

## The Application of *Wadi'ah* Contract By Some Financial Institutions in Malaysia

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### Abstract

*Islamic finance emancipated as a replacement for the conventional financial practices that aims only at profit making i.e. capitalist oriented finance. Although both are termed finance, but Islamic finance has two major distinguish features which are: the motive is not profit making only rather seeking the pleasure of Allah's mercy in the hereafter. The second feature is the use of asset backed-up transactions and profit distribution system as agreed at fore hand. These features manifested in the dealings of the Islamic Financial Institutions (IFIs) established to execute the aims and objectives of Islam and Muslims as the vicegerent of Allah on earth and one who are bound by injunctions in all their transactions. In order to achieve these objectives Islamic banks have moved in an alternative bearing from the conventional banks in practices and brands of products. One of these products is rebranding of the conventional savings account with the Wadi'ah account. Therefore, this paper aims at explaining the concept of wadi'ah, the evidences of its legitimacy, conditions, prohibited elements in this transaction, its types and how its application in some financial institutions in Malaysia. Finally, we found out that, modern wadi'ah took a different shape from the original wadi'ah. While original wadi'ah is based on Amanah (trust), contemporary wadi'ah is based on daman (liability) which is more or less loan.*

### Introduction

The term *wadi'ah* is derived from the verb "wada'a" which means to leave, lodge or deposit. Accordingly, *wadi'ah* in the literal sense means leaving something to somebody's custody. In the legal sense, however, Muslim scholars have defined the term *wadi'ah* as follows:

1. Empowerment to someone for keeping the owners wealth explicitly or implicitly. This definition is suggested by the Hanafis.
2. Representation in keeping possession or respectable private good in specific way. This is the view of the Shafi'is and Malikis.

In the light of the above definitions, it is possible to say that *wadi'ah* in the legal sense signifies a thing entrusted to the care of another. The proprietor of the thing is known as *mudi'* (depositor), the person entrusted with it is known as *muda'* or *wadi'* (trustee) and the property deposited is *wadi'ah*. In modern Islamic banking system it has been defined as the consent of the depositor to deposit a certain amount of money with the bank with different terms according to the type of deposit, either deposit base on withdrawal upon demand or deferred to a specific later date as agreed between the two parties and create from this deposit responsibility on the bank to refund a certain amount of money upon demand or upon the fulfilment of the specified period which ever come first (Mawsu'ah al-'Imiyah wa al-Maliyyah li al-Bunuk al-Islamiyyah, 1982). Originally, a *wadi'ah* as stated in the Islamic law and practiced in the Islamic golden period is a contract of trust (*amanah*) and as such the trustee is not subject to liability.

Therefore, its keeping is a meritorious act for a person who discharges the right of a trust, and without a violation of the limits. The limit, as it were, is that the trustee has no right to use the money in trade or investment. In return, the depositor has no right to claim any loss or damages on the trusted property inasmuch as the trustee did not violate the fundamental rule of trustship in Islam. However, as it evident, in the contemporary practices of *wadi'ah* by the Islamic banks specifically in Malaysia as the trustee i.e. the banks, are empowered by the banking laws to authoritatively received the deposits and use it as its own money, invest it in any form and at any period, makes profits from it etc. The terms and conditions of these deposits are assumed to be established between the bank and the clients but the case is in the opposite direction. The bank is the sole maker of the rules and regulations that govern the period of deposits and present it to the customers in the form of accept it or leave it (ibid). Thus, Islamic banks contract of trust is not based on meritorious act as it was practiced during early Islamic period, rather is profit oriented trustee and is subject to liability for any loss or damage to trusted wealth.

### **Evidences of Its Legality**

The concept of *wadi'ah* is not specifically mentioned in the Qur'an. However, as far as trust is concerned in this matter, there are some indications on this concept which can be observed in the following verses:

Those who are faithfully true to their trusts (*amanah*) and to their covenants. And those who strictly guard their prayers. These are indeed the inheritors".(Surah al-Mu'minun 8-10)

Verily, Allah commands that you should render back the trusts to those, to whom they are due." (Surah al-Nisa' 58)

In the former Surah, *Allah* tells us that among those who shall inherit the *firdaus* (paradise) and dwell therein forever are who keep their trusts and covenant, whereas in the latter verse, *Allah* commands that the trusts be returned to their rightful owners. This command includes the rights of *Allah* on His servants such as praying, fasting, giving *zakat*, etc. as well as the rights of the servants on each other, such as what they entrust each other with, including the cases that are not recorded or documented. Thus, the word trust or '*amanah*' is used in the above verses to indicate the importance of fulfilling all types of trusts including that of safekeeping (*wadi'ah*).

