THE BINDINGNESS AND ENFORCEABILITY OF A UNILATERAL PROMISE (WA’D): AN ANALYSIS FROM ISLAMIC LAW AND LEGAL PERSPECTIVES

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Marjan Muhammad, Hakimah Yaacob and Shabana Hasan*

ABSTRACT

The study aims to provide a comprehensive analysis of the bindingness and enforceability of a unilateral promise (wa’d) from both the Islamic law and legal perspectives. At the outset, the research also addresses the Sharī’ah rulings of some related principles, namely two-way unilateral promise (wa’dān) and bilateral promise (muwā’adah). Studying these aforementioned principles is vital as it helps to further comprehend the application of wa’d in modern Islamic banking and finance practices. The research also undertakes a case study, analysing some sukuk purchase and sale undertaking clauses found in offering circulars. This is to identify the application of two-way undertakings in šukūk structures, with a critical examination of the Sharī’ah compliance of these structures with regard to the related principles mentioned above. Besides that, the research elaborates on the possibility of enforcing binding wa’d from various legal positions, particularly the Malaysian Contract Act 1950, the equitable doctrine of promissory estoppel and the principles of undertaking. The research finds that the majority of contemporary Muslim scholars recognize wa’d in Islamic financial transactions to be binding on the promisor if it is contingent and related to a cause. Nevertheless, Malaysian legal provisions, especially the Contract Act 1950, are silent on the enforceability of wa’d in a court of law. Therefore, the study proposes that a separate clause on wa’d, defining its meaning and outlining the main characteristics or conditions of binding wa’d, should be incorporated in the Act.

Keyword : Unilateral promise (wa’d), bilateral promise (muwā’adah), purchase and sale undertaking, binding wa’d, promissory estoppel

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1. INTRODUCTION

Although the practice of Islamic economics can be traced back to the early formation of Islam and discourse on economic issues in Islam can be traced back to the writings of scholars in the early Islamic intellectual tradition such as Ibn Sīnā, al-Fārābī, Ibn Khaldūn, etc., the idea to treat it as an independent discipline and a viable practical modern institution is a twentieth century phenomena.

Historically, the issue of a binding unilateral promise (wa’d mulzim) has been debated since the early development of Islamic law. The majority of Muslim jurists from various schools of thought discussed it within the limited scope of charitable contracts (’uqūd al-tabarru’āt) such as gifts and loans. When Islamic banking and finance began to flourish in the 1970s, the issue was revisited; this time the context was expanded to exchange contracts (’uqūd al-mu’waḍāt). At first, the discussion was confined to the application of wa’d mulzim to a mark-up sale for a purchase orderer facility (murābaḥah li al-āmir bi al-shirā’) (Yahya, 2008).

Since then, the application of a binding unilateral promise (wa’d) has witnessed spectacular development in Islamic financial products. It has been widely applied to a variety of products: lease ending with ownership (ijārah muntahiyah bi al-tamlīk), Islamic hire-purchase (ijārah thumma al-bay’), diminishing partnership (mushārakah mutanāqīsah), hedging products such as Islamic forward forex, Islamic profit rate swaps and Islamic cross currency swaps, and ūkūk structures. Some of the abovementioned structures employ only one-way wa’d while others use two-way wa’d. Thus, it is important to examine the principles of both unilateral promise (wa’d) and bilateral promise (muwa’dah) in order to identify whether structures that utilize two-way wa’d (wa’dān) comply to the rules of wa’d or resemble the features of muwa’dah.

Wa’d has been used for several reasons; namely, to avoid selling something that one does not own, as in the murābaḥah contract; to eliminate the element of ribā al-nasā’ (deferred interest) as in the Islamic forward foreign exchange; to avoid the deferment of both countervalues (ta’jil al-badalayn), as in ūkūk structures; and to avoid parallel execution of two contracts in one transaction, as in Islamic hire-purchase. In other words, wa’d serves various purposes; namely as an alternative to put options and call options, a risk mitigator in the event of default, a tool for liquidity management, an exit mechanism in redeeming ūkūk, and as a hedging mechanism (Abdullah, 2010) in some derivatives products. Wa’d has lately become a major device for replicating several conventional products in Sharī’ah-compliant forms.
The main objective of this study is to look into the bindingness and enforceability of *wa’d* from Islamic law and legal perspectives. Apart from that, the study addresses the Sharī’ah ruling of two closely related principles, *wa’dān* and *muwā’adah*, as both of them are pertinent to understanding the application of *wa’d* in modern Islamic banking and finance practices. Discussion of the legal aspect highlights the enforceability of a binding *wa’d* based upon legal provisions such as the Contract Act 1950, the equitable doctrine of Promisory Estoppel, and the principles of undertakings.

This research paper is organized as follows: Part I focuses on the binding nature of *wa’d* from a Sharī’ah perspective. This part is further divided into three sections: the concept of *wa’d* and its legality; the concept of *muwā’adah* and its legality; and the concept of *wa’dān* and its ruling. Meanwhile, Part II delineates the enforceability of *wa’d* in courts of law from the legal perspective. This part is comprised of four sections: the concept of promise in civil law; *wa’d* and the Contract Act 1950; *wa’d* and the Promisory Estoppel; and *wa’d* and the law on undertakings. The conclusion summarizes the study and proposes some recommendations for future research.

PART I: SHARIAH PERSPECTIVE ON *WA’D*, *WA’DĀN* AND *MUWĀ’ADAH*

2. THE BINDINGNESS AND ENFORCEABILITY OF *WA’D* FROM THE ISLAMIC LAW PERSPECTIVE

This section provides an overview of *wa’d* and *muwā’adah* principles, beginning with their conceptual understanding, which includes definition, main features and legality from a Sharī’ah perspective. The section also discusses the meaning of *wa’dān* and its similar features to the *wa’d* and *muwā’adah* principles as well as its application in the ṣukūk structures.

2.1. The Concept of *Wa’d* and Its Legality

This sub-section defines the meaning of *wa’d* and elaborates its legality from the Sharī’ah point of view. It focuses on the different opinions of classical jurists on the fulfillment of *wa’d*. In addition, some contemporary resolutions on the binding *wa’d* are highlighted. Based on these views and resolutions, authors will outline some salient characteristics of a binding *wa’d*. 
2.2. Definition of Wa’d

Wa’d, which is translated as ‘a promise’, originates from the Arabic root word of *wa’ada,* which literally connotes both good and bad meanings. The verbal noun *wa’d* is used for promises to do good or bad, whereas the term *wa’id* is reserved for a promise to inflict harm only (al-Asfahani, 1412H).

Technically, there are two main definitions given by scholars. According to Ibn ‘Arafah, *wa’d* means “an expression by the person who gives it to do something good in the future” (‘Allish, 1989, 5:436). Likewise, al-‘Ayńī defines *wa’d* as: “the expression of intent to deliver something good in the future” (al-‘Ayńī, n.d, 1:220).

Note that the term ‘*idah*’ is commonly used by the Mālikī scholars to connote a promise to do something good (*al-wa’ad bi ma’rūf*), while jurists from other schools usually employ the term *wa’d* for a broader meaning that includes a promise to do something good, such as giving a loan on a voluntary basis; or a promise related to maintaining a relationship, such as visiting a friend; or a promise related to a marriage, such as engagement; or a promise related to a sinful action, such as to kill one’s enemy; etc. (Hammad, 1988).

*Wa’d* is unilateral in nature, as it occurs when only one party gives a promise to the other party that he will perform a certain action in the future. The acceptance of the promisee is merely an approval to benefit from the promise but not a promise to do something in exchange for it (Abu Ghuddah, 2010). For instance, if there is a promise to sell, the acceptance of this promise means the promisee will get the benefit of purchasing it in the future, but he may choose not to buy when the occasion arises.

Based on the above, the main features of *wa’d* are as follows:

(i) It is a verbal or written expression put forward by a single party and is, thus, unilateral in nature.

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1 According to Ibn Manẓūr, apart from *wa’d*, there are several other verbal nouns derived from the word *wa’ada*, namely ‘*idah*, maw’īd, maw’īdah, maw’īd and maw’īdah. Refer: Ibn Manẓūr, *Lisān al-’Arab*, (Beirut: Dār al-Šādir, 1414 AH), 3:461.


3 Arabic text (Ibn ‘Arafah): “العَدَّةُ إِخْبَارٌ عَنْ إِنشَاءِ المُخْصَّر مَعْرُوفًا فِي الْمُسْتَقَلِ "الْعَدَّةُ إِخْبَارٌ عَنْ إِنشَاءِ المُخْصَّر مَعْرُوفًا فِي الْمُسْتَقَلِ “\\nArabic text (Al-‘Ayńī): “الْعَدَّةُ إِخْبَارٌ عَنْ إِنشَاءِ المُخْصَّر مَعْرُوفًا فِي الْمُسْتَقَلِ “
(ii) It is generally related to performing good actions on a voluntary basis (based on the technical definitions of Ibn ‘Arafah and ‘Allish), or it may simply relate to the performance of any permissible (mubāḥ) action.

(iii) It is related to doing something in the future, not at present (the time of giving the promise). Therefore, some scholars mentioned that a person who gives a promise should use the imperfect tense (fīʾl muḍārī’), which is used for the present and future, not the perfect tense (fīʾl mādī), which is used for the past (‘Allish, n.d.).

Example 1 illustrates the concept of waʾd based on the definition given by the scholars.

Example 1:

Box 1: Illustration of Waʾd

The implication of giving a waʾd in the above example is that A (i.e. the promisor) has to sell car C to B (i.e. the promisee) when the future date T approaches. B, however, does not give any counterpromise to buy car C. He will, rather, benefit from A’s promise by either buying the car in the future or may choose not to.

### 2.3. The Legality of Waʾd

A promise to perform a permissible act in the future is permissible (mubāḥ), provided that the person (i.e., the promisor) makes an exception that it will only happen if Allah wills,4 while having the intention to fulfill it (al-Jassas, 1994).

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4 Editor’s note: This is to comply with the Qur’anic injunction, “Do not say about anything, ‘Indeed, I will do that tomorrow,’ except [when adding], ‘if Allah wills’” (18:23-24).
Muslim jurists unanimously agree that it is impermissible to make a promise to do something prohibited. Likewise, it is impermissible to make a promise without any intention of fulfilling it, as the act is a lie, which is an attribute of hypocrites (al-Hamawi, 1985), based on the hadith of the Prophet, reported by Bukhārī, who says: “The signs of a hypocrite are three: When he speaks he lies, when he makes a promise he breaks it, and when he is entrusted he betrays the trust” (al-Bukhari, 1422H, p. 1:16).

### 2.3.1. Rulings on the Fulfillment of Wa’d

There is scholarly consensus that it is obligatory to fulfill a promise made to Allah in a form of vow (*nadhr*), such as a promise to fast or to give charity (Ibn al-Arabi, 2003); (al-Qurtubi, 1964). This is based on a verse of the Qur’ān in which Allah says: “O you who believe, why do you say that which you do not do? Most loathsome is it in the sight of Allah that you say what you do not do” (Sūrah al-Ṣaff 61: 2-3).

However, if the promise is made to do something permissible (*mubāḥ*), jurists have different opinions as to whether its fulfillment is recommended or obligatory, and whether it is only religiously binding (*mulzim diyānatan*) or also legally binding and thus enforceable in a court of law (*mulzim qadāʾan*).

The key views of the classical jurists regarding the rulings on the fulfillment of *wa’d* in terms of its bindingness and enforceability are summarized in Table 1.

Table 1: The Views of Classical Jurists on the Bindingness of *Wa’d*
### Scholars/Jurists


### Opinion

Fulfillment of a promise is recommended (mustahab) but not obligatory (wājib)

### Quotation from the original texts

- فيما إذا وعَدَ زَيْدٌ عُمَّرًا أنَّ يَغْطَّيْهَا غِلَالَ أَرْضِهِ الْفُلَنِّيَّةَ فَسَئِلَ فِيمَا إذَا وَعَدَ زَيْدٌ عَمْرًا أَنْ يَتَعْطِيَهُ غِلَالَ أَرْضِهِ الْفُلَنِّيَّةَ تَنَعَ مِنْ أَنْ يَتَعْطِيَهُ شَيْءٌ مَّعَ الأَوْلَى مِنْ السُّئِلَ فَالْوَفَاءُ بِالْعِدَةِ مَطْلُوبٌ بِإِنَْازِ الْوَعْد وَلَكِن

- لا يُلزَمُهُ الْوَفَاءُ بِوَعْدِهِ جَلَافَ وَخُلْفَ فِي وُجُوبِ القَضَاءِ يَهَا ... وَقَلِلَ لَا يُضِنِّى يَحا مُطْلُقًا وَقَدْ أَمَرَ اللَّهُ بِإِنَْازِ الْوَعْد وَلَكِن حَمِّلَهُ الْجَهْشُور عَلَى النَّذَب

- وَقَدْ أَمَرَ اللَّهُ إِبْتِجَازَ الْوَعْدِ وَلَكِن
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<th>Scholars/Jurists</th>
<th>Opinion</th>
<th>Quotation from the original texts</th>
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<tr>
<td>Ibn al-‘Arabi al-Mālikī and Imām al-Ghazālī (Ibn al-Arabi, 2003, p. 4:242), (al-Ghazalī, n.d., p. 3:133)</td>
<td>Fulfillment of a promise in all occasions is obligatory except with a valid excuse</td>
<td>• مَسْأَلَةٌ كَانَ الْوَعْد مَقُولً مِنْهُ هَلْ يَتَلْزَمُ الْوَعْد مَعْنَى بِهِ عَلَى كُلِّ حَالٍ إِلَّا لِعُذْرٍ إِذَا فَهْيَ مَعَ ذَلِكَ الْوَعْد فَتَلَ بُدَّ مِنَ الْوَفَاءِ إِلَّا أَنْ يَتَغَدَّرُ إذا فَهْيَ مَعْ ذَلكَ الْجُرْمُ فِي الْوَعْدِ فَلَا بَدَّ مِنَ الْوَفَاءِ إِلَّا أَنْ يَتَغَدَّرَ.</td>
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<td>Fulfillment of a promise is obligatory and enforceable in court if the promise is attached to a cause/reason and the promisee has acted upon/entered into the cause of the promise.</td>
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Example: When Ahmad says to A: “Buy a commodity, and I promise to lend you some money,” and A bought the commodity, then it is obligatory for Ahmad to honour his promise.

- وَاعْلَمَ أَنَّ الْفُقَهَاءَ اخْتَلَفُوا فِي الْوَعْدِ الْحَلُّ يُبِّثُ الْوَفَاءُ يِهُ شَرْعًا أم لا... قَالَ سَحْنُونٌ الَّذِي يَنْتَزِمُ مِنْ الْوَعْدِ قُوَّةُ الْهَيْدِمِ دَاوْرُ، وَأَنَا أُسَلِّفُكَ وَزَبْعَةً أَوْ تَزَوَّجْ امْرَأَةً، وَأَنَا أُسَلِّفُكَ أَوْ اشْتَدْعَاهُ أَوْ أَوْلِمَهُ أَوْ أَنْتُوْدُ أَدْخُلُهُ بِوَعْدِهِ ذَلِكَ أَمَّا مَرْدُ الْوَعْدِ فَيَتَلَزَّمُهُ الْوَفَاءُ بِهِ يَتَيَّقَضُ عَلَيْهِ لاِمْكُرُّهُ مِثْلَهُ مِنْ الأَنْفَالِ وَقَالَ مَالِكٌ لَّا يَتَلَزَّمُهُ شَيْئًا فِي ذَلِكَ إِلَّا أَنْ يُدْخِلَهُ بِوَعْدِهِ ذَلِكَ فِ كُلْفَةٍ، فَيَتَيَّقَضُ عليها
- يُقُصَى بَيْنَنا إِنْ كَانَتْ عَلَى سِبَابِ وَدَخَلَ الْمُؤُوْدُ بِسِبَابِ الْإِدَةِ فِي شَيْئٍ وَهَذَا هُوَ الْمُشْهُورُ مِنَ الأَقْتَالِ
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<tr>
<td>Aṣbagh – a Mālikī scholar (Ibn Rushd, 1988, p. 15:318), (al-Qarafi, n.d., p. 4:25), ('Allish, n.d., p. 1:254)</td>
<td>Fulfillment of the promise is obligatory if the promise is attached to cause/reason, even though the promisee has not acted upon the cause of the promise. Example: When Aḥmad says to A: Buy a commodity, and I promise to lend you some money,” then it is obligatory for Aḥmad to honour his promise irrespective of whether A buys the commodity or not.</td>
<td>• أنه يقضي به إن كان على سبب وإن لم يدخل بسبب عدته في السبب، وهو قول أصبغ. وقال أصبغ يقضي عليك به تزوج المؤومود أم لا، وكذا أسفلني لأشترى سلبجة كذا لملك سبيل في ذلك أم لا، والذي لا يلزم من ذلك أن تعدة من غير ذكر سبب. وقيل يقضي بما أن كانت على سبيل، وإن لم يدخل المؤومود سبيل العدة في شيء.</td>
</tr>
</tbody>
</table>
### Scholars/Jurists


### Opinion

Fulfillment of a promise is obligatory if it is made contingent (al-wa’d al-mu’allaq).

