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Is Wa’dan any different to Muwa’adah? Empirical evidence from Malaysia

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Abstract

Purpose – The study aims to consider wa’dan-based products in Islamic banks in Malaysia and discuss the validity of wa’dan in those products from the perspective of Shari’ah.

Design/methodology/approach – Case studies were conducted of three Islamic banks in Malaysia. Semi-structured interviews were carried out with bankers as well as Shari’ah scholars. The document analysis method was adopted to strengthen the findings.

Findings – The study shows that three Islamic banking products: Musyarakah Mutanaqisah (MM) home and property financing; Al-Ijarah Thumma Al-Bai’ (AITAB) vehicle financing; and Ijarah rental swap (IRS) use wa’dan in their product structures. After discussing the different views of the scholars, the study concludes that wa’dan should be allowed in the above-mentioned products because it is different from muwa’adah. In wa’dan, every single wa’d is separate from each other, as every one of them is related to different types of events. With regard to the issue of Shari’ah in MM home and property financing, it was concluded that wa’d from the customer to purchase the bank’s share is not a capital guarantee. Moreover, IRS is not a form of gambling but is in line with Maqasid al-Shari’ah.

Research limitations/implications – The study is limited to three Islamic banks in Malaysia that focus on retail and commercial banking products. Therefore, the study excludes application of wa’dan in sukuk and some other Islamic derivatives that are not the practice of these three banks.

Originality/value – This empirical study adds new knowledge by developing the concept and practice of wa’dan. Wa’dan as an innovative tool for product development to overcome Shari’ah issues in conventional banking may be of interest to practitioners all around the world.

Keywords Malaysia, Shari’ah, Islamic banking product, Muwa’adah, Wa’d, Wa’dan

Paper type Case study

1. Introduction

Product innovation is an integral part of development for Islamic banking. In Malaysia, various types of Islamic banking products have been innovated since its inception. Shari’ah scholars along with practitioners have played an important role in providing Islamic alternatives for different conventional products to fulfil various financial needs among customers of Islamic banking and make Islamic banking flourish in a competitive market. Wa’dan is the result of market demand and innovative financial engineering. The fundamental reason for innovating Islamic banking products using wa’dan is to avoid prohibited elements, riba, gharar and maysir, that exist in conventional banking.

Wa’dan is an Arabic term which means two independent promises. It evolved from the concept of wa’d which means unilateral promise (Alish, 1958). Wa’d is essentially a hedging instrument. A number of Islamic banking products use wa’d to manage...
ownership risk or credit risk for the banks, e.g. “murabahah on purchase orderer” financing, “ijarah muntahiyah bi al-tamlik financing, etc. (Muhammad et al., 2011). However, in some cases, it is necessary to use more than one wa’d in a single banking product to accommodate the interests of both contracting parties in that product. To satisfy this need, muwa’adah (mutual promise) was initially thought to be the solution. However, the majority of Islamic scholars decided that if muwa’adah is used as a binding promise on both of the promisors to execute a contract in the future, then the muwa’adah itself turns into a forward contract (bay’ al-‘ajal bi al-‘ajal). When a binding muwa’adah has become a contract, then Shari’ah does not allow its use to conclude a contract in the future (Hammad, 1988; International Islamic Fiqh academy, 1988; Bank Negara Malaysia, 2010).

Considering the above factor, wa’dan has been innovated to satisfy the needs of the industry. Wa’dan includes two wa’d but they are separate from each other and not conditional on each other. However, several studies have questioned the validity of wa’dan, arguing that it is no different from muwa’adah. In practice, they are both the same. Therefore, similar to muwa’adah, it should not be allowed to conclude a contract in the future (Dusuki, 2009a, 2009b; DeLorenzo, 2012; Atallah and Ghoul, 2011; Ayub, 2011). For this reason, we have conducted an empirical study to find out the structure of wa’dan-based products so that we can determine whether wa’dan is similar to muwa’adah or not.

A definition of wa’dan is provided first, and then wa’dan-based products in Malaysian Islamic banks will be considered. Finally, there will be a discussion on the legitimacy of wa’dan in those products from the perspective of Shari’ah.

2. What is wa’dan?
Wa’dan is a new concept (Muhammad et al., 2011). It evolved from wa’d and muwa’adah. It is therefore sensible to discuss first the definition of wa’d and muwa’adah. The following sections will provide the definition of wa’d and muwa’adah, followed by wa’dan.

Wa’d is an Arabic word. It translates as “promise”. Technically, “it is a declaration from the declarer that he intends to perform a good deed in the future” (’Alish, 1958). This means that wa’d is a declaration for performing a good action in the future. Wa’d is made by only one party. Unlike a contract, there is no mutual agreement in wa’d. Rather, wa’d is a voluntary offer by one person to do something good for another person. Moreover, in normal circumstances there is no remuneration for the promisor. In wa’d, the promisor voluntarily offers to do something good to the promisee.

