Tawarruq Time Deposit With Wakalah Principle: An opinion That Triggers New Issues

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Abstract

The development of Islamic banking system in offering the products which is based on the shariah principles has witnessed a tremendous success. There are many new products being introduced as alternatives to conventional ones. Yet, at the same time, some of these products remain hotly debated amongst jurists on their validity and subsequently become non-compliant products. One of such products that have been introduced is tawarruq-based deposit product. In addition, the newly introduced Islamic Financial Services Act 2013 states that deposit products which are characterized as principal guaranteed feature could not be offered based on mudarabah or wakalah as they are only appropriate for investment products (principal non-guaranteed products). Therefore, the introduction of tawarruq-based deposit product by Islamic banks could be the best alternative to take place. However, the wakalah principle is also embedded in this twarruq deposits. Hence, this paper makes an attempt to analyze the adoption of wakalah in the tawarruq deposit that may trigger new issue.

Keywords: Deposit, Islamic Financial Services Act, Tawarruq, Wakalah

JEL Classifications: G23, G28, N15,
Tawarruq Time Deposit with Wakalah Principle: An option That Triggers New Issues

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1. Introduction

Both regulation and supervision become the crucial elements in the development of Islamic banking industry. Recently, Malaysia has introduced a comprehensive legal framework for the Islamic banking industry which is called the Islamic Financial Services Act 2013 (IFSA 2013). The main objectives of introducing this new law is to promote financial stability and compliance with Shari’ah. The later objective is clearly stated in Clause 28: “(1) an institution shall at all times ensure that its aims, operations, business, affairs and activities are in compliance with Shari’ah. (2) For the purpose of this Act, a compliance with any ruling of the Shariah Advisory Council in respect of any particular aim and operation, business, affair or activity shall be deemed to be a compliance with Shariah in respect of that aims and operations, business, affair or activity”. (Act 759 IFSA 2013).

Therefore, it is very crucial for any Islamic bank to ensure that its operation continues to be operated within the bounds of the Shari’ah law. As a financial intermediary, the main sources of funds for Islamic bank are mobilized through various forms of deposit products. There are four major types of deposits offered by Islamic banking institutions namely, saving account, current account, term deposit and investment deposit. According to the previous practice of Islamic banks, they are allowed to base these deposit accounts on any type of contracts as long as the contract is acceptable in Shari’ah (see (Ismail (2010) and Dusuki and Abdullah (2011)) For instance, Islamic banks could utilize mudarabah as underlying contracts for saving, current, term deposit and investment deposit accounts.

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However, with the introduction of IFSA 2013, there are some changes with regard to Islamic banks’ contractual features. One of the important elements of this new act is the definition and the scope of assets and liabilities in Islamic banking business based on the underlying contractual features.\(^4\) On the liability side, the scope of deposit-taking activities draws on the distinctive forms of Islamic contracts such as *qard*, *wadi’ah* and *tawarruq*. Meanwhile contracts like *mudarabah*, *musharakah* and *wakalah* \(^5\) are appropriate for investment activities.\(^6\) In other words, Islamic deposits are consisting of two features as follows: principal guaranteed Shariah contracts such as *qard*, *wadiah*, *murabahah* and *tawarruq*; and principal non-guaranteed Shariah contracts such as *mudarabah* and *wakalah*.

Hence, if an Islamic bank uses *mudarabah* or *wakalah* as underlying contracts for deposit-taking activities which are characterized by principal guaranteed, then it will be deemed contrary to the nature of *mudarabah*. The fact is that as a *mudarib*, the bank shall not guarantee the *mudarabah* capital except in the case of its misconduct (*ta’addi*), negligence (*taqsir*) or breach of specified term (*mukhalfat al-shurut*). This can be seen clearly in the Shariah Standard on Mudarabah issued by Bank Negara Malaysia (Refer to Part C, Section 11.0).

