

Application of Promise in *Sukuk Musharakah* Structure

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Abstract: *Sukuk musharakah* is an instrument of Islamic Capital Market (ICM). It is a preferred *sukuk* to be issued internationally or locally especially since the year 2005. In Malaysia, various Shariah principles and concepts i.e *wa'd*, *wa'dan* and *muwa'adah* had been used in *sukuk* structure to make the product more competitive than the conventional bond. This study therefore aims to analyse the application of promise in structuring *sukuk* in Malaysia. The study has identified that the concepts of promise in which consists of *wa'd*, *wa'dan* and *muwa'adah* are valid and recognized by Islamic jurisprudence to be implemented in *sukuk musharakah*.

Key words: *Purchase undertaking · Wa'd · Wa'dan · Muwa'adah · Sukuk · Musharakah*

INTRODUCTION

Promise in the practice of Islamic finance refers to the concept *wa'd*, *wa'dan* and *muwa'adah*. These concepts has been widespread in structuring Islamic financial products. It has become a major component of the current Islamic financial products to compete and match with conventional financial products. This concept that has been accepted and applied in the *sukuk* industry is related to the Purchase Undertaking and Sale Undertaking, liquidity facilities, exit mechanism i.e. to redeem a *sukuk* at maturity, event of default and redemption.

Definition of WA'D, WA'DAN AND MUWA'ADAH:

Wa'd literally means a promise or deed [1], whether the promise of good things or not [2, 3]. In normal circumstances, *wa'd* associated with good promise. While by definition, *wa'd* means the statement by a person of an action that will be done in the future which relate to other individuals, regardless of whether the action is good or not [4]. According to Aznan Hassan, *wa'd* is a promise by one party (unilateral) given by one party to the other

party to do certain things, such as a promise to sell or buy [5]. In Islamic law, *wa'd* (unilateral promise) means promise which connotes an expression of willingness of a person or a group of persons on a particular subject matter. Based on the definition given above, it can be concluded that *wa'd* is a promise that one party to another party to do something (like a promise to buy or sell) in the future.

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 recognized as promise. *Wa'd* in the practical sense can be explained as a commitment made by one person to another to undertake a certain action beneficial to the other party. The Chart 1 illustrates the *wa'd* illustration:

- On 1st December 2011, A promise to B to buy a book on the date of 1st January 2012 at a price of RM50. Both parties agree to perform the contract at the date of 1st January 2012.
- At the date of 1st January 2012, contract of sale occurs. A sells his book to B and B purchase the book at RM50.

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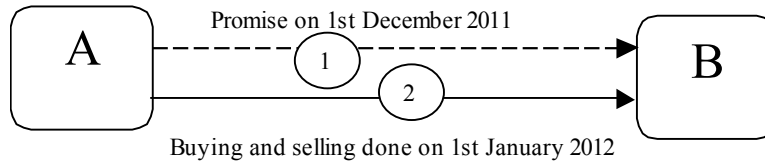


Chart 1: *Wa'd*

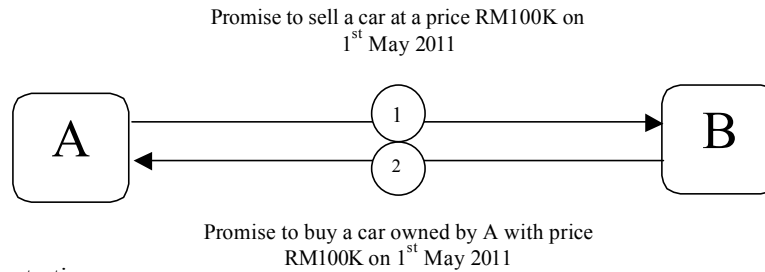


Chart 2: *Muwa'adah* illustration

Based on above chart, the promise had occurred on 1st December and the contract occurred on January 1. This shows promise different with contracts where the promise comes first and contract a later time. In addition, the two can be distinguished in which the contract requires the offer (*ijab*) and acceptance (*qabul*) to ensure that it certified in accordance with Islamic law while promise does not require *ijab* and *qabul*.

