

Bay' al-Dayn, Bay' al-'Īnah and IPDS in the Malaysian Islamic Capital Market

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Abstrak

Tulisan ini menghuraikan isu-isu yang berkaitan dengan *bay' al-'īnah* dan *bay' al-dayn* serta penggunaan kedua-duanya di dalam penerbitan dan perdagangan sekuriti hutang persendirian Islam (IPDS) terutama di dalam pasaran modal Islam di Malaysia. Semenjak diperkenalkan sebagai sebahagian daripada instrumen untuk menggerakkan pasaran modal Islam Malaysia, ia telah menimbulkan perdebatan hangat di antara dua aliran fuqaha', iaitu fuqaha' dari Malaysia dan fuqaha' dari Timur Tengah. Isu utama yang dipertikaikan adalah penggunaan kedua-dua kontrak di atas dalam operasi pasaran modal Islam. Tulisan ini mengasaskan perbincangannya ke atas kedua-dua kontrak tersebut dan cuba menganalisa hubungannya dengan IPDS serta peranannya dalam pensekuritian dan perdagangan sekuriti di negara ini.

Introduction

Malaysian economy has witnessed a tremendous growth in private debt securities market since the past thirteen years. In 1987 new issues of private debt securities or

PDS (excluding Cagamas Bonds) totaled up to RM295 million. This figure increased significantly to RM14.367 billion in 1997 before decreasing to RM10.832 billion in 1998.¹ Islamic bonds market, although initiated just a few years ago,² has also grown tremendously. This is proven by its significant increase in volume from RM25 million in 1992 to RM2.35 billion in 1996 (an increase of 9300%).³ In 1992, it is only 1.1 percents out of total issues of private debt securities in Malaysia. However as the figure indicates, this has expanded to about 20 percents in 1996. Although Islamic private debt securities (IPDS) have not dominated the bonds market yet, the figure shows that there is a positive trend and possibility towards this.

As the economy is recovering after the turndown in 1997-1998 economic crises, there are crucial needs for more capital. When domestic capital is found inadequate to fuel growth, the economy has two options. First, to intensify savings using forced savings. The other alternative is to attract foreign funds and portfolio capital. Using private debt securities is a way of doing this. And if we consider the fact that there are large funds from the Middle-Eastern countries looking for places to invest, Malaysia – as a Muslim country – has a bright opportunity of being chosen. Saiful Azhar and Sanusi asserted that the pull-factor will much depend on the nature of Islamic bond issues while those affecting economic policy and political uncertainties play a secondary role.⁴ However, it is not as simple as that. There are some factors that slow down the inflows of the funds. Among those factors are the extensive application of *bay' al-'inah* and *bay' al-dayn* as the basis for the issuance of IPDS in this country.⁵

Having said that, it is essential to have both *bay' al-dayn* and *bay' al-'inah* contracts in IPDS reviewed and if necessary, new modes of contracts to be introduced as substitutions to the existing ones. This paper will look into the issues surrounding both *bay' al-dayn* and *bay' al-'inah* contracts while analyzing their roles in the local Islamic capital market.

Problem Statement

Trading on bonds is a new type of trade, which has never been known to the Islamic traditional *fiqh*. This kind of transaction is also known as *'aqd ghayr musammā* (literally means unnominated contracts). Therefore there is no discussion done on this kind of trading in the traditional *fiqh*. However in contemporary studies, this topic has gained the attention of some scholars, especially when some countries started to develop their Islamic capital markets. Nevertheless, due to the fact that this is a new kind of contract already implemented in the Malaysian Islamic financial system, there is still no consensus whether bonds trading is permis-

sible or otherwise, and among the advocates of bonds trading themselves, disagreements exist on how to 'Islamize' the existing bonds trading, the contracts underlying the issuance of bonds etc.

In the Malaysian case, the dispute regarding the trade of debt securities or bonds circles around the permissibility of debt trading or *bay' al-dayn* and *bay' al-ʿĪnah*, which are the main contracts used in Islamic bonds trading here.⁶ The contention is between some Muslim Gulf scholars and the Islamic banks that take their advice and the Islamic bankers of Malaysia. The Muslim Gulf scholars prohibit debt trading, describing it as *ribā*, whereas the Malaysians classify it as *murābahah* or *musharakah* or *bay' bithaman ājil*.⁷ Badawī suggested some reasons that contribute to this disagreement. Among them is the difference in the background of studies of those scholars. In the Gulf, the *sharīʿah* authorities are scholars with distinguished academic or judiciary careers. They however are not involved directly in the banking sector, except as the ones who receive queries from bankers and seek the answers in the recognized book with occasional help from their *ijtihād*. In contrast, the Malaysians are those who are directly involved in the banking and financial sector. Thus, they start not in the text but the actual practical situation.⁸ In addition, the difference may be attributed to the differences between the Gulf and the Malaysian business environment. The Gulf is an exporter of capital with comparatively moderate scope of investment. On the other hand, Malaysia needs vast investment. Therefore, they have to find sources of capital to ensure a future of their community in the business life of their country.⁹

Even the Gulf scholars themselves do not have a unanimous view towards trading done in bonds. Shubayr describes that there are three views: the majority, who opposes to any kind of trade done in bonds, regardless of its types; secondly, the ones whose view permits the trading on this instrument, and another view proposed by those who give separate rulings (*ḥukm*) according to different types of bonds available.¹⁰

Contrast to the Malaysian style, financial instruments for project finance in the Middle East have been largely dominated by *al-murābahah* and *al-ijārah* financing. The *al-murābahah* project financing however, do not utilize bond instruments, as doing so will mean applying *bay' al-ʿĪnah* for securitization purposes as well. The process simply involves the usual *al-murābahah* technique. *Al-ijārah* financing on the other hand, involves the issuance of profit certificates called *sukūk al-ijārah* bearing the name *al-ijārah* on which the transaction is based. The securitization process in this case is valid since the underlying asset as the real *ijārah* assets from which cash flows are created from the lease payments.¹¹

Another main issue pertinent to IPDS is the concept of Islamic liquidity (*al-suyūlah*). This is the area where *bay' al-dayn* comes into the picture. This concept (Islamic liquidity) is of high importance. Hence, if respectfully submitted, this concept will significantly guide the practitioners to develop the instruments accordingly, i.e. to convert assets into tradable securities and a source for daily liquidity.¹²

Since liquidity is one of the principle of financing, it is important for the Islamic bankers and economic policy makers to understand that the currently used conventional liquidity instrument were developed over the years to meet specific needs in conventional financial setting. It is the challenge and responsibility of the Islamic bankers and economic policy makers to:

- a) First understand the needs for which such instruments were developed.
- b) Then offer solutions and creative ideas to meet the needs of the market in Islamic setting
- c) Then 'manufacture' and market competitive and/or new products (instruments) which meet the market needs, test the product, and solicit the legal and jurisprudence opinion about its Islamic viability from both the scholars and the Islamic practitioners.
- d) And finally to compare the product to its conventional corresponding product substitute in order to identify niches which can be useful in marketing it or deficiencies to be corrected.

Unfortunately, this is not done most of the time, many Islamic bankers go to the currently available conventional instruments, render them *ḥalāl* or *ḥarām* and in some cases try to force an Islamic dressing onto them to make them look acceptable. Such dressings are labelled by Islamic jurists as *ḥiyal* (or circumvention), and it has been severely criticized by most scholars; with an entire section of Imam Ibn Taymiyyah's *Fatwā* being dedicated to the condemnation of a variety of those *ḥiyal*. This does not mean that the use of any conventional financial instruments automatically falls under *ḥiyal*. Many financial instruments used by conventional bankers can be easily modified (as opposed to disguised) to become in accordance with *sharī'ah*.¹³

With this situation in mind, it is pertinent to have a closer look into the issues that construct the contentions and disputes among the contemporary Muslim scholars, especially between the Middle-Easterns and the Malaysians in the context of Islamic financing, specifically IPDS trading. It is hoped that this could lead to a point where there is some extent of agreement.

What matters us about these disputes is the fact that, isn't there any basis on which all parties can agree on how an Islamic bonds (or other instruments) could be operated. If we can overcome this problem, it is easier to attract investors and funds from Muslim countries, especially the rich Gulf countries.¹⁴ To have a genuine Islamic financial system, it is not enough to 'Islamize' the existing system by putting Islamic dress on it. And extending this to the implementation of IPDS, it should not primarily a product reflecting replacement of interest with profits.¹⁵

The next sections will elaborate some aspects regarding *bay' al-dayn* and *bay' al-'Īnah* contracts. These include the definitions, types and the most important, the Islamic rulings concerning both contracts. The sections will also discuss the notion IPDS in the Malaysian context and the technicalities involved in the issuance of such securities. The place and roles of *bay' al-'Īnah* and *bay' al-dayn* in IPDS operations will also be highlighted.

Bay' al-'Īnah

The BIMA Securities Sdn. Bhd. outlines that the Malaysian Islamic bonds are structured on the basis of *bay' al-'Īnah* (refinancing of assets) and subsequently traded on the basis of *bay' al-dayn* (debt trading).¹⁶ It is clear that *bay' al-'Īnah* is used as an underlying contract in the initial process of securitizing debts.

