

**THE PRACTICE OF *MURABAHAH* SCHEME IN SYARIAH BANKING  
(CRITICAL ANALYSIS TOWARDS THE APPLICATION OF *MURABAHAH*  
SCHEME IN INDONESIA AND MALAYSIA**

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**Abstraksi**

Terdapat perbedaan signifikan pada konsep akad murabahah antara Indonesia dan Malaysia. Perbedaan yang paling besar terletak pada adopsi *bai' ail-inah* di Malaysia yang tidak dapat diaplikasikan di Indonesia. Lembaga Syariah Nasional di Indonesia menegaskan bahwa jenis perjanjian tersebut adalah haram (fraudulent) sehingga di larang untuk diaplikasikan. Dalam hal ini, akad dibagi menjadi dua bagian, yaitu dari bank untuk nasabah dan dari nasabah untuk bank. Jelaslah bahwa ini adalah riba yang terselubung. Berkenaan dengan keamanan rasa percaya (*dhaman*), tidak terdapat perbedaan antara ke dua negara. Alasan untuk mengadopsi keamanan ini hanya karena didasarkan prudensialitas dalam pembiayaan yang dikucurkan kepada nasabah.

Keywords : *contract, Murabahah, ba'I al-Inah, Dhaman*

**Introduction**

The growth of syariah bank in Indonesia is rapidly increasing along with the growth of people awareness that interest and capital that are predetermined are considered as *riba* that is forbidden by Islamic principle. As a result, many Moslem intellectuals and Islamic economics theoreticians have been expecting an interest free banking<sup>1</sup> since 1950. Banking Institution refers to one of financial institutions in

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<sup>1</sup> Abdullah Saeed, *Bank Islam dan Bunga, Studi Kritis dan Interpretasi Kontemporer tentang Riba dan Bunga*, Pustaka Pelajar Ctk. Pertama, 2003, page 2

Indonesia as regulated in Law No. 7 year 1992 jo. Law No 10 year 1998 about Banking and Regulation No. 23 year 1999 jo. Law No. 3 year 2004 about Indonesia Bank that banking institution is in charge of collecting fund from people and redistributes the fund to people through crediting.

Indonesia and Malaysia are the pioneers in developing Islamic banking in Southeast Asia region. The development of Islamic banking in these two countries are increasing rapidly just like mushrooms in rainy season. In Malaysia, it has been starting since 1983 by establishing BIMB (Islamic Bank of Malaysia Berhad). Moreover, if it is referred to the project undertaken in *Lembaga Tabung Haji* (Saving Institution for Hajj), Malaysia, as a matter of fact, has learned Islamic Monetary Institution since 1963, even though the experiment was unsuccessful. Meanwhile, in Indonesia there are 3 syariah banks, and 20 conventional banks that provide syariah division and 105 BPRS, not including BMT with highly developed quality (LPPS, 2007). For this reason, the Law No. 10 year 1998 about the change of the Laws No. 7 year 1992 is regulated stating:

“Bank is an institution collecting the fund from the people in the form of saving and redistributing to people through crediting and / or any other forms for stimulating the living standard of the people. Conventional Bank refers to a bank conducting the activities conventionally and based on the *syariah* principles in which in its process it gives service in payment flow”.

The development of *Syariah* banking in Indonesia is so booming and rapid. Nevertheless, some still assume that syariah bank is merely a label used to attract Moslems in banking field. They view that syariah banks are merely conventional banks with banking terms covered by Islamic terms starting with *Bismillahirrahmaanirrahiim* and the staff with Islamic costumes saying *salam* (greeting), yet in the implementation of the contract, *Syariah* bank still applies the principles that are religiously forbidden. The skepticism from people about *syariah* banking is not able to be disregarded since the connotation of banking has been visibly separated with syariah and for the consequence, at the beginning of the establishment of syariah banking; many people doubtfully consider a success of the Islamic economists to combining the banking institution with syariah.

One of the methods in distributing fund in syariah bank is through the funding product of *murabahah* - a trading with cost price added by the profit contracted<sup>2</sup>. The

characteristics of *murabahah* are that the seller must inform to the buyer about the price of product purchased and state the amount of the profit added to the cost.<sup>3</sup>

The principle of Syariah related to *murabahah* implementation is QS. An-Nisa': 29, QS, Al-Baqarah: 275 with the following meaning :

“For you the faithful, do not ever you demolish your fellow’s wealth in the evil deed, except there is a transaction among you” (QS. An-Nisa sentence: 29)

“ .....and Allah allows a trade and forbid *riba* (interest). (QS. Al-Baqarah sentence: 275)

From Suhaib al-Rumi r.a, the Prophet Muhammad SAW said: “There are three things in which the blessing found inside: do trading firmly, *muqaradhan* (*mudharabah*), and blend flour with butter for household needs, not for sale”. (HR. Ibn Majah)

Product of *murabahah* is funding product in which the party from the bank could act as a mediator between the parties having an interest, namely customer and *developer*. At this point, if the customer desires to possess or purchase goods from the *developer*, while the customer has not had the sufficient finance to purchase it, thus the bank in this case provide assistance in the form of funding by purchasing the thing previously desired by the customer from *developer*. Following this, the bank will sell goods to the customer with the price which is equal with the purchasing of the bank from the *developer* by method of installment (on credit) added with the profit for the bank that is initially agreed by the bank and customer before the trading conducted.

