

An Islamic Perspective of Promise and Its Relationship with the Islamic Law of Contract

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Abstract

Principally, contract (*‘aqd*) and promise (*wa‘d*) are two different mechanisms in mutual dealings and have distinctive implications compared to each other. However, the need to enforce promise in the business dealings is substantially imperative nowadays due to the lack of confidence between the contracting parties, deficiency of trust in the society as well as the scale and size of loss that may occur resulting from the breach of promise in trades and dealings. Thus, this study aims to analyze the concept of promise and investigate its status in the Islamic law of contract. The authors will review and analyze the classical and contemporary *fatawa* (Islamic legal opinions) on this subject to reach at the conclusive opinion with regard to the differences and similarities between contract and promise in the Islamic law context. The authors will also discuss the applications and the implications of the selected opinion within the Islamic finance scope. Since this study is theoretical and conceptual in nature, the main references for this study would be the secondary information available in the relevant literatures. The authors shall analyze the contents of the literatures thoroughly in order to achieve the objectives of this study. The outcome of this study could put some light on the subject of promise and its relations with the Islamic law of contract as well as its applications and implications in the practical world.

Keyword: Promise (*wa‘d*), contract (*‘aqd*), *Fatwa* / *Fatawa* (Islamic legal opinions), Islamic Law of Contract

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THE STATUS OF PROMISE IN THE ISLAMIC LAW OF CONTRACT

Definition of Promise

This section shall discuss the concept of promise, its types and legality in Islam.

Literal Meaning

The literal meaning of *al-wa'd* is means promise. *Al-ʿidah* is the synonym of *al-wa'd* which originates from the same word “*wa'ada*”. Literally, both could denote promise of good matter as well as promise of bad matter. However, both *al-ʿidah* and *al-wa'd* usually denote the positive meaning. *Al-wa'id* also originates from the same word “*wa'ada*”. Conversely, *al-wa'id* is usually used to connote negative meaning i.e. promise of bad matter.

Technical Meaning

The technical (*fiqhi*) definitions of *al-wa'd* have been suggested by several Islamic jurists. Some of the technical definitions of *al-wa'd* are (WASI, 1983):

al-ʿAyni defines *al-wa'd* as:

الإِخْبَارُ بِإِيصَالِ الْخَيْرِ فِي الْمُسْتَقْبَلِ

Meaning: “Statement of delivering goodness in the future.”

Ibn ʿArafah defines *al-cidah* as:

إِخْبَارٌ عَنْ إِنْشَاءِ الْمُخْبِرِ مَعْرُوفًا فِي الْمُسْتَقْبَلِ

Meaning: “Information of the informer’s initiation of goodness in the future.”

Based on both stated definitions of *al-wa'd*, we could see that the Islamic jurists confine the technical use of *al-wa'd* for promise of good matters. This fact is observable by the use of *al-khayr* (الخير) by al-ʿAyni and *macrufan* (معروفا) by Ibn ʿArafah in their definitions of *al-wa'd*. Another important point that could be observed from their definitions is the time of the action. *al-wa'd* is used for the delivery of goodness in the future. Thus, delivery of past or current goodness is not included in the context of *al-wa'd*.

Other Related Terms

There are other terms which are similar or related with the promise (*al-wa'd*), they are *al-ʿahd* and *al-wa'y*. The following paragraphs summarize some of the main differences between those terms (WASI, 1983).

Al-‘ahd originates from the word “ahida”. Abu Hilal al-[‘]Askari states that *al-cahd* is a promise with a condition. Such promise is binding and requires fulfillment. The common trait shared by *al-wa[‘]d* and *al-[‘]ahd* is “both are required to be fulfilled from the Shariah perspective.”

Al-wa’y has the same meaning with *al-wa[‘]d* literally. However, Abu Hilal al-[‘]Askari mentions that *al-wa[‘]d* is used for permanent and temporary promise whilst *al-wa’y* is used for permanent promise only which must be fulfilled or defaulted. Al-Qadi [‘]Iyad states that *al-wa’y* is for guaranteed promise.