Al-Qur'an also states that *Allah* Almighty does not like those who do not fulfill the trust. This is shown in the following verses, namely:

And argue not on behalf of those who deceive themselves. Verily, Allah does not like anyone who is betrayer, sinner ( Surah al-Nisa' 107).

If you (O Muhammad s.a.w.) fear treachery from a group of people throw back (their covenant) to them (so as to be) on equal terms (that there will be no more covenant between you and them). Certainly *Allah* likes not the treacherous ( Surah al-Anfal 58).

In the Sunnah, there are several reported traditions that justify the permissibility of *wadi'ah* (deposit in trust) in Islamic law. Accordingly, these traditions indicated that return of deposited property to their owners is compulsory. Some of this traditions are:

On the authority of *Amriwin bin Shu'ayb* from his father from his grandfather, he said: the Apostle of *Allah* (s.a.w) said: he who accept trust property (as a trustee) has no liability (Sunan Ibn Majah 3/2401).

The above tradition signifies the first known *wadi'ah* as practiced by the Arabians before Islam and as it was retained by the Islamic civilization through permissibility of the Prophet (s.a.w) as an original source of Islamic law. Furthermore, subsequent narrated Prophetic traditions indicated that, there is no reason of using the wealth wish is on trust that it is better to return it rather than becoming liability intentionally. The popular last sermon (preach) of the Prophet at mount 'Arafah serves among evidences on how dangerous the deed of trust is, the tradition read as follows:

On the authority of 'Abdul *Allah* bin Dinar and Sadaqah bin Yasar from Ibn 'Umar who said: this verse was revealed to the Prophet (s.a.w) in Munnah, when he was in the midst of performing his farewell hajj (when the victory of *Allah* came). Then he knew it was nearer to his last time of farewell [...] **Oh you mankind! he who has trust wealth with him should return it back to their rightful owners.** Oh you mankind!, surely al-Shaytan (devil) is desperate to be worshiped in your cities at the end of time, surely he had pleased or made easy for you offensive, abusive, and disrespectful deeds, therefore, be careful and cautious of your religion away from graves and ruinous deeds [...] (Musnad al-Bazzar/vol. 12/6135).

In the above long *hadith* that motivated and stimulated the companions that were present when it was delivered. The presentation only advised on keeping and returning of trust property to their rightful owners. Accordingly, it warns on following ones' carnal desire by breaching *Allah's* commandments which may lead to ruins and punishments. Muslim jurists unanimously agree upon the permissibility of *wadi'ah* since people need this sort of transaction. This is because it is quite impossible to everyone to keep all his property with him all the time. However, contrary to the above undisputable evidences, is what we witness in the present applications of *wadi'ah*. Though, excellent contemporary academic works have been done on the activities of Islamic Financial Institutions (IFIs), albeit under major inaccurate legal interpretations on *wadi'ah*, most of these literatures have said little or nothing concerning *wadi'ah* in Islamic banks. In fact, the discussions are focused mainly on *Mudarabah*, *Murabahah*, *Ijarah* etc. careful, observation by the researchers, we found out that, these are major transactions which pull money at higher rate into the banks on the long run. Whereas, *wadi'ah* are more or less attractive because it has short term investment purpose.

Perhaps, this evidence may not totally be true, as there are other modes of contemporary *wadi'ah* contracts which are specific and are arranged on long term bases. One of the articles described above is that of the popular and leading gold dinarists Vadillo (2006) discusses the extent of intellectual deterioration that ravel the Islamic finance in both academic and practices. He pointed out the manouvering of Islamic law by the financial 'ulama' (scholars), in coloring *riba* (interest/usury) with beautiful adjectives like mark-up, hibah etc. An excellent article of all time, which nullified all forms of *riba* and unjustified transactions of the Islamic banks. However, the article was so limited by overlooking and ignoring the issues of common deposits based on original trust deposit as practiced in the Islamic golden era, which is the source of other contracts of financing. Additionally, misconceptions and misunderstanding in differentiating between *qard* (loan) and *wadi'ah* is ravelling most of the Islamic banks and Islamic windows of the conventional banks. An example of this is OCBC Bank (2006) in marketing their Islamic banking window published a two pages questions and answer concluding their understanding of *wadi'ah* as originally based on *al-Daman* (liability). Whereas, in our earlier quoted *ahadith* we pointed out that the early practiced *wadi'ah* do not permitted the usage of the trust item, thus automatically eradicating responsibility of liability. Logically, in Islamic law whatever ends on *daman* (liability) on the trustee is amounting to loan not trust anymore.