**Example:**

Aḥmad says to A: “Sell this ring to B; if he does not pay the price, I will pay you.” In this situation, if B does not pay the price of the ring, it is obligatory for Aḥmad to fulfill his promise, i.e. to pay the price of the ring to A.

### Quotation from the original texts

- وَلَا يَتَلْزَمُ الْوَعْدُ إلَّإٍّ إِذَا كَانَ مُعَلَّقًا
- وَلَا يَتَلْزَمُ الْوَعْدُ إلَّإٍّ إِذَا كَانَ مُعَلَّقًا، قَالَ بِتَعْضُ الْفُضَلَءِ: لَِنَّهُ إذَا كَانَ مُعَلَّقًا يَظْهَرُ مِنْهُ مَعْنٌ الِلْتَّعَحُّدِ... مِثَالُ ذَلِكَ: لَوْ قَالَ رَجُلٌ لِخَرَ: بِعْ هَذَا الشَّيْءَ مِنْ فتُلَنٍ وَإِذَا لَْ يَتُعْطِيك ثََنَهُ فَأَنَا أُعْطِيك إيَّاهُ فَتَلَمْ يتُعْطِهِ الْمُشْتَِي الثَّمَنَ لَزِمَ عَلَى الرَّجُلِ أَدَاءُ الثَّمَنِ الْمَذْكُورِ بِنَاءً عَلَى وَعْدِهِ.
The six opinions of the classical jurists expounded above can be summarized in three main categories:

(i) The fulfillment of a promise is recommended, but not obligatory from both religious and legal perspectives (the majority opinion of scholars).

(ii) The fulfillment of a promise is religiously and legally obligatory, and thus enforceable in a court of law (the minority view of scholars).

(iii) The fulfillment of a promise is legally obligatory if it is contingent upon a condition (according to Ḥanafī madhhab), and if the promise is attached to a cause and the promissee has engaged in or acted upon the cause of the promise (the famous view of Mālikī scholars).

The authors will not deliberate the justifications given by the proponents of binding waʻd and non-binding waʻd in detail, as many studies have already addressed them.5

2.3.2. Contemporary Resolutions on the Bindingness and Enforceability of Waʻd

Many contemporary scholars subscribe to the favoured opinion of the Mālikīs and of some Ḥanafīs and deem waʻd to be religiously and legally binding and thus enforceable in the court of law, based on these two legal maxims:

(i) “Promises in conditional forms are binding” (al-mawā‘id bi ṣuwar al-ta‘ālīq takūn lāzīmah).

(ii) “Detriment is to be removed” (al-ḍarar yuzāl).

Among the resolutions issued on the bindingness and enforceability of waʻd are as follows:

(i) OIC Fiqh Academy: Decision No. 40-41 (5/2 and 5/3) Regarding Fulfilling Promise and Murābahah for a Purchase Orderer (Murābahah li al-Āmir bi al-Shirā‘):

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“Second: The promise (that is put forward unilaterally by either the purchase-orderer or the bank) is **binding upon the promisor from a religious point of view** except in case of a [valid] excuse. It is also **legally binding in a court of law if it is made conditional upon a cause**, and if the one to whom the promise was made undertook actions entailing expense due to the promise. In such a case the binding nature of the promise takes effect either by the actual fulfillment of the promise or by monetary compensation for the actual damages incurred as a result of the breach of promise without valid excuse.”

(ii) **OIC Fiqh Academy: Decision No. 136 (15/2) Regarding Diminishing Partnership (Mushārakah Mutanāqīṣah) and its Sharī’ah Parameters:**

“**Mushārakah mutanāqīṣah** is uniquely characterized by the presence of a **binding promise** by only one of the two parties to effect multiple purchase contracts by which he/she will gain possession of every portion of the [other party’s] stake.”

(iii) **AAOIFI: Sharī’ah Standard No. 1: Trading in Currencies:**

“A promise from one party is permissible even if the promise is binding”.

(iv) **AAOIFI: Sharī’ah Standard No. 5: Guarantess**

7/8/2 It is permissible for the institution, in the case of a unilateral binding promise, to take a sum of money called hāmish jiddiyah (i.e., security deposit) from the purchase orderer (customer) as security for his promise. This sum of money is held on trust, not as an urbūn (earnest deposit money), because no contract has been established. The rules set out in item 7/8/1 apply here. Where the customer fails to honour his binding promise, the institution is not permitted to retain the security deposit as such. Instead, the institution’s rights are limited to deducting the amount of any damage actually incurred as a result of the breach, namely the difference between the cost of the item to the institution and its sale price to a third party.
(v) **AAOIFI: Sharī‘ah Standard No. 8: Murābāhah for a Purchase-Orderer**

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<thead>
<tr>
<th>2/3</th>
<th>The promise from the customer</th>
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<tbody>
<tr>
<td>2/3/1</td>
<td>It is not permissible that the document of promise to buy (signed by the customer) should include a bilateral promise that is binding on both parties (the institution and the customer).</td>
</tr>
<tr>
<td>2/3/2</td>
<td>The customer’s promise to purchase, and the related contractual framework, are not integral to a murābāhah transaction, but are intended to provide assurance that the customer will complete the transaction after the item has been acquired by the institution. If the institution has other opportunities to sell the item, then it may not need such a promise or contractual framework.</td>
</tr>
<tr>
<td>2/3/3</td>
<td>A bilateral promise between the customer and the institution is permissible only if there is an option to cancel the promise which may be exercised either by both promisors or by either one of them.</td>
</tr>
<tr>
<td>2/3/4</td>
<td>It is permissible for the institution and the customer, after the latter has given a promise but before the execution of the murābāhah, to agree to revise the terms of the promise, whether with respect to the deferment of payment, the mark-up or other terms. The terms of the promise cannot be revised unless both parties agree to revise the promise, as the right to do so cannot be given exclusively to one of them.</td>
</tr>
<tr>
<td>2/3/5</td>
<td>It is permissible for the institution to purchase the item from a supplier on a “sale or return” basis, with the option to return it within a specific period. If the customer then does not purchase the item, the institution is able to return it to the supplier within the specified period on the basis of the conditional option that is established in Shari‘ah. The option between the institution and the supplier does not expire by the mere presentation of the item to the customer; rather, it expires by virtue of the actual sale to the customer.</td>
</tr>
</tbody>
</table>
4/2 The institution is entitled to receive compensation for any actual damage it has incurred as a result of the customer’s breach of a binding promise. The compensation consists of the customer reimbursing the institution for any loss due to a difference between the price received by the institution in selling the asset to a third party and the original cost price paid by the institution to the supplier.

(vi) AAOIFI: Shari‘ah Standard No. 9: Lease and Lease Ending with Ownership (Ijārah wa Ijārah Muntahiyah Bi al-Tamlīk)

“A promise to transfer the ownership by way of one of the methods specified in item 8/1 above is a binding promise on one party only, while the other party must have the option not to proceed.”

(vii) Shariah Advisory Council (SAC) of Bank Negara Malaysia Resolution:

“The SAC, at the 49th meeting dated 28 April 2005 – Resolution no. 84 (2010, p. 138), resolved that the IFIs are allowed to perform transactions in forward foreign currency exchange based on wa‘d mulzim (binding promise) from one party which binds the promisor only. In addition, the party facing the losses may claim damages due to the breach of promise.”

2.4. Analysis of the Contemporary Resolutions on Binding Wa‘d.

All resolutions quoted above indicate that wa‘d in financial transactions is religiously and legally binding. Observations upon them can be summarized as follows:

(i) Wa‘d is legally binding upon one party only (i.e. the promisor) if it is made contingent upon a condition or it is attached to a cause, and the promisee has relied upon the cause of the promise and has incurred some expenses.

(ii) The effect of a binding wa‘d will either be:

a. Actual fulfillment of the promise
b. Monetary compensation for the actual damages incurred if there is a breach of promise without a valid excuse. The actual damage refers to the difference between the cost of acquiring the item to the promisee and its selling price to a third party.

(iii) A binding *wa’d* is allowed in several Islamic financial products such as *murābaḥah* for a purchase orderer (MPO), lease ending with ownership (*ijārah* muntahiyah bi al-tamlīk), diminishing partnership (*mushārakah mutanāqishah*), Islamic forward foreign currency exchange, and other products.

(iv) The promisee should have an option not to proceed with the promise upon the execution of the contract.

(v) A bilateral promise between the customer (promisor) and the institution (promisee) is permissible only if there is an option to cancel the promise which may be exercised either by both parties or by either one of them.

### 2.5. Application of Binding *Wa’d* in Various Products

(i) **Mark-up sale (*murābaḥah*) for a purchase orderer (MPO):**

An example of the application of binding *wa’d* in a mark-up sale (*murābaḥah*) for a purchase orderer is depicted in Diagram 1.

![Diagram 1: Binding *wa’d* in a *murābaḥah* sale for a purchase orderer (MPO)](image-url)
Explanation:

1. The customer approaches the bank and promises to purchase the asset/commodity from the bank.

2. The bank buys the asset/commodity from the vendor.

3. The bank offers to sell the asset to the customer for a spot or a deferred payment, the customer accepts, and the murābaḥah sale is concluded.

In the product structure above, the IFI does not own the asset/commodity, and the IFI will not buy it from the vendor unless the customer has agreed to buy it in the future. Since the customer and the IFI cannot enter into a murābaḥah contract now due to the prohibition of selling something that one does not own, a binding wa’d is used to make sure the customer commits himself to buy the asset/commodity once the IFI has purchased it upon his request.

(ii) Islamic hire-purchase (ijārah thumma al-bay‘ - AITAB)

Ijārah thumma al-bay‘ (AITAB) refers to a lease contract that is followed by a binding promise, either from the customer to buy the leased asset or from the IFI to sell the leased asset at the end of the lease contract. It is one form of lease ending with ownership (ijārah muntahiyah bi al-tamlīk) prescribed in Paragraph 8/1 of Shari‘ah Standard No. 9 (AAOIFI, 2010).

The application of binding wa’d in AITAB is illustrated in Diagram 2.
Explanation:

1. The customer identifies the asset.

2. The customer applies to the IFI to buy the identified asset.

3. The IFI buys the identified asset.

4. The IFI leases the asset to the customer for an agreed period and amount, and the customer promises to buy the asset at the end of the leasing period.

5. At the end of leasing period, the IFI sells the asset to the customer for a nominal price.

The binding *wa’d* in the above structure serves as a tool for transferring the ownership of the leased asset to the lessee (i.e., the customer) at the end of the leasing period. The promise may also be given by the lessor (i.e., the IFI) to sell the leased asset to the lessee.

Sharī‘ah Standard No. 9, in Paragraph 2/3 (AAOIFI, 2010), provides that:

“It is permissible for the institution to require the lease promisor (customer) to pay a sum of money to the institution to guarantee the customer’s commitment to accepting a lease on the asset and the subsequent obligations”.

In this case, payment of a commitment fee (*hāmish jiddiyah*) is required to mitigate the financial loss incurred by the institution as a result of breach of promise (Abdullah, 2010).

(iii) **Diminishing partnership (mushārakah mutanāqisah)**

Mohamed Naim (2011, p. 28) defines diminishing partnership as “a partnership between the financier and the customer to acquire property under a diminishing *mushārakah* arrangement where the customer agrees to rent the bank’s portion and pays rental on the bank’s share. Subsequently, the customer gradually purchases the bank’s share in the partnership. As the customer’s ownership in the property grows, the bank’s share diminishes...
until the customer has fully bought the bank’s equity in the property”. Hence, diminishing partnership is a hybrid product that consists of three main contracts: partnership (mushārahakah), lease (ijārah) and sale (bay‘).

In diminishing partnership, a binding wa’d provides an avenue for one of the partners (i.e., the customer) to gradually acquire his equity share on the basis of a sale contract, according to the market value or a price agreed at the time of acquisition. Diagram 3 illustrates the usage of a binding wa’d in diminishing partnership.

Diagram 3: Binding Wa’d in Diminishing Partnership

Explanation:

1. The customer enters into a partnership under the concept of a joint ownership (shirkat al-milk) agreement with the IFI to co-own the asset.

2. In a separate document, the customer gives a binding promise to do two things:
   
   i. to lease the asset (IFI’s 90% share)
   
   ii. to gradually purchase the IFI’s share.

3. The IFI leases its 90% share of the asset ownership to the customer under an ijārah contract
4. The customer pays rental for the usage of the IFI’s 90% share of the asset and then gradually buys the IFI’s share at an agreed portion periodically until the asset is fully owned by the customer

(iv) Islamic forex forward

The Islamic forex forward structure based on binding *wa’d* requires the customer (i.e., the promisor) to promise to buy or sell the currency for settlement on a forward value date at the rate and amount agreed today. Diagram 4 describes the structure flow of the Islamic forex forward based on binding *wa’d*.

---

**Diagram 4: Binding *Wa’d* in Islamic Forex Forward**

1. **At dealing date** (1 January 2012):
   The customer promises to sell USD$1 million @ USD/MYR 3.0 on the value date (1 March 2012).

2. **At value date** (1 March 2012):
   If the exchange rate of USD/MYR on the stipulated date is 3.1, the bank will exercise its right (based on the agreed *wa’d*) to purchase the USD from MYR at 3.0.
The reason *wa’ad* is used in this structure is to comply with Shari’ah requirements that prohibit the deferment of any countervalues in currency trading (*sarf*). Since *wa’ad* is not a contract, the actual currency trading only takes place on the value date, not at the dealing date, and hence, no *ribā al-nasā*’ arises.

In short, although *wa’ad* is allowed in the products illustrated above, its documentation must be independent and cannot be an integral part of the contracts.

The foregoing section will briefly outline the main characteristics of a binding *wa’ad*.

### 2.6. Characteristics of Binding *Wa’ad* and a Proposed Definition of *Wa’ad*

Based on the weightiest opinion (*al-ra’y al-rājihi*) of the Mālikī jurists and the view of some Ḥanafīs, as well as the contemporary resolutions issued on the religiously and legally binding *wa’ad*, there are several characteristics that it needs to fulfill, namely:

(i) *Wa’ad* is neither agreement nor contract

(ii) *Wa’ad* is binding on the promisor only.

(iii) The promise is made contingent upon a condition or is related to a cause.

(iv) The promisee has acted upon the promise and incurred some expenses.

(v) The consequences of this binding promise are that the promisor has to fulfill the promise or compensate the actual damages incurred as a result of the breach of promise without a valid excuse.

(vi) The compensation consists of the customer reimbursing the institution for any loss due to a difference between the price received by the institution in selling the asset to a third party and the original cost price paid by the institution to the supplier.

(vii) From these characteristics of binding *wa’ad*, it is apparent that a *wa’ad* associated with a cause or a condition becomes an obligation (*iltizām*)\(^6\) or pledge (*ta’ahhud*)\(^7\). Thus, a *wa’ad* can be defined as follows:

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\(^7\) *Ta’ahhud* originates from the word ‘ābd, which means securing and taking care of something. It is also used
“A unilateral promise (i.e., expression of commitment) given by one party to another to perform certain action(s) in the future, whereby it becomes an obligation that legally binds the promisor when the promise is contingent upon a condition or associated with a cause, and the promisee has acted upon it and incurred some expenses.”

After knowing the concept of *wa’d* from a Shari’ah perspective, this paper will examine the concept of *muwā’adah* and its legality.

### 3. THE CONCEPT OF MUWĀ’ADAH AND ITS LEGALITY

*Muwā’adah* is the other terminology that needs further clarification when one studies *wa’d*, as both of them originate from the same Arabic root of *wa’ada* and thus have a very close relationship. This section delineates the literal and technical definitions of *muwā’adah* and its permissibility from a Shari’ah point of view.