Types of Promise

Based on the researcher’s observations of the literatures, *al-wa[‘]d* could be divided into two main types i.e. (i) unilateral promise and (ii) bilateral promise. Some of the previous literatures has discussed on the topic of *al-wa[‘]dan* (two unilateral promises). Nevertheless, it still falls under the category of unilateral promises.

Unilateral Promise

Unilateral promise is a promise that is issued by one party only for another party. The promisor gives a promise to perform a certain action in the future. For example, Mr. A promises to Mr. B that he will purchase a computer from him next month. Mr. B may express his acceptance for the promise, but the acceptance is only considered as approval and not acceptance of contract (Marjan Muhammad et al., 2011).

Bilateral Promise (al-Muwa[‘]adah)

Al-Muwa[‘]adah refers to a mutually bilateral promise made by two parties. It could be defined as “a bilateral promise or undertaking by two parties to do something for each other in the future, either with or without any condition (Aznan Hasan, 2008).

Malikiyyah are perhaps the Islamic jurists who have extensively discussed the issue of al-muwacadah. Most of the Malikiyyah agree that al-muwacadah to do something that be invalid if it were done present is impermissible. However, they disagree on its permissibility with regard to the currency exchange. Although some of Malikiyyah allow the practice of al-muwacadah in the currency exchange, it is evident that the type of al-muwacadah which is allowed by them is non-binding (Marjan Muhammad, Hakimah Yaacob and Shabana Hasan, 2011).

On the same perspective, Islamic Fiqh Academy of OIC, AAOIFI (2010), Dallah Barakah and Kuwait Finance House also disallow the practice of al-muwa[‘]adah if it is binding (Rafiq Yunus al-Masri, 2002, Marjan Muhammad, Hakimah Yaacob and Shabana Hasan, 2011). Thus the discussion of bindingness of promise will be concentrated in the context of unilateral promise only.

Legality of Promise in Islam

The original ruling for making promise from the Shariah perspective is permissibility (al-ibahah). This is based on the principle of :

الْأَصْلُ فِي الْأَشْيَاءِ الْإِبَاحَةُ

Meaning: “The original ruling of matters (which has no Shariah prohibition) is permissibility.”

However, a person should not make promise for matters that are prohibited and unlawful in Islam. Further, he should not promise matters beyond his fulfillment ability and he should not issue too many promises as it could lead to over-loaded responsibilities which he may fail to fulfill some of them in the future (Mahmud Fahd Ahmad al-^cUmuri, 2004). Another important principle with regard to making promise in Islam is the use of *al-istithna*. *Al-istithna* refers to the phrase “Insha Allah”. “Insha Allah” is an Arabic phrase which could be translated in English as “God Willing” or “If it is God’s will” or “If God wills.” An example of a promise with *al-istithna* or exception phrase is when a promisor says : “I promise to pay your debt RM1,000 on me next Monday, Insha-Allah.” A promise without *al-istithna* does not contain the phrase “Insha Allah.”

The Islamic jurists agree that the use of *al-istithna* in the promise is required according to the following Quranic verses (al-Kahf: 23-24):

وَلَا تَقُولَنَّ لِّشَيْءٍ إِنِّي فَاعِلٌ ذَلِكَ غَدًا (*) إِلَّا أَنْ يَشَاءَ اللَّهُ ...

Meaning: “Do not say of anything (that has to be accomplished): I shall be sure to do such and such a thing tomorrow. Without (adding the words): If Allah wills..”

The use of *al-istithna* in the promise is also a way to avoid sin and *nifaq* if the promisor could not fulfill his promise due to valid excuses. However, they are of different opinions with regard to extent of requirement for *al-istithna*. Al-Ghazali considers *al-istithna* as recommendable, al-Jassas states that it is reprehensible to leave out *al-istithna* and Hanabilah view *al-istithna* in the promise as obligatory (WASI, 1983).

