

The *Bay' al-Inah* Controversy in Malaysian Islamic Banking

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Abstract

The current practice of Islamic banking in Malaysia has been criticised as insufficiently different from conventional banking. One of the foci of this criticism is the application of *bay' al-Inah* in creating a number of so-called Islamic financing products. *Bay' al-Inah* is a sale contract with immediate repurchase. It takes place when a person sells an asset in credit and immediately buys back the asset in cash at lower price. The classical jurists were in disagreement in assessing the legality of the contract. It was prohibited by majority of jurists including the Hanafis, Malikis and Hanbalis, but allowed by al-Shafi'i (d. 204/820). The present article examines the classical jurists' assessment of the contract and then evaluates the justifications of the Malaysian National Shari'ah Advisory Committee (NSAC). As a case study, this paper analyses the application of *bay' al-Inah* in inventing credit card of Bank Islam Malaysia Berhad (BIMB). Understanding the NSAC's justifications will help us comprehend their methodology and approach when approving other Islamic banking products in the country.

Keywords: Islamic Banking, *Bay' al-Inah*.

Introduction

Islamic banking institutions operate in a very competitive and demanding industry. In order to survive, they must be able to meet their customers' sophisticated financial needs. Product innovation is seen as the key success to maintain current business growth. Interestingly, the development of new products happens more extensively in the banking institutions of South-East Asia when compared to innovation within the Middle East. Malaysia is one of the countries where new products are regularly developed. The country became the first to establish the Islamic Inter-bank Money Market (IIMM), the full-fledged Islamic stock broking company, the corporate *sukuk* (Islamic bond) and the Islamic unit trust. However, the advancement of Malaysian Islamic banking industry has raised controversial issues. This is because the advancement is based on the application of *bay' al-Inah* contract which has been much criticised by most of the Middle East *shari'ah* scholars.

Because of the *bay' al-Inah*, Malaysian *shari'ah* scholars are viewed as adopting a more lenient or relaxed approach when compared to their Middle East counterparts. They seem very pragmatic in assessing the compliance of new banking products to the principles of Islamic commercial law. The present article attempts to understand thoroughly the local *shari'ah* methodology by analysing their justifications in permitting the practice of *bay' al-Inah* in the so-called Islamic credit card.

The article consists of five main sections. After the introduction, section two examines the classical jurists' assessment on the legality of *bay' al-Inah*. It analyses the roots of disagreement between the jurists of the four major *sunni* schools of law over the permissibility of the contract. Understanding the roots of disagreement is essential as the basis in evaluating the Malaysian *shari'ah* scholars' justifications. Then, section three describes how the contract of *bay' al-Inah* is put into practice to invent the Islamic credit card. After that, section four analyse the local *shari'ah* justifications in accepting the *bay' al-Inah*. A discussion of their methodology and approach in solving current banking and financial problems set forth the rest of the section. Lastly, section five concludes the preceding discussion.

The Rules of *Bay' al-Inah* in the Classical Jurists Legal Thought

Bay' al-Inah is a sale contract with immediate repurchase. The term *bay' al-Inah* was normally used by the Hanbali and Maliki jurists. According to some Maliki, *al-Inah* was derived from the root word of *al-'aunu* which means assistance. It is called *bay' al-Inah* because the seller assists the buyer in obtaining his need. Other Maliki jurists were of the opinion that *al-Inah* was derived from the word *al-'ain* which refers to cash. According to this view, it was called *bay' al-Inah* since the main purpose of executing the contract is to obtain cash (al-Hatab, 1992, pp. 404). In *Kitab al-Umm*, al-Shafi'i did not use the term *bay' al-Inah* but he explained the contract as one of the problems of deferred sale (al-Shafi'i, 1973, pp.78). Similarly, al-Marghinani (d.593/1197) for the Hanafis discussed the contract under the sub-topic of void sale (al-Barbati, n.d. pp.433). Although the jurists adopted different approach in discussing the contract, they had similar understanding on its basic concept. According to them, the contract takes place when a person sells an asset in credit and immediately buys back the asset in cash at different price.