#### 3.1. Definition of *Muwā’adah*

*Muwā’adah* is derived from the word *wa’ada*, a verbal form which connotes a mutual relationship between the two parties involved. The root word of *wa’ada* has been mentioned five times in the Qur’an; the most quoted verse among the classical scholars of *fiqh* and *tafsīr* regarding *muwā’adah* is verse 235 of Sūrah al-Baqarah, in which Allah says:

\[
\text{ُمْ فِ أَنتْ فُسَكُمْ،} \\
\text{ِ مْ بِهِ مِنْ حِيْتَانِ النِّسَاءِ أَوْ أَكْنَتْنَهُمْ فِي أَنْفُسِكُمْ} \\
\text{ُمْ لَا جُنَاحَ عَلَيْكُمْ فِي مَا عَرَّضْتُمُوهُم بِمِنَ حُطَابِ النَّسَاءِ أَوْ أَكْنَتْنَهُمْ فِي أنْفُسِكُمْ} \\
\text{ُعَلِيمَ اللَّهُ أَنَّكُمْ سَ عُلِيْكُمْ} \\
\text{ُمْ تَعْزِمُوا عُقْدَةَ النِّكَاحِ حَتِّ يتَبْتُلَ الْكَحُّةِ} \\
\text{ُمْ وَلَ} \\
\text{ُمْ لَ كَبَّرَ أَنَّكُمْ سَ عُلِيْكُمْ} \\
\text{ُمْ فِ أَنتْ فُسَكُمْ،} \\
\text{ِ مْ بِهِ مِنْ خِيْتَانِ النِّسَاءِ أَوْ أَكْنَتْنَهُمْ فِي أَنْفُسِكُمْ} \\
\text{ُمْ لَا جُنَاحَ عَلَيْكُمْ فِي مَا عَرَّضْتُمُوهُم بِمِنَ حُطَابِ النَّسَاءِ أَوْ أَكْنَتْنَهُمْ فِي أنْفُسِكُمْ} \\
\text{ُعَلِيمَ اللَّهُ أَنَّكُمْ سَ عُلِيْكُمْ} \\
\text{ُمْ تَعْزِمُوا عُقْدَةَ النِّكَاحِ حَتِّ يتَبْتُلَ الْكَحُّةِ} \\
\text{ُمْ وَلَ} \\
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a recognized manner. And you should not settle anything finally about the marriage until the waiting term expires.”

Technically, according to Ibn ‘Arafah, Ibn Rushd defined *muwā’adah* as both parties promising to each other [to do something] (Al-Abdari, 1994). In other words, it is a bilateral promise or undertaking by two parties to do something for each other in the future, either with or without any condition (Hasan, 2008). Taking the same example given previously, an illustration of *muwā’adah* based on the definitions given is shown in Example 2.

**Example 2:**

<table>
<thead>
<tr>
<th>Box 2: Illustration of <em>Muwā’adah</em></th>
</tr>
</thead>
</table>

**Wa’d 1:** A promises B that he will sell car C for price P at a future date T;  
or  
A promises B that he will sell car C for price P at a future date T, if the market price goes higher.

**Wa’d 2:** B promises A that he will buy car C for price P at a future date T;  
or  
B promises A that he will buy car C for price P at a future date T, if the market price goes higher.

---

10 Please refer to the original text:

"المواعدة، قال ابن رشد: أن يُعِدُ كلٌّ واحدٌ منهما صاحبًا لأنَّها مفاعة لا تكون إلا من الربَّين، وَالعِدَةُ أن يَعِدَ أحدهما صاحبًا بالترَويج دون أن يَعِدَ الآخر..."  

Meaning: "A bilateral promise is when each of the two parties promises the other, because the structure of the verbal noun ineluctably requires that there be two (subjects)...while a unilateral promise is when one of the two (parties) promises the other an offer of marriage without getting a reciprocal promise from the other party."
The implication of giving two *wa’d* in the above example is that in *wa’d 1*, A (i.e. the promisor) has to sell car C to B (i.e. the promisee) when the future date T approaches or if the market price turns higher, while in *wa’d 2*, B (i.e. the promisor) has to buy the car C from A (i.e. the promisee) when the future date T approaches or if the market price goes higher.

Based on the above definitions and illustration, the main features of *muwā’adah* can be summarized as follows:

(i) There are two reciprocal promises given by two parties to each other, hence they are bilateral in nature. In other words, if there is a promise (from A) to sell and the promisee (i.e. B) also makes a counter promise to purchase, then each of them is a promisor as well as promisee (Abu Ghuddah, 2010).

(ii) Both promises are on the same subject matter and based on the same condition, if any. Thus, they are interdependent and interrelated.

(iii) The delivery of both promises will occur in the future.

Therefore, *muwā’adah* is different from *wa’d* in terms of the parties giving the promise; in the former, both parties give promises to each other while in the latter only one party gives the promise (Mohamed, 2010).

### 3.2. Legality of *Muwā’adah*

Muslim scholars, particularly Mālikīs, have extensively dealt with the principle of *muwā’adah* in their discussion of a number of topics. In his book entitled “†Đah al-Masālik ilā Qawā’id al-Imām Abī ‘Abdillāh Mālik”, al-Wansharīsī (2006, p. 114) mentioned in the 69th principle that:

الأصلُ منْعُ المواعِدَةِ بِمَا لا يُصْحُ وْقُوَّعُهُ في الخَالِ جَمِيعًا. ومنْ تَمْ منْعُ مَالِكَ المواعِدَةِ في العَدَّةِ، وعلى يَنْهِ الطَّعَامَ قَتَبِذَانِي، وْوَقُّت نَذَا الجَمِيعةِ، وْعَلَى ما لَيْسَ عِنْدَكِ، وَفِ الصَّرْفِ مَشْهُورُهَا: المَنْعُ، وَشُهِّرَتْ أَيْضًا، لَِوَازِهِ فِ الَالِ وَشُبتِّهَتْ بِعَقْدٍ فِيْه
The original [ruling] is to disallow a bilateral promise to do something that would be invalid if it were done at present; [the rationale for it is] to prevent [abuses]. Therefore, (Imām) Mālik disallowed a bilateral promise [to marry given] during the ‘iddah period, to sell food before taking possession, [to trade given] during the call for Friday prayer, and to sell something one doesn’t own. In the case of [a promise to conduct] a currency exchange (sarf), the famous view is prohibition; the third view—which is also well known—is that it is reprehensible (makrūh), [based upon the fact that] it is allowed if done at present; but at the same time [the promise makes it] similar to a deferred contract.

Most Mālikī scholars agree that it is impermissible to make muwā‘adah to do something that be invalid if it were done at present, the reason being to block the means (sadd al-dharī‘ah) that lead to Shari‘ah violations. However, they disagree on its permissibility with regards to a currency exchange contract. There are three main opinions: the majority of Mālikīs disallowed muwā‘adah to conduct a currency exchange, Imām Mālik and Ibn al-Qāsim regarded its application as reprehensible (makrūh), whereas Ibn Nāfi‘ considered muwā‘adah permissible (al-Khurashi, n.d.).

Although Mālikīs did not specifically mention what type of muwā‘adah is allowed in currency exchange, it is evident from the following statement that the permissible muwā‘adah is one which is nonbinding.

According to al-‘Adawī (al-Khurashi, n.d., p. 5:38):

"... وأما لو أراذأ أن يَعْقِدَا فَإِنَّكُمَا حَدِيثُكُمَا، حَدِيثُكُمَا عَقْدُ الصَّرْفِ بتَعْدَ ذَلِكَ، وَهُوَ تَأْوِيفُ أَخْرَجَ النَّفْسَانِ بِعَدْدَ ذَلِكَ، وَيَقُولُ يَا أَوَّفُقُ تَعْدَ ذَلِكَ، وَالْعَقْدُ بتَعْدَ ذَلِكَ."

If both parties would like to enter into the contract [of exchange], there is no harm in it. One of the parties says, “Let’s go to the market with your silver money; if it is good, then we will exchange it,” and the other party agrees. This actually means that a bilateral promise [takes place] without a contract; rather, the contract [of exchange] happens after that.
Meanwhile, Ibn Ḥazm, a Zāhiri scholar who allowed muwāʿadah in a currency exchange contract (n.d, p. 7:465), noted:

فِ بتَيْعِ الذَّهَبِ بِالذَّهَبِ أَوْ بِالْفِضَّةِ، وَفِ بتَيْعِ الْفِضَّةِ بِالْفِضَّةِ، وَفِ التَّوَاعُدُ، وَالَّذِيَ يَعَايِ يَتَبَايَ، ِسَائِرِ الَّصْنَافِ الَّرْبَعَةِ بِتَعْضِهَا بِبتَعْضٍ جَائِزٌ، أَوْ لَمْ يَتَبَايَعِ، لَِنَّ الْتَوَاَعَدَ لَِّسْنَ بِنِعْمَةً.

“A bilateral promise to buy gold with gold or silver, or to buy silver with silver, or to [buy other ribawi items] from the remaining four groups, one for another, is allowed, whether or not the two parties enter into a contract after that, because a bilateral promise is not a contract.”

In other words, although muwāʿadah is different from a contract (ʿaqd), its implication is similar to that of contract if it is made binding. Therefore, a binding bilateral promise (muwāʿadah mulzimah) is not allowed in currency exchange contracts as it resembles a forward contract in which all parties are bound to enter into the contract without any option to cancel it. However, if the muwāʿadah is non-binding (muwāʿadah ghayr mulzimah)—whereby one party or both parties have an option whether or not to exercise the promise in the future and, consequently, conclude the exchange contract or otherwise—then it is permissible.

As the implication of muwāʿadah mulzimah is similar to that of a contract, it is pertinent to comprehend the definition of a contract and its essential requirements and later to compare both terms so that one knows their differences and similarities.

According to Majallat al-Ahkām al-ʿAdliyyah (the Ottoman Empire’s Code of Islamic Civil Law based on the Ḥanafi School, promulgated in 1876), contract means “what the parties bind themselves and undertake to do with reference to a particular matter. It is composed of the combination of offer and acceptance” (The Mejelle, Article 103). The Mejelle defines the conclusion of a contract as “connecting offer and acceptance together legally in such a manner that the result may be perfectly clear” (Article 104).

From the above definition it appears that a valid contract has three essential elements, namely:

(i) the contracting parties or al-ʿāqidān (offeror and offeree),
(ii) the form or šighah (offer and acceptance),

(iii) the subject matter or mahall al-‘aqd (object and price)

A comparison between muwā’adhah mulzimah and ‘aqd can be drawn as in Table 2:

<table>
<thead>
<tr>
<th>Features</th>
<th>Muwā’adhah Mulzimah</th>
<th>Contract</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parties involves</td>
<td>2 parties reciprocally give promises to each other</td>
<td>2 parties bind themselves with a contract</td>
</tr>
<tr>
<td>Nature</td>
<td>Bilateral</td>
<td>Bilateral</td>
</tr>
<tr>
<td>Obligation</td>
<td>To buy and to sell</td>
<td>Buy and sell</td>
</tr>
<tr>
<td>Subject matter</td>
<td>Same</td>
<td>Same</td>
</tr>
<tr>
<td>Price</td>
<td>Same</td>
<td>Same</td>
</tr>
<tr>
<td>Option</td>
<td>No option is given to the promisor and promisee to annul the promise. Hence, the contract shall be executed</td>
<td>Option is given to the seller and buyer to annul the contract even after its conclusion</td>
</tr>
<tr>
<td>Economic effect</td>
<td>Same</td>
<td>Same</td>
</tr>
<tr>
<td>Legal effect</td>
<td>1 documentation</td>
<td>1 documentation</td>
</tr>
</tbody>
</table>

Table 2: Comparison between muwā’adhah mulzimah and contract

3.3. Opinions of Contemporary Scholars on Muwā’adhah

The majority of contemporary Muslim scholars also opine that muwā’adhah is morally binding but not legally binding; they thus disallow muwā’adhah mulzimah in financial contracts.

In this regard, the OIC Fiqh Academy has held two different positions with regard to muwā’adhah mulzimah in a murābahah contract, one denying its legal bindingness and the other allowing it in necessary and exceptional cases, particularly documentary
credits for import and export transactions. In its 5th conference, Resolution no. 40 (5/2) regarding fulfilling a promise and murābaḥah for a purchase orderer (murābaḥah lil ʿāmir bi shīrāʾ) the Academy issued the following resolution:

Third: Bilateral promises (issued by each party to the other) are permitted in murābaḥah sales on the condition that either or both parties have the option to annul the sale; however, if there is no such option, such a promise is not allowed because a binding bilateral promise in a murābaḥah sale bears a similarity to the sale transaction itself. In that case the condition is laid down that the seller must be the owner of the commodity being sold in order that no dispute arises [based upon the prohibition of the Prophet (peace be upon him) of people selling what they do not possess].

In other words, the Academy disallowed a binding bilateral promise in a murābaḥah sale in its first resolution.

However, in its 17th session (Resolution no. 157 (6/17) the OIC Fiqh Academy retracted its earlier position and resolved that:

First: The basic rule for bilateral promises is that they are binding from a religious point of view but are not legally binding.

Second: Bilateral promises and mutual agreements to contractual forms in order to skirt the prohibition of ribā—for example, collusion to transact an Sharīʿah sale or a bilateral promise to engage in a sale combined with a loan—are prohibited in the Sharīʿah.

Third: There may be cases where it is impossible to conclude a sales agreement due to the commodity not being in the possession of the seller while a general need exists to oblige both parties to implement a contract in the future, either by legislation or some other means, such as the recognized practices of international commerce. An example of the latter would be opening a letter of credit in order to import goods. In such cases, it is permissible to oblige both parties to fulfill their promises, either through governmental legislation or by the agreement of both parties to a clause in the agreement that will make the promises binding on each of the two parties.
Fourth: The binding bilateral promise in the case described in Article Three does not take the ruling for sales to be executed in the future; the ownership of the commodity being sold does not transfer to the buyer, the purchase price does not become a debt owed by him, and sale does not take place until the agreed-upon date by the exchange of offer and acceptance.

Fifth: Should one of the two parties fail to keep his promise in the circumstances describe in Article Three, he shall be legally compelled to fulfill the contract or to bear responsibility for the actual damage suffered by the other party as a result of his breach of promise (but not for any [estimated] lost opportunity).

With regards to *muwā’adah mulzimah* in a currency exchange contract, most decisions resolve that it is impermissible. Among the resolutions issued are as follows:

(i) **AAOIFI Standard on Currency Trading (Standard No. 1):**

A bilateral promise to purchase and sell currencies is forbidden if the promise is binding, even for the purpose of hedging against currency devaluation risk. However, a promise by one party is permissible even if the promise is binding.

(ii) **Dallah Barakah Conference: Fatwa No. 13:**

**Question:** What is the position on a bilateral promise for the purchase of various currencies at their price on the day of the agreement (the day of the promise) with both the exchanged currencies to be paid at future date, and with the exchange of both being on the spot at that time? All of that will be either on the basis that the bilateral promises are binding or on the basis that they are not binding.

**Fatwa:** If the bilateral promise is binding, then it enters into the prohibition of selling a debt and is, thus, not permitted. However, if it is not binding on either party, then it is permitted.
(iii) **Kuwait Finance House: Sharî‘ah Fatwa No. 96:**

**Question:** A bilateral promise to buy a specified amount of a specified currency at a specified price within a specified period, with the seller pledging to deliver the amount.

**Fatwa:** This transaction is not permitted in the Sharî‘ah because it is a promise to buy currency. The format that is permitted in the Sharî‘ah for currency transactions is a decisive sale that is completed on the spot (i.e., the immediate transfer of one form of money for another).

### 3.4. Analysis of the Contemporary Resolutions on Muwā‘adah

Among the observations that can be summed up from the above resolutions are:

(i) **Bilateral promises in murābahah sales are allowed on the condition that either one party or both parties have the option to annul the promise and, hence, cancel the sale contract. Nevertheless, a binding bilateral promise (muwā‘adah mulzimah) in murābahah sales is forbidden as it bears a similarity to the sale contract itself in terms of the implications.**

(ii) **Nevertheless, a binding bilateral promise in murābahah sales is allowed for exceptional and necessary cases where it is impossible to conclude a sales agreement due to the commodity not being in the possession of the seller while a general need exists to oblige both parties to implement a contract in the future, either by legislation or some other means, such as a documentary credit for import and export.**

(iii) **The majority of scholars agree on the impermissibility of binding bilateral promises in the currency exchange even for the purpose of hedging. However, a binding promise from one party and non-binding bilateral promises (muwā‘adah ghayr mulzimah) are allowed in the currency exchange.**

### 4. RELATED TERMS: WA‘DĀN AND ITS RULING

This section elaborates on a term related to *wa‘d* and *muwā‘adah*—i.e., *wa‘dān*—in order to discover similarities and differences between these terminologies, and thus determine its ruling. In addition, an analysis is undertaken of the application of *wa‘dān* in two different *sukūk* deals, i.e., lease-based and equity-based structures.
4.1. Definition of Wa’dân

The term wa’dân has been newly introduced by contemporary scholars in order to differentiate two unilateral wa’ds from muwâ’adah. Hasan (2008) defined wa’dân as two unilateral promises, given by one party to another, that are not interrelated, and their application depends on two different conditions.

