Available online at www.jeeir.com
JEEIR

Journal of Emerging Economies and Islamic Research

www.jeeir.com

# *Bai 'Al-Tawarruq*: Concept Of Islamic Financing?

Luqman Nurhisam[a*]

[a] *Research Scholar, Sunan Kalijaga State Islamic University, Jl. Marsda Adisucipto Yogyakarta 55281, Indonesia*

**Abstract**

Shariah Committee in Malaysia in his fatwa has legitimized the execution of the contract *al-Tawarruq* and *al-'Īnah* in Islamic banking practices, while the contract is not ratified by the National Sharia Council in Indonesia. This study will discuss the reasons and background differences fatwa, and an aspect ratio of banking products and the legal framework used to legitimize Islamic financial products in Indonesia and Malaysia.

Therefore, further research is needed to analyze how the views of the scholars against al-Tawarruq along with proof of his, and the extent to which the contract tawarruq has been applied in Islamic finance, especially in Indonesia and Malaysia. As a result of a comparison of Islamic financial products in general, and the legal framework used by the Sharia Board between Indonesia and Malaysia.

The method used is descriptive qualitative analysis. In this study, the research subjects are the scholars of Sharia Council. While the object of research is the view of the scholars of fiqh against *al-Tawarruq,* aspects of financial products, and the framework of Islamic law. From this study, it was found that the mechanism of *al-Tawarruq,* can not be regarded as an Islamic financial products, because a lot of flaws in it. *Hilah* known that there are not good that lead to usury, so this is the reason of the majority of scholars do not technically separated in Indonesia. However, as far as the development of the contract used that *al-Tawarruq al-fiqhi* been applied in syariah commodity trading in the Jakarta Futures Exchange. While Malaysia believes that the buying and selling of *al-Tawarruq* is halal as the basic rule for the legitimacy of the agreement, which has been applied in private financing in Islamic banks, as well as a *commodity murabaha* on Bursa Malaysia namely Bursa Suq Al-Sila.

Keywords: *al-Tawarruq, al-'Īnah, al-Tawarruq al-fiqhī, commodity murabaha*, *Hilah*

## 1. Introduction

Islamic contributions in economic thinking as if lost in a world civilization that can not be found the history books of Islamic economic thought. That is no less surprising is, when it is mentioned that the

* Corresponding author. Tel.: +62 8132661086
*E-mail address*: luckyman46@gmail.com

origins of economics is the Bible, as embodied in a book entitled Economics 7th edition of Samuelson's work. Ironically, none of the economists react. Meanwhile, when Muslim scientists reappoint Islamic economics with the Qur'an and Hadith as the primary referral sources, economists including Muslim economists spontaneously react against it (Karim, 2002).

Economics is the legacy of human civilization which can be likened to a multi-storey building. Every nation has contributed in his time in setting up each of the building. Therefore, in an effort to develop Islamic economic thought, the scholars did not reject the thinking of philosophers non-Muslims as long as it does not conflict with the teachings of Islam.

Development of human life is increasingly complex, resulting in the diversity of the needs of humanity. One of the main requirements as part of the activities performed by humans is the need for a transaction that contract. Agreement contract has an important meaning in people's lives. The agreement is the basis of so many daily activities of man. Through the contract of a man together with a woman in a life together, and through contract also various business activities and the business can be run. *Akad* facilitate everyone in meeting the needs and interests that can not be fulfilled without help and services of others (Anwar, 2010).

This fact shows that what a human life can not be separated from what is called the agreement (contract), which facilitates humans to meet a variety of interests. Given the importance of the contract (agreement), every human civilization has ever appeared sure to pay attention and adjustment to it (Anwar, 2010).

The Qur'an and the Sunnah of the Prophet Muhammad. life is a source of guidance for Muslims to tread life while in this world in order to eternal life at the end of the day later. One of the proofs that the Qur'an and Sunnah that have affordability and universal power set, can be viewed in terms of the text that is always appropriate to be implicated in the actual life, such as affordability and power aturnya in the field *muamalah* worldly (Chairuman and Suhrawardi, 1994).

More concretely, the major staple or main source of Islamic law are the Qur'an and the Sunnah of the Prophet Muhammad. and additional sources include *ijma'* (consensus), *qiyas* (analogy), *istihsan* (legal wisdom), *'urf* (habit), *sadduaż-żarī'ah* (preventive action), *istiṣḥāb* (continuity law), and *syar'u man qablanā* (law of divine religions history). As for the schools of Islamic law that developed in the Sunni tradition includes the Hanafi, Maliki, Shafi'i and Hanbali school.