Definition

Bay' al-'Īnah is defined as a mode of sale where the seller sells an object to the buyer in credit and hands it over to the second party. Subsequently, the first person (the seller) - before he or she takes/obtains (*qabad*) the price - buys the same object back, but this time it is in cash, cheaper than the first quoted price. It can also be the other way around where the seller sells the object in cash and buys it back in credit with additional amount of price - regardless of whether he or she has obtained the price of the first transaction or not, and regardless of whether this kind of transaction has become his or her customs/habit or not.¹⁷ It is also known in the Mālikīs' and Shāfi'īs' term as *bay' al-ajal*.¹⁸

Another type of *bay' al-'Īnah* is where there is a third party involved.¹⁹ This case can be illustrated as a situation where the seller/creditor (A) sells the goods to the buyer/debtor (B) for RM15 on credit and hands it over to the buyer. B subsequently sells the goods to the third party (C) for RM10 and hands it over to him. Then C sells the goods to A who is the debtor for RM10 and hands it over to him. A gives C RM10 which is paid by C to B. As a result, B gets RM10 cash while he owes A RM15. It is like borrowing RM10 from A and paying him RM15.²⁰

As apparent from the *bay'*, the term *bay' al-'inah* describes a mode of sale; not a kind of loan.²¹ Actually, there are two (or three as in the last example) separate contracts of sale involved in *bay' al-'inah*, each with its own pillars and conditions. In the contracts of sale by way of *bay' al-'inah*, the intention is to create a sum price difference between two normally almost simultaneous sales of the same commodity or subject property by the same parties, only alternating in roles as vendor and purchaser and vice versa. At the end of the second transaction the seller will obtain the money (price) of what he has previously bought. This is why the sale is known as *bay' al-'inah*; *al-'inah* means money.²² In all of these transactions there is no intention to the parties to possess the goods, since it will immediately return to the original owner.²³ It is only used as an object to legitimize the sale, and making it look like a permissible contract of sale.

The sum difference between the first sale (immediate cash price) and the second sale (deferred payment - *al-bay' biḥaman ājil*) is the essence of the transaction, and it is in the classification or determination of this sum, whether it is a debt or a loan that the Muslim legal experts and scholars disputed for the last fourteen centuries, right from the death of the Prophet (PBUH), and to this day no solution in the sense of consensus is in sight.²⁴

General Conditions on *Bay' al-'Inah*²⁵

- 1) *Ribawī* objects which are based on currency/money cannot be traded using *bay' al-'inah*. This is because in the first transaction, the payment which is based on currency/money is postponed and the postponement can give rise to the prohibited *ribā* and make the contract void.
- 2) The buyer must receive (*qabad*) the sold object before selling it back to the original seller.

Fuqaha' Views

Abū Ḥanīfah said that this contract is void (*bāṭil*) if it does not involve the third party who comes between the original seller and buyer. However, Abū Ḥanīfah in this case seems to contradict his previous judgement in which he concluded that this kind of sale is *ṣaḥīḥ*.²⁶

Abū Yūsuf who is also from the Ḥanafite school has a view that this sale is valid without abhorrence. Muḥammad has a slightly different view. He perceives this sale as valid with abhorrence (*ṣaḥīḥ ma'a al-karāhah*).

Al-Shāfi'ī and Dāwūd al-Zāhiri are on the view that this kind of sale is valid with abhorrence because it has all its pillars. In other words, it is valid by the exter-

nal evidence that they were properly concluded. The intention (*niyyah*) of the contracting parties has no effect on the validity of the sale. The intention is not considered, since we have no means to know it,²⁷ except - of course - if it is explicitly expressed. As a conclusion, the Shāfi'īs and the Zāhirīs consider only the external intention of the contracting parties.²⁸ Therefore, they decide that this sale is valid based on the meaning of the verse: وَأَحَلَّ اللَّهُ الْبَيْعَ.²⁹ They do not consider the succession of two contracts of sale as enough evidence to prove the existence of *ribawī* intention of the parties.³⁰

On the other hand the Mālikīs and Ḥanbalīs regard this contract as void.³¹ According to them the motive of the parties to the contract determines the legality or illegality of the contracts, and in the sale under consideration the motive of the parties is illegal and, therefore, the sales are not valid because they constitute a legal device (*ḥīlah*) to get a loan with interest which should be averted at all costs according to the *shari'ah*.³²

This view is based on a report narrated regarding a case happened between Zayd ibn Arqam and 'Ā'ishah.³³ Those jurists also use analogy on the means/expendients (*dharā'i'*) which is prohibited by consensus (*ijmā'*) of the *fuqahā'*. In both cases, the unlawful intentions are the motives for the contract.³⁴ They concluded that this kind of sale is a medium or means to legalize *ribā*,³⁵ and every thing used as a means to the prohibited things is also prohibited.³⁶

There are another ḥadīth reported by Ibn 'Umar that the Prophet (PBUH) said:

*"Whenever you do business transactions by way of bay' al-'īnah, and you follow your cattle and get engrossed with your agricultural pursuit (and because of that) you neglect your jihād, Allah shall cause ignominy upon you and that it shall not cease until you return to your religion."*³⁷

Based on the discussion above, we can conclude that the objection to the validity of *bay' al-'īnah* is based on these reasons:

- a) It is an uncalled for *ḥīlah* (legal device)
- b) The presumed wrongful intention to commit *ribā* transaction. This is in line with the ḥadīth which says, "all actions are judged by intention"³⁸
- c) The reported opinion of 'Ā'ishah against Zayd ibn Arqam.
- d) The reported ḥadīth *ṣaḥīḥ* narrated by Ibn 'Umar.

However, al-Shāfi'ī has rejected the ḥadīth regarding Zayd ibn Arqam and 'Ā'ishah and he said that the ḥadīth is not established (*ihābit*).³⁹ Even if it (the ḥadīth) can be accepted as authentic, the conclusion that it is the proof of the voidness of *bay' al-'īnah* can be argued - according to al-Shāfi'ī - based on:⁴⁰

1. 'Ā'ishah's condemnation on this kind of sale is based on the reason that the price is deferred to an unknown/unspecified period. Sale with this kind of deferment is not valid.
2. This case happened between two companions and if there are disagreements between the companions, al-Shāfi'ī's methodology is to take the opinion of whom we can use analogy (*qiyās*) with. And in this case it is Zayd's side.⁴¹ In other words, while it is clear that Zayd acted contrary to the meaning of the *ḥadīth*, it does not lead to a conclusion that Zayd's action is sinful and a conclusion that such contract cannot be concluded. In contrary, this does prove that the companions themselves are not on the same opinion. When this happens, we will have to use analogy (*qiyās*).⁴²

The Effect of Intention on the Validity of Contracts

Since *bay' al-'inah* involves the intention (*qasd* or *niyyah*) of the contracting parties, it is pertinent to have a closer look into this issue.

In a nutshell, there are two views regarding the effect of intention in any kind of contract. The first one is the view of the Ḥanafīs and Shāfi'īs who consider only the external intention and not the internal motive. In other words, all contracts are considered valid if the external desire of the contracting parties is fulfilled. This view is based on the fact that if we were to take into account the internal desire or intention, we would ruin the principle of stability/solidity of transaction (*istiqrār al-ta'āmul*). This is because the internal desire is concealed or hidden and we have no means to know it precisely. The desire differs from one person to another. Therefore it cannot be considered.⁴³

As a result, the motive has no effect on a contract, unless if it is stated explicitly. The contract is - on this basis - valid and effective since all the pillars are fulfilled. Nevertheless, if the intention or motive is unlawful, the contract is considered abominable or abhorrent (*makrūh*) and prohibited albeit its validity.⁴⁴

The second view is upheld by the Mālikīs, Ḥanbalīs, Zāhirīs and the Shī'īs. They take into consideration the internal intention or desire. Consequently, they consider all contracts which contain any unlawful intention or desire to be void, provided that the second party knows the intention of the other through any means.⁴⁵ The external desire is not considered if the internal is discovered and it shows that the two desires are conflicting each other.⁴⁶ In this case, it is clear that both the buyer and seller in *bay' al-'inah* enter the contract with the intention to use it as nothing but a legal device or *ḥilāh* to legalize a *ribawī* contract. In fact, there

is no intention by both parties to buy or sell. Therefore, the contract is prohibited on the basis of blocking the means (*sadd al-dhari'ah*).⁴⁷

Regarding the Shāfi'īs and Zāhirīs view that we can only depend on the external form of the contract, the opponents said that this argument cannot be accepted, since the externals are considered only if there is no presumption or indication that the intention is of the opposite. In this case (i.e. *bay' al-'Īnah*), there is clear evidence from the customs that the real intention of the parties is the prohibited one. Therefore the contract is considered void.⁴⁸

In short, the prohibition of *bay' al-'Īnah* - according to the second opinion - is based on the reason that the contract is a medium or means to the prohibited *ribā*.⁴⁹ Other jurists state that all kinds of *buyū' al-ajal* is not permissible, since the real intention is not the sale but to have *ribawī* credit facility. The contracts of sale involved are used merely for crediting purpose using *ḥilāh*.⁵⁰