From this definition, wa’dân has two main features, namely:

(i) Both promises (wa’d 1 and wa’d 2) are independent (not interrelated) from each other

(ii) The application of the two promises depends on two different conditions

A simple example to illustrate the concept of wa’dân based on the above definition and requirements is depicted in Example 3 below:

Example 3:

Box 3: Illustration of Wa’dân

**Wa’d 1:** A promises B that he will sell car C for price P at a future date T, if the market price goes higher.

**Wa’d 2:** B promises A that he will sell car C, for price P, at a future date T, if the market price goes lower.
Based on this example, both promises in the *wa’dān* will have different implications; whereby in *wa’d* 1, A (i.e. the promisor) has to sell his car to B (i.e. the promisee) if the market price is higher. On the other hand, in *wa’d* 2, B (i.e. the promisor) has to sell his car to A (i.e. the promisee) if the market price is lower. In both cases, the sale price is also different.

Application of this form of *wa’dān* does not raise any Sharī’ah issue, as the two promises are completely independent from each other (Mohammad & Muhamad, 2010). In this case, the ruling of *wa’d* applies. However, it is argued that this form is not practical for application in structuring Islamic financial products. Thus, current applications of *wa’dān* in Islamic financial products differ slightly from the above example. They can be illustrated in the following scenarios:

(i) Both promises are made about the same subject matter but have different conditions leading to two different economic effects; and

(ii) Both promises are done on the same subject matter but have different conditions leading to one economic effect only.

It is apparent that the two promises of *wa’dān* are deemed independent even though they are done on the same subject matter. Their independence is, rather, related to their conditions. As long as two unilateral promises have two different conditions and are exercised exclusively (i.e., only one of either purchase undertaking or sale undertaking will be executed in accordance with the relevant condition/notice), they can be categorized as *wa’dān* rather than *muwā’adah*. Therefore, the only feature that will differentiate *wa’dān* from *muwā’adah* is the conditions, which must be different in the former but similar in the latter.

Hasan (2008, pp. 6-7), however, argued that two-way *wa’d* can only be qualified as *wa’dān* if its conditions lead to two different economic effects, so as to ensure that the conditions are genuine.

An analysis of various Sharī’ah-compliant *ṣūkūk* structures that utilize *wa’dān* indicates that different conditions of *wa’dān* do not necessarily lead to two different economic effects as claimed by Hasan (2008); they generally lead to only one economic effect. This will be discussed further in the next section regarding the application of *wa’dān* in some lease-based and equity-based *ṣūkūk* deals.
In short, *wa’dān* is different from *wa’d* with regards to the number of parties giving the promises. While, in *wa’dān*, there are two parties giving two promises that have different conditions on the same subject matter, only one party gives the promise in *wa’d*. However, both are similar in a sense that only one promise will be ultimately exercised in both *wa’d* and *wa’dān*.

As for comparing *wa’dān* with *muwā’adah*, both are different in terms of conditions and the number of promises exercised upon the time of execution. In *wa’dān*, two parties give two promises that have different conditions on the same subject matter, but only one of either the purchase undertaking or the sale undertaking will be executed in accord with the relevant condition. On the other hand, in *muwā’adah* both parties give two promises that have same condition(s) on the same subject matter, and both the sale and purchase undertakings will be exercised simultaneously. Nevertheless, both *wa’dān* and *muwā’adah* are similar in that the two parties involved become promisor and promisee at the same time.

After knowing the features of *wa’dān*, the similarities and differences between it and *wa’d* and *muwā’adah*, respectively, one question remains: what is the ruling on *wa’dān*?

### 4.2. The Ruling of *Wa’dān*

The determination as to whether *wa’dān* is permissible or impermissible depends on identifying the most appropriate principle that *wa’dān* falls under: is it closer to *wa’d* or *muwā’adah*? In this regard, there are two elements that require consideration:

(i) The number of parties involved in giving the promise

(ii) The number of promises to be executed in the future

From the definition and the criteria of *wa’dān* discussed earlier, there are two parties who give promises to each other (at the time of undertaking) and both assume the role of promisor and promisee at the same time. From this aspect, *wa’dān* resembles *muwā’adah*, except that the promises in *wa’dān* have different conditions and are independent. The other difference is that only one promise will ultimately be exercised in the future. From this second aspect, *wa’dān* resembles *wa’d*. 


Since *wa’dān* wears two hats (*wa’d* and *muwā’adah*) at the same time, there is another element that needs to be examined, i.e., the option (*khīyār*) to cancel the promise in this format so as to avoid it having an equivalent implication to that of a *muwā’adah*.

Table 3 illustrates how an option (*khīyār*) to cancel a promise is applied in the principles of *wa’d*, *wa’dān* and *muwā’adah*:

<table>
<thead>
<tr>
<th>Elements</th>
<th><em>Wa’d</em></th>
<th><em>Wa’dān</em></th>
<th><em>Muwā’adah</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>To whom the option is given</td>
<td>Promisee</td>
<td>Promisee in each <em>wa’d</em></td>
<td>To one promisor or both promisors</td>
</tr>
<tr>
<td></td>
<td>A ➔ B (P’sor) (P’see)</td>
<td>A ➔ B (P’see) (P’sor)</td>
<td>(P’sor) (P’see) A ➔ B (P’see) (P’sor)</td>
</tr>
<tr>
<td>When is the option given?</td>
<td>At the time the <em>wa’d</em> is executed;</td>
<td>At the time of executing the <em>wa’d</em> that matches the condition;</td>
<td>At the time of execution of the <em>muwā’adah</em>;</td>
</tr>
<tr>
<td></td>
<td>Thus: The promisee may choose whether to execute the <em>wa’d</em> and enter into the contract or not</td>
<td>Thus: The promisee may choose whether to execute the <em>wa’d</em> and enter into the contract or not</td>
<td>Thus:</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>i. One party (the promisor will exercise the <em>wa’d</em> while the other (promisee) has the option to cancel it – as in the case of <em>wa’d</em>, OR</td>
</tr>
</tbody>
</table>
THE BINDINGNESS AND ENFORCEABILITY OF A UNILATERAL PROMISE (Wa‘d): AN ANALYSIS FROM ISLAMIC LAW AND LEGAL PERSPECTIVES

<table>
<thead>
<tr>
<th>Elements</th>
<th>Wa‘d</th>
<th>Wa‘dān</th>
<th>Muwā‘adah</th>
</tr>
</thead>
<tbody>
<tr>
<td>ii. Both parties (in their capacity as promisors) may choose not to execute the muwā‘adah and not to enter into the contract)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 3: The option to cancel the promise in wa‘d, wa‘dān and muwā‘adah

Although the likelihood of a promise not being executed is very minimal when an option is given to the promisee in wa‘d and wa‘dān, and only to one promisor in muwā‘adah, it is obvious that the option serves as a mechanism to avoid any conclusion of a contract based merely on a promise.

When the option is given to one promisor only in muwā‘adah, it becomes a binding wa‘d, i.e., binding on the other promisor. On the other hand, when both promisors are given the option, then it can be regarded as a non-binding muwā‘adah (muwā‘adah ghayr mulzimah) in which both parties will have a complete freedom not to execute the promises.

Since options are given to both promisees in wa‘dān, it appears at first glance to share a feature of muwā‘adah. However, a closer examination reveals that the option given in wa‘dān complies to the rule of a binding wa‘d. This is due to the fact that the option is only effective in the future, i.e., at the time of executing the promise. In other words, upon the execution of the promise in wa‘dān, the promisee still has the option to annul the promise and decide not to conclude the contract. Thus, the wa‘dān documentation should not eliminate in any way the element of option that the promisee has upon the execution of the promise.
Hence, the authors strongly believe that *wa’dān* is a legal trick (*hīlah*) to avoid two promises on the same subject matter becoming a binding *muwā’adah*, which is not allowed by most scholars. The legal trick works through having different conditions that will eventually lead to the exclusive execution of one binding *wa’d* in the future. Since the majority allows a binding *wa’d* if it is made contingent upon a condition, it is inaccurate to deem *wa’dān* as impermissible. The analysis of a few *ṣukūk* deals indicates that *wa’dān* has been applied and approved even though it does not lead to different economic effects.

A summary of the elements in determining the principles under which the ruling of *wa’dān* falls is depicted in Table 4.

<table>
<thead>
<tr>
<th>Elements</th>
<th><em>Wa’d</em></th>
<th><em>Wa’dān</em></th>
<th><em>Muwā’adah</em></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Parties giving the promise</strong></td>
<td>1 party</td>
<td>2 parties</td>
<td>2 parties</td>
</tr>
<tr>
<td><strong>Conditions</strong></td>
<td>1 (if any)</td>
<td>2 different conditions</td>
<td>Same conditions</td>
</tr>
<tr>
<td><strong>Promises executed</strong></td>
<td>1 promise</td>
<td>1 promise</td>
<td>2 promises</td>
</tr>
<tr>
<td><strong>To whom the annulment option is given</strong></td>
<td>Promisee</td>
<td>Promisee in each <em>wa’d</em></td>
<td>Promisor (either or both)</td>
</tr>
<tr>
<td></td>
<td>A (P’sor) (P’see)</td>
<td>A (P’sor) (P’see)</td>
<td>A (P’sor) (P’see)</td>
</tr>
<tr>
<td></td>
<td>B (P’see)</td>
<td>B (P’see)</td>
<td>B (P’see)</td>
</tr>
</tbody>
</table>

Table 3: Elements That Determine the Ruling on *Wa’dān*
4.3. The Application of *Wa’d* in Lease-Based and Equity-Based *Šukūk* Structures

Even though *wa’d* has also been applied in structured products such as Islamic forward forex, Islamic profit rate swaps and Islamic cross currency swaps for risk management and hedging purposes, this study will focus on its application in *šukūk* structures only. As indicated earlier, *wa’d* is used in *šukūk* structures as an exit mechanism to redeem the *šukūk* at the maturity date (Abdullah, 2010), thus avoiding the deferment of both countervalue (*ta’jil al-badalayn*) to the future.

This section provides an analysis of the employment of two-way *wa’d* by focusing on the clauses of purchase and sale undertakings in some lease-based and equity-based *šukūk* structures, particularly the trigger events and exercise price.

This study scrutinizes two lease-based *šukūk* deals and two equity-based *šukūk* deals. Of these, two are Malaysian deals, and the other two are non-Malaysian. The lease-based *šukūk* deals are: Ingress *Šukūk* and Hijrah Pertama *Šukūk* whereas the equity-based *šukūk* deals are Almana *Šukūk* and Dubai *Šukūk*. The aim is to examine the Sharī’ah compliance of these structures.

3.3.1. Leased-based *Šukūk* Structures

(A) Purchase and Sale Undertaking Clauses of Ingress *Šukūk*

**Purchase Undertaking**

Ingress will give to the issuer a unilateral, unconditional and irrevocable undertaking to purchase the assets from the issuer at the exercise price on the occurrence of an event of default, a dissolution event or at the expiry of the *Ijārah* agreement.

**Sale Undertaking**

The issuer will give a unilateral, unconditional and irrevocable undertaking to sell the Assets to Ingress at the exercise price on the occurrence of an event of default, a dissolution event or at the expiry of the *Ijārah* agreement.
(B) Purchase and Sale Undertaking Clauses of Hijrah Pertama Sukuk

Purchase Undertaking

TM shall execute an irrevocable purchase undertaking (“Purchase Undertaking”) in favour of the issuer to purchase the assets leased to TM, and the issuer shall exercise its rights under the purchase undertaking in following manner:

(i) On the maturity date of Class A sukuk, TM shall be obliged to purchase 66.66% of the assets from the issuer and pay a consideration equal to the respective exercise price as set out below.

(ii) On the maturity date of Class B sukuk, TM shall be obliged to purchase the remainder of the assets from the issuer and pay a consideration equal to the respective exercise price as set out below.

(iii) Upon an event of default prior to the redemption of Class A sukuk, TM shall be obliged to purchase 100% of the assets from the issuer and pay a consideration equal to the respective exercise price as set out below.

(iv) Upon an event of default after the redemption of Class A sukuk, TM shall be obliged to purchase the remainder of the assets from the issuer and pay a consideration equal to the respective exercise price.

Sale Undertaking

If TM fails to exercise the purchase undertaking, the issuer shall be entitled to immediately exercise its rights under the irrevocable sale undertaking (“Sale Undertaking”) given by the Issuer to TM in the following manner:

(i) On the maturity date of Class A sukuk, regardless of whether or not a dissolution event has been declared, TM shall be obliged to purchase 66.66% of the Assets from the issuer and pay a consideration equal to the respective exercise price as set out below;

(ii) On the maturity date of Class B sukuk, TM shall be obliged to purchase the remainder of the assets from the issuer and pay a consideration equal to the respective exercise price.
A summary and comparison of the trigger events and exercise price of purchase and sale undertakings for both șukūk deals are presented in the next subsection. The trigger events for each undertaking represent the conditions employed in wa’đān, whereas the exercise price determines whether the wa’đān has the same or different economic effects.
<table>
<thead>
<tr>
<th><strong>Sukuk Deal</strong></th>
<th><strong>Ingress Sukuk al-Ijarah issued in July 2004</strong></th>
<th><strong>Hijrah Pertama Sukuk al-Ijarah issued in June 2007</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Issuer</strong></td>
<td>Ingress Sukuk Berhad (SPV wholly owned by Ingress)</td>
<td>Hijrah Pertama Berhad (“HPB”) (SPV incorporated under name of Malaysian Logistics Sdn. Bhd.)</td>
</tr>
<tr>
<td><strong>Obligor</strong></td>
<td>Ingress Corporation Berhad (Ingress)</td>
<td>Telecom Malaysia (TM)</td>
</tr>
<tr>
<td><strong>Type of Wa’d</strong></td>
<td>Purchase Undertaking (PU) by Obligor</td>
<td>Sales Undertaking (SU) by Issuer Purchase Undertaking (PU) by Obligor</td>
</tr>
<tr>
<td><strong>Trigger Event</strong></td>
<td>Exercise Price Formulae</td>
<td>Trigger Event</td>
</tr>
<tr>
<td>Maturity or Scheduled Dissolution</td>
<td>RM 160,000,000 + Scheduled Expenses (certificates are redeemed in full)</td>
<td>Maturity or Scheduled Dissolution</td>
</tr>
<tr>
<td>Maturity or Scheduled Dissolution</td>
<td>Class B Sukuk: RM 999 Million + Scheduled Expenses or RM 1,000 Million + Scheduled Expenses (certificates are redeemed in full)</td>
<td>Maturity or Scheduled Dissolution</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Šukūk Deal</th>
<th>Ingress Šukuk al-Ijarah issued in July 2004</th>
<th>Hijrah Pertama Šukūk al-Ijarah issued in June 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dissolution Event</td>
<td>PA + Unpaid Profit [2.5% (k) + EIBOR] (certificates are redeemed in full)</td>
<td>Dissolution Event</td>
</tr>
<tr>
<td>Dissolution Event</td>
<td>PA + Unpaid Profit [2.5% (k) + EIBOR] (certificates are redeemed in full)</td>
<td>Change of Control</td>
</tr>
</tbody>
</table>

Table 4: Lease-Based Šukūk – Summary of Trigger and Price of Purchase & Sale Undertakings
4.3.1.1. Analysis of the Purchase and Sale Undertakings in Leased-based Šukūk

The summary of Ingress Šukūk shows that the deal has two undertakings (PU and SU), with similar trigger events and exercise price.

Besides the inherence of similar trigger events and exercise price in the two undertakings, it is stated that “…Both undertakings are exercisable upon the occurrence of a Dissolution Event, Event of Default …or at the maturity of the Ijarah Agreement”.11 However this statement is found to be somewhat vague. This is because, “…Both undertakings are exercisable…” could imply:

(i) Only one undertaking will be exercised upon the occurrence of the trigger.

(ii) Both undertakings could be exercised simultaneously upon the occurrence of the trigger.

Thus, there is a need for the documentation of the clause(s) explaining the promises in a deal to be stated in clear terms. This is to avoid doubtfulness as to the implication of the conditions inherent in the promises. Moreover, according to Mokhtar (2011), it is necessary to ascertain whether simply having a similar trigger event for the purchase undertaking and the sale undertaking is sufficient to conclude that the promise is muwā’adah—or must they be exercised simultaneously for it to be classified as such?

The views of Shari‘ah scholars on the criteria to identify a PU and SU in Šukūk structures as muwā’adah can be found in Box 4 below.

<table>
<thead>
<tr>
<th>View of Scholars</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Scholars View 1</strong>: Similar trigger events for PU &amp; SU = <em>muwā’adah</em></td>
</tr>
<tr>
<td><strong>Scholars View 2</strong>: Similar trigger events for PU &amp; SU + exercised simultaneously = <em>muwā’adah</em></td>
</tr>
</tbody>
</table>

Box 4: Views of scholars on the criteria of *muwā’adah* for PU and SU (Source: Mokhtar, 2011)

Based on our earlier discussion of the features of *wa’dān* and *muwā’adah*, it is apparent that *wa’dān* should have different conditions and be exercised exclusively (i.e., only one promise—either purchase or sale undertaking—will be exercised in accordance with the relevant condition) in order to ensure the independence of both promises

11 Ingress Sukuk Offering Circular, p. 4.
given. On the other hand, *muwā’adah mulzimah* should have similar conditions in both promises, if any, and they need to be exercised simultaneously. If an option is given to one party only in *muwā’adah* then it becomes a binding *wa’d*, whereas if both parties have the option to annul the promise, then it is considered as non-binding bilateral promise (*muwā’adah ghayr mulzimah*), which most of the scholars allow.