The advantages of financing in *murabahah* product are that the customers could purchase the goods based on what they desire and how their financial capability is; moreover, the payment could be done in installment in order to give facilities to the customer. Beside that, there is no term of *riba* or interest system in *murabahah* product instead of the openness between the bank and the customer confirming that the bank previously gives the information about the goods that will be purchased is appropriate with the customer’s desire and the price that is determined by the developer has been recognized by the customer. After this, the bank will sell the goods to the customer based on the price of the purchasing from the *developer* plus the profit for the bank. This

additional profit for the bank is contracted at the beginning of transaction based on the agreement between the bank and the customer. At this point, the oppression will never appear.

Transaction in trade in general is related to *dhomman* (guarantee) which theoretically refers to the responsibility of the trader in guarantying that the goods is in a good condition.<sup>4</sup>

Most of the experts in Islamic Law (*jumhur*) explain that there are five pillars in issuing the contract of *murabahah*, namely: The existence of the trader (*ba'i*); the existence of the purchaser (*musytari*); the goods or commodity (*mabi'*) traded; the Price of the goods based on the currency rate (*tsaman*), and the agreement / *ijab kabul* (sighat), a statement of both parties.

The funding in *murabahah* enables the existence of *dhomman* (guarantee), since the characteristics from the payment in *murabahah* refers to a trade whose the payment is not completed in cash, thus the obligation becomes the loan that must be paid by *musytari*. Syariah bank (*ba'i*) applies the principles of carefulness by issuing *dhomman* to the customer.<sup>5</sup>

The emergence of the guarantee or *dhomman* in Syariah bank seems to be a problem for the party intending to propose the financing especially for the ones who has no *dhomman* that can be guaranteed to obtaining the financing from Syariah Bank. It then becomes a serious issue since syariah bank must decide on the customer from the aspect of appropriateness in obtaining the financing both from personal and financial sides. From the personal side, the syariah bank will try to find out the profile of the customer in order to decide whether the one has good and appropriate aims or not, while from financial side, it is usually based on the capability in the payment liability.<sup>6</sup>

The financing of *murabahah* in BTN Syariah (National Saving Bank), for instance, has the elements of *dhomman* possessing the crucial position in which *dhomman* is a must. Nevertheless, the existence of *dhomman* theoretically is not needed for each products of syariah bank since the initial determination of Syariah Bank does not apply *dhomman* but trust system. Additionally, from the regulation stated in regulation DSN No. 04/DSN-MUI/IV/2000, it is found that there is a point stating that *dhomman* is

allowed in order to make the customers are concerned with their order. In other words, it can be stated that *dhomman* is not forbidden to identify the seriousness of the customers<sup>1</sup> (*musytari*) with their order to the bank (*ba'i*). In the practice of syariah bank, the existence of *dhomman*, however, is a must for the customers. For the consequence, in the implementation of syariah bank, the position of *dhomman* is an absolute condition of the bank to the customers in which the payment will be accomplished.

Based on the explanation above, the issues that are interesting to be analyzed is how the application of *murabahah* contract scheme in syariah banking in Indonesia and Malaysia? What is the function of *dhomman* in *murabahah* contract?

### **Analysis of the Application of *Murabahah* Contract Scheme in Syariah Banking in Indonesia and Malaysia**

There are several distinctions in the application of *murabahah* contract scheme between Indonesia and Malaysia. Those distinctions can be seen from the following explanation: *Murabahah* contract in Syariah Bank in Indonesia.

Syariah bank in Indonesia - in general – in giving the financing of *murabahah*, establishes several conditions needed and the procedures that must be obeyed by *musytari*. The conditions and the procedures are closely equal with the conditions and the crediting procedures commonly established by conventional banks. General conditions and procedures in *murabahah* financing; namely:<sup>7</sup> It is for public, not only for Moslem; must be lawful, based on **KUHPerdata** (code of business law), fulfilling 5C: Character, Collateral, Capital, Condition of Economy; and Capability.