*Muamalah*, which is human interaction with all the goal to meet the needs of the mundane. This interaction is regulated in *Fiqh Muamalah*. Unlike the religious Jurisprudence, *Fiqh Muamalah* is more flexible and exploratory (Djazuli, 2006)

Can be seen in a rule *uṣhūl* namely:

الأصل فى المعاملات الإباحة الاّ أن يدلّ دليل على تحريمها

Meaning: *"The law of origin in all forms is muamalat be made unless there is proof that forbid it*." Al-Baqarah (2: 130)

*Muamalah* basically is permissible. Origin is permissible/legal (allowed but not required). *Muamalah* change the law if there is a ban, something which is halal then turned into *haram* and *makruh*. If there are no restrictions, or if there is no proof that forbid it, then go back to the original law, which is *halal* (Hidayatullah, 2012).

In Islamic law issues relating to the economy will not escape with *muamalah* such as buying and selling, lending and borrowing, debts and others. Islam actually has a lot to explain about the basic principles of which *muamalah* clear that transactions made legitimate or not should know five things: *maisir, garar, haram, riba,* and *batil.* The most crucial thing is about the element of usury in every transaction made as in the sale and purchase and accounts payable.

A person conducting *muamalah*, that such activities are prohibited by Islam because there was an element of usury in it. As described in His word:

يأيّها الّذين ءامنوا لا تأكلوا الرّبوا أضعفا مضٰعفة واتّقوا الله لعلّكم تفلحون

Meaning: *"O ye who believe, do not eat Riba with a double and fear Allah and that ye may prosper."* Ali-Imron (3: 130)

We often find problems in society *muamalah* between excessive and deficient, they need each other so that a mutual relationship harmonious. For those who have the energy to work for a wage, for those who are less able to meet their needs by borrowing or debt to the wealthy, so that there will be the fulfillment of a balanced society. By looking at the complexity of the problem *Muamalah*, then we are required to help each other and work together in order to meet their needs.

Allah SWT. said:

...ولا تعاونواعلي الإثم والعدوٰن واتّقوا الله إنّ الله شديد العقاب

Meaning: "*And do mutual assistance in sin and transgression. and ye fear Allah, Allah is severe in punishment.*" Al-Maidah (5: 2)

From this verse can be understood that prosperity will come true if between people working together and helping each other, because endowed with different abilities in meeting their needs. In the fulfillment of existing activity that is both production and consumption, requires a capital in the form of money. If there are no available cash, Islam provides a way out where parties who lack (deficit) can borrow money with the principle of *al-qard* (pure without any additional loans or interest) to the redundant (surplus) or in other words lend without expecting anything in return. But it will be a problem when no one was willing to give a loan without interest, so resorted to usurious transactions, as well as in debt to loan sharks that are clearly prohibited in Islam (Antonio, 2001).

To avoid the practice of usury in getting cash, some people make buying and selling by using *tawarruq* contract (*bai 'al-Tawarruq*), but some scholars still debate the halal transactions this model. Some argued that the *tawarruq* as a made-up activities or engineering commonly called *hilah* ie manipulating actions tend to cover so ribanya element does not appear, but its essence is the usury activities. On the other hand, *tawarruq* considered it permissible in Islam as a solution to meet cash needs.

Technically, according to legal experts of jurisprudence in the Fatwa Council of Fiqh Academy of the OIC No. 179, *tawarruq* can be specified as a (*mustawriq*) who bought a merchandise with a different price, in order to sell them in full with a lower price. Usually he sells the merchandise to a third party, in order to obtain a fee that is paid off (OIC Fiqh Academy, 2009).

In the dictionary, the word is defined *tawarruq* banknotes. In this case the meaning is to multiply wealth. So, *tawarruq* defined as activities to multiply money (Sa'di *et. all*, 2008).

In terms of language, *al-tawarruq* comes from the Arabic *al-wariq* which m.eans silver or dirhams. Ibn Faris stated that the word comes from *al-Tawarruq* (ورق) which gives two meanings, namely the first, showing the riches and wealth, this meaning is derived from (ورق الشجر) which means the leaves of a tree. And the meaning of the latter means color (Ghamidi, 2008).

In the *Business Dictionary Shari'ah*, Muhammad Abdul Karim Mustafa provide a definition of *tawarruq* ie purchase contract involving three parties when the owner of the goods to sell goods to the first buyer at a price and payment delay, and then the first buyer of the goods are sold to the final buyer at a price and cash. (Mustofa, 2012).

Briefly about the actual *tawarruq* contract is a contract involving the sale of goods to a person something buyers the price tangguh. Buyers later sell the goods to a third person in cash at a price less than the price of getting tough with the aim of liquidity or cash. Named *bai 'al-Tawarruq* because when buying goods are paid deferred, the buyer does not intend to use or exploit, but just wanted to make the path to obtain liquidity or cash.