In addition, the difference between contract and promise can be seen from the legal implications. In a resolution issued by the Bank Negara Malaysia, stated that each of them has legal implications of its own [6].

Each of them has its own legal implications. In a contract, the parties are bound by the terms of the contract, thus they may be obliged to compensate for the breach of the contract. On the other hand, in a promise it is not binding on the promisor to fulfill his promise. As such, no compensation could be imposed on him if he breaches of the promise.

While *wa'dan* derived from *wa'd* means two promises. *Wa'dan* in the practical sense has no specific definition of its own and there are no particular discussion have been made by previous jurists. However, contemporary jurist has defined *wa'dan* as: Two unilateral promises, given by one party to another, that are not interrelated and their application depends on two different conditions [5].

However, *muwa'adah* or *mu'ahadah* [7] literally] means two parties are mutually promise [1, 3, 8]. Based on the above understanding, *muwa'adah* can be defined as a mutual promise between two parties with the intention

to conclude a contract in the future. According to Aznan Hassan, *muwa'adah* is a two promises given in bilateral by the two parties, one to another, whether the promise was made with conditions or not [5]. It refers to a statement made by two individuals on their willingness to make a thing in the future which is the impact or implications will return to both individual. The chart 2 illustrates the *muwa'adah* structure:

- A promises to sell his car to B for RM100, 000 on 1st May 2011.
- B promises to buy a car belonging to A with a cost of RM100, 000 on 1st May 2011.

On the day of sale (1st May 2011), there will be two possibilities, either:

- Party B will demand a promise from the A to sell his car to B for RM100, 000, or
- Party A is on his promise to the B to buy his cars at a price of RM100, 000.

Chart 2 clearly shows that there are similarities which both sides give a same promise between each others. On 1st May, we can see the sale contract will happen and A will sell his car to B at RM 100,000.

The Binding Nature of WA'D AND MUWA'ADAH: The binding status of unilateral promise (*wa'd*).

Islamic scholars have different views with regard to the liability imposed to the parties of the *wa'd*. The consensus opinion of Islamic scholars opined that a *wa'd* made by a person to the other is religiously binding

(*mulzim diyamatan*) [9, 10]. But the questions arise whether it is enforceable by court (*mulzim qada'an*) or not.

First view: *Wa'd Is Binding:* Al-Qur'an and al-Hadith have greatly emphasised the fulfilment of *wa'd*, the punishments for abandoning it and so forth in several places in different contexts [11, 12]. From *Surah al-Saff*, verse 2-3 in the Quran, Allah Almighty says: "O you who believe! Why do you say that which you do not do? Most hateful it is with Allah that you say that which you do not do". In this verse, Allah Almighty has condemned those people who say something and then do not do it. It is also said that a person not honoring his word will incur the wrath of Allah Almighty. Among the views of classical jurists on the bindingness of *wa'd* are as follows:

Wa'd is absolutely binding and must be fulfilled by all means

Some of the contemporary scholars by the referring to the *Surah al-Saff*, verses 2-3 above opined that *wa'd* is binding and must be fulfilled. This view is supported by several scholars including Imam al-Bukhari, Hasan al-Basri, Ibn al-Asywa', Samrah bin Jundub, Ishaq bin Ibrahim [13], Ibn Qayyim al-Jauziyyah [14], al-Qarafi [15] and al-Syanqiti [16]. They rely on the opinion of Ibn Syubrumah, which is: all promises are binding and the promissory is compellable in fulfilling it [17].