Where wa’d denotes a unilateral promise, muwa’adah means a mutual promise (Al-Azhari, 2001). Technically, muwa’adah is defined as a promise to “each one of the two to the other as it is a mutual action which will not happen except by两个人” (Al-‘Abdari, 1994). Muwa’adah is a mutual action where two parties make a promise to each other on the same subject matter. If only one person makes a promise to another, then it is a unilateral promise (wa’d), and when two persons promise to perform something good for each other, then it is muwa’adah (mutual promise).

It may appear that muwa’adah is a contract (’aqd) as it is a mutual promise. Therefore, wa’dan has evolved to clearly differentiate between a promise and a contract. Wa’dan means two independent promises. Hasan (2008) defines wa’dan as “Two unilateral promises given by two parties to each other which are not interrelated and
their application relies on two different conditions”. It may also appear that *wa’dan* is similar to *muwa’adah*. The difference between them is that in *wa’dan* the two promises are not interrelated with each other. This means that there is no mutual relation between the first promise and the second one. Both promises are independent. Pertaining to this, Muhammad *et al.* (2011) point out that *wa’dan* has two important characteristics:

1. that the promises are not dependent on each other; and
2. that their application depends on two separate conditions.

Figure 1 provides an example of *wa’dan*. In the first *wa’d*, A promises B that he will sell a Honda Civic car on May 1, 2015 for MYR 100,000 if the market price goes higher. After that, in the second *wa’d*, B promises to A that he will purchase a Honda Civic car on May 1, 2015 for MYR 100,000 if the market price goes lower. In this example, both of the promises are independent and both are based on two different conditions. The two different situations are when the market price of the car is higher than the price fixed earlier and when the market price is lower than the price fixed earlier.

### 3. Research methodology

This study adopts a qualitative approach because in-depth information is required to know the practice of *wa’dan* in Islamic banks in Malaysia. In addition to this, determining the *Shari’ah* status of *wa’dan* requires rigorous analysis of the opinions of Islamic jurists, which is very subjective in nature. In *Shari’ah* research, the legal reasoning of the jurists (*Ijtihad*) plays a vital role in determining the permissibility of a certain element when the primary sources, *Quran* and *Sunnah*, are not clear on this (Faqir, 2011).

Given the nature of this study, a case study is the most suitable method. One of the advantages of a case study is that it permits the researcher to communicate with the respondents. Therefore, it provides opportunities to explore in more detail and ask for deeper explanation of the answers (Zhao and Singh, 2011). Blatter (2008) states that it is widely acknowledged that case studies have become the key foundation of theoretical innovation. Three fully-fledged Malaysian Islamic banks have been selected for the case study. However, the names of these banks will not be revealed because our discussion on the permissibility of *wa’dan*-based products as practiced by these banks is very critical. Revealing their names may pose a reputational risk to the banks.

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**Table: Wa’d 2**

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<thead>
<tr>
<th>A</th>
<th>B</th>
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<tr>
<td><strong>Wa’d 2</strong>: B promises to A that he will purchase a Honda Civic car on 1st of May, 2015 for MYR 100,000, if the market price goes lower</td>
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**Source:** Author’s own
We have conducted semi-structured interviews with the bankers and Shari’ah scholars. The first interviews were conducted with the officers at the Shari’ah management department in each of the banks. The reason for this choice is that the Shari’ah management department holds the most comprehensive information on wa’dan-based products. The first aspect they are involved with is the research and product structuring. They are then involved with the Shari’ah committee’s decision-making on the product through providing related information on the products. Finally, they take an active part in auditing and reviewing the overall operation of the product (Bank Negara Malaysia, 2011). If the information received from Shari’ah officers on wa’dan-based products was not sufficient then the product development officers of the respective banks were contacted for an interview. The product development officers were interviewed to find out more detail about the structure of the product. The names of these interviewees have been kept confidential to safeguard their interests.

The Shari’ah scholars were then interviewed. Shari’ah scholars who were part of the Shari’ah committees of the selected banks were interviewed to know their opinions on the Shari’ah issues related to the wa’dan-based products. Then, Shari’ah scholars who were not from the selected banks were interviewed to avoid bias and hear a variety of opinions on Shari’ah issues related to wa’dan-based products. The names of the interviewees from this category have been revealed to confirm the significance of their opinions.

Document analysis is also used in this study. Olson (2010) states that documents present a precious source of data in case study research. Together with interviews and observations, they contain one of the important types of data sources for explanation and analysis in case study research. In this study, document analysis includes the assessment of documents used by the Islamic banks. Annual reports, product disclosure sheets (PDS), product application forms, product brochures and legislative acts are among the evidence examined.

4. Islamic banking products based on wa’dan in Malaysia
We found three Islamic banking products which involve wa’dan in their operations. Among these three products, two of them are consumer-banking products and the other one is a treasury product. The names of the products are:

1. Musyarakah Mutanaqisah (MM) home and property financing;
2. Al-Ijarah Thumma Al-Bai’ (AITAB) vehicle financing; and
3. Ijarah rental swap (IRS).

The details of these products are provided below.

4.1 Musyarakah Mutanaqisah home and property financing
MM is an Arabic term which means diminishing partnership. The bank and the customer co-own a property. The customer then gradually purchases the bank’s share in the property. At the end of the contract, the customer becomes the sole owner of the property.