Regarding the law, there are differing opinions from various circles of scholars that there is a contract allowing it and some do not allow. The classical scholars of the Hanafi, Shafi'i and Hanbali school looked *tawarruq* as legally permissible transactions (Hosen and Nahrawi, 2012).

The contemporary scholars are also looking *tawarruq* transaction is allowed, among the scholars were Abdul Aziz Bin Abdullah Bin Baz and Muhammad bin Salih Al-Uthaymeen. Council of Fiqh Academy in his fatwa No. 179 allow *tawarruq* transaction, provided the buyer (*mustawriq)* does not resell the goods he had bought the first seller with a lower price.

The scholars of the Maliki school does not allow the transaction *tawarruq.* Most of them consider the sale of goods at a price lower than the market price when it is done by someone who took advantage of loans in ways that fall into the category of usury, the transaction is not much different with *'Īnah.* This indicates that *tawarruq* transaction is not allowed by most scholars of the Maliki school. Among these scholars did not allow the transaction is Umar Ibn Abdul Azizdan Muhammad Ibn al-Hasan. While Ibn Taymiyah and his student Ibn al-Qayyim of the Hanbali school considers that *tawarruq* transaction done when goods bought and sold only as an intermediary just to get cash and ownership of the item does not become the main objective truth (Rahman *et. all*, 2010).

The background does this assessment is based on the *hilah* are still debated by scholars of the contract in part *bai 'al-Tawarruq*, then the Fatwa No. 179 Year 2009 regarding the transaction *tawarruq* issued by Majma 'al-Fiqh al-Islami for the Board of the Islamic Fiqh Academy (ICFA-The International of Fiqh Academy) under the auspices of the Organisation of Islamic Cooperation, or commonly called the OIC (Organization of Islamic Conferences / OIC) in field Jurisprudence of *fiqh* (OIC, 2015).

With the consideration that the development of Islamic banking products is quite dynamic often involves some of the practices carried out by the Islamic banking which has not been covered well and thoroughly, especially in Indonesia by DSN-MUI or Bapepam-LK and certainly by the Otoritas Jasa Keuangan (OJK), which partially major activities in the banking supervision transferred to the OJK (OJK unveiled simultaneously on December 31, 2013 (OJK, 2015).

In addition, the existence of a fundamental difference between Indonesia and Malaysia countries associated with the development aspects of Islamic banking products, both in terms of products as well as the legal basis and the method of taking the law. (Najeeb and Vejzagic, 2013). This research focus on banking products using *tawarruq* contract, which viewed from the aspect of jurisprudence or shariah economy. It is known that Malaysia is already far in applying *tawarruq* contract into their various Islamic financial products is one of them into personal finance products (personal financing), the vehicle financing, also included in the product's Sukuk Ijarah.

Of financial products that are allowed in Malaysia, as well as referring to the decision by the board of islamic malaysia Malaysia are Shariah Advisory Council (SAC Malaysia) at the 51st meeting on July 28, 2005/21 Jumadil End 1426H. Not only that, *tawarruq* also applied in the form of commodity murabaha in Bursa Suq Al-Sila by Bursa Malaysia, and is also applied between Malaysian shariah council members at the 58th meeting on 27 April 2006/28 Rabiul Awal 1427H. (Resolutions of SAC BNM, 2005)

The conception of *bai 'al-Tawarruq* alone among scholars Indonesia much debated in terms of skill and its laws. While in Malaysia itself, is applied to the one of Islamic finance products in the middle of the fertile period of growth of Islamic banking in the country. Then, for the application of *bai 'al-Tawarruq* into the Islamic banking products in Indonesia which prohibited by scholars in Indonesia. Although not directly packed into one financial product, but comes from various sources of the existing literature, that the contract is not directly practiced in one financial product that is selling commodity shariah in one of the exchanges that the Jakarta Futures Exchange or more known as the Jakarta Futures Exchange (JFX) that specializes in commodity trading transactions.

Based on the description of the background, then we propose at issue is how the concept and application of *bai 'al-tawarruq* for islamic financing based on Islamic Financial Industry/Institutions? and how concept and application of *bai 'al-Tawarruq* perspective of the National Islamic Council in Indonesia and the Shariah Advisory Council in Malaysia?

