



Status and implications of promise (*wa'd*) in contemporary Islamic banking

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Abstract

Purpose – The purpose of this paper is to analyse the status and implications of promise (*wa'd*) in Islamic banking practices and the extent of its enforceability in the court of law. The analysis highlights the concept of *wa'd*, its application and limitation in the present practices.

Design/methodology/approach – Analysis of conceptual nature and status of promise is made in the light of classical and contemporary juristic rulings (*ijtihad* and *ifta'*). Illustrations of three main Islamic banking products structured based on *wa'd* principle are discussed to shed some lights in understanding the issues surrounded the practice.

Findings – This study reveals that the usage of *wa'd* is allowed by contemporary jurists as a necessity for the interest of the contracting parties. The paper admits the importance of *wa'd* which has become an innovative tool in structuring many forward contracts that require flexibility with full commitment of the parties involved without jeopardising the basic principles and *maqasid* Al-Shari'ah. The paper also highlights that the right of promisee is well protected in both Shari'ah and civil law, and also enforceable in the court of law.

Research limitations/implications – The analysis of this study reveals that *wa'd* has direct implications in determining the Shari'ah compliancy of particular Islamic banking products in two aspects; first, promise- and other-related undertakings are not integral to the main contract; second, the promise should not include a bilateral promise that is binding on both parties, unless if there is an option to cancel the promise which may be exercised by any of the parties. This research will be of interest to both incumbent and potential practitioners as well as researchers in the area of Islamic finance.

Originality/value – The paper presents an objective view on the implication of *wa'd* in Islamic banking practices based on facts and *Shari'ah* rulings. It will indeed be a material guideline to the industry player who directly adopts *wa'd* in many Islamic products.

Keywords Islam, Banking, Civil law, Contract law, Law enforcement

Paper type Research paper

Introduction

In the present Islamic banking practices, bank appears to depart gradually from its traditional function as a financial intermediary. *Shari'ah* requires bank to engage directly in the transaction in many instances. To illustrate, in a sale transaction, bank cannot sell something which bank does not own, thus requiring the bank to purchase a commodity before selling it to the customer. If the customer decides not to purchase the commodity after the bank has bought it, the bank will face a risk of not being able to dispose the commodity profitably and hence, suffering a financial loss.

To this effect, the jurists have resorted to the imposition of *wa'd*, which requires a customer to make a unilateral promise to buy the commodity from the bank, before the bank actually makes the purchase from the supplier. The earliest ruling on the application of *wa'd* was limited to murabahah sale to purchase order facility. Later, its application was extended to other financing and investment facilities which are



structured based on sale (*bay'*), leasing (*ijarah*) and partnership (*shirkah*) contracts. The use of *wa'd* in such facilities is necessary as a risk mitigation tool to show the parties' commitment to perform their contracts as mutually intended completely. Most importantly, its ultimate purpose is to ensure continuous Shari'ah-compliance in every stage of the transaction, particularly to avoid the formation of two contracts in one or pre-conditioned contract (conditional contract).

To assess the implications of *wa'd* in respect of its application in Islamic banking practices and the extent of its enforceability in the court of law, this study will focus on two major issues:

- (1) first, whether this promise is legally binding and enforceable; and
- (2) second, whether the bank has the right to seek legal enforcement of the promise in the court of law?

To these ends, discussion will begin with the concept and legality of *wa'd*. Next, the practical application of *wa'd* in some main Islamic banking products will be highlighted, and the final part will review its status in common law.

Concept of *wa'd*[1]

Literally, *wa'd* means notification of good or bad news; although *wa'd* is commonly used to give notice a good news, whereas *wa'id* is to warn the bad one[2]. *Muwa'adah* involves two parties exchanging their respective news. Technically, *wa'd* refers to an information leading to a good news in the future.

In Islamic law, *w'ad* means promise which connotes an expression of willingness of a person or a group of persons on a particular subject matter. In a commercial transaction, a promise carries dual connotation; an offer from the offeror is known as promise, and acceptance from the offeree is also recognised as promise. *Wa'd* in the practical sense has no specific definition of its own. However, it can be explained as a commitment made by one person to another to undertake a certain action beneficial to the other party.

In traditional concept, *wa'd* is unilateral in nature, and binds the maker only. For example, Ahmad makes a promise to sell his car to Abdul for RM60,000. This promise is unilateral in nature and does not bind Abdul to accept the offer. It will only be binding upon both parties after a sale contract is concluded.

