract session with the disengagement (*iftiraq*) of the contracting parties, physically of constructively; or by waiving the right to revoke the contract (*takhayur*) is in line with the opinion of majority scholars as highlighted in the deliberation above.

<sup>6</sup> Al-Zarqa', Mustafa Ahmad, *al-Madhal al-Fiqhi al-'Am*, Dar al-Qalam, Damsyik, vol. 1 page 432.

<sup>7</sup> Al-Zuhayli, Wahbah Mustafa, *Hukm Ijra' al-'Uqud bi Alat al-Ittisal al-Hadithah*, Majallah Majma` al-Fiqh al-Islami, Jeddah, vol. 6, page 665.

<sup>8</sup> Al-Qurahdaghi, Ali Muhyiddin, *Hukm Ijra' al-'Uqud bi Alat al-Ittisal al-Hadithah*, Majallah Majma` al-Fiqh al-Islami, Jeddah, vol. 6, page 704.

<sup>9</sup> Al-Qurahdaghi, Ali Muhyiddin, *Hukm Ijra' al-'Uqud bi Alat al-Ittisal al-Hadithah*, Majallah Majma` al-Fiqh al-Islami, Jeddah, vol. 6, page 713 & 718.

<sup>10</sup> See: Al-Qurahdaghi, Ali Muhyiddin, *Hukm Ijra' al-'Uqud bi Alat al-Ittisal al-Hadithah*, Majallah Majma` al-Fiqh al-Islami, Jeddah, vol. 6, page 713 & 704. Al-Syeikh, Usamah Abdul `Alim, *Majlis al-'Aqd wa Atharuhu fi `Uqud al-Tijarah*, Shariah Department, Umm Al-Qura University, Makkah, page 19 & 22.

## Implication of SAC Ruling

- This ruling is important to provide clarity to the IFIs with regard to the definition of contract session. Based on this ruling, the practice of the delivery of money in *bai` al-sarf*, for instance on day two after transaction date (T+2) is construed to have taken place beyond the contract session. However, such practice may be allowed due to established customary business practice (*'urf tijari*) arising from operational constraints. In addition, the delivery of money after the contract session may also be allowed in the event of an unexpected disruption.
- If the delivery of money after the contract session is not due to established customary business practice arising from operational constraints or an unexpected disruption, such transaction will be considered as *riba nasi'ah* transaction.
- This ruling also serves as a refinement to the ruling of 168<sup>th</sup> the SAC meeting dated 28 June 2016 on the contract session for *bai` al-sarf*.

*The effective date of this ruling is subject to the effective date of Policy Document on Bai` al-Sarf which is expected to be issued by end of 2017.*