Wa'd is binding if it is attached to a cause and the promisee has acted upon

The enforceability of *wa'd* is binding judicially can be upheld if it entails to the performance of promisee in reliance to the promise. In other words, fulfilling the promise is obligatory, or the promisee will suffer loss or difficulties as a result of the non-fulfilment. This is the preferred opinion by Imam Malik, Ibn Qasim and Sahnun [18, 19]. In the event of default on the promise, the court or government can take action on infringement [15, 19, 20, 21]. For example, if A says to B: "if u get married and I will pay the dowry," and B is married, then A is obligated to fulfill their promise and may be enforced by the courts.

Wa'd is binding although the promisee has not acted upon a cause yet

This view is presented by Ashbagh, the jurists from Maliki school [18, 19]. 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 [15]. For example, if A says to B: "I want to marry, so pay off debt" and B promises to pay. In this case, B is required to fulfill his promise even if A does not get married.

From the above discussion, majority of jurists held that *wa'd* is binding (*mulzim*). In other words, fulfilling a *wa'd* is obligatory by religion because in the context of divine sin and reward, fulfilling a promise is a must. The same goes to the situation where the promise is subject to certain conditions and requires commitment from the promisee. To support this argument, the researcher has cited conclusions made by Abdul-Sattar Abu Ghuddah in issuing the fatwa on the issue of *amir bi al-Syira*, which stated that the general principle is binding on both parties and if, the undertaking is not carried out then the promisee have a right to claim *ta'wid* on the harms caused by the breach of promise [22]. This view is also supported by a large number of contemporary jurists, including Mustafa al-Zarqa' [22], Yusuf al-Qaradawi [23], Ibrahim Fadil al-Dibu [23] and Abdullah bin Sulayman bin al-Mani' [23].

Second View: *Wa'd Is Not Binding:* The consensus opinion of the majority particularly Hanafi [24], Shafi'i [26], Hanbali [26, 27] and a few from Maliki [19] school opined that a *wa'd* is made by a person to the other is religiously binding (*mulzim diyamatan*) but not a legal duty (*mulzim qada'an*). Fulfilling a *wa'd* is obligatory by religion because if a *wa'd* is not fulfilled, the promisor is deemed to be sinful. However, its non-fulfilment will not be enforced by the court. This argument is based on hadith: From Zaid bin Arqam, the Prophet, said: "If a man promises to his brother and he intends to fulfill his promise, but he is not fulfill the promise and also not come to the place that they have been promises, it is no sin on them [28].

This view is also supported by Yunus Rafiq al-Misri [19], which says that *wa'd* is not legally binding. This is because a *wa'd* which is binding in nature by both parties is just similar as a contract. He also expressed that any views for making it binding upon both or either parties, explicitly or implicitly, are not founded on any legitimate basis. This view is also supported by some others scholars, Hassan `Abd Allah al-Amin, Muhammad Sulayman al-Ashqar, Ali al-Salus dan Muhammad Rida Abd al-Jabbar al-'Ani [23].

The Status of Binding in Bilateral Promise (muwa'adah mulzimah):

As stated previously, *muwa'adah* is a bilateral promise made by two parties and agree to do the same thing. For example, A make a promise to sell goods and B promise to buy the thing. Based on the review, there is no prohibition by jurist to do *muwa'adah* if it is not binding. However, Islamic jurists have different views with regard to the binding *muwa'adah* because some scholars view that *muwa'adah mulzimah* will amount to a conditional contract and not just a promise [30].

Muhammad Taqi Uthmani resolved that *muwa'adah* is unexecuted contract, which binds only understanding. It will only be binding upon both parties after a contract is concluded [31]. He also viewed that the use of *muwa'adah* is necessary not only in the current financial market but for the international trade. Most importantly, its ultimate purpose is to ensure continuous Shari'ah-compliance in every stage of the transaction. Therefore, a deep understanding on this concept is need before making a sale and purchase in the future. This statement was agreed by Abdul Sattar Abu Ghuddah.