Ascertaining the fact of our conclusion Engku (2007) concluded that the contemporary understandings and practiced *Wadi'ah Yad Daman* is simply more like *Qard* (loan), thus all principles of loan would be applicable. This is one of the major weaknesses of the present practices in the Islamic banking which makes no difference between its activities and the conventional banking activities save names or brands of the products or services as the case may be. Lastly, Chapra & Khan (2000) discusses in their regulation and supervision of Islamic banks by referring to the early Muslims transactions that are interest free as to have started from profit-sharing transaction. In this good article we expected the discussion to start with *wada'* (deposits) based on trust which was in the earlier practices during the period of the Prophet. *Wadi'ah* (trust goods) were allowed to be used with the consent of the owner therefore, the situation will shift from trustship to borrower and lender's relationship, it may be on reward which will amount to *riba* (usury). The most interesting part of cautions on the usage of trust property is the tradition reported on lost but found items.

On the authority of Yazid Master of al-Munba'ath that he heard Zayd bin Khalid al-Jahni a companion of the Prophet (s.a.w) saying: the Prophet was asked about lost but found gold or silver, thus, the Prophet said 'know its suitability (benefits) and bitterness (liabilities) then find or wait for the owner for a year, if no one ask after it, then spend/use it, however, you are just a trustee for it, whenever the owner come for it, do return it to him'. (Sahih Muslim, 5/4599).

The Prophet, in the above tradition accepted the usage of lost but found gold or silver, for an important reason that, its need special care during the waiting period. If the owner fails to turn-up after a year then the trustee can use it but he will be liable for any loss or damages that may arise out of his action. If the Islamic banks and financial scholars create analogy base on this hadith, though inappropriate analogy but at least there is an indication of usage of trust property. To the best knowledge of the researchers there is no text which compromised the usage of property on *wadi'ah* save the above tradition which had been reported through several chains. The four prominent schools of jurisprudent which we shall discuss in the subsequent paragraph were of different views on the issue of usage of trusted wealth not even like money (cash).

### ***The Conditions To Wadi'ah***

For a proper understanding of the conditions to *wadi'ah*, it is crucial to mention the pillars of this transaction in the first place. This is because every single contract in Islamic law has its own pillars which stipulate certain conditions to be complied in order to be valid.

According to the majority of jurists, *wadi'ah* has three pillars, namely:

1. The declaration (offer and acceptance)
2. The both parties involved (depositer and depositories).
3. The deposit itself.

The Hanafis, however, argued that the pillar of *wadi'ah* is only the declaration, while the other two pillars as suggested by the majority of jurists are merely conditions which must be met in order to complete the declaration. In any case, the discussion on the conditions to *wadi'ah* within the scope of the three above elements is inevitable (Al-Kasani, 587H/1166).

#### **1. Offer and Acceptance (Declaration)**

The jurists unanimously agreed upon the mutual consent as a original rule for every single contract. Thus, *wadi'ah* is not valid until there is a mutual consent between the involved parties. This mutual consent is expressed by offer and acceptance.

Offer is an indication of willingness to leave his property to somebody's custody for safekeeping. (e.g. if one person says to another: "I leave this item with you for safekeeping") (ibid). With regard to acceptance, it simply means an act whereby the trustee agrees to undertake a trust. Thus, the acceptance may be verbal (e.g. "I agree to keep your item safely"), or it may be implied through physical receipt and silence. Acceptance of a deposit, according to the majority of jurists is not obligatory at all, but there are jurists who hold that it is obligatory when the depositor cannot find anyone else with whom he can deposit his property.

## **2. Trustee and Depositor**

The *wadi'ah* contract must have at least two parties involved i.e. the depositor and the trustee. In this regard, the jurists are unanimous that the depositor and the trustee must be the persons who have legal capacity. According to the Hanafis, what is intended by attaining legal capacity here is one who is sane and reaching the stage of discretion (*mumayyiz*) even though he does not reach the age of puberty, whereas according to the majority of jurists such as al-Shafi'i and others, he must be sane and reaching the stage of discretion and the age of puberty as well (ibid). Based on the confirmation of contractual capacity in the Qur'an "And do not give the immatured ones their money which Allah has entrusted to you, then if you find they (the minor/immatured) have sound judgement, hand over their property to them." (Surah al-Nisa': 5-6). Thus, one should not accept the deposit on the part of a minor or an insane, though one incurs all the obligations of a true depository if one does so. On the other hand, a minor who has accepted a deposit is not responsible for it in case of loss, unless that loss is caused by his own personal fault.