Another difference between the contract and promise is that while contract is legally binding upon the contracting parties once it fulfils all the requirements needed, promise on the other hand depends on the acceptance of its applicability and to the opinion of jurists whether they are legally or religiously binding or both or it is a mere a question of morality.

The legal status of *wa'd* from perspectives of Shari'ah

Islamic jurists have unanimously agreed that when a person promises something without any intention of fulfilling his promise, such act is not permissible (haram) because the promisor will be deemed to be a liar and pretentious (*munafiq*) person who are seriously condemned by the religion. What more if the same promisor takes an oath to convince the promisee to act upon his promise. The promisor in the later case will not only be subject to Allah's condemnation but also a fine or compensation (*kaffarah*) to relieve him from his false oath[3].

However, if a promise is coupled with an intention of fulfilling it, the jurists are divided whether its fulfilment is obligatory or recommended. Those who opine the fulfilling a promise is obligatory are further divided as to whether it is binding by

religion (*mulzim diyamatan*) or enforceable by the court (*mulzim qada-an*). Islamic jurists have different views with regard to the liability imposed to the parties of the promise:

- (1) *View 1.* Fulfilling a promise is recommended (*mandub*), not obligatory; otherwise the promisor will be condemned (*makruh*).
 - As for general principle, promise must be fulfilled for religious reason only and it is a question of morality and the scholars are in agreement on this point.
 - According to al-Zarqa', a promise does not initially bind the person who makes it (promisor), and it does not give any right to the promisee.
 - The Shafi'i, Hanbali and Zahiri Schools recommend the fulfillment of a promise, even if it is subject to certain condition.
- (2) *View 2.* Fulfilling a promise is obligatory by religion because in the context of divine sin and reward, fulfilling a promise is a must. If a promise is not fulfilled, the promisor is deemed to be sinful. However, its non-fulfilment will not be enforced by the court.
 - The consensus opinion of the majority particularly Hanafi, Shafi'i, Hanbali, and a few from Maliki schools opined that a promise made by a person to the other is religiously binding (*mulzim diyamatan*) but not a legal duty (*mulzim qadha-an*). This is because *wa'd* is part of a voluntarily contract ("*aqd tabarru'at*"). Therefore, the judge has no way of such enforcement, because the second party has nothing more than a moral right.
 - Imam Nawawi said when a person promises another something (provided it is not illegal) he should fulfill his promise.
 - The promise is not binding at all. This is a view of Al-Qarafi.
- (3) *View 3.* Fulfilling a promise is obligatory by religion and can be enforceable by the court.
 - The promise is absolutely binding. Ibn Al-'Arabi is among the proponent of this view, stating that the promise must be fulfilled by all means unless in certain exceptional situation in which its fulfilment is impossible.
 - Ibn Shubramah made the fulfilment of promise as compulsory. He said:
 أن كل وعد بالتزام لا يُحل حراما, ولا يحرم حلالا, يكون وعدا ملزما قضاء وديانة
 (Meaning: every concluded promise which does not allow prohibited thing, and not prohibit permissible thing, is binding legally and religiously)
 الوعد كله لازم ويقضى به على الواعد ويجبر
 (Meaning: all promises are binding, and the promissory is compellable in fulfilling it).
- (4) *View 4.* In a specific case where a promise is subject to certain conditions, its fulfilment is obligatory and enforceable although the promisee has not acted upon the promise yet.
 - The ruling is affirmed by the Hanafi School which distinguished between absolute promise and conditional promise. The latter becomes binding in the contract of exchange in avoidance of *gharar* (unknown element) in the subject matter of promise. This rule is very similar to the concept of guarantee established by *kafalah* contract.

- (5) *View 5*. In the similar instance where a promise is subject to conditions, the promisor is obliged to fulfil it and can be enforced by the court only if the promisee has indeed acted on the basis of the promise. Thus, non-fulfilment of such a promise will make the promisee incurring loss.
- According to Ibn Al-'Arabi, the Maliki School viewed that if the promise results in a particular consequence then its fulfilment is obligatory; but if it is a promise *per se* without any consequential effect, fulfilling it is not made obligatory.
 - The enforceability of a binding promise judicially can be upheld if it entails to the performance of promisee in reliance to the promise. As such, fulfilling the promise is obligatory, or the promisee will suffer loss or difficulties as a result of the non-fulfilment. This is a preferred opinion in the Maliki School which was expounded by Malik, Ibn Al-Qasim and Sahnun.