Differences between Contract and Promise

We shall summarize the differences between contract (*al-^caqd*) and promise (*al-^cwa^d*) in the following table.

Table 1: Differences between Contract and Promise

Aspect	Contract	Promise
Parties	Offeror and Acceptor	Promisor and Promisee
Consent	Mutual Consent (Exchange Contracts)	Promisor’s Offer only
Format	Offer and Acceptance	Promise statement
Types	Has various types	Has two types only
Effectiveness	Effectiveness takes place instantaneously	For the future commitment
Purpose	Has various purposes	Informing of future commitment
Possession	Possession of the Subject Matter is	Possession of the Subject

Requirement	Required Primarily	Matter is Not Required
Primary Ruling	Permissible	Permissible

Bindingness of Promise from Islamic Legal (Qada') Perspective

Fulfillment of promise in the Islamic jurisprudence is referred as *al-wafa' bi al-ahd* whilst fulfillment of contract is known as *al-wafa' bi al-^cuqud*. Primarily, the Shariah ruling on the fulfillment of promise depends of its subject matter. The subject matter of a promise could be divided into three categories as follows:

1. Obligatory matter
2. Prohibited matter
3. Permissible matter.

The Islamic jurists unanimously agree that the promise to undertake a prohibited matter is impermissible and its fulfillment is forbidden such as a promise to commit adultery or drink liquor. Furthermore, the Islamic jurists also agree that the fulfillment of promise to perform obligatory matters, such as obligatory prayer performance, *nafaqah* obligation and et cetera, is binding and compulsory (WASI, 1983).

However, with regard to fulfillment and bindingness of a promise to perform permissible or recommended matters, the Islamic jurists are of various opinions. It must be made clear that the Islamic jurists' variation of this issue is on the legal ruling for the fulfillment of the promise and not on the ethical ruling for the promise fulfillment. They actually agree that the promise for performing permissible matter is binding ethically (*diyanah*) and they differ on its bindingness from the legal viewpoint (*qada'*).

The Islamic jurists' opinion on the bindingness of promise from the legal viewpoint (*qada'*) could be divided into several two main sections. The first one is the classical Islamic jurists and the

Classical Islamic Jurists

There are seven opinions of Islamic jurists regarding this matter (WASI, 1983).

First Opinion

The fulfillment of the promise is legally binding. This opinion was referred to Umar Ibn Abd al-Aziz, al-Qadi Ibn al-Ashwac al-Kufi al-Hamdani, Ibn Shubrimah, an opinion of both Hanabilah (Ibn Taymiyyah) and Malikiyyah.

Second Opinion

The fulfillment of the promise is legally binding except with valid excuse. It is the opinion of Abu Bakr Ibn al-cArabi.

Third Opinion

The fulfillment of the promise is not binding legally. It is the opinion of Taqiyy al-Din al-Subki, one of the prominent jurists of Shafi'iyyah.

Fourth Opinion

The fulfillment of the promise is strongly recommended (*mustahabb istihaban muta'akkadan*) and its non-fulfillment is strongly reprehensible (*karahah tanzih shadidah*). This is the opinion of the majority of the Islamic jurists from Malikiyyah, Shafi'iyyah and Hanabilah.

Fifth Opinion

The fulfillment of the promise is legally binding if the promise is a conditional promise (*mu'allaq 'ala shart*). This is the opinion of Hanafiyyah. The Majallat al-Ahkam al-Adliyyah states that:

الْمَوَاعِيدُ بِصُورِ التَّعَالِيقِ تَكُونُ لِأَزْمَةٍ

Meaning: "Promises in the forms of conditional (promises) are binding."

Sixth Opinion

The fulfillment of the promise is legally binding if it is made contingent upon a reason and the promisee has performed the reason. This is the well-known and most preferable opinion of Malikiyyah.