## **3. Subject Matter of Contract (Deposit Itself)**

The item of deposit must be a valuable property in Islamic law. What is meant by this is the deposit property is valuable for a Muslim and subject to transactions. This is because some property is valuable to non-Muslims but not Muslims, for example dead animal, unslaughtered cattle, wine, pork and other forbidden things. The item of deposit also must be a form of property that can be possessed physically (ibid).

### **The Prohibited Elements In Wadi'ah**

The jurists collectively maintained that the trustee is not liable, unless he transgresses or wilfully neglects the responsibility and the level of liability differs in different cases whether the act amounted to transgression. Having said that, the prohibited elements in *wadi'ah* can be noted out in a range of cases as follows:

#### **Utilising the Deposit.**

All the jurists are unanimously agreed that the trustee is supposed to guarantee the deposit if he utilizes it. They however, differed in their rulings in this issue when the trustee utilizes the deposit and then returns something identical, or utilizes it for his expenditure and then restores it. According to Malik, the trustee is absolved of the liability, in the case of identical property, when he returns it (Malik, 179H/759 A.D), while Abu Hanifah said that if he returns the property itself before spending it, he does not compensate, but if he returns something identical, he is liable. Al-Shafi'i said that he is liable in both cases (Al-Babarti, 786H/1365; Al-Zayidi, 800H/1379; Ibn Najim al-Misri, 970H/1549; al-Haskafi, 1386H/1965). In sum, it is possible to conclude that the jurists who portray the act as prohibited element in *wadi'ah* hold him liable for it just for moving it with the intention of utilising it, while the other jurists who permit the act, do not hold him liable as long as he returns to the depositor something identical.

#### **Travelling with the Deposit.**

The jurists are not unanimous in their rulings in this issue. They have different opinions regarding the trustee's right to travel with the deposit, and the resulting rulings if he does. Their opinions can be classified into 4 groups as follows:

1. Abu Hanifah stipulated that a trustee has the right to travel with the deposit, provided that the depositor did not explicitly forbid him from doing so, and as long as the travel route is safe. Thus, he ruled that the deposit contract was unrestricted by any geographic area unless there are such restrictions explicitly required by the depositor. Thus, if the trustee travels with the deposit, and it is adversely affected by a natural cause, he does not guarantee it. The wordings of the contract is very important and promise of future return of the deposit signifies taking obligation upon oneself amounting to a loan (Al-Mawsala, 2005).

2. Abu Yusuf and Muhammad, the disciples of Abu Hanifah however, stipulated that the trustee is not allowed to travel with the deposit if its transportation is difficult or costly. In this regard, they ruled that the depositor might be exposed to an additional cost of retrieving his property if the trustee were to die while travelling with the deposit. However, if the deposit can be transported with minimal effort and cost, the trustee is allowed to travel with it (Al-Babarti, 786H/1365).

3.The Malikis stipulated that a trustee has no right to travel with a deposit, unless he has been given the deposit on a journey. Thus, they ruled that under normal circumstances, the trustee must keep the deposit in the same city. In this case, he is allowed to re-deposit it with a trustworthy resident of that city, and he bears no guaranty for the deposit, whether or not he has the ability to deliver it to legal authorities (Malik, 179H/759 AD).

4.The Shafi'is and Hanbalis also stipulated that a trustee is not allowed to travel with a deposit. However, they ruled that if he needs to travel, then he must return it to its owner, his legal agent, or legal authorities, in that order. The ruling is based on the view that the trustee holds the deposit as a voluntary uncompensated act, and thus he is not bound to keep it. In this regard, if he cannot deliver the deposit to its owner or his legal agents, legal authorities can play the role of *de facto* legal agents of the owner. If the trustee were to travel with the deposit, they ruled that he would thus guarantee it, since travel adds a risk factor to his possession, whether or not the travel route is considered safe. They supported their argument that all types of travel involve additional risk with the saying of the Prophet s.a.w.: "The traveler and his property are exposed to risk of perishing, except to the extent that Allah protects them" (Al-Sarkhisi, 483H/1062). From the above discussion, it appears that travelling with the deposit is prohibited in the view of the majority of jurists.