As a result, Islamic banks are forced to find out new products to replace the existing *mudarabah* deposit account, particularly for term deposit-i products. In doing so, some of the Islamic banks have introduced *tawarruq*-based term deposit.\(^7\) However, this product must be supported by *wakalah* principle whereby the customer shall appoint the bank as his agent to purchase a required commodity from the supplier. This product will undergo several steps of transactions involving the acts of the agent on behalf of his principal. In this paper, we attempt to analyze the concept of *wakalah* in this product as to whether the mechanism of transactions complies with Shariah.

The remaining discussion of this paper will be divided into four sections. Section 2 will discuss the structure and modus operandi of time deposit. A further analysis on the presence of *wakalah* principle in time deposit-i will be done in section 3. Section 4 will present the conclusions.

### 2. Term Deposit-i Based on *Tawarruq*

Term deposit is a type of deposit held at a bank that has a fixed term. These are generally short-term with maturities ranging anywhere from a month to a few years. When a customer opens a term deposit, he/she understands that the money can only be withdrawn after the term has ended or by giving a predetermined number of days’ notice. The current practice shows


\(^5\) *Wakalah* in the investment products usually refers to *wakalah bi al-istithmar*.

\(^6\) According to IFSA 2013, “investment account” means an account under which money is paid and accepted for the purposes of investment, including for the provision of finance, in accordance with Shariah on terms that there is no express or implied obligation to repay the money in full and(a) either only the profits, or both the profits or losses, thereon shall be shared between the person paying the money and the person accepting the money; or(b) with or without any return;

\(^7\) *Tawarruq* is one of the most popular Shari’ah contracts used in Islamic banking and finance industry. It has been widely used in both sides of Islamic banks’ balance sheet, i.e. asset’s side and liability’s side. The concept of *tawarruq* has been extensively discussed by classical jurists in their writings. However, the original idea of *tawarruq* as mentioned in the books of *fiqih* is not workable in the real Islamic finance sector. Therefore, most of Islamic banks are using organized*tawarruq* in employing such a contract as banking products.
that the applicability of Shariah contracts used to structure such a product include 
mudarabah, wakalah and tawarruq.

Since the IFSA 2013 does not allow Islamic banks to use mudarabah and wakalah as 
underlying contracts for principal guaranteed deposit account, there is a need to create a new 
product which complies with the IFSA 2013. One of the newly introduced products is 
tawarruq-based time deposit account.

Initially, tawarruq was widely used for liquidity management. Some Islamic banks 
use tawarruq to facilitate liquidity needs as it can give a fixed return to the banks 
(Ayub(2007)). It is also widely used as a tool of liquidity managements especially in the 
Middle East countries. In other words, it can be used to place and obtain funds from 
customers to address various liquidity needs of the Islamic banks. The common term used in 
the market today to denote tawarruq is commodity murabahah transaction. In Malaysia, the 
common commodity used is Crude Palm Oil (CPO) made available by Bursa Suq al-Sila’ 
whereas metals are normally used in the London Metal Exchange (LME). The acceptable 
tawarruq transactions can be executed in the following manner: (i) one bank (in need of 
funds) and another bank (intends to place funds) select any commodity which are liquid in 
nature; (ii) the surplus bank purchases the commodity on cash payment from the market; and 
(iii) the deficit bank purchases it from the surplus bank on credit and after taking delivery, 
sells it in the market at spot price for cash.

However, the stock of CPO might not be enough to cater the needs of Islamic banking 
institutions in offering this type of product. Consequently, many new underlying assets have 
been introduced in the market such as condensed milk, telecommunication’s airtime, 
television’s airtime, etc.

In this paper, we try to look at the principle of wakalah which is embedded in 
tawarruq-based term deposit. In doing so, our attempt is to review the structure of tawarruq-
based deposit as described in the RHB Investment Bank website which is known as 
Commodity Murabahah Deposit. Apart from RHB, there are a number of Islamic banks 
offering the same structure as well. Yet, for the purpose of this paper, we will refer to RHB 
model since the data can be viewed publicly from its official website. The structure of this 
product can be seen in Figure 1.