The classical jurists differed in determining the assessment of *bay' al-Inah*. The Hanafis, Maliki and Hanbali were of the opinion that the contract was unlawful. On the other hand, the Shafi'i had two rules in this matter. According to al-Shafi'i, the contract was permissible. However, some later Shafi'i such as al-Nawawi contradicted the eponym's rule and viewed the contract as discouraged (al-Ramli, 1984, pp.477). Generally, the jurists who ruled against *bay' al-Inah* justified their assessment on two main explanations. Firstly, the prohibition is indicated in the fatwa of Companions (*athar*) and *hadith* and secondly, the practice of the contract was seen merely as *hiah* (legal stratagem) to legalise *riba*.

The most commonly quoted legal evidence in this matter was an *athar* narrated from Aishah. The *athar* was used by the Hanafis, Maliki and Hanbali as the main legal evidence to rule the impermissibility of *bay' al-Inah*. It was reported that Aishah was asked about a transaction

conducted by the slave of Zaid bin Arqam. Acting on behalf of her master, the slave sold another slave of Zaid at 800 dirham in credit to Ata' and bought back the slave at 600 dirham in cash. Ruling the transaction, Aishah said, "*it was very bad sale and inform Zaid that his conduct has eliminated all his rewards for participating in jihad with the Prophet if he does not repent*". According to the majority of jurists, Aishah's assertion clearly indicated that *bay' al-Inah* was an unlawful contract.

In addition to the *athar*, the Hanbalis justified their ruling based on a *hadith* which showed the condemnation of the contract by the Prophet. Narrated by Ibn Hanbal on the authority of Ibn Umar, the Prophet was reported as saying:

'If people are busy with counting every single dinar and dirham, trading based on al-Inah, following behind cows (i.e. farming activities), and abandoning the duty of jihad for the sake of Allah, Allah will make misfortune befall them, and will not remove it from until they return to their religion' (Ibn Qudamah, 1999, pp.260)

It should be noted however, the *hadith* was only used by the Hanbalis to support their ruling regarding *bay' al-Inah*. On the other hand, the Hanafis and Malikis did not use the *hadith* as legal evidence, probably because its chain of narrators was weak. One of the narrators, namely al-Amash, was considered to be a less than well-qualified narrator. The traditionists doubted that al-Amash had heard the *hadith* from the previous narrator, named as Ata'. Despite admitting the weakness, the Hanbalis accepted the legality of the *hadith* by supporting it with another chain of narrators from Abu Dawud. Abu Dawud's chain of narrators included Haiwah bin Shuraih, Ishaq bin 'Abd Rahman, Ata', Ibn Nafi' and Ibn Umar. According to Ibn al-Qayyim (d.751/1350) of the Hanbalis, Ishaq bin 'Abd Rahman was viewed as a better qualified narrator whom scholars of the Egyptian school relied on as compared to al-Amash. In addition, the chain of narrators of Abu Dawud also confirmed that the *hadith* was transmitted through Ata'. It testified that Ata' heard the *hadith* from Ibn Nafi', the most reliable narrator and the life-long servant of Ibn Umar. Hence, considering the two chains of narrators, the stipulated *hadith* is categorised as "fine" and valid to be used as legal evidence (Ibn Qayyim, 1973, pp.166). The *hadith* clearly indicates that the practice of *bay' al-Inah* was staunchly condemned and thus prohibited.

In justifying his rule, al-Shafi'i did not cite the above *hadith* but only mentioned the *athar* of Aishah. However, he did not accept the legality of the *athar* since for him it was a case of the Companions in disagreement. In this matter, al-Shafi'i considered Aishah and Zaid bin Arqam to have differed in determining the legality of the "double sale" contract. From the Shafi'i point of view, since both of them were Companions, no opinion can overrule the other. In contrast to the majority of jurists, al-Shafi'i viewed that Zaid bin Arqam's opinion as more accurate. Al-Shafi'i presumed that Aishah prohibited the contract not because of the double sale contract rather because the credit transaction was agreed with an unknown period (when the slave was sold in credit).

The majority of jurists followed the Aishah's *athar* as they viewed the application of *bay' al-Inah* to be a legal stratagem to legalise *riba*. Ibn Rushd (d.595/1198) for the Malikis contended that the contract was manipulated to make *riba al-nasi'ah* (interest in loan) seem legal. For instance, a person said to another person, "*I lend you 10 dinar for a month and I want 20 dinar (in return)*". "*That is not permissible*", said the other person. "*But you can sell to me this donkey for 20 dinar in credit for a month then buy back the donkey for 10 dinar in cash*" (Ibn Rushd, 1995, pp. 1590). Based on the transaction, the buyer will get 10 *dinar* in cash and the seller will receive 20 *dinar* in a month. The sale asset was just a trick since neither of the contracting parties actually intended to sell or buy the donkey. Hence, the contract was similar to a 10 *dinar* loan with 100 percent interest.