Seventh Opinion

The fulfillment of the promise is legally binding if it is made contingent upon a reason. This is an opinion of Malikiyyah.

Contemporary Fatwa Institutions

This section shall discuss the opinions of contemporary fatwa councils or institutions with regard to the bindingness of unilateral promise.

Islamic Fiqh Academy of OIC

The Council of the Islamic *Fiqh* Academy, holding its Fifth session, in Kuwait-City (State of Kuwait), from 1st to 6th Jumada al-'Ula 1409 H (10 to 15 December 1988), has resolved on the issue of discharging of promise by stating (IFA, 2000):

"Second: According to Shari'a, 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 fulfillment 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 a compensation be paid for damages caused due to the unjustifiable non fulfilling of the promise.”

The above resolution on promise has been discussed altogether with the Murabahah to the Purchase Orderer. In another resolution related to the Musharakah Mutanaqisah and Its Parameters (No. 136 (15/2)), Islamic Fiqh Academy states (Marjan Muhammad, Hakimah Yaacob and Shabana Hasan, 2011):

“Musharakah Mutanaqisah is uniquely characterized by the presence of a binding promise by only one of the two parties to effect multiple purchase contracts by which he/she will gain possession of every portion of the (other party’s) stake.”

Based on the above stated resolutions, we could conclude that Islamic Fiqh Academy approves the bindingness of unilateral promise if the promise is made conditional upon an obligation and the promisee has incurred expenses on the basis of such promise.

AAOIFI

Based on the author’s observation of the AAOIFI’s Shariah Standards, there is no specific section dealing with the topic of *al-wa’d* or *al-muwa’adah*. However, *al-wa’d* and *al-muwa’adah* are treated in the standards as a component of other relevant topics. The discussion of *al-wa’d* and *al-muwa’adah* could be found in several sections such as:

Currencies Trading (*al-Mutajarah fi al-Umlat*)

Guarantees (*al-Damanat*),

Murabahah to the Purchase Ordered (*al-Murabahah li al-Amir bi al-Shira’*)

Lease and Financing Lease (*al-Ijarah al-Muntahiyah bi al-Tamlik*)

Partnership and Modern Corporations (*al-Shirkah [al-Musharakah] wa al-Sharikat al-Hadithah*) and

Commodity Sales in Organized Markets (*Buyu’ al-Sila’ fi al-Aswaq al-Maliyyah*).

In all of the standards, AAOIFI has taken the same position with Islamic Fiqh Academy of OIC by allowing binding unilateral promise and prohibiting binding bilateral promise (AAOIFI, 2010, Marjan Muhammad, Hakimah Yaacob and Shabana Hasan, 2011).

Shariah Advisory Council (SAC) of Bank Negara Malaysia

Shariah Advisory Council (SAC) of Bank Negara Malaysia has, at least, two resolutions related to the bindingness of promise in the forward currency transactions. Firstly, SAC of BNM, in its 49th meeting dated 28 April 2005 –Resolution No. 84 has resolved that (BNM, 2010):

“... Islamic financial institutions are allowed to conduct forward foreign exchange transactions based on unilateral *wa’d mulzim* (binding promise) which is binding on the promissor. In addition, the party who suffers losses due to non-fulfillment of promise may claim compensation.

Secondly, Shariah Advisory Council (SAC) of Bank Negara Malaysia, in its 102nd meeting held on 22nd June 2010, has decided the following (www.bnm.gov.my):-

“1. Application of *Wa’d* (Promise) in Forward Currency Transaction

Islamic financial institutions are allowed to enter into forward foreign currency transaction for hedging purposes based on unilateral *wa’d* (promise) that carries binding effect on the promisor.

Nevertheless, no consideration (or fee) is allowed to be charged on the promisee in view that upfront cash payment for forward currency transaction would lead to a bilateral *wa'd* which is not allowed by Shariah. This is in line with the view of the majority of ulama' who opines that unilateral binding *wa'd* without any consideration is permissible in a forward currency transaction.”