The explanation of the structure of Term Deposits as follows:

a. A customer shall appoint the bank as an agent to purchase RM100k worth of commodity (Purchase Transaction) from the local market as determined by the bank at the Purchase Price. The purchase price shall be mutually agreed between the customer and the bank.

b. Upon signing the contract, the customer shall immediately pay the Purchase Price to the bank for the Purchase Transaction.

c. Simultaneously (or on the next Business Day) the Bank on behalf of customer will purchase RM100K worth of the commodity from Supplier for the deposit period.

d. Supplier provides RM100K worth of commodity to the Bank.

e. Bank receives on behalf of customer RM100K worth of the commodity from the Supplier.
f. Customer receives notification ownership of commodity worth RM100K of the commodity;

g. Customer may sell the commodity to the bank (according to the maturity date) at Deferred Sale Price (RM100K + x% profit).

h. Bank purchases (100k worth of the commodity + x% profit). At this step, the Bank owned the commodity;

i. Bank may sell RM100K (or RM100K+ x% profit) worth of the commodity to XYZ company;

j. XYZ company buys RM100K (or RM100K+ x% profit) worth of commodity from the Bank;

k. Bank receives RM100K (or RM100K+ x% profit) cash from XYZ company; and

l. On the last day of Tenor (Maturity Date), the bank shall pay the Deferred Sale Price under the Sale Transaction and the Customer will receive amount on agreed sale price i.e principal + X% profit.

However, with regards to the term deposit, care needs to be taken particularly when the transactions involve wakalah contract. Furthermore, in the current practice, some Islamic banks prefer to use the intangible assets such as airtime as underlying commodity.

3. Analysis on the Presence of Wakalah Principle in Tawarruq Based Term Deposit

As discussed in section 2, it is clearly appeared that the principle of wakalah\(^9\) is embodied in this application of tawarruq. The embodiment of wakalah can be viewed in the steps(a), (c), (e) and (g). Further explanation is given below:

*Step (a)*

In the first step(a), the customer (depositor) has appointed the bank as his agent to purchase RM100 thousand worth of commodity (tangible or intangible asset). Meaning that the depositor is muwakkil (principal) and the bank is an agent (wakil). The bank may or may not impose any charge as a fee of wakalah. Typically the fees will be charged if the bank acts as an agent to perform certain acts on behalf of their customer (Ayub 2007).

In this initial step, care needs to be taken with regard to the essential elements (arkan) of wakalah. The offer and acceptance must be clearly done in this step for the contract to be valid. The subject matter should be known to the extent that its performance is possible for him (Mansuri 2001). In this particular tawarruq product, the quality, quantity, kind, and other necessary attributes of the commodity to be bought should be identified. The subject matter could be a tangible asset or intangible asset. According to the majority of scholars, property actually is all things or their usufruct which can be possessed, secured, or stored and could be

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\(^9\)The term wakalah (ワカーラ) is derived from the root word wakala (ワカール) which means to substitute an agent for the principal to perform an act on behalf of that principal (Mansuri 2001). According to AAOFI Shariah Standard, wakalah or agency is defined as the act of one party delegating the other to act on its behalf in what can be a subject matter of delegation (AAOIFI, Shariah Standard, item 2/1/1).
used when needed. If the purchased commodity is an intangible asset, then scanning the attributes of the asset needs to be taken rigorously. By doing so, the identification of the subject matter of the *wakalah* would be accomplished. For instance, as practiced by some Islamic banks, using airtime as the asset could be considered permissible since the airtime has the following attributes: (i) it can be possessed, or capable of being possessed. Usually the telecommunication company will provide serial numbers representing such airtime; (ii) airtime is capable of being stored (*qabilan li al-tamlik*); (iii) airtime can be used whenever needed. Even, there is no an expiry date for airtime; (iv) airtime is beneficial in the eyes of the Shari’ah; and (v) moreover, *urf* (customs) recognizes airtime as valuable and beneficial.\(^\text{10}\)

*Step(c)*

In step(c), the bank as an authorized person will be acting to purchase the required commodity as stated in the contract. The bank must comply with all terms and conditions that is set forth by the principal regarding the required commodity.