Indeed the application of legal stratagem in Islamic law has become a topic of debate among the classical jurists. The Hanafis were known as the jurists most willing to employ the legal stratagems as one of the principles in deducing rules. For example, they permitted the marriage of *muhallil* based on the principle (Sarakshi, 1906). Marriage of *muhallil* refers to a temporary marriage contract executed to allow a husband who had divorced his wife three times to re-

marry the wife. In a marriage of a *muhallil*, usually it was agreed that the temporary husband will not sleep with the wife and will divorce her as soon as possible. Interestingly however, in the case of *bay' al-Inah* the Hanafis admitted that the contract was a kind of deception that can not be compromised (Ibn Abidin, 1992, pp.274).

In contrast, al-Shafi'i did not consider the practice of *bay' al-Inah* as legal stratagem. He treated *bay' al-Inah* as two separate contracts in which each of them comply with all the essential elements of a sale contract. In the case of Zaid bin Arqam, both sales were agreed with fixed prices, valid subject of sale and qualified contracting parties. Hence, al-Shafi'i questioned the basis on which one would forbid someone from selling his asset in cash in which the asset was obtained from credit purchase. He also made an analogy with the similar case which the jurists unanimously agreed on its permissibility. The jurists ruled that it is allowed for a person who purchased a slave with 100 dinar in credit to sell the slave with 200 *dinar* in cash. Therefore, for al-Shafi'i, *bay' al-Inah* should be permitted on the same basis. Al-Shafi'i clearly considered *bay' al-Inah* as a genuine sale contract that was distinct from *riba*.

Al-Shafi'i's rule in *bay' al-Inah* was consistent with his rule in *bay' al-mu'atah*. He established a principle that the validity of any type of sale contract is examined based on its compliance with the essential elements which are identified as the contracting parties, the subject of sale and the language of offer and acceptance. Briefly speaking, *bay' al-mu'atah* is a sale contract without the utterance of offer and acceptance between the seller and the buyer. A modern example of this type of contract would be purchasing via vendor machine. Contrary to the majority jurists, al-Shafi'i ruled that *bay' al-mu'atah* was void. His main argument was because the contract did not comply with the condition of the language of offer and acceptance. For him, the offer and acceptance must be spelling out verbally and can not be replaced by an action (Sharbini, 1994, pp.325).

However, his rule to legalise *bay' al-Inah* contradicted to his rule on marriage of *al-muhallil*. Applying the principle of analogy, al-Shafi'i should reach to conclusion that both contracts are prohibited. This is because *bay' al-Inah* and marriage of *al-muhallil* are similar: neither of the contracting parties have a genuine intention to execute the contracts. In the case of *bay' al-Inah* the main purpose is to obtain cash whereas in the marriage of *al-muhallil*, the motive is to allow the real husband to re-marry the wife. However, al-Shafi'i abandoned the analogy and ruled the permissibility of the former and the prohibition of the latter. Interestingly, in deducing the rule of marriage of *al-muhallil*, al-Shafi'i made an analogy with the marriage of *al-mu'atah*. Based on the Prophet's prohibition of marriage *al-mu'atah*, al-Shafi'i ruled that any kind of marriage contract which was executed on temporary basis was forbidden. The rule indicated that al-Shafi'i in this matter gave emphasis on the genuine intention of the contracting parties. Even though the marriage of *al-muhallil* complies with all the essential elements of the marriage contract, it was forbidden since the intention of the contracting parties contradicts with the concept of a marriage in Islamic law (i.e. establish permanent relationship between a husband and wife).

As indicated earlier, the Malaysian *shari'ah* scholars had favoured the opinion of al-Shafi'i in accepting the *bay' al-Inah* contract in creating a number of Islamic banking products. The following statements are the resolutions by the NSAC pertaining to the acceptability of the contract in Islamic money market products and Islamic credit card:

A. Resolution on Money Market Transaction

The Council in its 8th meeting held on 12th December 1998 / 23rd Syaaban 1419 resolved that *bay' al-Inah* transaction in the Islamic Inter-bank Money Market is permissible based the following conditions: i. *bay' al-Inah* transaction must strictly follow the mechanism which is accepted by the Shafi'is school; and ii. the transacted asset is not a ribawi item.