In practice, the customer usually provides a small portion of the capital, for example, 10 per cent, and the bank provides a large portion of the capital, for example, 90 per cent, to co-purchase the house from the developer. After that, the bank leases out its share of the property to the customer. The monthly instalment paid to the bank consists of a
rental payment and a capital repayment to the bank. Figure 2 describes the *modus operandi* of MM home and property financing.

Operational steps include the following six steps:

1. Customer identifies the property and pays deposit to developer and developer signs S&P agreement with the customer.

2. Customer approaches the bank for MM financing facility. Once approved, customer makes MM co-ownership agreement with the bank and promises to gradually purchase the bank’s share of the property. The initial deposit paid by the customer to the developer is considered as his contribution toward the MM agreement, while the bank’s contribution is the remaining financing amount.

3. Bank pays the remaining S&P price to the developer.

4. After acquiring the property, bank leases out its respective portion of the property to the customer.

5. Customer makes a monthly payment to the bank, which consists of the rental payment and the gradual purchase price of the bank’s equity.

6. Co-ownership terminated upon full payment for the acquisition of the property by the customer. The bank transfers property to the customer.

*Wa’dan* is applied in the above structure of MM home and property financing. Usually, there are three *wa’d* in MM home and property financing. The first *wa’d* is from the customer to the bank. The customer promises to gradually purchase the bank’s share. The second *wa’d* is from the bank to the customer in case the customer wants to have an

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**Figure 2.**

*Musyarakah Mutanaqisah* home and property financing

*Source: Interview with the bankers*
early settlement. The bank promises that it will sell its share to the customer whenever the customer wishes for an early settlement. This wa’d is there to protect the interests of the customer if the property price suddenly increases.

The third wa’d is to protect the interests of the bank in the event of default. The customer is required to promise that upon triggering the event of default, he will purchase the property from the bank. This is stated clearly in the purchase-undertaking document. This wa’d is made to allow the bank to recover its loss in the event of default. Because of this wa’d, when there is an event of default, the bank will ask the customer to purchase the bank’s portion of the property. If the customer does not purchase the property from the bank, the bank has the option to sell the property on the market to recover its loss. After the property is sold, the bank will recover the price of its share in the property. However, if the bank incurs a loss after selling the property on the market, then the customer is required to pay the bank so that it can recover its loss.

These three wa’d are separate from each other and they relate to different conditions. The first wa’d which is given by the customer is related to normal cases. The second wa’d is related to a specific situation when the customer asks for an early settlement. Finally, the third wa’d is related to a situation when there is a default.

The contemporary application of wa’d in MM home and property financing is different from the previous findings. Noor and Aripin (2010) show that, in MM, there is only one wa’d from the bank to sell its share to the customer. On the other hand, Shuib et al. (2011) show that there is only one wa’d from the customer to purchase the bank’s share in the property. The reason for this different finding is that Islamic banking in Malaysia is continuously developing its product structures and features. Moreover, Noor and Aripin’s (2010) study was a theoretical study that did not provide enough information on the application of wa’d in MM financing. In addition, the study by Shuib et al. (2011) was not specifically focused on wa’d in MM financing. Besides, different banks may apply wa’d in different ways. While some banks use a number of wa’d then others may use only one wa’d.

4.2 Al-Ijarah Thumma Al-Bai’ vehicle financing

Al-Ijarah Thumma Al-Bai’ (AITAB) means a lease ending with a sale. There are two contracts in AITAB: lease and sale. These two contracts are distinct from each other. Upon the expiry of the lease period, the customer purchases the vehicle from the bank. Usually, either the bank or the customer will promise to sell or buy the vehicle at the end of the lease period. Figure 3 describes the steps in AITAB vehicle financing.

Operational steps include the following five:

1. The client approaches the bank and requests vehicle financing with identifying the vehicle and the vendor.
2. The bank purchases the vehicle to be leased and obtains ownership from the dealer.
3. The bank leases the vehicle to the client.
4. The client makes a periodic payment (lease instalment) as per the contract.
5. The bank transfers ownership to the client at the end of the leasing period through a sale contract (or upon settlement by the customer).
There are two different *wa’d* in the above structure. One *wa’d* is from the customer and the other one is from the bank. In normal circumstances, the bank promises to sell the vehicle at the time of maturity to the customer. There is another *wa’d* by the customer in the event of default. It is called “purchase undertaking”. The customer will undertake to purchase the leased vehicle upon triggering the event of default. Both *wa’d*s are binding upon the related parties. Therefore, there are two *wa’d* related to two different conditions here. The bank’s promise is related to the time of maturity and the customer’s promise is related to the time of default.

Based on the above discussion, we can say that there are more *wa’d* developments and complications in this product than before. Previous studies show that there is only one *wa’d* either from the customer or from the bank to sell or purchase the vehicle at the end of the lease period (Abdullah, 2010; Zaini and Isa, 2011). However, currently, *wa’d an* is used to mitigate the bank’s risk in the event of default and allow the bank to recover its loss at the time of default. This *wa’d an* helps the bank to follow better risk management practice than before for the benefit of both parties: the bank and the customer.