Thus, authors believe that similar trigger events of PU and SU are sufficient to qualify the undertakings to be *muwā’adah*. Nonetheless, to consider them as a binding *muwā’adah*, both should have the same trigger events (= same conditions) and be exercised simultaneously.

For the Ingress *Šukūk*, although there is a possibility of only one undertaking being exercised upon the occurrence of any trigger event, the way each undertaking clause is indirectly drafted shows that both parties are obliged to fulfill their promise, as the authors could not find any option element to justify the non-existence of *muwā’adah mulzimah*.

In the case of the Hijrah Pertama *Šukūk* structure, both purchase undertaking and sale undertaking have the same trigger events, i.e., scheduled dissolution (maturity), with a similar exercise price formula. However, as illustrated in the table above, unlike the case for the purchase undertaking, there isn’t any statement pointing to “Event of Default” as a trigger for the sale undertaking. As long as the conditions or triggers for the purchase undertaking and sale undertaking are the same, they can be deemed to be *muwā’adah*, and that is so only in the scenario where maturity or scheduled dissolution is taken as the trigger event. If the trigger event that arises is the “Event of Default”, it is accepted as *wa’dān*.

By having two separate unilateral promises, the structure is claimed to be Shari’ah compliant as, theoretically, both the PU and SU are mutually exclusive, which allows a judgment that this is not *muwā’adah mulzimah*; rather, it is considered a binding *wa’d* (upon the execution of the promise) for only one *wa’d* will ultimately be exercised.

Nevertheless, if we examine the element of option that is needed for a *muwā’adah* to be qualified as *muwā’adah ghayr mulzimah* (when the option is given to both promisors) or to be deemed as *wa’d mulzim* (when the option is given to one promisor only), neither purchase undertaker nor the sale undertaker has that option as the sale undertaking clause clearly spells out that:
If TM fails to exercise the purchase undertaking, the Issuer shall be entitled to immediately exercise its rights under the irrevocable sale undertaking given by the Issuer to TM. On the maturity date of Class A sukūk regardless of whether or not a dissolution event has been declared, TM shall be obliged to purchase 66.66% of the Assets from the issuer and pay a consideration equal to the respective exercise price. On the maturity date of Class B sukūk, TM shall be obliged to purchase the remainder of the assets from the issuer and pay a consideration equal to the respective exercise price (p. 13).

The phrase “TM shall be obliged to purchase” in the SU indicates that the obligor/promisee (TM) must purchase the asset back from the issuer/promisor (Hijrah Pertama Berhad) in all circumstances, which may warrant the judgment that the structure involves muwā’adah mulzimah.

In these two deals, it is apparent that both undertakings will lead to the same economic effect because the purchase price of the sukūk (based on the exercise formula) is the same. Nevertheless, an undertaking by a lessee to purchase the sukūk assets at their nominal value or at any price is allowed in lease-based sukūk if the lessee is neither the issuer nor the manager of the sukūk (Abu Ghuddah, 2010).

Next, we will examine to the application of wa’dān in two equity-based sukūk deals, namely Almana and Dubai Ṣukūk.

### 4.3.2. Equity-Based Ṣukūk Structures

**(A) Purchase and Sale Undertaking Clauses of Almana Ṣukūk**

**Purchase Undertaking**

Under the purchase undertaking, the obligor undertakes that upon the trustee exercising its option to oblige the obligor to purchase all of the trustee’s rights, interests and benefits in, to and of the assets, the obligor shall purchase the same on an “as is” basis (without any warranty express or implied as to condition, fitness for purpose, suitability for use or otherwise, and if any warranty is implied by law, it shall be excluded to the full extent permitted by law) at the exercise price in accordance with the notice issued under the purchase undertaking from the trustee (“Exercise Notice”).
If the obligor fails to settle all or part of the exercise price that is due in accordance with the purchase undertaking (‘‘Outstanding Exercise Price’’), the obligor irrevocably undertakes to pay the trustee a late payment amount in respect of the period from, and including, the due date for settlement to, but excluding, the date of full settlement, calculated on a daily basis, as the product of (a) 1 per cent per annum, (b) the outstanding exercise price and (c) on the basis of 12 months of 30 days each. Any late payment amount received by the Trustee must be donated (on behalf of the obligor) to the Red Crescent Society, being the charity of the obligor’s choice.

**Sale Undertaking**

Pursuant to the sale undertaking, subject to the trustee being entitled to redeem the certificates early pursuant to condition 6.3 (redemption for taxation reasons), the obligor may, by exercising its option under the sale undertaking and serving notice on the trustee no later than 45 days and no earlier than 60 days prior to the tax redemption date, oblige the trustee to sell and assign all of the trustee’s rights, interests and benefits in, to and from the assets to the obligor at the exercise price.

(B) **Purchase and Sale Undertaking Clauses of Dubai Ṣukūk**

**Purchase Undertaking**

The purchase undertaking will be entered into on 13 June, 2007, by the obligor in favour of Dubai Sukuk Centre Limited (in its capacity as issuer and as trustee) and will be governed by DIFC law.

The obligor will irrevocably undertake in favour of Dubai Sukuk Centre Limited (in its capacity as issuer and as trustee) to purchase all of the trustee’s rights, benefits and entitlements in and under the *mudhārabah* agreement, including any interest it may have in the assets of the *mudharabah*, on the scheduled dissolution date or any earlier due date for dissolution, as the case may be. If the trustee exercises its option prior to the scheduled dissolution date, an exercise notice will be required to be delivered by the trustee under the purchase undertaking.

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12 Dubai Sukuk Offering Circular, pp. 11-12 & p. 56.
Under the purchase undertaking, the obligor will undertake that upon the trustee exercising its option:

(i) Following the occurrence of a dissolution event or not later than the fifth day prior to the scheduled dissolution date, to oblige the obligor to purchase all of the trustee’s rights, benefits and entitlements in and under the *mudhārabah* agreement; or

(ii) Following the occurrence of a change of control, to require the obligor to purchase all or a proportion of the trustee’s rights, benefits and entitlements in and under the *mudhārabah* agreement, including any interest it may have in the *mudhārabah* assets, the obligor shall purchase the same on the scheduled dissolution date or any earlier due date for dissolution, as

(iii) The case may be, at an exercise price equal to the aggregate face amount of the certificates of the subject of such exercise plus all accrued and unpaid periodic distribution amounts in respect of those certificates as of such date. If the trustee exercises its option prior to the scheduled dissolution date, an exercise notice will be required to be delivered by the trustee under the purchase undertaking.

**Sale Undertaking**

The sale undertaking will be entered into on 13 June, 2007, by Dubai Sukuk Centre Limited (in its capacity as issuer and as trustee) in favour of DIFCI and will be governed by DIFC law. Pursuant to the sale undertaking, subject to the issuer being entitled to redeem the certificates for tax reasons in accordance with condition 8.2 (*Early Dissolution for Tax Reasons*), DIFCI may, by exercising its option under the sale undertaking and serving notice on the trustee no later than 60 days prior to the tax redemption date, oblige the trustee to sell all the trustee’s rights, benefits and entitlements in and under the *mudhārabah* agreement, including any interest it may have in the assets of the *mudhārabah*, on the tax redemption date at an exercise price equal to the aggregate face amount of the certificates then outstanding plus all accrued and unpaid periodic distribution amounts as of such date.

A summary and comparison of the trigger events and exercise price of the purchase and sale undertakings for these *ṣukūk* deals are presented in the next subsection.

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13 Dubai Sukuk Offering Circular, p. 58.
<table>
<thead>
<tr>
<th>Issuer</th>
<th>Almana Šukūk Limited</th>
<th>Dubai Šukūk Centre Limited</th>
</tr>
</thead>
<tbody>
<tr>
<td>Obligor</td>
<td>Almana Group W.L.L</td>
<td>DIFC Investment</td>
</tr>
<tr>
<td><strong>Type of Wa’d</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Scheduled Redemption</td>
<td>PA + Unpaid Profit [2.5% (k) + EIBOR] (certificates are redeemed in full)</td>
<td>PA + Unpaid Profit [2.5% (k) + EIBOR] (certificates are redeemed in full)</td>
</tr>
<tr>
<td>Dissolution Event</td>
<td>PA + Unpaid Profit [2.5% (k) + EIBOR] (certificates are redeemed in full)</td>
<td>PA + Accrued &amp; Unpaid Profit [0.375% (k) + LIBOR] (certificates are redeemed in full)</td>
</tr>
<tr>
<td>Tax Event</td>
<td>PA + Unpaid Profit [2.5% (k) + EIBOR] (certificates are redeemed in full)</td>
<td>PA + Accrued &amp; Unpaid Profit [0.375% (k) + LIBOR] (certificates are redeemed in full)</td>
</tr>
<tr>
<td>Scheduled Dissolution or Distribution Date</td>
<td>PA + Accrued &amp; Unpaid Profit [0.375% (k) + LIBOR] (certificates are redeemed in full)</td>
<td>PA + Accrued &amp; Unpaid Profit [0.375% (k) + LIBOR] (certificates are redeemed in full)</td>
</tr>
<tr>
<td>Dissolution Event</td>
<td>PA + Accrued &amp; Unpaid Profit [0.375% (k) + LIBOR] (certificates are redeemed in full)</td>
<td>PA + Accrued &amp; Unpaid Profit [0.375% (k) + LIBOR] (certificates are redeemed in full)</td>
</tr>
<tr>
<td>Change of Control</td>
<td>EXP = PA + Accrued &amp; Unpaid Profit [0.375% (k) + LIBOR] (certificates are redeemed in full)</td>
<td>EXP = PA + Accrued &amp; Unpaid Profit [0.375% (k) + LIBOR] (certificates are redeemed in full)</td>
</tr>
</tbody>
</table>

Table 5: Equity-Based Šukūk – Summary of Trigger Events and Exercise Price of Purchase and Sale Undertakings
3.3.2.1. Analysis of the Purchase and Sale Undertakings in Equity-based Šuqūk

As illustrated in the Almana and Dubai Šuqūk, the two unilateral undertakings have the same exercise price but with different trigger events. This is an indication that muwā‘adah is absent here, as muwā‘adah is believed to be present only if both undertakings share similar trigger events. A review of all clauses in the circular, such as the “Purchase undertaking”, “Sale Undertaking” and “Redemption”, relevant to the purchase undertaking and sale undertaking are completely silent about whether or not the undertakings will be exercised together or separately. Nevertheless, it is obvious that once one undertaking is exercised, the other will no longer be effective as both undertakings apply to the same subject matter. Thus, these two Šuqūk deals seem to meet the criteria of wa‘dān set out earlier. But again, the economic effect of both PU and SU is the same, regardless of when the undertaking is exercised (based on different triggers), as the purchase price of the Šuqūk asset (based on the formula cited in the clauses) is done at one value.

Despite the validity of the wa‘dān structure in the Almana and Dubai Šuqūk deals, it is prohibited in the Sharī‘ah for the Šuqūk manager to undertake to purchase the Šuqūk at either nominal value or for a specific amount at the time of issuance or before the purchase, as it leads to a guarantee of the Šuqūk. However, it is permissible for him to purchase the Šuqūk at market value or a value agreed at the time of purchase (Abu Ghuddah, 2010). In other words, the combined effect of wa‘d and its purchase price at par in equity-based Šuqūk may play the role of a guarantee because it provides the investors with recourse to the obligor, regardless of the performance of the venture (Mokhtar, 2009), which circumvents the loss-sharing requirements of equity-based structures.

The fact that wa‘dān serves as a legal trick to avoid the exercise of promise based on muwā‘adah mutzimah is quite evident in these two structures. Since only one promise will eventually be exercised in the future according to the relevant condition in the wa‘dān structures, it is deemed permissible from the Sharī‘ah point of view despite its binding nature.

In conclusion, Islamic law only perceives wa‘d to be legally binding in Islamic financial transactions when it is contingent or attached to a cause, and the promisee has acted upon that cause and incurred some cost. On the other hand, the legal bindingness of
muwā’adah is not recognized except in necessary and exceptional cases only. Because of this, modern scholars have introduced a new concept of wa’dān to make some financial products Shari’ah compliant in that the structure eventually ends with one binding wand, which is admissible. Nonetheless, under which legal provision should the principle of binding wa’d be judged in the court of law in Malaysia?

The next part will examine this issue by exploring the enforceability of binding wa’d from various legal aspects.

**PART II: THE ENFORCEABILITY OF WA’D FROM THE LEGAL PERSPECTIVE**

This part looks into four possible approaches related to the practice of wa’d in the modern Islamic banking and finance industry, namely the concept of law of promise, the Malaysian Contract Act 1950, promissory estoppel, and the law on undertakings. The paper will only examine wa’dān and muwā’adah in light of the Contract Act 1950. The doctrine of promissory estoppel and undertaking law are not part of the discussion on muwā’adah and wa’dān due to their irrelevancy.

**5. THE CONCEPT OF PROMISE**

The law of promise is an ancient law that applies in a variety of transactions. It would be impossible to run a society merely based on promises that are not binding. A promise with no consideration is not enforceable by courts of law. Black’s Law Dictionary defines promise as “a declaration, verbal or written, made by one person to another for a good or valuable consideration in the nature of a covenant by which the promisor binds himself to do or forebear some act, and gives to the promisee a legal right to demand and enforce a fulfilment”. The Current Law Journal defines it as an undertaking relating to some event. It has no legal effect generally unless in the form of a contract or covenant.\(^\text{14}\) A promise is made by a promisor to a promisee. It has also been defined as an express undertaking or agreement to carry a purpose into effect or an undertaking expressed either that something shall happen, or that something shall not happen, in the future. It is a manifesto of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made.

A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct. The undertaking is a promise or security given in the course of the arrangement, which binds the appellant in law, for obtaining some concession from the respondent.\textsuperscript{15}

In \textit{Finlay v. Chirnley} [1888] 20 QBD 494 @ 498, Lord Esher MR observed that:

It is true that in the old days an action for breach of promise of marriage was in form an action founded on contract, and that even now it is still treated as an action for breach of contract. Formerly an action of tort was almost inevitably a personal action; but it did not follow necessarily that an action was not personal because it was founded on a breach of contract. The complaint in a breach of promise of marriage is indeed a complaint of a breach of contract, but the injury is treated as entirely personal, and not only are damages always given in respect of the personal injury to the Plaintiff, but also damages arising from and occasioned by the personal conduct of the Defendant; and evidence of the conduct of both parties is allowed to be given in mitigation or aggravation. The ages of the respective parties may be taken into account, as well as their whole behaviour; and the damages may be much enlarged if the conduct of the Defendant has been an aggravation of the breach of his promise. A consideration of these facts goes to show that an action for breach of promise of marriage is strictly personal, and that, although in form it is an action for breach of contract, it is really an action for a breach arising from the personal conduct of the Defendant and affecting the personality of the Plaintiff.

In the case of \textit{Smith v. Woodfine} [1857] 1 CN (NS) 660, Willes J said that:

This action...is given as an indemnity to the injured party for the loss she has sustained, and has always been held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of the marriage. From the nature of the case, it has been found impossible to fix the amount of compensation by any precise rule, and as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance.

\textsuperscript{15} For details, refer to \textit{Nasir Kenzin & Tan v Elegant Group Sdn Bhd}(2009] 1 CLJ 47.
In *Quirk v. Thomas* [1916] 1 KB 516, Waugh KC, counsel for the plaintiff, referred to the case of *Smith v. Woodfine* [1857] 1 CB (NS) 660 and said, “In the case of an action for breach of promise of marriage, though it is a case of contract, the general damages are of a purely personal or sentimental character and may be awarded for injury to the wounded feelings and pride of the Plaintiff caused by the breach as well as for the loss of the marriage.”

Phillimore LJ, in the same case, at p. 531, said:

> Now to deal with the one special action of breach of promise of marriage. It is an action for breach of contract, and would therefore seem to survive against the executor of the contract-breaker, but it is an action of a special character where the measure of damages may be that which is otherwise only applicable in some actions of tort. Exemplary or punitive damages can be given. The misconduct of the Defendant can be used for enhancing the damages, though it has no direct bearing upon any question of compensation of the Plaintiff.