B. Resolution on Credit Card

The Council in its 18th meeting held on 12th April 2001 / 22nd Muharram 1422 resolved that the mechanism of Islamic credit card which applies *bay' al-Inah* concept to generate funds for credit purposes by a customer who

requests for the Islamic credit card is permissible (Malaysian International Islamic Finance Center (MIFC), n.d.).

In the following section, we will examine how the *bay' al-Inah* contract has been applied to create the so-called Islamic credit. Understanding the *modus operandi* of the Islamic credit card would give us a clear indication regarding the methodology and approach adopted by the Malaysian *shari'ah* committees' members in solving current banking and finance problems.

The Application of *Bay' al-Inah* in BIMB Islamic Card (BIC)

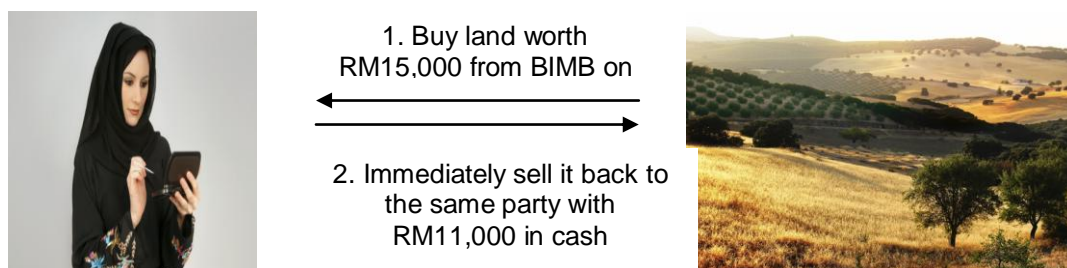
Credit card is a well-known product in the conventional banking system. It refers to 'plastic money' that grants credit facility to cardholder. By obtaining a credit card, one can spend the extended credit up to a pre-arranged ceiling level. However, it comes with condition. The cardholder must pay back the amount that has been borrowed within a given period, or else interest will be charged on the remaining balance of the unpaid debt (Paxson & Wood, 1998). Due to convenient and safety factors, credit card has become an indispensable banking facility for majority of people. Credit card provides a convenient way of making payment as one does not have to bring cash to make large purchases. It is also a safety way of shopping since carrying lot of cash will expose us to the risk of robbery. Furthermore, in certain cases the need for a credit card is obvious because the card is a pre-requisite in online transaction i.e. in hotel booking or car rental payment.

As far as the bank is concerned, credit card business potentially can bring huge profit for the institution. By issuing credit card, the bank will earn revenue from (1) annual fees charged to the cardholders and from (2) interest for the late settlement. It is reported that the credit card market in Malaysia has witnessed a 50 percent of increase in profit between 2005 and 2007. This significant growth is attributed to a 32 percent in the number of new card issued and a 44 percent growth in the outstanding debt.

Contemporary Muslim jurists had differed in determining the legality of conventional credit card. There are some jurists who permit its usage with conditions that Muslims customers must (1) pay the full outstanding balance every month, (2) never roll over any balance to next statement period and (3) avoid cash withdrawals (Adil, 2006). It is argued that by adhering to these conditions *riba* could be avoided, thus using a credit card in this way is legitimate. However, majority of jurists are on the view that the conventional credit card is absolutely forbidden. Its underlying concept is based on *riba al-nasi'ah*. A card credit holder is obliged to pay interest if he fails to settle his outstanding debt within a given period. Thus by signing a credit card contract, a Muslim is perceived as having agreed to commit a major sin. This majority view apparently becomes the most accepted ruling in this matter. Nevertheless, although credit card is regarded as unlawful product, its prospective profit seems hard to be ignored by the Islamic bankers. Therefore, they try to develop a credit card system which confirms the rules and guidelines of the Islamic commercial law. In their quest to invent an 'Islamic' credit card, BIMB with the help of their *shari'ah* committees have come out with the BIC card model.

The *modus operandi* of the transaction is illustrated in diagram 1 below.