To fulfill the procedures of Indonesia Bank and government regulated in the Law No. 10 1998 about the Changing of the Law No 7 year 1992 about banking; the guarantee (*dhomman*) usually is sufficient enough in the form of the goods that is becoming the object of the agreement. However since the amount of the financing is much more than the cost price of the goods (*mark up*), the bank will charge down payment as much as the overload of the amount of the financing that is not covered by cost price of goods.

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<sup>7</sup>interviewed with Arif Wijaya, Account Officer of PT. Bank Rakyat Indonesia (Persero) Branch Office of Syariah Yogyakarta May 20, 2008

For illustration: The financing for the purchasing of motorcycle whose cost price is Rp. 11.000.000,- and based on the agreement, the trader (*ba'i*) sells to *musytari* for Rp.12.000.000,- and is paid in the dead line for one year, as a result, the amount of the payment is Rp. 12.000.000,-. In this trade method, crediting principle could be conducted as well. The *musytari* in every month must pay Rp.1.000.000 in installment (on credit). Whenever something that is become *dhomman* is merely a motorcycle, so when *musytari* does not do the payment (**wanprestasi**), the cost price of the motorcycle- when it is sold – will not cover the amount of the financing. Thus, to answer this, *ba'i* gives the responsibility for *musytari* to do down payment of Rp.1.000.000 in minimum when the contract is held, or the amount of the down payment is based on the policy from the bank.

The financing of *murabahah* conducted by *ba'i* and *musytari* is a trade agreement. It means that if one comes to the syariah bank and intends to have a loan of fund to purchase a certain goods, such as car or house, he must – like or dislike – do a trade with the syariah bank which acts as *ba'i* and the customer is as *musytari*. That is the method of the bank to obtain the advantage that is from the profit of the sale of the goods, not from the overloaded that is conditioned in the contract of saving and loan. Above all, syariah bank as a commercial institution desires to have a profit. The profit obtained by *ba'i* is *marking up* from the sale of the goods in the financing of *murabahah*.<sup>8</sup>

The level of *mark up* for each financing is different; it is highly affected by the level of the risk guaranteed for the financing. The amount of the mark up- in its turn- is not affected by the duration of the deadline for the financing as commonly applied in contract agreement to the conventional bank using the principles of “The longer the duration of the credit is, the higher the interest will be obtained by the bank (time value of money).

The contract (*akad*) in the financing of *murabahah* – when it already occurs – will make the amount of the price never change. However, to pass up the *wanprestasi* by *musytari*, that is not paying or late to pay the financing of *murabahah*, in an agreement, a clausal about fining that must be paid by *musytari* is advanced. The fine accepted by *ba'i* is not one of the income sources of syariah bank (*ba'i*), since the fine obtained is used as

social funds, one of them is distributed by Qard al – hasan, this is one of positive sides in syariah banking, it is not only as commercial institution, but also syariah bank acts as a social institution for human prosperity.

*Musytari* in this financing is enabled to purchase by himself the goods that he desires. It is because *musytari* forces *ba'i* with many reasons, for instance with the reason to find the cheaper goods, or to find the discounts. As a matter of fact, the bank (*ba'i*) can obtain the goods with the cheapest price and when even there is a discount it belongs to *musytari*, but however to have the satisfying service to *musytari*; such as, to avoid the *ba'i* purchases goods unexpected by *musytari*, the bank as the *ba'i* allows the *musytari* to purchase the goods by themselves. The bank would give the right to them with *wakalah*.