Contemporary *ifta'* and *ijtihad* on the legality of *wa'd*

Contemporary jurists have been posed with many issues in financial products which require them to exercise an *ijtihad* and produce a new ruling (*ifta'*) to such effect. Some significant rulings are presented here as follows:

- (1) Sheikh Badr Al-Mutawalli Abdul Basit, Shari'ah advisor of Kuwait Finance House gave a fatwa relating to murabahah sale to purchase orderer in May 1979. Referring to Ibn Shubrimah's opinion, every unilateral promise that neither permit unlawful thing nor prohibit lawful thing is deemed to be a binding promise judicially and by religion (*mulzim qada-an wa diyatan*)[4]. The application of this opinion appears to benefit the parties involved and make the transaction well-governed.
- (2) The legality of *wa'd* in murabahah sale to purchase orderer was also presented during the First Conference of Islamic Banking in Dubai (May 1979). Such a transaction contains a unilateral promise (*wa'd*) from the customer to buy the goods according to an agreed term; and also a promise from the bank to sell the goods based on the agreed conditions. Each promise is judicially binding on both parties according to the *Maliki* school; whereas other schools view such promise as binding by religion. Fulfilling such promise may become judicially obligatory in the event of necessity, for example, if the non-fulfilment of promise entails difficulties or loss to the promisee.
- (3) Sheikh Abdul Aziz bin Baz, the Mufti of Saudi Arabia resolved that promises to sell are permissible provided that the goods that have been pledged are owned by those who made the promise[5].
- (4) The Second Conference of Islamic Banking in Kuwait (21-23 March 1983) affirmed the legality of bilateral promise (*muwa'dah*) in murabahah sale to purchase orderer provided that:
 - the bank owns the goods;
 - the goods are in bank's possession;
 - bank sells the goods to the purchase orderer with an agreed specification of profit;
 - bank must bear the ownership risk until the goods are delivered; and
 - bank must accept the redelivery if there is hidden defect in the goods.

The conference also resolved that the unilateral promise becomes binding to the promisor. This rule better safeguards the transaction and protects the interest of both bank and customer. As such, every bank may adopt this rule subject to the approval of their respective Shari'ah supervisory committee[6].

- (5) The Council of the Islamic Fiqh Academy in resolution no. 40-41[7] resolved its permissibility on goods already in the physical possession of the seller, provided he carries the risk of loss before delivery or consequential of returning the goods because of concealed defects or other reasons justifying the return. In this practice, a promise (*wa'd*) which is made unilaterally by the purchase orderer or the seller is morally binding on the promisor, unless there is a valid excuse. It becomes legally binding if:

- it is made conditional upon the fulfilment of an obligation; and
- the promisee has already incurred expenses on the basis of such a promise.

When a promise has the binding effect, it means that such promise must be fulfilled, otherwise a compensation must be paid for damages caused due to the unjustifiable non-fulfilling of the promise. Mutual promise (*muwa'adah*) is also permissible in the case of murabahah sale provided that the option is given to one or both parties. Without such an option, it is not permissible, since in murabahah sale, mutual and binding promise is like a sale contract which requires the seller to be in full possession of the goods to be sold.

- (6) The International Fiqh Academy resolved in 2006[8] that muwa'adah is initially binding by religion on both contracting parties without any judicial implications. However, muwa'adah can be made judicially binding according to local law or international trade regulation if there is any urgent public need to such effect.

From the above rulings, majority of jurists held that *wa'd* or promise is binding (*mulzim*) if it is subject to certain conditions, provided both parties agree and understand the nature of such promise as well as the consequence of its non-fulfillment. This is based on a legal maxim[9]:

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(Meaning: promises in conditional form become binding).

Application of *wa'd* in Islamic banking products

Generally, a binding unilateral promise has been applied in many Islamic banking products which are based on sale (*bay'*), leasing (*ijarah*) and partnership (*shirkah*) contracts. The promise or *wa'd* in this aspect serves the following functions:

- (1) *Wa'd* to show "parties' commitment" to complete the transaction according to their ultimate intention. For example in murabahah sale to purchase orderer, customer will give his undertaking to purchase the asset which he initially requested the bank to purchase it from the supplier on his behalf. To ensure the fulfilment of such promise, the bank usually asks for a security deposit or *hamish al-jiddiyah*. If the customer does not fulfil his promise, i.e. cancel the purchase, the deposit will serve as a remedy to any loss suffered by the bank.
- (2) *Wa'd* as an alternative to "put option and call option". In Islamic financing documents, *wa'd* concept is applied in a supplementary document to the master agreement, or commonly known as purchase undertaking (an alternative to put

option). There is also a sale undertaking[10] (or call option) by the bank although it is rarely used in Islamic banking transactions. For example, in *Al-ijarah thumma al-bay'* (AITAB) customer undertakes to purchase the asset at the end of *ijarah* (leasing) period for an agreed nominal price.