## 2. Research Methodology

This study used a qualitative method that aims to get research results as objective as possible. To get the results of these studies required accurate information and data support. In connection with this, the method used in this study are:

2.1. Types of Research

This type of research is a kind of library research, the research done only on the basis of written works, including both research results that have not been well publicized. The research document is the research done by looking at the data that is short, include: archival data, official data on government institutions, the published data (Court Decisions, Jurisprudence, and so on). Meanwhile, to get data about the object of this study is to use a document in the form of "Fatwa Council of Fiqh Academy of the OIC (Organisation of Islamic Cooperation) No. 179 on *Tawarruq*". Where there are provisions on *tawarruq* contained therein. While the supporting data will be obtained through the literature related to the subject that exists.

2.2. Nature Research

The nature of this research is descriptive-analytic. Descriptive research is research that is intended to gather information about the status of an existing symptoms, the symptoms according to what time of the study (Arikunto, 2000). While the analysis is an attempt to locate and systematically organize the data for later research conducted for the study of meaning (Moehajir, 1998). A description of the concept of *bai 'al-Tawarruq* described as it is. Then described regarding the permissibility and legal terms. After the data collected then analyzed in order to answer the point.

2.3. Research Approach

This research approach using a normative approach. The problem in this research is approached with the norms of Islamic law, in this case the Islamic contract law thereby arrangements regarding their *tawarruq* agreement was assessed by Islamic law.

2.4. Data Collection

1.4.1 Being Data

The form of the data used as research material there is a form of primary material obtained shariah law derived from the Qur'an Manuscripts, Hadith. Of the secondary material is the book of rules of *fiqh*. While the tertiary form of data derived from the books of literature relating to research as scientific papers in journals, dissertations, and theses.

1.4.2 Data Sources

The primary data source used in the research are derived from the library are:

1) Al-Qur'an: The Qur'an Manuscripts and Translations Juz 1 to Juz 30.
2) Hadith: Ahmad Ibn Hanbal*, Musnad Imam Ahmad Ibn Hanbal*.
3) The rules of jurisprudence: *Syarah qawa'id Fiqhiyyah* bouquet Shaykh Ahmad Bin Muhammad Az-Zarqa (Author Mustafa Ahmad Az-Zarqa).

1.4.3 Data Collection Techniques

The methods used in data collection techniques in this research is the collection of the library. Data collection techniques through literature that researchers examined data source either scientific work, such as journals, dissertations, theses and books related to the topics to be studied.

2.5. Data Analysis

Analisis The data analysis is one way which is used to analyze, study and manage specific data so that it can be concluded that concrete information about the issues examined and discussed. In analyzing the data, the researchers used an analysis of the way of deduction from the related general norm, then pulled into the conclusion of a special nature. Having first performed the assessment of the data that has been collected, either definitively or the principles contained therein.

With existing theories, researchers have attempted to analyze and formulate by tracing the various opinions of jurists regarding *bai 'al-Tawarruq.* Then the data obtained from the majority opinion Jurist, it will be found where the opinion is more powerful in terms of permissibility of *al-Tawarruq* contract.

## 3. Results and Discussion

Human civilization is not without implications for the issue of Islamic law. Empirically that the law go hand in hand with the times or periods. It thus demands for jurists to diligence to discover the law on contemporary issues.

One characteristic of Islam is, because the Islamic system has always set globally on issues that are changing, due to changes in the environment and the future as described in the following rules:

لاينكر تغيّر الأحكام بتغيّر الأزمان

Meaning: "*Do not be denied their legal change due to the changing times*." (Az-Zarqa, 2007)

Any future changes, requires the benefit in accordance with the situation. It has a great influence on the growth of a law based on the benefit. An existing law in the past, based on the past, but today, in the which the benefit of her has changed, then the law should follow anyway, that should be changed. Similarly, for the foreseeable future if the benefit of his change, then the change of law also based it.

Can be seen in the scope of *fiqh muamalah* could be the applicable law at the time did not allow for transactions *tawarruq*, for today may be more studied in detail considering the scope of *muamalah* is very complex and can be used as an emergency or emergency related to the benefit of the people. Instead expound on issues that do not change much.

It is also apparent from the institution Organisation of Islamic Cooperation which was formerly the Organization of the Islamic Conference called regular or OIC, especially those again with the issue of Jurisprudence are covered by Majma 'al-Fiqh al-Islami, namely Council Fiqh Academy (ICFA-The International of Fiqh Academy) in Jurisprudence, the council has the primary task to discuss various issues in the world of Islamic jurisprudence. Especially in connection with the issuance of Fatwa No. 179 on *tawarruq.* In the first discussion of the *bai 'al-Tawarruq* is discussed within the framework of the activities muamalat considered as worship. Legal issues in the field of *muamalah* basically is permissible unless there is the argument that forbid or require otherwise.