#### **Leaving the Deposit of Another to Someone Else.**

The trustee does not have the right to entrust the deposit of another to someone else, without an excuse. According to Abu Hanifah however, if he entrusts it to someone for whom maintenance is obligatory on him, he is not liable as they are the same as his family (Al-Zabidi, 800H/1379). While according to Malik, he has a right to entrust what has been entrusted to him to members of his family, those whom he trusts and who are under his authority like his wife, child, servants and those who resemble them. In case the trustee entrusts the deposit of another to someone else with an excuse such as threat of fire or drowning, he does not need to guarantee the deposit. This is because the trustee is deemed to have given implicit permission for taking such measures to ensure the safety of the deposit.

#### **Using the Deposit for Trade and making Profit**

The jurists differed in their rulings regarding profit gained from trading the deposit. Malik, al-Layth, Abu Yusuf and a group maintained that if the trustee returns the property, the profit is permitted for him, though he was a usurper besides being a trustee (Al-Kasani, 587H/1166; Al-Mawaq, 897H/1476; Al-'Abdari, n.d). Abu Hanifah, Zufar and Muhammad maintained that the trustee has to pay back the principal and give away the profit as charity (Al-Kasani, 587H/1166). A group said that both the principal and the profit belong to the owner of the deposit. Another group said that he has an option between the principal and the profit. Yet another group said that the sale occurring in this trade is void.

#### **Mixing Deposits with Other Properties**

If the trustee mixes the depositor's property with his own in a manner that allows him to identify them separately, he should continue to keep them identified, and bears no other responsibility. On the other hand, jurists stipulated differently in the case where the mixture makes it impossible to identify the deposit separately:

1.Abu Hanifah maintained that mixing a deposit with his own property, or mixing two deposits, in a manner that makes it impossible to identify the deposit separately, then he must guarantee it with its equivalent. This lack of identification clearly applies to the deposit that looks similar (e.g. money, grains, and other goods measured by weight and volume). In all such cases, Abu Hanifah said that mixture is equivalent to causing a defect in the deposit, thus he must guarantee it with its equivalent. This ruling applies to mixing items of different genus (e.g. wheat with barley), or the same genus (e.g. barley with barley) (Al-Sarkhisi, 483H/1062).

2.Abu Yusuf and Muhammad said (Al-Kasani, 587H/1166) that the depositor has an option to do one of three things in those cases, namely:

- (i) He may enforce the trustee's guaranty to return an equivalent amount
- (ii) He may take half of the mixture, or
- (iii) He may force a sale of the mixture and share the price.

This ruling is based on their view that the deposit in fact continued to exist intact, but mixture only prevented him from collecting it.

In all those cases, if the trustee were to die without identifying the deposit in the mixture, then, if the deposit is known, it must be returned to the depositor. This is based on the Hadith: "Whoever knows the identify of his property, he should collect it". If the deposit cannot be identified however, then it is guaranteed and established as a liability on the trustee's estate. In this case, the trustee would have died with the deposit unknown, which is legally equivalent to causing a defect.

### **Violating Depositor's Conditions**

In case a depositor makes it a condition that the trustee holds the deposit in a specific place (e.g. a particular house, or a particular box). Then, if the trustee places the deposit in a different place without the depositor's permission, most jurists agree that he guarantees it if he placed it in less secure place, and does not guarantee it if he placed in a place that is equally or more secure. On the other hand, jurists differed in their assessments if the depositor explicitly forbade the trustee from placing the deposit anywhere other than the one stated in the condition:

1. The Hanafis, Malikis, and Shafi'is maintained in this case that the restriction to a specific place does not serve any purpose. However, they also maintained in this case that the trustee guarantees the deposit if he places it in a less secure place, but does not guarantee it if he places it in an equally secure or more secure place (Al-Margiyani, 593/1172; Ibn Rushd, 1988).

In addition, the Malikis maintained that the trustee guarantees the deposit if he moved it from one city to another (Ibn Rushd, 1988). While, the Hanafis explicitly stated that the trustee does not guarantee the deposit if he violates a depositor condition not to move the object and not to give it to his wife. They argued that the trustee has no option but to leave the object with his wife if he needs to leave the house (Al-Kasani, 587H/1166). Thus, even if the condition can be beneficial to the depositor, it cannot be met by the trustee, and hence he does not guarantee the deposit in this case.