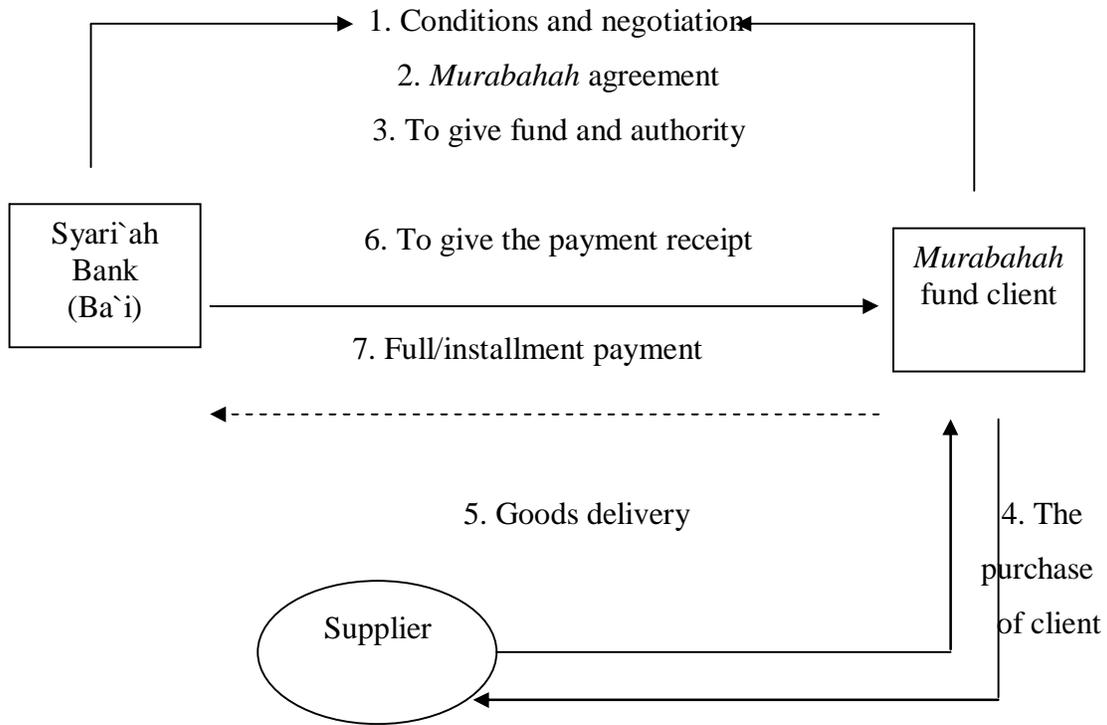
Based on it, the needs of the goods purchasing are from the *murabahah* which is for the work capital and the consumption needs as a measure of the ability of the syari`ah bank monitoring and ensuring that the goods are really applied as what is in the agreement or contract. Generally, the syari`ah bank as the *ba'i* has technical problems to the sold goods supplying and specialization while in the other hand the *musytari* needs the various goods from it.

In the practicing field happens in the syari`ah bank is not purely sells the goods as in the other trade industries which sells directly to the costumers since *ba'i* has no stock and the bank is not as an investment agency because it does not play the role as a trade object.

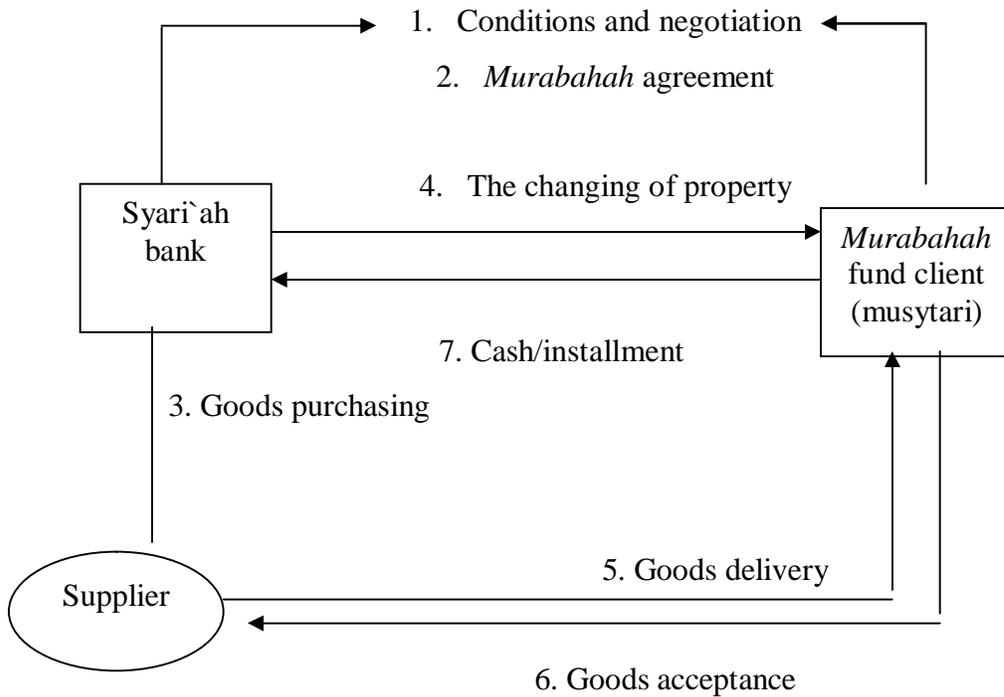
As an exposition of the expense practice of *murabahah* in the syari`ah bank in Indonesia, the writer would present the examples of it. They are: (a) the example of the house renovation expense. The *musytari* proposes the expense of the renovation to the bank and the bank then would give the fund. The *musytari* would get the letter of authorization, which functions as the right to purchase the building material goods as it describes in the picture 1.1. The bank would give 30 days limit to the *musytari* to purchase the goods with the payment receipt in bills or invoice. The practice above is implicated because the bank as the *ba'i* has difficulty to purchase the goods by themselves to renovate a house. (b) The agreement fund of *murabahah* to buy a transport vehicle; it is different from the fund for renovation. The *ba'i* would present the supplier directly in the fund agreement because the object of purchase and the supplier is visible.