### 4.3 Ijarah rental swap

IRS is a risk management tool to hedge against floating *ijarah* financing. Under IRS, one can manage or modify one’s *ijarah* rental obligation from floating to fixed and vice versa. IRS can be used for different *ijarah* facilities, e.g. *ijarah* contract financing, *ijarah* auto financing, *ijarah* asset acquisition financing and *ijarah*-based sukuk.

A fixed *ijarah* rate is determined at the beginning of the transaction, while the floating rate is determined on a periodic reset date. After the periodic reset date, two legs of commodity *murabahah* transactions occur at each periodic settlement date. After the commodity *murabahah* transactions, only the net-off balance is transferred between the parties who receive the higher payment. A *muqasah* is applied for this purpose. The Figure 4 below shows the operational steps of IRS.
Operational steps of IRS include the following nine:

1. Customer approaches the bank and signs IRS master agreement, and the customer undertakes to enter into a series of *musawamah* transactions.

2. The bank also promises the customer that it will perform a number of *musawamah* transactions with the customer at regular agreed upon dates.

**Source:** Interview with the bankers

**Figure 4.** *Ijarah* rental swap
(3) On every settlement date, the customer purchases a commodity from broker B via the bank as his agent.

(4) The customer sells the commodity to the bank with a profit referenced to KLIBOR, for example, on the spot.

(5) The bank sells the commodity to broker A and gets cash.

(6) Alternatively, the bank purchases a commodity from broker A.

(7) The bank sells the commodity to the customer with a fixed profit on the spot.

(8) The customer sells the commodity to broker B via the bank as his agent and gets cash.

(9) Because of the two commodity musawamah transactions, only the net-off amount is transferred based on the concept of muqasah.

There are two independent unilateral promises (wa’dan) in IRS. The two promises mentioned above are not conditional on each other. The subject matter for both of the promises is different because the bank and the customer promise on two different musawamah transactions. The bank promises to purchase a commodity from the customer with a profit referenced to KLIBOR for example. Alternatively, the customer promises to purchase a commodity from the bank with a fixed profit.

The commodity murabahah transaction is facilitated by Bursa Malaysia’s suq al-sila’ (commodity market). The commodity transaction is based on a real asset. Usually, crude palm oil is used for the transaction. The possession and delivery of the commodity takes place between the contracting parties. The transaction is performed through an electronic system that identifies and verifies the ownership and specifies the subject matter of the contract. The transacting parties are allowed to take delivery of the commodities within seven days. However, an additional fee is charged for the delivery.

If the client breaches the wa’d, the bank usually attempts to cover the loss if it is not a substantial amount. For commodity murabahah transactions, the bank only loses the brokerage fee which is not a large amount. For example, the brokerage fee is only MYR 15 for any purchase of a commodity for MYR 1 million. Therefore, the bank does not penalize the customer for that. However, the bank will not make any further transactions with that client. On the other hand, if the bank incurs a significant amount of loss due to the breach of wa’d, the case is brought to the court. The court should decide on that matter based on the principle that the promisor has to compensate actual loss incurred by the promisee due to the breach of that promise unless there is a valid excuse (e.g. bankruptcy).

5. Discussion on the Shari’ah status of wa’dan
As wa’dan evolved from wa’d and muwa’adah, we will briefly discuss the Shari’ah ruling of wa’d and muwa’adah first. Then, we will discuss the status of wa’dan in Shari’ah with reference to the Islamic banking products mentioned earlier.

5.1 Shari’ah ruling for wa’d
Imam Shafi’i, Abu Hanifah and the majority of scholars believe that wa’d is only a recommended (mustahab) duty. Therefore, if the promisor breaks the promise, then it means he has left a noble action and committed a disliked (makrûh) deed. However, his action is not considered sinful (Al-Nawawi, 2005; ‘Alish, 1958; Ibn Hazm, 1935).
On the other hand, a number of scholars hold that *wa’d* is always compulsory on the promisor. Among them, Ibn Shubrumah cites that *wa’d* is always compulsory and the promisor should be forced to fulfil his promise (Ibn Hazm, 1935). Al-Asqalani (1990) states that ‘Umar bin Abd al-‘Aziz, Hasan al-Basri, Sa’ıd bin ‘Amr bin al-‘Ashwa’, Samurah bin Jundub (may Allah be pleased with him) and Ishaq bin ‘Ibrahim view *wa’d* as compulsory. Ibn al’Arabi (2003) states that the most accurate opinion on this is that it is compulsory to fulfil the *wa’d* in all circumstances except where there is an excuse.

The famous opinion in the *Maliki* School is that the promise is compulsory if it is attached to a cause and the promisee has entered into an action based on this promise. Imam Malik, Sahnun, al-Lakhmi and others are all proponents of this opinion. Imam Malik states that if a person says to another, “if you purchase a slave then I will help you with one thousand dirham”, then when the promisee purchases the slave it is compulsory for the promisor to fulfil his promise (Al-Asbahi, 1994).