Ḥilāh*⁵¹ and Exit Mechanism From *Ribā

Allah says: وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا .⁵² Allah prohibits *ribā*, and He blocks the means towards the transaction involving *ribā* directly. Therefore, the individuals whose contracts involve *ribā* have no other way except to use *ḥilāh*.⁵³ And the best *ḥilāh* available is using sale (*bay'*) as a camouflage to cover the real intention. This is because Allah has permitted sale. As a result, we can find many *ḥilāh* regarding *ribā* executed through the contract of sale. One of them is in the form of *bay' al-'Īnah*. Some scholars condemned that the solutions proposed by the *fuqahā'* now and then using *ḥilāh* are dispraised and discreditable.⁵⁴ In Islamic *fiqh*, *bay' al-'Īnah* is regarded as the typical example for the rest *ḥiyal ribawī* in which sale took the external form and *ribā* in the essence.⁵⁵

Conclusion

From the foregoing discussion, we may draw the following conclusion:⁵⁶

1. It is obvious that *bay' al-'Īnah* is a legal device in order to overcome the prohibition of *ribā*, and is not deemed to be an act of sale (although some writers defend that it is a sale), as there is clear evidence that such act amounts, in effect, to a contract of loan. Thus, it is forbidden as it is based on unjustified enrichment (*faḍl māl bi lā 'iwad*) or 'receiving a monetary advantage without giving a counter value'.
2. There is hardly any satisfactory evidence which enables one to say that al-Shāfi'ī has expressly declared that *al-'Īnah* to be *ḥalāl*. It should be

pointed out that al-Shāfi'ī's method of determining the validity of any contract by its formal evidence that they are legally concluded, cannot be cancelled on account of the intention of the parties, although he had to recognize such intention as forbidden but the contract remains valid unless the intention is expressed in the contract. As not every valid contract is a permissible (*ḥalāl*) contract, al-Shāfi'ī may, thus permits contracts because its legal preconditions are fulfilled, but forbids the transacting act of the parties when it conflicts with *sharī'ah* principle. Conclusively speaking, one can say that al-Shāfi'ī teaching has reached a level which is similar to the other Muslim schools although the methodology which he adopted appears to be different. Al-Qaraḍāwī⁵⁷ states in relation to this question of *bay' al-'īnah* that it is a clear case of usury and the device: why should we practice transaction which contains elements of devices while we are in position to have a clear and apparent alternative transaction? Furthermore, *mu'āmalat* which contains elements of device deviates from the true objective of *sharī'ah*.

Relating this issue to the Malaysian Islamic capital market with respect to the application of *bay' al-'īnah* in the securitization process, Saiful Azhar and Mahmood M. Sanusi asserted that:⁵⁸

“The use of legal device is therefore an evidence that the *niyyah* factor is undermined or made secondary in the securitization process of Islamic bonds in Malaysia. It is apparently clear that most underlying assets used in Malaysian Islamic bond securitization have no direct relation with the actual project itself. These assets were simply collaterals, that serve as guarantees to the debt issued. To retain the basic structure of traditional bonds in Islamic finance, that is providing fixed return to investors, practitioners and the relevant *sharī'ah* experts may have wrongly applied *sharī'ah* laws, which implies now that the legitimacy of Islamic bonds issued *bay' al-'īnah* is suspect.”

Bay' al-Dayn

Securitization of debt in Malaysia is a pre-condition to make effective based on *bay' al-dayn* or selling of debt. The contract of *bay' al-dayn* is used in initial public offers (IPO) as well as in secondary trading. In the former, bond issuance is simply bonds sales to investors and redeemable at par value upon maturity while in the latter bonds are sold at some discounts.⁵⁹

As we have mentioned earlier, the trading of Islamic bonds - following the process of securitization - is done on the basis of *bay' al-dayn*.⁶⁰ In Malaysia, *bay'*

al-dayn is used for liquidity purpose. This section will discuss on the nature of *bay' al-dayn* and *fuqahā'* views regarding the contract. However, the discussion will be restricted to the application of *bay' al-dayn* in the secondary trading of IPDS.

Definition

In a simple word, *dayn* means debt and *bay'* means sale. *Bay' al-dayn* therefore, connotes the sale of debt. If a person has a debt receivable from a person and he wants to sell it, it is termed as *bay' al-dayn*.⁶¹ However, we will have a deeper look into the meaning of the term *al-dayn*.

Dayn in fiqh terminology has two meanings; one is more general than the other. The general meaning of the word *dayn* is "all right that exists upon one's self (*dhimmah*) whether it in the form of property (*māl*) or rights (*ḥuqūq*)"⁶² or simply everything that exists upon one's self (*dhimmah*).⁶³ The specific meaning is restricted only to properties. Furthermore, the *fuqahā'* have two different views regarding this specific meaning. The first view is of the Ḥanafis, which defines *dayn* as all property that exist upon one's *dhimmah* as a result of exchange, debt or damage. The second view, which is of the majority, defines *dayn* as all property that exist upon one's *dhimmah* due to any reason.⁶⁴ The difference is that the former does not include other obligations resulted from other than the three causes mentioned, while the latter comprises all property obligations that exists upon one's *dhimmah*.

Dayn can also be defined as a property stands as an obligation upon one's *dhimmah* as a result of a contract, consumption or loan.⁶⁵ Other writer defines *dayn* as generic, fungible, intangible goods which are often represented by monetary value alone and particularly by obligation to pay that monetary value, the debt. Basically *dayn* is everything that is not *'ayn* (existent or tangible things).⁶⁶ Originally it refers to the negative side in the monetary obligation or other similar things. In other words, it is the obligation of paying a sum of money or other similar things which fall under the category of *al-māl al-mithli*.⁶⁷

Based on the aforementioned definitions of *al-dayn*, and the literal meaning of *bay'*, one can define *bay' al-dayn* as the sale of a payable right arising normally from a transaction, services, and loan to either the debtor himself, or to any third party.⁶⁸

Difference Between *al-Dayn* and *al-Qard*

Although there is a very close relationship between the terms *al-dayn* and *al-qard*, the two words have different meanings. In fact, *al-dayn* is more general than the term *al-qard* since *al-dayn* includes all liabilities, whether it is from rent, sale, pur-

chase etc.⁶⁹ *Al-qard* on the other hand, refers to a contract, in which a person lends money or any items to another person, with the condition that the person (borrower) will return the value of the money to the lender at a specific time.⁷⁰ Therefore, the relationship between *al-qard* and *al-dayn* can be determined as the relationship between a general and a specific,⁷¹ meaning to say that the concept of *al-dayn* covers the right coming from *al-qard*, as well as the other rights coming from *al-bay'*, or *al-ijārah* or else.⁷²

Types of *Bay' al-Dayn*

There are two situations where *bay' al-dayn* can be made, i.e. (a) *Bay' al-dayn* to the debtor and (b) *Bay' al-dayn* to the third party. In both cases the debt could be sold in credit or in cash.

In the first situation where the debt is sold in credit (which is also known as *bay' al-kali' bi al-kali'* or selling debt with debt), the *fuqahā'* are unanimous that it is prohibited because the Prophet (PBUH) has prohibited such sale.⁷³

Regarding the second situation, in which the sale is made in cash, there were contentions among the *fuqahā'* regarding the legal rulings pertinent to it. The discussion is quite lengthy. However, in brief, we can conclude that the majority of *fuqahā'* permits the selling of debt to the debtor in cash.

On the other hand, regarding the selling of debt to the third party in cash, there are three views. The majority prohibits such sale; the second view is proposed by the Shāfi'is who permit it. The last is of the Mālikis who permit the sale with eight conditions.⁷⁴

Ḥaqq al-Dayn as Ḥaqq Malī

There are many discussions on the notion of rights (*ḥaqq*) and the rulings pertinent to the issue. In this section, we, however, will confine our discussion to the categorization of rights into property rights and non-property rights. In brief, the *fuqahā'* have divided rights in this perspective into two categories, namely *ḥuqūq māliyyah* (property rights) and *ḥuqūq ghayr māliyyah* (non-property rights). *Ḥuqūq māliyyah* are rights which are related to property and its usufruct (*manfa'ah*). This category includes rights related to things (*'ayn*), usufructs and debts. On the other hand, *ḥuqūq ghayr māliyyah* are rights that have no relation with property such as the rights of a custodian (*wali*) of the killed person whether to proceed with *qisās* or to forgive the killer.⁷⁵

From the categorization mentioned above, it can be seen that debt falls under the first category i.e. *ḥuqūq māliyyah*. As a consequence, all rulings that apply to this category also apply to *ḥaqq al-dayn*. It means that such right can be traded, inherited, given etc., provided that certain conditions are fulfilled.