In Islam, basically the issue of worship is ta'abud. Therefore, its operation has been established in the Qur'an and the Sunnah or Hadith. The question of the existence of problems in *muamalah* is *tawarruq*, therefore, permissible. In addition, transactions in *bai 'al-Tawarruq* are carried out in the absence of external pressure or with full compliance (*an-Taroḍin*). It can be based on the rules of uṣhūl following:

الأصل فى العقد رضى المتعاقدين ونتيجته ما إلتزماه بالتّعاقد

Meaning: *"The law was originally in the transaction contentment of both parties to a transaction, the result is valid validity of transactions."* (Az-Zarqa, 2007)

But the law is no difference of opinion among scholars from a variety that is there that allow this contract and there are no permits, as well as in terms of transaction *bai 'al-Tawarruq.* As is known in *muamalah* are basically still there may be halal and haram (Basyir, 1993). It is thus important because in Islam could have been in the contract in a deal it was lawful, but the goods produced illegitimate because

it was held in a way which is unlawful. This is more emphasis on the process or its implementation. It could be the object of *bai 'al-Tawarruq* were lawful, because in terms of its *hilah* could be unlawful.

*Hilah* according to the language comes from the word *al-Haul*, plural *al-Ḥiyal*, sometimes comes in the form of the word *al-Ikhtiyal, at-Taḥawwul*, or *at-Taḥayyul* which means *al-Ḥazaq* (smart), *Jaudah an-Nazr* (sweet seen), *al-Qudrah 'ala at-Tasarruf* (smart transaction). *Hilah* meaning often used in the meaning of *al-Makr* (deceit), *al Khadi'ah* (deception), and *al-Kaid* (in secret). Of the various terms such as *Hilah* that can be said is:

1) Any act by the perpetrator intended as not looked at birth;
2) Every effort to deliver on the goal;
3) A viewpoint is not the *Zahir* nor the mind, but an idea to achieve the goal without using reasonable means, according to custom.

In general, the use of the term is to attempt *hilah* reprehensible, but *hilah* term is sometimes used in the sense of the effort that has a good purpose, in the sense of deliberately diverting mean acts with the aim to obtain the benefit (Buhairi, 1974).

According to As-Syatibi, as cited by Muhammad Khalid Mas'ud, that *hilah* runs on the basis of two premises, namely:

1) *Hilah* seeks to alter the value of a legal action in other legal actions externally, that is solely based on similarities appear between the action;
2) *Hilah* ignore the inner sense (ie *maslahah*) and deeds that actually became the foundation for the Shari'ah to implement it. *Hilah* means to reduce the values of deeds into the deeds of certain others, but deeds are intended as a destination.

Based on this premise *hilah* is an attempt or a specific ways used by sesesorang to abort an existing obligation to him or to strive for everything that is forbidden to be *halal* (permissible) for him, using ways that ultimately led to something that must be not required or something that is forbidden to be *halal/*permissible (Mas'ud, 1995).

In sum is *hilah* described as the use of legal means for the purposes of extras, which are objectives that can not be reached directly regulated by the Shariah, whether an end in itself legitimate or not using it. The legal tool allows one to do it because it was forced by circumstances to be contrary to the law of God existing functions (Schacht, 103).

*Hilah* concept initially disputed its legitimacy by some scholars. Among the most support is the Hanafi and Maliki, while confronting the Shafi'i and Hanbali. But in the end they accepted the concept *hilah* (Hasyim, 1991).

Broadly speaking, *hilah* divided into two kinds, namely *hilah* is permissible (permitted) and *hilah* disputed. *Hilah* allowed is based on a particular case which is used to new things with the purpose of establishing the truth or to make it easier for the encouragement of critical importance that do not damage the benefit of Shariah. While *hilah* disputed is the principal *hilah* other legal obligations to act formally some truth, but materially mere left blank (Mahmassani, 1976).

While *hilah* according to Ibn Al-Qayyim there are forbidden and some are allowed to do, as long as not contrary to the Shariah. He distinguishes between *hilah* whose purpose is lawful purpose by using legitimate ways and hprohibited and declared invalid (Ibn Qayyim, 1968).

As the opinion of Abdul Wahab Buhairi, meaning *hilah* not necessarily forbidden absolutely and implicitly also be permitted. Because *hilah* is an attempt to deliver to the destination by using the smart way, proficient, and tasty sweet to the eye, also it is not all that can be delivered to the destination in this way preferably absolute or implicitly criticized (Buhairi, 1974).