2. Most of the Hanbalis ruled that the trustee in this case guarantees the deposit regardless of place he moved it, and no matter how secure the new place may be. Thus, they argued that the trustee in this case would have violated the depositor's condition without any benefit in doing so. In this regard, violating the depositor's condition without any reason is not permissible (Ibn Qudamah, 620H/1199).

However, if he felt that he needed to move the deposit to a safer place for fear that it may perish, then they ruled that he should move it. Moreover, they ruled in this latter case that if he does not move it and his fear of perishing is materialised, he would then guarantee it (ibid). Thus, they render the depositor's condition not to move the object to be concerned primarily with its safety. If that safety can best be secured by moving the deposit, then the trustee should do so, and the condition is regarded.

### **Contemporary Views and Practice of Wadi'ah**

Axiomatically, all complex modern transactions in Islamic banks are trademarked on the classical jurists definitions and interpretations of these transactions. *Wadi'ah* in the context of modern Islamic banks is trademarked on the early *wadi'ah* which was practiced by the Prophet (s.a.w) himself. However, contemporary jurists claimed that, modern business transactions are complex than it was during the Islamic golden period, and as such, necessitate extension of Islamic law to the new business issues. Encouraging and rewarding deed as it is, the statement above is struggling between what it should be and what it is or between substance and form. The practices in the Islamic banks needs further investigation and the branding methodology needs revisitation. As it evident, the application shows the contemporary jurists' preferring form over substance. With this method, emphasis is laid more on branding or trademarking while less attention will be given to the substance of the transactions. For the sake of brevity, in this section we are going to discuss types of contemporary *wadi'ah* products in modern Islamic banks, the modern mechanism of *wadi'ah*, specific focus on Malaysia Islamic banks practices etc.

#### **Types of Contemporary Wadi'ah**

In terms of application of *wadi'ah*, it is of two kinds, namely:

##### **1. Wadi'ah Yad al-Amanah**

Original form of *wadi'ah* is amanah where it is charitable and rewarded. Liability will be incurred according to rulings of liability. The hand in keeping is basically a trust to keep.

##### **2. Wadi'ah Yad al-Damanah (Safekeeping with Guarantee)**

Contemporary practice used in Islamic banking system where the deposits are the source of funds for the bank. These funds are used for banking investment activities. The hand in getting the deposits is liability to give back since the deposits have been mixed or used for investment activities. It may be considered as loan to the bank. The bank may give *hibah* at its discretion.

In one of the traditions of the Prophet that we quoted before, it was clearly stated that original *wadi'ah* does not attract penalty of any kind. Accordingly, the trustee must not use the trust property unless with prior agreement of both parties. When there is any agreement of usage it has become 'Ariyah. Furthermore, no return is expected as the agreement is not for partnership rather it is deposit in trust, especially when the deposited article is cash.

All the four prominent schools of jurisprudent totally forbid the use of cash as it will be extremely impossible for the trustee to refund the exact cash which was deposited by the customer, if he uses it it becomes loan. Another important thing is the statement of the agreement which must be on keeping without any future promise of return or gift. The modern practice has all the above mentioned forbidden items, i.e. it is cash, there is promise of returning of the cash with some profit, the bank guarantee the returning of the deposit at any circumstances. Whereas, in original *wadi'ah*, the trustee, if he discharge his duty as prescribed under Islamic law is not liable for any loss or damages to the deposited item. The jurists argued on the ground that, Malikis and some Hanafis have some reserve as to the use of the trust goods but cannot be extended to cash by analogy with the condition that exact and equivalent or stereotype is impossible to be replaced. Based on the above arguments Engku (2007) concluded that, the modern *wadi'ah* method/mode is loan and all laws related to loan must apply. Similarly, in Islamic jurisprudent encyclopedia it was stated that if the deposit is something that would be spendable like cash the trustee is liable of any liability that may arise because it is considered as loan.

### **Mechanism of Contemporary Wadi'ah**

In the modern application of *wadi'ah* in the banking system it can be elaborated as a contract (*'aqd*) between the owner of the asset (customer) and the custodian (bank) to safeguard the asset on behalf of the customer. This is applicable to current and savings accounts.