***Fuqahā'* Views**

Some jurists claim that the traditional Muslim jurists are unanimous on the point that *bay' al-dayn* is not allowed according to the *sharī'ah*.⁷⁶ The overwhelming majority of the contemporary Muslim scholars are of the same view - especially those from the Middle-Eastern countries. Apart from the arguments discussed above, this view stands on the premise that the prohibition of *bay' al-dayn* is a logical consequence of the prohibition of *ribā* or interest. A debt receivable in monetary terms corresponds to money, and every transaction where money is exchanged from the same denomination of money, the price must be at par value. Any increase or decrease from one side is tantamount to *ribā* and can never be allowed in *sharī'ah*. While the proponent of *bay' al-dayn* argue that the permissibility of *bay' al-dayn* is restricted to the case where the debt is created through a sale of a commodity, resulting that the debt represents the sold commodity and its sale may be taken as a sale of the commodity, this view is condemned on the basis that, once the commodity is sold, its ownership is passed on to the purchaser and it is no longer commodity of the seller. What the seller owns is nothing other than money, therefore if he sells the debt, it is no more than a sale of money and it cannot be termed by any stretch of imagination as the sale of the commodity.⁷⁷

In other words, the Middle-Eastern jurists, especially from the Gulf Countries do not allow *bay' al-dayn* with discount, on the ground that the debt arises is not an asset but in form of monetary liabilities (claims). Accordingly, it cannot be sold or exchanged except with the same rate (at premium). Those jurists - the Middle-Easterns - only allow sale with additional profit margin or at discount if it comes from instruments which preserve the ownership of the assets to the issuers, such as *ijārah* or in instruments which consist of a mix between *ijārah* and other contracts of exchange in which the *ijārah* contribution is dominant.⁷⁸

On the other hand, Malaysian jurists - especially in the supervisory level - have a view that debts arising via Islamic financing contract such as *bay' bithaman ājil* or *murābahah* are assets or commodity and therefore are tradable - either at discount or with additional profit margin.⁷⁹

From the discussion above, it is obvious that the contention among the scholars with respect to *bay' al-dayn* circles around the issue of selling debt at discount, with the Middle-Easterns opposing the idea, while the Malaysian jurists at the supervisory level supporting it.

Going further, Mohd. Daud Bakar asserted that future rights be it in the form of commodity to be delivered later or cash to be credited later can be considered as property even though they are yet to materialize. Therefore, future rights may be 'traded' to get cash for one reason or another.⁸⁰ This means is another argument supporting the selling of debt at discount.

As a concluding remark, the researcher would like to note down what Mohd. Daud Bakar has said regarding to the issue of *bay' al-dayn* and securitization:

"As far as the writer is concerned, the Muslim scholars have or might have eventually agreed on the practice of *bay' al-dayn*. However, the contention amongst the scholars with respect to *bay' al-dayn* is whether the debt could be sold at a discount. That would depend upon whether trade debts could amount to assets and not a price represented by its monetary worth. In this respect, trade debts could amount to assets if it could be argued that the obligation of the trade debtors to pay forms their underlying premise which thereby renders the sale of debt at a discount permissible. On the other hand, if these trade debts could not be construed as assets but rather a price represented by its monetary worth, then the transfer of such debts could only be effected at their par value. For the writer, this dispute is *ijtihādī* in character and one may choose one view or the other. Even, should we were to dispute the legitimacy of sale of debt at a discount, another solution is always possible which is *hiwālah bi ujr* i.e. transfer of debt for fees in the sense that the transferee (the SPV) is entitled to remit part of the total value of debts as the fees for its services. The same process would equally apply to the transferee(s) on the secondary market)."⁸¹

However this view was criticized by Saiful Azhar, who said that *bay' al-īnah* and *bay' al-dayn* instruments are essentially debt in nature. It follows that if these two contracts are allowed to flourish without restrictions, Islamic banking and finance will end in similar fate with their conventional counterpart in the event of debt driven economic crisis. In fact these instruments are expected to perform far worse as there is no floating rate option.⁸²

Islamic Private Debt Securities in Malaysia

Introduction

In this section we will look into the technical aspects of the creation of Islamic debt securities, specifically Islamic bonds in Malaysia. It will also show the role of *bay' al-dayn* and *bay' al-īnah* in the issuance of such securities.

Since 1992, the Rating Agency of Malaysia (RAM) and Malaysian Rating Agency Corporation (MRAC) have both rated 20 Islamic private debt securities (IPDS) issued in Malaysia. RAM undertook most of the rating exercises amounting to 18 issues while the newly formed MRAC rated the remaining two. In principle, most of these bonds are issued and traded on the basis of *bay' al-'inah* and *bay' al-dayn*. Others, such as Khazanah zero-coupon and promissory notes have also incorporated *bay' al-'inah* and *bay' al-dayn* as the basis of trading both for liquidity and closing position when the bonds matures.⁸³

Different Kinds of Financial Assets

Debt securities include such familiar financial claims as bonds, notes and accounts payable. Legally these financial assets entitle their holder to a priority claim over the holders of equities to the assets and income of an individual, business firm or unit of government. Usually that claim is fixed in amount and time (maturity) and depending on the terms of the indenture (contract) accompanying most debt securities, may be backed up by the pledge of specific assets as collateral.

Financial analysts usually divide debt securities into two broad classes:

1. negotiable, which can be easily be transferred from holder to holder as marketable security.
2. non-negotiable, which cannot legally be transferred to another party.⁸⁴

Private debt securities (PDS) are defined as IOUs issued by corporations with a promise to pay fixed periodic payments over a fixed time period and entitle the holder to payment of the principal amount of value at the end of that period. The IOUs could be in the form of bonds, notes, commercial papers, etc. There are two main forms of PDS that are equity-linked debt securities and non-equity linked debt securities (straight debt securities). The former differs from the latter in the sense that the former incorporates an equity conversion feature which would enable the holder of the debt securities to convert them into shares of the corporation issuing such debt securities. Conversely, the latter type of debt securities is those without an equity conversion feature. It is under the latter type of debt securities that the notes are issued which allows the issuer/borrower to tap the funds from the capital market by issuing short/medium term marketable promissory notes. The notes are debt instruments and are traded on the secondary market.⁸⁵

Basically, Islamic private debt security has the same attributes as the conventional one, except it has to be based on physical goods which have their real intrinsic value.⁸⁶

Capital Market in Malaysia

The capital market in Malaysia refers to the market in longer-term financial assets, comprising all public and private debt instruments with maturities exceeding one year, corporate stocks and shares for which there are no fixed maturity period, and commodity futures. The main purposes of the capital market in the country are to assist the process of economic development by mobilizing medium and long-term funds from a wide cross-section of the population to finance public development programs and to fund private investment, as well as assist the banking system in scrutinizing their assets.⁸⁷

Primary Markets and Secondary Markets

Financial market can be divided into primary markets and secondary markets. Primary market is for the trading of new securities never before issued. Its principal function is the raising of financial capital to support new investment in buildings, equipment and inventories. On the other hand, secondary market deals in securities previously issued. Its main function is to provide liquidity to security investors - i.e. provide an avenue for converting existing bonds, stocks and other securities into ready cash.

The volume of trading in the secondary market is far larger than trading in the primary market. However, the secondary market does not support new investment. Nevertheless, the primary and secondary markets are closely intertwined. A rise in the interest rates or security prices in the secondary market usually leads to a similar rise in the prices or rates on primary market securities and vice versa. This happens because investors frequently switch from one market to another in response to differences in prices and yield.⁸⁸

Securitization

Securitization has been defined in many ways in recent years. A typical conventional definition might be as follows:

The process which takes place when 1) a lending institution's assets are removed in one way or another from the balance sheet of that lending institution to that of a vehicle. 2) New assets are originated by the lending institution direct into a vehicle and such vehicle is funded by investors who purchase negotiable instruments issued by that vehicle. Further cash flow of the assets owned by the vehicle is then used to service the interest payments and principal repayment obligations of the issued securities.⁸⁹

In other words, securitization is basically a form of financing by converting the assets, tangible or otherwise without increasing the leverage on the balance sheet by selling the assets, tangible or otherwise to a special purpose vehicle (SPV) which in turn issues debt securities to finance the purchase.⁹⁰

Thus, in a broad sense, securitization involves:

- (a) the identification and pooling of assets of the same type, such as housing loans, to be sold to, or originated by, a special purpose vehicle;
- (b) an issue of securities promising returns backed by the payment streams of that pool of assets; and
- (c) obtaining credit and liquidity enhancements (in the form of asset insurance, guarantees, letters of credit, liquidity facilities, over-collateralization, subordinated debt issues, reserve accounts etc.) to ensure the timely payment of returns to investors.⁹¹

In Malaysia, Islamic private debt securities, up to date, have adopted the process of securitization which is a process of transforming an illiquid asset into a tradable security. In brief, securitization is a process that makes debt tradable on the secondary market.⁹²

IPDS In Malaysia

In Malaysia, the first IPDS was introduced in 1990 when a deferred payment sale facility under the concept of *bay' bithaman ājil*, amounting to RM125 million was concluded on a syndicated basis for a multinational company (Shell MDS).⁹³ Under this facility, the lead manager arranged for a group of financiers who purchased from the issuer certain assets amounting to RM125 million. These assets are then resold to the issuer at mark-up price, representing the cost and pre-determined profit margin from the repurchase of the assets by the issuer. This is where *bay' al-'īnah* takes place. The issuer then issued two types of notes. The primary notes represent the financiers purchase price of the assets from the issuer while the secondary notes represent the stream of installments for the profit margin accruing to the financiers. The notes may be traded in the secondary market under the concept of debt trading or *bay' al-dayn*.⁹⁴

