

The 188th Meeting of the Shariah Advisory Council (SAC) of Bank Negara Malaysia

The SAC of Bank Negara Malaysia at its 188th meeting on 30th October 2018 ruled the following:

Financial Retakaful Model based on the Concept of *Hibah Bithawab*

SAC Ruling

The SAC decided that the Financial Retakaful (FinRe) proposal based on the concept of *hibah bithawab* (gift with reward in return) between a retakaful operator (RTO) and a takaful operator (TO) is not permissible due to the following reasons:

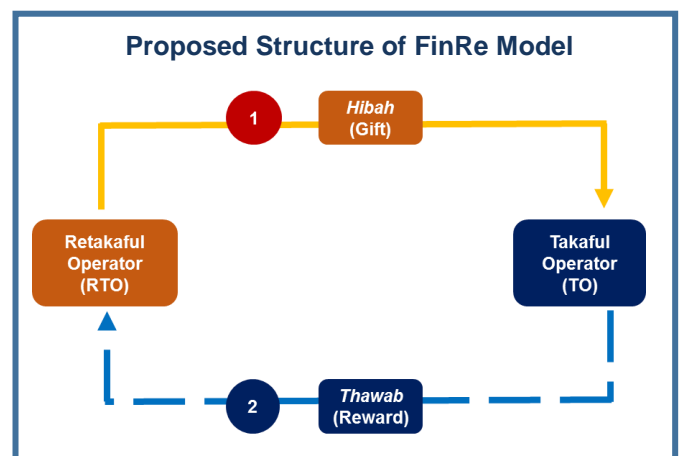
- In principle, the application of *hibah bithawab* is a form of *tabarru`* and is an act of appreciation (*mukaramah*) and affection (*widad*). Therefore, it is unsuitable to be applied in the business context which is motivated by profit as it alters the concept of *hibah bithawab* from *tabarru`* to an exchange contract.
- In this regard, *hibah bithawab* with a business motive is not allowed. Nevertheless, the application of *tabarru`* contract in takaful (Participant Risk Fund) for the purpose of mutual indemnity and not for business or substantial profit generation is allowed.
- In addition, both the components of gift (*hibah*) and reward (*thawab*) take the form of cash/monetary, which may lead to a transaction with the element of *riba*.
- The concept of *hibah bithawab* shall not be applied on the basis of necessity (*darurah*) or need (*hajah*) as there are other alternative Shariah concepts which are more suitable to be applied in the proposed FinRe model.

Background

- The proposed FinRe model based on *hibah bithawab* is an arrangement between a takaful operator (TO) and a retakaful operator (RTO), which enables the TO to manage expense strain of a new business portfolio in a more effective manner.
- This arrangement is one of the strategies to manage pressures on the shareholders' fund of the TOs arising from the requirement of 'Minimum Allocation Rate' (MAR)¹ which will come into effect on 1 January 2019. The MAR requirement specifies the minimum proportion of contribution paid by takaful participants that must be retained in the unit fund for investment-linked products.
- In brief, through the *hibah bithawab* concept, the RTO will provide *hibah* to the TO to cover the new business expenses.
- As a reward in return for the *hibah* received, the TO agrees to share a portion of the income received from the new business with the RTO.

Shariah Issues

- Is the proposed FinRe model based on *hibah bithawab* Shariah compliant?
- Does the application of *hibah bithawab* in the proposed structure give rise to any Shariah issues?



¹ Life Insurance and Family Takaful Framework, issued on 23 November 2015.