- (3) *Wa'd* as a “risk mitigation technique” in the event of default or total loss. A binding promise becomes necessary to manage and mitigate bank’s risk in the event of customer’s default or total loss[11] of the asset. For example, customer’s promise to allow bank to restructure the facility in the event of “hardcore” default[12]. Similarly, consecutive defaults in AITAB will entail repossession and then sale of asset in the public auction. In order to avoid bank’s loss resulting from this situation, customer’s promise becomes necessary, i.e. he undertakes to:
- pay any incidental costs of repossession; and
 - pay the indebtedness if, upon deducting the proceeds from the auction, the customer remains indebted.

Apart from the points stated above, *wa'd* is widely adopted in Islamic capital market products as a tool for liquidity payment, exit mechanism i.e. to redeem a sukuk at the end of maturity date, and also risk management and hedging purposes.

Wa'd in sale contract: Murabahah sale by purchase orderer

Murabahah is selling a commodity with a defined and agreed profit mark-up. Beside ordinary murabahah, this transaction may be also concluded with a customer’s promise to purchase the item from the institution. It is distinguished from the normal type of Murabahah in the sense that the latter does not include such a promise. It is called a “banking murabahah” or murabahah to the purchase orderer which is usually offered by the institution in the form of a Murabahah credit facility.

This transaction concerns with a sale of an item by the institution to a customer (the purchase orderer) for a pre-agreed selling price which includes a pre-agreed profit mark-up over its cost price. These matters are specified in the customer’s promise to purchase. Indeed, it is one of the trust-based contracts that depend on the transparency in relation to the actual purchase price or cost price in addition to common expenses[13].

Figure 1 illustrates the operation of murabahah sale to purchase orderer.

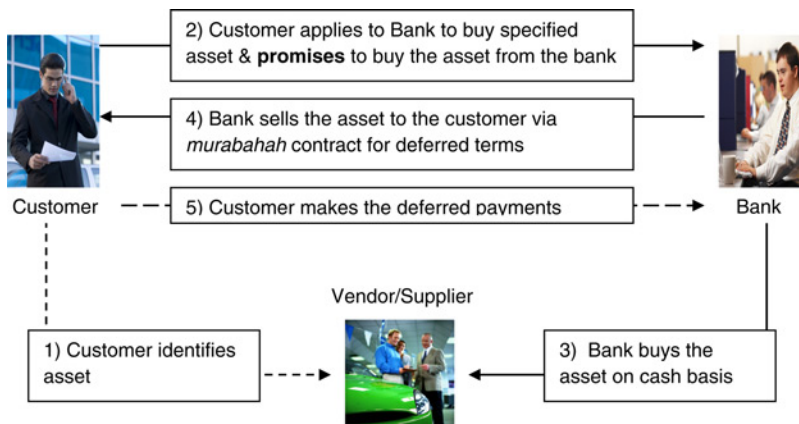


Figure 1.
Operation of murabahah
sale to purchase orderer

Paragraph 2/1/3 of the Shari'a Standards (2008) provides a guideline on the enforcement of customer's promise:

The customer's wish to acquire the item does not constitute a promise or commitment except when it has been expressed in due form [. . .] It is permissible for the customer to prepare such a document, or it may be a standard application form prepared by the institution to be signed by the customer.

This guideline requires the customer's undertaking to be put in a standard document or form which may be provided by the institution. Such a document shall expressly state the customer's wish that the institution should buy a particular commodity from a supplier and his promise to buy the commodity from the institution. However, to ensure the validity of the whole transaction, this document of promise must observe the following rules:

- The document of promise to buy which is signed by the customer should not include a bilateral promise that is binding on both parties; the institution and customer[14].
- The customer's promise to purchase- and other-related undertakings is not integral to a Murabahah transaction. These are merely intended to provide an assurance that the customer will purchase the commodity after it has been acquired by the institution[15].
- A bilateral promise between the institution and the customer is permissible only if there is an option to cancel the promise which may be exercised by any of the parties[16].
- Both parties shall mutually agree to revise the terms of the promise in respect of the deferment of payment, the mark-up, etc. at any time before the execution of the Murabahah transaction[17].