Another example of Islamic bond issue is the KLIA Project. In January 1996, Bank Islam Malaysia Berhad (BIMB) lead managed a RM2.2 billion Islamic Bond Issue on behalf of Kuala Lumpur International Airport Berhad (KLIA). In January 1997 another RM2.2 billion Islamic Bond Issue was raised for KLIA but this time Bank Islam co-managed the issue with other institutions. The resultant Islamic bond

is merely the securitization of the Selling Price Installment Schedule of the BBA transaction, i.e. an IOU of the semi annual installment payable by KLIA to the financiers. This IOU or Islamic Bond is in the form of a bearer note which states KLIA promises to pay the bearer of the notes a fixed sum of money at a certain date. To be more specific a bullet installment schedule was provided for KLIA where KLIA pays the profit portion of the facility every 6 months and the cost portion in one lump sum at the end of the facility. The securitization of the cost portion results in KLIA primary Notes with face value of RM1.0 million each, and the securitization of the profit portion results in Secondary Notes maturing every 6 months during the tenor of the facility. These primary and secondary notes are then apportioned to the original participants of the syndication or the Primary Subscribers according to their participation in the bought-deal syndication. The Primary Subscribers can then, if they so wish, sell down the notes on the secondary market.⁹⁵

Contracts Involved in the Issuance of IPDS

IPDS is actually a hybrid⁹⁶ of a number of contracts. These include *bay' al-'inah*, *bay' al-dayn*, *al-bay' bithaman ājil*, *al-mushārah*, *al-qard al-ḥaṣan*, *al-mudārah*, etc.⁹⁷

The Three-Steps of Bond Issues

From the example elaborated above, it can be concluded that the issuance of bonds in Malaysia involves three different steps. Saiful Azhar and Mahmood M. Sanusi have laid down the three steps which are:⁹⁸

- A. Securitization - The creation of the *bay' al-'inah* assets.
- B. Bond issues - Issuance of debt certificate - *Shahādah al-dayn*
- C. Trading of debt certificates - Buying and selling of debt certificate in the secondary market using the contract of *bay' al-dayn*.

Conclusion

From the explanation given, we can see that both *bay' al-'inah* and *bay' al-dayn* contracts have their roles in the process of bond issuance. The former is used in the first step, where securitization of the assets takes place. In the *bay' al-'inah* asset securitization, the financier purchases an asset from the issuer and sells it back to

the same party at a credit price. This buy-back agreement will ensure that the issuer will receive the money in cash while financier will be paid a prefixed or contracted amount in a future date. Debt payments will be made by installment through bond issues. The difference between cash and mark-up price will represent the profit due to the financier.

We have also shown that, to some extent, there are points of contentions between Muslim jurists regarding the permissibility of both contracts which, inevitably will affect their judgment regarding the application of the contracts in the trading activities in the Islamic capital market, especially in Malaysia. It is hoped that some actions would be taken to reduce the gap exists between those jurists. If this can be done, the growth of the Islamic capital market in this country and also at the international level could be enhanced and the overall consequences would benefit the muslim countries and the Islamic communities all over the world.

Appendix: The Three-Steps of Bond Issues⁹⁹

Since 1992, the Rating Agency of Malaysia (RAM) and Malaysian Rating Agency Corporation (MRAC) have both rated 20 Islamic private debt securities (IPDS) issued in Malaysia. RAM undertook most of the rating exercises amounting to 18 issues while the newly formed MRAC rated the remaining two. In principle, most of these bonds are issued and traded on the basis of *bay' al-īnah* and *bay' al-dayn*. Others, such as Khazanah zero-coupon and promissory notes have also incorporated *bay' al-īnah* and *bay' al-dayn* as the basis of trading both for liquidity and closing position when the bonds matures.

To further understand the role of *bay' al-dayn* in an Islamic bond market, it is worthy to look at the three main steps involved in the bond issues, namely:

- Step 1: Securitization - The creation of the *bay' al-īnah* assets
- Step 2: Bond issues - Issuance of debt certificate - *Shahādah al-dayn*
- Step 3: Trading of debt certificates - buying and selling of debt certificate in the secondary market using the contract of *bay' al-dayn*.

Step 1: The Creation of a Bay' al-īnah Underlying Asset

Asset securitization is the essence of Islamic bond issues as a bond must assume the role of *al-māl* or property to qualify as an object of sale. An object of sale in the Islamic law of contract must be a property of value. When a bond certificate is supported by an asset as evidenced via the securitization process, it is transformed into an object of value and therefore qualifies to become an object of trade whereby it can be purchased and sold in both the primary and secondary market. Investors then will have to the right to sell (*haqq māli*) these bonds. In the *bay al-īnah* asset securitization, the financier purchases an asset from the issuer and sells it back to the same party at a credit price. This buy-back agreement will ensure that the issuer will receive the money in cash while financier will be paid a prefixed or contracted amount in a future date. Debt payments will be made by installment through bond issues. The difference between cash and mark-up price will represent the profit due to the financier.

The underlying asset is therefore crucial in determining the Islamicity of these bonds. In the Malaysian experience, these assets include factories, equipment, stock and inventory and even intangible asset such as a list including building and properties. Some are given in Table 1.

Table 1:

Selected Islamic Debt Securities (IPDS) in Malaysia: Underlying Assets

Issuer	Instrument	Underlying Asset
Hicom Holding Bhd.	Guaranteed <i>Murābahah</i> Notes Issuance Facility	Mixture of halal shares (including unquoted shares)
Amanah Int. Finance Sdn Bhd.	Guaranteed <i>Murābahah</i> Notes Issuance Facility	A list including building and properties
KFC Holding	<i>al-Bay' Bithaman Ājil</i> Islamic Debt Securities	Restaurants, breeder, farm and hatchery
Petronas Dagangan	Redeemable Islamic Debt Securities	gas processing line and pipeline

Source: Rating Agency Malaysia 1998

The first stage is critical because it is where the yield or the simple rate of return is determined. The buy-back arrangement using a deferred sale approach will show that the yield is a fixed one since there the contract specifies only one selling price.

Step II: Issuance Of Islamic Debt Certificate (*Shahādah al-Dayn*)

This usually takes place in the primary market where in settling its debt, the issuing company will sell debt certificates or bonds to investors. As mention above, debt certificates issues is valid only when it is supported by an asset. In otherwords, the bonds must be securitized. Here the underlying security is the BBA or *al-murābahah* asset. The underlying asset need not be BBA or *al-murābahah* alone. If the 1st stage involves a contract of *ijārah*, then the debt certificate is called *Sukūk al-Ijārah*. If an *Istiṣnā'* contract is used, we can called it *Sukūk al-istiṣnā'*.

Islamic bonds new issues can be categorized into two, namely bonds issues with coupons and those with none. The former is known as the Islamic coupon bond while the latter Islamic zero coupon bond.

A. Islamic Coupon Bond

The term “coupon” here denotes the profit portion of the Islamic bond issues in both *al-murābahah* notes issuance facility (MuNif) and *al-bay'-bithaman ājil* Islamic debt securities (ABBA). The difference between MuNif and ABBA is mainly

on their respective maturities. Long-term issues normally applies the *al-bay'-bithaman ājil* - buy-back contract while short-term and medium term issues will use *al-murābahah*. Some selected bond issues are given below:

Table 2:
Selected Islamic Debt Securities in Malaysia: Tenure and Maturities

Issuer	Instrument	Tenure	Issue Date	Maturity
Houlam Corp.	<i>al-Bay' Bithaman Ājil</i> Islamic Debt Securities	7 years	03/09/97	02/09/04
Teledata Sdn Bhd	Guaranteed <i>Murābahah</i> Notes Issuance Facility	5 years	05/04/96	04/04/01
Moccis Trading SB	Guaranteed <i>Murābahah</i> Notes Issuance Facility	5 years	29/03/96	28/03/99

Source: Rating Agency Malaysia, 1998

In both MuNif and ABBA, two types of debt certificates were issued. Certificates that represent the capital component are called primary notes while the profit portion are known as secondary notes or coupon notes. Coupon need not mean interest alone. In the IDS, it also refers to the profit or mark-up portion of the deferred sale. So it is safe to say that the Islamic version of the conventional coupon bonds are the MuNif and ABBA.