Most contemporary scholars have weighed up the *Maliki* opinion. They have concluded that a promise is always morally binding, but it is only legally binding on the promisor when the promise is attached to a cause and the promisee has entered into an action based on this promise. *International Islamic Fiqh Academy* (1988) concluded that:

> According to Shari’ah, a promise (made unilaterally by the purchase orderer or the seller), is morally binding on the promisor, unless there is a valid excuse. It is, however, legally binding if made conditional upon the fulfilment of an obligation, and the promisee has already incurred expenses on the basis of such a promise. The binding nature of the promise means that it should be either fulfilled or compensation should be paid for damages caused due to unjustifiable non-fulfilment.

### 5.2 Shari’ah ruling for muwa’adah

The majority of Shari’ah scholars are of the opinion that if the *muwa’adah* is binding on both of the parties then it becomes a forward contract (*bay’ al-‘ajal bi al-‘ajal*). Therefore, it should not be allowed for executing a contract in the future. Hammad (1988) argues that if both of the promisors in *muwa’adah* agree that the promised contract that will be executed in the future is binding upon them from the time of *muwa’adah*, then it turns into a contract. Therefore, all the Shari’ah rulings pertaining to a contract will come into effect. This is based on the legal maxim which reads: “In contracts, effect is given to intention and meaning and not words and forms”.

In its fifth resolution, the *International Islamic Fiqh Academy* (1988) asserted that a binding *muwa’adah* is prohibited in the *murabahah* contract. It states that:

> Bilateral promises are permitted in *murabahah* sales on the condition that either or both parties have the option to annul the sale; however, if there is no such option, such a promise is not allowed because a binding bilateral promise in a *murabahah* sale bears a similarity to the sale transaction itself. In that case the condition is laid down that the seller must be the owner of the commodity being sold such that no dispute arises [based upon the prohibition of the Prophet (peace be upon him) of people selling what they do not possess].

Furthermore, *Bank Negara Malaysia* (2010), which is the central bank of Malaysia, stated in its Shari’ah resolutions that a binding mutual promise (*muwa’adah mulzimah*) is prohibited for a foreign exchange transaction because it comprises selling debt for debt, which is termed by the classical scholars as *’bay’ al-kali’ bi al-kali’*. 

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5.3 Shari’ah Ruling for wa’dan

Wa’dan is a recently invented term in Islamic finance. It cannot be found in the classical books of Islamic jurisprudence (Ahmad et al., 2012a). Therefore, only the contemporary scholars’ opinions on the status of wa’dan can be discussed. The contemporary scholars are divided on the permissibility of wa’dan. The opinions of different groups of scholars are provided below.

5.3.1 Wa’dan is permissible. According to Laldin (2014), wa’dan is allowed in Shari’ah. He argues that in IRS, there are two obligations, but they are different in terms of the subject matter. Even though it is bilateral, these two wa’d are different because there are some elements in the subject matter that differentiate between the first wa’d and the second. This is why it is termed wa’dan which means two separate wa’d. Therefore, wa’dan should be allowed in ijarah thumma al-bay’ as well as in currency transactions. The application of wa’dan in currency transactions is allowed by Bank Negara Malaysia with a few parameters to govern this transaction according to Shari’ah. Another reason to consider wa’dan as two separate wa’d is that between the two wa’d only one of them will be triggered in the future. The two wa’d will not be triggered together at one time. This is different from muwa’adah where both of the wa’d will be triggered at the same time.

In relation to AITAB and MM home and property financing, Chik (2013) mentions that the concept of wa’dan is used here but it is not muwa’adah. This is because the subjects of the wa’d are different. As an example, the first promise to sell the commodity is in one type of scenario and the second promise to purchase the commodity is in another scenario. Here, scenarios A and B are different. Pertaining to IRS, he points out that the wa’d here is not to execute a currency exchange contract (sarf) in the future but to conclude a number of commodity murabahah (tawarruq/musawamah) transactions in the future. This is an innovation in Islamic finance due to the current demands of business.

Lahsasna (2014) believes that wa’dan is a permissible legal trick (hilah) in swaps. He argues that in wa’dan, there are two different events or conditions in the undertakings, where the first undertaking is connected to event A and the second one is connected to event B. Even though the subject matter of the wa’d is the same, as long as there are two different events then it is allowed. He adds that wa’dan is the best solution that has been achieved so far to accommodate some products. There may be something better in the future but currently wa’dan is the best solution to accommodate swaps, FX forwards and other derivatives in Islamic finance. Others may invalidate the application of wa’dan in Islamic derivatives, arguing that in substance they are similar to the conventional derivatives. However, this may lead the clients to purchase the conventional products immediately. Therefore, we can say that wa’dan is the lesser evil between the two. Even though there is an element of doubt in wa’dan, it is still regarded as the best solution.

Moreover, Muhammad et al. (2011) conclude that wa’dan is a permissible legal trick to avoid muwa’adah. They argue that wa’dan is different from muwa’adah because wa’dan has different conditions that will result in the fulfillment of only one promise in the future. Therefore, it is not right to believe that wa’dan is impermissible in Shari’ah.

In addition, Saripudin et al. (2012) point out that, in some cases, the purchase and sale undertaking practices are in fact muwa’adah which is binding upon both parties but not wa’dan. They assert that even though wa’d, muwa’adah and wa’dan are binding upon
the parties, it is permissible to implement these in purchase undertakings. This is because these are just promises without any offer (‘ijab) and acceptance (qabul) Having considered the opinions) in the agreement.