Analysis and Discussions

Based on a more detailed observation on the above-stated classical Islamic jurists' opinions, we could further simplify their differences on this matter into four major opinions. The major classical Islamic jurist opinions are as follows (Mahmud Fahd Ahmad al-^cUmuri, 2004):

Fulfillment of a promise is not binding but recommendable.

Fulfillment of a promise is binding.

Fulfillment of a conditional promise is binding.

Fulfillment of a promise attached to a reason is binding if the reason has been undertaken by the promisee.

Each of the classical Islamic jurists' opinions has their Shariah bases and evidences to support their positions. However, the discussions of the Shariah evidences are not within the scope of this article.

We could further conclude that Islamic Fiqh Academy of OIC, AAOIFI and SAC of BNM have opted for the opinion of al-Hanafiyyah and al-Malikiyyah. We could also observe that SAC of BNM and AAOIFI are taking the same footing with Islamic Fiqh Academy in this matter since Islamic Fiqh Academy has resolved this issue since 1988.

Another interesting point to note is that the Islamic Fiqh Academy of OIC has resolved on a more detailed solution which has not been established in the classical opinions of Islamic jurists with regard to the bindingness of promise. The new solution is based on the principle of “Loss Must Be Eliminated” (*al-Darar Yuzal*). The solution deems the unilateral promise as binding in the case of:

The promise is made conditional upon the fulfillment of an obligation, and

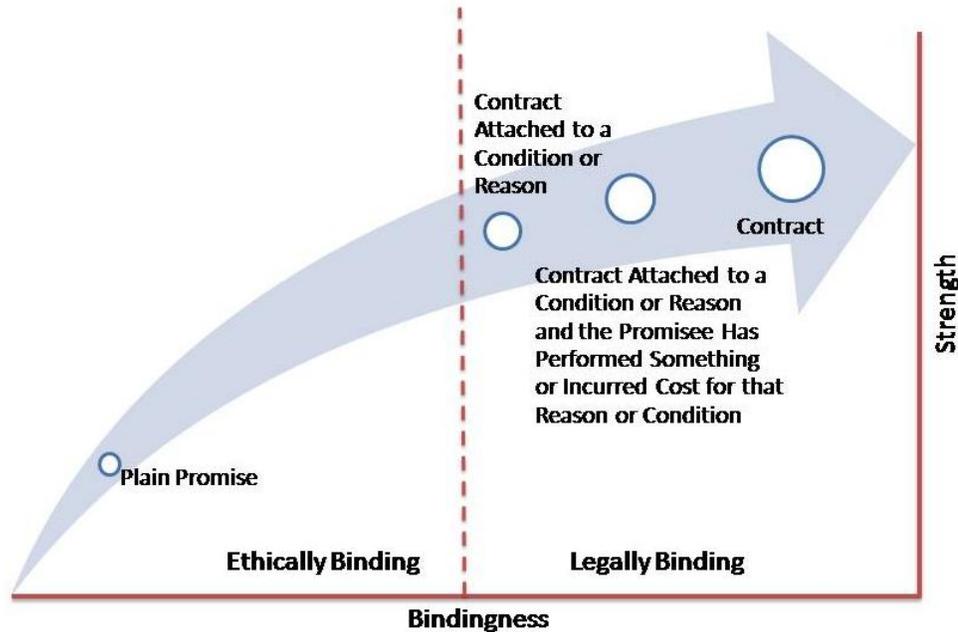
The promisee has already incurred expenses on the basis of such a promise.

Thus, having opted for the opinions of Malikiyyah and Hanafiyyah in this matter, Islamic Fiqh Academy of OIC also offers two (2) options for settling the issue. The options are: (i) fulfilling the promise, (ii) compensating the loss incurred without fulfilling the promise. SAC of BNM and AAOIFI also follow the OIC Fiqh Academy in this matter.