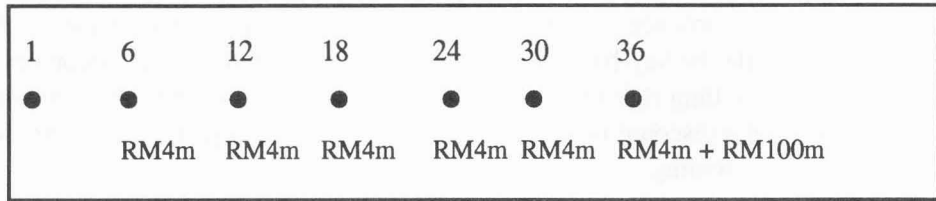
B. *Al-Murābahah* Notes Issuance Facility (MuNif)

The selling of *dayn* or debt by the issuer to the financier therefore involves two types of bond issues. In other words, *Shahādah al-dayn* (debt certificates) consists of the primary and secondary notes. The process is shown the following illustration:

Cost of Financing	: RM100 million
Annual Profit Rate	: 8%
Underlying Asset	: Land and building
Issue Date	: 5th. February 1999
Maturity	: 5th. February 2002
Tenure	: 3 years
Total Profit	: $RM100,000,000 \times 8\% \times 3 = RM24 \text{ million}$

Selling Price	: Cost of financing + profit margin = RM124 million
Number of Primary Notes	: 100,000 units
Price per unit	: $RM100,000,000/100,000 = RM1000$
Number of Secondary Notes	: 50,000 units
Price per Unit	: $RM24,000,000/50,000 = RM480$

Figure 1: Mode of payments in MuNif



Based on the above calculations and illustration in Figure 1, all primary notes will mature on the 5th February 2002, which implies that the capital component will be paid in a lump sum of RM100 million at maturity. Since investors desire to take out the profit out periodically, secondary notes maturing every six months were normally issued. In the above case, a 3 year maturity shall imply 6 semiannual profit redemptions at RM4 million each. The above example shows that MuNif or BaIDS are not zero coupon bonds. The absence of coupon interest payments does not mean that Islamic bonds are zero coupon. MuNif and BaIDS are coupon bonds because profit payments are contractual or fixed. Although similar to conventional coupon payments, issuance of secondary notes issues are said to be valid in Islamic law since it is based on sale (*al-bay'*) while the former is based on debt (*al-duyūn*)

C. Islamic Zero Coupon Bonds

Zero coupon bonds are bonds sold at a discount. Although no coupon or interest payments are made, the implicit interest is the difference between par value and discount value. The Islamic zero coupon bond operates on the same principle but works on a sale contract (*al-bay'*) which made it a valid transaction in Islamic law. The Khazanah benchmark bond will be used to illustrate some pertinent issues.

D. Khazanah Islamic Benchmark Bonds

Unlike MuNif and BaIDS, the Khazanah bonds are government guaranteed. But for trading purposes, Khazanah bond issues must fulfill the securitization requirement

which involves assets of Khazanah Nasional Berhad (KNB). The securitization of Khazanah bonds is similar to other Islamic bonds in which the contract of *bay' al-'inah* is applied. Securitization creates *ḥaq māli*, that is the right to sell or purchase a commodity one owns. To exercise this right shall also imply an ability to derive usufruct or *manfa'at* from it, which in essence qualify Khazanah bonds to take the role of *al-māl*.

Although the Khazanah Islamic benchmark bonds are sold at a discount, the discount price is market determined through a bidding process (*bay' al-muzāyadah*). The bidding process allows the bond to be priced according to the forces of demand and supply so as to produce a yield that can be used as a benchmark for the local bond market. While the buy-back price at par value is set by the issuer, secondary trading will mean selling rights of debt to the third party. At this point, the contract of *bay' al-dayn* at a discount is intensively applied to create liquidity (*al-suyūlah*) through secondary trading.

The basic feature of the Khazanah Islamic bond is quite straight forward. Let's say that through the bidding process, a RM 1000 bond at par value is sold at RM 800 per unit. For one million unit issues, the market value of securitized asset is therefore RM 800 million, while the buy back price is RM 1 billion. The return to investors is RM 200 million. The *bay' al-'inah* element emerges in the securitization process, involving of some underlying assets, namely *Khazanah* assets consisting of physical and financial assets that the Malaysian government owns such as land, buildings, shares, bonds and reserves in hard currencies.

Step III: Trading of Debt Certificate - Discounted *Bay' al-Dayn*

For liquidity purposes, bond trading in the secondary market is crucial. However, almost all Islamic bonds today were bought for long-term investments. The lack of secondary market however should not imply that trading issues is no longer significant. One of the objective in the Khazanah bond issues is to create a dynamic secondary market. This calls the need to explain the Islamic view of bond trading in the secondary market.

As mentioned earlier when a debt certificate is securitised, it now becomes property (*al-māl*) which is also an article of trade. As an article of trade, the bonds can be sold by investors to the issuer or the third party if a secondary market for Islamic bonds exists. The trading i.e sale and purchase of the debt certificates is called *bay' al-dayn*. In Malaysia, the contract is *bay' al-dayn* at a discount is acceptable while Middle-east Ulama' considered it invalid even though the debt is supported by underlying assets. Any profit created from the sale and purchase of a

debt is *ribā*. As an example Ali holds a bond worth RM1000. His urgent need for cash makes him sell the bond to Bakar for RM900. For whatever reasons, Bakar purchases the RM900 bond because he felt the price of bonds may go up. He will dispose the bond when price exceeds RM950 to make a RM50 which according to Islamic law is *ribā*.

In the case of an zero coupon Islamic bond, the company issues the bond to say, Ameen at a discount, say RM900. The bond is redeemable at par value of RM1000 upon maturity. In other words, when the bond matures, Mr. Ameen sells the bond to the issuer or another dealer for RM1000. Here trading of debt took place where Mr. Ameen receive RM100 as profit over a period of 1 year. In the Malaysian Islamic capital market, the RM100 profit is considered permissible (*ḥalāl*) while it is not permissible (*harām*) in the Middle-East countries although the bond is asset backed. It is therefore not surprising to observe that none of the deals made in the Arab countries so far has embraced *bay' al-dayn* bonds. The mode of financing applied in these countries were mostly the syndicated *murābahah* and *al-ijārah*.

End Notes

1. *Bank Negara Malaysia Monthly Statistics*, December 1998.
2. Generally, Islamic debt securities began in 1983 when the Government issued the Government Investment Certificates or GIC, which is considered the first Islamic security issued in Malaysia. While specifically, issuance of Islamic bonds began as early as 1992 and a total of RM20.5 billion (US\$5.3 billion) has been invested in Islamic bonds since then. See Abdul Murad Khalid, "The Emerging Role of Islamic Debt Securities in Financing Economic Development," working paper *Conference on Securitisation: The Way to Financial Competitiveness*, 20th September 1994, p. 6; Saiful Azhar Rosly and Mahmood M. Sanusi, "The Application of Bay' al-'Inah and Bay' al-Dayn in Malaysian Islamic Bonds: An Islamic Analysis," *International Journal of Islamic Financial Services*, Vol. 1, No. 2, July-September 1999.
3. Abdul Rashid Hussain, "Malaysia's Khazanah Benchmark Bonds - A Yield Curve for the Local Debt Market?," *Islamic Banker*, April 1998, p. 27.
4. Saiful Azhar Rosly and Mahmood M. Sanusi, *op.cit.*
5. *Ibid.*
6. There are other contracts involved such as *al-bay' bithaman ājil*, *murābahah*, *ijārah*, *muḍāradah* etc. but will not be discussed here
7. Zaki Badawi, "Debt Trading - A Consensus Too Far?," *Islamic Banker*, July 1996, p. 7.
8. *Ibid.*
9. *Ibid.*
10. Among those who prohibit trading in bonds are Dr. Yusuf al-Qaraḍawī, Dr. Muḥammad Yūsuf Musā, Dr. 'Alī al-Salūs etc. From the group that says that it is permissible is Dr. Muḥammad Sayyid Ṭantāwī. The third opinion is proposed by individuals like 'Abd al-'Azīm Barakah and Jād al-Haqq 'Alī Jad al-Haqq. See Muḥammad 'Uthmān Shubayr, *Al-Mu'āmalat al-Māliyyat al-Mū'asirah*, Jordan: Dār al-Nafā'is, 1996, pp. 179-182.
11. Saiful Azhar Rosly and Mahmood M. Sanusi, *op.cit.*
12. Mohd Daud Bakar, "As-Suyūlah: The Islamic Concept of Liquidity," Paper presented in the International Islamic Capital Market Conference '97, 15-16 July 1997, p. 16.
13. Yahia Abdul-Rahman, "Islamic Instruments for Managing Liquidity," *International Journal of Islamic Financial Services*, Vol. 1, No. 1, April-June 1999.
14. Many estimate the funds looking for *halal* investing and banking to be from \$50 billion to \$80 billion. Most of these funds are now handled in Europe; mainly in the London financial markets. That is why there are many of the international conventional banks are now focusing on Islamic banking and financing to gain a significant market share of the funds and the deals which insist on Islamic interest-free dealings. - Yahia Abdul-Rahman, "Islamic Instruments for Managing Liquidity."