Then at p. 534, His Lordship referred to the fact that the plaintiff in that case gave up her business to marry the plaintiff, and said that the only way in which the issue of giving up her business could properly be introduced into the case was as an item of assistance to the jury in measuring the damages they were to give. If it was worth her while to give up this business in order to get the man to marry her, it might be suggested that her loss by reason of his refusal was at least as great.16

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16 Contrast this case with *Oh, Thevesa v. Sia Hok Chai* [1992] 1 CLJ 170; [1992] 3 CLJ (Rep) 148, where the plaintiff instituted an action against the defendant for damages for breach of promise to marry. In that case, the defendant filed an application to strike out the action by the plaintiff. However, Lim Beng Choon J states that the case is not suitable to be struck out as the validity of a promise to marry made by a defendant (who was at the time of making the promise already married), to a plaintiff who, when the promise was made, was aware of his status, has not been fully settled in law. In fact, it was held that this issue raised required a mature and careful consideration on a serious point of law. It was held that “The defendant cannot drive away the plaintiff from the judgment seat by utilizing the summary procedure O. 18 r. 19(1). He should have adopted the procedure under O. 33 r. 2.” The facts and the basis for determination in *Oh, Thevesa v. Sia Hok Chai* are a far cry from the facts of our case herein. The basis for consideration in that case was a striking out application under O. 18 r. 19 as opposed to our situation, in which it is for the determination under O. 14A Rules of the High Court 1980. In fact, the court in *Oh, Thevesa v. Sia Hok Chai* did indicate that the defendant should have moved the court via O. 33 r. 2 Rules of the High Court 1980. In any event, the case of *Oh, Thevesa v. Sia Hok Chai* did not indicate whether the plaintiff was a married woman when the promise to marry was made by the defendant. In our case, clearly the plaintiff was a married Muslim woman at the time the promise
Pickford LJ, in the same case, at p. 538, said:

An action for breach of promise is anomalous. It is an action arising ex-contractu, but the damages are not confined to such damages as are recoverable in other such actions. It is competent to give what are sometimes called punitive damages, i.e., such as will compensate the Plaintiff not only for the money loss of the contract, but for the personal wrong that has been done to her. For this reason, evidence of the loss of a business could be given to show the conduct of the Defendant in breaking off an engagement after such a sacrifice by the Plaintiff.

Further, in Kremezi v. Ridgway [1949] 1 All ER 662 @ 663, Hilbery J, on damages for breach of promise to marry, said: “In English law, the damages are at large, the action being one of the exceptional actions in contract where English law allows more than the strict measure of damages ordinarily applicable to contract.”

Then at p. 664 His Lordship said:

If it is necessary for my decision (though I doubt it), I would say that, while it is true that this particular type of contract - the exchange of mutual promises to marry - ends, so far as the legal enforcement is concerned, on the performance of the marriage ceremony, none the less the performance which the parties contemplated at the time they exchanged mutual promises is not exhausted by the performance of a mere ceremony. I am quite sure that no young woman, when she accepts a proposal of marriage and a contract is formed, would be satisfied if she were told that all the young man is undertaking by the promise is to go through a form or a ceremony with her. What the parties intend is an exchange of mutual promises to become one another’s spouses - to become husband and wife with all that that should entail.”

On the quantum of damages, in so far as local authorities are concerned, in Dennis v. Sennyah [1963] 1 LNS 26, Hepworth J awarded a sum of RM1,500 in general damages and RM620.10 in special damages. In Nafsiah v. Abdul Majid (No 2) [1969] 1 LNS to marry was made. In the case of Dato’ Abdullah Hishan Mohd Hashim v. Sharma Kumari Shukla [1999] 2 CLJ 738, the defendant was a non-Muslim woman and, therefore, was not in violation of s. 14(1) of the Islamic Family Law (Federal Territory) Act 1984.
114, Sharma J awarded RM1,200 as damages. However, in that case, His Lordship erroneously concluded [against authorities such as Finlay v. Chirney (supra) and Quirk v. Thomas (supra), which were not referred to him] that there is no difference between this action and any other action for damages for breach of contract. In Doris Rodrigues v. Bala Krishnan [1980] 1 LNS 205, Ajaib Singh J awarded RM5,000 as damages and costs. These cases involved local parties, and local conditions, prevailing some 30-40 years ago and even for local conditions, inflation would have to be factored in. Recently the judge awarded the sum of RM150,000 as general damages for breach of promise to marry.17

Looking into the court’s recognition of a promise as a concept relevant to breach of contract, it shows that our law does recognize breach of promise to marry as being equivalent to breach of contract, based on the following:

(i) The reward is given as an indemnity to the injured party for the loss sustained, which has always been held to embrace the injury to the feelings, affections and wounded pride, as well as the loss of the marriage.

(ii) The complaint in a breach of promise of marriage is indeed a complaint of a breach of contract, but the injury is treated as entirely personal, and not only are damages always given in respect of the personal injury to the Plaintiff, but also damages arising from and occasioned by the personal conduct of the Defendant; and evidence of the conduct of both parties is allowed to be given in mitigation or aggravation.

Obviously, the damages awarded are based upon the loss and suffering. Applying this to wa’d as a promise, the consequences of breach may result in the other party suffering damages. This may indicate that breach of wa’d may be awarded by damages for loss and suffering in terms of economic loss.

5.1. The Concept of ‘Promise’ under the Malaysian Contract Act 1950

‘Promise’ is defined in Section 2(b) of the Act thus: “When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise.”

It is apparent from this definition that in order for a proposal by the proposer (in this instance, the customer) to be known as a ‘promise’, the Act requires that the proposal must be accepted by the promisee (in this instance, the Bank). Then only would the promise by the customer be binding pursuant to the Act.

Once the promise becomes binding, both parties (the customer and the bank) are bound by their respective promises to perform whatever they each intended under the contract. Should they fail to honour their end of the bargain, it would constitute breach of contract.\(^\text{18}\) Where there is a breach, the relevant remedies would be available to the innocent party.\(^\text{19}\)

5.1.1. Unilateral Promise Combined with Acceptance Becomes a Binding Contract

In order to make the promise binding, some form of action or abstinence must come from the promisee to signify the latter’s acceptance. According to Section 2(d) of the Act, “When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.”

It is clear from this definition that acceptance can be in the form of action, abstinence or promise to act or to abstain. This in turn is referred to as consideration on part of the promisee. In addition, the acceptance can be made expressly or impliedly.\(^\text{20}\)

\(^\text{18}\) Section 38 of the Act: “The parties to a contract must either perform, or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act, or of any other law.”

\(^\text{19}\) Section 40 of the Act: “When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence, in its continuance.”

\(^\text{20}\) Section 9 of the Act: “So far as the proposal or acceptance of any promise is made in words, the promise is said to be express. So far as the proposal or acceptance is made otherwise than in words, the promise is said to be implied.”
Having explained that, although the Act requires that an acceptance must be absolute and unqualified and be expressed in some usual and reasonable manner, an acceptance may be made by performing conditions or receiving consideration. This legal position has its origin in the two English cases of Shadwell v. Shadwell and Scotson v. Pegg. In each of the cases, the contract was unilateral, i.e., the consideration of the defendant’s promise was the plaintiff’s performance (not his promise of performance) of a contract between himself and a third person. In both, the decision was in the plaintiff’s favor.

In Harvela Investment, the court defined a unilateral contract as “a contract brought into existence by the act of one party in response to a conditional promise by another”. In this case, Pursuant to an agreement dated 1 January 1989, the plaintiff transferred two lots of land to the defendant, in consideration of the defendant developing the said land and giving the plaintiff RM554,000 or 17 units of houses in lieu of cash. The transfer was duly registered at the Registry of Land, Kluang. However, the development of the said land was not completed. The plaintiff then applied to the court for a declaration that the agreement was null and void on the grounds that it was wrong in law due to uncertainty of terms. The defendant contended otherwise, arguing that the plaintiff had failed to comply with cl 7 of the agreement, i.e., failing to give the required three months’ notice.

It was held that the agreement did contain an element of uncertainty as nothing was stipulated as to when the building plans must be submitted for approval.

This decision resembles sec 8 of our Contract Act 1950 on acceptance by performing conditions or receiving consideration. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

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21 Section 7 of the Act: “In order to convert a proposal into a promise the acceptance must (a) be absolute and unqualified; (b) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in that manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.”

22 Section 8: “Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.”

23 Shadwell v Shadwell (1860) 142 ER 62; 9 C.B. (N.S.) 159.

24 [1861]EWHC ExCh J2.
6. **WA’D AND THE MALAYSIAN CONTRACT ACT 1950**

*Section 2(a)* states that when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal;

*Section 2(b)* states that when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise;

*Section 2(c)* further states that the person making the proposal is called the “promisor” and the person accepting the proposal is called the “promisee”;

*Section 2(d)* mentions that when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

‘Promise’ is defined in *Section 2(b)* of the Act as “When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise.” In other words, The Act requires the proposal to be accepted as a condition of classifying it as a promise.

This clause amounts to *muwa’dah* and does not cover *wa’d*. It is apparent from this definition that in order for a proposal by the proposer (in this instance, the customer) to be known as a ‘promise’, the Act requires that the proposal must be accepted by the promisee (in this instance, the Bank). Then only would the promise by the customer be binding pursuant to the Act. Once the promise becomes binding, both parties (the customer and the bank) are bound by their respective promises to perform whatever they each intended under the contract. Should they fail to honour their end of the bargain, it would constitute breach of contract. Where there is a breach, the relevant remedies would be available to the innocent party. *Section 38* of the Act states: “The parties to a contract must either perform, or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act, or of any other law.” *Section 40* of the Act further clarifies: “When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence, in its continuance.”
Sec 32A describes “contingent contract” as a contract to do or not to do something, if some event, collateral to the contract, does or does not happen. This further illustrated as below:

“A contracts to pay B $10,000 if B’s house is burnt. This is a contingent contract.”

It is submitted that wa’d cannot be interpreted as a contingent contract since wa’d is not a contract and contingent excludes a promise.

6.1. The Validity of Wa’d in Terms of the Contract Act 1950

Section 1(2) states: “Nothing herein contained shall affect any written law or any usage or custom of trade, or any incident of any contract, not inconsistent with this Act.” Wa’d seems to be a practice under the custom of trade, which is not covered under the Contract Act 1950. However, the Act allows the contract practice that is not covered under the Act by way of opting out from the contract.

Despite full party autonomy free practice in contracting, the Act is silent on whether any agreement practiced under the umbrella of section 1(2) not inconsistent with the Contract Act is invalid. This is important since the Sharī‘ah emphasises only the contract which is valid in the eyes of the Sharī‘ah, while the Contract Act seems to allow any contract applicable by section 1(2).

6.1.1 Example of Legal Documentation of Wa’d in Murābahaḥ

Practically, in a murābahaḥ financial transaction, when the customer unilaterally promises to do a certain thing, e.g. purchase the assets at the end of the tenure, then only will the bank or financial institution agree to purchase the assets from a third party seller (in cash) to be sold to the customer (in installments) over a certain period of time. In the event the customer fails to pay the installments, the bank or financial institution may exercise its put option, i.e. require the customer to purchase the assets, and claim from the customer whatever amounts outstanding under the agreement pursuant to a formula that has been identified in the documentation.

This whole arrangement is founded on the basis that the customer had initially made a promise to the bank, either orally or in writing, to purchase the assets from the bank.
In the event the customer fails to do so, the bank has a right to exercise its put option on the customer. All these would normally be documented in the legal documentations concerning the financial arrangement between the customer and the bank or the financial institution.

Regarding the practice of contemporary Islamic banking and financial transactions in dealing with a promise, taking the example of a *murābāḥah* transaction, the arrangement can be summarised as follows:

<table>
<thead>
<tr>
<th>Steps</th>
<th>Process</th>
<th>Documentation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 1</td>
<td>Unilateral promise by the customer to purchase the asset from the bank</td>
<td>Promise (<em>Wa‘d</em>) Document</td>
</tr>
<tr>
<td>Step 2</td>
<td>Relying upon the promise by the customer, the bank purchases the asset from the third party vendor (payment in cash)</td>
<td>Asset Purchase Agreement</td>
</tr>
<tr>
<td>Step 3</td>
<td>The bank sells the asset to the customer (payment in installments)</td>
<td>Asset Sale Agreement</td>
</tr>
<tr>
<td>Step 4</td>
<td>Customer grants the bank a put option to be exercised by the bank in the event the customer fails to honour his end of the promise</td>
<td>Purchase Undertaking (normally integrated as part of the financing facility agreement itself, in this case, the Asset Sale Agreement)</td>
</tr>
</tbody>
</table>

When the customer makes the promise at Step 1, the customer is actually making a proposal to the bank to purchase the assets from the bank, should the bank purchase the assets from the third party vendor. This promise, standing alone, is not a binding promise, as it is only a proposal in the eyes of the Act. Just about anyone in the world can make a proposal, but a proposal by itself would not bind the promisor. For instance, when one person proposes to sell his land in Kajang, he is in under no circumstances obliged to sell his land until and unless there is acceptance for his proposal, i.e. a promisee signifies acceptance to purchase the land. Therefore, as the customer promises

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to purchase the asset from the bank, the bank may accept the proposal or otherwise. In the event the bank wishes to accept the proposal, the bank, having relied upon the customer’s promise, may proceed to enter into the Asset Purchase Agreement at Step 2. In the eyes of the Act, this constitutes an acceptance by way of performance of the proposal by the customer, and is recognised by Section 8 of the Act explained earlier.\textsuperscript{26}

Step 1 (proposal by the customer) combined with Step 2 (acceptance by the bank) becomes a legally binding contract between the customer and the bank, and it creates a legally binding relationship between the two by which each is under the obligation to honour their respective promises. In the event the customer fails to execute the Asset Sale Agreement with the bank (Step 3), the bank is in a position to enforce the promise given by the customer at Step 1. This is on the grounds that the bank would not have proceeded to Step 2 but for the said promise. Essentially, the financing documents are perfected pursuant to the requirements of the Malaysian civil laws, e.g. Contract Act 1950, Stamp Act 1949, Powers of Attorney Act 1949 and Commissioner of Oaths Rules, 1993. Upon enforcement of the financing, e.g. frustration, event of default, etc., the rules governing the enforcement would also be the civil laws, e.g. the Rules of the High Court 1980, the National Land Code 1965 and the Malay Reserved Enactments of the states. Therefore, it is inevitable for the Islamic financial arrangement that, apart from fulfilling the requirements of the Sharī‘ah, it also needs to fulfill the requirements of Malaysian civil law.

\textbf{6.2. Analysis of Mu‘āwadah from the Contract Act 1950}

\textit{Muwā‘adah} is equivalent to sec 2(d) of the Contract Act 1950. It states that a unilateral promise, although not expressly provided under the Act, is equivalent to a proposal which is recognised under the Act. A proposal, once accepted by the promisee, becomes a promise, which gives rise to legal relationship between the promisor and the promisee. Within the context of the practice of Islamic banking and finance, a promise by the customer by itself is not binding upon the customer nor the bank. It is only upon acceptance by the bank, whether by performance under Section 8 of the Act, or by estoppel, that the promise becomes binding upon both of the parties.

This resembles *muwāʿadah*. However, the Contract Act only specifies the binding *muwāʿadah* whereas the Sharīʿah only allows nonbinding *muwāʿadah* (if binding is equivalent to a contract).

However, if both parties give the promise, it is equivalent to section 2(e) that gives rise to a contract. And in *muwāʿadah*, the promisor (either one or both) is allowed to annul the option. Sec 2(i) states that an agreement which is enforceable by law at the option of one or more parties thereto, but not at the option of the other or others, is a voidable contract. However, if both are allowed, then it is already a contract.

### 6.3. Analysis of *Waʿdān* from the Contract Act 1950

*Waʿdān* means two parties give promises that have different conditions, but only one of the promises (either sale or purchase) will be executed in the future. The concept is equivalent to definition of an agreement in sec 2(e) the Contract Act 1950: every promise and every set of promises forming the consideration for each other is an agreement. The Act recognise the two promises to be as good as a contract and not a promise.

In brief, the differences between *waʿd*, *waʿdān* and *muwāʿadah* as compared to the Contract Act 1950 are illustrated in Table 6;

<table>
<thead>
<tr>
<th></th>
<th>Contract Act 1950</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Waʿd</em> – unil. promise</td>
<td><em>Contract Act</em> said a promise means when promise is accepted and does not include a unilateral promise. A proposal in section 2(b) is an offer and not a promise.</td>
<td>Proposal in contract act is an offer and the act is silent on the unilateral promise. <em>Waʿd</em> is a promise and these two terms are differ from each other</td>
</tr>
<tr>
<td><em>Muwāʿadah</em> – 2 parties give 2 promises that have same conditions and both will be exercised simultaneously.</td>
<td>Section 2(d) <em>A proposal, once accepted by the promisee, becomes a promise, which gives rise to legal relationship between the promisor and the promisee</em></td>
<td>This resembles <em>muwāʿadah</em>. However, <em>Contract Act</em> only specifies the binding <em>muwāʿadah</em>. Whereas sharīʿah only allows non binding <em>muwāʿadah</em>. (if binding is equivalent to contract).</td>
</tr>
</tbody>
</table>
**Wa’dan** – 2 parties give promises that have different conditions, but only one of promises (either sale or buy) will be executed in the future

Section 2(e) Contract Act 1950- every promise and every set of promises, forming the consideration for each other, is an agreement.