Issues and Basis of SAC Ruling

Scholarly views on the hibah bithawab concept

- There are two forms of *hibah bithawab* as discussed by the scholars. The first form is a *hibah* that receives a reward in return, as part of the society's customary practice. The second form is the giving of *hibah* that is conditioned upon receiving a reward.² The majority of scholars viewed that the social practice of giving reward in return to receiving a gift is permissible. However, the scholars' opinions differ with regard to the *hibah bithawab* arrangement, which stipulates/conditions a reward for the *hibah* given.³
- The Shafi'i⁴ and Hanbali scholars are of the view that *hibah bithawab* is invalid and is contradictory to the objective of *hibah* contract (*muqtada`aqd*), if the reward (*thawab*) is unknown (*majhul*). If the reward is specified and determined (*ta'yin*), the scholars consider the contract/arrangement as no longer a *hibah* contract, but rather has transformed into a sales contract.⁵
- The Hanafi *mazhab* is of the view that at the inception of the *hibah bithawab* arrangement, the contract still remains as *hibah* but will later transform into a sales contract⁶ upon taking possession (*qabd*) of the subject matters (*hibah* and reward) by both the contacting parties.
- The Maliki *mazhab* views that the *hibah* which stipulates/conditions a reward is permissible and is considered as a sales contract. The contract is binding on both the contracting parties in the case where the reward is determined (*ta'yin*).⁷ However, in certain circumstances, the *hibah bithawab* arrangement still retains the features of *hibah* such as the permissibility of giving an unknown return or a return which has a defect or is broken (*'aib*).⁸
- Among the reasons for the different views of the scholars regarding the applicable ruling for the *hibah bithawab* concept - whether it is considered as a sales contract or remains as a *hibah* - is due to the fact that the arrangement has both the elements of *hibah* and sales contract.⁹

The permissibility of giving both hibah and reward involving ribawi items

- Imam Malik outlined that *hibah bithawab* which involves the exchange of *ribawi* items should be in accordance to the rulings and conditions of a *ribawi* transaction. This is to ensure that the transaction does not tantamount to *riba fadhil* (interest with excess).¹⁰ This is also the view of the Shafi'i *mazhab* which states that a *hibah bithawab* arrangement involving the exchange of both a gift and a reward in the form of currency at different values are invalid.¹¹

² Al-Sarakhsi, *Al-Mabsut*, Dar al-Ma'rifa, 1993, ch. 2, pg. 75: والحاصل أن العوض في الهبة نوعان: متعارف ومشروط

³ Ibnu Rusyd, *Bidayah al-Mujtahid wa Nihayah al-Muqtasid*, Dar al-Hadis, 2004, ch.4, pg. 115:

وأما هبة الثواب فاختلّفوا فيها، فأجازها مالك وأبو حنيفة ومنعهما الشافعي، وبه قال داود وأبو ثور

⁴ Al-Umrani, *Al-Bayan fil Mazhab al-Imam al-Syafie*, Dar al-Minhaj, 2000, j.8, pg. 133:

وإن وهبه بشرط الثواب: فإن كان ثوابا مجهولا.. بطلت الهبة؛ لأنه شرط بناقي مقتضى الهبة، ولأنه شرط ثوابا مجهولا، فلم يصح، كالباع بضمن مجهول، فإن قبضها الموهوب له.. كان حكمه حكم البيع الفاسد

⁵ Al-Zuhaili, *Al-Fiqh al-Islami wa Adillatuh*, Dar al-Fikr, ch.5, pg. 4008:

وقال الشافعية والحنابلة: يعتبر العقد بيعاً على الصحيح، فيلزم الموهوب له بدفع العوض المشروط، وتطبيق عليه أحكام البيع من الشفعة والخيار وضمان الدرك أي ما يدرك المبيع من استحقاق، ونحو ذلك

Al-Juzairi, *Al-Fiqh 'ala al-Mazahib al-Arba'ah*, Dar al-Kutub al-'Ilmiyah, 2003, ch.3, pg. 276 :

الشافعية - قالوا: الهبة بشرط العوض ويقال له الثواب صحيحة بشرط أن يكون العوض معلوماً وفي هذه الحالة تكون بيعاً لها حكم البيع...

⁶ Al-Kasani, *Bada'i al-Sana'i fi Tartib al-Shara'i*, Dar al-Kitab al-'Ilmiyah, 1986, ch.6, h, 119:

⁷ Al-Kharashi, *Sharh Mukhtasar Khalil*, Dar al-Fikr, (t.t.), ch.7, pg. 119: (ص) وحاز شرط الثواب (ش) هبة الثواب حكمها حكم البيع

⁸ Al-Kharashi, *Sharh Mukhtasar Khalil*, Dar al-Fikr, (t.t.), ch.7, pg. 119:

(ش) يعني أن الموهوب له إذا أثناب الواهب في هبته ما يعاوض الناس عليه في البيع فإنه يلزمه قبوله ولو كان معيباً أي فيه عيب بشرط أن يكون فيه وفاء بالقيمة