The ba`i would give the money to the supplier (the car owner) as it would be the transaction between the *musytari* in the *murabahah* agreement. The owning of the car then would change from the supplier to the *musytari* as it can be seen in the picture 2.1. This scheme or transaction is proper with the National Syari`ah Board Instruction (Fatwa Dewan Syari`ah Nasional) both in theory and implication. (c) The other example is the *murabahah* fund for the house purchasing (the People's Development Credit (KPR) by the syari`ah bank as the syari`ah State Account Bank (BTN)). The bank would first purchase the house for the *musytari*'s interest from the developer then the bank would sell the house to the *musytari* with the same price and the amount profit agreed by the bank and the *musytari*. (d) The *murabahah* agreement of the work capital as the factory equipments; as above, the bank would purchase the goods from the supplier and it would sell it to *musytari* with the same price and the amount of profit for the bank agreed by the ba`i and the *musytari*.

Scheme 1: Fund of *murabahah* mechanism through wakalah/representative



Scheme 2: The *murabahah* direct fund



The explanation above: (1) the candidate *musytari* needs goods but he/she does not have any cash then he/she proposes to the syari`ah bank. The *musytari* then fulfills the conditions from the bank to get the fund through the negotiation between them, (2) after the negotiation there would be a *murabahah* agreement, (3) *ba`i* purchases the goods as what is in the agreement, (4) when the agreement is signed there is change in belonging the property from the *ba`i* to the *musytari*, (5) the supplier could deliver the goods directly to the *musytari* without the mediation from the *ba`i*, (6) the *musytari* accepts the goods as what is in agreement. (7) *musytari* would pay back the fund to the bank with the profit agreed between the two sides in cash or installment as the period comes.

According to the above, the bank as the *ba`i* plays the role as the fund giver rather than the seller in the *murabahah* agreement since it does not have the goods and take the risk of it. The work of the bank is only concern with documents. The *murabahah* contract generally is signed when the *ba`i* has not got the goods ordered by *musytari*. In the transaction the *musytari* has to pay attention to the law or rule regarding to the goods delivery, profit and the right specification of the ordered goods. The *musytari* him/herself would get all the burden of the responsibility and fine caused by the law violation. The *ba`i* does not have the responsibility in the transaction and all the risk. Theoretically the *ba`i* is free from those. The *musytari* concerns the loss with the supplier.

### **The *murabahah* agreement in the syari`ah bank in Malaysia**

When the transaction in Indonesia applies the *murabahah* agreement in trade transaction as a fund product, the *ba`i Innah* system is used in Malaysia. Generally, *Ba`i Innah* can be described: one of the Islamic bank in Malaysia sells the goods to the customer with the price RM 50,000,- agreed by the two sides with the installment payment in the certain period of time. The bank then would purchase back to the customer with the cheaper price, RM 40,000,-. The former price would be back to the seller.

Although most of the traditional thought ulamas ban it but Malaysia through the Advisory Council keeps applying the *Ba'i Innah* system as a concept of Islamic finance product in the country. The system is applied for the fund of work capital, syari'ah credit card and housing.

According to Manaf, the application of *Ba'i Innah* in the fund capital seems tends to practice the trade deception. In this fund there are deception in two kinds of agreement, which are in the *Ba'i Innah* the debtor is about to borrow some money, in the other side there is no such debt in Islam since there is an interest in it then the *Ba'i Innah* is created as if there is no interest practice in it. The example of the transaction is A needs big amount in cash Rp 10 millions for his/her business operation. He/she comes to the syari'ah bank where the bank agrees to sell the asset of A with the amount ... 10 million rupiahs with installment payment system. Afterward, the buyer will make a new agreement with Shariah bank to resell her/his asset to the bank in cash for 8 million rupiahs. In this case, both parties are benefited where Mr. /Ms. X get the 'loan' for 10 million rupiahs and the bank will get profit for about 10 million rupiahs – 8 million rupiahs = 2 million rupiahs.

According to Al Amin Ahmad, if it is not required, this law of such transaction can be categorized as *makruh* (the avoidance of which yields merit but the performance of which is not sinful) because there is a force or push because the buyers do not need the good or the asset but they only need the money. While the seller party or bank will not easily give a loan except the transaction contract (*akad*) has been done before.<sup>1</sup>

In Malaysia, the development of Shariah credit card was firstly done by AmBank in December 2001. This bank launched Al Taslif Credit Card using *akad ba'i inah* with the margin of 1.25 % per month or 15 % per year from the total buying. In the first transaction, the bank agreed to sell certain good to the card holder with certain price. In the second transaction, the card holder agreed to resell the good with lower price. Such credit card using cannot be accepted by the Ulama from the Middle East and Indonesia because it is considered as fake transaction. In the development, in July 2002, Bank Islam Malaysia Berhad (BIMB) also launched Shariah credit card. This bank claimed that their

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<sup>1</sup> Al Amin Ahmad: <http://www.mail-archive.com/ekonomiShariah@yahoogroups.com/msg0098.html>, accessed on 30 May 2008.

product was the first pure Shariah credit card. This BIMB product used three different *akads* (contracts) i.e. *ba'i inah*, *wadiah*, (deposit), and *qard hasan* (goodness loan).