#### **1. Savings Accounts**

Savings deposit accounts operate in different ways. In some banks, the depositors allow the banks to use their money but they obtain a guarantee of getting the full amount back from the bank. Banks adopt several methods of inducing their clients to deposit with them, but no profit is promised. In others, savings accounts are treated as investment accounts but with less stringent conditions as to withdrawals and minimum balance. Capital is not guaranteed but the banks take care to invest money from such accounts in relatively risk-free short-term projects. As such lower profit rates are expected and that too only on a portion of the average minimum balance on the ground that a high level of reserves needs to be kept at all times to meet withdrawal demands. **For instance, the Bank Islam Malaysia Berhad defines savings deposits in the following way:**

The Bank accepts deposits from its customers looking for safe custody of their funds and degree of convenience in their use together with the principle of *Al-Wadi'ah*. The bank requests permission to use these funds so long as these funds remain with the bank. The depositors can withdraw the balance at any time they so desire and the Bank guarantees the refund of all such balances. All the profits generated by the Bank from the use of such funds belong to the portion of the Bank. However, in contrast with the current account, the Bank may, at its absolute discretion, reward the customers by returning a portion of the profits generated from the use of their funds from time to time.

It must be pointed out that any return on capital is Islamically justified only if the capital is employed in such a way that it is exposed to a business risk. If savings depositors are guaranteed that their amounts will be refunded in full, if and when they want them, as is the case with traditional banks, then, they are not participating in a business risk. Under these circumstances, it has to be made clear that savings depositors are not Islamically entitled to any return. If an Islamic bank refunds some portion of the profits generated from the use of saving deposits to the depositors, it is absolutely at the discretion of the bank concerned and it must be treated as a gift. It is quite clear from the above quotation that this is exactly the course of action adopted by the Bank Islam Malaysia Berhad. Benefits given in this account: Token (*hibah*) is given every month based on Bank's discretion, Free savings passbook, Bankcard facilities, Salary crediting & sweeping facility, Standing instruction facility, Zakat (tithes) on the savings paid by the Bank, Electronic Banking Facilities, ATM Cash withdrawal

#### **2. Current Accounts**

All Islamic banks operate current accounts on behalf of their clients: individuals and business firms. These accounts are operated for the safe custody of deposits and for the convenience of customers. The main characteristics of these accounts, as operated by Islamic banks, are as follows:

(i) Current accounts govern what is commonly known as call deposits or demand deposits. These accounts can be opened either by individuals or companies, in domestic currency or in foreign currency if the bank is allowed to operate in the foreign exchange market and the holding of current balances in foreign currency is legal under the law of the land.

(ii) The bank guarantees the full return of these deposits on demand and the depositor is not paid any share of the profit or any other return in any form.

(iii) Depositors authorize the bank to utilize their funds at the bank's own risk. Hence, if there is any profit resulting from the employment of these funds, it accrues to the bank and if there is any loss, it is also borne by the bank.

(iv) With these accounts, there are no conditions with regard to deposits and withdrawals.

(v) Usually account holders have a right to draw cheques on their accounts.

There are two dominant views about current accounts. One is to treat demand deposits as *amānah*. Thus, these deposits are handed over to the bank by depositors as a trust and the bank does not have the authority to use them without first obtaining the specific permission of the owner of the funds. The other view is to treat demand deposits as *Qard Hasan*. According to this view, money deposited in these accounts is a benevolent (or interest free) loan (*Qard Hasan*) from the depositor to the bank. The bank is free to utilize these funds at its own risk without any return to the depositor and without needing any authorization because in the case of *Qard Hasan*, the debtor does not need the specific permission of the creditor to use the borrowed funds. The debtor owes the creditor only the principal amount borrowed. This condition is fulfilled as the amount deposited in these accounts is fully underwritten by the bank.

## Mechanism of Wadi'ah in Bank Islam Malaysia Berhad

### 1. Savings Account

Bank Islam offers the Wadi'ah Savings Account facility for customer to save his money. Based on the *wadi'ah* contract, this facility provides hassle – free safekeeping of customer's money and allows easy access for withdrawals whenever needed.

This account is divided into 3 different types, namely:

1. Individual Account - provided for those who are 12 years old and above.
2. Entrust Account – provided for children under 12 years old, opened with an individual adult.
3. Joint Account – provided for those who want to open the account jointly with another person

### 2. Current Account

Bank Islam offers the Current Account facility for safe custody of customer's cash. This facility, which is based on the *wadi'ah* contract, enables customer to wisely plan his monthly expenditure and allows him to manage his financial needs without involving cash. This account consists of several types, they are: Individual Account, Joint Account, Partnership Account, Government Account, Association Account, Private Company Account, Company Account. Benefits given in this account: Token (*hibah*) is given every month based on Bank's discretion, Free cheque book holder Bankcard facility, Salary crediting & sweeping facility etc.