Al-Zuhaili, *Al-Fiqh al-Islami wa Adillatuh*, Dar al-Fikr, ch.5, pg. 4008:

وقال المالكية: يعتبر هذا العقد كالبيع في غالب الأحوال، ويخالفه في الأقل منها؛ لأن هبة الثواب تجوز مع جهل عوضها، وجعل أجله، وليس للواهب رد الثواب المعيب، وإنما يلزم قبوله، ما لم يكن العيب فادحاً كحذام وبرص، وإلا فلا يلزم الواهب قبوله، ولو كمل له القيمة

⁹ Al-Dusuki, *Hashiyah al-Dusuki 'ala Syarh al-Kabir*, Dar al-Kabir, (t.t.), ch.4, pg. 116:

فهيبة الثواب كالبيع في غالب الأحوال ويخالفه في الأقل لأنها تجوز مع جهل عوضها وجعل أجله ولا تفتيتها حوالة الأسواق ولا يلزم عقابها الإيجاب والقبول

¹⁰ Malik ibn Anas, *Al-Mudawwanah*, Dar al-Kutub al-'Ilmiyah, 1994, ch.4, pg. 412:

قلت: فإن وهب له دراهم أو دنانير واشترط الثواب؟ قال: ما سمعت من مالك في هذا شيئاً إلا ما أحرزتك، وأرى له فيها الثواب إذا اشترطه عرضاً أو طعاماً وقال مالك: وسئل عن هبة الحلبي للثواب قال مالك: أرى للواهب قيمة الحلبي من العروض في الثواب ولا يأخذ دراهم ولا دنانير

Al-Juzairi, *Al-Fiqh 'ala al-Mazahib al-Arba'ah*, Dar al-Kutub al-'Ilmiyah, 2003, ch.3, pg. 274 :

ويلاحظ في العوض أن يكون مما يصح دفعه في بيع السلم حتى لا يفضي إلى الربا فإذا وهب له عروض تجارة يجوز أن يعوضه عنها من فضة وذهب أو طعام من قمح وشعير إلى ونحوها أو عروض تجارة من غير جنس العروض الوهوية وهب له قماشاً ساغ أن يعوضه عنها أو أصنافاً عطرية ونحو ذلك وإذا وهب له فضة فلا يصح أن يعوضه عنها ذهباً إذا كان في المجلس قبل تفرقة ما في المجلس فيجوز لأنه يكون من قبيل الصرف

¹¹ Al-Umrani, *Al-Bayan fil Mazhab al-Imam al-Syafie*, Dar al-Minhaj, 2000, j.8, pg. 134: وإن قال: وهبتك درهما بدرهمين.. لم يصح على الطرفين؛ لأنه ربا

The application of hibah bithawab in the proposed FinRe arrangement in accordance to the muqtada`aqd of hibah (objective of the hibah contract)

- Each *mu`amalat* contract as outlined by Shariah has a dedicated means and objective to be achieved which affect the execution, ruling and conditions of the contract.
- In order to ensure the objective (*maqasid*) and the wisdom of a Shariah contract is achieved, the contract shall not be altered or combined with other contracts to achieve an objective/means other than that of its original objective.
- Shariah has outlined specific contracts according to the intended objective to be achieved. For example, the suitable contracts for income and profit generation are investment based contracts such as investment (*mudarabah*), partnership (*musyarakah*) and agency (*wakalah*) or exchange contracts such as sales and lease contracts.
- In addition, the scholars also outlined the contracts which are benevolent in nature (*tabarru`at*) such as gift (*hibah*), benevolent loan (*qard*) and donation (*tabarru`*) for the purpose of charity and mutual assistance, which is free from profit or income generating purposes.
- In a social context, *hibah* may be given with or without a reward.¹²
- The elements of charity and help/assistance in the social context must be retained as it is the essence/original objective for the application of the *hibah bithawab* concept. This concept should never be altered for income generation purposes, which are against the intended objective of the *hibah* contract.¹³

The applicability of hibah bithawab in the context of takaful (tabarru` fund)