Differences Between Contract, Legally Binding Promise and Ethically Binding Promise

Based on the above discussions, the author attempts to illustrate the positions of the legally binding promise and ethically binding promise from the contract status in the figure below.

Figure 1: The Differences between Contract, Legally Binding Promise and Ethically Binding Promise



From the above figure, we could understand that the legally binding promise is distinctive from the plain promise which is only ethically binding. There are other factors that add up to the legally binding promise which strengthen its bindingness to be close with the contract. In other words, the condition or reason which the promisor has stated in his promise has potential to trigger the action of the promisee to fulfill the condition or involve in the stated reason. And if the promisee performs the condition or involve in the stated reason, he/she would have incurred cost that might cause *darar* (loss) to him/her if the promise is not binding legally on the promisor.

Applications and Implications of Binding Promise on the Islamic Finance Industry

Most of the previous writings on the topic of *al-wa^cd* and its bindingness upon promisor have discussed the application of binding promise by the IFIs in their financial instruments. Some of literatures have discussed the application of binding promise in sale-based, ijarah-based and shirkah-based financial products (Jasani Abdullah and Munawwaruzzaman Mahmud, 2008, Mahmud Fahd Ahmad al-^cUmuri, 2004, Burhanuddin Lukman, 2008, Azizi Che Seman, 2008, Ahmad Suhaimi Yahya, 2008). Several of them have discussed the application of *al-wa^cd* in the Murabahah to the Purchase Ordered such as Shubayr (2000) and al-Qaradawi (n.d.). Some of them have discussed this topic extensively in their writings (Mahmud Fahd Ahmad al-^cUmuri, 2004, Nazih Kamal Hammad, 1988, Muhammad Akram Laldin, , Marjan Muhammad, Hakimah Yaacob and Shabana Hasan, 2011, Muhammad Uthman Shubayr, 2000). However, the researcher notes that al-^cUmuri (2004) is the only author who have discussed the positive and negative economic implication of the binding promise concept from the macro economic perspective.

Application of Binding Promise/Undertaking

Based on the researcher's analysis of the literatures, the application of the binding promise in the Islamic finance industry could take form in three main forms. They are:

- Purchase Undertaking
- Sale Undertaking
- Al-Wa^cdan

Purchase Undertaking (Promise to Purchase)

Purchase undertaking refers to the promise made by the promisor (usually the client) to purchase a specified item from the promisee (usually the IFI). In other words, the promisor/client has issued a binding unilateral promise that obliges him to purchase a specified item from the IFI/promisee. According to (Aznan Hasan, 2008, Marjan Muhammad, Hakimah Yaacob and Shabana Hasan, 2011, Muhammad Uthman Shubayr, 2000), purchase undertaking is applicable in the following Islamic financial products:

- Al-Bay^c bi Thaman Ajil
- Al-Murabahah li al-Amir bi al-Shira'
- Al-Ijarah al-Muntahiyah bi al-Tamlik
- Al-Ijarah Thumma al-Bayc
- Musharakah Mutanaqisah
- Sukuk
- Comodities Murabahah Programme
- Venture Capital and Private Equity
- Islamic Forex Forward

Obviously, this type of promise could mitigate the business risk faced by the IFI as the promise is binding on the client. For example, in the Murabahah to the Purchase Orderer financing, the purchase undertaking is issued by the customer to the financier stating his/her promise to purchase the ordered goods from the financier (Islamic banks).

Sale Undertaking (Promise to Sell)

Sale undertaking refers to the promise to sell made by the promisor to sell a specified item to the promisee. According to Hasan (2008), sale undertaking is applicable in the following types of Islamic financial products:

- Al-Ijarah al-Muntahiyah bi al-Tamlik
- Al-Ijarah Thumma al-Bay^c
- Musharakah Mutanaqisah
- Sukuk
- Comodities Murabahah Programme
- Venture Capital and Private Equity

The binding sale undertaking is usually used to ensure the liquidity of the instrument or regain ownership of a specified item.

