

The 178th Meeting of the Shariah Advisory Council (SAC) of Bank Negara Malaysia

The SAC of Bank Negara Malaysia at its 178th meeting dated 25 July 2017 ruled on the following:

Conclusion of Incidental *Qard*¹ by Conduct (*Mu`atah*)

SAC Ruling

The SAC ruled that incidental *qard* may be concluded by conduct (*mu`atah*) and flexibility may be accorded by the regulator to allow Islamic financial institutions (IFIs) to conclude such *qard* without *qard* documentation.

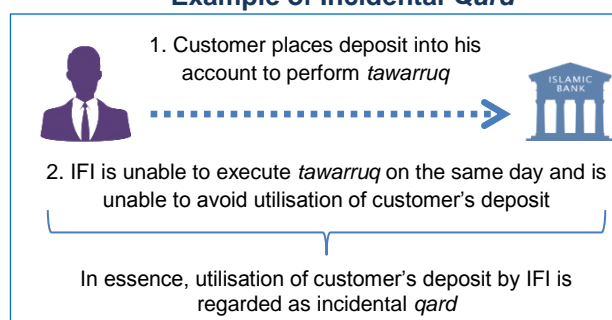
Background

- *Mu`atah* is a transaction concluded by conduct without explicit expression of offer and acceptance (*ijab* and *qabul*) either verbally or through documentation.
- This practice is not appropriate to be adopted in the context of current governance practices in the industry as it is difficult to prove if a dispute arises between contracting parties.
- Therefore, to ensure the transparency of the financial transaction and to preserve the interests of contracting parties, all contracts shall be executed with proper documentation and records.
- However, the requirement for proper documentation of offer and acceptance (*ijab* and *qabul*) especially in the context of the incidental *qard* contract causes IFIs to face operational difficulties.

Shariah Issue

- Whether incidental *qard* can be executed by conduct without *qard* documentation.
(Please refer to **Illustration 1** on the example of incidental *qard*)

Illustration 1: Example of Incidental *Qard*



Key Highlights of the SAC Discussion

What cause the operational difficulties for executing incidental *qard* through documentation?

- The documentation requirements for incidental *qard* may lead to additional costs and affect the operational efficiency of IFIs.
- In addition, incidental *qard* is not the intended contract and will only be pursued in limited circumstances. This raises the predicament of having to provide *qard* documentation when it only occurs incidentally.

What are scholars' opinions on the conclusion of contracts by conduct (without any explicit expression of offer and acceptance)?

1. Preferred view of Shafi'i school

- Conclusion of contract by conduct (*mu`atah*) is not allowed as it does not necessarily reflect the intention and consent of contracting parties.²
- Nevertheless, Shafi'i school allows for the specific application of *qard hukmi* without explicit offer and acceptance (*ijab* and *qabul*). An example of *qard hukmi* is an advance payment made by a party for another with the intention that it shall be repaid.³

¹ In this context, incidental contract refers to originally unintended contract.

² Zakariya al-Ansari, *Asna al-Matalib Syarh Raudh al-Talib*, Dar al-Kutub al-Ilmiyyah, Beirut, vol. 2, page 3. Al-Syarbini, *Mughni al-Muhtaj*, Dar al-Fikr, Beirut, vol. 2, page 117.

³ Zakariya al-Ansari, *Asna al-Matalib Syarh Raudh al-Talib*, Dar al-Kutub al-Ilmiyyah, Beirut, vol. 2, page 141.

2. The view of the majority of Hanafi, Maliki and Hanbali and several Shafi'i scholars i.e. al-Nawawi, al-Mutawalli and al-Baghawi
- Generally, conclusion of contract by conduct is allowed as it is sufficient to reflect the consent of the contracting parties.⁴

Does the conclusion of a transaction by conduct without any explicit expression of offer and acceptance fulfil and reflect the consent of contracting parties?

- Since Shariah recognises the conclusion of a transaction by conduct without explicit expression of offer and acceptance in a main contract, it may also be applied for the incidental *qard* contract. The conclusion of transaction by conduct is sufficient to fulfil the consent of the contracting parties.
- Furthermore, the provision indicates the incidental *qard* in the master agreement, and/or in other documents, and/or current banking practices (*`urf tijari*) would mitigate potential disputes between contracting parties.

Basis of Ruling

- Incidental *qard* is not originally intended contract in a product structure and is only likely to be concluded in certain circumstances such as where an IFI is unable to execute *tawarruq* (original customer's intention) on the deposit placement date and where IFIs face difficulties in avoiding utilisation of such deposits.
- The documentation requirements for execution of incidental *qard* will contribute to operational difficulties and will affect the execution efficiency by IFIs, particularly in terms of higher costs and longer time.
- The opinion of the majority of scholars which allow the conclusion of contracts by conduct is acceptable since it is sufficient to fulfil the consent of the contracting parties. In addition, Shafi'i school allows for the specific application of *qard hukmi* without the need for explicit offer and acceptance (*ijab and qabul*).
- Existence of clauses pertaining to incidental *qard* in master agreement, and/or other documents, and/or current banking practices (*`urf tijari*) indicate the consent of the contracting parties. In this regard, any records evidencing the movement of funds is sufficient to prove the conclusion of such contract.

Implication of SAC Rulings

- This ruling is important to clarify the permissibility on the conclusion of contract by conduct, therefore facilitate operational efficiency of IFIs in serving their customers.
- Based on this ruling, the regulator may accord flexibility to the requirement under paragraph 18.8 of the policy document of *qard* for the conclusion of incidental *qard*.

This ruling is effective immediately upon issuance of this statement.

⁴ Ibn Nujaym, *Bahr al-Ra'iq Syarh Kanz al-Daqaiq*, Dar al-Ma'rifah, Beirut, vol. 5, page 291.

Al-Dusuki, *Hasyiah al-Dusuki `ala al-Syarh al-Kabir*, Dar al-Fikr, Beirut, vol. 3, page 3.

Zakariya al-Ansari, *Asna al-Matalib Syarh Raudh al-Talib*, Dar al-Kutub al-Ilmiyyah, Beirut, vol. 2, page 3.

Ibn Qudamah, *al-Mughni*, Dar al-Fikr, Beirut, vol. 4, page 4.