On the other hand, Hasan (2008) clarifies that, in the case of wa’dan, if the two promises really have two different conditions and they result in two distinct effects, then it is permissible. Therefore, according to him, if the conditions are the same and have similar implications, then it is not accepted.

Finally, Ahmad et al. (2012b) show that wa’dan is different from a contract because wa’dan involves a future event, while a contract occurs on the spot. Moreover, there is no delivery of goods in wa’dan, whereas, in a contract, the goods are delivered on the spot. In wa’dan, there is no liability on the buyer to pay the price and the ownership of the commodity is not transferred.

5.3.2 Wa’dan is not permissible. Noor (2014) mentions that wa’d should not be binding in financial transactions. He argues that there is no such thing as a unilateral promise in banking practices because when one person promises to purchase/sell then another person accepts his promise. Therefore, it is actually a bilateral agreement. He adds that wa’dan is not acceptable either in Shari’ah because the outcome regarding the binding nature/obligation is the same as a contract. Besides, there is an element of gambling involved with wa’dan-based swaps and FX forwards. This is because an exchange rate between the two currencies is fixed beforehand and then the exchange rate may go up or down at the day of concluding the contract. In this case, one party will lose and the other party will gain.

After providing an example of FX forward based on wa’dan, Dusuki (2009a, 2009b) mentions that the application of wa’dan seems similar to muwa’adah. However, a number of Islamic financial institutions in the Middle East have been using wa’dan despite the criticisms. A number of Shari’ah scholars have accepted wa’dan, assuming that it is different from muwa’adah. However, they have approved this contract only for hedging purposes.

Similarly, DeLorenzo (2012) has highlighted that even though wa’dan is legitimate in Shari’ah, its application in total return swaps should be prohibited based on the concept of sadd al-dhara’i’ which denotes that if legitimate means are used to achieve an illegitimate end, then it is unlawful.

In relation to the application of wa’d in total return swaps, Atallah and Ghoul (2011) show that the application of wa’d – which is in fact wa’dan – is a hilah (legal trick) to make gambling Islamic, and it is a way of legalising prohibited future sales. They conclude that a total return swap based on wa’dan may be accepted in the Shari’ah in form but not in substance.

Finally, Ayub (2011) mentions that some banks are using “two unilateral independent promises” in Islamic swaps, hedge funds and short selling. He questions the Shari’ah-compliancy of using wa’dan in those products, and states that:

One cannot understand how the two reciprocal promises are unilateral and independent when no party is given an option for not entering into the contract, and if either party wishes to cancel, it has to pay on the basis of muqassah.

It is clear from the statement that he does not accept the difference between wa’dan and muwa’adah.
5.3.3 The weightiest opinion. Having considered the opinions of the scholars, we can say that if *wa’dan* involves two independent *wa’d* with different economic effects then it is permissible even though it is binding on the promisor. This is because, as discussed in the section on *Shari’ah* ruling for *wa’d*, the majority of scholars believe that *wa’d* is allowed in *Shari’ah*. Therefore, there is no question of *wa’dan* having different conditions and economic effects, as the two promises are separate from each other.

In our opinion, the doubt over its similarity to *muwa’adah* or a forward contract (*bay’ al-‘ajal bi al-‘ajal*) does not affect the permissibility of *wa’dan*. There are some fundamental differences between *wa’dan* and a forward contract. In the case of *wa’dan*, there is no offer (*‘ijab*) and acceptance (*qabul*) in the agreement, and these are the fundamental elements to conclude a contract (*‘aqd*). Usually, a future expression (e.g. I will purchase) is used in *wa’dan*. Islamic jurists unanimously agree that a future expression is not valid to conclude a contract but it should be a past or present expression (e.g. I purchased) (Saripudin *et al.*, 2012).

Moreover, there is no transfer of ownership in *wa’dan*, whereas, in a forward contract, the ownership of the commodity is transferred to the purchaser and the purchase price becomes the debt of the purchaser. In the case of *wa’dan*, when the promisor breaches the promise without any valid excuse, then he is obliged to compensate the promisee only for the amount of loss incurred due to the non-fulfilment of the promise and not for the contract price. This is very different to a forward contract where the full purchase price becomes a debt for the consumer.

Table I summarizes the differences between a forward contract (*bay’ al-‘ajal bi al-‘ajal*) and *wa’dan* in executing a contract in the future.

We have seen in the previous discussion that those who prohibit *wa’dan* (Dusuki, 2009a, 2009b; Atallah and Ghoul, 2011; DeLorenzo, 2012; Ayub, 2011) have actually mostly formed this judgment based on their case studies on certain products, e.g. total return swaps. However, the prohibition of *wa’dan* in a specific type of product does not theoretically prohibit the general concept of *wa’dan*. In this regard, it is appropriate to set up some parameters for the usage of *wa’dan* so that it does not lead to an illegitimate end or does not result in “form over substance”.