Diagram 1: *Bay' al-Inah* transaction in BIC card model



Suppose Aminah intends to obtain BIC card from BIMB. Firstly, she will be asked to fill up an application form, notifying her annual income to the bank. Based on Aminah' financial circumstances, the bank will offer different types of BIC card. Premium card (gold or platinum) with large amount of credit will be offered if her annual income is pretty high. Let us assume that Aminah is qualify to have a gold BIC card with credit facility up to RM11,000. In granting the said amount to Aminah, the bank will execute a *bay' al-Inah* transaction.

BIMB will identify a specific asset, for example a piece of land which will then be sold to Aminah, say for RM15,000 in deferred sale. Immediately, the bank will buy back the land from Aminah for RM11,000 in cash. When the second transaction is executed, Aminah who formerly came to the bank with empty pocket now will have a substantial amount of cash to spend with. The bank will disburse the cash (RM11,000) which is the proceeds of the second agreement into Aminah's BIC *wadi'ah* account. Having the money, Aminah now can use her BIC card for various commercial transactions just similar to the conventional credit card. She is required to pay back the money she had used from the account within a given period. Otherwise, the bank will impose additional payment for the late settlement.

BIMB contends that its additional payment for the late settlement is legitimate since it is regarded as profit not interest. The profit is referred to the difference between the sell and the buy back prices (RM15,000 – RM11,00) in the *bay' al-Inah* transaction executed earlier. In other words, through the act of selling land to Aminah, BIMB is actually entitled RM4000 of profit. However, the profit is only claimed on Aminah when she struggles to pay her debt on time. The maximum additional payment however is fixed (RM4000 in our example). According to BIMB, the fixed maximum profit demonstrates BIC card main advantage over its conventional counterparts. This is because in the conventional credit card system, the interest is perpetuate as it is charged compounded until cardholders' outstanding debts are been settled.

The Justifications of Malaysian *Shari'ah* Scholars

The Malaysian *shari'ah* scholars legalise the practice of *bay' al-Inah* based on two main justifications. Firstly, they argue that the contract was not clearly prohibited either in the Qur'an or in the Sunnah. They do not accept the validity of the *athar* and the *hadith* which indicate the prohibition of the contract. For them, the *athar* of Aishah is considered as weak evidence due to unreliable narrator in its chain of narrators. Even if the chain of narrators is accepted, the *athar* still regarded as invalid evident because its textual content appears to contradict the general principle of Islamic law. This is because Aishah was reported to have invalidated the reward of jihad that Zaid bin Arqam had involved together with the Prophet. In the *athar*, she was reported saying that '*inform Zaid that his conduct has eliminated all his rewards for participating in jihad with the Prophet if he does not repent*'. Such a statement could not be taken into consideration since Aishah was not in capacity to do so.

Secondly, the Malaysian scholars argue on the basis of *maslahah*, in which refers to the need or interest of Muslims contemporary society. The scholars accept the argument that credit card has become an important banking facility for majority of Muslims. In today's world, the card is crucial for daily business dealings and commercial transactions. Considering this need, the scholars support the bank's initiative to create a credit card that is *shari'ah* compatible. In this regard, *bay' al-Inah* is viewed as a key contract since it provides a *makhraj* (mode of problem solving). The contract can help the society as well as the Islamic banks achieve their respective goals. Although admitting *bay' al-Inah* resembles legal stratagem, the contract is accepted for the sake of majority interest (MIFC, n.d).

These two justifications signify the crux of methodology adopted by the local *shari'ah* scholars in assessing the legality of other Islamic banking products. The first justification indicates that the *shari'ah* scholars try to practice independent *ijtihad*. In solving *fiqh* problems of the Islamic banking, they will refer directly to the primary and the secondary sources of Islamic law. As generally known, the primary sources refer to the verses of the Qur'an and the Sunnah of the Prophet (pubh), while the secondary sources refer to *ijma'* (consensus), *qiyas* (analogy), *istihsan* (legal preferences), *'urf* (custom) and etc. They will also examine the prominent

classical jurists' opinions but will not blindly restrict to them. This method contradicts their approach when judging the matrimonial, inheritance, administration of mosque and *waqf* (endowment) cases where decisions are usually confined to the rulings of the Shafi'i school.