Their *hilah* or engineered to eliminate usury occurring in a sale and purchase transactions can also occur in the *tawarruq* contract (Moch. Anwar, 1996). That could include *hilah* permissible as used for the purpose or attempt to obtain the benefit, and could also include the disputed *hilah* which could be the purpose of *al-Tawarruq* contract is a transaction between three different parties just engineered to obtain liquidity. That is the way the object of the transaction selling to a different party from the previous. This

is to avoid selling to the first party as happened in al-'Īnah transaction. Departing from the above theoretical framework, which, as a knife to analyze the law legitimizing the *tawarruq* contract to answer the problem formulation in the study.

If the views of economics, that every economic activity is based on the needs, it is named as economic motives. As a concept that is in *tawarruq,* that the transaction was done as a means to meet the needs of the other is the need for cash or liquidity. But the problem is when the economics become an absolute justified, not necessarily in accordance with the principles or rules that exist in the shariah. It is a major focus *tawarruq* in Islamic economic perspective. Not only looking at whether the concepts used *tawarruq* as an excuse to avoid usury, which is to avoid a transaction that is in the *'Inah* involving third parties who have no connection with the first, and second. However, seen also that the contract used in *tawarruq* whether in accordance with the provisions contained in the contract, such as in view of the relationship between consent and kabul, justified by Shariah (both subject and object, ownership of the object), and how the result or consequence of the law arising in the aftermath of the relationship between *ijab* and *qabul.*

By doing a normative approach, the permissibility of the use of *tawarruq* by seeing a stronger outlook by some scholars using *tarjihi*, base their strong opinion that *tawarruq* as allowed is to involve several factors, namely; 1) The involvement of the parties, 2) The resale, 3) Purpose, and 4) The mechanism, which is very different from the transactions that incorporate the principles contained in the *'Inah.* Opinion was by some scholars started from the Hanafi, Shafi'i, Imam Al-Nawawi, one view of Imam Ahmad ibn Hanbal, Ibn al-Hammam and his followers. *Tawarruq* contract permissibility al-regulated in *Fatawa Lajnah Ad-Daimah No. 19297 Volume 13 Page 161.*

As in practice, that *tawarruq* has been applied to the Islamic financial institutions, both banks and non banks in Indonesia and Malaysia. The results showed that *al-Tawarruq* in practice in Jakarta Futures Exchange (JFX) in Indonesia, as the contracts used in Shariah commodity trading. It refers to the fatwa issued by the *DSN-MUI No. 82/DSN-MUI/VIII/2011.* So the permissibility of shariah-based commodity trading *tawarruq* contract is in accordance with the principles contained in the Shariah.

From the data the researchers obtained, that the use of *tawarruq* in financial institutions in Indonesia, especially bank financial institutions, is not allowed, because it still contains many elements doubtful (*syubhat*), so doubtful that must be avoided. The majority of scholars in Indonesia that Shafi'i still adhering to the principles contained in the *tawarruq* is not much different from the *'Inah* is plainly prohibited by the majority of scholars in Indonesia. As we know that in these transactions are *hilah*, which is not good because it refers to usury (*riba*).

Nonetheless, on the basis of the demands of the Islamic finance industry, especially the crucial issues related to the liquidity needs of financial institutions, both banks and non-banks, either excess or deficiency, it constitutes the main factor for issuing the Fatwa No. 82 by DSN-MUI, that allowed the commodity transactions that essentially it is using the principles contained in the *al-Tawarruq*. Because it is basically using this type of contract *Tawarruq al-Fardi* or *Tawarruq al-fiqhi* (*Tawarruq haqiqi*) allowed by the majority of scholars, of which there is an agreement (*wa'd*) to purchase any goods or commodities to be on message. So that the transfer of ownership (transfer of ownership) and the guarantee to give ownership in the form of Surat Penguasaan Atas Komoditi Tersetujui (SPAKT) resulting *qabd al-hukmi*, as happened in the Jakarta Futures Exchange (JFX).

While the *tawarruq* contract had long ago applied to the Malaysian Islamic finance industry, namely Bank Islam Malaysia Berhad (BIMB) in the form of personal finance products (personal financing), private vehicle (vehicle financing), etc. Until the financial industry, non-bank*, tawarruq* applied into one of the products of commodity murabaha in one of the Malaysian market, namely in Bursa Suq Al-Sila, the concept of *tawarruq* also be applied to the product's *Sukuk Ijarah* as well as had been decided in a meeting between Malaysian Shariah board members at the 58th meeting on 27 April 2006/28 Rabiul Awal 1427H. (Resolutions of SAC BNM, 2006)

In addition, the permissibility of the use of contract tawarruq also been set up in *Al-Ma'ayir As-Syar'iyyah No. 20 Paragraph 3/3/2/5*. Furthermore, in *Fatawa Lajnah Ad-Daimah No. 19297 Volume 13 page 161,* and the decision of Rabita Alam Islami Jurisprudence Division which is also confirmed by the Council of Fiqh Academy of the OIC (Organisation of Islamic Cooperation) in his fatwa No. 179 that forbids the type *Tawarruq munaẓẓam*. *Tawarruq* types allowed is *Tawarruq al-Fardi* or *Tawarruq al-fiqhi* (*Tawarruq haqiqi*).