The concept is equivalent to definition of an agreement in The Act recognise the two promises as good as a contract and not as promise.

| Table 6: Differences between *Wa’d, Muwā’adah and Wa’dan* in the Contract Act 1950 |

### 7. **WA’D AND THE EQUITABLE DOCTRINE OF PROMISORY ESTOPPEL**

Another doctrine which is widely used under the law of contract to uphold the enforcement of a unilateral promise is the doctrine of promisory estoppel. Although it is not defined in the Act, the Malaysian courts tend to adopt this doctrine, which originated from common law principles.

The doctrine of promisory estoppel means:

Where one party had made a promise (orally or by conduct) to the other with intention to affect legal relations between them and to be acted accordingly, once the promissee has taken him by his word and acted on it, the promisor cannot afterwards deny such promise given earlier, but the promisor must accept their legal relations, even though it is not legally supported by any consideration, but only his word.27

A simpler version of what is meant by promisory estoppel is: “a principle which prevents parties from acting inconsistently to the detriment of others”.28

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27 Combe v. Combe [1951] 1 All ER 767.
The rule of estoppel began with the case of *Central London Property Trust Ltd v. High Trees House Ltd*[^29^]. The court held that:

> In each case the court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppels.

The judge writing the decision proposed that the Foakes v. Beer doctrine no longer applied in contemporary law and that “a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration”. In this case, the evidence suggested that the reduction was only for the duration of low vacancy.

> When a creditor and debtor enter on a course of negotiation, which leads the debtor to suppose that, on payment of the lesser sum, the creditor will not enforce payment of the balance, and on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction: then the creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so.

Alternatively, if there is still need for consideration, then consideration does not necessarily have to be quantified or quantifiable in monetary terms. Any discernible detriment to one of the parties could be that party’s consideration.

The court in *Combe v. Combe*[^30^] defined the principle of promisory estoppel as follows:

- where one party had made a promise (orally or by conduct) to the other
- with intention to affect legal relations between them and to be acted accordingly
- once the promissee has taken him by his word and acted on it

[^29^]: [1947] KB 130.
[^30^]: [1951] 1 All ER 767.
• the promisor cannot afterwards deny such promise given earlier

• but the promisor must accept their legal relations

• even though it is not legally supported by any consideration, but only his word.

The thickness of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case (at page 122) as follows:

The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the Courts will give the other such remedy as the equity of the case demands.

The essential nature of the doctrine does not appear to be any different in American equity jurisprudence. This is reflected by the following passage in the opinion of the Supreme Court of the United States in *Dickerson v. Colgrove* [1880] 100 US 578, 580 (25 L. Ed. 618) delivered by Swayne J.:

The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais*. The law upon the subject is well settled. The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such
a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice.

This is the operation of the doctrine with regard to \textit{wa’d} when it involves active encouragement by the party subject to the estoppel. But the case differs when the encouragement comes in the form of silence. The true principle in such cases is to be found in the following passage in the judgment of Thesiger LJ in \textit{De Bussche v. Alt} 8 Ch. D. 286, 314:

If a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.

In \textit{MAA Holdings v. Ng Siew Wah} [1986] 1 MLJ 170, George J. (now JCA) was faced with a case where the defendant had remained silent while the purchaser had paid monies to him. Of the defendant’s silence, the learned judge said:

Having silently stood by and allowed the purchasers to find and pay the balance of the purchase price and then wait for another 38 days before insisting on compliance of the requirement to apply to the FIC, although the parties had expressly agreed that whether the FIC approval was obtained or not was not to have any effect on the contract, is, I think, the height of inequity.


The fundamental principle is that stated by Lord Cairns LC, \textit{viz}, that the representor will not be allowed to enforce his rights where it would be inequitable having regard to the dealings which have thus taken place between the parties. To establish such inequity, it is not necessary to show detriment; indeed, the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable
notice, for the representor to enforce his legal rights. Take the facts of *Central London Property Trust Ltd v. High Trees House Ltd.* [1946] 1 All ER 256, [1947] K.B. 130, the case in which Denning J breathed new life into the doctrine of equitable estoppel. The representation was by a lessor to the effect that he would be content to accept a reduced rent. In such a case, although the lessee has benefited from the reduction in rent, it may well be inequitable for the lessor to insist on his legal right to the unpaid rent, because the lessee has conducted his affairs on the basis that he would only have to pay rent at the lower rate; and a Court might well think it right to conclude that only after reasonable notice could the lessor return to charging rent at the higher rate specified in the lease. Furthermore it would be open to the Court, in any particular case, to infer from the circumstances of the case that the representee must have conducted his affairs in such a way that it would be inequitable for the representor to enforce his rights, or to do so without reasonable notice.

The doctrine of promissory estoppel is based on detrimental reliance. It normally involves a unilateral promise that the promisor knows or should know that any act of forbearance on the part of the promisee, and the promisee does in fact detrimentally rely upon the promise, or to a certain extent reasonably relies upon the promise so as to alter the promisee’s position. It has been held that the very fundamental purpose of the doctrine of promissory estoppel is “protection against the detriment which would flow from a party’s change of position if the assumption (or expectation) that led to it were deserted”.

The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract: this can be seen in series of cases as follows; *Sarat Chunder Dey v. Gopal Chunder Laha* LR 19 IA. 203; *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* [1982] QB 84. It has operated to prevent a

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31 See also Section 90 of the United States’ Restatement (Second) of Contracts, which defines promissory estoppel as: “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise”.


litigant from denying the validity of an otherwise invalid trust (see, *Commissioner For Religious Affairs, Trengganu v. Tengku Mariam binti Tengku Sri Wa Raja* [1970] 1 MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see, *Taylor Fashions Ltd v. Liverpool Victoria Trustees* [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see, *Waltons Stores (Interstate) Ltd. v. Maher* [1988] 164 CLR 387) and to create binding obligations where none previously existed (see, *Spiro v. Lintern* [1973] 1 WLR 1002. It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case *(supra)* or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *The American Surety Co. of New York v. The Calgary Milling Co. Ltd.* [1919] 48 DLR 295; *De Tchihatchef v. The Salerni Coupling Ltd.* [1932] 1 Ch. 330; *Taylor Fashions* *(supra)*.

The true nature of the doctrine as a shield and as a sword has been stated by Lord Russell of Killowen in *Dawsons Bank v. Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100, 108:

> Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.

It is also wrong to think that the doctrine is confined to cases where a representation of fact has been made or where a party has been encouraged by another to believe in the existence or in the nonexistence of a fact.

The decisions of the Privy Council in *Sarat Chunder Dey* and *The Calgary Milling Co* (among others), to which we have referred earlier, concerned cases involving representations not of fact but of law.

If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so.

There are two elements of the doctrine of estoppel that require further clarification and re-statement. The first concerns the effect which the representation or encouragement had upon the mind of the person relying upon the estoppels, and the second is the requirement that such a person should have acted to his detriment.

The traditional view adopted by jurists of great learning is that a litigant who invokes the doctrine must prove that he was induced by the conduct of his opponent to act in a particular way. It is sufficient that “his conduct was so influenced by the encouragement or representation...that it would be unconscionable for the representor thereafter to enforce his strict legal rights” (Per Robert Goff J. in Amalgamated Investment at page 105 of the report).

Taking the requirement of detriment, it is quite apparent that in the early development of the doctrine there are to be found, in the judgments of eminent judges, statements indicating that one who relies upon an estoppel must prove that he relied upon his opponent’s conduct, and in consequence, acted to his detriment.34

The court held that the detriment element does not form part of the doctrine of estoppel. In other words, it is not an essential ingredient requiring proof before the doctrine may be invoked. All that need be shown is that in the particular circumstances of a case it would be unjust to permit the representor or encourager to insist upon his strict legal rights. In the resolution on detriment, the justice may give rights to litigants in raising estoppels.

In one case, Hubbs v. Black, 1918, agreeing not to take a certain plot in a cemetery was considered to be sufficient consideration. Giving a right to sue on a “bona fide” claim has been deemed to be adequate consideration. Also, the courts don’t really care about the adequacy of the consideration. This is the business of the parties and is not a matter for judicial interference (sec 2(d)).

34 See, for example, Wong Juat Eng v. Then Thaw Eu [1965] 1 LNS 201.
Gopal Sri Ram JCA, in the Federal Court’s decision in Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283, it was observed at page 294 as follows:

The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

The same was also discussed in Alan v Al-Nasr [1972]2 WLR 800, that detrimental reliance is not a requirement of promissory estoppel. It only needs to be established that the promisor has changed their position. The above two decisions may open the floodgates for claims of Promisory estoppel. There is a second doctrine of equitable estoppel that is called ‘proprietary estoppel’. Proprietary estoppel applies to cases in which a party with rights to property leads another to believe either that the other party has rights to that property (often labelled ‘acquiescence’), or will be granted some in future. This doctrine is not merely an equitable doctrine of waiver, as the Combe v Combe ‘shield not sword’ limitation does not apply to proprietary estoppel. It is also fairly clear that detrimental reliance, rather than mere reliance, is required on the part of the party gaining the rights. It has to assert that the current trend also makes promissory estoppel a sword and not merely a shield. It can be brought as a cause of action. The uncertainty in legal principles may invite uncertainty in practice. In fact, wa’d mulzim is something fixed. Practically, promissory and wa’d may look similar; however, theoretically, they contain two different doctrines.

35 Refer to Walton Stores (Interstate) Ltd v Maher (1988) 76 ALR 513. As a consequence, promissory estoppel in Australia may be used as both a ‘sword and a shield’:

“Promissory estoppel, it has been said, is a defensive equity, and the traditional notion has been that estoppel could only be relied upon defensively as a shield and not as a sword. High Trees ([1947] K.B. 130) itself was an instance of the defensive use of promissory estoppel. But this does not mean that a plaintiff cannot rely on an estoppel.....But the respondents ask us to drive promissory estoppel one step further by enforcing directly, in the absence of a pre-existing relationship of any kind, a non-contractual promise on which the representee has relied to his detriment.....The principal objection to the enforcement of such a promise is that it would outflank the principles of the law of contract....[T]he doctrine [of promissory estoppel] extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required.....[T]his may be found, if at all, in the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party. .....[In this case] the crucial question remains: was the appellant entitled to stand by in silence when it must have known that the respondents were proceeding on the assumption that they had an agreement.”
7.1. Adequacy of Consideration Is Irrelevant; Hence, so Long as There Is Consideration on the Part of the Promisee, the Promise by the Promisor Becomes Binding

The Act has made it explicit that adequacy of consideration is irrelevant. For the avoidance of doubt, so long there is an action or abstinence on part of the promisee bank, so as to alter its position, then that action or abstinence is sufficient consideration on the part of the bank, and the court will not look into the adequacy of consideration in the contract. And as explained earlier, the consideration by the bank constitutes a form of acceptance of the promisor customer’s proposal; hence, concluding a legally valid and binding contract between the two.

Cheshire, Fifoot and Furmston’s *Law of Contract*, twelfth edition, at page 81 states that, in relation to adequacy of consideration:

> It has been settled for well over three hundred years that the courts will not inquire into the adequacy of consideration. By this is meant that they will not seek to measure the comparative value of the defendant’s promise and of the act or promise given by the plaintiff in exchange for it, nor will they denounce an agreement merely because it seems to be unfair. The promise must, indeed, have been procured by the offer of some return capable of expression in terms of value.

Section 2(d) of the Contract Act states, “When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.”

Currie v Misa contains a famous statement by Lush J giving the definition of consideration in English law. He said, “A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.” Apparently, abstaining from doing something or not doing something is also considered consideration in this case. In Winn v Bull, the contract subject to further contract means no formal contract is executed until the further contract is drafted and

36 Explanation 2 of Section 26 of the Act.
37 Low Fang Boo V. Lay Chee Foong @ Lye Chee Foong [1998] 1 LNS 499.
signed. The rule in Winn v Bull has been applied in the Malaysian case of Low Kar Yit. It means *wa’d* is a promise to act upon to do or to purchase something.  

The practice of the solicitors drafting the documentation in a number of Islamic financial arrangements in Malaysia that adopt promises (*wa’d*) as part of the transaction structuring is to normally require the Promise (*Wa’d*) Document to be executed by two parties, i.e., the customer and the bank. This is mainly to fulfil the requirement of the Act that there needs to be a proposal and acceptance in order to make the contract valid and binding, as well as to avoid possible future challenges from the customer that the promise was unilateral on his part.

Within the context of promises in the practice of Islamic banking and finance, it is apparent that the doctrine of promisory estoppel is not construed to cause hardship or detriment upon the promisee; i.e., in the event that the promisee bank acted upon the customer’s promise and suffered a loss or detriment because the customer failed to honour his promise, i.e. to purchase the asset from the bank, then the law would regard the promise by the customer as legally binding. The customer cannot later deny the fact that he actually gave the promise to purchase the asset, nor could he claim that he never intended the purchase at the point in time when the Promise (*Wa’d*) Document was signed. To allow such denial by the customer would deny justice to the promisee bank. Therefore, by applying the doctrine of promisory estoppel, a promise can be enforced legally in the court, but the court must be more vigilant in applying this equitable doctrine to achieve justice.

Estoppel has been invoked in section 115 of the Evidence Act 1950:

> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

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38 Refer to the case of Tg Zahara v Che Yusof; the court held the transaction was valid.

The characteristics of promisory estoppels are as follows:

(i) Mere silence can give rise to a promise or active encouragement (Boustead Trading (1985) Sdn Bhd v AM Merchant Bank [1995]3MLJ 331]. Refer to the case of Hughes v Metropolitan Railway(1877)2 App Cas439.

(ii) The representation, promise or encouragement must be clear and unequivocal.

(iii) The doctrine applies even when there is no preexisting legal or contractual relationship between the parties.

(iv) It must be unfair and unjust for the promisor to go back on his promise and insist on his strict legal rights.

(v) The promisor’s act had influenced the promisee.

(vi) The representation made by the promisor may be of fact or of law.

(vii) The promisee changed his position as a result of the promise (reliance but not necessarily to his detriment). A promise intended to be binding, intended to be acted upon, and in fact acted upon, is binding, so far as its terms properly apply.40

In brief, the differences and similarities between promisory estoppels and \( \text{wa'd} \) are as follows;

<table>
<thead>
<tr>
<th>Promissory Estoppel</th>
<th>( \text{Wa'd Mulzim} ) (Binding ( \text{Wa'd} ))</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Mere silence can give rise to a promise or active encouragement (Boustead Trading (1985) Sdn Bhd v AM Merchant Bank [1995]3MLJ 331] Refer to the case of Hughes v Metropolitan Railway(1877 )2 App Cas439</td>
<td>1. Silence only applied to promisee and not the promisor. (in case of non binding ( \text{wa'd} ) only)</td>
</tr>
<tr>
<td></td>
<td>2. Binding ( \text{wa'd} ) does not recognise silence or gestures on the promisor. It has to be written or oral.</td>
</tr>
</tbody>
</table>

40 Refer to the High Trees Case.
2. The representation, promise or encouragement must be clear and unequivocal | Yes
3. The doctrine applies even when there is no pre existing legal or contractual r/ship between the parties | Yes
4. It must be unfair and unjust for the promisor to go back on his promise and insist on his strict legal rights | Yes
5. The promisor’s act had influenced the promisee | Yes
6. The representation made by the promisor may be of fact or of law | Yes but must be on lawful subject matter
7. A change in position of the promisee as a result of the promise (reliance but not necessarily to their detriment) A promise intended to be binding, intended to be acted on and in fact acted on, is binding, so far as its terms properly apply. Refer to High Trees case | Must incur losses (actual)

Table 7: Differences and Similarities of Promisory Estoppel and Binding Wa’d

Based on the above table, it appears that criteria nos. 1, 6 and 7 are not similar to each other. These differences may lead to differing interpretations, and therefore, wa’d cannot be said to be entirely equivalent to promissory estoppel. A mere unilateral promise is not binding. However, a unilateral promise becomes binding when all criteria (1-7) in promissory estoppel are fulfilled. However, wa’d does not recognise mere silence or active encouragement or gestures as factors that make a wa’d binding. Wa’d has to be sarīh (explicit), either written or oral, and it has to have led someone to change his position from his status quo.
8. **WA’D AND THE LAW ON UNDERTAKINGS**

Wa’d implies an undertaking mentioning that the buyer/seller undertakes to buy a certain property in consideration of a bank purchasing it (as in case of an MPO). For example, the wording in *wa’d* executed as below:

“The customer hereby **promises** to purchase from the bank the asset pursuant to the bank purchasing the same asset from the vendor” [signed by the customer and the bank and in some banks, signed only by the customer without a signature from the bank].