According to the AAOIFI Shariah Standard (item 4/1(a)), there are two types of *wakalah*, namely specific *wakalah* and general *wakalah*. While a general *wakalah* refers to a general delegation of power, a specific *wakalah* is made only for a certain known transaction. This means that the agent should dispose within the scope of a particular disposition as identified by the principal.

In this *tawarruq*-based deposit, the *wakalah* could be perceived as specific *wakalah*. It can be clearly understood from the subject matter of the *wakalah* which is the act of purchasing a particular commodity from a particular supplier.

*Step(e)*

After the constructive delivery of the commodity has been executed at the step (e), the bank again acts on behalf of the customer to receive the purchased commodity and holds it as *amanah* (trust). According to the principle of *wakalah*, an agent appointed is considered to be a custodian of the principal’s property and in the fiduciary position of a trustee.

*Step(g)*

At the step (g), the customer may sell the commodity to the bank if he wishes. Yet, since the commodity is still held by the bank, it seems that the bank will act on behalf of the customer to sell the commodity to the bank itself. [Note: at step (g), the customer should not appoint the Bank to sell to itself as the customer has the ability to execute such transaction by selling to the Bank by himself].

Whilst (a), (c) and (e) are common in applying the *wakalah* (agency) concept, it is important to note that at the (f) step, an option will be given to the customer whether the customer wants to proceed selling the commodity to the bank. Instead, the customer may take the delivery of the commodity. Based on the above explanation, we found that the given option could be perceived as providing two following purposes: option to proceed or not to proceed is given to customer to reflect the genuineness effect of trading; and option is a way to ensure customer is free to transact by his own choice. In addition, the bank who acts on

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\(^{10}\)The terms of valuable and beneficial should be translated under a strict requirement especially when they know the number of airtime created does not match the demand of the market, thus it becomes artificial. For example, Company ABC creates RM1 million worth of airtime, but the daily market demand of usage of its airtime is only RM100,000. Here it proves that the airtime does not reach the market for real economy.
behalf of customer in the (f) step, it could be perceived as the bank is selling the commodity to itself. Thus, it triggers a Shariah issue which is known as bay al-wakillinafsihi (an agent selling to himself). From Shariah perspective, this issue falls under the disputed matters among the jurists.

Basically, the above issues are related to the ruling of the one who is acting as the parties to both sides of a contract. For example, the one who buys a commodity from himself who at the same time acts as an agent to sell such a commodity on behalf of its owner. The same ruling goes to the al-wasi (trustee) dan al-nazir ala al-waqf (supervisor of waqf property). In fiqh perspective, there are two opinions: First opinion: The sale contract is invalid even if the principal knows about that. Ibn Qudamah (Vol. 10, p. 303) attributed this opinion to the Hanafiyah, Shafi’iyah and a narration from Hanabilah.

Ibn Qudamah also has stated:

وشراء الوكيل من نفسه غير جائز، وكذلك الوصي، وجملة ذلك أن من وكل في بيع شيء، لم يجز له أن يشتريه من نفسه

“And the purchase of an agent from himself is not permissible as well as al-wasi (a trustee). The same rule applies to an agent in selling something, in which he is not allowed to purchase it from himself” (Ibn Qudamah, Vol. 10, p. 303).