At this present, Bank Muamalat Malaysia Berhad (BMMB) still uses *akad ba'i inah* to fund the Shariah housing program. The recent data up to 2007 show that the housing fund composed about 70 up to 80 % from the total fund of BMMB noted up to 5.6 billion Ringgit Malaysia (RM).<sup>1</sup>

In the concept, the BMMB housing funding actually uses *akad Ba'i Bitsamanil Ajil* (BBA). The *akad* is actually *akad murabahah* (selling and buying) for housing with the postponed payment. However, in Malaysia all Shariah banks including BMMB are considered has mistakenly practiced it. The BBA practice tends to be like *ba'i inah*.<sup>2</sup>

Since 2007, BMMB has stopped using *akad ba'i inah* for housing funding although in the practice, not all Shariah banks really leave it. As the replacement, BMMB introduced the using of *akad musyarakah mutanaqisoh* (MM) in the housing funding. MM is the *akad* where the bank and the customer commercially associated to buy a house. Then the customer pays the house installment in certain time period so that the bank's ownership of the house will decrease and finally be used up. This *akad* considerably is not against the Shariah in contrast to *ba'i inah*. However BMMB cannot leave the using of *ba'i inah* all at once in the housing funding because it will negative impacts on the Shariah business. Therefore, the usage will be decreased gradually.

Along with the development of commodity trade funding based on *akad murabahah* in the world which has developed since the last three decades, Malaysia keeps improving and organizing its national Shariah banking operational. Until the mid of June 2007, the market value of *murabahah* commodity is estimated reaching more than 1.2 trillion US dollar.<sup>3</sup> The high value of the *murabahah* commodity market value is stimulated by the increasing number of international trade business which conducted commodity transaction based on *akad murabahah*.

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<sup>1</sup> *Ibid.*

<sup>2</sup> Saiful Azhar Rosly and Mahmood M. Sanusi, *The Application of Bay' Al-Inah and Bay' Al Dayn in Malaysian Islamic Bonds: An Islamic Analysis*, published in International Journal of Islamic Financial Services vol. 1No 2., <http://www.iiibf.org/journals/journal2/art1.pdf>, accessed in 3 July 2008.

<sup>3</sup> <http://pkhonline.net/index.php?action=fatwa.detail&id=20&PHPSESSID=d10dde39572b0ff3b980c489992cff32>, accessed in 30 May 2008.

In April 2007, Bank Negara Malaysia (BNM) launched Commodity *Murabahah* Program (CMP) by involving the role of Securities Commission of Malaysia, Malaysia Stock Exchange, and business practitioner. The Malaysian CMP is treated as management skim of overnight liquidity for Shariah bank and as short term deposit. In the practice, the CMP is used palm oil as underlying commodity which is traded for investment. Up to this recent, BNM has executed the agreement with CMP with eight Shariah banks.<sup>1</sup> In May 2007, Saudi Hollandi Bank (SHB) also signed the CMP program. Even the bank becomes the first Saudi Arabia Bank that joins the CMP.

Not really different from Malaysia, the Shariah banks in Indonesia also keep increasing the quality and the quantity of their products. Until this present, Dewan Syariah Nasional Majelis Ulama (Indonesia National Shariah Committee of Indonesian Ulama Council) or DSN MUI has been studying the new fatwa about commodity *murabahah* product (CMP).<sup>2</sup> If this fatwa is published, it will help the development of Shariah banking industry because CMP transaction is very needed in the Shariah banking.

According to the general head of DSN MUI, K.H. Ma'ruf Amin, the Shariah fatwa authority institution is discussing the possibility of publishing new fatwa about CMP. Such fatwa is actually the development of fatwa *murabahah* (selling and buying). The fatwa enables the CMP to be categorized as the one with fixed margin because basically the fatwa is based on *murabahah* or selling and buying and the transaction process can be in dollar or rupiah.

In the Indonesian CMP concept, the customers delegate the Shariah bank to buy a commodity. Until this present, the fatwa of CMP is still being discussed by DSN MUI. It is done to make sure that the CMP is not in contrary with the Shariah principle. Besides, the fatwa is not against the other several fatwa that have been published.