The Islamic financial institution's (IFI's) respond to the customer's application to buy a commodity from a supplier is permissible because such an application or demand does not strictly bind the institution's acquisition. In fact, the institution may acquire the commodity from any other supplier provided the commodity meets the customer's specification and fits for the desired purpose. Instead, the customer may be forced to fulfil his promise on the basis of divine requirement imposed by the Quran and Sunnah.

Furthermore, a bilateral binding promise is not allowed in this transaction because it will amount to a conditional contract to the main Murabahah contract which is prohibited by the Shari'ah[18]. On the other hand, the revision or amendment of terms in the promise is allowed because a promise is not a contract. As such, any amendment to the profit margin and the duration will not amount to rescheduling of debt which is also prohibited by the Shari'ah[19].

Wa'd in Ijarah contract: lease ending with ownership (Ijarah Muntahiyah Bittamlík)
Ijarah Muntahiyah Bittamlík is a form of ijarah used by the Islamic financial institutions. It includes a promise by the lessor to transfer the ownership in the leased property to the lessee (see Figure 2). Lease ending with ownership can be in the following forms:

- A lease contract that enables the lessee to benefit from the leased property against a specific rental payment for a specific period, and coupled with a promise from the owner to sell the property at end of the lease period, at a price to be mutually agreed upon.

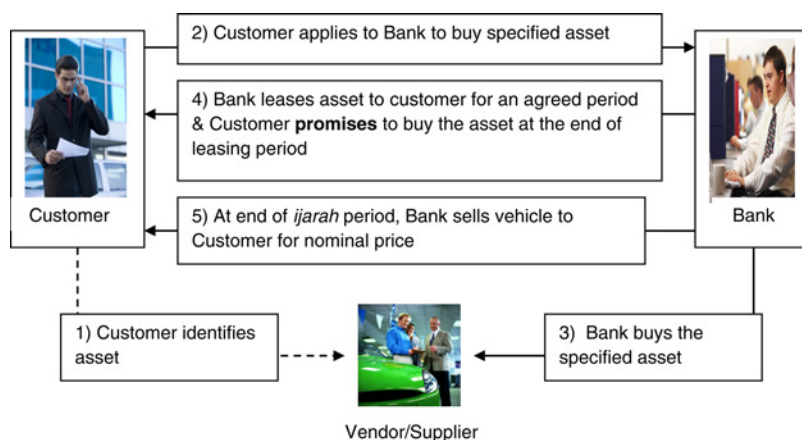


Figure 2.
Operation of Ijarah
Muntahiyah Bittamlik

- A lease contract (same as above) and followed by a promise to purchase by the lessee in order to become the owner at the end of the contract.
- A lease contract ending with offering the property as a gift to the lessee. The latter contract becomes effective at the end of lease period. The lessor promises to give the property as a gift (*hibah*) to the lessee after the lease period expires and full payment of rental is paid.
- A lease contract, upon its expiration, the lessor gives an option to the lessee to own the property at any time he wishes.

The first three forms of lease ending with ownership apply *wa'd* or undertaking by the owner to sell the property or give it as *hibah* to the lessee. The promise may also given by the lessee in the form of undertaking to purchase the property at the end of leasing period. These methods of transferring an ownership in the leased property are affirmed by the Shari'a standards No. (9) in paragraph 8/1 which provides that such a transfer must be evidenced in a document separate from the *ijarah* contract using any one of the following ways:

- promise to sell for a token or other consideration, or by accelerating the payment of the remaining amount of rental, or paying the market value of the leased property;
- promise to give it as a gift without any consideration; and
- promise to give it as a gift, contingent upon the payment of the remaining installments.

The transfer of ownership document comprising any of the above promise should be independent and cannot be an integral part of the *ijarah* contract.

Paragraph 8/2 of Shari'a Standards No. (9) emphasises that the above promise is treated as binding promise on the promissory only, while the other party (promisee) must have the option not to proceed. This is to avoid a bilateral promise which leads to a formation of contract prior to the actual contract or known as a conditional contract. Conditional contract is clearly prohibited in Shari'ah.

Paragraph 2/3 of Shari'a Standards No. (9) states: It is permissible for the institution to require the lease promissor (customer) to pay a sum of money to the institution to guarantee the customer's commitment to accepting a lease on the asset and the subsequent obligations [...].

The institution is allowed to demand payment of money from the lessee because of a need to confirm the commitment of the promissor. A binding promise has undoubtedly financial implications if the promissor breaches the promise. Thus, payment of a commitment fee[20] is required to cater for financial loss that may be suffered by the institution as a result of breach of promise.