In practising the *ijtihad*, the local *shari'ah* scholars uphold a legal maxim stipulating that '*the original ruling of mu'amalat (business transaction) is permissible*'. It implies that a new business transaction is regarded as lawful unless there is legal evidence to prove otherwise. In the case of *bay' al-Inah*, the contract is viewed as legal since evidences indicating its prohibition have been doubted by the local *shari'ah* scholars. The legal maxim was commonly practiced by the classical jurists when deciding new rules for commercial dealings and business transactions (Umar 'Abd Allah, 1999, pp. 327). It certainly advocates the Malaysian *shari'ah* scholars to adopt pragmatic orientation when assessing the compliance of Islamic banking products. Thus, the local *shari'ah* scholars are not rigid with the classical jurists' rulings but admit changes and modifications. They accept creativity and innovation in the field of Islamic commercial transaction. It should be noted however, the scholars embrace a different orientation when judging unprecedented worship (*ibadah*) matters. They are of the opinion that the original ruling of *ibadah* is forbidden until they find out a divine text which states otherwise.

The second justification (*maslahah*) shows that the Malaysian *shari'ah* scholars put great deliberation on the practical aspect of the current banking business. Through direct involvement in the Islamic banking practices, they admit that sticking with *mudarabah* contract has significant problem in terms of feasibility and practicality. They acknowledge the impediments faced by the Islamic bankers in implementing the original theory of interest-free banking institutions such as insufficient regulatory framework, the lack of managerial expertise and the profit seeking attitude of Muslims customers. Considering the settings in which Islamic banks are operating, the local *shari'ah* scholars try to balance between the ideal and the practice of Islamic banking industry.

In accepting the *maslahah* argument, the local *shari'ah* scholars adopt '*form over substance*' approach. The approach focuses on changing the legal terminology rather than the essence of the conventional banking products. As evident in the case of *bay' al-Inah*, the contract is analogous to usurious transaction. Financing products created through *bay' al-Inah* economically has similar effects to the conventional banking loans. Perhaps the local scholars' primary concern in adopting such an approach is to demonstrate the usefulness of various medieval Islamic commercial contracts in today's modern world. By adopting the contracts of *bay' al-Inah*, *bay' murabahah*, *bay' bithamanin 'ajil* and etc, they wish to prove that Islamic commercial law has solution to the *riba* problem even in the sophisticated banking environment (Muhammad Anwar, 2003, pp.62-80). However, critics of the Islamic banking disagree with the approach. Its implementation is seen as a kind of deception which manipulates the religious notion of Muslims for banks' economic profit. The banking products created through this approach look 'Islamic' in their appearance but maintain the element of *riba* in their fundamental nature. Therefore, the objective (*maqasid*) of Islamic banking will never be achieved if *shari'ah* experts continually evaluate new Islamic banking products on this basis.

Conclusion

The controversy of *bay' al-Inah* had been discussed by jurists since early period of the formation of Islamic law. Majority of the classical jurists disapproved the contract based on the *athar* of Aishah and the legal stratagem issue. In the *athar*, Aishah clearly condemned the contract which practiced by the servant of Zaid bin Arqam. According to the classical jurists, the contract is prohibited because it resembles legal stratagem to *riba*. However, al-Shafi'i approved the contract. He opined that *bay' al-Inah* is lawful since it complies with all the essential elements of a sale contract. Despite the disagreement, the Malaysian *shari'ah* scholars allow the contract to create various Islamic banking products in the country. Their justifications are based on two main points. Firstly, they do not accept the legality of the *athar*, as they claim it has flaws in its chain of narrators and textual content. Secondly, though

admitting the legal stratagem issue, *bay' al-Inah* is permitted to satisfy the needs of Muslims as well as to sustain the progress of Islamic banks.

The decision to legalise the *bay' al-Inah* demonstrates the pragmatic orientation adopted by the Malaysian *shari'ah* scholars in determining the compliance of Islamic banking product to the principle of Islamic law. As evident in the case of BIC card, they uphold the '*form over substance*' approach. This approach however is increasingly seen inappropriate to maintain the growth of the industry. It has failed to eradicate the element of *riba* in the presence banking system. Thus, Islamic bankers and their *shari'ah* experts are strongly advised to rethink of their current approach when developing new Islamic banking products. It is hoped that in the future, the Islamic banking institutions will be able to offer more authentic and Islamic financial products.

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