15. Abdul Murad Khalid, *op.cit.*, p. 10.
16. BIMB Institute of Research and Training Sdn. Bhd. (BIRT), *Konsep Syariah Dalam Sistem Perbankan Islam*, Kuala Lumpur: BIMB Institute of Research and Training Sdn. Bhd. (BIRT), 1998; Saiful Azhar Rosly and Mahmood M. Sanusi, *op.cit.*
17. Muḥyi al-Dīn Abū Zakariyyā Yaḥyā ibn Sharaf Al-Nawawī, *Raudat al-Tālibīn wa 'Umdat al-Muftīn*, Beirut: Dār al-Kutub al-'Ilmiyyah, n.d., vol. 3, pp. 85-86; Kamil Mūsā, *Aḥkām al-Mu'āmalat*, 2nd ed., Beirut: Mu'assat al-Risālah, 1994, p. 285; Amīrah 'Abd al-Latīf Mashhūr, *al-Istithmār fī al-Iqtisād al-Islāmī*, Cairo: Maktabah Madbūli, 1991, p. 253; *Al-Mausū'at al-'Ilmiyyah wa al-'Amaliyyah li al-Bunūk al-Islāmiyyah, al-Juz' al-Shar'ī*, vol. 1, Cairo: al-Ittiḥād al-Dawli li al-Bunūk al-Islāmiyyah, 1982, p. 57.

There are reasons why this kind of sale is called *bay' al-'īnah*. One is because it helps those with urgent needs to get what they want using *ḥilāh*. Other author reasons that it is because the owner of the goods gets the money he wants - see *Al-Mausū'at al-Fiqhiyyah*, vol. 9, Kuwait: Wizārat al-Auqāf wa al-Shu'un al-Islāmiyyah, 1989, p. 95; *Hāshiat al-Dusūqī 'alā al-Sharḥ al-Kabīr*, vol 3, p. 88; *Aḥmad al-Sharbatī, Al-Mu'jam al-Iqtisādī al-Islāmī*, n.p.: Dār al-Jīl, 1981, p. 61.

18. Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuh*, 3rd. ed., vol. 4, Damascus: Dār al-Fikr, p. 466; Muḥammad Wafā, *Abrāz Ṣuwar al-Buyū' al-Fāsīdah*, Egypt, 1984, p. 40.

Bay' al-ajal is actually a notion that includes not only *bay' al-'īnah* but some other kinds of sale. It is defined as sales which externally seem to be valid (if each components is perceived individually - exclusive from one another), but in the essence, it involves intentions to that end to unpermissible results, and these intentions are the dominant - Nazih Hammad, *Mu'jam al-Muṣṭalahāt al-Iqtisādiyyah fī Lughat al-Fuqahā'*, 3rd. ed., Virginia: The International Institute of Islamic Thought, 1995.

19. Some *fuqahā'* have different name for this kind of contract, which is *al-tawarruq* - see Rāfiq Yūnus al-Miṣrī, *Al-Jāmi' fī Uṣūl al-Ribā*, Damascus: Dār al-Qalam, 1991, p. 174.
20. Muḥammad Wafā, *op.cit.*, p. 40.
21. Hj Wan Ismail Wan Ibrahim, "Bay' al-'Īnah as a Useful Islamic Instrument," paper presented in International Islamic Capital Market Conference 1997, 15-16 July 1997, p. 5.
22. BIMB Institute of Research and Training Sdn. Bhd., *op.cit.*, p. 67.
23. Rāfiq Yūnus al-Miṣrī, *op.cit.*, p. 172.
24. Hj Wan Ismail Wan Ibrahim, *op.cit.*, p. 5; BIMB Institute of Research and Training Sdn. Bhd., *op.cit.*, p. 67;
25. BIMB Institute of Research and Training Sdn. Bhd., *op.cit.*, p. 68.
26. Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuh*, vol. 4, p. 468; *Al-Mausū'at al-Fiqhiyyah*, vol. 9, p. 96.
27. Wahbah al-Zuhaylī, *ibid.*, p. 468.

28. *Ibid.*, p. 470.
29. Meaning: *But Allah hath permitted trade* (al-Baqarah: 275).
30. Rāfiq Yūnus al-Miṣrī, *op.cit.*, p. 172.
31. Muḥammad Wafā, *op.cit.*, p. 41; *Al-Mausū'at al-Fiqhiyyah*, vol. 9, p. 96.
- Interestingly, the majority of writers, traditional and contemporary, discuss *bay' al-'īnah* in the category known as *al-buyū' al-fāsidah*, which literally means deficient or irregular sales. This is according to the categorisation made by the Hanafīs. They classify contracts into *ṣāḥiḥ* (valid), *fāsid* (deficient) and *batīl* (null and void). Deficient contract is such a contract which fulfils its pillars but misses one or more of the conditions of validity (*shurūṭ al-ṣiḥḥah*) - see Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuh*, vol. 4, pp. 423-425; Kāmil Mūsā, *op.cit.*, p. 280; Muḥammad Wafā, *op.cit.*, p. 41.
32. Ibn Taymiyyah, *Majmū'at al-Fatāwā*, vol. 29, p. 334.
33. Meaning: *The wife of Zayd ibn Arqam said to 'A'ishah: I have sold a slave to Zayd ibn Arqam by eight hundreds dirham to be paid in the future. I then bought him (the slave) back at a price of six hundreds dirham - in cash. 'A'ishah said: Vile indeed was your selling and vile indeed was your buying. Tell Zayd that he had forfeited God's blessing of his jihad with the Prophet unless Zayd repented.*
- Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuh*, vol. 4, p. 469.
34. In this case, 'A'ishah opined that the sale of the slave by the wife of Zayd ibn Arqam to her husband, Zayd by way of *bay' al-'īnah* is *ribā* and because of that Zayd shall forfeit God's blessing of his *jihad* with the Prophet unless Zayd repented.
- Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuh*, vol. 4, p. 469.
35. *Ibid.*
36. Muḥammad Amīn Ibn 'Abidin, *Hāshiyah Radd al-Mukhtar 'ala al-Durr al-Mukhtar*, Beirut: Dār al-Fikr, 1979, vol. 2, p. 326; Muḥammad ibn 'Abd al-Raḥmān al-Ḥaṭṭab, *Mawāhib al-Jalīl*, 2nd. ed., Beirut: Dār al-Fikr, 1978, vol. 4, p. 391; Muwaffiq al-Dīn Abdullah ibn Ahmad ibn Muḥammad ibn Quḍamah, *Al-Mughnī ma'a al-Sharḥ al-Kabīr*, Beirut: Dār al-Fikr, 1984, vol. 4, pp. 256-257.
37. There are other *ḥadīth* related to the prohibition of *bay' al-'īnah* such as:
- عن الأوزاعي عن النبي صلى الله عليه وسلم أنه قال: ليأتين على الناس زمان يستحلون الربا بالبيع وبينهما حريرة.
- Meaning: *There will be a time where the people deem ribā as permissible with sale using al-'īnah.*
- Muḥammad ibn 'Alī ibn Muḥammad al-Shawkānī, *Nayl al-Awṭār Sharḥ Muntaqā al-Akḥbār*, vol. 5, pp. 233-234.
38. إنما الأعمال بالنيات – *Sahih al-Bukhari*
39. Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuh*, vol. 4, p. 469.
40. Muḥammad Wafā, *op.cit.*, pp. 42-43.

41. Abū 'Abdullāh Muhammad ibn Idrīs Al-Shāfi'ī, *Al-Umm*, Beirut: Dār al-'Ilmiyyah, 1993, vol. 3, p. 95; Muṣṭafā Sa'īd al-Khinn, *Athar al-Ikhtilāf fī al-Qawā'id al-Uṣūliyyah fī Ikhtilāf al-Fuqahā'*, 7th. ed., Beirut: al-Risalah Publishers, 1998, p. 534.
42. Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuh*, vol. 4, p. 469.
43. Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuh*, vol. 9 p. 152; 'Izz al-Dīn Muhammad Khaujah, *Nazariyyat al-'Aqd fī al-Fiqh al-Islāmī*, Jeddah: Majmū'ah Dallah al-Barakah, 1992, p. 85.
44. Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuh*, vol. 9, p. 152.
45. *Ibid.*, p. 153.
46. 'Izz al-Dīn Muḥammad Khaujah, *op. cit.*, p. 85.
47. Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuh*, vol. 9, p. 154.
48. Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuh*, vol. 4, p. 470; There is a legal maxim which says "The crucial factors (the ones that are considered) in contracts are the intentions and not the terms or names"
العبرة في العقود للمقاصد والمعاني لا للألفاظ والمباني
However this maxim is not adopted by the Shāfi'īs. See Ja'fāl al-Dīn 'Abd al-Rahmān ibn Abū Bakr al-Suyūṭī, *Al-Ashbāh wa al-Nazā'ir fī Qawā'id wa Furū' Fiqh al-Shāfi'iyyah*, Ed. Muhammad al-Mu'tasim billah al-Baghdādī, 4th ed. Beirut: Dār al-Kitāb al-'Arabi, 1998, pp. 204-205.
49. Muḥammad Wafā, *op.cit.*, p. 43.
50. Nazih Hammad, *op.cit.*, p. 104.
51. *Hilāh* can be defined as presenting an external permissible deed to void a legal rule (*ḥukm shar'ī*), or using a permissible deed to achieve an unpermissible one. It is translated as stratagem. See Muḥammad Rawwās Qal'ah Ji, *Mausū'ah Fiqh 'Abdullāh Ibn 'Umar, 'Aṣruḥ wa Hayātuh*, Beirut: Dār al-Nafā'is, 1986, p. 312, Muḥammad Rawwās Qal'ah Ji and Hamīd Ṣadiq Qanibi, *Mu'jam Lughāt al-Fuqahā'*, 'Arabi - Inkalīzī, *Ma'a Kashshaf Inkalīzī - 'Arabi bi al-Mustalahāt al-Warīdah fī al-Mu'jam*, 2nd. ed. Beirut: Dār al-Nafā'is, 1988, p. 189.
52. Meaning: *But Allah hath permitted trade and forbidden usury* (al-Baqarah: 275).
53. There were many jurists who condemned the use of *ḥilāh* in any means. Ibn Taymiyyah regarded the use of *ḥilāh* as cheating Allah and insulting His verses. Ibn Taymiyyah, "Kitāb Iqāmat al-Dalīl 'Alā Ibtāl al-Tahlīl - Al-Tarīq al-Awwal: Buṭlān al-Ḥiyal wa Adillat al-Taḥrīm," *Al-Fatāwā al-Kubrā*, Internet edition, <http://feqh.al-islam.com> (5 December 2000).
54. Rāfiq Yūnus al-Miṣrī, *op.cit.*, p. 172.
55. *Ibid.*, p. 174.
56. Saiful Azhar Rosly and Mahmood M. Sanusi, *op.cit.*
57. Al-Qaradāwī, *Islam and Current Issues*, Kuala Lumpur: Securities Commission, 1995.
58. Saiful Azhar Rosly and Mahmood M. Sanusi, *op.cit.*