## Conclusion

*Wadi'ah* in Islamic law is a trust-oriented transaction that is not subject to liability unless the trustee violates the limits. Thus, its keeping is a meritorious act. Currently however, some financial institutions in this country such as Bank Islam, Bank Muamalat and Maybank apply *wadi'ah* contract to current and savings accounts. The contract (*'aqd*) is between the owner of the asset (customer) and the custodian (bank) to safeguard the asset on behalf of the customer and at the same time the bank can use the asset for investment. Thus, this paper suggests that *qard* or loan instrument for current account and *mudharabah* instrument for the saving and fixed investment account are more appropriate to be applied. The customer is to lend his money to the bank and the bank is the borrower. This is the opinion of the majority of scholars and the official position of Fiqh Academy of OIC based in Jeddah ruling no 86 (9/3) in its 9<sup>th</sup> meeting held in Abu Dhabi 5 Zulqedah 1415H. The council hereby decides that the money deposited by the customer in the current account whether at Islamic banks or conventional banks to be *qard* i.e loan and as such the bank will be liable (*yad dhaman*) to return the amount to the customer whenever the customer requires so.

This can be supported and justified by the following arguments:

1. The depositor who deposits the money in a bank knows that the bank will actually mix up the deposit with other money and will utilize and invest the money. The depositor may give consent to the bank to utilize his money. This takes the hukm of *qard* and not *wadi'ah* (safe keeping).
2. The bank owns the deposited money and deal in it as it likes, as such it is regarded as *qard*, not *wadi'ah*. As a matter of fact, in *wadi'ah* contract, the trustee does not own the deposit, and it is not permissible for him to deal in it. As such, to call it as *wadi'ah* is rather a metaphor not real because the conditions and salient features of *wadi'ah* are not fulfilled.
3. It is assumed that the bank will guarantee the deposits where it will return the same to the depositor. If it is to be treated as *wadi'ah*, the bank shall not guarantee to return the same amount, since indebtedness and guarantee contradict the trust (*wadi'ah*).

It is clearly upheld in Islamic law that if the depositor or the one who request somebody else to safe keep his belongings and making a condition that the later should guarantee the return the same, the contract of *wadi'ah* is void. It is also held that even if the trustee says: "I guarantee to return the same to you", he is not bound so unless it is because of his willful negligence. This is because to guarantee the deposited item which based on trust (*amanah*) is not valid in Islamic law.

One might argue that the depositor at the time of depositing his money into current account never intends to lend the money to the bank, neither to share with the bank the profit generated by the bank from the utilisation of his money and others. His aim is to save his money and get it back when he needs it, as such it is regarded as *wadi'ah*, not the *qard*. But this assumption can be refuted by the fact that the reason why depositors place their money at the bank is to save the money and at the same time gets a guarantee from the bank to return his money to him whenever needs it, and this is actually *qard*, not *wadi'ah*. Debt is defined as giving money to others to benefit from it (to consume it) where the debtor will return to the creditor the same amount. (al-Insaf, 12/323). It is interesting to note that al-Zubair bin al-Awwam used to tell his depositor who came to him asking him to keep their money, he told them that he will treat it as *qard* (loan) where he will use the money and return to them the amount he owed them when they want it back.

As regard to saving and fixed investment account, it is argued that *hibah* given by the bank to the depositors is based on the bank's discretion, and as such the bank is not bound to give *hibah* to the depositors. However, a question arises as it is the practice of the industry where the depositors will expect returns from their placement of deposit, and it is very common that the bank will definitely distribute *hibah* to the depositors, which is often to be tied up with the capital. This is actually similar to giving interest as it is the practise of the conventional bank. And it is clearly expressed in the legal maxim, "whatever is known by custom is tantamount to stipulated condition in a contract". This would explain why some Islamic banks like Islamic bank of Jordan has introduced *Mudharabah* instrument not only in saving and fixed investment accounts but also in current account. If saving is based on *Mudharabah* principle, providing that all the conditions of *Mudharabah* are met and applied, then the depositors can have a peace of mind to expect return from his investment and at the same time it must be borne in mind that they will also bear loss as the profit can only be expected but not guaranteed.

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