Wa'd in Shirkah contract: diminishing partnership (Musharakah Mutanaqisah)

Diminishing partnership is a form of partnership contract in which one of the partners promises to buy the equity share of the other partner gradually until the title to the equity is completely transferred to him[21]. This transaction requires a formation of partnership contract, and followed with gradual transfer of the equity share between the partners (see Figure 3). The transfer of ownership must be evidenced in a separate document that is independent from the partnership contract.

If the transfer is made by a sale contract, then the partner who wishes to buy the other partner's share must give an undertaking or promise to buy in any manner prescribed and agreed between them. But such a promise must be independent from the main agreement (partnership contract), because a contract cannot serve as a condition for concluding the other contract.

Paragraph 5/7 of the Shari'a Standards No. (12) provides that one of the partners is allowed to give a binding promise that entitles the other partner to acquire his equity share gradually on the basis of a sale contract, according to the market value or a price agreed at the time of acquisition.

A resolution by Dallah Barakah also allowed any of the partners to give a binding unilateral promise that enable the other partner to own his shares gradually by way of sale contract and in accordance to the market price or any price mutually agreed at the time of sale. In many situations, the promise is binding on the selling partner (bank) to transfer his share gradually as per agreement for the interest of the transaction.

In the present practice, the transfer of ownership is usually made gradually on the principle of *ijarah muntahiyah bittamlik* (lease end with ownership). There are two contracts to be concluded between the partners (bank and customer):

- (1) The customer enters into a partnership contract (*musharakah*) under the concept of "shirkat *al-Milk*" (joint ownership) agreement with the bank.

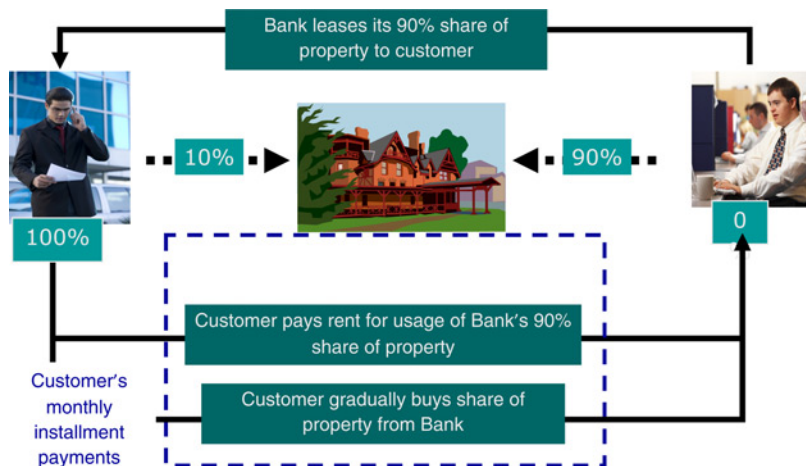


Figure 3.
Operation of Musharakah Mutanaqisah

Customer will pay, for example, 10 per cent as the initial share to co-own the house whilst the bank provides the balance of 90 per cent. The customer will then gradually redeem the bank's share at an agreed portion until the property is fully owned by the customer.

- (2) The bank leases its share in the property ownership to the customer under the principle of *ijarah* in consideration of rental payment. The customer's share ratio would increase after each rental payment due to the periodic redemption until eventually fully owned by the customer.

Paragraph 5/8 of the Shari'a Standards No. (12) states that the partners may arrange for the acquisition of the equity share of the institution in any manner that serves the interests of both parties. The partner (customer) is permitted to rent the share of the other partner (bank) for a specified amount and for an agreed duration, whereby the partners will be responsible for the routine maintenance of their respective shares on a timely basis[22].

Concept of promise in common law

A promise can be described as a kind of communication usable everyday life either in formal or informal functions. It depends on the usage of the promise itself whether as an element in the legal communication in term of contract or merely an ordinary conversation. The context of its usage is important to determine the status of promise or whether some legal obligations should be imposed on it or not. A promise is more than the truthfulness in reporting the intention of parties to a contract, for the party is free to change their mind.

In fact, a contract is formed by promises when both parties give their proposals and the others accepted it in the same contractual setting. Section 2 of the Contracts Act 1950 provides:

When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted; a proposal, when accepted, becomes a promise.

A promise is made when the contracting parties provide their considerations when making a contract. If one of them breaches the promise, the innocent party can sue the other party since this kind of promise is enforceable in the courts of law. This rule is also known as consideration doctrine; where the law will not enforce unilateral promises, but promises exchanged for something of value become legally binding contracts [23] (Gamage and Kedem, 2006). Section 2(d) of the Contracts Act 1950;

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

The promise made by the contracting parties can be made through express or implied as it is recognised in Section 9 of the Contracts Act 1950;

So far as the proposal or acceptance of any promise is made in words, the promise is said to be express. So far as the proposal or acceptance is made otherwise than in words, the promise is said to be implied.