If it is apparent that the usage of *wa’dan* leads to a non-legitimate end, then it should not be allowed based on *sadd al-dhara’i‘*. The Islamic legal maxim reads: “Matters are determined by intention” (Ibn Nujaym, 2005; Al-Burnu and Al-Ghazzi, 2003). Therefore,

<table>
<thead>
<tr>
<th>No.</th>
<th>Subject</th>
<th>Forward contract</th>
<th><em>Wa’dan</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Contractual expression (<em>Sighah al-‘Aqd</em>)</td>
<td>Past or present</td>
<td>Future</td>
</tr>
<tr>
<td>2</td>
<td>Ownership of the subject matter</td>
<td>Transferred</td>
<td>Not transferred</td>
</tr>
<tr>
<td>3</td>
<td>Price</td>
<td>Due on the purchaser</td>
<td>The promisor is required to make the full purchase price</td>
</tr>
<tr>
<td>4</td>
<td>Bindingness/Obligation (<em>Ilzamiyyah</em>)</td>
<td>The purchaser is required to pay to the promisee if any loss incurred</td>
<td></td>
</tr>
</tbody>
</table>

**Table I.**
The difference between *Wa’dan* and forward contract  

**Source:** Author’s own
it is necessary to follow some parameters related to the implementation of a binding \textit{wa’dan}. In this case, we suggest that the regulating authority, e.g. the central bank, should impose some conditions and restrictions on the usage of \textit{wa’dan} in some products.

However, Islamic jurists impose some conditions that should be met to use \textit{sadd al-dhara’i’i} to restrict the usage of \textit{wa’dan} in Islamic banking products. One of the conditions is that it should be evident that the permitted action will lead to an illegitimate end. This means that there should be sufficient proof or confidence that the legitimate action will definitely come to an illegal end. If it is simply assumed that the lawful action will come to an illegal end then \textit{sadd al-dhara’i’i} cannot be exercised (Al-Zuhayli, 1986). To support this point of view, we can refer to the prophetic narration which states that we should pass judgment on the basis of what is apparent, and should leave people’s inward intention to be taken care of by Allah (Muslim bin Hajjaj, 1991, vol. 3, p. 1,337, Book: \textit{al-Aqdiyah}, Chapter: \textit{al-Hukm bi al-Jawahir}). Therefore, in the Malaysian context, \textit{wa’dan} might be used in Islamic banking products with regulation from Bank Negara Malaysia.

In the case of MM home and property financing and AITAB vehicle financing, there is no issue of interest and gambling. However, there might be a question of \textit{muwa’adah} or forward contract in relation to the usage of \textit{wa’d}. In our opinion, there is no \textit{muwa’adah} in these two products because each of the \textit{wa’d} is related to a different specific event. While the bank’s \textit{wa’d} is connected to the time of maturity of the contract, then the customer’s \textit{wa’d} is related to the event of default. Therefore, we can conclude that the usage of \textit{wa’dan} should be allowed in both of the products.

Pertaining to MM home and property financing, it is claimed that the \textit{wa’d} given by the customer to the bank on purchasing the bank’s share at a price fixed earlier is a guarantee of the bank’s capital in the \textit{musharakah} business. If one partner provides a guarantee to another partner’s capital in a \textit{musharakah} investment, then it violates the purpose of the \textit{musharakah} contract. This is because the fundamental principle of a \textit{musharakah} contract is that all the partners in the \textit{musharakah} venture should share the profit and loss (Naim, 2011).

Corresponding with this view, we would like to argue that MM home and property financing is not a partnership business (\textit{shirkat al’aqd}) where the issue of capital guarantee is relevant. In fact, it involves \textit{shirkat al-milk} which means joint-ownership in the property. In \textit{shirkat al-milk}, one party is allowed to purchase another party’s portion for a price mutually agreed between them. Therefore, the bank’s portion of the property should be allowed to be purchased for a fixed price which is decided earlier regardless of the market price. However, it is preferable to follow the market price. Agreeing with the above argument, Usmani (2002, p. 62) affirms that:

\begin{quote}
It will be preferable that the purchase of different units by the client is effected on the basis of the market value of the house as prevalent on the date of purchase of that unit, but it is also permissible that a particular price is agreed in the promise of purchase signed by the client.
\end{quote}

In light of the above discussion, we can disregard the issue of capital guarantee in relation to MM home and property financing. Giving \textit{wa’d} to purchase the bank’s share at a price fixed earlier rather than at the market value should be allowed under \textit{Shari’ah}.

Apart from MM and AITAB, we are of the view that there is no \textit{muwa’adah} or forward contract in IRS. This is because the two \textit{wa’d} are linked to two different subject
matters. While the bank’s wa’d is to perform one type of musawamah contract, the customer’s wa’d is to perform another musawamah contract. However, in relation to the issue of gambling and “form over substance”, we would like to argue that there are a few underlying contracts in IRS that makes it different from gambling. The tawarruq transaction and wa’dan make IRS different from gambling in practice. Besides this, it is different from gambling in the sense that it does not involve a pure bet where one party gains another party’s wealth totally while the other party suffers a total loss of his asset. Moreover, the gambling issue can be overcome with stringent laws and regulation from Bank Negara Malaysia. A Shari’ah parameter from Bank Negara Malaysia on the usage of IRS may prevent the financial institutions from becoming involved in gambling. With stringent laws and governance from Bank Negara Malaysia, the possibility of using this product for the purpose of gambling might not occur.