In Indonesia, DSN MUI argues that *ba'i inah* cannot be implemented in the practice of Shariah banking. This shows that the authority of fatwa maker in Indonesia still strong hold the carefulness principle in order to approach to the true Islamic concept.

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<sup>1</sup> *Ibid*

<sup>2</sup> *Ibid*

Thus, the society will be more certain that the Shariah banking is really the solution and it not only becomes merely alternative for the Indonesian Moslem Society.

### **Analysis on the Position of *Dhomman* in the *Murabahah* Funding in Indonesia and Malaysia**

According to the ba'i party, in the practice, the existence of *dhomman* becomes a central aspect in the funding. It means that the *dhomman* should absolutely exist to cover the value of spent cost by the bank as the ba'i. The ordered goods can be one of the warranties. For example in the *murabahah* funding of a motorcycle, the BPKB (Vehicle Ownership Book) becomes the *dhomman* and cannot be given to the musytari as long as the musytari have not completed the obligation to pay the installment to the *ba'i*.<sup>1</sup>

According to the musytari, in the agreement of *murabahah* funding between musytari and ba'i, the existence of *dhomman* is a compulsory (obligatory condition). Therefore, if the musytari does not provide *dhomman* in the application of *murabahah* funding, it will be impossible for the ba'i to approve the funding. Besides, the value of the *dhomman* should be more than the value of the funding that will be provided by the ba'i.<sup>2</sup> This is required to cover the funding value of ba'i and the possible loss.

According to the informants (ba'i and musytari), we may know that the position of *dhomman* in the operational of *murabahah* funding is a compulsory condition that must exist in every funding and the value must be adequate to cover the total value of the funding given by the ba'i and the loss risk that may happen.

When the musytari does not do the obligation, ba'i (bank) can buy a half or the whole warranty (*dhomman*) through both auction and non auction according to voluntary giving by the owner of the good or by giving the authority to sell from the owner of the good with the condition that the warranty that will be bought should be cashed at least in one year. The buying of warranty goods by the ba'i through auction is aimed to help ba'i to foster the process of obligatory completion by the musytari. When the ba'i as the buyer of the warranty goods from the musytari, the ba'i (Shariah bank)'s status is equal to the

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<sup>1</sup> Interview with Arif Wijaya, Account Officer from PT. Bank Rakyat Indonesia (persero) in Shariah branch Office of Yogyakarta on 20 May 2008

<sup>2</sup> Interview with Adi Nugroho, customer of *murabahah* funding in PT. Bank Rakyat Indonesia (persero) in Shariah branch Office of Yogyakarta on 25 May 2008

buyer. Shariah bank as the ba'i enables to buy the warranty good outside the auction is aimed to foster the completion of musytari's obligatory. The time limit of one year by considering the recovery of Shariah bank's liquidity condition is a reasonable time limit to sell the asset of Shariah bank. The warranty good that can be bought by Shariah bank as the ba'i is the warranty good which its funding is categorized as stagnant in certain period of time. In the aspect of price, when the warranty good buying from the musytari is over the amount that should be paid by the musytari to the ba'i, the *agio* should be returned to the musytari after it is reduced with auction cost and other costs that directly relate with the process of warranty good process.<sup>1</sup>

This can be reviewed from the regulation aspect, in this case from the fatwa of DSN-MUI that becomes the basic guidance of Shariah banking in running its business. In the fatwa of DSN-MUI about the *Murabahah* Funding No.04/DSN-MUI/IV/2000 it is stated that:"The warranty in *murabahah* is allowed so that the customer becomes serious with its order and the bank can request the customer to provide the warranty that can be kept".

According to the fatwa of DSN-MUI, basically in the funding of *murabahah*, *dhomman* is the aspect that can be allowed and it is not a primary thing that must exist in the funding of *murabahah*. The existence of *dhomman* in the Shariah banking especially in the funding of *murabahah* is just to ensure the ba'i that the musytari in the *murabahah* funding will be serious with the order that has been agreed in advance.

According to such stipulation, actually the position of *dhomman* is not to cover the capital spent by the bank and *dhomman* is not a primary thing in the funding of *murabahah*. It means that the *murabahah* funding without *dhomman* can already be approved or implemented. Therefore, the position of *dhomman* according to the fatwa of DSN-MUI is to prevent deviation by the musytari so that the musytari is serious with the order as what have been agreed in advance, and the existence of *dhomman* is not a must and the obligatory condition in every *murabahah* funding.

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<sup>1</sup> The new warranty good will be used by ba'i if the musytari really does not fulfill the requirements as what have been agreed or after when some other efforts such as the extension of payment time period. The mechanism is adjusted by the stipulation in the article 40 act no. 21 year 2008 about Shariah banking.