Breach or violation of promise in a contract means that the promisor does not perform his obligation as promised to the other party. In common law, if one promisor has refused to perform his promise, the other contracting party has the right to end the contract. As stated in Section 40 of the Contracts Act 1950;

When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his consent to continue with the contract.

In addition to that, any promise contained in a contract must be performed by the promisor. But, in other cases, a promisor may also employ a competent person to perform the promise[24]. But, if the promise is breached under certain circumstances, only the contracting party i.e. the promisor and the promisee can sue or be sued. The promise between the promisee and the third party is not enforceable in the court of law. As stated in Section 42 of the Contracts Act 1950;

When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Therefore, if one party violates the promise containing in a contract, this contract is enforceable in the court of law in order to protect the interest of the innocent party, unless the innocent party gives his consent to continue with the contract.

The equitable doctrine of promissory estoppel

The above rule generally concerns with rights and liabilities of the contracting parties when their reciprocal promises give rise to a contract. What about a purely unilateral promise? To compensate innocent party who acted merely on a promise, the equitable doctrine of promissory estoppel was introduced. This equitable rule prevents the promisor from denying that he has made such promise which was relied and then acted upon by the promisee.

The court in *Combe v. Combe*[25] defined the principle of promissory estoppel as follows:

- where one party had made a promise (orally or by conduct) to the other;
- with intention to affect legal relations between them and to be acted accordingly;
- once the promisee has taken him by his word and acted on it;
- the promisor cannot afterwards deny such promise given earlier;
- but the promisor must accept their legal relations; and
- even though it is not legally supported by any consideration, but only his word.

The modern development of promissory estoppel began with the case of *Central London Property Trust Ltd v. High Trees House Ltd*.[26] The stated that:

In each case the court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel.

The court in this case also observed that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration.

To apply this principle, four conditions must be observed:

- (1) The promise must be clear and unequivocal to avoid any doubt about it and prevent the promisor from arguing against its formation.

- (2) There is a pre-existing legal relationship between the parties, but not necessarily contractual. For example in the case of *Cheng Hang Guan vs Perumahan Farlim and Ors*[27], both plaintiffs and defendants who had no contractual relationship claimed possession of the same land. The court found out that plaintiffs' possession of the land was protected by promissory estoppel, because the registered proprietor had promised to them that as long as they continued paying the rent, they could stay on the land as long as they wanted.
- (3) It must be inequitable (unfair) for the promisor to go back on his promise. For example, Abu borrowed RM500 from Chong, then during repayment he offered RM300 stating that Chong should take it or get nothing. Chong who was in a financial difficulty accepted RM300 in full settlement. If Chong sued for the balance, Abu cannot be protected by Chong's promise earlier (to accept the smaller sum in discharging the larger sum). It will be unfair to Chong because the settlement seemed to be involuntarily made due to his financial condition[28].
- (4) The promisee must have acted in reliance on the promise made to him. If the promisor does not fulfil his promise, the promisee may likely suffer from certain loss.

This equitable principle somehow has limited application. Promissory estoppel can only be used as a defence, not as an independent cause of action. To explain it metaphorically, it is a doctrine that enables a person to use it as a shield, not as a sword. In *Combe v. Combe*[29], the spouses were at divorce. The husband promised to give £100 per annum as permanent allowance. When the husband failed to pay, the wife sued on the husband's promise. The court held that the wife was not entitled to rely on promissory estoppel as the doctrine could be used only as a defence and not as a cause of action itself.

It means that the application of promissory estoppel is specifically to protect a person (particularly the promisee) from other's claim, either the promisor or third party. Thus, this doctrine cannot be simply used as an action against the promisor, for example to compel him to fulfil his promise. It may be applied if the promisee suffered loss or faced with the third party's claim because of the non-fulfilment of promise by the promisor.

Conclusion

When exercising an *ijtihad* in permitting the application of *wa'd*, contemporary jurists observed it as a necessity for the interest of the contracting parties. According to them, *wa'd* should not be rigidly construed in its limited application. Instead, *wa'd* can become an innovative tool in structuring many forward contracts which require flexibility with full commitment of the parties involved without jeopardising the basic principles and *maqasid* Al-Shari'ah.