59. Saiful Azhar Rosly & Sano Koutoub Moustapha, "Bay' al-Dayn and Islamic Bonds Issues in Malaysia," Paper presented in the International Conference, Islamic Economics in the 21st Century, 9-12 August 1999, Kuala Lumpur, p. 1.
See also, Mohd. Daud Bakar, "Isu Syariah Dalam Perbankan dan Kewangan Islam: Perlaksanaan, Potensi dan Cabaran Dalam Pasaran Kewangan Islam dan Konvensional," Paper presented at Seminar on Islamic Financial System, Kolej Islam Darul Ehsan, Shah Alam, 7th August 1999, p. 19.
60. BIMB Securities; Saiful Azhar Rosly and Mahmood M. Sanusi, *op.cit.*
61. Mufti Taqi Uthmani, *Principles of Shariah Governing Islamic Investment Funds*, <http://Islamic-finance.net/research/taqi2.html>.
62. Nazih Hammad, *op.cit.*, p. 164.
63. Md. Akhir Haji Yaacob (trans.), *Al-Ahkām al-'Adliyyah*, 3rd ed., Kuala Lumpur: DBP, 1994, p. 185; Wahbah al-Zuhaylī, *Bay' al-Dayn fī al-Sharī'at al-Islāmiyyah*, Damascus: Dār al-Maktabi, 1997, p. 7.
64. Nazih Hammad, *op.cit.*
65. Ahmad Al-Sharbati, *op.cit.*, p. 162.
66. Richard Thomas, "Islamic Financing for Commodities," <http://www.commodities-now.com/cnonline/sept2000/article1/a1-p1.shtml> (30 November 2000)
67. Wahbah al-Zuhaylī, *Bay' al-Dayn fī al-Sharī'at al-Islāmiyyah*, p. 8.
68. Saiful Azhar Rosly & Sano Koutoub Moustapha, "Bay' al-Dayn and Islamic Bonds Issues in Malaysia," p. 7.
69. Muḥammad Sayyid Tanṭāwī, *Mu'āmalat al-Bunūk wa Ahkāmuhā al-Syar'iyyah*, Cairo: Dār Nahḍah Miṣr li al-Tibā'ah wa al-Nashr wa al-Tawzi', 1997, p. 115.
70. Saiful Azhar Rosly & Sano Koutoub Moustapha, "Bay' al-Dayn and Islamic Bonds Issues in Malaysia," p. 7.
71. See Ismā'il ibn Ḥammad al-Jawhari, *Al-Siḥḥah: Tāj al-Lughah wa-Siḥḥah al-'Arabiyyah*, ed. Aḥmad 'Abd al-Ghafūr 'Attār, Beirut: Dār al-'Ilm li al-Malayīn, 1984.
72. Saiful Azhar Rosly & Sano Koutoub Moustapha, "Bay' al-Dayn and Islamic Bonds Issues in Malaysia," p. 7.
73. Wahbah al-Zuhaylī, *Bay' al-Dayn fī al-Sharī'at al-Islāmiyyah*, p. 23.
74. *Ibid.*, pp. 34-43.
For detailed discussion regarding types of *bay' al-dayn*, refer to Al-Sadiq 'Abd al-Rahman al-Gharyani, *Al-Mu'āmalat Ahkām wa Adillah*, 2nd ed., 1992, pp. 190 and above; Muḥammad Tawfiq Ramaḍān al-Būṭī, *Al-Buyū' al-Shā'i'ah wa Athar Dawābiṭ al-Mabi'alā Shar'iyyatiha*, Beirut: Dār al-Fikr al-Mu'āṣir, 1998, pp. 370-378; al-Nawāwī, *op. cit.*, p. 512.
75. 'Ajil Jasim al-Nashmi, "Al-Ḥuqūq al-Ma'nawiyyah - Bay' al-Ism al-Tijārī" in *Majallah Majma' al-Fiqh al-Islami*, Fifth Round, no. 5, vol. 3, 1988, p. 2296.
Another typical example for *al-ḥuqūq al-māliyyah* is the contract of *hiwālah*, which

- is very closely related to *al-dayn*. The right in this context is the right of the transferor to collect and receive repayment of either the loan or the debt from the transferee as the latter is the debtor to the former. This rights is converted to cash or cash equivalents - See Mohd Daud Bakar, "As-Suyūlah: The Islamic Concept of Liquidity," p. 13.
76. Muftī Taqī 'Uthmani, *Principles of Shariah Governing Islamic Investment Funds*, <http://Islamic-finance.net/research/taqi2.html>.
 77. *Ibid.*
 78. Mohd Daud Bakar, "As-Suyūlah: The Islamic Concept of Liquidity," pp. 19-20.
 79. This view is based on the opinion that trade debts could amount to assets, since the obligation of the trade debtors to pay forms their underlying premise which thereby renders the sale of debt at discount permissible. *Ibid.*, pp. 21-22.
 80. *Ibid.*
 81. *Ibid.*, pp. 20-21.
 82. Saiful Azhar Rosly, *The Role of Shariah Councils in Islamic Banking*, <http://skybusiness.com/drsaiful/sun4.htm> (3 December 2000)
 83. Saiful Azhar Rosly & Mahmood M. Sanusi, *op.cit.*
 84. Peter S. Rose, *The Financial System in the Economy*, 2nd. ed., Texas: Business Publications Inc., 1986, p. 28.
 85. Mohd Daud Bakar, "As-Suyūlah: The Islamic Concept of Liquidity."
 86. Saiful Azhar Rosly, "Bon Islam," *Dataniaga*, February, 1997, Kuala Lumpur: Dewan Bahasa dan Pustaka, p. 45.
 87. Bank Negara Malaysia, *Money and Banking in Malaysia*, Kuala Lumpur: Bank Negara Malaysia (35th. Anniversary Edition 1959-1994), 1994, p. 369.
 88. Peter S. Rose, *op.cit.*, p. 19.
 89. Ian Mattiske, "What is Securitisation," working paper, *The Malaysian Capital Market Conference*, Kuala Lumpur, 28 August 1990.
 90. Mohd. Daud Bakar, "As-Suyūlah: The Islamic Concept of Liquidity."
 91. Mohd. Munir Abdul Majid, "Debt Financing and Securitisation in Malaysia: A Regulator's Perspective," paper presented on the Conference on Securitisation: The Way to Financial Competitiveness, 19 September 1994, p. 6.
 92. Wan Abdul Rahim Kamil, "Securitisation of Interest-Free/Islamic Asset," paper presented at the Asian Dual Banking Conference, organised by the Asia Business Forum, Kuala Lumpur, 26-27th. September 1995, p. 2.
 93. Abdul Murad Khalid, *op. cit.*, p. 7, Wan Abdul Rahim Kamil, *ibid.*, p. 2.
 94. Abdul Murad Khalid, *ibid.*
 95. Muhammad Zahid Abdul Aziz, "Bai' Bithaman Ajil Financing With Notes Issuance: The KLIA Project," paper presented at the International Islamic Capital Market Conference '97, 15-16 July 1997, pp. 1-2.

96. A hybrid Islamic financial instrument refers to a product that contains more than one contract, i.e. in short “one product-many contracts” as opposed to “one product-one contract.” Saiful Azhar Rosly, “The Future of Hybrid Products in Islamic Banking,” <http://skybusiness.com/drsaiful/sun3.htm> (3 December 2000).
97. Abdul Murad Khalid, *op. cit.*, pp. 7-8.
98. Saiful Azhar Rosly and Mahmood M. Sanusi, *op.cit.* Please refer to Appendix A for the details regarding the steps involved.
99. Excerpt from Saiful Azhar Rosly & Mahmood M. Sanusi, *op.cit.*