- Currently, there are various concepts being discussed by scholars which can be adopted in takaful models. Among the takaful models discussed are models based on the concepts of *mudarabah*, *waqf* and *wakalah*. In the Malaysian context, the takaful model based on *wakalah* and donation (*tabarru`*) is the main model applied in the industry. This is on the basis of the permissibility of *wakalah* application between the participants and the TO, as well as the permissibility of donation amongst participants.¹⁴
- In principle, the concept of *hibah* is similar to the concept of *tabarru`*. Both contracts are suitable to be applied as the Shariah basis for the takaful model since both contracts have the element of mutual assistance amongst takaful participants in the risk fund. Nonetheless, the *tabarru`* contract is more widely applied as the Shariah basis for the takaful concept, as *tabarru`* is a more general term that includes all benevolent contracts (contracts for the purpose of charity and mutual assistance) including *hibah*.
- The contemporary scholars have discussed in theory, the suitability of applying the concept of *hibah bithawab* as one of the underlying Shariah contracts for takaful models.¹⁵ The application of this concept still remains within the context of mutual assistance and mercy/courtesy (*ihsan*) amongst participants and not for the purpose of income or profit generation, thus fulfilling the objective of the *hibah* contract.
- The concept of *tabarru`* and *ta`awun* (mutual assistance) is an important element as the basis for the contractual relationship between takaful participants. The OIC Fiqh Academy outlined that the concept of mutual assistance is different from the exchange contracts (*'aqd mu`awadhat*) as mutual assistance is practised on the basis of mercy/courtesy (*ihsan*). Under the concept of *ta`awun*, the element of *gharar*

¹² Ibnu Rusyd, *Bidayah al-Mujtahid wa Nihayah al-Muqtasid, Dar al-Hadis*, 2004, ch.4, pg. 115:

والهبة منها ما هي هبة عين، ومنها ما هي هبة منفعة. وهبة العين منها ما يقصد بها الثواب، ومنها ما لا يقصد بها الثواب

¹³ Al-Qarafi, *Al-Zakhirah, Dar al-Gharb al-Islami*, 1994, ch.6, pg. 271:

ولأن موضوع الهبة التبرع لغة والأصل عدم النقل والتبرع لا يقتضي عوضا فلا تكون الهبة تقتضي ثوابا ولأن كل عقد اقتضى عوضا غير مسمى لا يفترق فيه الأعلى مع الأدنى كالتكاح في التفتوي فلو اقتضته الهبة لاستوى الفريقان وبالقياس على الوصية بجامع التبرع والجواب عن الأول الفرق بأن هبة الثواب وإن دخلها العوض فمقصودها أيضا المكارمة والوداد فلم تتمحض للمعاوضة والمكايسة والعرف يشهد لذلك

¹⁴ Shariah Resolution in Islamic Finance Second Edition (Shariah Resolution), Resolution No. 41- Takaful Model Based on *Tabarru`* and *Wakalah*, 2010, pg. 82.

¹⁵ Ali Muhyiddin al-Qurrahdaghi, *Mathum al-Ta`min al-Ta`awuni*, a research paper presented at the Takaful Conference *al-Ta`min al-Ta`awuni* held on 11-13 April 2010 at Jordan; Mohamed Ali Elgari, Al-Faidh al-Ta`mini, a research paper presented at the Takaful Conference *al-Ta`min al-Ta`awuni* held on 11-13 April 2010 at Jordan

(ambiguity) in mutual assistance is tolerated and the rulings of *riba* are not applicable.¹⁶

Impact of SAC Ruling

- The SAC ruling to not allow or to restrict the application of *hibah bithawab* concept in an unsuitable context such as this one is important to ensure that the concept is not misused as a basis for other Islamic financial products and structures which intend to generate profit and commercial income.

This ruling is immediately effective by the issuance of this statement on Bank Negara Malaysia's website.

¹⁶ OIC Fiqh Academy, 21st Conference, Resolution no. 200 (21/6):

المادة الخامسة عشرة: العلاقة بين المشتركين في صندوق التأمين التعاوني
العلاقة بين المشتركين في الصندوق هي علاقة تعاون مجموعة من الأشخاص فيما بينهم بدفع مبالغ محددة لخير الضرر أو جلب النفع الذي قد يصيب أحدا منهم، وهو تعاون مبني على المساعدة والمواساة وإباحة حقوق بعضهم بعضا، وليس مبنيا على المعاوضة والمشاحة وقصد التربح، وفي مثل ذلك يغتفر الغرر الكثير ولا يجري الربا.