Moreover, IRS should be in line with maqasid al-Shari’ah, as it is a risk-mitigating instrument. Islamic jurists state that there are five noble objectives of the law giver in prescribing the Shari’ah rulings: the protection of religion, life, offspring, intellect and wealth. The objective of protecting wealth means that people’s property should be protected from any loss or destruction. Islamic Shari’ah disallows any action that leads to the destruction of wealth. Therefore, consuming other’s property illegally; destroying other’s property; wasting wealth, paying interest, gambling, etc. are prohibited in Shari’ah (Al-Ghazali, 1993; Al-Yubi, 1998). As hedging is a means of protecting the wealth of the hedger, it should be a tool to achieve maqasid al-Shari’ah.

Affirming the above argument, Al-Suwailem (2006) mentions that the practice of hedging is in line with the objectives of Islamic economics. However, the problem has been finding a Shari’ah-compliant means to reach this goal. Based on this, if a Shari’ah-compliant instrument is used for hedging, then it is not evil. This is because if a legitimate means is used to reach a legitimate end, then it is allowed in Shari’ah (Al-Shatibi, 1997). Furthermore, the following prophetic narration provides the ground for adopting a legitimate means to reach to a legitimate end:

Allah’s Apostle (peace be upon him) appointed a man as the ruler of Khaibar who later brought some janib [dates of good quality] to the Prophet. On that, Allah’s Apostle (peace be upon him) said [to him], “Are all the dates of Khaibar like this?” He said:

No, by Allah, O Allah’s Apostle! But we take one sa’ of these [dates of good quality] for two sa’ of other dates [of inferior quality] or, two sa’ [dates of good quality] for three sa’ [of inferior quality]. On that, Allah’s Apostle (peace be upon him) said, “Do not do so, but first sell the inferior quality dates for money and then with that money, buy janib [dates of good quality].” (Muslim bin Hajjaj, 1991, Book: al-Musaqat, Chapter: bay’ al-ta’am mathalan bi mathalin, vol. 3, p. 1,215, hadith no. 1,593).

In this prophetic narration, it can be seen that the Prophet (peace be upon him) describes a sound mechanism to get out of riba. Here, the goal is noble, which is to avoid riba, and the means to reach that goal is noble too, which is selling the inferior quality of dates in the market first and then purchasing the good quality of dates with that money. The similar mechanism is followed in IRS. This is because it has underlying contracts, which are wa’dan and tawarruq. As shown earlier, the tawarruq transaction is based on a real commodity. As such, it can be said that the contractual arrangements are legitimate means to reach a noble goal, which is risk management.
Finally, there is a demand in the Islamic finance industry for IRS. Dusuki (2009a, 2009b) states that Islamic finance is required to use an interest rate-related benchmark, e.g. London Inter-Bank Offer Rate (LIBOR) or Base Lending Rate (BLR), in its financial practices due to the absence of a profit rate benchmark. As a result, Islamic finance is inevitably exposed to the interest rate risk in terms of its revenue and expense flows along with the value of the assets. Thus, risk mitigation in the profit rate is important for Islamic financial institutions, namely, for their sustainability, viability and competitiveness in the market. Moreover, Mohamad et al. (2014) point out that Islamic hedging instruments are limited to catering for the demand of investors globally. It is difficult to mitigate market risk for Islamic finance because of the limited number of hedging instruments. Therefore, considering the public need, we should accept for the time being the best alternative to the conventional product that we have so far.

6. Conclusion
In conclusion, the application of *wa’dan* in two consumer banking products, namely, MM home and property financing and AITAB vehicle financing should be allowed because they are different from *muwa’adah*. In these products, each of the *wa’d* is related to a different situation. Therefore, they are separate from each other. In the case of IRS, there are two different *wa’d* to conclude two different *musawamah* transactions. Therefore, it is *wa’dan* but not *muwa’adah*. *Wa’dan* is allowed in the *Shari’ah* for the execution of a contract in the future because it is simply a promise through which the ownership of the commodity is not transferred and the price of the goods is not a debt on the promisor.

In relation to the *Shari’ah* issue in MM home and property financing, we have resolved that the customer’s *wa’d* to purchase the property at a price fixed earlier is not a kind of capital guarantee for the bank’s *musharakah* capital. This is because the underlying contract here is *shirkat al-milk* (joint-ownership) which allows the partners to sell their shares to others for a price agreed between them regardless of the market price. Moreover, corresponding to the *Shari’ah* view that IRS constitutes gambling, we have concluded that it involves some underlying contracts that make it different from gambling, and it is not a pure bet where one party faces a total loss of his property. With stringent laws and governance from Bank Negara Malaysia, the possibility of using this product for the purpose of gambling is very limited. In addition, IRS is consistent with *maqasid al-Shari’ah*. The contractual arrangements can be considered as a legitimate means of reaching the legitimate goal of hedging. Therefore, in respecting the public need, we should allow it until we find a better alternative. Based on this, this study recommends that there should be further research to consider more *Shari’ah*-compliant alternatives to IRS.

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