There is a gap between the guidance a (*das sollen*) and the practice (*das sein*) in the position of *dhomman* in the *murabahah* funding. The rules in the stipulation state that the position of *dhomman* in the *murabahah* funding is not to cover the loss that may happen to the capital value spent by *ba'i* and the *dhomman* are not the compulsory condition of a *murabahah* funding. *Dhomman* is only allowed to make the *musytari* become more serious with the order as what have been agreed in advance. In the practice, *dhomman* is not a principled thing if a *murabahah* funding is conducted without *dhomman* so that it can be made sure that the funding cannot be approved by the *ba'i*. In addition, the *dhomman* is useful to cover the value of the capital that has been spent by the *ba'i* and the risk of loss that may happen.

The stipulations about the funding of *ba'i inah* do not assertively regulate the position of *dhomman* in such funding, not like the funding in *murabahah*. Whereas, the position of *dhomman* in the *ba'i inah* funding is not significantly different from *murabahah* funding in Indonesia. The reason of every bank, both conventional and Shariah in Indonesia and Malaysia, implement the using of *dhomman* in every funding which is generally the same and considered acceptable. The main reason of the *dhomman* existence in every other kind of funding is generally for applying the principles of prudential banking in distributing the third party's fund. Such reason is actually acceptable because the fund that is circulated to the society is not the fund that is merely owned by the bank, but it is also the fund from the third party that should be protected by the bank.

## **Conclusion**

The application of *akad murabahah* concept in the Shariah banking in Indonesia can be explained with the existence of two kinds of legal relation i.e. the relation between the developer who acts as the seller (*ba'i*) while the bank acts as the buyer (*musytari al wakalah*). Afterward the relation is ended because there has been an agreement between the bank and the developer. The second legal relation between the bank and the customer that occurs is the selling and buying of the goods that bank has bought from the developer which is then sold to the customer with the installment payment transaction. In addition, it is added with the profit where the position of the bank is shifted from buyer to be seller

(ba'i) and the customer becomes the buyer (musytari). The application of *akad murabahah* with the mechanism of *ba'i inah* concept in Malaysian Shariah banking is prohibited in Indonesia. DSN MUI argued that *ba'i inah* cannot be implemented in the practice of Shariah banking. This indicates that the authority of fatwa maker in Indonesia still strongly holds the principle of prudence in order to approach the real Islamic concept since such kind of practice seems to apply fraud transaction. In such funding, there is engineering for two kinds of *akad* that is *ba'i inah*. In *ba'i inah* the creditor actually wants to borrow some money. However, since Islam does not allow borrowing some money with margin since it is considered as *riba*, the *ba'i inah* concept is made so that it will not look like *riba*. In fact, this *ba'i inah akad* funding is allowed by the Shariah Advisory Council of Bank Negara Malaysia and Suruhanjaya Sekuriti. They refer to the opinion of Imam Syafi'i and Zahiri which essentially states that *ba'i inah* is allowed because the *akad* is valued according to what is stated while the intention factor is relied to Allah SWT. In this case, it is exposed that the Malaysian banks apply the *akad* of selling (al-bay). This is allowed since the Quran explicitly legalize the trading and prohibit *riba* (usury). Whereas, the majority of *fiqh* experts prohibit *ba'i inah* because it is considered as a kind of a *zari'ah* (way) or *hilah* (legal excuse) to legitimate *riba*. Although the majority of classic ulama prohibit the practice, the Malaysian banks through the Shariah Advisory Council keep doing the practice as a concept for the development of Islamic financial product in the country. In the Shariah banking business in Malaysia, the *akad* of *ba'i inah* is applied in the funding of the activities such as business capital, Shariah credit card, and housing funding.

The position of *dhomman* in the *akad* of *murabahah* is not to cover the capital spent by the bank. In addition, the *dhomman* is not a principled or primary aspect of *murabahah* funding. This means that the *murabahah* funding without *dhomman* can already be approved or agreed. Therefore, the position of *dhomman* according to the Fatwa of DSN-MUI about the *Murabahah* Funding No. 04/DSN-MUI/IV/2000 is to prevent the misuse by the musytari and to make musytari become serious with the order. Thus, *dhomman* does not have to exist and it is not an obligatory requirement in every *murabahah* funding. Similarly, the position of *dhomman* in the *ba'i inah* funding in Malaysia is not different from the *murabahah* funding in Indonesia. The reason of every

bank, both conventional and Shariah, in applying *dhomman* in every funding is generally the same and acceptable. The main reason of *dhomman* practice is to implement the principle of prudential banking in distributing the fund of the third party. Such reason is actually acceptable because the fund that is distributed to the society is not only the one merely owned by the bank but it also comes from the third party which should be protected by the bank.

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