According to `Abbas Ahmad, *muwa'adah* is permitted if it does not lead to future sale (*bay' mudafah ila mustaqbal*) and contract of sale will only materialize when there is actual trading. The question whether *muwa'adah* is binding or not depends on the impact of these *muwa'adah*. Actual contract of sale will only be executed at the time agreed by both parties after the completion of the offer (*ijab*) and acceptance (*qabul*) [32].

Majma' al-fiqh al-Islami in its 17th meeting stated that, *muwa'adah* originally is religiously binding for both parties and not legally binding. *Muwa'adah mulzimah* in a contract is a "hilah" of riba (interest) like `inah and promise in "salaf" transaction. It is prohibited by syara'. However if there is a public need, binding promise from both parties is allowed whether through provision of law or by mutual consent of both parties [33]. AAOIFI [34] and BNM [35] also has disapproved the *muwa'adah mulzimah* because it is analogous to a contract.

When exercising ijthad in pertaining the application of *muwa'adah mulzimah*, the researcher's opinion towards this concept is not similar as a contract because it is only the promise made by two parties and therefore not a contract. Some significant arguments are presented here as follows [36]:

- Literally, contract and promise are two different principles. Contract by definition means a connection of the *ijab* and *qabul* which constitutes legal implication on the subject matter. It means legal relationship created by the conjunction of two declarations, from which flow legal consequences with regard to the subject matter. While *muwa'adah* are two promises given reciprocally by both parties to the other. From the meaning highlighted above, it can be concluded that *muwa'adah* is a promise to make a sale and purchase in the future. The actual contract will take place at the appointed time by the exchange of the *ijab* and *qabul*.
- The contract is said to be concluded when the connection between the *ijab* and *qabul* takes place. Referring to the discussion of previous jurists, the pronouncement of *ijab* and *qabul* can be in the form of verbs or commands, eg "I will sell you this book for RM10 and the buyer said, I buy it". Contrary to the pronouncement of the promise, that "I promise to buy your book tomorrow." The pronouncement is not certified by the jurists as a pronouncement of contract and it is merely a promise to do something at a future date rather than on the date the promise is made.

The argument which prohibit *muwa'adah mulzimah* is not based on the strong sources. This is because there is no strong *dalil* to support the view of some scholars who consider *muwa'adah* is a binding contract. Below is the diagram shows difference between contract and promise.

Table 1: Differences between contract and promise

Contract	<i>Muwa'adah mulzimah</i>
Formed with <i>ijab</i> and <i>qabul</i>	<i>Qabul</i> is not necessary
Khiyar confined within 3 days.	Khiyar right extends as long as the contract has not been made
Perfect possession after the contract occurs.	No possession even after the promise made
In trade, it is debt if the one do not pay it.	Both be a debt due
The sale and purchase, be liable to pay.	No liability to the provider promises.
If a party fails to pay, it considered as a debt	If one party does not fulfill its promise, the damages will be claimed.

Application of WA'D, WA'DAN AND MUWA'ADAH in Purchase Undertaking:

Purchase undertaking is a promise between issuers and investors to buy back the ownership of *sukuk*. Purchase undertaking generally based on *wa'd* which is sealed between the two parties to make a transaction at the time of purchase in future [37]. In structuring *sukuk*, this clause specifically put by the issuer in the trust deed and details of principal terms and condition. This clause is intended to provide rights to the issuer to buy back the *sukuk* or underlying assets. The purchase are usually made at a price agreed upon between investors and issuers. Based on the observations made, purchase undertaking can occur in three circumstances, namely at the end of the maturity of the *sukuk*, during the period in the event of *sukuk* and any event of default.

Purchase undertaking generally based on the promise that sealed between the two parties to make a transaction of purchase in future which is to buy back *sukuk* by the issuer. In the present *sukuk musharakah* practice in Malaysia, *wa'd* has been applied in a variety of methods including application of the purchase undertaking to ease liquidity. For example, *wa'd* occurs when one party either partners or third parties promise to buy one share owned by other parties. Upon the agreed date, the contract will be signed with the promisor to buy the ownership of another party as prescribed in the promises which has been made.