Zakariyya al-Ansari, a prominent scholar of Shafi’i school of thought has mentioned in Asna al-Matalib:

ولايجوز بيعه، ولا شراؤه من نفسه وطفله ونحو من محاجره ولو أن له فيه تضاد غرضي الاسترخاء لفهم والاستقصاء للموكل

Meaning: “And it is not allowed to sell to and to buy from himself, his children and the like among those who are under his responsibility, although it has been permitted by the principal due to the conflict of interest between decreasing prices for those and increasing prices for the principal (muwakkil)” (al-Ansari, Vol. 10, p. 289).

This opinion has a number of evidences as follows: (i) conflict of interests - Typically, the sale contract has contradicting rights such as to take delivery and to, to request to deliver the goods and to possess the price. Logically, it is impossible for all of these rights to be in one person at the same time. Meaning that, there is a conflict of interest in such contract. This proof has been clearly uttered by Zakaria al-Ansari in his book; (ii) there would be a sort of accusation (tuhamah) against an agent - once the agent purchased from himself, he would be accused as the one who acts against the interest of the principal. This kind of sale become invalid as usually the buyer i.e. agent will be doing for the best of his interest. Ibn Qudamah (Vol. 10, p. 304) explains this reason “ولأنه تلزمه التهمة” , which means “because it causes an accusation against him”.

According to the original orgeneral rule in Shariah, the unity of offer and acceptance is not allowed. This has been explained by Zakaria al-Ansari:

ولأن الأصل عدم جواز اتحاد الموجب والقابل وإن انتهفت التهمة، ولأنه لو وكله ليهب من نفسه لم يصح وإن انتهفت التهمة

Meaning: “And this is because of the general rule not allowed to have a unity of offer and acceptance even though without the evidence of accusation. And it is not valid if the principal appointed an agent to grant a gift to himself despite not having accusation since the unity of offer and acceptance is in existence”. (Al-Ansari, Vol. 10, p. 289)

Second opinion: The sale contract is valid provided that there is no accusation (tuhamah) against al-wakilas the principal knows about it and allows it or the agent buys it for
more than the usual price. As attributed by IbnQudamah (vol 10, pp. 303), this is the opinion of Malikiyyah, a narration of Hanabilah as well as narrated from al-Awza’i.

IbnRushd al-Maliki states:

إذا وكل على بيع شيء هل يجوز له أن يشتري نفسه فقال مالك: يجوز وفقل عه لا، قال الشافعي لا.

Meaning: “If he is appointed as an agent to sell something, is it permissible for him to purchase it for himself? Malik views it is allowed” (IbnRushd, Vol 2, p. 245).

This opinion is based on a number of evidences as follows: general rule of Shari’ah that the sale contract is permissible, and moreover there is no proof prohibiting this type of sale; and it might be a maslahah (benefit) for muwakkil in this kind of sale, since it would be no buyer as the agent who buys the commodity at the required price.

Based on the above discussion, it would be a second opinion that is referred to as dominant. We found that the focus of the dispute among scholars is the issue of an agent (wakil) selling for himself without permission. This kind of transaction will create an accusation against him. But, if the principal gives a permission to do such an act, then the contract should be valid. Moreover, the permission by a principal can be realized through a clear word from the principal (client) or by customary practice. In fact, the probability of accusation against the agent could be removed when the principal permitted it or the agent increases in price. But, then, if the wakil has the ability to purchase on its own, then the wakil cannot appoint the Bank as agent. As for retail clients who may not have such access to purchase the commodity, thus it is permitted but with strict observation.

4. Conclusion

The aim of this paper is to analyze the presence of wakalah in tawarruq term deposits. By analyzing the existing structure and modus operandi of tawarruq time deposit, we argue that the application of the concept of bay al-wakilinafsihi would not affect the validity of wakalah. However, care needs to be taken at each step of transactions for ensuring the shariah concepts and principles would not be violated.
References


Ayub, Muhammad. 2007. *Understanding Islamic Finance*. England: John Wiles & Sons Ltd.