It is a unanimously accepted principle that fulfilling promise is a must for an ethical and religious reason. An absolute promise which is not subject to a particular reason and neither affects to a loss to the other party, is not legally binding. But the promisor will be labelled as a liar, thus, sinful in the eye of Allah. On the other hand, conditional promise becomes binding and enforceable because it may affect the other party's interest who may suffer loss if the promise is not fulfilled. A promise to buy goods that the promisor initially orders from the promisee becomes binding and enforceable in avoidance of *gharar* (unknown element) in the subject matter of promise.

In the actual application to Islamic banking products, *wa'd* is commonly used to show parties' commitment to complete the contract. Its application and enforcement is

somehow subject to certain guidelines, such as the promise- and other-related undertakings are not integral to the main contract; the promise should not include a bilateral promise that is binding on both parties, but the bilateral promise is deemed to be permissible only if there is an option to cancel the promise which may be exercised by any of the parties.

Since Islamic banking matters fall within the purview of civil law and jurisdiction of civil courts, some common law principles may be very useful to support related Islamic banking or Muamalat cases. In fact, the position and enforcement of promise or *wa'd* are clearly recognised by the contract law which spells out detail rules in respect of unilateral and reciprocal promise, and remedies in the event of breach of such promise. In addition, rule of equity also provides protection to the innocent promisee with the application of equitable doctrine of promissory estoppel. But this doctrine is only applicable to the promisee as a defence against any suit from the promisor or third party.

It is well understood that *wa'd* has direct implications in determining the Shari'ah-compliancy of particular Islamic banking products. Both parties must understand its nature and consequences resulting from its breach. The right of promisee who has acted on the promise is well protected in both Shari'ah and civil law, and also enforceable in the court of law.

Notes

1. For detailed theoretical discussion on the concept and legality of *wa'd*, kindly refer to research papers presented at the Muzakarah Cendekiawan Syariah Nusantara (2008) by Us. Burhanuddin Lukman, Us. Ahmad Suhaimi Yahya (2008) and Dr Aznan Hassan (retrievable from <http://isra.my>).
2. Summarised from *Al-Mausuah Al-Fiqhiyyah*, Wizarah al-Auqaf wa al-Shu'uun al-Islamiyyah, Kuwait (www.islam.gov.kuwait).
3. See Al-Baqarah, 225.
4. *Al-Rukhsah Al-Shar'iyyah Fi Al-Usul wa Al-Qawa'id Al-Fiqhiyyah*, p. 400.
5. Resolutions of the securities Commission Shariah Advisory Council, adopted from Mohamad Sulaiman Al-Asyqar (1983, p. 138).
6. *Al-Rukhsah Al-Shar'iyyah*, p. 403, adopted from *Bay' Al-Murabahah Lil Amir Bi Al-Shira'* by Al-Qardhawi, pp. 9-11.
7. The resolution was made in the fifth session in Kuwait on 10-15 December 1988.
8. During the 17th session in Jordan at 24-28 June 2008.
9. No. 84 of Al-Majelle.
10. Sale undertaking (call option) is commonly used in the Sukuk market to ensure that the Sukuk holders sell the asset to the obligor at maturity.
11. The clause on "total loss" should be reviewed to give just and fair treatment to exceptional case where total loss is not caused by the customer's fault.
12. This is subject to the Shari'ah Advisory Council's approval. If the total amount of repayment resulting from the restructuring is higher than that of the original facility, new agreement (*'aqd*) to that effect must be made between the parties.
13. Shari'a Standards (2008), p. 129.
14. Paragraph 2/3/1 of the Shari'ah Standards No. (8), 2008.
15. Paragraph 2/3/2 of the Shari'ah Standards No. (8), 2008.
16. Paragraph 2/3/3 of the Shari'ah Standards No. (8), 2008.
17. Paragraph 2/3/4 of the Shari'ah Standards No. (8), 2008.

18. See the International Fiqh Academy, resolution No. 41 (3/5).
19. Shari'ah Standards No. (8), 2008, p. 131.
20. In murabahah, commitment fee is known as *Hamish jiddiyyah* a security deposit.
21. Paragraph 5/1 of the Shari'ah Standards No. (12), 2008.
22. Refer to paragraph 5/9 of the Shari'ah Standards No. (12), 2008.
23. Contract Act 1950, Act 120.
24. Contracts Act 1950, Section 41.
25. [1951] 1 All ER 767.
26. [1947] KB 130.
27. [1993] 3 MLJ 352.
28. See *D & C Builders Ltd v. Rees* [1965] 3 All ER 837.
29. See note 32.

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