Indeed, not a few of the scholars who forbid their dealings *al-Tawarruq,* but it should be viewed from another aspect that the use of the contract, not only in the philosophical aspects and principles of law, but in terms of the order of practical matter should also be noted, for example in the context of innovation and product islamic financial. Because it is affecting the development and advancement of Islamic finance industry, both banks and non banks. Besides, it is interesting to know that the majority of scholars in Indonesia, which on average is still fixated on the order of thinking philosophy and principles, much different from Malaysia which is far evolved from a practical level, especially related to issues in transactions Islamic finance industry both in scale national and global heading on. Advice from the author is none other than to support the permissibility *bai 'al-Tawarruq* as the concept of buying and selling is allowed by shariah and not deviate, which must be in accordance with the teachings of Islamic law.

## 4. Conclusion

From the discussion and analysis, a number of conclusions relating to the subject matter as follows:

4.1. There are differences of opinion among the scholars of classical and contemporary regarding *al-Tawarruq* contract, because transactions using the same contract with *al-'Īnah* that no more than clicking *hilah* of usury (*riba*). However, the majority of scholars interpreted as allowing for one form of transaction that involves a third party in order to obtain liquidity which did not obtain cash loans (*al-qard*), not-for profit alone. It refers to the Shariah standards *(Al-Ma'ayir Al-Syar'iyyah) No. 20 Paragraph 3/3/2/5.*

The majority of the scholars allow transactions *bai 'al-Tawarruq,* as scholars of the Hanafi school, Imam Shafi'i, Imam Al-Nawawi, one view of Imam Ahmad Bin Hanbal, Ibn Al-Hummam and his followers. *Tawarruq* contract permissibility regulated in *Fatawa Lajnah Ad-Daimah No. 19297 Volume 13 Page 161*. While prohibiting *tawarruq* because it included rather than *al-'Īnah* is a group of the Hanbali school is Ibn Taymiyyah and Ibn Qayyim Al-Jawziyyah, and Muhammad Al-Hasan Al-Syaybani. Referring to the decision of Rabita Alam Islami Jurisprudence Division which is also confirmed by the Council of Fiqh Academy of the OIC (Organisation of Islamic Cooperation) in his fatwa No. 179, which forbids the type of *tawarruq munaẓẓam. Tawarruq* types allowed is *tawarruq al-Fardi* or *tawarruq al-Fiqhi* (*tawarruq haqiqi*).

4.2. The development of the Islamic finance industry both banks and non-banks between Indonesia and Malaysia, located on several aspects, namely: the developmental aspects of the instrument of financial products, the legal framework for both Islamic and positive law, Shariah board positions up policy implementation, as well as certainty in oversight by the board shariah in the context of Shariah Compliance regulations which contrasts shows similarities and differences between Indonesia and Malaysia. From some of these aspects in stark contrast the difference between Islamic banking between Indonesia and Malaysia. Similarity between Islamic banking in Indonesia and Malaysia. For example in aspects of product and financial contracts, there is some agreement and the mechanism is the same example in the cooperation contract, loan, trade, and lease. But on the other hand that became a striking contrast to the crucial issues related to the use of contracts, which is associated with the main study in this discussion is relevant to the issue of trade products that use *al-Tawarruq* as his contract or agreement. If in Malaysia already

long ago took the *'start'* in the use of the contract, which is applied to one of their financial products, namely in the banking sector in the form of private financing, vehicle financing, and others. Also applied to the *commodity murabaha* in the Bursa Malaysia: Bursa Suq Al-Sila. While in Indonesia alone, only applied to the non-bank financial products for liquidity management for the financial industry in the form of shariah-based commodity trading at the Jakarta Futures Exchange (JFX), which refers to the fatwa in 2011, the *Fatwa of DSN-MUI No. 82/DSN-MUI/VIII/2011 on Commodity Shariah*. Because *al-Tawarruq* in Islamic banking is not allowed by the ulama in Indonesia, which is still being debated from some scholars who are still conservative, who just dwell dwell on the principles, which does not think of a practical level in the future.

## References


Abdurrahman as-Sa'di et. all. (2008). *Fiqih Jual Beli: Panduan Praktis Bisnis Syariah, version Abu Muhammad Asyraf bin Abdul Maqsud*. (1st ed.). Jakarta: Senayan Publishing.

Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). (2001). *Al Ma'ayir As-Syar'iyyah.* Bahrain. Rule No. 20 Paragraph 3/3/2/5.

Antonio, Muhammad Syafi'i. (2001). *Bank Syariah: Dari Teori Ke Praktik*. Jakarta: Gema Insani.

Anwar, Syamsul. (2010). *Hukum Perjanjian Syariah: Studi tentang Teori Akad dalam Fikih Muamalat.* Jakarta: Raja Grafindo Persada.

Arikunto, Suharsimi. (2000). *Manajemen Penelitian.* (5th ed.). Jakarta: Rineka Cipta.

Asmak Ab Rahman et. all. (2010). Bay' Al-Tawarruq dan Aplikasinya dalam Pembiayaan Peribadi di Bank Islam Malaysia Berhad. *Shariah Journal.* Vol.18:2.

Basyir, Ahmad Azhar. (1993). *Asas-Asas Hukum Mu'amalat: Hukum Perdata Islam*. Yogyakarta: UII Pers.

Buhairi, Muhammad Abdul Wahab Al-. (1974). *Al-Hiyal Fi Asy-Syari'ah Al-Islamiyyah*. (1st ed.). Kairo: Mathba'ah As-Sa'dah.

Chairuman Pasaribu dan Suhrawardi K. Lubis. (1994). *Hukum Perjanjian Islam.* Jakarta: Sinar Grafika.

Departemen Agama Republik Indonesia. (2011). *Al-Qur'ān dan Terjemahannya*. (10th ed.). Jakarta: Darus Sunnah.

Djazuli, A. (2010). *Kaidah-Kaidah Fikih*. (3rd ed.). Jakarta: Kencana.

*Fatawa Lajnah Ad-Daimah*

Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia. (2011). *Perdagangan Komoditi Berdasarkan Prinsip Syariah. Indonesia.* No. 82/DSN-MUI/VIII/2011.

Ghamidi, Abd al-Aziz Ali Aziz al-. (November 2007). *Al-Tamwil bi al-Tawarruq fi al-Mu'amalat al-Maliyyah.* In Majallah al-Buḥuth al-Fiqhiyyah al-Mu'asirah. No. 76.

Hanbal, Ahmad Ibn. (2008). *Musnad Imam Ahmad Ibnu Hanbal*. Beirut: Dar Al-Kutub Al-'Ilmiyyah.

Hidayatullah, Syarif. (2012). *Qawa'id Fiqiyyah dan Penerapannya Dalam Transaksi Keuangan Syari'ah dan Kontemporer.* Jakarta: Gramata Publishing.

Karim, Adiwarman A. (2002). *Ekonomi Islami: Suatu Kajian Ekonomi Makro*. Jakarta: IIIT Indonesia.

Moch. Anwar. (1996). *100 Masail Fiqhiyah*. Kudus: Menara Kudus.

Moehajir, Noeng. (1998). *Metode Penelitian Kualitatif.* (7th ed.). Yogyakarta: Rake Sarasin.

Muhammad Nadratuzzaman Hosen dan Amirah Ahmad Nahrawi. (2012). Comparative Analysis of Islamic Banking Products Between Malaysia and Indonesia. *International Journal of Academic Research in Economics and Management Sciences*. Vol.1:2.

Mustofa, Muhammad Abdul Karim. (2012). *Kamus Bisnis Syariah.* Yogyakarta: Asnalitera.

OIC. (2015). Retrieved from: www.en.wikipedia.org/wiki/Organisation_of_Islamic_Cooperation/.

OJK. (2015). Retrieved from: http://www.infobanknews.com/2014/01/6-kantor-regional-dan-29-kantor-cabang-ojk-resmi-beroperasi/.

Syed Faiq Najeeb and Mirza Vejzagic. (2013). Development, Growth and Challenges of Islamic Capital Markets: A Comparative Study on the Malaysian, Indonesian, United Arab Emirates and Brunei Markets. *Journal of Emerging Economies and Islamic Research (JEEIR)*. Vol.1: 3.

Syihab, M. Quraish. (2002). *Tafsir Al-Misbah: Pesan Kesan Dan Keserasian Al-Qur'an.* Jakarta: Lentera Hati. Vol. 13.

The International Council of Fiqh Academy. (2009). *Tawarruq: Its Meaning and Types (Classical Applications and Organized Tawarruq).* No.179.

Zarqa, Ahmad bin as-Syaikh Muhammad Az-. (2007). *Syaraḥ Qawā'id Fiqhiyyah*. (7th ed.). Damaskus : Darul Qolam, 2007.