On the other hand, the letter of undertaking may appear to be as follows;

“The customer hereby **undertakes** to purchase from the bank the asset pursuant to the bank purchasing the same asset from the vendor” [signed by the customer only].

This paper asserts that the execution of *wa’d* is in **pari materia** with a letter of undertaking applied in conventional practice. This part will discuss and compare the features of *wa’d* and LOU.

A letter of undertaking shall be given its natural and ordinary meaning. This is laid down in the case of Chase Perdana Sdn Bhd (formerly known as Chew Piau Bhd v. CIMB Bank Bhd [2010] 8 CLJ 428; [2009] 1 LNS 1031; [2010] 1 MLJ 685:

“An undertaking is defined in the New Shorter Oxford English Dictionary as, inter alia, pledge, promise or guarantee’. To ‘undertake’ is defined in Collins English Dictionary as ‘to contract to or commit oneself to (something) or (to do something)’.

In Michael C Solle v. United Malayan Banking Corporation [1984] 1 CLJ 267 (Rep); [1984] 1 CLJ 151; [1986] 1 MLJ 45, Hashim Yeop Sam FCJ said, on p. 46:

“The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said.”
8.1. Breach of an Undertaking

The breach of an undertaking attracts damages in the same manner as a breach of contract. It is, therefore, correct to state that an undertaking is similar to a contractual relationship.\(^{41}\)

8.2. Determining the Parties’ Intentions

How is the intention of the parties ascertained? As stated by Lord Bingham of Cornhill in Bank of Credit and Commerce International SA v. Ali & Ors \(2002\) \(1\) \(AC\) 251:

To ascertain the intention of the parties, the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties’ relationship and all the relevant facts surrounding the transaction as far as known to the parties. To ascertain the parties’ intentions, the court does not of course inquire into the parties’ subjective states of mind but makes an objective judgment based on the materials already identified.

In accordance with the law relating construction of contracts, the LOU is to be accorded its natural and ordinary meaning given the context and factual matrix of the contract.

In short, the meaning to be accorded to the LOU is to be contextual. This is indeed significant, as pointed out by Lord Hoffman in Jumbo King Ltd v. Faithful Properties Ltd & Ors \(1999\) \(2\) HKC 507:

The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean. And this involves having regard not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve. Quite often this exercise will lead to the conclusion that although there is no reasonable doubt about what the parties meant, they have not expressed themselves very well. Their language

\(^{41}\) See Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd \(1993\) \(2\) CLJ 146; \(1994\) \(3\) MLJ 777, p. 786.
may sometimes be careless and they may have said things which, if taken literally, mean something different from what they obviously intended. In ordinary life people often express themselves infelicitously without leaving any doubt about what they meant. Of course, in serious utterances such as legal documents, in which people are supposed to have chosen their words with care, one does not readily accept that they have used the wrong words. If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the court will give effect to that language, even though the consequences may appear hard for one side or the other. The court is not privy to the negotiation of the agreement – evidence of such negotiations is inadmissible – and has no way of knowing whether a clause which appears to have an onerous effect was a quid pro quo\(^{42}\) for some other concession. Or one of the parties may simply have made a bad bargain. The only escape from the language is an action for rectification, in which the previous negotiations can be examined. But the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems, the meaning is clear, it is that meaning which must prevail.”

Dato’ V.C. George J stated:

To constitute a valid contract, there must be separate and definite parties thereto; those parties must be in agreement. That is there must be a consensus ad idem; those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises and the promises of each party must be supported by consideration.\(^{43}\)

In the Indian case of *Muralidhar Chatterjee v. International Film Co Ltd* AIR [1943] PC 34, the Privy Council has given an explanation under Section 53 of the Indian Contract Act (which is in pari materia with Section 54 of the Malaysian Contract Act 1950). According to the decision, if one party prevents the other from performing his

\(^{42}\) Literally, something for something; applied, inter alia, to the concept of consideration in a contract. [http://www.cljlaw.com/membersentry/lawdictionary.asp](http://www.cljlaw.com/membersentry/lawdictionary.asp).

promise, the contract becomes voidable at the option of the party so prevented, and the latter may elect to rescind it. Section 76 of the Malaysian Contract Act expressly confers a right to recover damages. The party so prevented is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract. Indeed, Section 54 states that the party so prevented is entitled to treat the contract as discharged or elect to rescind the same, and may make claim for such loss which it has sustained as a consequence of the non-performance of the contract by the defendant. In this context, it is relevant that Section 54 applies equally to a failure or neglect or default in carrying out obligations under the contract as much as an act of direct or forcible prevention does.\(^\text{44}\)

This section applies to promises or obligations breached. However, does this section apply to a breach of \textit{wa\'d}? The answer would be negative, the reason being that Section 2(b) only recognizes a promise when the proposal has been accepted. This section applies to \textit{mu\'awadah mulzimah}, which is not recognized under the Shar\’ah law.\(^\text{45}\)

### 8.3. A Solicitor’s Undertaking

Where a solicitor who is acting professionally for a client gives his personal undertaking in that character to the client or to a third person, or gives an undertaking to the court in the course of proceedings, that undertaking may be enforced summarily upon application to the court. Before this remedy can be pursued, it must be shown that the undertaking is given by the solicitor personally, and not merely as an agent on behalf of his client. The undertaking must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor. The undertaking must be clear in its terms. The whole of the agreement to which it relates must be before the court, and the undertaking must be one which is not impossible \textit{ab initio} for the solicitor to perform. Nevertheless, an undertaking will be enforced against the solicitor even though, after it is given, the client dies or instructs the solicitor not to perform it or changes his solicitor.

The importance of respecting an undertaking given by solicitors is underlined by Suriyadi JCA in \textit{Nasir Kenzin & Tan v. Elegant Group Sdn Bhd} [2009] 1 CLJ 47; [2009] 1 AMR 715 when his Lordship said, on p. 729:


\(^{45}\) Refer to \textit{muwā\’dah mulzimah} in the Shar\’ah part.
The impugned undertaking is a promise or security given in the course of an arrangement for obtaining some concessions from the respondent, and binds the appellant in law. The seriousness of an undertaking cannot be underestimated, especially one given by a member of the legal profession, because a breach of the undertaking will whittle away public confidence and trust in the legal profession.

This is because each and every word used must be properly construed as in the English Court of Appeal’s case of *Caldwell v. Sumpters (a firm) and Another* [1972] 1 All ER 567. In *Re Choe Kuan Him, Advocate & Solicitor; T Damodaran v. Choe Kuan Kim* [1975] 1 LNS 143, YA Syed Agil Barakbah J states that:

Now, turning back to the written undertaking, (exh. D1), apart from what I have said earlier, the words are plain and unambiguous and do not call for any departure from the ordinary rules of interpretation. The intention is clear. When the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced. Further, he ought to have included words which show clearly that he is not accepting personal liability but merely acting as agent of a particular party in the transaction. As a solicitor, the respondent ought to have foreseen the consequences of such failure. He cannot now turn back and say he was acting on the instructions of his client. He is the stake-holder and therefore bound by his undertaking.

In *Seah Choon Chye V. Saraswathy Devi* [1970] 1 LNS 143, Syed Agil Barakbah J, as he then was, stated the principle regarding a solicitor’s undertaking in the following words, “The general principle as regards an undertaking of this nature is that it must be given by a solicitor personally and not merely as an agent on behalf of his client. It must be given in his professional capacity as a solicitor and not as an individual.”

*Halsbury’s Laws of England* (3rd edn., vol. 36, p. 195) states the principle in the following words:

Where a solicitor, who acting professionally for a client, gives his personal undertaking in that character to...a third...person that undertaking may be enforced summarily upon application to the Court. Before this remedy can be pursued, it must be shown that the undertaking is given by the
solicitor personally, and not merely as agent on behalf of his client; the undertaking must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor.

Siti Norma Yaakob H, J (As she then was), in United Malayan Banking Corp. Bhd. V. Warisan Niaga (M) Sdn. Bhd. & Ors [1990] 2 CLJ 110; [1990] 3 CLJ (Rep) 318, stated:

Turning to the undertaking that has been executed by the 6th Defendant, it is expressed in a very clear and unambiguous language, and despite what had been submitted before me, I see no precondition attached to it before it can be established. It is very clear in intent and meaning. It was given by him in his professional capacity as such, and since he is the sole proprietor of his firm, he cannot now deny it on the grounds of some precondition that does not appear in the undertaking itself.

Public Bank Bhd. V. Perwira Affin Bank Bhd. [2001] 7 CLJ 447, held that:

The undertaking was from the defendant and addressed to the plaintiff. The undertaking stated that the defendant was to release payment to the Developer’s account maintained at the Plaintiff’s Kuala Lumpur main office. The undertaking was from the defendant to the plaintiff and to no other. There were two conditions in the undertaking, namely, that a second charge to be created in favour of the defendant and that payments would be made upon presentation of the relevant architect’s/engineer’s certificate, certifying the actual stage of completion of the property pursuant to the agreement. As such there is no such third condition, nor was the plaintiff acting as agent of the purchaser when it issued the undertaking. If the purchaser did instruct the defendant not to pay out of his loan, such an event will not affect the undertaking from the defendant to the plaintiff as the defendant had not expressly guarded against the same in the undertaking.

Kamalanathan Ratnam J further analysed the matter, stating:

An undertaking is defined in the new shorter Oxford English Dictionary Vol. 2 N-Z [1993] as, inter alia, a pledge, a promise and a guarantee. It is clear and unchallenged that the document at p. 122 of the common agreed
bundle of documents is an undertaking. The construction to be given to an undertaking is similar to that applied to an ordinary contract.

In *Micheal C. Solle v. United Malayan Banking Corp* [1984] 1 CLJ 267 (Rep); [1984] 1 CLJ 151; [1986] 1 MLJ 45, Hashim Yeop Sani FJ stated on p. 46, “The principles of the construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said.”

The breach of an undertaking attracts damages in the same manner as breach of contract (see *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn. Bhd.* [1995] 1 CLJ 15; [1994] 3 MLJ 777 at p. 786). It is, therefore, correct to state that an undertaking is similar to a contractual relationship.

### 8.4. Undertakings by Banks

An undertaking from a bank is binding upon it. This was held in *Public Bank Bhd v Perwira Affin Bank Bhd*:

In any event, whether or not the defendant paid out any money to satisfy the garnishee order, it does not abrogate the defendant from performing its obligations pursuant to the undertaking. Further, whilst the garnishee order was made absolute, the Seremban High Court never made any order releasing the defendant from its obligations pursuant to the undertaking. An undertaking of the type as in the case before me, from a bank, must be given the due recognition of an undertaking from a bank, and is not to be equated to that of an undertaking given by a mere layman. An analogy can be drawn with that of a bank guarantee, performance bond or even a standby letter of credit issued by a bank. It is my judgment that an undertaking from a bank is similar in effect as that of a bank guarantee, performance bond or standby letter of credit. Should a bank be allowed to abrogate itself from the same, the consequences can be very damaging and far reaching not only in the banking industry but more so in the commercial and business industries. I hold that an undertaking from a bank should be given the due recognition similar to an undertaking from a solicitor. An undertaking such

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46 Refer also to *Chase Perdana Sdn Bhd v. CIMB Bank Bhd*. 
as this must be construed strictly against the bank issuing it; otherwise, the practice of usury, which relies heavily on honour and standing, will lose its usurer. If a bank cannot take for granted that an undertaking given to it by another bank will be honoured without having to have a court to decide if such an undertaking is a valid or an enforceable undertaking, then the position of a layman giving an undertaking will seem meaningless. It is, therefore, my judgment that notwithstanding the Seremban High Court proceedings, the defendant owes an independent duty and obligation as stipulated in the undertaking and the defendant has to discharge the same. Since the defendant has failed to discharge its obligations pursuant to the undertaking, I grant the plaintiff.

The table below shows that *wa’d* and undertakings are similar in terms of their nature but not in terms of the consequences of their breach. Common law treats *wa’d* as equivalent to breach of contract whereas breach of *wa’d* is not a breach of contract.

<table>
<thead>
<tr>
<th></th>
<th><em>Wa’d</em></th>
<th>Undertakings</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Nature</strong></td>
<td><em>Wa’d</em> is binding on the promisor only</td>
<td>Binding on the promisor</td>
</tr>
<tr>
<td><strong>The act</strong></td>
<td>The promise is made contingent upon a specific cause or condition</td>
<td>An undertaking, however expressed, either that something shall happen or that something shall not happen, in the future.</td>
</tr>
<tr>
<td><strong>Contractual obligation</strong></td>
<td>The promisee has acted upon the promise and incurred some expenses</td>
<td>The intentions of the parties are to be gathered from the language used, They are presumed to have intended what they said.</td>
</tr>
<tr>
<td><strong>Consequences of breach</strong></td>
<td>The consequences or effects of this binding promise: the promisor has to fulfill the promise, OR, to compensate the actual damages incurred as a result of the breach of the promise without valid excuses</td>
<td>Similar to breach contract</td>
</tr>
</tbody>
</table>

Table 8: Comparison between Binding *Wa’d* and Undertaking
The letter of undertaking is a promise given by someone to perform and made contingent upon a specific cause. LOU is as good as a contract; and consequences of its breach may lead to a similar result as breach of contract. Wa’d is regarded in the Sharī‘ah as merely a promise and a pre-negotiation towards formulation of a formal contract. It is an invitation to treat that invites parties to enter into a contract. The consequences of breach of wa’d are not the same as breach of contract as discussed either in English law or Malaysian law. In summary, wa’d is incapable of being in pari materia with LOU. Although the nature and the act look the same, the contractual obligation differs.

In summary, it is observed that the Contract Act 1950 is silent about wa’d mulzim. However, wa’d is not a stand-alone document; it has to be read together with other documents. Wa’dân and muwā‘adah are significant to Islamic finance practice and provisions for them need to be drafted equally with wa’d under the separate headings of promises. Our contract Act only recognises binding muwā‘adah, which is not recognised as valid in the Sharī‘ah. In contrast, our contract Act has nothing to say about muwā‘adah ghair mulzimah, which the Sharī‘ah does recognize.

9. CONCLUSION

This study has looked into the binding nature of wa’d from both Sharī‘ah and legal dimensions. In addition, it has examined other related terms, namely: muwā‘adah and wa’dân. From the Sharī‘ah perspective, the paper examines the conceptual meanings of the terms and their rulings, including the opinions of classical Muslim jurists as well as the contemporary resolutions issued by Sharī‘ah scholars of various institutions.

With regards to the concept of wa’d, many classical jurists, particularly from the Mālikīs, use the term within the context of unilateral contracts such as a loan or gift. The majority considers fulfillment of a wa’d not to be obligatory; therefore, it is not religiously or legally binding on the promisor. On the other hand, a minority opines that fulfilling a wa’d is obligatory under all circumstances. Some Hanafī and Mālikī scholars hold a middle position that fulfilling a wa’d is legally binding upon the promisor if the promise is contingent or the promise is attached to a cause and the promisee has acted upon that cause. In the modern era, especially with the vast growth of Islamic banking and finance, wa’d is deemed religiously and legally binding by most Sharī‘ah scholars in many Islamic financial transactions.
Muslim scholars in the past, particularly the Mālikīs, have also discussed the concept of muwā‘adah in relation to marriage and some exchange contracts such as trading something which is not owned, trading food before taking possession, trading during the call for Friday prayer and currency exchange (sarf). They disallow muwā‘adah if it is related to something that would be invalid if it were executed at the very time the promise is made. The basis for the prohibition is to block the means leading to forbidden acts (sadd al-dharī‘ah). With regards to muwā‘adah in a currency exchange, they had divergent views. While the majority disallowed it, some scholars considered it lawful but disliked. On the other hand, a minority considered muwā‘adah in a currency exchange as neutrally permissible, but in a non-binding context.

Wa‘dān is a relatively new term introduced by modern scholars as a legal trick (ḥīlah) to avoid two promises on the same subject matter becoming a binding muwā‘adah, which is not allowed by most scholars. The legal trick works through having different conditions that will eventually lead to the exclusive execution of one binding wa‘d in the future.

Looking at the legal aspect, this research has examined the principle of wa‘d from different angles, mainly the Malaysian Contract Act 1950, the doctrine of promisory estoppel, the principles of undertaking and the concept of promise, in an endeavour to find a possible provision for enforcing a binding wa‘d in a court of law. The study found that the Contract Act 1950 is silent on this issue. Therefore, the study proposes that a separate clause on wa‘d, its definition and the main characteristics of binding wa‘d should be incorporated in the Act.

In addition, an empirical study on wa‘d documentations will provide an avenue to examine the Sharī‘ah compliance of wa‘d-based products that are currently available in the market. This is because wa‘d has become a significant tool in structuring new controversial Islamic financial products.
REFERENCES