Al-Wa^ḥdan (Two Independent Unilateral Promises)

Al-Wa^ḥdan is a situation where there are two parties who give promises to each other and both assume the role of promisor and promisee at the same time. It may resemble al-wa^ḥd in one aspect and al-muwa^ḥadah in another aspect. However, al-wa^ḥdan is deemed as the hilah (legal device) to avoid binding al-muwa^ḥadah which has been rejected by most of the Islamic scholars. Al-wa^ḥdan has been applied in the lease-based (e.g. Ingress Sukuk) and equity-based sukuk (Almana and Dubai Sukuk) structures (Marjan Muhammad, Hakimah Yaacob and Shabana Hasan, 2011).

Implications of the Binding Unilateral Promise/Undertaking for the Islamic Finance Industry

Having discussed the various juristic opinions on the bindingness of the promise and its applications in the Islamic finance industry, it is valuable to discuss main implications of this concept on the operations of Islamic finance industry. The implications of the binding unilateral on the Islamic finance industry could be positive or negative.

Positive Implications

Although there are many benefits of the binding unilateral promise for the Islamic finance industry, the positive implications of the binding unilateral promise could be summarized into two main points.

Risk Control Mechanism for Trading and Profit-Sharing Contracts

Previously, Islamic banks were not so familiar with the trading concepts as they were more inclined to the application of financing-biased contracts such as BBA and Bayc al-Inah. The bindingness of the unilateral undertaking could be the “risk management mechanism” for Islamic banks to involve in trading contracts. Thus, The risks of trading contracts is ver (Jasani Abdullah and Munawwaruzzaman Mahmud, 2008)

Stability of Financial Dealings

With the implementation of binding promise/undertaking, the IFIs could ensure the stability of their dealings with their clients. This could enhance their stability in the operations. Stability of dealings is vital to the Islamic banking institutions as they are highly-leveraged and highly-regulated. If the client is permitted to default from fulfilling its purchase or sale undertakings, enormous business/operational would rise and thus jeopardize the Islamic banking and financial system itself.

Negative Implications

However, there could be several negative implications resulted from the application of binding promise in the Islamic financial products. The

Complexity of Documentations and Cost

Most of the Islamic financial products nowadays are the result of combining several mu^ḥamalat contracts. This combination requires executions of the involved contracts in a

way that fulfill the conditions outlined by the Shariah and no violation of the Shariah principles. The implementation of binding unilateral promise in the documents of the Islamic financial products may add to the complexity of the documentation and thus may result in the cost increase. Furthermore, the IFIs may need more time to educate their clients on the concept.

Transfer of Risk between the Promisor and Promisee: Mitigation of Risk Sharing and Real Business Spirits

Purchase or sale undertaking may mitigate the characteristics of real business dealings and risk sharing arrangements between the IFIs and their clients. In most cases, the IFIs or investors will take the safe position in their financing products, and the effects of the dealings would be very close to the conventional-based financings. Risk sharing and risk transfer are claimed by some scholars to be the differing characteristics of Islamic and conventional financial systems respectively. Although the dealings are valid legally, the financial and economic effects of the financial products of the two financial systems may seem to be much or less the same.

Conclusions and Recommendations

This study has attempted to draw some defining lines between contract, legally binding promise and ethically binding promise. It is observed that Malaysian and international fatwa institutions has taken into consideration the need for bindingness of promise in the Islamic finance industry. Although the bindingness of promise concept has positive implications and effects on the Islamic finance industry, it also carries together some drawbacks, especially for discouraging the application of risk sharing between the IFIs and their clients.

It is recommended that future studies should aim to propose and outline the Shariah-based conditions for implanting the binding promise instrument into the Islamic financial products. This is vital to ensure that critical comments such as made by Shaykh Taqi Usmani in 2008 will not rise again.

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