Looking at the practice of *wa'd* in purchase undertaking, it occurs if the promise was only be made by one side either by the issuer or investors. The promise will be documented in the form of principle terms and conditions. *Wa'd* clause can be identified by the use of the clause 'purchase undertaking' itself. For example, the Principle, Terms and Conditions (PTC) Project North-South Expressway Berhad as follows [38]:

The Purchase Undertaking obligation is an obligation by PLUS to purchase the Sukuk Series 1 from the holders of Sukuk Series 1 at the Exercise Price upon the occurrence of either of the following:

- the Maturity Date;
- the declaration of a Dissolution Event.

Upon the occurrence of either of the above, the Sukuk Series 1 held by the holders of Sukuk Series 1 shall be transferred to PLUS in exchange for payment of the Exercise Price.

The example above shows that PLUS as the issuer promises to buy back the *sukuk* of the partners at the end of the maturity or dissolution period. Upon arrival at one of such period, PLUS will buy back the partners *sukuk* ownership as a promise signed before.

Wa'dan also applied in purchase undertaking which is the clause shows the party promise to purchase and the other party promises to buy with two different promise. The following is an example of clauses in the PTC Haluan Gigih Sdn Bhd [39]:

The Issuer shall issue a Purchase Undertaking to the Trustee for and on behalf of the Sukukholders, wherein the Issuer undertakes to purchase the Sukukholders' interest in the Musharakah Venture from the Sukukholders at an Exercise Price upon declaration of Dissolution Event(s) and on each Reduction Schedule date, as stated in clause 2(f) below.

The Trustee, for and on behalf of the Sukukholders, shall issue a Sale Undertaking to the Issuer, wherein the Trustee for and on behalf of the Sukukholders undertakes to sell the Sukukholders' interest in the Musharakah Venture to the Issuer at an Exercise Price on the maturity date of the Sukuk.

Referring to the example above, *wa'dan* will take place between two parties promised to make the sale and purchase in the future, namely:

- In the event of Dissolution event, the issuer will buy back the *sukuk* from a partner with the exercise price, or,
- If at the maturity of the *sukuk*, *sukuk* holders will sell his possessions by the value of exercise price.

Looking at the above situation, condition given are different which is issuer will buy *sukuk* in the event of dissolution, while the *sukuk* holders will sell his possession at the end of period during maturity date of *sukuk*.

There were also several *sukuk musharakah* issued in Malaysia which applied *muwa'adah* concept in purchase and sale undertaking structure. The following are examples of clauses in purchase and sale undertaking in PTC Gamuda Bhd, which in the form of *muwa'adah* [40]:

Pursuant to a Purchase Undertaking, granted by LITRAK as obligor (“Obligor”) in favour of the Trustee for and on behalf of the Sukukholders, the Obligor shall undertake to purchase the Trust Asset from the Sukukholders at an Exercise Price (as defined below) on either the Maturity Date or upon any declaration of a Dissolution Event (as referred to in paragraph (y) below) of the respective outstanding Sukuk.

Pursuant to a Sale Undertaking, granted by the Trustee for and on behalf of the Sukukholders in favour of the Obligor, the Trustee for and on behalf of the Sukukholders shall undertake to sell the Trust Asset to the Obligor at an Exercise Price on either the Maturity Date or upon any declaration of a Dissolution Event of the respective outstanding Sukuk.

Based on the above clauses, conditions and effects are the same. This situation meets the characteristics of *muwa'adah* which is two bilateral promise given between two parties, one to the other, the promise was made unconditional and lead to the same effect. In addition, *muwa'adah* also available in the form of binding. This is shows in clauses PTC Hong Leong Industries Berhad [41]:

In consideration of the Issuer giving the Purchase Undertaking, the Sukuk Trustee shall give an undertaking to the Issuer that:

- *upon any Dissolution Event or maturity date of the respective outstanding Sukuk, the Sukuk Trustee shall ensure that the Portfolio Units are sold to the Issuer and not to any other party; and*
- *the Portfolio Units will be sold together with any income accrued thereon from the date of the Portfolio Units were purchased by the Issuer.*

Referring to the clause above, the investor needs to sell ownership to the issuer of *sukuk* and not to others. This statement is binding for the sale to specific party only, not to third parties or others.

After examining the two clauses above, it can be concluded that *muwa'adah* is binding directly or indirectly. *Muwa'adah* in form of direct binding takes place if the agreement is made with a specific promise that has to sell to a party, not to the other. While *muwa'adah* indirect binding situation is based on the legislation

which is law binds the promisor to deliver on their promises and if the promise was not fulfilled, then the promisee can bring the case to court [42].

Consequences of agreements becoming futures contracts

- *If an agreement that was not a futures contract when it was entered into becomes a futures contract as a result of an action taken by any of the parties to the agreement at a later time*
- *the parties to the agreement shall be deemed to have entered into a futures contract at that later time; and*
- *the agreement shall constitute the futures contract referred to in paragraph (a).*

RESULTS AND DUSCUSSION

Wa'd, *wa'dan* or *muwa'adah* are principally valid and recognized by Islamic jurisprudence. According to applications on purchase undertaking, binding promise have been made by the issuers to buy the underlying asset based on the agreed terms and conditions. The above explanation shows that applications and agreements made by the partners are just a promise only, excluding *ijab* and *qabul*.

Purchase undertaking is based on the principle of *wa'd* will only takes place when there is only unilateral undertaking. This appears contrary to the approach of *wa'dan* and *muwa'adah mulzimah* where purchase and sale undertaking clauses are placed together in one term as a promise to buy in the future. However, there are issues in which the purchase and sale undertaking practices similar to *muwa'adah mulzimah* and not to *wa'dan*. In spite of *wa'd*, *wa'dan* or *muwa'adah* are binding, the application of that principles in the Purchase Undertaking are in line with Islamic law. This is because all three types of promise are merely promise without the existence of *ijab* and *qabul* in the agreement.

After reviewing the above three different views, the first view which allows *muwa'adah* without any condition is more acceptable. This is based on the reason that there is no clear evidence from the Quran and Sunnah which prevents *muwa'adah*. Furthermore, *muwa'adah* is not a contract and it is merely a promise to execute a contract at a future date. The view that *muwa'adah* is permissible even though it is binding i.e the second view, appears to be more acceptable. The reason is that *muwa'adah* is not a contract but a mere promise. The contract will only happen when both parties conclude the contract with *ijab*

and *qabul* at the future agreed time. Furthermore, contemporary and classical jurists are of the view that *ijab* and *qabul* in the contract of buying and selling use the word “sell and buy” such as “I sell and I buy”. However, in *muwa’adah*, only the word “promise” is used.

CONCLUSION

Wa’d (promise) in the context of Islamic finance plays an important role and makes it possible for Muslims to deal with banks/financial institutions and conduct *halal* (permitted) financial transactions. Even in Malaysia, it is only the matter of terminology whereby many transaction applying *al-wa’d* indirectly without highlighting the word *al-wa’d* itself. Since Islam promotes on *amanah*, we are of the opinion that a promise made in the commercial transaction should not only religiously binding but it supposes to be legally binding provided that the principle is well governed and given recognition by proper manner and authority regardless whatever name it is going to be. Furthermore, the issue of a *wa’d* and its binding characteristic falls in the flexible sphere of *Shari’ah* (Islamic Law), which is subject to changes in accordance with needs and demands of time and place, therefore, comprehensive local law should be enacted regarding the enforceability of a *wa’d* in commercial transaction.

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